

1978

Frank M. Wells et al v. Walker Bank & Trust Co. : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Calvin L. Rampton; D. Miles Holman; Jones, Waldo, Holbrook & McDonough; Attorneys for Appellant;

W. Scott Barrett; Attorneys for Respondents;

Recommended Citation

Brief of Appellant, *Wells v. Walker Bank & Trust Co.*, No. 15750 (Utah Supreme Court, 1978).
https://digitalcommons.law.byu.edu/uofu_sc2/1219

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

FRANK M. WELLS, Assignee,
Statutory Assignment for the
Benefit of Creditors of Financial
Service Company, Inc.,

Plaintiffs,

v.

WALKER BANK & TRUST COMPANY,
a Utah corporation; and FIRST
SECURITY BANK OF UTAH, a Nat-
ional Association,

Defendants and Appellant,

WALKER BANK & TRUST COMPANY,
a Utah banking corporation,

Third-Party Plaintiff and
Appellant,

v.

GOLDEN STETTLER, an individual,
LYNN TOOLSON, an individual,
ALMA DITTMER, an individual,
H. M. NIELSON, an individual,
and ELMER GIBSON, an individual,

Third-Party Defendants and
Respondents.

Case No. 15750

FILED

MAY 22 1978

Clerk, Supreme Court, Utah

APPELLANT'S BRIEF

Appeal from an Order of the First Judicial District
Court in and for Cache County, Utah, Honorable
J. Duffy Palmer, Judge

W. Scott Barrett
Barrett & Mathews
300 South Main Street
Logan, Utah 84321

Calvin L. Rampton
D. Miles Holman
Jones, Waldo, Holbrook &
McDonough
800 Walker Bank Building

ATTORNEYS FOR APPELLANT

ATTORNEYS FOR RESPONDENTS

IN THE SUPREME COURT OF THE STATE OF UTAH

FRANK M. WELLS, Assignee,
Statutory Assignment for the
Benefit of Creditors of Financial
Service Company, Inc.,

Plaintiffs,

v.

WALKER BANK & TRUST COMPANY,
a Utah corporation; and FIRST
SECURITY BANK OF UTAH, a Nat-
ional Association,

Defendants and Appellant,

WALKER BANK & TRUST COMPANY,
a Utah banking corporation,

Third-Party Plaintiff and
Appellant,

Case No. 15750

v.

GOLDEN STETTLER, an individual,
LYNN TOOLSON, an individual,
ALMA DITTMER, an individual,
H. M. NIELSON, an individual,
and ELMER GIBSON, an individual,

Third-Party Defendants and
Respondents.

APPELLANT'S BRIEF

Appeal from an Order of the First Judicial District
Court in and for Cache County, Utah, Honorable
J. Duffy Palmer, Judge

W. Scott Barrett
Barrett & Mathews
300 South Main Street
Logan, Utah 84321

Calvin L. Rampton
D. Miles Holman
Jones, Waldo, Holbrook &
McDonough
800 Walker Bank Building

ATTORNEYS FOR APPELLANT

ATTORNEYS FOR RESPONDENTS

TABLE OF CONTENTS

	<u>Page</u>
NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL.	2
STATEMENT OF FACTS	2
STATEMENT OF POINTS.	5
ARGUMENT	7
POINT I:	
ALL ALLEGATIONS OF APPELLANT WALKER BANK ARE TO BE VIEWED IN A LIGHT MOST FAVORABLE TO IT	7
POINT II:	
APPELLANT HAS STATED A CLAIM AGAINST RESPONDENTS UPON WHICH RELIEF MAY BE GRANTED BASED UPON A RESPONDEAT SUPERIOR THEORY.	8
POINT III:	
APPELLANT HAS STATED A CLAIM UPON WHICH RELIEF MAY BE GRANTED BASED UPON THE ALLEGATIONS THAT RESPONDENTS NEGLIGENTLY HIRED AND RETAINED AN EMPLOYEE WHOSE ACTIONS MAY BE THE CAUSE OF DAMAGE TO WALKER BANK	11
POINT IV:	
APPELLANT HAS STATED A CLAIM UPON WHICH RELIEF MAY BE GRANTED BASED UPON THE ALLEGATIONS THAT RESPON- DENTS FAILED TO ADEQUATELY SUPER- VISE AN EMPLOYEE WHOSE ACTIONS MAY BE THE CAUSE OF DAMAGE TO WALKER BANK.	15

