

1986

V.R. Utah Limited v. Leroy Griffin : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

H. Ralph Klemm; Attorney for Respondent.

M. Richard Walker; Walker & Goodwill; Attorney for Appellant.

Recommended Citation

Brief of Appellant, *V.R. Utah Limited v. Griffin*, No. 860317 (Utah Court of Appeals, 1986).
https://digitalcommons.law.byu.edu/byu_ca1/213

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU

M. Richard Walker
Bar No. 3362 A10
WALKER & GOODWILL
Attorney for Defendant/Appellant
4685 Highland Drive, Suite 202
Salt Lake City, Utah 84117
Telephone: (801) 278-4747
DOCKET NO. 860317-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

V.R. UTAH LIMITED, a Utah limited
partnership, dba V.R. BUSINESS
BROKERS,

Plaintiff and Respondent,

vs.

LEROY GRIFFIN dba RDK BAKERY
and RIVERTON BAKERY,

Defendant and Appellant.

Case No. 860142

Category 13b

860317-CA

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE DAVID B. DEE, JUDGE

M. RICHARD WALKER, Bar No. 3362
WALKER & GOODWILL
4685 Highland Dr., Suite 202
Salt Lake City, Utah 84117
Telephone: (801) 278-4747
Attorney for Appellant

H. RALPH KLEMM, Bar No. 1838
500 Clark Leaming Bldg. Office Center
175 West South Temple
Salt Lake City, Utah 84101
Attorney for Respondent

FILED
SEP 9 1986

Clerk, Supreme Court, Utah

M. Richard Walker
Bar No. 3362
WALKER & GOODWILL
Attorney for Defendant/Appellant
4685 Highland Drive, Suite 202
Salt Lake City, Utah 84117
Telephone: (801) 278-4747

IN THE SUPREME COURT OF THE STATE OF UTAH

V.R. UTAH LIMITED, a Utah limited)
partnership, dba V.R. BUSINESS)
BROKERS,)
)
Plaintiff and Respondent,)
)
vs.)
) Case No. 860142
LERoy GRIFFIN dba RDK BAKERY)
and RIVERTON BAKERY,)
)
Defendant and Appellant.)

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE DAVID B. DEE, JUDGE

M. RICHARD WALKER, Bar No. 3362
WALKER & GOODWILL
4685 Highland Dr., Suite 202
Salt Lake City, Utah 84117
Telephone: (801) 278-4747
Attorney for Appellant

H. RALPH KLEMM, Bar No. 1838
500 Clark Leaming Bldg. Office Center
175 West South Temple
Salt Lake City, Utah 84101
Attorney for Respondent

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	i
Statement of Issues Presented for Review.....	1
Statutes, Rules and Regulations Cited.....	2
Statement of the Case.....	3
Summary of Arguments.....	4
Argument.....	5
 Issue I. THE JUDGMENT GRANTED TO V.R. UTAH LIMITED	
BY THE TRIAL COURT, IS A "SECOND COMMISSION" FOR THE SALE OF APPELLANT GRIFFIN'S BAKERIES, AND IS PROHIB- ITED BY THE UTAH REAL ESTATE COMMISSION RULES AND REGULATIONS GOVERNING REAL ESTATE BROKERS.....	5
 Issue II. THE UNDISPUTED EVIDENCE INTRODUCED TO THE	
TRIAL COURT CONFIRMS THAT THE BROKER V.R. LIMITED, THROUGH ITS OWN AGENT (OSSINGER) ENTERED INTO A CON- FIDENTIAL RELATIONSHIP WITH GRIFFIN AND IN VIOLATION OF ITS FIDUCIARY DUTY, OWED TO GRIFFIN THE BROKER/AGENT MADE MATERIAL MISREPRESENTATIONS TO GRIFFIN AND WILFULLY MISLED GRIFFIN INTO EXECUTING THE LISTING AGREEMENTS, WHICH HE WOULD NOT HAVE EXECUTED, BUT FOR SAID MISREPRESENTATIONS, AND ACCORDINGLY SHOULD BE DEEMED NULL AND VOID.....	8

	<u>Page</u>
Issue III. V.R. LIMITED FAILED TO INTRODUCE ANY EVIDENCE WHATSOEVER OF THE "PURCHASE PRICE" OF THE TWO LISTED BAKERIES (RDK AND RIVERTON) UPON WHICH THE COMMISSIONS WERE TO HAVE BEEN BASED, AND HAVING FAILED TO SUSTAIN ITS BURDEN, THE JUDGMENT SHOULD BE REVERSED.....	10
Issue IV. THE TRIAL COURT ACKNOWLEDGED THE RESPONDENT'S FAILURE TO ESTABLISH PROOF OF THE "PURCHASE PRICE". THE COURT'S AWARDING A \$6,000.00 COMMISSION FOR THE SALE OF THE RIVERTON BAKERY IS UNCONSCIONABLE, BEING 23% OF THE LISTING PRICE, IN ADDITION TO THE FULL 10% COMMISSION PAID TO UBI, THE SELLING BROKER.....	12
Issue V. THE TRIAL COURT IMPROPERLY USED THE "CLEAR AND CONVINCING" STANDARD FOR PROVING THE ELEMENTS OF MISREPRESENTATION, AND SHOULD HAVE APPLIED THE "PREPONDERANCE OF THE EVIDENCE" STANDARD.....	13
Conclusion.....	14

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<u>Adamson v. Brockbank</u> , 112 Utah 52, 185 P2d 264 (1947).....	9
<u>Baldwin v. Vantage Corporation</u> , 676 P2d 413 (Utah 1984).....	13
<u>Gadd v. Olsen v. Johnson</u> , 685 P2d 1041 (Utah 1984).....	9
<u>Gurule v. SLC Board of Education</u> , 661 P2d 957 (Utah 1983).....	12
<u>Hal Taylor & Associates v. Union America Inc.</u> , 657 P2d 743 (Utah 1982).....	9

STATUTES

U.C.A. 1953, Section 61-2-5.5.....	2
------------------------------------	---

RULES AND REGULATIONS

Utah Real Estate Commission Rules and Regulations - Rule 11g.....	2
--	---

I N T H E S U P R E M E C O U R T
O F T H E S T A T E O F U T A H

V.R. UTAH LIMITED, a Utah limited)	
partnership, dba V.R. BUSINESS)	
BROKERS,)	
)	
Plaintiff and Respondent,)	
)	
vs.)	
)	Case No. 860142
LEROY GRIFFIN dba RDK BAKERY)	
and RIVERTON BAKERY,)	
)	
Defendant and Appellant.)	

