

1984

# Guardian State Bank, a Utah corporation v. F.C. Stangl III : Brief of Respondent

Utah Supreme Court

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

 Part of the [Law Commons](#)

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

Harold G. Christensen; George A. Hunt; Snow, Christensen & Martineau; Attorneys for Respondent.

Stephen B. Mitchell; Burbidge & Mitchell; Attorneys for Appellant.

---

## Recommended Citation

Brief of Respondent, *Guardian State Bank v. Stangl III*, No. 198420158.00 (Utah Supreme Court, 1984).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/456](https://digitalcommons.law.byu.edu/byu_sc1/456)

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

UTAH

JMENT

198420158

IN THE SUPREME COURT OF THE STATE OF UTAH

GUARDIAN STATE BANK, a  
Utah corporation,

Plaintiff and  
Appellant,

Case No. 20158

vs.

F.C. STANGL III,

Defendant and  
Respondent.

BRIEF OF RESPONDENT

Appeal from the Judgment of the  
Third Judicial District Court in and for Salt Lake County  
State of Utah  
Honorable Scott Daniels, Judge

HAROLD G. CHRISTENSEN, ESQ.  
GEORGE A. HUNT, ESQ.  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, 11th Floor  
P. O. Box 3000  
Salt Lake City, Utah 84110

Attorneys for Respondent

STEPHEN B. MITCHELL, ESQ.  
BURBIDGE & MITCHELL  
139 East South Temple, Suite 2001  
Salt Lake City, Utah 84111

Attorneys for Appellant

**FILED**  
NOV 27 1984

Clerk, Supreme Court, Utah

---

IN THE SUPREME COURT OF THE STATE OF UTAH

---

GUARDIAN STATE BANK, a  
Utah corporation,

Plaintiff and  
Appellant,

Case No. 20158

vs.

F.C. STANGL III,

Defendant and  
Respondent.

---

BRIEF OF RESPONDENT

---

Appeal from the Judgment of the  
Third Judicial District Court in and for Salt Lake County  
State of Utah  
Honorable Scott Daniels, Judge

---

HAROLD G. CHRISTENSEN, ESQ.  
GEORGE A. HUNT, ESQ.  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, 11th Floor  
P. O. Box 3000  
Salt Lake City, Utah 84110

Attorneys for Respondent

STEPHEN B. MITCHELL, ESQ.  
BURBIDGE & MITCHELL  
139 East South Temple, Suite 2001  
Salt Lake City, Utah 84111

Attorneys for Appellant

## TABLE OF CONTENTS

	<u>Page</u>
NATURE OF THE CASE . . . . .	1
DISPOSITION BELOW . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	2
STATEMENT OF FACTS . . . . .	2
ARGUMENT:	
POINT I:	
THIS APPEAL WAS NOT TIMELY FILED . . . . .	8
POINT II:	
BANK MAY NOT RAISE AND ADVANCE ARGUMENTS FOR THE FIRST TIME ON APPEAL . . . . .	10
POINT III:	
THE LOWER COURT DID NOT ERR IN GRANTING A DIRECTED VERDICT IN FAVOR OF STANGL . . . . .	15
A.    The Claim of Fraud . . . . .	16
B.    Bank is Collaterally Estopped to Claim Fraud . . . . .	20
C.    Intent to Pay the Stangl Note . . . . .	21
D.    The Conditional Delivery Argumet . . . . .	21
E.    Reformation and Rescission . . . . .	22
F.    Lack of Consideration . . . . .	23
G.    Good Faith . . . . .	23
POINT IV:	
STANGL IS ENTITLED TO RECOVER HIS ATTORNEYS' FEES . . . . .	24
CONCLUSION . . . . .	26

# TABLE OF CASES

	<u>Page</u>
<u>American Gypsum Trust v. Georgia-Pacific Corporation,</u> 529 P.2d 419 (Utah 1974) . . . . .	25
<u>Berkeley Bank for Co-Ops v. Meibos,</u> 607 P.2d 798 (Utah 1980) . . . . .	18
<u>Commercial Bank of St. Louis v. Wright,</u> 645 S.W.2d 17 (Mo. App. 1982) . . . . .	13
<u>Cook v. Gardner,</u> 1381 P.2d 78, 80 (Utah 1963) . . . . .	9
<u>Dern Inv. Co. v. Carbon Co. Land Co.,</u> 75 P.2d 660, 664 (Utah 1938) . . . . .	23
<u>Dugan v. Jones,</u> 615 P.2d 1239, 1247 (1980) . . . . .	16,22
<u>Estate Counseling Service v. Merrill, Lynch, Pierce,</u> <u>Fenner &amp; Smith,</u> 303 F.2d 527, 531 (10th Cir. 1962) . .	16
<u>Fireman's Insurance Co. v. Brown,</u> 529 P.2d 419 (Utah 1974) . . . . .	25
<u>Franklin Financial v. New Empire Development Co.,</u> 659 P.2d 1040, 1044 (Utah 1983) . . . . .	10
<u>Fullmer v. Blood,</u> 546 P.2d 606 (Utah 1976) . . . . .	25
<u>Gadd v. Olson,</u> 685 P.2d 1041, 1044 (Utah 1984) . . . . .	19
<u>Grosse Pointe Shores v. Ayres,</u> 254 Mich. 58, 235 N.W. 829 (1931) . . . . .	22
<u>Halpin v. Fankenberger,</u> 644 P.2d 452 (Kan. 1982) . . . .	12
<u>Hanson v. Cheek,</u> 10 UCC Rep. 670, 475 S.W.2d 526 (Ark., 1972) . . . . .	15
<u>Jardine v. Brunswick Corp.,</u> 423 P.2d 659 (Utah 1967) . .	18
<u>Jenkins v. Bailey,</u> 676 P.2d 391, 392 (Utah 1984) . . . .	25
<u>Moyer v. Colyer,</u> 283 P.2d 815 (Okla. 1955) . . . . .	12
<u>N.J. Gendron Lumber v. Great Northern Homes, Inc.,</u> 8 Mass. App. Ct. 411, 395 N.E. 2d 457 (1970) . . . . .	12

