

2003

# John A. Fericks; and C. Kurt Hoffman v. Pentad Properties, INC., and Joe Goodman : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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JOHN A. FERICKS; and C. KURT  
HOFFMAN,

Plaintiffs/Appellants,

vs.

PENTAD PROPERTIES, INC., and JOE  
GOODMAN,

Defendants/Appellees.

Case No. 20030073-SC

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REPLY BRIEF OF APPELLANT

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**Appeal from the Final Order of the Third Judicial District Court  
of Salt Lake County, State of Utah  
The Honorable J. Dennis Frederick, District Court Judge**

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**FILED**  
UTAH SUPREME COURT

**SEP 30 2003**

PAT BARTHOLOMEW  
CLERK OF THE COURT

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## **INTRODUCTION**

Appellee/Defendants' Brief raises a series of issues concerning the posture of this appeal and why the relief sought is procedurally improper and substantively unmeritorious. To keep the arguments and issues in clear perspective, it is important to distinguish between the claims plaintiffs asserted when this litigation started and the claims asserted on appeal. Initially, plaintiffs brought separate claims against the sellers of the property, the Soffes, and the sellers' agents, Goodman and Pentad. Plaintiffs sought specific performance of the Real Estate Purchase Contract ("REPC") against the sellers, but also asserted non-contractual tort claims against Goodman and Pentad.

On appeal, plaintiffs have chosen not to pursue the contractual claims against the selling defendants and seek two specific forms of relief against defendants Goodman and Pentad: (1) reversal of the trial court's grant of summary judgment on plaintiffs' non-contractual tort claims; and (2) reversal of the trial court's grant of attorney fees to defendants Goodman and Pentad. Accordingly, plaintiffs did not join the sellers in this appeal, as no further relief is being sought against them. Plaintiffs alleged that defendants Goodman and Pentad engaged in conduct to induce a breach of the REPC in order to allow new buyers who offered more money and a quicker closing date to purchase the property. The timing of the events clearly supports these claims.

On appeal, defendants Goodman and Pentad have asserted a series of arguments attempting to protect an improper result in the trial court. Defendants' arguments on appeal are that the Statute of Frauds and the provisions of the REPC bar any claims relating to their professional conduct. Under defendants' theory, real estate brokers and agents can engage in improper behavior and then hide behind the Statute of Frauds. Utah law does not support such a premise.

Plaintiffs request a reversal of the trial court's grant of summary judgment as to the non-contractual tort claims asserted against defendants Goodman and Pentad. Plaintiff should be allowed to conduct discovery and prove their claims against defendants Goodman and Pentad. In addition, no basis existed for awarding attorney fees to defendants Goodman and Pentad, as Utah law clearly provides they are not parties to the REPC between sellers and plaintiffs.

#### **APPELLEES' STATEMENT OF FACTS**

In their responsive brief on appeal, defendants have included allegations for which plaintiffs have provided conflicting testimony. This is improper. On appeal from summary judgment, the facts must be viewed in the light most favorable to plaintiffs. See Higgins v. Salt Lake County, 855 P.2d 231, 233 (Utah 1993). Accordingly, this court

should disregard defendants' factual allegations that are conflicting with the facts set forth in plaintiffs' sworn affidavits and as set forth in their Appellants' Brief.

On page 5 of their brief, defendants make representations about what Goodman said in his conversations with plaintiffs regarding the extension. First, defendants state that plaintiffs knew Goodman needed to discuss the extension with the sellers. That is not accurate. Goodman represented to the plaintiffs that the extension would be no problem and he, Goodman, would take care of getting the extension for them. As a corollary, if a problem existed, Goodman said he would call the plaintiffs back and let them know that the extension would not be granted. **(R. at 195-97)**

Defendants then make the following statement: "Goodman promptly called the Sellers to ask whether they would agree to extend the additional earnest money deadline. **(R. at 256)** The Sellers refused to grant the extension. **(R. at 256-67)**." This statement is contradicted by plaintiffs' affidavits. First, one of the sellers, Carlos Soffe, told John Fericks that he was not aware that an extension had been requested. **(R. at 272)** More importantly, if this fact was true, this denial of the extension was not communicated to plaintiffs by Goodman when they called him back prior to the deadline to make sure that no problem existed with the extension. **(R. at 196-97)**. Curiously, defendants make

no allegation that the seller's unwillingness to grant the extension was ever conveyed to plaintiffs until after the deadline had passed.

