

1988

J. Ray Merkley v. John C. Beaslin : Brief of Respondent

Utah Court of Appeals

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DOCKET NO. 880191-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

J. RAY MERKLEY,

Plaintiff/Appellant,

vs.

JOHN C. BEASLIN

Defendant/Respondent.

:

:

:

:

:

88-0191-CA

Case No. 870420

Category 14.b.

BRIEF OF RESPONDENT

Appeal from the Seventh Judicial District Court
of Uintah County, State of Utah
The Honorable Dennis L. Draney, District Court Judge

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MAR - 3 1988

IN THE SUPREME COURT OF THE STATE OF UTAH

J. RAY MERKLEY,	:	
Plaintiff/Appellant,	:	
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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Respondent substantially adopts the Statement of Issues presented for review as set forth by the appellant.

There are sufficient facts to determine an absence of legal malpractice. Respondent notes that reference is made in appellant's Brief to depositions of the parties and respondent is assuming that the depositions, upon stipulation of counsel, were published by motion in open court on August 26, 1987, and if they were not, that it is stipulated that they are for purposes of this appeal. Respondent has similarly made reference to the depositions of the parties.

STATEMENT OF THE CASE

Respondent adopts appellant's Statement of the Case.

STATEMENT OF FACTS

1. John C. Beaslin is a licensed attorney under the laws of the State of Utah.

2. On or about March 1, 1976, Mr. Beaslin prepared a Contract under the terms of which nine hundred ninety (990) of the one thousand (1,000) shares of stock in Merkley Motors, Inc., owned by the plaintiff and his wife, Janet, were to be acquired by Tal R. Merkley, Charles Glen Merkley and his wife, Charlene Merkley. The remaining ten (10)

shares were already owned by Tal R. Merkley. (See Contract dated March 1, 1976.) [R. 23].

3. At the time of the execution of the Contract, the plaintiff was the President of Merkley Motors and continued in that office. There is no written documentation that the plaintiff ever resigned as an officer or director. On February 23, 1978, an Agreement between Merkley Motors, Inc., as seller, and Tal and Wyoma Merkley and Charles and Charlene Merkley, as buyers, was executed. The plaintiff signed as President of Merkley Motors, Inc. (See Agreement dated February 23, 1978.) [R. 38, 39].

4. On April 19, 1976, a Letter of Instructions was executed by the parties with Walker Bank under the terms of which the nine hundred ninety (990) shares were held in escrow until all payments had been made to Ray and Janet Merkley. In the event of default in payments by the buyers, the escrow agent, upon demand of seller Ray Merkley, the nine hundred ninety (990) shares were to be returned. (See Letter of Instructions.) [R. 34, 35].

5. The purchase price for the stock was ONE HUNDRED TWENTY THOUSAND DOLLARS (\$120,000.00). FIFTY THOUSAND DOLLARS (\$50,000.00) was paid down. The FIFTY THOUSAND DOLLARS (\$50,000.00) was received from proceeds of a loan from Walker Bank dated March 15, 1976. The plaintiff was

fully aware that the real property in question was owned by the corporation and was being mortgaged to help pay Ray and Janet Merkley part of the sales price. Mr. Beaslin was never asked to attend or participate in the loan arrangement or closing. (See J. Ray Merkley Deposition, pp. 14-15.)

6. From the proceeds of the Walker Bank loan, a Farmers Home Administration loan owed by the plaintiff was fully satisfied. (See J. Ray Merkley Deposition, p. 17.)

7. Merkley Motors, Inc., was the fee title owner of the real property mortgaged to Walker Bank. (See J. Ray Merkley Deposition, p. 17.)

8. Mr. Beaslin prepared and recorded a UCC-1 filing on May 4, 1976, with the Lieutenant Governor's Office, securing the plaintiff and his wife. The security described included inventory and personal assets of Merkley Motors, Inc., which were free and clear of claims of other creditors.

