

2001

Ines C. Fowler v. Harold W. Taylor : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH SEP 15 1976

INES C. FOWLER,

Plaintiff-
Respondent,

v.

HAROLD W. TAYLOR, dba
HAL TAYLOR ASSOCIATES,

Defendant-
Appellant.

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

Case No. 14399

BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT
OF THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH
HONORABLE GEORGE E. BALLIF, JUDGE

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INES C. FOWLER,

v.

Defendant-
Appellant.

Case No. 14399

The Court also awarded Respondent judgment against Appellant on Respondent's second cause of action in the additional amount of \$1,373.75 for a real estate sales commission, and Respondent's costs of court in the amount of \$46.00. This appeal contests only that portion of the judgment awarding Respondent \$9,715.25 for a real estate broker's commission pursuant to Respondent's first cause of action.

RELIEF SOUGHT ON APPEAL

Appellant seeks:

(1) Reversal of that portion of the judgment ordering that Respondent recover from Appellant a real estate broker's commission in the amount of \$9,715.25 pursuant to Respondent's first cause of action, and a judgment in his favor of no cause of action as a matter of law; or

(2) An order reducing the amount of such recovery to zero; or

(3) An order reducing the amount of such recovery to \$250.00; or

(4) An order reducing the amount of such recovery to \$1,965.25; or

(5) A new trial.

STATEMENT OF FACTS

The Official Report of Proceedings in the Trial Court will be referred to throughout this Brief by the letter "T." followed by the number of the specific page or pages referred to. Exhibits will be referred to as "Ex." followed by the number of the specific exhibit or exhibits referred to. The defendant-appellant and the plaintiff-respondent will be referred to throughout as "Appellant" and "Respondent," respectively.

Respondent was first licensed as a real estate salesman in Utah in November of 1967, and was so licensed continually thereafter until January 1, 1973. T. 26, 29, 84. In 1971, Respondent took and passed the Utah Real Estate Broker's Examination, but did not activate her real estate broker's license at that time. T. 29. In September of 1971, Respondent went to work for Treasure Mountain Corporation as a real estate salesman. T. 29.

Appellant was first licensed as a real estate salesman in Utah in 1958, and became the director of real estate sales for Treasure Mountain Corporation in July of 1972. At that time, Appellant became Respondent's supervisor in the Treasure Mountain Corporation sales office. T. 144, 145. In August of 1972, Appellant

activated his Utah real estate sales license, and was so licensed continually thereafter until February 19, 1973. T. 35, 171.

Effective October 20, 1972, Treasure Mountain Corporation registered for sale with the Utah State Department of Business Regulation and the United States Securities and Exchange Commission certain real estate securities commonly known as the Crescent Ridge and Payday Condominiums, located in Park City, Utah. T. 6, 7, 45. Also effective October 20, 1972, both Appellant and Respondent were licensed as securities salesmen under Treasure Mountain Corporation. Appellant was so licensed until December 14, 1972, and Respondent was so licensed until January 1, 1973. T. 7, 8, 170.

On December 14, 1972, Appellant was licensed by the appropriate Utah State and federal agencies as a securities broker-dealer. T. 112, 170.

At no time pertinent hereto did Respondent have any written agreement with anyone pursuant to which she would act as either a securities broker-dealer or a real estate broker. T. 62.

Within approximately one week prior to December 20, 1972, Appellant contacted a friend of his, Robert Monson, a licensed Utah real estate broker, and inquired of him whether he would be willing to "broker" for Appellant's sales organization until

Appellant could qualify for his own Utah real estate broker's license. Mr. Monson indicated that he was willing to so broker for Appellant. Mr. Monson was willing to so act at no charge to Appellant. T. 80, 81, 111.

Prior to December 20, 1972, Appellant and Treasure Mountain Corporation officials entered into negotiations to have Appellant act as an independent contractor for the purpose of marketing the subject real estate securities. T. 45, 46, 147, and Ex. 7, 12.

Prior to December 20, 1972, Respondent knew that Treasure Mountain Corporation and Appellant intended to enter into an agreement pursuant to which Treasure Mountain Corporation would retain Appellant to act as an independent contractor for the purpose of marketing the subject real estate securities, and that the aforesaid securities registration was being amended accordingly. Respondent also knew that Appellant was to receive a total commission of 3.5% on all sales made by him and his sales personnel, of which 2.5% would be paid to the salesman making the sale and 1% would be retained by Appellant. T. 35, 69-72, and Ex. 7.

Prior to December 20, 1972, Respondent knew that even though she held a license as a securities salesman and a license as a real estate salesman, and

even though Appellant held a license as a securities broker-dealer, she still would not be able to sell any of the subject real estate securities as one of Appellant's sales personnel unless she or someone else acted as a real estate broker for Appellant's sales organization, and that both a real estate broker's license and a securities broker-dealer's license were necessary for Appellant's sales organization in order for her to make any sales of the subject real estate securities. T. 85, 87.

Prior to December 20, 1972, Respondent and other salesmen in Appellant's sales organization had been waiting a considerable amount of time for the subject real estate securities to be effectively registered as securities and for all sales personnel to be properly licensed to sell. T. 110.

Prior to December 20, 1972, in addition to Respondent, another of the real estate salesmen in Appellant's sales organization was eligible to activate his real estate broker's license. T. 152.

On December 20, 1972, Appellant asked if he could "use" Respondent's real estate broker's license and requested her to activate such license with the Real Estate Division of the Utah Department of Business Regulation. Respondent agreed to Appellant's request, whereupon Appellant completed the necessary paperwork,

which Respondent signed, and which paperwork was then filed with the Real Estate Division. Respondent's real estate broker's license fees and bond were paid for by Appellant. T. 30, 31, 152, and Ex. 20.

On December 20, 1972, at the time Appellant requested and Respondent agreed to activate her real estate broker's license, no mention was made by anyone of any commission or other compensation to be paid to Respondent for her acting as a real estate broker for Appellant's sales organization, and there was no express agreement, written or oral, between the parties that any such commission or compensation would be paid.

