

1962

Keith B. Ellis et al v. Karl B. Hale et al : Brief of Appellants

Utah Supreme Court

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Adam M. Duncan; Ronald N. Boyce; Attorneys for Appellants;

Milton V. Backman; Hanson, Baldwin & Allen; Attorneys for Respondents;

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IN THE SUPREME COURT OF THE STATE OF UTAH

KEITH B. ELLIS and VIRGINIA
ELLIS, LOEL T. HEPWORTH and
CONNIE JO M. HEPWORTH,
ADAM M. DUNCAN and SHIR-
LENE H. DUNCAN, RICHARD B.
BURTON and ANN B. BURTON,

Plaintiffs and Appellants,

—vs.—

KARL B. HALE and DELSA G.
HALE, ROY A. BARRETT and
RUTH R. BARRETT, J. THEO-
DORE ELDERS, JR., and LOIS H.
ELDERS, RALPH D. FISHER and
BARBARA H. FISHER, LE GRAND
P. BACKMAN and MILTON V.
BACKMAN, d.b.a., BACKMAN AB-
STRACT AND TITLE COMPANY,

Defendants and Respondents.

Clerk, SUPREME COURT UTAH

APR 9 1962

Case No. LIBRARY
9537

BRIEF OF APPELLANTS

Appeal From the Judgment of the
Third District Court for Salt Lake County
Hon. Ray VanCott, Jr., Judge

ADAM M. DUNCAN
RONALD N. BOYCE
351 South State St.
Salt Lake City, Utah

Attorneys for Appellants

MILTON V. BACKMAN
HANSON, BALDWIN & ALLEN
Salt Lake City, Utah

Attorneys for Respondents

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BACKMAN, d.b.a., BACKMAN AB-
STRACT AND TITLE COMPANY,

Defendants and Respondents.

Case No.
9537

BRIEF OF APPELLANTS

NATURE OF CASE

The plaintiffs brought this action in the Third Dis-
trict Court, Salt Lake County, State of Utah, for damages
allegedly sustained due to the wrongful action of all
the defendants herein arising from a sale of certain real

property by the defendants and their agents to the plaintiffs, Shirlene Duncan, Adam Duncan, Keith B. Ellis and Virginia Ellis; and further for the resulting damages to the other named plaintiffs from and due to the wrongful acts of the defendants. The instant appeal is from an order of the Honorable Ray VanCott, Jr., Judge, granting the defendants' motion to dismiss plaintiffs' complaint with prejudice.

DISPOSITION IN LOWER COURT

On the 27th of April, 1961, the original complaint in this action was filed (R. 1), and an order to show cause issued thereon by Judge Marcellus K. Snow. (R. 10). Thereafter, a motion to vacate the plaintiffs' order to show cause (R. 13) and motion to dismiss plaintiffs' complaint were filed. A hearing was held thereon in May, 1961 (R. 22). The order to show cause hearing resulted in no material action. Thereafter the plaintiffs filed an amended complaint (R. 37) on June 5, 1961, and a motion to dismiss was made by defendants. Upon hearing thereon before the Honorable Aldon J. Anderson, Judge, an order was entered denying the defendants' motion to dismiss without prejudice, and plaintiffs were granted to file a second amended complaint. (R. 50). Thereafter, the plaintiffs filed a motion to amend their complaint, which was again granted. (R. 53). On July 10, 1961, the plaintiffs filed their second amended complaint. Motions to dismiss the second amended complaint were filed (R. 69) and on August 4, 1961, a hearing was held thereon before the Honorable Ray VanCott, Jr.. An order was entered after hearing on 4 August 1961,

dismissing the plaintiffs' second amended complaint as to all defendants. A notice of appeal from that order was filed by plaintiffs on 9 August 1961. This appeal is predicated upon the trial court's order granting the defendants' motion to dismiss the plaintiffs' second amended complaint.

RELIEF SOUGHT ON APPEAL

The plaintiffs seek reversal of the trial court's order granting the defendant's motion to dismiss the plaintiffs' second amended complaint, and that the defendants be compelled to answer said complaint.

STATEMENT OF FACTS

The defendants, Karl B. Hale, Delsa G. Hale, J. Theodore Elders, Jr., Lois H. Elders, Ralph D. Fisher and Barbara H. Fisher, will be referred to in this brief as the defendants Hale, Elders and Fisher unless otherwise specifically designated. The defendants Roy A. and Ruth R. Barrett will be designated as defendants Barrett unless otherwise specifically designated. The plaintiffs Keith B. Ellis and Virginia Ellis, and Adam M. Duncan and Shirlene H. Duncan will be referred to as plaintiffs Ellis and Duncan, unless otherwise specifically designated, and the same reference will be made to Richard and Ann Burton.

The facts relied upon in prosecution of the appeal are generally set in the plaintiffs' second amended complaint. The allegations are that the defendants Hale, Elders and Fisher engaged the engineering firm of Bush

and Gudgell in early 1959 to survey a piece of land in Salt Lake County which these defendants owned. The firm of Bush and Gudgell surveyed the defendants' property and divided it into four building lots, and prepared a subdivision plat therefor which they presented to the Salt County Planning and Zoning Commission on or about May 15, 1959. This subdivision embraced the defendants Hale, Elders and Fisher's property, as such, and was identified on the plat as "Mount Olympus Park No. 5." (R. 57). It is further alleged that the defendants Hale, Elders and Fisher were co-partners as to the development of the above mentioned subdivision building lots (R. 56), and that all the defendants were engaged together as co-partners and joint adventures in real estate transactions.

It was further alleged that subsequent to the filing of the proposed plat, above mentioned, the Hale, Elders, and Milton V. Backman, their attorney and agent, received notice from the Salt Lake County Planning Commission that the plat could not be accepted until the County "Subdivision Ordinance," Title 9, Salt Lake County Ordinances, was complied with. This ordinance requires the subdivider to provide curb, gutter, sidewalk, fire hydrant, water drainage and other facilities, and also requires that the subdivided lots be of a certain size, in which particulars the four above mentioned lots are alleged to be deficient.

