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Utah State University of Agriculture and Applied Science, A Utah Body Politic and Corporate v. Bear Stearns & Co., A Corporation v. Phillip A. Bullen, Jay R. Bingham, O.C. Hammond, Jay Dee Harris, Beverly D. Kumpfer, Snell Olsen, Rex G. Plowman, W. B. Robins, Alva C. Snow, William R. Stockdale, Jane S. Tibbals, Glen L. Taggart, Dee A. Broadbent, L. Mark Neuberger, Donald A. Catron, John Does, the Industrial Council of Utah State University of

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Appellant Bosworth, Sullivan and Company
Appellant Brief submitted to the Utah Supreme Court 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. Robert S. Campbell, Michael Heyrund, Lyle W. Hillyard, David R. Melton; Attorneys for certain Third-Party Defendants Darwin C. Hansen; Attorney for Third-Party Defendant Catron David L. Wilkinson; Attorney for Plaintiff Daniele M. Allred, Kathlene W. Lowe; Attorneys for Appellants

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IN THE SUPREME COURT
OF THE STATE OF UTAH

UTAH STATE UNIVERSITY OF
AGRICULTURE AND APPLIED
SCIENCE, a Utah body
politic and corporate,

Plaintiff-Respondent,

vs.

BOSWORTH, SULLIVAN AND
COMPANY,

Case No. 16274

Defendant-Appellant,

vs.

PHILLIP A. BULLEN, et al.

Third-Party
Defendants-Respondents.

FILED

BRIEF OF APPELLANT
BOSWORTH, SULLIVAN AND COMPANY

JUN 11 1979

Appeal from Orders of the
District Court of Cache County
Honorable VeNoy Christofferson, Judge

Clerk, Supreme Court, Utah

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BRIEF OF APPELLANT
BOSWORTH, SULLIVAN AND COMPANY

STATEMENT OF THE NATURE OF THE CASE

This action was commenced by Utah State University (hereinafter the "University") to recover monies from defendant Bosworth, Sullivan and Company (hereinafter "Bosworth"), a securities brokerage house, for losses allegedly sustained by the University arising out of securities bought and sold on behalf of the University by Bosworth.

Bosworth filed third-party claims of indemnity and contribution against University officials who authorized the University's purchase and sale of securities.

DISPOSITION IN LOWER COURT

On March 18, 1977, the Court entered an Order denying Bosworth's Motion for Change of Venue from the First Judicial District Court of Cache County. (R. 189).

On July 22, 1977, the Court denied Bosworth's Motion to Dismiss Plaintiff's First Amended Complaint.

On March 21, 1978 and on May 1, 1978, the Court granted Third-Party Defendants' Motions to Dismiss, and on January 3, 1979, the Court granted the University's Motion for Partial Summary Judgment on the issue of liability. (R. 771, 870, 999).

Bosworth here appeals from the Orders listed above.

RELIEF SOUGHT ON APPEAL

Bosworth seeks reversal of the Order denying Bosworth's Motion to Dismiss the University's First Amended Complaint. In the alternative, Bosworth seeks reversal of (1) the Order granting the University's Motion for Partial Summary Judgment, (2) the Order dismissing Bosworth's Third-Party Complaint, and (3) the Order denying Bosworth's Motion for Change of Venue.

STATEMENT OF FACTS

In mid-1970, the University began a program of investing part of its funds in securities. This was accomplished, in part, through the use of various stock brokerage houses, one of which was Bosworth. The investment program was prompted primarily by (1) criticism by the State Auditor's office in 1970 directed at the University for leaving large amounts of funds in non-interest-bearing bank accounts (Catron 44) and (2) a two percent cut in the University's budget in the summer of 1970. (Deposition Ex. 4).

The University's investment program was expressly adopted and authorized by the University's Institutional Council (Deposition Exs. 7, 8, 9 and 33).

Donald A. Catron, the University's Controller since April, 1970, was given unlimited control over the investment program. During the period from mid-1970 to March, 1973, Catron caused the University, through various broker-agents, including Bosworth, to buy and sell hundreds of securities involving millions of the University's dollars.

Shortly after the investment program was implemented, Catron and others from the University attended an investment seminar in San Francisco sponsored by the Ford Foundation on the subject of securities investments by universities. (Deposition Ex. 17).

Rex A. Plowman, a member of the University's Institutional Council and the then newly formed investment committee and also one of those attending the Ford Foundation seminar, gave an oral report of the seminar to the entire Institutional Council on February 23, 1971. (Deposition Ex. 96).

Three of the themes advanced by the Ford Foundation at the seminar influenced and became a part of the University's investment program. One theme was that in the past those who managed portfolios of educational institutions had lost more money, because of inflation, by being conservative in securities investments than by being aggressive, and that portfolio managers should move from fixed income securities to equity securities, i.e., to stocks. In particular, the Ford Foundation report stated that, following World War II,:

Far-sighted investors began to regard good common stocks as a better haven than bonds for funds seeking protection of purchasing power without material sacrifice of liquidity. . . . We conclude that, whatever may happen in the future, endowment managers should free themselves of rigid rules on the holding of bonds. (Deposition Ex. 96 at 16).

The Ford Foundation report also recommended that institutions not be restricted to "conventional blue chips" in common stock investments. (Deposition Ex. 96).

A third theme of the Ford Foundation report was that decisions to purchase or sell particular securities

should be delegated to a single manager with regular review by the institution's trustees. (Broadbent 100).

On January 20, 1972, the Institutional Council held a regular meeting with 18 high-ranking members of the University present. A motion was made, seconded and passed approving a corporate resolution authorizing Dee A. Broadbent, University Vice President, and Catron "to purchase, trade, and sell, long or short, transfer and assign, stocks, bonds and securities of every nature on margin or otherwise". By its terms, the resolution was to "remain in full force and effect until written notice of revocation hereof shall be delivered to the brokers". (Deposition Ex. 33).

At that meeting, there was absolutely no mention by anyone present about whether the University had the legal power to enter into such a resolution. The resolution was approved without a dissenting vote.

In February, 1972, Catron, pursuant to the resolution, opened an account on behalf of the University with Bosworth by signing a customer account card. Prior to, or at the time the account was opened, Bosworth asked for and received from the University a copy of the resolution of the Institutional Council authorizing Catron to purchase common stock. (R. 919).

Bosworth relied upon the resolution which was certified by the Secretary of the Institutional Council, L. Mark

Neuberger. Without the resolution, Bosworth would not have dealt with Catron or anyone else on behalf of the University. (R. 920).

