

2001

# KUTV, INC., a Nevada corporation v. Motor Sales, INC., a Utah corporation, dba Federal Mobile Homes : Brief of Appellant

Utah Supreme Court

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## BRIEF

BRIEF  
13987A

OF THE STATE OF UTAH

KUTV, INC., a Nevada corporation,

*Plaintiff-Respondent,*

VS.

MOTOR SALES, INC., a Utah  
corporation, dba FEDERAL  
MOBILE HOMES,

*Defendant-Appellant.*

CASE NO.

13987

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J. Reuben Clark Law School

## BRIEF OF APPELLANT

MOTOR SALES, INC.

APPEAL FROM THE JUDGMENT OF THE SIXTH JUDICIAL  
DISTRICT COURT OF SEVIER COUNTY, DON V. TIBBS,  
DISTRICT JUDGE, PRESIDING

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**FILED**

JUL 3 1 1975

**Clerk, Supreme Court, Utah**

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IN THE SUPREME COURT OF THE STATE OF UTAH

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KUTV, INC., a Nevada corporation,	)	
	:	
Plaintiff-Respondent,	)	CASE NO.
	:	
vs.	)	13987
	:	
MOTOR SALES, INC., a Utah corporation, dba FEDERAL MOBILE HOMES,	)	
	:	
Defendant-Appellant.	)	
	:	

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BRIEF OF APPELLANT

MOTOR SALES, INC.

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STATEMENT OF THE NATURE OF THE CASE

This is an action brought by the Plaintiff contending that the Defendant ordered television advertising and to recover the reasonable value of the advertising services. The services were alleged to have been rendered between September 1973 and February 1974. The Defendant contends the advertising was not authorized and further that the Plaintiff paid to an agent of the Defendant a secret commission and that any resulting agreement made by the agent and the Plaintiff as a result of the fraud and collusion was void.

DISPOSITION IN THE LOWER COURT

The Trial Court ruled that the agents of the Defendant

had apparent authority to contract for the advertising services of the Plaintiff and awarded a judgment against the Defendant in the sum of \$11,180.00 together with costs of court and interest.

RELIEF SOUGHT ON APPEAL

The Defendant-Appellant, Motor Sales, Inc., seeks a reversal of the judgment of the Trial Court.

STATEMENT OF FACTS

The Defendant, a Richfield Company, commenced doing business in the Salt Lake County area approximately May 1, 1973. Dewey Sargent was the General Manager of the Defendant Company. The Defendant company placed in charge of the Salt Lake Office an agent by the name of Harold J. Bowen who had an assistant by the name of Jim Martin. Both agents sold house trailers on a "commission only" compensation basis (R143 L30). Harold J. Bowen had no authorization to make purchases or incur any expense over the sum of \$250.00 (R144). During the month of May 1973, Harold J. Bowen made a contact with an agent of KUTV. An advertising proposal was presented to the Defendant and the advertising contract was authorized by Dewey Sargent of Motor Sales, Inc. The advertising account was paid through the month of August 1973.

Harold J. Bowen, without authorization, contracted with the Plaintiff for additional advertising services and without the knowledge of the Defendant or its general manager or any of its officers, Harold J. Bowen was given an expense paid

trip for two to Mazatlan, Mexico (R121). Thereafter, Harold J. Bowen executed an additional contract which would have given him a five day, four night "Fun in the Sun" vacation trip for four in San Juan, Puerto Rico (R121). The contract committed Motor Sales, Inc. to an advertising budget in the amount of \$7,000.00 for a period of time from December 1, 1973 thru February 28, 1974. The contract was not discovered by any of the principals of Motor Sales, Inc. until the month of February, 1974 when a copy was mistakenly mailed to the Motor Sales, Inc. Richfield Office (R149 L20). The secretary of KUTV who had mistakenly mailed the contract immediately called the Richfield Office of the Defendant and requested that the contract be returned immediately since she was apprehensive that she would lose her job unless it came back to her. Because of the inadvertency, the Defendant received notice that there was a conclusive and secret contract between the agent of the Defendant which gave the agent a secret benefit to induce the Defendant to spend large amounts for advertising with the Plaintiff company. A copy of the "KUTV San Juan Holiday" contract is attached as appendix i and the previous contract was identified as in substantially the same form and under which Bowen was given the trip to Mazatlan, Mexico (R128).

The principals of Motor Sales, Inc. were not made aware of the collusive contracts herein mentioned (R168-169)

and Harold J. Bowen, the beneficiary under the contracts, stated that the benefits from the contract were to inure to him personally although he regarded it somewhat unusual since he "never won a trip for spending money" before (R170 L11). However, he regarded the contract for his personal benefit (R170 L18; R171 L6).

## A R G U M E N T

### POINT I

A PRINCIPAL IS NOT BOUND BY CONTRACTS MADE BY HIS AGENTS, EVEN THOUGH WITHIN THE SCOPE OF AUTHORITY, WHERE THE AGENT HAS AN INDIVIDUAL INTEREST AND ACCEPTS A SECRET COMMISSION TO ENTER INTO THE CONTRACT.

