

1984

Zions First National Bank v. Clark Clinic Corporation : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

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

James G. Clark; Ray Phillips Ivie; Ivie & Young; Attorneys for Defendant/Appellant.

M. Dayle Jeffs; Jeffs and Jeffs; Attorney for Plaintiff/Respondent.

Recommended Citation

Brief of Respondent, *Zions First National Bank v. Clark Clinic Corporation*, No. 198420105.00 (Utah Supreme Court, 1984).
https://digitalcommons.law.byu.edu/byu_sc1/450

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

COURT

45.9

.S9

DOC#

1984 20105 IN THE SUPREME COURT OF THE
STATE OF UTAH

ZIONS FIRST NATIONAL BANK,
a Utah corporation,
Plaintiff/Respondent,

vs.

CLARK CLINIC CORPORATION,
a Utah corporation,
Defendant/Appellant.

Case No. 20105

RESPONDENT'S BRIEF

Appeal from the Judgment of the Fourth
District Court for Utah County,
Hon. David Sam, Judge

M. DAYLE JEFFS
Jeffs and Jeffs, P.C.
90 North 100 East
P. O. Box 888
Provo, Utah 84603

Attorney for Plaintiff/
Respondent

JAMES G. CLARK
261 E. Broadway, Suite 150
Salt Lake City, Utah 84111

RAY PHILLIPS IVIE
Ivie & Young
48 North University Ave.
Provo, Utah 84603

Attorneys for Defendant/
Appellant

FILED
DEC 10 1984

Clerk, Supreme Court, Utah

ZIONS FIRST NATIONAL BANK,
a Utah corporation.

vs.

CLARK CLINIC CORPORATION,
a Utah corporation.

Defendant/Appellant.

Appeal from the Judgment of the Fourth
District Court for Utah County,
Hon. David Sam, Judge

Attorney for Plaintiff/
Respondent

RAY PHILLIPS IVIE
Ivie & Young
48 North University Ave.
Provo, Utah 84603

Attorneys for Defendant/
Appellant

TABLE OF CONTENTS

	<u>Page</u>
NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL.	2
STATEMENT OF FACTS	2
ARGUMENT	5

POINT I

THE TRIAL COURT PROPERLY DISMISSED APPELLANT'S COUNTERCLAIM WHICH CLAIMED ZIONS WAS LIABLE FOR HONORING CHECKS ON APPELLANT'S ACCOUNT WITH ALLEGED UNAUTHORIZED SIGNATURES.	5
--	---

A. <u>The Une Of Stamped Facsimile Signatures To Validate Checks Is Within The Contemplation Of The Uniform Commercial Code.</u>	5
B. <u>Even If The Use Of The Facsimile Signature Stamp Was Unauthorized, Appellant Is Barred From Asserting The Signatures Were Unauthorized</u>	9
C. <u>Appellant Ratified The Use Of The Stamped Facsimile Signatures</u>	11
D. <u>Sugarhouse Finance Is Dispositive Of The Fourth Cause Of Action Of Appellant's Counterclaim</u>	14
E. <u>Appellant Does Not Have Standing Interest To Bring Any Claim That Zions Cashed Checks Payable To Clark Clinic, A Partnership, On Unauthorized Endorsements</u>	19

POINT II

THE COURT SHOULD AFFIRM THE TRIAL COURT'S DECISION GRANTING ZIONS' SUMMARY JUDGMENT ON THE GROUNDS THAT APPELLANT RATIFIED THE PROMISSORY NOTE	20
---	----

A.	<u>Ratification Of The Promissory Note Does Not Require A Corporate Resolution.</u>	22
B.	<u>Appellant Cannot Avoid Ratification By Claiming It Did Not Have The Money To Repay Zions.</u>	24

