

2015

**Reperex, Inc., a Utah Corporation, Brad Ball, and David Ball,
Plaintiffs-Appellants v. Child, Van Wagoner & Bradshaw PLLC, a
Utah Limited Liability Company, J. Russton Bradshaw, Coldwell
Banker Commercial, and Duane Bush, Defendants-Appellees :
Reply Brief of Appellants**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ORAL ARGUMENT REQUESTED

**REPEREX, INC., a Utah Corporation,
BRAD BALL, and DAVID BALL,**

Plaintiffs-Appellants

v.

**CHILD, VAN WAGONER &
BRADSHAW PLLC, a Utah Limited
Liability Company, J. RUSSTON
BRADSHAW, COLDWELL BANKER
COMMERCIAL, and DUANE BUSH,**

Defendants-Appellees

REPLY BRIEF OF APPELLANTS

Appellate Case No.: 20150246-CA

District Court No. 110916924

**APPEAL FROM JUDGMENT ON THE PLEADINGS, SUMMARY JUDGMENT AND
FINAL JUDGMENT FROM VERDICT
ENTERED BY JUDGE TODD M. SHAUGHNESSY
THIRD DISTRICT COURT FOR SALT LAKE COUNTY**

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APPELLANTS' RESPONSE TO COLDWELL BANKER'S OBJECTIONS AND BRADSHAW'S FACTS.

Response to Coldwell's Objections.

Coldwell Banker breathtakingly alleges that Appellants have made misrepresentations about the facts and the record to this court. Coldwell's allegations are much better left for a trial, where witnesses can be examined, cross-examined and closing arguments made. It appears that Coldwell wants to conduct the trial here on appeal, even when the order being appealed is judgment on the pleadings—before Plaintiffs can marshal their first scintilla of evidence. All of the facts are plainly alleged in Plaintiffs' Complaint (Rec. 7-10) as Coldwell must have read and cannot deny.

Fact No. 5: The record plainly states that Bush told the Balls that he represented both the buyers and sellers in a dual agency. This is confirmed with Bush's own testimony speaking plainly about fiduciary duty in Fact no. 6.

Fact No. 7: Balls should have the chance at trial to examine and cross examine regarding the shakey books. If the expenses were shakey, then the misrepresented profits were shakey. The same email at the same point in the record show that the books had a lot of intercompany commingling. Plainly the record shows that the books were "shakey."

Fact No. 8: The record shows that the Balls never received from Bush any information from the email which Bush plainly received from the Seller's Accountant as set forth in Fact No. 7. Bush either showed the Seller information to the Balls or concealed it.

Fact No. 9: The record shows exactly the income statements received by the Balls from Bush. The said income statements shows the adjustments made by Bush--or someone at Coldwell Banker--or even Coldwell's accountant in the column entitled adjustments. Bush/Coldwell also showed falsified numbers for 2006, omitting the Seller information he received from Bush's accountant in Fact No. 7.

Fact No. 10: The record shows Balls' affidavit testimony referring to Exhibit "A," a typo, when the affidavit should have referred to Exhibit "C." See explanation above for Fact no. 9. This typo error can be cleared up at trial.

Fact No. 12: While it is true that the affidavits in the record do not state that Bush represented that the Balls could get a license in 90 days, the Complaint alleges the same. (Rec. 7) The Balls did obtain in discovery documents which came from Bush a document representing that it takes 90 days to get a contractors' license, and that this document was given to the Balls by Bush himself. This will be shown at trial.

Fact No. 13: The Balls state that Promontory was not part of any bad debt. In addition, Rec. p. 1246 shows a Sales by Customer report, where Promontory had the vast majority of the orders for January and February, 2008, with the note written by someone at Coldwell stating that approx. 1 million additional in jobs were booked out through the rest of 08. Bush knew that this was not true when he gave this document to the Balls. Rec. P. 1242 shows Promontory with \$498,000.00 of the 1.1 million sales for 2007, which is a little more than 40%.

Fact No. 14: Rec. P. 1246 shows a Sales by Customer report, where Promontory had the vast majority of the orders for January and February, 2008, with the note written by someone at Coldwell stating that approx. 1 million additional in jobs were booked out through the rest of 08. This does verify Fact No. 14.

Fact No. 15: The email plainly shows that Mark Cobb, a prospect, telling Bush "Did you get my previous email about Promontory filing bankruptcy? This is Steve's [Seller's] bread and butter..on the tile side." The Balls will testify at trial that they never received a penny from any Promontory tile order during the 8 months that they tried to make a go of the business.

Fact No. 16: The Balls testified that Bush never mentioned any bad debt issue with Promontory. They were shown the document at Rec. p. 1246 where the Tile business with Promontory would continue for a year out. There will be no issue at trial that Bush concealed this email that Promontory had gone bankrupt, as alleged in their Complaint. (Rec. 7-8)

Response to Bradshaw's Selective Facts.

Response to No. 5. The prior emails Bradshaw sent to Bush plainly referred to spreadsheets and summaries which were attached by Bradshaw, with comments to Bush about the documents, signed by Bradshaw and attesting to the information sent. Many attachments were sent. (Rec. 1118, 1120, 1121, 1122, 1124, 1125, 1128, 1129, 1130, 1132, 1134, 1135, and 1136) The emails included items for due diligence review. (Rec. 1128)

Response to No. 9. Bradshaw's testimony is soundly contradicted by Appellant's Statement of Facts, par. 39, 40, 41, 46, 48, 50, 51, 52. Facts are to be examined in summary judgment most favorable to the Balls.

