1980

First Security Bank of Utah v. Colonial Ford, Inc. et al : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

FIRST SECURITY BANK OF UTAH, N.A., a corporation,	)	
Respondent,	)	
vs.	)	
COLONIAL FORD, INC.,	)	Case No. 15745
Defendant,	)	
and	)	
LEGRANDE L. BELNAP and DORIS BELNAP,	)	
Appellants.	)	

BRIEF OF RESPONDENT

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT

OF SALT LAKE COUNTY, STATE OF UTAH

HONORABLE G. HAL TAYLOR
District Judge

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a judgment entered in favor of plaintiff/respondent as against defendants/appellants LeGrande L. Belnap and Doris Belnap by the Honorable G. Hal Taylor, District Judge, sitting without jury. Default judgment had been previously entered against defendant Colonial Ford, Inc. No appeal was taken from that judgment.

RELIEF SOUGHT ON APPEAL

Appellants LeGrande L. Belnap and Doris Belnap have filed this appeal seeking reversal of judgment of the

trial court entered in favor of respondent, First Security Bank of Utah, N.A. It is respondent's position that the lower court's decision should be affirmed.

STATEMENT OF THE FACTS

At all relevant times prior to September 14, 1976, defendant Colonial Ford, Inc. held a checking account at the Sugar House Branch of respondent, First Security Bank of Utah, N.A. (R. 209.) Appellants LeGrande and Doris Belnap were respectively President and Vice President of the corporation. (R. 192, 171.) They were also its major shareholders. (R. 198.)

Prior to September 14, 1976, the corporate checking account became overdrawn in the approximate sum of $57,000. (R. 209.) As a result of the overdraft the manager of the Sugar House Branch of the Bank, Ronald Fulkerson, contacted Mrs. Belnap by telephone and requested that she arrange for payment of the overdraft. (R. 209, 211.) Eventually, representatives of Colonial Ford and of the Bank met on September 10, 1976. Present at the meeting were David Slater, an officer of Colonial Ford, Kenneth Rothey, Colonial Ford's attorney, Mr. Fulkerson, and the branch's assistant manager, William Allen. (R. 213.)

At the meeting the bank officers proposed that the overdraft be paid by means of a promissory note signed by Colonial Ford and a guaranty signed by the Belnaps. (R. 161, 216, 239.)

At trial there was some conflict in the testimony of the witnesses as to the nature of the guaranty. Rothey testified that the guaranty was one of collection. (R. 161.)

Fulkerson and Allen testified that the terms of the guaranty were not discussed. (R. 216-218.) Fulkerson further testified that he showed Rothey the standard guaranty form used by the Bank which he intended to use in this transaction. (R. 216-217.) Fulkerson also testified that prior to this action he was unaware that a guaranty could be conditional. (R. 218.)

On September 14, 1976, Fulkerson arranged with Rothey or with the Belnaps to deliver the documents which he had prepared. (R. 218-225.) He personally delivered the documents to the Belnaps at the offices of Colonial Ford. (R. 225.) When he arrived Mrs. Belnap asked Fulkerson if the documents he was carrying were those which she had discussed with her attorney. He responded that they were. (R. 225.) Fulkerson further explained that one of the documents he had brought was a "personal guaranty". (R. 225.)

Fulkerson observed that Mr. Belnap examined the guaranty and other documents before he signed them. (R. 226.) The guaranty itself bears the word "GUARANTY" in bold face type at the top of the form. (Exhibit P-2.)

Defendant Colonial Ford subsequently defaulted in making its payments under the note. Respondent thereupon brought this action seeking judgment against both Colonial Ford under the note and against the Belnaps under the guaranty. Defendant Colonial Ford failed to answer respondent's Complaint and default judgment was entered. (R. 12.) Appellants' Answer to plaintiff's Complaint (R. 14-16) besides a general denial of

the allegations of the Complaint set up the twin defenses of lack of consideration and fraud. (R. 15, Third Defense, paragraph 3.)

