

2000

# KUTV Inc., A Nevada corporation v. Motor Sales, Inc., a Utah corporation, dba Federal Mobile Homes : Brief of Respondent KUTV, Inc.

Utah Supreme Court

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## Recommended Citation

Brief of Respondent, *KUTV v. Motor Sales*, No. 13987.00 (Utah Supreme Court, 2000).

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UTAH SUPREME COURT

BRIEF

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KUTV, INC., a Nevada  
corporation,

Plaintiff-Respondent,

vs.

MOTOR SALES, INC., a Utah  
corporation, dba FEDERAL  
MOBILE HOMES,

Defendant-Appellant,

CASE NO.

13987

BRIEF OF RESPONDENT

KUTV, INC.

APPEAL FROM THE JUDGMENT OF THE SIXTH JUDICIAL  
DISTRICT COURT OF SEVIER COUNTY, DON V. TIBBS,  
DISTRICT JUDGE, PRESIDING

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FILED

OCT 9 - 1975

Clerk, Supreme Court, Utah

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### POINT I

THERE WAS NO SECRET COMMISSION OFFERED TO ANY AGENT OF THE DEFENDANT-APPELLANT AND THE PLAINTIFF-RESPONDENT DEALT FAIRLY, OPENLY AND IN GOOD FAITH WITH THE DEFENDANT-APPELLANT, THEREFORE, DEFENDANT-APPELLANT IS OBLIGATED TO PAY FOR THE SERVICES RECEIVED FROM PLAINTIFF-RESPONDENT . . . . .

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IN THE SUPREME COURT OF THE STATE OF UTAH

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KUTV, INC., a Nevada  
Corporation,

Plaintiff-Respondent,

vs.

MOTOR SALES, INC., a Utah  
corporation, dba FEDERAL  
MOBILE HOMES,

Defendant-Appellant,

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CASE NO.

13987

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BRIEF OF RESPONDENT

KUTV, INC.

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STATEMENT OF THE NATURE OF THE CASE

This is an action brought by the Plaintiff to recover the reasonable value of television advertising ordered by and furnished to the Defendant.

DISPOSITION IN THE LOWER COURT

The Trial Court found that Mr. Bowen and Mr. Martin were agents of the Defendant and that Defendant held them out as having authority to contract for advertising. The Court further held that the Defendant's course of conduct with regard to its agents justified the reliance of the Plaintiff in contracting with the agents and in furnishing advertising services to the

Defendant based on the agents acts and representations. Plaintiff was awarded a judgment against the Defendant in the amount of \$11,180.00 for services rendered through December 31, 1973, plus costs and interest. The Court found that plaintiff was not entitled to recover for advertising services for January and February, 1974, in the amount of \$2,123.20.

#### RELIEF SOUGHT ON APPEAL

The Plaintiff-Respondent, KUTV, inc., seeks an affirmance of the judgment rendered by the Trial Court.

#### STATEMENT OF FACTS

The Defendant, Motor Sales, Inc. dba Federal Mobile Homes, a Richfield, Utah Company was doing business in Salt Lake County, during 1973 and 1974. Harold Bowen was manager of the Salt Lake City lot (R.143). Mr. Bowen contacted Richard Cardwell of KUTV, the Plaintiff company, to secure television advertising for Motor Sales, Inc., dba Federal Mobile Homes. Bowen placed the advertising with Plaintiff commencing in May of 1973 (R.108).

Advertising industry custom is for salesmen to take orders from agents or employees of the client and not to contact company presidents for authorization (R.116,133). The advertising through August, 1973, was paid for by check signed by Dewey Sargent, general manager of the Defendant Company (R.124). During June, July and August 1973, Mr. Bowen ordered on behalf of the Defendant, over \$5,000 of advertising. This advertising was

accepted and paid for by the Defendant (R.121). Mr. Bowen continued to order advertising for the Defendant in September, 1973 and thereafter (R.118). There was no indication from anyone prior to this lawsuit that the advertising after August, 1973, was not authorized by the Defendant Company (R.92,94,95,120). All advertising placed by Plaintiff was authorized by either Dewey Sargent, Harold Bowen or Jim Martin (R.120,146).

Prior to running any of the ads, the Plaintiff company sent a notice to Defendant in Richfield, Utah, that they had ordered advertising and telling them the dates on which it would run (R.82). The principals of the Defendant Company in Richfield, Utah had advance notice of all advertising furnished by Plaintiff but did not instruct Plaintiff not to run it (R.92,94,95,120). As late as February, 1975, Plaintiff was assured by Defendant's Richfield office that the advertising would be paid for, that the checks were on Mr. Sargent's desk, but because he was going through a divorce he hadn't signed the checks (R.92,92).

