2009

Check City, Inc. v. L&T Enterprises : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CHECK CITY, INC., a Utah Corporation, Plaintiffs/Counterclaim Defendant/ Appellee, vs. L&T ENTERPRISES, a Utah Corporation Defendant/Counterclaimant/Appellant.	Court of Appeals No.: 20090685 District Court Civil No.: 060403068

REPLY BRIEF OF APPELLANT

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, HONORABLE FRED D. HOWARD PRESIDING

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Plaintiffs/Counterclaim Defendant/ Appellee,	:	Court of Appeals No.: 20090685
vs.	:	District Court Civil No.: 060403068
L&T ENTERPRISES, a Utah Corporation	:	
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I. L&T PRESERVED THE ISSUE OF WHETHER, UNDER THE UCC, A LEGAL DUTY WAS OWED TO CHECK CITY.

Check City concedes that given the facts of this case, *Utah Code Ann.* § 70A-3-406, "*does not create a cause of action for Check City.*" Check City Br. 14. By such concession, Check City recognizes that the trial court erred in applying section 3-406 as the legal basis for the specified duty owed by L&T to Check City. Check City argues, however, that L&T did not properly preserve the issue of "duty under 3-406" before the trial court. (Check City Br. 8). Check City's argument is without merit.

Check City argues that because L&T never specifically referenced section 3-406 during the course of the trial, the issue of whether the trial court properly applied section 3-406, was not preserved for appeal. Check City's argument improperly seeks to shift the burden of proving each element of its claimed cause of action from Check City as plaintiff in the underlying action, to the defendant L&T. It is well recognized that a plaintiff asserting a negligence cause of action has the burden to establish the legal basis for the duty asserted against the defendant. *See e.g. Payne v. Meyers,* 743 P.2d 186, 188 (Utah 1987). Check City's argument would effectively require any defendant wherein a general claim of negligence has been asserted against it, to speculate and attempt to create a record specific to any statutory provision that might be construed as a basis for the plaintiff's negligence cause of action. The impossibility of such burden is emphasized by the fact that Check City did not once mention at trial that the basis of its negligence claim rested on section 3-406.

Even assuming that L&T was required to create a record at trial relative to a statutory provision not mentioned at trial, the legal issue of whether any duty exists under the undisputed facts of this case was adequately preserved for appeal. In determining whether an issue was adequately preserved for appeal, the issue must have been raised before the trial court and supporting evidence or relevant legal authority must have been introduced. *Pratt v. Nelson*, 164 P.3d 366, 373 (Utah 2007).

In pre-trial submissions and throughout the trial, L&T consistently and uniformly maintained that because of the undisputed facts before the trial court, L&T did not owe a duty to Check City under any provision of the Uniform Commercial Code as adopted by Utah Code Annotated Title 70A. Specifically, L&T argued in its pre-trial Memorandum in Support of Motion in Limine that "[n]othing under Article 3 of Utah's Commercial Code creates a duty owed to Check City from L&T and any effort by Check City to present evidence to the contrary should be precluded." (R. 499). Further, L&T provided the trial court with "relevant legal authority" (by way of case law and statutory citation) to support L&T's "no duty" argument.(R. 498 (citing and discussing *Pacific Metals Co., v. Tracy-Collins Bank & Trust Co.*, 446 P.2d 303 (Utah 1968), and *Utah Code Ann.* § 70A-3-110(4)). In so doing, L&T expressly referenced the lack of duty under "Article 3 of Utah's Commercial Code." Further, L&T's Trial Brief focused almost exclusively on the contention that "L&T owes no Duty to Check City."(R. 437-42). L&T pointed out that the alleged duty, as set forth in Check City's Complaint and all subsequent pleadings, was that L&T had issued some of the Joint Checks after a time when L&T should have determined that the Joint Checks were being cashed by Check City without proper

endorsement. (R. 439).

Apparently recognizing that section 3-406 of Utah's Commercial Code "*does not create a cause of action for Check City*" (Check City Br. 14), throughout the course of the trial Check City did not once argue that the basis of the claimed duty owed by L&T arose under section 3-406. L&T on the other hand, consistently argued that "there is no duty imposed under the Uniform Commercial Code associated with this particular relationship" including Article 3. (Tr. 32; *see also* R. 437-42; 499; Tr. 30 – "*there's no duty owed to Check City*;" Tr. 140 – "*under the joint check law, as we've referenced here, the loss falls with Check City who took the [Joint Checks without] endorsement, there is no duty under the law.*"). Perhaps most importantly, it is also clear that the trial court recognized L&T's position and that the issue of any duty under the Uniform Commercial Code was squarely before the trial court. At the very outset of the trial and while addressing the issues to be considered at trial, the court emphasized that "*[o]f course, L&T disputes <u>any</u> duty.*"(Tr. 4 (emphasis added)).

