

2001

# Malcolm N. McKinnon v. The Corporation of the President of the Church of Jesus Christ of Latter Day Saints, a corporation : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT  
BRIEF

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OF THE STATE OF UTAH

MALCOLM N. McKINNON,

*Plaintiff-Appellant,*

vs.

THE CORPORATION OF THE  
PRESIDENT OF THE CHURCH  
OF JESUS CHRIST OF  
LATTER-DAY SAINTS,  
a corporation,

*Defendant-Respondent.*

Case No.  
13553

BRIEF OF APPELLANT

An Appeal from the Judgment of the  
Third Judicial District Court  
of Salt Lake County, State of Utah

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## TABLE OF CONTENTS

|  | Page |
|--|------|
| STATEMENT OF THE NATURE<br>OF THE CASE .....   | 1    |
| DISPOSITION IN THE LOWER COURT ....  | 1    |
| RELIEF SOUGHT ON APPEAL .....  | 2    |
| STATEMENT OF FACTS .....   | 2    |
| ARGUMENT .....   | 9    |
| POINT I. THE EXISTENCE OF DISPUTED<br>ISSUES OF MATERIAL FACTS PRE-<br>CLUDES THE GRANTING OF SUMMARY<br>JUDGMENT AS A MATTER OF LAW. ....         | 9    |
| A. PROPER PARTY DEFENDANT ARGU-<br>MENT. ....  | 10   |
| B. THE CLAIMED BAR OF THE STAT-<br>UTE OF LIMITATIONS .....  | 13   |
| C. THE COURT BELOW ERRED AS A<br>MATTER OF LAW IN ITS CONCLU-<br>SIONS AS TO "DAMAGES." .....  | 21   |
| POINT II. APPELLANT SHOULD<br>HAVE BEEN ALLOWED TO AMEND HIS<br>COMPLAINT TO AVER THE EXIST-<br>ENCE AND BREACH OF A CONSTRUC-<br>TIVE TRUST. .... | 22   |

|   | Page |
|---|------|
| POINT III. APPELLANT'S MOTION TO<br>AMEND TO INCLUDE A CLAIM FOR<br>PUNITIVE DAMAGES WAS PROPER. .... | 25   |
| CONCLUSION .....  | 26   |

#### Cases Cited

|   |    |
|---|----|
| Tiller v. Atlantic Coastline Railroad Co.,<br>323 U.S. 574 (1945) .....   | 23 |
| Atlas Corporation v. Magdanz, 130 Nebraska 519,<br>265 N.W. 473 (1936) .....                                      | 15 |
| Brown v. World Church, 77 Cal. Rptr. 669 (1969) ..  | 16 |
| Bullock v. Deseret Dodge Truck Center, Inc.,<br>11 Utah 2d 1, 354 P.2d 559 (1960) .....                           | 10 |
| Campbell v. Safeway Stores, Incorporated,<br>15 Utah 2d 113, 388 P.2d 409 (1964) .....                            | 21 |
| Davis v. Dyer, 56 N.H. 143 (1875) .....   | 18 |
| Elrod v. Preferred Risk Mutual Insurance<br>Company, Des Moines, Iowa, 201 Kan. 254,<br>440 P.2d 544 (1968) ..... | 22 |
| Fell v. Union Pac. Ry. Co., 32 Utah 101,<br>88 Pac. 1003 (1907) .....   | 23 |
| Haws v. Jensen, 116 Utah 212, 209 P.2d 229<br>(1949) .....  | 25 |
| Larsen v. Gasberg, 43 Utah 203, 134 Pac. 885<br>(1913) .....  | 23 |
| Morris v. Farnsworth Motel, 123 Utah 289,<br>259 P.2d 297 (1953) .....  | 9  |
| O'Hair v. Kounalis, 23 Utah 2d 355, 463 P.2d 799<br>(1970) .....  | 18 |

|  | Page |
|--|------|
| Reliable Furniture Company v. Fidelity &<br>Guarantee Insurance Underwriters, Inc.,<br>16 Utah 2d 211, 398 P.2d 685 (1965) ..... | 9    |
| Rice v. Granite School District, 23 Utah 2d 22,<br>456 P.2d 159 (1969) .....   | 18   |
| Scalise v. Beech Aircraft Corporation, 47 F.R.D.<br>148 (1969) .....   | 26   |
| Strangman v. Arc-Saws, 267 P.2d 395 (Cal. App.<br>1954) .....  | 16   |
| Tanner v. Utah Poultry & Farmers Cooperative,<br>11 Utah 2d 353, 359 P.2d 18 (1961) .....  | 10   |
| Transamerica Title Insurance Company v. United<br>Resources, Inc., 24 Utah 2d 346, 471 P.2d 165<br>(1970) .....                  | 9    |
| Van Hook v. Southern California Waiters Alliance,<br>323 P.2d 212 (1958) .....   | 20   |
| Waugh v. Lennard, 69 Ariz. 214, 211 P.2d 806<br>(1949) .....   | 16   |
| Williams v. Lloyd, 16 Utah 2d 427, 403 P.2d 166<br>(1965) .....  | 21   |

