

1986

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

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)



Part of the [Law Commons](#)

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

David M. Jorgensen, Roberty J. Debry; attorneys for appellant.

Robert L. Jeffs, M. Dayle Jeffs; attorneys for respondent.

---

#### Recommended Citation

Brief of Respondent, *Mel Trimble Real Estate v. Monte Vista Ranch*, No. 860135.00 (Utah Supreme Court, 1986).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/963](https://digitalcommons.law.byu.edu/byu_sc1/963)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court 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](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH COURT OF APPEALS  
BRIEF

UTAH  
DOC  
KFJ  
50  
A  
DC

IN THE SUPREME COURT OF THE  
STATE OF UTAH

860135-CA

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.

Case No. 860135-CA  
20769

RESPONDENT'S BRIEF

APPEAL FROM THE SUMMARY JUDGMENT OF THE  
FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY  
HONORABLE DAVID SAM

Robert L. Jeffs  
M. Dayle Jeffs  
Jeffs and Jeffs  
Attorneys at Law, P.C.  
90 North 100 East  
P. O. Box 888  
Provo, Utah 84603

Attorneys for Respondent,  
Monte Vista Ranch, Inc.

David M. Jorgensen  
Robert J. DeBry  
Robert J. DeBry & Associates  
965 East 4800 South, Suite 2  
Salt Lake City, Utah 84117

Attorneys for Appellant

**FILED**

NOV 14 1985

Clerk, Supreme Court, 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.

APPEAL FROM THE SUMMARY JUDGMENT OF THE  
FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY  
HONORABLE DAVID SAM

**Attorneys for Respondent,  
Monte Vista Ranch, Inc.**

**Attorneys for Appellant**

## TABLE OF CONTENTS

	<u>Page</u>
<u>TABLE OF AUTHORITIES</u> . . . . .	iii
<u>ISSUES PRESENTED</u> . . . . .	1
<u>STATUTES</u> . . . . .	1
<u>STATEMENT OF THE CASE.</u> . . . . .	2
NATURE OF THE CASE. . . . .	2
COURSE OF PROCEEDINGS . . . . .	2
DISPOSITION IN THE COURT BELOW. . . . .	4
STATEMENT OF FACTS. . . . .	4
<u>SUMMARY OF ARGUMENT.</u> . . . . .	6
<u>ARGUMENT</u> . . . . .	7
I.    APPELLANT IS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL FROM BRINGINT THIS ACTION. . . . .	7
A.    The Issue In This Action Is Identical To The Issue Decided In <u>Mel Trimble Real</u> <u>Estate v. Fitzgerald.</u> . . . . .	8
B.    The Prior Suit Was A Final Judgment On The Merits. . . . .	10
C.    The Judgment In The Prior Action Is Being Asserted Against The Same Party That Was A Party To The Prior Adjudication . . . . .	10
D.    Appellant Has Made No Claim That The Prior Case Was Not Competently, Fully, And Fairly Litigated. . . . .	11
E.    The Lower Court Had A Sufficient Record Upon Which To Apply The Doctrine Of Collateral Estoppel . . . . .	11
1. <u>Appellant Cannot Now Submit</u> <u>Additional Evidence To Avoid The</u> <u>Lower Court's Judgment Of Dismissal.</u> . . . .	13

II.	APPELLANT CANNOT RECOVER FOR A REAL ESTATE COMMISSION UNDER A THEORY OF QUANTUM MERUIT . . .	14
III.	APPELLANT'S CLAIM FOR A REAL ESTATE COMMISSION BASED UPON AN ORAL CONTRACT IS BARRED BY THE STATUTE OF FRAUDS . . . . .	17
	<u>CONCLUSION</u> . . . . .	22
	<u>APPENDIX A</u>	

# TABLE OF AUTHORITIES

	<u>Page</u>
Bentley v. Potter, 694 P.2d 617 (Utah, 1984)	20
Case v. Ralph, 56 Utah 243, 188 P. 640 (1920)	15,18,22
Franklin Financial v. New Empire Development Co., 659 P.2d 1040 (Utah, 1983)	20
Massey v. Utah Power & Light, 609 P.2d 937 (Utah, 1980)	20
Mel Trimble Real Estate v. Fitzgerald, 626 P.2d 453 (Utah, 1981)	3,6,8,9,14,17
Parrish v. Layton City Corp., 542 P.2d 1086 (Utah, 1975)	11,12
Pilcher v. State, 663 P.2d 450 (Utah, 1983)	13
Richards v. Hodson, 26 Utah 2d 113, 485 P.2d 1044 (1971)	7
Searle Bros. v. Searle, 588 P.2d 689 (Utah 1978)	7,8,10,11,12
Shaer v. State, 657 P.2d 1337 (Utah, 1983)	8
Smith Realty Co. v. Dipietro, 77 Utah 176, 292 P. 915 (1930)	15,19
Utah Dept. of Transportation v. Fuller, 603 P.2d 814 (Utah, 1979)	14
Watson v. Odell, 58 Utah 276, 198 P. 772 (1921)	15
Wilde v. Mid-Century Ins. Co., 635 P.2d 417 (Utah, 1981)	8
Young v. Buchanan, 259 P.2d 876, 123 Utah 369, 371 (1953)	15
Section 25-5-4(5), Utah Code Annotated, as amended	1,6,17,22
Section 61-1-3, Utah Code Annotated, as amended	16
Section 78-12-25, Utah Code Annotated, as amended	4
Rule 44(a), (d), Utah Rules of Civil Procedure	13
Rule 902, Utah Rules of Evidence	13
Rule 1005, Utah Rules of Evidence	13

