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IN THE SUPREME COURT OF THE

STATE OF UTAH

RODNEY L. PHILLIPS, Plaintiff-Respondent, vs. JCM DEVELOPMENT CORPORATION, a Utah corporation; JAMES C. McGARRY, JR.; LINDA McGARRY; JAMES R. GLAVAS, dba J. G. REALTY; JAMES GLEASON: ROBERT G. ANDERSON; UNITED FARM AGENCY, INC., a Utah corporation; CLAN STILSON; and DOES I through XV, Defendants-Appellants.	)	Case No. 18211

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR GRAND COUNTY, HONORABLE BOYD BUNNELL PRESIDING

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FILED

JUN - 4 1982

Clerk, Supreme Court, Utah

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BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an action by the Plaintiff against the Defendant, United Farm Agency, Inc., a Utah corporation, for damages arising out of a real estate transaction.

DISPOSITION IN THE LOWER COURT

The case was tried before the Honorable Boyd Bunnell on the 29th and 30th day of July, 1981. The Court granted judgment in favor of the Plaintiff on July 30, 1981, against all of the defendants except Linda McGarry and took under advisement the amount of the damages suffered by the Plaintiff. On September 4, 1981, the Court filed its Memorandum Decision (R. 213-215), and on October 14, 1981, the Court signed and filed its Findings of Fact,

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Conclusions of Law and Judgment (R. 232-243).

The Defendant, United Farm Agency, filed its Motion for a New Trial which was denied by the Court by its Order filed December 24, 1981 (R. 285). The notice of appeal was filed on January 8, 1982 (R. 304).

RELIEF SOUGHT ON APPEAL

The Respondent requests that the trial court's decision be affirmed in all respects and that he be awarded his costs.

STATEMENT OF FACTS

The Plaintiff operated a construction business in Moab, Utah, from 1970 until he was defrauded of his business in 1978 (Tr. 242-243).

The Plaintiff's first dealings with United Farm Agency occurred in 1976 (Tr. 7). At that time, Mitch Williams, a United Farm Agency agent, approached the Plaintiff about purchasing the Grand Valley Motel and Silver Dollar office building, which had been listed with United Farm Agency. The purchase was consummated with the help of Robert Anderson, United Farm's local representative, and Anderson, in lieu of receiving a monetary commission from the seller, received free rent in an office the Plaintiff renovated in the Silver Dollar office building (Tr. 8, 133).

SALE OF MOTEL AND OFFICE BUILDING

The Plaintiff and Anderson had occasion to see each other on a day to day basis during the months that renovation of the office building occurred and a good relationship evolved between Robert Anderson and the Plaintiff (Tr. 9-10, 134). On June 14, 1977, the Plaintiff listed the Grand Valley Motel and Silver Dollar office building with United Farm Agency through Anderson because

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of his daily contact with Anderson and because Anderson had helped him draw up the papers when he bought the motel (Tr. 134-135; Ex. 2). On June 23, 1977, the Plaintiff listed the office building separately with United Farm Agency. Each listing was executed on a United Farm Agency form (Tr. 10-11; Ex. 2, 5).

At the end of November, 1977, United Farm Agency and Anderson produced a prospective buyer for the Plaintiff's motel and office building. A Deposit Receipt and Agreement of Sale was signed by the propective buyer and the Plaintiff on a United Farm Agency form (Ex. 4). However, the sale failed to close and the earnest money was returned to the prospective buyer to the Plaintiff's displeasure (Tr. 12, 13, 411; Ex. 4).

Other buyers for the motel and office building were subsequently introduced to the Plaintiff by Anderson and the parties entered into a Deposit Receipt and Agreement of Sale on a United Farm Agency form on March 27, 1978 (Ex. 10). The agreed price for the motel and office building was $200,000.00 with $2,000.00 earnest money placed by the buyers. Because the Plaintiff had received no earnest money when the earlier sale fell through, the Plaintiff required that the $2,000.00 be released to him prior to closing in return for his property being tied up (Tr. 403-404, 411). The sale closed on May 8, 1978, and United Farm Agency received a $20,000.00 commission of which $10,000.00 went to Anderson (Tr. 19, 20-21). Financing for the purchase of the motel was arranged through RLC, which Anderson testified is a parent or subsidiary corporation of United Farm Agency which provides financing for United Farm Agency transactions (T. 22-23; Ex. 10, 11, 12).

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HOME AND CONSTRUCTION COMPANY LISTED

In the meantime, back in January 1978, the Plaintiff had also listed his home and construction company with United Farm Agency through Anderson for a combined sales price of $275,000.00 (Tr. 14-15; Ex. 6). Anderson had prepared letters on United Farm Agency's stationary to send to prospective buyers for the home and construction business, and the home and construction company were advertised in United Farm Agency's national listing service catalogue (Tr. 16-17, 24; Ex. 7-8).

HOME SOLD

A buyer for the home was found through United Farm Agency's national listing catalogue and the closing occurred on or about June 29, 1978. The home sold for $75,000.00 and United Farm Agency received a commission of $4,500.00, of which Anderson received one-half (Tr. 25). As in the case of the sale of the motel and office building, the Plaintiff again required that the earnest money be released to him early in return for his property being tied up and his request was again accommodated by the buyer, Anderson and the attorney handling the closing (Tr. 405, 411; Ex. 13).

The construction company was re-listed for one year with United Farm Agency on June 23, 1978. The list price was lowered from the previous asking price of $200,000.00 to $185,000.00. Additionally, the business shop building was listed separately for $70,000.00 (Ex. 14, 15). The Plaintiff at this time advised Anderson that his company was having cash flow problems and that a prospective buyer should have $50,000.00 cash available to meet the monthly cash turn over. As with the prior listing, the Plaintiff agreed to remain with the company for six months in order to

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provide a contractor's license and to assure the continuity and the good name of the business the Plaintiff had built (Tr. 30-32, 141, 147, 279). Although the Plaintiff was having cash flow problems, his company had plenty of assets which could be liquidated to pay off debts (Tr. 289).

PURCHASER FOR CONSTRUCTION COMPANY

On July 17, 1978, Anderson expecting to receive a commission, presented to the Plaintiff as a prospective purchaser of the Plaintiff's construction company one James C. McGarry acting as president of JCM Development Corporation. McGarry was represented by James Gleason, a real estate agent for J. G. Realty (Tr. 36-38, 41). Anderson, McGarry, Gleason and a Gerald (Bud) Stocks, who had introduced McGarry and Gleason to Anderson, all examined some of the Plaintiff's jobs and equipment and then went to the Plaintiff's office where they reviewed the Plaintiff's business records (T. 40). The Plaintiff asked Anderson if JCM had the $50,000.00 liquidity necessary to maintain continued operations of his company and Anderson assured the Plaintiff that "money was no problem with these people" and that the buyers were worth millions of dollars (Tr. 138, 141, 279). Anderson advised the Plaintiff that JCM was willing to pay $200,000.00 for his construction company (Tr. 235) and further advised the Plaintiff that he should not liquidate any assets to meet current obligations since the assets would be part of a sure sale to JCM (Tr. 287-288)[1].

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[1]Because of the Plaintiff's good credit, his bank honored checks even when his account temporarily had insufficient funds (Tr. 361,372). The Plaintiff's business had handled $714,000.00 in contracts in 1977 (Tr. 293-294; Ex. 42).