The Plaintiff Company had a program whereby large volume advertisers who purchased a certain amount of advertising would receive an expense paid trip. Bowen signed a commitment on behalf of the Defendant Company to purchase \$2600.00 of advertising from June through August of 1973 (R.120,121). The Defendant Company received trips for two to Mazatlan, Mexico, since the Defendant spent \$5,000 in advertising during that period (R.121).

Bowen later signed another commitment for the Defendant Company to purchase \$7,000 of advertising from December, 1973, through February, 1974, (R.121). For the second commitment the Defendant Company would receive a trip for four to San Juan, Puerto Rico, (R.120). No trips on the second commitment were given the Defendant Company because of their failure to pay their account (R.86,135).

While the agent of the Defendant signed the commitments for the Defendant, the trips were to go to whomever the Defendant Company decided should go (R.130,131). The plaintiff's sales manager had the understanding that Mr. Sargent was going to take the trip (R.122). Bowen told Sargent of the trip (R.153,170). Mr. Sargent stated that he didn't want a trip as he had won ten trips (R.153). Bowen testified that Sargent could have taken the trip if Sargent chose to do so (R.171).

## A R G U M E N T

### POINT I

THERE WAS NO SECRET COMMISSION OFFERED TO ANY AGENT OF THE DEFENDANT-APPELLANT AND THE PLAINTIFF-RESPONDENT DEALT FAIRLY, OPENLY AND IN GOOD FAITH WITH THE DEFENDANT-APPELLANT, THEREFORE, DEFENDANT-APPELLANT IS OBLIGATED TO PAY FOR THE SERVICES RECEIVED FROM PLAINTIFF-RESPONDENT.

It is an accepted rule of law that a principal will be liable to third persons for acts committed by the agent in his behalf in the course and within the actual or apparent scope of his authority. 3 CJS Section 390, Agency, page 276; B & R Supply Company v. Bringhurst, 28 Utah 2d 442, 503 P 2d 1216

(1972); Naujoks v. Suhrmann, 9 Utah 2d 84, 337 P. 2d 967 (1959).

The facts of the instant case dictate that the above stated rule of law should be applied here. Harold Bowen, manager of Defendant's Salt Lake City operation (R.143), contacted Richard Cardwell of KUTV, the Plaintiff company, for the purpose of securing television advertising for the Defendant (R.107) and did purchase advertising (R.108). It is advertising industry practice or custom for salesmen to take orders from agents or employees of the client and not to contact company principals for authorization of the orders (R.116,133). The advertising ordered by Bowen or his successor, Jim Martin (R.120) from May 1973 through August, 1973, amounting to over \$5,000 (R.152) was paid for by check signed by Dewey Sargent, general manager of the Defendant Company and another individual (R.124). Bowen and Martin continued to order advertising after August 1973, but it was not paid for (R.86) even though as late as February, 1975, Defendant's Richfield office assured Plaintiff that it would be paid for (R.91,92).

The Defendant does not challenge the Trial Court's decision that the purchases of advertising through December, 1974 were incurred by duly authorized agents of the Defendant, upon whom the Plaintiff was entitled to rely, but contends only that it should not be bound by the contracts because the agents had an individual interest and accepted a secret commission to enter into the contracts. (Appellants' Brief p.4).

The Plaintiff acted fairly, openly and in good faith in its dealings with Defendant and did nothing illegal nor against public



policy. There is no dispute that the services ordered by Defendant were furnished and were satisfactory. Notice was given to Defendant at it's main office in Richfield prior to the running of each ad telling them how and when it would run (R.82). Mr. Sargent testified that he was aware that they were receiving television advertising after August, 1973 (R.151). It was not until February, 1974, that Plaintiff received a letter from Defendant stating they would only pay bills purchased by purchase order (R.93,106). Thus, while the Defendant knew it was receiving advertising after August, 1973, no attempt was made to cancel the advertising for five or six months.

