

2001

# Zions First National Bank v. M-S Commodities INC. : Brief of Respondent

Utah Supreme Court

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

DEC 17 1975  
BRIGHAM YOUNG UNIVERSITY  
Reuben Clark Law School

ZIONS FIRST NATIONAL BANK, a National  
Association,

*Plaintiff and Respondent,*

vs.

M-S COMMODITIES, INC.; M-S COMMODI-  
TIES OF UTAH, INC.; PRISCILLA SE-  
CREST; MAURIE SCHNEIDER; J. MO-  
RONI STOOF; EDWARD DALLIN BAG-  
LEY; DAL-RON ENTERPRISES, a corpora-  
TION,

*Defendants and Respondents.*

ZIONS FIRST NATIONAL BANK, a National  
Association,

*Third Party Plaintiff and Respondent,*

vs.

CLARK TANK LINES COMPANY, a corpora-  
tion,

*Third Party Defendant and Appellant.*

Case No.  
13669

BRIEF OF RESPONDENT ZIONS FIRST NATIONAL BANK

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Clerk, Supreme Court, Utah

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## TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT OF RELATIONSHIP OF THIS APPEAL TO ANOTHER PENDING APPEAL BEFORE THIS COURT ARISING OUT OF THE SAME CASE .....	1
NATURE OF THE CASE .....	2
DISPOSITION IN THE LOWER COURT .....	3
RELIEF SOUGHT ON APPEAL .....	4
STATEMENT OF FACTS .....	4
ARGUMENT .....	17
POINT I. THE JUDGMENT ENTERED AGAINST CLARK TANK LINES AND IN FAVOR OF ZIONS FIRST NATIONAL BANK SHOULD BE AFFIRMED .....	17
POINT II. THE COUNTERCLAIM JUDGMENT FOR \$25,000.00 IN FAVOR OF M-S COMMODITIES AGAINST ZIONS BANK WITH A THIRD PARTY JUDGMENT AGAINST CLARK TANK LINES, SHOULD BE SUSTAINED .....	26
CONCLUSION .....	37

### CASES

Buchanan v. Crites, 106 Utah 428, 150 P. 2d 100 (1944) .....	21
DeWit Distribution, Inc. v. Bond Furniture, Inc., Sup. Ct. No. 13625 (Utah, October 21, 1974) ....	21
Stratton v. West States Construction, 21 Utah 2d 60, 440 P. 2d 117 (1968) .....	22

### TEXTS

19 C. J. S. Corporations, Section 999 .....	22
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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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ZIONS FIRST NATIONAL BANK, a  
National Association,  
*Plaintiff and Respondent,*

vs.

M-S COMMODITIES, I N C.; M-S  
COMMODITIES OF UTAH, INC.;  
PRISCILLA SECREST; MAURIE  
SCHNEIDER; J. MORONI STOOF;  
EDWARD DALLIN BAGLEY; DAL-  
RON ENTERPRISES, a corporation,  
*Defendants and Respondents.*

Case No.  
13669

ZIONS FIRST NATIONAL BANK, a  
National Association,  
*Third Party Plaintiff and Respondent,*

vs.

CLARK TANK LINES COMPANY, a  
corporation,  
*Third Party Defendant and Appellant.*

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BRIEF OF RESPONDENT

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ZIONS FIRST NATIONAL BANK  
PRELIMINARY STATEMENT OF RELATIONSHIP

OF THIS APPEAL TO ANOTHER PENDING AP-  
PEAL BEFORE THIS COURT ARISING OUT OF  
THE SAME CASE.

This appeal, being case No. 13669, has to do with a portion of the Judgment for \$38,505.08 awarded in favor of Zions First National Bank against the now defunct M-S Commodities, Inc., in the amount of \$25,000.00, which was awarded by way of offset in favor of M-S against Zions Bank, and then passed on by way of Third Party Complaint to Clark Tank Lines. Post judgment proceedings as to the said \$25,000.00 were conducted by M-S, and that is the subject of appeal in the related case, No. 14017. Although a Motion to Consolidate the two appeals was denied, the cases are decidedly related and should be argued together, since such appeal has to do with the legal effect of the same judgments below. (See brief in Case No. 14017.)

NATURE OF THE CASE

This is an action by plaintiff-third party plaintiff-respondent Zions First National Bank (hereinafter "Zions Bank" or "Zions") against certain individual defendants, including Maurie Schneider and J. Moroni Stoof and corporate defendant M-S Commodities, Inc. (hereinafter "M-S") [now defunct], for the recovery of \$38,505.08 net overdraft in an account of M-S with Zions Bank. The overdraft was created by a \$75,000.00 wire transfer from the M-S account at Zions Bank to an M-S account with Harris Trust in Chicago pursuant to direction of Maurie

Schneider when he and M-S knew or had reason to know that there were not sufficient funds to cover the wire transfer.

M-S sought offset of \$25,000.00 on a counterclaim against Zions Bank due to the failure of Zions properly to disburse a \$25,000.00 wire transfer from M-S to Dal-Ron Enterprises. Zions Bank, in turn, sought judgment by way of third party complaint against Clark Tank Lines (hereinafter "Clark") in the amount of the said \$25,000.00 for causing Zions Bank to improperly disburse the said \$25,000.00.

### DISPOSITION IN THE LOWER COURT

This matter was heard in a five-day trial commencing October 15, 1973. After ruling at the conclusion of the trial on October 19, 1973, the Court entered its Findings of Fact, Conclusions of Law and Judgment on January 17, 1974. Judgment for \$38,505.08 was rendered in favor of Zions Bank against M-S, and a judgment for \$38,505.08 was rendered in favor of Zions against the individual defendant Maurie Schneider for his actions in the wrongful transfer of \$75,000.00 from the M-S account at Zions, thereby creating an overdraft. Likewise, for his wrongful action relative to depositing bad checks, judgment for \$38,505.08 was rendered in favor of Zions Bank against J. Moroni Stoof, and against Dal-Ron Enterprises for \$34,725.50 on a returned check. M-S (and not Maurie Schneider or J. Moroni Stoof) was awarded judgment by way of offset for \$25,000.00 against Zions Bank on its

counterclaim (neither Schneider nor Stoof filed a counterclaim) for the improper disbursement of said \$25,000.00 wire transfer by M-S to Dan-Ron through Zions Bank. The Court found that Clark Tank Lines wrongfully induced Zions Bank to improperly disburse the said \$25,000.00 and thus awarded Zions judgment for \$25,000.00 against Clark on Zions Bank's third party complaint.

### RELIEF SOUGHT ON APPEAL

Zions Bank seeks affirmance of the \$25,000.00 judgment in its favor against Clark Tank Lines.

