

1998

Karl I. Truman v. William M. Dalton : Reply Brief

Utah Court of Appeals

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Ken Chamberlain; Chamberlain Associates; Attorneys for Plaintiff-Appellant.

Joseph Harlan Burns; John G. Mulliner; Attorneys for Appellees.

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IN THE UTAH COURT OF APPEALS OF THE STATE OF UTAH

* * * * *

KARL I. TRUMAN,)	
)	
Plaintiff-Appellant,)	Case No. 981354-CA
-vs-)	
)	
WILLIAM M. DALTON, and)	Priority No. 15
AUDIT AND ACCOUNTING)	
AUTHORITY, LTD.)	
)	
Defendants-Appellees,)	

* * * * *

REPLY BRIEF OF APPELLANT

* * * * *

APPEAL FROM THE SIXTH JUDICIAL DISTRICT COURT
OF SEVIER COUNTY, STATE OF UTAH
Honorable David L. Mower, District Judge

Ken Chamberlain [0608]
Chamberlain Associates
Attorneys for Plaintiff-Appellant
225 North 100 East
Richfield, Utah 84701
Telephone: (801) 896-4461

Joseph Harlan Burns
Attorney for Appellee William M. Dalton
905 Three Fountains
Cedar City, Utah 84721-6330

John G. Mulliner
Attorney for Appellee
Audit & Accounting Authority, Ltd.
363 North University Avenue, Suite 103
P.O. Box 1045
Provo, Utah 84603

FILED

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COURT OF APPEALS

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Attorneys for Plaintiff-Appellant
225 North 100 East
Richfield, Utah 84701
Telephone: (801) 896-4461

Joseph Harlan Burns
Attorney for Appellee William M. Dalton
905 Three Fountains
Cedar City, Utah 84721-6330

John G. Mulliner
Attorney for Appellee
Audit & Accounting Authority, Ltd.
363 North University Avenue, Suite 103
P.O. Box 1045
Provo, Utah 84603

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* * * * *

ARGUMENT

From Appellees' briefs it emerges that interest calculation is the only material dispute. Unanimously cases hold that interest is only accessory or incidental to principal where the principal is a determinable sum. The principal balance is the basis on which any type of interest, if perchance allowable,¹ rests. (State Mutual Insurance Company vs. Gist, 16 S.E.2d 599, 600, 65 Ga. App. 817)

A Summary by a certified public accountant (CPA) for Plaintiff-Appellant Karl I. Truman was received in evidence by

¹It is to be noted that at common law interest was not allowable except by statute or written agreement; U.S. [federal - following state] stare decisis has universally developed the contrary. (Vali Convalescent and Care Institutions vs. Division of Health Care Financing, 797 P.2d 438 at 445 [this Court 1990]; Shutts vs. Phillips Petroleum Company, 679 P.2d 1159 at 1175, 235 Kan 195 [1984])

the trial court at Tr. 36² and the trial court from the bench directly examined the CPA respecting his method and conclusions. The Summary as received by the trial court showed a balance due of \$51,988.07 (Tr. 34; Tr. 27).

The raw data from which the Summary was certified was in court.

The only defense is jointly offered by the Defendants that the entire balance was settled by an agreement between Appellant Truman and Defendant Audit and Accounting Authority, Ltd. ("AAA") that - irrespective of what the actual facts were - Appellant Truman signed an agreement that he would accept \$20,000 to dispose of everything. (Exhibit 37) In column 1 on the last page of Exhibit 6 the balance due is projected at \$57,263.09.

I. BURDEN OF PROOF

In the more "global" but coinciding Brief of Appellee AAA the erroneous conclusion advanced is that

At trial, Truman failed to offer evidence that the amount of the debt was not in dispute *** in order to prevail he [Truman] had to show that the amount of the indebtedness was not in dispute ***. (AAA Brief, p. 5)

Redundantly in passive voice is AAA's conclusion:

"There was no showing that a good faith dispute was lacking to support the settlement agreement***."

²The entire record of trial evidence was transcribed by a reporter selected by the trial court but not included in the record by number. Reference to the testimony will be by indicating "Tr." Exhibit No. 37 is a summary of all raw data (the charges and credits) (Tr. 12).

