

2001

# Robert B. Hansen v. Petrof Trading Company Inc : Brief of Appellant

Utah Supreme Court

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## Recommended Citation

Brief of Appellant, *Hansen v. Petrof Trading Company*, No. 13276.00 (Utah Supreme Court, 2001).

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IN THE SUPREME COURT OF THE STATE OF UTAH  
BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

ROBERT B. HANSEN,  
*Plaintiff, Respondent,  
and Cross-Appellant,*

vs.

PETROF TRADING  
COMPANY, INC.,  
*Defendant-Appellant.*

Case No.  
13276

BRIEF OF APPELLANT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
FOR SALT LAKE COUNTY, STATE OF UTAH,  
HONORABLE STEWART M. HANSON, JUDGE

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FILED  
FEB 25 1974

Clerk, Supreme Court Utah

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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ROBERT B. HANSEN,  
*Plaintiff, Respondent,  
and Cross-Appellant,*

vs.

PETROF TRADING  
COMPANY, INC.,  
*Defendant-Appellant.*

Case No.  
13276

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## BRIEF OF APPELLANT

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### STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the Findings of Fact, Conclusions of Law, and Judgment of the Third District Court for Salt Lake County, State of Utah, dismissing with prejudice the Appellant's counter-claim against the Respondent which sought recovery against the Respondent on the grounds of professional malpractice.

## DISPOSITION OF THE LOWER COURT

The case was tried on the 7th day of September, 1972, and the counter-claim of the Appellant against the Plaintiff was ordered dismissed by the court on the grounds that the counter-claim of the Appellant was filed beyond the period of the Statute of Limitations. The request of the Respondent and Cross-Appellant for interest on the sum claimed due was denied by the court on the grounds that the Respondent and Cross-Appellant had failed to comply with legislation requiring the disclosure of interest charges and on the grounds that the Respondent and Cross-Appellant had failed to include such interest charges in periodic billings to the Appellant.

## RELIEF SOUGHT ON APPEAL

The Appellant seeks a reversal of the lower court ruling dismissing the Appellant's counter-claim and for an Order remanding the case to the Third District Court for the County of Salt Lake, State of Utah, for trial.

## STATEMENT OF FACTS

In October of 1966, the Respondent was retained as counsel for the Appellant to collect a sum due to the Appellant from a Utah corporation, IRECO, Inc. The original cause of action was filed in the United States District Court for the District of Utah for the Central Division in that the amount in controversy exceeded Ten

Thousand Dollars (\$10,000.00) and that the parties were residents of different states. In December of 1966, this original case was dismissed based on representations of the Defendant's counsel to the effect that a large payment had recently reduced the amount in controversy to less than Ten Thousand Dollars (\$10,000.00). The representation was subsequently discovered to be false and the case was re-filed in the United States District Court for the District of Utah and was styled Petrof Trading Company, Inc., v. Intermountain Research and Engineering Company, Inc., Case No. 116-67.

During the discovery phase of Case 116-67, the Respondent advised the President of the Appellant corporation to retain the services of Arthur H. Nielson as counsel for trial of the case. The Respondent assisted Arthur H. Nielson in the discovery proceedings of the case and performed his last service in Case 116-67 on approximately October 9, 1968.

Case No. 116-67 went to trial and the Appellant corporation was successful in a portion of its claims. The case was appealed to the Court of Appeals for the Tenth Circuit which substantially affirmed the finding of the District Court.

During the appeal proceedings, and subsequent to the decision of the United States Court of Appeals for the Tenth Circuit, the president of the Appellant corporation, Mr. Julius Petrofsky, reviewed certain court records and discovered a deposition which had been taken at the instance and request of the Respondent

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which was never used in Case No. 116-67. Mr. Petrofsky also discovered other acts which may have constituted professional negligence on the part of Respondent and when this case was filed by the Respondent on July 31, 1970, the Appellant began to develop the issues which subsequently led to the filing of a Second Amended Answer and Counter-Claim by Appellant's then counsel, Reese C. Anderson, on the 19th day of August, 1972, less than four (4) years after the last services rendered by the Respondent and less than four (4) years after the discovery by the president of the Appellant corporation of certain acts in the nature of professional malpractice on the part of Respondent. The reply to the Second Amended Answer and Counter-Claim was filed by the Appellant on August 19, 1972, under the signature of the Respondent, Robert B. Hansen.

