

2001

Zions First National Bank v. M-S Commodities, INC. : Brief of Appellant

Utah Supreme Court

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Jay A. Meservy; Herhaaren and Meservy; Jeffrey N. Clayton; Moyle and Draper; Frank N. Karras; Ronald J. Ockey; Jones, Waldo, Holbrook and McDonough; Attorneys for Appellant.

J. Thomas Greene, Gifford W. Price; Callister, Greene and Nebeker; Attorneys for Plaintiff.

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UTAH SUPREME COURT
BRIEF

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STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

ZIONS FIRST NATIONAL BANK,
a National Association,

Plaintiff and Respondent.

vs.

M-S COMMODITIES, INC; 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.

APPELLANT'S BRIEF

Appeal from Portions of a Judgment in favor of Plaintiff and
Third Party Plaintiff-Respondent and Defendant-Respondent,
M-S Commodities, Inc. by the District Court of
Salt Lake County, Utah
Honorable Bryant H. Croft, Judge

J. THOMAS GREENE and
GIFFORD W. PRICE, of
Callister, Greene & Nebeker
800 Kennecott Building
Salt Lake City, Utah 84111

*Attorneys for Plaintiff and
Third Party Plaintiff-Respondent*

JAY A. MESERVY, of Herbaaren & Meservy
466 East 5th South, Salt Lake City, Utah 84111

*Attorneys for M-S Commodities, Inc.; M-S Commodities of Utah, Inc.;
Maurie Schneider and Priscilla Secrest*

JEFFREY N. CLAYTON, of Moyle & Draper
600 Deseret Plaza, Salt Lake City, Utah 84111

Attorneys for J. Moroni Stooft and Dal-Ron Enterprises

FRANK N. KARRAS

321 South 600 East, Salt Lake City, Utah 84102

Attorney for Edward Dallin Bagley

RONALD J. OCKEY, of
Jones, Waldo, Holbrook &
McDonough
800 Walker Bank Building
Salt Lake City, Utah 84111
Attorneys for Appellant

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

ZIONS FIRST NATIONAL BANK,
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vs.

M-S COMMODITIES, INC; M-S COMMODITIES
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Third Party Plaintiff and Respondent.

vs.

CLARK TANK LINES COMPANY,
a corporation,

Third Party Defendant and Appellant.

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action by the plaintiff and third party plaintiff-respondent, Zions First National Bank ("Zions") for recovery against the defendant-respondents on an overdrawn account and on signatures, endorsements and warranties on two returned checks. Defendant-respondent, M-S Commodities, Inc. ("M-S") asserted a coun-

terclaim on a wire transfer of \$25,000 by it to Zions, claiming that Zions had failed to disburse said funds in accordance with instructions given to it by M-S. Zions joined third-party defendant-appellant, Clark Tank Lines Company ("Clark") on a third party complaint alleging that Clark had wrongfully diverted the proceeds of the said wire transfer to its own use.

DISPOSITION IN THE LOWER COURT

After a five-day trial of the case beginning October 15, 1973, the District Court of the Third Judicial District, Salt Lake County, entered its Findings of Fact and Conclusions of Law and a Judgment on January 17, 1974, awarding Zions' judgment against M-S in the sum of \$38,505.08 (plus interest and costs) on the overdrawn account. In addition, the court awarded Zions personal judgments against Maurie Schneider ("Schneider") and J. Moroni Stoof ("Stoof") in the amount of the overdraft (\$38,505.08, plus interest and costs) for having caused the overdraft by, in Schneider's case, wrongfully transferring \$75,000 out of the M-S account at Zions and, in Stoof's case, by having deposited two bad checks to the said account against which Zions extended credit in transferring the \$75,000. The court also awarded Zions judgment against Dal-Ron Enterprises, Inc. in the sum of \$34,725.50 (plus interest and costs) on one of the returned checks. The trial court further awarded M-S judgment on its counterclaim against Zions in the sum of \$25,000 (plus interest and costs) and in favor of Zions on its third party complaint against Clark in the same

amount. The court dismissed Zions' claims against Priscilla Secrest, Edward Dallin Bagley and M-S Commodities, Inc. of Utah.

RELIEF SOUGHT ON APPEAL

Third party defendant-appellant, Clark seeks reversal of that part of the judgment of the lower court awarding M-S judgment on its counterclaim against Zions and awarding Zions judgment on its third part complaint against Clark.

STATEMENT OF FACTS

Appellant is a Utah corporation and a licensed interstate carrier of certain commodities.

Defendant-Respondent M-S is an Illinois corporation which operated a commodities futures brokerage business having its principal office in Chicago, Illinois. It also maintained branch offices in other cities including, from approximately November, 1970 through early 1972, Salt Lake City. It is no longer doing business. (R. 649, 818, 1084; A. 7-8, 55, 233.)¹

At all times pertinent herein, defendant-respondent Maurie Schneider was President, a director and principal stockholder of M-S. He had been a commodity futures broker for 22 years. (R. 851; A. 13.)

At all times pertinent herein, defendant-respondent

¹The letters "R" and "A" refer to the Record in Appeal and the Abstract, respectively.

J. Moroni Stoof was an agent of and a solicitor for M-S at its Salt Lake City office and served as the office manager of said office from the time it was opened in November, 1970. (R. 570, 649, 1084, 1131; A. 55, 88, 217, 233.) He was "in charge" of the Salt Lake office (R. 838, A. 12), having authority, *inter alia*, to hire and fire employees and salesmen, to arrange advertising and to lease space and equipment for the business. (R. 898-99; A. 25-27.)² In addition, Stoof was at all pertinent times President, a director and stockholder of Dal-Ron Enterprises ("Dal-Ron"). (R. 571, 649, 1086; A. 58, 218, 233.) Prior to the opening of the local M-S office Stoof had been employed by Clark Tank Lines as its controller and he continued to work for Clark Tank Lines on a part-time basis after becoming an agent for M-S in November, 1970, until about March 16, 1971. (R. 803, 1130; A. 7, 88).

Bagley also was at all pertinent times a solicitor for and agent of M-S at its Salt Lake City office. (R. 649, 904-08, 1033; A. 30-33, 45, 233.) Operating under Dal-Ron, a now defunct Utah corporation, organized by them in the fall of 1970, he and Stoof acted as commodity brokers for various customers trading in commodities futures contracts through said office as well as trading for their own account. (R. 1033, 1085-86; A. 45, 57-58.) Stoof,

²The Trial Court found that Stoof was co-manager of the Salt Lake office with Edward Dallin Bagley ("Bagley"). (R649) Bagley testified that he discussed this possibility with M-S but declined to accept it. (R. 1033, A. 44) In any event, Stoof was recognized by employees in the office as the person "in charge." (R. 838, A. 12)

Bagley and their wives were the only directors and stockholders of Dal-Ron. (R. 1171; A. 100.)

Dal-Ron maintained a checking account at the South Davis Security Bank on which Stoof and Bagley were authorized co-signatories. (Exh. 24-P; A. 209.) Although the signature card for this account specified that both signatures were required, both Stoof and Bagley had, in fact, drawn checks on the account by their individual signature which were honored by the drawee bank and their business relationship was such that they "didn't worry about" having two signatures on Dal-Ron checks. (R. 1093; A. 61.) Stoof and Bagley also cashed checks made payable to Dal-Ron upon their individual, single, endorsement. (R. 1113; A. 78.)