#### Statutes Cited

|                                     |    |
|-------------------------------------|----|
| Utah Code Annotated §78-12-25 ..... | 13 |
|-------------------------------------|----|

#### Authorities

|   |    |
|---|----|
| Restatement (Second) of Trusts, Section 208(1)<br>(b) ..... | 24 |
|---|----|

# IN THE SUPREME COURT OF THE STATE OF UTAH

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MALCOLM N. McKINNON,

*Plaintiff-Appellant,*

vs.

THE CORPORATION OF THE  
PRESIDENT OF THE CHURCH  
OF JESUS CHRIST OF  
LATTER-DAY SAINTS,

a corporation,

*Defendant-Respondent.*

Case No.  
13553

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## BRIEF OF APPELLANT

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### STATEMENT OF THE NATURE OF THE CASE

Plaintiff-appellant seeks money damages against defendant-respondent arising out of respondent's breach of legal duty to provide appellant with a haulage right-of-way to reach his substantial coal properties.

### DISPOSITION IN THE LOWER COURT

Respondent moved the Third Judicial District Court of Salt Lake County, Judge Ernest F. Baldwin,

Jr., presiding, for Summary Judgment. At the hearing, appellant requested leave to file an Amended Complaint and to add or substitute parties defendant. The Court granted respondent's motion for Summary Judgment and denied appellant's motions to amend his Complaint and to add or substitute parties.

### RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the lower court's final Amended Order dismissing appellant's Complaint, denying appellant leave to file an Amended Complaint and to add to or substitute parties and prays that this Court order:

1. That the case be remanded to the district court on its merits.
2. That appellant should be permitted to file his Amended Complaint, and alternatively,
3. That appellant's motion to add or substitute parties should be granted, if this Court should rule that the suit is now pending against the wrong defendant.

### STATEMENT OF FACTS

Appellant has been engaged in the business of coal mining and coal sales for in excess of twenty-five years. During all times herein pertinent he maintained large blocks of coal properties in Emery County, Utah, in his own name and in the name of his proprietorship,

American Fuel Company. (McKinnon Deposition, pg. 5) Appellant was and is a member of The Church of Jesus Christ of Latter-day Saints (hereinafter referred to as the "Church") having been raised a member of this religious organization. (R. 75) Respondent is a corporation sole and is the legal entity through which the Church operates its various programs among which is the General Church Welfare Program presided over by a General Church Welfare Committee. (Peterson Deposition, pg. 4)

In the early 1940's the Church began a concerted effort to acquire coal properties to insure supply for its welfare programs and for general Church operations. (Troseth Deposition, pg. 4) In 1958, Mr. Leonard E. Adams was nominated General Manager of coal properties of the General Church Welfare Committee under the supervision of Henry D. Moyle. (McArthur Deposition, pg. 7) Negotiations were thereafter conducted between appellant and the Church toward sale of the entirety of appellant's Emery County coal properties to the Church but no agreement was reached. (McKinnon Deposition, Exhibit 2) Subsequently, Adams contacted appellant regarding the purchase by the Church of 480 acres of fee coal land owned by appellant. (McKinnon Deposition, Exhibit 1) This sale was consummated in 1959). (Exhibit 2P)

At that time, appellant had an applicant's interest in contiguous coal properties owned by the United States and managed by the Bureau of Land Manage-

ment among which was a 640 acre parcel. (McKinnon Deposition, Exhibit 5) Traversing the area adjacent to the 480 acres were known faults and appellant was retaining his preferential applicant's interest in the contiguous 640 acres to provide a practical hallway around the end of the fault should the fault penetrate his then mining operations to provide access to a large block of coal reserves he controlled. (McKinnon Deposition, Exhibit 2) At that time no one knew the exact extent of the fault or faults and therefore control of the 640 acres was absolutely critical to appellant's long range mining plan. (Troseth Deposition, pg. 6)

