

1987

Israel Pagan Estate and Lenor C. Pagan v. Joseph N. Cannon, Dorius Black, Alpha leasing Company, Robert D. Apgood, Joseph N. Cannon, Dorius Black, and Richard McKean, under Alpha Leasing Company, Bill Brown Realty, INC., Scott Peatross, Stewart Title Company of Utah; Tommy W. Sisk, Capitol Thrift and Loan, and Merlin Hanks : Reply Brief

Utah Supreme Court

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Recommended Citation

Reply Brief, *Pagan v. Cannon*, No. 870503.00 (Utah Supreme Court, 1987).
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IN THE UTAH SUPREME COURT

ISRAEL PAGAN ESTATE and)	
LEONOR C. PAGAN, Personal)	REPLY BRIEF OF
Representative,)	PLAINTIFF AND
)	APPELLANT
Plaintiff and Appellant,)	
vs.)	
)	
JOSEPH N. CANNON, DORIUS BLACK,)	
ALPHA LEASING COMPANY, a)	
partnership; ROBERT D. APGOOD,)	
JOSEPH N. CANNON, DORIUS BLACK,)	
and RICHARD MCKEAN, doing)	No. 870503
business under the name and style)	
of ALPHA LEASING COMPANY; BILL)	
BROWN REALTY, Incorporated;)	
SCOTT PEATROSS, personally;)	
STEWART TITLE COMPANY OF UTAH;)	
TOMMY W. SISK; <u>CAPITOL THRIFT</u>)	
<u>AND LOAN</u> , a financial)	
Corporation; and MERLYN HANKS,)	PRIORITY 13
Defendants and Respondents.))	

REPLY BRIEF OF PLAINTIFF-APPELLANT

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FACT: This statement is true but it only tells part of the story. Dorius Black did execute a promissory note for One Thousand Dollars; but he never intended to pay anything; nor did he pay anything, in fact, Bill Brown Realty was given the \$1,000.00 down payment after the closing out of the Pagan equity (TR-564). The \$1,000.00 came from monies received from Capitol Thrift and was drawn on the account of Stewart Title (TR-564). Black personally paid nothing and he denied having any interest in or taking any title to the Pagan property, and further denied being liable for the making of any loans or the borrowing of any money on the Pagan property (TR-499).

CLAIM: b. Based on value of the home and Mr. Cannon's financial strength, lender agreed to loan \$32,325.00 to Cannon for the purpose of purchasing Pagan's property.

FACT: Again, this claim is partially true. The loan was made on the value of the home; as far as Joseph Cannon's financial strength is concerned, it was always questionable; his testimony was questionable; and, he certainly became financially "insecure" shortly after the transaction was completed. (Tr-857) also (See Exhibit "1", Exhibit "7", Exhibit "37", and Exhibit "38D".) Cannon has no recollection of submitting a credit report prior to this transaction (TR-575). Cannon denied negotiating with Capitol Thrift about a loan on the Pagan property (TR-582). Cannon denies making any applications to Capitol Thrift for a loan on the Pagan property (TR-582, 583, 584). Cannon denies, under oath, giving Capitol Thrift the financial statement. (See Exhibit "36", TR-596). He further denied giving Capitol Thrift Borrower's

Statement. (See Exhibit "37", TR-596.) Joseph Cannon testified his only purpose for being at the closing was to be a guarantor of loans and purchases of Dorius Black (TR-566, 567, 569-570, 582). Joseph Cannon never put one cent of his money in the real estate transaction. He made no payments on the trust deed and note and claimed no equity in the Pagan property. In fact, he admitted he had never seen the property and that he didn't even know that the property had been deeded to him (TR-570, 572, 578, 584, 593-594). Cannon testified that he did not receive any money personally from the transaction (TR-566, 568).

CLAIM: c. Mr. Cannon went to Capitol Thrift and extended his loan payments on two separate occasions when the loan became delinquent (TR-855).

FACT: Cannon admitted going to Capitol Thrift but denied making any payments for the extensions (TR-856). Cannon was financially "insecure" six (6) months after the transaction (TR-857). The ledger card did not show who made the alleged payment (TR-645). Hanks testified that the records do not show where the money came from (TR-646). Neither Black nor Cannon made any payments on the Pagan home (TR-494, 496, 498, 503, 504, 506, and 523, 852).

CLAIM: d. Capitol Thrift was not involved in any of the business arrangements between Black, Cannon or Alpha Leasing (TR-523, 524).