### STATEMENT OF FACTS

The recitation of facts in appellant's brief is inadequate. Accordingly, a statement of pertinent facts, by category, is deemed to be necessary in order to present the whole picture more clearly. Since neither the judgment of \$38,505.08 against the corporate defendant M-S, nor a separate judgment of \$38,505.08 against Maurie Schneider personally, was appealed, the facts underlying such are only briefly set forth, as such frame and give context to the subject of this appeal, namely, the \$25,000.00 judgment by way of offset by M-S against Zions, and the judgment over for \$25,000.00 in favor of Zions against Clark.

- A. The establishment of an office of M-S Commodities in Salt Lake City, including accounts with Zions Bank.

On September 21, 1970, agents of M-S Commodities, Inc. opened three bank accounts with Zions Bank. The account pertinent to this action was denominated, "M-S Commodities, Inc., Customer's Segregated Funds Account Account No. 02 12592 0". (R. 569, A. 204, 217, Exh. 4-P.)<sup>1</sup> The M-S accounts were opened in anticipation of M-S establishing a commodities trading office in Salt Lake City. M-S's Salt Lake City office was opened in November, 1970, and from the time of its opening through March 15, 1971, J. Moroni Stoof acted as an agent, solicitor and office manager for M-S. (R. 570, 649, 1084, 1131; A. 55, 88, 217, 233.)

During the relevant period in this case, defendant Maurie Schneider was a principal shareholder in M-S, its president and also a director. (R. 569-70.) During the same period Priscilla Secrest was also a director of M-S and its vice president. (R. 569-70.) Both Maurie Schneider and Priscilla Secrest were signators having authority to transfer funds out of the Segregated Fund account of M-S (No. 02 12592 0) at Zions Bank. (A. 204, 205; Exh. 4-P.) Periodically, funds would be wire transferred from this account of Zions Bank to a similar segregated fund account maintained by M-S at Harris Trust and Savings Bank in Chicago, Illinois. (R. 650-51, 987-89; A. 42-43, 234-35.)

On of the trading customer accounts of the M-S office in Salt Lake City was a corporation known as

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<sup>1</sup> The letters "R." and "A." refer to the Record on Appeal and the Abstract, respectively. "Exh." refers to Exhibit.



Dal-Ron Enterprises. (R. 856-857; A. 14-16, 210, 215, 216; Exh. 31P, 58 DC, 59 DC.) Two of the principals in this corporation were J. Moroni Stoof and Edward Dallin Bagley, both of whom were employees of M-S. (R. 1033-34, 1085-86; A. 45, 57-58.) Dal-Ron Enterprises was used by Stoof and Bagley for a period of time to receive payment from M-S for their trading commissions. (R. 1033, 1085-86; A. 45.)

B. Wrongful Wire Transfer of \$75,000.00 in March, 1971 by M-S and Maurie Schneider.

On Monday, March 15, 1971, a request was made by J. Moroni Stoof to Maurie Schneider for the transfer of \$25,000.00 by M-S Commodities in Chicago, Illinois, to Salt Lake City, Utah for the account of Dal-Ron Enterprises. (R. 856-865; A. 14-18; Exh. 54 DMS; A. 214.) Said transfer was effectuated based upon the representation to M-S in Chicago by J. Moroni Stoof that a check for \$34,725.50 would be deposited in the M-S account with Zions Bank to cover said \$25,000.00 transfer in addition to covering a margin call of approximately \$9,000.00 on the Dal-Ron account. (R. 856-865; A. 14-18; Exh. 25 P, 26 P, 54 DMS; A. 214.) Schneider insisted that a tele-photo copy of the deposit slip and the \$34,725.00 check be sent to Chicago for verification. (Exh. 25 P and 26 P.)

On the next day, March 16, 1971, J. Moroni Stoof had several more telephone conversations with Maurie Schneider who was in Chicago. (R. 654; A. 238.) During

these conversations Stoof told Schneider that he was terminating their working relationship. (R. 654; A. 238.) It was during one of these conversations that Schneider inquired of Stoof if the \$34,725.50 deposit of the previous day to cover the \$25,000.00 transfer and \$9,000.00 margin call was good. (R. 654, A. 238.) He was assured that it was good, but he was suspicious. Sensing the situation in Salt Lake City at the M-S office was in a mess, Schneider flew to Salt Lake City that same day, arriving late in the afternoon. (R. 868-869; A. 19-20; Exh. 28 P.)

After arriving in Salt Lake City, Schneider tried without success to contact Stoof, and the same evening did make contact with David Piggott, an officer of South Davis Security Bank. (R. 654, 960-61; A. 38-39, 238.) Schneider inquired of Piggott about whether payment had been made on the \$34,725.50 check that was deposited on the previous day by Stoof and drawn on South Davis Security Bank. (R. 960-61; A. 38-39.) Piggott was non-committal, but promised to look into the matter the next day. That evening, Schneider left a message with Stoof's wife that he wanted to breakfast with Stoof the following morning, and an arrangement for such a breakfast meeting was made. (R. 877, 823.)

Stoof did not show for the breakfast appointment, so Schneider went to the M-S offices early the next morning. Upon his arrival at the local office of M-S at about 7:00 a.m. the next morning (March 17, 1971), Schneider was informed of a memorandum from Stoof to the effect that he had quit. (R. 1266-1267.) That morning, Schnei-

der received a telephone call from Stoof and was informed that he (Stoof) had real trouble. (R. 878-881.) During the morning of March 17, Schneider had a meeting with B. Robert Clark of Clark Tank Lines and informed Mr. Clark that Stoof was a "thief" and that he should check the books and records of Clark Tank Lines. (R. 803; A. 7.) Throughout that day of March 17, Schneider was busy handling customer positions and had many conversations with the M-S office in Chicago, including conversations with Priscilla Secrest. (R. 887-889.) Maurie Schneider concluded that part of the money in the M-S account in Salt Lake City was not good such as the \$34,725.50 deposit. Accordingly, he determined that he should get the credits transferred from the Zions Bank account to Chicago, so as to protect M-S. (R. 657; A. 241.)

Late in the afternoon of March 17, 1971, Zions Bank received a telephone request for the transfer of \$75,000.00 from the segregated account of M-S at Zions Bank to a similar account of M-S at Harris Savings and Trust. Karen Christensen of Zions Bank informed the caller that the wires were closed so that the transfer could not be effectuated that day, but would be done the next morning. (R. 1207, 1208.) The request was unusual because in the past such requests by M-S for transfer had been made in the morning when the wires were open so that the transfer could be effectuated on the same day. (R. 1209.) Early in the morning on March 18, 1971, said wire transfer of \$75,000.00 was made. (R. 950-51; Exh.

44 P.) The lower court found that Maurie Schneider directed the transfer of the said \$75,000.00, with knowledge that there was not \$75,000.00 worth of funds in the account, thus creating a net deficit in the M-S Commodities account with Zions Bank in the amount of \$38,505.08. (R. 657, A. 241.) Thus, M-S was held liable for the overdraft that was created in its accounts, and because of his own individual actions with guilty knowledge, a separate personal judgment was rendered against Maurie Schneider in the amount of \$38,505.08 (R. 659; A. 243.)

