

2010

Leslie D. Mower v. David R. Simpson : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LESLIE D. MOWER, an individual, et. al,

Plaintiffs and Appellants;

vs.

DAVID R. SIMPSON, an individual, et. al,

Defendants and Appellees.

Utah Court of Appeals No. 20100532

District Court Civil No. 090403844

APPELLANTS' OPENING BRIEF ON APPEAL

Appeal from the Order of the Fourth District Court,
Utah County, Provo Division, The Honorable Samuel D. McVey

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UTAH APPELLATE COURT
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LIST OF PARTIES TO PROCEEDINGS IN DISTRICT COURT

Plaintiffs/Appellants:

Leslie D. Mower; LD SQ, LLC; LD III, LLC; LD Purpose, LLC; and Navona, LC.

Defendants/Appellees:

David R. Simpson; Nathan R. Simpson; Michael K. Thompson; Todd Dorny; Brandon Dente; David N. Nemelka; Dallas M. Hakes; Chad D. Carlson; Michael Marx; Allen R. Hakes; Michael W. Aviano; ALS Properties, LLC; Mai Ke Kula, LLC; Hanalei Kai Holdings, LLC; Ka Mahina, LLC; He Kiakolu, LLC; Koamalu Plantation, LLC; Landmark Real Estate, Inc.; Wood Springs, LLC; Oak Leaf, LLC; Dente, LLC; Sunny Ridge, LLC; KNDJ Development, LLC; DN Simpson Holdings, LLC; SOS Mapleton Development, LLC; DN Simpson Mapleton Holdings, LLC; The Preserve at Mapleton Development Company, LLC; Pheasant Meadows, LLC, Carnesecca Orchard Estates, LLC; Spanish Vista Plat I, LLC; Landmark Homes of Utah, LLC; Maple Mountain Water Tank, LLC; Lonestar Gutters, LLC; 2 Brothers Communications and Lonestar Builders, Inc.

Rule 19 Defendants:

Koamalu Plantation Investment, LLC; and, Kathy A. Templeman.

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STATEMENT OF JURISDICTION

The Court has jurisdiction over this matter pursuant to Utah Code Annotated § 78A-4-103(2)(j).

ISSUES PRESENTED FOR REVIEW

Did the trial court err when it held Plaintiffs failed to plead fraud with particularity when the complaint described in detail the content of the misrepresentations and material omissions, when they were made or omitted and who made them, thus giving defendants fair notice of the nature and bases or grounds of the claims and an indication of the type of litigation involved; but did not include the exact words used, the exact location at which the misrepresentations were made and who else was present? A District Court's grant of a motion to dismiss presents a question of law that is reviewed for correctness, *Osguthorpe v. Wolf Mountain Resorts*, 2010 UT 29, ¶ 10, 232 P.3d 999, "giving no deference to the decision of the trial court." *Coroles v. Sabey*, 2003 UT 339, ¶ 15, 79 P.3d 974.

Did the trial court err when it held Rule 9(b) of the Utah Rules of Civil Procedure requires all facts supporting each fraud claim to be pled or referred to in each specific cause of action rather than considering the complaint as a whole? (I.e., can a court ignore portions of the Complaint when deciding the "particularity" of the pleading?) A District Court's grant of a motion to dismiss presents a question of law that is reviewed for correctness, *Osguthorpe v. Wolf Mountain Resorts*, 2010 UT 29, ¶ 10, 232 P.3d 999, "giving no deference to the decision of the trial court." *Coroles v. Sabey*, 2003 UT 339, ¶ 15, 79 P.3d 974.

Did the trial court err in dismissing Plaintiffs' fraud-based claims for lack of particularity when Defendants failed to assert any argument, reason or authority for dismissing the fraud-based claims? A District Court's grant of a motion to dismiss presents a question of law that is

reviewed for correctness, *Osguthorpe v. Wolf Mountain Resorts*, 2010 UT 29, ¶ 10, 232 P.3d 999, "giving no deference to the decision of the trial court." *Coroles v. Sabey*, 2003 UT 339, ¶ 15, 79 P.3d 974.

Did the trial court err by determining "complete relief would not be available" to Defendants without Ken Dolezsar ("Dolezsar"), who is deceased, as a party for reason of "the inability to hold him accountable," when Plaintiffs allege that he was acting as Plaintiff Leslie D. Mower's agent at the time Defendants made misrepresentations to him, which he then repeated to Leslie? A District Court's determination under Rule 19 of the Utah Rules of Civil Procedure will not be disturbed absent an abuse of discretion. *See Seftel v. Capital City Bank*, 767 P.2d 941, 944 (Utah Ct. App. 1989).

Did the trial court err by determining "complete relief would not be available" to Defendants without Dolezsar (deceased) as a party for reason of the "inability to hold him accountable" when Plaintiffs allege, in the alternative, that he was authorized by Defendants to repeat their misrepresentations and may have conspired with Defendants? A District Court's determination under Rule 19 of the Utah Rules of Civil Procedure will not be disturbed absent an abuse of discretion. *See Seftel v. Capital City Bank*, 767 P.2d 941, 944 (Utah Ct. App. 1989).

Did the trial court err in determining Dolezsar (deceased) is an indispensable party by reason that "Defendants will be unfairly prejudiced by any judgment issued in the absence of Dolezsar" based on "their inability to cross claim against him" when Plaintiffs allege that Dolezsar was Leslie D. Mower's agent and, in the alternative, that he was authorized by Defendants to repeat their misrepresentations to Leslie D. Mower? A District Court's determination under Rule 19 of the Utah Rules of Civil Procedure will not be disturbed absent an abuse of discretion. *See Seftel v. Capital City Bank*, 767 P.2d 941, 944 (Utah Ct. App. 1989).

Did the trial court err in determining Dolezsar (deceased) is an indispensable party when it determined that any judgment rendered without him would be inadequate in as much as no cross-claims can be brought against his estate? A District Court's determination under Rule 19 of the Utah Rules of Civil Procedure will not be disturbed absent an abuse of discretion. *See Seftel v. Capital City Bank*, 767 P.2d 941, 944 (Utah Ct. App. 1989).

Did the trial court err in determining Dolezsar (deceased) is an indispensable party by reason that Plaintiffs will have an adequate remedy if their "fraud claims" are dismissed, concluding that Plaintiffs' remaining claims for breach of contract, breach of fiduciary duty, conversion and unjust enrichment will provide an adequate remedy when Plaintiffs' remaining claims do not give Plaintiffs a remedy against all the Defendants and leave them no remedy for the fraud perpetrated against them? A District Court's determination under Rule 19 of the Utah Rules of Civil Procedure will not be disturbed absent an abuse of discretion. *See Seftel v. Capital City Bank*, 767 P.2d 941, 944 (Utah Ct. App. 1989).

Did the trial court err by dismissing Plaintiffs' "fraud-based claims" without leave to amend when the trial court failed to find that amendment would be untimely, unjustified, prejudicial, would cause delay, would be in bad faith or would be futile; when discovery has not begun, most Defendants have not filed answer and the trial court recognized that amendment would cure the deficiencies it found in the complaint? A District Court's ruling on a motion for leave to amend a complaint will not be disturbed absent an abuse of discretion. Such determination will not be reversed unless the decision exceeds the limits of reasonability. *Coroles v. Sabey*, 2003 UT 339, ¶ 16, 79 P.3d 974.

Did the trial court err in holding that Utah does not recognize causes of action for aiding and abetting when such causes of action are recognized by the Restatement (Second) of Torts

and are recognized by the majority of states? A District Court's grant of a motion to dismiss presents a question of law that is reviewed for correctness, *Osguthorpe v. Wolf Mountain Resorts*, 2010 UT 29, ¶ 10, 232 P.3d 999, "giving no deference to the decision of the trial court." *Coroles v. Sabey*, 2003 UT 339, ¶ 15, 79 P.3d 974.

STATUTES, ORDINANCES, RULES AND REGULATIONS

Rule 9(b) Utah Rules of Civil Procedure.

Rule 15 Utah Rules of Civil Procedure.

Rule 19 Utah Rules of Civil Procedure.

STATEMENT OF THE CASE

NATURE OF THE CASE

Plaintiffs filed a *Second Amended Complaint* detailing five major theaters of activity where fraudulent acts occurred, thirty-five primary defendants, involved in various fraudulent acts described in twenty-one causes of action relating to fraudulent activity, including fraud and intentional misrepresentation, fraudulent non-disclosure, aiding and abetting fraudulent non-disclosure, negligent misrepresentation, conspiracy and Utah's Pattern of Unlawful Activity Act (the "UPUA"). Court Record ("Rec."), 3194-2834.

Plaintiffs allege in the general allegations section of the *Second Amended Complaint* what misrepresentations Defendants made, when they were made and to whom they were made. Plaintiffs repeated or referred to many of the specific allegations of the fraud contained in the general allegations in their specific causes of action. Rec. 3182-3017. Defendants moved the trial court to dismiss Plaintiffs' fraud claims, arguing that Plaintiffs failed to plead fraud with

particularity.¹ The trial court found that Plaintiffs failed to plead fraud with particularity because they did not repeat or refer to all of the specific facts contained in the general allegations again in the specific fraud causes of action. Rec. 6136, p. 183.²

Defendants also moved the trial court to dismiss Plaintiffs' fraud causes of action claiming Dolezsar was a necessary and indispensable party. Rec. 5288-5263. Plaintiffs allege that the misrepresentations at issue were made to Dolezsar, who was at all relevant times acting as the agent of Leslie D. Mower ("Leslie"). Plaintiffs allege, in the alternative, that the Defendants authorized Dolezsar to repeat their misrepresentations to Leslie as part of a conspiracy. The trial court found that Plaintiffs failed to allege where and when the misrepresentations were repeated to Leslie and dismissed the fraud claims, finding Plaintiffs failed to plead them with particularity. Rec. 6136, p. 183.

The trial court also concluded that because Dolezsar was the one who repeated Defendants' misrepresentations to Leslie, he is a necessary and indispensable party. Therefore, it dismissed Plaintiffs' fraud claims, based on Rule 19 of the Utah Rules of Civil Procedure ("URCP"). The trial court concluded that Dolezsar was "more than a simple go-between" and that he "occupied a pivotal representative role," based solely on Plaintiffs' alternative pleading that Dolezsar was authorized to make the misrepresentations to Leslie as part of a conspiracy.

¹Defendants Aviano, Nemelka, Carlson and the twenty-six Defendants represented by Ray Quinney & Nebeker (the "Simpson Defendants") all filed motions to dismiss the fraud claims. However, the Simpson Defendants' argument encompassed the argument of the other defendants. Therefore, Plaintiffs will focus on the Simpson Defendants' arguments, as the trial court did.

²The *Second Amended Complaint* is voluminous, totaling 361 pages as pled. The length would have likely doubled if the allegations were repeated in each of the specific causes, rather than including them once in the general allegations.

Rec. 5593.