FACT: Capitol Thrift appraised the home, prepared the note and mortgage, substituted Cannon for Black as buyer, paid Black \$4,848.75, paid Cannon \$13,471.57 and generally financed the entire transaction. Capitol Thrift supplied the Trust Deed and

Note; required that their Trust Deed be recorded first; ordered \$4,848.75 to be paid to Capitol Thrift and the remainder of the funds to be paid to Joseph L. Cannon or so as he directs, that Cannon's name be put on all checks so as to prove consideration in this matter (TR-505, See also Plaintiff's Exhibit "1").

CLAIM: e. Business arrangement to purchase Pagan's home was between Cannon, Alpha Leasing and Black.

FACT: Capitol Thrift financed the entire transaction, appraised Pagan's home, paid Black finder's fee, substituted Cannon for Black, prepared Exhibit "1", prepared note and mortgage, directed the order of recording, participated in the transaction from beginning to end with directions on how to disburse the funds. Cannon was not told by Capitol Thrift that he had been substituted as a buyer (TR-849).

CLAIM: f. Loan officer Hanks did not even know who Mr. Pagan was at that time (TR-860).

FACT: This is hard to believe when Merlyn Hanks personally appraised Pagan's home; financed entire transaction; prepared all documents; insisted that Israel Pagan deed his house and lot to Joseph Cannon and have the deed recorded first and prior to the second trust deed from Cannon to Pagan. (TR-505, 620. See plaintiff's Exhibit "1".)

CLAIM: g. Evidence clearly showed Capitol Thrift's involvement was limited to Promissory Note and transaction of Cannon (TR-860).

FACT: Capitol Thrift supervised all documents; supplied all monies by written instructions; set forth the terms of the entire transaction; gave instructions on disbursement of all funds, to-wit:

(a) \$4,848.75 to Capitol Thrift and Loan; (b) fees for recording and title insurance policy; (c) remainder of funds to Joseph N. Cannon or as he directs, in the disbursement Capitol Thrift recommended that Joseph N. Cannon's name be on all checks so as to prove consideration in this matter. (See plaintiff's Exhibit "1", TR-505.) Subituted Cannon for Black as purchaser.

CLAIM: h. The only money owed by Black to Capitol Thrift at the time of the transaction was \$4,848.75.

FACT: Capitol Thrift knew that Dorius Black was a skilled land developer and they knew that he was heavily in debt to them (TR-490, 524, 562, 608, 610). Black testified he owed Capitol Thrift money before the transaction and after the transaction (TR-497). Capitol Thrift knew that Black was not taking title nor was he making any any loans or borrowing any money; he was there for the sole purpose of assisting in dividing Israel Pagan's equity. (Tr-496). (Tr-503)

CLAIM: i. Vickie Phelps participated in the closing (TR-667, 580).

FACT: Vickie Phelps testified that while she was at the closing there was no mention of a Capitol Thrift mortgage. (Tr-750); nor, was there any mention of substituting Cannon for Black. (Tr-754).

CLAIM: j. Sisk conducted the closing in a slow and careful manner; Pagan asked numerous questions through his interpreter when he did not understand the transaction (TR-693).

FACT: Cannon testified that most of the time, at that time, was spent preparing documents by someone and when the documents were prepared, that was a very quick action (TR-580, 581). The

rest of the time was waiting for that to happen (TR-737-739). Vickie Phelps (TR-749, 750, 752), Emelio Ortiz, and Jack Thorpe, all testified that material facts were withheld; that there was a deviation from the Earnest Money Receipt and that the parties did not understand the transaction (TR-766, 718-720).

CLAIM: k. Sisk testified he told Pagan that Cannon was purchasing the property and not Black (TR-671).

FACT: Tommy Sisk, Stewart Title Company specialist, admitted to Emilio Ortiz "It was a crook from the beginning. I know that, but I'm not a lawyer to say anything." (TR-766)

CLAIM: l. Sisk told Pagan that the first and second trust deeds would exceed the \$44,000.00 sales price and that the Capitol Trust Deed would be recorded ahead of Pagan's \$24,000.00 trust deed and that Pagan was told that if Cannon did not pay his first mortgage then Pagan would have to pay in order to protect his second mortgage, and that Pagan nor his real estate agent Rhodes objected to Pagan's trust deed being recorded second (TR-713).

