

1990

Joseph D. Sanders and Cheryl M. Sanders v. Martin
S. Ovard, Reva S. Ovard, Ben F. Ovard, Helen T.
Ovard, and Jax Hayes Pettey : Brief in Opposition
to Certiorari

Utah Supreme Court

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900169

IN THE UTAH SUPREME COURT

JOSEPH D. SANDERS AND
CHERYL M. SANDERS,

Plaintiffs/Appellants,

V.

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

Defendants/Appellees,

V.

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

Counterdefendants.

BRIEF IN OPPOSITION TO
PLAINTIFFS' PETITION FOR
WRIT OF CERTIORARI

Court of Appeals
Docket No. 890063-CA

Petition for Writ of Certiorari
from the Utah Court of Appeals

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MAY 15 1990

Clerk, Supreme Court, Utah

JOSEPH D. SANDERS AND
CHERYL M. SANDERS,

v.

V.

Counterdefendants.

Court of Appeals
Docket No. 890063-CA

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QUESTIONS FOR REVIEW

1. Did the Court of Appeals err in failing to consider Plaintiffs' claims regarding the illegality of Defendants' conduct?

2. Did the Court of Appeals err in denying Plaintiffs' appeal of the trial courts' denial of Plaintiffs' Motion to Amend the Pleading to Conform to the Evidence and for a new trial on the issues of mistake and illegality?

3. Did the Court of Appeals err in denying Plaintiffs' appeal on the issue of whether the trial judge improperly based his decision on his physical inspection of the property at or around the time of trial where the appearance of the property at that time differed greatly from its appearance at the time the alleged misrepresentations occurred?

CONTROLLING STATUTES AND RULES

Rule 34, Utah Rules of Appellate Procedure (1990)

Rule 8(c), Utah Rules of Civil Procedure (1990)

Rule 9(b), Utah Rules of Civil Procedure (1990)

Rule 15(b), Utah Rules of Civil Procedure (1990)

Rule 52(a), Utah Rules of Civil Procedure (1990)

STATEMENT OF THE CASE

Plaintiffs are appealing the Court of Appeals' Order of Affirmance, in which it affirmed: (1) the trial court's judgment awarding damages to Defendants for Plaintiffs' default in payments to Defendants on a Promissory Note, allowing Defendants to judicially foreclose on the Trust Deed securing such payments, and denying Plaintiff's claims for relief; and (2) the trial court's subsequent denial of Plaintiffs' Motion for a New Trial and to amend their pleadings to conform to the evidence.

In March 1979, Defendants Martin S. and Reva S. Ovard purchased two one-acre lots, a "front" lot and a "back" lot, from Layne Newman. (Trial Transcript (hereinafter "Tr.") 58, Trial Exhibits (hereinafter "Ex.") 12-D and 13-D). The transactions were executed by two separate trust deeds, each covering one acre, (Tr. 222). The two lots were purchased for a total of \$58,000 and were closed at separate times (Tr. 206-07, 215, Ex. 21-D).

The lots were part of a subdivision plan of Mr. Newman, encompassing five one-acre lots just north of 650 East 13800 South, Draper, Utah (Tr. 58, 61, 206). However, the subdivision plan was not approved by the City of Draper (Tr. 60). As a consequence, a variance was applied for and granted by the City of Draper so that the Ovard's could build a home on the front lot (Tr. 60-61, Ex. 7-P). The Ovard's request was accompanied by a map showing both lots (Tr. 61, Ex. 6-P). The Ovard's then built a home on the front lot, intending to live there (Tr. 64-65). Before they could move in, the Ovard's ran into financial trouble and sold the house and the

front lot to a Mr. Nipco (Tr. 66). The Ovard's also received money from Mr. Ovard's parents, Defendants Ben and Helen Ovard, and put Ben and Helen Ovard's name on the deed to the back acre so that they could recover their money by sale of the lot (Tr. 65-66, 216). Mr. Nipco subsequently ran into financial troubles and sold the house and the front acre to Plaintiffs in July 1982 (Tr. 67, 151).

In April 1982, Defendants Ovard decided to list the back acre for sale with Alan Whipple, a realtor (Tr. 224). In September 1982, Plaintiffs noticed activity on the back acre and concluded that it might be sold (Tr. 152). Plaintiffs feared that someone would buy the lot, build on it, and obstruct Plaintiffs' view from, and enjoyment of, their property (Tr. 153). Plaintiffs did not want anyone to build on the back acre (Tr. 119-120, 185), and contacted their own realtor, Fred Hale, to discuss buying the adjoining back lot in order to prevent someone from building on it (Tr. 153, 155). Mr. Hale and Plaintiffs then prepared an offer of purchase, and Mr. Hale subsequently presented the offer to Defendants (Tr. 120).

On September 18, 1982, Plaintiffs and Defendants entered into an Earnest Money Agreement, pursuant to which Defendants agreed to sell and Plaintiffs agreed to purchase the back acre for \$26,000 (R. 201). On November 8, 1982, Plaintiffs delivered and Defendants received and recorded a Trust Deed Note (hereinafter "Note") in the amount of \$25,900, with interest at 15% per annum payable on January 15, 1984, and \$25,900 principal, plus then accrued interest, payable on November 15, 1985 (R. 201).

Prior to closing of the sale between Plaintiffs and Defendants, Plaintiffs did not request and Defendants did not offer information concerning a variance on the property or the validity of the subdivision map (R. 202). Subsequent to the closing, Plaintiffs learned that the back lot would require a variance, similar to the variance previously granted to Defendants, before the City of Draper would issue a building permit on the back lot (Tr. 168).

Plaintiffs' only payment to Defendants under the Note has been an interest payment of \$5000 made on March 1, 1984 (R. 202). Plaintiffs did not make the balloon payment that was due on January 15, 1985, and stated that they would not pay it (R. 202, Tr. 213). Defendants then attempted a non-judicial trust deed foreclosure, which was enjoined by Plaintiffs (R. 203).

Plaintiffs filed this fraud action in Third District Court and Defendants counterclaimed to foreclose the Trust Deed. The matter was tried on October 26 and 27, 1987, before the Honorable Frank G. Noel. During the course of the trial, Plaintiffs moved to amend their pleadings to conform to what they claimed was evidence of mutual mistake of fact (Tr. 200), which was a claim and issue not contained in Plaintiff's Complaint (R. 2-18). The Court reserved ruling on this motion (Tr. 204). Plaintiffs did not renew this motion during the remainder of or at the end of trial.

At the close of trial, the trial judge asked if either party objected if he went and viewed the property. Both counsel for Plaintiffs and counsel for the Defendants stated they had no objection (Tr. 264). Judge Noel then took the matter under advisement (Tr. 264).

On December 4, 1987, the court issued a memorandum opinion, finding in favor of Defendants on their counterclaim, and finding no cause of action on Plaintiffs' claim (R. 142-43). Plaintiffs thereafter filed a Motion for New Trial and to Amend the Pleadings to Conform to the Evidence, this time to assert claims of illegality and unilateral mistake (R. 216-217, 227-229). These motions were denied (R. 256), and Plaintiffs appealed.

On March 14, 1990, counsel for the parties presented oral argument to a panel of the Utah Court of Appeals. A decision was rendered that same day, denying Plaintiffs' appeal. Plaintiffs now seek a Writ of Certiorari and review of that decision.

REASONS WHY THE CASE SHOULD NOT BE REVIEWED

- I. PLAINTIFFS HAVE NOT MET THE REQUIREMENTS OF RULE 46, UTAH RULES OF APPELLATE PROCEDURE, FOR THE GRANTING OF PLAINTIFFS' PETITION FOR WRIT OF CERTIORARI.

Plaintiffs assert that this Court should exercise jurisdiction to review the decision of the Utah Court of Appeals, pursuant to Rule 46 of the Utah Rules of Appellate Procedure. That Rule lists four reasons for granting a Writ of Certiorari which, "while neither controlling nor wholly measuring the Supreme Court's discretion, indicate the character of reasons that will be considered." Those reasons include:

(a) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;

(b) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court;

(c) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision; or

(d) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by the Supreme Court.

None of these reasons exist in Plaintiffs' Petition. As the following arguments illustrate, the trial court's decisions are completely consistent with Utah statutory and case law. There is no conflict between the trial court's or Court of Appeals' decisions, as compared with other decisions rendered by this Court or by the Court of Appeals, or with the laws of the State of Utah. Nor are there any special and important reasons to grant Plaintiffs' Petition. The Court of Appeals recognized this, in light of its disposition of this case the same day that it was heard, pursuant to a Rule 31, Utah R. App. P., proceeding.

For these reasons, the requirements of Rule 46 are not met, and this Court must deny Plaintiff's Petition for Writ of Certiorari.

II. THE EVIDENCE ON THE ISSUE OF DEFENDANTS' ALLEGED ILLEGALITY WAS NOT SUFFICIENT TO JUSTIFY A REVERSAL OF THE TRIAL COURT AND A NEW TRIAL.

To avoid a contractual obligation by claiming illegality, an appellant must show clearly and unequivocally that the contract is illegal. Mitchell v. American Savings and Loan Association, 593 P.2d 692, 694 (Ariz. Ct. App. 1979). Plaintiffs cannot show that the contract between Plaintiffs and Defendants was illegal, and have misconstrued the application of the illegality defense.

The illegality defense applies to contracts which are themselves prohibited by law or contrary to public policy. See Williams v. Continental Life and Accident Co., 593 P.2d 708 (Idaho 1979); Greer v. Northwestern National Insurance Co., 674 P.2d 1257 (Wash. Ct. App. 1984). Plaintiffs have argued that the contract in question is itself prohibited by law or contrary to public policy, and cite two statutes to that effect. This argument fails for several reasons.

First, Defendants' basic premise of illegality, i.e., the illegal division of land, is unfounded, as the record clearly shows that the land was divided into two one-acre parcels when Defendants initially purchased the land (Tr. 58, 222; Ex. 12-D and 13-D). Defendants merely sold the land to Plaintiffs in the same manner that they had bought it, unaware that such a transaction might be called "illegal."

Second, Plaintiffs cite §§ 57-5-3, -5 and 10-9-26, Utah Code Ann. (1953 as amended), in an attempt to show that the sale of land by Defendants to Plaintiffs was illegal, thereby subjecting Defendants to civil liability. This Court addressed that argument in Ellis v. Hale, 373 P.2d 382 (Utah 1962). There, faced with facts surprisingly similar to those in the present case, the Court stated as follows:

Plaintiffs argue that the defendants, in selling the lots, violated the provisions of ... our state statutes.... [citing § 57-5-5, U.C.A. 1953] However, the laws here have as their object the intelligent and orderly development of the community, and, to effectuate this purpose, criminal sanctions were imposed. They were not enacted to promote safety, and they do not attempt to lay down rules regulating the conduct of individuals inter se. Their purpose is to impose a duty running to the sovereign, and a violation thereof does not necessarily give rise to civil liability.

Id. at 384 (emphasis added).

Based on the reasoning in Hale, this Court should not allow Plaintiffs to attack their contract based on an alleged violation of state statutes by Defendants, when, even assuming such a violation, it does not give rise to civil liability.

Third, Plaintiffs must convince this Court to allow them to raise the issues of illegality for the first time on appeal, since they did not raise them in their Complaint, and the trial court did not allow such issues to be heard. Plaintiffs cite two cases in other jurisdictions, which state that when an important public policy is concerned, illegality may be raised for the first time on appeal. See Mitchell and Greer, supra.

An important public policy does not exist in this case to allow Plaintiffs to raise the issue of illegality. This Court in Hale recognized that, by stating that a violation of the "lot" statutes did not give rise to civil liability.

