

1958

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

Utah Supreme Court

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Rawlings, Wallace, Roberts & Black; Richard C. Dibblee; Attorneys for Plaintiff and Respondents;

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

**FILED**  
OCT 29 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*

Clerk, Supreme Court, Utah

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**BRIEF OF RESPONDENT**

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## TABLE OF CONTENTS

|   | <i>Page</i> |
|---|-------------|
| PRELIMINARY STATEMENT .....   | 1           |
| STATEMENT OF FACTS.....   | 2           |
| STATEMENT OF POINTS.....  | 7           |
| ARGUMENT .....  | 8           |
| POINT I. THE WRITTEN AGREEMENT REQUIRED<br>DEFENDANTS TO DETERMINE VALUES OF<br>THE EXCHANGE PROPERTIES. ....         | 8           |
| POINT II. THE STATUTE OF FRAUDS IS NOT IN-<br>VOLVED IN THIS CASE. ....   | 9           |
| POINT III. THE DUTY OF DEFENDANTS WAS<br>NOT BASED UPON A VOID CONTRACT. ....   | 13          |
| POINT IV. THE COURT DID NOT ERR IN FAILING<br>TO INSTRUCT ON CONTRIBUTORY NEGLI-<br>GENCE OR ASSUMPTION OF RISK. .... | 13          |
| POINT V. THE EXCHANGE AGREEMENT DID NOT<br>WAIVE THE SECOND CAUSE OF ACTION. ....                                     | 15          |
| POINT VI. THE TRIAL COURT PROPERLY PRE-<br>SENTED TO THE JURY THE ISSUE OF DE-<br>FENDANTS' NEGLIGENCE. ....          | 16          |
| POINT VII. THE PROOF WAS SUFFICIENT AS TO<br>THE PLAINTIFF PATSY SMITH. ....  | 17          |
| POINT VIII. THE COURT DID NOT ERR IN<br>AWARDING PLAINTIFFS THE AMOUNT OF<br>REAL ESTATE COMMISSION. ....             | 17          |
| POINT IX. THE COURT PROPERLY DENIED DE-<br>FENDANTS' MOTION FOR A NEW TRIAL. ....                                     | 19          |
| SUMMARY AND CONCLUSION .....  | 25          |

### AUTHORITIES CITED CASES

|  |        |
|--|--------|
| Baird v. Madsen (Cal.) 134 P. 2d 885.....                      | 18     |
| Burgess v. Charles A. Wing Agency, (Ore.) 11 P. 2d 811.....    | 14     |
| Reese v. Harper, 329 P. 2d 410.....                            | 19     |
| Reich v. Christopulos, 256 P. 2d 238.....                      | 10, 18 |
| Richer v. Burke (Ore.) 34 P. 2d 317.....                       | 14     |
| Steiner v. Rowley (Cal.) 221 P. 2d 9.....                      | 11     |
| Trimble et ux v. Union Pacific Stages, 142 P. 2d 674, 677..... | 20     |

### TEXTS

|                                       |    |
|---------------------------------------|----|
| 32 A.L.R. 2d 728 .....                | 10 |
| 62 A.L.R. 1357, 1360 .....            | 14 |
| 8 A.J. Sec. 142, 134 A.L.R. 1346..... | 19 |

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WILLIAM F. SMITH and PATSY  
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*Plaintiffs and Respondents*

— vs. —

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

*Defendants and Appellants*

Case No.  
8892

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BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

PRELIMINARY STATEMENT

The parties are referred to as in the court below.

All italics are ours.

This is an appeal by defendants from a judgment rendered against them and in favor of plaintiffs in the sum of \$4, 850.00.

## STATEMENT OF FACTS

The Statement of Facts in defendants' brief is confusing and necessitates a restatement of the evidence.

Plaintiffs are husband and wife. In June of the year 1950, they purchased a home located at 3031 South 8th East Street, Salt Lake City, Utah. Shortly after the purchase they listed the home for sale with Jackson Realty Company which later became Carroll Realty Company. Plaintiffs selected Jackson Realty Company because their friend, N. A. Smith, was associated with the company as a real estate agent (R. 99).

