

1980

Western Surety Company v. Clarence H. Redding, Tom G. Redding, and Bert W. Redding, Individually : Brief of Respondent

Utah Supreme Court

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ROBERT D. MAACK: WATKISS & CAMPBELL; Attorneys for Defendants and Appellants DAVID H. EPPERSON HANSON, RUSSON: HANSON & DUNN; Attorneys for Plaintiff and Respondent

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IN THE SUPREME COURT
OF THE STATE OF UTAH

WESTERN SURETY COMPANY,

Plaintiff and
Respondent,

vs.

CLARENCE H. REDDING, TOM
G. REDDING, and BERT W.
REDDING, individually,

Defendants and
Appellants.

Case No. 16935

BRIEF OF RESPONDENT

AN APPEAL FROM A JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT, OF
SALT LAKE COUNTY, STATE OF UTAH, THE
HONORABLE HOMER F. WILKINSON, DISTRICT JUDGE

DAVID H. EPPERSON
HANSON, RUSSON, HANSON & DUNN
Attorneys for Plaintiff
and Respondent
650 Clark Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101

ROBERT D. MAACK
WATKISS & CAMPBELL
Attorneys for Defendants
and Appellants
310 South Main Street, 12th Floor
Salt Lake City, Utah 84101

FILED

JUL 31 1980

IN THE SUPREME COURT
OF THE STATE OF UTAH

WESTERN SURETY COMPANY,	:	
	:	
Plaintiff and	:	
Respondent,	:	
	:	
vs.	:	Case No. 16935
	:	
CLARENCE H. REDDING, TOM	:	
G. REDDING, and BERT W.	:	
REDDING, individually,	:	
	:	
Defendants and	:	
Appellants.	:	

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DAVID H. EPPERSON
HANSON, RUSSON, HANSON & DUNN
Attorneys for Plaintiff
and Respondent
650 Clark Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101

ROBERT D. MAACK
WATKISS & CAMPBELL
Attorneys for Defendants
and Appellants
310 South Main Street, 12th Floor
Salt Lake City, Utah 84101

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	:	
Defendants and	:	
Appellants.	:	

BRIEF OF RESPONDENT

NATURE OF THE CASE

Defendant-Appellants Redding, operating a used car dealership, sold a stolen vehicle with a defective title to Auto Exchange for \$2,550.00. Following this sale the car was recovered by the rightful owners and Auto Exchange made demand from Plaintiff-Respondent Western Surety Company under the Reddings Motor Vehicle Dealer Bond for its out of pocket loss on the vehicle of \$2,550.00. Western Surety Company paid this sum in good faith to the Auto Exchange and now seeks indemnification from the Reddings pursuant to the Motor Vehicle Dealer Bond Agreements.

DISPOSITION OF LOWER COURT

On November 23, 1979, cross motions for summary judgment were heard on oral argument and on stipulated facts before the Honorable Homer Wilkinson, District Court Judge, who granted the motion of Plaintiff-Respondent Western Surety Company for summary judgment, and held that "Plaintiff Western Surety Company shall have judgment in its favor and against the Defendants . . . Redding, both jointly and severally, in the sum of \$2,550.00 in indemnification for payments made by Plaintiff Western Surety Company to Auto Exchange pursuant to provisions of the Motor Vehicle Dealer Bond issued to Defendant by Plaintiff..."(R. 65).

RELIEF SOUGHT ON APPEAL

Respondent seeks a ruling affirming the Judgment rendered by the District Court.

STATEMENT OF FACTS

A written stipulation of facts was filed with the lower court for the purpose of determining the summary judgment motions filed by both parties. (R.35-46.) These stipulated facts indicate that the "defendants Clarence H. Redding, Tom G. Redding, and Bert W. Redding were engaged in the business of automobile sales . . . " and that "on February 6, 1976, defendants . . . made written application to plaintiff (Western Surety Company) for a surety bond . . . in the amount of \$5,000.00 . . . " (R. 35).