On January 30, 1978, the Hon. David K. Winder, Law and Motion Judge, pre-tried the case. As required by the Rules of Civil Procedure, respondent's counsel prepared a proposed pre-trial order, a copy of which was personally delivered to appellants' then-attorney, Mr. Rothey. After reviewing the order, Judge Winder signed it on February 1, 1978. (R. 107.) In the order Judge Winder acknowledged that the unresolved issues of law related to the defense of fraud raised by appellants in their Answer. (R. 106-107, paragraph VI.) The order, which had been tacitly approved by appellants' counsel, contained no indication that appellants wished to raise the issue of mistake.

On the morning of the trial appellants' counsel moved to strike the pre-trial order -- primarily in an effort to allow Mr. Rothey to testify. (He was not one of the witnesses listed in the order.) (R. 140.) Both counsel agreed to the striking of the order, whereupon the trial judge reframed the issues as defined by both counsel. Based upon his examination of the discarded pre-trial order and upon his discussion with counsel, the court conducted the following dialogue with both attorneys:

> THE COURT: . . . and based upon the allegations of fraud, the ultimate determination to be made is whether or not that guarantee [sic] dated the fourteenth of September, 1976, is valid. Will you stipulate that that's the issue actually?
>
> MR. KLEMM: Yes, your Honor.

MR. GUNN: Yes, your Honor. . . .

(R. 150-151.)

THE COURT: So the plaintiff has made the prima facie case by the introduction of the promissory note and the guarantee [sic]. All you seek to do in this case is to avoid the guarantee [sic] by the allegation of fraud. Now does that boil it down to what we are talking about today?

MR. KLEMM: I think so, yes.

THE COURT: Mr. Gunn?

MR. GUNN: Yes. I agree, your Honor.

(R. 152.)

In this same conference, which occurred prior to trial, the court also considered the question of whether appellants had pleaded the issue of fraud with sufficient particularity. The court ruled that appellants' pleadings were insufficient but granted them leave to file an Amended Answer at the time of trial. (R. 143.)

At the commencement of the trial appellants submitted their Amendment setting forth their allegation of fraud with particularity. (R. 109-110.) The Amended Answer contained no allegation of unilateral or mutual mistake. (Id.)

During the course of the trial appellants never once stated that they were attempting to show mistake in the formation of the contract or that mistake was an issue upon which they would rely. (See Transcript of the trial proceedings, R. 155-244.) It was only after both sides had rested, during oral argument, that appellants for the first time raised the issue of mistake and requested that the court permit them to amend

their twice-amended answer to raise this issue as an affirmative defense. (R. 249.) The court denied appellants' motion and subsequently entered judgment in respondent's favor. (Id., R.

ARGUMENT

POINT I
THE TRIAL COURT CORRECTLY DENIED APPELLANTS' MOTION TO AMEND ITS ANSWER TO RAISE THE AFFIRMATIVE ISSUE OF MISTAKE

After both sides at trial had rested appellants moved to amend their Answer to raise the affirmative defense of mistake. (R. 249.) This motion was denied. Appellants now base their appeal from the adverse judgment below solely upon the alleged error of the trial court in failing to grant their motion. Appellants contend that the court's denial of their motion was in error because they were entitled to amend as a matter of law (Point I of Appellants' Brief), and because even if the granting of their motion was discretionary, it was an abuse of discretion to fail to grant their motion. (Point II of Appellants' Brief.) Respondent will demonstrate with this Brief that appellants' contentions contradict established principals of law.

A. THE TRIAL COURT WAS NOT REQUIRED AS A MATTER OF LAW TO GRANT APPELLANTS' MOTION

Rule 15(b), Utah Rules of Civil Procedure, sets forth the circumstances under which a pleading may be amended to conform to the evidence. It states, in part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

Appellants correctly point out that this rule mandates the granting of leave to amend in those cases where the court finds that an issue has been tried by express or implied consent. From this fact appellants erroneously conclude that the court below should have granted their motion to amend. Such a position assumes a fact not in evidence; namely, that the issue of mistake was tried by the express or implied consent of respondent.

An examination of the record and of the pleadings fails to disclose any instance in which respondent expressly agreed to try the issue of mistake. Indeed, appellants fail to direct the court's attention to any such express consent. Instead, appellants state that the issue of mistake was tried by the implied consent of respondent and that such consent is shown by the fact that respondent failed to object to introduction of appellants' testimony to the effect that they believed they were signing a document different from the one which they actually signed. (See page 8 of Appellants' Brief.) The issue which appellants thus raise is this: Did respondent impliedly consent to trial of the issue of mistake by failing to object to appellants' testimony that they thought that they were signing a document different in character than that which they actually signed? An examination of cases which have dealt with this issue indicates that the answer to this question is "no".