No offers to purchase the home were submitted until early Autumn of 1950. At this time Defendant Smith presented to plaintiffs a photograph of a home located at Lava Hot Springs, Idaho. The owner of the home was Nick Kladis who was interested in exchanging it for property in Salt Lake City, Utah. Plaintiffs indicated to Defendant Smith they needed additional information before considering the transaction. On December 8, 1950, in the company of defendant Smith, plaintiff William F. Smith went to Lava Hot Springs to see the home. (R. 104, 134). The parties spent approximately two to three hours on the premises and returned to Salt Lake City the same evening (R. 103).

On the return trip the merits of the exchange agreement were discussed. Smith stated he was not familiar with the market value of properties in the Lava Hot Springs area, and agreed to determine the value of the Kladis property for plaintiffs. Defendant Smith called

a Mr. Teeples, the Bishop of the Latter-day Saint Church at Lava Hot Springs for the purpose of determining the value of said property (R. 175).

After the trip to Lava Hot Springs offers were submitted to Kladis through his local real estate agent, a Mr. Baird of Fletcher-Lucas Investment Company. On January 5, 1951, a meeting of plaintiffs, defendants, Mr. Baird and Mr. and Mrs. Kladis was held at the office of Fletcher-Lucas Investment Company in Salt Lake. At that meeting plaintiff Smith had the following conversation with defendant Smith (R. 107, 108, 109) :

“Q. When next were you contacted by Mr. Smith, by the defendant, Nathaniel A. Smith, with respect to this Kladis property?

A. Periodically, I kept in touch with Mr. Smith. However, some time in January, we did meet at the office of Fletcher-Lucas.

Q. Who was present?

A. There was Mr. Baird, who was the representative of that firm, Mr. Kladis, Mr. Smith and myself.

\* \* \*

Q. At that time did you have any discussion with Mr. Smith with respect to the property?

A. Yes.

Q. Did you have a discussion alone, or was somebody else there present?

A. We had a discussion in a group first, and then I had a discussion with Mr. Smith privately.

- Q. What was this discussion privately between you and Mr. Smith? Relate the conversation.
- A. I asked him what he had found out in the interim of time, about the property in Idaho.
- Q. (Mr. Dibblee) What did he say; give us the conversation.
- A. He said, 'Yes. From all I can determine, it looks like a good deal to me.'
- Q. Did he say anything with respect to what his opinion was, as to the value of the property?
- A. He said he thought it looked like it would be a good deal to him.
- Q. In this conversation did he say anything about the people he had contacted?
- A. He said he had contacted a reliable source, and that he could judge that it would be a good deal.
- Q. Did he make any disclosure to you as to what this reliable source had said?
- A. No."

The plaintiff further testified that this conversation was as follows (R. 116):

- "Q. Now, when you talked again, did he make any reference to these investigations?
- A. He made reference that he had investigated —
- Q. What did he say?
- A. He said, 'I have made investigations relating to what you asked me to, and all I can learn on this, it looks to me like it would be a reasonable price to allow for that property at Lava.'

Q. What did you say in reply to that statement?

A. I said, 'Nate, you know I rely on you — on your judgment — and, if you say it is okay, it is okay by me.' ”

After completion of the above conversations plaintiffs executed the Exchange Agreement (Exhibit 1). On February 1, 1951, the warranty deeds and mortgages were executed by the parties (Exhibit 2) and each party took possession of his respective home.

In August, 1951, plaintiff listed his acquired property for sale with a real estate agency in Pocatello, Idaho. The listing price was in the sum of \$16,000.00 (R. 112). Plaintiff was unable to sell the home and defaulted on the mortgage to Mr. Kladis. A foreclosure action was instituted by Kladis and the property sold at a sheriff's sale.

