

1990

John H. Klas v. Mark O. Van Wagoner and Kathryn Van Wagoner : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOHN H. KLAS,)	
)	
Plaintiff/Appellant,)	
)	
v.)	
)	
MARK O. and KATHRYN)	
VAN WAGONER,)	Case No. 900493-CA
)	
Defendants/Appellees.)	

BRIEF OF APPELLEES

AN APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, THE HONORABLE RAYMOND S. UNO, DISTRICT JUDGE

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STATEMENT OF JURISDICTION

Jurisdiction over plaintiff's Appeal and defendants' Cross-Appeal is proper in the Court of Appeal pursuant to Utah Code Ann., § 78-2a-3(2)(j) in that this matter been transferred to the Court of Appeals from the Utah Supreme Court.

ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

PLAINTIFF'S APPEAL PRESENTS THE FOLLOWING ISSUES:

- I. HAS THE PLAINTIFF FAILED TO MEET HIS BURDEN TO SHOW THAT THE TRIAL COURT'S FINDINGS OF FACT WHICH SUPPORT THE TRIAL COURT'S RULING OF UNILATERAL MISTAKE WERE CLEARLY ERRONEOUS?

Standard of Review: A trial court's findings of fact will not be disturbed unless they are clearly erroneous. Hoth v. White, 799 P.2d 213, 216 (Utah Ct. App. 1990). An appellant must marshall all evidence in favor of the facts as found by the trial court and then demonstrate that even viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings of fact. Saunders v. Sharp, 154 UAR 5 (Utah Feb. 12, 1991).

II. IS IT UNNECESSARY FOR THE COURT OF APPEALS TO INTERVENE ON THE ISSUE OF THE MEASURE OF PLAINTIFF'S DAMAGES?

Standard of Review: Issue II presents a question of law which is reviewed for correctness. Saunders v. Sharp, 154 UAR 5 (Feb. 12, 1991).

III. DOES THE TRIAL COURT'S JUDGMENT PRECLUDE PLAINTIFF FROM AN AWARD OF ATTORNEY FEES?

Standard of Review: Issue III presents a question of law which is reviewed for correctness. Saunders v. Sharp, 154 UAR 5 (Feb. 12, 1991).

DEFENDANTS' CROSS-APPEAL PRESENTS THE FOLLOWING ISSUES:

I. IS THE TRIAL COURT'S CONCLUSION OF LAW REGARDING PLAINTIFF'S FRAUD INCONSISTENT WITH THE COURT'S FINDINGS OF FACT?

Standard of Review: Issue I presents a question of law which is reviewed for correctness. Saunders v. Sharp, 154 UAR 5 (Feb. 12, 1991).

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case involves a dispute over the rescission of an agreement to purchase a personal residence. In about July of 1987, defendants, Mark and Kathryn Van Wagoner, responded to a for sale sign which had been placed on a residence owned in fee by plaintiff, John Klas. The sign was part of the marketing of the property undertaken by plaintiff's ex-wife and agent, Carol Klas. After several conversations between Carol Klas and defendants concerning the property and appraisals of the property, defendants and plaintiff entered into an earnest money agreement for the purchase of the home.

Thereafter, defendants learned that the representations made by Carol Klas were misleading and omitted to disclose an existing, low market value appraisal, and defendants attempted to rescind the earnest money agreement. In the course of a conversation with Klas' counsel, defendants understood that the contract had been rescinded. Later, plaintiff refused to a written rescission of the agreement, returned defendants' earnest money, sold the home and sued defendants on the difference between the eventual sales price

and the sales price listed in the earnest money agreement with defendants. Defendants denied that there was a valid contract and counterclaimed for fraud and detrimental reliance. Thereafter, discovery ensued and then a trial was conducted on May 9, 10 and 12, 1989.

On or about May 30, 1989, the trial court rendered its memorandum decision and found in favor of plaintiff. Subsequent to the memorandum decision of May 30, 1989, Findings of Fact, Conclusion of Law and a Judgment were presented to the trial court. Objections were filed by defendants, together with a Motion to Amend the Findings of Fact and Conclusions of Law. Defendants also requested a new trial.

The trial court then entered a Supplemental Memorandum Decision on November 30, 1989, finding that there was a unilateral mistake by the defendants. (Record at pp. 220-223). The trial court then entered Amended Findings of Fact and Conclusions of Law based on its Supplemental Memorandum Decision, dated May 31, 1990 and also rendered an Amended Judgment, dated July 3, 1990. (Record at pp. 309-312).

Plaintiff and defendants then filed their respective Notices of Appeal.

II. STATEMENT OF THE FACTS

Defendants' dispute plaintiffs' statement of facts and offer the following:

1. The property which is the subject of this action is a parcel of real estate located at 2340 Berkley Street, Salt Lake City, Utah. (Amended Findings of Fact No. 1, Record at p. 298).

2. At all times relevant to the issues involved, the plaintiff, John H. Klas, was the owner in fee simple of said property. (Amended of Findings of Fact No. 2, Record at p. 298).

3. In late July or early August, 1987, the subject property was offered for sale pursuant to the terms of a Decree of Divorce in Civil No. D-86-1705, in the District Court of Salt Lake County, State of Utah. (Amended Findings of Fact No. 3, Record at p. 298).

4. Pursuant to the provisions of the aforesaid Decree of Divorce, the former wife of plaintiff, Carol Klas, undertook the marketing of the property and said property was not listed

with a real estate broker. (Amended Findings of Fact No. 4, Record at p. 298).

5. In 1986, plaintiff and his then wife, Carol Klas, acquired an appraisal by Devere Kent for mortgage loan purposes. That appraisal showed a market value of between \$153,000 and \$165,000. The purpose of obtaining the appraisal was to secure a second mortgage on the Klas' marital residence. (Transcript, Volume I at page 32, lines 22-25).

6. In anticipation of the sale of the property in 1987, plaintiff had personal acquaintances provide their opinions on the current value of the property which plaintiff and his wife, Carol Klas agreed to use, as a basis for establishing the market value for the sale of the property. Said opinions ranged from \$175,000 to \$192,000. (Amended Finding of Fact No. 5, Record at pp. 298-299).

7. In late July or early August, 1987, the defendants inspected the property in the presence of Carol Klas and expressed an interest in acquiring the property. (Amended Finding of Fact No. 6, Record at p. 299).

8. As part of their initial contacts with Carol Klas defendant, Mark Van Wagoner, specifically asked Carol Klas how the property had been valued. (Amended Finding of Fact No. 30, Record at p. 305; Transcript, Volume II, at page 148, lines 19-21).

