

1988

# John Russo v. Bridlewood Corporation : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

JOHN RUSSO and ROBERT RUSSO, )  
Plaintiffs-Appellants, )  
v. ) Case No. 860457  
BRIDLEWOOD CORPORATION, ) #138  
Defendant-Respondent. ) 00-0000

## BRIEF OF APPELLANTS

APPEAL FROM A JUDGMENT OF THE THE SECOND JUDICIAL DISTRICT  
COURT OF WEBER COUNTY, STATE OF UTAH, THE HONORABLE DAVID E. ROTH  
PRESIDING BY WHICH JUDGMENT WAS ENTERED AGAINST EACH CAUSE OF  
ACTION OF PLAINTIFFS' COMPLAINT IN FAVOR OF DEFENDANT,  
NO CAUSE OF ACTION

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DEC 26 1986

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BRIEF OF APPELLANTS

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STATEMENT OF ISSUES

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The following issues of law are presented within the Brief of Appellant:

(1) Did the Bridlewood Corporation, as seller, intentionally conceal from the Russos information that the restaurant property contained significant soil stability and slope defects? A material component of this legal issue is whether or not the Russos' retained real estate agent acquired sufficient notice or knowledge from the seller's listing agent of the slope stability defects on the property so that the Russos' damages are not the proximate result of the seller's

intentional concealment of material facts.

(2) Did the Bridlewood Corporation, as seller, either individually or through its listing real estate agent, negligently fail to investigate and to disclose to the Russos that the restaurant property contained significant slope stability defects? A material component of this legal issue is whether or not the Russos' retained real estate agent acquired sufficient notice or knowledge from the seller's listing agent of the soil stability defects so that the Russos' damages are not the proximate result of the negligent conduct of the seller or of its listing agent.

#### STATEMENT OF THE CASE

The Russos commenced this action following their February 6, 1984 purchase from the Bridlewood Corporation of certain improved commercial real property upon which the Russos intended to operate a restaurant business. The Russos discovered during the Spring of 1984, for the first time, that slope slippage had occurred on the east side of the restaurant property related to general slope failure along the west side of the adjacent Birch Creek gully.

A two day non-jury trial was held in the Weber County District Court from May 22, 1986 through May 23, 1986, the Honorable David E. Roth, District Judge, presiding. The case was tried to the trial court upon the multiple theories Bridlewood's



intentional concealment of material facts and of its negligent failure to investigate and to disclose material facts both individually and through its listing agent, Robert Penton. The trial court entered a June 11, 1986 Memorandum Decision which concluded in material part that:

(1) The Russos' real estate agent was provided with sufficient information of slope failure on the property from the seller's listing agent to obligate him to disclose this acquired information to the Russos and to further investigate.

(2) The acquired knowledge of the Russos' real estate agent was fully chargeable to them as was the acquired knowledge of the seller's listing agent.

(3) The failure of the Russos' real estate agent to disclose to them the information which he had acquired and his failure to further investigate was the sole proximate cause of the Russos' damages. (Tr. at 101 - 104).

Conforming Findings of Fact, Conclusions of Law and Judgment were entered on August 12, 1986 by which each cause of action within the Plaintiffs' Complaint was dismissed, no cause of action. (Tr. at 112 - 118, 147).

#### STATEMENT OF FACTS

The real property in this action is located at 440 East 4400 South, Ogden, Utah. The property contains .75 acres and is rectangular in shape with its south facing length fronting on 4400 South. A restaurant designed and furnished rectangular shaped 3,700 square foot cinderblock and frame building is

located on the property. The south facing length of the building faces 4400 South. An asphalt surface parking lot extends from the front of the building approximately seventy-five feet to 4400 South. The east side boundary of the property is marked by chain link fence which traverses the crest of the west slope of the Birch Creek Gully. The Birch Creek Gully is a deep and steep sided intermittent stream created gully. The gully extends at extreme depth for several hundred yards north of the restaurant property to State Road 89 and for several hundred yards south of the restaurant property and beyond 4400 South. A waterslide complex has been built on the Birch Creek slope of the property immediately to the north of and adjacent to the restaurant property. An outside walk-in freezer unit approximately eight feet by sixteen feet is located along the north (rear) wall of the restaurant building. The east end of this freezer unit is flush with the east wall (side) of the building. The freezer unit is located upon a concrete pad of identical size dimensions. The northeast corner of the building is approximately twenty feet from the crest of the west slope of the Birch Creek Gully. The east side yard has neither been graded nor asphalted with the result that it is neither a public access nor personnel access to the rear entrance of the building. All personnel access to the rear (north side) of the building is made from the west side of the property which is asphalted and which further functions as a road right-of-way to the adjacent waterslide property.

The liability and damages issues in this action derive

from a pattern of Birch Creek Gully slope failure along the east side yard of the restaurant property. This failure pattern extends for several hundred yards to the south and to the north of the restaurant property along the west slope of the Birch Creek Gully.

During those times material to this action, the slope failure pattern along the east side of the restaurant building had been evidenced by a radiating line of earth slippage which began in the parking lot approximately twenty feet in front (south) of the building and approximately twenty feet from the crest of the Birch Creek Gully. The slippage line extended approximately thirty feet in an unbroken line parallel to the crest of the Birch Creek Gully to where it intersected the building's east foundation wall about ten feet from its northeast corner. The slippage continued under the east end of the walk-in freezer concrete pad, northward across the adjacent waterslide property and further northward into the hard surfaced right-of-way of State Road 89.

