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S and F Supply Co, Burger-In-The-Round, Andrew W. Souvall, Toula P. Souvall, Peter W. Souvall, Mary Souvall and Zions First National Bank v. S. Craig Hunter : Brief of Appellant

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

S & F SUPPLY COMPANY, a Utah corporation; BURGER-IN-THE-ROUND, a Delaware corporation, ANDREW W. SOUVALL, TOULA P. SOUVALL, his wife; PETER W. SOUVALL, MARY SOUVALL, his wife,

Plaintiffs-Respondents,

ZIONS FIRST NATIONAL BANK, a National Association,

Intervening Plaintiff-Respondent

vs.

S. CRAIG HUNTER,

Defendant-Appellant.

Case No. 12686

BRIEF OF DEFENDANT-APPELLANT

Appeal from the Judgment of the
Third Judicial District Court for Salt Lake County
Honorable Marcellus K. Snow, Judge

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STATEMENT OF THE KIND OF CASE

Plaintiffs-respondents brought their action in the lower court alleging breach of contract. Intervening plaintiff-respondent intervened. Defendant-appellant defended and counterclaimed that he was induced to purchase securities as a result of violations of Section 61-1-22(1) (b) of the Utah Uniform Securities Act.

DISPOSITION IN LOWER COURT

The Third Judicial District Court, the Honorable Marcellus K. Snow presiding, dismissed defendant-appellant's counterclaims, and submitted the case to the Jury on the basis of special Interrogatories. Judgment was granted against defendant-appellant.

RELIEF SOUGHT ON APPEAL

Defendant-appellant asks to have this Court reverse the judgment of the lower court and direct entry of judgment for defendant-appellant or in the alternative, remand the case for a new trial.

STATEMENT OF FACTS

1. The plaintiffs Peter and Andrew Souvall were the principal stockholders of plaintiffs S & F Supply and Burger-In-The-Round (previously named Dinner Table) (R-13, Exhibit 9-D at P. 1). They were officers, directors and members of the executive committees of both corporations (R-26, 29, 80).

2. John Langeland, senior vice president of the intervening plaintiff, Zions First National Bank (Bank) in charge of commercial loans, and T. Bowering Woodbury, a vice president of the Bank, were both stockholders of S & F Supply and Burger-In-The-Round (R-83, 84, 216, 217). They were also directors and members of active executive committees of both corporations (R-80, 207, 208). Souvall testified that Langeland and Woodbury

were also officers of S & F Supply Co. (R-28). The Souvalls had obtained commercial loans from the Bank prior to August, 1969 (R-80-84, 223).

3. In August, 1969, S & F Supply and Burger-In-The-Round obtained an additional commercial loan of $200,000.00 from the Bank (R-36). The Souvalls personally guaranteed the loan (Exhibit 9-D at P. 3). The loan was a Small Business Administration (SBA) loan participated in 75 percent by the SBA and 25 percent by the Bank (Exhibit 9-D at P. 3). Various corporate and personal assets of the plaintiffs were pledged to the Bank as collateral on the SBA loan (R-33-35). Among the assets pledged on the loan were 10,000 shares of Universal Leasing stock owned by the Souvalls (R-36). Peter Souvall was a director of Universal Leasing Corporation (R-37).

4. Peter Souvall testified that John Langeland and Donald Bennett, one of the loan officers in Langeland's department, assisted the Souvalls in preparing the loan application to the SBA (R-88).

5. The business and financial dealings of the Bank officers with the Souvalls, although required to be disclosed, were omitted from the SBA loan application (loan application, R-144-148).

6. After only one monthly payment, the SBA loan became in default in October, 1969 (R-92, 219).

7. The Souvalls and the Bank officers worked together to sell the collateral to pay off the SBA loan (R-39, 43, 52, 71, 98-102, 121, 126, 229, 236, 241, 259, 261, 710).

8. In February, 1970, defendant learned that the Universal Leasing stock held by the Bank as collateral on the SBA loan was for sale (R-391-394).

Defendant contacted Donald Bennett at the Bank, who told defendant that he could not give him any information unless the Souvalls authorized it (R-183, 395-396).