STATEMENT OF ISSUES

Issue I: The Judgment granted to V.R. UTAH LIMITED by the Trial Court, is a "Second Commission" for the sale of Appellant GRIFFIN'S bakeries, and is prohibited by the Utah Real Estate Commission Rules and Regulations governing real estate brokers.

Issue II: The undisputed evidence introduced to the Trial Court confirms that the broker V.R. Limited, through its own agent (Ossinger) entered into a confidential relationship with GRIFFIN and in violation of its fiduciary duty, owed to GRIFFIN the Broker/Agent made material misrepresentations to GRIFFIN and wilfully misled GRIFFIN into executing the listing agreements, which he would not have executed, but for said misrepresentations, and accordingly should be deemed null and void.

Issue III: V.R. Limited failed to introduce any evidence whatsoever of the "Purchase Price" of the two listed bakeries (RDK and Riverton) upon which the commissions were to have been

based, and having failed to sustain its burden, the Judgment should be reversed.

Issue IV: The Trial Court acknowledged the Respondent's failure to establish proof of the "purchase price". The Court's awarding a \$6,000.00 commission for the sale of the Riverton Bakery is unconscionable, being 23% of the listing price, in addition to the full 10% commission paid to UBI, the selling broker.

Issue V: The Trial Court improperly used the "clear and convincing" standard for proving the elements of misrepresentation, and should have applied the "preponderance of the evidence" standard.

STATUTES, RULES AND REGULATIONS

The following statutes, rules and regulations are determinative of the issues in this case:

UCA 1953, Section 61-2-5.5:

"There is create within the division a real estate commission. The commission shall

(a) Promulgate rules relating to the licensing and conduct of real estate principal broker, brokers, and salesmen;"

Rule 11 of the Real Estate Commission Rules and Regulations provides as follows:

"g. Double Commissions. The division will not condone acts of brokers who sell listed properties other than through the listing broker. SUBJECTING THE SELLER TO THE LIABILITY OF PAYING TWO COMMISSIONS IS PROHIBITED." (Emphasis added.)

STATEMENT OF THE CASE

This case involves a lawsuit filed by the Respondent, V.R. Utah Limited, a real estate broker, to recover a second real estate commission from the sale of two of Appellant, LeRoy Griffin's bakeries.

On July 22, 1983, the said Griffin listed his three bakeries (RDK Bakery, Riverton Bakery, and RDK-Winegars Bakery) for sale through UBI Business Brokers, on a one year listing, continuing through June 22, 1984.

Thereafter, on August 1, 1983, the Respondent, V.R. Utah Limited's agent, Diane Ossinger, a licensed real estate agent, contacted Griffin by telephone, and requested that she, Ossinger, be allowed to list the RDK Bakery. Ossinger was never called as a witness, but according to the unrefuted thesimony of Griffin, he told agent Ossinger that the bakery was already listed with another broker [Record 153, 154], to which Ossinger replied that she needed to have the listing in order to sel the bakery, but a commission would be payable to V.R. Utah Limited, only if they (V.R.) sold it. [Record 157, 158].

On August 1, 1983, Griffin signed the listing agreement with V.R. Utah Limited, on the Riverton Bakery for a six month listing, at the listing price of \$26,000.00. [Exhibit 2P]

Thereafter on August 17, 1983, V.R. Limited's agent, Ossinger, came to the home of Griffin [Record 156], met with Griffin, and after again informing Ossinger that the bakeries were all listed with UBI Business Brokers, and giving her the

same equipment list prepared for UBI, with UBI's name thereon, and receiving the assurance that if she didn't sell the bakeries, he would not have to pay a commission. [Record 156 Line 24-25].

On December 9, 1983, UBI Business Brokers concluded a sale for all THREE BAKERIES, including the two listed with V.R. Limited (RDK and Riverton Bakeries), and the third bakery, RDK Winegars Bakery, for the total price of \$154,400.00 and a full ten per cent (10%) real estate commission (\$15,400.00) was paid to UBI Business Brokers.

Thereafter V.R. Limited filed this lawsuit to collect a second commission on the two bakeries for which V.R. Limited also held a listing agreement.

SUMMARY OF ARGUMENTS

Issue I: The Respondent, V.R. Utah Limited, seeks to recover a second real estate commission on the sale of two bakeries of Appellant Griffin which were sold by another Broker UBI Business Brokers, based on their claim that Griffin also signed a listing agreement with V.R. Limited. However, subjecting a seller to payment of a double commission is prohibited under Rule 11g of the Utah Real Estate Commission Rules and Regulations.

Issue II: Undisputed testimony introduced to the Trial Court establishes that Respondent V.R. Limited's agent, Ossinger, was told prior to obtaining the listing on Appellant Griffin's two bakeries, that said bakeries were already listed with another broker (UBI), and said agent misrepresented said listing

agreements and induced Appellant Griffin to sign on the assurance that the listing agreements would only require payments of a commission to V.R. Limited if V.R. Limited sold the bakeries, in violation to said agent's fiduciary duty to Griffin - accordingly said listings should be null and void.

Issue III: The Respondent, V.R. Limited, failed to introduce any evidence whatsoever regarding the "purchase price" of the two bakeries listed, and accordingly there is no rational basis upon which damages may reasonably be measured. Respondent failed to meet its burden of proof and the Judgment should be reversed.

