

1988

# Western Capital and Securities, Inc. v. Helen Knudsvig : Reply Brief

Utah Court of Appeals

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**BRIEF**

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DOCKET NO. 880198-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

WESTERN CAPITAL AND SECURITIES,  
INC. )

Plaintiff-Appellant, )

-v- )

HELEN KNUDSVIG, )

Defendant-Respondent, )

88-0198-CA

No. 870056  
14b

REPLY BRIEF OF APPELLANT

Appeal from the Judgment of the  
Second Judicial District Court In  
And For Weber County, State of Utah,  
Honorable John F. Wahlquist, Judge

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Attorney for Defendant-Respondent

**FILED**  
JUL 17 1987

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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CONSTITUTIONAL PROVISIONS, STATUTES, RULES

UTAH CODE SECTION 70A-8-315(1)

70A-8-315. Action against purchaser based upon wrongful transfer.

(1) Any person against whom the transfer of a security is wrongful for any reason, including his incapacity, may against anyone except a bona fide purchaser reclaim possession of the security or obtain possession of any new security evidencing all or part of the same rights or have damages.

IN THE SUPREME COURT OF THE STATE OF UTAH

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WESTERN CAPITAL AND SECURITIES,  
INC. )

Plaintiff-Appellant, )

-v- )

No. 870056  
14b

HELEN KNUDSVIG, )

Defendant-Respondent, )

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REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case arose out of the sale of securities by the Defendant and her failure to deliver the certificate to finalize the transaction resulting in a purchase of securities to close the sale transaction. A Complaint was filed on December 19, 1984 for recovery of the loss occasioned by the failure to deliver the certificate for the securities sold. A Counterclaim was filed and amended alleging violations of Rule 10b-5, Rule 10b-10 and various NASD rules. Trial was held October 16 and 20, 1986 before the Honorable John F. Wahlquist. Judgment was entered November 10, 1986 in favor of the Defendant for punitive damages

only in the amount of \$10,000. A Motion to Alter or Amend the Findings of Fact, Conclusions of Law and Judgment was filed on November 10, 1986 and denied February 3, 1987. Appeal was taken to this Court by the Plaintiff on February 3, 1987.



### STATEMENT OF THE FACTS

The Defendant's Statement of the Facts as set forth in her Brief is almost a verbatim recitation of the District Court's Memorandum Decision and Findings. The references to the Court record are in many situations erroneous and the referenced pages do not contain facts or evidence which supports the alleged facts as set forth by the Respondent. Reference is made to the Statement of Facts as set forth in the Appellant's Brief.

## SUMMARY OF THE ARGUMENTS

### ARGUMENT No. 1

THE SUPREME COURT MAY REVIEW AND REVERSE THE RULING OF THE DISTRICT COURT WHEN THE RULING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

### ARGUMENT No. 2

THE TESTIMONY BY BABCOCK AS TO DEFENDANT'S KNOWLEDGE OF THE SALE IS SUPPORTED BY THE RECORD.

### ARGUMENT NO.3

THE DISTRICT COURT IN ITS FINDINGS NOTED THAT THE DEFENDANT REQUESTED THE SALE.

### ARGUMENT NO. 4

UTAH CODE SECTION 70A-8-315 IS NOT APPLICABLE TO THE PRESENT CASE.

### ARGUMENT NO. 5

THE RESPONDENTS ATTEMPT TO DISCREDIT THE WITNESSES IS WITHOUT MERIT AND SHOULD BE DISREGARDED. THE TESTIMONY OF THE RESPONDENT IS INCONSISTENT AND WAS IN PART NOT BELIEVED BY THE DISTRICT COURT.

### ARGUMENT NO. 6

THE TRIAL COURT'S FINDING OF VIOLATION OF 10(b)5 IS CLEARLY ERRONEOUS AND SHOULD BE REVERSED.

### ARGUMENT NO. 7

THE DISTRICT COURT ERRED IN FINDING A VIOLATION OF RULE 10(b)-10 AND APPLIED AN INCORRECT BURDEN OF PROOF.

### ARGUMENT NO. 8

THE DISTRICT COURTS FINDING OF VIOLATION OF NASD RULES WAS IMPROPER AND MUST BE REVERSED.

### ARGUMENT NO. 9

THE DISTRICT COURT ERRED IN AWARDING PUNITIVE DAMAGES.

### ARGUMENT NO. 10

THE MISCELLANEOUS FINDINGS OF THE DISTRICT COURT WERE NOT SUPPORTED BY THE EVIDENCE AND MUST BE REVERSED.

