2001

Peggy Bezner v. Continental Dry Cleaners, Inc., Bert Harry : Brief of Respondent

Utah Supreme Court

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14117

IN THE SUPREME COURT OF THE STATE OF UTAH

PEGGY BEZNER,

Plaintiff and Respondent,

vs

CONTINENTAL DRY CLEANERS, INC., a Corporation, and BERT HARRY,

Defendants and Appellants.

Case No. 14119

BRIEF OF RESPONDENT

Appeal From The Judgment Entered In The Third Judicial District Court, In And For Salt Lake County, State of Utah, The Honorable Ernest F. Baldwin, Judge

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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

This is an action brought by plaintiff to rescind a contract for the purchase of a dry cleaning business for fraudulent misrepresentation and for termination of a lease agreement for a breach by defendants. Defendants filed a counter-claim seeking a judgment for payments claimed due on the contract for the purchase of the dry cleaning business and for delinquent rent payments under the lease agreement.

DISPOSITION IN THE LOWER COURT

The case was tried to a jury. The jury returned a verdict in favor of plaintiff by special verdict. (R. 40-41). Plaintiff filed a motion for judgment on the verdict in the Third District Court, Earnest F. Baldwin, Judge, entered a judgment in favor of plaintiff in the sum of $10,670.00 (R. 29-30). Defendants' motion for judgment notwithstanding verdict, or in the alternative, for a new trial, was denied (R. 33-34). Defendants have appealed

the judgment on the verdict.

RELIEF SOUGHT ON APPEAL

Respondent respectfully requests the Court to sustain the special verdict of jury in favor of plaintiff with instructions to the Lower Court to increase the judgment of the Lower Court on the verdict to include all sums paid on the principle portion of the purchase contract by plaintiff to defendants under the contract rescinded. Respondent also requests that the Court reverse the Lower Court on the issue of breach of lease with instructions to enter judgment in favor of plaintiff against the defendants.

STATEMENT OF FACTS

Respondent takes exception to the facts set forth by appellant, and therefore restates the facts of the case. Respondent, Peggy Bezner, came to Salt Lake City, Utah, in June of 1972, from Kansas City, where she had been employed by Hercules, Inc., and not from Omaha, Nebraska, as stated by appellant in their brief (T. 84). Prior to coming to Utah, she wrote to a Mr. Zorn in the fall of 1971, about buying new equipment for a dry cleaning shop (T. 85). Mr. Zorn, in replying to Mrs. Bezner's inquiry, told her of existing dry cleaning businesses that were for sale (T. 86). When Mrs. Bezner arrived in Salt Lake City, Mr. Zorn took her to see dry cleaning businesses that were for sale. When Mr. Steadman arrived in Salt Lake City, from Kansas, in August, 1972, Mr. Zorn took both Mrs. Bezner and Mr. Steadman to see the businesses he had shown Mrs. Bezner, one of which

was the In-and-Out Sixty Minute Dry Cleaners owned and operated by defendant, Continental Dry Cleaners (T. 7, 8, 9, 86). Mr. Steadman had operated a part time carpet, drapery and upolstery business in Kansas, and wanted to continue in this type of business. Mr. Steadman was interested in investing in a business with Mrs. Bezner and was looking at dry cleaning businesses with her (T. 7). Mr. Zorn was the owner of Alliance Equipment Company which was in the business of selling dry cleaning equipment and had sold the equipment to Continental Dry Cleaners for the In-and-Out Sixty Minute Dry Cleaners (T. 104, 208, 210).

Mrs. Bezner and Mr. Steadman expressed some interest in the In-and-Out Dry Cleaners, and on or about August 24, 1972, Mr. Zorn introduced both Mrs. Bezner and Mr. Steadman to Mr. Bert Harry, the president and principle stockholder of Continental Dry Cleaners (T. 14, 87, 174). At this initial meeting, Mr. Harry told Mrs. Bezner and Mr. Steadman that the asking price for the In-and-Out Cleaners was $40,000.00. Mr. Steadman asked Mr. Harry how the price was established, and Mr. Harry said that the business was grossing at that time $1,000.00 per week, and the price included approximately $31,000.00 in equipment, inventory and goodwill (T. 15, 88). During this first meeting there was discussion about Mrs. Bezner and Mr. Steadman operating self-service gas pumps in connection with the dry cleaning business. Mr. Harry represented that the possibility existed of establishing a self-service station (T. 15-16, 89-90).

