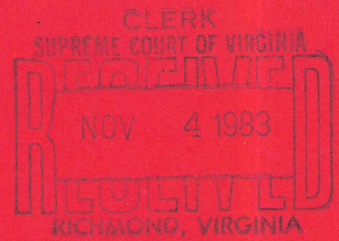


231 Va. 170



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 830206

LONG & FOSTER REAL ESTATE, INC.
and
RITA MARSH

Appellants,

v.

MARY W. CLAY

Appellee.

JOINT APPENDIX

Robert A. Johnson
Teresa K. Rawoot
Johnson & Ostby
8355 Greensboro Drive
McLean, VA 22102

Counsel for Appellants

Raymond J. Diaz
Kenneth J. Kopocis
Rees, Broome & Diaz
8133 Leesburg Pike
Suite 810
Vienna, VA 22180

Counsel for Appellee

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MAR 8 1982

JAMES E. HOOFNAGLE
Clerk of the Circuit Court
of Fairfax County, Va.MOTION FOR JUDGMENT

COMES NOW your Plaintiff, Long & Foster Real Estate, Inc., by Counsel, and in support of its Motion for Judgment against the Defendant, Mary W. Clay, does state as follows:

1. That your Defendant, Mary W. Clay, is the owner of a certain parcel of real property containing 12.4857 acres located on Route 29/211 at Cub Run near Centreville, Virginia in Fairfax County, Virginia, designated by County Tax Map Reference No. 64-1-01-0018 and more particularly described in Will Book 285, page 611 among the records of the Celrk of the Circuit Court of Fairfax County, Virginia.

2. That on or about November 15, 1981, your Defendant entered into and signed a Listing Agreement with your Plaintiff Long & Foster Real Estate, Inc., through its Sales Associate, Rita Marsh to sell the aforesaid real estate. A copy of the Listing Agreement is attached hereto as Plaintiff's Exhibit "A" and is made a part hereof.

3. That your Plaintiff is a corporation in good standing organized under the laws of the Commonwealth of Virginia engaged in the business of real estate sales and management.

4. That pursuant to the aforesaid Listing Agreement your Plaintiff through its sales associates sought a ready, willing and able purchaser for the property.

5. That on or about December 19, 1981 your Plaintiff produced a purchaser who offered a contract on the property which was accepted and signed by your Defendant. A copy of that contract entitled "Land Sales Contract" is attached hereto as Plaintiff's

Exhibit "B" and made a part hereof.

6. That on or about December 28, 1981 the Purchaser, Jim L. Blevins did appear at the time and place designated for settlement, and then and there paid all sums due, executed all papers, and performed all necessary acts required of him, as Purchaser, to complete settlement under the said "Land Sales Contract".


7. That your Defendant has refused and/or failed to complete settlement under the "Land Sales Contract" without justification based in law.

8. That pursuant to both the Listing Agreement and the "Land Sales Contract", your Plaintiff is entitled to ten percent (10%) real estate commission because a buyer who was ready, willing and able was found and performed under the contract, due to the efforts of the Plaintiff.

9. That your Defendant has failed and/or refused to pay your Plaintiff the ten percent (10%) real estate commission due in the amount of Thirteen Thousand Dollars (\$13,000.00).

10. That your Defendant is in breach of both the Listing Agreement and/or the "Land Sales Contract" with respect to payment of the real estate commission of ten percent (10%) in the amount of Thirteen Thousand Dollars (\$13,000.00) due your Plaintiff.

WHEREFORE, your Plaintiff prays that your Plaintiff be awarded a monetary judgment against your Defendant, Mary W. Clay, in the amount of Thirteen Thousand Dollars (\$13,000.00) plus the cost of this suit and interest from the date of the Defendant's breach.


MARTIN L. CROSS, ESQUIRE
COMPTON, COMPTON & POTTER
9315 Grant Avenue
Manassas, Virginia 22110
phone: 631-1610

LONG & FOSTER REAL ESTATE, INC.

BY: 

Counsel

APR 21 1982

GROUND OF DEFENSE

COMES NOW the Defendant/Counter-Claim Plaintiff, MARY W. CLAY, by counsel, and for grounds of defense to the Motion for Judgment exhibited against her herein, avers as follows:

1. That the allegations contained in Paragraph numbered 1 are admitted.
2. In answer to the allegations contained in Paragraph numbered 2 of the said Motion for Judgment, your Defendant admits that she entered into and signed the Listing Agreement, a copy of which is incorporated into the said Motion for Judgment, as Plaintiff's Exhibit "A." Your Defendant avers that the said agreement speaks for itself as to the terms and provisions. All other allegations contained in the said Paragraph numbered 2 not specifically admitted are hereby denied.
3. Your Defendant is without sufficient knowledge or information to form a belief as to the truth of the matters alleged in Paragraphs numbered 3, 4 and 6 of the said Motion for Judgment and, therefore, denies the same.
4. Your Defendant denies so much of the allegations in Paragraph numbered 5 of the Motion for Judgment as alleges that a purchaser produced by the Plaintiff offered a contract accepted by the Defendant. Further answering the allegations of the said Paragraph numbered 5, your Defendant avers that the Plaintiff, through its agent, RITA MARSH, prepared for your Defendant's signature, a document entitled "Land Sales Contract" which the Plaintiff required your Defendant to sign prior to the time that it was presented to a purchaser for execution.

Your Defendant denies that she accepted the contract offered by the purchaser as the same is reflected in Exhibit "B" to the said Motion for Judgment by reason of the fact that the Plaintiff by and through its agent, RITA MARSH, in breach of its fiduciary duty to your Defendant, misrepresented to your Defendant the content and import of the said Exhibit B so as to compel your Defendant's execution of the said document despite the fact that the said document contained terms and provisions inconsistent with and contrary to the terms and conditions specified in the contract of employment between the Plaintiff and your Defendant.

5. The allegations contained in Paragraphs 7, 9 and 10 of the said Motion for Judgment are denied.

6. The allegations contained in Paragraph numbered 8 of the said Motion for Judgment are denied. Further answering, your Defendant avers that the Plaintiff, through its agent, RITA MARSH, in total disregard of its fiduciary duty to your Defendant, knowingly failed to disclose to your Defendant that the document entitled "Land Sales Contract" contained terms and provisions contrary to the terms and conditions specified in the contract of employment between your Defendant and the Plaintiff and contrary to the terms and conditions which your Defendant informed the Plaintiff that she would accept in a real estate sales contract offer. Notwithstanding the Plaintiff's knowledge of the terms and conditions which were acceptable to your Defendant, and in breach of its fiduciary duties to your Defendant and for the purpose of inducing your Defendant to make the offer contained in the "Land Sales Contract" incorporated into the said Motion for Judgment as Exhibit B, the Plaintiff, by and through its agent, RITA MARSH, knowingly and intentionally misrepresented to your Defendant the terms and conditions set

forth in the said "Land Sales Contract." In reliance upon said misrepresentations, your Defendant executed the said "Land Sales Contract," all to her detriment. On account of the said breach of fiduciary duty, failure to disclose and misrepresentations by the Plaintiff, through its agent, RITA MARSH, the Plaintiff has forfeited its right to receive any real estate commission in the premises.

WHEREFORE, having fully answered, your Defendant prays that the said Motion for Judgment may be dismissed and that she be awarded her costs and attorney's fees in this behalf expended.

COUNTER-CLAIM

COMES NOW the Defendant/Counter-Claim Plaintiff, MARY W. CLAY, by counsel, and files this Counter-Claim against the Plaintiff/Counter-Claim Defendant, LONG & FOSTER REAL ESTATE, INC., and against the Counter-Claim Defendant and Third Party Defendant, RITA MARSH, and in support thereof, respectfully avers as follows:

1. That your Defendant/Counter-Claim Plaintiff, MARY W. CLAY (hereinafter "Mrs. Clay") is the owner of a certain parcel of real property containing 12.4857 acres of land located on Route 29/211 at Cub Run near Centreville, Virginia, in Fairfax County, Virginia.

2. Mrs. Clay employed the Plaintiff/Counter-Claim Defendant, LONG & FOSTER REAL ESTATE, INC. (hereinafter "Long & Foster"), and the additional Counter-Claim Defendant, RITA MARSH (hereinafter "Marsh"), to obtain a purchaser ready, willing and able to purchase the said real estate upon the terms and conditions set forth in the employment agreement between the parties, a copy of which is attached hereto and incorporated herein by this reference.

3. At the time of her employment of Long & Foster and Marsh, Mrs. Clay advised Long & Foster, through Marsh, and Marsh, that the said real property was encumbered by deeds of trust which Mrs. Clay intended to pay off as she was unable to continue to make the periodic payments thereon. Mrs. Clay further advised Long & Foster and Marsh that she intended to pay off the said deeds of trust from the proceeds of sale of the real property as she had no other source of funds sufficient to do so. Mrs. Clay advised Long & Foster and Marsh that she was unwilling to take back a purchase money note but required payment in cash from a purchaser. For these reasons, the printed Listing Agreement form containing the employment agreement between the parties was marked up by Marsh prior to its execution to reflect that Mrs. Clay would not take back a deferred purchase money note and trust and to reflect that the property was to be sold free of any existing encumbrances.

4. Thereafter, Marsh discussed the potential purchase of the real property with Jim L. Blevins, Mrs. Clay's tenant who had leased the property from Mrs. Clay for a number of years, and who was and is a friend of Marsh's and Marsh's husband. On the evening of December 19, 1981, and subsequent to the said discussions with Blevins, Marsh prepared and presented to Mrs. Clay the document attached hereto as Exhibit "B," but without a purchaser's signature thereon. At that time, Mrs. Clay asked Marsh repeatedly to explain the meaning of the handwritten language thereon which recited "Seller agrees to hold the remaining balance..." and "...seller agrees to subordinate a bona fide construction loan." Marsh failed and refused to explain the significance or the purport of the said language and, acting within the scope of her actual and/or apparent authority as agent for Long & Foster and with the intent that Mrs. Clay

rely on her representations, Marsh represented to Mrs. Clay that the language would make Mrs. Clay's property "more valuable" and that the document met Mrs. Clay's terms and conditions as the same were set forth in the Employment Agreement between the parties. Marsh further indicated to Mrs. Clay that it was essential that she execute the document at that time and refused to allow Mrs. Clay the opportunity to retain the document for review and execution at a subsequent time.

5. In reliance on the said misrepresentations of Long & Foster and Marsh, Mrs. Clay executed the said document which, upon information and belief, was thereafter presented to and executed by Jim L. Blevins.

6. In consequence of the said misrepresentation, nondisclosure and breach of fiduciary duties by Long & Foster and Marsh, Mrs. Clay has been damaged in that she has been required to obtain counsel to negotiate a resolution of the claim by Blevins for the performance of the undertakings contained in the said Exhibit B and has been compelled to enter into a subsequent agreement with Blevins under the terms of which Mrs. Clay is required to accept a deferred purchase money promissory note in the amount of \$100,000.00. Mrs. Clay has been further damaged in consequence of the said wrongful acts of Long & Foster and Marsh in that she has lost the present use of the said \$100,000.00.

WHEREFORE, the premises considered, Mrs. Clay prays judgment against the Counter-Claim Defendant and the additional Counter-Claim Defendant in the amount of \$40,000.00, together with interest thereon and reasonable attorney's fees.

THIRD PARTY MOTION FOR JUDGMENT

COMES NOW the Defendant, MARY W. CLAY, by counsel, and

as and for her Third Party Motion for Judgment against RITA MARSH, (hereinafter "Marsh"), respectfully avers as follows:

1. The Plaintiff, LONG & FOSTER REAL ESTATE, INC., has filed a Motion for Judgment against your Defendant, a copy of which is attached hereto as Exhibit "C."

2. The claim of Long & Foster Real Estate, Inc. as set forth in its Motion for Judgment is based on your Defendant's execution of a document denominated in the said Motion for Judgment as "Land Sales Contract." The execution of the said document by your Defendant was obtained by the misrepresentations, nondisclosure and breach of fiduciary duty of the Third Party Defendant, all as more fully set forth in the Counter-Claim filed herein by your Defendant, a copy of which is attached hereto and incorporated herein by this reference.

3. By reason of the foregoing, if the Plaintiff recovers against your Defendant upon the cause of action set forth in the said Motion for Judgment, the Third Party Defendant is liable over to your Defendant for the amount of any such recovery.

WHEREFORE, the premises considered, your Defendant, MARY W. CLAY, demands judgment of the Third Party Defendant, RITA MARSH, indemnifying your Defendant for any judgment which may be entered against her in this action and for any damages which she may suffer as a result thereof.

MARY W. CLAY
By Counsel

REES, BROOME & DIAZ, P. C.

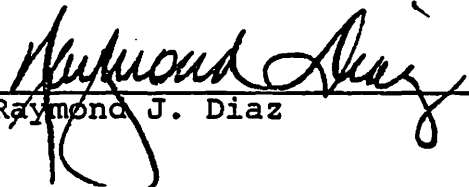
By


Raymond J. Diaz

Counsel for Mary W. Clay
8133 Leesburg Pike, Suite 810
Vienna, Virginia 22180
(703) 790-1911

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Grounds of Defense, Counter-Claim and Third Party Motion for Judgment was mailed, first class mail, postage prepaid, to Martin L. Cross, Esquire, Compton, Compton & Potter, Counsel for Long & Foster Real Estate, Inc., 9315 Grant Avenue, Manassas, Virginia, 22110, on this 1st day of April, 1982.



Raymond J. Diaz

GROUND OF DEFENSE

TO

COUNTERCLAIM

COMES NOW the Plaintiff/Counterclaim Defendant, Long & Foster Real Estate, Inc., by counsel, and for Grounds of Defense to the Counterclaim filed herein by the Defendant /Counterclaim Plaintiff does state as follows:

1. That your Plaintiff/Counterclaim Defendant admits the allegations of Paragraph 1 of the Counterclaim.

2. That your Plaintiff/Counterclaim Defendant admits the allegations of Paragraph 2 of the Counterclaim, except that the Plaintiff/Counterclaim Defendant expressly denies that the employment agreement attached to the Counterclaim is, in all respects, a true copy of said employment agreement.

3. That your Plaintiff/Counterclaim Defendant denies the allegations of Paragraph 3, 5 and 6 of the Counterclaim.

4. That your Plaintiff/Counterclaim Defendant denies the allegations of Paragraph 4 of the Counterclaim, except that your Plaintiff/Counterclaim Defendant admits that Marsh discussed the potential purchase of the real property with Jim L. Blevins.

WHEREFORE, your Plaintiff/Counterclaim Defendant prays that the Counterclaim asserted against it by the Defendant/Counterclaim Plaintiff be dismissed and that the Plaintiff/Counterclaim Defendant be awarded cost on its behalf expended.

LONG & FOSTER REAL ESTATE, INC.

By



Counsel



MARTIN L. CROSS, Esquire
Compton, Compton & Potter
9315 Grant Avenue
Manassas, Virginia 22110
361-2106

C E R T I F I C A T E

I hereby certify that this *15th* day of April, 1982, that
a copy of the foregoing was mailed, postage prepaid, to Raymond
J. Diaz, Esquire, 8133 Leesburg Pike, Suite 810, Vienna, Virginia
22180, counsel for the Defendant/Counterclaim Plaintiff.



MARTIN L. CROSS

GROUND OF DEFENSE

TO

THIRD PARTY MOTION FOR JUDGMENT

COMES NOW, the Third-Party Defendant, Rita Marsh, by counsel, and for her Grounds of Defense to the Third-Party Motion for Judgment filed herein, does state as follows:

1. That your Third-Party Defendant admits the allegations of Paragraph 1 of the Third-Party Motion for Judgment.
2. That your Third-Party Defendant denies the allegations of Paragraphs 2 and 3 of the Third-Party Motion for Judgment.

WHEREFORE, your Third-Party Defendant prays that the Third-Party Motion for Judgment asserted against her be dismissed, and that she be awarded her costs on her behalf expended.

RITA MARSH

By

Counsel

MARTIN L. CROSS, Esquire
Compton, Compton & Potter
9315 Grant Avenue
Manassas, Virginia 22110
361-2106

C E R T I F I C A T E

I hereby certify that a copy of the foregoing was this 15th day of April, 1982, mailed, postage prepaid, to Raymond J. Diaz, Esquire, 8133 Leesburg Pike, Suite 810, Vienna, Virginia 22180, counsel for the Defendant/Third-Party Plaintiff.

MARTIN L. CROSS

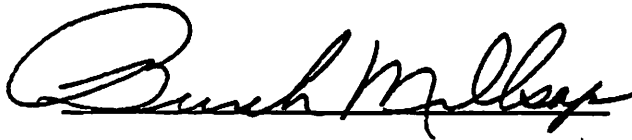
ORDER

UPON the joint motion of the parties and for good cause shown; it is hereby,

ADJUDGED, ORDERED and DECREED that RITA MARSH be, and she hereby is, joined as a party in the captioned action. Leave is hereby granted to the said RITA MARSH to make her defenses to the causes of action against her in the Counter-Claim and Third Party Motion for Judgment within 21 days of the date hereof.

AND, THIS ACTION IS CONTINUED.


ENTERED this 19th day of May, 1982.



JUDGE


WE ASK FOR THIS:

REES, BROOME & DIAZ, P.C.

By: 
Raymond J. Diaz
813B Leesburg Pike, Suite 810
Vienna, Virginia 22180
(703) 790-1911
Counsel for Mary W. Clay

SEEN AND AGREED TO:

COMPTON & POTTER

By: 
Martin L. Cross, Esquire
9315 Grant Avenue
Manassas, Virginia 22110
Counsel for Long & Foster
Real Estate Inc., and
Rita Marsh

You are the judges of the facts, the credibility of the witnesses, and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any has been shown, their prior inconsistent statements.

While you have no right to disregard arbitrarily the believable testimony of any witness, you may discard or accept, in whole or in part, the testimony of any witness when you consider it in connection with the other evidence in the case. You are entitled to use your common sense in judging any testimony.

From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

Given
JK

You must not base your verdict in any way upon sympathy, bias, guesswork or speculation. Your verdict must be based solely upon the evidence and instructions of the court.

Given

Your verdict must be based on the facts as you find them and as the law contained in all of these instructions:

The issues in this case are:

1. Was there a contract between the parties?
2. If there was, did the Defendant break it?

On these issues the Plaintiff has the burden of proof.

3. ~~Did the Plaintiff breach her fiduciary duty to the Defendant by failing to disclose the meaning of "subordination" to her?~~

On this issue, the Defendant has the burden of proof.

4. If the Plaintiff is entitled to recover, what is the amount of her damage?

On this issue the Plaintiff has the burden of proof.

5. If the Defendant is entitled to recover, what is the amount of her damages?

Your decisions on these issues must be governed by the instructions that follow.

INSTRUCTION NO. C

Your verdict must be based on the facts as you find them and as the law contained in all of these instructions:

The issues in this case are:

1. Was there a contract between the parties?
2. If there was, did the Defendant break it?

On these issues the Plaintiff has the burden of proof.

3. ^{whether} Rita Marsh induced Mrs. Clay to sign the Land Sales Contract by failing to explain that the contract contained terms different from the terms described in the listing agreement?

On this issue, the Defendant has the burden of proof.

4. If the Plaintiff is entitled to recover, what is the amount of her damage?
5. If the Defendant is entitled to recover what is the amount of her damages?

Your decisions on these issues must be governed by the instructions that follow.

You shall find your verdict for the Plaintiff if it has proved by the greater weight of the evidence that:

1. There was a contract between the parties and
2. The Defendant breached the contract by refusing to pay the commission.

You will find your verdict for the Defendant if:

1. The Plaintiff failed to prove either or both of the elements above, or if
2. The Defendant has proved by the greater weight of of the evidence that the Plaintiff breached its duties to her ~~and failed~~ ^{BY FAILING} to fully disclose the information to the Defendant.

When a party has the burden of proof on an issue, then he must prove that issue by the greater weight of all the evidence. This is sometimes called the preponderance of the evidence. It is that evidence which you find more convincing. The testimony of one witness whom you believe can be the greater weight of the evidence.

Gilson
Q.Y.

INSTRUCTION NO. F

A contract is an agreement between two parties. There must be an offer by one party and an acceptance by the other party for consideration.

W. K. Adams
W. K.

The parties to a contract must be competent. A person is competent if he is capable of understanding the nature and the effect of the contract.

Sincerely
JS

The contract should be considered as a whole; no part of it should be ignored. The contract should be interpreted to give effect to each of the provisions in it. No word or phrase in contract should be treated as meaningless if any meaning which is reasonable and consistent with other parts of the contract can be given to it.

Given
PH

INSTRUCTION NO. J.

When a party has the burden of proving an issue by clear and convincing evidence, he must produce evidence that creates in your minds a firm belief or conviction that he has proved the issue.

Given introduction
JS

A real estate agent is entitled to his or her commission when he produces a purchaser who is ready, willing and able to buy on the terms authorized by the seller in the listing agreement or on terms that are acceptable to the seller, ~~in the land sales contract.~~

If an agent has done this, then she is entitled to her commission, ~~even if she did not conduct the final negotiations for the sale of the property.~~ *AND if she has not Done*

so, she is not entitled to her commission.

The burden of proof is on her to prove ~~the facts~~ that she is entitled to her commission.

Gibber

INSTRUCTION NO. K

A real estate agent is entitled to his or her commission when he produces a purchaser who is ready, willing and able to buy on the terms authorized by the seller in the listing agreement or on terms that are acceptable to the seller.

If an agent has done this, then she is entitled to her commission. And if she has not done so, she is not entitled to her commission. The burden of proof is on the plaintiff to prove that she is entitled to her commission.

Given

A broker has a duty to deal with the seller in good faith; he is not entitled to a commission if he failed to disclose to the seller all facts within his knowledge which might have influenced the seller in his decision to sell.

W. H. Brown
PS

The Court instructs the jury that as a matter of law, one who accepts the benefits of a contract made for her by her agent is bound by the contract, and must take such contract as made with its burdens as well as its benefits. And even though you may believe from the evidence that the acts of the agent were not authorized by the Defendant, and if you further believe from the evidence that the Defendant took the benefits of the contract made in her behalf, then the Defendant is bound by the contract made by Mrs. Marsh.

denied.
PS
Robt. A. H. H. H.

INSTRUCTION NO. A /

*Wardlaw
JH*

You are the judges of the facts, the credibility of the witnesses, and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements.

While you have no right to disregard arbitrarily the believable testimony of any witness, you may discard or accept, in whole or in part, the testimony of any witness when you consider it in connection with the other evidence in the case. You are entitled to use your common sense in judging any testimony.

From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

INSTRUCTION NO. 82

*withdrew
JH*

You must not base your verdict in any way upon sympathy, bias, guesswork or speculation. Your verdict must be based solely upon the evidence and instructions of the court.

INSTRUCTION NO. C 3

with drawn
PD

The burden of proof is on the plaintiff to prove that its agent produced a purchaser ready, willing and able to buy on terms authorized by Mrs. Clay. If the plaintiff has not done this, it is not entitled to a commission and you shall find your verdict for Mrs. Clay.

INSTRUCTION NO. D 4

*withdrawing
JS*

When a party has the burden of proof on an issue, then he must prove that issue by the greater weight of all the evidence. This is sometimes called the preponderance of the evidence. It is that evidence which you find more convincing. The testimony of one witness whom you believe can be the greater weight of the evidence.

INSTRUCTION NO. E 5

Interpretation of a contract is primarily a determination of what the parties intended. In determining their intent you may consider the words they used. The words should be given their plain and ordinary meaning unless an obviously different meaning is apparent. You may also consider the subject matter of the contract, the situation of the parties, the purpose of the parties in making the contract, and the surrounding circumstances.

*Given
JH*

INSTRUCTION NO. F 6

wikudhans
[Signature]

The contract should be considered as a whole; no part of it should be ignored. The contract should be interpreted to give effect to each of the provisions in it. No word or phrase in a contract should be treated as meaningless if any meaning which is reasonable and consistent with other parts of the contract can be given to it.

INSTRUCTION NO. 67

In interpreting a contract, you should resolve any doubts about the meaning of a word or phrase against the party who supplied the contract and inserted the language in the contract.

Given

INSTRUCTION NO. H 8

~~MS~~ Marsh was an agent of Long & Foster Real Estate, Inc.
and Long & Foster Real Estate, Inc. is, therefore, liable
for the actions of ~~MS~~ Marsh *done* within the scope of
her employment.

Given
JS

INSTRUCTION NO.

I 9

*w/Answer
CPJ*

A broker or agent has a duty to deal with the seller in utmost good faith; he is not entitled to a commission if he failed to disclose to the seller fully and frankly all information within his knowledge which might have influenced the seller in his decision to sell and if he or she has failed to come up to this standard, no commission may be recovered.

INSTRUCTION NO. J 10

Hillery
PS

Mrs. Marsh was the agent of Mrs. Clay and owed to her the duty to exercise the utmost good faith towards her. In discharging such duty, ^{US} Marsh was required to disclose to Mrs. Clay all the facts with ^{US} Marsh's knowledge which were or may have been material to the transaction, or which may have influenced Mrs. Clay's decision. If you find that Marsh failed to discharge this duty, then Long & Foster's right to recover a commission is forfeited.

INSTRUCTION NO. J 10

Mrs. Marsh was the agent of Mrs. Clay and owed to her the duty to exercise the utmost good faith towards her. In discharging such duty, Mrs. Marsh was required to disclose to Mrs. Clay all the facts within Mrs. Marsh's knowledge which were or may have been material to the transaction, or which may have influenced Mrs. Clay's decision. If you find that Mrs. Marsh failed to discharge this duty, then Long & Foster's right to recover a commission is forfeited.

Given
JS
/

INSTRUCTION NO. K 11

You shall find your verdict for Mrs. Clay upon her Counter-claim if she has proved by the greater weight of the evidence that:

- (1.) Rita Marsh induced Mrs. Clay to sign the Land Sales Contract by failing to explain that the contract contained terms different from the terms described in the listing agreement; or,
- (2.) Rita Marsh induced Mrs. Clay to sign the Land Sales Contract by ~~misrepresenting~~ ^{FAILING TO EXPLAIN} the terms of the contract to Mrs. Clay.

*Given
JfJ*

If you find for the Plaintiff upon its Motion for Judgment against Mrs. Clay, then you shall find your verdict for Mrs. Clay against Rita Marsh if Mrs. Clay has proved by the greater weight of the evidence that:

- (1.) Rita Marsh induced Mrs. Clay to sign the Land Sales Contract by failing to explain that the contract contained terms different from the terms described in the listing agreement; or,
- (2.) Rita Marsh induced Mrs. Clay to sign the Land Sales Contract by ~~misrepresenting~~ ^{FAILING TO EXPLAIN.} the terms of the contract to Mrs. Clay.

INSTRUCTION NO. M ~~18~~
13

If you find your verdict for Mrs. Clay upon her counter-claim, then she is entitled to recover as damages all losses she sustained which are a direct and natural result of the breach and which she has proved by the greater weight of the evidence.

Given
JS

these are for questions you to
answer giving words their ordinary
Questions — meaning
Instructions cover this item. JLF

1. Instruction No C, item 3 says that
the Defendant ~~the~~ has the burden
to show
of proof ~~the proof~~ Mrs March
induced Mrs Clay to sign the
Land Sales Contract by failing
to explain that the contract
contained terms different from
the terms described in the
listing agreement.

Instruction D; item 2 says
failing to fully disclose
the information.

a) What is the difference between
disclose & explain?

b) Please ~~explain~~ tell us to what detail ~~that~~. Mrs Marsh was responsible to disclose or explain this information? || 83

c) Must it be to Mrs Clay's understanding?
Questions.

1. Do we have to determine the exact dollar amount to be awarded or can we specify which costs we want paid?

Must be a specific dollar amount
JHF

We, the Jury, on the issue joined in the case of
Mary W. Clay, Defendant/ Counter-Claimant, versus Long
& Foster Real Estate, Inc., Plaintiff/Counter-Defendant,
find our verdict in favor of the Defendant/Counter-
Plaintiff and assess her damages in the amount of

\$ 4,000

Melone A. Ringer
FOREMAN

We, the Jury, on the issue joined in the case of Long & Foster Real Estate, Inc., Plaintiff, versus Mary W. Clay, Defendant, find our verdict in favor of the Defendant.


