

1990

John H. Klas v. Mark O. Van Wagoner and Kathryn Van Wagoner : Petition for Rehearing

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. ~~XXXXXXXXXX~~ **IN THE UTAH COURT OF APPEALS**

JOHN H. KLAS,)	
)	
Plaintiff/Appellant,)	
)	
v.)	
)	
MARK O. and KATHRYN)	
VAN WAGONER,)	Case No. 900493-CA
)	
Defendants/Appellees.)	Priority Number (16)

APPELLEES' PETITION FOR REHEARING

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

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Attorneys for defendants

FILED

APR 21 1992

Mary T. McMan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

JOHN H. KLAS,)	
)	
Plaintiff/Appellant,)	
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v.)	
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MARK O. and KATHRYN)	
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Pursuant to Rule 35 of the Utah Rules of Appellate Procedure, defendants/appellees, Mark O. Van Wagoner and Kathryn Van Wagoner, by and through their counsel of record, hereby petition the Court for a rehearing in the above-captioned matter following the Court's Opinion of March 27, 1992.¹ This petition is based upon points of law and fact which the Court overlooked or misapprehended in its Opinion.

I. PETITION SUMMARY.

Defendants request a rehearing on the grounds that:

1. Rather than review the trial court's Findings of Fact under the "clearly erroneous" standard, the Court engaged in selective fact finding of its own.

2. The Court reviewed the trial court's Conclusions of Law by a standard not in place the time of the trial court's judgment or, alternatively, the Court created a new undesirable standard for unilateral mistake which supplants the Utah Supreme Court's standard.

¹ A true and correct copy of the Court's March 27, 1992, Opinion is attached hereto as Exhibit "A".

3. The Court created a new, undesirable legal standard for reliance

II. THE APPELLATE COURT HAS EXCEEDED ITS JURISDICTION BY ENGAGING IN A FUNCTION RESERVED FOR THE TRIAL COURT.

The Court's Opinion states that the plaintiff did not "dispute the trial court's finding of fact."² While it is true that plaintiff made no attempt to muster evidence from the record to support a challenge to the Findings of Fact, plaintiff could not challenge the trial court's legal conclusion regarding unilateral mistake, without challenging the facts. For example, the plaintiff could not leave the trial court's Finding of Fact No. 30 which states, in pertinent part:

In the course of negotiations between the defendant 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 defendants which was fundamental and substantial. The Devere Kent appraisal was never provided by Carol Klas in spite of defendants' requests for copies of appraisals.

² Curiously, the Court's Opinion acknowledges a challenge to the Findings of Fact in its footnote on page 3.

Plaintiff also had to challenge the trial court's Finding of Fact No. 31 which states, in pertinent part:

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 upon the representations made by Carol Klas and without the benefit of the Devere Kent appraisal.

(A true and correct copy of the trial court's Amended Findings of Fact and Conclusions of Law is attached hereto as Exhibit "B").

Nowhere in plaintiff's brief, or in the Court's Opinion, is there an indication that the trial court's Findings of Fact Nos. 30 and 31 are clearly erroneous. Indeed, as defendant's brief points out, there is ample evidence in the record to support those Findings as well as the other findings supporting the judgment. (See Appendix "A" to Brief of Appellees at pages 11-13, attached hereto as Exhibit "C").

A. The Trial Court's Findings Of Fact Are Unchallenged.

According to the Court's Opinion, "Essentially, plaintiff does not dispute the trial court's Findings of Fact, but challenges the trial court's application of the doctrine of unilateral mistake." (Exhibit "A" at p. 4). That being the

case, the Court should have accepted the trial court's Findings of Fact as valid and reviewed the trial court's Conclusions of Law based upon those Findings of Fact. "If the appellant fails to marshall the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to review the accuracy of the lower court's conclusions of law and the application of that law in the case." Crouse v. Crouse, 817 P.2d 836 (Ut. Ct. App. 1991) (quoting Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991)).

B. Ignoring The Trial Court's Findings Of Fact, The Court's Opinion Creates New Findings Of Fact.

Rather than review the evidence which supported the trial court's Findings of Fact, the Court's Opinion engages in selective fact finding of its own. For example, as indicated above, the trial court's Finding of Fact Nos. 30 and 31 indicate that defendants relied on the representations made by Carol Klas with regard to the value of the property and that the existence of the appraisal not disclosed by plaintiff's representative would have made a material difference to defendants. In short, the trial court found that the non-disclosure of the Kent appraisal was fundamental and substantial to the underlying contract. Of course, the Court's Opinion points out that plaintiff does not challenge these Findings of Fact.

Nonetheless, the Court's Opinion ignores the trial court's Findings of Fact and imposes its own finding:

Because defendants, after arms length negotiations with plaintiff, agreed to purchase the property for a price within the range set by plaintiff, we conclude that defendants' ignorance of the existence of the Kent appraisal valuing the property at \$165,000 would not render the enforcement of the agreement unconscionable. (Exhibit "A" at p. 7).

Here, the Court finds that the existence of the Kent appraisal was immaterial. Yet the trial court found that the existence of the Kent appraisal was "fundamental and substantial" and "would have made a material difference in [defendants'] offer to buy the subject property." (Exhibit "B" at Finding of Fact No. 30). The Court's Opinion does not indicate the trial court's Finding of Fact was clearly erroneous, the Opinion simply issues a different finding of fact.

The trial court's Findings of Fact also indicate that

In the course of defendants' contact with Carol Klas, prior to August 11, 1987, references were made to the effect that she understood "appraisals" have been made in the range of \$175,000 to \$192,000. . . (Exhibit "B" at p. 4, Finding of Fact No. 7).

