

1991

# Jerrold L. Davis v. Heath Development Company : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

J. Richard Bell; Bell & Bell; B.R. Parkinson; La Mar Duncan; Attorneys for Respondents.

C. Reed Brown; Armstrong, Rawlings, West & Schaerrer; Attorneys for Appellants.

---

## Recommended Citation

Brief of Respondent, *Davis v. Heath Development Company*, No. 914549.00 (Utah Supreme Court, 1991).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/3835](https://digitalcommons.law.byu.edu/byu_sc1/3835)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH  
DOCUMENT  
KFU  
45.9  
.59  
DOCKET NO.

BRIEF

JRT

RECEIVED  
LAW LIBRARY

14549 P

STATE OF UTAH

JERROLD L. DAVIS dba JERRY DAVIS AND  
ASSOCIATES,  
Plaintiff-Respondent,

vs.

HEATH DEVELOPMENT COMPANY, a Corporation  
dba PIONEER TRAILER PARK, SANDRA H.  
FLINDERS, KATHRYN B. HEATH, DOROTHY A.  
HOUSLEY, BONNIE J. BRINTON, HELEN YOUNG,  
MARY FRANCIS BENNION, LAWRENCE T. HEATH,  
CAROLYN H. MARLER, NANCY H. FERRIN,

Defendants-Appellants.

DOROTHY A. HOUSLEY AND BONNIE J. BRINTON,

Cross-Complainants-Respondents,

vs.

HEATH DEVELOPMENT COMPANY, a corporation,  
dba PIONEER TRAILER PARK,

Cross-Defendant-Appellant.

Case No. 14549

FILED

AUG 10 1976

Clerk, Supreme Court, Utah

BRIEF OF RESPONDENT - PLAINTIFF

An Appeal from the Judgment of the District Court of the Third  
Judicial District, The Honorable G. Hal Taylor, Judge

BELL & BELL  
J. Richard Bell  
303 East 2100 South  
Salt Lake City, Utah 84115

B. R. Parkinson  
503 Phillips Petroleum Building  
Salt Lake City, Utah 84101

La Mar Duncan  
706 Phillips Petroleum Building  
Salt Lake City, Utah 84101

ARMSTRONG, RAWLINGS,  
WEST & SCHAEFFER  
C. Reed Brown  
1300 Walker Bank Building  
Salt Lake City, Utah 84111

Attorneys for Appellants

Attorneys for Respondents

## TABLE OF CONTENTS

	Page
STATEMENT OF KIND OF CASE. . . . .	1
DISPOSITION IN LOWER COURT . . . . .	3
RELIEF SOUGHT ON APPEAL . . . . .	3
ARGUMENT . . . . .	4
POINT I.      THE EARNEST MONEY AGREEMENT WAS ENTERED INTO BY ALL OF THE PARTIES PRESENT, WHICH CONSTI- TUTED OVER 80% OF THE STOCK AND WAS ACTED UPON BY PLAINTIFF IN GOOD FAITH . . . . .	4
POINT II.     THE DEFENDANT IS ESTOPPED TO DENY THE VALIDITY OF THE CONTRACT AGREEMENT BECAUSE OF A TECHNI- CALITY IN THE PROCEDURE AS SET FORTH IN THE STATUTE, ESPECIALLY A SMALL FAMILY CORPORATION OF THIS KIND . . . . .	7
POINT III.    THE CORPORATE ENTITY IN THE CASE AT BAR WITH ITS SMALL, INFORMAL FAMILY GROUP ACTED PRO- PERLY AND THE COURT CONSIDERED THE SALE PROPER . . . . .	10
POINT IV.     THERE IS NO CONFLICT OF INTEREST ON THE PART OF PLAINTIFF AS BETWEEN PLAINTIFF AND DEFENDANT. . . . .	12
SUMMARY . . . . .	16

## CASES CITED

Baker v. Glenwood Mining Co., 82 Utah 160, 21 Pac.2d 889 .	10
Branch v. Western Factors, Inc., 28 Utah 2d 361, 502 Pac.2d 570 .	6
Buell v. Buckingham, 16 Iowa 284, 85 Am. Dec. 516. . . . .	12