FOREMAN

We, the Jury, on the issue joined in the case of
Mary W. Clay, Third Party Claimant, versus Rita Marsh,
Third Party Defendant, find our verdict in favor of
the Third Party Claimant and assess her damages in the
amount of \$1.00.

Melanie A. Ring
FOREMAN

FILED

SEP 7 1982

JAMES E. HOOFNAGLE
Clerk of the Circuit Court
of Fairfax County, Va.

MOTION TO SET ASIDE VERDICT

COMES NOW, the Plaintiff, Long & Foster Real Estate, Inc., and the Counter-Defendant and Third-Party Defendant, Rita Marsh, by counsel, and files this their Motion to Set Aside the Verdict of the jury in this civil action heard on August 10 and 11, 1982, in the Circuit Court of Fairfax County and respectfully represents unto this Honorable Court as follows:

I. STATEMENT OF FACTS:

Mary W. Clay (hereinafter referred to as the Defendant) was the owner of two parcels of real property in Fairfax County, Virginia. One parcel was located in Falls Church where the Defendant resided and the other, which was the subject of this suit, was an unimproved parcel of property containing about 12 acres and located in western Fairfax County on Route 29-211 across from Luck Quarry. The Defendant had tried on her own to sell the unimproved land for several years prior to 1981. In October of 1981 Luck Quarry had filed an application with the county authorities to rezone a portion of their property adjoining the Defendants land and Tom Marsh, Defendant Rita Marsha' husband, was employed by Luck Quarry to contact the adjoining property owners to advise them of the nature of the pending rezoning by Luck Quarry. After being contacted by Mr. Marsh, the Defendant later went to his office where she advised him that she had been trying

to sell her property to the owners of Luck Quarry because her husband had passed away and left her with many debts. She told Mr. Marsh that the asking price was \$130,000.00 and that she had considered getting a real estate agent to list her property for sale. It was at this time that Mr. Marsh advised her that his wife, Rita Marsh, (the Counter-Defendant and Third-Party Defendant, hereinafter referred to as Marsh or agent) was a real estate agent with Long & Foster, Inc., (the Plaintiff and Counter-Defendant hereinafter referred to as Long & Foster) and perhaps could help her to sell her property. The next day Mrs. Marsh phoned the Defendant and arranged to meet her at the Defendants home to discuss the listing agreement.

On November 15, 1981, Mrs. Marsh came to the Defendants home together with her husband, Tom Marsh, and there they discussed the terms of the sale with the Defendant. A "Listing Agreement" was then filled in by Mrs. Marsh and signed by the Defendant.

The agreement provided in part that Long & Foster would have the "exclusive right to sell the property.... at a selling price of \$130,000.00 or such other price as I/we may later agree upon - which price included commission."

The agreement further provided in part that Long & Foster would be paid a commission of 10% of the sales price "in cash, if during the listing period, the property is sold by you (Mrs. Clay, the seller), me (Long & Foster - Mrs. Marsh), us, or anyone else, or if anyone produces a purchaser, ready, willing and able to purchase the property...." (meaning added)

The exclusive right to sell was to expire on June 20, 1982.

The agreement also provided in part that "in the event of a sale, I/we will execute a sales contract enforceable in the state of Virginia." This document was entered as an Exhibit by the

Plaintiffs as was the later contract and was stipulated to by the Defendant.

At the time of entering into the listing agreement the parties agreed that the agent, Mrs. Marsh, would not put the property listing into a multiple listing service computer until she had sought an offer from the owner of Luck Quarry. In the days that followed, the agent notified the owner of Luck Quarry and received an offer from them by telephone. This offer was to purchase the property under terms of \$100,000.00. The agent typed this offer on a form of Long & Foster and prepared an amortization sheet for the deed of trust called for in the offer so that the seller could review the method and amount of payments she would receive under the trust should she accept the offer.

In the meantime, the agent took additional action to list, show and sell the subject property. She put the listing into the multiple listing computer and together with other agents for Long & Foster, she showed the property to interested persons. It was during one of these "showings" that the tenant, Jim Blevins, who was renting the subject property from Mrs. Clay in order to store his heavy duty trucks, saw the agents viewing the property and then contacted Mrs. Marsh at Long & Foster and inquired as to the terms of the sale.

On December 19, 1981, Mr. Blevins went to the agents office and prepared and signed a written "land sales contract" as an offer to purchase the property. Before the contract was prepared, Mr. Blevins discussed the terms of the offer with his accountant who reportedly advised him to offer the full listing price of \$130,000.00 provided he could receive certain terms. These terms included an earnest money deposit of \$1,000.00, a down payment of \$25,000.00 cash at the time of settlement and the seller to take back a note for \$105,000.00 and for the seller to agree to

subordinate the trust to a bona fide construction loan. Mr. Blevins signed the land sales contract and gave the agent an earnest money deposit check in the amount of \$1,000.00. The agent then prepared an amortization sheet which amortized the payment of the trust in accordance with the terms provided in the land sales contract.

On December 20, 1981, the next day, the agent took both the Luck Quarry contract offer and Mr. Blevins contract offer to Mrs. Clay's home. At that time, the Defendant looked at the Luck offer first together with the amortization sheet but quickly rejected it as being below the listing price. Then, the Defendant and the agent reviewed the contract line by line. The Defendant testified that she had only one question. She asked the agent what the subordination provision of the land sales contract meant. The agent defined for her the meaning of the provision and the Defendant then signed the contract.

The only other person present at the time of the signing of the contract was the agents' husband, Tom Marsh. Mr. Marsh had driven his wife to the Defendant's home and testified that the question of the meaning of the subordination provision was raised by the Defendant and answered by the agent. The Defendant appeared to understand the explanation and asked no further questions or demonstrated any hesitation to enter into the contract.

There was no evidence introduced by the Defendant that there were any threats directed by the agent or her husband towards her nor evidence that the agent ever misrepresented any of the terms of the contract to her. The Defendant testified that had she understood the meaning of the subordination provision she would have not signed the contract. She testified that the Plaintiff did explain the meaning of the subordination provision to her but that she did not understand it.

After the contract was signed, the Defendant advised the agent that there were two trusts on the subject property which would have to be paid from the proceeds of the sale and that by her own calculation she would have to pay money in order to settle. She advised the agent that even though she had to pay money to settle she still wanted to sell the property because the trust payments and the constantly increasing real estate taxes were beginning to be a financial burden for her. She stated that she had some certificates of deposit which she could cash in order to provide the necessary money to close the deal but that she still might be \$5,000.00 short. The agent agreed to work with the Defendant ~~to try~~ to transfer the trust from the unimproved property to her home which was unencumbered so that the trust need not be paid off. She also agreed to talk to her broker at Long & Foster to see if he would take \$5,000.00 of the \$13,000.00 commission in the form of a note so that she would not have to come up with this money at settlement. When the parties parted the Defendant hugged the agent and thanked her for helping her to finally sell the land.

The next day, the agent worked with the Defendant to arrange a transfer of the deeds of trust and to obtain an agreement from her broker to take a note for the \$5,000.00 of the commission.

However, the Defendant, after discussing the contract with her fellow employees at the CIA who were attorneys, notified the agent that she was not going to settle on the property. At this time her refusal was based on two reasons. First, that she did not know the financial background of the purchaser, Mr. Blevins, even though he had been her tenant for many years and secondly, because she felt the contract put her in a second trust position because of the subordination clause.

In response to her telephone conversation with the Defendant, the agent, after consulting with Mr. Blevins' attorney, obtained

from the purchaser his prior income tax reports for three years together with a proposal for an addendum to the contract which addendum would substitute a release provision for the subordination language in the contract. On December 22, 1981, the agent again went to the Defendants' home where she delivered the tax records and the proposed addendum to Mrs. Clay. The Defendant advised the agent that while she was satisfied with the purchasers financial ability to settle on the property she would have to consider the proposed addendum and would advise the agent later.

On December 24, 1981, the attorney for Mr. Blevins, the purchaser, advised all the parties in writing that the settlement would be held on December 28, 1981, as called for in the contract.

On the date of settlement, the note, trust and settlement sheets were all executed by the Purchaser, Mr. Blevins, who was ready, willing and able to comply with the contract. The seller, the Defendant, did not appear.

Later, in January negotiations began between the attorney for the Defendant and the attorney for the Purchaser. One such proposal included a reduction of the real estate commission to Long & Foster from the amount of \$13,000.00 to \$10,000.00, this proposal was never made to Long & Foster nor was it accepted by the parties.

Finally, Mrs. Clay entered into a new second agreement with the Purchaser. The terms of that conveyance were \$130,000.00 with \$30,000.00 down in cash at the time of settlement and a trust for \$100,000.00. The trust included a release provision in place of the subordination clause. There was no commission paid to Long & Foster or the agent.

Whereafter, the Plaintiff commenced suit to recover the commission. The Defendant responded by counter-claiming for damages against Long & Foster, as well as impleading Rita Marsh, the agent. The Defendant couched her claim on a theory of breach of fiduciary duty based upon the alleged failure of Long & Foster

and their agent to fully disclose the consequences of the subordination provision in the land sale contract.

At trial, all of the documents related to the transaction were introduced into evidence. The Defendant attempted to prove that her note from the buyer was worth less because of the subordination provision. Additionally, the Defendant alleged counsel fees incurred because the contract was rewritten.

✓ The trial judge refused a request by counsel for Long & Foster to have a corporate representative in the courtroom. Although the judge permitted separate party Defendant Rita Marsh in the courtroom, the corporation did not have an independent representative.

Upon the close of the trial and jury deliberation, the jury returned a verdict. The jury denied the Plaintiff its commission. On the Defendant's claims, the jury apportioned damages assessing \$4,000.00 against Long & Foster and only \$1.00 against the agent Rita Marsh.

The Plaintiff now asserts that the judgment on its case-in-chief was in error and as a matter of law a verdict should have been directed for Plaintiff, or in the alternative, the verdict was against the greater weight of the evidence. Further, the verdict obtained on the counter-claim was improper in that it was procured through errors of law and improper rulings by the Court, as will hereinafter be mentioned.

DISCUSSION

I

There is little question that this Court has the authority to set aside the verdict. It may be set aside as contrary to the law. Clinchfield Coal Co. v Wheeler, 108 Va 448, 62 S.E. 269 (1908); Michies Jurisprudence, Vol 13B, page 444. And it may be

set aside as being contrary to the evidence or without evidence to support it. Thress v Hackler, 155 Va 389, 154 S.E. 502 (1930); Michies Jurisprudence, Vol 13B, page 445. See 1950 Code of Virginia, Section 8.01-430 and notes attached thereto. The general rule of law has been that the verdict should not be set aside unless there has been a plain departure from right and justice. It must affirmatively appear that the verdict was plainly contrary to the law or evidence or that it was probably unjust for some other manifest reason. However, while only when the verdict is plainly wrong that it should be set aside, "it should be remembered that the duty of the trial Judge to set aside a verdict of the jury, where the same is not justified by the law and the evidence, is just as imperative as is the duty to sustain the verdict where a contrary condition exist." Nicholson v Garland, 156 Va 745, 158 S.E. 901 (1931); Michies Jurisprudence, Vol 13B, page 443.

Furthermore, while the jury is the trier of the facts, the very fact that the trial judge is given the power to set aside the verdict as contrary to the evidence necessarily means that he must, to some extent at least, pass upon the weight of the evidence.

The sole issue presented in the case of the Plaintiff, Long & Foster Real Estate, Inc., against the Defendant, Mary W. Clay, was whether or not the Plaintiff was entitled to a commission.

The Plaintiff contends that there can be no dispute under the law and the facts as presented by the Plaintiff in the Exhibits which were stipulated to by the Defendant, the Plaintiff is entitled to a commission.

In reviewing the law in this type of case, the Supreme Court of Virginia in Metro Realty of Tidewater, Inc. v Fenner V. Woolard, Jr., 223 Va 92 (1982) considered a listing agreement, as in

this case, where the Defendant relied upon a breach of the brokers duty to disclose certain information to the principal. There, the Court stated that the law was as follows:

The rule is plain in that a broker, who is the agent of the owner, in negotiating the sale of the owners property, owes to the principal "the duty to exercise the utmost good faith towards him." Duncan v Barbour, 188 Va 53, 61 49 S.E. 2d 260, 264 (1948). In discharging such duty, the agent must disclose to the principal all facts within the agents knowledge which are or may be material to the transaction, or which may influence the principal's action; should the agent fail to discharge that duty, the right to recovery of a commission is forfeited. Owen v Shelton, 221 Va 1051, 1054, 277 S.E. 189, 191 (1981).

In that case, the Court concluded that the broker was entitled to his commission. The Court found

"Even if the owner signed the contract intending that it have a provision for interest, in the absence of fraud, duress or mutual mistake, a person having capacity to understand a written document who reads it, or without reading it or having it read to him, signs it, is bound by his signature and cannot avoid the contract because of his unilateral mistake." Rossi v Douglas, 203 Md 190, 199, 100 A. 2d 3, 7, (1953); 135 Williston, Law of Contracts, §1577, at 501-03 (3d ed. 1970).

The evidence presented in this case by the Plaintiff and Defendant clearly showed that the Defendant was a mature person who was capable of understanding a written document when she read it. At the time of the signing of the listing agreement and the contract she had been a secretary for the CIA for almost 10 years and no evidence was presented that she was incapable of understanding a written document.

Further, it was unrebutted that when the Defendant asked about the meaning of the subordination provision the agent explained it and that after this explanation, which included no misrepresentation or fraud, Mrs. Clay then signed the contract.

Therefore, absence of any evidence of any fraud, duress or mutual mistake, Mrs. Clay was bound by her signature.

DISCUSSION

II

Secondly, the Defendant, Mary W. Clay, bases the substance of her counter-claim and cross-claim on breach of a fiduciary duty from alleged wrongful conduct sounding in tort. A fiduciary relationship arises incident to the agency agreement between the parties in this case. Bull v Logetronics, Inc., 323 F.Supp. 115 (E.D. Va 1971); Zetelle v Myers, 60 Va 62 (1869). Where a contractual relationship exists between parties, and at the same time a duty is imposed by or arises out of the circumstances surrounding or incident to the transaction, the breach of the duty is a tort. Slocum v Eastern Shore Trust Co., 163 Md 350, 163 A. 119 (1932); Lavery v Kansas City, 337 Mo. 47, 85 S.W. 2d 104 (1935). In such a case, the tortious act, and not the breach of contract, is the gravamen of the action. Yeager v National Cooperative Refinery Assoc., 205 Kan. 504, 470 P.2d 797 (1970); Driekosen v Black, Swalls and Bryson, Inc., 158 Neb. 531, 64 N.W. 2d 88 (1954). The contract underlying the transaction, as in the case at bar, merely furnishes the occasion for the tort. Wardman v Hanlon, 52 App. DC 14, 280 F. 988 (1922). Virginia courts do recognize tort actions arising out of contractual relations. Obenshain v Halliday, 504 F Supp. 946 (E.D. Va 1980); Jefferson Standard Life Insurance Co. v Hedrick, 181 Va 8324, 27 S.E. 2d (1943).

In this case, it is undisputed that at all times the Defendant Rita Marsh, was acting as an agent in the scope of employment for Long & Foster. Accordingly, any tortious liability assessed against Long & Foster due to the actions of Rita Marsh would be in the nature of vicarious liability based upon the doctrine of

respondeat superior. Hines v Gravins, 136 Va 313, 112 S.E. 869 (1922).

It is well settled in Virginia that an individual who acts as an agent for a corporation may be sued in tort by an aggrieved party. Mann v McVey, 3 W.Va. 232 (1809), Travis v Claiborne, 19 Va 435 (1817). However, when both the agent and the corporation are sued as co-defendants, a verdict which apportions compensatory damages is improper. Freeman v Sproles, 204 Va 353, 131 S.E. 2d 410 (1963). In that case, in reversing a circuit court judgment apportioning damages among joint tort feasons, the court stated without dissent at page 357 that:

Thus, when an action is against several joint tort-feasons, if the finding is against all of them, the verdict should be a single verdict against all for a single sum, and not a several verdict against each defendant either in the same or separate sums, there can be no apportionment of damages as between defendants jointly liable in such a case.***"

We said in Kelly v Schneller, 148 Va 573, 581, 139 S.E. 275:

Whatever the decisions elsewhere, the true rule in this jurisdiction is, that, with one exception (where no harm is done a Defendant), in an action against several for a single wrong, the verdict should be a joint one against all found guilty.****" See also Southern Ry Co. v Fitzpatrick, 129 Va 246, 252, 105 S.E. 663; Remine and Meade v Appalachian Constructors, 138 W. Va 437, 76 S. E. 2d 916.

Here, the jury rendered a verdict which apportioned damages between both Long & Foster and Rita Marsh in different amounts. Under these facts, this verdict is clearly erroneous.

The co-defendants on the counterclaim, as alleged by the Defendant Mrs. Clay, failed to disclose to her the legal consequences of the subordination provision. In Virginia, all

persons whose negligent acts or omissions contribute to the single injury of another are jointly and severally liable.

Virginia Ry and Power Co. v Hill, 120 Va 397, 91 S.E. 194 (1917) Yonker v Williams, 169 Va 294, 192 S.E. 753 (1937); Muldoon v Kepner, 141 W.Va. 577, 915 S.E. 2d 727 (1956); Schools v Walker, 187 Va 619, 47 S. E. 2d 418 (1948); Long v City of Weirton, 214 S.E. 2d 832 (W.Va. 1975); Whitehurst v Charles Town Hospital, 626 F.2d 357 (4th Cir. 1980).

Accordingly, if Long & Foster is liable at all, its liability must be joint and several with its agent. An aggrieved party may sue one or all of the joint tort-feasors. Bowles v Richmond, 147 Va 720, 129 S.E. 489 (1926). However, in an action against joint tort-feasors for a single wrong, the verdict should be a joint one against all Defendants for the full amount of damages. Kelly v Schneller, 148 Va 573, W.Va. 437, 76 S.E. 916 (1953). Between Master and Servant, as well as between other joint tort-feasors jointly sued, the verdict should be against all for a single sum of compensatory damages. Freeman v Sproles, 204 Va 353, 131 S.E. 2d 10 (1963).

Inasmuch as the Court failed to instruct the jury as to joint and several liability, there is clearly prejudicial error.

In Virginia, a trial judge has the affirmative duty to instruct the jury on the law of the case. Williams v Lynchburg Tract, 142 Va 425, 128 S.E. 732 (1925); Taylor v Commonwealth, 186 Va 587, 43 S.E. 906 (1947). The failure of the court to correctly instruct the jury in this case has lead to the adverse verdict against the Plaintiff. Therefore, Long & Foster has been unduly prejudiced, because the failure of the jury to render a joint verdict has in effect deprived the plaintiff of its right to contribution from the Defendant Rita Marsh. §8.01-34, Code of Virginia (1950); Ornan v Johns-Manville Corp., 482 F.Supp. 1060

(E.D. Va 1980); Virginia Electric & Power Co. v Wilson, 221 Va 979, 277 S.E. 2d 149 (1981); Hudgins v Jones, 205 Va 495, 138 S.E. 2d 16 (1964).

In view of the above, the verdict by the jury should be set aside and Long & Foster should be granted a new trial.

DISCUSSION

III

Additional grounds for setting aside the verdict in this case can be found in the prejudice and hostility shown by the jury toward the corporate Plaintiff, Long & Foster. The large disparity in the damage awards clearly reflects a prejudicial attitude toward the corporate Defendant. There is simply no other way to explain the disparity in the damage awards against the agent, Rita Marsh, and Long & Foster, for committing an alleged single wrong on Defendant Mary Clay. This prejudice becomes clearly apparent when you consider that there was merely vicarious liability imposed upon Long & Foster. A jury verdict, as in the instant case, should be set aside by the Court when it is plainly contrary to the law and evidence. Chesapeake & Ohio R. Co. v Meadows, 119 Va 33, 89 S.E. 244 (1916). It is apparent from the disparate damage awards that the jury was hostile toward Long & Foster as a Defendant. Can it be doubted that the same hostility and prejudice extended to Long & Foster's claim in chief as a Plaintiff? Clearly, Long & Foster did not receive a fair trial and the verdict should be set aside.

DISCUSSION

IV

During the trial of this case, the court improperly refused to permit the Plaintiff's designated representative, Frank Rice, manager of the Manassas office of Long & Foster, to be present in the courtroom. Frank Rice was the person most familiar with all facts giving rise to the litigation from Long & Foster with the

possible exception of agent Rita Marsh whose interests as a party defendant would not be coterminous with those of Long & Foster. He was excluded during all testimony except his own. Although Rita Marsh was permitted in the courtroom, she could not be construed as an adequate representative of the Plaintiff. Her status as a named individual third-party Defendant creates an inherent conflict of interest with that of Long & Foster. The Court's failure to permit Mr. Rice to attend the trial was clearly erroneous and constituted a denial of the Plaintiff's right to due process and a fair trial. Under Virginia law, a corporation can only act through designated agents. Neff Trailer Sales v Dellinger, 221 Va 367 (1981). The refusal of the Court to permit Mr. Rice to represent Long & Foster at trial prevented the Plaintiff from properly presenting its case.

An authorized agent or representative of a corporation may not be excluded from a courtroom during trial. Federal Rule of Evidence 615. A wrongful exclusion or sequestration of a corporate representative during trial is grounds for a new trial. Varlack v SWC Caribbean, Inc., 550 F 2d 177 (3rd Cir. 1977). Accordingly inasmuch as Mr. Rice was properly designated as the Plaintiff's representative and was excluded during the trial, the Plaintiff was denied due process of law and is therefore entitled to a new trial.

DISCUSSION

V

The award of damages by the jury in this case is also highly suspect. There was little evidence admitted of actual damages to the Defendant and yet, the jury returned a verdict in the amount of \$4,000.00 against the Plaintiff Long & Foster. The Defendant's allegations merely allege a 25% reduction in the value of the note

due to the subordination provision. However, the Defendant does not substantiate how she would realize such a loss. There was no evidence submitted that said note would be negotiated or otherwise transferred giving rise to such a loss.

Moreover, any assertion by the Defendant regarding the value of the note is mere speculation. Such a note has a fair market value which is determinable only based upon future market conditions such as the prevailing interest rate. Therefore, such a claim is complete speculation and guesswork and not grounded on any basis in fact. The general rule in Virginia is that damages which are uncertain, speculative or contingent cannot be recovered in either tort or contract. Spence v American Oil Co., 171 Va 62, 197 S.E. 468 (1938). Barnes v Graham Virginia Quarries, 204 Va 414, 132 S.E. 2d 395 (1963). It is also improper for a jury to consider consequences which are mere conjecture, guesswork or speculation in ascertaining damages. Jordan v Bero, 210 S.E. 2d 618 (1974). Further, recovery for future damages may only be had if they are certain to occur and certain in amount. Kiser v Amalgamated Clothing Workers, 169 Va 574, 194 S.E. 727 (1934)

In view of the above, the jury award of \$4,000.00 to Mrs. Clay in this case was outside the province of the jury. This award cannot be upheld under the applicable damages limitation imposed by the law of Virginia. This award therefore should be reversed and again it establishes another ground for reversal. The remedy in Virginia for an excessive verdict, absent remittitur, is to set aside the verdict and award a new trial. Sampson v Sampson. 221 Va 896, 275 S.E. 2d 597 (1981); Campbell v Hawkins, 217 Va 800, 232 S.E. 794 (1977); West v Anderson, 186 Va 554, 42 S.E. 2d 876 (1947); Hogg v Plant, 145 Va 175, 133 S.E. 759 (1926).

CONCLUSION

The Plaintiff Long & Foster Real Estate, Inc., was denied substantial justice and due process during this trial. The errors of law prevented the jury from rendering a fair and impartial verdict. Therefore, the jury verdict should be set aside and a verdict directed for Plaintiff Long & Foster as a matter of law or a new trial ordered.

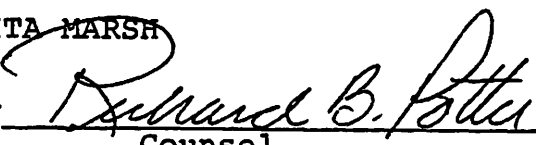
RESPECTFULLY SUBMITTED,

LONG & FOSTER REAL ESTATE, INC.

and

RITA MARSH

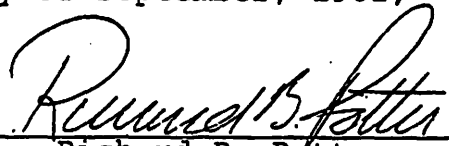
by


Counsel

COMPTON, COMPTON & POTTER
Richard B. Potter, Esquire
Counsel for Long & Foster
Real Estate, Inc. and
Rita Marsh

C E R T I F I C A T E

This is to certify that a copy of the foregoing Motion to Set Aside Verdict, was hand delivered to Raymond J. Diaz, Esquire, 8133 Leesburg Pike, Suite 810, Vienna, Virginia 22180, Counsel for Mary W. Clay, this 7th day of September, 1982,


Richard B. Potter



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

COUNTY OF FAIRFAX

CITY OF FAIRFAX

CITY OF FALLS CHURCH

September 28, 1982

JAMES KEITH
RETIRED JUDGE

BARNARD F. JENNINGS
WILLIAM G. PLUMMER
LEWIS D. MORRIS
BURCH MILLSAP
THOMAS J. MIDDLETON
RICHARD J. JAMBORSKY
LEWIS HALL GRIFFITH
F. BRUCE BACH
BARBARA M. KEENAN
QUINLAN H. HANCOCK
JOHANNA L. FITZPATRICK
JUDGES

FAIRFAX COUNTY JUDICIAL CENTER
4110 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

Richard B. Potter, Esq.
Compton, Compton & Potter
9315 Grant Avenue
Manassas, Virginia 22110

Raymond J. Diaz, Esq.
8133 Leesburg Pike, Suite 810
Vienna, Virginia 22180

Re: Long & Foster Real Estate Inc.
vs. Mary W. Clay, et al
Law No. 56196

Dear Counsel:

I have reviewed the memoranda submitted in the above referenced case as well as argument of counsel. I am considering further the issue of the counterclaim, however, I have no recollection of counsel designating a person as a corporate representative of Long and Foster, pursuant to Section 8.01-375, who was excluded. It is my recollection that Mrs. Marsh was there not only in her role as a Defendant, but as a representative of Long & Foster. I also do not recall counsel submitting an instruction or arguing joint and several liability.

If my memory is in error, would counsel proffer the appropriate transcript pages and I will be happy to review them.

If you feel that further argument is needed because of my questions, I will see you at 9:00 a.m. in Chambers prior to Court any morning.

Sincerely,

Johanna L. Fitzpatrick

JLF/110

BRIEF IN OPPOSITION TO MOTION TO SET ASIDE VERDICT

Based upon the Court's limited inquiry upon oral argument on the Counterclaim Defendants' Motion to Set Aside Verdict, and upon the Court's inquiry by letter to counsel of September 28, 1982, this Brief in Opposition is limited to the question whether the Court should grant a new trial upon the Counterclaim of of Mrs. Clay against the Counterclaim Defendants.

The Court should not set aside the Counterclaim verdict recovered by Mrs. Clay against the Counterclaim Defendants.

The Court should not set aside the Counterclaim verdict because the standard for such extraordinary action is not met in this case. The Court may set aside a verdict only "...[w]here the damages are either so excessive or so inadequate as to shock the conscience and to warrant the conclusion that the jury has been influenced by passion or prejudice, or in some way has misconceived or misinterpreted the facts or the law..." Dinwiddie v. Hamilton, 201 Va. 348, 111 S.E.2d 275, 278 (1959) [emphasis added].

