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Kaziah May Hancock and Cindy Stewart v. The True and Living Church of Jesus Christ of Saints of the Last Days, James D. Harmston, William B. Lithgow, Keith Larson, Daniel (Dan) Simmons, Kay Crabtree, Jeff Hanks, Bart Mulstrom, John Harper, and John Does Nos. 1-5 : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS
STATE OF UTAH**

KAZIAH MAY HANCOCK, and CINDY
STEWART,

Plaintiffs/Appellees and Cross-Appellants,

v.

THE TRUE AND LIVING CHURCH OF
JESUS CHRIST OF SAINTS OF THE
LAST DAYS, JAMES D. HARMSTON,
WILLIAM B. LITHGOW, KEITH
LARSON, DANIEL (DAN) SIMMONS,
KAY CRABTREE, JEFF HANKS,
BART MULSTROM, JOHN HARPER
and JOHN DOES NOS. 1-5

Defendants/Appellants and Cross-
Appellees

**REPLY BRIEF OF APPELLEES/
CROSS-APPELLANTS**

Supreme Ct. No. 20030984-CA
**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 20030984-CA**

Appeal from the Orders of the Sixth Judicial District Court in and for Sanpete County,
State of Utah, The Honorable David L. Mower

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**FILED
UTAH APPELLATE COURT**

JAN 10 2005

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ARGUMENT

I. THE TRIAL COURT RELIED ON ERRONEOUS LEGAL PRINCIPLES IN ITS ORDER SETTING ASIDE THE JURY VERDICT

An appellate court reviews a trial court decision to grant or deny a new trial motion for abuse of discretion and “if, as a preliminary matter prior to the ultimate determination of the motion, the judge relies on legal principles which are erroneous or facts which are wholly without record support, this may also constitute grounds for reversal.” *Crookston v. Fire Insurance Exchange*, 817 P.2d 789, 805 fn. 19 (Utah 1991).

The trial court should describe the basis for its decision to grant a new trial in the record “to eliminate speculation as to the basis of the exercise of judicial discretion in granting new trials....” *Saltas v. Affleck*, 99 Utah 381, 386, 105 P.2d 176, 178 (Utah 1940). In the absence of such a statement of reasons, the appellate court is left to analyze the matter from the evidence, the record, and the instructions. *Id.* That is exactly the case in this appeal, and Plaintiffs/Cross-Appellants therefore undertake a review of the record leading up to the trial court’s March 26, 2003 order setting aside the jury verdict in favor of Plaintiffs. This review demonstrates that the trial court relied on erroneous legal principles in granting Defendants a new trial. Moreover, that court cited the absence of a detailed verdict which was never requested or proffered by Defendants at the trial.

The verdict rendered by the jury awarded \$290,325.00 in damages to Plaintiffs for the Defendants’ breach of contract, fraud, and for infliction of emotional distress. (Minutes, R.

832-4; Verdict, Plaintiffs' Add. H) Plaintiffs' proposed Final Judgment implemented the jury's verdict. Then, for the first time, Defendants objected to the liability and Judgment being imposed jointly and severally upon them, arguing throughout the post-trial proceedings that the Plaintiffs' allegations of breach of contract and fraud must be made against each separate Defendant in order to allow apportionment of fault. (R. 1076) Defendants claimed that the liability for the damages awarded should be apportioned among the Defendants and that the Utah Comparative Fault Statute §§ 78-27-37 precluded joint and several liability. (R. 898)

Plaintiffs responded that the Liability Reform Act did not abolish joint and several liability and that Defendants had not raised the issue of proportionate fault at any time prior to the jury's verdict. In response to Defendants' objection, however, Plaintiffs removed from the Second Proposed Judgment the names of three Defendants who had not been served with the Amended Complaint (which amended only the cause of action for fraud). Defendants objected to Plaintiffs' Proposed Second Judgment, arguing that:

Finally, contrary to the argument of Plaintiffs' counsel, Joint and several is not abolished, only if requested by a party. The Utah Supreme Court in *Sullivan v. Scoular Grain Co.*, 853 P.2d 877, 880 (Utah 1993) clearly states, 'in 1986 the Utah Legislature passed the Utah Liability Reform Act abolishing joint and several liability....