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On the morning of July 18, all of the parties, except Stocks, again met at the Plaintiff's office and examined more equipment and further examined the business records. Anderson at trial admitted that at this time he still expected United Farm Agency to received a commission in the event of sale (Tr. 41-42).

Sale negotiations continued on and off throughout the 18th to late afernoon, Anderson negotiating on behalf of the Plaintiff and expecting to receive a commission. At 5:00 or 6:00 in the evening in a meeting at the United Farm Agency office, Anderson told the Plaintiff that McGarry and Gleason were satisfied with the information they had seen and were ready to make a deal (Tr. 144). By this time Anderson and United Farm Agency had also entered into their own deal with McGarry, unbeknown to the Plaintiff (Tr. 58, 248).[2] The understanding reached between the Plaintiff and McGarry

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[2]Prior in the afternoon Anderson, for himself and for United Farm Agency, had signed an Earnest Money Agreement with McGarry wherein JCM agreed to purchase 20 acres of land owned jointly by Anderson and United Farm Agency for $100,000.00, which land was to be developed by JCM into a mobile home park by using the Plaintiff's construction company to do the construction work (Tr. 60, 63-64). It was further anticipated that United Farm Agency would exclusively list and sell the mobile home lots, and that United Farm Agency and Anderson would ultimately handle upwards of two million dollars in sales (Tr. 62, 64-66, 69).

The acreage involved had been received by Anderson and United Farm Agency as a commission from a prior sale. With United Farm Agency's approval, the land had been mortgaged to First Security Bank on December 21, 1977 to secure a $25,000.00 loan taken by Anderson (Tr. 32-34, 61; Ex. 16-17). As of July 18, 1978, Anderson was several months delinquent in making the agreed payments and needed to find a buyer for the 20 acres to pay off the loan. JCM offered him the opportunity to pay off the loan and still have nearly $25,000.00 (the remainder of his $50,000.00 one-half of the purchase price) (Tr. 55-58). Anderson admitted that he was very much hopeful that JCM would purchase the 20 acres (Tr. 37). Also by this time, McGarry, Gleason and Anderson had agreed that United Farm Agency's $20,000.00 commission from the Plaintiff's sale would be split with $5,000.00 to go to Anderson and, implicitly, $5,000.00

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called for the Plaintiff to receive $200,000.00 for his business as previously listed, plus a 1.7 acre lot to be included which had not been listed (Ex. 18).

ANDERSON "STEPS ASIDE"

When it came time to reduce the understanding to writing Gleason called Anderson out of the presence of the Plaintiff and said his form was simpler and that Anderson should let him handle the sale. Gleason also stated that he intended to handle the closing as a stock transfer. Anderson stated that a stock transfer was not the proper way to handle the sale and that the bulk sales act should be complied with. Gleason told Anderson to "step aside" and said, "I know how to handle this deal. Just let me handle it". Anderson then acquiesced, "Mainly because Gleason didn't want me to" (do the sale) and because of the prior deal worked out between JCM, United Farm Agency and Anderson which offered United Farm Agency and Anderson a potential two million dollars in real estate sales and lots of attractive possibilites for the future (Tr. 47-48, 69, 145, 256).

When Gleason and Anderson rejoined the Plaintiff no explanation was given by Anderson to the Plaintiff as to why a J. G. Realty form was being used (T. 51). When the Plaintiff asked what

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to United Farm Agency and $10,000.00 to J. G. Realty (Tr. 44, 145, 161.

While the Plaintiff later learned that Anderson and United Farm Agency had made a deal with JCM, he was never told by Anderson of the delinquent note (Tr. 116-117, 155-156). After the Plaintiff's company was turned over to JCM an article appeared in the August 24, 1978 Moab Times Independent announcing that a mobile home subdivision was to be developed by JCM with lots to be sold and financed by United Farm Agency. The article also stated that the Plaintiff's construction company would be used to develop the subdivision. (Tr. 64-66, 110).

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was happening Anderson told him that there was to be a commission split between brokers with Anderson to receive $5,000.00 of the $20,000.00 commission (Tr. 145-146, 44).

UNITED FARM AGENCY'S POSITION

At trial Anderson, Clan Stilson (the United Farm Agency broker), and United Farm all took the position that Anderson had expressed concern over the need to comply with the bulk sales act in the PLaintiff's presence although Anderson admitted that the Plaintiff "may or may not have been present" when the discussion occurred. The Plaintiff denied being present (T. 47, 49, 256). Anderson, Stilson and United Farm further contended that once the parties seemed intent on proceeding contrary to Anderson's advice, Anderson determined that he was no longer going to represent the Plaintiff and from that point on United Farm Agency no longer expected to receive a commission (although a $20,000.00 commission appeared when the closing instruments were prepared by Anderson and the Plaintiff had no obligation whatsoever to pay a commission to J. G. Realty) (Tr. 51, 126, 161, 198; Ex. 18).

Contrary to the foregoing position, Anderson admitted at trial that he never told the Plaintiff that he was no longer going to represent him (Tr. 53-54, 107). Contrary to the foreoing position, Anderson admitted that he never told the Plaintiff that he had done wrong in entering into the Earnest Money Agreement with JCM (Tr. 53). Also contrary to the foregoing positon, Anderson admitted that despite his disagreement with Gleason over how a sale should be handled, there was no hesitation on his part to go ahead on the multi-million dollar deal between JCM, himself and United Farm Agency, the beginning of which had been executed on a J. G. Realty form

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(Tr. 58; Ex. 19).

EARNEST MONEY AGREEMENT

The earnest money agreement signed on July 18, 1978 by the Plaintiff and McGarry, as president for JCM, called for the Plaintiff to receive $200,000.00 as follows: $40,000.00 cash down; a five year 10% note for $38,750.00; the balance to be paid by JCM assuming existing loans on the company, building and equipment in the amount of $121,250.00 (Ex. 18). The Earnest Money Agreement, consistent with the Plaintiff's listing agreement, did not include the Plaintiff's accounts receivable or payable in the terms of the sale (Ex. 15, 18).

ANDERSON'S REPRESENTATIONS

On the evening of July 18 or the following day Anderson told the Plaintiff that the buyers were worth seven and one-half million dollars. When the buyers, through Anderson, asked the Plaintiff for a financial statement, the Plaintiff in turn asked Anderson to check into the buyers' financial standing. Anderson agreed to and reported back that the buyers were worth $3\frac{1}{2}$ million net worth (Tr. 154-155, 278-279, 282). Anderson at first denied that he had been told by the buyers that they were worth millions of dollars (Tr. 67). He later admitted that he may have told the Plaintiff that they were worth seven million dollars (Tr. 68) and also admitted that "millions" had come up in his presence (Tr. 73-74). Although Anderson denied that he represented to the Plaintiff that the buyers were financially sound (Tr. 68), a local bank manager testified that Anderson had told him that the buyers were sound (Tr. 289, 396). Anderson admitted that he never made any inquiry into the buyers' financial standing (Tr. 105, 109-110, 125).

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Following July 18, 1978 the Plaintiff continued to meet with Anderson on an almost daily basis (Tr. 151, 158). The Plaintiff, as with the sales of his motel and home, again told Anderson that he expected to receive the $5,000.00 earnest money and Anderson said that he would get it for him (Tr. 149-151, 265-266).

