

1962

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

Utah Supreme Court

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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, LEGRAND
P. BACKMAN and MILTON V.
BACKMAN, d.b.a. BACKMAN AB-
STRACT AND TITLE COMPANY,

Defendants and Respondents.

UNIVERSITY UTAH

APR 9 1962

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Case No. 9537

FILED
APR 11 1962

Supreme Court, Utah

BRIEF OF RESPONDENTS

Appeal from Judgment of the
Third District Court for Salt Lake County, Utah
HON. RAY VAN COTT, JR., *Judge*

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Case No. 9537

BRIEF OF RESPONDENTS

Respondents agree with the statement of the nature of the case, with the stated disposition of same, the relief sought as set forth in appellants' brief, and that the statement of facts substantially recites the allegations contained in the second amended complaint.

As a further statement the attention of the Honorable Court is directed to the fact that defendants Karl B. Hale and Delsa G. Hale, his wife, who owned the properties affected by this action, did on October 15th, 1958 make gifts to three of their children, two of whom are named as grantees in deeds of properties described in paragraphs 14th and 15th. These deeds were made and delivered by Karl B. Hale and his wife following a pattern adopted by them in reducing their estate, by each year conveying properties to their children. (R. 14). Defendants Karl B. Hale and Delsa G. Hale had no right, title or interest in and to the property described in the deeds, the subject of this action, after the deeds hereinabove mentioned were delivered to their children.

Defendants Fishers and Elders were parties to but one deed each, therefore there could be no violation of any law or ordinance on the part of these defendants.

None of defendants have been found guilty of violating any law or ordinance. Nor does it appear from the pleadings that any one of the defendants made any statement to induce plaintiffs to act, which statement was false, but plaintiffs rely on that which they claim was an omission on the part of defendants to advise plaintiffs of the status of the properties.

As to defendants Le Grand P. Backman and Milton V. Backman, dba Backman Abstract and Title Company it is alleged that a preliminary title report was issued by said company and that it was not disclosed by the report

that the property was not within a recorded subdivision. Appellants do not charge that the title company certified to a description of property as being within a subdivision.

Defendant Adam M. Duncan conferred with the Planning and Zoning Commission in company with defendant Karl B. Hale. Duncan had no conversation with Karl B. Hale prior to Duncan's having acquired title to the property (R. 34).

The plat of the proposed subdivision does not bear the signature of anyone representing themselves to be the owners of the property.

Plaintiffs do not charge that they have been disturbed in possession of the property described in the deeds, their only complaint is that they were denied building permits.

The property, the subject of this action, fronts on a present county road.

ARGUMENT

POINT I.

THE SECOND AMENDED COMPLAINT FAILS TO STATE A CLAIM AGAINST RESPONDENTS UPON WHICH RELIEF CAN BE GRANTED.

It cannot be determined from the complaint whether appellants rely on acts of fraud or misrepresentation on the part of defendants-respondents, or whether appellants rely on breach of warranty of title. If appellants rely

on fraud then under Rule 9b URCP appellants are required to state the acts of fraud on which they rely with particularity. This appellants have not done. If appellants rely on breach of warranty of title as against respondents who were grantors in the deeds, the subject of this action, then it is necessary to read into the warranty deed that which the statute does not imply. Appellants have not alleged facts sufficient to show the violation of any ordinance relied upon or of the violation of any law, nothing but bare legal conclusions.

There is no allegation of failure of title or of appellants having been disturbed in possession, neither is there any allegation that the title is encumbered. The only allegation is that appellants have been unable to obtain building permits to construct homes on the properties described in the deeds.

Appellants allege the deeds refer to lots in Mount Olympus Park No. 5. The deeds on which appellants rely and base their action do not recite any subdivision but on the contrary each deed contains a meets and bounds description as alleged by appellants in paragraphs 15th, 16th, and 17th of the second amended complaint. Therefore it is clear there is nothing before the court bearing out the allegations that the deeds made reference to or caused reference to be made to a certain purported plan or plat by a subdivision, to-wit, Mount Olympus Park No. 5.