It was alleged that during the spring of 1959 that defendants Hale, Elders and Fisher conveyed to defendants Barrett three lots identified on the plat prepared

by Gudgell as Lots 1, 2, and 3 (R. 58), and that in July and August, 1959, defendants Barrett conveyed by warranty deed all three lots to plaintiffs Adam M. and Shirlene Duncan for good consideration. That Lots 2 and 3 had in 1958 been conveyed by defendants Hale to their children and spouses. (R. 58). By warranty deed dated 7 July, 1959, a conveyance of land described in metes and bounds and bearing the description "Lot 2" was conveyed to plaintiffs Adam M. and Shirlene Duncan by defendants, Fisher and Hale, and that by warranty deed dated 7 July, 1959 a conveyance in land described in metes and bounds and bearing the description "Lot 1" was conveyed by defendants Hale and Elders to plaintiffs Duncan. (Both lots corresponded to Lots 1 and 2 on the subdivision plat above mentioned.

In addition, on August 7, 1959, a conveyance of land described in metes and bounds, and bearing the description "Lot 3" was conveyed by defendants Hale and Barrett to plaintiffs Duncan by warranty deed. "Lot 4" of the Mt. Olympus Park Subdivision was conveyed by defendants Elders to plaintiffs Keith and Virginia Ellis by warranty deed on 27 January 1960. Both of these lots corresponded to Lots "3" and "4" on the Mt. Olympus Subdivision plat.

It is alleged that the plaintiffs applied for building permits on these properties to the Salt Lake County Planning Commission, and have been refused permits because of the failure of defendants to comply with 57-5-5 and 17-27-21, U.C.A. 1953, and, further, that the

county will not issue permits until full compliance with Title 9 SLCO has been effected.

The plaintiffs Duncan, it is alleged, subsequent to the receipt of the above conveyances, conveyed their interest in the lots to plaintiffs Loel T. Hepworth and Connie Jo M. Hepworth and Richard B. Burton and Ann B. Burton, (R. 19), but that said sale cannot be consummated because of the defendants' wrongdoing.

It is alleged that the reference in the deeds to Duncans above mentioned conveying "Lot 1, "Lot 2" and "Lot 3", was intended to incorporate by reference the lots on the plat prepared by Bush and Gudgell as Mount Olympus Park No. 5, and that as subdivision lots they would be worth \$6,000.00 each, but only worth \$100.00 as non building lots. (R. 61).

It is alleged that *all* the defendants caused the purported plat or plan of Mount Olympus Park No. 5 to be shown to Adam M. Duncan and Keith B. Ellis and oral reference was made to the conveyer lands with respect to the platted lots, and that this reference and disclosure was to induce the purchase of the lots by Duncan and Ellis. (R. 1, 62). It is further alleged that Karl B. Hale did with intent to defraud and with full knowledge of contrary facts, tell defendant Ray A. Barrett that the lots were building lots, and did not disclose the refusal of approval by the County Planning Commission, and that defendants, through Barrett as co-partner of all defendants (R. 56, Fourth, 61) then made similar misrepresentations to Duncan who, in

reliance thereon, purchased Lots 1, 2, and 3. In addition, it is alleged that Milton V. Backman was attorney and agent in fact for the defendants Hale and a partner of Backman Abstract and Title Company, and that he was informed that Adam M. Duncan wanted the deeds in question to note the conveyances as subdivision lots, in that he, Backman, was aware that Duncan thought he was purchasing three subdivision lots, but failed to disclose they were not a part of an approved subdivision. (R. 64). In addition, it is alleged that Backman further issued, as a partner of Backman Abstract and Title Company, an "Interim Title Insurance Binder" to Duncan as an inducement to the plaintiff Duncan to purchase said property, and that Backman failed to note the defects of non-subdivision property in the insurance binder. (R. 64).

It is alleged that plaintiffs Ellis, upon purchasing "Lot 4" from defendants Elders who were co-partners, agents and principals of all the defendants, engaged the services of an architect to design a home for the lot and paid the sum of \$5,000 therefor, but due to the failure of defendants to comply with Title 9, Salt Lake County Ordinances, construction could not be commenced and the plans so prepared were rendered useless.

Finally, it is alleged that defendant Backman issued to plaintiffs Burton a title insurance policy covering Lots "1 and 2" and did not disclose therein the fact that the lots were not subdivision lots.

Eight claims for relief based upon the above facts are set out in the complaint, and damages prayed on

each claim. The legal conclusions of each claim are contained in the record and have not been set out at length, but are treated in the arguments herein presented.

The defendants' motion to dismiss the plaintiffs' complaint based on the above facts was asserted on the grounds of failure to state "facts upon which relief can be granted," and as to the defendants LeGrand P. Backman and Milton V. Backman, that it is an "improper misjoinder" of parties and claims.

ARGUMENT

POINT I.

THE APPELLATE COURT MUST VIEW THE RECORD IN A MANNER MOST FAVORABLE TO PLAINTIFFS.

The trial court granted the defendants' motion to dismiss the plaintiffs' second amended complaint, with prejudice, upon the merits as to all plaintiffs against all defendants. (R. 77). The basis of the defendants' motion was two-fold. First, it was contended the complaint "does not state facts upon which relief can be granted," and secondly, an "improper misjoinder of parties and causes of action" as to defendants LeGrand P. Backman and Milton V. Backman. (R. 9). No answer was ever filed, nor does the court's order reflect the basis for its holding.