### ISSUES PRESENTED

1. Are appellant's claims barred by the doctrine of collateral estoppel?
2. Can appellant recover a real estate commission on the theory of quantum meruit?
3. Is appellant's claim for a real estate commission based on an oral contract barred by §25-5-4(5), Utah Code Annotated, as amended, Statute of Frauds?

### STATUTES

In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:. . .

(5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation.

Section 25-5-4(5), Utah Code Annotated, as amended.

## STATEMENT OF THE CASE

### NATURE OF THE CASE

This is an action for breach of an oral contract for a real estate commission and alternatively for quantum meruit for services rendered in connection with the sale of the Monte Vista Ranch.

### COURSE OF PROCEEDINGS

On August 7, 1978, appellant filed a Complaint in Third District Court, alleging that he and Leland Fitzgerald had jointly purchased the assets of Monte Vista Ranch, Inc. and that he was entitled to an accounting and judgment for his share of the assets. The theory of the original Complaint was abandoned and appellant filed an Amended Complaint asking for a sales commission on the transaction involved herein (R. at 154).

The matter went to trial before a jury to determine whether appellant was entitled to a sales commission on the transaction herein. (R. at 154). The trial court's Instruction No. 8 to the jury provided in pertinent part ". . . the Court has ruled as a matter of law that the agreement of December 7, 1977 imposed upon defendant (Fitzgerald) the liability for the real estate commission, if any, owed plaintiff (appellant) upon this transaction." (R. at 155). The



jury returned a verdict against appellant, upon which judgment was entered. Appellant appealed from that judgment in Mel Trimble Real Estate vs. Fitzgerald, 626 P.2d 453 (Utah, 1981), a copy of which is attached to this brief marked Appendix A. As part of that appeal, appellant challenged the trial court's Instruction No. 8 quoted above. This Court affirmed the judgment and specifically upheld Instruction No. 8. (R. at 153-155).

On May 14, 1982, appellant commenced this action seeking to recover a sales commission from the very same transaction involved in its prior action. The Complaint of appellant contained two causes of action: (1) for an oral contract for a real estate commission, and (2) realleging all of the facts of the First Cause of Action and seeking recovery on the theory of quantum meruit for services rendered in the transaction. (R. at 1-4, Appellant's brief p. 7). On April 12, 1984, respondent filed its Motion for Summary Judgment based on four theories: (1) Appellant cannot recover a real estate commission on a theory of quantum meruit; (2) Appellant's claim for a real estate commission is barred by §25-5-4(5) Utah Code Annotated, as amended, aka Statute of Frauds; (3) Appellant's claim for a commission is barred by the applicable statute of limitations, §78-12-25 Utah Code Annotated, as amended; and (4) Appellant's claim is barred by the doctrine of collateral estoppel. (R. at 139-151). Respon-

dent's Motion for Summary Judgment was granted on August 31, 1984, on the grounds that appellant's claim was barred by the applicable statute of limitations. (R. at 200-207).

Appellant appealed that judgment on September 25, 1984. (R. at 213). During the course of that appeal the respective counsel for the parties discovered that the trial court had inadvertantly used the wrong date for commencement of the action in applying §78-12-25, Utah Code Annotated, as amended. On November 18, 1984, the parties stipulated to dismissal of the appeal without prejudice (R. at 227). The case was resubmitted to the lower court on the remaining three theories of respondent's Motion for Summary Judgment. (R. at 226-229).

#### DISPOSITION IN THE COURT BELOW

On June 17, 1985, the Court entered its judgment granting respondent's Motion for Summary Judgment. (R. at 260-261). Appellant brings this matter before the Court on an appeal of the lower court's grant of respondent's Motion for Summary Judgment.

#### STATEMENT OF FACTS

The facts and circumstances from which this action arises as alleged in appellant's Complaint are as follows:

Prior to December, 1977, appellant alleges Wallace

Ohran, as President of Monte Vista Ranch, Inc. (respondent herein), orally agreed to pay appellant's agent, Cal Florence, a 6% commission if he could find a purchaser of the ranch on terms acceptable to respondent. Pursuant to said agreement, Cal Florence introduced Leland Fitzgerald to Ohran and through the efforts of Cal Florence, Leland Fitzgerald, Wallace Ohran and Howard Sherwood, as officers for Monte Vista Ranch, Inc., entered into an Earnest Money Receipt and Offer to Purchase dated December 7, 1977. (R. at 2, 3 and 152). As admitted by appellant in its brief, the Earnest Money did not list any terms of any alleged real estate commission. (Appellant's brief p. 5).

