1982

Richard A. Christenson v. Commonwealth Land Title Insurance Company : Brief of Appellant

Utah Supreme Court

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In The
SUPREME COURT
Of The
STATE OF UTAH

RICHARD A. CHRISTENSON
Trustee for CAPE TRUST,

Plaintiff-
Respondent,

Supreme Court
No. 18330

vs.

COMMONWEALTH LAND TITLE
INSURANCE COMPANY,

Defendant-
Appellant.

RESPONDENT'S BRIEF

Appeal from the Third Judicial District Court
Of Salt Lake County, Honorable Kenneth Rigtrup, Judge

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NATURE OF THE CASE

This is a case in negligent misrepresentation or constructive fraud against the appellant, a title insurance company, for making misrepresentations which culminated in an Ackowledgment signed by said appellant to the effect that appellant had the beneficial interest in five (5) promissory notes secured by trust deeds on five (5) parcels of real property when in fact it did not.

DISPOSITION IN LOWER COURT

The case was tried without a jury before the Honorable Kenneth Rigtrup and resulted in a judgment against the appellant and in favor of the respondent. The lower court subsequently

denied appellant's post trial motions for a new trial and/or to alter and amend the Findings of Fact, Conclusions of Law and Judgment.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the decision of the trial court.

STATEMENT OF FACTS

Cape Trust (hereinafter referred to as respondent) does not entirely agree with the statement of facts in appellant's brief. (Appellant will hereinafter be referred to as "Commonwealth".) One of the problems with Commonwealth's statement of facts is that it states several immaterial facts so as to confuse the facts of the case. There are also some material facts that are omitted in Commonwealth's statement of facts.

The relevant facts are set forth in the court's Findings of Fact, including an ammendment thereto, and they are all supported by substantial evidence in the record. The material facts can be summarized as follows:

1. Commonwealth is a title insurance company and licensed escrow agent holding themselves out as experts in real estate and Commonwealth was hired in this transaction because of Commonwealth's expertise in real estate and to verify the status of the real estate involved in this case. (Tr. 12, 24, 36, 39, 43, 56, 171-172)

2. That on March 1, 1977, Commonwealth and AGLA Development Corporation (hereinafter referred to as "AGLA") entered into an escrow agreement wherein AGLA conveyed title to seventy-four lots in a subdivision to Commonwealth as trustee and with other escrow instructions concerning the sale of those lots and the payment of the proceeds therefrom to AGLA and its assigns. (Plaintiff's Exhibit P-2)

3. That on October 4, 1978, AGLA made an Assignment to the respondent of the proceeds from the sale of the lots in escrow with Commonwealth. (Plaintiff's Exhibit P-3)

4. That on October 4, 1978, Commonwealth executed an Acknowledgment that Commonwealth was in possession of the beneficial interest in promissory notes and trust deeds covering the subdivision lots, including the five lots involved in this litigation. (Plaintiff's Exhibit P-3 [reverse side])

5. That in reliance upon the representations of Commonwealth and the Acknowledgment, the respondent accepted the Assignment in satisfaction of an obligation that AGLA had incurred in favor of the respondent in 1977. (Tr. 15, 16, 17, 24, 31-32, 35, 42-43, 47)

6. That in reality at the time of the Acknowledgment, Commonwealth did not have the beneficial interest in the notes and trust deeds on the five lots because the proceeds from those sales had been paid to a separate entity, Capitol Thrift & Loan, (hereinafter Capitol) on April 12, 1978, on an entirely separate obligation owed from AGLA to Capitol. (Plaintiff's Exhibit P-4)

7. That had the respondent received the proceeds from the five lots it would have received $21,680.00 together with interest at 10% per annum from October 7, 1977 until April 7, 1978, and thereafter at the rate of 18% per annum. (Tr. 23; Plaintiff's Exhibit P-2; Defendant's Exhibit D-5; Defendant's Exhibit D-1)

The first major misstatement of fact in Commonwealth's statement of facts is the last sentence of paragraph one on page five. It erroneously states that after Capitol received the proceeds check on the five lots that it transfered its interest in the escrow back to AGLA. Commonwealth gives no reference to the transcript in support of that conclusion and cannot because no evidence was presented to that effect. Even if that had been the case it is irrelevant because it is the respondent and not Capitol that still makes claim to the proceeds from the five lots and the respondent has made no transfer of its interest.

