1981

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

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

CERRITOS TRUCKING CO., et al.,

Plaintiffs-
Respondents,

vs.

UTAH VENTURE NO. 1, et al.,

Defendants-
Appellants.

No. 17185

UTAH DEVELOPMENT COMPANY,
INC., et al.,

Cross Plaintiffs-
Appellants,

vs.

BETTILYON REALTY COMPANY, et al.,

Cross Defendants-
Respondents.

BRIEF OF DEFENDANTS AND CROSS PLAINTIFFS - APPELLANTS

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

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TABLE OF CONTENTS

CASES AND AUTHORITIES CITED

CASES:

RULES:

IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiffs-Respondents,

vs.

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

Defendants-Appellants.

No. 17185

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

Cross Plaintiffs-Appellants,

vs.

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

Cross Defendants-Respondents.

BRIEF OF DEFENDANTS AND CROSS PLAINTIFFS - APPELLANTS

STATEMENT OF THE CASE

In this action plaintiffs-respondents sought specific performance of an option to purchase real property and damages;

defendants-appellants sought, alternatively, rescission and damages against plaintiffs and cross-defendants based upon misrepresentation, mutual mistake and breach of fiduciary duty.

DISPOSITION OF THE CASE IN THE LOWER COURT

Following a trial by jury, the district court granted directed verdicts in favor of plaintiffs and cross-defendants, and against defendants, counterclaimants and cross-plaintiffs. Defendants, counterclaimants and cross-plaintiffs appeal from the granting of said directed verdicts and the subsequent entry of findings of fact and conclusions of law.

Relief Sought on Appeal.

Defendants-respondents seek an order of this Court reversing the granting of the directed verdicts in favor of plaintiffs and cross-defendants and an order that a new trial be granted in this action. Defendants-respondents also seek an order of this Court striking the Findings of Fact and Conclusions of Law filed by the district court in support of its granting of a directed verdict.

STATEMENT OF THE CASE WITH CITATIONS TO THE RECORD

A. Parties.

Defendant William J. Lowenberg is a resident of San Francisco who is engaged in the real estate business. Defendants Utah Venture No. 1 and Utah Development Company, Inc. are entities owned and controlled by Lowenberg. Each,

at various times, held legal title to the property at issue in this action and are nominal parties to this action.

Plaintiff-respondent and counterclaim defendant Cerritos Trucking Company is a California corporation and the optionee of an option granted by Lowenberg on or about April 28, 1978 (hereinafter "the Option"). Plaintiff-respondent and counterclaim defendant Cerritos Associates is a partnership comprised of plaintiffs-respondents Cerritos Trucking Company, Donald E. Heimark, William L. Fariester and James B. Fleming. Cerritos Associates was the assignee of the Option. Messrs. Heimark, Fleming and Fariester, also counterclaim defendants, were officers and partners, respectively, of Cerritos Trucking Company and Cerritos Associates. Those three individuals are the ultimate beneficiaries of the Option at issue herein. (Hereinafter, Cerritos Trucking Company, Cerritos Associates, Mr. Heimark, Mr. Fleming and Mr. Fariester are collectively referred to as the "Cerritos Group".)

Cross-defendant Bettilyon Realty Company was the intermediary between defendant Lowenberg on the one hand and plaintiffs and cross-defendant Dunahoo on the other hand with respect to negotiating of the lease and Option of the property at issue. One Gerald Daughtrey acted on behalf of Bettilyon Realty Company in this respect.

Cross-defendant Edmond O. Dunahoo was the President

of Fiber-Sciences, Inc., the sublessee on the property and actual tenant of the property in question. Fiber-Sciences, Inc. was a wholly-owned subsidiary of EDO, a publicly held corporation. (Hereinafter, Mr. Dunahoo and the other officers of Fiber Sciences, in their individual capacities, are collectively referred to as "the Fiber Sciences Group".)

B. Factual Background.

Lowenberg purchased a parcel of real property located at the International Center near Salt Lake Airport in 1977. (Tr. of trial at p. 41, line 21-25; testimony of William Lowenberg). He then developed the property by hiring a contractor to design and construct that warehouse as designed. (That parcel, as improved is hereafter referred to as "the Property".) By early 1978 the improvements on the Property were nearing completion. Lowenberg desired to find a lease tenant or tenants to occupy the Property. (Tr. p. 42, lines 17-23; testimony of William Lowenberg).

Lowenberg contacted several realtors to assist him in seeking a lease tenant or tenants. Among those was Bettilyon Realty Company. (Tr. of trial at p. 43, lines 1-5; testimony of William Lowenberg). The person acting on behalf of Bettilyon in this respect was Gerald Daughtrey.

During the period when Lowenberg was seeking a lessee for the Property, Fiber-Sciences, a corporation engaged in manufacturing water and waste tank systems for

aircrafts, had determined that it needed space in Salt Lake City for a warehousing and manufacturing operation. (Tr. p. 137, lines 8-14; testimony of Edmond Dunahoo). Its needs were for the type of property Lowenberg had to offer. Officers of Fiber-Sciences had contacted Bettilyon Realty to assist in the search for a suitable property. Mr. Daughtrey, on behalf of Bettilyon Realty, showed officers of Fiber-Sciences various properties, including the Property owned by Mr. Lowenberg. The officers of Fiber Sciences determined that the Lowenberg Property was best suited to Fiber-Sciences' needs. (Tr. p. 140; testimony of Edmond Dunahoo).

Fiber-Sciences was a wholly-owned corporation of EDO, a publicly held corporation. The officers of Fiber-Sciences were informed by the parent EDO that Fiber-Sciences should lease, not purchase, the property it required in Salt Lake City. (Tr. p. 138; testimony of Edmond Dunahoo).