Since the trial court's ruling must be assumed to have encompassed all the bases urged by the defendants, before the ruling of the trial court may be affirmed, it must appear that the plaintiffs' complaint, when construed in a light most favorable to the plaintiffs, *Young*

v. Texas Co., 8 Utah 206, 331 P.2d 1099 (1958), states no ground for relief as against any of the defendants by any of the plaintiffs, or that misjoinder is an appropriate remedy for dismissal with prejudice.

In *Liquor Control Commission v. Athas*, 121 Utah 453, 243 P.2d 441 (1952), the court stated as to the propriety of granting a motion to dismiss:

“A motion to dsmiss should not be granted unless it appears *to a certainty* that plaintiff would be entitled to no relief under any state of facts which could be proved in support of its claim.”

The court further noted that a claim could be pleaded by “recitation of conclusions of law or fact or both.” To the degree that defendants’ motion was based upon insufficiency of pleaded facts, it is contrary to the above rule.

It is submitted that when the second amended complaint is viewed most favorably to any of the plaintiffs and as against any of the defendants, it is clear a claim for relief sufficient to meet the test of the *Athas* case has been pleaded and the trial court erred in not so finding.

POINT II.

THE PLAINTIFFS’ FIRST CLAIM AGAINST ALL DEFENDANTS ADEQUATELY STATES A CLAIM FOR RELIEF ON TWO THEORIES:

It is submitted that plaintiffs’ second amended complaint, First Claim, adequately sets out a cause of action.

The First Claim reasserts paragraphs 1-25 of the complaint, and alleges in addition that "Subdivision Ordinance" Title 9, Salt Lake County Ordinances, and Sections 57-5-5 and 17-27-21, U.C.A. 1953, give rise to a civil action in favor of plaintiffs upon violation thereof that proximately damages the plaintiffs. It is additionally alleged that the defendants caused the Mount Olympus Park No. 5 plat or plan to be shown to plaintiffs Duncan and Ellis and that defendants never disclosed that the plan had not been recorded or approved; and, further, that in the deeds of conveyance and orally, reference was intended to be made to the subdivision and that no disclosure of non-approval or recording was made at such time. Further, in the general allegations in paragraphs 1-25, it appears that Milton V. Backman and defendants Hale, Elders and Fisher had notice of rejection of the plat by Salt Lake County, and that sale of the lots was made to Duncan and Ellis with that knowledge. It is submitted that the defendants are liable to the plaintiffs in negligence, based on the facts alleged, in their failure to comply with the ordinances and statutes.

A. NEGLIGENCE PREDICATED ON VIOLATION OF A STATUTE AND ORDINANCE;

Title 9 of the Salt Lake County Ordinances has been in effect in similar form to that presently in effect since 17 December 1952, and in present form since March 29, 1959. The purposes of this ordinance are set forth in 9-2-1 SLCO, which states:

"The underlying purpose and intent of this Title is to promote the health, safety, convenience and general welfare of the inhabitants of the

unincorporated territory of the County in the matter of the subdivision of land and to encourage the healthful growth of the county.”

The sale of subdivision land or the subdivision thereof is prohibited unless compliance with the ordinance has been had. 9-3-1 SLCO. The ordinance requires approval of County Planning Commission and sets up minimum subdivision requirements. Violation of this ordinance is a misdemeanor. 1-1-6 SLCO.

Title 17, Chapter 27, U.C.A. 1953, deals with county zoning and planning, and 17-27-5, U.C.A. 1953, sets out the purposes of the chapter, among which are to :

“ * * * promote the health, safety, morals, order, convenience, prosperity, or the general welfare of the inhabitants.”

Section 17-27-21, U.C.A. 1953, expressly provides :

“Whoever, being the owner or agent of the owner of any land located within a subdivision in a county where a county planning commission has been created, transfers or sells any land in such subdivision before a plan or plat of such subdivision has been approved by such planning commission and, except as set forth in the preceding paragraph, recorded in the office of the county recorder, shall be guilty of a misdemeanor for each lot or parcel so transferred or sold; *and the description of such lot or parcel by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring shall not exempt the transaction from such penalties or from the remedies herein provided.*”

Also bearing upon the subdivision of land is Title 57, Chapter 5, U.C.A. 1953. This chapter allows the subdividing of land, but provides that when it is so platted by the owner, an accurate map will be made which will be acknowledged, certified, and recorded, and if county or city approval is required, it should be obtained. 57-5-3, U.C.A. 1953. 57-5-5, U.C.A. 1953, provides:

“If any person shall sell any lot so platted according to such plat before it is made out, acknowledged, filed and recorded as aforesaid, such person shall be guilty of a misdemeanor for each lot which he shall sell.”

It is admitted that the above sections are criminal statutes; however, this does not preclude a civil remedy being based upon a violation thereof which is the proximate cause of a plaintiff's damages. Thus, in *Texas P. Ry. Co. v. Rigsby*, 241 U.S. 33 (1916), it was noted:

“A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied.”

A violation of a criminal statute or ordinance has been recognized as establishing some negligence as a matter of law. *Arbuckle v. Wasatch Land & Improvement Co.*, 120 Utah 358, 234 P.2d 607 (1951); *Gibbs v. Blue Cab Co.*, 249 P.2d 213 (Utah 1952); *Langlois v. Rees*, 10 U.2d 272, 351 P.2d 638 (1960). In the latter case, this court indicated that if a violation of a statute results in damage which the statute is designed to prevent, a supportable cause of action exists. Although these cases dealt with

vehicle accidents or personal injuries, and statutory violations of the pedestrian and vehicle codes, the theory behind such holdings is not so limited. *Huckleberry v. Missouri Pac. R.R.*, 324 Mo. 1025, 26 S.W. 2d 980 (1930); *Metz v. Medford Fur Foods*, 4 Wis. 2d 96, 90 N.W. 2d 106 (1958);¹ *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959);² *Major v. Waverly & Ogden, Inc.*, 7 N.Y. 2d 332, 165 N.E. 2d 181 (1960); *Dini v. Naiditch*, 170 N.E. 2d 881 (Ill. 1960).³ See also *Contrasting Images on Torts—The Judicial Personality of Justice Traynor*, 13 Stan. L. Rev. 779, 785. Thus, negligence may arise in many transactions and cause substantial damage apart from physical injury, where the conduct of the tortfeasor does not approach that of a reasonable man. Thus Prosser, *Torts*, 2nd Ed., notes:

“The standard of conduct of a reasonable man may be established by a statute or ordinance. The violation of such a legislative enactment may be negligence in itself if:

- a. The plaintiff is one of a class of persons whom the statute was intended to protect, and
- b. The harm which has occurred is of the type which it was intended to prevent.”