The Court's Opinion takes issue with this Finding of Fact and states "it is clear from the record that both Carol Klas and Mark Van Wagoner understood the range of those appraisals to begin at \$170,000, not at \$175,000." (Exhibit "A" at p. 3, n.3). Under the proper standard for review, the Court's Opinion should have reviewed the record in order to determine if there was any evidence in the record which supported the trial court's Finding of Fact. Absent such support, the Court could have found that the trial court's finding was clearly erroneous. In this case, however, the record clearly contains evidence which supports the trial court's Finding of Fact No. 7. The testimony of Kathryn Van Wagoner indicates that the appraisal range from \$175,000 to the low \$190,000 area. (Transcript Vol. II, at p. 148, l. 15-25, p. 149, l. 1-12) (see Exhibit "C" at p. 5).³ The trial court found Ms. Van Wagoner's testimony credible and compelling and made its Finding of Fact accordingly. This Court's conclusion that this Finding of Fact is clearly erroneous cannot be based on a lack of evidentiary foundation in the record, it must be the product of the Court's judgment of the credibility and weight afforded the evidence. This function is reserved for the finder of fact, in this case, the trial court.

³ Although plaintiff failed to marshall the evidence in regard to this Finding of Fact, Appendix A to the brief of appellees (Exhibit "C" herein) is an annotation of the trial court's Amended Findings of Fact. The annotation cites to testimony in the record which supports the trial court's Findings of Fact.

A third point where the Court's Opinion substitutes its judgment regarding a Finding of Fact for that of the trial court is found on page 8, footnote 7 of the Court's Opinion. There the Court states:

In light of our conclusion that both parties understand the appraisals to range from \$175,000 and up, we likewise to do not consider the \$5,000 difference between the Kent appraisal and the lowest of the three informal appraisal to be an unconscionable difference. (Exhibit at p. 8) (Emphasis added).

Here the Court has displaced the trial court's Finding of Fact that the existence of the "Devere Kent appraisal valuing the property at \$165,000 . . . was unknown to defendants, and if known, would have made a material difference in their offer to buy the subject property." (Exhibit "B" at p 10).

The function of the trial court is to hear the relevant testimony, weigh that testimony and then resolve conflicts and make inferences necessary to reach supportable findings of fact. By contrast, the function of the Appellate Court is limited to determining whether any evidence (or inferences therefrom) support the trial court's Findings. By disregarding the clearly erroneous standard, this Court exceeded its jurisdiction and deprived the trial court of its essential function. "In

determining whether a finding is clearly erroneous, due regard is given to the trial court to evaluate the credibility of witnesses since it is not [the Court of Appeals'] function to determine conflicting evidence or the reasonable inferences drawn therefrom." State v. Ford, 818 P.2d 1052, 1054 (Ut. Ct. App. 1991).

The proper inquiry on the appellate court's part is whether there is any evidence in the record which supports the trial court's Finding of Fact, not whether there is evidence in the record which could support a different finding of fact. Id. ("We do not assess facts de novo on appeal.") Given that both the plaintiff and the Court have admitted that there is no challenge to the facts, this case should be reheard based on the facts found by the trial court.

III. THE COURT'S OPINION RETROACTIVELY APPLIES A NEW STANDARD FOR UNILATERAL MISTAKE OR CREATES A NEW STANDARD WHICH SUPPLANTS THE STANDARD SET BY THE UTAH SUPREME COURT.

The trial court issued its Findings of Fact and Conclusions of Law with regard to unilateral mistake in May of 1990. Accordingly, the trial court applied the standard for unilateral mistake set forth in Guardian State Bank v. F. C. Stangl, 778 P.2d 1 (Utah 1989). In Stangl, the Supreme Court agreed with,

and adopted, Professor Corbin's formulation of the law of unilateral mistake:

There is particularly 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 a character and accompanied by such circumstances that he has reason to know of it, the mistaken party has a right to rescission. (Emphasis added).

Guardian State Bank v. F.C. Stanql, 778 P.2d at 12.

Following the standards set forth by the Supreme Court in Stanql, the trial court concluded 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 the 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 aware of the undisclosed, lower appraisal, it would have made a material difference in their offer to buy the property. (Exhibit "B" at p. 11).

Though charitable to plaintiff, the language of the trial court's Conclusions of Law follows the Supreme Court standard for unilateral mistake as set forth in Stanql.

A. The Court's Opinion Ignores The Stanql Standard And Retroactively Applies Its Own Standard.

The standard for unilateral mistake as set forth in Stanql has not been overruled, yet the Court's Opinion applies a more restrictive standard set forth in Grahn v. Gregory, 800 P.2d 320 (Ut. Ct. App. 1990). The application of Grahn creates two problems. First, it wrongly places the burden upon the trial court's Conclusions of Law to meet a standard which did not even exist until five months after the trial court made those conclusions of law based on Stanql. Certainly, the trial court did not err in applying the standards set forth in Stanql.

B. The Court's Opinion Purports To Overrule Stanql.

The second problem created by this Court's application of Grahn is that it holds the Stanql standard to be insufficient, thus, findings following Stanql do not sustain a unilateral mistake judgment. If that is the Court's position, it should be made sufficiently clear to afford the parties and courts of this State appropriate guidance and opportunity for review.

In either event, Appellees' respectfully suggest a rehearing is appropriate to clarify the record.

IV. BY CREATING NEW FINDINGS OF FACT REGARDING DEFENDANTS' RELIANCE, THE COURT'S OPINION MISAPPLIED THE STANDARD FOR UNILATERAL MISTAKE.

Even if the Court should hold the trial court's Conclusions of Law to the more restrictive Grahn standard, the Court's Opinion improper selective fact finding misapplies the standard for unilateral mistake. The Court's Opinion on unilateral mistake focuses on two of the four criteria for unilateral mistake under Grahn: unconscionability and diligence. Under both theories, the Court's Opinion centers on the reasonableness of defendants' reliance on the misrepresentations of plaintiff's agent.

A. Defendants' Reliance Was Justified and Plaintiff's Misrepresentation Makes Enforcement of the Agreement Unconscionable.

