

1988

# Built Mart Mall, Inc. v. Deseret Federal Savings and Loan Association : Reply Brief

Utah Court of Appeals

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**UTAH COURT OF APPEALS  
BRIEF**

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IN THE SUPREME COURT

*840334 LA* IN THE STATE OF UTAH

BUILD MART MALL, INC. -  
PHOENIX,

Plaintiff and Appellant,

vs.

DESERET FEDERAL SAVINGS AND  
LOAN ASSOCIATION,

Defendant and Respondent.:

Case No. 870268

Category No. 14b

**88-0334-31**

REPLY BRIEF OF APPELLANT

APPEAL FROM A SUMMARY JUDGMENT OF THE  
THIRD JUDICIAL DISTRICT COURT, HONORABLE  
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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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BUILD MART MALL, INC. - :  
PHOENIX, :  
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Plaintiff and Appellant, : Case No. 870268  
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vs. : Category No. 14b  
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DESERET FEDERAL SAVINGS AND :  
LOAN ASSOCIATION, :  
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Defendant and Respondent.:

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POINT I. THE RULES OF PRACTICE IN THE THIRD DISTRICT COURT DO NOT REQUIRE ANY MORE THAN PRESENTATION OF A GENUINE ISSUE OF FACT TO PRECLUDE SUMMARY JUDGMENT.

The defendant argues on appeal that the plaintiff must controvert some part of the defendant's statement of facts in the trial court or suffer entry of judgment. This is a unique and peculiar argument. Defendant seems to be suggesting that a moving party can limit the scope of the Court's inquiry into the facts by selecting some set of undisputed facts which fail to show an entitlement to relief. Obviously, a plaintiff is not limited to presentation of those matters chosen by the defendant.

While it is true that the defendant's uncontroverted factual assertions are deemed admitted, they are not thereby deemed to be the only facts which the Court may consider.

In the instant case the "disputed" facts presented to the Court involved Mr. Frandsen's repeated misrepresentations. The defendant cannot avoid this fact dispute by simply excluding any reference to it in its selected statement of facts, and neither logic nor legal authority support such a strained construction of the Rules of Practice of the Third District Court.

POINT II. THE APPARENT AUTHORITY OF RONALD FRANDSEN TO SPEAK FOR DESERET FEDERAL IS A QUESTION OF FACT FOR RESOLUTION BY THE JURY.

The thrust of Deseret Federal's argument regarding Mr. Frandsen's lack of authority to "bind" the institution by his oral misrepresentations is simply that Deseret's standard loan appli-

cation disclaims the ability of agents to enter into binding oral commitments for loans. Plaintiff has repeatedly pointed out that Deseret issued a written loan commitment. Mr. Frandsen's misrepresentations which followed did not concern the willingness of the institution to make such an agreement, but rather its performance pursuant to that agreement.

Plaintiff submits that by making Mr. Frandsen the head of its major loan department, Deseret Federal clearly gave him the apparent authority to discuss its major loans with clients. If, during the course of such authorized discussion, he made tortious misrepresentations, then Deseret is vicariously liable for those torts under rudimentary principles of agency law. At a minimum, there is nothing in the written documents which advises the plaintiff that no one at the institution is authorized to convey information about an eleven million dollar loan transaction. Deseret Federal's liability for Mr. Frandsen's torts, therefore, is clearly a matter for jury resolution in light of all the facts pertaining to the dealings between the parties.

POINT III. THE DAMAGES INCURRED BY PLAINTIFF WERE EXPENDITURES MADE IN RELIANCE ON MISREPRESENTATIONS OF DEFENDANT'S AGENT.

Defendant's final argument in support of the Judgment entered below is flawed because it attempts to assert a contract defense to a tort claim. Plaintiff presented evidence below

that it made repeated expenditures of funds in direct reliance upon Mr. Frandsen's assertions that the loan in question would be funded. Build Mart made additional expenditures at his request to extend its option to purchase the property based upon his representations that such extensions were needed by the institution to fund the loan. A new commitment agreement was drafted by Deseret Federal and Mr. Frandsen testified that the time for Build Mart to perform would have been at the closing, which closing was never scheduled because Deseret Federal never obtained the loan participants which Mr. Frandsen had previously represented were in place. Finally, Deseret Federal specifically agreed to extend its commitment to May 20, 1985, provided Build Mart agreed to waive all claims for past or future damages.

The assertion that Build Mart wasn't damaged because it failed to satisfy "conditions precedent" to the funding of the loan is a thinly veiled attempt to argue a contract defense to a tort claim.

The real issue concerning damages presented in this action is whether Build Mart's action in spending money in reliance upon Frandsen's misrepresentations was reasonable. The reasonableness of a plaintiff's reliance, however, is a question for jury resolution. See Conder v. A.L. Williams & Assoc., Inc., 739 P.2d 634 (Utah App. 1987).

#### CONCLUSION

The defendant has continuously attempted to transform this tort action into a breach of contract case governed exclusively by the writings of the parties. It is not such a

case. It is an action seeking damages caused by the misrepresentations of an executive officer of a financial institution made in connection with a major loan transaction, the administration of which was his chief responsibility for the institution. In such an action it is not a complete defense to say that the standardized contracts of the institution warn a client that they can never believe the representations of the institution's officers. The reasonableness of the plaintiff's reliance and the apparent authority of the agent must be assessed in light of all of the evidence regarding the parties' dealings, not on the basis of an isolated boilerplate paragraph of a standardized form.

Accordingly, as a genuine issue of fact exists regarding the plaintiff's entitlement to damages for Deseret Federal's agent's misrepresentation, the summary judgment entered below should be vacated and the matter remanded for trial.

DATED this \_\_\_\_\_ day of January, 1988.

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CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing were mailed this \_\_\_\_\_ day of January, 1988, to the following:

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