

1989

# Jerry Spicer v. Michael S. Hughes : Brief of Appellant

Utah Court of Appeals

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

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

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**BRIEF**

UTAH  
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DOCKET NO. **890586-CA** IN THE COURT OF APPEALS

STATE OF UTAH

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JERRY SPICER,

Plaintiff - Appellant

v.

MICHAEL S. HUGHES,

Defendant - Respondent.

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Docket No. 890586CA

Priority No. 14b

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**APPELLANT'S BRIEF**

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

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Plaintiff - Appellant

ADDENDUM TO  
APPELLANT'S BRIEF

the appointment. Thereafter, the term of office of a judge of the Court of Appeals is six years and commences on the first Monday in January, next following the date of election. A judge whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified. The presiding judge of the Court of Appeals shall receive as additional compensation \$1,000 per annum or fraction thereof for the period served.

(2) The Court of Appeals shall sit and render judgment in panels of three judges. Assignment to panels shall be by random rotation of all judges of the Court of Appeals. The Court of Appeals by rule shall provide for the selection of a chair for each panel. The Court of Appeals may not sit en banc.

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall

- (a) administer the rotation and scheduling of panels,
  - (b) act as liaison with the Supreme Court,
  - (c) call and preside over the meetings of the Court of Appeals, and
  - (d) carry out duties prescribed by the Supreme Court and the Judicial Council.
- (5) Filing fees for the Court of Appeals are the same as for the Supreme Court. 1988

#### 78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary

- (a) to carry into effect its judgments, orders and decrees, or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over

- (a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer,
- (b) appeals from the district court review of adjudicative proceedings of agencies of political subdivisions of the state or other local agencies,
- (c) appeals from the juvenile courts, except
- (d) appeals from the circuit courts, except those from the small claims department of a circuit court,
- (e) interlocutory appeals from any court record in criminal cases, except those involving charge of a first degree or capital felony,
- (f) appeals from district court in criminal cases, except those involving a conviction of first degree or capital felony,
- (g) appeals from orders on petitions for extraordinary writs involving a criminal conviction, except those involving a first degree or capital felony,

(h) appeals from district court involving domestic relations cases, including but not limited to divorce, annulment, property division, child custody, support, visitation, adoption, and paternity,

- (i) appeals from the Utah Military Court, and
- (j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals, upon its own motion only and by the vote of four judges of the court, may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Chapter 46b, Title 63, in its review of agency adjudicative proceedings. 1988

#### 78-2a-4. Review of actions by Supreme Court.

Review of the judgments, orders, and decrees of the Court of Appeals shall be by petition for writ of certiorari to the Supreme Court. 1986

#### 78-2a-5. Location of Court of Appeals.

The Court of Appeals has its principal location in Salt Lake City. The Court of Appeals may perform any of its functions in any location within the state. 1986

### CHAPTER 3 DISTRICT COURTS

Section	
78-3-1 to 78-3-2	Repealed
78-3-3	Term of judges — Vacancy
78-3-4	Jurisdiction — Transfer of cases to circuit court — Appeals
78-3-5	Repealed
78-3-6	Terms — Minimum of once quarterly
78-3-7 to 78-3-11	Repealed
78-3-11.5	State District Court Administrative System — Primary and secondary county locations
78-3-12	Repealed
78-3-12.5	Costs of system
78-3-13	Repealed
78-3-13.4	Counties joining court system — Procedure — Facilities — Salaries
78-3-13.5, 78-3-14	Repealed
78-3-14.5	Allocation of district court fees and fines
78-3-15, 78-3-16	Repealed
78-3-16.5	Fees for filing and other services or actions
78-3-17	Repealed
78-3-17.5	Application of savings accruing to counties
78-3-18	Judicial Administration Act — Short title
78-3-19	Purpose of act
78-3-20	Definitions
78-3-21	Judicial Council — Creation — Members — Terms and election — Responsibilities — Reports
	Presiding officer — Compensation — Duties
	Administrator of the courts — Appointment — Qualifications — Salary
	Court administrator — Powers, duties, and responsibilities
	Assistants for administrator of the courts — Appointment of trial court executives

Section	
78-3-26	Courts to sit
78-3-27	Annual meeting
78-3-28	Repealed
78-3-29	Presiding judge
78-3-30	Duties of judges

#### 78-3-1 to 78-3-2. Repealed.

#### 78-3-3. Term of judges.

Judges of the district courts shall serve for a term of three years after the first Monday in January following their election. Thereafter, the term of office of a judge of the district courts is six years and until a successor is elected. A judge whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified.