In early 1959 Leonard Adams contacted appellant on behalf of the General Church Welfare Committee to determine if appellant would relinquish his interest in the 640 acre preference parcel and assist the Church in acquiring the B.L.M. lease thereon. (McKinnon Deposition, Exhibit 1) Appellant indicated his willingness to assist his Church in this endeavor but only on the express condition that he could reserve a right-of-way to guarantee him access around the fault to provide access to his other coal property. (McKinnon Deposition, Exhibit 2) On March 12, 1959 Leonard Adams wrote to plaintiff regarding the desire of the Church to acquire the preference parcel and further suggesting that appellant make a contribution to the Church in the sum of \$14,000.00. (McKinnon Deposition, Exhibit 2) Subsequently on March 17, 1959 appellant notified Adams that he would favorably consider the proposal with this caveat:

I would like to present a proposition, wherein the Church applies for the acreage I asked for in my lease modification, along with other acreage suitable to Church use, and after the lease is granted, assign to me a portion of the land I applied for in my lease modification. I need a portion of this land in order to develop a practical haulage-way to the West that will go around the end of the fault that is running in a Southwesterly direction and could cut me off if I do not have some additional land to the South (McKinnon Deposition, Exhibit 2).

Appellant then discussed the Church's proposal with his attorney who in turn met with President Henry D. Moyle. The attorney indicated that appellant was agreeable to making this preference parcel available to the Church and to make an additional contribution of \$14,000.00 if the Church would provide the right-of-way. The deposition of the attorney reveals the following colloquy:

Q. During the initial discussion with President Moyle did President Moyle make any response to your request or suggestion?

A. Yes, he did.

Q. Can you tell us your best recollection now of what President Moyle said on that first occasion?

A. When he looked at the maps and after I got through explaining them to him, he said, 'Well, Frank, there's no problem there'. He said, 'if those faults extend into our ground we will arrange to give him a right-of-way to go around them.'

Q. And by 'we' did you understand him to mean

the Corporation of the President of The Church organization would grant to Mr. McKinnon that right-of-way?

A. Yes, that's true (Armstrong deposition,, p.8-9).

At the conclusion of the meeting President Moyle stated to appellant's counsel "We will wait until we get the lease and then we will prepare a right-of-way for him." (Armstrong deposition, p. 10).

Appellant had been taught to believe by virtue of the teachings received by him as a member of The Church of Jesus Christ of Latter-day Saints:

1. That the Church was divinely organized and restored to the earth in this dispensation by Jesus Christ himself and by other resurrected beings acting directly under his supervision.
2. That one of the primary purposes and functions of the organization of the Church was to provide an appropriate organization to assist all men in attaining perfection in this life and hence to earn the right to eternal life and exaltation.
3. That Henry D. Moyle, with whom he dealt and upon whom he relied in the transactions here involved, was not only an authorized agent and General Authority of the Church, but more especially a direct representative of God and that Leonard Adams and Alfred Uhrhan, the other Church representatives with whom he dealt and upon whom he relied, were authorized agents or representatives of the Church.
4. That the honesty and integrity of the Church and its General Authorities, its officers, its agents, and representative, including Henry D.

Moyle, Leonard Adams, and Alfred Uhrhan was wholly beyond repute and unimpeachable and for him to consider otherwise would be heresy.

5. That the welfare program of the Church which was to be the repository of the coal properties here involved was inspired of the Lord and was an important and vital program of the Church. (R. 76)

Appellant's counsel reported the substance of his conversations with President Moyle and appellant thereafter prepared two checks totalling \$14,000.00 made payable to the Church and abandoned his interest in the preference parcel sought by the Church. Appellant subsequently wrote a letter to President Moyle indicating that he was holding the \$14,000.00 donation and desired to have the formal right-of-way documented "in accordance with the understanding (Moyle) had with (appellant's counsel)." (McKinnon deposition, Exhibit 7). At no time did President Moyle or any other representative of the Church dispute or deny the understanding reached between Moyle acting for the Church and appellant's counsel.

