1977

Daniel M. Schwartz, Bernice L. Schwartz And Alvin I. Smith : M.D. Haltrom And Michael S. Tanner : Brief of Appellant M.D. Haltom

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

DANIEL M. SCHWARTZ, BERNICE L. SCHWARTZ AND ALVIN I. SMITH,

Plaintiffs-Respondents,

vs. Case No. 14832

M. D. HALTOM and MICHAEL S. TANNER,

Defendants- Appellants.

BRIEF OF APPELLANT M.D. HALTOM

Appeal from a judgment entered in the District Court of the Third Judicial District, In and for Salt Lake County, State of Utah, by the Honorable Ernest F. Baldwin, Jr., Judge.

ROBERT VAN SCIVER
321 South Sixth East
Salt Lake City, Utah 84102

Attorney for Appellant,
M. D. Haltom

HARLEY W. GUSTIN
1610 Walker Bank Building
Salt Lake City, Utah 84111

Attorney for Respondents

TABLE OF CONTENTS

Page

STATEMENT OF THE NATURE OF THE CASE 1

DISPOSITION IN THE LOWER COURT 1

RELIEF SOUGHT ON APPEAL 1

STATEMENT OF THE FACTS 2

ARGUMENT

POINT I

THE PLAINTIFFS FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE ALL OF THE ELEMENTS OF COMMON LAW FRAUD ON THE PART OF THE APPELLANT, M. D. HALTOM 5

POINT II

THE PLAINTIFFS DID NOT EXERCISE DUE CARE IN THEIR BUSINESS DEALINGS WITH STAN TANNER AND DID NOT HAVE ANY RIGHT TO RELY ON THE STATEMENTS 8

POINT III

THE EVIDENCE PRESENTED BY THE PLAINTIFFS AT TRIAL DOES NOT SUSTAIN THE LOWER COURT'S FINDING OF APPELLANTS INVOLVEMENT IN A CONSPIRACY 10

CONCLUSION 12

TABLE OF CASES

Bezner v. Continental Dry Cleaners, Inc., 548 P. 2d 898 (Utah 1976) 6

Bunnell v. Bills, 13 Utah 2d 83, 368 P. 2d 597 (1962) 10

Elder v. Clawson, 14 Utah 2d 384, P. 2d 802 (1967) 6

TABLE OF CASES CONT'D

Ellis v. Hale, 13 Utah 2d 279, 373 P. 2d 597 (1962) 6

Harris v. Capital Records, 50 Cal. Rptr. 539, 413 P. 2d 139 (1966) 11

Jardine v. Brunswick Corp., 18 Utah 2d 378, 423 P. 2d 659, (1967) 8

Lewis v. White, 2 Utah 2d 101, 269 P. 2d 865 (1954) 8

Lundstrom v. Radio Corporation of America, 17 Utah 2d 114, 405 P. 2d 339 (1965) 6, 11

Pace v. Parrish, 122 Utah 141, 247 P. 2d 273, (1952) 5

Tanner v. Pillsbury Mills, 3 Utah 2d 196, 281 P. 2d 391 (1955) 11

Teamsters, Chauffers & Helpers of America, Local 222 v. Board of Review, Department of Employment Security, 10 Utah 2d 63, 348 P. 2d 588 (1960) 10

MISCELLANEOUS

23 Am Jur 850, Fraud and Deceit §85 7

IN THE SUPREME COURT

OF THE STATE OF UTAH

DANIEL M. SCHWARTZ, BERNICE L. SCHWARTZ AND ALVIN I. SMITH,	:	
Plaintiffs-Respondents,	:	Case No. 14832
vs.	:	
M. D. HALTOM and MICHAEL S. TANNER,	:	
Defendants-Appellants.		

BRIEF OF APPELLANT M.D. HALTOM

STATEMENT OF THE NATURE OF THE CASE

This is a civil action wherein a judgment was entered against the defendants on the basis that through their representations they obtained property to which they were not entitled and defaulted on the promissory note which evidenced such obligation.

DISPOSITION IN THE LOWER COURT

Judgement was entered against the defendants, jointly and severally.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant, M. D. Haltom, requests the Court vacate the judgment entered by the lower court and

that he be awarded his costs herein.