Unless this Court admits finding different facts, it must base its conclusion of unconscionability on the facts found by the trial court, namely: 1) the existence of the Kent Appraisal was significant; 2) defendants lack of knowledge regarding the existence of the appraisal was material; 3) that plaintiff knew of the appraisal; and 4) that Carol Klas failed to disclose it.

These facts compel a legal conclusion of unilateral mistake, as found by the trial court. If these Findings of Fact are not clearly erroneous, the trial courts judgment should stand.

B. The Court's Opinion Creates An Unreasonable Standard For A Buyer's Diligence.

By contrast, the Court's Opinion states that defendants should not have relied upon the statements of plaintiff's representative, a neighbor of the Van Wagoners, but should have obtained an appraisal on the underlying property themselves. (Exhibit "A" at p. 9).

Again, this Court ignored the trial court's findings that Carol Klas failed to inform defendants that the property had been appraised at a value as low as \$165,000, a fact which she knew⁴ and which, if known to defendants, would have made a substantial difference to them in entering into this contract. The Court's new facts set a standard that a buyer cannot rely on a statement made by a seller, without further acts by the buyer to independently test the seller's representations. That standard effectively eliminates reliance.

⁴ Transcript, Vol. II, at p. 130, l. 8-23; see Exhibit "C" at pages 4-5 re: Finding of Fact No. 5.

C. The Court's Opinion Ignores Kathryn Van Wagoner's Reliance.

1. Kathryn Van Wagoner Is A Separate Individual Party.

The Court's Opinion indicates that defendant should not have relied upon the representations of plaintiff's agent because Mark Van Wagoner is an attorney with experience in real estate matters. (Exhibit "A" at p. 9). The Opinion, however, ignores the issue of the reasonableness of Kathryn Van Wagoner's reliance on the statements of plaintiff's agent. As indicated above, it was Kathryn Van Wagoner, a non-lawyer, who testified as to Carol Blas' representations regarding the value of the property. (Exhibit "C" at p. 5).

Kathryn Van Wagoner has an identity separate and apart from that of Mark Van Wagoner. She is named as an individual defendant in this matter and has defenses and counterclaims which, though similar, are separate from those of Mark Van Wagoner. The Court's Opinion directs its comments regarding the expertise and experience of the buyer towards Mark Van Wagoner. It completely ignores Kathryn Van Wagoner as if she did not exist apart from her husband.

2. Imputed Knowledge Should Be Applied Consistently To Both Parties.

If the Court intends to transfer Mr. Van Wagoner's status as an attorney to Mrs. Van Wagoner, it also should transfer Mr. Klas' knowledge as a mortgage banker to Mrs. Klas. Indeed, it is grossly inequitable to state that Kathryn Van Wagoner, as the spouse of an attorney, is assumed to have the knowledge of an attorney, but that Carol Klas, the former spouse of a mortgage banker, is a layperson and has no idea what the term "appraisal" means. All defendants seek is the equal application of the principal of imputed knowledge. If the knowledge of Mark Van Wagoner as an attorney is imputed to Kathryn Van Wagoner, the knowledge of John Klas as mortgage banker must be imputed to Carol Klas.

3. Acting As A Unit, Plaintiff And Carol Klas Deceived Defendants.

John Klas, a mortgage banker, clearly understood the term "appraisal" and the distinction between an appraisal and an opinion of value. Loans are not granted based on opinions. When John Klas discussed with Carol Klas of the range of "appraisals" for the home, they both knew about Kent appraisal. Nonetheless, the price was established based on a range of opinions which ignored the only appraisal the Klases obtained.

Taken together, the actions of John and Carol Klas evidence more than a seller setting a price range for his property and his agent misconstruing the term "appraisal". This only could have been a plan to withhold the only true appraisal of the property from prospective buyers, even in the face of the Van Wagoners' direct, specific inquiry.

V. CONCLUSION.

For the reasons stated above, defendants respectfully request a rehearing.

DATED this 21st day of April, 1992.

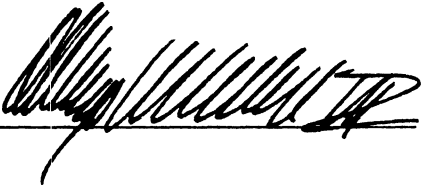
VAN WAGONER & STEVENS
Lewis T. Stevens
Alexander H. Walker III
Kristin G. Brewer

By: 
Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 1992, I caused a true and correct copy of the foregoing APPELLEES' PETITION FOR REHEARING to be mailed, postage prepaid, to:

Cory R. Wall
WALL & WALL
9 Exchange Place #800
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "Cory R. Wall", is written over a horizontal line.

klas.pet

FILED

This opinion is subject to revision before
publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

MAR 27 1992

Mary T Noonan

Mary T Noonan
Clerk of the Court
12th Court of Appeals

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John H. Klas,)	OPINION
)	(For Publication)
Plaintiff and Appellant,)	
)	
v.)	Case No. 900493-CA
)	
Mark O. Van Wagoner and)	
Kathryn Van Wagoner,)	F I L E D
)	(March 27, 1992)
Defendants and Appellees.)	

Third District, Salt Lake County
The Honorable Raymond S. Uno

Attorneys: Brant H. Wall and Cory R. Wall, Salt Lake City, for
Appellant
Lewis T. Stevens, Alexander H. Walker, and Kristin G.
Brewer, Salt Lake City, for Appellees

Before Judges Billings, Orme, and Russon.

ORME, Judge:

Plaintiff, John H. Klas, appeals from the trial court's ruling entitling defendants to rescission of an Earnest Money Sales Agreement, challenging the trial court's determination that the defendants made a unilateral mistake. Defendants also seek clarification on the issue of damages and attorney fees on appeal. We reverse and remand for further proceedings.