9. Shortly after the Contract was signed on March 1, 1976, the plaintiff moved from Vernal to Salt Lake City. (See J. Ray Merkley Deposition, p. 4.)

10. From the spring of 1976 until November 23, 1983, the plaintiff did not in any way communicate with Mr. Beaslin relative to this matter. Merkley Motors filed a Bankruptcy Petition on December 6, 1983. (See J. Ray Merkley Deposition, p. 34.)

11. The plaintiff filed a timely Proof of Claim. It is not known what, if any, distribution plaintiff has received.

12. On February 23, 1984, a bankruptcy auction took place at 1620 North Vernal Avenue, Vernal, Utah, pursuant to legal notice. [R. 117].

13. The sale of all property not secured by creditors occurred on February 23, 1984, and the auction accounting indicated the bankruptcy sale realized a net amount of SEVEN THOUSAND SIX HUNDRED SIXTY-NINE AND 23/100 (\$7,669.23). (See Report of Harry Margulies, February 24, 1984.) [R. 118].

14. The plaintiff received notice of the bankruptcy sale, appeared at the sale, and bid about FOUR THOUSAND DOLLARS (\$4,000.00) for the bulk of the items. The portion he bid for sold for approximately FOUR THOUSAND TWO HUNDRED DOLLARS (\$4,200.00). (See J. Ray Merkley Deposition, p. 45.)

15. The instant case was filed with the District Court in Uintah County on July 30, 1984. [R. 1].

SUMMARY OF ARGUMENT

Where there is no continuing attorney-client relationship and no active concealment of fact or deceit, a

cause of action based on malpractice accrues at the time of the act or occurrence.

There was no breach of duty. The defendant handled the plaintiff's business affairs competently and completely within the scope of his employment.

ARGUMENT

Point I.

THE ACTION IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

The applicable Statute of Limitations is Utah Code Annotated §78-12-25(1):

"an action upon a contract, obligation or liability not founded upon an instrument in writing; also on an open account for goods, wares and merchandise, and for any article charged in a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received.

(2) an action for relief not otherwise provided for by law."

Where an attorney is retained to draft documents or close a business transaction such as in the instant case, the courts have consistently ruled that malpractice actions are based on a breach of contract and that the time begins to run from the date of the occurrence or performance of the work. In the case of Lazzaro v. Kelly, 57 NY.2d 630, 454 NYS.2d 59, 439 NE.2d 868 (1982), the court concluded that

the Statute of Limitations for alleged preparation of a contract for the sale of a business accrued upon the completion of the act. This has always been the New York rule.

The great weight of authority in the American Jurisdictions for negligent acts or omissions take the view that the Statute of Limitations begins to run from the time of the occurrence of the negligent act or omission. See Annot., Legal Malpractice-Statute of Limitations, 32 A.L.R. 4th 260 et seq.

The case of Buxton v. Perry, 32 Wash. App. 211, 646 P.2d 779 (1982) is instructive. The Washington Supreme Court has begun a modified discovery rule in some cases. But in a legal malpractice case involving the drafting of a real estate contract, the court determined that the three year Statute of Limitations began to run from the time the contract was prepared and delivered into the hands of the plaintiff. The court stressed the idea that the facts were within the four corners of the documents and were thus equally within the knowledge of the plaintiff and the defendant.

In the instant case, the document which was the vehicle transferring the business was straightforward, short, simple and easily understood. The defendant took steps to perfect

a security interest in the inventory which was all done at the time of the transaction. The facts, as will be developed later, demonstrate that no further act could have been done at that time and the parties lived happily under the contract through the expiration of the four year Statute of Limitations.

In Martin v. Clements, 98 Idaho 906, 575 P.2d 885 (1978), the Idaho Supreme Court refused to judicially legislate into a discovery or damage rule in considering an attorney malpractice case for an alleged negligent probate of a will. The Idaho Supreme Court stuck to the occurrence rule where their state legislature had expressly made inroads and changes in the medical malpractice fields.