III. THE TRIAL COURT'S DECISION TO DENY PLAINTIFFS' MOTION TO AMEND THE PLEADINGS TO CONFORM TO THE EVIDENCE SHOULD NOT BE DISTURBED

When issues not formally raised in the pleadings are tried by the express or implied consent of the parties, Rule 15(b) of the Utah Rules of Civil Procedure (hereinafter "Rule 15(b)") allows the amendment of the pleadings. That the issue has been tried by the consent of the parties must be evident from the record. Colman v. Colman, 743 P.2d 782 (Utah Ct. App. 1987) (citations omitted). Further, it must "appear that the parties understood the evidence was to be aimed at the unpleaded issue." Id. at 785.

a. The trial court's decision to deny plaintiff's motion was within the sound discretion of the court.

This court has stated that there is a mandatory requirement to allow a party to amend its pleadings to conform to the evidence when issues are tried by the express or implied consent of the parties. Lloyd's Unlimited v. Nature's Way Marketing, Ltd., 753 P.2d 507, 509 (Utah Ct. App. 1988). However, the question of whether the issues have been sufficiently tried, and thus the ultimate decision as to whether the amendment should be allowed, remains in the sound discretion of the court. Stratford v. Morgan, 689 P.2d 360 (Utah 1984); Westley v. Farmer's Insurance Exchange, 663 P.2d 93 (Utah 1983). Implied consent to try an issue may be found where there is no objection to introduction of supporting

evidence by an opposing party, and where it appears that the opposing party understood that such evidence was aimed at an unpleaded issue. In any event, the opposing party must have had a fair opportunity to defend and introduce evidence. See Colman, supra at 785.

In the present case, Plaintiffs have not shown that the denial of the Rule 15(b) motion was a clear abuse of discretion. To do so, Plaintiffs have to show that they sufficiently tried the issues of illegality and mistake. Plaintiffs cite Colman to show that they have done so. However, the issue in Colman, that of alter ego, was "fully tried," and evidence concerning "every element" was introduced without objection. Colman, supra at 785.

Any claimed evidence of illegality or unilateral mistake introduced by Plaintiffs in the instant case would also support Plaintiffs' claim of fraud. Plaintiffs' counsel even acknowledged and argued such fact with respect to mistake (Tr. 241-243).

The mere introduction of claimed evidence of mistake did not therefore place Defendants on notice that it was aimed at unpleaded issues of mistake as is required by Colman, supra. The motion of Plaintiffs' counsel at trial (Tr. 200-204) to amend their pleading to assert mistake was the first act that could be argued to have placed Defendants on notice that Plaintiffs were asserting or relying on a claim of mistake. Defendants immediately objected to such motion (Tr. 200).

Any introduction by Plaintiffs of claimed evidence of illegality likewise supported Plaintiffs' claims of fraud and did not place Defendants on notice that such evidence was aimed at a claim of illegality. Plaintiffs did not move to amend their pleadings to assert illegality during trial when such a motion was made as to mistake (Tr. 200-204), but such motion was made after trial and after judgment had been entered (R. 210-214, 216-17).

Because Defendants were without notice that Plaintiffs were introducing evidence aimed at mistake and illegality at the time that the alleged evidence of such theories was introduced, any alleged trial of such issues was not with actual or implied consent of Defendants and was inadvertent. Defendants did not therefore have fair opportunity to defend. This was so, especially with respect to the motion on illegality which was not made until after trial and after formal judgment was entered. Plaintiffs have therefore not satisfied the requirements set forth in Colman.

b. Plaintiffs did not sufficiently plead illegality.

Rule 8(c) of the Utah Rules of Civil Procedure requires that a party must affirmatively set forth the affirmative defense of illegality. In their Petition, Plaintiffs point to page 60 of the Trial Transcript to support their argument that illegality was sufficiently raised at trial. (Petition for Writ of Certiorari, 5). However, there is nothing on that page or in any section of the record which states that Defendants' actions were illegal.

At trial, Plaintiffs merely alleged that Defendants' division of the land is subject to land use regulations (Tr. 17, 19 & 23). The only time at trial where illegality was conceivably argued concerns arguments of counsel during an objection at trial (Tr. 175, 178-79). However, these sections of the Trial Transcript are not evidence and cannot be considered in determining whether Plaintiffs pleaded illegality.

The defense of illegality does not apply to this case. Even if this court finds that it does, Plaintiffs did not sufficiently plead it at trial.

c. Plaintiffs did not sufficiently plead mistake.

When Plaintiffs appealed to the Court of Appeals, they argued that a mutual mistake of fact had been made, and attempted to support that allegation (Brief of Appellants, p. 9). Plaintiffs again raise that argument in their Petition, but this time fail to support it at all (Petition for Writ of Certiorari, p. 7).

Rule 9(b) of the Utah Rules of Civil Procedure requires that "all averments of ... mistake shall be stated with particularity." The nature of mistake ultimately relied upon by Plaintiffs is unilateral mistake (R. 227-229), and their brief focuses only on the mistake of Plaintiff Joseph Sanders.

The Utah Supreme Court has stated the elements that must be established under unilateral mistake:

- (1) The mistake must be of so grave a consequence that to enforce the contract as actually made would be unconscionable.
- (2) The matter as to which mistake was made must relate to a material feature of the contract.

(3) Generally the mistake must have occurred notwithstanding the exercise of ordinary diligence by the party making the mistake.

(4) It must be possible to give relief ... without serious prejudice to the other party except the loss of his bargain. In other words, it must put him in statu [sic] quo.

Briggs v. Liddell, 699 P.2d 770, 773 (Utah 1985) (citations omitted).

Using the same analysis as the Briggs court, even if Plaintiffs' evidence is viewed favorably to them, it is still deficient as to at least one element, i.e., the exercise of ordinary diligence. Id. The trial court concluded that "Plaintiffs failed to exercise due diligence at the time of purchase to determine the status of the Property," and that "under the totality of the circumstances, a reasonable person should have been alerted that there may be access problems ... that should have been investigated." (R. 205-06) Therefore, Plaintiffs have not met their burden of sufficiently pleading unilateral mistake.

d. Plaintiffs have not marshalled the evidence, but rather have only recited the facts that favor their side.

Under Rule 52(a), Utah Rules of Civil Procedure, an "appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989) (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987)). In Bartell, a widowed spouse

appealed from a finding that she had been omitted from her deceased husband's will. As in Bartell, Plaintiffs in this case have

not even attempted to marshal the evidence in support of the trial court's findings, nor [have they] attempted to demonstrate that the trial court's findings are against the clear weight of the evidence, as required by Walker. Instead, [they] have essentially reargued the factual case submitted below, construing all evidence in a light most favorable to [their] case and largely ignoring the evidence supportive of the trial court's findings.

Id.

Because the question of whether Plaintiffs sufficiently plead the issues of mistake and illegality is a question of fact, and because Plaintiffs did not marshal the evidence in support of the trial court's findings, this Court must "rely heavily on the presumption of correctness that attends [the trial court's] findings," and affirm its judgment. Id.

IV. THE TRIAL COURT'S VIEWING OF THE PROPERTY IN DISPUTE WAS PROPER.

Plaintiffs contend that the trial judge erred in viewing the property in dispute because, in doing so, he relied on extrinsic evidence gathered at the viewing to find in favor of Defendants. Plaintiffs' contention is based on conjecture and speculation and is without merit, as they have read misguided and unsupported interpretations into the trial judge's conclusions of law.

A decision by the court to view the property in a dispute rests within the sound discretion of the court. O'Connor v. Dory Corp., 381 A.2d 559 (Conn. 1977). The purpose of such a viewing "is to assist in interpreting and resolving differences in evidence," rather than to supply evidence totally lacking. Weber

Basin Water Conservancy District v. Moore, 272 P.2d 176, 177 (Utah 1954). At trial in this case, conflicting evidence was presented as to whether a cul-de-sac existed at the time Defendants purchased the property in dispute (Tr. 62, 172). Plaintiffs allege that no cul-de-sac existed at the time they purchased the property, and that the conditions of the property have changed dramatically since that time. However, the Affidavits of neighboring residents submitted by Defendants state that the area is virtually identical now to what it was at the time the Plaintiffs purchased the property (R. 238-39, 242-44). The only changes have been the installation of a cement gutter around the cul-de-sac, not to define the cul-de-sac, but to control water run-off; the planting of shrubs and plants on private property near the cul-de-sac; and the installation of a cement wall on the front of private property which adjoins the cul-de-sac (R. 239, 243-44). None of these changes have caused the property to change dramatically in appearance.

After viewing the property at the conclusion of the trial, the trial court stated in its Memorandum Opinion that:

after having viewed the property, that due to the location of the property, the road leading from the main paved road ending in what appears to be somewhat of a cul-de-sac [sic], and under the totality of the circumstances, a reasonable person should have been alerted that there may be access problems associated with the back parcel that should be investigated.

(R. 142-43, 205-06). Plaintiffs have not shown that any of these factors considered by the trial judge did not exist at the time they purchased the property in question.

The Colorado Court of Appeals has dealt with this issue in a similar case. In Thomas v. National State Bank, 628 P.2d 188 (Colo. Ct. App. 1981), there was a dispute as to whether a house had been negligently constructed. Defendants contended that the trial court had erred in allegedly basing one of its findings in part on its viewing of the premises. The trial court had announced at the end of trial that it wished to view the property and received no objection from counsel. In finding for the plaintiff, the trial court stated, "This [the finding for the Plaintiff] is apparent both from the topographical map [introduced into evidence by defendants] and from a view of the premises which the court made" Id. at 190 (quoting trial court). The court of appeals stated that under these circumstances, defendants' argument was without merit. Id. (citations omitted).

Defendants are merely speculating when they allege that the trial court relied heavily on his viewing. The trial court in fact dispelled that notion in its Order Denying Motions for New Trial and to Amend the Pleadings to Conform to the Evidence, when it stated that its viewing of the property in question was not of primary importance to its decision (R. 255-256). Even if it did put some reliance on the viewing, its reliance was proper, as it was only to assist in resolving differences in the evidence already presented.

Finally, the trial court's viewing of the property was agreed to by both Plaintiffs and Defendants (Tr. 264). After such agreement and failure to object to the viewing prior to its

occurrence, and after being given the opportunity by the trial court to object, Plaintiffs' later objection is precluded and without merit.

ATTORNEY'S FEES AND COSTS

The promissory note sued upon by Defendants provides for attorney's fees to Defendants upon default by Plaintiffs in payment of the same (Exh. 2-P). Defendants should therefore be awarded attorney's fees and costs on this appeal, with the amount thereof to be determined by the trial court upon remand for that purpose.

In addition, if this Court refuses to grant Plaintiffs' Petition for Writ of Certiorari, Defendants should be granted their costs in opposing Plaintiffs' Petition, pursuant to Rule 34, Utah Rules of Appellate Procedure.

CONCLUSION

Defendants ask this court to deny Plaintiff's Petition for a Writ of Certiorari for several reasons. First, Plaintiffs have not met any of the requirements of Rule 46, Utah R. App. P. Second, the evidence on the issue of defendants' alleged illegality was not sufficient to justify a reversal of the trial court and a new trial, nor does such alleged illegality give rise to civil liability. Third, the trial court's refusal to allow Plaintiffs to amend their pleadings to conform to the evidence was within the court's discretion, as Plaintiffs did not sufficiently plead illegality or mistake, and Plaintiffs have failed to marshal the evidence to show otherwise. Finally, the trial court's viewing of

the property in dispute was proper, and its subsequent decision was based on evidence in the record.


WHEREFORE, Defendants ask that this Court deny Plaintiffs' Petition for Writ of Certiorari, and award Defendants their fees and costs in opposing the same.

DATED this 4th day of May, 1990.

CROWTHER & REED



Thomas N. Crowther



Michael L. Labertew

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Four copies of the foregoing Brief in Opposition to Writ of Certiorari were mailed in the United States Mail, postage prepaid, to Plaintiffs' Attorney, Frederick N. Green, at GREEN & BERRY, 528 Newhouse Building, 10 Exchange Place, Salt Lake City, Utah 84111, this 4th day of May, 1990.



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FILED

IN THE UTAH COURT OF APPEALS

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MAR 15 1990
Mary S. ...
Utah Court of Appeals

Joseph D. Sanders and Cheryl M.)
Sanders,)

Plaintiff and Appellants,)

v.)

