

1988

Western Capital and Securities, Inc. v. Helen Knudsvig : Brief of Respondent

Utah Court of Appeals

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IN THE SUPREME COURT OF THE

STATE OF UTAH

WESTERN CAPITAL AND
SECURITIES, INC.,

Plaintiff and
Appellant,

vs.

HELEN KNUDSVIG,

Defendant and
Respondent.

BRIEF OF RESPONDENT

Appeal from the Judgment of The
The Second Judicial District Court for
Weber County, State of Utah

HONORABLE JOHN F. WILKINSON, JUDGE

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Supreme Court, Utah

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IN THE SUPREME COURT OF THE
STATE OF UTAH

WESTERN CAPITAL AND SECURITIES))	
INC.,)	
)	
Plaintiff and)	
Appellant,)	
)	CASE NO: 870056
vs.)	
)	
HELEN KNUDSVIG,)	
)	
Defendant and)	
Respondent.)	
_____)	

BRIEF OF RESPONDENT

Appeal from the Judgment of the District
Court of Weber County, State of Utah,
Honorable John F. Wahlquist, Judge

STATEMENT OF ISSUES

I.

The decision of the trial court in dismissing Plaintiff's Complaint no cause of action, was amply justified by the facts before the Court and was a lawful exercise of Judicial discretion.

II.

That the trial court's finding that Plaintiff had violated Securities and Exchange Rule 10(b)5, is amply supported by the facts and is a proper application of the Law.

III.

That the trial court's finding that Plaintiff had violated Securities and Exchange Rule 10(b)10, was a proper applications of law and fact and should be sustained.

IV.

That the trial court's finding of violation of various NASD Rules has ample justification in law and fact.

V.

The trial court was justified in rendering Judgment against the Plaintiff for punitive damages.

VI.

That any and all findings by the trial court were justified and were amply supported by the evidence and the law as determined by the Court.

STATEMENT OF THE KIND OF CASE

This was an action in which the Plaintiff was found to have violated Rules 10(b)5 and 10(b)10, and various Rules of the NASD and having defrauded the Defendant and others through the illegal use of insider information.

DISPOSITION IN LOWER COURT

After a two-day trial before the Honorable John F. Wahlquist, the District Court determined that there had been a violation of Rule 10(b)5 and 10(b)10 of the Securities and Exchange Act of 1934, and further, that the Plaintiff had violated various NASD Rules and that it specifically set out to defraud the Defendant and others through illegal trading and use of insider information.

RELIEF SOUGHT ON APPEAL

Respondent seek affirmation of the Judgment of the Lower Court as to the dismissal of Plaintiff's Complaint no cause of action and the awarding of \$30,000.00 worth of stock to Defendant in addition to \$10,000.00 in punitive damages.

STATEMENT OF FACTS

First it should be noted that Respondent takes exception to the Appellant's Statement of Facts as being

argumentative and not supported by the testimony referred to.

RESPONDENT'S STATEMENT OF FACTS

That the Defendant is a 61 year old lady who has habitually dabbled in penny stocks, usually in the amount of a few hundred dollars or less, investing in new issues which would hopefully achieve a quick rise in value. (T. 399) That Plaintiff attempted to establish that the Defendant was an experienced and sophisticated investor, but this is contrary to the facts. (T. 555)

That in 1984 the Defendant bought \$200.00 worth of penny stocks in a company known as Venture Consolidated, which amounted at that time to 20,000 shares. The particular stock was a new issue and a typical penny stock offering and the corporation Appellant was the market maker of the issue in any market which would follow. (T. 506, 517 and 549) The plan was to sell 100 million shares and insiders eventually captured 23% of the actual 200,000 plus shares which were sold while the public holding was to remain at \$200,000.00. (T. 506, 517, 518 and 549)

The investment was to be held in cash with the plan to be that at a shareholders meeting a merger and consolidation with several other corporations would be made, with the

resulting entity to be known as Tires, Inc., authorizing a 20 to 1 reverse stock split taking place immediately thereafter. The particular shareholders meeting to occur on September 19, 1984. (T. 531 and 532) In the meantime, Venture Consolidated stock rose from 1¢ to 16¢ or 17¢, sole reason for the rise being the proposed merger and the general market making activities of the Plaintiff Brokerage. (T. 531, 532 577 - 600)

The result of the activities of the Appellant and others was the consistent rise in value of Venture Consolidated and eventually Tires, Inc., stocks. It resulted in the Defendant's original \$200.00 investment being worth approximately \$30,000.00 at the time of trial based again upon the general market making activities of the Plaintiff Brokerage and/or other insiders activity. (T. 531, 571 and 592 - 600).