	<u>Page</u>
<u>Provident Bank v. Gast</u> , 57 Ohio St. 2d 102, 386 N.E. 2d 1357 (1979) . . . . .	13
<u>Prowswood, Inc. v. Mountain Fuel Supply Co.</u> , 676 P.2d 952, 959 (Utah 1984) . . . . .	9
<u>Royal Indemnity Co. v. McFadden</u> , 65 Ohio App. 15, 29 N.E.2d 181 (1940) . . . . .	22
<u>Searle Bros v. Searle</u> , 588 P.2d 689 (Utah 1978) . . . .	21
<u>Simson v. Bilderbeck, Inc.</u> , 417 P.2d 803 (N.M. 1966) . .	11,12
<u>Sugarhouse Finance Co. v. Anderson</u> , 610 P.2d 1369, 1373 (Utah 1980) . . . . .	17
<u>Utah State Building Board v. Walsh Plumbing Co.</u> , 399 P.2d 141, 144 (Utah 1965) . . . . .	9
<u>Yergensen v. Ford</u> , 402 P.2d 696, 697 (Utah 1965) . . . .	12

#### TREATISES

<u>Anno.</u> , <u>Declaratory Judgments</u> , 87 ALR 1205, 1221 . . . .	22
Restatement, Second, <u>Contracts</u> , § 74 (1981) . . . . .	23
22 Am. Jur. 2d, <u>Declaratory Judgments</u> , § 16 . . . . .	22

#### STATUTES AND AUTHORITIES

Utah Code Ann. § 70A-3-208 (1953) . . . . .	13
Utah Code Ann. § 70A-3-401 (1953) . . . . .	14
Rule 73(a), U.R.C.P. . . . .	15
Utah Code Ann. § 70A-3-414 (1953) . . . . .	14
Utah Code Ann. § 70A-3-415(4) (1953) . . . . .	13
Utah Code Ann. § 70A-3-415(5) (1953) . . . . .	8,9
Utah Code Ann. § 70A-3-606(1)(b) (1953) . . . . .	21

---

IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

GUARDIAN STATE BANK, a  
Utah corporation,

Plaintiff/Appellant,

BRIEF OF RESPONDENT

vs.

Case No. 20158

F.C. STANGL III, an  
individual,

Defendant/Respondent.

---

NATURE OF THE CASE

This is an action for damages. Appellant Guardian State Bank (herein, "Bank") sought recovery on a promissory note and also sought damages for fraud. Respondent F.C. Stangl III (herein, "Stangl") admitted liability on his note with Bank, denied the fraud claim and counterclaimed against Bank on Bank's indorsement of a separate, but related, promissory note which he held.

DISPOSITION BELOW

The case was tried before the Honorable Scott Daniels sitting with a jury. Stangl admitted liability on his note with Bank. The facts were undisputed respecting the fact of

Bank's unrestricted indorsement of the note held by Stangl. Bank adduced its evidence respecting the fraud claim and its defenses to the counterclaim. At the close of the evidence the trial court granted Stangl's motion for a directed verdict and judgment was entered on June 19, 1984. Notice of appeal was filed August 17, 1984.

#### RELIEF SOUGHT ON APPEAL

Stangl seeks a dismissal of this appeal or, in the alternative, affirmance of the judgment entered below and an award of his attorney's fees both in the court below and on this appeal.

#### STATEMENT OF FACTS

The Statement of Facts advanced by Bank requires amplification and clarification.

##### A. The Original Transaction.

In August of 1979, Stangl signed a Guaranty in favor of Bank, guaranteeing a \$150,000 loan made by Bank to John Sargetis Fine Cars, Inc. dba John Sargetis Ford, Inc. [Ex. 2] The loan was evidenced by a promissory note of even date (herein "Sargetis Note") signed by the corporation. [Ex. 1] The Sargetis Note did not mention or refer to the Guaranty. [Id.]