Issue IV: The Trial Court acknowledged that Respondent V.R. Limited failed to establish the "purchase price" of the bakeries, and improperly assessed damages of \$6,000.00 per listing, which constitutes an unconscionable damages.

Issue V: The Trial Court improperly imposed the "clear and convincing" standard for proving misrepresentation, and should have applied the "preponderance of evidence" standard.

ARGUMENT

I. THE JUDGMENT GRANTED TO V.R. UTAH LIMITED BY THE TRIAL COURT, IS A "SECOND COMMISSION" FOR THE SALE OF APPELLANT GRIFFIN'S BAKERIES, AND IS PROHIBITED BY THE UTAH REAL ESTATE COMMISSION RULES AND REGULATIONS GOVERNING REAL ESTATE BROKERS

The Respondent V.R. Limited, is a real estate broker, licensed under the laws of Utah and subject to the Rules and Regulations of the Real Estate Commission. The irrefuted evidence before the Court establishes the fact that V.R. Limited's agent, Diane Ossinger, was told, before she ever drew up the listing agreements, that the bakeries were already listed with another broker [Record 152, 153 Line 18, and Record 154 Line 13]. There was no testimony to refute Griffin's statement of the first telephone conversation, or the meeting at his home on August 17, 1983, since only he [Griffin] and Ossinger were present. Ossinger assured Griffin that she needed the listing in order to try to sell the bakeries, and that he [Griffin] would only pay a commission, if they [V.R. Limited] sold the bakeries [Record 157 - 158]. Griffin clearly testified that he would never have signed the listing without Ossinger's assurance that if they [V.R. Limited] did not sell the bakery, he [Griffin] wouldn't have to pay a commission [Record 168 Line 26].

Ossinger was the licensed agent of V.R. Utah Limited [Record 105, page 9-19]. She not only held herself out to be an agent of V.R. Limited, but owed to Griffin a "fiduciary duty" to represent the interests of Griffin, who was uneducated in the sale of business properties and real estate [Record 158, Line 14-24].

Under the provisions of U.C.A. 1953, Section 61-2-5.5, the Utah State Real Estate Commission was created and authorized as follows:

"...The Commission shall
(a) Promulgate rules and regulations relating
to the licensing AND CONDUCT of real estate
principal brokers, brokers, and SALESMEN."

[Emphasis added.]

Pursuant to Title 61, the Real Estate Commission established Rules and Regulations to govern brokers and salesmen, not the members of the public who deal with them.

Rule 11g. provides in part as follows:

"Subjecting the seller to liability of paying two commissions IS PROHIBITED." [Emphasis added.]

This case represents a blatant violation of this rule. V.R. Limited, through its own agent (Ossinger), was informed of the prior listing with UBI, but by telling Griffin the listing is needed so they [V.R. Limited] can pursue a sale, and that a commission will be payable to V.R. Limited only if V.R. Limited sells the bakeries, the Trial Court erroneously ignores the misrepresentations of Ossinger, made to induce the wrongful execution of the second listing agreements, and concludes that it was not the broker, but Griffin who subjected himself to pay a second commission, by executing the listing. [Record 130-131].

V.R. Limited, through its own agent (Ossinger) with knoweldge that the bakeries were already listed with another broker, wrongfully induced Griffin to execute a second listing agreement, and now because of their wrong doing, are allowed by the Trial Court to subject the seller to payment of a second commission on a single sale of Griffin's bakeries. The Judgment is in violation of the clear prohibition of Rule 11g and should be reversed.

II. THE UNDISPUTED EVIDENCE INTRODUCED TO THE TRIAL COURT CONFIRMS THAT THE BROKER V.R. LIMITED, THROUGH ITS OWN AGENT (OSSINGER) ENTERED INTO A CONFIDENTIAL RELATIONSHIP WITH GRIFFIN AND IN VIOLATION OF ITS FIDUCIARY DUTY OWED TO GRIFFIN, THE BROKER/AGENT MADE MATERIAL MISREPRESENTATIONS TO GRIFFIN AND WILFULLY MISLED GRIFFIN INTO EXECUTING THE LISTING AGREEMENTS, WHICH HE WOULD NOT HAVE EXECUTED, BUT FOR SAID MISREPRESENTATIONS, AND ACCORDINGLY SHOULD BE DEEMED NULL AND VOID.

The undisputed evidence before the Court established that Ossinger was the licensed real estate agent representing V.R. Limited in obtaining the listings from Griffin.

The testimony clearly establishes that three distinct conversations took place between Ossinger and Griffin, before both bakery listings were executed:

1. A telephone conversation between Ossinger and Griffin in which Ossinger inquired regarding listing the RDK Bakery. Only these two parties were involved and only Griffin testified. Therefore his testimony of the conversation must stand unrefuted. He testified that he told Ossinger the bakeries were already listed with another broker, UBI Business Brokers [Record 152, 153, 154].

2. A meeting at the RDK business premises, where Ossinger, Griffin, and another agent Douglas E. Miller, were present. Although Miller testified that he was sitting on another bench, he nevertheless testified he was involved in the conversation and

he and Griffin disagree as to what was said.

3. A meeting on August 17, 1983, at the home of Griffin, with only Ossinger and Griffin present, at which Griffin was again assured by Ossinger, that unless V.R. Limited sold the bakeries, no commission would be payable to V.R. Limited (Record 156, 157, 158].

IN the case of Hal Taylor Associates v. Union American, Inc., 657 P2d 743 (Utah 1982) this Court stated at page 748:

"In Utah, as elsewhere, a real estate broker is held to to be the agent of the property owner for whom he acts. As an agent, he owes a fiduciary duty to this principal."

further:

"A fiduciary or confidential relationship may be created by contract or by circumstances where equity will impose a higher duty in a relationship because the trusting party has been induced to relax the care and vigilance he would ordinarily exercise."