Response to No. 12. Bradshaw agreed to give attestation services directly to the Balls, and was paid to provide attestation services to Bradshaw. (Rec. (Rec. Rec. 1196 par 11-14, 1827 p 79 lines 14-21, 1141 p 38 line 10 through p 40 line 11, Rec. 1195 par 9-10, 1202 par 9-10)

Response to No. 14. The Balls had a second ill prepared expert which Bradshaw also deposed, and from which Bradshaw cites from here. On Summary Judgment, Bradshaw cannot truthfully ignore the plain testimony of the Balls' first expert witness, which Bradshaw pretends does not even exist. Conflicting testimony is to be

resolved at trial, not on summary judgment, where the facts and law are to be construed most favorably to the Balls.

Response to No. 15. The Balls' Expert witness said that Bradshaw did establish an accountant-client relationship, and also provided attestation services to the Balls. (Rec. 1141 p 38 line 10-23, p 40 line 9-11)

Response to No. 16. The Balls presented their Expert Witness testimony described in Response to No. 15, and did dispute with facts that there was privity of contract with Bradshaws. The Court erred in its analysis of the same.

Response to No. 17. Bradshaw presented many documents and emails showing that Bradshaw intended for the Balls to rely on Bradshaw's attestation and verification services, contradicting Bradshaw's statement here, as set forth in Appellant's Statement of Facts, par. 40, 49, 50, 51 and 52.

Response to No. 19. Bradshaw continued to send emails with information to Bush which Bush gave to the Balls, as Bradshaw admits doing. (Rec. 1170, lines 7-20)

ARGUMENT

I. BUSH AND COLDWELL BANKER HAVE NOT SHOWN WHY THEY SHOULD NOT BE HELD ACCOUNTABLE FOR THEIR FRAUD WHILE ACTING AS A REAL ESTATE BROKER.

Coldwell Banker Commercial and its real estate agent Duane Bush completely rely on the unpublished opinion *Ruf, Inc. V. Icelandic Investments, Inc.*, 1999 WL 33244779 (Utah App. 1999). While the exculpatory agreement in the case at bar is similar to the agreement in the *Ruf* case, that is the only real similarity of the two cases.

Bush heavily relies on the provision of that agreement that the Balls were relying on its own inspection of the business and Seller representations, and not of Coldwell Banker or its agents, and that Coldwell Banker and its agents have not verified such representations of Seller when Coldwell acted as the only conduit of the information. This statement however does not cover the falsified filtering and the concealing of the Seller information of which they were the very conduits, and their own direct false representations they directly verified and knew to be false. The Supreme Court has said that real estate brokers are to fully account for dishonest behavior notwithstanding any exculpatory agreement. There is also a point where public policy cannot sanction seriously egregious behavior with a cleverly drafted agreement.

A. Bush and Coldwell Banker Admit that They in Fact Were a Conduit for the Information from the Seller to the Buyers When They Withheld and Misrepresented That Seller Information.

On page 15 of their brief, Duane Bush and Coldwell Banker admit that they “would simply act as the conduit for passing information between the parties, and would not take any steps to determine the veracity of said information.” In making this

admission they must agree that they should be liable for fraudulently misrepresenting the information they have verified, and which they covered up, concealed and filtered, when they should have acted as the honest conduit they claim to have been. Therefore, the Balls did reasonably rely on an apparently honest Coldwell Conduit.

Bush concealed 2006 profits of \$74,000 shown on a profit and loss statement emailed to him from the Seller, and in its place drafted a falsified profit and loss statement showing profits of \$371,742.00 based on the Seller's falsified tax return. (Rec. 1228-1233, 1235-1239) If Bush would have passed the information he admitted that he was a conduit for passing, then the Balls would have seen the \$74,000.00 figure and would have not purchased the company. (Rec. 1999 par. 36) Concealment of this earlier profit is a fraud on which the Balls can and did reasonably rely on from the Coldwell Conduit of information.

Bush likewise concealed an email from the Seller's accountant saying that the books were "a bit shakey," that there was a lot of intercompany commingling between the company being purchased and Seller's other company, Mays Granite (Rec. 1118, 1260 par. 7), that the company would continue to be prosperous in the future, including a vendor, Promontory, which had constituted 40% of sales (Rec. 1242, 1246), when Bush knew and verified that Promontory had gone bankrupt, giving no sales. (Rec. 1258). Bush also represented as a business broker that the Balls could get a contractor's license in 90 days (Rec. 7, 1160 par. 5), when he knew or recklessly should have known that it actually took 3 years. (Rec. 207, par. 13-15)

All of these falsified representations did not come from the Seller. They came directly from Coldwell Banker through Duane Bush. While Coldwell Banker want to put the onus on the Balls to verify the Seller's representations, Duane Bush and Coldwell

