

1990

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

Utah Court of Appeals

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Brant H. Wall; Cory R. Wall; Wall & Wall; Attorneys for Plaintiff.

Lewis T. Stevens; Alexander H. Walker III; Kristin G. Brewer; Van Wagoner & Stevens; Attorneys for Defendants.

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900493-CA

JOHN H. KLAS,

VS.

Defendants/
Appellees.

CASE NO. 900493-CA

Priority #6

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

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FILED

1991

Mary T. Noonan
Clerk of the Court

JOHN H. KLAS,
Plaintiff/
Appellant,
vs.
MARK O. VAN WAGONER and
KATHRYN VAN WAGONER,
Defendants/
Appellees.

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

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III. Whether the trial court incorrectly applied the case of Guardian State Bank v. Stangl, 778 P2d 1 (Utah, 1989) in rescinding the Earnest Money Sales Agreement and in dismissing the Plaintiff's Complaint.

IV. In the event this Court reverses the ruling of the lower court in reference to the issue of unilateral mistake, we respectfully request, in the interest of judicial economy, that the issue of damages to be awarded be clarified by order of this Court to conform with the applicable law.

V. In the event this Court reverses the ruling of the lower court, the Plaintiff/Appellant is entitled to his attorney's fees on appeal.

PRELIMINARY STATEMENT

The Appellant/Plaintiff Klas will sometimes be referred to as "Klas"; and the Appellees/Defendants will sometimes be referred to as "Van Wagoners".

"TR." refers to the Transcript of Record; "R." refers to Record; and, "Ex." refers to Exhibit.

The Transcript of Record consists of three (3) volumes each beginning with the numerical designation Page "1." Therefore, the Transcript of Record will of necessity identify the respective Volume.

STATEMENT OF THE CASE

A) Nature of the Case:

This is an action arising from an Earnest Money Sales Agreement executed by the parties on or about August 11, 1987,

wherein the Defendants agreed to purchase the Plaintiff's home for \$175,000. Plaintiff brought this action seeking damages for breach of contract following the Defendants' failure and refusal to consummate the purchase.

B) Course of Proceedings:

This is an appeal from the Judgment and Amended Judgment filed in the Third Judicial District Court of Salt Lake County, State of Utah, before the Honorable Raymond S. Uno, District Court Judge, dated March 13, 1990, and July 3, 1990, respectively, and each docketed with the Clerk of the District Court of Salt Lake County, State of Utah, on or about the same dates, and from all rulings and Orders of said Court affecting or pertaining to the rights claimed and asserted by this Plaintiff. (R. 139, 220, 261, 274, 296, 309)

C) Disposition in Lower Court:

The trial of the above entitled matter was held before the Honorable Raymond S. Uno, Third District Court Judge, on May 9, 10, and 12, 1989. The court thereafter rendered its Memorandum Decision, together with instructions to Plaintiff's counsel to prepare Findings of Fact, Conclusions of Law, and Judgment. (R. 139-157). After said documents were submitted, there followed objections to the proposed Findings, Conclusions, and Judgment by Defendants' counsel. (R. 169-175)

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 prepared and entered a

Judgment on March 13, 1990, which allowed the Defendants to rescind the subject Earnest Money Sales Agreement on the basis of "unilateral mistake" by the Defendants. The court held that no damages were recoverable by the Plaintiff and dismissed the Complaint and the Defendants' Counterclaim. (R. 274-277, 309-312)

There then followed additional objections to the Findings, Conclusions, and Judgment, together with motions to amend same. (R. 278-295) On May 31, 1990, the court prepared and entered its Amended Findings of Fact and Conclusions of Law which basically clarified factual issues, but resulted in the same legal conclusion as the March 13, 1990, Judgment. (R. 296-308). Plaintiff's counsel thereafter prepared and submitted an Amended Judgment to the court which conformed to the Amended Findings of Fact and Conclusions of Law. Said Amended Judgment was entered by the court on July 3, 1990. (R. 309-312) Notice of Appeal was filed by Plaintiff on July 26, 1990. (R. "111" - Note page number not in sequence) Defendants filed Notice of Appeal on August 2, 1990. (R. 316) The matter is now before this Court for consideration of the issues raised by each appeal.

STATEMENT OF FACTS

The real property which is the subject of this action is located at 2340 Berkley Street, Salt Lake City, Utah. In a divorce action entitled John H. Klas v. Carol Louise Klas, Civil No. D86-1705, in the District Court of Salt Lake County, the court awarded the subject property to the Plaintiff, John H. Klas, as his sole and separate property. The Divorce Decree further

provided that if prior to September 1, 1987, Carol Klas could find a ready, willing, and able buyer of the property, at a price and upon terms acceptable to the Plaintiff, she would receive a one-time finder's fee for her services in showing the house and finding a buyer. Said finder's fee would be 3% of the gross sales price. (Vol. I TR. 6-8) (Ex. "1")

Carol Klas advertised the property for sale and on approximately July 25, 1987, held an "open house", at which time the Defendants inspected the property and expressed an interest in purchasing same. (Vol. I TR. 18-20) The Defendant, Mark Van Wagoner, who is an attorney, prepared and delivered an Earnest Money Sales Agreement, together with a \$1,000 earnest money deposit, to Carol Klas bearing date of August 7, 1987, which offer was in the amount of \$175,000. (Vol. II TR. 92-98) (Ex. "3")

Upon receipt of the Earnest Money Sales Agreement, Carol Klas delivered the same to the Plaintiff, John Klas, sometime between the 7th and 11th of August, 1987. (Vol. I TR. 21-22, Vol. II TR. 98-99) Upon receipt of the Earnest Money Sales Agreement, Klas contacted his attorney, Phil Cowley, and attended a meeting in his counsel's office to review the written proposal. (Vol. I TR. 21-24, 111) During the course of said meeting, Plaintiff's counsel, Phil Cowley, contacted the Defendant Mark Van Wagoner by telephone and reviewed the document, at which time the parties discussed various modifications of the Agreement which were made and to which the said Defendant acquiesced and authorized. (Vol. I TR. 195-196, 111-114) Thereafter, Klas executed the modified

Earnest Money Sales Agreement and delivered the same to the office of the Defendant Mark Van Wagoner on or about August 11, 1987. (Vol. II TR. 2-4) Subsequently, the Defendant Mark Van Wagoner and his wife, Kathy Van Wagoner, executed said document on or about August 11, 1987, at which time said Earnest Money Sales Agreement was in the form as reflected by "Ex. 3". (Vol. I TR. 189, 197) (R. 261-272) (Addendum "A")

By way of background, it should be noted that in 1986 the Plaintiff, John Klas, had obtained an "appraisal" of the subject premises for mortgage loan purposes from an individual by the name of Devere Kent. (Vol. I TR. 30-59) Also, in anticipation of selling the property in 1987, the Plaintiff had solicited verbal opinions of market value of the property from personal acquaintances who were then engaged in the real estate business, which appraisals or opinions ranged from \$175,000 to \$192,000. (Vol. I TR. 10-13) (Vol. II TR. 127-133)

In the course of discussions which occurred between Carol Klas and Van Wagoners prior to August 11, 1987, Carol Klas made reference to the fact that she understood some "appraisals" had been made on the property; she understood they ranged from \$175,000 to \$192,000; however, at no time on or prior to August 11, 1987, did she or the Plaintiff, John Klas, represent that any written appraisals existed. (Vol. I TR. 25) (R. 264, 299)