As to the allegations purporting to state a cause of action against Defendants Backman, appellants allege

that defendant Milton V. Backman prepared all of the deeds. That this defendant was aware that Duncan thought he was purchasing 3 building lots although said defendant knew that the lots were not part of an approved subdivision he wholly failed to disclose this fact to said Duncan. This allegation is contradictory to the allegations contained in paragraphs sixteenth, seventeenth and eighteenth and is in conflict with the descriptions contained in the deeds relied upon. Therefore it is apparent Duncan was on notice at all times of the fact that the property was not a part of a subdivision.

As to the allegation in paragraph 37th of the issuance of "Interim Title Insurance Binders," it is alleged that the same were delivered to Duncan by Barrett. There is no allegation of any privity of contract between Duncan and defendants, Backman Abstract & Title Co. The instruments relied upon as against these defendants were not pleaded, and subparagraphs 1, 2 and 3 thereunder contain statements not presumed to be covered by an Interim Title Insurance Binder. As to the other allegations of the complaint purporting to state a cause of action against defendants Backman, the complaint contains no allegations as to the description of the property contained in the title policy purportedly issued or in the binder allegedly issued by defendants Backman. Neither is it alleged that there was privity of contract between Backman and any one of the plaintiffs.

POINT II.

The appellants, in Point II of their brief, contend that they state a cause of action against all of the defendants named upon two theories.

The first of these theories is predicated upon the proposition that it is negligent to violate certain statutes and ordinances which are set forth in the appellants' brief.

There is no question that the Salt Lake County Ordinance set forth in the section referred to of the Utah Code Annotated are accurate recitations of what those statutory provisions hold. It should be noted in this connection that the statutory provision referred to creates a violation or describes a violation as a misdemeanor.

On Page 10 and Page 11 of the appellants' brief there is set forth the underlying purpose of the county ordinance which is stipulated therein in the broadest terms. In neither the county ordinance referred to nor the state statute is there established in so many words or expressly any civil action such as the appellants brought against any violator of the ordinance or the state statute. The question which arises by reason of Point A in the appellants' brief contending that negligence can be predicated upon a violation of a statute and ordinance and thereby give rise to a cause of action in favor of the appellants and against the defendants.

In support of this proposition, the appellants refer to certain cases which purport to hold that a violation of a criminal statute or ordinance has been recognized as establishing some negligence as a matter of law. Also, in support of this proposition, is cited the case of *Langlois v. Reese*, 10 Utah 2d 272, 351 P 2d 638.

The appellants' brief uses this language in referring to the Langlois case:

"In the latter case (the Langlois 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."

The Langlois case arose out of an automobile-pedestrian accident at the intersection of State Street and First Avenue. The westbound automobile was making a left turn from First Avenue going south on State Street when the pedestrian was crossing from west to east, not in a crosswalk, across State Street. The essence of the case is that the trial court sent the question of contributory negligence on the part of the plaintiff to the jury on the question of whether this alleged contributory negligence was a proximate cause. The jury found that it was and the Supreme Court affirmed the decision. But nowhere in the decision is any language apparent which is susceptible of the proposition that the court indicated a violation of the statute or of a statute creates a supportable cause of action.

Also, in support of this proposition, the appellants cite in their brief a headnote from Prosser, Torts, 2nd Edition. The material in Prosser, which follows this headnote contains some decisions which seem to support the proposition that the violation of a criminal statute, will create a civil action on the part of one who is injured as a result of the violation of the statute if the plaintiff is one of a class the statute was designed to protect.

In connection with the citation to Prosser on Torts, 2nd Edition, which is made by appellants in their brief, beginning at Page 154 of the 2nd Edition, the following language appears under the general headnote which has been submitted to the court :

“It is not every infraction of a statute or an ordinance which will result in civil liability. Otherwise stated, there are statutes which are construed as creating no duty of conduct toward the plaintiff. The courts have been careful not to exceed the purpose which they attribute to the legislature. This judicial self-restraint has served as an argument for those who contend that an action cannot be founded upon a duty to another; but there is, of course, a special reason, in the theory of the separation of powers, for such reluctance to go beyond the legislative policy.”