FACT: The foregoing conflicts with Real Estate Agent Jack Rhodes testimony. See (TR-718-720); to-wit:

Q. Was anything said in that closing about mortgages with Capitol Thrift and Loan.

A. No sir, not to my recollection.

Q. Was anything at the closing ever said about a First Mortgage to Capitol Thrift and Loan in the amount of \$32,325.00.

A. No.

Q. I'm going to show you what has been marked Exhibit 19. Was that ever shown to you at the closing by Mr. Sisk or anyone else?

A. No.

Q. Did you have any knowledge of any type or nature of a note, Exhibit 2, that that Trust Deed secured?

A. No. I had no knowledge at all of any amount over and above the original offer, earnest money, which was a total of \$44,000.00. These documents were not discussed while I was present.

CLAIM: m. Pagan testified he did not claim cause of action against Capitol Thrift (TR-467).

FACT: Dr. William Barrett testified that Israel Pagan was in the low to normal range between 80 and 90. Pagan was mentally deficient (TR-541, 743, 744, 745).

CLAIM: n. Von Hake v. Thomas, 705 P.2d 766, provides that the court may reverse a jury verdict.

FACT: "A party claiming that the evidence does not support the jury's verdict carries a heavy burden. The evidence is considered in the light most supportive of the verdict, Berkeley Bank for Cooperatives v. Meibos, Utah, 607 P.2d 798 (1980), and we will not substitute our judgment for that of the jury where the verdict is supported by substantial and competent evidence. Schwartz v. Tanner, Utah, 576 P.2d 873, 875 (1978)."

CLAIM: o. Miner says Mr. Black was employed by Capitol Thrift. Respondent's brief at page 20.

FACT: It has never been claimed that Dorius Black was an employee of Capitol Thrift. It has always been claimed that Dorius Black was a finder who was paid \$4,848.75 by Capitol Thrift who was well acquainted with Dorius Black (TR-493, 497, 498). Capitol Thrift knew that Dorius Black did not have a real estate license and, whose only interests was financial gain at Pagan's expense (TR-197, 490, 492, 579).

CLAIM: p. Plaintiff's own expert testified that a lay person would not be able to tell Mr. Pagan was disabled by looking at him.

FACT: Israel Pagan had a badly scarred face; an IQ between 80 and 90 (TR-540, 550-551); he had never been to school; he

spoke very broken English; he had little or no abstract thinking ability (TR-538); his mentality was such that he did not comprehend or understand the real estate transaction (TR-541, 743, 744, and 745).

CLAIM: q. Plaintiff's own real estate agents testified that they felt Pagan was capable of entering into the real estate transaction.

FACT: Plaintiff's real estate agents both testified that there was a substantial deviation from original earnest money receipt (TR-718-720):

1. Trust deed from Cannon to Capitol Thrift was concealed.

2. Note from Cannon to Capitol Thrift was concealed.

3. \$34,000.00 Trust deed at 22% interest to be paid in six (6) months was concealed.

4. The placing of \$55,000.00 worth of mortgages on the property was concealed.

5. Rhodes testified that there was a substantial deviation from the agreed Earnest Money Receipt and the final transaction (TR-737-739); that Rhodes never understood the transaction; that it is in his opinion that Pagan never understood the transaction (TR-737-739). Vickie Phelps testified that the Capitol Thrift mortgage between Cannon and Capitol Thrift was never discussed (TR-752).

CLAIM: r. All deviations to the contract were slowly and clearly explained to Pagan through his interpreter.

FACT: Cannon testified that: "Most of the time was spent in the preparation of documents by someone and when the documents were prepared, that was a very quick action. The rest of the time was waiting for that to happen." Q. During this time you were waiting, was anyone explaining to you what was taking place. A Not to my recollection. (See Cannon TR-580, 581. See also Rhodes TR-721.) Where Rhodes testified, nothing was said about mortgages with Capitol Thrift and Loan; nothing was said about the mortgage to Capitol Thrift and Loan in the amount of \$32,325.00; nothing was said about Exhibit "32" (TR-737-739). Rhodes testified that there was a substantial deviation from the Earnest Money Receipt to the final papers; that he never understood it, nor did Pagan (TR-737-739).

II. THE COURT PROPERLY INSTRUCTED THE JURY

Respondent's complain that the Court erred in giving Instruction No. 21. The objectionable parts of this instruction were offered and submitted to the Court by the respondents; in their proposed instruction No. 11 and 12, which are annexed hereto and by reference made a part hereof.

