

H B

5 1 7

HOUSE COMMITTEE REPORT

Date Referred: March 4, 1994

FURTHER REFERRALS:

Date of Committee Action: _____

By JUDICIARY Committee considered:

HB 517

HOUSE BILL NO. 517

REAL PROPERTY TRANSFERS

An Act relating to real property transfers."

RECOMMENDATIONS:

to be replaced with _____ the same title a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): _____ (Dept)

APPROVES PREVIOUS: _____ (Dept/Date)

fiscal impact _____

fiscal note(s) _____

zero fiscal note _____

zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Monette Jones</i>	<input checked="" type="checkbox"/>	<i>[Signature]</i>			<input checked="" type="checkbox"/>
<i>[Signature]</i>	<input checked="" type="checkbox"/>	<i>[Signature]</i>			<input checked="" type="checkbox"/>
<i>Brian Fortes</i>	<input checked="" type="checkbox"/>				

Brian Fortes
 CHAIRMAN'S SIGNATURE



REALTOR®

ALASKA ASSOCIATION OF REALTORS, INC.®

741 Seawall Street, Suite 100 • Anchorage, Alaska 99503
Telephone 907-863-7133

DATE: MARCH 14, 1994

TO: HOUSE JUDICIARY COMMITTEE
BRIAN PORTER, CHAIRMAN
JEANNETTE JAMES, VICE CHAIRMANFROM: DEA TURNER, *DT*
EXECUTIVE VICE PRESIDENT

REF: HB 517

ATTACHED ARE COPIES OF RESOLUTIONS IN FAVOR OF SB206 THE COMPANION BILL ADDRESSING "INNOCENT MISREPRESENTATION". THESE RESOLUTIONS HAVE ENDORSED THE PASSAGE OF SB206, AND ARE FROM ALL SEVEN BOARDS OF REALTORS® IN ALASKA. ALL SEVEN BOARDS, REPRESENTING THE 1100 PLUS REALTORS IN THE STATE, HAVE REAFFIRMED THEIR SUPPORT FOR HB 517.

The Voice for Real Estate™ in Alaska

REALTOR® is a registered mark which identifies a professional in real estate who subscribes to a strict Code of Ethics as a member of the NATIONAL ASSOCIATION OF REALTORS®





Valley Board of REALTORS®
500 E. Railroad Avenue Ste. A, Wasilla, Alaska 99654
Telephone 907-376-5080 • Fax 907-376-5081

Resolution 93-01

A Resolution Supporting Senate Bill 206, Innocent Misrepresentations by Agents in Real Property Transactions

WHEREAS, Senate Bill 206 was introduced in the Eighteenth Session of the Alaska State Legislature at the request of the Alaska Association of REALTORS, and

WHEREAS, this legislation would remove liability for "Innocent Misrepresentations" by agents in a real estate transaction, and

WHEREAS, Alaska and two other states are the only jurisdictions in which real estate professionals are made liable for "Innocent Misrepresentations," and

WHEREAS, Alaska statutes are silent on "Innocent Misrepresentations" there has been cause for numerous lawsuits, causing errors and omissions underwriters to either withdraw from issuing policies in Alaska or causing insurance companies to increase their premium rates to real estate professionals, and

WHEREAS, errors and omissions insurance premiums are so expensive real estate agents may determine the insurance to be cost prohibitive to carry, and

WHEREAS, the absence of such protection is not in the public's best interest because the Alaska Surety Fund does not cover innocent misrepresentation claims, and

WHEREAS, the Alaska Association of REALTORS wholeheartedly supported the passage of legislation during the Seventeenth Legislature addressing Real Property Transfer Disclosure (AS 34.70) which further increases a real estate agent's liability exposure, and

WHEREAS, the real estate community's position is that an agent or broker for the transferor or transferee should not be liable for "Innocent Misrepresentations" in information provided to the transferee in the transfer of an interest in real property if the agent does not have personal knowledge of the error, inaccuracy, or omission that is the basis for the misrepresentations,

NOW THEREFORE, BE IT RESOLVED that the Valley Board of REALTORS strongly urges the Alaska State Legislature to pass Senate Bill 206.

Adopted this 28th day of July, 1993.



Steve Adams, President

Tammy Shanley (p)
Tammy Shanley, Secretary



GREATER FAIRBANKS BOARD OF REALTORS®

The Voice for Real Estate™ in FAIRBANKS

1449 Gillam Way
Fairbanks, Alaska 99701
(907) 452-7743

A RESOLUTION SUPPORTING SENATE BILL 206, INNOCENT MISREPRESENTATIONS BY AGENTS IN REAL PROPERTY TRANSACTIONS

WHEREAS, Senate Bill 206 was introduced in the Eighteenth Session of the Alaska State Legislature at the request of the Alaska Association of REALTORS®, and

WHEREAS, this legislation would remove liability for "Innocent Misrepresentations" by agents in a real estate transaction, and

WHEREAS, Alaska and two other states are the only jurisdictions in which real estate professionals are made liable for "innocent Misrepresentations," and

WHEREAS, Alaska statutes are silent on "Innocent Misrepresentations" there has been cause for numerous lawsuits, causing errors and omissions underwriters to either withdraw from issuing policies in Alaska or causing insurance companies to increase their premium rates to real estate professionals, and

WHEREAS, errors and omissions insurance premiums are so expensive real estate agents may determine the insurance to be cost prohibitive to carry, and

WHEREAS, the absence of such protection is not in the public's best interest because the Alaska Surety Fund does not cover innocent misrepresentation claims, and

WHEREAS, the Alaska Association of REALTORS® wholeheartedly supported the passage of legislation during the Seventeenth Legislature addressing Real Property Transfer Disclosure (AS 34.70) which further increases a real estate agent's liability exposure, and

WHEREAS, the real estate community's position is that an agent or broker for the transferor or transferee should not be liable for "Innocent Misrepresentations" in information provided to the transferee in the transfer of an interest in real property if the agent does not have personal knowledge of the error, inaccuracy, or omission that is the basis for the misrepresentations,

NOW, THEREFORE, BE IT RESOLVED that the Greater Fairbanks Board of REALTORS® strongly urges the Alaska State Legislature to pass Senate Bill 206.

Adopted this 23rd day of July, 1993.

BY: GREATER FAIRBANKS BOARD OF REALTORS®


J. Scott Grundy, President


Susan L. McDonald, Executive Officer

Chairman Porter, Members of the Committee

My name is Greg Erkins, I am a Broker, member of the Anchorage Independent Brokers, a marketing group, and foremost a Realtor®, currently serving as the Alaska Association of Realtors®, State Legislative Chairman.

I too have had brushes with innocent misrepresentation.

While working my first year for a large Anchorage Real Estate Company, I had an offer on a property that was new construction. The builder-seller had place the well 5 feet to close to the septic system per the survey that I had ordered. The well and septic engineer, whom was also a surveyor ordered the drilling of the well and placed it 5 feet from the property line according to his report. The survey showed no problem, and the lender closed the loan.

Everything was fine until the buyer, now owner for two years wanted to refinance the property. Another survey was completed. The first well and septic engineer was correct when he said the well was 5 feet from the property line, but 5 feet on the other side of the property line in a road easement. ~~It~~ Instead of an innocent misrepresentation suit, I settled for \$500.

Another case of passing on information innocently, was a seller's statement disclosing a sump pump. The seller signed the disclosure additionally stating no water problems. The engineer with the buyers and I saw the area where the seller's and listing agent said the sump pump was located. We saw the necessity for the sump pump because it was at the end of a stairwell on the outside back of the house when water would run off a sloping hill and collect then possibly coming through the back door. The buyers accepted the house that included all appliances and the washer and dryer. At break up another sump pump well became apparent in the front corner of the building and another on the front side. We are now up to 3 sump pumps. During the day and evening hours there was a low intermitted hum that the buyers now owners heard and could not determine where the sound was coming from. The basement flooded. The moving of the washer and dryer to dry the area caused the discovery of a 4th sump pump hidden behind a wall and placed through chipped out concrete.

A third case involved a buyer who bought a house that was reduced in price 15% to compensate for an increase in interest rates on a loan because a crawl space was less than 18" and AHFC wouldn't finance the property under a first time home buyer at reduced rates. The buyer was living in the house during all

procedures, let two engineers inspect the house, signed both reports and said he would dig out the crawl space the needed 6 inches to make it more financable. Three years later a complaint was filed with the Real Estate Commission on non-disclosure and misrepresentation. The Real Estate Commission found no justification for the claim that he had no prior knowledge.