The only reference to any real estate commission in that Earnest Money Receipt and Offer to Purchase is on line 22 which provides: "Buyer [Leland Fitzgerald] to be responsible for all real estate commissions." No other mention is made in the agreement of any obligation to pay a commission or any of the terms of the alleged agreement. (R. at 152). The sale contemplated by the Earnest Money Receipt and Offer to Purchase was never completed and subsequent to the signing of that agreement, the stockholders of Monte Vista Ranch, Inc. entered into an agreement dated May 18, 1978 for the sale of their stock to Leland Fitzgerald. (R. at 3, 182-195). Respondent was not a party to the Stock Sale Agreement dated May 18, 1978 and did not receive any consideration or benefit from

that transaction. (R. at 182-195). The Stock Sale Agreement provides that none of the parties thereto has incurred any obligation for any real estate or other brokerage commissions. (R. at 189).

#### SUMMARY OF ARGUMENT

The same issue is presented in this case that was adjudicated adversely to appellant in Mel Trimble Real Estate v. Fitzgerald, 626 P.2d 453 (Utah, 1981). Under the doctrine of collateral estoppel, appellant is barred from relitigating that issue. The lower court had a sufficient record before it to determine that the identical issue was presented in this case as was litigated in the prior action brought by appellant. The Court may not consider any additional evidence offered for the first time by appellant on this appeal in its attempts to attack the lower court's judgment.

Furthermore, as presented to the lower court, appellant cannot recover for any services rendered in the sale of real estate under a theory of quantum meruit. Neither can appellant recover a commission on an oral contract for compensation for the sale of real estate by reason of §25-5-4(5), Utah Code Annotated, as amended. The alleged "writings" or "memorandum" of any alleged agreement for the payment of a real estate commission are insufficient to satisfy Utah's Statute of Frauds.

Therefore, the Court should affirm the judgment entered by the lower court dismissing appellant's Complaint.

## ARGUMENT

### POINT I

#### APPELLANT IS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL FROM BRINGING THIS ACTION

The Utah Supreme Court has recognized the doctrine of collateral estoppel as a form of res judicata. In Richards v. Hodson, 26 Utah 2d 113, 485 P.2d 1044 (1971), the Court set forth the distinguishing features of collateral estoppel as follows:

A form of res judicata applies to situations like this wherein issues which are actually decided against a party in a prior action may be relied upon by an opponent in a later case as having been judicially established. This doctrine, known as collateral estoppel, differs from res judicata not only in the fact that all parties need not be the same in the two actions, but also in the fact that the estoppel applies only to issues actually litigated and not to those which could have been determined.

26 Utah 2d at 115.

The Court further clarified the doctrine of collateral estoppel in 1978 in Searle Bros. v. Searle, 588 P.2d 689 (Utah 1978). In Searle Bros., the Court adopted a four part test for application of collateral estoppel, namely:

(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question?

(2) Was there a final judgment on the merits?

(3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

(4) Was the issue in the first case competently, fully, and fairly litigated?

Searle Bros. at 691.

See also Wilde v. Mid-Century Ins. Co., 635 P.2d 417 (Utah, 1981), and Shaer v. State, 657 P.2d 1337 (Utah, 1983).

A. The Issue In This Action Is Identical To The Issue Decided In Mel Trimble Real Estate v. Fitzgerald

Appellant claims that the issue involved in the present action differs from the issue presented in Mel Trimble Real Estate v. Fitzgerald in two ways: (1) in the prior action, appellant sought recovery of his claimed commission from the buyer, whereas in the present action he seeks recovery of the commission against the seller; and (2) respondent's defense of novation was not presented in the prior case.

The prior action brought by appellant fully adjudicated the issue of whether appellant was entitled to a commission on the sale of the Monte Vista Ranch. The Court in Mel Trimble Real Estate v. Fitzgerald set forth a complete summary of the factual basis from which that action arose.

Appellant does not dispute that this action and its prior action arise out of the same transaction. In the Court's Instruction No. 8 to the jury it stated:

. . . the court has ruled as a matter of law that the agreement of December 7, 1977, imposed upon defendant, (Fitzgerald) the liability for the real estate commission, if any, owed plaintiffs (appellant) upon this transaction.

Mel Trimble Real Estate v. Fitzgerald, at 455.

The jury returned a verdict against the plaintiff (appellant herein), which verdict was affirmed on appeal. In light of the instruction given the jury, the jury necessarily must have found that appellant was not entitled to any commission upon this transaction. The Court had directed a ruling that if the jury found that appellant was entitled to a commission from this transaction, Fitzgerald was liable for that commission. The jury determined that appellant was not entitled to a commission on this transaction and returned a verdict against appellant and in favor of Fitzgerald.