If the statute is not interpreted as intended to afford such protection, its violation may still, in some cases, be evidence of negligence for the jury.

-
1. Liability was imposed based on a criminal statute for the sale of injurious animal foods.
 2. Illegal sale of alcohol.
 3. Building Code violations.

A similar standard is found in the Restatement of Torts, Sec. 286, but, in addition, the restatement adds a section to cover particular hazards, and recognizes the defense of contributory negligence.⁴ It is also recognized that the presence or absence of a penalty is not material in the instant case. *Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450 (1883); Restatement of Torts, Sec. 287. It may certainly be said that a reasonably prudent man would not violate a criminal statute—especially where he has knowledge of it, as was alleged in the instant case. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 Minn. L. Rev. 361, 364 (1932). Prosser, *supra*, p. 153. The real question then is whether the plaintiffs in the instant case fit the above categories. There can be no doubt that the prohibitive sale ordinances and statutes intended to cover these plaintiffs, since both Title 9 of the County Ordinances and 17-27-5, U.C.A. 1953, set out the purpose of the legislation as being for the protection and general welfare of the inhabitants, in which class all plaintiffs fall. 57-5-5, U.C.A. 1953 has been enacted without specifically setting out the legislative purpose; however, it goes without saying that these statutes are designed to protect the buyer from receiving as a building lot, property which may not have been so approved, and upon which he may not be able to build. This is so, since it is the sale or transfer which is prohibited—not just the building.

4. The absence of contributory negligence need not be pleaded in Utah since it is an affirmative defense (Rule 8 (c), U.R.C.P.), and the facts before the court have not concerned such claim. Many other facts such as estoppel to raise the defense may be involved so that this issue is now immaterial.

It is admitted that the scope of the chapters is to provide for regulated community development, but the prohibition against sale is to insure that until the subdivision is approved, the buyer will not be misled into thinking he is obtaining a good building lot. Damages have been recognized before for failure to comply with platting requirements. *Bibber v. Weber*, 102 NYS 2d 945 (1951). That the homeowner or purchaser is clearly within the class of persons sought to be protected is noted in Melli, *Subdivision Control in Wisconsin*, 1953, Wis. L. Rev. 389, where it is said:

“In additon to protecting the community interests subdivision control protects the lot purchaser or home buyer and his mortgage lender.

* * *

For example, subdivisions located too far from fire protection, public transportation and schools are a poor investment for the average home owner. Areas so far from public water and sewer that the cost of extending those services is prohibitive should also be avoided. This is true of subdivisions which because of an excess of subdivided lots, may never be fully built up. In discouraging the subdivison of these areas the community is protecting the potential buyer.

* * *

By requiring a survey and plat of the planned area for official scrutiny, the community provides the buyer with accurate boundary lines thus eliminating costly boundary disputes.”

Subdivision regulations have always been conceived in part as a control on fraudulent activities of promoters. 65 Har. L. Rev. 1226, 1227.

In the instant case it is clear that the very evil sought to be avoided was the claimed result of defendants' wrongdoing, that is, a buyer was sold a lot upon which it was thought valid building could be commenced, but such was not the case. The prohibition of the sale was, in part, for that very purpose, and thus gives rise to a cause of action. It seems clear then that in the instant situation the selling of the lot, even though criminal, was also such action as to allow a civil remedy for the damages sustained.

There can be no doubt either that the statute was violated, for the sale was in direct prohibition of the statute. *Smith v. Bach*, 183 Cal. 259, 191 Pac. 14 (1920). California has a comparable statute, Sec. 11538, Cal. Bus. & Prof. Code, and in *Smith v. Bach*, supra, the California Court held the statute was for the benefit of the vendee and that he could rescind. If rescission is available, why not damages? In 27 Ops. Atty. Gen. 66 (Cal.), the California Attorney General ruled that a scheme almost identical to that alleged here was a violation of the statute, and a sale by metes and bounds description could not remove it from the statute. 23 Ops. Atty. Gen. 223 (Cal.); 17-27-21, U.C.A. 1953. It is therefore submitted the plaintiffs' claim for negligence based upon a statutory violation was well pleaded. The prayer for relief is for \$23,600, or the difference between what the value of the property would have been if the ordinance and statutes had been complied with, and what it will take to comply with the ordinances and statutes as to the four lots. This is the appropriate measure of damages. *Nielson v.*

Hansford, 78 Colo. 456, 242 Pac. 677 (1926); Prosser, *supra*, p. 566.⁵

B. NEGLIGENT MISREPRESENTATION.

It is submitted that the actions of the defendants, as alleged in the complaint, give rise to an additional cause of action, based upon negligence. It should be remembered that it was alleged that the defendants were co-partners in the land development business, and that they exhibited or caused to be exhibited to plaintiffs Duncan and Ellis a plat of a subdivision of Mount Olympus Park No. 5, and that it was the understanding of the parties that the conveyances of the lots in question related to the platted lots. No disclosure of lack of recordation or approval of this subdivision was made, and the pleading clearly shows an inference left by defendants that this was a valid subdivision. Although no intentional scienter is pleaded as to the first claim, the law has recognized that a tort action on the basis of negligence may arise from a negligent misrepresentation. 1958, Annual Survey of American Law 478. Thus, as noted in Sec. 528, Restatement of Torts:

“A misrepresentation in a business transaction which is believed to state the truth but which because of negligent expression states what is false is a negligent but not a fraudulent misrepresentation.”