T. 34, 69, 84, 153. The Trial Court took judicial notice of the fact that Rule 19 of the Rules and Regulations issued by the Real Estate Division of the Department of Business Regulation requires that real estate brokers are required to provide their salesmen with the written terms of their employment arrangement in order to avoid any misunderstanding. T. 224, 225. Respondent admits that she should have insisted on a written agreement between her and Appellant with respect to any commissions or compensation due her for her acting as a real estate broker for Appellant's sales organization.

T. 84.

Shortly after December 20, 1972, Appellant completed the necessary paperwork to open a real estate

broker's trust account for which Respondent would be responsible, and both Appellant and Respondent signed the signature card. Appellant alone provided the funds necessary to make the initial deposit in the trust account, and no additional monies were ever deposited in the account. T. 35, 68, 69.

Effective December 29, 1972, amendments to the aforesaid October 20, 1972, securities registration and prospectus were amended as planned, and Treasure Mountain Corporation and Appellant entered into the anticipated agreement pursuant to which Appellant would act as an independent contractor to market the subject real estate securities. T. 45, 46, 48, and Ex. 7, 12.

Effective January 1, 1973, Respondent became the real estate broker for Appellant's sales organization, and Appellant and two other salesmen held real estate licenses under her. On January 1, 1973, Appellant held the securities broker-dealer's license for Appellant's sales organization and Respondent and two other salesmen were licensed for securities purposes under him. Respondent continued to be licensed as a securities salesman under Appellant until June, 1973. One additional salesman was licensed under both Appellant and Respondent about February 1, 1973. T. 7, 8, 149, 150, and Ex. 1.

After January 1, 1973, and continuing until February 19, 1973, Respondent incurred the risks incidental to "brokering" for Appellant's sales organization. T. 82. Other than being the responsible real estate broker for up to four real estate salesmen, Respondent's duties between January 1 and February 19, 1973, were the same as they were both before and after that period of time. T. 65, 85, 156, 157.

Between January 1, 1973, and February 19, 1973, the office space, office furniture, and office utilities and telephone service used by Appellant's sales organization, including Respondent in her capacity as a real estate broker, were provided without charge by Treasure Mountain Corporation.

Between January 1, 1973, and February 19, 1973, Appellant was responsible for the success of his sales organization, including supervision of all sales personnel, T. 149; conducting weekly sales meetings, T. 64; the hiring and payment of a secretary and the furnishing of stationery, office supplies, etc., T. 137, 150; and performance of the contractual obligation he had with Treasure Mountain Corporation, including making certain that all sales personnel were properly licensed; that his sales organization complied with all applicable laws and regulations, including securities laws, real estate laws, and Interstate Land Sales Acts; payment of all personnel; and indemnification

of Treasure Mountain Corporation with respect to the form of the Securities Registration Statements and Prospectus. Ex. 12.

Between January 1, 1973, and February 19, 1973, sales made by Appellant's sales organization were considered made when deposits were received and/or sales agreements were signed, T. 37, 116; but commissions were not considered earned until the sale was closed. Forty-two sales were made during that period of time but none of them were closed. T. 37, 39, 40, 87, 92, 116, and Ex. 22, 23, 24.

As of January 1, 1973, Appellant's sales organization had a list of approximately 500 names of persons who had indicated an interest in purchasing the subject real estate securities as soon as registration thereof was effective and sales personnel were qualified to sell. Accordingly, Appellant's sales organization enjoyed brisk sales activity in January and February of 1973. T. 205, 207. The gross sales price of the real estate securities sold by Appellant's sales organization between January 1, 1973, and February 19, 1973, was \$2,193,050.00, and Treasure Mountain Corporation paid to Appellant a 1% broker's commission on that gross, or \$21,930.50. Ex. 24. For that same period of time Respondent earned and was paid a 2.5% commission on the sale of eighteen of the

subject real estate securities made by her, which commission amounted to \$12,335.00. T. 186 and Ex. 31.

On February 19, 1973, Appellant's Utah real estate broker's license became effective, whereupon Respondent inactivated her real estate broker's license and became licensed as a real estate salesman under Appellant's license effective the same date. Respondent continued to act as a real estate salesman under Appellant's real estate broker's license until her employment was terminated by Appellant on May 4, 1973. T. 35, 153.

No mention of any real estate broker's commission for Respondent was ever made by Respondent or anyone acting on her behalf to Appellant or anyone acting on his behalf until on or about July 25, 1973. T. 35, 92, and Ex. 19.

Appellant's overhead for the maintenance of his sales organization pursuant to his agreement with Treasure Mountain Corporation amounted to \$1,500.00 per month for all of 1973. T. 137.

The forty-two sales made between January 1, 1973, and February 19, 1973, were closed over a thirteen month period beginning February 21, 1973, as follows:

<u>Month</u>	<u>No. of Sales Closed</u>
February 1973	2
March 1973	2

<u>Month</u>	<u>No. of Sales Closed</u>
April 1973	1
July 1973	3
August 1973	5
September 1973	1
October 1973	5
November 1973	8
December 1973	9
January 1974	4
February 1974	1
March 1974	1

In Utah, the compensation normally paid to a real estate broker for the "use" of his broker's license varies according to the circumstances in each instance, and sometimes it amounts to less than 5% of the salesman's commission; and sometimes it might be \$250.00 per year. T. 78-82.

ARGUMENT

POINT I

RESPONDENT'S CLAIM FOR A REAL ESTATE BROKER'S COMMISSION IS BASED UPON AN IMPLIED AGREEMENT "AUTHORIZING OR EMPLOYING AN AGENT OR BROKER TO PURCHASE OR SELL REAL ESTATE FOR COMPENSATION" WITHIN THE MEANING

OF SECTION 25-5-4(5), UTAH CODE ANNOTATED, 1953, AND IS THEREFORE UNENFORCEABLE.

From the foregoing Statement of Facts, it is clear that Respondent was not a party to any written or oral agreement to pay her the real estate broker's commission she claims. Further, the Trial Court, in its Conclusions of Law, concluded that any such agreement between the parties was implied. See Conclusions of Law, Paragraph 1.