Appellant is precluded by the doctrine of collateral estoppel from relitigating the issue of whether it is entitled to a commission on the sale of the Monte Vista Ranch. The fact that appellant is asserting the claim against the seller in this action whereas the prior suit was against the buyer makes no difference in light of the actual determination made by the jury in the prior action.

Appellant's claim that the present action will involve the issue of whether any acts of appellant constituted a novation of any obligation for a commission is without merit. The fact that respondent may have the defense of novation available to it in the present action which was not litigated in the prior action does not preclude the application of collateral estoppel to bar the claims of appellant. Since the previous litigation already determined that appellant is not entitled to a commission on the transaction, the Court does not need to reach the issue of whether respondent may have any additional defenses not addressed by the prior suit.

**B. The Prior Suit Was A Final Judgment On The Merits**

Appellant does not dispute that the prior action resulted in a final judgment on the merits. The action was tried on its merits before a jury that rendered judgment against appellant. Appellant appealed that verdict and the Court affirmed the judgment rendered against appellant. Therefore, the second part of the test set forth in Searle Bros. has been met.

**C. The Judgment In The Prior Action Is Being Asserted Against The Same Party That Was A Party To The Prior Adjudication**

In this action, respondent has asserted the prior judgment rendered against Mel Trimble Real Estate against the



very same entity; namely, appellant, Mel Trimble Real Estate.  
This action meets the third part of the Searle Bros. test.

D. Appellant Has Made No Claim That The  
Prior Case Was Not Competently, Fully, And  
Fairly Litigated

The final test in applying collateral estoppel is whether the prior action was competently, fully and fairly litigated. Appellant has made no claim that the prior case was not competently, fully and fairly litigated. The same counsel, Robert J. DeBry, represented appellant in both actions. The previous matter was tried in four days before a jury and appellant was given full opportunity to present witnesses on its behalf and cross-examine opposing witnesses. Therefore, all of the requirements for application of the doctrine of collateral estoppel have been met and the lower court properly applied the doctrine to bar appellant from relitigating this matter.

E. The Lower Court Had A Sufficient Record  
Upon Which To Apply The Doctrine Of Colla-  
teral Estoppel

Appellant asserts that the lower court did not have the entire record of the prior proceeding which precludes it from applying the doctrine of collateral estoppel. Appellant cites Parrish v. Layton City Corp., 542 P.2d 1086 (Utah,

1975), and Searle Bros. v. Searle, in support of its claim that the court must examine the entire record of the prior proceeding in order to apply collateral estoppel.

Neither of the cases cited by appellant involved a prior action that had been appealed with an official report of the proceeding as in the case before the Court. In Parrish v. Layton City Corp., the defendant merely asserted that a prior action had been filed by the plaintiff therein and judgment had been rendered in favor of defendant. No copy of the pleadings or record from the prior action was before the Court for it to apply the doctrine of res judicata. Without any evidence of the prior proceeding, the Supreme Court properly ruled that the lower court did not have sufficient evidence before it to apply the doctrine of res judicata.

In Searle Bros. v. Searle, the Court denied application of collateral estoppel on the grounds that there was no privity between the parties in the prior action and the Searle Brothers involved in the subsequent action. The Court, in dicta, went on to say that the only record of the prior proceeding before the Court were counsel's references to transcript of testimony from the prior action in their respective memoranda which was not a sufficient record to sustain a determination that the plaintiff's claim was barred by the doctrine of collateral estoppel.

In the present action, the lower court was cited to

the official publication of the prior case and was furnished a copy of said case (R. at 153-155). The published opinion contains a complete discussion of the nature of the case, the procedural background, the relevant facts, and the rulings and instructions in question herein. The published opinion was a sufficient record upon which the Court could make a determination that appellant was collaterally estopped from asserting its claims herein.

Furthermore, appellant had full opportunity to provide copies of the record from the previous proceeding pursuant to Rule 44(a) and (d), Utah Rules of Civil Procedure, and Rule 902 and 1005, Utah Rules of Evidence, if appellant felt the record contained in the published opinion was incomplete.

1. Appellant Cannot Now Submit  
Additional Evidence To Avoid The Lower  
Court's Judgment Of Dismissal

Appellant has submitted and referred to evidence in his brief which were not before the lower court, including excerpts from prior briefs on appeal, pleadings from the prior action, minutes from the prior trial, and unsupported statements about the proceedings in the prior case. It is well settled that evidence which was not offered in the lower court cannot be considered on appeal. In Pilcher v. State, 663 P.2d 450 (Utah, 1983), the Court held:

Furthermore, plaintiff's reliance on documents not found in the record is improper. Matters not admitted in evidence before the trier of fact will not be considered here (citations omitted).

Id. at 453.

See also Utah Dept. of Transportation v. Fuller, 603 P.2d 814 (Utah, 1979).

Appellant's belated attempts to submit evidence to attack the verdict of the jury in Mel Trimble Real Estate v. Fitzgerald as clearly shown in the published opinion should be disregarded.

