1985

Walton v. Tolaman : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

KENT L. WALTON, 20627 Plaintiff/Appellant & Cross Respondent, vs. R.C. TOLAMAN and R.C. TOLMAN CONSTRUCTION, INC., A Utah Corporation, Defendant/Respondent & Cross Appellant.	Case No. 20627

APPELLANT'S BRIEF

APPEAL FROM FINAL JUDGMENT OF
THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR DAVIS COUNTY, STATE OF UTAH

HONORABLE DOUGLAS L. CORNABY, JUDGE

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STATUTES WHOSE INTERPRETATION IS DETERMINATIVE

UTAH CODE SECTION 61-1-22(1) (a) and (b)

Section 61-1-22(1)(a) and (b) is set forth in its entirety on page 9 herein.

UTAH CODE SECTION 61-1-3(1)

It is unlawful for any person to transact business in this state as a broker-dealer or agent unless he is registered under this chapter.

UTAH CODE SECTION 61-1-13(15)(a) and (5)

(a) "sale" or "sell" includes every contract for sale of, contract to sell, or disposition of, a security or interest in a security for value.

A. STATEMENT OF FACTS

The Plaintiff Kent L. Walton brought this action under the Utah State Securities Laws (Utah Code Section 61-1-1 et. seq.) seeking to recover $15,000 that he invested in Vasilacopulos and Associates. Following a jury trial before the Honorable Douglas L. Cornaby in the Second Judicial District Court, Davis County the jury returned a set of Special Interrogatories finding that "the Vasilacopulos and Associates Interest" purchased by Mr. Walton was a security, (TR. 418-419) but finding that R. C. Tolman did not sell a Vasilacopulos and Associates interest to Kent L. Walton for $1,000 on October 7, 1981 or for $14,000 on November 5, 1981 (TR. 419). Accordingly, judgment was entered for the Defendant.

Prior to the time that the Court instructed the jury, the Plaintiff submitted two proposed jury instructions dealing with the meaning of the word "sell". Those instructions were denied. Those instructions stated:

> "You are instructed that under Utah State Securities Law that "sell" is defined to include contracts for sale of, contract to sell or disposition of a security or interest in a security for value."
>
> Source:
> 1. Utah Code Annotated 61-1-13(15)(a)

The Court then instructed the jury, over the Plaintiff's objection (TR. 414 and 415) that:

"You are instructed that in order to find R. C. Tolman "sold" any security to Walton you must find that his conduct was the proximate cause of any sale, that is, his conduct and participation was a substantial factor in bringing about any actual purchase and sell transaction. (see Jury Instruction No. 18) (Emphasis Added)

The proximate cause of an event is that cause which, in natural and continuous sequence, produces the event. It is the efficient cause--the one that necessarily sets in operation the factors that acconplish the event. (see Jury Instruction No. 19) (Emphasis Added)

You are instructed that R. C. Tolman cannot be held legally responsible for Walton's losses from his purchases of the investments in question if Tolman merely participated in the purchase and sale transactions as an agent of Vasilacopulos without actually "selling" the investments to Walton as that term has been defined for you in these instructions. (see Jury Instructions No. 22) (Emphasis Added).

B. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO INSTRUCT THE JURY AS TO THE MEANING OF "SELL" PURSUANT TO UTAH CODE ANN. § 61-1-13(15)

1. MATTERS ADMITTED BY DEFENDANT AT TRIAL.

In order for the Court to evaluate the Plaintiff's arguments it is necessary for the Court to understand additional facts. During the course of the trial Mr. Tolman testified as to his involvement with Vasilacopulos and Associates and with the Plaintiff, Kent L. Walton. The following facts are drawn exclusively from the testimony of R. C. Tolman unless it is otherwise indicated.

During 1981, R. C. Tolman served as a Salesman for Vasilacopulos and Associates (TR. 3). In that capacity Tolman received a commission of 10% of the Vasilacopulos and Associates interests that he sold. (TR. 4). Investors were told that under the Vasilacopulos and Associates plan, an individual would invest money in Vasilacopulos and Associates. That money would be taken by Mr. Jon Vasilacopulos, who would purchase large quantities of diamonds at

wholesale prices (TR. 21). Thereafter those diamonds would be resold and the profit paid to the Investors (TR 22) after about four weeks time (TR. 10). The return on that investment was reported to be approximately 30% per month (TR. 9). If the investors desired, they could hold diamonds as collateral or security for their investment (TR. 10, 19, 327). Very few of the investors actually took the diamonds (TR. 89).