In the last paragraph on page five of Commonwealth's statement of facts, Commonwealth states that Mr. Hanks testified that in preparing the Assignment from AGLA to the respondent that he relied upon information supplied to him by AGLA to determine which lots should be included in the Assignment. That is true as far as it goes, but the testimony also was that the list of lots provided to the respondent by AGLA came from a list which AGLA received from Commonwealth on lots on which Commonwealth said there were still notes outstanding. (Tr. 15, 16) There was no objection to that

testimony and it was never controverted. That testimony was corroborated with testimony that on September 6, 1978 Commonwealth delivered to AGLA a lists of lots with outstanding trust deeds which included the five disputed lots, thereby representing that the notes were still outstanding even though in fact they were not. (Defendant's Exhibit D-1; Tr. 52) So there were misrepresentations by Commonwealth other than the Acknowledgement.

On page six of Commonwealth's brief, Commonwealth claims that Mr. Hanks testified that there were no representations from Commonwealth to the respondent other than the Acknowledgment and that in the telephone conversation between Commonwealth and the respondent, that preceded the Acknowledgement, there were no specific representations by Commonwealth concerning the status of any particular notes or subdivision lots. That characterization of the testimony is not accurate. Mr. Hanks testified that there were other misrepresentations. (Tr. 31-32, 35, 71). Mr. Hanks testified that in that telephone conversation he told Commonwealth's agent what would be in the Assignment, the reason for it, and asked the agent if he thought he would be able to give the respondent the assurance needed. To that question the agent responded that Commonwealth could give the assurance needed. (Tr. 31-32, 35) So Commonwealth knew that the Assignment was being drafted to transfer the beneficial interest in the notes and trust deeds to the respondent and that the respondent needed assurance that AGLA had the beneficial interest to

assign. (Tr. 31-32, 35) Subsequently Mr. Hanks testified that in that telephone conversation he told the agent for Commonwealth that the lots would be listed on the Assignment and that Commonwealth should not sign the Acknowledgment unless the lots described were available. (Tr. 35) Commonwealth signed the Acknowledgment even though five lots were unavailable.

The last half of page seven of Commonwealth's statement of facts is another example of the introduction of immaterial facts. That discussion concerns whether the Assignment to the respondent fully satisfied the debt and concerns present value. Those facts are both totally immaterial for reasons that will be discussed.

In summary the facts are that two separate entities, Capitol Thrift & Loan and Cape Trust, each had an obligation owed to it by AGLA. Because it was anticipated by AGLA and the respondent that both obligations would be satisfied from the proceeds of the sale of many lots secured by trust deeds, the parties involved Commonwealth because of its expertise. Commonwealth's expertise in real estate was necessary to assure the respondent that AGLA had the necessary lots available to satisfy both obligations. Commonwealth represented that the lots were available when in fact there was a duplication in that five of the same lots were to be used to pay on the obligation to Capitol and the obligation to the respondent. Of course the proceeds from the lots can only be credited once and therefore when the proceeds were used to pay Capitol, they were

not available on the obligation to the respondent despite the representation by Commonwealth that they were available. Therefore the respondent is damaged exactly in the amount of the notes which was the amount awarded by the trial court.

ARGUMENT

POINT I

THE MATERIAL FACTS ARE ALL SUPPORTED BY THE RECORD.

The basic rules of review on appeal are that the findings and judgment of the trial court are presumed to be valid and correct; the record is reviewed in the light favorable to them and the findings and judgment of the trial court are not to be disturbed if they are supported by substantial evidence. R. C. Tolman Construction v. Myton Water Association, 563 P.2d 780 (Utah 1977). The findings and judgment of the trial court should not be upset on appeal if there exists any substantial evidence in the record supportive of the lower court's conclusions. Town & Country Disposal, Inc. v. Martin, 563 P.2d 195 (Utah 1977); Wheeler v. Jones, 431 P.2d 985 (Utah 1967); Weight v. Miller, 396 P.2d 626 (Utah 1964); Thorley v. Kolob Fish & Game Club, 373 P.2d 574 (Utah 1962); Bountiful v. Swift, 535 P.2d 1236 (Utah 1975); McCarren v. Merrill, 389 P.2d 732 (Utah 1964); Erickson v. Bennion, 503 P.2d 139 (Utah 1972); Lake v. Pinder, 368 P.2d 593 (Utah 1962); Branel v. Utah State Road Commission, 465 P.2d 534 (Utah 1970).