However, Mr. Dunahoo and several of his vice presidents, the Fiber Sciences Group, determined that they, in their individual capacities, wished to purchase property and in turn lease it to Fiber-Sciences. (Tr. p. 144, lines 1-3; testimony of Edmond Dunahoo). The officers of Fiber-Sciences determined that the purchase of Lowenberg's Property would be a good investment for them and would provide a potential retirement benefit that they did not at that time enjoy. (Tr. p. 151; testimony of Edmond Dunahoo).

Because of the desire of the officers of Fiber-Sciences to own the Property, and notwithstanding that Fiber-Sciences or EDO did not wish to own the Property, Fiber-Sciences determined to purchase, not lease, the Property from Lowenberg. (Tr. p. 150, lines 18-20; testimony of Edmond Dunahoo). The only reason not to lease the Property directly from Lowenberg was a desire of the Fiber-Sciences officers to own or participate in the ownership of the Property in their individual capacities. (Tr. p. 168; testimony of Edmond Dunahoo).

Mr. Heimark, President of Cerritos Trucking Company, was a long-time friend of Mr. Dunahoo. Mr. Heimark and Mr. Dunahoo entered into an oral agreement that the Cerritos Group and the Fiber-Sciences officers would share in the ownership of the Property upon exercise of the Option. (Tr. p. 89, line 22; p. 94, lines 19-20; p. 96, line 9; testimony of Donald Heimark; Tr. pp. 153-154; testimony of Edmond Dunahoo; Tr. p. 128, lines 1-3; pp. 129-130; testimony of Gerald Daughtrey).

Subsequent to the "hand-shake" agreement between the Cerritos Group and the Fiber-Sciences Group, Mr. Daughtrey brought to Mr. Lowenberg a proposal that Fiber-Sciences would lease the Property <u>if an option to purchase the Property was granted to the Fiber-Sciences Group</u>. Mr. Daughtrey told Bill Lowenberg that the Fiber-Sciences Group would own or

participate in the ownership of the Property. (Tr. p. 127, lines 5-6; p. 128, lines 1-3; testimony of Gerald Daughtrey). In fact, the Option was negotiated by Mr. Daughtrey on the basis that the Fiber-Sciences people would own or participate in the ownership of the Property. (Tr. pp. 129-130; testimony of Gerald Daughtrey). There were no direct dealings between Lowenberg on the one hand and either the Cerritos Group or the Fiber-Sciences Group on the other hand. All communications were transmitted through the agency of Mr. Daughtrey. (Tr. p. 165, lines 23-25; testimony of Edmond Dunahoo).

Mr. Lowenberg was not told that Fiber-Sciences would lease the building directly from him if there could be no purchase option. (Tr. p. 205, lines 13-17; testimony of Gerald Daughtrey). Mr. Lowenberg did not wish to sell the Property, only to lease it. (Tr. p. 42, lines 17-20; testimony of William Lowenberg). However, he was told that Fiber-Sciences would not lease the Property unless the officers of Fiber-Sciences and/or EDO could, in their individual capacities, be given the option to buy the Property. (Tr. at p. 46, lines 20-24).

It was Mr. Lowenberg's understanding that Cerritos Trucking Company was to be the "vehicle" or nominee to hold the Option but that the option was to be exercised by, and the ownership of the Property ultimately was to vest in the officers of Fiber-Sciences. (Tr. p. 48, lines 9-13; testimony of William Lowenberg). Mr. Lowenberg was unwilling to grant an option to purchase the Property to anyone other than the officers of

Fiber-Sciences. (Tr. p. 48; lines 21-23; testimony of William Lowenberg). In fact, but for the representation that the officers of Fiber-Sciences would own the Property, Mr. Lowenberg would not have granted an option or sold the Property. (Tr. p. 218; testimony of William Lowenberg).

On or about April 28, 1978, Mr. Lowenberg executed both a lease and an Option to Cerritos Trucking Company. Mr. Lowenberg understood that Cerritos was a "vehicle" or a nominee and that the Option as drafted would be sufficient to cover the "intent" of the parties that the officers of Fiber-Sciences would own the building upon the exercise of the Option. (Tr. p. 227, lines 19-22; testimony of William Lowenberg). These concessions on Mr. Lowenberg's part were purely business oriented. (Tr. p. 217, lines 13-18; testimony of William Lowenberg). The concessions that Mr. Lowenberg made were first, that he would grant an option to purchase the buidling, and second, he gave an extremely favorable price for the building to the officers of Fiber-Sciences. (Tr. p. 49, lines 3-11; testimony of William Lowenberg).

Sometime in late January or early February 1979, Mr. Lowenberg heard rumors that the Fiber-Sciences Group would not own the building upon the exercise of the Option. Mr. Lowenberg confronted Dunahoo with that information, and Dunahoo admitted that Fiber-Sciences officers would not so own the Property. (Tr. p. 219, lines 2-14; testimony of William

Lowenberg). The officers of Fiber-Sciences had learned in the summer of 1978 that they would not participate in the ownership but had no so informed Mr. Lowenberg. (Tr. p. 157; testimony of Edmond Dunahoo). EDO or its counsel had determined that for Mr. Dunahoo and other officers of Fiber-Sciences to own the building and lease it to Fiber-Sciences, Inc. would be a conflict of interest requiring disclosure to EDO's shareholders. Upon learning that the Fiber-Sciences Group would not own the building, Mr. Lowenberg refused to honor the option and tendered the $5,000.00 option price back to Cerritos Trucking Company.

Subsequently, plaintiffs brought this action seeking to enforce the Option and for damages. The damages alleged were the differential between the lease payments that had been received by Lowenberg subsequent to notice of the exercise of the Option and the amount of the mortgage payments during that period that had been paid by Mr. Lowenberg.

Lowenberg denied his obligation to perform under the Option and counterclaimed and cross-claimed for misrepresentation, breach of fiduciary duty and sought, additionally, reformation of the contract.

Trial was had in this matter before a jury demanded by defendant Lowenberg. All parties rested on Thursday afternoon. Counsel for all parties spent several hours with the court drafting and agreeing upon jury instructions on Friday. On Monday, the district court did not call back the

jury to be charged and deliberate but instead granted the directed verdict.

