

1980

# Neve-Welch Enterprises, Inc. v. United Bank : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

-----  
NEVE-WELCH ENTERPRISES, INC., :  
A Utah Corporation, dba Neve- :  
Welch Furniture & Appliance, :

Plaintiff-Respondent, :

Case No. 17071

vs. :

UNITED BANK, :  
A Utah Corporation, :

Defendant-Appellant.

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BRIEF OF APPELLANT  
-----

Appeal From the Judgment of  
The Third District Court of Salt Lake County, State of Utah  
The Honorable James S. Sawaya, Judge  
-----

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A Utah Corporation, dba Neve- :  
Welch Furniture & Appliance, :

Plaintiff-Respondent, :

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vs. :

UNITED BANK, :  
A Utah Corporation, :

Defendant-Appellant, :

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BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

Respondent sued Appellant for stopping payment on a cashier's  
check issued to Respondent by Appellant.

DISPOSITION IN THE LOWER COURT

This matter was tried before the Honorable James S. Sawaya,  
without a Jury on February 4, 1980. The Court found in favor of  
Respondent and after amendments thereto the final Judgment,  
Conclusions of Law, and Findings of Fact were signed April 9,

1980.

## RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the Judgment and a determination that as a matter of law, a bank under certain circumstances, may stop payment on its cashier's check. Respondent has cross appealed the trial court's refusal to grant damages.

## STATEMENT OF FACTS

Tri-Power Electronics, hereafter Tri-Power began a liquidation sale on or about April 17, 1979 which was to run through April 22, 1979. Neve-Welch (hereafter Respondent) attempting to take advantage of the situation created by Tri-Power's financial difficulties arranged to sell its own merchandise at Tri-Power's liquidation sale on Saturday and Sunday, April 21 & 22nd. (T.6, line 23). There was no segregation of merchandise (T.9, lines 1 seq) and the proceeds from the sale of Respondent's merchandise, were co-mingled with those of Tri-Power's (T.9-13).

On Sunday night, April 22, 1979, Respondent's President, George Welch told Lee Klein, President of Tri-Power, what amount Tri-Power owed them for Respondent's merchandise sold at the sale. (T.11, lines 28-30). Lee Klein told Welch to write up an accounting and that payment by cashier's would be coming the following morning (T.12, lines 4-7).



On Monday morning, April 23, 1979, George Welch, appeared at Tri-Power for payment. Lee Klein telephoned United Bank, hereafter Appellant, and spoke with Loren Urry, Senior Vice-President of Appellant and asked Urry to issue a cashier's check to Welch (T.14,15,16,51,52).

George Welch testified that he was unaware of what was said by the bank officer over the phone (T.15, lines 4-5). Lee Klein testified that he told Mr. Urry that a sizeable deposit would be made that morning (T.52, lines 6-11). The apparent reason for this assurance was that the Tri-Power account at the bank was in overdraft at the close of business on April 20, Friday, and at the opening of business on Monday the 23rd in the amount of \$5,778.58 (T.89-92). Lee Klein testified that he thought there was a balance in the account when he spoke to Mr. Urry (T.52, lines 16-18). He also testified that he thought there had been a deposit made on Saturday but that he had not made such deposit (T.52, lines 24-25 and T.53, lines 3-8). In any event, Lee Klein gave no check or other instrument to George Welch to present to Appellant to exchange for the cashier's check (T.45-46).

On the morning of April 23, 1979, shortly after the aforementioned telephone conversation between Mr. Urry and Mr. Klein, George Welch picked up the cashier's check from Appellant and gave nothing for its issuance. The cashier's check was issued on the oral assurances of Lee Klein that the deposits would be made. An involuntary petition in bankruptcy was filed the morning of April 23, 1979 against Tri-Power and its assets seized including



deposits prepared for deposit to Appellant (T.74, lines 1-7, T.76, lines 23,24).

There is some confusion as to whether or not some deposits were actually made. Evidence was presented over the strenuous objection of plaintiff's counsel that a number of checks which went to make up the alleged deposit were not paid. (T.77 and Exhibit D-17). At the close of business on Monday, April 23, 1979, Tri-Power's account was overdrawn in the amount of \$9,518.20. At the close of business on April 30, 1979, Tri-Power's account was in overdraft in the amount of \$48,530.40 (T.92 and 93).

On April 25, 1979, Appellant stopped payment on its cashier's check (T.18, lines 26-30 and T.19, lines 1-20, and Exhibit P-2) based on a failure of consideration.

Respondent commenced action against Appellant on the theory that a bank may not stop payment on a cashier's check and is strictly liable thereon and for damages to its business and reputation. The trial Court found in favor of the Respondent for the face amount of the check only, plus interest. The additional damages sought for the lost profits and damages to reputation were denied.