While, on its face, the Sargetis Note was a demand note, the Bank had not treated it as such, causing Stangl to believe



it was for a longer term, perhaps 5 years. [R. 607, 627; 514-516; Ex. 7] The payment record on the note and Bank's treatment of the note is consistent with Stangl's understanding that the Sargetis Note was a term rather than a demand note. [Ex. 7]

Periodic payments were made by the corporation on the Sargetis Note. [Id.] It became delinquent in the spring of 1980. [Id.]

B. The Second Transaction.

Sometime in late April or early May of 1981, Mr. Russell B. Webb, Bank's then president, contacted Stangl with respect to his guaranty of the Sargetis Note. [R. 561]

In his meeting with Mr. Webb of the Bank, Stangl never unequivocally agreed to pay the Sargetis Note off as implied by Bank in its Statement of Facts. [Appellant's Brief, p. 4] Stangl testified both on direct and cross-examination that his memory of the meeting with Mr. Webb was that while he recognized a certain responsibility in the matter, he needed to consult with counsel before he decided what to do about the situation. [R. 607-609; 625-628] Mr. Webb's testimony on the subject was limited and very general in nature. It is as follows:

Q Do you recall the content of your discussion?

A I do not recall the content exactly. I can only assume that the conversation--

Q Well, let me interrupt. I'm not asking you to assume. I'm asking you to give us your best recollection.

A All right. We discussed the past due loan and what direction we should take in satisfying the obligation. As I recall, it was indicated that Mr. Sargetis had not assets, or if he did, they were very limited. That the company no longer existed. That Mr. Sargetis was not in a position to pay the note. And that Mr. Stangl, as the guarantor, would have to accept the responsibility for paying it.

Conversation again, to the best of my recollection, revolved around how Mr. Stangl would be able to take care of this note. As I recall he was very cooperative and agreed that he had a responsibility. Suggested that he was not in a position at that time to pay the obligation in full and requested a repayment program which called for a specific amount, I think, within 60 or 90 days, half of it was I recall. And the other half within a year. That is to the best of my recollection.

Q Okay. In this conversation who were the parties present, to the best of your knowledge?

A To the best of my knowledge, it was Mr. Stangl and myself.

Q And was this held at what location?

A At the bank office.

Q Did you have any further conversations with Mr. Stangl?

A I do not recall any specific conversations with him after the initial meeting. However, there probably was another meeting at which time the transaction was consummated.

[R. 561-562]

Upon consultation with his counsel, Stangl was advised that he had substantial defenses to the guaranty and could elect to

litigate the issue if he desired. [R. 678] Stangl decided instead to negotiate with Bank to see if the matter could be settled amicably. [Id.]

After Stangl had consulted with his counsel, Bruce A. Maak, the mechanics of the transaction and all further substantive conversations and dealings were between lawyers Maak and Dearing (who represented Bank). [R. 567-568; 589; 609; 629]

The documents reflecting the legal structure of this transaction were initially prepared by either Bank or its counsel. [R. 678-679] The essence of the structure was that Stangl would purchase the Sargetis Note and his Guaranty by giving Bank a new personal note (herein, "Stangl Note") for the balance due on the Sargetis Note, bring the past due interest current and forego any suit or claim against his Guaranty. [R. 662-676; Ex's 1, 2, 4, 10 and 21] Mr. Maak suggested some revisions and clarifications to the Bank's draft documents, but in his legal judgment those requested changes did not alter the overall legal effect of the transaction. [Id.] Stangl never made the decision to seek recourse against Bank on the Sargetis Note until Bank forced the issue in August of 1982. [R. 616] At no time did either Stangl or his counsel establish as a condition to the transaction that Bank had to indorse the Sargetis Note with recourse. That is simply the way it worked out. The concept of indorser's liability was never discussed--either

between Stangl and Webb or Maak and Dearing. The subject simply did not arise. [R. 510; 642-643; 685-686; 695]

Prior to and after Stangl's purchase of the Sargetis Note from Bank, Stangl looked to NACM as a major source for recovering funds to pay Bank. [R. 614] Both Stangl and his attorney Bruce A. Maak believed substantial funds could be obtained from NACM. It was not until the fall of 1981 that it was discovered Ford Motor Credit Co. had a blanket security interest in the Sargetis assets assigned to NACM. [R. 680-685] A prior search by Mr. Maak at the Secretary of State's office had disclosed no secured parties. [R. 682-683; Ex. 8] Consequently, it appeared that a substantial sum could be recovered from NACM. After purchase of the Sargetis Note by Stangl, his attorney attempted to collect on the Sargetis assets which NACM held, but to no avail. [Id.] Ford Motor Credit Co. and the IRS got all the money.