9. In response, Carol Klas informed defendants that three appraisals had been made in the range of \$175,000 to \$192,000. Although she was aware of its existence, Carol Klas did not disclose the existence or amount of the Devere Kent appraisal. (Transcript, Volume I, at page 93, lines 9-15).

10. Carol Klas never provided defendants with information regarding the Devere Kent appraisal despite the defendants' specific inquiry regarding appraisals and their request for copies of any of the appraisals. (Amended Finding of Fact No. 30, Record at p. 305).

11. Carol Klas informed defendants that John H. Klas would not even entertain an offer that was below the lowest of the appraisals. (Transcript, Vol. I, p. 182, lines 2-5).

12. On or about August 7, 1987, defendants presented Carol Klas with an earnest money agreement for the purchase of

the home with an offered purchase price of \$175,000, which they understood to be the lowest value established by the three appraisals disclosed to them. (Transcript, Vol. I, p. 181, lines 19-25, p. 182, lines 1-12).

13. Carol Klas then presented defendants' offer to her former husband, John H. Klas, who accepted it on August 11, 1987. (Amended Finding of Fact No. 9, Record at p. 300).

14. After repeated requests for copies of the appraisals, plaintiff finally provided defendants a copy of the Devere Kent appraisal and disclosed that in truth, he had no other written appraisals. Defendants then sought to renegotiate the earnest money based upon the belated disclosure of the only written appraisal. (Amended Finding of Fact Nos. 12 and 13, Record at pp. 300-301).

15. Thereafter, plaintiff returned defendants' earnest money deposit, sold the subject property for \$160,000, an amount squarely in the middle of the Devere Kent appraisal, and brought this action against defendants to recover his supposed damages. In return, defendants asserted their counterclaim against defendants.

16. The trial judge found that, in the course of negotiations between the defendants and Carol Klas, there existed the Devere Kent appraisal valuing the property at \$165,000, the existence of which was unknown to defendants, and if known, would have made a material difference to their offer to buy the subject property. This was a unilateral mistake on the part of the defendants which was fundamental and substantial. The Devere Kent appraisal was never provided by Carol Klas in spite of defendants' request for copies of appraisals. (Amended Finding of Fact No. 30, Record at p. 305).

17. The trial judge further found that, the defendants offered a price of \$175,000 for the property in question, based upon representations made by Carol Klas regarding three appraisals and without knowledge of the Devere Kent appraisal. (Amended Finding of Fact No. 31, Record at p. 306).

18. The defendants made no attempt to secure appraisals on the subject property prior to the time the earnest money sales agreement was entered into by the parties, because of representations made by Carol Klas that there were three appraisals in existence which placed values on the subject

property between a low of \$175,000 and a high of \$192,000.
(Amended of Finding of Fact No. 32, Record at p. 306).

19. The trial court made the following conclusions of
law:

a. "The Van Wagoners were mistaken in their understanding that the lowest existing appraisal on the property was \$175,000." (Conclusion of Law No. 1, Record at p. 306).

b. Their mistake was caused by their misunderstanding of the representations made by Carol Klas, and failure to have the Devere Kent appraisal provided in a timely manner." (Conclusion of Law No. 2, Record at p. 306).

c. "The mistake was substantial and fundamental to the proposed agreement between the defendants and plaintiff. If the Van Wagoners had been aware of the undisclosed, lower appraisal, it would have made a material difference in their offer to buy the property." (Conclusion of Law No. 3, Record at p. 306).

d. "The mistake provides a basis for rescision of the Ernest Money Agreement." (Conclusion of Law No. 4, Record at p. 306).

20. The trial court went on to dismiss the plaintiff's Complaint, rescind the Ernest Money Agreement and dismiss the Defendant's Counterclaim. The trial court also ordered each side to bear their own costs, attorney fees and expenses of litigation. (Conclusions of Law Nos. 5 through 8, Record at p. 307).

21. Defendants filed their Notice of Appeal from the trial court's Amended Findings of Fact and Conclusions of Law and Amended Judgment on July 31, 1990. (Record at pp. 316-318).

SUMMARY OF ARGUMENTS

A. DEFENDANTS' RESPONSE TO PLAINTIFF'S APPEAL

- I. PLAINTIFF HAS NOT MET HIS BURDEN TO SHOW CLEAR ERROR BECAUSE HE HAS FAILED TO MARSHAL THE EVIDENCE AND HAS NOT SHOWN THAT TAKEN AS A WHOLE, THE EVIDENCE FAILS TO SUPPORT THE TRIAL COURT'S FINDINGS OF FACT REGARDING UNILATERAL MISTAKE AND RESCISION.
- II. THERE IS NO BASIS TO OVERTURN THE TRIAL COURT'S FINDINGS AND, THEREFORE, NO BASIS TO REACH THE ISSUE OF DAMAGES.

III. THE STIPULATION OF THE PARTIES REGARDING PLAINTIFF'S ATTORNEY FEES WAS PREMISED ON THE TRIAL COURT AWARDING FEES IN THE FIRST PLACE. THE TRIAL COURT MADE NO SUCH AWARD AND PURSUANT TO THE PARTIES STIPULATION, PLAINTIFF IS NOT ENTITLED TO ATTORNEY FEES.

B. DEFENDANT'S CROSS-APPEAL

I. THE TRIAL COURT'S LEGAL CONCLUSION THAT PLAINTIFF DID NOT COMMIT FRAUD IS INCONSISTENT WITH THE TRIAL COURT'S FINDINGS OF FACT.

ARGUMENT

I. REPLY TO BRIEF OF APPELLANT/PLAINTIFF.

POINT I: The Trial Court's Ruling On Mistake Is Consistent With and Supported by The Facts Presented At Trial.

In its conclusions of law, the trial court found that "the Van Wagoners were mistaken in their understanding that the lowest existing appraisal on the property was \$175,000." (Record at 311). As a result, the trial court found that a unilateral mistake of fact sufficient to warrant rescission of the Earnest Money Agreement existed.

In his brief on appeal, plaintiff argues that this conclusion of law could not possibly follow from the evidence presented at trial and claims that "defendants failed to show the elements present to allow rescission." (Plaintiff's Brief at page 14). In short, plaintiff claims that the trial court's Findings of Fact are not supported by the evidence presented at trial.

A. Plaintiff has failed to marshal the evidence which supports the trial court's findings of fact.

This Court has made it clear that a trial court's findings of fact will not be disturbed unless they are clearly erroneous. Hoth v. White, 799 P.2d 213, 216 (Utah Ct. App. 1990); Burrow v. Vrontikis, 788 P.2d 1046 (Utah Ct. App. 1990). As the Court stated in Hoth:

When challenging findings of fact on appeal, the appellant must show that the factual findings are clearly erroneous. To show clear error, the appellant must marshal all the evidence supporting the trial court's factual findings and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings.

