

1958

# William F. Smith and Patsy Smith v. Carroll Realty Company and Nathaniel A. Smith : Brief of Appellants

Utah Supreme Court

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Richards and Bird; Attorneys for Defendants;

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# In the Supreme Court of the State of Utah

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AUG 21 1958

WILLIAM F. SMITH and PATSY  
SMITH, his wife,

*Plaintiffs and Respondents,*

vs.

CARROLL REALTY COMPANY, a  
Corporation, and  
NATHANIEL A. SMITH,

*Defendants and Appellants.*

Clark, Supreme Court, Utah

Case No.  
8892

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## BRIEF OF APPELLANTS

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## BRIEF OF APPELLANTS

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### STATEMENT OF THE CASE

This Appeal is from a Special Verdict of a Jury in the Third District Court, awarding to plaintiffs damages in the sum of \$4,850.00 in connection with an exchange of property of the plaintiffs in Salt Lake City, Utah, for property in Lava Hot Springs and assumption of mortgage on the Salt Lake City property. Defendants were real estate broker and salesman for the plaintiffs.

The Complaint alleges that plaintiffs are husband and wife and that defendant, Nathaniel A. Smith, was a licensed real estate salesman connected with the Carroll Realty Co., a real estate broker, at the time of the listing of the Salt Lake City property of plaintiffs with defendants; defendants, as agents of plaintiffs, negotiated an exchange of property with Mr. and Mrs. Nick Kladis of Lava Hot Springs, Idaho, the properties being valued at \$23,500.00 for the Salt Lake City property and \$15,500.00 for the Lava Hot Springs property; that plaintiffs directed the defendants to consult with qualified persons in Lava Hot Springs, as to the value of the Kladis property and that defendants falsely and fraudulently misrepresented the information received as to value and that plaintiffs entered into the exchange relying on the false information and suffered damage in the sum of \$8,000.00 (R. 1, 2).

An Amended Complaint added a Second Cause of Action, alleging that defendants "negligently failed to exercise due care in accordance with the standards of their profession to determine the value of the said Kladis property" and alleged damage as a result of such negligence at \$8,000.00 (R. 9).

After the trial of the case, the plaintiffs waived their claim on the basis of fraud and deleted the First Cause of Action and added as an additional Count "the right to receive, as damages, the commission paid in this case" (R. 272).

Defendants denied receipt of the commission made the subject matter of the Third Cause of Action (R. 273) and by Amended Answers took issue with the Second Cause of Action (R. 15, 16, 17, 18). The First Defense denied the alleged negligence (R. 15); the Second Defense pleaded

estoppel of plaintiffs to plead negligence or reliance on the defendants because the plaintiffs inspected the Kladis property and in signing the exchange agreement waived any cause for negligence against the defendants in making or failing to make determinations of value (R. 15); the Third Defense pleaded contributory negligence of the plaintiffs as a bar to their action, well knowing the extent of the inspection and inquiry made by the defendants of the Lava Hot Springs property (R. 16); the Fourth Defense alleged that plaintiffs "assumed the risk of disproportion in making the exchange of properties, well knowing that no appraisal of either the Idaho or the Utah properties was made" (R. 17); the Fifth Defense challenged the alleged oral modification requiring defendants to determine the value of the Kladis property as being void under the Statute of Frauds (R. 18); and the Sixth Defense alleged acceptance, approval, and ratification of the acts of defendants by entering into the written exchange agreement and closing the transaction on or about February 1, 1951 (R. 18).

At the first pretrial of the case the only issue presented was whether a preponderance of evidence would be sufficient to go to the jury (on the First Cause of Action) and to continue the pretrial (R. 7). At the second pretrial the plaintiff, William F. Smith, admitted that his Salt Lake property was listed with the Carroll Realty Company for sale or exchange (R. 8) and there were no other pretrials which modified the issues raised by the pleadings.

Following the trial of the case, defendants filed a Motion for Judgment Notwithstanding Verdict or for a New Trial (R. 61-64) and then a Supplement to Motion for New Trial

on the basis of newly discovered evidence, to which certain documents were attached (R. 68-73) and which will be discussed more fully as part of the Statement of Facts.

The Court, in writing, made its Partial Decision on said Motions (R. 74-77), holding open the question of new trial for newly discovered evidence (R. 76) and, finally, denied the said Motion For a New Trial (R. 79).

## STATEMENT OF FACTS

*William F. Smith*, one of the plaintiffs, testified that he bought the home at 3031 South 8th East, Salt Lake City, in June of 1950 and listed the home for sale with Nathaniel A. Smith at the price of \$23,000.00, having previously been acquainted with Nathaniel Smith (R. 99). It is a rambler-type, hip roof home on a large lot (R. 100). "It was advertised regularly. There was a pretty fair attempt made to sell it. \* \* \* There may have been some discussion on something other than less than 'the listed price,' but 'no offer was entertained ' ' (R. 101).

In the autumn of 1950, shown a photograph of the Lava Hot Springs property, "I said I certainly would not be interested in ever making a deal without seeing more than a photograph" and so William F. Smith and Nathaniel Smith went to Lava Hot Springs around the 9th of December, 1950 (R. 102). They were at the Kladis home in Lava Hot Springs for two or three hours and "Mr. Kladis directed us through the place" and some interest in making a transaction was exhibited (R. 103).



On the return trip from Lava Hot Springs, the two Smiths had "quite a discussion about it" and "at the time I felt that I did not want to make the deal." He was interested in the possibility of moving the property rapidly and Mr. Smith thought it would be an easy task (R. 104). He felt that \$18,000.00 was too high for the Kladis property and "that we could probably get \$15,000.00 out of it" (R. 105).

Coming back, plaintiff said he wanted to find out more about the property and that he needed money to pay the commission on this transaction as well as on an earlier transaction that Nathaniel Smith had handled. Nate Smith thought he could get Kladis to provide some cash on a mortgage and \$5,000.00 was discussed (R. 106, 107). Thereafter he kept in touch with Mr. Smith periodically and about January 25, 1951 "we met at the Fletcher-Lucas office, first in a group and then I had a discussion with Mr. Smith, privately. \* \* \* I asked him what he had found out \* \* \* about the property in Idaho. He said: 'Yes, from all I can determine, it looks like a good deal to me' " (R. 108). "He said he had contacted a reliable source (R. 108). I had previously asked him to find out from some reliable people in Lava Hot Springs what the value of the property was and he had said he would (R. 109). At the time of the trade the Eighth East home had a mortgage of \$7,500.00 on it and Mr. Kladis advanced money on the Lava Hot Springs property to enable him to pay the commission (R. 110). Kladis had moved into the Salt Lake City property after renting the Lava Hot Springs property from him for February, 1951 for \$75.00, and then it was vacant until April 20th while efforts were made to sell the property (R. 111). Carroll Realty Office gave some assist-

ance in renting the property and it was listed for sale with the Pocatello Realty (R. 112), but he was unable to sell the property (R. 113). The property was lost through foreclosure of the Kladis mortgage for \$3,000.00, the foreclosure being for some \$4,400.00 (R. 114).

After the noon recess, plaintiff Smith was asked again about the conversations between the Smiths on the return from Lava Hot Springs and plaintiff testified: "I said, 'Nate, I am very much concerned about this transaction, and I don't know anything about property values in Lava, so I want to rely upon you to do that for me' "; that is, to make some investigations concerning the property and "he said, 'Bill, I feel that I will help you just as much as I can on this case, and I will do that for you.' " (R. 115); and there was a further conversation about this in the Fletcher-Lucas Office when Nate Smith said he had made investigations and "it looked to me like it would be a reasonable price to allow for that property at Lava," and plaintiff told him: "Nate, you know I rely on you—on your judgment—and, if you say it is O.K., it is O.K. by me." And in entering into the transaction he relied on defendant Smith's statement about these investigations (R. 116). In the latter part of February, 1954, the plaintiff made an investigation at Lava Hot Springs to determine what had happened and called on a banker, the manager of a Lumber Company, and a Mr. Teeple, who operates a cleaning establishment and was the L.D.S. Bishop (R. 117). Plaintiffs completed the commission payments to the defendant Smith for the exchange transaction and also the commission previously owed.

The exchange agreement was made Exhibit 1, and consummated by warranty deeds and mortgage, marked Exhibit 2.

Exhibit 1 is as follows:

### "EXCHANGE AGREEMENT"

"The Exchange Agreement Witnesseth: That the undersigned, Nick Kladis, of the County of Bannock, State of Idaho, hereinafter called the first party, hereby offers to exchange the following described property, situated in Lava Hot Springs, County of Bannock, State of Idaho, to-wit:

180 x 110 feet of ground, together with all improvements thereon, located on Brooks Street, valued at \$15,500.00, free and clear of all encumbrance,

for property owned by W. F. Smith, of the County of Salt Lake, State of Utah, hereinafter called the second party, situated in Salt Lake City, County of Salt Lake, State of Utah, to-wit:

3031 South 8th East, consisting of 100 x 284 feet, together with 1 share of Mill Creek Irrigation water, valued at \$23,000.00, subject to a mortgage of \$7,500.00 which the buyer of 3031 South 8th East agrees to assume and pay.

#### Terms and Conditions of Exchange

Each party hereto shall supply an Abstract of title for their respective properties described herein, within 30 days from the date this offer is accepted by the second party, made by a bonded abstractor showing the titles to said properties to be merchantable and free from all taxes, assessments, liens or encumbrances, except as herein mentioned and the hereinafter named agent is authorized to procure and deliver said abstracts of title. Each party shall pay for the abstracting of title to the property to be conveyed by him and the legal opinion rendered thereon.

Each party hereto shall execute and deliver, within 30 days from the date this offer is accepted, all instru-

ments necessary to transfer the titles to said properties and complete and consummate this exchange.

In the event errors appear in the titles to either or any of said properties, then this agreement shall be extended for a reasonable time and that the same may be corrected. In the event any error cannot be corrected, this agreement shall be null and void, except as to the payment of commissions, unless the title to the property affected is accepted subject thereto.

All taxes, insurance, rents and other expenses affecting said properties shall be pro-rated from the date this exchange is completed and consummated. Any act required to be done may be extended not longer than thirty days by the hereinafter named agent.

