

1982

# Beverly Kerr v. Thomas Alden Kerr : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

---

RICHARD A. CHRISTENSON  
Trustee for CAPE TRUST,

Plaintiff and  
Respondent,

vs.

Case No. 18330

COMMONWEALTH LAND TITLE  
INSURANCE COMPANY,

Defendant and  
Appellant.

---

APPEAL FROM THE JUDGMENT OF THE  
DISTRICT COURT OF THE THIRD  
JUDICIAL DISTRICT, SALT LAKE COUNTY,  
STATE OF UTAH

HONORABLE KENNETH RIGTRUP, JUDGE

---

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

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NATURE OF THE CASE

This case involves an action brought on behalf of Cape Trust, the employees' pension and profit sharing trust for Capitol Thrift & Loan, against Commonwealth Land Title Insurance Company, alleging that Commonwealth, acting as escrow agent in the sale of residential subdivision lots, negligently misrepresented to Cape Trust, the assignee of the beneficial interest in certain of the lots covered by the escrow agreement, the status of promissory notes and second trust deeds on five of the subdivision lots.

### DISPOSITION OF THE CASE IN THE LOWER COURT

The case was tried without a jury before the Honorable Kenneth Rigtrup, and resulted in a judgment against Commonwealth and in favor of plaintiff Richard A. Christenson as trustee for Cape Trust as to plaintiff's claim for negligent misrepresentation. The lower court subsequently denied Commonwealth's post-trial motions for a new trial and/or to alter and amend the Findings of Fact, Conclusions of Law and Judgment.

### STATEMENT OF FACTS

Early in 1977, AGLA Development Corporation ("AGLA") a Salt Lake County based real estate developer, desired to develop a residential subdivision in Salt Lake County to be named "Falconhurst No. 1." In connection with this development, AGLA obtained construction financing through Western Mortgage Loan Corporation in the amount of approximately \$450,000.00, and as security therefor granted Western Mortgage Loan Corporation a deed of trust on the undeveloped subdivision property.

At AGLA's request, defendant Commonwealth Land Title Insurance Company ("Commonwealth") agreed to act as escrow agent for the subdivision. A copy of the escrow agreement between AGLA and Commonwealth was introduced and received into evidence as Plaintiff's Exhibit P-2.

The escrow agreement between AGLA and Commonwealth provided that as the individual subdivision lots were sold, Commonwealth would collect and remit 60% of the proceeds of each sale to Western Mortgage Loan Corporation toward satisfaction of the \$450,000.00 obligation. The escrow agreement provided further that if the purchaser of a subdivision lot paid the entire purchase price, Commonwealth would remit the remainder, after payment to Western Mortgage Loan Corporation, to AGLA or its assigns. In the event the purchaser of a lot did not pay the entire purchase price, the purchaser would execute a promissory note secured by a deed of trust on the subdivision lot purchased. The notes were to provide for payment of the balance of the purchase price in full within six months, with interest accruing at 10% per annum until the date due and 18% per annum thereafter.

Sometime in 1977 Capitol Thrift & Loan ("Capitol") made a loan to AGLA for which AGLA assigned its beneficial interest in the escrow agreement to Capitol as security (Tr. p. 32). It should be pointed out that plaintiff Cape Trust is the employee's pension and profit sharing trust for Capitol, and that Capitol is Cape Trust's sole contributor.

As each lot was purchased during the period of time in which Capitol held the beneficial interest in the escrow agreement, Commonwealth, pursuant to the terms of the escrow

agreement, paid 60% of the proceeds to Western Mortgage Loan Corporation, and either remitted the remainder to Capitol or had promissory notes secured by trust deeds in favor of Capitol executed by the purchasers for the remainder.

Under the arrangement outlined above, in October of 1977, the five subdivision lots which are disputed in this action were purchased by Irwin Custom Homes, Inc. Pursuant to the terms of the escrow agreement, Irwin Custom Homes executed promissory notes representing the balance of the purchase price which was owed to AGLA or its assigns under the escrow agreement. These notes were secured by trust deeds on the individual lots. Certified copies of the trust deeds from the Salt Lake County Recorder were introduced and received into evidence as Defendant's Exhibit D-5.