Banker were falsifying the very information themselves, that they were supposed to be the conduit in conveying. In so doing, the Balls' reliance on the Coldwell Conduit of Seller information was fully justifiable and reasonable. The Balls had no way of knowing they were dealing with a fraudulent conduit that was hiding and misrepresenting information. Coldwell Banker sets forth in plainness that neither Coldwell Banker nor its agents "have verified the representations *of the Seller*." Their hiding and misrepresenting the information from the Seller stopped the Balls from being able to inspect the material facts of the Seller the Balls knew nothing about and could not know about, which therefore they could not independently verify. The Balls made no contract to allow Coldwell to hide information which the Balls then had no way of knowing, much less any need to verify, when Coldwell was the conduit for the information. Therefore, if the Balls "would not and could not" rely on Coldwell's misrepresentations, that would make the agreement a fraud itself, as the agreement contemplated that Coldwell would convey as the conduit the Seller information. Coldwell Banker would have this court believe that they are entitled to manipulate Seller information as fraudulently that they can in their role as conduit, and do so with complete total impunity, regardless of the egregiousness of their fraud. Coldwell also knowingly and/or recklessly misrepresented the State licensing requirements to the Balls, which was not Seller information.

In examining the *Ruf* case, the Seller made a false representation directly to the Buyer that there was no litigation against the company the buyer was purchasing. And there were no provable damages to the Buyer, even against the Seller. This is a far cry from the facts of the case at bar. The Balls understood in the disclaimer (after the fact—signed after all the fraud was perpetrated) that their role was to inspect the Seller representations, and they made no agreement to allow the Broker to fraudulently

manipulate the information given by the Seller which the Broker was giving as the conduit of Seller information, nor about the licensing requirement, which was not Seller information.

B. *Hermansen* Directly Overrules the Law Announced by the Unpublished Opinion of *Ruf*.

Coldwell claims that Appellants cannot argue the case law from new cases regarding the legal reasoning of *Ruf*, because “arguments” cannot be raised for the first time on appeal. The cases cited specifically state that new “issues” cannot be raised. *State v. Webb*, 790 P.2d 65,71 n. 2 (Utah App. 1990) refers to a whole new State Constitutional Provision, which is a whole new claim. *O’Dea v. Olea*, 217 P.3d 704 (Utah 2009) also raises whole new issues, including new constitutional issues and choice of law issues. Appellants have fully heretofore raised the issue that the *Ruf* reasoning was legally incorrect in their opposition Memorandum in the trial court.

Coldwell next states that *Ruf* was not specifically overturned. However, *Ruf* is an unpublished opinion, which therefore is not noticed sufficiently to be specifically overturned, even though the subsequent case law directly opposes *Ruf*. Appellants meant to say or should have said that the later cases overturned the law set forth in *Ruf*.

In *Hermansen v. Tsaulis*, 48 P.3d 235, 241 (Utah 2002) the Court specifically states that a real estate agent has “a duty, independent of any implied or express contracts, to be honest, ethical, and competent.” This unambiguous language completely and plainly negates any exculpatory or disclaimer contract, including one where a broker would attempt to vitiate his plain duty with a contract that has a reliance provision. The Utah Supreme Court is in verity plainly saying here that there is no contractual exception stopping a broker from being liable for his/her duty to be honest, ethical and competent

—even where his fiduciary duty is with the opposing party in the transaction. The Court is not giving any public policy reasoning here which *Ruf* could excuse, but instead gives a detailed analysis about how the plain duty of a broker to be honest and ethical trumps anything, including any exculpatory contract.

C. *Robinson* States Beyond Question that Reasonable Reliance Does Exist Even Though a Disclaimer Provision Attempts to Disclaim Reasonable Reliance, as in *Ruf*.

The case *Robinson v. Tripco Investment, Inc.*, 21 P.3d 219 (Utah App. 2000) sets forth in detail beyond any question that even though a disclaimer provision exists which is very plainly similar to the disclaimer in *Ruf*, a Court can indeed find the element of reasonable reliance, as it did find in *Robinson*. In a direct complete about face to *Ruf*, the very detailed analysis of *Robinson* plainly found the reasonable reliance element did exist notwithstanding the plainly similar disclaimer provision. Now the case here involved liability of a Seller--General Contractor instead of a real estate broker. However, that is the only essential difference. All of the reliance arguments used in *Ruf* were plainly trumped in this case involving the misrepresentations of the General Contractor. The case is as much directly and exactly on point showing that reasonable reliance *can* exist with a disclaimer contract like the one in *Ruf*, to the same degree as Coldwell attempts to show how *Ruf*'s holding about reasonable reliance with a similar disclaimer provision is similar to the case at bar. Surely Coldwell must have noticed the similarity of the disclaimer provision in *Robinson* and *Ruf*. Coldwell's erroneous claim that Appellants have made a "complete misrepresentation" with this *Robinson* case is breathtaking.

D. The egregious conduct of the broker in this case offends public policy, unlike *Ruf*.

The facts of the unpublished *Ruf* case are very benign when compared to the egregious representations of Coldwell and Bush in the present case. In the unpublished *Ruf* case, fraud could not be found--even against the Seller, because the Seller misrepresentation regarding the existence of litigation with the company being purchased was not shown to have caused the buyer any damages.

In the case at bar, Coldwell and Bush were the very conduits of Seller information which they manipulated, concealed and misrepresented, such that the Balls had no idea what material parts of the Seller information really was.

