

1990

Vitamin Products Inc. v. Spectummedical Inc. : Brief of Respondent

Utah Court of Appeals

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Recommended Citation

Brief of Respondent, *Vitamin Products Inc. v. Spectummedical Inc.*, No. 900208 (Utah Court of Appeals, 1990).
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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 900208CA IN THE COURT OF APPEALS

FOR THE STATE OF UTAH

VITAMIN PRODUCTS, INC.)

Respondent/Plaintiff,)

vs.)

SPECTRUMEDICAL, INC., a Utah) Case No. 900208-CA

Appellant/Defendants.)

BRIEF OF RESPONDENT

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Argument Priority Classification No. 14.b.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES	1
FACTS	2
ARGUMENT	2
Point I: Appellant, J.E. Dresel, Admitted by Failing to Answer the Request for Admissions.....	2
Point II: The Court Does Not Have Jurisdiction to Reconsider Appellant's Motion to Set Aside The Summary Judgment	6
Point III: Any Person Who Issues an Insufficient Funds Check Whether as Corporate Agent or Otherwise, is Liable to the Holder..	7
CONCLUSION	7
ADDENDUM	

TABLE OF AUTHORITIES

TABLE OF CASES

<u>Bennion vs. Hansen</u> 699 P.2d 757, 760 (Utah 1985)	6
<u>Conder v. A. L. Williams & Assoc., Inc.,</u> 739 P.2d 634, 636 (Utah Ct. App. 187)	6
<u>Drury vs. Lunceford</u> 24 Utah 2d 211, 469 P.2d 1 (1970) .	5
<u>Jensen v. Pioneer Dodge Center, Inc.</u> 702 P.2d 98 (Utah 1985)	3
<u>People ex. rel. Gallagher v. District Court</u> 666 P.2d 550, 553 (Colo. 1983).	6
<u>Richardson v. Grand Central Corp.</u> 572 P.2d 395, 397 (Utah 1977)	6
<u>Schmidt v. Pioneer Dodge Center, Inc.,</u> 702 P.2d 98 (Utah 1985)	3
<u>W. W. and W. B. Garnder, Inc. vs. Park West Village</u> <u>Inc.</u> 568 P.2d 734 (Utah 1977)	2
<u>Whittaker v. Nikols,</u> 699 P.2d 685 (Utah 1985).....	3

STATUTES AND RULES

Utah Code Annot. Section 7-15-1(1) (1953 as amended) ...	1
Utah R. Civ. Proc. 36(a) (1987).....	2
Utah R. Civ. Proc. 37	8

STATEMENT OF JURISDICTION

THIS COURT IS AUTHORIZED BY SECTION 78-2a-3(C), Utah Code Annotated (1953 as amended) to hear this appeal from the Third Circuit Court, Salt Lake Department, State of Utah. This is an action to recover monies due and owing from the issuance of insufficient funds checks.

CONSTITUTIONAL PROVISIONS AND STATUTES

Utah Code Annotated Section 7-15-1(1) (1953 as amended):

"Any person who makes, draws, signs or issues any check, draft, order or other instrument upon any depository institution, whether as corporate agent or otherwise, for the purpose of obtaining from any person, firm, partnership, or corporation any money, merchandise, property, or other thing of value or paying for any service, wages, salary, or rent, shall be liable to the holder of the check, draft, order, or other instrument if the check, draft, order or other instrument is not honored upon presentment and is marked "refer to "maker" or the account with the depository upon which the check, draft, order or other instrument has been made or drawn does not exist, has been closed or does not have sufficient funds or sufficient credit with the depository for payment of the check, draft, or other instrument in full.

Utah R. Civ. Proc. 36 (a)
Utah R. Civ. Proc. 37

FACTS

The appellant in this case is the maker of two checks; one in the sum of \$3,000.00 and the other in the sum of \$5,000.00 which failed to clear the bank. Request for Admissions were forwarded to the Defendant with notice that if the same were not answered timely, the same would be deemed admitted.

The lower court granted Respondent's Motion for Summary Judgment on the grounds Appellant had failed to answer Respondent's Request for Admission.