POINT III

THE TRIAL COURT'S ORDER IN LIMINE IS NOT BEFORE THE COURT	27
CONCLUSION	27

CASES CITED

	<u>Page</u>
Aetna Cas. & Sur. Co. v. Hepler State Bank, 630 P.2d 721 (Kan.App., 1981)	8
Antrim Lumber Co. v. Oklahoma State Bank, 65 Okla. 25, 162 P. 723 (1917)	24
Bankers Protective Life Ins. Co. v. Addison, 237 SW 2d 694 (1951, Tex. 10.App.).	25
Bradshaw v. McBride, 649 P.2d 74 (Utah, 1982)	13,14,20 21
Calhoun v. McCrory Piano & Realty Co., 129 Tenn. 651, 168 S.W. 149	22
Duffy v. Scott, 129 ALR 487, 235 Wis. 142, 292 NW 273	23
Farmers State Bank v. Haun, 30 Wyo. 322, 222 P. 45.	25
Floor v. Mitchell, 86 Utah 203, 41 P.2d 281 (1935)	21
Moses v. Archie McFarland & Son, 119 Utah 2d 602, 230 P.2d 571 (1951).	14,20,21
Movie Films, Inc. v. First Security Bank of Utah, N.A., 447 P.2d 38, 22 Utah 2d 1 at 4, Footnote 2 (1968)	15
Newco Land Co. v. Martin, 358 Mo. 99, 213 SW 2d 694	25
Research-Planning, Inc. v. Bank of Utah, #18968, decided September 28, 1984	18
Robb v. Pennsylvania Co. For Insurance, Etc. A. 969, 186 Pa. St. 456 (1898)	7
Seattle-First National Bank v. Pacific National Bank, 587 P.2d 617, 22 Wash. App. 47 (1978)	8
Sugarhouse Finance Company v. Zions First National Bank, 21 Utah 2d 68, 440 P.2d 869 (1968)	5,17,18, 19
Taeger & Branch, Inc. v. Pappas, 20 Utah 2d 100, 433 P.2d 605 (1969)	6
Winkleback v. National Exchange Bank, 155 Mo.App. 1, 136 SW 712	25

STATUTES CITED

	<u>Page</u>
§16-10-4(h), Utah Code Annotated, as amended	23
§16-10-6, Utah Code Annotated, as amended	24
§22-1-1, Utah Code Annotated, as amended	15
§22-1-2, Utah Code Annotated, as amended	16
§22-1-4, Utah Code Annotated, as amended	16
§70A-3-307, Utah Code Annotated, as amended	6
§70A-3-401(2), Utah Code Annotated, as amended	6
§70A-3-404, Utah Code Annotated, as amended	12
§70A-4-406, Utah Code Annotated, as amended	9,10,14
Rule 16, Utah Rules of Civil Procedure	27
114 A.L.R. 996	23

ZIONS FIRST NATIONAL BANK,
a Utah corporation,

Plaintiff/Respondent,

Case No. 20105

CLARK CLINIC CORPORATION,
a Utah corporation,

Defendant/Appellant.

NATURE OF THE CASE

DISPOSITION IN THE LOWER COURT

The District Court on September 30, 1982, granted Summary Judgment for respondent, dismissing Clark's Counter-

claim. On April 17, 1984, the Court granted Summary Judgment for respondent, Zions Bank, on its first cause of action on the promissory note in the principal sum of \$25,000.00. The Court requested the issues of the computation of interest due under the note and the amount of attorney's fees be reserved for trial. (R. at 347-349). In June, 1984, the Court took evidence on the amount of attorney's fees for collecting of the note and the amount of interest due and rendered its judgment on July 6, 1984 in the amount of \$25,000.00 principal, \$27,332.31 interest accrued through May 31, 1984 and attorney's fees of \$6,875.75. (R. at 357-360) Clark's appeal is taken from these decisions.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the Supreme Court reverse the judgment granted by the Court as a matter of law and judgment in its favor. Alternatively, appellant asks that the case be remanded to the district court for a trial on all issues. Respondent seeks to have the Supreme Court affirm the district court's award of judgment against appellant, Clark Clinic Corporation.

STATEMENT OF FACTS

The facts essential to the consideration of this appeal are set forth herein.

Prior to 1971, the Clark Clinic had been a partnership of doctors. (R. 388; Deposition of Robert N. Westover 5:1-12).

Robert N. Westover had been the business manager of the partnership since 1960 (R. 41, 42; Defendant's Answers to Interrogatories #1, 2 and 3). The business was incorporated in about 1971. Mr. Westover continued as business manager for both the partnership and the corporation. (R. 388, Deposition of Robert N. Westover; 6:1-5, 17-17; Defendants Answers to Request for Admission #2; R. 48).

As business manager, Mr. Westover kept the accounting and financial books of Clark, prepared checks for payment of accounts payable or in furtherance of the business of Clark, deposited funds to bank accounts, reconciled bank statements, received payment on accounts, did the general banking of Clark, made purchases of supplies, and did all the banking for Clark Clinic, a partnership. (R. 48, 49; Defendant's Answers to Request for Admission #3).

In addition to being business manager for Clark, Mr. Westover also arranged personal loans for the doctors with banks. (R. 388; Deposition of Robert N. Westover 9:1-25).

In 1976 Clark's business manager began using stamped facsimile signatures on various documents, including checks drawn by the manager for Clark's payment of accounts. (R. 388; Deposition of Robert N. Westover 12:2-16).

The use of the stamped signatures continued until the business manager was terminated in September, 1978.

Defendant's officers received checks payable to themselves bearing stamped facsimile signatures as early as January 5, 1978 (R. _____; Plaintiff's Exhibit "A" attached to Requests for Admission).