On or about April 12, 1978, Irwin Custom Homes, Inc., paid off the promissory notes on the five disputed trust deeds. Commonwealth then reconveyed the trust deeds (Defendant's Exhibit D-5) and remitted \$22,446.72 to Capitol, who was at that time the assignee of AGLA's beneficial interest in the escrow agreement. A copy of the check from Commonwealth to Capitol which indicates on its face that it represents "lot pay-offs" on the five disputed lots, and which is dated April 12, 1978, was introduced and received into evidence as Plaintiff's Exhibit P-4.

Mr. Merlyn Hanks testified at trial that in his role as an officer of Capitol, the check which indicated on its face that it represented lot pay-offs on the five disputed subdivision lots would most likely have come to him to be negotiated (Tr. pp. 13, 33). Capitol subsequently transferred its interest in the escrow agreement back to AGLA, probably because the obligation which was secured thereby had been satisfied.

On October 4, 1978 AGLA assigned its beneficial interest in twenty-five individual subdivision lots located in the Falconhurst No. 1 subdivision and nine lots located in another development called Falconhurst No. 2 subdivision, to plaintiff Cape Trust, the employees' pension and profit sharing trust of Capitol. The assignment, a copy of which was introduced and received into evidence as Plaintiff's Exhibit P-3 was prepared by Merlyn Hanks as trustee for Cape Trust (Tr. p. 31).

Mr. Hanks testified that in preparing the assignment from AGLA to Cape Trust he relied upon information supplied to him by AGLA to determine which lots should be included in the assignment (Tr. pp. 15-16, 17). He testified that in the preparation of the assignment he took no independent steps, nor did he make any independent effort, to determine the status of the promissory notes or subdivision lots involved,

and he admitted that at no time did Cape Trust or Capitol keep a record of the promissory notes and trust deeds which were being paid off and reconveyed (Tr. pp. 24, 34, 35-37).

Mr. Hanks testified that "in anticipation of" the assignment he talked with Mr. Ralph Ribas of Commonwealth over the telephone prior to the execution of the assignment (Tr. pp. 31-32). During that telephone conversation specific promissory notes and subdivision lots were not mentioned, nor, according to Mr. Hanks' testimony, was there any representation by Mr. Ribas regarding the status of any of the notes and subdivision lots (Tr. p. 32).

As discussed above, it turns out that five of the twenty-five subdivision lots in Falconhurst No. 1 subdivision covered by the October 4, 1978 assignment from AGLA to Cape Trust had already been sold to Irwin Custom Homes, Inc., and the beneficial interest in the trust deeds on those five lots had been extinguished by the payment of the promissory notes by Irwin Custom Homes to Capitol and the reconveyance of the trust deeds on April 12, 1978.

Cape trust's claim of misrepresentation against Commonwealth involves an "Acknowledgement" contained on the reverse side of the October 4, 1978 Assignment from AGLA to Cape Trust. The Acknowledgment, which was prepared along with the rest of the document by Mr. Merlyn Hanks, was signed by Ralph Ribas of Commonwealth. It provides:

Commonwealth Land Title Insurance Company hereby acknowledges receipt of an executed copy of the foregoing instrument and hereby promises its performance to satisfy said agreement. Commonwealth Land Title Insurance Company also agrees that it is in possession of the beneficial interest of promissory notes and second trust deeds covering the above-mentioned properties and that it will not convey its interest in any way back to AGLA DEVELOPMENT CORPORATION or any other entity not covered in the escrow agreement.

Cape Trust sued Commonwealth claiming that the Acknowledgment quoted above constituted an actionable misrepresentation by Commonwealth as to the status of the five disputed subdivision lots. Plaintiff alleged in its complaint that the Acknowledgment signed by Commonwealth induced Cape Trust to loan funds to, or for the benefit of, AGLA (Plaintiff's Complaint, ¶5). However, Mr. Hanks testified at trial that the assignment was made to Cape Trust to satisfy a debt owed to Cape Trust by AGLA which arose out of an earlier joint venture between the two parties (Tr. pp. 29-30). Mr. Hanks testified further that he did not know whether that pre-existing debt was fully satisfied by the assignment (Tr. pp. 11, 14-15), and that the amount of debt so satisfied was based upon some type of present value calculation, evidence of which was not offered (Tr. pp. 18, 26, 30-31).

Mr. Hanks also testified that the amount of the pre-existing debt forgiven by the assignment probably did not equal the \$21,680.00 prayed for in the complaint (Tr.

p. 27). No testimony or documentary evidence was offered by plaintiff to establish the amount of debt so forgiven.