"Defendants in consideration of the issuance of said bond . . . by plaintiff, agreed to indemnify plaintiff and save it harmless from any and all damages, costs and charges which plaintiff may sustain as surety upon said bond, for defendants' failure to observe and comply with the requirements and provisions of Chapter 3 of Title 41 of the Utah Code Annotated, (1953), as amended." (R.36).

"That, on or about August 27, 1976, the defendants, doing business as Redding Auto Sales, sold a 1972 CJ5 Jeep to Auto Exchange, for the sum of \$2,550.00." (R.36).

Subsequently . . . "the Jeep was found to have been a stolen vehicle with a defective title. The vehicle was recovered in California and was returned to . . . the lienholder for the rightful owner . . . ". (R.36).

"Auto Exchange made written demand upon plaintiff as surety for defendants under the Motor Vehicle Dealer Bond . . . inasmuch as said vehicle had been stolen and had a defective title at the time of the sale by defendants to Auto Exchange." (R.37).

Plaintiff, as surety for defendants, indemnified the Auto Exchange in the sum of \$2,550.00 . . . " and obtained a "Release executed by Auto Exchange which releases all claims against the plaintiff and defendants arising out of the sale of the said automobile". (R.37,46).

"Plaintiff . . . made demand upon the defendants to indemnify plaintiff for the \$2,550.00 in damages which plaintiff had sustained as surety upon the bond issued to defendants." (R.37).

Defendants refused to reimburse plaintiff alleging "that they had no knowledge of the defective title at the time of sale", and as a result of that denial this lawsuit was commenced. (R.37).

Each of the above facts were stipulated to and are not at issue. Facts not stipulated to include the affidavit of Clarence Redding which alleges that at the time of the sale of the Jeep to Auto Exchange an employee of Auto Exchange accompanied him to the Motor Vehicle Division when the title was checked out. Western Surety Company has no knowledge of the truth or falsity of this allegation as it was not a party to that transaction.

The Reddings also have included in their fact statement the unsupported allegation that "Western Surety , without making any demand upon Reddings, and without contacting or consulting them, paid Auto Exchange's claim for \$2,550.00 . . ." This statement is not correct as noted in the attached Appendix 1 which establishes by registered receipt that the Reddings did receive notice of the claim on or about April 15, 1977, prior to any payment on the Bond to Auto Exchange.

Motions for Summary Judgment based upon these facts, were filed by both parties and after a hearing thereon without a transcript, the Honorable Homer Wilkinson, Judge, entered an order granting plaintiff's Motion for Summary Judgment and denying defendant's corresponding motion.

POINT I.

THE LOWER COURT CORRECTLY HELD THAT
THE REDDINGS SALE OF THE STOLEN
VEHICLE WITH DEFECTIVE TITLE TO
AUTO EXCHANGE VIOLATED THE MOTOR
VEHICLE DEALERS ACT.

On August 27, 1976, when the Reddings sold the Jeep to Auto Exchange, Reddings in conveying title implicitly represented that the title so conveyed was good and legally sufficient.

Section 41-3-2 Utah Code Annotated (1953) requires,

" Every person, firm, or corporation
upon the sale and delivery of any
used or second hand motor vehicle
shall within forty-eight hours
thereof deliver to the vendee,
and endorsed according to law,
a Certificate of Title, issued
for said vehicle by the State Tax
Commission. (Emphasis added.)

This statute in requiring a motor vehicle dealer to convey title to the vendee endorsed according to law, certainly implies that the title so issued should be valid and legally sufficient.

In the present case, the facts are undisputed that defendants Redding did not provide a good and sufficient Certificate of Title to the CJ5 Jeep to Auto Exchange, inasmuch as the vehicle had been stolen and had faulty title and registration.

Section 41-3-16 Utah Code Annotated (1953) requires that motor vehicle dealers obtain a good and sufficient bond with corporate surety thereon and "conditioned that said applicant shall conduct his business as a dealer without fraud or fraudulent representation, and without the violation of any of the provisions of this act."

