

1997

Mahlon Peck & Family, Inc.; Plaintiffs and Appellants, v. Lloyd R. Brooks, et. al., Defendants and Appellees. : Brief of Appellant

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 970588-CA

THE UTAH COURT OF APPEALS

MAHLON PECK & FAMILY, INC.;

Plaintiffs/Appellants,

v.

LLOYD R. BROOKS, et. al.,

Defendants and Appellees.

BRIEF OF APPELLANT

Civil No. 960400145

Appeal No. 970588-CA

Priority No.

Priority No. 15

BRIEF OF APPELLANT

**APPEAL FROM THE RULING OF THE FOURTH
JUDICIAL COURT OF UTAH COUNTY,
THE HONORABLE JUDGE HOWARD H. MAETANI**

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FILED

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COURT OF APPEALS

PARTIES TO THE PROCEEDING

Mahlon Peck & Family, Inc., the plaintiff/appellant, was the owner of real property who enlisted the services of the defendants to help sell the real property. The corporation is referred to as the "seller."

Lloyd R. Brooks, one of the defendants/appellees, is a licensed real estate agent. Stanley W. Robinson, Donna Robinson, and Denice A. Wilson Jepson, the other defendants/appellees, are the brokers or owners of Century 21 Robinson & Wilson Realty. They are collectively referred to as the "agent."

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STATEMENT OF JURISDICTION

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 78-2-2(j) and Utah Code Ann. § 78-31a-19(3) because the Fourth District Court confirmed an arbitration award and dismissed the seller's complaint with prejudice. This appeal is taken, therefore, as a matter of right pursuant to Rules 3 and 4 of the Utah Rules of Appellate Procedure.

STANDARD OF APPELLATE REVIEW

A. STANDARD OF REVIEW FOR CONFIRMING THE ARBITRATION AWARD

"There is no special standard governing [an appellate court's] review of a district court's decision to confirm, vacate, or modify an arbitration award." Buzas Baseball, Inc. v. Salt Lake Trappers, Inc., 925 P.2d 941, 948 (Utah 1996), quoting First Options of Chicago v. Kaplan, 131 L. Ed. 2d 985, 115 S. Ct. 1920, 1923 (1995). "In reviewing the order this court grants no deference to the district court's conclusions of law but reviews them for correctness." DeVore v. IHC Hosps., Inc., 884 P.2d 1246, 1251 (Utah 1994). Appellate review of the trial court's factual findings is under a clearly erroneous standard. DeVore, 884 P.2d at 1256.

B. STANDARD OF REVIEW FOR REVIEWING ARBITRATOR'S
MANIFEST DISREGARD OF THE LAW.

Manifest disregard of the law is a judicially created doctrine stemming from the statutory prohibition of an arbitrator exceeding his authority. If arbitrators manifestly disregard the law in making their decision, they can be said to have exceeded their authority. Manifest disregard is more than mere error as to the law, the error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. The arbitrator must appreciate the existence of a clearly governing legal principle but decide to ignore or pay no attention to it. Buzas Baseball, Inc. v. Salt Lake Trappers, Inc., 925 P.2d 941, 951 (Utah 1996); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930 (2d Cir. 1986).

C. STANDARD OF REVIEW FOR REVIEWING ARBITRATOR'S AWARD
WHICH VIOLATES PUBLIC POLICY.

The public policy exception is a judicially created ground for vacating an arbitration award. See United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42, 98 L. Ed. 2d 286, 108 S. Ct. 364 (1987). "The public policy exception is rooted in the common law doctrine of a court's power to refuse to enforce a contract that violates public policy or law." Seymour v. Blue Cross/Blue Shield, 988 F.2d

1020, 1023 (10th Cir. 1993). The court must find a well-defined and dominant policy against the described conduct after a review of the relevant laws and legal precedents. *Id.* at 1024 quoting United Paperworkers, 484 U.S. at 44.

STATEMENT OF ISSUES

1. Was it manifest error or a violation of public policy when the arbitrator failed to rule that the agent owed the seller a fiduciary duty to disclose to the seller the agent's prior contacts and agency relationship with the intended buyer regarding the sale of the plaintiff's property?

2. Was it error for the arbitrator to find that the agent's conduct did not constitute a breach of his fiduciary duty in 1) failing to disclose to the seller his prior contacts with the buyer regarding the purchase of the seller's property, 2) failing to make reasonable efforts to ascertain the true value of the seller's property, and 3) failing to seek out other potential buyers for the property?

DETERMINATIVE STATUTES AND CASES

The *Utah Arbitration Act*, Utah Code Annotated § 78-31a-16, provides in pertinent part: "An award which is confirmed, modified, or corrected by the court shall be treated and

enforced in **all** respects as a judgment." (Emphasis added.)

