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Draper Bank and Trust Company v. Claudia R. Brown, Bug Parts Unlimited, Inc., dba Motivation Enterprises, and Western Surety Company : Brief of Respondent

Utah Supreme Court

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Dwight L. King; Attorney for Plaintiff.

David E. Yocum; Terry M. Plant; Attorney for Defendant.

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IN THE SUPREME COURT OF THE STATE OF UTAH

DRAPER BANK & TRUST COMPANY,
Plaintiff-Respondent,

vs.

CLAUDIA R. BROWN, BUG PARTS
UNLIMITED, INC., dba MOTIVATION
ENTERPRISES, and WESTERN
SURETY COMPANY,

Defendants.

CASE NO. 20591

WESTERN SURETY COMPANY,
Appellant.

BRIEF OF RESPONDENT

STATEMENT OF ISSUES PRESENTED ON APPEAL

The following issues are presented for review on appeal:

1. Do the undisputed facts provide sufficient support for the summary judgment granted respondent against Western Surety Company, surety for Claudia R. Brown and Bug Parts Unlimited, Inc., dba Motivation Enterprises?

2. Is the conduct of Claudia R. Brown and/or Motivation Enterprises as undisputed constitute fraud or fraudulent representations or a violation of §41-3-18, Utah Code Annotated?

3. Is respondent a person who is within the protection of the surety bond furnished by Western Surety Company to the State of Utah and covering the dealer Bug Parts Unlimited, Inc., dba Motivation Enterprises?

STATEMENT OF THE CASE

The facts are undisputed and were presented to the trial court by respondent and appellant as undisputed.

Claudia R. Brown obtained a loan from respondent for the purpose of purchasing an automobile particularly described as a 1978 Porsche 924, Serial No. 1248207902. The proceeds of the loan were placed in the form of a cashier's check made payable to Claudia R. Brown and Motivation Auto. The proceeds were paid to Motivation Enterprises but were diverted by it and never used for the purpose of paying the purchase price of the particularly described automobile. Other sums never were available to buy the automobile, so respondent's security interests were never perfected in the security which was to have been provided by the 1978 Porsche 924.

Respondent's position is that the diversion of the funds by Claudia R. Brown and/or Motivation Enterprises was fraud on its rights and that, as a consequence, the appellant, by reason of its surety bond, became liable to respondent for the damage suffered through loss of its security.

STATEMENT OF FACTS

The undisputed facts supporting the summary judgment are as follows:

A. A bond of motor vehicle dealer or salesman, No. 2334416, was in effect on the 9th day of January, 1979 and thereafter until the 10th day of May, 1979 under which defendant Western Surety Company agreed to indemnify any and all persons, firms and corporations for any loss suffered by reason of the fraud or fraudulent representations made or through the violation of the Motor Vehicle Business Act. The bond covered all judgments and costs adjudged against the principal Bug Parts Unlimited, Inc., dba Motivation Enterprises. A General Agreement of Indemnity (pg. 161) shows that Harold Michael Brown was the President of Bug Parts Unlimited, Inc., dba Motivation Enterprises, and that Claudia R. Brown was a co-signer on the General Agreement of Indemnity with Harold Michael Brown.

B. On the 9th of January, 1979, Brown executed a Motor Vehicle Security Agreement with Draper Bank & Trust covering a 1978 Porsche automobile, Model 924, two-door, Serial No. 1238207920 (R. 164). On the 9th of January, 1979, Claudia Brown entered into a promissory note agreement in the face amount of \$14,184.72 (R. 165).

C. On the 9th of January, 1979, plaintiff delivered to Claudia Brown its cashier's check No. 46407 made payable to Claudia Brown and Motivation Auto in the face amount of \$11,500.00. On the back thereof is the following endorsement:

Endorsement of this check constitutes an agreement to procure a Utah Certificate of Title to automobile for which this check represents payment showing Draper Bank & Trust, Draper, Utah as lien holder and

also guarantees good and clear title to said automobile

Make Porsche 924

Year 1978

Serial # 1248207920

(R. 165A)

The check was endorsed "Motivation Auto, by C. Brown, Vice Pres." and was deposited in the account of Claudia Brown, dba Tac and Togs, Inc.