It has been held that the Supreme Court will not upset the findings of the trial court unless the evidence clearly preponderates to the contrary. Zions First National Bank v. First Security Bank of Utah, 534 P.2d 900 (Utah 1975); North v. Marsh, 504 P.2d 1378 (Utah 1973). If the findings are supported by any substantial evidence and reasonable inferences to be drawn therefrom, they will be upheld on appeal. Jensen v. Eddy, 514 P.2d 1142 (Utah 1973). The trial court's findings will not be disturbed on appeal unless they are clearly against the weight of evidence. Winters v. Charles Anthony, Inc., 586 P.2d 453 (Utah 1978); Ream v. Fitzer, 581 P.2d 145 (Utah 1978).

As can be seen from respondent's Statement of Facts above and its Argument which will follow, all the material facts are supported by substantial, competent and admissible evidence.

POINT II

COMMONWEALTH MADE A MISREPRESENTATION TO THE RESPONDENT.

It is difficult to imagine how Commonwealth can contend that there was no substantial evidence of misrepresentation by Commonwealth to the respondent when it is in writing in the Acknowledgment. The Acknowledgment says as follows:

> "Commonwealth Land Title Insurance Company hereby acknowledges receipt of an executed copy of the foregoing instrument and hereby promises its performance to satisfy said agreement. Commonwealth Land Title

> Insurance Company also agrees that it is in possession of the beneficial interest of promissory notes and second trust deeds covering the above mentioned properties and that it will not convey its interest in any way back to AGLA Development Corporation or any other entity not covered in the escrow agreement."

In fact, Commonwealth did not have possession of the beneficial interest of promissory notes and trust deeds for the five lots in concern.

Commonwealth also contends that the Acknowledgment was not a representation that proximately caused respondent's loss. This is apparently on the theory that the Acknowledgment was executed after the Assignment.

This theory is also fallacious because:

1. There were other misrepresentations before the Assignment was executed that proximately caused the damages. These representations included the telephone conversation between Commonwealth and respondent where Commonwealth represented, among other things, that it would not sign the Acknowledgment unless the facts therein were true. There was also Defendant's Exhibit D-1 wherein Commonwealth represented to AGLA that the five lots in concern had outstanding trust deeds, when in fact they did not. Defendant's Exhibit D-1 was given by AGLA to the respondent and was relied on by the respondent in making the Assignment. (Tr. 35) Even though it was delivered to AGLA, Commonwealth knew the respondent would be relying on it. So there were misrepresentations prior to the Assignment that proximately caused the damages.

2. The Assignment was not an agreement signed by the the respondent. It was not binding on the respondent until accepted. So the fact that it was signed by AGLA before the Acknowledgment is immaterial. From the evidence presented at the trial, it is evident that the respondent did not accept the Assignment prior to receiving the Acknowledgment. (Tr. 15, 16, 24, 31-32, 35, 42-43, 47)

3. The Assignment and Acknowledgment were in the same document and were all part of the same transaction. (Tr. 15-17) Therefore, it is immaterial if the Assignment is signed first. Naturally it would be since it appears first. Both the Assignment and the Acknowledgment were executed the same day.

Therefore, for Commonwealth's argument to stand, the court would have to believe that the Acknowledgment had no meaning and that it was drafted and executed for no reason. Obviously such is not the case.

The final argument of Commonwealth, with regard to the issue of whether there was a representation, is that the Acknowledgment was an agreement and not a representation because the Acknowledgment says that the Commonwealth "agrees that it is in possession of the beneficial interest of the promissory notes and second trust deeds. . ." Even if that were the case the result would be the same. If it was an agreement then Commonwealth breached the agreement to which the respondent was a third party beneficiary and caused the same damages.

POINT III

THE RESPONDENT'S RELIANCE WAS REASONABLE.

Commonwealth contends that respondent's reliance on the misrepresentation was unreasonable because the respondent had actual knowledge that Commonwealth was not in possession of the beneficial interest of the promissory notes and trust deeds and that the respondent had constructive knowledge that the trust deeds had been reconveyed because they were of record in the County Recorder's office.