Although Check City initially argues in its brief that L&T failed to adequately preserve the issue of duty under section 3-406 (Check City Br. 8-11), in its next argument, Check City admits that "L&T argued [before the trial court] there was no duty under the UCC." (Check City Br.12). Based on this admission and the express references to the issue throughout the course of the trial, Check City's assertion that the issue of whether a legal duty existed under Utah's Commercial Code (including section 3-406), was not sufficiently preserved is without merit.

In addition to the relevant legal authority set forth in L&T's Motion in Limine and

addressed at the outset of trial, additional legal authority was presented to the trial court both in L&T's trial brief as well as at trial so as to preserve the issue on appeal. The principal authority referenced was in connection with L&T's argument that by imposing such legal duty on L&T under the facts and circumstances of this case the trial court would effectively nullify the "joint check rule" recognized in *Sfr, Inc. v. Comtrol, Inc.*, 2008 UT App 31, 177 P.3d 629 (Utah Ct. App., 2008). (R. 439-41; Tr. 132-33). Although L&T raised this issue and corresponding legal authority both at trial as well as in its opening brief before this Court (L&T Br. 20), Check City failed to address or even respond to the argument both at trial as well as in its reply brief to this Court. The legal authority presented to the trial court satisfies the requirement that the question of whether L&T owed Check City a duty has been preserved for appeal.

Check City next argues that L&T failed to "preserve the issue of duty" because L&T "never argued that there was not a forgery which would trigger 3-406." (Check City Br. 8). Similarly, Check City argues that L&T failed to marshal all evidence "that led the trial court to determine that there was a forgery or alteration under 3-406." (Check City Br. 11). Check City's arguments are not supported by the trial court record.

The trial court made no determination, nor even hinted that this case involved a forged signature or alteration as contemplated by 3-406. The reason: it was undisputed and indeed admitted by Check City that the Joint Checks at issue involved a case of a missing endorsement and not that of a "forged signature" or "alteration of instrument" -- express requirements for the application of 3-406. Such admissions occurred not only at the outset of the case as reflected in Check City's Complaint, but continued throughout

the case and trial. (*E.g.* R.9 Check City's complaint includes the admission that *"[the Joint Checks] were returned because they only had one of two required endorsements"*); Tr. 3-4 (the trial court recognizing that "*there is very little factual dispute*" and that "*the checks were not endorsed*"); Tr. 5 (Check City's counsel acknowledging that the Joint Checks were missing an endorsement); Tr. 30-31 (the trial court acknowledging as true that it was "undisputed" Check City had accepted the Joint Checks without proper endorsement); Tr. 31 (the trial court recognizing "*These [Joint Checks] didn't have two endorsements. There was one endorsement. ... Those are facts that I don't think are disputed.*"); Tr. 123-24 (L&T's counsel emphasizing that there was no dispute that Familian as one of the joint payees had not endorsed the Joint Checks, whereupon Check City's counsel admits "*never disputed that*")). Based on Check City's clear admissions, there can be no dispute that the Joint Checks did not involve a forgery or alteration as contemplated by 3-406. Accordingly, Check City should not now be heard to argue that L&T "never argued that there was not a forgery" (Check City Br. 8), or that L&T failed to marshal the evidence that might lead to a "determin[ation] that there was a forgery." (Check City Br. 11, 13).

Based on the foregoing, L&T respectfully submits, that the issue of whether a duty under *Utah Code Ann.* § 70A-3-406, was owed by L&T to Check City given the undisputed facts of this case, is properly before this Court.

II. CHECK CITY CONFUSES THE APPLICATION OF A "FORGED SIGNATURE" UNDER *UTAH CODE ANN.* § 70A-3-406, WITH CIRCUMSTANCES INVOVLING A MISSING OR FORGED ENDORSEMENT.

Check City next contends that if L&T would have made the argument at trial that the Joint Checks did not involve a forged signature, then "Check City would have presented additional evidence of the [endorsements] being forgeries." (Check City Br. 13). Again, Check City appears to be asking this Court to shift the burden of establishing all elements of Check City's negligence theories. As previously cited, such an attempt ignores well recognized principles that the party asserting a negligence claim has the burden of establishing the legal basis for the duty being asserted. *See e.g. Payne v. Meyers,* at 188. More importantly, Check City's assertion that it would have presented evidence that the endorsements on the checks were forgeries belies Check City's numerous admissions that the Joint Checks involved a missing endorsement. *Supra.* Finally, Check City's argument reflects Check City's misunderstanding relative to the application of section 3-406.