There is no dispute in the evidence that the KUTV Account Executive, R. K. Cardwell, contacted Harold J. Bowen and secured advertising for the month of September, October, November and December of 1973. The advertising was induced by a KUTV Mazatlan, Mexico Holiday Contract in which Harold J. Bowen, agent for Motor Sales, Inc. secured an expense paid trip to Mazatlan, Mexico. Further there is no dispute in the evidence that Harold J. Bowen also executed a contract in which he committed \$7,000.00 in advertising in order to secure a "Fun in the Sun" Holiday in San Juan, Puerto Rico. The Mazatlan, Mexico Holiday Contract was in all respects similar to the San Juan Holiday Contract introduced into evidence as Exhibit "7" and attached for reference as appendix i. The principals of Motor Sales,

Inc. were never aware of either contract at the time of their execution. It was only through an error made in the mailing office of KUTV that the "San Juan Holiday" contract came to light (R149). Although R. K. Cardwell was aware the billings for advertising went to Richfield either directly or indirectly, he at no time advised any of the principals of the company of either advertising contract (R129-130). Each contract offered a reward to an agent who would induce Motor Sales, Inc. to spend substantial sums of money.

Public policy has long denied the validity of contracts entered into where an agent has been influenced in his contact by a secret commission or gratuity. The Utah Legislature has made such conduct a criminal offense.

Included in the Utah Criminal Code under "Fraud" is Section 76-6-508, U.C.A. 1953, which reads as follows:

76-6-508 BRIBERY OF OR RECEIVING BRIBE BY PERSON  
IN BUSINESS OF SELECTION, APPRAISAL OR CRITISIM  
OF GOODS OR SERVICES:

(1) A person is guilty of a class B misdemeanor when, without the consent of the employer or principal, contrary to the interests of the employer or principal:

(a) He confers, offers, or agrees to confer upon the employee, agent, or fiduciary of an employer or principal any benefit with the purpose of influencing the conduct of the employee, agent, or fiduciary in relating to his employer's or principal's affairs.

The legislature seeks to correct a situation where a gratuity or commission is given directly to an agent to influence his judgment in entering into contracts which are binding upon his principal. In the event such conduct were permitted, the agent's judgment is at best suspect since one of his motives is to obtain a personal benefit for himself. Under such circumstances the principal is not liable on contracts made by his agents as a result of collusion with the third party, although otherwise the agent may have acted within the scope of his authority. The payment or agreement to pay a secret commission, bribe or gratuity to the agent by the third party as an inducement to enter into the contractual relations on behalf of the principal is such collusion as to entitle the principal to avoid the contract, although the principal may have received some benefit.<sup>1</sup>

This matter was carefully considered by the New York Supreme Court in the case of *Sirkin vs. Fourteenth Street Store*, 108 New York Supplement 830. An action was brought against the Fourteenth Street Store to recover \$1555.81, being the purchase price of certain hosiery and wrappers sold and delivered by the Plaintiff to the Defendant. The Defendant was a corporation conducting a department store in the City

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<sup>1</sup>3CJS Section 421 Agency, Page 276

of New York and the Plaintiff was a manufacturer of or a dealer of goods. The defense to the purchase contract was that the Plaintiff for the purpose of inducing the purchase of goods by the Defendant purchasing agent, agreed to pay a sum equivalent to 5% of the purchase price of the goods ordered. The Lower Court entered a decision favoring the Plaintiff because the goods had been delivered and holding that it would be inequitable for the Defendant to retain the goods and also to decline to pay for them.

In reversing the decision of the Lower Court, the Supreme Court of New York cited New York Penal Code which made it a misdemeanor to "corrupt influencing of agents, employees or servants by the giving of any gift or gratuity whatsoever."

The court then held a contract made in violation of a criminal statute, although not expressly prohibited or declared to be void, is prohibited, void and unenforceable whether executory or executed. The Court held:

"It is manifest that the legislature in enacting this criminal statute intended to emphasize and extend the public policy of common law, which rendered such contacts by agents for their own benefit void. It being the providence of the legislature to declare the public policy of the state, it is the duty of the court to be guided thereby in administering the law. Nothing could be more corrupting, nor have a greater tendency to lead to disloyalty and dishonesty on the part of servants, agents and employees, and

to betray the confidence of the the trust reposed in them, than these practices which the legislature has endeavored to stamp out; and I think nothing will be more effective in stopping the growth and spread of this corrupting and now a criminal custom than a decision that the courts will refuse their aid to a guilty vendor or vendee, or to anyone who has obtained a contract by secretly bribing the servant, agent, or employee of another to purchase or sell property or to place the contract with him . . . public policy requires that an agent, servant or employee shall perform the duties of his employment involving discretion and trust, with a single purpose of serving his master or employer, for the salary or compensation which he has agreed to pay, has the right to expect honest, faithful, loyal services rendered with a sole regard to his interest. The tenancy of this practice (permitting individual gratuities or commissions) is to make the servant disloyal and to have his action not only influenced, but controlled, by his personal interests, rather than by duties of his employment . . . the vise lies in making the agreement without the knowledge of the master."