On August 14, 1981, Tolman opened an office of Vasilacopulos & Associates in Centerville, Utah (TR. 3). That office was located in the office of R. C. Tolman Construction, Inc. (TR. 4) and Mr. Tolman was the manager of that office (TR. 4 and 6) and a full time employee for Vasilacopulos (TR. 78,79). Tolman was the only salesman for Vasilacopulos & Associates located at the Centerville Office (TR. 6). In August 1981, Mr. Tolman hired Lana Townsend as a secretary. Ms. Townsend was paid by checks drawn on the account of R. C. Tolman Construction, Inc. (TR. 80, 133) but worked solely for Vasilacopulos & Associates (TR. 81)

From August 14, 1981 until Novemeber 6, 1981 approximately 1100 people (TR. 78) invested 2 million dollars in Vasilacopulos & Associates through the office of R. C. Tolman Construction (TR. 386). Each week the Centerville office received between $100,000 and 300,000 from investors (TR. 91). Mr. Tolman received or was entitled to receive a 10% sales commission on the entire sum, (TR. 138) and all that money came through Tolman (TR. 76). During that period of time Mr. Tolman controlled the Centerville office's books (TR. 127) and bank accounts (TR. 62).

From August 1981 through October 1981, Jon Vasilacopulos made withdrawals from the Centerville account (TR. 63). Prior to October

6, 1981, M4. Vasilacopulos had withdrawn 1.5 million dollars from the Centerville office bank account without returning any funds to the Centerville office (TR. 384). Tolman knew that fact when he first met with Walton but did not inform him of that fact (TR. 385). Prior to November 5, 1981, Vasilacopulos had withdrawn approximately $1,854,000.00 from the Centerville office bank accounts (TR. 386). Mr. Tolman knew this fact (TR. 391) since he had established a system to monitor Mr. Vasilacopulos' withdrawals from the Centerville bank accounts (TR. 63 and TR. 391).

Vasilacopulos never returned a single penny to the Centerville account (TR. 65, 75) despite the fact that the Vasilacopulos plan called for diamonds to be bought and sold every four weeks (TR. 389). The fact that Vasilacopulos never returned any profits concerned Tolman (TR. 389) but despite the fact that the Centerville office's bank account had become depleted by Vasilacopulos' withdrawals (TR. 390) Mr. Tolman did not tell those who invested after the end of October 1981, that the bank account of the Centerville office of Vasilacopulos & Associates was empty (TR. 390).

Tolman first met with the Plaintiff, Kent L. Walton on October 6, 1981. At that meeting Tolman explained the "Vasilacopulos plan" to Walton. (TR. 65, 77). Tolman told Walton that the venture "should be looked upon as high risk" (TR. 65, 66). This was the same thing that Tolman told all investors (TR. 77) (See also testimony of Kent L. Walton) (TR. 203-206). According to Mr. Walton, Tolman told him that he would receive 30% per month (TR. 204) (Compare with Tolman testimony at TR 9). Tolman also informed Walton that an investor could "hold diamonds" to cover his investment.

(TR. 205). Thereafter, on October 7, 1981, Walton delivered a cashiers check to Tolman in the sum of $1,000 (Tolman, TR. 72-77) and Tolman delivered a receipt to Walton, personally signed and prepared by Tolman, for that $1,000 (TR. 77, 78 and Plaintiff's Exhibit No. 2). Thereafter, on November 5, 1981, Walton delivered a check in the sum of $14,000 to Centerville office (TR. 83, 84)

During the period of time between late September 1981, and the end of October 1981, Vasilacopulos & Associates collapsed (see generally TR. 34-55). In late September 1981, Tolman attempted to purchase "collateral" diamonds from United Investment Reserve in California (TR 34). (These diamonds were to be held by the investors to protect their investment (TR. 28-30)). The "collateral" diamonds were different than the diamonds that were allegedly purchased and sold by Vasilacopulos to generate a profit (TR. 23). United Investment however, refused to ship Tolman any diamonds even though Tolman had wired United Investment $300,000 for those diamonds since Vasilacopulos & Associates stilled owed United Investment at least $300,000 from a previous purchase. (TR. 34-37) Mr. Tolman was aware of that fact (TR. 37).