The Second Proposed Judgment is error, as is the Jury Verdict, which both rely on the application of joint and several liability, which has been abolished in Utah under Utah's Comparative Fault Statute. Based on these errors, the Court should not enter the Second Proposed Judgment, but order a new trial to determine the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery, to each Defendant, with all of the Defendants properly served."

(R. 923)

At the trial court hearing on their motion, Defendants did not argue that the verdict was unsupported by the evidence at trial. (Minutes of the hearing, R.927) No decision was entered by the court. Plaintiffs proposed a Third Judgment, to which Defendants objected as follows (R. 949):

No jury can disregard the law whether it is instructed or not. The jury's failure to apportion fault among the defendants is an abuse of the law that whether objected to by Defendants at trial or not, can not be overcome. Utah has abolished the joint and several liability of multiple tortfeasors.

Other than the joint and several liability issue, only issues regarding service of certain individual defendants were raised; never was there a request to set aside the verdict based on a lack of evidence to support it. Defendants resisted the entry of a Judgment only on legal issues, primarily joint and several liability.

Finally, on August 5, 2002, the trial court signed and entered a final Judgment. (R. 969; Add.I) Defendants then filed a Motion for a New Trial (R. 1019), and objections to the entry of the Judgment. Several weeks later, the trial court reversed itself and set aside the entered Judgment. (Minutes, R. 1045) Six months later, the trial court finally entered an order to set aside the jury verdict and grant a new trial. (Add. J) At no time did the trial court state that the jury verdict was not supported by the evidence presented at trial, or that the verdict was excessive. The single issue that had been the basis of objection and argument since the January, 2002 verdict was the joint and several liability of the Defendants. The trial court's reliance on the abolition of joint and several liability as claimed by the

Defendants was in error.

The Plaintiffs prayed for an award of damages against each Defendant, individually, in their initial Complaint, (R.1) and Plaintiffs have never wavered on that request. Defendants did not plead or ask for apportionment of liability prior to trial and the verdict. Defendants waived that defense. Defendants proposed no jury instruction to define fault, or joint and several liability, or asking for apportionment of the damages awarded. (R. 724-735, 754-762, 845-882) There was no objection to the jury instructions or to form of the verdict. (Add. H)

After the trial and the jury's verdict against Defendants, Defendants asserted no objection to the evidence or its sufficiency. Defendants argued against joint and several liability until the trial court finally set aside the jury verdict and granted a new trial. (Add. J)

The trial court made no statement of reasons, as *Affleck, supra*, suggested, but the court, by signing and entering a judgment in Plaintiffs' favor and jointly and severally against the Defendants as the jury verdict required, demonstrated that it had no concern that the judgment was not supported by sufficient evidence. Instead, the court apparently relied on the erroneous legal arguments of Defendants that joint and several liability had been abolished and apparently (without saying) interpreted the Liability Reform Act to permit apportionment of liability among defendants sued for fraud and for breach of contract. That

legal conclusion was erroneous.¹ When the court was unable to enter a judgment against the individual defendants on the information provided by the Verdict, the court set aside the verdict and granted a new trial. The appropriate action by the court would have been entry of the judgment in conformance with the Verdict, which Defendants could appeal in their discretion.