Rule 15(b), Federal Rules of Civil Procedure, is identical to Rule 15(b) of the Utah Rules. Concerning this rule Professor Moore has stated:

> The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried; therefore an amendment after judgment is not permissible which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, even though there is evidence in the record -- introduced as relevant to some other issue -- which would support the amendment. This principal is sound, since it cannot be fairly said that there is an implied consent to try an issue where the parties do not squarely recognize it as an issue in the trial.

3 Moore's Federal Practice, paragraph 15.13 [2], pp. 15-171 to 15-172.

An excellent illustration of the above rule can be found in Bettes v. Stonewall Insurance Company, 480 F.2d 92 (5th Cir. 1973). There, Bettes had brought an action against Stonewall for payment of benefits under an insurance policy. Stonewall raised the issue of misrepresentation as a defense to enforcement of the policy. At trial, after the parties had rested and the jury had been charged, Bettes sought to amend the pre-trial order to permit him to raise the issue of whether Stonewall, as required by its policy, had notified him that it would refuse to be bound by the terms of the policy because of the alleged misrepresentation. As with appellants here, Bettes argued that because he had been permitted to introduce evidence relevant to both the issues of misrepresentation and notice without objection of Stonewall, under Rule 15(b), Federal Rules of Civil Procedure, the trial court had erred in failing to grant his motion. Id. at 94. In rejecting Bettes' argument the court of appeals stated:

> Bettes claims that certain evidence offered by him is so particularly and uniquely appropriate to the issue of notice that Stonewall's lack of objection constituted implied consent for the issue to be tried, despite its omission from the pre-trial order.
>
> At no time during the trial was a request made for an amendment of the pleadings to conform to the evidence, but Bettes correctly notes that this is not necessarily fatal to his argument. [Citation omitted.] Instead, the death knell for his argument results from a careful reading of the record which discloses no evidence that Stonewall gave any consent -- express, implied, or otherwise -- to trying this issue. Bettes' evidence did not pertain solely to the issue of notice, but had general relevance to the entire defense of misrepresentation. [Citations omitted.] Furthermore, for an issue allegedly tried by consent, mention of it was conspicuously absent at the charge conference, in the arguments of both counsel to the jury, and in charge to the jury. As such, without warning that this evidence was being offered to prove a new issue, its admission without objection cannot be said to be "implied consent" within the meaning of Fed.R.Civ.P. 15(b).

Id. at 94-95.

Respondent has been unable to find any Utah cases which specifically deal with the question of whether failure to object to the admission of evidence relevant to an unpleaded issue comprises consent to trial of that issue. However, the holding of this court in Taylor v. E. M. Royle Corp., 1 Utah 2d 175, 264 P.2d 279 (1953), indicates that the rule in this state is that more is required for a showing of consent than the mere admission of evidence. There, plaintiff, a former employee of defendant, brought suit against defendant for claimed damages for breach of an express contract of employment. The trial court found that there had been no express contract but entered judgment

in plaintiff's favor on a theory of quantum meruit, even thou the latter theory had never been raised by plaintiff. On app this Court reversed the judgment of the lower court. In explaining its reason for doing so, the Court made the follow pertinent statement:

> [A] defendant must be extended every reasonable opportunity to prepare his case and to meet an adversary's claims. Also he must be protected against surprise and be assured equal opportunity and facility to present and prove countercontentions, -- else unilateral justice and injustice would result sufficient to raise serious doubts as to constitutional due process guaranties. . . .
>
> Here the record indicates that the plaintiff had an express contract in mind, not one implied in law. Plaintiff sought no change in theory by way of pleading or proof. We believe an injustice would result if the rule were interpreted to charge the defendant with liability under quantum meruit, an issue he was never called upon to meet.

Id. at 177, 264 P.2d at 280.