Plaintiff had a sales program in which any client who bought certain amounts of advertising would receive free holiday trips. Mr. Bowen signed an agreement on behalf of the Defendant Company to the effect that if the company purchased \$2,600 worth of advertising from June through August of 1973, the Defendant Company would receive two trips to Mazatlan, Mexico (R.120,121). The Defendant purchased and paid for over \$5,000 of advertising through August, 1973 (R.152) and Mr. Sargent personally authorized payment for the advertising (R.124). As a result of that advertising the Defendant Company received trips for two to Mazatlan, Mexico. Bowen told Mr. Sargent he had the trip coming (R.153,170). The Plaintiff's sales manager didn't offer the trip to Bowen but to the Company and understood that Sargent would take the trip (R.122). Mr. Sargent stated he did not want the trip because he had won ten

trips of his own (R.153). Bowen testified that Sargent could have taken the trip had he chosen to do so (R.171). Bowen later signed another agreement under which the Defendant Company would get a trip for four, to Puerto Rico if it purchased \$7,000 of advertising (R.121). When asked about the signing of the free trip agreements Bowen testified to the effect that the Company had nothing to lose by his signing. If it turned out that the Company bought enough advertising the Company would get the trips. If the Company did not, they would not receive the trips but would still receive the advertising purchased (R.169). Indeed, under the first agreements, Mr. Sargent spent over twice as much on advertising as was required to receive the trip (R.152) and was able to qualify his company for the trips.

Defendant argues that the offer of the trips was a secret bribe offered by Plaintiff to Bowen to induce him to act against his company's best interests. The argument is fallacious. There is no evidence that there was any secret agreement between the Plaintiff and Defendant's agents. Mr. Cardwell, the Plaintiff's sales manager was told that Mr. Sargent, the general manager of the Defendant, would take the trip if the advertising was sufficient (R.122). Defendant's interests were not adversely affected in any way. Defendant received the advertising ordered. Defendant was not induced to purchase more advertising than desired. In fact, during the months of June, July and August, 1973, the Defendant voluntarily spent twice as much on advertising as was required to receive the trip.

The trips were not offered to Defendant's agents individually but were offered to the company (R.130,131). Mr. Sargent was informed of the trip and declined to go (R.153). The commitment signed by Bowen indicates that Bowen signed for the Defendant and the agreement lists Defendant's Richfield address. Thus the offer of the trips were not secret, were not made to the agents individually, were not made to induce the agents to violate their fiduciary duty to their principal and did not adversely affect their principals interests.

Defendant also argues that Plaintiff's actions violated state law (Appellants Brief p.5). Utah does have a bribery statute which reads in pertinent part:

76-6-508. Bribery of or receiving bribe by person in the business of selection, appraisal, or criticism of goods or services. - (1) A person is guilty of a class B misdemeanor when, without the consent of the employer or principal, contrary to the interests of the employer or principal:

(a) He confers, offers, or agrees to confer upon the employee, agent or fiduciary of an employer or principal any benefit with the purpose of influencing the conduct of the employee, agent, or fiduciary in realting to his employer's or principal's affairs; or

(b) He, as an employee, agent, or fiduciary of an employer or principal, solicits, accepts, or agrees to accept any benefit from another upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principals affairs; provided that this section does not apply to inducements made or accepted solely for the purpose of causing a change in employment by an employee, agent, or fiduciary.

There are several elements to this offense. A benefit must be offered to an agent. The purpose of the offer must be to influence

the agents conduct relating to his principal's affairs. The offer must be both without the principals' consent and contrary to the principals interests.

The statute does not proscribe the Plaintiff's actions nor was it intended to cover this fact situation. Plaintiff's offer to provide trips was not made to Bowen, the agent, individually; it was made to the Defendant Company. The agreement itself states that Bowen was signing on behalf of Federal Mobile Homes and lists Defendant's Richfield address. The offer was not without Defendant's consent because its General Manager knew of the trip and did not complain (R.153,170). It was understood by the Plaintiff that the General Manager and not the agent would take the trip (R.122). The Plaintiff did not give any secret incentives to Mr. Bowen (R. 109).

The contract was not contrary to Defendant's business interests and the Defendant did receive the benefits of the advertising. Originally, Mr. Bowen contacted the Plaintiff seeking advertising. Plaintiff did not even make the original contact (R.107,108).

It might be argued that Plaintiff acted unwisely in dealing with the Defendant Company through Bowen and Martin. However, it is industry custom to deal with agents and rely upon their authority for advertising contracts both as to volume of advertising and content of advertising (R.116,133). When dealing with a corporation, one must of necessity deal with employees of the corporation and when dealing with an agent one may presume that information given to the agent

will be communicated to the principal. 3 CJS, Agency, Section 432-433. By analogy, payments to an agent may be presumed to be properly applied to the principal. Utah Code Annotated Section 22-1-2 (1953) reads:

Payments made to fiduciaries - A person who in good faith pays or transfers to a fiduciary any money or other property which the fiduciary as such is authorized to receive, is not responsible for the proper application thereof by the fiduciary; and no right or title acquired from the fiduciary in consideration of such payment or transfer is invalid in consequence of a misapplication by the fiduciary.