AUGUST 14, 1978 CLOSING

On August 14, 1978 Anderson contacted the Plaintiff and told him that all of the arrangements for the funding of the purchase of his company ahd been worked out, including the $50,000.00 operating capital. He asked the Plaintiff to come to his office to finish preparing the paperwork necessary for closing the sale (Tr. 161).

At 3:00 p.m. the Plaintiff met at the United Farm Agency office with Anderson, Anderson's wife and secretary, Martha, McGarry and Gleason. The parties figured adjustments and prepared a rough draft of a closing statement. The closing statement included the $200,000.00 sales price, the $20,000.00 commission, and the down payment of $40,000.00, among the other items. Adjustments were made to reflect changes in the Plaintiff's inventory since his business was listed. The Plaintiff's receivables and payables were at this point included in the sale and offset against each other. After the receivables, payables, and other adjustments had been taken into account, the Plaintiff was entitled to his $40,000.00 cash down and to an additional $44,000.00 note (rather than the $38,750.00 listed in the earnest money agreement (Tr. 163), making an agreed equity in the company of $84,000.00 (Tr. 161-162, 197-198, 305-313).

The adjustments having been made, Anderson prepared two promissory notes to be signed by the Plaintiff, one for $44,000.00,

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and one for $35,000.00 (Tr. 81-31, 85-86). Anderson also prepared several warranty deeds for the Plaintiff's signature (Tr. 83-84, 90, 93-95). He helped prepare a bill of sale for the Plaintiff's equipment (Tr. 163-164, 237) and he had previously ordered preliminary title reports on the Plaintiff's land which were kept in the United Farm Agency file (Tr. 416-417; Ex. 20-29).

WORTHLESS NOTES GIVEN

The warranty deed and the bill of sale were signed by the Plaintiff and the warranty deeds were notorized by Anderson. The note for $44,000.00, payable over five years, was signed by James C. McGarry as president of JCM Development Company, notorized by Anderson and given to the Plaintiff. About an hour later Anderson brought the note for $35,000.00 to the Plaintiff. This note represented $35,000.00 of the $40,000.00 cash down which was to be paid to the Plaintiff at closing. The Plaintiff expressed concern why he was receiving a note instead of cash as agreed and the parties told him that the money had not yet been wired and requested that he wait for this amount and that they would give him the balance of $5,000.00 from the earnest money. Anderson assured the Plaintiff that his procedure would be safe and encouraged him to accept the notes. When the Plaintiff asked Anderson about the need for collateral for the notes, Anderson laughed and told the Plaintiff that the notes were "as good as gold" and he would have no problem getting paid (Tr. 88, 162-165, 282).

Relying upon Anderson, the Plaintiff accepted two worthless unsecured notes totaling $79,000.00. The Plaintiff surrendered $200,00.00 in assets to JCM on an oral promise that JCM would pay off his obligations. He turned his checking account and in excess of $60.000.00 accounts receivable over to McGarry, assured by

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Anderson that McGarry would use them to pay debts and keep the company running (Tr. 171-172, 306). When the Plaintiff received the $5,000.00 "earnest money" it was actually $5,000.00 of his own receivables (Tr. 171). Despite admitting that the Plaintiff had been a good customer, Anderson testified that he was not concerned about the Plaintiff's welfare on August 14, 1978 (Tr. 118).

LAWYER NOT USED

The following morning of August 15, 1978, the Plaintiff asked Anderson for a finished closing statement, but never got a satisfactory response (Tr. 96, 170-171). On the closings of the Plaintiff's motel and home, Anderson had gotten the parties together, roughed out the closing documents, and then, pursuant to United Farm Agency policy, had taken the Plaintiff and the buyers to an attorney who finalized the closing. The Plaintiff had expected this to occur again and, therefore, kept asking, without success, for the closing statement (Tr. 96, 122, 257-264, 284). Anderson did most of the negotiating for the Plaintiff and the Plaintiff at all times believed that Anderson and United Farm Agency were representing him (T. 144, 252-255, 264-266, 284).

PLAINTIFF DEFRAUDED OF HIS ASSETS

Once McGarry and Gleason had the Plaintiff's assets, the sale of the Plaintiff's business came to a devastating conclusion. McGarry and Gleason immediately skimmed off the Plaintiff's accounts receivable and failed to apply them to the operation of the business. Unsecured assets were sold or hauled off. Secured assets were repossessed or foreclosed upon by creditors. The company's creditors and employees were not paid. All of the deals involving McGarry and Gleason fell through (Tr. 75, 113-114, 117).

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The Plaintiff went to the county attorney, the attorney general, and private attorneys for help, but received no help. He did his own investigation which revealed that the supposedly wealthy Mr. McGarry had a tiny office above a little store in Salt Lake City, and that J. G. Realty's business address was a bathroom in an office building. When he tried to regain his business records a gun was pointed in his face and his life threatened. A year later, after the commencement of this action, he was compelled to file bankruptcy (Tr. 176-191, 203, 212, 221).

JUDGMENT

The trial court granted the Plaintiff judgment against McGarry, Gleason and JCM Development Company for fraud. The court entered judgment against Anderson, Clan Stilson (the United Farm Agency broker), and United Farm Agency for the reasons set forth in the court's ruling at pages 413 to 418 of the transcript, and as set forth in the Findings of Fact and Conclusions of Law entered (R. 232-239).

The court found that fiduciary and other legal duties were owed the Plaintiff by Anderson, Stilson and United Farm Agency as a result of their prior dealings, their signed listing agreements and Utah law (R. 233; Finding No. 9). The court further ruled that the duties were not terminated by the parties since they never told the Plaintiff that they were no longer representing him and, furthermore, continued to do so. The court found that the Plaintiff justifiably, and without fault of his own, relied on the parties to protect his interests and was entitled to rely on Anderson's representations (R. 236; Finding No. 25). Specifically, the court found that the following duties were owed to the Plaintiff and were breached by Anderson, Stilson and United Farm Agency:

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1. The duty to deal in honesty, good faith, loyalty and with due competence (R. 236; Finding No. 26).

2. The duty to investigate the financial stability of JCM (R. 237; Finding No. 26).

3. The duty to utilize the services of an attorney to conduct the Plaintiff's closing (R. 237; Finding No. 27).

4. The duty to prevent the Plaintiff from accepting unsecured notes and from parting with his assets without proper collateral being provided to assure payment (R. 237; Finding No. 28.)

5. The duty to investigate into J. G. Realty's background (R. 237; Finding No. 29).

The court found that the Plaintiff had suffered damages in the amount of $185,178.30 and awarded judgment, jointly and severally, against all parties named except Linda McGarry, for said amount. Neither Anderson, McGarry, Gleason, nor JCM has appealed.

POINT I

THE TRIAL COURT'S JUDGMENT AGAINST UNITED FARM AGENCY IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Robert Anderson had been United Farm Agency's agent since 1974 and had handled about 20 closings per year for United Farm Agency by the time he undertook to sell the Plaintiff's business in 1978 (Tr. 121, 125).

