

2001

James Ashley Fennell, II v. Edward D. Green, Neil Wall, AKA Neil J. Wall, and GMW Development Inc., DBA Ivory North : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JAMES ASHLEY FENNELL, II,	:	
Plaintiff and Appellant,	:	
	:	
vs.	:	
	:	
EDWARD D. GREEN, NEIL WALL, aka	:	Civil No. 000601295 PD
NEIL J. WALL, and GMW	:	Court of Appeals No. 20011029SC
DEVELOPMENT INC., dba IVORY	:	
NORTH,	:	
Defendants and Appellees,	:	

**REPLY BRIEF OF APPELLANT JAMES ASHLEY FENNELL, II
TO BRIEF OF APPELLEE EDWARD D. GREEN**

Appeal from Summary Judgment entered by the Honorable
Thomas L. Kay, Second Judicial District Court for Davis County

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RELEVANT FACTS

Defendants Wall and Green in their respective depositions reflected knowledge of the soil instability. As partners for Falcon Ridge Subdivisions I and II (R. 619) the knowledge of one would be the knowledge of both. More specifically, Neil Wall was in charge of construction and Ed Green in charge of sales. (R. 619). Wall had experience with Layton City and, in seeking to obtain city approval for lot 31, engaged the services of Glenn Maughan to do a soils report which was required by Layton City. (R. 623-625). Based on the soils report, if things were properly done the lot would be “buildable.” (R. 628). Further, Wall was aware that Maughan recommended a road be built on the South portion of the lot with a twenty (20) foot right-of-way to maintain a distance from the brow of the hill. (R. 629).

Contrary to the assertions of Defendant/Appellee Green in his Appeal Brief, the Plaintiff’s Memorandum asserts that Defendant Wall was advised by Glenn R. Maughan of the lot instability as was Green and, Green read and discussed the soils report with Defendant Wall. (R. 598). Further, the Statement of Facts in the Reply Memorandum in Opposition to the Summary Judgment reflects the factual dispute as to the conversation that Defendant/Appellee Green claims he had with Defendant/Appellee Wright concerning the placement of the house as far south as possible on the lot. (R. 604). Further, the opinion of an engineering consulting firm was cited for the fact that the plan for the placement of the building should have put a developer on notice of establishing a

minimum distance for the placement of the residence from the landslide scarp. (R. 605).

As to the soil instability, there was no warning on the plat (R. 631) nor on the Deed of July 7, 1995, to GMW, and Wall was aware of a “lack of buildable area on the slope” (R. 632).

Wall further admitted that a purchaser should be made aware of the problems re the soils report and had thought that the purchaser had so been informed. (R. 634). However, since Wall was selling to an experienced purchaser, Wall thought the lot may have been discounted. (R. 635). Wall thought, also, that Ed Green had made Gary Wright of GMW Development aware of the problem.. (R. 636). As an afterthought, Wall admitted that he should have put notice of the condition in the protective covenants to provide notice of and adhere to the soils report in light of what ultimately occurred. (R. 637).

Ed Green also acknowledged that there was nothing notated anywhere concerning any special considerations as to lot 31 with nothing on the subdivision plat as well. (R. 646). Green could not recall, and did not think, that the lot had been discounted in a sale to GMW but in having spoken with Wright had indicated to Wright that he should put the building, i.e., the residence, as far back on the lot as possible. (R. 647).

Green was aware of the issue as to the soils report (R. 642) and acted upon the report recommendations by removing the crown of the hill and rolling the top of the lot. (R. 643). Further, Green was aware that there was to be a house built on the property and

assumed it was for a customer of GMW but provided nothing in writing as to the special considerations. (R. 648).

Plaintiff/Appellant Fennell stated in his Affidavit responding to the Summary Judgment Motion that he contracted with Ivory North/GMW Development to purchase Lot 31 for \$33,000.00 from Defendants/Appellees Wall and Green with no knowledge that the price may have been discounted. (R. 677). Plaintiff/Appellant Fennell walked the property, Lot 31 of Falcon Ridge, and it was smooth with no indications of any defects or evidence or indication of a scarp or a gorge or unstable condition. (R. 677). Nor was he informed of any geological hazards on the lot nor that the lot had could be subject to landslides. (R. 677a). Had Plaintiff/Appellant Fennell been informed as to the unstable soil he would not have purchased that lot. (R. 678). He relied upon the expertise of the subdivision developer and the home builder that the lot would be satisfactory for construction. Further, he has been informed that the home has been placed too close to the North and since the landslide is in jeopardy of damage by reason of the hill sluffing. (R. 678).

