

1981

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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NEVE-WELCH ENTERPRISES, INC., )  
a Utah corporation, dba NEVE- )  
WELCH FURNITURE & APPLIANCE, ) CASE NO. 17071  
Plaintiff-Respondent )  
v. ) BRIEF OF RESPONDENT  
UNITED BANK, )  
a Utah corporation, )  
Defendant-Appellant )  
-----

BRIEF OF RESPONDENT

-----  
APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT  
OF SALT LAKE COUNTY, STATE OF UTAH,  
THE HONORABLE JAMES S. SAWAYA, PRESIDING  
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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

v.

UNITED BANK,  
A Utah corporation,

Defendant-Appellant

CASE NO. 17071

BRIEF OF RESPONDENT

BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

Tr. refers to the Transcript on file in this action, and  
R. refers to the Record on Appeal. Ex. refers to Exhibit.

STATEMENT OF THE NATURE OF THE CASE

This is an action by plaintiff against defendant to force  
payment of a cashier's check issued by defendant at the request of a  
third party to the plaintiff.

DISPOSITION IN THE LOWER COURT

This action was tried without a jury in the Third District  
Court in and for Salt Lake County, before the Honorable James S.  
Sawaya, district judge, on February 4, 1980. The court found in  
favor of respondent and against appellant and awarded judgment on

April 9, 1980, for the amount of the cashier's check in the amount of \$22,020.80, plus interest and costs. The district court refused to grant consequential or other damages to the plaintiff.

#### RELIEF SOUGHT ON APPEAL

The respondent seeks to have the judgment affirmed as to the portion of the judgment granting the amount of the cashier's check, but seeks reversal of the court's ruling denying damages.

#### STATEMENT OF FACTS

Because respondent feels there are errors in the appellant's statement of the facts the following statement of facts is made by the respondent.

1. On or about April 21, 1979, the respondent, at the suggestion of General Electric, and with the consent of Tri-Power Electronics, transported to the business address of Tri-Power in Salt Lake City, various appliances and items of merchandise to sell on an independent basis at the close-out sale of Tri-Power, which sale was currently in progress at that time. (Tr. 6-7,48)

2. The merchandise sold by the respondent was generally segregated from that of Tri-Power (Tr. 9), contrary to the statement of the appellant.

3. The merchandise belonging to the respondent was sold during the course of the sale on the 21st and 22nd of April, 1979.

These items were sold as the separate property of Neve-Welch, the respondent, as far as Tri-Power was concerned, and were sold by respondent's own salesmen. The proceeds from each sale were commingled with those of Tri-Power with the understanding that when the banks reopened on Monday the money would be divided and Neve-Welch given its income from the sale. The respondent maintained its own receipts. (Tr. 9-14)

4. During the course of the sale respondent's salesmen actively promoted the name and business of respondent. (Tr. 10)

5. At the end of the sale on the evening of April 22nd, Mr. Welch, who had been keeping a separate record of all of respondent's sales (Tr. 12), was instructed by Mr. Klein, the president of Tri-Power, to present his bill Monday morning to him and he would call the bank and have a check cut for him. (Tr. 12-13)

6. During the course of the sale all payments were in the form of cash, checks or charges on bank cards (Tr. 13), all of which amounts were paid to Tri-Power and none to respondent. (Tr. 13-14)

Mr. Welch had no dealings whatever with the money and all collections were paid at the Tri-Power cash register and handled exclusively by Tri-Power's agents. (Tr. 17, 49)

7. During the course of the sale substantial amounts were deposited with appellant by Tri-Power, which deposits included amounts collected by respondent. These deposits included a sizable

deposit on Saturday of approximately \$30,000.00. (Tr. 52-53).

Contrary to appellant's statement, Mr. Klein was confident of the day and approximate amount of this deposit. (Tr. 52-53)

8. By the end of the business day on the 22nd (Sunday evening) the respondent had received from the sale of its merchandise the sum of \$22,020.80, which sum had been delivered to Tri-Power and deposited with appellant. (Tr. 52-53, 11-14, Ex.'s 11-P, 12-P, 13-P).

9. At approximately 9:00 a.m. on Monday, the 23rd of April, Mr. Welch met with Lee Klein and they examined and totalled the records Mr. Welch had kept and mutually agreed that the sum of \$22,020.80 was owing by Tri-Power to the respondent. (Tr. 14) There was no dispute as to the amount owing. (Tr. 51)

10. After Mr. Klein and Mr. Welch reached an agreement as to the amount owing, Mr. Klein telephone Mr. Loren Urry, an officer of United Bank, and told him that Mr. Welch was coming down to the bank, and asked him to cut a check for \$22,020.80. (Tr. 14-15, 51)

11. At that time there was no indication or statement by Mr. Urry to the effect that there was an overdraft or any problem with the account, nor did Mr. Urry indicate any reluctance or problem with issuing a check for the amount requested. (Tr. 15, 51). Contrary to appellant's statement on p. 3 of its brief, there was never any type of condition to the issuance of the check, including no condition that a check would be issued on the condition that a deposit be made by Mr. Klein.

12. Immediately thereafter Mr. Welch left Tri-Power and went directly to United Bank where he was introduced to Mr. Urry (Tr. 15-16). At that time some brief amenities were exchanged between the two and the check was delivered by Mr. Urry to Mr. Welch. (Tr. 16)

13. Immediately thereafter Mr. Welch took the check to his bank, Capital City State, and deposited <sup>in</sup> respondent's account. (Tr. 16)

14. At no time did Mr. Welch have any knowledge of the account balance of Tri-Power at United Bank (Tr. 17), nor did he have any knowledge of Tri-Power's banking status, credit standing, or anything else dealing with its financial situation. These matters were never discussed with Mr. Welch by Mr. Klein. (Tr. 53)

15. On Wednesday, April 25, an agent of United Bank delivered a letter (Ex. 2-P) to Mr. Welch informing him that appellant had stopped payment on the check. (Tr. 19)

16. Shortly thereafter this action was commenced by respondent to collect the amount of the check and consequential damages.