The checks were then delivered by counsel to President Moyle, who stated "We will hold these checks until we can give you the right-of-way and until we get the lease from the Government." (Armstrong deposition, p. 13). The two checks totalling \$14,000.00 were handed by President Moyle to the Secretary of the General Church Welfare Committee, Alfred W. Uhrhan, who placed them in an envelope and wrote

on the cover "hold two checks totalling \$14,000.00 Malcolm McKinnon tendered for right-of-way. This matter is pending." (McKinnon deposition, Exhibit 12). Appellant then assisted the Church in acquiring the 640 acre parcel and although several requests were made by appellant for a memorialization of the right-of-way agreement, none was ever forthcoming and in 1966 the Church leased the 640 acres to Peabody Coal Company without reserving the promised right-of-way to appellant. Respondent's Exhibit "A", pg. 38 and 40)

The Church maintains a recognized internal procedure through which Church members may bring grievances before the Church. (Curtis Deposition, pg. 13-14) Upon being apprised of the transfer of the property by the Church to Peabody Coal Company, appellant sought to take advantage of this ecclesiastical grievance procedure. (Curtis Deposition, pg. 15) He presented his claim through his own Bishop, Stake President and a close friend who was also a Stake President and eventually met personally with President N. Eldon Tanner of the First Presidency of the Church in the company of both his attorney and one of the Stake Presidents. (Armstrong Deposition, pg. 18) President Tanner was unable to explain the retention by the Church of the \$14,000.00 donation and indicated to those present that appellant's grievance should be put "at rest" until appellant found out whether he could go around the fault on his own property. (Armstrong Deposition, pg. 20) It is undisputed that the procedure

followed by appellant was the recognized grievance procedure for a member's claim against the Church. (Curtis Deposition, pg. 14-15) No right-of-way has ever been granted appellant. (McKinnon Deposition, pg. 55)

## ARGUMENT

### POINT I.

#### THE EXISTENCE OF DISPUTED ISSUES OF MATERIAL FACTS PRECLUDES THE GRANTING OF SUMMARY JUDGMENT AS A MATTER OF LAW.

It is axiomatic that Summary Judgment is improper when there exist disputed issues of material facts. *Transamerica Title Insurance Company v. United Resources, Inc.*, 24 Utah 2d 346, 471 P.2d 165 (1970); *Reliable Furniture Company v. Fidelity & Guarantee Insurance Underwriters, Inc.*, 16 Utah 2d 211, 398 P.2d 685 (1965). The appellant submits that the lower court erred in granting respondent Summary Judgment as there exist in this matter a plethora of disputed factual issues and, more particularly, that the grounds set forth in the Amended Order dismissing appellant's Complaint are insufficient when viewed as they must be on appeal in a light most favorable to appellant. *Morris v. Farnsworth Motel*, 123 Utah 289, 259 P.2d 297 (1953). The lower court set them forth as follows:

A. The defendant is not a proper defendant;

B. The cause of action is barred by the Utah Statute of Limitations; and

C. The issue of damages is either moot or not susceptible to legal determination (R. 10).

Each of these enumerated bases involves genuine issues and as there has been no showing by respondent which precludes *as a matter of law* the awarding of any relief to appellant, *Tanner v. Utah Poultry & Farmers Cooperative*, 11 Utah 2d 353, 359 P.2d 18 (1961); *Bullock v. Deseret Dodge Truck Center, Inc.*, 11 Utah 2d 1, 354 P.2d 559 (1960) summary relief is improper.

### A. PROPER PARTY DEFENDANT ARGUMENT

Respondent avers and the lower Court agreed that respondent "The Corporation of The President of The Church of Jesus Christ of Latter-day Saints" is not a proper party defendant. Appellant submits that respondent is the proper party defendant, or in the alternative, that appellant should have been granted opportunity on motion duly made, accepted but denied by the Court below, to add or substitute parties defendant. It is undisputed that all of appellant's contacts during the formation of the underlying agreement which gave rise to this action were with representatives of The Corporation of the President of The Church of Jesus Christ of Latter-day Saints.

Appellant and appellant's agents met with Henry

D. Moyle, an agent and employee of The Corporation of the President of The Church of Jesus Christ of Latter-day Saints, who struck the bargain whereby appellant would transfer to respondent appellant's interest in the 640 acre preference parcel and respondent would grant appellant a haulage right-of-way across the property should the need arise. (Armstrong Deposition, pg. 9) In a prelude to this contractual relationship, appellant had sold respondent 480 acres of fee property and had received in payment therefor a check drawn on respondent The Corporation of the President of The Church of Jesus Christ of Latter-day Saints. (Exhibit 2P) In furtherance of this agreement, appellant made a \$14,000.00 contribution payable to "The Church of Jesus Christ of Latter-day Saints" and it is beyond cavil that the The Corporation of the President of The Church of Jesus Christ of Latter-day Saints is the legal entity which holds title to property donated in its name or to the name of the "Church of Jesus Christ of Latter-day Saints".

