

1986

# Johnny Haig v. Orrice McShane : Brief of Appellant

Utah Supreme Court

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Robert H. Wilde; Cook and Wilde, P.C.

Donn E. Cassity, J. Ray Barrios; Romney, Nelson, and Cassity.

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860265  
IN THE SUPREME COURT OF THE STATE OF UTAH

JOHNNY HAIG,

Plaintiff/Respondent,

vs.

ORRICE McSHANE,

Defendant/Appellant.

CASE NO. 860265

Category 13 b.

APPELLANT'S BRIEF

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PARTIES

Plaintiff in the lower Court proceeding was Johnny Haig. Defendant was Orrice McShane. Defendant, McShane third-party complained against Ronald Davey, third-party defendant, not a party to this appeal.

ISSUES ON APPEAL

The issues raised by this Appellant on appeal are as follows:

1. The statute upon which plaintiff relied, Utah Code Annotated, Section 7-15-1(1), as applied to this defendant, Orrice McShane, is unconstitutional under the facts of this case, and denies this defendant an opportunity of substantive and procedural due process of the law.
2. The trial Court erred by failing to recognize that portion of the holding in Howells, Inc. v Nelson, 565 P2d 1147, (1977), in which the facts of that case, and as directly on point with the facts of this case, take the instrument, or, in this case, check, out of the purview of the statute upon which plaintiff relies.

3. The trial Court erred by granting an award of attorney's fees to plaintiff in that the Order for Partial Summary Judgment was inappropriate under the facts of this case, and an award of attorney's fees was therefore inappropriate.

#### MATERIAL FACTS

The only material facts of record in this appeal are found in the Plaintiff's Memorandum In Support Of Plaintiff's Motion For Summary Judgment and in Defendant's Memorandum Of Points And Authorities In Support Of Defendant's Opposition To Plaintiff's Motion For Partial Summary Judgment. Those facts are as follows:

Defendant/Appellant, (hereinafter referred to as Appellant), Orrice McShane, was an officer of the Jay Welch Chorale Corporation, also known as the Musical Arts Society, volunteering his time, without pay, to the corporation at the time of the events of which the Plaintiff/Respondent, (hereinafter referred to as Respondent) complained. The third-party defendant in the action below, Ronald Davey, was the paid General Manager of the Jay Welch Chorale Corporation.

The Jay Welch Chorale Corporation contracted with the Respondent's orchestra to provide the backup music for a concert of the Jay Welch Chorale Corporation to be performed in Las Vegas, Nevada, in December of 1982. Ronald Davey, as General Manager of the Jay Welch Chorale Corporation, promised, in behalf of the Jay Welch Chorale Corporation, to pay the Johnny Haig Orchestra, said promise being to pay for the

Orchestra's services at sometime in the future.

A corporate check was issued to Johnny Haig upon the specific condition and agreement by Johnny Haig and Ronald Davey, that the check not be presented for payment until it could be paid at a time in the future, said time being uncertain.

The corporate check given to Johnny Haig by Ronald Davey, General Manager of the Jay Welch Chorale Corporation, required two (2) signatures of officers of the corporation to be valid. It was undisputed that both signatories, i.e., Ronald Davey and Appellant signed the corporate check, and did so in their capacities as corporate officers.

#### SUMMARY OF ARGUMENT

Appellant argues that his due process rights have been violated by the interpretation of the statute relied upon by Respondent, in that the statutory presumption of liability to anyone signing an instrument denies Appellant the right to defend against the imposition of such liability by not allowing Appellant to present facts which preclude liability from accruing against Appellant.

Further, Appellant is denied the ability to argue facts and law, as stated by this Court, which place Appellant outside of the purview of the statute relied upon by the Respondent.

The Appellant also argues that since the lower Court erred in granting partial summary judgment against Appellant, it also erred in awarding Respondent his attorney's fees.



### ARGUMENT

The statute relied upon by Respondent, Utah Code Annotated, Section 7-15-1(1) is a statute which presents a statutory presumption that anyone signing an instrument, in this case a check, which is presented for payment and is dishonored, is held liable to the holder, regardless of the facts or circumstances of any individual case. The statute above cited purports to be a strict liability statute. However, the statute makes no distinction among signors. In this case the check was a corporate check requiring two (2) signatures of corporate officers, the check was given with the explicit instruction to Respondent, acknowledged by Respondent that such check would not be good until some time in the future.

In 1977 this Honorable Court in Howells, Inc. v Nelson, 565 P.2d 1147, (1977) stated:

The law is that where the maker and payee are aware that there are not funds presently available to pay a check and it is therefore post dated, or agreed to be held, it does not come within the definition of a check, which must be payable upon demand, but is properly regarded as a promise to pay in the future. (Nelson at 1149-50; see also, State v Bruce, 262 P.2d 960). (Emphasis added).