Despite the evidence summarized above, the trial court found that Commonwealth had made affirmative representations to Cape Trust regarding the status of the five disputed subdivision lots prior to the assignment from AGLA to Cape Trust, which representations were confirmed by the Acknowledgment signed by Mr. Ralph Ribas on behalf of Commonwealth; that Commonwealth knew that Cape Trust intended to rely upon the representations and the Acknowledgment of Commonwealth; that Cape Trust reasonably relied upon the representations and the Acknowledgment of Commonwealth; that Cape Trust had no knowledge of the fact that the five disputed notes had been paid to Capitol and the second trust deeds securing the notes thus reconveyed; and that the promissory notes on the five disputed subdivision lots, which notes were not offered as evidence, were for the total principal amount of \$21,680.00, together with interest for 6 months at 10% per annum and thereafter at 18% per annum.

From the foregoing Findings of Fact the trial court entered its Conclusions of Law that Commonwealth breached a "special duty of care" which it owed to plaintiff by making representations regarding the status of the five disputed subdivision lots which it knew or should have known were

false; that plaintiff was not required to do anything to verify the truth of the representations of Commonwealth, and plaintiff was therefore in no way contributorily negligent; and that the representations and Acknowledgment of Commonwealth materially influenced the actions of plaintiff Cape Trust proximately causing plaintiff damages in the amount of \$21,680.00 together with interest at the rate of 10% per annum from October 7, 1977 to April 7, 1978, and thereafter at the rate of 18% until the date judgment was entered, and thereafter at 12% per annum.

#### ARGUMENT

##### POINT I

THERE WAS INSUFFICIENT EVIDENCE THAT COMMONWEALTH MADE AN AFFIRMATIVE REPRESENTATION TO CAPE TRUST REGARDING THE STATUS OF THE FIVE DISPUTED SUBDIVISION LOTS.

A. There was no evidence that Commonwealth made any representation regarding the status of the five disputed subdivision lots prior to the execution of the October 4, 1978 Assignment and Acknowledgment.

Plaintiff's claim against defendant Commonwealth was based upon a theory of misrepresentation. To prevail upon such a claim plaintiff must prove by a preponderance of the evidence that an actual representation as to a material fact was made by Commonwealth to plaintiff.

In this case the trial court found that such a representation had been made by Commonwealth to Cape Trust regarding the

status of the five disputed subdivision lots. However, the record is devoid of evidence indicating that such a representation was actually made by Commonwealth. Paragraph 7 of the Findings of Fact entered by the trial court reads:

That the Acknowledgment confirmed in writing the same agreements and representations that had been previously made by Commonwealth to the plaintiff.

Following the trial, the trial judge indicated that the telephone conversation between Merlyn Hanks and Ralph Ribas which was testified to by Mr. Hanks, contained the false representation concerning the status of the five disputed subdivision lots (Tr. p. 88). The trial judge indicated his opinion that the Acknowledgment signed by Mr. Ribas merely confirmed the false representation earlier made on the telephone to Mr. Hanks (Id.)

However, Mr. Ribas testified that he had no recollection of any telephone conversation with Mr. Hanks which had anything to do with the assignment of beneficial interests from AGLA to Cape Trust (Tr. p. 65). Further, Mr. Hanks testified that the only telephone conversation which he recalled with Mr. Ribas regarding this particular assignment of beneficial interests was a very general one in which nothing was said by either of the parties concerning any specific promissory notes, trust deeds or subdivision lots (Tr. p. 31-32). Thus, there was no

evidence to support a finding that Commonwealth made a representation to Cape Trust in the telephone conversation between Mr. Ribas and Mr. Hanks.

B. The Acknowledgement which was contained in the October 4, 1978 Assignment and which was signed by Mr. Ralph Ribas of Commonwealth cannot, as a matter of law, be held to constitute an actionable misrepresentation.

Plaintiff presented no evidence concerning any possible representations made by Commonwealth to Cape Trust other than the Acknowledgment which was contained in the October 4, 1978 Assignment and which was signed by Mr. Ribas on behalf of Commonwealth. Indeed, Mr. Hanks admitted during cross-examination at trial that the written Acknowledgement was the only "representation" which Cape Trust claimed was made by Commonwealth regarding the status of the disputed subdivision lots (Tr. p. 70).