C. The \$25,000.00 Wire Transfer from M-S in Chicago to Dal-Ron Enterprises at the Request of J. Moroni Stoof, Controller of Clark Tank Lines, and the Use of Said \$25,000.00 to Cover an indebtedness of Stoof to Said Clark Tank Lines.

1. The transfer of \$25,000.00 at the request of Clark's controller Stoof to Dal-Ron Enterprises.

On the morning of March 15, 1971, J. Moroni Stoof requested that Maurie Schneider of M-S, who was at the time in Chicago, Illinois, transfer \$25,000.00 from M-S to the account of Dal-Ron Enterprises in Salt Lake City through Zions Bank. (R. 652-3, 854-7; A. 236-7, 14-17.) At this time (while also working with M-S), as had been the case for a substantial period of time, Stoof was the controller for Clark Tank Lines. Stoof told Schneider that he needed the \$25,000.00 because Edward Dallin

Bagley (an officer of Dal-Ron) was on a binge and that he, Stoof, wanted to buy his (Bagley's) position in Dal-Ron Enterprises. (R. 652-3, 854-7; A. 236-7; 14-17.) At this time, both Stoof and Schneider were aware that there was a margin call of approximately \$9,000.00 on the account of Dal-Ron Enterprises with M-S. (R. 1189, 865, 914; A. 112, 18.)

Stoof wanted the \$25,000.00 transferred as an accommodation to him. (R. 1325; A. 184.) To induce Maurie Schneider of M-S to make the transfer, but still keep \$25,000.00 in the Dal-Ron account with M-S, Stoof told Schneider that a \$34,725.50 check would be deposited in the M-S Commodities account in Salt Lake City at Zions Bank. (R. 856-865; A. 14-18, 214; Exh. 25 P, 26 P, 54 DMS.) Prior to transferring the \$25,000.00, Schneider required the sending of and received a wire photo copy of the \$34,725.50 deposit slip, and in addition took the further step, not normally done, of requiring Stoof to send a wire photo copy of the \$34,725.50 check itself. (R. 856-865; A. 14-18, 214; Exh. 25 P, 26 P, Exh. 54 DMS.) It was clear that the \$25,000.00 to be wire transferred was to represent the difference between the margin call on Dal-Ron Enterprises (approximately \$9,000.00) and the \$34,725.50 check deposited into the M-S account by Stoof. (R. 865, 1189-90; A. 18, 112.) There was no intention that the Dal-Ron funds with M-S be reduced by a net \$25,000.00. (R. 1189-90, A. 112.) To the contrary, the \$25,000.00 was to remain in the Dal-Ron account, and the margin call of \$9,000.00 was also to be paid.

Based upon the strength of the \$34,725.50 deposit in Salt Lake City, \$25,000.00 was wire transferred from Chicago to Zions First National Bank by M-S with the notation, "for credit of Dal-Ron Enterprises." (A. 214; Exh. 54 DMS.) As heretofore noted, it was thereafter discovered by Schneider that the \$34,725.50 check deposited by J. Moroni Stoof in the M-S account at Zions Bank was no good. (A. 207; Exh. 7 P.) The net result was that \$25,000.00 was wire transferred by M-S on the strength of a bad check, which became a part of the overdraft loss to Zions in the amount of \$38,505.08. (R. 865, 1189-90; A. 18, 112, 207; Exh. 7 P.)

2. Improper action by Clark Tank Lines in inducing Zions Bank to transfer the \$25,000.00 to Clark Tank Lines for deposit in its (Clark's) bank account at Clearfield State Bank.

Throughout the period of time that J. Moroni Stoof was working for M-S Commodities he was the controller for Clark Tank Lines. (R. 1125, 1130, 1287; A. 84, 87, 88, 154, 1555.) Craig Maddux, another employee of Clark, acted under the supervision of Stoof as to certain financial matters of Clark. (R. 1174, 1286-88; A. 154-56.) In early March, 1971 (prior to the 15th, the day of the \$25,000.00 wire transfer), J. Moroni Stoof told Craig Maddux that he, Stoof, was going to handle a Clark Tank Lines obligation in the amount of \$50,000.00. (R. 1286-1293; A. 157-160.) Stoof asked Maddux to make

out a \$50,000.00 check payable to Stoof, drawn on Clark, and that he, Stoof, would make a personal check for deposit at American National Bank to cover the \$50,000.00 obligation of Clark Tank Lines. (R. 1286-1293; A. 157-160.)

A couple of days later, Stoof told Maddux that American National Bank would not accept Stoof's personal check to cover the \$50,000.00 obligation of Clark Tank Lines. (R. 1291; A. 158, 159.) He then directed Craig Maddux to make a check for \$50,000.00 payable to Walker Bank so as to procure a cashier's check from Walker Bank in the amount of \$50,000.00 to then be taken to American National Bank to cover the Clark indebtedness in that amount. (R. 1291; A. 158-159.) A cashier's check for \$50,000.00 was in fact purchased from Walker Bank, and then deposited with American National Bank to cover the Clark Tank Lines obligation. (R. 1291-93; A. 159-160.) However, Stoof had utilized for his own purposes the \$50,000.00 which he had earlier directed that Craig Maddux give to him by way of a Clark Tank Lines check. Hence, by reason of the directions by Clark Tank Lines' own controller, J. Moroni Stoof, and participated therein by its other financial officer, Craig Maddux, there was created an indebtedness between J. Moroni Stoof and Clark Tank Lines prior to March 15, 1971, in the amount of \$50,000.00. (R. 1291; A. 160.)

On the morning of March 15, 1971, Clark's controller, J. Moroni Stoof, called Maurie Schneider and requested \$25,000.00 to be wire transferred from the Dal-Ron ac-

count with M-S in Chicago for the credit of Dal-Ron through Zions Bank in Salt Lake City. (R. 854-57; A. 14-17, *supra*). Around 10:00 a.m. on that morning (15th), controller J. Moroni Stoof called Clark Tank Lines' other financial officer, Craig Maddux, and indicated that he (Maddux) could pick up a cashier's check made payable to Clearfield State Bank in the amount of \$25,000.00 at Zions Bank. (R. 1294; A. 161.) This was to be in part payment of Stoof's indebtedness of \$50,000.-00 to Clark. (R. 1294; A. 161.) At this time, Craig Maddux knew of the necessity for a deposit of money in Clark Tank Lines account, and on March 15, 1971, pursuant to conversations with and in accordance with instructions by controller J. Moroni Stoof, Maddux of Clark Tank Lines stopped by the office of Zions Bank in the latter part of the morning to pick up the \$25,000.00 wired from M-S. (R. 1295; A. 162.) After being informed at Zions Bank that the money had not arrived, Maddux then went to the office of J. Moroni Stoof and waited until early afternoon. (R. 1295-96; A. 162-163.)

