

1989

Jerry Spicer v. Michael S. Hughes : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Edward T. Wells; J.H. Bottum and Associates; Attorney for Plaintiff-Appellant.

Michael H. Wray; Neeleman and Wray; Attorney for Defendant-Respondent.

Recommended Citation

Brief of Respondent, *Spicer v. Hughes*, No. 890586 (Utah Court of Appeals, 1989).

https://digitalcommons.law.byu.edu/byu_ca1/2211

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU
50
.A10
DOCKET NO

STATE OF UTAH

Priority No. 14b

Appeal from Judgment of the Third Judicial District Court
in and for Salt Lake County, State of Utah
The Honorable Scott Daniels, Judge, Presiding

Michael H. Wray
NEELEMAN & WRAY
1061 East 2100 South
Salt Lake City, Utah 84106
Telephone: (801) 487-3222
Attorney for Michael S. Hughes
Defendant - Respondent

IN THE COURT OF APPEALS

STATE OF UTAH

JERRY SPICER,

Plaintiff - Appellant,

vs.

MICHAEL S. HUGHES,

Defendant - Respondent.

)
)
)
)
)
)
)
)
)
)

Docket No. 890586CA

Priority No. 14b

BRIEF OF RESPONDENT

Appeal from Judgment of the Third Judicial District Court
in and for Salt Lake County, State of Utah
The Honorable Scott Daniels, Judge, Presiding

Edward T. Wells
J.H. Bottum & Associates
418 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 538-0700
Attorney for Jerry Spicer,
Plaintiff - Appellant

Michael H. Wray
NEELEMAN & WRAY
1061 East 2100 South
Salt Lake City, Utah 84106
Telephone: (801) 487-3222
Attorney for Michael S. Hughes
Defendant - Respondent

TABLE OF CONTENTS

Index to Authorities	3
Jurisdiction	4
Statement of Issues Presented for Review	4
Statement of Determinative Statutes and Rules	4
Statement of Case	6
Disposition in Lower Court	7
Statement of Facts	8
Summary of Argument	9
Argument	10
Point I Defendant in this case has no implied duty at law to repay monies paid for his benefit and at his request by the Plaintiff	10
Point II The Statute of Frauds does not apply to this case	16
Point III The Trial Court's findings Number 3 and Number 4 and the Judgment are supported by the evidence and should not be disturbed	17
Point IV The Trial Court did not abuse its discretion in refusing to hold the case open to receive Plaintiff's testimony	19
Point V Defendant is entitled to collect from Plaintiff attorney's fees and costs in defending this Appeal	20
Conclusion	22

INDEX TO AUTHORITIES

Utah Code Annotated Section 25-5-4 (2)	4, 16
Utah Rules of Civil Procedure Rule 40 (b).	5, 20
Utah Rules of Civil Procedure Rule 59.	5, 17
Rules of Utah Court of Appeals Rule 33 (a)	6, 21
Rules of Utah Court of Appeals Rule 40 (a)	6, 21
<u>Beecher v. Salt Lake City</u> , 531 P.2d 1300 (Utah 1975) . .	14
<u>Build v. Italasano</u> , 398 P.2d 544 (Utah 1965)	14
<u>Cody v. Johnson</u> , 671 P.2d 149 (Utah 1983).	21
<u>College Irrigation Co. v. Logan River and Blacksmith Fork Irriga- tion Co.</u> , 780 P.2d 1241 (Utah 1989).	18
<u>Harline v. Campbell</u> 728 P.2d 980 (Utah 1986)	18
<u>In re Estate of Bartrell</u> , 776 P.2d 885 (Utah 1989) . . .	17
<u>Island Petroleum Co. v. Commission of Internal Revenue</u> , 57 F.2d 992 (4th Cir. 1932) Cert. den. 287 U.S. 646 (1933)	11
<u>Kennedy v. Conrad</u> , 9 Mont. 356, 9 P.2d 1075 (1932) . . .	11
<u>Manwill v. Oyler</u> , 361 P.2d 177 (Utah 1961)	15
<u>Minsky's Follies of Florida v. Sennes</u> , 206 F.2d 1 (5th Cir. 1953)	13
<u>O'Brien v. Rush</u> , 744 P.2d 306 (Utah App. 1987).	21
<u>Riche v. Riche</u> , __P.2d__ (Utah App. 1989)	20
<u>Roussel v. Russell</u> , 339 P.2d 522 (Okla 1959).	14
<u>Redevelopment Agency of Salt Lake City v. Daskalas</u> , __P.2d__ (Utah App. 1989).	20
<u>Scharf v. B.M.G. Corp.</u> , 700 P.2d 1068 (Utah 1985)	18
<u>Sommer v. Nakdimen</u> , 97 F.2d 715 (8th Cir. 1938)	12

JURISDICTION

This Court has jurisdiction of this appeal pursuant to Utah Code Annotated Section 78-2a-3(2)(j). This case is an appeal from the District Court and has been transferred to the Court of Appeals from the Supreme Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. When money is paid by a Plaintiff to a third party on behalf of, and at the request of the Defendant, but there is no written or oral agreement that the transaction is a loan, and there is evidence that the Plaintiff and his associates owe Defendant money, does the law imply a duty to repay?

2. Does the Statute of Frauds preclude introduction at trial of evidence of the circumstances and relationship between the parties in an action to recover monies paid to a third person by Plaintiff on behalf of Defendant?

3. Were the Trial Court's Findings Numbers 3 and 4 and the Judgment supported by the evidence?

4. Did the Trial Court abuse its discretion in its determinations at trial?

5. Is the awarding of costs and fees to the Defendant/Respondent appropriate in this case?

STATEMENT OF DETERMINATIVE STATUTES AND RULES

Utah Code Annotated Section 25-5-4(2):

The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing signed by the party to be charged with the agreement:

(2) every promise to answer for the debt, default or miscarriage of another;

Utah Rules of Civil Procedure Rule 40(b)

Rule 40. Assignment of Cases for Trial Continuance

- (a) Order and Precedence.
- (b) Postponement of the Trial.
- (c) Taking Testimony of Witnesses Present.

(b) Postponement of the Trial

Upon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown. If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it. The court may also require the party seeking the continuance to state, upon affidavit or under oath the evidence he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it may be considered as actually given on the trial, or offered and excluded as improper, the trial shall not be postponed upon that ground.

Utah Rules of Civil Procedure Rule 59.

Rule 59. New trials; amendments of judgment.

- (a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(6) Insufficiency of the evidence to justify the verdict or other decision,

or that it is against the law.

(7) Error in law.

- (b) Time for motion. A motion for new trial shall be served not later than 10 days after the entry of the judgment.

Rules of the Utah Court of Appeals Rule 33(a)

Rule 33. Damages for delay or frivolous appeal; recovery of attorney fees.

- (a) Damages for delay or frivolous appeal. If the Court determines that a motion made or an appeal taken under these rules is either frivolous or for delay, it shall award just damages and single or double costs, including reasonable attorney fees, to the prevailing party.

Rules of the Utah Court of Appeals Rule 40(a)

Rule 40. Attorney's or party's certificate; sanctions and discipline.

- (a) Attorney's or party's certificate. Every motion, brief, and other paper of a party represented by an attorney shall be signed by at least one attorney of record who is an active member in good standing of the bar of the Supreme Court of Utah. The attorney shall sign his or her individual name and give his or her business address. A party who is not represented by an attorney shall sign every motion, brief, and other paper and state the party's address. Except when otherwise specifically provided by rule or statute, motions, briefs, or other papers need not be verified or accompanied by affidavit. The signature of an attorney or a party constitutes a certificate that the attorney or the party has read the motion, brief or other paper; that to the best of the attorney's or the party's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purposes, such as to

harass or cause unnecessary delay or needless increase in the cost of litigation. If a motion, brief, or other paper is not signed as required by this rule, it shall be stricken unless it is signed promptly after the omission is called to the attention of the attorney or the party. If a motion, brief, or other paper is signed in violation of this rule, the court, upon motion or sua sponte, shall impose upon the person who signed it, a represented party, or both an appropriate sanction, which may include dismissal or affirmation of the appeal, sanctions and discipline under Paragraph (b) of this rule, or an order to pay to the other party or parties this amount of the reasonable expenses incurred because of the filing of the motion, brief, or other paper, including a reasonable attorney fee.