Because the issue is one of law, and neither party has appealed the jury's verdict as unsupported by the evidence, the arguments and authorities of Defendants' Brief in Reply to Plaintiffs' Cross-Appeal on the providing of a transcript of the proceedings and which party did or did not comply with Rule 11(e), Utah Rules App. Proc., are irrelevant. As to an error of law, even Defendants' cited authority, *Parsons v. Parsons*, 70 P.3d 887 (Okla. App. Div 3 2002) states that the trial court's decision granting a new trial is vulnerable on appeal if it is apparent that the trial court erred in a question of law, or acted arbitrarily. This Court of Appeals must deduce from review of the record whether the trial court's Order on Motions Regarding Judgment and New Trial (R. 969; Add. I) was based on Rule 59(a) or on an erroneous legal principle. Because the record reflects that the Order was made in reliance on an erroneous legal principle, *Crookston* provides authority for this Court to reverse and remand to the trial court for entry of the Fourth Proposed Judgment. 817 P.2d at n.19.

¹See *Guardian Title Co. of Utah v. Mitchell*, 2002 UT 63, ¶ 2, 54 P.3d 130 (holding that the Liability Reform Act does not apply to contract actions); *Diversified Holdings v. Turner*, 2002 UT 129, ¶ 3, 63 P.3d 686 (holding that defendants may be jointly and severally liable for fraud.)

II. THE TRIAL COURT'S ORDER SETTING ASIDE THE JURY VERDICT AND GRANTING DEFENDANTS A NEW TRIAL IS PROPERLY BEFORE THE APPELLATE COURT

Defendants have argued in their Reply Brief and in their October 4, 2004 Motion to Dismiss (Plaintiffs') Issue I that the trial court's decision to set aside the jury verdict and grant a new trial is raised for the first time on appeal. Defendants' legal theories and cited authorities do not show a lack of jurisdiction for appellate review.

A. The Issue of Joint and Several Liability Was Properly Preserved For Review.

Plaintiffs asserted, in their 1998 Complaint, that Defendants were liable as individuals and as agents of the Defendant True and Living Church who co-operated and conspired to obtain substantial sums of money from Plaintiffs. Plaintiffs consistently maintained before the trial court that the Defendant True and Living Church, its agents, and the named individual Defendants acted in concert to persuade Plaintiffs to give money to the TLC in exchange for promises of land and water, and in Plaintiff Stewart's case, a return of her retirement funds. Whether joint and several liability was appropriate under Utah law was not litigated until the jury rendered its verdict. Thereafter, the issue was the subject of memoranda filed by both parties and oral argument to the trial court.

Defendants cite *Badger v. Brooklyn Canal Company*, 966 P.2d 844 (Utah 1998) as support for their contention that the Plaintiffs did not preserve the liability issue for review. (Reply Brief, p. 10; Reply Memorandum In Support of Defendants' November 8, 2004 Motion To Dismiss Plaintiffs' Appeal of the Trial Courts' Order Granting New Trial, pp. 3-

4). However, Plaintiffs' complied with *Badger* by (1) raising the issue in a timely manner in their Jury Instructions; (2) specifically raising the issue by responding to Defendants' objections to entry of a judgment consistent with the jury verdict; and (3) presenting relevant legal authority and argument on the Liability Reform Act. For example, Plaintiffs' March 4, 2002 Response to Objection to Proposed Judgment (R. 913) p. 3, states: "Defendant's complaint based on the comparative fault statute is misplaced. That statute does not abolish joint and several liability. It provides for apportionment of fault IF REQUESTED." The parties continued to argue the issue both orally and in writing until the trial court withdrew its signed and entered Judgment, set aside the jury verdict and granted a new trial.

The preservation of issues for appellate review is addressed in *Spears v. Warr*, 2002 UT 24, ¶11, 44 P.3d 742, which states: "The Warrs claim the issue was adequately preserved simply because the trial court ruled on it. We agree. By ruling on the question, the trial court demonstrated that the issue was brought to its attention, and the issue has been sufficiently preserved for our review."²

Likewise, the trial court heard argument on the liability issue and ruled on it when it withdrew its Judgment, not for lack of factual evidence but for a stated lack of evidence as to the individual liability of the Defendants. Plaintiffs' argument is preserved.