CONCLUSION	17
----------------------	----

AUTHORITIES CITED

CASES

Christensen v. Lelis Automatic Trans. Service, Inc., 24 Utah 2d 165, 467 P.2d 605 (1970)	7
Curtis v. Title Guarantee Trust Company, 3 Cal. App.2d 612, 40 P.2d 562 (Ct. App. Cal. 1935)	10
Foster v. Steed, 19 Utah 2d 435, 432 P.2d 60 (1967)	7
Stone v. Hurst Lumber Company, 15 Utah 2d 49, 386 P.2d 910 (Utah 1963)	13
Stricklin v. Parsons Stockyard Company, 192 Kan. 360, 388 P.2d 824 (1964)	14
Young v. Texas Company, 8 Utah 2d 206, 331 P.2d 1099 (1958)	7

TREATISES

57 C.J.S., Master and Servant §559	12
Bogert, <u>Trusts</u> , §129 (5th ed. 1973)	10
Prosser, <u>Torts</u> , §70 (4th ed. 1971)	9
Restatement, Second, Agency, §213.	11, 15
Restatement, Second, Agency, §213, Comment d.	12
Restatement, Second, Agency, §219.	9
Restatement, Second, Trusts, §264, Comment b.	10

IN THE SUPREME COURT OF THE STATE OF UTAH

FRANK M. WELLS, Assignee, :
Statutory Assignment for the :
Benefit of Creditors of Financial :
Service Company, Inc., :

Plaintiffs, :
: :
: :

v. :
: :
: :

WALKER BANK & TRUST COMPANY, :
a Utah corporation; and FIRST :
SECURITY BANK OF UTAH, a Nat- :
ional Association, :

Defendants and Appellant, :
: :
: :

WALKER BANK & TRUST COMPANY, :
a Utah banking corporation, :

Third-Party Plaintiff and :
Appellant, :

Case No. 15750

v. :
: :
: :

GOLDEN STETTLER, an individual, :
LYNN TOOLSON, an individual, :
ALMA DITTMER, an individual, :
H. M. NIELSON, an individual, :
and ELMER GIBSON, an individual, :

Third-Party Defendants and :
Respondents. :

APPELLANT'S BRIEF

NATURE OF THE CASE

This is an action brought by Frank M. Wells, Assignee, Statutory Assignment for the Benefit of Creditors of Financial Service Company, Inc., claiming damages in excess of \$96,000.00 against Walker Bank & Trust Company, the appellant herein, and

another bank, upon which claim appellant asserts that if there be any damage to the plaintiff below for which appellant may be responsible then the third party defendants, being the former trustees of the Cache Valley Syndicate Trust (CVST), and the respondents herein (CVST being the successor to Financial Service Company, Inc.), are responsible to appellant based upon the alleged wrongdoing of an employee of the respondents done in the course of his employment and the alleged negligence of respondents in hiring, retaining and supervising that employee.

DISPOSITION IN LOWER COURT

The trial court, the Honorable J. Duffy Palmer, Judge, sitting under designation of the Honorable VeNoy Christoffer-son, granted a motion to dismiss submitted by respondents dismissing the Third-Party Complaint of appellant against respondents.

RELIEF SOUGHT ON APPEAL

Appellant requests this Court to reverse the Order of the lower court dismissing appellant's Third-Party Complaint and remand the case for trial.

STATEMENT OF FACTS

This action, being one on which a third party complaint has been filed, relies upon the allegations of the plaintiff below as well as the respondent herein. The allegations of the plaintiff below in his Complaint are accepted as true

for the purposes of this appeal even though they will be contested at time of trial. Those allegations of the Complaint were incorporated by reference into the Third-Party Complaint and, thereby, add to the factual basis of this appeal.