Hoth v. White, 799 P.2d at 216.

Recently, the Utah Supreme Court held:

An appellate court does not lightly disturb the verdict of a jury nor the findings of fact made by a trial court. If a challenge is made to the findings, an appellant must marshal all the evidence in favor of the facts as found by the trial court and then demonstrate that viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support findings of fact.

Saunders v. Sharp, 154 UAR 5 (Utah Feb. 12, 1991).

While plaintiff argues that the trial court's findings of fact are erroneous, there is no effort by him, and no basis in his brief, to support a reversal based on the "clearly erroneous" standard which governs this appeal. Rather than marshal the evidence as this Court requires, plaintiff simply argues that there is testimony in the record which might support his theory of the case. Plaintiff's efforts fall woefully short of carrying his burden of proof to show that given the evidence as a whole the trial court clearly erred. Plaintiff has not even attempted to marshal all the evidence.

When one reads the record the reason for this omission is obvious. Plaintiff could not marshal the evidence which serves as the basis for the trial court's ruling and still claim

grounds for his appeal. Had plaintiff attempted to meet his burden and had he revisited all the evidence, it would too clearly support the trial court's ruling.

B. The evidence presented at trial supports the trial court's findings of fact which support the trial court's ruling on unilateral mistake.

Even though plaintiff failed to meet his burden of proof and the appeal must be dismissed on that ground alone, it is helpful to realize how strongly the record supports the trial court's findings of unilateral mistake. The evidence is overwhelming. Indeed, for this Court's convenience, defendants have annotated the trial court's unilateral mistake findings of fact to the record of testimony presented at trial. This annotation is attached hereto as appendix "A" and incorporated herein by this reference.

As plaintiff has pointed out, unilateral mistake involves four elements;

1. The mistake must be of so grave a consequence that to enforce the contract as actually made would be unconscionable.
2. The matter as to which the mistake was made must relate to a material feature of the contract.

3. Generally, the mistake must have occurred notwithstanding the existence of ordinary diligence by the party making the mistake.
4. It must be possible to give relief by way of rescission without serious prejudice to the other party except the loss of his bargain. In other words it must be possible to put in the status quo. (Plaintiff's Brief at page 11, citing Grahn v. Gregory, 800 P.2d 320 (Utah Ct. App. 1990)).

The trial court's Amended Findings of Fact and Conclusions of Law set forth the factual basis for the ruling or unilateral mistake. In pertinent part, the trial court found:

In the course of the negotiations between the defendants and Carol Klas, there existed the Devere Kent appraisal valuing the property at \$165,000, the existence of which was unknown to defendants, and if known, would have made a material difference to their offer to buy the subject property. This was a unilateral mistake on the part of the defendants which was fundamental and substantial. The Devere Kent appraisal was never provided by Carol Klas in spite of defendants' request for copies of appraisals. (Record at p. 305).¹

This Finding of Fact is born out by the testimony presented at trial. As defendants' annotation shows, defendants

¹ The court's finding regarding plaintiff's fraud is admitted here, but will be discussed in defendants' argument on cross-appeal herein.

testified that they specifically asked plaintiff's agent, Carol Klas, about the existence of appraisals on the subject property before the earnest money agreement was signed. Mrs. Van Wagoner testified that during her first contact with Carol Klas on or about July 25, 1987, she specifically asked Carol Klas if there were any appraisals on the home. (Transcript, Vol. II, p. 148, lines 19-21). In response, Carol Klas stated that she had three appraisals. (Transcript, Volume II, pages 180 through 182). As Van Wagoner's testified, Carol Klas told the Van Wagoners that those appraisals indicted the home had an appraisal market value of somewhere between \$175,000 to \$192,000. (Transcript, Volume I, at page 181-182).

In contrast with that statement, as both plaintiff and Carol Klas admitted at trial, at the time of Carol Klas' representations to the Van Wagoners, they kept hidden an appraisal (the "Kent" appraisal) which valued the home at approximately \$153,000 to \$165,000, some \$10,000 to \$20,000 below what Carol Klas had represented as the lowest appraised value of the home. (Transcript, Vol. II, p. 42, lines 1-14). Mr. Van Wagoner testified that, the offer itself was based on the lowest value of the three represented appraisals. This point was critical because Carol Klas represented that John Klas would not even consider an offer less than the lowest appraised

value. (Transcript, Vol. I, p. 181, lines 19-25, p. 182, lines 1-12). The trial court subsequently found that the existence of the undisclosed Kent appraisal was material to the Van Wagoner's decision to make the offer on the home. (Record at p. 306). That is, the Van Wagoners would not have executed the Earnest Money Agreement in the amount of \$175,000 if Carol Klas had disclosed the Kent appraisal in response to the Van Wagoner's specific inquiry.

Such testimony supports the trial court's previously cited Findings of Fact. Those findings of facts, in turn, serve an appropriate basis for the trial court's Conclusions of Law that:

1. The Van Wagoners were mistaken in their understanding that the lowest existing appraisal on the property was \$175,000.
2. Their mistake was caused by their misunderstanding of the representations made by Carol Klas, and failure to have the Devere Kent appraisal provided in a timely manner.
3. The mistake was substantial and fundamental to the proposed agreement between the defendants and plaintiff. If the Van Wagoners had been made aware of the undisclosed, lower appraisal, it would have made a material difference to their offer to buy the property.
4. The mistake provides a basis for rescission of the earnest money agreement.

(Record at p. 306).

Clearly, the evidence supports the trial court's finding of unilateral mistake. First, it would be unconscionable to enforce the contract and allow plaintiff to profit from the misrepresentations of "appraised" value and the omission of the Kent appraisal. Second, as the court specifically found, the matter as to which the mistake was made, the value of the home in question, was material to the contract. Third, as the court found, the mistake occurred despite defendants' requests for appraisals which would have avoided the mistake. And fourth, Plaintiff was placed in the status quo. That is, the contract was rescinded and plaintiff was in the same position as he was before he entered into the contract with defendants. Indeed, plaintiff sold the home after a short remarketing effort for \$160,000, a sum consistent with the Kent appraisal.

C. The Trial Court's Interpretation of the Law on Unilateral Mistake is Correct.

The trial court found that the Earnest Money Agreement had to be rescinded because of the unilateral mistake which had occurred relating to the meaning of the term "appraisal". The trial court found that the mistake was caused whether innocently

or not, by the Klas' use of the word "appraisal". Plaintiff argues that the trial court relied on the holding in Guardian State Bank v. Stangl, 778 P.2d 1 (Utah 1989) as the basis for its ruling on unilateral mistake. Plaintiff then argues that Stangl is factually distinguishable. Even if Stangl could be distinguished factually, Stangl stands for a legal proposition supports the trial court's finding of unilateral mistake.

