

1990

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

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

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

REPLY BRIEF OF APPELLANT

BRIEF OF APPELLANT TO CROSS APPEAL OF APPELLEES

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

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

JOHN H. KLAS,)
:

Plaintiff/)
Appellant,)
)

vs. : Case No. 900493-CA
MARK O. VAN WAGONER and :
:

vs. : Case No. 900493-CA
MARK O. VAN WAGONER and :
:

MARK C. VAN WAGONER and
KATHRYN VAN WAGONER,

Defendants,

Defendants/)
Appellees. :
)

REPLY BRIEF OF APPELLANT

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IN THE UTAH COURT OF APPEALS

JOHN H. KLAS,)
:

Plaintiff/
Appellant,

vs. : CASE NO. 900493-CA
)

MARK O. VAN WAGONER and :
KATHRYN VAN WAGONER,)

Defendants/)
Appellees)

Appellees. :

REPLY BRIEF OF APPELLANT

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

SUMMARY OF ARGUMENTS

- A. THE APPELLANT KLAS HAS MARSHALED HIS EVIDENCE AND BY DOING SO HAS SHOWN, AS WELL AS HAVING MET HIS BURDEN, THAT THE EVIDENCE DOES NOT SUPPORT THE FINDINGS OF FACT AND CONCLUSIONS MADE BY THE COURT.
- B. NOT ONLY DOES SUBSTANTIAL EVIDENCE EXIST TO SUPPORT THE POSITION OF KLAS, AND THUS REFUTE THE POSITION OF THE COURT, BUT IN FACT VIRTUALLY NO EVIDENCE EXISTS THAT SUPPORTS THE COURT'S FINDINGS AND THE VAN WAGONERS' INTERPRETATION THEREOF.
- C. THE ISSUE OF DAMAGES MUST BE ADDRESSED, THE FINDINGS OF THE COURT NOT BEING SUPPORTED BY THE EVIDENCE IN THE RECORD.
- D. THE APPELLANT KLAS IS ENTITLED TO HIS ATTORNEY'S FEES, BOTH FOR THE TRIAL BELOW, AS WELL AS THOSE FEES INCURRED IN THIS APPEAL.

ARGUMENT

POINT I

THE APPELLANT KLAS HAS MARSHALED HIS EVIDENCE AND BY THAT EVIDENCE SUPPORTS HIS POSITION THAT THE COURT WAS IN ERROR IN ITS DECISION AND THAT THE FINDINGS OF FACT ARE NOT SUPPORTED BY THE EVIDENCE IN THE RECORD.

It should be stated at the outset that the Appellant Klas has set forth in his brief a detailed statement of the facts, with repeated references to the record and transcript, in both his Statement of Facts as well as his Argument. Repeated references are made as to the findings made by the court, how those findings were later amended and in what respects, the testimony relied upon with regard to such findings, the exhibits used, and the authorities relied upon by the court in formulating its Findings of Fact which we here contest. In his arguments, Mr. Klas has repeatedly referenced the record and the transcript, and has indicated where he believes the court has erred, as well as those facts which support the findings. Clearly, Mr. Klas does not disagree with all of the court's findings and equally as clear is the fact that Mr. Klas has cited numerous references to facts which support correctly the findings made by the court.

It should be further noted that the actions by Klas in his brief appear to be substantially different than those of the Appellant in Saunders v. Sharp, 793 P2d 927 (Utah, 1990), which case the Van Wagoners rely upon in their argument that Klas has not marshaled his evidence. Clearly, Klas agrees with most of the court's findings, and has done more than ". . . merely argue that there is evidence contradicting them. . . ." (Ibid., at 931.) Indeed, the Appellant's Brief is replete with references to the findings and supporting facts.

We also draw the Court's attention to the fact that the cross-appeal of the Van Wagoners' does no more to marshal the evidence than does the Appellant, allegedly. Indeed, we submit that their efforts to marshal are substantially less than those of the Appellant.

Furthermore, while the appellate courts of this state talk about marshaling, we find guidelines given as to exactly what is expected, or at what point a party has crossed the line in providing sufficient evidence to constitute marshaling. We submit that given the lack of any such guidelines, and what we believe is a substantial effort and full compliance by Mr. Klas, the Van Wagoners' argument that we have not marshaled the evidence is without merit.

Finally, we submit that the nature of the proceedings in this action really require a complete reading of the entire transcript by any appellate court. This is not a case with redundant testimony, or endless witnesses testifying as to extraneous matters. The witnesses are few, primarily involve the parties to the action, and their testimony must be reviewed in detail to really obtain a clear understanding of the evidence which both supports and contradicts the findings of the court. Given these facts it would be impossible to marshal all of the supporting testimony. Such a task would require many pages of references and quotations from the transcript, and citations to the testimony and record. This would only create a burdensome brief and would, in all likelihood, only serve to confuse rather than clarify or marshal the facts supporting the findings.

We, therefore, submit that we have met the marshaling requirement, and in fact, have done so to a much greater extent that the Appellees themselves in their cross-appeal brief.

POINT II

THE EVIDENCE ADDUCED AT TRIAL CLEARLY SUPPORTS THE POSITION OF KLAS, DOES NOT SUPPORT THE FINDINGS OF THE COURT, NOR THE POSITION OF VAN WAGONERS, AND THEREFORE, THE JUDGMENT SHOULD BE REVERSED.

Central to the argument by Van Wagoners is their contention that the Devere Kent appraisal was purposely kept from them, and had they known of its existence they would never have bought the home. In support of this position, they cite Amended Findings, No. 30 (R. 305), which states as follows:

"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."