D. Out of the proceeds of the cashier's check, Claudia Brown paid Motivation Auto approximately \$11,500.00, the price of the Porsche automobile described in the security documents (Claudia R. Brown (Conger) deposition, pg. 23).

E. Motivation Auto did not pay for the price of the Porsche automobile but spent the proceeds from its purchase price (Claudia R. Brown (Conger) deposition, pg. 25). No title was ever obtained to the vehicle.

F. Subsequent to the payment of the cashier's check, Motivation Enterprises resold the Porsche automobile through the auction. It retained the sale price without paying Draper Bank & Trust the loan which was to be secured by said automobile (Claudia R. Brown (Conger) deposition, pg. 25).

G. Payments amounting to \$3,682.55 were paid to Draper Bank & Trust on account. There remained due and owing on the note on the 25th of March, 1980 the sum of \$7,817.45 with interest on said sum at the rate of 14% per annum, which equals, as of the 8th of February, 1985, a total of \$12,976.20.

H. Neither Motivation Enterprises nor Brown are able to pay the unsecured debt for the purchase price of the Porsche (Claudia R Brown (Conger) deposition, pg. 33-34) (Bond cancellation May 20, 1979) (R. 163).

SUMMARY OF ARGUMENT

Summary judgment, pursuant to respondent's motion, was entered by the Court in the amount of \$12,976.20. The judgment recites that the conduct of Claudia R. Brown was in fraud of the rights of plaintiff as defined by Utah Code Annotated relating to bonding of automobile dealers and that the bond required appellant to pay the damages caused to plaintiff.

It is respondent's position and argument that the defendants Brown and Motivation Enterprises committed fraud on the respondent by diverting the proceeds of the cashier's check furnished by respondent to pay the purchase price of the Porsche automobile to purposes other than those for which it was intended and for which it was entrusted to defendants. The endorsement of the check without using the funds for the purposes for which it was entrusted by respondent is the fraud claimed by respondent.

It is the further argument of the respondent that the statutes providing for the bonding of automobile dealers specifically requires the appellant to pay all damages suffered by respondent, and that respondent is within the scope of the statute and among those persons whom the bonding statute requires the surety to protect.

ARGUMENT

POINT I

THE DIVERSION OF THE FUNDS PROVIDED BY DRAPER BANK & TRUST FOR THE PURCHASE PRICE OF THE AUTOMOBILE CONSTITUTED FRAUD ON IT BY PAYEES OF THE CASHIER'S CHECK.

POINT II

APPELLANT BECAME LIABLE ON ITS SURETY BOND TO RESPONDENT WHEN DEFENDANTS BROWN AND MOTIVATION ENTERPRISES DIVERTED THE PROCEEDS FROM THE CASHIER'S CHECK TO PURPOSES OTHER THAN FOR WHICH THEY WERE ENTRUSTED.

POINT I

THE DIVERSION OF THE FUNDS PROVIDED BY DRAPER BANK & TRUST FOR THE PURCHASE PRICE OF THE AUTOMOBILE CONSTITUTED FRAUD ON IT BY PAYEES OF THE CASHIER'S CHECK.

Section 41-3-16 of Utah Code Annotated 1953 as amended, provides for the bonding of all automobile dealers and fixes the maximum liability at \$20,000.00. It provides that the bond be conditioned that the applicant will conduct business as a dealer without fraud or fraudulent representations. Section 41-3-18, Utah Code Annotated, then provides that there shall be a right of action against dealers, salesman, crusher, or surety on bond and reads as follows:

If a person suffers loss or damage by reason of fraud, fraudulent representation, or violation of this chapter, - - - such person shall have a right of action against the dealer, salesman, or crusher guilty of the fraud, fraudulent representation, or violation and the sureties upon their respective bonds.