Martin S. Ovard, Reva S. Ovard,)
Ben F. Ovard, Helen T. Ovard)
and Jax Hayes Pettery,)

Defendants and Respondents.)

v.)

Joseph D. Sanders, Cheryl M.)
Sanders; Utah State Tax)
Commission; Salt Lake)
County; and Insurance Company)
of North America,)

Counterdefendants.)

ORDER OF AFFIRMANCE

Case No. 890063-CA

Before Judges Garff, Billings, and Davidson (on Rule 31
Hearing).

The judgment and findings of the trial court are
supported by the evidence and the record before the trial
court. Also, there was no abuse of discretion in refusing to
allow plaintiff's amendment.

The judgment is affirmed.

Dated this 14th day of March, 1990.

FOR THE COURT:

[Signature]
Regnal W. Garff, Judge

Ronald Dean Lancaster, pro se.

David L. Wilkinson, Kimberly Hornak, Salt Lake City, for defendants and respondents.

PER CURIAM:

Plaintiff filed, in *propria persona*, a petition for post-conviction relief in the trial court with respect to his guilty plea to and subsequent conviction of second degree murder. The trial court dismissed the petition as inappropriate, as plaintiff had not brought a motion to withdraw his guilty plea and a collateral attack under rule 65B of the Utah Rules of Civil Procedure was therefore not permissible. We reverse and remand for entry of findings on the merits.

In response to plaintiff's petition, the State brought a motion to dismiss on the ground that under the rationale of *State v. Gibbons*, 740 P.2d 1309 (Utah 1987), plaintiff was precluded from bringing a motion for post-conviction relief until he had first brought a motion to set aside his guilty plea. The trial court adopted that rationale in its order denying writ of habeas corpus, and the State repeats it before this Court in challenging the merits of plaintiff's habeas corpus petition.

State v. Gibbons is inapposite here. Gibbons pleaded guilty to several charges and then appealed *directly* after the trial court had sentenced him to consecutive terms of imprisonment. He did not file a motion to withdraw his guilty plea before perfecting his appeal, and the State argued that this Court should decline to consider the guilty plea issue because it was not raised below, 740 P.2d at 1311. This Court declined to follow the State's request and remanded the case to enable Gibbons to file a motion to withdraw his guilty plea, retaining jurisdiction over the case for further action. *State v. Gibbons* did not represent a collateral attack on the guilty plea.

Conversely here, plaintiff filed a post-conviction petition to challenge the validity of his guilty plea some nine years after the time for a direct appeal had run. It appears from his handwritten pleadings that he was originally charged with first degree murder, but pleaded to second degree mur-

der when the prosecution was unable to prove the aggravating circumstances with which he had been charged. In his habeas corpus petition, plaintiff appears to allege that he thought he had pleaded to "unintentional murder" and that he should have been sentenced to one to fifteen years' imprisonment instead of five years to life. Plaintiff stated that he was innocent of knowingly and intentionally committing the offense and was therefore unlawfully imprisoned and that he had been denied due process and effective assistance of counsel. In addition, plaintiff challenged the constitutionality of the statutes under which he was charged and sentenced.

This Court has repeatedly stated that habeas corpus is not a substitute for and cannot be used to perform the function of regular appellate review. *Porter v. Cook*, 747 P.2d 1031, 1032 (Utah 1987); *Codianna v. Morris*, 660 P.2d 1101, 1104 (Utah 1983); *Martinez v. Smith*, 602 P.2d 700, 702 (Utah 1979). But it has also recognized that review by habeas corpus is appropriate in unusual circumstances to assure fundamental fairness and to reexamine a conviction when the nature of the alleged error is such that it would be unconscionable not to reexamine. *Codianna*, 660 P.2d at 1115 (Stewart, J., concurring in result). Moreover, rule 65B(f) of the Utah Rules of Civil Procedure specifically provides that a prisoner who asserts a substantial denial of his constitutional rights "may institute a proceeding under this rule." See also *Martinez v. Smith*, *supra*, where this Court held a petition for habeas corpus reviewable without first requiring the withdrawal of a guilty plea. Given the allegations plaintiff made in his petition, it was therefore error for the trial court to dismiss the petition without granting a hearing.

Without the benefit of findings, this Court is in no position to review the validity of plaintiff's claims. It is safe to assume that trial courts prefer to give short shrift to the many post-conviction petitions which they decide lack merit. It is equally safe to assume that an appellate court will be unable to review the case in a vacuum

LLOYD'S UNLIMITED v. NATURE'S WAY

Utah 507

Cite as 753 P.2d 507 (Utah App. 1988)

and will have to remand it where no rationale for dismissal or denial is given. A simple finding, on the other hand, will suffice in the vast majority of cases to limit the judicial process to one review. The trial court's basis for dismissing plaintiff's petition in this case was erroneous, as stated. The record is too sparse for this Court to determine whether the issues raised by the pleadings were legal, so that it could affirm the trial court on the ground that the claims were properly resolved as a matter of law. See *Gonzales v. Morris*, 610 P.2d 1285, 1286 (Utah 1980). Instead, it appears that plaintiff claims irregularity in the reception of his guilty plea, an issue that should have been considered by the trial court.

The case is remanded for entry of findings on the merits.



LLOYD'S UNLIMITED, a corporation,
Plaintiff and Appellant,

v.

NATURE'S WAY MARKETING, LTD.,
a corporation, Defendant and
Respondent.

No. 860311-CA.

Court of Appeals of Utah.

April 21, 1988.

Middleman brought action for breach of contract against supplier, seeking accounting and judgment for sums due under contract. The Third District Court, Salt Lake County, Dean E. Conder, J., entered judgment in favor of supplier, and middleman appealed. The Court of Appeals, Greenwood, J., held that: (1) trial court erred in denying middleman's motion to amend to include cause of action for reformation of contract so the commission schedules could be changed; (2) middleman

was not precluded from seeking reformation of commission schedule under contract; and (3) middleman was not entitled to recover costs of deposing two witnesses and serving subpoena on one witness.

Vacated and remanded.

1. Pleading \Rightarrow 248(4)

In breach of contract action in which middleman who sold "coffee extender product" for supplier sought to recover commissions under contract with supplier, trial court erred in denying middleman's motion to amend to include cause of action for reformation of contract so the commission schedules could be changed; issue of commission schedules was not raised until second day of trial and court did not allow middleman to submit evidence on issue of parties' intent in entering contract.

2. Reformation of Instruments \Rightarrow 25

Middleman who sold "coffee extender product" for supplier was not precluded from seeking reformation of commission schedule under contract with supplier because contract included integration clause.

3. Reformation of Instruments \Rightarrow 36(1), 45(1)

Reformation of contract is equitable remedy which must be pled with particularity and established by clear and convincing proof.

4. Costs \Rightarrow 176, 193

In middleman's action against supplier to recover commissions under contract with supplier, middleman was not entitled to recover costs of deposing two witnesses and serving subpoena on one witness. Rules Civ.Proc., Rule 54(d).

5. Costs \Rightarrow 207

Party claiming entitlement to cost of depositions has burden of demonstrating that depositions were reasonably necessary and whether that burden is met is within sound discretion of trial court. Rules Civ.Proc., Rule 54(d).

6. Appeal and Error \Rightarrow 984(1)

Trial court's ruling on whether to award party the costs of depositions is pre-

sumed correct and will not be disturbed unless it is so unreasonable as to manifest clear abuse of discretion. Rules Civ.Proc., Rule 54(d).

Kevin J. Sutterfield (argued), Leslie W. Slauch, Ray G. Martineau, P.C., Provo, for plaintiff and appellant.

Terry M. Crellin (argued), M. Wayne Western, Thorpe, North & Western, Sandy, for defendant and respondent.

Before GREENWOOD, BILLINGS and BENCH, JJ.

OPINION

GREENWOOD, Judge:

Plaintiff, Lloyd's Unlimited (Lloyd's), initiated this action against defendant, Nature's Way Marketing, Ltd. (Nature's Way), for breach of contract, seeking an accounting and judgment for sums due under the contract. The court found that the parties had entered into a valid and enforceable contract and awarded Lloyd's \$416.25. Lloyd's appeals, claiming that the court improperly denied its motion to amend the complaint to include a cause of action for reformation and that the trial court's findings of fact were clearly erroneous. Lloyd's requests modification of the lower court's award and entry of judgment against Nature's Way for \$39,710.41. Alternatively, Lloyd's requests that the judgment be vacated and the case remanded. We reverse and remand.

FACTS

In early 1982, Lloyd Dowdle (Dowdle), president of Lloyd's, and Lynn Burningham (Burningham), president of Nature's Way, began negotiating terms of a contract involving a "coffee extender product" (product). The contract was to provide that Lloyd's would receive a commission from Nature's Way for product sold to Yurika Foods Corporation (Yurika) by Nature's Way in consideration of Lloyd's efforts in inducing Yurika to purchase and market the product. In early August 1982, Dowdle drafted a handwritten document

which stated that Lloyd's would receive \$1.00 commission for each pound of product sold. On August 11, 1982, after Dowdle and Burningham discussed the document, Dowdle crossed out the commission paragraph he had drafted and inserted a new schedule in the handwritten contract which, as found by the trial court, provided the following commission schedule:

1 unit—60 packets pack:	25¢
1 unit—2 lb. bulk pack:	35¢
1 unit—5 lb. bulk pack:	50¢
1 unit—37 lb. bulk pack:	\$1.00

The parties then signed the agreement. Several days later, Dowdle's secretary typed the agreement from the handwritten version. The typewritten agreement set forth the same commission schedule as set out above except the commission on the 5 lb. bulk pack was .50¢ rather than 50¢. The typewritten agreement also repeated verbatim the following clause from the handwritten agreement: "This agreement contains the entire understanding of the parties hereto and may not be altered, amended, modified, or discharged in any way whatsoever except by subsequent agreement in writing by all parties hereto." The parties then signed the typewritten agreement and Nature's Way paid Lloyd's \$500, representing commission earned from April 24, 1982 to August 1, 1982. The parties did not make a formal accounting of the sizes or amount of the product sold to earn the \$500 commission.

Between August 1, 1982 and February 28, 1984, Nature's Way received more than \$625,000 for product sold to Yurika but failed to pay any commissions to Lloyd's. Subsequently, Lloyd's initiated this action, alleging in paragraph 5 of its complaint that Nature's Way owed it commissions based on the following commission schedule:

60 packets pack:	\$ 25
2 lb. bulk pack:	35
5 lb. bulk pack:	50
37 lb. bulk pack:	1.00

Nature's Way's answer to paragraph 5 stated "Defendant denies the validity of the agreement and therefore denies the allegations in paragraph 5 of the Plaintiff's complaint to the effect that defendant is

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obligated or indebted to Plaintiff in any sum of money."

After two days of trial, the judge found the contract was enforceable and awarded commissions to Lloyd's based on the lesser commission amounts stated in the typewritten contract, rather than those set forth in Lloyd's complaint. Subsequently, Lloyd's filed a motion to amend its complaint to include a cause of action for reformation of the contract, stating that it was not aware until the second day of trial that Nature's Way contested the commission schedule Lloyd's had asserted in its complaint.

After both parties filed extensive memoranda and several post-trial motions, the court ruled that the typewritten agreement was a valid, integrated and enforceable contract, awarded Lloyd's \$416.25, and denied the motion to amend the complaint. The court denied Lloyd's its requested costs incurred in taking Burningham's deposition and in serving Burningham with a subpoena.

On appeal, Lloyd's claims that: 1) the trial court erred in denying its motion to amend the complaint to include a cause of action for reformation; 2) the trial court erred in failing to award Lloyd's its costs of depositions and service of subpoenas; and 3) the trial court's findings of fact are not supported by the evidence.