Plaintiff justifiably presumed that Bowen would communicate the offer of the trips to his principals, particularly where prior purchases by Bowen had been paid for by the Defendant and where Plaintiff was informed that General Manager, Sargent, was going on one of the trips (R.122) and where the offer was communicated to his principals (R.153,170).

As stated, Plaintiff did not violate the Utah bribery statute. There is no public policy reason Plaintiff should be denied recovery in this case. The Defendant has not been injured in any way. The services ordered were furnished. Only Plaintiff has been injured to the extent that it has not been paid for services rendered in good faith.

The cases cited by Defendant to bolster its position in this matter are inapplicable. The Three Utah cases cited involve people engaging in the building contracting business without the proper license. The public must be protected from unscrupulous and unqualified builders when making such a substantial expenditure as buying a

home. But, there is no allegation in the present case that the Plaintiff has violated any licensing laws.

Similarly, the cases cited by Defendant for the proposition that it is against public policy and the law to corruptly influence agents by offering secret bribes, commissions and gratuities involved actions very different from those of the Plaintiff and do not apply. In Standard Lumber v. Butler Ice Co., 146 Federal Reporter 359 (1906) the principal of one company entered into a corrupt agreement with the president of another company to increase the bid for constructing a building by 50 percent with the understanding that the amount of the increase would be divided among the conspirators. In the present case there were no such dealings. The Defendant was not induced to pay more for services than the services were worth and there was no agreement between any of the parties involved to divide any increases in costs among themselves at Defendant's expense. There is absolutely no evidence of any conspiracy to defraud the Defendant.

American Shipbuilding Co., v. Commonwealth S.S. Co., 215 Federal Reporter 296 (1914), involved a situation similar to that in Standard Lumber, (Supra.). In that case, certain parties agreed with a shipbuilding company that they would organize a corporation which would purchase a ship from the shipbuilding company at an inflated price in exchange for a secret commission in the amount by which the ship price was inflated. The fact of the secret commission was not communicated to the stockholders of the newly organized corporation.

But, again there is no such kind of conspiracy to profit at the expense of some uninformed principal in the present case.

Finally the case of Sirkin vs. Fourteenth Street Store, 108 New York Supplement 830 (1908) involved a secret agreement between a seller and a purchasing agent, where, in exchange for an order to purchase, the purchasing agent would receive 5% of the purchase price of the goods ordered. The agreement was secret, the secret bribe was given to the purchasing agent for his own use and the 5% payment came out of the price paid by the Defendant Company. Moreover, the agreement was in violation of state law. None of these characteristics exists in the present case. The offer of the trip was not secret, was not given to the agent for his own use, was not paid for out of an increased price passed on to the Defendant and was not in violation of state law.

There is no evidence of fraud, conspiracy or collusion between Plaintiff and Defendant's agents to profit at Defendant's expense. But assuming for argument, that there were, Plaintiff, nonetheless, under more recent cases would be entitled to recover the reasonable value of the services furnished to and enjoyed by the Defendant. In the United States Supreme Court case of Crocker vs. United States, 240, U.S., 74, 36 S.Ct. 245, 60 L.Ed. 533 (1915), a postal employee was offered a share in excess profits by a supplier if he could induce the government to purchase satchels. The supplier was denied recovery upon the contract for the satchels supplied because of the fraud but the Court held that this was not an obstacle to a recovery upon a quantum valebut.

### C O N C L U S I O N

The Plaintiff dealt fairly and openly with the Defendant. All services ordered were supplied. There is no dispute as to the quality or the price of the services rendered by Plaintiff. Defendant was aware that the advertising was ordered and was being supplied and that free trips were offered by the Plaintiff. Defendant's interests were not adversely affected by the Plaintiff. There was no collusion or conspiracy to defraud the Defendant. While there is some dispute in the testimony of the witnesses, the Trial Court, having heard the testimony and having observed the demeanor and comportment of the witnesses, held that the Plaintiff should recover for the services rendered. It is respectfully submitted that the judgment of the Trial Court should be affirmed.

Respectfully submitted,



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