## **ARGUMENT**

### **I. Defendants' Suggestion of Mootness Should Be Denied.**

In their Brief on appeal, plaintiffs requested the following relief:

- 1) Reversal of the Trial Court's Grant of Summary Judgment as to plaintiffs' non-contractual, independent claims against Pentad and Goodman; and
- 2) Reversal of the Trial Court's Award of Attorney Fees to Pentad and Goodman.

None of the appellate relief requires continued jurisdiction over or legal access to the property which was the subject of the Real Estate Purchase Contract ("REPC"). Nor does the appellate relief require the sellers to be parties to the appeal. Plaintiffs' claims against Pentad and Goodman are based on: (1) statutory and common law duties of care owed by real estate professionals for the rights of third parties; (2) common law claims for intentional interference with contractual and economic interest; and (3) fraud and misrepresentation regarding the circumstances of the 30-day extension under the REPC. It is because plaintiffs have lost their contractual rights under the REPC, vis a vis the property and the sellers, that these claims have substance and merit against Pentad and Goodman.



The claims are direct against Pentad and Goodman, not derivative from claims against the sellers.

Pentad and Goodman claim that the case of Richards v. Baum, 914 P.2d 719 (Utah 1996) “is directly on point” and necessitates dismissal of this appeal for mootness. Yet, Richards v. Baum is easily distinguishable: it involved only the purchasing and selling parties under a contract to buy/sell real property; the claims below were only equitable – i.e., for specific performance of the sale, and for a decree quieting title in the plaintiff/buyer; unlike here, no other non-contractual claims or parties were involved; and unlike here, no claim for monetary damages was made. Richards v. Baum might have aided the sellers in this present case, if they were still parties, but it is no protection for Pentad and Goodman.

Pentad’s and Goodman’s suggestion of mootness is based on a misstatement of the case – i.e., that “Plaintiffs’ claims are all based on an alleged oral modification of the contract between Plaintiffs and the Sellers of the property.” In truth, only the claims against the sellers were so based. The claims against Pentad and Goodman are based on facts and circumstances surrounding the failure of that oral modification. They are independent of the claims against the sellers under the REPC. In fact, the trial court issued a separate order disposing of these non-contractual claims. Therefore, only defendants Pentad and Goodman need to be parties to this appeal.

The trial court abused its discretion by prematurely granting summary judgment and not allowing plaintiffs the opportunity to complete discovery pursuant to Rule 56(f), Utah R. Civ. P. That discovery was served on and directed against Pentad and Goodman, not the sellers. That discovery went to the facts underlying the non-contractual claims against Pentad and Goodman. Appellate relief on this issue does not require jurisdiction over the property or participation of the sellers.

Even if the trial court properly granted summary judgment to Pentad and Goodman, it erred in determining that they were entitled to recover attorney fees. Goodman and Pentad were not parties to the REPC, and no other basis exists for an award of attorney fees to them. Accordingly, the sellers are not necessary parties to this aspect of the appeal, while defendants Pentad and Goodman quite properly are.

Finally, the trial court erred in the amount of attorney fees it awarded to Goodman and Pentad (\$27,699.52). In contrast to the fees awarded to the sellers (\$2,343.75), the fees amount awarded was not reasonable or supported by Utah law. Accordingly, the sellers are not necessary parties to this aspect of the appeal, while defendants Goodman and Pentad certainly are.

II. Utah Recognizes Exceptions To the Strict Application of the Statute of Frauds in Cases Involving Real Property Transactions.