The Utah Supreme Court has aligned itself with this general proposition in the case of Hansen v. Petrof, 527 P.2d 116 (Utah 1974).

It should be noted that some jurisdictions that have gone to the discovery or damage rule have been faced with facts concerning active negligence on a continuing basis or active deceit or concealment continuing through the relationship of the attorney-client. It is noteworthy that Justice Ellett in a concurring opinion in Hansen v. Petrof, writes:

"...The cause of action, if any there be, should ripen and the statute of limitations begin to run only

upon termination of services of the attorney in that particular case."

Giving the plaintiff the benefit of Justice Ellett's extended protection, the Statute of Limitations had run long prior to the filing of this action on or about July 30, 1984.

If the plaintiff contends that the statute does not commence to run until after the termination of services of the attorney in the particular case, the four year statute would have commenced to run on May 4, 1976, because that was the last date the defendant performed any services in behalf of the plaintiff in connection with the instant matter. It is undisputed that the plaintiff left Vernal for Salt Lake shortly after the Contract was signed in March of 1976 and never again had any conversation with the defendant concerning this matter until 1983 when the buyers either had or were contemplating filing bankruptcy, a period in excess of seven years.

If the plaintiff contends the Contract was not properly drafted on March 1, 1976, the statute had run by February 28, 1980.

If the plaintiff contends that the defendant should have advised the plaintiff that the UCC-1 filing recorded May 4, 1976, must be renewed before the expiration of five years, the statute would have run by May 3, 1980.

In summary, the great weight of American Jurisprudence still follows the rule that the Statute of Limitations for legal malpractice involving breach of contract, begins to run from the time of the occurrence. See Annot., Legal Malpractice-Statute of Limitations, 32 A.L.R. 4th 260 at 268. It is noteworthy in reviewing jurisdictions that have eroded this rule, they have been faced with entirely different fact situations and, it is further, noteworthy that the Statutes of Limitations have been either one or two year limitations, see for example, California and Texas 32 A.L.R. 4th 260 at 279.

In the instant case, from the depositions, the understandings of the parties and from the documents themselves, which were fairly short and straightforward, it would be absurd to have a possible claim extend on a tail of in excess of seven years, particularly where the plaintiff was involved in subsequent dealings in his capacity as a corporate officer, vis-a-vis the escrow provisions for the sale of capital stock at later dates.

Point II.

DEFENDANT DID NOT BREACH ANY CONTRACTUAL DUTY

The plaintiff's allegations of malpractice sound in contract. Therefore, the issue is what duty is owed by an

attorney to his client, and if that duty is breached, what damages has the client suffered.

The law is well settled in Utah. An attorney is required to possess the legal knowledge and skills common to members of his profession in his community and to represent his client's interests with competence and diligence. Jackson v. Drabney, 645 P.2d 613, 615 (Utah 1982); Dunn v. McKay, Burton, McMurray & Thurman, 584 P.2d 894, 896 (Utah 1978).

Am.Jur.2d Attorneys at Law §199, states:

An attorney's "duty to his client requires an attorney to exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated."

However, it is clear that there is no requirement that an attorney be infallible. Making a mistake is not negligence as a matter of law. Myers v. Beem, 712 P.2d 1092 (Colo. App. 1985).

The plaintiff contends that the defendant breached his implied contract to prepare a Sales Agreement in such a manner as to protect and secure plaintiff's interest as a seller. The basis of the allegations are:

1. The sale would be secured by real property upon which Merkley Motors was located in Vernal, Utah.
2. The buyers would always maintain a secured inventory in excess of the balance owing.

3. The control of the corporation was transferred to the buyers without affording the plaintiff any protection.

4. The defendant improperly prepared a UCC-1 form and failed to advise the plaintiff that he must renew the UCC-1 filing before the end of five years.