ARGUMENT

POINT I. THE DISTRICT COURT ERRED IN GRANTING A DIRECTED VERDICT.

At the close of evidence, plaintiffs' counsel made a speaking motion for a directed verdict. The grounds therefor were stated by counsel for plaintiffs as follows:

(1) There was no misrepresentation, no fraud and no damages; (Tr. p. 292, lines 13-15)

(2) The record was void of material misrepresentations; (Tr. p. 293, lines 21 and 22)

(3) There was no reliance on the part of Lowenberg; (Tr. p. 294, line 18)

(4) There was no material mistake of fact; (Tr. p. 296, lines 2-8)

(5) The representations made to Mr. Lowenberg were "bona fide expectations"; (Tr. p. 296, lines 9-10) and

(6) The misrepresentations were in fact "predictions of future events". (Tr. p. 319, lines 1-2).

After argument and a delay of nearly three days, the court granted the motion, ruling and finding as follows:

(1) "Defendant has failed by a preponderance of the evidence"; (Tr. at p. 329, lines 8-13)

(2) There was no fraud or misrepresentation; (Tr. p. 329, line 20)

(3) Defendant did not rely upon representations made; (Tr. p. 330, lines 3-4) and

(4) The representations made were as to future acts. (Tr. p. 331, lines 6-7).

Defendants-appellants respectfully submit that the district court erred in granting the directed verdict and in so doing erred in applying the wrong legal standard to determine whether a directed verdict should have been granted.

A. The District Court Applied the Wrong Legal Standard in Granting the Directed Verdict.

Pursuant to Rule 50 of the Utah Rules of Civil Procedure, a motion for a directed verdict shall state the specific grounds therefor. As set forth, supra at p. 10, plaintiffs based their motion on the grounds that defendants had failed to produce evidence indicating a misrepresentation, a mistake or damages, and additionally that any representations made were as to a "future act" and therefore not misrepresentations but merely predictions. None of plaintiffs' arguments can withstand scrutiny.

In directing a verdict, the court must examine the evidence in a light most favorable to the party against whom the directed verdict is attendant; it is not the province of the court to weigh or determine the preponderance of the

evidence. Every controverted fact must be resolved in that party's favor. (Finlayson v. Brady, 121 Utah 204, 240 P.2d 491 (1952); Boskovich v. Utah Constr. Co., 123 Utah 387, 259 P.2d 885 (1953)). As this Court noted in Finlayson v. Brady, supra, the Constitution, statutes and case authority establish the right to a trial, and decision, by jury where there is evidence on both sides. (240 P.2d at 492).

If there was some substantial evidence in support of the essential facts which a party is required to prove, or if evidence or inferences deducible therefrom were of a character which would cause reasonable men to arrive at different conclusions, a directed verdict may not be granted. (Christensen v. Utah Rapid Transit Co., 83 Utah 231, 27 P.2d 468, 471 (1933)).

In a recent decision of this Court reviewing and reversing the granting of a judgment n.o.v., it was stated as follows:

> "When a party has so requested, he is entitled to a trial by a jury of his fellow citizens. In order that that right be safeguarded as it should be, it is essential that the jury have the exclusive prerogative of passing upon the credibility of the evidence and of determining the facts.
>
> Therefore, no matter how ardent may be the trial judge's desire to see that justice is done from his own point of view, he has an obligation of judicial restraint: to make allowance for the fact that other reasonable minds might arrive at a different conclusion than his own.
>
> . . . .

> It has long been established in our law that a court should not take the case from the jury where there is any substantial dispute in the evidence on issues of fact, but can properly do so only when the matter is so plain that there really is no conflict in the evidence upon which reasonable minds could differ."
> Flynn v. W. P. Harlin Constr. Co., 509 P.2d 356, 360-61 (1973).

The transcript unequivocably demonstrates that the district court substituted its determination of the facts for those that were or should have been those of the jury. For instance, the court stated:

> "The Court further finds that the defendant has failed in its burden of proof by a preponderance of the evidence as to the count or counts that the burden of proof is applicable, and has failed in its burden of proof by clear and convincing evidence as to the count or counts that the burden of proof is applicable."
> (Tr. at p. 329, lines 8-13).

It is for the jury to determine whether the defendant has failed in its burden of proof by a preponderance of the evidence, not the court. (Finlayson v. Brady, supra).

It was improper for the district court to weigh the evidence and determine where the preponderancy lay. That inquiry is the exclusive province of the jury. The district court may well have determined, after three days in which to consider testimony and in light of the jury instructions that counsel for all parties and the court were considering, that the preponderance of the evidence was with plaintiff. Nonetheless, his substituting of his judgment for that of the jury was clear and prejudicial error.

The arguments of plaintiffs' counsel in support of their motions for a directed verdict invited the district court to make such substitutions. No legal authority was presented to support the proposition that the evidence presented by defendants was legally insufficient. Instead, the thrust of their argument was conclusory statements in which a weighing of the evidence was implicit. As will be pointed out more fully, infra, there was sufficient evidence presented by defendants from which the jury could have determined that Lowenberg placed reasonable reliance upon material representations made to him and was damaged thereby. It was error for the district court to arrogate to itself the weighing of that evidence in this case.

Other "findings" of the district court were similarly conclusory and reflected an implicit weighing of the evidence. For instance, the court further ruled and found:

> "that, number one, that there has been no fraud or misrepresentation."
> (Tr. p. 329, lines 19-20).

The question of whether or not there was a misrepresentation is, under Utah law, a determination for the jury. (Berkeley Bank for Cooperatives v. Meibos, 607 P.2d 798 (1980)). The court did not find that there was no evidence supporting defendants' contentions that misrepresentations had been made, but, obviously, weighed the evidence and concluded that there had been "no misrepresentation".