That after the Appellant was served with an Order to Show Cause, Appellant made a Motion to Set Aside the Summary Judgment. Appellant's Motion was argued and thereafter, Appellant's Motion to Set Aside the Summary Judgment was denied and Appellant appealed therefrom.

ARGUMENT

POINT I

APPELLANT, J.E. DRESEL, ADMITTED BY FAILING TO ANSWER THE REQUEST FOR ADMISSIONS.

Rule 36(a) of the Utah Rules of Civil Procedure provides in pertinent part:

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty (30) days after service of the

request or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney...

In a series of cases, the Utah Supreme Court has strictly construed this provision of Rule 36(a). The first case interpreting Rule 36(a) is W.W. and W.B. Gardner, Inc. v. Park West Village, Inc., 568 P.2d 734 (Utah 1977). The Park West court held that when the party to whom the requests for admissions are directed fails to respond within thirty (30) days, and also fails to seek leave of the court for additional time to answer the requests or object to the requests, the requests for admissions are deemed admitted. 568 P.2d at 736.

This issue was also presented to the Utah Supreme Court in Schmidt v. Billings, 600 P.2d 516 (Utah 1979), where the court reaffirmed the Park West holding. In 1985, the Supreme Court again considered the matter in Whittaker v. Nikols, 699 P.2d 685 (Utah 1985). In Whittaker, the Plaintiff served the Defendant with a Request for Admissions and Defendant failed to respond. At trial, the Plaintiff moved for Summary Judgment based upon the Defendant's failure to respond to the requests for admissions. The trial court denied the motion. At the conclusion of the evidence, the court gave a directed verdict to the defendant.

The Supreme Court reversed the trial court and ruled that when the requests for admissions are not responded to by the Defendant within the time limit, those matters deemed admitted are conclusively established as true, unless the trial court on motion by Defendants permits withdrawal or amendment of the admissions." 699 P.2d at 686 (emphasis added).

The most recent case to come before the Utah Supreme Court on this issue is Jensen v. Pioneer Dodge Center, Inc., 702 P.2d 98 (Utah 1985). In Pioneer Dodge, the Supreme Court noted that the trial court does not have discretion to unilaterally disregard the admissions. 702 P.2d at 100. Upon motion by the responding party, the trial court has discretion to permit withdrawal or amendment of the admissions only when the presentation of the merits of the action will be served and there is no prejudice to the party obtaining the admissions. Id.

Applying the facts in this matter to the law reviewed above, it is clear that the Requests for Admissions contained in Exhibit "C" are admitted and may form the basis for this Summary Judgment motion. The Requests for Admissions were mailed on May 26, 1989, and they have never been answered. A Motion for Summary Judgment was made on September 20, 1989.

Statements in Appellant's Requests for Admissions conclusively establish a prima facie case Appellant executed the

insufficient funds checks and said sums are due and owing to the Respondent.

Appellant, J.E. Dresel, admitted by failing to answer the request for admissions the following:

"a. Defendant J. E. Dresel is requested to admit that he signed and executed the insufficient fund checks, marked Exhibit "A" and "B" and by this reference incorporated herein.

b. If Defendant, J. E. Dresel, denies execution of Exhibit "A" and "B", Defendant, J. E. Dresel, is requested to state in detail the factual basis of said denial.

c. Defendant J. E. Dresel is requested to admit there is due and owing to the Plaintiff the sum of \$8,0000.00 represented by the insufficient fund checks marked Exhibit "A" and "B" attached hereto and by this reference incorporated herein.

d. If Defendant J. E. Dresel denies Request for Admission No. 3, Defendant, J.E. Dresel is requested to state the factual basis of said denial."

Appellant J. E. Dresel is personally liable on the insufficient funds checks. Appellant, J.E. Dresel, admitted he signed the checks marked Exhibits A" and "B" which checks did not clear the bank. J. E. Dresel is the maker of said checks marked Exhibit "A" and "B" and is personally liable under Utah Law and said sums are owed to Respondent.

POINT II

THE COURT DOES NOT HAVE JURISDICTION TO
RECONSIDER APPELLANT'S MOTION TO SET ASIDE
THE SUMMARY JUDGMENT

The reasoning behind such a ruling was articulated in DRURY VS. LUNCEFORD 24 Utah 2d 211, 469 P.2d 1 (1970) where the court ruled as follows:

When [a motion has been made] and the court has ruled upon the motion, if the party ruled against were permitted to go beyond the rules, make a motion for reconsideration, and persuade the judge to reverse himself, the question arises, why should not the other party who is now ruled against be permitted to make a motion for re-reconsideration, asking the court to again reverse himself?