It is interesting, however, to note that the Van Wagoners have cited virtually no references to the trial testimony to support this finding by the court. In fact, they cite only five (5) references to the transcript in their entire argument relative to the central issue.

Reference Number One. They allege that Mrs. Van Wagoner testified that during her first contact with Mrs. Klas she inquired as to the existence of any appraisals. (Tr., Vol. II, p. 148.) This is true.

Reference Number Two. They claim Carol Klas told Van Wagoners that she had three "appraisal", and that those "appraisals" indicated a value of somewhere between \$170,000 to ". . . \$190 -- 1 or 3 or something, but it was above 190, but just a little above 190." (Tr. Vol. I, pp. 181-182.) {They cite volume II in their first reference but mean volume I.} This is also true, as far as it goes. But there are important qualifying facts that need to be mentioned as well.

First is the issue of what Mrs. Klas defined as an "appraisal". It is clear from the testimony that she considered an appraisal anything from anyone that reflected their opinion of the value of the property. (Keep in mind that she was not experienced in real estate, was not a real estate agent, and saw herself as ". . . involved in a decorative, more of a facilitator way" (Tr. Vol. II p. 90, Lines 9-10.) She mentioned "appraisals", but it is clear that she had no real idea what an actual "appraisal" consisted of.

In her testimony, she describes the "appraisals" as follows: "And I had mentioned that Mr. Payne of American Savings and Loan had seen the home a year before and had drawn up some type of a letter and had given this to Mr. Klas." (Tr. Vol. II, p. 90, lines 18-21.) * * * *

"Howard Badger (ph.) had given an opinion to John, which John had shared with me. Vic 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. . . ." (Tr. Vol. II, p. 91, lines 4-11.)"

The court's own findings (Finding No. 20, R. 302)

states:

"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 value of the three highest "appraisals". (Emphasis added.)

Thus, we see that Carol Klas referred to four appraisals, to wit: that of Mr. Payne, Howard Badger, Vic Ayers and ". . . one other opinion" The Court, itself, found that the range would be based upon the three highest appraisals, (R. 299, Finding No. 20) and the term appraisals was in quotes ("appraisals"), implying that the term was used loosely and primarily was used according to what Carol Klas understood an appraisal to be. (R. 299, Finding No. 7.) It was found that it was dispute as to whether there were written appraisals. (R. 299, Finding No. 7.)

Reference Number 3. They refer to the allegation that Carol Klas ". . . told the Van Wagoners that those appraisals indicated the home had an appraisal market value of somewhere between \$175,000 to \$192,000." (Appellee's brief, p. 17). The court found that John and Carol Klas were basing their asking price in part on the three highest appraisals, and bear in mind the Defendants' conclusions and argument on this matter rest on the limited knowledge and understanding of Carol Klas, not only as to the nature of an appraisal, but generally what was being used to support the value.

Carol Klas testified that she ". . . did not know a great deal about the background of hoe he {John Klas} arrived at this but I could share with him what John had told me." (Tr. Vol. II, p. 90, lines 10-12.)

Kathryn Van Wagoner testified as follows:

"Q. In that visit to the home, did the subject of appraisals come up?

"A. Yes. Once again, we asked, 'Do you have any appraisals?' She had a fact sheet but from that time, that initial time she let us know that John had the mechanics of the deal. He had the paperwork.

I understood that Carol was interested in selling the house. I did not know that they were getting a divorce until she told me the night before. So, obviously the situation was a delicate one, and she was cooperative and helpful. But she said, 'You will have to talk to Mr. Klas. Mr. Klas has those papers. I don't have access to any of those. John has relayed this information to me and I am just telling you what I know.'" (Emphasis added.) (Tr. Vol. II, p. 150-151, lines 20-25, and 1 to 7.)

It was clear that she didn't have a great deal of background knowledge and that if they wanted more information on "appraisal" they would have to obtain that from Mr. Klas. All she was going on was what Mr. Klas had told her. The court found that "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. . . ." (R. 304, Finding No. 26) We refer the Court to pages 11 through 20 of Vol. I, Transcript of Proceedings, wherein the Court will find that not only did Mr. and Mrs. Klas rely upon these three "appraisal", but an abundance of other factors and information which Mr. Klas used to help determine the value of the property. Indeed, Mrs. Klas

at one point expressed her concern that she thought his suggested asking price of \$175,000 to \$180,000 was too low. (Tr. Vol. I, p. 19, lines 1-2)

Reference Number 4. They refer to Tr. Vol. II, p. 42, lines 1-14, which reference they use to support their allegation that the Klas' had ". . . kept hidden . . ." (Appellees' brief, p. 17) the Devere Kent appraisal. (Emphasis added.) However, this one reference in no way supports such an allegation. There is absolutely nothing whatsoever in the entire transcript of proceedings, nor anything at all in the record which supports their allegation that the Kent appraisal was ever hidden, or in any way or manner kept from the Van Wagoners.

Indeed, the Findings of Fact made by the court, cited above, clearly point out that at no time did Mr. Klas ever misrepresent anything to the Van Wagoners, nor was there ever any misunderstanding on the part of Mr. Klas as to the nature or extent of any appraisals. (R. 304, Finding No. 26) One must also note the chronological context in which the Van Wagoner appraisal requests were made. Their requests were made after Van Wagoners had made their offer on the home, after the Earnest Money Sales Agreement was signed by both parties, and after Van Wagoners had had every opportunity to -- first, either ask for any "appraisal" which Mr. Klas had, or in the alternative, obtain their own. They chose to do neither. What they did do, however, is both interesting and instructive as to their supposed reliance upon any appraisals. This is illustrated by the testimony of Mrs. Klas as to what ac-

tions the Van Wagoners took to examine, inspect and become acquainted with the home, prior to the offer. We refer the Court to the following testimony of Mrs. Klas:

"Q. Did there come a point in time subsequent thereto when you were later contacted by the Van Wagoners relative to the presentation of a formal offer?