The *Utah Arbitration Act* specifically allows an appeal to be taken from any court order confirming an arbitration award.

Utah Arbitration Act, Section 78-31a-19 reads:

An appeal may be taken by any aggrieved party as provided by law for appeals in civil actions from any court order:

- (1) denying a motion to compel arbitration;
- (2) granting a motion to stay arbitration;
- (3) **confirming or denying confirmation of an arbitration award;**
- (4) modifying or correcting an award; or
- (5) vacating an award without directing rearbitration.

(Emphasis added.)

Utah Code Ann., Section 61-2, outlines certain violations for which real estate brokers or agents can be penalized. Some of the specific violations found in Section 61-2-11 relevant to this case are:

- (1) making any substantial misrepresentation;
- (4) acting for more than one party in a transaction without the informed consent of all parties;
- (16) breaching a fiduciary duty owed by a licensee to his principal in a real estate transaction;
- (17) any other conduct which constitutes dishonest dealing.

Hopkins v. Wardley Corporation, 611 P.2d 1204 (Utah 1980), holds that a real estate broker, as the seller's agent, owed the seller a fiduciary duty of full disclosure of facts

material to the principal's business.

Phillips v. JCM Development Corp., 666 P.2d 876 (Utah 1983), holds that a real estate salesman has a duty to exercise reasonable skill and diligence on behalf of his principal and the principal is justified in relying on information received from the salesman and broker without making independent investigation. Reese v. Harper, 319 P.2d 410, 412 (Utah 1958), states:

[b]ecause of the specialized service the real estate broker offers in acting as an agent for his client there arises a fiduciary relationship between them; it is incumbent upon him to apply his abilities and knowledge to the advantage of the man he serves; and to make full disclosure of all facts which his principal should know in transacting his business.

STATEMENT OF THE CASE

A. Nature of the case.

The seller appeals from an arbitrator's decision which found "no cause of action" when:

1) the real estate agent did not disclose to the seller that:

*--the intended buyer, an acquaintance of 25 - 30 years, first enlisted the agent to find property for the buyer;
*--the intended buyer and the agent looked at various parcels before the buyer asked the agent to approach the seller to see if the seller wanted to sale his property;

2) and, after the agent signed a listing agreement with the seller claiming to solely represent the seller, the agent:

- *--provided no market analysis to the seller;
- *--recommended accepting an earnest money in an amount less than the industry standard;
- *--assisted in arranging a note for the balance of the purchase price with an interest rate that was less than the industry standard;
- *--did not place any "for sale" signs on the property;
- *--did not do any advertising or prepare any flyers for the property;
- *--took no action to formalize the rezone from agricultural land to commercial land for 15 months;
- *--did not propose any counter offers on behalf of the seller even though the buyer needed two extensions to arrange financing and the sale did not close for 17 months during a time of explosive growth in the Utah Valley real estate market;
- *--RELISTED THE PROPERTY FOR SALE FOR \$425,000 FOR THE BUYER ONLY 6 1/2 MONTHS AFTER THE CLOSING WHERE THE BUYER PURCHASED THE PROPERTY FROM THE SELLER FOR ONLY \$134,880, A 315% INCREASE IN JUST OVER SIX MONTHS.

B. Course of Proceedings and Disposition Below.

The seller filed a complaint against the agent seeking damages for the agent's breach of his fiduciary duty, fraudulent non-disclosure, fraudulent misrepresentation, breach of his statutory obligations as a real estate agent under Utah Code Ann. § 61-2-11, and unjust enrichment. Subsequently, the parties agreed in arbitration. On or about January 15, 1997, the parties appeared before Stephen Nebeker for an arbitration hearing. On or about April 9, 1997, the arbitrator issued an opinion. The opinion declared that sellers had no cause of action against the agent, and denied seller's claims. The agent submitted a Motion to Confirm Arbitration Award and Enter Judgment of Dismissal with

Prejudice to Judge Howard Maetani on or about May 14, 1997. Because none of the statutory grounds specifically set forth in the *Utah Arbitration Act* for a trial court to modify or vacate the arbitration award directly apply in the present case, the seller did not move the trial court to modify the award. Judge Maetani entered the final judgment confirming the arbitrator's award on or about July 23, 1997. On or about August 22, 1997, the appellant filed a notice of appeal.

C. Statement of Facts.

1. Lloyd Brooks, a real estate agent, had an ongoing relationship with Carl Mellor, the intended buyer in this matter, having known him for "25 - 30" years. Brooks at 14. Additionally, the agent had represented, the intended buyer in a previous real estate matter. Mellor depo at 13; Brooks depo at 15.