FACTS

This matter was tried to the court on May 9, 10, and 12 of 1989. The court thereafter rendered its Memorandum Decision concluding that defendants had breached the Earnest Money Sales Agreement and that plaintiff was entitled to damages, interest, costs, and attorney fees. After a period of almost one year of objections, motions for new trial, and conflicting proposals for findings, conclusions, and judgment by both sides, the trial court entered a judgment allowing defendants to rescind the

subject agreement on the basis of unilateral mistake by the defendants.¹

Inasmuch as there is no serious dispute concerning the findings of fact, the essential facts are taken from the lower court's findings.

In July of 1987, defendants, Mark O. Van Wagoner and his wife, Kathryn Van Wagoner, attended an "open house" held by Carol Klas, the former wife of plaintiff, John Klas. Carol Klas had undertaken to sell the subject property, which was owned by plaintiff pursuant to a Divorce Decree that awarded the property to plaintiff as his sole and separate property. The Divorce Decree provided that if, prior to September 1, 1987, Carol Klas could find a buyer willing to purchase the property at a price and upon terms acceptable to plaintiff, she would receive a finder's fee of 3% of the gross sale price. Following the open house, defendants expressed interest in purchasing the property.

In August of 1987, Mark Van Wagoner, who is an attorney, prepared and delivered to Carol Klas an Earnest Money Sales Agreement (the Agreement) wherein defendants offered to purchase the property for \$175,000. The Agreement included an integration clause and specified that the offer was subject to no contingencies, exceptions, or conditions of sale other than what was set forth in the Agreement.² Carol then presented the offer to plaintiff.

Upon receiving the Agreement, plaintiff reviewed the written proposal with his attorney. Plaintiff's attorney then telephoned Mark Van Wagoner to review the document. At this time the parties discussed and made modifications to the Agreement. Plaintiff then executed the Agreement and delivered it to Mark's office. Defendants signed the document on August 11, 1987, and the parties agreed to a September closing date.

Prior to the August 1987 signing of the Agreement, defendants inquired of Carol Klas about appraisals of the property. Carol expressed to defendants her understanding that

1. There followed additional objections to the Findings, Conclusions and Judgment, together with motions to amend the same. On May 31, 1990, the court entered its Amended Findings of Fact and Conclusions of Law which clarified factual issues, but resulted in the same legal conclusion as the March 13, 1990 Judgment.

2. A provision conditioning the contract upon buyers' obtaining financing was expressly deleted.

several "appraisals" had been made and that they ranged from \$170,000 to \$192,000.³ The trial court found that there was an apparent misunderstanding between defendants and Carol regarding the term "appraisals." While defendants understood the term to mean formal, written appraisals, Carol's testimony indicates that she considered any opinion, whether verbal or written, given as to the value of the property to be an "appraisal." The appraisals to which Carol referred later proved to be informal opinions as to the market value of the property solicited by plaintiff from several personal acquaintances in the real estate business. One of these was in letter form; the others were merely verbal.

At no time prior to their signing the Agreement did defendants request that plaintiff produce written appraisals of the property, although, as indicated, they mistakenly assumed the "appraisals" referred to by Carol Klas were formal, written appraisals.⁴ Only after signing the Agreement did defendants affirmatively demand copies of the appraisals to which Carol had referred. Plaintiff was at first unresponsive, but after learning that an appraiser engaged by defendants' prospective lender had valued the property at \$137,000, plaintiff provided defendant with a copy of a fourth "appraisal," and the only formal written appraisal, prepared for plaintiff.

That appraisal, prepared by Devere Kent, valued the property at \$165,000 but was older than the other "appraisals" referred to by Carol Klas. It had been prepared earlier in connection with a loan application made by plaintiff, prior to the divorce and plaintiff's decision to sell. Throughout the course of

3. Plaintiff questions the trial court's finding that the three appraisals to which Carol Klas referred ranged from \$175,000 to \$192,000. It is clear from the record that both Carol Klas and Mark Van Wagoner understood the range of those appraisals to begin at \$170,000, not \$175,000. Thus, we conclude that the trial court's finding that the three appraisals ranged from \$175,000 and up was clearly erroneous. Bell v. Elder, 782 P.2d 545, 547 (Utah App. 1989).

4. "Appraisal" may have a different, more precise connotation in contemporary real estate parlance. However, Carol Klas was not a real estate agent or broker. In general usage, appraisal means "an act of estimating or evaluating . . . esp[ecially] by someone fitted to judge"; "a valuation of property by the estimate of an authorized person." Webster's Third New Int'l Dictionary 105 (1986). The three "appraisals" Carol had in mind were estimates furnished by Larry Payne, Howard Badger, and Vic Ayers, all of whom were in the real estate or mortgage lending business.

negotiations with Carol Klas, defendants were unaware of the existence of this appraisal, and believed that the lowest appraisal referred to by Carol was the lowest existing appraisal of the property.

In early October of 1987 defendants, through their counsel, notified plaintiff of the withdrawal of their offer to purchase the property and demanded the return of the earnest money deposit. Plaintiff then notified defendants that if they failed to consummate the purchase of the property within ten days, the property would be placed on the market in an effort to mitigate damages and that defendants would be responsible for any damages sustained. Defendants failed to finalize the purchase of the property, and plaintiff thereafter placed the property on the market. The property was sold in April of 1988, for \$160,000, and plaintiff sued defendants to recover the difference between the Agreement price and the fair market value.

At trial, defendants based their refusal to consummate the purchase of the subject property upon the fact that, if known, the Kent appraisal would have made a material difference in their offer to buy the subject property. Defendants claimed this was a unilateral mistake on their part entitling them to rescission of the Agreement. Eventually, the trial court agreed with defendants, and concluded that the unilateral mistake provided a basis for rescission of the Agreement. Accordingly, the court held that no damages were recoverable by plaintiff, and dismissed plaintiff's complaint. The court also dismissed defendants' counterclaim requesting relief on the grounds of fraud, mutual mistake of fact, and detrimental reliance.⁵ Plaintiff appealed, challenging the trial court's application of the law in permitting rescission of the Agreement on the basis of unilateral mistake.