Accord and Satisfaction can never be implied. (Ashby vs. Hubbard, 593 P.2d 402, 100 Idaho 67)

Conversely, all presumptions and burden of requisite proof of Accord and Satisfaction elements must lie with the party claiming the defense (Milberger vs. Chaney Building Company, Inc., 704 P.2d 822, 146 Ariz 181 [Appellate Division 1985]; Bennion vs. LeGrand Johnson Construction Co., 701 P.2d 1078 [1985]; United American Life Insurance Company vs. Zions First National Bank, 641 P.2d 158 [1982]). Idaho places the burden upon the party alleging it to prove all elements of Accord and Satisfaction. (Perkins vs. Highland Enterprises, Inc., 817 P.2d 177, 120 Idaho 511 [1991])

The Summary relates all charges and all credits and those figures are clear, exact, and undisputed. The numbers exposed in Exhibit 37 and recorded on the AAA collection contract there was \$57,263.09 due (Tr. 27 and 33 [the trial court's conclusion in the Addendum]).

II. A QUESTION ABOUT INTEREST DOES NOT CREATE A DISPUTE.

Interest is merely an incident of the principal. (Board of Education of School District of City of Pontiac vs. City of Pontiac, 294 N.W. 141, 144, 294 Mich 708)

Interest is merely an incident to the debt to be paid from time to time or when the principal falls due in consideration of forbearance to the debtor, and becomes a part of the debt, or a debt at all, only when earned. (Carlson vs. City of Helena, 102 P 39, 41, 39 Mont. 82, 17 Ann.Cas. 1233 [1909];

Central Bank & Trust Corp. vs. State, 76 S.E. 587, 589, 139 Ga.

54) If interest were a pure justiciable stimulus alone litigation without reason would explode.

III. INTEREST IS A SEPARATE ELEMENT TO INDEBTEDNESS.

It is of compelling significance that there was always a principal amount due from Appellee Dalton greater than the \$20,000 for which Appellee AAA contracted with Dalton (and apparently with Truman). (Please see Addendum 1, voir dire examination [Tr. 22] Paul Morris.) At that time, the trial court appropriately interceded to examine the CPA's Summary and the record beginning at Tr. 23.

Interestingly, Exhibit D-33 is a letter from Appellee AAA to J. Harlan Burns, counsel for Appellee Billy Dalton stating that

On June 6, 1992, our firm delivered two packets containing photocopies of the delinquent outstanding unpaid invoices over to Minersville Feed by your client Bill Dalton.

These invoices total \$62,117.55 principal only, excluding any and all interest or service charges. We have not received any proof of payments to substantiate your client's disputation in this amount of \$62,117.55 and therefore we must assume that is a correct figure.

To avoid enforcement of payment by Billy Dalton Farms by litigation we need to make a settlement and conclude this matter immediately.

CONCLUSION

We respectfully represent that the decision of the trial court should be reversed and the case remanded to the District Court to enter judgment in favor of the Plaintiff and Appellant Karl I. Truman, dba Minersville Feed and Supply in no less than the amount of \$51,988.07 [and such other claims Truman may have against either Appellee].

Respectfully submitted,

CHAMBERLAIN ASSOCIATES

By 


Ken Chamberlain
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing Reply Brief of Appellant were mailed to the following by U.S. regular mail, postage prepaid, on this 7th day of April, 1999:

Joseph Harlan Burns
Attorney for William M. Dalton
905 Three Fountains Drive
Cedar City, Utah 84720

John G. Mulliner
Attorney for Audit & Accounting Authority, Ltd.
363 North University Avenue, Suite 103
P.O. Box 1045
Provo, Utah 84603



Tab 1

1 THE COURT: And this is Exhibit No. 37.

2 MR. CHAMBERLAIN: Yes, your Honor.

3 THE COURT: And are you offering No. 37 at this
4 point?

5 MR. CHAMBERLAIN: Yes, your Honor, I am offering
6 it.

7 THE COURT: Mr. Mulliner.

8 MR. MULLINER: I would like to ask a couple of
9 questions about it before it's submitted into evidence, if
10 I could.

11 THE COURT: Okay, go ahead.

12 VOIR DIRE EXAMINATION

13 BY MR. MULLINER:

14 Q. Are you telling us that each of the entries here
15 is represented by one of the invoices in this stack?

16 A. Yes, they were used and placed on the Summary.

17 Q. And I note that interest charged apparently at
18 the end of each year.

19 A. Yes.

20 Q. And how did you calculate that interest? At what
21 interest rate?

22 A. The interest rate is a very conservative rate
23 used by the IRS at different years. The interest is a
24 very low estimate.