In the latter part of February, 1954, plaintiff Smith returned to Lava Hot Spring, Idaho, to investigate his transaction with Kladis. He contacted residents in that community, including Mr. Teeples (R. 117). Upon completion of this investigation, plaintiffs filed their complaint against defendants.

The theory alleged in plaintiffs' original complaint was fraud. The complaint was amended to allege as a second cause of action the failure of defendants to exercise the usual and customary skill and diligence of their profession.

Defendant Smith testified he agreed to determine the value of the Kladis property. He secured this valuation from Mr. Teeples who was not a real estate agent



and who was not familiar with the market value of property in Lava Hot Springs. The witness Jensen testified that this conduct in determining the value of the Kladis property was not in accordance with the standards of the profession (R. 165). Defendant Smith testified he reported to plaintiffs all material information he secured from Mr. Teeple but this was denied by Plaintiff Smith. (R. 179, 180).

In view of this evidence plaintiffs withdrew their first cause of action and submitted the matter to the jury on the basis of negligence.

The witness Banning, a real estate agent in Pocatello, and who was familiar with the market values of property in Lava Hot Springs, Idaho, testified the reasonable value of the Kladis property as of February 1, 1951, was between the sum of \$7,000.00 and \$8,000.00 (R. 91). The defendants' expert witness Solomen testified the value of the Smith property on February 1, 1951, was \$19,200.00 (R. 227).

The trial court instructed the jury the measure of damages in this action was the difference between the reasonable market value of the Kladis property and the reasonable value of plaintiffs' home. The evidence presented substantiated the verdict in the sum of \$3,700.00.

The third cause of action concerned the refund of the real estate commission paid by plaintiffs.

Plaintiffs respectfully submit that the case was properly submitted to the jury and the judgment should be affirmed by this court.

## STATEMENT OF POINTS

## POINT I.

THE WRITTEN AGREEMENT REQUIRED DEFENDANTS TO DETERMINE VALUES OF THE EXCHANGE PROPERTIES.

## POINT II.

THE STATUTE OF FRAUDS IS NOT INVOLVED IN THIS CASE.

## POINT III.

THE DUTY OF DEFENDANTS WAS NOT BASED UPON A VOID CONTRACT.

## POINT IV.

THE COURT DID NOT ERR IN FAILING TO INSTRUCT ON CONTRIBUTORY NEGLIGENCE OR ASSUMPTION OF RISK.

## POINT V.

THE EXCHANGE AGREEMENT DID NOT WAIVE THE SECOND CAUSE OF ACTION.

## POINT VI.

THE TRIAL COURT PROPERLY PRESENTED TO THE JURY THE ISSUE OF DEFENDANTS' NEGLIGENCE.

## POINT VII.

THE PROOF WAS SUFFICIENT AS TO THE PLAINTIFF PATSY SMITH.

## POINT VIII.

THE COURT DID NOT ERR IN AWARDING PLAINTIFFS THE AMOUNT OF REAL ESTATE COMMISSION.

## POINT IX.

THE COURT PROPERLY DENIED DEFENDANTS' MOTION FOR A NEW TRIAL.

## ARGUMENT

## POINT I.

THE WRITTEN AGREEMENT REQUIRED DEFENDANTS TO DETERMINE VALUES OF THE EXCHANGE PROPERTIES.

The written agreement required defendants to exercise reasonable skill and diligence in the performance of their duties as real estate agents and brokers. When the proposal to exchange plaintiffs' property for the Kladis property was presented to defendants it was their responsibility to become fully informed about the Kladis property and particularly to become properly advised as to the reasonable market value of said property. The expert witnesses Jensen and Solomen, both testified that the standards and custom of the real estate business require this to be done. (R. 173, 209).

Defendants knew that plaintiffs were relying on them to ascertain the value of the Kladis property and on the basis of that value to advise plaintiffs as to whether the exchange would be beneficial to them. This was the sole reason defendant contacted Mr. Teeples.

Defendants now contend that the employment agreement did not require them to ascertain the value of the Kladis property. The trial court did not give credence to this rather novel argument and submitted the matter to the jury as an issue of fact.