At no time on or prior to August 11, 1987, did the Plaintiff personally engage in any discussion with the Defendants, and at no time on or prior to said date did said Defendants make

any request that the Plaintiff, John Klas, produce an appraisal of the property. (Vol. I TR. 25) In early October, 1987, Defendants notified the Plaintiff that they did not intend to complete the purchase of the property. (Vol. I TR. 36) (Ex. "4") Plaintiff, Klas, then gave notice to the Defendants that if the sale was not completed within ten (10) days, the property would be placed on the market in an effort to mitigate damages and that the Plaintiff would look to the Defendants for any damages sustained. (Vol. I TR. 38) (Ex. "5") Van Wagoners failed to respond; whereupon, the earnest money deposit of \$1,000 was returned to Defendants by the Plaintiff. (Vol. I TR. 37-38) (Ex. "5")

The property was thereafter placed on the market for sale and was subsequently sold for \$160,000 on or about April 13, 1988, at its then fair market value. (Vol. I TR. 44-45)

Plaintiff initiated suit against the Defendants seeking damages for breach of contract and the Defendants counterclaimed for fraud, mutual mistake, and detrimental reliance. (R. 2-5, 11-23)

Trial was conducted on the dates of May 9th, 10th and 12th, 1989. Thereafter, the court rendered its Memorandum Decision dated May 30, 1989, wherein the court found the issues in favor of the Plaintiff and against the Defendants and found that the Plaintiff was entitled to damages in the sum of \$7,500, together with interest, costs, and attorney's fees, and that the Counterclaim of the Defendants should be dismissed. (R. 139-157) (Addendum "B")

Subsequent to the Memorandum Decision of May 30, 1989, Findings of Fact, Conclusions of Law and Judgment were presented to the Court and objections thereto were filed by the Defendants, together with a Motion to Amend Findings of Fact and Conclusions of Law and a Motion for New Trial. In response to said Motions and Objections, the Court made and entered its Supplemental Memorandum Decision dated November 30, 1989, wherein the court found that "there was a unilateral mistake by the Defendants", and that by reason thereof, the prior Findings of Fact "remain" except as to the mutual mistake of fact and considerations relating to that finding. (R. 220-222) (Addendum "C") The parties presented proposed Findings of Fact, Conclusions of Law, and Judgment, and thereafter, the court prepared, adopted, signed, and entered its own Findings of Fact and Conclusions of Law on March 13, 1990, (R. 261-272) (Addendum "D") together with Judgment bearing date March 13, 1990. (R. 274-276) (Addendum "E")

The Plaintiff thereafter filed Objections to the Findings of Fact, Conclusions of Law, and Judgment, together with a Motion to Amend. (R. 278-280) Subsequent thereto, the court adopted and entered Amended Findings of Fact and Conclusions of Law dated May 31, 1990, (R. 296-307) together with Amended Judgment dated and filed July 3, 1990. (R. 309-312) (Addendum "F" & "G")

The essence of the findings and Judgment of the trial court was to the effect that the Defendants were mistaken in their understanding that the lowest appraisal on the property was \$175,000 and that their mistake was caused by their

misunderstanding of representations made by Carol Klas. The court found that the mistake provided a basis for rescission of the Earnest Money Sales Agreement and dismissed both the Plaintiff's Complaint and the Defendants' Counterclaim. (R. 220-222) (Addendum "F" & "G")

The Notice of Appeal was filed on July 26, 1990. (R. 111 [out of sequence; follows R. at 314.])

SUMMARY OF ARGUMENT

1. THE TRIAL COURT INCORRECTLY INTERPRETED THE STANGL CASE AND OTHER APPLICABLE LAW IN RESCINDING THE EARNEST MONEY SALES AGREEMENT ON THE BASIS OF UNILATERAL MISTAKE.

2. THAT SHOULD THE LOWER COURT'S RULING BE REVERSED, AN ORDER SHOULD ISSUE FROM THIS COURT CLARIFYING THE ISSUE OF DAMAGES TO BE AWARDED IN CONFORMITY WITH APPLICABLE LAW.

3. PLAINTIFF/APPELLANT IS ENTITLED TO ATTORNEY'S FEES ON APPEAL.

ARGUMENT

POINT I

THE TRIAL COURT INCORRECTLY INTERPRETED THE "STANGL" CASE AND OTHER APPLICABLE LAW IN RESCINDING THE EARNEST MONEY SALES AGREEMENT ON THE BASIS OF UNILATERAL MISTAKE.

The first three issues outlined hereinabove will be addressed under the argument on Point I due to the interrelationship of the issues involved.

In its Supplemental Memorandum Decision of November 30, 1989, (R. 220-222) the trial court ruled there was a "unilateral mistake" by the Defendants based on the facts as presented at

trial. That Supplemental Memorandum Decision was issued as a result of the arguments put forth by the parties in connection with objections to the proposed Findings of Fact and Conclusions of Law. Principally, the Defendants contended that a mistake had occurred which excused their performance under the Agreement. Specifically, they cited the case of Guardian State Bank v. Stangl, 778 P2d 1 (Utah, 1989), in support of their claim that they were entitled to rescission of the Agreement on the basis of their unilateral mistake. It is apparent that the trial court based its Supplemental Memorandum Decision on Stangl and it is the Plaintiff's contention that the court misinterpreted that case in rendering its decision.

The facts of the Stangl case and those of the case at hand are clearly distinguishable.

The Court noted in Stangl that relief, based on unilateral mistake, is available:

" . . . when one party's mistake of fact is coupled with knowledge of the mistake by the other party or a mistake is produced by fraud or other inequitable conduct by the nonerring party," (Citing Thompson v. Smith, 620 P2d 520, 523-34 [Utah, 1980], Jensen v. Manila Corp. of the Church of Jesus Christ of Latter-Day Saints, 565 P2d 63 [Utah, 1977].) Id. at 5.

The Stangl court further noted that relief can be accorded on the basis of unilateral mistake under certain circumstances and observes that each case must be analyzed on its own merit.

This Court needs only to analyze the testimony presented at trial to realize that the rationale applied to the Stangl case has no application. In Stangl, the Court found that Stangl knew

that the bank never intended to be liable to Stangl when it executed and delivered a promissory note without restrictive endorsement and that in effect Stangl was endeavoring to take advantage of a pure legal technicality in the face of the known mistake which he had produced.

In Grahn v. Gregory, 800 P2d 320 (Utah App., 1990), this Court set forth the criteria for determining whether rescission based on unilateral mistake should be allowed. In that case, the Court stated:

"The standard for determining whether rescission is the proper remedy for a unilateral mistake is as follows:

"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." Id. at 326-327 (citing B & A Associates v. L.A. Young Sons Construction Co., 796 P2d 692 [Utah, 1990] [quoting John Call Engineering v. Manti City Corp., 743 P2d 1205, 109-10 (Utah)].)

In applying the evidence and testimony presented at trial, it is clear that the four elements for rescission have not been met.

First, the alleged mistake did not and would not make enforcement of the Agreement unconscionable. There were arms

length negotiations between the Defendants and Carol Klas. The record clearly shows that a negotiated price of \$175,000 for the home was agreed upon. (Vol. I TR. 195-196) (Ex. "3") The Defendants were informed by Carol Klas that if they wanted the home, the offer would have to be submitted to the Plaintiff on the basis that there were no contingencies or conditions attached thereto. (Vol. III TR. 161) The Defendants agreed to those terms and executed the Agreement. (Vol. I TR. 195, 196) (Addendum "A") (Ex. "3")

Second, the alleged mistake pertains to the value of the property. As stated previously, the Agreement was made on the condition that there were no contingencies, and the record clearly sustains the Court's finding that the offer was not contingent upon the existence and production of appraisals. (Vol. I TR. 195-196; Vol. II TR. 161) The issue of whether and what appraisals were made did not develop until after the Agreement was executed. Furthermore, there was no credible evidence presented at trial to support the claim or contention of the Defendants that the alleged "appraisals" were in fact contrary to any representations made by Carol Klas. (Vol. II TR. 91-91, 96) (Addendum "F")

The Van Wagoners clearly understood that the offer to purchase was not subject to any "special conditions and/or contingencies" and gave the following significant testimony in that regard:

Mark Van Wagoner testified:

"Q: Did he call your attention to the fact that there had been an omission of the word 'one hundred' in the written part of the sales price?"