Section 25-5-4, Utah Code Annotated, 1953, provides in pertinent part as follows:

Certain Agreements Void Unless Written and Subscribed. 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.

The opinion in Baugh v. Darley, 112 U. 1, 184 P.2d 335 (1947), contains a helpful discussion of the meaning and effect of the foregoing statutory provision as follows:

... It provides that any agreement for the performance of services as a real estate broker shall be void unless in writing. The statute is applicable to contracts implied in law as any other. In effect, it forbids any recovery for

services in selling land which are not provided for by written agreement. See also Page on the Law of Contracts, Sec. 1413. [Emphasis added]

The statute now under discussion was construed by this Court in Case v. Ralph, 56 U. 243, 188 P. 640, 642, where, speaking through Mr. Justice Frick, we said:

The Courts generally hold that 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 the money and time expended for the use and benefit of the owner of the property. (Italics added)

And in Watson v. Odell, 58 U. 276, 198 P. 772, 775, 20 A.L.R. 280, we said:

Under our statute, the plaintiff could recover a commission only by virtue of a contract. He could not recover as upon a quantum meruit. [Citing Case v. Ralph, Supra.] (Italics added)

See also Smith Realty Co. v. Dipietro, et ux., 77 U. 176, 292 P. 915.

In Hale v. Kriesel, 194 Wis. 271, 215, N. W. 227, 228, 56 A.L.R. 780, in construing a statute similar to ours, the Supreme Court of Wisconsin said:

These statutes leave no opportunity for the law to imply a contract. They apply to implied agreements as well as to those that are express. ... (Italics added)

From the foregoing, it is apparent that a cause of action based on an implied agreement cannot circumvent the plain language of our statute of frauds. However, the Trial Court concluded that an implied agreement between Respondent and Appellant as opposed to an implied agreement between Respondent and Treasure Mountain Corporation, the owner of the subject real property, does not come within the meaning and prohibition of the statute. In Anderson v. Johnson, 108 U. 417, 160 P.2d 725 (1945), this Court held that an oral agreement by a broker to pay commissions to an unlicensed procurer of listings was not an agreement which involved any right or interest in land and therefore not made void and unenforceable by the statute of frauds, but it appears that the Court in Anderson v. Johnson had reference to a different provision of the statute of frauds than Section 25-5-4(5), because that section does not talk in terms of "any right or interest in land." There is no indication in Anderson v. Johnson that the Court considered the issue of whether the particular provision relied on by Appellant here applies to implied agreements like the one claimed by Respondent. Accordingly, as near as we can tell, the question is one of first impression in this Court.

The issue may be quickly decided by considering the plain language of the subsection and two

propositions: (1) Note that the provision talks about "every" agreement "authorizing or employing" which, of course, broadens the provision to apply to any agreement providing for compensation to a real estate broker or agent; and (2) If the legislature did not really mean what the provision clearly says, it would have been a simple matter to state otherwise.

However, even if one concludes that Section 25-5-4(5) applies only to agreements between real estate brokers and agents and the owners of real property, in the case at bar, any implied agreement Respondent had for compensation was with Appellant as an agent or alter-ego of the owner of the property. In support of this proposition, it is important to note that this is not a case where a licensed real estate broker orally or impliedly agreed to share commissions with one of his salesmen or a "finder," nor is it a case where one licensed real estate broker orally or impliedly agreed to share commissions with another licensed real estate broker. On the contrary, at the time any implied agreement relied on by Respondent came into being, Appellant was a licensed real estate salesman but he was not a licensed real estate broker. Consequently, Appellant was not in a position to lawfully act as a real estate broker or receive any compensation as a real estate broker. This is well established by

the following provisions of Utah Code Annotated
(1953):

Section 61-2-1. License Required. It shall be unlawful for any person, co-partnership, or corporation to engage in the business, act in the capacity of, advertise, or assume to act as a real estate broker or a real estate salesman within this state without first obtaining a license under the provisions of this chapter.

Section 61-2-18(a). Unlicensed Broker - Action for Recovery of Compensation Prohibited. No person, partnership, association, or corporation shall bring or maintain action in any Court of this state for the recovery of commission, a fee, or compensation for any act done or service rendered, the doing or rendering of which is prohibited under the provisions of this act, to other than licensed real estate brokers, unless such person was duly licensed hereunder as a real estate broker at the time of the doing of such act or the rendering of such service.

Based on the foregoing statutes, at the time Respondent was acting as a real estate broker for which she claims compensation, she had no legally enforceable claim for real estate brokerage commissions against Appellant because he was acting only on behalf of Treasure Mountain Corporation in requesting her brokerage services. Any legally enforceable claim for real estate broker's commissions during the time Respondent's real estate broker's license was in effect would have had to have been between Respondent and Treasure Mountain Corporation, the owner of the property. Yet, she had no written agreement with Treasure

Mountain Corporation, as required by Section 25-5-4(5), so any implied agreement she had is simply unenforceable. To hold otherwise seems to us to make Section 25-5-4(5) meaningless, because even if Appellant had entered into a written agreement with Respondent, he could have done no more than make her a real estate broker of the owner's property. She certainly could not have been a real estate broker for Appellant with respect to the subject property, because he didn't own it. In Paragraph 7 of the December 29, 1972, agreement between Treasure Mountain Corporation and Appellant, Appellant covenanted as follows:

To obtain and at all times during the term hereof maintain in full force and effect a license issued by the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934, as amended (the "Exchange Act"), as a broker-dealer and licenses covering all Salesmen as securities Salesmen pursuant to the Exchange Act, as well as all other licenses and permits necessary to comply with applicable state securities, real estate, and other laws and relating to all activities of and services rendered by Taylor and Salesmen hereunder Ex. 12, Paragraph 7(b)

Thus, Appellant had a mandate from and an obligation to Treasure Mountain Corporation to obtain a real estate broker to act on behalf of Treasure Mountain Corporation. He did just that, and Respondent became a real estate broker for Treasure Mountain Corporation. The only problem is, her appointment was not in writing

as required by our statute. Therefore, since any real estate broker's agreement in this case had to have been between Respondent and Treasure Mountain Corporation, the owner of the subject real estate securities, and since any such agreement was not in writing, even by the most liberal construction of the provisions of Section 25-5-4(5), any agreement Respondent had is void and unenforceable.