As a matter of fact, the evidence was quite to the contrary; there had been a clear misrepresentation made to Mr. Lowenberg. That misrepresentation was that if he would grant an option, that option would be for the benefit of and exercised by the officers of Fiber-Sciences. All parties testified that an agreement had been entered into between the Cerritos Group and the Fiber-Sciences Group to that effect. Mr. Daughtrey testified that he negotiated the lease and Option between Cerritos and Mr. Lowenberg "on that basis" and Mr. Lowenberg testified that he would not have granted an option but for that representation. Similarly, there is no question but that representation proved untrue and that the Fiber-Sciences Group did not participate in or benefit from the ownership of the Property upon the exercise of the Option. Thus, there can be no question but that evidence was adduced supporting defendants' contention that a representation was made to Mr. Lowenberg that proved false. Therefore, the question for the jury was properly whether or not plaintiffs and cross-defendants acted negligently in causing that representation to be made to Mr. Lowenberg by Mr. Daughtrey and in negotiating the Option on that understanding. It is abundantly clear, based upon the record, that there was substantial evidence presented to the jury from which they could have concluded that there had been a negligent misrepresentation made to Mr. Lowenberg on behalf of plaintiffs and cross-defendants. Defendants,

therefore, submit that it was clear error for the court to substitute its decision for that of the jury and that said error is prejudicial and sufficient to cause a reversal and the granting of a new trial.

Under Utah law, in a misrepresentation case the issues of (1) whether a misrepresentation was made; (2) whether there was fraud or negligence by the person making the misrepresentation; (3) the materiality of any misrepresentations; and (5) whether any damage resulted therefrom, are all questions for the jury and must be submitted to the jury if there is conflicing evidence. (Flynn v. W. P. Harlin Constr. Co., supra; Finlayson v. Brady, supra). The court should not have taken those issues from the jury in this case.

POINT II. DEFENDANTS PRESENTED EVIDENCE FROM WHICH THE JURY COULD HAVE FOUND IN FAVOR OF DEFENDANTS ON THEIR CLAIM BASED UPON NEGLIGENT MISREPRESENTATION.

The tort of negligent misrepresentation has long been recognized in the State of Utah. (Jardine v. Brunswick Corp., 18 Utah 2d 378, 423 P.2d 659 (1967); Ellis v. Hale, 13 Utah 2d 279, 373 P.2d 382 (1962)). In Jardine, the court stated as follows:

> "Where one having a pecuniary interest in a transaction, is in a superior position to know material facts, and carelessly or negligently makes a false representation concerning them, expecting the other party to rely and act thereon, and the other party reasonably does so and suffers loss in that transaction, the representor can be

held responsible if the other elements of fraud are also present."
(423 P.2d at 662).

Jardine v. Brunswick has been cited with approval by this Court recently in Berkeley Bank for Cooperatives v. Meibos, 607 P.2d 798 (1980) and Dugan v. Jones, No. 16334, filed July 23, 1980). In the Berkeley Bank for Cooperatives case, this Court refused to reverse a jury verdict for defendants. The plaintiff bank had brought actions against the defendants for collection of promissory notes. Each defendant had alleged as a defense that the plaintiff had fraudulently induced them to execute the notes. In refusing to overturn the jury verdict, this Court stated as follows:

"Although the evidence was conflicting in many respects, there was substantial evidence upon which the jury could find all the elements of fraud."
(607 P.2d at 800).

"The issue of actual reliance and the reasonableness of reliance is, of course, for the jury to determine.

. . . .

The fact is there is ample evidence in the record from which the jury could find that representation to have indeed been made."
(607 P.2d at 801).

"Under the circumstances of this case, it was clearly, as the trial court properly ruled, within the province of the jury to determine whether defendants' reliance on the repeated assertions of plaintiff was justified."
(607 P.2d at 802).

In Dugan v. Jones, supra, this Court reversed the district court's denial of a trial by jury of defendants' counterclaims and cross-claims alleging fraud, negligent misrepresen ation, breach of contract and breach of fiduciary duty. This Court held that despite the fact that plaintiff asserted only equitable claims, defendant was entitled to a trial by jury on his legal counterclaims and cross-claims. That case was remanded for a jury trial.

Defendants in this action presented evidence on all elements of negligent misrepresentation from which the jury could have found in their favor. In this circumstance, it is appropriate that this Court remand for a new trial. (Dugan v. Jones, supra).

A. A Misrepresentation Was Made to Lowenberg By or On Behalf of Plaintiffs and Cross-Defendants.

Defendants submit that there is no question but that the unqualified and unconditional representation was made to Lowenberg that the Option to purchase was for the benefit of the officers of Fiber-Sciences and that those individuals would own or participate in the ownership of the Property upon its exercise. The only dispute in the testimony is whether Lowenberg was told that the ownership would exclusively be for the benefit of the Fiber-Sciences Group or whether they would "participate" in the ownership of the Property.

(Compare testimony of William Lowenberg at Tr. p. 48, lines 18-20 with that of Gerald Daughtrey at Tr. p. 127, lines 5-6). Even the district court appears to have acknowledged the making of that representation. (Tr. p. 321, remarks of district court).

It is inconceivable that the district court could have determined that there was an absence of evidence that could support a jury determination that such a representation was made. Similarly, there was no doubt that that representation proved untrue. Mr. Dunahoo stated unequivocably that he and his group would not participate in the ownership of the building. (Tr. p. 159, line 22; p. 160, line 10; testimony of Edmond Dunahoo). Defendants submit that there is no question but that a representation was made to Lowenberg that proved untrue.

B. The Representation Was to a Presently Existing Fact.

Counsel for plaintiffs advance the argument in support of their directed verdict that the representation made to Mr. Lowenberg that the option would be for the benefit of the Fiber-Sciences Group and that they would participate in the ownership of the Property was not actionable because it concerned a future event. Their argument appears to be that because the Option could not be exercised until some future date, any representation as to the effect of the exercise of that Option was necessarily an opinion or prediction as to a future event. The inverse of that argument presumably is that there was no misrepresentation as to a presently existing fact.