STATEMENT OF THE FACTS

The plaintiffs, Daniel M. Schwartz and Bernice L. Schwartz, were owners of a house located at 1792 Millbrook Road, Salt Lake County, State of Utah, which was listed for sale beginning in 1966 when the plaintiffs left the State of Utah and established residence in California. (T. 14)

Mr. and Mrs. Schwartz had authorized their attorney in Salt Lake City, plaintiff, Alvin L. Smith, to receive offers for purchase of the house and relay them to California. (T. 100)

Sometime in November of 1968, the defendant, Stan Tanner, defendant, Earl J. Knudson, a real estate broker, and appellant, M. D. Haltom, contacted Mr. Smith at his office in Salt Lake City, Utah. (T. 102) Mr. Haltom indicated that he represented the defendant, Stan Tanner, a resident of Phoenix, Arizona (T. 102) and said that Stan Tanner wanted to purchase the plaintiffs' house in Salt Lake City, which he was going to give to his son, Michael S. Tanner. (T.104) Mr. Haltom said any offer from Stan Tanner was conditioned upon sale of the house to Stan Tanner, free and clear of any mortgage. At this meeting, M. D. Haltom, as Stan Tanner's representative, discussed with Mr. Smith (T. 112) the possible means of collateralizing

the proposed purchase of the property and made some statements regarding Stan Tanner's holding in the stock of several corporations. (T. 104 to T. 112)

On December 8, 1968, Daniel Schwartz met for a period of two hours personally with the Appellant in San Francisco, California. (T. 15) At this meeting Mr. Haltom again indicated that he represented Stan Tanner, who wanted to purchase a house in Salt Lake City which he was going to give, free and clear, to Michael Tanner to induce the Appellant to come to Utah from his residence in Phoenix to operate a business in Salt Lake City in which Stan Tanner had an interest. (T. 16) Mr. Haltom made an offer on behalf of Stan Tanner to purchase the house for $47,000.00 the price at which it was listed. (T. 17) The balance of the purchase price, after payment of an outstanding mortgage of $3,000.00 was to be paid by a personal note executed by Stan Tanner. (T. 17) Mr. Haltom also stated that as security for the note, Stan Tanner would pledge certain stock in Bishop Industries Incorporated and other stock. (T. 18) During this meeting Mr. Haltom made several statements and representations about the above mentioned corporation and several other companies, United Equities Company and Western States Land of Utah. (T. 18 to 24) The plaintiff stated at the trial that at this time he did request that Mr. Haltom become involved as a signator to the note but that Mr. Haltom refused to sign the note. (T. 81)

On January 2, 1969, Stan Tanner personally executed and delivered to the plaintiffs a promissory note in the principal amount of $40,643.00 with interest and this Note was secured by a pledge of 10,000 shares of common stock of Bishop Industries, Inc. and 20,000 shares common stock of Western States Land of Utah owned by Stan Tanner. (Exhibit 5-D) Contemporaneously, the plaintiffs, Daniel and Bernice Schwartz executed a Warranty Deed in favor of Michael S. Tanner and Louisa Tanner. (Exhibit 6-D)

Michael S. Tanner was called as a witness by the plaintiff. (T. 154) He testified that in November of 1968, he came to Salt Lake City to look for homes suitable for his family after his father, Stan Tanner had offered to purchase for him a home to induce him to live in Salt Lake City and to take a position with his father's organization. (T. 166, 167) Michael Tanner, at this time, selected three houses, one of which was the house owned by the plaintiffs (T. 168) He stated that prior to the closing he did not have any detailed conversations with either Mr. Haltom or Stan Tanner. (T. 183)

On February 20, 1969, the real property at issue was mortgaged by Michael Tanner (T. 172 and Exhibit 17-P) The funds obtained by the mortgage went to Jennifer Day Enterprises, a Nevada corporation in which Stan Tanner had an interest. (T. 161, 173) Michael Tanner lived in the house for a period of one year at which time he moved

out to find a more suitable residence. (T. 181)

The note signed by Stan Tanner was unpaid at the time of trial in the amount of $40,643.00. (R. 76)

The trial court entered judgment in favor of the plaintiffs, Daniel M. Schwartz and Bernice L.Schwartz against the defendant, M.D. Haltom, Stan Tanner and Michael Tanner for $40,643.00 and $7,500.00 for attorney's fees. (R. 80) The Court also awarded the plaintiffs a judgment against Stan Tanner for $21,870.29 for interest on the note. (R. 80)

I.

