

1986

James D. Conder v. A.L. Williams : Brief of Appellant

Utah Supreme Court

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UTAH
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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES D. CONDER,	:	
	:	
Plaintiff and	:	
Appellant,	:	
	:	
vs.	:	
	:	
A.L. WILLIAMS & ASSOCIATES,	:	Case No. 20297
INC., a Georgia corporation;	:	
MASSACHUSETTS INDEMNITY AND	:	
LIFE INSURANCE COMPANY, a	:	
Massachusetts corporation;	:	
and BRYCE D. PETERSON,	:	
	:	
Defendants and	:	
Respondents.	:	

BRIEF OF APPELLANT

Appeal from the Judgment of the Third District Court
Salt Lake County, The Hon. Scott Daniels, Judge

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PARTIES TO THIS PROCEEDING

Plaintiff and
Appellant:

JAMES D. CONDER
(hereinafter, "Conder")

Defendants and
Respondents:

A.L. WILLIAMS & ASSOCIATES,
INC., a Georgia corporation,
(hereinafter, "A.L. Williams")

MASSACHUSETTS INDEMNITY AND
LIFE INSURANCE COMPANY, a
Massachusetts corporation,
(hereinafter, "MILICO")

Defendant:

BRYCE D. PETERSON
(Mr. Peterson did not join
in the motion in the lower
court and is not a party to
this Appeal.)

TABLE OF CONTENTS

	Page
AUTHORITIES CITED	
Cases.....	iii
Statutes.....	v
Rules.....	v
Other Authorities.....	v
ISSUES PRESENTED FOR REVIEW.....	1
STATEMENT OF THE CASE	
Nature.....	2
Course and disposition in court below.....	2
STATEMENT OF FACTS.....	3
SUMMARY OF ARGUMENTS.....	6
STATEMENT OF LAW	
INTRODUCTION.....	8
POINT I: THERE ARE NUMEROUS ISSUES OF MATERIAL FACT WHICH PRECLUDE SUMMARY JUDGMENT IN THIS CASE.....	12
POINT II: THE ESSENTIAL ELEMENTS OF FRAUD WERE SUFFICIENTLY ALLEGED IN THE COMPLAINT AND THE EVIDENCE ADDUCED SUPPORTS SAID ELEMENTS.....	14
POINT III: THE VICTIM OF FRAUD HAS THE OPTION TO RESCIND A FRAUDULENTLY INDUCED CONTRACT AND SEEK RESTITUTION OR TO AFFIRM THE CONTRACT AND SUE FOR DAMAGES.....	20
POINT IV: THE DOCTRINE OF AVOIDABLE CONSEQUENCES DOES NOT REQUIRE THE VICTIM OF A FRAUDULENTLY INDUCED CON- TRACT TO RESCIND THE CONTRACT UPON LEARNING OF THE FRAUD.....	23
CONCLUSION.....	26

AUTHORITIES CITED

CASES

<u>Aird Ins. Agency v. Zions First National Bank</u> , 612 P.2d 341 (Utah 1980).....	10
<u>A & M Industries, Inc., v. Hunziker</u> , 25 Utah 2d 363, 482 P.2d 700 (1971).....	10
<u>Anchorage Independent School District v. Stephens</u> , 370 P.2d 531 (Alaska 1962).....	24
<u>Anderson v. Viking Pump Division, Houdaille Industries, Inc.</u> , 545 F.2d 1127 (8th Cir. 1976).....	10
<u>Bangerter v. Poulton</u> , 663 P.2d 100 (Utah 1983).....	15
<u>Berkeley Bank for Cooperatives v. Meibos</u> , 607 P.2d 798 (Utah 1980).....	18
<u>Brandt v. Springville Banking Co.</u> , 10 Utah 2d 350, 353 P.2d 460 (1960).....	9
<u>Brockway v. Heilman</u> , 58 CalRptr. 772 (1967).....	22
<u>Bruce v. Martin-Marietta Corp.</u> , 544 F.2d 442 (10th Cir. 1976).....	10
<u>Chester v. McDaniel</u> , 504 P.2d 726 (Ore. 1972).....	22
<u>Corbet v. Corbet</u> , 24 Utah 2d 378, 472 P.2d 430 (1970).....	12
<u>Doff v. Brunswick Corp.</u> , 372 F.2d 801 (9th Cir. 1967).....	10
<u>Dugan v. Jones</u> , 615 P.2d 1239 (Utah 1980).....	21, 22
<u>Elizaga v. Kaiser Foundation Hospitals, Inc.</u> , 487 P.2d 870 (Ore. 1971).....	22
<u>Frisbee v. K&K Construction Co.</u> , 676 P.2d 391 (Utah 1984).....	9, 10
<u>Golden Oil Co., Inc. v. Exxon Co., U.S.A.</u> , 543 F.2d 548 (5th Cir. 1977).....	10