In the case of Gadd v. Olsen v. Johnson, 685 P2d 1041 (Utah 1984) this Court discussed the general rule that misrepresentations of the law or of the legal effects of contracts and writings does not constitute remedial fraud, but then cited the case of Adamson v. Brockbank, 112 Utah 52, 185 P2d 264, 276 (1947) as authority for exceptions to the general rule and concluded as follows:

"The circumstances that generally render the rule inapplicable include the following:

Where the speaker sustained a confidential relation toward the hearer, OR POSSESS SUPERIOR MEANS OF INFORMATION OR WILFULLY MISLEADS HIM INTO A MISCONCEPTION OF HIS RIGHTS AND LIABILITIES."
[Emphasis added.]

further the Court stated:

"Fraudulent representations as to the legal effect of an instrument will avoid it, EVEN IF MADE TO ONE WHO HAS ACTUALLY READ IT, IF UNABLE TO JUDGE ITS TRUE CONSTRUCTION. But the fraud must consist in OBTAINING THE ASSENT OF THE PARTY DEFRAUDED BY INDUCING A FALSE IMPRESSION AS TO ITS LEGAL OR LITERAL NATURE AND OPERATION." [Emphasis added.]

The undisputed evidence introduced to the Trial Court established that V.R. Limited, through its own agent (Ossinger) sustained a confidential relationship with Griffin, and in violation of V.R. Limited's fiduciary duty owed to Griffin, misrepresented and wilfully misled Griffin into a misconception of his rights under the listing agreement by the following:

a. With knowledge that the bakeries were already listed with another broker, Ossinger told Appellant she had to have a written listing so V.R. Limited could sell the bakeries. [Record 153, 154].

b. By telling Griffin that a commission would be payable to V.R. Limited only if V.R. Limited sold the bakeries. [Record 156, 157, and 159].

c. By failing to inform Griffin that by signing the listing he could become liable for payment of double commissions.

III. V.R. UTAH LIMITED FAILED TO INTRODUCE ANY EVIDENCE WHATSOEVER OF THE "PURCHASE PRICE" OF THE TWO LISTED BAKERIES (RDK AND RIVERTON) UPON WHICH THE COMMISSIONS WERE TO HAVE BEEN BASED, AND HAVING FAILED TO SUSTAIN ITS BURDEN, THE JUDGMENT SHOULD BE REVERSED.

Under V.R. Limited's Complaint in paragraph 6, V.R. Limited

claimed as follows:

"Under the terms of both of the listing agreements, defendant agreed to pay to the plaintiff a real estate fee equal to 12% of the purchase price for each business property."

As also stated in the listing agreements, the commissions were to be based upon a percentage of the PURCHASE PRICE.

In the Memorandum Decision [Record 29] the Trial Court stated:

"There is merit to the Defendant's argument that the Court should not speculate upon how to allocate the purchase price of three bakeries, between two of the three bakeries sold inasmuch as the payment was a lump sum."

No evidence whatsoever was introduced to the trial to establish the "purchase price". Therefore the Court on its own resorted to the listing agreement language to award \$6,000.00 on each contract, although not prayed for in the Plaintiff's Complaint. That procedure is also defective, because the language of the agreement says:

Seller agrees to pay broker twelve percent (12%) but in any event not less than \$6,000.00 of the purchase price."

A prerequisite for awarding any commission is to determine the "purchase price", and no such evidence having been introduced to the Trial Court, it was erroneous to award any amount, the Plaintiff having failed to meet its burden of proof.

IV. THE TRIAL COURT ACKNOWLEDGED THE RESPONDENT'S FAILURE
TO ESTABLISH PROOF OF THE "PURCHASE PRICE".

THE COURT'S AWARDING A \$6,000.00 COMMISSION FOR THE SALE
OF THE RIVERTON BAKERY IS UNCONSCIONABLE, BEING 23% OF THE
LISTING PRICE, IN ADDITION TO THE FULL 10% COMMISSION
PAID TO UBI, THE SELLING BROKER.

The Trial Court erred in awarding any commission, where the
Plaintiff failed to establish the "purchase price" of the
bakeries.

In the case of Gurule v. SLC Board of Education, 661 P2d 957
(Utah 1983) this Court stated:

"...an award of damages based only on
speculation cannot be upheld."

stating further at page 957:

"[6,7] The findings of fact must provide a basis
for determining whether there is a rational basis
for the award of damages. Proper findings are
essential to enable this Court to perform its
functions of assuring that the findings support
the judgment and that the evidence supports the
findings."

In this case, there is no rational basis for awarding
\$6,000.00 on the sale of the Riverton Bakery. The total listing
price of Riverton Bakery was \$26,000.00 [Exhibit 3P]. It is also
clear from the evidence that the three bakeries sold by UBI, sold
for less than the full listing price. [Record 78 Line 20-23,
Record 79 Line 1-2].

UBI Brokers has already been paid a full ten percent (10%)
commission for the sale. The Trial Court in this matter awarded
\$6,000.00 commission on RDK Bakery and \$6,000.00 on the Riverton

Bakery.

The Riverton Bakery was listed for \$26,000.00, and had the 12% been allowed on the full listed price it would have resulted in a commission of \$3,120.00. By awarding \$6,000.00 on the Riverton Bakery, the Trial Court granted a commission which is 23% of the full listing price, and an unconscionable commission.

In order for the Court to determine a rational basis for damages, it was imperative that in accordance with the listing agreement the "PURCHASE PRICE" be proven by competent evidence. The Plaintiff having failed in its burden, the damages should be stricken and the Judgment reversed.

V. THE TRIAL COURT IMPROPERLY USED THE
"CLEAR AND CONVINCING" STANDARD FOR PROVING THE ELEMENTS
OF MISREPRESENTATION, AND SHOULD HAVE APPLIED THE
"PREPONDERANCE OF THE EVIDENCE" STANDARD.