C. The Suit Below.

In late July or early August of 1982, Bank contacted Stangl respecting payment of the Stangl Note. Shortly thereafter, Stangl effected presentment and demand upon Bank of the Sargetis Note which Bank dishonored. [R. 342] Bank then elected to sue Stangl on his note and seek a further judgment for damages arising from Stangl's alleged fraud in obtaining Bank's indorsement of the Sargetis Note. [R. 2-6; 338-352]

Stangl admitted liability on his note and counterclaimed on Bank's indorsement of the Sargetis Note. [R. 10-16] Bank then sued its lawyers on a third party claim for negligence. [R. 101-105] At trial, Bank obtained judgment against Stangl on his note. [R. 439-442] Stangl was granted a directed verdict against Bank on the fraud claim, was awarded judgment on his counterclaim and was allowed to set-off Bank's judgment against him. [Id.] Bank also obtained a judgment against its lawyers for the full amount of Stangl's judgment. [R. 909] Because the jury found Bank 45% negligent, its ultimate recovery against its lawyers was reduced by that percentage. The lawyers satisfied that judgment and it has not been appealed.

D. This Appeal.

Judgment was entered by the court below on June 19, 1984. Rule 50(b) and 59 post-trial motions were filed by Bank on June 29, 1984. Said motions were never ruled upon. They were voluntarily withdrawn on August 15, 1984. [R. 463] On August 16, 1984, Bank filed a motion pursuant to URCP 73 to extend the time for appeal. [R. 471] Said motion was heard on August 17, 1984 and was granted. [R. 473] The order on said motion was not entered until September 4, 1984. [R. 496] The Notice of Appeal was filed on August 17, 1984. [R. 474] No affidavit was filed or other record made in support of the motion to extend the appeal time. The sole basis for the lower

court's finding of excusable neglect justifying extension of the appeal time was a recital in the order that "there was excusable neglect in that the withdrawal of said post-judgment motion was a mistake and plaintiff simply should have requested a denial of its motion." [R. 497]

#### ARGUMENT

##### POINT I

THIS APPEAL WAS NOT TIMELY FILED.

Unless the order of the lower court extending the time for filing the appeal herein is proper and is further given nunc pro tunc effect, this appeal is untimely.

But for the filing of Rule 50(b) and 59 motions, the Notice of Appeal here should have been filed by July 18, 1984. The post-trial motions terminate the running of the time for appeal until entry in the Register of Actions of an order "granting or denying" such motions. Rule 73(a), URCP. No such order was ever entered in this case. The motions were voluntarily withdrawn by counsel. [R. 463] Upon withdrawal of said motions the appeal time expired. The motion to extend time for filing the appeal was not filed until the day following the withdrawal and the order granting the extension motion was not entered until 20 days after the withdrawal on September 4, 1984. [R. 496] Thus, when the Notice of Appeal was filed on

August 17, 1984, it was out of time and no order extending the filing time had been entered.<sup>1</sup>

Even if we are to assume that the September 4, 1984 order extending the appeal time is to be given retroactive effect, a problem remains because the motion to extend was improperly granted. Per Rule 73(a), URCP the appeal time can be extended only "upon a showing of excusable neglect." When the excusable neglect standard is applied in a jurisdictional context, as here, the standard is necessarily a strict one. Prowswood, Inc. v. Mountain Fuel Supply Co., 676 P.2d 952, 959 (Utah 1984). This court has stated that:

Inadvertence or mistake of counsel does not constitute the type of unique or extraordinary circumstances contemplated by this strict standard.

\* \* \*

a flat mistake of counsel about the meaning of a statute or rule may not justify relief: relief is not extended "to cover any kind of garden variety oversight." Id. at 960.

Here, there is no record whatever to establish a showing of excusable neglect, save and except the recitation in the lower

---

<sup>1</sup>It is the Order, not the minute entry which is the controlling document and which truly embodies the ruling of the court. Cook v. Gardner, 381 P.2d 78, 80 (Utah 1963). Further, an order cannot be given nunc pro tunc effect where it is being used to "revive time for taking a required step in a legal proceeding after the statutory time for doing it has elapsed." Utah State Building Board v. Walsh Plumbing Co., 399 P.2d 141, 144 (Utah 1965).

court's order that "withdrawal of the . . . motion was a mistake and plaintiff simply should have requested a denial of its motion." [R. 497]

Thus, we have a simple mistake of counsel in reading the Rules of Civil Procedure as the sole justification for excusable neglect to support extension of the appeal time. This court has found such a mistake to be insufficient. Id. The lower court thus abused its discretion in extending the appeal time; consequently, this appeal is untimely and should be forthwith dismissed.

## POINT II

### BANK MAY NOT RAISE AND ADVANCE ARGUMENTS FOR THE FIRST TIME ON APPEAL.

It is axiomatic that matters not presented to the trial court may not be raised for the first time on appeal. Franklin Financial v. New Empire Development Co., 659 P.2d 1040, 1044 (Utah 1983). All of the arguments raised by Bank under Point I of its brief on appeal (Appellant's Brief, pp. 9-17) are advanced for the first time on appeal. They were not framed, briefed or argued at the trial level. Thus they may not properly be considered here. Id.

However, even if such arguments were properly raised and advanced, they are without merit.



**A. Bank Has No Rights Under The Guaranty.**

Bank claims that under principles of equitable subrogation it is entitled to recover from Stangl once it reacquires and pays the Sargetis Note because Stangl guaranteed that note.