9. The defendant then contacted Peter Souvall who told him the Bank had all the information on Universal Leasing and that the Souvalls would authorize the Bank to deliver whatever information the Bank had to the defendant (R-183, 396). The Souvalls telephoned Bennett and told him to give defendant whatever information the Bank had on Universal Leasing (R-183, 396).

10. Defendant then returned to the Bank and asked Don Bennett for the information about Universal Leasing (R-160, 396-397, 507).

Bennett gave defendant one financial statement of Universal Leasing (Exhibit 18-D) and claims that he showed defendant two other financial statements (Exhibits 13-P & 14-P) (R-153, 160, 397, 398, 667).

Defendant denies that Bennett showed him anything except one financial statement (R-507). Defendant claims that Bennett, after giving defendant one financial statement, said "That is all the information we have" (R-513).

11. At the time of defendant's visit with Bennett, Universal Leasing was in serious financial difficulty (P-

604, 605, 606, 607, 608, 609, 610, 617, 618). Both Langeland and Bennett knew of the serious financial difficulty of Universal Leasing (R-151-153, 672-673).

12. Defendant did not know at the time of the signing of the contract on March 9, 1970, that Universal Leasing was in serious financial difficulty (R-397-403).

13. On February 27, 1970, Bennett learned from the President of Universal Leasing that at least one Universal Leasing financial statement he claimed to have had was false (Exhibit 15-P). Bennett admitted he did not inform defendant of this fact (R-184-186, 663).

14. Defendant agreed to purchase the stock held by the Bank and was to act as a conduit for the sale of the other assets held as collateral which were sold or to be sold to other persons (R-48, 98-103). The Bank and the Souvalls had already arranged for Ernie Psarras to purchase some of the assets (R-98-104, 244-245). Peter Souvall was to help sell the remaining assets (R-71, 102). All receipts from the sale of the assets were to be delivered to the Bank to apply to the SBA loan (R-70-71, 399-400). The Bank approved and signed the contract for the sale of stock to defendant (R-261).

15. Certain of the SBA collateral assets were in fact channeled back to the Souvalls and to the Souvall's attorney (R-57-58).

16. Both the contract with the defendant and the contract with Psarras were executed on March 9, 1970 (R-101, 537). Bennett delivered the Universal Leasing

stock to defendant and did not require a promissory note. Bennett admitted that this was a very unusual transaction for the Bank to make (R-135). The Souvall's attorney stated at trial that plaintiffs wanted to consummate the sale to defendant by "hook or by crook" (R-742).

17. Approximately six weeks after the signing of the contract, Bennett approached Hunter and requested Hunter to sign a promissory note in the amount of $133,500.00 as an accommodation to Bennett to satisfy the Bank examiners, which Hunter signed (R-402).

Bennett assured Hunter that he would in no way be obligated on the note and that it was not intended to evidence a separate obligation of Hunter (R-402).

18. In the summer of 1970, defendant discovered that Universal Leasing was financially broke, and had been in serious financial difficulty since the fall of 1969. He later discovered that the Bank's officers were deeply involved with the plaintiffs and had known that Universal Leasing was in serious financial difficulty when the Bank delivered him the stock (R-402-403).

19. Defendant tendered back to the Bank stock comparable to 10,000 shares of Universal Leasing (R-156, 164, 522).

20. In defendant's pleadings and also at trial defendant raised the issue of whether the Bank was the agent of the plaintiff, for the giving of information to defendant, about Universal Leasing (See Argument Point I).

21. Counsel for plaintiffs inquired extensively regarding Exhibit 7-D, the SBA loan application, in direct testimony of their witnesses, before counsel for defendant ever inquired about Exhibit 7-D (R-31-36). Counsel for defendant offered Exhibit 7-D, the SBA loan application, into evidence (R-85-87). The Judge sustained an objection on the basis of immateriality and irrelevancy (R-90-91). At least twice again during the course of the trial, both in chambers and at the bench, Exhibit 7-D was re-offered.

22. The Court refused to give an instruction on the agency of the Bank and permitted the case to go to the Jury on the basis of special interrogatories propounded by counsel for plaintiffs.

ARGUMENT

POINT I.

THE COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO INSTRUCT THE JURY TO DETERMINE WHETHER THE BANK WAS THE AGENT OF THE PLAINTIFFS FOR THE GIVING OF INFORMATION ABOUT UNIVERSAL LEASING TO THE DEFENDANT, AND FURTHER THAT A PRINCIPAL IS LIABLE FOR THE ACTS AND OMISSIONS OF ITS AGENT ACTING WITHIN THE SCOPE OF THAT AGENCY.