"A: I can't remember that, but he very well could have. I would have said fine. I mean, it was intended to be a no exceptions offer of \$175,000."

"Q: And that's what you intended?"

"A: Yes."
(Vol. I TR. 195-196)

The Defendant Kathryn Van Wagoner testified:

Q: And didn't she also tell you that the written offer would have to be on the basis of no contingencies?"

A. There could be no contingencies or exceptions."
(Vol. II TR. 161)

Third, Defendant Mark Van Wagoner's conduct did not even rise to the level of ordinary diligence; especially in light of his occupation as a practicing attorney. At trial, said Defendant testified that he was experienced in real estate transactions and that he had been involved in many "closings" with real estate agents. (Vol. I TR. 108) Testimony was also presented to the effect that the Agreement was executed by the Defendants after consultations with another attorney, James P. Cowley. (Vol. I TR. 109-116) As an attorney with knowledge of these facts, Defendant Mark Van Wagoner executed the Agreement and advised his wife, Kathryn Van Wagoner, accordingly. (Vol. I TR. 196-197)

Fourth, with the exception of the loss of his bargain, Plaintiff has been seriously prejudiced by the trial court's ruling. Had the Defendants kept the Agreement and purchased the home, Plaintiff would have had to pay a "finder's fee" to Carol Klas in the sum equivalent to 3% of the gross sales price (R. 8) or, in this instance, \$5,250. Following the Defendants' refusal

to complete the purchase of the home, it was necessary for the Plaintiff to have the property marketed and sold by a professional real estate agency. That agency received a commission of 7% percent of the ultimate sales price, or \$11,200 as sales commission. Consequently, the Plaintiff was required to pay an additional \$5,950 in commissions and fees as a result of the Defendants' failure to perform. (Vol. I TR. 47)

In order to allow rescission based on unilateral mistake, the Defendants need to show that all four of the elements listed in the Grahn case have been met. Based upon the foregoing arguments, it is clear the Defendants have failed to show the elements present to allow rescission. The Plaintiff contends that the trial court completely misinterpreted the law in the Stangl case and the other cases decided by the Appellate Court of this State regarding rescission based on unilateral mistake. As a result, we urge this Court to enter a ruling reversing the trial court's judgment and order that judgment be entered in the Plaintiff's favor for the damages incurred consistent with the evidence and testimony.

POINT II

THAT SHOULD THE LOWER COURT'S RULING BE REVERSED, AN ORDER SHOULD ISSUE FROM THIS COURT CLARIFYING THE ISSUE OF DAMAGES TO BE AWARDED IN CONFORMITY WITH APPLICABLE LAW.

We believe that the Memorandum Decisions and Findings of Fact entered by the lower court (Addendum "B", "F" & "G") relative to the breach of the contract and the fact that the Plaintiff, but for the unilateral mistake of the Defendants, had sustained

damages and loss are well supported by the testimony and evidence elicited throughout the proceedings of the trial, and by reason thereof, this Court should reverse the Judgment of the lower court in reference to the issue of unilateral mistake and find that an enforceable and valid contract exists between the parties, and the true measure of damages to be awarded to the Plaintiff should be the "Loss-of-Bargain", i.e., the net difference between the contract price and the subsequent price derived from the subsequent sale of the property.

We recognize that the final Amended Judgment entered by the lower court did not address the issue of damages as outlined in that court's prior Memorandum Decision of May 30, 1989, (R. 139-157) because of the unilateral mistake ruling. However, in the interest of judicial economy and to avoid retrial, we respectfully request that should this Court determine that the lower court's ruling and Judgment on the issue of unilateral mistake, be reversed, then, and in such event, this Court lend its assistance in directing the appropriate measure of damages to be applied in any further judgment.

In reference to the issue of damages which should be awarded, we submit that the evidence and testimony supports the Plaintiff's claim for damage for "loss-of-the-bargain".

No where in the Record do we find any support for the lower court's ruling that Plaintiff's damages should be limited to the amount of "\$7,500", as reflected in the court's memorandum decision of May 30, 1989. (R. 139) (Addendum "B") We, therefore,

urge this court to lend its assistance in clarifying the appropriate rule of law to be applied in assessing the damages.

The Utah Supreme Court addressed the issue of assessing damages for breach of contract for the sale of real estate in the case of Smith v. Warr, 564 P2d 771 (Utah, 1977), and set forth the following rule:

"The rule followed by Utah is that benefit-of-the-bargain damages are to be awarded for breach of contract for the sale of real estate regardless of the good faith of the party in breach."

In the case of Nielson v. Droburay, 652 P2d 1293 (Utah, 1982), the Utah Supreme Court recognized the application of the "loss of bargain" rule as being the measure of damages.

See also, Beckstrom v. Beckstrom, 578 P2d 250 (Utah, 1978); Bradshaw v. Kershaw, 627 P2d 528 (Utah, 1981); Terry v. Panek, 631 P2d 896 (Utah, 1981).

We do not believe that any credible testimony was at variance with the damages testified to by the Plaintiff, nor did Defendants present any reliable testimony or evidence to refute same. We, therefore, submit the true measure of damages to be applied should be the "loss-of-the bargain," measured by the net difference between the contract price as originally contracted for between Plaintiff and Defendants and the amount received by Plaintiff in the resale of the property.

POINT III

PLAINTIFF/APPELLANT IS ENTITLED TO ATTORNEY'S
FEES ON APPEAL.

The Earnest Money Sales Agreement at issue provided for attorney's fees in the event of default. In the lower court proceedings a Stipulation was entered allowing the court to enter judgment against the Defendant and in favor of the Plaintiff in the sum of \$6,250 in the event the trial court found the issues in favor of the Plaintiff. (Addendum "H") Should this Court reverse the lower court as requested by Plaintiff, we respectfully request the Court to remand this case for a further hearing before the trial court as to the amount of reasonable additional attorney's fees which should be awarded for this appeal.

CONCLUSION

A review of the Memorandum Decisions and Findings of Fact rendered by the trial court leaves no doubt but that the trial judge, as the fact finder in this case, was conclusively persuaded that but for the misunderstanding or "unilateral mistake" on the part of the Defendants only, a valid, subsisting, and binding contract had been entered into by the parties.

The trial court had no difficulty in reaching the conclusions aforesaid and making findings in accordance with the overwhelming credible evidence and testimony, and it was not until the Stangl case was raised as an issue late in the proceedings that the trial court modified its prior rulings.

We respectfully submit that in the Stangl case an entirely different factual background existed, in that Stangl never intended to be relieved of his contractual obligation and attempted to avoid liability on a pure technical construction of a promissory note.

If this Court were to subscribe to the lower court's ruling in the instant case, we submit that it would be virtually impossible to enforce any contract if either party chose to come forward and allege that they had "misunderstood" some aspect of the transaction which they alone deemed to be of great significance. The consequence of such a ruling or holding would create utter chaos in the field of contract law and present an issue for appellate review in every contract transaction.

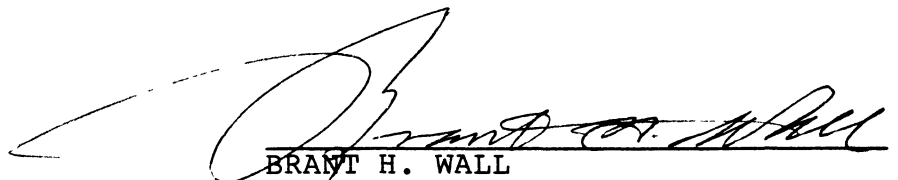
The elements set forth by our appellate courts in the Stangl and Grahn cases have been meticulously and carefully delineate to address those instances where unilateral mistake affords redress in contract law. When one applies the fact of the subject case in contrast to the factual background of Stangl and Grahn, it becomes abundantly clear that the subject action does not fall within the ambit of either case. Had Van Wagoners wanted to avoid any problem, they could have adequately protected themselves by requiring that the contract set forth the conditions necessary to achieve that goal. However, the uncontroverted evidence and testimony of the Defendants themselves was that they knew and understood that if they wanted to purchase and acquire the subject property, there could be no contingencies or exceptions attached thereto.