25 Q. I'm not sure if that answers my question. What

1 interest rate did you use?

2 A. You can see off to the side. It depended on the
3 year. You can see a 9 percent, an 8 percent over in the
4 far-right column. Some years were calculated at 9, the
5 old balances, depending on what those rates were at the
6 time.

7 Q. So on page 2 on 12/31/90, where it says
8 \$1,319.47, the interest rate you used is 10 percent?

9 A. Yes, 10 percent on an average balance for the
10 year, which we felt was very conservative.

11 THE COURT: I don't think he's asking you to
12 justify whether it's a good or bad interest rate. He
13 wants to know what it is and how you calculated it.

14 THE WITNESS: Okay, 10 percent average balance.

15 THE COURT: Average of what?

16 THE WITNESS: We basically just took the year --
17 the amount due at the end of the year, divided it by two,
18 said that was an average for the year, times it by 10
19 percent.

20 THE COURT: So if I used this formula, if I took
21 this \$26,000 -- you don't have the exhibit in front of
22 you, do you?

23 THE WITNESS: I do.

24 THE COURT: Do you see there's an entry on 12/28
25 of '90, which shows a balance of \$26,235.01?

1 THE WITNESS: Uh-huh.

2 THE COURT: So if I used this formula, I'd take
3 this \$26,235.01, divide it by two, and multiply it by 10
4 percent, I'd get --

5 THE WITNESS: You've got to take the one on
6 12/31/90. It comes out \$50.

7 THE COURT: Oh, I see. So (inaudible), divided by
8 two, multiplied by 10 percent, I'd get \$13,019.47.

9 THE WITNESS: But with the rounding.

10 THE COURT: Okay. I just want to know if that's
11 how you did it. Am I right about that?

12 THE WITNESS: There are several calculations used
13 on that particular one, that's correct.

14 MR. BURNS: Your Honor.

15 THE COURT: Go ahead.

16 MR. BURNS: I want to pose an objection so I don't
17 leave anything.

18 THE COURT: Okay.

19 MR. BURNS: There's no proper foundation. No
20 showing that my client is obligated to pay that amount of
21 interest or any amount of interest. No proper foundation
22 for the agreement. Irrelevant and immaterial as far as
23 Mr. Dalton.

24 THE COURT: Okay. The objection is noted and
25 overruled at this point. I think I've got foundation

1 about what this exhibit is and how it's put together.
2 That's not to say that it means anything at this point.
3 I've just got some information about how it was put
4 together.

5 Q. BY MR. MULLINER: Okay, and that was my next
6 question. How you determine what balance you're charging
7 interest on. It appears, then, if you use the 10 percent
8 figure, and 50 percent of that, you're assuming that the
9 average balance would have been half the ending balance?

10 A. That's correct.

11 Q. But that's not necessarily true, is it?

12 A. No, I said it was an estimate.

13 Q. And in fact, since nothing was owing prior to
14 March, the first three months of the year it was zero. So
15 your average balance by taking half of the ending balance
16 would substantially overstate it; isn't that true?

17 THE COURT: That's an argumentative question. I
18 understand what your argument is, but there's no point
19 arguing with the witness about that.

20 MR. MULLINER: I (inaudible), your Honor.

21 THE COURT: So Mr. Morris, what about on the very
22 last page of the exhibit, 12/10 of '91. Do you see the
23 entry that I'm talking about?