In connection with the operation of its Salt Lake office, M-S maintained several bank accounts with Zions, including the "M-S Commodities, Inc. Customers Segregated Fund Account" ("Segregated Fund Account"), with which this appeal is concerned. (R. 569, 755-76; Exh. 4-P; A. 2, 204-05, 217.) This was a depository account for funds of the customers of M-S's Salt Lake City office. The funds of each customer were maintained separate and apart within the account from funds of other customers in accordance with the Commodity Exchange Act, 42 Stat. 998, 49 Stat. 1491, 7 U. S. C. §§1-17. All monies in the account were customer funds and were not funds of M-S Commodities. (R. 754, Exh. 2-P; A. 1, 203.) Stoof was authorized to endorse checks for deposit into the Segregated Fund Account, but no checks could

be drawn against the funds in the account. (R. 570, 794; A. 61, 217.) Funds deposited in the account were transferred between Zions and a similar customers segregated fund account maintained by M-S at the Harris Trust and Savings Bank in Chicago, Illinois ("Harris Trust"). Maurie Schneider and Priscilla Secrest (Vice President of M-S) and other M-S employees in Chicago were authorized to withdraw and transfer funds from and between these two accounts. (R. 650-51, 988-89; A. 42-43, 234-35.) In addition, Stoof and Bagley were authorized to request the M-S Chicago office to transfer funds from Harris Trust to Zions for account customers. (R. 909; A. 34.)

The events with which this appeal is concerned occurred principally on Monday, March 15, 1971. On the morning of that day, Stoof endorsed and deposited into the Segregated Fund Account for Dal-Ron a check for \$34, 725.50 payable to M-S drawn on insufficient funds by him alone as President of Dal-Ron on the Dal-Ron account at South Davis Security Bank. (R. 651, 1092; A. 60, 235.) Later the same morning Stoof telephoned Schneider in Chicago and requested that \$25,000 be transferred to Zions from the segregated fund account of Dal-Ron Enterprises at Harris Trust. Stoof told Schneider that \$34,725.50 had been deposited into the Segregated Fund Account for Dal-Ron that morning which, together with Dal-Ron funds already on hand at Harris Trust and sales commissions due from M-S to Stoof, would provide ample funds for the transfer, even

after deducting \$9,000 for a margin call on the Dal-Ron account that morning. (R. 854-57, 110-11; A. 13-16, 75-76.) During the same morning, Betty Lou Curtis, Stoof's secretary at the Salt Lake M-S office, also called the M-S Chicago office several times requesting that the \$25,000 be transferred to Zions. (R. 1279-80, 1282; A. 147-48, 150-51.) After seeing a wire photo of the deposit slip, Schneider directed the M-S bookkeeper, Bruce Bochner, to transfer the funds from the Dal-Ron account at Harris Trust in Chicago to Zions. (R. 653, 857; A. 16-17, 237.) This transfer was effected by means of an Advice of Credit from Harris Trust to Zions in the sum of \$25,000, bearing the notation "for credit of Dal-Ron Enterprises." (Exh. 54-DMS; A. 214.)

The Trial Court found that Schneider transferred the funds at Stoof's request for him to use to buy out Bagley's stock and interest in Dal-Ron, that the \$25,000 transfer represented the difference between the \$9,000 margin call on the Dal-Ron account and the \$34,725.50 Dal-Ron check deposited earlier in the morning of March 15th, that Stoof made the deposit intending to try to get the \$25,000 sent back to him to use for his own purpose and that the \$25,000 was a return to Dal-Ron of funds deposited on behalf of Dal-Ron. (R. 652-53; A. 236-37.) Of particular significance to this appeal is the trial court's further finding that the \$25,000 so transferred on March 15, 1971, did not belong to Stoof personally, but were funds which belonged to Dal-Ron. (R. 653, 658; A. 237, 242.)

On March 15, 1971, none of the officers or employees of Clark Tank Lines (except Stoof) knew that Stoof had been embezzling funds from Clark. (R. 807, 1116-18, 1127-28, 1177, 1305; A. 7, 79-80, 86, 104.)³ On that day, however, Craig Maddux, a Clark employee, knew that Stoof owed Clark \$50,000, which Stoof had obtained from Clark about a week before.⁴ Maddux's actions on March 15, 1971, were directed toward obtaining payment of this obligation. (R. 1293-94, 1338-39; A. 160, 192.)

Around 10:00 a.m. on the morning of March 15, 1971, Stoof telephoned Maddux and told him he had \$25,000

³This fact was first revealed to Clark's President, Boyce R. Clark, On March 17, 1971, following Stoof's confession to his church leaders on the evening of March 16, 1971. (R. 1115-18; A. 79-80)

⁴The details of this transaction, which is only pertinent to this case to show Clark's bona fide right to receive the \$25,000 on March 15, 1971, are as follows: On or about March 8, 1971, Stoof had obtained \$50,000 of Clark funds by representing to Maddux, Clark's office manager, who had worked under Stoof's supervision both before and after Stoof became M-S's local office manager (R. 1131, 1174, 1299-1300; A. 89, 102-03, 166) that he (Stoof) was going to make a temporary personal loan of \$50,000 to Clark to use in paying a Clark indebtedness in that amount owed to American National Bank. He told Maddux he would take his personal check for \$50,000 to American National and instructed Maddux to issue to him a Clark check in the same amount which he would hold for several days until Clark had funds to cover it. Several days later, on or about March 10th, he informed Maddux that the American National Bank had refused to accept his personal check in payment for the Clark obligation and instructed Maddux to purchase for Clark a \$50,000 cashier's check from Walker Bank and take it to American National, which Maddux did. During the conversation, Stoof told Maddux he would come to Clark later the same day and return the \$50,000 previously given to him, which he failed to do. Between March 10th and March 15th, Stoof telephoned Maddux several times and told him he would be in to re-pay the \$50,000, each time failing to do so. (R. 1289-92; A 157-60)

coming from Chicago which would repay half of the \$50,000 indebtedness. Stoof instructed Maddux to go to Zions and pick up a cashier's check made payable to Clearfield State Bank and to deposit it to the Clark Tank Lines account at that bank, this being the normal way transfers of funds were handled between Clark's bank accounts. (R. 1294; A. 161.)

Either before or just after talking to Maddux, Stoof telephoned Zions and spoke to Karen Christensen, a bank employee assigned to its wire transfer desk. (R. 1124, 1172-73, 1195-96; A. 83, 101, 115.) Christensen had met Stoof previously and knew he was the Salt Lake representative for M-S and was also connected with the Dal-Ron account. She recognized his voice. (R. 653, 1196, 1203-04; A. 115, 122-23, 237.) Stoof instructed her that the funds coming from Chicago were to be disbursed in the form of a cashier's check made payable to Clearfield State Bank and authorized her to deliver this check to Maddux. (R. 653, 1125, 1137-38, 1156, 1196; A. 83-84, 93-94, 96, 115, 237.) During the same morning, Christensen also spoke by telephone with Stoof's secretary at the M-S office, Betty Lou Curtis, who also informed Christensen that the check representing the funds was to be made payable to Clearfield State Bank. (R. 1125, 1279-80; A. 83, 148.)

Maddux arrived at Zions approximately 15 to 30 minutes after receiving Stoof's telephone call (R. 1324; A. 184), went to the bank's wire transfer desk and told them he had been sent by Stoof to pick up the funds.