Based upon the foregoing, we respectfully submit that the alleged "unilateral mistake" does not constitute a basis for a rescission of the contract in question, and this Court should reverse the Judgment of the lower court in that regard and render

its assistance in directing the manner in which judgment should be entered on the issue of damages.

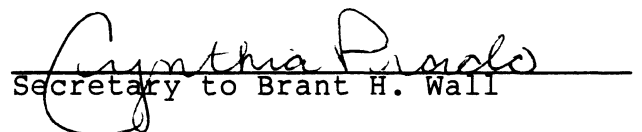
We further request that should this Court reverse the lower court on the issue of "unilateral mistake", then, and in that event, we ask that this case be remanded for further hearing before the trial court as to the amount of reasonable attorney's fees which should be awarded for this appeal.

RESPECTFULLY SUBMITTED this 1st day of February, 1991.


BRANT H. WALL
Attorney for Plaintiff/Appellant

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing was mailed, postage prepaid, to Lewis T. Stevens, Attorney for Defendants/Appellees, 215 South State, Suite 500, Salt Lake City, Utah 84111, this 1st day of February, 1991.


Secretary to Brant H. Wall

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- (F) Amended Findings of Fact & Conclusions of Law, May 31,
1990
- (G) Amended Judgment, July 3, 1990
- (H) Stipulation for Attorneys Fees



EARNEST MONEY SALES AGREEMENT

Legend Yes (X) No (O)

This is a legally binding contract. Read both front and back carefully before signing.

EARNEST MONEY RECEIPT

DATE: AUG 7, 1997

The undersigned Buyer MARK MO. VAN WAGONER & KATHRYN VANWAGONER hereby deposits with Agent/Broker Company

as EARNEST MONEY, the amount of 1,000 (ONE THOUSAND DOLLARS) Dollars (\$ 1,000), in the form of A CHECK DRAWN ON 1ST SECURITY BANK which shall be deposited in accordance with applicable State Law.

Agent/Broker Company

Received by: JOHN H KLAS

OFFER TO PURCHASE

1. **PROPERTY DESCRIPTION** The above stated EARNEST MONEY is given to secure and apply on the purchase of the property situated at 2340 BERKELEY ST in the City of SALT LAKE CITY County of SALT LAKE Utah, subject to any restrictive covenants, zoning regulations, utility or other easements or rights of way, government patents or state deeds of record approved by Buyer in accordance with Section 4. Said property is more particularly described as: THE SOUTH 90 FEET OF LOT 13, BLOCK 13, ATTENDED COUNTRY CLUB ACRES

CHECK APPLICABLE BOXES:

☒ IMPROVED REAL PROPERTY ☐ Commercial ☒ Residential ☐ Other _____
☐ UNIMPROVED REAL PROPERTY ☐ Vacant Lot ☐ Vacant Acreage ☐ Other _____

(a) **Included items.** Unless excluded below, this sale shall include all fixtures and any of the following items if presently attached to the property: plumbing, heating, air-conditioning and ventilating fixtures and equipment, water heater, built-in appliances, light fixtures and bulbs, bathroom fixtures, curtains and draperies and rods, window and door screens, storm doors, window blinds, awnings, installed television antenna, wall-to-wall carpets, water softener, automatic garage door opener and transmitter(s), fencing, trees and shrubs. The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: _____

(b) **Excluded items.** The following items are specifically excluded from this sale: _____

(c) **Connections:** Seller represents that the above property is connected to:
☒ public sewer; ☐ septic tank; ☒ municipal water; ☐ well; ☒ natural gas; ☐ irrigation water/secondary system; ☐ other sanitary system (specify) _____

(d) **Utilities, Improvements, and Other Rights.** The property presently has or is served by the following:
☒ public water main; ☐ well; ☐ water stub in; ☒ sewer main; ☐ private water main; ☒ gas main; ☒ electric distribution line; ☒ gas distribution line; ☒ telephone; ☐ ingress and egress by private easement; ☐ dedicated road; ☐ crops; ☒ sidewalk; ☒ curb & gutter; ☐ water rights, specify _____; ☐ mineral rights, specify _____; ☐ other, specify _____

(e) **Survey.** A certified survey ☐ shall be furnished at the expense of _____ prior to closing. ☒ shall not be furnished.

(f) **Buyer Inspection.** Buyer has made a visual inspection of the property and subject to Section (d) above accepts it in its present physical condition, except: NO EXCEPTIONS

2. **PURCHASE PRICE AND FINANCING.** The total purchase price for the property is ONE HUNDRED SEVENTY FIVE THOUSAND DOLLARS Dollars (\$ 175,000) which shall be paid as follows:

\$ 1,000 which represents the aforescribed EARNEST MONEY DEPOSIT:
\$ 174,000 representing the approximate balance of CASH DOWN PAYMENT at closing.
\$ _____ representing the approximate balance of an existing mortgage, trust deed note, real estate contract or other encumbrance to be assumed by Buyer, which obligation bears interest at _____% per annum with monthly payments of \$ _____ which includes: ☐ principal; ☐ interest; ☐ taxes; ☐ insurance.
\$ _____ representing the approximate balance of an additional existing mortgage, trust deed note, real estate contract or other encumbrance to be assumed by Buyer, which obligation bears interest at _____% per annum with monthly payments of \$ _____ which includes: ☐ principal; ☐ interest; ☐ taxes; ☐ insurance.
\$ _____ representing balance, if any, including refinancing, to be paid as follows: _____

\$ 175,000

TOTAL PURCHASE PRICE

~~If outside financing is required, Buyer agrees to use best efforts to procure same and this offer is made subject to Buyer qualifying for and lending institution granting said loan. Buyer agrees to make application for said loan within _____ days after Seller's acceptance of this Agreement, at an interest rate not to exceed _____%. Buyer further agrees to obtain a written commitment for said loan, and if the commitment is not obtained within a reasonable time, this Agreement is voidable at the option of Seller.~~

If FHA, VA or special conventional financing is contemplated, Seller agrees to pay the lesser of _____ discount points or \$ _____

property under a real estate contract. Transfer of Seller's ownership interest shall be made as set forth in Paragraph N. Seller agrees to furnish good and marketable title to the property, subject to encumbrances and exceptions noted herein, evidenced by a current policy of title insurance in the amount of purchase price ☒ an abstract of title brought current, with an attorney's opinion (See Paragraph I).

4. **INSPECTION OF TITLE.** Within 10 days after acceptance of this offer, Seller shall provide Buyer with either a commitment for title insurance or an abstract of title brought current with an attorney's opinion. Buyer shall have a period of 5 days after receipt thereof to examine and accept. If Buyer does not accept, Buyer shall mail written notice thereof, by certified mail, return receipt requested, within the prescribed time period. Thereafter, Seller shall be required, through escrow at closing, to cure the defect(s) to which Buyer has objected. If said defect(s) is not curable through an escrow agreement at closing, this Agreement shall be null and void at the option of the Buyer, and all monies received herewith shall be returned to the respective parties.