Under Group 1, Proposition A and B of the Special Verdict the trial court presented as an issue of fact the scope of defendants' employment. The jury found that

the scope of defendants' employment agreement did, in fact, include the duty to determine the reasonable market value of the Kladis property.

The standards of the real estate profession and the conduct by defendants substantiated this finding by the jury.

Under the same group of the Special Verdict the trial court properly included the duty of defendants to report the results of their inquiry.

## POINT II.

THE STATUTE OF FRAUDS IS NOT INVOLVED IN THIS CASE.

Under Point II of their brief defendants again argue that the written Sales Agency Contract did not include the duty of defendants to determine the reasonable value of the Kladis property, and further that if defendants did have the duty, this duty was based upon an oral modification of the written agreement. Counsel then cites authorities that any oral modification is void as being within the Statute of Frauds.

This same argument was presented to the trial court in the Motion for Judgment Notwithstanding the Verdict. The trial court disposed of this novel contention in his memorandum decision as follows:

“The defendants claimed that the oral agreement to determine the valuation of the property was not supported by consideration, and barred by the Statute of Frauds.

“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.” (R. 75)

It is a well accepted principle of law that the scope of employment of a real estate agent encompasses the duty to disclose pertinent and material facts.

In *Reich v. Christopulos*, 256 P. 2d 238, this court stated:

“In undertaking the sale of the property for the Reichs, Hill had a duty to represent their interest in good faith, to discharge it with reasonable skill and diligence and to disclose to them all pertinent facts which would materially affect their interest. As is noted in American Jurisprudence:

‘The faithful discharge of his duties is a condition precedent to any recovery upon the part of a broker for the services he has rendered his principal. Thus, he is not entitled to compensation if he fails to disclose to his principal any personal knowledge which he possesses relative to matters which are or may be material to his employer’s interests  
\* \* \*’”

An annotation in 32 ALR 2d 728, discusses the subject as follows:

“As pointed out in 8 Am. Jur. 1038, Brokers, Sec. 39, the rule requiring a broker to act with the utmost good faith toward his principal places him

under a legal obligation to make a full, fair, and prompt disclosure to his employer of all facts within his knowledge which are or may be material to the matter in connection with which he is employed, which might affect his principal's rights and interest of influence his action in relation to the subject matter of the employment, or which in any way pertain to the discharge of the agency which the broker has undertaken; and it is the interests of the employer that furnish the criterion as to what information is material in the sense that it should be communicated by the broker to his employer."

It is admitted that Smith orally agreed to determine the value of the Kladis property and in accordance with said oral agreement contacted Mr. Teeples and received valuable information pertaining to the prospective exchange property. The jury found he failed to disclose this information to the plaintiffs. It is inconceivable that the Statute of Frauds could be used to relieve the defendants from legal responsibility for their failure to discharge their fiduciary duty of full disclosure. The trial court correctly ruled the Statute of Frauds has no application.

An interesting case in point is *Steiner v. Rowley*, (Cal.) 221 P. 2d 9. This was an action by plaintiffs to secure the amounts paid as commission and secret profits to defendants as real estate agents. In count one of their complaint plaintiffs alleged defendant was employed by them under an oral contract and alleges the violation of his duties.

A general demurrer to this court was sustained by the trial court and plaintiffs appealed. Defendants asserted that this court did not state a cause of action because the oral agreement was within the Statute of Frauds. The trial court in overruling the demurrer stated:

“The right of the Steiners to recover against Rowley on count one of their complaint depends upon the applicability of section 1624 of the Civil Code to the transaction which is basis of the controversy. That statute reads: ‘An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission \* \* \*’ is invalid unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent. The first count states, the Steiners contend, a cause of action for the recovery of secret profits made by a fiduciary. The purpose of section 1624 of the Civil Code, they say, is only to prevent a broker from recovering a commission for services performed under an oral contract. As Rowley received his commission and the contract was fully executed, the form of the agreement is immaterial. Finally, they assert that there is a fiduciary relationship between the broker and his employer under either an oral or written contract, and a contrary rule would allow the statute of frauds to be used as a cloak for fraud. Rowley declares that because of the allegation of an oral contract between the parties, count one fails to state a cause of action.