In responding to said allegations, the defendant asserts that the Contract and UCC-1 filing were prepared in strict accordance with the terms and conditions as previously agreed between the parties.

The defendant shall address the plaintiff's contentions in order.

1. The real property was, in fact, deeded by Ray Merkley and his wife, Janet, to Merkley Motors, Inc., on March 4, 1975. At the time of the execution of the deed, there was a mortgage against the property in favor of the Farmers Home Administration dated January 4, 1965, and guaranteed by the plaintiff.

Prior to the preparation and execution of the Contract on or about March 1, 1976, the plaintiff had met with the buyers and had agreed that the real property would be mortgaged to Walker Bank and Trust Company by Merkley Motors, the plaintiff, his wife and the buyers.

Ray Merkley testified in his deposition:

(Ray Merkley Deposition, Page 13, Line 25; Page 14, Lines 1-25)

Q: "Now, getting the down payment, do you recall how you were able to get the fifty thousand dollars cash? That was paid to you, I assume. It says fifty thousand cash receipt of which is acknowledged."

A: "It was paid to me."

Q: "How did you get that money?"

A: "They g[a]ve it to me."

Q: "Do you know the source of the money, where the money came from?"

A: "Yes. It came from Walker Bank at that time, it's First Interstate now."

Q: "About the time of the negotiation for the sale, were you also at that time negotiating -- and when I say you, Tal and whoever might have been buying it -- negotiating with Walker Bank for a loan to pay the down payment?"

A: "Yes."

Q: "Did you ever go over to Walker Bank and talk with any particular person relative to that financing?"

A: "Yes."

Q: "Who would you talk with?"

A: "Howard Carroll."

Q: "What position did he have?"

A: "I think he was president of that branch. He was one of the officers anyway."

Q: "Do you recall in terms of the 1st of March when this contract was signed when you first talked with Howard Carroll?"

(Ray Merkley Deposition, Page 15, Lines 1-3 and Lines 15-24)

A: "No, I don't recall."

Q: "Would it have been before the 1st of March?"

A: "Yes. Well, yeah, I think so. When was this signed?"

Q: "At the time that you went over to the bank did Mr. Beaslin on any occasion ever go over to the bank with you?"

A: "Not to my knowledge."

Q: "Do you know whether or not you or anyone else had ever advised John Beaslin of the Walker Bank loan or where the fifty thousand would come from to pay you?"

A: "Yes. I'm sure I did."

Q: "Tell me what you did."

A: "I'm sure I asked him how we would go about it because they wanted a mortgage on the property."

Therefore, Merkley Motors, with the consent and knowledge of the plaintiff, executed a mortgage in favor of Walker Bank & Trust Company on March 15, 1976. The plaintiff, himself, received the direct benefit of FIFTY THOUSAND DOLLARS (\$50,000.00).

On page 1 of the Contract under paragraph entitled Effective Date, it states, "Possession of all of the property, both real and personal, owned by the said corporation shall be March 1, 1976."

On page 3 of the Contract, the parties are specifically advised that title will be conveyed by the corporation to the buyers when all payments have been made.

The plaintiff, as a business man, independently conveyed the real property to the corporation and then knowingly, without any direction from the defendant, mortgaged said property for his own benefit. There is no basis for his contention that it was ever intended that the land be in his individual name or that he have a claim superior to the lending institution's claim.

2. As part of the Contract, the buyers were to maintain an inventory in excess of the balance owing.

Paragraph entitled INVENTORY on page 3 states:

"The Buyers hereby agree that they shall at all times retain an inventory that is unmortgaged in excess of the balance that is owed to the Seller at all times during the terms of this contract."

Plaintiff apparently now believes it was the responsibility of the defendant as the attorney to "insure" that the buyers would comply with all of the terms of the Contract. At the time the Contract was signed on March 1, 1976, the plaintiff was satisfied that the inventory was adequate. There was no duty placed upon the defendant to monitor the size of the inventory. The plaintiff never asked the defendant to perform this duty.