Clark received regular monthly statements from Zions with the cancelled checks bearing the stamped facsimilie signatures on them through September, 1978. (Defendant's Answers to Requests for Admission #4 & #5; R. 49-50).

Clark did not notify Zions of the alleged unauthorized signatures until after September 18, 1978. (R. 44; Defendant's Answer to Interrogatory No. 12).

In August, 1978 there was a substantial overdraft in Clark's bank account. The business manager arranged a loan with Zions to cover the overdrafts. (R. 388; Deposition of Westover 20:16-25)

The promissory note was signed with facsimilie signatures by the business manager and returned to Zions.

The loan funds were deposited in Clark's account to cover the overdrafts in August, 1978. (R. 383, Deposition of Arnold Brown 14:16-25).

Clark made no payment on the promissory note and this action was commenced for collection of the note.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DISMISSED APPELLANT'S COUNTERCLAIM WHICH CLAIMED ZIONS WAS LIABLE FOR HONORING CHECKS ON APPELLANT'S ACCOUNT WITH ALLEGED UNAUTHORIZED SIGNATURES

The trial court granted Zions' Motion for Summary Judgment dismissing appellant's Counterclaim, finding that no issues of material fact remained precluding summary judgment and Zions was entitled to dismissal of the Counterclaim as a matter of law. The trial court's decision was based on the applicable sections of the Uniform Commercial Code, the Uniform Fiduciaries Act and Sugarhouse Finance Company v. Zions First National Bank, 21 Utah 2d 68, 440 P.2d 869 (1968).

A. The Use Of Stamped Facsimile Signatures To Validate Checks Is Within The Contemplation Of The Uniform Commercial Code.

Appellant counterclaimed in this action claiming that 332 checks on its account honored by Zions between April, 1977 and September, 1978, bore stamped facsimile signatures as one or both of the required signatures necessary to validate a check. Appellant claimed the use of the facsimile signatures on the checks was unauthorized and Zions should not have honored the checks. (R. at 18-20) Appellant has never alleged that the checks were used for anything other than the benefit of appellant. In fact, Zions propounded Requests for Admissions requesting appellant to admit or deny that each of the checks was used for payment of a debt of the Clark Clinic

Corporation, the purchase of goods or services for the Clark Clinic Corporation or its principals, or was issued in furtherance of the business of the Clark Clinic Corporation. Appellant in February, 1981, merely answered that it needed more information which it had not developed yet. (Answer to Requests for Admission #1.B, R. at 47, 48.) Appellant never supplemented the answer even though the information to answer the Request is peculiarly within the control of appellant.

The starting point for determining the issue of whether Zions is liable for accepting the alleged unauthorized signatures is §70A-3-307, Utah Code Annotated, as amended, which provides in pertinent part:

(1) . . . when the effectiveness of a signature is put in issue

(a) the burden of establishing it is on the party claiming under the signatures; but

(b) the signature is presumed to be genuine or authorized. (Emphasis added)

The introduction of the checks bearing the signatures of the officers of appellant made out a prima facie case and shifted the burden of establishing the lack of authority to appellant. See Taege & Branch, Inc. v. Pappas, 20 Utah 2d 100, 433 P.2d 605 (1969). And in §70A-3-401(2), Utah Code Annotated, as amended, it provides that:

A signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature. (Emphasis added)

Therefore, unless appellant carries its burden of establishing the lack of authority the signature, including any mark used in lieu of a written signature, is presumed to be genuine and authorized.

Appellant cites the Court to three cases from other jurisdictions which it claims hold that the unauthorized use of a rubber stamp signature is not a valid signature. The first case appellant cites is Robb v. Pennsylvania Co. For Insurance, Etc. A. 969, 186 Pa. St. 456 (1898) In Robb the employee was not authorized to use the rubber stamp in any way and had to break into the employers safe to use the stamp. The Court found the use of the stamp was unlawful and the employer had not entrusted the stamp to his employee. But, the Court went on to say that if the owner of the stamp:

If the owner place it in the hands of a third person for the purpose of affixing the signature to certain papers, and he, without authority, use it to forge the signature of the owner to checks, it might well be argued that the bank honoring the checks should not be responsible for the loss. . . . the loss would be traceable to the act of the owner of the stamp in selection of the agent to use it.

Robb at 969.

The uncontroverted facts of this case are that Robert N. Westover had the use of the facsimile signature stamp at least to affix the signature of the doctors onto insurance

forms. (Deposition of Robert N. Westover, page 54, lines 14-25.)

The second case cited by appellant is Seattle-First National Bank v. Pacific National Bank, 587 P.2d 617, 22 Wash. App. 47 (1978). In that case, the issue was not the liability of the bank for honoring a check signed by use of a rubber stamp; rather, the issue was whether a collecting bank was liable to a payor bank on the theory of breach of warranty of good title for honoring a check payable to a corporate entity endorsed by stamping "for deposit only" to the account of an individual. The issue before this Court, of the use of a stamp facsimile signature to validate a check, was never addressed by the Washington court.