“\* \* \* Count one of the Steiners’ complaint therefore states a cause of action unless the fact that Rowley was employed under an oral contract bars a recovery against him.

“Section 1624 of the Civil Code is applicable to the collection by the agent or broker of his ‘\* \* \* compensation or a commission \* \* \*’ and the enforcement by the principal of the broker’s agreement, (citing cases) but it has nothing to do with the cause of action pleaded by the Steiners. They are not attempting to ‘enforce’ a contract made by Rowley. The commission has been paid and the contract for Rowley’s services fully executed. The cause of action is one to recover from a fiduciary his commission and secret profits, and the general demurrer to it should have been overruled.”

### POINT III.

#### THE DUTY OF DEFENDANTS WAS NOT BASED UPON A VOID CONTRACT.

Under this point defendants contend that negligent performance of a duty based upon a void contract is not actionable. This is merely a reargument of Points I and II under a different guise. We refer the Court to our previous two points for our position.

### POINT IV.

#### THE COURT DID NOT ERR IN FAILING TO INSTRUCT ON CONTRIBUTORY NEGLIGENCE OR ASSUMPTION OF RISK.

There can be no question about the fact that a fiduciary relationship existed between the parties. This being true, the plaintiffs had the right to rely upon Defendant Smith’s representation that he had checked into the value of the Kladis property and that the prospective trade was to plaintiffs’ advantage.



In *Richer v. Burke* (Ore.) 34 P. 2d 317, which involved the exchange of properties by residents of different states, the court, in discussing the issue of reliance, stated as follows:

“Moreover, it will be recalled that the defendant Burke was the witness’ agent. It was Burke’s duty to fully and frankly inform the plaintiffs concerning this property. The plaintiffs owned no duty to him to be on the alert lest he deceive them. They were not bound to investigate his statements. To the contrary, they would rightfully place confidence in any statements their agent made concerning this property. (Citing cases)”.

In *Burgess v. Charles A. Wing Agency*, (Ore.) 11 P. 2d 811, the court stated:

“Whatever may be the rule requiring investigation where the parties deal at arm’s length, it is well established that this necessity does not exist where a relationship of trust or confidence exists between the parties so that the principal places reliance upon the trustworthiness of the other.”

Defendants, on page 43 of their brief, refer to an annotation at 62 ALR 1357, 1360, as being in support of their contention. Counsel omitted a portion of the statement and did not correctly include within the quotes the important portion of the annotation. The correct statement is as follows:

*“In the absence of special circumstances giving the principal a right to rely on the agent’s skill and care, the principal has been held to be barred from recovering for the agent’s negligence by contributory negligence.”*

In the case at bar plaintiffs questioned defendant concerning the value of the Kladis property. Defendant Smith elected to withhold facts and instead gave an opinion "It looks like a good deal to me." (R. 109). In view of the fiduciary relationship plaintiff was under no duty to cross examine or investigate this statement.

The jury found that defendants breached their duty of full disclosure and that as a result of this violation plaintiffs entered into a real estate transaction which caused them to suffer damages. This finding was abundantly supported by the evidence.

The authorities cited by defendants are not in point. For example, the Cole case involved an action between a buyer and seller, not a real estate agent and his client.

Plaintiff could only be found contributory negligent or to have assumed the risks of the transaction if he had no right to rely on the representations of his fiduciary. The authorities are uniform that under the circumstances of this case a fiduciary relationship existed and that plaintiff did have a right to rely on said representations. The undisputed evidence is that he relied on said representations to his detriment. Therefore, there was and could be no issue of contributory negligence or assumption of risk in this case, and the trial court was correct in so holding.