# TABLE OF CONTENTS - Continued

## CASES CITED

	Page
Central Idaho Agency, Inc. v. Clara Turner, 92 Idaho 306, 442 Pac.2d 442 . . . . .	15
Fontaine v. Brown County Motors Co., (1947) 251 Wis. 433, 29 NW 2d 744, 174 ALR 694 . . . . .	11
Grover v. Garn, 23 Utah 2d 441, 464 Pac.2d 598 . . . . .	4
Hoyt v. Wasatch Homes, 1 Utah 2d 9, 261 Pac.2d 927 . . . . .	16
Jeppi v. Brockman Holding Co., (1949) 34 Cal.2d (adv) 206 Pac.2d 849 . . . . .	11
McCloskey v. New Orleans Brewing Co. (1911) 128 La. 197, 54 So. 738 . . . . .	12
McMenamin v. Bishop, 6 Washington Appeals 455, 493 Pac.2d 442 . . . . .	15
Peterson v. Holmgren Land and Livestock Co., 12 Utah 2d 125, 361 Pac.2d 786 . . . . .	8
Runswick v. Floor, 116 Utah 91, 208 Pac.2d 948 . . . . .	6
Sargent v. Ritchey, 233 Pac.2d 1619 (Washington) . . . . .	16
Shaw v. Bailey McCune Co., 11 Utah 2d 93, 355 Pac.2d 321 . . . . .	10
Taylor v. Axton-Fisher (1934) 148 ALR 834, 295 Ky. 226, 173 SW 2d 377 . . . . .	8 & 15
Union Trust v. Carter (Fed.) . . . . .	11
Zions Savings Bank & Trust Co. v. Tropic and East Fork Irr. Co., 102 Utah 101, 126 Pac.2d 1053 . . . . .	10

TABLE OF CONTENTS - Continued

<u>TEXTS CITED</u>	Page
19 Am. Jur. Sec. 1164, p. 590 . . . . .	9
13 Am. Jur. Sec. 1890, p. 871-72 . . . . .	9
18 Am. Jur.2d p. 97, Sec. 485 . . . . .	5
19 Am. Jur.2d p. 639, Sec. 1227 . . . . .	5-6
9 ALR 2d 1309 . . . . .	10
5 ALR 930-931 . . . . .	12



and the Defendant, HEATH DEVELOPMENT COMPANY, on November 13, 1973, which Agreement was approved and endorsed by substantially all of the stockholders of the company at a subsequent meeting held November 19, 1973. (See Exhibit 1P). The Listing Agreement is on the printed form used for many years and approved by the Salt Lake Real Estate Board (See Exhibit 2). Objections to said Listing Agreement were not made until after the acceptance of an offer to purchase signed by all of the Directors of the defendant corporation.

Plaintiff contends a bona fide offer to purchase was presented and accepted by the Defendant, Heath Development Company, and approved at a meeting where all of the Directors were present, and said offer and acceptance were within the 90-day Listing Agreement. The offer and acceptance allowed the purchasers 90 days, or until May 1st, to arrange financing. (See Plaintiff's Exhibit 3).

The record and testimony of all the witnesses called shows conclusively that the Defendant and all members of this family corporation had tried to sell the property for years; that the main topic of conversation at almost every stockholders' meeting was in substance that all of the stockholders were getting along in years and unless the property was sold soon, each stockholder would soon be dead or too old to enjoy any return from the property (Tr. 148 and following).

The foregoing facts were all established by documents signed by the parties and the signatures are acknowledged as genuine. The Plaintiff secured the financing but the Defendants refused to perform prior to the expiration of the time for the execution of the documents and the actual consummation of the transaction.

Plaintiff contends that he is entitled to the six percent (6%) commission, plus costs and expenses, including a reasonable attorneys' fee, because he performed his services and Defendants breached said contract by refusing to complete the transaction.