Fletcher-Lucas Investment Co., of Salt Lake City, Utah, is hereby authorized to act as agent for all parties hereto and may accept commission therefrom, and should this offer be accepted by the second party, the undersigned first party agrees to pay said agent the usual and regular \$775.00 commission for services rendered to become due on the execution of this agreement by all parties hereto.

It is also presumed and understood that all principals to this agreement have investigated the respective properties, and the agent or broker is hereby released from all responsibility regarding valuation of same.

I have read (or have had read to me) this entire agreement and understand the terms and conditions contained therein.

Dated December 18, 1950.

s/ Nick Kladis

Witness:

s/ H. E. Baird

### Acceptance

I accept the foregoing offer upon the terms and conditions stated, and the undersigned, hereinbefore called the second party agrees to pay Fletcher-Lucas Inv. Co., agent, of Salt Lake City, Utah, Eleven Hundred Fifty Dollars, (\$1,150.00) commission for services rendered to become due on the execution of this agreement by all parties hereto.

I have read (or have had read to me) this entire agreement and understand the terms and conditions contained therein. \* \* \* \* \* to include stoves and heating equipment, subject to getting a \$3,000.00 loan on Lava Hot Springs place.

Dated January 5, 1951

s/ W. F. Smith

Witness:

s/ N. A. Smith."

Exhibit 2 consisted of a warranty deed from Nick Kladis and Yerda Kladis of Lava Hot Springs, to the plaintiffs, dated February 1, 1951 and conveying the Lava Hot Springs property. It also includes the warranty deed from the plaintiffs to Nick and Yerda Kladis, covering the Salt Lake City property, subject to a mortgage for the balance of \$7,500.00. It also included a mortgage for \$3,000.00 on the Lava Hot Springs property to Nick and Yerda Kladis.

On cross-examination, the plaintiff Smith testified that he was a life insurance agent and was 39 years old (R. 119) and acquired the Eighth East home on a trade in a family transaction, his father having an interest in the Eighth East home (R. 120). The Eighth East home was acquired on a trade for a grocery store valued at \$14,500.00, the Eighth East home

was valued at \$22,000.00 and a mortgage of \$7,500.00 on it was assumed. No appraisal was made of either of those properties in the exchange, which was handled by Nathaniel A. Smith and Carroll Realty (R. 122). Before making the trade, he inspected the Eighth East property once and viewed it twice from the outside and spent "not very long" in looking it over. Title was taken in the names of him and his wife (R. 123). In August, 1950, he borrowed \$7,650.00 on the home to refinance it, which refinancing produced no cash but put the mortgage in his name and his wife's instead of Mecham's, who had previously owned it (R. 125). The note was payable on February, 1951 in the full amount of \$7,650.00, and by moving into the Eighth East home he could have obtained some long term financing (R. 126). At that time he was living in a home at 5755 Hanson Circle, which had been purchased for \$8,750.00 with a balance owing of \$7,500.00 (R. 127).

Exhibit 3 was a copy of the listing agreement on the Eighth East home showing a mortgage balance of \$6,765.00 on June 30th, which the plaintiff then recalled as the correct balance, which was increased in August, 1950, to \$7,650.00 upon application for a loan for a larger amount (R. 129). The amount on the listing agreement, Exhibit 3, is \$23,000.00 asking price, which amount was suggested by the defendant Smith (R. 130).

The Eighth East home was surrounded mostly by vacant property, with a mink ranch across the street, although it is now built up into new homes. There were some people shown through the property, but no offers to buy (R. 131, 132).

Exhibit 4, dated December 11, 1950 was received after the trip to Lava Hot Springs, which was made on a Friday, the 8th day of December (R. 133).

Exhibit 4 is on the same form as Exhibit 1 and offers to trade the Lava Hot Springs property by Nick Kladis for \$18,000.00 on the Eighth East property at \$23,000.00 and assume a balance of \$5,000.00, signed by Nick Kladis only, with no acceptance. Exhibit 4 was not satisfactory because the mortgage to be assumed was \$5,000.00 and it actually was \$7,150.00 on the Eighth East home. He first saw Exhibit 1, dated December 18, 1950 "when I signed it, which was January 5." It involves a difference in the mortgage assumed of \$7,500.00 and also a \$3,000.00 loan on the Lava Hot Springs property. The terms on Exhibit 1 were satisfactory, provided the investigation of the Lava Hot Springs property was satisfactory (R. 135, 136). Defendant Smith tried to get Kladis to loan \$5,000.00 instead of \$3,000.00 and signed it at \$3,000.00 because the \$5,000.00 could not be obtained. It was January 5, 1951 when the plaintiff Smith told defendant Smith he was relying upon his investigation of the Lava Hot Springs property in making the agreement (R. 138). The plaintiff asked: "Nate, did you ask—did you inquire of anyone in Lava as I requested—namely, the L.D.S. Bishop, as one? He said: 'Yes, I have, and, from what I could learn from him, he said he felt that might be a fair price on that property, ' and plaintiff said: "Nate, I rely entirely on you" (R. 139). From January 5th to February 1st the transaction just waited for closing, there being some bad weather (R. 139).

On January 5th, when we met at the Fletcher-Lucas

Office, plaintiff was told he was free to back out of the transaction, but this was not said after January 5th, after he signed the agreement (R. 140).

William F. Smith handled the transaction. His wife did not confer with any of the people (R. 141).

On the trip to Lava Hot Springs, plaintiff Smith had looked through the inside and the outside of the Lava property and he found it "in very probable condition at that time" (R. 142). He discussed with defendant Smith the possibility of using it for a hotel or motel. Defendant Smith told the plaintiff he was not familiar with properties in Lava Hot Springs (R. 143).

Plaintiff went to Lava Hot Springs with Mr. Carroll in June, 1951 and in August, 1951.

"Q. Do you remember whether, on the day you went to Lava Hot Springs with Mr. Smith, before you parted, after you had returned to Salt Lake, you signed an offer—a counter proposal of some kind?

A. No, I don't remember that.

Q. Do you recall whether there were any counter offers made, other than the two I had shown you?

A. No.

Q. Did you originate any?

A. No.

Q. These two were both originated by Mr. Kladis, weren't they?

A. Yes.



Q. You don't think you made any counter proposal to Mr. Kladis? You don't recall any?

A. No." (R. 148).

While in Lava Hot Springs, Mr. and Mrs. Kladis had represented the Lava property very highly and placed the value of \$18,000.00 on it (R. 150). They compared it with one or two other homes there which had recently been sold and mentioned the prices (R. 150). Plaintiff did not tell them he did not think their house was worth \$18,000.00 (R. 151). In the foreclosure action brought by the Kladis estate following the death of Mr. Kladis, plaintiff filed a counter-claim, alleging that Mr. and Mrs. Kladis had defrauded him and that they had represented that they had the opinion of a banker and the L.D.S. Bishop as to values (R. 151, 154).

*Fred F. Jensen* testified for the plaintiff that he was a retired real estate broker, having retired in March, 1954 (R. 162). There is a common practice or procedure upon which a realtor determines market value of property which includes consideration of the community, the building, depreciation, the neighborhood, comparable transactions (R. 162-163). His opinion is that inquiring of a stranger by long distance telephone, the stranger being in the cleaning and dyeing business is not the exercise of reasonable skill and diligence in determining market value, where the buyer has himself inspected the property and the transaction being considered is an exchange (R. 163-164).

On cross-examination Mr. Jensen testified that he had been a member of the Salt Lake Real Estate Board only prior to 1940 (R. 166) and that the procedure he described on

direct examination was for making an appraisal of property. He had been an appraiser for Home Owners Loan Corporation and followed this procedure (R. 167). When properties are being exchanged, it is frequent that both properties are inflated and if the person making the exchange wants the value determined, it should be done in the manner he testified (R. 169). Sometimes exchanges are left without determination of values knowing that both properties are inflated and both parties feel they have made a good bargain (R. 170). Witness has known William F. Smith ever since he was a kid and knows his parents (R. 170). On redirect Mr. Jensen testified that he had not appraised the Eighth East home, but that the builder told him it cost \$15,000.00 (R. 172).

*Robert C. Banning* testified for the plaintiffs that he is a real estate broker from Twin Falls, Idaho (R. 89). He visited the property of William F. Smith in Lava Hot Springs some time in 1951 and made an inspection for the purpose of determining market value (R. 91) and that the market value would be between \$7,000.00 and \$8,000.00 (R. 91). William F. Smith listed the property for sale, but he was not able to sell it (R. 95). The property was listed by William F. Smith at \$16,000.00 (R. 96).

## EVIDENCE FOR THE DEFENDANTS

*Mrs. Yerda N. Kladis* testified that she is the widow of Mr. Kladis, who died February 28, 1951. She resides at 3031 South 8th East, having moved there from Lava Hot Springs on or about the 15th of March, 1951. As administratrix of his estate she foreclosed the mortgage of the Lava Hot Springs

property against Mr. and Mrs. Smith. The condition of the Lava Hot Springs property was good when it was traded to the Smiths, with recent paint inside and out, grass and shrubbery. The Eighth East house was in not too good condition when she moved into that. There were holes in the walls, it needed painting, it needed to have the floors revarnished, the roof graphite and oiled and the plumbing cleaned out (R. 181 to 183). She put a fence around the property, had awnings put on and planted some more lawn, painting inside and outside (R. 184).

She recalls a visit of Mr. Nate Smith and Mr. William Smith to Lava Hot Springs, believes it was in January, 1951 (R. 184). At that time her husband had not seen the Eighth East property. She saw it before the trade was made, but after the Smiths had come to Lava (R. 185).

On cross-examination Mrs. Kladis testified that the Lava Hot Springs property is still in the estate and is not being rented. It was rented for about six months at \$45.00 a month (R. 187).

*Hyrum E. Baird* testified that he has been a real estate salesman for 30 to 35 years and was employed by Fletcher-Lucas Investment Company. He has been with them nearly thirty years (R. 188). He obtained a listing on the Kladis property in Lava Hot Springs, which is Exhibit 5, dated December 11, 1950 and had known Mr. Kladis for a little while before that. He had been looking for a place for Mr. Kladis in Salt Lake City and took Mr. Kladis to look at the Eighth East property (R. 189). Exhibit 4 was also signed on December 11th and it was either on that date or a few days before that

he and Mr. Kladis had looked at the Eighth East property. They had discussed listing his Lava Hot Springs property before that time but had never listed it until the matter of the Eighth East possible trade came up (R. 190).