The respondent did not have actual knowledge. The only evidence about actual knowledge was that a check was paid to Capital which had the five lots in concern listed on the legend as being paid off and that Capitol applied the check proceeds to Capitol's loan. Mr. Hanks testified that he had no specific recollection of seeing the check. (Tr. 13, 33, 68-69) So even though there was other testimony that he may have seen the check, that was only speculation because he always maintained that he had no specific recollection. (Tr. 13, 33, 68-69) Therefore, there was substantial evidence from which the trial court could, and did, conclude that the respondent had no actual knowledge. So when Commonwealth subsequently represented that the lots were unpaid, Capitol did not actually know otherwise, nor did the respondent. Even assuming any actual knowledge was conveyed to Mr. Hanks, it must be remembered that if he received the check, he did so as an officer of Capitol. That does not charge Cape Trust, a separate entity, with knowledge.

Even though the check was paid to Capitol, the respondent had no duty to read the legend on the check and keep track of which lots were paid for. (Tr. 36) Commonwealth was an expert in the field and by undertaking the duties of Trustee under the Escrow Agreement, Commonwealth took on fiduciary duties. One of those duties was to keep track of what lots had been paid for and what lots had not. The reason for involving Commonwealth in the beginning was to relieve the other parties from the responsibility and the expense of administering the receivables, making reconveyances and keeping track of the lots. (Tr. 40) Having given Commonwealth that responsiblity, respondent and Capitol Thrift & Loan, on their obligations, only had to apply the funds as they came in at various times and the lot numbers on the checks served no functional purpose for them. (Tr. 43) Respondent knew that an accounting regarding the various lots could be requested at anytime. (Tr. 36, 39, 43)

There is further evidence in the record to support the finding that the respondent did not have actual knowledge. Even assuming Mr. Hanks read the legend on the check, he testified that it would not necessarily tell him that the check represented the beneficial interest that AGLA had assigned to the respondent in the Assignment. (Tr. 48) This is because there were other obligations secured by the same lots and, therefore, the check would not have necessarily exhausted

AGLA's interest in the lots. (Tr. 48) After that testimony the trial judge was of the opinion that the testimony was sufficient to shift the burden to Commonwealth on the issue of actual notice. (Tr. 50) That burden was never met.

So the check did not actually give the respondent the knowledge required to make the reliance unreasonable. The lot numbers on the check were not included for the purpose of giving the respondent notice nor did it indirectly accomplish such a purpose. The lot numbers were written on the checks for the record keeping purposes of Commonwealth who had the duty of making reconveyances when the lots were paid for. The respondent did not actually know any facts precluding reasonable reliance.

The cases cited by Commonwealth in its brief are cited for the principle that the reliance must be reasonable. While it is true that reliance must be reasonable, the cases are not otherwise on point. As was stated in the Jardine case, the right to rely depends on the circumstances of each case. The cases cited by Commonwealth all concern misrepresentations that could all be independently investigated by a lay person. In the case at bar, verification of the status of title to real estate cannot be done other than by experts. Where the misrepesentation itself is by an expert, the party relying on it has no duty to make an independent investigation.

So the fact that the deeds of reconveyance had been recorded does not alter the decision in this case. A party is entitled to rely on a representation concerning the status of

property even though the true facts could have been ascertained by an examination of the public records. Barnes v. Lopez, 544 P. 2d 694 (Ariz. 1976). It has been held that a vendee of real property has no duty to investigate to determine whether the vendor has misrepresented the area conveyed and said vendee is not estopped from recovering in an action for deceit because he had the opportunity to inspect the property. Dugan v. Jones, 615 P. 2d 1239 (Utah 1980). The same rule of law should apply with regard to a misrepresentation of the status of title by an expert since title status is even more difficult to verify than acreage.

"False statements and misrepresentations as to the existence of liens and encumbrances on property . . . are usually deemed to constitute actionable fraud, even though the liens and encumbrances are matters of public record." 37 Am Jur 2d §89, Fraud and Deceit. "(W)here the parties do not stand on an equal footing, or where the means of obtaining information are not equal, the positive representations of the person who is supposed to possess, or does possess, peculiar or superior means of information may be relied on and under such circumstances, investigation may be dispensed with." 37 Am Jur 2d §253, Fraud and Deceit. "(A) representee has a right to rely upon representations where a confidential or fiduciary relationship exists between the parties. In such cases a high degree of frankness and fair dealing is required, and the representee cannot be charged with lack of diligence in failing to make an independent investigation, either at the time or

