

1980

Nanette Dixon, Val Humpherys and Carrie Humpherys v. William Stoddard and Darlene Stoddard : Brief of Defendants-Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

NANETTE DIXON, VAL HUMPHERYS, :
and CARRIE HUMPHERYS, :
:
Plaintiffs- :
Appellants, : Case No. 16876

vs. :
:
WILLIAM STODDARD and DARLENE :
STODDARD, :
:
Defendants- :
Respondents. :

BRIEF OF DEFENDANTS-RESPONDENTS

APPEAL FROM A JUDGMENT AND DECREE
OF THE DISTRICT COURT OF BOX ELDER
COUNTY, UTAH. HONORABLE TED S.
PERRY, PRESIDING

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TABLE OF CONTENTS

	PAGE (S)
CASES CITED	i
TEXT BOOKS CITED	ii
NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF THE FACTS	2
ARGUMENT	5
POINT I: THE JURY'S VERDICT WAS SUPPORTED BY THE EVIDENCE AND SHOULD BE SUSTAINED.....	5
A. PLAINTIFFS' ARE SUBJECT TO THE DEFENSE OF UNAUTHORIZED COMPLE- TION.....	5
B. THE DEAD MAN STATUTE IS TO BE STRICTLY CONSTRUED.....	5
C. EVIDENCE THAT THE PROMISSORY NOTE WAS SIGNED IN BLANK WAS COMPETENT BECAUSE PLAINTIFFS WAIVED THE DEAD MAN STATUTE.....	7
D. EVEN IF THE TESTIMONY WERE NOT COMPETENT ITS SUBMISSION TO THE JURY WAS HARMLESS ERROR SINCE THE TRIAL JUDGE WAS EMPOWERED TO SUBMIT THE SAME INFORMATION.....	8
E. FROM THE EVIDENCE PRESENTED AT TRIAL, THE JURY WAS ENTITLED TO REACH THE VERDICT IT DID.....	9
F. JURY INSTRUCTION NO. 2 AND SPECIAL VERDICT NO. 1 WERE CORRECT.	10

TABLE OF CONTENTS CONTINUED

	PAGE(S)
POINT II: THE DISTRICT COURT'S DENIAL OF PLAINTIFFS' MOTION TO SET ASIDE THE JUDGMENT AND FOR A NEW TRIAL WAS CORRECT.....	11
A. THE NEW EVIDENCE COULD HAVE BEEN DISCOVERED IN TIME TO MOVE FOR A NEW TRIAL IF DUE DILIGENCE HAD BEEN EXERCISED.....	11
B. THE NEW EVIDENCE WOULD NOT BRING ABOUT A DIFFERENT RESULT.....	12
POINT III: THE JURY'S FINDING ON ATTORNEY'S FEES WAS SUPPORTED BY THE EVIDENCE.	14
CONCLUSION.....	14

CASES CITED

PAGE(S)

Bank vs. Shivers, 20 Utah 2d 25, 432 P.2d 339 (1967) .	
Bezner v. Continental Dry Cleaners, 548 P.2d 898 (1976)	
Burk v. Peters, 115 Utah 58, 202 P.2d 543 (1949)	
Hanks v. Christensen, 11 Utah 2d 8, 354 P.2d 564 (1960)	
Kettner v. Snow 13 Utah 2d 382, 375 P.2d 28 (1962) ...	
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Morrison v. Walker Bank and Trust, 11 Utah 2d 416, 360 P.2d 1015 (1961)	
O'Gara v. Findley, 6 Utah 2d 102, 306 P.2d 1073 (1957)	
Wellman v. Noble, 12 Utah 2d 350, 366 P.2d 701 (1961).	

TEXT BOOKS CITED

			PAGE (S)
Section	70 A-3-302 (3) (b)	UCA	1953.....
Section	70 A-3-306 (b)	UCA	1953.....
Section	70 A-3-115 (2)	UCA	1953.....
Section	70 A-3-407	UCA	1953.....
Section	70 A-3-407 (2) (a)	UCA	1953.....
Rule	59 (b)	Utah R.Civ. P.....	
Rule	60 (b) (2)	Utah R.Civ. P.....	
Mckormick, <u>Evidence</u> , (2d ed., 1972)			

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STODDARD,	:	
	:	
Defendants-	:	
Respondents.	:	

BRIEF OF THE DEFENDANTS-RESPONDENTS

NATURE OF THE CASE

This is an action by the heirs of Glen S. Humphreys to enforce a Promissory Note.

DISPOSITION IN THE LOWER COURT

The case was tried before a jury which found that there had been a material and fraudulent alteration of the Promissory Note.