## POINT II

### APPELLANT CANNOT RECOVER FOR A REAL ESTATE COMMISSION UNDER A THEORY OF QUANTUM MERUIT

Even if the Court finds that Appellant's claim is not barred under the doctrine of collateral estoppel, appellant cannot recover for a real estate commission on a theory of quantum meruit. In respondent's Motion for Summary Judgment granted by the lower court, respondent presented four theories upon which respondent asserted appellant was barred from bringing this action. Appellant has only addressed one of those theories in its brief, namely collateral estoppel.

In appellant's Second Cause of Action, it attempts to recover a real estate commission on the theory of quantum meruit. The Court has consistently ruled that a real estate agent cannot recover a commission on the theory of quantum

meruit, but can only recover by virtue of a written contract. "It has long been established in this jurisdiction, however, that a broker or agent may recover only by virtue of contract and cannot recover upon the basis of quantum meruit." Young v. Buchanan, 259 P.2d 876, 123 Utah 369, 371 (1953). See also Case v. Ralph, 56 Utah 243, 188 P. 640 (1920); Smith Realty Co. v. Dipietro, 77 Utah 176, 292 P. 915 (1930); Watson v. Odell, 58 Utah 276, 198 P. 772 (1921).

Appellant's only argument in opposition to respondent's claim that it cannot recover for a commission on a theory of quantum meruit was to try to characterize its Second Cause of Action as one arising out of the sale of stock rather than real estate. Appellant's First Cause of Action alleges a claim for a commission arising out of the sale of real estate. In paragraph 19 of Appellant's Second Cause of Action, appellant realleges all of the allegations of the First Cause of Action relating to the claim for a real estate commission as forming the basis for its right of recovery on the theory of quantum meruit. Therefore, appellant cannot claim that its claimed right to recovery is based upon anything other than a sale of real estate.

Since the actual transfer of the real property was accomplished through a stock sale, appellant seeks to circumvent the established case law by characterizing the transaction as a stock sale. The Second Cause of Action on the

theory of quantum meruit and the First Cause of Action for a real estate commission arose out of the very same transaction and occurrence. The Court should not sanction appellant's attempt to subvert the laws of Utah.

Furthermore, it is unlawful for appellant to transact business as a broker-dealer or agent in the sale of securities without being licensed in accordance with the Utah Uniform Securities Act and §61-1-3, Utah Code Annotated, as amended. Appellant did not allege or present any evidence it was a licensed broker-dealer or agent for the sale of securities even though respondent raised the issue in its Motion for Summary Judgment. This Court should not condone an unlawful act by ruling that appellant is entitled to recover on a theory of quantum meruit for the sale of securities.

Even if appellant was entitled to recover under a theory of quantum meruit for the sale of stock, respondent could not be liable to appellant. The Stock Sale Agreement was entered into by Fitzgerald and the individual shareholders. Monte Vista Ranch, Inc. did not sell any stock. Monte Vista Ranch, Inc. did not receive anything from the sale. Monte Vista Ranch, Inc. was not a party to the agreement nor was it benefited in any way by a transfer of its stock between individuals.

POINT III

**APPELLANT'S CLAIM FOR A REAL ESTATE COMMISSION BASED  
UPON AN ORAL CONTRACT IS BARRED BY THE STATUTE OF  
FRAUDS**

As set forth in Respondent's Motion for Summary Judgment, appellant's claim for a real estate commission based on an oral contract is barred by the Statute of Frauds, §25-5-4(5), Utah Code Annotated, as amended, which provides as follows:

In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith: . . .

(5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation.

Appellant's First Cause of Action alleges that Ohran, acting on behalf of respondent, entered into an oral contract with it for a real estate commission. Appellant further alleges that this oral contract is evidenced by a writing signed by Ohran.

Appellant offers three "writings" in support thereof: (1) the Earnest Money Receipt and Offer to Purchase dated December 7, 1977; (2) alleged in court admissions of Wallace Ohran's in Mel Trimble Real Estate vs. Fitzgerald of the existence and terms of the contract for a real estate commission; and (3) deposition testimony from the prior action which was transcribed and signed by defendant's president in the above referenced case.

None of these so called "notes or memorandum" are sufficient to meet the requirements of §25-5-4(5), Utah Code Annotated, as amended. As set forth in defendant's Motion for Summary Judgment, the only reference to a real estate commission in the Earnest Money Receipt and Offer to Purchase of December 7, 1977 is at line 22 where it provides: "Buyer to be responsible for all real estate commission."

The language of the Earnest Money Receipt and Offer to Purchase does not constitute a sufficient writing to satisfy the Statute of Frauds. The only effect it could possibly have would be on the buyer under that agreement, not the seller, Monte Vista Ranch, Inc. The Court has applied a very strict standard for writings alleged to be a sufficient memorandum for an agreement for payment of a real estate commission.