<u>Jardine v. Brunswick Corp.</u> , 18 Utah 2d 378, 423 P.2d 659 (1967).....	17, 18, 24
<u>Massey v. Utah Power & Light</u> , 609 P.2d 937 (Utah 1980).....	10
<u>Mecham v. Benson</u> , 590 P.2d 304 (Utah 1979).....	21, 22
<u>Mikkelson v. Quail Valley Realty</u> , 641 P.2d 124 (Utah 1982).....	18
<u>Morris v. Farnsworth Motel</u> , 123 Utah 289, 259 P.2d 297 (1953).....	9
<u>Pace v. Parrish</u> , 122 Utah 141, 247 P.2d 273 (1952).....	7, 14, 15
<u>Pilcher v. State of Utah Dept. of Social Services</u> , 663 P.2d 450 (Utah 1983).....	11
<u>Pratt v. Board of Educ. of the Uintah Co. School Dist.</u> , 564 P.2d 294 (Utah 1977).....	25
<u>Reliable Furniture Co. v. Fidelity and Guaranty Insurance Underwriters, Inc.</u> , 14 Utah 2d 169, 380 P.2d 135 (1963).....	11
<u>Rogers v. Crest Motors, Inc.</u> , 516 P.2d 445 (Colo. 1973).....	22
<u>Rosander v. Larsen</u> , 14 Utah 2d 1, 376 P.2d 146 (1962).....	11
<u>Thompson v. Ford Motor Co.</u> , 16 Utah 2d 30, 395 P.2d 62 (1964).....	9
<u>Thompson v. Ford Motor Co.</u> , 14 Utah 2d 334, 384 P.2d 109 (1963).....	11
<u>Thompson v. Jacobsen</u> , 23 Utah 2d 359, 463 P.2d 801 (1970).....	24
<u>Utah Dept. of Transportation v. Fuller</u> , 603 P.2d 814 (Utah 1979).....	12

STATUTES

U.C.A. 61-1-1, et seq.....	17
U.C.A. 61-2-1, et seq.....	16
U.C.A. Title 16.....	3

RULES

URCP 54(b).....	2
URCP 56(c).....	8, 9

OTHER AUTHORITIES

<u>McCormick, Damages</u>	20
---------------------------------	----

ISSUES PRESENTED FOR REVIEW

1. Whether the admissible evidence before the court below was sufficient to establish genuine issues of material fact which would preclude summary judgment as a matter of law.

2. Whether Conder was permitted under Utah law to affirm an employment contract upon learning of the fraud and misrepresentation which induced him to enter into said contract, and pursue his remedy in damages.

3. Whether Conder was required to rescind said contract in order to mitigate his damages.

STATEMENT OF THE CASE

Nature. This appeal relates to a cause of action for damages resulting from fraud and misrepresentation in the inducement of an employment contract between Conder and the respondents.

Course and disposition in court below. Conder filed his Complaint on August 27, 1982, alleging five causes of action. On July 27, 1984, the court below heard a motion for summary judgment filed by A.L. Williams and MILICO and, as a result, the first cause of action, alleging fraud and misrepresentation, was dismissed by partial summary judgment entered September 5, 1984. The motion was denied as to three causes of action which alleged wrongful termination and breach of contract. This Court subsequently denied the petition of A.L. Williams and MILICO for an interlocutory appeal on those issues, (Case No. 20262), and they are not a part of this Appeal. The remaining cause of action had been abandoned previously.

The court below thereafter denied Conder's motion to amend the partial summary judgment and entered its judgment pursuant to Rule 54(b), Utah Rules of Civil Procedure, on October 11, 1984.

On November 27, 1984, this Court denied respondents' motion for summary disposition of this case.

STATEMENT OF FACTS

This action was brought in the court below because of what Conder claims were fraudulent statements made by agents of A.L. Williams and MILICO, misrepresenting to him the nature of their business and the authority they had to do business and provide services in the State of Utah. Relying upon such statements and misrepresentations, Conder was induced to go to work as an agent of MILICO, working in the A.L. Williams sales organization. By doing so he claims to have sustained compensable damages.