He does not know where the original of Exhibit 4 is. There were other offers made involving the exchange. Mr. Smith made a counter offer and came into the office to make a change from the \$5,000.00 he was asking to \$3,000.00 (R. 190). As he recalls it, both Mr. Smith and Mr. Kladis came into his office to make the correction on the exchange agreement, as Mr. Kladis would not loan \$5,000.00 on the property and make the deal and that is when they changed to \$3,000.00 (R. 191). At the time of closing Mr. Kladis had Mr. Diamant, an attorney, present to represent him. Everyone seemed happy at that time.

There is no rule in the real estate profession in Salt Lake City that it is the agent's duty to determine correct values in an exchange. Getting an appraisal is a matter for the parties (R. 192).

On cross-examination Mr. Baird testified that he represented the Kladises in the transaction (R. 192).

*Nathaniel A. Smith* testified that he lives in Salt Lake City and has been in the real estate business for twelve years, first as salesman and then as broker, and was licensed with Mr. Wayne Carroll for a little over a year in 1950 and 1951 (R. 193).

No values were discussed by him and William Smith in connection with the exchange of 3031 South Eighth East for the

grocery store (R. 194). William Smith listed the property with Carroll Realty and Mr. Carroll gave him credit for the listing, as he had known Mr. Smith. He had no conversation with Mr. Smith before the listing was taken (R. 195).

The property was shown but no offers were received until the Kladis exchange came in. Mr. Smith came into the office quite frequently and they discussed the price and the reasons the property had not sold (R. 197-198).

The first offer from Mr. Kladis was Exhibit 4 on the basis of \$18,000.00 on the Kladis property and \$23,000.00 on the Smith property, which was the premise Smith went to Lava on (R. 198). They went in all of the rooms and inspected the house generally, inside and outside, including the garages and both were favorably impressed with the property. While there, there was no conversation about values (R. 199). They drove around the town and he advised Mr. Smith he was not familiar with the Lava property and went to the Mineral Springs, two or three short blocks away (R. 200).

On the return trip there was a lot of conversation about the two properties and the exchange (R. 212).

I said to Mr. Smith: "Now, Mr. Kladis has made an offer here, he has offered his place for \$18,000.00. We cannot take that. You do not have \$18,000.00 equity in your place, supposing it is being turned in on this deal at \$23,000.00, but assuming that he will allow you \$23,000.00 for your place on Eighth East, you would have over and above the mortgage approximately \$15,500.00. Now, would you be willing to accept his place in Lava and \$15,500.00 and let him assume

your mortgage on that Eighth East property” He said he would, but he needed a little cash to pay off some obligations and had promised his dad some money if he sold the Eighth East place. He asked if I thought he could get a mortgage on the Lava place of \$5,000.00 and I suggested that Mr. Kladis might give him a mortgage for that amount and let him pay it back by renting the place or developing it if he wanted to (R. 214). Smith said: “By golly, if I could do that, if I could borrow some money on that Lava place that would be a good deal and if we could turn that in and take it at \$15,500.00 on Eighth East, for \$23,000.00, that would be a good deal for me” (R. 214-215). Nate Smith said that seemed like a good deal and he should take his wife and go look the place over. Three or four times on the way down he said he believed he would take that, if they could make that deal. And so, upon return to Salt Lake, they went right to Carroll’s office and wrote up a counter offer at \$15,500.00 instead of \$18,000.00 and the counter proposal was signed, but he doesn’t have a copy of it, it was delivered to Fletcher-Lucas’ office to present back to Mr. Kladis. Mr. Kladis would not loan the \$5,000.00 but came back with another proposal at \$3,000.00. Smith’s counter-proposal was at \$23,000.00 for Eighth East, \$15,500. for Lava, and Kladis to loan Smith \$5,000.00 on a first mortgage, which was signed on the same form as Exhibit 4 and delivered to Fletcher-Lucas. Exhibit 1 looks like the one Kladis submitted back after the counter-proposal (R. 216). It might have been two or three days or a week between Smith’s counter-proposal and the new proposal signed by Kladis. It was signed by William Smith January 5th in the Carroll Realty Office. The agreement was

read over carefully and Smith knew exactly what was in it. The \$5,000.00 offer was never returned and the one that came back had \$3,000.00 (R. 218). Between the time Exhibit 1 was offered on January 5th, he talked to Mr. Smith and told him Kladis did not want to stall around and if Mr. Smith did not want the deal, he was going to look for another place as he wanted to get his family down here. During that period of time he talked to Mr. Kladis as to whether Exhibit 1 was to remain open and subject to acceptance by William Smith. One conversation took place in the Fletcher-Lucas office at which he and Mr. Smith, Mr. Baird and Mr. Kladis were present. Mr. Kladis wanted to know whether the deal was going to be accepted or not, if it was not, he wanted to be relieved of it and go ahead and purchase another property. Smith asked if Nick Kladis would raise the loan and Nick said: "No, that is the best I will do." So Smith said: "Alright, I will take it" and it was signed. The two Smiths' went over to Carroll's office to talk it over and sign it, and it was then that they went over the contents of the terms and conditions of the exchange "and I told Mr. Smith that this was a decision that he would have to make. He had seen the property, and he knew what the exchange called for, and considering all things, it looked like a fair exchange" (R. 223-224). This was when they read the contract together and they also read the contract together the first time he signed one on the evening after they returned from Idaho (R. 224). The agreement was read to Smith, a paragraph at a time. He read this paragraph: "It is also presumed and understood that all principals to this agreement have investigated the respective properties, and the agent or broker is hereby released from all responsibility

regarding valuation of the same." And I said: "Now, you understand that you have inspected the property, and Mr. Kladis has inspected your property, and you are buying this property on your own judgment?" And he answered: "I understand that" (R. 229). And they read together the acceptance which recites: "I accept the foregoing offer upon the terms and conditions stated, and the undersigned, hereinbefore called the second party \* \* \* . I have read, or have had read to me, this entire agreemnt and understand the terms and conditions contained therein." And he said he understood it and thereupon signed it and I witnessed it (R. 230-231). Nothing was said at that time about information received from Mr. Teeples. The conversation about that was the second or third day after the trip to Lava. The day after the trip he called Mr. Teeples, the L.D.S. Bishop, and got his report and reported that to Mr. Smith one evening when he dropped in the office (R. 231).

On their way back from Lava Hot Springs it was mutually agreed that he should call the Bishop and see what he thought about values (R. 231-232). After calling Mr. Teeples he reported to Mr. Smith "that Mr. Teeples said he was not a real estate man, but he was familiar with property in Lava, he was in business there, and he thought that that property was a little high at \$15,500.00, but that on a trade for Salt Lake property that would be another thing, as it might be a fair exchange" (R. 23). Mr. Carroll was present at that conversation and it was never discussed again. He was still holding out to see if he could get the \$5,000.00 mortgage (R. 232). At the closing of the transaction on or about February 1st,



both parties expressed satisfaction with the deal, the documents were explained, and the transaction was closed (R. 233-234).

He is of the opinion the store in Murray traded by Smith and others for the Eighth East property was worth about \$6,000.00 (R. 234-235).

While the Eighth East property had been listed, he talked to Mr. Smith about the price and told him: "If we get the price down where it ought to sell, it will sell," and he suggested that we advertise it for a trade. So Mr. Carroll advertised the property for trade and it was at that time that Baird from Fletcher-Lucas called (R. 235-236).

On cross-examination Mr. Nathaniel A. Smith testified:

The Fletcher-Lucas Office got the commission of 5% of \$23,000.00 on the Eighth East house, which he approved (R. 238), having received a portion of the listing commission (R. 238).

As they returned from Lava Hot Springs they discussed Smith's equity in the home of \$15,500.00 and they wrote up an offer which they don't have, since it was never returned after Smith's counter-offer had been submitted. "He finally said it was a good deal and he wanted to take it" (R. 239). The next day, he called Mr. Teeples. This was after he had signed the counter-offer (R. 239). After the call to Teeples was reported to Mr. Smith, he said: "I have got a cushion in that Eighth East place. I can come out on it alright" (R. 241).

*C. Francis Solomon* testified for the defendant that he is a fee appraiser and a real estate broker. He appraised the property at 3031 South 8th East, after a thorough examination

and in accordance with standard appraisal technique (R. 202-203). The value of the property as of February 1, 1950 was \$17,200.00 (R. 204). The value as of February 1, 1951 was \$19,200.00 (R. 227).

He is a past president of the Utah State Real Estate Association, acquainted with practices and customs of real estate men in the area, with much experience in exchanges of property. There is no custom in this area which requires a real estate salesman working on an exchange of properties, particularly where one is in an area with which he is not familiar, to reduce the properties to dollar values and report that to the customer (R. 207-208).

*Wayne Carroll* testified that he was unemployed due to a heart attack and was formerly a real estate broker under the name of Carroll Realty Company, a corporation (R. 249). At the time he took the listing from the plaintiff on Exhibit 5, he told Smith they could not get \$23,000.00 for it and Smith said: "We can always try" (R. 252). The closing papers between the Smiths and Kladises were prepared under his direction and he had several conversations with William Smith (R. 252). He was present when Nate Smith reported to William Smith the conversation with Mr. Teeple that Teeple was not a real estate man and thought \$15,500.00 was a little high, but William Smith said he expected something like that and did not seem surprised (R. 253). There was also discussion about the fact that if it was a trade that would affect the price (R. 254). The call to Mr. Teeple had taken place in the Carroll Realty Office and he had heard Nate Smith's end of it (R. 254).

At the time the transaction was consummated, he gave the deed on the Eighth East place to Bill Smith's wife and Bill took it from her and said he did not want her looking the papers over, just wanted her to sign them (R. 257). In the summer of 1951 he went to Lava Hot Springs with William F. Smith and examined the property formerly owned by Kladis and formed the opinion that its value was \$10,000.00 or \$11,000.00, which he discussed with Mr. Smith while they were there and that it was useless to try to get \$15,000.00 or \$16,000.00 out of it (R. 261). Smith said he had a cushion there, but it was not enough (R. 262).