After February, 1972, Bosworth executed trades at the request and on behalf of the University, the first taking place on February 1, 1972. Many of the trades occurred after December, 1972, the last trade occurring on March 7, 1973. In each instance, Bosworth acted as an agent of the University, rather than as a principal. (R. 921).

In the spring of 1972, until Catron was suspended in March, 1973, the Institutional Council, the Board of Regents and the University Administration received monthly reports of investments purchased, and the amount of the entire investment portfolio. (Catron 146; Neuberger 15).

Throughout 1972, the Institutional Council gave wholehearted support and assistance to Catron. The minutes of the Institutional Council reflect that on February 15, 1972, Catron gave a report of the investment program and all present agreed that the project was being handled in a very satisfactory manner. (Deposition Ex. 85c).

The minutes of a June 23, 1972, Institutional Council meeting reflect that at a meeting of the Investment Committee the evening before, Catron had demonstrated the use of a ticker tape which had been installed in his office. Mr. J. D. Harris, a member of both the Institutional Council and

the Investment Committee, reported in that meeting that he was more convinced than ever that the University was moving in the right direction. (Deposition Ex. 41 and 42).

On July 29, 1972, Harris reported to the Institutional Council that the Investment Committee had received a report of the earnings on investments for the past year and expressed the feeling that the investment staff was doing a remarkable job. (Deposition Ex. 44).

Not until December, 1972, did anyone at the University question the legality or validity of the University's investment program. In late 1972, an audit of the University was begun by the private accounting firm of Ernst & Ernst. The accounting firm questioned the validity of investments being made by the University and sought an opinion from the Utah Attorney General's office. (Broadbent 260-261).

During this period of time, Catron continued to purchase securities through Bosworth. (R. 77).

On January 10, 1973, the Institutional Council reviewed a letter written by Mr. H. Wright Volker, Assistant Attorney General, to Mr. Sherman J. Preece, State Auditor, which questioned the validity and legality of the University's investments. However, investments continued to be made through Bosworth by Catron. No one from the Institutional

Council, the President's office, or the Attorney General's office notified Bosworth of the questions raised as to the legality of the investment program.

Catron was fired in March, 1973. The officers of the University and members of the Institutional Council were not clear as to what instructions Catron had been given from December, 1972, to March, 1973. Some of the members and officers believed Catron was given instructions to follow the "prudent man" rule in liquidating stocks while others thought that he had been instructed to stop purchasing stocks. (Broadbent 203). Bosworth was informed for the first time on March 20, 1973, that Catron's authority on behalf of the University had been withdrawn. (Deposition Ex. 63).

Mr. Catron testified in his deposition that no one instructed him not to purchase common stocks after December, 1972, even though the University had received Mr. Volker's opinion.

Q. Was it your understanding prior to March 1, 1973, that during the period December, 1972, to March 1, 1973, that you were not to purchase common stocks for the investment portfolio of Utah State University out of public monies?

A. What were those dates again?

Q. December 1, 1972, to March 1, 1973.

A. No.

Q. That was not your understanding?

A. Yes. That was not my understanding.

Q. And to make sure that it's clear, you have no recollection of ever receiving such instructions either from Mr. Broadbent or President Taggart or any member of the Institutional Council in that regard?

A. No. (Catron 217-218).

On January 10, 1973, Broadbent informed the Institutional Council that funds invested as of June 30, 1972 had come from the unrestricted general account, the auxillary fund, development funds, loan funds, endowment funds, plant funds, agency funds, and investment pool gains. (Deposition Ex. 850).

ARGUMENT

POINT I

THE LOWER COURT ERRED IN DENYING BOSWORTH'S MOTION TO DISMISS AND IN GRANTING THE UNIVERSITY'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

A. The Allegations Of The University's First Amended Complaint Fail To State A Claim Against Bosworth Upon Which Relief Can Be Granted.

Assuming arguendo that the security transactions at issue were ultra vires or illegal, the University's First Amended Complaint nevertheless fails to state a claim upon which relief can be granted.

Plaintiff's First Amended Complaint alleges merely that (1) Catron was the University's Investment Officer; (2) at the request of Catron, Bosworth executed securities orders for the University; (3) the only monies available to Catron for payment were in the custody and/or possession of the University; (4) said payments were ultra vires. The University alleges no wrongdoing against Bosworth.

Where parties to an illegal or ultra vires contract are in pari delicto the courts will refuse to enforce rights arising therefrom, not only where the contract is executory, but also when the agreement has been executed. Restatement of Contract, §598 (1932).

Even if Bosworth is charged with knowledge that the University's securities purchases were illegal or ultra vires, the University would be in pari delicto because it similarly would be charged with such knowledge. Indeed, the University should have the greater responsibility to know the legal limits of its own actions. This being so, the court should leave the parties where it finds them and deny the University rescission of the executed transactions. This result would conform to the law regarding illegal contracts and would be consistent with the Utah Supreme Court decision in First Equity Corporation of Florida v. Utah State University, 544 P.2d 887 (Utah 1975). In First

Equity, a broker sued the University to recover monies for securities ordered but not paid for. Because the transactions were executory and because the court found the securities transactions to be ultra vires and illegal, the Court denied the relief prayed for.

The court in First Equity stated: "Utah State University had no power to enter into an agreement for the purchase of common stock and the agreement to purchase and pay commissions thereon are ultra vires agreements and unenforceable". 544 P.2d at 893 (emphasis added). The court specifically held the ultra vires contracts were unenforceable. The ruling is far different than the University's position asserted here that ultra vires contracts may be unwound in favor of the University to the severe detriment of the University's broker-agent.

This result would also conform with the ruling of the United States Court of Appeals for Tenth Circuit where this action and other similar actions were taken on appeal after having been originally brought in the United States District Court for the District of Utah, Central Division, raising federal claims along with the state claims now presented. On January 24, 1977, the Tenth Circuit unanimously ruled that the University's theory of recovery was untenable.

The argument that the brokers are liable because they should have known that the stock purchases by U.S.U. were illegal under Utah law does not impress us. U.S.U. seeks to take advantage of its own wrongful acts. It would retain the profits which it has made and recover from the brokers the losses which it has sustained. An ultra vires act of an institutional customer may not be converted into a wrongful act of the broker. Utah State University v. Bear, Stearns & Co., 549 F.2d 164, 168 (1977).