Defendant alleged in his Answer to the Bank's Com-

plaint that the officers of the Bank were "intimately involved as officers and/or agents in other business ventures involving the other plaintiffs and the Souvalls, . . . and [that] said officers were working with and assisting the said Souvalls and were trying to induce defendant to purchase said stock . . ." (R-55-56). The testimony is uncontested that the Bank conveyed the financial information regarding Universal Leasing to defendant only upon the Souvall's specific instruction. The testimony is as follows:

Testimony of Bank Officer, DON BENNETT;

CROSS-EXAMINATION by Mr. Faber:

Q. Did the Souvalls tell you that he [defendant] talked to them?

A. Yes.

Q. In fact they told you to give him whatever information the Bank had. Isn't that correct?

A. Yes (R-183).

Testimony of Defendant;

DIRECT EXAMINATION by Mr. Faber:

Q. Did you have a conversation with Mr. Bennett?

A. At that time he just told me that I should go out and see the Souvalls, that I would have to discuss it with them first, and that he couldn't give me any information unless they authorized it.

Q. Did you go to see the Souvalls?

A. Yes.

Q. And when did that meeting take place?

A. It was either, it was right in that same two or three day period. I don't remember if it was the same day or the next day or — it was right shortly after I talked to Don Bennett anyway.

Q. Did you talk to the Souvalls?

A. Yes.

Q. And what did they tell you?

A. They told me that I would have to go get any information that I wanted on the stock, outside of the fact they were willing to sell it, from the bank.

Q. Did they tell you that they would authorize the bank to release that information to you?

A. Yes. Called over to the bank and did that.

Q. Did you then go back to the bank?

A. Yes (R-345-346).

Testimony of Defendant;

CROSS-EXAMINATION by Mr. Nebeker:

Q. Now when you went to the Souvalls and had your discussion with them about buying this stock, did you ask them to furnish any current financial statements?

A. When I asked the Souvalls for information on the stock, they sent me to the Bank. When I got to the Bank, I saw Don Bennett. He gave me a financial statement and told me that was all the information that they had on it . . . (R-507).

From the testimony, it is clear that the Souvalls authorized the Bank to convey the information about

Universal Leasing to defendant. It is also clear that the Bank only acted as a result of that authorization. Under such circumstances, defendant was absolutely entitled to an instruction directing the jury to determine whether the Bank was the agent of the Souvalls for giving information about Universal Leasing to defendant. Because of the close business association between the Bank's officers and the plaintiffs, and because of defendant's claim that the Bank and the Souvalls failed to give him certain critical information about Universal Leasing, it was impossible for defendant to fairly present his defense to the Jury unless the Jury was instructed on the question of agency.

The applicable statute holds the principal (a seller of securities) and his agent jointly liable. § 61-1-22(1) (b) of the Utah Uniform Securities Act states:

> "Any person who . . . offers or sells 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 omission), 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 omission, is liable to the person buying the security from him, . . . Every *agent* who materially aids in the sale is also liable jointly and severally with and to the same extent as the seller, unless the nonseller who is so liable sustains the burden of proof that he did not know, and in exercise of reasonable care could not have known,

> of the existence of the facts by reason of which the liability is alleged to exist . . ." (Emphasis added.)

The testimony in this case is that the Bank had express authority from the Souvalls to divulge to the defendant whatever financial information the Bank had about Universal Leasing. The Bank only acted pursuant to that authority. The statute is clear that both the agent and his principal are jointly liable for material omissions by the agent. Defendant requested and was clearly entitled to an instruction on agency. The Jury should have been instructed as to the legal binding effect of the acts of the agent upon the principal. Failure to give these instructions to the Jury denied the defendant the right to have the Jury (1) find that the plaintiffs, the Souvalls, were liable under the Utah Securities statute for the acts and omissions of intervening plaintiff, Zions First National Bank, and (2) find that the Bank was liable for misconduct under the Securities statute and chargeable thereunder as the agent of the Souvalls.