Here, the conjunctive requirements of excessiveness and misinterpretation of facts or the law are not met. The uncontradicted evidence adduced at trial was that the difference between the value of the note Mrs. Clay received and the note she should have received was between \$21,000 and \$31,000. In addition, there was unrebutted evidence that Mrs. Clay incurred approximately \$300 in attorney's fees. On the basis of this evidence, it is plain that the verdict of the jury is not excessive but is well within the amount of damages presented to the jury. This being the case, it is not possible

for one's conscience to be shocked by the verdict nor is the verdict so excessive as to warrant the conclusion that the jury has in some way misconceived or misinterpreted the facts. In dealing with the issue of a trial court's discretion to set aside a jury verdict, our Supreme Court has stated:

We have many times held that in the trial of a civil action the trial judge may not set aside a jury verdict simply because he disagrees with the amount of the verdict. If a fair and impartial jury has reached a verdict which is supported by sufficient evidence, it cannot be disturbed." State Highway Commissioner v. Frazier, 214 Va. 556, 557-558, 203 S.E.2d 350, 351 (1974). See also, Lane v. Scott, 220 Va. 578, 581, 260 S.E.2d 238, 240 (1979)[quoting with favor from Commonwealth v. McNeely, 204 Va. 218, 129 S.E.2d 687 (1963)].

On the basis of this authority and in light of the evidence adduced at the trial of this matter, the Court is without discretion to set aside the verdict of the jury and the Counterclaim Defendants' Motion should be denied.

Even if this Court were to determine that the standard for setting aside the verdict were met in this case, only so much of the verdict as fixes the amount of damages should be set aside. This is true because, plainly, the finding of liability is supported by ample, albeit disputed, evidence. Only the amount of the damages awarded by the jury is at all susceptible to challenge. Of course, this challenge arises because the verdict may arguably be so inadequate as to shock the Court's conscience and to therefore raise the question whether the jury has in some way misconceived or misinterpreted the facts or the law. If the Court concluded that the amount of damages awarded by the verdict were so inadequate as to satisfy this standard, it would, of course, have the discretion pursuant to Code Section 8.01-383 to set aside so much of the verdict as fixes

the damages and to award a new trial limited solely to this issue.

The Virginia Supreme Court has had recent occasion to review whether a verdict on liability should remain undisturbed and only a new trial limited to the question of damages should be allowed. In Sampson v. Sampson, 221 Va. 896, 275 S.E.2d 597 (1981), the Court declared the following to be the law upon this subject:

Several alternatives are available to a trial court where an improper verdict has been returned by a jury. Where the issue of liability is not clearly decided by the verdict or it is not separable from the issue of damages, the verdict should be set aside and a new trial granted as to all issues. [citations omitted] Where the finding of liability is clearly decided by the verdict and is supported by the evidence, the trial court may set aside the verdict and grant a new trial limited to the issue of damages. [citations omitted]

* * *

In the present case, where some part of the damage award was based upon inadmissible hearsay evidence, it was proper for the trial court to set aside the verdict. Nevertheless, as the verdict as to liability and a portion of the damages was supported by credible evidence, the court erred in entering final judgment for the defendants notwithstanding the verdict. Id. at 221 Va. 902, 275 S.E.2d at 601.


For the foregoing reasons, it is respectfully submitted that the Motion to Set Aside Verdict should be denied. Even in the event the Court should determine that the amount of damages awarded to Mrs. Clay is, upon the evidence adduced at trial, so inadequate as to shock the conscience and to compel the conclusion that the jury has misconceived or misinterpreted the facts or the law, the Court's discretion is limited to setting aside only so much of the verdict as establishes Mrs. Clay's damages and granting a new trial limited to this question.

Respectfully submitted,

MARY W. CLAY
By Counsel


REES, BROOME & DIAZ, P. C.

By:


Raymond J. Diaz
Counsel for Mary W. Clay
8133 Leesburg Pike
Suite 810
Vienna, Virginia 22180
(703) 790-1911

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion In Opposition To Motion To Set Aside Verdict was mailed, postage prepaid, to Richard B. Potter, Esquire, Compton, Compton & Potter, Counsel for Long & Foster Real Estate, Inc. and Rita Marsh, at 9315 Grant Avenue, Manassas, Virginia, 22110, on this 20th day of October, 1982.


Raymond J. Diaz

8452B

FINAL JUDGMENT ORDER

THIS CAUSE came on again to be heard on the 26th day of October, 1982, upon the pleadings, proceedings, and orders formerly had; upon the evidence, including testimony and exhibits, adduced upon trial by jury on the 10th and 11th days of August, 1982; upon motions and other incidents of trial as shown in the transcript of proceedings therein; upon the verdict of the jury rendered in favor of the Defendant upon the Motion for Judgment and in favor of the Defendant/Counterclaim Plaintiff upon the Counterclaim and in favor of the Defendant/Third Party Plaintiff upon the Third Party Motion for Judgment, all rendered on the 11th day of August, 1982; upon the bench ruling of the Court made sua sponte on the 11th day of August, 1982, that the verdict upon the Third Party Motion for Judgment should be set aside; upon the Motion of the Plaintiff, LONG & FOSTER REAL ESTATE, INC., requesting the Court to set aside the jury's verdict in favor of the Defendant, MARY W. CLAY, upon the Motion for Judgment; upon the Motion of the Counterclaim Defendants, LONG & FOSTER REAL ESTATE, INC. and RITA MARSH, requesting the Court to set aside the jury's verdict in favor of the Counterclaim Plaintiff, MARY W. CLAY, upon the said Counterclaim; upon the written Motion and Memorandum in support of the Motions to Set Aside the Jury Verdict upon the Motion for Judgment and upon the Counterclaim; upon the Brief in Opposition to the Motion to Set Aside the said verdicts; upon the Motion of the Defendant and Counterclaim Plaintiff, MARY W. CLAY, for the entry of final judgment upon the said verdicts; and upon argument upon the said Motions by counsel before the Court on the 25th day of September, 1982, and the 26th day of October, 1982.

UPON CONSIDERATION OF ALL OF WHICH and the Court having considered the said Motions to Set Aside Verdicts and all of the grounds thereof, and the authorities submitted in support thereof, and the Court being of the opinion that the said Motions should be overruled; it is therefore

ADJUDGED and ORDERED that the Motion of the Plaintiff, LONG & FOSTER REAL ESTATE, INC., to Set Aside the Verdict of the jury upon the Motion for Judgment in this cause be, and the same hereby is, overruled; and it is further

ADJUDGED and ORDERED that the Motion of the Counterclaim Defendants, LONG & FOSTER REAL ESTATE, INC. and RITA MARSH, to Set Aside the Verdict upon the Counterclaim filed against them herein be, and the same hereby is, overruled; and upon its own motion, the Court does further

ADJUDGE and ORDER that the verdict of the jury upon the Third Party Motion for Judgment by MARY W. CLAY, Third Party Plaintiff, against RITA MARSH, Third Party Defendant, be, and the same hereby is, set aside, and the said Third Party Motion for Judgment is hereby dismissed.

THEREFORE, pursuant to the verdict of the jury, the Court doth; adjudge and order that the Plaintiffs, LONG & FOSTER REAL ESTATE, INC., shall have and recover nothing upon its Motion for Judgment against the Defendant, MARY W. CLAY, but that the said Defendant/Counterclaim Plaintiff, MARY W. CLAY, shall have and recover of the said LONG & FOSTER REAL ESTATE, INC., and of RITA MARSH, the Counterclaim Defendants herein, upon the Counterclaim filed herein, jointly and severally, the sum of FOUR THOUSAND AND 00/100 DOLLARS (\$4,000.00), together with her costs in this behalf expended, to which action of the Court the Plaintiff and the Counterclaim Defendants, by counsel, excepted.

It is further, ADJUDGED, ORDERED and DECREED that the transcript of the hearing shall be part of the record for the purposes of appeal, provided said transcript is filed in the office of the Clerk within sixty days after entry of this Final Judgment and the contents of the record shall be as provided in Rule 5:8 of the Rules of the Supreme Court of Virginia.

AND THIS JUDGMENT IS FINAL.

ENTERED this 5 day of November, 1982.


JOHANNA L. FITZPATRICK, JUDGE

WE ASK FOR THIS:

REES, BROOME & DIAZ, P.C.

BY: 

RAYMOND J. DIAZ
Counsel for Mary W. Clay
8133 Leesburg Pike, Suite 810
Vienna, Virginia 22180
(703) 790-1911

SEEN AND EXCEPTED:

COMPTON, COMPTON & POTTER

BY: 

RICHARD B. POTTER
Counsel for Long & Foster
Real Estate, Inc. and
Rita Marsh
9315 Grant Avenue
Manassas, Virginia 22110

ASSIGNMENT OF ERROR

1. The trial court erred in not setting aside a jury verdict on a counterclaim which held a corporate defendant liable exclusively under the doctrine of respondeat superior and yet failed to find the agent of the corporation liable even though she was joined as a defendant under the counterclaim.
2. The trial court erred in submitting jury verdict forms to the jury which were misleading and confusing in that there were two defendants, corporate principal and individual agent, named in the counterclaim but the jury verdict form mentioned only the name of the corporate principal.
3. The court erred in not recharging jury following delivery of initial verdict since it was readily apparent that the jury was confused and misled by the instructions and jury verdict forms and the initial verdict was inconsistent with logic and law in finding for defendant on claim in chief and at the same time find for defendant against agent in sum of \$1.00 on third party claim for indemnification.
4. The trial court erred in imposing joint and several liability on individual agent defendant on the counterclaim when agent defendant was not named and only corporate principal was named in the jury verdict form on the counterclaim.
5. The trial court erred in refusing to set aside the jury verdict awarding the defendant seller \$4,000 in damages on the counterclaim because such verdict was totally without evidence to support it.
6. The trial court erred in not setting aside a jury verdict for the defendant on the claim in chief which was not supported by the evidence and was a product of speculation, confusion, and prejudice against the corporate defendant.

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

-----x
LONG & FOSTER REAL ESTATE, INC.,

Plaintiff,

- vs -

MARY W. CLAY,

Defendant.
-----x

COPY

AT LAW NO. 56196

Fairfax, Virginia

Tuesday, August 10, 1982

The hearing commenced at 10:05 o'clock, a.m.

BEFORE:

The Honorable Johanna L. Fitzpatrick, Judge.

Reported by:
Kirk Sturges

Ron Johnson Reporters
VERBATIM STENOGRAPHY REPORTING
P.O. BOX 485 FAIRFAX, VIRGINIA 22030
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APPEARANCES:For the Plaintiff:

RICHARD B. POTTER, ESQ.
 Of: Compton, Latimer, Compton & Potter
 9315 Grant Avenue
 Manassas, Virginia 22110

For the Defendant:

RAYMOND J. DIAZ, ESQ.
 Of: Rees, Broome & Diaz, P.C.
 8133 Leesburg Pike, Suite 810
 Vienna, Virginia 22180

C O N T E N T S

<u>WITNESS:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Rita C. Marsh	22	92	129	130 ✓
Franklin C. Rice	133	142	--	--
J. Gordon Kincheloe	144	153	158	160
Jim L. Blevins	161	170	--	--
Thomas D. Marsh	172	184	--	--
- - - -				
Robert Warren Dudley	189	203	--	-- ✓
Gary Peterson	209	222	231	234
Mary W. Clay	235	259	--	--

-oOo-

E X H I B I T S

<u>EXHIBIT:</u>	<u>FOR IDENT.</u>	<u>IN EVID.</u>
Plaintiff's No. 1	36	188
Plaintiff's No. 2	48	188
Plaintiff's No. 3	--	188
Plaintiff's No. 4	51	188
Plaintiff's No. 5	82	188
Plaintiff's No. 6	146	188
Plaintiff's No. 7	--	188
Plaintiff's No. 8	148	188
Plaintiff's No. 9	--	188
Plaintiff's No. 10	148	188
Plaintiff's No. 11	--	188
Plaintiff's No. 12	--	188
Plaintiff's No. 13	65	188
Defendant's No. 1	201 258	--
Defendant's No. 2	201 258	258
Defendant's No. 3	231	258

-oOo-

RITA C. MARSH

proceedings were had in their presence and hearing:)

THE COURT: Who is your first witness?

MR. POTTER: I call Mrs. Marsh.

Thereupon,

RITA C. MARSH

was called as a witness, and after having been previously duly sworn by the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. POTTER:

Q Mrs. Marsh, I believe you have been sworn in already.

A Yes.

Q Will you state your full name for the record?

Please, speak up so the ladies and gentlemen of the jury can hear you.

A My name is Rita C. Marsh.

Q Where do you reside?

A 7622 Michelle Court, Manassas, Virginia.

Q How are you employed?

A I'm a Long and Foster real estate agent.

Q How long have you been a real estate agent

1 with Long and Foster?

2 A Three years -- well, three and a half.

3 Q For the past three, three-and-a-half years,
4 what have been your duties as an agent for Long and
5 Foster, just briefly?

6 A Duties as an agent --?

7 Q Right.

8 A Well, it's contracts, it's listing; it's
9 extra schooling and things of this nature.

10 Is that what you are speaking of?

11 Q What type of schooling or training have you
12 had as an agent with Long and Foster?

13 A As an agent with Long and Foster we are
14 required to take other training before we are allowed
15 to list and to write up contracts on property.

16 Q By listing, you are referring to what?

17 A Listing is when you list a person's piece of
18 property.

19 Q How long was the schooling that you took with
20 Long and Foster?

21 A It lasted for about a month -- consecutive
22 days.

23 Q Were you required to graduate from that class?

1 A Yes.

2 Q Are you licensed by the State of Virginia as
3 an agent?

4 A Yes, I am.

5 Q For how long have you been licensed as an
6 agent?

7 A Three-and-a-half years.

8 Q Have you ever been licensed as a broker at
9 all?

10 A No.

11 Q In the course of your duties as an agent,
12 have you had occasion to list residential and commercial
13 property for sale?

14 A Yes, I have.

15 Q Approximately how many residential lots have
16 you listed and sold for the past three, three-and-a-
17 half years?

18 A It's a little hard to tell because I have
19 listed subdivisons before.

20 We have sold acre property before and different
21 things like that.

22 It's a little hard -- how many listings have
23 I had?

1 Q Either one: how many listings or how many
2 contracts?

3 A Listings and contracts have I had -- I would
4 say over the past three-and-a-half years, I would say
5 anywhere from one hundred, one hundred and twenty-five.

6 I mean, you know, it is hard to tell because
7 we don't keep track of that unless we go back in the
8 records.

9 Q Have you sold subdivision lots before?

10 A Yes, I have.

11 I have listed subdivisions.

12 Q What subdivisions were those?

13 A Okay. I have Waterfall Village listed. I
14 have listed and sold lots up in there.

15 Q Where is Waterfall Village?

16 A Waterfall Village is up here on -- right off
17 of Route 234.

18 It's right past Gibson Hills.

19 Q Is that in Prince William County?

20 A -- That's in Prince William County.

21 And then I listed quite a few subdivisions
22 which were lots only, down at Lake Anna, which I
23 listed and sold.

1 Q Have you listed commercial property as well?

2 A Yes, I have.

3 Q How many pieces of commercial property,
4 would you say, have you listed over the past three
5 years?

6 A Listed or sold --?

7 Q Sold.

8 A Listed, or sold, anywhere from four to five.

9 Q How about listed, about the same thing?

10 A Listed -- let's see.

11 You do list property that doesn't sell
12 sometimes, so I would say anywhere from ten to twelve.

13 It's hard for me to really tell you.

14 Q In the course of listing property, have you
15 had occasion to draw up contracts with the purchasers
16 and the sellers?

17 A Oh, yes.

18 Q In the course of doing that, have you worked
19 with different types of financing in today's market?

20 A Oh, yes. Yes.

21 Q Have you worked with the subordination
22 provisions?

23 A Yes. Quite a number of times.

1 Q Can you explain, just briefly, to the jury
2 how subordination works in general terms?

3 A Subordination -- like, if you have got a piece
4 of land to sell and you want to sell your piece of
5 land, usually the only way we can get financing -- you
6 can get some financing through the bank. Usually,
7 the most you can get is for fifteen years. And right
8 now the market is at eighteen percent. It's high
9 financing.

10 Usually, to sell a parcel of land and your
11 note cannot be assumed, it's owner financing.

12 Q What do you mean by owner financing?

13 A Owner financing is where the buyer for the
14 piece of property, they will take and put "X" amount of
15 dollars down.

16 And the owner holds a note at a certain amount
17 of interest. We usually do a lot of balloon payments.

18 And say you take residential lots, and say
19 if you want to put a house on it, well, in order for a
20 bank to come in and finance your property, your house,
21 or give you a loan on this, you have to have the
22 property paid for -- and they hold the first deed of
23 trust -- or either you have to have a subordination

1 clause.to where the owner of the property will agree
2 to subordinate a construction loan.

3 And you always put in the contract a bona
4 fide construction loan to guarantee that construction
5 is going to take place on this piece of property.

6 Q You say you are familiar with that process
7 and have used it in other cases at other times.

8 A Oh, yes. A number of times -- many times.

9 Q How does a release provision work with regard
10 to the sale of property like that?

11 A Pardon?

12 Q How does a release provision work if you
13 release certain properties from the trust?

14 A If you release certain properties from the
15 trust -- like deed release, right?

16 Q Right.

17 A Okay. Deed of release -- it works like this.
18 Say like they will agree upon a price. And a certain
19 parcel of property will be released after the person
20 has paid so much money on the principal.

21 Q Have you used that in other contracts?

22 A Yes, I have.

23 ~~Q Were you familiar with the subject property~~

1 Q She lives where now? Where was it you went
2 to see her at?

3 A Pimmit Drive.

4 Q He drove you there?

5 A Yes. He drove me there because --

6 Q Was he present when you talked to her?

7 A Yes, he was.

8 -- when you go down to Pimmit Drive, some way
9 you head on down another street. -- And you go down
10 another street -- you know how they are fixed out at
11 Tysons.

12 Q So you get lost.

13 A Yes. He got lost.

14 Q Did you have occasion, then, to discuss the
15 listing agreement with her?

16 A Yes, I did.

17 Q Did you go over the form of the listing --

18 A Yes.

19 Q Did she have any questions about the listing
20 form?

21 A She was very anxious to sell it. She was
22 very anxious for me to get a hold of Mr. Luck.

23 And she felt like that since my husband

1 did work for Mr. Luck that I could get a hold of
2 him and see if he was interested or not.

3 And if he wasn't, put it in the computer and
4 sell it.

5 She needed to sell the piece of property.

6 Q At that time, did she tell you why she wanted
7 to sell it at all or just that she needed to sell it?

8 A I mean, she just said that her husband was
9 dead.

10 And he had left her encumbered with debts.

11 That's all she said.

12 And I don't go into people's personal things
13 unless they so desire.

14 Q How about the price that you were going to
15 list it for, was that discussed?

16 A Yes. We arrived at a price of \$130,000,
17 because we told her to keep it, you know, at what she
18 would be willing to take for the piece of property.

19 I did tell her we did charge a ten percent
20 commission on the selling of land.

21 Q Did you go over a listing form and fill one
22 in?

23 A Yes, I did.

1 Q Can you identify what's marked as exhibit
2 number one?

3 A Yes, I can.

4 (Thereupon, the document referred to
5 above was marked for Identification as
6 Plaintiff's Exhibit No. 1.)

7 MR. POTTER: I believe that has been
8 stipulated to by counsel for the defendant.

9 THE WITNESS: Yes.

10 BY MR. POTTER:

11 Q Is this the original of the listing agreement?
12 (Indicating.)

13 A This is the original, right.

14 Q For the jury and the Court, can you just
15 briefly describe what the makeup is, what the different
16 parts of the listing agreement are?

17 A This, up here, is mainly -- we have to make
18 sure all of our facts and everything is accurate.

19 Once it goes into the computer -- you have to
20 make sure.

21 So like Mrs. Clay, all she had to identify
22 the property was the deed book and the page number --
23 from her husband's deed.

1 land -- commercial -- and things of this nature,

2 So you take those for at least six months.

3 I usually try to get them for a year.

4 In our listing agreements -- like I had this
5 one set up for six months.

6 And then one-hundred-and-twenty days after the
7 expiration of the listing -- like anybody that I have
8 introduced to -- or another real estate company has
9 introduced to the property and if Mrs. Clay sells it
10 to them after it expires, they still owe a commission
11 of ten percent.

12 Q Is this something you discussed with her
13 that night?

14 A Yes.

15 Q Let me show you or draw your attention to
16 one portion of it that says the property may be sold
17 subject to existing deeds of trust having an unpaid
18 balance of -- and there is a dollar sign and a blank
19 with a line through it.

20 A Yes.

21 Q Did you fill that portion in?

22 A Yes, I did.

23 Q What was the intent -- what was the discussion

1 concerning the existing deeds of trust on the property
2 if there was any at that time?

3 A I was never told there was a deed of trust
4 on the property.

5 Q She never advised you of that.

6 THE COURT: Excuse me.

7 Let me just ask you if you can't hear.

8 If you can't hear, please let me know.

9 All right. You need to speak up just a
10 little louder.

11 THE WITNESS: I'm sorry. I've got a cold
12 and --

13 THE COURT: There is a microphone you can
14 speak into if you need to.

15 Why don't you ask your question again?

16 MR. POTTER: All right.

17 BY MR. POTTER:

18 Q With regard to this line that says the
19 property may be sold subject to existing deeds of trust
20 Having an unpaid balance of -- a dollar sign, blank and
21 a line through it -- was it subject to any deed of
22 trust?

23 Did she tell you it was --

1 A Not to my knowledge.

2 And quite honestly, I didn't even question
3 her about it because I was so familiar with the
4 property.

5 I had been familiar with the property for
6 years and years.

7 And I had known when Mr. Clay had bought the
8 property.

9 And I had known that land can only be financed
10 for fifteen years.

11 And I knew that the Golps (Phonetic) -- the
12 person that they had bought the property from -- had
13 since moved to Florida.

14 I mean, I didn't even question it, to be quite
15 honest with you.

16 Q Did she tell you, at this time, that there
17 was any trust on the property?

18 A: No, she did not.

19 Q The next line says: we will take back a
20 second deed of trust in the amount of -- there is a
21 line through that blank, again.

22 Did you discuss any second trusts that she
23 was going to take back?

1 A No.

2 Q The rest of this is simply a standard form
3 that Long and Foster uses and you have used for some
4 time.

5 A Yes. I have used them for years.

6 Q Did she raise any questions concerning any
7 of the form -- of this form of the listing agreement
8 at all that you can recall?

9 A The main thing we talked about -- she was
10 most anxious to sell it.

11 And that was just -- essence of it.

12 Q This was on what date that you entered into
13 this agreement?

14 A November 15, 1981.

15 MR. POTTER: With the Court's permission,
16 can I show this to the jury? (Indicating.)

17 THE COURT: Yes.

18 BY MR. POTTER:

19 Q After the listing agreement was entered into
20 and you met with Mrs. Clay, was there anything else
21 said that day at all that you recall?

22 A (No response.)

23 Q That was pretty much --

1 A No. We talked a little bit about our
2 families.

3 She told me about her family. She told me
4 she had a daughter and son into real estate, but they
5 didn't really care for it that much.

6 And she told me that the main reason she was
7 so anxious to sell the property was she wanted to move
8 to Florida.

9 She had a son killed in an automobile
10 accident when he was very young. He did have two
11 children. She wanted to be there with the children
12 because they were, you know, a little bit older now
13 and she wanted to retire.

14 Q All right.

15 A Then we talked about her, you know, when she
16 built on the addition to her house and how she had
17 worked on that.

18 Q Did she tell you that she owned this house --

19 A Yes, she did.

20 Q -- that you met her at?

21 A Yes, she did.

22 Q You didn't discuss that particular house at
23 that particular time.

1 ~~A Yes, it was.~~

2 Q Did there come a time when you were contacted
3 -- or you contacted a Mr. Blevins?

4 A Yes.

5 Q When was that?

6 A It was on December the 19th, this contract
7 was in the mail.

8 Q How was it that Mr. Blevins came in to see
9 you?

10 A He contacted Tommy first.

11 And then Tommy --

12 THE COURT: Let me just interrupt. You have
13 to use last names.

14 THE WITNESS: I'm sorry I apologize.

15 THE COURT: You have to keep it clear to the
16 jury as well as to me.

17 THE WITNESS: All right.

18 Okay. He contacted my husband, Tommy Marsh,
19 and said that he had seen some agents over there.

20 He knew I had the property listed.

21 And he wanted to know -- well, Tommy -- there
22 is no need to tell you about that conversation.

23 Well, anyhow, Tommy told me to call -- Tommy

1 ~~Marsh him, that he was interested in putting in a~~
2 ~~contract on the property.~~

3 BY MR. POTTER:

4 Q Did you call Mr. Blevins?

5 A Yes, I did.

6 I called him on that day. And we set up an
7 appointment for him to meet me on December the 20th,
8 at my office at ten o'clock.

9 Q Did he come in to see you on the 20th?

10 A Yes, he did.

11 Q What was the conversation you had with him at
12 that time?

13 A Okay. He sat down.

14 And he said --

15 MR. DIAZ: If Your Honor please, the same
16 objection.

17 Mr. Blevins' conversations with Mrs. Marsh
18 are not admissible through this witness.

19 MR. POTTER: Mr. Blevins is present today,
20 Your Honor. I would be glad to call him concerning
21 the testimony of this witness.

22 THE COURT: All right. That's the way the
23 testimony has got to come in.

1 BY MR. POTTER:

2 Q As a result of your conversation with Mr.
3 Blevins, did you then prepare a document called a
4 land-sales contract?

5 A Yes, I did.

6 Q Can you identify this, marked plaintiff's
7 exhibit number two? (Indicating.)

8 A Yes, I can.

9 (Thereupon, the document referred to
10 above was marked for Identification as
11 Plaintiff's Exhibit No. 2.)

12 BY MR. POTTER:

13 Q What is that?

14 A That's a land-sales contract dated December
15 the 19th, 1981.

16 Q Who filled this in?

17 A I did.

18 Q Was it signed by Mr. Blevins?

19 A Yes, It was. It was signed December the 10th,
20 1981, at twelve, approximately twelve o'clock.

21 Q In addition to that, can you identify plaintiff's
22 exhibit number three?

23 A Yes. That's a copy of Mr. Blevins' check
made out to Long and Foster. It's an earnest money

1 A This is the second one because when we made
2 up the contract he wanted to make it -- now, this one's
3 --no. This is the first one.

4 Amortized over thirty years due and payable
5 in ten -- but, he wanted to really write it up --
6 complete amortization over ten years.

7 His tax accountant had advised him to do
8 it --

9 MR. DIAZ: If Your Honor please --

10 THE COURT: I am going to sustain that
11 objection.

12 MR. DIAZ: All right.

13 BY MR. POTTER:

14 Q You went to see Mrs. Clay the next day, is
15 that right?

16 A Yes, I did.

17 Q Did you discuss with her the Luck land-sales
18 contract at all?

19 A Yes, I did.

20 Q What did you do when you went in the house?
21 What was your conversation with Mrs. Clay?

22 A We went to the dining room table. We set
23 down.

1 She was very excited. She had the contract
2 on the piece of property.

3 She wanted to know who the contract was
4 from.

5 And I says, "Mrs. Clay," I says, "I have one
6 that is an offer. It is not a ratified contract."

7 "It is in the mail. I expect it back any-
8 where from Monday or Tuesday if you want to wait for
9 it."

10 "I did talk to my broker.. I do have to make
11 you aware that there is a contract, you know, on the
12 way."

13 "I can give you the contents of the
14 contract, but it's not a ratified contract" -- which
15 I showed her Luck Quarries' offer first, the amortiza-
16 tion sheet.

17 And if you will notice on the amortization
18 sheet, it has December the 18th on it, the day it was
19 ran.

20 Q Their offer was a purchase for how much money?

21 A Their offer was a purchase of \$130,000 -- I
22 mean, \$100,000.

23 Q What was Mrs. Clay's reaction to this?

1 A She looked at it. She took it in her hand.
2 And she says, "Well, that certainly is not
3 acceptable."

4 She laid it over to the side.

5 And that's when I told her about Mr. Blevins
6 contract.

7 Q That's when you presented her with plaintiff
8 exhibits number two and four, is that right?

9 A Yes.

10 Q Two and three, I mean, is that right?

11 A That's correct. That's correct.

12 Q What was your discussion concerning this
13 contract that you had with Mrs. Clay?

14 A Okay. I presented her the contract.

15 And it says in the contract, "Purchaser to
16 pay \$25,000 down, of which \$1,000 is part. Seller
17 agrees to hold the remaining balance of \$105,000, at
18 twelve percent interest, amortized over thirty years,
19 due and payable in ten years, with monthly payments of
20 \$1,080.04. Purchaser has the right to pre-pay loan
21 without penalty. Seller agrees to subordinate a bona
22 fide construction loan."