At the time of the May 1986 trial, the slippage had increased to an approximate two foot depth where it intersected the building's foundation and thereafter passed under the concrete freezer pad and beyond the north property boundary.

Slope failure along the west slope of the Birch Creek Gully is continuing and will encroach further westward into the restaurant property. (Ex.7, 22). The result of this continuing

slope failure along the east side of the property is that major slope failure is projected to occur under the foundation of the restaurant building within the following ten years. (Ex. 7, 22, 23). This event will structurally condemn the facility. (Ex. 7). The known condition of the property has disqualified it for landslide/disaster insurance coverage, for long term secured lender financing and has rendered the property unsuitable for a replacement structure which can comply with controlling zoning ordinance set back requirements for the usable boundaries of the property. (Tr. at 349, 365 - 366). The combined impact of slope failure, disqualification from insurance coverage, and disqualification from secured lender financing has rendered the property financially worthless to a prospective purchaser (Tr. at 365 - 366; Ex. 14). The Russos have applied in excess of \$19,000.00 toward the improvement of the building, for the acquisition of restaurant equipment, for advertising signs and fixtures and have paid real property taxes totalling \$6,068.40 for fiscal years 1984 and 1985. (Tr. at 328 - 334; Ex. 11, 12, 13, 17).

The Defendant, Bridlewood Corporation, sold the restaurant property to the Russos on February 6, 1984 for \$177,000.00 against which the Russos applied a \$20,000.00 down payment. (Tr. at 310; Ex. 15). Terms of sale provide for sixty monthly installments of \$1,363.05 commencing April 1, 1984 with the entire unpaid balance of principal and interest to be paid in

full not later than March 1989. (Ex. 25).

Bridlewood Corporation is a foreign corporation with its principal place of business in Illinois. The sole contact which the corporation has had with the State of Utah has been its ownership of the restaurant property. The president of Bridlewood Corporation and its sole shareholder is Clinton E. Frank. For purposes of this litigation, the conduct of the corporation has always been the conduct of its president, Mr. Frank, who is also an Illinois resident.

The restaurant property was placed by Frank for sale during August 1980 with Rick J. Wadman, an Ogden, Utah real estate broker. (Tr. at 193). The building, outside freezer unit, parking lot and boundary lines appeared then as they did at trial. Frank allowed the Wadman listing to expire without being renewed on December 31, 1983. He thereafter placed the listing with Realty World Abide and one of its Ogden, Utah agents, Robert Penton. (Tr. at 238). The Realty World Abide listing went into effect on January 1, 1984 and was in place when the property was sold to the Russos on February 6, 1984.

The original listing agent, Rick Wadman, discovered the radiating soils slippage line on the east side of the restaurant building soon after he acquired his August 14, 1980 listing. (Tr. at 199). At that time, the depth of the slippage was not more than six inches where it intersected the northeast corner area of the building. (Tr. at 201). Wadman further observed that

this radiating slippage line had cracked the east end of the concrete pad for the walk-in freezer but no further damage was evident. (Tr. at 203).

Wadman ordered from Frank, during November 1982, a written real estate appraisal for the restaurant property. (Tr. at 199). The completed November 1982 appraisal provided in material part:

. . .  
there is a crack in the earth on the east side.  
There has been some slippage here and the separation extends back to and through the waterslide in the back. This slippage occurred several years ago. One cannot predict what will happen in the future, but it may have stabilized. (Ex. 3; Tr. at 162 - 163).

The appraisal report likewise contained a photograph of the described condition. (Ex. 3).

Wadman did not believe that the November 1982 appraisal impacted adversely the value or desirability of the property in that the report described a condition which had existed unchanged on the property since August 1980. (Tr. at 200). A copy of the report was received by Frank. (Tr. at 164).

Wadman's first concern with slope stability on the east side of the property occurred during June 1983 when he inspected the property at that time. (Tr. at 200). The radiating slippage line continued to be approximately thirty feet long but the depth of the slippage had deteriorated to a depth of not less than one foot where the slippage line intersected the building's foundation and the east end of the concrete pad had completely fractured and had dropped approximately one foot. (Tr. at 201 -

204). Wadman saw that a significant length of the west slope of the Birch Creek Gully was slipping over an area about two hundred yards south of 4400 South and northward from the restaurant property to State Road 89. (Tr. at 204 - 205). Wadman coupled his observations of the restaurant property and of the west slope of the Birch Creek Gully with recently received television and newspaper reports that the heavy snow fall during the 1983/84 winter season was then producing slope movement along the length of the Birch Creek Gully. (Tr. at 201).

Wadman immediately telephoned Frank and described to Frank what he had seen on the restaurant property within the adjacent Birch Creek Gully area and what he had learned about the Birch Creek Gully from television reports and newspaper articles. (Tr. at 207). Wadman next sought by telephone the advise of a consulting engineer, a Mr. Adamson. (Tr. at 207). Adamson told Wadman that the entire west slope of the Birch Creek Gully was "sluffing off, as a general rule". (Tr. at 207 - 208).