Although the court's decision in Taylor v. E. M. Royle Corp. does not specifically state that evidence relevan to the issue of quantum meruit was admitted without objection at trial, it is reasonable to assume that such was the case, since the elements for breach of express contract and for quantum meruit are very similar. Nonetheless, the court foun that the trial court had acted improperly in entering judgmen in plaintiff's favor on a theory he had not pleaded.

Similarly, in National Farmers Union Property and Casualty Co. v. Thompson. 4 Utah 2d 7, 286 P.2d 249 (1955), court refused to find in defendant's testimony as to the val

of a building any consent to trial of that issue where plaintiff in his complaint had alleged a different value figure and defendant had admitted the allegation as to value in his answer. Plaintiff contended that because defendant had testified at trial as to a different valuation of the building, he had consented to a reconsideration of that issue. This Court disagreed, saying:

> Notwithstanding all of our efforts to eliminate technicalities and liberalize procedure, we must not lose sight of the cardinal principle that under our system of justice, if an issue is to be tried and a party's rights concluded with respect thereto, he must have notice thereof and an opportunity to meet it. This is recognized in Rule 15(b) which recites that such liberal amendments shall be allowed if the issue is tried "by express or implied consent of the parties." It does not appear that there was any such consent to try the issue of the value of the building.

Id. at 13, 286 P.2d at 253.

A different result was reached in General Insurance Co. of America v. Carnicero Dynasty Corporation, 545 P.2d 502 (Utah 1976), cited by appellants in their Brief. There this Court permitted a defendant to amend his answer at trial to deny the allegation in plaintiff's Complaint that a certain indemnity agreement had been executed by defendant for consideration. Defendant's answer had initially failed to admit or deny the relevant allegation in plaintiff's Complaint with the result that the allegation was deemed admitted. The court held that since plaintiff had failed to object to admission of evidence showing lack of consideration, he had consented to trial

of that issue. Id. at 506.

At first glance it may appear that there exists an inconsistency between the results in General Insurance of America v. Carnicero Dynasty Corp., supra, on the one hand and Taylor v. E. M. Royle Corp., and National Farmers Union v. Thompson, supra, on the other, since in the former case leave to amend was granted but entry or modification of judgment based upon unpleaded issues was discouraged in the latter two cases. In reality, all three cases support the rule that "an amendment after judgment is not permissible which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, even though there is evidence in the record -- introduced as relevant to some other issue -- which would support the amendment." 3 Moore's ¶15.13[2], supra. In the General Insurance Co. case, supra, defendants proffer of evidence as to lack of consideration in executing the indemnity agreement could only have been interpreted as going to the issue of lack of consideration. By contrast, in the Taylor case, supra, evidence as to services rendered and as to damages would be relevant to both the theory of breach of express contract and to that of quantum meruit.

And in National Farmers Union evidence of value was presented by the party not seeking to raise that issue, thus in General Insurance Co., the adverse party had notice that the party subsequently seeking amendment was raising an issue for which amendment could be sought, but in Taylor and National Farmers Union the adverse party had no such notice. It follows

that far from rejecting the rule set forth in Moore's and Bettes v. Stonewall Insurance Co., supra, the Utah court accepts the rule that the adverse party's failure to object to admission of evidence relating to a subsequently raised issue does not necessarily show his consent to trial of that issue.

In the instant action appellants contend that respondent's failure to object to the testimony of appellants that they were laboring under an incorrect impression as to the contents of the documents they signed shows that respondent consented to trial of the issue of mistake. As discussed above, this argument betrays an incomplete understanding of the law. The true rule as set forth by Moore, supra, is that there can be no implied consent to try an issue "where parties do not squarely recognize it as an issue in the trial." 3 Moore's ¶15.13[2], supra.

In the instant case the sole issues raised by appellants in their pleadings and in their pre-trial stipulation as to issues were (1) lack of consideration and (2) fraud. An examination of the elements of fraud reveals that it would have been possible for appellants to have adduced evidence relevant to both mistake and fraud.

This Court has defined the elements of fraud as follows:

> (1) That a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base

> such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage. (Emphasis added.)

Pace v. Parrish, 122 Utah 141, 144-145, 247 P.2d 273, 274-275 (1952). As indicated by the emphasized portion of the above quotation, in order to prove fraud, the party with the burden must show that he acted reasonably and in ignorance of the falsity of the misrepresentation.