I. MOTION TO AMEND COMPLAINT

A. Amendment of Pleadings

Lloyd's first contention is that the trial court erred in denying its motion to amend the complaint. Amendment of pleadings is specifically addressed in Utah R.Civ.P. 15(b), which states:

[1] When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the

trial of these issues. [2] If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

There are two parts to Utah R.Civ.P. 15(b). *General Ins. Co. of Am. v. Carnicerro Dynasty Corp.*, 545 P.2d 502, 505-06 (Utah 1976). Under the first part of the rule, it is mandatory for the trial court to grant leave to amend pleadings to conform to the evidence to include issues tried by the express or implied consent of the parties. *Poulsen v. Poulsen*, 672 P.2d 97, 99 (Utah 1983); *General Ins. Co.*, 545 P.2d at 505-06. The second part of the rule is permissive and allows the pleadings to be amended when evidence is objected to at trial on the ground that it raises issues not framed by the pleadings. *General Ins. Co.*, 545 P.2d at 506. Utah R.Civ.P. 8(b) states that "[w]hen a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder." Subsection (d) of the same rule further provides that "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."

The Utah Supreme Court discussed the proper application and purpose of the pleading rules in *Cheney v. Rucker*, 14 Utah 2d 205, 211, 381 P.2d 86, 91 (1963), as follows:

They must all be looked to in the light of their even more fundamental purpose of liberalizing both pleading and procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertain-

ing to their dispute. What they are entitled to is notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is required. Our rules provide for liberality to allow examination into and settlement of all issues bearing upon the controversy, but safeguard the rights of the other party to have a reasonable time to meet a new issue if he so requests.

Accord Williams v. State Farm Ins. Co., 656 P.2d 966, 970-71 (Utah 1982).

B. Procedural Background

In order to properly assess the validity of the trial court's rulings, we must first provide a rather detailed description of the procedural history of this case.

The record reveals that proceedings in this matter focused on Lloyd's theory of lack of consideration, up until the second day of trial. As stated earlier, Nature's Way's answer to the complaint generally denied liability under the contract, without specifically addressing the commission rate amounts alleged in the complaint. The answer also included an affirmative defense of lack of consideration. Prior to trial, Lloyd's filed a motion for partial summary judgment, seeking judgment in the sum of \$31,545.64 plus accruing interest. The motion was supported by the affidavit of a certified public accountant which calculated the amount due under the contract utilizing the commission schedule as alleged in the complaint and invoices of sales made by Nature's Way to Yurika. Lloyd's memorandum in support of the motion and "Statement of Uncontested Facts" again set forth the same schedule as in the complaint. Nature's Way's memorandum in opposition to the motion for summary judgment states "Defendant has no objection to what plaintiff has set out as uncontested facts other than that important uncontested facts were omitted." The memorandum then sets forth additional "facts" but does not mention the commission rate amounts. The court denied the motion for summary judgment.

1. This testimony strikes us as inconsistent with Nature's Way's contention that the agreement

During the first day of trial, the parties addressed, almost exclusively, the question of what consideration Lloyd's was to provide in order to earn the commission. Burningham testified that he expected Dowdle to do a lot of traveling to procure sales for Nature's Way, and that in regard to payment of Dowdle's travel expenses, "That's the reason why I offered the commission. And I offered that—I offered it to him because it would have been very lucrative for him."¹

On the second day of trial, Burningham testified under direct examination as to what the contract said, as follows:

Q. What does it state will be payable for one unit of the two-pound bulk pack?

A. .25 cents.

Q. .25 cents?

A. That's correct.

Q. Quarter of a cent, I guess.

On cross examination, Lloyd's counsel began to question Burningham about the intent of the parties on the commission rate amounts. The trial court sustained Nature's Way's objection to such questioning.

After trial, but before the court entered its findings of fact and conclusions of law, Lloyd's filed a motion for an order granting leave to file an amended complaint to conform to the evidence to include a cause of action for reformation of the contract. Lloyd's also filed a post trial memorandum which included excerpts from the deposition of Burningham, as follows:

Q. Had you made commissions to Lloyd's ... you would pay him 35 cents for each two pound bulk pack?

A. Correct.

Q. Based on the 300 figure?

A. Correct.

Q. For the five pound bulk you would pay him 50 cents based on the 180 figure?

A. Correct.

Lloyd's also submitted Dowdle's affidavit which stated that he habitually noted de-

yielded commissions of only \$416.25 over the time period in question.

mal points erroneously, as was done on at least part of the handwritten agreement.

Several months after the trial, the court entered findings of fact, which included the following: the handwritten agreement executed by the parties had commission rates of .25¢, .35¢, .50¢, and \$1.00; the typed agreement executed by the parties had commission rates of .25¢, .35¢, .50¢, and \$1.00; and the intent of the parties with respect to commissions did not change between execution of the two agreements. Further, the court found that the parties had stipulated to the amount of product sold during the time in question. The court concluded that the typed contract was a valid, integrated and enforceable contract and entered judgment for \$487.87 and costs of \$138.77.

The court denied the motion to amend the complaint to include a cause of action for reformation.

C. Application of Law

In this case, when, on the second day of trial, Burningham first testified that the commission for a sixty pound bulk pack was a quarter of a cent, Lloyd's attorney did not object to the testimony on the ground that it was not within the issues framed by the pleadings. Therefore, because no objection was raised, we conclude that there was implied consent to trying of the issue and the first part of Rule 15(b) applies, allowing consideration of the issue. On the other hand, Lloyd's had notice of the issue of commission rates only on the second day of trial, and by the court's rulings, had no adequate opportunity to meet the issue. We, therefore, also find that it was an abuse of discretion to concomitantly disallow Lloyd's to respond to the newly raised issue, by the court's refusal to consider evidence of intent and denial of the motion to amend the complaint to plead reformation of contract. There was no evidence of prejudice which would result to Nature's Way and, indeed, amendment would allow realization of one of the criteria under Rule 15(b)—"presentation of the merits of the action."

2. The court may have believed reformation was not available for other reasons, but the inte-

[1] Consequently, we hold that the trial court erred in denying the motion to amend to include a cause of action for reformation of the contract where the issue of commission schedules was not raised until the second day of trial and where the court did not allow Lloyd's to submit evidence on the issue of the parties' intent in entering the contract. Because the motion to amend should have been granted, we reverse and remand for further proceedings on the reformation issue.

D. Reformation of Contract

[2,3] We further note that the trial court apparently believed that the typewritten agreement could not, as a matter of law, be reformed, because of the integration clause included in the contract.² Reformation of a contract is an equitable remedy which must be pled with particularity and established by clear and convincing proof. *Briggs v. Liddell*, 699 P.2d 770, 772 (Utah 1985). The *Briggs* court stated:

A contract may be reformed for either of two reasons. First, if the instrument does not embody the intentions of both parties to the contract, a mutual mistake has occurred, and reformation is appropriate. Second, if one party is laboring under a mistake about a contract term and that mistake either has been induced by the other party or is known by and conceded to by the other party, then the inequitable nature of the other party's conduct will have the same operable effect as a mistake, and reformation is permissible.

Id. at 772. Reformation has also been applied in instances of drafter error. "Reformation is clearly appropriate where there is a variance between the written deed and the true agreement of the parties caused by a draftsman." *Hottinger v. Jensen*, 684 P.2d 1271, 1273 (Utah 1984).

On remand, the court should allow Lloyd's to present whatever evidence it can muster to establish its right to reformation of the contract. Moreover, it is not pre-

gration clause was the only rationale mentioned by the court.

cluded from doing so by the integration clause included in the contract. An integration clause may prevent enforcement of prior or contemporaneous agreements on the same subject, but "does not prevent proof of fraudulent representations by a party to the contract, or of illegality, accident, or mistake.... [P]aper and ink possess no magic power to cause statements of fact to be true when they are actually untrue." *Corbin on Contracts*, § 578 at 405-07 (1960).

II. COSTS

[4-6] Lloyd's also contends that the court erred in failing to award it the costs of deposing Burningham and Webb and serving a subpoena on Burningham. Utah R.Civ.P. 54(d) provides that except as the rule otherwise provides, "costs shall be allowed as of course to the prevailing party unless the court otherwise directs...." The general rule is that under Utah R.Civ.P. 54(d) "costs" means those fees which are "required to be paid to the court and to witnesses...." *Frampton v. Wilson*, 605 P.2d 771, 774 (Utah 1980). However, the Utah Supreme Court has held that the expenses of taking depositions are also allowable as costs if they were reasonably necessary. *John Price Assoc., Inc. v. Davis*, 588 P.2d 713, 715 (Utah 1978). Deposition costs are generally allowed as necessary and reasonable "where the development of the case is of such a complex nature that discovery cannot be accomplished through the less expensive method of interrogatories, requests for admissions and requests for the production of documents." *Highland Constr. Co. v. Union Pac. R.R.*, 683 P.2d 1042, 1051 (Utah 1984). The party claiming entitlement to the costs of depositions has the burden of demonstrating that the depositions were reasonably necessary and whether that burden is met is within the sound discretion of the trial court. *Id.*; *First Sec. Bank of Utah N.A. v. Wright*, 521 P.2d 563, 567 (Utah 1974). The trial court's ruling on whether to award a party costs of depositions is presumed correct and will not be disturbed unless it is so unreasonable as to manifest a clear abuse of discretion. *First Sec.*

Bank, 521 P.2d at 567. The Utah Supreme Court has declined to extend the rule which allows recovery of the cost of taking a deposition, to expenses such as service of a subpoena. *Frampton*, 605 P.2d at 774.

Lloyd's claims that the depositions of Burningham and Webb were essential for the development and presentation of the case and that Webb's deposition was taken because both parties anticipated that Webb would be unavailable to testify at trial. In addition, Lloyd's argues that because portions of Burningham's depositions were used at trial, it should be awarded the costs of Burningham's deposition. Lloyd's also contends that it should have been awarded the costs of serving Burningham with a subpoena to insure his appearance at the deposition. Nature's Way had previously failed to appear at a hearing on a motion to compel discovery, and Lloyd's believed that the subpoena was necessary to secure Burningham's appearance at the deposition.

Nature's Way, to the contrary, argues that because Lloyd's did not use Webb's deposition at trial and did not publish Burningham's or Webb's deposition at trial, the court properly denied Lloyd's the costs of the deposition. Nature's Way also contends that Lloyd's could have avoided the cost of the subpoena by telephoning Nature's Way's attorney to see if the corporation would produce Burningham for a deposition, and, therefore, the trial court correctly denied Lloyd's the cost incurred in subpoenaing Burningham.

We find that, in view of these arguments, the trial court's decision to deny Lloyd's the costs of the two depositions was reasonable. Apparently, Lloyd's failed to prove that the deposition costs were reasonably necessary and could not be accomplished through less expensive means. Therefore, because the burden of proof was not met and because the trial court's decision was reasonable, we hold that the trial court did not abuse its discretion in denying Lloyd's the costs of taking the depositions.

We also hold that the trial court's decision to deny Lloyd's the cost of subpoenaing Burningham was not unreasonable, in light of *Frampton*, where the court declined to extend the rules for awarding deposition costs to expenses such as service of subpoenas and vacated the trial court's award of such costs. Therefore, we hold that the trial court did not abuse its discretion in refusing to award Lloyd's the costs of serving the subpoena.

III. FINDINGS

Lloyd's third claim of error is that the trial court's findings are not supported by the evidence. Because we hold that the trial court erred in denying the motion to amend, we need not reach the issue of whether the findings are supported by the evidence.

The judgment of the trial court is vacated and the matter remanded for further proceedings in accordance with this opinion.

BILLINGS and BENCH, JJ., concur.



STATE of Utah, Plaintiff and Respondent,

v.

Dickie Lynn STUKES, Defendant and Appellant.

No. 880154-CA.

Court of Appeals of Utah.

April 22, 1988.

Following ruling of the Third District Court, Summit County, Pat B. Brian, J., on March issue, defendant filed petition for certificate of probable cause. The Court of

Appeals held that petition failed to satisfy applicable requirements.

Petition denied.