The duty to monitor the inventory was that of the plaintiff. In his deposition, the plaintiff testifies that he accepted that responsibility.

(J. Ray Merkley Deposition, Page 23, Line 25, Page 24, Lines 1-24)

Q: "Now, did you ever set up any kind of program or effort to monitor or make sure that they were maintaining that kind of inventory?"

A: "Yes."

Q: "Tell me what you did to kind of assure yourself that inventory was there in accordance with the contract."

A: "Mostly I visited the store, personally went through the parts department and just visually looked to see what was there."

Q: "How often would you do that?"

A: "Whenever I happened to be in the Vernal area."

Q: "And how often would you say that would be?"

A: "Probably three times a year."

Q: "And what years did you actually go out there and check it two or three times or something?"

A: "I was in Vernal every year. That's where my parents live and I visit Vernal quite often."

Q: "And on any of the occasions when you went out there and you say visually looked at the inventory, were you satisfied that they had adequate inventory there?"

A: "All the time except for -- well, I was always satisfied that the inventory was there, but there was two times that I requested -- in fact, I requested it more than two times but two times I received because I requested it, written inventory and balance sheet[s] from them."

On May 4, 1976, the defendant filed a UCC-1 form which encumbered the inventory and other personal assets of the corporation not otherwise securing other creditors.

The defendant did everything legally required of him, and the attorney-client relationship terminated at that time.

3. The defendant provided the means by which the plaintiff could control the corporation during the time monies were still owing to him.

The Contract has an Escrow Provision which declares that the nine hundred ninety (990) shares in Merkley Motors shall remain in escrow until all of the payments have been made.

In the event of any default, the plaintiff was entitled to the return of the stock. There was no requirement that the plaintiff resign any office in the corporation. Under paragraph V of the Letter of Instructions, the seller may demand the return of the stock and all other documents in the event any installment is 60 days late.

In carrying out the terms of the Contract, all of the parties acknowledged the power and authority of the plaintiff to exercise control as described in the following sub-paragraphs (a) through (j):

(a) Plaintiff approved the mortgage in favor of Walker Bank.

(b) Plaintiff monitored the inventory.

(c) There is no record that plaintiff ever resigned as an officer and/or director.

(d) The plaintiff acknowledged that he still owned and controlled the stock.

(J. Ray Merkley Deposition, Page 30, Lines 5-19)

Q: "Do you recall whether or not the stock certificates, the thousand shares, actually were placed with Walker Bank to be held in escrow?"

Mr. Bennett: "Nine ninety."

The Witness: "Nine hundred and ninety. Tal had ten shares."

By Mr. Nygaard:

Q: "The nine hundred and ninety represented yours and Janet's shares; is that correct?"

A: "Yes. They were placed there."

Q: "Do you know how long they were to be held by Walker Bank?"

A: "Until this mortgage -- this note was paid off."

Q: "Until you were paid in full?"

A: "Yes."

(e) The Letter of Instructions with Walker Bank was signed by the plaintiff as President.

(f) When shares were sold, plaintiff executed the release and did sign the stock certificates.

(J. Merkley Deposition, Page 30, Lines 20-25; Page 31, Lines 1-2):

Q: "Were the shares in your name during this period of time?"

A: "They were in my name and Janet's name until there was some shares released."

Q: "What shares are you referring to there?"

A: "When Francis Palmer bought in, why they paid me a sum of money to release a certain amount of the shares and they was released and given to Francis Palmer."

(g) The plaintiff received the TEN THOUSAND DOLLARS (\$10,000.00) from the sale of the stock.

(J. Ray Merkley Deposition, Page 31, Lines 17-20)

Q: "Did you get that ten thousand dollar figure?"

A: "Yes."

Q: "Did it go to you and Janet or just to you?"

A: "It went to me."

(h) The plaintiff clearly understood any release of stock required his signature.