## ARGUMENT

### POINT I

UNITED BANK HAS A RIGHT TO STOP PAYMENT ON  
ITS CASHIER'S CHECK WHEN IT IS ISSUED WITHOUT  
CONSIDERATION

The major issue in this case is whether or not a bank is strictly liable on a cashier's check or whether it can stop payment under certain circumstances, including failure of consideration.

The Respondent contends that a bank is strictly liable once it issued a cashier's check regardless of the underlying transactions. The following excerpts from the trial transcript are illustrative. At T.72 beginning on line 4, the following exchange took place:

MR. OLSEN: We will offer Exhibit 20-D, Your Honor.

MR. G. WALL: We will object to this as lack of relevancy and materiality. Whatever negotiations or procedures they may commonly have between themselves and Tri-Power, I don't think are relevant as to what procedures were used when Mr. Welch picked up the check. This is a transaction between Mr. Welch and the bank, and they are issuing that to him and it is not drawn at his request or on his account.

I, therefore, don't think it is relevant on that basis.

THE COURT: What do you claim for it, Mr. Olsen?

MR. OLSEN: Only that it's the instrument by which the cashier's check was issued.

THE COURT: I am not sure I understand what issue bears on--as far as this trial is concerned.

MR. OLSEN: It bears on the issue of why the cashier's check was issued by telephone, rather than some instrument having been brought in.

THE COURT: It may be admitted for whatever probative value it may have. I am not quite sure I understand, but I will let it in.

At T.77 beginning on line 21 and continuing over to T. 78, the exchange continued:

MR. OLSEN: Is that a portion of the deposit, that exhibit and those two checks, of the deposit which was brought in by Mr. Klein the first thing that morning?

A. (Mr. Urry) Yes, it is.

Q. Now, were those checks in fact paid?

MR. B. WALL: I will object, Your Honor. He issued the cashier's check, if he relied upon those checks or whatever the account, his testimony is that there were funds available in the account.

THE COURT: Now, you are taking the position that he has to rely on-- If he issues the check, it's almost--

MR. B. WALL: Strict liability. That is correct, Your Honor, because it is up to him to certify that check as to whether there are funds or not, and once he cuts loose that check, he in effect certifies and represents that those funds are on deposit with that bank.

THE COURT: Well, it's not a certified check.

MR. B. WALL: But he in effect represents that the funds are available, and the only thing Mr. Welch would have had to have done was walk to their window and cashed it and they would have an obligation to honor it.

THE COURT: It is a pity for Mr. Welch. He didn't know--

MR. B. WALL: Yes, but I think the law requires that same degree of responsibility.

Finally, at T.89, counsel for Respondent again objected as follows:

MR. B. WALL: "If Your Honor please, at this time, I would like to interpose an objection to this line of questioning.

Now, the only reason I made the indication I did earlier about this very subject is the fact that the Court has entertained some conditional receipt of another exhibit. I am, you know, concerned about that. I think for the record I would like to interpose and do interpose an objection to the relevancy of this continuing exhibit or anything to do with the account from the standpoint of its balance, in taking into account our theory of the case, they issued a cashier's check and what the balance was on a given hour or date, I fail to see the materiality of it.

THE COURT: Okay, I understand your theory, Mr. Wall, and I am not sure that it is incorrect. It may be correct, but on the chance that it isn't, I am going to hear this.

MR. B. WALL: That's why I wanted to make the record on it."

This case is one of first impression in this jurisdiction and other jurisdictions seem to split on the issue. It has been held by a number of courts that a bank issuing a cashier's check may defend an action upon it on the ground that it was issued without consideration or through mistake, or that it was obtained through false representation. 10 Am.Jur. 2d, Banks §569.

In a very recent case, TPO, Inc. vs. Federal Deposit Inc. Corp., 3rd Cir. N.J., (1973), 487 F2d 131, applying the New Jersey U.C.C., the Court followed this general rule. The Court indicated that a bank was not absolutely obligated by U.C.C. §4-303 to honor its own cashier's check when presented by a payee who was not a holder in due course, and was allegedly a party to a scheme to defraud the bank, but was entitled under U.C.C. §3-306 and §3-408 to present defenses that would be available on a simple contract, including lack of consideration or fraud.

Other cases follow the above rule where the payee is not a holder in due course. Mid Central Towing Co. v. National Bank of Tulsa, 348 P.2d 327 (Oklahoma, 1960), Dakota Transfer & Storage Co. vs. Merchants National Bank, 86 N.W. 2d 639 (North Dakota, 1957).

Appellant submits that it is completely within its rights to stop payment on its cashier's check. If the position of absolute liability on the check contended for by Respondent were followed to its logical extreme, the Respondent could recover even if it had alone perpetrated the fraud on Appellant.