Criminal Law ¶1071

Petition for certificate of probable cause lacked required affidavit of counsel or memorandum of law supporting defendant's position that issues presented on appeal were novel or fairly debatable.

Bradley P. Rich, Yengich, Rich, Xaix & Metos, Salt Lake City, for defendant and appellant.

David L. Wilkinson, State Atty. Gen., Sandra L. Sjogren, Asst. Atty. Gen., for plaintiff and respondent.

Before JACKSON, ORME and GREENWOOD, JJ. (On Law and Motion).

MEMORANDUM DECISION

PER CURIAM:

This matter is before the court on a Petition for Certificate of Probable Cause. Appellant's counsel filed the petition on March 10, 1988. It was accompanied by a brief Memorandum of Points and Authorities, but was not supported by the affidavit of counsel required by *State v. Neeley*, 707 P.2d 647 (Utah 1985). The Utah Supreme Court set forth the rationale for the procedure mandated in *Neeley* as follows:

The record of proceedings below is not available in this Court at the time such petitions are brought. In addition, the petitions filed by the defendants are generally conclusory and contain little information concerning the case. The attorney general, who is by law required to argue before this Court, is uninformed concerning the facts of the case or the proceedings taken in the court below and therefore finds it difficult to respond to petitions for certificates of probable cause. This Court is likewise uninformed concerning the record until oral argument. In order that this Court may make an informed decision in issuing cer-

Phyllis E. COLMAN, Plaintiff
and Respondent,

v.

William J. COLMAN, Defendant
and Appellant.

No. 868325-CA.

Court of Appeals of Utah.

Oct. 2, 1987.

Husband appealed from order of the Third District Court, Salt Lake County, David B. Dee, J., which divided property in connection with divorce. The Court of Appeals, Garff, J., held that: (1) evidence sustained trial court's determination to pierce corporate veil of husband's corporations, and (2) distribution was proper.

Affirmed.

1. Pleading ¶427

If theory of recovery is fully tried by the parties, court may base its decision on that theory and deem the pleadings amended, even if the theory was not originally pleaded or set forth in the pleadings or the pretrial order, that the issue has, in fact, been tried and that the procedure has been authorized by the express or implied consent of the parties must be evident from the record.

2. Divorce ¶293

Although alter ego issue was not specifically raised in pleadings, where entire trial testimony concerned husband's control over assets in question, the issue was tried by the consent of the parties and trial court properly based its decision on that issue.

3. Divorce ¶253(2)

Finding that corporation was husband's alter ego was supported by evidence that husband ignored corporate formalities, that he referred to the corporation's checking account as his personal account, that he dealt with corporate assets without suggesting that he was acting on behalf of anyone other than himself, that the officers and directors played little or no role in the

operation of the corporate entity, that corporate records were not kept, and that the husband used the corporation and other corporate shells as a facade for his personal business operations.

4. Corporations ¶1.6(10)

Corporate veil which protects stockholders from individual liability will be pierced only reluctantly and cautiously.

5. Corporations ¶1.4(4)

To disregard corporate entity under alter ego doctrine, there must be shown such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and it must be shown that, if the corporate form were observed, it would sanction a fraud, promote injustice, or result in an inequity; it is not necessary that plaintiff prove actual fraud but he must show that a failure to pierce the corporation veil would result in an injustice.

6. Corporations ¶1.4(1)

Factors which are significant in determining whether corporate veil should be pierced are undercapitalization of a one-man corporation, failure to observe corporate formalities, nonpayment of dividends, siphoning of corporate funds by dominant stockholder, nonfunctioning of other officers or directors, absence of corporate records, use of corporation as a facade or operations of the dominant shareholder, and use of the corporate entity in promoting injustice or fraud.

7. Corporations ¶1.4(1)

Failure to observe corporate formalities, which may justify piercing corporate veil, includes such activities as commencement of business without the issuance of shares, lack of shareholders at directors meetings, lack of signing of consents, and making of decisions by shareholders as if they were partners.

8. Corporations ¶1.4(1)

Rationale used by courts in permitting corporate veil to be pierced is that, if principal shareholder or owner conducts his private and corporate business on an interchangeable or joint basis as if they were

one, he is without standing to complain when an injured party does the same.

Frank J. Allen, Salt Lake City, for defendant and appellant.

9. Divorce ¶252.3(3)

Former spouses attempting to shield assets from a court-ordered property distribution by using a corporate form are especially looked upon with judicial disfavor.

Bryce Roe, Albert Colton, Salt Lake City, for plaintiff and respondent.

Before BILLINGS, GARFF and JACKSON.

10. Divorce ¶252.2

Fact that property distribution may not have been mathematically equal is not sufficient grounds to constitute an abuse of discretion, as fair and equitable property distribution is not necessarily an equal distribution.

11. Divorce ¶252.3(3)

Trial court did not abuse its discretion in dividing property after piercing corporate veil on the grounds that the corporation was the husband's alter ego.

12. Divorce ¶252.3(5)

Trial court did not abuse its discretion in requiring husband to pay an amount representing a percentage of the price of proceeds from sale of ranch where he found that husband held an interest in the ranch.

13. Estoppel ¶52(4)

Estoppel arises when there is a false representation or concealment of material facts made with knowledge, actual or constructive, of the facts to a party who is without knowledge or the means of knowledge of the real facts and made with an intention that the representation be acted upon, and the party to whom the representation was made relies or acts upon it to his prejudice.

14. Estoppel ¶64

Estoppel cannot be inferred from facts of which party to be estopped had no knowledge.

15. Husband and Wife ¶279(1)

Wife was not estopped from denying that husband had furnished adequate accounting as required by their divorce agreement even though wife's attorney had returned certain stock certificates which he had turned over to them.

OPINION

GARFF, Judge:

Defendant/appellant William J. Colman appeals from a property settlement judgment in favor of plaintiff/respondent Phyllis E. Colman stemming from their 1977 divorce. He seeks reversal of the judgment.

The parties were divorced after a twenty-four year childless marriage during which they acquired substantial property. On August 2, 1977, in anticipation of divorce, they executed a written property settlement agreement. Because questions had not been resolved as to which assets controlled by defendant were part of the marital estate, this agreement required him to provide plaintiff with a "complete accounting of all stocks currently owned by him or in which he [had] any interest," and a "complete accounting of all royalty interests currently owned by him or in which he [had] any interest" within one year of the agreement. Once the extent of defendant's holdings was determined, plaintiff was to receive one-half of defendant's interest in any stocks "held in ... [his] name or in which he [had] any interest," and one-half of the sales proceeds of the Anderson Ranch, jointly owned property located in Cache County, Utah.

Much of the dispute between the parties centered around defendant's relationship to Owanah Oil Corporation [Owanah], a closely held corporation which defendant and Francois de Gunsberg had founded in 1952 to engage in oil and gas exploration. Defendant had served as Owanah's president during much of the parties' marriage. In 1969, Owanah was restructured to generate outside capital. As a consequence, de

twenty percent of Owanah's outstanding shares.

At the time of the divorce, defendant also controlled stock, originally issued in various names, in other closely held corporations: Western Oil Shale Corporation, Cayman Corporation, and Royalty Investment Company. Defendant claimed that most of this stock belonged to Owanah, was not part of the marital estate, and, therefore, was not subject to the property division agreement.

The Western Oil Shale Company stock was issued in 1964 in consideration for Owanah's interest in several oil shale leases. Although defendant alleged that none of the parties' personal funds were expended to acquire these leases, he introduced no evidence beyond his testimony to that effect. He also explained that the stock was issued in names other than Owanah's so that Owanah could sell it more easily by avoiding normal corporate formalities. At the time of trial, he held at least 28,200 Western Oil Shale shares under his personal control, but admitted ownership of only 2,256 of them.

Cayman stock had been issued by Cayman Corporation as consideration for stock in another closely held corporation, National Oil Shale Corporation, and for an oil and gas lease with a producing oil well. Defendant testified that both the National Oil Shale and Cayman shares were issued in his name for ease in sale and handling, but that he held them in trust for third parties. However, he introduced no evidence other than his testimony that there was an actual trust relationship between himself and others. Part of the reason for his failure to introduce evidence was the lack of Cayman and National Oil Shale corporate records. At the time of trial, defendant held at least 48,000 shares of Cayman stock in his name.

At the time of the property settlement agreement, Royalty Investment Company owned, as its only major asset, the Anderson Ranch. At trial, defendant testified that Owanah and two other parties had made installment payments on the ranch and, thus, were entitled to 62½% of Royalty's outstanding stock. However, defendant's

earlier deposition contradicted this testimony, stating that he and plaintiff owned 62½% of the Royalty stock. Defendant, in his personal financial statements, valued the ranch at between \$250,000 and \$1,000,000.

In January 1982, Royalty sold the Anderson ranch for \$250,000 and authorized Owanah to use the proceeds. The only consideration which Royalty received for the proceeds was its choice between an interest-bearing loan and a 4% overriding royalty interest in Owanah.

Defendant also claims that he made an oral accounting pursuant to the property settlement agreement with the law firm Roe and Fowler, and turned over to Roe and Fowler all stock certificates in the parties' safe deposit box. Because plaintiff was not satisfied that there had been an adequate accounting under the terms of the property settlement agreement, she finally brought this action on May 29, 1980, to compel the accounting and judgment for any damages caused by defendant's delay in submitting the accounting. The purpose of the accounting was to identify the amount to which plaintiff was entitled as her share of the marital estate.

The trial court agreed that defendant had not made an adequate accounting, finding that Owanah was defendant's alter ego even though this issue was not explicitly raised in the pleadings. The court also found that the assets subject to the accounting were, in fact, owned by defendant, and, pursuant to the terms of the settlement agreement, that plaintiff was entitled to one-half of those assets. However, because most of the assets had been sold by defendant, the court established a monetary value for the liquidated assets and included that amount as part of the marital estate to be distributed between the parties. Although this was an accounting action, the court appropriately disposed of the assets according to the terms of the stipulated property settlement agreement without objection by either party.

Defendant raises the following issues on appeal: (1) Was the alter ego issue properly before the trial court? (2) If the alter

ego issue was properly before the court, was there sufficient evidence to sustain the court's finding that Owanah was defendant's alter ego? (3) Does applying the alter ego doctrine effect a property distribution contrary to the parties' property distribution agreement? (4) Did the evidence, findings, and conclusions support the order requiring defendant to pay plaintiff an amount representing a percentage of the Anderson Ranch sale proceeds? (5) Is plaintiff estopped from denying that defendant furnished a satisfactory accounting?

I

Under Rule 15(b) of the Utah Rules of Civil Procedure, issues not raised by the pleadings may be tried by the express or implied consent of the parties.¹ The Utah Supreme Court has observed that issues tried by express or implied consent shall be treated as if raised in the pleadings. Therefore, "even failure to amend the pleadings does not affect the result of the trial of these issues." *General Ins. Co. of Am. v. Carnicero Dynasty Corp.*, 545 P.2d 502, 506 (Utah 1976).

[1] If a theory of recovery is fully tried by the parties, the court may base its decision on that theory and deem the pleadings amended, even if the theory was not originally pleaded or set forth in the pleadings or the pretrial order. *MBI Motor Co. v. Lotus/East, Inc.*, 506 F.2d 709, 711 (6th Cir.1974). However, that the issue has, in fact, been tried, and that this procedure has been authorized by express or implied consent of the parties must be evident from the record. *Wirtz v. F.M. Sloan, Inc.*, 285 F.Supp. 669, 675 (W.D.Pa.1968). "A trial court may not base its decision on an issue

that was tried inadvertently." *MBI Motor Co.*, 506 F.2d at 711.

Implied consent to try an issue may be found "where one party raises an issue material to the other party's case or where evidence is introduced without objection," *General Ins. Co. of Am.*, 545 P.2d at 505-06, where it "appear[s] that the parties understood the evidence [was] to be aimed at the unpleaded issue." *MBI Motor Co.*, 506 F.2d at 711. See *First Security Bank of Utah v. Colonial Ford, Inc.*, 597 P.2d 859, 861 (Utah 1979).