The third case cited by appellant, Aetna Cas. & Sur. Co. v. Hepler State Bank, 630 P.2d 721 (Kan.App., 1981), involved an employee who used a stamp of the name of his corporate employer and not a facsimile signature to fill in the payee and endorsed the check with the same stamp. He then endorsed them to himself for deposit in his personal account. The facts are significantly different from the present case.

Appellant has cited no cases holding that a check signed by an agent affixing the signature of his principal by using a facsimile signature stamp in excess of his authority renders the instrument invalid. If the Court held as urged by appellant it would create a horrendous burden on banks to

verify the validity of signatures and who affixed the signature on the check that was not contemplated by the legislature in passing the Uniform Commercial Code.

B. Even If The Use Of The Facsimile Signature Stamp Was Unauthorized, Appellant Is Barred From Asserting The Signatures Were Unauthorized.

Regardless of whether the use of the facsimile signature stamps was authorized, appellant is precluded from asserting against Zions the lack of authority. The preclusion is in §70A-4-406, Utah Code Annotated, as amended, which states:

(1) When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries. . . , the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof.

(2) If the bank establishes that the customer failed with respect to an item to comply with the duties imposed by subsection (1) the customer is precluded from asserting against the bank

(a) his unauthorized signature or any alteration on the item if the bank also establishes that it suffered a loss by reason of such failure; and

(b) an unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days and before the bank receives notification from the customer of any such unauthorized signature or alteration. (Emphasis added)

The undisputed facts before the Court are that the monthly statements of account and returned checks were regularly received by appellant at Clark's place of business for the period of time when the checks with the alleged unauthorized signatures were processed through appellants account, a period of 17 months. (Answer to Requests for Admission #4 and #5, R. at 49, 50.) Appellant made no claim to Zions of the alleged unauthorized signatures until after September 21, 1978. (R. at 18). The checks bearing the alleged unauthorized signatures for which plaintiff counterclaimed were paid between April, 1977 and September, 1978.

Appellant is barred by §70A-4-406(2)(b) from asserting any alleged unauthorized signatures by reason of its failure to notify Zions before it paid the checks of the alleged unauthorized signature from the time the statement containing the first unauthorized signature by its agent was received by appellant.

Section 70A-4-406 further provides that:

(3) The preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s). (Emphasis added)

The only evidence introduced by appellant in its opposition to Zions' Motion for Summary Judgment to show that Zions paid the items with lack of ordinary care is that the items contained stamped facsimile signatures. Appellant

contends this raises an issue of fact precluding summary judgment. But it is undisputed by either appellant or respondent that one or both of the signatures on the checks complained of were stamped facsimile signatures, the facts are not in dispute. The trial court merely found that stamped facsimile signatures were recognized under the Uniform Commercial Code and absent other evidence of lack of ordinary care it ruled as a matter of law that Zions did not lack due care in paying the checks. (R. at 94).

C. Appellant Ratified The Use Of The Stamped Facsimilee Signatures.

Even if the use of stamped facsimile signatures by Robert N. Westover, Clark's business manager, was unauthorized, appellant, through its officers, knew of the use of the stamps and ratified their use. Appellant in its Counterclaim and in subsequent Affidavits by appellant's officers claims it did not learn of the alleged unauthorized signatures until September, 1978, but the evidence before the trial court shows that the officers of appellant did in fact know of the stamped signatures at the time they were being affixed to checks. Of the 332 checks furnished to Zions by appellant as the checks bearing unauthorized stamped signatures which were attached to Zions Interrogatories and Requests for Admission to appellant, six of the checks were paid to officers of the corporation which they subsequently cashed or deposited to their personal accounts. Those checks show the following:

Check No.	Date	Payee	Amount	Manual Signature	Stamped Signature	Page No. Re of Ex A P to Req. N for Adm.
2850	1/5/78	Richard S. Clark	\$4,000.00	R. Craig Clark	Stanley N. Clark	29
2851	1/5/78	R. Craig Clark	\$6,000.00	R. Craig Clark	Stanley Clark	30
2852	1/5/78	Stanley N. Clark	\$6,000.00	R. Craig Clark	Stanley N. Clark	31
3341	4/25/78	Richard S. Clark	\$ 384.87	None	R. Craig Clark Stanley N. Clark	220
3342	4/25/78	Richard S. Clark	\$1,000.00	None	R. Craig Clark Stanley N. Clark	221
3404	4/7/78	Richard S. Clark	\$5,000.00	None	Stanley N. Clark R. Craig Clark	249

Richard S. Clark is president of Clark Clinic Corporation, Stanley N. Clark is past vice-president and R. Craig Clark is secretary/treasurer. (R. at 285, 289, 293).