Section 552 of the Restatement of Torts recognizes a cause of action for negligent misrepresentation where a

5. An inappropriate claim for damages would not be a proper grounds for dismissal if a claim was otherwise stated.

person engaging in a business or professional transaction negligently communicates false information to another. Prosser, Torts, 2nd Ed. ,p. 541, notes :

“A representation made with an honest belief in its truth may still be negligent, because of lack of reasonable care in ascertaining the facts, *or in the manner of expression.* * * *”

In the instant case it is submitted that even if the showing of the platted map to Duncan and Ellis was in an effort merely to locate the land, the means chosen was of such a nature as to express and leave an implication as pleaded, that subdivision lots were being sold. In *Ashburn v. Miller*, 326 P.2d 229 (Cal. 1958), it was held that a cause of action was made out where a lot was sold which consisted of filled land, and where the defendant, who had no actual knowledge of the fact, lead the plaintiffs to believe to the contrary. In *Morris v. Miller*, 104 Ohio App. 461, 149 N.E. 2d 751 (1957), the court held pleadings similar to those set out in the plaintiffs' First Claim sufficient to state a cause of action for negligent misrepresentation. See Prosser, Torts, 2nd Ed., p. 536. Here, where the defendants are alleged to be co-partners and adventurers having much experience in the subdividing and promotion of land development (R. 56), a special duty to use care to avoid negligently conveying erroneous information exists. Harper & James, *The Law of Torts*, Sec. 7.6. In such cases, as noted by Prosser, *supra*, p. 543-44:

“When the representation is made directly to the plaintiff, in the course of his dealing with the defendant, or is shown to him with knowledge

that he intends to rely on it, there has been no difficulty in discovering a duty of reasonable care."

In *Decatur, Land, Loan & Abstract Co. v. Rutland*, 185 S.W. 1064 (Tex. 1916), it was held that the negligent giving of information as to the title of land by an abstractor to a purchaser gave rise to a cause of action in tort. Certainly there is equally as great a duty upon the subdivider or seller of platted land to insure that a plaintiff is not misled. Indeed, our Legislature has endeavored to impose such an obligation. 57-5-1-12, U.C.A. 1953. It is submitted, therefore, that a tort action for negligent misrepresentation is properly pleaded by plaintiffs.

POINT III.

THE PLAINTIFF ADAM M. DUNCAN HAS STATED A CLAIM FOR RELIEF AGAINST ALL DEFENDANTS IN HIS SECOND CLAIM FOR FRAUD AND DECEIT AND NEGLIGENT MISREPRESENTATION.

It is submitted that the Second Claim adequately sets out a claim for relief in fraud and misrepresentation based upon two theories: (1) deceit; (2) negligent misrepresentation. The facts as alleged are that defendant, Karl B. Hale, a co-partner of defendants Elders and Fisher (R. 56), made definite misrepresentations (R. 62) with the intent to deceive, to Roy A. Barrett, who thereafter made the same representations to Adam M. Duncan, who in reliance thereon purchased Lots 1, 2, and 3 from the defendants. In addition, it is alleged that Milton V. Backman, as agent and partner of Backman Abstract and Title Co., and of the defendants (R. 63), did with knowl-

edge that Adam M. Duncan thought he was purchasing four building lots, fail to disclose the fact that the lots were not subdivision building lots. Further, that Backman Abstract & Title Company prepared three "Interim Title Insurance Binders" which were presented to Adam M. Duncan by Barrett, acting for the defendants, in an effort to have Duncan purchase the lots in question, which insurance binders did not disclose that the lots were not as represented. On this basis, it is submitted that all defendants are liable to plaintiffs for damages for fraud and negligent misrepresentation.

A. Fraud.

In the second amended complaint, the facts alleging the fraud are set out with particularity as required by Rule 9 (b) U.R.C.P. In *Davis Stock Co. v. Hill*, 2 U. 2d 20, 268 P.2d 988 (1954), this court set out the requirements for a pleading of fraud, noting that the true facts must be alleged also, unless they appear obvious from the pleadings. In the instant case the pleading amply sets out with particularity the alleged fraud, the showing of materiality and reliance, and what in fact the true facts were. There can be no complaint that the instant pleadings are not sufficient unless as a matter of law they do not state a claim for relief as set out. It is submitted that they adequately set out such a claim.

First, as to the defendant Milton V. Backman, he was the agent and attorney for Hale, and although he knew that plaintiff Duncan was under the impression that he was purchasing building lots, he never made any

disclosure to the contrary. In fact, he, Backman, issued a title insurance binder to Duncan, thus acting in a double capacity. As to Backman's dual capacity, the law requires that he act with the upmost good faith. Thus, as noted in Prosser, *supra*, p. 534-35 :

“In addition, certain types of contracts, such as those of suretyship or guaranty, *insurance*, partnership and joint venture are recognized as creating something in the nature of a confidential relation, and hence as requiring the utmost good faith, and full and fair disclosure of all material facts.”

A recent Utah case notes the high responsibility placed on a fiduciary relationship to avoid misleading. *Lynch v. MacDonald*, No. 9406 (Jan. 2, 1962). If non-disclosure can make out fraud then Backman's failure to make disclosure where he also knew Duncan thought he was purchasing building lots was an actionable fraud; especially where it is alleged that Backman was fully aware of facts to the contrary. In *Cole v. Parker*, 5 U. 2d 263, 300 P.2d 623 (1956), this court recognized that non-disclosure gives rise to an action in fraud, noting:

“ * * * we agree with plaintiff's cited authorities that a material nondisclosure or a half-truth may be the basis for an action on fraud as well as a positive representation. * * * ”

In doing so, the court relied upon Section 529 of the Restatement of Torts. Here, where a special relationship is made out as attorney and agent for one side, and title insurer for the other, a duty of full and fair disclosure existed. It is submitted, therefore, that a fair cause has been stated as to Backman. It may be said that Duncan

had a duty to investigate, but this is a jury question when all facts have been disclosed. *Lewis v. White*, 2 U.2d 101, 269 P.2d 865; *Cole v. Parker*, supra.