afterward." 37 Am Jur 2d §254, Fraud and Deceit. "(T)he law of constructive notice can never be applied as to relieve a party from responsibility for actual misstatements and frauds, and to prevent a representee from having a right to rely upon representations under such conditions. Thus, one to whom a misrepresentation is made is not held to constructive notice of a public record which would reveal the true fact." 37 Am Jur 2d §262, Fraud and Deceit. "The general rule is that the mere fact that public records, if examined, would show the representee that representations of fact are false, does not preclude his establishing fraud, because he is under no duty to make such examination . . . . Thus, it has repeatedly been held that one acquiring property is under no duty to examine public records to ascertain that the representor disposing thereof is really the owner. . . ." 37 Am Jur 2d §263, Fraud and Deceit; Boonstra v. Stevens-Norton, Inc, 393 P.2d 287 (Wash. 1964). "One has the right to rely generally on representations of fact in regard to title, and is under no obligation to search the records or otherwise exercise diligence in investigating the truth of the representations and it is no defense that he might have discovered the truth by so doing." 37 Am Jur 2d §274, Fraud and Deceit.

So the respondent had no duty to make an independent check of the record and is not charged with constructive notice. Any other conclusion would mean that in every case involving title insurance, for example, the insured would be under a duty to double check the recordings in the recorder's

office before relying on the insurer's representation as to the status of the title. Such is not the law.

POINT IV

THE AWARD OF DAMAGES WAS SUPPORTED BY THE EVIDENCE.

A review of the background and facts surrounding the Assignment will reveal that the damages awarded are the actual damages and any present value deduction is irrelevant. AGLA owed respondent some money. In full satisfaction of that obligation respondent accepted, after getting the Acknowledgment from Commonwealth, the anticipated proceeds from the lots, after taking into consideration present value since the lots were to be paid for in the future. So even if present value were relevant, it has already been taken into account. (Tr. 26) It was taken into account in an attempt to pay the respondent a future amount that, when reduced to present value, would be equivalent to the obligation being satisfied. (Tr. 19, 26) Present value only concerns an underlying obligation that is not before the court.

This means that if the representations made by Commonwealth had been true then the respondent would have received the proceeds from the notes in the amount of $21,680.00 together with the interest called for thereunder. So the misrepresentation caused the respondent to lose exactly the amount that was awarded by the court. Any change from that or any present value computation would only alter the actual damages caused by Commonwealth.

With regard to damages Commonwealth also contends that they were not proven because the notes were not introduced into evidence. The notes were unnecessary because:

1. The Trust Deeds state the amount of the obligation being secured and the terms of those notes are in the attachment to the Escrow Agreement. Both were received into evidence without objection. There was also other evidence. (Tr. 20; Plaintiff's Exhibit P-2; Defendant's Exhibit D-5)

2. The dates, amounts and interests rates of the notes are all listed on Defendant's Exhibit D-1.

3. There is no dispute as to any terms of the notes and Rule 3 of the Utah Rules of Evidence adopted by the Supreme Court of Utah provides that where there is no dispute as to a material fact, such fact may be proved by any relevant evidence and exclusionary rules will not apply. In Commonwealth's own statement of facts on the middle of page three, Commonwealth admits that the notes were to provide for the payment of the balance of the purchase price in full within six months with interest accruing at 10% per annum until the due date and 18% per annum thereafter.

Commonwealth contends that the prejudgment interest award was erroneous because there was no contract between the respondent and Commonwealth which provided for the interest rate awarded and there is no Utah statute which authorizes such an award of interest. There does not need to be a contract or statute. This is a case for negligent misrepresentation and the respondent is entitled to be reimbursed for the actual damages

sustained. Because of the mispresentations of Commonwealth, the respondent lost not only the principal amount of the notes but the interest called for under the notes. It is as much a part of the notes as the principal amount.

The rule in Utah is that in an action for fraud and deceit, the measure of damages is the difference between the actual value of what the party received and the value thereof if it had been as represented. Lamb v. Bangart, 525 P.2d 602 (Utah 1974) In the case at bar the actual value of the notes and trust deeds assigned on the five lots was zero. The value if they had been as represented was the face value of the notes in the amount $21,680.00 plus interest as called for thereunder.

