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Cerritos Trucking Co., Et Al. v. Utah Venture No. 1, Et Al. And Utah Development Company, Inc., Et Al. v. Bettilyon Realty Company, Et Al. : Brief of Plaintiffs Respondents And Cross Defendant-Respondent Dunahoo

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

CERRITOS TRUCKING CO., et al.,

Plaintiffs-
Respondents,

vs.

UTAH VENTURE NO. 1, et al.,
Defendants-
Appellants.

No. 17185

UTAH DEVELOPMENT COMPANY,
INC., et al.,

Cross Plaintiffs-
Appellants,

vs.

BETTILYON REALTY COMPANY, et al.,

Cross Defendants-
Respondents.

BRIEF OF PLAINTIFFS RESPONDENTS AND CROSS DEFENDANT-RESPONDENT DUNAHOO

Appeal from Judgment of the Third Judicial District Court,
Salt Lake County, State of Utah, The Honorable Peter F. Leary

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Clerk, Supreme Court, Utah

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CASES:

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IN THE SUPREME COURT OF THE STATE OF UTAH

CERRRITOS TRUCKING CO., a California corporation, and CERRITOS TRUCKING CO., DONALD E. HEIMARK, JAMES B. FLEMING, and WILLIAM L. FARIESTER dba CERRITOS ASSOCIATES, a partnership,

Plaintiff-Respondents,

vs.

UTAH VENTURE NO. 1, WILLIAM J. LOWENBERG, FERN E. LOWENBERG, and UTAH DEVELOPMENT COMPANY, INC., a Utah corporation,

Defendants-Appellants.

No. 17185

UTAH DEVELOPMENT COMPANY, INC., a corporation and WILLIAM J. LOWENBERG,

Cross Plaintiffs-Appellants,

vs.

BETTILYON REALTY COMPANY, a corporation, and EDMOND O. DUNAHOO,

Cross-Defendants-Respondents.

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BRIEF OF PLAINTIFFS-RESPONDENTS
AND CROSS-DEFENDANT-RESPONDENT DUNAHOO

STATEMENT OF THE CASE

Respondents herein believe that appellants' statement of the case is incorrect on a number of important particulars. These areas of dispute on the facts will be discussed each in turn.

It is alleged by appellants on pages 5 and 6 of their brief, and they would lead the Court to believe, that the officers of Fiber Science were planning on purchasing the property in question totally by themselves. Their brief states that:

> However, Mr. Dunahoo and several of his vice presidents, the Fiber Science's group, determined that they, in their individual capacities, wished to purchase the property and in turn lease it to Fiber-Sciences.

(Appellants' Brief p. 5).

The brief also speaks of "the desire of the officers of Fiber-Sciences to own the Property," (Appellant Brief p. 6) and "Fiber-Sciences determined to purchase, not lease, the Property from Lowenberg." (Appellant Brief p. 6). The transcript cited by appellants in support of those allegations, however makes it very clear that the contemplation from the very beginning for all parties was that Respondent Dunahoo and some of his vice presidents in Fiber Science, Inc. were interested only in participating in the ownership of the property. It was never expected that they by themselves would

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own the property, if for no other reason that they did not have the financial capacity to own any more than twenty-five percent (25%) of the property in question. For example, respondent Dunahoo testified as follows in answer to questioning from appellants' counsel:

> Q. All right. Consider your financial status at the time, and those that you were contemplating participating, did you have an idea of what your capability of participation would be?
>
> A. It appeared to be approximately 25 percent.
>
> Q. All right. Now, you were the president of Fiber Science at this time, as you've earlier testified. What made you believe that you could participate in the ownership of the building that was being leased to your own company?
>
> A. My understanding of the corporate policy was if it were an arms-length deal that it would be satisfactory to be involved in such an attangement.
>
> Q. Did you believe that this was an arms-length deal?
>
> A. Yes.
>
> Q. On what basis?
>
> A. Because we had negotiated a lease with Cerritos Trucking that was less than was being requested for the building originally.

(Tr. pp. 143-144).

> Q. The question was: Did you ever attempt to lease that property from Bill Lowenberg?
>
> A. No, we did not.
>
> Q. All right. You were in the market to lease property?
>
> A. That's correct.
>
> Q. You determined that you would rather buy it?

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A. It was determined that if we could be involved in it, we would rather have Cerritos buy it so we could be involved in that investment.