In Case v. Ralph, the Court, in a very detailed analysis, outlined the requirements necessary to satisfy the Statute of Frauds for a real estate commission. The Court interpreted §5817, Comp. Laws Utah 1917, which is identical to the present statute cited above as follows:

Under such a statute a real estate broker or agent cannot recover a commission for services rendered in either selling or procuring a purchaser for real property unless it appears: (1) that there is an express contract or agreement of authority in which the terms and conditions of his employment, if any, and the amount of his commission, etc. are stated; (2) that such contract be in writing; (3) that in the



absence of such an express contract no recovery can be had for the reasonable value of the services rendered as upon a quantum meruit, nor for money and time expended for the use and benefit of the owner of the property. It is also held that performance or part performance of a parol agreement is unavailing.

Id. at 246.

And in Smith Realty Co. v. Dipietro, the Court held that an exchange agreement between the buyer and seller therein that provided for the amount of the commission and the agreement that the defaulting party would have to pay the commission to Smith Realty Co. was insufficient to satisfy the Statute of Frauds.

The Earnest Money Agreement relied upon by appellant clearly fails to specify the terms of any agreement for a real estate commission or even the existence of any alleged agreement between Monte Vista Ranch, Inc. and appellant.

In its Memorandum in Opposition to Respondent's Motion for Summary Judgment, appellant cited the lower court to alleged testimony of Wallace Ohran, former president of Monte Vista Ranch, Inc., from the prior action brought by appellant against Fitzgerald in support of its claim that Wallace Ohran had admitted the terms of the alleged agreement in testimony therein. Appellant merely cited the pages and lines of a transcript of the former action and made one alleged quotation from said transcript. Appellant did not submit any portions of any alleged transcript into evidence

pursuant to the Utah Rules of Evidence and Utah Rules of Civil Procedure.

It is axiomatic that a party cannot oppose a Motion for Summary Judgment by bare allegations unsupported by competent, admissible evidence. Massey v. Utah Power & Light, 609 P.2d 937 (Utah, 1980); Franklin Financial v. New Empire Development Co., 659 P.2d 1040 (Utah, 1983). Without any evidence of any alleged in-Court admissions of the contract terms properly before the lower court, it could not find that an issue of fact existed on whether there was a sufficient writing to overcome the Statute of Frauds.

In its Supplemental Memorandum in Opposition to Respondent's Motion for Summary Judgment, appellant cites Bentley v. Potter, 694 P.2d 617 (Utah, 1984), in support of the proposition that an admission at trial of an oral contract constitutes a waiver of the Statute of Frauds defense. But Bentley v. Potter requires an admission at trial of the "existence and all the essential terms of the contract". Id. at 621.

Even if the Court considered the citations to the transcript of the prior action as properly before the lower court in order to establish an issue of fact, a reading of the citations made by appellant makes it clear that the testimony relied upon by appellant does not establish the necessary, essential elements of any contract alleged by appellant.

Of singular importance in this case is the determination of which parties, if any, contracted to pay any commission claimed by appellant. Appellant cites the Court to page 528, lines 10-14, as the testimony of Wallace Ohran to establish the parties to the contract. Lines 8-14 of page 528 of the transcript provide as follows:

Q. (By Mr. DeBry) The question was: "Tell me, to the best of your recollection, what was said during the conversation." And do you recall at that time you testified: "I told Mr. Florence that we would agree to sell the property to his buyers and to pay him a 6 percent commission." Was that your testimony at this time we gave [sic] the deposition?

A. (By Wallace Ohran) That was my testimony, that is right.

(Emphasis added)

There is no identification of the parties to the alleged contract in the citation relied on by appellant. Wallace Ohran merely testified that "we would agree to sell the property . . . and pay him a 6 percent commission." Mr. Ohran does not identify who he refers to when he says "we". Mr. Ohran does not state whether "we" is used to denote himself and other individuals in a personal capacity, whether he refers to Monte Vista Ranch, Inc., or whether he refers to other individuals or entities who might have agreed to pay a commission. The parties to any alleged contract are simply not established by the testimony relied upon by the appellant.

The testimony, when read in context, clearly demonstrates that no contract for real estate commission was entered into as was determined at the prior trial of this matter and upheld on appeal. The Statute of Frauds is specifically designed to avoid the fraud and difficulties of proof associated with establishing the terms of any alleged oral contracts. The testimony relied on by appellant does not establish the essential elements of a contract or avoid the potential fraud and uncertainty in proving the terms.

Appellant also claims that performance under the alleged oral contract takes it out of the Statute of Frauds. In Case v. Ralph as cited above, the Court held that performance or part performance of a parol agreement for a real estate commission would not bring the contract outside the Statute of Frauds. This Court has never held that performance was sufficient to take an oral contract for a real estate commission outside the Statute of Frauds.

Therefore, the Court should affirm the dismissal of appellant's Complaint as being barred by the Statute of Frauds.

#### CONCLUSION

Therefore, the Court should affirm the lower court's judgment on the grounds that appellant is collaterally estopped from bringing this action, or alternatively, that appellant is barred by §25-5-4(5), Utah Code Annotated, as

amended, from bringing an action on an oral contract to pay a real estate commission and it cannot recover for said commission on quantum meruit.