"A. Oh, yes.

"Q. When did that happen?

"A. This would have been, I would say a few days after the 26th. {Of July}

"Q. In the interim, before you met with them, did anything happen from the standpoint of people coming to the home to go through it in behalf of the Van Wagoners, such as architects or people of that nature?

"A. Yes, a series of people. I mean, there seemed to be people like electricians, architects, decorators, a whole series." (Tr. Vol. II, p. 94, lines 8-21.)

And what did they do after the offer had been accepted?

Again, we refer the Court to the testimony of Mrs. Klas.

"And I said, 'Well, will there be anyone coming over to look at the property?' And I think in my mind I was going back to my own experience of having someone from a bank when you are taking a loan to come in and look at in an appraisal situation.

"And she said, 'No, go ahead. We have no trouble with that. I don't believe there will be anyone coming.'" (Tr. Vol. II, p. 104, line 4-11.) (Emphasis added.)

From these testimony examples alone, it is clearly evident that the Van Wagoners had every opportunity to either have the home appraised on their own, or inspect any "appraisals" in the possession of Mr. Klas. They did neither. They saw fit to have architects in, decorators, and all kinds of other people, but

never anyone to appraise the home to verify its value. The home was clearly open for their use by such experts, but they never availed themselves of the opportunity.

And finally on this point, we cannot emphasize enough the mischaracterization by the Van Wagoners in their brief that Mr. Klas had "kept hidden" any appraisal. Indeed, this allegation flies directly in the face of the very clear findings of the court. The court found no fraud, no misrepresentations, not even a misunderstanding on the part of the Klas'. Their allegation of hidden appraisals is simply not true, and unsupported by a single reference in the record or their brief.

Their fifth and final reference to the transcript of proceedings refers to Vol. I, p. 181, lines 19-25, and p. 182, lines 1-12. This testimony by Mrs. Klas states that, according to the best of her knowledge, which was admittedly limited, Mr. Klas had three "appraisal" ranging from \$170,000 to a little over \$190,000. This is true. He did have three "appraisals", or perhaps statements would be more accurate, with this range of values. But she never said these were the only appraisals he had. She also stated Mr. Klas wouldn't take anything outside this range. This is also true. As she indicated, Mr. Klas was ". . . looking for a very substantial offer." (Tr. Vol. I, p. 185, line 5.)

But we must remember that a person is entitled to ask anything he or she wishes for the sale of their property, and can rely upon anything that he or she may wish in formulating a sales price. We have already noted above that Mr. Klas testified at

length, in page after page of testimony from the transcript cited above, as to the many factors that he considered in determining the value. There is no indication that he relied solely upon these three "appraisals". Anyone familiar with real estate appraisals knows full well that you can have many different appraisers and come up with many different values. Mr. Klas never hid the Ken appraisal. He obviously didn't feel it accurately reflected the true value of the property. He did not rely upon it in determining his asking price. It may have been too dated, it may have been used for other purposes initially, or it simply in his mind, based upon the abundant other information he relied upon, did not accurately reflect the value of the home. He had three "appraisals" and he was entitled to rely upon them. The fact situation does not mandate that Mr. Klas reveal every appraisal ever done on the home.

Our Supreme Court has stated in the case of Park Valley Corp. v. Bagley, 635 P2d 65,67 (Utah, 1981), that:

"The trial court's ruling runs counter to an important principle which is a common thread running through many of the decisions of this Court. That principle is 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."

Mr. Klas chose from a variety of elements to determine his sale price, the three highest "appraisals" being among them. These were his terms. These formed the basis for his asking price, as well as his acceptance of the Van Wagoner offer. This

now brings us to one very critical point that has never been addressed by the Van Wagoners in their brief, and that is the "no exceptions" provision of the contract between the parties.

The court in its Findings (R. 303, Finding No. 23) found that:

"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."

This finding is borne out by various points of testimony. For example, in Mr. Van Wagoner's testimony at Tr. Vol. I, p. 196, lines 5-8, he testified as follows:

"A. * * * I mean, it was intended to be a no exception offer for \$175,000.00.

"Q. And that's what you intended.

"A. Yes."

Given this fact, that the agreement, event the offer in and of itself, were intended to be without exceptions or conditions, we can only ask why any appraisal is relevant to the case. If the Van Wagoners intended their offer or the agreement to be subject to any conditions whatsoever, including the existence, examination or accuracy of any "appraisals", regardless of their nature, then that condition or exception should have been made a part of the agreement.

It is manifestly clear that the Earnest Money Sales Agreement constituted an integrated contract, and parol evidence is admissible only to show circumstances under which the agreement was made, or if there is a showing of fraud (which the court expressly found to be absent {R. 305, Finding No. 28}), or some similar exception which permits the use of parol evidence. See for instance Bullfrog Marina v. Lentz, 501 P2d 266 (Utah, 1972). No such exception is present in this case. Indeed, it is admitted by the Van Wagoners that they knew full well that there were to be no exceptions or conditions, and prior to signing the agreement, they had every opportunity, as found by the court, to investigate the issue of fair market value of the property. (R. 303, Finding No. 22)

From all of this, several things are clear. The Van Wagoners' brief only cites five (5) factual references, most of which have little real meaning, and which lend little or no buttressing to their position. Carol Klas admittedly had little knowledge of real estate or the "appraisals". Mr. Klas did use the three highest "appraisals", as well as a plethora of other elements in determining the value of his property. The Van Wagoners had every opportunity to examine the appraisals, or have the property independently appraised prior to their signing the agreement. They did nothing. They knew full well that the offer and the final, accepted agreement were without exceptions or conditions of any sort. Mr. Klas was free to choose whatever factors he desired in determining his asking and acceptance prices, and absent some type of fraud or misrepresentation the agreement

should stand. Furthermore, the court specifically found no misrepresentations of any sort, no fraud, and that the Van Wagoners had every opportunity to appraise the property or examine the appraisals prior to signing the agreement. As stated, they did neither.