Respondent contended during argument that it was not a proper party defendant and that the proper party defendant was Cooperative Security Corporation. (Respondent's Opening Brief, pg. 6) At no time did appellant have any contact with employees or representatives of Cooperative Security Corporation; his exclusive contact was with representatives of respondent, more particularly: Leonard Adams, the then General Manager of the Church Coal Mine Properties; Henry D. Moyle, a Second Counselor in The Church

of Jesus Christ of Latter-day Saints; and Alfred W. Uhrhan, an employee of the General Church Welfare Committee. (Peterson Deposition, pg. 7) It is true that the Cooperative Security Corporation was the legal entity which eventually took title to the 640 acres which appellant transferred to respondent as its designee but appellant is not required to bring this action against respondent's nominee or designee. Appellant has never contended or effectuated any contractual relationship with Cooperative Security Corporation.

From the statement of the Trial Judge below at hearing (R. 10), we assume that he deemed the appropriate party defendant to be the "Church of Jesus Christ of Latter-day Saints", an unincorporated association, and, consequently, that both appellant and respondent were in error as to the proper identity of the defendant. In any event, appellant, without waiving his position that the "Corporation of the President" was the proper party defendant, moved to be permitted to add the "Church of Jesus Christ of Latter-day Saints", an unincorporated association, Cooperative Security Corporation, and any other legal entity pressed by the Court or respondent as substitute or additional defendants. That motion, although accepted by the Court, was denied on its merits.

If this Court determines that the "Corporation of the President" is not the proper party defendant, then it must further rule that the Court below erred in not granting the motion of appellant to add or substitute

parties. Otherwise, form would certainly triumph over substance and manifest injustice would prevail. If the Trial Judge had asked for the real defendant to stand, it would have been the same "body" whether in the form of the "Corporation of the President", the unincorporated association, Cooperative Security Corporation or some other controlled pseudonym or designee. Such a charade of musical chairs should be beneath the dignity of a self-declared agent of deity, and, even applying general principles of law and equity which are less divine, would, if successful, shock the conscience and defy the most primitive concepts of fairness and justice.<sup>1</sup>

It follows that the Court below erred grievously and that the Judgment must be reversed.

## B. THE CLAIMED BAR OF THE STATUTE OF LIMITATIONS

The second ground enumerated by the lower court in dismissing appellant's Complaint was that the cause of action is barred by the four (4) year Utah Statute of Limitations, §78-12-25, Utah Code Annotated. Even the most cursory review of the record indicates beyond question that appellant raised significant factual issues which preclude respondent from beneficial reliance on the Statute of Limitations.

### 1. First is the existence of the special fiduciary

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<sup>1</sup> No religious bias should be assumed from the foregoing argument for its scrivener is an active member in good standing of the same church.

relationship between appellant and respondent. This was not, by any means, an ordinary business transaction. Appellant in his untraversed affidavit states:

That the entire transaction which is the subject of this controversy was colored by the Church and its self-declared mission as described generally herein, his membership therein and his belief and faith in its mission, purpose, honesty and integrity, together with that of its officers, agents, and representatives. (R. 77)

It is undisputed that appellant would not have dealt with respondent at all and would not have performed any of the acts which gave rise to this controversy but for the existence of the special fiduciary relationship. Appellant had been engaged for years in the coal business and recognized the necessity of maintaining access to his properties. However, when appellant was approached by Leonard Adams and the negotiations were conducted with Henry D. Moyle, appellant was dealing with what he believed to be the direct representative of God (R. 76) and further believed that the welfare program of the Church which was to be the repository of the coal properties here involved was inspired of the Lord and was an important and vital program of the Church. (R. 76) Because of appellants' belief and faith he did not take the precautions in dealing with respondent in this transaction as he would have taken in dealing with mere mortals or their institutions. (R. 76)

Appellant had been induced by respondents' own specific teachings to believe that he was dealing with

God's chosen representative in aid of God's special purposes. He had been led to believe by the Church itself that the contiguous preferred mining properties as to which he held a preference and which were absolutely necessary to the future mining of his properties were critically needed by the Church's inspired welfare program. Appellant was a member in good standing of The Church of Jesus Christ of Latter-day Saints and as such had been taught that Henry D. Moyle, as a member of the First Presidency, was a person directly revelating with God on behalf of the Church and for the guidance and protection of all members of the Church, including appellant. (R. 76) This special and unique relationship removed respondent's agents from the mundanities of every day business transactions and placed all of the dealings between appellant and respondent on a higher plane.