## ARGUMENTS

### ARGUMENT No. 1

THE SUPREME COURT MAY REVIEW AND REVERSE THE RULING OF THE DISTRICT COURT WHEN THE RULING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Defendant claims that the ruling of the District Court cannot be reversed and that the District Court is accorded the right to find the facts and such findings will not be reversed even though the Supreme Court may disagree. However, the law is well settled that the Supreme Court may reverse a decision of the District Court if there is not evidence sufficient to sustain the judgment made. *Wash-A-Matic, Inc. v. Rupp*, 532 P2d 682 (1975). Further this Court has ruled that the findings of the District Court must be supported by substantial evidence. *Bountiful v. Swift*, 535 P2d 1236 (1975). In the present case, as set forth in Appellant's Brief, the Findings, Conclusions and Judgment of the District Court are not supported, much less substantially supported by the evidence and should therefore be reversed.

### ARGUMENT No. 2

THE TESTIMONY BY BABCOCK AS TO DEFENDANT'S KNOWLEDGE OF THE SALE IS SUPPORTED BY THE RECORD.

The testimony of Lou Babcock is that the Defendant knew that a sale had occurred and that the Defendant intended to complete her portion of the sale by delivering the stock

certificate. At page 469 and 470 of the record, in the testimony of Lou Babcock the record sets forth:

"Q OKAY. AND AFTER THAT CONVERSATION, DID YOU DO ANYTHING BASED ON THAT CONVERSATION?

A YES.

Q AND WHAT WAS THAT?

A I WENT TO SEE HELEN.

Q AND YOU WENT TO SEE THE DEFENDANT AT THAT POINT?

A RIGHT.

Q WHERE DID YOU GO THEN?

A WHAT?

Q WHERE DID YOU GO TO SEE HER?

A THE SAME PLACE THAT I DID BEFORE, THE -- WHERE SHE WORKED.

Q OKAY. AND CAN YOU TELL ME APPROXIMATELY HOW LONG AFTER THE CONVERSATION WITH MR. JOHNSON THAT WOULD HAVE BEEN?

A I IMAGINE, SAY, ONE OR TWO DAYS.

Q OKAY. AND CAN YOU TELL ME WHAT YOU SAID AND WHAT SHE SAID?

A WELL, I WOULD ASK THE DEFENDANT WHERE HER STOCK CERTIFICATE WAS, IT HAS TO BE DELIVERED.

Q AND WHAT WAS HER RESPONSE TO THAT?

A THAT, AS I RECALL, THAT SHE WOULD HAVE HER HUSBAND LOOK IT UP AND SEND IT IN."(Emphasis added)

Therefore Respondent's contention in her brief that the Appellant had attempted to mislead this court is without basis.

#### ARGUMENT NO.3

THE DISTRICT COURT IN ITS FINDINGS NOTED THAT THE DEFENDANT REQUESTED THE SALE.

The Respondent claims that the Appellant is attempting to deceive this court in stating that the District Court knew that the Defendant requested the sale. In its Memorandum Decision the District Court states:

" 6. The defendant interpreted the telephone conversation in another direction. She had in the past experienced efforts to make sales when she did not have a stock certificate and had been faced with cancelled sales as opposed to purchases by the broker to cover what is called "shorts". She assumed that there would be no final sale until she was able to get a stock certificate." (Page 277.)

As set forth in Appellant's brief, the District Court clearly set forth that the Defendant requested the sale but believed she could get out of that sale since she had done so in the past. Defendant's error in believing she could cancel a contract for sale is insufficient basis for voiding the contract.

#### ARGUMENT NO. 4

UTAH CODE SECTION 70A-8-315 IS NOT APPLICABLE TO THE PRESENT CASE.

The Defendant quotes Section 70A-8-315 of the Utah Code and claims this is controlling in this matter. However, this section relates to the transfer of a stock certificate. As is amply evident in this matter, a stock certificate was never in the possession of the Plaintiff and was never transferred by the Plaintiff nor any other party in this action and thus this section is not applicable to this case. This section does not relate to a sale of securities but only to the wrongful transfer of a certificate and since no transfer of any certificate occurred in this case, this section is not applicable. In any event, the Defendant cannot raise a new theory on which to claim relief at

this late date and this argument must not be the basis for any relief granted.

ARGUMENT NO. 5

THE RESPONDENTS ATTEMPT TO DISCREDIT THE WITNESSES IS WITHOUT MERIT AND SHOULD BE DISREGARDED. THE TESTIMONY OF THE DEFENDANT IS INCONSISTENT AND WAS IN PART NOT BELIEVED BY THE DISTRICT COURT.