23 So, anyhow, I ran the amortization sheet. It

1 showed her whole schedule of how much Mr. Blevins would
2 owe her on the property -- ten years, which came to
3 ninety-some -- \$99,000, something like that.

4 And her monthly payments that she would be
5 getting -- she looked at it.

6 And she says, "Well," she says, "this is a far
7 better contract than Mr. Luck's was."

8 She signed the contract then.

9 Q After she signed the contract, did you get up
10 and leave or were there further discussions?

11 A No. There were further discussions.

12 The contract was taken over. She is given a
13 copy of it.

14 She was on the copy and she was writing right
15 on the side of the original contract that I gave her
16 different figures, you know, and everything.

17 And she looked back at me and she says, "Mrs.
18 Marsh," she says, "I have got a problem."

19 And I says, "What is your problem, Mrs. Clay?"

20 And she says, "I cannot clear the Tand." She
21 says, "I am lacking \$5,000."

22 I says, "Mrs. Clay, you owe on this piece of
23 property."

1 And she says, "Yes."

2 I says, "How much do you owe?"

3 Q Let me interrupt.

4 Was that the first time that she ever advised
5 you that she owed any money on the property?

6 A Yes, sir. That was the first time I ever
7 even heard of it.

8 Q What was your discussion then?

9 A Okay. I told her, you know -- she says, "Do
10 you think Mr. Blevins could come up with \$5,000 more?"

11 I says, "I don't know." I says, "I cannot
12 speak for Mr. Blevins, but if \$5,000 presents a problem
13 to you, I suggest that we take it right back."

14 And what we do, you have to go back and you
15 counterback to where we take and we put a "T" in it.

16 And you initial it to where she can only
17 accept \$30,000 down.

18 And then you do all the other figures and
19 everything.

20 That's a counterback. It is not a ratified
21 contract at this time when you counterback.

22 Q Did you explain all this to her?

23 A Yes. I told her, but I said, "Once you do

1 this, this is not a ratified contract until once it
2 goes back to Mr. Blevins and Mr. Blevins signs the
3 contract."

4 "Then it becomes a ratified contract."

5 Q What was her reaction to that?

6 A She says, "Will you go back to Mr. Blevins
7 and ask him if he can come up with \$5,000 in good
8 faith?"

9 She didn't want to mess up the contract.

10 Q What was your response? What was your
11 reaction?

12 A I says, "Yes, I will."

13 Q Did you go to Mr. Blevins and ask him about
14 the \$5,000?

15 A Yes, I did.

16 Q Did she strike out the \$25,000 down and put
17 \$30,000 at any time?

18 A No.

19 Q So she never amended the written contract.

20 A No she did not. No.

21 Q She signed.

22 A No she did not.

23 Q Were there any questions that she raised as to

1 the terms of the contract, what the meaning of them
2 were?

3 A Yes. She did raise -- subordination.

4 I explained subordination to her.

5 Q What do you mean she raised it? What did she
6 say to you and what was your response?

7 A She asked me about the clause on subordination.

8 Q All right. What did you tell her?

9 A I explained subordination -- do you want me
10 to --

11 Q Yes. Tell the Court and the jury what you
12 told her.

13 A Okay. I explained to her that subordination
14 is -- I says, "When you first go to settlement you will
15 be holding the first deed of trust. Mr. Blevins, at
16 this time, is not going to build on it, but he wants
17 the right to build a garage on it because the old
18 filling station -- it was leaking and everything. And
19 he wanted to do some repairs to it."

20 "And so anyhow, at the time that he goes and
21 gets the construction loan on this piece of property,
22 you are agreeing to subordinate."

23 And so, I says, "At that time, you would have

1 the second deed of trust. The bank would hold the
2 first deed of trust."

3 "If, by any means, Mr. Blevins should go
4 bankrupt or anything like that, you still have the
5 money that was paid down to you -- all the monthly
6 payments."

7 "And your property -- it is an improvement
8 to your property when you have a building on it --
9 construction."

10 Q Did you discuss any improvement or increase
11 in the value of the proerty by virtue of the fact
12 that there would be a building on it?

13 A Oh, yeah. Anytime there is a building on a
14 piece of property, property becomes more valuable. Yes

15 Q Did she have any other questions?

16 A (No response.)

17 Q How did she appear in response to that?

18 A (No response.)

19 Q I mean, did she raise further questions about
20 what that meant?

21 A No, she did not.

22 Q ~~Was there anyone else present when you had~~
23 ~~these discussions?~~

60
1 A Yes. My husband. I still had a hard time
2 finding the place.

3 Q Did she ask your husband any questions about
4 the contract and what the contract might have meant?

5 A No.

6 Q How did she appear to you?

7 Did she appear to you as if she understood
8 what the contract meant?

9 A She appeared to me that she understood.

10 There was a question about the \$5,000, and I
11 had -- you know, I knew that I was going to go back
12 and talk to my broker about it to see if we would hold
13 the note on it.

14 But I can't speak for my broker and I don't
15 like to say anything to a client until after I do
16 discuss it with my broker.

17 Q That day there were no other questions. She
18 didn't ask any other questions about the contract or
19 what it meant?

20 A No. She was very happy to get a contract.

21 Q What was her reaction? What do you mean by
22 she was happy?

23 A Well, she just seemed like she was just

1 relieved.

2 And we did discuss the fact when it came up
3 about this \$5,000.

4 That's when she discussed the fact that her
5 house was completely paid for. She had some C & D's
6 due to become due.

7 By her house completely paid for, I told her
8 I could work with her and work with the loan first.

9 I said, "Mrs. Clay," I said, "eighteen
10 percent on this property," I said, "you know, that's
11 way too much."

12 Q What's eighteen percent now?

13 What loan was eighteen percent?

14 A The loan that she had on the property. She
15 was paying eighteen percent interest.

16 She was paying eight hundred dollars a month.

17 Mr. Blevins, was giving her four hundred
18 dollars a month, so therefore, she was going
19 four hundred dollars plus taxes in the hole every
20 month.

21 Q Does this have anything to do with her desire
22 to sell the property?

23 A Yes.

1 Q Did you discuss trying to finance it?

2 A Yes.

3 When I told her, "You would be better off
4 getting the first deed of trust on your property,
5 since it is free and clear, if you don't want to use,
6 you know --"

7 Q You mean her property now.

8 A Her house.

9 Q Her house.

10 A She has a lovely home in Falls Church.

11 And she would be better off getting a first
12 deed of trust on that with a lower percentage rate
13 than what she was paying because she had a renegotiable
14 percentage rate on her piece of property.

15 Q Was she aware at the time of the settlement
16 she would have to come up with some proceeds to settle?

17 A Yes.

18 Q Did she tell you when she would get them?

19 A She was going to first try -- she had her
20 C & D's that was due to come to maturity.

21 And she was lacking \$5,000.

22 And I told her I would work with her and if
23 she had to, I would even call the bank.

1 MR. DIAZ: If Your Honor please, it is being
2 offered to prove the truth of the matter being set
3 forth therein.

4 Consequently, necessarily, it is hearsay.

5 THE COURT: Well, what I am going to do is
6 once again admonish the jury that this is being received
7 as a copy that this lady received concerning the
8 settlement.

9 As to whether it was the true date and so on,
10 it is not being accepted for that purpose.

11 MR. DIAZ: Thank you, Your Honor.

12 THE COURT: That is the admonishment that goes
13 with it.

14 BY MR. POTTER:

15 Q Now, did there come a time in December,
16 Mrs. Marsh, when you were notified by Mrs. Clay
17 concerning her position on the contract?

18 A Yes.

19 Q When was that?

20 A Tuesday, the 23rd.

21 Q How did she notify you?

22 A She called me.

23 Q What did she say?

A She said she was not going to go through with

1 the tentative contract.

2 And I says, "Mrs. Clay," I says I don't have
3 a tentative contract.

4 I have a contract on your piece of property.

5 And she says, "You don't even have my
6 property listed."

7 And I says, "Mrs. Clay, your property is
8 listed."

9 She says, "I don't have a copy of it."

10 And I says, "I will come down. I will bring
11 you a copy of it."

12 She said, "I am no way going to take a second
13 deed of trust on my piece of property. You did not
14 explain it to me. The contract was presented very
15 poorly to me. You did not give me a financial statement
16 of Mr. Blevins, and it was very poorly presented."

17 And I says, "Mrs. Clay, Mr. Blevins has been
18 your tenant for a number of years. And you knew how he
19 paid your rent."

20 "I did not think that you needed a financial
21 statement, but if you would prefer a financial state-
22 ment I will get you a financial statement."

23 MR. DIAZ: Your Honor, may I approach the

(Thereupon, the jury returned to the courtroom and the following proceedings were had in their hearing and presence:)

DIRECT EXAMINATION (Continued)

BY MR. POTTER:

Q Mrs. Marsh, can you relate what was said -- the balance what was said in your phone conversation with Mrs. Clay?

A She informed me that the commission was way too high, that she was having to pay.

And she says my services was worth no more than \$8,000.

Q Did you have any other conversations with her that day?

A Yes, I did.

First of all, I called Mr. Kincheloe and asked him what we could do about the subordination clause.

She was very unhappy.

He set up an addendum to the contract relenting the subordination clauses.

He put deeds of releases in it.

At that time he dictated the addendum to me.

1 He says, "You take it over to Mr. Blevins
2 and see if the addendum is oaky with Mr. Blevins, and
3 then, at this time, do not have Mr. Blevins sign it.
4 She is to sign it first. And then he is to sign it."

5 Q All right. Did you prepare an addendum
6 according to Mr. Kincheloe's words?

7 A Yes, I did.

8 I prepared an addendum according to Mr.
9 Kincheloe's words.

10 Q Prior to that time, with regard to the finan-
11 cial ability of Mr. Blevins, did you make any effort
12 to satisfy Mrs. Clay concerning his ability to pay?

13 A Yes. Mr. Blevins went to Warrenton. He got
14 his tax returns for three years back.

15 And he brought them to my office.

16 I carried his tax forms plus the addendum.
17 I set up an appointment for Mrs. Clay at seven o'clock.

18 And that's when I took the tax forms.

19 Q Did you go back to see Mrs. Clay with the
20 addendum?

21 A Yes, I did.

22 Q Who was present at the time you went back to
23 see Mrs. Clay?

1 A When I went back to see Mrs. Clay she intro-
2 duced her -- she says, "This is my daughter and son-in-
3 law."

4 Q I show you this and ask if you can identify
5 plaintiff's number five: (Indicating.)

6 A Yes, I can.

7 (Thereupon, the document referred to
8 above was marked for Identification
9 as Plaintiff's Exhibit No. 5.)

10 BY MR. POTTER:

11 Q What is that?

12 A It's a letter that Mrs. Clay sent to me
13 registered mail, which after, she said she would let
14 me know in two days --

15 Q Let me ask you a question about this letter.

16 A Okay.

17 Q Was this letter sent to you before your meeting
18 concerning the addendum or afterwards?

19 A After.

20 Q Let me go back to the meeting concerning the
21 addendum.

22 Did you take the addendum to Mrs. Clay for
23 her signature?

1 A ~~Yes, I did.~~

2 Q Did you present that addendum to Mrs. Clay?

3 A Yes, I did.

4 Q Did she sign the addendum?

5 A No, she didn't.

6 Q Did she give you -- did you also give her
7 the income tax -- three-years worth of income tax
8 records on Mr. Blevins?

9 A Yes, I did.

10 Q Did she make any comment on the financial
11 ability of Mr. Blevins?

12 A She said that she could see that he was
13 well qualified to buy the property.

14 Q Did she make any comment on the addendum
15 to remove the subordination provision and put in the
16 release provision?

17 A She said she would have to think about that.

18 Q So she didn't sign the addendum in your
19 presence that day.

20 A No, she did not.

21 Q Did she retain possession of that addendum?

22 A Yes, she did.

23 Q Was there any discussion with her concerning

1 Long and Foster's ability on the -- to take a note on
2 the commission?

3 A Yes. I had talked to my broker that morning
4 because we knew that she was -- she had told me the
5 previous evening that she was \$5,000 short.

6 And I asked him if we had any problem with
7 taking the note back.

8 And he says, "No." He says, "I will have no
9 problem with that whatsoever because we were, trying to
10 -- I was working with the finance company at that time.

11 So I did inform her that I had talked to my
12 broker and that he was willing to take a note.

13 Q What was her response to to your willingness
14 to take the note back?

15 A Her response was that our commission was way
16 too high.

17 She really needed \$9,000, now, instead of the
18 \$5,000.

19 Q Did you have any further discussions with her
20 that afternoon?

21 A Yes, I did.

22 Q What were your discussions?

23 A She told me that she felt like -- that she only

1 hired Long and Foster to get to Mr. Luck.

2 She said she could have sold the property
3 to her own tenant herself. She did not need Long
4 and Foster's services for that.

5 The fee was way too high.

6 Her son-in-law would have not charged as
7 much as Long and Foster?

8 Q Were you acquainted with her son-in-law at
9 that time?

10 A No. I was not acquainted with him at that
11 time.

12 Q Was her son-in-law present when you went through
13 the addendum?

14 A Yes, he was.

15 Q Did you know what his occupation was?

16 A (No response.)

17 Q Was there any conversation with him at that
18 point?

19 A When she -- I had talked to him previously
20 that morning.

21 He called my home with the pretense of working
22 up on comparable property over on 29/211.

23 We worked with other relatives.

1 ~~THE COURT.~~ Yes.

2 BY MR. POTTER:

3 Q Did you attend settlement on December the
4 28th?

5 A Yes, I did.

6 Q Did anyone else show up at the time of
7 settlement?

8 A Yes. It was Mr. Holmes -- Mr. Kincheloe was
9 out of town at the time -- Mr. Holmes; it was Gladys,
10 Mr. Kincheloe's secretary, Mr. Blevins and myself.

11 Q Who is Mr. Holmes?

12 A Mr. Holmes, I presume, is a lawyer that
13 works with Mr. Kincheloe.

14 Q Did, in fact, Mr. Blevins execute the note
15 and the deed of trust to go to purchase the property
16 on the 28th of December?

17 A Yes, he did.

18 Q Did Mrs. Clay show up and execute any papers
19 at that time?

20 A No, she did not.

21 Q Are these -- can you identify these
22 documents I have placed in front of you?

23 A (No response.)

1 Q Are these copies of the settlement papers?

2 A Yes, it is.

3 Q This settlement, then, technically, as far
4 as Mrs. Clay was concerned, was never finished --
5 never took place, is that right?

6 A No, it did not.

7 Q Did you have any conversation with her
8 after the settlement date?

9 THE COURT: Counsel, before you go -- just
10 counsel approach the bench off the record for just a
11 moment.

12 (Thereupon, there was had a discussion
13 at the bench off the record, which was
14 not reported by the court reporter.)

15 BY MR. POTTER:

16 Q Did you attempt to contact Mrs. Clay at the
17 time of settlement or after settlement?

18 A Yes, I did.

19 Q Did you attempt to contact her yourself?

20 A Yes, I do.

21 Q What was the result?

22 A She just said that she was not in the
23 position to sell her property at this time.

1 Q She, in effect, refused to settle.

2 A Yes, she did.

3 She refused to settle.

4 MR. DIAZ: Your Honor, I am going to object
5 to the leading form of the questions.

6 THE COURT: I will sustain it. Strike the
7 answer.

8 BY MR. POTTER:

9 Q What else did she say to you? Anything else?

10 A Let's see.

11 I don't know what I am supposed to answer
12 to and what I am not.

13 I know the answer but --

14 THE COURT: Just answer the question.

15 BY MR. POTTER:

16 Q Let me pose the question again.

17 Did there come a time, to your knowledge,
18 that Mrs. Clay sold this property?

19 A Yes, she did.

20 Q Do you know when that was?

21 A It was on April the 14th, 1982.

22 Q Do you know who she sold the property to?

23 A She sold it to Mr. Jim Blevins.

1 Q Do you know how much she sold it for?

2 A She sold it for \$130,000.

3 Q Do you know how much was paid down at that
4 time?

5 A \$30,000.

6 Q How much was taken back in the form of a
7 trust?

8 A \$100,000.

9 Q Since that time, have you received any
10 payments at all from Mrs. Clay on the commission from
11 the property?

12 A No.

13 MR. POTTER: That's all the questions I have.

14 THE COURT: Mr. Diaz?

15 MR. DIAZ: Thank you, Your Honor.

16 - - -

17 CROSS EXAMINATION

18 BY MR. DIAZ:

19 Q Let me, if I could, Mrs. Marsh, talk to
20 you a little bit about this subordination term.

21 Perhaps, it might be helpful if I took plaintiff's
22 number one and number two.

23 Now, you said that you have done one-hundred

1 or one-hundred-and-twenty-five listings since you
2 started practicing, is that right?

3 A I can't really speak on that in all honesty.

4 Q In that magnitude --?

5 A I mean, I was the top producer of Long and
6 Foster in Fredericksburg.

7 I have been a member of the million-dollar
8 club.

9 Q It's fair to say, then, that you have worked
10 on maybe fifty subordination cases.

11 A I have worked on quite a few, yes, sir.

12 Q Let me be sure that I understand what the
13 subordination is and how it works.

14 As I understand it, on a transaction where
15 the seller is going to hold the deed of trust, he has
16 the first deed of trust, is that right?

17 A Yes. That's correct.

18 Q Then, the seller agrees with the buyer that
19 he will let the buyer go out and borrow money and that
20 the seller will take a junior security position in the
21 property.

22 A Only if the money is borrowed for construction
23 on that particular piece of land -- on a bona fide

1 construction loan.

2 Q Only for construction on that piece of land.

3 A That piece of land, yes, sir.

4 Q All right.

5 Is there a restriction, usually, that it
6 be only on that piece of land?

7 A It's wrote in the contract --

8 Q There is --

9 A -- as a bona fide construction loan.

10 Q So, the restriction on that piece of land
11 is written into the contract.

12 A Yes, sir.

13 Q Typically, aren't there limits on how large
14 a construction will be done, what kind of construction
15 loan?

16 A The bank would make the limits on that.

17 Q Is there, typically, any limit on what a
18 seller will want and how much of a construction loan
19 he will let go in front of him?

20 A (No response.)

21 Q There is, isn't there?

22 A A limit --?

23 Q Yes, ma'am, a limit.

1 A I presume there is.

2 Q I would think that's right.

3 If there was, that would be in the contract,
4 too, wouldn't it?

5 A No, sir.

6 Q That wouldn't be.

7 A The bank is the one that is going to
8 put the mortgage -- the first deed of trust on it.

9 No, sir.

10 Q Mrs. Marsh, have you ever written a sales
11 contract that has a subordination clause in it for
12 construction or subordination which had a dollar limit
13 on how much of a loan the construction loan would be?

14 A No, I have not.

15 Q You have never done that.

16 A I have never done that, sir.

17 Q You said that when a construction loan goes
18 on, the construction loan has first priority on the
19 property, right?

20 A Yes.

21 Q Have you ever had the experience where the
22 borrower, the buyer of the property, defaults on the
23 payments while construction is going on?

1 A (No response.)

2 Q Has that ever occurred on a case that you
3 have been involved in?

4 A No, sir.

5 Q You don't know whether or not the property
6 would be less valuable with that construction loan on
7 it or whether it would be more valuable, do you?

8 A It would be more valuable, sir.

9 Q Even if it was in the middle of construction --?
10

11 A Well, the bank is going to see that it's
12 through..

13 Q Suppose he defaults midway through the job.

14 A Defaults which way, sir?

15 Q Suppose the buyer doesn't make his payments.

16 A To the bank --?

17 Q Yes, ma'am,

18 A Then the bank is going to repossess it.

19 Q That's right. It is going to repossess it
20 with a half-finished improvement on it, isn't that
21 right?

22 A Yes. And the bank is going to have it
23 finished.

1 Q Isn't it typically the case that when a
2 construction loan goes on and the deferred purchase
3 money is subordinated that during the period of
4 construction the property is worth less than the total
5 of the financing that is on it?

6 A (No response.)

7 Q Isn't that true?

8 A Less than --

9 Q Than the financing --

10 A -- the financing of the second deed of trust
11 or the first, sir --?

12 Q The first and the second. The first and
13 the second.

14 A That, I would not have knowledge of, sir.

15 Q You wouldn't know.

16 A No, I wouldn't.

17 Q Would you say in circumstances where a first
18 loan -- a construction loan is going on the property
19 and the deferred purchase-money loan is going into a
20 second place on the property the financial position of
21 the buyer is important?

22 A You mean the financial ability of the buyer
23 is important.

1 Q Yes, ma'am.

2 A Yes. The bank is going to check him out on
3 this, sir.

4 Q It would be important to the seller, too,
5 wouldn't it?

6 A Yes, it would.

7 But the bank isn't going to lend the money
8 unless he is qualified.

9 THE COURT: Let me just interrupt and say
10 that I think the jury needs to have a better definition
11 of the terms that you are using, such as deferred
12 purchase money trust and so on.

13 Unless you have objection to it, Counsel --

14 MR. POTTER: No, Your Honor. That's fine.

15 MR. DIAZ: Can I describe the typical
16 situation to the jury, Your Honor, subject to any
17 criticisms Mr. Potter might have?

18 THE COURT: Any problem with that, Mr.
19 Potter?

20 MR. POTTER: No. I would like to hear it.

21 THE COURT: If I'm making it more simple than
22 it need be, then you can let me know, but I think that
23 when you are using terms of art like that it's more

1 helpful if the jury is specifically aware of what
2 they mean.

3 MR. DIAZ: Ladies and gentlemen, if I under-
4 stand how these transactions will work, typically --
5 if there is such a thing as a typical situation -- if
6 a seller owns a piece of 'property that is unimproved --
7 has no construction on it -- and if he is willing to
8 accept a trust back, it, typically, is a first trust,
9 that is in the event there is a failure to pay by the
10 buyer the holder -- the seller of the deed of trust --
11 has the right to cause the property to be foreclosed
12 and get the money from that sale to pay off the
13 balance that's owed to him.

14 In some circumstances, a buyer may wish to
15 construct improvements on that property.

16 If he seeks to do that, he is -- and has
17 to borrow to do it -- he is going to go to a bank,
18 institutional lender or even a private source of money
19 and he is going to borrow the money from them.

20 That person who is going to lend him that
21 money insists on having security for the repayment of
22 the money. So he will ask for a deed of trust on the
23 same property.

1 Now, the rule of law is that the first trust
2 that is recorded on the property is the first that he
3 has paid, that is, it's got to get one hundred cents
4 of the money owed to it before anyone goes down to who-
5 ever is second in line.

6 The lender on a construction loan typically
7 isn't content to do that. He is not willing to accept
8 the second position because he knows if the property
9 is sold in a foreclosure, a distress sale, the chances
10 are good there is not going to be enough money for him
11 to get paid.

12 What he will insist on doing is he will insist
13 that the seller, who is holding the deferred purchase
14 money promissory note, that is the note promising to
15 pay the balance of the purchase price and is secured
16 by a first trust.

17 He will insist that that seller subordinate,
18 that is, change the order of priority and put himself
19 down second so that if a foreclosure is necessary
20 because the buyer isn't able to make his payments, then
21 the money that comes in first pays off the construction
22 lender, and then pays off, if there is money left, to
23 the seller.

1 So the consequence of the switch is to put
2 the seller in the junior position so if the property
3 goes out under a distress sale, the seller isn't going
4 to get his money.

5 THE COURT: That is sufficient.

6 MR. DIAZ: Thank you, Your Honor.

7 THE COURT: Any objection, Counsel?

8 MR. POTTER: Well, the only objection would
9 be that it assumes that the foreclosure sale draws less
10 cash than enough to pay off the second trust.

11 THE COURT: It may be that everybody gets
12 paid.

13 MR. POTTER: It may be that everybody gets
14 paid off, but there is a great assumption there that
15 it will sell for less.

16 I think the other caveat that has to be
17 added is that in every construction loan it's not
18 paid lump sum to the builder.

19 It is paid in construction draws as the
20 building goes up.

21 THE COURT: Well, the only issue that I am
22 interested in is that you understand the difference
23 between a construction loan, a subordination clause

1 and first and second coverage.

2 I think that does it.

3 MR. POTTER: The other issue may be the
4 releases.

5 I don't know if you want to talk about that.

6 THE COURT: Well, we haven't gotten into
7 that yet, but I just think I saw a question in the
8 minds of the jury there.

9 MR. DIAZ: Thank you for your assistance,
10 Your Honor.

11 THE COURT: All right.

12 CROSS EXAMINATION (Continued)

13 BY MR. DIAZ:

14 Q Mrs. Marsh, is there any question in your
15 mind who you represented, who you were working for as
16 a real estate agent?

17 A No.

18 Q Can you tell the jury who it is that you are
19 required to work for?

20 A The only thing that we offer in real estate
21 is services. That's what we get paid for.

22 Q That isn't my question, Mrs. Marsh.

23 A Oh, I'm sorry.

1 THE COURT: His question is very specific.

2 THE WITNESS: I serve the seller, sir.

3 MR. DIAZ: Thank you.

4 BY MR. DIAZ:

5 Q That is where your obligation runs.

6 A Yes, sir.

7 Q You said that Mrs. Clay, when you presented
8 the listing agreement to her, told you that she was
9 encumbered with debts, is that right?

10 A She told me her late husband had left her
11 heavy laden in debt.

12 Q Did she give you any reason beyond what you
13 have already testified to as to why she wanted to
14 sell the property?

15 A She wanted to sell the property.

16 She wanted to move to Florida. She wanted
17 to be with her grandchildren.

18 Q She made no mention to you of the fact that
19 the mortgages were costing her money.

20 A No. She did not, sir.

21 Q Let me ask you this: is it typical for you
22 to inquire when you take a listing whether or not there
23 are any encumbrances on a piece of property?

1 A Yes, it is.

2 Q Let me direct your attention to this listing
3 agreement, here, and point you to the letters, T-A-C,
4 which is handwritten. (Indicating.)

5 A (Witness complied.)

6 Q Is that your handwriting?

7 A Yes, it is.

8 T-A-C --

9 Q Let me ask the question.

10 THE COURT: Just a minute.

11 MR. DIAZ: I'm sorry.

12 THE COURT: What I am going to ask you to do
13 is -- this is cross examination which is different from
14 direct examination.

15 THE WITNESS: Yes

16 THE COURT: He asks you very specific
17 questions --

18 THE WITNESS: And I just say yes or no.

19 THE COURT: -- and I am going to ask you
20 to respond not just yes or no, but you respond to them
21 specifically.

22 THE WITNESS: Okay.

23 THE COURT: Go ahead and ask your question.

1 BY MR. DIAZ:

2 Q Now, those letters, T-A-C, are they in your
3 handwriting?

4 A Yes, sir.

5 Q Did you put that on there?

6 A Yes, sir.

7 Q What do those initials stand for?

8 A Treat as clear.

9 Q Do you mean clear of deeds of trust?

10 A No, sir.

11 Q No. What did you mean by T-A-C?

12 A T-A-C is a form --

13 Q I'm asking you what you meant by T-A-C on
14 this document.

15 A Treat as clear. That is information for
16 other realtors to see when they look at it.

17 We look for assumable loans. A lot of
18 conventional loans are not assumable.

19 Q Clear of what, Mrs. Marsh?

20 A (No response.)

21 Q Treat as clear of what?

22 A They don't have an assumable loan.

23 A lot of --

1 Q You have answered my question.

2 Thank you.

3 THE COURT: Wait for the next question.

4 BY MR. DIAZ:

5 Q With respect to the purchase price of
6 \$130,000, did you believe that to be an appropriate
7 price?

8 A Yes, sir.

9 Q Isn't it a fact that that's what you thought
10 the property was worth?

11 A That's what Mrs. Clay and I both thought the
12 property was worth.

13 Q Is it fair to say that you thought the
14 property was worth \$130,000?

15 A I thought it was worth every bit of \$130,000.

16 Q Every bit of \$130,000 --.

17 A (No response.)

18 Q With respect to the Luck contract that you
19 testified to, the Luck offer --

20 A Yes.

21 Q -- that's from Luck Quarries, Inc., is that
22 right?

23 A Yes, sir.

1 Q That's the quarries that your husband runs,
2 isn't it?

3 A He runs Fairfax Quarries.

4 Q That offer was for \$100,000, is that right?

5 A Yes, sir.

6 Q Was that offer ever signed?

7 A The offer was --

8 Q It was never signed.

9 A -- in the mail.

10 No. It was never signed because Mr. Blevins
11 contract was signed before they received it in
12 Richmond.

13 Q On the listing agreement there is no question,
14 is there, but that you put that mark through the line
15 that says, "I will take back a second deed of trust in
16 the amount of" -- and there is a line for dollars?