United Farm Agency's responsiblity as Anderson's principal is set forth in 3 Am Jur 2nd Agency § 267:

> The well-settled general rule is that a principal is liable civilly for the tortious acts of his agent which are done within the course and scope of the agent's employment. However, this rule is not grounded on agency principles, which is evident from the hold-

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> ings that a principal may be held for his agent's tort committed in the course and scope of the agent's employment <u>even though the principal does not authorize, ratify, participate in, or know of, such misconduct</u>, or even if he forbade or disapproved of the act complained of.
>
> Fundamentally, and according to both the Restatement and the American courts, there is no distinction to be drawn between the liability of a principal for the tortious act of his agent and the liability of a master for the tortious act of his servant. In both cases, the tort liability is based on the master and servant, rather than agency, principal; the liability for the tortious act of the employee is grounded upon the maxim of "respondeat superior" and is to be determined by considering, from a factual standpoint, the question whether the tortious act was done while the employee, whether agent or servant, was acting within the scope of his employment. (Emphasis added.)

United Farm Agency, in addition to being Anderson's principal, was also the Plaintiff's agent. Under such circumstance, Anderson was the Plaintiff's subagent. The Restatement of Agency, Second § 406 states:

> Unless otherwise agreed, an agent is responsible to the principal for the conduct of a subservant or other subagent with reference to the principal's affairs entrusted to the subagent, as the agent is for his own conduct; and as to other matters, as a principal is for the conduct of a servant or other agent.

Comment b. of § 406 states:

> An agent who employs a subagent is the latter's principal and is responsible . . . to his principal for the subagent's derelictious. Thus, the agent is subject to liability to the principal for harm to the principal's property or business caused by the subagent's negligence or other wrong to the principal's interest...[3]

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[3]Two of the illustrations of § 406 concern real estate agents:

1. P employes A, a real estate agent, to sell Blackacre for him. A entrusts the transaction to B, one of his employees. Without A's knowledge, B misprepresents to T, a prospective purchaser,

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The facts herein clearly show that Anderson was acting within the scope of his employment as agent for United Farm Agency when he listed, advertised, found a buyer for and caused the loss of the Plaintiff's property, that Anderson, as subagent, was entrusted to handle the sale of the Plaintiff's business, and that Anderson caused the Plaintiff's loss while acting under his entrusted authority. The facts further show that United Farm Agency itself was involved in the sale and not just Anderson.

Contrary to the Defendant's argument, the issue herein involved does not begin with Anderson's deplorable (mis)representation of the Plaintiff in July and August of 1978. The issue commences with the United Farm Agency listing agreement which was signed each time the Plaintiff listed his motel, his office building, his home, and his business. The same listing agreement form was signed by Robert Anderson as a United Farm Agency local representative on each property listed (Ex. 2, 3, 5, 6, 14, 15). The form had no place for the United Farm Agency broker, Clan Stilson, to sign. Instead, it said, "IMPORTANT TO OUR LOCAL REPRESENTATIVE: Be sure this agreement is filled out as fully as possible...", clearly showing that Mr. Stilson's signature as broker was not required by company policy and that Anderson was authortized and entrusted to act for the company on his own. Most significantly, the form contained the

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the condition of the premises, and for this misrepresentation P is subject to liability to T. A is subject to liability to P for the loss to P caused by B's conduct.

2. Same facts as in Illustration 1, except that B is bribed by T to sell Blackacre at a low price. A is subject to liability to P for the loss P thereby caused, but not for the amount of the bribe received by B unless it comes to A's hands.

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printed signature of Norman McCain, president of United Farm Agency. Under Utah law a corporation that engages in the sale of real estate for a fee is a "real estate broker". Utah Code Annotated, 1953, as amended, §61-2-2; Diversified General Corporation v. White Barn Golf Course, Inc., Utah, 584 P.2d 848 (1978). Therefore, the listing agreement form was signed by United Farm Agency as a broker.

The United Farm listing agreement form, signed each time by the parties, contained "A Personal Message From Our President", which included such assurances as: "Thank you for entrusting us with the sale of your property. We will do our best to warrant your faith", and, "We will do our best to serve you".

The Plaintiff signed this United Farm Agency form when he listed his motel and office building (Ex. 2, 3; Tr. 9-11). The motel and office building were advertised and sold through United Farm Agency's national catalogue and by use of financing provided by United Farm Agency's subsidiary, RLC. Anderson and United Farm Agency split a $20,000.00 commission which was paid by the Plaintiff. United Farm Agency never disputed that Anderson was its agent and acting for it when the Plaintiff's motel and office building were listed, advertised and sold (Tr. 19-23).

On January 28, 1978, the Plaintiff listed his home and construction business together. The business and home were also listed separately but on the same United Farm Agency form each time (Ex. 5, 6; Tr. 13-16). The home was advertised and sold through United Farm Agency's national catalogue and United Farm Agency and Anderson split a $4,500.00 commission (Tr. 24-25). Again, United Farm Agency did not dispute that Anderson was acting as its agent.

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The construction business was also advertised in United Farm Agencys' national catalogue, clearly proving that United Farm Agency approved of Anderson's undertaking on its behalf to sell the property (Tr. 16-17). Anderson delivered JCM to the Plaintiff as a prospective buyer, fully expecting a commission on July 17, 1978, a date within two months of the dates that both the motel and home closings had occurred (Tr. 36-41). At trial Anderson, Stilson and United Farm Agency contended that they ceased to represent the Plaintiff after Anderson, out of the presence of the Plaintiff, agreed to let Gleason handle the sale. However, neither Anderson, nor United Farm Agency, nor Stilson, nor anyone else, ever told the Plaintiff that he was no longer being represented by them or that no commission was to be received by United Farm Agency (Tr. 53-54, 107, 414). To the contrary, Anderson told the Plaintiff that he was to receive a commission, and a $20,000.00 commission appeared on the closing statement prepared on August 14, 1978 (Tr. 44, 51, 126, 145-146, 161, 198). Anderson also prepared closing documents including deeds and notes (Tr. 80-94; Ex. 20-29).

Despite the foregoing facts, United Farm Agency contends that it had no responsiblity for the Plaintiff's loss and relies upon Wilkerson v. Stevens, 16 Utah 2d 424, 403 P2d 32 (1965) to support its position. However, Wilkerson can be readily distinguished. In Wilkerson, the wronged Plaintiff had dealt solely with a real estate agent and did not even know that the agent had a broker until afer he had instituted suit. The court found that: (1) no documents with the broker's name were used; (2) there was no reliance on the broker; (3) the broker did not anticipate receiving a commission; and (4) the broker simply did not participate in the sale. The evidence in the instant case S[illegible]

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clusion on each point.

(1) In the Plaintiff's case, United Farm Agency documents were used to list the Plaintiff's construction business, or parts thereof, three times (Ex. 6, 14, 15). While United Farm Agency's forms were not used for the earnest money agreement, it was because, as is customary between participating brokers, a commission split had been arranged between United Farm Agency and J. G. Realty and because Gleason persuaded Anderson to let him handle the sale in return for millions in sales that United Farm would handle down the road (Tr. 44-48, 69, 145-146).