These three cases are reasons that I use on every transaction an inspection rider to the contract. However there always seems to be the problem that as I pass on information, it can be construed as a representation of the property, true or not and if not an innocence misrepresentation even if a higher authority licensed by the State made it.

Currently Alaska Statues bar innocent misrepresentation in certain land sales. The State of Alaska realizes that land subdividers could not possibly know all there is to know about a piece of land. Sec. 34.55.030 Civil Remedy. (a) **READ A**

It is not to much to ask that the State of Alaska to protect a licensed Real Estate Practitioner that as long as the purchaser knew the untruth or omission or that the agent used in a transaction did not know and in the exercise of reasonable care could not have known of the untruth or omission, that the licensed Real Estate practitioner not be liable.

This will protect the public because the Licensed Real Estate Practitioner will not be held responsible for untruths and omissions will exercising reasonable care The Licensed Real Estate Practitioner will for their own protection as well as the seller and purchaser always suggest, home inspectors, well and septic engineers, appraisers for point estimates of value, surveyors, title insurance, home owner association reports and other licensed contractors or qualified professional.

This practice would become the standard in which Real Estate Practitioners would follow so that they exercise reasonable care and therefore if an untruth was passed along to the purchaser, it would truly be innocent.

The public would be the greatest beneficiary to this practice.

I urge you pass along and support heavily HB517.

Thank you.



Alaska State Legislature

Please enter into the record my testimony to the Judiciary
 committee name
 committee on H.B. 517, dated 3-16-94
 bill/subject

Signed: DAVE FORKOR
 Testifier
Alaska Assoc. of REALTORS
 Representing (Optional)
100 Tundra Bay Dr. Suite 6 Kenai
 Address
283-5444
 Phone No.

Mr. Chairman, members of the Committee, thank you for opportunity to comment on this legislation.

I would like to give you an example of innocent misrepresentation, and how a buyer can try to use it to their unfair advantage in a real estate transaction.

I listed an executive type home for sale in Kenai, the home was approximately 25 years old at the time. The home was in good condition with most of the cosmetic items like carpet, cabinets, etc., being original installation, and was priced accordingly to represent the condition.

A buyer was located, a professional, (a doctor) with a large family of 4 children. After the closing the buyer sent a letter to myself and the seller outline defects in the property they felt were not disclosed to them.

The defects include a leaking shower, and the buyers accusation that a reasonable competent visual inspection by a licensed real estate professional would have revealed the defect. After an inspection by a contractor it was discovered that the leak was just recently caused by the buyer. The buyer had started remodeling the bathroom and had removed part of the wall this shower was on. The buyers hammering during remodeling had broken a 25 year old seal resulting in the leak. When the home was for sale, and at closing this shower did not leak, the leak was caused by the buyers construction that had taken place after the closing.

The second defect also involved this shower. The hot and cold water controls were reversed. Allegedly, this has created a dangerous condition for the children.

The third defect was that the hot water system was inadequate. Suggesting that there was not enough hot water to wash cloths, run the dishwasher, and bathe. Again accusing me the licensed real estate agent of being incompetent for not adequately questioning the Seller to discover this defect. A third opinion, from an independent contractor was obtained, who's comments were that the heating and hot water system performed excellent for a 25 year old system, actually there was no lack of hot water in his opinion.

The buyer demanded a new heating system, although none of his complain dealt with the heating system, only hot water. The buyer also demanded that

the shower be repaired and replumbed. These total repairs amounted to \$7000 plus dollars. All of this based upon an attorney's (his sister in-law) advise that there are laws protecting consumer from the negligence of real estate agents, and laws requiring sellers to make full disclosure of known defects. All concluding with the threat of litigation seeking damages and all attorneys fees.

This resulted in myself hire an attorney, the attorney hired a contractors to inspect the property before preparing his response to the buyer, and after considerable time and expense the buyer dropped the complaint. This unfortunately is not an isolated case, real estate brokers all over the state are having to deal with buyers with similar situations.

The agents are still held liable for misrepresentation. If they intentionally deceive a buyer or hide property defects, the laws are very clear that the agent will be held accountable. Look at the word "innocent" and imagine how unfairly broad that term is. The chances to bend that to suit the buyers whims are astronomical. As in this example, should I be taking a shower in every listing to make sure the water faucets are not reversed.

The interesting fact in this transaction is that the seller, was in fact an attorney, and had spent considerable time completing the sellers disclosure statement. Their were notes written all over the disclosure statement explaining in detail, repairs and property condition, considerably more detailed than the average home seller does.

In conclusion, with this legislation we are attempting to close a loop hole for unethical buyers and sellers. We are not trying to limit the publics rights from knowing the true condition of the property. I do strongly feel that if, the seller has withheld information on the property that affects its value or condition that the seller should be held responsible for these defects. I also feel agents should be held responsible for doing a profession and competent job. They should be held responsible for misrepresentations, and the law is already in place for that. There already exists a surety fund, broker's E. & O. Insurance, and the Real Estate Commission all providing a means for the buyer and seller to be compensated for misrepresentations of the agent. If other professionals were held to these standards, attorneys would be liable for the lies of their clients.

Real Estate
Corporation

FACSIMILE

COVER SHEET

RECEIVED

MAR 16 1994

DATE: 2-16-94

Rep. Brian Porter

TO: Brian Porter, Chairman

FAX # 465-3834

FROM: PAT KRUSE
Assoc. Broker

WE ARE TRANSMITTING 1 PAGES
(INCLUDING THIS COVER PAGE)

IF TRANSMISSION IS NOT COMPLETE, PLEASE CALL
HERITAGE REAL ESTATE CORP. 562-1222

HERITAGE FAX # (907) 273-2473

COMMENTS:

*Please! Please! Support HB517
to remove "Innocent Misrepresentation"
Thank you!*

*Pat Kruse, Assoc. Broker
Jay Melville - Assoc. Broker
Scott Dallas - Realtor
Gandra Thomas Assoc. Broker*

220 C Street, Suite 102
Anchorage, Alaska 99503
(907) 562-1222 FAX 273-2473

18550 Eagle River Road
Eagle River, Alaska 99577
(907) 694-4994 FAX 694-3641

35571 Spur Highway
Soldotna, Alaska 99669
(907) 262-5862 FAX 262-1004

502 Lake Street
Kenai, Alaska 99611
(907) 283-4408 FAX 283-4225

701 East Parks Hwy, Suite
Wasilla, Alaska 99654
(907) 876-2448 FAX 373-7



Chelsea Realty & Development, Inc.

"The Effort People"

104 Center Avenue, Suite 201 • Kodiak, Alaska 99615

Fax: 486-2887 • Telephone: (907)486-3424

March 14, 1994

Representative Brian Porter
Chairman, House Judiciary Committee

Dear Representative Porter: -

I am writing in support of HR517. As owner/broker of a full-service real estate company in Kodiak, I feel that "innocent misrepresentation" legislation is long-overdue for the real estate industry.

My company prides itself on putting forth extra effort and providing the most professional service possible. I am very aware of our liability on a daily basis and insist that my agents know "all there is to know" about a listed property. However, there are times when the facts are misleading and an agent could be caught unknowingly in "innocent misrepresentation." I feel that obtaining affordable "Errors and Omissions" insurance in Alaska is adversely affected by the fact that we currently have no innocent misrepresentation law.

I would very much appreciate your support of this legislation and do not feel that such a law will compromise the responsibility held by real estate professionals in Alaska.