5. **VESTING OF TITLE.** Title shall vest in Buyer as follows: AS REQUESTED BY BUYER

6. **SELLER WARRANTIES.** Seller warrants that: (a) Seller has received no claim nor notice of any building or zoning violation concerning the property which has not or will not be remedied prior to closing; (b) all obligations against the property including taxes, assessments, mortgages, liens or other encumbrances of any nature shall be brought current on or before closing; and (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances shall be sound or in satisfactory working condition at closing. Exceptions to the above shall be limited to the following: NONE

7. **SPECIAL CONSIDERATIONS AND CONTINGENCIES.** This offer is made subject to the following special conditions and/or contingencies which must be satisfied prior to closing: NONE

8. **CLOSING OF SALE.** This Agreement shall be closed on or before SEPT 15, 1987 at a reasonable location to be designated by Seller, subject to Paragraph K on the reverse side hereof. Upon demand, Buyer and Seller shall deposit with the Escrow Closing Office all documents necessary to complete the purchase in accordance with this Agreement. Prorations set forth in Paragraph L on reverse side, shall be made as of ☐ date of possession ☒ date of closing ☐ other _____

9. **POSSESSION.** Seller shall deliver possession to Buyer on CLOSING unless extended by mutual agreement of parties.

10. **GENERAL PROVISIONS.** Unless otherwise indicated above, the General Provisions on the reverse side hereof are incorporated into this Agreement by reference.

11. **AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE.** Buyer offers to purchase the property on the above terms and conditions. Seller shall have until _____ (AM/PM) _____, 19____, to accept this offer. Unless accepted, this offer shall lapse and the Agent shall return the EARNEST MONEY to the Buyer.

DATE August 11, 1987

SIGNATURE OF BUYER

Sharon O. Zick
Kathryn Van Wagoner

CHECK ONE

ACCEPTANCE OF OFFER TO PURCHASE

☒ Seller hereby ACCEPTS the foregoing offer on the terms and conditions specified above.

COUNTER OFFER

☐ Seller hereby accepts the foregoing offer SUBJECT TO the exceptions or modifications or specified in the attached Addendum and presents said COUNTER OFFER for Buyer's acceptance.

DATE Aug 11, 1987

SIGNATURE OF SELLER

TIME 1:34 PM (AM/PM)

John Miller

REJECTION

☐ Seller hereby REJECTS the foregoing offer. _____ (Seller's Initials)

AGREEMENT TO PAY REAL ESTATE COMMISSION

CHECK ONE

☐ This property is listed by _____ Listing Agent/Broker Company, and a real estate commission shall be paid in accordance with the Sales Agency Agreement. The Selling Agent/Broker Company is _____

☐ _____ Listing and Selling Agent/Broker Company has been authorized to offer this property for sale and Seller agrees to pay a real estate commission of _____ as consideration for its efforts in procuring Buyer. Said commission shall be payable at closing or upon Seller's default on this Agreement, whichever occurs first. The amount or due date thereof cannot be changed without the prior consent of the Listing and Selling Agent/Broker Company.

DATE _____

SIGNATURE OF SELLER

MAY 30 1989

[Signature]
Deputy Clerk

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

JOHN H. KLAS,	:	MEMORANDUM DECISION
Plaintiff,	:	CIVIL NO. C-88-3192
vs.	:	
MARK O. VAN WAGONER and	:	
KATHRYN VAN WAGONER,	:	
Defendants.	:	

This matter came on regularly for trial to the bench on May 9 and 10, 1989, and by agreement final arguments were made on May 12, 1989. Plaintiff was present and represented by his counsel Brant H. Wall, and defendant was present and represented by his attorneys Lewis D. Stevens and Craig W. Anderson. Witnesses were sworn and testified, evidence introduced, and after final argument, submitted to the bench for decision. The Court took the matter under advisement, and now having been fully advised, renders its findings and decision.

I. FACTUAL BACKGROUND

A. This action involves certain described real property located at 2340 Berkley Street in Salt Lake City, Utah. John H. Klas was the owner of the property at all times relevant to the claims alleged in his Complaint.

"B"
ADDENDUM

"B"

B. Sometime in late July or early August, 1987, the property was offered for sale pursuant to the terms of a Decree of Divorce Klas' former wife Carol undertook the responsibility of marketing the property for Klas. The property was not listed with a real estate broker, and Klas did not set a specific asking price for the property.

C. In late July or early August, 1987, the Van Wagoners looked at the property and expressed an interest in the premises.

D. 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 also bearing the date of August 11, 1987 as a date of signature.

E. It is disputed whether Carol Klas told the Van Wagoners that there were three recent appraisals on the property which expressed values ranging from \$175,000.00 to \$190,000.00.

F. Carol Klas presented the offer to her former husband John Klas, who accepted the same on August 11, 1987. A closing date of September 15, 1987 was agreed upon, and the premises were vacated in anticipation of the closing.

G. At no time on or prior to August 11, 1987 did plaintiff have any discussions with defendants relative to the subject transaction. At no time on or prior to August 11, 1987 was any request made by defendants for the production of an appraisal of the property.

H. It is alleged that on or about August 17, 1987 Mark Van Wagoner telephoned Klas and asked for copies of the current appraisals on the property so that he could use them to obtain financing. It is alleged that Klas responded that he would attempt to locate an appraisal.

I. It is alleged on or about August 24, 1987, Mark Van Wagoner again called Klas regarding the appraisals, and Klas responded that he still could not locate any of them. It is alleged Mr. Van Wagoner told Klas that because Klas could not find the appraisals, he had arranged for another appraiser to make an appraisal of the property. It is alleged that on or about September 10, 1987, Mark Van Wagoner called Klas and informed him that the appraiser had valued the property at approximately \$137,000.00. It is alleged that Mr. Van Wagoner again asked for the Klas appraisals. In less than an hour Klas brought an appraisal prepared by Devere Kent to Mr. Van Wagoner's office. The Kent appraisal was made in 1986, and it had valued the property at only \$165,000.00.

J. It is alleged that on or about September 10, 1987, Mr. Van Wagoner called Klas and informed him that he had to have the other current appraisals which had been the basis of the amount of the offer. It is alleged Klas did not come forward with any of those appraisals. Instead Klas obtained yet another appraisal from Badi Mahmood which showed the market value of the property

to be \$160,000.00, and he delivered the appraisal to Mr. Van Wagoner.

K. It is alleged that after he had received the Mahmood appraisal for \$160,000.00, Klas offered to sell the property to the Van Wagoners for \$161,000.00. The Van Wagoners counteroffered for \$153,000.00, but Klas rejected the counteroffer.

L. Klas listed the property with a real estate broker on September 29, 1987 at an asking price of \$174,500.00.

M. In a letter to Mr. Klas dated October 2, 1987, the Van Wagoners through their counsel gave written notice of the withdrawal of their offer to purchase the property given the disparity in the represented and actual appraisal values, and demanded the return of the earnest money deposit.

N. In mid-October 1987, defendants were notified that if they failed to consummate the sale 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.

O. When defendants failed to consummate the purchase agreement on December 15, 1987, Klas returned the earnest money payment of \$1,000.00 to the Van Wagoners after repeated demands, at which time defendants were notified that plaintiff would expect them to respond in damages if such should occur.

P. On April 13, 1988, Klas sold the property to David B. Boyce for \$160,000.00.

II. ISSUES BEFORE THE COURT

A. Is plaintiff entitled to damages for the difference between the sale price of \$160,000.00 and the offer of \$175,000.00?

B. Is plaintiff entitled to damages for the real estate commission in the sum of \$11,200.00 which exceeded "finders fee" due Carol Klas by \$5,950.00, attorney fees and costs?

C. Are the defendants entitled to damages they suffered based on claims for fraud, mutual mistake of fact, and detrimental reliance?

III. ARGUMENT

A. ARGUMENT OF PLAINTIFF

1. CONTRACTS ARE CONSTRUED MOST STRICTLY AGAINST THE MAKER.

Plaintiff argues that instruments are construed most strongly against the party who drafts the same, and where the party drafting the document is an attorney, the significance of the authorship becomes much greater. In this case, plaintiffs argue that defendants drafted the earnest money sales agreement, and thus any ambiguity, if there should be any, should be

construed most strongly against them, particularly in this situation since Mark O. Van Wagoner is an attorney.

