

1986

Mel Trimble Real Estate v. Monte Vista Ranch, Inc.
and Wallace Ohran, Ray e. Nelson Howard d.
Sherwood, Joyce Rice, and Neldon Williams :
Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 860135-CA

IN THE SUPREME COURT

STATE OF UTAH

MEL TRIMBLE REAL ESTATE,

Appellant,

vs.

MONTE VISTA RANCH, INC. and
WALLACE OHRAN, RAY E. NELSON
HOWARD D. SHERWOOD, JOYCE,
RICE, AND NELDON WILLIAMS,

Respondents.

860135-CA
Case No. 20769

APPELLANT'S REPLY BRIEF

Appeal from the Summary Judgment of the
Fourth Judicial District Court, Utah County
Honorable David Sam

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FILED

JAN 6 1986

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

TABLE OF CASES.....	ii
SUPPLEMENTAL FACTS.....	1
SUMMARY OF ARGUMENT.....	2
POINT I. THE RECORD IN THIS CASE DEMONSTRATES THAT THE TRIAL COURT'S RULING WAS BASED UPON AN INCORRECT ASSUMPTION.....	2
POINT II. THE RECORD IN THIS CASE DEMONSTRATES THAT THE COURT DID NOT HAVE ANY ADEQUATE RECORD OF THE PRIOR CASE BEFORE IT.....	4
POINT III. DEFENDANTS DID NOT MEET THEIR BURDEN OF PROOF.....	6
POINT IV. THE STATUTE OF FRAUDS DOES NOT APPLY BECAUSE OHRAN ADMITTED THE EXISTENCE OF A CONTRACT.....	8
POINT V. THE STATUTE OF FRAUDS DOES NOT APPLY BECAUSE THE CONTRACT WAS FULLY PERFORMED.....	11
POINT VI. PLAINTIFF DID NOT ACT AS A SECURITIES BROKER DEALER.....	12
CONCLUSION.....	13

TABLE OF CASES

CASES CITED:

<u>Bently v. Potter,</u> 694 P.2d 617 (Utah 1984)	8
<u>Board of Education of Salt Lake City v. Bothwell</u> <u>& Swanor,</u> 400 P.2d 568 (Utah 1965)	9
<u>Case v. Ralph,</u> 188 P. 40 (Utah 1920)	11
<u>Edgar v. Wagner,</u> 572 P.2d 405 (Utah 1977)	9
<u>FMA Acceptance Co. v. Leahterby Ins. Co.,</u> 594 P.2d 1332 (Utah 1979)	7
<u>Fritsch v. Hess,</u> 162 P. 70 (Utah 1916)	10
<u>Greenwood v. Jackson,</u> 128 P.2d 282 (Utah 1942)	11
<u>Johnson v. Allen,</u> 158 P.2d 134 (Utah 1945)	9
<u>Kerr v. Hillyard,</u> 170 P. 981 (Utah 1918)	12
<u>Mel Trimble Real Estate v. Fitzgerald,</u> 626 P.2d 453 (Utah 1981)	4
<u>Ney v. Harrison,</u> 299 P.2d 1114 (Utah 1956)	10
<u>Richards v. Hodson,</u> 485 P.2d 1044 (Utah 1971)	10
<u>Schaer v. State,</u> 657 P.2d 1337 (Utah 1982)	6
<u>Searle Bros. v. Searle,</u> 588 P.2d 689, 692 (Utah 1978)	4
<u>Smith Realty Co. v. Dipietro,</u> 282 P. 915 (Utah 1930)	11
<u>Watson v. Odell,</u> 198 P. 772 (Utah 1921)	11
<u>Webster v. Sill,</u> 675 P.2d 1170 (Utah 1983)	7
<u>Young v. Buchanan,</u> 350 P.2d 876 (Utah 1953)	11

Other Authorities:

72 Am Jur.2d "Statute of Frauds"	
§296.....	9
72 Am Jur.2d "Statute of Frauds"	
§297, §371.....	10
72 Am Jur.2d "Statute of Frauds"	
§405.....	11
Section 61-1-13, Utah Code Annotated.....	13

SUPPLEMENTAL FACTS

Plaintiff brought this action against Monte Vista Ranch, Inc. and its former shareholders to collect a real estate commission (R. 1-4). The shareholders sold the corporation's assets (consisting mainly of real property) to Leland Fitzgerald by selling their stock in Monte Vista (R. 182-195). Plaintiff procured the sale (R. 152). The Earnest Money Agreement between Monte Vista and its former shareholders and Leland Fitzgerald required Fitzgerald to pay plaintiff's real estate commission (R. 152). In a prior action, plaintiff sued Fitzgerald for his commission. Plaintiff first alleged that he had some kind of a joint purchase agreement with Fitzgerald (R. 153, 253). Plaintiff later amended that pleading to simply sue for a commission (R. 153).