First and foremost, the guaranty instrument is a separate and distinct instrument from the Sargetis Note. [Cf. Exhibits 1 and 2] The note makes no mention of the guaranty and is a fully enforceable and negotiable instrument separate and distinct from the guaranty. [Ex. 1] Stangl acquired the guaranty, is the owner of it and Bank has no rights whatever under it. Concurrently with Bank's becoming liable on the Sargetis Note by indorsement, it assigned away to Stangl any and all rights it may have had under the guaranty. [Ex. 2]

In addition to the argument that Bank cannot enforce a guaranty it does not own or hold, three additional arguments bar Bank's subrogation claim. First, subrogation is an equitable remedy. Simson v. Bilderbeck, Inc., 417 P.2d 803 (N.M. 1966). Bank elected here to bring an action at law for damages and, as noted above, did not plead a subrogation claim below.

Secondly, Bank fails to draw the distinction between the situation where a co-maker discharges an obligation and seeks recovery against the other maker, and the case at bar where an indorser seeks recovery from an accommodation guarantor who has since reacquired his guaranty. None of the cases cited by Bank

at pages 10 and 11 of its brief deal with a fact situation similar to the instant case. For example: N.J. Gendron Lumber v. Great Northern Homes, Inc., 8 Mass. App. Ct. 411, 395 N.E.2d 457 (1979) [plaintiff owned the guaranty and was originally the guaranteed party]; Halpin v. Fankenberger, 644 P.2d 452 (Kan. 1982) [action by co-guarantor against co-guarantor and creditor; no indorsement involved; action against creditor failed]; Simson v. Bilderbeck, Inc., supra [suit by accommodation maker against maker; no guaranty or indorsement involved]; Moyer v. Colyer, 283 P.2d 815 (Okla. 1955) [a lien priority action between a guarantor who had satisfied a debt and taken possession of collateral and a third party judgment creditor seeking attachment of the collateral].

Finally, the promissory note has merged into the judgment entered in this action and no longer exists as an instrument upon which a subrogation claim may be based. Yergensen v. Ford, 402 P.2d 696, 697 (Utah 1965). If Bank had wanted to pursue this avenue it would have had to voluntarily pay the Sargetis Note, reacquire the same prior to judgment being entered upon it and then pursue its theory. This it did not do. The rule of merger is a laudable one because without it litigation would never end. Here, the Sargetis Note was reduced to judgment, merged into the judgment and lost its

character as a promissory note. Bank may not revive it and pursue further claims based thereon.

B. Bank Has Not Been Discharged.

Bank also argues that Stangl's acquisition of the Sargetis Note operated to discharge it by virtue of the operation of UCA § 70A-3-208 (1953). This argument, raised for the first time on appeal, must fail. Where the guaranty in question is a separate contract and is not negotiated with the note, by its own terms the statute is inapplicable. In order for the discharge provisions of § 3-208 to apply, the transaction must involve an "instrument" as defined by § 3-102 and the reacquiring party must have been a "party" to such instrument. The instrument in question here is the Sargetis Note. Stangl was not a party to that note--the parties were Empire State Bank and John Sargetis Fine Cars, Inc. dba John Sargetis Ford, Inc. Bank has cited two cases for the supposed proposition that a "party" to the instrument (note) includes those executing separate guarantys for purposes of § 3-208. The cases cited are: Commerce Bank of St. Louis v. Wright, 645 S.W.2d 17 (Mo. App. 1982) and Provident Bank v. Gast, 57 Ohio St. 2d 102, 386 N.E.2d 1357 (1979). Those cases do not stand for the proposition cited. They do not even deal with the code section in question. Rather, they are cases involving the definition of "party" under § 3-606(1)(b) of the UCC which deals with the

question of whether a guarantor, co-maker or surety is discharged from their obligations when the holder releases or otherwise impairs collateral securing a note. They are fundamentally inapplicable here. A simple reading of § 3-208 leads one inexorably to conclude that it does not apply because Stangl was not a party to the Sargetis Note.<sup>2</sup> It is unnecessary to address cases dealing with other statutes that say black is white. The fact is: Stangl was not a party to the Sargetis Note, he did not sign it and thus the cited statute does not apply.

C. Bank Is Not An "Accommodation Indorser."

The final commercial argument raised for the first time on appeal by Bank is that Bank was an accommodation indorser and therefore cannot be held liable to the accommodated party, citing UCA § 70A-3-415(5). The simple answer to this argument is that Bank was not an accommodation indorser. Bank owned the note. It was selling the note to Stangl in exchange for a new note with him as maker. Generally, if you are in the chain of title, the presumption is that you are not an accommodation party. Likewise, if you are not in the chain of title, the

---

<sup>2</sup>Under the UCC, in order to be liable to the holder of an instrument your signature must appear on it. UCA § 70A-3-401 (1953).

presumption arises that you are an accommodation party. See, UCA § 70A-3-415(4) (1953). Here, Bank is in the chain of title. It received consideration for the indorsement (a new note), and it has advanced no evidence or theory to show it was an accommodation indorser.<sup>3</sup> Its argument must fail.