STANDARD OF REVIEW

Essentially, plaintiff does not dispute the trial court's findings of fact, but challenges the trial court's application of the doctrine of unilateral mistake. The issue before us, then, is whether the trial court erred in its legal conclusion that defendants were entitled to rescission of the Agreement on the basis of unilateral mistake. "If a trial court interprets a contract as a matter of law, we accord its construction no

5. Defendants sought an award of punitive damages, costs, and attorney fees on their claims for fraud and detrimental reliance, and sought cancellation or rescission of the Agreement as relief on their claim for mutual mistake.

particular weight, reviewing its action under a correctness standard." Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985). Accord 50 West Broadway Assocs. v. Redevelopment Agency of Salt Lake City, 784 P.2d 1162, 1171 (Utah 1989); Copper State Leasing Co. v. Blacker Appliance & Furn. Co., 770 P.2d 88, 90 (Utah 1988). Moreover, the trial court's legal conclusions "are accorded no particular deference; we review them for correctness." Bellon v. Malnar, 808 P.2d 1089, 1092 (Utah 1991) (quoting Grayson Roper Ltd. v. Finlinson, 782 P.2d 467, 470 (Utah 1989)).

UNILATERAL MISTAKE

This court has identified four criteria that must be satisfied before rescission on the basis of unilateral mistake will be permitted:

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 exercise 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 him in status quo.

Grahn v. Gregory, 800 P.2d 320, 327 (Utah App. 1990). See generally Guardian State Bank v. Stanql, 778 P.2d 1, 4-5 (Utah 1989) (discussing evolution of doctrine of unilateral mistake). In applying these factors to the trial court's findings of fact, we conclude that at least two of the four elements required to sustain the trial court's rescission of the Agreement have not been met.

A. Unconscionability

First, we are not convinced that the alleged mistake was so grave as to render enforcement of the Agreement as made unconscionable. Concerning unconscionability, the Utah Supreme Court has stated that "a duly executed written contract should be overturned only by clear and convincing evidence." Resource Management Co. v. Weston Ranch and Livestock Co., 706 P.2d 1028, 1043 (Utah 1985). In determining unconscionability, "a court must assess the circumstances of each particular case in light of the twofold purpose of the doctrine, prevention of oppression and of unfair surprise." Id. at 1041. Courts analyze unconscionability in terms of "procedural" and "substantive" unconscionability. Id.

Procedural unconscionability focuses on the "relative positions of the parties and the circumstances surrounding the execution of the contract." Jones v. Johnson, 761 P.2d 37, 39 (Utah App. 1988) (quoting Bekins Bar V Ranch v. Huth, 664 P.2d 455, 461 (Utah 1983)). Procedural unconscionability occurs "where there is an absence of meaningful choice and where lack of education or sophistication results in no opportunity to understand the terms of the agreement." Johnson, 761 P.2d at 39. Substantive unconscionability occurs when contract terms are "so lopsided as to unfairly oppress or surprise an innocent party," id. at 40, or where there is "an overall imbalance in rights and responsibilities imposed by the contract, excessive price or a significant cost-price disparity, or terms which are inconsistent with accepted mores of commercial practice." Id.

In the instant case, defendants' alleged mistake as to the value of the property did not result from any procedural unconscionability. The trial court's findings show that the parties dealt at arms length. Defendant Mark Van Wagoner, an attorney, testified at trial that he was experienced in real estate transactions and that he had participated in many closing transactions with real estate agents.⁶ Prior to signing the Agreement, defendants engaged in discussions with Carol Klas regarding the value of the home, fully aware that she was financially interested in effecting a sale. Defendants were informed by Carol that plaintiff would only accept an offer within the range of the three appraisals to which she had referred--from \$170,000 to \$192,000--and only if there were no exceptions, contingencies, or conditions attached thereto. Defendants assented to those terms, and tendered a form of

6. There was also testimony presented at trial that Mark had previously owned a home in the neighborhood where the subject property is located, and that he lived there until 1985.

agreement of their own choosing. It is apparent that both parties were essentially in equal bargaining positions, and that the circumstances surrounding the execution of the Agreement were not oppressive. Thus, any surprise on defendants' part was not unfair.

Similarly, the terms of the Agreement were not "so lopsided as to unfairly oppress or surprise an innocent party." Id. The Utah Supreme Court has stated that

sellers and buyers should be able to contract on their own terms without the indulgence of paternalism by the courts in the alleviation of one side or another from the effects of a poor bargain. They should be permitted to enter into contracts that may actually be unreasonable or which may lead to hardship on one side.

Park Valley Corp. v. Bagley, 635 P.2d 65, 67 (Utah 1981). In the instant case, both parties bargained for and clearly understood the terms of the Agreement. Prior to preparing the Agreement, defendants were advised by Carol Klas that plaintiff would not approve of any exceptions or conditions to the Agreement, nor any offer lower than the range of appraisals referred to by Carol. The Agreement signed by both parties contained a notation that no special considerations or contingencies existed relative to the written Agreement. Accordingly, there was no provision in the Agreement conditioning the purchase upon production of any written appraisals by plaintiff or of the property appraising at any particular value. The parties freely bargained for these terms and assented to them by executing the Agreement.

The Agreement's price of \$175,000 fell within the range of informal appraisals valuing the subject property from \$170,000 to \$192,000. The record indicates that plaintiff relied on a variety of factors, including the three informal appraisals, to determine the value of his property. These factors formed the basis for his asking price, as well as his acceptance of defendants' offer. Under the rationale stated in Bagley, plaintiff was entitled to formulate the sales price of his home in the manner of his choice, just as defendants were entitled to base their offer on their own opinion of the value of the property. Because defendants, after arm's-length negotiations with plaintiff, agreed to purchase the property for a price within the range set by plaintiff, we conclude that defendants' ignorance of the existence of the Kent appraisal valuing the property at \$165,000 would not render enforcement of the Agreement unconscionable.