On October 23, 1981, Tolman paid out the last of the funds in the Centerville account (TR. 132-134). On October 24, 1981, the Deseret News published an article alleging that the price of diamonds had dropped drastically and that it was impossible for people to make 30% per month on a commodity that had been dropping for a year. (See TR. 30, 43 and Plaintiff's Exhibit No. 6) The article also implied that the diamond investment plan was a "ponzi scheme" (See Plaintiff's Exhibit No. 9). In connection with the last

allegation it is interesting to note the manner in which Tolman ran the Centerville bank account. (TR. 91). Tolman read that article (TR. 58). Following the publication of the article many of Vasilacopulos' investors requested the return of their money. Because the funds had been depleted a high number of investors, perhaps as many as 150 investors, did not receive any return of their investment. (TR. 51) At that time investors were coming into the Centerville office every day asking for the return of their money (TR. 53), none of the investors were paid their money in November of 1981 (TR. 51). Thereafter, on November 2, 1981, Tolman refused to allow any new investors to invest in Vasilacopulos & Associates (TR. 64) because the office was out of diamonds and funds (TR. 65). Prior to that time Tolman had been "hounding" Vasilacopulos to get him additional funds and diamonds (TR. 65). Thereafter, on November 5, 1981, Kent Walton delivered a check in the sum of $14,000 to the Centerville office (TR. 83, 84 and Plaintiff's Exhibit No. 4). That deposit was made late in the afternoon of November 5, 1981 (Walton, TR. 209). In the first week of November 1981, Tolman received $38,200. (TR. 401). All of that money came from previous investors (TR. 402). At least some of that money went to pay R. C. Tolman the commissions for the Vasilacopulos sales (TR. 93, 94). The November commission may have been in excess of $30,000 (TR. 94). In all Tolman, his wife and company were paid the sum of $201,847.00 by Vasilacopulos & Associates (TR. 409). That sum represents $63,419.00 above any investment made by Tolman in Vasilacopulos & Associates (TR. 413) or an annual commission in excess of $243,000.00.

During the last few weeks in October 1981, Tolman became very

concerned about the financial condition of Vasilacopulos & Associates. On October 28, 1981, Tolman wrote to Vasilacopulos as follows:

> Dear Jon,
>
> Enclosed find the article by Deseret News dated October 24, 1981. The article is having a bad effect on the Centerville bank account; it is overdrawn at the present. The $250,000 you withdrew from the account on October 8, 1981 and the $200,000 you withdrew on October 15, 1981 has left this office without funds to operate on. I have kept very good records of what is owed your diamond purchasers, but the effect of the said article is causing may of the diamond purchasers to want their money back.
>
> I am requesting money from you on the diamond sales as our funds are depleted. Money is needed to pay the returns to the many people who are demanding their cash returned at this time. I have not received any monies to pay what is needed. I am having to make excuses to the people which is causing me personal discomfort. I am puzzled as to what the delay would be. If there is a problem with funding or selling the diamonds I need to know. Otherwise, I have nothing to tell them and they are suspecting the worst.
>
> I am only a commissioned salesman for your organization and I am on the firing line with the diamond purchasers. Please let me know immediately if what they suspect is true.
>
> Sincerely,
> R. C. Tolman

See Plaintiff's Exhibit No. 7. The next day (October 29, 1981), Tolman wrote to Vasilacopulos as follows:

> Dear Jon,
>
> I have worked for your organization since January 1981. We have been very successful in obtaining a large number of diamond buyers. My arrangement with you was to receive 10% commission on all new accounts. I have kept a good account of all the prople and their deposits. I have not been able to keep current on my earned commissions because of lack of funds. I have approximately $70,000 commissions due me. I was able to deduct small amounts of my commission from the Vasilacopulos and Assoc. account from time to time, but because of the present drain on funds I am concerned about being paid all I am owed. It is important to me to be more current and up-to-date with the commissions. I have requested more current funds, but none are forthcoming. I cannot

get in touch with you by phone, so I have written this letter. Please help me out!