THE PLAINTIFFS FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE ALL OF THE ELEMENTS OF COMMON LAW FRAUD ON THE PART OF THE APPELLANT, M. D. HALTOM.

The plaintiffs had the burden of establishing all of the elements of a cause of action of fraud as to the appellant,M. D. Haltom, which are according to Pace v. Parrish, 122 Utah 141, 247 P. 2d 273 (1952) as follows:

1. That a representation was made;
2. Concerning a presently existing material fact;
3. Which was false;
4. Which the representor either
   (a) knew to be false, or
   (b) made recklessly, knowing that he had sufficient knowledge upon which to base

such representation;

5. For the purpose of inducing the other party to act upon it;

6. That the other party, acting reasonably and in belief of its falsity;

7. Did in fact rely upon it;

8. And was thereby induced to act;

9. To his injury and damage.

The plaintiffs had the burden of proving each and every element of common law fraud by clear and convincing evidence. Lundstrom v. Radio Corporation of America, 17 Utah 2d 114, 405 P. 2d 339 (1965) and Bezner v. Continental Dry Cleaners, Inc. 548 P. 2d 898 (Utah 1976).

The appellant submits that the evidence presented to the trial court does not sustain the finding of liability on the basis of fraud against the appellant.

First, the trial court based the findings of liability not upon the willful misrepresentations of fact of the appellant as agent of Stan Tanner, or a participant in a company, but rather upon the ommissions of certain facts about the stocks. (R. 74) Paragraphs 12(a), 12(c), 12(d), 12(e), 12(f), 12(g), 12(h), 12(i) and 12(j) of the findings all concern matters concerning the various holdings of Stan Tanner which were not told to the plaintiffs in the two hour meeting. (R. 74)

In Elder v. Clawson, 14 Utah 2d 379, 384 P. 2d 802 (1963) this Court set forth the general rule as to actionable

concealment of the truth. Justice Wade, in his opinion quoted 23 Am Jur. 850, Fraud and Deceit, Section 86, which stated:

> "Silence in order to be actionable fraud must relate to a material matter known to the party, whether the duty arises from a relation of trust from confidence, inequality of condition and knowledge, or other attendant circumstances. . . . (Emphasis added by Justice Wade)"394 P. 2d at 804.

The Court went on to cite the rule that the duty to disclose does not arise if the other party could fairly discover the information by the exercise of reasonable diligence.

In the present case, the transaction in which the plaintiffs executed was accomplished on January 2, 1969, while the representations made by M. D. Haltom were made on December 8, 1968. In the intervening period the plaintiffs had the time, opportunity and means of finding out all of the matters undisclosed by M. D. Haltom concerning the corporations. (T. 65, T. 67, and T. 146) Therefore, in light of these facts and the fact that this was a business transaction, there existed no duty on the part of the appellant to affirmatively relate the information to the plaintiffs upon which the Court based the liability for fraud.

Secondly, the ommissions and misstatements specified in the trial courts findings of fact, 12(a) through 12(j) are not material statements. In light of the facts and circumstances of the case, this can be determined by composing

the evidence presented by the plaintiff, Daniel Schwartz, at trial with the instances relied on by the trial court in the findings of fact. At trial, the plaintiff primarily testified as to the appellant's statements of opinion concerning the future progress as to the possible development of the corporations. (T. 21 to T. 25) A careful reading of the record reveals that the plaintiff was interest primarily in the speculative value of the stock and not the information cited in the findings of fact.

The appellant submits that under the standard of clear and convincing evidence the plaintiffs failed to prove all of the elements of fraud and therefore, the judgment entered against this appellant should be reversed.

II.

THE PLAINTIFFS DID NOT EXERCISE DUE CARE IN THEIR BUSINESS DEALINGS WITH STAN TANNER AND DID NOT HAVE ANY RIGHT TO RELY ON THE STATEMENTS.