²See *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 968 (Trial counsel need not raise an issue before the trial court more than once.)

B. The Order Setting Aside the Jury Verdict and Granting a New Trial Is Appealable As An Intermediate Order Relating To A Judgment Certified As Final.

Defendants' Reply Brief, p. 5, argues that the trial court's decision setting aside the verdict and granting a new trial was never properly appealed by the Plaintiffs and refers to the Defendants' separate Motion to Dismiss Issue I. Defendants' Reply Memorandum in Support of Defendants' Motion to Dismiss Plaintiffs' Appeal of the Trial Courts' Order Granting New Trial, dated November 8, 2004, cites authorities for its position that Rule 54(b) certification does not allow for a review of intermediate orders. The cited cases, however, do not support that position. *Kirkpatrick v. Introspect Healthcare Corp.*, 845 P.2d 800, 809 (N.M.1992) is only relevant for its conclusion that the trial court erred when it certified *all* of Kirkpatrick's claims pursuant to New Mexico Rule 54(C)(1), which treats the entry of final judgment for cases involving multiple claims in a manner substantially similar to Utah Rule 54(b). That decision provides no guidance in the present case.

Defendants inaccurately cite *Holt v. Biggs*, 714 P.2d 643 (Utah 1986) as supporting their statement that when a ruling is certified as final under Rule 54(b), the appeal is limited only to that ruling. *Holt* only holds that the appeal of an order granting partial summary judgment is not taken from a final order that disposes of all the issues between all the parties and must be dismissed. *Id.* There is some guidance from *Holt's* statement of the general rule that a "party may appeal as of right only from a final order or from a ruling properly certified under Rule 54(b) of the Utah Rules of Civil Procedure." *Id.* at 644. By clarifying that a ruling certified under Rule 54(b) is appealable as of right, *Holt* brings the Hancock Plaintiffs'

Cross-Appeal within the provisions of Rule 4, Utah Rules App. Proc.: “In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed....” and Rule 3(d), Utah Rules App. Proc.: “The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from....”

There is no separate provision for the filing of a notice of appeal of an order certified under Rule 54(b), and there is no other opportunity for an aggrieved party to obtain review of an order entered prior to the order certified as final under Rule 54(b). Rule 3(d) applies, bringing such a judgment and the intermediate orders that led to its entry as a final order properly before the appellate court. *Zions First Nat’l Bank v. Rocky Mountain Irrigation, Inc.* 931 P.2d 142, 144 (Utah 1997) (“Because the Coopers complied with rule 3(d) and generally designated the final judgment in their notice of appeal, they are not precluded from alleging errors in any intermediate order involving the merits or necessarily affecting the judgment as long as such errors were properly preserved.”)

Under *Holt* and *Zions*, Plaintiffs’ Notice of Cross-Appeal identifying the Order Continuing Trial entered November 3, 2002 (R. 1555, Add. K) allows review of the Order On Motions Regarding Judgment And New Trial (R. 1052, Add. J) as an order intermediate to the final order, pursuant to Rules 3 and 4, Utah Rules App. Proc.

III. THE ALLEGATIONS OF FRAUD/CONSTRUCTIVE FRAUD/NEGLIGENT MISREPRESENTATION AND OF UNLAWFUL ACTIVITY IN VIOLATION OF UTAH CODE ANN. 76-10-1601 *et seq.* ARE SUFFICIENT AND SHOULD NOT HAVE BEEN DISMISSED

Plaintiffs appeal the dismissal of two of their claims for relief, for fraud/constructive fraud/negligent misrepresentation and for racketeering. In their opening brief, Plaintiffs set forth with specificity the promises and lies set forth in the Second Amended Complaint, the Affidavits of Plaintiffs Hancock (R. 210, 418) and Stewart (R. 217) and witness Douglas Jordan (R. 200). In addition, the Defendants and the trial court had the benefit of a full presentation of Plaintiffs' testimony and their supporting evidence at the four-day trial of the matter. Based on the evidence, the jury rendered a verdict for Plaintiffs for fraud and for breach. For Defendants to continue to argue, and the trial court to conclude, that the allegations of fraud were inadequately pleaded is irrational.