Under special confidential relationships such as those here controlling, the courts have removed the otherwise protective umbrella of Statute of Limitations. One case is *Atlas Corporation v. Magdanz*, 130 Nebraska 519, 265 N.W. 473 (1936), involving the relationship between a bank and one of its managing officers. The Court held at 265 N.W. 746:

We are of the opinion that defendant Magdanz (manager) is estopped as against the bank and its assignee to plead either the Statute of Frauds or Limitations. Magdanz was cashier and active manager of the bank. He had charge of the note as such officer and it was his duty to enforce payment when due or report the situation to the

Board of Directors for instructions. Instead of performing his duty, he made the endorsement and thereby concealed the fact that the note was due. He should not now be permitted to take advantage of his wrong.

The attorney-client relationship is of like confidential nature and courts have precluded counsel from relying upon the Statute of Limitations when suit is brought by a disenchanted client. In *Strangman v. Arc-Saws*, 267 P.2d 395 (Cal. App. 1954), an action was initiated against an attorney by an ex-client who had been solicited by the attorney to invest money in a corporation in which the attorney was an officer and director. The attorney had concealed from the client the existence of the attorney's relationship with the corporation. The Court denied the attorney the defense of Statute of Limitations. See also *Waugh v. Lennard*, 69 Ariz. 214, 211 P.2d 806 (1949).

In a somewhat analogous case to the facts here presented, the California Appellate Court in *Brown v. World Church*, 77 Cal. Rptr. 669 (1969), considered a case wherein the Church through its pastor had borrowed money from a parishioner and for an extended period of time the Church and minister repeatedly advised Mrs. Brown that her note was secure, that she need not contact counsel to collect the note and that if any person sued, it would become a sin against the Church and that she should have faith in her ministers. When suit was finally initiated, defendant Church and the ministers raised the defense of Statute of Limi-

tations. The Court summarily estopped both from asserting this defense.

Appellant's state of mind is a factual issue which must be determined by the trier of fact and until such a determination as to the existence of a fiduciary relationship is made, no Summary Judgment can lie against him.

2. The defense of Statute of Limitations is also non apropos and not available to respondent because respondent's conduct in persuading appellant to seek redress through respondent's grievance procedures lulled appellant into a false sense of security as appellant reasonably believed the breach of agreement by respondent had occurred because of an innocent mistake on the part of respondent and its officers and representatives and that the same could be and would be rectified through the internal grievance procedure of the Church. (R. 77)

Appellant initiated his contacts with the Church prior to the running of any applicable Statute of Limitations. One of the Church's authorized representatives characterized appellant's efforts in this regard as being consistent with its internal practice and policy. (Curtis Deposition, pg. 15) However, rather than promptly denying the claim to demonstrate to appellant the hopelessness of this procedure, respondent entreated appellant to hold the matter in abeyance for an indefinite period. (Armstrong Deposition, pg. 20) It was not until after the four (4) year Statute of Limitations had run

that respondent, for the first time, indicated to appellant that respondent had no intention of granting him redress through this procedure.

This Court has enunciated its displeasure as to such conduct in *Rice v. Granite School District*, 23 Utah 2d 22, 456 P.2d 159 (1969), at 22 Utah 2d 28:

One cannot justly or equitably lull an adversary into a false sense of security thereby subjecting his claim to the bar of limitations and then be heard to plead that very delay as a defense to the action when brought. Acts or conduct which wrongfully induce a party to believe an amicable adjustment of his claim will be made may create an estoppel against the pleading of the Statute of Limitations.

*Rice*, is, if possible, a weaker case than appellant's because in *Rice* only negotiations to compromise a claim were involved, whereas in appellant's situation, the equities weigh much heavier in his favor.

Again, the intention of the parties and the existence of confidential and fiduciary relationships between them are matters of factual determination at a trial upon the merits and summary denial of such claims is error. *O'Hair v. Kounalis*, 23 Utah 2d 355, 463 P.2d 799 (1970). See also *Davis v. Dyer*, 56 N.H. 143 (1875), wherein the New Hampshire Supreme Court in a case involving a suit between a parishioner and his Church where the Church's arbitration policy was first invoked held at 56 N.H. 146:

If in fact the plaintiff was induced to postpone bringing his suit by the agreement of the defendant to refer and to perform the award for the period of time during which his legal right to commence a suit was thus put in abeyance by the agreement, I see no reason why that does not amount to an estoppel in pais which must prevent the defendants from availing themselves of the fact that the cause of action did not accrue within six years to defeat the action. However strong the probabilities on that subject may appear, the Court *cannot* say as a matter of law the fact was so. (Emphasis added)

Furthermore, appellant's affidavit on this subject was uncontroverted. It follows then, for the purpose of motion for Summary Judgment, the Court below was legally bound to find the existence, not the absence, of this confidential and fiduciary relationship as a matter of law.