#### 78-3-4. Jurisdiction of district court.

(1) The district courts have jurisdiction of all matters civil and criminal, except those matters which are within the jurisdiction of the Supreme Court and not within the jurisdiction of the district courts.

(2) The district courts have jurisdiction of all writs and orders, except those which are within the jurisdiction of the Supreme Court.

(3) Under the general provisions of the Judicial Administration Act, established by the Judicial Council, which are within the jurisdiction of the circuit court by the court in multiple judge cases in single judge cases may be made up upon the motion of a judge. When an order is made by the court to which the case is referred, the court has the same jurisdiction as the court to which the case is referred. Appeals from final judgments of the district courts.

(4) Appeals from the decrees of the district courts and 78-2a-3.

(5) The district courts have jurisdiction of all agency adjudicative proceedings under Chapter 46b, Title 63, and all matters of that chapter, except those which are within the jurisdiction of the Supreme Court.

#### 78-3-5. Repealed.

#### 78-3-6. Terms — Minimum.

Each district court shall have a seat of each county within each quarter of the year.

#### 78-3-7 to 78-3-11. Repealed.

#### 78-3-11.5. State District Court Administrative System — Purpose.

(1) There is established the State District Court Administrative System. The purpose of the system is to administer the operation of the district courts.

(2) In this chapter, "court administrator" means the court administrator of the district courts.

### Failure to comply with rules and requirements.

on must leave a posted hunting unit immediately on request of a landowner or posted hunting unit, if that person:

- (1) does not have in his possession a posted hunting unit permit;
- (2) endangers or has endangered human life;
- (3) damages or has damaged private property on a posted hunting unit; or
- (4) fails or has failed to comply with reasonable rules of a landowner association. 1988

**2. Damage or destruction of property.** Person on the land of another person may not willfully damage, disarrange, or destroy that property. 1988

### 3. Violation of chapter — Class B misdemeanor.

Person who violates any provision of this chapter is guilty of a class B misdemeanor, unless another punishment is provided elsewhere in the laws of this state. 1988

### 4. Landowner protection under Landowner Liability Act.

Landowners who participate in posted hunting shall have the full protection afforded under Chapter 14, Title 57, the Limitation of Landowner Liability Act. 1988

## TITLE 24

### REGISTRY AND FIRE CONTROL

Repealed by Laws 1961, ch. 53, § 21; 1973, ch. 36, § 1; 1988, ch. 121, § 18.)

## TITLE 25

### FRAUD

Repealed by Laws 1961, ch. 53, § 21; 1973, ch. 36, § 1; 1988, ch. 121, § 18.)

#### CHAPTER 1

##### FRAUDULENT CONVEYANCES

Repealed by Laws 1988, ch. 59, § 16.)

#### CHAPTER 2

##### SALE OF MERCHANDISE IN BULK

Repealed by Laws 1965, ch. 154, § 10-102.)

#### CHAPTER 3

##### EASES AND SALES OF LIVESTOCK

Repealed by Laws 1965, ch. 154, § 10-102.)

#### CHAPTER 4

##### MARKETING WOOL

Repealed by Laws 1965, ch. 154, § 10-102.)

#### CHAPTER 5

##### STATUTE OF FRAUDS

- on
1. Estate or interest in real property.

### Section

- 25-5-2. Wills and implied trusts excepted.
- 25-5-3. Leases and contracts for interest in lands.
- 25-5-4. Certain agreements void unless written and signed.
- 25-5-5. Representation as to credit of third person.
- 25-5-6. Promise to answer for obligation of another — When not required to be in writing.
- 25-5-7. Contracts by telegraph deemed written.
- 25-5-8. Right to specific performance not affected.
- 25-5-9. Agent may sign for principal.