Sincerely,

R. C. Tolman.

See Plaintiff's Exhibit No. 7.

Concerning the last week of October 1981, and the first week of November 1981, Mr. Tolman Testified:

Q. So actually the money ran out on October 23rd, didn't it?

A. Well, These --

Q. Not money that came in subsequent. But the money that was in the account prior to that was gone on October 23rd, wasn't it?

A. No, it wasn't all gone. There was deposits that were put into the account after that date.

Q. There were new deposits?

A. Yes.

Q. But the money that had been in the account was depleted, taken to pay off the investors on October 23rd, wasn't it?

A. Yes.

Q. Now, you said you just bit the bullet after this and informed people that the funds were not available. Did you tell them the money was gone; the bank account was empty?

A. That is what it means when you don't have any funds.

Q. And the people you told this to were the people that wanted their money?

A. Yes.

Q. How about the people that were going to pay in money; did you tell them as well?

A. The people that I paid money?

Q. That are paying in the money to Vasilacopulos & Associates; did you say the bank account is empty?

A. No.

Q. Or as of October 23rd, 1981, we paid the last of the money out we had at that time?

A. No, I didn't tell them. (TR. 133, 134)

At trial the Defendant stipulated that neither he nor his company registered as an agent or in any other capacity with the Utah Satate Securities Commission. (TR. 73). At trial the Defendant did not offer any proof that the Vasilacopulos & Associates security was exempt from registration. Indeed, Tolman testified

that he did not know whether or not the Vasilacopulos interest was exempt from registration (TR. 73).

2. UTAH STATUTORY LAW

Section 61-1-22(1) and (2) of the Utah Code states:

> (1) Any person who:
> (a) Offers or sells a security in violation of subsection 61-1-3(1), section 61-1-7 or subsction 61-1-17(2) or of any rule or order under section 61-1-15 which requires the affirmative approval of sales literature before it is used, or of any condition imposed under subsection 61-1-10(4) or 61-1-11(7); or
> (b) Offers, sells, or purchases a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or ommission, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or ommision, is liable to the person selling the security to or buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at 12% per year from the date of payment, costs, and reasonable attorney's fees, less the amount of any income received on the security, upon the tender of the security or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon the tender less the value of the security when the buyer disposed of it and interest at 12% per year from the date of disposition.
> (2) Every person who directly or indirectly controls a seller or buyer liable under subsection (1), every partner, officer, or director of such a seller or buyer, every person occupying a similar status or performing similar functions, every employee of such a seller or buyer who materially aids in the sale or purchase, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller or purchaser, unless the nonseller or nonpurchaser who is so liable sustains the burden of proof that he did not know, and in exercise of reasonalbe care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable. (Emphasis Added)

Section 63-1-3(1) states:

> It is unlawful for any person to transact business in this state as a broker-dealer or agent unless he is registered under this chapter.

An "agent" is defined in Section 61-1-13(2) of the Utah Code as:

> Any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities. "Agent" does not include an individual who represents an issuer, who receives no commission or other remuneration, directly or indirectly, for effecting or attempting to effect purchases or sales of securities, and who: (a) effects transactions in securities exempted by clause (a), (b), (c), (i) or (j) of subsection 61-1-14(1); (b) effects transactions exempted by subsection 61-1-14(2); or (c) effects transactions with existing partners, officers, or directors of the issuer.

An issuer is defined in Section 61-1-13(11) as:

> Any person who issues or proposes to issue any security, or has outstanding security that it has issued.

Black's Law Dictionary defines issue as "to put into circulation; as, the treasury issues notes."

Section 61-1-13(15) defines the meaning of the words "sale", "sell", "offer" and "offer to sell" and gives examples of those terms. Those terms are defined as:

> "Sale" or "sell" includes <u>every</u> contract for sale of, contract to sell, or <u>disposition of, a security or interest in a security for value.</u>
>
> "Offer" or "offer to sell" includes <u>every attempt</u> or offer <u>to dispose</u>, or solicitation of an <u>offer to buy, a security or interest in a security for value</u>. (Emphasis Added)

C. DEFENDANT TOLMAN SOLD THE PLAINTIFF A SECURITY

<u>Summary</u> Both cases decided under Section 410(a) of the Uniform Securities Act and under Section 12(2) of the Federal Security Act of 1933 would hold that the Defendant R. C. Tolman "sold" the Plaintiff a security.