Accordingly, Appellant is entitled to judgment in his favor, no cause of action.

POINT II

THE TRIAL COURT ERRED IN CONCLUDING THAT THERE WAS ANY IMPLIED AGREEMENT BETWEEN THE PARTIES.

In its Conclusions of Law, Paragraph 1, the Trial Court concluded that "there was an agreement, implied in fact and in law, that defendant would pay to plaintiff the reasonable value of her services as a real estate broker" between January 1, 1973, and February 19, 1973. Technically, if there was any implied agreement, it could not be both implied-in-fact and implied-in-law. A contract implied-in-fact is based on the agreement of the parties to be inferred from their words or conduct. On the other hand, implied-in-law contracts arise not from any implied

agreement of the parties, but by implication of law in an effort to do justice regardless of any agreement or presumed intention on the part of the parties. See 66 Am Jur 2d, Restitution and Implied Contracts, Section 2, and Hill v. Waxberg, 237 F.2d 936 (9th Cir. 1956) at page 939. However, regardless of whether the Trial Court's conclusion is measured by the standards for an implied-in-fact contract or the standards for an implied-in-law contract, for the reasons discussed below, the evidence in this case is insufficient to support a conclusion that there was either.

In testing the sufficiency of the evidence, it should be borne in mind with respect to this Point II on the issue of whether any implied agreement exists, and Point III on the issue of the reasonable value of Respondent's services, on appeal of an equity case in Utah, the Court should review the evidence, and if a "clear preponderance" of the evidence on the controlling points favors an Appellant, the Court should either enter judgment for the Appellant or remand the matter for further determination of such factual issues. See Green v. Palfreyman, 109 U. 291, 166 P.2d 215 (1946), amended and rehearing denied 109 U. 303, 175 P.2d 213 (1946).

A. THERE WAS NO IMPLIED-IN-FACT AGREEMENT.

The applicable rule with respect to whether an implied-in-fact contract exists is stated in 17 Am Jur 2d, Contracts, Section 4, as follows:

... Thus, where a person performs services, furnishes property, or expends money for another at the other's request, and there is no express agreement as to compensation, a promise to pay the reasonable value of the services or property or to reimburse for money expended may properly be implied where, but only where, the circumstances warrant such an inference. [Emphasis added]

Elaborating on certain circumstances which do not warrant such an inference, 66 Am Jur 2d, Restitution and Implied Contracts, Section 25, provides as follows:

Where no compensation is agreed upon in advance for services requested by and performed for another, the presumption that compensation was intended is rebutted by circumstances which negative such an intention; and one of such circumstances is strong self-interest in the outcome of the transaction by the person furnishing the services. The inference of a promise to pay for services is also negated by the fact that such services when rendered under like circumstances customarily are given without compensation, or where the circumstances or conduct warrant a contrary inference or the person benefited has said or done nothing from which such a promise may be inferred, or where, at the time the services were rendered, it was intended, understood, or agreed that no payment would be made for them, or where the services were performed without authority, express or inferred. [Emphasis added]

The foregoing rules of law have clearly been adopted in this state, as is apparent from a reading

of the Court's opinion in McCollum v. Clothier, 121 U. 311, 241 P.2d 648 (1952). In that case, it was held that a plaintiff was entitled to recover under an implied contract for services rendered and expenses incurred in securing bidders on and buyers of machinery and equipment sold for the benefit of the defendant. In so holding, the Court stated:

The rule applicable to the situation is contained in the Restatement of Agency, Vol. 2, Sec. 441: "Except where the relationship of the parties, the triviality of the services, or other circumstances indicate that the parties have agreed otherwise, it is inferred that one who requests or permits another to perform services for him as his agent promises to pay for them."

The Court went on to say of the rule that it:

... should not be applied to bind one under implied contract to merely permit services to be rendered him, or accept benefits from another, under such circumstances that he may reasonably assume they were given gratuitously. The law should not require everyone to keep on guard against such possibility by warning persons offering services that no pay is to be expected. It is therefore essential that the Court should exercise caution in imposing the obligations of implied contract, as contrasted to express contract where the parties have actually defined and agreed to the terms they are to be bound by. With such caution in mind, the test for the Court to apply was: Under all the evidence, were the circumstances such that the plaintiff could reasonably assume he was to be paid, and that the defendant should have reasonably expected to pay for such services. [Emphasis added]

What, then, does the evidence in the case at bar indicate with respect to negating any implied-in-fact agreement between the parties? We invite your attention to the following considerations:

(1) Respondent's strong self-interest in the result of her complying with Appellant's request to activate her real estate broker's license negatives any inference of an implied-in-fact agreement.

Prior to the December 20, 1972, conversation, when Appellant asked to use Respondent's broker's license and requested that she activate the license for use of Appellant's sales organization, Respondent knew the following:

(a) That Appellant and Treasure Mountain Corporation intended to forthwith enter into an agreement that would make Appellant's sales organization the exclusive sales agent for the subject real estate securities.

(b) That it was intended that she be one of the sales personnel in Appellant's sales organization.

(c) That there was a large list of prospective purchasers of the real estate securities, which purchasers could not be contacted by Appellant's sales personnel until such securities were properly registered and such sales personnel were properly licensed.

(d) That the salesmen making the sales of the real estate securities would receive a 2.5% sales commission on each such sale.

(e) That she would not be able to sell any of the real estate securities and earn the 2.5% sales commission unless she or someone other than Appellant acted as a real estate broker for Appellant's sales organization until such time as Appellant could qualify for his own real estate broker's license.

