

1978

# Gustave E. Bush v. Mickey M. Coult et al : Brief of Appellant

Utah Supreme Court

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THE LEGAL COUNSEL

vs.

COMMONWEALTH LAND INSURANCE  
INSURANCE COMPANY,

Third Party  
Defendant and  
Appellant

BRIEF OF

APPEAL FROM A JUDGMENT OF THE DISTRICT COURT

OF SALT LAKE COUNTY

HONORABLE JAMES S. SAWAYA, JUDGE

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FILE

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

-----

GUSTAVE E. BUSH,	*
Plaintiff,	*
vs.	*
MICKEY M. COULT, et al,	*
Defendants.	*

----- \* CASE NO. 15680

THE LOCKHART COMPANY,	*
Third Party	*
Plaintiff and	*
Respondent,	*
vs.	*
COMMONWEALTH LAND TITLE	*
INSURANCE COMPANY,	*
Third Party	*
Defendant and	*
Appellant.	*

-----

BRIEF OF APPELLANT

-----

APPEAL FROM A JUDGMENT OF THE DISTRICT COURT

OF SALT LAKE COUNTY

HONORABLE JAMES S. SAWAYA, JUDGE

-----

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IN THE SUPREME COURT OF THE STATE OF UTAH

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GUSTAVE E. BUSH, \*

Plaintiff, \*

vs. \*

MICKEY M. COULT, et al, \*

Defendants. \*

----- \* CASE NO. 15680

THE LOCKHART COMPANY, \*

Third Party \*

Plaintiff and \*

Respondent, \*

vs. \*

COMMONWEALTH LAND TITLE \*

INSURANCE COMPANY, \*

Third Party \*

Defendant and \*

Appellant. \*

-----  
BRIEF OF APPELLANT  
-----

-----  
PRELIMINARY STATEMENT

The Third Party Defendant, Commonwealth Land Title Insurance Company, is a corporation engaged in the general business of title insurance in the State of Utah, and will be referred to hereinafter as "Appellant". The Third Party Plaintiff, The Lockhart Company, is a corporation licensed as an industrial loan company under the laws of the State of Utah and will be referred to hereinafter as "Respondent".

"TR" refers to the Transcript of the Record, "R" refers

to the Record, and "Ex" refers to Exhibit.

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## NATURE OF THE CASE

In this case the plaintiff, Gustave E. Bush, filed suit against various defendants to quiet title to a parcel of land in Salt Lake County, Utah, contending that the interests asserted by each defendant were derived by a forged deed of conveyance. (R 2)

One of the defendants, in the original Complaint, The Lockhart Company, filed a Cross Claim against the other defendants, alleging that said defendants had executed and delivered to The Lockhart Company, Promissory Notes secured by Deeds of Trust (Ex. P 1, 2, 3, 4) upon the land which is the subject of this action, and further contending that said notes were in default and that Judgment should be entered in favor of The Lockhart Company for the sums evidenced by said Notes and that said Deeds of Trust should be foreclosed as a mortgage. (R 6-21)

Thereafter, Respondent filed a Third Party Complaint in two counts against the Appellant. The first count alleges that Appellant is liable to Respondent for losses incurred due to defects in the title of the real property given as security for the Promissory Notes aforesaid, and based upon policies of title insurance issued by Appellant in favor of Respondent. The second count alleges damages for attorney's fees, costs and failure to undertake the defense of the action instituted by Plaintiff, and for punitive damages incurred by reason of the Appellant's failure to defend the action instituted by the plaintiff. (R 22-32)

Appellant answered the third party Complaint of Respondent and asserted various defenses. (R 67-71). In brief, Appellant asserted that Respondent had a duty to seek recovery of its loss, if any, against the makers of the original Promissory Notes and Deeds of Trust, and further, that Appellant was not liable for any loss or damage, or the defense of said action by virtue of the fact that the loss or damage, if any, sustained by Respondent was excluded from coverage under the "Exclusions From Coverage" provisions of the applicable Commitment for Insurance and the policies of title insurance. (Ex. P-5, P-6, P-7)

Following discovery, the plaintiff, Gustave Bush, filed a Motion for Summary Judgment against the original defendants, which motion was granted, quieting title in the plaintiff.

The Respondent then filed a Motion for Summary Judgment against the defendants Coult and Harward, and a similar Motion against the Appellant. (R. 135). The later Motion was opposed by the Appellant. (R. 163-165). On May 17, 1977 the Motion for Summary Judgment in favor of The Lockhart Company and against the defendants Coult and Harward was granted. (R 176-177).

The issues existing between Appellant and Respondent were set down for trial after Respondent's Motion for Summary Judgment had been denied.