In the instant case appellants' proffer of proof as to their ignorance of the contents of the documents which they signed was perfectly consistent with their theory of fraud -- specifically, the allegations contained in paragraphs 4(f) and 4(g) of appellants' Amendment to Defendant's Answer to Complaint dated February 2, 1978, wherein appellants allege:

> The defendants acted reasonably in signing the guaranty agreement on the basis of the representation and were ignorant of its false nature at the time the guaranty was signed.
>
> The defendants relied upon the representation made by the said Ronald Fulkerson in signing the document. . . .

Furthermore, appellants' counsel specifically represented to the court immediately prior to the trial that the sole issues to be tried were lack of consideration and fraud. In view of this representation and also in view of the fact that the evidence submitted was consistent with appellants' allegation of fraud, it is clear that respondent did not and could not have recognized that appellants' evidence was offered for the purpose

of showing mistake. Thus, respondent cannot be said to have "consented" to trial of the issue of mistake.

Furthermore, the question of whether or not there was consent to trial of a particular issue is left to the determination of the trial court. Thus, one court has stated:

> Once an issue has been tried by express or implied consent of the parties, Rule 15(b) requires it be treated as if raised by the pleadings. [Citations omitted.] Where the question is whether that is the case, however, the essential inquiry is the understanding of the parties as to whether the unpleaded issue was being contested. [Citations omitted.] The trial judge's answer to that inquiry is reviewable only for abuse of discretion. [Citations omitted.] He is in a far better position than we to determine the understanding under which the parties proceeded. Where the new issue or theory is raised only after trial, courts of appeals have been loathe to overturn the decision of the trial judge that it was not tried by consent.

Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 478 n.370 (D.C. Cir. 1977).

Since there is ample evidence to support the conclusion that respondent did not consent to trial of the issue of mistake, the trial court clearly did not abuse its discretion in refusing to grant appellants' leave to amend their Answer to raise this issue.

B. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT APPELLANTS' MOTION TO AMEND ITS ANSWER

As discussed above, Rule 15(b), Utah Rules of Civil Procedure, requires the court to grant leave to amend a pleading to conform to the evidence if trial of the issue for which amendment is sought was consented to by the adverse party.

In addition, Rule 15(b) also permits the granting of leave to amend at the discretion of the trial court. In pertinent part, the rule states:

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

While conceding that the above provision gives the court discretion in determining whether a motion seeking leave to amend will be granted, appellants at the same time contend that the trial court abused its discretion in denying their motion.

This Court has considered the issue raised by appellants in at least two cases. Thus, in Meyer v. Deluke, 23 Utah 2d 74, 457 P.2d 966 (1969), the Court affirmed the decision of the trial court denying the motion of defendant, subsequent to judgment, seeking leave to amend his answer to raise the affirmative defense of usury. The Court said:

> In the instant action the defendants waived their statutory defense of usury; the facts were known to them at the time of their pleading and were, in fact, pleaded; they merely failed to assert the defense of usury. The only effect of their proposed amendment would be to withdraw their waiver of this statutory defense, not because of new evidence which was revealed at trial, but, because their asserted defenses were inadequate for them to prevail. Under these circumstances the trial court did not abuse its discretion by its refusal to permit an amendment to the pleadings.

Id. at 78, 457 P.2d at 968-969.

Similarly, in Goeltz v. Continental Bank & Trust Co., 5 Utah 2d 204, 299 P.2d 832 (1956), this Court affirmed the order of the trial court denying defendant leave to amend its answer to plead the statute of limitations after all evidence had been presented at trial. In affirming the decision of the lower court this Court noted that all facts upon which the defense of limitations was based had been known to the defendant prior to trial and that no new evidence was discovered during the trial which would have made the defense available where it had not been available before. Id. at 208-209, 299 P.2d at 834, 835.

As in Meyer v. Deluke and Goeltz v. Continental Bank, supra, prior to the time of trial appellants in this case were well aware of the facts upon which a claim of mistake could be based. Thus, under the holdings of the above cited cases, it was not an abuse of discretion for the trial court to have denied appellants' motion for leave to amend.