Several conversations took place between Stoof and Betty Curtis (Mr. Stoof's secretary) and Zions Bank personnel, making inquiry as to the arrival of the \$25,000.00. Stoof instructed Zions that when the funds arrived a cashier's check should be made payable to Clearfield State Bank, and that a representative of Clearfield State Bank would be there to pick it up. (R. 653, 1198-99; A. 118, 237.)

After the \$25,000.00 for Dal-Ron from M-S had ar-



rived at Zions Bank, Maddux again presented himself and requested the \$25,000.00. (R. 1195, 1296; A. 114, 163.) Maddux indicated to Karen Christensen, the wire transfer clerk at the Bank, that the cashier's check should be made payable to Clearfield State Bank. (R. 1195, 1296; A. 115, 163), and stated that he was "down from Clearfield." (R. 1198-99; A. 117.) Karen Christensen of the Bank typed on the stub of the item, "for the Dal-Ron Enterprizes," asking Craig Maddux how to spell "Dal-Ron." (R. 1195; A. 115, 212-213; Exh. 52 DMS, 53 DMS.) Stoof had arranged for Maddux of Clark Tank Lines to pick up the money at Zions Bank. The Court found that Maddux instructed Karen Christensen of Zions to make the check payable to Clearfield State Bank, this then facilitating the subsequent deposit of the money into the Clark account at Clearfield Bank. (R. 635; A. 237.) Maddux even spelled "Dal-Ron" for Christensen which was placed on the check stub. The Court entered the following Finding:

25. Pursuant to conversation with J. Moroni Stoof, Craig Maddux of Clark Tank Lines stopped by the office of Zions First National Bank in the latter part of the morning of March 15, 1971, to pick up the \$25,000 wired from M-S Commodities, Inc. After being informed that the money had not arrived, Maddux then went to the office of J. Moroni Stoof and there waited until early afternoon. Several conversations took place between J. Moroni Stoof and Betty Curtis, Mr. Stoof's secretary, with Zions First National Bank personnel, making inquiry as to the

arrival of the \$25,000. After the money had arrived at Zions First National Bank, Craig Maddux by agreement with J. Moroni Stoof, again presented himself at Zions Bank and requested the \$25,000. *He indicated to Karen Christensen, the wire transfer clerk at the Bank, that the check should be made payable to Clearfield State Bank, which instruction previously had been given to Karen Christensen by J. Moroni Stoof, whom she knew to be associated with both M-S and Dal-Ron. Karen Christensen typed on the stub of the item, "for the Dal Ron Enterprizes" asking Craig Maddux how to spell "Dal-Ron."*

(R. 653; A. 237 — Emphasis added.)

After receiving the \$25,000.00 cashier's check made payable to Clearfield State Bank, Craig Maddux personally took the check to Clearfield State Bank and there had it deposited to an account of Clark Tank Lines. (R. 1294-5; A. 161-162.) Prior to depositing the check, Maddux removed the stub which stated "For the Dal Ron Enterprizes," and placed the stub in the records of Clark Tank Lines where it was retained. (R. 694, 1297-98; A. 164-5, 237.)

Without the \$34,725.50 deposited by J. Moroni Stoof, there were not sufficient funds in the Dal-Ron account with M-S in Chicago to justify the transfer of \$25,000.00. (R. 856-865; A. 14-18, 214; Exh. 25 P, 26 P, 54 DMS.) It was a transfer of good money based upon the deposit of a bad check, so as to meet an obligation of controller Stoof to Clark Tank Lines, an obligation created by the actions of Stoof and Clark's other finan-

cial officer, Craig Maddux. (R. 1291; A. 160.) At the conclusion of the trial, Judge Croft stated:

... that it was the bank's obligation to receive those funds on behalf of Dal-Ron Enterprises and to disburse them to Dal-Ron Enterprises. ... And certainly the bank employee that signed the cashier's check had some responsibility in failing to see thaa the check was made out to Dal-Ron Enterprises. But it seems to me that the Bank had an absolute duty in disbursing those funds to do so by check made payable to Dal-Ron Enterprises and to no one else. (R. 1342; A. 195.)

Judge Croft further observed that:

... the manner in which the bank employees handled that transaction was negligent and without any justification whatsoever. I think the Bank had a firm duty and responsibility to disburse that \$25,000.00 in accordance with its instructions, by paying it out to no one else other than Dal-Ron Enterprises. (R. 13490-50; A. 201.)

With respect to Clark Tank Lines, the judge stated:

*I think Clark is bound by the fact that Stoof was then its controller, an important officer in a company of some magnitude, I am sure, had been for years, and the two of them who alone are responsible for what was done with that \$25,000.00 were Clark Tank Lines employees. (R. 1343-44; A. 196 — Emphasis added.)*

The Court then concluded that:

I think that the Zions Bank is entitled to a judgment against Clark Tank Lines on its Third Party Complain in the sum of \$25,000.00; and in regard to that, it seems to me that if two employees of Clark can do what Stoof — and incidentally, and carried along with Stoof, Maddux — and get the benefit of Stoof's fraud at the expense of the bank or M-S Commodities, it seems to me a gross miscarriage of justice. *It was Clark Tank Lines, employee that caused all of this mess and it, least of all, should benefit by that \$25,000.00 transaction.* (R. 1350; A.

201-202 — Emphasis added.)

## ARGUMENT

### POINT I.

THE JUDGMENT ENTERED AGAINST CLARK TANK LINES AND IN FAVOR OF ZIONS FIRST NATIONAL BANK SHOULD BE AFFIRMED.

- A. The Lower Court Correctly Found that the \$25,000.00 was Improperly Diverted to Clark Tank Lines Through Actions of Stoof and Maddux Who Were at the Time Employees of Clark Tank Lines.

In its brief, appellant Clark Tank Lines repeatedly overlooks the importance attached by the lower court to the salient fact that J. Moroni Stoof at *all* pertinent times was the *controller* of Clark Tank Lines and Craig

Maddux the *office manager*. (R. 1125, 1130, 1174, 1286-88; A. 80, 87-8, 154-56.) To bootstrap its theory of the case into some semblance of plausibility, appellant makes the bold conclusion that when Stoof sought the transfer of the \$25,000.00 for the purpose of paying his personal indebtedness, he was acting at all times in the capacity of an agent for M-S or Dal-Ron. (Appellant's brief, pp. 31-32, 38, 41-42.) The appellant fails to recognize what the Court *found*, i.e., that Stoof and Maddux in the circumstances revolving around the \$25,000.00 were acting in the interest of Stoof and *Clark Tank Lines*. (R. 658; A. 242.)