2. THE EARNEST MONEY SALES AGREEMENT WAS AN INTEGRATED AGREEMENT.

Plaintiffs contend where an agreement addresses the issues and no ambiguity exists, an earnest money sales agreement has been recognized as an integrated agreement, and in the absence of fraud, extrinsic evidence should not be allowed to contradict the terms of an integrated agreement.

3. RELIEF SHOULD NOT BE GRANTED TO DEFENDANTS UPON GROUNDS OF ALLEGED MISTAKE.

Plaintiff contends the law is well-settled that relief from a contract cannot be granted, except on the basis of mutual mistake of material fact. In this case they claim the evidence shows that no contact existed between the parties prior to the signing of the contract, and that defendants had no conversation with plaintiff, hence any mistake would have been unilateral in nature.

He further state that for mutual mistake to form a basis for relief from a contract, the mistake must be so substantial and fundamental as to defeat the object of the parties. He contends that this is not the case in this situation.

4. DAMAGES FOR LOSS OF BARGAIN AND EQUITABLE LOSSES MAY BE RECOVERED

Plaintiff contends that one of the measures of damages in cases such as this is a loss of a bargain, and that the trial court has the latitude to consider such factors as may be necessary to achieve justice. Therefore, he claims the Court should award \$15,000.00 as the difference between what was bargained for and what the property was sold for, and in addition, the difference in the commission that had to be paid to the realtor in the sale of the property and what would have had to be paid to Ms. Klas on the original agreement.

B. ARGUMENT OF DEFENDANTS

1. THE AGREEMENT IS NOT AN ENFORCEABLE CONTRACT.

Defendant contends that the agreement is not an enforceable contract because it was rescinded by letter dated October 2, 1987 addressed to the Klas from Van Wagoners' counsel of record. They also contend that Klas was not relying on the agreement at that time, since he had listed the property with a real estate broker on September 29, 1987. Thus, the agreement was mutually abandoned and rescinded by both parties.

2. THE AGREEMENT IS VOID DUE TO A MUTUAL MISTAKE OF THE PARTIES

The defendants contend that at the time the agreement was entered into, the parties mistakenly believed that there were current market value appraisals of the property showing it to have a market value of at least \$175,000.00. The offer made by the Van Wagoners was based upon the representation of Carol Klas that three current appraisals of the property showed values ranging from \$175,000.00 to \$190,000.00. Since there were no appraisals at those values, Klas must have been mistaken as to their existence. The mutual mistake soon became apparent. The actual current appraisals prepared after the date of the agreement and prior to the sale of the property in April, 1988 established that the actual appraised market value was substantially below the appraised value both parties mistakenly assumed.

The Van Wagoners and Mr. Klas were both operating under a mistake of fact regarding the existence of three current appraisals on the property which framed the issue of the market value of the property at the time of the agreement. Thus, the contract was rendered void. They contend that the contract was either voidable, or a basis for rescission of the contract.

3. THE AGREEMENT IS VOIDABLE BECAUSE OF THE MISREPRESENTATION REGARDING THE EXISTENCE OF CURRENT APPRAISALS.

The Van Wagoners contend that Carol Klas represented that three current appraisals existed valuing the property between \$175,000.00 and \$190,000.00. She also represented that Mr. Klas would not entertain an offer less than the appraised value. The Van Wagoners contend they relied upon these representations at the time they submitted their offer and signed the agreement. After Klas accepted the offer and the Van Wagoners requested the appraisals to support financing for the property, Klas continued to represent that appraisals existed supporting the value of the property. Klas knew that the Van Wagoners were relying on the representations as to the existence of the appraisals, and had based their offer price on those representations. Klas also knew or should have known that as of August 1987, the only existing appraisal on the property was dated April, 1986, and it showed a value substantially less than that purportedly contained in the three current appraisals. The Van Wagoners contend that the representation as to the existence of the three current appraisals and their bearing on the value of the property was the most basic element of the agreement, and was a material fact. The representation was made knowing that the Van Wagoners would rely on it in making an offer and, in fact, the Van Wagoners did rely on the representations by making an offer in an amount

consistent with the purported appraisals, but in fact substantially exceeding the actual market value of the property. Where a party enters into an agreement in reasonable reliance upon a material and fraudulent misrepresentation, the agreement thereby created is voidable.

4. KLAS HAS NOT SUSTAINED ANY DAMAGES.

The Van Wagoners contend that Klas has not sustained any damages. They contend that three appraisals valued the property between \$175,000.00 and \$190,000.00. That the Van Wagoners' offer was \$175,000.00 based on those appraisals. In fact, there was an appraisal of April 4, 1986 valuing the property at \$165,000.00 (Kent appraisals). An independent appraisal arranged by the Van Wagoners valued the property at \$137,000.00 (Cook appraisal). Mr. Klas subsequently arranged for his own appraisal, dated September 18, 1987, valuing the property at \$160,000.00 (Mahmood appraisal). The property was later sold in April, 1988 for \$160,000.00.

The Van Wagoners contend that the measure of damages should be determined by the market value of the property at the time of the breach, less the contract price to the buyer. Where the seller has failed to produce evidence that the property has diminished in value, he is not entitled to any damages from a defaulting buyer. Klas had subsequently listed the property with a broker on September 29, 1987 for \$174,500.00. The property

subsequently sold in April, 1988 for \$160,000.00, an amount the Van Wagoners contend is consistent with the market value as established by the highest one current appraisal. The market value of the property did not diminish after the date of the agreement, and Klas sustained no damage. They contend that under Klas' theory of the case, the difference between the agreement and the sales price substantially exceeds any damages which he may have sustained as a result of the failure of the agreement. Thus, an award of the damages as claimed by Klas would result in an arbitrary penalty or liquidated damages holding, which would be grossly disproportionate to any actual loss sustained by him.

They further contend that Klas is not entitled to interest, because the agreement does not provide for interest, and because he received full market value for the property. In addition, Klas is not entitled to moving expenses for the reason that he would have been responsible for those costs in any event on the sale of the property. Furthermore, Klas should not recover his attorney's fees for the reasons that they were not necessarily incurred, because he received full market value for the property. The costs and attorney's fees were incurred by Klas in an effort to exact a penalty.

5. THE VAN WAGONERS' COUNTERCLAIM FOR DAMAGES

The Van Wagoners claim that the same facts which give rise to the claim for misrepresentation serve as a basis for the Van

Wagoners' Counterclaim against Klas. The Counterclaim asserts three causes of action for fraud, mutual mistake of fact, and detrimental reliance.

The claim for detrimental reliance is based on the Van Wagoners' reasonable reliance on the misrepresentations regarding the appraised value of the property. Following the execution of the agreement, the Van Wagoners engaged the services of an architect, a contractor, and other workmen. Preliminary services were performed by the architect and others for the remodeling of the property. This was acknowledged by Carol Klas.

6. CONCLUSIONS OF THE DEFENDANTS.

The Van Wagoners conclude that the agreement for the sale of the property was rescinded by the Van Wagoners after they discovered that the appraisals did not exist as had been misrepresented. The facts disclosed reliance on the nonexistent appraisals was a mistake shared by both parties, and supports a rescission of the agreement. Furthermore, the misrepresentation as to the existence of the appraisal renders the agreement voidable.

They contend that even if it is determined that the agreement is not voidable or was not rescinded, Klas has not sustained any damages, because the property was sold for the amount of its appraised value. Klas has not demonstrated that

the property declined in value after the failure of the agreement, and has no claim for damages against the Van Wagoners.