(2) The court specifically found that the Plaintiff relied on United Farm and had the right to do so by virtue of the terms of the listing agreement, United Farm Agency's duties under Utah real estate law, and United Farm Agency's fiduciary duties arising from the agent-principal relationship (R. 233; Finding No. 9; Tr. 414). The listing agreement contained a warranty that United Farm Agency would act in good faith and do its best to serve the Plaintiff. The Plaintiff testified that his was a United Farm Agency deal and that he was relying on both Anderson and United Farm Agency:

> Q: (By Mr. Snow) Now, you indicated here that you expected me to close this transaction; did you not?
>
> A: I did.
>
> Q: Well, now, when did you come and talk to me about this transaction?
>
> A: I didn't.
>
> Q: You didn't. Well, if you never talked to me about it, why would you have expected to have it closed in my office?
>
> A: <u>Because all of United Farm's deals were being handled</u>

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through you and this was a United Farm deal and I expected to go to your office and close.

Q: But his was not a United Farm deal, this was a J. G. Realty deal?

MR. MORTENSEN: Objection, your Honor. He's not asking a question. He's just arguing with the witness.

THE COURT: Objection sustained. That's not a question, when you say this is not, you see. That's argumentative.

Q: (By Mr. Snow) All right. Well, now, when you asked Mr. Anderson -- you said you asked him on this $5000, and that would have been on the 19th?

A: Yes.

Q: Why didn't you ask J. G. Realty for It, Gleason?

A: They weren't representing me. Bob Anderson was my representative.

Q: Well, why did you do it with that other realty company then?

A: I didn't.

Q: Oh, you didn't?

A: No. I was making an earnest money agreement with the parties in the office, Mr. Anderson and McGarry and myself. And when Mr. Gleason made this statement: "Shall we use your form or my form," it didn't make any difference who was handling the deal. I was still working through United Farm. (Tr. 264-265)

(Emphasis added.)

(3) In this case, United Farm Agency clearly anticipated receiving a commission. The property was listed several times on its listing agreement form. United Farm Agency advertised the property

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for sale in its national catalogue and Anderson introduced JCM, expecting to receive a commission. The $20,000.00, ten percent, commission appeared on the closing statement prepared by the parties on August 14, 1978 (Tr. 161). Only United Farm Agency was entitled to the commission since only United Farm Agency had a listing agreement with the Plaintiff and no commission was included on the J. G. Realty Earnest Money Agreement (Ex. 18, line 49). The reason that Anderson never told the Plaintiff he was no longer representing him was that he continued to represent the Plaintiff and continued to expect a commission to and beyond August 14, 1978.

(4) United Farm Agency not only participated in the sale of the Plaintiff's business as shown above, but United Farm Agency also participated in the purchase of the Plaintiff's business as well. United Farm Agency and McGarry intended to use the Plaintiff's construction business to develop a mobile home park in which each was to benefit financially.

United Farm Agency and Anderson, by an Earnest Money Agreement dated July 18, 1978, agreed to sell to JCM 20 acres of land located south of Moab for $100,000.00. The land had been taken by United Farm Agency and Anderson as a commission from a prior sale and each owned an undivided one-half of the property. The 20 acres and surrounding property to be purchased by JCM were to be developened into a mobile home subdivision with United Farm Agency to have the exclusive right to sell over two million dollars in lots for a ten percent commission on sales made (or a potential $200,000.00). United Farm Agency was also to provide financing for the purchase of the lots. At trial United Farm Agency did not disclaim knowledge of this and could not because a public announcement of its

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deal with JCM had appeared in the Moab Times-Independent newspaper (Tr. 60-69).

Immediately after the Plaintiff turned his company over to the crooks the newspaper article had appeared announcing that United Farm Agency would sell and finance the lots at $12,500.00 each and that Phillips Construction Company, recently purchased by JCM, would be the contractor (T. 64-66, 110). The whole United Farm Agency-JCM deal had hinged upon the purchase by JCM of the Plaintiff's business and this dramatic conflict of interest on the part of United Farm Agency directly contributed to the Plaintiff's loss.

To this point it has been shown that Anderson was clearly acting as agent for United Farm Agency when he caused the Plaintiff's loss and that United Farm Agency clearly was itself participating in the sale and loss of the Plaintiff's business. Despite such clear evidence that United Farm Agency knew or should have known that Anderson was mishandling the Plaintiff's sale (see Wells v. Walker Bank and Trust Co., Utah, 590 P2d 1261 (1979), United Farm Agency, *for the first time on appeal*, attempts to feign ignorance of Anderson's actions on its behalf. However, in so doing United Farm Agency proves that it is culpable even if it did not know what Anderson was doing. At page 16 of its brief United Farm Agency states:

> In fact, aside from setting out its policies and procedures as to how a proper transaction should be handled for United Farm Agency, *there was no supervision at all of Anderson's activities and conduct.*" (Emphasis added.)

This incredible admission establishes in and of itself United Farm Agency's and Clan Stilson's liability for the Plaintiff's loss. Such failure to supervise is per se negligence on the part of United

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Farm Agency and Stilson as brokers under Utah law and as such is cause for revocation of their right to sell real estate pursuant to Section 61-2-11(14) of the Utah Code Annotated, which states that a broker's license may be suspended or revoked for "failing to exercise reasonable supervision over the activities of his licensees."

The record overwhelmingly supports the trial court's finding that United Farm Agency and Clan Stilson are liable for the Plaintiff's loss. Anderson was their agent and acted in his entrusted capacity as agent at all times. United Farm Agency itself undertook to represent the Plaintiff when it accepted Anderson's listing of the Plaintiff's business and advertised the Plaintiff's business in its national catalogue. United Farm Agency, as a real estate broker, owed the Plaintiff the obligation to deal with the Plaintiff with high standards of "honesty, integrity, truthfulness, reputation, and competancy". Dugan v. Jones, Utah, 615 P2d 1239 (1980); Utah Code Annotated, 1953, as amended, §61-2-6(a). The record is replete with proof that those standards were not met. The only dispute in the record is whether United Farm Agency unilaterally abandoned the Plaintiff without advising him that he was on his own[4], or whether United Farm Agency, through Anderson, continued to represent the Plaintiff through the time he was defrauded.

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[4]In relation to United Farm Agency's claimed unilateral abandonment of the Plaintiff, the Court is referred to Disciplinary Rule 2-110(2), which states that a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client. A real estate broker should have no less a duty. Dugan v. Jones, supra.

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Either way, United Farm breached its contractual, professional, fiduciary, and codified duties to the Plaintiff and the Plaintiff as a result was defrauded of his business.

POINT II

THE PLAINTIFF WAS NEVER PAID FOR OVER $185,000.00 IN ASSETS BECAUSE OF UNITED FARM AGENCY'S NEGLIGENCE AND BREACHES OF DUTIES

A broker is liable to his principal for all damages which flow naturally from his misconduct and which are a direct consequence thereof. 12 Am Jur 2d, Brokers, §96. The uncontroverted evidence shows that the Plaintiff lost over $260,000.00 in assets as a result of the misconduct of United Farm. The uncontroverted evidence further shows that he was never paid for over $185,000.00 worth of assets (R. 236; Findings No. 22-25).

It must be understood that the Plaintiff's company contained over $200,000.00 in assets exclusive of the Plaintiff's accounts receivable. The construction company, as listed for sale, included only a shop and office building (with storage rental units), all equipment for building construction, franchise, and equipment for metal buildings (Ex. 5, 6, 8, 15; Tr. 13-15, 28). The Plaintiff's accounts receivable were not included in the listings and and were not included in the assets listed in the Earnest Money Agreement of July 18, 1978 which contained the $200,000.00 sales price (Ex. 18).