After being informed that the funds had not yet arrived he stated that he was going to talk to Stoof and left. (R. 1200, 1318-19; A. 119, 178-79.) Maddux then went to the M-S Commodities Salt Lake office where he waited during the noon hour until word was received from Zions that the funds had arrived. (R. 1295-96; A. 162-63.) While he was waiting at the M-S office, a telephone call from the Zions wire transfer desk was received by Stoof's secretary, Betty Lou Curtis, inquiring about the identity of the person who had stopped at the bank to pick up the funds. Curtis informed the person calling that it was "Craig Maddux," identifying him as an employee of Clark Tank Lines,⁵ and then passed the tele-

⁵The testimony is somewhat conflicting concerning how Maddux was identified to Christensen and the Trial Court made no factual finding on the matter. Christensen claimed that she never knew Maddux was a Clark Tank Lines employee and he was not identified to her as such. (R. 1198, 1202; A. 117-18, 121) She stated that Stoof told her a representative of Clearfield State Bank would pick up the check (R. 1198-99; A. 118) and that when Maddux first arrived at her desk he told her he had "come down from Clearfield" to pick up the funds. (R. 1199; A. 119) She also said that during Maddux's first or return visit she asked him to provide identification from Clearfield State Bank which he did not do, giving her his driver's license verifying that he was Craig Maddux. (R. 1197; A. 116-17) She specifically admitted that Maddux did not tell her he was from Clearfield State Bank. (R. 1197-98; A. 117) Stoof testified that he told Christensen the funds would be picked up by a representative of Clark Tank Lines and that he believed he gave her Maddux's name. (R. 1124, 1137-38; A. 83-84, 93-94) Betty Curtis testified that in her telephone conversation with Christensen around noon on March 15th, while Maddux was in the M-S office she told Christensen that the man Christensen had described to her was Craig Maddux and that he was employed at Clark Tank Lines. (R. 1280-81; A. 149) Maddux denied telling Christensen he was from Clearfield at any time and stated that Christensen's only request to him was that he identify himself as Craig Maddux, which he did by producing his driver's license. (R. 1297, 1319; A. 164, 179). He testified that Christensen

phone to Stoof who handled the call from thereon. (R. 1281-82; A. 149-51.)

Maddux returned to Zions at about 1:00 p.m. to pick up the funds which had arrived from Harris Trust under an Advice of Credit bearing the notation "For Credit of Dal-Ron Enterprises". (R. 1200, 1296, Exh. 54-DMS; A. 119, 163, 214.) Christensen prepared Cashier's Check No. L24055 for \$25,000 payable to Clearfield State Bank (Exhibit 52-DMS; A. 212) and gave it to Maddux, attached to which was a stub bearing the notation:

Funds wired for the Dal-Ron Enterprises [sic]
March 15, 1971 \$25,000 kc Mar transfer from
Harris Trust in Chicago.

(R. 1201-02, 1297-98; Exh. 53-DMS; A. 120-121, 164-65, 213.) While she was making up the check, Maddux repeated the instruction that it be payable to Clearfield State Bank. (R. 1195, 1296; A. 115, 163.) Maddux then took the check to Clearfield State Bank and deposited it, along with other funds, to Clark's account at that bank. (R. 1294-95; A. 161-162.) Prior to making that deposit, Maddux read the notation on the stub attached to the check, but assumed it was merely a bank notation concerning the source of the funds. (R. 1298, 1322; A. 165, 182.) The check was endorsed by Clearfield State Bank over to Clark and credited to the Clark account.

was preparing the check at the time of his return visit and that she asked him for the name of the payee, to which he replied "Clearfield State Bank", this being his only reference to that bank. (R. 1296, 1320; A. 163, 180-81)

Clearfield had never claimed any right to or interest in the check or its proceeds. (R. 1294-95; Exh. 52-DMS; A. 162, 212.)

Subsequent events occurring during the period March 16 through March 18, 1971 resulted in the confession by Stoof of his embezzlements from Clark, the visit of Maurie Schneider to Salt Lake City for the purpose of closing out commodity trading accounts of customers of the local M-S office and Schneider's transfer of \$75,000 to Chicago out of the Segregated Fund Account on March 18, 1971, which, when two checks previously drawn and deposited therein by Stoof^e were returned unpaid, resulted in that account becoming overdrawn in the sum of \$38,505.08. Zions filed suit in this action to recover on this overdraft. The trial court found that Schneider had wrongfully arranged the \$75,000 transfer knowing or having reason to know that the \$34,725.50 check was no good and that there would be insufficient funds to cover the transfer. (R. 657, 659; A. 241, 243) Accordingly, the trial court entered judgment in favor of Zions against Schneider personally for the amount of the overdraft along with judgments in the same amount against M-S and Stoof. These judgments are not challenged by this appeal.

Following the trial, Clark filed its Alternative Motions for a New Trial or to Amend Findings and Conclusions or to Alter and Amend Judgment. (R. 664; A. 248)

^eThe aforementioned Dal-Ron check for \$34,725.50 and a check for \$20,000 drawn by Stoof on his personal account at Clearfield State Bank.

After the entry in the minutes of the Trial Court's Order denying a new trial and the Motion to Alter and Amend Judgment,⁷ Clark timely filed its Notice of Appeal⁸ appealing to this Court from the portions of the trial court's judgment reading as follows:

1. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that defendant M-S Commodities, Inc. is awarded judgment on its counterclaim against plaintiff Zions First National Bank in the amount of \$25,000.00, plus interest and costs.

2. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that third party plaintiff, Zions First National Bank, is awarded judgment against third party defendant Clark Tank Lines in the amount of \$25,000.00 plus interest and costs.

ARGUMENT

A. *Appeal from Judgment of Trial Court Awarding M-S Commodities Judgment on its Counterclaim Against Zions in the Sum of \$25,000*

At the close of M-S's evidence on its counterclaim Zions and Clark Tank Lines moved for dismissal thereof for insufficiency of proof, including M-S's failure to prove damages or its standing to maintain the counterclaim. (R. 1263; A. 141) These Motions were taken under ad-

⁷The Trial Court granted, in part, Clark's Motion to Amend Findings and Conclusions.

⁸R. 701-03; A. 251-53.

visement and the Trial Court subsequently entered judgment for M-S on the counterclaim for \$25,000 based upon its conclusion, that:

Plaintiff Zions First National Bank was *negligent* in releasing the \$25,000 wire transfer of March 15, 1971, which had been sent for the credit of Dal-Ron Enterprises to representatives of Clark Tank Lines, by check made payable to the Clearfield State Bank, and M-S Commodities is entitled to a judgment of \$25,000 as an offset to its liability to Zions First National Bank. R. 659-60; A. 243-44) [Emphasis supplied.]

The sole basis asserted by M-S Commodities for recovery on its counterclaim was that it had transferred the \$25,000 for the "credit" of Dal-Ron and Zions had failed to follow this instruction in releasing the funds to Craig Maddux. During the trial, M-S expressly withdrew any claim on its counterclaim based upon fraud.

MR. MESERVY:

* * *

In the circumstances, I feel that goes to my question of the fraud angle of my counterclaim; that is, that the \$25,000 was obtained by fraud and therefore with no title passed. I feel at this point I am unable to prove that and it would probably shorten the trial if I conceded that point and proceeded on my counterclaim only on the basis of the strict liability of the bank as our agent and having received these funds and failed to disburse them per our instruction and we are entitled to have them back from the bank. (R. 1242; A. 133)

To sustain this claim, M-S was required to prove each of the following elements by a preponderance of the evidence: (1) a specific instruction from it to Zions; (2) failure by Zions to use the applicable standard of care in carrying out such instruction; (3) damage to M-S proximately caused by such failure by Zions.