A second meeting took place between Mrs. Bezner, Mr. Steadman and Mr. Harry on August 26, 1972, at the Continental Plant located at 5th South and 7th East, in Salt Lake City (T. 17). At this

meeting Mrs. Bezner and Mr. Steadman made an offer to purchase the In-and-Out Cleaners for $35,000.00. Mr. Harry flew into a rage and said it was absolutely out of the question (T. 18). Mr. Harry again told Mrs. Bezner and Mr. Steadman that the price was $40,000.00, and that this price represented the fact that the business was doing a substantial volume of $1,000.00 per week (T. 18, 91, 92). Mr. Harry then proposed a partnership arrangement with Mrs. Bezner and Mr. Steadman. This proposal was immediately rejected by both Mrs. Bezner and Mr. Steadman (T. 18, 90). The possibility of self-service gas was again discussed at the second meeting, and Mr. Harry provided Mrs. Bezner with the name and telephone number of an oil company representative. He also represented that the gas tanks were still there buried under the ground, and that the building which has the cleaning business had been operated as a service station (T. 19, 90, 163, 164). Mr. Harry claimed that he showed a lease between Continental Dry Cleaners and the prior owner of the service station to Mrs. Bezner at this meeting, and that Mr. Bezner, the husband of Mrs. Bezner, who was not present at any of the meetings, was supposed to have pointed out that there was a restriction in the lease concerning the operation of a service station (T. 163, 164). The terms of purchase were also discussed, should Mrs. Bezner and Mr. Steadman agree to buy the In-and-Out Cleaners (T. 21, 89).

During the meeting with Mr. Harry at the Continental Dry Cleaners Plant, both Mrs. Bezner and Mr. Steadman requested to see financial records concerning the operation of the cleaning

business. Mr. Harry told Mrs. Bezner and Mr. Steadman that he had no accurate records of what the shop was doing in that his prior manager was supposed to have been stealing him blind (T. 24, 43, 91). When Mr. Harry made the representation that he had no accurate records of what the shop was doing, his wife, Clair Harry, had been operating the In-and-Out Cleaners for 2½ to 3 months, had maintained daily records, and records were kept on each store, including the In-and-Out at the main office of Continental (T. 175, 176, 202). Mr. Harry explained that he had no accurate records of what, in fact, the In-and-Out Cleaners was doing because the plant was doing work for other plants owned by Continental, was doing Army work of 2,000 pieces per week, and some drapery work (T. 177). Katherine Winters, a former employee of Continental Dry Cleaners, who had worked at the In-and-Out Plant, testified that the work from other plants was the so-called "Army Contract" and consisted of less than 100 pieces per day (600 per week at an average price per item of .14 cents) (T. 178, 221, 222). Mr. Harry testified that the Army Contract was for one year beginning March, 1972, to March, 1973 (T. 178).

It was established by the testimony of Mr. Fannin (T. 63, 64), Clair Harry (T. 202, 205, 206), and Katherine Winters (T. 219), that daily records of what the shop was doing had been kept from the beginning and that Mr. Harry, Mrs. Harry and their sons had picked up these daily receipts and daily records from the In-and-Out Cleaners and turned them into the main office. Mrs. Clair Harry

further testified that she had received instructions to remove all records from the In-and-Out Cleaners prior to Mrs. Bezner assuming ownership and that the records had been picked up by the drivers (T. 201, 202).

After the second meeting with Mr. Harry, Mrs. Bezner and Mr. Steadman agonized over the decision of whether to purchase the In-and-Out Sixty Minute Dry Cleaners or to start a new business for 2½ days (T. 25, 92). Mrs. Bezner and Mr. Steadman decided to purchase the In-and-Out Cleaners in reliance primarily upon Mr. Harry's representations that the business was grossing $1,000.00 per week. Also, the fact that they would be able to offer self-service gas operations with it and that the value of the equipment was represented to be $31,000.00, with some inventory and goodwill; that the name was established and the name In-and-Out would be advertised and they could trade on the advertising (T. 19, 29, 93). A purchase agreement was subsequently entered into between Continental Dry Cleaners as Seller, and Mrs. Bezner and Mr. Steadman as Buyer (T. 46, 100). However, Mr. Harry never provided Mrs. Bezner or Mr. Steadman with a schedule of equipment in connection with the purchase agreement (T. 44, 101 and 102). Mrs. Bezner had made inquiry about putting in the self-service gas pumps prior to taking possession of the business. Around October 10th or 11th, 1972, after she had taken possession of the business, she was informed that she could not operate self-service gas pumps in connection with the cleaning business (T. 97, 98, 99). Mr. Harry was aware of the fact that self-service gas pumps could not be operated in connection with the cleaning business and

failed to inform Mrs. Bezner of this fact before delivering to her for execution the final contracts (T. 163 and 164). Mr. Steadman terminated his partnership with Mrs. Bezner in the first week of November, 1972, in that he found that the setting up of his carpet, drapery and upholstery cleaning business was taking all of his time and he could not devote time to the cleaning business (T. 31, 32, 38, 39). Mrs. Bezner paid out Mr. Steadman his interest in the business and continued to operate the cleaning business until Mr. Harry finally retook possession of it (T. 106, 123).