#### POINT V.

#### THE EXCHANGE AGREEMENT DID NOT WAIVE THE SECOND CAUSE OF ACTION.

In the memorandum decision the trial court stated as follows:

## “Point II

“The defendants argued that the motion should be granted because upon the signing of the exchange agreement, the plaintiffs waived claims against the realtor. The matter being submitted to the jury on the theory that the defendants failed to disclose an opinion as to the value of the property in Idaho, presented an action on which a claim could not be waived by contract, and on this ground the motions are denied.” (R. 75)

The defendants, on page 45 of their brief, after referring to the above comment contend that the failure to disclose an opinion is fraud and the court must have had in mind that a waiver of an action for negligence is contrary to public policy. Counsel then cites authorities for this proposition.

We submit that the language used by the trial court is a sufficient response to counsel’s argument.

## POINT VI.

### THE TRIAL COURT PROPERLY PRESENTED TO THE JURY THE ISSUE OF DEFENDANTS’ NEGLIGENCE.

Plaintiffs’ original complaint was based upon an allegation of fraud and misrepresentation. The complaint was amended to allege negligence as a second cause of action which was the only issue presented to the jury.

Dismissal of the first cause of action was not an abandonment of plaintiffs’ only tenable position. The evidence disclosed defendants breached their fiduciary duty to disclose valuable information to plaintiff. The

evidence further disclosed that defendants, as real estate agents, failed to use their skill and knowledge before expressing an opinion to their client. All of this conduct on behalf of defendants was based upon a written agreement between the parties.

It is immaterial whether this conduct by defendants is termed fraud or negligence because it is obviously a failure of defendants to perform their legal duty. A label cannot change the quality or characteristics of the product.

#### POINT VII.

THE PROOF WAS SUFFICIENT AS TO THE PLAINTIFF PATSY SMITH.

The plaintiffs' home which was listed with the Jackson Realty Company for sale was owned jointly by the plaintiff William A. Smith and Patsy Smith, his wife. The evidence reveals that William A. Smith dealt with defendants and with Kladis for himself and for his wife as well. Defendants offered no rebuttal evidence as to Patsy Smith's rights. But they now undertake to inject this hypertechnical contention into the case to confuse the issues. We will leave it to this court's good judgment whether to sustain the verdict in favor of William A. Smith alone or in favor of both plaintiffs. The end result would be identical.

#### POINT VIII.

THE COURT DID NOT ERR IN AWARDING PLAINTIFFS THE AMOUNT OF REAL ESTATE COMMISSION.

The trial court properly directed the jury to include as damages the commission paid on this transaction.

Defendants argue the commission was paid to Fletcher-Lucas Investment Company but the evidence discloses that the commission was paid pursuant to plaintiffs' Sales Agency Agreement.

In *Reich v. Christopoulos*, 123 U. 137, 266 P. 2d 238, the court stated:

"In undertaking the sale of the property for the Reiches, Hill had a duty to represent their interest in good faith, to discharge it with reasonable skill and diligence and to disclose to them all pertinent facts which would materially affect their interest. As is noted in American Jurisprudence, (4 Am. Jur. 1067, Brokers, Sec. 142):

"The faithful discharge of his duties is a condition precedent to any recovery upon the part of a broker for the services he has rendered his principal. Thus, he is not entitled to compensation if he fails to disclose to his principal any personal knowledge which he possesses relative to matters which are or may be material to his employer's interests \* \* \*."

In *Baird v. Madsen* (Cal.) 134 P. 2d 885, the court stated:

"It is doubtless true, as pointed out by defendant, that a real estate broker must act in good faith in the discharge of his duties as agent; that by misconduct, breach of conduct or wilful disregard, in a material respect, of an obligation imposed upon him by the law of agency he may forfeit his right to compensation. (Citing cases). To

this end it is held that the rule which applies to trustees generally governs the relationship between a real estate broker and his principal. The broker is bound to disclose to the principal any facts known to him which are material to the transaction, and if he takes part in the negotiations he is bound to exercise his skill for the benefit of his principal; and any concealment from the principal of material facts known to the agent, or any collusion by the latter with a purchaser may operate to forfeit the right of the agent to compensation for his services (Citing cases), and it matters not that there was no fraud meditated and no injury done. The rule is not intended to be remedial of actual wrong, but preventative of the possibility of it. (Citing cases) Applying the foregoing legal principles to the findings on this issue, it would seem that the trial court was not unwarranted in giving judgment for the defendant."