The Van Wagoners' brief specifically alleges that the appraisals were hidden from them. But this is not true, is unsupported and contrary to the evidence and the findings of the court.

This brings us to the next requirement to maintain a defense based upon unilateral mistake, that being that "the mistake must be of so grave a consequence that to enforce the contract as actually made would be unconscionable." Grahan v. Gregory, 800 P2d 320, at 326, (Utah App. 1990). We have already mentioned the Park Valley case, wherein the Supreme Court ruled that a fair amount of latitude should be permitted to parties entering into contracts, free from the intrusions and "paternalism" of the courts. In light of the Grahan and Park Valley cases, we submit that the showing of severity of consequences should be so extreme that the contract is unconscionable on its face, or in light of even the most obvious or readily available facts.

Much has been made of the allegedly "missing" Devere Kent appraisal for \$165,000. (R. 305, Finding No. 30) The agreed upon sales price was for \$175,000. We question whether a \$10,000 difference between the sales price and one "appraisal" could be termed "grave" or "unconscionable"? It cannot. And this is so particularly in light of the price of the home and the fact that

there was an abundance of other evidence valuing the property higher. But let's assume, for argument's sake, that the Kent appraisal was the only one existing. It is clear from the whole testimony of not only Mrs. Klas, but both of the Van Wagoners as well, that these people wanted the home, and they wanted it badly. Mr. Van Wagoner is an attorney, and has experience in real estate law, and had been the owner of a home himself. Certainly, he had some idea in his mind as to whether or not his offering price fell within the general realm of what the home might be worth. Given this highly probable knowledge on the part of both of the Van Wagoners, they made the offer, asked for no appraisals, and entered into a no exceptions or conditions contract without having the property first appraised, or the "appraisals" examined. The fact of the matter is that the sales price is not unconscionable. The court specifically found that the Van Wagoners ". . . considered the price of \$175,000 as being a reasonable price for the property. . . ." (R. 305, Finding No. 31) What the court never found or concluded was that the difference in the \$175,000 contract price and the Devere Kent appraisal, or any other for that matter, constituted grave circumstances, the enforcement of which would be unconscionable. This finding being absent, the Van Wagoners have clearly failed to fulfill one of the requirements established by this Court to sustain a defense of unilateral mistake. They merely mention in their brief (P. 19) that it would be unconscionable to enforce the contract, but cite no reasoning or authority to sustain such a conclusion.

Furthermore, we question the court's finding that the three "appraisals" ranged from \$175,000 and up as found by the court. (R. 299, Findings No. 5 & 7) There is abundant testimony that from at least the Van Wagoners' and Carol Klas' understanding, the appraisals ranged from \$170,000 and up, and not \$175,000. (See, for example, Tr. Vol. I, p. 93, line 18; p. 181, line 25; Vol. II, p. 22, lines 17-18; Vol. I, p. 181, lines 19-25, and p. 182, lines 1-12.) If they understood the range to start at \$170,000, we question even more strongly how the Kent appraisal at \$165,000 could be considered an unconscionable and substantial difference.

We also draw the court's attention to the testimony of Mr. Van Wagoner at Tr. Vol. II, p. 63, lines 17-21, wherein he indicates that there had been a proposal subsequent to the subject Earnest Money Sales Agreement wherein Mr. Klas had offered to sell the subject property for \$161,000; \$4,000 below the \$165,000 Devere Kent "appraisal" as found by the court. (R. 298, Finding No. 5) Given this testimony, we question how the court could find that had the Van Wagoners known of the Devere Kent appraisal it ". . . 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." (R. 305, Finding No. 30) The credibility of their position is further weakened by the testimony of Mr. Van Wagoner at Tr. Vol. II, pp. 71-72, lines 1-25 of P. 71 and lines 1-7 of p. 72, wherein he indicates that they weren't interested in the \$161,000 possible sales figure, but, rather, were more concerned, and

governed by, their own independent appraisal of \$173,000. We submit that the court was in error, therefore, in making a finding that the lack of knowledge of the Kent appraisal had a material impact upon their desire to buy the home. How can this be when they even refused a possible sale below that of the Kent appraisal? We further submit that the difference between the Kent appraisal and the sales price, as well as the difference between the Kent appraisal and the lowest appraisal as the Van Wagoners apparently understood it, (\$170,000) were not of such a difference to be considered in any way unconscionably palatable.

They must also show that the mistake occurred ". . . notwithstanding the exercise of ordinary diligence by the party making the mistake." Grahan v. Gregory, supra, at 327. Their sole reply to this critical element was one sentence (Appellees' brief, p. 19), wherein they assert that ". . . the mistake occurred despite defendants' requests for appraisals which would have avoided the mistake." This is wrong. Nowhere in the transcript of proceedings is there any indication that the Van Wagoners attempted to obtain the "appraisals" at any point in time prior to their executing the Earnest Money Sales Agreement with Mr. Klas. We refer the Court, for example, to the testimony of Mr. Van Wagoner at Tr. Vol. II, pp. 18-23, wherein he describes the offering and acceptance process the parties went through. There are other places where such testimony is present, but this will serve to indicate that the Van Wagoners never made

an effort to obtain and examine any "appraisals" prior to their submitting their offer. They never made any effort to have the property independently appraise, or otherwise determine if the asking price was in keeping with the apparent or true value of the home.