The Court in Guardian State Bank v. Stangl, 778 P.2d 1 (Utah 1989), specifically agreed with Professor Corbin's formulation of the law of mistake and showed that in the State of Utah that legal theory of the law of mistake is controlling. The Utah Supreme Court quoted from Professor Corbin, stating that, "There is practically universal agreement that, if the material mistake of one party was caused by the other, either purposely or innocently or was known to him, or was of such character and accompanied by such circumstances that he has reason to know of it, the mistaken party has a right to rescission." 3 A. Corbin, Corbin on Contracts, § 610, at 692 (1960) (emphasis added). Stangl, 778 P.2d at 5. The Court relied on Stangl and properly applied Stangl as precedents for the proposition that even a unilateral mistake can be a complete defense and afford rescission.

If anything, factually, the case at bar is more egregious than Stangl. In Stangl, for example, the Court reasoned that Stangl knew of the mistake because he knew the bank had not intended to become liable on the original note. In essence, the mistake gave Stangl a windfall. There is evidence in this case that the Klases engineered the Van Wagoners' mistake. That was not so in Stangl. Stangl does make it clear, however, that the mistake in the case at bar constitutes a complete defense to the earnest money, and rescission is the only appropriate remedy. Anything else gives Klas a windfall.

Stangl clearly supports the trial court's ruling rescinding the earnest money on the basis of unilateral mistake. In addition, the plaintiff misstates consequences of upholding the trial court's ruling in this case. The plaintiff states that "It would be virtually impossible to enforce any contract if either party chose to come forward and allege that they had 'misunderstood' some aspect of the transaction which they alone deem to be of great significance." (Plaintiff's brief at p. 18). The plaintiff does not understand the law of mistake as it is applied in the State of Utah. A misunderstanding of an aspect of the transaction which one party deems to be of great significance is not the focus of the law on unilateral mistake. Rather, according to the holding in Grahn v. Gregory, 800 P.2d

320 (Utah Ct. App. 1990), the mistake must be one that the court views as relating to a material feature of the contract. Therefore, it is not just a misunderstanding as to "some aspect of the transaction" but must a mistake which was material to the contract.

In the present case the mistake was very material to the contract as the contract price was based upon the representations or misrepresentations about the "appraisals" which had been obtained on the property. The trial court found that the existence of the Devere Kent appraisal was unknown to defendants, "and if known, would have made a material difference to their offer to buy the subject property. This was a unilateral mistake on the part of the defendants which was fundamental and substantial." (Record at p. 305).

Defendants request that the Court uphold the trial court's ruling on unilateral mistake as the ruling clearly falls within the legal standard for unilateral mistake as set forth in Stangl and Grahn.

POINT II: The Trial Court's Ruling Regarding Plaintiff's Damages Is Consistent With The Facts Presented At Trial.

There is no basis to overturn the trial court's findings, and therefore no basis to reach the issue of damages. Even if the court were to remand, plaintiff has provided no sound basis to reevaluate the trial courts ability to calculate damages but is asking this Court to indulge his wish for more money on a purely speculative, hypothetical basis.

POINT III: Plaintiff Is Not Entitled To An Award Of Attorneys Fees Because The Trial Court Did Not Award Fees.

The trial court made no award of attorney fees. Because there was no award, there is nothing for this Court to sustain or uphold. Plaintiff refers to a stipulation between the parties, but that stipulation, by its own terms, required an award of attorney fees for a stipulated amount to take effect if the trial court awarded fees. Because there was no award, there is nothing further to be decided.

II. APPELLEES/DEFENDANTS' BRIEF ON CROSS-APPEAL.

POINT 1: The Trial Court's Legal Conclusion That Plaintiff Is Not Responsible For The Material Misrepresentations Of His Agent Is Incorrect.

The trial court's findings are clear and plaintiff does not here dispute those findings. Nevertheless, the court's findings compelled a legal conclusion of fraud and the court's legal conclusions failed to follow its factual findings.

A. The Court's Findings Regarding Carol Klas' Omission Compel A Legal Conclusion Of Fraud.

The trial court found a false representation of an existing material fact. In the trial court's words, "In the course of negotiations between defendants and Carol Klas, there existed the Devere Kent appraisal valuing the property at \$165,000, the existence of which was unknown to defendants, and if known, would have made a material difference in their offer to buy the subject property. ... The Devere Kent appraisal was never provided by Carol Klas in spite of defendant's request for copies of appraisals." (Amended Finding of Fact No. 30, Record at p. 305).

It is important to note that the trial court found that Carol Klas did not disclose information regarding the appraisals of the subject property when specifically requested to do so by defendants. (Id.). "Misrepresentation may be made either by affirmative statement or by material omission, where

there exists a duty to speak." Sugarhouse Finance Company v. Anderson, 610 P.2d 1369, 1373 (Utah 1980). As the Court in Sugarhouse points out, the potential victim of fraud must take steps to inform himself and protect his interests. Id. In this case, the Van Wagoners took those steps when they asked Carol Klas if there were any appraisals on the home. They relied on Carol's answers as being truthful. Indeed, they could do no more. They could not have discovered the existence of Devere Kent appraisal without the Klas' disclosure of it. In fact, that is the only way they subsequently discovered the existence of the appraisal.

Carol Klas either knowingly or recklessly failed to disclose this material fact. The appraisal existed at the time the Van Wagoners dealt with Carol Klas. (Amended Finding of Fact Nos. 5 and 6, Record at pp. 298-299). In addition, John Klas admitted that at the time the Devere Kent appraisal was obtained, Carol Klas was married to him and the purpose of the appraisal was to secure a second mortgage they were seeking on their marital residence. (Transcript, Volume I, page 32, lines 22-25). Similarly, Carol Klas admitted that she knew of the Kent Appraisal a year before the house was to be sold. (Transcript, Vol. I, p. 132, lines 4-19.)

Carol Klas also admitted that she and John met in June 1987 to plan the sale of the house and that he gave her guidelines to follow. (Transcript, Vol. I, p. 83, line 16.) Clearly, the purpose behind hiding the Devere Kent appraisal was to induce defendants to offer for the property at the higher appraised prices Carol Klas said they had. It is critical to this marketing plan to call friends' opinions appraisals and to conceal the only real appraisal. It is no coincidence that the amount the Van Wagoners offered was equal to the what Carol Klas said was the lowest appraised value of the home. (Amended Finding of Fact No. 7-9, Record at pp 299-300.)

Lastly, the trial court specifically found that the Van Wagoners relied on Carol Klas' representations (Amended Finding of Fact No. 22, Record at p. 303), and also found that the non-disclosed information was material to defendants decision to enter into the contract with plaintiff. (Amended Conclusion of Law Nos. 2 & 3, Record at p. 306).