That the Appellant had at all times maintained an Ogden office with an account executive in that office Lou Babcock, who was well acquainted with Respondent. (T. 461 - 471 and 557) That Mr. Babcock visited with the Defendant on September 14, 1984, and advised her of the stocks recent climb in value and offered to sell it for her, (T. 467) and that such a sale would bring on the recording of an additional indication of an increase of fixed value for the market making

activity and would serve also to pick up the stock in the face of what appeared to be high-promotional activity in order to prevent profit taking before the explosion in value which was about to occur. (T. 531, 532 and 571) While the motive to sell the stocks on commission was no doubt present, any such commission would be very small.

That the Respondent was excited about the potential rise in value and decided to obtain a second opinion by placing a call to the Appellant's Salt Lake office and requesting further information. (T. 443) That the broker who received the call interpreted the conversation to be a request for a sale of shares and that he contacted the Vice-President for instructions on how to handle a sale in as much as there was no stock certificate with the Plaintiff Brokerage. (T. 454, 455) In spite of this perceived difficulty, the Vice-President of the brokerage immediately approved the sale and the brokerage then made an entry that the purchase was made for their own market making account. (T. 451, 452)

That the Appellant failed to give notice of the transaction as required by its own agreement with Respondent, in addition to the SEC Rules and NASD Rules. (T. 404, 459 - 471, 435, and 505)

That Respondent had no intention of making a sale of her shares and was aware of the fact that such a sale could not take place without the presence of a stock certificate, Appellant in the past had such a sale cancelled as opposed to having the purchase made by the broker to cover what is known as a "short sale". (T. 565) That one of the reasons Respondent never received a stock certificate is that it would serve the personal interests of insiders market making activity to freeze outsiders and prevent their profit taking and interference with the stock's rise by making it more difficult for them to profit-take. (T. 571)

That regulations in the broker's contract itself with the Defendant required a winding up and closing of all transactions within five (5) days after a sale or purchase occurs. (T. 552 and 451 - 455) That the Appellant make no effort to close in the required five (5) day period, and that they in fact preferred not to do so, preferring instead to await further developments. (T. 456 through 458 and 527 - 529)

That the stock rose uniformly through the next period of time without any drop below the sales price so that the brokerage's position would not in any way be threatened. (T. 456 - 458 and 527 - 529) That after approximately 75 days, the Plaintiff decided to make a transfer purporting to

cover the short, making an entry that they had bought from their own profit-making account. (T. 523)

That this resulted in a paper calculation that if the sale was made in accordance with the original sales entry and a short coverage was effected at the repurchase date, that the Defendant would owe the \$5,400.00 claimed in Plaintiff's Complaint because of the steady rise of the market during the intervening 75 days of Appellant's dalliance. That Appellant knew that it would not be closing within five (5) days, even assuming that the original sale had actually taken place and let the matter ride at the Defendant's risk and should now be estopped to make any claim against the Respondent. (T. 451 - 459)

That the Appellant brokerage suffered no damage in that the entries made were strictly to and from their own market making accounts and records, and there is no evidence to establish that they were ever in any way threatened in their position. (T. 451 - 459, 523 and 524) That Defendant's shares could not be sold without possession of the certificate. (T. 452 - 455)

SUMMARY OF ARGUMENT

That there is clear evidence to support the finding of the Trial Court as to the violation of Rule 10(b)5 and

10(b)10 and the NASD Rules and the use of insider information in attempting to defraud the Respondent and others, and that the ruling of the Court is amply supported both by the facts determined and also by the Case Law.

ARGUMENT

POINT I.

THE DECISION OF THE TRIAL COURT IN DISMISSING PLAINTIFF'S COMPLAINT NO CAUSE OF ACTION, WAS AMPLY JUSTIFIED BY THE FACTS BEFORE THE COURT AND WAS A LAWFUL EXERCISE OF JUDICIAL DISCRETION.

This Court has previously ruled in Valley Bank v. First Security Bank, 538 P.2d 298, that in a case at law, the Trial Court is accorded the right to find facts and such finding will not be disturbed even though the Supreme Court may disagree. See also, Washamatic v. Rupp, 532 P.2d 682.