Sincerely,

Bonnie M. Aulabaugh
Owner/Broker

RECEIVED

MAR 14 1994

Rep. Brian Porter



Valley Board of REALTORS®
 851 E. Westpoint Drive, Ste. 208, Wasilla, Alaska 99654
 Telephone 907-376-5080 • Fax 907-376-5081

Resolution 94-01

A Resolution Supporting House Bill 517

Innocent Misrepresentations by Agents in Real Property Transactions

WHEREAS, Senate Bill 206 was introduced in the Eighteenth Session of the Alaska State Legislature at the request of the Alaska Association of REALTORS, and

WHEREAS, House Bill 517 has been introduced in the Eighteenth Session of the Alaska State Legislature as a "Companion Bill", and

WHEREAS, this legislation would remove liability for "Innocent Misrepresentations" by agents in a real estate transaction, and

WHEREAS, Alaska and two other states are the only jurisdictions in which real estate professionals are made liable for "Innocent Misrepresentations," and

WHEREAS, Alaska statutes are silent on "Innocent Misrepresentations", there has been cause for numerous lawsuits, causing errors and omissions underwriters to either withdraw from issuing policies in Alaska or causing insurance companies to increase their premium rates to real estate professionals, and

WHEREAS, errors and omissions insurance premiums are so expensive real estate agents may determine the insurance to be cost prohibitive to carry, and

WHEREAS, the absence of such protection is not in the public's best interest because the Alaska Surety Fund does not cover innocent misrepresentation claims, and

WHEREAS, the Alaska Association of REALTORS wholeheartedly supported the passage of legislation during the Seventeenth Legislature addressing Real Property Transfer Disclosure (AS 34.70) which further increases a real estate agent's liability exposure, and

WHEREAS, the real estate community's position is that an agent or broker for the transferor or transferee should not be liable for "Innocent Misrepresentations" in information provided to the transferee in the transfer of an interest in real property if the





Alaska State Legislature

Please enter into the record my testimony to the House Judiciary Committee
 committee name
 committee on HB 517 / Real Property, dated 3/10/94
 bill/subject

Memo: Pro-testimony for HB 517
 Chairman Brian Porter
 Representative Cliff Davidson

From: Craig H. Johnson
 Associated Island Brokers Inc.

Date: March 10, 1994

Re: Supporting this legislation

RECEIVED

MAR 11 1994

Rep. Brian Porter

Please accept this as written to support this new legislation. As an owner of Kodiak's largest real estate office I am aware of the liability we face daily in the real estate business. As a member of the Alaska Association of Realtor's I know the time & effort that has been spent working for SB 206. As Vice-Chairman of the AAR Legislative Committee I hope to influence this legislation in a positive way.

We are responsible to properly represent real estate. Innocent misrepresentation is only law in 3 states, however, & we take every precaution but we can't know all the facts about the properties we're selling. We will continue to have liability but it will be manageable. Alaska has been affected by "Errors & Omissions" carriers that have excluded us from their coverage areas. This has resulted in our paying much higher premiums for insurance of this type. I would appreciate your support for this legislation.

If you have further questions on this please call; office, 486-2000.

Signed: _____
 Testifier Craig H. Johnson ALASKA ASSN. OF REALTORS LEG. COMMITTEE
 Representing (Optional) 218 CENTER, STE 200 KODIAK, AK 99615
 Address _____
 Phone No. 907-486-2000

Alaska State Legislature Office



Alaska State Legislature

Please enter into the record my testimony to the House Judiciary Committee
 committee name
 committee on HB 517 / Real Property, dated 3/10/94
 bill/subject

Memo: Pro-testimony for HB 517
 Chairman Brian Porter
 Representative Cliff Davidson

From: Craig H. Johnson
 Associated Island Brokers Inc.

Date: March 10, 1994

Re: Supporting this legislation

RECEIVED

MAR 11 1994

Rep. Brian Porter

Please accept this as written to support this new legislation. As an owner of Kodiak's largest real estate office I am aware of the liability we face daily in the real estate business. As a member of the Alaska Association of Realtor's I know the time & effort that has been spent working for SB 206. As Vice-Chairman of the AAR Legislative Committee I hope to influence this legislation in a positive way.

We are responsible to properly represent real estate. Innocent misrepresentation is only law in 3 states, however, & we take every precaution but we can't know all the facts about the properties we're selling. We will continue to have liability but it will be manageable. Alaska has been affected by "Errors & Omissions" carriers that have excluded us from their coverage areas. This has resulted in our paying much higher premiums for insurance of this type. I would appreciate your support for this legislation.

If you have further questions on this please call; office, 486-2000.

Signed:

Testifier

Craig H. Johnson

ALASKA ASSN. OF REALTORS LEG. COMMITTEE

Representing (Optional)

218 CENTER, STE 200 KODIAK, AK 99615

Address

907-486-2000

Phone No.

Alaska State Legislature Office

**Chelsea Realty & Development, Inc.****"The Effort People"**

104 Center Avenue, Suite 201 • Kodiak, Alaska 99615

Fax: 486-2867 • Telephone: (907)486-3424

March 14, 1994

Representative Brian Porter
Chairman, House Judiciary Committee

Dear Representative Porter: -

I am writing in support of HB517. As owner/broker of a full-service real estate company in Kodiak, I feel that "innocent misrepresentation" legislation is long-overdue for the real estate industry.

My company prides itself on putting forth extra effort and providing the most professional service possible. I am very aware of our liability on a daily basis and insist that my agents know "all there is to know" about a listed property. However, there are times when the facts are misleading and an agent could be caught unknowingly in "innocent misrepresentation." I feel that obtaining affordable "Errors and Omissions" insurance in Alaska is adversely affected by the fact that we currently have no innocent misrepresentation law.

I would very much appreciate your support of this legislation and do not feel that such a law will compromise the responsibility held by real estate professionals in Alaska.

Sincerely,

Bonnie M. Aulabaugh
Owner/Broker

RECEIVED

MAR 14 1994

Rep. Brian Porter



Chelsea Realty & Development, Inc.

"The Effort People"

104 Center Avenue, Suite 201 • Kodiak, Alaska 99615

Fax: 486-2667 • Telephone: (907)486-3424

March 14, 1994

Representative Brian Porter
Chairman, House Judiciary Committee

Dear Representative Porter: -

I am writing in support of **HR517**. As owner/broker of a full-service real estate company in Kodiak, I feel that "innocent misrepresentation" legislation is long-overdue for the real estate industry.

My company prides itself on putting forth extra effort and providing the most professional service possible. I am very aware of our liability on a daily basis and insist that my agents know "all there is to know" about a listed property. However, there are times when the facts are misleading and an agent could be caught unknowingly in "innocent misrepresentation." I feel that obtaining affordable "Errors and Omissions" insurance in Alaska is adversely affected by the fact that we currently have no innocent misrepresentation law.

I would very much appreciate your support of this legislation and do not feel that such a law will compromise the responsibility held by real estate professionals in Alaska.

Sincerely,

Bonnie M. Aulabaugh
Owner/Broker

RECEIVED

MAR 14 1994

Rep. Brian Porter

Real Estate
Corporation

FACSIMILE

COVER SHEET

RECEIVED

MAR 16 1994

DATE:

2-16-94

Rep. Brian Porter

TO:

Brian Porter, Chairman

FAX #

465-3831

FROM:

PAT KRUSE

Associate Broker

WE ARE TRANSMITTING 1 PAGES
(INCLUDING THIS COVER PAGE)

IF TRANSMISSION IS NOT COMPLETE, PLEASE CALL
HERITAGE REAL ESTATE CORP. 562-1222

HERITAGE FAX # (907) 273-2473

COMMENTS:

Please! Please! Support HB517
to remove "Innocent Misrepresentation"
Thank you!

Pat Kruse, Associate Broker
Jay Melville, Associate Broker
John Daley - Realtor
Dandra Thomas Associate Broker

2230 C Street, Suite 102
Anchorage, Alaska 99503
(907) 562-1222 FAX 273-2473

18550 Eagle River Road
Eagle River, Alaska 99577
(907) 694-4994 FAX 594-3641

35571 Spur Highway
Soldotna, Alaska 99669
(907) 262-5862 FAX 262-1004

502 Lake Street
Kenai, Alaska 99611
(907) 283-4408 FAX 283-4225

701 East Parks Hwy, Suite
Wasilla, Alaska 99654
(907) 376-2448 FAX 373-7

END

Alaska State Legislature

Ronald L. Larson

Co-Chair
(907) 465-38

INTERIM ADDRESS
P.O. Box 53
Palmer, Alaska 99645
(907) 746-1046



Eileen P. MacLean

Co-Chair
(907) 465-3722

INTERIM ADDRESS
P.O. Box 290
Barrow, Alaska 99723
(907) 852-7111

House of Representatives

Committee on Finance

State Capitol, Juneau, Alaska 99801-1182

Sponsor Statement for HB517

An Act relating to innocent misrepresentations by agents in real property transfers

HB517 would remove real estate professionals from liability for "innocent misrepresentation" in real property transactions.

The Alaska Supreme Court ruled in 1982 in Bevins v. Ballard that brokers who make an "innocent misrepresentation" to a purchaser of real property are liable for the misrepresentation. This ruling puts an unjustified liability on real estate professionals.