Plaintiff admits the signatures of Helen Young and Mary Francis Bennion were signed by their mother, Essie Heath, now deceased, and the signature of Lawrence T. Heath was signed by Carolyn Marler. But the Heath Development Company has been operated over the years in a very informal and unorthodox manner, more like a partnership than a corporation, so far as management is concerned, and the objection was not timely made but only after the refusal to complete the sale.

Jurisdiction is not in dispute.

#### DISPOSITION IN THE LOWER COURT

The Statement found in Defendants' Brief as to the disposition in the lower Court is correct. Also, the statement of the relief



sought by Defendant, Heath Development Company, is substantially correct.

ARGUMENT

POINT I

THE EARNEST MONEY AGREEMENT WAS ENTERED INTO BY ALL OF THE PARTIES PRESENT, WHICH CONSTITUTED OVER 80% OF THE STOCK AND WAS ACTED UPON BY PLAINTIFF IN GOOD FAITH.

The statement that the January 13, 1973, Earnest Money Agreement was never properly signed or accepted by a properly constituted quorum of Heath Development Company and the contract created is voidable, is not at all accurate and does not apply to the facts of this case.

This was and is a family corporation with members all related. Business was carried on in a very informal fashion. (See Exhibit 4, indicating the easy, informal manner in which the business of the family corporation was conducted and business was transacted.)

In the case of Grover vs. Garn, 23 Utah 2d, page 441, Judge Faux stated at pages 445-6, as follows:

"So we have the owners of substantially all of the stock of the corporation who were also the owners of the land before it came into the corporation as its primary asset, acting without the formality of a stockholders' meeting or a written resolution in selling the primary asset of the corporation. More, they agreed in

the sale, that all payments should go from the buyers to Mr. and Mrs. Grover individually and to turn over the Garns property of Mr. Grover consisting of shares of water stock and rights for grazing cattle under the U. S. Taylor Grazing Act. While this latter facet of the whole contract may be termed a maverick and concededly not a model for all corporate dealings yet as tendered in defense by the Garn defendants and respondents we are not concerned here with a corporation having a multitude of stockholders situated over a wide expanse of the country. The two owners signed as vice president and secretary-treasurer of the seller corporation on October 1, 1964. While we do not approve the method employed here and certainly denounce it as a pattern to be followed by corporations generally, we cannot disagree in this instance with the statement of law:

"\*\*\*but the trend of authority is to uphold as binding on the corporation acts or contract on its behalf by a person or persons owning all or practically all of the stock."

It is stated in 18 Am Jur 2d, page 97, Section 485 as follows:

"The acts or contracts of persons owning all or practically all of the stock of a corporation are binding on the corporation, at least where the rights of creditors of the corporation would not be prejudiced thereby. The unanimous action of all the stockholders may be binding as to them and the corporation, even though there was no formal meeting or no action by the Board of Directors. Contracts by a sole stockholder may be ratified by the Directors."

It is stated in 19 Am Jur 2d, pages 639-640, Section 1227, as follows:

"While a charter or statutory provision under which officers have power to convey is of course binding, the Board of Directors, in the absence of any charter or statutory limitation, has full authority to effectuate the corporation's power to convey the corporate realty and may authorize the officers to execute a conveyance thereof or make a contract for its sale. It has been held that express authority to sell real estate carries with it authority to make a contract for its sale. \* \* \*"

Now counsel cites Runswick vs. Floor 116 Ut 91, 208 P2d 949 (1949) and cites this language:

"So long as corporate officers act fairly and in good faith, they are not precluded from dealing or contracting with the corporation merely because they are officers."

This is certainly our case where business is conducted as herein stated by a small, informal group of family members. As to the balance of the quotation cited concerning a "disinterested quorum being present, that certainly is not this case and does not apply here.