Frank traveled to Utah on July 24, 1983 and personally inspected the restaurant property with Wadman. (Tr. at 208). The inspection lasted approximately one-half hour. (Tr. at 209). Wadman showed Frank the radiating slippage line on the property and informed him that its depth had doubled since November 1982. (Tr. at 208). Wadman again recounted to Frank the contents of the newspaper articles and television segments which had covered

to date the slope failure occurring along the west slope of the Birch Creek Gully drainage area and his own observations of the west slope of the gully. Wadman further showed Frank, for the first time, an area of soil erosion in the vicinity of the northeast corner of the property. (Tr. at 210 - 211). Erosion had been created by water flowing from a roof drainpipe, the end of which was placed at the crest of the gully. (Tr. at 210). The erosion was located under the pipe and extended for a distance down the face of the gully's west slope. (Tr. at 210 - 212). Wadman told Frank that both the value and desirability of the property could be adversely impacted by what they had each observed, notwithstanding that purchase offers were being received for the property. (Tr. at 211). Wadman informed Frank that his listing real estate broker obligations required him to disclose to each subsequent prospective purchaser what he knew of the nature and extent of the slope failure and erosion condition along the east boundary of the restaurant property. (Tr. at 210).

Wadman inspected for approximately twenty minutes the restaurant property with Adamson on July 29, 1983 and after Frank had returned to Illinois. (Tr. at 212). Adamson informed Wadman that the slope failure along the east boundary of the property was part of the general slope failure pattern then occurring along the entire west slope of the Birch Creek Gully drainage area and



that the slippage pattern on the property and along the west slope of the gully could not be corrected but was symptomatic of the saturated clay soils of the gully sliding horizontally along the underlying hard rock strata. (Tr. at 212 - 213). Adamson stated that the slope failure had been ongoing for the past fifty to one hundred years and could damage the restaurant building if the area continued to receive heavy water years like the 1983/84 winter. (Tr. at 213). Adamson concluded that the east side of the restaurant property could experience further slope failure within one year or not for the next fifty to one hundred years - it was a judgment call that he as not willing to predict. (Tr. at 213). The engineer emphasized that the placement of fill dirt on the east side of the property to return it to grade and limited asphalt resurfacing would be cosmetic repair only which would not defeat the underlying slope failure mechanisms. (Tr. at 213 - 214).

Wadman telephoned Frank in Illinois and told him the contents of his meeting with Adamson. (Tr. at 214). Wadman then recommended that Frank cosmetically repair for an estimated \$15,000.00 the east side of the property with fill dirt, extend the roof drainpipe beyond the crest of the gully and asphalt resurface. Frank refused this proposal because he wanted the property sold in its then condition without further financial expenditures or financial demands being imposed. (Tr. at 216) Frank did not return to the restaurant property following his

July 24, 1983 Utah trip until after the commencement of this action.

Robert Penton became the listing agent for the restaurant property on January 1, 1984. (Tr. at 238). All listing documents were exchanged by mail between Frank and Penton. (Tr. at 239). Penton never met Frank personally during the time he held the listing for the restaurant property or when it was sold to Russos on February 6, 1984. (Tr. at 238). All communication between the two men was by telephone or by written correspondence. Frank never disclosed to Penton, at any time, his knowledge of slope failure on the restaurant property and along the west slope of the Birch Creek Gully drainage as acquired from Wadman and from his July 24, 1983 inspection of the property with Wadman. (Tr. at 243 - 244). At the time the restaurant property listing was obtained by Penton, approximately two feet of snow had accumulated on the ground, the building had been vacant for several months and the parking lot was snow covered and inaccessible. (Tr. at 241 - 242). Penton did not inspect the property outside the restaurant building at the time the listing was obtained and had no knowledge of the earth slippage and soils erosion conditions along the east side of the building. (Tr. at 243 - 244).

Robert Russo learned during January 1984 that the restaurant property was listed for sale. He retained Mr. Steven Brown, a real estate agent with the Wardley Corporation of Ogden, Utah to arrange for an inspection of the property. (Tr. at 281).

Brown and Robert Russo thereafter inspected, by themselves, the restaurant property. (Tr. at 283). The parking lot at that time was inaccessible and the entire property was under a two foot snow cover. (Tr. at 317). Their inspection included, in material part, an approximate twenty minute walk around and inspection of the exterior of the restaurant building. (Tr. at 283, 317). Neither Robert Russo nor Brown saw under the heavy snow cover any evidence of slope failure on the east side of the building or any slope failure along the west slope of the Birch Creek Gully in either direction from the restaurant property as had been observed by Frank and described to him by Wadman during June and July 1983. (Tr. at 286 - 287, 317). Each of them together saw, however, in the northeast corner area of the property and under the chainlink boundary fence a rather substantial slope erosion which had been caused by washout from the roof drainpipe (Tr. at 286, 317). This washout area on the gully slope extended from the crest of the gully, under the chainlink fence and for a rather a rather substantial distance along and into the surface of the gully slope. (Tr. at 287, 317).

The Russos thereafter tendered a purchase offer for the restaurant property which was accepted by Frank with a minor change in payment terms. (Tr. at 288 - 290). The closing was scheduled by the parties' realtors for February 6, 1984. (Tr. at 291).