STATEMENT OF THE CASE

Jerry Spicer sued Michael Hughes to collect the sum of Eleven Thousand Two Hundred Twenty-One dollars and Eighty Cents (\$11,221.80) alleging that he had "loaned" Mr. Hughes that amount, that Spicer had demanded repayment of the "loan", and that Hughes refused to repay. Defendant Answered Plaintiff's Complaint, denying the allegations, claiming no loan was made, and no obligation of repayment existed.

DISPOSITION IN LOWER COURT

A bench trial was held on September 20, 1988 before Third Judicial District Court Judge Scott Daniels. Immediately before trial, Plaintiff moved to continue the action as the Plaintiff failed to appear, which motion was denied. Plaintiff's motion to allow the testimony of Mr. Spicer to be taken sometime in the future was taken under advisement, and later denied. Judge Daniels heard Plaintiff's case, and awarded judgment in favor of

Defendant dismissing the action. A notice of appeal was filed.

STATEMENT OF FACTS

Trial was originally set in this matter for Thursday, July 14, 1988, at 9:00 a.m. Upon motion by the Plaintiff, a continuance was granted until Tuesday, September 20, 1988 (TR:2). On the date and time set for trial, Plaintiff's counsel again moved the Court to continue the trial, alleging that Mr. Spicer was in Florida (TR:5) with an ear infection (TR:2) which prevented him from flying to attend the trial (TR:2). Defendant objected to another continuance (TR:3). The Court denied Plaintiff's Motion (TR:5).

Plaintiff next moved the Court to allow Mr. Spicer to present testimony at some future date. Plaintiff's motion was taken under advisement (TR:5).

Mr. Spicer alleged in his Complaint that he had "loaned" Mr. Hughes a sum certain (Plaintiff's Complaint paragraph 4). Inasmuch as Mr. Spicer did not attend the trial, and counsel elected to proceed, Mr. Hughes was the only witness to testify. Mr. Hughes testified that at the time of the transaction giving rise to this action, that he was employed as a stockbroker (TR:10), and had a series of dealings with Mr. Spicer (TR:44-45). Mr. Hughes had a financial problem in Texas, the resolution of which required the payment of eleven thousand Dollars to a third person. (TR:10). Hughes was owed money by Mr. Spicer (TR:46). A

corporate entity in which Mr. Spicer was involved called U.S.S.& T. owed Mr. Hughes money (TR:48). Mr. Hughes telephoned Mr. Spicer at U.S.S.& T.'s offices in Dallas Texas, and directed that Mr. Spicer pay the third party \$11,000 (TR:22-23). Mr. Spicer paid \$11,000 to the third person (TR:16, 24). No mention of a loan to Mr. Hughes was ever made by Spicer (TR:16,42). Mr. Hughes never considered the funds transferred to the third person to be a loan (TR:16, 41, 43).

Some twelve (12) months passed without any attempt by Mr. Spicer to seek repayment of the \$11,000 from Mr. Hughes (TR:42).

After hearing and weighing the credibility of the witness, examining the admitted exhibits, and considering the arguments of counsel, the Court ruled in favor of Defendant. The Court denied Plaintiff's Motion to hold the trial open until it was more convenient for Mr. Spicer to testify. (TR:49).

SUMMARY OF THE ARGUMENT

The bald payment of money from the Plaintiff to another for the benefit of the Defendant, does not, as a matter of law, imply a duty on the part of Defendant to repay, even if payment was made at the direction or request of the Defendant.

The introduction and consideration of evidence at trial of the circumstances surrounding the subject transaction was not barred by the Statute of Frauds.

The Findings of Fact were logically founded upon the evidence at trial, and were not clearly erroneous, and should not be

disturbed.

It was not an abuse of discretion for the Court to deny Plaintiff's motion to allow the case to remain open to a later date to permit testimony of Mr. Spicer.

Because of the relative merits of the parties' positions in this matter, and because of the nature of the issues raised by Appellant on appeal, the Plaintiff should be ordered by this Court, pursuant to Rule 33 of the Rules of the Utah Court of Appeals to pay Defendant's costs and attorney fees incurred through the defense of this action.

ARGUMENT

Point I

MR. HUGHES HAS NO DUTY TO REPAY MR. SPICER.

In Plaintiff's Complaint, Spicer alleges the existence of a loan in the amount of \$11,221.80, to be repaid in ten (10) days. The burden is on the Plaintiff to prove the elements of his case. The Plaintiff here is unable to do so. At trial, Plaintiff urged the Court to find that the Defendant had an implied duty at law to repay monies paid on his behalf to third persons. The Court gave leave to Counsel to brief and present to the Court legal argument in support of his proposition. The Court received plaintiff's "post-trial memorandum" which propounds in substance the argument contained in Point I of Appellant's Brief. Plaintiff now urges this Court to reverse the Judgment of the District

Court and to enter Judgment of Plaintiff as prayed for in the Complaint. Counsel for the Plaintiff relies on his interpretation of the Common Law rules of assumpsit in support of his position, citing five cases. Each of these cases can be distinguished and are of limited precedential value.

Island Petroleum Co. v. Commissioner of Internal Revenue, 57 F.2d 992 (4th Cir. 1932) Cert. den. 287 U.S. 646 (1933) is factually dissimilar. There the Plaintiff was attempting to receive a certain tax benefit after it had thrown good money after bad. The facts disclosed that the lender had continued to advance money to borrowers for the development of oil properties, even after the venture proved worthless. The finding of the tax board was that "the amounts paid out by the petitioner to or for the Texas corporations were merely advances or loans by the petitioner." id. at 994. The Court held that the advances made were loans which the Texas corporations would repay if the business venture was successful. Here there was no finding that this transaction was a loan.

In Kennedy v. Conrad, 9 Mont. 356, 9 P.2d 1075, (1932), the defendants were owners of an oil and gas lease on property on which they were obligated to drill an oil well. Plaintiffs acquired an overriding royalty interest in the proceeds. After commercial quantities of petroleum was found, "the well required cleaning to prevent it from becoming valueless through caving, and to prevent defendants' rights from being forfeited for non-

production of oil and gas in commercial quantities; that, for the protection of the said lease and plaintiffs' interests therein, it was necessary that someone should furnish the money for the cleaning out and swabbing... that the defendants were unable to pay for the same or to perform the said labor, and that at the instance and the request of the defendants...the plaintiffs advanced to defendants for the use and benefit of all of them (certain amounts at certain times and under certain conditions)... and that in equity and good conscience the defendants should repay the said amount to the plaintiffs." Kennedy at 1076. The Court held "Since the parties made an agreement with respect to the emergency confronting them, and since the advancements were made pursuant to the agreement, plaintiffs, if they insisted upon the right of indemnity from defendants, should have made provision to that effect as a part of the agreement. The circumstances under which plaintiffs paid the money negative any expectation of its return from defendants...." id at 1079. The Court here found no agreement between the parties, after considering, as did the Court in Kennedy, the circumstances surrounding the transaction.

In Sommer v. Nakdimen, 97 F.2d 715 (8th Cir. 1938), an Arkansas Court was asked to enforce a stale negotiable note where the defendant had for many years promised in writing to repay. The defendant raised the Arkansas Statute of Frauds and Statute

of Limitations. The Court held that the claim, since founded on an implied contract, was be barred by the Statute of Limitations. Sommer at 722.

In Minsky's Follies of Florida v. Sennes, 206 F.2d 1 (5th Cir. 1953), the Florida trial Court was asked to enforce an oral lease agreement of over one year evidenced by a series of telegrams and letters. The defendant raised the Florida statute of frauds as a defense. The Court held that the lease was unenforceable and barred by the statute of frauds. But because of the attending circumstances, the Court did find that certain expenditures made by the plaintiff for the benefit of defendant did not flow from the breach of the lease itself, and were therefore recoverable. The Trial Court here likewise considered the context in which this transaction occurred, and held that the Defendant did not owe the Plaintiff.

In Roussel v. Russell, 339 P.2d 522 (Okla. 1959), the Court interpreted an oral agreement, under which the defendant was to pay the plaintiff his costs expended in obtaining for the defendant certain oil and gas leases. The defendant attempted unsuccessfully to have the contract deemed unenforceable as violative of the Oklahoma statute of frauds.