Mrs. Bezner made numerous attempts to obtain a schedule of equipment (Schedule A) from Mr. Harry but was unsuccessful until Mr. Zorn provided her with a list of equipment in April of 1973, (T. 103, 104). The failure of Mr. Harry to provide a schedule "A" of equipment to Mrs. Bezner forced her to request an extension on filing her tax returns for the year 1972 (T. 105). The preparing of the first financial statements of the operations of the business were delayed until May of 1973. It was at this time Mrs. Bezner became aware that the business had been grossing only $400.00 and $500.00 per week (T. 105).

In the first three or four months of operation of the business Mrs. Bezner encountered numerous difficulties. During the first two weeks that Mrs. Bezner operated the business considerable money was required to be put into the business (T. 106). Mrs. Bezner's mother took ill in the early part of November, 1972, and Mrs. Bezner left the business and went to

Kansas to be with her mother. Mrs. Bezner went to Kansas for a week or more during the month of November and again in the month of December, 1972 (T. 31, 107). Mr. Steadman operated the cleaning shop during her absence. While Mrs. Bezner was away in December, 1972, the cleaning shop was damaged by water, from a snow storm, that had leaked through the roof (T. 32, 33, 34, 35, 36, 107). Mrs. Bezner incurred expenses of approximately $330.00 in repairing the damages caused by the water that had leaked through the roof (T. 108, 109). All of these problems, coupled with the problem of trying to get Mr. Harry to repair the roof (T. 110); the problems she encountered with regard to the business license (T. 114, 115); also contributed to the delay in preparing financial statements of the business operations.

In about the second or third week of June, 1972, Mrs. Bezner's husband, while cleaning the boiler room at the dry cleaning shop, found a box containing the business records of the In-and-Out Cleaners for the period that Continental Cleaners had operated it beginning with the month of February, 1972, through September, 1972 (T. 115, 116, 121). Mrs. Bezner ran tapes on the records to determine the gross business the shop had done for the eight month period the records covered, and found that the shop had averaged approximately $400.00 per week (T. 117, 118, 119, 121). She had attempted to contact her attorney, but was not successful until the middle of July (T. 122). That she, after consultation with her attorney, authorized her attorney to send a letter to Mr. Harry informing him that she elected to rescind the contract and tendered back possession of the shop (T. 122, 123, 180). At

this time she discontinued payments under the contract of purchase on the lease agreement, and began winding down the operation of the business. Mr. Harry took no action after receiving the letter in July, 1973, informing him that Mrs. Bezner had elected to rescind the contract of purchase and requesting that he retake possession of the premises until September 23, 1973, (T. 180).

Prior to the time that it was conclusively determined by Mrs. Bezner that the representation of Mr. Harry that the business was grossing $1,000.00 per week was false, the representation as to the value of the equipment as being $31,000.00 had not been questioned. It was after the discovery of these records Mr. Steadman then questioned the represented value of the equipment (T. 48).

That prior to Mr. Harry retaking possession of the cleaning business on or about October 1, 1973, he negotiated a sale of it to a Mr. Kiter in August or September of 1973 (T. 73, 74). Mr. Kiter testified that Mr. Harry started negotiations for the sale of the business to him in July of 1973 (T. 82). The appellants in their statement of facts state that Mr. Kiter, after he had purchased the In-and-Out Cleaners from Mr. Harry and commenced its operations, did $1,100.00 business in one week, which was the grand opening week, and that there were 18 weeks over $900.00 unaffected by any rise in prices (T. 77-80). The appellant is in error, in that Mr. Kiter definitely stated that the figures did not take into consideration that he had raised prices substantially from the time that he purchased and took over

the operations of the business (T. 80). That the price structure was different and that the 18 weeks of business over $900.00 per week were during the entire period from October, 1973, to March, 1975, and did not take into consideration the higher prices charged for the cleaning and whether the weeks of the higher income were in the peak period of the business year or the low period of the business year (T. 80). Mr. Kiter testified that the business had lost money since he had purchased it and that it was not profitable as of March, 1975 (T. 80).

The Court submitted the case to the jury on special verdict (R. 40-41). The Court clearly and properly instructed the jury as to the law and the burden of proof of plaintiff as set forth in proposition number 1 of the special verdict and as set forth in instruction number 20, as well as instruction number 8 (R. 104), number 15 (R. 111), number 17 (R. 113), number 18, (R. 114), and 19 (R. 115). The jury clearly and without contradiction answered each proposition of the special verdict (R. 40-41), and the Court entered judgment on the verdict for $10,000, which was the down payment made by Mrs. Bezner on the contract of purchase, less rents due defendants under the lease and allowing the defendants to retain all additional sums paid by Mrs. Bezner as principle and interest under the purchase contract as rental for the use of the equipment (R. 33-34, 40-41).

The Court in proposition number 2 of the special verdict submitted the question of waiver to the jury, even though the defendants had failed to plead anywhere in their answer or counterclaim the affirmative defenses of waiver, estoppel,

laches or any other matter constituting avoidance or affirmative defense to the action of plaintiff as required by Rule 8(c) of the Utah Rules of Civil Procedure (R. 127-130). The jury answered proposition number 2 submitted to them in the special verdict as false, thereby finding that Mrs. Bezner, after she discovered the false and fraudulent statement of Mr. Harry "that the business was grossing $1,000.00 per week" acted with promptness and did not waive her right to disaffirm and rescind the contract of sale of the business (T. 40-41).