He was formerly a member of the Salt Lake Multiple Listing Bureau and knows of no practice among realtors working out exchanges under which estimates or opinions of value are given to customers where exchanges are involved (R. 263).

On cross-examination Mr. Carroll said he was not sure his appraised value of the Lava Hot Springs was given to Mr. Smith but he did tell him the price of \$15,500.00 or \$16,000.00 could not be realized from it (R. 265).

The deposition of *Morris W. Teeple*s was published (R. 86), in which Morris W. Teeple's testified that he lives at Lava Hot Springs and is in the dry-cleaning business (p. 2). He owns no real estate in Lava Hot Springs and has not engaged in real estate transactions there. He is a Bishop of the L.D.S. Church and knows generally of the property formerly owned by Nick Kladis there. He had been in the Kladis home twice prior to December, 1950 and remembers receiving a telephone call about this property from Nathaniel Smith in December, 1950, or January, 1951 (p. 2-4). Mr. Smith

asked him if he was Bishop of the Ward and asked about the property and what he figured it would be worth. Smith quoted a price of \$15,500.00 which he told him sounded high because the building was poorly built and had no heating plant "and I thought that the price was a little high," but after Smith mentioned that it was to be a trade to be made on Utah property, he told him that would be different because maybe the property in Salt Lake would be high enough to offset that (p. 4-6).

The defendants then rested.

On rebuttal, William F. Smith testified that before this exchange was worked out Nathaniel Smith did suggest a reduction of the price of the Eighth East home (R. 266).

On rebuttal, Nathaniel A. Smith testified only as to the Murray Store, formerly owned by Smith (R. 268).

The Jury was instructed and after deliberating for some time inquired whether in Group 3 plaintiff was singular or plural (R. 279). The Jury came back again with a question as to Group 4, Proposition A and B and stated their understanding that if Proposition A under Group4 is marked, the verdict is returned to the Court and if they marked Proposition B, then they consider the final page. The Court confirmed this (R. 280).

The Jury later returned with the verdict with an X as to Group 1, Proposition A; Group 2, Proposition A; Group 3, Proposition A; Group 4, Proposition A; and nothing filled in on Group 5 (R. 280).

The Court stated that the effect of the verdict is for the

defendant, no cause of action, "and that the scope of the employment of the plaintiff of the defendant Smith was to determine and report the reasonable value of the Kladis property, that the defendant's Smith breach of that employment agreement was a proximate cause of the plaintiff's entry into the exchange transaction, and that the entry was made with full knowledge of all of the parties that the defendant Smith had." All the Jury said this was its verdict, except Mr. Ownby and he said he understood that it was a stand-off. The Court said that was so, the parties would be left as they came there. Mr. Ownby stated that was different than they imagined, as they thought their verdict entitled the plaintiff to something. They thought the verdict would make a judgment for the plaintiff. The other jurors indicated that they felt the same way (R. 282-283). Mr. Ownby said that was really the reason that they had come back the time before (R. 283).

The jury then retired to further deliberate and returned with the change in their cross on Group 4, placing it on Proposition B, and with Group 5 filled in for \$3,700.00 and \$1,150.00, with seven signatures on the verdict (R. 284).

In support of the Motion for New Trial on the basis of newly discovered evidence (R. 63) there was the Affidavit of H. E. Baird stating that he had looked for all documents in the files of Fletcher-Lucas before the trial and that following the trial the defendant Smith came and requested a further search, whereupon additional papers were found (R. 67), which additional papers and documents included a letter to Nick Kladis, written by Mr. Baird dated December 8, 1950, enclosing a photograph of 3031 South 8th East, and inviting

Mr. Kladis to come to Salt Lake and consider an exchange (R. 69); a letter from Mr. Baird to Mr. Kladis dated December 16th, reporting that Mr. Smith had agreed to take the Lava Hot Springs property and inviting him to come to Salt Lake City to complete arrangements (R. 70); copy of an exchange agreement dated December 11, 1950 which was a copy of Exhibit 4 (R. 71); a document similar to Exhibit 4 and containing a counter-proposal signed by W. F. Smith dated December 11, 1950 (R. 72); and an exchange agreement dated December 18, 1950 and signed by Mr. and Mrs. Kladis and both plaintiffs and witnessed by H. E. Baird (R. 73).

## ARGUMENT

This was a confused case. Although two pretrials were held, there is nothing in the pretrial orders which indicate what the issues were to be or how the case was to be tried. The Second Cause of Action is ambiguous as to whether it is *ex contractu* or *ex delicto*. The Third Cause of Action was added orally after the trial was concluded and was plainly an action in breach of contract for recovery of commission paid. The Amended Answers raise issues in both contract and tort and some of these defenses were added after the case had been tried and submitted to the jury.

The line of demarcation between actions sounding in contract and in tort is a dim and indistinct one. 1 Am. Jur. on Actions, Sections 50, 51, 55. In this case the Second Cause of Action appears plainly to sound in tort, and appellants suggest that it was an action in tort for negligent performance of a contract. The contract is essential to the cause of action,

but the nature of the action is tortious performance of the contract.

The Third Cause of Action is mentioned as a simple contract action for return of consideration due to breach of contract, although it was never written by the plaintiffs and all that exists is the oral statement made by counsel to the Court after the Jury had left. "Comes now the plaintiff and moves to amend the Complaint, setting forth as an additional County the right to receive, as damages, the commission paid in this case" (R. 272).

The Special Verdict submitted to the Jury by the Court, although confusing, assumes a theory of negligent performance of a contract, as much as anything else, although Group 2 sounds purely in contract and uses the phrase "breached his employment agreement." But Group 3 refers to proximate cause of the damage and seems closer to the tort theory of damage than contract.

As will appear in the development of appellant's arguments, the errors relied upon are more plain if the theory of the action is in contract; and we shall, therefore, make the unfavorable assumption that the theory of the action sounds in tort because this Court could draw that conclusion.

#### POINTS RELIED ON

1. The Written Agreement did not require that defendants determine values of exchange properties.
2. If there was an oral modification of the Written Agreement, it was void under the Statute of Frauds.

3. Negligent performance of a duty based upon a void contract is not actionable.

4. The Court erred in refusing an instruction on contributory negligence or assumption of risk.

5. The signed Exchange Agreement waived the Second Cause of Action.

6. Dismissal of the Count as to Fraud was an abandonment of plaintiffs' only tenable position.

7. There was a failure of proof as to the plaintiff, Patsy Smith.

8. The Court erred in directing a verdict for the amount of the real estate commission on the Eighth East home.

9. The Court abused its discretion in denying the Motion for New Trial based upon newly discovered evidence.

#### POINT 1.

THE WRITTEN AGREEMENT DID NOT REQUIRE THAT DEFENDANTS DETERMINE VALUES OF EXCHANGE PROPERTIES.

This is important because Nate Smith believed his obligation was as contained in the Written Agreement (R. 115, 231-232), and because it is the necessary starting point for the conversation between the two Smiths on the way back from Lava Hot Springs. It must be remembered that the listing agreement, Exhibit 5, was taken by Wayne Carroll from the plaintiff, William F. Smith, and that there were no other parties to that agreement.



The Court instructed the jury that employment of a real estate broker can be merely to find a person willing to exchange, "or he may employ a real estate broker to determine the value of property being considered \* \* \* " (R. 38). Although this Instruction is true, it surely was an invitation to the jury to find that the defendant Smith was obligated to determine values, although the written agreement did not require that.

The Court then instructed the Jury that the agreement of employment was contained "in the listing agreement and any modifications thereof, entered into subsequently by the parties either orally or in writing," (R.39), which is a further invitation to the Jury to find that the defendants were obligated beyond the listing agreement. And then Instruction No. 9 was: "If a real estate broker is employed to determine the value of a piece of property, he is bound to exercise reasonable care, skill, and diligence" (R. 40). This again is true but it is misleading and is a strong invitation to the Jury to find for the plaintiff. Appellants admit that a broker is bound to exercise reasonable care, skill, and diligence in his employment. But the Instruction emphasizes care only in connection with determination of value, the requirement of which was a controverted issue. Then, Instruction No. 10 refers to the relationship of salesman and client "as one of confidence and trust" and requiring "the utmost good faith at all times, and to make full and complete disclosure of any and all information he had which would materially affect the interest of his client" (R. 41). In view of the conflicting evidence which was before the Jury, it would be hard for the Jury not to find for the plaintiff if it paid any attention to these four In-

structions. And Instruction No. 10 doesn't refer to value, but to any information.

What then was the written agreement?

Exhibit 5 is the standard listing agreement such as was before this Court in *Reich vs. Christopulous*, 123 U. 137, 256 P. 2d, 238 at 239. In that case and under that listing agreement this Court held that the real estate agent "had a duty to represent their interest in good faith, to discharge it with reasonable skill and diligence, and to disclose to them all *peritnent* facts which would *materially* affect their interest." (Emphasis supplied.)

The nature of the relationship is, therefore, established by this Court, but that is not to read into the listing agreement any obligation to determine values of properties. In *Frye v. Levanger*, 76 Idaho 252, 281 P. 2d 134, the Idaho Court observed that requiring reasonable skill and care does not impose upon a real estate agent duties or responsibilities beyond those expressed or implied by his contract of employment. And in *Coe v. Ware*, 40 Minnesota 404, 42 N.W. 205, the Minnesota Supreme Court held that a requirement that real estate agents determine facts as to value will not be inferred in the absence of evidence that it was included in the employment. In this record there is silence as to any requirement of determination of value in connection with the signing of Exhibit 5 by the plaintiff, William F. Smith.

The plaintiffs attempted to prove that determination of value is made as a matter of custom by real estate brokers in Utah. Fred F. Jensen, a retired real estate man, responded

to leading questions that there is a common practice by which realtors determine market values of property (R. 162). This witness then proceeded to explain how he appraises property and testified that the procedure he had described about examining properties amounted to an appraisal (R. 166). He did not testify that the listing agreement required or contemplated determination of value, but only *how* such determinations are made. He was a member of the Multiple Listing Bureau of Salt Lake City before the year 1940 (R. 166), which was too remote to be effective as to present practices. The witnesses, H. E. Baird (R. 192), Wayne Carroll (R. 263), and Francis Solomon, former president of the Utah Association of Real Estate Boards (R. 207-208), all testified that in making exchanges there was no custom or practice or requirement arising from a listing agreement that properties be appraised.