Appellant submits, for the reasons set forth in the following Points I through VI, that the Trial Court erred in its above-quoted Conclusion of Law and in awarding M-S judgment on its counterclaim on the basis for recovery asserted by it, or on any basis, on the grounds that such judgment is unsupported by the evidence and is contrary to the Trial Court's findings, the evidence and the law. Inasmuch as recovery by M-S on its counterclaim was and is a condition precedent to Zions' recovery on its Third Party Complaint against Appellant Clark, reversal of the judgment on the counterclaim would automatically require reversal of the Third Party judgment without any need for considering the merits of that action.

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR A NEW TRIAL OR TO ALTER OR AMEND JUDGMENT AND IN AWARDING JUDGMENT TO M-S COMMODITIES ON ITS COUNTERCLAIM BECAUSE THE \$25,000 WERE FUNDS BELONGING TO DAL-RON ENTERPRISES AND M-S COMMODITIES HAD

NO INTEREST THEREIN, SUFFERED NO DAMAGE WITH RESPECT THERETO AND HAD NO STANDING TO MAINTAIN THE COUNTERCLAIM.

The Trial Court's judgment awards M-S damages for the "loss" of funds which the Trial Court expressly found belonged to Dal-Ron Enterprises. This factual finding is fully supported by the record and the only conclusion to be drawn therefrom is that M-S suffered no loss or damage with respect to the \$25,000 transfer and, indeed, had no standing to maintain its counterclaim. Consequently, the Trial Court erred in awarding judgment to M-S on the counterclaim.

In its summary of the evidence made at the trial immediately after final arguments, the Trial Court clearly stated that the funds belonged to Dal-Ron:

Now, as I see it, that \$25,000 is a return of \$25,000 of the \$34,000 included in that check which Stoof told Schneider he had deposited to the M-S account in Salt Lake City that day. They were deposited as funds from Dal-Ron Enterprises. *They were Dal-Ron Funds.* They were not Stoof's personal funds. . . .

* * *

What was done, was done with Dal-Ron Enterprises money and not with Stoof's money. (R. 1341; A. 194-95) [Emphasis supplied.]

This factual finding was reiterated by the Trial Court in Paragraphs 24 and 41 of its Findings of Fact and Conclusions of Law as follows:

24. The \$25,000 wire transfer on March 15, 1971, did not belong to J. Moroni Stoof personally, *but were funds which belonged to Dal-Ron Enterprises, Inc.* (R. 653; A. 237) [Emphasis supplied.]
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 instructions 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 a release of those funds payable other than to Dal-Ron Enterprises 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.* (R. 658; A. 242) [Emphasis supplied.]

This finding is fully justified and amply supported by the evidence. First, all parties conceded that the \$25,000 transferred was debited to "Dal-Ron Customer Account No. 40041," this being Dal-Ron's customer account in the M-S Customers segregated fund account at Harris Trust in Chicago. (See Paragraph 3n of the Pre-Trial Order, R. 571; A. 217-18)

Second, M-S admitted that the segregated fund accounts in Chicago and in Salt Lake City were, in effect, one account containing only customers' funds. Priscilla Secrest testified:

Q. All right, lest we fall into the trap of thinking there is a conflict here, what is the differ-

ence between the Segregated Fund Account in Utah and Zions, and the Segregated Fund Account in Harris Bank in Chicago?

A. There is really no difference between the two. They are only located in two different banks.

Q. All right, they are part of the same overall accounting system?

A. They are all customer segregated funds of M-S Commodities no matter where they are located. (R. 989; A. 43)

It was always understood that the funds in the segregated fund account belonged to M-S's customers and not to M-S. In its letter of September 21, 1970, sent to Zions for the purpose of establishing the segregated fund account at that bank, M-S stated:

Please acknowledge, by signing and returning to us the enclosed copy of this letter, that you have been informed that the funds from time to time deposited in the aforesaid account *are those of our commodity customers* and are being held in accordance with the provisions of the Commodity Exchange Act. (Exh. 2-P; A. 203) [Emphasis supplied.]

The Commodities Exchange Act, 42 Stat. 998, 49 Stat. 1491, 7 U. S. C. §§ 1-17, pursuant to which the segregated fund accounts were maintained at Zions and Harris Trust, specifically provides that funds in the account are *customers' funds* which do not belong to the commodities commission merchant (i.e., M-S Commodities) or any other person and that it is unlawful for the commodities

commission merchant to hold, dispose of or use them as its own property.⁹

Thus, the debiting of Dal-Ron's Customer Account No. 40041 at Harris Trust for the purposes of transferring the \$25,000 to Zions could only have involved Dal-Ron's funds, as expressly found by the Trial Court. There is clearly a reasonable basis in the record to sustain this factual finding.¹⁰ What cannot be sustained, however, is the Trial Court's judgment, in the face of such finding, awarding M-S damages on its counterclaim for the loss of Dal-Ron's money. M-S did not allege, and there is no evidence even suggesting that it had reimbursed or was obligated to reimburse Dal-Ron for the \$25,000 and was therefore the assignee of or subrogated to Dal-Ron's claim.

Appellant has had and continues to have extreme difficulty in perceiving any basis upon which the Trial

⁹[S]uch person [i.e., registered commodities commission merchant] shall, whether a member or non-member of a contract market, treat and deal with all money, securities, and property received by such person to margin, guarantee, or secure the trades or contracts of any customer of such person or accruing to such customer as the result of such trades or contracts, *as belonging to such customer*.

* * *

It shall be unlawful for any person, including . . . any depository, that has received any money, securities, or property for deposit in a separate account . . . to hold, dispose of, or use any such money, securities or property as belonging to the depositing futures commission merchant. . . . 7 U.S.C. § 6d(2) (Supp.) [Emphasis supplied.]

¹⁰The Trial Court's factual findings are presumed to be correct unless the evidence clearly shows otherwise. *DeWitt Distributors, Inc. v. Bond Furniture, Inc.*, Sup. Ct., No. 13625 (Utah, Oct. 21, 1974); *Buchanan v. Crites*, 106 Utah 428 150 P.2d 100 (1944).

Court could award judgment to M-S in face of its determination that the funds belonged to Dal-Ron. In its Findings, the Trial Court stated that the \$25,000 transfer was intended by Stoof "to be nothing more than a return to Dal-Ron of \$25 [thousand] of the \$34,000 deposited in the M-S account that morning on behalf of Dal-Ron" and that Stoof deposited the check with the intent of getting the \$25,000 back from M-S. (R. 652-53, 1341; A. 194, 236-37) However, M-S did not even claim that Stoof obtained the funds by some nefarious design. During the trial, it expressly *withdrew* any claim that the funds were obtained from it through fraud and that title thereto did not "pass" from it.¹¹ Furthermore, Stoof's intent in having the money transferred has absolutely nothing to do with the question of whose funds were being transferred. The Trial Court expressly found that they belonged to Dal-Ron and the record clearly supports this determination. For example, there is ample evidence from which to infer that \$25,000 of Dal-Ron's funds were available for transfer on March 15, 1971, independent of Stoof's \$34,725.50 deposit to the Dal-Ron account on that day. Exhibit 58-DC; (A. 215), an M-S accounting record for Dal-Ron's account, shows that on the morning of March 15, 1971, Dal-Ron had \$18,357.50 in its cash account with M-S. In addition, it would

¹¹See statement of Mr. Meservy made at R. 1242; A. 133 quoted above at page 14. Furthermore, if Stoof's intent were a material issue it could not help M-S's claim against Zions. Stoof acted as M-S's agent in directing Zions to release the funds (see discussion under Point III, *infra*) and the consequences of any improper motive by Stoof should be imposed upon it rather than Zions, an innocent party. As the actor, M-S must bear the loss even if it were equally innocent with Zions. 27 Am. Jur. 2d, Equity § 146.

have had whatever surplus was reflected in its equity account.¹² Although the record is silent as to balance in Dal-Ron's equity account on March 15, 1971, if there was a negative balance it was M-S's burden to prove it, which it did not do. In the absence of such proof, and in view of the Trial Court's express finding that the \$25,000 were Dal-Ron's funds, this Court is entitled (indeed, obligated) to presume that Dal-Ron's equity and cash accounts at least equaled \$25,000 on that date.