Their argument misses the crucial point. The representation made to Mr. Lowenberg was that the Option was for the benefit of the Fiber-Sciences Group. The unconditional and unqualified representation was not that if events in the future proved propitious the Fiber-Sciences Group might receive some remote benefit from the grant of the Option, but that it was presently intended and agreed upon that the Option would be for the benefit of the Fiber-Sciences Group and that they would participate, upon the exercise of the Option, in the ownership of the Property.

That was a respresentation as to a present state of mind, intention and agreement. The fact that the Option could only be exercised in the future does not detract from the fact that the representation made was as to a presently existing fact--viz., the agreement and intent of the Fiber-Sciences Group and the Cerritos Group.

An argument similar to that advanced by plaintiffs in this action was advanced by plaintiffs in Berkeley Bank for Cooperatives, supra. In that case, plaintiffs argued that fraud or misrepresentation could not be predicated upon representations or statements of an intention to perform or not perform an act in the future. In that case, the representation was that the promissory notes would not be collected. This Court readily disposed of that argument as follows:

> "Plaintiff also grounds its appeal on the principle that fraud cannot be predicated

upon representations or statements of an intention to perform or not perform an act in the future. However, what is involved in this case is whether the fact of the then present intent of the bank at the time of its representations to the farmers was contrary to the statements made to the farmers. Under such circumstances, the misrepresentations are actionable. As stated in Harper and James, The Law of Torts, Vol. 1, 571-72 (1956):

> A closely similar problem is raised by a promise or statement of future conduct by one who, at the time, intends not to fulfill the promise. The promise itself is regarded as a representation of a present intention to perform. Hence, such a promise, made by one not intending to perform operates as a misrepresentation--a misrepresentation of the speaker's state of mind, at the time, and is actionable as a misrepresentation of 'fact.'"

607 P.2d at 804.

In this action, then, the misrepresentation was as to the agreement and intention of the Cerritos Group and the Fiber-Sciences Group at the time of the granting of the Option. That was a presently existing fact and was a negligently made representation that proved false.

C. The Representations Made to Lowenberg Were Material.

Mr. Lowenberg testified that but for the fact that the Fiber-Sciences Group was to own the Property, he would not have granted an option to purchase the Property. (Tr. p. 218, lines 3-5). That testimony is moreover entirely consistent with prior actions of Mr. Lowenberg. For instance, he stated that he did not wish to sell the Property but wished to lease

it. (Tr. p. 42, lines 17-20; testimony of William Lowenberg).

Moreover, Mr. Lowenberg had previously been unwilling to sell the Property. It was only after he was told that the Option would be for the benefit of the Fiber-Sciences Group and that they required it that he agreed to grant an Option for the purchase of the Property. Mr. Daughtrey further testified that the lease and Option was "negotiated on the basis" that the Fiber-Sciences Group would participate. (Tr. pp. 129-130; testimony of Gerald Daughtrey).

Thus, from the fact that the Option was negotiated on the basis that the Fiber-Sciences Group would participate, it may be inferred that the Fiber-Sciences Group and the Cerritos Group understood the materiality and importance of that factor. The obvious inference to be drawn from all the testimony is that the Fiber-Sciences Group would own or participate in the ownership of the Property was a material fact and was the basis for negotiation of the Option.

Certainly, it must be concluded that the jury could have inferred from the testimony presented to them that that fact was "material". Under the law applicable in this jurisdiction, the question of materiality is clearly one for the jury. (Berkeley Bank for Cooperatives v. Meibos, supra; Dugan v. Jones, supra). Therefore, it was error for the district court not to allow the jury to determine the materiality of the representation.

D. Lowenberg Reasonably Relied Upon the Representation

Made to Him.

Evidence was presented at trial from which the jury could have determined that Lowenberg relied upon the representation made to him that the Fiber-Sciences Group would own or participate in the ownership of the Property upon the exercise of the Option. Lowenberg's own testimony was unequivocable on that point. He stated in no uncertain terms that but for the fact that the Fiber-Sciences people were to own the Property, he would not have granted the Option. (Tr. p. 218, lines 3-5). This is, of course, consistent with his earlier course of action in refusing to grant an option to purchase, or to sell the Property, prior to being informed that the Fiber-Sciences Group would own or participate in the ownership of the Property.

It is often the case that evidence of reliance must be primarily proved by the testimony of the party claiming reliance. That was indeed the case in Berkeley Bank for Cooperatives, supra:

> "The defendants stated they would have continued to refuse to sign the notes if they had not been repeatedly assured that the notes were required as a standard procedure of all coops getting loans from plaintiff, that they were solely for the purpose of assuring Dairymen with a source of milk, and that they would not be collected." 607 P.2d at 801.

Again, there were facts presented from which the jury could have concluded that Lowenberg acted in reliance upon the representations made. The factual issue of reliance was one

invested in the province of the jury, and it was error for the district court to itself weigh the evidence and conclude that Mr. Lowenberg had not relied.

The court based its conclusion in part upon the notion that the Option was expressly "assignable". From this the district court concluded that Lowenberg could not have relied upon the representation that the Option would be for the benefit of the Fiber-Sciences Group. In doing so, the court was obviously weighing the facts and coming to its own conclusion. This is sufficient in itself to demonstrate error. In addition, the conclusion of the district court was not logical. For instance, Mr. Heimark testified that an assignee would be necessary upon the exercise of the Option in order to take advantage of the tax provisions. (Tr. p. 76, line 20; testimony of Heimark). Lowenberg testified that he understood that Cerritos Trucking Company was only to be a "vehicle" or nominee. (Tr. p. 48; testimony of William Lowenberg).