"It therefore appears us not to be within the Statute of Frauds, but, on the contrary, to be within the class of cases where, after the contract directly concerning the interest in land has been executed, the action has been held to lie upon a separate promise to be per-

formed after such execution.

Whether the present action be regarded as founded on an express promise, or an implied one, or whether defendant's final promise to pay for the plaintiff had obtained, related back to, and was connected with, his original request for leases on the interest of all of the Quigley heirs, or whether it be regarded as founded on quasi, or constructive, contract, we think that instead of being an action to charge a defendant on a contract to convey an interest in real estate--and within the Statute of Frauds--it is solely for the recovery of money paid, lent, or advanced, and is in the nature of assumpsit, in which actions for 'money had or received had their origin." Roussel at 527.

Again, the Court found an agreement to repay, and because of the surrounding circumstances of the transactions, enforced that agreement. Here, there was no agreement for the Court to enforce, and the Court found no other basis to award Judgment for the Plaintiff.

Assumpsit has been discussed by Utah Courts relatively infrequently. In Beecher v. Salt Lake City, 531 P.2d 1300, (Utah 1975), the Court disallowed an architect's claim of an additional \$130,000 in fees for alleged extra work. In Build v. Italasano, 398 P.2d 544, (Utah 1965), the Court would not disturb the Trial Court's findings that although there was not an enforceable contract, that in order to "effectuate substantial justice in equity,... that from the evidence, on a quasi-contractual basis, Build was entitled to judgment...." Build at 544. "The trial

court, finding no express or enforceable contract, did find that there was a quasi-contractual relationship which is law, rather than an equity, action. (footnote omitted) It thereupon assessed the value of the benefits conferred upon the Italasanos by Build and entered judgment accordingly. (footnote omitted) In reviewing the record, we cannot say that the lower court's findings and judgment, viewed in the light most favorable to them, were unsound or unreasonable." id at 545. Here, the findings of the Court were contrary, but similarly are well founded in the evidence and should not be disturbed.

And, in Manwill v. Oyler, 361 P.2d 177 (Utah 1961), although assumpsit is not discussed specifically, the factual setting is somewhat analogous to the instant case. There, the plaintiff sued to recover the amount of payments he had made on defendants' behalf. Plaintiff alleged that during the years 1950, 1951, 1952, and 1953 he had made payments on defendants' behalf on a farm occupied by the defendants, and that in 1954 had transferred a valuable grazing permit and eighteen head of cattle to them. Plaintiff further alleged that in July or August, 1956, defendants orally agreed to repay plaintiff. Manwill at 177. The Utah Supreme Court held that since the plaintiff could not allege facts sufficient to make the alleged oral promise of 1957 a binding contract, inasmuch as a mere moral obligation is not valid consideration, it was error to deny the defendants' motion to dismiss. id at 179.

Appellant fails in his Brief to cite to any Utah authority to support his position that the common law rules of assumpsit are viable in this jurisdiction, and if they are, why Mr. Hughes has an implied duty at law to repay Mr. Spicer. Even if the rules of assumpsit as propounded by Plaintiff are applicable to this case, the Court did not find any legal or equitable reason given the particular facts of this case to award Judgment to the Plaintiff.

Point II.

THE STATUTE OF FRAUDS DOES NOT APPLY TO THIS CASE.

Utah Code Annotated Section 25-5-4 (2) as part of the Utah Statute of Frauds provides "The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing signed by the party to be charged with the agreement (2) every promise to answer for the debt, default or miscarriage of another; (emphasis added). Here, the Court was not faced with a promise to repay. Mr. Hughes never promised to repay Mr. Spicer. Mr. Hughes testified that Mr. Spicer owed Hughes money. Mr. Hughes also testified that others associated with Mr. Spicer owed Hughes money. Mr. Spicer actually paid monies to third persons for the benefit of Mr. Hughes. Plaintiff alleges that in order to enforce the "contract" between Spicer and Hughes for Spicer to answer for the debt of a third party that it must be in writing. But Mr. Hughes is not attempt-

ing in this action to collect from Mr. Spicer. Spicer already repaid a portion of the money owed to Hughes and is now attempting to reverse that transaction by raising the Statute of Frauds as a "defense" even though he is the Plaintiff. The evidence adduced at trial while possibly irrelevant to the issue of whether third party associates of Mr. Spicer owed Mr. Hughes, was nonetheless relevant to the issue of the existence of a "loan" from Spicer to Hughes as alleged in Plaintiff's Complaint. The Court heard competent testimony relative to the course of dealings between the parties in its determination of the context of the payment of the \$11,000 by Mr. Spicer to the third person on Mr. Hughes' behalf. The evidence was not barred by the Statute of Frauds, and was properly admitted and considered by the Court.

Point III.

THE TRIAL COURT'S FINDINGS NUMBERS 3 AND 4 AND THE JUDGMENT ARE SUPPORTED BY THE EVIDENCE AND SHOULD NOT BE DISTURBED.

Utah Rule of Civil Procedure 59 (a) governs the method by which a dissatisfied party may have a case reopened. The Plaintiff here did not comply with the Rule.

The standard by which this Court must examine the findings of the lower Court is one of "clearly erroneous". "We give great deference to the trial courts' findings of fact and do not overturn them unless they are clearly erroneous." In re Estate of Bartrell, 776 P.2d 885, 886 (Utah 1989). That finding (of

fact) is entitled to a presumption of correctness, and on appeal, the evidence is surveyed in the light most favorable to the finding." College Irrigation Company v. Logan River and Blacksmith Fork Irrigation Co., 780 P.2d 1241 (Utah 1989) (citing Harline v. Campbell, 728 P.2d 980, 982 (Utah 1986)). "If there is a reasonable basis in the evidence to support the finding, the finding will not be overturned unless it is clearly erroneous. College Irrigation at 1244. Further, "it is incumbent upon appellants to marshal all of the evidence in support of the findings of the trial court and to then demonstrate that even when viewed in the light most favorable to the factual determination of the trial court, the evidence is insufficient to support its findings." (citing Harline, supra at 982.) "Failure of appellants to do so in the instant case is, in and of itself, dispositive of their challenge to the trial court's findings of fact." College Irrigation, supra at 1244, (citing Scharf v. B.M.G. Corp., 700 P.2d 1068, 1070 (Utah 1985). Findings Numbers 3 and 4 by Judge Daniels are not clearly erroneous, and therefore must be upheld.

The evidence at trial showed that Mr. Spicer owed Hughes money. Citram Corp., of which Mr. Spicer was an officer owed Hughes money. U.S.S. & T., of which Mr. Spicer was an officer, owed Hughes money. In the absence of any evidence to the contrary, the Trial Court did not err in its Findings relative to these issues.

The Conclusions of Law reached by the Court flowed naturally and directly from the evidence, and were not based exclusively on Findings Numbers 3 and 4 as alleged in Plaintiff's Brief, but were determined by the totality of the factual evidence presented at trial. Even if arguendo Findings #3 and #4 were totally erroneous, and not at all supported by the evidence, the legal conclusions still stand on their own merits, and should not be disturbed. There simply was not an agreement between Spicer and Hughes that Hughes would repay the money paid by Spicer to the third party at the direction of Hughes. There is no evidence that this was a "loan". Mr. Hughes testified specifically that this transaction was not a loan. And given the test as outlined above from College Irrigation, the Plaintiff clearly has not met his burden of overcoming the presumption of correctness, which is dispositive on this issue.

Because the testimony of the witness and the evidence introduced at trial substantiate the Findings, they cannot be found to be clearly erroneous, and as such must be upheld.

Point IV.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS RULINGS AT TRIAL.

Trial Courts are afforded wide latitude respecting the conduct of trial. Here, Judge Daniels did not err in denying Plaintiff's motion to continue or to hold the trial open. This matter had already been continued once at the instance of Plain-

tiff. The motion to continue was not timely filed, but was made orally at the time set for trial. Utah Rule of Civil Procedure 40 governs the circumstances by which a postponement could occur. Mr. Spicer as the Plaintiff had the affirmative obligation to attend the trial if he wished to testify and present evidence. Counsel for Plaintiff presented no evidence other than bald assertions as to the unavailability of the Plaintiff. Even if Mr. Spicer was in fact medically precluded from flying to the trial, there exist alternate methods of transportation. Further, Plaintiff was not left without a remedy even facing the posture in which he was voluntarily placed, as counsel could have dismissed the action without prejudice, and refiled. Instead, counsel stated on the record that he was prepared to proceed (TR:3, 4, and 6), and in fact put on his case in chief. Given this scenario, the Court did not err in refusing Plaintiff's motions.