24 THE WITNESS: Uh-huh.

25 THE COURT: Does that same formula apply that we

1 THE WITNESS: Came in '92. The dates we show
2 are the dates that the payments were recorded off
3 (inaudible) books.

4 THE COURT: So why would those payments be taken
5 out of the \$47,000 before you computed the interest?

6 THE WITNESS: Well, as I stated before, it's
7 conservative. This interest is extremely conservative.

8 THE COURT: Okay. Back to you, Mr. Chamberlain.

9 MR. CHAMBERLAIN: We only have one more question,
10 then.

11 DIRECT EXAMINATION (resumed)

12 BY MR. CHAMBERLAIN:

13 Q. Mr. Morris, is this an accurate summary of all of
14 the raw data that has been given to you, calculated at
15 these varying rates, and do they accurately show a fair --
16 well, tell the Court what you --

17 A. They're just summaries we did for Karl to help
18 him know what we thought the balance would be. It's just
19 based on the books that were provided to us at varying
20 times.

21 Q. How could you tell what balance is owing?

22 A. Balances are stated in the summary. The ending
23 balance we show is \$51,988.07.

24 Q. And that includes interest?

25 A. Yes.

1 Q. Simple interest?

2 A. Yes, it's not a compound interest.

3 Q. And it would be repetitious if I asked you for
4 for a rate.

5 A. Right.

6 MR. CHAMBERLAIN: You've testified that it's the
7 rate. That's all I have, your Honor.

8 MR. BURNS: I have some questions on voir dire
9 with respect to foundation, your Honor.

10 THE COURT: Sure.

11 VOIR DIRE EXAMINATION

12 BY MR. BURNS:

13 Q. Mr. Morris, can you hear me all right?

14 A. Yes.

15 MR. BURNS: Your Honor, would it be better if I
16 approached the --

17 THE COURT: No, you're okay right there.

18 MR. BURNS: Thank you.

19 Q. BY MR. BURNS: Mr. Morris, did you personally do
20 this accounting?

21 A. No, sir.

22 Q. Someone in your office?

23 A. Yes, Robert Morris.

24 Q. Let me ask you this. When was the contract made
25 for you to do the accounting?

1 "Balance," the figure at the very end is just a duplicate
2 of the last number in that column.

3 THE WITNESS: That column will represent column 3,
4 less column 4, less column 5. Which is the principal
5 amount, plus the sales tax on the invoices, less the
6 payment received by Mr. Truman. So if you apply all of
7 the payments to the principal, you would get that balance.

8 THE COURT: So we could see if we could duplicate
9 that right now, then, couldn't we?

10 THE WITNESS: We could do it, yeah.

11 THE COURT: So I should be able to take -- see if
12 this calculator works here. The 57,263.09. Then add
13 \$8.17. Then subtract 26,789.15, and get \$30,482.11. So
14 then the next column over, which is entitled "Interest,"
15 that's just a summation of all the figures in that?

16 MR. WITNESS: Yes, that's right. We tried not to
17 include the interest in that balance. So it's a separate
18 number, and it can be recalculated based upon whatever
19 decisions are made.

20 THE COURT: Now, there's a summary at the bottom
21 of this.

22 THE WITNESS: Yes.

23 THE COURT: And the first figure is \$57,271.26.

24 THE WITNESS: Uh-huh.

25 THE COURT: Now, I don't see that figure matched

1 by any of those totals.

2 THE WITNESS: That should be the \$57,263.09, plus
3 the \$8.17, which is the total invoice amounts.

4 THE COURT: Then there's the "Total Payments,"
5 \$26,789.15, and that's the subtract figure.

6 THE WITNESS: That's right.

7 THE COURT: And then the interest is an add.

8 THE WITNESS: That's correct.

9 THE COURT: And we come up with \$51,988.07.

10 THE WITNESS: Yes.

11 THE COURT: Mr. Chamberlain, other questions,
12 based on what I've asked?

13 MR. CHAMBERLAIN: I don't, your Honor. I
14 appreciate your --

15 MR. BURNS: I have a question, your Honor, if
16 other Counsel are finished.

17 THE COURT: Sure. I think so. Go ahead,
18 Mr. Burns.

19 CROSS EXAMINATION

20 BY MR. BURNS:

21 Q. Mr. Morris, you're aware that Minersville Feed
22 and Supply who was hired you is a supplier to farmers.

23 A. Yes.

24 Q. And you're aware that Mr. Dalton (inaudible) the
25 farms within that business.