Section 41-3-18 Utah Code Annotated (1953) further states:

" If any person shall suffer any loss or damage by reason of fraud, fraudulent representation or violation of any of the provisions of this act by a licensed dealer... such persons shall have a right of action against such dealer... guilty of the fraud, fraudulent representation or violation of any of the provisions of this act, and/or the sureties upon their respective bond. (Emphasis added.)

These statutes are necessary to protect innocent purchasers from fraud in the conveyance of title, or from failure of title. In this case a valid Certificate of Title was not provided to Auto Exchange, despite representations to the contrary, and damages resulted. Because of the false representation of good title, together with the failure of the Reddings to provide good and sufficient title within forty-eight hours following the sale as required by statute, the Reddings should be responsible pursuant to the provisions of

the Indemification Agreement to reimburse Western Surety Company for payments expended on their behalf.

The Reddings maintain that although good title was represented to Auto Exchange in the sale of the Jeep, and although the title was in fact defective at the time of sale, the Reddings lacked actual knowledge of the defective title and as a result should not be liable to indemnify Western Surety Company for payments on the bond to Auto Exchange.

Many courts have recognized that in an equitable action such as one for indemnity, knowledge of falsity with regard to false representations is not required.

In 37 Am.Jur. 2nd Section 220 it states:

" As a general rule, however, courts of equity will grant appropriate relief in cases involving transactions arising from misstatements, even though no fraudulent intent on the part of the person making the representations is shown, and even though he made them innocently, as a result of misapprehension or mistake. All that need be shown under such circumstances is that the representations are false and that they actually mislead the person to whom they are made. Thus, the prevailing opinion seems to be that even where a party innocently misrepresents a fact by mistake, especially if it operates as a surprise and imposition on the other party, the latter is entitled to relief.

Applying this principle to the present case, even if the Reddings innocently represented that the title on the

Jeep was good, wherein in fact it was defective, a misrepresentation was made which ultimately caused Auto Exchange to sustain a \$2,250.00 loss when the vehicle was reclaimed by the rightful owner. Western Surety made payments under the bond to Auto Exchange in good faith, and should be entitled to indemnification on that bond.

POINT II.

EVEN IF THE REDDINGS DELIVERY OF DEFECTIVE TITLE DID NOT VIOLATE THE MOTOR VEHICLE DEALERS ACT, WESTERN SURETY IS ENTITLED TO RECOVER ALL MONEYS PAID IN THE GOOD FAITH SETTLEMENT OF THE CLAIM OF AUTO EXCHANGE UNDER THE GENERAL AGREEMENT OF INDEMNITY, EXECUTED BY THE REDDINGS.

In Point II of their brief, the Reddings allege that Western Surety acted as a volunteer when it honored the claim of Auto Exchange, and in so doing relieved Reddings of any duty of indemnification under the bond. This allegation totally ignores the provisions of the General Agreement of Indemnity, page 2 of the Appendix to this brief, which contract was entered into on February 13, 1976 by Bert W. Redding, Clarence H. Redding and Tom G. Redding as individual indemnitors and by Bert W. Redding as President of Redding Associates, Inc.

Paragraphs two and three of this Indemnification Agreement state as follows:

"SECOND: That the Company shall have the right, and is hereby authorized, but not required: To adjust, settle or compromise any claim, demand, suit or judgment upon said instrument... unless the Indemnitors shall, in writing, request the Company to litigate such claim or demand, or defend such suit..."

"THIRD: That liability of each Indemnitor hereunder shall extend to... all moneys paid by the Company in settlement or compromise of any claims, suits and judgments, in good faith, under the belief that it was liable therefor, whether liable or not, ..."

(Emphasis added.)

After Auto Exchange had filed a claim with Western Surety Company, a copy of that claim and notice was sent to the Reddings by Registered Mail. Attached as Appendix 1 is a copy of this letter of notification together with the return receipt signed by the President of Redding Associates, Inc. Bert W. Redding, on April 15, 1977.