As to Hale, the acts of Backman as his agent may well make him liable. *Stuck v. Delta Land & Water Co.*, 63 Utah 495, 227 Pac. 791 (1924); Sec. 257, Restatement of Agency 2nd, and even for nondisclosure. Restatement of Agency 2nd, Sec. 257 (c); Restatement of Torts, Sec. 535. In addition, it appears that Hale was interested in the whole transaction since he made false representations to Barrett, a partner in some transactions, and it is alleged that all the defendants caused the insurance binders to be issued to Duncan, knowing the instruments did not disclose the true facts, and that Duncan was under a mis-impression. It was alleged that the binders were submitted to Duncan as an inducement for the sale. This was active participation and a duty of disclosure arose on the part of Hale and all the defendants. Whether Hale was authorized to act for Elders or Fisher is again a factual question. The facts, as pleaded, cover the nondisclosure of material facts, and as noted by the Wyoming Supreme Court in *Steadman v. Topham*, 338 P. 2d 820 (1959 Wyo.):

“Fraud may be perpetrated by silence as well as by representations and the former is at times the equivalent of the latter.”

As to the defendant Barrett, it is alleged that he made false statements to Duncan, showed him the plat map, and lead him to believe that the lots in question were subdivision lots, which Duncan relied on in purchasing the property. It is concluded that several Utah cases

have said that a “knowingly false representation” must be made to make a cause for fraud. *Fleming v. Fleming-Felt Co.*, 7 U.2d 293, 323 P.2d 712; *Auerbach v. Samuels*, 10 U.2d 152, 349 P.2d 1112 (1960). Knowledge of the falsity to Barrett is not specifically pleaded, but it need not be; it may be averred generally, and inferred from the facts. Rule 9(b), U.R.C.P. Such is the allegation in the instant case. Even if knowledge is not sufficiently averred, the facts as set out are sufficient claim for relief where Barrett “recklessly” affirmed as a fact something of which he had no actual knowledge. *Stuck v. Delta Land & Water Co.*, 63 Utah 495, 227 Pac. 791 (1924). Especially is that so where a document, such as a plat, was shown to Duncan. Restatement Torts, Sec. 532.

It is submitted, therefore, that an adequate claim in fraud has been pleaded.

Negligent Misrepresentation.

As was noted in Point II, negligence may raise a cause of action based upon a representation. It is debatable whether it is a cause of action in negligence or misrepresentation. Bohlen, *Should Negligent Misrepresentations Be Treated as Negligence or Fraud*, 18 Va. L. Rev. 703 (1932). Much of what has been said under Point II is applicable under the instant claim, as to Barrett, for negligently representing the facts. Harper & James, *The Law of Torts*, Vol. 1, Sec. 7.7. Thus, in *Lerner v. Riverside Citrus Assn.*, 115 Cal. App. 2d 544, 252 P. 744 (1953), it was said:

“If, therefore, one asserts that a thing is true within his personal knowledge, or makes a statement as of his own knowledge, or makes such an absolute, unqualified and positive statement as implies knowledge on his part, when in fact he has no knowledge whether his assertion be true or false, and his statement proves to be false he is as culpable as if he had wilfully asserted that to be true which he knew to be false and is equally guilty of fraud.”

Barrett's conduct would be sufficient in showing the map, and unqualifiedly asserting the representations from Hale to raise a claim for relief. Such conduct is best termed culpable neglect.

As to the defendant Milton V. Backman, who acted as insurance agent as well as agent for defendants, a much higher duty of care not to mislead exists. Restatement of Torts, Sec. 552; Harper and James, *supra*, Sec. 7.6. Therefore, it appears clear that a proper cause of action was alleged.

POINT IV.

PLAINTIFFS ELLIS HAVE ADEQUATELY STATED A CLAIM FOR RELIEF AGAINST ALL DEFENDANTS FOR SPECIAL DAMAGES BASED UPON NEGLIGENCE.

It is submitted that plaintiffs Ellis claim set out in the complaint as Claim III is well pleaded. This is a claim for special damages for architect's fees expended by Ellis upon purchasing “Lot 4.” The plaintiff Ellis has claimed liability for negligence on the part of the defendants. In such cases the primary aim of measuring damages for tort is to place the person in a position as

nearly as possible as he would have been had no tort been committed. McCormick, Damages, Sec. 137. In the instant case the damages from selling the property in violation of a statute could be readily foreseen to have included expenses for architect's fees, since the lot was purportedly a building lot. See 17 ALR 1357.⁶ Further, as to the claims of negligent misrepresentation, special damages have been recognized as recoverable thereunder if it is the natural and foreseeable result of the wrongdoing. Restatement of Torts, Sec. 549(b).

If the plaintiffs' action is well stated, it is certainly proper for recovery to be had for all damages flowing from the tortious wrongdoing of the defendants. Where a subdivision building lot is the object sold, it is readily foreseeable that a party purchaser may well expend money in preparation to build. The expenditure of architects' fees in such instances is readily foreseeable and would be a proper recovery. So long as the damage is the foreseeable, proximate result of the wrongdoing, as it is here, it is recoverable. *McKinney v. Carson*, 35 Utah 180, 99 Pac. 660 (1909). Therefore, the claim for special damages is well pleaded.

POINT V.