2. During September or October of 1990, the buyer approached the agent several times and requested the agent's assistance in obtaining some commercial land on which to relocate the buyer's business. The two men looked through the agent's current listings and found nothing of interest. Brooks depo at 16, 19; Mellor depo at 14.

3. The buyer specifically asked the agent to approach the seller Peck to determine if his family corporation's

property was for sale, and the agent did so. The intended buyer testified:

Q. So, did you ask him [the realtor] to look for the Peck property.

A. Yes, I did ask him to look. And I said, "I'd like to see if this property is for sale."

Q. Did you know who the owners were at that time?

A. Yes.

Q. And did you approach Mr. Brooks to assist you in finding out the details of that property?

A. Yes.

Mellor depo at 14-16.

4. The buyer had established an amount of \$15,000 per acre as the maximum amount he was willing to pay for the prospective property. He testified:

A. I told Lloyd that I would not pay more than 15,000 an acre, told him to try to get it for 12, and that I would not go over 15. And he came and said that they were asking for 16. And I was - - it was over my figure.

Q. So your figure was 15,000 then?

A. That was what I had programed myself to go.

Mellor depo at 17.

This amount was based solely on the amount the buyer "could afford" to pay and not on any estimate of the property's value. Id. at 46.

5. The seller indicated a willingness to sell the property, but not for the \$14,000 per acre price indicated by

the agent. The agent informed the seller that, dependent upon the annexation of the property into the City of Lehi and rezoning it as commercial, \$16,000 per acre would be the top selling price for the property. The seller relied on the agent's expertise as a realtor in determining that \$16,000 per acre was a fair price for his property. Brooks depo at 25-26; Peck depo at 32.

6. The seller and the agent entered into a seven-month listing agreement on October 25, 1990. Exhibit "3."

7. Paragraph 10 of the listing agreement, entitled "Agency Disclosure," which was filled out by the agent, indicates that the agent represented only the seller and that written disclosure of the agency relationship was provided to the seller.

8. At all times prior to and including the closing of the sale from the seller to the buyer, the agent represented himself as the seller's exclusive agent. Complaint and Answer, paragraphs 1 and 25.

9. The agent did not disclose to the seller that the buyer had previously asked the agent to determine whether the seller's land was for sale nor did he disclose that the buyer had already set a maximum price of \$15,000 per acre.

10. Following verbal communications between the agent and the buyer, an Earnest Money Sales Agreement was entered into between the seller and the buyer, with the price established at \$16,000 per acre. The Earnest Money Sales Agreement set a closing date of May 31, 1991. Exhibit "2".

11. Two extensions were granted, extending the closing date through March 1992. Exhibits "6" and "8." The closing occurred in March 1992, almost a year and a half after the original Earnest Money Sales Agreement was signed.

12. At the time the Earnest Money Sales Agreement was signed, commercial and residential real estate values were increasing significantly throughout Utah County. By the date of the second contract extension in September 1991, land values were increasing by 1% per month. Brooks depo at 79.

13. Between the time the earnest money contract was signed and the date of the closing, the seller's property was annexed into the City of Lehi, rezoned as commercial, and the new Lehi I-15 was constructed, increasing the value of the property. Complaint and Answer, ¶ 17; Exhibit "11."

14. The rezone was granted by Lehi City at the seller's request and at the urging of the agent because commercial zoning, according to the agent, was the "highest value of the property" and the agent "thought we could get (seller) pretty

good money out of the property by annexing into the city and zoning it commercial." Brooks depo at 42-44.

15. The seller had the right to change the conditions of the sale, including the price of the property, at either time he signed an extension on the sale, and he had no obligation to relist the property with the agent. Brooks depo at 39. However, the agent failed to explain these options to the seller.

16. Despite the fact that property values had increased dramatically and that rezoning the property had further increased its value, the agent did not recall doing any research to determine if the property had gone up in value at the time of the signing of the last extension. Brooks depo at 46.

17. In the listing agreement entered into between the agent and the seller, the agent agreed to use reasonable efforts to sell the land. Exhibit "3." Reasonable efforts typically include placing a "for sale" sign on the property, among other things such as preparing flyers and advertising. Brooks depo at 13-14; Exhibits 19 and 20. These things were not done for the seller. (They were done later on the relisting.) Additionally, despite having some inquiries about the property, the agent did not make an attempt to procure a

"backup offer" as is typically done in case the original sale falls through. Brooks depo at 36-37.

18. Only six months after closing the seller's sale of the property to the buyer, the agent again listed the property for sale, this time for the buyer. The property was listed at \$425,000, 315% more than the amount that the agent had sold the property for only six months earlier. Exhibit 17.