MILICO is a Massachusetts insurance corporation doing business in Utah although not qualified as a foreign corporation pursuant to Title 16, Utah Code Annotated, 1953. (R102 ¶3) It received a Certificate of Authority to sell insurance from the predecessor of the State of Utah Department of Insurance on March 1, 1964. (R102 ¶4)

A.L. Williams is a Georgia corporation which acts as the nationwide marketing organization for MILICO in Utah (R14-16 ¶¶3,6) but is not qualified under Title 16, Utah Code Annotated, 1953. (R91 ¶3) It was licensed by the Insurance Department on March 19, 1982, under the name A.L. Williams Insurance Services, Inc. (R91 ¶4) This licensure did not occur until after the events complained of in the Complaint. (R3 ¶9)

Conder was first introduced to A.L. Williams and MILICO in the early part of 1980 by a friend who had attended an opportunity meeting conducted by A.L. Williams' representatives. Although Conder was gainfully employed at the time, he was looking for opportunities to improve himself financially. Consequently, he had several conversations with various representatives of A.L. Williams and MILICO and met with them at their opportunity meetings to learn more of the companies and the opportunities open to him to pursue a career with them. During these conversations and meetings, Conder was told by sales representatives, sales supervisors and regional vice presidents of A.L. Williams that A.L. Williams was a full service financial company like E.F. Hutton, Merrill Lynch and Dean Witter and that it dealt in insurance, real estate, securities, gold, silver and annuities. (R221, 241 ¶9, 511 ¶3)

These persons, in referring to A.L. Williams, often spoke of "the insurance side of the house," "the real estate side of the house," and "the investment side of the house." R221, 241 ¶9, 511 ¶3, 518 ¶2, 520 ¶2) The obvious impression left with recruits was that if they came to work with A.L. Williams they would be involved in investment counseling and asset management (R511-12

¶¶5,8, 518 ¶4, 520 ¶3) Conder left his former employment in reliance upon these representations because he desired to get into the business of investment counseling. (R511-12 ¶7)

In fact, A.L. Williams did nothing but sell MILICO insurance. It has never been licensed as a real estate broker. (R447 ¶3) It has never received compensation for buying, selling, leasing or exchanging real estate for another, (R448 ¶5) nor has it employed, during the period in question, anyone as a real estate salesman. (R449 ¶8)

Furthermore, A.L. Williams has never been licensed by the Utah Securities Division as a broker-dealer, investment advisor or issuer to enable it to have "an investment side of the house," (R451 ¶13) nor has it received any compensation for any securities-related business. (R452 ¶17) A.L. Williams claims an affiliation with a licensed broker-dealer through which its agents may sell securities (R451-52 ¶15) but that company was not registered as such during the period in question.

Even after Conder signed an agent agreement with A.L. Williams and began his initial training in insurance, he was led to believe that training in the field of securities would begin later. (R512 ¶9) By the time

he discovered that A.L. Williams was only a marketing organization for MILICO and that it only sold insurance, he had severed all ties with his former employers and had committed his time and resources to A.L. Williams. He continued working with A.L. Williams because he had no other source of income (R512 ¶¶12,13)

The foregoing Statement of Facts is based upon evidence which was of record when the court below heard defendants' motion for summary judgment and includes answers to interrogatories, official records and affidavits filed in opposition to the said motion. Defendants filed no affidavits in support of their motion and their memorandum primarily cited selected excerpts from depositions which were never published and are not now a part of the record on appeal nor were they part of the published record at the time of the hearing.

SUMMARY OF ARGUMENTS

1. Introduction. Summary judgment is a harsh remedy which should only be used when all admissible evidence before the court in the form of pleadings, depositions, answers to interrogatories, admissions or affidavits show that there are no genuine issues as to any material fact and that summary judgment is appropriate as a matter of law.

2. There are numerous issues of material fact which preclude summary judgment in this case. Although all the evidence relevant to this case is not yet before the court, there is sufficient evidence in the form of answers to interrogatories and affidavits to establish that the elements of fraud were present in the events complained of in this action. Although the record is virtually devoid of evidence supporting the position of A.L. Williams and MILICO, which position is indicated by their Answer to the Complaint, one must assume that they concede that there are genuine issues of material fact but that they claim, instead, that the facts as alleged and so far proved, support a contention that they are entitled to judgment as a matter of law. Nevertheless, Conder believes these issues of fact, must be determined by a jury.

3. The essential elements of fraud were sufficiently alleged in the Complaint and the evidence adduced supports said elements. Of the nine elements of fraud enumerated in Pace v. Parrish, 122 Utah 141, 247 P.2d 273 (1952), and alleged by Conder, five were unchallenged in the case below and are not before this Court. Of the remaining four elements, Conder contends that summary judgment is also inappropriate as a matter of law.

4. The victim of fraud has the option to rescind a fraudulently induced contract and seek restitution or to affirm the contract and sue for damages. The general principles of law concerning remedies available to the victim of a fraudulently induced contract should be available to Conder and he should not be required to terminate his employment agreement to maintain an action against the defendants. Such a requirement denies him the option to elect to affirm the agreement and ask for damages.

5. The doctrine of avoidable consequences does not require the victim of a fraudulently induced contract to rescind the contract upon learning of the fraud. It is a misapplication of the doctrine of avoidable consequences to require Conder to quit his job and seek employment elsewhere to mitigate damages caused by the fraud of defendants.