Subsequently the Reddings failed to respond by writing as required by paragraph two cited above . . . and the Reddings never requested that the claim be defended against or indicated that any valid defense existed to their having conveyed defective title to a stolen vehicle to Auto Exchange. Inasmuch as Western Surety received no instructions or requests from the Reddings, its principals, as to the handling of the claim at issue, and inasmuch as it clearly appeared to Western Surety from the claim filed by Auto Exchange that the vehicle was in fact a stolen one with defective title at the time of its sale by Reddings to Auto Exchange, then because of these factors, Western Surety made a Good Faith settlement with Auto Exchange. In that settlement Western Surety took great care to obtain a complete release of all claims to protect the Reddings. (R. 46).

Paragraph three of the Indemnification Agreement

cited above, expressly requires the Reddings to indemnify Western Surety for all monies paid under the bond to Auto Exchange if the claim was paid in good faith and under the belief that the Reddings were liable under the claim. Thus under the Reddings Indemnification Agreement, if such a good faith settlement was made by Western Surety, it makes no difference whether the Reddings were ultimately liable for the claims of Auto Exchange.

Public policy encourages both prompt, and Good Faith payments to be made under Bonds; and when as in this case payment is made in good faith and under circumstances where the principal has failed to cooperate or indicate any defenses to the claim, the surety is entitled to indemnification for paid out claims.

POINT III.

THE REDDINGS BOTH IN THEIR BOND
APPLICATIONS AND IN THEIR AGREEMENTS
TO INDEMNIFY AGREED TO BE PERSONALLY
LIABLE FOR PAYMENTS MADE BY WESTERN
SURETY COMPANY ON THE BOND.

Point III of the Reddings brief alleges that "any obligation that may be owing to Western Surety by virtue of its payment to Auto Exchange is the debt of a bona fide corporation, for which Reddings are not personally or individually responsible." This position is clearly erroneous.

In the bond applications signed in February of 1976, Clarence H. Redding (R.39), Tom G. Redding (R.40); and Bert W. Redding (R.41) each filled out a personal financial statement and each agreed to be an indemnitor on the Bond. Paragraph two of each Bond Application states as follows:

" . . . we each jointly and severally agree to indemnify and keep indemnified the said Company from and against any liability, and all loss, cost, charges, suits . . . said Company shall incur . . . in consequence of said Company having become surety . . .

Similarly, Appendix 2, sets forth a separate signed document entitled General Agreement of Indemnity dated February 13, 1976, wherein Bert W. Redding, Clarence H. Redding and Tom G. Redding as individuals agreed to be personally responsible for payments made on the bond. It states:

" NOW, THEREFORE, in consideration of the premises, the undersigned Applicant and Indemnitors (herein referred to as Indemnitor or Indemnitors) hereby agree and bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, as follows, to-wit:

FIRST: To indemnify the Company from and against any and all liability, loss, costs, damages, attorneys' fees and expenses of whatever kind or nature which the Company may sustain or incur by reason or in consequence of executing on behalf of said Applicant-Principal any instrument or instruments, past, present or future, as Surety or Co-Surety, or amendments of same.

The provisions of the Bond Application and General Agreement to Indemnify cited above, clearly establish that each of the Reddings agreed to be personally and individually responsible for payments under the bond. As indemnitors on the bond, the Reddings should be required to reimburse Western Surety the \$2,550.00 paid on the bond to Auto Exchange.

CONCLUSION

Based upon the provisions of the Bond Applications and Indemnity Agreement entered into by the Reddings with Western Surety Company, Respondent Western Surety Company respectfully requests that the summary judgment rendered by the District Court in favor of Western Surety Company and against the Reddings be affirmed.

Respectfully submitted this 31st day of July, 1980.

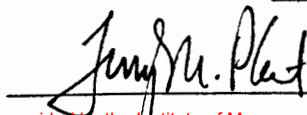
HANSON, RUSSON, HANSON & DUNN



DAVID H. EPPERSON
Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above foregoing Brief of Respondents was HAND DELIVERED to Robert D. Maack, of Watkiss and Campbell, 310 South Main Street, 12th Floor, Salt Lake City, Utah 84111, this 31st day of July, 1980



April 6, 1977

CERTIFIED
RETURN RECEIPT REQUESTED

Clarence H. Redding
1029 Capistrano Drive
Salt Lake City, Utah 84116

Tom G. Redding
3616 South 11th E.,
Salt Lake City, Utah 84106

Bert W. Redding
135 No. 200 W.
American Fork, Utah 84103

Gentlemen:

Re: Claim S-21,781, Bond 2292401 - Redding Associates, Inc.