Indeed, the evidence in this case was devoted in large part to the testimony between the two Smiths as they drove back from Lava Hot Springs in an effort to determine whether there was a special agreement applicable in this case and, if so, what was that agreement. It seems plain from the instructions, the contract, the evidence, and the positions of the parties that there is no showing here that Exhibit 5 required determination of values before an exchange could be made.

## POINT 2.

IF THERE WAS AN ORAL MODIFICATION OF THE WRITTEN AGREEMENT, IT WAS VOID UNDER THE STATUTE OF FRAUDS.

Group 1 of the Special Verdict included this Proposition A: "The scope of the employment agreement required the defendant Smith to determine and report the reasonable value of the Kladis property." The Jury found this Proposition (R. 51).

An oral modification of a written agreement within the Statute of Frauds must also be written to be valid. The trial court, in effect, found this to be the law and said:

"The Court tentatively is of the opinion that such is the fact, but is of the opinion that the agent was bound by the written agreement of employment to disclose to his principal what he had learned concerning the value of the property and that a breach in that respect was a breach of the written agreement, and on this ground the motions are denied."

This statement goes off on a tangent. The defendant Smith either was or was not required, as a matter of agreement, to obtain and report certain information. If there was such an agreement, it was void. Appellants were entitled to an instruction to that effect. Failure to give such an instruction was prejudicial for the very reason outlined by the Court (R. 75).

After building up the scope of the employment to include determination of value by Instructions numbered 7, 8, 9, and 10, and after including the scope of the employment agreement as modified by the oral agreement, in the Special Verdict, Group 1, Group 2, Group 3, and Group 4, it is a strange thing for the Court to rule, in passing on the Motion for New Trial and for Judgment Notwithstanding Verdict, that the oral agreement was meaningless, since the written agreement

required disclosure of the information, whether it was within the agreement or not.

If the oral agreement was void because of the Statute of Frauds, there should have been no reference to a possible oral agreement in any of the Instructions or in any part of the Special Verdict, and the Jury should have been instructed on the theory that there was a written employment agreement which required that important information obtained in the course of the transaction be reported to the employer. That would have made meaningless all of the testimony and all of the argument about whether there was an oral agreement requiring the defendant to do something, for breach of which damages were to be imposed on the defendant.

This question is the subject of a series of annotations appearing at 17 ALR 10, 29 ALR 1095, 80 ALR 539, and 118 ALR 1511. In the 80 ALR and 118 ALR annotations Utah cases are cited as supporting the doctrine that a contract required by the Statute of Frauds to be in writing cannot be modified by subsequent oral agreement. This appears to be the general rule. The Utah cases cited are: Combined Metals v. Bastian, 71 Utah 535, 267 P. 1020, 1031-1032, and Bamberger Company v. Certified Productions, 88 Utah 194, 48 P. 2d 489, 491. Appellants admit that if fraud were alleged and supported, the Statute of Frauds could not be pleaded as an instrument to defraud a person who had relied on the oral modification in rendering performance. But that is not the situation here. In fact, the agreement relied on by the plaintiffs as requiring determination of value, was not so much a modification, as an additional agreement imposed upon

the real estate broker. There was no new or additional consideration, and the party who rendered the performance or the purported performance of the modified agreement was the defendant Smith and not the plaintiff. We have, therefore, none of the elements of fraud or estoppel to modify the general rule of these cases.

In the Combined Metals case this Court holds that where there is no new or independent consideration and there are additional duties imposed, the Statute of Frauds requires a modifying agreement to be in writing.

In the Bamberger case the Court recognized the general rule "that a contract required by the Statute of Frauds to be in writing cannot be modified by subsequent oral agreements." The Court goes on to observe that this principle cannot be employed to perpetrate an injustice and to offer an asylum to a person who has rendered performance in reliance upon the modification. But, again, that is not the case here. The Jury apparently found that there was a modification of the written agreement, but there was obviously no new or additional consideration. The plaintiffs rendered no performance of this modified agreement, the denial of which would work a fraud upon him. It is a case where the one who received the performance is attempting to allege inadequacy of the performance and refuses to be bound by the Statute of Frauds in showing the measure of the performance required. If defendant should be accused of leading plaintiffs into a trap and using the Statute of Frauds as a cloak, the plaintiffs should allege and prove the fraud by clear and satisfactory evidence.

Different portions of the Statute of Frauds demand differ-

ent treatment. Contracts not to be performed in a year may be taken out of the Statute by part performance, else it would be inequitable. But the requirement that employment of a broker connected with purchase of real estate must be in writing must not be taken out of the Statute of Frauds by part performance, or the provision of the Statute would be meaningless. *Baugh v. Darley*, 112 Utah 1, 184 P. 2d 335. The purpose of the Statute of Frauds is to establish definitely and in writing the terms of the employment. To permit departure from this requirement, except to avoid fraud, would defeat the purpose of this Statute. See *Knight v. Chamberlain*, 6 Utah 2d 394, at 399, 315 P. 2d 273; also Williston on Contracts, Revised Edition, Section 593.

### POINT 3.

#### NEGLIGENT PERFORMANCE OF DUTY BASED UPON A VOID CONTRACT IS NOT ACTIONABLE.

The Court assumed that negligence in performing a contract need not be concerned with the Statute of Frauds and so the Instructions on negligence were made without reference to whether the agreement as to making inquiry or determining value was in writing.

In *A. A. Easton v. Milton S. Wycoff*, 4 Utah 2d 386, 391-392, 295 P. 2d 332, this Court seems to have passed on that question:

“If an action sounding in tort were allowed in every instance where the contract was unenforceable because not in writing, and barred by the Statute of Frauds, the Statute would be rendered meaningless. As stated

in 37 CJS, Frauds, Statute of, Section 224: ' \* \* \* The operation of the Statute is not confined to cases where an action is brought directly on the contract. Whatever the form of the action may be, if the proof of promise or contract within the Statute is essential to maintain it, there can be no recovery unless the Statute is satisfied \* \* \* . Even an action sounding in tort may be barred by the Statute, where an essential element of the cause of action is an oral contract within the Statute; but where the oral contract or representation is a mere circumstance or incident of a fraud, it may be shown in an action in tort for damages, as the Statute has no application to such a case.' "

#### POINT 4.

#### THE COURT ERRED IN REFUSING AN INSTRUCTION ON CONTRIBUTORY NEGLIGENCE OR ASSUMPTION OF RISK.

Appellants raised the defense of contributory negligence and assumption of risk in the Amended Answer (R. 13-14), which was filed six weeks before the trial. Plaintiffs also requested instruction to the Jury on the issue of contributory negligence (R. 25, 26, 27, 28, 29, 30).

The Court treated the evidence as though defendant Smith had learned from Morris Teeple that the Lava Hot Springs property was grossly overvalued for the purpose of the exchange. Had such been the fact, the failure to disclose it would have been a fraud upon the plaintiff and the cause of action for fraud could safely have been left in the case. Plaintiffs dismissed the First Cause of Action because it was obvious that Nate Smith had not dealt fraudulently and that



if there had been any shortcoming at all, it would have to be classed as negligence or an oversight.

We know that Nate Smith learned from Morris Teeples from four sources: Mr. Teeples' deposition, Nate Smith's recital of the conversation, Wayne Carroll's recital of one end of the telephone conversation and the relating of the conversation by Nate Smith to William Smith, and William Smith's recollection of what Nate Smith told him.

Morris W. Teeples testified in his deposition that he was a dry cleaner and as to the property owned by Nick Kladis he knew nothing but the location and had been in it twice before the telephone call, for a few minutes each time (R. 86 page 3). Teeples did not know what the property was worth "and then when he quoted the price, \$15,500.00, I told him it sounded high to me and when its inclusion in a trade was mentioned I told him that would be different because maybe the property here would be high enough to offset that" (R. 86, p. 5). Nate Smith testified that he told the plaintiff "that Mr. Teeples said he was not a real estate man, but he was familiar with property in Lava, he was in business there, and he thought that that property was a little high at \$15,500.00, but that on a trade for Salt Lake property that would be another thing, as it might be a fair exchange" (R. 233). The discrepancies between the Teeples statement and the Smith recital of it seems to be to make Teeples familiar with property in Lava and insertion of the word "little" in referring to the price of \$15,500.00 as being high.

Wayne Carroll testified that Nate Smith told William Smith that Teeples was not a real estate man and thought

\$15,500.00 was a little high, but William Smith said he expected something like that and did not seem surprised (R. 253).

William Smith testified that Nate Smith told him: "I asked him what he had found out about the property in Idaho and he said: 'Yes, from all I can determine, it looks like a good deal to me.' He said he had contacted a reliable source" (R. 108). Again, Nate is described as saying: "The L.D.S. Bishop had been contacted and Smith 'felt that that might be a fair price on that property and was satisfied that that would be a fair price.' "

There is no evidence that defendant Smith ever told William Smith that Teeple was a real estate man or knew values or gave him any misstatement as to what Teeple had told him. Nate Smith gave his opinion to the plaintiff, included in which was his conversation with Teeple. If that was misrepresentation, it was fraudulent. If Nate Smith was negligent in making that statement, then William Smith was negligent in relying on it, since there was no indication that Teeple's opinion was probative or that Nate Smith's opinion was corroborated by substantial facts. Plaintiff had inspected the property and had made a counter-proposal before the Teeple conversation was related to him, according to Nate Smith's testimony (R. 224, 239) and according to the documents included in the Motion For New Trial (R. 72). Plaintiff was negligent if he accepted Smith's recommendation as an opinion that the Lava Hot Springs property was worth \$15,500.00 cash.

In *Cole v. Parker*, 5 Utah 2d 263, 300 P. 2d 623, this

Court quoted from *Lewis v. White*, 2 Utah 2d 101, 269 P. 2d 865, as follows:

“No matter how naive or inexperienced the defendants were, they could not close their eyes and accept unquestioningly any representations made to them. It was their duty to make such investigation and inquiry as reasonable care under the circumstances would dictate; whether this required them to make further inquiry concerning the income, and if so, the extent thereof was for the jury to determine.”

The law is plain that contributory negligence or contributory fault of a principal can defeat his action against an agent or broker, and the facts in this case were such that defendants were entitled to have the Jury know this principle of law.