It should be noted that plaintiff did not proceed directly with his internal appeal through the grievance procedure of respondent simply out of an election of remedies; he did so because he had been informed and believed that the Church always strived to solve its problems internally and never brought such internal problems to light outside of its confines. (Curtis Deposition, pg. 14) At a meeting conducted in the presence of then President N. Eldon Tanner, appellant and his attorney presented the facts surrounding his claim. President Tanner did not deny the claim and, on the contrary, suggested that the matter be tabled until such time as the actual situs of the fault could be ascertained.

At such subsequent time, Tanner promised, the Church would again review the matter. (Curtis Deposition, p. 11)

An analogous case wherein a member of an organization availed himself of internal grievance procedures and thereby failed to file his civil action within the appropriate limitation period is *Van Hook v. Southern California Waiters Alliance*, 323 P.2d 212 (1958). In *Van Hook* the general secretary of the local union was offered other employment and so advised the union. The union thereupon granted him an extensive retirement program. Subsequently, the secretary lost a re-election bid and notified the union of his intent to secure the retirement program. Defendant thereupon refused to comply with its agreement and the matter was submitted through the union's internal arbitration procedures. After the Statute of Limitations had run for filing a civil action, plaintiff filed a civil complaint and defendant union raised the defense of Statute of Limitations. The Court summarily denied defendant the right to claim the benefit of the Statute and held at 323 P.2d 219:

By its conduct herein the defendant lulled plaintiff into a sense of false security in implying that by proceeding through the successive steps of appeal provided by the constitution of the International Union his claim might be recognized or a settlement reached. 'It is well settled that where delay in commencing an action is induced by conduct of the defendant, he cannot avail himself of the defense of statute of limitations.'

**C. THE COURT BELOW ERRED AS A MATTER OF LAW IN ITS CONCLUSIONS AS TO "DAMAGES."**

The final ground enumerated by the lower court in granting respondent's Motion for Summary Judgment is a statement that appellant having "leased his property without any diminution in price to the owner of the property through which the alleged right-of-way was to be granted, makes the issues of damages either moot or not susceptible to legal determination." (R. 10) This simply is not the fact!

Summary Judgment is not the proper vehicle for ascertaining damages. The lower court's determination to resolve damages prior to receiving any testimony from witnesses, lay or expert, takes from the trier of fact one of its fundamental duties. It is a touchstone of our judicial system that the determination and assessment of damages is peculiarly within the province of the jury. *Williams v. Lloyd*, 16 Utah 2d 427, 403 P.2d 166 (1965); *Campbell v. Safeway Stores, Incorporated*, 15 Utah 2d 113, 388 P.2d 409 (1964). The proper method of determining damages is to put appellant in the position he would have been but for the breach of contract by respondent.

It is clear that the lower court's abrupt resolution of the damage issue is not proper; it, in no respect, attempts to determine the position in which plaintiff would have been had there been no breach. The damage question necessitates a finding of fact and the existence

of such factual issue precludes Summary Judgment on the damage issue. *Elrod v. Preferred Risk Mutual Insurance Company, Des Moines, Iowa*, 201 Kan. 254, 440 P.2d 544 (1968).

Appellant submits that summary resolution by the lower court of each of the material factual issues raised herein was improper and that the existence of such issues mandates a remand of this matter for trial before a trier of fact. No other decision by this Court would satisfy appellant's right to trial of these issues on their merits.

## POINT II.

APPELLANT SHOULD HAVE BEEN ALLOWED TO AMEND HIS COMPLAINT TO AVER THE EXISTENCE AND BREACH OF A CONSTRUCTIVE TRUST.

It is uncontroverted that respondent obtained the 640 acres through which appellant sought his haulage right-of-way by means of the underlying agreement with appellant. Respondent did so with full knowledge of the confidential relationship existing between itself and appellant as hereinabove set forth. Respondent obtained this property subject to a specific condition: The granting to appellant of the promised right-of-way. Respondent subsequently transferred the property without reserving such right-of-way to appellant. As a direct and proximate result of the actions of respond-

ent, a constructive trust resulted covering the leasehold property with appellant as beneficiary.