Furthermore, the Van Wagoners had lived in the same neighborhood since July of 1980. (Tr. Vol. I, p. 90, lines 1-2) Mr. Van Wagoner had lived in another home with his prior wife which they owned that was situated approximately two blocks from the subject property (Tr. Vol. II, p. 12, lines 13-15), and he had sold that home as a result of his divorce in 1985, and entered into the subject agreement in August of 1986. Certainly, one could reasonably assume that Mr. Van Wagoner had some idea as to the value of properties in the subject neighborhood. Certainly, Mr. Van Wagoner must have had some idea as to the value of the subject property, whether or not the value fell within what might be reasonable for the type of home and the location. With his profession, his probable knowledge of real estate values in the area, his involvement with real estate law, we find it impossible to believe that the Van Wagoners have exercised anything that could ever remotely be characterized as ordinary diligence.

When Mr. Van Wagoner was asked why he hadn't inserted any conditions into the Earnest Money Sales Agreement, he replied that he had two reasons. The first was that since he and Mrs. Klas had both been through divorces he trusted her as to the appraisal values (keeping in mind that she had in fact been informed that there were three "appraisals" in the range she indi-

cated to the Van Wagoners), and second, Mr. Klas was a difficult person to work with. We submit that these are not sufficient excuses. We submit that these reasons do not rise to the level or ordinary diligence, particularly with any an attorney who had lived in the same neighborhood for six years and within a few blocks of the subject property.

The final issue to prove unilateral mistake involves the necessity of placing the other party in status quo as he stood prior to the agreement, except for the loss of his bargain. They assert that the Appellant, Mr. Klas, was placed in a status quo position because the contract had been rescinded and he was in the same position as he had been prior to the agreement. First, they are in error in contending that the agreement had been rescinded. The court made no such finding and they cite absolutely no authority or finding by the court to substantiate this position. What the court found was unilateral mistake, and not rescission.

Secondly, as we pointed out in our initial brief, had the agreement been honored by Van Wagoners, Mr. Klas would only have had to pay a 3% finder's fee to his former wife. But due to their breach, he had to subsequently pay a 7% real estate commission, resulting in an additional loss of \$5,950, which amount we are seeking in additional damages from this Court.

CONCLUSION OF POINT II

While our discussion has been lengthy, we feel it has been necessary to illustrate where the findings and the position of Van Wagoners lack credible evidence to support their positions.

Their entire position rests on the court's finding of unilateral mistake. We have gone through each [point and shown that they have failed to factually support any of the points necessary to prove unilateral mistake. These people knew what they were doing, or should have known, the difference between the sales price the Kent appraisal is not of an unconscionable nature, they have failed to exercise ordinary diligence, and they have not left Mr. Klas in a status quo position. The only error, if there is one, is that they failed to take steps and ask questions that would have provided them with information that supposedly might have altered their opinion about the home, but event that is conjectural. Had they seen the Kent appraisal prior to their offer they still may have offered \$175,000. It is clear from the evidence that they really wanted this home. So much so, in fact, that they lost little time in making an offer, and were apprehensive they would not obtain the home prior to another party. Bear in mind, as well, that the Kent "appraisal" was not one of the three appraisals upon which Mr. Klas was making his offer. Indeed, Mr. Klas relied upon a variety of other factors in determining his asking and acceptance price. In addition, there is absolutely no evidence to support their position that the Kent appraisal was "hidden" from the Van Wagoners. the court made no such finding and the appraisal was eventually provided sometime shortly after the requests by Mr. Van Wagoner, which requests and the providing of the "appraisal" both came after the agreement had been signed by the parties.

Finally, it cannot be overlooked that the offer made was intended to be, and was required to be, without exceptions or conditions. This being the case we fail to see how any appraisals at that point could be relevant. Accordingly, we submit that the court erred in ruling that unilateral mistake had occurred that would permit the Van Wagoners from escaping their responsibility under the subject agreement between the parties.

POINT III

THE COURT COMMITTED ERROR IN ITS INITIAL ASSESSMENT OF DAMAGES, AND IN THE EVENT THIS COURT RULES IN FAVOR OF MR. KLAS, THE DAMAGES DUE THE APPELLANT NEED TO BE CLARIFIED BY THIS COURT.

The Van Wagoners' brief argues that since the court did not err, there is no need to reach the issue of damages; but they argue that if the Court sees fit to reach that issue in the event of a reversal, they claim that the damages claimed are ". . . purely speculative. . . ." (Appellees' brief, p. 23.)

We have already argued that there is no basis for the court's award of only \$7,500, and its failure to award the difference that had to be paid in real estate fees for the sale. It is readily apparent that had the Van Wagoners bought the home, Carol Klas would have been paid a 3% finder's fee, as set forth in their Decree of Divorce. This is without dispute, and therefore, certainly not in the slightest degree speculative.

Second, as the court's first Memorandum Decision points out, the property sold for \$160,000 (R. 143) (see also Tr. Vol. I, p. 45, lines 3-4) after the Van Wagoners failed to perform, leaving a difference in the two sales prices of \$15,000. These facts are

also undisputed. It is hardly speculative or hypothetical to see that the difference between the two sales prices is an exact figure, readily ascertainable, and thus the correct measure of damages.

Accordingly, we submit that the damages due in this matter is the difference between the sales prices of \$15,000, plus the difference in the real estate sales fees, or \$5,950, for a total damage amount to Mr. Klas of \$20,950, plus interest. We, therefore, request that this Court, in the event it rules in favor of Mr. Klas, specify and direct the correct damages due to the Appellant.