Logically, the fact that the Option was made expressly assignable is supportive of Mr. Lowenberg's position. If the Option had not been expressly assignable, it could have been argued that Lowenberg should have been put on notice that Cerritos Trucking Company, and not the Fiber-Sciences Group, would of necessity exercise the Option. The fact that the Option was assignable meant that the Fiber-Sciences Group could be the assignee of the Option and subsequently exercise that Option.

Thus, the fact that the Option was made expressly assignable is consistent with Mr. Lowenberg's understanding that Cerritos Trucking Company was a vehicle or nominee and that the Option would be exercised by the Fiber-Sciences Group at the appropriate time.

Again, there is nothing unreasonable about such a course of action of Mr. Lowenberg. Certainly, the jury could have concluded or could have logically inferred from the evidence presented to them that Mr. Lowenberg reasonably relied upon the representations made to him that the Option would be for the benefit of the Fiber-Sciences Group.

E. Plaintiffs and Cross-Defendants Were Negligent in Representing to Lowenberg that the Fiber-Sciences Group Would Own or Participate in the Ownership of the Property.

Prior to requesting Lowenberg to grant an option that would be for the benefit of the Fiber-Sciences Group, the Cerritos Group and Fiber-Sciences Group had entered into an agreement whereby Fiber-Sciences Group would participate in the ownership of the Property. (Tr. pp. 95-96; testimony of Donald Heimark). At that time, Mr. Heimark made no investigation, nor indeed was he aware, that a potential conflict of interest existed with respect to the officers of Fiber-Sciences owning a building and leasing that building to the corporation they represented. (Tr. pp. 91-92; testimony of Donald Heimark).

Mr. Dunahoo testified that he believed his participation in the ownership of the building and that of his associates was not improper. (Tr. p. 144, lines 1-3; testimony of Edmond Dunahoo). Later Mr. Dunahoo was informed that he and his associates could not participate in the ownership of the building by counsel to EDO, the parent of Fiber-Sciences.

Lowenberg had the right to rely upon the representations made to him that the Fiber-Sciences Group would have the ability to own the Property. Correspondingly, there was a duty on the part of the Fiber-Sciences Group and Cerritos Group to determine whether the Fiber-Sciences Group could participate in the ownership of the building.

In Dugan v. Jones, supra, this Court set forth the standard of care and competence required of one making material representations in connection with the purchase or sale of real property.

> "Jardine cites the Restatement, Torts, Sec. 552. The current standards of the evolving tort of negligent misrepresentation are set forth in Restatement, Torts, 2nd, Sec. 552:
>
> > '(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.'

'(2) Except as stated in Subsection (3), the liability in Subsection (1) is limited to loss suffered.

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.'

Under comment e of Sec. 552 (p. 130), it is stated:

'Since the rule of liability stated in Subsection (1) is based upon negligence, the defendant is subject to liability if, but only if, he has failed to exercise the care of competence of a reasonable man in obtaining or communicating the information....

'The particulars in which the recipient of information supplied by another is entitled to expect the exercise of care and competence depend upon the character of the information that is supplied. When the information concerns a fact not known to the recipient, he is entitled to expect that the supplier will exercise that care and competence in its ascertainment which the supplier's business or profession requires and which, therefore, the supplier professes to have by engaging in it. Thus the recipient is entitled to expect that such investigations as are necessary will be carefully made and that his informant will have normal business or professional competence to form an intelligent judgment upon the data obtained...."

The actions of the Cerritos Group and the Fiber-Sciences Group fall far short of the required level of care or competence. They had the power prior to making the representation

to determine whether or not a conflict of interest existed. They could have received an opinion of counsel or a firm approval from their parent corporation. They did neither. Rather, they were content to assume that such conflicts of interest as may have existed were not disabling. Having not done so, they were clearly negligent in making the unqualified and unconditional representation that the Fiber-Sciences Group would own or participate in the ownership of the Property to Lowenberg.

Certainly, that fact was one peculiarly within the knowledge of the Fiber-Sciences Group. Mr. Lowenberg was not privy to the internal guidelines of EDO and Fiber-Sciences respecting conflicts of interest. Moreover, no one even alluded to the potential problem of a conflict of interest. The representations made to Mr. Lowenberg were unconditional and unqualified. Plaintiffs and cross-defendants were clearly negligent in not exercising care and competence to determine the ability of the Fiber-Sciences Group to participate in the ownership of the Property prior to making representations to Mr. Lowenberg.

Again, the question of whether or not the representations were negligently made was one for the jury. Evidence was presented upon which the jury could have determined that plaintiffs and cross-defendants acted negligently. In this situation, it was error for the district court to grant a directed verdict,

taking this issue from the jury.

F. There Was Evidence of Damage to Defendants as a Result of the Misrepresentations Made By Plaintiffs and Cross-Defendants.

Mr. Lowenberg testified that among the concessions he made to the Fiber-Sciences Group was the favorable price to be paid for the Property by the Fiber-Sciences Group upon the exercise of the Option. (Tr. p. 49; testimony of William Lowenberg).

At trial there was ample testimony to support Mr. Lowenberg's claim that the Property was worth more at the time the Option was granted than the option price for the Property. Dale Jackman, an MAI appraiser, testified as to the methods he used in appraising the value of the Property as of April 28, 1978, the time of the granting of the Option. (Tr. at pp. 231-232; testimony of Dale Jackman). He then testified that in his opinion the Property at the time the Option was granted was worth $1,750,000.00. (Tr. at p. 237; testimony of Dale Jackman). That was some $200,000.00 in excess of the option price set for the Property at or about that time. In addition, Exhibit D-22 was received into evidence, which exhibit stated Mr. Jackman's opinion as to the value of the Property on or about April 28, 1978. That exhibit similarly sets a value for the Property at that time of $1,750,000.00, or $200,000.00 more than the option price.