(J. Ray Merkley Deposition, Page 32, Lines 12-25; Page 33, Lines 1-12)

Q: "The stock, however, apparently with Walker Bank was still in your name to the best of your understanding; is that correct?"

A: "The stock was."

Q: "And it did require you to release the stock to any other person; is that right."

A: "That was my understanding, yes."

Q: "Now, look at defendant's Exhibit 10 and I will ask you if you recognize that signature."

A: "That signature is mine."

Q: "Was that document signed about the same time as the Exhibit 9 and relates to the same ten thousand dollar stock exchange figure?"

A: "I think that this here is evidently instructing Walker Bank to in the changes in this -- the shares that's in escrow because of the change made here."

Q: "That's the question I want to ask you is the best that you recall at the time you received the ten thousand dollars you did authorize the bank to deliver a part of those nine hundred and ninety shares to one who purchased the stock; is that correct?"

A: "Yes. I authorized them to deliver three hundred and thirty-four shares."

Q: "Later on were you aware also that other shares were sold by Tal to Glen?"

A: "Yes."

(i) The plaintiff was advised as to the business activities of Merkley Motors by the buyers.

(J. Ray Merkley Deposition, Page 33, Lines 22-25; Page 34, Lines 1-17)

Q: "How did you become aware that Tal had sold out to Glen?"

A: "Tal told me that he was going to get out."

Q: "During this time when Palmer was buying in and Tal was selling out were you generally advised of all of these transactions that were taking place?"

A: "Yes."

Q: "Generally who was advising you as to what some changes were occurring in the operation of the business and the ownership of the business."

A: "It would have been either Tal or Glen."

Q: "In your judgment were Tal and Glen generally keeping you informed as to what was going on?"

A: "I thought they was, yes."

Q: "Subsequently did you ever determine that they weren't advising you of what was going on?"

A: "Just until right there at the last when they took out -- just before they -- prior to taking out bankruptcy."

Q: "That was Glen that took out bankruptcy, wasn't it?"

A: "Yes."

(j) The plaintiff was involved in the business right up to the time of the bankruptcy.

Furthermore, the plaintiff admits that he had no conversations with John Beaslin between March 1976 and the filing of the bankruptcy.

(J. Ray Merkley Deposition, Page 34, Lines 18-23)

Q: "During the time after March of 1976 and after you had left Vernal, on what occasions, if any, did you have any meetings or telephone calls or any kind of communication with John Beaslin?"

A: "I don't remember specifically any time other than just the latest just when this bankruptcy took place."

Obviously, the plaintiff did not believe that the defendant had any duty or responsibility to assist him with respect to his ongoing business dealings with the buyers.

4. The defendant properly and timely prepared a UCC-1 filing on all inventory and personalty not being used to secure obligations of other creditors. All of the parties acknowledged the seller as Merkley Motors with the plaintiff

as having the power and authority to monitor the business, release shares of Merkley Motors when payments were made, and to participate in business meetings and transactions.

The buyers made reports whether formally or informally to the plaintiff.

The UCC-1 filing listed Merkley Motors, Inc., as the debtor and the plaintiff as the creditor because all of the assets, real and personal, were in the name of Merkley Motors. The buyers had no assets to give as security. The UCC-1 filing was made in accordance with the Contract of March 1, 1976, and as intended by the parties.

Plaintiff admits that he had no communication with the defendant from March 1, 1976, until the time of bankruptcy in 1983--a period of almost seven years and six months.

When this long delay is considered in light of the plaintiff having moved from Vernal to Salt Lake, it is evident that the relationship between the plaintiff and the defendant in this matter terminated during the spring of 1976.

The defendant in his deposition confirms the testimony of the plaintiff:

(John C. Beaslin Deposition Page 20, Lines 2-16)

Q: "And what was your impression of what it was that Mr. Merkley wanted you to do?"