Plaintiff lost the prior action against Fitzgerald. The record does not show what Fitzgerald's specific defense to plaintiff's claims was (R. 253). The trial court in this case acknowledged that the basis of the decision against plaintiff on his claim against Fitzgerald was unclear (Id.)

In its memorandum decision, the trial court refers to Wallace Ohran. Mr. Ohran was Monte Vista's president and a major shareholder before the sale to Fitzgerald. The other individual defendants are Monte Vista's other former shareholders (R. 182-195). Neither Monte Vista Ranch, Inc.

nor its former shareholders were sued by plaintiff in the prior action (R. 17).

SUMMARY OF ARGUMENT

Defendants did not introduce any evidence of what the prior case was all about. They relied solely on the reported appellate decision of the prior case. That decision does not reveal what the underlying issues really were in the prior case. Thus, defendants did not meet their burden of showing that no material issue of fact on the res judicata and collateral estoppel claims. The trial court relied upon defendants' incomplete submission and reached the wrong result.

The determination that the trial court erred can be made from the materials of record in this case.

The State of Frauds does not preclude recovery because Ohran admitted the existence of plaintiff's contract in court and because the "contract was fully performed. Additionally, the sale ultimately became a sale of stock to which the Statute of Frauds does not apply rather than a sale of real property.

POINT I

THE RECORD IN THIS CASE DEMONSTRATES THAT THE TRIAL COURT'S RULING WAS BASED UPON AN INCORRECT ASSUMPTION

Defendants admitted plaintiff did not file any complaint against Monte Vista Ranch or its former shareholders in the prior action (R. 17). Defendants admitted that

Fitzgerald filed a third-party complaint against Monte Vista's former shareholders (R. 17). Fitzgerald's third-party complaint in the prior action was for indemnification from Monte Vista's former shareholders if plaintiff recovered from Fitzgerald (R. 17).

The issues in Fitzgerald's third-party indemnification suit were completely different than the issues plaintiff asserted against Fitzgerald. (See plaintiff's original brief, pp. 14-16). The indemnification suit was based upon language in the stock purchase agreement between Fitzgerald and Monte Vista's former shareholders to the effect that each party would reimburse the other for any liability for commissions (R. 189). Such an arrangement was circular. Under those terms, ultimate payment would depend on whom plaintiff sued first. But the Earnest Money Agreement between Fitzgerald and Monte Vista's former shareholders clearly stated that as between Monte Vista's former shareholders and Fitzgerald, Fitzgerald would be responsible (R. 152). Thus, the court in the prior action ruled that Fitzgerald would be liable to plaintiff (R. 155).

This ruling was referred to in a jury instruction (R. 155). Both in its ruling on res judicata and in its ruling on collateral estoppel, the trial court assumed that one result of the prior action was that "the courts hearing the previous action" were persuaded "that liability for the commission cannot be imputed to the defendant Ohran" (R.

251-254, quoting from 253). A copy of the trial court's order is attached as Exhibit "A".

As against plaintiff, the courts in the prior action could not and did not make that determination because plaintiff did not bring any claim against Monte Vista or its shareholders in that prior action (R. 17). The trial court's ruling was based upon an assumption that was clearly erroneous.

POINT II

THE RECORD IN THIS CASE DEMONSTRATES THAT
THE COURT DID NOT HAVE ANY ADEQUATE RECORD
OF THE PRIOR CASE BEFORE IT

Defendant argues that the rule that the court must independently examine the record of a prior case before making a res judicata or collateral estoppel ruling is not applicable because there was a reported appellate decision of the case against Fitzgerald. Defendants did not cite any authority for their argument. Further, collateral estoppel and res judicata require a showing that the issues in the prior case and the pending one are the same. Searle Bros. v. Searle, 588 P.2d 689 (Utah 1978). Even if defendants could rely on a reported decision, any such opinion would have to be complete enough to make that determination. It is not enough to just show plaintiff lost.

The record in this case demonstrates that the reported decision, Mel Trimble Real Estate v. Fitzgerald, 626 P.2d 453 (Utah 1981), was not complete enough to make a proper determination of collateral estoppel. The reported

decision mentioned plaintiff's contention that the verdict should have been directed in his favor. But the court disposed of that argument without specifying what the actual claims of the parties were. The majority of the reported decision simply dealt with the adequacy of a jury instruction. The appellate decision did not go into significant detail on specific allegations or specific conclusions.

The trial court admitted in its memorandum decision that it did not know what the actual arrangement was between plaintiff and Fitzgerald:

Although the Utah Supreme was unable to determine from the record the exact nature of the dealings between Florence and Fitzgerald, the court noted several facts that cast serious doubt on whether any money that passed or would have passed between them should be characterized as a commission (upon Fitzgerald's agreement to pay it), Fitzgerald and plaintiff Florence were still negotiating as to their possible joint purchase of the assets of Monte Vista.