If real estate brokers were allowed to put cleverly drafted language in a disclaimer to allow a court to find it "impossible" to ever have reasonable reliance, then a broker could devise any manner of clever fraudulent techniques to lie, deceive, and conceal essential Seller information, lie about the requirements of a contractor's licensing to any extent possible with absolute complete utter immunity from any accountability. This indeed does offend public policy as much as it does the very statutes and case law already discussed which plainly places a direct duty of agents and brokers to be honest and ethical.

E. Appellants Should Have Their Day in Court to Present a Seriously Egregious Set of Facts Concerning Fraud.

Coldwell next tries to say how Appellants have distortions in their statement of facts, notwithstanding Appellants cite to affidavits, emails, depositions and other documentation in the record to which Appellants cite. Let Coldwell show the trier of facts such purported distortions by cross examination and in closing arguments which

Appellants should have—even their day in court. Such is Appellants’ whole point in their appeal of a judgment on the pleadings.

If Buyers’ facts were so irrelevant in a Motion on the Pleadings, then Coldwell would be able to cover up at the pleadings stage any whole amount of seriously egregious facts regardless of the extent in which they would offend public policy and show broker dishonesty, without any broker accountability at all to ever be considered. Such would be “irrelevant.” Again, the record cited by the facts speaks for itself regarding Coldwell’s false claim that Appellants have “significantly misrepresented” such facts. Appellants are not the ones being sued for misrepresentation here.

II. APPELLANTS DO NOT NEED AN EXPERT TO PROVE THAT FRAUD AND DISHONESTY ARE A BREACH OF FIDUCIARY DUTY, WHICH ANY JURY PLAINLY UNDERSTANDS.

Coldwell details the need for some expert testimony as “necessary” testimony, and then claims that *Posner v. Equity Title Ins. Agency, Inc.*, 222 P.3d 775 (Utah App. 2009) “is on all fours” with this case and “is dispositive.” No issue concerning fraud and dishonesty was raised in *Posner*, and Coldwell wants to feign that this case is dispositive on whether fraudulent conduct and dishonesty on the part of a real estate agent requires expert testimony?

In *White v. Jeppson Et. Al.*, 325 P.3d 888, 893-894 (Utah App. 2014) a more recent case than *Posner*, this same issue of whether the lower court should have granted summary judgment for failure to designate an expert, arose over a claim of breach of fiduciary duty. The case was extremely complex involving a number of real estate brokers who were selling a wide variety of real estate investment opportunities involving Real Estate Investment Trusts, and where securities laws were involved.

This court overturned the lower court’s grant of summary judgment even though it noted that the case was a “complex, multi-issue and multi-party case...” No discretion was given to the trial judge on summary judgment. This Court said, “The district court's broad brush approach did not adequately assess the need for an expert on each claim, or, more precisely, on each element of Plaintiffs' claims.” *White*, par.22. The Court went on in its analysis:

[I]n a complex, multi-issue and multi-party case like this one, the district court should carefully analyze the need for expert testimony on a claim-by-claim, element-by-element basis, rather than taking the blanket approach that it did here.”

For instance, Plaintiffs' claim, if true, that Defendants breached their fiduciary duty to Plaintiffs when they lied about having invested in the Packer REIT and having received "big checks" from the investment is a

clear example of where expert testimony is not needed. The gravity of investment advisors misrepresenting their participation in an investment and the consequence of lying about, or even exaggerating, the return they have received on their investment is certainly " within the common knowledge and experience of the layman."

White, par. 22-23.

This Court's clear statement that lying and the gravity of misrepresenting, the consequence of lying about or even exaggerating--being within the common knowledge and experience of the layman, gives Coldwell's foundation of "all fours" on *Posner* a sound shaking and a whale of a *White*-wash.

A. Coldwell's Agent Bush Plainly Admitted that He Owed a Dual Fiduciary Duty to Both the Buyer and the Seller.

Coldwell attempts to argue that the Balls' claim of an agency relationship "must exist solely in some type of implied agency relationship" which can only be shown by an expert witness. Coldwell's agent Bush plainly admitted in open deposition testimony two different times that he had a fiduciary duty to both the Seller and the Buyer. (Rec. 204, 1225) This is in addition to the testimony of both David Ball and Brad Ball that Bush said the same thing to them. (Rec. 1259, 1261) Coldwell knows this, and are they really trying to hide it?

Bush was an experienced real estate agent himself, having been an agent for 12 years, in addition to owning and managing two businesses 8 years before. Bush therefore knew what he was talking about when he admitted that he owed a dual fiduciary duty to the Buyer and the Seller. His own experience shows that he knows what he was talking about when he admitted his dual agency and fiduciary duties. Coldwell hired Bush to act on its behalf as its agent with full knowledge of Bush's ability to know and admit to a fiduciary duty here, or it would not have hired Bush as its agent. No expert is needed to

show that a fiduciary duty existed here to a jury.

B. No Expert Is Needed to Determine the Standard of “Care” Concerning Fraud and Dishonesty.

Coldwell claims that the sale of a business (“which they call a mergers and acquisitions transaction”) is so complex that no normal juror could ever understand it. On examining each issue where fraud and dishonesty is plainly involved, lying about and covering up essential and material information is “certainly within the common knowledge and experience of the layman.” *White*, par. 23.