Penton met with Wadman at the latter's office approximately three to four days prior to the scheduled closing. (Tr. at 224, 249). Wadman and Penton do not agree why this late January 1984 meeting occurred. (Tr. at 223 - 224, 249 - 250). Not disputed is that Wadman questioned Penton whether the Russos knew about the Birch Creek Gully slope failure along the east boundary of the property. (Tr. at 224 - 225, 250 - 252). The restaurant property was thereafter discussed for approximately one-half hour between the two men. (Tr. at 225, 252). Wadman told Penton that the Birch Creek Gully "as a whole was slipping" and that excessive slippage had occurred on the east side of the building within the 1982/83 winter. (Tr. at 224, 225). Wadman's trial testimony was that he described to Penton both the soils failure pattern on the restaurant property and the general slippage pattern along the west slope of the Birch Creek Gully in the same manner which he had observed it individually and with Frank during June and July 1983. (Tr. at 224 - 225). Wadman gave Penton Adamson's name and related to him Adamson's opinion of why slope failure was occurring on the east side of the restaurant property and in general along the west slope of the Birch Creek Gully and that further slope failure on the east side of the property could occur within the following year or not for the next fifty to one hundred years. (Tr. at 223 - 225). Wadman's January 1984 conversation with Penton was Penton's first notice from any source that the Birch Creek Gully and the east side of the restaurant property, in particular, had experienced

slope failure and slippage. (Tr. at 258).

Penton's testimony of the January 1984 meeting largely, but not entirely, corresponds with Wadman's testimony. (Tr. at 251 - 252). When Penton left Wadman's office, Penton understood that a certain amount of slippage had occurred under the concrete freezer pad located at the northeast corner of the building, that a crack was present in the asphalt surface of the parking lot to the front of the building and that Adamson had reassured Wadman that the soils slippage on the property would not cause future problems. (Tr. at 251). Penton's perception of Wadman's information was that soil slippage had occurred on the east side of the property, at the northeast corner of the building and was located under the east end of the concrete walk-in freezer pad. (Tr. at 252 - 253). Penton had no understanding from Wadman's information that slope failure was located anywhere else on the property other than under the concrete freezer pad or that the slippage on the east side of the property was part of general slope failure occurring along the length of the west slope of the Birch Creek Gully. (Tr. at 253 - 254).

Penton traveled to the restaurant property during the late afternoon of the same day that he conversed with Wadman. (Tr. at 254). Penton walked through the snow covered parking lot, along the east side of the building and directly to the east end of the concrete freezer pad. (Tr. at 254 - 257). Penton there saw that

a six to eight inch width of the east end of the concrete pad had fractured and had dropped off. (Tr. at 256 - 258). Penton additionally saw the slope erosion under the chainlink fence and at the crest of the gully in the northeast corner area of the property caused by washout from the roof drainpipe. (Tr. at 257). Penton did not look beyond the immediate area of the concrete pad for the reason that what he saw underneath the cement pad reconciled with his understanding of the slippage condition which Wadman had described to him. (Tr. at 258). Penton's investigation stopped at that point. (Tr. at 259). Penton saw no other evidence, through the two feet of snow cover, of slope failure on the east side of the property or in either direction from the property along the west slope of the Birch Creek Gully. (Tr. at 258 - 259). Penton's inspection of the east side of the restaurant property was made in street clothes and shoes and did not extend beyond five minutes. (Tr. at 256, 258).

Penton telephoned Brown that same evening and within a ten minute to fifteen minute telephone call told him that he had conversed with Wadman earlier that day, that he had visited the property immediately following his conversation with Wadman and that he had seen at the northeast corner of the building the fractured concrete pad and the slippage underneath it. (Tr. at 263). Penton gave Adamson's name to Brown and recommended that Brown disclose to Russos what Penton had seen on the property. (Tr. at 263).

Brown understood Penton's telephoned information to mean

that Penton had discovered "a problem with slippage" in the northeast corner of the property. (Tr. at 291). Brown, however, understood from Penton's description that Penton was describing the slope erosion under the chainlink boundary fence and at the crest of the gully caused by washout from the roof drainpipe. (Tr. at 291 - 293). Brown further understood from Penton's telephone call that Adamson had informed Wadman that the east side of the property would not experience further slope failure for fifty to one hundred years. (Tr. at 291). Brown did not disclose to Russos the contents of his telephone conversation with Penton upon the basis that Brown did not believe the contents of the telephone call disclosed anything not already known to him and to Robert Russo. (Tr. at 293).

Brown never contacted Adamson or Wadman for additional or clarifying information. (Tr. at 306). Similarly, Penton never contacted either Frank, Adamson or Wadman (a second time) after his late January 1984 conversation with Wadman to investigate further what any of those individuals knew about slope and soil conditions on the east side of the restaurant property. (Tr. at 259, 260).

All sales negotiations as well as the February 6, 1984 closing were conducted without the real estate agents or the clients having personally met each other. (Tr. at 248, 249). The closing documents contain no disclosures of slope failure and

earth slippage conditions on the east side of the restaurant property. (Tr. at 270). The Russos learned of the earth slippage and slope failure conditions on the east side of the property during the Spring months of 1984 and after the snow cover had melted. (Tr. at 321).

### SUMMARY OF ARGUMENTS

The Russos agree with the Findings of Fact entered by the trial court as is evidenced by their Statement of Facts in this appeal brief. (Tr. at 112 - 116). The Russos, however, specifically challenge paragraphs three through six of the trial court's Conclusions of Law upon which judgment was entered in this action in favor of the Defendant, Bridlewood Corporation, and against the Russos. (Tr. at 116 - 118).

The Russos do not disagree with the trial court's conclusion of law that acts and omissions of their real estate agent, Steven Brown, are chargeable to them just as the Bridlewood Corporation is bound by the acts and omissions of its listing real estate agent, Robert Penton. What the Russos do challenge is that:

(a) The contents of Penton's January 1984 telephone call to Brown was a sufficient disclosure by Bridlewood (the seller) to the Russos (the buyer) that the east boundary area of the restaurant property evidenced slope failure and earth slippage



which materially impacted the property's value and desirability.