POINT I

REFUSAL TO GIVE REQUESTED INSTRUCTION OF DEFENDANTS/APPELLANTS ON THE ISSUE OF WAIVER WAS NOT PREJUDICIAL ERROR.

The appellants assert that the submission of proposition no. 2 of the special verdict to the jury without instruction was prejudicial error. Respondent takes the position that the issue of waiver was not properly raised by appellants, and therefore, the refusal of the Court to give appellants requested instructions, not withstanding exception duly taken, did not constitute prejudicial error. Respondent does not take issue with the general rule that fraud or misrepresentation may be waived and that the defense of waiver, ratification or estoppel to a fraud action is clearly recognized in law. However, the defense of waiver, ratification or estoppel is an affirmative defense which must be plead expressly by the party claiming it. The provisions of Rule 8(c) of the Utah Rules of Civil Procedure provides as follows, to-wit:

> In pleading to a preceding pleading, a party shall set forth affirmatively *** estoppel, *** laches, *** waiver and any other matter consti-

Appellants did not assert in their answer or counterclaim, or any other pleadings in this action, the affirmative defense of waiver, ratification, laches or estoppel. Nor did the appellants at any time during the trial of this case move the Court to amend their pleadings so as to bring the issue of waiver before the Lower Court. Thus, the issue of waiver was not properly raised by the appellants, and they were not entitled to have the issue submitted to the jury. (Siciliano -vs- D. & R.G.W.R. Co., 12 U.2d 183; 364 P.2d 413). Rule 12(h) of the Utah Rules of Civil Procedure provides, to-wit:

> A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, ***.

The provisions of Rule 12(b) of the Utah Rules of Civil Procedure provides, to-wit:

> Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, ***.

In Thomas -vs- Braffet's Heirs, 6 U.2d 57, 305 P.2d 507, the Court said,

> "It is no doubt true that Rule 8(c) requires a party to set forth his affirmative defenses and matters constituting avoidance; *** It is also true that generally a failure to plead an affirmative defense results in its waiver and excludes it as an issue in the case." (Emphasis Added)

Therefore, the submission of proposition no. 2 without the requested instruction of appellants would not constitute reversible error, (Anderson -vs- Bingham and Garfield R. Co., 117 Utah 197, 214 P.2d 607), the defense having been waived for failure to plead.

Appellants do not take issue with the language of proposition no. 2 and that the same was not understandable to the jury. In Shupe -vs- Menlove, 18 U.2d 130, 417 P.2d 246, (1966), the Court held that if the language of instructions to jury is such that issues are understandable and facts are ascertainable to resolve issues, the trial court's failure to give instructions requested by defendant will not constitute reversible error. The facts of this case were readily ascertainable and clearly established that Mrs. Bezner acted with reasonable promptness after she learned that the cleaning business had not grossed a $1,000.00 per week as represented by Mr. Harry. The first three months of operation of the business by Mrs. Bezner was fraught with difficulties in that additional money was required to be put into the business for supplies and she commenced operation of the business at a slow time of the business year. Mrs. Bezner was required to be away from the business during the months of November and December, 1972, to be with her mother who had taken ill. The preparing of financial statements for the operation of the business for the year 1972 was delayed until May, 1973, by the fact that Mr. Harry failed to provide Mrs. Bezner with a schedule of equipment. Mrs. Bezner discovered the records of the cleaning shop in June, 1973, which then clearly established that the business had never grossed $1,000.00 per week as represented by Mr. Harry. She then took action and in July, 1973, sent a letter to Mr. Harry telling him that she elected to rescind the contract and tender back the business to Mr. Harry. Mr. Harry, after receiving the letter of July, 1973, took no action to retake possession of the business

until October, 1973. However, Mr. Harry commenced negotiations to sell the cleaning shop to Mr. Kiter in the latter part of July or the first part of August, 1973, and did in fact sell the shop to Mr. Kiter in August, 1973. This action on the part of Mr. Harry could be construed to be constructive retaking of the business as early as August, 1973, with actual possession by October 1, 1973. The jury properly answered proposition no. 2 in light of all of these facts which were clearly ascertainable to the jury, and these facts and circumstances would clearly support the answer of the jury to proposition no. 2.

Trial by jury is a right fundamental and is sacred to the citizen and once it has been granted and a verdict rendered, such verdict should not be regarded lightly nor overturned without good and sufficient reason and judgment should not be disturbed merely because of error. (Bowden -vs- D. & R.G.W.R. Co., 3 U.2d 444, 286 P.2d 240). Generally in any lawsuit of several days duration, counsel can usually find matters upon which he may claim error. The reviewing Court will not reverse on mere error, but only if it be substantial and prejudicial to the extent that there is a reasonable likelihood that unfairness or injustice has resulted. (Lamb -vs- Bangart, ___ U.2d ___; 525 P.2d 602 (1974). Where, as in this case, both parties had fair and full opportunity to present their contentions and the evidence supporting them to the Court and jury, all presumptions are in favor of the validity of the verdict and the judgment. In order for the verdict to be overturned, there must exist errors which are substantial and prejudicial in the sense that there is reasonable likelihood that the result would have been different in the absence of error.