POINT IV

APPELLANT, MR. KLAS, IS ENTITLED TO HIS ATTORNEY'S FEES
FOR THE PROCEEDINGS BELOW, AS WELL AS FEES INCURRED
FOR THIS APPEAL.

In the event this Court rules in favor of Mr. Klas, the issue of attorney's fees incurred for both the proceedings in the lower court and the proceedings before this Court arises as an issue and under the terms of the Earnest Money Sales Agreement, we submit that Mr. Klas is entitled to those fees. Accordingly, we request that this Court render as part of its opinion the rights of Mr. Klas to attorney's fees in the two different proceedings.

CONCLUSION

We have already spoken at length as to the merits of the central issue of the case, that being unilateral mistake. In our opinion, the Van Wagoners have clearly failed to fulfill all of the requirements of a unilateral mistake defense, bearing in mind

that all elements of such a defense must be satisfied. The facts do not sustain the critical findings of the court below and we submit that the opinion should be reversed.

We also submit that Mr. Klas is entitled to damages in the amounts specified, said amounts being the differences between the sales prices and the real estate fees that were involved, versus those that would have been present had the Van Wagoners performed.

Finally, we submit that Mr. Klas is entitled to his reasonable costs and attorney's fees for both the lower court proceeding and the proceedings before this Court. We feel that the issue concerning marshaling of evidence has been adequately addressed, and that Mr. Klas has complied fully with that requirement. Certainly as much, in not more so, than the Van Wagoners in their own cross appeal.

IN THE UTAH COURT OF APPEALS

JOHN H. KLAS,

Plaintiff/
Appellant,

vs.

MARK O. VAN WAGONER and
KATHRYN VAN WAGONER,

Defendants/
Appellees.

Case No. 900493-CA

BRIEF OF APPELLANT TO CROSS APPEAL OF APPELLEES

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

PRELIMINARY STATEMENT

In the Appellant's initial brief on appeal, he has already set forth his position as to the facts in this case. The Van Wagoners have likewise set forth their statement of facts as they saw them. Those facts were further elaborated upon in the arguments and Mr. Klas' reply brief. We, therefore, rely upon the factual statements as they have already been argued.

SUMMARY OF ARGUMENTS

- A. THE ARGUMENTS OF VAN WAGONERS IN THEIR CROSS APPEAL ARE FLAWED BECAUSE EACH ONE RELIES UPON THE ASSUMPTION THAT THE TRIAL COURT FOUND CAROL KLAS TO BE THE AGENT OF JOHN KLAS.
- B. THE ACTIONS OF JOHN KLAS NOT ONLY DID NOT CONSTITUTE FRAUD, BUT THEY DIDN'T EVEN RISE TO THE LEVEL OF MISREPRESENTATION.
- C. JOHN KLAS DID NOT MAKE ANY MISREPRESENTATIONS TO THE VAN WAGONERS, EITHER PERSONALLY OR THROUGH CAROL KLAS.
- D. THE ARGUMENT OF VAN WAGONERS THAT THERE WAS BOTH FRAUD AND UNILATERAL MISTAKE ARE CONTRADICTORY ARGUMENTS. THEY

MUST RELY UPON ONE OR THE OTHER, BUT THEY CANNOT RELY UPON BOTH.

ARGUMENT

POINT I

CAROL KLAS WAS NOT THE AGENT OF JOHN KLAS AND THERE WAS NO FINDING BY THE COURT TO THAT EFFECT.

Basic to the arguments set forth in the cross appeal of the Van Wagoners is their contention that Carol Klas was the agent of John Klas, her former husband. The most obvious defect with this argument is that the Van Wagoners cite not a single finding by the court, point of authority, nor a single reference to the transcript that evidences the existence of an agency relationship.

In our examination of the record and the transcript of proceedings, we find no real effort made on the part of the Van Wagoners to adduce any evidence or basis to indicate that an agency relationship existed. There was no questioning during the trial of the witnesses on this point, no argument to this effect in the record, and no finding by the court that an agency relationship existed.

It is well settled that an agency relationship exists where a party acts for and represents the principal ". . . and who acquires his authority from him. . . ." (2A CJS Agency, Sec. 4, p. 554.) Our Supreme Court has followed this reasoning, adding that:

"In general, the determinative question has usually been posed as one of 'control', the view being that if the defendant controls, or has the right of control, the manner in which the operations are to be carried out, the defendant is liable as a master, while, if the control extends only to the result to be achieved, the actor is regarded as an inde-

pendent contractor, and the defendant is liable under neither respondeat superior nor the workmen's compensation statutes." Foster v. Steed, 432 P2d 60, 62 (Utah, 1967).

From whence, then, did Carol Klas derive her authority to sell the home? Not from John Klas. She acquired her authority from the court pursuant to the Decree of Divorce. (Tr. Vol. II, p. 81, lines 11-12) The only control John Klas had was to accept or reject any offers. He didn't even set the sales price. (R. 298, Finding No. 4) But the right to sell the home and to receive a "finder's fee" was granted to Mrs. Klas by the Third District Court in the Divorce Decree, and not from John Klas. Indeed, John Klas had moved out of the home and Mrs. Klas continued to reside in the home until the time the Van Wagoners were to perform. (Tr. Vol. II, pp. 80-81, lines 21-25 and lines 1-5) The Van Wagoners, on the other hand, offer no evidence whatsoever as to the existence of an agency relationship. Under the terms of the Decree she was granted by the court the right to find a buyer and to receive a fee for doing so, with the attendant responsibilities and rights to show the home, care for it during the time it was up for sale, and in general, to find a buyer. (Tr. Vol. II, p. 82, lines 1-13)

Again, the Van Wagoners offer no evidence, nor do they offer any authorities, that would indicate the existence of an agency relationship. The Van Wagoners even admitted that they made no effort to inquire into the extent of her authority under the Decree of Divorce. (Tr. Vol. I, p. 105, lines 10-13) Furthermore, as stated, the court did not find that an agency relationship existed. In fact, the assertions of Van Wagoners of an

agency relationship are so lacking throughout the proceedings that one could virtually claim that the matter has been raised for the first time in this cross appeal.