The trial court erred by adopting defendants' argument that no exceptions to the Statute of Frauds exists and in determining that the Statute of Frauds barred an oral modification of the REPC. In support of their position, defendants cite selected cases and argue the Statute of Frauds mandates rigid application without consideration of any surrounding circumstances, such as an enforceable REPC which fixes all material terms, or equitable considerations, such as misrepresentations, reliance, partial performance and estoppel.

However, as the cases cited in plaintiffs' opening brief indicate, the law is not as rigid as defendants would have this court believe. Defendants continually ignore the recognized statement of the law in Utah: "a recognized and accepted exception to the statute of frauds provides, "[i]f a party has changed his position by performing an oral modification so that it would be inequitable to permit the party to found a claim upon the original agreement[,] . . . the modified agreement should be held valid.""Fisher v. Fisher, 907 P.2d 1172, 1176-77 (Utah Ct. App. 1995). Holt v. Katsanevus, 854 P.2d 575 (Utah Ct. App. 1993). Defendants, however, citing Stangl v. Ernst Home Center, Inc., 948 P.2d 356

(Utah Ct. App. 1997) and Mills v. Brody, 929 P.2d 360 (Utah 1996), would have this court believe that the statute of frauds is an absolute bar to any oral modification of a contract subject to the statute of frauds. (Appellees' Brief at 14). Defendants do not even acknowledge the cases which allow for oral modifications of real estate contracts subject to the Statute of Frauds.

To be sure, in certain circumstances, application of the Statute of Frauds to bar oral modification of a written contract is warranted. Utah law, however, does not mandate rigid application asserted by defendants. Plaintiffs' opening brief discussed all the relevant cases on both sides of the issue and pointed out distinguishing facts warranting application of the recognized exceptions to the Statute of Frauds in this case. (Appellants' Brief at 10-19).

Taken as a whole the cases cited by both parties stand for the proposition that in certain circumstances an oral modification of contract for real property may be allowed despite the Statute of Frauds<sup>1</sup>. These cases unequivocally show two things: (1) Utah

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<sup>1</sup>Compare: Stangl, 948 P.2d at 363-365 (holding that oral promise to enter into contract is not enforceable where the parties are only negotiating); Mills, 929 P.2d at 364 (declining to address estoppel argument where it was not raised at the trial court); Wardley Corp. Better Homes and Gardens v. Burgess, 810 P.2d 476, 477-78 (Utah Ct. App. 1991) (holding oral agreement which modified material term of the contract and created a new contract was not enforceable under statute of frauds); Allen v. Kingdon, 723 P.2d, 394, 396-97 (Utah 1986) (holding that buyers had not raised any equitable

recognizes that certain circumstances warrant exceptions to the statute of frauds, and (2) whether or not an oral modification is enforceable depends upon the facts of each case which in most circumstances precludes summary judgment.

In this matter, the trial court's rulings deprived plaintiffs of the opportunity to discover and offer evidence supporting their allegations that: (1) the parties had agreed upon an oral extension of the due date for payment of additional earnest money; and (2) plaintiffs had continued performing under the REPC in reliance on the extension. Furthermore, the key fact that defendants to continue to gloss over and the trial court apparently missed is that the parties had an enforceable written contract (the REPC) which satisfied the statute of frauds. The oral modification of the REPC did not alter the real property being sold, the purchase price, the parties or the closing date. Accordingly, the oral modification did not implicate the Statute of Frauds.

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considerations or changed their position in reliance on oral agreement warranting application of exception to statute of frauds), with: R.T. Nielson Co. v. Cook, 40 P.3d 1119 (Utah 2002) at ¶ 13 n.4 (discussing Utah law which allows parties to orally modify a contract even where the contract specifically requires all modifications to be in writing); Fisher, 907 P.2d at 1176-77 (allowing oral modification of payment provision of contract for the sale of real property based on parties' change in position in reliance on oral agreement); Holt, 854 P.2d at 579-80 (reversing grant of summary judgment under statute of frauds where party presented sufficient issues of fact to demonstrate partial performance in reliance on oral agreement modifying a contract for the sale of real property).