In addition, we conclude that, even considering the Kent appraisal, the sales price was not itself unconscionable. First, the \$10,000 difference between the Kent appraisal, valuing the property at \$165,000, and defendants' offer of \$175,000 can hardly be termed "grave" or "unconscionable."⁷ Second, the trial court specifically found that defendants considered their offering price of \$175,000 to be reasonable. Third, despite its conclusion that rescission was proper on the basis of unilateral mistake, the trial court made no finding suggesting that the difference between the sale price and the Kent appraisal constituted grave circumstances such that enforcement of the Agreement would be unconscionable. Finally, we note that defendants have cited no authority, nor set forth a persuasive argument, to support their conclusion that the difference between the sale price and the Kent appraisal constituted grave circumstances sufficient to render enforcement of the Agreement unconscionable. For these reasons, we conclude that the consequence of defendants' alleged mistake was not so grave as to render enforcement of the Agreement unconscionable.

B. Buyer's Diligence

Jumping to the third element necessary to sustain rescission on the ground of unilateral mistake, we find that defendants' conduct did not rise to the level of ordinary diligence required to rescind a contract on the basis of unilateral mistake. In the course of negotiations between the parties prior to signing the Agreement, defendants were aware of the existence of three "appraisals" valuing the subject property. While defendants did not know that these "appraisals" were only informal expressions of opinion, they did know that plaintiff would not entertain an offer below the lowest of the quoted figures. However, the trial court found that during these negotiations, defendants made no attempt to secure an independent appraisal on the subject property. Defendants contend that their reliance on Carol Klas's representations as to the three alleged appraisals excused their failure to obtain additional appraisals of the subject property prior to executing the Agreement. Specifically, defendants contend, and the trial court found, that defendants' mistaken belief that the lowest existing appraisal on the property was \$170,000 was caused by Carol Klas's representations and failure to have the Kent appraisal provided in a timely manner. We are not persuaded.

7. In light of our conclusion that both parties understood the appraisals to range from \$170,000 and up, we likewise do not consider the \$5,000 difference between the Kent appraisal and the lowest of the three informal appraisals to be an unconscionable difference.

Defendants had ample opportunity, if materially concerned about the value at which the property would appraise, to have the property appraised during the two-week time period between the time of their initial inspection of the property and the time they executed the agreement. The record indicates that, during this two-week period, defendants saw fit to have architects, decorators, and electricians examine the property. Yet, they did not engage an appraiser to assess the value of the home until they attempted to obtain financing after executing the Agreement. Furthermore, we find it unreasonable, especially given Mark Van Wagoner's professional training and experience in real estate law, for defendants to have failed to obtain an independent appraisal prior to executing the Agreement, or to have conditioned the obligation to purchase on the property appraising at a particular level, if they were truly concerned about the property's appraised value. Because defendants failed to conduct a reasonable investigation of the subject property's market value prior to executing the Agreement, defendants' conduct did not rise to the level of ordinary diligence required to establish unilateral mistake.

Accordingly, because defendants failed to fulfill two of the four elements necessary to justify rescission on the basis of unilateral mistake, the trial court erred in concluding that defendants were entitled to rescission of the Earnest Money Sales Agreement on the basis of unilateral mistake.⁸ See, e.g., John Call Engineering v. Manti City Corp., 743 P.2d 1205, 1209-10 (Utah 1987) (absent showing that enforcement of sewer construction project contract would be unconscionable, that city had exercised due care in executing contract, and that rescission of contract would not seriously prejudice engineer, contract would not be rescinded on grounds of unilateral mistake); Davis v. Mulholland, 475 P.2d 834, 835 (Utah 1970) (remedy of rescission on basis of unilateral mistake improper where any

8. Not every unilateral mistake entitles the buyer to relief. We note that even if defendants' misunderstanding of Carol Klas's representations did amount to unilateral mistake, the facts suggest that defendants bore the risk of mistake as to the value of the subject property. Restatement (Second) of Contracts § 154 (1981) explains that a party bears the risk of mistake when "(a) the risk is allocated to him by agreement of the parties, or (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient." Defendants were aware, upon entering into the Agreement, that they had only "limited knowledge" with respect to the value of the home.

mistake on plaintiff's part was due entirely to plaintiff's own negligence).'

Accordingly, we hold that the parties executed a valid contract, influenced by no legally cognizable unilateral mistake on the part of defendants. This agreement bound defendants to purchase the subject property, with "no exceptions." In refusing to consummate the sale, defendants materially breached the Agreement, thereby entitling plaintiff to recover damages.

PLAINTIFF'S DAMAGES

In its final judgment, the trial court did not address the issue of damages because of its ruling based on unilateral mistake. In the trial court's Memorandum Decision of May 30, 1989, however, the court ruled that plaintiff's damages should be limited to \$7,500. However, the trial court did not specify how it arrived at this figure. "The measure of damages for breach of contract for the conveyance of land is the difference between the contract price and the market value at the time of the breach." Terry v. Panek, 631 P.2d 896, 897 (Utah 1981). See D. Dobbs, Handbook on the Law of Remedies § 12.11 at 853 (1973).