(b) The Bridlewood Corporation and its listing agent, Penton, discharged their obligations individually and together to properly investigate and to disclose the nature and extent of slope failure along the east boundary of the restaurant property by the contents of Penton's late January 1984 telephone call to Brown.

Under the first argument, the disclosure obligation of the seller, Bridlewood Corporation, must be measured by what its president, Clinton E. Frank, knew and not merely by what its listing agent, Penton, disclosed to the Russos' agent within the late January 1984 telephone conversation. Undisputed is that Frank never disclosed to Penton his knowledge and personal observations of slope failure on the east side of the property. Equally undisputed is that Penton discovered only a fraction of what Frank had personally observed and what Frank had been told by the original listing agent, Wadman. As a matter of law, Penton's disclosures within the January 1984 telephone call to Brown were inadequate and too incomplete to place Brown (and hence the Russos) on any form of realistic notice that the value and desirability of the restaurant property was adversely impacted by slope failure.

The Russos' second argument is based upon the rule of law found within Easton v. Strassburger, 199 Cal.Rptr. 383 (Cal.App. 1 Dist. 1984) that the duty of a listing broker to disclose facts includes the affirmative duty to conduct a reasonably competent

and dilligent inspection of the listed real property and to disclose to the prospective purchaser all facts materially affecting the value and desirability of the property which such and investigation would disclose.

The Russos submit that the cited rule of law is applicable equally to the seller in this action based upon the quantity and volume of slope failure information which Frank acquired from his personal observations of the property during July 1983 and from his June/July 1983 conversations with Wadman. Notwithstanding, Frank elected to both ignore the importance of this information and to further not disclose any part of it to either his listing agent, Penton, or to the Russos.

The Russos independently urge that Penton (whose conduct is chargeable to Bridlewood) did not meet his disclosure obligation to the Russos by his fortuitous conversation with Wadman, his brief and narrowly focused inspection of the restaurant property and his telephone conversation with Brown. Penton discovered only a fraction of what Frank had personally observed upon the property and what Frank had been told by Wadman, the former listing agent.

The court ruled as a matter of law that Penton's January 1984 telephone conversation with Brown was a sufficient disclosure to put Brown on sufficient notice to further investigate and discover. Brown admittedly did not advise the Russos of his telephone call with Penton nor did he return to the

property for further inspection nor did he contact Adamson, the engineer. Brown's conduct, however, is no different from Penton's. If Brown had a continuing obligation to investigate and disclose based upon the contents of Penton's January 1984 telephone call, so did Penton. Notwithstanding the notice upon which Penton had been placed, Penton did not communicate with either Frank or Adamson to further discover the nature and extent of the slope failure on the property's east boundary, nor did he return to the property with Brown for further inspection. The contents of Penton's January 1984 telephone call to Brown are inadequate and too incomplete to shift entirely to the Russos the obligation to discover the presence of slope failure on the property in the middle of winter and under a two foot deep snow cover. Principles of comparative negligence should apply to measure the quality of conduct between Bridlewood and the Russos both individually and through their respective realtors.

## ARGUMENT

### POINT 1

THE BRIDLEWOOD CORPORATION, AS SELLER, INTENTIONALLY CONCEALED FROM THE RUSSOS, AS BUYER, INFORMATION THAT THE RESTAURANT PROPERTY CONTAINED SIGNIFICANT SOIL STABILITY DEFECTS.

Liability for the intentional/reckless concealment of material facts typically derive from a confidential or fiduciary relationship existing between a plaintiff and defendant. The maintenance of a confidential or fiduciary relationship

between a plaintiff and defendant imposes upon the defendant the affirmative duty to speak and disclose. A defendant commits fraud through the concealment or suppression of material information when:

- (a) The defendant has concealed or suppressed a material fact;
- (b) The defendant was in a fiduciary or confidential relationship to the plaintiff;
- (c) The defendant intentionally concealed or suppressed a material fact with the intent to defraud the plaintiff;
- (d) The plaintiff was unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact;
- (e) Finally, as a result of the concealment or suppression of the fact, the plaintiff sustained damage.

Blodgett v. Martsch, 590 P.2d 298 (Utah 1978), Elder v. Clawson, 14 Utah 2d 379, 384 P.2d 802 (1963), Cooper v. Jevne, 128 Cal.Rptr. 724, (Cal.App. 1 Dist. 1976).

Liability for the intentional/reckless concealment of material facts has been invoked by this Court even where a confidential or fiduciary relationship has not existed between the plaintiff and the defendant. A legal duty to communicate will arise where an inequality of condition exists between the parties. The result

follows that if a party to a contract or transaction possesses material information not reasonably available to the other party and which the latter cannot discover by reasonable diligence, the defendant has a legal duty to speak. The defendant's silence is actionable fraud. Elder v. Clawson, 14 Utah2d 379, 384 P.2d 802 (1963); Ellis v. Hale, 13 Utah2d 279, 373 P.2d 382 (1962); and see, Turnball v. Larose, 702 P.2d 1331 (Alaska 1985); Mitchell v. Straith, 40 Wash.App.405, 696 P.2d 609 (1985); Ogan v. Ellison, 297 Or. 25, 682 P.2d 760 (1984), Lingsch v. Savage, 19 Cal.Rptr. 201 (Cal.App. 1963).