Plaintiff/Appellant Fennell was deposed on March 8, 2001. The applicable pages of the deposition referenced hereinafter are attached as an Addendum to this Reply Brief. In the deposition Plaintiff/Appellant Fennell indicated that he hired a landscaper, Elite Landscaping, to landscape the lot. (Fennell Depo. Pg. 9). In first examining the property, there was a gentle, even slope going down to a fence line. (Fennell Depo. Pg.

8). Additionally, Plaintiff/Appellant Fennell had a decorative rock wall installed which rock wall was damaged in the slide. (Fennell Depo. Pgs. 17 & 18). However, after the slide there was a defect or a slide at the crest and a gorge to the left. (Fennell Depo. Pg. 11). The slide occurred on or about April 17, 1998. (Fennell Depo. Pg. 13).

As a factual contradiction, Mr. Wright, who is the sole owner of GMW Development, Inc., was not aware of a discounting of the property price in GMW Development purchasing same from Wall and Green.. (R. 695). Further, Mr. Wright indicated that he had not had conversation with anybody in connection with any special requirements for constructing of Lot 31 of Falcon Ridge. (R. 698).

Maughan told Defendant/Appellee Wall that the lot in question (Lot 21 in Maughan's report later renamed as Lot 31 at the time of purchase by Plaintiff/Appellant) was too unstable to put a house near the edge. (R. 655). Further, Wall did not talk thereafter with Maughan because Maughan would not clear the lot for building and Wall would not pay Maughan thereby his last \$500.00. (R. 656).

Further, by correspondence dated October 9, 1992, Maughan advised Wall that the lot had a scarp which turned out to be a landfall (sic) (R. 672-674) where Kays Creek undercut the bank. The lot was singled out in paragraph 7.0.0 under special problems in Maughan's report. (R. 670)

The term "landfall" used by Maughan is identified as a landslide in the follow-on correspondence with a later engineering report undertaken at the expense of

Plaintiff/Appellant Fennell through Bingham Engineering of Salt Lake City. (R. 718-728).

SUMMARY OF THE ARGUMENTS

Appellant in Appellant's Reply Brief and concurrently with the submission of a corrected Appellant's Appeal Brief satisfies Rule 24 of the Utah Rules of Appellate Procedure with references to the record without any disadvantage to Green.

To grant summary judgment pursuant to Rule 4-501 of the Utah Rules of Judicial Administration was improper as a factual dispute was presented to the trial court and the rule is not to be used to abridge substantive rights. A review of the corrected Appeal brief demonstrates substantial dispute of facts in contravention of the grant of summary judgment.

A review of the Statement of Facts in the Memorandum in Opposition to the Motion for Summary Judgment, although stated as "Undisputed Facts" specifically recites points of dispute as between the knowledge of the various Defendants with respect to the soils report as to which all of the Defendants had a duty to disclose or by reason of their expertise should have known.

The duty of disclosure arises from statutory requirements imposed upon developers and subdividers.

The elements of fraud were presented in the content of the complaint in addressing the duty to disclose, the failure to disclose, the reliance of Appellant upon the

failure of the Appellees to disclose, and his subsequent injury in the destruction of his lot and the putting at risk of his home by its proximity to the sluff area.

Breach of warranty is not applicable, rather suitability for purpose for use as a building lot comes to the fore without the necessity of privity of contract as the duty upon the developers and subdividers was to provide the information which could have prevented the eventuality which occurred with the sluffing of the hillside.

ARGUMENT

ISSUE I: APPELLANT CONFORMS THE RULE 24 PAGINATION HEREIN AND CONCURRENTLY CORRECTS THE APPEAL BRIEF.

Concurrent with the filing of the reply brief, Appellant's Appeal Brief has been corrected to contain citations to the Court record per its chronological pagination thereby conforming to Rule 24 reference requirements.

In reviewing *Uckerman v. Lincoln Nat'l Life Ins. Co.*, 588 P.2d 142 (Utah 1978) as it applies to Rule 24, the Appellant therein failed to make citation to the record as to the material facts. Appellant herein has attempted to make those proper pagination citations by corrections to the original Appeal Brief and by so conforming the Reply Brief herein.