Judge Croft clearly perceived the fact that Stoof played many roles on behalf of different parties. In delivering his ruling, he stated:

At the outset, I think we have an unusual situation here that seldom appears in a case in that we have *Moroni Stoof as a party defendant who wears several hats*. First of all, he is here as an individual defendant. He is here as an officer and stockholder in Dal-Ron Enterprises. He is here as a solicitor and I think an agent and employee of M-S Commodities, because certainly some of the duties he performed in the office were employee-type of activities on behalf of M-S Commodities. He is here as an independent, I think, dealer through his wife's name, probably, in the commodity market. *He is here as a controller of Clark Tank Lines and my decision in this case with respect to the various issues, I think, will be such as to indicate to you, as I intend to do, that I think I must take into*

*consideration his various roles that he plays in these activities in those various capacities.* (R. 1337; A. 191 — Emphasis added.)

The lower court placed great significance upon the many roles of J. Moroni Stoof, and expressly based his findings and conclusions upon a determination as to the particular role or “that” Stoof was in at a particular time.

The facts and findings do not support appellant’s tortured attempt to suggest Stoof was at all important times acting for Dal-Ron or M-S, but never Clark. At page 41 of its brief, appellant flatly asserts “. . . that in directing Zions to make the cashier’s check payable to Clearfield and to give it to Maddux, he (Stoof) was acting as M-S’s agent and/or as Dal-Ron’s President, and not as Clark’s employee.” That statement is contrary to the express finding of the trial court, which is based upon ample evidence. The lower court rejected the contention that at the time Stoof was acting for M-S or Dal-Ron, and in the Findings of Fact expressly *found* just the opposite:

4. From at least January 1, 1971, until at least through March 15, 1971, defendant J. Moroni Stoof was the *Controller* for Clark Tank Lines and an employee thereof.

5. From at least January 1, 1971, until at least through March 15, 1971, *Craig Maddux was an employee of Clark Tank Lines* and assisted J. Moroni Stoof in Stoof’s duties as Controller of

said company. (R. 649; A. 233 — Emphasis added.)

\* \* \*

19. *Prior to March 15, 1971, Craig Maddux had knowledge of certain check writing activities of J. Moroni Stoof involving Clark Tank Lines.* Prior to March 15, 1971, J. Moroni Stoof had obtained from Clark Tank Lines' bank account \$50,000.00 for his own use by means of a check written to him by Maddux on direction of Stoof and by reason thereof. J. Moroni Stoof needed to secure money for deposit on March 15, 1971, to an account of Clark Tank Lines at Clearfield State Bank. Craig Maddux knew of the necessity for a deposit of money in said Clark Tank Lines account on March 15, 1971, and Maddux was informed by J. Moroni Stoof that \$25,000 was to be wire transferred to Salt Lake City to meet the aforesaid needs and which money Mr. Stoof would then direct to the custody of *Craig Maddux for deposit in the account of Clark Tank Lines at Clearfield State Bank.* (R. 651; A. 235 — Emphasis added.)

\* \* \*

42. The said \$25,000 was deposited by Craig Maddux into the account of Clark Tank Lines, and helped Mr. Maddux achieve a partial return to Clark Tank Lines of \$50,000 which Stoof had obtained from Maddux, drawn on the Clark Tank Lines account a few days before. (R. 658; A. 242.)

\* \* \*

44. *J. Moroni Stoof and Craig Maddux were acting together on behalf of Clark Tank Lines in obtaining the said \$25,000 from Zions*

*First National Bank as aforesaid.* (R. 658; A. 242 — Emphasis added.)

Findings of Fact on this issue could not be clearer. After hearing evidence for four days, and clearly understanding the significance of the fact that Stoof wore many official “hats,” the lower court consciously and specifically rejected the major thrust of appellant’s argument, i.e., that Stoof was acting for M-S or Dal-Ron instead of Clark when involved in directing the transfer of the \$25,000.00.

A review of the evidence makes it clear why the Court so found. As set forth, *infra*, the real reason Stoof wanted the \$25,000.00 was to cover a personal debt with Clark, and Maddux of Clark (Maddux had no employee relationship with M-S or Dal-Ron) was privy at all pertinent times to this need. Stoof, as controller for Clark, of course, knew of the debt to his employer; he was motivated in his role of controller of Clark to cover a debt to said company, not M-S; and the best evidence is that the \$25,000.00 in fact did go to Clark Tank Lines through the concerted and planned actions of Stoof and Maddux.

In its brief at page 19, appellant recognizes the fundamental principle that a trial court’s findings are presumed correct unless the evidence clearly shows otherwise. *DeWitt Distribution, Inc. v. Bond Furniture, Inc.*, Sup. Ct. No. 13625 (Utah, Oct. 21, 1974); *Buchanan v. Crites*, 106 Utah 428, 150 P. 2d 100 (1944). Based upon the evidence in the record, appellant has failed to demonstrate why it was not reasonable for the lower court



to *find* as it did. Clearly, the findings of the lower court should not be disturbed in that Stoof and Maddux were acting as Clark employees in the pertinent circumstances surrounding the \$25,000.00 wire transfer.

B. Clark Tank Lines Obtained the \$25,000.00 to Help Cover a \$50,000.00 Debt, and was Unjustly Benefits Thereby.

As referred to *supra*, the \$25,000.00 was obtained to cover part of Stoof's \$50,000.00 debt to Clark. Clark received the said \$25,000.00, and the court found that it unjustly benefited thereby. (R. 658; A. 242.) As appellant recognizes in its brief (p. 25), a corporation acts through its agents and employees and certainly, as the lower court found, this is applicable to Clark because of controller Stoof wearing his Clark "hat" in concert with Clark's office manager Maddux. *Stratton v. West States Construction*, 21 Utah 2d 60, 440 P. 2d 117 (1968); 19 C. J. S. *Corporations*, § 999.

A careful review of the evidence makes it patently clear that the activities of Stoof and Maddux were geared to getting the money into Clark's bank account.<sup>2</sup> By any stretch of imagination, these actions could hardly

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<sup>2</sup> Appellant in its own Statement of Facts recognizes this in pointing out that "Maddux's actions on March 15, 1971, *were directed toward payment of this* (Stoof's) obligation." (Appellant brief, p. 8.) (Emphasis added.) One can easily understand this for as discussed, *infra*, Maddux played a prime role in the rather unusual circumstances surrounding the creation of Stoof's \$50,000.00 debt to Clark.

be imputed as of benefit to M-S or Dal-Ron, but only to Stoof, Maddux and Clark.