In fact, such findings by the Trial Judge will not be disturbed unless they are clearly against the weight of evidence, First Security Bank v. Hall, 504 P.2d 995. Where the action was a matter in law and not in equity, the Supreme Court is in fact precluded from substituting its view of the evidence for the Trial Court's, Ream v. Fitzon, 581 P.2d 145, and on appeal the evidence will be viewed in

the light most favorable to sustaining the Lower Court's ruling. Hardy v. Hendricksen, 495 P.2d 28.

This is because the Trial Court is in a unique position to observe witnesses and hear testimony which places it in a better position than the Appellate Court to weigh and evaluate the testimony and evidence. Shioji v. Shioji, 712 P.2d 197.

This Court has further found in the case of Kimball v. Campbell, 699 P.2d 714, that in interpreting a contract, findings with regard to the same are strictly limited on review where they are based simply on testimony.

That even where facts may be found to be conflicting, when the facts found by the Trial Court are supported by substantial evidence, they will be summarily affirmed, Bountiful v. Swift, 535 P.2d 1236. This is true even where reasonable men may differ and the Trial Court is simply left with the decision as to chose who to believe. Koesling v. Basamakias, 539 P.2d 1043, Riggle v. Daines, 463 P.2d 1.

As has been demonstrated by the references and the findings of fact, there is ample authority to support the Court's finding that no sale of stock had been made. (T. 423 - 430, 435, 467, 471, 474, 475, 477) It is further obvious that the activities of the brokerage firm are in violation of their own agreement setting up the account

which is identified as Exhibit 1P. (T. 537) Contrary to the case law that has previously been cited by Respondent, Appellant would have the Court rely solely upon the testimony of a Mr. Davis, who made self-serving statement on behalf of his then employer.

At the same time, Appellant is asking that the Court disregard the testimony of Mr. Knudsvig, the Respondent, Mrs. Knudsvig, Lou Babcock, an employee of Appellant at the time, Mr. Johnson, an employee of the Appellant at the time, and the total lack of documentation of proper procedure. (T. 403, 404, 423 - 439, 461 - 490, and 505) In addition, Appellant would attempt to mislead the Court into believing their version of the testimony which is not supported in any way by the actual transcript, such as their statement on page 12 of their Brief that Lou Babcock's testimony was that Defendant knew of the sale and she intended to complete her portion of the sale, where in reality throughout his entire testimony, he restates the fact that she never agreed to any sale. Appellant also misstates the finding of the District Court that Respondent had requested the sale, which is totally contrary to said finding. (R. 288 - 290)

The actual finding by the Court is as follows:

"That the Defendant became excited about the potential rise in value and decided to obtain a second opinion by placing a call to the Salt Lake office and

requesting further information. That the broker who received the call interpreted the conversation to be a request for a sale of her shares and he then contacted the Vice-President of the brokerage for further instructions on what to do in as much as he knew that there was no stock certificate with the Plaintiff brokerage....that the Defendant had no intention of making a sale of her shares and was aware of the fact that such a sale could not take place without the presence of a stock certificate, and had in the past had such a sale cancelled as opposed to having the purchase made by the broker to cover what is known as a short sale."

Thus, Appellant has deliberately attempted to deceive the Court as to what the previous ruling of the District Court was, and attempts to also do so in its Statement of Facts and Arguments by repeatedly misquoting the testimony from the Transcript.

Appellant attempts to cite § 70A-8-319 of the Uniform Commercial Code in support of its position, but at the same time would apparently desire to disregard § 70A-8-315 which states:

"Any person against whom the transfer of a security is wrongful for any reason, including his incapacity, may against anyone except the 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 this case the overwhelming weight of evidence supports the Trial Judge's finding and decision that there was no

sale and that the attempt to claim a sale was solely to support the market-making activity and insider trading of the Appellant to take illegal profits therefrom. Based upon such finding and § 70A-8-315, the finding of the Court that no such sale had taken place and that there was no basis for the suit by Appellant, and the other various illegal activities of Western Capital and Securities, Inc., amply justifies the dismissal of their Complaint, the awarding to the Respondent of her shares of stock, and the awarding of \$10,000.00 in punitive damages.