The Acknowledgement which was prepared by plaintiff and signed by Mr. Ribas is not, and cannot be as a matter of law, a representation regarding the status of the disputed subdivision lots. Rather, it is merely an acknowledgement and an agreement which was signed by Mr. Ribas after the execution of the Assignment.

The Acknowledgement signed by Mr. Ribas cannot be held to be a representation by Commonwealth regarding the status of the disputed subdivision lots for two reasons. First, the Acknow-

ledgment states that Commonwealth "acknowledges receipt of an executed copy" of the Assignment. Thus, since the Assignment had already been executed when Mr. Ribas signed the Acknowledgment, even if the Acknowledgment were to be considered as a representation by Commonwealth, it would have been made after the action by plaintiff which it supposedly induced. It would therefore have been impossible, as a matter of law, for the Acknowledgment to have been a representation as to an existing material fact, or, as discussed in pages 13-15 below, to have been the proximate cause of plaintiff's loss.

The second reason the Acknowledgment cannot be held to be an affirmative representation regarding the status of the disputed subdivision lots is that it is couched in terms of an agreement, rather than as a statement or representation of certain facts. The Acknowledgment provides:

Commonwealth Land Title Insurance Company also agrees that it is in possession of the beneficial interest of promissory notes and second trust deeds covering the above-mentioned properties . . .

The Assignment specifying the specific promissory notes and trust deeds covered thereby, and the Acknowledgment contained therein, were prepared by plaintiff (Tr. p. 31) and should, therefore, be construed against plaintiff. The Acknowledgment signed by Mr. Ribas was, by its own terms, merely an agreement with the representations made by plaintiff in the Assignment

regarding the status of the specific notes and trust deeds. It was not a statement of fact, nor was it a factual representation. The Acknowledgment cannot, as a matter of law, therefore be held to constitute an actionable misrepresentation.

Since there was no evidence at trial regarding a representation made by defendant to plaintiff with respect to the status of the five disputed subdivision lots, and since the Acknowledgment signed by Mr. Ribas on behalf of Commonwealth cannot, as a matter of law, be construed as an actionable misrepresentation of an existing fact, the finding that Commonwealth made an actual representation to plaintiff regarding the status of the five disputed subdivision lots is erroneous and the judgment entered by the trial court should therefore be reversed.

## POINT II

THE TRIAL COURT WAS WRONG IN ITS CONCLUSION OF LAW THAT PLAINTIFF REASONABLY RELIED UPON ANY REPRESENTATION MADE BY DEFENDANT.

A. Plaintiff did not, as a matter of law, rely upon any representation made by defendant with respect to the status of the five disputed subdivision lots.

To make out a prima facie case of negligent misrepresentation, it was incumbent upon Cape Trust to prove by a preponderance of the evidence that it actually relied upon the

representation of defendant Commonwealth which it claims was false. This principle is summarized in 37 Am.Jur.2d, Fraud and Deceit, § 223:

To be actionable a representation must have been relied on at the time of the transaction or contract. Moreover, the representation must have been the proximate cause of the representee's action or change of position -- that is, it must have been acted on in the manner contemplated by the party making it or else in some manner reasonably probable.

Mr. Merlyn Hanks admitted on cross-examination that the only representation which Cape Trust claimed was made by Commonwealth with respect to the status of the five disputed subdivision lots was the Acknowledgment contained in the October 4, 1978, Assignment (Tr. pp. 16-17, 70), which document was drafted by Mr. Hanks (Tr. p. 31). Since the Acknowledgment was not prepared by Commonwealth, any representation imputed to Commonwealth by virtue of the Acknowledgment must have been made by the act of Mr. Ribas in signing the Acknowledgment.

In this regard it is important to note the opening language of the Acknowledgment, which states that Commonwealth "hereby acknowledges receipt of an executed copy of the foregoing instrument." Thus, when the Acknowledgment was signed by Mr. Ribas and the "representation" of Commonwealth was thus made, the Assignment had already been executed. Indeed, at one point during direct examination Mr. Hanks referred to

the October 4, 1978 document as "the Assignment and subsequent Acknowledgment" (Tr. p. 17, line 13). The representation therefore was not, as a matter of law, "relied on at the time of the transaction or contract," and, consequently, was not an actionable representation.

Further, the action which Cape Trust supposedly took in reliance upon Commonwealth's representation was the execution of the October 4 Assignment in satisfaction of a pre-existing debt owed by AGLA. However, as discussed above, this action had already occurred when the Acknowledgment was signed by Commonwealth. Therefore, the signing of the Acknowledgment by Commonwealth could not, as a matter of law, have been the proximate cause of the actions of Cape Trust or of Cape Trust's claimed damages.