Conversely, respondent would have been prejudiced had the court granted appellants' motion. As discussed more fully below, this Court has recognized that unilateral mistake is not grounds for rescission of a contract if it would not be possible to give relief by way of rescission without serious prejudice to the other party. Ashworth v. Charlesworth, 119 Utah 650, 231 P.2d 725 (1951). Similarly, it has been recognized that mistake is not grounds for avoiding a contract if the party against whom avoidance is sought can demonstrate that he did not know about the alleged mistake. 17 C.J.S. Contracts §143, p. 892.

In the instant action respondent wishes to represent to this Court that it could have proved that it could not have been placed in the status quo if the contract were rescinded, and that it did not know about the alleged mistake. However, because the issue of mistake was first raised at the conclusion of the trial, after respondent had rested, respondent had no opportunity to present its evidence as to the above issues. It follows that the trial court was correct in recognizing that respondent would have been prejudiced by the requested amendment. For the same reason this Court should affirm the lower court's ruling.

POINT II

EVEN IF THE COURT RULED INCORRECTLY IN REFUSING TO GRANT APPELLANTS' MOTION, SUCH ERROR WAS HARMLESS

It is a well-established doctrine of this Court that harmless error of the trial court is not grounds for reversal of its judgment. Rule 61, Utah Rules of Civil Procedure, provides, in part:

> No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice.

Concerning the rule of "harmless error" this Court has stated that the judgment of the trial court will not be overturned unless the nonprevailing party shows that the trial

court committed error "which is substantial and prejudicial in the sense that there is a reasonable likelihood that in its absence the result would have been different. . ." Hales v. Peterson, 11 Utah 2d 411, 415, 360 P.2d 822, 825 (1961); Rivas v. Pacific Finance Company, 16 Utah 2d 183, 186, 397 P.2d 990, 992 (1964).

An examination of the law of mistake clearly shows that if the lower court committed error in failing to grant appellants' motion, such error was harmless for the reason that even if appellants had been allowed to raise the issue of mistake, they could not have prevailed on such a theory.

While it is not clear from the statements of appellants' counsel at trial whether appellants were alleging the existence of unilateral or mutual mistake, appellants' Brief makes it clear that they allege unilateral mistake. Thus, appellants state:

> The defendants are alleging that the guarantee [sic] that they signed should be rescinded because of their unilateral mistake. (Brief of Appellants, p. 14.)

It is well established that unilateral mistake will not provide a basis for rescission or cancellation of an instrument except where it would be inequitable to enforce the contract.

> Equity will relieve a party from a unilateral mistake that was a result of fraud or duress or was accompanied by other special facts creating an independent equity on behalf of the mistaken person, such as inequitable conduct of the other party, but cancellation shall not be decreed upon a party whose conduct did not contribute to or induce the mistake and who will obtain no unconscionable advantage therefrom.

13 Am. Jur. 2d Cancellation of Instruments, § 32.

> Equity will not relieve one from the burden of a contract entered into by reason of a mistake resulting from negligence where the means of knowledge were easily accessible.

Id. at 834.

This Court has on at least two occasions defined the circumstances under which unilateral mistake may provide a basis for cancellation. In Ashworth v. Charlesworth, supra, the court ennunciated the following rule concerning cancellati of instruments based upon unilateral mistake:

> Equitable relief from a mutual mistake is frequently given by a reformation of the contract. But a contract will not be reformed for unilateral mistake. Equitable relief may, however, be given from a unilateral mistake by a rescission of the contract. Essential conditions to such relief are: (1) The mistake must be of so grave a consequence that to enforce the contract as actually made would be unconscionable. (2) The matter as to which the mistake was made must relate to a material feature of the contract. (3) Generally the mistake must have occurred notwithstanding the exercise of ordinary diligence by the party making the mistake. (4) It must be possible to give relief by way of rescission without serious prejudice to the other party except the loss of his bargain. In other words, it must be possible to put him in status quo.

Id. at 656, 231 P.2d at 726. See also, Davis v. Mulholland, 2 Utah 2d 56, 57, 475 P.2d 834 (1970).