#### DISPOSITION IN THE LOWER COURT

At the conclusion of two days of trial, the Court, sitting without a jury, the Honorable James S. Sawaya, presiding, entered Judgment in favor of the Respondent and against the Appellant and made and entered Findings of Fact and Conclusions of Law,



and Judgment. (R 217-224). Appellant filed a Motion for New Trial, Objections to Findings of Fact and Conclusions of Law and Judgment (R 228-233), which were overruled and denied. (R 235-237). Thereafter, Notice of Appeal was filed. (R 238).

#### RELIEF SOUGHT ON APPEAL

Appellant asks that the Judgment and ruling of the trial court be reversed, and that Judgment be entered in favor of Appellant and against the Respondent.

#### STATEMENT OF FACTS

At all times material to this action, the Respondent corporation, The Lockhart Company, maintained a branch office at Provo, Utah, and employed as its manager an individual by the name of Gary Lyon. (TR 74-75). Mr. Lyon had been employed by the Respondent in a managerial capacity for some 13 years, and he was well versed and acquainted with mortgage loan transactions. (TR 74-75). During May, 1975, he was contacted by one Leon Harward, who stated that he had been requested to assist in the procurement of a mortgage loan for a party by the name of Jerome Yeck, who desired to use the money for development of a subdivision in Salt Lake County, Utah, and that a first mortgage on said property would be given as security by Mr. Yeck. (TR 76,77,79).

In the course of this initial contact, Mr. Lyon was informed that the loan was to be used for developing a portion of said tract of land which would contain in excess of 100 homes.

and that Holmquist & Sons Realtors would do the selling of the homes in the project. (TR 76, 77, 92, 101) Mr. Lyon testified that he "understood" that Mr. Yeck had fee title to the property in question and that the property comprised 126 acres of real property in West Jordan, Utah. (TR 82) Mickey Coult and Leon Harward were real estate agents employed by Holmquist & Sons Realtors. (TR 118-119)

At this time Mr. Lyon obtained a financial statement and "resume" on Mr. Yeck as well as an "updated" credit report. (TR 76-78) (Ex. D-15, D-16, D-17)

After said reports had been obtained, Mr. Lyon concluded that the Respondent would not be interested in making a loan to Mr. Yeck and so advised the real estate agent, Mr. Harward. (TR 80-81)

After the loan application for Mr. Yeck had been declined by the Respondent, Leon Harward once again contacted Mr. Lyon and asked "if we restructure the situation and put it (referring to the title) in a fee title or take the property into somebody else's name" could the loan be obtained. (TR 82, 83) To this inquiry Mr. Lyon stated that such could be accomplished, however it would require two separate loans of \$25,000.00 each, with one loan to be made in favor of Mickey Coult and the other to Merrill Harward, father of Leon Harward. (TR 82,83)

Mr. Lyon was then informed by Mr. Harward and Mr. Coult that they were in possession of an unrecorded deed to the subject property, signed by Gustave E. Bush, in favor of Deseret

Distributing Company, (a corporation in which Jerome Yeck was involved). (TR 83) Pursuant to instructions from Mr. Lyon, Leon Harward and Mickey Coult then delivered said deed to Western States Title Insurance Company for the purpose of obtaining a title policy or committment for title insurance. (TR 83) It should be noted that the Respondent transacted a vast majority of it's title insurance business with Western States Title Insurance Company at all times material to this action, and had transacted a great deal of business with them in the past. (TR 87)

Shortly after the delivery of said deed to Western States Title Insurance Company, Mr. Lou Livingston, chief administrative officer and counsel for Western States Title Insurance Company, telephoned Mr. Lyon and informed him that said deed had been "checked" and that the investigation revealed that Deseret Distributing Company, was a corporation not in good standing, that Mr. Yeck was a director of the corporation, and the Western States Title Insurance Company did not care to have any business transactions where Mr. Yeck was involved in any way. (TR 84, TR 33, Vol. II)

Mr. Lyon then informed Mr. Harward that Western States Title Insurance Company would not write the title insurance, however, Respondent would accept a title policy from another title insurance company if one could be obtained. (TR 85, 86) Subsequently, Mr. Coult delivered to Mr. Lyon a preliminary title report issued by Appellant. (TR 86, Ex. P-5)

Mr. Coult then took the original deed in favor of Deseret Distributing Company back to Jerome Yeck and requested that he obtain a new deed from Mr. Bush to Mr. Coult. (TR 124)

After this was accomplished, in mid June, 1975, the Respondent consummated two separate loans with the defendants Mickey Coult and Patricia Ann Coult, his wife, and Merrill W. Harward and Vera Mae Harward, his wife, each in the amount of approximately \$25,000.00 and obtained Promissory Notes and Deeds of Trust on the subject property. (TR 97, 98) (Ex. P-1, 2, 3, & 4)