19. The buyer received several offers for the property in excess of \$275,000. Mellor depo at 40-45; Exhibits 21-27. A sale closed in November 1994 for almost \$38,000 per acre. Mellor depo at 45.

20. The agent received a commission for the subject property in both the sale for the seller and the subsequent sale for the buyer. Mellor depo at 37-38.

SUMMARY OF ARGUMENT

Although the Utah Supreme Court has previously recognized the "longstanding public policy favoring speedy and inexpensive methods of adjudicating disputes," Allred v. Educators Mut. Ins. Ass'n, 909 P.2d 1263, 1265 (Utah 1996), it has also suggested that review may be necessary to assure the "proceeding was fair and honest and the substantial rights of the parties were respected." DeVore v. IHC Hosps., Inc., 884 P.2d 1246, 1251 (Utah 1994). As indicated in *Buzas Baseball*

v. Salt Lake Trappers, 925 P.2d 941, 951 (Utah 1996), federal courts have recognized "manifest disregard of the law" as a ground for review. "Manifest disregard of the law is a judicially created doctrine stemming from the exceeding authority statutory ground." *Id.*, citing *Wilco v. Swan*, 346 U.S. 427, 436-37.

The Utah Supreme Court has also ruled that there is a public policy exception for overturning an arbitration award. The basis of this exception is the common law doctrine that the courts have the power to refuse to enforce an arbitration opinion that violates public policy or law. *Buzas Baseball v. Salt Lake Trappers*, 925 P.2d 941, 951 (Utah 1996). This exception allows the courts to maintain the integrity of public policy standards that have been established in Utah. In Utah it is a well-defined public policy that a real estate agent has a fiduciary duty to his principal and that he should honor that obligation or be held responsible for the breach of that duty. The arbitrator's decision in this case violates this public policy. To allow this arbitration decision to stand would set aside both statutory and case law precedents that work to maintain a public policy which protects innocent parties from real estate agents who engage in nefarious practices. Public policy is against allowing realtors to use

their license as a badge to defraud innocent people instead of the badge of competence and integrity that it should be.

ARGUMENT

I. AN ARBITRATOR'S DISREGARD OF THE LAW IS BASIS FOR A REVERSAL OF THE ARBITRATION AWARD.

The purpose of this appeal is not to challenge the factual findings of the arbitrator, but to bring before the Court an issue of law regarding the existence and breach of a fiduciary duty owed by the agent to the seller. In a recent case, the Utah Supreme Court left open the issue of whether manifest disregard of the law, a judicially created doctrine, may provide grounds for reviewing an arbitration award. In footnote 8 of Buzas Baseball, 925 P.2d 941, the Court states that it reserves the issue of whether manifest disregard of the law is recognized in Utah.

Given that the statute specifically provides that an award confirmed by a court should be treated in all respects the same as a judgment, *Utah Code Ann.*, § 78-31a-16, awards that disregard established law should be subject to appellate review. Public policy should require that an arbitration award not manifestly disregard clearly established statutes and judicial decisions dealing with the same situation.

The seller recognizes that public policy supports the use of arbitration as a speedy and inexpensive method of settling disputes. That policy objective, however, can only be achieved if arbitrators are not allowed to manifestly disregard the law, as defined by this Court. Otherwise, participants will soon perceive that the arbitration process and the unreviewable decisions of a renegade arbitrator lack consistency, predictability and fairness.

The perception that arbitration results in unfair decisions that disregard controlling law will defeat arbitration's purpose as an efficient just and cost-effective alternative to traditional litigation. Potential litigants will be extremely reluctant to participate in a process they may agree is less expensive than traditional litigation, but that will not result in fair decisions or protect the rights of all parties. Similarly, the public is likely to refuse to accept mandatory arbitration provisions that could otherwise be included in many contracts. By allowing the doctrine of manifest disregard of the law to be a basis of review and requiring arbitrators to not disregard clearly established lines of legal precedent, this Court can monitor and preserve a measure of predictability, which is necessary to establish confidence in the arbitration process.

In the present case, the arbitrator manifestly disregarded clear Utah law on the existence and breach of the fiduciary responsibility of a real estate agent towards his principal. This disregard of the law should allow the arbitration award to be appealed so that an obvious and readily perceivable error may be corrected and the legitimacy of the arbitration process may be maintained.

As the Supreme Court's recent ruling in *Buzas* specifically reserved the issue of whether or not manifest disregard of the law is grounds for appeal, the seller addresses below the arbitrator's highly questionable application of Utah law to the facts of the case. The Court should therefore issue a ruling holding that manifest disregard of the law may provide grounds for appellate court review of arbitration awards.