IV. ANALYSIS

Based on the facts and the evidence as presented at trial, the Court is of the opinion that the agreement is not voidable and was not rescinded. It is the opinion of the Court that the testimony has supported plaintiff's contention that he made no representations regarding the existence of any written appraisals. The evidence shows that references were made by Carol Klas to appraisals, but those references never indicated that the appraisals were of a written nature. From the evidence it appears that informal oral appraisals were given to Mr. Klas by personal friends. Mr. Klas had personal acquaintances Larry Payne, Victor Ayers and Howard Badger provide personal appraisals on his property, although no written appraisals were ever made, oral representations regarding the appraised value based on the opinion of these individuals was given to Mr. Klas. It appears that Mr. Klas used these opinion appraisals as a basis for his current market value of the property. These appraisals range from \$175,000.00 to \$192,000.00. Thus it would appear that any representations regarding the appraisals does not appear to be a deliberate misrepresentation regarding written appraisals, but it does appear that the Van Wagoners misunderstood those

representations to be written appraisals. Thus, it does not appear that Mr. Klas mistook the appraisals and their values, but it may be that the Van Wagoners did misunderstand; therefore, there does not appear to be a mutual mistake of fact. If anything, there was a unilateral mistake of fact by the Van Wagoners.

Looking at plaintiff's exhibit 13, the Earnest Money Sales Agreement, the purchase price of \$175,000.00 does not appear to be based on misrepresentation of Mr. Klas. The document was prepared by the Van Wagoners. Under the purchase price in paragraph 2, there was a provision for outside financing which was deleted. This provision would have granted the buyer "subject to buyer qualifying for and lending institution granting said loan." Unfortunately, this very vital provision was stricken out, and approved by both the seller and the buyer.

Under paragraph 7, special considerations and contingencies, there is noted "none." Under paragraph 8, the closing of the sale was set for September 15, 1987. Under paragraph 11, the agreement to purchase and time limit for acceptance, the buyer offers to purchase the property on the above terms and conditions. The agreement was signed on August 11, 1987 by both Mark O. Van Wagoner and Kathryn Van Wagoner. On the acceptance of offer to purchase, it is marked that the seller hereby accepts the foregoing offer on the terms and conditions specified above,

and this was dated August 11, 1987, signed by John Klas. Under paragraph (1) of the earnest money sales agreement, it states:

Complete agreement, no oral agreements, this instrument constitutes the entire agreement between the parties, and supersedes and cancels any and all prior negotiations, representations, warranties, understandings, or agreements between the parties. There are no oral agreements which modify or effect this agreement. This agreement cannot be changed except by mutual agreement of the parties.

This integration clause appears to bring together all of the understandings and agreements between the parties, and there can be no variance, except by mutual agreement of the parties, and in case of any breach paragraph (n) provides for attorneys fees and costs.

Based on the above, it would appear to the Court that there is a binding agreement between the parties. That there was no fraud or misrepresentation, or mutual mistake. The only question that remains is the measure of damages.

In determining the measure of damages, the defendants' point regarding what loss, if any, did the plaintiff sustain is important. It appears that based on various types of appraisal, the property value can range from anywhere between \$137,000.00 to \$192,000.00. The midpoint appears to be in the \$160,000.00 range. It was testified that there is a margin of error between 10% to 15%. Thus, based on the various appraisals, the value of the property could range below \$137,500.00 and above \$192,000.00,

or anywhere in between. It would not appear that an initial listing price of between \$175,000.00 and \$190,000.00 would be unreasonable. Based on Larry A. Payne's testimony, he felt that the market was relatively stable at that period of time, and that the value of \$195,000.00 was not unreasonable. He feels that the market has softened since that time, which would be August 3, 1987.

Thus, in determining the measure of damages, we must look at what the parties bargained for, and what Mr. Klas may have lost as a result of the breach of that bargain, tempered by equity and fairness to both parties. The Van Wagoners bargained for a piece of property in which they were very interested, and which they felt \$175,000.00 was not an unreasonable price, and were willing to make an offer in that amount. They failed to secure appraisals that were written which would confirm the actual appraised value of the home. It does not appear that Mr. Klas intentionally misrepresented that there were written appraisals. In his own mind he felt that the opinions given by associates and friends of his were sufficient to establish a value for which he, himself, would like to sell the home, regardless of any other appraisals.

There does not appear to be clear and convincing evidence of any fraudulent misrepresentation. There does appear to be evidence that there was a clear misunderstanding of the use of

the term "appraisal" by Carol Klas and what the Van Wagoners thought were appraisals. It does not appear that Mr. Klas deliberately misrepresented that there were written appraisals. It was incumbent upon the Van Wagoners to request and secure those appraisals prior to the time the written earnest money agreement was entered into, particularly when that agreement and document was prepared and executed by the Van Wagoners.

It does appear that Mr. Klas attempted to mitigate the damages by placing the home on the market when it became apparent that the Van Wagoners did not intend to close on the designated date.

There is testimony that Carol Klas moved out of the home prior to the time of the closing date in anticipation of the sale of the property. If this offer and earnest money agreement were not entered into, the question is would she have remained on the premises, and also would she have been able to sell the property to another buyer at a comparable price, or if not, could some negotiations have been entered into, and the property be sold at a lesser price, or even a greater price? The Court is of the opinion that a fair and equitable award of damages to Mr. Klas would be \$7,500.00, plus interest and costs, and attorney's fees, which should not include the time spent for preparation of jury instructions.


V. CONCLUSION

The Court finds that the defendant has breached the earnest money sales agreement. That plaintiff is entitled to damages and interest, costs and attorney's fees. That the amount of damages should be \$7,500.00, and no award for real estate commission, because it is speculative that Carol Klas could have sold the property for that sum of money, and it is the opinion of the Court that Mr. Klas would have had to incur the real estate commission that was incurred if the property were sold at a future date. No award is made for moving costs or any other expenses.

Defendants' Counterclaim is hereby dismissed.

Plaintiff's counsel is to prepare Findings, Conclusions and Judgment pursuant to this Memorandum Decision.

Dated this 30th day of May, 1989.



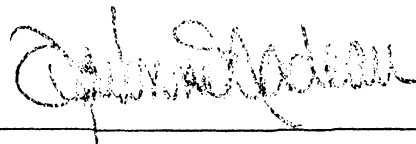
RAYMOND S. UNO
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this 30 day of May, 1989:

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

Craig W. Anderson
Attorney for Defendant
215 S. State, Suite 500
Salt Lake City, Utah 84111



NOV 30 1989

By Barbara Bohne
Deputy Clerk

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

JOHN H. KLAS	:	SUPPLEMENTAL MEMORANDUM
	:	DECISION
Plaintiff,	:	
	:	CIVIL NO. C-88-3192
vs.	:	
	:	
MARK O. VAN WAGONER and	:	
KATHRYN VAN WAGONER,	:	
	:	
Defendants.	:	

Subsequent to the Court's rendering of its Memorandum Decision on the 30th day of May, 1989, pursuant to the Court's direction, plaintiff's counsel prepared Findings of Fact and Conclusions of Law and Judgment.

Defendants' counsel filed Objections to Proposed Findings of Fact and Conclusions of Law and Motion to Amend Findings of Fact and Conclusions of Law and For a New Trial supported by the required Memorandum in Support of Defendants' Motion to Amend Findings of Fact and Conclusions of Law and For a New Trial. Plaintiff then filed his Response of Plaintiff to Objections to Proposed Findings of Fact, Conclusions of Law and Motion for New Trial.

ADDENDUM "C"

"C"

0000220

The defendants next filed Defendants' Reply to Plaintiffs' Response to the Defendants' Objections to Proposed Findings of Fact, Conclusions of Law and Motion For a New Trial. A Request to Submit Defendants' Objections to Proposed Findings of Fact, Conclusions of Law and Motion for New Trial for Decision was filed by defendants. Via telephone conference with the parties, the Court requested response from plaintiffs' counsel regarding unilateral mistake.

