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Norma Lee Madsen v. Walker Bank & Trust Co:Mpany, A Corporation : Brief of Appellant

Utah Supreme Court

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

CASES CITED

AUTHORITIES CITED

STATUTES

Utah Code Annotated, 1953, Section:

In The Supreme Court of the State of Utah

NORMA LEE MADSEN,
Plaintiff-Respondent,

vs.

WALKER BANK & TRUST COMPANY, a corporation,
Defendant-Appellant.

Case No. 12822

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an action by the Plaintiff-Respondent (hereafter called Miss Madsen) for damages for negligence in the handling of a $5,500 check payable to Miss Madsen and deposited by her without endorsement in her savings account with the Defendant-Appellant bank (hereafter referred to "the Bank").

DISPOSITION IN THE LOWER COURT

The case was tried to a jury, and the court submitted one special verdict only for the jury's determination: "The Defendant, Walker Bank & Trust Com-

pany, was negligent in accepting and in forwarding the check in evidence without any endorsement." The jury found the proposition "true." (R. 92). The court found that the negligence of the Bank was the sole proximate cause of Miss Madsen's loss of the amount of the check (R. 126, 127) and awarded Miss Madsen judgment against the Bank in the amount of $5,500.00 plus interest at 6% from December 5, 1969 and costs. (R. 142). The Bank's motions for Dismissal or for a Directed Verdict; and for Judgment N.O.V. or for a new trial; were denied. (R. 53-54, 93-95, 124).

RELIEF SOUGHT ON APPEAL

The Bank seeks a reversal of the judgment of the District Court and a holding that recovery of damages by Miss Madsen is barred by her contributory negligence in failing to endorse the check and by her warranties to the Bank upon deposit of the check that she would make it good if it was not paid.

STATEMENT OF FACTS

Sometime prior to May of 1969, Miss Madsen loaned $5,000.00 to one Darrell G. Hafen. (R. 172). She tried unsuccessfully to collect the loan for some time. (R. 173, 174). In May of 1969 she was given a check for $5,050.00 by Mr. Hafen drawn on a Virginia bank. This check was returned marked "insufficient funds" or "account closed." (R. 173). In September

of 1969, Mr. Hafen gave her a check on a Swiss bank, which was returned unpaid twice. (R. 173, 174). On December 4, 1969, Mr. Hafen gave Miss Madsen a check for $5,500.00 drawn on the account of Dixie Minerals and Water, Inc., at the Draper Bank & Trust Co.[1/] She had demanded cash; Mr. Hafen said that if the money was in the bank it would be the same, and to call the Draper Bank to confirm that money was there. Miss Madsen took the check to the Sugarhouse Office of Walker Bank. She did not endorse the check. She deposited a number of other checks, all of which she endorsed. (R. 177-183). She gave the Hafen check to a teller and asked the teller to telephone the Draper Bank to determine if there were sufficient funds in the Dixie Minerals account to cover the check. (R. 183-185). Upon receiving confirmation that sufficient funds were in the Draper Bank account, Miss Madsen deposited the check to her savings account. (R. 185). The check was processed through normal banking channels. The check reached the Draper Bank on December 8, 1969, at which time there was sufficient funds in the Dixie Minerals account to cover the check. The Draper Bank returned the check for lack of Miss Madsen's endorsement. (R. 94). Walker Bank affixed a substitute endorsement on the check ("credited to the account of the within named payee") and sent it a second time through normal channels to the Draper Bank. Prior to the receipt of the check a second time by the Draper

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[1/] Draper Bank & Trust Co., originally a co-defendant in this action, was granted a judgment of dismissal on December 6, 1971. (R. 56).