The issue in this action is simply whether the trial court committed reversible error in not advising that the sale of a security included any "disposition of a security or interest in a security of value" pursuant to the definition set forth herein, did Tolman "sell" the Vasilacopulos interest to Walton?

It should be noted that once the Court makes that determination, then judgment should be entered for the Plaintiff and the matter remanded for a determination of Plaintiff's attorney's fees pursuant to Section 61-1-22(1)(a). There is no question that the Vasilacopulos interest constituted a security (TR. 418) and that Tolman did not register as an agent with the Utah State Securities (TR. 73 and Jury Instruction No. 20).

The leading case interpreting Section 61-1-22 is S & F Supply Company v. Hunter 527 P.2d 217 (Utah, 1974) That case however, does not address the issues raised in this action. In interpreting Section 61-1-22, however, the Utah Supreme Court noted that Section 61-1-22 "is sufficiently identical with Section 410(a)(2) of the Uniform Securities Act (U.L.A.), and Section 12(2) of the Federal Securities Act of 1933 that we regard adjudications on those statutes as helpful to us. S & F Supply, Supra, 220 footnote 3.

1. CASES DECIDED UNDER SECTION 410(a) OF THE UNIFORM SECURITIES ACT, (U.L.A.)

Summary: numerous cases decided under Section 410(a) of the Uniform Securities Act have held an agent liable for the "sell" of securities.

Numerous cases have been adjudicated in other states under Section 410 of the Uniform Securities Act (U.L.A.) concerning the meaning of the term "sell". The applicable statutes in these actions define "sell" in the same manner as does Utah under Section 61-1-13(15).

In McClellan v. Sundholm 574 P.2d 371 (Wash. 1978) the Supreme Court of Washington held that a salesman who described the Defendant company's services including selection of silver, storage of bars, advice regarding silver market and resale of silver for purchaser at commission and who advised Plaintiff as to how payment was to be made, had "offered to sell" and had "sold" unregistered security to the Plaintiff pursuant to the Washington State Statute, RCW 21.20.430(1) that made the sale of an unregistered security illegal.

In McClellan the Washington Supreme Court, indiscussing the role of the salesman stated:

> Since there is no question that the security was unregistered, the only remaining issue is which statutory section defines the liability of the respondent. The trial court found RCW 21.20.430(3) applicable. That section defines the civil liability of "every person who directly or indirectly controls a seller or buyer liable under subsection (1) or (2) . . . ." Subsection (1), on the other hand, defines the liability of "any person, who offers or sells a security in violation of any provisions of RCW 21.20.140 . . ." The trial court apparently believed Sundholm did not offer or sell a security, but only directly or indirectly controlled a seller. We disagree.
>
> It is quite clear that Sundholm did offer to sell, and did in fact sell, the security to appellant under the the definitions of "offer" and "sell" in RCW 21.20.005(10). An "offer" is an "attempt or offer to dispose of, or solicitation of an offer to buy" a security. This accurately decribes respondent's sales approach to appellant. The term "sell" includes "every contract of sale of, contract to sell, or disposition of, a security . ." We find the pur-

chase agreement here was a disposition, and therefore a sale, of a security.

Respondent's liability is therefore defined by RCW 21.20.430(1) applicable to any person "who offers or sells a security." (Emphasis Added) (Supra at 374)

In Cola v. Terzano 322 A.2d 195 (N. J. Super. 1974) the purchaser of unregistered corporate stock an action against the salesman who sold her that stock. That salesman was a manager in one of the offices of the corporation whose stock was sold. The salesman in that action explained the investment to the Plaintiff, received a check from her which he forwarded to the corporation and received a commission from that purchase. In discussing the salesman's (Terzano) liability for the sale of the unregistered stock pursuant to a statute that is virtually identical to Utah Code Section 61-1-22(1) the New Jersey Superior Court stated:

> There can be no doubt as to Terzano's liability under N. J. S. A. 49-3-70(a). He was the actual seller who negotiated with Mrs. Cola, made the representations in question, and participated in the actual transfer of funds from Mrs. Cola to I. I. S. (Supra at 200) (Emphasis Added)

In Gaudina v. Haberman 644 P.2d 159 (Wyo. 1982) the Wyoming Supreme Court found an unregistered salesman liable for the sale of unregistered securities under the Wyoming Statutory equivalent of Section 410(a)(1) of the Uniform Securities Act (U.L.A)

In Gaudina the salesman sold the Plaintiffs a "trust contract" through Heritage Trust Company. Those contracts were subsequently determined to be securities by both the S.E.C. and the Wyoming Supreme Court. See Gaudina at 164.

In holding the salesman (Gaudina) liable for violating the applicable Wyoming statutes (Those statutes are identical to Utah Code Sections 61-1-22(a)(1), 61-1-3(1) or 61-1-13(2)), the Wyoming

Supreme Court stated:

> (10) Gaudina was a person unlawfully acting as an agent in the sale of unexempt securities and had not registered as such an agent as required by § 17-117.3, W.S. 1957, C.1965, now §17-4-103, W.S.1977, supra fn.7. This automatically made him civilly liable under §17-117.22(a)(1), W.S.1957, C.1965, now §17-4-122(a)(i), W.S.1977,fn. 7. The various unlawful acts creating civil liability are in the alternative, as underscored. Gaudina was a person who sold nonexempt, unregistered securities in violation of §17-117.7, W.S.1957, C.1965, now §17-4-107, W.S.1977. This also automatically created civil liability under §17-117.22(a)(1), W.S.1957, C.1965, now §17-4-122(a)(i), W.S.1977.
>
> In Cola v. Terzano, 129 N.J.Super. 47,322 A.2d 195 (1974) it was held that the state's Uniform Securities Law was intended to protect the uninitiated and to prevent fraud on the public. All who participated in the sale of an unregistered security, including the salesman, have a civil liability. An agent is is charged with knowledge of the registration requirements and liable for his assistance in the distribution of unregistered securities. The court held that it is clear that liability attaches "by operation of law" to the sale by any person of any nonexempt, unregistered security and gives rise to a cause of action against all those who participated in the sale.
>
> The only facts necessary are that a security was sold, that it was unregistered, and that it was not exempt. Here the security was not only unregistered but it was also sold by an unregistered agent, which also creates civil liability without more. (Supra at 168) (Emphasis added).

2. DECISIONS UNDER SECTION 12(2) OF THE SECURITIES ACT OF 1933.

Summary: Federal decisions under Rule 12(2) of the Federal Securities Act of 1933 support an "expansive" definition of the word "sell" so as to include the Defendant as a "seller" in the present action.

In summarizing the meaning of the word "sell" under Section 12(2) of Federal Securities Act of 1933 it has been stated:

> Liability for violations of either prohibition of section 12 of the Securities Act attaches to one who "offers or sells" a security--the action being brought by the "person purchasing . . . from him." At its

> most basic level, this language depicts a buyer/seller relationship not at all unlike traditional contractual privity. However, section 2(3) of the Act defines "sale" or "sell" to include "every contract of sale or disposition of a security or interest in a security, for value" and the terms "offer to sell," "offer for sale," or "offer" to include "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value." Careful consideration of this provision reveals that any person can make an "attempt to dispose" of a secuirty. Thus, in the case of a passive actual seller who sells through an active agent, the latter can also logically be deemed a "person who sells" within the contemplation of section 12. (Emphasis Added).

Rapp, Expanded Liability under Section 12 of the Securities Act: When is a Seller not a Seller? 27 Case Western Reserve Law Review 445, 450 (1977. See also Loss, Fundamentals of Securities Regulation, 1712.

The foregoing reasoning was adopted in 1940 in Cady v. Murphy 113 F.2d 988 (1st Cir. 1940), cert denied 311 U.S. 705 (1940). In Cady v. Murphy the court dealt with the issue of the liability of Security broker under Section 12(2). At trial the broker argued that the section 12 recission remedy only contemplated a restoration of the status quo between those in strict contractual privity. The trial court rejected that argument stating:

> Whether the seller, being a broker, himself owns the security, or whether he is acting as the agent for the owner, or for the pruchaser, or for both, is immaterial. If, in the course of an attempt to dispose of, or solicitation of an offer to buy a security, he makes false statements under circumstances referred to in Section 12, the purchaser is given a right of action to recover any damages he has suffered on account of the false representations.