The case had been set for trial many times and on the date of the filing of the Second Amended Answer and Counter-Claim and the reply to the Counter-Claim the case had been set for trial on the 7th day of September, 1972.

On the 28th day of August, 1972, the Respondent raised, for the first time, the contention that the claim of professional malpractice was barred by the provisions of Title 78, Chapter 12, Section 25, Utah Code Annotated, 1953, as amended. That statute provides a four (4) year statute of limitations for claims such as the counter-claim of the Appellant for professional malpractice. The Amended Reply to Counter-Claim which raised the statute of limitations defense was received by counsel



for the Appellant less than one (1) week before the trial of the matter.

At the trial on September 7, 1972, the Respondent presented his case-in-chief and the court advised the Appellant that argument would be necessary prior to taking evidence on the Appellant's counter-claim. Thereupon, the then counsel for the Appellant went forward to present his evidence regarding the amount in controversy, payments which were made, over-charges which were claimed by the Appellant and subsequently proven.

In accordance with the instructions of the court, counsel for the Appellant asked no questions designed to elicit evidence of the Appellant's counter-claim. At the conclusion of the evidence, the court required counsel for the Appellant to go forward with a proffer of evidence on which the Appellant's counter-claim was based for the sole purpose of determining whether or not the claim was barred by the statute of limitations. The court did not place the burden upon the Respondent to affirmatively prove facts showing that the statutes of limitations barred the claims of the Appellant. Upon receiving a proffer of evidence from the then counsel for the Appellant and upon hearing arguments of counsel, the court found that the president of the Appellant corporation should have discovered the acts of alleged professional negligence and sought relief on those claims before the filing of the counter-claim on August 19, 1972.

The court also found that the provisions of the Utah Uniform Consumer Credit Code applied to the interest

sought by the Respondent inasmuch as no interest was claimed until after the Act went into effect on July 1, 1969, and on the ground that a fair reading of the Utah Uniform Consumer Code and the statute under which the Respondent claimed interest led the court to the conclusion that the statute under which the Respondent claimed interest was modified insofar as it was inconsistent with the provisions of the subsequent Utah Uniform Consumer Credit Code. The court also found that there was no agreement to pay interest for the professional charges and that the Respondent made no disclosure to the Appellant of its intention to charge interest until the filing of this law suit on July 31, 1970.

After the filing of Findings of Fact, Conclusions of Law, and a Judgment for the Respondent in the amount of Fifteen Hundred Ninety Eight Dollars and 60/100 (\$1,598.60), the amount of the judgment was paid by the Appellant and accepted by the Respondent in satisfaction of the Judgment.

Post trial proceedings were conducted specifically directed to the applicability of the Statute of Limitations defense, post-trial relief was denied, and appeal was taken.

## ARGUMENT

### POINT I.

THE TRIAL COURT ERRED IN DISMISSING APPELLANT-DEFENDANT'S COUNTER-CLAIM ON THE GROUNDS THAT THE

## STATUTE OF LIMITATIONS HAD EXPIRED PRIOR TO THE FILING OF THE COUNTER-CLAIM.

The Statute of Limitations applied by the court to this case to bar the recovery of the Appellant on his counter-claim is 78-12-25 Utah Code Annotated, 1953, as amended, which provides a four (4) year statute of limitations. Counsel for the Appellant believes that this is the applicable statute of limitations for professional malpractice cases against attorneys. Throughout most of the courts of the United States and specifically in the courts of Utah, statutes of limitations defenses are to be affirmatively plead and proven by the party asserting the statute of limitations defense. *DeVas v. Noble*, 13 Utah 2d 133, 369 P.2d 290 (1962), *Kimball v. McCormick*, 70 Utah 189, 259 P. 313, (1927), *Thomas v. Glendinning*, 13 Utah 47, 44 P. 652, (1896), *Tate v. Rose*, 35 Utah 229, 99 P. 1003 (1909).