### 25-5-1. Estate or interest in real property.

No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing. 1953

### 25-5-2. Wills and implied trusts excepted.

The next preceding section [25-5-1] shall not be construed to affect the power of a testator in the disposition of his real estate by last will and testament; nor to prevent any trust from arising or being extinguished by implication or operation of law. 1953

### 25-5-3. Leases and contracts for interest in lands.

Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing. 1953

### 25-5-4. Certain agreements void unless written and signed.

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:

- (1) every agreement that by its terms is not to be performed within one year from the making of the agreement;
- (2) every promise to answer for the debt, default, or miscarriage of another;
- (3) every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry;
- (4) every special promise made by an executor or administrator to answer in damages for the liabilities, or to pay the debts, of the testator or intestate out of his own estate;
- (5) every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation;
- (6) every credit agreement.

(a) As used in Subsection (6):

(i) "Credit agreement" means an agreement by a financial institution to lend, delay, or otherwise modify an obligation to repay money, goods, or things in action, to otherwise extend credit, or to make any other financial accommodation. "Credit agreement" does not include the usual and customary agreements related to deposit accounts or overdrafts or other terms associated

with deposit accounts.

(ii) "Creditor" means a person or institution which extends credit or financial accommodation to a debtor in connection with a credit agreement.

(iii) "Debtor" means a person who receives a financial accommodation in connection with a credit agreement.

(iv) "Financial institution" means a state or federally chartered savings and loan association, industrial loan company, or any other institution subject to the jurisdiction of the Federal Reserve Board, the Federal Reserve Bank of St. Louis, or the Federal Reserve Bank of Kansas City.

(b) A debtor or a creditor who obtains an action on a credit agreement is in violation of this section if the agreement is in violation of the conditions, and is subject to enforcement against whom enforcement would be sought. For purposes of this section, a credit agreement, if the creditor obtains an additional benefit from the debtor when the agreement is made.

(c) The following actions are prohibited by this section:

- (i) the rendering of a credit agreement by a creditor to a debtor; or
- (ii) the consultation of a credit agreement between a creditor and a debtor; or
- (iii) the creation of a credit agreement between a creditor and a debtor; or
- (iv) Each credit agreement clearly stated typewritten giving notice to the debtor that the agreement is a financial agreement between the creditor and the debtor, and the written agreement is contradicted by evidence of the agreement. The provision of the promissory note or indebtedness that is tied to the agreement.

### 25-5-5. Representation as to credit of third person.

To charge a person upon a representation of a third person, such representation must be in writing, signed by the party to be charged therewith.

### 25-5-6. Promise to answer for obligation of another — When not in writing.

A promise to answer for the obligation of another is deemed a credit agreement if any of the following cases is deemed a credit agreement: (1) Where the promise is made in connection with the receipt of property of another person, or the promise is made to apply it pursuant to a contract with one who has received a discharge in whole or in part in connection with the promise.

with deposit accounts or overdrafts.

(jj) "*Creditor*" means a financial institution which extends credit or extends a financial accommodation under a credit agreement with a debtor.

(iii) "*Debtor*" means a person who seeks or obtains credit, or seeks or receives a financial accommodation, under a credit agreement with a financial institution.

(iv) "*Financial institution*" means a state or federally chartered bank, savings and loan association, savings bank, industrial loan corporation, credit union, or any other institution under the jurisdiction of the commissioner of Financial Institutions as provided in Title 7, Financial Institutions Act of 1981.

(b) A debtor or a creditor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the party against whom enforcement of the agreement would be sought. For purposes of this act, a signed application constitutes a signed agreement, if the creditor does not customarily obtain an additional signed agreement from the debtor when granting the application.

(c) The following actions do not give rise to a claim that a credit agreement is created, unless the agreement satisfies the requirements of Subsection (b):

(i) the rendering of financial advice by a creditor to a debtor;

(ii) the consultation by a creditor with a debtor; or

(iii) the creation for any purpose between a creditor and a debtor of fiduciary or other business relationships.

(d) Each credit agreement shall contain a clearly stated typewritten or printed provision giving notice to the debtor that the written agreement is a final expression of the agreement between the creditor and debtor and the written agreement may not be contradicted by evidence of any alleged oral agreement. The provision does not have to be on the promissory note or other evidence of indebtedness that is tied to the credit agreement.

1989

#### 25-5-5. Representation as to credit of third person.

To charge a person upon a representation as to the credit of a third person, such representation, or some memorandum thereof, must be in writing subscribed by the party to be charged therewith.

1953

#### 25-5-6. Promise to answer for obligation of another — When not required to be in writing.

A promise to answer for the obligation of another in any of the following cases is deemed an original obligation of the promisor and need not be in writing:

(1) Where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise, or by one who has received a discharge from an obligation in whole or in part in consideration of such promise.