Other evidence which may have confused the Trial Court concerned oral testimony by Secrest and Schneider that M-S suffered a net loss in the Dal-Ron Account as a result of trading losses incurred in closing out the accounts of its Salt Lake office while Schneider was in Salt Lake during the period of March 16-18, 1971. If the Trial Court based its determination that M-S was entitled to recover the \$25,000 upon this testimony it committed clear error for at least two reasons.

First, although M-S had the burden of proving the amount of its damage, neither Secrest, Schneider nor any other witness offered any evidence (oral or otherwise) as to the *amount* of trading losses allegedly incurred by M-S.

¹²Priscilla Secrest explained that M-S maintained two accounting records for each of its customers. One, a cash account, is illustrated by Exhibit 58-DC, and represents the amount of cash of the customer on hand and available for trading purposes on a given day. The second account represents the customers equity position in its commodities future contracts and is a function of his losses or gains in such contracts. (R. 1260-62; A. 138-41)

The record is simply silent on this essential point. Indeed, M-S failed to show by a preponderance of the evidence that it suffered *any losses*, its only evidence being the bald statements of Secrest and Schneider that losses occurred without any supporting documentary or oral evidence concerning the specific trading transactions, amounts of loss, etc. Nothing in the record supports a damage award in any amount. Certainly, nothing suggests that M-S's losses even approached \$25,000. The court cannot (but the Trial Court in this case did) relieve M-S of its burden of proof by awarding it damages for which no evidence exists.

Second, *all* of the trading losses claimed by M-S occurred (if they occurred at all) *after* March 15, 1971, and cannot support M-S's claim that it suffered damage when Zions disbursed to Clark Tank Lines the \$25,000 transferred to Zions by M-S on that day. The record conclusively establishes that any trading losses claimed by M-S were caused solely by frantic trading activity during March 17-18, 1971, in Salt Lake City under Schneider's personal, on-the-scene supervision, after it became apparent that Stoof had serious problems and would no longer be working for M-S. Schneider and Secrest testified that on March 16, 1971, many customers of M-S's Salt Lake office had large positions in soybean contracts and that the soybean market went against these positions on the morning of March 17. (R. 870, 1225-27; A. 20, 126-27) Because of this and Stoof's departure from the local office, Schneider came to Salt Lake and undertook an intensive two day effort to contact the customers of the

Salt Lake office concerning their market positions.¹³ Schneider admitted that any losses existing in the Dal-Ron account on March 18, 1971, would have resulted from these trading losses and not from allocating Salt Lake office expense to this account. (R. 913-14; A. 33-34) Because of the volatile nature of the commodities futures market¹⁴ it is, perhaps, possible that losses occurred in these accounts during this period. However, the record doesn't indicate the amount of any such losses and, in any event, they all occurred after March 15, 1971, when the transaction upon which M-S's counterclaim was based was entirely consummated and could not have been caused by any act of Zions. Indeed, M-S's counsel admitted during the Trial that evidence of losses in the Dal-Ron account occurring after March 15, 1971, were not relevant to M-S's counterclaim.¹⁵

¹³This effort was referred to by several witnesses. Secrest testified that on March 17, 1971, Schneider was in Salt Lake "attempting to contact the various customers . . . to ask them what to do with their position." (R. 1228; A. 128) She said that when the soybean market opened at 9:30 on that day, "one side went one way and the other side went the other which was contrary to our position." (R. 1229; A. 129) Betty Curtis and Dal Bagley also testified that they were heavily involved under Schneider's direction in calling customers of M-S's Salt Lake office about their positions on March 17 and 18, 1971. (R. 824-25, 830, 1042-45; A. 8-11, 49-50)

¹⁴Secrest testified that market prices can fluctuate sharply in a matter of seconds. (R. 1224; A. 126)

¹⁵Following M-S's withdrawal of its claim that the funds were obtained from it by fraud, the following colloquy occurred:

MR. MESERVY: If the Court please, it would appear to me in view of my stipulation into the record at the commencement of this session the issues of losses in this account would no longer be relevant since they were relevant to

Finally, the Trial Court may simply have been troubled because Stoof was using money which the Court found belonged to Dal-Ron to pay his personal debt to Clark. The Court repeatedly stressed that the \$25,000 was not Stoof's money. (R. 653, 1342-43; A. 196-96, 237) Apparently, it simply forgot that it wasn't M-S's money either, even though M-S was the party seeking damages for its "loss". Whether Dal-Ron had or has ground to complain has never been an issue in this case. The Trial Court's error in awarding M-S judgment on the counterclaim is clear even though its *ratio decidendi* is not.

POINT II.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR A NEW TRIAL OR TO ALTER OR AMEND JUDGMENT AND IN CONCLUDING THAT ZIONS WAS NEGLIGENT IN DISBURSING THE \$25,000 TO CLARK BECAUSE ZIONS FULLY COMPLIED WITH THE INSTRUCTION CONTAINED ON THE ADVICE OF CREDIT

the question of the fraud and the fraud count on our counterclaim. At the present time they would not be relevant to our position in our claim back for the \$25,000 from the bank.

THE COURT: Well, it might have some bearing upon whose money the \$25,000 was, you see.

MR. MESERVY: Well, I don't believe that would be so, Your Honor, because we are talking about a situation several days after the \$25,000 was transferred out. (R. 1248; A. 135)

(EXHIBIT 54-DMS) IN DISBURSING THE FUNDS.

Assuming, *arguendo*, that the notation on the Advice of Credit was, as M-S contends, the only instruction given to Zions in connection with the \$25,000,¹⁶ and that M-S's actual intention was for Dal-Ron to receive the funds,¹⁷ the evidence conclusively shows that Zions faithfully complied with such instruction.

An important fact apparently overlooked by the Trial Court was that Stoof was at all times, including March 15, 1971, Dal-Ron's President, holding, on the date, draft authority on Dal-Ron's checking account at South Davis Security Bank. (R. 571, 649, 1086; Exh. 7-P, Exh. 24-P; A. 58, 207, 209, 218, 233.) Zions' actions on March 15th must be viewed in light of these facts.

First, in disturbing the funds to Dal-Ron, Zions could only deal with that company's officers and employees.¹⁸ Disbursement of the funds to Dal-Ron's President, Stoof, or at his discretion was, *in fact*, disbursement to Dal-Ron.

Secondly, the facts known to Zions when it disbursed the \$25,000 upon Stoof's instructions were cer-

¹⁶In fact, the instructions received by Zions included instructions received from M-S's agents, Stoof and Curtis. See discussion under Point III, *infra*.

¹⁷In fact, M-S's actual intention was for *Stoof* to receive the funds. See discussion under Point IV, *infra*.