Point V.

PLAINTIFF SHOULD BE ORDERED TO PAY DEFENDANT'S COSTS INCURRED
IN DEFENSE OF THIS ACTION.

Plaintiff should be ordered to pay costs of this Appeal. This Court is afforded wide latitude in the apportionment of costs of appeal. (see: Riche v. Riche, __P.2d__, (Utah App. 1989), Redevelopment Agency of Salt Lake City v. Daskalas, P.2d (Utah App. 1989), Maughan v. Maughan, 770 P.2d 156 (Utah App.

1989)).

Rules of Utah Court of Appeals 33(a) governs this issue. Rule 33(a) states that attorney fees may be awarded when "the motion made on an appeal taken under these rules is either frivolous or for delay.... In Cody v. Johnson, 671 P.2d 149, 151 (Utah 1983), the Supreme Court equated frivolous with being without merit. "A frivolous appeal is one without merit." O'Brien v. Rush, 744 P.2d 306, 310 (Utah App. 1987). "For purposes of Rule 33(a) of the Rules of the Utah Court of Appeals we define a "frivolous appeal" as one having no reasonable legal or factual basis as defined in Rule 40 (a)." "Since a party has already been to court once and had the benefit of one ruling, the decision to appeal should be rendered only after careful consideration by the party and counsel." "Defendant's claim on appeal simply controvert the findings of the court. The claims are not only without merit but are also without basis in law or fact." O'Brien supra at 310.

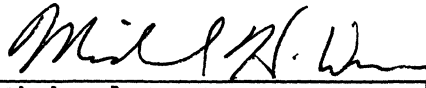
Taken in its most simple terms, this case is one where Plaintiff owed Defendant money, repaid a portion of it, and then sued to recover what had been repaid. It should not be overlooked that there was never an agreement by Hughes to pay Spicer, or that over a year went by before Spicer made a "demand" on Hughes for repayment, or that any delay in bringing this matter to trial was brought on by the Plaintiff. Mr. Hughes was compelled to defend himself against the action of Mr. Spicer in the

trial court, and now, after Mr. Spicer has "had his day in Court" is placed in the posture of once again incurring legal fees and costs in this appeal. Given the relative merits of the parties' positions in this matter, and given the authority as articulated above, Defendant urges this Court to assess costs and expenses of the Defendant to the Plaintiff.

CONCLUSION

WHEREFORE, for the above-stated reasons, Respondent hereby respectfully requests that the appeal taken by Jerry Spicer be denied, and that Respondent be awarded his reasonable costs and attorney's fees.

Respectfully submitted this 7th day of January, 1990.



Michael H. Wray
Attorney for Defendant/Respondent

**ADDENDUM TO
BRIEF OF RESPONDENT**

Edward T. Wells - Bar No. 3422
BOTTUM & WELLS, P.C.
323 South 600 East - Suite 150
Salt Lake City, Utah 84102
Telephone: (801) 538-0700

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JERRY SPICER,)	
Plaintiff,)	COMPLAINT
Vs.)	Civil No. <u>C77-07595</u>
MICHAEL S. HUGHES,)	
Defendant.)	

For cause of action against defendant, plaintiff alleges as follows:

1. Plaintiff is a resident of the State of Florida.
2. Defendant is a resident of Salt Lake County, State of Utah.
3. The actions complained of occurred in Salt Lake County, State of Utah.
4. On or about October 15, 1986, plaintiff loaned to defendant the sum of Eleven Thousand Two Hundred Twenty-One Dollars and Eighty Cents (\$11,221.80) which sum defendant agreed to repay in ten (10) days.
5. Defendant has refused to pay back the money loaned.
6. Defendant is indebted to plaintiff in the sum of Eleven Thousand Two Hundred Twenty-One Dollars and Eighty Cents

\$11,221.80) plus interest at the statutory rate to date of judgment which sums defendant has refused to pay.

WHEREFORE, plaintiff prays judgment against defendant in the sum of Eleven Thousand Two Hundred Twenty-One Dollars and Eighty Cents (\$11,221.80) plus interest as allowed by law plus all costs incurred in this action.

DATED this 19TH day of November, 1987.

BOTTUM & WELLS, P.C.

By: 

Edward T. Wells
Attorney for Plaintiff

William L. Schultz #3626
Attorney at Law
1061 East 2100 South
Salt Lake City, Utah 84106
Telephone: (801) 487-3222

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JERRY SPICER,

Plaintiff,

-VS-

MICHAEL S. HUGHES

Defendant.

)
)
)
)
)
)
)
)
)
)

ANSWER TO COMPLAINT

Civil No. C87-07595

COMES NOW Defendant, Michael S. Hughes, and answers
Plaintiff's Complaint as follows:

FIRST AFFIRMATIVE DEFENSE

1. Plaintiff's Complaint fails to state a cause of action on which relief can be granted.

SECOND AFFIRMATIVE ACTION

2. Defendant is without sufficient knowledge to answer the allegations of paragraph 1 of Plaintiff's Complaint, and therefore denies the same.

3. Defendant admits the allegations of paragraphs 2 and 3 of Plaintiff's Complaint.

4. Defendant denies the allegations of paragraphs 4, 5 and 6 of Plaintiff's Complaint.

5. Defendant denies each and every allegation of Plaintiff's Complaint not specifically admitted.

THIRD AFFIRMATIVE DEFENSE

6. Plaintiff's claims are barred by the State of Frauds and the Uniform Commercial Code.

FOURTH AFFIRMATIVE DEFENSE

7. Plaintiff's claims are barred by the Statute of Limitations and the Doctrine of Laches.

FIFTH AFFIRMATIVE DEFENSE

8. Defendant's obligations to Plaintiff have been satisfied and discharged in full.

SIXTH AFFIRMATIVE DEFENSE

9. Plaintiff's transfer of moneys to Defendant was not a loan, and there is no obligation for repayment.

Wherefore, having fully answered Plaintiff's Complaint, Defendant prays that Plaintiff take nothing thereby and that it be dismissed with prejudice.

DATED this 12 day of December, 1987.
14

William L. Schultz
WILLIAM L. SCHULTZ

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Answer was deposited, postage prepaid, in the U.S. Mail to the below named on this 14 day of December, 1987.

Edward T. Wells, Esq.
Bottum & Wells, P.C.
323 South 600 East, Suite 150
Salt Lake City, Utah 84102

W. T. Wells

Edward T. Wells - 3422
J. H. BOTTUM & ASSOCIATES
323 South 600 East, Suite 150
Salt Lake City, Utah 84102
Telephone: (801) 538-0700

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

JERRY SPICER,)	
)	
Plaintiff,)	POST TRIAL MEMORANDUM
)	
vs.)	
)	
MICHAEL S. HUGHES,)	HONORABLE SCOTT DANIELS
)	
Defendant.)	

COMES NOW the plaintiff herein, pursuant to the request of the Court at the time of argument of the above cause, and submits the following Memorandum to support the proposition that there is an implied duty at law to repay monies paid to a third party at the request of defendant.

ISSUE

At trial, the evidence clearly showed, and defendant admitted, that he requested Mr. Spicer to make a payment on his behalf to an attorney in Texas to solve a rescission problem he had on a stock sale. Exhibits 11, 12, 13 and 14 show that the money was in fact paid as requested by the defendant.

The issue on which the Court requested authority was:

"Whether there is an implied duty at law to repay to the plaintiff monies which he has paid out at the specific request of the defendant."

ARGUMENT

At common law, one could bring an action in assumpsit for money paid. The action was one for money paid by one to a third party for the benefit of another. See 58 C.J.S. Money Paid Sec. 1. As a general rule, if a person pays money to a third party for the use or benefit of another at such other's express or implied request, he can recover the money so paid from such other. Id at Sec. 4. In fact "Where one pays out money at the special instance and request of another, the law implies a promise on the part of the latter to repay it." Id at 894.