The law of Utah is the same. In Moe v. Millard County School District, 54 Utah 144, 179 P. 980 (1919), a contractor entered into a contract with the Millard County School District to supply fixtures for a school building. The contract was declared void because it exceeded the constitutional debt limit. While recognizing that the contractor cannot recover money owing on an ultra vires contract, the Court also held the contractor would not be required to refund any of the purchase price previously paid by the school district. The Court stated:

We cannot perceive the necessity of refunding the money that was paid as aforesaid. To that extent the contract has been executed and there certainly is no good reason why in equity that matter should be reopened. Nor is it necessary to do that in order to reflect justice between the parties. If there were but one article that had been sold, or the articles were so united that they would have to be treated as an entirety, then, in order to reflect full justice, if plaintiff were given the right to remove and to repossess himself of all he had sold, he should also be required to refund what he had received. In this case, however, there are many articles some of which can be removed while others cannot. Again, as already stated, a part of the purchase

price has been paid and received, and to that extent the matter, in equity at least, should be treated as closed. 54 Utah at 151, 179 P. at 983.

In the present case, the University alleges that its payments to Bosworth were made either ultra vires or under a mistake of law. As shown by the Utah Supreme Court in Moe, the University may not recover regardless of its own or its agent's mistake.

In a later decision by this Court involving a contract between the same school district as in Moe and another corporation, the court again left the parties where it found them:

When an ultra vires contract with a corporation has been fully performed on both sides, neither party can maintain an action to set aside the transaction or to recover what has been parted with. In other words, neither a Court of Law nor a Court of Equity will interfere with such a case to deprive either the corporation or the other party of money or property acquired under the contract. Millard County School District v. State Bank of Millard County, 80 Utah 170, 14 P.2d 967, 972 (1932) (quoting 3 Fletcher, Cyc. Corpsns. §1559, p. 2631) (emphasis added).

The University received precisely what it bargained for. The transactions are closed and equity requires that they remain so. The University should not be allowed to take advantage of its own wrongful acts. The fact that the University is a public institution expending public monies does not change the law. Moe and Millard County School District both involved a public school district.

Furthermore, the University's alternative theory of recovery, i.e., that the payments in question were made under a mistake of law, is unsupported and unsupportable in this case. The law is well settled that payments under a mistake of law may not be recovered. Restatement of the Law of Restitution, §45; Union Pacific R. Co. v. Dodge County Commissioners, 98 U.S. 541 (1879); Olympic Steamship Co. v. United States, 165 F.Supp. 627 (D.C. Wash. 1958).

B. Bosworth Acted Only As The University's Agent.

With respect to the University's investment program, Bosworth functioned solely as an agent for the University. Bosworth neither purchased securities from the University nor sold securities to the University. Bosworth received nominal commissions for its services as a broker. The University's allegedly ultra vires purchases and sales of securities were entered into with third party sellers and buyers, and in no respect with Bosworth.

Even if the University were entitled to damages for losses, if any, sustained in connection with its investment program, liability would rest with those who bought from and sold to the University. There exists no conceivable theory upon which such liability could lie against the broker-agent.

An agent is not liable on a contract executed by him on behalf of another. Restatement (Second) of Agency, §320 at

67 (1958); Fink v. Montgomery Elevator Co., 421 P.2d 735 (Colo. 1966); General Motors Acceptance Corp. v. Turner Insurance Agency, Inc., 535 P.2d 664 (Idaho 1975); and Seigworth v. State, 539 P.2d 464 (Nev. 1975).

In Unger v. Travel Arrangements, Inc., 266 N.Y. Supp. 2d 715, 721 (1966), a customer sued a travel agency to recover the amount paid for a trip later cancelled by a steamship company which had become insolvent. Because the travel agency had passed the customer's money on to the steamship company the Court held the most the plaintiff could recover was any commission retained by the travel agency.

The reasoning of the Unger case is applicable here. If the University may obtain relief from Bosworth, such relief must be limited to the amounts retained by Bosworth in the form of commissions. And under this court's holding in First Equity, supra, the University's claims are completely barred. Pursuant to that case, if the University's stock transactions through Bosworth were ultra vires then the agreement may not be enforced by either side. Dicta in First Equity suggesting that a stock broker for the University, even through an agent rather than a principal, is nonetheless estopped from enforcing an ultra vires contract does not apply to the present case because here the broker is not attempting to enforce

the agreement. As previously mentioned herein, First Equity does not hold that the University may unwind its alleged ultra vires transactions.

C. The University Requested, Initiated And Ratified The Acts Of Bosworth. The University Is Estopped From Seeking Relief From Bosworth.

A stockbroker's customer is deemed to have ratified the acts of the broker, even if the acts were unauthorized, unless, after becoming aware of the material facts in connection with the acts, the customer promptly repudiates the broker's conduct. Clews v. Jamieson, 182 U.S. 461 (1901). Once a customer ratifies his broker's acts, the customer is estopped from seeking liability against the broker. Merrill Lynch, Pierce, Fenner & Smith v. Bockock, 247 F.Supp. 373 (S.D. Tex. 1965).

The general issue of ratification and the more specific issue of whether an alleged repudiation was timely are questions of fact. Hansen v. Boyd, 161 U.S. 397 (1896).

In this case, there is no dispute as to the following facts:

1. The University first became aware of the question of the propriety of the investment program in December, 1972;
2. As early as December, 1972, the University decided that it should generally cease buying and selling common stocks;

3. The University did not notify Bosworth until March, 1973, that Catron, who had been duly authorized by written resolution of the University to deal with Bosworth, was no longer authorized to buy stocks on behalf of the University; and

4. The bulk of the University trades through Bosworth occurred between December, 1972, and March, 1973.

Ratification by the University is raised by Bosworth as an affirmative defense (Bosworth's Answer, 12th Defense). The above facts and others in the case clearly frame the issues of ratification and estoppel. Genuine questions of fact are presented including (1) when did the University first become aware of the material facts in connection with the alleged impropriety of investing its funds in common stocks? (2) did the University repudiate its trades made through Bosworth? (3) if the University repudiated its trades with Bosworth, was the repudiation timely? and, (4) by trading in the stock market through Bosworth after December, 1972, until March, 1973, did the University ratify the acts of Bosworth thereby estopping any claims of liability against Bosworth?

Even assuming the University has stated a claim for relief against Bosworth (which Bosworth denies), these questions need to and must be answered by the trier of fact

at a trial. The lower court erred in granting partial summary judgment on liability.

