

1980

First Security Bank of Utah v. Utah Turkey Growers, Inc. : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FIRST SECURITY BANK OF UTAH,)	
NATIONAL ASSOCIATION,)	
)	
Plaintiff and Appellant,)	PETITION FOR REHEARING AND
)	BRIEF IN SUPPORT OF PETITION
vs.)	FOR REHEARING
)	
UTAH TURKEY GROWERS, INC., a)	
Utah corporation,)	Civil No. 16354
)	
Defendant and Respondent.)	
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IN SUPPORT OF PETITION FOR REHEARING

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PETITION FOR REHEARING


Pursuant to Rule 76(e), of the Utah Rules of Civil Procedure, plaintiff-appellant First Security Bank of Utah, N.A., petitions this court for a rehearing and reargument with respect to those portions of the court's opinion in this matter which affirmed the trial court's dismissal of plaintiff's complaint. Plaintiff-appellant does not petition for a rehearing on that portion of the majority opinion which awarded judgment in favor of plaintiff-appellant in the sum of \$28,427.65. The reason for the petition for rehearing is as follows:

THE CONTENTION OF THE COURT, IN ITS MAJORITY OPINION, THAT PLAINTIFF-APPELLANT DOES NOT CONTEST THE TRIAL COURT'S

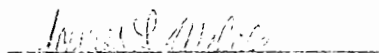
FINDING OF NO MONETARY DAMAGE BECAUSE OF THE RECOUPMENT BY DEFENDANT-RESPONDENT OF THE OVERPAYMENTS TO CARLSON BROTHERS, IS INCORRECT. RATHER, PLAINTIFF BOTH EXPRESSLY AND IMPLIEDLY CLAIMED AND PROVED THAT IT SUFFERED DAMAGE BECAUSE OF THE OVERPAYMENTS RECOUPED.

Dated this 8 day of April, 1980.

RAY, QUINNEY & NEBEKER



Don B. Allen



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MAILING CERTIFICATE

I certify that I mailed two (2) copies of the Petition for Rehearing and the Brief in Support of the Petition for Rehearing to Tex R. Olsen and Ken Chamberlain, of Olsen and Chamberlain, 76 South Main Street, Richfield, Utah 84701, on this 8 day of April, 1980.

/s/ _____

BRIEF IN SUPPORT OF PETITION FOR REHEARING

ARGUMENT

THE CONTENTION OF THE COURT, IN ITS MAJORITY OPINION, THAT PLAINTIFF-APPELLANT DOES NOT CONTEST THE TRIAL COURT'S FINDING OF NO MONETARY DAMAGE BECAUSE OF THE RECOUPMENT BY DEFENDANT-RESPONDENT OF THE OVERPAYMENTS TO CARLSON BROTHERS, IS INCORRECT. RATHER, PLAINTIFF-RESPONDENT BOTH EXPRESSLY AND IMPLIEDLY CLAIMED IT SUFFERED DAMAGES BECAUSE OF OVERPAYMENTS RECOUPED.

A crucial sentence in the court's majority opinion, which apparently underlies a substantial portion of the decision, is:

At no point in its argument does plaintiff directly contest the trial court's finding that it was not monetarily damaged by defendant's recoupment of the overpayments from the 1976 proceeds. (Majority Opinion p.4).

Plaintiff-appellant (hereafter "Bank" or "Appellant") respectfully disagrees with the above cited language of the majority opinion. The Appellant's Brief earlier filed with the court concludes with the following language:

. . . [U]nder theories of conversion, negligence, estoppel and promissory estoppel UTG is liable to the Bank for the full sum of monies UTG withheld. The decision of the trial court which dismissed the complaint should be reversed. And the trial court should be directed to enter judgment in favor of the plaintiff in the sum of \$457,608.00, or, alternatively the sum of \$142,306.78 (which includes the sum of \$113,878.54 plus \$28,427.65).
Appellant's Brief pp. 42-43.

Earlier in its Brief the Bank mentioned that it had on its books the sum of at least \$556,342.46 owed the Bank by Carlson Brothers, which sum the Bank had been unable to collect.

Appellant's Brief p.3. See also Exhibit P-2 and Tr. 31-32. The Brief further mentioned that, absent knowledge of the overadvancements, the Bank lent Carlson Brothers the sum of approximately \$593,000.00 during the 1976 year, based at least in part on information supplied to the Bank by the defendant and which did not mention the prior overadvances. (Appellant's Brief p.9. See also Tr. 65, 52, 75, and 101. It was contended in the brief and consistent with undisputed facts in the record that in advancing the nearly \$600,000 to Carlson Brothers for its 1976 birds, the Bank did not know of any intended setoff against the 1976 birds. (Appellant's Brief p. 13. See also Tr. 76).

Part V of the Appellant's Brief dealt with the Bank's claim that birds or proceeds in which it had an interest were converted by Utah Turkey Growers. The argument in point V referred to damages as a necessary element in the tort of conversion (Appellant's Brief p. 39). It indicated that the measure of damages in a conversion claim is the full value of the property converted at the time of the taking (Id.). Mention was made of testimony of some of UTG's own growers that the price Norbest paid for turkeys during the 1973 through 1976 years was a rather accurate reflection of the fair market value of the birds (Appellant's Brief p. 40. See also Tr. 305, 308-309.) Significantly, the following language appears in that argument:

. . . . UTG converted assets of the Bank to satisfy alleged offsets it claimed Carlson Brothers owed it. To do so damaged the Bank to the full extent of the collateral and proceeds converted. (Appellant's Brief p. 40) (emphasis supplied)

The Bank urges that the portions of its earlier filed Brief mentioned herein indicate a clear objection by the plaintiff-appellant to the lower court's finding that the Bank did not suffer a financial loss because of the defendants recoupment of the overpayments. Because plaintiff did so contest, this matter should be reheard and reargued and this court should determine whether sufficient evidence exists to support the trial court's findings on the issues of waiver, negligence, pecuniary interest, reliance, validity of offset, change of position and damages.

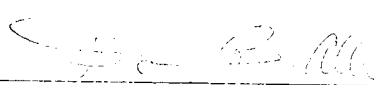
Appellant believes the lower court erroneously concluded that because the Bank had received overpayments from UTG in prior years, the later setoff left the Bank undamaged because accounts were adjusted, although belatedly. In its Brief the Bank indicated its losses and damages arose because UTG converted birds and proceeds from the sale of 1975 and 1976 turkeys in which the Bank had a security interest. Appellant's Brief pp. 39-40. Because of UTG's own negligence in either causing or failing to timely identify the overpayments until long after the overadvancements had occurred, and because the Bank properly relied on information UTG supplied it, UTG forfeited rights of

recoupment and set-off it otherwise might have had. The proceeds and birds were converted to the Bank's damage and UTG waived or lost any rights to set-off.

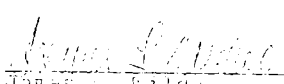
For all these reasons, together with those set forth in detail in its Brief, Appellant requests rehearing and reargument and urges that full judgment be entered in favor of plaintiff pursuant to the prayer of its complaint.

Respectfully submitted,

RAY, QUINNEY & NEBEKER



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