Justice Connor's Dissenting opinion stated:

"When a realtor acts as a mere conduit for passing on information supplied by the seller, he should be under no duty independently to verify that information unless he has reason to believe the information to be false. ... Allowing an innocent misrepresentation action against the broker in such circumstances is quite close to imposing strict liability. There is no reason to make the broker the "insurer" of the seller's representations."

Moreover, the Supreme Court ruled in 1984 in State of Alaska, Real Estate Commission v. Myrna Johnston and Eva Loken that the Alaska Surety Fund does not cover innocent misrepresentation claims. This has made errors and omissions insurance for real estate professionals more expensive and difficult to obtain in Alaska.

The passage of HB298 last year, requiring detailed written disclosures in residential real property transfers as of July 1st, has substantially increased brokers' liability risk. Written disclosures provided by the seller to the broker, then forwarded by the broker to potential buyers, could place liability on the broker for misrepresentation the seller makes.

HB517 would overturn the Court's decision in Bevins v. Ballard, removing a real estate agent's liability for innocent misrepresentations.



**ANCHORAGE BOARD
OF REALTORS, INC.**

REALTOR® *The Voice for Real Estate™* In Anchorage

741 Sesame Street
Suite #100
Anchorage, Alaska 99503
(907) 561-2338
(907) 563-8476 Fax

**A RESOLUTION SUPPORTING SENATE BILL 206, INNOCENT MISREPRESENTATIONS
BY AGENTS IN REAL ESTATE PROPERTY TRANSACTIONS**

WHEREAS, Senate Bill 206 was introduced in the Eighteenth Session of the Alaska State Legislature at the request of the Alaska Association of REALTORS, and

WHEREAS, this legislation would remove liability for "Innocent Misrepresentations" by agents in a real estate transaction, and

WHEREAS, Alaska and two other states are the only jurisdictions in which real estate professionals are made liable for "Innocent Misrepresentations," and

WHEREAS, Alaska statutes are silent on "Innocent Misrepresentations" there has been cause for numerous lawsuits, causing errors and omissions underwriters to either withdraw from issuing policies in Alaska or causing insurance companies to increase their premium rates to real estate professionals, and

WHEREAS, errors and omissions insurance premiums are so expensive real estate agents may determine the insurance to be cost prohibitive to carry, and

WHEREAS, the absence of such protection is not in the public's best interest because the Alaska Surety Fund does not cover innocent misrepresentation claims, and

WHEREAS, the Alaska Association of REALTORS wholeheartedly supported the passage of legislation during the seventeenth Legislature addressing Real Property Transfer Disclosure (AS 34.70) which further increases a real estate agent's liability exposure, and

WHEREAS, the real estate community's position is that an agent or broker for the transferor or transferee should not be liable for "Innocent Misrepresentations" in information provided to the transferee in the transfer of an interest in real property if the agent does not have personal knowledge of the error, inaccuracy, or omission that is basis for the misrepresentations,

NOW, THEREFORE, BE IT RESOLVED that the Anchorage Board of REALTORS, which represents over 700 REALTORS, strongly urges the Alaska State Legislature to pass Senate Bill 206.

Adopted this 4th day of August, 1993. By: Anchorage Board of REALTORS

DeAnn Gleason
DeAnn Gleason, President

Anita Bates
Anita Bates, Legislative Chairman



GREATER FAIRBANKS BOARD OF REALTORS®

The Voice for Real Estate™ in FAIRBANKS

1449 Gillam Way
Fairbanks, Alaska 99701
(907) 452-7743

A RESOLUTION SUPPORTING SENATE BILL 206, INNOCENT MISREPRESENTATIONS BY AGENTS IN REAL PROPERTY TRANSACTIONS

WHEREAS, Senate Bill 206 was introduced in the Eighteenth Session of the Alaska State Legislature at the request of the Alaska Association of REALTORS®, and

WHEREAS, this legislation would remove liability for "Innocent Misrepresentations" by agents in a real estate transaction, and

WHEREAS, Alaska and two other states are the only jurisdictions in which real estate professionals are made liable for "Innocent Misrepresentations," and

WHEREAS, Alaska statutes are silent on "Innocent Misrepresentations" there has been cause for numerous lawsuits, causing errors and omissions underwriters to either withdraw from issuing policies in Alaska or causing insurance companies to increase their premium rates to real estate professionals, and

WHEREAS, errors and omissions insurance premiums are so expensive real estate agents may determine the insurance to be cost prohibitive to carry, and

WHEREAS, the absence of such protection is not in the public's best interest because the Alaska Surety Fund does not cover innocent misrepresentation claims, and

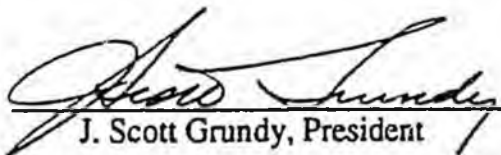
WHEREAS, the Alaska Association of REALTORS® wholeheartedly supported the passage of legislation during the Seventeenth Legislature addressing Real Property Transfer Disclosure (AS 34.70) which further increases a real estate agent's liability exposure, and

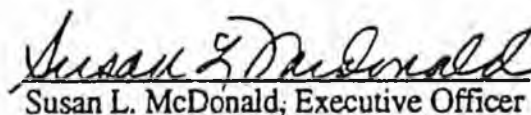
WHEREAS, the real estate community's position is that an agent or broker for the transferor or transferee should not be liable for "Innocent Misrepresentations" in information provided to the transferee in the transfer of an interest in real property if the agent does not have personal knowledge of the error, inaccuracy, or omission that is the basis for the misrepresentations,

NOW, THEREFORE, BE IT RESOLVED that the Greater Fairbanks Board of REALTORS® strongly urges the Alaska State Legislature to pass Senate Bill 206.

Adopted this 23rd day of July, 1993.

BY: GREATER FAIRBANKS BOARD OF REALTORS®


J. Scott Grundy, President


Susan L. McDonald, Executive Officer

A RESOLUTION SUPPORTING SENATE BILL 206, INNOCENT MISREPRESENTATIONS BY AGENTS IN REAL PROPERTY TRANSACTIONS

WHEREAS, Senate Bill 206 was introduced in the Eighteenth Session of the Alaska State Legislature at the request of the Alaska Association of REALTORS, and

WHEREAS, this legislation would remove liability for "Innocent Misrepresentations" by agents in a real estate transaction, and

WHEREAS, Alaska and two other states are the only jurisdictions in which real estate professionals are made liable for "Innocent Misrepresentations", and

WHEREAS, Alaska statutes are silent on "Innocent Misrepresentations" there has been cause for numerous lawsuits, causing errors and omissions underwriters to either withdraw from issuing policies in Alaska or causing insurance companies to increase their premium rates to real estate professionals, and

WHEREAS, errors and omissions insurance premiums are so expensive real estate agents may determine the insurance to be cost prohibitive to carry, and

WHEREAS, the absence of such protection is not in the public's best interest because the Alaska Surety Fund does not cover innocent misrepresentation claims, and

WHEREAS, the Alaska Association of REALTORS wholeheartedly supported the passage of legislation during the Seventeenth Legislature addressing Real Property Transfer Disclosure (AS 34.70) which further increases a real estate agent's liability exposure, and

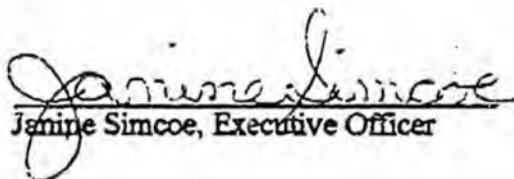
WHEREAS, the real estate community's position is that an agent or broker for the transferor or transferee should not be liable for "Innocent Misrepresentations" in information provided to the transferee in the transfer of an interest in real property if the agent does not have personal knowledge of the error, inaccuracy, or omission that is the basis for the misrepresentations,

NOW THEREFORE, BE IT RESOLVED that the Kachemak Board of REALTORS strongly urges the Alaska State Legislature to pass Senate Bill 206.

Adopted this 3rd day of August, 1993.