In the course of all these transactions, Mr. Lyon, manager for Respondent, had been informed that Mr. Yeck and/or a corporation controlled by Mr. Yeck (Deseret Distributing Company) claimed to be an owner or possess an interest in the real property which is the subject of this action; (TR 76, 77, 79, 80, 82, 83, 84, 89) that plans existed for the development and sale of said property; (TR 92, 102, 108) that Jerome Yeck held an "option" or right to demand a reconveyance of the title upon repayment of the obligations in favor of Respondent (Ex. P-1, 2, 3, & 4) and that Mr. Yeck had agreed to repay the loans in favor of Respondent. (TR 134, 135)

At no time did Respondent furnish Appellant any written notice of the claimed interest of Jerome Yeck or of "his company" or of the existance of the deed of conveyance in favor of Deseret Distributing Company, or that Western States Title Insurance Company had refused to issue title insurance upon the property because of Mr. Yeck's involvement, nor did said

Appellant possess any such knowledge or information prior to the date that Summons and Complaint were served upon Respondent in this action. (TR 88, 89, 90, 91)

The Appellant and several other title insurance companies subscribed to a service generally identified as Dina-Comp, Inc., a "computerized title plant" which supplied computerized abstracts of title and Judgment records pertaining to real estate in Salt Lake County, Utah, during the times material to this action. (TR 66-67)

On about April 12, 1974, Dina-Comp, Inc., made an entry in the "general index" furnished to the members of it's service that they should be alerted to the name of Jerome Yeck with a notation that Utah Title Insurance Company should be contacted for further information. (TR 67-69) This precautionary action occurred as a result of Utah Title Insurance Company sustaining a loss of approximately \$45,000.00 in 1973-1974 due to a "forged deed" where Jerome Yeck was identified as the responsible party for the forgery. (TR Vol. II, 4, 5, 6, 7, 8, 9, & 10)

Approximately 5-6 years prior to the trial of this case, Western States Title Insurance Company insured title to a parcel of real estate in Salt Lake County, Utah, and as a result of a "forged deed", admitted to by Mr. Yeck, was required to respond to a claim by it's insured. This information was circulated widely among members of the title insurance industry, including Appellant. (TR Vol. II, 33, 36)

Many title insurance companies were alerted to the name

of Jerome Yeck and precautions were instituted to be aware of any request for title insurance where said party was involved in any manner. (TR Vol. II, 8, 10, 11-20, 23-26, 33-35, 61-71)

Some time after the loans to the defendants Mr. Coult and Mr. Harward had been consummated, the plaintiff, Gustave E. Bush, filed a Complaint on November 12, 1975 against Mr. Coult, Mr. Harward and The Lockhart Company seeking to quiet title to the subject property. (R 2)

After suit had been filed, and the Respondent served with process, Mr. Gary Lyon placed a telephone call to the office of Appellant and related to an employee of Appellant that the Respondent had been served with Summons and Complaint in this action and inquired what should be done. He was advised to contact counsel. (TR 38, 44) During the course of this conversation, it was related to the employee, by Mr. Lyon, that they had normally done all of their title insurance business with Western States Title Insurance Company and that they had originally tried to get title insurance from Western States Title Insurance Company on this property, however, it was refused because Jerome Yeck was involved and he had "burned them before". (TR 38)

#### POINT I

THE FINDINGS OF FACT ARE NOT SUPPORTED BY THE CREDIBLE EVIDENCE AND THEREFORE THE CONCLUSIONS OF LAW AND JUDGMENT ARE ERRONEOUS

#### ARGUMENT

Finding of Fact No. 10 (R 219) presents a gross dis-

tortion of the credible probative evidence and testimony. This Finding should be read in conjunction with Finding of Fact No. 9 to understand it's full significance. These findings are as follows:

"9. In this proceeding the Court has taken judicial notice of Findings of Fact, Conclusions of Law and a Judgment entered by this Court in the present action (Civil No. 231575) in favor of Gustave E. Bush, plaintiff and against the defendants named therein, (Mickey M. Coult, Patricia Ann Coult, Merrill Wilson Harward, Vera Mae Harward and The Lockhart Company) wherein it was held that Gustave E. Bush is the owner in fee simple of the property described above and that he has never executed any deed or document conveying any interest in the above described real property to any of the defendants named therein and that any purported conveyance from himself to the defendants Mickey M. Coult and Patricia Ann Coult does not contain the signature of Gustave E. Bush. Neither the Third Party Plaintiff nor the Third Party Defendant opposed Bush's Motion for Summary Judgment.

10. The Third Party Plaintiff, The Lockhart Company, had no knowledge of the above referenced defect and had no knowledge of any other defect, lien, encumbrance, adverse claim or other matter effecting the title to the property described above."