Coldwell also breathtakingly says that “there are no statutes, cases or administrative regulations that charge a business broker with any of the duties referenced in Buyers’ Complaint. (Brief of Coldwell, p. 30) Did Coldwell read Appellant’s Brief where Utah Code Ann. § 61-2f-401 is cited regarding broker misrepresentations likely to induce, and other dishonest dealing? Did not Appellant cite *Hermansen*? What about *Gilbert Development Corp. V. Wardley Corp.*, 245 P.3d 131, 140 (Utah App. 2010) regarding a Broker being honest and ethical?

Coldwell cites the disclaimer contract language to claim that Coldwell had no duties regarding fraud and dishonesty, at least which a jury could understand, notwithstanding the statute and cases in Appellant’s brief. Earlier, Coldwell admitted that *Hermansen* in fact “dealt with the “duty” element of fraud...” (Brief of Coldwell, p. 20) In fact, the Utah Supreme Court did quite well in describing the “duty” of a real estate agent to be honest and ethical in *Hermansen* –without an expert.

Coldwell states that the Breach of Fiduciary Duty of Bush and Coldwell is not pled properly. A review of the Complaint shows that it has been pled properly and sufficiently to give notice of its claim based on dishonesty, concealment and fraud. Plaintiffs reallege

all of the facts set forth in the Complaint concerning Coldwell's fraud, misrepresentations and concealments.

Examining each claim, the issues facing the jury are as follows: Is the concealment by Coldwell's agent Bush of 2006 company profits which Bush received from the Seller's accountant of \$74,000.00 (Rec. 1228-1233) and showing the Balls misrepresentation of \$371,000.00 in its place (Rec. 1235-1239, 1260 par 7, 1261 par 7), is that not an issue a jury can understand? Profits more than 4 times greater than the ones the Coldwell Conduit showed should shock the conscience of any juror.

The Balls carefully inquired of Bush whether there was commingling between the company being purchased and Seller's other sister company May's Granite. Bush concealed the email he received from the accountant saying that "there was a lot of intercompany commingling" (Rec. 1228) and that the 2006 books "were a bit shakey," (Rec. 1228) and instead told the Balls that Coldwell Banker absolutely could not even market the business at all if there were any such commingling. (Rec. 1260, par 7, 1262, par 7) A jury can plainly understand and be shocked at this blatant misrepresentation from the Coldwell Conduit.

The Balls also requested Bush to tell them what was the Utah licensing requirements for the business they were considering buying. The Balls are able to show at trial that Bush told the Balls specifically that they could get a contractor's license in 90 days. (Appellants' Response to Coldwell's Objection to Fact No. 12). When the actual requirement was 3 years, a jury can plainly understand what a business broker ought to have known and said about state licensing requirements with 12 years experience selling these types of businesses which require licenses. Coldwell has many agents selling these businesses. Surely Coldwell should have some policy regarding withholding information

about state licensing requirements from a buyer of a business when Coldwell is so much in depth with marketing businesses. Any juror should understand and be shocked at such a misrepresentation from a prestigious large company selling so many businesses.

Bush also knew that Promontory, a developer which accounted for 40% of the company, had gone bankrupt, based on his own email admissions (Rec. 1258) but he concealed this fact from the Balls, and represented to the Balls that the company's prosperity would continue as before. (Rec. 1246) A jury can plainly understand that a concealment and misrepresentation regarding the dropoff of 40% of business income would be material and essential to a buyer of the company.

III. THE BALLS SHOULD HAVE THEIR DAY IN COURT TO SHOW THAT THEY HAD PRIVACY OF CONTRACT WITH BRADSHAW AND THAT BRADSHAW KNEW AND PROVIDED A SUFFICIENT WRITING THAT THE BALLS SHOULD RELY ON HIS ATTESTATION AND VERIFICATION SERVICES.

A. The Balls Had an Enforceable Contract as a Third Party Beneficiary, Giving Them Privacy of Contract.

Third Party Beneficiaries— are able to enforce contracts where they are the intended beneficiaries. In *Bybee v. Abdulla*, 189 P.3d 40, 49 par. 35-36 (Utah 2008) the court said that “We have defined third-party beneficiaries to a contract as those recognized as having enforceable rights created in them by a contract...A third party may claim a contract benefit only if the parties to the contract clearly express an intention " to confer a separate and distinct benefit" on the third party.” See also *Rio Algom Corp. V. Jimco LTD*, 618 P.2d 497, 506 (Utah 1980).

In *Ron Case Roofing and Asphalt Paving, Inc. V. Blomquist*, 773 P.2d 1382 (Utah 1989) the court cites the Restatement (Second) of Contracts, where a third party is the intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties, and the circumstances indicated that the promisor intends to give the beneficiary the benefit of the promised performance.”

Bradshaw states that the Balls had no privacy of contract by reason of their being third party beneficiaries. However, in *McKay v. Ward*, 57 P. 1024, 1027 (Utah 1899) the court in ruling for the third party beneficiary, cites language that “the law, operating upon the acts of the parties, establishes the privacy, and implies the promise on which the action is found.” In *Forsberg v. Bovis Lend Lease, Inc.*, 184 P.3d 610 (Utah App. 2008) this court said: “Ordinarily, one who is not in 'privacy' with another cannot sue that party to recover on a contract.” In *Davencourt v. Davencourt*, 221 P.3d 234, 253 par. 63 (Utah 2009) the Court indicated:

“on remand, the Davencourt Homeowner’s Association may bring a claim for breach of the implied warranty, but it must show privity of contract with the Developer. We do not address whether privity of contract exists, because the issue is not before us and claims of breach of contract for a third-party beneficiary and equitable subrogation are pending before the district court.