BY: KACHEMAK BOARD OF REALTORS


Sally Rogers, President


Janine Simcoe, Executive Officer



Kenai Peninsula Board Of REALTORS®

35477 Spur Highway, Suite 201
(907) 262-1851

P.O. Box 1288

Soldotna, AK 99689

FAX: (907) 262-1821

A RESOLUTION SUPPORTING SENATE BILL 206, INNOCENT MISREPRESENTATIONS BY AGENTS IN REAL PROPERTY TRANSACTIONS

WHEREAS, Senate Bill 206 was introduced in the Eighteenth Session of the Alaska State Legislature at the request of the Alaska Association of REALTORS®, and

WHEREAS, this legislation would remove liability for "Innocent Misrepresentations" by agents in a real estate transaction, and

WHEREAS, Alaska and two other states are the only jurisdictions in which real estate professionals are made liable for "Innocent Misrepresentations," and

WHEREAS, Alaska statutes are silent on "Innocent Misrepresentations" there has been cause for numerous lawsuits, causing errors and omissions underwriters to either withdraw from issuing policies in Alaska or causing insurance companies to increase their premium rates to real estate professionals, and

WHEREAS, errors and omissions insurance premiums are so expensive real estate agents may determine the insurance to be cost prohibitive to carry, and

WHEREAS, the absence of such protection is not in the public's best interest because the Alaska Surety Fund does not cover innocent misrepresentation claims, and


WHEREAS, the Alaska Association of REALTORS® wholeheartedly supported the passage of legislation during the Seventeenth Legislature addressing Real Property Transfer Disclosure (AS 34.70) which further increases a real estate agent's liability exposure, and

WHEREAS, the real estate community's position is that an agent or broker for the transferor or transferee should not be liable for "Innocent Misrepresentation" in information provided to the transferee in the transfer of an interest in real property if the agent does not have personal knowledge of the error, inaccuracy, or omission that is the basis for the misrepresentations,

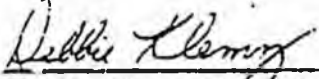
NOW, THEREFORE, BE IT RESOLVED that the Kenai Peninsula Board of REALTORS® strongly urges the Alaska State Legislature to pass Senate Bill 206.

Adopted this 30th day of July, 1993,

BY: KENAI PENINSULA BOARD OF REALTORS®



David Feeka, President



Debbie Klemz, Executive Officer

A RESOLUTION SUPPORTING SENATE BILL 206, INNOCENT MISREPRESENTATIONS BY AGENTS IN REAL PROPERTY TRANSACTIONS

WHEREAS, Senate Bill 206 was introduced in the Eighteenth Session of the Alaska State Legislature at the request of the Alaska Association of REALTORS®, and

WHEREAS, this legislation would remove liability for "Innocent Misrepresentations" by agents in a real estate transaction, and

WHEREAS, Alaska and two other states are the only jurisdictions in which real estate professionals are made liable for "Innocent Misrepresentations": and

WHEREAS, Alaska statutes are silent on "Innocent Misrepresentations" there has been cause for numerous lawsuits, causing errors and omissions underwriters to either withdraw from issuing policies in Alaska or causing insurance companies to increase their premium rates to real estate professionals, and

WHEREAS, errors and omissions insurance premiums are so expensive real estate agents may determine the insurance to be cost prohibitive to carry, and

WHEREAS, the absence of such protection is not in the public's best interest because the Alaska Surety Fund does not cover innocent misrepresentation claims, and

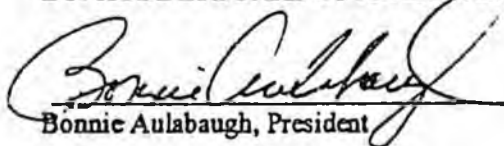
WHEREAS, the Alaska Association of REALTORS® wholeheartedly supported the passage of legislation during the Seventeenth Legislature addressing Real Property Transfer Disclosure (AS 34.70) which further increases a real estate agent's liability exposure, and

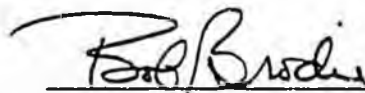
WHEREAS, the real estate community's position is that an agent or broker for the transferor or transferee should not be liable for "Innocent Misrepresentations" in information provided to the transferee in the transfer of an interest in real property if the agent does not have personal knowledge of the error, inaccuracy, or omission that is the basis for the misrepresentations,

NOW, THEREFORE, BE IT RESOLVED that the Kodiak Board of REALTORS® strongly urges the Alaska State Legislature to pass Senate Bill 206.

Adopted this 3rd day of August, 1993.

BY: KODIAK BOARD OF REALTORS®


Bonnie Aulabaugh, President


Bob Brodie, Vice President

A RESOLUTION SUPPORTING SENATE BILL 206, INNOCENT MISREPRESENTATION BY AGENTS IN REAL PROPERTY TRANSACTIONS

WHEREAS, Senate Bill 206 was introduced in the Eighteenth Session of The Alaska State Legislature at the request of the Alaska Association of REALTORS, and

WHEREAS, this legislation would remove liability for "Innocent Misrepresentation" by agents in a real estate transaction, and

WHEREAS, Alaska and two other states are the only jurisdictions in which real estate professionals are made liable for "Innocent Misrepresentations" and

WHEREAS, Alaska statutes are silent on "Innocent Misrepresentation" there has been cause for numerous lawsuits, causing errors and omissions underwriters to either withdraw from issuing policies in Alaska or causing insurance companies to increase their premium rates to real estate professionals, and

WHEREAS, errors and omissions insurance premiums are so expensive real estate agents may determine the insurance to be cost prohibitive to carry, and

WHEREAS, the absence of such protection is not in the public's best interest because the Alaska Surety Fund does not cover innocent misrepresentation claims, and

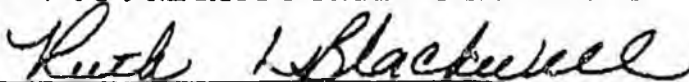
WHEREAS, the Alaska Association of Realtors wholeheartedly supported the passage of legislation during the Seventeenth Legislature addressing Real Property Transfer Disclosure (A.S. 34.70) which further increases a real estate agent's liability exposure, and

WHEREAS, the real estate community's position is that an agent or broker for the transferor or transferee should not be held liable for "Innocent Misrepresentations" in the information provided to the transferee in the transfer of an interest in real property if the agent does not have personal knowledge of the error, inaccuracy or omission that is the basis for misrepresentations,

NOW, THEREFORE, BE IT RESOLVED that the Southeast Board of Realtors strongly urges the Alaska State Legislature to pass Senate Bill 206.

Adopted this 5th day of August, 1993.

BY: SOUTHEAST BOARD OF REALTORS



Ruth L. Blackwell, President



REALTOR®

Valley Board of REALTORS®
 500 E. Railroad Avenue Ste. A, Wasilla, Alaska 99654
 Telephone 907-376-5080 • Fax 907-376-5081

Resolution 93-01

A Resolution Supporting Senate Bill 206, Innocent

Misrepresentations by Agents in Real Property Transactions

WHEREAS, Senate Bill 206 was introduced in the Eighteenth Session of the Alaska State Legislature at the request of the Alaska Association of REALTORS, and

WHEREAS, this legislation would remove liability for "Innocent Misrepresentations" by agents in a real estate transaction, and

WHEREAS, Alaska and two other states are the only jurisdictions in which real estate professionals are made liable for "Innocent Misrepresentations," and

WHEREAS, Alaska statutes are silent on "Innocent Misrepresentations" there has been cause for numerous lawsuits, causing errors and omissions underwriters to either withdraw from issuing policies in Alaska or causing insurance companies to increase their premium rates to real estate professionals, and

WHEREAS, errors and omissions insurance premiums are so expensive real estate agents may determine the insurance to be cost prohibitive to carry, and

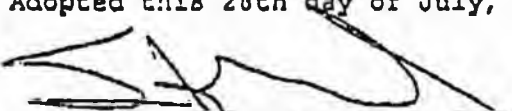
WHEREAS, the absence of such protection is not in the public's best interest because the Alaska Surety Fund does not cover innocent misrepresentation claims, and

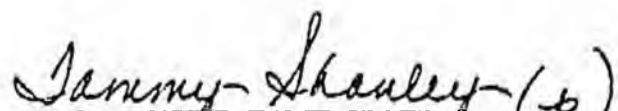
WHEREAS, the Alaska Association of REALTORS wholeheartedly supported the passage of legislation during the Seventeenth Legislature addressing Real Property Transfer Disclosure (AS 34.70) which further increases a real estate agent's liability exposure, and

WHEREAS, the real estate community's position is that an agent or broker for the transferor or transferee should not be liable for "Innocent Misrepresentations" in information provided to the transferee in the transfer of an interest in real property if the agent does not have personal knowledge of the error, inaccuracy, or omission that is the basis for the misrepresentations,

NOW THEREFORE, BE IT RESOLVED that the Valley Board of REALTORS strongly urges the Alaska State Legislature to pass Senate Bill 206.