The committment for title insurance (Ex. P-5) and the two policies of title insurance which are at issue here (Ex. P-6, P-7) each contain the following significant terms and provisions in addition to the insuring clause:

- "EXCLUSIONS FROM COVERAGE"
- "1.....  
2.....  
3. Defects, liens, encumbrances, adverse claims, or other matters (a) created, suffered, assumed or agreed to by the insured claimant; (b) not known to the company and not shown by the public records but known to the insured claimant either at Date of Policy or at the date such claimant acquired an estate or interest insured by this policy or acquired the insured mortgage and not disclosed in writing by the insured claimant to the Company prior to the date such insured claimant became an insured hereunder; (c) resulting in no loss or damage to the insured claimant;



(d) attaching or created subsequent to Date of Policy (except as to the extent insurance is afforded herein as to any statutory lien for labor or material or to the extent insurance is afforded herein as to assessments for street improvements under construction or completed at Date of Policy)." (emphasis added)

The testimony illicited from Gary Lyon, manager of the Respondent corporation merits careful attention on this point. This witness was no novice in the mortgage loan industry. He was affiliated with The Lockhart Company for 13 years and served as the Vice President and Branch Manager of the Provo office. (TR 74, 75) He candidly admitted that the initial contact made with Respondent was for the purpose of securing a mortgage loan for a party by the name of Jerome Yeck; (TR 76-80) that a credit report and resume were obtained on Yeck; (D 15, 16) that property in West Jordan, Utah, comprising some 126 acres would be pledged as security for the loan; (TR 81, 82) that Yeck was buying the property and was "assumed" to be the owner of "fee title". (TR 80, 81, 82)

The testimony of Mr. Lyon is as follows:

"Q. And you were at that time considering making a loan to Mr. Jerome Yeck?

A. That's correct." (TR 80)

\* \* \* \* \*

"Q. (By Mr. Wall) After you received the initial request for the loan for Mr. Yeck, did you in the interest of time or for any other reason undertake to secure any evidence of the ownership or title of the property that was to be involved in the transaction?"



A. No, I did not.

Q. Was there to be some security for the proposed loan?

A. Yes, a first mortgage on the real estate in -- I think it's West Jordan." (TR 81)

\* \* \* \* \*

"Q. (By Mr. Wall) Yes. Did he in effect or in substance tell you if you would make the loan that Mr. Yeck would give you a first mortgage and lien on this property, the one hundred and twenty some odd acres in West Jordan?

A. He didn't tell me in so many words. It was just more or less presumed because he said he had the acreage and this was the man buying and I naturally assumed he had fee title to it.

Q. This was the man that was buying it?

A. Yes. Had fee title to it; that owned the property.

Q. Did you at any time after that undertake to obtain any title evidence on this property that they had referred to?

A. After we had rejected the loan then Mr. Harward came back and said, "If we restructure the situation and put it in a fee title or take the property into somebody else's name," would we go ahead with the transaction and I said, Yes, that would be feasible and then at that time he discussed with me about himself and I told him that there was no way because he had two loans with us at that time and his income would not justify him handling a payment on a twenty-five thousand dollar loan in that nature so then he mentioned about, "How about

Coult and his father?" And we had had previous dealings with his father in Idaho Falls, and I said, yes, I felt that we could get financial statements and tax returns and so on; we would check them and see if we could possibly work it this way." (TR 82-83)

Mr. Lyon further testified that he had been informed of the existance of a deed in favor of Deseret Distributing Company, a corporation known to be associated with Jerome Yeck, which pertained to the subject property (TR 82, 83, 84) and upon securing such information Mr. Lyon directed that said deed be delivered to Western States Title Insurance Company "to start the title work in it" or obtain a title policy. (TR 83, 84, 115) The following testimony of Mr. Lyon is relevant:

"Q. Was there ever at any time when you went to the Western States Title Insurance Company and solicited a Title Insurance Commitment from them that involved this piece of property?

A. What do you mean? When was--

MR. BURT: Your Honor, I object.

Q. (By Mr. Wall) Well, I am asking you if there ever was a time.

A. That that happened? After the two applications had been approved and the appraisal on the real estate had been made, I talked to Mr. Harward and Mr. Coult and they said they had a deed that was in the name of Deseret Distributing Company and I told them, "Would you please take that to Western States

Title Company", and which Mr. Coult did to obtain a title policy or committment for title policy from Western States Title.