(Rowley -vs- Graven Brothers, 26 U.2d 448, 491 P.2d 1206; Burnson -vs- Strong, 17 U.2d 364, 412 P.2d 451; Gordon -vs- Provo City, 15 U.2d 287, 391 P.2d 430).

Should this Court determine that the refusal of the Lower Court to give defendants' requested instruction was error, then, this Court must determine whether the error or irregularity was such that there is a reasonable likelihood to believe that in its absence there would have been a result more favorable to the appellants. In answering this question, the Court must survey the whole evidence and after so doing the question must be answered in the negative, then there is no justifiable basis for reversal of a judgment. (Rowley -vs- Graven Brothers, (supra.). The Court, in the case of In Re Richards Estate, 5 U.2d 106, 297 P.2d 542, submitted the case to the jury by giving them only three interrogatories and directing them to place an "X" opposite the proposition with which they agreed. The trial judge refused to give proponent's requested instructions. This Court held that the refusal of the Lower Court to give instructions was not basis for reversal, unless the jury was insufficiently advised of the issue they were to determine, or it appears that they would have been confused or mislead to prejudice. Appellants state that the only question raised by their Point I on appeal is whether the jury was entitled to be given some guiding instruction on the issue of waiver. That the fact that the Lower Court failed to instruct the jury as to the legal effect of their finding on proposition no. 2 was error. This does not meet the test of the above cited cases where the Court properly instructed the jury as to the proper burden of proof on each proposition not

specifically requiring the burden of clear and convincing evidence and clearly instructed the jury on the elements necessary to be proved by respondent to support a finding of fraudulent misrepresentation by clear and convincing evidence. The refusal of the requested instruction of appellants by the Lower Court would have merely stated the legal effect of the answer to proposition no. 2, and therefore, was not prejudicial error where the substance thereof was contained in the instructions given by the Court, specifically in proposition no. 2. (Hardman -vs- Thurman, 121 Utah 143, 239 P.2d 215). In reviewing the evidence as a whole, the refusal to give defendants requested instruction was not error where appellants were required to plead affirmatively the defense of waiver, ratification or estoppel, and failed to do so; and thereby, waived this defense. The substance of the requested instruction was given by the Court in proposition no. 2 with proper instruction as to burden of proof required in reaching the answer. The special verdict of the jury should be affirmed and the request of the appellants to reverse or set aside the verdict of the jury should be denied.

POINT II

EVIDENCE WAS SUFFICIENT TO SUPPORT THE SPECIAL VERDICT OF THE JURY OF FRAUD BY DEFENDANTS/APPELLANTS.

Appellants, during the course of trial, motioned the Lower Court to dismiss the action of respondent in that the evidence, in the opinion of appellants, was insufficient to establish fraud. (T. 172-174). The Lower Court denied the motion of appellants and submitted the case to the jury under proper instructions as to all of the elements of fraud necessary to

be proved by respondent and instrucing the jury thoroughly that they must be proved by clear and convincing evidence. (R. 111, 113-116). The jury, without contradiction, answered each proposition of the special verdict. (R. 40-41). In the case of Lynch -vs- MacDonald, 12 U.2d 427, 367 P.2d 464, this Court said, "That the Supreme Court had the duty to review evidence in the light most favorable to trial Court's finding where judgment was rendered in part on conflicting evidence." The Supreme Court affirmed the Lower Court's finding of fraud.

The question as to whether or not fraud has been established by clear and convincing evidence is usually for determination by the trial of fact. In Condas -vs- Adams, 15 U.2d 132, 388 P.2d 803, this Court held that evidence was sufficient to present a jury question as to whether the landlord had misrepresented to tenants the quantity of hay which had been produced from the land per year and as to whether he had misrepresented the water supply available for the land. The fact situation in the Condas -vs- Adams, supra. case is very similar to this case. The owner of land represented that the land offered for lease would produce 90 tons of hay per year. The leasee later obtained proof that the land had not produced 90 tons of hay in the years prior to entering into the lease. Mr. Harry represented to the respondent that the cleaning shop was grossing approximately $1,000.00 per week, but he did not have accurate records of what the shop was doing. (T. 24, 43, 91). At the time Mr. Harry made the representation that he had no accurate records of what the shop was in fact doing, his wife, Clair Harry, had operated the shop for 2½ to 3 months, and had maintained daily records