(Tr. pp. 150-151)

At no time was it ever represented to appellants or to the real estate agent Daughtrey by plaintiffs-respondents or by Cross Defendant-Respondent Dunahoo that Dunahoo and the Fiber Science vice presidents would own all of the property in question. In fact of the matter, once the building in question was selected, no one from Fiber Science was directly involved with the negotiations on the purchase of the same. (Tr. pp. 111-112; testimony of Daughtrey; Tr. pp. 154-155; testimony of Dunahoo; Tr. pp. 69-70; testimony of Heimark.)

It is also alleged by appellants that the proposal given to Mr. Lowenberg was that Fiber Science, Inc. would lease the property in question only if an option to purchase the property was granted to "the Fiber-Sciences group" (identified in the brief as Respondent Dunahoo and several of his vice presidents). (Appellant Brief pp. 5-6.) The actual fact is that no such contingent offer was made. (Tr. 207; testimony of Daughtrey.) The only offer to purchase brought by Daughtrey to Lowenberg were from Respondents Heimark and Fleming and not from the Fiber Science people. (Tr. pp. 130-131; testimony of Daughtrey.)

It is alleged in the appellants' brief on page 8 that Appellant Lowenberg heard rumors sometime in late January or early February of 1979 that Fiber Science people would not own

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the building. The evidence as to that point is clear that on or around January 26, 1979, at a meeting at which Daughtrey, Heimark and Dunahoo along with appellant Lowenberg were in attendance, and that Lowenberg was explicitly told that the Fiber Science people were not able to participate in the purchase of the building in question. (Tr. #pp. 145-146; testimony of Dunahoo; Tr. pp. 211-212; testimony of Daughtrey.) Despite having learned in January 1979, of the inability of the Fiber Science people to participate in the purchase, it was not until April 1979 or at the earliest late March, 1979, that the notice of recission (Ex. 8P) was sent. (Tr. p. 223; testimony of Lowenberg.) It is also of importance to the factual context of this case that it be noted that on February 28. 1979, i.e., almost exactly one month after the discussion in which appellant was told that the Fiber Science people would not participate in the purchase, that plaintiffs-respondents paid into an escrow the full amount of the purchase price. On that occasion appellants, represented by legal counsel, put into the same escrow a warranty deed representing the transfer of the property to plaintiffs-respondents. (Ex. 7P.)

Although there are other areas where respondents would dispute the correctness of the facts as alleged by appelants, perhaps respondents' position can best be summed up by directing this Court to the Findings of Fact signed by the lower court and on file herein.

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ARGUMENT

POINT I
APPELLANTS DID NOT SUSTAIN THEIR BURDEN OF PROVING MISREPRESENTATION

Repeatedly throughout the appellants' brief the allegation is made that because there are some disputed facts, it was error that the case was not submitted to the jury. That this is not the case is clear from the very cases cited by appellants in support of their own position. See, e.g., Boskovich v. Utah Const. Co., 123 Utah 387, 259 P.2d 885 (1953). There the court held that "where there is no evidence upon a material part of the plaintiff's claim, it is the court's duty to direct a verdict." 259 P.2d at 886.

Likewise, in other cases cited by the appellants, this Court has held that a directed verdict is proper where there is no "substantial" contradictory or disputed evidence. L. W. Flynn v. W. P. Harlin Constr. Co., 590 P.2d 356 (Utah 1973); Finlayson v. Brady, 121 Utah 240, 240 P.2d 491 (1952). In other words, the fact that appellant Lowenberg at the time of trial attempted to contravene the corroborated testimony of respondents by making uncorroborated self-serving statements is not sufficient to have the matter go to the jury. First, the testimony has to be sufficient that reasonable minds could differ. Second, that evidence has to go to substantive items. Third, appellants have to establish their entire case and not simply have a dispute on the evidence on part of their case.

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As discussed herein, it is the contention of respondents that as to material items claimed to be in dispute, reasonable minds could not differ from the ruling reached by the trial court on the basis of the evidence presented. As to those items for which there is any real dispute, such items were not substantive and were only peripheral. In addition, most of the critical elements of the claims under which appellants were proceeding were never established in their favor, even taking the evidence in a light most favorable to them.