In addition, the general law of agency is that a corporation may act as an agent for an individual principal or for another corporation. 3 *Am. Jur.* 2nd, "Agency", § 13 at page 427. Furthermore, the agency and the assent of the parties thereto may be either expressed or implied. 3 *Am. Jur.* 2nd, "Agency", § 18, at page 428. By the testimony, agency here was express (R-183). So far as concerns a third person dealing with an agent, the agent's scope of authority includes not only the actual authorization conferred upon the agent by the principal, but also

that which has apparently been delegated to him. *Wood* v. *Strevell-Paterson Hardware Co.*, 6 Utah 2nd 340, 313 P. 2d 800 (1957), cited at 3 *Am. Jur.* 2nd, "Agency", § 73, at page 475. A principal is responsible for injury resulting from the fraud of his agent committed during the existence of the agency and within the scope of the agent's actual or apparent authority. An agent does not cease to act within the course of his employment merely because he engages in a fraud upon a third person. 37 *Am. Jur.* 2nd, "Fraud and Deceit", § 311, at pages 411-412. Clearly the defendant was entitled to an instruction on agency as he requested.

POINT II.

SUBSTANTIAL AND PREJUDICIAL ERROR WAS COMMITTED BY THE LOWER COURT IN EXCLUDING FROM THE EVIDENCE DEFENDANT'S PROPOSED EXHIBIT 7-D, ENTITLED "SBA LOAN APPLICATION".

The evidence was that the plaintiffs and the Bank officers were working together to liquidate the SBA loan and that both the plaintiffs and the Bank signed the contract of sale to defendant of the Universal Leasing stock pledged on the SBA loan (See Fact No. 7, STATEMENT OF FACTS; R-241). Defendant alleged that he was not told certain critical facts about Universal Leasing Corporation, which facts were in possession of the Bank, and was not told that plaintiffs and the Bank officers were

working together to have defendant purchase the said stock (See R-151, 153, 550, 398, 673). Evidence supporting such claim was material to defendant's presentation of his defense. The SBA loan application shows the substantial involvement of the plaintiffs and the Bank officers in their common cause to have defendant pay off the loan.

Moreover, the SBA loan application is admissible on several grounds:

1. Counsel for plaintiffs examined witnesses concerning the SBA loan application prior to any mention of the same by defendant (R-31-36). It is an undisputed rule of law that if a party opens the door by inquiring into a particular matter, he is estopped from thereafter shutting the door to that inquiry by the opposing party. *McCormick on Evidence* states that ". . . one who induces a trial court to let down the bars to a field of inquiry that is not competent or relevant to the issues cannot complain if his adversary is also allowed to avail himself of the opening." *McCormick on Evidence*, Chapter 6, § 57, p. 132.

Counsel for both plaintiffs and the Bank opened the subject of the SBA loan in their opening statements (R-13, 16-17). Counsel for the plaintiffs inquired extensively and in detail regarding the loan application, its preparation, the assets listed on the application as security for the loan, and the filing of the application, prior to the offer into evidence of the application by defendant's counsel (R-31-36). Even if the SBA loan application was incompetent or irrelevant, plaintiffs and the Bank should

be estopped on this ground alone from objecting to its admission.

2. The SBA loan application is relevant and material to show the relationship between the plaintiff and the Bank officers and that they had common cause in inducing the defendant to enter the transaction with the Souvalls.

Defendant alleged in its "Answer to Intervenor's Complaint & Counterclaim", that

> ". . . the officers of and acting for intervening plaintiff, Zions First National Bank, who dealt with defendant on or about February 17, 1970, . . . were intimately involved as officers and/or agents in other business ventures involving the other plaintiff and the Souvalls . . . that said officers were working with and assisting said Souvalls and were trying to induce defendant to purchase stock to aid said Souvalls and so that intervenor's loan would be paid back by defendant purchasing said stock, which said stock said officers knew to be worthless" (R-55-56).