A. Plaintiffs Stated A Claim For Fraud.

Defendants' Second Brief in Response to the Cross-Appeal sets forth the general rule that the elements of fraud must be particularly pleaded, which Plaintiffs admit. The Brief of Appellees/Cross-Appellants identified the particular elements pleaded in the Second Amended Complaint and identified the numbers of the paragraphs in which each element appeared. Plaintiffs will not re-state those allegations here, but refer to their Brief of Appellees/Cross-Appellants, pp. 38-40.

Defendants have not responded by identifying any element that remains, in their view, lacking and required dismissal of the claim. The allegations Plaintiffs made gave sufficient

and fair notice to each of the Defendants of Plaintiffs' claims against each of them, jointly and severally. *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982) Particularly where Plaintiffs have cited authority that defendants are jointly and severally liable for fraud, Defendants' repetition of the demand that facts be specified as to each defendant is not persuasive.

B. Plaintiffs Stated A Claim For Negligent Misrepresentation.

Plaintiffs' Second Amended Complaint also alleges that Defendants are liable to them for Negligent Misrepresentation. According to *Atkinson v. IHC Hospitals, Inc.*:

Negligent misrepresentation is a form of fraud which occurs when "[o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by the justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communication the information."

798 P.2d 733, 737 (Utah 1990) quoting Restatement (Second) of Torts § 552 (1977).

The elements of negligent misrepresentation are alleged in the Second Amended Complaint, ¶¶ 1-23. Plaintiffs incorporate herein their arguments and authorities regarding fraud, as set for in the Brief of Appellees/Cross-Appellants, pp. 38-40, which Plaintiffs believe give sufficient and fair notice to each of the Defendants of Plaintiff's claims against each of them, jointly and severally. *Williams, supra*.

C. Plaintiffs Stated A Claim For Constructive Fraud.

Plaintiffs' allegations, arguments and authorities are sufficient to state a claim for

constructive fraud, in which a fiduciary relationship must be alleged. Defendants cite *White v. Blackburn*, 787 P.2d 1315, (Utah App. 1990) as authority that Utah courts do not impose upon religious leaders a fiduciary obligation to their members. *White* holds, much more narrowly, that the Court of Appeals declined to establish a cause of action for clerical malpractice on the basis that the “wrongs and injuries involved were both comprehensible and assessable within the existing judicial framework.” *White*, 787 P.2d at 1319, quoting *Nally v. Grace Community Church of the Valley*, 763 P.2d at 960 (quoting *Peter W. v. San Francisco Unified School Dist.*, 60 Cal.App.3d 814, 824, 131 Cal. Rptr. 854 (1976)) (citations omitted). Thus, while the TLC Defendants may not be liable for “clerical malpractice,” *White* does not force the conclusion that a claim for constructive fraud has not been stated.

In the Second Amended Complaint, ¶ 23 (Add. E), a “fiduciary, confidential, or superior relationship with the promisee” is alleged. “Constructive fraud is defined as a breach of duty that the law declares fraudulent because of its tendency to deceive, to violate confidence, or to injure public interests.” *John R. Behrmann Revocable Trust v. Szaloczi*, 74 P.3d 371, 375 (Colo. App. II 2002). “Such fraud often arises where a special, confidential or fiduciary relationship exists, which affords the power and means of one to take undue advantage over the other.” *Sec. Nat’l Bank v. Peters, Writer & Christensen, Inc.*, 569 P.2d 875, 881 (Colo. App. 1977).