Pentad and Goodman argue by bald assertion, with no rationale or affidavit support, that the deadline for plaintiffs to post additional earnest money was a material term of the contract which could not be changed except in writing. Plaintiffs argued below that it was not. The trial court took no evidence from the sellers to the contrary. It is difficult to imagine a more stark dispute as to a material fact. And for this reason, resolution through summary judgment was completely inappropriate.

III. Plaintiffs Tort Claims Arise Out of Defendants Goodman and Pentad's Improper Conduct And Are Independent of the REPC.

Plaintiffs Claims for breaches of professional duties, intentional interference with contract and economic interests, and fraud and misrepresentation are all tort claims asserted directly against defendants Goodman and Pentad. None of these tort claims depend for their success on contractual obligations from the REPC or the oral modification being enforceable. In fact, if the oral agreement had been enforced and the property was sold to plaintiffs, plaintiffs would have no damages on any of these claims against Pentad and Goodman. The tort claims are based on the separate, non-contractual conduct of defendants Goodman and Pentad. Because the tort claims do not require an enforceable oral modification and do not arise out of the REPC, the trial court erred in dismissing these claims under the Statute of Frauds.

In order to get a sense of the nature of the tort claims asserted against defendants Goodman and Pentad, a few background facts are helpful. Plaintiffs alleged in their pleadings and sworn affidavits the following conduct by defendants Goodman and Pentad. On March 26, 2002, plaintiff, C. Kurt Hoffman, had a conversation with Joe Goodman regarding obtaining an extension for the second earnest money deposit which was due on April 6, 2002. **(R. at 56-57; 195-96)**. On Friday, April 5, 2002, C. Kurt Hoffman followed up with Joe Goodman regarding the extension. **(R. at 196)** During this conversation, Goodman again represented that plaintiffs could have an extension and made no demands for payment on April 6, 2002. **(R. at 196)**. The next business day, Monday, April 8, 2002, Goodman sent a letter informing plaintiffs that the seller intended to void the contract based on the failure to tender the second earnest money payment on April 6, 2002. **(R. at 272, 277)** On the same day, plaintiffs learned from Goodman that another offer for the property at a higher price with a quicker closing date had been made to Goodman. **(R. at 273)** In a subsequent conversation with the seller on April 18, 2002, the seller informed plaintiff, John Fericks, that Goodman had not discussed the requested extension with him nor was the seller aware of any extension request. **(R. at 272)** These facts support the allegations that Goodman was simultaneously negotiating a new deal with a different buyer while representing to plaintiffs that an extension had been granted.

Based on these facts, plaintiffs asserted tort claims against defendants Goodman and Pentad for their conduct which caused plaintiffs to lose the opportunity to complete the real estate transaction under the REPC. These claims do not hinge on whether the oral extension is enforceable under the Statute of Frauds. The tort claims focus on Goodman's (and Pentad as Goodman's principal) conduct in making misrepresentations to plaintiffs and double-dealing on the property.

If proven, the facts would constitute a breach of Goodman's and Pentad's duty of care as established by this court. "Specific to the duties of a real estate agent to those persons to whom the agent owes no fiduciary duty, we stated in Dugan v. Jones that '[t]hough not occupying a fiduciary relationship with prospective purchasers, a real estate agent hired by the vendor is expected to be honest, ethical, and competent and is answerable at law for his or her statutory duty to the public.'" Hermansen v. Tasulis, 2002 UT 52, ¶ 22, 48 P.3d 235 (citation omitted). The duty to "deal fairly and honestly" with plaintiffs exists "despite the fact that the broker is acting primarily as the seller's agent." Id. at ¶ 20 (quoting Secor v. Knight, 716 P.2d 790, 795 n.1 (Utah 1986)).

Defendants argue that Stangl v. Ernst Home Center, Inc., 948 P.2d 356 (Utah Ct. App. 1997) provides that the statute of frauds also bars plaintiffs tort claims as well. However, nothing in the Stangl opinion stands for this proposition. See Stangl, 948 P.2d at



359-60. In Stangl, the plaintiff did not raise any tort claims. See id. The Stangl text relied on by defendants is found in the opinion's discussion of whether the defendant in that case was estopped from asserting a statute of frauds defense. See id. at 362. The court in Stangl went on to hold that where the parties had no written contract, an oral promise to enter into a contract was unenforceable. See id. Defendants' reliance on Stangl is simply misplaced, as the case involved no non-contractual tort claims.