The existence of the constructive trust is implicit in the allegations of fact contained in the original Complaint and it does not constitute a new cause of action. The decision of the lower court in denying appellant the opportunity to so amend is contrary to the interest of justice and serves no useful function but to frustrate a full hearing on the merits of the controversy. The amendment sought is proper and should have been permitted. *Larsen v. Gasberg*, 43 Utah 203, 134 Pac. 885 (1913); *Fell v. Union Pac. Ry. Co.*, 32 Utah 101, 88 Pac. 1003 (1907).

This Court should allow the amendment alleging the existence and the breach of the constructive trust which arose from the fact setting of the original Complaint as a matter of law. Respondent cannot claim to have been prejudiced by the amendment because respondent has had notice from the beginning of this lawsuit that appellant was seeking enforcement of a claim arising out of the breach of respondent's agreement to provide the right-of-way. The language of the United States Supreme Court in *Tiller v. Atlantic Coastline Railroad Co.*, 323 U.S. 574 (1945), although written in a different factual context, is applicable here. In that suit, an action was commenced under the Federal Employers' Liability Act for a death resulting from negligence; it was held that an amendment to the complaint was properly permitted to state an addi-

tional ground of negligence. The Court held at 323 U.S. 581:

The cause of action now, as it was in the beginning, is the same—it is a suit to recover damages for the wrongful death of the deceased. ‘The effect of the amendment here was to facilitate a fair trial of the existing issues between plaintiff and defendant.’ *Maty v. Grasselli Chemical Co.*, 303 US 197. There is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in the respondent’s yard.

Appellant has sustained damage as a result of respondent’s breach of the constructive trust. When respondent sold the trust property in breach of the constructive trust it did so to the substantial detriment of the beneficiary, appellant. The determination of such damage is more particularly described in *Restatement (Second) of Trusts*, Sec. 208 (1) (b) providing that when a trustee sells property which is its duty to retain, the beneficiary can “*charge him with the value at the time of the decree*, with the income which would have accrued thereon if he had not sold it or require him to make specific reparation if this is reasonable under the circumstances.” (Emphasis added)

To now allow respondent to transfer this property free of the right-of-way agreement would constitute an unjust enrichment to respondent because respondent has received monetary consideration for the transfer

from Peabody Coal Company. This Court has recognized the availability of constructive trust in similar fact situations, that such trust arises by operation of law and that sitting as a court of equity, the lower court is free to effect justice according to the equities peculiar to each transaction whenever a failure to perform a duty to convey property would result in unjust enrichment. *Haws v. Jensen*, 116 Utah 212, 209 P.2d 229 (1949). It should do so here.

### POINT III.

#### APPELLANT'S MOTION TO AMEND TO INCLUDE A CLAIM FOR PUNITIVE DAMAGES WAS PROPER.

Appellant sought permission from the lower court to file an Amended Complaint asserting an additional claim for punitive damages based upon the gross and aggravated nature of respondent's breach of agreement and of its duties as constructive trustee and further averring the breaches to have been willful and malicious in nature. The motion was based upon facts developed through discovery after filing of the original Complaint which demonstrated the grievous nature of respondent's action and the inconsistency between its conduct toward appellant and its self-declared mission and the precepts which it espouses and which it expects from its many members including this appellant.

This breach arose out of a relationship of strictest confidentiality and highest trust in that appellant has been continually assured and reassured by representatives of respondent that the Church would never act consciously in such a manner as to cause injury to a member such as himself and that a member should believe in the promises of such representatives implicitly.

This claim for punitive damages in no way states a new cause of action and does not prejudice respondent in its defense of this action. It is merely a new element of damages having its source in the same occurrence as were the subject of the original Complaint. See *Scalise v. Beech Aircraft Corporation*, 47 F.R.D. 148 (1969). The Court erred in refusing to allow the amendment.

## CONCLUSION

Appellant has presented this Court with a compendium of the material factual issues which had not been resolved and which existed at the time of the precipitous action of the trial court in granting Summary Judgment. Appellant has further shown that no grounds or bases whatsoever existed for the court below to deny appellant the opportunity to present his cause to a trier of fact. Appellant respectfully submits that the decision of the lower court must be reversed and this matter remanded for trial on its merits, with appellant being permitted to amend his Complaint to aver

the existence and breach of a constructive trust and for punitive damages as well as opportunity to add or to substitute parties defendant if required.

Respectfully submitted,

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