Numerous pertinent and material facts required to be disclosed in the SBA loan application were either omitted completely or misstated. Said omissions are material and relevant to defendant's defense and counterclaim of fraud in that they establish a connection and association between the plaintiffs and the Bank officers and create strong and substantial inferences that both plaintiffs and the Bank officers worked together in a scheme or artifice or plan to dispose of the collateral of

the SBA loan to defendant by "hook or by crook" (as counsel for plaintiff stated (R-742)), to protect their mutual business interests and to prevent the misstatements and omissions of the SBA loan application of Dinner Table and S & F Supply from being brought to light. The omissions and misstatements were numerous, but the following are sufficiently demonstrative:

ITEM TWO of "Applicant's Statement" of the SBA loan application requires the declaration of all who assisted in the preparation of the application (Exhibit 7-D). Mr. Souvall testified that both Mr. John Langeland and Donald Bennett of the Bank assisted in the preparation of the loan application. Their participation was not disclosed (R-88). ITEM THREE requires the disclosure of officers and directors, etc., of the applicants (Exhibit 7-D). T. Bowering Woodbury, Vice-President of the Bank, and Mr. John Langeland, Senior Vice-President of the Bank, were stockholders, directors and members of the Executive Committees of both the Dinner Table and S & F Supply (R-28, 80, 83-84). None of these facts were disclosed as required (R-144-145, Exhibit 7-D). ITEM EIGHT of the SBA loan application requires the disclosure of the use of the loan proceeds (Exhibit 7-D). It was not disclosed that substantial amounts of the loan proceeds went to pay off other personal and commercial loans with the Bank (R-148).

These omissions show the inner involvement of plaintiffs and the Bank officers and indicate a mutual interest

in working together to dispose of the assets by "hook or by crook", to defendant.

3. The assets pledged under the SBA loan application are the same assets which the Souvalls were claiming that defendant bought, and the said application would be material and relevant to establish the identity and value of said assets. Furthermore, the misstatements and omissions clearly demonstrate the propensity and capacity of both plaintiffs and intervening plaintiff to misstate and omit material facts and thus the document should have been admitted to impeach the testimony of the plaintiff Peter Souvall and the officers of the Bank.

It is a clear rule of evidence particularly in Utah that "whatever to the ordinary reasoning mind is logically probative of a fact in issue is prima facie admissible and should not be excluded unless its admission violates a rule of law or policy. 29 *Am. Jur.* 2nd, "Evidence", § 251; *Thiede* v. *Utah*, 159 U. S. 510, 40 L. Ed. 237, 16 S. Ct. 62 (1895). Objections upon the ground of irrelevancy are not favored for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. *Moore* v. *United States*, 150 U. S. 57, 37 L. Ed. 996, 14 S. Ct. 26 (1893).

It is therefore submitted that Exhibit 7-D of the SBA loan application was wrongfully excluded from evidence for the reason that where the plaintiffs inquired into the subject of the loan application they should be estopped

from denying defendant from further examination regarding it. Plaintiffs' objection based on immateriality and irrelevancy is clearly without merit. The application demonstrates the connection and common cause between plaintiffs and the Bank's officers to have defendant charged with the purchase of the collateral assets. The loan application lists the assets which are the subject of this dispute and places values on each. Furthermore, it impeaches the testimony of plaintiffs and the Bank's officers and demonstrates their propensity and capacity to misstate or omit material facts.

POINT III.

THE LOWER COURT COMMITTED PREJUDICIAL ERROR IN ITS INSTRUCTIONS NUMBER 17 AND 19 WHEN IT FAILED TO INSTRUCT THE JURY THAT LIABILITY UNDER THE UTAH UNIFORM SECURITIES ACT CAN BE PREDICATED UPON AN OMISSION AS OPPOSED TO A MERE HALF-TRUTH.

Section 61-1-22(1) (b) of the Utah Uniform Securities Act states as follows:

> Any person who offers or sells a security by means of an untrue statement of material fact or *omission* to state a material fact necessary in order to make the statements made, in light of the circumstances in which they are made, not misleading, . . . is liable to the person buying the security from him who may sue either at law or at

> equity to recover the consideration paid for the securities, . . . (Emphasis added.)