(This instruction did not in any way apply to the Respondent. A casual glance at the instruction reveals that this instruction applied only to the defendant, Alpha Leasing, who is not a party to this appeal. In fact, the jury in their special Verdict No. 6, found that Joseph Cannon was not an agent of Alpha Leasing and in Special Verdict No. 10, exonerated Alpha Leasing. Therefore, Instruction No. 21 has no application to this appeal.)

The legal effect of Instruction 21; is set forth verbatim in Respondents requested Instruction No. 21 (TR-310). See also, respondents requested instruction No. 11 (TR-310); Respondents are estopped from objecting to their own proposed instructions.

The Courts attention is also called to respondents requested Instructions No. 7; 8; 9; 11; 12; 13 (TR-303-311); all of which were given in substance by the Court. This Court has repeatedly held that you cannot request that the Court give an instruction and later complain when your instruction is given. This is exactly what respondents are doing in this case. Capitol Thrift's proposed instruction No. 12 (TR-310) which is annexed hereto as an exhibit reads as follows: "You may in your discretion award such damages, if and only if, you find from a 'preponderance' of the evidence that said defendant's acts were wilful and malicious." Also see Capitol Thrift's proposed Instruction No. 11 (TR-309) which was given by the Court which reads as follows: "before punitive damages may be awarded, you must find the issues in favor of the plaintiff and against the individual defendants, and further you must find by a 'preponderance' of the evidence that the individual defendant's conduct in injuring the plaintiff was wilful and malicious." The instructions complained of were prepared and submitted to the Court by respondents herein. They should not be allowed to object when their proposed instructions were given in substance by the Court. See, Shupe v. Menlove, 18 Utah 2d 130; Cordner v. Clinger's, Inc., 15 Utah 2d 85.

With regard to Instruction No. 26, appellant represents to the Court that Instruction No. 26 is proper in all respects. This instruction is clearly set forth on page 185, of the Jury Instruction Forms for the State of Utah; and has been given by the Utah Courts, as a proper instruction for the past twenty years. See Mecham v. Foley, 120 Utah 416, 235 P.2d 497 and Evans v. Gaisford, 247 P.2d 431 (Utah).

Behrens v. Raleigh Hills Hospital Inc., 675 P.2d 1179 (Utah 1983) does not apply to the instant case in fact or in law and has no bearing thereon. Appellants assert and allege that the instructions by the Court were proper in all respect. The Court's attention is called to the fact that in each instance, the Court in its special verdict with regard to Joseph Cannon, Capitol Thrift and Loan; and, Stewart Title Company respectfully requested that the jury make findings with regard to clear and convincing evidence. In each instance, the jury found by clear and convincing evidence that Joseph Cannon, Capitol Thrift and Stewart Title Company of Utah, did, by clear and convincing evidence, engage in a civil conspiracy to defraud the plaintiff.

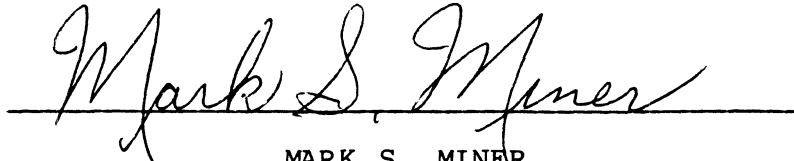
It was only after the special verdict was made and entered that the Court issued a judgment based on the jury verdict.

III. CONCLUSION

The jury heard the evidence, carefully examined all documents; the jury was properly instructed, and, answered 18 questions and made 18 findings in appellant's favor and against


the respondents; the verdict was a result of a two-day deliberation; their findings and their award of damages are correct. The court's judgment based on the jury verdict should be affirmed.

RESPECTFULLY SUBMITTED this 27th day of May, 1988.


MARK S. MINER
Attorney for the Appellant

CERTIFICATE OF SERVICE AND MAILING

I hereby certify that I hand delivered four (4) true and correct copies of the foregoing Reply Brief of Appellant to Respondents' Attorneys, Kay M. Lewis and Bruce H. Shapiro, JENSEN & LEWIS, P.C., 320 South 300 East, Suite 1, Salt Lake City, Utah 84111 this 27th day of May, 1988.


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ADDENDUM

JURY INSTRUCTION NO. 11

In addition to the actual damages plaintiff alleges he has sustained, he also seeks to recover punitive or exemplary damages against the defendants. If you find the issues in favor of the plaintiff and that he is entitled to recover actual damages, you may also consider whether the plaintiff is entitled to such punitive damages.