### POINT III

THE LOWER COURT DID NOT ERR IN GRANTING A  
DIRECTED VERDICT IN FAVOR OF STANGL.

To place the ruling of the trial court in proper perspective, it is critical to analyze just what the Bank was trying to accomplish with this lawsuit and how it was trying to do it. Bank's complaint sought collection on the Stangl Note and set forth a fraud claim for damages. Stangl admitted liability on his note and counterclaimed on Bank's indorsement of the Sargetis Note. Bank raised defenses of mistake, lack of consideration and lack of good faith. No affirmative equitable relief was ever sought. This action was brought as a case at law for damages. Bank sought to keep the benefit of its bargain (the new Stangl Note) and yet to avoid any liability on the Sargetis Note it indorsed which was used to purchase the

---

<sup>3</sup>The burden of pleading and proof is upon the party claiming accommodation status. Hanson v. Cheek, 10 UCC Rep. 670, 475 S.W.2d 526 (Ark. 1972).

Stangl Note. Bank never offered to unwind this transaction and start over. Rather, it sought to selectively enforce those portions of the transaction it liked and to selectively avoid those aspects of the transaction which it disliked. It has elected to affirm the contracts which the alleged fraud concerned (the Sargetis and Stangl Notes) and pursue its fraud claim for damages. See, Estate Counseling Service v. Merrill, Lynch, Pierce, Fenner & Smith, 303 F.2d 527, 531 (10th Cir. 1962); Dugan v. Jones, 615 P.2d 1239, 1247 (1980). Hindsight has proven Bank's election to have been unwise. No fraud was proven. However, this does not give Bank the right to claim error, appeal the decision of the court below and bring its claim anew on a different theory.

A. The Claim Of Fraud.

The claim by Bank as to just what constituted the alleged fraud has never been very clear. Early in the case the emphasis seemed to be that perhaps it was lawyer Maak who had deceived lawyer Dearing. However, as evidence was adduced it became apparent that this was not so as the first draft of documents from Bank and its counsel had the same legal effect as those generated after Mr. Maak's involvement. Mr. Maak had no input whatever in the first draft and had not actively negotiated the deal with Mr. Webb at the Bank. The legal die was cast prior to Mr. Maak's involvement. So, if a fraud

occurred which distorted that legal structure it must have been between Stangl and Mr. Webb.

Mr. Webb's complete recollection of his negotiations with Stangl are set forth verbatim, supra at 4. Stangl's recollection concerning the negotiations are found in the record at pages 625-628. A reading of this testimony readily indicates that no misrepresentations of any kind occurred in these negotiations. Bank has conceded this point as its fraud argument treats this as an omission case claiming Stangl failed to disclose the whole truth. [Appellant's Brief at 19] An omission case will lie only where there exists a duty to speak. Such a duty will not be found where the parties deal at arms length and where the underlying facts are reasonably within the knowledge of both parties. Sugarhouse Finance Co. v. Anderson, 610 P.2d 1369, 1373 (Utah 1980).

Here, indorsement of the note was never discussed. The subject never arose. As noted previously, the legal structure of the transaction was a matter negotiated between counsel. Stangl had given his lawyer full authority to negotiate and structure the deal. Stangl was not advised by his counsel that he had the legal right to go against Bank until he was driving to the Bank with his lawyer to close the deal. [R. 612] He did not have a duty to disclose something to Mr. Webb he never even became aware of until a week later. Further, Bank first

came up with the unrestricted indorsement idea. And it did so without any suggestion or prompting by Stangl or his lawyer. In effect, Bank is saying that Stangl had an affirmative duty to advise Bank of the legal effect of instruments which Bank and/or its counsel prepared when both parties were represented in the transaction by legal counsel. Such is not the law of Utah. Bank was obliged to take reasonable steps to protect its own interests. Jardine v. Brunswick Corp., 423 P.2d 659 (Utah 1967). Stangl did not have an affirmative duty to protect Bank from its own negligence--which is what the jury finally found as a matter of fact and law was the proximate cause of its loss. [R. 903-904]

When reduced to its essence, Bank's fraud claim is that Stangl, having decided he wanted to purchase the Sargetis Note, had to disclose in advance to Bank all uses to which the note might be put in the future, even though Stangl himself did not know. Or, in the alternative, that Stangl had an affirmative duty to advise Bank of the legal effect of its own papers even though Bank was represented by counsel.

Bank cites Berkeley Bank for Co-Ops v. Meibos, 607 P.2d 798 (Utah 1980) for the proposition that Stangl had a duty to tell Bank what he intended to do with the Sargetis Note. As stated above, at the time he was negotiating with Webb, Stangl did not know Bank would have indorser liability--the subject was not



discussed and the documents were not prepared. Further, Stangl never himself decided to enforce the indorsement until circumstances compelled the decision in August of 1982. [R. 616] One cannot misrepresent an intent which does not exist. The Meibos case is thus inapposite. If no future intention respecting a given subject even exists, it is impossible to misrepresent that intention.