B. Even if Cape Trust did rely upon a representation by Commonwealth, such reliance was unreasonable and unjustified on the part of Cape Trust.

Even assuming that Commonwealth made an actual false representation to Cape Trust regarding the status of the five disputed subdivision lots, and assuming that Cape Trust's reliance upon such representation proximately caused it damage, it is essential in a cause of action for negligent misrepresentation that the person to whom such a false representation is made reasonably and justifiably relies thereon.

See, e.g., Mikkelson v. Quail Valley Realty, 641 P.2d 124

(Utah 1982); Pace v. Parrish, 247 P.2d 273 (Utah 1952). It follows that one who has actual or constructive knowledge of the falsity of facts represented to him cannot justifiably rely upon those representations. 37 Am.Jur.2d, Fraud and Deceit, § 383 provides:

There are many defenses available in an action for damages for fraud, some of which may be based upon the absence in the case of one or more of the elements essential to the maintenance of such an action. Thus, the right of action may be negated on the ground . . . that the complainant had knowledge, actual or constructive, of the actual facts.

This general rule as it applies to fraud actions, and by inference to actions based upon negligent misrepresentation, is summarized in Section 541 of the Second Restatement of Torts as follows:

The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him.

In this case, Mr. Hanks, trustee for Cape Trust, and the one who prepared the Assignment of promissory notes and trust deeds from AGLA to Cape Trust, testified that in his role as treasurer of Capitol he would have seen and negotiated the April 12, 1978 check (Plaintiff's Exhibit P-4) payable to Capitol which specified on its face that it represented lot payoffs on the five disputed lots. Thus, Cape Trust had actual knowledge, imputed to it through Mr. Hanks, of the fact

that the five disputed trust deeds and notes which they secured had been reconveyed and satisfied, and it could not justifiably rely upon any representations to the contrary by Commonwealth.

Further, certified copies of deeds of reconveyance which were recorded in the Salt Lake County Recorder's office on the five disputed subdivision lots were introduced and received into evidence as Defendant's Exhibit D-5. These reconveyances were of record in the County Recorder's office at the time the assignment from AGLA to Cape Trust was prepared by Mr. Hanks and executed. Utah Code Annotated § 57-3-2, provides:

Every conveyance, or instrument in writing affecting real estate, executed, acknowledged or proved, and certified, in the manner prescribed by this title . . . shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; . . .

Cape Trust therefore had constructive knowledge of the fact that the trust deeds on the five disputed subdivision lots had been reconveyed prior to the preparation and execution of the Assignment, and it could not, therefore, justifiably rely upon representations by Commonwealth to the contrary.

Mikkelson v. Quail Valley Realty, supra, was an action for the misrepresentation of the square footage in a house. In Mikkelson the defendant, a real estate agent, listed a

house for sale indicating that it contained 2800 square feet. The house was purchased by the plaintiff, and an FHA appraisal was obtained which indicated that the square footage was actually 2,394 square feet. The plaintiff signed the closing documents after having acknowledged receipt of the FHA appraisal information.

In preparing to sell the house one year later, the plaintiff measured the square footage and discovered the discrepancy. The trial court found an actionable misrepresentation on the part of the defendant real estate agent and awarded damages to the plaintiff. The Supreme Court reversed the lower court, holding that the plaintiff did not reasonably rely upon the representation of defendant as to the square footage of the house. The court stated, at page 126:

The undisputed evidence shows that the plaintiff could not have reasonably relied on his belief that the house contained 2800 square feet since he not only inspected the property but also signed, prior to closing, loan documents acknowledging receipt of the FHA appraisal report wherein the correct footage was revealed. Furthermore, on cross-examination, plaintiff admitted that he had in his file and possession a copy of the form containing the correct figure. While plaintiff may have initially received false information, he cannot reasonably continue to rely on it once true and correct information is furnished him, particularly when the corrected information is contained in a document of the importance and dignity of an appraisal and related forms.

As in the Mikkelson case, Mr. Hanks here testified that he most likely saw and negotiated the check which indicated on its face that it represented lot pay-offs on the five disputed subdivision lots prior to preparing the Assignment of the beneficial interests which contained those five subdivision lots (Tr. pp. 13,33). Cape Trust was, therefore, not justified as a matter of law in relying upon any representation by Commonwealth regarding the status of the five disputed subdivision lots where it knew, or should have known, of the true status of those lots.