Furthermore, under traditional elements of estoppel, it is clear that this case presents, at the very least, a question of fact as to whether the University should be estopped to recover on the transactions in issue.

This Court applied estoppel against a governmental entity in Wall v. Salt Lake City, 50 Utah 593, 168 P. 766 (1917). In doing so, this Court became one of the earliest to apply estoppel against a governmental body. In its opinion, this Court stated:

[T]he municipality by its own affirmative acts, declarations, and conduct, misled the party, or induced him to believe that he had the right to rely upon the assurances which the municipality, after a long period of time, sought to repudiate to his injury. Id.

In Tooele City v. Elkington, 100 Utah 485, 594, 116 P.2d 406 (1941), this court expressly reaffirmed the principles of estoppel applied in Wall.

Of course, not every representation by a government employee gives rise to a defense of estoppel. But where, as here, high-ranking public officials assure a private company, which relies on the assurances, estoppel should be applied to bar recovery. See Hackett v. City of Ottawa, 99 U.S. 86 (1879).

In Moser v. United States, 341 U.S. 41 (1951), the plaintiff (Moser) had relied on express written assurances

of a State Department officer that he (Moser) would not be barred from seeking American citizenship if he applied for an exemption from military service. In fact, however, a federal treaty provided that exemption from military service would bar citizenship. Hence, the department officer's assurances to Moser constituted an ultra vires promise to him. In allowing Moser to obtain citizenship despite the express provisions of the treaty, the United States Supreme Court explained:

Petitioner had sought information and guidance from the highest authority to which he could turn. . . . He was led to believe that he would not thereby lose his rights to citizenship. If he had known otherwise he would not have claimed exemption. In justifiable reliance on this advice he signed the papers sent to him by the Legation.

In this case, Bosworth asked for and received from the University an express assurance of the propriety of the University's conduct before Bosworth agreed to open an account for the University. As was Moser, Bosworth was "lulled . . . into misconception of the legal consequences" of its actions. Under such circumstances, the lower court should have held that the University is estopped, as a matter of law, from recovery. At the very least, the lower court should have allowed the question of estoppel to go to the trier of fact.

Every element of estoppel, as applied against governmental bodies in the aforementioned decisions and in many others, is present in this action:

1. The party to be estopped knew the facts. In this case, University officers and its Institutional Council were fully advised of the University's investment program, the kinds of stocks being purchased and sold, and the precise identity, cost and sales price of every stock actually purchased and sold;

2. The University intended that its conduct would be acted upon. The University's corporate resolution was obviously designed to allow the University to open and maintain an account with Bosworth;

3. The party raising estoppel was ignorant of the true facts;

4. The party (Bosworth) seeking to invoke estoppel relied to its detriment on the University's conduct.

The lower court erred in granting the University's Motion for Summary Judgment. The University's case against Bosworth should have been dismissed as a matter of law because the University is estopped from seeking relief. In the alternative, there exist genuine material issues of fact with respect to the issue of estoppel to be resolved by a trier of fact at trial.

D. The University Had Authority To Invest In Securities.

The University's complaint asserts that the University did not have the power to enter orders with Bosworth for the

purchase of securities. As a matter of law the University had such power. The University has a traditional legislative general grant of authority to handle its finances. The Utah State Legislature has specifically granted the University power to invest in the securities at issue here.

In 1888, the Territorial Assembly authorized the existence and operation of an agricultural college which later became known as Utah State University. (Chapter 2, Compiled Laws of Utah 1888, p. 663, §§1852-1857, 1862, 1868, 1870). In doing so, the Assembly provided for the Governor and Secretary of the Territory and five county assessors to be trustees of the college. Section 4 of the Act specified the powers of the trustees:

Said trustees shall take charge of the general interest of the institution, and shall have power to enact by-laws and rules for the regulation of all of its concerns, not inconsistent with the laws of the territory. They shall have the general control and supervision of the agricultural college, the farm pertaining thereto, and such lands that may be vested into the college by territorial legislation, of all appropriations made by the territory for the support of the same, and also of lands that may hereafter be donated by the territory, or the United States, or by any person or corporation, in trust for the promotion of agricultural and industrial pursuits. (Emphasis added).

In 1892, the Territorial Assembly amended the Act of 1888 and created a Board of Trustees to be appointed by the governor. The enumerated powers of the Board did not differ substantially from those of its predecessor, except that the

1892 amendment also empowered the Board "to exercise such other powers as might be incidental or necessary to carry out the express powers". Spence v. Utah State Agricultural College, 225 P.2d 18, 23 (Utah 1950).

In 1896, the Utah State Constitution was enacted.

Article X, Section 4 states:

University and Agricultural College Located -- Rights and Immunities Confirmed. The location and establishment by existing laws of the University of Utah and the Agricultural College are hereby confirmed, and all of the rights, immunities, franchises and endowments heretofore granted or conferred, are hereby perpetuated unto said University and Agricultural College, respectively.

This Constitutional provision perpetuated into Utah's law all "rights, immunities, franchises and endowments" enjoyed by the University under the enabling Act of 1888 including, of course, the "general" power vested in the Board of Trustees to "control and supervise all appropriations" of the University.

In 1969, the Legislature enacted the "Higher Education Act of 1969" now Utah Code Ann. §53-48-1 - §53-48-25 (1953). This Act eliminated the Board of Trustees and the Coordinating Council and in their stead created a State Board of Higher Education in which was vested the "control, management and supervision of . . . Utah State University" Utah Code Ann. §53-48-4 (1953). The Section added:

Except as specifically provided by law, the Board shall succeed to the powers, duties, authorities

and responsibility heretofore held and exercised by the governing bodies of the aforementioned institutions and by the Coordinating Council of Higher Education.

Thus, the Coordinating Council of Higher Education has the power, previously granted by the Board of Trustees, to have "general control and supervision of the college . . . of all appropriations made by the State of Utah . . . for the support of same."

Throughout this legislative history, the legislature and the Utah Constitution have granted general authority to the University to handle its appropriations.

There are also other specific legislative grants of power to the University which permit investments in the securities now under consideration.

Utah Code Ann. §53-32-4 (1953) states:

The Utah State Agricultural College in its corporate capacity may take by purchase, grant, gift, devise or bequest any property real or personal for the use of any department of the college or for any purpose appropriate to the objects of the college. It may convert property received by gift, grant, devise or bequest and not suitable for uses into other property so available or into money. Such property so received or converted shall be held, invested and managed and the proceeds thereof used by the Board of Trustees for the purposes and under the conditions prescribed in the grant or donation. (Emphasis added).