Maddux was involved from the beginning in the events creating Stoof's indebtedness to Clark. Maddux knew that Stoof was taking a Clark Tank Lines' check for his (Stoof's) use, and then taking the most curious step of supposedly writing a *personal* check to cover it. Maddux testified unequivocally that he *knew* on the day of the \$25,000.00 wire transfer (March 15) that Stoof owed \$50,000.00 to Clark. (R. 1294; A. 161.) Evidence was also adduced that Maddux knew of Stoof's "float" or "kiting" activities with Clark funds. Maddux testified that with respect to picking up the \$25,000.00 and depositing it in the Clark bank account at Clearfield, that he did so pursuant to Stoof's directions. (R. 1294; A. 161.) Thus, the court found that Maddux assisted Stoof in making a partial return of the \$50,000.00 to Clark:

42. . . . helped Mr. Maddux achieve a partial return to Clark Tank Lines of \$50,000 which Stoof had obtained from Maddux, drawn on the Clark Tank Lines account a few days before. (R. 658; A. 242.)

The \$25,000.00 deposited at Clearfield State Bank was "suspended" in such a manner as to inure to the direct benefit and use of Clark Tank Lines. Stoof certainly did not know how to "suspense" the funds at Clearfield State Bank in a Clark bank account from his employment with M-S or his association with Dal-Ron. (R. 1134.) He gleaned this information wearing the "hat"

of controller for Clark Tank Lines. His directing the \$25,000.00 to Clark did not benefit M-S or Dal-Ron, but only Stoof and Clark. The evidence overwhelmingly supports the trial court's finding that as to the \$25,000.00, Stoof and Maddux were working as employees or agents of Clark.<sup>3</sup> As emphasized by appellant in its brief, if all parties are innocent, the one placing the agent must absorb the consequences of that agent's activities. (Appellant's brief, p. 26; Restatement, Agency 2d § 8.)

The court correctly concluded that Clark was liable to Zions for the improper diversion of the \$25,000.00 *because* of the acts of its (Clark) agents *found* by the Court to *then* be acting as agents for Clark. Words of the Court in ruling at the conclusion of the evidence summarize the matter well:

I think that the Zions Bank is entitled to a judgment against Clark Tank Lines on its Third Party Complaint in the sum of \$25,000; and in regard to that, it seems to me that if *two employees of Clark* can do what Stoof did — and incidentally, and carried along with Stoof, Mad-

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<sup>3</sup> Repeatedly throughout its brief, appellant makes the same false assumption that Stoof was acting at certain material times for M-S, and not Clark. For example, appellant argues at p. 32 of its brief that “. . . M-S is responsible for their (Stoof and secretary Curtis) acts even though they may have been acting fraudulently. . . .” (Restatement, Agency, § 261 and 262; C. J. S. Agency, § 267.) The law of agency on this point is not really in dispute. It is a question of fact. The trial court perceived *factually* that the diversion of the \$25,000.00 was by Stoof and Maddux acting at the time as *agents* of Clark to cover an embarrassing debt and a factual finding is not to be disturbed unless such is without evidence. The trial court just didn't agree on factual findings with Clark's counsel.

dux — and get the benefit of Stoof's fraud at the expense of the bank or M-S Commodities, it seems to me a miscarriage of justice. *It was Clark Tank Lines' employee that caused all of this mess and it, least of all, should benefit by that \$25,000 transaction.* (R. 1350; A. 201-202 — Emphasis added.)

C. The Judgment is Proper Upon Principles of Fairness and Equity as the \$25,000 Never Belonged to Clark in the First Place.

Appellant does not dispute the fact that the \$25,000.00 in question came from an account of M-S in Chicago. While the issue of whether the money belonged to M-S or to Dal-Ron, may be in dispute, there is not a *scintilla* of evidence that the \$25,000.00 *ever* belonged to Clark Tank Lines prior to the diversion.

This is not a case where something goes full circle, i.e., money once with Clark goes back. An employee of Clark got into financial difficulties with his employer and attempted to remedy it, with the assistance of a fellow employee, at the expense of someone else. The funds were diverted from third party sources to help solve an internal financial problem of Clark Tank Lines. From the standpoint of equity and fairness, there is *no* basis for Clark to have the \$25,000.00. Its internal management problems should not be foisted on third parties, and the lower court was absolutely correct in stating that Clark "*least of all*" was entitled to the \$25,000.00. (*Supra*, R. 1350; A. 201-202.)

## POINT II.

THE COUNTERCLAIM JUDGMENT FOR \$25,000.00 IN FAVOR OF M-S COMMODITIES AGAINST ZIONS BANK WITH A THIRD PARTY JUDGMENT AGAINST CLARK TANK LINES, SHOULD BE SUSTAINED.

A. There is Substantial Evidence to Sustain the Judgment in Favor of M-S Commodities on its \$25,000.00 Counterclaim, by Reason of the Interest M-S Had in the Said \$25,000.00.

1. There was not \$25,000.00 in the Dal-Ron account with M-S for the wire transfer.

Appellant argues at pages 20-22 of its brief that there were sufficient funds in the account of Dal-Ron with M-S in Chicago to transfer \$25,000.00 *without* considering the \$34,725.50 bad check deposited by Stoof. Therefore, goes the argument, there was no damage to M-S, but only to Dal-Ron.

A more careful review of the record discloses the faulty premise of this argument. Appellant admits at page 20 of its brief that Exhibit 58-DC (A. 215) shows \$18,557.50 in the Dal-Ron account on March 15, 1971, the day of the transfer. There is *no* evidence that Dal-Ron had anything in an equity account. Before the wire

transfer of the \$25,000.00, however, it is undisputed that there was a margin call of approximately \$9,000.00 on Dal-Ron. (R. 625, 865, 1106-7; A. 236.) The court found that both Stoof and M-S knew about this margin call. (R. 652, 1106-7; A. 236.) Therefore, with the \$9,000.00 margin call, there was effectively at best on the day of the \$25,000.00 wire transfer \$9,357.50 in the Dal-Ron account. This is far short of the \$25,000.00 and hence there was no justification for sending \$25,000.00 for which by the best posture of things there would be *an account deficit* of \$15,642.50.<sup>4</sup>

2. It was not intended for there to be a net loss of \$25,000.00 from the Dal-Ron account with M-S, but the \$25,000.00 was only intended to be a return on the specific deposit of \$34,725.50.

It is clear from the evidence, whatever amount was in the M-S account, that there would *not* be a *net* effect of reducing the Dal-Ron account by \$25,000.00. If there was meant to be such an effect on Dal-Ron, then the obvious question arises as to why Stoof felt he needed to *first* deposit \$34,725.50 (covering \$25,000.00 plus the

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<sup>4</sup> The fact that there were not sufficient funds in the Dal-Ron account with M-S was further emphasized in M-S's answers to interrogatories:

"Mr. Schneider advised Mr. Stoof that the Dal-Ron Enterprises account with M-S Commodities, Inc. *did not have* sufficient funds to cover margin calls and the \$25,000.00 which Mr. Stoof was requesting." (R. 611, 861 — Emphasis added.)

remainder for the approximate \$9,000.00 margin call of that day) before the \$25,000.00 was to be transferred. Likewise, Schneider of M-S *insisted* on such a deposit. Therefore, had the \$34,725.50 deposit been good, the Dal-Ron account would *not* have had a reduction of \$25,000.00.

