

1986

Vernon S. Cheever v. Joseph A. Seethaler : Brief of Respondent

Utah Supreme Court

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Jackson Howard; Howard, Lewis & Petersen; attorney for respondent.

Kenneth F. Clarke; attorney for appellant.

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UTAH COURT OF APPEALS

BRIEF

UTAH

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DOCKET NO.

IN THE SUPREME COURT OF THE STATE OF UTAH

860086

VERNON S. CHEEVER, MARTHA
T. CHEEVER, UTAH COUNTY
PACKING COMPANY, INC., and
COLES BROTHERS, INC.,

Plaintiffs-Appellants,

v.

JOSEPH A. SEETHALER, MYRA
K. SEETHALER, and SECURITY
TITLE AND ABSTRACT COMPANY,

Defendants-Respondents.

No. 20,362

860086-CA

BRIEF OF RESPONDENTS

Appeal from Summary Judgment, November 30, 1984
Fourth Judicial District Court in and for Utah County
Honorable David Sam, presiding.

JACKSON HOWARD
HOWARD, LEWIS & PETERSEN
120 East 300 North
P.O. Box 778
Provo, Utah 84601
(801) 373-6345
Attorney for Respondents

KENNETH CLARKE
Box H
Provo, Utah 84603
(801) 375-2911
Attorney for Appellants

FILED

APR 23 1985

Clerk, Supreme Court, Utah

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P.O. Box 778
Provo, Utah 84601
(801) 373-6345
Attorney for Respondents

KENNETH CLARKE
Box H
Provo, Utah 84603
(801) 375-2911
Attorney for Appellants

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STATEMENT OF ISSUES PRESENTED UPON APPEAL

1. Whether or not appellants' brief comports with the standards of the Utah Supreme Court.

2. Whether or not Utah County Packing and Coles Brothers were necessary and indispensable parties to this action.

3. Whether or not Utah County Packing and Coles Brothers were barred by the applicable statute of limitations.

4. Whether or not Cheever had standing as an individual and guarantor to bring an action for rescission when any alleged fraud or damage was done to the principal, Utah County Packing, and Cheever, as president of Utah County Packing elected to affirm and ratify the contract.

5. Whether or not Cheever, if he had standing, could as a guarantor with professional expertise inherent to the contract, inspect the property and still claim reliance upon the opinions of the seller.

6. Were Cheever permitted standing, whether or not his allegation of mistake as to the trust deed failed to establish a sufficient basis for rescission.

7. Whether respondents are entitled to attorney fees by reason of appellants' initiating a frivolous appeal.

IN THE SUPREME COURT OF THE STATE OF UTAH

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T. CHEEVER, UTAH COUNTY
PACKING COMPANY, INC., and
COLES BROTHERS, INC.,

Plaintiffs-Appellants,

v.

JOSEPH A. SEETHALER, MYRA
K. SEETHALER, and SECURITY
TITLE AND ABSTRACT COMPANY,

Defendants-Respondents.

No. 20,362

BRIEF OF RESPONDENTS

STATEMENT OF FACTS/NATURE OF CASE

This matter arises out of the sale of a meat packing business in Provo, Utah. The business and equipment were owned by Seethalers, a Utah corporation. The real property on which the business was located was owned by Joseph Seethaler and Myra Seethaler, husband and wife. In June of 1981, the real property and all of the stock of Seethalers was purchased by Utah County Packing Company and Coles Brothers, Inc., each of which were also Utah corporations. (R. 13, 18). As security for the transaction, Vernon S. Cheever, the President of Utah County

Packing Company, and Martha Cheever, his wife, executed a Trust Deed in the amount of \$371,750.00 secured by a Trust Deed on their residence. (R. 28-31). (Appellant's Brief P.28-31).

Soon after the sale of the plant, Vernon Cheever notified Joe Sethaler and complained of the condition of the equipment sold. (R. 691-96). As president of Utah County Packing, Vernon Cheever achieved a compromise with Seethaler in the price of the accounts receivable to off-set the equipment failures (R. 642-45, 697-98). Utah County Packing continued to operate the plant and by so doing affirmed the contract for sale.

Utah County Packing Company and Coles Brothers, Inc., defaulted on their obligations and Mr. and Mrs. Seethaler, the beneficiaries under the Deed of Trust, proceeded to exercise their remedies provided under the Trust Deed. There was issued a Notice of Default and a Notice of Sale. (R. 32).

The Cheevers filed this action seeking an injunction against the sale of their residence, and also affirmatively sought damages and other relief based upon fraud alleged to have incurred in the transaction. (R. 8-17). The Complaint attempted to allege fraud of two types. In the first cause of action, which sought reformation of the Trust Deed, the Cheevers apparently claimed that their residence was to be security for the transaction only to the extent of \$25,000.00, and that Mr. and

Mrs. Seethaler were somehow responsible for that misunderstanding. The second cause of action, which sought to enjoin the sale, attempted to claim that Mr. and Mrs. Seethaler had fraudulently misrepresented the quality of the various items of equipment used in the business and the earning power of the business itself. The original Complaint was filed June 28, 1983, (R. 8-17).

On August 26, 1983, defendants moved the Court to dismiss plaintiff's Complaint based upon the fact that plaintiffs did not establish the necessary elements for a cause of action based upon fraud and also on the grounds that the plaintiffs allegation of a mutual mistake failed to provide a sufficient basis for the rescission of any contracts. (R. 40). After the submission of briefs by both parties to the Court, the plaintiffs sought leave of Court to file an Amended Complaint. (R. 117). Based upon stipulation of counsel, plaintiffs received permission from the Court on January 30, 1984, to attempt to amend their Complaint so as to adequately state a viable cause of action. (R. 190).