This section specifically allows the University to invest in any property, real or personal, received by purchase, grant, gift, devise or bequest.

Section 53-48-20 (3) of the Higher Education Act also authorized universities to accept contributions, grants or gifts from private corporations or persons in governmental agencies for certain research programs. It also authorized the universities to "retain, accumulate, invest, commit and expend funds and proceeds from authorized programs."

Apparently the University's assertion that it did not have the power to invest in the securities listed is based upon Utah Code Ann. §33-1-1 (1953) which, by its own terms, merely supplements the powers of municipal bodies to invest in securities. Utah Code Ann. §33-1-3 (1953) states:

The provisions of this Act are supplemental to any and all other laws relating to and declaring what shall be legal investment for the persons, corporation, organizations and officials referred to in this Act. . . .

Any reliance by the University on the common law Dillon's Rule in municipal law is also misplaced. Dillon's Rule states that a municipality only enjoys such powers as are expressly granted by constitutional or legislative provision. Even if Dillon's Rule applies to the University it in no respect means that the University has no power to invest in securities. The University has been given a general and specific grant of authority to so invest.

Furthermore, Dillon's Rule has no application to the University because the University is not a municipality.

See Condor v. University of Utah, 123 Utah 182, 257 P.2d 367 (1953).

Reading all of the laws together, the University's position that Utah Code Ann. §33-1-1 (1953) prohibits investments in common stock is without foundation.

Bosworth recognizes that this Court held in First Equity v. Utah State University, 544 P.2d 887 (Utah 1975), that at least some of the University's funds could not be invested in common stocks. Bosworth asserts that this Court should now reconsider and overrule its decision in First Equity on the grounds set forth in this section of Bosworth's Brief. However, even if the court does not overrule its decision in First Equity, Bosworth is nevertheless entitled to the relief it seeks on appeal in this case on the basis of all other arguments asserted in this Brief. In First Equity, this Court held that a broker is not entitled to enforce an executory contract to purchase securities because the securities were outside the ambit of Utah Code Ann. §33-1-1 (1953). In so holding, this Court simply applied the longstanding rule that parties to an illegal contract will be left where the court finds them. The holding in First Equity in no respect supports the University's position in this case that the securities transactions should be undone and that Bosworth, the agent-broker should be held liable

for any losses sustained by the University.

E. The University's Claim Against Bosworth Is Barred By The Utah Uniform Fiduciaries Act.

The Utah Uniform Fiduciaries Act, Utah Code Ann. §22-1-1 et. seq. (1953) precludes a finding of liability against Bosworth. Pursuant to the act, the University and Catron, as its agent, had authority to invest in securities. Utah Code Ann. §53-32-4 (1953) states:

The Utah State Agricultural College . . . in its corporate capacity may take by purchase, grant, gift, devise or bequest any property real or personal for the use of any department of the college and for any purpose appropriate to the objects of the college. It may convert property received by gift, grant, devise or bequest and not suitable for its uses into other property so available or into money. Such property so received or converted shall be held, invested and managed and the proceeds thereof used by the board of trustees for the purposes and under the conditions described in the grant or donation.

This section specifically allows the University to invest in any property, real or personal, received by purchase, grant, gift, devise or bequest.

Similarly, the Higher Education Act of 1969, ch. 138 §20(3), Utah Code Ann. §53-48-20(3) authorizes state universities to accept contributions, grants or gifts from private corporations or persons in governmental agencies for research programs and concomitantly, to "retain, accumulate, invest, commit and expend funds and proceeds from such authorized programs."

Under the Utah Uniform Fiduciaries Act, Catron, in dealing with Bosworth, was acting as a fiduciary. The act defines fiduciary as follows:

[A] Trustee, under any trust, expressed, implied, resulting or constructive, executor, administrator guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer and any other person acting in a fiduciary capacity for any person, trust or estate. Utah Code Ann. §22-1-1 (1953).

Catron was clearly an "agent, officer of a corporation, public or private, or a public officer".

Since Catron was a fiduciary, and since the University had the authority to invest part of its money in common stocks, the Utah Uniform Fiduciaries Act relieves Bosworth from inquiring as to whether the fiduciary had the power to invest all monies under his control if he had the power to invest any of them. The Act also provides that:

If a check or other bill of exchange is drawn by a fiduciary as such, or in the name of its principal by a fiduciary empowered to draw such instrument in the name of its principal, the payee is not bound to inquire whether the fiduciary is committing a breach of his obligations as a fiduciary in drawing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary, unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts of his action in taking the instrument amounts to bad faith. Utah Code Ann. §22-1-5 (1953).

The depositions taken in this action to date show that neither the University nor Catron knew the specific source of the funds used for any individual common stock transaction. Part of the money came from grant, gift, devise, or bequest and from contributions, grants and gifts from private corporations which, clearly, the University had the power to invest in securities. (Catron 58). Therefore, pursuant to the Utah Uniform Fiduciaries Act, §22-1-5, Bosworth, as a matter of law, cannot be held liable to the University. The lower court should have dismissed this suit.

F. The University May Not Recover From Bosworth Because Bosworth Reasonably And In Good Faith Changed Its Position In Reliance Upon The Regularity Of The Transactions At Issue.

During a period covering several months, Bosworth acted as the University's broker-agent and negotiated numerous purchases and sales of securities on the University's behalf. For its services, Bosworth retained only its earned commissions. By so acting on behalf of the University, Bosworth reasonably and in good faith changed its position in reliance on the regularity of the transactions engaged in by the University through Bosworth. Under such circumstances, the University should, in equity, be precluded from undoing those transactions.

In Maricopa County v. Cities and Towns, 467 P.2d 949 (Ariz. 1970), a county sued to recover tax funds mistakenly disbursed to defendant cities and towns. The Arizona court recognized that the county had a legitimate claim for restitution, but denied recovery because (1) the defendants had no prior notice of the payments, (2) the funds had been spent, and (3) laches. The court stated:

No claimant, however, has an absolute right to restitution for an enriching benefit, mistakenly conferred. Comment C under §1 of the Restatement of Restitution states: "Even where a person has received benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it." 4687 P.2d at 953.

The reasoning and holding in Maricopa County are equally applicable here. An action for restitution (which the University seeks in this case) is necessarily based upon fundamental equitable principles. In equity, the University's claim for restitution against Bosworth cannot be sustained.