(R. 253).

After expressing this uncertainty, the trial court clearly showed that its decision on collateral estoppel as well as res judicata was based on its assumption that the court made a determination that Monte Vista's former shareholders did not owe anybody (including plaintiff) anything:

Irrespective of the actual agreement that emerged between Fitzgerald and Florence, this court is persuaded, as were the courts hearing the previous action, that liability for the commission cannot be imputed to the defendant Ohran" [Monte Vista's former shareholder].

(R. 253).

As we have shown, that conclusion was wrong. Defendants admitted plaintiff did not bring an action against Monte Vista or its former shareholder in the prior action (R. 17). Thus determination that Monte Vista and its former shareholders owed nothing to plaintiff could not possibly have been made.

POINT III

DEFENDANTS DID NOT MEET THEIR BURDEN OF PROOF

Defendants argue that plaintiff is, nevertheless, collaterally estopped from asserting any claims against Monte Vista or its former shareholders because the prior action at least determined that Fitzgerald did not owe plaintiff anything. But, before collateral estoppel could apply, we would need to know why the prior court made that decision. We would need to know what the precise issues were. Schear v. State, 657 P.2d 689 (Utah 1983).

The fact that plaintiff did the work which procured the sale is not disputed. The Earnest Money Agreement establishes that fact by specifying that plaintiff's commission should be taken care of (R. 152). The record also establishes that plaintiff was only paid \$5,000 (R. 154) on what was at least a \$1,400,000 sale (R. 185).

By specifying that plaintiff's real estate commission was to be paid, defendants acknowledged plaintiff procured the sale and earned a commission of some kind (R. 152). The record also contains a six page transcript from

Wallace Ohran's deposition in the prior case (R. 81-87), a copy of which is attached as Exhibit "B" hereto). In that transcript, Ohran admits that the shareholders at one time agreed to pay plaintiff a 6% commission (R. 81).

The trial court did not understand the basis for the decision in the prior case (R. 253). We have shown that it could not have been based on failure to perform, or payment which would be the usual reasons. The record in this case shows that plaintiff and Fitzgerald were negotiating some kind of a joint purchase of the subject property that never took place (R. 146-147, 154, 253).

It was defendants' burden to show that collateral estoppel applies. Rule 56, Utah Rules of Civil Procedure. FMA Acceptance Co. v. Leatherby Ins. Co., 594 P.2d 1332 (Utah 1979). Mere assertions that no genuine fact question exists are no more valid than mere assertions that a fact question exists. See Webster v. Sill, 675 P.2d 1170 (Utah 1983).

For collateral estoppel to apply, defendants would have to show what the precise issues in the prior case were -- not just that plaintiff lost. Defendants did not introduce any evidence on what the underlying contentions and facts were in the prior case and relied solely on the incomplete reported decision. (See plaintiff's original brief, pp.11-14). Defendants did not meet their burden.

After reviewing defendants' authorities, plaintiff acknowledges that defendants are probably right when they

argue the material not in the record (Exhibits C and D to plaintiff's brief in chief) cannot be considered on appeal. But the trial court erred by ruling without considering similar material. The record in this case demonstrates that defendants did not meet their burden of showing that no material fact issue exists concerning the application of res judicata or collateral estoppel. The court does not have to consider materials not in the record to make that determination.

POINT IV

THE STATUTE OF FRAUDS DOES NOT APPLY BECAUSE OHRAN ADMITTED THE EXISTENCE OF A CONTRACT

The trial court properly refused to base its decision on the Statute of Frauds (R. 251-254). An admission in pleadings, depositions, or in open court satisfies the Statute of Frauds. Bentley v. Potter, 694 P.2d 617 (Utah 1984). Defendants admitted that a contract existed.

Ohran admitted on page 528, lines 10-14 of the prior cases' transcript that Monte Vista's shareholder's agreed to pay plaintiff a 6% commission. The relevant testimony came in as follows:

Q: (By Mr. DeBry) The question was: "Tell me, to the best of your recollection, what was said during this conversation." And do you recall at that time that you testified: "I told Mr. Florence that we would agree to sell the property to his buyers and to pay him a six percent commission." Was that your testimony at this time we gave the deposition?

A: (By Wallace Ohran) That was my testimony, that is right. (R. 234-235).

Defendants assert that this admission is not sufficient because the term "we" allegedly does not identify the promisors. In context, however, it clearly refers to Monte Vista and its former shareholders. Moreover, it is well established that ambiguities in the materials used to satisfy the Statute of Frauds can be resolved by parol evidence. Johnson v. Allen, 158 P.2d 134 (Utah 1945); Johnson v. Ogle, 181 P.2d 789 (Mont. 19) ; 72 Am Jur.2d "Statute of Frauds" §296. This includes the identity of a party. 72 Am Jur.2d "Statute of Frauds" §297 n.45, n.46.