II. IT WAS ERROR FOR THE ARBITRATOR TO MANIFESTLY DISREGARD THE LAW.

Along with the public policy exception the Buzas court also recognized that the theory of manifest disregard of the law may also provided a basis for vacating or modifying an arbitration award. Buzas Baseball, 925 P.2d at 951. The basis for this exception stems from the idea that an arbitrator cannot exceed his authority. Id. Although the

supreme court noted that the bounds of this doctrine have never been defined, it did set out certain criteria in applying the exception.

The court found that more than a simple error or misunderstanding of the law must be shown. The error must be obvious in nature and readily perceivable by an average person qualified to be an arbitrator. Further, it must be shown that the arbitrator, knowing of the law, decided not to pay attention to it. Id. These requirements are satisfied by the facts of this case.

In seller's pre-arbitration brief, the seller specifically presented the issues of whether it was a breach of his fiduciary duty for the agent to fail to disclose prior relations with the buyer, fail to seek out other buyers, and fail to ascertain the fair market value of the property. During the arbitration the seller carefully and thoroughly presented the status of the law on a realtor's fiduciary duty and what constituted a breach of that duty. Using both statutes and case law, the seller presented evidence that made it clear that all three of the agent's failures constituted breaches of a realtor's fiduciary duty. Throughout the course of the arbitration, the seller presented evidence establishing that all three of these failures occurred. While the

arbitrator's opinion does refer to the fair market value of the property, he makes absolutely no reference to findings on the other two issues.

In this case the arbitrator simply chose to ignore the clearly defined law. The arbitrator did not say that the seller had made an effort to determine the fair market value. The arbitrator did not say that the seller had disclosed his relationship with the buyer or that he had tried to find other buyers. Utah law clearly states what constitutes a breach of the fiduciary duty of a realtor. That law was made known to the arbitrator. Facts establishing the failures of the agent were clearly presented. The arbitrator simply did not apply the law to those facts but he applied his own definition of what constitutes a breach in disregard of the obvious and readily perceivable law.

An arbitrator cannot set his own definition of the law above firm precedents and clear statutory language. He cannot manifestly disregard the controlling authority on the issue upon which he is ruling. In Jenkins v. Prudential-Bache Sec. Inc., 847 F.2d 631 (10th Cir. 1988), the 10th Circuit articulated the same standards for the use of the manifest disregard theory as were set out by the Utah Supreme Court in Buzas, but also went on to point out that the United States

Supreme Court has stressed that an arbitrator does "not sit to dispense his own brand of [arbitrary] justice." The court also noted that an award is legitimate only so long as it draws its essence from the controlling authority. Jenkins 847 F.2d at 634 (quoting United Steelworkers or America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

In the face of obvious and readily perceivable authority, the arbitrator decided to apply his own definition of what constituted a breach of a realtor's fiduciary duty. These actions on the part of the arbitrator constitute a manifest disregard of the law and as such the award should be vacated.

III. CONFIRMATION OF THE ARBITRATION AWARD IS CONTRARY TO PUBLIC POLICY

In Buzas Baseball v. Salt Lake Trappers, 925 P.2d 941, 951 (Utah 1996), the Utah Supreme Court ruled that there was a public policy exception for overturning an arbitration award. The basis of this exception is the common law doctrine that the courts have the power to refuse to enforce an arbitration opinion that violates public policy or law. Id. This exception allows the courts to maintain the integrity of public policy standards that have been established in Utah.

The Supreme Court has indicated that for this exception to apply, the court must find a well-defined and dominant public policy that would be negatively impacted by the

arbitration award. Relevant laws and legal precedents are to be reviewed in determining if a dominate public policy is involved in an arbitration award. Id. After reviewing the facts of this case in light of Utah law, it is apparent that the arbitration opinion in this case does have a negative impact on a clearly defined public policy.

In Utah it is a well-defined public policy that a real estate agent has a fiduciary duty to his principal and that he should honor that obligation or be held responsible for the breach of the duty. This policy is clearly established in statutory law and in legal precedent. U.C.A. § 61-2-11 (1997); Hopkins v. Wardley Corp., 611 P.2d 1204 (Utah 1980); Reese v. Harper, 329 P.2d 410 (Utah 1958); Phillips v. JCM Development Corp., 666 P.2d 876 (Utah 1983); Swallows v. Laney, 691 P.2d 874, (N.M. 1984); Jones v. Maestas, 696 P.2d 920 (Idaho App. 1985); Adams v. Cheney, 661 P.2d 434 (Mont. 1983).