STATEMENT OF LAW

INTRODUCTION

Rule 56(c), Utah Rules of Civil Procedure, states that summary judgment may be granted:

. . . if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

To prevail on a motion for summary judgment,

the moving parties should prevail in each of the two areas set forth in Rule 56(c), i.e., they must show that (1) there is no genuine issue as to any material fact, and (2) they are entitled to judgment as a matter of law.

Such a remedy is harsh in that it prevents a party from having his day in court and should be used reluctantly by the courts. This Court has said, in Brandt v. Springville Banking Co., 10 Utah 2d 350, 353 P.2d 460 (1960) that:

We are cognizant of the desirability of permitting litigants to fully present their case to the court and that summary judgment prevents this. For that reason courts are, and should be, reluctant to invoke this remedy.

Although summary judgment may be appropriate in some instances, and when thus granted, may spare all parties the time, trouble and expense of a trial, such a ruling should be made by the court only when clearly justified after reviewing the record and the evidence and every inference fairly arising therefrom, in the light most favorable to the party against whom such action is sought. Frisbee v. K&K Construction Co., 656 P.2d 391 (Utah 1984); Thompson v. Ford Motor Co., 16 Utah 2d 30, 395 P.2d 62 (1964); Brandt, supra; Morris v. Farnsworth Motel, 123 Utah 289, 259 P.2d 297 (1953).

In determining whether there is a genuine issue

as to any material fact, the court is permitted an "excursion beyond the pleadings", Aird Ins. Agency v. Zions First National Bank, 612 P.2d 341 (Utah 1980), to determine if a motion for summary judgment should be granted. Indeed, pleadings alone are insufficient to sustain or defeat such a motion. Cf. Golden Oil Co., Inc. v. Exxon Co., U.S.A., 543 F.2d 548 (5th Cir. 1977); Anderson v. Viking Pump Division, Houdaille Industries, Inc., 545 F.2d 1127 (8th Cir. 1976).

Even if a motion for summary judgment is based upon averments or admissions in answers to interrogatories, depositions, admissions on file or affidavits, it still may not justify granting summary judgment if such averments or admissions would not be admissible as evidence in court. It has been held that conclusions and bare contentions, Frisbee, supra; hearsay statements and conclusions, A&M Enterprises, Inc. v. Hunziker, 25 Utah 2d 363, 482 P.2d 700 (1971); conclusionary allegations, Bruce v. Martin-Marietta Corp., 544 F.2d 442 (10th Cir. 1976); hearsay and legal conclusions, Doff v. Brunswick Corporation, 372 F.2d 801 (9th Cir. 1967); and bare contentions, Massey v. Utah Power & Light, 609 P.2d 937 (Utah 1980), are insufficient to justify the granting of a motion for summary judgment. Thus, inadmissible evidence cannot be used

to support a challenge to a cause of action in a motion for summary judgment.

Furthermore, evidence not properly before the court cannot be considered in determining the merits of such a motion. In Thompson v. Ford Motor Co., 14 Utah 2d 334, 384 P.2d 109 (1963), depositions were taken but never published, marked or introduced into evidence nor read by the trial court. Although both parties cited from the depositions in their briefs before the trial court, this Court said on appeal from summary judgment, ". . . we must assume that the testimony contained in the deposition was not presented to or considered by the lower court." Similar rulings were made in the cases of Reliable Furniture Co. v. Fidelity and Guaranty Insurance Underwriters, Inc., 14 Utah 2d 169, 380 P.2d 135 (1963), and Rosander v. Larsen, 14 Utah 2d 1, 376 P.2d 146 (1962). In Rosander, this Court said:

It deserves mentioning that the plaintiff's deposition was taken in this action. Defendant in his brief makes reference to this deposition. However, the deposition as received by this court was still in the sealed envelope of the reporter. Under the circumstances we cannot consider its contents and must assume that it was not considered by the lower court.

Matters not admitted in evidence before the trier of fact will not be considered on appeal. Pilcher v. State of Utah Department of Social Services, 663 P.2d

450 (Utah 1983); Utah Department of Transportation v. Fuller, 603 P.2d 814 (Utah 1979); Corbet v. Corbet, 24 Utah 2d 378, 472 P.2d 430 (1970).

In brief summary, a motion for summary judgment can only be granted if supported by admissible evidence properly before the court. It cannot be granted if only supported by pleadings, inadmissible evidence or evidence not submitted to the court on a timely basis.