In addition to the clear language of the statute concerning omissions, cases construing identical language of Federal law have made it clear that liability can be predicated upon a failure to disclose even where no representations at all are involved. See *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 112 (EDPA 1946), where the essence of the complaint was the failure of the Buyer to disclose to the Seller certain corporate facts known only to the Buyer, which, if had been divulged to the Seller would have resulted in a totally different situation. In *Speed* v. *Transamerica Corp.*, 99 F. Supp. 808 (1951), recovery was granted because of non-disclosure. Also see *S.E.C.* v. *Texas Gulf Sulphur*, 258 F. Supp. 262 (1968); see Gadsby, *Business Organizations*, Volume 11-A, § 5.03-(1) (b) for an analysis of the development of the law in this area. If there was liability only for false statements and half-truths and not for omissions, then the law would place a premium on taciturnity. (Gadsby, Page 5-15.) Gadsby concludes that, "the Courts, in applying Rule 10(b) 5, [the language of which is the same as the language in the Utah Securities statute] have merely substituted for the requirement of scienter, the requirements of the rule itself; that is that the representation made by the defendant be false or that he stood silent when he should have spoken." (Gadsby, Page 5-32).

In the instant case, the lower court cited the statute and then stated that the statute related to misstatements

of fact and half-truths. The statute itself clearly states "omissions". On that basis alone the lower court's instructions are in error and clearly confusing, and may have tended to mislead the Jury. In addition, the word "half-truth" is not used in the statute and is not an accurate statement of the reasonable reading of the statute itself as the cases construing similar language in the Federal law have demonstrated.

The evidence is that the Bank's officer, Donald Bennett, knew that one financial statement of Universal Leasing was false, and he admitted he did not tell defendant (Exhibit 15-P, R-184-186, 663). The Bank officers also knew that Universal Leasing was in poor financial condition and did not tell defendant (R-151, 153, 673, 398-400). Defendant was entitled to have the Jury consider these omissions as violations of the Utah Securities Statute. The lower court's interpretation of the statute denied defendant this opportunity.

Furthermore, inasmuch as the Utah Statute is a recission statute and does not allow the Buyer to sue for his expectation interest as does the federal rule, the rationale for the Federal interpretation should be even more rigorously applied to the Utah statute.

If the law were to be as the lower court set it forth in the last paragraph of Instruction 17, then all one need do to avoid liability under the statute would be to remain absolutely silent. This Court has expressed its opinion against this position in regards to common law fraud. See

Elder v. *Clawson*, 14 Utah 2d 379, 384 P. 2d 802 (1963). The language of the statute itself as well as Federal case law dictate that material omissions are actionable under Section 61-1-22(1) (b).

POINT IV.

THE COURT COMMITTED PREJUDICIAL ERROR WHEN IT IMPROPERLY INSTRUCTED THE JURY CONCERNING DEFENDANT'S STATUTORY DEFENSE AND CONCERNING THE BURDEN OF PROOF.

FIRST: The defendant's defense of statutory fraud against the plaintiffs and the Bank under Section 61-1-22(1) (b) of the Utah Uniform Securities Act was completely removed from the consideration of the Jury by the court's erroneous instructions. Even though the Souvalls omitted to reveal material facts to the defendant about the financial condition of Universal Leasing, the Jury was prevented from finding that the Souvalls were liable under the statute because the court's instruction did not allow them to consider omissions (see Argument Point II above) (R-441).

The Jury was prevented from finding that the plaintiffs were liable for the conduct of the Bank officers, or that there may have existed a device, scheme or artifice to defraud, because the court refused to give an instruction on agency (see Argument Point I), and because the instructions and the interrogatories to the Jury completely separated defendant's defense against the plain-

tiffs from defendant's defense against the Bank (See Instructions 14, 18, 20, 31 and Interrogatories 11-25). Further, the court denied the defendant the right to amend the pleadings for a separate statutory fraud action and defense against the Bank.

The consequence of the foregoing is that all the Jury could possibly find in defendant's favor was a common-law fraud defense against the Bank. Defendant was denied his defense of statutory fraud against plaintiffs and the Bank.

Defendant pleaded in his answer to intervenor's complaint and counterclaim dated December 30, 1970, that the officers of Zions First National Bank who dealt with defendant on or about February 17, 1970, were "intimately involved as officers and/or agents in other business ventures involving the other plaintiff and the Souvalls mentioned in intervenor's complaint . . ." and, ". . . that the said officers were working with and assisting the said Souvalls and were trying to induce defendant to purchase said stock . . .". The evidence in the instant case was clearly to the effect that the Bank was the agent of the Souvalls (see Argument Point I above), and therefore liable under statutory fraud as their agent.