In examining *Koulis v. Standard Oil Co.*, 764 P.2d 1182 (Utah Ct. App. 1987), therein the court characterized the brief of Appellant, at 1185, essentially as

“filled with burdensome, emotional, immaterial and inaccurate arguments. Further, only a small proportion of authorities cited in this brief bare any resemblance to the propositions for which they are cited, and most are irrelevant

or directly contradict the propositions, thus indicating that there is little, if any, legal support for her allegations.”

Plaintiff/Appellant Fennell as to the status of the Appeal Briefs is substantially different than the status of the brief only lacking in the aspect initially of providing the pagination references rather giving references to the specific brief and exhibits previously submitted to the court for the motion hearing itself. In this regard, it is improbable that Defendant/Appellee Green was disadvantaged by the identifying of the origin by referencing the memoranda and related exhibits as such are identical to that submitted in response to the Summary Judgment motions. This is in apposition to the circumstances contained in *Uckerman*, supra, and *Koulis*, supra, as they were both instances in which there was no response to the motion providing any proper citation to origin by which to put Appellee on notice as to origin or authenticity.

ISSUE II: INVOKING RULE 4-501 AS THE BASIS FOR GRANTING OF SUMMARY JUDGMENT WOULD BE CONTRARY TO CASE LAW.

Scott v. Majors, 980 P.2d 214 (Utah App. 1999), at 217, states,

The purpose of the Code of Judicial Administration is to bring order to the manner in which the courts operate. They are not intended to, nor do they, create or modify substantive rights of litigantsCf. *Hartford Leasing Corp.*, 888 P.2d 694, at 702 (Utah Ct. App.1994)

In so stating, the court indicated that the trial court could properly consider a motion sua sponte without there having been a “Notice to Submit for Decision.” In further examination of *Hartford Leasing*, supra, at 697, the court further recited,

In Determining whether the court abused its discretion, we “balance the need to expedite litigation and efficiently utilize judicial resources with the need to allow parties to have their day in court.” (Citation omitted). Of course, the goal of affording parties “an opportunity to be heard” is the essential purpose of the court system, and thus our system values this goal over that of judicial economy. (Citation omitted).

The sustaining of the summary judgment against Plaintiff/Appellant Fennell would contravene these purposes.

Wall and Green had specific knowledge of the instability of the soils, a condition which even Wall, in retrospect, says should have been noted in a fashion which would satisfy the developer/subdivider disclosure requirements. These are enunciated in *Loveland v. Orem City Corp.*, 746 P.2d 763 (Utah 1987) per Appellant’s Appeal brief p.15 and the follow on discussion of *Elder v. Clawson*, 384 P.2d 802 (Utah 1963) and *Stepanov v. Gavrilovich*, 594 P.2d 30 (Alaska 1979).

Green asserts he advised Wright to set the house far back on the lot, however, Wright denies having been so advised or of being aware of the soils instability. As developed in the Appeal brief at pages 10 and 11, Green had the duties of a developer/subdivider as well as a duty arising out of inquiry notice to Wright by reason of the alleged conveying of information. Moreover, Wright as a person of “similar experience” per *Mitchell v. Christensen*, 429 Utah Adv. Rep. 15 (SC 2001), had a duty to further inquire when being advised to place the residence as far south on the lot consistent as to setback requirements.

ISSUE III: THE ECONOMIC LOSS RULE IS NOT APPLICABLE AS THERE IS

PROPERTY DESTRUCTION AS OPPOSED TO MERE DEVALUATION.

First Security v. Banberry, 786 P.2d 1326 (Utah 1990), can be distinguished on its facts. It dealt with a senior lien foreclosure determining that there was no duty to a junior lien holder of a fiduciary nature. The Court in *Banberry*, at 1333, recited that “a fiduciary duty implied in law gives rise to a duty of disclosure.” That duty of disclosure is required of a subdivider pursuant to 57-11-7, Utah Code Annotated, as to which Green and Wall as sellers would be subdividers/developers as would GMW Development, Inc., being the purchaser of Lot 31. The disclosure thereunder must be of a nature to afford public notice as a “matter of public record” and that references only those matters identifiable by statute incident to county recording and title statutes. That would require notation on the subdivision plat, in the deed of conveyance, in the covenants and restrictions, or in specific written notice to the purchaser - none of which occurred. See *First American Title Insurance Company v. J.B. Ranch Inc.*, 966 P2 834 (Utah 1998). Further, the *Banberry Court*, *supra*, at 1333, stated that the failure to disclose something would violate a standard requiring conforming to what the ordinary ethical person would have disclosed. (FN citations omitted). The Court then went on to list several factors which would include, among other things, the relation of parties, the nature of the fact not disclosed, and the general class to which the person belongs and to that extent a seller would have a greater duty of disclosure than a buyer.