POINT I

THERE ARE NUMEROUS ISSUES OF MATERIAL
FACT WHICH PRECLUDE SUMMARY JUDGMENT
IN THIS CASE

Conder contends that there are numerous and significant issues of material fact which were before the lower court. Since A.L. Williams and MILICO did not support their motion for summary judgment with affidavits, and the depositions were not before the court, the motion must be supported, if at all, by the pleadings themselves, and the averments or admissions in answers to interrogatories. Since little effort was made by A.L. Williams and MILICO in their memorandum in support of their motion for summary judgment to cite such documents, it is reasonable to assume that the main thrust of their argument was not that there were no genuine issues of material fact, but that the facts as they were set forth

in the record required judgment for them as a matter of law.

Nevertheless, the following are the issues of material fact which Conder believes must be determined by a jury if he is to have his rightful day in court. (References in parenthesis are to the portions of the record where the position of the parties is set forth.)

1. Whether A.L. Williams was referred to by the defendants in this lawsuit as then being a full service financial-type organization like E.F. Hutton, Merrill Lynch and Dean Witter. (R3 ¶12; 15 ¶12; 221; 241; 511 ¶3; 518¶¶2,3; 520 ¶¶2,3)

2. Whether A.L. Williams was characterized by the said defendants as then dealing in real estate and securities as well as securities. (R3 ¶12; 15 ¶12; 221; 241; 511 ¶3; 518 ¶2; 520 ¶2)

3. Whether such references or characterizations were relating to presently existing facts or to future plans, promises or performances. (3 ¶12; 15 ¶12; 221; 241; 511 ¶3; 518 ¶¶2,3; 520 ¶¶2,3)

4. Whether such representations were false. (R3 ¶12; 15 ¶12; 221; 241; 512 ¶10; 518 ¶6; 520 ¶5)

5. Whether Conder reasonably relied upon such representations in acting to change his employment. (R5

¶¶21,22; 16 ¶¶21,22; 221; 241; 511 ¶6)

6. Whether such reliance upon such representations resulted in damage to Conder. (R5 ¶22; 16 ¶¶21,22; 221; 241; 511 ¶8; 512 ¶11)

7. Whether Conder took all necessary steps to mitigate any such damage. (R512 ¶13; 655-56)

There is nothing in the Partial Summary Judgment from which Conder appeals to indicate the reasons for its entry. (R526-27) In light of the foregoing enumeration of issues remaining to be decided it is evident that the trial court could not have reasonably determined that there is no genuine issue as to any material fact as required by Rule 56(c).

POINT II

THE ESSENTIAL ELEMENTS OF FRAUD WERE
SUFFICIENTLY ALLEGED IN THE COMPLAINT
AND THE EVIDENCE ADDUCED SUPPORTS
SAID ELEMENTS

The essential elements of fraud have been enumerated by this Court in Pace v. Parrish, supra, to be: (1) that a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the

other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

These elements have been alleged in Conder's Complaint. (R5 ¶¶21,22) A.L. Williams and MILICO challenged only four of them in their motion for summary judgment so it can be assumed for the purposes of their motion and this appeal, that they concede the remaining five elements of fraud were sufficiently pleaded and that the evidence might sustain them. Since the five elements were not at issue in the court below, they cannot be raised for the first time on appeal. Bangerter v. Poulton, 663 P.2d 100 (Utah 1983)

The four elements of fraud, as enumerated in Pace, which were at issue below, are (1) the second element concerning a "presently existing material fact", (R646-50); (2) the third element concerning falsity of the representations, (R650-51); (3) the sixth element concerning the reasonableness of Conder's reliance on the misrepresentations, (R652-55); and (4) the ninth element concerning damages, (R655-56).

The Evidence Demonstrates Defendants' Representations Related to Presently Existing Material Facts. First, Conder's Complaint (R2 ¶12) alleges in the present tense

that defendants "intentionally misrepresented the A.L. Williams company to be a 'full service financial-type company.'" Such a statement cannot be read to imply future promises, predictions or conjectures. Furthermore, answers to interrogatories, (R221,241) and affidavits (R511, 518, 520) clearly show that the statements and representations in question related to supposedly existing facts and situations. No affidavits were filed in support of the contentions of A.L. Williams and MILICO, but had there been any, they would only have contested the statements referred to above, thus creating the issue of material fact which would preclude summary judgment.

The Representations Made To Conder Were False.
A.L. Williams has never been licensed as a real estate broker. (R447 ¶3) Since real estate agents must sell through a broker, (See U.C.A. 61-2-1, et seq.), it was not possible for A.L. Williams to have the "real estate side of the house" which it claimed to have. Even if MILICO agents happened to have a real estate license, they would have had to work through a company other than A.L. Williams or MILICO, since neither were licensed as brokers.

Furthermore, A.L. Williams has never been licensed as a broker-dealer or issuer. (R451 ¶13) Consequently,

any person who had a securities license could not have represented it as a securities agent. (See U.C.A. 61-1-1, et seq.) Any person so licensed who was working for A.L. Williams or MILICO would have had to use such a license, if it was used at all, for someone other than A.L. Williams or MILICO. Thus, there was no "securities" or "investment" side of the house.