Knowing what she knew, her quick willingness to comply with Appellant's request to use her real estate broker's license was extremely prudent in view of the fact that during the fifty-day period of time her real estate broker's license was in effect, Respondent personally sold eighteen of the condominiums or real estate securities, and as a result of such sales, earned a commission of \$12,335.00. Under such circumstances, can there be any doubt that Appellant was justified in reasonably assuming that Respondent's compliance with his request was gratuitous? What real estate salesman wouldn't have complied unhesitatingly, without promise of any additional compensation, in view of Respondent's prospects. In the language of McCollum v. Clothier, this Court has held that a court should "exercise caution in imposing the obligations of implied contract." With such caution in mind, the only reasonable

conclusion is that Respondent's self-interest in this case was too strong to support any implied-in-fact agreement.

(2) The intentions of the parties with respect to compensation were clearly contrary to each other.

As was said in Rasmussen v. United States Steel Co., 1 U.2d 291, 265 P.2d 1002 (1954), and restated with approval in Rapp v. Salt Lake City, 527 P.2d 651 (Utah 1974):

... The distinction between express and implied in fact contracts largely is a difference only in mode of expression. A contract is express or implied by reason of the expression of offer and acceptance, --whether there is a manifestation of mutual assent, by words or actions or both, which reasonably are interpretable as indicating an intention to make a bargain with certain terms or terms which reasonably may be made certain. The elements are basically identical in both cases, although the evidentiary facts may be expressed differently. ...
[Emphasis added]

From the foregoing authority, it is obvious that whether one concludes that a contract is express or implied-in-fact, there must be a manifestation of mutual assent between the parties. In the case of the implied-in-fact agreement, such mutual assent must be inferable from some words or conduct short of an expressed agreement. We cannot find any evidence in the record now before the Court from which it appears that any mutual assent on the part of the

parties with respect to compensation of Respondent may be inferred. On the contrary, Respondent's own testimony clearly negates any notion that there was any mutual assent with respect to what Respondent was to receive as compensation. At trial, with respect to the December 20, 1972, conversation with Appellant, in response to questions from her own counsel, Respondent testified as follows:

(Q) Mrs. Fowler, was there any discussion with respect to brokerage commissions?

(A) He only said that it was good for me to activate my license.

(Q) So the subject wasn't mentioned at all?

(A) No, not at all. He didn't approach the subject.

(Q) At that time, what expectations did you have, if any, respecting commissions?

(A) Well, all the sales for Treasure Mountain Corporation had been done on the premises that the broker will get 1% commission on all sales.

(Q) And that was your expectation?

(A) And that was my expectation. He was a salesman and I was a broker, and I expected to be paid as a broker. T. 34, 35.

In the face of that testimony, the Trial Court nonetheless inferred that notwithstanding Respondent's expressed intention to take the full 1% brokerage commission, she and Appellant impliedly mutually agreed that she be paid the reasonable value of her services.

If Respondent had testified that she expected to be paid a "reasonable amount" or if she had testified that she expected to be paid "something," then the Trial Court may have had some reasonable basis for concluding as it did. However, it is obvious that the Trial Court did not feel that the full 1% commission was the reasonable value of Respondent's services, because the Trial Court awarded Respondent approximately \$12,000.00 less than what she had stated she intended to receive. Thus, the Trial Court's own finding as to the reasonable value of the services performed is directly contrary to the proposition that there was any mutual assent on the part of the parties. Such conclusion can be reached without bothering to point out that Appellant clearly did not intend to pay Respondent the full 1% broker's commission, and at the same time put up his securities broker-dealer's license and pay out of his own pocket all of the expenses incidental to running his sales organization, other than those expenses paid for or incurred by Treasure Mountain Corporation. Surely, no one can believe that Appellant intended that Respondent be paid the full 1% broker's commission. Accordingly, Respondent's own testimony confirms the lack of any mutual assent sufficient to serve as the foundation for an implied-in-fact agreement.

If Respondent were permitted to prevail in spite of her own testimony, in other words, if Respondent really intended to take the whole 1% of the brokerage commissions for herself, can anyone believe that if she had revealed that to Appellant, he would have agreed to pay her that amount? How then can we permit her to collect even one-half of that amount on the theory of an implied-in-fact contract when she admits that that is not what she intended. If we permit her to collect even one-half of that amount, such recovery becomes the result of the fact that she was clairvoyant enough or lucky enough to have simply kept quiet about the matter of compensation at the time Appellant requested her services as a real estate broker. She thus is permitted to accomplish by her silence what she clearly would not have been able to accomplish had she been forthright enough to express her intentions to Appellant.

(3) By Respondent's own admission, there was no agreement between her and Appellant with respect to her compensation as a real estate broker.

At trial, Respondent further testified on cross-examination as follows:

(Q) I would like to know, Mrs. Fowler, exactly what discussions you and Mr. Taylor had about payment of commissions from January 1 of [sic] February 19, 1973.

(A) Mr. Taylor was very inaccessible to me. He came to the office just like a breeze.

(Q) Was there any agreement between you?

(A) No, there was no agreement. The only agreement was that all the things that he had filed with the real estate division--

(Q) You mean the State Real Estate Division?

(A) --the State Real Estate Division that he had knowledge that he was a salesman under me. T. 69.

Here, Respondent clearly admits that there was no agreement between her and Appellant other than the documents on file with the State Real Estate Division, which, of course, had nothing to do with Respondent's compensation as a real estate broker. See Ex. 1. Here again, then, Respondent has clearly admitted that there was no mutual assent between the parties with respect to her compensation as a real estate broker. While Respondent may still be heard to contend that the law in the interest of justice should allow her recovery on an implied-in-law theory, her own testimony is such that there was no implied-in-fact agreement between the parties.

(4) There can be no implied-in-fact contract in the event that the law with respect to such agreement has not been complied with.

Section 61-2-5(b) of the Utah Code Annotated (1953) speaking of the powers of the State Securities Commission provides as follows:

(b) The Commission is vested with the power and authority to make and enforce such rules and regulations connected with the application

for any broker's or salesman's license, and the revocation or suspension thereof, as shall be deemed necessary to administer and enforce the provisions of this chapter.