Before punitive damages may be awarded, you must find the issues in favor of the plaintiff and against the individual defendants, and further you must find from a preponderance of the evidence that the individual defendants' conduct in injuring the Plaintiff was wilfull and malicious. If you so find, you may award, if you deem it proper to do so, such sum as in your judgment would be reasonable and proper as a punishment to that defendant for such wrongs, and as a wholesome warning to others not to offend in like manner. If such punitive damages are given, you should award them with caution and you should keep in mind that they are only for the purpose just mentioned and are not the measure of actual damage. Such damages must not exceed ~~the sum of \$500,000.00~~ the amount prayed for by the plaintiff.

Capitol Thrift's Proposed
Jury Instruction No. 11
(TR-309). Given in
Substance.

JURY INSTRUCTION NO. 12

If you find that plaintiff suffered damage as a proximate result of the conduct of any of the defendants on which you base a finding of liability, you may then consider whether you should award punitive or exemplary damages against such defendant for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by a preponderance of the evidence that said defendant's acts were wilful or malicious in the conduct on which you base your finding of liability.

In arriving at any award of punitive damages, you are to consider the following:

1. The reprehensibility of the conduct of the defendant.
2. The amount of punitive damages which will have a deterrent effect on the defendant.
3. That the punitive damages must bear a reasonable relation to the actual damages.

Capitol Thrift's Proposed
Jury Instruction No. 12
(TR-310). Given by the
Court.

JURY INSTRUCTION NO. _____

If you find that Plaintiff suffered damage as a proximate result of the conduct of any of the Defendants on which you base a finding of liability, you may then consider whether you should award punitive damages against such Defendant for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by a preponderance of the evidence that said Defendants' acts were willful or malicious in the conduct on which you base your finding of liability.

In arriving at any award of punitive damages, you are to consider the following:

1. The reprehensibility of the conduct of the Defendants.
2. The amount of punitive damages which will have a deterrent effect on the Defendants.
3. That the punitive damages must bear a reasonable relation to the actual damages.

EXHIBIT "C"

Proposed Jury Instruction
by Joseph Cannon (TR-252)

Given by the Court

Under the law, it does not necessarily follow from a finding that one member of a partnership is liable for punitive damages that any or all of other members of the partnership are also liable for punitive damages. The acts or omissions of one partner will justify an award of punitive damages against another partner or partners if and only if those acts or omissions are within the ordinary course and scope of partnership business and the other partner or partners against punitive damages are awarded authorized, participated in, or ratified those acts or omissions.

If you find that the acts or omissions of Joseph N. Cannon justify an award of punitive damages against him, punitive damages may be awarded against the other partners of Alpha Leasing if, and only if, you find by the preponderance of the evidence each of the following elements:

1. That at the time of the events at which this lawsuit occurred Joseph N. Cannon was acting as a partner of Alpha Leasing Company;
2. That the acts of Joseph N. Cannon were within the ordinary course and scope of Alpha Leasing's business;
3. That each of the partners against whom punitive damages are awarded sought, authorized, participated in, or ratified the acts or omissions of Joseph N. Cannon.

INSTRUCTION NO. 26

In addition to the actual damages plaintiff alleges he has sustained, he also seeks to recover punitive or exemplary damages against the defendants. If you find the issues in favor of the plaintiff and that he is entitled to recover actual damages, you may also consider whether the plaintiff is entitled to such punitive damages.

Before punitive damages may be awarded, you must find the issues in favor of the plaintiff and against the individual defendants, and further you must find from a preponderance of the evidence that the individual defendants' conduct in injuring the plaintiff was willfull and malicious. If you so find, you may award, if you deem it proper to do so, such sum as in your judgment would be reasonable and proper as a punishment to that defendant for such wrongs, and as a wholesome warning to others not to offend in like manner. If such punitive damages are given, you should award them with caution and you should keep in mind that they are only for the purpose just mentioned and are not the measure of actual damage. Such damages must not exceed the amount prayed for by the plaintiff.

If you find that plaintiff suffered damage as a proximate result of the conduct of any of the defendants on which you base a finding of liability, you may then consider whether you should award punitive or exemplary damages against such defendant for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by a preponderance of the evidence that said defendant's acts were wilful or malicious in the conduct on which you base your finding of liability.

In arriving at any award of punitive damages, you are to consider the following:

1. The reprehensibility of the conduct of the defendant.
2. The amount of punitive damages which will have a deterrent effect on the defendant.
3. That the punitive damages must bear a reasonable relation to the actual damages.