Even though appellant claims it did not receive notice of the use of stamped signatures on its checks until September, 1978, the record established that reasonable minds could not differ that appellant's officers knew of the use of stamped signatures.

Section 70A-3-404, Utah Code Annotated, as amended, provides that:

(1) Any unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it. . .

(2) Any unauthorized signature may be ratified for all purposes of this chapter.
. . . (Emphasis added)

Therefore, the stamped facsimile signatures are capable of ratification.

In Bradshaw v. McBride, 649 P.2d 74 (Utah, 1982), this Court gave a detailed discussion of the principles of ratification. Therein, the Court held that ratification need not be an express ratification.

A principal may impliedly or expressly ratify an agreement made by an unauthorized agent. . . . Under some circumstances failure to disaffirm may constitute ratification of the agent's act. . . . "Any conduct which indicates assent by the purported principal to become a party to the transaction or which is justifiable only if there is ratification is sufficient. Even silence with full knowledge of the facts may manifest affirmance and thus operate as a ratification." (quoting Moses v. McFarland & Son, 119 Utah 602, 607, 230 P.2d 571, 573-74)

Bradshaw at 78.

Appellant ratified the use of the stamped facsimile signatures when its officers accepted checks bearing those signatures. Furthermore, the ratification established a course of conduct between Zions and appellant for the acceptance of stamped facsimile signatures. While the course of dealing established between Zions and appellant for the use of stamped facsimile signatures may not be sufficient justification at law to hold that appellant ratified the use of stamped facsimile signatures on all checks, the equities in this case cry out that appellant should be estopped from asserting the use of the facsimile signature stamps was unauthorized. Appellant's officers accepted checks bearing stamped signatures, it allowed its business manager, Robert N. Westover, to

use and have access to the stamp, and it waited until Zions attempted to collect its promissory note to assert the unauthorized signature.

Neither is it a defense that appellant did not have full knowledge of the use of the facsimile signature stamp. In Moses v. Archie McFarland & Son, and again in Bradshaw cited above, this Court held that failure to look at information within a principal's possession would not prevent ratification.

So a purported principal may not be willfully ignorant, nor may he purposely shut his eyes to means of information within his possession and control and thereby escape ratification if the circumstances are such that he could reasonably have been expected to dissent unless he were willing to be a party to the transaction.

Bradshaw, 649 P.2d at 78.

All such checks bearing the stamped signatures were returned to Clark monthly with the monthly statement. (R. 49-50; Defendant's Answers to Requests for Admission #4 and #5)

Appellant's failure to avail itself of information within its possession and control is of signal importance in this case since appellant was under a duty imposed by §70A-4-406, Utah Code Annotated, as amended, to examine the statements sent to it by Zions and notify Zions promptly of any unauthorized signatures.

This Court should affirm the trial court's dismissal

of appellant's counterclaim alleging the unauthorized signature on its checks.

D. Sugarhouse Finance Is Dispositive Of The Fourth Cause of Action of Appellant's Counterclaim.

Utah has adopted the Uniform Fiduciaries Act, Title 22, Chapter 1, Utah Code Annotated, as amended. In 22-1-1, Utah Code Annotated, as amended, a fiduciary covered by the provisions of the act is defined as:

"Fiduciary" includes a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, and any other person acting in a fiduciary capacity for any person, trust or estate. (Emphasis added)

The purpose of the Uniform Fiduciaries Act is "to protect the bank where it allows withdrawals on the personal order of a fiduciary who may be breaching his trust, unless the latter fact is known to the bank." Movie Films, Inc. v. First Security Bank of Utah, N.A., 447 P.2d 38, 22 Utah 2d 1 at 4, Footnote 2 (1968).

In answer to Requests for Admissions #3 (R. at 48, 49), appellant admitted that Robert N. Westover was the business manager of Clark Clinic Corporation and his duties included keeping the accounting and financial books of the Clark Clinic Corporation; preparing and directing the preparation of checks for the payment of accounts payable of the Clark Clinic

Corporation; making deposits of funds received by the Clark Clinic Corporation; doing the general banking for the Clark Clinic Corporation; since incorporation in 1971 he endorsed or directed the endorsement of all checks payable to Clark Clinic Corporation (although appellant contends the authority to endorse checks was limited to endorsing by stamp for deposit only); and he did substantially all the banking for the Clark Clinic, a partnership.

It is clear when you look at the duties and responsibilities of Robert N. Westover that he comes under the definition of a fiduciary for purposes of the Uniform Fiduciary Act. He was the agent for both the Clark Clinic Corporation and Clark Clinic, a partnership.

Section 22-1-2, Utah Code Annotated, as amended, provides that:

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.