Frank M. Wells, the plaintiff below, is the statutory assignee for the benefit of creditors for Financial Service Company, Inc., a defunct Utah corporation, and its common law assignee for the benefit of creditors, Cache Valley Syndicate Trust, hereinafter referred to as "CVST". (R.1) Plaintiff brought an action against Walker Bank & Trust Company, the appellant herein, and First Security Bank of Utah (R.1) based upon various allegations that those banks had been grossly negligent or merely negligent and dealt with various checks with knowledge of a breach of fiduciary duties or not in good faith. (R.2) The specific factual allegations upon which plaintiff bases his action against appellant and First Security Bank are:

- (1) that appellant paid out over checks of CVST not drawn on appellant which bore unauthorized alterations of the name of the payee or the amount of the checks, or both (R.2, 4);
- (2) that appellant converted or allowed Elmer G. Erickson to convert proceeds of some checks of CVST not drawn on appellant despite a special deposit nature of those checks (R.3);

- (3) that appellant paid out on various checks payable to CVST without adequate execution of the checks (R.3);
- (4) that appellant paid out on checks payable to CVST bearing unauthorized endorsements. (R.4);

During that period of time that the allegations referred to above were supposed to be occurring Financial Service Company, Inc., was being operated as Cache Valley Syndicate Trust (R.1) which was being managed and directed by Golden Stettler, Lynn Toolson, Alma Dittmer, H. M. Nielson, and Elmer Gibson, the respondents herein, acting as trustees of CVST. (R.43) Elmer G. Erickson was employed as an agent or servant of respondents to help respondents in their management of the trust. (R.45) While so employed and in the scope of his employment, Elmer G. Erickson perpetrated those acts referred to above of making unauthorized alterations to checks, conversion of special deposits, submitting checks for payment without adequate execution, and submitting for payment checks bearing unauthorized endorsements which endorsements were made by said Elmer G. Erickson. (R.45)

While Elmer G. Erickson was employed by respondents, respondents knew or should have known that Elmer G. Erickson had been doing those wrongful actions with the checks and accounts of CVST as referred to above, yet respondents hired and continued to employ Mr. Erickson. (R.46) Respondents also failed to adequately supervise and care for Elmer G.

Erickson while he was in the employ of respondents while at the same time placing Mr. Erickson in a position that required his supervision as he aided the management of CVST. (R.1, 46)

STATEMENT OF POINTS

POINT I

ALL ALLEGATIONS OF APPELLANT WALKER BANK ARE TO BE VIEWED IN A LIGHT MOST FAVORABLE TO IT.

POINT II

APPELLANT HAS STATED A CLAIM AGAINST RESPONDENTS UPON WHICH RELIEF MAY BE GRANTED BASED UPON A RESPONDEAT SUPERIOR THEORY.

POINT III

APPELLANT HAS STATED A CLAIM UPON WHICH RELIEF MAY BE GRANTED BASED UPON THE ALLEGATIONS THAT RESPONDENTS NEGLIGENTLY HIRED AND RETAINED AN EMPLOYEE WHOSE ACTIONS MAY BE THE CAUSE OF DAMAGE TO WALKER BANK.

POINT IV

APPELLANT HAS STATED A CLAIM UPON WHICH RELIEF MAY BE GRANTED BASED UPON THE ALLEGATIONS THAT RESPONDENTS FAILED TO ADEQUATELY SUPERVISE AN EMPLOYEE WHOSE ACTIONS MAY BE THE CAUSE OF DAMAGE TO WALKER BANK.

ARGUMENT

POINT I

ALL ALLEGATIONS OF APPELLANT WALKER
BANK ARE TO BE VIEWED IN A LIGHT
MOST FAVORABLE TO IT.

The standard to be applied in reviewing the sufficiency of any attempt to state a claim upon which relief may be granted has been clearly stated by this Court and others. The matters alleged by the party to whom a motion to dismiss under 12(b)(6) of the Utah Rules of Civil Procedure is lodged are entitled to be viewed and considered by the court with all the inferences fairly arising therefrom in a light most favorable to that party. This Court has previously stated in Young v. Texas Company, 8 Utah 2d 206, 331 P.2d 1099 (1958), that in reviewing the granting of a motion for summary judgment

. . . the party against whom the judgment has been granted is entitled to have all the facts presented and all the inferences fairly arising therefrom considered in a light most favorable to him. Id. at 1100.

?

See also, Foster v. Steed, 19 Utah 2d 435, 432 P.2d 60 (1967). The same rule is applied to Rule 12(b)(6) motions to dismiss. In reviewing a case involving a 12(b)(6) motion to dismiss this Court wrote:

A complaint does not fail to state a claim unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim. Christensen v. Lelis Automatic Trans. Service, Inc., 24 Utah 2d 165, 467 P.2d 605, 607 (1970).

To this standard the pleading of appellant must be compared.

