

2000

# Lowell Walker v. Richard L. Sandwick and Pete R. Falvo : Brief of Appellant

Utah Supreme Court

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Boyd M. Fullmer; Attorney for Respondent.

Don Blackham; Blackham and Boley; Attorneys for Appellants.

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IN THE SUPREME COURT OF UTAH  
STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

LOWELL WALKER,

Plaintiff and  
Respondent,

vs.

Case No. 14266

RICHARD L. SANDWICK and PETE R.

FALVO, d/b/a Sandwick Motors,

Defendants and  
Appellants.

\* \* \* \* \*

APPELLANTS' BRIEF ON APPEAL

\* \* \* \* \*

Appeal From a Judgment Of The  
Third District Court of Salt Lake County,  
Honorable Marcellus K. Snow, Judge

\* \* \* \* \*

DON BLACKHAM  
BLACKHAM AND BOLEY  
Attorneys for Appellants  
3535 South 3200 West  
Salt Lake City, Utah 84119

BOYD M. FULLMER  
Attorney for Respondent  
540 East Fifth South Suite 203  
Salt Lake City, Utah 84102

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

LOWELL WALKER,

Plaintiff and  
Respondent,

vs.

Case No. 14266

RICHARD L. SANDWICK and  
PETE R. FALVO, d/b/a Sandwick  
Motors,

Defendants and  
Appellants.

\* \* \* \* \*

APPELLANTS' BRIEF ON APPEAL

\* \* \* \* \*

STATEMENT OF NATURE OF CASE

Respondent, Lowell Walker, commenced an action in the City Court of Salt Lake City against the appellants, Richard L. Sandwick and Pete R. Falvo, alleging an indebtedness owing from appellants herein to respondent herein.

From a judgment dismissing his complaint, the respondent herein, Lowell Walker, appealed to the District Court of Salt Lake County.

The case on appeal to the District Court of Salt Lake County was tried before the Honorable Marcellus K. Snow, District Judge, sitting without a jury.

The Court found in favor of the appellant (respondent here), Lowell Walker, and against respondents (appellants here), Richard L. Sandwick and Pete R. Falvo.

#### DISPOSITION IN THE LOWER COURT

Judgment was entered against the appellants herein, Richard L. Sandwick and Pete R. Falvo, by the Honorable Marcellus K. Snow, District Judge, and appellants, Richard L. Sandwick and Pete R. Falvo, have undertaken this appeal to the Supreme Court Of The State of Utah.

#### RELIEF SOUGHT ON APPEAL

Appellants seek an affirmance of the Judgment entered by the Salt Lake City Court and a reversal of the Judgment entered by the District Court of Salt Lake County, State of Utah.

#### STATEMENT OF FACTS

Appellants operated a used car sales business at Salt Lake City, Utah under the name of Pete and Dick's Auto Sales.

Respondent, Lowell Walker, was an independent insurance agent (R-3 and 11), writing liability insurance through Trans-Western General Agency.

In April, 1970, respondent, acting as an insurance agent for Trans-Western General Agency, obtained a policy of liability insurance issued by Yosemite Insurance Company, insuring Pete and Dick's Auto Sales (R-11 and Exhibit D-3).

Appellants, Richard L. Sandwick and Pete R. Falvo made a premium payment of \$255.50 upon the liability insurance policy issued by Yosemite Insurance Company as insurer of Pete and Dick's Auto Sales (R-9 and 10).

Cancellation of the liability insurance policy which was issued to Pete and Dick's Auto Sales was effected by Yosemite Insurance Company, and respondent, Lowell Walker, through his Amended Complaint, commenced his action against the appellants in the City Court of Salt Lake City, claiming that appellants were indebted to him (respondent).

#### ARGUMENT

##### POINT I

The Judgment In Favor Of The Respondent Was Not Supported By The Findings Of Fact And By The Evidence And Is Contrary To Law.

Respondent, Lowell Walker, in his Amended Complaint, sues appellants in his (respondent's) own name for a claimed indebtedness (to respondent), arising out of a contract of insurance between Yosemite Insurance Company, as the insurer, and the appellants herein as the insured.

In 44 Am. Jur. 2d, Insurance, Section 1932, the general rule is expressed as follows:

"The general rule is that an insurance agent cannot maintain in his own name an action for unpaid premiums unless he has paid the premium to the insurer, or where he has not paid the premium, has become personally liable to the insurer for the premium. Only where the insurance agent has made a showing of payment, or of personal obligation for payment, of premiums to the insurer, may he sue in his own name."

This general rule was followed in the case of Franklin W. Baumgartner vs. John C. Burt and Grace G. Burt, 365 Pa 2d 681, 90 A.L.R. 2d 1286, a 1961 case decided by the Supreme Court of the State of Colorado, which this writer finds indistinguishable from the case now before this

Court, an insurance agent was denied recovery in his suit to recover unpaid insurance premiums from an insured.

In order to be able to sue an insured (appellants here) in his own name (respondent here), an insurance agent (respondent here) in order to remove himself from an application of the general rule that an insurance agent cannot sue an insured in his own (agent's) name, it is incumbent upon the insurance agent (respondent here) to show that he (respondent) was in fact a creditor of the insured (appellants here). And in order to be a creditor of the insured (appellants here), an insurance agent (respondent here) would have to show (1) an assignment of the rights of the insurer to the premiums due under the policy to the insurance agent (respondent here) or (2) a subrogation of the rights of the insurer to the premiums due under the policy to the insurance agent (respondent here) or (3) that the insurance agent (respondent here) was charged with and paid the premium, Franklin W. Baumgartner vs. John C. Burt and Grace G. Burt, supra. In the instant case, there is no allegation or proof of any assignment of any premium due Yosemite Insurance Company, the insurer, from appellants to the respondent, Lowell Walker, the insurance agent nor was there any proof that the insurance agent (respondent) was charged with and paid any premium whatsoever on account of the insurance policy sold to appellants.

#### CONCLUSION

Upon the record of this case and the authority cited herein, it should be determined that the respondent, Lowell Walker, neither alleged nor proved that he was a creditor of the appellants, Richard L. Sandwick and Pete R. Falvo. The trial court should have granted defendants'

(appellants here) motion for Judgment Of Nonsuit, and the Judgment entered by the trial court should be reversed.

Respectfully submitted,

BLACKHAM AND BOLEY



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