And in §22-1-4, Utah Code Annotated, as amended:

. . . if any negotiable instrument payable or endorsed to his principal is endorsed by a fiduciary empowered to endorse such instrument on behalf of his principal, the endorsee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in endorsing or delivering the instrument, and is not

chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary, unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith.

Of the twelve checks claimed to have been endorsed and cashed without authority, eight of the checks, totalling \$9,600.00, were made payable to Clark Clinic, a partnership and the remaining four checks, totalling \$3,200.00, were made out to either cash or to Zions First National Bank. (R. at 22-31). The Answers to Requests for Admissions referred to above demonstrate that Robert N. Westover was empowered to endorse checks for both Clark Clinic, a partnership, and Clark Clinic Corporation. Appellant's claim that it limited the power of Robert N. Westover to endorse those checks is precisely the type of limitation that the Uniform Fiduciaries Act is designed to shield the bank from the obligation to inquire into before it can cash a check of a principal presented by or endorsed by the agent of the principal.

In Sugarhouse Finance Company v. Zions First National Bank, 440 P.2d 869, 21 Utah 2d 68 (1968), the Court made a detailed analysis of the Uniform Fiduciaries Act and found that:

. . . the statute places a duty on principals to use only honest fiduciaries, and gives relief to those who deal with fiduciaries except where they know the fiduciary is breaching his duty to his principal

or where they have knowledge of facts that their action in dealing with the fiduciary amounts to bad faith.

Id. at 70.

The Court went on to define "bad faith" as "when a thing is done dishonestly and not merely negligently." Sugarhouse at 70. Appellant has never alleged that Zions had actual knowledge that Westover was breaching a duty to the appellant or that Zions acted in bad faith. The Counterclaim merely alleges that Zions was negligent in cashing the checks. (R. at 22, 23).

The rulings in Sugarhouse have recently been reaffirmed by this Court in Research-Planning, Inc. v. Bank of Utah, #18968, decided September 28, 1984, _____ P.2d _____. In holding that the bank cannot be held liable unless there is a showing of "bad faith", this Court at page 4 said: "Thus, bad faith requires willfulness; simple negligent conduct by itself is not a sufficient basis for liability."

The Court in Sugarhouse found that negligence was not a sufficient basis for a cause of action because of the limitations imposed by the Uniform Fiduciaries Act. Furthermore, the Court held that:

. . . the plaintiff suffered no loss by reason of the cashing of the checks, for the funds from the checks were given to its fiduciary, who under his duty should have held them for the plaintiff.

Sugarhouse at 70.

The holdings in Sugarhouse were made even though the fiduciary had deposited the funds to his personal account in the same bank.

Appellant has no cause of action against Zions for cashing the checks presented to it by Robert N. Westover and delivering the money to him because Westover was under a duty to hold it for appellant. Any claim of appellant for those funds would properly lie against appellant's agent, Robert N. Westover, if he did not fulfill his duty to deliver the funds to appellant.

E. Appellant Does Not Have Standing Interest To Bring Any Claim That Zions Cashed Checks Payable To Clark Clinic, A Partnership, On Unauthorized Endorsements.

This action was commenced by Zions against Clark, for collection of a promissory note. Clark in turn counterclaimed against Zions because Zions honored alleged unauthorized endorsements and signatures of Clark's checks. Included in Clark's Fourth Cause of Action is a claim that eight checks payable to Clark Clinic, a partnership, totalling \$9,600.00, for rent of Clark Clinic's office building were cashed by Zions on unauthorized endorsements. (R. at 22-31, appellant's brief at 3).

Any claim that the endorsements by Robert N. Westover were not authorized by Clark Clinic, a partnership, would necessarily have to be brought by Clark Clinic, a partner-

ship. Clark Clinic Corporation has suffered no injury by any alleged unauthorized endorsement by an agent of Clark Clinic, a partnership.

POINT II

THE COURT SHOULD AFFIRM THE TRIAL COURT'S DECISION GRANTING ZIONS' SUMMARY JUDGMENT ON THE GROUNDS THAT APPELLANT RATIFIED THE PROMISSORY NOTE

Zions' First Cause of Action is for appellant's failure to pay a \$25,000.00 promissory note when due. Appellant contends the promissory note was entered into by its business manager, Robert N. Westover, and he executed it by affixing facsimile signature stamps of the officers' signatures to the note without authority. Appellant claims Westover did not have either express, apparent or implied authority to borrow money on behalf of appellant. (Appellant's Point 3 A. and 3 B.).

Regardless of whether Westover had authority to borrow money from Zions on behalf of appellant, appellant has ratified the promissory note entered into by Westover. Since the ruling of the trial court was predicated upon the defendant's ratification, the issue of apparent or implied authority is immaterial and irrelevant to this appeal.