There are no new cases contradicting the <sup>Howells</sup>~~Nelson~~ case with respect to the interpretation of Utah Code Annotated, Section 7-15-1(1). The current Section 7-15-1(1) in the Utah

Code Annotated was enacted by the Utah State Legislature in Laws of 1981, Chapter 16, Section 13. A review of the Legislative history of that 1981 enactment of the law upon which Respondent relies, shows that Section 7-15-1, et seq., was enacted by Senate Bill 134, which is the Financial Institution Act of 1981. Further research of the Legislative history reveals that there was no recorded comment or floor debate or discussion of this particular Section of the Bill, and, that the Section in question passed on March 12, 1981, to be effective on July 1, 1981, and was simply tacked onto the Financial Institution Act of 1981 without comment. If the Legislature had intended to legislate around the holding of the Howells case, supra., there would have been some comment regarding the reasons for limiting or eliminating the result of the Howells holding under the Howells facts.

The Howells case clearly carves out an exception to the purported strict liability of the Section 7-15-1(1). The 1981 legislation changing 7-15-1(1) does not alter the Howells fact situation. To allow the Section 7-15-1(1) interpretation of the Howells facts (identical to the facts of this case) to stand by the ruling of the lower Court herein, is to deny this Appellant his opportunity to present facts to a trier of fact for determination as to his liability in this fact situation. Put another way, if the lower Court's ruling that Utah Code Annotated, Section 7-15-1(1) is a strict liability statute is allowed to stand, then this Appellant is denied

his right to substantive due process by not allowing him to present his facts to a trier of fact for a determination as to whether or not he falls, factually, within the exception carved by Howells.

It appears to Appellant that the Legislature, in enacting Section 7-15-1(1), has attempted to balance the competing interests of the merchant and financial institution as against the check writer to lessen the burden upon the merchant and financial institution by making the maker of a check pay the amount thereupon if such check is dishonored. However, the Section 7-15-1(1) enactment goes too far in impairing the rights of makers, or, as in this case, the rights of corporate co-makers in fact situations wherein this Court has stated that the instrument is not an instrument within the meaning of the statute. Again, this Appellant has been substantively deprived of his right to present his facts to a trier of fact for their determination of whether or not Appellant is liable to Respondent.

This Court has stated in Wells v Children's Aid Society of Utah, 681 P.2d 199, at 204-5 (1984):

Substantive due process concerns  
the content of the rules specifying  
when a right can be lost or impaired.  
This question can arise in the context  
of a hearing where the procedural  
formalities were observed.

\* \* \*

(The Court speaking of In re J.P.,  
648 P.2d at 1375)

That holding assumed that the judge's hearing met all the requirements of procedural due process, but concluded that the statute was invalid in its substantive content. (parenthetical added)

Utah Code Annotated, Section 7-15-1(1) as interpreted by the Court below presents a substantive due process challenge because it specifies a particular substantive rule which impairs Appellant's ability to have his facts heard. Facts which have previously been held by this Court to take Appellant out of the purview of the very statute which denies him his ability to be heard. The substantive content of Section 7-15-1(1) creates a statutory presumption of liability regardless of the facts presented to the court. If a maker were to be forced to sign a bad check at gun point, that maker would be held liable for the check under the lower Court's interpretation of Section 7-15-1(1) because that maker would not be able to get his or her facts before the court. Section 7-15-1(1), as interpreted by the lower Court, is a strict liability statute that impairs a maker's rights in violation of the Constitution of the State of Utah, Article I, Section 7, by depriving the maker of, and affecting the maker's, liberty. As applied to this Appellant, there is no rational relationship between the purpose of the statute and the deprivation of this Appellant's liberty.

In this case, as to this Appellant, Appellant signed only as an officer of a corporation, yet the Respondent has held Appellant personally liable, with no evidence being presented to Court or jury as to whether or not the corporation or the

the other signatory has been made to pay the obligation.

The Statute on fraudulent checks as set forth in Utah Code Annotated, Section 7-15-1(1) is invalid, as it is, in substance, in violation of this Appellant's due process rights as guaranteed by the Constitution of The State of Utah, Article I, Section 7.

It follows that if the above cited statute is invalid as to this Appellant because of its substantive due process defects, then the award of attorney's fees to Respondent based upon Section 7-15-1(3) is also inappropriate.

#### CONCLUSION

The Court below did not take into account the holding of the Howells case which had facts on point with the facts of the instant case. The facts of the instant case take the "instrument" signed by Appellant out of the purview of the statute upon which Respondent relies.


The Statute, Utah Code Annotated, Section 7-15-1(1) and the attorney fee matter in Section 7-15-1(3) are rendered invalid as applied to this Appellant due to the statutes substantive due process defects.

This Court should remand the case to the District Court for trial of the factual issues consistent with the holding in the Howells case, otherwise this Appellant's right to due process has been violated.

Dated this 15th day of September, 1986.

Respectfully submitted,

ROMNEY, NELSON & CASSITY



J. Ray Barrios  
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed four (4) true and correct copies of the foregoing APPELLANT'S BRIEF to attorney for Respondent, Robert H. Wilde of the law firm of COOK & WILDE, P.C., 6925 Union Park Center, Suite 490, Midvale, Utah, postage prepaid, this 16<sup>th</sup> day of September, 1986.