The aforesaid rule appears to be universally followed. See e.g. Minsky's Follies of Florida v. Sennes, 206 F.2d 1,4 (5th Cir. 1953); Sommer v. Nakdimen, 97 F.2d 715, 721 (8th Cir. 1938); Island Petroleum Co. v. Commissioner of Internal Revenue, 57 F.2d 992 (4th Cir. 1932) cert. den. 287 U.S. 646 (1933); Roussel v. Russel, 339 P.2d 522, 527 (Okla. 1959); Kennedy v. Conrad, 9 P.2d 1075, 1078, 91 Mont. 356 (1932).

In the Roussel case, Supra, the Oklahoma Court, citing Kennedy v. Conrad, Supra., stated:

The rule is that where one pays out money at the special instance and request of another, the law implies a promise on the part of the latter to repay it. 339 P.2d at 527.

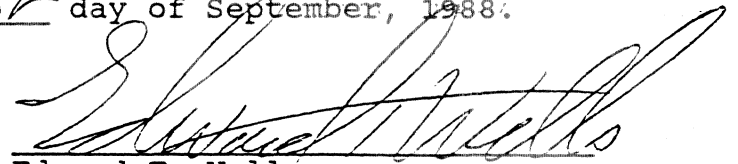
In Kennedy v. Conrad, Supra, the Court held:

...[I]t was not necessary to sustain plaintiff's right of recovery that there be an express promise on the part of defendants to repay the value of the casing; for the rule is that, "Where one pays out money at the special instance and request of another, the law implies a promise on the part of the latter to repay it." 9 P.2d at 1078 (Citations omitted).

CONCLUSION

Thus in the present case, on the evidence adduced from defendants mouth, plaintiff is entitled to recover the monies paid on behalf of defendant at his express request as prayed for in the complaint, since all claimed offsets of defendant are barred by the statute of frauds.

RESPECTFULLY submitted this 22 day of September, 1988.



Edward T. Wells
Attorney for plaintiff

MAILING CERTIFICATE

I certify that on the 22 day of September, 1988, I mailed a copy of the above Memorandum, postage prepaid by United States mail, to:

Michael H. Wray
1061 East 2100 South
Salt Lake City, Utah 84106

15
Secretary

1 IN THE THIRD JUDICIAL DISTRICT COURT
2 SALT LAKE COUNTY, STATE OF UTAH

3 JERRY SPICER,

4 Plaintiff,

5 vs.

6 MICHAEL S. HUGHES,

7 Defendant.

Civil No. C-87-7595

9 REPORTER'S TRANSCRIPT

10 September 20, 1988
11 9:00 a.m.

12
13 BEFORE THE HONORABLE SCOTT DANIELS
14 District Court Judge

15 A P P E A R A N C E S:

16 For the Plaintiff

Edward T. Wells
J. H. Bottum & Associates
323 South 600 East, Suite 150
Salt Lake City, Utah 84102

19 For the Defendant:

Michael Wray
Attorney at Law
1061 East 2100 South
Salt Lake City, Utah 84106

22
23
24 **GAYLE B. CAMPBELL**

25 Registered Professional Reporter
240 East 4th South - A304
Salt Lake City, Utah 84111

1 Salt Lake City, Utah

September 20, 1988

2 P R O C E E D I N G S

3 (Following proceedings held in chambers at
4 9 o'clock a.m.)

5 THE COURT: This is Spicer vs. Hughes,
6 C87-7595. The record will show that the attorneys are
7 present here in chambers.

8 Do we have anything to cover before we start
9 the trial.

10 MR. WELLS: Yes, Your Honor. As Your
11 Honor is aware, I called yesterday afternoon and tried
12 to reach Mr. Wray's office, and did speak with a
13 gentleman there, who indicated that he would attempt
14 to reach Mr. Wray and have him call me.

15 I did not hear from him and was unable to reach
16 him through the afternoon until a little after 5 o'clock.

17 I tried to call the court, and the court of
18 course called me and we had a discussion at the time
19 regarding my request for a continuance. I'd had a phone
20 call from Mr. Spicer, who, as the court is aware, has
21 been suffering from an inner ear infection, and the doctor
22 has advised him not to fly when that is bothering him.

23 Now, the trial was continued the last time
24 because of that problem, and I was going to ask for a
25 continuance. Since we couldn't reach Mr. Wray and he

1 is here prepared to go to trial, I would like to make
2 a motion in the alternative: First of all that the court
3 grant a continuance, and in the event that that continuance
4 is not granted, that the court then go ahead and allow
5 me to put my case on through the defendant, which I think
6 I can do.

7 And then in the event there is a need for rebuttal
8 testimony, that the court hold the case open to allow
9 us to either get a trial deposition from Mr. Spicer,
10 in the event the doctor doesn't feel he will be able
11 to travel within, you know, a reasonable period of time,
12 or in the alternative that we hold the matter open and
13 allow him to come in and get his testimony at a later
14 date.

15 THE COURT: Thank you. Mr. Wray.

16 MR. WRAY: I would strenuously oppose
17 the motion of counsel. I don't know if I need to address
18 my whereabouts yesterday. However, I will indicate for
19 the court's information that I was preparing for this
20 trial. As of Thursday of last week, the last time that
21 Mr. Wells and I had communication about this matter,
22 it was Mr. Wells' indication to me that Mr. Spicer was
23 going to be here on Tuesday and we were going to trial.
24 Now, there are alternate means of transportation for
25 Mr. Spicer from wherever he is to here this morning.

1 He has known about the trial. I am prepared for trial.
2 I think it's appropriate that the witness -- and the
3 plaintiff especially be here in court this morning for
4 the trial. I think a continuance in this matter is not
5 appropriate.

6 As far as the second motion by Mr. Wells, I'm
7 not certain of the mechanics of what he is proposing.
8 Many of the documents that we have marked as exhibits
9 for the defendant, the foundational requirements are
10 unlikely to be fulfilled without the presence of Mr.
11 Spicer.

12 I would move for a dismissal with prejudice
13 in this case, Your Honor, if Mr. Wells is not prepared
14 to go to trial.

15 MR. WELLS: I'm prepared to go if the
16 court so rules. I'm just asking that in the event there
17 is a need for rebuttal testimony from Mr. Spicer, that
18 we be allowed an opportunity to -- because of his problem,
19 too, as I said, either get it by way of deposition or
20 have him come out. He is scheduled to be here, I believe,
21 the second week of October for a trial in Judge Noel's
22 court, in which he is a defendant.

23 All I'm asking is that if we do go ahead today,
24 that I be given an opportunity to present whatever rebuttal
25 may be necessary from him at a later date. And with

1 respect to the fact that has been represented by defendant,
2 that is true. I did speak with him last week. I spoke
3 with Mr. Spicer and he had every intention of coming
4 when I spoke to him.

5 When he called me yesterday morning, this is
6 something that apparently flared up again over the weekend,
7 and he was not aware in time to get any kind of alternative
8 transportation and get here.

9 THE COURT: Where is he?

10 MR. WELLS: In Florida.

11 THE COURT: Oh, Florida. The motion for
12 a continuance will be denied. The motion -- the other
13 motions will be taken under advisement.

14 MR. WELLS: Thank you.

15 THE COURT: We can proceed.

16 There is in the file a confusing pleading.
17 I think maybe this was your secretary, Mr. Wells, who
18 may have typed the wrong caption on the case and it has
19 gotten in the wrong file as a result. But I don't see
20 what it has to do --

21 MR. WELLS: This is the other matter,
22 and I think that's what happened. We had two files in
23 the office, and my gal got the wrong heading on it.

24 THE COURT: That shouldn't be in there.

25 MR. WELLS: That should be in the other

1 file, and unfortunately, I don't have that number with
2 me. But I can get it.

3 THE COURT: I'll just ignore it for right
4 now, and after this is over we'll put the right heading
5 on it and get it into the right file. But for right
6 now, I will just presume it is meaningless in this case.