Appellants' brief very nicely lays out the elements which appellants needed to establish before they could receive a verdict in their favor on the claim of misrepresentation, which is really the only claim brought by them before this Court. On each point the only evidence, if it can be called such, presented by appellants were the self-serving statements of appellant Lowenberg. There was no corroboration by any of the other witnesses. In fact, the conduct and actions of appellant Lowenberg, as verified by his own testimony, speaks against him. Moreover, appellants failed to present any evidence at all in their favor regarding some of the critical elements of their claim. Thus, the lower court was quite justified in determining as it did that appellants had not proven a cause of action sounding in fraud or misrepresentation.

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A. No Evidence of a Misrepresentation.

Appellants claim that there was a misrepresentation of a material fact. The misrepresentation they rely on is a claim that appellant Lowenberg was told by Daughtrey, the real estate agent employed by respondent Bettilyon, that the Fiber Science people wanted to buy the property in question and that unless they could purchase the property, Fiber Science, Inc. would not lease the building. Appellant Lowenberg claims that except for that representation, he never would have considered selling the property to anyone. He further claims that he was motivated to sell the building to the officers of Fiber Science in order to win the good graces and further business as a tenant of Fiber Science, Inc.

It is readily apparent that the very claim made by appellants on appeal is contradictory. The one claimed basis for relief implies a certain blackmail or coersion to sell the building. The second indicates a readiness to sell the building in order to promote goodwill but that the intended beneficiaries did not receive the benefit intended. Despite that anomaly, both assertions are rested on the basic and underlying claim that the Fiber Science people would, in fact, be the purchasers of the building in question.

If the record is devoid of evidence either that the representation as stated was not in fact made by these respondents, or that, if made, was not false at the time it was made, then appellants' cause of action fails for having failed

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to establish the most fundamental aspect of their entire case, namely a misrepresentation. This court has in fact even stated it stronger, requiring in Jardine v. Brunswick Corporation, 18 Utah 2d 378, 423 P.2d 659 (1967) that the one making the representation must either intentionally misstate the facts (which is really an action in fraud), or else have "a pecuniary interest in a transaction, [be] in a superior position to know material facts, and carelessly or negligently [make] a false representation concerning them . . . " 423 P.2d at 662.

Appellant Lowenberg testified that he was not a close personal friend of respondent Dunnahoo prior to the signing of the lease and option on April 28, 1978. (Tr. p. 221; testimony of Lowenberg.) Appellant Lowenberg also testified under examination by his own counsel that he did not know the names of the other officers of Fiber Science whom he expected to benefit:

> Q. Now, at that time did you know the names of the officers of Fiber Science?
>
> A. I had only met two officers of Fiber Science.
>
> Q. Did you intend to allow them, the officers of Fiber Science, to have this concession because they were friends of yours?
>
> A. No, they were not friends.
>
> Q. It was because of business consideration?
>
> A. Business consideration.

(Tr. 217; testimony of Lowenberg.)

In short, Lowenberg's testimony is that based on a one-time meeting with Dunahoo and one other officer of Fiber

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Science, he was induced to give a valuable concession to people he did not know, even by name, as a good business manueuver. Futher he claims that he would not have made the concession had he known that the said individuals from Fiber Science (whom he did not know) were not going to participate and that the partners of Cerritos Associates, (whom he claims he also did not know), were in fact going to be the ultimate purchasers. It is also interesting to note from appellant Lowenberg's own testimony that he did not even tell the Fiber Science people they were getting a benefit or a concession.

> Q. Mr. Lowenberg, isn't it true that you -- that prior to -- or, prior to April 28, 1978, you had no written agreement with the Fiber Science people showing any participation in the purchase of the property in question?
>
> A. That's correct.
>
> Q. And it just as true, Mr. Lowenberg, that you never told anyone from Fiber Science prior to April 28, 1978, that you were giving them a good deal?
>
> A. I never discussed a good or a bad deal. We -- there was no reason for me to say "a good deal."

(Tr. p. 63; testimony of Lowenberg.)

From the record one cannot find any form of corroborated representation at all to Lowenberg that the offer to lease was contingent upon the sale to the Fiber Science people. While it is undisputed that the Fiber Science people did have an interest in participating in the purchase of the property, all of the witnesses except Lowenberg were explicit that (1) the participation would be limited, (2) would be

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determined in the future, and (3) the lease was independent of the sale. (Tr. pp. 128, 207; testimony of Daughtrey; Tr. pp. 141, 143; testimony of Dunahoo; Tr. pp. 106-107; testimony of Heimark.)