which were sent to the main office of Continental Dry Cleaning. (T. 175-176, 202). Mr. Harry, although he denied he had represented that the shop was doing $1,000.00 per week, attempted to explain that the lack of records was due to the fact that his former manager was stealing from him and that he was doing plant work for other plants and work on an army contract which was not included in the shop's daily records. (T. 177). Mr. Harry testified that the army work constituted 2,000 pieces per week. Katherine Winters, a former employee of Mr. Harry, testified that the army work consisted of 100 pieces per day at an average of $.14 per item. (T. 178, 221, 222). Mr. Fannin testified that the drapery work was included in the daily receipts and completely dispelled Mr. Harry's claim of charge accounts not being included in the daily records. (T. 70-71). Mr. Fannin also testified that the shop averaged $400.00 per week during the time he was its manager, and there never was a $1,000.00 week. (T.67-68). The daily records of the shop were picked up by Mr. Harry, Mrs. Harry and the drivers and kept at the main office of Continental Dry Cleaning. (T. 63-64). This was also confirmed by Mrs. Harry and Katherine Winters. (T. 202-206, 219). Mr. Harry represented that the price of the business was based upon $31,000.00 of equipment and the fact the shop was grossing $1,000.00 per week. (T. 18, 91, 92). That these representations were relied upon by Mrs. Bezner in purchasing the business. (T. 19-29, 93). That she agonized over the decision for 2½ days. (T. 25, 92). Mr. Zorn, who received a commission for the sale of the business, said that the selling price was determined by how much money it

grossed in a year. (T. 212). The representation that the business was doing between $400.00 and $500.00 per week would not have supported the $40,000.00 selling price under Mr. Zorn's testimony. In fact, Mr. Zorn admitted that he had told Mrs. Bezner that the cleaning shop's break even point was $500.00 to $600.00 per week, not that the shop was doing $500.00 per week. (T. 213-214). Mr. Zorn further contradicted himself by stating that the cleaning shop could do $1,000.00 to $1,500.00 per week by raising prices, not on increased volume. (T. 216).

Plaintiff/respondent established by sufficient and competent evidence each of the essential elements of her alleged cause of action for fraud and deceit to make out a prima facie case of liability, and in so doing, the Court properly submitted the matter to the jury under proper instruction for its decision. (Oberg -vs- Sanders, 111 Utah 507, 184 P.2d 229). The evidence presented on the issue of variance between what the cleaning shop was actually grossing and what the shop grossed as represented by Mr. Harry and on the issues of disparity in business experience between appellants as sellers and respondent as buyer, and Mrs. Bezner's reliance on Mr. Harry's representations, was sufficient to take the case to the jury. (Lewis -vs- White, 2 U.2d 101, 269 P.2d 865).

The instructions given to the jury by the Lower Court, principally instructions numbers 8, 15, 17, 18, 19 and 20, follow very closely the guidelines set down by the Supreme Court in Stuck -vs- Delta Land and Water Company, 63 Utah 495, 227 P.791; and Lewis -vs- White (supra.). If anything, these instructions

were more favorable to the appellants than the facts justified, and therefore, should not be heard to complain. (Motter -vs- Bateman, 18 U.2d 335, 423 P.2d 153). The evidence presented clearly supports the verdict of the jury in finding that the appellants fraudulently misrepresented the business to Mrs. Bezner. Substantial weight must be given to the jury's determination when it clearly appears that the jury's findings were based on the application of the standard of clear and convincing evidence required by law, and therefore, the jury verdict must stand.

POINT III

THE LOWER COURT'S AWARD TO DEFENDANTS OF REASONABLE RENT FOR THE EQUIPMENT PURCHASED UNDER CONTRACT WAS ARBITRARY AND NOT SUPPORTED BY THE EVIDENCE.

The Lower Court, in entering judgment on the verdict, allowed defendants/appellants to retain all installment payments made by respondent, Mrs. Bezner, under contract of purchase as the reasonable rental value of the equipment that was to have been purchased under the contract rescinded by Mrs. Bezner. (R. 33-34, 29-30). In 77 Am Jur 2d, Vendor and Purchaser, § 565, it is stated:

> As in other cases of rescission, the vendee is ordinarily required to restore the status quo, insofar as he has received any benefit, as a condition of his right to rescind; but he is not required to put the other party in the same situation in which he was before the contract, where the latter has rendered it impossible by the nature of his fraud or other act, ***.

It is generally recognized that upon rescission of a contract of sale, the purchaser is entitled to a return of all money paid on the purchase price. (Heidemann -vs- Petersen, 75 Utah 107,

283 P. 435; Horiwitz -vs- David K. Richards & Co., 20 U.2d 232, 436 P.2d 794; Bethhe -vs- Bain, Ore., 240 P.2d 958). Mrs. Bezner paid a total of $12,000.00 under the contract on the purchase price of the cleaning shop. Mr. Kiter testified that he purchased the shop from Mr. Harry in August, 1973, for $28,000.00, the balance owing on Mrs. Bezner's contract at the time she made her election to rescind the same. (T. 74). That the equipment at the time Mr. Kiter purchased the cleaning shop from Mr. Harry was in excellent condition and well worth the price of $28,000.00. (T. 79, 81-82). In addition to the payments on the principal amount of the contract, Mrs. Bezner paid interest totalling $1,719.00. (R. 33).