In addition to the possibility of liability of the Bank as agent, defendant was entitled to a separate claim and defense against the Bank based on statutory fraud under Section 61-1-22(1) (b). After the evidence was in, defendant's counsel raised Rule 15b of the Utah Rules of Civil

Procedure to allow an independent claim against the Bank of statutory fraud under Section 61-1-22. Rule 15b provides as follows:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause and to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial on these issues . . ."

Defendant is entitled under the statute to a separate claim and defense against the Bank not involving its agency. In omitting to give material information to defendant the Bank was acting on its own behalf as well as for plaintiffs. The misrepresentations and non-disclosures in question under the statute were clearly those of the Bank, as well as the Souvalls.

SECOND: Instructions 17, 18 and 21 are erroneous in that they incorrectly state the burden and elements of proof under the statute.

Instruction 17 places the burden upon the defendant to show under statutory fraud that plaintiffs "*knowingly* and *willfully* and with *intent* that defendant *rely* thereon and *be deceived* thereby *induced* defendant to purchase" (emphasis added), by an untrue material fact or *half-truth.*

Not only is the instruction erroneous in the use of the term "half-truth", but such a statement of the burden of proof is certainly in error under Section 61-1-22(1) (b) of the Utah Uniform Securities Act. The statute only requires that the defendant ". . . not have known of the untruth or omission . . ." Nowhere does the statute require defendant to show scienter, intent to deceive, reliance, or inducement. In *Steven* v. *Vowells,* 343 F. 2nd 374, at 379 (10th Cir. 1965), a case arising under Rule 10b5 of the Securities and Exchange Commissions Act of 1934, the 10th Circuit Court of Appeals specifically held that "it is not necessary to allege or prove common law fraud to make out a case under the statute and rule. It is only necessary to prove one of the prohibited actions such as a material misstatement of fact or the omission to state a material fact." The court's instruction requires defendant to show common law fraud under the statute which is clearly erroneous.

Under Instruction 18, defendant should not be bound by the elements of the burden of proof of common law fraud in his action against intervening plaintiff for the reasons stated in paragraph FIRST above.

Furthermore, Instruction 21, by creating a presumption that men are fair and honest in their dealings until the contrary is clearly and convincingly proven by the evidence to the contrary, conflicts with Instruction 31 which states that defendant must prove his defense against plaintiff by a preponderance of the evidence.

THIRD: The interrogatories which plaintiffs and the Bank proposed to be submitted to the Jury in numerous instances were so phrased as to ask questions of fact and questions of law in the same interrogatory denying the Jury the right to make a separate judgment on each. One such example will demonstrate: Interrogatory No. 3 asks: "Do you find that the defendant, S. Craig Hunter, in order to induce the Bank to deliver stock, made a representation of a material fact?"

This single interrogatory asks the following questions:

1. Did defendant make a representation?
2. Was it material?
3. Was it made with intent to induce?

To a jury unschooled in the consequences of the law, which of those three questions did they answer when they answered Interrogatory No. 3.

Interrogatories 17 through 25 have to do with defendant's defense of fraud against the plaintiffs based upon Section 61-1-22. Instructions 17 and 19 are repetitious in that twice the Jury is asked whether it finds that the plaintiffs made a representation of material fact to the defendant.

Following Interrogatories 11-16, which cover the elements of common law fraud against the Bank, the Jury is instructed that, "The burden is upon defendant to prove each of the foregoing interrogatories by clear and con-

vincing evidence." A similar sentence follows Interrogatories 1-10, informing the Jury that the plaintiffs and intervenor carried the burden of proving all the elements of common law fraud against the defendant by "clear and convincing evidence."

No such explanation of the burden of proof under Section 61-1-22 follows Interrogatories 17 through 25. Consequently, the Jury may have presumed that defendant's burden under the statute was "clear and convincing" rather than "a preponderance of the evidence."

Interrogatory 21 states, "Do you find that plaintiff knew or should have known that Universal Leasing, Ltd. was in very serious financial difficulty in February and March of 1970?" In its context, and in the absence of an explanation regarding the burden of proof of this point, the Jury likely presumed that defendant carried the burden of proving this point when in fact plaintiffs carried that burden as per the statute. Under the statute the plaintiffs carry the burden of proving that they did not or in the exercise of reasonable care could not have known that Universal Leasing was in serious financial difficulty.