Again, no affidavits or discovery are of record which dispute the above, but if they were, they would only create an issue of fact which would make summary judgment inappropriate.

Conder Reasonably Relied Upon the Misrepresentations of A.L. Williams and MILICO. Although A.L. Williams and MILICO do not support their claim with affidavits or other admissible evidence in support thereof, they cited two cases in their argument below, in an attempt to show that Conder did not reasonably rely upon their false representations.

Jardine v. Brunswick Corp., 18 Utah 2d 378, 423 P.2d 659 (Utah 1967), recognizes a defense to actionable fraud which is analogous to contributory negligence in other tort actions. This Court said:

The one who complains of being injured by such a false representation cannot heedlessly accept as true whatever is told him, but has the duty of exercising such degree of care to protect

his own interests as would be exercised by an ordinary, reasonable and prudent person under the circumstances; and if he failed to do so, is precluded from holding someone else to account for the consequences of his own neglect.

Jardine was cited in Berkeley Bank for Cooperatives v. Meibos, 607 P.2d 798 (Utah 1980), by the defendants in that case in an attempt to show that a person is precluded from recovering if he is "contributorily negligent." However, this Court rejected that argument saying, at p. 804, that Jardine "was a case of negligent misrepresentation. Negligence is a proper defense in a case of negligent misrepresentation, but it is not a proper defense in the case of an intentional misrepresentation." There is nothing in the record to support the proposition that A.L. Williams and MILICO were negligent in their misrepresentation and that such fraud was not intentional. The Court went on, in Berkeley Bank, to say:

It can hardly be maintained that the general moral level of business and other financial relationships would be enhanced by a rule of law which would allow a person to defend against a willful, deliberate fraud by stating, "You should not have trusted or believed me" or "Had you not been so gullible you would not have been [so] deceived. . . . The rules governing fraud should foster intercourse based on trust, forthrightness and honesty.

A.L. Williams and MILICO also cited Mikkelson v. Quail Valley Realty, 641 P.2d 124 (Utah 1982), in support of their claim that Conder did not reasonably rely on their

misrepresentations. In that case, a homebuyer sued his real estate agent because the house was not as large as it had been represented by the agent. In rejecting his claim for relief, this Court noted that the homebuyer not only had inspected the house, but had loan documents in his possession prior to the closing which revealed the correct footage. Thus, his reliance on the statements of the agent was not reasonable.

Although the principle of reasonable reliance is appropriate and furthers justice in some cases, there is nothing in the record which demonstrates that it should apply in this case to defeat Conder's claim. Indeed, Conder's affidavit, which is the only evidence so introduced on this subject, states that "he had confidence in the persons who made the above representations and had no reason to believe that such representations were false". (R511 ¶6)

Whether Damages Should Be Awarded Is A Question of Fact. Whether Conder is entitled to recover damages in this case is, and should be, a question of fact to be decided by the jury. Because of the apparent emphasis placed upon this issue by the court below in its decision to grant summary judgment as to Conder's claim of fraud and misrepresentation, it will be treated separately in

Point IV of this Statement of Law.

POINT III

THE VICTIM OF FRAUD HAS THE OPTION
TO RESCIND A FRAUDULENTLY INDUCED
CONTRACT AND SEEK RESTITUTION OR TO
AFFIRM THE CONTRACT AND SUE FOR DAMAGES

This issue was raised by the claim of A.L. Williams and MILICO that Conder should have terminated his employment immediately upon learning that the representations which had induced him to go to work for them in the first place were fraudulent. The court below seems to have accepted that claim as the basis of its granting the summary judgment. (R613-14)

This position assumes that there are undisputed facts in evidence which establish the exact moment when Conder came to this realization. There are not. Furthermore, it confuses the selection of a remedy with the amount of damages which may be awarded after the remedy is selected. This latter point, the amount of damages, is discussed in more detail in Point IV.

Typically, a person who claims that he has been defrauded in a transaction with another person, has two alternative courses of action that he can pursue. McCor-mick, Damages §121, pp. 448-54. He may rescind the agreement by renouncing it to the other party, tender back all the consideration he has received, and sue for restora-

tion of all that he has parted with in the bargain. However, if the victim of the fraud is unable to tender back what he received, or finds it inexpedient to do so, he may affirm the agreement by bringing an action which claims damages based on the assumption that each party will keep what he obtained under the agreement.

In this case, Conder did find it inexpedient to rescind the contract, simply because of the difficulty in returning both parties to the situation that they were in before the agreement. Neither the court nor the defendants had the power or the means to return Conder to his former employment. The only practical remedy available to him was to continue working, thus affirming the agreement, and bring an action seeking damages.