Again counsel cites the case Fay L. Branch vs. Western Factors Inc. et al vs. Arnel Heaps 28 Ut 2d 361-501 P2d 570, with the point that a director occupies a fiduciary relationship to the corporation, and his personal dealings with the corporation may be avoided unless good faith and fairness are shown. Mr. Justice Ellett in the opinion states as follows:

"Where as in the execution of a trust deed here under consideration, there is an entire absence of a want of good faith, fraud and collusion, and the corporation is yet a going concern, no sound principle of law prohibits a stockholder or director from dealing with the corporation. A corporation is an artificial entity, and one of the principal objects of its creation is to contract with individuals in due course of business. This it may do with its directors and stockholders as well as with others; and under the weight of American authority, at least, contracts made by the corporation with its officers are not void per se, but at most voidable merely, at the election of the corporation or its representatives, within a reasonable time."

Plaintiff, of course, has no quarrel with Judge Ellett's opinion herein stated, except that the facts in that case are entirely different and therefore have nothing whatsoever to do with the case at bar.

## POINT II

THE DEFENDANT IS ESTOPPED TO DENY THE VALIDITY OF THE CONTRACT AGREEMENT BECAUSE OF A TECHNICALITY IN THE PROCEDURE AS SET FORTH IN THE STATUTE, ESPECIALLY A SMALL FAMILY CORPORATION OF THIS KIND.

It is stated in 19 C.J.S. at pages 714-15, as follows:

"Each party to a corporate contract may be estopped to set up that the corporation neglected to observe some regulation that it should have observed before entering into the transaction.

"Where an act done is within the corporate powers, and both parties to the transaction have proceeded as if all preliminary formalities had been complied with, and rights have attached, each party is estopped to set up, with a view

of defeating the rights of the other, that the corporation neglected to observe some regulation that it should have observed before entering into the transaction. So, in general, a person dealing with one who is a proper officer to execute a corporate contract is entitled to assume that such officer is acting regularly, and that all formalities of acts of the corporation and its affairs on which the right to execute the contract is conditioned have been performed, and the rights of such person will not be affected because they have not been performed. A corporation will not be allowed to defend against an action on its contract on the ground that the provisions of its charter or a governing statute were not complied with, if it has received the consideration from the other party, particularly where the act was with the knowledge and consent of its stockholders. A corporation's successor, which receives the benefit of its contract, is estopped from denying its liability thereon."

In Taylor vs. Axton-Fisher Tobacco Co. 148 ALR 834, 295 Ky 226, 173 SW 2d 377, it is said:

"The action of directors, when exercised in good faith and not in fraud of the rights of the stockholders, is not subject to the latter's control, and will not be interfered with by the Courts."

In the case of Peterson vs. Holmgren Land & Livestock Company, 12 Utah 2nd 125, 363 P2d 786 (1961) the Court held:

"Wade C. J. A contract for the sale of realty was enforceable against corporate vendor, even if the minutes of the Board of Directors were insufficient to show express authorization, where the corporation was a family corporation,

articles provided for acquirement and alienation of realty and there was binding ostensible authority in its president."

13 Am. Jr. Sec. 890, pp. 871-72, states:

"If a corporate officer assuming to contract on behalf of the corporation is one to whom authority to make such a contract may be given, a person dealing with him in good faith is not affected by the fact that the proper steps to clothe him with were not taken."

Again in 19 Am. Jr. Sec. 1164, p. 590, the same principle is stated:

"The fundamental and well-settled rule is that when, in the usual course of the business of a corporation, an officer or other agent is held out by the corporation or has been permitted to act for it or manage its affairs in such a way as to justify third persons who deal with him in inferring or assuming that he is doing an act or making a contract within the scope of his authority, the corporation is bound thereby, even though such officer or agent has not the actual authority from the corporation to do such an act or make such a contract. This authority is known as apparent or ostensible authority. This apparent authority is materially the same and is based upon the same principles as authority by estoppel. Stating the rule in terms of estoppel, a corporation, which, by its voluntary act, places an officer or agent in such a position or situation that persons of ordinary prudence, conversant with business usages and the nature of the particular business, are justified in assuming that he has authority to perform the act in question and deal with him upon that assumption, is estopped as against such persons from denying the officer's or agent's authority."

In the case of Baker vs. Glenwood Mining Co., 82 Utah 100, 21 P2d 889, Justice Folland stated at page 107 the following:

"This Court is committed to the doctrine that where a corporation has received the benefits of a contract, and while it still retains the fruits thereof, it will be estopped from urging as a defense that the contract was ultra vires the corporation or the corporate officers were without authority with respect thereto."