These cases show that they who can sue to enforce a contract, including third party beneficiaries, are in privity of contract. Otherwise, such third party beneficiaries to a contract would have no enforceable action against the party in breach. It does not make sense for a contract in favor of a third party to be unenforceable because the third party did not negotiate or pay for the services. All trust law and sureties would vanish. Utah Code Ann. § 75-7-407 recognizes the validity of an oral trust.

In applying the case law to the facts, Bradshaw attempts to say that the Balls have not cited to the record facts showing privity of contract. Bradshaw needs to read the plain detailed Statement of Facts in Appellants’ Brief which cites in detail to the record, and which facts are not disputed by Bradshaw.

Bradshaw plainly knew and admitted at trial that this was a due diligence meeting for the Balls. (Rec. 1827, p 79 line 14-21) The Sellers, the Buyers, Coldwell and Bush, and also the accountant Bradshaw all knew that the August 11, 2008 due diligence meeting was the agreed place where the Balls would conduct their due diligence by examining the books from the accountant. (Rec. 1196 par 11-14) Bradshaw was hired to provide attestation and verification services (Rec. 1196 par 11-14, 1827 p 7 lines 16-20, 1141 p 38 line 10 through p 40 line 11) and was paid to do so. (Rec. 1195 par 9-10, 1202 par 9-10). The accountant agreed to give the services and was paid to provide them. (Rec. Rec. 1196 par 11-14, 1827 p 79 lines 14-21, 1141 p 38 line 10 through p 40 line 11, Rec. 1195 par 9-10, 1202 par 9-10). The Balls’ expert witness plainly said in deposition:

Q. It would be your conclusion then that those services fell in the realm of accountant services?

A. Yes.

Q. And, therefore, created a relationship, accountant-client relationship, between Mr. Bradshaw and Reperex and Mr. Ball?

A. Yes.

Q. And that conclusion would be based on AICPA standards or --

A. The conclusion is based on Generally Accepted Accounting Principles, Once he stepped out of the realm of providing solely tax services for Mr. May, he has entered more in the auditor assurance or attestation side of accounting...

Q. Is it typical for accountants to provide due diligence services to clients, generally speaking?

A. Yes.

(Rec. 1141 p 38 line 10-23, p 40 line 9-11) This expert testimony from an accountant shows the creation of an accountant-client relationship, which further establishes privity.

The Sellers, the Buyers, Coldwell and Bush, and also the accountant Bradshaw all knew that the August 11, 2008 due diligence meeting was the agreed place where the Balls would conduct their due diligence by examining the books from the accountant.

(Rec. 1196 par 11-14) There was no other purpose for the meeting. (Rec. 1195 par 9-10) Bradshaw was paid to provide these attestation services to the Balls. (Rec. 1195, par 9-10) The Balls had no other opportunity or way to examine the company books but in this due diligence meeting. (Rec. 1195 par 5-8) At the due diligence meeting, the Balls made plain to Bradshaw that the reason for the due diligence meeting was to have Bradshaw as the accountant for the company to provide them the due diligence services which they needed to make a decision to buy May's Tile, including to verify and validate that the financials from the actual books were in agreement with the tax returns, what the recent income amounts actually were, and that the books were separate from the Seller's other company without commingling. (Rec. 1196-7 par 13, 14, 16, 18, 20, 21, and 23)

These surrounding circumstances here show that there was an accountant relationship established, even directly between Bradshaw and the Balls. There was only one unquestionably clear purpose of the meeting—that the accountant provide the attestation services to the Balls, sufficient for the Balls to verify the numbers in the books and to conduct their due diligence—and there was no other purpose of the meeting. This was the only way available for the Balls to conduct due diligence on the books. (Rec. 1195 par. 6-9)

B. The Writings Coming from Bradshaw Evidenced the Writing Requirement of the Statute That Bradshaw was Liable to the Balls.

Reynolds v. Bickel, 307 P.3d 570, 574-575 (Utah 2013) states that the statute does not require an explicit statement, but an Identification in writing that a third party is intended to rely on the accountant services and that all emails, spreadsheets, manifest an implied reference to one another based on the contents and surrounding circumstances of the transaction.

Balls' statements regarding the emails which Bradshaw provided the real estate agent Bush at Coldwell, are well documented in the record in Fact 39. (Rec. 1118-1138). Bradshaw admitted in deposition that the advice to Bush's prospects, including the Balls—the second prospect, was ongoing. He said, "I was asked to provide similar documents to Duane Bush as we had before. Many of them were the same documents. Nothing changed." (Rec. 1170, lines 7-20) Sending emails and documents to Bush for the Balls to rely on as a continuation of the emails he sent to Bush for the first prospect, Mark Cobb, is plainly admitted here by Bradshaw in deposition.