In the instant case, defendants offered to pay \$175,000 for the subject property in August of 1987. When defendants failed to consummate the purchase of the property, plaintiff placed the property for sale on the open market, and on April 13, 1988, sold the property for \$160,000, a figure well above the value stated

9. In light of our determination that defendants' conduct did not rise to the level of ordinary diligence, it follows that the trial court correctly dismissed defendants' counterclaim for fraud and misrepresentation. "Fraud as related to purchase of real estate may not be predicated on alleged false statements the truth of which could have been ascertained with reasonable diligence by the party asserting their falsity." Sokolosky v. Tulsa Orthopaedic, Inc. Pension Trust, 566 P.2d 429, 431 (Okla. 1977) (quoting Onstott v. Osborne, 417 P.2d 291, 293 (Okla. 1966)). Defendants could have ascertained with reasonable diligence the truth or falsity of Carol Klas's alleged misrepresentations by requesting copies of the appraisals, or demanding to know the basis for her information, or by obtaining an independent appraisal of the subject property prior to executing the agreement. Since the means of knowledge were available to defendants and since they failed to avail themselves of these means, they cannot now claim to have been deceived by the representations of the vendor. See Sokolosky, 566 P.2d at 431.

in defendants' appraisal. The trial court found that \$160,000 was the "highest and best price available in the market place" at the time of the sale. However, the trial court's findings do not specifically address whether this price represented the market value of the property at the time defendants breached the Earnest Money Sales Agreement, which was some seven months prior to the sale. The trial court made no finding as to the market value of the property at the time of defendants' breach. Plaintiff is entitled to recover the difference between the contract price and the market value of the property at the time of the breach.

ATTORNEY FEES

In its first Memorandum Decision of May 30, 1989, the trial court concluded that defendants breached the Earnest Money Sales Agreement, and that plaintiff was entitled to damages and interest, costs, and attorney fees. In August of 1989, the parties entered a Stipulation allowing the court to assess attorney fees in the sum of \$6,250 against defendants "should the trial court's award of attorney's fees be sustained or otherwise upheld on appeal." However, after a period of almost one year of objections, motions for new trial, and new proposed Findings, Conclusions and Judgment by both sides, the trial court entered its Amended Judgment of July 3, 1990, allowing defendants to rescind the Earnest Money Sales Agreement on the basis of unilateral mistake. Accordingly, in its July 3, 1990 Amended Judgment, the trial court awarded no attorney fees. We reverse the lower court's final Amended Judgment on the issue of unilateral mistake. We conclude, as did the trial court in its first Memorandum Decision, that defendants breached the Earnest Money Sales Agreement. Plaintiff is therefore entitled to attorney fees as specified in the stipulation as well as reasonable attorney fees incurred on appeal. See e.g., Management Servs. Corp. v. Development Assoc., 617 P.2d 406, 408-09 (Utah 1980).

CONCLUSION

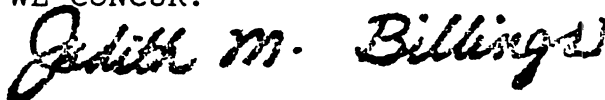
The trial court's judgment allowing defendants to rescind the Earnest Money Sales Agreement on the basis of unilateral mistake is reversed. We remand to the trial court with

instructions to enter judgment in favor of plaintiff, to fix appropriate damages, and to award plaintiff attorney fees consistent with this decision.

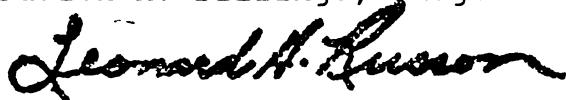


Gregory K. Orme, Judge

WE CONCUR:



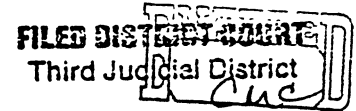
Judith M. Billings, Judge



Leonard H. Russon, Judge

EXHIBIT B

FILE COPY



MAY 31 1990

By Barbara Bohne SALT LAKE COUNTY
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOHN H. KLAS,	:	AMENDED FINDINGS OF FACT AND
	:	CONCLUSIONS OF LAW
Plaintiff,	:	
vs.	:	CIVIL NO. C-88-3192
MARK O. VAN WAGONER and	:	
KATHRYN VAN WAGONER,	:	
Defendants.	:	

The above-entitled matter came on regularly for trial to the bench, the Honorable Raymond S. Uno, presiding on May 9 and 10, 1989, with final argument being made and submitted to the Court on May 12, 1989. The plaintiff was present and represented by his counsel, Brant H. Wall, and the defendants were present and represented by their counsel, Lewis D. Stevens and Craig W. Anderson. Witnesses were duly sworn and testified, evidence introduced, and upon submission of final arguments, the matter was duly submitted to the Court for decision. The Court having taken the matter under advisement and having duly considered all of the evidence, testimony, pleadings, stipulations, arguments, and other matters presented in the course of said trial, and being thus fully advised in

the premises, the Court made and entered its Memorandum Decision on the 30th day of May, 1989, and counsel for the plaintiff having thereafter prepared and submitted Findings of Fact, Conclusions of Law, and Judgment, and counsel for the defendants having thereafter filed Objections to the proposed Findings of Fact and Conclusions of Law, together with a Motion to Amend Findings of Fact and Conclusions of Law, and for a New Trial; the plaintiff having thereafter responded to said Objections and Motion for New Trial, and the defendants having filed a reply to plaintiff's response to the defendant's Objections to proposed Findings of Fact, Conclusions of Law, and Motion for New Trial, and the plaintiff thereafter responded to the defendants' Reply to plaintiff's Response to Objections to proposed Findings and Conclusions, and the Court having reviewed all of the pleadings and Memoranda filed by the parties in support of their respective positions, and the Court having made and entered its Supplemental Memorandum Decision, dated the 4th day of November, 1989, and directing counsel for the plaintiff to prepare and submit Findings of Fact, Conclusions of Law, and Judgment in conformity therewith, and the Court thereafter having amended paragraph 13 of the Findings of Fact, which does not alter the Conclusions of Law or Judgment, the Court now makes and enters the following:

AMENDED FINDINGS OF FACT

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.

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

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.

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.

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.

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.

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.

8. On or about August 7, 1987, the defendant Mark Van Wagoner, who is an attorney, prepared and delivered an Earnest Money Sales Agreement to Carol Klas, dated August 7, 1987, and bearing the date of August 11, 1987, as the date of signature by the parties. Said agreement was not based upon any misrepresentation by plaintiff or Carol Klas.