Adopted this 28th day of July, 1993.


 Steve Adams, President


 Tammy Shanley, Secretary





GREEN LAW OFFICES, P.C.

F A X T R A N S M I T T A L

TO: Senate Labor & Commerce
Hearings on SB206

FROM: Harold Green,
Green Law Offices, P.C.

DATE: January 17, 1994

RE: Written Testimony on
Hearing on SB206

Dear Committee Members:

I am submitting this written testimony on SB206 which, as I understand it, will remove civil liability for "innocent" misrepresentation by a licensed real estate professional in Alaska, and thereby reverse *Bevin v. Ballard*, 655 P.2d 757 (Alaska 1982).

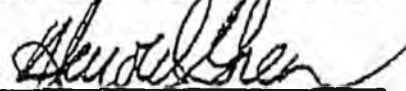
Whether or not to pass SB206 involves real public policy judgment on the part of this legislature. Let us assume that SB206 were to become law. How will the public be notified that they can no longer rely upon certain representations made by a licensed real estate professional?

Must each real estate transaction contain conspicuous language such as WARNING: YOU SHOULD NOT RELY UPON STATEMENTS MADE BY YOUR LICENSED REAL ESTATE PROFESSIONALS IN ALASKA; or should the real estate professional be required to start each conversation with a new prospective client with such a notice. How will the public be notified that they can no longer rely upon statements made by a licensed real estate professional? How will the public know which statements from a licensed real estate professional can be relied upon, and which statements from a licensed real estate professional cannot be relied upon?

Wouldn't it be cruel to pass SB206 without concurrently passing express notice requirements that clearly tell the public they should no longer rely upon statements of licensed real estate professionals in Alaska.

Perhaps SB206 will erode public confidence in our licensed real estate professionals. Does SB206 truly benefit the real estate profession? Does SB206 benefit the citizens of Alaska?

GREEN LAW OFFICES, P.C.

By: 
Harold Green, Esq.



Background and Analysis of Proposed
"Innocent Misrepresentation" Legislative Relief

In 1982, on an appeal to the Supreme Court of Alaska, Bevins v. Ballard, 655 2nd 757, the court upheld a lower court decision that a (real estate) broker/or agent was liable for "innocent misrepresentations" made to a buyer. In other words, under Alaska law a real estate broker/agent may be liable for fraudulent, negligent and even innocent misrepresentation. The broker/agent is liable for damages resulting from representations concerning property, even though he had no knowledge that his statement was incorrect. Simply reporting a statement from an owner may result in liability. Only two other jurisdictions in the U.S. have similar liability statutes.

The Real Estate Surety Fund, a fund created to allow injured parties in a real estate transaction the ability to file a claim (up to \$10,000) and funded by all licensees, does not cover "innocent misrepresentation" claims. Errors and omissions insurance carriers have become increasingly wary of writing policies in Alaska due to this liability. The majority have refused (at any price) to issue errors and omissions insurance for real estate agents/brokers in the state. It is virtually impossible to obtain coverage. The result is the consumer does not have the needed protection in real estate transactions for the occurrence of fraudulent and intentional misrepresentation by an agent/broker who does not have the resources available to pay a judgement.

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT OF THE STATE OF ALASKA

MAX BEVINS and JOHNSON-BEVINS
INC., d/b/a STAR REALTY,

Appellants,

v.

DAVID L. BALLARD and LINDA K.
BALLARD,

Appellees.

File No. 4571

O P I N I O N

[No. 2582 - November 19,

Appeal from the Superior Court of the State
of Alaska; Third Judicial District, Anchorage, ...
Eben H. Lewis, Judge.

Appearances: Fredrick P. Pettyjohn, Anchorage,
for Appellants. Saul R. Friedman,
Hedland, Fleischer & Friedman, Anchorage, for
Appellees.

Before: Rabinowitz, Chief Justice, Connor,
Burke, and Matthews, Justices, and Dimond,
Senior Justice.* (Compton, Justice, not
participating.)

BURKE, Justice:
CONNOR, Justice, with whom RABINOWITZ,
Justice, joins, dissenting in part.

* Dimond, Senior Justice, sitting by assignment
made pursuant to article IV, section 11 of the Constitution
of Alaska, and Ala

This is an appeal from a judgment holding a real estate broker liable for certain misrepresentations made in the course of a real estate transaction.

A. Facts

On February 3, 1975, David and Linda Ballard purchased a lot with an unfinished dwelling from Josephine, Patricia, and William Ferris. Prior to their purchase, certain representations were allegedly made to the Ballards regarding the adequacy of a well on the property. The purchaser, David Ballard, who had previous experience as a general contractor, attempted to complete the existing well on the property. He installed a pump and piping from the well to the house. The well, however, failed to provide sufficient water. As a result, the Ballards were forced to haul water to their property. They subsequently incurred expenses of \$6,935.00 in deepening the well to an adequate level.

Believing themselves the victims of fraudulent misrepresentations, the Ballards sued the sellers, the broker (Bevins), and an employee of the broker (Lucas). Their complaint alleged, in part, intentional and negligent

misrepresentation. In addition, it alleged that Bevins and

1. The complaint made the following factual allegations:

(a) Bevins personally inspected the property;

(b) sellers told Bevins that there was a well drilled on the property;

(c) sellers failed to disclose to Bevins the incomplete nature of the well, with the knowledge and intent that Bevins would tell potential buyers there was a well;

(d) sellers represented to the broker's employé that the well was finished, held 36 feet of standing water, and was capable of supporting the reasonable water needs of residents of the house;

(e) sellers made those representations with the intent that Lucas would tell the buyers;

(f) Lucas did so represent to the Ballards;

(g) the representations were false;

(h) Lucas made the representations with the knowledge they were false;

(i) sellers made the representations knowing they were false, for the purpose of deceiving plaintiffs and inducing them to buy;

(j) plaintiffs did rely and were induced; and,

(k) plaintiffs were unable to discover the defect until after purchase.

In addition, the following legal allegations were made:

(1) Bevins owed plaintiffs a duty to investigate the accuracy of the sellers' representations, and breached that duty (this count was dismissed at the close of plaintiffs' evidence);

(Cont'd)

Lucas had a duty to check the well's condition; that Lucas knew there was no functional well, that Bevins was vicariously liable for Lucas's acts, and that the Ferrises were vicariously liable for the actions of their agents, Bevins and Lucas. The complaint did not explicitly allege innocent misrepresentation.

After the close of plaintiffs' evidence, the trial court dismissed certain counts of the complaint. First, the court ruled that the broker did not have a general duty to inspect the premises. Second, it held that the broker was not vicariously liable for the acts of his employee, Lucas. In a subsequent written decision, the court further ruled that Lucas was not liable. It then held that Bevins and the sellers were jointly and severally liable, each with a right of contribution from the other for any payment in excess of a pro rata share. While both the sellers and the broker filed timely notice of appeal, only Bevins, the broker, pursues his appeal.

1. (Cont'd)

(2) Lucas (broker's employee) owed plaintiffs a duty to investigate, and breached that duty;

(3) Bevins was vicariously liable for acts of his employee Lucas (this count was dismissed at the close of plaintiffs' evidence); and,

(4) sellers were vicariously liable for the acts of their agents, Bevins, the broker, and his employee, Lucas.

The basis of the broker's liability is not clear. The court found that the sellers were the source of the representation that the well was "good," i.e., capable of supplying the reasonable water needs of the residents. It ruled that the broker had a right to rely on the representations, and thus the sellers were liable (as principals) for the act of Bevins (their broker and thus their agent) who passed on the misrepresentation. The court also found that Lucas passed on the representation intending that it be relied upon; Bevins admitted to the same intent. The court further found that the Ballards did so rely, and that their reliance was justified.

Although the court earlier concluded that Bevins had no general duty to inspect, it subsequently held that a duty of inquiry arose when Lucas asked Bevins, on behalf of the Ballards, about the adequacy of the well. The court concluded that Bevins acted unreasonably by simply assuring Lucas that it was a "good well" rather than by investigating. Thus Bevins' liability appears to rest on a negligence theory.