The same question was also considered in *Standard Lumber Company vs. Butler Ice Company* by the Circuit Court of Appeals of the United States for the Western District of Pennsylvania, 146 *Federal Reporter* 360. In that matter, the Plaintiff, Standard Lumber Company, brought an action against the Defendant, Butler Ice Company for material and labor in a certain construction contract for the erection of an ice plant. The president of the Defendant company was paid \$2,000.00 to influence the Defendant

company in entering into the contract. The Court refused judgment to Plaintiff holding the contract was not only immoral, but it was illegal and criminal and therefore void. No court would be justified in enforcing the whole or any part of said contract.

The United States Circuit Court of Appeals, Sixth Circuit considered a similar question in the case of *American Ship Building Company vs. Commonwealth SS Company*, 215 Federal Reporter 296. The American Ship Building Company constructed and delivered a ship to Commonwealth SS Company for the price of \$385,000.00. It was agreed that the Plaintiff would pay a commission of \$15,000.00 to agents of the Defendant, which commission was not disclosed to the Defendant officers. The court authorized rescission by the buyer because of the fraud and then considered certain equitable matters since the ship had been used for a period of over six years.

Under statutes such as the one adopted by the Legislature of the State of Utah making the payment of a secret commission or bonus to an agent a crime, it has been generally held that resulting public policy would forbid an action for the price of goods sold and delivered or for work, labor and materials furnished.<sup>2</sup>

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<sup>2</sup>3CJS Section 421 Agency, Page 276

This court has consistently declared contracts unenforceable where the legislature has enacted a statute to protect the public.<sup>3</sup>

C O N C L U S I O N

Defendant's agents Bowen and Martin were granted a trip to Mazatlan, Mexico in October of 1973 for inducing advertising purchases by the Defendant from the Plaintiff and thereafter entered into a contract to induce the Defendant to spend an additional \$7,000.00 in committed advertising funds (R128). The bribe or gratuity was never disclosed to the Defendant or any of its principal operating officers. Under this circumstance, the Utah Statutes and public policy will not permit an action for the price of the advertising service extended by the Plaintiff in such a manner as to seriously influence or undermine their loyalty to a principal. We submit the contract for the advertising services is void and the judgment of the Lower Court should be reversed since it authorizes payment for services rendered under such circumstances.

Respectfully submitted,

TEX R. OLSEN  
Olsen and Chamberlain  
76 South Main  
Richfield, Utah 84701

*Attorneys for Defendant-Appellant*


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<sup>3</sup>*Olsen vs. Reese* 200 P2d 733; 114 Utah 411  
*Eklund vs. Elwell* 211 P2d 849; 116 Utah 521  
*Lyman vs. Taylor* 384 P2d 401; 14 U2d 362

CERTIFICATE OF MAILING

I hereby certify that on the 29th day of July,  
A. D., 1975, two copies of the within and foregoing  
Brief of Appellant were served upon the following by  
U. S. Mail, Postage Prepaid:

Mr. E. Nordell Weeks  
McMillian & Browning  
Attorneys for Plaintiff-Respondent  
1020 Kearns Building  
Salt Lake City, Utah 84101

  
\_\_\_\_\_  
Attorney for Appellant

# KUTV "SAN JUAN" HOLIDAY

## YOU RECEIVE:

Five days and four nights of "Fun in the Sun" for two in San Juan, Puerto Rico April 3 thru April 7, 1974.

Your excursion includes the following:

- A. Round trip air transportation for two from Salt Lake International Airport via DC8 regular airlines chartered jet.
- B. Deluxe room accommodations for four nights (based on double occupancy) at the Americana Hotel.
- C. One cocktail party; one hour; unlimited beverage, all taxes and gratuities included.
- D. Transfers including luggage handling.
- E. Luggage handling in and out of hotel.

NOTE: Airport taxes; service charges, taxes and tips at hotel ARE NOT included.

## I. FOR:

A \$3500. committment in air time to be run between December 1, 1973 and February 28, 1974.

The \$3500. cost must be over and above any expenditure made by your company or agency during the above dates and must also be over and above any committment previously made for the above dates.

The \$3500 committment is to be used in air time to be selected from availabilities at applicable rate card costs. Holiday price does not include production of commercials.

An agency may combine account expenditures to participate. No company or agency may purchase more than two holiday schedules for themselves.

## III. COST:

1973 Expenditure 0 1974 Committed Expenditure 7000  
Total Cost of Holiday Schedule 7000

Harold Bowen of FEDERAL MOBILE HOMES accept the KUTV "San Juan" offer. Our (firm) (agency) guarantees to schedule \$ 7000 in spot announcement advertising on KUTV from December 1, 1973 to February 28, 1974. I understand that the holiday schedule must be completed and paid for by March 15, 1974. and that this contract is firm and non-cancellable.

Submitted by:

KUTV Account Executive  
R.K. Cardwell  
Name  
Local Sales Manager  
Title  
Defendants  
Plaintiff's Exhibit 11-7  
Case No. 6802  
Dennis S. Robinson

Harold Bowen  
Signature  
FEDERAL MOBILE HOMES  
Name of Business  
RICHFIELD UTAH  
Address  
April 3, 1974  
Date of trip