Subsequently, the plaintiffs moved for a Partial Summary Judgment regarding the Notice of Default as it related to the Trust Deed. (R. 191). On February 14, 1984, the Court considered plaintiffs' Motion for Partial Summary Judgment and also considered defendants' Motion to Dismiss referred to above. Pursuant

to the submission of briefs and oral argument, the Court ordered that the plaintiff's' Complaint be dismissed based upon the findings that the pleadings as did exist did not allege fraud or mutual mistake with particularity such that relief could be granted. The Court did, however, allow the plaintiff three days to file a Second Amended Complaint. (R. 239, 304). The plaintiffs did so file a Second Amended Complaint on February 17, 1984. (R. 213). Subsequently, defendants moved once again to dismiss plaintiffs' Second Amended Complaint for plaintiffs' failure to state a cause of action upon which relief could be granted. (R. 251).

Subsequent to the receipt of briefs and the opportunity for oral arguments, the Court on March 30, 1984, granted the plaintiffs' Motion for Partial Summary Judgment ruling that the Notice of Default had not given proper notice to the trustors and thus was not a sufficient Notice of Default pursuant to the Utah Code Annotated. (R. 388).

On March 26, 1984, counsel met with the Court in chambers and an informal discussion was held. The Court considered defendants' Motion to Dismiss plaintiffs' Second Amended Complaint. The Court ruled that defendants' Motion to Dismiss was denied on the basis of the existence of an issue of fraud

that was properly pled. All of the plaintiffs other motions were denied. (R. 393).

On May 29, 1984, the case had been set for trial; however, counsel held a conference in chambers with the judge as to pre-trial matters that defendants felt may be dispositive of the case. Defendant Seethaler made a Motion to Dismiss the Complaint for failure to join Utah County Packing Company as a necessary and indispensable party. Because defendants' motion, if granted, would preclude the necessity of a trial, the Court ordered the trial date stricken and allowed for the filing of briefs by both parties on the issue of whether or not Utah County Packing was a necessary and indispensable party. (R. 473).

Oral arguments were scheduled for July 5, 1984, wherein the Court, after the submission of lengthy briefs, heard the arguments of counsel, stated its inclination on the ruling, and took the defendants' motion under advisement. (R. 601). On July 11, 1984, the Court contacted counsel by conference call and further discussed defendants' Motion to Dismiss. The Court ruled that the plaintiffs' Second Amended Complaint be dismissed without prejudice for failure to join the necessary and indispensable party, Utah County Packing. The Court did, however, rule that the dismissal would not be effective for ten days in the event that the plaintiff could once again file an Amended Complaint,

this time for the purpose of joining Utah County Packing. On July 19, 1984, plaintiffs did indeed file a third Amended Complaint and added as plaintiffs, Utah County Packing (R. 516).

Defendants, Mr. and Mrs. Seethaler subsequently moved for Summary Judgment on the grounds that the statute of limitations had run as against the corporate plaintiffs, Utah County Packing and Coles Brothers, Inc., and also that the individual plaintiffs were estopped from electing a remedy contradictory to that which they had elected as corporate officers of Utah County Packing. (R. 580, 571).

The plaintiffs basically conceded that the statute of limitations had run as to the corporate plaintiffs. After numerous memoranda and oral argument, the Trial Court granted defendants Seethalers' Motion for Summary Judgment ruling that the statute of limitations had run on Utah County Packing; however, the Court once again allowed the plaintiffs to file further briefs as it related to the liability of the Seethalers. (R. 715).

On October 1, 1984, the Court held a hearing to give the plaintiffs the opportunity to present testimony to the Court and allow the Court to ask questions of counsel with their clients present. An open discussion between Court, counsel and parties then took place. The plaintiff, Cheever, was sworn in and

questioned by counsel. The Court ruled that it would take the matter under advisement. Subsequently, the Court met in chambers with counsel and indicated its inclination to grant the defendants Motion for Summary Judgment based upon the theory that Cheever, as an individual, could not bring an action for fraud against the Seethalers in a separate capacity as an individual where he had affirmed the same transaction as a corporate officer of Utah County Packing. The Court indicated that it would reserve ruling and allow, once again, the plaintiffs to submit legal authority in an opportunity to persuade the Court not to grant defendants' Motion for Summary Judgment.

Again after the consideration of numerous memoranda and oral argument, on November 5, 1984, the Court ruled that it found that undisputed facts established that there were no facts known to Utah County Packing, the principal, that were not known by Cheever, the surety. The Court further ruled that all facts which establish any alleged fraud were committed upon both the principal, Utah County Packing, and the surety, Cheever. The Court ruled that the principal, Utah County Packing, after discovering all the facts upon which it now complained, had ratified or affirmed the contract between the buyer and the seller (Utah County Packing and Seethaler, Inc.). The Court further found that under the facts and circumstances, that any

facts which may establish any alleged fraud were known or should have been known by all parties because the surety, Cheever, was also president of Utah County Packing, the party that had ratified the contract between the buyer, Utah County Packing, and the seller, Seethaler, Inc. The Court then found that the principal, Utah County Packing, having ratified the contract, had thereby waived any claim for fraud and that that election was binding on the surety. The Court further found that the surety who is and was the President of Utah County Packing was thereby estopped from asserting any claim for an alleged fraud, having made his election of remedies. The Court cited Utah case law as a basis for its decision. The Court further found that the plaintiffs' Complaint did not state a cause of action for fraud and that the defendant had admitted that any claim by Utah County Packing is barred by the statute of limitations. The Court then granted defendants Motion for Summary Judgment. (R. 746, 747, 794-795).

Subsequently, through a rather unusual Motion, the plaintiff objected to the Court's Ruling and Minute Entry. The plaintiff claimed surprise regarding the issue of whether or not Utah County Packing had ratified the contract. Notwithstanding defendants' opposition to the form of plaintiffs' objection, the Court once again granted leave to the plaintiffs to file a brief

and supporting affidavits relative to the question raised. (R. 787).

Subsequent to the submission of memoranda, the Court heard oral argument on the matter on November 2, 1984. (R. 793). On December 5, 1984, the Court ruled that "matters presented by additional briefing have heretofore been considered and are adequately covered in the Court's ruling dated November 5, 1984. Accordingly the Court's ruling dated November 5, 1984, is deemed final." (R. 796).