RELIEF SOUGHT ON APPEAL

Appellants seek an order reversing the Judgment in the District Court and entering Judgment for the Plaintiff for

the unpaid balance on the Note plus interest and costs, or, in the alternative, a new trial.

STATEMENT OF THE FACTS

William and Darlene Stoddard own a drugstore in Brigham City. In 1967, they agreed to buy the prescription items and other saleable inventory from the drugstore owned by Glen S. Humphreys, who was retiring. At Mr. Humphreys' request, the parties entered into an Agreement (P-3) and Promissory Note (R-3) which were drawn up by Mr. Humphreys' attorney. The Agreement provided that the value of the saleable inventory was to be determined by the Rocky Mountain Wholesale Inventory Crew. Defendant William Stoddard testified at trial that there was to be a reconciliation of the inventory and the merchandise received after the inventory was taken. (T-28) The parties also determined that the store inventory would be paid for as the items were sold through the Defendants' store. (R-24,25) After making payments for several years, the Defendants stopped when they found it impossible to sell a major part of the inventory received under the Agreement. Plaintiffs sued to enforce the Note. Defendants raised as a defense the fact that the Promissory Note had been completed without their knowledge or authorization since they had never received an inventory as per the Agreement.

At trial, Defendant William Stoddard was called as an adverse witness by the Plaintiff and questioned concerning the identity of his signature and the signature of his wife on the Promissory Note. (T-26,27) On cross-examination, the Defendant was permitted to testify where he was when he signed the Note, who was present, and that he and his wife signed the Note in blank. The defendants had already admitted in their Amended Answer that they had signed the Note in blank. (R-42) The Defendants also testified that they had never received an inventory as provided in the Agreement (R-40) and that some of the heirs had agreed to work out a settlement on the unsaleable merchandise. (T-46-48)

After the Plaintiffs and Defendants rested their cases, the trial Judge gave appropriate instructions based on the pleadings and evidence. The jury, exercising their prerogative as trier of fact, found that there had been a fraudulent and material alteration of the Promissory Note. Plaintiffs moved for a Judgment notwithstanding the verdict but were denied their motion in a Memorandum Decision. (R-133)

The Plaintiffs now appeal the verdict of the trial court and seek a reversal or, in the alternative, a new trial based on some recently discovered evidence. A Motion for a new trial based on this new evidence was previously denied by the District

Court in a Memorandum Decision. (R-181)

ARGUMENT

POINT I

THE JURY'S VERDICT WAS SUPPORTED BY THE EVIDENCE AND SHOULD BE SUSTAINED.

- A. PLAINTIFFS ARE SUBJECT TO THE DEFENSE OF UNAUTHORIZED COMPLETION.

Since the Plaintiffs acquired the Promissory Note "in taking over an estate," they are not holders in due course. UCA 70A-3-302(3)(b). Therefore, they are subject to the defense of unauthorized completion. UCA 70A-3-306. Defendant has the burden of establishing that the instrument was completed without authorization, UCA 70A-3-115(2); 70A-3-307 and that such a completion consisted of a fraudulent and material alteration under 70A-3-407. Upon meeting this burden, the Defendants may be discharged under 70A-3-407(2)(a) if the contract is changed by the material alteration.

- B. THE DEAD MAN STATUTE IS TO BE STRICTLY CONSTRUED.

In *Maxfield v. Sainsbury*, 110 Utah 280, 172 P.2d 122 (1946), the Utah Supreme Court outlined the purpose of the dead man statute:

The purpose of the statute is to guard against the temptation to give false testimony in regard to a transaction with a deceased person

by the surviving party, when the transaction is involved in a lawsuit and death has sealed the mouth of the other party. Furthermore, the statute seeks to put the two parties upon terms of equality in regard to giving evidence of the transaction....It was never intended that this section be used for the purpose of suppressing the truth. On the contrary, the statute's sole purpose is to prevent the proving by false testimony of claims against the estate of a deceased person.at 125.

Since the danger of suppressing truthful testimony is so real, the Court requires that the statute be strictly construed. Morrison v. Walker Bank and Trust, 11 Utah 2d 416, 360 P.2d 1015 (1961).

The parties have presented themselves before the court in an effort to achieve justice. It does not seem just that the Defendants' entire case should be swept aside because of the unfortuitous demise of one of the parties. McKormick's respected treatise on Evidence points out:

In seeking to avoid injustice to one side, the statute-makers have ignored the equal possibility of creating injustice to the other. . . .A searching cross-examination will usually, in case of fraud, reveal discrepancies in the 'tangled web' of deception. In any event, the survivor's disqualification is more likely to balk the honest than the dishonest survivor. McKormick, Evidence 65 (2d 2d.1972)

Since the danger of suppressing honest, truthful testimony is inherent in this situation, the court's task would

appear to be 1) the exercise of a heightened degree of scrutiny to determine if §78-24-2 even applies to the portions of testimony challenged by Plaintiffs and 2) viewing Defendants' assertions of waiver and harmless error in the best possible light.