The net result of this is that John Klas cannot be held responsible for the acts of Carol Klas due to the lack of agency. this includes the preclusion of a finding of fraud, since he was admittedly not involved in any representations or negotiations directly and personally with the Van Wagoners.

It might also be appropriate at this point to reiterate our argument in our reply brief as to the issue of marshaling of evidence. We find the Van Wagoners' cross appeal brief to be totally lacking in any effort to marshal evidence. Much less so than any efforts made by the Appellant. There is clearly very little effort made to set forth factual data from the trial that supports their various contentions of agency, fraud, etc. The net result of this omission on their part is that they basically have nothing more than bare bones allegations concerning all of the points made. Their arguments are so lacking in factual and legal support that we submit that there is no basis to alter or over turn the court's rulings pertaining to the issues of fraud, agency, and misrepresentation.

POINT II

THERE IS NO BASIS FOR A FINDING OF FRAUD.

The Van Wagoners cite Finding No. 30 of the Amended Findings (R. 305) to support their contention that there had been a false representation of a material fact:

"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

the 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 defendants' request for copies of appraisals."

We are at a loss to see how these actions, if believed and take at face value, support a conclusion of fraudulent misrepresentation. We have already pointed out in our prior brief that Carol Klas had no real understanding as to the nature of an appraisal. (Tr. Vol. II, p. 90) The court even found that it remained disputed as to whether or not it was represented that written appraisals existed. (R. 299, Finding No. 7) Carol Klas also testified that she didn't know a great deal about the background of the value information, (Tr. Vol. II, p. 90, lines 10-20), and that she didn't have access to any of the appraisal information and that she informed Van Wagoners they would have to obtain that information from Mr. Klas. (Tr. Vol. II, pp. 150-151, lines 20-25 and 1-7)

In light of these facts, i.e., that she informed the Van Wagoners that she didn't have a great deal of knowledge about the background on the value, and that she didn't have access to any appraisal information, and that they would have to obtain this from Mr. Klas, how can one claim that she did anything to induce them to act based upon false representations, or even omissions. They cannot. They knew that the information concerning value was in the possession of Mr. Klas, yet they did nothing to try and obtain that information prior to signing the papers.

Furthermore, there is a serious question as to how important the appraisal information really was. Mr. Klas, for example, testified that:

"Carol called me and said that Mrs. Van Wagoner had said to her that she did not know why we were fooling around with all this business of appraisals because that was not relevant to the matter and they wanted the home and they would appreciate her vacating it as soon as possible." (Tr. Vol. I, p. 34, lines 7-12)

Of critical importance in maintaining a claim of fraud is the issue of reasonable reliance. Given all of the above, and more, is it any wonder that the court concluded that no misrepresentations had been made, let alone fraud, and based its relief to the Van Wagoners solely on the ground of unilateral mistake. It is well settled that it is up to the court to determine whether or not there had been reasonable reliance. (Berkeley Bank for Coops. v. Meibos, 607 P2d 798, 801 {Utah, 1980}.) We have, in our prior reply brief, argued at length concerning the failure of the Van Wagoners to act in a prudent manner before signing the Earnest Money Sales Agreement, and whether or not the knowledge of "appraisals" even formed a basis for their intent to purchase the home. We have argued concerning the other knowledge available to the Van Wagoners relative to property values in the neighborhood, the actual representations made by Carol Klas to the van Wagoners, their intense desire to purchase the home, and other facts that would all indicate a total lack of fraud or misrepresentation on anyone's part.

Furthermore, even if the Van Wagoners had obtained the "appraisals" from Mr. Klas, it is without dispute that those "appraisals" used by Mr. Klas ranged from \$170,000 to \$192,000. If they had spoken with him, he would have informed them as to the range of these appraisal values, the nature of the "appraisals" and from whom he had obtained them. The net result

would have been that the three highest of these "appraisals" did in fact have the range Carol Klas had indicated to the Van Wagoners. Clearly, there was no deception here. The fact that a fourth appraisal, which was not hidden as they claim, lowered the range of "appraisals" another \$5,000 would not seem to make any difference. The bottom line is that John Klas based his value on both the three highest "appraisals", as well as the copious other facts available to him which we have previously set forth in some detail in our other reply brief.

In their cross appeal brief, the Van Wagoners argue that they followed the requirements set forth by the Court in Sugarhouse Finance Company v. Anderson, 610 P2d 1369 (Utah, 1980) to protect themselves by asking ". . . Carol Klas if there were any appraisals on the home." (Cross Brief, p. 25) We submit that this simple inquiry does not measure up to the standard required by the Court. In the Sugarhouse case, the Court, at p. 1373 states as follows:

"Misrepresentation may be made either by affirmative statement or by material omission, where there exists a duty to speak. Such a duty will not be found where the parties deal at arm's length, and where the underlying facts are reasonably within the knowledge of both parties. Under such circumstances, the plaintiff is obliged to take reasonable steps to inform himself, and to protect his own interests."