Certain facts are not contested:

1. The listing mentioned a 100 foot well.
2. The well proved to be incomplete, i.e., inadequate to support reasonable water needs.

3. Bevins, the broker, testified that the listing of a well would reasonably lead buyers to assume the well was "good," i.e., adequate.
4. The Ballards relied on the listing and representations that the well was "good."
5. Both Lucas and Bevins intended that the Ballards so rely.

As to the source of the misrepresentation, Bevins testified that he would not have written it on the listing unless it came from the sellers. The sellers, however, denied telling him about it; they testified that Bevins must have misunderstood. The court believed Bevins, concluding that the sellers were the original source of the representation.

B. The Broker's Liability

There are three types of misrepresentations: intentional, negligent, and innocent. While the Ballards did assert an intentional misrepresentation claim against the sellers, they did not do so against Bevins or Lucas. Thus, we need address only the negligent and innocent mis-

representation claims in this appeal. Bevins' liability to be sustained, must rest on one of these two theories.

1. Negligent Misrepresentation

The Ballards' third claim for relief stated a cause of action for negligence against Bevins. That claim alleged that Bevins had a duty to "take reasonable steps to determine whether or not the well . . . was a completed well" and had sufficient capacity to support a purchaser's reasonable water needs, that Bevins breached that duty, and that as a direct and proximate result of Bevins' breach the Ballards purchased the property believing the well was completed. As noted, the trial court subsequently dismissed that claim, and the Ballards did not appeal. In its final opinion, however, the trial court imposed liability on

2. Bevins' liability could be based on a vicarious liability for the acts of his employee Lucas. As we noted in Black v. Dahl, 625 P.2d 876, 879 n.3 (Alaska 1981), a real estate broker can be liable under the doctrine of respondeat superior for the acts of his or her salespeople. However, two of the rulings below preclude resting liability on such a basis. First, at the close of the Ballards' evidence, the trial court dismissed the eighth claim for relief, which had asserted that Bevins was vicariously liable. Second, in its written opinion, the trial court found in favor of Lucas, the salesman. Thus there is no underlying liability for which Bevins could be held vicariously responsible. The Ballards have not appealed these rulings.

whether the well was, in fact, 'a good well.'" Bevins argues that the court thus held him negligent even though negligence was dismissed from the case and, further, that he was prejudiced thereby because dismissal of the third claim led him to forego a negligence defense.

We recognized the tort of negligent misrepresentation in Transamerica Title Insurance Co. v. Ramsey, 507 P.2d 492 (Alaska 1973), and Howarth v. Pfeifer, 443 P.2d 39 (Alaska 1968). Under this theory, Bevins could have been liable for breaching his duty to provide accurate information once he undertook to speak. In determining whether such a duty exists, one must consider: (a) whether the defendant had knowledge, or its equivalent, that the information was desired for a serious purpose and that the plaintiff intended to rely upon it; (b) the foreseeability of harm; (c) the degree of certainty that plaintiff would suffer harm; (d) the directness of causation; and (e) the policy of preventing future harm. Howarth v. Pfeifer, 443 P.2d at 42; see Transamerica Title Insurance Co. v. Ramsey, 507 P.2d at 494-95.³ In the land sales context, such a duty

3. In Transamerica Title, we upheld submitting the negligence issue to the jury where a title insurance company failed to inform a client that a power of attorney, upon which she was relying in asserting her authority to sell the property, had been revoked. Although the title

(Cont'd)

can arise when a broker becomes aware of suspicious facts regarding his or her representations, or when a buyer makes an affirmative inquiry and the broker fails to check the accuracy of his subsequent responding representation, or when a court determines that public policy requires brokers to undertake certain functions. See, e.g., First Church of the Open Bible v. Cline J. Dunton Realty, Inc., 574 P.2d 1211 (Wash. App. 1978).

We believe, however, that the trial court's dismissal of Ballards' third claim for relief, which was their only negligence claim against Bevins, precludes the broker's liability from resting on a negligent misrepresentation

3. (Cont'd)

company was unaware of the revocation, that information was readily available to it. We concluded that the title insurer knew that the seller, its client, desired information about her legal capacity to sell the land, that she intended to rely on that information, and that there was foreseeable harm to her should she be poorly advised. We concluded that the jury could find that the title company had a "duty to speak carefully." We rejected any distinction between the nonfeasance of the title company and the misfeasance in the Howarth case. 507 P.2d at 494-95.

In Howarth, a vendor sought damages for the alleged negligent misrepresentation by the defendant insurer that a purchaser of vendor's property had obtained fire insurance on the property. We held that assuming the presence of the essential factors establishing a duty of care, those engaged in the insurance business are required to speak with reasonable care.

4. That the court intended to dismiss negligence claims from the case is further evidenced by the following colloquy:

THE COURT: . . . I feel that it's the third claim for relief that you seek thereby to impose upon realtors a burden that does not exist except in extraordinary circumstances. That is when there's been -- when there has been evidence adduced as to the duty of a realtor to inquire arising from some circumstances directing the attention of a reasonable prudent realtor to some -- some -- something unusual. In this case it seems to me that this was just an ordinary transaction. That it's rural property, most of which does require that it be serviced by a well. It is incomplete, and if I accept the evidence as it now stands, that it was represented that there was a good well, that that's the end of the matter, that there's no duty on the realtors to go further and inquire whether that is the actual fact. You know, there's nothing unusual about that well that would alert the ordinary prudent realtor of the need to do something about it; to check it out.

MR. FRIEDMAN: Well, if the court finds that there was no duty, then they can't obviously be negligent. But I still ask the court

THE COURT: They -- well, they still can be -- the defendants still could be -- they made the representation, which is -- facts show was not true.

MR. FRIEDMAN: Correct.

THE COURT: So that they can be -- they can be held liable for having made the same. But not on -- not on -- (indiscernible) negligence -- or negligence theory.

post-judgment amendments to conform the issues tried to the evidence, and further provides that the failure to so amend "does not affect the result of the trial" on those issues, the rule sets as a threshold the requirement that such issues be "tried by express or implied consent of the parties." We do not believe that this condition was met in the case at bar. Subsequent to the dismissal neither party argued negligent misrepresentation in their trial briefs. The court and parties treated the case as one involving innocent misrepresentations. Bevins neither expressly nor impliedly consented to trying a negligence claim. Accordingly, Bevins' liability cannot rest on a negligent misrepresentation theory.

2. Innocent Misrepresentation

The case went forward against Bevins on an apparent theory of innocent misrepresentation, evidenced by the colloquy quoted in note 4 and the arguments advanced in the trial briefs.⁵ The tort of innocent misrepresenta-

5. The elements of innocent misrepresentation were alleged to a sufficient degree. Paragraph 8 of the Ballards' first claim for relief makes the necessary allegation concerning Bevins' scienter. Paragraph 2 of the fifth claim for relief alleged that Bevins' agent passed on the representation with the intent to cause action in reliance thereon. Finally, paragraph 15 of the first claim for relief alleged actual reliance. In light of this, plus the

(Cont'd)

tion is defined by section 552C(1) of the Restatement

(Second) of Torts (1977) as follows:

One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

Id. The Restatement leaves open the question of whether such a cause of action lies against real estate brokers.

Id. § 552C, Comment g.

We have recognized a cause of action against the owner of realty who innocently misrepresents its condition to the purchaser. Cousineau v. Walker, 613 P.2d 608 (Alaska 1980). In Cousineau, we granted rescission and restitution to a purchaser where the seller made false statements concerning the highway frontage and gravel content of the purchased land. In so doing, we held that an owner guilty of even innocent misrepresentation could not hide behind the doctrine of caveat emptor. Id. at 614-16. This is so because owners are presumed to know the character and attri-

5. (Cont'd)

court's and the parties' arguments concerning Section 552 of the Restatement, we conclude that Bevins was "adequately notified" that the Ballards were asserting a cause of action based on innocent misrepresentations. See Clary Ins. Agency v. Doyle, 620 P.2d 194, 201 (Alaska 1980).

butes of the land conveyed and buyers are consequently entitled to rely on the seller's reasonable representations. See Sorenson v. Adams, 571 P.2d 769, 776 (Idaho 1977), quoted in Cousineau v. Walker, 613 P.2d 608, 615 n.14 (Alaska 1980). The owner of land must therefore be both truthful and informed in making any representations, for fraud includes the pretense of knowledge where there is none. Spargnapani v. Wright, 110 A.2d 82, 84 (D.C. App. 1954).