SUMMARY OF THE ARGUMENT

Utah County Packing, Inc. and Coles Brothers, Inc. entered into an agreement with Seethaler, Inc. for the sale of a meat packing plant from Seethalers. Vernon Cheever, as President of Utah County Packing inspected the plant and executed the agreement. Cheever, as an individual, provided additional security for the transaction and became a guarantor through signing an unambiguous Trust Deed Note for \$371,750.00. Subsequently, Utah County Packing, through Cheever, complained to Seethaler about the condition of the equipment. Seethaler adjusted the price of the transaction and Utah County Packing continued doing business, and in so doing affirmed the contract.

Vernon Cheever brought an action to rescind the Trust Deed and to allege fraud in the entire transaction. The trial

court, after prolonged argument and briefing, correctly ruled that Utah County Packing and Coles Brothers were necessary and indispensable parties to the action in that there were no facts known to Utah County Packing, the principal, that were not known by Cheever, the surety and that any action based upon alleged fraud belonged to the principal, who in this instance, chose to affirm the contract. Utah County Packing, having affirmed the contract, had thus waived a claim for fraud, which election was binding upon the guarantor. Vernon Cheever was therefore estopped from asserting any claim for fraud. Because the statute of limitations had run on the corporation, the Court correctly granted the defendant Seethalers' Motion for Summary Judgment.

ARGUMENT

Introduction

The Seethaler Corporation, a meat packing business, was sold to Utah County Packing Company, also a corporation. Prior to the sale, Joseph Seethaler took Vernon Cheever, President of Utah County Packing, on a tour of the plant facilities. Mr. Cheever was given the opportunity to see for himself and assess the equipment involved in the sale. An appraisal was also obtained. (R. 697-698) After agreeing upon a price, the parties decided that it would be necessary for Cheever to provide additional security for the transaction. Consequently, at the

closing, Cheever signed the documents as President of Utah County Packing and also signed, with his wife, a Trust Deed and Trust Deed Note offering their real estate as security. The amount of the Note, clearly set forth without ambiguity, was for \$371,750.00. Mr. Cheever, formerly having done business as a realtor, could not have misunderstood the terms of the simple Trust Deed. (R. 28-31).

Upon experiencing some difficulty with the machinery used at the meat packing plant, Mr. Cheever wrote a letter to Mr. Seethaler complaining of the equipment and sought damages in the form of a compromise on the sale price. After some negotiation, there did indeed occur a settlement of sorts between Cheever, representing Utah County Packing and Seethaler in that the price of the plant was reduced. (R. 642-45, 697-98).

Utah County Packing continued operation, never seeking to rescind the transaction. Eventually, Utah County Packing could not successfully operate the business and bankruptcy proceedings ensued. Seethaler, through Notice of Default, sought his remedy based upon the Trust Deed and Note. At that point, Vernon Cheever, as an individual, brought this action to attempt to enjoin any foreclosure and to rescind the Trust Deed and Note, claiming that he did not read the Trust Deed and claiming he was defrauded in the sale.

After numerous procedural battles, Seethaler brought to the Trial Court's attention the fact that the meat plant transaction involved Utah County Packing and Coles Brothers, Inc., and that Cheever, as an individual, merely provided additional security. Furthermore, Utah County Packing and Cheever, as an officer of the corporation, had affirmed and ratified the Contract and received the benefits thereof, and Cheever, as an individual could not bring an action for rescission, because the allegations related to fraud in the sale, if true, were properly to be brought by Utah County Packing. If Cheever, as an individual, had any allegations of fraud at all to assert, it could only be fraud as to the signing of the Trust Deed which was wholly unambiguous. The Trial Court was never compelled to even reach the questions of fact as to fraud allegations in the sale since the only parties entitled to assert such fraud, were Utah County Packing and Coles Brothers and they were barred by the statute of limitations.

Notwithstanding appellant's brief, which gives a contrary impression, this case upon appeal is conceptually and procedurally very simple.

POINT I

APPELLANTS' BRIEF DOES NOT MEET THE STANDARDS
SET FORTH BY THE UTAH SUPREME COURT AND APPELLANTS'
CASE, AS STATED, CANNOT PREVAIL UPON APPEAL.

Respondents respectfully submit that litigants filing briefs with the Supreme Court of Utah are under a duty to inform the Court of the facts, the nature of the proceeding below, the issues, the relevant law, to supply references to the trial record and to do more than superficially comply with the sub-heading requirements.

Generally, respondents found appellants' brief to be insufficient to adequately inform this Court of the nature of the case, the actual disputes, and the rulings of the lower court. Appellants' arguments were unorganized, largely unsupported by law and respondents had difficulty in succinctly and completely addressing appellants' brief.

Specifically, appellants failed to set forth the pertinent facts of the case. Appellants merely listed six facts which it attempted to prove before the lower court. The entire "Statement of the Case" was largely without reference to the trial record except for the multiple exhibits attached.

The Utah Supreme Court has previously addressed the problems which the structure of appellants' brief presented. In Hobbs v. Denver and Rio Grande Western Railroad, 677 P.2d 1128 (Utah 1984), the appellants therein apparently cited only those facts which supported its claim to the exclusion of other material

facts supportive of the trial court's Decision. The Supreme Court ruled:

In his presentation on appeal, the plaintiff has recited facts that support his claim of error to the exclusion of those properly admitted, material, and supportive of the trial court's decision. Axiomatically, we affirm the lower court in such event. [Emphasis added].

Respondents respectfully submit that the failure of the appellant to clearly present its case to the Supreme Court, as well as its failure to present the material facts upon which the Trial Court relied, and the failure to cite to the record constitute a situation wherein appellants' case as stated, is one which cannot prevail upon appeal.

POINT II

THE TRIAL COURT WAS CORRECT IN RULING THAT UTAH COUNTY PACKING AND COLES BROTHERS, INC. WERE NECESSARY AND INDISPENSIBLE PARTIES.