In the Trial Court's Memorandum Decision [Record 27] it was concluded:

"To void or modify the terms of the contract by the oral agreement, if there was one, there must be shown fraud, duress, undue influence, etc. The Defendant has claimed that V.R. Limited or it's agent perpetrated a fraud on him. However the Defendant has not proven BY CLEAR AND CONVINCING EVIDENCE the elements of fraud."
[Emphasis added.]

In the case of Baldwin v. Vantage Corporation, 676 P2d 413 (Utah 1984) this Court stated:

"Plaintiff's further assert that one of their claims against the Defendant was based on misrepresentation which they had the burden of proving only by a preponderance of the evidence... Thus the record indicated that the Trial Court

distinguished between the two standards of proof and held the plaintiff ONLY TO THE PERPONDERANCE STANDARD in their attempt to prove misrepresentation." [Emphasis added.]

CONCLUSION

Based upon the foregoing it is respectfully submitted that the Trial Court erred in its interpretation of Rule 11g of the Real Estate Commission, that the Trial Court applied the improper evidentiary standard for misrepresentation, that the Judgment was not supported by the evidence, and that the Respondent failed to sustain its burden of proof for determination of damages and accordingly the Court erroneously speculated and awarded damages not prayed for in the Plaintiff's Complaint, which are irrational and unconscionable in their application. Accordingly the Trial Court's Judgment should be reversed.

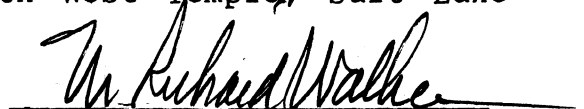
Respectfully submitted this 8th day of September, 1986.



M. RICHARD WALKER
Attorney for Defendant
and Appellant

MAILING CERTIFICATE

I hereby certify that on this 9th day of September, 1986, I mailed ~~four~~ true and correct copies of the foregoing APPELLANT'S BRIEF, postage prepaid, in the United States mail, to H. Ralph Klemm, Attorney for Plaintiff and Respondent, at 500 Clark Leaming Bldg. Office Center, 175 South West Temple, Salt Lake City, Utah 84101.



A D D E N D U M

	<u>Page</u>
Judgment	15-17
Findings of Fact and Conclusions of Law	18-23
Memorandum Decision	24-28
Listing Agreement (Riverton Bakery)	29
Listing Agreement (RDK Bakery)	30

JUDGMENT

FILED IN CLERK'S OFFICE
Salt Lake County Utah

NOV 12 1985

H. Dixon Hurdley, Clerk 3rd Dist. Court
By [Signature] Deputy Clerk

H. RALPH KLEMM
Attorney for Plaintiff
Bar No. 1838
500 Clark Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101
Telephone: 328-2206

BR. 203 ND. 161
11-15-85 - 8:15 a.m.

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

V R UTAH LIMITED, a Utah
limited partnership, dba
V R BUSINESS BROKERS,

Plaintiff,

-vs-

LEROY GRIFFIN, dba R.D.K.
BAKERY & RIVERTON BAKERY,

Defendant.

J U D G M E N T

C84-367

Civil No. C84-376

This matter came before the court for trial on August 21, 1985, with the Honorable David B. Dee presiding. Plaintiff and defendant were represented by their respective attorneys of record. The court having received evidence in documentary form and from witnesses called to testify on behalf of the parties, and the court having received arguments of counsel in written form pertaining to the issues of fact and law to be resolved in this action, and the court being fully advised

in the premises, and the court having heretofore entered its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That plaintiff is awarded judgment against the defendant in the sum of \$12,000.00 as a real estate commission under the terms of the two Listing Agreements that form the basis for this action.

2. Plaintiff is further awarded judgment against the defendant for interest accruing to and until the date of Judgment in the sum of \$1,068.49.

3. Plaintiff is further awarded judgment against the defendant for attorney's fees in the sum of \$2,000.00, plus court costs in the sum of \$183.65.

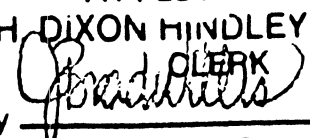
4. Interest shall run on the Judgment at the rate of 12% per annum, as provided by Utah law, until paid.

DATED this 12 day of November, 1985.

BY THE COURT:


DISTRICT COURT JUDGE

H. DIXON HINDLEY
CLERK

By 
Deputy Clerk

000000

NOV 12 1985

H. Dixon Hindley, Clerk, 3rd Dist. Court
By [Signature] Deputy Clerk

STATE OF UTAH

Defendant.

Civil No. ~~C84-376~~

AND
A 17

C 84-36-

18

FINDINGS OF FACT

1. Plaintiff is a limited partnership that is duly licensed to do business as a real estate broker in the State of Utah. Under the terms of that license, the plaintiff is authorized by Utah law to list and sell all kinds of real estate properties, including business opportunities of all kinds.

2. Defendant is a resident of Salt Lake County, State of Utah, and the listing contracts referred to in this action were executed in said County and State.

3. At all times relevant to this action, defendant was the owner and operator of two established bakery businesses known as R.D.K. Bakery and Riverton Bakery.

4. All of plaintiff's agents who participated in the listing and sale of defendant's properties were duly licensed and authorized by the State of Utah to engage in the sale of real estate in this State.

5. On August 1, 1983, the defendant executed and delivered to the plaintiff a Listing Agreement granting the plaintiff the sole and exclusive right to sell the business known as R.D.K. Bakery, together with all fixtures, equipment, goodwill, trademarks, trade names, accounts receivable and inventory associated therewith. By its terms, the Listing Agreement had a duration of five months, extending from August 1, 1983, to and until December 31, 1983.