The prior emails to Bush plainly referred to spreadsheets and summaries which were attached by Bradshaw, with comments to Bush about the documents, signed by

Bradshaw and attesting to the information sent. Many attachments were sent. (Rec. 1118, 1120, 1121, 1122, 1124, 1125, 1128, 1129, 1130, 1132, 1134, 1135, and 1136)

The emails included items for "due diligence review." (Rec. 1128)

Bradshaw provided the attestation and verification services which were relied upon by the Balls and the former prospect Cobb, as plainly explained by Balls' expert witness Brandon Ball, who said, " Once [Bradshaw] stepped out of the realm of providing solely tax services for Mr. May, he has entered more in the auditor assurance or attestation side of accounting..." (Rec. 1141 p 38)

The Balls had a second ill prepared expert which Bradshaw also deposed, and from which Bradshaw cites from in their facts and argument. On Summary Judgment, Bradshaw cannot truthfully ignore the plain testimony of the Balls' first expert witness, which Bradshaw disingenuously pretends does not even exist. Conflicting testimony is to be resolved at trial, not on summary judgment, where the facts and law are to be construed most favorably to the Balls.

At the due diligence meeting which Bradshaw provided attestation services as set forth above prior discussion, Bradshaw gave specific written reports from the company books to attest and to validate the 2006 and 2007 tax returns , and gave them directly to the Balls. (Rec. 1196 par 17-18, 1203 par 17-18) Specific reports verifying and attesting to the company income for the recent beginning months of 2008 Bradshaw gave directly to the Balls, which the Balls specifically inquired about. (Rec. 1197 par 21,24, 1204 par 21, 24) Bradshaw knew that he was giving written reports in his office directly to the Balls as part of that due diligence. Therefore, the writings of those very reports directly given by Bradshaw to the Balls was a direct giving of a writing with a clear nexus to all writings he gave, which are writings showing the attestation services which he

demonstrated that the Balls were relying on, just the same as in *Reynolds*. Why would the Balls go to the office of this ostensibly reputable accountant to conduct the agreed due diligence meeting which the accountant admitted that he knew was a due diligence meeting where the accountant would show the Balls the written reports which the Balls would plainly rely on, if the Balls were not to rely on such written reports from the books of the company? There is no writing that could imply in a stronger manner than the very reports this accountant gave directly to the Balls in the due diligence meeting that they came from honest books that the accountant intended the buyers in due diligence to rely on. Every such writing and report therefore strongly served as a loud statement from the accountant that they were to be relied on. The Balls were not some remote party relying on the accountant.

Bradshaw's giving the Balls the written reports from the actual books so the Balls could verify the Seller information in due diligence, was a sledge hammer from Bradshaw saying "Rely on them!"

IV. BRADSHAW DOES NOT ADDRESS APPELLANT'S ARGUMENT THAT FRAUD ITSELF HAS A DUTY ELEMENT, WHICH DUTY BRADSHAW BREACHED IN THE PRESENT CASE.

Bradshaw argues forcefully that the duty element of nondisclosure fraud should be rejected by this court—because it is a “duty” just like the element of “duty” found in negligence, negligent fraud and even fiduciary “duty.” Did not Bradshaw read the statute that exempts fraud from the operation of the statute? And nondisclosure fraud has a duty element. If the causes of action Bradshaw claims should be dismissed—negligent fraud, fiduciary duty—have a duty element, that does not take away the duty element of nondisclosure fraud. Bradshaw can argue a million pages in his brief and yet still fail to take the duty element out of nondisclosure fraud. Of all the things Bradshaw claims are the “wishes” of Appellants, Bradshaw cannot wish away himself the fraud exemption from the statute he forcefully tries to cite—with its element of duty.

A. The Trial Court erred in rejecting that Bradshaw had a duty to disclose to the Balls in the due diligence meeting.

Bradshaw attempts to try to show that the case law does not support a finding of duty in this case. It cites *Reynolds v. Bickel*, 307 P.3d 570 (Utah 2013) for the proposition that the policy of the statute limiting accountant fraud Utah Code Ann. 58-26a-602 determines the duty of the accountant. *Reynolds* did not consider any issue of actual fraud in that case. *Reynolds* said nothing at all about the duty element of fraudulent nondisclosure whatsoever.

Next, Bradshaw tries to show that because Utah courts have not considered the issue of nondisclosure fraud by an accountant at this point, that therefore the accountants are not accountable for this type of fraud at all, as though accountants were better than anyone else, and above the law. This court in *Moore v. Smith*, 158 P.3d 562, 572 (Utah

App. 2007) did say that there were “a multitude of life circumstances” on what constitutes a duty in nondisclosure fraud, which multitude of life’s circumstances does not exempt accountants. Bradshaw’s statement that *Moore*’s multitude of life circumstances only applies to “a very specific and limited duty between a home builder and purchaser” (Bradshaw’s brief, p.29) completely misrepresents the analysis in the cases. Likewise Bradshaw completely misrepresents *Davencourt v. Davencourt*, 221 P.3d 234 (Utah 2009), which plainly states that “privity of contract *is not necessary* where a direct relationship exists...such as the direct relationship between buyers, a real estate broker [of the Seller], and his agent.” *Id.*, p. 245, par. 30.