It should further be pointed out that Appellant repeatedly claims that a confirmation was sent to Respondent, yet Respondent's husband, the Respondent herself, and the account executive all testified that they were not aware of and had never seen any such confirmation. (T. 404, 427 - 430, 459, 479)

In addition, Appellant was unable to provide any original of the confirmation, even though testimony clearly established that two (2) original copies of the same were normally retained at least until the settlement date, (T. 510, 521) thus the Court was convinced that there never in fact had been a confirmation, and that the requirement to provide such a confirmation on the part of Western Capital

and Securities, Inc., according to the Rules and Regulations, had never been fulfilled.

Instead, Appellant would have this Court believe that they simply waited for a period of 75 days without any stock certificate, holding the account open because Respondent was such a valued customer of penny stocks, and they were willing to sit and do nothing in the face of steadily increasing price of the stock, even though they had testified that they had never done it for any other party. (T. 454 - 458, 524)

It is also not surprising that the Court chose to disbelieve testimony by officials of Western Capital and Securities, as it was demonstrated on at least several occasions that they were either lying or had changed their testimony from previous statements under oath.

For example, Mr. Johnson claims that he has a social security number matching that of Respondent, while the agreement setting up the account doesn't carry any such social security number and no other documents were produced showing the same, and Respondent believes that it was simply obtained subsequent to the filing of the lawsuit. (T. 400, 503)

Mr. Johnson further testifies that he actually believed that the value of the stock was about to decrease at the

time that the purported sale was to have taken place, while in his previously filed Answers to Interrogatories under oath, had stated that they fully believed that they would increase. (T. 531)

When asked about a previous suit brought against Western Capital and Securities alleging securities fraud, Mr. Johnson conveniently could not recall any details of that suit, even though he had previously filed a specific response to questions about the same in Answers to Interrogatories. (T. 537)

Mr. Johnson further states that he was not required to settle the accounts within any specific time period, notwithstanding the fact that he acknowledges the provisions found on the back of the account agreement. (T. 539)

Mr. Parker, while testifying on behalf of the Appellant, attempted to convince the Court that Respondent was a sophisticated investor with great experience in the stock market. (T. 555) This claim by Parker was found by the Court to be totally and blatantly false based upon the fact that Respondent was a simple individual having had no employment in the securities field, and having only occasionally dabbled in penny stocks in the amount of a few hundred dollars or as much as she was able to lose.

POINT II.

THAT THE TRIAL COURT'S FINDING THAT PLAINTIFF HAD VIOLATED SECURITIES AND EXCHANGE RULE 10(b)5, IS AMPLY SUPPORTED BY THE FACTS AND IS A PROPER APPLICATION OF THE LAW.

With regard to the requirements to establish a 10(b)5 violation, Respondent will take exception with the requirements as set forth by Appellant as the same has already clearly been defined by the United States Supreme Court in the case of Santa Fe Industries v. Green, 430 US 462, as follows:

1. The use of a means or instrumentality of interstate commerce or the mail.
2. A material misrepresentation.
3. An actual intent to deceive, manipulate or defraud, otherwise known as scienter.
4. That damages are suffered due to the fraudulent scheme.

Appellant misquotes two cases that it claims supports its position that would deny Respondent a cause of action. Both of the cases quoted, that being Blue Chip Stamps et al v. Manor Drug Stores, 421 US 723 and Birnbaum v. Newport Steel Corp., 193 F2d 461, established the proposition that no suit could be brought under 10(b)5 for corporate

mismanagement and have nothing to do with the fraudulent activities of brokers or stock dealers.

Appellant now tries to claim, surprisingly, that there was no sale of security involved and that this would thus serve to defeat any claim by Respondent. This is obviously contrary to the testimony of its own officers wherein Mr. Johnson testified that the sale was completed by Western Capital and Securities act of buying in to cover the short. (T. 527) Thus, Appellant is now found in the position of arguing and against its own officers' testimony and its own previous position as set forth in its Complaint and also in our Point I of its Brief on Appeal. Surely the activities on the part of Western Capital and Securities were with the intent of claiming that there had been a concluded, completed sale as evidenced by the confirmation November 30th, showing the buy-in.