Defendants remaining argument is that allowing a party to raise tort claims would somehow eviscerate the Statute of Frauds. The Statute of Frauds does not govern non-contractual based tort claims. The Statute of Frauds requires the material terms of certain contracts to be in writing to be enforceable—it does not address anything else. Plaintiffs do not seek any contractual remedies in their tort claims. Plaintiffs are seeking damages against defendants Goodman and Pentad for the lost benefits and opportunities they would have received under the REPC. Again, if plaintiffs had been able to enforce the REPC against the Soffe defendants and buy the property, the tort claims against Pentad and Goodman would not exist.

IV. Defendants Goodman and Pentad Are Not Parties to the REPC  
Which is the Only Authority for Award of Attorney Fees.

The status of the parties in this action is straightforward: the Soffes as sellers (not made parties to the appeal); the buyers (plaintiffs/appellants); and the real estate agent and broker (defendants/appellees Goodman and Pentad). Nothing in plaintiffs' complaint makes defendants Goodman and Pentad parties to the REPC. Utah has adopted the American Rule which does not allow for the recovery of attorney fees except as provided by contract or statute. Because only the buyer and seller are parties to the REPC, the trial court had no legally supportable basis to award attorney fees to defendants Goodman and Pentad.

On appeal, defendants do not attempt to argue that any provision of the REPC makes them a party to the contract. Instead, defendants sole argument is that plaintiffs' pleadings somehow "engrafted Pentad and Goodman onto the principal party status of the Sellers in the underlying contract for purposes of a fee award." (Appellees' Brief at 33) It is impossible to "engraft" principal party status onto a party by allegations in a pleading. If defendants' argument had any merit, plaintiffs would be able to enforce the terms of the REPC against defendants Goodman and Pentad—which plaintiffs clearly cannot do. Defendants Goodman and Pentad cannot be parties to the contract for selective provisions which they find appealing to their situation. The Utah Court of Appeals in Wardley Corp. v.

Welsh, 962 P.2d 86, 91-92 (Utah Ct. App. 1998) carefully analyzed a contract almost identical to the REPC in this matter and concluded the parties to the contract were the buyer and the seller. Defendants Goodman and Pentad have not cited a single authority to support their argument.

Nothing in the pleadings suggests that defendants Goodman and Pentad were parties to the REPC or occupied the same position as the sellers. Defendants quote the allegations under the three causes of action against defendants Goodman and Pentad as support for their argument. The first cause of action quoted is “breach of statutory and common law standards of care with regard to the rights and interests of the Plaintiffs *as third parties to a Real Estate Purchase Contract.*” (Appellees’ Brief at 30 citing the Record at 57-58, 413-14) (emphasis added by defendants). Defendants have misquoted the allegation in an apparent attempt to bolster their argument. The last part of the allegation in the Complaint actually reads: “as third parties to a real estate transaction.” (**R. at 57**) (The whole allegation properly reads: “breach of statutory and common law standards of care with regard to the rights and interests of the Plaintiffs as third parties to a real estate transaction.”). In the present case, plaintiffs were third parties to the listing agreement and relationship between seller and defendants Goodman and Pentad. The allegation mirrors the

duty owed by a seller's agent to a buyer as set forth in Hermansen v. Tasulis, 2002 UT 52, ¶ 22, 48 P.3d 235.