Defendants further protest on the grounds that plaintiff merely referred the court to the admission and did not set it out fully for the trial court. But defendants themselves set the quote out fully in their own memorandum to the trial court (R. 234-235). They did not assert that plaintiff's citation was wrong or argue that plaintiff needed to do more to place the issue before the court. (Id.). The matter was presented to the trial court with defendants' approval as to the form of submission. They cannot complain now. Board of Education of Salt Lake City v. Bothwell & Swanor, 400 P.2d 568 (Ut. 1965).¹

¹Additionally, the contention that plaintiff should have borne the burden of setting forth the actual testimony is raised from the first time on appeal. Even if there were merit to this argument, it should not be considered for that reason alone. Edgar v. Wagner, 572 P.2d 405 (Utah 1977).

Defendants also ignore other writings and admissions. Admittedly, the phrase in the Earnest Money Agreement that makes Fitzgerald responsible to pay plaintiff's commission (as between Monte Vista's former shareholders and Fitzgerald) does not specify the amount of plaintiff's commission. Arguably, that could be supplied by custom. Richards v. Hodson, 485 P.2d 1044 (Utah 1971); Ney v. Harrison, 299 P.2d 1114 (Utah 1956); 72 Am Jur.2d "Statute of Frauds" §297. At the minimum, the Earnest Money Agreement (R. 152 and attached as Exhibit "C") together with the Stock Sale Agreement (R. 182-195), conclusively shows that Monte Vista's former shareholders are the "we" referred to in Ohran's admission. The material necessary to satisfy the Statute of Frauds need not be contained in one writing but may be pieced together from several sources. Fritsch v. Hess, 162 P. 70 (Utah 1916); 72 Am Jur.2d "Statute of Frauds" §371.

Ohran's actual deposition testimony referred to in his in-court admission is attached as Exhibit B. It is part of the record (R. 81-87). Using the term "we," Ohran admits to an agreement to pay plaintiff a 6% commission on the sale of the property (R. 81). It is clear from the transcript that the "we" refers to Monte Vista and its former shareholders. (See, for example, R.84, lines 23 and 24; R. 85, line 13, and the entire context of the admission).

POINT V

THE STATUTE OF FRAUDS DOES NOT APPLY
BECAUSE THE CONTRACT WAS FULLY PERFORMED

Part performance generally satisfies the Statute of Frauds. 73 Am Jur.2d "Statute of Frauds" §405, et. seq. Utah follows the general rule. Greenwood v. Jackson, 128 P.2d 282 (Utah 1942). In the present case, plaintiff fully performed. This is not just a part performance case.

Defendants rely heavily on Smith Realty Co. v. Dipietro, 292 915 (Utah 1930) and Case v. Ralph, 188 P. 40 (Utah 1920) to support their conclusion that the doctrine of part performance does not apply in situations where a real estate broker seeks his commission when no written contract for that commission exists. Both Smith Realty Co. v. Dipietro, supra and Case v. Ralph, supra were decided before the Rules of Court Procedure were liberalized to permit notice pleading. A close reading of both those cases shows that they were each decided on the basis that the plaintiffs did not adequately allege that any kind of a contract for a commission existed.

Defendants also cite Young v. Buchanan, 259 P.2d 876 (Utah 1953) and Watson v. Odell, 198 P. 772 (Utah 1921). Neither of these cases actually held that full performance does not satisfy the Statute of Frauds in real estate commission cases. Watson v. Odell, supra, held that the real estate agent could not recover under the specific wording of his contract where the underlying sale did not occur. Young v. Buchanan, supra held that an unlicensed

real estate agent could not use a licensed broker's license when he was acting as an independent contractor rather than an employee. To be sure, the cases defendants cite hold that a real estate commission cannot be recovered under a quantum merit theory. But they do not establish any rule that full performance of an express contract cannot satisfy the Statute of Frauds in real estate commission cases.

To plaintiff's knowledge, the only Utah case which has squarely decided whether full performance satisfies the Statute of Frauds in real estate commission cases is Kerr v. Hillyard, 170 P. 981 (Utah 1918). That case held full performance would satisfy the Statute of Frauds. Like Kerr v. Hillyard, the pending case does not involve a situation where the agent found a willing buyer but the sale did not go through. The contract was not just partly performed, it was fully performed. That satisfies the Statute of Frauds.

POINT VI

PLAINTIFF DID NOT ACT AS A SECURITIES BROKER DEALER

The sale in this case was finally effected as a sale of stock (R. 182-195). Thus, the Statute of Frauds should not apply at all.

The argument that the Statute of Frauds still applies because plaintiff was not a licensed securities broker is without merit. First, plaintiff never intended to arrange a stock sale (R. 152). He always felt he was selling property. He did not take part in changing the form

of the transaction and did not even learn that the form of transaction had been changed until well after the Stock Purchase Agreement had been executed (R. 197-198).