I enclose copy of claim forwarded to me by Frank N. Karras, attorney of Salt Lake City, on behalf of Auto Exchange, Ivar Blackner, regarding a certain Jeep bought from Redding Auto Sales. I also enclose copy of letter from United Bank of LaSalle.

We have the individual indemnity of each of you gentlemen for any loss or expense in connection with this Auto Dealer bond. Please advise at once what you propose to do about this claim. If we are required to make any payment we have a right of reimbursement from each or any of you.

Please advise at once.

Yours very truly,

GENE McDONNELL

k
Enc.
cc: Agent

PS Form 3811, Jan. 1975

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

SENDER: Complete items 1, 2, and 3.
Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).

☐ Show to whom and date delivered..... 15¢

☐ Show to whom, date, & address of delivery... 35¢

☐ RESTRICTED DELIVERY.
Show to whom and date delivered..... 65¢

☐ RESTRICTED DELIVERY.
Show to whom, date, and address of delivery 85¢

2. ARTICLE ADDRESSED TO:

S-21,781-Bert W. Redding

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	631563	

(Always obtain signature of addressee or agent)

I have received the article described above.

SIGNATURE ☐ Addressee ☐ Authorized agent

Bert Redding

4. DATE OF DELIVERY

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE:

POSTMARK
19 APR 1975

CLERK'S INITIALS
RR

☆ GPO: 1975-O-568-047

WESTERN SURETY COMPANY

One of America's Oldest Bonding Companies

CHICAGO • SIOUX FALLS • DALLAS
PALO ALTO • BALA-CYNWYD, PA.

GENERAL AGREEMENT OF INDEMNITY

WHEREAS, the WESTERN SURETY COMPANY, of Sioux Falls, South Dakota, (herein referred to as Company), has heretofore issued or may hereafter issue certain instruments in the nature of bonds or undertakings for the Applicant as Principal, and

WHEREAS, the WESTERN SURETY COMPANY requires indemnification of the undersigned Applicant-Principal, as an essential condition to the Company remaining as Surety upon the bond or bonds or undertaking or undertakings heretofore issued for the Applicant, or issuing new bond or bonds or undertaking or undertakings or increases or amendments in existing bond or bonds or undertaking or undertakings for the said Applicant-Principal (hereinafter referred to as instrument or instruments),

NOW, THEREFORE, in consideration of the premises, the undersigned Applicant and Indemnitors (herein referred to as Indemnitor or Indemnitors) hereby agree and bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, as follows, to-wit:

FIRST: To indemnify the Company from and against any and all liability, loss, costs, damages, attorneys' fees and expenses of whatever kind or nature which the Company may sustain or incur by reason or in consequence of executing on behalf of said Applicant-Principal any instrument or instruments, past, present or future, as Surety or Co-Surety, or by continuing upon any such instrument or instruments now in existence as Surety or Co-Surety or amendments of same.

SECOND: That the Company shall have the right, and is hereby authorized, but not required:

To adjust, settle or compromise any claim, demand, suit or judgment upon said instrument or instruments, unless the Indemnitors shall, in writing, request the Company to litigate such claim or demand, or defend such suit, or to appeal from such judgment, and shall deposit with the Company satisfactory collateral, sufficient to pay any judgment or judgments, rendered or that may be rendered, with interest, costs, expenses and attorneys' fees.

THIRD: That liability of each Indemnitor hereunder shall extend to, and include the full amount of any and all moneys paid by the Company in settlement or compromise of any claims, suits and judgments, in good faith, under the belief that it was liable therefor, whether liable or not, as well as of any and all disbursements on account of costs, attorneys' fees and expenses which may be made under the belief that such were necessary, whether necessary or not.