See 8 A.J. Sec. 142, 134 ALR 1346, and *Reese v. Harper*, 329 P. 2d 410.

The evidence establishes in this case that defendants forfeited their rights to receive any compensation for their services when they failed to discharge the duties of their employment. We submit that the better authorities all support our position on this issue.

The case cited by defendants involved a statute peculiar to the State of California and is not controlling in this case.

#### POINT IX.

THE COURT PROPERLY DENIED DEFENDANTS' MOTION FOR A NEW TRIAL.

The granting of a motion for a new trial is within the discretion of the trial court. This court in *Trimble et ux v. Union Pacific Stages*, 142 P. 2d 674, 677, discussed the circumstances under which so-called newly-discovered evidence will be considered sufficient to require the granting of a motion for a new trial. The court stated:

“Nor do we believe that the lower court erred in refusing to grant a new trial. The evidence of witnesses Hess and Halahan was cumulative, and it is well settled in this state that such evidence is not ground for a new trial. *Klopenstine v. Hays*, 20 Utah 45, 57 P. 712, 714, wherein it is said: ‘It is well settled that, to entitle a defeated party to a new trial on the ground of newly-discovered evidence, it must appear, (1) that he used reasonable diligence to discover and produce at the former trial the newly-discovered evidence, and that his failure to do so was not the result of his own negligence; (2) that the newly-discovered evidence is not simply cumulative; (3) that such evidence is not sufficient if it simply be to impeach an adverse witness; (4) it must be material to the issues, and so important as to satisfy the court, by reasonable inference, that the verdict or judgment would have been different had the newly-discovered evidence been introduced at the former trial; (5) that the defeated party had no opportunity to make the defense, or was prevented from doing so by unavoidable accident, or the fraud or improper conduct of the other party, without fault on his part.’ ” (Citing cases)

In the case at bar the proposed newly-discovered evidence pertained to written letters and counter-offers in the custody of Fletcher-Lucas Investment Company.

Defendants argue that the documents are of such a character that the trial court abused its discretion in denying the Motion for a New Trial. They contend the documents would have an affect upon the verdict because they would substantiate the testimony of defendants and impeach the testimony of plaintiff. Plaintiffs contend that these documents are not newly-discovered evidence as defined in the rule of the Trimble case for the following reasons :

*First*, there is no showing that defendants used reasonable diligence to discover and produce the newly-discovered evidence. The affidavit of the witness Baird (R. 67) discloses that the evidence was in his office but he was unable to locate it for the trial. If counsel felt these documents were of such great importance he should have requested a continuance. He did not elect this remedy and we submit that because his choice was erroneous he cannot claim relief from this court by contending that the evidence was newly discovered. *Second*, the documents are merely cumulative. Defendant Smith testified that in his opinion the trip to Lava Hot Springs was on the 18th day of December rather than December 8, 1950, and immediately after the trip plaintiff requested him to make a counter-proposal for the Kladis property. In his brief counsel argues that these documents would substantiate this testimony by Defendant Smith. We submit this argument establishes the fact that the evidence is merely cumulative. *Third*, this evidence is simply for the purpose of impeaching plaintiff. Counsel states that this evidence would alter the testimony of plaintiff



pertaining to the date of the trip to Lava Hot Springs and the question as to whether counter-proposals were submitted by him. We submit that this argument shows that one of the main purposes for its introduction is simply to impeach an adverse witness. *Fourth*, that the trial court was not satisfied by reasonable inference that if these documents had been presented at the time of trial the verdict would have been different.