The trial court also dismissed Plaintiffs' claims for aiding and abetting breach of fiduciary duty and aiding and abetting fraudulent non-disclosure, finding that Utah does not recognize such causes of action. Rec. 5604. Further, the trial court, without applying any of the required factors or giving an explanation, also dismissed Plaintiffs' fraud claims without leave to amend. Rec. 6136, p. 186.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Plaintiffs filed a *Complaint* in this matter on October 20, 2009. Rec. 461. On November 27, 2009, Plaintiffs filed a *First Amended Complaint*, adding two causes of action. Rec. 2143. After hearing argument on various motions to dismiss, the trial court dismissed Plaintiffs' fraud claims, but granted Plaintiffs leave to amend. Rec. 2608-2606. On March 5, 2010, Plaintiffs filed their *Second Amended Complaint*, detailing five major theaters of activity where fraudulent acts occurred, thirty-five primary defendants, involving various fraudulent acts described in twenty-one causes of action relating to the fraudulent activity, including fraud and intentional misrepresentation, fraudulent non-disclosure, negligent misrepresentations, conspiracy and Utah's Pattern of Unlawful Activity Act. Rec. 3194-2834.

On March 15, 2010, Defendant Chad Carlson filed a motion to dismiss the *Second Amended Complaint*, alleging that Plaintiffs failed to plead fraud with particularity. Rec. 5071-5053. On March 19, 2010, Defendant Michael Aviano filed a motion to dismiss, alleging that five of Plaintiffs' causes of action should be dismissed for failing to plead fraud with particularity. Rec. 5128-5107. On April 16, 2010, Defendant David Nemelka filed a motion to dismiss, claiming all of Plaintiffs' fraud based causes of action in relation to The Preserve at

Mapeleton development should be dismissed.³ Rec. 5310-5300. On April 13, 2010, the Simpson Defendants filed a motion to dismiss, alleging that fifteen of Plaintiffs' causes of action should be dismissed for failing to plead fraud with particularity, that Plaintiffs' claims for aiding and abetting should be dismissed based on Rule 12(b)(6) URCP, and that all of Plaintiffs' fraud based claims should be dismissed for failure to join an indispensable party. Rec. 5288-5263.

The various motions to dismiss were argued before Fourth District Court Judge Samuel D. McVey on May 13, 2010. Ruling from the bench, the trial court dismissed Plaintiffs' "fraud based claims," finding Plaintiffs failed to plead them with particularity. Rec. 6136, p. 182. On June 7, 2010, the trial court dismissed all of Plaintiffs' fraud claims, finding Dolezsar (deceased) is a necessary and indispensable party under Rule 19(b) URCP. Rec. 5593-5592. On June 22, 2010, the trial court executed a written order dismissing fourteen of Plaintiffs' causes of actions in their entirety and five of Plaintiffs' causes of action "to the extent those claims are based on allegations of fraud" without leave to amend. Rec. 5603. Plaintiffs filed petitions for permission to file interlocutory appeals regarding both orders. Rec. 5711 and 5715. Both petitions were granted. Rec. 5959.

STATEMENT OF FACTS

1. Plaintiffs' *Second Amended Complaint* details five major theaters of activity where fraudulent acts occurred, thirty-five primary defendants, involved in various fraudulent acts described in twenty-one causes of action including: fraud and intentional misrepresentation, fraudulent non-disclosure, aiding and abetting fraudulent non-disclosure, negligent

³Nemelka was not named as a defendant in two of the causes of action, fraud and intentional misrepresentation and negligent misrepresentation in relation to The Preserve development, which he moved the trial court to dismiss.

misrepresentation, conversion, conspiracy and claims under UPUA, occurring over a five year period. Rec. 3194-2834.

2. Throughout the *Second Amended Complaint*, Plaintiffs allege that Dolezsar was at all times acting as her agent, was Leslie's husband and was in charge of her business affairs. Rec. 3177, ¶ 8; 3126, ¶ 209; 3016, ¶ 542; 3001, ¶ 601; 2978, ¶ 718, and 2945, ¶ 864.

3. Dolezsar was murdered on November 15, 2007. Rec. 3056, ¶ 400.

Hawaii Condominium Development

4. Plaintiffs' *Second Amended Complaint* contains causes of action in relation to a Hawaii condominium development for fraud and intentional misrepresentation, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraudulent non-disclosure, aiding and abetting fraudulent non-disclosure, negligent misrepresentation, conversion, unjust enrichment, conspiracy and UPUA, along with various contract based causes of action. Rec. 3017-2978.

5. The trial court dismissed Plaintiffs' causes of action for fraud and intentional misrepresentation and fraudulent non-disclosure for lack of particularity and for failure to join an indispensable party. Rec. 5606-5600. The trial court dismissed Plaintiffs' causes of action for conspiracy and UPUA to the extent they were based on allegations of fraud. *Id.* The trial court also dismissed Plaintiffs' causes of action for aiding and abetting, finding Utah courts do not recognize causes of action for aiding and abetting. *Id.*

6. Plaintiffs allege in detail the facts underlying and supporting their fraud claims in relation to the Hawaii Condominium development and describing the scheme that Michael Thompson had initiated and in which Thompson, David Simpson, Nathan Simpson, Todd Dorny and Brandon Dente (the "Hawaii Defendants") participated. Rec. 3182-3128.

7. Plaintiffs allege the formation of the scheme and its participants. Rec. 3180-3179,

¶¶ 73,74 and 75.

8. David Simpson, on behalf of the Hawaii Defendants, approached Dolezsar, seeking Leslie's investment in the Hawaii Condominium development. Rec. 3177, ¶ 82.

9. On March 1, 2005, David Simpson made misrepresentations to Dolezsar to induce Leslie to invest her funds. Rec. 3177-3176, ¶¶ 82 and 83.

10. Plaintiffs specifically identify who made the misrepresentations, when the misrepresentations were made and the misrepresentations' content. Rec. 3177-3176, ¶ 81-83; 3174-3173, ¶¶ 85-86; and 3016-3015, ¶¶ 542- 543 and ¶ 545.

11. Plaintiffs allege that the Hawaii Defendants made the misrepresentations to Dolezsar, knowing that he was acting as Leslie's agent, that he was Leslie's husband and that he was managing Leslie's affairs. Rec. 3017-3016, ¶¶ 541-42.

12. Plaintiffs allege that Dolezsar repeated the misrepresentations to Leslie. Rec. 3016, ¶ 543.

13. Plaintiffs allege, in the alternative, that David Simpson and Nathan Simpson, knowing Dolezsar was Leslie's agent and was managing her business affairs, authorized Dolezsar to repeat the misrepresentations to Leslie. Rec. 3016, ¶¶ 542-543.

14. Plaintiffs allege that the Hawaii Defendants knowingly, intentionally and deceitfully failed to disclose relevant, material facts to Dolezsar and Leslie, that they knew the true facts, had a duty to disclose them and failed to do so. Rec. 3005-3004, ¶¶ 580-583.

15. Although Defendants failed to provide any argument, reason or authority as to why Plaintiffs' fraud allegations were not pled with particularity, the trial court dismissed Plaintiffs' fraud and intentional misrepresentation and fraudulent non-disclosure claims. It also dismissed Plaintiffs' conspiracy and UPUA claims to the extent they are based on claims of

fraud. Rec. 5605-5603.

16. Despite Plaintiffs' detailed allegations regarding the representations made to Dolezsar repeated to Leslie, and despite the fact that Plaintiffs allege that Dolezsar was acting as Leslie's agent, the trial court stated, "Plaintiff [Leslie] in this case ... was directly privy to what was said to her. She has all that information and knowledge. ... I mean, she knows where that occurred, what words were used, who else was present, all of those types of things." Rec. 6136, p. 183.

17. The trial court dismissed Plaintiffs' fraud-based claims, finding Plaintiffs did not repeat all the facts supporting Plaintiffs' fraud claims within the causes of action, even though they were included in the general allegations section of the *Second Amended Complaint*. The trial court stated, "there are circumstances where there were not references to earlier facts that were pleaded ... those should be identified and included in the cause of action." However, the trial court failed to specify any example of those circumstances. Rec. 6136, p. 183.

18. The trial court concluded that Dolezsar was "more than a simple go-between," and that he "occupied a pivotal representative role in the alleged fraud." The trial court found: (1) Dolezsar was a major actor; (2) the Defendants would be unfairly prejudiced because they cannot cross claim against Dolezsar; (3) any judgment rendered without Dolezsar would be inadequate because no cross claims can be brought against Dolezsar or his estate; and (4) Plaintiffs' remaining claims would provide them an adequate remedy. Rec. 5595-5591. Therefore, the trial court found Dolezsar (deceased) to be an indispensable party and dismissed Plaintiffs' "fraud claims" based on Rule 19 URCP. Rec. 5593-5592.

The Preserve at Mapleton Development Scheme

19. Plaintiffs' causes of action for fraud and intentional misrepresentation, fraudulent

non-disclosure, negligent misrepresentation, conspiracy and UPUA in relation to The Preserve at Mapleton development consists of several inter-related frauds:

(a) Fraud and intentional misrepresentation and fraudulent non-disclosure in relation to the purchase of approximately 30.7 acres of real property known as the "Whiting Property" and the representations David Simpson and Nathan Simpson made to convince Leslie to invest \$4,300,000.00 to fund the purchase of the Whiting Property;

(b) Fraud and intentional misrepresentation and fraudulent non-disclosure in relation to David Simpson's and Nathan Simpson's efforts to convince Leslie to invest an additional \$6,800,000.00 in The Preserve at Mapleton development;

(c) Fraud and intentional misrepresentation and fraudulent non-disclosure in relation to The Preserve at Mapleton development project regarding a document that purported to accurately summarize Leslie's funds that had been taken and used for The Preserve development project;

(d) Fraud and intentional misrepresentation and fraudulent non-disclosure, in relation to David Simpson's and Nathan Simpson's application for a loan from MagnetBank and later misrepresentations to MagnetBank; and,

(e) Fraud and intentional misrepresentation and fraudulent non-disclosure in relation the sale by David Simpson and the purchase by Leslie of 30.7 acres of real property located in Springville, Utah, as additional incentive for her to lend funds to David Simpson and Nathan Simpson.

Rec. 3127-3041.

20. Plaintiffs allege that David Simpson and Nathan Simpson, knowing that Dolezsar was acting as Leslie's agent, that he was managing Leslie's business affairs and that he had access to Leslie's funds, persuaded him that The Preserve at Mapleton development was a "blue chip investment" opportunity. Rec. 3124, ¶ 216.

21. Plaintiffs allege the specific facts and details underlying and supporting their fraud claims in relation to The Preserve at Mapleton development. Rec. 3127-3041.

The Preserve - Whiting Property Fraud

22. Plaintiffs allege that David Simpson and Nathan Simpson concocted a scheme to artificially raise the value of 170 acres they had previously purchased for The Preserve at

Mapleton development. Rec. 3116, ¶ 247; 3313-3108, ¶¶ 256-265; 3108-3107, ¶¶ 269-270; and 2978-2977, ¶¶ 719-720. In an attempt to inflate the value of the total acreage for the purposes of an appraisal, they intended to use Leslie's funds to purchase 30.7 acres next to the 170 acres at a higher cost per acre than they paid for the 170 acres. *Id.*

23. Plaintiffs allege that David Simpson and Nathan Simpson, as part of their scheme, intended to use, and did use, Leslie's funds to purchase 30.7 acres immediately next to the 170 acres at a much higher per acre cost to fool appraisers and lenders into believing that the 170 acres were worth the same higher per acre value as the 30.7 acres. Rec. 3116, ¶ 247; 3107, ¶ 270; and 2978-2977, ¶¶ 719-720.