Secondly, the transaction was an isolated one. The Securities Laws in effect at that time defined a securities "broker-dealer" as a person "engaged in the business of effecting transactions in securities for the account of others or for his own account." Section 61-1-13 Utah Code Annotated. Because the transaction was an isolated one and because plaintiff did not play a part in changing the form of the deal, plaintiff was not "in the business" of dealing in securities. He was not a securities "broker-dealer" and did not have to be licensed as such.

Yet the sale was consummated as a sale of stock (R. 182-195). Thus, the transaction does not fall within the literal wording of the Statute of Frauds.

CONCLUSION

The real issue in this case is not res judicata, collateral estoppel, or the Statute of Frauds. The real issue in this case is whether plaintiff intended to release Monte Vista and its former shareholders from all liability when he tried to secure payment from Fitzgerald. That issue is a fact question that has never been addressed. The case should be remanded for determination of that issue.

DATED this 3rd day of January, 1986.

ROBERT J. DEBRY & ASSOCIATES

By: David M. Jorgensen
DAVID M. JORGENSEN

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing APPELLANT'S REPLY BRIEF (Appeal from the Summary Judgment of the Fourth Judicial District Court, Utah County, Honorable David Sam) (Trimble v. Monte Vista Ranch, Inc., et al.), was mailed this 3rd day of January, 1988, to the following:

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David M. Jeffs

Exhibit A

1985 JUN -4 PM 3:43

In the Fourth Judicial District Court

WILLIAM F. HUGHES, CLERK
DEPUTY

of the State of Utah

In and For Utah County

MEL TRIMBLE REAL ESTATE

Plaintiff

MONTE VISTA RANCH, INC., A UTAH
CORPORATION, WALLACE D. OHRAN,
RAY E. NELSON, HOWARD D. SHERWOOD
JOYCE T. RICE AND NELDON WILLIAMS

Defendant

MINUTE ENTRY

CASE NUMBER 60,784

DATED June 3, 1985

David Sam

JUDGE

This case is before the court on Defendants' Motion to Dismiss and is considered pursuant to Rule 2.8, Rules of Practice of the District Courts.

R U L I N G

When examined under the doctrine of res judicata, it is apparent the case at bar rests on the same state of facts and evidence of the same character as were presented in Mel Trimble Real Estate et al v. Leland A. Fitzgerald, Civil No. C-78-4944. The trial court in that case, after hearing the witnesses who would appear and viewing the documents that would be introduced in this suit, ruled as a matter of law, that Fitzgerald was solely liable for any real estate commission that may have been owed Florence. The jury sitting in that action was so instructed after the court explicitly rejected an instruction related to third party beneficiary contracts. Undoubtedly

PAGE TWO

60,784

the precise issue at bar was fully and finally litigated in the four day trial which resulted in a verdict that no commission was due Florence. On appeal, the Utah Supreme Court upheld the decision finding no error in the trial court's ruling or instruction. Mel Trimble Real Estate v. Fitzgerald, 626 P.2d 453 (1981). This court clearly lacks jurisdiction to review the application of law or findings of fact in that case and consequently lacks jurisdiction to relitigate the issue of liability for the alleged commission. Therefore, the instant action is barred under the doctrine of res judicata.

Moreover, even if this suit could be characterized as arising from a cause of action different from that previously tried, it is barred under the doctrine of collateral estoppel as adopted by the Utah Supreme Court in Schaer v. State of Utah, 657 P.2d 1337, 1340, 1341 (1983). Clearly, the "issue decided in the prior adjudication was identical with the one presented in th[is] action. . . ." Id. at 1340. The issue at the first trial and the present issue are essentially the same, that is, whether a real estate commission was due Florence from the sale of Monte Vista Ranch, Inc. (Monte Vista), and if so, who should pay the commission. The record shows that defendant Ohran testified at that trial and was present for cross examination, and that evidence of the event surrounding the transaction was fully presented. This court is unaware of any occurrence

PAGE THREE

60,784

subsequent to the previous trial or appeal that would lead to the introduction of evidence not fully considered in the previous action.

Secondly, the previous case was "decided on its merits." Id. at 1341. Although the Utah Supreme Court was unable to determine from the record the exact nature of the dealings between Florence and Fitzgerald, the court noted several facts that cast serious doubt on whether any money that passed or would have passed between them should be characterized as a commission. Apparently, even after defendant Ohran, as seller, reduced the sales price offered by the amount of the claimed commission (upon Fitzgerald's agreement to pay it), Fitzgerald and plaintiff Florence were still negotiating as to their possible joint purchase of the assets of Monte Vista. Irrespective of the actual agreement that emerged between Fitzgerald and Florence, this court is persuaded, as were the courts hearing the previous action, that liability for the commission cannot be imputed to the defendant Ohran.