Once Stangl did learn of his rights respecting the indorsement by Bank, the negotiations were over and the deal was struck. Counsel, with full authority, had reached a compromise where each party had altered their respective positions in order to settle a dispute. Bank now obliquely suggests that Stangl had a duty to then step forward and advise Bank that it should perhaps try to improve its bargain. As noted previously, no such duty exists. Further, given the sequence of events the alleged fraud would not have occurred contemporaneously with the preparation and execution of the instruments and would not have been made to one "unable to judge of its true construction." Gadd v. Olson, 685 P.2d 1041, 1044 (Utah 1984). Thus, no claim of fraud will lie.

Finally, and critical to the duty question here is that this transaction was between sophisticated businessmen who were represented by counsel at all critical stages of the deal. Bank and its counsel were the experts in commercial paper

they dealt in it daily. It was an arms length transaction between parties to a dispute where the posture was adversarial. For this court to require lawyers on opposite sides of a question to disclose their legal theories and intentions to the other side would in effect require them to represent both sides to a dispute at the same time. In fact, an ethical duty exists which prohibits such conduct. The lower court properly ruled that no fraud had been shown.

B. Bank Is Collaterally Estopped To Claim Fraud.

As noted above, the jury found that the proximate cause of Bank's loss was the negligence of Bank and its lawyers Kirton & McConkie. That verdict was not appealed and the judgment on the verdict has been satisfied. By continuing to assert its fraud claim Bank now argues in effect that the cause of its loss was the fraud of Stangl. It cannot be both. The damages claimed for the fraud are identical to those claimed for the negligent acts of Kirton and McConkie. [R. 910-914] Where Bank has chosen to accept the benefits of the judgment against its lawyers rather than appeal, it has lost its right to assert Stangl's alleged fraud as the cause of its loss. The issue of ultimate fact (i.e. the cause of Bank's loss) has been fully and finally adjudicated. Bank has benefitted from such determination and is now collaterally estopped from repudiating the

finding in order to re-litigate the identical issue against Stangl. Searle Bros. v. Searle, 588 P.2d 689 (Utah 1978).

C. Intent To Pay The Stangl Note.

Stangl has never questioned his obligation to pay the Stangl Note. Liability was admitted in the answer [R. 11, ¶ 8] and again in the Pre-Trial Order. [R. 341, ¶ 5] Bank's claim that Stangl misled Bank on his intention to pay the Stangl Note is simply not supported by the record. In point of fact, Bank obtained a judgment on the note. [R. 440] Stangl has paid that judgment by setting off \$192,019.32 of the amount owed to him by Bank. [Id.] Bank's argument that Stangl never intended to pay his note finds no support in this case.

D. The Conditional Delivery Argument.

Bank suggests that the Sargetis Note was delivered to Stangl for a limited or conditional purpose and therefore Bank is not liable on its indorsement.

The argument is new, having been raised for the first time on appeal. Also, it finds no evidentiary support in the record whatever. Even under Bank's cases, it would be incumbent upon Bank to plead and prove a collateral agreement in order to rebut the express terms of the indorsement itself. UCA § 70A-3-414 (1953). Bank has not done this. The evidence does not even suggest or hint that such an agreement was reached or even discussed. This argument must fail.

E. Reformation and Rescission.

Bank would apparently like to change its entire theory of this case on appeal and seek equity. It is too late. The remedy of damages has been elected. Bank elected to sue on the Stangl note and obtained a judgment in its favor. It further elected to sue its lawyers for negligence, and it collected from them. It cannot now keep the fruits of that election and seek only to rescind or reform that portion of the transaction which, with benefit of hindsight, appears detrimental. See, Dugan v. Jones, supra.

Further, mistake of fact was raised only as a defense to the counterclaim. Thus, it may be used only as a matter of avoidance to the claim - not as a vehicle for affirmative equitable relief.

Bank suggests its joinder of a claim for declaratory relief gives the court the latitude to grant equitable remedies. This is not true. A declaratory action will not lie where the purpose is to determine the sufficiency of legal defenses to a pending action. Royal Indemnity Co. v. McFadden, 65 Ohio App. 15, 29 N.E.2d 181 (1940). A declaratory action is not to be used as a substitute for actions at law or in equity where a remedy is available. Grosse Pointe Shores v. Ayres, 254 Mich. 58, 235 N.W. 829 (1931); Anno., Declaratory Judgments, 87 ALR 1205, 1221; 22 Am. Jur. 2d Declaratory Judgments, § 16. It was

thus proper for the lower court to dismiss the declaratory count as it was redundant and improper under the circumstances. The defenses to the counterclaim were addressed on their merits and the lower court obviously found them insufficient as a matter of law.

F. Lack Of Consideration.

Bank's claim on this point continues to ignore the evidence in this case. Stangl gave a new note with him as maker to purchase the Sargetis Note. [Ex. 10] He also paid \$8,104.39 to bring the interest current on the Sargetis Note. [Ex. 21] He gave up defenses his lawyer thought he had to the guaranty. [R. 678] Any one of these items constitutes sufficient consideration to support the indorsement. Dern Inv. Co. v. Carbon Co. Land Co., 75 P.2d 660, 664 (Utah 1938); Restatement, Second, Contracts § 74 (1981). Also, if there is no consideration for the Sargetis indorsement then likewise there is none for the Stangl Note and this whole case is moot. In point of fact, adequate consideration as described above existed to support the entire transaction.