24. Plaintiffs allege that in April 2006, David Simpson and Nathan Simpson made misrepresentations to Dolezsar, who was acting as Leslie's agent, to induce Leslie to provide her funds to purchase the 30.7 acres. Plaintiffs allege the specific misrepresentations made by the Simpsons. Rec. 3113-3112, ¶ 256; 3110, ¶ 259; and 2977, ¶¶ 720-721.

25. Plaintiffs allege that David Simpson and Nathan Simpson knew that Dolezsar was acting as Leslie's agent when they made misrepresentations to him. Rec. at 3113-3112, ¶ 256.

26. Plaintiffs allege the misrepresentations were false and why they were false. Rec. 2977-2976, ¶ 723.

27. Plaintiffs allege that Dolezsar was not aware that the misrepresentations were false and, that he was acting as Leslie's agent. Plaintiffs allege, only in the alternative, that Dolezsar was part of a conspiracy and was acting on David Simpson's and Nathan Simpson's authorization, direction and instruction when he repeated the misrepresentations to Leslie. Rec. 3110, ¶¶ 258-259; and 2977, ¶ 721.

28. Plaintiffs allege that David Simpson and Nathan Simpson intentionally withheld

relevant, material facts. Rec. 3112-3110, ¶ 257; 2976, ¶ 724; and 2951, ¶¶ 833-837.

29. Plaintiffs allege the misrepresentations were statements of presently existing fact and intent, that Defendants intentionally withheld the relevant, material facts, that they knew the misrepresentations were false, they made them for the purpose of inducing Leslie to provide funds and that Leslie provided the funds and was harmed thereby. Rec. 2977-2975, ¶¶ 722-729.

30. Defendants failed to make any argument, reason or authority as to why Plaintiffs' allegations failed to meet the Rule 9(b) URCP particularity requirement. Rec. 5288-5268.

31. Despite Defendants' failure to provide any argument, reason or authority as to why Plaintiffs' fraud allegations in regard to the Whiting Property did not meet the particularity requirement, the trial court dismissed Plaintiffs' "fraud-based claims" concluding that Plaintiffs failed to plead the facts with the required particularity. Rec. 5288-5268 and 5605-5603.

\$6,800,000.00 Loan

32. Plaintiffs allege at or near the end of November or the beginning of December 2006, David Simpson and Nathan Simpson needed \$6,800,000.00 to save The Preserve at Mapleton development. Rec. 3092-3091, ¶ 314.

33. Plaintiffs allege that at the end of November or beginning of December 2006, David Simpson and Nathan Simpson made misrepresentations to Dolezsar, who was acting as Leslie's agent, to induce her to lend funds for The Preserve at Mapleton development. Plaintiffs allege the specific misrepresentations, who made them and when they were made. Rec. 3092-3086, ¶¶ 314-317; 2975, ¶ 731; 2974, ¶ 734; and 2973, ¶ 739.

34. Plaintiffs allege that Dolezsar, on the authorization and instruction of David Simpson and Nathan Simpson or, in the alternative, as part of a conspiracy, repeated misrepresentations to Leslie to induce her to lend \$6,800,000.00 for The Preserve at Mapleton

development. Rec. 3092-3091, ¶ 314; and 2975, ¶ 731.

35. Plaintiffs allege the representations were false and why they were false. Rec. 2974, ¶¶ 733 and 736; and 2973, ¶ 741.

36. Plaintiffs allege that David Simpson and Nathan Simpson knowingly and intentionally withheld relevant, material facts from Dolezsar and Leslie and that they had a duty to disclose the relevant, material facts. Rec. 3089- 3086, ¶ 317; 2976, ¶ 724; 2951, ¶ 838; and 2949, ¶ 848.

37. Plaintiffs allege the representations were statements of presently existing fact and intent, that Defendants intentionally withheld relevant, material facts, that Defendants knew the representations were false, they were made for the purpose of inducing Leslie to provide funds and that Leslie provided the funds and was harmed thereby. Rec. 2975, ¶ 732; 2974, ¶ 735, 2973, ¶ 740, 2972, ¶¶ 743-745.

38. As an inducement for Leslie to make a \$6,800,000.00 loan, David Simpson and Nathan Simpson, on behalf of The Preserve at Mapleton Development Company, LLC, executed a promissory note and trust deed in favor of Leslie's entity, LD III, LLC, as security for the loan. Rec. 3085-3084, ¶ 323.

39. As a further inducement for Leslie to make the \$6,800,000.00 loan, David Simpson and Nathan Simpson signed an additional promissory note to Leslie in the amount of \$6,800,000.00 as prepaid consideration. Rec. 3090, ¶ 316(a); 3084, ¶ 325.

40. Defendants did not provide any argument, reason or authority as to why the fraud allegations in relation to the \$6,800,000.00 loan do not meet the Rule 9(b) URCP particularity standard. Rec. 5288-5268.

41. Despite Defendants' failure to provide any argument, reason or authority as to

why Plaintiffs' fraud allegations in regard to the \$6,800,000.00 loan did not meet the particularity requirement, the trial court dismissed all of Plaintiffs' "fraud-based claims" concluding that Plaintiffs failed to plead the facts with particularity. Rec. 5605-5603.

Summary Document

42. David Simpson, Nathan Simpson, Dolezsar and Leslie all signed a document which summarized the various transfers of Leslie's funds for The Preserve at Mapleton development. Rec. 3086-3085, ¶ 319.

43. Plaintiffs allege the summary document fails to account for at least four transfers of Leslie's funds, that David Simpson and Nathan Simpson represented the document accurately summarized all of Leslie's funds that had been used for The Preserve at Mapleton development, that the document was false and that the Simpsons had a duty to disclose the true facts to Leslie but failed to do so. Rec. 3086-3085, ¶ 319; 2971, ¶¶ 747-749; and 2939-2938, ¶¶ 891-894.

44. Plaintiffs allege the misrepresentations were false and why they were false. Rec. 2971, ¶ 749.

45. Plaintiffs allege the misrepresentations were statements of presently existing fact and intent, that David Simpson and Nathan Simpson intentionally withheld relevant material facts, that Defendants knew the representations were false, that they were made for the purpose of inducing Leslie to provide funds and that Leslie provided the funds and was harmed thereby. Rec. 2971, ¶¶ 748-753.

46. Once again, Defendants failed to provide any argument, reason or authority as to why the fraud allegations in relation to the summary document loan do not meet the Rule 9(b) URCP particularity requirement. Rec. 5288-5268.

47. Despite Defendants' failure to provide any argument, reason or authority as to

why Plaintiffs' fraud allegations in regard to the summary document did not meet the particularity requirement, the trial court dismissed all of Plaintiffs' "fraud-based claims" concluding that Plaintiffs failed to plead the facts with particularity. Rec. 5605-5603.

MagnetBank

48. Plaintiffs allege David Simpson and Nathan Simpson needed to obtain a new loan for The Preserve at Mapleton development. Rec. 3100-3099, ¶ 296. They needed a high value appraisal to obtain a loan in a sufficient amount to refinance their existing high interest loan. Rec. 3099, ¶ 297. As part of the scheme to artificially raise values for an appraisal, the Simpsons arranged for fourteen offers to be made by four parties on lots within a one week period. Rec. 3098-3096, ¶¶ 300-304. Plaintiffs allege the offers were not real but were intended to deceive appraisers and lenders. Rec. 3099, ¶ 297; 3098-3096, ¶¶ 300-304; 3081, ¶ 335; 3079, ¶ 340; and 2067-2966, ¶¶ 783-784.

49. Plaintiffs allege that Nathan Simpson provided the offers to an appraiser and that the offers were used by the appraiser in arriving at a value for the real property. Rec. 3098-3096, ¶¶ 300-303; 3081, ¶ 335; 3079, ¶ 340; and 2967-2966, ¶¶ 783-784.

50. Plaintiffs allege that David Simpson and Nathan Simpson failed to inform the appraiser that as part of gaining approvals for The Preserve at Mapleton development, they were obligated to furnish 10 acres to the city of Mapleton for a cemetery. Rec. 3079, ¶ 341; and 2966, ¶ 785.

51. Plaintiffs allege that David Simpson and Nathan Simpson failed to inform the appraiser that The Preserve at Mapleton development property did not include 3.85 acres that were necessary for the construction of a debris basin, without which the property could not be developed. Rec. 3080-3079, ¶ 339; and 2966, ¶ 786.

52. Plaintiffs allege David Simpson and Nathan Simpson intentionally never recorded the trust deed securing LD III's loan for \$6,800,000.00 so that MagnetBank would be unaware of the loan. Rec. 3085-3084, ¶¶ 323-324; and 2974-2973, ¶¶ 737-738.

53. Plaintiffs allege that in return for Michael Aviano's agreement to lend David Simpson \$2,000,000.00 personally, that David Simpson and Nathan Simpson sold a lot to Aviano for \$575,000.00 that had a list price of \$1,360,000.00 and the amount due to MagnetBank to release its security interest in the lot was \$1,020,000.00. Rec. 3055-3053, ¶¶ 404-413; and 2965-2963, ¶¶ 794-810.

54. The Aviano closing documents show the purchase price was \$900,000.00, the purchase price was reported to MagnetBank as \$900,000.00 and Michael Aviano affirmed to a deputy county assessor that the purchase price \$900,000.00. Rec. 3054, ¶ 408; 3054-3053, ¶ 413; and 2964, ¶ 798.

55. Plaintiffs allege that had MagnetBank known of the misrepresentations it would not have allowed the sale to occur and would have taken steps to secure its collateral. Rec. 2963, ¶¶ 806-810. Further, Plaintiffs allege that if MagnetBank had known, it would have declared the loan due. Rec. 2963, ¶ 808.

56. Plaintiffs allege David Simpson and Nathan Simpson furnished MagnetBank false personal financial statements which overstated their assets and understated their liabilities. Rec. 3075-3072, ¶¶ 352-356; 2969, ¶¶ 767-768; and 2968, ¶ 773.

57. Based on the false information provided by David Simpson and Nathan Simpson, MagnetBank provided a \$12,713,200.00 loan to them for The Preserve at Mapleton development. Rec. 3073-3069, ¶¶ 356-359, 2963, ¶¶ 806-810. Because the Simpsons failed to record LD III's trust deed and because Leslie knew that the Simpsons were about to default on

th MagnetBank loan, her entity, Navona, L.C., purchased the MagnetBank loan. Rec. 3053-3052, ¶ 416.

58. Defendants argued that to satisfy Rule 9(b) URCP, Plaintiffs must allege which particular assets were over-valued, by how much each asset was over-valued and why each asset was improperly included. Rec. 5276. They also argued that Plaintiffs had to allege which liabilities were understated or otherwise not included. *Id.*

59. The trial court granted Defendants' motion to dismiss for the "reasons set forth in the memoranda supporting the Simpson Motion," and therefore presumably agreed that Plaintiffs had to allege the particulars of each asset and liability. Rec. 5605.

60. Plaintiffs allege that David Simpson and Nathan Simpson failed to include their personal obligation to pay \$6,800,000.00 to Leslie in the financial statements furnished to MagnetBank. Rec. 2968, ¶ 774.

61. Dolezsar was not involved in the misrepresentations made to MagnetBank or in the false offers. Rec. 2969-2962.

62. The trial court dismissed all of Plaintiffs' fraud claims for failure to join Dolezsar, yet Dolezsar had no involvement with the misrepresentations made to MagnetBank. Rec. 2969-2962; and 5592.