Admittedly, the law recognizes that appellants would be entitled to some compensation for the use of the equipment by Mrs. Bezner, prior to her discovering the fraud upon her and her election to rescind the contract. (See Eastman -vs- Overman, 11 U.2d 258, 358 P.2d 85; Case Credit Corp. -vs- Stark, Wash., 392 P.2d 215). However, defendants/appellants made no claim for rentals in any of their pleadings, nor did they present any evidence as to what a reasonable rental for the equipment would be for the period it was used. The giving of $3,719.00 as rental for the equipment to the defendants/appellants by the Lower Court, without the benefit of testimony as to what in fact was a reasonable rental, was arbitrary and was not supported by any evidence whatsoever. It is respectfully submitted that respondent, Mrs. Bezner, should be allowed to recover back by law the amount paid on the contract of purchase, the sum of $12,000.00, and the defendants/appellants retain the interest

payments in the sum of $1,719.00 as reasonable rental for the equipment in light of the fact that there was no testimony before the Court as to what constituted a reasonable rental for the equipment. Therefore, the judgment on the verdict should be amended accordingly.

POINT IV

IT WAS ERROR FOR THE LOWER COURT TO REFUSE TO SUBMIT THE FACTUAL QUESTION OF BREACH OF LEASE TO THE JURY.

Plaintiff/respondent in her complaint claimed that the defendants/appellants had breached their lease agreement by failing and refusing to repair water damage caused by water that had built up on the roof of the premises and leaked down through a seam in the parapet that had separated. (R. 141, 228). The testimony of Mr. Stedman and Mrs. Bezner was uncontradicted as to the water damage that had occurred and Mrs. Bezner incurred expenses in the sum of $330.00 to repair said damage. (T. 32-36, 107-111). Mr. Bezner testified that the drain on the roof in the lower area of the roof was raised two to three inches and the water had to rise that height to get into it and that there was a screen over it. When the water rose to reach the level of the drain, it would run in behind the flashing and parapet, which was not sealed. That he investigated personally and observed where part of the flashing had been sealed, but it had pulled loose, and therefore, allowed the water to run down into the cleaning shop. (R. 226-228). Mr. Harry instructed Mr. Stedman to call Layton Roofing for the purpose to come out and correct the leaking problem and undertook to pay for what services and repairs Layton Roofing in fact rendered. This could certainly

Harry. It was also undisputed that Mr. Harry had prepared the lease agreement in connection with the contract of purchase of the In-And-Out Cleaners. (T. 100-102). The Lower Court considered the contract of purchase and the lease agreement as two separate contracts, but also stated that they were interdependent and could not separate the two. The Court raised the question at the time of trial that if one of the contracts could be rescinded by fraud or a breach occurred which would warrant the rescission of the contract, then both contracts could be rescinded in that they were interdependent. (T. 172). Mr. Kiter testified that he had experienced the same leaking problem on two separate occasions since purchasing the cleaning shop from Mr. Harry in August, 1973. (T. 75).

In the case of Bullfrog Marina, Inc. -vs- Lentz, 28 U.2d 261, 501 P.2d 266, the Court stated:

> Where two or more instruments are executed together by the same parties contemporaneously, ***, in course of the same transaction, and cover the same subject matter, they will be read and construed together so far as determining respective rights of the parties, even though they do not in terms refer to each other. (Emphasis Added)

There is no dispute that the lease agreement was a part of the entire transaction between the parties and was entered into simultaneously with the contract for the purchase of the cleaning shop. Respondent submits that the rescission of the contract of purchase for fraud warrants a recission and cancellation of the lease in that they were interdependent. A rescission and cancellation of the lease should have resulted in an award of damages to the respondent for the repairs made to the premises

by reason of the water damage.

Appellants succeeded in convincing the Lower Court that the provisions of paragraph 6 of the lease agreement relieved them of any responsibility or liability for damages suffered by Mrs. Bezner due to the leaking roof. Paragraph 6 of the lease agreement reads as follows:

> That the party of the first part shall not be liable for any damages occasioned by failure to keep said premises in repair and shall not be liable for any damage done or occasioned by or from plumbing, gas, water, steam or other pipes or sewage, or the bursting, leaking or running of any washstand, tank, water closet or waste pipe in above, upon, or about said building or premises, nor from any damage occasioned by water arising from acts or neglect of co-tenants or other occupants of the same building.

It is the position of respondent that the Court should have applied the general rule of ejusdem generis in construing the provisions of paragraph 6 quoted above in making its determination as to whether or not appellants would have been liable for the damages occasioned by the water that had leaked into the cleaning shop. (U.S.F.&G. -vs- Tomlinson-Arkwright Co., Ore. 141 P.2d 817; Vogel -vs- Cobb, Okla. 141 P.2d 276, 148 ALR 774; Trego -vs- WaKeeney State Bank, Kan. 519 P.2d 743).