With regard to the material misrepresentation and attempt to deceive or defraud requirements, this has clearly been established by the findings of the Court and is most clearly stated on page 6 of the Memorandum Decision entitled "Damages":

"The Court considers that the alleged sale never occurred pursuant to the contract. The Court does, however, find that the Plaintiff's activity in this instance is unconscionable. It knew early that the Defendant had denied the

original sale had been made, but nevertheless, the brokerage took no action to close the transaction within the five (5) days. It left the situation in an ambiguous state. Its intent was that they could make a profit on the stocks generally held in the market-making account with the risk only to the Defendant because the stocks rise in value was consistent. The Court is mindful that the evidence in general discloses a relatively large brokerage business which has branch offices, makes prices, invests for its own purposes, etc. The Court is also mindful of the vulnerability of persons in the Defendant's position. It is obvious that the penny market stock market is one that attracts persons that might otherwise be in the lottery ticket person class. The purchases are generally sufficiently small that they cannot afford litigation if treated unfairly. The deliberate failure to move towards the closing of a transaction, even if they were correct that a sale occurred and an agreement had taken place, their motive was to hold at the Defendant's expense for the period over the five (5) day maximum or on into what they have testified is the right to hold indefinitely and their tying up of the stock certificate requiring lengthy litigation and all results in general cheat of a public that is near helpless."

Also on page 2 of the Memorandum Decision and page 275 of the transcript, the Court states:

"A plan was developed wherein a shareholders meeting was to be called to bring about a stock transfer with Tires, Inc., at a 20 to 1 reverse split. This was to occur on October 19, 1986. In the meantime the Venture Consolidated

stock rose from 1¢ to 16¢ or 17¢. There is no evidence as to why the stock value rose, except the proposed merger and the general market-making activities of Plaintiff brokerage. There is nothing like discovery of oil on the adjoining property in evidence. The bottom line seems to be that a cash injection of something like \$200,000.00 was to raise the value of Venture Consolidated to many times the invested value and to further raise the Tires, Inc., stocks. The result was that this \$200.00 investment has a market value of in the neighborhood of \$30,000.00 at trial time. The evidence offers no explanation for this rise except a general market-making activities of the Plaintiff brokerage and/or other insiders activity."

This ruling in the Court's Memorandum Decision clearly evidences illegal and fraudulent activity on the part of Western Capital and Securities, all to the detriment of Respondent. They materially misrepresented that they had sold Respondent's stock when in reality they were simply attempting to freeze holdings of other parties so as to enhance their own position. The Court specifically found from this an intent to manipulate and defraud the market in this particular stock.

In the case of Huddleston v. MacLean, 640 F2d 534, the Court found that scienter could be established by proof of conduct which is so extreme as to be a form of intentional conduct and behavior equivalent to an intent to deceive, manipulate or defraud. The Court further found that

extrinsic facts could be used to establish scienter in a 10(b)5 action, and then looked at whether Defendant's actions violated the standard of care of a securities broker or dealer or one in a fiduciary capacity and that such is a question of fact to be determined by the Trial Court. Further, in the case of E.F. Hutton v. Penham, 547 F. Supp. 1286, there is recognized a specific right of action for unauthorized trading in individual securities. See also U.S. v. Naftalin, 441 US 768.

In the case of SEC v. Capital Gains Research Bureau, 375 US 180, the Court held that the purpose of 10(b)5 was to provide investor protection and a high standard of business ethics in every facet of the securities industry. Western Capital and Securities intentional manipulation of the market and attempt at unauthorized trade with Plaintiff's stock specifically violated those rules.

POINT III.

THAT THE TRIAL COURT'S FINDING THAT PLAINTIFF HAD VIOLATED SECURITIES AND EXCHANGE RULE 10(b)10, WAS A PROPER APPLICATIONS OF LAW AND FACT AND SHOULD BE SUSTAINED.

With regard to Rule 10(b)10, it specifically provides:

"It shall be unlawful for any broker or dealer to effect for or with the account of a customer, any transaction in, or to induce the purchase or sale by such

customer of, any security unless such broker or dealer, at or before completion of such transaction, gives or sends to such customer written notification disclosing."

Rule 10(b)10 then goes on to require certain specific information with regard to any trades or transactions on a customer's account.

The Court has specifically found, and this has been born out by the evidence already identified in Argument I, that no such confirmation as required by 10(b)10 was ever sent or received by Respondent and the illegal and fraudulent activity and dealings on the part of Western Capital and Securities in connection with the sale has already been detailed in Argument II. With regard to the showing of damages, Mrs. Knudsvig testified at length as to her damages the fact that she couldn't pay normal living expenses and the mental pain and suffering that she had undergone because of the activities conducted by Western Capital and Securities.