Q. To answer my question, did you ever personally solicit a title report from Western States Title Insurance Company?

A. I did not. They called me before the policy-- or before I had a chance to order the committment from them.

Q. Did you ever talk to Mr. Lou Livingston?

A. Yes, I did.

Q. When did you talk to Mr. Livingston?

A. Mr. Livinston talked to me--now, I'm not familiar on the dates right there but it was during this period of time Mr. Coult had brought in the Warranty Deed into Deseret Distributing Company and Lou Livingston said he had called the State Capitol and checked the validity of the corporation and found the corporation had not paid its corporation tax and was not a corporation in good standing at that time and that he had found that Jerome Yeck was a director of that corporation and he was not interested in insuring that property and to the effect that the deed was not valid or that the property transfer was not valid, he just did not care to have any business transactions with Mr. Jerome Yeck.

Q. Now, this was what Mr. Livingston told you?

A. That is correct.

Q. And, here again, can you tell me in the time frame when that conversation occurred?

A. I would say that time frame was the last part of May and first part of June.

Q. At that point in time had you seen or requested a committment for title insurance from Commonwealth Title Insurance Company?

A. No, I had not.

Q. When he told you that they would not insure the title because of Mr. Yeck's involvement-- I think you indicated that was part of the reason?

A. That is correct.

Q. Did you make any effort to explore why?

A. No, I did not.

Q. Did you tell Mr. Coult or Mr. Harward that the title was uninsurable because of Yeck's involvement?

A. Yes, I did. I called --

Q. Who did you tell?

A. I think it was Mr. Harward.

Q. How did you convey that information to him?

A. Over the telephone.

Q. And would that have been at or about the date that you had your conversation with Mr. Livingston in late May?

A. It would have been the same date."

(TR 83-85)

Following the rejection by Western States Title Insurance Company of the request for title insurance, Mr. Lyon received a committment for title insurance (Ex P-5) issued by the

Appellant, (TR 86) and thereafter during mid June, 1975, Respondent concluded a mortgage loan transaction with the defendants Coult and Harward. Promissory Notes and Deeds of Trust were executed and recorded (TR 95, 98) (Ex. P-1, 2, 3, 4) following which policies of title insurance were issued by Appellant and delivered to Respondent. (Ex P-6, P-7)

The Respondent never gave Appellant any written notice, as required by the terms of the policies of title insurance and commitment, of Jerome Yeck, Deseret Distributing Company, or the rejection of title insurance by Western States Title Insurance Company or the manner in which the title of the subject property had been manipulated to circumvent recordation of a known and existing deed in favor of a corporation known to be directly involved with Jerome Yeck. (TR 88, 133) A portion of the testimony of Mr. Lyon highlights this point:

"Q. Now, did you ever pursue that telephone conversation by giving any written notice to Commonwealth Land Title Insurance Company of the interest of Mr. Yeck or his company that you have just related to the Court?

A. No, I did not. I didn't see any reason to.  
(TR 87, 88)

Other significant testimony was illicit from the witness Delmar Rowley, manager of the Provo office of Western States Title Insurance Company. This party testified that he was a long time acquaintance of Gary Lyon; that he had several discussions with Mr. Lyon concerning the subject litigation and that Mr. Lyon had previously informed him that the Salt Lake

office of Western States Title Insurance Company had declined to write title insurance on the property in question because of the parties involved and in particular a party by the name of Yeck; that he had told the other loan applicants that if they could get another company to write the title insurance, the loan could be made, and that Western States Title Insurance Company wanted nothing to do with the request for title insurance as long as Mr. Yeck was involved. (TR 48-52) The Respondent did not refute this testimony.

In light of this compelling evidence and testimony, it is incredible that the trial court would adopt Finding of Fact "No. 10".

A comment made by the court in the course of the trial is of interest. During the questioning of the witness Gary Lyon, the following questions, answers, and colloquy occurred:

"Q. You were aware of the fact that there was a deed where, had it been recorded, it would have reflected the interest of this Deseret Company, whatever the name was?

A. That's correct.

Q. And that Yeck was an agent or a principal of that corporation, right?

A. Yes, I was aware that there was a deed.

Q. And how did you propose to circumvent that deed so that that deed would not go of record and then result in a new deed issuing to someone else?

A. Well, the -- when we discussed the -- deed that had not been recorded, Mr. Harward said, well, that Mr. Bush was in

Ogden, and that it would be very simple to get a new deed and so instead of going into this corporation that Mr. Bush would just go ahead and deed straight through to the new principals on the new property.

Q. Was there any discussion about how you would get the interest of this Deseret Company out of the title?

A. No, there was not.

Q. But you were aware of the fact that that deed existed showing that that company with Yeck as a party was in existence?

MR. HOWE: You Honor, I'm going to object. There is no foundation for the deed and Mr. Yeck being tied together. None whatsoever.

MR. BRANT WALL: He has testified that he knew the corporation and Mr. Yeck were in on it together.

MR. HOWE: He testified he knew of a deed of the corporation or not a deed from Mr. Yeck or Mr. Yeck's involvement with the corporation.

THE COURT: I understood him to testify in checking the Secretary of State's office -- did you check?