¹⁸A corporation can only act through its agents and employees. *Stratton v. West States Constr.*, 21 Utah 2d 60, 140 P.2d 117 (1968); 19 CJS Corporations § 999.

tainly sufficient to clothe him, in Zions' eyes, with at least the apparent authority to direct the distribution of Dal-Ron's funds.¹⁹ Christensen testified that she knew that Stoof, in addition to being the local representative for M-S, was also connected with the Dal-Ron account. (R. 653, 1203-04; A. 123, 237.) On the morning of March 15, 1971, Stoof had deposited into the Segregated Fund Account at Zions a check for \$34,725.50 drawn by him as President of Dal-Ron on Dal-Ron's corporate account at South Davis Security Bank. (R. 651, 1092; Exh. 7-P; A. 60, 206, 235.) Thus, when Zions distributed the \$25,000 it was holding physical evidence of Stoof's authority to disburse Dal-Ron's corporate funds.

M-S has argued that Stoof was not authorized to draw checks on the Dal-Ron account at South Davis Security Bank without the co-signature of Dal Bagley, since the account signature card purportedly required both signatures. (Exh. 4-P; A. 204.) Zions, however, was unaware of any such requirement and the Dal-Ron check drawn and deposited with it by Stoof on March 15, 1971, contained nothing on its face to indicate that two signatures were needed. In fact, there is only one signature line on the printed check. Furthermore, the record shows that in practice checks had been drawn on the account by Stoof and Bagley individually, had been

¹⁹Under the doctrine of apparent authority, a person who manifests to a third person that another is his "agent", is bound by the actions of such "agent" regardless of the latter's actual authority. Restatement, Agency 2d § 8.

honored by the drawee bank, and that the parties didn't "worry" about having two signatures on the checks. (R. 1093; A. 61.) Regardless of the number of signatures required, however, it is uncontroverted that Stoof was an actual signatory on Dal-Ron's checking account and he proclaimed such authority to Zions on March 15, 1971, by depositing with it the Dal-Ron check drawn by him on that date.

In holding Zions negligent, the Trial Court placed great emphasis upon the fact that the funds were disbursed in the form of a check payable to Clearfield State Bank, rather than to Dal-Ron. Indeed, in the Trial Court's view, this fact was determinative on the question of Zions' negligence. The Trial Court stated:

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 funds to do so by check made payable to Dal-Ron Enterprises and to no one else. (R. 1342; A. 195.)

[R]elease of those funds payable other than to Dal-Ron Enterprises . . . constituted negligence on the part of the bank. (R. 658; A. 242.)

Perhaps the Trial Court was troubled by the fact that by having the check made payable to Clearfield State Bank, rather than to Dal-Ron, Zions may have facilitated Stoof's personal use of the funds to partially pay his existing indebtedness to Clark Tank Lines.

It should first be noted that the instruction on the Advice of Credit only directed Zions to "credit" the funds to Dal-Ron; it did not preclude Zions from thereafter disbursing them as directed by Dal-Ron. 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 but it was M-S's burden to prove non-compliance with the instruction.

Appellant does not claim that as Dal-Ron's President, Stoof had inherent authority to pay his personal obligations with corporate funds. Appellant simply contends that Stoof's use of the funds is immaterial to M-S's right to recover against Zions in this case. At best, Stoof's use of the funds could only give rise to a claim by Dal-Ron for their return, a claim not made in this action or elsewhere.²⁰ No party herein claims to be an assignee of or subrogated to Dal-Ron's claim.

Furthermore, 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

²⁰Dal-Ron did not complain, counterclaim or crossclaim against any party in this action. Bagley testified that he had never made any legal claim to the \$25,000. (R. 1036; A. 47) Stoof said that Bagley had never made any claim to him for the \$25,000. (R. 1126, A. 84) By such failure to assert a claim Dal-Ron has either ratified Stoof's use of the funds or is estopped from now asserting any right to the funds. *Gordon v. Pettingill*, 105 Colo. 214, 96 P.2d 416 (1939).

the check and used the funds for his own purpose. Indeed, as President, he possessed the implied or inherent power, by virtue of his office, to endorse commercial paper on behalf of the corporation. 2 *Fletchers, Corporations* § 601. Furthermore, any bank negotiating a Dal-Ron check endorsed by him as a fiduciary of Dal-Ron would be protected from liability even if he used the funds for his own purpose unless the bank had actual knowledge of such use or otherwise paid the check in bad faith.²¹ A check payable to Clearfield State Bank, however, was beyond Stoof's fiduciary endorsement power. It could only be transferred to Clark by proper endorsement by Clearfield State Bank. This, in fact, was done, and Clearfield has never made any claim to the check or the proceeds thereof.

POINT III.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR A NEW TRIAL OR TO ALTER OR AMEND JUDGMENT AND IN CONCLUDING THAT ZIONS WAS NEGLIGENT IN DISBURSING THE \$25,000 TO CLARK BECAUSE THE "INSTRUCTIONS" RECEIVED BY ZIONS FROM M-S CONCERNING SUCH DISBURSEMENT INCLUDED ALL INSTRUCTIONS RECEIVED FROM THE AGENTS AND EMPLOYEES OF M-S'S SALT LAKE

²¹§ 22-1-8, Utah Code Annotated, 1953.

OFFICE, WHICH INSTRUCTIONS WERE
FULLY COMPLIED WITH BY ZIONS.

In claiming that Zions failed to follow its instructions in disbursing the \$25,000, M-S relied solely upon the notation "For credit of Dal-Ron Enterprises" as set forth in the "Advice of Credit" received by Zions from Harris Trust in connection with the transfer. (Exh. 54-DMS; A. 214.) Both M-S and the Trial Court failed to recognize that the "instructions" received by Zions concerning the disbursement of the funds included not only this notation, but also the specific, direct instructions given it by Stoof and Betty Curtis, both agents or employees of M-S at its Salt Lake office.

The specific instructions given to Karen Christensen (Zions' wire transfer desk clerk) by Stoof were to disburse the funds in the form of a cashier's check payable to Clearfield State Bank and to deliver said check to Craig Maddux. (R. 653, 1125, 1137-38, 1156, 1196; A. 83-84, 93-94, 96, 115, 237.) These same instructions were repeated to Christensen by Betty Curtis, a secretary and bookkeeper at M-S's local office. (R. 1125, 1279-80; A. 83, 148.) Zions fully complied with the instructions received from Stoof and Curtis in disbursing the funds.

M-S can't point only to the instruction which came to Zions from Harris Trust and ignore or disclaim responsibility for more explicit instructions given to Zions by its local agents. This is particularly so where the instructions were given by Stoof, whom M-S had appointed as the *manager* of its local office.

The powers of an agent are particularly broad in the case of one acting as general agent or manager; such a position presupposes a degree of confidence reposed and investiture with liberal powers for the exercise of judgment and discretion in transactions and concerns which are incidental or appurtenant to the business entrusted to his care and management. 3 Am. Jur. 2d, Agency §86.

Christensen testified that she accepted and followed Stoof's instructions because she had met him previously and knew he was M-S's representative for its Salt Lake office. She also said she knew he was connected with the Dal-Ron account. (R. 653, 1196, 1203-04; A. 115, 122-23, 237.) Stoof was, as admitted by Schneider, specifically authorized to request transfers of customers' funds from Chicago to Zions in Salt Lake. (R. 909; A. 34.)

Furthermore, the instructions received by Zions from the local M-S agents were given *repeatedly* on the day of the transaction. Betty Curtis testified that she spoke by telephone with Karen Christensen several times on that day concerning the transfer, during which conversations she told her to make the check payable to Clearfield State Bank and that Maddux would pick it up. (R. 1279-82; A. 148-51.) In addition, Stoof spoke with Christensen at least twice, giving her the same instructions. (R. 1124, 1281; A. 83, 149.) Zions was literally bombarded with instructions from M-S's local agents concerning the distribution of the funds.