The Utah Code has recognized the fact that a real estate agent has a fiduciary duty and establishes harsh penalties for the breach of that duty. Utah Code Ann. § 61-2-11(16) allows the Division of Real Estate to impose penalties on a real estate broker who is guilty of "breaching a fiduciary duty owed by a licensee to his principal in real estate transactions." The penalties that can result from a breach

of the duty may include suspension or revocation of the broker's license or probation. Utah Code Ann. § 61-2-11. There are also criminal penalties since a breach of the fiduciary duty as a violation of this section of the code is a Class A misdemeanor. Furthermore, individuals injured by a breach of the fiduciary duty may recover triple damages. See Utah Code Ann. § 61-2-17(4). The serious treatment of a real estate agent's fiduciary duty in the Utah Code establishes Utah's strong public policy that a real estate agent should be considered a fiduciary of his principal and that he honor that duty.

The case law in Utah also clearly establishes a strong public policy in favor of regulating a real estate agent's relationship with his principal. Reese v. Harper, 329 P.2d 410 (Utah 1950), established the clear precedent that a fiduciary relationship exists between a realtor and his clients. Reese discussed that fiduciary duty and established that a realtor must use his skill exclusively to advance the interest of his principal, for "it is incumbent upon [the agent] to apply his abilities and knowledge to the advantage of the man he serves; and to make full disclosure of all facts which his principal should know in transacting the business." Id. at 412.

The Reese court quoted with approval a Virginia case that stated it is the agent's "duty to inform his principal of all facts which might influence his principal in accepting or rejecting the offer." Id. at 413 (quoting *Duncan v. Barbour*, 49 S.E.2d 260, 265).

The unique fiduciary duty owed by a real estate agent to his client was stressed by the court in Reese because an agent licensed by the state is permitted "to hold himself out to the public as qualified by training and experience to render a specialized service in the field of real estate transactions." Id. at 412. The court went on to state:

There rests upon him the responsibility of honestly and fairly representing the interests of those who engage his services . . . [and] persons who entrust their business to such agents are entitled to repose some degree of confidence that they will be loyal to such trust and that they will, with reasonable diligence and in good faith, represent the interests of their clients. Unless the law demands this standard, instead of being the badge of competence and integrity it is supposed to be, the license would serve only as a foil to lure the unsuspecting public in to be duped by people more skilled and experienced in such affairs than are they.

Both Utah statutes and case law recognize the existence and significance of a realtor's fiduciary duty to his client. The public policy behind imposing a fiduciary duty and applying penalties for the breach of that duty on those realtors licensed by the state assure that the integrity of the state

license is maintained and that the citizens of Utah are protected. A major public policy question in this case is whether a realtor has been allowed to hold out his Utah license as a foil and whether a Utah citizen looking to sell his property so he could retire has been protected as the state intended.

While it is clear that such a duty is breached when a realtor withholds or fails to fully disclose information pertinent to the sale, this is not the only conduct which can result in a breach of fiduciary duty. In *Smith v. Carroll Realty Co.*, 335 P.2d 67 (Utah 1959), the Utah Supreme Court specifically outlined another of a realtor's duties to his principal. The court in *Smith* found that a realtor has a duty to "determine the reasonable value of the property." *Id.* The court made it clear that the realtor's failure to do so would not be justified even if he had merely neglected to obtain the reasonable market value of the property. *Id.* at 69. Mr. Brooks, the agent in the case at hand, as a realtor, had a duty to the seller to take significant steps to ascertain the reasonable fair market value of the property in question. According to the Utah Supreme Court in *Smith*, the seller in the case at hand was justified in relying on the price provided by the agent, a realtor "more skilled and experienced

in such affairs" than he and his wife. In *Reich v. Christopulous*, 256 P.2d 238 (Utah 1953) the Utah Supreme Court stated the real estate agent "had a duty to represent (the seller's) interest in good faith, to discharge it with reasonable skill and diligence and to disclose to them all pertinent facts which would have materially affected their interest." *Reich*, see also *Smith*, 335 P.2d at 68.

The arbitration award in this case would work against these public policies. The record shows that the agent had a fiduciary duty to the seller and that he failed to disclose his prior contact with the buyer. The record also shows that the agent failed to make a reasonable effort to seek out other potential buyers, and that he failed to take any steps to determine the true fair market value of the property. All of these actions breach the agents' fiduciary duty to the seller. To allow this arbitration opinion to stand would set aside both statutory law and case law precedents that work to maintain a well-defined public policy in Utah.

IV. IT WAS ERROR FOR THE ARBITRATOR TO FIND THAT THE AGENT DID NOT OWE SELLER GENERAL FIDUCIARY DUTIES.

In addition to the statutes governing breach of fiduciary duty by a realtor there are several Utah cases which also address the issue. Reese discusses the fiduciary duty between a broker and his principal. A realtor must use his skill

exclusively to advance the interests of his principal, for "it is incumbent upon [the agent] to apply his abilities and knowledge to the advantage of the man he serves; and to make full disclosure of all facts which his principal should know in transacting the business." Reese at 412.