000038

6. On August 17, 1983, the defendant executed and delivered to the plaintiff a Listing Agreement granting the plaintiff the sole and exclusive right to sell the business known as Riverton Bakery, together with all fixtures, equipment, goodwill, trademarks, trade names, accounts receivable and inventory associated therewith. By its terms, the Agreement had a duration of six months, extending from August 17, 1983, to and until February 18, 1984.

7. Both of the Listing Agreements referred to herein further provided that the agreed real estate commission shall be immediately due and payable if the seller, directly or indirectly, enters into a purchase and sale agreement (however designated), accepts a deposit or does any other act tantamount to a sale or contract of sale without the written approval of the plaintiff.

8. Defendant further agreed in both the Listing Agreements to pay not less than \$6,000.00 as a commission for the sale of the property.

9. After the Listing Agreements were signed, the plaintiff undertook efforts to find a buyer for both of the bakeries. In connection therewith, they placed the properties on the multiple listing board and advertised the properties for sale in newspapers. They showed the properties to potential buyers on several occasions, and they otherwise made a reasonable effort to sell the properties.

00003

10. On December 9, 1983, the defendant sold both bakeries to Mrs. Toula Souvall. The sale was made without seeking or obtaining the written approval of the plaintiff. The defendant thereby violated the provisions of the two Listing Agreements referred to herein and became immediately liable for payment of the commission under both Listing Agreements.

11. The minimum commission payable under each of the Listing Agreements is the sum of \$6,000.00, and the court finds that this amount is a fair and reasonable commission to be paid to the plaintiff under the terms of each of the Listing Agreements.

12. Under the terms of the Listing Agreements, the defendant further agreed to pay the plaintiff all expenses, including attorney's fees, connected with any suit that may be commenced to enforce the plaintiff's rights under the contracts. The parties have stipulated and agreed in open court that the sum of \$2,000.00 is a reasonable amount to be awarded to the plaintiff for attorney's fees in this action.

13. The listing contracts which form the basis for this suit were negotiated at arms length and in good faith by the plaintiff and its agents. Any statements made by plaintiff's agent in indicating that no real estate commission would be payable unless the plaintiff sold the business were true, subject to the other terms of the contracts.

000006

14. The defendant has failed to show by clear and convincing evidence that the plaintiff perpetrated any fraud upon him. The elements of fraud have not been established in this action. In particular, defendant has failed to show that plaintiff intended to defraud or mislead the defendant to his detriment.

From the foregoing Findings of Fact, the court makes the following

CONCLUSIONS OF LAW

1. The court has jurisdiction over this action and over the parties named herein.

2. The Listing Agreements executed by the parties on August 1, and August 17, 1983, were valid and enforceable contracts which were legally binding upon the parties to those Listing Agreements.

3. The defendant was not fraudulently induced to execute the Listing Agreements, and the Agreements are not voidable for this reason.

4. The Listing Agreements were not voidable by the defendant for any reason, but were fully enforceable by the court.


5. Upon the sale of the property to a third party, the defendant became liable, under the terms of both contracts, for payment of the minimum listing fee of \$6,000.00 stated in each of the Listing Agreements.

00007

6. Plaintiff is entitled to judgment against the defendant in the total sum of \$12,000.00, plus interest accruing thereon at the legal rate from and after December 9, 1983, together with an attorney's fee in the sum of \$2,000.00.

DATED this 12 day of November, 1985.

BY THE COURT:


DISTRICT COURT JUDGE ~~EST~~
H. DIXON HINDLEY
CLERK

NOTICE OF SERVICE

By 
Denita Clerk
November

Served the foregoing this 30th day of November, 1985, by mailing a true copy thereof, by United States Mail, postage prepaid to defendant's attorney, Richard Walker, 4685 South Highland Drive, Salt Lake City, Utah 84117.



000028

FILMED

OCT 24 1985

Bradwell

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

V.R UTAH LIMITED, a Utah
Limited Partnership, dba
V R BUSINESS BROKERS,

Plaintiff,

VS.

LEROY GRIFFIN, dba R.D.K
BAKERY & RIVERTON BAKERY

Defendants.

MEMORANDUM DECISION

CIVIL NO. C 84-367

The above captioned matter came on for trial before this Court at the conclusion of which the Court requested written final arguments be submitted and these were submitted, the last being received by this Court on the 23rd of September, 1985. Plaintiff was represented by H. Ralph Klemm, Esq. and defendant was represented by M. Richard Walker, Esq.

The Court having read the applicable law pertaining to the issues raised and the closing arguments of counsel now makes and enters its Memorandum Decision on the issues raised of (1) the voidability of the contract and (2) the amount of damages, if any, to be awarded.

On the issue of voidability of the contract the defendant's liability turns on whether the contract is voidable for some reason. The fact which might create voidability is Ms. Ossinger's

knowledge of a prior "sole and exclusive right to sell" agreement. Since there is a controversy over this evidence, both possibilities are to be examined.

On the proposition of no knowledge, if Ms. Ossinger had no knowledge of a prior listing agreement then the contract is not voidable. The contract would have been negotiated at arms length and in good faith by V R Limited or its agent. Ms. Ossinger's statement, if she made it, that "no commission would be payable unless V R Limited sold the business" is reasonable under these circumstances --- it would be true, subject to the other terms of the contract.

On the proposition of knowledge, if Ms. Ossinger knew of a prior listing agreement then there may be some doubt as to her competence but the contract is still not voidable. To void or modify the terms of the contract by the oral agreement, if there was one, there must be shown fraud, duress, undue influence, etc. The defendant has claimed that V R Limited or its agent perpetrated a fraud on him. However, the defendant has not proven by clear and convincing evidence the elements of fraud. Specifically, he has not shown the element of intent by V R Limited that he rely to his detriment upon its mis-representations of fact. The defendant bears the burden of proof in this instance and, therefore, the risk of non-persuasion.