Prime Commercial Property

63. Plaintiffs allege that as part of David Simpson's and Nathan Simpson's scheme to induce Leslie to lend her funds for The Preserve at Mapleton development, they offered to sell her 30.76 acres of real property located in Springville, Utah which they represented was worth \$3,300,000.00 for only \$1,500,000.00 if she would lend them \$6,800,000.00. Rec. 3048-3046, ¶¶ 434-435; 2909, ¶ 1008.

64. Plaintiffs allege that in December 2006, as an inducement for Leslie to lend \$6,800,000.00, David Simpson and Nathan Simpson represented to Dolezsar that a 30.76 acre parcel of real property owned by one of David Simpson's entities was prime commercial property where Leslie could build an office building, warehouse and production facilities. Rec. 3048-3047, ¶ 433-434; and 3013, ¶ 757.

65. Plaintiffs allege that David Simpson and Nathan Simpson made specific misrepresentations to Dolezsar, knowing that he was acting as Leslie's agent. Plaintiffs allege what misrepresentations were made, who made them and when they were made. Rec. 3048-3047, ¶ 434; and 2908, ¶ 1014.

66. Plaintiffs allege only in the alternative that Dolezsar conspired with David Simpson and Nathan Simpson. Rec. 3047-3046, ¶ 435. Even if Dolezsar conspired with the Simpsons, Plaintiffs allege that the Simpsons authorized him to make the representations to Leslie. Rec. 3048-3047, ¶ 434.

67. Plaintiffs allege David Simpson and Nathan Simpson knew the representations were false when they made them. Rec. 2969, ¶ 761.

68. Plaintiffs allege that David Simpson and Nathan Simpson had a duty to disclose relevant, material facts but failed to do so, and they specify what those facts are. Rec. 3047-3046, ¶ 435; and 2899-298, ¶¶ 1075-1079.

69. Once again, Defendants failed to provide any argument, reason or authority to the trial court as to why the fraud allegations in relation to prime commercial property do not meet the Rule 9(b) URCP particularity requirement. Rec. 5288-5268.

70. Despite Defendants' failure to provide any argument, reason or authority as to why Plaintiffs' fraud allegations in regard to the prime commercial property do not meet the

particularity requirement, the trial court dismissed all of Plaintiffs' "fraud-based claims," concluding that Plaintiffs failed to plead the facts with particularity. Rec. 5605-5603.

Double T Ranch Water Purchase

71. Defendants claimed that Plaintiffs failed to plead their cause of action for fraudulent non-disclosure in relation to the Double T Ranch Water Purchase with particularity – arguing that Plaintiffs fail "to allege how such non-disclosures resulted in any damage." Rec. 5275.

72. Plaintiffs allege how David Simpson took LD III's funds, purchased the water shares, and then kept them for himself. Rec. 3032-303, ¶ 489-495; and 3028, ¶ 504. Further, Plaintiffs allege that Simpson sold some of the water shares but kept the funds for himself. Rec. 3028, ¶ 505. Plaintiffs also allege that "as a direct and proximate result of David Simpson's failures to disclose the relevant facts of which he had knowledge, Leslie and LD III were damaged in the amount of at least \$300,125.00." Rec. 2882, ¶ 1182.

73. The trial court dismissed Plaintiffs' cause of action, concluding that Plaintiffs failed to adequately plead damages and therefore failed to satisfy Rule 9(b) URCP. Rec. 5605-5603.

Presidio Land and Water

74. The trial court dismissed Plaintiffs' fraud and intentional misrepresentation and their fraudulent non-disclosure causes of action in relation to the Presidio Land and Water deal in their entirety and dismissed Plaintiffs' conspiracy cause of action, in relation to the Presidio Land and Water deal to the extent it is based on allegations of fraud. Rec. 5605-5603.

75. Defendants argued that Plaintiffs failed to allege what specific actions were taken in reliance on the misrepresentations and what particular damages were caused by each discrete

action. Rec. 5288-5268.

76. Plaintiffs allege that David Simpson and Nathan Simpson told Leslie's son, who was then managing her business affairs, that The Preserve needed at least \$281,693.59 to pay due and past due bills and that a large portion of that amount represented funds needed to pay The Preserve's pro rata share of the cost of a water tank for the City of Mapleton. Rec. 2895, ¶ 1094. Leslie provided the funds. Rec. 3035, ¶ 479. However, the Simpsons paid themselves rather than using the funds for the water tank costs. *Id.*

77. Plaintiffs allege that on April 3, 2008, Leslie furnished another \$300,000.00 to be used to fully satisfy The Preserve's share of the water tank cost. Rec. 3035-3034, ¶ 480. From those funds, Nathan Simpson paid \$200,384.20 to Maple Mountain Water, the entity handling the payment of the water tank costs. *Id.* Nathan Simpson, manager of Maple Mountain Water, then directed the bookkeeper to allocated \$151,037.28 of the \$200,384.20 as payment for another party's share of the water tank cost, a party to whom David Simpson owed money. *Id.*

78. Plaintiffs allege that David Simpson and Nathan Simpson used funds received from Leslie to pay themselves, clearly setting forth that Leslie had furnished funds. Rec. at 2894, ¶ 1101.

79. Defendants never offered any argument, reason or authority regarding why all of Plaintiffs' conspiracy and fraudulent non-disclosure allegations did not comply with Rule 9(b) URCP. Rec. 5288-5268.

80. Further, Dolezsar was not involved with the misrepresentations in relation to the Presidio Land and Water scheme, yet the trial court dismissed "all of Plaintiffs' fraud claims" because of the failure to join Dolezsar as a party. Rec. at 3041-3032; 5605-5603.

Dismissal Without Leave to Amend

81. Plaintiffs filed an original *Complaint*, then, before serving it, filed a *First Amended Complaint*. Rec. 461 and 2143.

82. After several motions to dismiss, Plaintiffs filed a *Second Amended Complaint*. Rec. 3194-2834.

83. The trial court dismissed all of Plaintiffs' "fraud-based claims" in the *Second Amended Complaint* without leave to amend. Rec. 6136, p. 182.

Aiding and Abetting Causes of Action

84. Plaintiffs allege two causes of action for aiding and abetting fraudulent non-disclosure and two causes of action for aiding and abetting breach of fiduciary duties. Rec. 3007-3006; 3003-3002; 2953-2952; and 2947-2945.

85. The trial court dismissed the aiding and abetting claims, finding that Utah courts do not recognize causes of action for aiding and abetting. Rec. 5604.

SUMMARY OF ARGUMENTS

Rule 9(b) URCP requires that fraud be alleged with particularity. In the *Second Amended Complaint's* general allegations section, Plaintiffs allege the misrepresentations made, who made them and when they were made. Defendants moved to dismiss Plaintiffs' causes of action for fraud and intentional misrepresentation and fraudulent non-disclosure in their entirety; and Plaintiffs' conspiracy and UPUA claims to the extent they are based on fraud. Defendants offered argument, reasons and authority as to why only three of Plaintiffs' causes of action did not meet the Rule 9(b) URCP particularity requirement.

However, relying on Defendants' memoranda, the trial court dismissed all of Plaintiffs' fraud and intentional misrepresentation claims and fraudulent non-disclosure claims in their

entirety and also dismissed Plaintiffs' conspiracy and UPUA claims to the extent they are based on fraud. The trial court concluded that Plaintiffs' fraud causes of action failed to meet the Rule 9(b) URCP particularity requirements, finding Plaintiffs did not refer to, include, or repeat all of the facts underlying the fraud claims pled within the *Second Amended Complaint's* general allegations section again in the specific causes of action. The trial court failed to consider the *Second Amended Complaint* as a whole, and instead focused only on what was contained in the individual causes of action. Further, the trial court ignored that Plaintiffs' included and referred to the important facts in the specific causes of action.

The trial court ignored established agency principles by focusing on the wrong events. It focused on Dolezsar's repetitions of Defendants' misrepresentations to Leslie, rather than focusing on Defendants' misrepresentations to Dolezsar, Leslie's agent. Plaintiffs allege Dolezsar was always acting as Leslie's agent or, in the alternative, that he was authorized by the Defendants to make the misrepresentations to Leslie. Utah law is clear that when a representation is made to an agent, it is the same as having been made to the principal. Therefore Plaintiffs did not need to allege the specifics of when and where Dolezsar repeated the misrepresentations to Leslie. Alleging Defendants' misrepresentations to Dolezsar was enough.

The trial court also found that because Dolezsar was the person who repeated the misrepresentations to Leslie, even though Plaintiffs allege he was acting as Leslie's agent, that Dolezsar was a necessary and indispensable party who could not be joined. The trial court, relying on *Turville v. J&J Properties, L.C.*, 2006 UT App 305, 145 P.3d 1146, concluded that Dolezsar was necessary and indispensable because he was the one who repeated the misrepresentations to Leslie and because Defendants cannot now bring a cross-claim against

Dolezsar. The trial court misapplied the *Turville* holding in finding that Dolezsar occupied a "pivotal representative role" in the fraud. Further, the inability to bring a cross-claim against a co-conspirator or a joint-tortfeasor is not grounds for finding a party is indispensable under Rule 19(b) URCP. The trial court misapplied Rule 19(b) URCP.

Plaintiffs do not allege that Dolezsar repeated *all* of the alleged misrepresentations to Leslie, or that he was involved in *all* the misrepresentations. Yet the trial court dismissed *all* of Plaintiffs' fraud claims, finding Dolezsar was necessary and indispensable.

The trial court further dismissed Plaintiffs' fraud claims without leave to amend. Rule 15 URCP requires leave to amend be liberally granted. By dismissing Plaintiffs' fraud claims without leave to amend, the trial court abused its discretion. It failed to apply the appropriate factors. Had it done so, it would have had to conclude that Plaintiffs should be allowed to amend. The trial court dismissed Plaintiffs' fraud claims for procedural deficiencies and stated that Plaintiffs could cure the defects by amendment. It is early in this matter, there would be no delay or prejudice, yet the trial court dismissed the claims without leave to amend.

Lastly, the trial court found Utah does not recognize causes of action for aiding and abetting and dismissed Plaintiff's causes of action for aiding and abetting fraudulent non-disclosure and aiding and abetting breach of fiduciary duty. The Restatement (Second) of Torts recognizes such causes of action, as do the majority of states. The Federal District Court for the District of Utah held Utah State courts recognize such causes of action.

ARGUMENT

I. PLAINTIFFS PLED FRAUD WITH THE REQUISITE PARTICULARITY

Rule 9(b) URCP states, "[i]n all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity. Malice, intent, knowledge,

and other condition of mind of a person may be averred generally." "In reviewing a dismissal under Rule 12(b)(6) of the Utah Rules of Civil Procedure, we accept the plaintiff's description of facts alleged in the complaint to be true" *Osguthorpe v. Wolf Mountain Resorts, L.C.*, 2010 UT 29, ¶ 10, 232 P.3d 999 (internal citations omitted). When considering a motion to dismiss, a trial court must draw all reasonable inferences in the light most favorable to the plaintiff. See *Mackey v. Cannon*, 2000 UT App 36, ¶ 2, 996 P.2d 1081.