PLAINTIFFS BURTON HAVE ADEQUATELY STATED A CAUSE OF ACTION AS ASSERTED IN THEIR FOURTH AND FIFTH CLAIMS AGAINST DEFENDANTS BACKMAN.

A. FOR NEGLIGENCE.

6. Although the cases collected there relate to contracts, the same foreseeable and proximate cause principle is applicable to tort.

B. UPON A CONTRACT OF INSURANCE.

The fourth claim of the complaint is by plaintiffs Burton, who entered into a purchase contract with the plaintiffs Duncan to purchase Lots 1 and 2 of the property sold by defendants to Duncan. The pleadings reassert paragraphs "First" through "Twenty-Fifth" and "Thirty Fourth" through "Thirty Seventh" of plaintiffs' second amended complaint. It is further alleged that Burtons ordered a title insurance policy from Milton V. Backman and LeGrand Backman, d/b/a Backman Abstract and Title Co., and received policies and interim binders, embracing and guaranteeing good title to Lots 1 and 2. The defendants had knowledge through Milton V. Backman that the lots in question were not a part of a platted subdivision, and that the County Commission had denied approval of the lots as building lots. It is alleged that in preparing the title insurance binders, the defendant Backman failed to disclose the fact that the lots were not subdivision building lots.

As has been noted before, the law recognizes that, "One who in the course of his business or profession supplies information for the guidance of others in their business transaction" is liable for harm incurred to the other, who relies thereon, if he fails to exercise due care. Restatement of Torts, Sec. 552; Prosser, Torts, 2nd Ed., 541. In this regard, liability has been placed upon notaries public for negligent certification, *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958); for negligent weighing, *Glanzen v. Shepard*, 223 N.Y. 236, 135 N.E. 275 (1922); for negligent issuance of a certificate by a city clerk, *Mulroy v. Wright*, 185 Minn. 84, 240 N.W. 116 (1931); for

negligent FHA appraisal, *United States v. Neustadt*, 281 F.2d 596 (1960), reversed on other grounds, 366 U.S. 696 (1961). A substantial number of cases have held abstractors liable for lack of due care in preparing a title abstract, *Trisdale v. Shasta County Title Co.*, 146 C.A. 2d 831, 304 P. 2d 832;⁷ Prosser, *supra*, p. 544; Harper and James, *supra*, Vol. I, p. 548, N. 13; 1 Am. Jur. Abstracts of Title, Sec. 15, 16. Thus the question is, does a person who sells title insurance have a duty of reasonable care to disclose defects of which he is knowledgeable concerning the property. As noted by Prosser, *op. cit.*, p. 535, a fiduciary duty in an insurance contract arises requiring full disclosure. A title insurer should be under the same obligation to disclose defects and use reasonable care for disclosing errors of title. Many people rely upon title insurance in making purchases, as indicating the absence of defects, and attorneys are often asked to prepare title opinions based upon the disclosures made in title insurance policies. Title insurance companies endeavor to create and stimulate this thinking in the public mind as a means of increasing their business. It would be closing one's eyes to the facts to say that because title insurance is a form of insurance, due care in making disclosures respecting title may be avoided. Especially is this so where it is well known that vendors and purchasers often rely on such policies for clear title before consummating a transaction. This court has recognized that the procuring of title insurance may evidence good faith, even where a boundary dispute is involved, thus recognizing the title insurance influence on the

7. Court held action for negligence in preparation of abstract not demurable for contributory negligence.

common purchaser of real estate. *Alleman v. Miner*, 10 U.2d 356, 353 P.2d 463 (1960). In such instances as this, title insurance companies should be liable for the negligent failure to disclose defects of which they have knowledge, and where plaintiff is likely to rely upon the absence of any defects being disclosed in making the purchase. It is submitted, therefore, that Burtons have validly pleaded a claim in negligence against defendants' Backman.

The second cause of action by plaintiffs Burton against Backman is based upon the breach of warranty and guarantee provisions of the insurance policies. The policies were not presented to the court during the motion, nor are they a part of the record. In 40 ALR 2d 1238, relating to this subject, it is said:

“The questions whether a title insurance policy protects against loss sustained by reason of the fact that the premises, described by lot and subdivision, or map showing abetting streets, do not lie within any tract effectually subdivided * * * are of course not to be dealt with other than by attending closely to the language of the particular policy and its clauses of exception.”

In *Hocking v. Title Ins. & Trust Co.*, 37 Cal. 2d 644, 234 P.2d 625 (1951), the California Supreme Court recognized the necessity of looking directly at the policy provisions where a similar issue of failure of subdivision was involved. It is submitted that the plaintiffs Burton should be allowed to have the case returned to the District Court to have an opportunity to demonstrate that the terms of the policy issued cover the instant claim.

POINT VI.

PLAINTIFFS DUNCAN AND BARRETT IN CLAIMS SIXTH, SEVENTH AND EIGHTH VALIDLY STATE CLAIMS FOR RELIEF UPON BREACH OF A WARRANTY DEED.

Plaintiff Duncans' causes of action appear in the second amended complaint as the Sixth, Seventh and Eighth claims, and are against defendants Elders, Hale, Fisher and Barrett, based upon breach of warranty by virtue of the warranty deeds conveying Lots 1, 2, and 3 of the plat known as Mount Olympus Park No. 5. It is further alleged that it was understood by all parties that residential building lots in approved subdivisions were being conveyed by the deeds, and that this was not what was in fact conveyed. The deeds given were short form warranty deeds similar to those set out under 57-1-12, U.C.A. 1953.

The provisions of 57-1-12, U.C.A. 1953, provide that when a warranty deed is given as required by law, it shall have the effect:

“* * * of a conveyance in fee simple to the grantee, his heirs and assigns of the premises therein named, together with all the appurtenances, rights and privileges thereunto belonging, that he is lawfully seized of the premises; that he has good right to convey the same * * *.”