7 All right. Let's get started.

8 MR. WELLS: May I inquire as to how we
9 should proceed.

10 THE COURT: Mr. Wells, you are the plaintiff.

11 MR. WELLS: I'm going to call your client
12 as a witness and go to work.

13 MR. WRAY: May I have just a moment with
14 my client, Your Honor.

15 THE COURT: Yes.

16 (The following proceedings were held in open
17 court)

18 THE COURT: The matter before the court
19 this morning is Jerry Spicer vs. Michael Hughes, C87-
20 7595. Is the plaintiff ready to proceed?

21 MR. WELLS: We are ready, Your Honor.

22 THE COURT: Is the defendant ready to
23 proceed?

24 MR. WARY: Thank you, Your Honor. We
25 are.

1 THE COURT: Mr. Wells, you can proceed.

2 MR. WELLS: Thank you, Your Honor. I
3 have just a very brief opening statement.

4 THE COURT: That will be helpful. Thank
5 you.

6 MR. WELLS: This matter, Your Honor, is
7 really quite a simple matter. The evidence will show
8 that in approximately October of 1986 that the defendant
9 was a registered stockbroker and acting as such, and
10 that in that capacity he effected a transaction in the
11 State of Texas, which because of certain regulations
12 relating to the registration of securities, needed to
13 be rescinded.

14 And that at that time he was under an obligation
15 to repay a certain person in the State of Texas the sum
16 of \$11,221.80. And the evidence will show that he had
17 asked plaintiff, Mr. Spicer, who was in Texas at the
18 time, to make that payment on his behalf. That Mr. Spicer
19 did in fact make that payment for him, and that since
20 that date he has not repaid Mr. Spicer for the monies
21 advanced on his behalf to solve the problem with the
22 rescission in Texas.

23 It will be the plaintiff's position, Your Honor,
24 that there was an implied promise to repay that money.
25 That even if that is not found under the theory of

1 quantum meruit, we are entitled to recover back from
2 Mr. Hughes the amount of money advanced by Mr. Spicer
3 on his behalf to take care of that problem.

4 THE COURT: Do you wish to make a statement
5 at this time, Mr. Wray?

6 MR. WRAY: Thank you, Your Honor. I do.

7 I agree with Mr. Wells that the matter before
8 this court is quite simple. Mr. Wells, through his opening
9 statement, has indicated that the matter in controversy
10 here is a contract matter. Consequently, his relief,
11 if any, would be a matter of law. He has, in his opening
12 statement, indicated to the court that he would be pursuing
13 a theory of quantum meruit, an action in equity, not
14 well pleaded, and therefore precluded in this action.
15 Likewise, the indications of counsel that the transaction
16 in question was a loan cannot be proven. In the simplest
17 of contract terms there needs to be a meeting of minds.
18 There will not be any testimony from defendant that there
19 was in fact a meeting of minds in this matter. In fact,
20 the testimony of defendant will be quite clear that that
21 was not a loan, this was merely a repayment of an
22 antecedent debt.

23 With respect to the reason that the transaction
24 occurred, it is totally irrelevant, from Mr. Wells'
25 perspective, as to why the transaction occurred. Whether

1 there was a gentleman in Texas or anyone else is
2 irrelevant. Mr. Wells has pleaded specifically in his
3 opening argument and indicated there was a payment flowing
4 from Mr. Spicer for the benefit of Mr. Hughes in the
5 amount of \$11,221.80. There will not be any evidence
6 in this matter as to that specific amount. Consequently,
7 Your Honor, the theory of quantum meruit is barred by
8 his failing to raise it timely in the pleadings. And
9 I'm confident that Mr. Wells will not be able to indicate
10 a contract with a meeting of the minds for the repayment
11 of \$11,221.80, or any other amount.

12 Thank you.

13 THE COURT: Thank you. If you could proceed,
14 Mr. Wells.

15 MR. WELLS: Thank you. We will call Mr.
16 Michael Hughes.

17 MICHAEL HUGHES
18 having been duly sworn, was examined and testified on
19 his oath as follows:

20 DIRECT EXAMINATION

21 BY MR. WELLS:

22 Q Would you state your full name for the
23 record.

24 A Michael Scott Hughes.

25 Q And your address?

1 A 4388 Emigration Canyon Road.
2 Q How old are you?
3 A 32.
4 Q What is your profession?
5 A I'm a stockbroker.
6 Q What was your profession in October of
7 1986?
8 A I was a stockbroker.
9 Q Calling your attention to October of 1986,
10 by whom were you employed at that time?
11 A Equity-One Corporation.
12 Q Okay. And again calling your attention
13 to October of 1986, did you at that time have a problem
14 in Texas with a rescission which required you to make
15 a repayment?
16 A Yes.
17 Q And was the sum of that repayment \$11,221.80?
18 A No. It was \$11,000.
19 Q Even?
20 A Yes.
21 Q And this was apparently to persons in
22 Texas who had purchased stock from you?
23 A Yes, it was.
24 Q And as a result of that problem you were
25 under an obligation to repay that money?

1 A Yes, I was. Not an obligation; I chose
2 to do it.

3 THE COURT: I beg your pardon? I didn't
4 hear the last statement.

5 THE WITNESS: I chose to do it. I wasn't
6 under an obligation. I chose to do it.

7 Q (By Mr. Wells) And you asked Mr. Spicer
8 to make that payment for you, didn't you?

9 A I certainly did.

10 Q And he in fact made that payment for you?

11 A Yes, he did.

12 Q And since the time that he made that payment
13 for you, you have not repaid any of that money to him,
14 have you?

15 A Heavens no.

16 Q I hand you what's been marked as plaintiff's
17 Exhibit No. P-24, which is a letter that was shown to
18 you in your deposition in this matter. I will ask you
19 if you recognize that letter.

20 A Yes, I do.

21 Q And was that letter in fact delivered
22 to you on or about the date thereof?

23 A Yes, it was.

24 Q And you made no response to either the
25 law firm that sent the letter or to Mr. Spicer with respect

1 THE COURT: Mr. Wray.

2 CROSS EXAMINATION

3 BY MR. WRAY:

4 Q Mr. Hughes, did you feel it was appropriate
5 that you respond in writing to a demand from --

6 A No, I did not.

7 Q At any time did you borrow money from
8 Mr. Wells, this \$11,000, at any time?

9 A From Mr. Wells?

10 Q I'm sorry, Mr. Spicer.

11 A No, I did not.

12 Q Was there ever any communication between
13 you and Mr. Spicer about a loan of \$11,000 or \$11,228?

14 A No, there was not.

15 MR. WRAY: I have no further questions,
16 Your Honor.

17 THE COURT: Anything further, Mr. Wells?

18 MR. WELLS: Yes, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. WELLS:

21 Q He did make that payment on your behalf,
22 did he not?

23 A He absolutely did.

24 Q And you asked him to make it?

25 A You bet I did.

1 not in evidence any writing that shows, number one, that
2 any of these transactions involved Mr. Spicer as the
3 purchaser. And number two, that Mr. Spicer ever agreed
4 in writing to stand good for any of these transactions.
5 And that's the whole problem with this defense, Your
6 Honor, is that it's all precluded by the statute of frauds.

7 THE COURT: Well, let's let Mr. Wray proceed
8 here. I want to ask you one more question before he
9 does, Mr. Hughes.

10 EXAMINATION BY THE COURT

11 I know this is a long time ago, a couple
12 of years, but as I understand the testimony, you called
13 Mr. Spicer on the phone and asked him -- or told him
14 to pay this \$11,000 for you; is that right?

15 A Yes, I did.

16 Q Okay. Now, I know it's been a long time,
17 but as near as you can recall, tell me what he said and
18 what you said.

19 Let me ask you this first: When was it, about?

20 A October of '86.

21 Q 1986. And it was a telephone call?

22 A Yes.

23 Q And did you call him or did he call you?

24 A I called him at U.S.S.&T. In an office
25 there.

1 Q Was anyone else on the line?

2 A Not at the time.

3 Q Was there anyone else in your office or

4 in his office that could have overheard part of the

5 conversation?

6 A There was someone on my phone. My partner,

7 Jeff Vanos.

8 Q He heard your half of it?

9 A Yes, he did. He heard Jerry's half of

10 it, too. He was on the telephone with us.