The absence of a "protected relationship" between a seller and a buyer in a real property transaction has produced the general rule that a seller is under no duty to a buyer to investigate and disclose material components within a real estate transaction, even if not known to the buyer. Cole v. Parker, 5 Utah 2d 263, 300 O.2d 623 (1956); Secor v. Knight, 716 P.2d 790 (Utah 1986); Dugan v. Jones, 615 P.2d 1239 (Utah 1980). This general rule, however, is subject to significant exception. Utah applies the majority rule that where the seller knows facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to or within the diligent attention and observation of the buyer, the seller is under a duty to disclose those facts to the buyer.

Dugan v. Jones, 615 P.2d 1239 (Utah 1980) (negligent misrepresentation by the seller and listing broker regarding the amount of acreage for sale); Jardine v. Brunswick Corp. 18 Utah 2d 378, 423 P.2d 659 (1967) (theory of negligent misrepresentation approved - seller's disclosure obligation); Elder v. Clawson, 14 Utah 2d 379, 384 P.2d 802 (1963) (intentional concealment of material facts by vendor and listing agent regarding economic impact of noxious weed quarantine on real property being sold); Turnball v. Larose, 702 P.2d 1331 (Alaska 1985) (intentional concealment of information by vendor and broker from purchaser that lessee intended to terminate lease thereby materially impairing the investment value of the real property to the purchaser); Sorrell v. Young, 6 Wash.App. 220, 491 P.2d 1312 (1971) (purchaser of lot entitled to rescind because vendor intentionally concealed information that lot had been built up to street level by substantial placement of fill dirt); Obde v. Schlemeyer, 56 Wash.2d 449, 353 P.2d 672 (1960) (vendor intentionally failed to disclose to purchaser that residence was infested with termites - rescission allowed); Cooper v. Jevne, 128 Cal.Rptr. 724 (Cal.App. 2 Dist.1976) (allegations that vendor and listing real estate agent knew of substantial structural defects in condominiums - intentional concealment action - rule of law approved that where seller and listing estate agent know facts materially affecting value and desirability of property

offered for sale and such facts are known or accessible only to them and seller and agent also know that such facts are not known to or within reasonable reach of the diligent attention and observation of the buyer, seller and listing agent are each under a duty to disclose such facts to buyer); Lingsch v. Savage, 29 Cal.Rptr. 201, (Cal.App. 1 Dist. 1963) (vendor and broker intentionally concealed from purchasers information that building was in state of disrepair and had been placed for condemnation by city officials - liability of vendor and real estate broker to purchaser for intentional concealment of material facts affecting value and desirability of property).

The Utah Supreme Court decision in Elder v. Clawson, 14 Utah 2d 379, 384 P.2d 802 (1963) represents the application of fraud liability based upon the intentional concealment of material facts. The Court there held that the seller and its real estate agent had intentionally failed to disclose to the buyer the existence of a government imposed quarantine resulting from the presence of a noxious weed upon the real property which had been purchased by the defendant and the economic impact of that quarantine on the operation of the land. The seller's intentional suppression of these material facts within a transaction for which it possessed superior knowledge, not within the fair and reasonable reach of the defendant, was held to be fraud.

The Russos accept the Findings of Fact entered by the

trial court in this action. (Tr. at 112 - 116). The Russos also agree that the acts and omissions of their real estate agent are chargeable to them just as Bridlewood is bound by the acts and omissions of its listing real estate agent, Robert Penton. The Russos challenge, however, those conclusions of law entered by the trial court that:

(a) The contents of Penton's January 1984 telephone conversation to Brown was a sufficient disclosure by Bridlewood (the seller) to place the Russos (the buyer) on notice that slope failure conditions were present on the east side of the restaurant property which materially affected its value and desirability.

(b) The Russos (through Brown) failed to meet their obligation to investigate the contents of Penton's disclosure which failure was the sole and proximate cause of their damages.

The identified conclusions of law are inconsistent with and are not supported by the trial court's Findings of Fact. The cited conclusions of law ignore the knowledge of slope failure both on the restaurant property and within the Birch Creek Gully possessed by Bridlewood through its president, Clinton E. Frank. The disclosure obligation of the seller to the Russos must be measured by what Frank knew and not merely by what its listing agent disclosed to the seller's agent in a fifteen minute telephone conversation. Godesky v. Provo City Corp., 690 P.2d 541 (Utah 1984) (test for proximate cause is whether a



subsequent act, even if negligent, was reasonably foreseeable by the tort-feasor). Frank knew or was on notice of the following slope failure conditions both on the restaurant property and within Birch Creek Gully:

(a) The west slope of the Birch Creek Gully was in general slipping because of heavy water saturation received from the 1982/1983 winter,

(b) The slope failure mechanisms evident along the west slope of the Birch Creek Gully had produced the slope failure on the east side of the restaurant building,

(c) The slope failure on the east side of the restaurant property was evidenced by a radiating slippage line which originated thirty feet from the building, ran parallel to the crest of the gully, intersected into the east wall of the building's foundation and thereafter traversed in a northward direction under the concrete freezer pad, across the north boundary of the restaurant property and into the adjacent waterslide property,

(d) The slippage pattern had been stable from August 1980 through November 1982,

(e) The slippage pattern had doubled in depth from six inches to one foot at the point where it intersected the building and crossed under the concrete freezer pad during the 1982/8383 winter,

(f) An engineer (Adamson) projected that further slope failure on the east side of the building could occur the

following year or not for the next fifty to one hundred years - a projection largely dependent upon annual precipitation levels.