The Respondent attempts to discredit the Plaintiff's witnesses and evidence. First, the Responents states that the Plaintiff never produced the original confirmation of the sale to the Respondent. Since the original was sent to the Respondent at the time of the sale, the Plaintiff no longer had the original. However, the Plaintiff produced from their business records their copy of the original confirmation and this was entered into evidence as exhibit number 3-P. Further, the Account executive testified that he never received a copy of the original confirmation in any sale transaction with any client but that he would receive a document called a "can-buy" and that in this case he received a can-buy shortly after the date of the sale transaction. (Page 487). Kim Johnson testified that copies of confirmations were destroyed after the microfilm copies were obtained. (Page 521-1) Defendant argues that the Plaintiff did nothing and waited until it bought in the Defendant's sale. The evidence clearly shows that the Plaintiff made repeated attempts to contact the Defendant and was told on each occasion that she

would bring in the stock to complete the contract. (Page 469-471) It was the Defendant's misrepresentations to the Plaintiff that caused the delay in buying in the stock and not, as Defendant contends, that the Plaintiff was just waiting.

The Defendant attempts to discredit the testimony of the Plaintiff's witnesses. She claims that Kim Johnson lied when he said he had a social security number for the Defendant on the computer system in the offices of the Plaintiff and she then states this must be false because the social security number was not on Exhibit 1-P. However, when the Defendant requested documents showing Defendant's social security number Mr. Johnson indicated several such documents which contained that social security number. (Page 525) Defendant would have this court believe that since one document did not have the number then no other could have. This certainly is no evidence of any untruthfulness on Mr. Johnson's part but is only a feeble attempt to discredit a witness without any basis. The Defendant further states that Mr. Johnson testified he believed the stock would decrease in price yet had earlier stated he believed the price would rise. The Defendant mistates the testimony. Mr. Johnson indicated hypothetically that stock in a potential merger situation could go up or could go down in price. (Page 531) In the Answers to Interrogatories, Mr. Johnson stated in hindsight

why he believed this particular stock rose in price. (Page 531) There is no contradiction in Mr. Johnson testimony. Further, Defendant states Mr. Johnson must be lying since he could not remember specific details about a previous law suit which when he prepared Answers to Interrogatories and had the documents before him he could research and provide full answers. It is unreasonable for any person to remember details as clearly as when they have the documents to refresh themselves before them. The Defendant claims that Mr. Johnson is inconsistent and not to be believed since his testimony and what the Defendant would like to believe are the responsibilities set forth on the reverse side of Exhibit 1-P. Mr. Johnson testified that he believed he had two options when the Defendant failed to bring in her stock. (Page 515) The Account Card (Exhibit 1-P) requires the Customer to complete their portion within five days but does not require the brokerage house to do so. It specifically alloww the house at its option to pursue various remedies. (Exhibit 1-P) Thus Mr. Johnson's testimony is consitent. The Defendant's efforts to discredit Mr. Johnson are a feeble attempt without sucess.

Defendant claims that Mr. Parker attempted to convience the Court that the Defendant was a "sophisticated investor with great experience in the stock market." The testimony clearly shows that Mr. Parker stated that the Defendant was a client of long



standing who had fully completed all her former transactions and he believed would complete this transaction. (Page 551).

While the Defendant attempts to unsuccessfully discredit the Plaintiff's witnesses, it is the Defendant who is not to be believed. The Defendant in her testimony claims she never made a call to the Salt Lake office of the Plaintiff on or about September 14, 1984. (Page 424) However, in its Findings the District Court clearly indicates it did not believe the Defendant since the Court found she did call the Plaintiff's Salt Lake office on September 14, 1984. (Page 288-9). Further, the Defendant in her brief at page 6 now admits she was lying by stating she made a call to Plaintiff's office in Salt Lake on September 14 to get a second opinion.

#### ARGUMENT NO. 6

THE TRIAL COURT'S FINDING OF VIOLATION OF 10(b)5 IS CLEARLY ERRONEOUS AND SHOULD BE REVERSED.

The Defendant in her brief sets forth what she believes to be the standards for violation of Rule 10(b)5. However, the Defendant never shows evidence which substantiates that alleged violation by the Plaintiff. Defendant states that Plaintiff is now claiming no sale occurred. Plaintiff has stated that the Defendant claims there was no sale and if the court believes there was no sale, then there by definition can be no violation of 10(b)5. Defendant in her brief at page 10 states "As has been

demonstrated by the references and the findings of fact, there is ample authority to support the Court's Findings that no sale of stock had been made." (Respondents Brief Page 10). If this is the case then there can be no violation.