Thus, the test for determining whether pleadings should be deemed amended under Utah R.Civ.P. 15(b) is "whether the opposing party had a fair opportunity to defend and whether it could offer additional evidence if the case were retried on a different theory." *R.A. Pohl Const. Co. v. Marshall*, 640 F.2d 266, 267 (10th Cir.1981). See also *Cheney v. Rucker*, 14 Utah 2d 205, 381 P.2d 86, 91 (1963); *Buehner Block Co. v. Gleason*, 6 Utah 2d 226, 310 P.2d 517, 519-20 (1957).

[2] In the present case, even though the alter ego issue was not specifically raised in the pleadings, either initially or by amendment, the entire trial testimony concerned defendant's control over the assets in question. During trial, evidence concerning every element of the alter ego issue was introduced without objection. Further, the basic question raised in an alter ego case is whether the principal had personal control over assets which he claimed to belong to the corporation. Since this question is the essential issue presented by this accounting action, we find that the parties received adequate notice of the alter ego issue and an opportunity to meet it

1. Utah R.Civ.P. 15(b) (1977) reads as follows:

When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is introduced by one party

on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subverted thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

There was no indication in the record that defendant ever represented to the court that he was taken by surprise or was otherwise disadvantaged in meeting the alter ego issue. See *Cheney v. Rucker*, 381 P.2d at 91. We find, therefore, that the alter ego issue was properly before the court.

II

[3,4] There is sufficient evidence to sustain the trial court's finding that Owanah was defendant's alter ego. "Ordinarily, a corporation is regarded as a separate and distinct legal entity from its stockholders." *Dockstader v. Walker*, 29 Utah 2d 370, 510 P.2d 526, 528 (1973). This is true whether the corporation has many stockholders or only one. *Ramsey v. Adams*, 4 Kan. App.2d 184, 603 P.2d 1025, 1027 (1979); *Kline v. Kline*, 104 Mich.App. 700, 305 N.W.2d 297, 298 (1981). Consequently, the corporate veil which protects stockholders from individual liability will only be pierced reluctantly and cautiously. *Ramsey v. Adams*, 603 P.2d at 1027; *William B. Roberts, Inc. v. McDrilling, Co.*, 579 S.W.2d 335, 345 (Tex.Civ.App.1979).

[5] To disregard the corporate entity under the equitable alter ego doctrine, two circumstances must be shown: (1) Such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, but the corporation is, instead, the alter ego of one or a few individuals; and (2) if observed, the corporate form would sanction a fraud, promote injustice, or result in an inequity. *Norman v. Murray First Thrift & Loan Co.*, 596 P.2d 1028, 1030 (Utah 1979). *Accord United States v. Healthwin-Midtown Convalescent Hosp. and Rehabilitation Center, Inc.*, 511 F.Supp. 416 (C.D.Calif. 1981). See also *Centurian Corp. v. Fiberchem, Inc.*, 562 P.2d 1252, 1253 (Utah 1977); *Dockstader v. Walker*, 29 Utah 2d

370, 510 P.2d 526, 528 (1973); *Geary v. Cain*, 79 Utah 268, 9 P.2d 396, 398 (1932). It is not necessary that the plaintiff prove actual fraud, but must only show that failure to pierce the corporate veil would result in an injustice. *Healthwin-Midtown Convalescent Hosp.*, 511 F.Supp. at 420.

[6,7] Certain factors which are deemed significant, although not conclusive, in determining whether this test has been met include: (1) undercapitalization of a one-man corporation; (2) failure to observe corporate formalities; (3) nonpayment of dividends; (4) siphoning of corporate funds by the dominant stockholder; (5) nonfunctioning of other officers or directors; (6) absence of corporate records; (7) the use of the corporation as a facade for operations of the dominant stockholder or stockholders; (8) the use of the corporate entity in promoting injustice or fraud. *Ramsey v. Adams*, 603 P.2d at 1028; *Amoco Chemicals Corp. v. Bach*, 222 Kan. 589, 567 P.2d 1337, 1341-42 (1977). See also *Ramirez v. United States*, 514 F.Supp. 769, 763-64 (D.Puerto Rico 1981); *Healthwin-Midtown Convalescent Hosp.*, 511 F.Supp. at 418-19; *Dillman v. Nobles*, 351 So.2d 210, 213-14 (La.App.1977).

[8] The rationale used by courts in permitting the corporate veil to be pierced is that if a principal shareholder or owner conducts his private and corporate business on an interchangeable or joint basis as if they were one, he is without standing to complain when an injured party does the same. *Bone Constr. Co. v. Lewis*, 148 Ga.App. 61, 250 S.E.2d 851, 853 (1978). In *Lyons v. Lyons*, 340 So.2d 450, 451 (Ala. Civ.App.1976), the court stated that "[a] court of equity looks through form to substance and has often disregarded the corporate form when it was fiction in fact and deed and was merely serving the personal use and convenience of the owner." The

2. Failure to observe corporate formalities includes such activities as commencement of business without the issuance of shares, lack of shareholders' or directors' meetings, lack of signing of consents, and the making of decisions by shareholders as if they were partners. *Roylex, Inc. v. Langston Bros. Constr. Co.*, 585 S.W.2d 768, 772 (Tex.Civ.App.1979).

3. Failure to distinguish between corporate and personal property, the use of corporate funds to pay personal expenses without proper accounting, and failure to maintain complete corporate and financial records are looked upon with extreme disfavor. *Roylex*, 585 S.W.2d at 772.

Lyons court found a corporation to be a shareholder's alter ego, even though he owned only one share of stock, because he commingled corporate funds with his own, kept no regular corporate records, meetings, or minutes aside from a bank account, and did not file corporate income tax returns. See *Standage v. Standage*, 147 Ariz.App. 473, 711 P.2d 612, 614-15 (1985).

[9] Former spouses attempting to shield assets from a court-ordered property distribution by using a corporate form are especially looked upon with judicial disfavor. See *Standage v. Standage*, 147 Ariz. App. 473, 711 P.2d 612 (1985); *Colandrea v. Colandrea*, 401 A.2d 480 (Md.Ct.Spec. App.1979).

In the present case, the trial court considered the evidence in the light of this test, finding that Owanah was defendant's alter ego on the grounds that (1) "[t]here exists such a unity of ownership and interest between defendant and Owanah Oil Corporation that the separate personalities of the corporation and the individual no longer exist," and (2) to recognize such separate personalities "would promote injustice and an inequitable result."

For purposes of appellate review, the trial court's decision to pierce the corporate veil will be upheld if there is substantial evidence in favor of the judgment. *Standage*, 711 P.2d at 614-16. An examination of the present trial record indicates that there was substantial evidence supporting the trial court's finding that the separate personalities of Owanah and defendant no longer existed.

First, defendant ignored corporate formalities. He stated that he preferred to conduct corporate business personally, rather than in the corporate name, because it was more convenient than observing appropriate corporate procedures, and repeatedly did so.

Second, defendant failed to distinguish between corporate and personal property in his business dealings.

In correspondence with First Security Bank, defendant continually referred to the Owanah checking account as his personal

account. Although he stated that this occurred because the bank initially preferred to deal personally with the principals because of Owanah's small net worth, he also continued this practice well after Owanah acquired substantial assets, because, as he stated, adjustments in loans and sales of stock could be made without time-consuming corporate resolutions.

On September 17, 1976, defendant pledged 50,820 shares of Western Oil Shale stock and 48,000 shares of Cayman stock to First Security Bank as collateral for loans to Owanah. He testified that this stock had originally been issued in his, his brother's, and his broker's names, rather than in Owanah's name, so that corporate formalities could be avoided in selling the stock. Between September 17, 1978, and February 23, 1979, he held as many as 93,298 shares of Western Oil Shale stock and 48,000 shares of Cayman stock in his personal bank and brokerage accounts. All transactions dealing with these shares were authorized by his signature without any suggestion that he was acting on behalf of anyone else.

First Security Bank released the 48,000 shares of Cayman stock and 47,820 shares of the Western Oil Shale stock to defendant on July 9, 1979. The bank recognized this stock as being defendant's personal property in that it required defendant to sign an indemnity agreement to protect the bank from any claim raised by plaintiff against the shares.

Defendant testified that this stock, valued by the trial court at \$14.25 per share, was later sold to fund one of Owanah's projects, and that the proceeds from this sale were deposited in Owanah's account. However, payments for defendant's residential mortgage, light and utility bills were also made directly from Owanah's account, as were numerous cash payments to defendant, totalling \$22,695.25 within a twelve month period. To help finance Owanah's activities, defendant also mortgaged the parties' Park City residence for \$60,000, applied part of the proceeds to a reduction of Owanah's debt, and deposited the

ant explains the mortgage payments made on his behalf by Owanah as repayment by Owanah of this mortgage. Further, defendant presented no evidence at trial that he maintained any personal checking account apart from Owanah's. Personal and corporate affairs appear to be inextricably interwoven.

Third, the other officers and directors played little, if any, role in the operation of defendant's corporate entities. Defendant produced no evidence at trial, other than his testimony, to indicate that others had any interest in Owanah, although the trial judge requested such evidence on several occasions during the trial and the trial was recessed for defendant to provide it.

Fourth, there was an almost complete failure to keep and maintain corporate records. There was no evidence that shareholder records were kept for Cayman Corporation, even though such records were repeatedly requested by plaintiff's counsel and the trial judge, and defendant was even given an opportunity by the court to find and present them. Defendant was similarly unable to produce any records which showed shareholders, bylaws, or financial status of Royalty Investment Corporation. Defendant claimed that Owanah owned Cayman stock as well as proceeds from the sale of the Anderson Ranch, which was owned by Royalty Investment Corporation.

Fifth, there is evidence that Owanah and the other corporate shells were used as a facade for defendant's personal business operations. The most significant evidence was the method in which the Anderson Ranch sale was consummated. After the property settlement agreement had been entered, Royalty Investment Corporation sold the ranch, using no corporate formalities, and then deposited the sale proceeds in Owanah's bank account for a 4% overriding royalty interest in the Owanah project. Plaintiff alleged that this was no consideration at all. Although the transaction was ratified by Royalty on the advice of counsel eleven months after the sale and three days before trial, such a ratification does not insulate this transaction with legit-

macy. Since defendant did not proffer testimony at trial of anyone other than himself, purporting to have an interest in Royalty, Owanah, or the Anderson Ranch, it is difficult to view this transaction as anything but a personal transaction done under a corporate aegis. Thus, defendant's equivocal testimony regarding the ownership of the Anderson Ranch, coupled with the lack of substantial evidence that Owanah gave valuable consideration for the proceeds of the Anderson Ranch sale, supports a finding that the corporate shells were used as a facade for the transfer of property from a corporate shell that plaintiff had some interest in to one in which she had less interest.

Further, defendant's use of Owanah to receive the proceeds from the sale of the Cayman and Western Oil Company stock, coupled with his use of Owanah's account to pay his personal living expenses, suggest that defendant was using Owanah as a facade for his personal affairs.

Finally, the use of the corporate entity in this circumstance would result in injustice. If viewed as legitimate corporate transactions, plaintiff's post-settlement agreement business transactions would convert substantial assets, which otherwise would be regarded as marital property, to corporate assets in which plaintiff had no interest. Such shielding of assets would result in a great injustice to plaintiff.

Therefore, we find that there was substantial evidence before the trial court to support its finding that defendant's corporations were actually his alter ego.

III

Because application of the alter ego doctrine is justified, we reach the issue of whether the property division by the trial court is in harmony with the parties' property settlement agreement. Defendant argues that the property division resulting from the alter ego finding is contrary to the intent of the property settlement agreement because it awards plaintiff more than half of the marital estate, and, thus, is an abuse of judicial discretion.