The Plaintiff testified that about $125,000.00 in equipment and inventory was sold to JCM. Defendant's Exhibit 45 is a partial inventory and was referred to as a partial inventory in the Earnest Money Agreement (Ex. 18; Tr. 299-301). That partial

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inventory listed over $92,000.00 in assets which were sold. In addition to the items on the inventory, the Plaintiff also sold a 950 cat loader valued at about $15,000.00 and metal buildings valued at over $30,000.00 (Tr. 226-227, 301). He also sold his shop building and an additional lot. The shop building alone had been listed at $70,000.00 (Ex. 14). The combined value of these assets, therefore, equalled, if not exceeded, $200,000.00 before the Plaintiff's accounts receivable came to be included in the sale on August 14, 1978. At, or before, the closing, the Defendants persuaded the Plaintiff to include his accounts receivable of about $62,000 into the sale. These were to be "offset" by JCM agreeing to pay over $30,000.00 in accounts payable owed by the Plaintiff and by JCM agreeing to pay off loans to which certain of the accounts receivable had been pledged (Tr. 305-306, 312, 314-315). The effect of this "offset" was to include over $60,000.00 additional assets into the sale but to leave the purchase price at $200,000.00 on paper.

At trial the Plaintiff did not try to recover the full $260,000.00 plus value of his lost assets since some debts had been paid (a small portion by JCM; a larger portion by proceeds from foreclosure sales) (Tr. 206, 210-211). The Plaintiff instead offered proof to show how much of that value had not been paid. His uncontroverted testimony showed that he had not been paid any part of the $79,000.00 equity represented by the two notes ($44,000.00 and $35,000.00 respectively). His uncontroverted testimony further proved that obligations totaling over $106,000.00 were not paid by JCM as agreed (R. 236, Findings No. 22-25; Tr. 197-235, 317).

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Therefore, the Plaintiff was defrauded of over $185,000.00 in assets for which he was never paid. The unpaid debts and worthless notes are the measure of the Plaintiff's loss of assets. Points II and III of United Farm Agency's brief do not allege that the Plaintiff was not defrauded or that JCM was not to have paid the debts testified to by the Plaintiff. United Farm Agency's contentions regarding the Statute of Frauds and capacity to sue are red herrings which detract from the fact that the Plaintiff was defrauded because of United Farm Agency's negligence and breaches of fiduciary duties. All of United Farm Agency's contentions are smokescreens to hide the fact that it was negligent when it encouraged the Plaintiff to part with over $260,000.00 in assets without receiving collateral, a written assumption agreement, a closing statement and other necessary legal protection. Morely v. J. Pagel Realty & Insurance, 27 Ariz. App. 62, 550 P.2d 1104 (1976).

POINT II(A)

THE PLAINTIFF HAD CAPACITY TO SUE BECAUSE HE OWNED THE ASSETS OF WHICH HE WAS DEFRAUDED AND WAS PERSONALLY LIABLE FOR THE DEBTS WHICH WERE ASSUMED BUT NOT PAID. ALSO, THE LAW DOES NOT REQUIRE THAT THE TRUSTEE IN BANKRUPTCY BE SUBSTITUTED AS THE PLAINTIFF IN A PENDING ACTION.

The evidence clearly shows that the Plaintiff had capacity to sue for his damages. It was the Plaintiff who was wronged, not the corporation.

First, all assets sold to JCM were owned by the Plaintiff personally (Tr. 218; Ex. 20, 21, 26, 28, 29).

Second, the obligations which were to be paid by JCM were the personal primary obligations of the Plaintiff and not obligations of the corporation. The Plaintiff did business personally as

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Phillips Construction Company at all times. He had in early 1978, upon the advice of an attorney, formed a corporation which was called Phillips Construction Company, Inc. The attorney's plan called for the Plaintiff to maintain ownership of all equipment and property and to lease them to the corporation (Tr. 132, 207). Business was intended to be carried on through the corporation, however, the corporation "had just been formed and was not fully going" and no assets were ever conveyed to the corporation (Tr. 218). The Plaintiff testified that no obligations were ever incurred through the corporation's name but that all were incurred in the Plaintiff's name personally:

THE COURT: Mr. Mortensen, I thought he testified he did business in the name of the corporation, but he owned all the property and equipment and stuff was in his name personally.

THE WITNESS: That was the intent.

THE COURT: All right. You have a bill to somebody like Riverside Accoustics. Now, was that to order material doing business as?

THE WITNESS: I did not order these materials as Phillips Construction Company, Inc. I ordered all material as Phillips Construction Company, Rodney L. Phillips, doing business as Phillips Construction Company. The people are not going to supply a corporation unless credit is established for that corporation. And all the accounts that I had prior to the sale of this business, all those accounts

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were continuing accounts over the past years of doing business as Rodney L. Phillips doing business as Phillips Construction Company.

THE COURT: All right. Go ahead. (Tr. 219).

The Plaintiff testified that each obligation was his and the court accepted his testimony as true (Tr. 197-235). Exhibits 34, 36, 38, 39 and 40 all show that obligations, including taxes, were incurred personally by the Plaintiff doing business as Phillips Construction Company. A bank manager's testimony confirmed the same (Tr. 394).

The inclusion of the corporation stock in the sale was a clean up matter and purely incidental to the main sale. The provision for the sale of 100% of the stock in Phillips Construction Company was added to the Earnest Money Agreement and initialled by the Plaintiff as an afterthought (see line 7 of Exhibit 18). Both Anderson and the Plaintiff testifed that a stock transfer would not properly transfer the Plaintiff's assets (Tr. 43, 170-171). No conflicting evidence or testimony was ever offered by any Defendant to show that any of the obligations were corporation rather than personal debt, or that any of the assets belonged to the corporation rather than to the Plaintiff.

While United Farm Agency alleges that there is no evidence that the Plaintiff has suffered as a result of JCM's failure to pay the obligations and, therefore, the Plaintiff has no cause of action, the evidence, from start to finish, says otherwise (Tr. 197-234; Ex. 34, 36, 38, 29, 40). The Plaintiff testified repeatedly at trial (three years after the July 1978 sale) that the obligations had never been paid and that he was being held responsible by his creditors. Perhaps the most succinct statement occurred during the

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Plaintiff's testimony at this point:

> Q. (By Mr. Mortensen) For the record, Mr. Phillips, on any of the matters we're going to be bringing before the Court, have you made any payments towards satisfying them?
>
> A. No. Because of my transactions with Bob Anderson, I was forced into bankruptcy and I haven't had any -- a penny to pay any of it (Tr. 212).

Third, although the Plaintiff filed bankruptcy, no rule of law required that the trustee in bankruptcy be substituted as the Plaintiff in the action. Bankruptcy Rule 610, states:

> The trustee or receiver may, with or without court approval, prosecute or enter his appearance and defend any pending action or proceeding by or against the bankrupt, or commence and prosecute any action or proceeding in behalf of the estate, before any tribunal. (Emphasis added.)