Key to the disconnection of the Economic Loss Rule would be *Price v. Orem*, 713

P.2d 55 (Utah 1986), which specifically said privity of contract is not a necessary prerequisite to liability for negligent misrepresentation and that is so stated in *Loveland*, 746 P.2d 763 (Utah 1987) at 769. Further, the circumstances in this case do not give rise to any inquiry notice requirement on the part of Plaintiff/Appellant Fennell.

SME Ind. v. Thompson, Ventulett, Stainback 28 P.3d 669 (Utah 2001) as well can be distinguished on the facts. It dealt with a breach of contract claim and an alleged breach of warranty. The Economic Loss Rule comes into play with contractor and subcontractor claims against a design professional. However, the case went on to recite that third party beneficiaries as end users would not have the contractual relationship specific to contractors and subcontractors.

However, *SME Ind.*, *supra*, is instructive as to summary judgments generally. The reviewing court accepts the facts and inferences in the light most favorable to the non-moving party which in this case is Plaintiff/Appellant Fennell. Further, it gives no deference to the trial court's view of the law; it is reviewed for correctness.

Further, *SME Ind.*, at 682, cited *Price Orem* for the proposition that a third party had a standing to bring and had sufficiently stated a cause of action for negligent representation against a surveyor.

SME Ind., turned on the contractual relation of the parties being able to negotiate terms of a contract and economic losses by reason of such there was not a sufficient basis for recovery. N.B. The recognition that a design or finished product did not sustain or

carry an intended valuation as may have been contemplated does not guarantee as to a specific value or profit for the contracting party. This is substantially different from a failure to disclose an inherent or latent defect as to which there is a statutory and case law duty to so disclose. The purpose of the Economic Loss Rule is to maintain a boundary between tort and contract law. See *SME Ind.*, *supra*, at 683.

American Towers Owners v. CCI Mechanical, Inc., 930 P.2d 1182 (Utah Ct. App. 1996), was a privity of contract issue as well. The “economic loss” was a resultant of the shabby construction by the developer which had no contract privity with the end purchasers and the Plaintiff Condominium Association. With respect to Plaintiff/Appellant Fennell we are dealing with a duty of disclosure imposed statutorily and voiced through Supreme Court decision as iterated with respect to Plaintiff Appellant’s initial brief. The economic loss per *American Towers* was that the real estate valuations had decreased because of the shabby construction accomplished years before. This is contrary to the circumstances herein whereby the latent defect of the soils was not disclosed to Fennell and Fennell subsequently had a substantial loss in the destruction of most of the residential lot to the point of putting in jeopardy the stability of his home foundation.

Clear factual disputes exist as to the knowledge of the various Defendants concerning the special considerations as to Lot 31 as set forth by Glen Maughan. Those factual disputes relate to the communications among Wall and Green and Wright as well

on behalf of GMW Development. Further, Wall and Green as partners and Wright as the entity GMW Development purchasing the lot from Wall and Green all fall under the definition of subdividers for purposes of disclosure requirements.

The duty imposed upon developers/subdividers for disclosure of a material matter gives rise to the basic claim of Plaintiff/Appellant Fennell's litigation herein. Had the disclosure of the unstable soil been made, he would not have agreed for Ivory North to acquire Lot 31 for the construction of his residence thereon. He properly relied upon the nondisclosure, was thereby injured with the destruction of his landscaping (including decorative wall and irrigation system), and had nothing in the nature of disclosure to have alerted him to the possibility of the circumstances which he now faces.

The *American Towers* and *SME Ind.* decisions turn upon contractual considerations concerning language dealing with an intent to confer performance benefits upon third parties, i.e., future purchasers. There was no intent shown necessary to confer benefits on the association.

Again, the issue as to Plaintiff/Appellant Fennell is not one of privity of contract or warranty, rather, it is nondisclosure of an inherent or latent defect. Further, Defendant/Appellee Green asserts that since Fennell's property is residential property by virtue of *American Towers*, it must fail as an implied warranty claim. However, we are not dealing with the residential construction which was the subject of *American Towers* but the latent defect present in the building lot which ultimately resulted in the damage to

Plaintiff/Appellant Fennell.