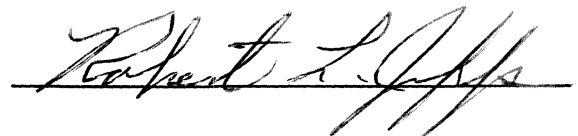
Respectfully submitted this 14th day of November, 1985.

  
Robert L. Jeffs

CERTIFICATE OF MAILING

I hereby certify that ten copies of the foregoing were hand delivered to the Clerk of the Court, Utah Supreme Court, State Capitol Building, Salt Lake City, Utah 84114, and four copies were mailed to the below named parties by placing same in the United States mails, postage prepaid, this 14th day of November, 1985, addressed as follows:

David M. Jorgensen, Esq.  
Robert J. DeBry, Esq.  
Robert J. DeBry & Associates  
Attorneys for Appellant  
965 East 4800 South, Suite 2  
Salt Lake City, Utah 84117



## APPENDIX A

MEL TRIMBLE REAL ESTATE and  
Cal Florence, Plaintiffs and  
Appellants,

v.  
Leland A. FITZGERALD Defendant  
and Respondent.

No. 16746.

Supreme Court of Utah.

Feb. 13, 1981.

Broker and sales agent brought action against purchaser for real estate sales commission. The Third District Court, Salt Lake County, Bryant H. Croft, J., entered judgment in favor of purchaser, and plaintiffs appealed. The Supreme Court, Harding, District Judge, held that: (1) in case in which earnest money agreement between vendor and purchaser provided "Buyer to be responsible for all real estate commissions," instruction given by the court fairly and adequately covered the contentions of the parties as they were presented to the court, and there was no error in refusing to give requested instruction on theory that broker was a third-party beneficiary in earnest money agreement, and (2) issues as to sales commission claimed by broker and whether there should have been any sales commission at all were for the jury.

Affirmed.

### 1. Contracts ⇐87(1)

It is essential for a third-party beneficiary claimant to prove that contract was intended to benefit him directly; one incidentally benefited by performance of a promise to a third person may not maintain an action against the promisor.

### 2. Contracts ⇐87(1)

Terms of agreement and facts circumstances that surround its making can be examined to determine whether supposed third-party beneficiary of contract was in fact intended to be such.

### 3. Brokers ⇐88(7)

In action against purchaser for real estate sales commission in case in which earnest money agreement between vendor and purchaser provided "Buyer to be responsible for all real estate commissions," instruction given by the court fairly and adequately covered the contentions of the parties as they were presented to the court, and there was no error in refusing to give requested instruction on theory that broker was a third-party beneficiary in earnest money agreement.

### 4. Brokers ⇐88(1)

In action by broker and sales agent against purchaser for real estate sales commission, issues as to sales commission claimed by broker and whether there should be any sales commission at all were for the jury.

Robert J. DeBry and Dale F. Gardner,  
Salt Lake City, for plaintiffs and appellants.

Lawrence E. Corbridge, Salt Lake City,  
for defendant and respondent.

HARDING, District Judge.

This appeal is from an adverse judgment on a claim for a real estate sales commission.

Appellants were in the business of selling real estate. Mel Trimble was a licensed real estate broker, and Cal Florence was employed by Trimble as a sales agent. The appellants will be referred to herein jointly as Florence.

The ranch property involved in this action is located in Cedar Valley, Utah, and was under the management and control of Wallace Ohran. Respondent Leland A. Fitzgerald was a rancher.

Two or three years prior to December 1977, Florence allegedly obtained an oral listing from Ohran to sell the ranch property. The terms of the oral listing allowed Florence to seek offers, and if any offer was accepted by Ohran, a six percent commission would be paid on the sale.

In October, 1977, through the efforts of Florence, Fitzgerald became interested in a part of the ranch and an offer was made to Ohran. The offer was unacceptable to Ohran. About December 1, 1977, there was a meeting of Ohran, Fitzgerald and Florence in which Ohran told Fitzgerald he would sell the ranch for \$2,000,000, and that he would pay the sales commission of six percent from the proceeds of the sale. During the course of their discussion, Ohran said that he would reduce the sale price of the ranch to \$1,875,000 if Fitzgerald would pay the commission. Fitzgerald agreed to this proposal. Nothing was put in writing at this time.

On December 7, 1977, Ohran, Fitzgerald, Florence and other interested persons met in American Fork, Utah, in an effort to effect a final sales agreement and to reduce it to writing. Up to this time, there had been no binding contract for a real estate listing, a sales commission, nor for the sale of any property. At this meeting, further discussions ensued. A sales commission for \$125,000 to Florence was mentioned. Florence asked that there be two earnest money agreements: one for Fitzgerald's part of the ranch, and the other for Florence's part of the ranch. Ohran said there would have to be one entire sale. Fitzgerald and Florence retired to another room to discuss the matter between themselves. The testimony is conflicting as to what was discussed at this private conference. About one-half hour later, when they rejoined the others, Fitzgerald said that he would take title to the property and would take care of Florence.