In rebuttal to Mr. Jackman, plaintiffs offer the testimony of Larry Rigby, who is not an MAI approved appraiser, and, presumably, whose testimony on that basis might have been less credible in the eyes of a jury. Even Mr. Rigby, plaintiffs' expert, testified that the Property at the time of the Option had a value of from $1,600,000.00 to $1,645,000.00. (Tr. p. 267, testimony of Larry Rigby). Thus, plaintiffs' expert also testified that the Property was worth from $50,000.00 to $95,000.00 more at the time of the granting of the Option than the option price stated.

Similarly, Mr. Daughtrey had prepared for plaintiffs, and had provided to Mr. Heimark, several projections of the value of the Property. The range of values for the Property in Mr. Daughtrey's projections was from $1,600,000.00 to $1,890,000.00. Thus, Mr. Heimark was presented with information that the Property was worth from $50,000.00 to $340,000.00 more than the option price.

The foregoing demonstrates that ample evidence as to damages was presented to the jury from which the jury could have concluded that Mr. Lowenberg suffered damages owing to his granting of the Option to purchase the Property.

G. Defendants Offered Testimony as to All of the Elements of Negligent Misrepresentation.

As set forth in Dugan v. Jones, supra:

> "The elements of an action in deceit based on fraudulent misrepresentation are:

> (1) a representation; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage."

As it has been noted, in an action based upon negligent misrepresentation, item (4) above requires only the lack of due care and competence on the part of the actor, and not fraud or recklessness.

Defendants submit that the evidence at trial was sufficient from which a jury could find:

(1) Plaintiffs and cross-defendants represented to Mr. Lowenberg that the Option would be for the benefit of the Fiber-Sciences Group and they would either own or participate in the ownership of the Property;

(2) That agreement and intention was an existing material fact;

(3) That fact proved false;

(4) Plaintiffs and cross-defendants made such representation negligently;

(5) That representation was made to induce Mr. Lowenberg to grant the Option;

(6) Mr. Lowenberg acted reasonably and in ignorance of its falsity;

(7) Mr. Lowenberg did in fact rely upon that representation;

(8) Mr. Lowenberg was induced to act by that representation; and

(9) Mr. Lowenberg was damaged thereby.

Defendants submit that the evidence set forth, supra, was sufficient to demonstrate that a jury could have found that all elements were satisfied. In this situation, it was error on the part of the district court to grant directed verdicts.

POINT III. THE DISTRICT COURT ERRED IN RECEIVING AND SIGNING FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBSEQUENT TO RULING ON THE MOTION FOR A DIRECTED VERDICT.

This Court has previously ruled in Smith v. Thornton, 23 Utah 2d 110, 458 P.2d 870 that on a motion for a directed verdict the trial court need not enter findings and conclusions in granting the motion. That ruling was consistent with the language of Rule 52(a) which sets forth those instances in which the district courts are to find facts and state conclusions of law. Rule 52(a) excludes motions under Rule 50.

Not only should a trial court not be required to state findings of fact and conclusions of law, it is inconsistent

with the edicts of Rule 50(a) and the right to a trial by jury for a court to do so. Pursuant to Rule 50(a), a motion for a directed verdict "shall state the specific grounds therefor". It is thus clear that the moving party has the burden of stating with specificity the grounds, factual and legal, upon which a motion for a directed verdict is based. That in turn suggests that it is inappropriate for findings and conclusions to be subsequently entered that could bolster and enlarge upon the specific grounds upon which the motion rested.

As a practical matter, findings of fact and conclusions of law are typically drafted by the successful party. In fact, in this action, the district court invited counsel for plaintiffs to draft findings of fact and conclusions of law. (Tr. pp. 331-332). Plaintiffs' counsel did so, and the district court signed those findings and conclusions over the objection of counsel for defendants. In that situation, the findings and conclusions are not drafted in the light most favorable to the opposing and losing party. Rather, they are drafted, as is customarily the case, to support the decision of the court in granting the motion.

Because upon review of a motion for directed verdict this Court is required to view the evidence in the light most favorable to the party against whom the directed verdict was granted, subsequent findings of fact and conclusions of law must be disregarded.

In O'Brien v. Westinghouse Electric Corp., 293 F.2d 1

(3rd Cir. 1960), motions were granted in a jury trial at the close of plaintiff's case both pursuant to Rule 41(b) and pursuant to Rule 50. In that case, plaintiff on appeal challenged the filing of findings of fact and conclusions of law. The Third Circuit, with respect to its review of the motion for a directed verdict pursuant to Rule 50, ignored the findings of fact and conclusions of law, stating as follows:

> "If the court grants it no findings of fact are necessary and upon review the evidence must be viewed in the light most favorable to the party against whom the motion is made. Hence in this case it is held that no findings of fact were necessary, any indication in Makowsky v. Povlick, supra, to the contrary notwithstanding."
> 293 F.2d at 9.

In order for this Court to review the record in the light most favorable to defendants, as it must, it must ignore the findings of fact and conclusions of law filed subsequently by the court as drafted by counsel for plaintiffs. Defendants respectfully submit that this Court should strike the findings of fact and conclusions of law on the basis that not only are such findings and conclusions not required pursuant to Rule 50, but that they may not be filed by the court in support of the granting of a motion for a directed verdict. Any other rule is an open invitation for the district court to sift and weigh evidence in the same fashion that it would in a non-jury trial.

POINT IV. THERE WAS EVIDENCE PRESENTED FROM WHICH THE JURY COULD HAVE CONCLUDED THAT PLAINTIFFS AND CROSS-DEFENDANTS BREACHED FIDUCIARY OBLIGATIONS OWED TO DEFENDANTS.

A. Evidence Was Presented From Which the Jury Could Have Determined that Plaintiffs and Cross-Defendant Dunahoo Breached Fiduciary Duties Owing to Lowenberg.

Under Utah law the issue of whether a fiduciary duty exists and has been breached is a question of fact to be determined by the jury. (Blodgett v. Martsch, 590 P.2d 298 (1978); McCutcheon v. Brownfield, 2 Wash. App. 348, 467 P.2d 868, 874 (1970)). In so doing, all pertinent facts and circumstances must be considered.