(2) Where the creditor parts with value or enters into an obligation in consideration of the obligation in respect to which the promise is made in terms or under circumstances such as to render the party making the promise the principal debtor and the person in whose behalf it is made his surety.

(3) Where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancel the antecedent obligation, accepting the new promise as a substitute therefor; or upon the consideration that the party receiving it releases the property of another from a levy or his person from imprisonment under an execution on a judgment obtained upon the antecedent obligation; or upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation or from another person.

(4) Where a factor undertakes for a commission to sell merchandise and to guarantee the sale.

(5) When the holder of an instrument for the payment of money upon which a third person is or may become liable to him transfers it in payment of a precedent debt of his own, or for a new consideration, and in connection with such transfer enters into a promise respecting such instrument.

1953

#### 25-5-7. Contracts by telegraph deemed written.

Contracts made by telegraph shall be deemed to be contracts in writing, and all communications sent by telegraph and signed by the person sending the same, or by his authority, shall be deemed to be communications in writing.

1953

#### 25-5-8. Right to specific performance not affected.

Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof.

1953

#### 25-5-9. Agent may sign for principal.

Every instrument required by the provisions of this chapter to be subscribed by any party may be subscribed by the lawful agent of such party.

1953

## CHAPTER 6

### UNIFORM FRAUDULENT TRANSFER ACT

#### Section

25-6-1. Short title.

25-6-2. Definitions.

25-6-3. Insolvency.

25-6-4. Value — Transfer.

25-6-5. Fraudulent transfer — Claim arising before or after transfer.

25-6-6. Fraudulent transfer — Claim arising before transfer.

25-6-7. Transfer — When made.

25-6-8. Remedies of creditors.

25-6-9. Good faith transfer.

25-6-10. Claim for relief — Time limits.

25-6-11. Legal principles applicable to chapter.

25-6-12. Construction of chapter.

25-6-13. Applicability of chapter.

#### 25-6-1. Short title.

This chapter is known as the "Uniform Fraudulent Transfer Act."

1988

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Telephone: (801) 538-0700

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

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*Entered  
June 1, 1989*

JERRY SPICER,	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
Plaintiff,	)	
	)	C87-7595
vs.	)	
	)	
MICHAEL S. HUGHES,	)	HONORABLE SCOTT DANIELS
	)	
Defendant.	)	

---

This case came on for trial before this Court, the Honorable Scott Daniels, District Judge, presiding, on September 20, 1988. The plaintiff, Jerry Spicer, was represented by Edward T. Wells of the firm of J. H. Bottum & Associates, and the defendant, Michael S. Hughes, was represented by Michael H. Wray. The Court heard evidence, received exhibits and entertained the arguments of counsel.

As to plaintiff's claims against the defendant, the Court hereby enters its findings of fact and conclusions of law.

FINDINGS OF FACT

1. On or about October 15, 1986, the plaintiff, Jerry Spicer, at the request of the defendant, Michael S. Hughes,

provided to Mr. Hughes for his benefit the sum of Eleven Thousand Two Hundred Twenty-One Dollars and Eighty Cents (\$11,221.80).

2. Said money was given at the request of the defendant, Michael S. Hughes.

3. At the time the money was given to Hughes by Spicer, United States Savings & Trust (hereinafter "USS&T"), a corporation, owed the defendant, Michael S. Hughes, sums of money relating to stock purchases by USS&T and for a finder's fee.

4. The money paid by the plaintiff, Jerry Spicer, to the defendant, Michael S. Hughes, was not intended as a loan, but was repayment for past consideration furnished by the defendant to USS&T.

#### CONCLUSIONS OF LAW

The defendant is entitled to judgment against the plaintiff for no cause of action.

DATED this \_\_\_\_\_ day of May, 1989.

BY THE COURT:

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Scott Daniels  
District Court Judge



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

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JERRY SPICER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil No. C-87-7595
	)	
MICHAEL S. HUGHES,	)	
	)	
Defendant.	)	

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REPORTER'S TRANSCRIPT

September 20, 1988  
9:00 a.m.