Thereupon, an earnest money agreement was made and executed between Monte Vista Ranch, Inc. (Ohran's principal) and Fitzgerald for the sale of the ranch for \$1,875,000. The agreement had a provision stating, "Buyer to be responsible for all real estate commissions." No further particulars were discussed at the meeting nor stated in the earnest money agreement with respect to a real estate sales commission.

Later that evening, Fitzgerald and Florence had a discussion concerning the purchase that had been made of the ranch, but their testimony is conflicting as to any determination. However, Fitzgerald did give Florence a check for \$5,000. Their testimony is in conflict as to what the check was for.

On August 7, 1978, appellant filed a complaint, alleging that he and Fitzgerald had jointly purchased the assets of the Monte Vista Ranch, Inc., that he was entitled to an accounting, and demanded judgment for his share of the assets. The theory upon which the original complaint was based was later abandoned, and an amended complaint was filed praying for a sales commission in money only of \$125,000. The case went to trial with a jury on the latter theory. A verdict against appellant was returned, upon which judgment was entered. The court denied appellant's motions for judgment notwithstanding the verdict and for a new trial.

[1, 2] Appellant contends that the court erred in failing to give a requested instruction, No. 23, on the specific theory that he was a third-party beneficiary in the earnest money agreement between the seller and Fitzgerald, the buyer of the ranch property. In this regard, it is essential for a third-party beneficiary claimant to prove that the contract was intended to benefit him directly. One incidently benefited by the performance of a promise to a third person may not maintain an action against the promisor. The terms of the agreement and the facts and circumstances that surrounded its making can be examined to determine whether the supposed beneficiary was in fact intended to be such.<sup>1</sup>

The court gave Instruction No. 8, to which appellant excepted. The portions of this instruction relevant here are as follows:

The controversy centers around an earnest money receipt and offer to purchase agreement dated December 7, 1977, by which the corporate owner of the ranch agreed to sell it to defendant for the price stated therein. Among other

1. *Kelly v Richards*, 95 Utah 560, 83 P 2d 731 (1938), 129 A L R 164



things, this agreement contained a provision that defendant, Laland [sic] A. Fitzgerald, as buyer was to be responsible for all real estate commissions. . . .

. . . the court has ruled as a matter of law that the agreement of December 7, 1977, imposed upon defendant the liability for the real estate commission, if any, owed plaintiffs upon this transaction.

Normally, the amount of any such commission would have been as fixed by agreement between the real estate salesman and the parties to the earnest money agreement and should your determination from the evidence be that in this case such was done and agreed to at the time of the execution of that agreement, no one could unilaterally change the agreement, and you should return your verdict accordingly; but should your determination be that while defendant agreed with the seller to be responsible for all real estate commissions at the time the agreement was signed, but that at that time Cal Florence and Leland Fitzgerald were still negotiating with each other with respect to the nature of the transaction as between themselves and how and in what manner and in what amount any such commission was to be paid, you are instructed that they could between themselves make an agreement thereon by which each would be bound irrespective of the intent or belief of the seller, and once such agreement was made, neither could change that agreement without the consent of the other.

Thus, it is your responsibility to determine from the evidence what amount, if any, is owed by defendant to plaintiffs. The burden is upon the plaintiffs to prove by a preponderance of the evidence the basis for, and the amount of, their claim.

[3] After reading the transcript of the trial proceedings, including the testimony of the witnesses, and considering the theories of the parties and the applicable law, we think Instruction No. 8 fairly and adequately covered the contentions of the parties as they were presented to the court. We find

no error in giving Instruction No. 8, and in refusing to give appellants' requested Instruction No. 23.

[4] Appellants' assertion of error in failing to direct a verdict of liability against the defendant is without merit, since there were sharp conflicts in the testimony on the issue of the sales commission claimed by Florence, or whether there should have been a sales commission at all.

The record shows that the verdict of the jury was based on competent, relevant, and admissible evidence; that the trial judge supported the verdict by his denial of appellants' motions for judgment notwithstanding the verdict and for a new trial; and that he accorded to the litigants a fair and full trial, without prejudicial error.

Affirmed. Costs to respondents.

HALL, STEWART and CROCKETT,\* JJ., and HENRIOD, Retired Justice, concur.

MAUGHAN, C. J., and HOWE, J., do not participate herein.

HENRIOD, Retired Justice, and HARDING, Retired District Judge, sat.



Lisa WATTERS, Plaintiff and Appellant,

v.

Clayton N. QUERRY, Jean C. Querry, Charles L. Querry, Elizabeth Hemingway, and David E. Hemingway, Defendants and Respondents.

No. 16897.

Supreme Court of Utah.

Feb. 17, 1981.

Plaintiff sued defendant, whose car had rear-ended plaintiff's, and codefendant,

\* CROCKETT, J., concurred in this case before his retirement, January 5, 1981.