[10] In the division of marital property, the trial court has wide discretion, and, while the appellate court is not necessarily bound by its findings, *Thompson v. Thompson*, 709 P.2d 360, 361-62 (Utah 1985), the findings are presumed valid and will not be disturbed unless the record indicates such a manifest injustice or inequity as to indicate a clear abuse of discretion. *Eames v. Eames*, 735 P.2d 395, 397 (Utah Ct.App.1987); *Petersen v. Petersen*, 737 P.2d 237, 239 (Utah Ct.App.1987). Regarding challenges to property distributions, the Utah Supreme Court has stated that a party seeking reversal of the trial court must prove a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, or that the evidence clearly preponderated against the findings, or that such a serious inequity resulted from the order as to constitute an abuse of the trial court's discretion.

McCrory v. McCrory, 599 P.2d 1248, 1250 (Utah 1979). That the property distribution may not have been mathematically equal is not sufficient grounds to constitute an abuse of discretion, since a fair and equitable property distribution is not necessarily an equal distribution. See *Fletcher v. Fletcher*, 615 P.2d 1218, 1223-24 (Utah 1980).

Further, it is well recognized that a parties' stipulation as to property rights in a divorce action, although advisory and usually followed unless the court finds it to be unfair or unreasonable, is not necessarily binding on the trial court. It is only a recommendation to be adhered to if the court believes it to be fair and reasonable. *Pearson v. Pearson*, 561 P.2d 1080, 1082 (Utah 1977); *Klein v. Klein*, 544 P.2d 472, 476 (Utah 1975). Thus, even if the trial court does not exactly follow the parties' agreement, such a decree is still within the trial court's reasonable discretion.

The Utah Supreme Court has previously upheld a trial court's property division under somewhat similar circumstances. In *Puery v. Puery*, 728 P.2d 117 (Utah 1986), the defendant husband appealed from the portion of a divorce decree awarding the plaintiff wife one-half of the value of a

corporation formed during their marriage. He alleged that a corporation which the trial court had determined to be his personal, premarital property had loaned \$69,000 to a corporation which he and his wife formed during the marriage. Because he "utterly failed to prove that the loan did indeed exist," in that he could produce no papers documenting the loan, any terms, conditions of repayment, or interest, and because the trial court expressly found that he had commingled corporate and personal funds throughout the marriage so that it could not trace any assets to any source, the court found that he had failed to carry his burden of proof. *Id.* at 119.

[11] Similarly, the present defendant has failed to carry his burden of proof that the disputed assets are corporate rather than personal property, so we find no abuse of discretion in the trial court's property division resulting from application of the alter ego theory.

IV

Defendant further argues that the trial court's order requiring him to pay plaintiff an amount representing a percentage of the price of the Anderson Ranch sale proceeds is without support in the findings, conclusions, or evidence. We reiterate that the trial judge has wide discretion in the division of marital property, and his findings will not be disturbed by an appellate court unless the record shows a clear abuse of discretion. The Utah Supreme Court has stated, in *Pearson v. Pearson*, 561 P.2d at 1082, that:

in regard to the matter of the sufficiency of findings of fact, a substantial compliance with Rule 52, Utah Rules of Civil Procedure, is sufficient, and findings of fact and conclusions of law will support a judgment, though they are very general, where they in most respects follow the allegation of the pleadings. Findings should be limited to the ultimate facts and if they ascertain ultimate facts, and sufficiently conform to the pleadings and the evidence to support the judgment, they will be regarded as sufficient.

though not as full and as complete as might be desired.

However, "to determine if equity was done, we must have before us specific findings of fact pertinent to that issue." *Jones v. Jones*, 700 P.2d 1072, 1074 (Utah 1985); *Boyle v. Boyle*, 735 P.2d 669, 671 (Utah Ct.App.1987).

[12] In the present case, the trial court specifically found that "[a]t the time of the parties' agreement, and until the property was sold in January 1982, defendant held title to 62½% interest in the ranch through Royalty Investment Company. The ranch was sold for \$250,000.00 in January 1982, and the accounting shows that defendant is indebted to plaintiff in the amount of \$78,125.00, which is 31.25% of \$250,000.00." It is the trial judge's prerogative, not an abuse of discretion, to choose to disbelieve defendant's explanation of this property interest. There was evidence in the record to support such a finding, which is sufficient to come within the guidelines outlined by *Pearson and Jones*.

Therefore, we affirm the trial court's award with respect to the Anderson Ranch property.

v

Defendant's final issue raised on appeal is whether plaintiff was estopped from denying that he furnished an adequate accounting. He alleges that he made an oral accounting to the law firm of Roe and Fowler and turned over to Roe and Fowler all the stock certificates in the parties' safe deposit box. Roe and Fowler later returned some of these certificates to defendant. Defendant argues that he acted in reasonable reliance upon express or implied representations that the accounting was satisfactory because defendant made no further demand for an accounting after this event. However, the document which defendant received from Roe and Fowler when it returned the certificates was only an acknowledgement that the shares were delivered into his control as president of Owanah, rather than a release or exclusion of the shares from an eventual accounting.

continual contact with defendant concerning his failure to make the accounting and had brought a prior lawsuit against defendant to enforce the divorce decree and agreement. Finally, plaintiff stated that she was totally without knowledge of the business affairs concerning the disputed assets.

[13, 14] Estoppel arises when there is (1) a false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of the facts; (3) made to a party who is without knowledge or the means of knowledge of the real facts; (4) made with the intention that the representation be acted upon; and (5) the party to whom the representation was made relied or acted upon it to his prejudice. *Kelly v. Richards*, 95 Utah 560, 83 P.2d 731, 734 (1938); *Morgan v. Board of State Lands*, 549 P.2d 695, 697 (Utah 1976). See also *City of Mercer Island v. Steinmann*, 9 Wash.App. 479, 513 P.2d 80, 82 (1973). If any of these elements are missing, there can be no estoppel. *Kelly v. Richards*, 83 P.2d at 734. Further, estoppel cannot be inferred from facts of which the party to be estopped had no knowledge. *Grover v. Gorn*, 23 Utah 2d 441, 464 P.2d 598, 602 (1970).

[15] Estoppel is not applicable under the present facts.

The judgment of the trial court is affirmed. Costs to plaintiff.

BILLINGS and JACKSON, JJ.,
concur.



STATE of Utah, Plaintiff and
Respondent,

v.

Robert HOLYOAK, Defendant
and Appellant.

No. 860220-CA.

Court of Appeals of Utah.

Oct. 14, 1987.

Defendant was charged with possession of cocaine. The District Court, Utah County, Ray M. Harding, J., denied defendant's pretrial motion to suppress and allowed introduction of cocaine into evidence and defendant was subsequently convicted. Defendant appealed. The Court of Appeals, Garff, J., held that defendant failed to object to admissibility of cocaine evidence at trial, and hence, could not raise issue on appeal.

Affirmed.

Criminal Law ¶1036.1(3)

Defendant failed to object to admissibility of cocaine evidence at trial, and hence, he could not raise on appeal issue challenging denial of motion to suppress.

James G. Clark, Provo, for defendant and appellant.

David L. Wilkinson, State Atty. Gen.,
Sandra L. Sjogren, Asst. Atty. Gen., for
plaintiff and respondent.

Before GARFF, BILLINGS and
GREENWOOD, JJ.

OPINION

GARFF, Judge:

Defendant Robert Holyoak appeals from his conviction of possession of cocaine, a third degree felony, on the grounds that the trial court failed to suppress evidence obtained from the execution of an allegedly

Police, relying on information provided by a confidential informant, obtained a search warrant to search Holyoak's premises for cocaine. As a result of the search, they found a small plastic bag containing cocaine hidden under Holyoak's water bed. Prior to trial, Holyoak moved to suppress the admission of the cocaine on grounds that the confidential informant's veracity and basis of knowledge were inadequate, that corroboration of his information was defective, as was the police affidavit based on the informant's testimony, and, therefore, that there was insufficient probable cause to issue the search warrant. Holyoak moved alternatively for disclosure of the informant's identity or for the court to conduct an *in camera* interview of the informant on the theory that there was, in reality, no confidential informant, but that the police officer had fabricated the affidavit and had planted the cocaine.

A suppression hearing was held, and even though testimony indicated that some of the allegations in the police affidavit were false, the trial court denied all of Holyoak's motions. Regarding the motion to suppress, the trial court stated that the affidavit, viewed in its entirety, supported the issuance of the search warrant.

At trial, the cocaine was introduced into evidence. Holyoak did not object to its introduction, and was convicted by a jury of possession of cocaine.

On appeal, Holyoak raises substantially the same issues as in the evidentiary hearing: (1) Should the cocaine obtained pursuant to the search warrant have been suppressed on grounds that there was no probable cause to support the search warrant? (2) Alternatively, should the trial court have ordered disclosure of the identity of the confidential informant? (3) As a further alternative to suppressing the evidence or disclosing the identity of the informant, should the court have conducted an *in camera* interview of the informant?

Our review of these questions, however, depends upon whether these issues were preserved for appeal. Although Holyoak moved to suppress the cocaine prior to tri-

of the contrary view taken by my four colleagues, I suppose it can reasonably be said that there is at least some doubt that the statute should be construed and applied as I have stated above. If that be so, then under the rule which requires taxing statutes to be interpreted and applied liberally in favor of the taxpayer and strictly against the taxing authority, the issue can be resolved in favor of the plaintiff.

It seems to me unfair and inequitable that Utah should bear the entire cost of the cooperative examination by giving the taxpayer credit against its tax, when its benefits also have value to the other states participating in the examination. In view of the decision of the majority, if the situation is changed, it must be done by legislation.



13 Utah 2d 279

**Kelth B. ELLIS et al., Plaintiffs
and Appellants,**

v.

**Karl B. HALE et al., Defendants and
Respondents.**

No. 9537.

Supreme Court of Utah.

July 12, 1962.

Action for damages arising out of real estate transactions. From an order of the Third District Court of Salt Lake County, Ray Van Cott, Jr., J., dismissing vendees' second amended complaint with prejudice, vendees appealed. The Supreme Court, Callister, J., held that vendors' exhibition of unapproved subdivision plat to vendees, without informing vendees that such plat had not been approved, was not negligent misrepresentation, and complaints of vendees were insufficient to maintain claims that vendors induced the purchase of the lots in question by fraudulently misrepresenting that the plat had been ap-

proved and recorded, or that insurer negligently failed to disclose the fact that properties involved were not approved building lots.

Affirmed.

1. Negligence Ⓒ6

In some instances, negligence may be predicated upon violation of an ordinance or statute.

2. Municipal Corporations Ⓒ43

Statutes making it unlawful for anyone to sell a subdivision lot unless subdivision plat has been approved and recorded impose a duty running to the sovereign, and violation thereof does not necessarily give rise to civil liability. U.C.A.1953, 17-27-21, 57-5-5.

3. Fraud Ⓒ27

Vendors' exhibition of unapproved subdivision plat to vendees without informing them that such plat had not been approved was not negligent misrepresentation. U.C.A.1953, 17-27-21, 57-5-5.

4. Fraud Ⓒ4

Usual action for fraud, whether negligent or intentional, requires that a representation be made with the intention that it be relied on.

5. Fraud Ⓒ13(3)

Negligent misrepresentation differs from intentional misrepresentation in that in the former the representor makes an affirmative assertion which is false without having used reasonable diligence or competence in ascertaining the verity of the assertion.

6. Fraud Ⓒ13(3)

Liability will only lie for a negligent misrepresentation when there is a special duty of care running from the representor to the representee.

7. Fraud Ⓒ13(3)

There can be no liability for negligence in the manner of expression.

8. Fraud Ⓒ42

Complaint which did not show that vendor, who made alleged misrepresenta-

to another, intended that such misrepresentations would be transmitted to vendees as insufficient to state cause of action for fraudulent misrepresentations. U.C.A. 1953, 17-27-21, 57-5-5.

Id. ¶29

that a person fraudulently makes a misrepresentation of facts to another with the intent that it will be transmitted to a third person, the latter may have cause of action against the misrepresentor.

Id. ¶41

that a fraudulent misrepresentation concerning which did not reveal any allegation of misrepresentation made to vendees was sufficient.