As set forth above, the transaction in question upon appeal is the sale of a meat packing plant by Seethaler Corporation to Utah County Packing Company and Coles Brothers, Inc. The lawsuit was originally only initiated by Vernon Cheever, as an individual. Respondents submit that there are at least two reasons for Rule 19(a) of the Utah Rules of Civil Procedure, which require the joinder of necessary parties:

Rules 19(a) and 17(a) both seek to protect the same interests: judicial economy and

fairness to the parties in litigation. The purpose of Rule 19(a), "which requires the joinder of indispensable parties as a condition to suit, is to guard against the entry of judgments which might prejudice the rights of such parties in their absence." Sanpete County Water Conservancy District v. Price Water Users Association, Utah 652, P.2d 1302, 1306 (1982). In addition, by requiring joinder of necessary parties, Rule 19(a) protects the interest of parties who are present by precluding multiple litigation and contradictory claims over the same subject matter as the original litigation. [Emphasis added].

Camp v. Murray, 680 P.2d 758, 760 (Utah 1984).

The Trial Court determined, by Order dated July 17, 1984, (R. 514-15) that Utah County Packing Company was a necessary and indispensable party to the action. One of the basis for that Ruling was that the cause of action for fraud, if any, belonged to the corporation, and not to the individual plaintiffs. A second basis for that ruling is that if Utah County Packing were not joined, Vernon Cheever could claim that the self-same acts by the defendants constituted fraud against Vernon Cheever individually, but not against Vernon Cheever as President of Utah County Packing Company. This is precisely the type of "contradictory claim" that Rule 19(a) was designed to prevent.

"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." Dugan

v. Jones, 615 P.2d 1239, 1247 (Utah 1980). The defrauded party must make an election of remedies. Utah County Packing has clearly elected to affirm the contract. This is evidenced by the failure of Utah County Packing Company to bring a timely action for rescission, by the fact that Utah County Packing Company has made several payments on the Contract, and by the letter written to Joseph Seethaler. (R. 691-695, 642-45, 697-98).

In addition to having elected to affirm the contract, Utah County Packing Company has waived any claim it may have had for damages. This is evidenced by the accord and satisfaction which was reached shortly after the sale (R. 642-45, 697-98), and by failing to bring a timely action for damages.

Utah County Packing Company has, therefore, elected to affirm the Contract and has waived any claim for damages. Vernon Cheever sought, however, a directly contradictory result, that of rescission. The result would clearly have been inequitable, and Rule 19(a) prevents such a result.

Where the existing plaintiff has failed to join other necessary plaintiffs, the entire case must be dismissed. Kent v. Murray, 680 P.2d 758, 759 (Utah 1984).

The entire transaction, except for the Trust Deed Note, which Vernon Cheever signed personally and the Deed of Trust to the subject property signed by Mr. and Mrs. Cheever, was between

the corporations of Seethalers and Utah County Packing and Coles Brothers. Assuming, arguendo, that the fraud allegations made in plaintiffs' Complaint were in fact made, they were not made to Vernon Cheever in his capacity as guarantor, they were made to the purchasers, Utah County Packing Company and Coles Brothers, Inc., and neither of those parties made any claim against the Seethalers based upon fraud. Vernon Cheever, therefore, as guarantor, cannot raise such an issue because he does not stand in the position of the debtor. The misconception of the plaintiff, Cheever, in this case concerns the right of subrogation. This right of subrogation would place the guarantors, Cheever, in the place of the creditor were he required to pay off the debt of the debtor, Utah County Packing and Coles Brothers, Inc. There is no right for him to stand in the position of the debtor. The guarantors right against the creditor is based entirely upon the terms of the agreement of the guaranty and nothing more. 38 Am. Jur. 2d Guaranty, § 127, Page 1135 (1968).

The law does impose an obligation upon the creditor (Seethalers), to do nothing that would impair the security which has been taken for the debt. The Courts have even gone so far as to give the guarantor an independent right of action to force the creditor to seek the security that has been given before relying

on the guaranty; however, none of the rights given to the guarantor include the right of substituting himself in the position of the debtor. There is absolutely no authority for the guarantor to be subrogated to the position of the debtor and, consequently, unless the debtor raises the appropriate issues, the guarantor cannot.

This is not to say that the guarantor would not have a right of action independently for fraud if he were induced to enter into an agreement of guaranty based upon fraudulent misrepresentations to him. However, that type of fraud would relate to intrinsic fraud within the instrument. There must be independent fraud affecting the guarantor separate and apart from the contention of fraud which the debtor could raise but does not. For example, if the purported guarantor was imposed upon to sign a paper which he never intended to sign or did not know his signature was being affixed to the loan guaranty agreement, there would be no contract, regardless of whether the lender was a party to obtaining the signature or whether the lender was negligent in not checking with the purported guarantor before advancing the money to the borrower. First National Bank of Grand Junction v. Osborne, 28 Utah 2d. 392, 503 P.2d 440 (1972).

The Trial Court was correct in ruling that Utah County Packing and Coles Brothers were necessary and indispensable

parties to this action in that the thrust of plaintiffs' allegations were allegations concerning damages done to Utah County Packing and not to Vernon Cheever as an individual, and in that Vernon Cheever's claims as an individual were contradictory to his actions as a corporate officer of Utah County Packing.

POINT III

AS CONCEDED BY APPELLANTS, ANY ACTION BY UTAH
COUNTY PACKING AND COLES BROTHERS, INC. WAS BARRED
BY THE APPLICABLE STATUTE OF LIMITATIONS.

Utah Code Ann. § 78-12-26 (1953 as amended) provides for a three-year statute of limitations for actions for relief on the ground of fraud or mistake, and also provides that "the cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." The corporation plaintiffs filed their Complaint on July 19, 1984. The crucial issue with respect to the statute of limitations is, therefore, whether they discovered the facts, which are the basis for their claim before July 19, 1981. The uncontroverted evidence in this matter establishes, as a matter of law, that the corporate plaintiffs did discover the facts upon which their claim is based before July 19, 1981, and their causes of action are, therefore, barred.

As is evidenced by the Affidavit of Joseph Seethaler, (R. 642-45, 697-98), on or before June 18, 1981, Mr. Cheever,

President of Utah County Packing, contacted Mr. Seethaler with respect to certain alleged defects in equipment. Mr. Seethaler disputed that the equipment was defective, but agreed to make an adjustment of approximately \$1,200.00 in the price of the accounts receivables, which Utah County Packing was purchasing at that time. (R. 642-45, 697-98).