The plaintiff, Daniel Schwartz, was under a duty to exercise reasonable care and prudence before entering into an "arms-length" business transaction with the defendant, Stan Tanner. Lewis v. White 2 Utah 2d 101, 269 P. 2d 865 (1954). Jardine v. Brunswick Corporation, 18 Utah 2d 378, 423 P. 2d 659 (1967). If the plaintiff fails to exercise reasonable care to protect his interests then under the rule as stated in the foregoing cases, the plaintiff's negligence precludes any claim that he reasonably relied on

the representations and the plaintiff could not recover in this action.

In the present case, the plaintiff had the opportunity and ability to independently verify and substantiate the value of the stock being offered as security for the note. (T. 65) At trial he stated that he contacted a broker in New York concerning the value of the stock. (T. 65) He also contacted a banker. (T. 67) The plaintiff did not have a credit check made of Stan Tanner the person signing the note. (T. 67) After the December 8, 1968 meeting, and until January 1969 closing the plaintiff had the opportunity and ability to investigate the representations and determine whether or not he should rely on the information communicated to him in the two hour meeting with M. D. Haltom concerning the stock of Stan Tanner.

Furthermore, the plaintiff was represented by legal counsel, Alvin I. Smith, who had previously known Mr. Stan Tanner and told the plaintiff that the stock was speculative stock. (T. 146) The plaintiff relied on the representations of Mr. Smith, who had personally made some investigations of Bishop Industries stock and who had personally purchased some of the stock at the same period of time. (T. 148)

The appellant submits that in light of the foregoing circumstances, the decision of the trial court should be reversed because the plaintiff was not entitled to reasonably rely on the representations made by M. D. Haltom on behalf

of Stan Tanner in selling the property and, therefore, the judgment should be reversed.

III.

THE EVIDENCE PRESENTED BY THE PLAINTIFFS AT TRIAL DOES NOT SUSTAIN THE LOWER COURT'S FINDING OF APPELLANTS INVOLVEMENT IN A CONSPIRACY.

The Trial court in the Findings of Fact entered in this action based the liability of the appellant, M. D. Haltom upon his involvement as a conspirator in a plan to defaud the plaintiffs. The trial court found in paragraph 5 of the Findings of Fact that Michael Tanner, M. D. Haltom, and Stan Tanner had acted at all times in concert in a scheme and plan to defraud the plaintiffs. (R. 70)

In the case of Bunnell v. Bills, 13 Utah 2d 83, 368 P. 2d 567 (1962) the plaintiffs sought to establish liability on the basis of conspiracy to cause a breach of contract. The court held that no conspiracy had been proven because the evidence had not shown that the parties were engaged in a concerted action to cause the breach of contract, nor did the evidence show that such action was, in fact, done for the group or part of a plan. The court cited as authority for this proposition the case of Teamsters, Chauffers & Helpers of America Local 222 v. Board of Review, Department of Employment Security, 10 Utah 2d 63, 348 P. 2d 588 (1960). In the Teamsters case,the Court stated the general proposition that

there is no basis for holding a group of persons responsible for the acts of one unless it is affirmatively established that the group is engaged in a concerted activity and that the action of one is, in fact, done for the group as part of a plan.

Because the plaintiffs alleged that there existed a conspiracy to defraud, the burden to prove the existence of such conspiracy is even greater than most other civil cases. In Lundstrom v. Radio Corporation of America, 17 Utah 2d 339, 405, states the general rule that fraud must be proven by the plaintiff by clear and convincing evidence and that a cause of action will not lie in mere suspicion or innuendo raised by the relationship of the parties. See also, Tanner v. Pillsbury Mills, 3 Utah 2d 196, 281 P. 2d 391 (1955), and Harris v. Capital Records, 50 Cal. Rptr. 539, 413 P. 2d 139 (1966).

In the present case, the evidence established that M. D. Haltom made the representations to the plaintiffs concerning the stock which Stan Tanner was to pledge as security for the note. However, the actual purchase was made by Stan Tanner and it was Stan Tanner who defaulted the note. There is no evidence that M. D. Haltom had any knowledge that the note would not be paid at the time the statements were made or any other evidence of a conspiracy or plan to defraud.

CONCLUSION

On the basis of the foregoing points, the appellant, M. D. Haltom, submits the judgment entered in the lower court should be reversed and the appellant awarded his costs in this matter.

Respectfully Submitted,

ROBERT VAN SCIVER
Attorney for Defendant-Appellant
M. D. Haltom