...[The] new rules of procedure ... were designed to provide a pattern of regularity of procedure which the parties and the courts could follow and rely upon ... In order to avoid such a state of indecision for both the judge and the parties, practical expediency demands that there be some finality to the actions of the court; and he should not be in the position of having the further duty of acting as a court of review upon his own ruling.

In Bennion vs. Hansen, 699 P.2d 757, 760 (Utah 1985), the "law of the case" doctrine is employed to avoid delay and to prevent injustice. "The purpose of [this] doctrine is that in the interest of economy of time and efficiency of procedure, it is desirable to avoid the delays and the difficulties involved in repetitious contentions and rulings upon the same propositions in the same case". Richardson v. Grand Central Corp., 572 P.2d 395, 397 (Utah 1977). See Conder v. A.L. Williams & Assoc., Inc., 739 P.2d 634, 636 (Utah Ct. App. 1987). "Although a trial court is not inexorably bound by its own precedents, prior relevant rulings made in the same case are generally to be followed." People ex. rel. Gallagher v. District Court, 666 P.2d 550, 553 (Colo. 1983).

POINT III

ANY PERSON WHO ISSUES AN INSUFFICIENT FUNDS CHECK, WHETHER AS CORPORATE AGENT OR OTHERWISE, IS LIABLE TO THE HOLDER.

1. Section 7-15-1(1), Utah Code Annotated provides:

(1) Any person who makes or..issues any check... whether as corporate agent or otherwise...which is not honored... and marked "refer to maker" shall be liable to the holder of the check.

2. Defendant, J.E. Dresel, is a maker of the insufficient funds checks marked Exhibits "A" and "B" and is personally liable under Utah Law.

3. Defendant failed to answer Plaintiff's Request for Admissions on May 26, 1989. The Court granted a Summary Judgment on October 10, 1989.

4. The Court has no Jurisdiction to reconsider its granting of a Summary Judgment.

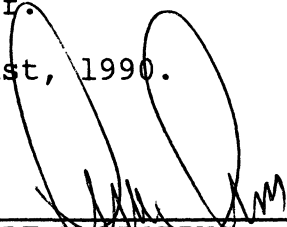
CONCLUSION

In the action before the Court, the Appellant has inexcusably failed to timely respond to Requests for Admissions within thirty days after service. Appellant made no attempt to obtain an extension of time and has never answered said Request for Admissions to date. Appellant's Request for Admissions are not only deemed admitted pursuant to Rule 36(a), but are conclusively established as true under Rule 36(b). The Utah

Supreme Court's strict construction of Rule 37 of the Utah Rules of Civil Procedure clearly supports this conclusion. Because the Requests for Admissions establish a prima facie case in favor of the Plaintiff, Plaintiff is entitled to Summary Judgment as a matter of law.

The Court does not have jurisdiction to reconsider its own ruling and to reverse itself.

DATED this 31st day of August, 1990.



DALE M. DORIUS
Attorney for Respondent
P. O. Box U
29 South Main Street
Brigham City, UT 84302

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Brief to Appellant's attorney, BRENDA L. FLANDERS, at 1111 Brickyard Road, Suite 200, Salt Lake City, UT 84106, this 31st day of August, 1990.



DALE M. DORIUS

EXHIBIT 22 A

SPECTRUMEDIC INC.

195 WEST COTTAGE AVENUE (801) 255-5775
SANDY, UTAH 84070

No 2017

SANDY STATE BANK
140 West 9000 South
Sandy, Utah 84070
97-247/1243

----- Three thousand and no/100 -----

DATE AMOUNT

8-30-85 \$ 3000.00

R Vitamin Products, Inc.

John
Patricia REFER TO MAKER

⑈0002017⑈ ⑆124302477⑆ 91013813⑈

⑈0000300000⑈

City Mountain Bank Note

SPECTRUMEDICAL, INC.