Section 415 of the Restatement of Agency thus states the principle:

“The liability of the agent to the principal may be avoided, terminated, or reduced, by a breach of contract by the principal, his contributory fault, or his failure to mitigate damages.”

The illustrations given are where a principal knows a fire insurance policy has not been cancelled, as requested, or knows that the agent has not paid money over, as required. The same principle is announced in Section 162 of 3 CJS on Agency. The discussion in 23 Am. Jur., page 948, 960-961, makes the rule plain. This is in the title on fraud and indicates that contributory negligence is plainly available as a defense in actions involving representation of facts, except where there is fraud and here there is a division of authority because of a conflict in interest to punish those who use fraudulent means

to accomplish their ends and to require of a person seeking assistance that he will have used due care; but unless fraud is charged, the defense of contributory negligence accords with the policy of the law. See also *Salem vs. DeWitt-Jenkins Realty Co.* (Ohio App.), 113 N.E. 2d 918, where the plaintiff gave the agent a faulty description and then failed to check on whether the agent had verified the description; *Moore v. Coler*, 99 N.Y.S. 846, 114 App. Div. 301, where plaintiff relied on representations concerning bonds about which he had means of knowledge; *Benton v. Roberts* (Ga. App.), 134 S.E. 846, where the principal could have avoided loss through ordinary care in determining whether loans of money were secured; *Fort Valley Coca Cola Co. vs. Lumbermen's Mutual Insurance Co.*, 69 Ga. App. 120, 24 S.E. 2d 846, 851, where it was held the plaintiff should have examined his policy of insurance and not relied on the agent's statement as to what it contained; *Lawrason v. Richard*, 135 So. 29, 172 La. 696; and *Clay v. Dunford*, 121 Utah 177, 239 P. 2d 1075, both involving automobile accidents; *Schneider vs. Suhrman* (No. 8716 .... Utah ...., .... P. 2d .... , where supplier should have known that retailer might not cook pork products.

*Johnson v. Allen*, 108 Utah 148, 158 P. 2d 134 at 137, contains a discussion similar to that from 23 Am. Jur. (supra). This Court there observed that contributory negligence will seldom be allowed as a plea to a wilfull wrong, indicating that against the plea of negligence in making statements of fact, contributory negligence such as failure to read a document will defeat recovery unless fraud is involved. And although it is not a square holding involving a plea of contributory negligence, this Court applied the principle of con-

tributory fault in *Cole v. Parker*, 5 Utah 2d 263, 267, 367, 300 P. 2d 623, where the court considered cancellation of the contract for misrepresentation or misapprehension as to fact and in refusing cancellation to the defendant observed:

“He spent no time obtaining independent advice as to the value of the farm and, even though he was told by the seller that there was a water loss between the source of the creek and the ranch, he did not investigate how much loss occurred or the cost of preventing the loss. Under these circumstances, the trial court made the finding that there was no fraud involved \* \* \* .”

*Clay v. Dunford*, *supra*, explains the difference between contributory negligence and the assumption of risk existing where there is a known danger to which one voluntarily subjects himself.

In a brief annotation at 62 ALR 1357, 1360, entitled “Skill and Care Required of Real Estate Broker,” the rule is also stated that in the absence of special circumstances “the principal has been held to be barred from recovering for the agent’s negligence by contributory negligence.”

The issue of contributory negligence was plainly raised, instructions were requested, and it surely is negligent to rely on any off-hand opinion of an L.D.S. Bishop as to whether a proposed exchange should be made, where there is no evidence that the L.D.S. Bishop knows anything about the one property, and cannot possibly know anything about the other property. Under the instructions given, the jury was permitted to penalize the defendant as to all of plaintiff’s theoretical damage, if it could find that any statement made by the L.D.S.

Bishop was not accurately and completely related to the plaintiffs, regardless of whether Nate Smith believed the opinion of the L.D.S. Bishop to be significant, and regardless of the right of the plaintiffs to let such a person and such a conversation be a substitute for determination of value. And all of this is in the atmosphere of exchange of properties far removed from each other, where the real question is not so much the value of a particular piece of property, but comparative values, coupled with the fact that the owner of the Lava property owned his outright and was willing to assume a mortgage on the other property, and was also willing to loan cash to the plaintiffs, which happened to be a much needed item.

All of this was known to the parties. Plaintiff saw the property and knew no appraisal was made. He did not inquire as to the competency of the L.D.S. Bishop or the source of Nate Smith's inquiry. He preferred to go ahead and assumed the risk of proceeding blindly. He was guilty of contributory negligence and this proposition should have been given to the Jury. (See *Cole v. Parker*, supra, at p. 268).

#### POINT 5.

#### THE SIGNED EXCHANGE AGREEMENT WAIVED THE SECOND CAUSE OF ACTION.

The particular clause of the contract (Exhibit 1), relied upon by the Appellant, reads:

"It is also presumed and understood that all principals to this agreement have investigated the respective properties, and the agent or broker is hereby released from all responsibility regarding valuation of same."

The trial judge ruled in Point II of his Partial Decision on Motions that the defendants' failure to disclose an opinion as to the value of the property presented an action on which a claim could not be waived by contract (R. 75). The failure to disclose an opinion sounds like fraud, but of course there were no instructions on fraud and the First Cause of Action was dismissed. The Court, therefore, must have had in mind that a waiver of negligence or a cause of action for negligence is contrary to public policy. This is the subject of an annotation at 175 ALR 8 and where applied to future negligence, the rule is admitted to have some force. This Court has recognized such a rule in *Allen v. Southern Pacific Co.*, 117 Utah 171, 213 P. 2d 667; *Jankele v. Texas Co.*, 88 Utah 325, 54 P. 2d 425; *Brooks v. Western Union Telegraph Co.*, 26 Utah 147, 72 P. 499. But we are not here concerned either with fraud or with anticipated negligence. The question here is whether an existing cause of action, based upon negligence or breach of a contract, can be waived by the execution of a contract containing the waiver. Such a contract will be upheld in the absence of fraud. *Landes & Co. v. Fallows*, 81 Utah 432, 19 P. 2d 389; *Consolidated Wagon & Machine Co. vs. Kay*, 81 Utah 595, 21 P. 2d 836, *B. T. Moran, Inc. vs. First Security Corporation*, 82 Utah 316, 24 P. 2d 384 (see 10 ALR 1432). Those cases involved sales of personal property wherein clauses in the contracts stated that the contracts were complete, and warranties or oral representations and actions thereon were waived by the parties. This seems to be the principle involved in the execution of Exhibit 1. The document containing the waiver was signed by the plaintiffs on January 5th, after any claim of reporting the Teeple's con-

versation. Whether the signed agreement filed with the Motion for New Trial (R. 73) was signed after a report of the Teeple's conversation, would have to be determined in a new trial.

This principle, in the absence of fraud, is well established. See 12 Am. Jur., Contracts, Section 182.

#### POINT 6.

DISMISSAL OF THE COUNT AS TO FRAUD WAS AN ABANDONMENT OF PLAINTIFF'S ONLY TEN-  
ABLE POSITION.

The action was tried on the theory that the plaintiffs were attempting to prove fraud, both as a means of getting around the Statute of Frauds and as a means of setting aside the exchange agreement with its waiver of conduct of the broker. Defendants also had pleaded laches in bringing the action. This matter had been discussed at pretrial and the instructions of the Jury with fraud in issue would have had to involve a different burden of proof from that for negligence or breach of contract. It was plain from the Court's instructions to the Jury that fraud was not an element in the plaintiffs' case.

Defendants have taken the position by their pleadings and at the pretrial and at the trial that unless fraud can be proved, plaintiffs cannot make out a cause of action. If this Court comes to the same conclusions, upon consideration of the foregoing points and arguments, the plaintiffs will not have lost their case, but will have opportunity to retry the case on the theory of fraud and perhaps upon the theory of negligence with appropriate provision for contributory negligence,



if the Statute of Frauds can be satisfied and if plaintiffs did not waive their cause of action against the broker.

#### POINT 7.

THERE WAS A FAILURE OF PROOF AS TO THE PLAINTIFF, PATSY SMITH.

The plaintiff Patsy Smith did not testify and entered not at all into the preliminary transactions, except to be present when the transaction was consummated (R. 141 and 257) and to sign Exhibit 1. She was, however, mentioned as one of the owners of the property on Eighth East (R. 123, 124, 125). The Jury noted that in Group 3, Proposition A, the word "plaintiff" was singular and in Proposition B it was plural (R. 53). The Jury was instructed that in both cases the word was plural.

It is plain that Patsy Smith was not a party to the listing agreement (R. 250) and was not a party to the conversation on the return trip from Lava Hot Springs. She simply went along with her husband, who stated that she was not supposed to have an opinion on the sufficiency of the transaction, but was only supposed to sign (R. 257). Did this establish a cause of action in favor of Patsy Smith?

Patsy Smith did not sign Exhibit 1, which was the exchange agreement, and at the time it was signed the two Smith men went to another room where they discussed, among other things, the two properties (R. 149). Wayne Carroll took the listing agreement from W. F. Smith, with no mention of Mrs. Smith (R. 250, 251, 264). William F. Smith stated that he listed the property (R. 128, R. 99, 100).

The failure to establish any evidence in favor of Patsy Smith was one of the bases for the Motion for Judgment Notwithstanding Verdict (R. 61). In denying the Motion on this ground, the Court stated that it was of the opinion that Patsy Smith joined in the listing agreement, and so the Motion was denied (R. 76-77). The error of the Court in making this assumptoin suggests that if the Court had had the facts and the transcripts available and in mind, the Motion would have been granted on this ground.

Mrs. Patsy Smith was a co-owner of the Eighth East property. Title was taken in the name of husband and wife (R. 123, 124, 125) and it can only be presumed that the interests of husband and wife were equal, 48 CJS 930, 932.