BEFORE THE HONORABLE SCOTT DANIELS  
District Court Judge

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

For the Plaintiff	Edward T. Wells J. H. Bottum & Associates 323 South 600 East, Suite 150 Salt Lake City, Utah 84102
For the Defendant:	Michael Wray Attorney at Law 1061 East 2100 South Salt Lake City, utah 84106

**GAYLE B. CAMPBELL**  
Registered Professional Reporter  
240 East 4th South - A304  
Salt Lake City, Utah 84111

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           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 Q 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 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

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IN THE COURT OF APPEALS

STATE OF UTAH

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JERRY SPICER,

Plaintiff - Appellant

v.

MICHAEL S. HUGHES,

Defendant - Respondent.

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Docket No. 890586CA

Priority No. 14b

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APPELLANT'S BRIEF

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

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## 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 Appeal from the Supreme Court.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Defendant had an implied duty at law to repay monies paid for his benefit and at his request by the Plaintiff.

2. The Statute of Frauds precluded evidence and findings of an agreement by Plaintiff to repay money owed to Defendant by USS&T Corporation or to cover losses to Defendant caused by third parties.

3. The Trial Court's findings number 3 and 4 and the Judgment are not supported by the evidence.

4. The Trial Court abused its discretion in refusing to hold the case open to receive Plaintiff's testimony.

## 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;

## STATEMENT OF THE CASE

This case was commenced by Jerry Spicer filing a complaint against Michael Hughes to collect the sum of Eleven Thousand Two Hundred Twenty-One Dollars and Eighty Cents

(\$11,221.80) from Mr. Hughes. Plaintiff claimed that Hughes asked him by telephone to loan him money to take care of an obligation in Dallas, Texas which required payment of \$11,000.00 on the date of the phone call. Plaintiff, as a friendly accommodation, made the payment on behalf of Defendant and when Defendant did not return the money and pay the expenses upon demand, suit was filed. The suit alleged that money was loaned to Defendant and repayment was refused. Defendant claimed no loan was made and no obligation of repayment existed.

#### DISPOSITION IN LOWER COURT

A Bench Trial was held on September 20, 1988, after the Court refused to grant a Motion for Continuance due to illness of Plaintiff who was unable to travel to Utah from Florida for the trial. The Trial Court also refused to allow the testimony of Plaintiff to be taken subsequently. The Court entered Findings of Fact and Conclusions of Law and awarded judgment in favor of Defendant dismissing the action. A timely notice of appeal was filed.

#### STATEMENT OF FACTS

Defendant Michael Hughes testified that in October of 1986 he was working for Equity One Corporation and he had a rescission problem in Texas which required him to make an \$11,000.00 payment TR:10. Hughes stated he had an obligation to repay the \$11,000.00 TR:10-11. Hughes testified he asked the Plaintiff, Jerry Spicer, to make the payment on his behalf. TR:11. He further admitted he had never repaid Spicer for making the payment on his behalf. Id. See also TR:16, Ln. 21-25.

Mr. Hughes testified specifically as to the telephone call wherein he asked Plaintiff to advance the money on his behalf. He stated:

I said, "Jerry, I have to have something paid to the State of Texas, or to Mr. Zwerner, in order to preclude going to the State of Texas. It has to be done today. It's \$11,000.00 and I need to get it done." and he said he would do it. TR:23, Ln. 19-23.

Mr. Spicer was in Dallas, Texas at the time. TR:24, Ln. 12-17.

Exhibit D-12 is the check paid to Mr. Zwerner on behalf of Mr. Hughes by Mr. Spicer.

While Mr. Hughes testified there were never any agreed terms for the repayment (TR:42) he did testify that the money was paid by Mr. Spicer at his request, to fulfill his personal obligation. TR:10-11.

Mr. Hughes admitted that his purpose in asking Spicer, who was in Dallas, Texas, to take care of a money problem was that he had to move quickly. The testimony of Mr. Hughes is enlightening as to what occurred.

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

A Uh huh. (Indicating affirmative)

Q You told him there was a time problem and you needed to get the check there that day.

A Yes.

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

A Yes, it was.

TR:43-44

At the close of testimony, the Court denied Plaintiff's Motion to allow rebuttal testimony to be taken at a later date from Mr. Spicer who was unable to attend the trial due to illness. TR:49

No claim was made and no evidence was introduced to show that the money paid on behalf of Mr. Hughes by Plaintiff was a gift or that anyone considered it a gift.