C. EVIDENCE THAT THE PROMISSORY NOTE WAS SIGNED IN BLANK WAS COMPETENT BECAUSE PLAINTIFFS WAIVED THE DEAD MAN STATUTE.

In this case, the Plaintiff called Defendant William Stoddard as an adverse witness to testify regarding the identity of the signatures on the Promissory Note.

(T-26,27) On cross-examination by defense counsel, the Defendant testified that he had signed the document in a basement apartment, that three other people were present, and that he had signed the Promissory Note in blank.

It is clear from the trial record that Plaintiff was the first to inquire into the transaction between the Defendants and the decedent. As stated in O'Gara v. Findley, 6 Utah 2d 102, 306 P.2d 1073 (1957):

He [the Plaintiff] is therefore in no position to object when the adverse party explores the subject more fully upon cross-examination of the witness. In Plain terms the statute does not apply when the witness has been called to

testify to the transaction by the executor of the estate, the adverse party. at 1075
(emphasis added)

Therefore, the Plaintiff waived the dead man statute as to the testimony regarding signatures in blank, thus rendering the testimony competent evidence.

D. EVEN IF THE TESTIMONY WERE NOT COMPETENT EVIDENCE, ITS SUBMISSION TO THE JURY WAS HARMLESS ERROR SINCE THE TRIAL JUDGE WAS EMPOWERED TO SUBMIT THE SAME INFORMATION TO THE JURY AS A JUDICIAL ADMISSION.

It is the trial judge's responsibility to instruct the jury as to the issues that must be decided in the case and the applicable law so that the jury will understand its duties. Hanks v. Christensen, 11 Utah 2d 8, 354 P.2d 564 (1960); Wellman v. Noble, 12 Utah 2d 350, 366 P.2d 701 (1961). In this case the judge had the authority to instruct the jury that the signature of the Promissory Note in blank had been admitted in the pleadings and to explain its impact on the issue of execution of the Note. It appears from the record that the trial judge did in fact make an instruction regarding admission of the signature, but this presumably refers to the testimony. (R-100) The judge could just as well have instructed the jury regarding the admission

in the pleadings if the testimony had not been allowed in earlier.

E. FROM THE EVIDENCE PRESENTED AT TRIAL, THE JURY WAS ENTITLED TO REACH THE VERDICT IT DID.

It is settled law that a reviewing court will not disturb the jury's findings "unless clearly against the weight and credibility of the evidence." Bank v. Shivers 20 Utah 2d 25, 432 P.2d 339,340 (1967); see also Bezner v. Continental Dry Cleaner, Inc., 548 P.2d 898 (1967).

In this case the jury was informed that the Defendants signed the Promissory Note in blank and that the amount was not to be filled in until after an inventory performed by The Rocky Mountain Wholesale Inventory Crew determined the value of the store items. Defendant William Stoddard also testified that the inventory was to be reconciled with the merchandise he received. (T-28) The jury was informed that these arrangements were pursuant to the Agreement entered into by the parties. No evidence was introduced even as to an inventory ever having been performed. Therefore, the jury was entitled to believe that the amount and date filled in the blank spaces on the Promissory Note were material and fraudulent alterations because done without authorization and that the Defendant should be discharged from making

further payments on the Note.

Furthermore, the comment made by the jury on the verdict suggesting that the Plaintiffs remove the unsaleable items from the Defendants' basement does not indicate confusion on the jury's part. The comment is clearly in response to the Defendant's testimony that unsaleable items were still in his basement. (T-48) This testimony was not objected to and was not excluded. The objections and exclusion came when defense counsel sought to introduce some of the items into evidence. (T-48)

F. JURY INSTRUCTION NO. 2 AND SPECIAL VERDICT NO. 1
WERE CORRECT.

The court's Instruction No. 2 (R-100) reminded the jury of the fact that the Defendants had admitted they signed the Promissory Note in blank. As previously pointed out, evidence regarding such signatures was competent. Therefore, the jury was entitled to rely on it. The remainder of the instruction correctly sets forth the law as contained in UCA 70 A-3-407 and the common law.