The reference to a "forged signature" within 3-406 does not extend to a case involving a "forged endorsement." (L&T Br. 17-18). *See e.g., Chow v. Enterprise Bank & Trust Co.,* 16 Mass. L. Rptr. No. 31, 795, 797 (Mass. 2003) (recognizing that reference to "forged signature" in section 3-406, has no application to a case involving a missing, unauthorized or forged endorsement). Thus, even if Check City had not made clear admissions and had also sought to "present additional evidence" that the Joint Checks

contained a forged endorsement, section 3-406 would have no application and could not be the legal basis for any duty owed under the circumstances of this case. Such conclusion is acknowledged by Check City in recognizing the "numerous authorities which hold that a check which is missing [an endorsement] does not contain a forgery or alteration under U.C.C. § 3-406." (Check City Br. 13).

III. THE UTAH COMMERICAL CODE CONTROLS THE DETERMINATION OF WHETHER A DUTY WAS OWED BETWEEN CHECK CITY AND L&T.

Check City next concedes that section "3-406 does not create a cause of action for Check City." (Check City Br. 14). However, Check City then attempts to ignore the trial court's clear application of 3-406 as the basis for the legal duty imposed upon L&T. In doing so, Check City appears to suggest that the trial court's legal conclusion should be upheld based on a general, but unspecified duty of "reasonable" or "ordinary care." (Check City Br. 14-15). In doing so, Check City cites no authority for the proposition that the provisions of the UCC should be superceded by an unspecified duty of reasonable care.

It is well recognized that the provisions of the Uniform Commercial Code supercede and even preempt common law claims when the allowance of such claims would otherwise thwart the purposes of the Code. *See e.g. Bradley v. First Nat. Bank of Walker*, N.A., 711 N.W.2d 121, 127 (Minn. App., 2006) (discussing various state court decisions that recognize the principle that the UCC preempts common law claims that are inconsistent with the provisions of the UCC). Check City's assertion of an unspecified and general duty owed by L&T to Check City when it is undisputed that Check City

negotiated the Joint Checks without requiring both joint payee's endorsements, is wholly inconsistent with *Utah Code Ann.* § 70A-3-110(4) which states in the pertinent part: "If an instrument is payable to two or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced **only by all of them.**" (Emphasis supplied). By allowing check cashing institutions like Check City to ignore the direction of the maker to 'pay to the order' of the named payees, and then sue the maker under unspecified common law negligence theories, would effectively nullify the application of *Utah Code Ann.* § 70A-3-110(4).

As more fully set forth in L&T's opening brief and not addressed by Check City in its responsive brief, recognition of Check City's "ordinary care" theory against L&T would also nullify the "joint check rule" recognized in *Sfr, Inc. v. Comtrol, Inc.*, 2008 UT App 31, 177 P.3d 629 (Utah Ct. App., 2008). L&T Br. 20. The imposition of a negligence standard not otherwise recognized or contemplated by the UCC would eliminate the "protection" otherwise contemplated by *Utah Code Ann.* § 70A-3-110(4), as well as the "widespread practice in the construction industry that allows owners and general contractors to protect themselves" through the issuance of joint checks. *Sfr, Inc.*, 177 P.3d at 636. *See also Pacific Metals Co.*, 446 P.2d at 305 (emphasizing that it is "elementary negotiable instruments law" that [Check City] was "not entitled to pay the check without the endorsement of the copayee").

IV. THE TRIAL COURT'S PROXIMATE CAUSE DETERMINATION MAY BE REVIEWED FOR CORRECTNESS AND IS NOT SUPPORTED BY WELL RECOGNIZED AUTHORITY.

To the extent this Court determines that the trial court properly imposed a general

duty of care on L&T as the maker of the Joint Checks, and that such duty exists notwithstanding *Utah Code Ann.* § 70A-3-110(4) and the "joint check rule," Check City's admitted negligence in paying on the Joint Checks without both endorsements of the copayees, supercedes as a matter of law any comparative negligence on the part of L&T. In response to the foregoing argument set forth in L&T's opening brief (L&T Br. 21-24), Check City does not discuss or even attempt to distinguish the numerous cases and authority cited therein. (Check City Br. 15-16). Rather, Check City asserts that the issue of "comparative negligence" is a fact question subject to a clearly erroneous standard of review. *Id.* Check City relies on the case of *State v. Pena,* 869 P.2d 932 (Utah 1994) (a case addressing the standard of review appropriate to reasonable-suspicion determinations). In applying the analysis in the *Pena* case to the instant case, however, a trial court's determination of whether a specific set of facts gives rise to a proximate cause determination is more appropriately reviewed "nondeferentially for correctness." *Id.* at 939. *See also, Bennion v. LeGrand Johnson Const. Co.*, 701 P.2d 1078, 1083 (Utah 1985) ("an actual cause-effect relationship" is a legal conclusion to be reviewed for correctness).