In Lewis v. White, 269 P.2d 865 (Utah 1954), the plaintiff sued to forfeit a real estate contract and retake possession of a motel. The defendants filed a counterclaim alleging that in connection with the sale of the motel the plaintiff misrepresented the motel's gross income. The trial court ruled in favor of the defendants on the misrepresentation issue.

In the Lewis case, despite the fact that the defendants were naive and were entirely without business experience, and were relying upon the plaintiff's knowledge and expertise as a real estate broker and motel operator, the Utah Supreme Court reversed the trial court's ruling on the misrepresentation issue. The Supreme Court held, at page 866:

In submitting the question of fraud it was incumbent upon the trial court to instruct the jury as to the elements necessary to establish it. Plaintiffs point out that he failed to do this in that he did not tell them that in order to establish their claim of fraud defendants must have reasonably relied upon the representations they claim the plaintiff made to them. This is invariably held to be an element necessary to make out a case of fraud. No matter how naive or inexperienced the defendants were, they could not close their eyes and accept unquestioningly any representations made to them. It was their duty to make such investigation and inquiry as reasonable care under the circumstances would dictate. [Emphasis in original]

See, also, Kohler v. Garden City, 639 P.2d 162 (Utah 1981); and Jardine v. Brunswick Corporation, 423 P.2d 659 (Utah 1967), in which the Utah Supreme Court held:

One who complains of being injured by such a false representation cannot heedlessly accept as true whatever is told him, but has the duty of exercising such degree of care to protect his own interests as would be exercised by an ordinary, reasonable and prudent person under the circumstances; and if he fails to do so, is precluded from holding someone else to account for the consequences of his own neglect.

The undisputed evidence at trial established that plaintiff Cape Trust had actual and constructive knowledge of the fact that the five disputed promissory notes and trust deeds had been satisfied and reconveyed prior to the assignment of those notes and trust deeds from AGLA to Cape Trust. Cape Trust was therefore not justified, as a matter of law, in relying upon any contrary representations made by Commonwealth. Further, plaintiff Cape Trust was not justified in

blindlessly and heedlessly accepting as true anything which Commonwealth might have represented concerning the disputed lots.

### POINT III

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE AWARD OF DAMAGES TO CAPE TRUST.

A. The \$21,680 awarded as damages was unsupported by competent evidence, and was wrong as a matter of law.

Following trial the court awarded plaintiff damages in the amount of \$21,680 plus interest at the rate of 10% per annum from October 7, 1977 to April 7, 1978 and 18% interest thereafter until the date of judgment. This award of damages was excessive as a matter of law, and was not supported by the evidence.

Mr. Merlyn Hanks testified that the amount of debt owed by AGLA which was forgiven by Cape Trust in return for the assignment of the beneficial interest in the promissory notes and trust deeds on the disputed lots was based upon some type of present value formula or analysis (Tr. pp. 18, 26, 30-31). There was no testimony or evidence offered to explain the present value formula or analysis so used.

Mr. Hanks testified on cross-examination that the present value formula utilized by Cape Trust resulted in some discounting of the face value of the promissory notes involved

(Tr. p. 27). However, Mr. Hanks did not testify as to the amount of discounting which occurred. Indeed, he testified on cross-examination that a calculation of the discounting which occurred could not be made from the evidence in the record:

Q. So you applied the present value of the face amount of 40% of whatever the lot prices were?

A. Not the present value of the face amount. The present value of the anticipated payoff.

Q. From the date the notes bore?

A. Yes. To the date that we anticipated they would payoff.

Q. Well, what was the date you anticipated they would payoff?

A. Without that document that I referred to having received from AGLA, I can't give you that date. It was different, however, than the date of the maturity because AGLA Development, in its relationship with the builders, you know, to whom they had sold the lots wanted us to be a little more lenient with the time than the notes called for. That's why it took some additional calculation to determine what the anticipated amount would be.

Q. So without some further evidence in the record you can't specifically tell us what date you utilized in your present value calculations in order to determine the amount that was actually credited against the AGLA debt; is that correct?

A. That's right.

Transcript, pages 30-31.