Pursuant to such rule-making authority, the Securities Commission, through the Real Estate Division of the Department of Business Regulation, adopted the following rule with respect to real estate brokers and salesmen:

19. Broker-Salesman Disputes. Brokers are required to treat salesmen and other brokers ethically and in accordance with good, accepted business practices. Brokers are required to provide salesmen with the terms of employment in writing to avoid misunderstanding.

... [Emphasis added]

The Trial Court took judicial notice of the fact that the foregoing Rule 19 was applicable to the present controversy.

Speaking to the issue of whether an implied-in-fact contract can be inferred without fully complying with all of the laws pertaining thereto, this Court stated, in 1974, in Rapp v. Salt Lake City, 527 P.2d at page 654, that "no contractual liability can be created without compliance with" the applicable ordinances. In the face of that holding, and in view of the fact that any implied agreement Respondent had with Appellant was in her capacity as a real estate broker and in his capacity as a real estate salesman, in view of the fact that the above-quoted Rule 19 requires the broker, not the salesman, to reduce the terms of their

agreement to writing, and in view of the fact that at trial, Respondent testified upon cross-examination as follows:

(Q) And with your knowledge of real estate, Mrs. Fowler, can you explain to me why on January 1, 1973, that you didn't insist upon a written contract of some type with Mr. Taylor to take care of your brokerage fee, such as you did on February 29 of 1973?

(A) It was his idea. It wasn't mine.

(Q) What was the reason why you didn't do this on January 1 of 1973, with you and Mr. Taylor or the other salesmen?

(A) I should have done it. There was no time to discuss it with Mr. Taylor. He came in with the papers ready to be signed. He had negotiated everything. It was all arranged. All I did, as I could see the papers, was sign, because those papers had to be submitted to the real estate division before the 31st of December.

it surely cannot be said that any implied-in-fact agreement relied on by Respondent complied with the other relevant provisions of State law.

Furthermore, from a purely equitable point of view, Respondent's failure to reduce to writing any understanding on her part with respect to her compensation as a real estate broker makes it unconscionable that she be permitted to have failed to discharge such duty, wait another seven months before the matter is ever discussed, claim a \$21,930.50 fee based on her unilateral intention, and then recover \$9,715.25. It wasn't until July 25, 1973, that the subject was ever broached, and not only was that seven months after the December 20,

conversation, it was five months after she was no longer a real estate broker for Appellant's sales organization, and two and a half months after her employment with Appellant was terminated. It is also important to note that five real estate securities sales for which she claims she was entitled to a real estate broker's commission were closed between February 21, 1973, and April 30, 1973, and still she made no demand for the real estate broker's commission with respect to those sales until July 25, 1973, and then through her attorney she demanded the full 1% commission. See Ex. 19, 22, 23, 24. Given that kind of dilatoriness, a "clear preponderance" of the evidence could lead one to believe that the idea of claiming a real estate broker's commission at all was an afterthought. However, that need not be decided because whether it was an afterthought or not, to wait so long to raise the issue was clearly inequitable and negatives any inference that Appellant agreed to pay Respondent anything for the use of her real estate broker's license.

B. THERE IS NO IMPLIED-IN-LAW AGREEMENT.

On the issue of whether the Trial Court was justified in concluding that there was an implied-in-law agreement between the parties, that is, whether the equities were such that notwithstanding any manifestation of mutual assent on the part of the parties,

the law should nonetheless imply that such a contract existed in the interest of justice, we direct your attention to two Utah cases previously cited in this Brief. In Baugh v. Darley, cited earlier in Point I with respect to the statute of frauds issue, the plaintiff sued the defendant to recover for unjust enrichment. (The terms "unjust enrichment," "quasi-contracts," "contracts implied in law," and "restitution" are largely interchangeable. See 66 Am Jur 2d, Restitution and Implied Contracts, Sections 1, 2, and 3.) The facts in Baugh v. Darley were that the defendant had orally agreed to sell certain real property to the plaintiff, and the plaintiff in turn had located a buyer that was willing to pay plaintiff a higher price for the same property. Upon discovering that plaintiff's buyer was willing to pay the higher price, the defendant refused to sell to the plaintiff, then sold to the plaintiff's buyer and refused to pay anything to the plaintiff. In holding that the plaintiff could not recover for unjust enrichment, the Court stated at 184 P.2d 337, "Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another." The Court then went on to say:

The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor. Restatement of Restitution, Section 1, Comment C. Services officiously or gratuitously furnished

are not recoverable. Restatement of Restitution, Section 2. Nor are services performed by the plaintiff for his own advantage and from which the defendant benefits incidentally, recoverable. See Restatement of Restitution, Section 40, Comment C; and Section 41(a)(i). [Emphasis added]

In Rapp v. Salt Lake City, cited previously with respect to the issue of whether there was an implied-in-fact agreement in this case, this Court stated as recently as 1974 as follows, at 527 P.2d 654:

In effect, plaintiff's argument on appeal is directed toward enforcing a quasi-contractual obligation, which is imposed by the law for the purpose of bringing about justice without reference to the intention of the parties. Such obligations are not true contracts but are based on unjust enrichment or restitution. The promise is purely fictitious and is implied in order to fit the actual cause of action to the remedy. The liability exists from an implication of law that arises from the facts and circumstances independent of agreement or presumed intention. Where the facts indicate a duty of the defendant to pay, the law imputes to him a promise to fulfill that obligation. In states distinguishing actions of contract from actions of tort, a proceeding at law for restitution is an action of contract. Thus again plaintiff encounters the statutory requirements which mandate his contractual obligation is void without fulfillment of the requisite formalities. [Emphasis added]

Applying the foregoing authorities to the facts in the case at bar, at trial, Respondent did not prove the existence of an implied-in-law agreement, for the following reasons:

(1) Respondent's services were gratuitous and self-serving and were performed for her own substantial advantage.