It is clear that a principal can either expressly or impliedly ratify the transaction of an unauthorized agent. Bradshaw v. McBride, 649 P.2d 74 (Utah, 1982); Moses v. Archie McFarland & Son, 119 Utah 2d 602, 230 P.2d 571 (1951). And as

cited above in Point I in both Bradshaw and Moses, the Court held:

Any conduct which indicates assent by the purported principal to become a party to the transaction or which is justifiable only if there is ratification is sufficient.

Bradshaw at 78.

Utah recognized early on that a principal may not retain the benefits of a contract entered into by an alleged unauthorized agent and still repudiate the contract. In Floor v. Mitchell, 86 Utah 203, 41 P.2d 281 (1935), the Court held:

When a principal claims the benefits of a contract made by his agent, he cannot repudiate the acts of his agent on the ground such acts were unauthorized. Accepting a contract and claiming the fruits thereof, the principal takes with whatever taint attaches to its origin.

Id. at 287.

The undisputed affidavit of Arnold W. Brown, branch manager of Zions First National Bank's Provo Regional Head Office, states that the \$25,000.00 proceeds of the promissory note were deposited to appellant's checking account on August 19 and August 30, 1978. (R. at 241). By appellant's own representations, it learned of the promissory note no later than September, 1978. (R. at 284). Appellant has never returned the proceeds of the promissory notes. (R. at 242).

The retention of the loan proceeds by appellant precludes it from asserting that the acts of its business

manager in entering into the transaction exceeded his authority.

A. Ratification Of The Promissory Note Does Not Require A Corporate Resolution.

Appellant cites various cases from other jurisdictions which it contends hold that ratification of a loan entered into by an unauthorized agent must be in writing. The cases do not so hold and in fact support Zions claim that appellant has ratified the promissory note herein.

In Calhoun v. McCrory Piano & Realty Co., 129 Tenn. 651, 168 S.W. 149, cited by appellant, the Court stated the general rule of retention of benefits constituting ratification:

it is a well-settled doctrine of equity that where a principal obtains the benefit of a loan procured by his agent acting without authority, he thereby ratifies the unauthorized contract, and makes himself liable to the lender for the sum received.

Id. at 150.

In Calhoun, the only reason the Court found there was no ratification was because the loan proceeds were deposited to the agent's personal account and then the agent used the proceeds to pay an obligation he owed to his principal. The principal did not receive the benefit of loan because it did not "increase his money in hand, or which he is entitled to receive from his agent, or unless it is used to extinguish outstanding liabilities against him." Calhoun at 150. In the

case now at bar, appellant received the benefit of the loan because it was deposited to Clark's account reducing an outstanding obligation, namely the overdraft of its account.

Duffy v. Scott, 129 ALR 487, 235 Wis. 142, 292 NW 273, cited by appellant, was an action for money had and received and did not address whether an action would lie on the underlying contractual terms of the promissory note.

Appellant cites 114 ALR 996 as authority for the proposition that ratification of the loan must be by corporate resolution. The annotation deals with ratification of the sale of land and the case therein holds that since the contract for the sale of land is required by the statute of frauds to be in writing, the ratification of the sale must also be in writing.

This writer has been unable to find any cases requiring ratification to be in writing other than those dealing with transactions covered by the statute of frauds. Furthermore, the claim of appellant that it can only borrow under authority of a corporate resolution is inaccurate. Section 16-10-4(h), Utah Code Annotated, as amended, specifically grants a corporation the power to borrow money. At common law, if the officers or agents of a corporation borrowed money without a corporate resolution, one of the defenses available to the corporation was that the act was invalid as to the corporation under the doctrine of ultra vires acts. But Utah

has abolished that defense except for limited situations, namely some actions by shareholders against the corporation or actions by the corporation against its officers. Section 16-10-6, Utah Code Annotated, as amended.

The cases cited above in this memorandum dealing with ratification by retention of benefits include cases of ratification by corporations. In Antrim Lumber Co. v. Oklahoma State Bank, 65 Okla. 25, 162 P. 723 (1917), the facts before the Oklahoma Court were nearly identical to the present case. The defendant, Antrim Lumber Co.'s agent "was without authority to borrow money. . . or to sign the name of defendant." Id. at 724. The agent signed a promissory note on behalf of the defendant to cover an overdraft in the defendant's checking account allegedly created by the agent's embezzlement. The Court cited authorities from numerous jurisdictions in support of its holding that the credit to the defendant's account to cover the overdraft conferred a benefit upon the defendant. Defendant Antrim Lumber Co.'s failure to return those funds constituted a ratification of the unauthorized act of its agent.

Therefore, appellant's claim that the only means of ratifying the loan from Zions is by corporate resolution is not supported by either statutory or case law.