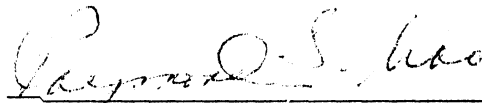
Finally, plaintiff filed Plaintiffs' Supplemental Response to Defendants' Objections to Proposed Findings and Conclusions. The Court having reviewed all of the pleadings and Memoranda, now modifies its Memorandum Decision as follows:

The Court finds there was a unilateral mistake by the defendants based on the facts as presented at trial. That said unilateral mistake was substantial and fundamental to warrant a rescission of the Earnest Money Sales Agreement. Defendants were unaware of the Kent appraisal and were under the belief that the lowest appraisal provided by Carol Klas was the lowest appraisal available. In fact, there was a Kent appraisal valuing the property at \$165,000, the existence of which, if known to the defendants, would have made a material difference in their offer to buy the subject property. In this finding,

the Court does not find any fraud or misrepresentation on the part of the plaintiff. The Findings of the Court remain, except as to the mutual mistake of fact and considerations relating to that finding.

Plaintiffs' counsel to prepare Findings and Judgment incorporating this modification and defendants' prayer for relief pursuant to this Supplemental Memorandum Decision. Each party to assume their own attorney fees and costs.

Dated this 30th day of November, 1989.



RAYMOND S. UNO
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy
of the foregoing Memorandum Decision, to the following,
this 4th day of ^{December}~~November~~, 1989:

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

Craig W. Anderson
Attorney for Defendants
215 S. State, Suite 500
Salt Lake City, Utah 84111

Barbara Bohne

MAR 13 1990

[Signature]
Deputy Clerk

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

JOHN H. KLAS,	:	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

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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, the Court now makes and enters the following:

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 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.

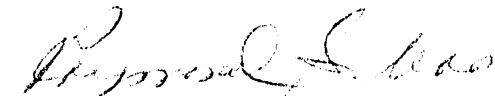
29. The market pertaining to the value of the property in question diminished or softened between the date of the contract of August, 1987, and the sale of the property by the plaintiff in April, 1988.

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,

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 13th day of March, 1990.



RAYMOND S. UNO
DISTRICT COURT JUDGE

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.

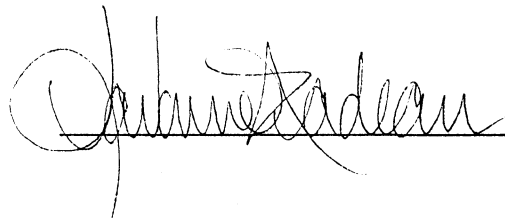
4. The mistake provides a basis for rescission of the Earnest Money Agreement.

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Findings of Fact and Conclusions of Law, to the following, this 13 day of March, 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

A handwritten signature in cursive script, appearing to read "John H. Anderson", written over a horizontal line.

MAR 13 1990

By Robert M. Allen
Deputy Clerk

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

JOHN H. KLAS,	:	JUDGMENT
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

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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 defendants' 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 being thus fully advised in the premises, and having entered its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREE, as follows:


1. A unilateral mistake of material fact exists on the part of the defendants which allows the defendants to rescind the Earnest Money Sales Agreement of August 1987.

2. The plaintiff did not commit any fraud or misrepresentation in any of the negotiations with the defendants herein and did not breach the Earnest Money Sales Agreement of August, 1987.

3. By virtue of the unilateral mistake on the part of the defendants, the damages sustained by plaintiff are not recoverable.

4. The Complaint of the plaintiff and the Counterclaim of the defendants are dismissed, no cause for action, and each of the parties are to bear their own costs and attorney's fees.

Dated this 13th day of March, 1990.



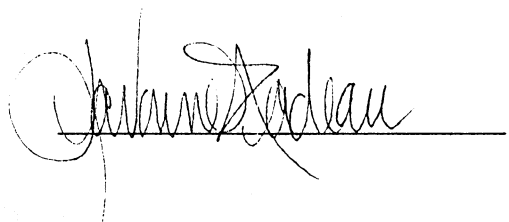
RAYMOND S. UNO
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Judgment, to the following, this 13 day of March, 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

A handwritten signature in cursive script, appearing to read "John H. Adair", is written over a horizontal line.

FILED DISTRICT COURT
Third Judicial District

MAY 31 1990

By *[Signature]* 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
Plaintiff,	:	CONCLUSIONS OF LAW
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

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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.



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 31 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

Barbara Bohne

By B. J. Bohac
Deputy Clerk

Decision 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 Defendants' 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; Plaintiff's counsel having thereafter prepared and submitted Amended Findings of Fact, Conclusions of Law, and Judgment and Defendants' counsel having also submitted proposed Findings of Fact and Conclusions of Law and Plaintiff's counsel having thereafter filed an Objection to Defendants' proposed Findings of Fact and Conclusions of Law, and Defendants' counsel having thereafter filed an Objection to Plaintiff's proposed Amended Findings of Fact and Conclusions of Law; the Court thereafter having prepared and

entered its own Findings of Fact, Conclusions of Law and Judgment on March 13, 1990, Plaintiff's counsel filed an Objection to the Courts Findings of Fact, Conclusions of Law, and Judgment, together with a Motion to Amend same, and Defendants' counsel having filed a response to Plaintiff's Objection to and Motion to Amend the Court's Findings of Fact, Conclusions of Law, and Judgment, and the Court having duly considered the position of the parties in their respective objections and responses thereto, prepared and entered on the 31st day of May, 1990, its own Amended Findings of Fact and Conclusions of Law, and having done so and thus being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

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 Defendants' Counterclaim is dismissed.

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

DATED this 3rd day of ^{July}~~June~~, 1990.

BY THE COURT:


DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing Amended Judgment was mailed, postage prepaid, to Lewis D. Stevens and Craig W. Anderson, Attorneys for Defendants, 215 South State, Suite 500, Salt Lake City, Utah 84111, this 14 day of June, 1990.


Secretary to Brant H. Wall

BRANT H. WALL, NO. 3364
WALL & WALL, a.p.c.3104)
Attorney for Plaintiff
Suite 800 Boston Building
Salt Lake City, Utah 84111
Telephone: (801) 521-8220

CLERK OF DISTRICT COURT
SALT LAKE COUNTY

NOV 29 1989

[Signature]
Clerk

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

JOHN H. KLAS,	:	
	:	
Plaintiff,	:	
	:	STIPULATION
vs.	:	
	:	
MARK O. and KATHRYN	:	
VAN WAGONER,	:	
	:	Civil No. C 88-3192
Defendants.	:	
	:	Honorable Raymond S. Uno


COME NOW the parties to the above entitled action, by and through their respective counsel of record, and stipulate and agree as follows:

Should the trial court's award of attorney's fees be sustained or otherwise upheld on appeal, that the sum of \$6,000 is a fair and reasonable amount to be awarded to the Plaintiff as attorney's fees necessarily incurred in the above entitled action through the trial of said cause, and that in addition thereto, the additional sum of \$250 should be awarded as attorney's fees for the preparation of Findings of Fact, Conclusions of Law, and Judgment in this matter, for a total of \$6,250 and that such sum may be entered in the Judgment of the Court.

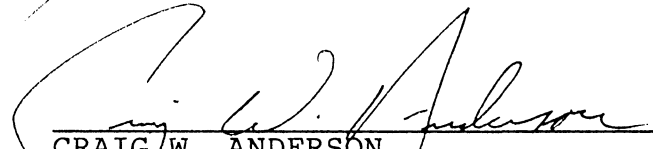
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DATED this 16 day of August, 1989.



BRANT H. WALL
Attorney for Plaintiff



CRAIG W. ANDERSON
Attorney for Defendant