In alleging fraud, a party must set forth the facts with "sufficient particularity to show what facts are claimed to constitute the charges." *Armed Forces Ins. Exchange v. Harrison*, 2003 UT 14, ¶ 16, 70 P.3d 35. In addressing whether fraud had been adequately pled, the Utah Supreme Court stated "our liberalized rules of pleading are designed to afford parties the privilege of presenting whatever legitimate contentions they have pertaining to their dispute, subject only to the requirement that their adversary have fair notice of the nature and the basis or grounds of the claim and general indication of the type of litigation involved." *Hill v. Allred*, 2001 UT 16, ¶ 14, 28 P.3d 1271. In holding that Hill pled fraud with particularity, the court stated, "Hill alleges specific facts ... regarding her attempt to purchase a piece of real property with the help of several defendants in this action, the manner in which the transaction was initiated, and the unfolding of events related to her attempt to secure ownership of the property." *Id.* at ¶ 14.

The Utah Supreme Court held that to plead fraud with particularity means that a party's allegations must contain the "substance of the acts constituting the alleged wrong." *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 972 (Utah 1982). A plaintiff who alleges the time of the alleged fraud, the persons involved and the facts and transactions underlying the fraud satisfies the requirements of Rule 9(b) URCP. See *Dahl v. Gardner*, 583 F.Supp. 1262, 1267 (D. Utah 1984). "[C]ourts should be sensitive to the fact that application of the Rule [Rule 9(b)] prior to

discovery may permit sophisticated defrauders to successfully conceal the details of their fraud." *Shapiro v. UJB Financial Corp.* 964 F.2d 272, 284 (3rd Cir. 1992).

Here, the trial court dismissed Plaintiffs' fraud-based claims prior to any discovery, concluding Plaintiffs did not specify the exact location at which the misrepresentations were made, exactly when the misrepresentations were made, exactly what words were used and who else may have been present. The trial court required far more particularity than Rule 9(b) URCP requires. The trial court stated, "I mean she [Leslie] knows where that should have occurred, when it would have occurred, what words were used, who else was present" Rec. 6136, p. 183. Here, as in *Hill*, Plaintiffs allege specific facts regarding the various misrepresentations – when the misrepresentations were made, who made them, the content of the misrepresentations, the manner in which the misrepresentations and transactions were initiated and the unfolding of events related to the fraud. *See e.g.* Rec. 3177-3174; 3113-3110; 3092-3086; 3073-3069; 3048-3046; 3033-3032; 3017-3014; 3011; 3005-3004; 2994; 2992; 2990; 2982; 2980; 2978-2970; 2968-2965; 2962; 2950-2948; 2925-2911; 2909-2906. Therefore, like the plaintiff in *Hill*, Plaintiffs allege fraud with sufficient particularity.

In *Schwartz v. Celestial Seasonings*, 124 F.3d 1246 (10th Cir. 1997), a securities fraud case, the court found that the complaint met the particularity requirements of Rule 9(b), stating:

"[t]he complaint identifies each of the defendants and describes their involvement with, or responsibility for, the alleged fraud. It identifies, describes, paraphrases and quotes allegedly fraudulent statements and/or omissions found in the IPO and SPO prospectuses The Complaint also alleges facts which the identified statements failed to disclose or misrepresent, and it explains how the statements accomplished the fraudulent scheme."

Id. at 1250-51. The *Schwartz* court went on to say "[t]he purpose of Rule 9(b) is to afford defendant fair notice of plaintiff's claims and the factual ground upon which they are based."

Id. at 1252 (citations omitted). The *Schwartz* court certainly did not require that a plaintiff quote the exact words used.

The *Schwartz* court further stated:

Rule 9(b) does not require that a complaint set forth detailed evidentiary matters as to why particular defendants are responsible for particular statements, or that the allegations be factually or legally valid. Instead, Rule 9 requires that the pleadings give notice to the defendants of the fraudulent statements for which they are alleged to be responsible. The complaint adequately identified the defendants charged with having made the allegedly fraudulent statements. There can be no doubt that the complaint gives each defendant notice of what he is charged with. No more is required by Rule 9(b).

Id. at 1253.

Here, Plaintiffs clearly and specifically identify who made the fraudulent statements, when they were made, and the fraudulent statements they are alleged to have made. Rec. 3177-3174; 3113-3110; 3092-3086; 3073-3069; 3048-3046; 3033-3032; 3017-3014; 3011; 3005-3004; 2994; 2992; 2990; 2982; 2980; 2978-2970; 2968-2965; 2962; 2950-2948; 2925-2911; 2909-2906. The *Second Amended Complaint* clearly gives each defendant "notice of what he is charged with."

In *Seattle-First National Bank v. Carlstedt*, 800 F.2d 1008, 1011 (10th Cir. 1986), the Tenth Circuit Court of Appeals stated that Rule 9(b) only:

requires identification of the circumstances constituting fraud or mistake. That requirement means that individual plaintiffs should identify particular defendants with whom they dealt directly, and from whom they purchased stock; that individual plaintiffs should designate the occasions on which affirmative statements were allegedly made to them and by whom; and that individual plaintiffs should designate what affirmative misstatements or half truths were directed to them and how.

Id. at 1011.

In proving the elements of fraud, a Plaintiff is not required to prove where misrepresentations were made, thus there was no basis for dismissing for failing to do so. There

is no requirement that a plaintiff plead the exact words used in making a misrepresentation. Plaintiffs allege which particular defendants made the misrepresentations, when the misrepresentations were made, and what misrepresentations were made. Such is sufficient to satisfy Rule 9(b) URCP.

Regarding Plaintiffs' claims for fraudulent non-disclosure, the trial court required that Plaintiffs allege who made omissions, when they made omissions, where they made omissions and the content of the omissions. To allege a cause of action for fraudulent non-disclosure, a plaintiff must allege only "(1) that the non-disclosed information is material, (2) that the nondisclosed information is known to the party failing to disclose and (3) that there is a legal duty to communicate." *Yazd v. Woodside Homes Corp.*, 2006 UT 47, ¶ 10, 143 P.3d 283. Plaintiffs adequately allege those elements. To go beyond that and prove a negative is never required for fraud arising from an omission.

The trial court concluded Plaintiffs' failed to allege all of their fraudulent non-disclosure causes of action with particularity. The trial court held that to allege a cause of action for fraudulent non-disclosure, Plaintiffs must specifically explain how they relied on Defendants' fraudulent non-disclosures. It partly based its dismissal of Plaintiffs' fraudulent non-disclosure cause of action in relation to the Double T. Ranch Water Purchase on its conclusion that Plaintiffs did not allege how they relied on the misrepresentations. Rec. 6136, p. 183. However, as explained in *Yazd*, reliance is not a required element of pleading fraudulent non-disclosure.

Plaintiffs clearly allege the non-disclosed facts are material, the information was known to Defendants and they had a legal duty to communicate the information. Plaintiffs identified the facts not disclosed, the identity of the Defendants who intentionally withheld the facts and when the Defendants intentionally withheld the facts. Yet the trial court dismissed those causes

of action based on Rule 9(b) URCP, finding there was "no alleged reliance, or action, or inaction, change of position based on what was allegedly conferred." Rec. 6136, p. 183. Plaintiffs are not required to allege reliance. If Plaintiffs are required to allege reliance, they clearly allege that they furnished funds because Defendants' intentionally withheld material facts. Rec. 3174, ¶ 85; 3112, ¶ 258; 3086, ¶ 318; 3069, ¶ 359; 3044-3045, ¶ 436; and 3932, ¶ 487.

Plaintiffs' *Second Amended Complaint* clearly identifies the persons with whom plaintiffs dealt, the occasions on which the misrepresentations were made and by whom the misrepresentations were made. Rec. 3177-3174; 3113-3110; 3092-3086; 3073-3069; 3048-3046; 3033-3032; 3017-3014; 3011; 3005-3004; 2994; 2992; 2990; 2982; 2980; 2978-2970; 2968-2965; 2962; 2950-2948; 2925-2911; 2909-2906. It also clearly describes the misrepresentations which Defendants made and material facts withheld, the time they made or omitted them, the content of the misrepresentations or omissions and what Defendants obtained by making misrepresentations. *Id.* Rule 9(b) URCP does not require Plaintiffs to include the exact words used or whether other parties were present, as the trial court required.

For the purposes of finding if fraud was adequately pled, a trial court must consider the complaint as a whole. *See Armed Forces Ins. Exchange v. Harrison*, 2003 UT 14, ¶ 18, 70 P.3d 35; *Hall v. Romero*, 685 P.2d 757, 761 (Ariz. Ct. App. 1984); *Parks v. Macro-Dynamics*, 591 P.2d 1005, 1008 (Ariz. Ct. App. 1979). In construing Rule 9(b) of the Federal Rules of Civil Procedure, the Tenth Circuit of Appeals stated "[u]pon review of the entire complaint, we find that it met the requirements of Rule 9(b). While paragraphs 46 and 47 only parroted the requirements for fraud ... earlier parts of the complaint stated the facts underlying the allegations of fraud." *American Town Center v. Hall 83 Associates*, 912 F.2d 104, 109 (6th Cir. 1990). The *American Town Center* court went on to hold that the complaint gave fair notice to the defendants of the substance of

the claims of misrepresentation. *Id.* at 110.

Additionally, the trial court refused to consider the *Second Amended Complaint* as a whole. It required Plaintiffs to include all relevant facts regarding the fraud-based claims in the various causes of action. The trial court stated, "there are circumstances where there were not references to earlier facts that were pleaded." Rec. 6136, p. 183. The trial court held that if all of the facts would have been restated in the specific causes of action, it would have satisfied the particularity requirement of Rule 9(b)URCP. Rec. 6136, p. 203. The trial court admits the relevant facts were contained in the *Second Amended Complaint*, but it was fatal to the *Second Amended Complaint* that they were not all referred to or contained within each cause of action. *Id.* The trial court held that to plead fraud with particularity means Plaintiffs must plead all of the relevant facts in the specific causes of action or refer to them specifically in the causes of action. *Id.*

Rule 9(b) URCP does not require all the facts to be stated or referred to within each cause of action. Defendants never presented any argument, reason or authority for such a proposition. Because the trial court must examine the *Second Amended Complaint* as a whole, there is no need to engage in such redundancy. *See Armed Forces Insurance Exchange v. Harrison*, 2003 UT 14, ¶ 18, 70 P.3d 35.

Even if the trial court correctly required all the important and relevant facts be alleged within the causes of action, Plaintiffs meet that standard. A review of all of Plaintiffs' fraud based causes of action demonstrates that Plaintiffs either included or incorporated all of the important facts into the actual causes of action. The trial court committed error when it refused to consider the *Second Amended Complaint* as a whole, when it required that all the facts relevant to each fraud based claim be included within each cause of action and when it concluded that Plaintiffs did not include the important facts in the causes of action.

The trial court stated that it dismissed Plaintiffs' fraud based claims after a "careful review of the memoranda and authorities submitted" by Defendants. Rec. 5605. However, Defendants provided argument, reason or authority only as to why Plaintiffs' fraud claims in relation to the MagnetBank loan, the non-disclosure action in relation to the Double T Ranch Water Purchase and the fraud allegations in relation to the Presidio Land and Water Deal failed to meet the particularity requirement. Yet the trial court dismissed *all* of Plaintiffs' fraud based claims. It is *a fortiori* that the trial court could not have dismissed *all* of Plaintiffs' fraud based claims for lack of particularity based on the reasons given in Defendants' memoranda if they did not submit any argument, reason or authority as to why *all* of Plaintiffs' fraud claims failed to meet the particularity requirement.