Although Daughtrey was never clearly established as appellants' agent, he was definitely never established as plaintiffs-respondents representative or agent. Hence regardless of whatever appellant Lowenberg claims Daughtrey told him, such statements (largely denied by Daughtrey) do not in any way constitute representations by plaintiffs-respondents. Nowhere in any of the testimony were appellants successful in attributing directly to plaintiffs-respondents or to third-party respondent Dunahoo any statement even closely resembling the claim that if the property were not sold, Fiber Science would not lease the building.

In short, appellants have not established a misrepresentation by these respondents. That portion of the claim missing, their entire claim falls.

B. <u>There was no Misrepresentation as to a Presently Existing Fact</u>.

The second element outlined in appellants' brief as a requirement to sustain their claim is that the representation be as to a presently existing fact. Appellants' brief, however, incorrectly characterizes the argument made by plaintiffs-respondents on that point at trial. It is not because the option called for conduct to take place in the

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future that these respondents claim that the representation was not as to a presently existing fact. Rather, the future conduct is based on the understanding and agreement between the Fiber Science people and plaintiffs-respondents that the determination of the extent of the participation in the ownership of the building by the Fiber Science people would come at a later date. In other words, plaintiffs-respondents were the ones who signed the lease and option and who paid the earnest money. The Fiber Science people expected to be able to participate but there was no definite agreement as to when they would participate or to what extent. As of the day of the signing of the lease and option by Cerritos Trucking, Dunahoo indicated that there was no confirmed committment by any of the Fiber Science that they would in fact purchase nor was there any percentage set as to the amount in which they would participate. The only thing they knew was that plaintiffs-respondents were willing to let them participate up to fifty percent (50%) but that based on their financial capability at that time they would only be able to participate up to about twenty five percent (25%). (Tr. p. 143; testimony of Dunahoo.)

Heimark also testified similarly, stating that as of that date he did not know who all the participants would be, much less the amount of participation. (Tr. p. 107; testimony of Heimark.) Hence the participation, by whom, and to what extent was a matter set for the future and was not decided either at the time of the alleged misrepresentation or by the

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time the option and lease agreement had been signed by plaintiffs-respondents. The participation issue had nothing to do with exercising of the option, particularly since it was determined by the Fiber Science people prior to the exercising of the option that the Fiber Science people could not participate at all in the purchase of the building in question.

C. The Representation was not False at the Time it was Given.

A claim based on a promise of future events which at the time it was made was true, or was reasonably expected to be true, is not actionable when it is later determined not to be true. Thus in Cameron v. Outdoor Resorts of America, Inc., 608 F.2d 187 (5th Cir. 1979) rehearing, 611 F.2d 105 (5th Cir. 1980), the court stated:

> A promise of future action or a prediction of future events does not, standing alone, constitute the necessary false representation of an existing fact for common law fraud.

As further stated in the case of Miller v. Premier Corp., 608 F.2d 973 (4th Cir. 1979) the court held:

> A false prediction or a promise of future events generally cannot be a basis for fraud because it is not a representation, there is no right to rely on it, and it is not false when made . . .

At the time of the negotiations and at the time of the signing of the lease and option agreement, respondent Dunahoo gave testimony that he had a reasonable basis to believe that he could participate in the purchase of the said property. His testimony, uncontradicted by appellants, is as follows:

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Q. All right. Now, you were the president of Fiber Science at this time, as you have earlier testified. What made you believe that you could participate in the ownership of the building that was being leased to your own company?

A. My understanding of the corporate policy was if it were an arms length deal that it would be satisfactory to be involved in such an arrangement.

Q. Did you believe that this was an arms length deal?

A. Yes.

Q. On what basis?

A. Because we had negotiated a lease with Cerritos Trucking that was less than was being requested for the building originally.

(Tr. pp. 143-144; testimony of Dunahoo)

In a case cited by appellants in their brief, this Court likewise has held that representations or statements of future acts or conduct constitute actionable misrepresentation, only if the intent of the one making the representations at the time they were given was different than represented. Berkeley Bank for Coops. v. Meibos, 607 P.2d 798 (Utah 1980). Thus in accord with that case, appellants had to prove "fraudulent intention" not to perform in the future existing on the part of respondents at the time the claimed misrepresentation was made.

The fact that there was a subsequent decision by the parent company of Fiber Science that the Fiber Science people could not participate in the purchase of the building does not change the fact that up to that time the officers of Fiber Science had good reason to believe they could participate in the purchase of the property in question. Hence there was no

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misrepresentation in the statement made by Daughtrey to Lowenberg that the Fiber Science officers wanted to participate in the purchase of the building.