## ARGUMENT

### POINT I

#### APPELLANT IS OBLIGATED TO HONOR ITS CHECK ISSUED TO RESPONDENT

In the opening paragraphs of appellant's first point of argument, they mis-state the issue. This has never been an action involving or alleging strict liability on a cashier's check. No

such finding was made by the court in its Findings, (R. 107, 134), and respondent has never made such an argument. However, as will be shown, there is generally such a strict requirement for payment imposed by the courts and the commercial code that one could almost characterize the obligation as one of strict liability. But it should be remembered that for appellant to claim that the ruling should be reversed because the court found that it was strictly liable is clearly fallacious and improper argument for this appeal. Such an issue is simply not present.

The appellant in its Docketing Statement sets forth several cases which it thinks disposes of the issues in this case in favor of the appellant. These cases are again set forth on page 7 of appellant's brief. However, these cases are not dispositive of the issues for the simple reason that they are not at all in point with the facts of this case.

These cases involve situations where the payee attempted to defraud the bank, or another party, and was thus not a holder in due course, with fraud being the defense. At no time in this case has there ever been the slightest bit of proof of any type of misconduct, let alone fraud, on the part of the respondent. The dealings between respondent and appellant, Tri-Power, and any other party even remotely involved have been spotless. These cases thus simply do not apply.

The appellant cites Dakota Transfer v. Merchant's National

Bank, 86 N.W.2d 639 (North Dakota, 1957), to support its proposition. However, this case, as with the others, is not in point. In that case the drawer presented a worthless check to the bank and asked for a cashier's check in return. No such thing happened in this case. Tri-Power, not plaintiff, made a deposit with United and respondent was issued a cashier's check from Tri-Power's account at the request of Tri-Power and with the full consent and knowledge of appellant.

It is generally and widely recognized, with regard to a cashier's check, that such a check is a bill of exchange drawn by a bank upon itself and is accepted in advance by the act of its issuance. It is not subject to countermand by the issuing bank. 10 Am.Jur.2d Banks, Sec. 643, p. 614; Wertz v. Richardson Heights Bank and Trust, 495 S.W. 2d. 572 (Tex.); Bank of El Paso v. Powell, (Tex) 550 S.W.2d. 383; State ex.rel Chan Siew Lai v. Powell, (Mo.), 536 S.W.2d 14; Laurel Bank & Trust Co. v. City National Bank, 365 A2d 1222 (Conn.); Bank of Niles v. American State Bank, (Ill App.) 303 N.E.2d 186; Malphrus v. Home Savings Bank, 254 NYS 2d 980.

In the Malphrus case, supra., a depositor requested the bank to issue a cashier's check to the seller of a car to the customer, which the bank did. The bank then stopped payment on the check. The Supreme Court therein stated that the bank could not stop payment on the check, despite U.C.C. 4-104(1) defining a customer to include a bank carrying on business with another bank, and despite 4-403 of

the U.C.C. providing that customer could stop payment. The court said a bank not a party to a transaction between the two parties involved could have no standing or right to stop payment. See also 18 A.L.R. 3rd 138.

Another point to be made is that "once the cashier's check is negotiated to a holder in due course, the credit and resources of the payee are no longer primarily involved; it is then a primary obligation of the bank and, upon presentment of the check for payment, the bank must honor the check." 10 Am.Jur2d, Banks, Sec. 643, p. 615. It is also now well settled that a payee may be a holder in due course. 70A-3-302, U.C.A., 1953.

Thus, once a cashier's check is negotiated to a holder in due course, the credit and resources of the purchaser are no longer primarily involved or controlling; it is then a primary obligation of the bank and upon presentment of the check for payment, the bank must honor the check. See 70A-3-418, U.C.A., 1953; 10 Am.Jur.2d. Banks, Sec. 643, p. 615; Bank of Niles v. American State Bank, supra.; State ex. rel. Chan Siew Lai v. Powell, supra.; Citizens Bank of Bonneville v. National Bank of Commerce, 334 F2d 257 (10th Cir., 1964).

In May of 1979, the respondent filed an action in the United States Bankruptcy Court for the District of Utah, Central Division, seeking reclamation of the funds deposited by Tri-Power for Neve-Welch at United Bank. The receiver for Tri-Power then filed a Motion to Dismiss on the grounds that Neve-Welch, the plaintiff.

had failed to state a claim upon which relief could be granted, which the court denied. The second contention in the motion was that the issuance of the cashier's check discharged the underlying obligation.

On November 29, 1979, the Bankruptcy Court granted the motion to dismiss on this second ground, which decision we ask this Supreme Court to take judicial notice of. The memorandum decision of the Bankruptcy Court, the honorable Ralph R. Mabey presiding, is of importance here and we quote at length as follows:

A cashier's check is a bill of exchange drawn by a bank on its own funds (on itself). By assuming the dual position of drawer and drawee on the check, the bank injects into circulation an instrument which is considered as equivalent to, and a substitute for, the money it represents. Due to the confidence of the commercial world in such instruments when endorsed, such checks trade hands often and traverse many financial transactions. See Ross v. Peck Iron and Metal Co., 264 F2d. 262 (4th Cir. 1959); Schwartz v. Twin City State Bank, 201 Kan. 539, 441 P2d. 897 (1968).

Tri-Power authorized United Bank to issue such a check, and to make it payable to Neve-Welch. This was done to pay Neve-Welch the amount it had earned during the sale. Tri-Power could be said to have purchased the cashier's check from the bank in order to facilitate payment of the debt. By the act of issuance, United Bank assumed the status of drawer and drawee on the check, and by the act of receiving the check, Neve-Welch completed the transaction. Such a transaction is governed by UTAH CODE ANN. 70A-3-802 (1953), which states:

- (1) Unless otherwise agreed where an instrument is taken for an underlying obligation
- (a) the obligation is pro tanto discharged if the bank is drawer, maker or acceptor of the instrument, and there is no recourse on the instrument against the underlying obligor.