Subsequently, on or about August 19, 1981, Utah County Packing Company sent a letter to Mr. Seethaler detailing certain alleged defects in the equipment. Although the letter indicates that some of the repairs were performed after July 19, 1981, the letter clearly sets forth that all of the alleged defects were known or should have been known prior to July 19, 1981. (R. 691-96).

As set forth in the statute, the crucial part in this matter is not when Mr. Cheever, as President of Utah County Packing Company, decided that he had been defrauded, but rather it is when he discovered the facts upon which he finally based his conclusion. The uncontroverted evidence in this matter clearly indicates that he discovered the facts upon which his claim is based prior to July 19, 1981, and the claim is, therefore, barred.

Coles Brothers, Inc. was a partner of Utah County Packing in this transaction, and the knowledge which was gained by Utah

County Packing Company must, therefore, be imputed to Coles Brothers, Inc. Further, the letter is signed by O. Kent Coles, who was the Vice-President and Director of Coles Brothers, Inc.

The Trial Court ruled that Utah County Packing Company was a necessary and indispensable party to Cheevers' cause of action for fraud. Utah County Packing Company's cause of action for fraud was barred by the applicable statute of limitations and Utah County Packing Company was, therefore, never effectively joined in the action. It thus followed that Cheevers' cause of action for fraud had to be dismissed, with prejudice, for failure to join a necessary and indispensable party.

Appellants' claim in their brief that it is anomalous for Seethalers to first claim that Utah County Packing must be joined in the action, and to then claim that Utah County Packing Company's action must be dismissed. There is nothing anomalous about this situation. The only anomaly would be if the result advocated by appellant were to be obtained.

As is evidenced by the Affidavit of Vernon Cheever, dated August 24, 1984, (R. 697-98), Utah County Packing Company compromised all claims it had for defective equipment against Mr. Seethaler. Further, Utah County Packing continued to operate the business after it knew or should have known of any fraud on the part of Mr. Seethaler, and thereby waived any claim for fraud

and accepted and ratified the Contract. Finally, Utah County Packing has also waived its claims for fraud by failure to assert them within the applicable limitations.

Where Utah County Packing Company has accepted the benefits of the transaction and has waived any claims it may have had for fraud, it would certainly be anomalous for Mr. Cheever, the President of Utah County Packing Company, to now come in and assert a contrary position.

POINT IV

CHEEVER, AS AN INDIVIDUAL AND GUARANTOR, HAD NO STANDING TO BRING AN ACTION FOR RESCISSION WHEN ANY ALLEGED DAMAGE WAS DONE TO UTAH COUNTY PACKING/COLES BROTHERS AND CHEEVER, AS PRESIDENT OF UTAH COUNTY PACKING ELECTED TO SEEK DAMAGES, AND THROUGH COMPROMISE TO AFFIRM AND RATIFY THE CONTRACT.

At the risk of redundancy, respondents respectfully submit that Vernon Cheever was without standing to bring the cause of action as a personal guarantor of the purchase agreement. With regard to defenses available to the guarantor in determining the validity of the guaranty agreement, 38 Am. Jur. 2d Guaranty, § 52 (1968), is instructive:

If the principal obligation is not void . . . but is merely unenforceable against the debtor because of some matter of defense which is personal to the debtor, the guarantor may not successfully set up this matter to defeat an action by the creditor or obligee seeking to hold the guarantor liable on the contract of guaranty. Accordingly, the guarantor may not successfully defend

an action brought on the contract of guaranty on the basis that the principal obligation was obtained through fraud practiced on the debtor. . .

See also Vickers v. Chrysler Credit Corp., 158 Ga. App. 434, 280 S.E.2d 842 (1981) (a guarantor may assert all defenses, with the exception of personal defenses available to the principal).

A claim that entry into contract was induced by fraud makes the contract voidable, not void. Pinkis v. Network Cinema Corp., 9 Wash. App. 337, 512 P.2d. 751 (1973); see also State v. Barlow, 107 Utah 292, 153 P.2d 647 (1944), appeal dismissed, 324 U.S. 829, (1945), rehg. denied, 324 U.S. 891 (1945).

The decision of how to proceed upon avoidable or unenforceable contract must necessarily be preserved to the principal rather than the guarantor. The Court's holding in Walcutt v. Clevite Corp., 13 N.Y. 2d 48, 191 N.E.2d 894 (1963), establishes that a guarantor may not take upon himself the election of remedies which rightfully belong solely to the principal. The Court reasoned that by allowing the guarantor to interpose his principals' defense of fraud, the principal would effectively be deprived of his independent right to affirm or disaffirm the contract. This view has been recognized as early as 1917 in the case of Ettlinger v. National Surety Company, 221 N.Y. 467, 117 N.E. 945 (1917), wherein the Court stated:

[W]hat shall be done with the contract induced by fraud is purely a question for the determination of the party on whom the fraud is committed. He may repudiate it, and if he does so the surety may avail himself of the repudiation . . . He may affirm it, in which case the surety cannot be heard to raise the question. He may suspend his action at least for a time, and the surety may not compel him to elect.

117 N.E. at 946.

The Court also adopted the following language:

If the principal could abide by his contract, and the surety repudiate it, the strange result would be produced, that the principal would retain the fruits of its contract, while the surety would avoid the performance of his obligation, on the ground of its validity, in direct opposition to the acts of its principal, admitting that the contract was valid.

In the present case, Cheever, as an individual, attempted to affirmatively utilize the defense of fraud in an action to reform a guaranty agreement when the creditors had filed no cause of action either against the principal or the guarantor. To allow the Cheevers affirmative use of this defense could not only deprive Utah County Packing Company and Coles Brothers, Inc. of their rights to elect affirmance or disaffirmance of the purchase agreement, but also subjects, the Seethalers, to multiple suits, undue burden and hardship. Judicial economy dictates that disputes be resolved in an orderly and efficient manner. The rights of subrogation available to the guarantor in the event of

the principals' default affords sufficient protection to the plaintiffs' interest. More importantly, however, is the fact that the actions sought by the Cheevers is in direct opposition to the choice of remedies elected by Utah County Packing.