Given these specific findings, the trial court should have concluded that plaintiff committed a fraud on the defendants.

B. The Court's Legal Conclusion That John Klas Did Not Make Misrepresentations To The Defendants Was Incorrect Because John Klas Was Bound By The Misrepresentations (And Omissions) Of His Agent Carol Klas, As A Matter Of Law.

The trial court found that Carol Klas acted as plaintiff's agent in her transactions with defendants. Indeed, the evidence overwhelmingly supported a finding that Carol Klas acted as plaintiff's agent. Carol Klas undertook the marketing of the home which plaintiff owned in fee. (Amended Finding of Fact Nos. 2 & 4, Record at p. 238). Because plaintiff owned the home in fee, Carol only could act as his agent. Her actions with regard to the sale of the home evidence this agency relationship: First, she admits she met in June with John where he gave her certain guidelines to follow. (Transcript, Vol I, p. 83, line 16.) As plaintiff asserts, Carol Klas advertised the property for sale and held an "open house" as part of her efforts to sell the house for plaintiff (Plaintiff's Brief at p. 5; Transcript, Vol. I at pp. 18-20); Carol Klas negotiated the sale of the home with defendants (Amended Finding of Fact Nos. 12, 19, 20, 22, 30, 31 and 32, Record at pp. 300, 302-03 and 305-306); and she presented the offer for the sale to plaintiff (Amended Finding of Fact No. 9, Record at p. 299; Plaintiff's Brief at p. 5; Transcript, Vol. 1 at pp. 21-22; Transcript Vol. II at pp. 98-

99) in anticipation that plaintiff would pay her a finders fee of 3% of the gross sales price (Plaintiff's Brief at p. 5; Transcript, Vol. I at pp. 6-8).

It is clear under Utah law that a principal is responsible for the actions of his agent when those actions are taken within the scope of the agency. Jensen v. Manila Corporation and the Church of Jesus Christ of Latter-Day Saints, 565 P.2d 63, 65 (Utah 1977) ("A representation by a real estate agent as to the quality of land, or boundary lines is generally held to be binding on the principal"); see also Whitehead v. Variable Annuity Life Insurance Company, 801 P.2d 934 (Utah 1989). Certainly, Carol Klas's actions in dealing with defendants were taken in the scope of her agency with plaintiff. Indeed, it is undisputed that Carol Klas was acting as plaintiff's real estate agent in the negotiations with defendants for the purchase of plaintiff's home.

Regardless of whether plaintiff personally misrepresented the actual facts which induced defendants to enter into the contract in question, it is undisputed that Carol Klas failed to disclose a material fact known to her when the information was specifically sought by defendants. That act constitutes the fraud which serves as the basis for

defendants' counterclaim. It is a clear error of law for the trial court to find that plaintiff's agent omitted to disclose facts which made her other representations misleading but then conclude as a matter of law that plaintiff is insulated from that fraud because he hired an agent, gave her guidelines, and then stepped back.

In short, the trial court's factual findings follow the elements of fraud set out in the seminal case of Pace v. Parrish, 122 Utah 141, 247 P.2d 273 (1952): (1) a representation was made (only three appraisals); (2) concerning an existing material fact (the existence of appraisals); (3) which was false (the three appraisals were only opinions and, moreover, there was a fourth, much lower, real appraisal); (4) which the representor knew to be false (Mr. & Mrs. Klas both admit knowledge of the Kent appraisal); (5) for the purpose of inducing the other party to act (they wanted a high price); (6) the other party, acting reasonably and in ignorance of its falsity (the Van Wagoners inquired about appraisals and had no knowledge of the truth); (7) did in fact rely (the high offer was consistent with the supposed appraisal); (8) and was induced to act (the Van Wagoners signed the Earnest Money, and then hired architects, craftsmen and spent money in anticipation of owning the house; and (9)

to their injury and damage (the Van Wagoners lost thousands of dollars in out of pocket expenditures).

Under the basic principles of agency, plaintiff is responsible for the misrepresentations of his agent as if he had made those misrepresentations himself. Such a result is just given the fact that plaintiff can seek relief against his agent for the fraud which support defendants' counterclaim. The trial court's ruling on defendants' counter-claim should be reversed, judgment entered in favor of defendants on their counterclaim for fraud and the case remanded to the trial court for a determination of damages.

CONCLUSION

I. The Trial Court's Ruling Regarding Unilateral Mistake Should Be Affirmed.

Plaintiff has failed to marshal the evidence and demonstrate the that the trial court's findings of fact are clearly erroneous. Given the testimony and other evidence presented at trial, it is clear that the trial court's findings of fact with regard to unilateral mistake and rescission are free from error. Thus, the trial court's

ruling regarding unilateral mistake and rescission are proper and should be affirmed.

II. The Trial Court's Dismissal of the Counterclaim for Fraud Should be Reversed.

This Court should reverse the trial court's dismissal of the counterclaim for fraud as John Klas through his agent, Carol Klas, clearly had a duty to speak when asked about appraisals, and the omission to disclose the Devere Kent appraisal constituted fraud.

The nine elements of fraud made clear in Pace v. Parrish, 247 P.2d 273 (Utah 1952) are found here as facts by the Court. Here, however, the fraud was principally by omission which made the other representations misleading.

Defendant respectfully requests that the Court enter judgment on the counterclaim and remand that part of the case for a finding of the amount of damage.

DATED this 20th day of March, 1991.

VAN WAGONER & STEVENS
Lewis T. Stevens
Alexander H. Walker III

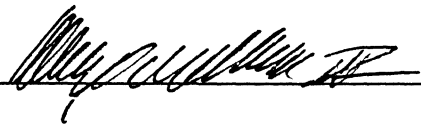
By: 

Attorneys for Defendant

CERTIFICATE OF MAILING

I hereby certify that on this 20th day of March 1991,
I caused a true and correct copy of the foregoing Brief of
Appellees to be hand delivered to:

Brant H. Wall, Esq.
WALL & WALL
Attorney for Plaintiff
Suite 800 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111



APPENDIX "A"

What follows is an annotation of the trial court's Amended Findings of Fact which support the trial court's ruling on unilateral mistake and rescission. The paragraphs are numbered as they appear in the trial court's Amended Findings of Fact.

This annotation is not intended to be an exhaustive summary of the evidence which supports all of the trial court's findings of fact. Only those findings of fact which relate to the issue of unilateral mistake and rescission are listed below. Indeed, some portions of particular findings of fact are omitted where those portions are irrelevant to the court's ruling on unilateral mistake. These annotations simply indicate that there was sufficient testimony given at trial upon which the court could base the particular findings of fact.