One of the leading cases for the proposition of absolute liability on a cashier's check is Wertz vs. Richardson, 495 S.W.2d 527 (Texas, 1973). The Court in Wertz, supra, by a four to three decision held that a cashier's check is accepted for payment when issued. The majority spoke in conclusionary terms and appeared to use circular reasoning in reaching the result it did. The Court unsuccessfully attempted to distinguish between a customer's right to stop payment on a check and the bank's right to stop payment on its cashier's check.

A cashier's check is nothing more than a check drawn by the bank the same as any other check would be drawn by an ordinary person. The only real distinction is that a bank is a depository for its own funds as well as those of other people. The type of reasoning used in the majority opinion of Wertz, supra, would force a bank to deal in cash or deposit its own money in another bank.

The dissent in the Wertz case, supra, written by Judge Walker, is well reasoned and analytical. Judge Walker begins by distinguishing those cases where a remitter or third person, purchases or acquires a cashier's check for a payee and later tries to stop payment after transfer, as opposed to the situation in this case. Here, Respondent as payee dealt directly with the Appellant and acquired the check directly from Appellant.

Respondent stressed at trial, that this was an obligation between Appellant and Respondent. Judge Walker, in the Wertz case continued:



"No one is attempting to order another person not to pay, and Respondent is not denying liability on the check because it was requested to do so or because of any claim or right asserted by another person. Respondent has repudiated its obligation to pay on the ground that it has a legal defense to liability on the check, and the question to be decided is whether the asserted defense is good. In my opinion, it is not correct to say that a bank can never legally refuse to pay one of its cashier's checks. For example, a bank from which a cashier's check has been procured by fraud would certainly be entitled to set up the fraud and defeat liability as long as the check remains in the hands of the payee who perpetrated the fraud. The text writers agree that a bank may properly refuse to pay its cashier's check to the payee on the ground of failure of consideration or fraud. 5B Michie, Banks and Banking, §521 (Supp. 1972); 7 Zollman, Banks and Banking, §§4694, 4695. 495 S.W. 2d 572 at 575." (Emphasis added)

Respondent took the cashier's check directly from Appellant. This is not a case where Respondent has transferred the check to an innocent third party. Respondent was given timely notice of the dishonor as well.

The question presented by this case is simply one of law and policy as to whether or not a bank can stop payment on its cashier's check. A bank's right to stop payment under these circumstances is supported by both the reason and policy set forth in the foregoing legal authorities.

## POINT II

RESPONDENT DOES NOT QUALIFY AS A HOLDER IN DUE COURSE AS DEFINED IN U.C.A. §70A-3-302 BECAUSE IT GAVE NO VALUE TO APPELLANT IN EXCHANGE FOR THE CASHIER'S CHECK.

U.C.A. §70A-3-302 (1953), as amended, provides:

- "(1) A holder in due course is a holder who takes the instrument
- (a) for value; and
  - (b) in good faith, and
  - (c) without notice that it is overdue or has been

dishonored or of any defense against or claim to it on the part of any person."

70A-3-303, (1953), as amended, provides:

- "A holder takes the instrument for value
- (a) to the extent that the agreed consideration has been performed or that he acquires a security interest in or a lien on the instrument otherwise than by legal process; or
  - (b) when he takes the instrument in payment of or as security for an antecedent claim against any person whether or not the claim is due; or
  - (c) when he gives a negotiable instrument for it or makes an irrevocable commitment to a third person."

Respondent's agent, George Welch testified that he received no check or negotiable instrument from Tri-Power and delivered nothing to Appellant in exchange for the cashier's check. (T.45, line 30 and T.46, lines 1-6). Therefore, under U.C.A. §70A-3-303(c), Respondent could not be a holder in due course.

With respect to U.C.A. §70A-3-303(a) official comment 3 to U.C.C. 3-303 which is identical to the above cited Section of the Utah Code provides:

- "(a) resolves an apparent conflict between the original Section 54 and first sentence of the original Section 25, by requiring that the agreed consideration shall actually have been given. An executory promise to give value is not itself value, except as provided in paragraph (c). The underlying reason of policy is that when the purchaser learns of a defense against the instrument or of a defect in the title, he is not required to enforce the instrument, but is free to rescind the transaction for breach of the transfers warranty. (§3-417). There is thus not the same necessity for giving him the status of a holder in due course, cutting off claims and defenses, as where he is actually paid value. A common illustration is the bank credit not drawn upon, which can be and is revoked when a claim or defense appears.:



Official comment 6 to the same Section goes on to state:

"Paragraph (c) is new, but states generally recognized exceptions to the rule and that an executory promise is not value. A negotiable instrument is value because it carries a possibility of a negotiation to a holder in due course, after which the party who gives it cannot refuse to pay. The same reasoning applies to any irrevocable commitment to the third person such as a letter of credit issued when an instrument is taken."