Thus, Neve-Welch's act of "taking" the check in recognition of the payment due discharged the underlying obligation of

of Tri-Power. See Meckler v. Highland Falls Savings and Loan Ass'n., 64 Misc. 2d. 407, 314 N.Y.S. 2d. 618 (Sup. Ct. 1979); Rushkin v. Central Federal Savings and Loan Ass'n., 3 U.C.C. Rptg. Serv. 150 (N.Y. Sup. Ct. 1966); Malphrus v Home Savings Bank, 44 Misc. 2d 705, 254 N.Y.S. 2d. 980 (Albany County Ct. 1965).

Since Tri-Power has been relieved from liability on the instrument, its credit and resources no longer are subject to the underlying obligation. Neve-Welch must now look to the issuing bank, which has the primary obligation on the check and is the guarantor of payment. See Ross v. Peck Iron and Metal Co., supra.; Meckler v. Highland Falls Savings and Loan Ass'n., supra.; Allison v. First National Bank of Albuquerque, 85 N.M. 283, 511 P2d 769, (N.M. App. 1973).

The second ground of defendant's motion is well taken. The cashier's check discharged the debt between Tri-Power and Neve-Welch in the stated amount and the motion to dismiss should be granted.

It is clear from this opinion, and the cases cited therein, that appellant took upon itself the obligation in exchange for the business and deposits of Tri-Power. If appellant failed to take the necessary precautions, an innocent third party should not bear the burden when it has relied on the issuance of the check.

The attitude and thinking of the appellant is evident in an interesting exchange that occurred during the course of the trial (BEGINNING AT PAGE 74 of the Transcript, line 14):

A. (Mr. Urry) Mr. Larner, one of the principals of the corporation, was at my desk and wanted to have us issue another cashier's check, and I said there wasn't sufficient funds, so I call down to Tri-Power to get in touch with Mr. Klein. He was not in and so I talked with a Mr. George Speciale, who was the attorney for Tri-Power, to confirm that those funds would be coming down to our bank.

Q. When did you become aware of the bankruptcy of Tri-Power?

MR. B. WALL: I object. I fail to see the relevancy. I don't think that has any bearing on these issues.

THE COURT: I am having a little trouble myself, Mr. Olsen. I suppose that the issue here is the contractual relationship between the bank and Mr. Welch, isn't it?

MR. OLSEN: No, I don't believe there is any contractual relationship between the bank and Mr. Welch. What we're----

THE COURT: If a bank gives me a cashier's check, isn't there at least an implied contractual relationship?

MR. OLSEN: Well, I think that is the gist of our case, that the cashier's check was issued without consideration and by mistake, and what we're saying is that Tri-Power was about to go under, that everybody down there knew it was going to go under, that there was a mad scramble to shift that loss off onto somebody else, and that the bank was the last to find out about it, and thus they were the ones who were left holding the sack.

THE COURT: Doesn't the bank have an obligation only to issue funds pursuant to what's on deposit in somebody's account?

I mean, if Mr. Urry got a call--I hate to argue in advance of the evidence--but it seems to me if Mr. Urry gets a call from Mr. Klein, saying "Issue a \$20,000 cashier's check and give it to Mr. Welch and charge our account with it", the first thing he would do is go to the account and make sure there are funds there to cover that; isn't that --

MR. OLSEN: That is correct.

THE COURT: Then if he determines there are funds there, issues the check. Shouldn't he charge that account for that amount of money--

MR. OLSEN: Issued, but if there are no funds and then he says, "We will need further inquiry" and it's represented to him that the funds will be brought in, and on the strength of that, he issues the cashier's check when in fact the bankruptcy was imminent. Everyone knew it was imminent except him. That's what we are getting at.

THE COURT: Well, my question--the question in my mind is whether or not there is either a contractual or statutory obligation and duty on the part of the bank to make sure that there are funds to cover the cashier's check when it is issued. I don't know whether there is or not.

As we have amply set forth above, virtually all of the cases cited state that the issuance of a cashier's check establishes a contractual relationship between the bank and the payee, which is somewhat analagous to a relationship on a promissory note.

What Mr. Olsen is arguing is that unilateral mistake was present and the bank should be relieved of payment. This is not the law. "A mistake of only one of the parties to a contract in the expression of his agreement or as to the subject matter does not affect its binding force, and ordinarily affords no ground for its avoidance, or for relief, even in equity." 17 C.J.S. Contracts, Sec. 143, pp. 888-889. Thus, where one party to a contract has made a mistake, but such mistake is not known to the other party to the contract, it is not invalidated. Russell & Pugh Lumber Co. v. U.S., 290 F2d 938; Heifetz Metal Drafts, Inc., v. Peter Kiewit Sons' Co., 264 F2d. 435.

From the excerpt above it is clear that appellant is characterizing the situation as one having a condition at the time of the issuance of the check where Mr. Olsen stated "We will need further inquiry", which characterization is totally incorrect. As can be seen from the record there was never any condition to the issuance of the check, especially between the bank and Mr. Welch. Mr. Urry himself stated that when Mr. Welch came in he told him nothing of the condition of the account nor did he give him any reason that the check would not be honored. (Tr. 83, lines 23-28).

While on this general point of argument, we should look at the accounting procedures of the bank. The appellant called Mrs. Nealley, head bookkeeper for the appellant bank. Several points in her testimony are quite interesting. First, she was unable to show or state that the bank had a record of the cashier's check in the documents with her in court that day. There was no record of Tri-Power's account having been charged with the check, nor was there any record of a stop payment or the effect that had on the account. (Tr. 94)

Second, she could not show what the running balance of the account was from late Friday until the close of business on the following Monday, the 23rd. (Tr. 96). She could not tell the court what the hourly balance of the account was between Friday and Monday afternoon. Thus, considering the testimony of the respondent's agents and Mr. Klein it is entirely possible and probable that at the time the check was issued to Mr. Welch that there were in fact sufficient funds in the account to cover the check. This is of great importance because the appellant has argued repeatedly that there were insufficient funds, if that has any relevancy, but according to their own bookkeeper the bank was unable to actually show what the account balance was at the time the check was issued. It would therefore appear that if in fact Mr. Urry was relying on a balance figure when he issued the check, which is questionable, he was relying on figures that were over two days old, and he was

working from knowledge he had obtained the previous week, Mr. Urry having been out of the bank for a number of days prior to Monday.