The general rule is that a tort committed upon one person furnishes no cause of action in favor of another. 39 Am. Jur., Parties, Section 10; 38 Am. Jur., Title Negligence, Section 21 at page 662; Central Georgia Power Co. v. Pope, 141 Ga. 186, 80 S.E. 642, LRA 1916 (d), 358. This general rule is recognized in cases where third persons claim damage from negligent work of independent contractors. Berg v. Otis Elevator Co., 64 Utah 518, 231 P. 832; Sutton v. Otis Elevator Co., 68 Utah 85, 249 P. 437. The only basis for liability in that type of case is where the contractor knew that there was imminent danger and also knew that persons such as plaintiff would use the dangerous instrumentality. In the instant case there was no evidence whatever that Mrs. Patsy Smith even knew of the conversation between the two Smiths on the way back from Lava Hot Springs or that she even knew that the property had been listed with Carroll Realty Company. There was no

testimony of any kind that she relied on any statements made by Nate Smith or that her husband ever advised her that Nate Smith had informed him that the difference between the properties at fair value was represented by the mortgage on the Eighth East property.

Had there been a claim of fraudulent representation by Nate Smith, the law will permit a damaged third party to recover for the fraudulent representation. 8 Am. Jur., Title Brokers, Section 135, page 1062.

#### POINT 8.

THE COURT ERRED IN DIRECTING A VERDICT FOR THE AMOUNT OF THE REAL ESTATE COMMISSION ON THE EIGHTH EAST HOME.

The Court withdrew this question from the Jury and, in effect, included it as additional damages to the plaintiff, in the event the verdict should be in favor of the plaintiffs on other grounds (R. 43 and 55). The Court considered this to be a real estate commission paid to the defendants and characterized it as a refund (R. 55). The evidence was specific that this \$1,150.00 was paid to Fletcher-Lucas Company and not Carroll Realty Company (R. 238). This Third Cause of Action was inserted after the trial upon oral motion (R. 272), and appellants promptly denied that they had received the commission (R. 273). And appellants took exception to the giving of Group No. 5 for the reason that the \$1,150.00 had not been received by the Appellants (R. 277), and took exception to the giving of Instruction No. 12 for the same reason (R. 278).

If the exchange had been found proper and involving no breach of contract, the plaintiffs would have been out of pocket the \$1,150.00. The Court instructed the Jury that the damage of the plaintiffs, if they were allowed to recover anything, was the difference between the value of the two houses, reduced by the assumed \$7,500.00 mortgage. This was all of the damages of the plaintiffs and would have made plaintiffs whole. Adding the \$1,150.00 amounted to additional damage or double damage and made the plaintiffs better off by reason of the breach. The loss on overestimating the valuation was found at \$3,700.00 (R. 55 and 59). Instruction No. 12 advised the Jury that there were two items of damages. The first was for \$1,150.00, and the second one was to be derived by determining market value of the equity of plaintiff in the Eighth East home and subtracting the fair market value of the Kladis property from that. The remainder, if any, would be the amount of damages plaintiffs suffered. This latter measure of damages was all plaintiffs were entitled to.

“A person injured by the commission of a tort is entitled to actual pecuniary compensation for the injury sustained, and except where the circumstances are such as to warrant the allowance of exemplary damages, he is limited to such compensation. He is not to be placed in a better position than he would have been in had the wrong not been done.” 15 Am. Jur. on Damages, 470.

In *Briec v. Bosso* (Mo. App.), 158 S.W. 2d 463, the Court held that where an exchange of real estate is based upon misrepresentation of market values and damages are awarded to the deceived person, the measure of damages is the difference between the market value and the value as represented. That

is the measure of damages contained in Instruction No. 12, without the commission of \$1,150.00 which would place the plaintiffs in a better position than if there had been no representation.

In *Isaacs v. Frank Meline Co.* (Cal. App. hearing denied by Supreme Court) 37 P. 2d 1045, 1047-1048, the California Court seems to have passed upon this precise question. In that case there had been an exchange of land for a worthless note and trust deed, the value of which had been misrepresented. The value of the land was found to be \$13,500.00 and judgment was given for that amount and also for the amount of commission paid in the sum of \$1,119.00, for \$90.00 escrow fee, and \$10.00 for title search. The Court upheld the contention of the appellant that these were not proper items of damages, which should have been measured by the value of what she gave for the worthless note and trust deed.

“The value of her equity in the property she traded was, according to her own testimony, \$13,500.00. Had she received this amount with the interest on the Spears’ note, she would have had no cause of action for the commission and other items she paid. Having been made whole, as it were, on her deal by the judgment for the value of her equity, and interest thereon, this would seem to be the full amount of the detriment suffered by her, because the Spears’ note and trust deed was not what Roberts represented it to be.”

#### POINT 9.

THE COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR NEW TRIAL BASED UPON NEWLY DISCOVERED EVIDENCE.

In the trial of the case there were three real controversies:

1. Was there an agreement between the Smiths that Nate Smith would obtain information from Lava Hot Springs, as to the value of property?

2. In reporting this information to the plaintiff Smith, was there a negligent representation, a fraudulent representation, or a reasonable representation? And,

3. What was the value of the respective properties?

The plaintiff contended that he relied implicitly on Nate Smith to obtain some information about the value of the property and report it to him and that he made no counter offer until he had received the report from Nate Smith (R. 108, 115, 116, and 150). Nate Smith, on the other hand, testified that on the evening of their return from Lava Hot Springs a counter proposal was signed by the plaintiff and submitted to Kladis through Fletcher-Lucas Investment Co. (R. 215-216) and that when the conversation about Teeple's was later reported to him, William Smith stated that he was not expecting anything different and had a cushion in his Eighth East property, anyway (R. 262 and 241).

The Court specifically instructed the Jury that the matter of reliance was a necessary element in establishing the plaintiffs' case (R. 53-55). In addition to this, the jury was confronted with the problem of deciding whom it should believe, the plaintiff who said he relied on Nate Smith and made no counter offer, or the defendant Smith, who said the counter offer was made, but that he could not find the copy of it, and

that plaintiff did not rely on any statement from him or from Bishop Teeples. The Jury obviously believed the plaintiff and believed that Nate Smith and Wayne Carroll and H. E. Baird (R. 190) were not being truthful.

The plaintiff testified that the trip to Lava Hot Springs was on December 8th or 9th and Nate Smith believed it was after December 11th (R. 102, 133, and 216). The plaintiff believed the trip to Lava was made before there was a written offer from Kladis (R. 133) and Nate Smith testified that the trip to Lava was made after the date of the first offer, Exhibits 1 and 4, and that an offer from Kladis was discussed with William Smith and made the basis of a counter offer that very night (R. 215-216, 239).

Exhibit 3 was the listing of the Eighth East property dated June 30, 1950, by W. F. Smith.

Exhibit 5 was the listing of the Lava property by Nick Kladis dated December 11, 1950.

Exhibit 4 was an exchange agreement signed by Nick Kladis, dated December 11, 1950 offering to exchange the properties at \$23,000.00 and \$18,000.00 with a balance of \$5,500.00.

Exhibit 1 was an exchange agreement offer signed by Nick Kladis, dated December 18, 1950, and offering the exchange at \$23,000.00 for Eighth East and \$15,500.00 for Lava Hot Springs, subject to a mortgage for the difference. On the acceptance, the date of December 18, 1950, was crossed out and January 5, 1951 written in with a signature of W. F. Smith witnessed by N. A. Smith and made subject to getting a

\$3,000.00 loan on Lava Hot Springs place. This is not signed by Mrs. Kladis or by Mrs. Smith and there is no acceptance of the counter proposal by Nick Kladis.

Exhibit 2 consisted of the warranty deed from Kladis to Smith, the warranty deed from Smith to Kladis, and the mortgage from Smith to Kladis, all dated February 1, 1951 and representing the consummation of the transaction.

After the trial, according to the affidavits of Nathaniel Smith and H. E. Baird, (R. 65 and 67), Nate Smith insisted on a further search for documents which he believed had been written concerning this transaction, which resulted in the finding of an old file, away from the other file, in which additional documents were found and copies presented to the Court.

These documents consist of: copy of letter of H. E. Baird to Mr. Kladis, dated December 8, 1950 and enclosing a photograph of the Eighth East property, listed at \$23,000.00, with a proposal to consider trading at \$18,000.00 or a difference of \$5,000.00, and inviting Kladis to come to Salt Lake (R. 69);

Offer from Kladis on exchange agreement form dated December 11, 1950 and being identical with Exhibit 4;

Additional copy of same exchange agreement offer dated December 11, 1950, upon which the price of the Lava property has been erased and reduced to \$15,500.00, the amount of the mortgage has been increased from \$5,000.00 to \$7,500.00, and W. F. Smith has signed the acceptance with the notation, "accepted, subject to terms on reverse side" and on the reverse



side has been written, "Mr. Kladis to assume present mortgage on 3031 South Eighth East, Salt Lake City, and made Mr. Smith a loan of \$10,000.00, secured by a first mortgage on the property in Hot Springs";

An exchange agreement on the same form as Exhibit 1 and appearing to be a carbon copy of Exhibit 1 as it was originally written, dated December 18, 1950 and signed by Mr. and Mrs. Kladis and by Mr. and Mrs. Smith, and containing no provision as to a \$3,000.00 loan on the Lava Hot Springs place.

In the testimony at the trial there was no reference by any of the parties to a proposed \$10,000.00 loan, as contained on the counter offer of Smith dated December 11, 1950, and there was no testimony by any party or person as to a signed exchange agreement without an advance of cash by the Kladisses, as appears from the document presented on the Motion for New Trial.

This newly discovered evidence would be bound to compel far different testimony from the plaintiff upon a new trial, as to dates and the making of a counter offer and the reliance upon representations of value and would also indicate that the parties were bound by an agreement dated December 18, 1950, and that, thereafter, further negotiations took place between the parties and that Kladis finally waived his position under the agreement (R. 223-224) and acceded to the need of the plaintiff for a loan of money, as shown on Exhibit 1 and as finally consummated as shown on Exhibit 2. This tends to show awareness by the plaintiff that the Lava Hot Springs property was overvalued somewhat and that is why he insisted on the

loan of \$3,000.00 which Kladis finally made, and that the plaintiff relied on no one but himself in entering into the exchange agreement.

Furthermore, the letter from H. E. Baird dated December 8, 1950 confirms the time table as testified by Nate Smith, since on December 8 or 9 Kladis had not yet been advised of the Smith property and it was of necessity December 15 or 16 that the two Smiths went to Lava Hot Springs. This means that the exchange agreement dated December 11, 1950 was in their possession, as testified to by Nate Smith, that the counter offer was made immediately upon their return, and that on December 18 a new agreement was written up and signed by all of the parties, the 18th being the Monday following the trip to Lava Hot Springs on Friday, the 15th. It, therefore, appears that the plaintiff's counter proposal was acted on almost immediately and that all of the parties gathered on Monday and signed up the agreement, making plain the anxiety of the plaintiffs to get the exchange completed and their satisfaction with the comparative values.