The cashier's check was issued on the oral assurances by Lee Klein that the deposits would be made (T.52, line 6). This is an executory promise and does not qualify as value. Respondent at trial argued strenuously that the contract on the cashier's check was between it and Appellant and that Tri-Power's involvement is immaterial and irrelevant (T.72, lines 10-12).

Again following Respondent's position asserted at trial, U.C.A. §70A-3-303(b) does not furnish the consideration either. If Tri-Power allegedly owes money to Respondent and Respondent argues the deposits made by Tri-Power are irrelevant, that the balance in Tri-Power's account is immaterial and finally, that this is a contract only between Respondent and Appellant, then U.C.A. §70A-3-303 (b) is of little or no help to Respondent.

Even if Respondent chooses to rely on this sub-section (b), close examination reveals its inapplicability. An example may illustrate this more clearly. A owes B money. C owes A money and gives A a check or promissory note. A can transfer the note he received from C to B in exchange for release of the antecedent debt A owes B. B in this case would qualify as a holder in due course.

In the present case, Tri-Power owed money to Neve-Welch. Tri-Power also owed money to United Bank inasmuch as its account was in overdraft status when this check was issued (T.89, lines 92-93). Appellant transferred a cashier's check to Respondent based on the oral assurances of Lee Klein. The Respondent gave neither value nor consideration to Appellant for the cashier's check. Appellant over the objections of Respondent introduced evidence that Tri-Power as well failed to give value or consideration for the cashier's check. Appellant is under no obligation to gratuitously assume the debt Tri-Power owes to the Respondent.

Appellant submits that the interpretation of the meaning of "value" in the statute is a question of law and that the trial Court erred when it determined that Respondent gave value and that good and valuable consideration had been paid by the Respondent in exchange for the cashier's check, when in fact neither Respondent nor Tri-Power ever gave any consideration for the cashier's check in question.

### POINT III

THE TRIAL COURT RULED CORRECTLY IN REFUSING TO  
AWARD DAMAGES FOR LOST PROFITS, PUNITIVE DAMAGES  
AND DAMAGES FOR INJURY TO RESPONDENTS CREDIT  
REPUTATION

Respondent has chosen to cross-appeal on the following issues:

1. Failure of the District Court to award damages for lost profits to plaintiff's by virtue of defendant's failure to honor the cashier's check.

2. Failure of the District Court to award damages based on defendant's intentional, reckless and unwarranted refusal to honor the cashier's check issued by it.

3. Failure of the District Court to award damages for injury and damage to plaintiff's credit reputation."

In the amendments to the findings of facts and conclusions of law signed by Judge Sawaya on April 9th, 1980, it states, at number 2(b): "The plaintiff is not entitled damages in addition to the amount of the check and the interest thereon, the basis therefor being too speculative."

It is also a well settled legal principle that this Court will affirm the decision of the trial Court when its determination is supported by substantial evidence. Ranch Homes Inc. vs. Greater Park City Corporation, 592 P.2d 620 (Utah, 1979). This Court will not upset the trial Court's determination unless it is "clearly against the weight of the evidence". Ream vs. Fitzen, 581 P.2d 145 (Utah, 1978), Winter vs. Charles Anthony, Inc., 586 P2d 453 (Utah, 1978).

Respondent presented absolutely no evidence of Appellant's wilfulness or any malice in stopping payment of the check as is required for punitive or exemplary damages. Palombi vs. D & C Builders, 22 Utah 2d 297, 452 P.2d 325 (1969).

Damages for lost profits and to business reputation are considered too speculative to base an award of damages on. Howarth vs. Ostergaard, 30 Utah 2d 183, 515 P.2d 442 (1973).

There was substantial evidence that Respondent was in finan-

cial difficulty well before the stop payment on this check. An independent audit conducted by a national accounting firm at Appellant's request revealed an almost consistent history of operating losses which actually diminished after Appellant stopped payment on the cashier's check in question (T.105-107). In addition, funds to replace those represented by the stopped cashier's check were placed back into Respondents cash flow in less than thirty days(T.42,103, lines 13-25).

Appellant submits that the trial Court was well within its discretion in refusing to award these damages and based on the foregoing, this Court should not upset those findings.

#### CONCLUSION

Appellant was within its rights to stop payment on its cashier's check. Respondents theory of strict liability is commercially unsound and not based on practicalities.

Respondent does not qualify as a holder in due course because it did not take the instrument for value and gave Appellant nothing in exchange for the check.

Appellant respectfully requests this Court to reverse the trial Court and determine as a matter of law that Appellant was within its rights to stop payment based on failure of consideration.

DATED this 4th day of August, 1980.

RESPECTFULLY SUBMITTED



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I hereby certify that on the 4th day of August, 1980, I caused two copies each of the foregoing Brief of Appellant to be deposited in the United States Mail, postage prepaid, and addressed to:

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