Cady v. Murphy 30 F. Supp. 466, 469 (D.Me.1939) The First Circuit Court of Appeals affirmed this analysis stating: "This is not a strained interpretation of the statute, for a selling agent

in common parlance would describe himself as a person who sells, though title passes from his principal, not from him. (Id at 990)

In discussing agent liability under Section 12(2) it was recently stated in Sommerville v. Major Exploration 576 F.Supp 902 (D.S.D.N.Y. 1983) that:

> Nevertheless, although strict privity is not a prerequisite to liability, Plaintiff must establish clearly that Defendant is at least a person acting as the immediate seller's agent, one who is alleged to be a controlling person of the immediate seller; one who actively participated in the sale, either as an aider and abetter or as a co-conspirator, or one under similar circumstances. (Supra at 913) (Emphasis Added).

See also Junker v. Crory 650 F.2d 1349 (5th Cir. 1981)

In Klein v. Computer Devices 591 F. Supp 270, 274 (S.D.N.Y. 1984) it was stated:

> This section [12(2)], as compared with common law recission, provides several advantages to the buyer. For example section 12(2) permits the buyer to pierce the privity requirement that normally prevails in common law recission to the extent of reaching controlling persons, "sellers" who are agents rather than principals, and others who participate in the sale more or less in the criminal aidor and abettor sense. (Emphasis added)

In Lawler v. Gilliam 569 F.2d 1283 (4th Cir 1978) the Fourth Circuit Court of Appeals discussed the meaning of the word "sell" in a factual setting similar to the present action: That action involved an action to recover the amounts paid to purchase unregistered securities. In discussing the meaning of the word "sell" under Section 2(3) of the Federal Security Act of 1933, 15 U.S.C. § 77(b)(3) the Fourth Circuit Court of Appeals stated:

> Section 12(1) imposes liability on any person who "offers or sells" securities in violation of the registration provisions of the Act. These terms are defined

in §2(3) of the Act, 15 U.S.C. § 77b(3):

> The term . . . "sell" shall include every contract of sale or disposition of a security, for value. The term . . . "offer" shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security for value.

These definitions include as sellers or offerors all persons whose actions are a substantial factor in causing a purchaser to buy a security. It is unnecessary to show that the offeror or seller owns the security, for the definitions encompasses any significant participation in the sale on behalf of the actual owner. Liability may be imposed on any person who actively solicits an order, participates in the negotiations, or arranges the sale. (Supra at 1287 and 1288) (Citations omitted and Emphasis Added)

The Defendant argues that he did not "sell" the Vasilacopulos Interest to the Plaintiff. He argues that Walton "sold" himself on the investment. That Walton went to Tolman's office with his "mind made up" (TR. 275). In other words the Defendant is arguing that he is not liable to the Plaintiff because he did not 'persuade" the Plaintiff to purchase the security (TR. 275). Because the Plaintiff had his "mind made up" to purchase the Vasilacopulos security the Defendant argues that he did not "proximately cause" the sale. Defendant ignores the fact that he explained the Vasilacopulos plan to the Plaintiff (TR. 77,78); that he personally received and receipted the Plaintiff's money, that he received a 10% commission on all Vasilacopulos sales (TR. 4), that the company that bore his name permitted Vasilacopulos to use his office (TR. 3); that the Defendant told the Plaintiff he would receive a 30% per month return on his investment (TR. 204, TR. 9); that he personally opened the office at which Walton invested (TR. 3). That he was the only salesman in the Centerville office (TR. 6). That he hired

(TR. 183) and paid (TR. 80, 183) the secretary who receipted the Plaintiff's second check. If Tolman didn't sell the Vasilacopulos security to Walton, who did?

D. PUBLIC POLICY CONSIDERATIONS

In recent years the State of Utah has received much negative publicity for the manner in which the Utah Security industry operates.