#### SUMMARY OF THE ARGUMENT

The District Court erred in granting judgment to Defendant in this case. The unrefuted testimony of Defendant was that he requested Plaintiff to help him handle an emergency in which he was involved that required a payment of \$11,000.00 to be made immediately in Texas. Defendant's own description of events was that he had to make a payment in Texas on the date he made a call to Mr. Spicer in Texas to ask for his help. TR:23, 43-44. He asked Spicer as a friend to help him solve the problem Id and as a friend Spicer did so by paying the amount due from his own funds. See Ex. D-12.

Thus the only evidence in the record shows conclusively the following as true:

1. Hughes had a debt to be paid immediately in Dallas, Texas.
2. Hughes was in Salt Lake City.
3. Hughes called Spicer in Dallas and asked him if he could help him out by paying the amount due in Dallas.
4. Spicer said yes and made the payment on behalf of Hughes.



The Court made the following findings of fact with respect to the above items:

Finding 1. On or about October 15, 1986, the Plaintiff, Jerry Spicer, at the request of the Defendant, Michael S. Hughes, provided to Mr. Hughes for his benefit the sum of Eleven Thousand Two Hundred Twenty-One Dollars and Eighty Cents (\$11,221.80).

Finding 2. Said money was given at the request of the Defendant, Michael S. Hughes.

Under the said evidence it is clear there was a loan to Hughes which he has either a legal or equitable duty to repay.

If there was any question regarding the above facts and the fact that a loan was made, it was then error for the trial judge to refuse to hold the case open to receive the testimony of Mr. Spicer.

#### ARGUMENT

##### Point 1.

DEFENDANT HAD AN IMPLIED DUTY AT LAW TO REPAY MONIES PAID FOR HIS BENEFIT AND AT HIS REQUEST BY THE PLAINTIFF.

At common law, a party had the right to bring an action in assumpsit to recover money paid on behalf of another to a third party. The general rule is that if one pays money to a third party for the use or benefit of another at such person's express or implied request, he can recover the money so paid from such other person. It has been held the law implies a promise to repay in such a case. The old assumpsit rule appears to be universally accepted today. See e. g. Minskiv'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 Mont. 356, 9 P.2d 1075, 1078, (1932).

In the Roussell case, supra, the Court 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 the Kennedy case, supra, the Court stated:

...[I]t is 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).

Thus it is clear from the cases and the evidence that Defendant Hughes had a duty to repay the monies advanced on his behalf by Mr. Spicer in the sum of \$11,221.80 which consisted of the \$11,000.00 plus expenses incurred in delivering the money of \$221.80.

#### Point II.

THE STATUTE OF FRAUDS PRECLUDED EVIDENCE AND FINDINGS OF AN AGREEMENT BY PLAINTIFF TO REPAY MONEY OWED TO DEFENDANT BY USS&T CORPORATION OR TO COVER LOSSES TO DEFENDANT CAUSED BY THIRD PARTIES.

Utah Code Annotated Section 25-5-4(2), as part of the Utah Statute of Frauds, precludes enforcement of a contract to answer for the debt of a third party absent a writing.

Mr. Hughes testified he was owed a finder's fee by Citram Corporation. As of the date of trial, such fee had not been paid by Citram Corporation. TR:41 at 6-7. Hughes testified on cross examination that he was owed the finder's fee in a merger. TR:45, Ln. 19-24. Hughes testified Spicer was an officer of Citram Corporation, which corporation owed the finder's fee. TR:46. Hughes specifically testified as follows:

Q and so Citram was going to pay you a finder's fee if you could find a suitable merger partner?

A Yes, that's correct.

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

A No, he did not.

TR:46, Ln. 16-22.

Objection was properly made to all testimony of Mr. Hughes as to debts of third parties for which he claimed Mr. Spicer was responsible (see TR:21, 46-47) and proper motions to strike such testimony were made. See TR:46-47, 50-51. The motion was overruled TR:47.

Clearly it is improper to allow such testimony.

Findings number 3 and 4 that USS&T owed money to Hughes and that the money paid by Spicer on behalf of Hughes was a repayment of such amounts were apparently based upon such evidence even though such evidence is clearly precluded by the Statute of Frauds.

Point III.

THE TRIAL COURT'S FINDINGS NUMBER 3 AND 4 AND THE JUDGMENT ARE NOT SUPPORTED BY THE EVIDENCE.