Below, plaintiffs argued that if Utah County Packing had compromised its claims it cannot maintain an action. That, however, was the very reason for the rule. The defendants should not be subjected to multiple and contradictory actions and claims. Vernon Cheever's only right of action is by right of subrogation against Utah County Packing and Coles Brothers, Inc.

Appellants would persuade the Court that when the alleged misrepresentations were made Mr. Cheevers was acting as both president of Utah County Packing Company and as a personal guarantor of the guaranty agreement. In one of plaintiff's documents submitted to the Court below, its response to defendant's Trial Memorandum, (R. 474), the plaintiff set forth that Utah Packing Company compromised its claims of misrepresentations, yet, the plaintiff referred to an Affidavit as evidence of no such compromise by Vernon Cheever, individually. Such reasoning is inconsistent and supports the defendant's positions that any representations were, in fact, made to the plaintiff, Vernon Cheever, while he was wearing the hat of the company president. Thus, two situations came before the Court, either

Vernon Cheever acted both as president of Utah Packing Company and as personal guarantor throughout the negotiations, or Vernon Cheever acted as president of Utah County Packing Company during the negotiations and subsequently signed the guaranty under his capacity as a personal guarantor.

Under the first situation, any compromise and settlement of Utah Packing Company claims of misrepresentation act as a merger of and bar of claims of Utah Packing Company, as well as Vernon Cheever, individually, as personal guarantor. Similarly, under the second situation, any representations were made exclusively to the president of Utah Packing Company, and the plaintiffs, as guarantors, are without standing to assert the claims or defenses of Utah Packing Company.

Either situation supports the respondent's position that plaintiffs are without standing to bring the action.

As set forth in arguments above, the only action that a guarantor might have independently for fraud, would be if he were induced to enter into an agreement of guaranty based upon fraudulent misrepresentations to him. It must be an independent fraud affecting the guarantor separately and apart from the contention of fraud which the debtor could raise but does not.

There is a dearth of authority for the proposition since it is so fundamental that no court has had to rule upon the subject;

however, there are now analogous cases. For example, in a suit wherein a seller of steel sought to recover from buyer's trade account guarantors, in the absence of any evidence the buyer's contract and purchase from the seller were inherently illegal or that enforcing collection of the purchase price for the product would be invoking the powers of the Court to aid in unlawful activity, the trial Court properly rejected the trade account guarantor's defense of alleged anti-trust violations by the seller. See Keene Corporation v. R. W. Taylor Steel Company, 594 P.2d 889 (Utah 1979).

In Financial Corporation of America v. Prudential Carbon and Ribbon Company, 507 P.2d 1026 (Utah 1973). The point of the Court's decision in this case is that Wilkerson, the guarantor, could not raise a defense that had vested in the debtor. Fraud is a defense to the debtor and may be pleaded affirmatively; however, it is nothing more than a defense and may be waived. Since the debtor does not take advantage of the claim of fraud, the guarantor cannot

The fallacy of appellant's position in this case is that the debtor may or may not have been injured or damaged by reason of the alleged fraud and the debtor may have reasons of its own why it did not raise fraud as a defense, and it does not behove this Court in this instance to substitute itself into what it presumes

to be the position of the debtor, and of course, the guarantor cannot bootstrap himself into the position of the debtor.

The defects set forth above, that the plaintiffs have no standing to complain of any fraud that they claim to have occurred in the transaction between Seethalers, Inc., and Utah County Packing Company and Coles Brothers, Inc., and that the plaintiffs have failed to join parties necessary to this action, are jurisdictional defects that cannot be waived. As stated by the California Supreme Court in McKinny v. Oxnard Union Heights School District Board of Trustee, 31 Cal.3d 79, 180 Cal. Rptr. 549, 642 P.2d 460 (1982):

Defendants contend that plaintiffs do not have standing to maintain this action . . . it is elementary that a plaintiff who lacks standing cannot state a valid cause of action; therefore, a contention based upon a plaintiff's lack of standing cannot be waived . . . and may be raised at any time in the proceeding.

642 P.2d at 465. The rule is the same where the plaintiff has failed to join the necessary and indispensable party. Jolley v. Puregro Company, 94 Id. 702, 496 P.2d 939 (1972).

POINT V

THE TRIAL COURT WAS CORRECT IN NOT REACHING ALLEGATIONS OF FRAUD IN THAT THE CORPORATIONS WERE BARRED AND CHEEVER, AS AN INDIVIDUAL, COULD NOT SEEK A REMEDY IN CONTRAST TO THAT SOUGHT AS A CORPORATE OFFICER; IN ANY EVENT, WHERE A GUARANTOR EXERCISING PROFESSIONAL EXPERTISE AS TO BUSINESS OPERATIONS INHERENT TO THE

CONTRACT, INSPECTS PROPERTY PRIOR TO THE CONTRACT,
THE DOCTRINE OF CAVEAT EMPTOR APPLIES AND RELIANCE
UPON THE OPINIONS OF THE SELLER ARE UNJUSTIFIED.

Assuming, arguendo, that the defendant, in his statements and opinions regarding the meat packing plant, had misrepresented its value, plaintiff's reliance thereon would still be unjustified. It is axiomatic that an element of fraud that must be proven is that a party acted reasonably when relying upon a representation and took reasonable steps to inform himself and to protect his own interest.

It must be noted, that Mr. Cheever, as well as Mr. Coles, were experienced in the real estate business as evidenced by each having a realty sales and brokers license. The case of Tokarz v. Frontier Federal Savings & Loan, 34 Wash. App. 446, 656 P.2d 1089 (1983) sets forth the applicable law:

A party cannot be permitted to say he was taken advantage of, if he had the means of acquiring the information, or if, because of his business experience or his prior dealings with the other party, he should have acquired further information before he acted.