Furthermore, even if "third party" referred to defendants Goodman and Pentad, third party status to a contract or transaction is not a basis to recover or enforce the contract—absent an express indication that the party was an intended beneficiary. See American Towers Owners Assoc., Inc. v. CCI Mechanical, Inc., 930 P.2d 1182, 1187-88 (Utah 1996) (setting forth requirements for a third party beneficiary). Nothing in the REPC indicates an intent to confer a benefit on defendants Goodman and Pentad. Unlike defendants Goodman and Pentad who had no rights or obligations under the REPC, plaintiffs had third party rights to the sellers and defendants Goodman and Pentad. Utah common and statutory law provide a real estate agent owes a duty of care to third parties to the relationship between the seller and its agent. See Hermansen, 2002 UT 52 at ¶ 22. Defendants are grasping at straws to read plaintiffs' claim as elevating defendants Goodman and Pentad into the status of actual parties to the REPC.

The remaining responses to the allegations against defendants Goodman and Pentad are similarly unavailing. The second allegation specifically alleges interference with plaintiffs' contractual interests "with regard to the REPC between Soffe [sellers] and Plaintiffs." (**R. at 58**). This allegation sets forth that a contract existed between the buyer

and seller, and that defendants Goodman and Pentad interfered with plaintiffs' contractual and economic interests in that contract. It does not allege that defendants Goodman and Pentad were a party to or had any interest in the REPC.

Finally, with regard to the allegation of fraud and/or misrepresentation, as agent of the sellers, defendants Goodman and Pentad had authority to grant or secure an extension on behalf the sellers. This agency relationship, however, does not make them a party to the contract. Defendants Goodman and Pentad have not cited any authority to support the proposition that an agent becomes a party to a contract. Other courts have uniformly rejected this type of argument. See, e.g., Welsh, 962 P.2d at 91-92; Harris v. Richard N. Groves Realty, Inc., 315 So. 2d 528, 529 (Fla. Ct. App. 4th Dist. 1975); Harwig v. Downey, 56 P.3d 1220, 1221-22 (Colo. Ct. App. 2002).

Plaintiffs request this court reverse the trial court's award of attorney fees to defendants Goodman and Pentad. Defendants Goodman and Pentad are not parties to the REPC, and, accordingly, no basis exists to award them attorney fees. Defendants Goodman and Pentad have not argued, nor could they, that any provision of the REPC makes them a party to the contract. Defendants have manufactured an argument in the hopes of preserving an improper award from the trial court. Under Utah law, the award is not supportable and should be reversed.

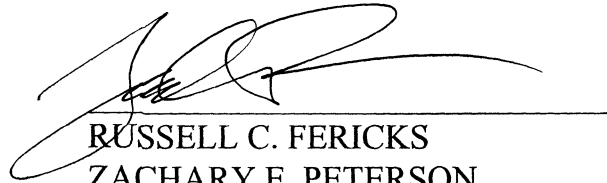
## **CONCLUSION**

Plaintiffs request this court reverse the trial court's grant of summary judgment on the non-contractual tort claims against defendants Goodman and Pentad. The Statute of Frauds does not bar non-contractual tort claims. Plaintiffs also seek reversal of the trial court's award of attorney fees to defendants Goodman and Pentad. First, the trial court improperly found the Statute of Frauds barred plaintiffs claims under the REPC. Utah recognizes exceptions to the Statute of Frauds which necessarily turn on the facts of each case. Summary judgment was improper in this case as a matter of law where disputed issues of fact existed. Furthermore, even if the trial court correctly determined the Statute of Frauds applied, no basis existed to award defendants Goodman and Pentad attorney fees. Defendants Goodman and Pentad are not parties to the REPC. Finally, the amount of the award is not reasonable under Utah law. The trial court's grants of summary judgment

should be reversed, the award of attorney fees to defendants Goodman and Pentad should be vacated and the matter should be remanded.

DATED this 30 day of September, 2003.

RICHARDS, BRANDT, MILLER  
& NELSON

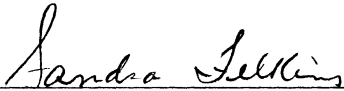
A handwritten signature in black ink, appearing to read 'R. C. Fericks', is written over a horizontal line. The signature is stylized with a large loop at the end.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that two true and correct copies of the foregoing Reply Brief of Appellant were delivered via U.S. Mail on this 30 day of September, 2003, to the following:

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