Under the criterion as established by this Court all the allegations of the Third-Party Complaint of appellant are to be deemed true and are to be read in a light most favorable to appellant. Consequently, those facts as stated in the Statement of Facts herein, being merely a recitation of the allegations of the Third-Party Complaint which incorporated by reference the allegations of the Complaint are to be accepted as true by this Court and given all inferences favorable to the position of appellant herein.

POINT II

APPELLANT HAS STATED A CLAIM AGAINST RESPONDENTS UPON WHICH RELIEF MAY BE GRANTED BASED UPON A RESPONDEAT SUPERIOR THEORY.

Appellant has alleged in its Third-Party Complaint that whatever loss that may have been sustained by Frank M. Wells, Trustee, the plaintiff below, for which appellant may be legally responsible to plaintiff, was a result of the tortious actions of one Elmer G. Erickson, namely, the forging of endorsements, altering of instruments and passing on of instruments known to be incompletely executed. All such actions of Elmer G. Erickson causing such damage were alleged by appellant to have been done in the scope and course of the employment of Elmer G. Erickson as an agent or servant of respondents while respondents were trustees of Cache Valley Syndicate Trust.

The doctrine of respondeat superior has long recognized that the employer is vicariously liable, notwithstanding complete lack of fault on his part, for the tortious conduct of his employees done in the course of the employee's employment. Under such circumstances the employer is liable for the wrong of the employee just as if the employer was the actual wrongdoer. The general rule is succinctly set forth in Prosser, Torts, §70 (4th ed. 1971), where it reads:

Once it is determined that the man at work is a servant, the master becomes subject to vicarious liability for his torts.

* * * *

. . . his vicarious liability, for conduct which is in no way his own, extends to any and all tortious conduct of the servant which is within the "scope of the employment."

The phrase "scope of the employment" is sometimes substituted with the phrase "course of the employment." Id.

The Restatement, Second, Agency, §219, reinforces the position of Professor Prosser noted above when it states:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

The general authorities are clear as to the standard to be applied, the application of which to the fact situation now before this Court would dictate the conclusion that appellant had stated in its Third-Party Complaint a claim upon which relief may be granted.

Appellant had alleged that all of respondents are trustees of the Cache Valley Syndicate Trust and had employed Elmer G. Erickson, the alleged tortfeasor, to help conduct the affairs of their managing the trust. It has been uniformly determined that:

[a] trustee is liable for the tortious acts of an agent or servant performed during the course of his employment. Bogert, Trusts, §129, (5th ed. 1973).

See also, Curtis v. Title Guarantee Trust Co., 3 Cal. App. 2d 612, 40 P.2d 562 (Ct. App. Cal. 1935). The drafters of the Restatement, Second, Trusts, §264 provided in Comment b. that:

Under the principle of respondeat superior, torts committed by the agents or servants of the trustee in the course of the administration of the trust subject the trustee to liability to the same extent as though he were not a trustee. The principle of respondeat superior is applicable although the trustee receives no benefit from the trust.

Appellant is herein petitioning this Court to reverse the decision of the lower court and remand the action for trial giving appellant the opportunity to prove the facts and legal relationships as alleged. The granting of the motion to dismiss, we respectfully suggest, was in error. That which was pleaded stated a claim for which relief may be granted based upon the doctrine of respondeat superior, a generally recognized theory upon which liability may be grounded.

POINT III

APPELLANT HAS STATED A CLAIM UPON WHICH RELIEF MAY BE GRANTED BASED UPON THE ALLEGATIONS THAT RESPONDENTS NEGLIGENTLY HIRED AND RETAINED AN EMPLOYEE WHOSE ACTIONS MAY BE THE CAUSE OF DAMAGE TO WALKER BANK.

Appellant has alleged in its Third-Party Complaint that respondents negligently hired Elmer G. Erickson when respondents knew or should have known that Elmer G. Erickson had been mishandling the affairs of Cache Valley Syndicate Trust. The respondents also continued to retain Elmer G. Erickson as an employee with that knowledge or charge of knowledge. While in the employment of respondents, Elmer G. Erickson committed various torts that damaged the plaintiff below. Plaintiff below looks to appellant in satisfaction of some of those damages. Appellant asserts under the circumstances of this case that if it is responsible to the plaintiff below that respondents are responsible to it because of their negligence.