G. The University's Claim Is Barred By The Equitable Doctrine Of Unclean Hands.

The University, in asking for a rescission of the contracts, is seeking equitable relief. Equitable relief will not be given to a party whose injury or loss is due to his own wrongdoing. For the purposes of the University's

Motion for Summary Judgment asserted below, it must be taken as true that the University affirmatively and wrongfully induced Bosworth to act to its detriment. It also must be taken as true that the University had knowledge that its authority to invest in common stocks out of public monies was in question in December, 1972, but that it failed to notify Bosworth of such question until March, 1973, during which period of time most of the University's transactions through Bosworth occurred.

It also must be taken as true that Bosworth has neither committed a wrongful act nor breached any judicially recognized duty to the University. Before these transactions were undertaken, the Institutional Council expressly warranted to Bosworth that the University had the capacity and authority to engage in the transactions. Bosworth, after taking great pains to inquire into the issues of capacity and authority by the University, reasonably assumed that those members of the Institutional Council charged by law with supervising the University investments would be familiar with limitations, if any, on its investment powers and would not have authorized the transactions had there been any doubt as to their validity.

Wall v. Salt Lake City, 50 Utah 593, 168 P. 766 (1917) involved a municipality which had, by its own affirmative

declarations, misled a third party and induced him to believe that an agent for the municipality was authorized. The court held that the third party had the right to rely upon those assurances which the municipality sought to repudiate:

. . . [T]he municipality, by its own affirmative acts, declarations, and conduct, misled the party, or induced him to believe that he had the right to rely upon the assurances which the municipality, after a long period of time, sought to repudiate to his injury. 50 Utah at 601.

Similarly, the Court in Marin v. Calmenson, 197 N.W.

262, stated:

No one should be permitted to plead his own wrong to relieve himself from the obligations of an executed contract, the benefits of which he retains. The innocence or ignorance of the creditor is not essential to his right to enforce the contract, because the principle of estoppel is not applied, but the fundamental principle that one who seeks equity must do equity and may not accept the benefits and repudiate the burdens of his contract.

In this case, the University has not done equity and, therefor, may not turn to equity for relief.

H. To Allow The University To Recover Would Be In Violation Of Bosworth's Constitutional Right Of Due Process Of Law.

To allow the University to recover against Bosworth under the circumstances of the present case would be contrary to fundamental notions of fairness and justice in violation of Bosworth's due process rights under both the Utah and United States Constitutions.

In Haley v. Ohio, 332 U.S. 596, 607 (1947) the United States Supreme Court held that "fundamental notions of fairness and justice . . . lie embedded in the feelings of the American people and are enshrined in the Due Process Clause of the Fourteenth Amendment". Summarily, the United States Supreme Court stated the following in Malinski v. New York, 324 U.S. 401 (1944):

[J]udicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon the Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples. 324 U.S. at 417.

There is a long tradition in the Courts of this country requiring legislation, both state and federal, to comport with "fundamental notions of fairness and justice" contemplated by the Fourteenth Amendment. This requirement that legislation work a fair result has been recently applied in City of Edmund v. Wakefield, 537 P.2d 1211 (Okla. 1975):

If the ordinance in question deprived no one of constitutionally protected procedural rights, then this Court must concern itself with the issues of the basic fairness and reasonableness of the ordinance. In essence, substantive due process of law, independently of any procedural rights guaranteed by constitutional provisions, is the general requirement that all governmental actions have a fair and reasonable impact on the life, liberty, or property of the person affected. 537 P.2d at 1213.

It would be grossly unfair to hold Bosworth liable to the University in this case. Bosworth did everything reasonably within its power to determine the validity of its dealings with the University and was assured not only with oral representations that the University had the power to invest in securities, but also with a written corporate resolution to that effect.

I. There Is A Question Of Fact As To Whether Plaintiff Suffered Any Loss.

There is a genuine question of fact as to whether the University in fact suffered any loss resulting from its investments. The State of Utah by its Legislature reimbursed the University in the 1974 Budget Session for losses incurred from the University's securities transactions. See Supplemental Appropriations Act, Senate Bill No. 38, Laws of Utah, 1974, Chap. 39, Sec. 1. If a party has suffered no loss in fact, he has no claim for relief. See Estate Counseling Services, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 303 F.2d 527, 533 (L.A. 10 1962); Chaney v. Western States Title Insurance Co., 292 F.Supp. 376 (D.C. Utah 1968); Madigan, Inc. v. Goodman, et al., 357 F.Supp. 1331 (D.C. Ill. 1973).

POINT II

THE LOWER COURT ERRED IN DISMISSING BOSWORTH'S THIRD-PARTY CLAIMS.

A. Bosworth's Third-Party Complaint For
Indemnity And Contribution Stated Claims
Upon Which Relief Can Be Granted.

Bosworth's Third-Party claims are directed against the University's officers and members of its Institutional Council and are based on theories of implied contract, warranty, implied warranty, misrepresentation, indemnity, subrogation and conduct outside the scope of authority.

The court below granted the third-party defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted. In so doing, the lower court held as a matter of law that under no conceivable state of facts could those persons who actively implemented and supervised the University's investment program be held liable to Bosworth.

The lower court erred in dismissing Bosworth's third-party claims. Bosworth's third-party action was based on express assurances to Bosworth from the third-party defendants that the University had the authority to invest in common securities. Under well-settled principles of law, those express assurances of capacity and authority gave rise to an implied contract to indemnify Bosworth from any loss it may suffer as a result of Bosworth's reasonable reliance on such assurances.

If Bosworth is only constructively at fault in this case, (i.e., if Bosworth is charged only with constructive notice of the illegality of the University's investment), then it is entitled to full indemnity for any of its losses as a result of reliance on representations by the Institutional Council and other University officials. On the other hand, even if the court were to determine, at trial, that Bosworth is equally culpable with the Institutional Council members and other University officials, then at least Bosworth's third-party claims for contribution from those individuals constitute claims upon which relief can be granted under general principles of law applicable to joint wrongdoers.

Bosworth is entitled to seek the relief sought by its third-party action because it fulfilled its duty of inquiry regarding the University's authority. This court held in First Equity Corp. of Florida v. Utah State University, 544 P.2d 887 (Utah 1975), that persons dealing with public officers have a duty to inquire into the limits of their authority. Under the circumstances of this case, there is no question that Bosworth fulfilled such a duty. Bosworth did all that could possibly be expected to satisfy itself that the University had authority to deal in securities.