The principles enunciated by Professor McCormick as cited above, were followed by this Court in the case of Dugan v. Jones, 615 P.2d 1239 (Utah 1980):

The plaintiff in an action for fraud has the option to elect to rescind the transaction and recover the purchase price or to affirm the transaction and recover damages. The choice of remedy belongs to the victim of the fraud, and cannot be forced upon him.

See also, Mecham v. Benson, 590 P.2d 304 (Utah 1979), where the same principles were set forth and followed. The court below held that the Dugan case to be inapplicable

without stating its reasons either in making the ruling from the bench or in its Partial Summary Judgment. (R527 632)

Utah is not alone in recognizing this choice of remedies. See, e.g., Rogers v. Crest Motors, Inc., 516 P.2d 445 (Colo. 1973); Brockway v. Heilman, 58 Cal. Rptr.772 (1967). Cf. also, McCormick, supra. In Chester v. McDaniel, 504 P.2d 726 (Ore. 1972), that court stated:

The law is well settled that a defrauded purchaser upon discovery of the fraud may elect to rescind the contract or may affirm the contract and sue for damages. The action for damages is an affirmation or ratification of the contract and a waiver of the right to rescind, but in no sense is it a waiver of the right to recover all the damages caused by the fraud.

In this case, to require Conder to terminate his employment, claiming that it was necessary in order to mitigate his damages, is both a denial of the option given him under Dugan and other cases cited herein, and a misapplication of the avoidable consequences doctrine.

Although the Dugan and Mecham cases involved purchase agreements, there is no reason why the choice of remedies should not also be available in the case of a fraudulently induced employment agreement. In Elizaga v. Kaiser Foundation Hospitals, Inc., 487 P.2d 870 (Ore. 1971), the issue was the measure of damages in an action

based upon a fraudulently induced employment agreement and the defendant had asked for an instruction that damages should be in an amount "which would restore Plaintiff to the condition that he was in prior to the fraudulent representation." The court rejected the request because the plaintiff had not elected to disaffirm the agreement, but in fact had affirmed it and was seeking damages. Such is the case here.

POINT IV

THE DOCTRINE OF AVOIDABLE CONSEQUENCES
DOES NOT REQUIRE THE VICTIM OF A FRAUDU-
LENTLY INDUCED CONTRACT TO RESCIND
THE CONTRACT UPON LEARNING OF THE
FRAUD

A.L. Williams and MILICO asserted in the proceedings before the district court that Conder should be "barred from recovering any damages accruing after he discovered the alleged falsity of those representations. A plaintiff suing in tort is charged with the duty to reasonably mitigate his damages." (R655) This was based upon the fact that Conder did not terminate his employment agreement immediately upon learning of the fraud. Counsel for A.L. Williams and MILICO argued that Conder "has a duty to avoid such consequences as are avoidable and simply get another job if he wants to sell securities and real estate as he claims."

(R623-24) He cites three cases in support of this argument, none of which do more than set forth the doctrine of avoidable consequences. Thompson v. Jacobsen, 23 Utah 2d 359, 463 P.2d 801 (1970), is an automobile accident case where no facts were set forth in the written opinion. Several rules of law were cited with approval: ". . .(2) The jury should be left to make its best estimate of damage and compensate accordingly . . .(5) That plaintiff has a duty reasonably to mitigate damages." The damages awarded by the jury were then upheld.

Jardine v. Brunswick, supra, was also cited but the question of damages was not discussed as the Court found an absence of liability on the part of the defendant.

The last case cited, Anchorage Independent School District v. Stephens, 370 P.2d 531 (Alaska 1962), involves property tax redemption. The property owner, who could have redeemed property sold at a tax sale for \$135.00, waited six months and then asked for \$6,000.00 of alleged damages occurring in the interim. The court denied relief because the owner did not take reasonable steps to avoid the loss.

All three cases may well expound sound legal

principles, but none are applicable here. The doctrine is sound, but it should not be applied to deny Conder his selection of remedies.

The issue might well be raised as a question of fact at trial for the jury to determine whether Conder did all he could do after affirming the contract to mitigate his losses. It might be an appropriate issue to raise to determine whether Conder had done all he could do to restore himself to the position he was in before the contract, had he elected to rescind it. It is premature to decide as a matter of law that he isn't entitled to go to the jury because the avoidable consequences rule required him to rescind the agreement and "get another job."

Even if the doctrine were appropriate here, A.L. Williams and MILICO would have to do more than argue the point to prevail. In Pratt v. Board of Educ. of the Uintah County School Dist., 564 P.2d 294 (Utah 1977), this Court observed:

Mitigation of damages is an affirmative defense. Although plaintiff is obligated to minimize his damages, the burden is upon the party whose wrongful act caused the damages to prove anything in diminution thereof.