The Court as part of its Findings of Fact and Conclusions of Law made the following factual findings numbered 3 and 4 in the Findings of Fact and Conclusions of Law:

3. At the time the money was given to Hughes by Spicer, United States Savings & Trust (hereinafter "USS&T"), a corporation of which Spicer was an officer, owed the Defendant, Michael S. Hughes, sums of money relating to stock purchases by USS&T and for a finder's fee.

4. The money paid by the Plaintiff, Jerry Spicer, to the Defendant, Michael S. Hughes, was not intended as a loan, but was repayment for past consideration furnished by the Defendant to USS&T.

Based upon findings 3 and 4, the court concluded in its conclusion of law as follows:

The Defendant is entitled to judgment against the Plaintiff for no cause of action.

Such a judgment was then entered.

Nowhere in the transcript do we have any competent admissable evidence that supports the conclusion that the money advanced personally by Jerry spicer to pay the debt of Michael Hughes was intended by the parties to repay debts owed to Hughes by third parties or indeed that such moneys were owed to Hughes by Mr. Spicer. The statute of frauds precludes evidence that such

was the case. The statute specifically provides that proof of an agreement to pay debts of third parties which is not in writing cannot be used as a defense. Utah Code Annotated Section 25-5-4. The defense of Hughes was that he was entitled to offset moneys owed to Spicer by him against money owed to him by third persons associated with Spicer. The purpose of the statute is to preclude the very situation we have in this case. Spicer advances money at the request of Hughes (Findings of Fact 1 and 2). Nothing is said by Hughes at the time he makes the request of Spicer that Hughes considers the money advanced to be repayment of obligations owed to him by third parties (see TR:22-24, 47, Ln. 24 through 48, Ln. 9) and then when Spicer seeks his legal remedy to recover for the money advanced, Hughes says in effect "I don't owe anything, I set off what you owed against what I was owed by these third parties (USS&T).

Such testimony is barred by the Statute of Frauds. The Court erred in admitting such testimony. The Court erred in denying the motion to strike such testimony. See TR:46-47.

It is certainly error to base findings 3 and 4 on such testimony. Without the erroneously admitted testimony, there is no testimony to support findings 3 and 4 and without findings 3 and 4 the Judgment and conclusion of law have no basis in the record and were erroneously entered.

#### Point IV.

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO HOLD THE CASE OPEN TO RECEIVE PLAINTIFF'S TESTIMONY.

Having denied Plaintiff's Motion to continue the trial due to the inability of Plaintiff to attend for medical reasons (TR:5), it was an abuse of discretion to refuse to allow the case to remain open to allow rebuttal testimony from Mr. Spicer.

The evidence adduced from the mouth of the Defendant in this case clearly shows, for the reasons set forth in Point I above, and in the Court's findings numbered 1 and 2, that Plaintiff is entitled to recover from Defendant the amounts advanced for him by the Plaintiff.

The Court, however, proceeded to allow defendant to testify, over objection, as to numerous unrelated transactions involving third parties who were not parties to the litigation, wherein defendant claimed debts were owed to him by such third parties. The Court then, over objection, allowed defendant to testify that he considered that Spicer "owed him" for his losses in dealing with these third parties and that he was entitled to offset what the third parties owed him against the amounts advanced by Spicer to pay his debt.

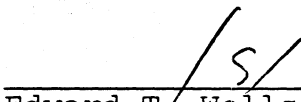
Having allowed such testimony and denied a motion to strike all such testimony (TR:46-47) the Court then refused to allow the case to remain open to allow rebuttal from Mr. Spicer. TR:49-50.

The trial was to the Court. Defense made no claim of any detriment were the motion to be granted. Under the circumstances, counsel respectfully suggests that the refusal to allow the record to be supplemented with Plaintiff's testimony was an abuse of discretion.

## CONCLUSION

Wherefore, premises considered, counsel respectfully suggests that as a matter of law, as set forth in Point I, Plaintiff was and is entitled to judgment against Mr. Hughes for \$11,221.80 plus interest at the statutory rate until paid; that the Court erred in holding the money paid on behalf of Hughes by Spicer was intended as repayment of debts owed to Hughes by third persons; and that the Judgment of the District Court should be reversed and the case remanded with instructions to vacate the Judgment and to enter judgment for Plaintiff as prayed for in the Complaint.

Respectfully submitted this 27<sup>th</sup> day of November, 1989.

  
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Edward T. Wells  
Attorney for Plaintiff Appellant