To establish constructive fraud, a plaintiff need not satisfy the requirements of Rule 9(b). *John R. Behrmann Revocable Trust*, 74 P.3d at 376; *see also FDIC v. Wise*, 758 F. Supp. 1414 (D.Colo.1991) (denying motion to dismiss for failure to aver fraud with particularity where there was breach of fiduciary duty).

In light of the above authorities, even if Plaintiffs' allegations did not contain sufficient particularity to satisfy the requirements of Rule 9(b), the complaint should have survived Defendants' motion to dismiss, because Plaintiffs adequately alleged Defendants' breach of fiduciary duty. This claim should not have been dismissed and, upon remand, should be restored to Plaintiffs' action.

D. Plaintiffs Stated A Claim For Racketeering.

The allegations of racketeering, or violation of Utah's Unlawful Activities Act, do much more than allege that Defendants have engaged in "unlawful activity," as Defendants state in their Second Brief, p. 21. Plaintiffs have reviewed the Second Amended Complaint and identified in their Brief, pp. 41-43, specific paragraphs in which the elements of the racketeering claim are set forth. Defendants were thus able to prepare an adequate defense. A cognizable claim for relief was stated, and the claim should not have been dismissed.

**IV. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED
LEAVE TO AMEND PLAINTIFFS' COMPLAINT**

Following the trial court's dismissal of three of Plaintiffs' claims for relief on August 8, 2003 (Add. F), Plaintiffs moved on September 19, 2003, for leave to file a Third Amended Complaint to be more specific in the allegations of fraud, misrepresentation and infliction

of emotional distress. The Motion was accompanied by a proposed Third Amended Complaint. On October 17, 2003 (Add. G) the motion for leave to amend was denied on the grounds that it was not timely, that complete relief could not be afforded because not all persons were joined as Defendants, and that the court was impermissibly required to adjudicate “church doctrine.” (R. 1558-62) Denial of leave was an abuse of the trial court’s discretion, as articulated in *Kelly v. Hard Money Funding, Inc.*, 2004 UT App 44, 87 P.3d 734. In that case, the Court of Appeals reviewed the factors to be considered in trial courts’ rulings on motions to amend and concluded that, absent procedural inadequacy, courts should inquire regarding the timeliness, motivation, and prejudice to the non-movant in making their determinations. *Id.* at 745, ¶ 39. In this appeal, the trial court’s denial of leave to amend was an abuse of discretion, as briefly set forth herein.

A. Timeliness.

Plaintiffs’ Brief presented argument and authorities for the position that their motion to amend the Second Amended Complaint, made only days after the trial court granted the Defendants’ third Rule 12(b)(6) motion to dismiss, was improperly dismissed as untimely. Defendants have cited no authority in their Brief in Response, but only re-state the argument that trial was quickly approaching, intimating that Defendants should not be required to respond to new allegations. This argument is surely specious, where Defendants were preparing for the October trial date until their motion to dismiss was granted on August 8, 2003. If clarification of the claims was what they were seeking, an amendment that

proposed no new claims and provided new factual allegations would have been welcome.

Kelly v. Hard Money Funding, Inc., *supra*, provides needed guidance on the timeliness factor, suggesting that the timeliness prong should relate to whether the motion to amend was filed as the result of bad faith or dilatory motive on the part of the movant. *Kelly*, 2004 UT App 44, ¶37, quoting *Foman v. Davis*, 371 U.S. 178, 179, 83 S.Ct. 227, 228 (1962). Here, it was not. The amendment was promptly made in response to Defendants' motion to dismiss, and no new claims for relief were made.

The trial court's reliance on "untimeliness" also intimates that Defendants would have been prejudiced by having to respond to the Third Amended Complaint. A showing of simple prejudice is not enough to support a denial of a motion to amend. In *Kasco Services Corp. v. Benson*, the Utah Supreme Court indicated that a motion to amend should be denied only where "the opposing side would be put to unavoidable prejudice by having an issue adjudicated for which he had not time to prepare." 831 P.2d 86, 92 (Utah 1992). Here, Plaintiffs raised no new issues in their amendment, only seeking to provide the additional information that Defendants claimed to need, despite the depositions and trial that had already taken place. The Amendment should not have been denied on the ground of untimeliness.