Further, looking to the contract itself there is no reference to any outside agreements and it appears to be complete and fully integrated. If this is the case, and it appears to be so, then the intent of the parties is found within the "four corners of the writing". See Stanger v. Sentinel Security Life Insurance Co., 669 P2d 1201 at the page 1205. Here it is obvious that the parties intended no other agreements to be included in the contract. The assurance that no commission be paid except in the event V R Limited sold the business can be inferred from the contract. However, there are several occurrences specified which result in the commission coming due and payable immediately. One of those conditions is a sale or a contract to sell by the defendant without the written approval of V R Limited. V R Limited never agreed to the sale to Souvall. By signing the contract the defendant is presumed to have read and understood it. There is evidence that the defendant did read and understand the contract.

On the question of contract, therefore, this Court finds that the contract is valid and therefore enforceable. There is no fraud or misrepresentation established by V R Limited or its agent and the defendant understood or should have understood the terms of the contract he signed.

On the issue of damages, the Court finds that the damages to be awarded the plaintiff is imprecise if considering only

the twelve percent commission provided in the contract. There is merit to the defendant's argument that the Court should not speculate upon how to allocate the purchase price of three bakeries between two of the three bakeries sold inasmuch as the payment was a lump sum. The plaintiff's argument that the listing price be used would probably result in an inequity because the listing price of the two bakeries listed with V R Limited totaled more than the ultimate purchase price for the three bakeries..

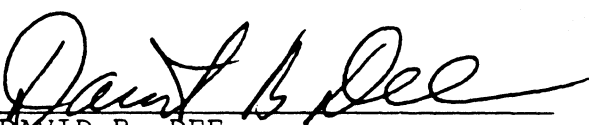
Since the contract is valid as heretofore determined by this Court it is appropriate to look to the terms of the contract to assess damages. The contract does specify a minimum commission of \$6,000 for each listing. This amount would undoubtedly be the commission "due and payable" if one of the events occurred other than a sale by V R Limited which are specified in the contract (e.g., seller withdraws property before expiration of term), therefore this Court finds that the minimum commission of \$6,000 is due the plaintiff and that plaintiff may recover attorney's fees as provided in the contract.

Plaintiff's counsel, Mr. Klemm, is instructed to prepare the appropriate Findings of Fact, Conclusions of Law and Decree together with his Affidavit showing hours spent and hourly rate of billing for the assessment of attorney's fees,

submit the same to Mr. Walker as required under Rule 2.9 and then forward to this Court for signature and entry.

Dated this 22nd day of October, 1985.

Copies mailed to counsel.

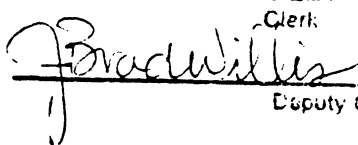


DAVID B. DEE

DISTRICT JUDGE ATTEST

H. DIXON HINDLEY

Clerk

By  Deputy Clerk



LISTING AGREEMENT

Office	BLS#	Manager Initials	Date
--------	------	------------------	------

Business Type ☐ ☐ ☐ BAKERY
Address 1341 E. 10600 S.
City Sandy UT 84092
Phone No. 571-7052
Corp. &/or Firm Name _____
dba RDK BAKERY
Seller's Name LeRoy R. GRIFFIN
Address 10942 So. Bay Meadow Cir
City SANDY 84092
Phone No. 571-8903
Bldg. Size 2000 # Seats _____
No. Employees 5 F.T. 4 P.T. _____
Payroll \$ 3,000 Per Month employment only
License Required Business License
Parking Shooting
Days Open 6 Closed On Sun
Hours Open 7AM till 8 P.M.

Base Mo. Rental 1115.- Lease Exp. Date Nov 85
Option 5 Years Security on Lease \$ 1115.-
Terms and Conditions Temp. prop. U.S.
Misc. Lease Information no. 20, Tax & Ins. Included
Landlord Bell Capital Phone 1
Property Mgr. Ray Nelson Phone 1
Estab. 4 Yrs. Pres. Owner 4 Yrs.
Furn., Equip. \$ _____ incl. in purch. price
Inventory at Cost \$ 3500.- incl. in purch. price
Monthly Receipts \$ 15,000.- Seller will prove
Monthly Net Profit \$ 5,000.- Seller will prove
Purchase Price \$ 135,000 Includes \$ 16,200 Comm.
Down Payment \$ 40,000 Includes \$ 16,200 Comm.
Seller will carry balance at \$ None per month incl.
10 % interest on unpaid balance
Additional Terms Ten Year Payment

REASON FOR SALE _____

LIENS/ENCUMBRANCES Total \$ -0-Amount \$ -0- Payments \$ -0- Interest -0- % Holder -0- Phone 1Amount \$ -0- Payments \$ -0- Interest -0- % Holder -0- Phone 1

All trade fixtures and equipment included except the following items: _____

REMARKS _____

SOLE AND EXCLUSIVE RIGHT TO SELL

1. The Seller hereby engages the Broker, on a sole and exclusive basis, to sell the above described property, including all fixtures, goodwill, trademarks, trade names and inventory associated therewith.
2. Seller agrees to pay Broker Twelve (12 %), but in any event not less than \$ 6,000.- of the purchase price.
3. Seller agrees that if this listing is cancelled or the property withdrawn from sale during the listing term by Seller, the commission shall become immediately due by Seller to Broker. If Seller refuses or is unable to comply with the listing terms for any reason, thereby preventing disposition of the property during the listing term upon the terms set forth above, the commission shall become immediately due by the Seller to the Broker.
4. Seller agrees that the commission shall be immediately due and payable if the Seller, directly or indirectly, enters into a Purchase and Sale Agreement (however designated) accepts a deposit or does any other act tantamount to a sale or contract to sell without the written approval of the Broker, and the cancellation or rescission of any of the foregoing acts shall not act as a release of Seller for such liability.
5. In any case where the deposit and/or down payment have been forfeited, the deposit shall be split 50% to

Seller and 50% to Broker.

6. The Seller acknowledges that it has supplied the listing information above and Seller warrants such information to be true and correct.