G. Good Faith.

Bank suggests that state of mind - the absence or existence of good faith - is an element to a negotiable instrument case. The authority Bank cites for the proposition does not support

it. The idea is counter to the basic notions of commercial transactions.

Commercial intercourse as we know it would screech to a halt if a party's state of mind (lack of good faith if you will) became a defense to a promissory note. Commercial paper would be rendered meaningless. Every action to enforce a note would involve a foray into "the intention of the parties" at the time the paper was created. The parole evidence rule would be circumvented, the statute of frauds avoided.

State of mind in a contract case is irrelevant. The absence of good faith is not a defense to a promissory note. And then, of course, there is no evidence here that Stangl was dishonest or did not act in good faith when the deal was made.

#### POINT IV

STANGL IS ENTITLED TO RECOVER HIS ATTORNEY'S FEES.

At the trial level, Stangl was denied recovery of his attorney's fees. [R. 445] Said denial was based solely on grounds of "equity." [Id.]

The claim for fees by Stangl was legally based upon the provisions of the Sargetis Note which provided for the recovery of such fees. [Ex. 1]

The position of Stangl was and is that where the contract (i.e. the Sargetis Note) provides for the recovery of such

fees, the discretion of the trial court is bounded only by the reasonableness and the amount of such fees - and that discretion does not extend to the issue of whether the trial court can choose not to award fees in the first instance.

In Jenkins v. Bailey, 676 P.2d 391, 392 (Utah 1984), this court held that where the parties have agreed by contract to the allowance of attorney's fees and where the evidence as to such fees is essentially undisputed, the trial court should award the fees. This court noted that where the parties have entered an arms-length transaction regarding such fees, the court should not ignore it. [Id.] This is the general rule. On occasion, this court has made exception - however, none of them apply here. For example, see: Fullmer v. Blood, 546 P.2d 606 (Utah 1976) [Plaintiff lost primary issue in the case and received substantial forfeiture in addition]; Fireman's Insurance Co. v. Brown, 529 P.2d 419 (Utah 1974) [Both parties had breached contract and the court essentially effected a set-off]; American Gypsum Trust v. Georgia-Pacific Corporation, 542 P.2d 658 (Utah 1973) [Trial court found against plaintiff on major issue in the case].

In the instant case, none of these exceptions exist. Stangl prevailed below and is entitled to prevail on appeal. Bank did not win a major contested issue. The contract is clear. The evidence respecting the reasonableness of the fees

is not seriously disputed. [R. 319-320; 325-337; 435-438]  
Stangl should be awarded his attorney's fees for the case below  
and on appeal.

#### CONCLUSION

This transaction began as a disputed matter between two parties represented by counsel. The matter was negotiated at arms length. Thereafter, the factual circumstances changed. The expectation that Stangl would be able to recover a substantial amount from NACM was not fulfilled. Bank became disenchanted when the legal effect of the settlement and compromise was pursued to effect by Stangl. It claimed fraud and sought to retain its benefit from the compromise and disavow its detriment.

The lower court found no evidence of fraud. The record discloses none. No evidence supports Bank's defenses. Many defenses were not raised below. Those which were raised were not proved. By accepting the benefits of its third party judgment, Bank is collaterally estopped from repudiating the jury's finding and re-litigating the causation issue which supported its \$108,000 recovery from the third party defendant.

Finally, Stangl should be entitled to recover his attorney's fees against Bank because: the contract provided for recovery; Bank failed to prevail on any significant contested



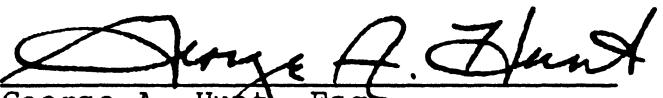
issue; the amount was essentially undisputed and the trial court should not have rewritten the agreement between the parties on this point.

Respectfully submitted this 27<sup>th</sup> day of November, 1984.

SNOW, CHRISTENSEN & MARTINEAU

By   
Harold G. Christensen, Esq.

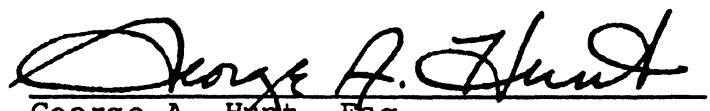
- and -

By   
George A. Hunt, Esq.  
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 27<sup>th</sup> day of November, 1984, I caused two (2) copies of this Brief of Respondent to be served upon opposing counsel by depositing the same in the U.S. Mail, postage prepaid and addressed to:

Stephen B. Mitchell, Esq.  
Burbidge & Mitchell  
139 East South Temple  
Suite 2001  
Salt Lake City, UT 84111

  
George A. Hunt, Esq.