656 P.2d at 1094. It should also be noted that Mr. Cheever eagerly pursued the purchase involved and based on the experience of over two decades in the meat packing industry.

The recipient of a fraudulent misrepresentation is required to use his senses, and cannot recover if he blindly relies upon a

misrepresentation, the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation. The rule has been clearly stated as follows:

Where the means of knowledge are at hand and equally available to both parties, and the subject of the purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness and been misled by over-confidence of another.

Anstott v. Osborne, 417 P.2d 291 (Okla. 1966). Similarly, the Utah Supreme Court has stated as follows:

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

Jardine v. Brunswick Corp., 18 Utah 2d 378, 423 P.2d 659, 662 (1967).

In the present action, Mr. Cheever, as well as his business partners, financial advisers and family visited the plant regularly. The employees at the meat packing plant were very

familiar with the visitors and knew many by name. Mr. Cheever, experienced in the trade of meat processing, was familiar with all of its operations, including the equipment, and was aware of the used nature of the equipment which was to be purchased. Skilled in the use of such equipment, Mr. Cheever knew of a constant need to maintain and repair used equipment. In fact, during such inspections, it would not be uncommon to observe the maintenance, repair and cleaning process inherent in the trade. Mr. Cheever had the duty to act reasonably and exercise due diligence in taking the necessary precautions against being deceived by those with whom he is bargaining. In view of Mr. Cheever's experience as a licensed real estate agent, it would be improper for the Court disregard such peculiar intelligence and relieve such a party from the adverse effects of his freely bargained-for contract.

There is no fraud where a vendor acts upon his own judgment rather than upon the representations made by the purchaser. This doctrine has received approval by a substantial majority of courts:

[A]s a general rule, a purchaser making his own investigations, either in person or by his agent, which the vendor does not prevent from being as thorough as the vendee chooses to make them, cannot afterward allege that he relied upon the vendor's misrepresentation . . . If a purchaser makes a personal investigation which is free and unhampered

and the conditions are such that he must obtain the information that he desires, he is presumed to rely upon his own investigation rather than on representations made to him by his vendor. A purchaser of real property must be regarded as having relied upon his own judgment and not upon the representations of the vendor as to the value of the premises. So where, before entering into a contract . . . the purchaser or his agent makes an actual examination of the premises, it is held generally that such purchaser is precluded from having the contract rescinded upon the ground of falsity of representations.

Where the buyer of personal property not only has an opportunity to ascertain the truth or falsity of the sellers representation with respect thereto, but instead of relying upon the representations, also actually makes or undertakes an investigation regarding them, it is generally held that he cannot avail himself with misrepresentations on the part of the seller, regardless of the result of the inquiry, if the seller does nothing to impede or frustrate the investigation.

37 Am. Jur. 2d Fraud and Deceit, § 231 (1968).

Mr. Seethaler in no way restricted Mr. Cheever's access to the premises; indeed the plaintiff was allowed to have access to any and all information pertaining to the business. An independent appraisal, performed at the request of Mr. Seethaler and is shown to the plaintiff, further evidences the plaintiff's free and unhindered access to the property. (R. 697-98).

The doctrine or maxim "caveat emptor" expresses a general principle of law, both as to real and personal property. This doctrine means merely that they buyer of one acquiring property

through a business or commercial transaction must rely upon his own expertise in the purchase of such property. At present, the doctrine "caveat emptor" may be deemed to apply where the parties deal at arms length and the buyer investigates or inspects the subject the matter or has a full opportunity to do so. In Weil Clothing Company v. Glasser, 213, F.2d 296 (5th Cir. 1954), the Court held that the maxim of "caveat emptor" applies whenever a purchaser has full opportunity to inspect what he is buying but fails to do so and relies upon mere statements of the seller which amount to know more than "puffing," "boasting," or the expressing of an opinion.

Respondent contends that the trial court was correct in not even reaching the allegations of fraud in that the only parties who could allege fraud were the corporations and such were barred by the statute of limitations. The Trial Court was further correct that Cheever, as an individual, could not seek a remedy in contrast to that sought as a corporate officer. Furthermore, even if Cheever were allowed to bring an action in fraud as an individual, he was in the position to make his own judgment and his failure to rely on any of the alleged expressions of opinion of the seller were his risk assumed knowingly.

POINT VI

EVEN WERE CHEEVER PERMITTED TO BRING A
SEPARATE ACTION AS GUARANTOR, HIS ALLEGATION OF
MISTAKE AS TO THE TRUST DEED FAILED TO ESTABLISH
A SUFFICIENT BASIS FOR RESCISSION.

Appellant contends that Vernon Cheever, in signing the Trust Deed and Trust Deed Note as guarantor failed to read the document and did not realize that he was securing the amount of \$371,750.00.

A mere glance through the pertinent document would indicate to anyone, uneducated or not in real estate, that they were securing the amount of \$371,750.00. Mr. Cheever's claim of ignorance is even more incredible in view of the fact that he was a licensed realtor.

It is well recognized that a guarantor's failure to read or understand a document he signed is not sufficient grounds for invalidation.

[W]hen the guarantor seeks to avoid liability on his promise of guaranty basis that he did not understand the legal significance of the document in which he signed, the concept of objective mutual assent often preclude such a defense

. . . [T]he present rules requires the guarantor to read, to inquire as to the facts which would be apparent to reasonable persons, and to understand the legal significance of the document which he is signing. Any mistake which could have been corrected by due diligence and which is not the result of imposition practiced on the

guarantor by the creditor is not a basis for rescinding the guaranty contract if the creditor reasonably relied on the promise of the guarantor.

38 Am. Jur. 2d Guaranty § 56 (1983). The Utah Supreme Court in Utah Valley Bank v. Tanner, 636 P.2d 1060, 1061 (Utah 1981) stated, "the intent of the parties is to be ascertained from the content of the instrument itself . . ." The Court in Hotel Riviera, Inc. v. Torres, 97 Nev. 399, 632 P.2d 1155 (1981), adopted the following language:

The making of a contract depends not on the agreement of two minds and one intention, but on the agreement of two sets of external signs -- not on the parties' having met one thing but on their having said one thing.