In this action, plaintiffs and Mr. Lowenberg had more than the usual purchaser-seller relationship. Mr. Lowenberg was induced to grant the Option as a result of representations made that it would be for the benefit of, and indeed a personal benefit for, the Fiber-Sciences Group. Mr. Lowenberg was asked to grant a personal benefit to the Fiber-Sciences Group in a transaction that properly only concerned Fiber-Sciences, Inc. and Mr. Lowenberg.

Because of the fact that the Fiber-Sciences Group, through the agency of Mr. Daughtrey, requested a personal and unusual benefit from Mr. Lowenberg, the jury could have easily

inferred that a fiduciary relationship existed, at least to the extent of requiring the Fiber-Sciences Group and plaintiffs to ensure that the representation that the Fiber-Sciences Group would own or participate in the owenrship of the Property was fulfilled. The making of a request for a special personal benefit and the representations made to Mr. Lowenberg are certainly sufficient so that the jury could have determined that a relationship of trust and confidence existed between plaintiffs and the Fiber-Sciences Group on the one hand and Mr. Lowenberg on the other hand.

Certainly, this issue was not addressed by the moving parties in their motion for a directed verdict or by the court in its response thereto. This issue was simply by-passed or perhaps assumed away, sub silentio.

Defendants submit that there was ample evidence presented from which a jury could have determined that a relationship of trust and confidence existed between Mr. Lowenberg on the one hand and plaintiffs and cross-defendant Dunahoo on the other hand and that said relationship of trust and confidence had been breached by the failure of the representations made to Mr. Lowenberg to be fulfilled and, further, by the absence of timely notice to Mr. Lowenberg when it was determined that the Fiber-Sciences Group could not participate in the ownership of the Property.

B. Evidence Was Adduced From Which the Jury Could Have Determined that the Cross-Defendant Bettilyon Breached a Duty of Trust and Confidence.

Cross-defendant Bettilyon Realty Company, by and through its agent and employee, Gerald Daughtrey, had undertaken to find a tenant for Mr. Lowenberg. Subsequently, Mr. Daughtrey registered with Mr. Lowenberg Fiber-Sciences, Inc. That meant that should Fiber-Sciences, Inc. lease or purchase the Property, Bettilyon Realty Company would be entitled to a commission. In fact, a commission of $70,000.00 was paid to Bettilyon Realty by Mr. Lowenberg.

In this situation, a duty of trust and loyalty exists between the owner of property and a licensed real estate agency that undertakes to lease or sell it, or present offers to that effect, for or to the owner.

Unfortunately, Mr. Daughtrey was, in fact, representing both sides in this transaction. He had undertaken to locate for Fiber-Sciences, Inc. a property suitable for its needs. In so doing, he was acting as agent for and on behalf of Fiber-Sciences, Inc.

The practicality of the matter from Bettilyon's and Mr. Daughtrey's standpoint was that if an arrangement could be negotiated whereby Fiber-Sciences, Inc. would lease or purchase the Property from Mr. Lowenberg, then he would be ensured of a commission. If Fiber-Sciences did not lease or purchase the

Property from Mr. Lowenberg, but some other entity so did, Bettilyon and Mr. Daughtrey would not get a commission.

In this situation, it is quite clear that Mr. Daughtrey bent his efforts towards achieving what the Fiber-Sciences officers and Mr. Heimark and his associates wished in derrogation of his duty to arrange or negotiate an optimal situation for Mr. Lowenberg.

Mr. Daughtrey testified that although he attended meetings with Mr. Dunahoo and Mr. Heimark and others, at which the needs of Fiber-Sciences were discussed, he did not report to Mr. Lowenberg what transpired at those meetings. Further, it is abundantly evident that Mr. Daughtrey did not attempt to negotiate a lease of the Property from Fiber-Sciences as Mr. Lowenberg had desired, even though Mr. Daughtrey presumably knew that Fiber-Sciences would agree to lease the Property. Instead, he directed his efforts towards arranging a purchase of the Property, consistent with the wishes of Mr. Dunahoo and Mr. Heimark, but inconsistent with the wishes of Mr. Lowenberg.

From the above, the jury could well have determined that Bettilyon Realty, through Gerald Daughtrey, breached its obligation of trust and confidence owed to Lowenberg in that it did not attempt to arrange a lease as Mr. Lowenberg desired and did not fully report to Mr. Lowenberg all the information Mr. Daughtrey had as to Fiber-Sciences' needs and wishes. As this Court stated in Dugan v. Jones, supra:

> "Though not occupying a fiduciary relationship with prospective purchasers, a real estate agent hired by the vendor is expected to be honest, ethical and competent and is answerable at law for breaches of his or her statutory duty to the public."

The real estate agent owes an even greater duty to the seller of the property whom he represents. He did not fairly and fully represent Lowenberg. Rather, he failed to inform Lowenberg that Fiber-Sciences, Inc. would lease the Property whether or not a purchase option was granted to its officers. This was a clear breach of his duty to Mr. Lowenberg. Caught in a situation of conflict, Mr. Daughtrey chose to represent the interests of Mr. Heimark and Mr. Dunahoo in derrogation to his duty to Mr. Lowenberg.

CONCLUSION

Defendants submit that the foregoing demonstrates conclusively that the district court erred in not allowing the jury to determine matters entrusted to them pursuant to the laws of the State of Utah. Defendants clearly met their burden of presenting evidence from which the jury could have, and probably would have, ruled in favor of defendants and against plaintiffs and cross-defendants. In this situation, the proper remedy is for this Court to remand for a new trial in order that defendants be given their right to a trial by

jury as provided by the Constitution, statutes and decisional law of the State of Utah.

Respectfully submitted this 15th day of January, 1981.

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Brief of Defendants and Cross Plaintiffs - Appellants were mailed, postage prepaid, on this 15th day of January, 1981, to:

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