As has been stated earlier, with respect to whether Respondent proved an implied-in-fact agreement, Respondent making her real estate broker's license available at the request of Appellant was to her own substantial advantage and complying with such request was incidental to the benefits she received. At the time of Appellant's request, if Appellant had stated to Respondent that he was not willing to pay her any compensation for the use of her real estate broker's license, can it really be doubted that she would not have gone ahead and put up her license in order to insure that she would have been able to sell the subject real estate securities as soon as the registration thereof became effective, and earn the \$12,335.00 she received for the sales she personally made between January 1, 1973, and February 19, 1973.

(2) There can be no implied-in-law contract without fulfillment of the requisite formalities.

The law does not permit the creation of an implied-in-law agreement without compliance with the requisite formalities, any more than the law permits the creation of implied-in-fact agreement without such compliance. In addition to what we have said earlier, with respect to implied-in-fact agreements, note that this Court in Rapp v. Salt Lake City, speaking with respect to implied-in-law agreements, said that such "contractual obligation is void without fulfillment of

the requisite formalities." Thus, Respondent's failure to comply with Rule 19 of the applicable rules and regulations of the State Securities Commission pertaining to real estate brokers and salesmen clearly makes Respondent's "unjust enrichment" claim unenforceable.

Aside from the formal technicalities of such a holding, such a holding is entirely just and equitable. Why should Respondent, who played the role of the real estate broker in this whole matter, be absolved of her legal responsibility for putting the agreement, if any, in writing; be permitted to remain silent with respect to the matter of her compensation for over seven months and then come to court and recover \$9,715.25 from one of the real estate salesmen licensed under her.

(3) Justice does not require Appellant to compensate Respondent for her services.

After activating her real estate broker's license as requested by Appellant, the evidence is uncontroverted that Respondent performed no services for Appellant that she did not perform prior to activating her license, except (a) she opened (but never used) a real estate broker's trust account with a bank; and (b) she took the risk of being responsible for the real estate sales activities of three to four real estate salesmen for a period of fifty days.

On the other hand, Appellant took all of the executive, management, and supervisory responsibility, and entrepreneurial risk with respect to the whole sales operation that benefited both of them.

He, not she, paid the fees for her real estate broker's license and bond.

He, not she, put up the money for the initial and only deposit in her real estate broker's trust account.

He, not she, bargained for and negotiated the agreement giving his sales organization, including her, something to sell.

He, not she, incurred the contractual obligation to perform the agreement with Treasure Mountain Corporation, including making certain that all sales personnel were properly licensed; that his sales organization complied with all applicable laws and regulations, including securities laws, real estate laws, and interstate land sales acts; payment of all personnel in his sales organization; and indemnification of Treasure Mountain Corporation with respect to the form of the securities registration statements and prospectus.

He, not she, supervised the sales organization.

He, not she, conducted weekly sales meetings.

He, not she, hired and paid for a secretary.

He, not she, paid all of the expenses of the sales office other than those expenses paid for or

incurred by Treasure Mountain Corporation, and such net expenses attributable to earning the 1% broker's commission were \$1,500.00 per month for all of 1973.

He, not she, took the risk of closing all of the sales on which she claims a real estate broker's commission, because all of such sales were closed when he was the responsible real estate broker.

All of the foregoing Appellant did without requesting or receiving any indemnification from Respondent.

All of the foregoing Appellant did during a time when Respondent certainly was not indispensable, because Appellant had a real estate broker friend who was willing to broker for him without receiving any compensation therefor, and there was in Appellant's sales organization another real estate salesman who was eligible to activate his real estate broker's license to broker for the organization.

Based on the foregoing considerations, the record in this case is not such as to support a conclusion that the law ought to create an implied-in-law agreement in the interest of justice.

It also appears that regardless of whether one is determining Respondent's rights by whether there was an implied-in-fact or an implied-in-law agreement, the record does not support the Trial Court's conclusion that there was either one, let alone both. For

the same reasons, the Court should enter judgment in favor of Appellant and against Respondent, no cause of action.

POINT III

THE TRIAL COURT ERRED IN FINDING AND CONCLUDING THAT THE REASONABLE VALUE OF THE SERVICES PERFORMED BY RESPONDENT WAS \$9,715.25.

The record makes clear that Treasure Mountain Corporation paid Appellant gross brokerage commissions in the amount of \$21,930.50 for the period between January 1, 1973, and February 19, 1973. The Trial Court found that between those dates Appellant incurred expenses in the amount of \$2,500.00 and that therefore the net brokerage commissions recovered by Appellant for the subject period of time amounted to \$19,430.50. The Trial Court further found that the reasonable value of the services performed by Respondent was one-half of such net commissions, or \$9,715.25, and then concluded as a matter of law that Respondent's measure of recovery was said reasonable value of her services. See Conclusions of Law, Paragraph 2.

Appellant has no quarrel with the Trial Court's conclusion that Respondent's measure of recovery in this case, if she is entitled to any recovery at all, is the reasonable value of her services. In Utah, it appears that the measure of recovery is the same regardless

of whether the implied contract on which recovery is predicated is said to be implied-in-fact or implied-in-law. As was said in Baugh v. Darley, Supra, with respect to an implied-in-law count: "... in an action for unjust enrichment, in those cases where there is a proper equitable basis for the same, the measure of damages, by the great weight of authority, is the reasonable value of the services rendered." Likewise, in Wooldridge v. Wareing, 120 U. 514, 236 P.2d 341 (1951), this Court held with respect to implied-in-fact contracts that the law

... requires that he who accepts service from him who unofficiously performs under circumstances justifying the latter in reasonably assuming he would be compensated must pay the reasonable value thereof. As is more clearly explained by Professor Williston in Section 41 of his monumental work on contracts, "It is by no means uncommon for those who offer or agree to employ others or to buy goods, to make no statement as to the wages or price to be paid. The law invokes here (as likewise where an agreement is indefinite as to time) the standard of reasonableness. Accordingly, the fair value of the services or property is recoverable on the implied in fact contract.