The undisputed factual situation described for the Court shows a clear embezzlement. The funds entrusted were used in a manner not authorized by Draper Bank & Trust. Defendants did not obtain the title to the vehicle and place on said title the lien that Draper had for the automobile purchase price.

Appellant argues through its brief that there were no fraudulent representations by Brownin obtaining the loan from respondent. Appellant fails to even consider the fact that fraud may occur in many ways other than by false representations. It is respondent's position that theft, embezzlement, misappropriation, and a whole series of dishonest dealings by an automobile dealer may subject its surety to liability if damages are suffered.

The standard and classical definition of embezzlement is set forth in 29A Corpus Juris Secundum, §1, pg. 2, and is as follows:

'Embezzlement' is broadly defined as the fraudulent appropriation of another's property by a person to whom it has been intrusted or into whose hands it has lawfully come.

Additional insight into the definition of fraud is found in the Criminal Code, Utah Code Annotated §76-6-401. Subparagraph (4) reads as follows:

'Obtain or exercise unauthorized control' means, but if not necessarily limited to, conduct heretofore defined or known as common-law larceny by trespassory taking, larceny by conversion, larceny by bailee, and embezzlement.

Further information on the definitions of fraud is contained in subparagraph (5) which defines deception. It reads as follows:

'Deception' occurs when a person intentionally:
(d) Sells or otherwise transfers or encumbers property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment is or is not valid or is or is not a matter of official record.

The undisputed facts show that defendant Brown paid to defendant Bug Parts Unlimited, Inc., dba Motivation Enterprises, the proceeds of the cashier's check as the purchase price of the Porsche automobile. Motivation Enterprises did not use those proceeds for the purpose of obtaining title to the Porsche and this is clearly embezzlement of the funds of respondent which were entrusted to Brown and Motivation Enterprises for a specific purpose, namely to obtain title to the Porsche.

It is also undisputed that the Porsche was then sold back over the auto auction and its sale price was not used by Motivation Enterprises to liquidate the loan which had been advanced to pay the purchase price. Respondent submits that this kind of dishonest dealing with the proceeds of the cashier's check, which was specifically intended to obtain title to the Porsche, is the type of fraud that the appellant's surety bond is intended to protect against.

This Court in Schwartz v. Tanner, 576 P.2d 873, at 875 (1978), defined fraud in the following terms:

Fraud is a generic term which embraces all the multifarious means which human ingenuity can devise and are resorted to in order to gain an advantage over another. In its general or generic sense, it comprises all acts, omissions and concealments involving a breach of legal or equitable duty and resulting damage to another. 37 C.J.S. Fraud §1.

It is undisputed that Brown paid Motivation Enterprises the price of the Porsche and Motivation Enterprises did not obtain the title to the Porsche or place on said title the lien that all parties understood and agreed was the purpose for which the cashier's check proceeds were to be used. It is respectfully submitted that this conduct on the part of Brown and/or Motivation Enterprises was fraud on the rights of respondent.

POINT II

APPELLANT BECAME LIABLE ON ITS SURETY BOND TO RESPONDENT WHEN DEFENDANTS BROWN AND MOTIVATION ENTERPRISES DIVERTED THE PROCEEDS FROM THE CASHIER'S CHECK TO PURPOSES OTHER THAN FOR WHICH THEY WERE ENTRUSTED.

Respondent was financing the purchase by Brown of the Porsche automobile from Motivation Enterprises. It supplied the funds through its cashier's check for the purpose of obtaining a clear title. Its interests were to be protected by the title showing it as a lienholder and by delivery of the title to the automobile. Appellant argues that the fraud of Brown was not covered by Western Surety's bond.

The law has always been clear in Utah since the early case of Bates v. Simpson, 121 Utah 155, 239 P.2d 749. The surety was there held liable to the purchaser of an automobile when his funds were not used for the purpose of obtaining title. The facts in the Bates case involved two used car dealers, one of whom was providing the financing for the purchase from the other dealer. The purchaser and the financier relied on the automobile dealer to procure the necessary title. When title was not procured, the bonding company was held liable to the financier and to the

purchaser. The Bates v. Simpson, supra, case is indistinguishable from the facts now before the Court as undisputed.