After having been approached by the University's agent, Catron, Bosworth went directly to the principal, the University's Institutional Council, and received written assurances that the University had authority to deal in the stock market through Bosworth. Under these facts, pursuant to general principles of the law of warranty, those acting on behalf of the University in assuring Bosworth that the University had the capacity to deal and invest in securities are strictly liable to Bosworth if those assurances prove to be false. The purpose of the law of warranty is to relieve the one assured of his duty to inquire further into the facts for himself. Paccon, Inc. v. United States, 399 F.2d 162 (Ct. of Cl. 1968); Hoover v. Nielson, 510 P.2d 760 (Ariz. 1973); Quagliana v. Exquisite Home Builders, Inc., 538 P.2d 301 (Utah 1975).

The law in Utah is that one only constructively liable to an injured party may recover either contribution, indemnity, or subrogation from the person primarily responsible. Holmstead v. Abbott G.M. Diesel, Inc., 493 P.2d 625 (Utah 1972) ["While the master may be jointly sued with the servant for a tort of the latter . . . they are not joint tortfeasors in the sense that they are equal wrongdoers without the right of contribution, for the master may recover from the servant the amount of loss caused to him by the tort,"]

Hoggan v. Cahoon, 73 P. 512 (Utah 1903); Culmer v. Wilson, 44 P. 833 (Utah 1896).

Under the circumstances of this case, Bosworth is clearly entitled to seek indemnity, contribution or subrogation from the third-party defendants.

B. Bosworth's Third-Party Claims Are Not Barred By Sovereign Immunity.

The court below granted third-party defendants' Motions to Dismiss Bosworth's third-party claims without setting forth any reasons for the dismissals in its Memorandum Decision. (R. 1775).

The only clues provided by the lower court as to its reasons for dismissing the third-party action were two statements it made in the course of other rulings. At a hearing before the lower court on April 19, 1978, Judge Christofferson explained that his decision to grant the third-party defendants' Motions to Dismiss was based "primarily on immunity". Tr. 68. And, the court also noted, in its final decision granting the University's motions for partial summary judgment, that:

This Court feels that the brokers cannot escape liability for their illegal acts, acts with which they are charged legally with knowing to be illegal by saying officials of Utah State also knew this and were charged with this knowledge. The Court feels that where a governmental entity is involved and parties are charged with the illegal use of public funds that the other illegal party cannot escape liability by saying the

specific party we dealt with does not come into this matter with clean hands either.

Thus, according to the lower court, if one "illegal party" is a governmental entity and the other "illegal party" is a private company, the private company is always strictly liable for any losses sustained by the government. Such a position is legally untenable. The third-party action should not have been dismissed.

Bosworth's third-party claims are not barred by immunity. The Utah Governmental Immunity Act, Utah Code Ann. §§68-30-3, et. seq. (1953), has no application to the third-party defendants. That Act applies only to "governmental entities", not to employees of governmental entities. Recognizing this, the third-party defendants argued in the court below that they were entitled to common law "official immunity." T. 87.

This court's holding and reasoning in Cornwall v. Larsen, 571 P.2d 925 (Utah 1977) are applicable in the present case. In Cornwall, the plaintiff was injured in a collision between the automobile in which he was riding and a vehicle operated by a deputy sheriff. Suit was brought against the county, the deputy sheriff and the sheriff. The trial court dismissed the suit as to all defendants, but this Court reversed the dismissal against the sheriff, the deputy

sheriff and other named individuals, ruling that a claim for relief had been made as to the individual defendants because of the plaintiff's assertions that (1) the employees in question were negligent, even though acting within the scope of their authority, and (2) the acts of the officer driving the emergency vehicle were wilful, unlawful and in excess of his authority. Id. at 927. This Court also expressly relied upon its earlier decision in Sheffield v. Turner, 21 Utah 2d 314, 445 P.2d 367 (1968).

In Sheffield this court noted that immunity of an individual government employee is derivative of the immunity of the sovereign. Accordingly, because the officer sued in Sheffield was engaged in the exercise of a governmental (rather than proprietary) function of the sovereign, he was protected unless he was acting outside the scope of his authority. Id. at 316-317.

The allegations of the third-party complaint filed by Bosworth meet the requirements for stating a claim for relief in accordance with Cornwall and Sheffield. Bosworth has alleged that the conduct of the University's officers wilfully exceeded the scope of their authority, that those officers were negligent in not ascertaining that the securities transactions in question might be ultra vires or

illegal, and that the officers knew, or should have known, of such illegality. Bosworth also states a claim for relief by alleging that the officers and Institutional Council members failed to notify Bosworth, at the earliest possible time, of the revocation of Catron's authority.

Whenever a public officer exceeds his authority in carrying out either ministerial or discretionary duties, he may be held personally liable to a private party injured by his actions. Bosworth's third-party complaint stated claims against the Institutional Council members and other University officials for acts outside their statutory authority, the reasoning being that (1) if the University is entitled to recover from Bosworth, it will do so on the sole basis that the securities transactions were ultra vires, i.e., not authorized by statute, and (2) if the University lacks statutory capacity to engage in securities transaction, (3) then the Institutional Council members and other University officials similarly lack statutory authority to open an account with Bosworth to deal in securities or to issue a corporate resolution that the University has such authority. Thus, the acts of the Institutional Council members and other University officials are not protected by common law official immunity. Said persons clearly exceeded their statutory authority. Logan City v. Allen, 86 Utah 375, 44 P.2d 1085

(1935); Blonquist v. Summit County, 25 Utah 2d 387, 483 P.2d 430 (1971); and Roe v. Lundstrom, 89 Utah 520, 527, 57 P.2d 1128 (1936) [no public officer may "claim immunity for the commission of an act entirely outside the scope of his official duties"]].

Furthermore, to the extent the immunity of the Institutional Council members and other University officers is derivative of the immunity of the University, immunity as to those persons is not proper because the acts here sued upon clearly involved proprietary and not governmental functions of the University. See, e.g., Greenhalgh v. Payson City, 530 P.2d 799 (Utah 1975) ["It is therefore our conclusion that proprietary functions of a municipality are not within the coverage of the Utah Governmental Act"]. The conduct here at issue is clearly proprietary because the sole purpose of the University's investment program was to make money by competing with private investors in commercial securities markets. See Greenhalgh, supra.

POINT III

THE LOWER COURT ERRED IN DENYING BOSWORTH'S MOTION FOR CHANGE OF VENUE.