The Utah Securities Laws 61-1-1 et. seq. were enacted for the remedial purpose of restoring investor confidence in the financial markets. See generally: Bennett, Securities Regulation in Utah: A Recap of History and the New Uniform Act, 8 Utah L. Rev. 216 (1963). In light of those purposes the Utah Supreme Court recently declared that "Securities Laws are remedial in nature and should be broadly and liberally construed to give effect to their purpose. Payable Accounting Corp. v. McKinley 667 P.2d 15 (Utah, 1983). Similarly, the Utah Supreme Court in S & F Supply Company v. Hunter 527 P.2d 217 (Utah 1974) in discussing the purpose of Section 61-1-22(1)(b). The Utah Supreme Court emphasized the remedial nature of that section.

In this action the jury ruled that the Vasilacopulos Interest constituted a security. The Defendant stipulated that he did not register as an agent or in any capacity with the Utah State Securities Commission. Section 61-1-22(1)(a) and (b) states:

> Any person who offers or sells a security in violation of subsection 61-1-3(1) [making it illegal for one to transact business as an agent unless he has registered with the Utah State Securities Commission] . . . is liable to the person buying a security from him . . .

Obviously an unregistered agent can be held liable for selling a security that does not belong to him. Otherwise why would the legislature, by reference, refer to agents in that subsection if the Defendant's definition of "sell" is adopted an unregistered agent could sit in his Utah office constantly selling securities just so long as he didn't sell to anyone who wasn't already "sold" on the particular security. Clearly such a result is ridiculous. The purpose of requiring the registration of agents is to protect the public. Such a purpose requires a general registration. Clearly the statutes purpose can only be accomplished if the definitions of the word "sell" and "offer to sell" are broad. Hence, the definitions set forth in Section 61-1-13(15)(a).

CONCLUSION

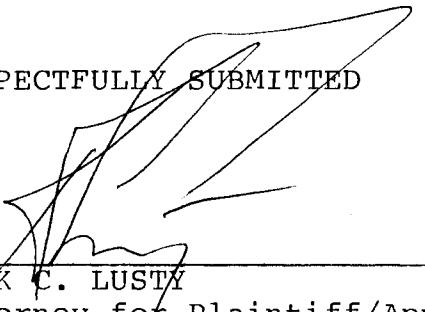
The Plaintiff contends the failure of the trial court to instruct the jury as to meaning of the word "sell" pursuant to Utah Code Section 61-1-13(15) constitutes reversible error.

From the authorities presented and from the facts that Mr. Tolman admitted at trial, it is clear that the Defendant sold the Plaintiff the Vasilacopulos interest within the meaning of that section. The definition established by Statute would therefore have been significant benefit to the jury in determining that a "sale" had occurred. The failure of the trial court to give the

definition adopted by the legislature therefore constituted reversible error.

Dated this 26th day of December, 1985.

RESPECTFULLY SUBMITTED



KIRK C. LUSTY
Attorney for Plaintiff/Appellant
and Cross-Respondent

ADDENDUM

INSTRUCTION NO._____

You are instructed that under Utah State Securities Law that "sell" is defined to include contracts for sale of, contract to sell or disposition of a securtiy or interest in a security for value

Source:

1. Utah Code Annotated 61-1-13(15)(a)

INSTRUCTION NO. 18

You are instructed that in order to find R.C. Tolman "sold" any security to Walton you must find that his conduct was the proximate cause of any sale, that is, his conduct and participation was a substantial factor in bringing about ~~the~~ any actual ~~buy/sell~~ transaction~~s~~. purchase and sell

INSTRUCTION NO. 19

The proximate cause of an event is that cause which, in natural and continuous sequence, produces the event. It is the efficient cause--the one that necessarily sets in operation the factors that accomplish the event.

INSTRUCTION NO. 20

You are instructed that R.C. Tolman cannot be held legally responsible for Walton's losses from his purchases of the investments in question if Tolman merely participated in the purchase and sale transactions as an agent of Vasilacopolus and Associates without actually "selling" the investments to Walton as that term has been defined for you in these instructions.

CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 27th day of December, 1985 that I hand delivered two true and correct copies of the foregoing brief to Mr. Gary L. Paxton of Clyde & Pratt, Attorney's for Defendant, 77 West Second South, Suite 200, Salt Lake City, Utah 84101.