D. The Representation to Lowenberg was not Material.

If the parties to a transaction are essentially strangers, a statement that other strangers will also participate in the purchase can hardly be said to be material to the sale. As noted above, appellant Lowenberg admitted that he hardly knew the Fiber Science people. The offer to purchase that came to him in the form of an earnest money agreement was signed by Cerritos Trucking. The checks that were paid to him were signed by Fleming and Heimark. Nowhere did he see respondent Dunahoo's name. Nowhere did he see any written reference to the Fiber Science officers particpating in the purchase of the property. The option and lease agreements were made with Cerritos Trucking and its assigns without reservation. There was no mention in any of those documents of the Fiber Science people, either individually or as a group. Lowenberg insisted on receiving financial data from Cerritos Trucking and its parent Triangle Distributing. However, similar requests were not made for financial data from the Fiber Science people. The testimony on this point went as follows:

> Q. Prior to the April 28, 1978 visit, had you given any financial information to Mr. Lowenberg on behalf of Cerritos Trucking and Triangle Distributing?

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A. Once we basically concluded negotiations with Cerritos and Utah Venture No. 1, which is Mr. Lowenberg, he did not know anything about the Company at all, so he wanted some financial statements to be sure that they could afford the lease payment.

Q. Did he ask for any financial statements from Mr. Dunahoo?

A. No, he did not.

(Tr. p. 113; testimony of Daughtrey.)

Considering the information requested by appellant Lowenberg of plaintiffs-respondents and not of the Fiber Science people, considering the paucity of information about the Fiber Science people which lay before appellant Lowenberg at the time of the execution of the lease and option agreements, and considering the failure to have any writing confirmining or limiting the participation in the purchase, the trial court was fully justified in determining that the element of materiality of the representation was missing in this case.

E. Lowenberg did not reasonably rely on the representation.

From all standards there was nothing reasonable about appellant Lowenberg's claim that he relied on statements made to him by Daughtrey that the Fiber Science people would participate in the purchase of the property and that he conditioned his sale of the property upon that event occuring. However, Lowenberg is not the orginary seller. Lowenberg was and is an experienced realtor and developer. He was not the country boy taken in by big city fast talkers. He had his own San Francisco legal counsel to assist him. In fact, they were

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the ones who drafted the option agreement and who reviewed all of the documents prior to their being signed by appellant Lowenberg. (Tr. p. 29; testimony of Lowenberg.)

Appellant Lowenberg did not avail himself of the opportunity to confirm directly with the Fiber Science people that they would in fact participate in the purchase of the property. He made no safeguards assuring himself that Cerritos Trucking Company would be used only as a "vehicle" to acquire the property. He allowed the option to be assignable freely, as evidenced by the option document itself. (See Ex. 1P.) He hardly knew the Fiber Science people. Claimed representations made by a real estate agent who was not an employee of either Fiber Science or Cerritos Trucking, or employed or associated by or with any of the principals of the same, were not tested or challenged by appellants.

The testimony is that in January, 1979, Lowenberg was definitely told that the Fiber Science people would not participate in the purchase of the first building. Lowenberg himself admitted that at least by early February, 1979, he knew that the Fiber Science people would not participate in the first building. (Tr. p. 219; testimony of Lowenberg.) Yet he allowed Cerritos Trucking to place its money in escrow the last day of February, 1979, and signed a warranty deed conveying the property to plaintiffs-respondents dated February 27, 1979. It was only at the very end of March, 1979, that he sent his recision letter. None of that conduct on the part of the

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average seller, much less an experienced seller such as appellant Lowenberg, shows any reliance on the claimed representation as the sole basis for selling the property in question. The court was therefore fully justified in determining that the reliance claimed by appellant Lowenberg was in fact unreasonable.

F. There was no negligent representation to Lowenberg that the Fiber Science people would own or participate in the ownership of the property in question.