See also Zions Savings Bank & Trust Co., vs. Tropic & East Rock Irr. Co., 102 Utah, 101, 126 P2d 1053.

### POINT III

THE CORPORATE ENTITY IN THE CASE AT BAR WITH ITS SMALL, INFORMAL FAMILY GROUP ACTED PROPERLY AND THE COURT CONSIDERED THE SALE PROPER.

In the case of Shaw vs. Bailey-McCune Company, et al., 11 Utah 2d page 93, Justice Callister states at page 95:

"Under some circumstances the corporate entity may be disregarded in the interest of justice in such cases as fraud, contravention of law or contract, or public wrong. \* \* \*.

"Moreover, the conditions under which the corporate entity may be disregarded or the corporation be regarded as the alter ego of the stockholders vary according to the circumstances in each case inasmuch as the doctrine is essentially an equitable one and for that reason is particularly within the province of the trial court."

It is stated in 9 ALR 2d at page 1309, as follows:

"Quite naturally it has been held -- in fact no other conclusion would seem logical--that a corporation created under corporate reorganization statutes with a view to ultimate liquidation of

the corporation, and operated in the meantime for the purpose of salvaging whatever amounts it can for the benefit of bondholders or creditors may sell all the assets of the corporation.

"For the convenience of the user examples of the tests of the types of legislative enactments characteristic of those found in the cases herein discussed are presented herewith:

"No corporation shall sell. . . . all or substantially all of the property and assets . . . unless under authority of a resolution of its Board of Directors and with the approval of the principal terms of the transaction and the nature and amount of the consideration by vote or written consent of (the) shareholders." See *Jeppi v. Brockman Holding Co.* (1949) 34 Cal 2d (Adv 10) 206 p2d 847, 9 ALR 2d 1297.

"Every corporation may, by a vote of the majority of the stock entitled to vote, sell and convey or authorize to be conveyed, all or any portion of the property owned by it, or mortgage or lease any such property whenever it shall be necessary for its business or the protection or benefit of its property." See *Fontaine v. Brown County Motors Co.*, (1947) 251 Wis. 433, 29 NW 2d 744, 174 ALR 694."

In Union Trust Co. vs. Carter (Fed.) *supra*, it appeared that a corporation was formed, by the charter of which it was provided that the stockholders thereof might not vote, or control the management of the corporation in any way, the entire control thereof being delegated to the directors, who were given power to do all that the stockholders might ordinarily do. The directors of the corporation, which had been



formed to sell certain property sold all of its property to a fellow director. The complainant, a stockholder, thereupon sought to enjoin the transfer of the property to a vendee. It was held that since the stockholders had provided rules for the management of the corporation they must be guided thereby, and that, since the sale in question was a matter coming within the provision, the stockholders of the corporation were necessarily bound. The result of the by-law was to authorize the directors to sell the property."

It is stated in 5 ALR page 930-931 as follows:

"Where a corporation is a going and solvent concern, and has corporate power to sell its property in the ordinary course of the corporate business, the directors may make such sales without the consent of the stockholders. Buell v. Buckingham (1864) 16 Iowa 284, 85 Am. Dec. 516; McCloskey v. New Orleans Brewing Co. (1911) 128 La. 197, 54 So. 738. And see the reported case (Hendren v. Neeper, ante, 927).

"The directors are ordinarily intrusted with the management of the corporate business. McCloskey v. New Orleans Brewing Co. (La.) Supra, wherein it was said that stockholders cannot take the business out of the hands of the Board of Directors without very good cause."

#### POINT IV

THERE IS NO CONFLICT OF INTEREST ON THE PART OF PLAINTIFF AS BETWEEN PLAINTIFF AND DEFENDANT.

There is no conflict of interest on the part of Plaintiff as between Plaintiff and Defendant. All four of the Directors were aware of and knew the terms of the Listing Agreement and

knew the signing of the Earnest Money Agreement would make the Corporation obligated to pay the real estate commission according to the terms of the Listing Agreement. The four individuals also were the holders of over eighty percent (80%) of the voting stock of the Corporation.