The agent clearly committed a breach of his fiduciary duty by failing to determine a reasonable value for the seller's property. The failure to do so not only netted the agent two commissions on the same property within a matter of months, but it also netted his long-time client and friend, the buyer, a whopping profit. The agent also failed to disclose to the seller that the seller was not obligated to go through with the sale and had the option to renegotiate each time the earnest money sales agreement expired and was extended. The agent failed to inform the seller that he could easily get more than \$16,000 per acre for his land, which the agent himself must have believed, since he testified real property was appreciating at 1% per month. The agent's breach is also evidenced by his listing the very same property for more than three times the selling price only six months after the sale to the buyer was finalized.

The seller's reliance on the agent's misrepresentations concerning facts material to the transaction caused the seller

to sell his land at a price that was far less than the true fair market value.

- V. IT WAS ERROR FOR THE ARBITRATOR TO FIND THAT THE AGENT'S CONDUCT DID NOT CONSTITUTE A BREACH OF HIS FIDUCIARY DUTY TO THE SELLER.

At the time the original Earnest Money Sales Agreement was signed, commercial and residential real estate values were increasing throughout Utah County. Northern Utah County, where the seller's land is located, experienced the greatest increase in value due to its proximity to Salt Lake Valley. Between the 1990 listing and when the first contract extension was signed in May 1991, land values in Utah County had increased 11.53%. Exhibit 30. By September 1991, when the second contract extension was signed, land values had increased even more. In addition to this general increase in land values, during this same period seller, had accomplished the annexation of the land into the City of Lehi, the property was rezoned as commercial, and the new Lehi freeway interchange was being constructed. These factors had the effect of further increasing the value of the land.

During the year and a half that it took agent to finally complete the sale of the property to the buyer, the agent never once informed the seller that real estate values in the area had drastically increased. Neither had the agent

disclosed to the seller that his land had gone up in value because it had been annexed into the City of Lehi, rezoned as commercial, and the proximity of the property to the new I-15 freeway interchange. The agent had an affirmative duty to make those disclosures to the seller, yet he failed to do so. His silence breached his duty to his seller. The agent, as a realtor by profession, obviously was aware of the value of real estate and the upward trend of the marketplace for land in northern Utah County. He understood that the value of land in the area was going up for a number of reasons, including the construction of the new freeway interchange nearby, the rezoning of the property, and the general increase in property value in the area. If, for some reason, the agent was unaware of the true value of the land, or how the rezoning and freeway interchange would affect the value of the land, he had a duty to make all reasonable efforts to ascertain the increasing reasonable value of the land. The agent, however, could not recall doing any research that would have helped determine whether the seller's property had increased in value during the period of time following the signing of the original Earnest Money Sales Agreement. Brooks depo at 46. According to the Utah Supreme Court in Smith, the agent had a duty to determine the increasing value of the seller's property and to

disclose this information to seller, his client. The agent failed to do so and thereby breached his fiduciary duty to the seller.

The agent further breached his fiduciary duty to the seller by failing to disclose a conflict of interest which existed by reason of (a) the agent's real estate and business dealings with the buyer immediately prior to this transaction; and (b) that the buyer had previously contacted the agent, requesting that agent look for land suitable for the buyer's needs at a predetermined price, specifically requesting that the agent inquire about the seller's property, prior to the agent's contacting the seller and listing the seller's property.

The buyer approached the agent and told the agent he was looking for property on which to locate his business. Brooks depo at 15. The two men searched a listing of properties the agent had for sale, but found nothing of interest to the buyer. Id. at 16. The buyer then asked the agent to determine whether several pieces of land, including the seller's property, were for sale. Mellor depo at 14-15. The buyer set the price he was willing to pay for the property. Only after the buyer requested that the agent inquire about the seller's property did the agent approach the seller about

selling his property. As an agent for the buyer, the agent should have disclosed his conflict of interest to the seller, yet he not only failed to do so, he affirmatively misrepresented his agency by his own hand on paragraph 10 of the Earnest Money Sales Agreement. Exhibit "3." This failure constituted yet another breach of the agent's fiduciary duty to the seller.

Furthermore, the agent breached his fiduciary duty to the seller by failing to inform the seller that he was under no obligation to go through with the sale under the terms of the original Earnest Money Sales Agreement once that agreement had expired. In his deposition, agent acknowledged that seller was under no such obligation. Brooks depo at 39. Upon the expiration of the original Earnest Money Sales Agreement, the seller could have renegotiated the price of the land, declined to sell at all, or changed realtors had he known of his agent's conflict. The agent failed to disclose these options to the seller and the seller agreed to extensions on the sale without seeking any other changes in terms. The seller signed the extensions without being advised that it would be in his best interest to let the contracts expire and place the land on the market at a price more in line with the true market value.