The following finding of the trial court is very relevant:

24. On the morning of March 15, 1971, J. Moroni Stoof talked to Maurie Schneider who was in Chicago, Illinois, on the telephone and requested that \$25,000 from the account of Dal-Ron Enterprises with M-S Commodities, Inc., be wire transferred to Salt Lake City, Utah through Zions First National Bank, Stoof saying Bagley was on a binge and he was going to buy him out. Prior to said transfer, both J. Moroni Stoof and Maurie Schneider were aware that a margin call of approximately \$9,000 *had been made on the account of Dal-Ron Enterprises. Prior to wire transferring the \$25,000, J. Moroni Stoof informed Maurie Schneider that \$34,725.50 had been or would be deposited in the M-S Commodities Segregated Fund Account in Salt Lake City at Zions First National Bank.* Before transferring the \$25,000, Maurie Schneider *requested and saw a wire photo copy of the \$34,725.50 item and a wire photo copy of the deposit slip related to said item.* The \$25,000 to be wire transferred was to represent the difference between the margin call on Dal-Ron Enterprises and the \$34,725.50 check deposited earlier in the morning. *It was to be a return to Dal-Ron Enterprises of funds deposited on behalf of Dal-Ron Enterprises.* The \$25,000 wire transferred on

March 15, 1971, did not belong to J. Moroni Stoof personally, but were funds which belonged to Dal-Ron Enterprises, Inc. After seeing the wire photo of the check, and a wire photo of the deposit slip, Maurie Schneider then directed Bruce Bochner, bookkeeper for M-S Commodities, Inc., to transfer from the Dal-Ron Enterprises, Inc. account with M-S Commodities, Inc. at Harris Trust & Savings in Chicago, Illinois, \$25,000 to Zions First National Bank "for credit of Dal-Ron Enterprises." (R. 652-3; A. 236-7 — Emphasis added.)

The entire transaction of wiring the \$25,000.00 was based upon the strength of the \$34,725.50 deposit — *not* what was or was not in the account in Chicago. Even if, arguendo, Stoof was acting for Dal-Ron at the time of the transfer, *his* intent (and hence that of Dal-Ron using the logic of appellant) was to keep a positive balance of at least \$25,000.00 in the Dal-Ron account with M-S.<sup>5</sup>

Schneider's intent was precisely the same. He was transferring money as an accommodation *to Stoof* (*not* Dal-Ron) and thus the requirement that Stoof *first* make a deposit to cover it. Not only did Schneider require Stoof to wire photo a copy of the deposit ticket, but took the further step not usually taken by M-S of *requiring* a photo copy of the *actual check* itself to be sent to Chicago. (Exh. 25P, 26P.)

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<sup>5</sup> As argued, *supra*, and found by the Court, Stoof *was not* then acting for Dal-Ron, but as an employee of Clark using information gleaned from his other positions to help himself and Clark.



So important was the \$34,725.50 deposit in justifying the \$25,000.00 transfer, the next day (March 16), Schneider inquired at Stoof's bank with David Piggott if the deposit was good, as indicated in the following finding of the Court:

... Mr. Schneider inquired whether the deposit of the previous day of \$34,725.50 has been good  
... (Finding of Fact, No. 27, R. 654, A. 238.)

3. A net reduction in the Dal-Ron Account would damage M-S Commodities.

It is argued by counsel for Clark that whatever effect there would be upon the Dal-Ron fiduciary account, such could not harm M-S, since M-S was not the owner of the funds. It has been seen, however, that the transfer caused a *net deficit* in the Dal-Ron account, thus sending good money after bad, so to speak. Maurie Schneider testified that there weren't sufficient funds in the Dal-Ron account to cover the transfer, *supra*. (R. 611, 862.) The flow out of \$25,000.00 from funds which M-S had to account for and become liable to others most certainly damaged M-S. The trial court correctly so found.

The argument at page 33 of appellant's brief that the money was transferred as an accommodation to Stoof places appellant in a contradictory position. Assuming this position of the appellant only strengthens the proposition that there was *no* intent whatsoever to take \$25,000.00 from the Dal-Ron account with M-S. The \$25,000.00 was transferred *solely* on the strength of the \$34,-

725.50 check. Since the \$34,725.50 check was *not* good, the transfer was done on a false premise.

B. There is Substantial Evidence to Sustain the Judgment in Favor of M-S Commodities on its \$25,000.00 Counterclaim as against Zions Bank.

1. The Court found Zions negligent for not preparing the check for Dal-Ron.

The trial court found and concluded that Zions Bank acted negligently in releasing the \$25,000.00 wire transfer for Dal-Ron Enterprises to Craig Maddux of Clark Tank Lines in a check made payable to Clearfield State Bank:

41. Representatives of Zions First National Bank acted negligently in releasing a cashier's check for \$25,000 payable to Clearfield State Bank to Craig Maddux at the request and instruction of J. Moroni Stoof and Craig Maddux. The said check was based upon a wire transfer request from M-S Commodities "for the Dal-Ron Enterprises," and release of those funds payable other than to Dal-Ron Enterprises and at the mere direction of J. Moroni Stoof and Craig Maddux constituted negligence on the part of the bank. The funds belonged to Dal-Ron Enterprises. (Finding of Fact 41, R. 658, A. 242.)

In alluding to this issue in its brief, the appellant cites certain facts incorrectly, and misperceives what the court carefully found. For instance, at page 28 of its brief the appellant states:

Presumably, the receipt of the funds was properly reflected by *Zions as a credit to Dal-Ron's account* when the funds were received and *with a corresponding debit entry* when they were disbursed. The record is silent on this point . . . (Emphasis added.)

The record is *not* silent on the subject as suggested by counsel for Clark. Karen Christensen, the wire transfer clerk for the Bank, testified that the \$25,000.00 was "directed to the account of Dal-Ron Enterprises." (R. 1194; A. 114.) She testified further, however, that Dal-Ron had *no account* with the Bank:

THE COURT: Did Dal-Ron have an account at Zions Bank?

THE WITNESS: Not that I was aware of, Sir.

THE COURT: *So the funds were sent out here by M-S for delivery to Dal-Ron?*

THE WITNESS: Yes, Sir.

R. 1204, A. 123 — Emphasis added.)

Contrary to the assumption of the appellant, *supra*, there was no debit or credit to *an account*. Zions Bank was used to assist in the *delivery* of funds to *Dal-Ron* as clarified by the trial court's own questioning.