The foregoing authorities and arguments clearly support an affirmation of the judgment. The authorities are clear that a bank may not countermand its check, except in some very limited situations. The authorities cited by the appellant are not in point. The evidence of appellant is contradictory and unconvincing. The cases are virtually unanimous in holding that ". . . a cashier's check may be generally regarded as the substantial equivalent of a certified check in that neither can be countermanded and both circulate in the commercial world as primary obligations of the issuing bank as substitutes for the money represented."(Emphasis added Scharz v. Twin City State Bank, 441 P2d 897, at 899 (Kan. 1968).

If the respondent had received cash or had cashed the check at the bank after receiving it from Mr. Urry, it is clear that the bank would not be entitled to the monies. See for example, State of Penn. v. Curtiss Natl. Bank of Miami Springs, Fla., 427 F2d 395 (1970), wherein a check was issued to the payees at the request of bank customers. The check was then cashed and the bank sought to recover the funds from the payee. The court stated that "the bank, whether through its own negligence or through fraud practiced upon it by the borrowers, has made an improvident loan. A legal recourse is to seek a judgment against the borrowers and assert its rights in the collateral securing the loan; it has no right to recover the proceeds of the loan from persons who ultimately received

If this is the case, there is no sound reason for denying the respondent the relief he demands merely because he deposited the check rather than cashing it at the bank.

As the above decision states, the bank should have sought the monies from the bankruptcy receiver and/or Walker Bank, and not from the payee of the check. For these reasons alone the judgment should be sustained.

## POINT II

THE RESPONDENT IS A HOLDER IN DUE COURSE OF THE INSTRUMENT AND IS ENTITLED TO AFFIRMATION OF THE JUDGMENT AS A RESULT THEREOF

70A-3-418, U.C.A., 1953, reads as follows:

Except for recovery of bank payments as provided in the chapter on Bank Deposits and Collections (chapter 4) and except for liability for breach of warranty on presentment under the preceding section, payment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment.

Appellant thus rests his entire case on whether or not the respondent was a holder in due course.

70A-3-302, U.C.A., 1953 as amended, defines a holder in due course as follows:

"(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, U.C.A., 1953 as amended, defines taking for value as follows:

"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.

As to subsection (a) the respondent has performed all of the consideration--it has given \$22,020.80 to Tri-Power in exchange for a cashier's check. This money was in fact collected, turned over to Tri-Power and deposited in Tri-Power's account with appellant.

As to subsection (b), defendant has misconstrued the whole meaning of the comment and section cited. The promise involved does not concern what Tri-Power may or may not have told United Bank over the phone concerning deposits, etc., but the claims and promise with which the section are concerned deal with obligations between the payee, the plaintiff in this case, and the third party, to-wit: Tri-Power. Appellant's further allegation that plaintiff may or may not have a claim against Tri-Power again completely ignores the facts. Defendant continually ignores that over \$22,000 was given to Tri-Power, a fact which has never been refuted or questioned.

and an amount upon which Tri-Power agreed and has made no adverse claim or made any denial towards.

As to subsection (c) of the cited statute, a negotiable instrument was given to a third party, Tri-Power, by respondent, to-wit: cash, checks, etc., totalling over \$22,000.00.

The value given by the respondent is further emphasized by 70A-3-802 U.C.A., 1953, as amended, which states:

(1) Unless otherwise agreed where an instrument is taken for an underlying obligation

(a) the obligation is protanto discharged if a bank is drawer, maker or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor. . . ."

By issuing the cashier's check appellant bank paid and discharged the obligation owed to Neve-Welch by Tri-Power and thus prevented Neve-Welch from being able to collect on the obligation from any other source.

At the center of appellant's argument is the contention that respondent must have paid the consideration directly to the bank, but this conclusion and interpretation are simply not supported by the language of the cited statutes, their intent, nor by the cases.

Appellant ignores that a payee may be a holder in due course. See 70A-3-302, U.C.A., 1953 as amended. 11 Am. Jur 2d, Bills and Notes, p. 446, states that the ". . . payee, like any other holder, is regarded as prima facie a holder in due course. . . ."

In the case of Christensen v. Financial Service Co., (Utah, 1963), 377 P2d 1010, held, at page 1012, that neither failiure of

consideration nor any offset which maker might have had against the payee's father was available as a defense against the payee of the instrument where payee was a holder in due course of the note involved.

The court in Christensen then went on to say that a payee not a party to the original transaction, may be a holder in due course. The court cited with approval Flores v. Woodspecialties, Inc., 138 Cal. App.2d. 763, 292 P2d 626, wherein it was held that the bank involved was a holder in due course even though it was payee and the consideration it gave went to a third party.

There is also the requirement of acting in good faith to qualify as a holder in due course. 70A-1-201 (19) defines good faith as "honesty in fact in the conduct or transaction concerned."

"The test of good faith in Section 1-201(19) does not require the holder of an instrument regular on its fact to inquire as to possible defenses unless the facts known to the holder are such that the failure to inquire discloses the desire to evade knowledge for fear it would reveal a defense to the instrument." Midcontinent National Bank v. Bank of Independence, Mo. Ct. of Appeals, 16 U.C.C. Rptg. Serv. 1293, 523 S.W.2d 569; See also General Investment Corp v. Angelini 58 N.J. 396, 278 A2d 193.