Next, Bradshaw states that in *Yazd v. Woodside*, 143 P.3d 283 and *Moore* all had undisputed privity of contract. Yes they did--in an adversarial relationship as buyer and seller, but where duties were still imputed. In the case at bar, Bradshaw was hired to provide attestation and verification services (Rec. 1196 par 11-14, 1827 p 79 lines 15-21, 1141 p 38 line 10 through p 40 line 11) and was paid to do so, (Rec. 1195 par 9-10, 1202 par 9-10), which was a much closer relationship, and yes, even included privity of contract as a third party beneficiary to that contract. (See prior discussion on privity of contract)

In applying the facts to the law, Bradshaw attempts to say that the Balls have not cited to the record regarding its facts. The Balls have very carefully cited to the record in their carefully detailed Statement of Facts, which facts with cites are not disputed at all by Bradshaw. Let Bradshaw review such Statement of Facts before saying that there are no cites to the record.

The Sellers, the Buyers, Coldwell and Bush, and also the accountant Bradshaw all knew that the August 11, 2008 due diligence meeting was the agreed place where the

Balls would conduct their due diligence by examining the books from the accountant. (Rec. 1196 par 11-14) There was no other purpose for the meeting. (Rec. 1195 par 9-10) Bradshaw was paid to provide these attestation services to the Balls. (Rec. 1195, par 9-10) The Balls had no other opportunity or way to examine the company books but in this due diligence meeting. (Rec. 1195 par 5-8)

Appellants' expert accountant testified that the accountant was hired to provide "attestation services" in the due diligence meeting. (Rec. 1196 par 11-14, 1827 p 79 lines 15-21, 1141 p 38 line 10 through p 40 line 11) The accountant agreed to give the services and was paid to provide them. (Rec. Rec. 1196 par 11-14, 1827 p 79 lines 14-21, 1141 p 38 line 10 through p 40 line 11, Rec. 1195 par 9-10, 1202 par 9-10) That is what a due diligence meeting is for--the agreed place where the Balls would verify whether the Seller information was true. The Balls had nowhere to turn but to the company accountant Bradshaw that had the books in the due diligence meeting. (Rec. 1196 par 11-14, 1827 p 79 lines 14-21, 1141 p 38 line 10 through p 40 line 11, 1195 par 5-8) The written reports from the company books by Bradshaw were the only things the Balls had to rely on in order to determine whether the Seller information was true. (Rec. 1195 par 5-8) And Bradshaw knew that this was a due diligence meeting. (Rec. 1827, p 79 line 14-21)

Nowhere do the Balls "admit" to no privity of contract. A contract where there is a third party beneficiary, is entered into with consideration and binding on all the parties, which establishes privity between the Balls and Bradshaw.

What plainer case could there be made of a special relationship with a plain duty in fraudulent nondisclosure than here--where the accountant who was hired and paid to give the Balls due diligence information, including attestation and verification services of due diligence? The Balls had no other avenue of due diligence to verify the company books

but at that due diligence meeting. (Rec. 1195 par 5-8)

B. No issue existed at trial regarding the fact that nondisclosure fraud was properly before the Court.


Appellee argues that he brought up at the trial hearing the issue that nondisclosure fraud was not pled. However, Balls' attorney quickly pointed out at that hearing that in fact it was sufficiently pled—that Paragraphs 24 and 27 of the Complaint (Rec. 4) directly allege that Bradshaw failed to make any disclosure to any Plaintiff that he had made this derogatory [entry] into the Tile books...The 2007 \$777,538 tax return was never shown to any Plaintiff prior to this lawsuit.” (Rec. 1828, p 6 lines 11-20). The Complaint also realleges the fraud facts throughout the Complaint, thereby alleging every element of nondisclosure fraud.

The court then dismissed the MUJI instruction not on grounds of lack of pleading, but on failure to show a duty, as Bradshaw even points out in his own facts, par. 26-27. The trial court also has ample wide discretion to rule on the pleadings issue pursuant to U.R.C.P. Rule 15©, where “...the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby...” and here the court did not at all rule that the pleading itself was insufficient.

CONCLUSION

Neither the Broker nor the accountant in this case can escape accountability for their fraud, fraudulent nondisclosure, and breach of fiduciary duty. Any jury understands such dishonesty and fraud without expert witnesses. The Accountant plainly gave attestation services directly to the Balls in such a way that Utah Code Ann. § 58-26a-602 does not exempt liability. The Balls request the Court to reverse the dismissals by the trial court so they can have their day in court against the Accountant and the Broker on fraud including nondisclosure fraud, negligent fraud and breach of fiduciary duty.

Dated this October 30, 2015.



J. Spencer Ball
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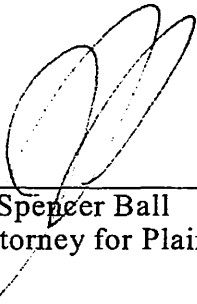
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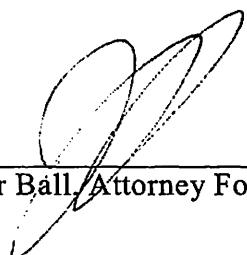
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CERTIFICATE OF SERVICE

I certify that on October 30, 2015, I served by regular mail, postage prepaid, 2 true and correct bound copies of the foregoing REPLY BRIEF OF APPELLANT, to the following:

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