Upon signing the Earnest Money Agreement a valid contract was created. The Plaintiff had earned his commission and was entitled to be paid providing the purchasers could come up with the money within the allotted time. All parties, corporation, and otherwise, knew Plaintiff would work to arrange financing (Ex. 3). Plaintiff was able to do this (Tr. 15-26) where the bank representative testified a loan had been approved that would enable purchasers to comply with the Earnest Money Agreement. Only at that late date did the Defendant refuse to execute the deed and thereby breached its contract with Plaintiff. It may be noted here that a son-in-law of the President of the Corporation who owned no voting stock and whose wife owned less than one share of stock, instructed the President of the Corporation what to do. In fact, the evidence indicated his action could be described as intimidating. No corporation meeting had been held to determine that the contract between the Plaintiff and the Defendant should be breached or that the contract was to be voided. This was simply an arbitrary breach of contract

induced by a relative who had no direct interest in the Corporation as a stockholder or officer. The nearest thing to an interest on the part of Mr. Flinders would be to keep the property in the Corporation until his wife inherited the interest of the President of the Corporation.

The contract between Plaintiff and Defendant was not one with conflict of interest problems and was not void or voidable. The Plaintiff acted in complete candor and good faith, and full disclosures were made at all times. There is no tint of bad faith or any improper activity on the part of the Plaintiff.

If the contract between Plaintiff and Defendant can be ignored and broken, then it is difficult to conceive of a real estate sale where the seller could not break the Agreement with impunity. All of the cases cited by the Defendant go to the question of the rights as between seller and purchaser, but not to the obligation of the Defendant to the Plaintiff.

If the Heath family here involved wished to impune the motives of each other, the law does not require that Plaintiff be denied its proper compensation. The Plaintiff has fully performed and complied with the terms of its contract with the Defendant and is entitled to be paid. There is no conflict of interest as between Plaintiff and Defendant.

One hundred percent (100%) of the Directors and in excess of eighty percent (80%) of the stockholders approved the contract to sell, and both the Corporation and the individuals involved approved the original Listing Agreement. All of the stockholders and directors approved the Listing Agreement (Ex.1).

Again, in the case cited above, Taylor vs. Axton-Fisher Tobacco Company, the Court said:

"If in a particular instance where the action taken by directors creates rights in another, they cannot thereafter alter or affect those rights to his prejudice."

Central Idaho Agency, Inc. v. Clara Turner, 92 Idaho 306

442 P2d p. 442:

"Pursuant to terms of exclusive Listing Agreement contract Plaintiff broker in suit for commission would be entitled to Summary Judgment against land owner only if it were conclusively established that Plaintiff produced buyer ready, willing and able to purchase the realty under terms authorized by the Agreement or under terms acceptable to the Defendant. \* \* \*."

McMenamin v. Bishop, 6 Washington Appeals 455, 493 Pac.2d

1016:

"Exclusive real estate Listing Agreement providing that vendor would be liable to broker for the commission if she withdrew the broker's authority prior to expiration of listing, was a bilateral contract. Thus, where broker made bona fide and continuous effort to procure purchaser by advertising the property approximately 17 times

in local newspaper and showing the property to six or seven prospective purchasers, vendor was liable for the commission when she refused to complete sales transaction even if she had revoked the Agreement."

Hoyt vs. Wasatch Homes, 1 Ut 2d, p. 9, 261 Pac.2d 927:

"That Agreement certainly contemplates that the Plaintiff would cooperate in good faith toward the accomplishment of the purpose for which he employed Defendant. He cannot be permitted to procure them to obtain a buyer on terms acceptable to the Plaintiff and then prevent the accomplishment of what he requested and authorized them to do by arbitrarily refusing to perform his part of the transaction. Under such circumstances he will not be heard to complain of their failure to do that which he prevented."