The seller rightfully relied on his agent to have the knowledge and expertise to determine the fair market value of the land, or to conduct a proper inquiry to determine the fair market value of seller's land. The seller relied on his agent to aggressively represent the interests of the seller, not to mislead him in order to help the subsequent buyer get a bargain price on the land. The seller was led to believe by the statements and actions of the agent that the agent was working for him and him alone. Utah law holds these assumptions and beliefs on the part of the seller to be reasonable and valid by reason of the fiduciary duty owed by the agent to the seller. The agent's conduct clearly constituted a breach of that fiduciary duty.

The agent's breach of fiduciary duty cost the seller \$74,991.06, the difference between the price the seller received for his land and the appraisal price on the date of the last extension. In addition, the seller is entitled to interest on this amount from the date of the sale of the property to the buyer. Furthermore, under Utah Code Ann. § 61-2-17(4) the seller was entitled to three times the commission received by the agent from the two sales as treble damages because the agent profited from the breach of his fiduciary duty and his duty of loyalty to the seller. T h e

arbitrator failed to consider the impact that Brooks' dual agency had on the sales price of the property. The arbitrator did not adequately address whether the sales price was reasonable in light of the circumstances. Whether or not the price defendants set for the Peck property was reasonable depends upon whether the highest and best use of the property is for commercial or residential use. The evidence in the record indicates that all parties acknowledged that the property was suited for commercial use and that it was "worth much more" as commercial. Brooks depo at 25, 42, 43.

1. The property was identified by Brooks and Mellor as a desirable location for Mellor's commercial use. Mellor depo at 16; Brooks depo at 17.

2. Don Gurney, an appraiser with over twenty years experience and ten years of specialization in the appraisal of commercial property in Utah County, concluded that the highest and best use of this property is commercial. Guerny appraisal at 9.

3. Mellor, the buyer, determined that the property was well suited for his commercial business. He bought the land for commercial use and turned around and sold it as commercial property.

4. Robert Young, a potential purchaser was willing to pay \$275,000.00 for the property as commercial land. Earnest Money Agreement, Seller's Arbitration Exhibit 21; Mellor depo at 41.

5. The subsequent purchasers of the property, Allred and Robbins, also believed the Peck land to be desirable as commercial property and paid \$320,000 for it. Mellor depo at 45.

The only person who believes that this property, situated along the State Street corridor and within sight and hearing of I-15, was best suited for residential use is Kent Carpenter. The appraisal by Carpenter takes the astounding position Peck's property is best suited for residential use rather than commercial use. Carpenter appraisal at 27. Carpenter takes that position even though he notes that approval for the commercial zoning and annexation by Lehi was "virtually assured" and that the annexation and rezone could have been obtained at "any time." Carpenter appraisal at 23, 77.

Carpenter's conclusion that the property is best suited for residential use is not surprising considering his very limited experience in conducting commercial land appraisals. Carpenter stated that this appraisal was only his fifth

commercial land appraisal in Utah. This was his first ever in Utah County. His prior experience was in California where he reviewed appraisals done by others. In contrast to Mr. Gurney's twenty years of continuous work as an appraiser, Mr. Carpenter is no longer working as an appraiser. Carpenter had not lived in Utah since 1981. He had, in fact, only moved back to Utah in 1995, the same year he was hired by the defendant to conduct this appraisal. The Utah County market which Carpenter was acquainted with in 1981 was very different then the same market in 1992. Carpenter was not present in Utah or Utah County during the time in question to feel the energy that was stimulating the real estate market to record levels.


CONCLUSION

The arbitration award is subject to review by the Utah Supreme Court under the judicially created doctrine of manifest disregard of the law doctrine. The agent did owe a fiduciary duty to the seller to disclose his prior relationship with the buyer regarding the sale of the seller's property, to make reasonable efforts to seek out other potential buyers, and to make reasonable efforts to ascertain the true fair market value of the property. The facts show that the agent's conduct in affirmatively concealing his prior

contacts with The buyer regarding the possible purchase of the seller's property, failing to seek out other potential buyers for the property, and failing to make reasonable efforts to ascertain the true value of the seller's property constituted a breach of his fiduciary duty to seller.

DATED this 13 day of March 1998.

DUVAL HANSEN WITT & MORLEY, P.C.



GORDON W. DUVAL
Attorney at Law

CERTIFICATE OF SERVICE

I certify that on March ____, 1998, I caused a true and correct copy of the BRIEF OF APPELLEE to be mailed via first class to:

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Secretary

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