In looking at *Snow Flower Homeowners' Assoc. v. Snow Flower Ltd.*, 2001 UT App 207, 31 P.3d 576, a Condominium Association brought tort and contract claims alleging defects in construction. In affirming the of Summary Judgment for Appellees, the Court, at 583, recited that Plaintiff's claim did not "differ from a claim for breach of implied warranty." Therefore, the result was similar to that of American Towers. Again, this is different from the pursuit of relief by Plaintiff/Appellant Fennell herein.

We are not dealing with an issue of habitability. The issue is that of negligent nondisclosure of a latent defect. Defendant/Appellee Green would attempt to avoid any responsibility for disclosure by asserting that Green had no knowledge of the instability. As previously set forth, there is deposition testimony to the effect that not only was Green aware of the issue but he acted upon it by smoothing the hill and cropping the brow of the hill. Moreover, if indeed Green is determined to not have had any knowledge of the defect, he nevertheless is bound as a partner to the same duties that Defendant/Appellee Wall had in dealing with such disclosure. Defendant/Appellee Green seeks to invoke *Maack v. Resource Design & Constr., Inc.*, 875 P.2d 570, (Utah Ct. App. 1994). As required in *Maack*, the defect or condition was known, at least, to the partner of Green and the condition was indeed a material condition and, by virtue of the subdivider/developer status of the Defendants/Appellees Wall and Green, both had a legal duty to communicate that material defect.

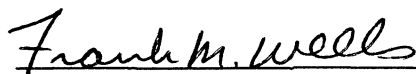
While Plaintiff/Appellant Fennell has not specifically stated fraud in the Complaint with the use of the word “fraud,” the circumstances as to the misrepresentations and nondisclosure are indeed concomitant as to the elements of fraud. Defendant/Appellee Green attempts to invoke *Andalex Resources v. Myers*, 871 P.2d 1041 (Utah Ct. App. 1994), for the proposition that it is necessary to prove by clear and convincing evidence that the elements of the fraud are present. However, that case dealt specifically with contractual provisions as between the parties dealing with an attempt to enforce an oral provision outside that contract. In applying the elements to establish the fraud claim in *Andalex*, at 1046, by paraphrase, there was a nondisclosure as to a then existing fact and the fact of the nondisclosure was essentially the same as it being a false representation, which the non-representor knew about and/or recklessly knowing that he had insufficient knowledge upon which to base such non-representation, failed to so advise the other party, and Plaintiff/Appellant acted reasonably in his ignorance as to the omission, relied upon the omission and thereby engaged Defendant/Appellee Wright to acquire the property which ultimately led to his injury and damage.

CONCLUSION

Plaintiff/Appellant Fennell has established factual dispute sufficient to require the

setting aside of the summary judgment of the trial court.

RESPECTFULLY SUBMITTED this 10th day of October, 2002.



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CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the above-entitled Reply Brief to Defendant/Appellee Green's Brief has been served upon the Defendants by placing same in the US Postal Service, postage prepaid this 10th day of October, 2002, to:

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ADDENDUM

1 correct?

2 A. That's correct, the spring of 1996.

3 Q. The placement of those large decorative
4 rocks, I understand those rocks are also on that crest
5 of the hill back behind your house, is that correct?

6 A. Yes. And part of them have slid down this
7 way because they were two tiers. There was one tier
8 here and another tier here, and that lower tier had slid
9 down near the edge of the lot.

10 Q. Would you mind just placing on here where
11 those tiered rocks were, please, and label it, to the
12 best of your understanding.

13 A. One tier would have been somewhere along in
14 here and one tier would have been about here. Do you
15 want me to label those?

16 Q. Yes.

17 A. (Indicating.)

18 Q. Thank you. When they brought those rocks in
19 did they just come in and bring them in and sit them
20 down or did they also bring some soil at that time to go
21 around those tiered rocks?

22 A. They brought the rocks in and set them. I
23 do not recall them bringing any soil.

24 Q. So they were simply sat on top of the hill?

25 A. That's correct.

1 A. It was a lot with an extremely beautiful
2 view and I had no reason to have a concern.

3 Q. It is a very pretty view. I've been out
4 there. I understand you also had some large rocks that
5 were brought in.

6 A. Correct.

7 Q. Did Elite Landscaping also do that?

8 A. No.

9 Q. Who did that?

10 A. They are also in the report. I cannot -- I
11 can't remember the company's name, but it's in one of
12 the reports.