FOURTH: That in case any Indemnitor shall fail to execute this agreement, or in case any Indemnitor who executed this agreement shall not be bound for any reason, the other Indemnitors shall nevertheless be bound hereunder for the full amount of liability, loss, costs, damages, attorneys' fees and expenses.

FIFTH: The death or release or insolvency of any Indemnitor shall in no manner release any other Indemnitor, and this obligation shall still be binding upon each and every other Indemnitor, both as to any and all instruments theretofore issued by the Company, and any and all instruments issued by the Company after the death or release or insolvency of any Indemnitor.

SIXTH: The Indemnitors do hereby waive notice of any breach or breaches of any such instrument or instruments, or notice of any act or acts that may give rise to claim hereunder.

SEVENTH: That each Indemnitor consents that the Company may increase or decrease the penalty of, alter, change, modify, amend, limit or cancel instruments, and may execute renewals thereof, or other and new instruments, without notice to the Indemnitors, notice being expressly waived, and the Indemnitors shall be fully bound thereby.

EIGHTH: That if the Company shall be required or shall deem it necessary to set up a reserve in any amount to cover any claim or claims under any instruments executed for the Applicant-Principal, or for any reason whatsoever, the undersigned Applicant-Principal and Indemnitors will immediately, on demand, deposit with the Company current funds in the amount of such reserve, to be held by the Company as collateral.

The undersigned hereby expressly waive any notice of the acceptance of this agreement by the Company.

Dated this 13 day of Feb, 19 75.

Bert W. Redding
Bert W. Redding Indemnitor

Clarence H. Redding
Clarence H. Redding Indemnitor

Tom C. Redding
Tom C. Redding Indemnitor

REDDING ASSOCIATES, INC.

Applicant

By: Bert W. Redding
Bert W. Redding, President Applicant

Applicant

EACH INDEMNITOR'S SIGNATURE MUST BE ACKNOWLEDGED

INDEMNITOR'S ACKNOWLEDGEMENT

STATE OF Utah

COUNTY OF Salt Lake } ss.

On the 13 day of Feb, 1976, before me personally came Bert W. Redding and Clarence H. Redding

to me known and known to me to be the individual who executed the foregoing instrument, and acknowledged that he executed the same.

My commission expires May 16, 1979

Paul T. Allsop
Notary Public

INDEMNITOR'S ACKNOWLEDGEMENT

STATE OF Utah

COUNTY OF Salt Lake } ss.

On the 13 day of Feb, 1976, before me personally came Tom G. Redding

to me known and known to me to be the individual who executed the foregoing instrument, and acknowledged that he executed the same.

My commission expires May 16, 1979

Paul T. Allsop
Notary Public

APPLICANT'S ACKNOWLEDGEMENT AS INDIVIDUAL

STATE OF _____ } ss.

COUNTY OF _____ } ss.
On the _____ day of _____, 19____, before me personally came _____

to me known and known to me to be the individual who executed the foregoing instrument, and acknowledged that he executed the same.

My commission expires _____, 19____

Notary Public

APPLICANT'S ACKNOWLEDGEMENT IF PARTNERSHIP

STATE OF _____ } ss.

COUNTY OF _____ } ss.
On the _____ day of _____, 19____, before me personally came _____, to me known, and

stated that he _____ partner in the firm of _____ and acknowledged that he executed the foregoing instrument as the act of the said firm.

My commission expires _____, 19____

Notary Public

APPLICANT'S ACKNOWLEDGEMENT IF CORPORATION

STATE OF Utah

COUNTY OF Salt Lake } ss.

On this 13 day of Feb, 1976, before me, a Notary Public in and for said county, personally appeared Bert W. Redding

to me personally known, and being by me duly sworn, did say that he is President of said corporation, that the seal affixed to said instrument is the seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors,

and said _____ acknowledged the execution of said instrument to be the voluntary act and deed of said corporation, by it voluntarily executed.

My commission expires May 16, 1979

Paul T. Allsop
Notary Public