The respondent acted in accordance to established procedures of United Bank and showed no bad faith in requesting the check which it had been informed by Tri-Power would be available to respondent on Monday morning. Respondent relied on appellant's inquiry into the account of Tri-Power, and appellant's judgment as to the status of that account, and respondent accepted the check as payment to discharge

the obligation in reliance upon the actions of appellant. If there has been any bad faith in this action it has certainly been on the part of the appellant. As stated previously, there has never been any evidence of any wrong doing on the part of respondent at any stage of these proceedings.

An additional requirement is that the payee act without notice of any defect or defense to the instrument. The cashier's check was issued to respondent without any conditions or qualifications, and it was regular on its face. Respondent had no actual or constructive notice of any defense to it at the time of issuance. It was in no position to have any knowledge. All knowledge of the account that was then available was in the sole hands of appellant.

It is thus clear from the foregoing that respondent was and is a holder in due course and entitled to the judgment on the check.

### POINT III

#### THE COURSE OF DEALING OF TRI-POWER AND APPELLANT PRECLUDES THE APPELLANT FROM STOPPING PAYMENT ON A CHECK TO AN INNOCENT THIRD PARTY--THE RESPONDENT

As previously stated, a cashier's check is to be considered to be an agreement analagous to a promissory note. If there is any question as to the purpose for the note or the circumstances or conditions under which it is issued, respondent believes that one is entitled to look at the prior course of dealing or usage of trade between the parties. 70A-2-202 U.C.A., 1953, as amended, permits a party to explain such agreement by refering to these sources.

70A-1-205, U.C.A., 1953, as amended, provides in paragraph (1) as follows:

A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

Subparagraph (2) provides as follows:

A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in questions. \* \* \*

It had been the practice of Tri-Power to call in and request the issuance of a cashier's check on numerous occasions prior to the time the check was issued to respondent, all of which was done without objection or complication. Tr. 58, beginning at line 18 is illustrative of this fact.

A. Yes. We was. It was not uncommon practice for me to call the bank and tell them to issue a cashier's check, especially during the last week or two of our business.

Most of the people that did business with us would not accept a personal company check, and so I would assume I made that kind of a phone call to Mr. Urry on 20 or 25 occasions to issue cashier's check.

Q. Did he ever object?

A. No. He deducted it from the account.

It is clear from these authorities that appellant had been in the practice of issuing cashier's checks at Tri-Power's request for some time, and that both Tri-Power and United Bank had been accustomed to operating in this fashion and knew what to expect from each other. Accordingly, appellant should not now be permitted to

alter this procedure in mid-stream. It is very clear that United Bank was accustomed to operating in this manner with Tri-Power and must be estopped from asserting any claims of wrong doing when United had issued numerous checks in the same manner as the one involved in this action.

#### POINT IV

THE RULING OF THE BANKRUPTCY COURT IS RES JUDICATA  
AS TO ALL ISSUES HEREIN AND RESPONDENT IS ENTITLED  
TO THE BENEFIT OF THAT COURT'S RULING

The effect of the ruling by the Federal Bankruptcy court is res judicata as to the issue of pro tanto discharge, consideration, and further has the effect of holding that the appellant is a holder in due course. These issues being determined in respondent's favor require an affirmation of the district court's judgment pertaining to amount of the cashier's check. That ruling also determined that United Bank was primarily responsible on the check and that Neve-Welch had the right, the sole right, to look to the bank for payment of the check.

#### POINT V

AS A MATTER OF PUBLIC POLICY THE JUDGMENT SHOULD  
BE AFFIRMED

Respondent makes the following two general arguments in connection with the need for affirmation as a protection of the interests of the public:

(1) Many public and commercial interests rely heavily upon the reliability of cashier's checks. For appellant to act irresponsibly and then claim foul invites all banks to undermine the reliability of cashier's checks and issue them carelessly, without regard to consequences and with impunity.

Appellant seeks to place cashier's checks in the same category as the personal checks of the general public. The result of such treatment would be to allow banks to issue checks at the request of individuals maintaining accounts at given banks without regard to the account balance, and then permit the banks to dishonor the checks, as they do with any other personal check, if there are insufficient funds in the account. Such action would vitiate the reliability placed in these checks and obviate a valuable tool of the commercial world.

(2) If appellant's position is accepted the payees of many cashier's checks would be placed in jeopardy of being left without a remedy should the check be issued on an account without sufficient funds. This because of the effect of 70A-3-802, U.C.A., 1953, as amended, which section discharges the underlying obligation. Should this occur, and should the innocent payee be left without a remedy against the irresponsible acts of the bank, then the payee is completely without a remedy against either party. It is therefore essential that the banks issue checks only in proper circumstances, i.e., where the funds are present, or where the bank is dealing with a reliable and good customer, as Mr. Urry characterized Tri-Power

(Tr. 82), is willing to take the risk of advancing the funds.

To avoid chaos and the loss of a valuable commercial tool, banks should be held to a strict standard and degree of liability when they issue such a check.

#### POINT VI

##### THE RELIANCE ON THE CHECK BY RESPONDENT PRECLUDES APPELLANT FROM STOPPING PAYMENT AND AVOIDING LIABILITY

70A-3-418, U.C.A., reads as follows:

Except for recovery of bank payments as provided in the chapter on Bank Deposits and Collections (chapter 4) and except for liability for breach of warranty on presentment under the preceding section, payment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment. (Emphasis added)

There has never been a showing of any kind of bad faith on the part of the respondent in this action. The question of their good faith is thus not in question. Did the respondent, then, change its position in reliance on the check. Obviously, it took the check with the understanding that the funds would be available and under the cited authorities the debt owed the respondent by Tri-Power was discharged. Had the bank told Tri-Power that it would not issue such a check the respondent could, in all likelihood, have made other arrangements to have secured the funds before any bankruptcy proceeding, was initiated, or action could have been taken against the receiver to collect any funds held by the receiver. However, respondent was precluded from

any of these options because of respondent's reliance upon the issuance of the check by appellant.