Interrogatory No. 22 is not material to defendant's statutory defense of fraud. Defendant does not have to show that plaintiffs in February and March of 1970 expected the stock of Universal Leasing, Ltd. to become valueless within a short period of time. Its inclusion only confuses the Jury further as to what must be shown under statutory fraud.

Instruction No. 23 states, "Do you find that the defendant agreed to purchase the stock of Universal Leasing, Ltd. as a result of Plaintiffs' device, scheme, *and* artifice to defraud the defendant?" (Emphasis added.) For the first time in the instructions and interrogatories the term "device, scheme and artifice to defraud" is used in lieu of "misstatement, or omission."

There is no instruction explaining that under the statute, a material misstatement or omission may constitute a "device, scheme and artifice" to defraud. The Jury had no way of knowing that a material misstatement or omission may constitute a device, scheme or artifice to defraud. By the inclusion of the conjunction "and", presumably defendant must prove all three.

Interrogatory No. 24 is repetitious of Interrogatory No. 21, and from its context it appears that defendant carried the burden of proving it, which is clearly not the case under the statute.

Interrogatory No. 25 is wholly immaterial to defendant's defense of statutory fraud and should not have been included in the Interrogatories. Its inclusion is only confusing to the Jury.

Based on the error and unfairness that so extensively affect the instructions and the interrogatories, there is no way defendant's defense could be fairly submitted to the Jury.

POINT V.

THE COURT COMMITTED PREJUDICIAL ERROR IN DISMISSING DEFENDANT'S COUNTERCLAIMS FOR FRAUD AGAINST THE PLAINTIFFS AND INTERVENING PLAINTIFFS UPON THE BASIS THAT "NO PROOF OF GENERAL DAMAGES OR PUNITIVE DAMAGES WERE SHOWN."

Damages in this case are calculated according to Section 61-1-22(1) (b) of the Utah Uniform Securities Act.

The statute is clearly a recission statute granting to a purchaser of stock so harmed under the statute the right to rescind and receive his restitution interest which is the amount paid for the stock. Or, if the stock has been sold, he may calculate his restitution interest by deducting from the amount paid, the amount received upon the sale of the stock and sue for the difference plus interest.

Defendant tendered back the equivalent of 10,000 shares of Universal Leasing stock (R-156). The stock taken out was lettered and the stock tendered back was lettered, hence plaintiff and intervening plaintiff are put in the same position they were before the sale (R-156).

Mr. Hunter testified he paid $9,000.00 for the stock which constitutes damages under the statute (R-402). He is entitled to an instruction to the Jury to that effect. Defendant did not plead a set off. He pleaded statutory fraud and damages thereunder (R-55-56). Without his

counterclaims he is materially harmed in that he is not allowed the right to seek a restitution of the consideration which he paid for the worthless stock.

Even though the lower court dismissed defendant's counterclaims on the grounds of a failure to show damages, neither counsel for plaintiff nor counsel for intervening plaintiff ever asserted in their arguments for dismissal that no damages were shown by defendant (R-725-761). In fact, counsel for intervening plaintiff admitted in his argument for dismissal that, "The facts are in dispute . . ." (R-731).

The established rule in Utah requires the trial court to view the evidence in the light most favorable to the party against whom the motion for dismissal is directed and must resolve every controverted fact in his favor. *Boskovich* v. *Utah Construction Co.*, 123 Utah 387, 259 P. 2d 885, 887 (1953). It is not within the province of the lower court to weigh or determine the preponderance of the evidence when determining a motion to dismiss. *Finlayson* v. *Brady*, 121 Utah 204, 240 P. 2d 491 (1952). Defendant submitted evidence as to amounts paid for the stock. Where counsel for the Bank admits that the facts are in dispute, defendant is clearly entitled to an instruction, and Jury consideration of his counterclaims, and if the Jury finds misconduct under the statute, to a restitution of the amounts paid for the stock.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing brief on Alvin I. Smith, Attorney for Plaintiffs at 1309 Deseret Building, Salt Lake City, Utah 84111, and on Richard H. Nebeker, Attorney for Intervening Plaintiff at 400 Kennecott Building, Salt Lake City, Utah 84111, and on Ralph Klemm, Asst. U. S. Attorney for SBA, assignee of Intervening Plaintiff's judgment, at 200 Post Office Bldg., Salt Lake City, Utah 84101, this 1st day of June, 1972.