B. Church Doctrine.

Plaintiffs set forth at length in their Brief the authorities and arguments that religious doctrines of the TLC are not at issue in this case, and the trial court properly rejected

Defendants' arguments that Plaintiffs' claims for breach of contract and for unjust enrichment should be dismissed because they arise from church doctrine not subject to adjudication by the courts. Defendant's Reply does not persuasively distinguish *Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998), the most pertinent authority. The *Jeffs* plaintiffs commonly bought land in the area of Hildale, Utah and Colorado City, Arizona and "consecrated" it to the religious group of which they were members. *Id.* at 1252. The members were told that they could live on the land permanently. *Id.* at 1239-40. When they were later told that they were tenants at will, the members brought unjust enrichment claims. *Id.* The Utah Supreme Court refused to dismiss appeal of the trial court decision, concluding that the dispute could and should be decided without resolving underlying controversies over religious doctrine. *Id.* at 1244.

Accordingly, this Court should deny Defendants' appeal of the trial court's refusal to dismiss Plaintiffs' remaining claims for relief on the grounds that church doctrine precludes further proceedings. Equally important, this Court should reverse the trial court's denial of leave to amend on the stated grounds that "it would require the fact finder to judge church doctrine, which is not allowed." (R. 1558-62) *Jeffs* is controlling authority in the present case.

C. Indispensable Party.

The third ground given by the trial court for denial of the Plaintiffs' motion for leave to amend was the lack of a non-party, Douglas Jordan. (R. 1511, Add. G) Defendants do not

even attempt to distinguish the authorities cited by Plaintiffs' Brief, pp. 32-35, and repeat without significant alteration the argument of their opening brief. Those conclusory factual allegations are wholly inadequate to support their claim. Under *Grand County v. Rogers*, 2002 UT 25, ¶ 29, 44 P.3d 734, the moving party bears the burden of persuasion that non-parties are necessary. Defendants, who could have joined Jordan or his estate as a party to the action at any time, did not move for his joinder. Defendants' failure to present specific facts and reasoning under Rule 19 or to cite any authority to the trial court or to this Court caused the trial court to err when it determined that Jordan was a party without whom complete relief could not be afforded.

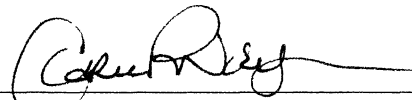
In summary, the trial court's denial of leave to amend as to the dismissed counts of fraud/constructive fraud/negligent misrepresentation and unlawful activity is not supported by the authorities cited by Plaintiffs. It constituted a dismissal with prejudice. Plaintiffs should have been granted leave to amend their complaint.

CONCLUSION

Defendants have failed to offer persuasive authority that the trial court's setting aside the jury's verdict and the judgment thereon was anything but an error of law and an abuse of discretion. The verdict and judgment should be reinstated. In the alternative, the trial court's belated decision, barely two months before trial, dismissing the claims of fraud and racketeering and refusing leave to amend was an abuse of discretion and should be reversed.

The dismissed causes of action should be reinstated. If retrial is necessary, it should be inclusive of all Plaintiffs' claims for relief and, if required, further amendment should be allowed.

RESPECTFULLY SUBMITTED this 10th day of January, 2005.

A handwritten signature in black ink, appearing to read 'Clark R. Nielsen', written over a horizontal line.

Clark R. Nielsen
Attorney for Plaintiffs/Cross-Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of January, 2005, I served two true and correct copies of the foregoing **REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS** by causing the same to be mailed, via U.S. first class mail, postage pre-paid, addressed to the following:

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BOND & CALL
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