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.

10. Plaintiff and defendants executed the Earnest Money Sales Agreement on August 11, 1987.

11. The integrated clause contained in the Earnest Money Sales Agreement, dated August 7, 1987, brings together all of the understandings and agreements of the parties and there can be no variance except by mutual agreement of the parties.

12. At no time on or prior to August 11, 1987, did the plaintiff engage in any discussion with the defendants relative to the subject transaction and at no time on or prior to August 11, 1987 was any request made by the defendants to plaintiff for the production of an appraisal of the property, except, however, pursuant to paragraph 4 above, defendants negotiated directly with Carol Klas and asked her to obtain an "appraisal" and she requested the same from plaintiff.

13. A series of negotiations intervened, and what was understood by the defendants as a counter offer was made to the defendants through Mr. Cowley, after which the defendants failed to meet the closing date of September 15, 1987, and

defendants notified the plaintiff that they did not intend to consummate the purchase of the property.

14. The plaintiff then listed the property with a real estate broker on or about September 29, 1987, at an asking price of \$174,500.

15. On or about October 2, 1987, the defendants through their counsel gave formal written notice to the plaintiff of the withdrawal of their offer to purchase the property and demanded the return of the earnest money deposit, which earnest money deposit was thereafter refunded and returned to the defendants.

16. In approximately mid-October, 1987, plaintiff gave defendants notice that if they failed to consummate the acquisition and purchase of the property within ten (10) days, the property would be placed on the market in an effort to mitigate damages and that defendants would be responsible for any damages sustained.

17. The defendants failed to consummate the purchase of the property and on December 15, 1987, the plaintiff returned the earnest money deposit of \$1,000, at which time the defendants were further notified by plaintiff that he would look to said defendants for any damages, if such should occur.

18. The property was placed for sale in the open market for a period of several months during which period of time a

bona fide and diligent effort was made to locate a buyer or otherwise sell the property at its fair market value, and on April 13, 1988, said property was sold to one David B. Boyce, at a price of \$160,000, which was then the highest and best price available in the market place.

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.

20. At no time did the plaintiff have any knowledge or notice that the defendants were relying on any alleged representations made by Carol Klas and at no time did the plaintiff make any representation relative to the fair market value of the property other than by signing and accepting the Earnest Money Sales Agreement submitted by the defendants, dated August 11, 1987. 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."

21. The defendants did not rely upon any representations made by the plaintiff pertaining to the fair market value of

the subject property prior to the execution and signing of the Earnest Money Agreement, dated August 11, 1987, handled by plaintiff's attorney, James P. Cowley, except for representations made by Carol Klas, and the first contact which occurred between the plaintiff and the defendants was on the execution of the Earnest Money Sales Agreement which was on August 17, 1987.

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.

23. The defendants knew that the plaintiff would not approve of any "conditions" or "exceptions" to the Earnest Money Sales Agreement at the time of its execution and delivery to the plaintiff and were advised that if they desired to purchase the property, the purchase would have to be on the basis that there were no contingencies, exceptions, or conditions of sale other than as set forth in the Earnest Money Sales Agreement.

24. The Earnest Money Sales Agreement and offer to purchase the subject property at a price of \$175,000 was among

the various "appraisals" ranging from \$137,000 to \$190,000 for the fair market value of the property in question at the time of the sale to the defendants.

25. At no time did the parties agree to any rescission of the contract, although defendant Mark O. Van Wagoner was told by plaintiff's attorney, James P. Cowley, that if the defendants did not accept the \$161,000 offer from plaintiff, the deal would be off.

26. At no time did the plaintiff make any misrepresentations to defendants regarding any appraisal made on the property and no misunderstanding existed on the part of the plaintiff with reference to the nature and extent of any appraisals; however, there was a misunderstanding between Carol Klas and defendants regarding the term "appraisal." The defendants understood it to mean written.

27. The Earnest Money Sales Agreement of August, 1987, had the provision relating to the procurement of financing stricken from the agreement and approved by all parties thereto, and similarly, said agreement had a notation that no special considerations or contingencies existed relative to the written agreement.

28. The plaintiff did not make any fraudulent representations or misrepresentations relative to the terms and provisions of the sale and purchase of the property. The defendants, however, were negotiating on the understanding there were appraisals and the appraisals were in writing.

29. The market pertaining to the value of the property in question diminished or softened between the date of the contract of August, 1987, and the sale of the property by the plaintiff in April, 1988.

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.

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.

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.

Based upon the foregoing Findings of Fact. the Court now makes the following:

CONCLUSIONS OF LAW

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 aware of the undisclosed, lower appraisal, it would have made a material difference in their offer to buy the property.

4. The mistake provides a basis for rescission of the Earnest Money Agreement.

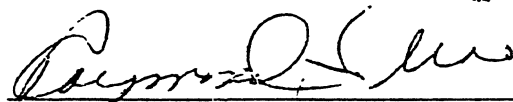
5. The plaintiff's Complaint is dismissed.

6. The Earnest Money Agreement is rescinded and is void and of no force or effect.

7. The defendant's Counterclaim is dismissed.

8. Each party is to bear his own attorney's fees, costs and expenses of litigation.

Dated this 31ST day of May, 1990.

A handwritten signature in cursive script, appearing to read 'Raymond S. Uno', is written over a horizontal line.

RAYMOND S. UNO
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Amended Findings of Fact and Conclusions of Law, to the following, this ____ day of May, 1990:

Brant H. Wall
Attorney for Plaintiff
Suite 800, Boston Building
Salt Lake City, Utah 84111

Lewis T. Stevens
Craig W. Anderson
Attorneys for Defendant
215 S. State, Suite 500
Salt Lake City, Utah 84111



EXHIBIT C

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, l.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 [] 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, 1.2-11).

"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, 1.17-25, p.21, 1.1-11)

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, 1.6-10).

"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, 1.16-21).

"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 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).

12. 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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