THE WITNESS: I didn't check with it. Mr. Livingston did.

MR. BRANT WALL: You were advised by Mr. Livingston, I think you said, that that's what he had learned.

THE COURT: This is prior to this?

THE WITNESS: Yes.

THE COURT: Well, then he had some awareness of the fact Mr. Yeck was involved with that corporation and as a member of the Board of Directors as I recall you saying.

THE WITNESS: That's what he said."

(TR 89-90)

To further highlight the obvious erroneous finding, it is important to note the language of Conclusion of Law No. "2" which reads:

"2. The third party plaintiff's knowledge of Jerome Yeck did not constitute a defect or other matter which would preclude third party plaintiff's recovery under the policies."

The Findings and Conclusions seem totally incongruous. In the Findings of Fact, the Court says that Respondent had no knowledge of any defect, lien, encumbrance, adverse claim or other matter affecting the title, and then concludes that knowledge did exist of Jerome Yeck.

The record is replete with the testimony of Respondent's own manager conclusively establishing that there existed documents and other matters which precluded the procurement of title insurance from the title insurance company which Respondent regularly conducted business with, and that a known deed in favor of Deseret Distributing Company had intentionally been kept off the record, and that Respondent did not, at any time, inform the Appellant in writing of the known asserted claims and interests of Jerome Yeck and Deseret Distributing Company.

(TR 82, 83, 84, 85, 89, 91, 108, 115) (Ex. P-22)



In line with all of the foregoing evidence and testimony, the Finding of Fact No. "10" adopted by the Court finds no support, and as stated in the case of Continental Bank & Trust Company v. Stewart, 4 Ut. 2d 228, 291 P2d 890, the Court observed that "where certain testimony standing alone might be sufficient to support a finding, it must always be appraised in the light of all attendant circumstances and countervailing testimony. If when so viewed, it appears so clearly and palpably unreasonable that no fact trier acting fairly and reasonably could accept it, then it must be rejected as a matter of law, and the fact determined otherwise..."

It should also be noted that many courts view with disfavor the Findings prepared and adopted verbatim by one side, and as the Supreme Court of the United States observed in the case of United States v. Marine Ban-Corporation, Inc., (1974) 418 U.S. 602, 41 L ed 2d 978, 945 ST 2856, at footnote 13:

"In adopting verbatim proposed Findings of Fact in a complicated Section 7 antitrust action, the District Court failed to heed this Court's admonition voiced a decade ago." (Citing United States v. El Paso Natural Gas, op. cite.)

In the case of Prosser v. Schmidt, 262 P2d 272 (Colo 1953) the Supreme Court of that jurisdiction noted an oft repeated rule as follows:

"Ordinarily we are slow to disturb a judgment entered upon the fact findings made by a court or jury on conflicting evidence; however, in cases where there is no serious conflict in the evidence and the trial court makes erroneous application of the law to the facts in hand, we do not hesitate to reverse the judgment, especially on questions of

law in the case made abundantly clear and decided in the same litigation between the same parties when the cause was formerly before this court." (See Mehlbrandt v. Hall, 213 P2d 605)

In the light of all credible evidence and testimony, as reflected by the total record on appeal, we respectfully submit that the trial court misconceived the law applicable to the facts herein involved and thus committed reversible error.

## POINT II

THE RESPONDENT CONCEALED OR MISREPRESENTED FACTS WHICH IT KNEW WOULD INFLUENCE THE RISK OF ISSUING THE POLICIES OF TITLE INSURANCE AND WOULD INFLUENCE INSURER'S JUDGMENT IN MAKING THE CONTRACTS, HENCE, RESPONDENT'S CLAIMS ARE EXCLUDED FROM COVERAGE.

The evidence presented had shown that a concealment of material facts was carried on by several of the parties, including the Coultts, the Harwards, and The Lockhart Company and it's various agents involved in the transactions. Does this concealment then preclude the insured from obtaining the relief claimed? The conclusion from the authorities cited below is that the insured may not recover. In 31-19-8 U.C.A. (1953) it states, in part:

- "(1) All statements and descriptions in any application for an insurance policy or annuity contract, or for the reinstatement or renewal thereof, by or in behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy or contract unless
- (a) fraudulent, or
  - (b) material either to the acceptance of

the risk, or to the hazard assumed by the insurer; or  
(c) the insurer in good faith either would not have issued, reinstated or renewed it at the same premium rate, or would not have issued, reinstated or renewed a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise."

It is apparent that under the facts presented, the Appellant should be exempted from liability under all three of these provisions.