A year later, in McCollum v. Clothier, Supra, the Court held that there was an implied contract requiring the defendant to pay for the reasonable value of the plaintiff's services. Again in 1964, in Richards and Sorenson v. Lake Hills, 15 U.2d 150, 389 P.2d 66 (1964), this Court affirmed the Trial Court's decision allowing recovery on an implied agreement to pay reasonable compensation and allowed recovery "on the basis of usual charges for such services."

Based upon the foregoing, it appears that whether you call the measure of recovery "the reasonable value of services rendered," the "usual charges for such services," or "unjust enrichment," the result is the same. For example, if a property owner accepts improvements to his property that cost his benefactor \$5,000.00 but appreciates the value of his property by \$10,000.00, the property owner has been unjustly enriched only to the extent of \$5,000.00 or the reasonable value of his benefactor's services.

Applying the foregoing rules of law to this case, what is the reasonable value of the services Respondent performed pursuant to any implied agreement?

At trial, no one, not Respondent, not Appellant, nor any expert witness, rendered any opinion as to the reasonable value of Respondent's services in light of all the circumstances of this case. Robert Monson, an experienced Utah real estate broker, testified that the compensation that should be paid a real estate broker for the use of his license depends on the circumstances of the situation; that he had brokered for a third party on one occasion for a whole year for a fee of \$250.00; that he personally would have brokered for Appellant in this case without any compensation; but he was never asked what was the custom in the industry for compensating a real estate broker under the

circumstances of this case. Respondent herself testified that she intended to get the whole 1% broker's commission. However, as noted above, what she intended to recover has nothing to do with the measure of recovery but only whether the parties could reasonably be said to have intended any agreement to pay compensation in the first place. In short, no one testified that it is the custom in the real estate industry in the state of Utah, given the facts and circumstances of this case, to equally split the net securities and real estate brokerage commissions received. Accordingly, Respondent simply did not carry the plaintiff's burden of proof with respect to proving the reasonable value of Respondent's services. At the very least, then, we contend that Appellant is entitled to a new trial on that issue.

In the alternative, we request an order and judgment holding that the reasonable value of Respondent's real estate broker's services for the time in question is zero or no more than \$250.00. There is justification for the latter holding, based on the evidence in the record that Mr. Monson would have performed the same services as Respondent without any charge to Appellant and that he had "brokered" for a third party for a year's time for \$250.00. Respondent brokered for Appellant for only fifty days.

A new trial or such reduction in the amount of the judgment seems to be supported by the Court's opinion in Wooldridge v. Wareing, Supra, wherein on the issue of the amount of the recovery for breach of an implied-in-fact contract, the Court said:

Since the trial Court found there was no express contract between the parties, and since both parties concur, we must determine whether the \$4,000.00 award was based on any substantial evidence. Plaintiff contended the award should have been far greater, and defendant asserted it should have been much less, or nothing at all. Both sides discussed at length "net profits," "50-50 split," "sales discount," and the like, but the record discloses that the sales price of [the] equipment on the ... sale was almost exactly \$80,000.00, 5% of which would be \$4,000.00, the amount adjudged by the Court. The only uncontroverted satisfactory evidence of value for services rendered in similar cases was elicited by defendant's own expert witness, who testified that the customary commission paid in industry to a casual dealer who assists in effecting a sale was 5% of the sale price of the equipment, which testimony, taken together with other evidence adduced, is sufficient to justify the award. [Emphasis added]

At the case at bar there is no evidence in the record discussing the "50-50 split" used by the Trial Court in arriving at the amount of the judgment, nor is there any evidence as to the custom in any case where securities broker-dealer and real estate broker commissions are to be shared.

Further, even if the Trial Court concluded correctly that the reasonable value of Respondent's real estate broker's services was equivalent to one-half

of the net commissions received by Appellant, the record is clear that Appellant's net commissions were far less than the \$19,430.50 found by the Trial Court. The evidence is uncontroverted that Appellant incurred expenses attributable to earning securities and real estate brokerage commissions at the rate of \$1,500.00 per month for all of 1973. The evidence is also uncontroverted that not one single sale on which such brokerage commissions were paid was closed during the period between January 1, 1973, and February 19, 1973. This means that in order for Appellant to have grossed the \$21,930.50 in brokerage commissions he received, all of which was received between February 21, 1973, and sometime in March of 1974, he incurred expenses at the rate of \$1,500.00 per month at least through 1973. Accordingly, rather than being given credit for \$2,500.00 in expenses for January 1, 1973, to February 19, 1973, Appellant should have been given credit for expenses in the amount of \$1,500.00 for the twelve months of 1973, or \$18,000.00. If Appellant is given credit for such expenses, the net commissions he received for the period in question were only \$3,930.50, one-half of which would be \$1,965.25.

Such calculation does not take into consideration any of Appellant's expenses with respect to closing the six sales that were closed in 1974. Accordingly, at the very most, Respondent would be entitled to

recover \$1,965.25 as the reasonable value of her real estate broker's services for the period in question.

Based on the foregoing, Appellant requests an order granting a new trial on the issue of the reasonable value of Respondent's services, or requests an order reducing the amount of Respondent's recovery to zero or \$250.00 or \$1,965.25.

CONCLUSION

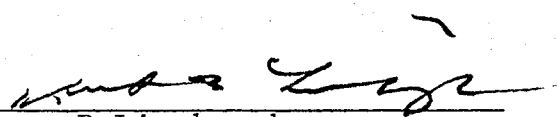
Because the applicable provisions of the Utah Statute of Frauds makes any implied agreement between the parties void and unenforceable, and because the Trial Court erred in concluding that there was an implied-in-fact and/or implied-in-law agreement between the parties, Appellant is entitled to a judgment in his favor and against Respondent, no cause of action as a matter of law. In the alternative, Appellant is entitled to a new trial on the issue of the reasonable value of Respondent's services to Appellant, or an order reducing the amount of the judgment to zero or \$250.00 or \$1,965.25.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 1st day of April, 1976, two copies of this Brief of Appellant were served upon counsel for Plaintiff-Respondent by delivering such copies to the office of Bryce Roe, of Roe and Fowler, at 340 East Fourth South, Salt Lake City, Utah 84111.


Kent B Linebaugh