Further, the respondent, after having deposited the check, issued many checks on the account to pay off bills due to various suppliers and other creditors. All of this in reliance upon the validity of the check. (See Tr.20 of Mr. Welch's testimony to the end of his testimony.) The testimony by Mr. Welch is replete with facts indicating a changed position in reliance on the check, and how the stop payment adversely affected the respondent. There can be absolutely no question that the respondent changed its position in reliance of the check issued by appellant. For this reason alone the judgment should be affirmed.

#### POINT VII

#### THE EVIDENCE IS SUFFICIENT TO SUPPORT THE TRIAL COURT'S FINDINGS OF FACT

All of the facts and matters set forth in the appellant's brief were duly considered by the Trial Court. Findings of Fact based upon all of the evidence should be sustained. This Court has long recognized the rule of law that Findings of Fact adopted by the Trial Court should be sustained unless evidence clearly preponderates against same.

In the case of Elton v. Utah State Retirement Board, 28 Ut. 2d 368, 503 P2d 137 (1972), where the issue of the Trial Court's

findings was attacked by the appellant, this court succinctly stated that it is ". . . a well settled rule of judicial review that the trial court's findings will not be disturbed unless they are clearly against the weight of the evidence or if it manifestly appears the trial court misapplied the law to the established facts." See also Hardy v. Hendrickson, 27 Ut. 2d 251, 495 P2d 28.

In the case of Stucki v. Stucki, (Utah, 1977), 562 P2d 240, this court stated:

"This Court must review the whole evidence in the light most favorable to the findings of the Trial Court, and will not disturb them merely because it might view the matter differently, but only if evidence clearly preponderates against the findings."

See also the cases of Ridge v. Ridge, (Utah), 542 P2d 189; Stone v. Stone, 19 Ut 2d 378, 431 P2d 802; Higginson v. Westergard, (Idaho), 604 P2d 51.

The justification for this rule was clearly defined in Nokes v. Continental Mining & Milling Co., 6 Ut.2d 177, 308 P2d 954 (1957), wherein this court stated as follows:

". . . Credit should be indulged in favor of the findings of the trial court because of the advantages peculiar to his position in immediate contact with the trial. It is indeed often true, 'the manner hath more eloquence than naked words portend.' There are intangibles of expression and attitude which give color meaning not apparent from words alone. The trial judge feels the impact of the personalities of the parties and the witnesses: He is able to observe their appearance and behavior; their forthrightness or hesitancy in answering; their frankness and candor, or lack of it. Similarly revealing to him are indications of surprise, anger, resentment or vindictiveness, pleasure or other emotions which may be discerned from expressions of the countenance or voice. He also has some advantage in appraising their abilities to understand and their capacities

to remember. Furthermore, he is in a position to question the witness himself to clarify doubtful points or verify his impressions on the matters just mentioned. All of this combines to afford him better insight as to the truthfulness of the testimony offered than does a perusal of the cold record. It is a sound and well recognized policy of the law to repose some confidence in the verity of the actions of the trial court, and not to interfere with them unless it clearly appears that he is in error." (Footnote omitted)

Thus, in order for the appellant to prevail on appeal, the evidence must clearly show that the trial court's findings are arbitrary and capricious because they are not based upon sufficient evidence. In this matter a review of the evidence before the court shows sufficient and preponderating evidence to support the judgment of the trial court.

For example, the appellant's witnesses were unable to definitely say that there were no funds in the account at the time the check was issued, there was conflict as to the what transpired over the telephone between Tri-Power and Mr. Urry, with the witnesses for the respondent unequivocally stating that there was no discussion as to account balance, conditions on the issuance of the check, or anything else pertaining to the issues at hand. These are only some of the examples, and the trial court's belief in certain witness' testimony and the rejection of the testimony of others should be upheld. For this reason the judgment should be affirmed.

## POINT VIII

### THE DOCTRINE OF EQUITABLE ESTOPPEL REQUIRES AFFIRMATION OF THE JUDGMENT

The requirements to maintain an action of affirmation of a judgment on the grounds of equitable estoppel are set forth in the case of Celebrity Club, Inc. v. Utah Liquor Control Comm., (Utah, 1979) 602 P2d 689, at 694 as follows:

- (1) An admission, statement, or act inconsistent with the claim afterwards asserted,
- (2) action by the other party on the faith of such admission, statement, or act, and
- (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act.

As to point number one, it is clear from the facts that there were a number of statements, or acts on the part of the appellant which preclude it from obtaining the relief demanded in this appeal. We have already shown at length the conversations which went on between Tri-Power and the bank, which show, despite statements to the contrary by Mr. Urry, which the court chose not to believe, that there were no conditions as to the issuance of the check, there were no demands or anything else that would have put the respondent on notice that it should seek the funds from another source and thus enable it to secure its position.

The course of dealing over an extended period of time had been one of issuing checks on a telephone request, and oftentimes without there being sufficient funds in the account. All of these matters have been pointed out previously.

The following testimony of Mr. Klein from Tri-Power is most revealing: (Tr. 56, line 30, to page 58, line 1)

Q. Did Mr. Urry, in your opinion, know of financial problems of Tri-Power?

A. In my opinion, he did, yes.

Q. How do you know that he did?

A. I discussed it with him, and that was the reason for his meeting with Mr. Malecker and Mr. Urry coming to my office the week before the sale.

Q. How long had he known?

A. Well, you know, we had a hundred thousand dollars certificate of deposit on file with United Bank for six or seven months, and suddenly, after that, our funds started dwindling and we started having some problems, and he started getting a little inquisitive as to why, and Loren and I-- and Mr. Malecker and I would go to lunch from time to time, and I told him. He also knew we were looking for funds.

I was looking to borrow a substantial amount of money and we of course asked our banking source if they would loan it to us. So they were very well aware that we were having problems.