In the memorandum decision of the court the following is stated pertaining to his point :

#### “POINT VII.

“A motion was made for a new trial on the ground that newly discovered evidence would indicate that the plaintiffs signed an agreement on the night they returned from Lava Hot Springs, which indicated that the plaintiffs had decided to make the exchange without waiting for the opinion of any Idaho residents. The case may still be presented to the jury on the theory that the plaintiffs had decided to go through with the exchange, but would have been stopped in the procedure if they had learned of the opinion of Bishop Teeples in Idaho.

“On this point the Court is 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.

“This point may justify the granting of the motion for a new trial. The Court, however, understood that counsel would investigate further as to the nature of the documents, and the evidence

presented with reference to the absence thereof, and the Court would like to hear additional argument upon this point at the convenience of counsel."

We submit that this statement substantiates the position of plaintiff as to the materiality and effect of these documents. Furthermore, it indicates that the trial court was not at all satisfied with the showing of defendants on the issue of whether due diligence had been exercised in obtaining these documents for the trial. As a matter of fact, the documents were not newly discovered at all because defendants had known of their existence all the time. The same diligence exercised before the trial that was exercised after the trial would unquestionably have resulted in their production. The primary issue as outlined by the court is whether defendants related to plaintiffs the information secured by him from the witness Teeples. These documents would have no effect upon that issue.

The documents now claimed to be newly-discovered would not alter the fact that defendant agreed to determine the value of the Kladis property. This conclusion is apparent regardless of the date the defendant agreed that he would make the investigation for plaintiffs. The documents now claimed to be newly-discovered evidence do not alter the effect of whether defendant after contacting the witness Teeples related the entire substance of his conversation with him to the plaintiffs. At the trial

the plaintiff testified he did not receive this information and defendant testified that he did give the information to plaintiffs. The jury was the sole judge of the credibility of these witnesses and these documents would not affect this decision.

Counsel argues that these documents would have affected the credibility of Plaintiff Smith but we submit this contention is purely speculative. The trial court in denying the motion for a new trial has held otherwise.

The instructions contained in group four of the Special Verdict concerned the issue as to whether plaintiffs received the information before executing the Exchange Agreement. We contend, as the trial court ruled, that these so-called newly-discovered documents would have had no effect upon the jury in their deliberation on this important point of the Special Verdict.

In considering further statements contained in defendants' brief counsel states that these documents would substantiate the position of defendant Smith that he was making the inquiry to the witness Teeple as an accommodation to plaintiff and that plaintiff Smith did not rely on the report.

Again, it is our position that the obtaining of the information was not an accommodation but a duty imposed upon defendants in exercising the reasonable skill

and diligence common in their profession. The statement by counsel that these documents would prove by a preponderance of the evidence that plaintiff did not rely on the report is without merit. The record now before this Court is full of statements by both Defendants that Defendant Smith did not convey the information he secured. This testimony was not believed by the jury and the assumption by counsel that these documents would alter this finding is without merit. We submit that the trial court did not abuse its discretion in denying the motion.

## SUMMARY AND CONCLUSION

This case was nothing more than an action against a real estate agent for violating the duties of his employment.

The action was predicated on the theory that defendants as real estate agents and brokers had the duty under the circumstances of this case to determine the reasonable value of property located in the State of Idaho. The defendants in discharging this responsibility failed to use the reasonable skill and diligence common to their profession. As a result of their failure plaintiffs exchanged property correctly valued at \$19,200.00, subject to a \$7,500.00 mortgage, for property in Idaho, incorrectly valued at \$15,500.00, but whose actual value was between \$7,000.00 and \$8,000.00. The jury correctly found plaintiffs'

damage to be \$3,700.00, plus \$1,150.00 real estate commission, or a total damage of \$4,850.00.

We respectfully submit that the trial court, in denying defendants' Motion for a New Trial and Judgment Notwithstanding the Verdict was proper and in accordance with the instructions given and the damage proven at the trial.

Respectfully submitted,

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