A: "Prepare the contract and set up the Stock Certificates so that he could have hold of those as

security instruments over at the bank; and in the contract provide, which we did, that they would maintain an inventory over there in excess of the amount of the unpaid balance that was owed to Ray."

"I recall specifically telling Ray at that time that it would certainly be up to him to check on that inventory because they could have depleted his inventory without him knowing about it and so forth; and that he would have to make frequent checks or whatever to try and determine and keep a hold of that to determine whether or not they were complying with that provision.

(John C. Beaslin Deposition, Page 48, Lines 1-11)

Q: "When did you last see Ray after the execution of this document on March 1, 1976?"

A: "Well, Ray moved to Salt Lake. I don't recall exactly when he moved. I probably didn't see Ray until -- I don't know -- maybe until '82 when he came out and I did that little deal for him on the divorce."

Q: "So is it accurate to indicate that from the spring of 1976 until some time in 1983 you had no conversation with Ray concerning any matters?"

A: "After he moved to Salt Lake, I don't recall seeing him out to Vernal that I can recall."

The employment agreement of the attorney was completed at this time and the defendant did everything that was expected of him and required of him in a professional and competent manner. Notwithstanding all of the above, the Statute of Limitations ran on March 2, 1980.

Point III.

PLAINTIFF IS NOT ENTITLED TO RECOVER DAMAGES

The plaintiff, by his conduct, caused the losses which he now claims to have suffered.

1. The plaintiff, after conveying the real property to Merkley Motors, Inc., then mortgaged the property twice for his direct benefit; first, to Farmers Home Administration and second, to Walker Bank & Trust Co. Therefore, plaintiff was not entitled to a priority position.

2. The plaintiff had the right and power to monitor the size of the inventory and failed to do so.

3. The plaintiff had control of Merkley Motors, Inc., through his stock held in escrow, but he failed to exercise his prerogative to demand return of stock and assume complete control of the corporation.

4. The plaintiff was invited to bid on the inventory at the bankruptcy auction, but refused to bid the necessary FOUR THOUSAND TWO HUNDRED DOLLARS (\$4,200.00) to obtain the assets which he contends had a much higher value.

The Supreme Court of Utah has ruled that damages cannot be based upon speculations or conjecture.

"A finding of such damages cannot properly be based on speculation or conjecture. They can be awarded only if there is a basis in the evidence upon which reasonable minds acting fairly thereon could believe with reasonable certainty that the plaintiff

suffered injury and damage and also that it was proximately caused by the negligence of the defendant." (Dunn v. McKay, et al, 584 P.2d 894, 896 (Utah 1978)).

Assuming that the plaintiff can overcome the Statute of Limitations as a bar to recovery and the plaintiff's own contributory negligence, the defendant's liability would be limited to actual damages that proximately arose out of defendant's negligence. These losses could not exceed the FOUR THOUSAND TWO HUNDRED DOLLARS (\$4,200.00) which represented the amount of the successful bid on the applicable inventory.

CONCLUSION

The Statute of Limitations in the present case begins to accrue at the date of the occurrence complained of and has clearly run, therefore, the four year Statute of Limitations bars this action.

The respondent respectfully submits that he represented the appellant in a professional and diligent manner and given the provisions in the Contract, there was no breach of duty as a matter of law.

Respondent respectfully asks this Court to affirm the ruling of the Court below dismissing the case with prejudice as being outside of the applicable Statute of Limitations.

Respectfully submitted this 26th day of February, 1988.

NYGAARD, COKE & VINCENT

Henry S. Nygaard

Henry S. Nygaard

BEASLIN & ANDERSON

John R. Anderson

John R. Anderson

CERTIFICATE OF MAILING

I hereby certify that I mailed four copies of the foregoing Brief of Respondent to Wendell E. Bennett, Attorney for Appellant, 448 East 400 South, Suite 304, Salt Lake City, Utah 84111, on this 26th day of February, 1988, postage prepaid.

Margaret Nelson

Secretary