Mr. Hanks testified further under cross-examination that the \$21,680 prayed for in the complaint represented the face value of the notes, not taking into account the discounting which occurred (Tr. p. 27). Thus, he testified that the actual amount of damages sustained by Cape Trust was not the amount prayed for in the complaint. There was no testimony or evidence regarding the amount of damage actually sustained by plaintiff.

Further, paragraph 14 of the Findings of Fact entered by the court, upon which the award of damages was based, states:

That the five promissory notes the Trust Deeds on Lots 12, 18, 30, 34 and 53, Falconhurst Subdivision No. 1, were all executed October 7, 1977 and the original total principal amount of the five notes was the sum of \$21,680, together with interest for six months at 10% per annum and thereafter at 18% per annum.

Mr. Hanks was allowed to testify regarding the terms of the promissory notes despite objections by defendant under Rule 70 of the Utah Rules of Evidence that the best evidence of the terms of the notes would be the notes themselves, which were not offered as evidence (Tr. p. 19). Since the testimony contained in the transcript on pages 20-23 concerning the terms and contents of the disputed promissory notes should not have been admitted because of the Best Evidence

Rule, the award of damages based upon such testimony was error and cannot stand as a matter of law.

B. The pre-judgment interest awarded plaintiff by the trial court was unsupported by the evidence, and was wrong as a matter of law since it represented special damages which were neither pleaded nor proved by plaintiff.

The pre-judgment interest awarded by the trial court is also clearly in error. There was no contract between plaintiff and defendant which provided for the interest rate awarded by the court. There is no Utah statute which authorizes such an award of interest.

The amount of interest which was awarded to plaintiff is an element of special damages. See, Cohn v. J. C. Penney Company, Inc., 537 P.2d 306 (Utah 1975). As such, it was error to award that amount of interest since it was not specially pleaded or prayed for by plaintiff. Special damages, in order to be awarded, must be specifically pleaded and prayed for by plaintiff Id. The prayer of plaintiff's complaint reads:

WHEREFORE, plaintiff prays judgment against Commonwealth and AGLA, jointly and severally, in the amount of \$21,680, together with interest thereon from the date such funds were paid by Commonwealth to others to the date of judgment herein, and for plaintiff's costs incurred herein.

It is clear that plaintiff did not plead nor pray for the special rate of interest which was awarded.

Not only did plaintiff not plead or pray for the special interest award, but plaintiff failed to prove by competent evidence that it was entitled to such an award of interest. Indeed, the only evidence at trial indicating that plaintiff suffered a loss of the specified amount of interest awarded was the testimony by Mr. Hanks concerning the terms of promissory notes which were not introduced into evidence. As discussed above, such testimony should have been excluded based upon the Best Evidence Rule. Thus, the interest awarded was wrong as a matter of law, and was totally unsupported by admissible evidence.

#### CONCLUSION

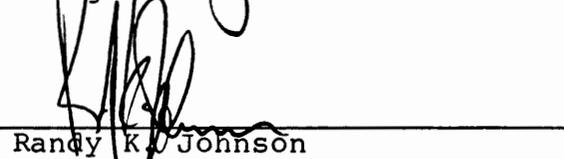
The trial court erred in finding that Commonwealth made an affirmative representation to Cape Trust regarding the status of the five disputed subdivision lots, and in finding that Cape Trust reasonably relied upon any possible representation of Commonwealth. The trial court further erred in awarding Cape Trust an amount of damages which finds no support in the evidence and which plaintiff admitted was not the amount of damages actually sustained by plaintiff, and in awarding plaintiff a pre-judgment rate of interest which represents an award of special damages which was neither

pleaded nor proved by plaintiff. It is therefore respectfully submitted that the judgment of the trial court should be reversed and judgment should be entered in favor of defendant, Commonwealth Land Title Insurance Company.

DATED this 13<sup>th</sup> day of May, 1982.

SNOW, CHRISTENSEN & MARTINEAU

By   
George A. Hunt

By   
Randy K. Johnson

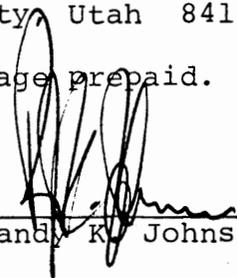
Attorneys for Defendant/  
Appellant Commonwealth Land  
Title Insurance Company

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing  
Brief of Appellant to:

David B. Boyce  
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Attorneys for Plaintiff/  
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this 14th day of May, 1982, postage prepaid.

  
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Randy K. Johnson