As far as defendant Smith is concerned, the new documents compel a change of his testimony as to the amount of loan discussed on the way back from Lava Hot Springs to make it \$10,000.00 instead of \$5,000.00 and would compel him to recall the agreement signed by all the parties dated December 18, 1950 and would further support his testimony that the plaintiff did not rely upon any recital of value transmitted from Bishop Teeples. The evidence corroborates defendant almost completely and would compel radical changes in plaintiff's testimony.

The trial court apparently found that the newly discovered evidence satisfied the requirements of Rule 59 as to diligence and materiality and which he summarized by saying the new evidence indicated "that the plaintiffs had decided to make the exchange without waiting for the opinion of any Idaho resident," which he speculated might still have permitted the case to go to the Jury on the theory that the exchange would have been abandoned or breached had the opinion of Bishop Teeple been transmitted and the Court was of the opinion "that the plaintiffs would be very much weaker, and is of the opinion that the plaintiffs testified they did not sign any documents on the evening of the return from Lava Hot Springs" (see R. 148). The Court then indicated that this might justify the granting of a new trial but understood there would be further investigation of the documents and further argument upon the point (R. 76).

On April 22nd, 1958, the Court finally denied the Motion for New Trial and the Judgment Notwithstanding Verdict (R. 78) formalized by the Order of May 2, 1958 (R. 79).

Appellants recognize the rule in this state to be that the trial court has a wide latitude of discretion in granting or denying motions for new trial. *Beck v. Dutchman Coalition Mines*, 2 Utah 2d 104, 269 P. 2d 867; *Lindsey v. Eccles Hotel Co.*, 3 Utah 2d 364, 284 P. 2d 477; *Bowden v. Denver & Rio Grande W. R. Co.*, 3 Utah 2d 444, 266 P. 2d 240; *Trimble v. Union Pacific Stages*, 105 Utah 457, 142 P. 2d 674. However, where required by the showing made or by error in law, this Court has many times reversed trial judges in their rulings on Motions for new trial: *Jensen v. Logan City*, 89 Utah 347,

380, 75 P. 2d 705 at 723 (where newly discovered evidence was sufficient); Uptown Appliance and Radio Company v. Flint, 122 Utah 298, 249 P. 2d 826 (newly discovered evidence insufficient to warrant new trial); Stamp v. Union Pacific R. Co., 5 Utah 2d 397, 303 P. 2d 279 (excessive verdict arrived at as result of passion or prejudice); Pauly v. McCarthy, 109 Utah 431, 184 P. 2d 123 (same); Bowden v. D. & R. G. W. R. Co., 3 Utah 2d 444, 266 P. 2d 240 (court's view of the law was in error); Haywood v. D. & R. G. W. R. Co., 6 Utah 2d 155, 307 P. 2d 1045 (law not adequately presented in instructions); Saltas v. Affleck, 99 Utah 381, 105 P. 2d 176 (granting a new trial for inadequacy of verdict was error).

In Bowden v. D. & R. G. W. R. Co., (supra), at page 450 of 3 Utah 2d, this Court thus stated the rule on reversing the District Court in its judgment on new trials:

“Only when there is error both substantial and prejudicial, and when there is a reasonable likelihood that the result would have been different without it, should error be regarded as sufficient to upset a judgment or grant a new trial.”

The Court cited Rule 61 of the Utah Rules of Civil procedure as noting that a new trial should not be granted “unless refusal to take such action appears to the Court inconsistent with substantial justice.”

In Uptown Appliance & Radio Co. vs. Flint, Supra, this Court, in reversing the granting of a new trial, indicated the rule should be followed in determining whether a new trial should be granted and said:

“There should be none where no showing is made of any newly discovered evidence or any other matter

to indicate that any different evidence would be produced such as could be thought to render a different result from the one the Jury came to \* \* \* .”

Likewise, in *Crellin v. Thomas*, 122 Utah 122, 247 P. 2d 264, the Court said:

“A wide discretion is reposed in the trial court in granting or denying a new trial on the basis of newly discovered evidence. The primary concern of the court is that justice be done, and the granting of such a motion is only reviewable in this court on the question of abuse of discretion. *Greco v. Gentile*, 88 Utah 255, 53 P. 2d 1155. True, the exercise of judicial discretion in such instance must be based on a showing of substantial material evidence from which it appears there is at least a reasonable likelihood that it would affect the result in a new trial.” (P. 124).

In *Jensen v. Logan City*, *Supra*, this Court found the newly discovered evidence to require reversal of the refusal to grant a new trial and in doing so said:

“Where disinterested testimony on the vital points in a case is very scant, newly discovered testimony on that point appearing from affidavit in support of the motion for a new trial to be apparently reliable, when it appears that the movant for the new trial was not guilty of indiligence in failing to obtain the witness for the trial, and that there is no element of holding such witness in reserve for purposes of obtaining a new trial — generally picturesquely denominated in slang phraseology as—‘an ace in the hole’—and it appears likely that such evidence would change the result, a new trial should be granted. While the granting or refusing of the motion lies in the sound discretion of the court, where there is grave suspicion that justice may have miscarried because of the lack

of enlightenment on a vital point which new evidence will apparently supply, and the other elements attendant on obtaining a new trial on the ground of newly discovered evidence are present, it would be an abuse of sound discretion not to grant the same." (P. 380).

It is submitted that the most reliable evidence obtainable on this type of case and in view of the controversy between the parties, would have been the documents prepared by the brokers and signed by parties to the transaction. The trial judge recognized that these documents would be important to the jury; and consideration of the documents in the light of the testimony of the witnesses makes plain the fact that the oral testimony would necessarily have been vastly different had these documents been available for cross examination and much more favorable to the position of the defendant.

A reading of Instructions 7, 8, 9, and 10 and of the Special Verdict will indicate undue concern for the plaintiffs with little or no attention paid to the position and the defenses of the defendants. It was in this atmosphere that the defendants were compelled to present their Motion for New Trial and Motion for Judgment Notwithstanding Verdict. It is submitted that the newly discovered evidence meets the requirements of this Court that "it appears likely that such evidence would change the result." In the language of an old case:

"A new trial should not be granted upon the ground of newly discovered evidence unless such evidence is very clear and satisfactory, and likely to seriously affect the result, if admitted." *Baumgarten v. Hoffman*, 9 Utah 338, 34 P. 294.

The newly discovered evidence would show that Mr.

Baird wrote to Kladis on December 8, 1950 advising him of a possible trade for the Eighth East home, that Kladis came to Salt Lake and executed an exchange offer on December 11th, which was taken to Lava Hot Springs by the two Smiths on Friday, December 15th and that on that very evening another copy of the December 11th exchange agreement was used by plaintiff for the purpose of making a counter proposal. Plaintiff, therefore, did not wait for any word from Bishop Teeple or anyone else but made his counter proposal because he had seen the property, liked it, and was anxious to make the exchange. On the following Monday, December 18, 1950 the Kladises came to Salt Lake City and an exchange agreement was executed by all four of the interested parties, after Nate Smith had reported to William Smith his conversation with Bishop Teeple of Lava Hot Springs. Or, it might have been that shortly after the December 18th agreement was signed, Nate Smith reported the conversation to William Smith; but in any event, the plaintiff thereafter started to drag his feet and on January 5th signed the exchange agreement, Exhibit 1, which eventually became the contract between the parties. This amounted to the loan of \$3,000.00 by Kladis and was evidence that plaintiff had good information on the values of the properties and was insisting on a further concession by Kladis. With this additional evidence it is not possible for William Smith to testify that he did not make a counter proposal on the return from Lava Hot Springs or that he waited for word from Lava Hot Springs via Nate Smith before he went forward. The substantial changes which the new evidence would necessitate in the testimony of William Smith would seriously discredit his entire testi-

mony. On the other hand, the position of Nate Smith, that he was making the inquiry as an accommodation to the plaintiff and that William Smith did not rely on the report, would be entirely vindicated (R. 115).

This is the case where the newly discovered evidence is material, goes to substantial points, would make a vast difference in the testimony at a new trial, and would in all probability change the result, as the jury was in doubt anyway (R. 283).

## SUMMARY AND CONCLUSION

This was a difficult case because plaintiffs abandoned the only logical action for relief, namely, fraudulent representations by Nate Smith, if in fact there were any misrepresentations and if in fact the plaintiff relied on them. The trial judge gave comfort to the plaintiffs in this change of theories and attempted to instruct the Jury without any reference to fraud and upon a theory which appeared to be a mixture of breach of contract and negligent performance of a contract.

The waiver contained in the exchange agreement should bar plaintiffs from any action except for fraud to avoid the agreement. Likewise, if Nate Smith misrepresented his conversation with Bishop Teeple and this was done intentionally, it could properly be reached by an action in deceit for misrepresentation. If Nate Smith acted honestly but negligently, then he was entitled to have the theory of contributory negligence presented to the Jury, for the reason that if a buyer of land asks for the opinion of someone who is not known to be familiar with land values, and if he shows no interest in



the value of the opinion referred, he would be guilty of contributory negligence.

The oral agreement testified to by William Smith modified the written employment of the broker and under the Statute of Frauds must be in writing to be valid and to be the basis of this action.

And, in any event, and if appellants are wrong on the foregoing questions of law, it appears plain that there was a failure of proof as to the plaintiff Patsy Smith and a further error in directing a verdict for \$1,150.00.

The newly discovered evidence produced from the files of Fletcher-Lucas Co. fits into the crucial questions of evidence at the trial and virtually disproves the claims of the plaintiffs, which tend to show that the plaintiff did not rely on statements of Nate Smith as to the opinions of residents in Lava Hot Springs, but went ahead on his own judgment and that the Kladises and the Smiths signed an agreement three days after the trip to Lava Hot Springs. This evidence would completely transform the nature and course of the trial and requires that the Court reverse the judgment of the District Court and order a new trial of this action with such decision as to other questions raised herein as the Court believes might be important in a new trial.

Respectfully submitted,

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