It is submitted that where, as here, it is alleged that the parties contemplated the conveyance of subdivision building lots, and the same were in fact not conveyed by reason of the failure of defendants to comply with the required statutes and ordinances, that defendants have breached their warranty of “good right to convey” and

“seizen.” They had no right to convey approved building lots since they owned none, and they had no right to convey the land in lots by plat and map since Sections 17-27-21 and 57-5-5, U.C.A. 1953 expressly prohibited it. Thus, where the statutes themselves prohibit the conveyance, it appears clear that there was no “good right to convey” in the defendants. It has been generally said that the covenants of seizen and good right to convey are exact equivalents. *Rogers v. Amrey*, 123 Okla. 70, 251 Pac. 1013 (1927); American Law of Property, Sec. 12.127. It has also been stated:

“In a majority of the states and in England the covenant means that the grantor is seized of an indefeasible estate in *quality* and quantity which he purports to convey.”

American Law of Property, Section 12.127; *Burton v. Price*, 105 Fla. 544, 141 So. 728 (1932).

Here the defendants had no title to subdivision lots as they purported to convey, but only bare title to the land; thus they did not own the quality or extent of the thing they purported to convey, and hence, breached the covenants. *Russell v. Belcher*, 221 Ala. 360, 128 So. 452 (1930). So also they had no legal right under law to even make the conveyance they did until compliance with the law had been had. There is no question that the lots sold related to the subdivision property since this was established at the hearing before Judge Snow (R. 25), and is so alleged in the complaint. (R. 56-67). Under these circumstances, it is submitted that a valid claim of lack of good right to convey and seizen has been pleaded, as breach of warranty under the deeds.

If it is argued that the deeds do not purport to convey subdivision lots, it still does not alter the fact that the conveyances were prohibited by statute and, hence, contrary to the warranty no matter what was purported to be conveyed. Even so, the conveyances here are of Lots 1, 2, and 3, which certainly indicate a subdivided area. At the least, they would be ambiguous, and parol evidence could be introduced. Thus in *Egelund v. Fayter*, 51 Utah 579, 172 Pac. 313 (1918), it was said:

“As to this question the deed was silent. There was a latent ambiguity which either party had the right to explain by parol testimony if such was available.”

In the instant case it would appear that at the least, the plaintiffs should have been allowed to introduce parol evidence. 16 Am. Jur., Deeds, Sec. 411.

It is submitted, therefore, that the trial court seriously erred in dismissing plaintiffs Duncans' complaint on breach of warranty, first, because there was no right to convey as a matter of law; second, the conveyance was not of the quantity and quality purported to be conveyed; third, at any rate parol evidence was admissible to show the intention of the parties.

POINT VII.

MISJOINDER OF PARTIES AND ISSUES IS NOT A VALID GROUND TO DISMISS A COMPLAINT.

The defendants also moved the trial court to dismiss the claims against Milton V. Backman and LeGrand Backman for misjoinder of parties and misjoinder of

claims. It should be remembered that it is alleged that Milton V. Backman had acted as co-partner of all the defendants in previous transactions, was the attorney and agent in fact for defendants Hale; that it is alleged he, as one of the defendants, caused the plat map of the subdivision to be displayed to plaintiffs; that he failed to disclose material facts concerning the status of the subject property, and finally, that, in part, to induce the purchase of the lots, he issued title insurance policies to the plaintiffs. All claims against Backman arise from the same general transaction and occurrence, namely the sale of the four purported subdivision lots. Backman participated as an integral element in the whole transaction.

At the outset it is well to note that if the trial court based any part of its ruling on misjoinder of parties, it did so erroneously, since Rule 21, U.R.C.P. provides:

“Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.”

Thus, any motion on misjoinder of parties could not lead to dismissal, but only severance.

As to the allegation of misjoinder of claims, Rule 18, U.R.C.P. provides:

“The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as

he may have against an opposing party. There may be like joinder of claims when there are multiple parties if the requirements of Rules 19, 20 and 22 are satisfied. * * *”

Thus, the joining of claims against multiple defendants is permitted under the above rule and, as relevant to this case, Rule 20, U.R.C.P. Rule 20, U.R.C.P. provides :

“All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.”

It appears clear that in the instant case the defendants are all being sued out of the same general transaction and occurrence and a common question of law and facts is alleged against all defendants. Thus, they were properly joined. Even if it were found that a misjoinder of claims was made, dismissal is not appropriate relief. *Man-Sew Pinking Att. Corp. v. Chandler Machine Co.*, 29 F. Supp. 480 (1939). The federal rules served as

the pattern for our rules, and the joinder and severance provisions are the same. Professor Moore, in commenting on the effect of misjoinder of federal claims, notes:

“The Federal Rules are so flexible on joinder of actions and parties that misjoinder of actions will rarely occur. But if there is a misjoinder, as where A and B, each with a separate cause of action, join as plaintiffs and there is no question of law or fact common to their claims, *the court is not obliged to dismiss the suit*. Rule 21 provides that ‘any claim against a party may be severed and proceeded with separately.’ Hence if there is federal jurisdiction to support each cause of action, the court should normally order a severance. * * *”

Moore’s Federal Practice, Vol. 3, Sec. 18.05.

Thus, it appears clear that the defendants’ motion for dismissal on a misjoinder ground was not well taken, 5 Fed. Rules Serv. 828, and to the degree the trial court may have so ruled, error was committed.

CONCLUSION

The instant court may only affirm the trial court’s dismissal with prejudice if under any conceivable state of facts pleaded, none of the plaintiffs have stated a cause of action under any theory against any of the defendants. In this case it appears clear that the actions pleaded were proper, and defendants should be compelled to answer on penalty of default.

Respectfully submitted,

ADAM M. DUNCAN

RONALD N. BOYCE

Attorneys for Appellants.