As to the special verdict, competent evidence regarding fraudulent and material alteration of the Promissory Note was introduced at trial and the jury was entitled to rely on it and find that the Note was altered. Burk v. Peters,

though a correct statement of law, does not support Plaintiffs' case because 1) the evidence of the signatures admitted at trial was also presentable to the jury as a judicial admission; 2) in Burk, the Plaintiff was held not to have waived the dead man statute. It is Defendants' contention on appeal that Plaintiffs waived the dead man statute by calling Defendant William Stoddard as an adverse witness and questioning him about the transaction that was "equally within the knowledge" of the Defendant and decedent.

POINT II

THE DISTRICT COURT'S DENIAL OF PLAINTIFFS' MOTION TO SET ASIDE THE JUDGMENT AND FOR A NEW TRIAL WAS CORRECT.

A. THE NEW EVIDENCE COULD HAVE BEEN DISCOVERED IN TIME TO MOVE FOR A NEW TRIAL IF DUE DILIGENCE HAD BEEN EXERCISED.

Utah R. Civ. P. 60 (b) (2) indicates that the court may set aside a judgment if there is "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under 59(b)." Rule 59(b) provides: "A motion for a new trial shall be served not later than 10 days after the entry of the judgment."

In Kettner v. Snow, 13 Utah 2d 382, 375 P.2d 28 (1962),

the Utah Supreme Court held:

In order to warrant the granting of a new trial on the ground of belatedly discovered evidence, relied on by the plaintiffs, it would appear both that it 'by due diligence could not have been discovered in time to move for a new trial'; and that such evidence was of sufficient substance that there would be a reasonable likelihood of a different result. Otherwise, it is obvious that the ends of justice would not be served by ordering a new trial. at 30

It has now been almost four years since the complaint bringing this action was filed. In the two years and two months that expired between the filing of the complaint and the trial, the Plaintiffs have stated they searched for the inventory records only three times. (R-159) It seems that the due diligence requirement would call for more than one search per year for such valuable evidence. Furthermore, the fact that the inventory was found among the decedent's personal effects indicates that prior efforts to find the inventory had not been as thorough and diligent as they should have been. In other words, a truly diligent search, and surely several truly diligent searches of the decedent's personal effects would have turned up this evidence. Had it not been for what the Plaintiffs saw as the broad, shield-like protection of the dead man statute, perhaps a more diligent search would have been conducted.

B. THE NEW EVIDENCE WOULD NOT BRING ABOUT A DIFFERENT RESULT

It is also necessary that there be a ~~reas~~asonable likelihood of a different result because of the newly discovered evidence. The learned trial judge indicated in a Memorandum Decision that he did not think the new evidence would change the jury's verdict. (R-181) Based on the testimony given at trial, it appears that the trial judge was correct.

Defendant William Stoddard testified that after the inventory was taken there was to be a reconciliation and that such reconciliation was pursuant to the Agreement. (T-28,29) Although a provision for a reconciliation is not expressly included in the Agreement, it would be reasonable for a jury to assume that the Defendants would desire a reconciliation and that Defendant's testimony was merely additional evidence of the intent of the parties. There was also conflicting testimony regarding an agreement to make a settlement regarding the unsaleable merchandise. (T-24, 47-48) A jury could reasonably conclude from this that the parties were willing to work outside the terms of the Agreement.

Since there was testimony indicating that the Agreement was not the sole embodiment of the intent and wishes of the parties, a jury could reasonably conclude that the

inventory had to be accepted by the Defendants before being included as the sum due on the Promissory Note. Therefore, the likelihood of the new evidence bringing about a different result is not sufficient to justify a new trial because even though the inventory amount corresponds to the amount on the Note, it does not prove that Defendants authorized the completion of the Note. The trial judge did not abuse his discretion by dismissing the motion for a new trial.

POINT III

THE JURY'S FINDINGS ON ATTORNEY'S FEES WAS SUPPORTED BY THE EVIDENCE

The jury found that there had been a fraudulent and material alteration of the Note and that the Plaintiffs did not have enough evidence to support a verdict in their favor. Based on the evidence that led to these findings, the jury could reasonably deny Plaintiffs' an award of attorney's fees.

CONCLUSION

Respondents respectfully submit that the verdict of the trial court was supported by competent evidence and should be upheld on appeal. It is also respectfully submitted that a new

trial based on recently discovered evidence should not be granted because the evidence could have been discovered by due diligence in time to move for a new trial and will not bring about a different result.

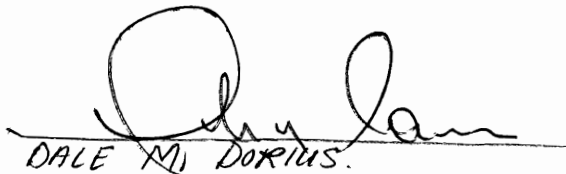
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