Thirdly, there can be no serious claim that the issue in the first case was not "competently, fully, and fairly litigated." Id. As stated above, the Utah Supreme Court found no reversible errors in the previous jury trial that lasted four days and included testimony from and opportunity to cross examine all the witnesses relevant to this action. Finally, the Utah Supreme Court has abandoned the rule requiring mutuality of the parties in a collateral

PAGE FOUR

60,784

estoppel case. "The established rule is that a stranger to a judgment may assert a judgment against one who actually litigated an issue that was necessarily decided by the judgment and thereby preclude the relitigation of the same issue." Searle v. Searle, 588 P.2d 689 (Utah 1978). The exception to the requirement of mutuality is particularly just in the case at bar where defendant Ohran seeks to use the prior judgment as a shield to avoid liability in this suit because his alleged liability would depend on fact and law previously determined and applied. Therefore, even if this suit could be treated as arising from a cause of action different from that underlying the previous action, plaintiff is barred, under the doctrine of collateral estoppel, from bringing its claim against defendants.

Based upon the foregoing, it is clear to this court that plaintiff is barred from bringing this action against the instant defendants.

Accordingly, defendants' Motion to Dismiss is granted, and plaintiff's complaint is dismissed with prejudice. Costs to defendants.

Dated this 2nd of June, 1985.


DISTRICT JUDGE

cc: Robert B. Hansen
M. Dayle Jeffs

Exhibit B

Fullmer's Restaurant?

A. No, I don't think so.

Q. Tell me to the best of your recollection what was said.

I want you to recall the exact words that were used by you and by Mr. Florence, and by Mr. Fitzgerald. Not a summary but actually what the parties said. I don't want you to summarize what happened in the meeting. I want you to act as a camera or a tape recorder as well as you can remember.

A. As I remember it, we agreed -- I agreed I should say ~~that~~ that we would sell the ranch to Mr. Fitzgerald for \$2,000,000. and we would pay Mr. Cal Florence his commission. ✓

Mr. Florence spoke up and said, "But we get the cattle," and I -- I -- I thought a minute, and I says, "Well, we have just changed the deal. The deal if ¹⁵\$1,875,000, and you pay Mr. Florence his commission, but you don't get the cattle." ✓

That's -- and that's the gist of it.

Q. Now, that's what you said, and what did Fitzgerald say to that?

A. "That's fine." ✓

Q. Fitzgerald agreed to that proposal? ✓

A. Right, he agreed to that. ✓

Q. When you talked about paying Mr. Florence a commission, was anything said about how much of a commission? ✓

A. We were going to pay him 6 percent. ✓

1 Q. The conversation as I understand it was that 2 million,
2 you pay the 6 percent commission. When you changed the deal
3 to \$1,875,000, without the cattle, Florence would get a --

4 A. We retained ownership of the cattle and Mr. Fitzgerald
5 paid the commission.

6 Q. What was the commission of 6 percent?

7 A. I don't know. That's what we were going -- we were
8 considering. As to any arrangement between Mr. Fitzgerald
9 and Cal, I have no knowledge of.

10 Q. But what was said at the meeting about how much the
11 commission would be?

12 A. I -- I told Mr. Fitzgerald the price was \$2,000,000.
13 We would pay a 6 percent commission. Mr. Florence said that
14 they got the cattle. I said, "No, you don't get the cattle
15 Mr. Fitzgerald pays the commission. The deal is
16 \$1,875,000, and we keep the cattle."

17 Q Mr. Fitzgerald said --

18 A. "That's fine." ✓

oral agreement

19 Q. Did Mr. Florence say anything at that point?

20 A. I don't recall.

21 Q Do you remember whether anything else was said during
22 that meeting?

23 A. No, I don't.

24 Q. What I'd like to do now -- she is working pretty hard --
25 May we take five minutes, and stretch, and let her relax her

1 hands for a minute and drink water.

2 A. Okay.

3 (Brief recess.)

4 MR. DeBRY: Let's go on the record.

5 Q. I wanted to ask one thing to clear up one question.
6 When you said to Fitzgerald, you reduced the commission, but
7 you said you pay the commission. Why did you say that?
8 Why did you say to Fitzgerald you pay the commission? Why
9 that shift? ✓

10 A. Because Mr. Florence said, "We get the cattle," and I
11 thought he was working for me.

12 Q. When he said something about the cattle, you thought he
13 showed more loyalty for the other side, and so you wanted the
14 other side to pay the commission? ✓

15 A. Right.

16 Q. But that also enabled you to lower the purchase price,
17 is that true?

18 A. Right, I lowered it the amount of the commission. ✓

19 Q. Was it your understanding in these negotiations that
20 Mr. Florence was, in fact, working for both parties, trying
21 to put both parties together? You just said that he wasn't
22 working for you.