17 A (No response.)

18 Q There is no question but that you put that
19 line through there, is there?

20 A No. It's no question.

21 Q At the time that you got Mrs. Clay to sign
22 the listing agreement, did you discuss anything with
23 Mrs. Clay about subordination?

1 A No, sir.

2 Q Did you discuss anything with Mrs. Clay about
3 second trusts?

4 A No, sir.

5 Q With respect to the Blevins' contract, you
6 said that Mrs. Clay was concerned about \$5,000 -- that
7 she lacked \$5,000 for closing, is that right?

8 A Yes, sir.

9 Q Isn't it a fact that under the Blevins'
10 contract she lacked a lot more than \$5,000 in cash to
11 close?

12 A Not to my knowledge.

13 I mean, she told me \$5,000.

14 Q Let's review that a little bit.

15 As I understand it, the contract that Mr.
16 Blevins' proposed and which you presented was going to
17 produce \$25,000 in cash, is that right?

18 A Yes, sir.

19 Q Was it your testimony that something in the
20 magnitude of \$30,000 in mortgages had to be paid off?

21 A No, sir. It was not.

22 Q Do you know what the amount of the mortgages
23 were ultimately paid off?

1 A \$21,000.

2 Q You are positive of that?

3 A That's what she told me.

4 No. I am not positive of that.

5 Q How much was due to you for a real estate
6 commission?

7 A \$13,000.

8 Q So there is a shortfall of at least \$9,000,
9 isn't there?

10 A She said she had C & D's that she was going
11 -- that was getting ready to mature -- that she was
12 short \$5,000.

13 This is the essence that she told me.

14 I did not ask her how much she had in C & D's
15 We discussed. She told me her house was
16 paid for.

17 And we discussed moving the loan over there
18 if she didn't want to pay for it because she was paying
19 eight-hundred dollars a month.

20 She was getting one-thousand-and-some-odd
21 dollars from Mr. Blevins -- that she was released of
22 her tax thing --

23 Q So there was a discussion --

1 A -- on the property which is --

2 Q So there was a --

3 A -- one thousand.

4 Q There was a discussion, then, of her
5 obtaining a trust on her property, is that correct?

6 A Yes, sir.

7 Q That property had no encumbrances on it
8 whatsoever, is that correct?

9 A That's what she told me.

10 Q On this real estate contract, you filled
11 this out, is that right? (Indicating.)

12 A Yes, sir.

13 Q Did you fill that out in front of Mrs. Clay
14 or did you come to her home with it already filled
15 out?

16 A When I reached her home the contract was
17 filled out completely.

18 And it was signed by Mr. Blevins then, too,
19 sir.

20 THE COURT: Wait a minute. I don't think
21 that is responsive to the question.

22 Would you ask your question again?

23 MR. DIAZ: Yes.

1 BY MR. DIAZ:

2 Q When you went to Mrs. Clay's home, was the
3 contract all filled out?

4 A Yes, sir.

5 Q Who thought of the words that were hand-
6 written on this document?

7 A The words that are handwritten on it -- I
8 worked with Mr. Blevins' tax man and we made up about
9 three or four contracts on the property.

10 Mr. Blevins -- I mean -- yeah, Mr. Blevins --

11 Q Please, Mrs. Marsh, try to stay with my
12 question.

13 I know it is difficult --

14 A Well --

15 Q -- because I know you are concerned about
16 this, but I'd like very much for you to just --

17 A Okay.

18 Q -- stay with my questions.

19 A Okay.

20 THE COURT: Repeat your question.

21 MR. DIAZ: Okay.

22 BY MR. DIAZ:

23 Q Who thought up the words that are written

1 on it?

2 A Her tax man -- I mean, his tax man.

3 Q Then you wrote it down.

4 A Yes, sir.

5 Q Did you talk with the tax man?

6 A Yes, sir.

7 Q The contract says: "Purchaser to pay
8 \$25,000 down."

9 Did you write that?

10 A Yes, sir.

11 Q When was that \$25,000 to be paid?

12 A It's sold.

13 Q Does the contract say that?

14 A (No response.)

15 Q It doesn't, does it?

16 A If you read it, you can see where it does.

17 Q Why don't you point out to me where it says
18 that that \$25,000 is to be paid at settlement?

19 A "Purchaser to pay \$25,000 of which \$1,000 is
20 part..."

21 Okay. Right up here at first it says "...in
22 ~~consideration of \$1,000, paid in check~~"

23 ~~Q Yes~~

1 ~~Q That's your experience.~~

2 ~~A Yes, sir.~~

3 Q The contract says: "Seller agrees to sub-
4 ordinate a bona fide construction loan."

5 Can you tell me what that is supposed to
6 mean?

7 A It means a construction loan on that piece
8 of property.

9 Q Well, "Seller agrees to subordinate a bona
10 fide construction loan."

11 How does one subordinate a bona fide con-
12 struction loan?

13 A (No response.)

14 Q Do you mean subordinate to a bona fide
15 construction loan?

16 A (No response.)

17 Q Was that what the language was supposed to
18 say?

19 A A bona fide construction loan is construction
20 on that particular piece of property.

21 She would -- the bank would hold the first
22 deed of trust and she would take the second at that
23 time, sir.

1 Q This language, here, "Seller agrees to
2 subordinate a bona fide construction loan," that
3 language is binding on the seller if she signs the
4 contract and it becomes a contract, isn't it?

5 A Yes, sir.

6 Q That language does not have any limit in
7 it, does it, as to the amount of the construction --

8 A No, it does not --

9 Q -- loan?

10 A Sir.

11 Q It does not.

12 A (No response.)

13 Q Neither does that language have any limit
14 to the fact that the construction loan must be with an
15 institutional lender, does it?

16 A No, sir.

17 Q Neither is it limited to the type of improve-
18 ments to be constructed or the amount of improvements
19 to be constructed, is it?

20 A No, sir.

21 Q It doesn't even say that the improvements are
22 to go on this piece of property, does it?

23 A Bona fide construction loan -- it would go

1 on that piece of property.

2 Q Well, what does the word bona fide or the
3 expression bona fide mean to you?

4 A Bona fide means to me that it would go on
5 that piece of property -- bona fide construction
6 loan.

7 Q Where did you learn that meaning for bona
8 fide?

9 A I don't know. I have had so many classes.
10 I've had real estate classes. I have had
11 extra schooling.

12 I really couldn't come right down and show
13 you right where and when I learned the meaning of
14 anything.

15 Q Isn't it a fact that bona fide means -- to
16 use the vernacular -- an honest-to-goodness construction
17 loan?

18 A (No response.)

19 Q Isn't that what bona fide means?

20 A (Witness nods head.)

21 Q So it doesn't mean that the loan is going to
22 be limited to this piece of property.

23 It just means it to be an honest-to-goodness

1 construction loan.

2 A Well, she would not have to subordinate, sir --

3 MR. POTTER: I want to object, Your Honor.

4 He is arguing with the witness.

5 THE WITNESS: -- a piece of property --

6 THE COURT: Just a minute. Wait until your
7 attorney makes his objection.

8 MR. POTTER: He is arguing with the witness,
9 Your Honor, and I don't think that that is a question
10 that she can respond to.

11 THE COURT: Well, I am going to overrule the
12 objection.

13 She has testified as to what her under-
14 standing of bona fide means.

15 I think the question has been answered, but
16 I am going to let him go into it.

17 THE WITNESS: Do you want me to answer it?

18 THE COURT: Why don't you re-ask your
19 question?

20 MR. DIAZ: If the court reporter would,
21 please, read it back.

22 THE COURT: Will you read that back?

23 (Thereupon, the following was read back

1 by the court reporter:

2 QUESTION: Isn't it a fact that
3 bona fide means -- to use the
4 vernacular -- an honest-to-good-
5 ness construction loan?

6 Isn't that what bona
7 fide means?

8 So it doesn't mean that
9 the loan is going to be limited
10 to this piece of property.

11 It just means it to be an
12 honest-to-goodness construction
13 loan.)

14 BY MR. DIAZ:

15 Q Will you, please, answer that?

16 A That's true.

17 Q Just answer that.

18 A Okay. If she is supposed to follow a
19 second deed of trust, she has the first deed of trust
20 on the property.

21 How could she follow the second deed of
22 trust if it's not a construction loan on that particular
23 piece of property?

1 How can you go get a construction loan --

2 THE COURT: Just one second.

3 I think the question was: doesn't bona
4 fide mean an actual construction loan as opposed to
5 a construction loan on that piece of property?

6 Was that not your question?

7 MR. DIAZ: That's right.

8 THE WITNESS: Yes. Yes. That's true.

9 BY MR. DIAZ:

10 Q Now, going back to this \$5,000 for a minute,
11 the question of the \$5,000, as I understood your
12 testimony, came up after Mrs. Clay had signed the
13 contract, is that right?

14 A Yes, sir.

15 Q It is correct that at that point, then, is
16 it not, that there was a ratified contract between Mrs.
17 Clay and Mr. Blevins?

18 A Yes, sir.

19 Q When you went back to Mr. Clay to ask him --
20 to Mr. Blevins to ask for the additional \$5,000, it
21 was already a contract, wasn't it?

22 A Yes, sir.

23 Q Did Mr. Blevins know that?

1 A Yes, sir.

2 Q So you went to him and you said, "We have a
3 binding contract here, but Mrs. Clay wants \$5,000 more
4 down."

5 A She told me to go back and ask him in good
6 faith, which I did.

7 Q Even though there was already a binding
8 contract -- so Blevins could insist that it be per-
9 formed.

10 A Yes, sir.

11 Q At the time that you presented this land-
12 sales contract to Mrs. Clay, a contract that required
13 her to take back \$105,000 worth of financing --

14 A Yes, sir.

15 Q -- did you provide her, at that time, any
16 financial information on Mr. Blevins?

17 A No, sir. Mr. Blevins had been her tenant
18 for years.

19 Q Isn't it a fact that the only time you got
20 any financial information for her was after there was
21 a binding contract between the parties and only when
22 she asked you to go and get some financial information
23 for her?

1 A Yes, sir.

2 Q When you did this contract, you didn't even
3 put a purchase price into it, did you?

4 A No, sir. The purchase price is put right
5 down in the small lettering where --

6 Q The purchase price is put where?

7 A It's right down there. (Indicating.)
8 \$25,000 down -- we made up quite a few
9 contracts that day when Mr. Blevins was there.

10 Q All right. Let me --

11 A This is what you are talking with --

12 Q -- ask you the question --

13 A -- about, right here.

14 Q At the top where it says, "For the sum of..."
15 that's blank, isn't it?

16 A Yes, sir.

17 Q Nowhere --

18 A Sir --

19 Q Let me ask the question.

20 A Okay.

21 THE COURT: Wait just one minute.

22 THE WITNESS: Okay.

23 THE COURT: Let him ask the question first.

1 THE WITNESS: Okay. I'm sorry.

2 THE COURT: Let him finish the question before
3 you start to answer.

4 THE WITNESS: Okay.

5 THE COURT: Go ahead and ask your question.

6 MR. DIAZ: We have got to try to get along
7 because we have got to spend the time asking the
8 questions and answering them.

9 THE WITNESS: All right.

10 Okay. I apologize. I apologize.

11 BY MR. DIAZ:

12 Q With respect to the financing you put ten
13 days in that contract to settle, is that right?

14 A Yes, sir.

15 Q So the contract had a closing date of ten
16 days.

17 A Yes, sir, within ten days.

18 Q That was after you had had discussions with
19 Mrs. Clay in which one of the possibilities that you
20 discussed was her putting a mortgage on her home to
21 close the difference between the amount of cash she
22 was going to get from Mr. Blevins on the transaction
23 and the amount she was going to need to close.

1 A Yes, sir.

2 Q In your experience, Mrs. Marsh, is it possible
3 to make application for a deed-of-trust loan and get
4 it approved and committed within ten days, or, isn't
5 it a fact that it takes more like thirty to forty-
6 five days?

7 A Well, yes, true, sir.

8 But we were doing it otherwise.

9 MR. DIAZ: Thank you, Your Honor, that's all
10 the questions I have.

11 THE COURT: All right, Mr. Diaz.

12 Do you have any redirect?

13 MR. POTTER: Yes, Your Honor, if I may,
14 just briefly.

15

16

REDIRECT EXAMINATION

17

BY MR. POTTER:

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Q Mrs. Marsh, you have been asked a lot of
questions about the contract dated December 19, 1981,
and about your experience with real estate contracts.

In your experience, is it common that all
the terms of the deed-of-trust note and all the terms
of the deed of trust find their way into this land-sales

1 contract?

2 A No. That's what you have your settlement
3 attorneys for.

4 Q In fact, although it says that \$25,000 is
5 not to be paid at settlement, was Mr. Blevins prepared
6 to pay \$25,000?

7 A Yes, sir. He brought a cashier's check for
8 \$24,000.

9 Q Although, as Mr. Diaz is trying to point out,
10 it doesn't say that she is to take the deed of trust
11 for \$105,000, didn't Mr. Kincheloe prepare and Mr.
12 Blevins execute a deed of trust for \$105,000?

13 A Yes, sir.

14 MR. POTTER: That's all the questions I have.

15 THE COURT: Mr. Diaz?

16 MR. DIAZ: Just one on recross, if I could,
17 Your Honor.

18 THE COURT: Okay.

19 - - -
20 RECROSS EXAMINATION

21 BY MR. DIAZ:

22 Q You mentioned a couple of times Mr. Kincheloe's
23 preparation of documents and the settlement where Mr.

1 Blevins signed these documents.

2 I understood you to say that Mr. Kincheloe
3 was out of town at the time, is that correct?

4 A Yes, sir.

5 Q In fact, didn't that occur after Mrs. Clay
6 had written to Long and Foster saying that she couldn't
7 close on the contract because of the terms she had
8 discovered were in it?

9 A Yes, sir.

10 I carried a copy of it to Mr. Kincheloe.

11 Q All right.

12 So you knew and everyone else knew in advance
13 of the time that you all sat down at Mr. Kincheloe's
14 office and all had all these documents done and
15 everything signed that Mrs. Clay was objecting to
16 that contract and didn't feel that she could settle
17 on it.

18 You knew that before then, didn't you?

19 A I didn't know whether she was going to be
20 there or not, sir.

21 Q You had her letter, didn't you?

22 A Oh, yes, sir, I had it.

23 MR. DIAZ: Thank you.

1 years, have you been doing settlement work in real
2 estate transactions?

3 A Primarily real estate settlements..

4 Q Did there come a time, Mr. Kincheloe, when
5 you had occasion to receive a copy of a contract dated
6 December 19, 1981, from Mrs. Clay to Mr. Blevins?

7 A (No response.)

8 Q Do you remember that contract?

9 A Yes, I do.

10 Q In accordance with that contract, did you
11 take certain steps to prepare for the settlement under
12 the settlement, under the provisions of that contract?

13 A I did.

14 Q Will you just briefly describe what your
15 actions were after you received the contract?

16 A Settlement was scheduled.

17 There were some problems regarding the
18 settlement.

19 The seller, I know, was unhappy.

20 And what I did was give notice to the parties
21 that settlement would be held on December the 28th.

22 ~~Q Let me show you a copy of the letter, if I~~
23 ~~may, and ask you if that's the letter you are referring~~

1 I have leafed through my file.

2 I know that something was done either before
3 or afterwards, I know.

4 Q Did you work with Mrs. Marsh in an attempt
5 to get that problem solved or getting the addendum
6 drawn up?

7 A My primary interest was Mr. Blevins.
8 Mr. Blevins had signed the contract for
9 the ground.

10 And he wanted the ground.

11 And I wanted to do whatever I could to see
12 that he was protected in his contract.

13 Q Did you also draw up a deed and a deed of
14 trust and a note and a settlement sheet for Mr.
15 Blevins for the 28th of December?

16 A Yes. My office did that.

17 Q Let me show you this, if I may. (Indicating)

18 Is this the settlement sheet that you drew
19 up -- a copy thereof, for December?

20 A It was done by my secretary.

21 Q Is this a copy of the trust and the deed
22 that were also prepared?

23 A Yes.

1 ~~wasn't in Fairfax at the time of settlement.~~

2 Q Was there ⁵someone in your office who was
3 going to conduct that settlement?

4 A Yes. I have a memorandum that is in the file
5 that says that settlement was set for the 28th of
6 December, 1981, at four o'clock, for Clay to Blevins.

7 Justus M. Holme, Jr., handled the settlement.

8 Jim Blevins, Rita Marsh and Justus Holme
9 attended the settlement.

10 The trust and note was signed and a check
11 was left for the settlement in the amount of \$24,964.24.

12 Q That was in accordance with the settlement
13 sheet, I take it.

14 A That's correct.

15 Q After the settlement date, did you have
16 occasion to have a telephone conversation with Mrs. Clay
17 concerning the settlement?

18 A I had several.

19 Q Do you remember what these conversations
20 were? What the gist of them was? What was said by
21 Mrs. Clay concerning the settlement?

22 A Well, Mrs. Clay was upset.

23 And I know one of the things that disturbed

1 her most was the fact that there was a subordination
2 provision in the original papers.

3 Q To your knowledge, did Mrs. Clay ever
4 threaten you or threaten Mrs. Marsh in any way?

5 A Well, there was some talk about F.B.I. and
6 C.I.A. and so forth.

7 There was some. I don't remember exactly
8 what was said, but -- and quite frankly, I don't
9 know whether it was said to me or my secretary.

10 I know my secretary was very upset about
11 the thing.

12 Q After that period of time, I take it that
13 there was a separate or a new contract with regard
14 to the sale of this property, if you know.

15 A Yes. Actually, when I was out of town
16 over the Christmas holidays, I turned the matter over
17 to Mr. Holme.

18 Mr. Holme, subsequently, worked out a new
19 contract or arrangement between the parties for the
20 same ground.

21 And settlement was later concluded for the
22 same ground.

23 Q To your knowledge, was there any change in

1 the purchase price in the second contract?

2 A Not to my recollection.

3 The purchase price was the same.

4 MR. DIAZ: If Your Honor please, the witness
5 has testified that he wasn't there. He didn't have
6 anything to do with it.

7 Mr. Holme handled it..

8 I don't think he is qualified to answer the
9 question.

10 THE COURT: Any response?

11 MR. POTTER: I believe he has testified to
12 the best of his recollection and that's all I can ask
13 for.

14 THE COURT: Well, I think his objection is
15 where his recollection is coming from.

16 MR. DIAZ: There is no foundation.

17 THE COURT: You are going to have to lay a
18 better foundation to go into that area.

19 BY MR. POTTER:

20 Q Did you have anything else to do with the
21 settlement, Mr. Kincheloe?

22 A Yes. I -- my office, apparently, completed
23 the settlement.

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And settlement -- let's see. I have got the papers here with me somewhere.

Q Are these papers kept in the normal course of your business?

A Yes.

Q Are these the settlement papers from the settlement that took place later?

A Yes.

THE COURT: Is there any dispute as to this matter?

MR. DIAZ: No, Your Honor, there is not.

THE WITNESS: I have a settlement statement that -- where settlement was concluded on April 15, 1982.

BY MR. POTTER:

Q Does that reflect the purchase price?

A \$130,000.

Q To your knowledge, has that deed been recorded and the settlement concluded in its entirety?

A It has.

MR. POTTER: Thank you. That's all the questions I have.

THE COURT: Mr. Diaz?

1 MR. DIAZ: Thank you, Your Honor.

2 - - -
3 CROSS EXAMINATION

4 BY MR. DIAZ:

5 Q Good afternoon, Mr. Kincheloe.

6 A Good afternoon, sir.

7 Q My name is Raymond J. Diaz and I represent
8 Mrs. Clay in this matter.

9 We have spoken before.

10 A Yes.

11 Q Mr. Kincheloe, you indicated that you were
12 aware, before you sent that notice of settlement out
13 to the parties, that there was a disagreement with
14 respect to the contract, is that correct?

15 A That's correct.

16 Q Would it be fair to say that the purpose
17 for sending that notice out was to just bring the
18 matter to a head and get it resolved?

19 A The reason that I sent this notice out was
20 to protect Mr. Blevins so he would have performed his
21 portion of the contract so he wouldn't lose his rights
22 under the contract.

23 Q That's a fair answer. Okay.

1 You mentioned that something had been done
2 with respect to an addendum.

3 So far as you know, no addendum was ever
4 signed by Mr. Blevins, was there?

5 A Yeah. A complete new contract was later
6 signed.

7 Q Yes. I understand that.

8 We will talk about that in just a moment.

9 I am concerned with the steps you indicated
10 that something was done. You couldn't recall exactly
11 what it was.

12 It was some kind of an addendum or --

13 A No. No addendum was signed.

14 You are correct.

15 Q In fact, Mr. Blevins had no obligation to
16 sign any addendum, did he?

17 A No.

18 Q He had a binding contract, did he not?

19 A He had a binding contract.

20 What he was trying to do was to placate the
21 seller.

22 Q But had no obligation to --.

23 A None.

1 Q Now, you recall the original language
2 between Mrs. Clay and Mr. Blevins with respect to
3 subordination and the construction loan, do you not?

4 A Yes.

5 Q Let me put it in front of you to help you
6 refresh your recollection a little bit. (Indicating.)

7 Let me draw your attention to this language
8 here. (Indicating.)

9 Is it fair to say that you would have been
10 upset if Mr. Blevins had been the seller in that
11 contract and had brought it to you, binding himself
12 to those terms?

13 A Well, I usually don't recommend subordination.

14 Q Thank you.

15 It is correct, is it not, Mr. Kincheloe,
16 that an entirely new contract was written between Mr.
17 Blevins and Mrs. Clay?

18 A A new contract was written but it was for
19 the same land and the same price.

20 Q There were a number of changes between the
21 two contracts, isn't that correct?

22 A That's right.

23 The subordination provision, I believe, was

1 eliminated.

2 And in order to balance the thing out and make
3 it fair, I believe that release provisions were
4 included.

5 MR. DIAZ: For the convenience -- if Your
6 Honor will indulge me -- I wonder if I could ask the
7 Court to permit me to have Mr. Kincheloe explain to
8 the jurors what partial release provisions are.

9 THE COURT: Any objection?

10 MR. POTTER: No. I have no objection.

11 BY MR. DIAZ:

12 Q Mr. Kincheloe, would you be kind enough to
13 explain to the jury what partial release provisions
14 are?

15 How do they function?

16 A The property involved here was twelve acres
17 running along Route 29/211.

18 If the owner of the property wanted to build
19 a building on a small portion of it and get a loan from
20 a bank, then he would have to have a partial release
21 from the basic trust -- basic purchase-money trust so
22 that they could give the bank a first trust on any
23 building that would be constructed there, or if he

1 sold an acre or two acres of land, if they had a
2 release provision, it would, say, provide for
3 \$10,000 an acre release, and he could pay \$20,000
4 and get two acres released with reasonable road
5 frontage and depth.

6 It's a method whereby a partial payment can
7 be made and part of the land can be released without
8 being forced to pay the note in full.

9 Q And so once the release is effected, then
10 the remaining security would be just whatever residue
11 of land had not been released.

12 A That's right. The residue of money and the
13 residue of the debt.

14 Q In fact, isn't it correct, Mr. Kincheloe,
15 that settlement was had on the second contract that
16 was entered between Mr. Blevins and Mrs. Clay and
17 not on the first contract?

18 A That's correct.

19 Q Just to clear up a point as well, can you
20 tell me, please, when you closed the contract what
21 amount of encumbrances on the property you discharged;
22 what amount you paid off of existing trusts on the
23 property?

1 A There was a first mortgage paid off in the
2 amount of \$31,147.26.

3 There was a second mortgage paid off in the
4 amount of \$274.08.

5 Q So that's a total of, approximately, \$31,400?

6 A Right.

7 Q \$31,400; those were mortgages that were on
8 the property when Mrs. Clay owned it.

9 A Correct.

10 MR. DIAZ: That's all the questions I have,
11 Your Honor.

12 Thank you.

13 THE COURT: Does that raise any other
14 questions?

15 MR. POTTER: Yes, it does.

16 - - -

17 REDIRECT EXAMINATION

18 BY MR. POTTER:

19 Q With regard to the release provision, you
20 said, as I understood your testimony, that you don't
21 ordinarily recommend a subordination agreement, is
22 that right?

23 A Particularly, in this market --.

1 in other words, you attempted to do an addendum to the
2 contract with the release earlier.

3 Do you know what happened to that attempt?

4 A Nothing was concluded at that time.

5 It was months -- couple months before any-
6 thing was concluded.

7 Q To your knowledge, did Mr. Blevins offer to
8 go to a release type of provision back at that time
9 on the first contract?

10 A I recommended it to him.

11 And he was willing to do whatever I said.

12 MR. POTTER: Thank you.

13 That's all the questions I have.

14 THE COURT: Anything else, Mr. Diaz?

15 MR. DIAZ: Yes. One question, please,

16 Your Honor.

17
18 RE CROSS EXAMINATION

19 BY MR. DIAZ:

20 Q It's correct, is it not, Mr. Kincheloe,
21 the matter wasn't successfully completed until Mrs.
22 Clay employed counsel of her own?

23 Isn't that right?

1 A That's correct.

2 The settlement wasn't completed as such.

3 Q The second contract was a result of the
4 negotiations between Mr. Holme, the attorney for Mr.
5 Blevins, and the attorney that Mrs. Clay employed,
6 Mr. Peterson, isn't that correct?

7 A That's correct.

8 But it was for the same land and the same
9 price.

10 Q With the variations in the terms you have
11 already described --.

12 A That's right.

13 MR. DIAZ: Thank you, sir.

14 THE COURT: Can Mr. Kincheloe be excused?

15 MR. DIAZ: Yes.

16 MR. POTTER: Yes, Your Honor.

17 (Thereupon, the witness was excused.)

18
19 THE COURT: Next witness.

20 MR. POTTER: Mr. Blevins:

21
22 Thereupon,

23 JIM L. BLEVINS

1 was called as a witness, and after having been
2 previously duly sworn by the Court, was examined
3 and testified as follows:

DIRECT EXAMINATION

4
5 BY MR. POTTER:

6 Q Would you state your name, please?

7 A Jim L. Blevins.

8 Q Mr. Blevins, how are you employed at the
9 present time?

10 A Self-employed --.

11 Q What type of business are you in?

12 A In trucking.

13 Q Are you acquainted with Mrs. Clay, the,
14 defendant in this case?

15 A Yes, sir.

16 Q How long have you known her?

17 A I have knowed her about six, seven years.

18 Q Did you lease the subject property from
19 her?

20 A Yes. I leased it from her husband before he
21 died.

22 Q Then, from her --?

23 A (Witness nods head.)

1 Q How much rent were you paying on a monthly
2 basis, do you recall?

3 A When -- from him I was paying \$400 a month.

4 Q To your knowledge, before the contract in
5 December, 1981, did Mrs. Clay make any effort to sell
6 this property at all?