Prosser continues on Page 155 of the 2nd Edition to say as follows :

“In many cases the evident policy of the legislature is to protect only a limited class of individuals, and the plaintiff must bring himself within that class in order to maintain an action based on the statute.”

The purpose of the passage of the county ordinance which is set forth in the appellants' brief is repeated here because of the very general language which is used. It reads as follows :

“The underlying purpose and intent of this title is to promote the health, safety, convenience and general welfare of the inhabitants of the un-

incorporated territory of the county in the manner of the subdivision of land and to encourage the healthful growth of the county.”

In *Akers v. Chicago, St. Paul, Milwaukee and Ohio Railway Company*, 58 Minn. 540, 60 N.W. 669, the following statement, footnoted in Prosser, occurs :

“Even if a defendant owes a duty to someone else but does not owe it to the person injured, no action will lie. The duty must be to the person injured. These principles are elementary and are equally applicable, whether the duty is imposed by positive statute or is founded on general common law principals.”

It is submitted that the general language employed in the preamble to the Salt Lake County Ordinance does not in express terms or otherwise purport to create in favor of these plaintiffs a civil cause of action against these defendants. The second theory advanced by the appellants in support of their Point II is that a negligent misrepresentation should give rise to the kind of cause of action which the appellants seek to bring here. This theory on the part of the appellants appears to be based on the proposition that the defendants, or some of them, either deliberately misrepresented the facts or negligently made representations or assertions, the truth of which, they did not ascertain.

The answer to this theory and contention of the appellants is simply that no representation, or misrepresentation, of the kind contended for by the appellants was

made, nor was there any conscious withholding of information which should have been given to the appellants.

The appellants in this regard seem to rely upon what they describe as an inference left by the defendants that the land in question was part of a valid subdivision. There is no support for the suggestion that an inference was left or made that the land was part of a valid subdivision. In this connection, also, the appellants refer to Prosser on Torts, 2nd Edition, Page 541, and say as follows:

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

This last statement “or in the manner of expression” is italicized in the appellants’ brief. Their contention seems to be that they were mislead by some sort of inference or a manner of expression or even a tone of voice.

In this connection, it should be taken into account that the plaintiff who complains most bitterly about this contended or alleged negligent misrepresentation is an attorney, who had equal and ample access to all of the information concerning the land involved as did the defendants. There is no necessity on the part of the defendants and respondents in this action to rely upon the doctrine of caveat emptor. It seems curious that the attorney to whom this property was sold made no personal inquiry with respect to its status as subdivision property

or otherwise; does not contend that he even asked concerning its subdivided status and then files a cause of action based upon inference or “a manner of expressio.”

It is submitted to the court, based upon the foregoing that the appellants have not stated a cause of action which can be predicated upon either a violation of a statute or an ordinance or upon the theory of conscious or negligent misrepresentation because no such representations were ever made.

POINT III.

Under Appellants’ Point III sub paragraph A—Fraud, they say the facts alleging the fraud are set out with particularity as required by Rule 9(b) URCP, and cite *Davis Stock Co. v. Hill*, 2 U. 2d 20 noting that the true facts must be alleged unless they appear obvious from the pleadings. The lower court in sustaining respondents’ motion determined that the allegations of fraud were insufficient and rightly so. Let us examine the complaint as to the allegations of fraud. Under paragraph 10th appellants allege the lots contained fewer than the minimum number of square feet allowed by the terms of the cited ordinance. It is apparent appellants knew or should have known from the meets and bounds description the area the lots contained.

In paragraph 11 appellants allege that title to all of the properties was in Hales and that the four lots were transferred to other members of the Hale family prior to execution of deeds to Barrett (one of the defendants), Duncan and Ellis. Then in paragraph 12th it is alleged

that in the spring of 1959, Hales, Elders and Fisher conveyed to Barrett three lots identified as 1, 2, and 3, in consideration of or exchange of some Utah County property, and under paragraph 13th it is alleged that Barrett and Hale deeded the three lots to Duncan and that certain of the other defendants (not named) joined in the deeds.