13 Q. Would it be Ralph Marchant?

14 A. Yes, Marchant.

15 Q. Was that done at about the same time as
16 Elite Landscaping came in?

17 A. No.

18 Q. When was that done?

19 A. The decorative rock wall was done October
20 20th of '95. And that was near the completion of the
21 home.

22 Q. So that was done about a year before Elite
23 Landscaping did their work?

24 A. Correct.

25 Q. So Elite did their work in 1996, is that

1 defect or slide. I don't know the geologic exact terms.

2 Q. How has that slid? Not the gorge here, but
3 the scarp, has it slid since the time you moved in?

4 A. Since the time I moved in, yes.

5 Q. How much would you estimate that it has
6 slid?

7 A. Our reports indicate that --

8 Q. Just based on your own personal knowledge,
9 that you've observed.

10 A. Well, my personal knowledge comes from
11 reports because I'm not a geologist, but this is -- this
12 is going down, roughly, four to five feet.

13 Q. Is that based on what you have observed or
14 just what your geologist has indicated to you?

15 A. Beg your pardon?

16 Q. That four to five feet, is that based on
17 your observations or, again, is it based on what the
18 reports have said?

19 A. What the reports have said. I have not been
20 out measuring or anything on any of this, no.

21 Q. Going back to the gorge, do you recall when
22 that occurred?

23 A. On or about April 17th of 1998.

24 Q. Were you home at the time.

25 A. No.

1 with that dirt they brought in?

2 A. No. Elite Landscaping probably did not
3 change the elevation much at all because they basically
4 brought in dirt for trees and shrubs and grass and soil
5 and that kind of -- I mean, foot grass and trees and
6 that kind of thing.

7 Q. So it's your understanding, then, that the
8 crest of the hill today is basically the same shape it
9 was at the time you first walked on the lot before
10 construction, is that accurate, then?

11 A. Now, that question I don't understand.

12 Q. Okay. We talked earlier that when you first
13 walked on the lot before anything was constructed that
14 the hill had, I don't want to misrepresent what you
15 said, a slight slope to it around on that crest.

16 A. Uh-huh.

17 Q. Is that same slope today the same as it was
18 at that time?

19 A. No.

20 Q. How has it changed?

21 A. There's now a defect or slide that is at
22 that crest now and a gorge to the left.

23 Q. Would you mind just making a mark where that
24 gorge is or where that slide is that you indicated, to
25 the best of your knowledge?

1 your house? Were you involved with that?

2 A. No. It would be whomever Ivory's
3 subcontractors were.

4 Q. So Ivory took care of all the details of the
5 construction of the home?

6 A. That's correct.

7 Q. Do you have a full basement in that home?

8 A. Yes.

9 Q. The basement is below the ground level?

10 A. Yes.

11 Q. Do you know where the contractor, the
12 excavator, put that dirt that was taken out for that
13 basement?

14 A. No.

15 Q. How often did you go and witness your house
16 or watch your house being constructed?

17 A. Probably at least on a weekly basis.

18 Q. It's kind of an exciting process to see it
19 going up.

20 A. Yes.

21 Q. At one time you hired a landscaper by the
22 name of Elite Landscaping?

23 A. Correct.

24 Q. Why did you hire them?

25 A. To landscape the lot after the home was

1 corners, rounding of the ledge. If I could just show
2 you on this lot where your house is located here as you
3 indicated as a Newport. I would just like to get a
4 little bit of information of what you remember as the
5 status of the land on the back of the lot about 25 feet
6 from the north property line.

7 What do you remember that rounding of the --

8 A. Is this the back?

9 Q. I think this is north. So the road comes up
10 here (indicating), your house goes right in here.

11 A. Okay.

12 Q. So this is about 25 feet from the back as
13 marked on this.

14 A. Okay.

15 Q. What do you recall that this appeared like
16 on the back of this lot?

17 A. Basically, a general slope. A general even
18 slope going down to a fence line.

19 Q. Would you be able to estimate what the slope
20 of the angle was at that time?

21 A. No.

22 Q. You saw that prior to any construction being
23 done on your house, is that correct?

24 A. That's correct.

25 Q. Do you recall who did the excavating work on