195 WEST COTTAGE AVENUE (801) 255-5775
SANDY, UTAH 84070

01962

SANDY STATE BANK
140 West 9000 South
Sandy, Utah 84070
97-247/1243

----- Five thousand and no/100 -----

DATE AMOUNT

7-17-85 \$ 5000.00

R Vitamin Products, Inc.

John REFER TO MAKER
Patricia REFER TO MAKER

⑈0001962⑈ ⑆13017⑆ 91013813⑈

⑈0000500000⑈

Mountain Bank Note

EXHIBIT

11 B

FOR DEPOSIT ONLY
VITAMIN PRODUCTS, INC
02-22-114-1

AG 8 12 P
SALT LAKE CITY
PAY ANY BANK
1240-0031-3

AG 8 12

AUG 8 8.85

CANCELLED
55-101

AUG 16 8.85

CANCELLED
55-101

08 85 30

PAY ANY BANK E.E.B.
UNITED COMMERCIAL TR. CO.
ELIZABETH, NEW JERSEY

55-101

SE 8 12 P
SALT LAKE CITY
PAY ANY BANK
1240-0031-3

DEPOSIT ONLY
VITAMIN PRODUCTS, INC
02-22-114-1

10151

08 85 30

1240-0031-3

1240-0031-3

Exhibit "C"

DALE M. DORIUS #0903
Attorney for:
P.O. Box U
29 South Main Street
Brigham City, Utah 84302
723-5219

IN THE CIRCUIT COURT OF SALT LAKE COUNTY, STATE OF UTAH
SALT LAKE DEPARTMENT

VITAMIN PRODUCTS, INC.,	(REQUEST FOR ADMISSIONS TO
Plaintiff,	(DEFENDANT, J. E. DRESEL,
vs.	(INDIVIDUALLY
SPECTRUMEDICAL, INC.,	(
a Utah Corporation,		
J. E. DRESEL and PATRICIA M.	(
WOLFF		
	(Civil No. 860049146CV
Defendants.	(

COMES NOW the Plaintiff, VITAMIN PRODUCTS, INC., and submits the following Request for Admissions to the Defendant, J. E. DRESEL, individually, to be answered under oath within thirty (30) days, pursuant to Utah Rules of Civil Procedure. Defendant J. E. DRESEL is further given Notice if said Request for Admissions are not answered timely, the same will be deemed admitted.

1. Defendant J. E. DRESEL is requested to admit that he signed and executed the insufficient fund checks, marked Exhibit "A" & "B" and by this reference incorporated herein.

2. If Defendant, J. E. DRESEL, denies execution of Exhibit "A" and "B", Defendant J.E. DRESEL, is requested to state in detail the factual basis of said denial.

3. Defendant J. E. DRESEL is requested to admit there is due and owing to the Plaintiff the sum of \$8,000.00 represented by the insufficient fund checks marked Exhibit "A" and "B" attached hereto and by this reference incorporated herein.

4. If Defendant J. E. DRESEL denies Request for Admission No. 3, Defendant J. E. DRESEL is requested to state the factual basis of said denial.

DATED this 26th day of May, 1989.

151
DALE M. DORIUS
Attorney for Plaintiff
29 South Main
P. O. Box U
Brigham City, UT 84302

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Request for Admission to Defendant J. E. Dresel, Individually to the Defendant, J. E. DRESEL at 8396 South Supernal Way, Salt Lake City, UT 84121, this 26th day of May, 1989.

151
DALE M. DORIUS

History: C. 1953, 7-14-4, enacted by L. 1961, ch. 16, § 12.

7-14-5. Reciprocal exchange of information authorized.

One or more financial institutions may jointly agree with one or more other financial institutions for the reciprocal exchange of any information authorized to be reported by the provisions of this chapter. Such reciprocal exchange of information or the acts or refusals to act of one or more recipients because of such information shall not constitute a boycott or blacklist, or otherwise be a basis for liability to any person on the part of any participant in the reciprocal exchange of information authorized by this chapter.

History: C. 1953, 7-14-5, enacted by L. 1961, ch. 16, § 12.

CHAPTER 15 FRAUDULENT CHECKS

Sunset Act. — Section 63-55-7 provides that Title 7 terminates on July 1, 1989.