The only allegations of fraud are contained in Second Claim wherein appellants recite certain statements purportedly made to defendant Barrett and then restated by Barrett to Duncan. The statements allegedly made even if not hearsay as to Hales are not such statements as will give rise to an action of fraud.

As to representations claimed to have been made by Backmans under the Interim Title Report, as heretofore stated, there are no allegations of any privity of contract between them and Duncan. Neither are the instruments or any provisions thereof pleaded. The documents are not in evidence nor are they attached to the pleading as exhibits. There are no allegations to the effect that the title company failed to certify to that which is a matter of record, neither do appellants allege that the title company certified to the property as being a part of a subdivision.

There are no allegations to the effect that it was represented to Duncan or to his grantees by Hales that the property was a part of a dedicated subdivision.

At page 23 of appellants' brief they say knowledge of the falsity to Barrett is not specifically pleaded, but

it need not be. If appellants have stated a cause of action against Barrett for fraud it is not imputed to the other defendants and Barrett is not defending the case.

POINT V

The complaint contains no allegations against Backmans to the effect that they insured title to a property described as a part of subdivision. As stated heretofore, appellants do not so much as set out any provision of the Interim Title Report. All that appellants do is to allege Backmans did not disclose the lots were not subdivision lots. The description contained in the reports will show a meets and bounds description and that no reference is made to any subdivision. Appellants refer to defects in the title reports but fail to point out the particular in which the defect appears or just what the defect is, they allege the report did not point out that the property was subdivision building lots without specifying any provision of the report requiring the title company to do so.

The case of *Hocking v. Title Ins. & Trust Co.*, 37 Cal. 2d 644, 234 P2d 625, 40 ALR 2d 1238 is favorable to defendants Backman. Therein the court said in quoting from *The Coast Mutual Bldg. Loan Assn. v. Security Title Ins. & Guar. Co.*, 14 Cal. App. 2d 225, 57 P2d 1392:

“Not only the provisions of the policy as a whole, but also the exceptions to the liability of the insurer, must be construed so as to give the insured the protection which he reasonably had

a right to expect, and to that end doubts, ambiguities, and uncertainties arising out of the language used in the policy must be resolved in his favor."

Without the policies relied upon being pleaded or without pleading the provisions thereof appellants have not pleaded any cause of action as against Backmans. The allegations contained in the complaint are nothing but bare legal conclusions of the pleaders.

POINT VI.

Appellants charge defendants with breach of Warranty. It appears that Barrett is inadvertently referred to in the introductory paragraph of appellants' brief as a plaintiff.

Appellants have not alleged facts constituting any breach of warranty of title. The argument on pages 29 and 30 of their brief is not supported by the pleadings, on the contrary it is clearly evident from the allegations as contained in paragraphs 16th, 17th and 18th that no reference to any plat or map is contained in the deeds. Nowhere in the pleading does it appear that the grantee or their successors in interest have been disturbed in possession of the property covered by the deed. Appellants have cited no authority holding they had no right to convey the property covered by the deeds, and as to there not being the "quantity and quality" purported to be conveyed the deeds being meets and bounds description clearly disclose the area covered. Parol evidence could

not be introduced to alter or to explain same as there is no ambiguity in the deeds. In *Knight v. So. Pac. R. Co.*, 52 U. 42, 56, 172 P 689 the court said a parol agreement in no event runs with the land.

The deeds contain a complete description and the notation of Lot number adds nothing to the description and it will not be considered.

In 2 Devlin on Deeds, Third Ed., Vol. 2 at section 1013a, the law is stated as follows :

“If the land conveyed can be identified by the other calls of the description an impossible or senseless course will not be considered. Citing *Brose v. Boise City R.R.*, 5 Idaho 695.”

See also Thompson on Real Property, Perm. Ed. Vol. 6, Sec. 3274, p. 445.

POINT VII.

Appellants contend that the action against the grantors in the deeds, the subject of the action, and that pleaded against defendants Backman in their having issued Interim Title Reports arise out of the same transaction, occurrence or series of transactions or occurrences. It is contended that the issuance of a title report on a tract of land is not the transaction or occurrence contemplated by the rules.

Respectfully submitted,

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