In the light of this evidence, i.e., that the funds were wired for Dal-Ron and that there was no Dal-Ron account but that the money was to be delivered to Dal-Ron, the court had a basis for its finding of negligence on the

part of Zions. The cashier's check plain and simply was *not* made out to Dal-Ron, but to another party, i.e., Clearfield State Bank. The Court considered this matter carefully, and in its ruling stated:

... it was the bank's obligation to receive those funds on behalf of Dal-Ron Enterprises and to disburse them to Dal-Ron Enterprises.

\* \* \*

And certainly the bank employee that signed the cashier's check had *some responsibility in failing to see that that check was made out to Dal-Ron Enterprises*. But it seems to me that *the bank had an absolute duty in disbursing those funds* to do so by check made payable to Dal-Ron Enterprises and to no one else. (R. 1342; A. 195 — Emphasis added.)<sup>6</sup>

It may have been different had Dal-Ron had *an account* with Zions with a signature account card and someone authorized on the signature card instructed the Bank as to such a disbursement. But this was *not* the case. Dal-Ron had no account and *no account card*, and the only instructions were those which were wired by B-S, that the money was for *delivery to Dal-Ron*.

## 2. Clark Tank Lines' agents induced the

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<sup>6</sup> The following from the testimony of Maurie Schneider of M-S bolsters the fact that the trial court had substantial evidence on which to base its findings:

Q. And to your knowledge, the \$25,000 check that we have referred to as being sent to Dal-Ron should have been re-issued in the name of Dal-Ron?

A. (Schneider) That's correct. (R. 910, A. 35.)

Bank's negligence and the diversion to Clark of the \$25,000.00.

As argued, *supra*, Clark's employees, Maddux and Stoof were the ones directly involved in getting the \$25,000.00 diverted to Clark Tank Lines. They were aware of Stoof's indebtedness to Clark, as they were the ones who were involved in the creation of the indebtedness. As indicated by the Court's findings, they were the one who persuaded and instructed the Bank to make the cashier's check payable to Clearfield State Bank. Had it not been for Maddux's actions at the Bank in collusion with Stoof, Karen Christensen would *not* have made the check payable to a party other than Dal-Ron:

Q. . . . The wire transfer came in directly into the account of Dal-Ron?

A. That is right.

Q. And was it your *intent* then based upon that direction, *to make the check out to Dal-Ron?*

A. Yes, Sir.

Q. *But for the instruction of Craig Maddux you would have done so?*

A. Yes, Sir.

(R. 1196; A. 116 — Emphasis added.)

As the record shows, there was certainly substantial evidence enough for the Court to find and conclude that Clark's two employees were the cause of the diver-

sion — the cause of the Bank's negligence. Again, since Stoof was a man of many official hats, the Court could certainly view his actions with respect to the \$25,000.00 as being accomplished while he was wearing his "Clark hat." Since Maddux worked *only* for Clark, there can be no question as to his capacity and interests.<sup>7</sup>

<sup>7</sup> Appellant argues at page 28 of its brief that:

. . . the manner in which Zions disbursed the funds, by a check payable to *Clearfield State Bank* did *less* to facilitate Stoof's personal use of the funds than if it had made the check payable to Dal-Ron. As Dal-Ron's President, Stoof could easily have endorsed the check and used the funds for his own purpose. (Appellant's brief, pp. 28-29.)

Again, the Court in its meticulous and thorough review of the evidence even specifically considered this point. It again saw it differently than Clark's counsel. The Court indicated that it was *significant* that Stoof himself *didn't* pick up the check and did not have to have his name on it as an *endorsement*. The trial court believed, contrary to Clark's argument, that making the check payable to Clearfield *facilitated* the designs of Clark's controller as the following from the record shows:

THE COURT: Why didn't you just simply sit down and write a check for that amount? (\$25,000)

STOOF: I could have done that, which I did on several occasions prior to that, Your Honor.

THE COURT: Why didn't you go to the bank and pick up the wire transfer?

STOOF: I was rather busy and Mr. Maddux volunteered that he would come and take care of it.  
(R. 1188-89)

Then, from the evidence including the above the Court stated in its ruling:

*It is not without significance that Stoof wanted Maddux to pick up the check. It is not without significance that he didn't leave the University Club Building and walk a block to Zions Building and get the check himself and ask that it be made to Dal-Ron Enterprises. I think the inference there, as a logical inference, is he didn't want his name to appear as an endorsement on that check if it were used for his purposes.* (R. 1343; A. 196 — Emphasis added.)

3. Clark's reliance on the Uniform Fiduciaries Act is misplaced.

Beginning at page 35 of its brief, appellant makes a strained attempt to base a defense upon the Utah Uniform Fiduciaries Act. (§ 22-1-1, et seq. U. C. A.) The thrust of appellant's position is that payment to a fiduciary (Stoof, Maddux) gives the payor protection no matter what the payee does with the funds.

The premises of appellant's position is completely misplaced in that the Court found that Zions *had specific instructions* as to the disbursal of the money and *did not* follow them. Clark's position might be more tenable had the check been made payable to Dal-Ron. Then, had Stoof used the check improperly by endorsement, there might be protection because the Bank would have at last followed its directions and made the disbursal to the right fiduciary in the first instance, however the money money might thereafter have been used.

Also, Clark assumes again in its brief that when Stoof and Betty Curtis were calling the bank, they were acting on *behalf of M-S*. Appellant still ignores the Court's view that Stoof acted in various capacities, and when he was planning to effectuate the diversion of the money to Clark, he was *not* acting for M-S or Dal-Ron, but rather for Clark. Appellant argues much about authority

and apparent authority of an agent. Clark had employed Stoof (as well as Maddux) and had no right to retain money which they wrongfully diverted, and which never belonged to Clark in the first place.

### CONCLUSION

It is submitted that the judgment entered in favor of Zions First National Bank and against Clark Tank Lines for \$25,000.00 should be affirmed. There is ample evidence in the record to sustain that judgment, as well as the judgment of offset awarded to M-S Commodities against Zions, which judgment was then passed on to Clark Tank Lines as a third party defendant. The gravamen of this case is the wrongful actions by Clark Tank Lines' employees which in the last analysis caused the \$25,000.00 loss. Clark should not benefit from the wrongful acts of its employees, nor be unjustly enriched as a result thereof.

Reversal of the offset judgment in favor of M-S and against Zions would only increase the net uncollectible judgment in favor of Zions against the defunct corporation M-S from the net of \$13,505.08, but such would not restore the \$25,000.00 which in fact was wrongfully diverted. Clark Tank Lines would thus retain the \$25,000.00 which became a part of the \$38,505.08 loss suffered by Zions First National Bank — which clearly would be an inequitable and unconscionable result.



For the reasons set forth herein, this court is urged to affirm the judgment for \$25,000.00 in favor of Zions First National Bank and against Clark Tank Lines.

Respectfully submitted,

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DATED: July 15, 1975