Check City then points to factors that should have caused L&T to be suspicious of TJS (the subcontractor and one of the copayees on the Joint Checks). For purposes of this appeal, L&T does not dispute that as the maker of the Joint Checks, it might have been more diligent in seeking to obtain copies of the Joint Checks from the depository bank so as to verify the existence of both copayee endorsements. However, the trial court's determination that L&T was the proximate cause of Check City's damage ignores the

well recognized principle that the party in the best position to prevent the harm ought to bear the loss. *Pacific Metals*, 446 P.2d at 306. As previously set forth, L&T's opening brief further discusses the numerous cases in support of the forgoing principle and Check City's only response is to argue that such cases are "distinguishable" because such cases involve instances where a joint check was missing an endorsement. As previously set forth, Check City admitted throughout the course of trial and the trial court expressly acknowledged that this case indisputably involved a situation where the Joint Checks were missing the required endorsement of a copayee. *See* L&T's previous discussion and citation to the record *supra* at Argument "I." For Check City to assert that such cases are "distinguishable" from the instant case because herein one of the copayees endorsed the Joint Checks both as an individual and with the company name, belies the multiple admissions during trial that Familian never endorsed the Joint Checks and is therefore without merit.

Because Check City failed to fulfill its "duty to comply with the direction of the maker to pay to the order of the named payees" (*Pacific Metals* at 306), such act of negligence was an "independent intervening cause and therefore the sole proximate cause" of Check City's damages. *Watters v. Querry*, 626 P.2d 455, 458 (Utah 1981) (citation omitted).

V. THE TRIAL COURT'S DISMISSAL OF L&T'S COUNTERCLAIM WAS PROPERLY PRESERVED FOR APPEAL AND DID NOT TAKE INTO CONSIDERATION THE VERIFIED PLEADINGS IN SUPPORT THEREOF.

Check City initially argues that L&T did not adequately preserve for appeal the

dismissal of L&T's counterclaim. (Check City Br. 17-18). Check City seems to assert that L&T should have put on specific evidence of L&T's damage claim during the course of the trial, even though the trial court had previously dismissed L&T's counterclaim when it granted Check City's Motion for Summary Judgment on such counterclaim. (R. 334). Check City's argument ignores the effect of the trial court's dispositive dismissal of L&T's counterclaim. Simply put, once the trial court dismissed L&T's counterclaim, there was no claim to "preserve for appeal." The counterclaim was dismissed and L&T was precluded from further pursing the claim.

Check City then argues that L&T's verified pleadings setting forth the amount L&T was obligated to pay as a result of Check City's failure to obtain both copayee endorsements did not contain "specific facts" setting forth an adequate explanation of such payment. (Check City Br. 19). As set forth in L&T's opening brief, the applicable standard is whether the verified pleadings before the trial court created a "plausible inference" in favor of L&T regarding the damage arising from Check City's failure to comply with *Utah Code Ann.* § 70A-3-110(4) (an instrument payable to two or more persons may be "negotiated, discharged, or enforced **only by all of them**").

L&T's Verified Counterclaim provides record evidence that after Check City failed to require both co-payee endorsements, L&T was required to pay Familian the sum of $39,900.34. (R. 73). L&T's Verified Memorandum further provides that this amount was $20,592.22 more than L&T would have otherwise had to pay Familian, but for Check City's negligence. (R. 298). The verified pleadings before the trial court supported a "plausible inference" in favor of L&T regarding the alleged damages arising from

Check City's negligence. *See Uintah Basin Medical Center v. Hardy*, 179 P.3d 786, 790 (Utah 2008).

CONCLUSION

Based on the foregoing, L&T respectfully requests that this Court reverse the trial court's judgment in favor of Check City and reinstate L&T's previously dismissed counterclaim.

DATED this 17 day of March, 2010.

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CERTIFICATE OF SERVICE

I certify that on this 17 day of March, 2010, I caused a true and correct copy of **REPLY BRIEF OF APPELLANT** to be mailed in the United States mail, first class postage prepaid thereon to the following:

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