The lease agreement contained conflicting paragraphs in that paragraph 13 of said lease agreement required appellants to keep the premises and exterior of the leased building in good condition and state of repair. Paragraph 13 of the lease agreement reads as follows:

> Party of the first part (Continental Cleaners) agrees to keep the premises and exterior of the leased building in good condition and state of repair and the building and premises insured.

As a general rule of law, where the lease agreement is drawn by the appellants, which is the undisputed fact in this case, conflicts in the lease agreement are to be construed most strongly against the landlord (appellants) where a question of conflicting meaning arises. (Wolfe -vs- White, 119 Utah 183, 225 P.2d 729). Generally an ambiguous lease is construed most strongly against the lessor on the theory that he is the party using the language thereof. (Powerline Co. -vs- Russells, Inc., 103 Utah 441, 135 P.2d 906). Thus, the scrivener-lessor becomes accountable for his words, which he uses in his lease agreement in case of doubt. (Sine -vs- Rudy, 27 U.2d 67, 493 P.2d 299). In the case of uncertainty as to the meaning of a contract, it should be construed most strictly against its framer. (Seal -vs- Tayco, Inc., 16 U.2d 323, 400 P.2d 503). Inasmuch as the lease agreement was drawn up by the appellants through their attorney, the law requires it to be strictly construed against appellants, and any conflict in the terms and conditions of said lease agreement should be construed against appellants and in favor of the respondent, Mrs. Bezner. (Wingetts -vs- Butters, 28 U.2d 231, 500 P.2d 1007). The fact that there was a direct conflict and contradiction in the terms of the lease agreement clearly raised a jury question as to a breach of the lease agreement on the part of Continental Dry Cleaners, which should have been submitted to the jury for its determination as triers of the fact. Respondent contends that the conflict in the provisions of the lease agreement created an ambiguity and the terms of the lease agreement should have been construed against appellants, the party who had prepared

it. (Guinand -vs- Walton, 22 U.2d 196, 450 P.2d 467; 25 U.2d 253, 480 P.2d 137; Wingetts -vs- Butters (supra.). It is respectfully submitted that the Lower Court errored when it refused to submit the issue of breach of lease and the question of damages to the jury, and awarded to the appellants judgment for the sum of $600.00 for lease payments for the months of August and September, 1973, in light of the fact that the lease agreement was an integral part of the contract of purchase and could well have been considered to have been rescinded along with the contract of purchase; and for the further reason that the lease agreement contained a direct conflict in its terms and construction of the meaning of the conflict should have been construed directly against appellants, they being the party who had their attorney draw their lease agreement and contract of purchase. Respondent requests that the Court reverse the Lower Court on the issue of breach of lease with instructions to enter judgment in favor of respondent against appellants for rescission of the lease agreement, and awarding to respondent damages in the sum of $350.00 for repair of the premises and damages occasioned by water, that being a direct responsibility of the appellants.

CONCLUSION

The special verdict of the jury should be affirmed in that no prejudicial error resulted to appellants by the refusal of the Lower Court to give appellants requested instruction in light of the fact that the substance of the requested instruction was given by the Court in the language of proposition no. 2 of

the special verdict. Further, the issue of waiver was not properly before the Lower Court in that appellants failed to plead it as an affirmative defense as required under the Utah Rules of Civil Procedure, and therefore, waived the same. The evidence of fraud, viewed as a whole, was more than sufficient to justify and support the verdict of the jury against appellants by the applicable standard and burden of proof and in view of the detailed instructions on the issue of fraud given by the Lower Court to the jury. Substantial weight must be given to the jury's determination and it is clear that the standard of clear and convincing evidence was met and the special verdict of the jury should be affirmed.

Respondent was entitled to recover back all funds paid to appellants on the contract of purchase of the cleaning shop as a matter of law. The giving of reasonable rents to the appellants equal to the amount of the installment payments paid on the contract of purchase exclusive of the original down payment by the Lower Court was arbitrary and was not supported by the evidence where appellants made no claim for rental value of the equipment and presented no evidence as to what the reasonable rental value for the equipment would be during the time respondent operated the cleaning shop. The judgment on the verdict of the Lower Court should be amended to include all amounts paid by respondent on the purchase price of the contract, allowing appellants to retain only the sum paid as interest as reasonable rent for the use of the equipment. Further, the lease agreement should be declared as rescinded together with the purchase agreement, and respondent be awarded judgment against

appellant, Continental Dry Cleaners, for the amount of the repairs to the cleaning shop. In the alternative, the special verdict of the jury should remain in full force and effect, and the judgment on the verdict, as requested to be amended, should remain in full force and effect, and the issue of breach of lease and the question of damages associated therewith be remanded to the Lower Court for further hearing.

Respectfully submitted,

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