11 Q Oh.

12 A As a matter of fact, every conversation

13 I had with Jerry Spicer, because of what had happened,

14 I had Jeff Vanos listen to every single --

15 THE COURT: Vanos? V-A-N-O-S.

16 THE WITNESS: Yes.

17 Q (By the Court) As near as you can remember,

18 tell me what you said to him and what he said to you?

19 A I said, "Jerry, I have to have something

20 paid to the State of Texas, or to Mr. Zwerner, in order

21 to preclude going to the State of Texas. It has to be

22 done today. It's \$11,000. And I need to get it done."

23 And he said he would do it.

24 Q Exactly what were his words? Do you remember

25 what he said?

1 A He said he would do it. He would take
2 care of it. "What's the address?"

3 Q Okay.

4 A And he sent a courier.

5 THE COURT: Do you have any questions
6 on that particular conversation before he moves on, either
7 of you?

8 MR. WELLS: No.

9 MR. WRAY: Yes, I do, Your Honor.

10 CROSS EXAMINATION

11 BY MR. WRAY:

12 Q Do you know where Mr. Spicer was located
13 at the time this conversation occurred?

14 A I called him at U.S.S.&T., United States
15 Savings & Trust.

16 Q Do you know what city in Texas?

17 A Dallas, Texas.

18 Q So you phoned Mr. Spicer in the Dallas,
19 Texas offices of U.S.S.&T?

20 A Yes.

21 Q Do you know what the term alter-ego means?

22 A I think I know what it is.

23 MR. WELLS: I'll object to his opinion
24 about that, Your Honor.

25 THE COURT: Well, sustained.

1 Wray.

2 MR. WRAY: All right.

3 Q (By Mr. Wray) You testified as to the
4 existence of a \$10,000 finder's fee.

5 A Yes.

6 Q Has the finder's fee been paid?

7 A No.

8 Q Is it possible that the \$11,000 transaction
9 that we discussed previously was in fact payment for
10 a finder's fee?

11 MR. WELLS: I'm going to object to what
12 is possible.

13 THE COURT: Sustained. He's testifying
14 that it hasn't been paid.

15 MR. WRAY: Well, swell.

16 Q (By Mr. Wray) Mr. Hughes, we have entered
17 into evidence some documents indicating a transaction
18 that occurred from the offices of U.S.S.&T to another
19 office in the amount of \$11,000. Can you tell us what
20 that transaction was about?

21 A I had a rescission in Texas that was paid
22 by that transaction.

23 Q Was it a loan?

24 A No, it was not.

25 MR. WELLS: I'm going to object to his

1 conclusions without a foundation.

2 THE COURT: Overruled. He stated his
3 understanding.

4 Q (By Mr. Wray) Were there any -- ever
5 any terms for repayment of that \$11,000?

6 A No.

7 Q By you or by anyone else?

8 A By no one. There were no terms. There
9 was no loan.

10 Q Did Mr. Spicer make any other collection
11 efforts?

12 A No, he did not.

13 Q Pardon me.

14 A No, he did not.

15 Q Was there ever any communication after
16 that transaction about repayment?

17 A Until I got the letter from Mr. Wells,
18 there was none.

19 Q And that was approximately how long ago?

20 A I guess that was October. It was October
21 28, 1987.

22 Q Is that approximately a week or a year
23 or ten years, or how long ago?

24 A A year.

25 Q So for a period of a year there is not

1 any communication about this transaction between you --

2 A Absolutely not.

3 Q Have you ever felt it was a loan?

4 A No.

5 Q Do you feel today it's a loan?

6 A No.

7 Q Did you feel at the time it was a loan?

8 A No.

9 MR. WRAY: Your Honor, I have no further
10 questions of this witness.

11 THE COURT: Mr. Wells:

12 MR. WELLS: Yes, I do have a few.

13 THE COURT: Maybe we'll take a five minutes
14 recess before you start your cross examination. We'll
15 be in recess for about five minutes.

16 (Morning recess)

17 THE COURT: Proceed, Mr. Wells.

18 MR. WELLS: Thank you, Your Honor.

19 CROSS EXAMINATION

20 BY MR. WELLS:

21 Q It's true, is it not, that at the time
22 you asked Mr. Spicer to take care of this for you there
23 was some need to move quickly?

24 A Uh huh. (Indicating affirmative)

25 Q You told him there was a time problem

1 and you needed to get the check there that day?

2 A Yes.

3 Q And so this was a way for you in Salt
4 Lake of getting a check delivered to Texas that day,
5 was to have Mr. Spicer take care of it for you?

6 A Yes, it was.

7 Q And you in fact told him that there was
8 a time problem, it had to be done that day?

9 A Yes, I did.

10 Q Now, with respect to this finder's fee,
11 I believe you testified that you were introduced to Mr.
12 Spicer as president of CITRAM; is that correct?

13 A I was introduced to him as Jerry Spicer.
14 He ended up being the president of CITRAM.

15 Q He is the president of CITRAM, and CITRAM
16 was looking for a partner.

17 A Yes, they were.

18 Q And you were going to act on behalf of
19 them to put them together with somebody that could merge
20 with them?

21 A Sort of the other way around. I represented
22 the Gold Hold people and found CITRAM for them.

23 Q So you were representing the other side
24 of the deal and putting them together with CITRAM?

25 A No. When they came to me I was representing

1 that I knew some of these people who were in fact looking
2 for those merger opportunities.

3 Q Okay.

4 A They came to me, asked me if I could help
5 them put one together, and I said yes.

6 Q And when you say "they," who are you talking
7 about?

8 A Jerry Spicer and Bill Windsor.

9 Q And Mr. Spicer came to you and said, "can
10 you help me put together a merger for CITRAM"?

11 A Yes.

12 Q And you said, "Yes, I can get a merger
13 partner for CITRAM"?

14 A No. I said, "I will try and find someone
15 who could help him to --

16 Q You were going to find somebody who would
17 help CITRAM get a merger put together?

18 A Yes.

19 Q And for your fees for putting that merger
20 together you were going to get a finder's fee?

21 A Yes, I was.

22 Q And that finder's fee would be paid to
23 you if the merger came about?

24 A Yes, it was.

25 Q And was to be paid to you for in fact

1 helping to bring the merger about?

2 A Yes.

3 Q That was something CITRAM wanted you to
4 do and something that the other corporation wanted you
5 to do?

6 A Yes.

7 Q Were you going to get a finder's fee from
8 each side?

9 A No, I was not.

10 Q Which side of the deal was responsible
11 for the finder's fee?

12 A Jerry Spicer was.

13 Q So that would have been the CITRAM side
14 of the deal?

15 A Yes.

16 Q And so CITRAM was going to pay you a finder's
17 fee if you could find a suitable merger partner?

18 A Yes, that's correct.

19 Q Now, did Mr. Spicer ever give you anything
20 in writing that said that if CITRAM didn't pay that fee
21 that he would pay it to you personally?

22 A No, he did not.

23 MR. WELLS: Thank you, Your Honor. I'm
24 going to move to strike all the testimony regarding the
25 supposed finder's fee on the basis of the statute of

1 frauds, because he has just testified that Mr. Spicer
2 never agreed personally to assume that. He's testified
3 that it was a finder's fee from CITRAM which was to be
4 paid upon the completion of a successful merger. And
5 apparently this merger came about and the fee is owed
6 by CITRAM. But there is no evidence that Mr. Spicer
7 in fact ever agreed to be personally responsible for
8 that.

9 THE COURT: Overruled. I think even if
10 it's not legally collectible it goes to the issue of
11 what the \$11,000 transaction was all about, and therefore,
12 the motion to strike will be denied.

13 MR. WELLS: Well, Your Honor, the statute
14 does say that it cannot be used as a defense.

15 THE COURT: I understand that. But in
16 this particular instance it's not being used as a setoff,
17 it is being used to explain the purpose of the \$11,000
18 transaction, and the motion is denied.