POINT IV.

THAT THE TRIAL COURT'S FINDING OF VIOLATION OF VARIOUS NASD RULES HAS AMPLE JUSTIFICATION IN LAW AND FACT.

Appellant attempts to argue that there is no private right of action under NASD Rules, which is contrary to

numerous holdings by the Federal Court and also specifically a previous holding of this Court. In the case of Utah State University v. Bear Stearns, 549 F2d 164, the 10th Circuit Court of Appeals in ruling on an appeal from the District Court of Utah, specifically finds that a violation of association or exchange rules may give rise to a private cause of action requiring only the showing on the part of the broker of a manipulative or fraudulent practice. Also another Circuit in Colonia Realty v. Bache, 358 F2d 178, recognizes a private cause of action where the Rule violated amounts to a substitute for SEC regulation and established an explicit duty previously unknown to common law.

The District Court in Geyer v. Paine Weber, 389 F. Supp 678, also finds such a private right of action as does Gerant v. Dean Whitter, 502 F2d 854, particularly where there is a fraudulent conversion of securities. Also, the 7th Circuit in Buttrey v. Merrill Lynch, 410 F2d 135, recognized a private right of action for violation of New York Stock Exchange Rule 405 and the determination of whether or not such a violation is actionable, is as to whether or not such rule was created for the direct protection of investors. Finally this Court in the case of Cowen & Company v. Atlas Stock Transfer, 695 P.2d 109, states:

"Industry practice and NASD Rules and Regulations required Cowen to make delivery of the stock to purchasers within five (5) business days of each sale."

The Court in that case then went on to find that the failure to follow a prescribed rules and regulations gave rise to a cause of action for damages and affirmed such an award by the Trial Court. The Court further found that provisions of the Uniform Commercial Code as found in § 70A-8-401 were applicable in such cases and that they should be governed by the Uniform Commercial Code.

In the present case, another section of the Uniform Commercial Code previously cited to, that being § 70A-8-315, also provides for the awarding of damages in connection with a wrongful transfer of security and specifically provides for damages. A fraudulent and manipulative activity on the part of Western Capital and Securities has already been gone into at length, but they are clearly sufficient to make out a cause of action for violation of the NASD Rules. That compliance with the rules is specifically required by Exhibit 1P.

Appellant makes reference to the fact that § 12 requires the delivery of a confirmation and the Court very clearly found in its ruling that there had been no such delivery. Also as stated, § 18 prohibits the use of

fraudulent or manipulative devices in connection with the sale of security, closely paralleling 10(b)5, which the Court also found. Section 21 requires certain bookkeeping practices on the part of the securities dealer and it is obvious that this was not done based upon the fact that no confirmation was ever made or delivered, the sale was not terminated when there was no stock certificate, and Western Capital and Securities further proceeded with an illegal sale by the buying-in from securities maintained in its own account.

POINT V.

THE TRIAL COURT WAS JUSTIFIED IN RENDER-
ING JUDGMENT AGAINST THE PLAINTIFF FOR
PUNITIVE DAMAGES.

Appellant argues that there can be no recovery of punitive damages in a 10(b)5 setting and apparently would desire the Court to totally disregard the long line of cases specifically allowing such an award where a State violation is joined with the 10(b) violation. In the case of Nye v. Blythe Eastman Dillon, 588 F2d 1191, the Court specifically found that punitive damages may be awarded if allowed under State law and a State violation is joined with 10(b)5. The Court also found that punitive damages were intended to punish malicious or oppressive conduct and to prevent it

occurring in the future. In this case a breach of contract in violation of the Uniform Commercial Code and NASD Rules is included along with the 10(b)5 and 10(b)10 violation and would certainly justify the awarding of punitive damages to punish malicious and oppressive conduct and to prevent its occurring in the future.

Also, in the case of Pretrites v. Bradford, 656 F2d 1033, the Court found that punitive damages may be recovered along with attorney fees because the claim also included with it a claim under the Florida Blue Sky Laws, and specifically states that Florida Law applies to negotiating for the sale of a security in any manner whatever, similar to the provisions of § 70A-8-315 of the Utah Code. The Court in that case felt that punitive damages were particularly appropriate where part of the claim was for a common law fraud count including activity on the part of the brokerage known as "Churning" or the stirring up and creating of a market such as was done by Western Capital and Securities. (T. 549) See also Coffee v. Premium, 474 F2d 1040.