The burden of affirmatively proving a particular fact requires the party asserting the fact to come forward and produce evidence, either by testimony or by documents, to the effect that the asserted statute of limitations applies. In the instant case, the trial court erred in shifting the burden to the Appellants to prove that the statute of limitations did not apply and, in fact, required the Appellant meet that inappropriate burden of proof by a proffer of evidence. In view of the very short notice given to counsel for the Appellant at the trial, sufficient time did not exist to prepare and marshal the facts appropriate to such a demand by the court. In an effort to ob-

tain post trial relief, the president of the Appellant corporation submitted a detailed affidavit of the evidence to be presented through his testimony. The affidavit is in the record detailing the claims of the Appellant. Supporting documents and expert opinion evidence were not presented. Of course, the counsel for Appellant, during the trial, would not foresee the shift by the court of the burden of proof and, therefore, could not adequately prepare for the trial court's request.

The Appellant contends that the trial court committed reversible error in shifting the burden of proof and in subsequently dismissing the Appellant's counter-claim.

The more substantial issue raised in this case is the question which this court finally resolved for medical malpractice cases in *Christiansen v. Rees*, 20 Utah 2d 199, 436 P.2d 435 (1968).

In *Christiansen v. Rees, supra*, this court adopted the so-called "discovery rule" for medical malpractice cases and specifically over-ruled all prior pronouncements of the court on the issue. The trial court in the instant case made no specific finding of the date on which the president of the Appellant corporation should have discovered the acts of professional malpractice which formed the basis of his counter-claim and instead made the general finding that the acts of negligence "should have been discovered" more than four (4) years prior to the filing of the counter-claim on August 19, 1972. Without appropriate evidence being taken under an appropriate burden of proof, it was impossible for the trial

court to make specific findings of fact on that issue. Without such specific evidence and without specific findings, it was error for the court to dismiss the counter-claim of the Appellant and forever foreclose the Appellant from having his day in court on the allegations of his counter-claim.

At the trial of the matter, all parties conceded that the last services rendered by the Respondent were performed in September or October of 1968; a formal withdrawal of counsel by Mr. Hansen was never filed, and he ultimately received payment from the Appellant in satisfaction of the judgment rendered in 116-67. Because of the relationship of trust between an attorney and his client, a client generally should not be expected to discover professional negligence on the part of an attorney until their relationship of attorney and client is terminated.

In *Holland v. Morton*, 10 Utah 2d 390, 353 P.2d 989 (1960), this court held that clients are under no duty to maintain a careful supervisory check on the actions of their attorney. In the relationship of trust between an attorney and his client, clients are entitled to trust their counsel and until that relationship of trust is terminated, there should be no expectancy that a client will discover an act of professional malpractice.

The court concluded in *Holland v. Morton, supra*, that the attorney's duty to make a full and fair disclosure to his clients prevented the applicable statute of limitations in that case from running until termination of the

attorney-client relationship or until discovery of the fraud.

*Holland v. Morton*, *supra*, however, is not directly in point in this situation and does not resolve the issue for us of when the statute of limitations begins to run in a professional malpractice case against an attorney.