This Court has been confronted with similar issues on a number of occasions. In the case of Theros v. Metropolitan Life Insurance Company, 407 P2d 685 (Utah 1965), all of the facts in an application for life insurance had been provided to the company agent but recorded falsely and the insurance applicant then signed the application which application contained the false statements. The Court ruled, in part, as follows at pages 687-688:

"In order to defeat recovery on an insurance policy because of misrepresentation in the application, the misrepresentations must have been made with an intent to deceive and defraud the insurance company. However, such an intent may be inferred where the applicant knowingly misrepresents facts which he knows would influence the insurer in accepting or rejecting the risk. The same rule should apply where the applicant knowingly, or with constructive knowledge, permits such misrepresentations to be submitted to the insurance company." (Emphasis added)

A similar ruling was handed down in the case of Page v.

Utah Home Fire Insurance Company, 391 P2d 290 (Utah 1964).

wherein the Court stated at page 292 that:

".... the failure to make disclosure of facts which would have a material bearing upon the decision as to whether to issue the insurance constitutes a fraud on the principal sufficient to avoid the policy...." (Emphasis added)

See also the cases of Wootton v. Combined Insurance Company of America, 395 P2d 724, (Utah 1964); Farrington v. Granite State Fire Insurance Company, 232 P2d 754 (Utah 1951).

It is the general rule in most, if not all, jurisdictions that the "...insurer may avoid liability on a policy of title insurance where the policy was obtained through the fraud of insured, or the policy may be avoided where, in violation of a provision in the policy, insured has made an innocent misrepresentation of a fact material to the risk, or had intentionally concealed or suppressed such fact...." 45 CJS, Insurance, Section 665, p 596. (See CJS for numerous cases thereunder for support of said position.) Thus we see that the Utah statutory provisions and the Utah cases are in agreement with the great weight of authority on the matter.

With regard to the intent of the insured to deceive the insurer the Courts have held that "there is a presumption of intent to deceive from the knowing concealment of material facts unless such presumption is overthrown by substantial evidence. \*\*\* The burden is upon the plaintiff to prove lack of an intent to deceive on the part of the insured." Castagno v. Occidental Life Insurance Company, 151 F. Supp. 781, at 783 (Utah 1973).

It is also the general rule that conditions set forth in a policy are not per se violative of the basic nature of title insurance and it is the general rule that parties to an insurance policy are free to define what losses or encumbrances they intend to cover. Lawyers Title Insurance Corp., v. Research Loan and Investment Corp., 361 F2d 764, at 768 (1966). From the facts presented in this action it seems apparent that the limitations set forth in the policies involved in this action exclude Respondent's claims from coverage. However, it should be kept in mind that this rule notwithstanding and absent any exclusionary provision in the policy, the above cited provision of the code should provide full protection to the Appellant for incidents such as are involved herein.

It has been stated that "Title insurance is no different from any other type of non-marine insurance, and, as such, is governed by the same general rules and principles applicable to issuance, validity and interpretation of policies of insurance generally." Weir v. City Title Insurance Company, 125 N.J. Super. 23, at 29, 308 A2d 357 (1973). See this case for a listing of additional decisions so holding.)

It is also the continuing responsibility and duty of the claimant and applicant to divulge "...newly discovered matters arising between the application for, and confirmation of, the contract where they come to the applicant's knowledge and render his former answers no longer true." Id.

From the evidence it is clear that there was a concealment and to a degree and in manner misrepresentation of facts.

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The insured knew that Yeck had and claimed a lien and interest in the subject property and it was their duty to disclose this information to the insurer. It is the insurer's duty to search the records for Judgments, liens, etc., on a named individual to protect their interests and those of the claimant and to accomplish this goal it is mandatory that the claimant provide all pertinent information to the insurer. In the case of Apolskis v. Concord Life Insurance Company, 445 F2d 31, the Court stated that an applicant has a duty to act in good faith toward his potential insurer in an attempt to make a full and complete disclosure of all relevant information and that the claimant or applicant must not judge the materiality of the information on his own, but that he must submit all information to the insurance company and then let the company decide on the materiality.

In the case of Fidelity and Casualty Company of New York v. Middlemiss, 135 P2d 275, 103 Utah 429, issues bearing upon the critical point involved herein, that is, failure to disclose facts which would naturally influence the insurer's judgment in making an insurance contract, were involved. The Court there stated, with regard to the issue of materiality:

"A material representation is one which ordinarily would influence a prudent insurer in determining whether to accept or reject a risk, or in fixing the amount of premium in the event of such acceptance or in excepting some risk or part thereof from coverage."

The Court then citing Zolintakis v. Equitable Life Assurance Society, 10 Cir., 97 F2d 583 at 586, went on to set

forth the recognized rule as follows:

"A misrepresentation will not constitute a defense to an action on a policy of insurance unless it was intentionally untrue or was made with a reckless disregard for its truth or falsity. Where an insured knowingly makes a material misrepresentation, proof of an actual, conscious purpose to deceive is not necessary.