B. Appellant Cannot Avoid Ratification By Claiming It Did not Have The Money To Repay Zions.

Appellant claims there is no ratification of the

unauthorized acts of an agent for failure to return the benefits of the contract if it is impossible to return the benefits. Utah has never recognized impossibility to return the benefits as a defense to ratification. In support of its position, appellant cites Newco Land Co. v. Martin, 358 Mo. 99, 213 SW 2d 694, and Farmers State Bank v. Haun, 30 Wyo. 322, 222 P. 45.

Appellant refers to language in Newco Land Co. wherein the Court distinguished a case, (Winkleback v. National Exchange Bank, 155 Mo.App. 1, 136 SW 712) dealing with the rescission of a sale of realty that held principal's retention of benefits was not a ratification when "without his fault conditions are such that he cannot be placed in status quo or repudiate the transaction without loss." Newco Land Co. at 510. The Court in Newco Land Co. held this principle was not applicable to the retention of money deposited to the account of the defendant therein.

The benefit that was impossible to return in Farmers State Bank was a series of transactions that kept the bank solvent. The benefit was of the nature that it "could probably not be measured or restored. . ." Farmers State Bank at 57. The defense claimed by appellant is limited to strict impossibility of the return of the benefits, for instance services performed by a physician. Bankers Protective Life Ins. Co. v. Addison, 237 SW 2d 694 (1951, Tex. 10.App.).

The only evidence of appellant in support of its claim that it was impossible to return the benefits is an affidavit by its officer that at the time the transaction was discovered:

[t]here was no money in the corporate account at Zions Bank, nor in the partnership account. We had recently ordered \$50,000 in equipment which was due to be paid for in October, 1978 and we had ongoing expenses of over \$40,000 per month. The doctors had to go without pay for a period of time. We had to give Zions Bank about \$5,000 to close out our checking account. We could not give back the money because we didn't have it, the money had already gone back to Zions Bank to pay for overdrafts on our account.

(R. at 283, 84).

At most, the affidavit demonstrates a financial difficulty in repaying the promissory note but not an impossibility. Clark had already had the benefit of the loan when it issued the \$25,000.00 in checks which overdrafted the accounts for which the loan was made. Clark further does not answer how it is going to pay for the \$50,000.00 of equipment it had ordered or the \$40,000.00 monthly ongoing expenses when there were no funds in Clark's account. Furthermore, there is nothing in the record indicating that it was impossible for appellant to borrow elsewhere to repay the note or that appellant continued to be financially unable to repay the note. Appellant merely attempts to avoid its legitimate obligation by ill-founded claims that it did not receive the benefit of

the promissory note or that it was financially difficult to repay the note.

POINT III

THE TRIAL COURT'S ORDER IN LIMINE IS NOT BEFORE THE COURT

In Point II of appellant's brief, it seeks review of the trial court's Order in Limine limiting the issues at trial and the evidence that could be presented. The Order in Limine was an interim order entered pursuant to the power of the court under Rule 16, Utah Rules of Civil Procedure. Rule 16 provides the court with the continuing power to modify the order at any time prior to trial.

Subsequent to the Order in Limine, the court granted Zions' Motion for Summary Judgment on its First Cause of Action. The Order in Limine never became operative because the action did not proceed to trial. Therefore, the Order in Limine is not properly before this Court for review because it never had any effect on the proceeding.

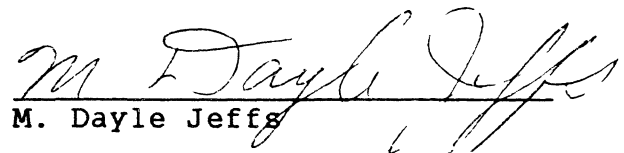
CONCLUSION

The trial court granted plaintiff's Motions for Summary Judgment on facts not in dispute. Primarily, those rulings were predicated upon the defendant's Answers to Requests for Admission.

Where facts not in dispute were the basis for the trial court's rulings, it was appropriate that the ruling on

the Counterclaim and on plaintiff's First Cause of Action on ratification of the promissory note should be decided on summary judgment. This Court should affirm both rulings.

Respectfully submitted this 10th day of December, 1984.


M. Dayle Jeffs

CERTIFICATE OF MAILING

I hereby certify that eleven copies of the foregoing were mailed to the Clerk of the Court, Utah Supreme Court, State Capitol Building, Salt Lake City, Utah 84114, and two copies were mailed to the below named parties by placing same in the United States mails, postage prepaid, this 10th day of December, 1984, addressed as follows:

James G. Clark, Esq.
261 East Broadway, Suite 150
Salt Lake City, Utah 84111

Ray Phillips Ivie, Esq.
Ivie & Young
48 North University Ave.
P. O. Box 672
Provo, Utah 84603

Attorneys for Defendant/Appellant