In one of the leading cases on the subject of negligent misrepresentation, the court in Ellis v. Hale, 13 Utah 2d 279, 373 P.2d 382 (1962) noted that negligent misrepresentation can only lie "when there is a special duty of care running from the representor to the representee." Aside from the argument, stated above, that the Fiber Science people had a reasonable basis to believe they could in some way participate in the ownership of the property in question, there is absolutely no evidence showing any type of a special relationship running from either plaintiffs-respondents or from third-party defendant-respondent Dunahoo to appellants or to any of them. As made clear even by testimony of appellant Lowenberg, the parties hardly knew each other. In fact, at one point in his testimony appellant Lowenberg could not determine whether he had even met any of plaintiffs-respondents prior to the execution of the lease and option agreements. (Tr. pp. 61-62; testimony of Lowenberg.)

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Even in the recently decided case of Dugan v. Jones, 565 P.2d 63 (Utah 1980) the Ellis v. Hale language is cited with approval. The court in that case also cited the latest version of Section 552 of the Restatement of Torts second. The language of Section 552, apparently cited with approval in appellants' brief, however gives no comfort to appellants. To prevail under that language would require evidence that plaintiffs-respondents were the ones who supplied the incorrect information, that it was supplied for the guidance of appellant in making his business decision, that it was false when given, and that plaintiffs-respondents failed to exercise reasonable care or confidence in obtaining or communicating their information. The record does not reflect any evidence of appelants having met those requirements. Hence, the trial court was justified in determining that evidence of negligent misrepresentation was missing.

G. Appellants have established no evidence of damage based on the claim of misrepresentation.

Possibly the most important element of all of appellants' claim, that of damages, is totally missing. It is true that the appraiser for appellants testified that the value of the property in question at the time of the issuance of the option could have been worth more than the option price. That fact by itself, however, does not in any way establish damages. As pointed out above, Appellant Lowenberg did not even tell the Fiber Science people that he was conferring upon

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them a special benefit with regard to the price. Appellant Lowenberg also testified that his purpose in selling to the Fiber Science people was to curry their good favor because this was his first project in the area. He was looking to Fiber Science to potentially lease even additional space from him. The testimony of Lowenberg in this regard is most instructive :

Q. You wanted somebody to start out your first building, to be your first tenant?

A. That's correct.

Q. But Fiber Science was not prepared to take your whole first building; isn't that correct?

A. At that point in time, no.

Q. All right. And isn't it true Mr. Lowenberg, that since that time you had a long relationship with Fiber Science and have been able to lease them additional space in other buildings?

A. Yes.

Q. And so that that expectation that you had hoped for has been met; is that not correct?

A. Yes.

(Tr. p. 222; testimony of Lowenberg.)

Appellant Lowenberg thus made it clear that the "concession" to sell the building and the "favorable" price stated in the option agreement were based solely on the business consideration that the Fiber Science people would thereby be induced to be good tenants and lease additional space from him. The result he was seeking has happened; there is no evidence of any damage whatsoever to appellants. All expectations have been met.

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Ironically, despite the lawsuit in question, appellant Lowenberg claims he still has a good relationship with respondent Dunahoo:

Q. Now, you testified that you think highly of Fiber -- of Fiber Science; is that correct?

A. Yes.

Q. And you think highly of the Fiber Science officers -- ?

A. Yes.

Q. --Is that correct? Mr. Dunahoo is an officer of Fiber Science; isn't he?

A. I know that.

Q. Mr. Lowenberg, you have sued him in this action for fraud?

A. I did.

Q. In your own thinking is that not inconsistent with your high regard for him, charging him with fraud on one hand and holding him in high esteem on the other?

A. Not at all. I consider him to be a very fine tenant, and as far as the tenancy relationship between Ben [sic] and me is concerned its been impeccable.

Q. They have been good tenants?

A. No question.

(Tr. pp. 224-225; testimony of Lowenberg)

In addition to establishing that appellants have received everything which they expected out of the sale of the property, the above conversation reflects the goodwill of the Fiber Science people. They were not allowed to participate in the purchase of the building by their parent company. The

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president of Fiber Science has been sued in this action. Despite all of that, they are not only good tenants but have increased the size of their leasehold space with appellant Lowenberg. Thus there is no evidence of damages by reason of the claimed misrepresentation. The trial court was fully justified in ruling against appellants.

In summary of the above points A through G, appellants have failed to provide any real evidence on the critical elements which appellants have to prove in order to prevail on their claim of misrepresentation. In fact, the absence of any one of the elements is sufficient to deny appellants relief, and they have failed to meet any of the necessary elements, namely: (1) That there was a representation; (2) intentionally or negligently given; (3) as to a present existing fact; (4) which was false when given; (5) which representation was material; (6) and appellants reasonably relied on the representation; (7) to their injury. Not only is the record deficient on each of these elements, but they must be proven by clear and convincing evidence as opposed to the preponderance of the evidence. Cheever v. Schramm, 577 P.2d 951 (Utah 1978). Hence, there was no basis at all to submit the matter to the jury. That being the case, the decision of the lower court should be sustained by this Court.