The Restatement, Second, Agency §213 addresses the theory purported by your appellant when it says:

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:

* * * *

(b) in the employment of improper persons or instrumentalities in work involving risk of harm to others; or

(d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

The official comment of those who drafted the Restatement is equally instructive. Restatement, Second, Agency, §213, Comment d. reads:

The principal may be negligent because he has reason to know that the servant or other agent, because of his qualities, is likely to harm others in view of the work or instrumentalities entrusted to him.

Therefore, it is prudent to pick one's agents wisely.

The claims of negligently hiring and retaining an employee do not rely upon any vicarious liability but rely on the liability that comes to a wrongdoer for his own actions or lack of action. The authorities are clear that an employer may be held liable for damages caused by the tortious activities of its employees, even though not in furtherance of the employer's business, if the employer was negligent in employing or retaining the employee who committed the tort. Reinforcing that which has been stated herein, the authors of 57 C.J.S., Master and Servant §559, have written:

A master may be liable for injuries inflicted on a third person by his servant where he was guilty of negligence in selecting a servant incompetent or otherwise unfit to perform the services for which he was employed . . .

Retaining in employment a servant who is, or should be, known to be incompetent, habitually negligent, or otherwise unfit, is such negligence on the part of the master as will render him liable for injuries to third persons resulting from

the acts of the incompetent servant, whether the master's knowledge of the servant's incompetency was actual, or direct, or constructive; the master is chargeable with knowledge of the incompetency of the servant if by the exercise of due or reasonable care or diligence he could have ascertained such incompetence.

The allegations of Walker Bank fit neatly into the statement of the law above.

This Court has supported the above rule in Stone v. Hurst Lumber Company, 15 Utah 2d 49, 386 P.2d 910 (Utah 1963). There the Court accepted as proper the contention that an employer may be liable for being "negligent in failing to exercise reasonable care for the safety of its customers by employing or retaining a person whom it knew, or should have known because of habits or temperament, might" injure another dealing with that employee. Id. at 911. The courts have, therefore, recognized that an individual in the wrong position or employment may be a dangerous instrumentality to third persons. One ought not to be able to hire another to do his bidding with known wrongful tendencies and propensities without bearing the consequences of the wrongs committed when those tendencies and propensities effectuate themselves in wrongful action.

As stated earlier herein, it is not material whether or not the actions of the employee was within the scope of employment where the action is based upon the negligence of the employer in hiring and continuing to employ an

incompetent employee. In Stricklin v. Parsons Stockyard Company, 192 Kan. 360, 388 P.2d 824 (1964), the Kansas Supreme Court was faced with a law situation similar to the one now before this Court. In Stricklin the plaintiff had alleged that the defendant employees "knew or had knowledge" that an employee had played dangerous pranks to those properly on the premises of the defendant. The plaintiff in that case was the recipient of one of the pranks and was injured. In reversing the lower court which had dismissed the action against the employer, the Kansas Supreme Court wrote:

The doctrine of respondeat superior is not here involved. This is a common law action charging the master with actionable negligence in retaining an incompetent and unfit employee, and it is unnecessary to determine whether Burt [the wrongdoing employee] was acting within the scope of his employment. Id. at 829 (bracketed item added.)

In this matter now before this Court respondent requests a similar reversal to that requested and granted in the Stricklin case.

Appellant Walker Bank & Trust Company merely requests permission of this Court to have the opportunity to prove the substance of its allegations. As has been shown by the recitation of the authorities herein, if Walker Bank can establish as true the facts as alleged, then Walker Bank will be entitled to relief from respondents herein.

POINT IV

APPELLANT HAS STATED A CLAIM UPON WHICH RELIEF MAY BE GRANTED BASED UPON THE ALLEGATIONS THAT RESPONDENTS FAILED TO ADEQUATELY SUPERVISE AN EMPLOYEE WHOSE ACTIONS MAY BE THE CAUSE OF DAMAGE TO WALKER BANK.