In its *Ruling and Order on Defendants' Motions to Dismiss the Second Amended Complaint*, the trial court likened Plaintiff's *Second Amended Complaint* to the complaint at issue in *Coroles v. Sabey*, 2003 UT App 339, 79 P.3d 974, concluding that the "Second Amended Complaint merely dumps upon the court the burden of sifting through hundreds of paragraphs of alleged facts to ascertain whether Plaintiffs have alleged the facts necessary to make all their elements of fraud." Rec. 5605. However, Plaintiffs' *Second Amended Complaint* is very different from the complaint in *Coroles*.

The *Coroles* court found the complaint suffered from several flaws. First, "the section of the complaint devoted to common law fraud consists of eleven paragraphs. The first of these paragraphs, paragraph 661 of the complaint, simply reads: 'the foregoing paragraphs numbered 1-660 are incorporated into this Count.' The remaining ten paragraphs of this section merely recite the elements of fraud and allege that Defendants committed each element." *Id.* at ¶ 25. The *Coroles* Court found "the mere recitation of the elements of fraud in a complaint does not

satisfy the particularity requirement." *Id.* at ¶ 26. Importantly, the *Coroles* court found the paragraph incorporating all of the previous paragraphs was "equally unhelpful. It essentially dumps upon the trial court, and now this court, the burden of sifting through hundreds of paragraphs of alleged facts to ascertain whether Plaintiffs have alleged facts necessary to make all their elements of fraud." *Id.* at ¶ 27.

Here, Plaintiffs have not merely incorporated all the previous paragraphs of the *Second Amended Complaint* into their fraud causes of action, but have included references to the specific allegations contained in the general allegations sections of the *Second Amended Complaint*. Rec. 3017-3014; 3011; 3005-3004; 2994; 2992; 2990; 2989; 2882; 2980; 2978-2970; 2968-2965; 2962; 2950-2948; 2925-2911; 2909-2906. Further, the *Second Amended Complaint* contains discrete sections which set out the misrepresentations made, who made them, that they were false and why they are false. Rec. 3177-3176; 3113-3112; 3092-3089; 3073-3071; 3048-3047. The alleged fraudulent non-disclosures are likewise set forth in discrete paragraphs. Rec. 3176-3174; 3112-3110; 3089-3086; 3071-3069; 3047-3046; 3033-3032.

Another problem with the *Coroles* complaint was it used "the passive voice" and failed to identify "who made the alleged misrepresentations." *Coroles v. Sabey*, 2003 UT App 339, ¶ 28, 79 P.3d 974. Here, Plaintiffs used the active voice and identify who made the misrepresentations, when they made the misrepresentations and what the misrepresentations were. Rec. 3177-3174; 3113-3110; 3092-3086; 3073-3069; 3048-3046; 3033-3032; 3017-3014; 3011; 3005-3004; 2994; 2992; 2990; 2982; 2980; 2978-2970; 2968-2965; 2962; 2950-2948; 2925-2911; 2909-2906. Therefore, unlike *Coroles*, Plaintiffs' *Second Amended Complaint* does not "dump on the trial court ... the burden of sifting through hundreds of paragraphs of alleged facts"

Id. at ¶ 27.⁴ For the above-mentioned reasons, Plaintiffs' *Second Amended Complaint* comports with the particularity requirements of Rule 9(b) URCP and the trial court erred by dismissing Plaintiffs' fraud claims.

II. Dolezsar Is Not a Necessary and Indispensable Party

Rule 19 of the Utah Rules of Civil Procedure states:

(a) Persons to be joined if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

(b) Determination by court whenever joinder not feasible. If a person described in Subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In addressing an issue under Rule 19 URCP, a court must first determine whether a party is necessary under Rule 19(a) URCP. *See Smith v. Osguthorpe*, 2002 UT App 361, ¶ 48, 58 P.3d 854. If the court concludes that a party is necessary under 9(a) URCP, it then must "consider whether joinder of the necessary party is feasible." *Id.* Rule 19 URCP is "substantively similar to its

⁴This Court stated in *Coroles*, "whether a complaint is much too long and involved is, of course, dependent on the complexity of each individual case." *Coroles v. Sabey*, 2003 UT App 339, n. 11, 79 P.3d 974. This matter concerns complex, multiple, inter-related frauds that occurred over a five year period.

federal counterpart" and federal case law may be used as guidance. *See Seftel v. Capital City Bank*, 767 P.2d 941, 944 (Utah Ct. App. 1989).

In finding Dolezsar is a necessary party, the trial court determined that "complete relief would not be available" to Defendants without Dolezsar as a party for reason of their inability to hold him accountable. Rec. 5593. The trial court's analysis was flawed because it disregarded established laws regarding agency.

Plaintiffs allege that at all times Dolezsar was acting as Leslie's agent. Rec. 3016, ¶ 542; 3001, ¶ 601; 2978, ¶ 718; 2945, ¶ 864. "Under Utah law, the knowledge of an agent concerning the business he is transacting for his principal is to be imputed to his principal." *Swan Creek Village Homeowners v. Warne*, 2006 UT 22, ¶ 27, 134 P.3d 1122. Therefore, when Defendants made misrepresentations to Dolezsar, it is if they made them to Leslie. When a third person perpetrates a fraud upon an agent, either by misrepresentation or by silence, the fraud is considered as worked upon the principal. *See* 3 Am Jur 2d Agency § 287. In both its Rule 19 URCP analysis and in its Rule 9(b) URCP analysis, the trial court focused on when, where and how the misrepresentations were repeated to Leslie. Rec. 6136, p. 183. However, such focus is misplaced. Under agency principals, when Defendants made misrepresentations to Dolezsar, a person whom Plaintiffs allege Defendants knew was acting as Leslie's agent, they made the representations to Leslie. It does not matter where the misrepresentations were repeated to Leslie, when the misrepresentations were repeated to Leslie, or even if they were repeated to Leslie. Further, Rule 19 does not require the joinder of principal and agent. *See Nottingham v. General American Communications Corp.*, 811 F.2d 873, 880 (5th Cir 1987).

The trial court focused on the fact that Plaintiffs pled, in the alternative, that Dolezsar was part of conspiracy with the Defendants and therefore Dolezsar is a necessary party because

"complete relief would not be available" to Defendants for reason of the "inability to hold him accountable." Rec. 5593. Such a holding ignores that Plaintiffs allege, in the alternative, that if Dolezsar was acting as part of a conspiracy, Defendants authorized him to make the misrepresentations to Leslie. For the purposes of a Rule 19 URCP analysis, such an alternative allegation does not make Dolezsar a necessary party. Nor does it mean that Plaintiffs failed to plead fraud with particularity. In *Israel Pagan Estate v. Cannon*, 746 P.2d 785 (Ut. Ct. App. 1987), this Court held that "[a] person cannot be liable for fraud unless he made the false representations himself, *authorized someone to make them for him* or participated in the misrepresentation in some other way, such as through a conspiracy." *Id* at 792 (emphasis added). Here, Plaintiffs allege, in the alternative, that Defendants authorized Dolezsar to make the misrepresentations to Leslie as part of a conspiracy. Rec. 3110, ¶¶ 258-259; 3092-3091, ¶ 314; 3048-3046, ¶¶ 434-435; 2977, ¶ 721; and 2975, ¶ 731. Defendants are liable to Plaintiffs because they authorized Dolezsar to make the representations to Leslie. Such liability does not make Dolezsar a necessary party, nor does it act to relieve Defendants from responsibility for their misrepresentations.

The trial court, in concluding that Dolezsar is a necessary and indispensable party, relied heavily on *Turville v. J&J Properties, L.C.*, 2006 UT App. 305, 145 P.3d 1146. In *Turville*, James Ritchie ("Ritchie"), John Quitquit ("Quitquit") and Clark Properties, Inc. ("CPI"), whose officers were Mrs. and Mr. Clark, formed Tri-J Properties, LLC ("Tri-J") for the purpose of buying 142 acres of real property from Davis County. Tri-J won the bid on the property. Mr. Clark, unbeknownst to Ritchie and Quitquit, caused the property to be titled in CPI's name, rather than Tri-J's. Mr. Clark later deeded the property back to Tri-J, only to subsequently deed 128 acres of the real property back to CPI. Fourteen acres remained in Tri-J's name. All of the

transfers were done without Ritchie's or Quitquit's consent. *See Id.* at ¶ 2.

Turville met with Ritchie, Quitquit and Mr. Clark in hopes of purchasing the real property. Tri-J's members were undecided about selling the property. Unknown to the other members of Tri-J, Mr. Clark contacted Turville and told him that CPI owned the 128 acres, that he would sell the 128 acres and that he had authority to sell the 14 acres as well because he was manager of the 14 acre property. Turville then made an offer to Mr. Clark to purchase the 128 acre parcel and the 14 acre parcel for \$1,000,000.00. Mr. Clark caused CPI to deed the 128 acres to Turville. Mr. Clark also gave Turville a quitclaim deed for CPI's interest in the 14 acres. Mr. Clark promised Turville that he could convince Tri-J to transfer the 14 acre property to him. Turville gave Mr. Clark a note for \$1,000,000.00 and began developing the properties. *See Id.* at ¶¶ 3-4.

Mr. Clark was unable to convince the other members of Tri-J to deed the 14 acres to Turville. Tri-J refused to convey its interest without proper compensation, alleging that Turville had no legal right to the 14 acres because Mr. Clark had no legal authority to transfer the property. *See Id.* at ¶ 5.

Tri-J and CPI sued Turville claiming he had obtained title to the 128 acres and the 14 acres by misrepresentation and without consideration. After the lawsuit was filed, Mr. Clark made a deal with Ritchie and Quitquit under which they would receive \$300,000.00 of the proceeds from the \$1,000,00.00 note given to Mr. Clark. The lawsuit was then dismissed. *See Id.* at ¶ 7.

Later, Turville filed a complaint against Tri-J, Ritchie, Quitquit, J&J Properties, CPI, Mrs. Clark and Mr. Clark. Turville served Ritchie but took no further action. Turville filed for a default against Ritchie, which the trial court granted. Then Mr. Clark died of cancer. *See Id.* at

¶¶ 8-9. Turville then served the complaint on Tri-J, J&J, Quitquit, CPI and Mrs. Clark. He never served Mr. Clark. CPI answered the complaint and filed a notice of suggestion of death, noting Mr. Clark had died. Ritchie then moved the court to set aside the default against him, which was later set aside. Quitquit, Tri-J, Ritchie and J&J moved to dismiss Turville's complaint. *See Id.* at ¶ 10.

Turville filed a First Amended Complaint which added the Estate of Mr. Clark as a defendant. On the same day, Turville also filed a motion for leave to amend his complaint to add additional parties, among them the Estate of Mr. Clark. *See Id.* at ¶ 13. The trial court denied Turville's Motion to Amend and struck Turville's First Amended Complaint. *See Id.* at ¶ 15. Mrs. Clark, CPI, Quitquit and Ritchie moved the court to dismiss Turville's complaint for failure to join the Estate of Mr. Clark as an indispensable party. *See Id.* at ¶ 17. The trial court granted the motion to dismiss the complaint for failure to join an indispensable party. *See Id.* at ¶ 19.