19 Anything further.

20 MR. WELLS: Yes, Your Honor.

21 Q (By Mr. Wells) Now, you have previously
22 testified regarding the telephone conversation.

23 A Yes.

24 Q Is there anything else you can remember
25 about that conversation that you haven't told us?

1 A Which conversation are we talking about?

2 Q The one where you called Mr. Spicer and
3 asked him to deliver this money.

4 A No, there wasn't.

5 Q There's nothing else?

6 A That is the gist of the conversation.

7 Q There's nothing else about that conversation
8 that you can recall, that you haven't told us?

9 A No. That's it.

10 MR. WELLS: That's all I have, Your Honor.

11 THE COURT: Anything further.

12 MR. WRAY: Just one further question.

13 REDIRECT EXAMINATION

14 BY MR. WRAY:

15 Q Mr. Hughes, does U.S.S.&T owe you money?

16 A Yes, they do.

17 MR. WRAY: Thank you.

18 MR. WELLS: Your Honor, again, I'm going
19 to -- well, strike that, I can cover that on cross.

20 RE CROSS EXAMINATION

21 BY MR. WELLS:

22 Q You claim that U.S.S.&G owes you money?

23 A U.S.S.&T.

24 Q U.S.S.&T.

25 A Yes. United States Savings & Trust.

1 Q That's a corporation.

2 A Yes, it is.

3 Q Have you ever received from Mr. Spicer
4 anything in writing wherein he agreed to personally pay
5 any debts owed to you by that corporation?

6 A No. Of course not.

7 MR. WELLS: That's all I have, Your Honor.

8 THE COURT: Mr. Wray, anything further.

9 MR. WRAY: Your Honor, I have nothing
10 further.

11 THE COURT: You may step down. Do you
12 have any more witnesses, Mr. Wray?

13 MR. WRAY: No, Your Honor.

14 THE COURT: Any rebuttal witnesses.

15 MR. WELLS: Yes, Your Honor. I believe
16 that would be appropriate, and we do have some rebuttal
17 testimony from Mr. Spicer.

18 And as I indicated to the court earlier, because
19 of his health problems he is unable to be here. I would
20 move that the court allow the case to remain open to
21 a later date when we can have Mr. Spicer appear and testify.

22 THE COURT: That motion was taken under
23 advisement earlier. After having heard the testimony,
24 I think my inclination is to deny that motion.

25 This matter was continued once. Mr. Spicer

1 did have an opportunity to be here, and I think today
2 is the day set for trial. I would anticipate that if
3 he were here he would say that he had a different under-
4 standing than Mr. Hughes, and there may be some differences
5 in his testimony, but I don't think that the nature of
6 the case is such that it would be unfair to not allow
7 him to testify. And based upon that, the motion is denied.

8 Do you have a closing statement to make, Mr.
9 Wells?

10 MR. WELLS: Yes, Your Honor. Before I
11 do that, though, I would once again move to strike all
12 of the testimony of Mr. Hughes relating to monies owed
13 to him by CITRAM as a finder's fee and by U.S.S.&T for
14 whatever reason on the grounds that those debts are not
15 material to the issues of this lawsuit. They are not
16 relevant to the issues of this lawsuit. And the question
17 before the court is whether or not Mr. Jerry Spicer had
18 an antecedent debt personally owing to the defendant
19 which could have been used as an offset for the amounts
20 loaned and advanced on his behalf by Mr. Spicer and as
21 shown by the testimony.

22 The statute of frauds precludes any consideration
23 by the court of debts owing to Mr. Hughes by either of
24 the corporations because of the fact that there is no
25 evidence of a writing, as required by the statute of

1 frauds. And so I would therefore move the court that
2 all of the testimony relating to debts owed to the
3 defendant by any corporate entity be stricken at this
4 time.

5 THE COURT: I will take that under advisement
6 for a few moments. I will let you continue with your
7 closing argument.

8 MR. WELLS: Thank you, Your Honor.

9 As I indicated, Your Honor, this is a relatively
10 simple case. If the court will recall the testimony,
11 and specifically when the court was inquiring of Mr.
12 Hughes with respect to the conversation he had with Mr.
13 Spicer at the time that he needed this money paid in
14 Texas, he testified that he called and ask Jerry if he
15 would pay that money for him, and Jerry said yes.

16 I think it is very -- I guess telling is a
17 good word that with respect to the claim of the defendant
18 he did not claim that in that conversation he said to
19 Jerry, you can take care of the monies you owe me, or
20 this will take care of the finder's fee, or this will
21 take care of anything else.

22 He said nothing in that conversation which
23 would have indicated to Mr. Spicer that he was asking
24 him to repay an amount previously owed to him.

25 If you will recall, he testified that he called

1 would be obligated to repay.

2 Thank you, Your Honor.

3 THE COURT: Thank you. You may have the
4 last word if you want, Mr. Wells.

5 MR. WELLS: Thank you, Your Honor. Counsel
6 now tries to raise, I guess you would say, a specter
7 before the court with respect to the fact that Mr. Spicer
8 isn't here, that he's unavailable. I don't think that
9 it's proper for him to get up and say, you know, we should
10 have had Mr. Spicer here. If he wanted Mr. Spicer here
11 he could have agreed to the continuance.

12 Now, the court is well aware that in law a
13 loan agreement as such is not necessary. You can have
14 a loan without having a signed loan agreement. All you
15 have to do is pass the money. The law will imply that
16 this is a loan unless there is testimony that would show
17 that the parties agreed to some other disposition other
18 than it being treated as a loan.

19 Now, Mr. --

20 THE COURT: I'm not familiar with that
21 principle of law. Is there a case or something that
22 you've got that says that the law implies a loan?

23 MR. WELLS: The law would imply a contract
24 to repay. There are cases to that effect, Your Honor,
25 that when money passes, the law implies an obligation

1 to repay the money. When a benefit is conferred, the
2 law implies a duty to compensate the person who gave
3 the benefit. In this case the benefit was received,
4 and he admits it. Mr. Spicer took care of a personal
5 obligation that he had in the State of Texas.

6 THE COURT: I would like to see one of
7 those cases. You're saying that if you say, "Give me
8 \$25," and I say okay and I give it to you, and nothing
9 more is said, there is a presumption that that was a
10 loan? You're saying that's the law.

11 MR. WELLS: Well, I think I would state
12 it perhaps a little differently than that, Your Honor.
13 Where there is no circumstance that would presume a gift.
14 And when I confer a benefit to you, such as if you would
15 say I have got to pay this light bill today or they are
16 going to shut off my power, and then I go and pay your
17 light bill for you, the law implies a duty on you to
18 reimburse me for that payment.

19 THE COURT: I would like to see a case
20 like that.

21 MR. WELLS: Now, in the event -- that's
22 basically what happened here. Mr. Hughes had an obligation
23 in Texas that day.

24 THE COURT: All right.

25 MR. WELLS: And he calls Mr. Spicer and

1 said, "I have got to get this money to this attorney
2 today. Can you help me out with that?" Mr. Spicer says
3 yes, and Mr. Spicer then takes a personal check over
4 and handles the problem for Mr. Hughes.

5 THE COURT: Right. I think that's
6 essentially what happened.

7 MR. WELLS: It's our position that the
8 law therefore implies a duty to repay Mr. Hughes that
9 money.

10 Now, again, Mr. Spicer isn't here and we don't
11 have his side of what was said. But even without that
12 I think the law gives us that implication.

13 Now, we have that implication in place, and
14 let's just assume for the sake of argument that we now
15 have shown the loan either through the evidence or implied
16 in law. The duty, then, of the defendant, and before
17 he can come into court and make a valid claim that he
18 does not owe the money, he would have to show that the
19 circumstances were such that it was not a loan. The
20 only way to do that is to show that it was a gift.

21 He did not testify that it was a gift. He
22 testified only that he asked Jerry to take care of a
23 pressing obligation, that he had to have the money to
24 Texas that day. There is no evidence from which the
25 court could find there was a gift.

IN THE COURT OF APPEALS

STATE OF UTAH

JERRY SPICER,

Plaintiff - Appellant,

vs.

MICHAEL S. HUGHES,

Defendant - Respondent.

Docket No. 890586CA

Priority No. 14b

CERTIFICATE OF MAILING

I certify that on the ⁷~~5~~th day of January, 1990, ^{Four}~~three~~ (3)⁴
true and correct copies of the Brief of Respondent in the above
matter were mailed, postage prepaid, to:

Edward T. Wells
J.H. Bottum & Associates
418 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101

Michael H. Wray Michael H. Wray
Michael H. Wray
1061 East 2100 South
Salt Lake City, Utah 84106
Telephone: (801) 487-3222
Attorney for Michael S. Hughes
Defendant - Respondent