Frank never disclosed to Penton his acquired information and personal observations of the restaurant property and of the Birch Creek Gully. What Penton understood about the east boundary of the restaurant property from his conversations with Wadman is fractional compared to what Frank could have and should have disclosed. Penton understood only that:

(a) Slippage was present under the concrete freezer pad located at the northeast corner of the building,

(b) Adamson had been retained by Wadman to look at slippage on the property and Adamson's opinion was that the slippage would not cause future problems,

(c) Brown should inform Russos that he had observed slippage at the northeast corner of the building which was located under the concrete freezer pad.

Penton had no knowledge that what he had seen under the eight foot wide concrete freezer pad was part of a radiating slippage line which began south of the restaurant building, intersected into the building and thereafter traversed across the property's north boundary and continued across the adjacent property. He additionally had no knowledge that the slope failure mechanisms on the restaurant property existed generally along the west slope of Birch Creek Gully. Penton, like Brown and like the Russos could not see these failure conditions

because of the two foot snow cover. Penton's disclosure to Brown was inadequate and incomplete for what existed on the property. Brown justifiably confused Penton's disclosure of a slippage problem at the northeast corner of the building with the slope erosion caused by washout from the roof drainpipe.

Brown didn't disclose the Penton telephone conversation with the Russos, he didn't communicate with Adamson and he didn't return to the restaurant property for further inspection for the same reason that Penton did not undertake such conduct - i.e., neither realtor had obtained a competent understanding of the slope conditions on the restaurant property and consequently neither realtor was concerned. The absence of a slope failure disclosure in the parties' February 6, 1984 closing documents further confirms this lack of concern between the realtors and their collective judgment that any such problems were merely cosmetic.

The result follows that the contents of Penton's January 1984 telephone conversation to Brown was not a sufficient disclosure to obligate the Russos either individually or through Brown to further investigate and discover by their own resources what Frank knew and intentionally failed to disclose. Penton could not disclose what he did not understand. The Russos submit that this lawsuit would never have been litigated if the slippage on the east side of the restaurant property had been limited to what Penton saw under the concrete freezer pad and what he understood the slippage problem to be.

## POINT 2

THE BRIDLEWOOD CORPORATION, AS SELLER, EITHER INDIVIDUALLY OR THROUGH ITS LISTING REAL ESTATE AGENT NEGLIGENTLY FAILED TO INVESTIGATE AND TO DISCLOSE TO THE RUSSOS INFORMATION THAT THE RESTAURANT PROPERTY CONTAINED SIGNIFICANT SOIL STABILITY DEFECTS.

The Utah Supreme Court has confirmed in Phillips v. J.C.M. Development Corp., 666 P.2d 876 (1983) that a real property owner is subject to liability for the tortuous acts of its real estate agent under the doctrine of respondeat superior. Agency law further requires that the knowledge of a real estate agent is imputed to the employing real property owner. Telling v. Eastern and Pacific Enterprises, 702 P.2d 1232 (Wash.App. 1985).

Article Nine of the Code of Ethics of the National Association of Realtors provides:

Realtors shall avoid exaggeration, misrepresentation, or concealment of pertinent facts. He has an affirmative obligation to discuss adverse factors that a reasonably competent and dilligent investigation would disclose.

The Arizona Supreme Court has held in Baker v. Leight, 370 P.2d 268 (Ariz. 1962) that an industry adopted code of ethics will constitute the standard of care from which negligent or fraudulent conduct can be measured and defined.

Utah law confirms that no fiduciary duty runs from a listing real estate agent to the buyer. The listing agent is nonetheless required to meet standards of honesty, integrity, truthfulness, reputation and competency. Dugan v. Jones, 615 P.2d 1239 (Utah 1980). The application of this rule of law

has been fully defined by the California Court of Appeals in Lingsch v. Savage, 29 Cal.Rptr. 201, (Cal.App.1 Dist.1963) as follows:

The real estate agent or broker representing the seller is a party to the business transaction. In most instances he has a personal interest in it and derives a profit from it. Where such agent or broker possesses, along with the seller, the requisite knowledge according to the foregoing decisions, whether he acquires it from, or independently of, his principal, he is under the same duty of disclosure. He is a party connected with the fraud and if no disclosure is made at all to the buyer by the other parties to the transaction, such agent or broker becomes jointly and severally liable with the seller for the full amount of the damages. It is not necessary that there be a contractual relationship between the agent or broker and the buyer. Cit.29 Cal.Rptr. at 205.

The California state courts now apply the rule of law that on agent's duty of care in a real estate transaction includes the duty to conduct a reasonably competent and diligent inspection of property listed for sale in order to discover defects for the benefit of the buyer. The agent's failure to investigate, discover and thereafter disclose such material defects to a prospective purchaser of real property constitutes negligence.

Easton v. Strassburger,

199 Cal.Rptr. 383 (Cal.App.1 Dist.1984). This rule of law has similarly been applied by the New Mexico state courts in Gouveia v. Citicorp Person-to-Person Financial Center, Inc., 101 N.M.572, 686 P.2d 262 (N.M.App. 1984). The Utah Supreme Court has approved by dicta the Easton v. Strassburger negligence standard in Secor v. Knight, 716 P.2d 790 (Utah 1986).

The fact pattern in Easton v. Strassburger, 199 Cal.Rptr.