In other states, courts have adopted the rule that the statute of limitations in professional negligence cases involving attorneys does not begin to run until termination of the attorney-client relationship. In *Tuck v. Theusen*, 10 Cal. App. 3d 193, 88 Cal. Rptr. 759 (1970), the California Court of Appeals held that the statute of limitations began to run on the day that the plaintiff obtained new counsel and reasoned that the defendant's duty to render legal services ceased with the substitution of another attorney and since, until the time the attorney was replaced, he was under a continuing duty to correct any negligent acts which may have occurred during the relationship. In *Keaton v. Colby*, 27 Ohio St.2d 234, 271 N.E.2d 772, (1970), the Ohio Supreme Court adopted the rule that the statute of limitations for professional negligence cases against attorneys begins to run at the termination date of the attorney-client relationship. In *Nellas v. Loucas*, 191 S.E.2d 165, (1972), the Virginia court adopted the so-called "Termination Rule" in attorney malpractice cases and cited for authority the decision in *Keaton*, *supra*, reasoning that until the attorney-client relationship terminates, the client has no duty to discover professional malpractice and bring a law suit while the attorney is in the employ of the client.

In the case of *Wilson v. Econom*, 56 Misc. 2d 272, 288 N.Y.Supp.2d 381 (1968), the New York court held that the continuing representation of a client by an attorney extends the statute of limitations during the period of the attorney's representation of the client and thereby adopted the "Termination Rule" in the State of New York.

This court in *Christiansen v. Rees*, *supra*, discussed the same policy considerations which led the court to adopt the discovery rule in medical malpractice cases. Different policy considerations apply to the attorney-client relationship inasmuch as a client generally has a trust in his attorney at least until the termination of the relationship and that until that basis is extinguished, either by the attorney's negligent acts or by the conclusion of the case, the client is under no duty to assume that the attorney may have committed an act of professional negligence.

In most cases, an attorney has exclusive custody of records, evidence, research and other pertinent materials to his client's case which are not usually available to others having the professional qualifications to determine whether or not an act of professional negligence has occurred. Without access to such materials, and particularly where an attorney has made representations to avoid the discovery by his client of negligent acts, a client cannot make a judgment of whether or not professional negligence has occurred. Conceivably, an attorney could "stall" or foreclose inquiry into his work until the

statute of limitations barred recovery under the rule applied by the trial court in the instant case.

Justice Henroid, dissenting in *Christiansen, supra*, also raises the issue which should lead to the adoption of the termination rule for the State of Utah. In the dissenting opinion, Justice Henroid argues that, for example, an error by an attorney in the examination of an abstract of title may not be discovered until many years after the act of negligence and that extending the statute of limitations for such an unreasonable period of time would work a hardship on both parties.

Justice Henroid argues that the limitation rules are appropriately the function of the legislature. The legislature, however, has not seen fit to foresee all of the possible situations in which statutes of limitations may apply. Therefore, the courts are called upon to construe certain common sense rules for the practical application of the legislative fiat.

Adoption of the termination rule in Utah would provide, for example in the abstract of title situation, that the statute of limitations begins to run as of the date of the termination of the attorney-client relationship; i.e., on the date on which the attorney's services are completed in the examination of an abstract of title, and that actions against the attorney for malpractice would be barred four (4) years after the termination of that relationship. Application of the termination rule to the facts of this case will result in a reversal of the lower court's opinion with instructions to determine the exact



date of the attorney's last services and to apply the statute of limitations accordingly.

Unless the court adopts the termination rule, the courts of the State of Utah will be continually faced with the kinds of claims made in this case by the president of the Appellant corporation, to wit: That the representations by the attorney to him lulled him into a false sense of security, into believing that no acts of negligence had been committed, and that the course of professional representation was proceeding in an appropriate fashion. If the courts are continually required to examine claims of professional negligence against attorneys where allegations of fraudulent concealments are made such as those claims made in *Holland v. Morton, supra*, litigation could become time-consuming, costly and vituperative for the public, the courts, and the attorneys who are required to defend claims of fraudulent concealment.

From every perspective, it appears that the court should adopt the so-called "Termination Rule" for the State of Utah and in so doing, should reverse the lower court's decision in this case and remand the case for further consideration.

Respectfully submitted,

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