AMENDED FINDINGS OF FACT

2. At all times relevant to the issues involved, the plaintiff John H. Klas was the owner in fee simple of said property.

Testimony of John H. Klas: "Q. In the decree of divorce, as granted were you awarded that home as your sole and separate property? A. Yes I was." (Transcript, Vol. I, at p.7, 1.8-11).

3. In late July or early August, 1987, the subject property was offered for sale pursuant to the terms of a decree of divorce in Civil No. D-86-1705, in the District Court of Salt Lake County, State of Utah.

Testimony of John H. Klas: "Q. When did you first, to the best of your knowledge, have an occasion to talk to Carol about your intention to sell the home or what you expected to get out of it? A. It was either June or July of 1987." (Transcript, Vol. I, at p.18, 1.5-9).

"Q. Well, this is what I'm -- did there come a point in time when you had a conversation with her and told her it was your desire that the home be exposed to the market and sold? A. There is no question about that. That was understood right from the beginning. Q. But did you tell her that? A. Yes I did. Q. Would this have been around June/July time frame of 1987? A. Yes, I would say June of 1987." (Transcript, Vol. I, at p.19, 1.18-25, p.20, 1.1-3.)

Testimony of Carol Klas: "Q. In approximately when did the election or the determination come about when he decided the home would be put on the market? A. I believe it would have been following the decree of divorce, because I had to make plans at that time whether to move out, find a job, and so we talked about this issue of remaining in the home and being there. Because he had already moved out and there would be someone there to show the home. So, it would have been I would say June, after the middle of June." (Transcript, Vol. II, at p.82, 1.25, p.83, 1.1-9).

4. Pursuant to the provisions of the aforesaid Decree of Divorce, the former wife of the plaintiff, Carol Klas, undertook the marketing of the property and said property was not listed with a real estate broker. The plaintiff John H. Klas did not set a specific asking price for the property.

Testimony of John Klas: [Here John Klas reads a portion of his divorce decree] "A. If the defendant, prior to September 1, 1987, finds a buyer who is willing and able and ready to purchase the Berkley Street property at a price and upon terms acceptable to the plaintiff, the plaintiff shall pay to the defendant as a one - time finders fee for her services in showing the house and finding a buyer a sum equivalent to 3% of the gross sale price of the residence." (Transcript, Vol. I, at p.8, l.2-11).

"Q. After this conversation occurred, do you know what then transpired or happened from the standpoint of marketing the property? A. Well, I was aware of the fact because I drove past the home on occasion, that there was a sign in front of the yard that the home was for sale. I was aware of the fact that she contemplated having open houses in the home because she had told me that she intended to do that. I was aware of the fact that she intended to advertise the home because I saw the ads in the Salt Lake Tribune and the Deseret News advertising the home." (Transcript, Vol. I, at p.20, l.17-25, p.21, l.1-3).

Testimony of Carol Klas: "Q. And during that period of time, did you undertake to find a buyer for the home that you were residing in on Berkley Street, which is the subject of this litigation? A. That is correct." (Transcript, Vol. II, at p.81, l.6-10).

"A. He gave me some guidelines to follow. We drew up an ad. I primarily wrote the ad. He reviewed it and said it would be acceptable to him. And it was placed in the Salt Lake in something called the newspaper agency which incorporates the Deseret and Salt Lake Tribune." (Transcript, Vol. II, at p.83, l.16-21).

"Q. Did you do anything other than put the ad in the paper? Did you conduct an open house or make any effort that way? A. I believe, if I recall my memory, the Sunday indicated open house. I don't remember having an open house on Saturdays, but I did it primarily on the weekend. Yes, and I felt the response was very good, particularly by owner. . . . Q. When is the first open house that you can recall that was conducted in connection with the ad that was placed in the paper? A. About the

18th of July." (Transcript, Vol. II, at p.84, 1.25, p.85, 1.1-7, 1.13-16).

5. In 1986, plaintiff acquired an appraisal by Devere Kent (the Kent appraisal) for mortgage loan purposes. That appraisal showed a market value of \$165,000. In anticipation of the sale of said property in 1987, plaintiff had personal acquaintances, engaged in real estate practice, provide opinion appraisals on the current value of the property which were oral in nature, and used by plaintiff as a basis for establishing the market value for sale of the property. Said opinion appraisals ranged from \$175,000 to \$192,000.

Testimony of John Klas: "A. Mr. Kent is an appraiser who lives in Kerns, Utah. And what his qualifications are I am not familiar with. He apparently does work for Chase Manhattan Bank. Carol and I were in the process of applying for a second mortgage loan on the home prior to our divorce and Chase Manhattan Bank had asked him to make an appraisal for the home on it. Because banks are extremely conservative in their lending policies and they want to make sure that the value is reflected to secure the loan that they are making. And he was placed to make the appraisal at the suggestion of Chase Manhattan Bank. Q. Now, that was in connection with this financing that you and your then wife, Carol, contemplated? A. That's true." (Transcript, Vol. I, at p.32, 1.18-25, p.33, 1.1-10).

Testimony of Carol Klas: "Q. In the Chase Manhattan item we referred to, was that an effort to maintain separate financing on the home through Chase Manhattan? A. That would have been in 86. Q. That was the efforts; you were going to obtain some separate mortgage? A. Yes, to pay off some loans. Q. And an appraisal was performed in connection with that effort? A. Yes. I was not aware of it at the time because the property was in my name and John just asked me to come in and sign. So, I was not aware of the appraisal until some time later. Q. Sometime later after what? A. Uhm, perhaps when John and I were discussing what

he would enter as a consideration." (Transcript, Vol. II, at p.130, 1.8-23).

Testimony of Kathryn Van Wagoner: "A. And the next question I asked was: 'How much is the house?' and she, right then said, 'We don't have a firm asking price.' And I said, 'Do you have any appraisals?' was my next question. And she said, 'Yes. They range from \$175 to somewhere in the low \$190's.' And during that conversation, she told me about where the three came from. She did not tell me which one was which. She just mentioned 'One is from American Savings; that's where John is employed. Vick Ayers has given us another one. He is a good friend of John's.' He is with Gump & Ayers so I knew his name. I knew he was well known in real estate. And then the third name she mentioned was Mr. Howard Badger, who was a neighbor on Berkley Street who had been a principle of Badger/Jensen Reality for years. So, I knew those three names from that conversation that Saturday night. Q. Did you specifically ask for appraisals? A. Yes. Q. You have no doubt in your mind about that? A. No." (Transcript, Vol. II, at p.148, 1.15-25, p.149, 1.1-12).

6. In late July or early August, 1987, the defendants inspected the property in the presence of Carol Klas and expressed an interest in acquiring the property.