"In tort actions compensation most often takes the form of putting the plaintiff in the same financial position he was in prior to the tort. With contracts, compensation is most often stated in terms of placing the plaintiff in the same position he would have been but for the broken promise." 22 Am Jur 2d §12, Damages. In the case at bar the actual damage to the respondent was the amount of the notes and the interest called for.

Where interest is part of the actual loss it is recoverable in a tort action. Sanders v. Park Towne, Ltd., 578 P. 2d 1131 (Kan. 1978). "Interest is awarded as a part of the

damages recoverable for the nonpayment of a liquidated claim and although not stipulated for in any contract between the parties, it is allowed when the debtor knows precisely what he is to pay and does not pay it." 22 Am Jur 2d §180, Damages. If the amount claimed is liquidated or if the amount of an unliquidated claim is ascertainable by computation without resort to speculation, prejudgment interest is allowable as damages for withholding the amount due. Vermette v. Andersen, 558 P. 2d 258 (Wash. 1976). In the case at bar the claim was a liquidated claim and Commonwealth knew the amount. "Where there is a contract governing the rate of interest, the contract applies." 22 Am Jur 2d §182, Damages. In this case the notes and the Escrow Agreement set the rate of interest and the respondent is a third-party beneficiary to those contracts.

Finally, Commonwealth contends that prejudgment interest should not be awarded because it was not pleaded or prayed for by the respondent. This argument too must fail because:

1. The prayer of the complaint asks for the principal amount, together with interest.

2. General damages do not need to be specifically pleaded. General damages are those naturally and necessarily resulting from the harm done. Cohn v. J. C. Penney Co., Inc., 537 P. 2d 306 (Utah 1975). Interest in this case is part of the general damages because it naturally follows under the terms of the notes when the notes are not paid.

It is special damages, rather than general damages, that need to be specifically pleaded. Even where the injury alleged is of such a character as to give notice to all of the damages which would of necessity follow, then, of course, items usually classified as special damages could be proved without pleading them. Cohn v. J. C. Penney Co., Inc., supra. In the case at bar Commonwealth knew that the damages to the respondent would be the amount of the notes and the interest rates set forth therein if not paid. "In Utah there does not seem to be an inflexible rule regarding the pleading of special damages. It is a question of whether or not the pleadings contain such information as will apprise Commonwealth of such damages as must of necessity follow from that which is alleged." Cohn v. J. C. Penney Co., Inc., supra. at 311. Commonwealth cannot be heard to contend that it was surprised by the evidence.

CONCLUSION

All the material facts are supported by substantial evidence and should not be upset on appeal. Commonwealth, an expert with fiduciary duties, represented in the written Acknowledgment that it was in possession of the beneficial interest of the promissory notes and trust deeds concerning five (5) lots when in fact it was not. Those same misrepresentations were also made previously in a written list of lots given by Commonwealth to AGLA and used by the respondent in preparing the Assignment and Acknowledgment. The Assignment and Acknowledgment were all part of the same

transaction and Commonwealth cannot excuse its misrepresentations on the basis that the Acknowledgment was not executed until after the Assignment and that, therefore, the Acknowledgment did not proximately cause the respondent's loss. The same misrepresentations were made before the Assignment was executed and, furthermore, the Assignment was not binding on the respondent upon execution by AGLA.

The respondent did not have actual knowledge that the five (5) lots had been paid for. If that had been the case certainly the respondent would not have taken an Assignment for the anticipated proceeds from the five (5) lots in full satisfaction of an obligation. It is not logical to think that the respondent knew there would be no proceeds but took the Assignment anyway to set up Commonwealth. There is evidence in the record that the check did not give the respondent actual knowledge. As a matter of law therespondent is not charged with constructive notice because of the expertise of Commonwealth thereby giving the respondent the right to rely on the representations without making an independent investigation.

The damages awarded are in conformity with law. The respondent is entitled to the difference between the value of th notes as actually received and the value if they had been as represented. That difference is the difference between zero and the amount of the notes. There is no need to introduce present value calculations because present value has already been taken into account and because the damages are the amount

of the notes. Present value would only be a factor if they were going to be paid before they matured. They have already matured and the damages are precisely as set forth by the terms of the notes. There is no dispute as to their terms. The damages were adequately pleaded and prayed for as awarded and Commonwealth was in no way surprised by the evidence.

The decision of the trial court should be affirmed on appeal.

Respectfully submitted,

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