Rule 610 clearly states that a trustee's appearance is discretionary in a pending action which was instituted prior to the bankruptcy petition being filed. Without trustee intervention the debtor can continue the litigation and, if successful, the fruits of the litigation will inure to the benefit of the trustee. The trustee in turn is bound by any judgment rendered. See 9 Am Jur 2d, Bankruptcy, §157 and authorites cited therein.

Further, this issue is raised as a defense for the first time on appeal. The Defendant knew of the Plaintiff's bankruptcy prior to trial and never raised the issue even though it was brought to the court's attention during the pretrial conference held on August 4, 1980.[5] Utah Rule of Civil Procedure 9(a)(1) states that

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[5]A transcript of the pretrial conference is to be filed pursuant to order of this Court dated May 17, 1982.

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if a defendant desires to raise the issue of capacity he must do so by a specific negative averment. The Defendants never alleged a lack of capacity and thereby waived the defense, assuming, arguendo, that lack of capacity could be a defense in this matter.

Finally, even if this Court should conclude that the trustee is a necessary party plaintiff, the proper way to remedy the matter is not by a reversal, but by a simple order joining the trustee as a plaintiff pursuant to URCP 21, which states in applicable part:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or its own initiative at any stage of the action and on such terms as are just. (Emphasis added.)

Pursuant to Rule 21, parties may be added even after trial has been completed. Harris-Dudley Plumbing Company v. Professional United World Travel Association (WTA), Inc., Utah, 529 P2d 586 (1979).[6] This Court may rest assured that the Plaintiff's trustee in bankruptcy has known of this action and that he is willing upon request be joined as a party plaintiff. Up to the point of appeal the Defendants simply did not request the trustee's joinder despite the Plaintiff's offer to do so at the pretrial.

POINT II(B)

THE DEFENSE OF THE STATUTE OF FRAUDS IS UNAVAILABLE TO UNITED FARM AGENCY BECAUSE NO AFFIRMATIVE PLEADING OR OBJECTION RESERVED THE RIGHT TO RAISE THE ISSUE ON APPEAL AND FURTHER BECAUSE THE DEFENSE COULD NOT BE AVAILABLE TO UNITED FARM AGENCY IN ANY EVENT.

The affirmative defense of the Statute of Frauds is raised

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[6] This Court in this very action has approved the post trial addition of a party defendant. The March 1, 1982 ruling denied a motion by the party added to quash Rule 71B service. See also Shirley v. Venaglia, 86 N.M. 721, 527 P2d 316 (1974); Smith v. Castlemen, 81, N.M. 1, 462 P2d 135 (1969).

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for the first time on appeal. As conceded by United Farm Agency in its brief, the defense was never plead. Since the defense was not plead it was waived under Rules 8(c) and 12(h) of the Utah Rules of Civil Procedure. Bezner v. Continental Dry Cleaners, Inc., Utah, 548 P2d 898 (1976). Additionally, the Statute of Frauds was not raised at trial. Rule 4 of the Utah Rules of Evidence states that no verdict or finding shall be set aside, nor decision based thereon be reversed, by reason of the erroneous admission of evidence unless there is a timely objection which sets forth the specific ground of objection and the matter is ruled upon by the Court. No objection relating to the Statute of Frauds was ever voiced by the Defendants and ruled on by the trial court. Therefore, the Statute of Frauds cannot now be raised to attack the evidence received by the trial court.

Despite the foregoing, United Farm Agency now claims that it didn't need to plead the Statute of Frauds because the Plaintiff did not plead special damages. The answer to this is that, assuming that the Plaintiff's damages constituted special damages (which they did not), the Defendants should have objected if they were surprised. They did not object because they were not surprised. They were not surprised because they were forwarned that the Plaintiff was going to measure his loss of assets by the amount he had not been paid for them by JCM as agreed. They were forewarned by Point V (pages 12-13) of the Plaintiff's pretrial Memorandum dated July 9, 1981, that the Plaintiff was going to so contend (R.159-161). In that memorandum the Plaintiff clearly stated that he was entitled to the value of his unpaid notes plus the balance owed on all unpaid obligations.

The Plaintiff testified that he had not been paid any amount

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toward his notes totalling $79,000.00. He testified that JCM was to have paid off over $106,000.00 in debt as part of the purchase price, but failed to do so. He testified that Robert Anderson was present and participated in the closing on August 14, 1978. Anderson did not dispute that he was present, nor did he dispute that any of the obligations cited by the Plaintiff were to be paid by JCM (Tr. 254, 317).[7] No witness for United Farm Agency claimed that the Plaintiff had received any payments on his notes nor that the Plaintiff's obligations had been paid. Therefore, the court was absolutely justified in finding that the Plaintiff had been damaged in the amount of $186,000.00, the amount he had not been paid for assets of which he was defrauded.

Because the Plaintiff's testimony regarding unpaid debt went to establish the value of his assets for which he had not been paid, the Statute of Frauds is irrelevant. The Plaintiff did not seek to enforce an agreement whereby United Farm Agency had promised to answer for his debt. The Plaintiff sought to recover damages resulting from United Farm Agency's failure to discharge its duties to him as found by the trial court. 12 Am Jur 2d, Brokers, §96.

In Points II and III of its brief, United Farm Agency incredibly seeks to use its own negligence to prevent the Plaintiff from recovering his damages. Both points emphasize that the Plaintiff did not receive a final written contract which obligated JCM to pay

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[7]The fact that the Plaintiff's payables became part of the sale despite not being part of the Earnest Money Agreement is not remarkable. As has been shown, the parties clearly departed from the terms of the Earnest Money Agreement at the closing. The Plaintiff's receivables, as well as the payables, were included in the sale. The Plaintiff received a note for $44,000.00 instead of a note for $38,750.00. The Plaintiff received a note for $35,000.00 and $5,000.00 cash instead of the $40,000.00 cash down.

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off his debts. Both points ignore the trial court's findings that the failure of the Plaintiff to have a proper and legal closing was the fault of United Farm Agency, since by United Farm Agency policy a lawyer should have been used to close the matter (Tr. 122, 415; R. 236; Finding 27).

United Farm Agency cannot be allowed to escape liability because of its own negligence. The evidence clearly shows that in July, 1981, three years after the sale, the Plaintiff still had not been paid the value of his notes and his creditors had still not been paid, forcing the Plaintiff into bankruptcy. Before the Plaintiff listed his business with United Farm Agency, the Plaintiff had over $260,000.00 in assets and around $175,000.00 in liabilities. After the Plaintiff listed his business with United Farm Agency he had no assets, $106,000.00 in liabilities, and two worthless notes.

POINT III

THERE IS SUBSTANTIAL EVIDENCE TO SUSTAIN THE JUDGMENT AGAINST ROBERT ANDERSON FOR BREACHES OF DUTIES OWED TO THE PLAINTIFF.

Robert Anderson has not appealed from the judgment and findings of the trial court. However, United Farm Agency, nevertheless, contends that there was insufficient evidence to support the court's findings and judgment against Anderson.