Section
7-15-1 Civil liability of issuer — Notice
7-15-2 Notice form

7-15-1. Civil liability of issuer — Notice.

(1) Any person who makes, draws, signs, or issues any check, draft, order, or other instrument upon any depository institution, whether as corporate agent or otherwise, for the purpose of obtaining from any person, firm, partnership, or corporation any money, merchandise, property, or other thing of value or paying for any service, wages, salary, or rent, shall be liable to the holder of the check, draft, order, or other instrument if the check, draft, order, or other instrument is not honored upon presentment and is marked "refer to maker" or the account with the depository upon which the check, draft, order, or other instrument has been made or drawn does not exist, has been closed, or does not have sufficient funds or sufficient credit with the depository for payment of the check, draft, or other instrument in full.

(2) The holder of the check, draft, order, or other instrument which has been dishonored may give written or verbal notice of dishonor to the person making, drawing, signing, or issuing the check, draft, order, or other instrument and may impose a service charge not to exceed \$10 in addition to any contractual agreement between the parties. Prior to filing an action based upon this section, the holder of a dishonored check, draft, order, or other instrument shall give the person making, drawing, signing, or issuing the dishonored check, draft, order, or other instrument written notice of intent to file civil action, allowing the person seven days from the date on which the notice was mailed to tender payment in full, plus the service charge imposed for the dishonored check, draft, order, or other instrument.

(3) In a civil action the person making, drawing, signing, or issuing the check, draft, order, or other instrument shall be liable to the holder of it for

the amount of the check, draft, order, or other instrument, for interest, and for all costs of collection, including all court costs and reasonable attorney's fees.

History: C. 1953, 7-15-1, enacted by L. 1981, ch. 16, § 13; L. 1986, ch. 29, § 1.

Repeals and Enactments. — Laws 1981, ch. 16, § 1 repeals former §§ 7-15-1, 7-15-3 (L. 1969, ch. 240, §§ 1, 3, 1977, ch. 15, §§ 1, 3, 1979, ch. 92, §§ 1, 2), relating to fraudulent checks. Laws 1981, ch. 16, § 13 enacts present §§ 7-15-1 and 7-15-2. Former section 7-15-2 was repealed by Laws 1979, ch. 92, § 3.

Amendment Notes. — The 1986 amendment, effective April 28, 1986, substituted "\$10" for "\$5" in the first sentence of Subsection (2) and made stylistic changes throughout the section.

Cross-References. — Criminal penalties for issuing bad check, § 76-6-505.

NOTES TO DECISIONS

Insufficient funds.

—Knowledge of holder.

There was no fraudulent issuance of a check, and plaintiff was not entitled to attorney fees in an action on the check, where the check was issued to pay on a past due account, plaintiff

accepted it with knowledge that there were insufficient funds to cover it and agreed to hold it for two weeks before presenting it to the bank. *Howells, Inc. v. Nelson*, 565 P.2d 1147 (Utah 1977)

COLLATERAL REFERENCES

Utah Law Review. — Criminal and Civil Liability for Bad Checks in Utah, 1970 Utah L. Rev. 122

Attorney's Fees in Utah, 1984 Utah L. Rev. 553

Am. Jur. 2d. — 12 Am. Jur. 2d Bills and Notes § 1119

C.J.S. — 10 C.J.S. Bills and Notes §§ 35, 380

A.L.R. — Personal liability of officers or directors of corporation on corporate checks issued against insufficient funds, 47 A.L.R.3d 1250

7-15-2. Notice form.

(1) "Notice" means notice given to the person making, drawing, or issuing the check, draft, order, or other instrument either in person or in writing. Such notice, in writing, shall be conclusively presumed to have been given when properly deposited in the United States mails, postage prepaid, by certified or registered mail, return receipt requested, and addressed to such signer at his address as it appears on the check, draft, order, or other instrument or at his last known address.

(2) Written notice as applied in Subsection 7-15-1(2) shall take the following form:

Date: _____

To: _____

You are hereby notified that check(s) described below issued by you has been returned to us unpaid:

Instrument date: _____

Instrument number: _____

Originating institution: _____

Amount: _____ Reason for dishonor (marked on instrument): _____

The foregoing instrument together with a service charge of \$10 must be paid to the undersigned within seven days from the date of this notice in