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POINT II
APPELLANTS CLAIMS ARE BARRED BY THE PAROL EVIDENCE RULE AND/OR BY THE STATUTE OF FRAUDS

Appellants' brief appears to center on the question of whether they should have been allowed to rescind the option agreement in question. In the complaint and during the trial below, however, appellants attempted as an alternate course to have the option agreement reformed or modified to require a participation or an ownership interest by the Fiber Science peiple. However it was never established which of the individuals from Fiber Science exactly would participate, if they could, and the extent to which they would participate. It is thus obvious that it would not be proper for this Court to permit a modification or reformation of the agreement to include participation of ownership by the Fiber Science people.

In the event there is any question on the possibility of reformation or modification of the agreement it should be noted that the pertinent documents in this case are completely clear and unambiguous in every respect. They show that the lease and the option was made to Cerritos Trucking or its assigns. In fact, the option was assigned to Cerritos Associates which is none other than the three principals of Cerritos Trucking plus Cerritos Trucking itself.

(An ironic note to this whole matter is that the purpose for the assignment to Cerritos Associates was for tax benefits (Tr. p.76; testimony of Heimark.) Yet apparently except for that assignment appellants would have been willing

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to go through with the whole arrangement. Allegedly it was upon learning that Cerritos Associates did not include the Fiber Science people that the attempt to rescind came from appellants.)

This Court has made it clear that parol evidence in modification or reformation of ambiguous documents is not admissible unless there was a mutual mistake or fraud by the other party. See, e.g., Neeley v. Kelsch, 600 P.2d 979 (Utah 1979) (Citing several other Utah cases on this point). The option between appellants and plaintiffs-respondents was clear and unambiguous. Hence, any modification or reformation of the agreement could not be established by parol evidence unless there was fraud by plaintiffs-respondents or a mutual mistake betweeen the parties. There was no fraud or misrepresentation by plaintiffs-respondents, as fully discussed above. The record is also clear that there was no mutual mistake. Plaintiffs-respondents were prepared to take the entire purchase by themselves and did not in anyway depend on the participation of the Fiber Science people. (Tr. p.89; testimony of Heimark.) That being the case, parol evidence of any type submitted by appellants was not admissable to modify or reform the agreement between the parties.

Applicable provisions of the Utah Statute of Frauds would likewise prohibit enforcement of any claimed oral agreement eithr between appellants and the Fiber Science people or between plaintiffs-respondents and the Fiber Science

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people. The subject matter of any such agreement would have involved the sale of property; thus it cannot be enforced. Utah Code Ann. §§25-5-1 et seq.

POINT III
THERE WAS NO FIDUCIARY DUTY OWED APPELLANTS

Appellants have argued that plaintiffs-respondents had "more than the usual purchaser-seller relationship" with them. Appellants Brief, p. 35. The fact is that, if anything, the parties had less than the usual buyer-seller relationship. For the most part, all dealings were through a third party, Mr. Daughtrey. Even at the time of signing the option and lease agreements, plaintiffs-respondents were in Los Angeles and appellant Lowenberg was in San Francisco. Daughtrey transported the agreements between the parties.

A fiduciary duty may be created by force of law, such as in the case of attorney-client or trustee-beneficiary. It may also be created by the development of a confidential relationship where one party has a valid reason to place a special trust in another. Such a relationship, however, is not created by mere friendship. Blodgett v. Martsch, 590 P.2d 298 (Utah 1978). Moreover, this Court had said that a buyer-seller relationship by itself does not create a fiduciary duty. Dugan v. Jones, 615 P.2d 1239 (Utah 1980); Cole v. Parker, 5 Utah 2d 263, 300 P.2d 623 (1956).

Appellants have not shown any evidence of the creation of a fiduciary relationship with plaintiffs-respondents. In

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fact it is allegedly because plaintiffs-respondents were not appellant Lowenberg's friends that he caused the recission letter to go out. (Tr. p. 219; testimony of Lowenberg.) ("I decided that I had no obligation whatsoever to sell my building to strangers.")