7 A I didn't get the question.

8 Q Before the contract in December of 1981, did
9 Mrs. Clay make any effort to sell the property at all?

10 A She put a sign up on it.

11 I don't know how long the sign was up.

12 I come in one week and the sign was on the
13 property.

14 It was put up on a light pole and one on
15 the building some time before I bought it.

16 Q Was it a for sale by owner type of sign?
17 Do you recall?

18 A Yeah. It had a for sale on it.

19 Q Also, prior to the contract in December,
20 1981, were you ever contacted by any agents about
21 buying this land?

22 A Well, yes, I was contacted.

23 When I seen the agents come over and show

1 the property to people, then I started inquiring about
2 it myself because I had been interested in the land
3 for some time.

4 Q How about Mr. Day, Mrs. Clay's son-in-law?
5 Did he ever contact you prior to this time about
6 buying it?

7 A He came by one time and gave me one of those
8 cards.

9 Q He didn't give you any price or anything
10 like that on the property.

11 A No.

12 Q So you say you saw some people looking at
13 the property.

14 Was that last year some time?

15 A Yes. A month or so before I bought it.

16 Q What steps did you then take?

17 When you saw them looking at it, what did
18 you do concerning the property?

19 MR. DIAZ: If Your Honor please, I wonder if
20 I might make an objection as to the relevance to this
21 line of testimony to this cause of action that Mr.
22 Potter has put on.

23 I am not able to see it.

1 THE COURT: Where are you going, Mr. Potter?

2 MR. POTTER: Well, just with regards to the
3 background of the formation of the contract and the
4 listing agreement and how he came into the property,
5 and, also, the formation of the contract itself; what
6 his understandings were concerning the contract.

7 THE COURT: Well, I think what happened at
8 or near the formation of the contract that concerns
9 this specific case, this realtor and so on, is
10 relevant, and what happened prior to that is not.

11 I am going to sustain his objection.

12 MR. POTTER: I was asking him about this
13 particular time.

14 THE COURT: With this realtor --.

15 MR. POTTER: Right.

16 BY MR. POTTER:

17 Q --- With regard to Mrs. Marsh and this time,
18 when you saw the agents, what action did you take?

19 A I went to the realty office.

20 Q Which realty office? Where did you go?

21 A The one over on Sudley Road.

22 Q Is that Long and Foster?

23 A Long and Foster.

1 Q Did you speak with Mrs. Marsh at that time?

2 A (Witness nods head.)

3 Q Prior to that time, you made no efforts,
4 yourself, to go in and buy the land from Mrs. Clay.

5 A (Witness shakes head.)

6 Q As a result of your conversations with Mrs.
7 Marsh, did you execute a contract -- an offer, if you
8 will -- to purchase that property?

9 A Yes, sir.

10 THE COURT: Let me ask you to speak up, sir,
11 so that the jury can hear.

12 BY MR. POTTER:

13 Q Let me show you plaintiff's number two and
14 ask you to identify that. (Indicating.)

15 A (No response.)

16 Q Do you recall if that is the contract that
17 you signed?

18 A Yes, sir. That is the one I went over and
19 talked to her --.

20 Q Who came up with the terms and the provisions
21 that went in here with regard to financing and that
22 sort of thing?

23 Whose language was that? Do you recall?

1 A Who financed the land and stuff?

2 Q Yes...

3 How much you were going to pay down --

4 THE COURT: Just a minute.

5 Can you hear the answers to the questions?

6 JUROR # 4: No.

7 THE COURT: All right.

8 Sir, I am going to ask you to talk into the
9 microphone.

10 Speak up a little louder.

11 THE WITNESS: Okay.

12 I went over on the 19th and talked to Rita
13 Marsh.

14 And she presented this to me.

15 And I agreed upon the price that was bid.

16 And I put the \$1,000 down at the time I was over there.

17 That was on the 19th.

18 And she presented it to Mrs. Clay the next
19 day, I thought.

20 BY MR. POTTER:

21 Q Didn't she -- with regard to the price, was
22 there some discussion before you came to this amount
23 of the loan with your tax man or something like that?

1 A Oh, yeah. Yeah.

2 Q Did you call him while you were in their
3 office?--

4 A I called him from there.

5 Q -- and discuss that?

6 A Yeah.

7 Q Did he give you any advice concerning the
8 subordination clause?

9 A (No response.)

10 Q Do you recall?

11 A We talked about the subordination.

12 And the way we had it worded he seemed --
13 all right.

14 We went ahead the way she wrote it up. That
15 is the way we agreed upon it, you know.

16 Q To your knowledge, did you discuss with Mrs.
17 Marsh whether you intended to go out and get a
18 construction loan and build on that lot or what you
19 were going to do with the property?

20 A Well, at the time, I says I might build on
21 it and I might not.

22 It was just whatever becomes available.--
23 how the money comes about.

1 Q There wasn't anything definite about what
2 improvements you were going to make on that property.

3 A No.

4 Q After that period of time, did Mrs. Marsh
5 contact you concerning the contract?

6 A Yes, sir, after she had presented it to
7 Mr. and Mrs. Clay.

8 Q Did she tell you she had gotten it signed by
9 Mr. and Mrs. Clay?

10 A Yes.

11 Q Did she get you a copy of it at all?

12 A Yeah.

13 Q Were there any other discussions concerning
14 any of the terms of the contract that you can recall?

15 A No -- well, it came up on a different later
16 on of -- I put \$25,000 down.

17 And they came about wanting five more thousand
18 dollars.

19 Q Did she ask you about paying \$30,000 instead
20 of \$25,000 down?

21 A Yes.

22 Q What was your response to that?

23 A Well, I went ahead and agreed on it, but I

1 needed more time to put it all together and all.

2 Q You are talking about the final contract
3 that was entered into.

4 A The final contract that was presented later.

5 Q That was a separate contract that you ended
6 up signing at that time.

7 A Yes, sir.

8 Q Then you went to settlement under the terms
9 of that separate contract; is that right?

10 A Yes, sir.

11 MR. POTTER: Thank you.

12 That's all the questions I have.

13 THE COURT: Mr. Diaz?

14 MR. DIAZ: One or two just because it is
15 impossible for attorneys not to cross examine, Your
16 Honor.

17 - - -
18 CROSS EXAMINATION

19 BY MR. DIAZ:

20 Q Mr. Blevins, do I understand you to say that
21 -- I think this is what you said on direct and I want
22 to be clear -- that Mrs. Marsh filled that contract
23 out, wrote in the empty spaces the language that is

1 handwritten in there, and you agreed to what she put
2 down? Is that correct?

3 A That's the one we wrote up --

4 Q Correct.

5 A -- and we changed it later, yes, sir.

6 Q It is your testimony, then, that Mrs. Marsh
7 wrote this language in here that the seller agrees
8 to subordinate a bona fide construction loan and you
9 agreed to that, is that right?

10 A This is the one I signed, right here.

11 (Indicating.)

12 Q But my point is: that is her language.

13 A Yeah.

14 MR. DIAZ: Thank you, Your Honor.

15 That is all I have.

16 THE COURT: Any other questions?

17 MR. POTTER: No. I have no other questions.

18 THE COURT: Can he be excused?

19 MR. POTTER: Yes.

20 (Thereupon, the witness was excused.)

21 - - -

22 THE COURT: Next witness.

23 MR. POTTER: Mr. Marsh.

- - -

1 ~~or through larger investment groups, things like~~
2 ~~retirement funds and insurance company funds.~~

3 Q As I understand it, you are going to be
4 asked to make an evaluation on the loan.

5 Is that what you do in the normal course
6 of your business?

7 A We do that every day.

8 My job would be to evaluate a loan.

9 If I buy the loan, I might be able to sell
10 it on a short-term basis at a profit.

11 So every day I evaluate every loan, it is
12 to be able to sell it at a profit.

13 Q Are you -- in your investigation in this
14 particular contract, are you limiting yourself to
15 November, December, 1981, with regard to the rates
16 at that time?

17 A Well, I haven't been asked to do that, but
18 I suppose that I could do that.

19 Q Perhaps I can get into that on cross
20 examination.

21 THE COURT: I think at this juncture he
22 would be qualified as an expert.

23 MR. DIAZ: Thank you, Your Honor.

1 THE COURT: He can ask the questions.

2 BY MR. DIAZ:

3 Q All right. Mr. Dudley, let me ask you
4 again -- and to address the concern that Mr. Potter
5 has expressed to you, let me limit it if I could.

6 A All right.

7 Q Do you have an opinion with which you can
8 express with reasonable certainty that this note that
9 I just described to you, that is, \$105,000, twelve
10 percent, amortized for thirty years but due and
11 payable in ten years, what the value of such a note
12 would have been in December of 1981, if it was
13 secured by a first deed of trust.

14 A My opinion on that would be that anywhere
15 between seventy-five and eighty percent of the face
16 amount of the note would be a prudent investment.

17 Q Is it your opinion then that the value of
18 such a first deed of trust would be seventy-five to
19 eighty percent of its face amount, seventy-five or
20 eighty percent of the \$105,000?

21 A Of the \$105,000, yes, sir.

22 Q Let me ask you if you have an opinion which
23 you can express with reasonable certainty as to the

1 value of the same note if it is subject to a bona fide
2 construction loan without any fixed figure as to the
3 amount of the construction loan, again, directing
4 your attention to the area of November and December
5 of 1981.

6 MR. POTTER: I am going to object to the
7 question.

8 The question implies that there is a
9 subordination loan under these particular circumstances
10 and that there is no foundation or evidence before the
11 Court to indicate to the Court that there is, in
12 fact, a subordination loan present that would make
13 the existing trust the second trust, if you will, or
14 subordinate that second trust.

15 The evidence by Mr. Blevins is that he
16 entered into the contract. He may have intended to
17 do that. He may do it at any time.

18 It would seem to me that in order to show
19 that there is a loss or in order to show that there
20 is a difference in evaluation, we would have to show
21 that there has, in fact, been a subordination in order
22 to show any loss at that point.

23 MR. DIAZ: May I respond, Your Honor?

1 THE WITNESS: So I understand this -- this
2 has come at me two ways --

3 THE COURT: Three ways.

4 THE WITNESS: You are asking me to value
5 the note subject to subordination.

6 Is that simply what you are asking?

7 BY MR. DIAZ:

8 Q If it is the same note that we just talked
9 about --

10 A Subject to --

11 Q -- except it has a provision in it under
12 the terms of which the maker of the note could insist
13 on it being subordinated if he chose to.

14 A I'll answer the question from the period of
15 November of '81, on.

16 It wouldn't really make a difference over
17 what period we are talking about.

18 It could have been any period from 1980,
19 through the present.

20 That type of a note would bring on the open
21 market anywhere from fifty to fifty-five, perhaps sixty
22 percent of its face value.

23 Q In your opinion, then, such a note would be

1 worth somewhere between fifty and sixty percent of the
2 \$105,000 face amount.

3 A That's correct.

4 Q At my request, you have looked specifically
5 at the note and trust which Mrs. Clay ultimately did
6 take back from Mr. Blevins, have you not?

7 A Yes, I have.

8 Q Let me show you what has been marked for
9 identification as defendant's exhibit number one
10 and exhibit number two.

11 That's the note and deed of trust, is it not?

12 A Yes.

13 Q If I could, Mr. Dudley, I would like to draw
14 your attention to the second deed of trust which
15 contains a release provision which I think you have
16 reviewed before.

17 A Yes, I have.

18 Q Again, I want to ask you if you have an
19 opinion which you can express with reasonable certainty
20 as to the value of a note that has all the character-
21 istics we have just described except it is subject to
22 the release provisions that you see there.

23 A To the release provisions that I see here, I do

1 not see much of a difference between what I just said
2 on the previous note and this one.

3 It would still be somewhere around fifty
4 to fifty-five percent.

5 Q Do you think that the value of the note is in
6 the magnitude of fifty to sixty percent of the
7 \$105,000 face amount?

8 A That's correct.

9 Q Can you give the jury an understanding of
10 the basis for your opinion in this regard?

11 A Basically, what someone who is the holder of
12 this note would have would be an uncertainty in the
13 event of a sale -- foreclosure sale or distress sale.

14 At no time would anybody be certain as to the
15 amount of property left and to the value of that
16 property that would be left.

17 And anyone entering or anyone trying to buy
18 the note wants to be certain of making money on it.

19 That's the only reason you buy a note at a
20 reduced value.

21 For that purpose, someone would have to
22 look long and hard at a note of this type to be able
23 to pay much more than fifty or fifty-five percent -- quite

1 possibly sixty, but that, in my opinion, would be the
2 limit of it.

3 MR. DIAZ: Thank you very much, Mr. Dudley.
4 That's all the questions I have of this witness.

5 THE COURT: All right.

6 Mr. Potter?

7 MR. POTTER: Yes, Your Honor.

8 - - -

9 CROSS EXAMINATION

10 BY MR. POTTER:

11 Q Mr. Dudley did you discuss the facts and
12 circumstances of this case with Mr. Diaz prior to
13 reviewing the contract?

14 A Not prior to reviewing the contract.

15 We discussed it as I reviewed the contract.

16 Q Do you know what the zoning was in this type
17 of case as to this property?

18 A No, I don't. I didn't.

19 Q Does it make any difference to you with
20 regard to the loan what type of zoning there is on
21 this particular property?

22 A I would say it could.

23 If you are asking me if it makes any difference

1 to me, personally, it could, possibly, yes.

2 Q In the opinions that you have rendered, you
3 did not know whether or not this was commercial or
4 residential property.

5 A I took it to be commercial from the nature
6 of the contract.

7 Q In its entirety --?

8 A From the nature of the second page that I
9 was asked to testify on, I took it as being commercial
10 rather than residential by the release terms.

11 Q Rather than residential, did you say?

12 A (Witness nods head.)

13 Q You weren't certain whether or not it was
14 commercial.

15 A No. I was not certain. That is correct.

16 Q When you speak of evaluation, what the note
17 might be of value at, the value to whom?

18 Whom are we talking about?

19 A A potential purchaser -- anybody who would
20 purchase that note from Mrs. Clay or from anyone that
21 would have a note of that nature.

22 Q That would be someone, normally, in the
23 business of purchasing notes --

A In the business of purchasing notes, either

1 short-term or long-term investments.

2 That's why you purchase notes.

3 Q When you discuss evaluation, you are not
4 referring about an evaluation to a buyer or a seller,
5 what that term might have been in the contract, you
6 are discussing the evaluation to a potential mortgage
7 purchaser.

8 A If I am purchasing a note, it's what value
9 it has to me.

10 Q Right.

11 A And when it is discounted zero percent or
12 fifty or sixty or seventy percent from face value, that's
13 my judgment as to how much risk I want to take on the
14 note.

15 And the more risk you have in the note the
16 less you are going to offer for it.

17 Q How much would the note discount have been
18 back in November for a note of this nature with a
19 subordination agreement?

20 A That would be the second choice that Mr.
21 Diaz gave me.

22 Q That's correct.

23 A I think I have answered that.

Back in November it wouldn't really much

GARY PETERSON

was called as a witness, and after being first duly sworn by the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DIAZ:

Q Mr. Peterson, I wonder if you might state your name and occupation for the jury.

A My name is Gary Peterson. I'm an attorney. I practice law in Northern Virginia.

Q Do you have an area of law in which you concentrate, Mr. Peterson?

A For the past ten years I have specialized pretty much in real-estate law.

Q You have been practicing for how long, sir?

A Since 1970.

Q Directing your attention to late 1981, early 1982, did you have occasion to be employed by Mrs. Clay?

A I did.

Q Can you tell the jury, please, the nature of your employment by Mrs. Clay?

A I believe it was in January -- early January

1 of 1982, when Mrs. Clay was referred to me to look at
2 a contract she had signed.

3 She was very concerned about her ability to
4 perform under that contract.

5 Q When she came to see you, Mr. Peterson, did
6 she have with her a copy of the contract that you
7 described to me?

8 A Yes, sir.

9 Q Did she have as well with her a copy of the
10 listing agreement that she had entered with Long
11 and Foster Real Estate?

12 A (No response.)

13 Q Do you recall?

14 A I do recall seeing it. Whether it was at the
15 initial meeting or subsequent meeting, I don't know,
16 but I do recall reviewing a listing agreement with
17 Long and Foster.

18 Q Did she as well have a letter from an
19 attorney Justus Holme?

20 A That's correct.

21 Q Let me show you two documents so that we can
22 be clear.

23 Is that the contract and the letter from

1 ~~MR. DIAZ: Thank you, Your Honor.~~

2 BY MR. DIAZ:

3 Q Did you offer Mrs. Clay any advice on the
4 enforceability of that contract?

5 A Well, she was concerned about understanding
6 the contract.

7 ~~My recollection was that she had emphasized~~
8 ~~to me how important this asset was to her.~~

9 ~~I think she is a widow. I don't know if my~~
10 ~~recollection is correct, but my recollection is that~~
11 ~~she is a widow and that her husband had left her~~
12 ~~this property.~~

13 ~~And it was something that she was relying on~~
14 ~~for her retirement.~~

15 And she was asking me about what a subordina-
16 tion clause was.

17 There is a clause in here, as you are aware,
18 that deals with subordination.

19 Q When she came to you, then, she asked you
20 about it and didn't understand what it was.

21 A That's correct.

22 She did not understand even at that time
23 what it was.

1 A My recollection was that there were a couple
2 of trusts on the property.

3 And she had more -- she would have to pay
4 money at settlement.

5 And she did not have the money to pay to go
6 to settlement on this contract.

7 Q Is that because of when the settlement was?

8 A It was -- that was certainly a factor,
9 although the time for settlement had already trans-
10 pired when I had talked to her, I believe.

11 I can't say that with certainty, but I know
12 the contract said that settlement would be within ten
13 days.

14 And at the time I talked to her, she did not
15 have enough time to arrange for financing so that she
16 could bring money to settlement.

17 Q So there was a timing problem.

18 A It was partially a timing problem, that is
19 correct.

20 Q Specifically, did you take steps on her
21 behalf to negotiate a new contract with Mr. Blevins'
22 attorney?

23 A I did, yes, sir.

1 I talked with Mr. Holme numerous times on
2 the telephone.

3 I invited he and his client to my office.

4 And indeed, they did come to my office.

5 And of course, Mrs. Clay was with me, also.

6 And we did work out new terms for a contract
7 that I presume was entered into.

8 I'm not certain of that so I don't know.

9 Q The new arrangement that you were successful
10 in negotiating, is it correct that that increased the
11 cash down for Mr. Blevins from \$25,000 to \$30,000?

12 A That's correct.

13 Q Is it also correct that as a result of your
14 negotiations the subordination provisions were
15 eliminated and in their place there was a provision
16 for partial releases?

17 A That's correct.

18 When I had explained what the subordination
19 meant to Mrs. Clay, she was insentient.

20 She didn't understand it at all. And she
21 felt that she would have no security.

22 And I couldn't really quantify what security
23 she would have if somebody started to build a building

1 on her property and went bankrupt in the middle of it
2 with first trust indebtedness securing the construction
3 loan.

4 I simply could not quantify that. No one
5 could, I don't believe, to tell what her exposure would
6 be.

7 Q You couldn't judge whether she would be
8 secure in a subordinate position or not.

9 A Well, I could certainly judge, as anybody
10 could, that she would be very insecure in that posi-
11 tion.

12 Q Was it possible for you, Mr. Peterson, to
13 negotiate her back into a first trust position?

14 A That's correct.

15 My recollection is that we put some curtail
16 provisions in the contract that were not there before
17 distinguishing between some of the property which
18 was zoned industrial and some residential, providing
19 either a per-foot or per-acre curtailment for sections
20 of property that Mr. Blevins, the purchaser, might
21 choose to have released from the first deed of trust.

22 Q It wasn't possible to eliminate anything
23 except just the pure first trust.

1 It wasn't possible to get her to that posi-
2 tion, was it?

3 A It was not. That was very important to
4 Mr. Blevins.

5 Q Are you aware of any attempts that were made
6 by anyone else before you were employed to substitute
7 release provisions and the place of the subordination
8 position?

9 A (No response.)

10 Q For example, can you tell me whether or not
11 you recollect the preparation of an addendum to the
12 original contract?

13 A I believe that some sort of an addendum had
14 been prepared, but not signed, that addresssed that
15 particular issue.

16 Q Is it correct that that addendum did not
17 distinguish between what pieces or parcels of land
18 that would be released?

19 A I believe that is correct, that it did not
20 make the distinctions that we ultimately did in the
21 contract.

22 ~~Q In fact, Mr. Petersen, can you tell the jury~~
23 ~~what arrangements you made with respect to what~~

1 A That's correct.

2 Q In other words, you couldn't just grab all
3 of the property on Route 29 and get it released.

4 A No. You had to -- the buyer, Mr. Blevins,
5 had to release some of the residential property which
6 was off in back of the industrial property along the
7 front, as I recall it.

8 Q That's a result that you accomplished by
9 your negotiations, is that correct?

10 A That's correct.

11 Q It was not something you had seen in the
12 earlier addendum, is that also correct?

13 A It absolutely was not in the earlier
14 addendum.

15 My recollection is that the earlier addendum
16 was very cursory, perhaps a half page of handwritten
17 material, but I could be wrong.

18 Q Did you charge Mrs. Clay for your services,
19 Mr. Peterson?

20 A I did.

21 I had asked her for a retainer of three-
22 hundred dollars, not knowing quite what was involved.

23 She paid that to me.

1 She ran up a total bill of over seven-hundred
2 dollars.

3 At some point in time, we had settled Mr.
4 Blevins and worked out a contract that was acceptable
5 to her. And at some point in time, I believe, a
6 representative from Long and Foster felt that I had
7 at least some conflict of interest.

8 And I did not want to jeopardize Mrs. Clay's
9 case.

10 And I suggested that she get another
11 counsel. And I recommended two attorneys, including
12 yourself, to represent her so that her position wouldn't
13 be jeopardized by somebody thinking I had a conflict
14 of interest.

15 I believe that concern arose from the
16 fact that I am general counsel for the Northern
17 Virginia Board of Realtors.

18 I believe that was represented to me by a
19 person from Long and Foster.

20 Q The charges that you made for your services,
21 was that work which you charged necessary work in
22 connection with this?

23 A It was absolutely essential.

1 Q All right.

2 A And I believe was very helpful to her -- at
3 least we arrived at a contract that was acceptable both
4 to Mr. Blevins and to my recollection, to Mrs. Clay.

5 I was concerned about duplicative costs for
6 her, so I sent her back one-hundred-and-fifty dollars
7 on her retainer.

8 I absorbed what was six-hundred-and-some
9 dollars as experience money that I just lost on the
10 transaction.

11 Q Are you satisfied that your fees were
12 reasonable in amount for the work done?

13 A I think they were very reasonable.

14 MR. DIAZ: Thank you very much.

15 That's all I have of Mr. Peterson.

16 THE COURT: All right. Mr. Potter?

17 MR. POTTER: Yes, Your Honor.

18 - - -

19 CROSS EXAMINATION

20 BY MR. POTTER:

21 Q Mr. Peterson, did you see the listing agree-
22 ment when Mrs. Clay came in to talk to you originally?

23 A I can't say that with certainty, but I know

1 Q Didn't you renegotiate and make a proposal
2 to Mr. Holme that a new contract be brought about --

3 A That's correct.

4 Q -- that instead of \$13,000, that a \$10,000
5 commission be paid in this case?

6 A Well, there were numerous proposals that
7 went back and forth.

8 I don't think you want me to trace the history
9 of them. They included proposals for Long and Foster.

10 Q So part of the problem Mrs. Clay had was the
11 payment of the real-estate commission in the case, was
12 it not?

13 A Well, subsequently we looked at that as a
14 possible way to make it possible for her to go to
15 settlement, to make it feasible for her to get the
16 money for her, as the seller, to lay on the table to
17 complete this contract she had entered into.

18 Q What you had offered was a settlement with
19 less than the real estate commission called for in the
20 listing agreement or the contract, is that right?

21 A I made numerous offers.

22 Which one are you referring to?

23 Q The one for \$10,000 instead of \$13,000.

1 A Well -- did we make that?

2 I don't have that contract in front of me.

3 I frankly don't remember.

4 Q You don't recall that?

5 A No, sir. I really don't.

6 I remember about talking about Long and
7 Foster possibly taking a note for the commission.

8 I remember partial commissions. I remember
9 explaining several different possibilities to make it
10 possible for Mrs. Clay to handle the financing involved.

11 Q So her objection was not in the payment of
12 the commission or in the operation of Long and Foster
13 but with the inability to come up with money at settle-
14 ment, is that what you are saying?

15 A I think her objection, as I recall it, Mr.
16 Potter, was not understanding quite what the contract
17 was with respect to the subordination clause, and more
18 importantly, not being able to get the money that
19 would enable her to go to settlement.

20 Q She sought your counsel in January of 1982,
21 is that correct?

22 A That's correct.

23 Q But she didn't seek it prior to that time.

1 A I can't say that with certainty, but I don't
2 believe -- it's possible I talked with her in late
3 December, but I don't believe I met with her until
4 January.

5 I simply don't recall.

6 Q It was --

7 A It was after Christmas, right around New
8 Year's, in there somewhere when I met with Mrs. Clay.

9 I met with her numerous times. That was the
10 first time.

11 Q Did she give you an explanation of what she
12 thought subordination meant?

13 A I don't recall her giving me an explanation.
14 I recall her telling me that she had a first
15 trust on the property.

16 Q Did she tell you that the agent had explained
17 what subordination meant?

18 A She told me the agent did not explain what --

19 Q Not at all --?

20 A -- subordination -- that's correct.

21 Q Did she tell you with regard to the release
22 provision that the agent had offered this addendum
23 that had a release provision in it?

1 Thereupon,

2 MARY W. CLAY

3 was called as a witness, and after being previously
4 duly sworn by the Court, was examined and testified
5 as follows:

6 DIRECT EXAMINATION

7 BY MR. DIAZ:

8 Q Are you Mary W. Clay?

9 A Yes.

10 Q You are the defendant in this case.

11 A Yes.

12 Q You are not married, Mrs. Clay.

13 A No. I am a widow.

14 Q Are you employed?

15 A Yes. I am a secretary.

16 Q Who do you work for?

17 A I work for the U.S. Government Central
18 Intelligence.

19 Q As a secretary --?

20 A As a secretary.

21 Q How long have you had that job?

22 A I have been there ten years.

23 Q Did there come a time, Mrs. Clay, when you

1 decided to sell -- well, let me ask you the first
2 question, first, and then the second question, second.

3 Did your husbnad leave any property to you
4 when he passed away?

5 A Yes. He left the property at 15900 Lee
6 Highway, on Routes 29/211.

7 Q That is the twelve-plus acreage that we have
8 been talking about.

9 A Yes. It is twelve point something.

10 Q That was left to you by your husband.

11 A That is what he left.

12 That was his estate.

13 Q When he left it to you, Mrs. Clay, did it
14 have any encumbrances on it?

15 A Yes, it did.

16 It had two outstanding loans, one quite large
17 and one which he had paid on and which was rather
18 small.

19 Q They were loans that your husband had put
20 on the property before he died.

21 A Yes.

22 Q Directing your attention to November of
23 1981, do you remember approximately how much you owed.

1 on those mortgages or was owed on those mortgages?

2 A About \$31,000.

3 Q Did those mortgages have requirements of
4 monthly payments in them?

5 A Yes, they did.

6 Q Can you tell me how much they required you
7 to pay each month on those mortgages?

8 A About \$800 a month.

9 Q Was the property producing any income for
10 you at that time?

11 A Yes. Mr. Blevins was my renter.

12 And he paid \$400 a month.

13 Q Do I take it, then, that you had to come up
14 with \$400 a month, yourself, to pay the balance on
15 those mortgages?

16 A That's right.

17 Q Did there come a time in November that you
18 determined to sell the property?

19 A Yes. The taxes were very high.

20 Q Can you tell me, please, whether you went
21 to Mr. Marsh to see whether Lucks would be interested
22 in buying the property?

23 A Yes. At one point right after my husband

1 passed away, I did.

2 Q When would that have been?

3 A Well, that would have been, I think -- that
4 would have been about December of 1980, something
5 around that time because my husband died in 1980.