Bosworth's principal place of business is in Colorado. At all times material to this case, it has maintained only

one branch office in Utah, located in Salt Lake County. The University is located in Logan, Cache County, Utah.

No significant acts in connection with the various transactions between the University and Bosworth were performed in Cache County. (R. 94, 95 and 136).

Pursuant to Utah Code Ann. §78-13-8 (1953), Bosworth moved the lower court for a change of venue to Salt Lake County pursuant to Utah Code Ann. §78-13-9(1) (1953) which allows the court to change the place of trial "when the county designated in the Complaint is not the proper county".

The grounds of the motion were that Bosworth resides in Salt Lake County and that the contracts complained of, if performed in Utah, were performed in Salt Lake County.

The Motion for Change of Venue was denied by the lower court holding Bosworth subject to trial in Cache County on the ground that Cache County was the residence of the University.

The University alleges in its First Amended Complaint that Utah Code Ann. §8-13-7 (1953) is controlling in this case. Bosworth, in support of its Motion for Change of Venue (R. 138-146), contends that Utah Code Ann. §78-13-4 (1953) is the controlling statute if the University's allegations establish a cause of action based upon a contract.

Regardless of which statute controls, however, the only proper county in which suit may be brought is Salt Lake County. Venue in Cache County is improper.

A. Venue Is Improper In Cache County Under Utah Code Ann. §78-13-7 (1953).

Section 78-13-7 (1953) states:

In all other cases the actions must be tried in the county in which the cause of action arises, or in the county in which any defendant resides at the commencement of the action; provided that if any such defendant is a corporation, any county in which such corporation has its principal office or place of business shall be deemed the county in which such corporation resides within the meaning of this section. If none of the defendants resides in this state, such action may be commenced and tried in any county of which the plaintiff may designate in his complaint; and if the defendant is about to depart from the state, such action may be tried in any county where any of the parties resides or service is had, subject, however, to the power of the court to change the place of trial as provided by law.

As applied to this case, §78-13-7 requires that the action be tried (1) in the county where the action arises or (2) where the defendant resides.

The Utah Supreme Court has defined a "cause of action" as "either the violation of a legal obligation or the omission to perform a duty imposed by law of the condition of a wrong by a person which results in injury to another, and of either the actual damage, or the damage implied by

law caused thereby." Fields v. Daisy Gold Mining Co., 73 P. 521 (Utah 1903).

The gist of the University's cause of action, if any, is that Catron exceeded his authority in purchasing and selling speculative stock on behalf of the University, that the University itself had no power to authorize the purchase or sale of such stock, that Bosworth was allegedly aware of the limitations of authority and power, and that the University suffered damages caused thereby.

Such a cause of action arose, if at all, in Salt Lake County, not in Cache County.

(1) The University's securities trading account with Bosworth was opened in Bosworth's Salt Lake County office;

(2) All orders for the purchase or sale of securities were entered by the University at Bosworth's Salt Lake County office and were accepted, transmitted and confirmed by Bosworth at or from its Salt Lake County office;

(3) All new account documents and authorizations by the University were submitted to Bosworth's Salt Lake County office. (R. 94, 95).

Hence, the facts of the record below affirmatively show that the cause of action, if any, arose in Salt Lake County and that Salt Lake County is the "residence" of Bosworth. Salt Lake County is the only proper venue under Utah Code Ann. §78-13-7 (1953).

B. Venue Is Improper In Cache County Under Utah Code Ann. §78-13-4 (1953).

Section 78-13-4 pertains to actions on written contracts:

When the defendant has contracted in writing to perform an obligation in a particular county of the state and resides in another county, an action on such contract obligation may be commenced and tried in the county where such obligation is to be performed or in which the defendant resides.

If this case is deemed to be one strictly in contract, then §78-13-4 would be applicable and venue would be proper only in the place where the contract was to be performed, which place of performance was Salt Lake County, or in the county in which Bosworth resides, also Salt Lake County.

Virtually all of the various transactions between the University and Bosworth which were contemplated by and arose out of the original written brokerage agreement were Salt Lake County based. All orders for the purchase or sale of stock on behalf of the University were placed either in person or by telephone to Bosworth's place of business in Salt Lake County. (R.95, 136).

Bosworth's only place of business in Utah was in Salt Lake County. (R.94).

Furthermore, if each individual transaction entered into subsequent to the initial written brokerage agreement

between the University and Bosworth are considered, then contracts not in writing serve as the focal point of venue. In discussing the issue of venue in actions on contracts not in writing, the Utah Supreme Court in Buckle v. Ogden Furniture and Carpet Co., 216 P. 684 (Utah 1923) interpreted the predecessor to §78-13-4 and stated:

Section 6528 relates to actions upon contracts only, and, if it means anything at all, it means that, when a defendant has contracted in writing to perform an obligation in a particular county, and resides in another county, the action may be tried in the former county and by plain implication, and the maxim, "expressio unius est exclusio alterius," it means that actions on contracts not in writing are excluded, and are not authorized to be tried out of the county where the defendant resides." 216 P. at 686. (Emphasis added).

Thus, whether the contract is deemed written or oral under §78-13-4, the only proper venue for this case is in Salt Lake County.

Under any of the venue provisions which may be applicable in this case, Cache County is not a proper place for trial. The lower court's order denying Bosworth's Motion for Change of Venue was clearly in error and should be reversed.

CONCLUSION

The University's position in this case is wholly unsupportable, both in law and in fact. Bosworth acted reasonably and in good faith upon official authorization

from the University to act as the University's agent. To now attempt, as the University is doing in this case, to hold Bosworth liable to the University for the University's alleged losses sustained as a result of its activities in the stock market is repugnant not only to Bosworth's Constitutional rights, but also to basic notions of fairness and justice. The lower court clearly erred in denying Bosworth's motion to dismiss this action.

The lower court further erred in holding Bosworth liable as a matter of law, in refusing to allow Bosworth's third-party claims against the very individuals upon whose assurances Bosworth reasonably relied, and in denying Bosworth's Motion for Change of Venue.

Accordingly, Bosworth respectfully requests this Court to reverse the ruling of the court below, directing the lower court to enter judgment in favor of Bosworth on its motion to dismiss.

In the alternative, Bosworth requests the court to reverse the rulings of the Court below in granting the University's Motion for Summary Judgment, dismissing Bosworth's

Third-Party Complaint against the individual defendants and
in denying Bosworth's Motion for Change of Venue.

Respectfully submitted,

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