The relationship between appellants and respondent Dunahoo is even less of a fiduciary nature. Dunahoo signed no contracts and entered into no contractual relationships of any kind with appellants as of the signing of the option and lease agreements. As of that date appellants did not even have a written offer to purchase or lease the property in question from Dunahoo. In fact at that time Dunahoo had met appellant Lowenberg at the most only once. (Tr. p. 221; testimony of Lowenberg.)

It is difficult to perceive on what basis appellants would have this Court extend the duties of a fiduciary to cover their relationship with these answering respondents. It is submitted, however, that the law on fiduciary relationships does not extend that far.

POINT IV
IT WAS NOT ERROR FOR THE COURT TO HAVE FINDINGS OF FACT AND CONCLUSIONS OF LAW

Only because it is raised in appellants' brief is it necessary to address the question of there being findings of fact and conclusions of law submitted and signed by the court in this case. Respondents do not dispite the fact that where there has been a directed verdict, the evidence must be viewed

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in the light most favorable to the party against whom the directed verdict was granted. That does not, however, imply that findings of fact and conclusions of law should not be submitted in the case. The only cases addressing this subject are ones in which there was an absence of findings of fact, and the Court had to rule on whether the trial court should have in fact filed such findings of fact.

The recent case of Smith v. Thornton, 458, P.2d 870 (Utah 1969) bears on this matter. There Court said that in such a case as the instant case, findings of fact "need not" be filed. Nothing was said that findings "should not" be filed. It is submitted that the filing of the findings of fact is helpful to an appeals court to show what guided the trial court in making its decision. Those findings of fact can be ignored by this Court if it so desires. However, it seems, a bit strong on appellants' part to insist that the findings be entirely stricken from the record. They are there and this Court can use them as it sees fit.

POINT V
PLAINTIFFS-RESPONDENTS ARE ENTITLED TO DAMAGES IN ADDITION TO THOSE AWARDED BELOW

The option agreement (Ex. 1P) specifically provided that two months after its exercise, plaintiffs-respondents needed to pay only the amount of the mortgage as a lease payment until the time of closing. However, upon the mailing of the attempted recision letter, appellants demanded that the

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full amount of the lease payments be made. Thereafter, and until the time of trial, said additional payments were made. The court below awarded judgment to plaintiffs-respondents in the amount of the excess payments based on its finding that the option agreement was validly and properly exercised by plaintiffs-respondents and that plaintiffs-respondents were entitled to the property. Subsequent to filing the appeal, appellants made a new demand they be paid the full amount of the lease payments and not simply the amount of the mortgage payments. Upon motion, the court below on November 26, 1980 ordered plaintiffs-respondents to pay the said full amount retroactive to the date of the trial. Thereupon plaintiffs-respondents did make the lease payments as ordered and have thereafter to the present time made payments of the full lease amount. This case therefore should be remanded to the lower court for a determination of the additional damages to which plaintiffs-respondents are entitled as a result of making said payments in excess of the mortgage payments since the time of trial.

POINT VI
PLAINTIFFS-RESPONDENTS ARE ENTITLED TO THEIR ATTORNEYS FEES

Pursuant to the terms of the option agreement, plaintiffs-respondents are entitled to attorneys fees incurred in seeking to enforce the option. Plaintiffs-respondents have now incurred additional attorney's fees as a result of defending this appeal. This Court should therefore remand this

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matter back to the District Court for determination of the additional attorney's fees to which plaintiffs-respondents are entitled as a result of defending this appeal.

SUMMARY

The main thrust of appellant's claim on appeal is that they were induced to sign the option agreement because they thought the Fiber Science people were going to end up as the ultimate owners of the property in question. Inasmuch as the Fiber Science people didn't end up as the owners, appellants claim that they can rescind the option agreement.

The trial court granted the directed verdict in favor of respondents and against appellants because appellants failed completely to justify their claim. Neither the facts nor the law support them. A review of the trial record leaves no doubt that the critical elements of appellants' claim were never established. There was no basis for the trial court to present the case to the jury. That decision should be upheld by this Court.

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The Court should remand this case to the lower court for only one purpose: to determine the amount of additional damages and attorney's fees plaintiff-respondents are entitled to by reason of the appeal.

Respectfully submitted this 17th day of February, 1981.

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Brief of Plaintiffs Respondents and Cross Defendant - Respondent Dunahoo were mailed, postage prepaid, on this 17th day of February, 1981, to:

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