In Ashworth v. Charlesworth, supra, plaintiff, a contractor, sued defendant, a subcontractor, who had repudiate a contract for the painting of a bridge which plaintiff had constructed. The evidence showed that defendant had had the

opportunity to examine the plans and specifications and to read the contract before executing it. Based upon these facts the trial court entered judgment in favor of plaintiff and found that defendant's mistaken belief as to the size of the bridge and as to the materials which defendant thought that plaintiff would supply did not comprise the type of unilateral mistake which would permit cancellation of the contract. In affirming the lower court's decision, this Court made the following statement whose relevance to the instant action is obvious:

> From the foregoing facts and circumstances, we are of the opinion that the findings of the trial court to the effect that there was no mistake is not contrary to the weight of the evidence. He could have reasonably concluded that the claimed mistake was an afterthought. But even assuming the mistake was made by the defendants, they were guilty of such carelessness in not seeing what they should have seen and in not obtaining readily available information that the trial court was not obliged to relieve them from the results of their own neglect. The fault, if any, in this case, appears to fall heavily upon the shoulders of the defendants.

Id. at 659, 231 P.2d at 728.

Similarly, in Davis v. Mulholland, supra, this Court refused to rescind an option agreement containing the description of a certain parcel of land which was not the same parcel shown to the party seeking rescission. In affirming the lower court's judgment this Court stated:

> Plaintiff admits that he was given the correct legal description of the land actually owned by the defendant; and since the court found that there was no misrepresentation on the part of the defendant in pointing out the location of the land, the plaintiff cannot have a rescission of the option contract for the reason that if there was any mistake on his part, it was due entirely to his own negligence.

Id. at 58, 475 P.2d at 835.

In the instant action, the findings of fact by the lower court make it clear that if there did exist a unilateral mistake, that mistake could have been avoided if appellants had exercised ordinary care. In this regard the court's findings of fact show the following examples of appellants' negligence and lack of due diligence:

(1) At the time the Belnaps executed the guaranty they knew or should have known that their attorney had not examined or approved it. (R. 118, Finding 12.)

(2) The Belnaps did not read the guaranty prior to or at the time of their signing it. (Finding 13.)

(3) The Belnaps were knowledgeable as to the legal significance of the guaranty. (Findings 14 and 15.)

(4) At the time of the execution of the guaranty the Belnaps had not even taken the trouble to find out what agreement their attorney had reached with the Bank's representatives. (Findings 16.)

Based upon the foregoing it is clear that even if appellants had been permitted to amend their answer at the time of trial to raise the issue of unilateral mistake, and even if they had been successful in convincing the court that such mistake existed, their negligence was sufficient to prevent cancellation or rescission of the guaranty. It follows that the court's refusal to permit an amendment was at worst a harmless error.

CONCLUSION

Appellants allege that the decision of the trial court must be reversed because of its refusal at the conclusion of the trial to permit appellants to amend their answer to raise a new issue not previously raised in the pleadings or in the pre-trial conferences. Rule 15(b) of the Utah Rules of Civil Procedure and the relevant case law mandate that the decision of the trial court be affirmed unless it can be demonstrated that respondent consented to trial of the issue of mistake or that the trial court abused its discretion in failing to permit such amendment. The record on appeal clearly indicates that at no time did respondent ever consent to trial of the issue of mistake. Indeed, an examination of the record makes it clear that respondent first became aware that appellants intended to raise this issue near the conclusion of the trial. Correspondingly, inasmuch as respondent had no opportunity through the presentation of evidence to meet the allegation of mistake, respondent would have been prejudiced by the granting of appellants' motion. The trial court was therefore clearly correct in denying appellants' motion.

In any case, even if appellants were otherwise entitled to the granting of their motion, the Findings of Fact of the trial judge and the record on appeal demonstrate that the alleged mistake was not of such a nature as to result in the cancellation or rescission of the guaranty in question.

DATED this 16th day of October, 1978.

Respectfully submitted,

RAY, QUINNEY & NEBEKER

By Steven H. Gunn
Steven H. Gunn

MAILING CERTIFICATE

I hereby certify that two copies of the foregoing Respondent's Brief were delivered to H. RALPH KLEMM, Attorney for Appellants, 510 Ten Broadway Building, Salt Lake City, Utah 84101, by depositing a copy of the same in the U. S. Mails, postage prepaid thereon, this 16th day of October, 1978.

Steven H. Gunn