A subsequent case decided by the Utah Supreme Court holding the bond liable when a car dealer failed to obtain title is Lawrence v. Ward, 5 Utah 2d 257, 300 P.2d 619 (1956). One of the several transactions before the Utah Supreme Court in the Lawrence case involved a check made payable to the purchaser of the automobile and to the automobile dealer selling the car, which check was cashed and collected, as is the situation before the Court. When the dealer was unable to deliver title, the balance of the purchase price was not paid. The purchaser of the automobile claimed forgery on the check. It was held that the bonding company was responsible under its dealer's bond. Contributory negligence of the bank was held not to be a defense. This is a transaction where the dealer was entrusted with the check for the purchase price of the automobile.

This Court in Western Surety Company v. Redding, 626 P.2d 437, had an occasion to examine the sections of the Utah law relating to the requirements that dealers be bonded and the right of indemnification by the bonding company where the dealer was unable to furnish clear title to an automobile sold in the ordinary course of business. The Court examined §41-3-18 Utah Code Annotated, which is the section of our motor vehicle law requiring bonding of dealers. The Court held:

This statute should be construed broadly, for the bond was intended to protect all persons doing business with a motor vehicle dealer. Lawrence v. Ward, 5 Utah 2d 257, 261, 300 P.2d 619 (1956).

The holding in Western Surety, supra, was that the dealer must then indemnify its surety where loss was sustained and paid by the surety. In the present case, there is the indemnification agreement executed by both Brown and Harold Michael Brown as President of Motivation Enterprises (R. 161). The Western Surety v. Redding case, supra, and the indemnification agreement would both indicate that appellant has its remedies over against the defendants for the amount it is required to pay respondent for its losses.

The most recent case from this Court which involves the bonding statute is Betenson v. Call Auto and Equipment Sales, Inc., 645 P.2d 684. This case is cited by the appellant in its brief. It does not involve the indemnification of a person dealing with the automobile dealer as such. The plaintiff there seeking indemnification was a creditor of the automobile dealer. The Court in its holding stated as follows:

'A person who engages in the used car business, as in any business, must concern himself not alone with selling but with all the myriad details required to conduct such a business. That each part of the business contributes to the total success or failure is patent.'

Commercial Standard Insurance Co. v. West, 74 Ariz. 359, 361, 249 P.2d 830, 832 (1952). In a more recent case, Western Surety Co. v. Redding, Utah, 626 P.2d 437, 439 (1981), this Court emphasized that the bond 'was intended to protect all persons doing business with a motor vehicle dealer.' We note that the foregoing statement is accurate so long as the motor vehicle dealer is himself doing business as a dealer; the bond was never intended to indemnify all persons who contract with a dealer in a capacity unrelated to his

motor vehicle dealership. Consequently, this case is reversed and remanded to the district court for a trial to determine first, whether the agreements were entered into by defendant in connection with its business as a licensed motor vehicle dealer and, if so, for resolution on the merits.

It is undisputed that the check from respondent was made payable to both Brown and to Motivation Enterprises, the automobile dealer, so there can be no question but that respondent was dealing with an automobile dealer as such.

Respondent submits that it is clear that it is within the group that is intended by the statutes of the State of Utah cited herein to be protected, that its rights were violated by fraud as defined and mentioned in the bonding statute, that the trial court, on the undisputed facts, correctly ruled that appellant is responsible for the damages suffered by respondent.

CONCLUSION

It is respectfully submitted that the trial court's summary judgment should be affirmed on this appeal. The facts are undisputed and the law is clear that the bond is available to Draper Bank & Trust Company to indemnify it and pay its damages suffered by reason of the fraud committed by defendants Brown and/or Motivation Enterprises.

RESPECTFULLY SUBMITTED this _____ day of August, 1985.

DWIGHT L. KING & ASSOCIATES, P.C.

DWIGHT L. KING
Attorney for Respondent