The Utah Court of Appeals upheld the trial court's dismissal for failure to join an indispensable party, stating that its review of the record supported the trial court's conclusion that in the absence of the Estate of Mr. Clark, complete relief could not be accorded among those already parties to the action. *Id.* at ¶ 40. The court found it very important that Turville's claims "specifically named or included Mr. Clark in his individual capacity" and the court referenced a case from the Federal District Court in Pennsylvania which stated "because plaintiff makes no claim against the unjoined party, it is clear that complete relief can be granted in its absence." *Id.* at ¶ 40. The court further stated, "Plaintiff's reason for naming and including Mr. Clark is apparent where the record reveals that it was primarily, if not solely, the actions of Mr. Clark in his individual capacity that led to Plaintiff's alleged damages." *Id.*

The court found it was not possible to join Mr. Clark's estate, stating:

[w]e further concur that because Plaintiff named or included Mr. Clark in his claims as the major, if not the sole, actor responsible for Plaintiff's alleged damages, 'a judgment rendered in the Estate of Mr. Clark's absence would prejudice those already parties' to the action; protective judgment provisions would not ameliorate this prejudice; a judgment entered in the Estate of Mr. Clark's absence would be less than adequate; and, most importantly, as a result of the foregoing factors, the nonjoinder of the Estate of Mr. Clark would violate principles of 'equity and good conscience.'

Id. at ¶ 42.

The court's finding that the Estate of Mr. Clark was a necessary party was based on the fact Turville had named him as party. *See Id.* at ¶ 40. Further, the court quoted with approval a Federal District Court's holding that because a plaintiff made no claims against an unjoined party, it was clear that complete relief could be granted in the party's absence. *Id.* Here, Plaintiffs did not name Dolezsar. Therefore, according to the court's reasoning in *Turville*, Dolezsar is not a necessary party and complete relief may be granted in his absence.

Further, Mr. Clark and Dolezsar played very different roles. Mr. Clark initiated and made misrepresentations directly to Turville. He did so for his own benefit. Here, the misrepresentations were initiated by Defendants and made to Dolezsar who was acting as Leslie's agent and managing her business affairs. When the misrepresentations were made to Dolezsar, they were made to Leslie. Dolezsar simply repeated Defendants' misrepresentations to Leslie.

The Simpson Defendants, on the other hand, are most like Mr. Clark. They made the misrepresentations to Dolezsar and Leslie for their benefit. They knew the true facts but failed to disclose them to Dolezsar and Leslie. In *Turville*, the Court found that Mr. Clark was the major, if not sole actor, responsible for Turville's damages. *See Id.* at ¶ 42. Here, the Defendants

are the major actors and are responsible for Plaintiffs' damages, not Dolezsar.

The trial court concluded that Dolezsar, like Mr. Clark, occupied a "pivotal representative role." Rec. 5593. However, unlike Mr. Clark who initiated the misrepresentations and benefitted thereby, Dolezsar merely repeated the misrepresentations, he did not initiate them. The misrepresentations were made to Dolezsar, in his capacity as Leslie's agent. Even if it was proper to focus on Dolezsar's repeating Defendants' misrepresentations, he did so on the instruction and authority of the Defendants, and they are liable for their actions in authorizing Dolezsar to repeat the misrepresentations to Leslie.

Further, in determining Dolezsar occupied a "pivotal representative role," the trial court made a factual determination regarding Dolezsar's involvement in the misrepresentations. In deciding a motion to dismiss, a trial court may not make **factual determinations** regarding allegations. *See Osguthorpe v. Wolf Mountain Resorts, L.C.*, 2010 UT 29, ¶ 10, 232 P.3d 999. In considering a trial court's denial of a motion to amend, the Utah Court of Appeals stated, "[e]ven if there are factual disputes about [a party's] role in this matter, it is inappropriate for a trial court to resolve those factual disputes in the course of evaluating a motion to amend." *Hancock v. The True and Living Church of Jesus Christ of Saints of the Last Days*, 2005 UT App 314, ¶ 19, 118 P.3d 297. Because a trial court cannot make **factual determinations** in considering a motion to dismiss, the same reasoning applies. Here, the trial ignored Plaintiffs' main allegations that Dolezsar was acting as Leslie's agent and made a factual finding regarding Dolezsar's role in the misrepresentations. This is error.

In applying the first and second factors of Rule 19(b) URCP to determine whether or not Dolezsar was an indispensable party, the trial court held Defendants would be unfairly prejudiced by any judgment issued in the absence of Dolezsar and any judgment rendered

without Dolezsar would be inadequate because Defendants would not be able to bring a cross-claim against him. However, the inability to bring a cross-claim against another party does not make that party indispensable under Rule 19 URCP. Where, as here, claims are expressly limited to a defendant's acts or omissions, when defendants can be held liable only for damages attributable to their own fault and when defendants can be held liable for damages only in proportion to their own fault, joinder is unnecessary. *See Johnson v. Higley*, 989 P.2d 61, 71-72 (Ut. Ct. App. 1999).

In *Nottingham v. General American Communications Corp.*, 811 F.2d 873 (5th Cir. 1987), the court stated, "it is well established that Rule 19 does not require the joinder of persons against whom [the parties] have a claim for contribution." *Id.* at 880. The Seventh Circuit Court of Appeals stated, "prior to the 1966 amendments to Rule 19, co-conspirators were not indispensable parties and the 1966 amendments did not alter this established principle." *Pasco International Ltd. v. Stenograph Corp.*, 637 F.2d 496, 501 n.10 (7th Cir. 1980). Therefore, even if Dolezsar relayed misrepresentations to Leslie as part of a conspiracy, he still is not an indispensable party. The Third Circuit Court of Appeals stated "the possibility that the defendant may have a claim for contribution or indemnity does not render an absentee indispensable. The right of contribution and indemnity should not therefore, be considered to cause inadequacy of the resulting judgment." *Gardiner v. Virgin Islands Water & Power Authority*, 145 F.3d 635, 641 (3rd Cir. 1998).

Applying the last factor of Rule 19(b) URCP, the trial court concluded Plaintiffs would have an adequate remedy if their fraud claims were dismissed. The trial court found Plaintiffs' remaining claims for breach of contract, breach of fiduciary duty, conversion and unjust enrichment constitute an adequate remedy for Plaintiffs. However, the trial court's analysis is

faulty. Plaintiffs are left with no remedy against Defendants who made misrepresentations to them and wrongfully damaged them.

One of the major considerations in applying the last factor is whether a plaintiff would have another venue to bring his claims. See *Provident v. Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 112 (1968). Here, there is no other court in which Plaintiffs may bring their claims.

Plaintiffs made the above arguments to the trial court and the Defendants never contradicted the authority cited by the Plaintiffs regarding joint tortfeasors, claims for contribution, co-conspirators and claims for indemnity. Yet the trial court ignored such authority and specifically concluded the Defendants would be prejudiced and that any judgment entered in the absence of Dolezsar would be inadequate because Defendant would not be able to make a cross-claim against Dolezsar. The case law clearly states that such a reason does not make an absent party indispensable.

In *Provident Tradesmens Bank & Trust*, the United States Supreme Court addressed Rule 19 of the Federal Rules of Civil Procedure in detail. It stated that Rule 19(b) "suggests four 'interests' that must be examined in each case to determine whether in equity and good conscience, the court should proceed without a party whose absence from the litigation is compelled." *Id.* at 109. "First, the plaintiff has an interest in having a forum. Before the trial, the strength of this interest obviously depends upon whether a satisfactory alternative forum exists." *Id.* The trial court did not consider whether Plaintiffs would have an alternate forum. The *Provident* court found that under the Federal Rules of Civil Procedure, on which the Utah Rules of Civil Procedure are patterned, the consideration is centered on whether the plaintiff would have access to another court. *Id.*

In *Provident*, the court referred to the comments of the Advisory Committee on the Federal Rules of Civil Procedure which state, "[t]he court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible." *Id.* at n. 3. Plaintiffs have no other court in which they may bring their fraud claims. They are left without a remedy. The trial court, instead of looking at Plaintiffs' interest in having a forum; found, without any analysis to support its statement, that Plaintiffs' remaining claims for breach of contract, breach of fiduciary duty, conversion and unjust enrichment would suffice. There was no analysis or suggestion that Plaintiffs would have a forum in which to pursue their claims for fraud, fraudulent non-disclosure, conspiracy and UPUA claims. When this criteria is correctly applied, it weighs in favor of allowing Plaintiffs to proceed with their claims even in the absence of Dolezsar.

The second interest addressed by the *Provident* court was the defendant's "wish to avoid multiple litigation or inconsistent relief, or sole responsibility for a liability he shares with another." *Id.* at 110. It is clear, as set forth above, Defendants' inability to make a cross-claim against Dolezsar or his estate does not make Dolezsar an indispensable party. Therefore, the trial court erred in holding that Defendant's inability to make a cross-claim against Dolezsar makes him an indispensable party.

The third interest considered by the *Provident* court was "the interest of the outsider whom it would have been desirable to join." *Id.* The court must consider "the extent to which the judgment may 'as a practical matter impair or impede his ability to protect' his interest in the subject matter." Here, because Dolezsar is deceased, this factor weighs in favor of allowing Plaintiffs to proceed.

Lastly, a court must consider "the interest of the courts and the public in complete,

consistent, and efficient settlement of controversies." *Id.* The *Provident* court stated, "[w]e read the Rule's third criterion, whether the judgment issued in the absence of the nonjoined person will be 'adequate,' to refer to this public stake in settling disputes by wholes, whenever possible." *Id.* at 111. Here, the trial court only considered the effect of nonjoinder on Defendants. This criterion when properly applied weighs in favor of Plaintiffs.

III. THE TRIAL COURT IMPROPERLY DISMISSED PLAINTIFFS CLAIMS WITHOUT LEAVE TO AMEND

In its *Ruling and Order on Defendants' Motions to Dismiss the Second Amended Complaint*, the trial court held that Plaintiffs' fraud-based causes of action were dismissed without leave to amend. Rec. 5603. However, complaints dismissed under Rule 9(b) are almost always dismissed with leave to amend. See *Wight, Mackey et al. v. Bankamerica Corp.*, 219 F.3d 79, 91 (2nd Cir. 2000).

Rule 15 URCP provides that leave to amend "shall be freely given when justice so requires." "It is well established that rule 15 should be interpreted liberally so as to allow parties to have their claims fully adjudicated. This is especially true when the motion to amend is made well in advance of trial." *Nunez v. Albo*, 2002 UT App. 247, ¶ 19, 53 P.3d 2. Further, "[t]rial courts should liberally allow amendments unless the amendments include untimely, unjustified, and prejudicial factors. Trial courts are not required to find all three factors to deny a motion to amend; a court's ruling on a motion to amend can be predicated on only one or two of the particular factors. And many other factors, such as delay, bad faith, or futility may weigh against the trial court's allowing amendment." *Daniels v. Gamma West Brachytherapy, LLC*, 2009 UT 66, ¶ 58, 221 P.3d 256 (internal citations and quotations omitted).

Plaintiffs did not make a motion to amend the complaint because in its order the trial court specifically stated it dismissed Plaintiffs' fraud based claims without leave to amend. Rec.