The Defendant tries to show a material misrepresentaion by quoting the language of the District Court's Findings. Defendant never shows any evidence which would indicate what misrepresentation was made to the Defendant. The Defendant states, without any reference to the evidence, that the Plaintiff misrepresented that they had sold the Defendant's stock. If the Plaintiff did sell the Defendant's stock, and told the Defendant they had sold her stock then no misrepresentation occurred. The Defendant claimed that she was never told her stock was sold and yet now is claiming that the Plaintiff misrepresented in that they told her they had sold her stock. She cannot claim both. The Defendant also states that the Plaintiff was "attempting to freeze holdings of other parties so as to enhance their own position. (Respondent's Brief Page 19) Defendant fails to show any evidence for this statement and Plaintiff states categorically that there is no such evidence since this did not occur.

The Defendant claims that she has shown scienter. However, the Findings of the District Court specifically show that the

Court knew otherwise. The District Court stated in its Memorandum Decision:

"This Court has learned to its frustration during this trial that the Defendant's testimony is extremely difficult to follow, particularly when she is excited. The Salt Lake Broker interpreted the conversation to be a request for a stock sale." (Page 276)

Clearly the Court found evidence that the Plaintiff at most made an unintentional misinterpretation of the Defendant's statement requesting the sale. Scienter requires an actual intent to deceive which clearly was not found.

The Defendant claims that the Court found that the Plaintiff had an intent to manipulate and defraud the market. However, since there is no evidence of this, the Defendant does not show any such evidence and makes no attempt to do so.

Further, Defendant never even attempts to show Damages, which is an essential element of a violation of 10(b)5. This is because the District Court awarded no damages to the Defendant and thus a finding of violation must be reversed.

ARGUMENT NO. 7  
THE DISTRICT COURT ERRED IN FINDING A VIOLATION OF RULE 10(b)-10 AND APPLIED AN INCORRECT BURDEN OF PROOF.

In order for there to be a violation of Rule 10b-10 it is the burden of the Defendant to show that the Plaintiff failed to send a confirmation. Except for the testimony of the Defendant

that she never received a confirmation, all of the evidence clearly shows that the Plaintiff made every reasonable effort to deliver a confirmation. (See Argument No. I in Appellant's Brief). The District Court clearly applied an improper burden of proof on the Plaintiff by requiring that the Plaintiff to show by a preponderance of the evidence that it had sent a confirmation. (Page 277) On this basis alone the decision of the District Court must be reversed. However, as set forth in Appellant Brief Argument No. III, the Defendant failed to show any of the elements for a violation of Rule 10b-10 and thus this finding must be reversed.

#### ARGUMENT NO. 8

THE DISTRICT COURTS FINDING OF VIOLATION OF NASD RULES WAS IMPROPER AND MUST BE REVERSED.

The Defendant claims that a private right of action exists for violation of NASD rules and quotes cases which would allow such right only if the Rule is a substitute for SEC regulation (Respondents Brief Page 22) and yet in her argument states that the violations closely parallel 10b-5. (Respondent's Brief Page 24). Further the Defendant totally misinterprets the findings in the Cowen v. Atlas case. In that case, the Court stated that Cowen was required to comply with NASD regulations since Cowen was a member of the NASD and found that Atlas violated Utah Code Section 70A-8-315. The Defendant would have this Court believe

that Cowen was found to have violated NASD rules and was liable to Atlas for those violations. This is just not the case.

Defendant tries to again use Section 70A-8-315 as a means of showing violation by the Plaintiff. But as set forth above, no transfer of a certificate occurred and thus this section is not applicable.

As to Section 12 and the failure to send a confirmation, the District Court applied the wrong burden of proof and Defendant can show no evidence except her claimed non-receipt, to show that Plaintiff did not send a confirmation. As to the balance of the requirements of Section 12 see Argument No. IV in Appellant's Brief.

Section 21 requires bookkeeping efforts on the part of the Plaintiff. Defendant claims a violation based on a "obvious" determination and yet shows no facts which show a violation. This Finding must also be reversed.

#### ARGUMENT NO. 9

##### THE DISTRICT COURT ERRED IN AWARDING PUNITIVE DAMAGES.

Defendant claims that punitive damages may be awarded in a Federal Securities case if the Federal claims are coupled with a properly plead state court action. Whether this is the case is immaterial since the Defendant did not plead any state law claims and is thus not entitled to punitive damages on this basis alone.

Defendant now tries to claim that Plaintiff engaged in "Churning or the stirring up and creating of a market." However, Defendant shows no facts or evidence to support her claim and would be otherwise precluded from raising a new cause of action at this late date.