Sargent vs. Ritchey 233 Pac.2d 1619 (Washington):

"Unless the broker or his employer have expressly stipulated to the contrary, the broker is entitled to his compensation upon the completion of the negotiations he undertook irrespective of whether or not the contract negotiated is ever actually consummated, so long as the failure to carry it through to a successful completion is not due to any fault of the broker."

#### SUMMARY

The Plaintiff in this case acted in good faith, performed the service for which he was hired and the duly elected, qualified and acting Board of Directors engaged him to so perform. The fact that some of the officers had sellers' remorse or thought they could make a better deal some place else has no

place in the law.

It should be noted that over 80% of the stock was represented at the meeting on January 13, 1974, when the Earnest Money Agreement was approved. The sale, so far as the Plaintiff herein was concerned, was completed and his commission earned. The financing was approved as shown by the testimony (Tr. p.71-72), before the deadline as provided in the Agreement. This, therefore, appears to be a simple case of a seller's remorse and the stockholders in this family corporation backing out of an agreement after the Plaintiff had completed and fulfilled his part of the contract, and Plaintiff should therefore recover his commission as prayed for in his Complaint.

The Listing Agreement was in conformity with the requirements of the Articles of Incorporation, and was also approved at a meeting of substantially all of the stockholders.

The authority to sell the property of a corporation by its Directors has long been the law of Utah. As early as 1919 in the case of Beggs vs. Myton Canal & Irr. Co., 54 Utah 120, 179 Pac. 984, the Court said, at Page 125-6:

"\* \* \* Considering the section as a whole, the manifest legislative intent is that all corporations in this State may, through their directors and upon confirmation by a vote of a majority in amount of the outstanding stock,

dispose of the corporate property when such disposition is not provided for in the Articles of Incorporation. And when the Articles of Incorporation provide that the property of the corporation may be sold by the directors or by the stockholders, sales made in accordance with such provision will be binding upon the corporation. Whether such corporation be organized for mining purposes, or for other purposes, under the general incorporation laws of the State, our statute gives private corporations the power to sell and dispose of their property upon confirmation by the majority in amount of the outstanding stock. No further authority need be invoked in this case. The rule, however, is well settled that failing or unsuccessful corporations may sell and dispose of their property provided the transactions are not in fraud of the rights of creditors."

It should also be noted that all of the qualified directors were present at the time the Earnest Money Agreement was executed. It has been admitted that Sandra Flinders did not own one share of common stock as required by the Articles of Incorporation and there had been no actual transfer of a share to her on the books of the Corporation.

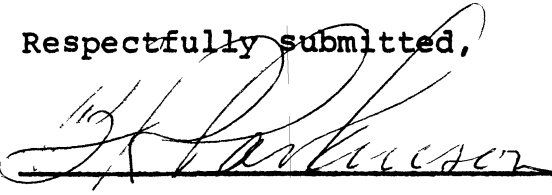
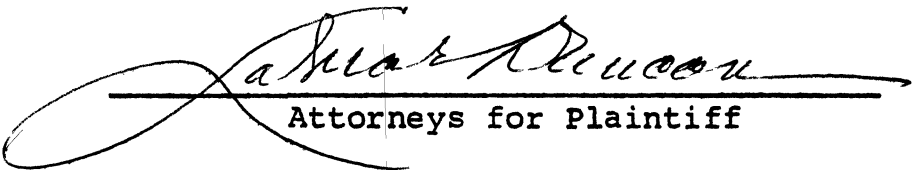
It would therefore appear to Plaintiff that this is a simple case of sellers changing their minds or backing out of the deal after the Plaintiff had performed all of his part of the Listing and Earnest Money Agreements for the sale of the property.

Mrs. Heath, herself, on cross examination, admitted that

her only reason for refusing to sign the deeds was some second thoughts which she had after talking to the husband of Sandra Flinders at the time she, Mrs. Flinders, owned less than one full share. (Tr. 8), and Mr. Flinders owned no voting stock.

We therefore submit that the Judgment should be affirmed.

Respectfully submitted,

  
\_\_\_\_\_  
  
\_\_\_\_\_  
Attorneys for Plaintiff