Q. Who is Mr. Malecker?

A. Mr. Malecker is, I guess, the manager of the bank.

Q. Was he present at this close-out sale?

A. Mr. Malecker?

Q. Yes.

A. Yes, he was.

Q. Do you recall when?

A. It was Saturday.

Q. What was he doing?

A. He came in for a television set.

Q. Had United Bank put any restrictions on your account during the months prior to the April 23rd date?

A. None whatsoever.

It is clear from this, and other, testimony, that the appellant knew all along the condition of Tri-Power and the status of the account and general financial condition of Tri-Power. The manager of the bank was even in the store during the sale buying a television set. Yet despite all of this, the appellant has the audacity to claim that they were completely in the dark and knew nothing about the problems of Tri-Power and were the last ones to know that anything at all was wrong.

As to requirements (2) and (3) requiring reliance to detriment, the actions, reliance and injury of the respondent have been amply pointed out in prior arguments, which actions and reliance on the part of Neve-Welch were the direct result of the issuance of the check. The case of Morgan v. Board of State Lands, (Utah, 1976), 549 P2d 695, states as follows:

Estoppel is a doctrine of equity purposed to rescue from loss a party who has, without fault, been deluded into a course of action by the wrong or neglect of another. The measure we apply to plaintiffs' claim of estoppel is an adaptation to this case of the standard heretofore approved by this court: Estoppel arises when a party (defendant Board) by his acts, representations, or admissions, or by his silence when he ought to speak, intentionally or through culpable negligence, induces another (plaintiffs) to believe certain facts to exist and that such other (plaintiffs) acting with reasonable prudence and diligence, relies and acts thereon so that he will suffer an injustice if the former (Land Board) is permitted to deny the existence of such facts. (Page 697)

This decision squares with the facts of this case. The bank

had total control of the situation by being able to issue or not issue the check and all parties involved relied on the bank's knowledge, actions and representations. The respondent relied on these actions to its detriment. For these reasons the judgment should be affirmed.

#### CONCLUSION

The law is clear that when the bank issued the check a contractual relationship was established between it and Neve-Welch Furniture. Neve-Welch acted in reliance on the actions of the bank, and itself was completely free of any blame or wrong doing. The respondent collected the money and delivered it to Tri-Power. There is no question that the amount claimed was infact collected and turned over to the Tri-Power and then deposited by Tri-Power with the bank. There is thus no question that the respondent is a holder in due course and that it acted in good faith, and relied upon the issuance of the check, all to its detriment.

The only party in this case who is guilty of wrong doing is the bank. Appellant knew all along of the circumstances of Tri-Power, yet now claims it knew nothing and is a completely innocent party. The facts simply do not support this or any other contention of the appellant. For these reaons, and the other arguments advanced by respondent above, we respectfully urge that that portion of the judgment for \$22,020.80 against appellant

CROSS APPEAL

By virtue of the Notice of Preservation of Issue on Appeal (R. 66), the respondent appeals from the failure of the District Court to grant respondent's Motion for Partial Summary Judgment (R. 19-20), which shall be set forth hereinbelow as issue number one of the Cross Appeal.

By virtue of the Notice of Cross Appeal (R. 148-149), the respondent appeals from the District Court's ruling at the trial of this case denying damages to the respondent, which question shall form the second issue of the Cross Appeal below.

RELIEF SOUGHT ON CROSS APPEAL

The respondent seeks to have a determination made that as a matter of law the respondent was entitled to Summary Judgment for the amount of the check and no further proceedings on said issue should have transpired.

The respondent further seeks to have the trial court's decision denying damages to respondent reversed and remanded for a determination of the amount of damages due.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN REFUSING TO  
GRANT RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The respondent herein filed a Motion for Partial Summary Judgment (R. 19-20) wherein respondent was seeking judgment for the amount of the check and reserving the issue of damages to the time of trial. The factual allegations of appellant's case were supported by appellant's Affidavit in Opposition to Motion for Summary Judgment, (R. 44-46), and Answers to Interrogatories (R. 27-37).

The respondent's primary factual position was supported by various affidavits (R. 41-43, and 38-40). Subsequently, the respondent filed an ~~Objection~~ to Affidavit of Defendant in Opposition to Motion for Summary Judgment (R. 63), and Objection to Answers to Interrogatories (R. 62), which were filed with the court at the time of the hearing on the motion. These objections set forth the grounds for objecting to various statements made by appellant in the Affidavit and Answers to Interrogatories, which included objections based on hearsay, lack of foundation, lack of relevancy, lack of responsiveness, etc.

It is the position of the respondent that had these objections been sustained there would have been no factual issues left for trial, and that as a matter of law the respondent would have then been entitled to judgment as requested in the motion.

An examination of the pleadings involved clearly point out that all of the important statements made by appellant's agent in the Affidavit and Answers are based on hearsay, lack foundation, and have other problems which require that they be ignored for

However, the court committed error by refusing to sustain the objections. As a matter of fact, and most important of all, the court failed to even rule on the objections and without giving the objections the credit due went ahead, despite the objections, and denied the motion.

Accordingly, the court should have ruled on the objections, the court should have sustained the objections, and had this occurred the factual issues would have remained in favor of the respondent. The factual issues being in favor of the respondent the respondent was then entitled to judgment as a matter of law. See Fox v. Allstate Ins. Co., 22 Ut.2d 383, 453 P2d 701; Rule 56(e), U.R.C.P.

For these reasons the ruling denying Motion for Summary Judgment should be reversed.

## POINT II

### THE DISTRICT COURT COMMITTED ERROR BY REFUSING TO GRANT DAMAGES TO THE RESPONDENT AT THE TIME OF TRIAL

As is apparent from the arguments and authorities advanced by the respondent above, the issuance of a cashier's check by a bank constitutes a separate agreement to pay the amount of the check, which most authorities liken to a situation where a promissory note is involved. In this matter the failure of the bank to pay and honor the check constitutes a breach of that agreement or contract. Accordingly, the issue arises as to what

damages the respondent is entitled to as a result of this breach, in addition to the amount of the check.

In this matter the respondent alleges error by the court in failing to award any damages whatsoever, including punitive, and consequential, including loss of profits, damage to credit reputation, etc.