There is no evidence presented to the court below which would justify the contention that Conder's claim of damage

should be diminished for failure to mitigate damages. If Conder had quit his job, as has been suggested, it may have increased the damages but there is no evidence before the court to sustain either position. Although the burden of proof was upon A.L. Williams and MILICO to prove anything in diminution of damages, they instead attempted to place the burden upon Conder by claiming that he had to "mitigate" in order to establish a prima facie case. (R622-23) Such a claim is incorrect and gives no legitimate basis for granting summary judgment.

CONCLUSION

Mr. Conder has alleged in his Complaint that A.L. Williams and MILICO falsely represented to him that they were a full service financial company. In sworn answers to Interrogatories, he also stated that A.L. Williams and MILICO representatives had repeatedly told him that they were a company like E.F. Hutton, Merrill Lynch and Dean Witter; that they had a securities side of the house and a real estate side of the house and that they could deal in gold, silver and annuities as well. Mr. Conder has made these claims under oath and elicited evidence from A.L. Williams and MILICO by way of answers to interrogatories that these claims concerning the nature of A.L. Williams and MILICO were false, and were known

by the claimants to be false. Mr. Conder claims to have relied upon these false representations and claims to have been damaged thereby. The above is further supported by affidavits submitted by him in response to the Motion for Summary Judgment.

In spite of the fact that A.L. Williams and MILICO had ample opportunity to do so, they have chosen to present no evidence contradicting any of the above. In their Motion for Summary Judgment and supporting Memorandum, no affidavits were used to support any contention that Mr. Conder's claims were false and that there were no genuine issues of material fact, thus justifying Summary Judgment. Mr. Conder contends that there are numerous such issues, although he only has defendants' Answer to his Complaint to support that contention, because he finds nothing in his or defendants' discovery to justify their position.

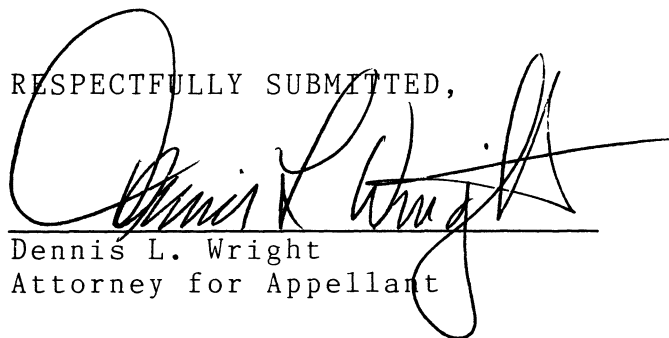
The only logical conclusion from the above is that A.L. Williams and MILICO did not challenge the various claims concerning fraudulent misrepresentations by their representatives because they accepted the fact that the misrepresentations had, in fact, been made. Therefore, they proceeded to contend that Mr. Conder was precluded from pursuing his claims as a matter of law because, (1)

the misrepresentations did not relate to presently existing material facts, but to future promises, predictions or conjectures; (2) Conder unreasonably relied upon the misrepresentations; and (3) he should have quit his job to mitigate his damages. At the risk of being redundant, it should again be pointed out that no evidence was submitted to support the legal challenge to the lawsuit. More importantly, Conder contends that said challenge is insufficient for the reasons set forth in his Statement of Law.

Mr. Conder, the plaintiff and appellant in this case, respectfully requests that this Court set aside the Partial Summary Judgment entered by the court below and remand the case for trial, for the reasons and on the grounds set forth herein.

DATED this 11th day of January, 1985.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to read "Dennis L. Wright", is written over a horizontal line. The signature is stylized with a large initial 'D' and a long, sweeping horizontal stroke at the end.

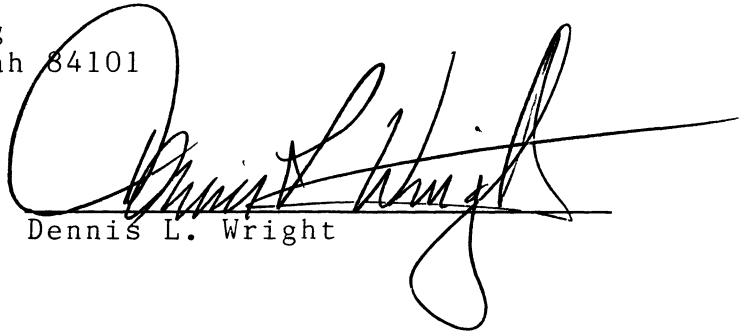
Dennis L. Wright
Attorney for Appellant

CERTIFICATE OF DELIVERY

I hereby certify that I hand delivered four
true and correct copies of the foregoing BRIEF OF APPELLANT
on this 11 day of January, 1985, to:

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Dennis L. Wright