Id. ¶46

that a claim by vendees, against insurers for negligence in failing to disclose that insureds were in unapproved subdivision failed where complaint contained no allegation that insurers knew that vendees were acting under the impression that lots were within approved subdivision.

Id. ¶354(22)

that a claim by vendees, who purchased lots in an unapproved subdivision plat, that there was breach of provisions of title insurance policy issued by insurers was properly dismissed where the policy was not recorded in the record and the particular provisions or provisions claimed to have been breached were not set out in the complaint. U.C.A. 1953, 17-27-21, 57-5-5; Utah Code of Civil Procedure, rule 8(a).

Id. ¶17, 114(1)

that a description of land by the word "lot" does not indicate a promise of vendors that lots were in approved subdivision, and that there was breach of warranty where complaint contained no allegation that sale of lot in unapproved subdivision was prohibited by law. U.C.A. 1953, 17-27-21, 57-5-5.

that it appears from the record and the complaint, however, that in October, 1958, Hales had evidently divided the parcels because they executed separate deeds,

14. Covenants ¶3

that Warranties, other than the five embraced in the statutory warranty deed, should be stated in a deed with clarity.

Adam M. Duncan, Ronald N. Boyce, Salt Lake City, for appellants.

Hanson, Baldwin & Allen, Backman, Backman & Clark, Salt Lake City, for respondents.

CALLISTER, Justice.

Action for damages arising out of certain real estate transactions. From an order of the lower court dismissing their second amended complaint, with prejudice, plaintiffs appeal.

The complaint which we are asked to review is rather lengthy and complex, to say the least. As best we can determine, the facts alleged are as follows:

The defendants Hale, Elders and Fisher were the owners of a certain parcel of real property in Salt Lake County. In the forepart of 1959, these defendants caused the parcel to be surveyed and subdivided into four lots.¹ A subdivision plat was prepared, designated as "Mount Olympus Park No. 5." The plat was submitted to the Salt Lake County Planning and Zoning Commission who refused to approve and accept it because there had not been compliance with a county ordinance relating to subdividing which requires lots of a larger area, installation of curbs, gutters, sidewalks, etc.² There is a general allegation that all of the defendants were acting as partners or joint adventurers in these real estate transactions and all had knowledge of the rejection of the subdivision plan.

It is also alleged that "during the spring of 1959" the defendants Hale, Elders and Fisher conveyed to defendants Barrett three lots identified upon the subdivision plat as Lots 1, 2 and 3, and that "in July

four in all, to Elders, Fishers, and two others to portions of the parcel.

2. Title 9, Revised Ordinances of Salt Lake County, 1953.

and August 1959" the Barretts conveyed, by warranty deeds, these three lots to the plaintiffs Duncan.

Following the foregoing, the complaint alleges that on July 7, 1959, the defendants Hale and Elders conveyed, by warranty deed, Lot 1 to the Duncans, and on the same date, the Hales and the defendants Fisher, by like conveyance, conveyed Lot 2 to the Duncans. By warranty deed, dated August 7, 1959, the Hales and Barretts conveyed Lot 3 to the Duncans.³ These last three mentioned deeds described the property conveyed by lot number and by metes and bounds. The metes and bounds descriptions coincided with the lots as they appeared on the plat. No mention of "Mount Olympus Park No. 5" was contained in these deeds.

On January 27, 1960, the defendants Elders executed a warranty deed to the plaintiffs Ellis. While this deed did not contain a lot number, the metes and bounds description conformed to Lot 4 of the subdivision plot.

The Duncans "conveyed or agreed to convey" their interest in the lots to the plaintiffs Hepworth and Burton, but are unable to complete the conveyance because of defendants' noncompliance with the ordinance. It is then alleged that the impossibility of securing building permits from the county has caused plaintiffs damage.

The complaint sets forth eight claims, revolving about essentially five asserted causes of action. These causes are: (1) defendants were negligent in violating a statutory standard of care and in exhibiting or causing to be exhibited to plaintiffs the subdivision plat without informing them that it had not been approved; (2) defendants induced the purchase of the lots

by fraudulently misrepresenting that the plat had been approved and recorded; (3) defendants Backman negligently failed to disclose the fact that the properties involved were not approved building lots; (4) the title insurance policy was breached; and (5) there was a breach of the warranty of title.

[1,2] (1) Plaintiffs argue that the defendants, in selling the lots, violated the provisions of the county ordinance⁴ aforementioned and our state statutes.⁵ It is true that in some instances negligence may be predicated upon the violation of an ordinance or statute.⁶ However, the laws here involved have as their object the intelligent and orderly development of the community, and, to effectuate this purpose, criminal sanctions were imposed. They were not enacted to promote safety, and they do not attempt to lay down rules regulating the conduct of individuals *inter se*. Their purpose is to impose a duty running to the sovereign, and a violation thereof does not necessarily give rise to civil liability.

[3] With respect to the claim that the defendants exhibited or caused to be exhibited the plat without informing plaintiffs that it had not been approved, the plaintiffs maintain that this amounted to a negligent misrepresentation. This claim was properly dismissed. The gravamen of the claim is that defendants are liable for negligently using a mode of communication which they ought to have foreseen, would be interpreted by the plaintiffs as an indication that the lots involved were a part of an approved subdivision.

[4-6] The usual action for fraud, whether negligent or intentional, requires

1953). The instant tract was divided into only four lots.

5. 17-27-21 and 57-5-5, U.C.A.1953. These statutes make it unlawful, and provide a misdemeanor penalty for anyone selling a subdivision lot unless the subdivision has been approved and recorded.

6. cf. *Satterlee v. Orange Glenn School Dist.*, 29 Cal.2d 581, 177 P.2d 279.

3. While impossible of precise ascertainment from the allegations of the complaint, it is a reasonable inference that these deeds were later in time than the deeds from the Barretts to the Duncans.

4. It is doubtful that this ordinance has any application since it defines "subdivision" as a division of a tract of land into five or more lots. (9-1-2, Rev.Ord.S.L.Co.,

that a representation be made with the intention that it be relied on.⁷ Negligent representation differs from intentional representation in that in the former the representor makes an affirmative assertion which is false without having used reasonable diligence or competence in ascertaining the verity of the assertion.⁸ Moreover, liability will only lie for a negligent representation when there is a special duty of care running from the representor to the representee.⁹

[7] In plaintiffs' complaint it is specifically alleged that the defendants had knowledge of the falsity of the supposed representation that induced the belief that the lots were part of an approved subdivision.

It is concluded that this knowledge forecloses an action for negligent misrepresentation, unless it can be said that defendants might be liable for the manner of their communication, rather than in the ascertaining of the verity of the communication. Under the facts of this case, such liability can be recognized. The parties were dealing at arm's length, there was no special duty between them arising out of a special expertise or confidence on the part of one of the parties, and the plaintiffs could have very easily cleared up whatever ambiguity or equivocalness there was in the communications by the easy expedient of a simple question. The inherent ambiguity of most means of communication compel us to the conclusion that usually, as a matter of law, there can be no liability for negligence in the manner of expression. Obviously, if a person intentionally uses equivocal or ambiguous language with the hope that one of several meanings will be understood by the representee, an entirely different situation would be presented. But, since these facts are not pleaded, we need not address ourselves to that problem.

[8,9] (2) Plaintiffs contend that their complaint states a cause of action based upon fraudulent misrepresentation in that the defendants exhibited or caused to be exhibited to plaintiffs the subdivision plat and represented to them that it had been approved although they knew otherwise. However, it is specifically alleged that the defendant Karl B. Hale made the misrepresentation to the defendant, Roy A. Barrett, and that the latter repeated the same to plaintiff, Adam A. Duncan. If a person fraudulently makes a misrepresentation of facts to another with the intent that it will be transmitted to a third person, the latter may have a cause of action against the misrepresenter.¹⁰ The instant complaint fails to allege that Hale intended the misrepresentation to be transmitted to Duncan or anyone else and must, therefore, fail.

[10] The claim of fraud by plaintiffs Ellis must also fail. They received their deed directly from the Elders. A search of the complaint fails to reveal any allegation of a misrepresentation made to them.

[11] (3) Plaintiffs Burton contend that the Backmans, in issuing to them an "interim insurance binder" and title insurance policy, were negligent in failing to disclose in these instruments the fact, of which the Backmans had knowledge, that the lots were located in a disapproved subdivision. The complaint contains no allegation that the Backmans knew that the Burtons were acting under an impression that the lots were within an approved subdivision and the Backmans had no duty to reveal facts outside the scope of the transaction. The lower court properly dismissed this claim.

[12] (4) The Burtons also claim that there was a breach of the provisions of the title insurance policy issued by the Backmans. The policy is not contained in the

Ellis v. Bd. of Trade, 164 Cal.App.2d 636, 31 P.2d 89; Courteen Sud Co. v. Hong Kong & Shanghai Bkg. Corp., 245 N.Y. 77, 157 N.E. 272, 56 A.L.R. 1186.

8. 1 Harper & James, the Law of Torts, Sec. 7.6.

9. Ibid.

10. Rest. of Torts, Section 533.

record before us, and the particular provision or provisions claimed to have been breached are not set out in the complaint. This claim does not meet the requirements of our rules¹¹ and was properly dismissed.

[13] (5) Finally, the Duncans contend that there was a breach of warranty of title in the deeds received by them to Lots 1, 2 and 3. It is alleged that the parties to these deeds understood the word "lot" to mean building lots in an approved subdivision. The lots were conveyed by use of the short form warranty deed. In their brief the Duncans argue that the warranties of good right to convey and seisin were breached. Whatever force this argument may have, by virtue of the fact that Section 17-27-21, U.C.A.1953 prohibits the sale of lots in an unapproved subdivision, it is not properly before the court since the complaint contains no allegation to that effect. In fact, the complaint does not rely on any of the five warranties embraced in the statutory warranty deed.

[14] Duncans' theory apparently is that by using the word "lot" the defendants warranted that the properties were part of an approved subdivision. This is not sustainable. Warranties, other than the five embraced in a statutory warranty deed, should be stated in a deed with clarity. Description of land by the use of the word "lot" does not indicate a promise on the part of the defendant vendors in this case. Although such a description might possibly be probative of fraud, it cannot as a matter of law be considered a warranty. These claims were properly dismissed.

No discussion is contained in this opinion with regard to the possible claims against the defendants Barrett. It appears from the record that no appearance was made by them in the court below or in this court.

The order of dismissal with prejudice is affirmed. Costs awarded to defendants.

WADE, C. J., and HENRIOD, McDONOUGH, and CROCKETT, JJ., concur.

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Paul RUBEY and Carol Rubey, his wife,
Plaintiffs and Respondents,

v.

Morris T. WOOD and Ruby J. Wood, his wife,
Defendants and Appellants.

No. 9447.

Supreme Court of Utah.

July 20, 1962.

Action for specific performance of real estate contract. The Third District Court, Salt Lake County, Aldon J. Anderson, J., rendered judgment on directed verdict for plaintiffs, and defendants appealed. The Supreme Court, McDonough, J., held that evidence was insufficient to take to jury question whether defendants had been justified in relying on plaintiffs' oral representations as to contents of contract.

Affirmed.

1. Appeal and Error Ⓒ987(3)

Supreme Court had duty to review both questions of law and fact in equitable case.

2. Contracts Ⓒ99(3)

To overturn written contract by claim of fraud and misrepresentation, evidence must be clear and convincing.

3. Appeal and Error Ⓒ1012(1)

For defendants to succeed on appeal from judgment denying their claim of fraud and misrepresentation, evidence must clearly preponderate against trial court's decision.

4. Specific Performance Ⓒ123

Evidence, in action for specific performance of real estate contract, wherein defendants charged fraud and misrepresentation, was insufficient to take to jury question whether defendants had been justified in relying on plaintiffs' oral representations as to contents of contract.

Cayias, Day & Livingston, Salt Lake City, for appellants.

11. U.R.C.P. 8(a).