23 A. It was my understanding he was trying to make a ranch
24 sale.

25 Q. Put both parties together so that he could make a sale?

1 A. Right.

2 Q. Have you given all the testimony about this meeting?
3 Do you have any further recollection about what was said at
4 this meeting?

5 A. I think we talked about the down payment.

6 Q. What was said about the down payment?

7 A. I think it was supposed to be a half a million dollars

8 Q. Did Mr. Fitzgerald -- what did he respond to that?

9 A. He agreed. ✓

10 Q. Was anything said about the underlying mortgage?

11 A. Not at that time.

12 Q. Remember anything else being said about closing dates or

13 A. I think -- I think somewhere along the line we talked
14 about closing it immediately after the 1st of the year.

15 Q. After the meeting, did you have any further
16 conversations or contact with Mr. Florence on the subject of
17 the sale of the ranch or the property?

18 When was the next meeting?

19 A. I don't remember just when it was, but I think we had a
20 meeting with Mr. Florence and Mr. Fitzgerald, and also his
21 nephew -- is that right? -- at Howard Sherwood's ✓

22 Q. Who is Howard Sherwood?

23 A. One of the stockholders, and he one of the accountants
24 that took care of --

25 Q. Where is Sherwood's office?

1 A. In American Fork.

2 Q. To place this in time, the meeting in American Fork,
3 about how many days or weeks was that meeting after this
4 meeting at Fullmer's Restaurant?

5 A. I don't know. But it had to be in December.

6 Q. Who else was present at the meeting in December in
7 American Fork? Tell me all the people that were present

8 A. I don't believe Nelson was there, was he?

9 MR. FLORENCE: At the meeting I was at, he was.

10 A. It was Mr. Nelson --

11 MR. FLORENCE: That was the final draft of the
12 agreement between you and Fitzgerald and our conversation.

13 All stockholders had agreed to that.

14 A. Was Perry, his nephew there, too?

15 MR. FLORENCE: Not at this particular meeting.

16 A. There was just three of us then, Nelson, and Ohran, and
17 Sherwood, and you.

18 MR. FLORENCE: And Fitzgerald?

19 A. And Fitzgerald.

20 Q. Nelson, Ohran, Florence, and Fitzgerald, is that right?

21 A. Yes. ✓

22 Q. That meeting was at the office of Mr. Nelson?

23 A. Mr. Sherwood.

24 Q. Who is Mr. Sherwood?

25 A. He is the accountant who took care of the books for the

1 ranch, and a stockholder in the corporation.

2 Q. Remember about what time of day that meeting was held?

3 A. In the afternoon? Yes.

4 Q. Do you remember who called the meeting, how the meeting
5 was arranged, or who set the meeting up?

6 A. I think Mr. Sherwood set it up. Called Mr. Fitzgerald
7 and made an appointment with him, and we met with him at the
8 time that Sherwood and Fitzgerald worked out.

9 Q. To your knowledge were any minutes, notes, or memoranda
10 kept of that meeting?

11 MR. FLORENCE: Yeah, the earnest money was --

12 MR. DeBRY: Let him answer.

13 Just whatever you remember, any minutes or
14 notes or documents written down at that meeting.

15 A. The only thing that I remember is that Mr. Sherwood
16 wrote down the earnest money agreement and his secretary, as
17 I remember, he called his secretary in, and she typed it up.

18 Q. Now, tell me to the best of your recollection what was
19 said at that meeting. What was said and done at that meeting?

20 A. As I remember, we -- Mr. Sherwood or Mr. Fitzgerald,
21 rather, agreed to buy the ranch on the terms that we had
22 outlined, and then Mr. Fitzgerald and Mr. Florence went into
23 another room and had a private conversation about their
24 arrangements, and when they came back in, Mr. Fitzgerald says
25 that he would buy the entire ranch, and he would pay Mr.

Florence's commission. ✓

Q. When he said he would buy the entire ranch, did he say how much? What purchase price was discussed?

A. We had already agreed upon that.

Q. It would be the \$1,825,000 -- ✓

A. 875.

Q. Was anything else said, to your recollection, on the subject of the purchase? Just anything you can recall about the meeting?

A. No, except that earnest money was drawn up on those -- on that agreement and also put in the earnest money, the buyer was to pay the commission.