Testimony of Mark O. Van Wagoner: "Q. And did she reveal anything else to you as a result of that initial conversation? A. Well, she said that Carol would be in the house the next day and that we could go over and look at the house and talk to her some more about it. Q. Did you go over and look at the house? A. We did. Q. And how long did you spend looking at the home and inspecting it? A. Well, overall we spent a lot of time. On the next day, I think we spent a good deal of time." (Transcript, Vol. I, at p.93, 1.19-25, p.94, 1.1-4).

Testimony of Kathryn Van Wagoner: "A. Well before the conversation ended, I asked her if we could come and see the house. Q. And did you schedule an appointment? A. Yes for the next day. Q. Did you go to the house on the next day? A. Yes. Q.

What did you do? A. We went through it. And we liked it. I had never been inside. That was the first time I had been inside. From the outside, we had always admired the house. It was attractive and it was always well maintained. And I think we, what we were looking for initially, it was just to see if it would work. Q. On the visit -- when did this visit to the house occur, as best you recall? A. It was a Sunday and it was in the afternoon. I believe that the time that Carol said was probably right. I have no recollection of the exact time. It was not dark, though. It was not dusky; it was afternoon. It was a nice, summer afternoon. Q. Was this on the weekend of the 24th holiday? A. Yes, it was, the Sunday after the July 24th holiday." (Transcript, Vol. II, at p.149, 1.16-25, p.150, 1.1-15).

Testimony of Carol Klas: "Q. Alright, and tell the court, if you will, the first date that you can recall that the Van Wagoners contacted you with reference to the subject property? A. The 25th, I believe. It would have been a Saturday. Q. Of July? A. Of July. Q. Of 1987? A. That is correct. Q. And how did you recall that particular date? Is there some way that you can tie it to that? A. Because it was the day before my open house on the 26th. And they specifically asked if they could come over prior to the time. I think it was listed at 1:30 or 2:00 and they asked if they could come over before. And I agreed." (Transcript, Vol. II, at p.86, 1.7-23).

7. In the course of defendants' contact with Carol Klas, prior to August 11, 1987, references were made to the effect that she understood "appraisals" had been made in the range of \$175,000 to \$192,000, which defendants believed to be of a written nature, however, there is a dispute whether plaintiff or Carol Klas represented that "written" appraisals existed.

Testimony of Mark O. Van Wagoner: "A. Well, I asked Kathryn if they had no price, how could we know whether we could be interested in the house?

And she told me that in the conversation with Carol Klas that she had suggested that there was a range of market values set by three appraisals of the property and that some offer in that range of market value would be acceptable. Q. Did she tell you what the range was? A. Yes. The range was from -- my recollection is the range was from \$170 to the mid \$190's." (Transcript, Vol. I, at p.93, 1.9-18).

"We then asked her what the asking price was for the house. And she told us that she didn't have a definite asking price; that it had just gone on the market; that she was marketing the house pursuant to the decree of divorce; and that she had three appraisals on the property that ranged in value from \$170,000 to \$190,000 -- one or three or something, but it was above \$190, but just a little above \$190. She told me and Kathryn, she explained that Mr. Klas had told her that he would not take anything outside of that range and that he was looking for a very substantial offer. We talked again about the appraisals. And I'll tell you, I do not recall whether it was at that time that she said that Mr. Klas had them and that she didn't. But we discussed the values and were they current and that sort of thing. She said, yes, that they were all available and that's why that she felt good about this range of price." (Transcript, Vol. I, at p.181, 1.19-25, p.182, 1.1-12).

Testimony of Kathryn Van Wagoner: "A. And I said, 'Do you have any appraisals?' Was my next question. And she said, 'Yes, they range from \$175 to somewhere in the low \$190's.'" (Transcript, Vol. II, at p.148, 1.19-21).

Testimony of Carol Klas: "A. Then I believe Mr. Van Wagoner said to me, 'How did Mr. Klas arrive at the price of \$180,000? How did he arrive at that?' And I mentioned to him at the time, since I was involved in a decorative, more of a facilitator way, I did not know a great deal about the background of how he arrived at this, but I could share with him what John had told me. Q. Just tell us what you told the Van Wagoners in response to their inquiry? A. To their inquiry about how we arrived at this. Q. Yes. A. And I mentioned that Mr. Payne of American Savings and Loan had seen the home a year before and had drawn up some type of letter and had given this to Mr. Klas. And the provisions of that letter were one page. I had

indicated a year before we had applied for a loan, and I was aware there was something to qualify for a loan; that you had to have some kind of appraisal. So, I was aware there was something there but I was very vague on it. I thought that would be from Chase Manhattan Bank. Howard Badger had given an opinion to John, which John had shared with me. Vick Ayers had given an opinion to John. He had been through the home. And I believe there was one other opinion that had been raised, plus the fact that -- I just can't recall. I think there was one other opinion - Vick Ayers and Howard Badger. I believe those were the main ones. And they had all come up. And I believe I said at that time, 'Mr. Klas is looking at a range from about \$170 up to \$190 or a little over \$190.' (Transcript, Vol. II, at p.90, 1.4-25, p.91, 1.1-16).

9. Carol Klas presented the offer to her former husband, John H. Klas, who accepted the same on August 11, 1987, and a closing date of September 15, 1987 was agreed upon by the parties and the premises were vacated in anticipation of the closing. The sales price for the premises was \$175,000, which was the lowest price of the opinion appraisals provided by Carol Klas.

Testimony of John Klas: "A. Yes. And in early August, approximately August 7th of 1987, Carol brought an earnest money agreement signed by Mark Van Wagoner & Kathryn Van Wagoner to me at my office." (Transcript, Vol. I. at p.21, 1.14-17).

Testimony of Carol Klas: "Q. And did you then, in fact, take the document to his office downtown? A. I did at American Savings. Q. And did you deliver it to him? A. I did." (Transcript, Vol. II, at p.98, 1.20-24).

19. Defendants were unaware of the "Kent" appraisal and were under the belief that the lowest appraisal referred to by

Carol Klas was the lowest appraisal on the property. The "Kent" appraisal, if known to the defendants, would have made a material difference in their offer to buy the subject property.

Testimony of Mark O. Van Wagoner: "A. I said, 'The appraisal had come back at \$137,000 I need your appraisals.' Q. What did Mr. Klas respond? A. He said, 'I'll get them.' Q. What happened then? A. About thirty minutes later, Mr. Klas came into my office. Q. And what happened? A. He had in his hand an appraisal by Devere Kent made in 1986. He handed it to me and said, 'Here; this ought to help.' Q. When was the first time you saw the Kent appraisal? A. That very moment." (Transcript, Vol. II, at p.42, 1.1-14).