The question presented in this case is whether or not liability for innocent misrepresentation should extend to the owner's agent, the real estate broker, where that party serves as a conduit for the owner's misinformation. Most courts addressing this issue recognize a cause of action by the purchasers of property against the broker for the latter's innocent misrepresentation.⁶

6. Sodal v. French, 531 P.2d 972, 973 (Colo. App. 1974); Spargnapani v. Wright, 110 A.2d 82, 85 (D.C. App. 1954); Pumphrey v. Quillen, 135 N.E.2d 328, 331 (Ohio 1956); Berryman v. Riegert, 175 N.W.2d 438, 442 (Minn. 1970); Lawlor v. Scheper, 101 S.E.2d 269, 271 (S.C. 1957); Polk Terrace, Inc. v. Harper, 386 S.W.2d 588, 593 (Tex. App. 1965). Contra Lyons v. Christ Episcopal Church, 389 N.E.2d 623, 625 (Ill. App. 1979).

A.2d 82 (D.C. App. 1954). There, both the seller and broker were held liable for representing that a house could be heated for a little more than \$100.00 per year, when a defect in the boiler made it impossible to heat the house at all. Id. at 85. The broker had merely passed on the seller's information, and neither defendant had knowledge of a defect. Nevertheless, the court sustained liability:

If the broker innocently represented that the heating plant was in workable condition and was mistaken in that representation, or made the representation without knowing whether it was true or false, the injured party may recover in an action for fraud.

. . . We may assume that the broker was guilty of no deliberate deception and had no actual knowledge of the concealed defect. But on defendants' own evidence their selling agent did not disclaim such knowledge . . . The representation . . . was flagrantly inaccurate, since the defect . . . made it impossible to heat the house at all . . . "Fraud includes the pretense of knowledge when knowledge there is none."

Id. at 83-84 (citations omitted).

The policy favoring liability for innocent misrepresentation is found on a recognition that purchasers should be entitled to rely on a broker's representations. As one opinion notes:

BROKERS—ATTORNEYS WHO ARE NOT LICENSED AS REAL ESTATE BROKERS CAN RECOVER COMMISSION ON SALE OF REAL ESTATE (Cont'd)

Thus, § 212(f)(6) establishes that an attorney who is not regularly engaged in the real estate business and who does not offer to provide real estate services to the general public, may, for a commission, perform certain acts associated with the sale and use of real estate without being licensed as a real estate broker. Accordingly, such an attorney, who is not licensed as a real estate broker, and who engages in such acts, does not violate § 217(a). Therefore, the prohibition against recovery contained in § 228, generally applicable to unlicensed persons who act in the capacity of a real estate broker, is inapplicable to such an attorney.

In conclusion, the Court opined:

While there was evidence to show that Sybert and Nippard were regularly engaged in the practice of law relating to real estate, there was no evidence to show that they were regularly engaged in the real estate business or that they publicly offered to perform acts authorized to be performed by a real estate broker. Under these circumstances, Sybert and Nippard were not real estate brokers within the definition of § 212 and did not have to be licensed as real estate brokers under § 271(a). Consequently, they were not prohibited by § 228 from recovering the agreed upon commission when the potential purchaser they had introduced to ARCO eventually bought the property.

From Ballard case re well issue

See comment in Bevins case 555 P.2d 757

BROKERS—BROKER IS HELD LIABLE FOR INNOCENT MISREPRESENTATION

BEVINS v. BALLARD

555 P.2d 757 (Supreme Court of Alaska, 1982)

ISSUE: Whether a broker who misrepresents, innocently, the state of a well to home purchasers is liable for the tort of innocent misrepresentation.

FACTS: On February 3, 1975, David and Linda Ballard purchased a lot with an unfinished dwelling from the Ferrises. Prior to their purchase, certain representations were allegedly made to the Ballards regarding the adequacy of a well on the property. The purchaser, David Ballard, who had previous experience as a general contractor, attempted to complete the existing well on the property. He installed a pump and piping from the well to the house. The well, however, failed to provide sufficient water. As a result, the Ballards were forced to haul water to their property. They later incurred expenses of \$6,935 in deepening the well to an adequate level. The Ballards, believing that they had been the victims of fraudulent misrepresentations, sued the seller, the broker, Bevins, and an employee of the broker, Lucas. The Ballards alleged that Bevins and Lucas had a duty to check the well's condition, that Lucas knew there was no functional well, that Bevins was vicariously liable for Lucas' acts, and that the Ferrises were vicariously liable for the actions of their agents, Bevins and Lucas. The complaint did not explicitly allege innocent misrepresentation.

At the trial, the court held that the broker did not have a general duty of inspecting the premises; that the broker was not vicariously liable for Lucas; and that Lucas also was not liable. However, the court found that Bevins and the sellers were jointly and severally liable, each with a right of contribution from the other. Bevins then appealed.

HELD: Affirmed.

The Court initially reviewed the tort of innocent misrepresentation:

The tort of innocent misrepresentation is defined by section 552C(1) of the Restatement (Second) of Torts (1977) as follows:

One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

Id. The Restatement leaves open the question of whether such a cause of action lies against real estate brokers. *Id.* § 552C, Comment g.

After this review, the Court restated the issue which the factual situation presented:

The question presented in this case is whether or not liability for innocent misrepresentation should extend to the owner's agent, the real estate broker, where that party serves as a conduit for the owner's misinformation. Most courts addressing this issue recognize a cause of action by the purchasers of property against the broker for the latter's innocent misrepresentation.

The Court declared:

The policy favoring liability for innocent misrepresentation is found on a recognition that purchasers should be entitled to rely on a broker's representations. As one opinion notes:

Real estate brokers and their agents hold themselves out to the public as having specialized knowledge with regard to housing, housing conditions and related matters. The public is entitled to and does rely on the expertise of real estate brokers in the purchase and sale of its homes. Therefore there is a duty on the part of real estate brokers to be accurate and knowledgeable concerning the product they are in the business of selling — that is, homes and other types of real estate. Courts have held in many cases that purchasers are entitled to rely on real estate brokers' statements.

Lyons v. Christ Episcopal Church, 71 Ill. App. 3d 257, 27 Ill. Dec. 559, 389 N.E.2d 623, 628 (1979) (dissenting opinion).

We find this reasoning persuasive. Parties to real estate transactions frequently do not deal on equal terms. Real estate brokers are

licensed professionals, possessing superior knowledge of the realty they sell and the real estate market generally.

The Court then held:

Accordingly, we held that a purchaser who relies on a material misrepresentation, even though innocently made, has a cause of action against the broker originating or communicating the misrepresentation.

It further reasoned:

Brokers, in turn, can protect themselves from liability by investigating the owner's statements, or by disclaiming knowledge, by requiring the seller to sign at the time of listing a statement setting forth representations which will be made, certifying that they are true and providing for indemnification if they are not.

In dissent, Justice Connor stated:

I dissent from the holding that an action for innocent misrepresentation should be permitted against the real estate broker.

When a realtor acts as a mere conduit for passing on information supplied by the seller, he should be under no duty independently to verify that information unless he has reason to believe the information to be false. . . . Allowing an innocent misrepresentation action against the broker in such circumstances is quite close to imposing strict liability. There is no reason to make the broker the "insurer" of the seller's representation.

CONDOMINIUMS—MEMBERS OF CONDOMINIUM BOARD OF DIRECTORS MAY BE HELD LIABLE FOR THEIR ACTS ONLY WHERE THERE IS EVIDENCE OF FRAUD, DISHONESTY OR INCOMPETENCE

SCHWARZMANN v. ASSOCIATION OF APARTMENT OWNERS OF BRIDGEHAVEN
655 P.2d 1177 (Court of Appeals of Washington, Division 1, 1982)

ISSUE: Whether the individual board of director members of a condominium are liable for their acts absent showing of fraud, dishonesty or incompetence.

FACTS: Robert and Eleonore Schwarzmann purchased a unit in the Bridgehaven condominium in Seattle in 1971. Bridgehaven Association is an unincorporated association with a seven-member Board of Directors (Board). The Association and the Board are responsible for the maintenance and repair of common areas of the condominium. In November, 1978, spots appeared in the Schwarzmanns' ceiling. They reported this at the December 6, 1978 board meeting and several days later the Board sent building chairman Nick Buono to look at the spots. At that time, the Schwarzmanns noticed additional spots on the ceiling.