383 (Cal.App. 1 Dist. 1984) applies to the facts at issue in this action. The litigation involved residential property which was subjected to massive earth movement after purchase. Expert testimony established that earth slides had occurred because a portion of the property was fill dirt which had not been properly engineered and compacted. The property owners did not tell the purchaser about the slides or the corrective actions which had been taken by them prior to the sale date. Similarly, the owners did not inform the listing broker and agents of these same slide conditions and corrective actions. Notwithstanding that the listing broker and listing agents did not know of the property's earth movement history, the evidence established that the listing broker and agents were aware of certain "red flags" which should have indicated to them that soil problems were present. Even though the listing broker and agents were on notice of soil stability problems, neither of them requested soil stability evaluations for the property nor did any of them inform the buyer of the potential soil problems. The California Court of Appeals rejected the listing broker's argument that it should be liable only for concealment or suppression of facts known to it or its agent. The California Court of Appeals instead held that the duty of the listing real estate broker, to disclose facts -- includes the affirmative duty to conduct a reasonably competent and diligent inspection of the property listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an

investigation would reveal. The rationale for the California Court of Appeals ruling is stated as follows:

If a broker were required to disclose only known defects, but not also those that are reasonably discoverable, he would be shielded by his ignorance of that which he holds himself out to know. The rule thus narrowly construed would have results inimical to the policy upon which it is based. Such a construction would not only reward the unskilled broker for his own incompetence, but might provide the unscrupulous broker the unilateral ability to protect himself at the expense of the inexperienced and unwary who rely upon him. 199 Cal.Rptr. at 388.

Russos submit that the negligence standard set forth within Easton v. Strassburger has direct application to Bridlewood (the seller) as well as to each of the real estate agents. Both Bridlewood as well as Penton and Brown should be obligated as a matter of law, to disclose to the Russos not only facts known to each of them but also to disclose facts which should be known to them through reasonable and competent investigation. Bridlewood should not be allowed to shield itself from its failure or Penton's failure to investigate and disclose because of the superseding conduct of Brown. Godesky v. Provo City Corp., 690 P.2d 541 (Utah 1984) (Superseding cause should rarely, if ever, be a basis for dismissal or summary judgment - test for proximate cause is whether a subsequent act, even if negligent, was foreseeable by the original tort-feasor); accord, Williams v. Melby, 699 P.2d 723 (Utah 1985).

Brown's failure to independently investigate the

information contained within Penton's January 1984 telephone call and to disclose such acquired information to the Russos may constitute negligence. Brown's conduct, however, was no different from that of Penton. Penton told Brown what Penton understood, however imperfectly, of his earlier conversation with Wadman. Brown did not further investigate and the trial court found as a matter of law that Brown's failure to act was negligent. Undisputed is that Penton himself did not further investigate. Penton's duty of care as a listing agent cannot be any less than Brown's and indeed under the Strassburger rule Penton's duty is greater. The seller's obligation to disclose (which here includes the duty to investigate) should be measured by what Frank knew or should have known. Bridlewood should not be shielded from negligence liability because of Penton's superseding conduct or that of Brown's. The insufficiency of Penton's disclosures to Brown are certainly a foreseeable product of Frank's election to both ignore the importance of this information and to not disclose any part of it to either Penton or to the Russos. Comparative negligence standards should apply in this case. The application of comparative negligence standards should compare the conduct of Frank on the one hand and the conduct of Brown on the other. Bridlewood Corporation (through Frank) should not be allowed to have its standard of care measured merely by what Penton fortuitously discovered through Wadman and thereafter disclosed to Brown. What the Bridlewood Corporation knew or should have known can only be



properly defined by what its president, Clinton E. Frank, knew or should have known of slope failure conditions on the east side of the restaurant property. Russos submit that the clear result of such a comparative negligence application would be that the negligence of the Bridlewood Corporation would exceed any negligence attributable to the acts and omissions of the Russos through their real estate agent, Steven Brown.

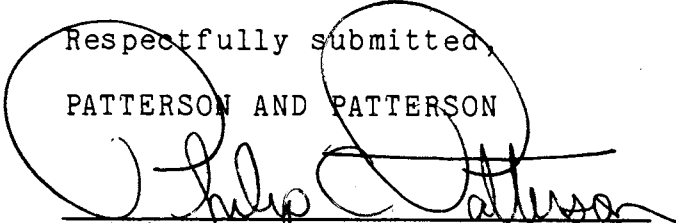
#### CONCLUSION

The August 12, 1986 judgment entered in the District Court of Weber County, Utah should be reversed with this action remanded for trial on the merits or in the alternative for a directed judgment in favor of Plaintiffs.

DATED this 24th day of December, 1986.

Respectfully submitted,

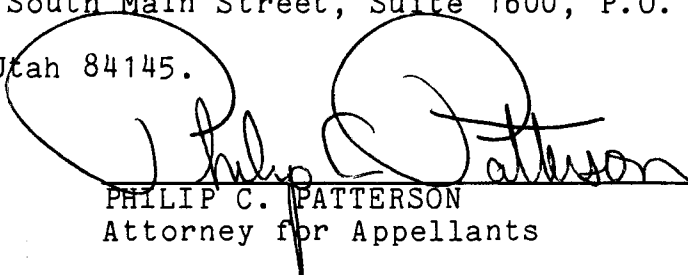
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MAILING CERTIFICATE

I hereby certify that I mailed four true and correct copies of the foregoing Brief of Appellants, postage prepaid, to Jeffrey E. Nelson, VAN COTT, BAGLEY, CORNWALL & McCARTHY, Attorney for Respondent, 50 South Main Street, Suite 1600, P.O. Box 45340, Salt Lake City, Utah 84145.



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