This really is the crux of the whole case. Did the Van Wagoners, who were without dispute, dealing at arm's length, take reasonable steps to inform themselves as to the appraisal values and to protect their own interests. They did not. We ask, what purpose is there in asking about appraisals, in order to verify their existence, their accuracy and other content. A mere in-

quiry does not rise to the level of protecting one's interest, particularly when Carol Klas clearly in her testimony indicated that she had little knowledge of the nature, number or content of any "appraisals", and informed the Van Wagoners they would have to obtain that information from Mr. Klas. If that information was so critical why did they wait until after the agreement had been signed and they were seeking bank financing to ask for the appraisals? The answer is that the existence and accuracy of the appraisals were not material to the offer, but rather, the Van Wagoners only sought them out when it came time to obtain their financing in order to avoid the cost of obtaining another appraisal. (Tr. Vol. II, p. 35, lines 13-24)

In the above referenced testimony, Mr. Van Wagoner makes it clear that he only wanted the appraisals for obtaining his loan, and was not using them as a basis in determining whether or not to make his offer. His offer had already been made and accepted. When he could not obtain the appraisals from Mr. Klas as quickly as he wanted, he asked the bank about another appraiser and went through that person to obtain his appraisal for the bank.

We see nothing in these actions that would indicate that the Van Wagoners were taking steps of any type to inform themselves prior to making the offer, and without this information, how can they claim they were reasonable in their actions to protect their own interests. Furthermore, the Court will note in the entire context of Mr. Van Wagoner's dealings with Mr. Klas, that Mr. Klas was anything but difficult. While he was unable to provide the information as quickly as Mr. Van Wagoner wished, he was

friendly, and we submit, made a reasonable effort to comply with Mr. Van Wagoners' requests for appraisal information, and did in fact supply that information.

From the foregoing, we submit that it is readily apparent that there was no fraud by anyone involved with this transaction. The central fact is that the Van Wagoners badly wanted the Klas home and the existence, content, and accuracy of any appraisals was secondary and of little importance. They obviously and admittedly felt the home was worth what they offered, they had information upon which to base their knowledge of value other than the appraisals, and were more concerned that someone else would buy the home before they did. If the home was really worth substantially less than the \$175,000 offered, which we dispute, their failure to verify the value can only be characterized as recklessness on the Van Wagoners' part, and not fraud or misrepresentation on the part of Mr. Klas. Negligence on the part of the Van Wagoners is the issue here, and not any act or omission on the part of John Klas or anyone connected with him. Their claim for fraud should, therefore, be dismissed and the court's finding of a lack of fraud upheld.

POINT III

THERE IS NO BASIS FOR OVERRULING THE COURT'S RULING
THAT THERE HAD BEEN NO MISREPRESENTATIONS
MADE BY JOHN KLAS.

The Van Wagoners' claim of misrepresentation uses the same reasoning as their claim of fraud, and rests entirely upon the assumption that Carol Klas was John Klas' agent. We have argued already at length that Carol Klas was not his agent. She acted

virtually independently, derived her authority from the court under the Decree of Divorce, and Mr. Klas' only involvement was whether or not to accept the offers presented to him. There was no principal-agent relationship between John and Carol Klas.

There were no misrepresentations made directly by John Klas. They admit, or rather, never even contend, that John Klas ever made any factual representations to the Van Wagoners.

They contend that there was a fourth, much lower appraisal which would have altered the Van Wagoners' decision. This is not only conjecture as to the possible influence it might have had, but it is not a "much lower" appraisal. The court found the range to start at \$175,000, but we argued in our other brief that the testimony indicated that the range more likely ran from \$170,00. In either case, the Devere Kent appraisal was \$165,000. This would make the range \$165,000 to \$192,000. An offer of purchase at \$175,000 is hardly out of line, or to the detriment which they have suffered? We contend that there is none.

They go through the motions of citing to the Court the elements of fraud and/or misrepresentation, but fail to show how the Van Wagoners acted to their detriment. They have failed to show that a purchase of \$175,000 was so out of line as to be unconscionable and thus to their detriment if enforced.

They also ignore, as cited in our other brief, the fact that Carol Klas indicated a possible fourth appraisal. Did they inquire into this possible additional appraisal. They did not. Did she fail to disclose it? She did not. Was the Kent appraisal much lower? It was not. Was the Kent appraisal among

the three highest "appraisals" upon which John Klas, in part, was relying in determining his selling price? It was not. It was made clear that John Klas was relying on the three highest "appraisals" in setting his value. We will not belabor these points further since they are discussed in much greater detail in our other reply brief. Suffice it to say, that the court's ruling that there had been no fraud nor any misrepresentation was clearly correct, and well supported by the testimony and the exhibits received at trial.

CONCLUSION

If there is a failure to marshal evidence in this case, it lies with the Van Wagoners. Their support from the transcript and record of their cross appeal claims, as well as their rebuttal brief, are substantially lacking. Their claims of fraud and misrepresentation do not bear up under scrutiny. Carol Klas was not John Klas' agent. They were grossly remiss in their duty to inquire into the nature and accuracy of the appraisals. They did absolutely nothing to protect themselves, proceeded quickly to present an offer to stave off the possibility of the home being bought by another party, and only finally got around to inquiring about the appraisals when they needed them for obtaining their loan, and not for the purpose of verifying the value of the property, or for the purpose they should have made of them, to wit: to aid in establishing and verifying value prior to making their offer of purchase. We, therefore, submit

that their cross appeal relief should be denied, and that the appellant should be awarded his attorney's fees incurred in responding to the Van Wagoners' cross appeal in this matter.

DATED this _____ day of May, 1991.

BRANT H. WALL
Attorney for Plaintiff

CERTIFICATE OF MAILING

This is to certify that four true and correct copies of the
regoining were mailed, postage prepaid, to Lewis T. Stevens, At-
rney for Appellees, 215 South State, Suite 500, Salt Lake City,
ah 84111, this _____ day of May, 1991.