Appellant Walker Bank & Trust Company also asserts that the court below erred in failing to recognize that the Third-Party Complaint stated a claim against respondents upon which relief may be granted based upon a claim that respondents failed to adequately supervise the actions of one of its employees, namely Elmer G. Erickson, should appellant be required to respond in damages to plaintiff. The allegations here also are that the respondents knew or should have known of the mismanagement of Cache Valley Syndicate Trust by Elmer G. Erickson, it being the actions of Elmer G. Erickson which give rise to the action of plaintiff against appellant for damages. Here again we refer to the Restatement, Second, Agency §213 to establish the general rule. That section provides:

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:

* * * *

(c) in the supervision of the activity; or

(d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

The courts and authorities have recognized that the employer must supervise his employees. The dilatory and non-diligent employer will not be rewarded for its ignorance of his employee's actions caused by its failure to supervise that employee. Such a result would have no social utility. The employer is properly charged with the knowledge of the actions of his employees that proper supervision would have disclosed and the duty to correct any wrongly performed actions or take steps to assure that future wrongful acts are prevented.

Elmer G. Erickson was also placed or allowed to remain in a position wherein the wrongs could have been committed merely by virtue of the position held. Elmer G. Erickson was directly involved in the management of CVST which presumably gave him access to all the instrumentalities of CVST, including the checks and accounts. The Restatement, Second, Agency, §219 provides:

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
* * * *

(d) the servant purported to act or speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation. (Emphasis Added)

Without such access the torts of Elmer G. Erickson alleged by plaintiff below and appellant could not have occurred.

Appellant hereby requests this Court to recognize, like the authors of the Restatement quoted above, that one.

who undertakes an enterprise has a duty to others to do all within his power to assure that the enterprise is operated in a safe and non-damaging manner especially when that employee is placed or allowed to remain in a position which could aid the commission of the tort. This duty is independent of any duty to hire competent employees. Once employed the employee should not be left to his own, subject to all the monetary temptations to which even strong persons can succumb without some adequate precautions and supervision. The allegations of the Third-Party Complaint suggest that respondents did fail to meet that supervisory standard in their continued employment of Elmer G. Erickson. It is to this allegation that appellant also requests an opportunity to present the merits.

CONCLUSION

The allegations of the Third-Party Complaint of Walker Bank & Trust Company, the appellant herein, state claims against Golden Stettler, Lynn Toolson, Alma Dittmer, H. M. Nielson and Elmer Gibson, the respondents herein, based upon a respondeat superior theory, their negligence in hiring and continuing to employ their wrongdoing employee, and for the failure to supervise the actions of that wrongdoing employee. If for some reason some technical aspect of pleading has not been met causing the pleadings of the Third-Party Complaint to be inadequate, we respectfully

request that this Court remand this action to the trial court so that an amended pleading may be submitted, otherwise we respectfully suggest that the decision of the lower court be reversed and the matter be remanded to the trial court for further discovery and trial. The granting of the motion to dismiss of respondents was premature. Appellant merely asks for an opportunity to prove that which it pleaded, which if proved would state a claim upon which relief may be granted under generally accepted principles of law as noted herein.

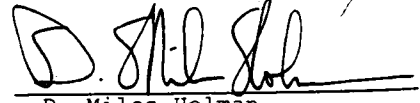
Respectfully submitted this 19th day of May, 1978.

JONES, WALDO, HOLBROOK &
MCDONOUGH

By


Calvin L. Rampton

By


D. Miles Holman
800 Walker Bank Building
Salt Lake City, Utah 84111
Telephone: (801) 521-3200

ATTORNEYS FOR APPELLANT
WALKER BANK & TRUST COMPANY

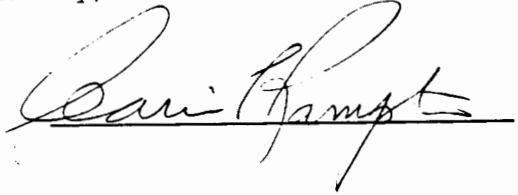
CERTIFICATE OF SERVICE

I hereby certify that on this, the 22nd day of May, 1978, that I served two copies of the foregoing APPELLANT'S BRIEF on the following persons by mail, postage prepaid:

W. Scott Barrett
BARRETT & MATHEWS
Attorneys for Respondents
300 South Main Street
Logan, Utah 84321

N. George Daines, III
DAINES & DAINES
Attorneys for Plaintiff
128 North Main Street
Logan, Utah 84321

Don B. Allen
RAY, QUINNEY & NEBEKER
Attorneys for Defendant First Security Bank
Deseret Building
Salt Lake City, Utah 84111



A handwritten signature in cursive script, appearing to read "Don B. Allen", is written over a horizontal line.