7. Seller agrees to pay the full commission set forth in this Agreement to the Broker in the event the property described herein is, within one year after the termination of this Agreement, sold, traded or otherwise conveyed to anyone referred to Seller by the Broker or with whom Seller had negotiations during the term of this Agreement.

8. This Agreement shall commence on the day and year set forth below and continue until 31. 1983

9. Should any suit be commenced to enforce the Broker's rights herein, in the event the Broker is successful the Seller agrees to pay the Broker the expenses connected therewith, including attorney's fees incurred.

10. Seller hereby acknowledges that he has read this agreement and has received a copy of it.

11. If Seller is a partnership, corporation or other entity, the person(s) signing on behalf of such entity hereby represent(s) and warrant(s) that he/she has, or they have the authority to enter into this contract on behalf of said entity.

Employment Accepted by VR Business Brokers

OFFICE NAME VR WTRH LTD.
OFFICE ADDRESS 312 W. 5400 So. Murray
LISTING AGENT Donna Miller

Corp. Name LeRoy R. Griffin
Seller [Signature]
Seller [Signature]
DATE 8-1-83

ALL OFFICES ARE INDEP.

ED AND OPERATED

WHITE - OFFICE CANARY - SELLER PINK - SALES

VRIS, P.O. BOX 499, CANTON, MASSACHUSETTS 02021



LISTING AGREEMENT

Office	BLS#	Manager Initials	Date

Business Type ☐ Bakery
Address 12662 S. Redwood Road
City Riverton UT
Phone No. 354-1539
Corp. &/or Firm Name _____
dba Le Roy Bakery
Seller's Name Le Roy R. Grifflin
Address 10742 S. Bay Meadow Circle
City Druid UT
Phone No. 571-8903
Bldg. Size 1500 sq ft Seats _____
No. Employees 1 F.T. 1 P.T. _____
Payroll \$ 900 Per Month employees only
License Required Business
Parking Adequate
Days Open Mon-Sat Closed On Sunday
Hours Open 10-7
REASON FOR SALE Extreme Illness

Base Mo. Rental 350 + 75 utilities Lease Exp. Date _____
Option _____ Years Security on Lease \$ 700
Terms and Conditions open end lease
Misc. Lease Information _____
Landlord Compton Hansen Phone 1 SLC
Property Mgr. same Phone 1
Estab. 2 1/2 Yrs. Pres. Owner 2 1/2 Yrs.
Furn., Equip. \$ _____ incl. in purch. price
Inventory at Cost \$ 500 kg + 2509 incl. in purch. price
Monthly Receipts \$ 5,400 Seller will prove
Monthly Net Profit \$ 1,250 Seller will prove
Purchase Price \$ 21,000 Includes \$ 4,000 Comm.
Down Payment \$ 11,200 Includes \$ 10,000 comm. 11/2
Seller will carry balance at \$ 1,500 per month incl.
10 % interest on unpaid balance
Additional Terms _____

LIENS/ENCUMBRANCES Total \$ -0-

Amount \$ -0- Payments \$ -0- Interest -0- % Holder -0- Phone 1
Amount \$ -0- Payments \$ -0- Interest -0- % Holder -0- Phone 1
All trade fixtures and equipment included except the following items: _____

REMARKS

SOLE AND EXCLUSIVE RIGHT TO SELL

1. The Seller hereby engages the Broker, on a sole and exclusive basis, to sell the above described property, including all fixtures, goodwill, trademarks, trade names and inventory associated therewith.
2. Seller agrees to pay Broker twelve (12%), but in any event not less than \$ 4,000, of the purchase price.
3. Seller agrees that if this listing is cancelled or the property withdrawn from sale during the listing term by Seller, the commission shall become immediately due by Seller to Broker. If Seller refuses or is unable to comply with the listing terms for any reason, thereby preventing disposition of the property during the listing term upon the terms set forth above, the commission shall become immediately due by the Seller to the Broker.
4. Seller agrees that the commission shall be immediately due and payable if the Seller, directly or indirectly, enters into a Purchase and Sale Agreement (however designated) accepts a deposit or does any other act tantamount to a sale or contract to sell without the written approval of the Broker, and the cancellation or rescission of any of the foregoing acts shall not act as a release of Seller for such liability.
5. In any case where the deposit and/or down payment have been forfeited, the deposit shall be split 50% to

Seller and 50% to Broker.

6. The Seller acknowledges that it has supplied the listing information above and Seller warrants such information to be true and correct.
7. Seller agrees to pay the full commission set forth in this Agreement to the Broker in the event the property described herein is, within one year after the termination of this Agreement, sold, traded or otherwise conveyed to anyone referred to Seller by the Broker or with whom Seller had negotiations during the term of this Agreement.
8. This Agreement shall commence on the day and year set forth below and continue until Feb 12 1984
9. Should any suit be commenced to enforce the Broker's rights herein, in the event the Broker is successful the Seller agrees to pay the Broker the expenses connected therewith, including attorney's fees incurred.
10. Seller hereby acknowledges that he has read this agreement and has received a copy of it.
11. If Seller is a partnership, corporation or other entity, the person(s) signing on behalf of such entity hereby represent(s) and warrant(s) that he/she has, or they have the authority to enter into this contract on behalf of said entity.

Employment Accepted by VR Business Brokers

OFFICE NAME VR Hall LTD
OFFICE ADDRESS 312 W 5th St
LISTING AGENT Le Roy R. Grifflin

Corp. Name Le Roy R. Grifflin
Seller Le Roy R. Grifflin
Seller Le Roy R. Grifflin
DATE 9-17-83

ALL OFFICES ARE INDEPENDENTLY OWNED AND OPERATED

WHITE - OFFICE CANARY - SELLER PINK - SALESPERSON GOLD - RBS-VRIS, P.O. BOX 499, CANTON, MASSACHUSETTS 02021