The court found that at least five duties were owed to the Plaintiff and breached by Anderson (R. 236-237; Findings No. 25-29). First, the court found that by abandoning the Plaintiff without advising him that he was on his own, Anderson breached his duties of good faith, loyalty and due competence, and that the Plaintiff was justified in relying on Anderson since he had never been told that he should not do so. Anderson admitted that he never told

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the Plaintiff he was not going to represent him (Tr. 107). On August 14, 1978, Anderson never expressed any concern about the manner of the closing although he knew things weren't being done as they should (Tr. 118). He prepared and notorized notes and deeds at the closing and allowed the Plaintiff to take unsecured notes and otherwise part with his assets without receiving collateral (Tr. 81-88). Anderson testified that although the Plaintiff had been a good customer in the past, he was not concerned about his welfare because, "I wasn't involved" (Tr. 118).

While Anderson claimed to have expressed concern to the Plaintiff on July 18, 1978, about how the sale was to be handled, the Plaintiff denied that any concern was ever expressed in his presence, and Anderson admitted that the Plaintiff may not have been present when he told Gleason that the sale should not be handled as a stock transfer (Tr. 47, 256). Anderson also admitted that he never told the Plaintiff that he had done wrong in entering into the Earnest Money Agreement (Tr. 53). He testified that he washed his hands of the Plaintiff because Gleason had promised him millions of dollars in future sales (Tr. 48, 69).

The listing agreement did reserve the Plaintiff's right to sell the business himself (Ex. 15). However, the Plaintiff had also reserved the right to sell his office building himself (Ex. 3). Anderson found a buyer for the office building and the motel and received one-half of United Farm Agency's $20,000.00 commission. Neither Anderson nor United Farm Agency at that time claimed that the Plaintiff had sold the office building and motel himself. It was Anderson who introduced McGarry and Gleason to the Plaintiff on July 17, 1978. The Plaintiff testified that after July 18, 1978 and prior to the August 14, 1978 closing,

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an almost daily basis and that he believed that the sale of his business was going to be handled like his other sales had been by Anderson and United Farm Agency (Tr. 151, 158, 165). He was told that there was to be a commission split between United Farm Agency and J. G. Realty, and a commission appeared on the draft of the closing statement (Tr. 44, 145-146, 161).

Anderson omitted to advise the Plaintiff of other important facts. Anderson admitted that he never told the Plaintiff about his $25,000.00 note which was in default and which was secured by the 20 acres which Anderson and United Farm Agency were selling to JCM (Tr. 117).[8] When he was informed at or near the end of August, 1978, that there were "flags sticking up" on the deal, Anderson also omitted to advise the Plaintiff that problems were developing regarding his sale (Tr. 100-102, 116).

The foregoing conduct by Anderson can only be described as being in bad faith, dishonest, disloyal and incompetent. Additional improper conduct by Anderson will be discussed in relation to the court's other findings.

In Finding No. 27 the court found that Anderson had a duty to assure that a legally proper closing occur and that in not utilizing the services of an attorney, Anderson breached said duty. Anderson testified that United Farm Agency policy required that he use an attorney to close his sales (Tr. 122). On prior sales Anderson had prepared closing documents and then had taken the Plaintiff to an attorney who finished the closings. The Plaintiff expected this to occur again and asked Anderson for a closing statement on August 15,

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[8] See Footnote No. 2, supra.

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1978. However, Anderson told the Plaitniff that a closing statement wasn't necessary and never did provide one to the Plaintiff despite repeated requests by the Plaintiff (Tr. 96, 122, 257-264, 284). By failing to use an attorney, Anderson caused the Plaintiff to part with his assets without receiving collateral and a signed agreement requiring JCM to pay off the Plaintiff's obligations (Tr. 415). Morely v. J. Pagel Realty & Insurance, supra.

In Finding No. 26, the court found that Anderson had a duty to investigate the solvency of JCM and breached said duty. The court further found that the Plaintiff was justified in not making his own investigation because of assurances made by Anderson (R. 237; Finding No. 26). The Plaintiff testified that Anderson told him on July 17 that "money was no problem with these people" (Tr. 139-140); that the buyers were worth seven and one-half million dollars (Tr. 153); that on or about July 19, 1978, he specifically asked Anderson to check into the buyer's solvency and that Anderson thereafter reported back that the buyers were worth three and one-half million net worth (Tr. 154); and that on August 14, 1978 Anderson had assured him while standing over his shoulder, that collateral wasn't necessary and that the unsecured notes he was receiving were as "good as gold" (Tr. 88, 164, 282-283). The Plaintiff and a Moab bank manager both testified that Anderson had told bank personel that the buyers were financially sound (Tr. 289, 396). In light of the foregoing, there clearly was substantiated evidence to support a finding that Anderson had a duty to investigate the buyer's solvency. Anderson admitted that he made no investigation and thereby breached his duty (Tr. 105, 109-110, 415). The Plaintiff testified that he had complete trust in Anderson and the court found the

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Plaintiff's reliance to be justified, particularly since Anderson never told the Plaintiff that he was not representing him (Tr. 165, 282-283, 417). The foregoing representations were made by Anderson as a licensed real estate agent and no independent investigation by the Plaintiff was required by law. Smith v. Carroll Realty Company, 8 Utah 2d 356, 335 P2d 67 (1959); Dugan v. Jones, supra.

In Finding No. 38 the court found that Anderson had a duty to prevent the Plaintiff from accepting unsecured notes and from parting with his assets without proper collateral being provided to assure payment, and that by preparing unsecured notes and allowing the Plaintiff to part with his assets without collateral Anderson breached said duty. This Finding is related to prior findings already discussed and will not be further elaborated upon except to note again that Anderson did not merely permit the Plaintiff to give away his property. To the contrary, Anderson prepared the documents and encouraged the Plaintiff to sign the deeds and accept the worthless note while standing over his shoulder and assuring him that collateral was not necessary (Tr. 282-283).

In Finding No. 29 the court found that Anderson had the duty to investigate into who J. G. Realty was. This duty is supported by Anderson's assurances to the Plaintiff that the $5,000.00 earnest money would be properly held in trust by Gleason and that the Plaintiff did not need to worry about receiving it (Tr. 149-152). In Fact, the Plaintiff did need to worry since $5,000.00 was never placed in the J. G. Realty trust account and the Plaintiff was actually paid the $5,000.00 with his own money (Tr. 171).

The record is replete with evidence to support the court's findings. However, rather than restate what has already been set

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forth, the Court is respectfully referred to the Statement of Facts for further information. The trial court's findings and judgment are supported by substantial evidence and, therefore, should be accepted and upheld by this Court. Hutcheson v. Gleave, Utah, 632 P2d 815 (1981).

CONCLUSION

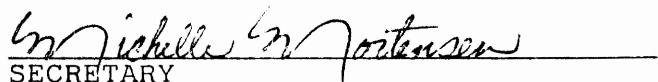
The findings and judgment of the trial court are supported by substantial evidence and no prejudicial error of law occurred during the course of the trial. Therefore, the Plaintiff's judgment against United Farm Agency, a Utah corporation, should be affirmed in all respects.

Respectfully submitted this 2nd day of June, 1982.

PAUL W. MORTENSEN
Attorney for Plaintiff-Respondent

CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) true and exact copies of the foregoing Brief of Respondent to Jackson Howard and Richard B. Johnson, counsel for Defendant-Appellant United Farm Agency, Inc., HOWARD, LEWIS & PETERSON, P. O. Box 778, Provo, Utah 84603, dated this 2th day of June, 1982.



SECRETARY

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