The instructions were and are binding upon M-S,

who knowingly caused and permitted Stoof and Curtis to be its agents and to appear as such to Zions, who responded to their directions in good faith. Under such circumstances, M-S is responsible for their acts even though they may have been acting fraudulently, for their own account and not in M-S's interest. Restatement, Agency §§261 and 262; 3 C. J. S. Agency §257.

It is, however, for the ultimate interest of persons employing agents, as well as for the benefit of the public, that persons dealing with agents should be able to rely upon apparently true statements by agents who are purporting to act and are apparently acting in the interests of the principal. Restatement, Agency 2d §262, Comment a.

The Trial Court's judgment unjustly rewards M-S and penalizes Zions for faithfully and fully complying with the instructions of M-S's agents.

POINT IV.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR A NEW TRIAL OR TO ALTER OR AMEND JUDGMENT AND IN CONCLUDING THAT ZIONS WAS NEGLIGENT IN DISBURSING THE \$25,000 BECAUSE M-S INTENDED THAT THE FUNDS BE DISBURSED TO STOOF, DID NOT INTEND ZIONS TO BE INSTRUCTED OTHERWISE, AND ZIONS

PROPERLY FOLLOWED M-S'S INTENDED
INSTRUCTIONS.

Not only did the trial court fail to consider the entire instructions given to Zions by M-S and its local agents, it also failed to recognize that the notation on the Advice of Credit was not the "instruction" intended by M-S concerning the funds. The evidence clearly shows that (1) M-S did not intend the notation on the Advice of Credit to be an instruction to Zions, (2) M-S intentionally transferred the funds to Stoof, for his own personal use, (3) M-S intended the funds to be picked up, rather than "credited" to Dal-Ron's account as stated in the notation, and (4) Zions fully complied with M-S's intent in disbursing the funds.

Schneider admitted that the notation on the Advice of Credit (Exhibit 54-DMS) was not a directive to the bank to do any particular thing with the funds, but was merely a bookkeeping memorandum for M-S. (R. 1329; A. 187-88.) He further stated that he sent the funds only as an "accommodation" to Stoof, for him to use to buy Dal Bagley's interest in Dal-Ron. (R. 854, 1325; A. 14, 184.) When asked what he intended Zions to do with the funds he stated that it was to hold them for "pick up" by Dal-Ron. (R. 1328; A. 187.)

These admissions show that the true intention was for Stoof, not Dal-Ron, to get the funds. The issue of Stoof's authority to use the Dal-Ron money is immaterial to the issue of Zions' liability for failure to follow the

alleged "instructions". Assuming he was not, that could only give rise to a claim by Dal-Ron never made in this action or elsewhere. It is clear from the evidence that M-S when faced with Zions' claim on the overdrawn account, seized upon the notation on the Advice of Credit as a basis for asserting its counterclaim, notwithstanding that at the time of the transaction its intention was to get the funds to *Stoof* rather than to Dal-Ron. Zions fully complied with the intended instruction by disbursing the funds according to *Stoof's* directions.

POINT V.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR A NEW TRIAL OR TO ALTER OR AMEND JUDGMENT AND IN AWARDING JUDGMENT TO M-S BECAUSE THE EVIDENCE SHOWS THAT M-S'S DAMAGES, IF ANY, WERE PROXIMATELY CAUSED BY ITS OWN AGENTS.

Appellant submits that M-S failed to prove by sufficient evidence that any damage suffered by it was proximately caused by Zions and that the evidence clearly shows that any such damages were caused by M-S's agents and employees, *Stoof* and *Curtis*, by the direct statements made by them to Zions (as recited under Point III, *supra*) concerning the manner in which the funds were to be disbursed. These statements were the independent intervening proximate cause of any loss suf-

ferred by M-S and it cannot recover from Zions therefor. *McMurdie v. Underwood*, 9 Utah 2d 400, 346 P. 2d 711 (1959); *Hillyard v. Utah By-Products Co.*, 1 Utah 2d 143, 263 P. 2d 287 (1953).

POINT VI.

THE TRIAL COURT IMPOSED AN IMPROPER STANDARD OF CARE UPON ZIONS IN HOLDING THAT IT WAS LIABLE FOR NEGLIGENCE IN DISBURSING THE \$25,000.

Appellant submits that the Trial Court erred by imposing an improper standard of care upon Zions in holding that it was liable for negligence in disbursing the funds.

Utah has adopted the Uniform Fiduciaries Act (§§22-1-1, et seq., U. C. A., 1953, as amended, the "Act"), the purpose of which is to establish uniform and definite rules to govern the liability of banks and others who deal with fiduciaries. Under the statute, banks are not liable for negligence, which is the *only* basis upon which the Trial Court imposed liability upon Zions in this action.

The general purpose of the Act is to establish uniform and definite rules in place of the divers and indefinite rules now prevailing as to "constructive notice" of breaches of fiduciary obligations. In some cases there should be no liability in the absence of actual knowledge or bad faith; in others there should be action at

peril. *In none of the situations here treated is the standard of due care or negligence made the test.* (Commissioners' Note to §1 of the Act, quoted in II Paton's Digest §22A:1.) [Emphasis supplied.]

For the purposes of the Act, a "fiduciary" includes an "agent", an "officer of a corporation" or "any other person acting in a fiduciary capacity for any person". §22-1-1, U. C. A., 1953. On March 15, 1971, Stoof was an agent of M-S and President of Dal-Ron.

Section 2 of the Act (§22-1-2, U. C. A., 1953) provides as follows:

A person who in good faith pays or transfers to a fiduciary any money or other property which the fiduciary as such is authorized to receive, is not responsible for the proper application thereof by the fiduciary; and no right or title acquired from the fiduciary in consideration of such payment or transfer is invalid in consequence of a misapplication by the fiduciary.

Under this statute, Zions is "not responsible" for the application of any money paid to Stoof in good faith if Stoof was "authorized to receive" such money. Stoof was unquestionably authorized by both Dal-Ron and M-S to receive the \$25,000 from the bank. He was President of Dal-Ron, the owner of the funds, having authority to draw checks on its account at South Davis Security Bank. He was the local office manager of M-S, the person responsible for maintaining the Segregated Fund Account and upon whose "instructions" Zions acted in connection

with the transaction. It was clearly Schneider's intent that Stoof *receive* the money and the Trial Court found that he sent the funds to Stoof for the purpose of buying out Bagley's interest in Dal-Ron. Stoof's actual use of the funds is wholly immaterial to the issues of Zions' liability under the statute. Under the Act, the bank is "not responsible" for the bad faith of the fiduciary so long as the bank itself acts in *good* faith. The whole purpose of the Act is to protect banks and other persons dealing with fiduciaries from incurring liability for the fiduciary's breach of trust unless the bank has actual knowledge of such breach or otherwise acts in bad faith. The record does not suggest, nor did the Trial Court find, that Zions had any indication of Stoof's intended use of the money or that it acted in bad faith.

Furthermore, even if Utah did not have the Uniform Fiduciaries Act, Zions' non-liability for mere negligence is established under principles of general common law.

It is well recognized that under Utah law at the time the causes of action in this case arose,²² a plaintiff's contributory ordinary negligence barred recovery for damages caused by the ordinary negligence of the defendant. *E. g. Rogers v. Rio Grande Western R. Co.*, 32 Utah 367, 90 Pac. 1075 (1907).²³ *A fortiori*, where the plaintiff has

²²Utah's comparative negligence law did not become effective until May 8, 1973. Laws of Utah, 1973, Ch. 209.