6 Q Again, in November of 1981, did you speak to
7 Mr. Marsh about that?

8 A Yes, at his request.

9 He called me to come out and talk about some
10 zoning.

11 Q Can you tell me when you first met Mrs.
12 Marsh?

13 A I met her shortly thereafter.

14 Mr. Marsh said his wife was an insurance
15 agent -- a real estate sales agent.

16 And he spoke to her.

17 And she called me and made an appointment
18 to come to the house.

19 Q Would that have been on the date of the
20 listing agreement -- the date it was signed?

21 A Yes, it would.

22 Q So that would be November 15, is that right?

23 A Yes. It was about in the middle of November.

1 Q What time of day did Mrs. Marsh come out and
2 see you?

3 A It was about seven-thirty in the evening.

4 Q Was she alone?

5 A No. Her husband came along.

6 Q Did you sit down in the house together?

7 A Yes, we did.

8 Q The three of you --?

9 A Yes.

10 Q Whereabouts did you sit down?

11 A In the recreation room.

12 Q Can you tell me at that time what the
13 discussions you had with Mrs. Marsh with respect to
14 selling the property were about?

15 A Well, I told her that I wanted to sell it,
16 that I was thinking of retiring.

17 And I believe I mentioned that I had obli-
18 gations on the property and they were costing me an
19 awful lot.

20 I couldn't retire because of it.

21 Q Let me phrase it so I'm sure it is clear.

22 Did you discuss with Mrs. Marsh on that day
23 that she brought the listing agreement out to you

1 your reasons for selling the property?

2 A Yes.

3 Q You indicated to her that it was because
4 the property was costing you too much, is that correct?

5 A Yes.

6 Q Did you have any discussions with her with
7 respect to what it was that you wanted in the contract,
8 what was acceptable to you?

9 A Yes, we did.

10 I discussed it very specifically.

11 Q Can you tell the jury what discussions you
12 had with respect to what it was you wanted in the
13 contract?

14 A Well, I told her I would like to have cash
15 so I could pay the debts off on the property.

16 And she said she didn't think I could get
17 all cash, that it would be very difficult because there
18 just aren't a lot of people around that collect that
19 much cash.

20 And I told her what I would like to get for
21 the property.

22 And I told her -- then she made reference to
23 a first trust and asked me if I would be willing to

1 hold a note.

2 And I thought about it a while and said,
3 "Well, if I could get enough down to pay off the debt,
4 then I would consider taking a note for the remainder."

5 Q Were you aware that under the listing agree-
6 ment there would be an obligation to pay a real estate
7 commission if Mrs. Marsh successfully sold the
8 property?

9 A Yes, I was.

10 Q Did you discuss with Mrs. Marsh that
11 evening, the evening that you signed the listing
12 agreement, anything more specific about how much
13 you needed to pay those trusts?

14 A Well, I mentioned to her that there was
15 around \$30,000 owing on the property.

16 I told her there were two notes.

17 Q All right.,

18 A I told her that this is the major reason
19 that I wanted to sell it.

20 Q Did you contemplate how you would pay the
21 real estate commission and the closing costs that
22 would be necessary to be paid if you got only enough
23 to pay the mortgages?

1 A Well, I don't know if I mentioned it to her,
2 but in my own mind I had the idea that I would take
3 out a second trust on my house.

4 Q Let me show you what has been admitted into
5 evidence as exhibit number one, which is the listing
6 agreement. (Indicating.)

7 I want to call your attention, specifically
8 to this line, here, which you have heard testimony
9 about. (Indicating.)

10 It says: "I will take back a second deed
11 of trust in the amount of ... dollars," and then
12 there is a line struck through that dollar amount.

13 Who struck that line through there, Mrs.
14 Clay?

15 A Well, Mrs. Marsh did.

16 She went over the listing agreement, point-
17 by-point.

18 And she was filling it out, I guess.

19 And she said, "And you don't want to take
20 back any second trust."

21 And I said, "No, indeed."

22 I remember that very distinctly.

23 Q Consequently, she struck that line, is that

1 correct?

2 A Correct. This one. (Indicating.)

3 Q There came a time, did there not, Mrs. Clay,
4 when Mrs. Marsh brought to you a land sales contract
5 that was signed by Mr. Blevins, and which you ultimately
6 signed?

7 A Yes.

8 Q Was that agreement December 20th?

9 A Yes, it was. It was the 19th or 20th, as
10 I recall. I believe it was the 20th of December.

11 Q When she brought it to you was it all filled
12 in and signed as far as you can recollect?

13 A Yes. I believe it was.

14 Q Let me put it in front of you for references
15 purposes. (Indicating.)

16 What time of day did she come to your home?

17 A Well, again, it was in the evening. I guess
18 it was around seven-thirty or eight.

19 Q Were you alone at home?

20 A Yes, I was.

21 Q Did Mrs. Marsh give you an opportunity to
22 read it?

23 A Yes. I read it.

1 Q I wonder if you can tell the jury whether or
2 not you had any conversations with Mrs. Marsh about
3 the language in that contract after you read it.

4 A Yes, I did.

5 Q Can you tell the jury what the conversations
6 were that you had?

7 A When I came to the last line that says:
8 "Seller agrees to subordinate a bona fide construction
9 loan," I read it over two or three times.

10 And I didn't understand it.

11 And I said, "Mrs. Marsh, what does this last
12 sentence on the contract mean?"

13 Q Can you tell the jury, please, what it was
14 that Mrs. Marsh told you when you asked her that
15 question?

16 A She said, "Well, it means that Mr. Marsh"--
17 then she went into a description that he wanted to
18 build a building on the property.

19 Q When you say Mr. Marsh, do you mean Mr.
20 Marsh or do you mean Mr. Blevins?

21 A Mr. Blevins wanted to construct a building
22 for a garage.

23 And he wanted me to subordinate a bona fide

1 construction loan.

2 I had never heard this language before. It
3 was alien to me.

4 And she said, "Well, it means that you would
5 subordinate a construction loan. And it would make
6 your property much more valuable."

7 So then she went on to other things.

8 And I came back again, a second time,
9 because I didn't understand it.

10 And I said, "I don't want to sign this
11 contract until I fully understand what is meant by
12 the subordinated bona fide construction loan."

13 Q What did she say the second time that you
14 asked her?

15 A She made no explanation that I could make
16 head nor tails of.

17 I just didn't understand it.

18 Q Did she ever say to you that this was a
19 second trust?

20 A No, sir. She never told me that.

21 Q Let me ask the obvious question, Mrs. Clay.
22 If you didn't understand that, why did you
23 sign the contract?

1 A Because Mrs. Marsh kept urging me to sign it.
2 She kept saying, "Sign it, Mrs. Clay. Sign
3 it now so we can hurry and go to settlement."

4 Q I take it, then, that you signed it because --

5 A I signed it under duress.

6 Q I understand you think that today, Mrs.
7 Marsh.

8 If you knew that the contract had a provision
9 in it that would require you to accept a trust and be
10 put into the second position, would you have signed
11 the contract?

12 A I didn't understand that and no, I would not
13 have by any means.

14 Q Is it fair to say, then, that you signed
15 the contract because you thought it was consistent
16 with the terms of the listing agreement?

17 A Yes. That's what I had hoped for.

18 Q Did you make any inquiry of Mrs. Marsh
19 whether you could keep the contract or not?

20 A (No response.)

21 Q Did you ask whether you had to sign it then?

22 A I don't recall asking her if I could keep
23 it.

1 Q You signed the contract that night then, is
2 that correct?

3 A That night.

4 Q Can you tell me whether or not anything
5 caused you to reconsider within a day or two the signing
6 of that contract?

7 A Yes. I kept thinking about the subordination
8 note in there.

9 And I asked someone where I work what it
10 meant.

11 Q What were you told, if you can recollect?

12 A Well --

13 Q Did it become clear to you as a result of
14 that conversation with someone at work that what it
15 was was a potential for a second trust?

16 A yes. When I got a copy of it and showed it
17 to some of the lawyers, they told me I was in a real
18 precarious position.

19 Q Thereafter, did you receive a letter from
20 Attorney Holme, who represented Mr. Blevins?

21 A (No response.)

22 Q That letter that I just put in front of you --

23 A Yes. I received this letter.

1 Q That was in response to your letter to
2 Long and Foster, wasn't it, in which you wrote to
3 them and indicated that the terms and conditions of
4 the contract were not satisfactory and weren't
5 presented and explained to your satisfaction --

6 A Yes.

7 Q -- and that therefore, you were revoking
8 the contract.

9 A Yes. That is correct.

10 Q Thereafter, you employed Mr. Peterson, is
11 that correct?

12 A That's correct.

13 Q Mr. Peterson was successful in renegotiating
14 the -- negotiating a new contract, was he not?

15 A Yes.

16 Q That contract you have, in fact, signed.

17 A Yes.

18 Q In fact, you have settled upon it.

19 A Yes, sir.

20 Q Let me show you what has been marked for
21 identification as defendant's exhibit number one and
22 defendant's exhibit number two, and ask you whether
23 that is a true copy of the note, the deed of trust,

1 which you ultimately received on the settlement of
2 the new contract.

3 (Thereupon, the documents referred to
4 above were marked
5 as Defendant's Exhibit No.'s 1 and 2,
6 respectively, for Identification.)

7 THE WITNESS: Yes. These are copies.

8 MR. DIAZ: Your Honor, I would move these
9 into evidence at this time.

10 THE COURT: Any objection?

11 MR. POTTER: I have no objection.

12 THE COURT: These are defendant's two and
13 three.

14 MR. DIAZ: One and two, Your Honor.

15 (Thereupon, Defendant's Exhibit No.'s
16 2 and 3 were received into Evidence.)

17 BY MR. DIAZ:

18 Q I think you heard Mr. Peterson testify, but
19 it is a fact that that note and the trust that you
20 have does have the release terms in the partial
21 release terms, isn't it?

22 A Yes. It does.

23 Q Did you pay any legal fees to Mr. Peterson

1 for his work in the case for you?

2 A Yes, I did.

3 Q Can you tell the jury how much you paid,
4 please?

5 A I paid him three-hundred dollars retainer.
6 And I received subsequent bills.

7 Q Ultimately, he adjusted those, is that
8 correct?

9 A Yes.

10 MR. DIAZ: Thank you very much, Mrs. Clay.
11 That's all I have, Your Honor.

12 THE COURT: Any cross examination, Mr.
13 Potter?

14 MR. POTTER: Yes, Your Honor.

15 - - -

16 CROSS EXAMINATION

17 BY MR. POTTER:

18 Q Good afternoon, Mrs. Clay.

19 Mrs. Clay, let me see if I understand your
20 testimony so far.

21 As I understand it you were presented -- you
22 met Mrs. Marsh. She came out to your house with her
23 husband, is that right?

1 A Yes, sir.

2 Q There was no one else there with you, just
3 the two of them and you, is that right?

4 A That's correct.

5 Q She presented you with the listing agreement
6 at that time, is that right?

7 A Yes.

8 Q Did you read the listing agreement?

9 A I didn't really read it very completely, no.
10 I was relying on Mrs. Marsh.

11 And she was going over it item by item and
12 reading it back to me.

13 Q So she went through the listing agreement
14 item by item.

15 Were you aware that if the property was sold
16 within the listing time period that a commission would
17 be due?

18 A Yes, I was aware of that.

19 Q Were you aware that that commission would be
20 ten percent?

21 A Yes.

22 Q That's if it were sold during that period by
23 anyone, not just Long and Foster, but by you or anyone

1 else.

2 That commission would be due. Were you aware
3 of that?

4 A No. I wasn't aware of that.

5 If I sold it myself, I didn't suppose I
6 would -- of course, I had tried to sell it and was
7 unsuccessful.

8 Q Did -- after discussing it and going
9 through it item-by-item with Mrs. Marsh, did you take
10 an opportunity to read it before you signed it?

11 A Not really completely, no.

12 Q You then went ahead and did sign the listing
13 agreement, is that right?

14 A Yes. I trusted Mrs. Marsh.

15 Q As I understand your testimony, are you
16 saying that when you signed that listing -- or prior
17 to signing that listing agreement you told her that
18 you had \$31,000 due on this property?

19 A I remember telling her early on that there
20 were two debts on the property.

21 I was very forthcoming with her. I told her
22 I held nothing back.

23 I told her that this was the major reason

1 I wanted to sell it -- to satisfy the debts.

2 . That was my objective.

3 Q Do you recall when it was in your dealings
4 with Mrs. Marsh that you told her that?

5 A It was early on. I don't remember the exact
6 date.

7 Q Could it have been when the contract was
8 presented, Mr. Blevins' contract?

9 A I really don't recall.

10 I thought I explained to her -- I'm pretty
11 sure I explained to her that there were debts on the
12 property?.

13 Q She told you at that time, as I understand
14 your testimony, that it would be difficult to get
15 all cash in today's market, an all cash type deal,
16 didn't she?

17 A Yes.

18 Q Then she told you you might have to take
19 a trust back on the property in order to sell it.

20 She told you that.

21 A Yes.

22 Q When she presented you with that -- with the
23 second contract, I take it that that was in your home

1 as well.

2 A The second contract --?

3 Q When she came with the contract --.

4 A Oh, the sales contract.

5 Q Right. The sales contract.

6 A Yes. That was in my home.

7 Q Do you remember the discussions concerning
8 Luck, about asking Luck and trying to get an offer
9 from Luck first before it went on the computer and
10 this sort of thing?

11 A Yes. I remember that.

12 Q To your knowledge, when they came to your
13 house, didn't they present you with that Luck contract
14 first, or that Luck offer first?

15 A Well, it wasn't a signed offer.

16 She told me that it was in the mail or some-
17 thing like this.

18 I believe she had -- she did show it to me,
19 yes, but it was unsigned.

20 Q It was rejected by you --

21 A Yes.

22 Q -- as being too low an offer.

23 A Yes. It was a pretty low bid.

1 Q The figure of \$130,000, was that your
2 figure?

3 A Yes.

4 Q That goes back to the listing agreement.
5 That was put on the listing agreement, was it not?

6 A Yes, it was.

7 Q With regard to the contract and the way it
8 was presented to you, do you remember discussing a
9 downpayment and taking back the note on the Blevins'
10 contract?

11 A Well, what kind of discussion?

12 Q Do you remember what the figures were and
13 did Mrs. Marsh go over that contract with you item-
14 by-item like she did the itemized account --

15 A No. She didn't go over it item-by-item.
16 She sat, waiting, while I read it.

17 Q Oh, you read that one.

18 A I read it silently.

19 Q So, the contract you read. The listing
20 agreement you don't recall reading.

21 A I read it very sketchily.

22 Q Did she also have amortization schedules,
23 lists of payments, both with the Luck contract and with

1 this Blevins' contract?

2 A I don't recall about the Luck contract but
3 I do know that on the proposal from Mr. Blevins she
4 had an amortization thing worked out.

5 Q You looked at that contract and looked at
6 the amortization schedule to see what the monthly
7 payments would be under the terms of that trust.

8 A Yes.

9 Q Were you satisfied with those monthly payments
10 under the terms of that trust?

11 A I wasn't satisfied with the downpayment,
12 no, because I knew I needed \$30,000.

13 Q Yet, you signed the contract with the
14 \$25,000 downpayment, isn't that correct?

15 A Well, I believe Mrs. Marsh testified that
16 I asked her, at the time, for an additional \$5,000.

17 And I did do that.

18 Q Did you amend the contract or make any
19 changes to that contract?

20 A No. I wrote nothing at all on the contract.

21 Q You didn't take any action after that.

22 Was there any reason why you didn't take
23 any action to get that additional \$5,000 down?

1 A Well, I asked Mrs. Marsh if she would
2 approach Mr. Blevins to see whether or not he could
3 make a \$30,000 down payment because that's the amount
4 that I had to have.

5 Q Didn't she tell you that you could go
6 ahead and amend the contract and ask for \$30,000 down
7 and make that counteroffer back to Mr. Blevins?

8 A I don't recall her saying that. She may have
9 but she did agree to ask him for another \$5,000.

10 And she said she would let me know what his
11 reply would be.--

12 Q All right.

13 A -- whether or not he could put down \$30,000.

14 Q When she came to your house later with the
15 amendment, didn't she tell you that he couldn't put
16 down \$30,000?

17 A She said he needed more time.

18 Q With regard to that \$5,000, did you, at that
19 time, tell Mrs. Marsh what the payments were on the
20 trust?

21 A At the time of the contract signing, yes,
22 I did.

23 Q Was that after the contract was signed?

1 A No. I explained all this to her before
2 there was any signing.

3 Q Did you do the computations on the contract
4 as she has testified or did she do her calculations?

5 A I don't know what you mean.

6 Q Who calculated what you were going to net out
7 of the sale, how much money you were going to make out
8 of the sale?

9 Did you do that?

10 A I believe -- well, I knew in my own mind
11 how much I needed to satisfy the debt.

12 Q Didn't you make notations on the side of your
13 copy of the contract as to what the payoff would be?

14 A I don't think I did.

15 Q Okay.

16 A I don't think I wrote on it at all.

17 Q You said that you knew in your mind -- at one
18 point in your testimony did I understand you to say
19 that you might have to -- you might take out a second
20 trust on your house?

21 A On my house -- on my residence.

22 Q That was in order to come up with enough
23 cash to go to settlement on this particular piece of

1 property.

2 A That's right. To pay the commission and to
3 go to settlement.

4 Q You knew when you signed the contract that
5 you were going to have to come up with some funds to
6 go to settlement on this piece of property.

7 A Oh, certainly.

8 Q Did you discuss with her C.D.'s or bonds or
9 anything like that as being a source for additional
10 funds?

11 A I might have mentioned some securities, a
12 couple small ones that I had.

13 Q Did you ever tell her that day that there
14 was no way you could come up with that money to settle
15 or that you couldn't settle?

16 A I told her that it would be a problem.

17 Q Yes, but did you tell her that you couldn't
18 settle and that you just couldn't go through with it.
19 that day?

20 A No. Not until I realized that she had set
21 settlement for ten days hence.

22 And when I went to the bank to try to secure
23 a loan, I was told that it would take at least a month.

1 And I knew that I couldn't go to settlement because
2 I didn't have enough money.

3 Q It wouldn't have taken that long to cash in
4 the C.D.'s or the bonds, would it?

5 A Well, that wouldn't have been enough to
6 satisfy the contract the way she had it written.

7 Q Did you advise her that you were going to
8 go to the bank to get a loan?

9 A I told her I could not come up with the money
10 and that I couldn't go to settlement because I wasn't
11 ready.

12 Q The next day, did she work with you to
13 work with you on trying to get the trust that was
14 presently on the subject property transferred to your
15 house?

16 A (No response.)

17 Q Do you remember her working with the bank
18 on that?

19 A I didn't agree with that at all.

20 I didn't want any trust transferred to my
21 residence. I didn't want this to happen.

22 Q Why not? When you say you were going to
23 take out a second trust on your house to pay this off,

1 there wasn't any trust on your residence, was there?

2 A No, indeed.

3 Q So instead of a second trust, you mean an
4 additional trust. Is that what you are saying?

5 A A mortgage, so to speak.

6 Q With regard to the trust that was on the
7 property, was that a commercial type of mortgage?

8 A Yes. My husband left that.

9 Q Was that eighteen percent or --

10 A It is a variable rate of interest. It was
11 the going rate plus two.

12 It was a very high rate.

13 Q I guess that went up each year then, is
14 that right?

15 A That's the way it reads.

16 Q Did Mrs. Marsh, at any time, threaten you
17 to sign that contract?

18 A No. She did not threaten me.

19 She insisted that I sign.

20 Q She insisted that you sign it.

21 A Yes:

22 Q Did she insist repeatedly, over and over?

23 A Two or three times, yes, sir.

1 Q Did she shout at you?

2 A Oh, no. No, indeed.

3 Q Mrs. Clay, you have a son-in-law who is a
4 real-estate agent, do you not?

5 A He isn't now. He was two or three years ago.

6 Q Wasn't he doing real estate part-time back
7 in November of 1981?

8 A He was in real estate from about 1978, until
9 about 1980.

10 Q You've got a daughter in real estate as well,
11 don't you?

12 A No. I have a daughter who is a bank manager.
13 She has real-estate training, but she is not
14 in real estate, no.

15 Q You have some granddaughters who are in
16 real estate.

17 A Oh, no. My oldest granddaughter is only
18 seventeen.

19 Q Isn't it true, Mrs. Clay, that after you
20 signed this contract your son-in-law and the other
21 members of your family had a family meeting at your
22 house concerning this contract?

23 A That's true.

1 Q Wasn't it decided at that time that you
2 were going to try to get out of this contract?

3 A No. It was not decided at that time.

4 I decided, after I talked to the attorney
5 where I worked, that I couldn't perform under the
6 contract because it was too burdensome financially.

7 Q Before you signed the contract I take it
8 you didn't call your son-in-law who has some real-
9 estate experience, is that right?

10 A Oh, no. He knew nothing about my signing it.

11 Q You didn't call your daughter.

12 A They knew nothing about it.

13 Q You didn't contact any other attorneys until
14 after you signed it.

15 A I didn't have an opportunity to contact an
16 attorney.

17 Q As I understand your testimony, Mrs. Clay,
18 Mrs. Marsh did explain what a subordination was, what
19 that term in the contract meant.

20 A No, she didn't.

21 She didn't explain it so I could understand
22 it. And that is the big hangup.

23 I just -- I never did understand what I

1 signed.

2 Q Do you feel that what she told you was
3 wrong about what her definition of subordination was?

4 A I feel she didn't explain it, at least she
5 didn't explain it until I understood what I was signing.

6 I really didn't understand what I signed.

7 Q But you went ahead and signed it in any event.

8 A At her insistence --.

9 Q Isn't it true that they brought you an addendum.

10 I take it your objection was the subordina-
11 tion clause more than anything else, wasn't it?

12 A That's correct.

13 Q Somehow you felt that that put you in a
14 second trust position, is that right?

15 A Well, I didn't understand that I was to
16 hold a second trust.

17 Q Isn't it true, Mrs. Clay, that until Mr.
18 Blevins got a subordination loan you would hold the
19 first trust on that property?

20 In fact, you hold the first trust today on
21 that property, don't you?

22 A Under the contract I settled under, yes.

23 Q Under this contract, the one we were talking

1 about in December, you would have held the first trust
2 in that one as well until he subordinated, would you
3 not have?

4 A Well, the way it was explained to me, he was
5 -- had plans to build on the land.

6 Q Did you ever talk to him?

7 A No, I didn't.

8 Q He was your tenant for a lot of years,
9 wasn't he?

10 A Yes. He had been.

11 Q But you never discussed with him when he
12 was going to build or what he was going to build or
13 anything like that.

14 A Well, Mrs. Marsh was handling the transaction.
15 I wasn't really directly involved.

16 Q Do you know whether or not you had a first
17 trust under that contract as long as you didn't file
18 a subordination -- or file a construction loan?

19 A (No response.)

20 Q Did you have a first trust?

21 A I assume I did.

22 Q You are not certain today, are you?

23 A Well, I wasn't really certain of anything the

1 way the language was written on the contract.

2 Q When you contacted this lawyer at your work
3 with the C.I.A., you then got back and got in touch
4 and wrote this letter, I guess, of December the 23rd,
5 is that right?

6 A Yes. After I realized what the contract
7 really meant --.

8 Q Were you taking the position in your letter
9 and in your other conversations that you, in fact, had
10 a second trust on this property?

11 A I beg your pardon.

12 Q Didn't you take the position when you
13 talked to people and in this letter that, in fact,
14 you had a second trust on the property and you didn't
15 agree with that second trust on this property?

16 A That's right.

17 Q Today you are assuming that you actually
18 had a first trust on the property, is that right?

19 A If the property had been subordinated, I
20 suppose I would have had -- I would have been holding
21 a first and a second trust, both, which I felt I
22 couldn't do.

23 Q With regard to the meeting on the addendum,

1 wasn't there some discussion concerning getting an
2 addendum so that the subordination came out and the
3 release provision went in?

4 A She brought me the addendum, yes.

5 Q Did you sign the addendum?

6 A No.

7 Q Was this meeting on the addendum prior to
8 your letter going out?

9 A Yes. I believe it was.

10 Q Did you tell her when she brought you the
11 addendum that the contract was invalid as far as you
12 were concerned?

13 A No. I simply told her that the addendum
14 didn't protect me and I couldn't sign it.

15 Q Did the addendum do away with the subordina-
16 tion provision and give you an opportunity to get
17 releases on the property instead of subordination?

18 A The addendum made it apparent to me that the
19 seller -- the buyer could pick portions of the land
20 anywhere he chose without respect to the commercial
21 frontage, which is, he could take that and leave me
22 with the back which would be relatively invaluable
23 considering the frontage.

1 Q But it did away with the subordination
2 provision, did it not --

3 A Yes, it did.

4 Q -- which had been your major objection at
5 that point?

6 A Yes.

7 Q Also, didn't you request Mrs. Marsh to get
8 some tax records of Mr. Blevins?

9 A I asked for financial statements because I
10 didn't know whether or not Mr. Blevins -- I didn't
11 know what his financial position was.

12 And I felt I should know that if I was going
13 to hold a \$100,000 note for him.

14 Q You never, I guess, dealt with him in any
15 business matter even though you rented this property
16 to him per se.

17 A No. I did not.

18 Q Did she provide you with those tax records?

19 A Yes, she did.

20 Q Didn't you tell her that you were satisfied
21 that he was an able purchaser of that property?

22 A It seemed so from his tax records.

23 Q On December the 28th, when settlement was

1 called and you were given notice by Mr. Kincheloe --
2 were you not -- of the settlement?

3 A Yes, I was.

4 Q You did not attend settlement at that time,
5 did you?

6 A No, I didn't.

7 Q Did you later enter into a new contract
8 with the purchaser for the sale of that property?

9 A Yes. With Mr. Blevins -- he was insisting
10 at that time.

11 Q Was that not the same purchase price of
12 \$130,000?

13 A It was \$130,000.

14 Q Have you paid any commission to Long and
15 Foster as a result of that settlement?

16 A No, I haven't.

17 MR. POTTER: Thank you.

18 That's all the questions I have, Your Honor

19 THE COURT: Any redirect?

20 MR. DIAZ: No, Your Honor.

21 THE COURT: Thank you very much.

22 Watch your step. You may step down.

23 MR. DIAZ: The defense rests, Your Honor.

1 to explain that the contract contained terms different
2 from the terms described in the listing agreement, or,
3 two: that Rita Marsh induced Mrs. Clay to sign the
4 land-sales contract by failing to explain the terms
5 of the contract to Mrs. Clay.

6 If you find your verdict for Mrs. Clay upon
7 her counterclaim, then she is entitled to recover as
8 damages all losses she sustained which are a direct
9 and natural result of the breach and which she has
10 proved by the greater weight of the evidence.

11 All right; Counsel. We will have closing
12 arguments now.

13 (Thereupon, closing arguments were
14 given by respective counsel.)

15 (Thereupon, at the conclusion of the
16 jury's deliberation, they returned to
17 the courtroom and the following
18 proceedings were had:)

19 THE CLERK: Members of the jury, are these
20 your verdicts?

21 THE JURY: Yes.

22 THE CLERK: Are your verdicts unanimous?

23 THE JURY: Yes, they are.

1 THE CLERK: "We, the jury, on the issue
2 joined in the case of Mary W. Clay, defendant, counter-
3 claimant, versus Long and Foster Real Estate, Incorporated,
4 plaintiff, counterdefendant, find our verdict in
5 favor of the defendant, counterclaimant, and assess
6 her damages in the amount of \$4,000."

7 "We, the jury, on the issue joined in the
8 case of Long and Foster Real Estate, Incorporated,
9 plaintiff, versus Mary W. Clay, defendant, find our
10 verdict in the favor of the defendant."

11 "We, the jury, on the issue joined in the
12 case of Mary W. Clay, third-party claimant, versus
13 Rita Marsh, third-party defendant, find our verdict
14 in favor of the third-party claimant, and assess her
15 damages in the amount of one dollar."

16 THE COURT: Counsel, do either of you wish
17 the jury polled?

18 MR. DIAZ: No, Your Honor.

19 MR. POTTER: No, Your Honor.

20 THE COURT: Ladies and gentlemen, thank you
21 very much. I know it was a long two days and I
22 certainly appreciate it.

23 You are free to go today.

1 (Thereupon, the jury was excused.)