In order to set aside any awarding of punitive damages, the Court must first make a finding that they are manifestly unjust or that the Court itself was unduly influenced. Maby v. Kay Peterson, 682 P.2d 287 and Clayton v. Crossroads, 655 P.2d 1125. Also, in the case of Cowen & Company v. Atlas

Stock Transfer, supra, the Court found that an award of damages must be affirmed if there is evidence to support it. In this case the activities of Western Capital and Securities clearly were fraudulent with intent to deceive, control and manipulate the market and would justify the award of punitive damages, particularly in view of the testimony of the Defendant and the great anguish and financial difficulty occasioned by the activity and the subsequent lawsuit resulting.

Appellant attempts to state that the claim for punitive damages is not properly pleaded and then sets forth no authority revealing how or in what manner it was not properly pleaded. In the case of Stole v. Ted S. Finkle Investment Services, 489 F. Supp. 1209 and Sutton v. Schierson, 490 F. Supp. 98, the Court particularly allowed exemplary damages which were requested in a properly pleaded pendent State claim and if such damages are allowable under State law and if a particular State violation for which punitive damages are sought is alleged in conjunction with the Federal violations. The fraud and illegal activity in connection with the prayer for award of punitive damages is further set forth in the second cause of action as follows:

"The Plaintiff has failed to comply in any regard with this Rule, causing the Plaintiff great damage in preventing her from the free sale or alienation of the

stock and any profits which may have been generated thereby, all of which shall be demonstrated at the time of trial."

Finally, Appellant makes the argument that since no general damages were awarded, punitive damages were not proper and attempts to disregard the fact that the Court did in fact award the stock which it valued at \$30,000.00 to the Respondent free and clear of any claims or encumbrances of Appellant, and would also seek to distinguish the Court's ruling in the case of Nash v. Craigco, 585 P.2d 775, which is a case similar to the one now before the Court in that the party had breached a fiduciary duty and wrongfully acted to destroy the Plaintiff's option in his control of a corporation. The Court in that case states:

"The question whether punitive damages can be given and the amount thereof should be determined from the nature and type of wrongful conduct rather than on the amount of money awarded as actual damages, since the purpose of an award is to teach the offender not to repeat the wrong and to be a warning to others that such conduct is not to be tolerated."

Thus the award of punitive damages is amply supported by case law and fact in this case and should be affirmed.

POINT VI.

THAT ANY AND ALL FINDINGS BY THE TRIAL COURT WERE JUSTIFIED AND WERE AMPLY

SUPPORTED BY THE EVIDENCE AND THE LAW AS
DETERMINED BY THE COURT.

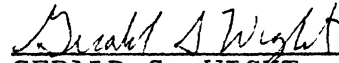
With regard to the various arguments made in Appellant's Argument VI, in none of these is any authority that that they are improper offered either by case law, statute or otherwise, and appears to simply be some sort of attempt to argue facts or logic on the part of Appellant. Appellant's own officers all testified that the sale could not be concluded without the stock certificate and there is ample evidence supporting the fact that the Appellant tied up the Respondent's stock certificate at a time when it had insider information and was attempting to gain profits for itself due to the activity in the stock. The rest of the findings that Appellant seeks to dispute are basically undisputed in the facts or are another interpretation of the facts which are offered by Appellant.

CONCLUSION

The facts and law set forth in Respondent's Brief clearly show that the Court was justified in its ruling and that there were adequate facts upon which the Court could rely in making such a ruling. The entry of the Judgment in favor of Respondent awarding her the stock valued at \$30,000.00 and for punitive damages in the amount of

\$10,000.00 are all entirely justified. The ruling of the District Court should be affirmed.

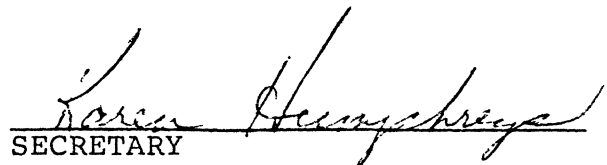
DATED this 19th day of June 1987.


GERALD S. WIGHT
Attorney for Respondent

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of June, 1987, I mailed four (4) true and correct copies of the above and foregoing BRIEF OF RESPONDENT by placing same in the U.S. Mail postage prepaid and addressed to the following:

Craig F. McCullough
Attorney for Appellant
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P.O. Box 11378
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SECRETARY