70A-4-402, U.C.A., 1953 as amended, provides as follows:

A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. When the dishonor occurs through mistake liability is limited to actual damages proved. If so proximately caused and proved damages may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case." (Emphasis added)

"Wrongful dishonor" means a dishonor done in a wrong manner, unjustly, unfair, in a manner contrary to justice. See "Wrongful" 46 Words and Phrases, p. 488.

"Mistaken dishonor" means a dishonor done erroneously, unintentionally, a state of mind that is not in accord with the facts. See "Mistake" 27 Words and Phrases, p. 568. A wrongful dishonor may also include checks issued through mistake. See Loucks v. Albuquerque National Bank, 76 N.M. 735, 745, 418 P2d 191, 198 (1966).

An intentional or wilful or malicious dishonor permits an award of punitive damages. See Allison v. First National Bank of Albuquerque, 511 P2d 769.

"Consequential damages" are not defined in the Commercial Code, but they are in other sources. In 3 Anderson, Uniform Commercial Code, 2nd Ed., p. 306, the author states as follows:

"Damages for Wrongful Dishonor. A payor bank is liable to its customer for the damages proximately caused by the wrongful dishonor of an item. The damages may include consequential damages (such as those sustained in connection with an arrest and prosecution), provided they are proximate damages. Whether the consequential damages are proximately related to the wrongful dishonor is a question of fact and not of law.

"Consequential damage" is defined in Black's Law Dictionary, Third Ed., as "such damage, loss or injury as does not flow directly and immediately from the act of the party, but only from the consequences or results of such act."

"Consequential damage" includes injuries to credit as a result of wrongful dishonor. Loucks, supra. It also includes ". . .any . . . consequential harm, loss or injury proximately caused by a wrongful dishonor. . . ." A.F.N.B. v. Flick, 146 Ind. App. 122, 132, 252 N.E.2d 839, 845 (1969).

It is also well recognized that damages may be recovered in many instances where there has been a breach of contract, including damages for lost profits.

"Under most authorities, as a general rule a party not in default is, in case of a breach of contract due to the fault or omission of the other party, entitled to recover profits which would have resulted to him from performance. In order that it may be a recoverable element of damages, the loss of profits must be the natural and proximate, or direct, result of the breach complained of and they must also be capable of ascertainment with reasonable or sufficient certainty, or there must be some basis on which a reasonable estimate of the amount of profit

can be made; absolute certainty is not called for or required." 25 C.J.S., Damages, Sec. 43, pp. 742-746. (Emphasis added). (See many cases thereunder in support of this statement)

As to our allegation of lost profits, several ways of proof are available to the plaintiff in such an action. Obviously, if the facts point to a definite loss situation and particular facts resulting in a definite loss then that amount is obviously recoverable. The plaintiff is also permitted to ". . . show the actual profits and receipts realized in the past in the particular business or enterprise in order to furnish a reasonable basis for estimating the amount of profits lost by him." 25A C.J.S., Damages, Sec. 158(b), p.66. This Supreme Court has followed this rule by stating in the case of Clawson v. Walgreen Drug, 162 P2d 759, that the measure of damages for impairment of earning capacity is the difference between the amount which plaintiff was capable of earning before his injury and that which he was capable of earning thereafter.

In the case of Jenkins v. Morgan, 260 P2d 532, at 535, (Utah, 1953), this court stated:

". . . Before special damages for loss of profits to a general business occasioned by the wrongful acts of another may be recovered, it must be made to appear that the business had been in successful operation for such a period of time as to give it a permanency and recognition, and that such business was earning a profit which could be reasonably ascertained and approximated"

These cases and authorities only require, after showing the losses sustained, that such losses were the natural and probable

consequence of the wrongful act of the defendant or defaulting party. In this action the wrongful act is the failure of the bank to honor the check, which they had an obligation to honor and pay.

Respondent has also alleged various other damages, which include loss of credit or damage to business credit and reputation. It is well recognized that the loss of business credit and reputation, injury to business and other pecuniary losses constitute proper elements of damages. (See 25 C.J.S., Damages, Sec. 55, pp. 806-808). See also C.C.E. Federal Credit Union v. Chesser, 258 S.E.2d 2 (Ga., 1979), for damages to credit.

See also, for example, the case of Air Technology Corp. v. General Electric Co., (Mass) 199 N.E.2d 538, wherein the court held that damages for loss of business opportunity were to cover all aspects of opportunity of which plaintiff had been deprived as long as the several elements of damages were reasonably ascertainable.

In this action the damages are ascertainable, and the most important authority cited, 70A-4-402, U.C.A., together with the Loucks and Allison cases cited supra. clearly provide that a wrongful, improper, etc., dishonor of a cashier's check by a bank is a basis for awarding all consequential damages, which the evidence in this case clearly shows lost profits, damage to credit reputation, etc., etc.

The testimony of Mr. Welch, beginning at Tr. 21 to the end is replete with facts evidencing the extent of the lost profits, lost opportunities, damage to credit reputation, etc., which damages are considerable. While it may not seem as though the loss of the amount of the check would affect a business to the extent claimed, the lengthy testimony of Mr. Welch details the peculiar situation of the respondent corporation and the effect the lost money had on the company.

Exhibits 6-P, 8-P, and 9-P also provide additional detail and support to the losses claimed.

#### CONCLUSION

Based upon the authorities cited the respondent is entitled to damages as a matter of law if respondent is able to prove the damages. These damages were proved by extensive, detailed testimony by Mr. Welch, and the exhibits he prepared and submitted, which exhibits were received by the court. Therefore, the judgment denying such damages was in error and should be reversed.

RESPECTFULLY SUBMITTED

BRANT H. WALL  
GREGORY B. WALL  
Attorneys for Plaintiff-Respondent

CERTIFICATE OF DELIVERY

This is to certify that two true and correct copies of the foregoing Brief of Respondent were personally delivered to Don Olsen, attorney for appellant, 1100 Boston Building, Salt Lake City, Utah, 84111, on the \_\_\_\_\_ day of August, 1980.

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GREGORY B. WALL