2 MR. POTTER: If Your Honor please, with
3 regard to the finding of the jury on the issue joined
4 in the case of Long and Foster Real Estate, Inc.,
5 plaintiff, versus Mary W. Clay, defendant, finding in
6 favor of the defendant, we would ask that the Court
7 consider a motion to strike the jury's finding and
8 rule in favor of the plaintiff in that case and set
9 aside the finding of the jury, and to rule in favor
10 of the plaintiff in that case based upon the evidence
11 presented and the law.

12 THE COURT: Do you wish to submit memoranda
13 on that or argue today.

14 MR. POTTER: I --

15 THE COURT: I will set it down for a time
16 certain to argue.

17 MR. POTTER: I think we would just as soon
18 set it down as opposed to attempt to argue it today,
19 Your Honor.

20 THE COURT: All right.

21 What I will do is note that you have made
22 the motion and continue it until such time as you put
23 it on the docket.

1 MR. POTTER: Note, if you will, our
2 exceptions to the findings in the other matters.

3 THE COURT: All right. Note on the record
4 the plaintiff's exceptions to the findings.

5 We will set it down on the docket for an
6 argument on the motion.

7 MR. DIAZ: Thank you, Your Honor.

8 MR. POTTER: Thank you, Your Honor.

9 (Thereupon, at 1:05 o'clock, p.m.,
10 the hearing in the above-entitled
11 matter was concluded.)

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CLASS 4 LAND

NORTHERN VIRGINIA BOARD OF REALTORS®, INC.

(Information only for use of BROKERS. NOT GUARANTEED.)

Address 15900 Lee Highway, Centerville Va 22020 \$ 130,000 MLS No. 130
Legal Description/ Sub Division stone bridge, part of Lot 3 MC Y Z 2
County/City Stafford Deed Book 2400 Page 178
Tax Map No. 64-7-01-0018 Acres 12.4857 Square Feet

Suitable Use _____
Zoning 10152541 R C5F Frontage _____ Depth _____ Road _____
Plat in office Topo Survey _____ Soil Survey _____ Perc Rate _____
Water _____ Sewer _____ Gas _____ Elec. _____
Telephone _____ RR Siding _____ Development Status _____

ASSESSMENT: Land \$ 81,230 Improvements \$ 3,000 - 4,330 Tax \$ 1,302.01 81
Improvements _____
Income/Yr \$ _____ Source _____

Tenant				Terms of Lease			
Trust	Type	Interest Rate	Balance	Date	PI	Lender	Loan No.
1st		%	\$				
2nd		%	\$				

Loan Assumption terms: _____
Cash Required _____ DWC Financing _____ Int Rate _____ % Yrs _____ Subordinate: Yes _____ No _____
DIRECTIONS/Showing Instructions _____

HiSch _____ JrHS _____ Elem Lomond Paroch _____

REMARKS/Sketch: _____
Legal Owner Mary W. Clay Initial by Broker CS 10% \$ _____
REALTOR® L.F.R. Phone _____ Lister Rita March Phone 369-0567
Address _____ \$ _____ MLS No. _____

(R/8/B1)

© 1981, Multiple Listing Service of Northern Virginia Board of Realtors, Inc.

LISTING AGREEMENT

Date Nov 15

To: _____ REALTOR®

In consideration of your services and facilities, you are hereby granted the exclusive right to sell the property, including the above listed equipment, known as stone bridge, part of Lot 3 City/County Stafford/Stafford Virginia; legal description Deed Book 1519 page 666 offered at a selling price of \$ 130,000 or such other price as I/we may later agree upon, which price includes selling compensation.

The property may be sold subject to existing Deed(s) of Trust, having an unpaid balance of about \$ _____.

I/We will take back a Second Deed of Trust in the amount of \$ _____.

I/We agree to pay a compensation of 10% of sales price in cash if, during the listing period, the property is sold by you, me, us, or anyone else, or if anyone produces a purchaser ready, willing and able to purchase the property, or if within 120 days after the expiration of the listing agreement a sale is made by me to any person to whom the property has been shown during the listing period. This last clause shall not be effective if the property is subsequently listed with another broker.

This exclusive right to sell will expire at midnight Nov 15 1982.

This property shall be shown and made available to all persons without regard to race, color, creed, religion, national origin, sex, marital status, age or handicap.

You are authorized to make a blanket unilateral offer of subagency to real estate brokers and to participants in any Multiple Listing Service which you deem appropriate to include the dissemination of real estate offered for sale and/or sold by printed form and/or electronic computer service.

You are authorized to place your "For Sale" sign on the property and to remove all others. The entire property will be available for showing during reasonable hours.

I/We understand and agree that Virginia licensed real estate agents, appraisers, inspectors, prospective purchasers and other persons may require access to the property to facilitate and/or consummate a sale.

You are authorized to place a common key lockbox on the property to facilitate ease of access to the property.

I/We understand that no multiple listing service or Board of REALTORS® is a party to this listing agreement and that no multiple listing service or Board of REALTORS® sets, controls, recommends, or suggests the amount of compensation for any brokerage service rendered pursuant to this listing agreement, whether by the listing broker or by any other broker acting as subagent or otherwise.

In the event of a sale, I/we will execute a sales contract enforceable in the State of Virginia.

I/We have read this agreement which contains the entire terms and provisions of this contract, and hereby acknowledge receipt of a copy of this contract.

235

Sales Associate Rita March (Seal) Owner Mary W. Clay (Seal)

Land Sales Contract

Exhibit #3

THIS AGREEMENT of Sale made in triplicate this

19

day of

December 1981

between

Jim L. Blasing

(hereinafter known as the Purchaser)

Mary W. Clay

(hereinafter known as the Seller)

Long & Foster Realty

(hereinafter known as the Agent)

WITNESSETH: That for and in consideration of the sum of

One Thousand

Dollars (\$ 1,000)

by cash ☐ check ☐ in hand paid, receipt of which is hereby acknowledged, the Purchaser agrees to buy and the Seller agrees to sell for the sum of

Dollars (\$)

all that certain piece, parcel or lot of land, together with any improvements thereon, described as follows, to-wit:

Will Book 285 Page 611 containing 12.4857 Acres
on Route 29/211 at Cub Run; Tax map Number
64-1-01-0012

Terms of sale:

Purchaser to pay \$250.00 down of which \$1,000.00 is
part. Seller agrees to hold the remaining balance
of \$105,000 at 12% interest amortized over 30 yrs.
due & payable in 10 yrs. with monthly payments
of \$1,030.04. Purchaser has the right to prepay loan without
penalty; Seller agrees to subordinate a bona-fide Construction loan

The Seller agrees to furnish and convey the above property with a General Warranty Deed, complete with State Rec. fee Examination of title, conveyancing,
notary fees, and all recording charges, including those for purchase money trust, if any, are to be at the cost of the purchaser.

Where trustees are to be named in a deed of trust or trusts the said trustees are to be named by the party respectively secured thereby.

All taxes, insurance, rents, and interest are to be adjusted to Settlement

The purchaser agrees to comply with the terms of sale herein within 10 days
from the date of acceptance by owner or the deposit may be forfeited, in which event one-half of said deposit shall be paid to Seller, and one-half of said deposit
shall be paid to Agent.

Settlement shall be made at the offices of Gordon Kinole

It is understood that the title is to be good of record or sale will be declared off and deposit returned to purchaser. However, a reasonable time shall be
allowed the Seller to correct any defects reported by the title examiner.

It is understood that the property is to be conveyed subject to any restrictions now thereon.

Possession is to be given Settlement

The SELLER agrees to pay to LONG & FOSTER REAL ESTATE, INC., the said Agent, a sales commission of 10% of the gross purchase price. Entire deposit
to be held by LONG & FOSTER REAL ESTATE, INC., until settlement is made.

WITNESS the following signatures and seals this

19

day of

Dec

19

LONG & FOSTER REAL ESTATE, INC. (AGENT)

Beta Marsh

(BY)

Jim L. Blasing
Mary W. Clay

(SEAL)

(SEAL)

(SEAL)

(SEAL)

this 20th day of December, 1981

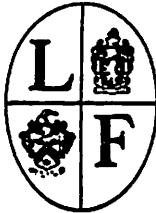
Title to be conveyed as

PLF 00000 Exhibit #2
DATE 8-10-81
JUDGE

for engineering and/or economic tests and/or studies to the PURCHASER and his agents.

R. F. Community Relations

Amendment
(unrecorded)



DEF Exhibit #3
DATE
JUDGE
CASE #

**LONG & FOSTER
REAL ESTATE, INC.**

ADDENDUM TO SALES CONTRACT

This addendum is made and entered into this 22 day of December, 1981.

Addendum to Sales Contract:

Dated: Dec 19, 1981

Between: Jim L. Blum, Purchasers

and Mary W. Claus, Sellers.

To Purchase and Sell property known as:

Route 29-211 at Cub Run
Tax map number 64-1-01-0018

Now, therefore, it is mutually agreed that the following provisions be added:

Purchaser agrees to eliminate subordination
clause in Contract Dated Dec 19, 1981.

Seller agrees to release land in reasonable
shapes & sizes at the rate of \$10,000 per acre
paid on principal of loan. Seller will
hold first deed of trust on property.

All other items and conditions of this contract remain in full force and effect.

Date _____

Purchaser _____

Purchaser _____

Date _____

Seller _____

Seller _____

PLF 9
8-10-82
JUDGE
1-11-86
JH

THIS DEED OF TRUST made this 28th day of December, 1981, by and between JAMES L. BLEVINS, hereinafter referred to as grantor; and J. GORDON KINCHELOE and JOHN T. KINCHELOE, TRUSTEES, both of Fairfax County, Virginia, hereinafter referred to as grantees;

WITNESSETH that for and in consideration of the sum of \$10.00, cash in hand paid, and other good and valuable considerations, the receipt of which is hereby acknowledged, the grantor does hereby grant, bargain, sell and convey, with GENERAL WARRANTY OF TITLE, unto the grantees, all of that certain tract or parcel of land with its improvements and appurtenances, located in Fairfax County, Virginia, on the North side of Lee Highway (Route #29-211) containing 12.4857 acres as duly platted with instrument recorded August 11, 1960 in Deed Book 1917, at page 666 among the Fairfax County, Virginia land records, and being the same the grantor by land acquired by deed of Mary W. Clay by deed dated December 28, 1981, and duly recorded immediately prior hereto.

REFERENCE is hereby made to said plat and deed for a further and more particular description of the land hereby conveyed.

IN TRUST, however, to secure the prompt payment of one certain negotiable, promissory homestead waiving note bearing even date herewith drawn by James L. Blevins and payable to the order of Mary W. Clay in the principal sum of \$105,000.00 and bearing interest at the rate of 12% per annum payable in monthly

installments of \$1,080.04, the first installment being due and payable on January 28, 1982 and continuing on the 28th day of each and every successive month thereafter until December 28, 1991 when the entire remaining unpaid balance shall become due and payable in full.

The note shall be payable at any bank or trust company or place designated by the noteholder.

Seller agrees to subordinate to a bona fide construction loan. This deed of trust represents deferred purchase money.

The said grantors covenant to pay the debts hereby secured, and, during the continuance of this trust, to pay immediately all taxes, levies and assessments on said premises when they first become due, and to keep the improvements thereon insured against fire with extended coverage against other damage with some responsible insurance company, for such amount, in such company or companies as the beneficiary hereunder may elect, and to deposit the same with the said beneficiary, properly assigned for the beneficiary's protection, and any amount received from said insurance shall be applied in the reduction of the debt hereby secured, whether due or not, unless the holder or holders thereof shall waive the right to have the same so applied, and the said grantor hereby waives the benefit of the homestead exemption as to the debts hereby secured.

The said grantor covenants to keep the said property in sound condition and good repair; that no act or thing shall be done to depreciate or impair the value of the property hereby conveyed during the continuance of this trust, and that the said property shall not be transferred or assigned in any manner which will affect the security of the holder or holders of the indebtedness hereby secured.

The said grantor covenants that all awnings, door and window screens, mantels, cabinets, linoleum, stoves, shades, blinds, refrigerators, heating system and equipment, water heaters, radiator covers, and all plumbing, heating, lighting, cooking, ventilating, cooling, air-conditioning and refrigerating apparatus and equipment, and each and every of the interior improvements and fixtures, movable or immovable, of every kind and description, in and upon said land and premises, or used in connection therewith, and all additions and replacements thereto, are, and shall be deemed to be fixtures and all shall be an accession to the freehold and a part of the realty, and the same are covered by this deed of trust and included in the terms "land," "real estate" and "premises" wherever used herein.

Whenever in this instrument the context so requires, the masculine gender includes the feminine and neuter, the singular number includes the plural, and the plural number includes the singular.

Whenever more than one grantee are named as Trustees herein, any one of them shall have full power to act alone under any provision of this deed of trust and any such action by one of the Trustees shall have the same force and effect as though all had acted jointly.

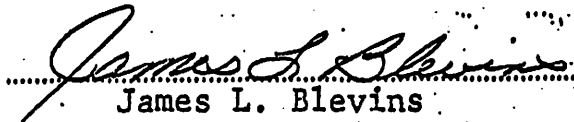
If any action, cause, or suit is filed with regard to the property herein given as security and the grantee and holder of the note secured, or either of them, are named as parties thereto, the grantor agrees to pay a reasonable attorney's fee for them to employ counsel, or to act for themselves if they be attorneys, for the defense thereof in order to protect the lien and the validity and priority of the lien of this deed of trust and the note secured.

The said grantor covenants that upon default being made in the payment of the indebtedness hereby secured when and as same shall become due and payable, or any installment or interest thereon when due, or upon default being made in the payment of any such taxes, levies and assessments, or to so insure, or upon default in payment after demand of any sum or sums advanced by the holder of said indebtedness or any part thereof on account of any costs, counsel fees or expenses of this trust, or on account of any taxes, assessments, liens, deed of trust, or other encumbrance on said land or premises, prior in lien to this trust, with interest thereon as set forth in the note secured hereby from the date of advance (it being hereby agreed that on default in payment of said costs, fees, expenses, taxes or assessments, or insurance, or expense of litigation, or such prior lien, deed of trust or other encumbrance as aforesaid, the same may be paid by the holder or holders of said indebtedness or any part thereof, and all sums advanced in so doing, with interest as aforesaid, shall forthwith attach as a lien hereunder and be demandable at any time); or upon the breach of any of the covenants herein contained; then upon any and every such default so made the entire balance shall become due and payable, at the option of the holder of said indebtedness, and at any time thereafter, upon being requested so to do by the holder of any part of said indebtedness, the said grantee shall sell the property hereby conveyed at public auction for cash, or such other terms as said grantee may deem appropriate, after advertising the time, terms and place of sale by hand-bills for at least eight days prior thereto, or by publication once a week for two successive weeks in some newspaper published or circulated in said county, or both, in the discretion of the said grantee and shall convey the same to the purchaser thereof, who shall not be required to see to the application of the purchase money; and from the proceeds of said sale the said grantee shall first pay all proper costs, charges and expenses, all taxes, levies, assessments and insurance premiums paid by any party secured by this trust, or that may be unpaid, and to retain as compensation a commission of five per centum upon the gross amount of said sale; secondly, pay what may then remain unpaid of the said indebtedness, and any sums advanced by the holder or holders thereof to protect the same as aforesaid, and the interest thereon, if any, and attorney fees; and, lastly, pay the remainder, if any, to the said grantor, or his assigns.

And it is further agreed that if the said property shall be advertised for sale as herein

provided and not sold, the grantee acting shall be entitled to one-half the commission above provided, to be computed on the amount of the debt hereby secured. Except where the terms hereof expressly provide otherwise, this deed of trust shall be construed in accordance with Section 55-59 of the Code of Virginia.

Witness the following signature and seal :

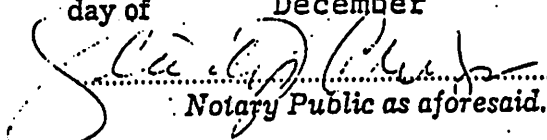
 (SEAL)
James L. Blevins
..... (SEAL)

STATE OF Virginia }
COUNTY OF Fairfax } to wit:

I, the undersigned, a notary public in and for the
State and County aforesaid, whose commission as such will expire on the
27th day of January, 19 82, do hereby certify that this day personally
appeared before me in my said State and County, James L. Blevins

whose name is signed to the foregoing and hereunto annexed deed of trust,
dated the 28th day of December, 19 81, and who acknowledged the
same before me.

GIVEN under my hand this 28th day of December, 19 81.


Notary Public as aforesaid.

J. GORDON KINCHELOE
ATTORNEY AT LAW
10410 MAIN STREET
P. O. BOX 88
FAIRFAX, VIRGINIA 22030

December 28, 1981

\$ 105,000.00

For value received -----I----- promise to pay to the order of

MARY W. CLAY

the sum of ONE HUNDRED FIVE THOUSAND AND NO/100-----DOLLARS

with interest at 12 per cent, per annum, negotiable and payable at any bank or trust
company or other place designated in writing by the holder hereof without offset.

I

And we, the maker and endorser, hereby waive the benefit of our Homestead Exemption
as to this debt; notice of maturity, presentment, demand, protest, and notice of protest; and agree
to pay attorney's fees of 15% of the balance owed (including principal and interest) if it
becomes necessary to place this note in the hands of an attorney for collection. It is further
agreed by the maker and endorser hereof, that upon default of payment of any installment
hereof, the entire balance, principal and interest shall become due and payable.

This note is payable in monthly installments of at least the sum of \$1,080.04, the first
installment being due and payable on January 28, 1982 and continuing on
the 28th day of each and every successive month thereafter until December
28, 1991 when the entire remaining unpaid balance shall become due and
payable in full.

Each installment when so made to be applied first to the payment of
interest on the amount of principal remaining unpaid and the balance
credited to the principal.

Witness the following signature and seal

This is to certify that this is
the promissory note described in a cer-
tain deed of trust of even date herewith, to

J. Gordon Kincheloe &
John T. Kincheloe, Trustees

secured on 12.4857 acres,
Fairfax County, Virginia

[Signature]
Notary Public

[Signature] (SEAL)
James L. Blevins (SEAL)

Address:

DEF Exhibit #1
DATE 8-18-82
JUDGE [Signature]
CASE # 456196

J. GORDON KINCHELOE
ATTORNEY AT LAW
10410 MAIN STREET
P. O. BOX 400
FAIRFAX, VIRGINIA 22030

\$ 100,000.00

April 15, 1982

For value received -----I-----promise to pay to the order of
MARY W. CLAY

the sum of ONE HUNDRED THOUSAND AND NO/100-----DOLLARS

with interest at 12% per cent, per annum, negotiable and payable at any, bank or trust
company or other place designated in writing by the holder hereof
I without offset.

And we, the maker and endorser, hereby waive the benefit of our Homestead Exemption
as to this debt; notice of maturity, presentment, demand, protest, and notice of protest; and agree
to pay attorney's fees of 15% of the balance owed (including principal and interest) if it
becomes necessary to place this note in the hands of an attorney for collection. It is further
agreed by the maker and endorser hereof, that upon default of payment of any installment
hereof, the entire balance, principal and interest shall become due and payable.

This note is payable in monthly installments of at least the sum of \$1,028.62 each including
interest with the first payment being due on the 15th day of May, 1982,
and continuing on the 15th day of each and every successive month there-
after, except that unless the same is sooner paid, the unpaid balance
shall become due and payable in full ten years from date. Each install-
ment when so made to be applied first to the payment of interest on the
amount of principal remaining unpaid and the balance credited to the
principal. See deed of trust for additional terms.

This is to certify that this is

the promissory note described in a cer-
tain deed of trust of even date herewith, to

Raymond J. Diaz and
Robert G. Mayer

, Trustees

secured on 12.4857 acres

N. Side Rt. #29-211, Fx.

Co.

Notary Public

Witness the following signature and seal

[Signature] (SEAL)
James L. Blevins

(SEAL)

Address: 15900 Lee Highway

Centerville, Va 22020

~~DEF EXHIBIT # 2~~
DATE 8/11/82
JUDGE [Signature]
CASE # 256196

THIS DEED OF TRUST made this 15th day of April, 1982, by and between JAMES L. BLEVINS, hereinafter referred to as grantor; and RAYMOND J. DIAZ and ROBERT G. MAYER, TRUSTEES, both residents of Fairfax County, Virginia, hereinafter referred to as grantees;

WITNESSETH that for and in consideration of the sum of \$10.00, cash in hand paid, and other good and valuable considerations, the receipt of which is hereby acknowledged, the grantor does hereby grant, bargain, sell and convey, with GENERAL WARRANTY OF TITLE, unto the grantees, all of that certain tract or parcel of land with its improvements and appurtenances, located in Fairfax County, Virginia, on the North side of Lee Highway (Route #29-211) containing 12.4857 acres as duly platted with instrument recorded August 11, 1960 in Deed Book 1917, at page 666 among the Fairfax County, Virginia land records, and being the same land acquired by the grantor by deed of Mary W. Clay by deed dated April 15, 1982 and duly recorded immediately prior hereto.

REFERENCE is hereby made to said plat and deed for a further and more particular description of the land hereby conveyed.

IN TRUST, however, to secure the prompt payment of one certain negotiable, promissory note bearing even date herewith drawn by James L. Blevins and payable to the order of Mary W. Clay in the principal sum of \$100,000.00 and bearing interest at the rate of 12% per annum payable in monthly installments of \$1,028.62, the first installment being due and payable on May 15,

1982 and continuing on the 15th day of each and every successive month thereafter, except that unless the same is sooner paid, the unpaid balance shall become due and payable in full ten years from date.

The note shall be payable at any bank or trust company or other place designated by the noteholder.

Curtails and releases - As long as the purchase money note is in good standing, upon grantor's payment to beneficiary pursuant to the schedule below, beneficiary shall release from the lien of the deed of trust the acreage requested based on the following agreed values.

a. Land zoned commercial - Fifteen Thousand and No/100 Dollars (\$15,000.00) per acre.

b. Land zoned industrial or residential - Ten Thousand and No/100 Dollars (\$10,000.00) per acre.

Beneficiary agrees to release acreage selected by grantor in accordance with the above schedule, and release the same from the deed of trust upon receipt of one hundred ten (110.0%) percent of the amount delineated above per acre or portion thereof. Land to be released shall only be released on a pro-rated basis with respect to the frontage on Route 29. That is to say, if one-tenth (1/10th) of the property is to be released upon payment of curtail in accordance with the above terms then only one-tenth (1/10th) of the frontage on Route 29-211 shall be released thereby.

Grantor shall only be entitled to the release of contiguous acreage from the lien of the deed of trust, the first portion shall be at grantor's election.

SAID INDEBTEDNESS SHALL BECOME DUE AND PAYABLE UPON SUBSEQUENT SALE OR TRANSFER OF TITLE OR OF ANY INTEREST ON THE PROPERTY. (THIS PARAGRAPH SHALL NOT APPLY TO PARTIAL SALES OF LAND PER PARTIAL RELEASE CLAUSE ABOVE).

Grantor shall have the right to pay said note in part or in full at any time without penalty.

This deed of trust represents deferred purchase money.

The said grantors covenant to pay the debts hereby secured, and, during the continuance of this trust, to pay immediately all taxes, levies and assessments on said premises when they first become due, and to keep the improvements thereon insured against fire with extended coverage against other damage with some responsible insurance company, for such amount, in such company or companies as the beneficiary hereunder may elect,

and to deposit the same with the said beneficiary, properly assigned for the beneficiary's protection, and any amount received from said insurance shall be applied in the reduction of the debt hereby secured, whether due or not, unless the holder or holders thereof shall waive the right to have the same so applied, and the said grantor hereby waives the benefit of the homestead exemption as to the debts hereby secured.

The said grantor covenants to keep the said property in sound condition and good repair; that no act or thing shall be done to depreciate or impair the value of the property hereby conveyed during the continuance of this trust, and that the said property shall not be transferred or assigned in any manner which will affect the security of the holder or holders of the indebtedness hereby secured.

The said grantor covenants that all awnings, door and window screens, mantels, cabinets, linoleum, stoves, shades, blinds, refrigerators, heating system and equipment, water heaters, radiator covers, and all plumbing, heating, lighting, cooking ventilating, cooling, air-conditioning and refrigerating apparatus and equipment, and each and every of the interior improvements and fixtures, movable or immovable, of every kind and description, in and upon said land and premises, or used in connection therewith, and all additions and replacements thereto, are, and shall be deemed to be fixtures and all shall be an accession to the freehold and a part of the realty, and the same are covered by this deed of trust and included in the terms "land," "real estate" and "premises" wherever used herein.

Whenever in this instrument the context so requires, the masculine gender includes the feminine and neuter, the singular number includes the plural, and the plural number includes the singular.

Whenever more than one grantee are named as Trustees herein, any one of them shall have full power to act alone under any provision of this deed of trust and any such action by one of the Trustees shall have the same force and effect as though all had acted jointly.

If any action, cause, or suit is filed with regard to the property herein given as security and the grantee and holder of the note secured, or either of them, are named as parties thereto, the grantor agrees to pay a reasonable attorney's fee for them to employ counsel, or to act for themselves if they be attorneys, for the defense thereof in order to protect the lien and the validity and priority of the lien of this deed of trust and the note secured.

The said grantor covenants that upon default being made in the payment of the indebtedness hereby secured when and as same shall become due and payable, or any installment or interest thereon when due, or upon default being made in the payment of any such taxes, levies and assessments, or to so insure, or upon default in payment after demand of any sum or sums advanced by the holder of said indebtedness or any part thereof on account of any costs, counsel fees or expenses of this trust, or on account of any taxes, assess-

ments, liens, debt of trust, or other encumbrance on said land or premises, prior in lien to this trust, with interest thereon as set forth in the note secured hereby from the date of advance (it being hereby agreed that on default in payment of said costs, fees, expenses, taxes or assessments, or insurance, or expense of litigation, or such prior lien, deed of trust or other encumbrance as aforesaid, the same may be paid by the holder or holders of said indebtedness or any part thereof, and all sums advanced in so doing, with interest as aforesaid, shall forthwith attach as a lien hereunder and be demandable at any time); or upon the breach of any of the covenants herein contained; then upon any and every such default so made the entire balance shall become due and payable, at the option of the holder of said indebtedness, and at any time thereafter, upon being requested so to do by the holder of any part of said indebtedness, the said grantee shall sell the property hereby conveyed at public auction for cash, or such other terms as said grantee may deem appropriate, after advertising the time, terms and place of sale by hand-bills for at least eight days prior thereto, or by publication once a week for two successive weeks in some newspaper published or circulated in said county, or both, in the discretion of the said grantee and shall convey the same to the purchaser thereof, who shall not be required to see to the application of the purchase money; and from the proceeds of said sale the said grantee shall first pay all proper costs, charges and expenses, all taxes, levies, assessments and insurance premiums paid by any party secured by this trust, or that may be unpaid, and to retain as compensation a commission of five per centum upon the gross amount of said sale; secondly, pay what may then remain unpaid of the said indebtedness, and any sums advanced by the holder or holders thereof to protect the same as aforesaid, and the interest thereon, if any, and attorney fees; and, lastly, pay the remainder, if any, to the said grantor, or his assigns.

And it is further agreed that if the said property shall be advertised for sale as herein provided and not sold, the grantee acting shall be entitled to one-half the commission above provided, to be computed on the amount of the debt hereby secured. Except where the terms hereof expressly provide otherwise, this deed of trust shall be construed in accordance with Section 55-59 of the Code of Virginia.

Witness the following signature and seal :

.....*James L. Blevins*..... (SEAL)
James L. Blevins
..... (SEAL)

STATE OFVirginia..... }
COUNTY OFFairfax..... } to wit:

I, _____ the undersigned _____, a notary public in and for the
State and County _____ aforesaid, whose commission as such will expire on the
7TH day of January, 1983, do hereby certify that this day personally
appeared before me in my said State and County, James L. Blevins

whose name is _____ signed to the foregoing and hereunto annexed deed of trust,
dated the 15th day of April, 1982, and who acknowledged the
same before me.

GIVEN under my hand this 15TH day of April, 1982 .

Notary Public as aforesaid.