Testimony of Kathryn Van Wagoner: "Q. Mrs. Van Wagoner, you told Mr. Wall that you made no attempt to contact Mr. Klas prior to the 11th of August who obtained the appraisals, is that true? A. Yes. Q. Why didn't you? A. I thought they existed. I had no reason to doubt that there were no appraisals. I had no reason. I believe that there were. And I knew that we would get them. I knew John had been out of town because Carol had a hard time reaching him one weekend when she needed to. She said, 'He must have gone out of town.' He didn't tell her, but she said, 'I can't find him; I can't find him.' I thought that when it came down to us, we will give him the \$1,000. We will make this offer and we would get all the papers that we needed. We needed an appraisal; I knew that, to justify where we were going to be and to go to the bank and proceed with the transaction. I knew what we needed." (Transcript, Vol, II, at p.162, 1.3-21).

20. However, defendants negotiated with plaintiff through Carol Klas pursuant to paragraph 4 above and pursuant to plaintiff and Carol Klas' understanding the range would be the property value of the three highest "appraisals."

Testimony of Mark O. Van Wagoner: "Q. And did she reveal anything else to you as a result of that initial conversation? A. Well, she said that Carol would be in the house the next day and that we could go over and look at the house and talk to her some more about it." (Transcript, Vol.I at p.93, 1.19-23).

"Q. Is there any doubt in your mind but what at the time the document was signed by you and your wife that the sum of \$175,000 was disclosed as the sales price? A. Yes, it was disclosed as the price that Carol told me John would accept if I offered it to him." (Transcript, Vol. I, at p.98, 1.10-15).

"A. Carol Klas told me -- and I don't know that this is true -- that John was a very difficult person; that he would not look kindly on an exception. That if we wanted to get the house -- and she knew I wanted it -- that I would have to let her show me and lead me through how to get it; and that there could be no condition, exceptions or other kinds of things written into the earnest money." (Transcript, Vol. I, at p.101, 1.18-25).

"Q. So, when you were dealing with her, there was no doubt in your mind but what Mr. Klas was the owner of the property. A. No." (Transcript, Vol. I, at p.103, 1.23-25, p.104, 1.1).

22. Although the defendants had opportunity to investigate the issue of fair market value of the property prior to execution of the Earnest Money Sales Agreement of August 7, 1987, they continued to rely upon the existence of appraisals as represented by Carol Klas regarding the market value of the property.

Testimony of Kathryn Van Wagoner: "Q. Mrs. Van Wagoner, you told Mr. Wall that you made no attempt to contact Mr. Klas prior to the 11th of August to obtain the appraisals, is that true? A. Yes. Q. Why didn't you question Mark? A. I thought they existed. I had no reason to doubt that there were no appraisals. I had no reason. I believe that

there were. And I knew we would get them. I knew John had been out of town because Carol had a hard time reaching one weekend when she needed to. She said, he must have gone out of town. He didn't tell her, but she said, 'I can't find him; I can't find him.' I thought when it came down to us, we will give him the \$1,000. We will make this offer and we would get all the papers that we needed. We needed an appraisal; I knew that to justify where we were going to be and go to the bank and proceed with the transaction. I knew what we needed." (Transcript, Vol. II, at p.162, 1.3-21).

28. The defendants, however, were negotiating on the understanding there were appraisals and the appraisals were in writing.

Testimony of Mark O. Van Wagoner: "Q. I take it from what I have heard in your counsels opening statement and other comments, that it is your claim or contention that there was some representation about the existence of appraisals as being a relevant factor in this case, correct? A. That's correct." (Transcript, Vol. I, at p.101, 1.3-8).

"A. Well, we had some truncated conversations in which I told Mr. Klas that I had to have the appraisals that I had been told existed." (Transcript, Vol. II, at p.43, 1.8-10).

30. In the course of negotiations between the defendants and Carol Klas, there existed the Devere Kent appraisal valuing the property at \$165,000, the existence of which was unknown to defendants, and if known, would have made a material difference in their offer to buy the subject property. This was a unilateral mistake on the part of the defendants which was fundamental and substantial. The Devere Kent appraisal was never provided by Carol Klas in spite of

defendants' request for copies of appraisals. In this regard, the Court does not find any fraud or misrepresentation on the part of the plaintiff.

Testimony of Mark O. Van Wagoner: "Q. Mr. Van Wagoner, if you will recall before the lunch hour, we were discussing a telephone conversation between you and Mr. Cowley on September 23, 1987; do you recall that? A. Yes. Q. After that telephone call on September 23rd, what was the next thing that happened with regard to the Berkley property? A. Well, I told Kathryn about the \$161 offer. And we talked about whether it would be possible to do that in view of the fact that there was an appraisal for \$137." (Transcript, Vol. II, at p.70, 1.21-25, p.71, 1.1-7).

"A. Well, I decided that based on what Mr. Dimmick had told me that it would not be possible to use the \$161 figure as a basis, and that I would need to use the \$137 as a basis." (Transcript, Vol. II, at p.72, 1.4-7).

Testimony of Kathryn Van Wagoner: "Q. Did you specifically ask for appraisals? A. Yes. Q. You have no doubt in your mind about that? A. No." (Transcript, Vol. II, at p.149, 1.9-12).

31. The defendants considered the price of \$175,000 as being a reasonable price for the property in question at the time the offer to purchase was submitted and executed by them, based on representations made by Carol Klas and without the benefit of the Devere Kent appraisal.

Testimony of Mark O. Van Wagoner: "Q. Is there any doubt in your mind but what at the time the document was signed by you and your wife that the sum of \$175,000 was disclosed as the sales price? A. Yes, it was disclosed as a price that Carol told me John would accept if I offered it to him." (Transcript, Vol. I, at p.98, 1.10-15).

32. The defendants made no attempt to secure appraisals on the subject property prior to the time the Earnest Money Sales Agreement was entered into by the parties, because of representations made by Carol Klas, there were "appraisals" in existence.

Testimony of Mark O. Van Wagoner: "Q. Is there any doubt in your mind but what at the time the document was signed by you and your wife that the sum of \$175,000 was disclosed as the sales price? A. Yes, it was disclosed as a price that Carol told me John would accept if I offered it to him." (Transcript, Vol. I, at p.98, 1.10-15).

Testimony of Kathryn Van Wagoner: "Q. Mrs. Van Wagoner, you told Mr. Wall that you made no attempt to contact Mr. Klas prior to the 11th of August to obtain the appraisals, is that true? A. Yes. Q. Why didn't you? A. I thought they existed. I had no reason to doubt that there were no appraisals. I had no reason. I believe that there were." (Transcript, Vol. II, at p.162, 1.3-10).

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