Defendant claims that the Plaintiff has failed to show in what manner the Defendant failed to properly plead a claim for punitive damages. (Respondent's Brief Page 26) Defendant never made any claim whatsoever for punitive damages. Therefore Plaintiff has no burden of showing how those damages should have been plead. Defendant claims that she made a claim for punitive damages by quoting language of the Defendant's Amended Counterclaim. (Respondent's Brief Page 26-27) However the language quoted refers to Defendant's federal claim of violation of Federal Rule 10b-10 and not a state law claim. Further there is no wording of any nature relating to punitive damages and thus none were requested and none should be awarded.

As to the issue of the award of actual damages, the Defendant tries to state that she was awarded her stock. Since the Plaintiff had never claimed an interest in her stock, did not have nor hold the certificate for the Defendant's stock, no award of that stock could be made since the Defendant had always been the owner and the Plaintiff had never contested that ownership.

The Defendant attempts to use the Court's ruling in Nash v. Craigco, 585 P2d 775 (1978) to show that actual damages are not necessary for the award of punitive damages. However, this Court in Taylor v. Union America, Inc. 657 P2d 433 (1987) narrowed the findings of Nash wherein the Court stated:

"HTA cites our opinion in Nash v. Craigco, Inc. Utah, 585 P.2d 775, 778 (1978), for the proposition that "the nature and type of the wrongful conduct" should determine whether punitive damages should be awarded. In applying this statement to the instant case in support of an award of punitive damages, HTA reads Nash too broadly." (Page 750)

Further, this Court later in Cruz v. Montoya 660 P.2d 723 (Utah 1983) reiterates that "punitive damages must bear a reasonable relationship to actual damages." (Page 727).

ARGUMENT NO. 10

THE MISCELLANEOUS FINDINGS OF THE DISTRICT COURT WERE NOT SUPPORTED BY THE EVIDENCE AND MUST BE REVERSED.

The Defendant in her Point No. VI claims that the miscellaneous Findings of the Court should be sustained. However, as set forth in Appellant's Brief, there is no evidence to support those findings and the Defendant in her brief never shows or attempts to show any such evidence except that the Defendant claims tht Plaintiff's officers said that the sale could not be concluded without the stock certificate. (Respondent' Brief Page 28) The testimony of those officers clearly shows that sales of securities are made in many cases

where the brokerage house does not have the certificate in its possession at the time of the sale and that the sale can be made with the seller bringing in his certificate at a later date.

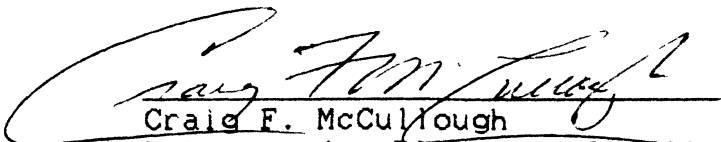
(Page 459) Defendant tries to claim that the Plaintiff had inside information, and tried to gain profits from some type of illegal activity. (Respondent's Brief Page 28) However, again, the Defendant shows no evidence, testimony or otherwise to support those allegations.



### CONCLUSION

The facts and evidence before this Court require a reversal of the District Court's decision and the entry of a Judgment against the Defendant in favor of the Plaintiff in the amount of \$5404.20 plus interest from the date of the sale transaction, attorneys fees and costs. Further that the decision as to violations by the Plaintiff of Rules 10b-5, 10b-10 and NASD Rules must be reversed. The entry of a Judgment in favor of the Defendant for punitive damages was improper and must be reversed. The various miscellaneous Findings and Conclusions and Judgments as set forth above must be reversed.

Dated this 17th day of July, 1987.



Craig F. McCullough

Attorney for Plaintiff-Appellant

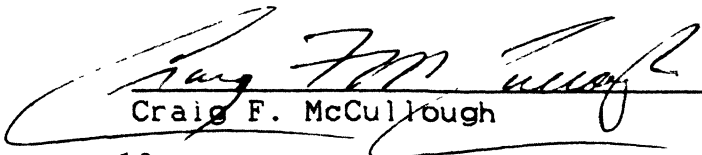
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### CERTIFICATE OF MAILING

I hereby certify that on the 17th day of July, 1987, I deposited postage prepaid in the United States Mail, four copies of the foregoing Reply Brief of Appellant addressed to Gerald S. Wight, Attorney for Defendant-Respondent, Legal Forum Building, 2447 Kiesel Avenue, Ogden, Utah 84401.



Craig F. McCullough