Q. Was earnest money executed at that time?

A. Right.

Q. Was an earnest money deposit paid?

A. Yes.

Q. How much money?

A. \$25,000 is what he paid.

Q. All right. Where is that earnest money at the present time, if you know, earnest money agreement?

A. In Mr. Sherwood's office.

Q. Now, after that meeting, have you ever at any time had any conversation with Mr. Fitzgerald on the subject of Mr. Florence's commission? ✓

A. No. ✓

Exhibit C



THIS RECEIPT AND OFFER TO PURCHASE This may be a legally binding form, if not understood, seek other advice

1 To: State of Hunter Company American Fork Utah, December 7, 1977

2 IN CONSIDERATION OF your agreement to use your efforts to present this offer to the Seller, I, Leland A. Fitzgerald

3 hereby deposit with you as earnest money the sum of \$ 25,000 , Twenty-five Thousand Dollars

4 in the form of personal check

5 to secure and enjoy on the purchase of the property situated at All that property sold by Co-operative Securities

6 Corporation to Wallace Ohran more commonly known as the Cedar Valley Ranch,

7 including all improvements, water rights, sprinkling systems, and equipment.

8 This offer excludes the South 1/4 of Section 26, Range 2 West sold on Uniform Real E

9 contract to Blue Grass Turf Farms, Inc., David Pennington, President.

10 City Utah County, State of Utah

11 including any of the following items if at present attached to the premises: Plumbing and heating fixtures and equipment including water and oil tanks, water heaters and burners

12 light fixtures including bulbs, bathroom fixtures, roller shades, curtain rods and fixtures, window blinds, window and door screens, linoleum, all shrubs and trees, and any other

13 except no exceptions

14 The following personal property shall also be included as part of the property purchased none

15

16

17 The total purchase price of \$ 1,875,000 , One Million Eight Hundred seventy-Five Thousand

18 shall be payable as follows: \$ 25,000 which represents not to be seller's here part of which is hereby acknowledged by you

19 \$ 475,000 xxxxxxxxxxxx on delivery of deed or final

20 late which shall be on or before January 15 , 1978 and \$ equal annual installments over xxxxxxxx

21 a period of ten years from date of sale

22 Buyer to be responsible for all real estate commissions

23 Sellers agree that acreage will be released to buyer after existing obligations to

24 Co-Operative Security Corp., has been satisfied, upon payment of \$1,250.00 per acre

25 principal payment for irrigated acreage and/or \$200.00 per acre principal payment

26 for dry land acreage.

27 until the price of \$ 1,375,000 together with interest is paid, provided, however, that Buyer at his option at any time, may pay amounts in excess of

28 payments upon the unpaid balance, subject to the limitations of any mortgage or contract by the Buyer herein assuming interest at 8 % per annum on the unpaid balance.

29 purchase price to be included in the prescribed payments and shall begin as of date of possession which shall be on or before Jan. 15 1978. All risk of loss and

30 of property, and expenses of insurance shall be borne by the seller until date of possession at which time property taxes, real insurance, interest and other expenses of the property

31 incurred as of date of possession. All other taxes and all assessments, mortgages, chattel loans and other liens, encumbrances or charges against the property of any nature shall

32 the seller except real estate taxes to be apportioned

33 The following special improvements are included in this sale: Sewer ☒ Connected ☐ Septic Tank and/or Cesspool ☐ Sidewalk ☐ Curb and Gutter ☐ Special S

34 ☐ Special Street Lighting ☐ Culinary Water (City) ☐ Other Community System ☐ Connected ☐ Private ☐ (Legend: Yes (x) No (o))

35 Contract of Sale or Instrument of conveyance to be made on the approved form of the Utah Dept. of Business Regulation in the name of

36 to be determined prior to closing date

37 This payment is received and offer is made subject to the written acceptance of the seller endorsed hereon within 45 days from date hereof, &

38 approved the return of the money herein receipted shall cancel this offer without damage to the undersigned agent.

39 In the event the purchaser fails to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid hereon shall, at the option of

40 be retained as liquidated and agreed damages.

41 It is understood and agreed that the terms written in this receipt constitute the entire Preliminary Contract between the purchaser and the seller, and that no verbal statement

42 anyone relative to this transaction shall be construed to be a part of this transaction unless incorporated in writing herein. It is further agreed that execution of the final con

43 constitute this Earnest Money Receipt and Offer to Purchase

44 _____ Agent _____ By _____

45 We do hereby agree to carry out and fulfill the terms and conditions specified above, and the seller agrees to furnish good and marketable title with abstract brought to date of

46 return a policy of title insurance in the name of the purchaser and to make final conveyance by warranty deed on _____

47 in the event of sale of other than real property, seller will provide evidence of title or right to sell or lease. If either party fails to do so, he agrees to pay all expenses of enforcement,

48 ment, in or out of any right arising out of the breach thereof, including a reasonable attorney's fee.

49 The seller agrees in consideration of the efforts of the agent in procuring a purchaser, to pay said agent a commission of _____

50 In the event seller has entered into a listing contract with any other agent and said contract is presently effective, this paragraph will be of no force or effect.

51 Dec 7, 1977 State of Hunter Company Wallace Ohran Leland A. Fitzgerald

52 Dec 7, 1977 State of Hunter Company Wallace Ohran Leland A. Fitzgerald