"A material fact is any fact, the knowledge or ignorance of which would naturally influence the insurer's judgment in making the contract, in estimating the degree and character of the risk, or in fixing the rate of insurance." (Emphasis added)

See also Connecticut Fire Insurance Company v. Colorado Leasing, Min. & Mill. Co., 116 P 154; Charlton v. Wakimoto, 216 P2d 370; Pelican v. Mutual Life Ins. Co. of New York, 119 P 778; Telford v. New York Life Insurance Co., 69 P2d 835; Temperance Ins. Exchange v. Coburn, et al, 379 P2d 653; All American Life & Casualty Co. v. Krenzelok, 409 P2d 766.

The Respondent thus had a duty to disclose all information concerning the title to the property in question and failed to do so. This failure constituted the withholding and concealment of material facts which, if known by the Appellant, would have enabled the Appellant to exercise a most valuable prerogative, i.e. a determination of whether or not it was willing to assume the risks in light of all attendant circumstances.

The testimony on this point clearly indicates that had all matters been revealed, including particularly the involvement of Jerome Yeck and/or his corporation, the Appellant would



not only have scrutinized the application carefully, but would not have issued the policies of insurance involved herein. (TR Vol. II 15, 16, 64)

### POINT III

THE RESPONDENT BY ITS CONDUCT AND KNOWLEDGE, CREATED, SUFFERED, ASSUMED OR AGREED TO ACCEPT THE RISK COMPLAINED OF, AND PURSUANT TO THE PROVISIONS OF PARAGRAPH #3 OF THE EXCLUSIONS FROM COVERAGE OF THE COMMITMENT TO INSURE AND POLICIES OF INSURANCE, THE CLAIMS OF THE RESPONDENT ARE EXCLUDED FROM COVERAGE

Paragraph #3 of the "Exclusions from Coverage" provisions of the commitment to insure and the title insurance policies (Ex. P-5, P-6, P-7) provide that if the insured creates, suffers, assumes or agrees to defects, liens, encumbrances, adverse claims, or other matters, which are not known to the insurer and not shown by the public records but known to the insured claimant either at Date of Policy or at the date such claimant acquired an estate or interest insured by the policy of insurance, or acquired the insured mortgage and not disclosed in writing by the insured to the insurer prior to the date the insured claimant became insured, such matters are expressly excluded from coverage.

The testimony of Respondents own manager, supra, stands as a total indictment of the Respondent on these issues. It appears conclusive from said testimony that the Respondent was willing to assume full responsibility for all consequences which might flow from the intentional concealment of the facts not



revealed to Appellant.

The compelling conclusion which must be drawn from the total evidence and testimony is that the Respondent was put on notice by the title insurance company which it regularly conducted it's business with (Western States Title Insurance Company) that title insurance could not be obtained if Jerome Yeck was involved in any manner with the title to the property to be insured. It is interesting to note that after the loan application had been restructured to circumvent Jerome Yeck and or Deseret Distributing Company and the existing unrecorded deed to Deseret Distributing Company, Respondent made no further attempt to secure title insurance from Western States Title Insurance Company, but rather saw fit to quietly sit by and allow another company (Appellant) to issue its commitment to insure and policies of title insurance totally unaware of the risks, which if known to the Appellant would have undoubtedly resulted in said policies being denied.

Respondent has its judgments against the makers of the original notes and should be left with its recourse against them for the recovery of its loss, if any. To conclude otherwise violates every sound legal doctrine and equitable principal.

#### CONCLUSION

Respondent was the co-architect of this entire transaction. The Conclusions of Law are clearly irreconcilable and contrary to the significant Findings of Fact, and such Findings of Fact are clearly without support in the Record.

Respondents failure to adhere to requirements and provisions of the committment to insure and the policies of insurance should exclude Respondents claims from coverage.

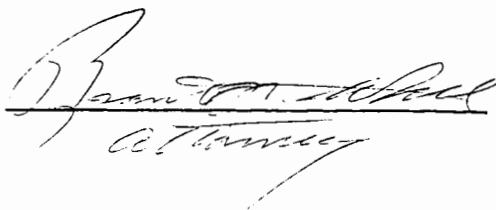
The Respondent, having assumed the consequences of its own design by concealing known facts which it knew would influence the judgment of the Appellant in issuing committments to insure or policies of title insurance, should now look to the parties who acted in concert with it for such relief as may be available.

We respectfully submit that the Judgment of the lower court should be reversed.

Respectfully,

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I hereby certify that two copies of the foregoing Brief of Appellant were delivered to Gary R. Howe and W. Clark Burt, of Callister, Greene & Nebeker, 800 Kennecott Building, Salt Lake City, Utah, 84113, this 30 day of June, 1978.



Attorney