It has been held, "if the signer could read the instrument, not to have read it is gross negligence; if he could not read it, not to have it read to him is equally negligent; in either case, the writing binds him." Azrak v. Manufacturer's Trust Company, 120 N.Y.S.2d 855 (N.Y. Sup. Ct. 1953).

Appellant, in its first cause of action asked the Court to reform the \$371,750.00 Trust Deed and Trust Deed Note to become a second trust deed for only \$25,000.00. The plaintiff therein failed to even allege a prima facie case for reformation.

To state a cause of action for reformation, the plaintiff must at least allege either (1) mutual mistake or (2) "ignorance or mistake of a complaining party coupled with or induced by the

fraud or inequitable conduct of the other remaining parties." 66 Am. Jur. 2d Reformation of Instrument, § 12 (1973) as quoted in Thompson v. Smith, 620 P.2d 520, 523 (Utah 1980).

The Cheevers have not alleged any mutual mistake. There is no claim that Mr. and Mrs. Seethaler were mistaken as to the meaning of the documents which were signed.

Cheevers have similarly failed to allege fraud of the type contemplated by this rule. An example of this type of fraud would be if Mr. Seethaler had handed the Trust Deed to Mr. Cheever and said "this is a \$25,000.00 Trust Deed." There is not even an allegation of actionable fraud going to the signing of the document.

An allegation that Mr. Seethaler fraudulently induced Mr. Cheever to sign the documents by misrepresenting the quality of the meat packing business, is not a type of fraud which will support a cause of action for reformation. The Cheevers have erroneously urged the Court to rewrite an unambiguous instrument.

In sum, even if Cheever were permitted to bring a separate action as guarantor, in his allegation of mistake as to the Trust Deeds, he has wholly failed to establish the sufficient basis for rescission.

POINT VII

RESPONDENTS ARE ENTITLED TO ATTORNEYS FEES
BY REASON OF APPELLANTS' FRIVOLOUS APPEAL.

Pursuant to Rule 33 of the Utah Rules of Appellate Procedure, if the Court determines that an appeal taken is frivolous, it can award just damages of single or double costs, including reasonable attorney's fees, to the prevailing party.

It is respondent's contention that the appeal undertaken by the appellants was unnecessary and frivolous.

In appellant's brief, he states that "the case is the most protracted and ludicrous lawsuit in which there have been at least three trial settings and the filing of 825 paginated pages . . ." (Appellant's Brief Page 4). The proceeding below was rather extensive prior to defendant's Motion for Summary Judgment only because the Court allowed the plaintiff to amend his Complaint three times in attempt to state a cause of action, and because after each hearing the Court allowed the plaintiff to re-brief the legal questions, and only because the Court thoroughly considered every issue before granting defendant's Motion for Summary Judgment. Further, the plaintiff, as pointed out, was allowed to file enumerable pleadings all of which were without merit. The last pleading, (March 1985) was to enjoin the sale of the pledged property. Their motion was filed in duplicate in the Supreme Court and the District Court without

notice of the contemporaneous filing to either Court. Both Courts denied the motion, but the trial court granted the defendant \$300.00 attorney fees for responding to a petition after the Court had lost jurisdiction and because the prayer for relief was frivolous. The same is true of the appeal and the plaintiffs are entitled to attorney fees. The Court below committed no error of law and after repeated opportunities to present its case, plaintiff simply failed to state a cause of action upon which relief could be granted.

CONCLUSION

The Court below allowed the plaintiffs to amend and revise their Complaint three times in an effort to give them every opportunity to state a cause of action upon which relief could be granted. Upon filing the original Complaint the defendants moved to dismiss and the Court allowed for briefs and argument. The plaintiffs amended their Complaint and the defendants renewed their Motion to Dismiss. The Court allowed for briefs and arguments. The plaintiffs amended their Complaint again and the defendants moved to dismiss. This time the Court denied defendants' Motion. Subsequently, the defendants moved to dismiss for plaintiffs' failure to join a necessary and indispensable party. The Court allowed for briefs and argument. After two additional conferences the Court dismissed the case but allowed the plain-

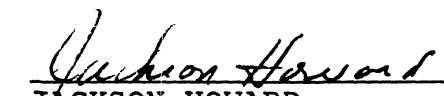
tiffs to once again amend. Upon the filing of the plaintiffs' fourth Complaint, the defendants moved for summary judgment. The Court stated its inclination to rule on the Motion in favor of defendants but once again allowed for briefs and arguments before entering the ruling. The Court then ruled in favor of the defendants but allowed for additional briefing. Upon entry of the ruling, the plaintiff challenged the ruling and Minute Entry and, amazingly, the Court allowed plaintiffs to submit yet another brief. Finally, the Court ruled against plaintiffs and granted defendants' Motion for Summary Judgment.

Clearly the trial court went to great lengths to consider every possible aspect of the litigation and made an enormous effort to afford plaintiffs every opportunity to state a claim upon which relief could be granted.

The trial court was correct in ruling that Cheever did not have a cause of action as guarantor and the statute of limitations had run against the corporations. The trial court was further correct in ruling that any alleged fraud was committed upon both the principal, Utah County Packing and the guarantor, Cheever and that Utah County Packing affirmed the contract, thus Cheever was estopped from asserting the alleged fraud, having elected his remedies.

The respondents seek affirmation of the trial court's ruling and seek attorney fees for appellants' frivolous appeal.

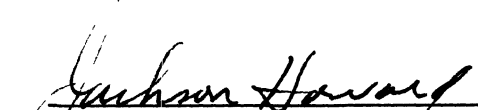
DATED this 22nd day of April, 1985.


JACKSON HOWARD
HOWARD, LEWIS & PETERSEN
Attorney for Defendants-
Respondents

MAILING CERTIFICATE

I certify that on the 22nd day of April, 1985, ten true and correct copies of the Respondents' Brief was mailed to the Supreme Court and four true and correct copies of same were mailed, postage prepaid, to the following:

KENNETH CLARKE
Box H
Provo, UT 84603


JACKSON HOWARD