5603. Therefore, any motion to amend would have been futile. Moreover, the trial court abused its discretion because it did not apply any of the factors or give any reasons for dismissing the *Second Amended Complaint* without leave to amend. *Id.* Plaintiffs are left to wonder why they were denied leave to amend. If the trial court had correctly applied the factors, it would have had to grant Plaintiffs leave to amend their *Second Amended Complaint*.

Because it is early in this matter, any motion to amend would have been timely. Amendment to cure the deficiencies found by the trial court certainly would have been justified. Further, because most of the Defendants have not yet filed an answer to the *Second Amended Complaint*, amendment would not be prejudicial. There would be no delay if Plaintiffs were to amend and Plaintiffs have not demonstrated bad faith. The trial court specifically found that amendment would not be futile. Rec. 6136, p. 217. Plaintiffs have not had multiple opportunities to amend the complaint. The trial court recognized Plaintiffs could cure any perceived deficiencies in the pleading of fraud with an amended complaint, and therefore amendment would be justified and would not be futile. *Id.* The trial court stated:

"[t]he Court did not dismiss the Complaint because ... there was a total lack of factual basis or something like that. The Court dismissed those sections that it did dismiss because they weren't properly pled. And I could see sitting down and pleading these in a different manner and then adding in a few more things and being able to survive a motion to dismiss...."

Id. The trial court recognized that Plaintiffs could amend their complaint and thereby survive a motion to dismiss. *Id.* Instead of allowing Plaintiffs to amend, the trial court dismissed the fraud claims without leave to amend. By doing so it abused its discretion.

IV. Utah Recognized Causes of Action for Aiding and Abetting.

The trial court concluded that Utah does not recognize a cause of action for aiding and abetting breach of fiduciary duty, which is provided for in the Restatement (Second) of Torts,

§ 876. Rec. 6136, p. 184. However, the Utah Supreme Court has implicitly recognized such a claim. In *United Park City Mines Co. v. Greater Park City Co.*, 870 P.2d 880 (Utah 1994), the plaintiff alleged some of the defendants "induced, aided, and abetted [some of the other defendants] in breaching their fiduciary duty." *Id.* at 884. The trial court dismissed that claim on the grounds that the plaintiff had failed to state a claim against the defendants for aiding and abetting breaches of fiduciary duty and because the claims were barred by the applicable statute of limitations. *See Id.* 884-885. The Utah Supreme Court addressed the aiding and abetting breach of fiduciary duty claim and the application of the statute of limitations to that claim. *Id.* It affirmed the trial court's dismissal of those claims, finding they were barred by the applicable statute of limitations. *See Id.* at 890. However, it is important to note that the Utah Supreme Court did not take the position that such a claim did not exist in Utah, and did not affirm the trial court's determination that the plaintiff failed to state a claim for aiding and abetting breach of fiduciary duty. *Id.* Therefore, the claim for aiding and abetting breach of fiduciary duty is necessarily valid in Utah.

In *Coroles v. Sabey*, 2003 UT App 339, 79 P.2d 974, the Utah Court of Appeals considered a cause of action for aiding and abetting breach of fiduciary duty and did not explicitly find that such a cause of action does not exist in Utah. In fact the Court noted that if such a cause of action exists in Utah, the plaintiff failed to properly allege it. *See Id.* at n. 20. Most recently, the Federal District Court for the District of Utah determined that Utah state courts "would recognize such a cause of action." *Farm Bureau Life Ins. Co. v. American Nat. Ins. Co.*, 505 F.Supp.2d 1178, 1189 (D. Utah 2007).

In addition, numerous other state and federal courts have adopted a cause of action for aiding and abetting breach of fiduciary duty, among them are Arizona, California, Colorado,

Illinois, Massachusetts, Missouri, New Jersey, New Mexico Nevada and Oregon.⁵

Further, Utah has adopted Restatement (Second) of Torts, § 874. *See D'Elia v. Rice Development, Inc.*, 2006 UT App 416, ¶ 36, 147 P.3d 515. According to Restatement (Second) of Torts § 874, "[a] person who knowingly assists a fiduciary in committing a breach of trust is himself guilty of tortious conduct and is subject to liability for the harm thereby caused." Restatement (Second) Torts § 874, comment c. Therefore, because Utah recognizes the applicability of the Restatement (Second) of Torts § 874, it also must recognize a cause of action for aiding and abetting breach of fiduciary duty.⁶

CONCLUSION

The trial court required that Plaintiffs include, repeat or refer to all the fraud allegations that are contained in the general allegations section of Plaintiffs' *Second Amended Complaint* within

⁵ *Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust*, 38 P.3d 12, 23 (Ariz. 2002); *Saunders v. Superior Court*, 33 Cal.Rptr.2d 438,446 (Cal. 1994); *Nelson v. Elway*, 971 P.2d 245, 249-50 (Colo. Ct. App. 1998); *Sanke v. Bechina*, 576 N.E.2d 1212, 218-19 (Ill. 1991); *Kurker v. Hill*, 689 N.E.2d 833, 837 (Mass. Ct. App. 1998); *Herman v. Coastal Corp.*, 791 A.2d 238, 253 (N.J. 2002); *GCM, Inc. v. Ky. Cent. Life Ins. Co.*, 947 P.2d 143, 147-48 (N.M. 1997); *Dow Chemical Co. v. Mahlum*, 970 P.2d 98, 112-13 (Nev. 1998); *Holmes v. Young*, 885 P.2d 305, 308 (Colo. Ct. App. 1994); *Borsellino v. Goldman Sachs Group, Inc.*, 477 F.3d 507 (7th Cir. 2007); *Brown v. United Missouri Bank, N.A.*, 78 F.3d 382, 387 (8th Cir. 1998)(Missouri law recognizes claim for inducing breach of fiduciary duty); *Seismic Intern. Research Corp. v. South Ranch Oil Co.*, 793 F.2d 227, 232 (10th Cir. 1986)(recognizing claim for inducement of breach of fiduciary duty); *Gagan v. American Cablevision, Inc.*, 77 F.3d 951, 965 (7th Cir. 1996)(Indiana law recognizes that non-fiduciary can be held liable for inducing other to breach fiduciary duties); *Donovan v. Schmoutey*, 592 F.Supp. 1361, 1395-1396 (D.C. Nev. 1984)(same under Nevada law). Many of these courts have adopted the Restatement (Second) of Torts § 876 for guidance. *See Terrydale v. Liquidating Trust & Barnes*, 611 F.Supp. 1006, 1015-1016 (S.D.N.Y. 1984)(adopting Restatement reformulation and citing numerous other courts which also adopted the cause of action). For a complete list of jurisdictions that had recognized causes of action for aiding and abetting as of 2002, *see Dale v. ALA Acquisitions, Inc.*, 203 F.Supp.2d 694, n. 5 (S.D. Miss.).

⁶Similar reasoning was set forth and adopted by the Colorado Court of Appeals. *See Holmes v. Young*, 885 P.2d 305, 308 (Colo. Ct. App. 1994).

the specific causes of action for fraud. The trial court concluded that even though Plaintiffs allege Defendants made misrepresentations to Dolezsar, knowing he was Leslie's agent, that Plaintiffs had to allege when, where, and what it was Dolezsar relayed to Leslie. However, Utah law is clear that when the misrepresentations were made to Dolezsar as Leslie's agent, they were made to her. Because the trial court refused to consider the *Second Amended Complaint* as a whole and instead focused on the specific fraud causes of action, and because it failed to recognize that Plaintiffs allege that Dolezsar was always acting as Leslie's agent, it erred in dismissing Plaintiffs' fraud claims. Therefore, Plaintiffs respectfully request this Court to determine that Plaintiffs satisfied the particularity requirement of Rule 9(b) URCP and reinstate all of Plaintiffs' fraud claims.

The trial court further misapplied the factors contained in Rule 19 URCP to determine Dolezsar is a necessary and indispensable party. Plaintiffs allege Dolezsar was acting as Leslie's agent. Therefore, for the purposes of the motion to dismiss, it does not matter when, or where Dolezsar relayed the misrepresentations to Dolezsar. The misrepresentations originated with Defendants and they are liable for their actions in making the misrepresentations to Leslie, through her agent. The trial court focused on Plaintiffs' alternative pleading that Dolezsar was part of a conspiracy with Defendants.

It further focused on Dolezsar repeating the misrepresentations to Leslie, rather than the Defendants making the misrepresentations to Dolezsar. However, even if Dolezsar was part of a conspiracy with Defendants, he is not a necessary and indispensable party because Defendants are liable for the misrepresentations they made, and which they authorized Dolezsar to repeat to Leslie. The trial court also made an impermissible determination of fact regarding Dolezsar's role in the misrepresentations. The trial court failed to recognize that the inability to bring a

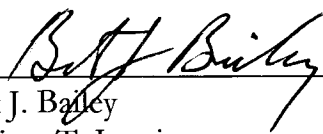
cross-claim against a joint tortfeasor is not grounds for finding a party is necessary and indispensable, and therefore the trial court abused its discretion in dismissing Plaintiffs' fraud claims based on Rule 19 URCP. Therefore, Plaintiffs respectfully request that this Court to find the trial court abused its discretion in finding Dolezsar is a necessary and indispensable party, reverse the trial court's decision, and reinstate Plaintiffs' fraud claims.

The trial court failed to apply any of the applicable factors and therefore abused its discretion when it dismissed Plaintiffs' fraud claims without leave to amend. Leave to amend is to be liberally granted. The trial court recognized it dismissed Plaintiffs' fraud claims for a procedural reason which could be remedied by amendment, yet, nevertheless, it dismissed the claims and specifically ruled Plaintiffs could not amend. By doing so, it abused its discretion. Therefore, Plaintiffs respectfully request this Court to find that the trial court abused its discretion in dismissing Plaintiffs' fraud claims without leave to amend and grant Plaintiffs' leave to amend their *Second Amended Complaint*.

Lastly, the trial court dismissed Plaintiffs' causes of action for aiding and abetting, finding Utah does not recognize them. Because the Restatement (Second) of Torts and the majority of jurisdictions recognize aiding and abetting causes of action, Utah should also recognize them. Plaintiffs therefore respectfully request this Court to find that Utah recognizes a cause of action for aiding and abetting and reinstate Plaintiffs' aiding and abetting causes of action.

DATED this 22nd day of February, 2011.

BAILEY & JENNINGS, LC


Bart J. Bailey
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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2011, I served two true and correct copies of the foregoing **APPELLANTS' OPENING BRIEF ON APPEAL**, via first class mail, postage prepaid, on the following:

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ADDENDUM TABLE OF CONTENTS

- A. Statutes, Rules and Regulations Applicable to Appeal.
- B. Second Amended Complaint filed March 5, 2010. Rec. 3194-2834.
- C. Ruling and Order on Defendants' Motions to Dismiss the Second Amended Complaint, dated June 22, 2010. Rec. 5605-5600.
- D. Ruling and Order on Defendants' Motion to Dismiss Fraud Claims in Second Amended Complaint Under Rule 19, dated June 16, 2010. Rec. 5595-5591.
- E. Motion to Dismiss Second Amended Complaint, dated April 13, 2010. Rec. 5267-5263.
- F. Memorandum in Support of Motion to Dismiss Second Amended Complaint, dated April 13, 2010. Rec. 5288-5263.
- G. Excerpts from Transcript of Oral Argument. Rec. 6136, pp. 182, 183, 184, 186, 203 and 217.