²³This principle is applicable in an agency relationship. An agent's contributory negligence bars or does not bar his principal from recovery against a third party to the same extent as the principal's own contributory negligence. Restatement, Agency 2d § 317.

acted intentionally, in bad faith, or has been grossly or wantonly negligent or reckless, he cannot recover from a defendant whose conduct amounts only to ordinary negligence.

As previously stated (see Point III), in disbursing the funds, Zions responded to the directions of M-S's local agents and employees, including its local manager. The only inference to be drawn from the evidence is that Stooft and Curtis acted *intentionally* in giving these instructions to Zions, for the purpose of causing the funds to be disbursed in the manner prescribed by them. They were not simply negligent in giving such instructions but acted intentionally, for a specific purpose. As principal, M-S placed them in the position to so act and was responsible for regualting and supervising their conduct. Restatement, Agency 2d §213. Under such circumstances, Zions can only be liable for complying with the intentional instructions of the M-S agents if it acted with knowledge that the disbursement was improper or in bad faith or under circumstances amounting to gross or wanton negligence, none of which were found by the Trial Court. The Trial Court's determination that Zions was ordinarily negligent is an insufficient legal basis upon which to impose liability and the judgment against it on the counterclaim must therefore be reversed.

*B. Appeal from Judgment of the Trial Court
Awarding Zions Judgment on its Third Par-
ty Complaint Against Clark Tank Lines.*

POINT VII.

REVERSAL OF THE TRIAL COURT'S JUDGMENT AWARDING M-S JUDGMENT ON ITS COUNTERCLAIM WILL REQUIRE REVERSAL OF ZIONS THIRD PARTY JUDGMENT AGAINST CLARK TANK LINES.

Under Rule 14, Utah Rules of Civil Procedure, Zions' cause of action on its Third Party Complaint against Clark can arise only upon Zions' first being held liable to M-S on the latter's counterclaim. The prayer for relief in Zions' Third Party Complaint is based upon the fulfillment of this condition precedent. (R. 182-83.) Therefore, reversal of the judgment in favor of M-S on its counterclaim will automatically require reversal of the Third Party judgment without need for any consideration of the merits of that action.

POINT VIII.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR A NEW TRIAL OR TO ALTER OR AMEND JUDGMENT AND IN AWARDING JUDGMENT IN FAVOR OF ZIONS ON THE THIRD PARTY COMPLAINT BECAUSE SUCH JUDGMENT IS UNSUPPORTED BY ANY FINDING OF ACTIONABLE WRONG COMMITTED BY CLARK VIA-A-VIS ZIONS, BECAUSE CLARK COMMITTED NO SUCH ACTION-

ABLE WRONG AND WAS NOT UNJUSTLY
ENRICHED BY RECEIVING THE FUNDS.

In its Findings of Fact and Conclusions of Law, the Trial Court made the following factual findings in support of its conclusion that Clark was liable to Zions on the Third Party Complaint:

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.

43. Clark Tank Lines received the \$25,000 in question and used the funds for its own purposes, although officials of Clark Tank Lines, other than Stoof and Maddux had no knowledge of the transaction prior thereto.

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.

45. Third Party Defendant, Clark Tank Lines, benefitted by reason thereof to the extent of \$25,000 which it neither earned nor deserved. (R. 658; A. 242.)

In entering these findings, the court considered and rejected the following proposed findings prepared by counsel for Zions, modifying them as set forth in the foregoing Paragraphs 44 and 45.

44. J. Moroni Stoof and Craig Maddux

were acting together on behalf of Clark Tank Lines, and obtained the said \$25,000 from Zions First National Bank by deceit, trickery and/or misrepresentation.

45. Third Party Defendant, Clark Tank Lines, benefitted by Stoof's fraud to the extent of \$25,000, which it neither earned nor deserved. (R. 698; A. 229.)

Thus, the Trial Court expressly refused to find that Clark obtained the funds from Zions by "deceit, trickery and/or misrepresentation" or by reason of "fraud" on the part of Stoof. Indeed, the court didn't find that Clark's actions were in any way wrongful.

Appellant submits that the Trial Court's findings show that Clark committed no actionable wrong upon which to base liability to Zions on the Third Party Complaint, that the record contains no sufficient evidence upon which to base such liability and that the evidence is contrary to a determination of such liability.

The only evidence which in any way connects Clark to the release of the funds by Zions is that Stoof and Maddux were Clark's employees on March 15, 1971. With respect to Stoof, however, it is clear that in directing Zions to make the cashier's check payable to Clearfield and to give it to Maddux, he was acting as M-S's agent and/or as Dal-Ron's President, and not as Clark's employee. Christensen testified that she complied with Stoof's instruction because she knew he was M-S's local representative and was connected with the Dal-Ron account. Nothing in the record suggests that she had any

knowledge that he was employed by Clark. Stoof was successful in obtaining the release of the funds because he was M-S's agent and Dal-Ron's President, not because of his part-time employment at Clark. If Stoof acted wrongfully in causing Zions to disburse the funds, that wrong is attributable only to M-S or Dal-Ron, and not to Clark.

Maddux's position is somewhat different since he was employed only by Clark on March 15, 1971, and was not associated with M-S or Dal-Ron. Maddux, however, did nothing wrongful in connection with the transaction. All he did was to receive the funds in partial payment of a bona fide obligation owed to Clark by Stoof. The Trial Court's only finding was that he and Stoof were "acting together" in obtaining the funds. Concerted action is not, however, inherently wrongful and the Trial Court expressly found that neither his nor Stoof's actions were deceitful or constituted trickery, misrepresentation or fraud.

The Trial Court's statement in Paragraph 45 that Clark neither "earned nor deserved" the \$25,000 is directly contrary to the evidence and the Court's further finding in Paragraph 42 is that the funds were 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 evidence is uncontroverted that the money was a payment of a bona fide debt owed by Stoof to Clark. The Trial Court's finding was perhaps motivated by its re-

luctance to allow Clark to receive Dal-Ron's money in satisfaction of Stoof's personal debt. The question of Stoof's authority to use these funds in this way is not, however, material to the issue of Clark's liability on the Third Party Complaint. Clark "deserved" to have Stoof's debt repaid and was not unjustly enriched by receiving the funds. Whether it had a right to repayment out of Dal-Ron's funds is a question that could only be raised by Dal-Ron or someone standing in Dal-Ron's shoes as its assignee or subrogee, positions not occupied by Zions.

CONCLUSION

Appellant submits that the Trial Court's judgment in favor of M-S on its counterclaim is erroneous on any of the numerous grounds above set forth. The judgment awards M-S damages for the "loss" of funds which the Trial Court expressly found belonged to Dal-Ron and for a "loss" which in any event was caused by M-S's own agents. The Trial Court totally failed to recognize that M-S's own agents, Stoof and Curtis, instructed Zions concerning the distribution of the funds and the evidence clearly shows that Zions followed these instructions, the instruction received from Harris Trust and the instructions actually intended by M-S. The Court also imposed an erroneous standard of care in holding Zions liable for ordinary negligence.

Appellant further submits that the Third Party judgment in favor of Zions is unsupported by the evidence and the Trial Court's findings and is contrary to the evi-

dence and law. Furthermore, it must be reversed if the judgment on M-S's counterclaim is for any reason reversed.

Appellant respectfully asks this Court to reverse the portions of the Judgment of the Trial Court herein appealed from and for its costs on appeal.

Respectfully submitted,

RONALD J. OCKEY, of
Jones, Waldo, Holbrook
& McDonough
800 Walker Bank Building
Salt Lake City, Utah 84111

Attorneys for Appellant

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