Bank, the Dixie Minerals account was attached by third parties who had commenced a lawsuit against Hafen which resulted in a judgment against Hafen adjudging that the funds in the Dixie Minerals account had been obtained by fraud. (R. 94-97). The check was returned to Walker Bank, who returned the check to Miss Madsen and reversed the credit entry in her savings account. (R. 186). Miss Madsen subsequently brought suit against the Bank for negligence. She did not bring any action against Mr. Hafen to collect the debt, and expressed no intention of doing so. She testified that Mr. Hafen told her that he felt there had been negligence on the part of the Bank and that his obligation with regard to the debt was fulfilled. (R. 196-197).

> Q. Then, have you filed a lawsuit against Darrell G. Hafen to collect your $5,000.00?
>
> A. I have not, for the same reason. I feel that he did pay me, that he did get the money there. (R. 197).

ARGUMENT

POINT I

UPON DISHONOR OF THE CHECK, THE BANK WAS ENTITLED TO REIMBURSEMENT FOR THE AMOUNT OF THE CHECK AND PLAINTIFF-RESPONDENT HAS NO CAUSE OF

ACTION TO REQUIRE THE BANK TO BEAR THE LOSS ON DISHONOR.

This action was brought as a negligence action. The testimony established that the check was handled in accordance with standard banking procedure and in accordance with the requirements of the Uniform Commercial Code Title 70A, Utah Code Annotated, 1953, as amended. To establish negligence, Miss Madsen would have to establish that the Bank had not acted in accordance with the procedures established by Utah statutory law, since the Utah Uniform Commercial Code, especially chapters 3 and 4, are a comprehensive scheme which sets forth the liabilities and duties of all the parties to banking transactions. The court, however, refused to instruct the jury on the applicability of the Uniform Commercial Code to the case. (R. 78). Under the facts of the case, the Code, would allow no recovery by Miss Madsen; to the contrary, the Code, as well as pre-code law, specifically provides that under the circumstances of this case, the Bank had an absolute right to take the action it did in charging back the amount of the dishonored check to Miss Madsen's savings account. The Bank's motion to dismiss, citing the Code, as well as the Bank's motions for directed verdict, judgment N.O.V. or for a new trial should have been granted as a matter of law.

Under Article 4 of the Code, when a check is dishonored on presentation to the drawee, (and regardless of the cause of dishonor) the customer has the obliga-

tion to make the check good to the bank or other person to whom the check is transferred. Utah Code Annotated 70A-4-207(2) provides in part:

> Each customer . . . who transfers an item and receives a settlement of other consideration for it warrants to his transferee . . . that . . . In addition, each customer . . . so transfering an item and receiving a settlement or other con sideration engages that upon dishonor and any necessary notice of dishonor and protest he will take up the item.

The obligation to make good the dishonored check applied whether or not the check was endorsed. Utah Code Annotated 70A-4-207(3) provides in part:

> The warranties and the engagement to honor set forth in the two preceding subsections arise notwithstanding the absence of endorsement or words of guarantee . . .

The Bank has the right to enforce this obligation as it did in this case by charging the check back to the customer's account. Utah Code Annotated 70A-4-212 provides in part:

> "If a collecting bank has made provisional settlement with its customer for an item and itself fails by reason of dishonor, suspension of payments by a bank or otherwise to receive a

> settlement for an item which is or becomes final, the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customers account, or obtain refund . . ."

Utah Code Annotated 70A-4-212 was applied by the Utah court in *First Security Bank of Utah, N.A. v. Ezra C. Lundahl, Inc.,* 22 Utah 2d 433, 454 P.2d 886 (1969).[2/]

Under Article 3 of the Code, the customer, by endorsement, makes a like engagement to pay the amount of a dishonored check. Utah Code Annotated 70A-3-414 provides in part:

> . . . every endorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his endorsement to the holder. . .

In this case, the Bank, as transferee for value, would have the right to compel such endorsement if the remedy of chargeback to the account were not available.

2/ The *Lundahl* case was decided on the fact that the First Security had not given timely notice of dishonor, an issue not raised here. The right of charge-back provided by the Code is also provided contractually in the Walker Bank passbook savings agreement, an agreement Miss Madsen admitted familiarity with. (R. 203, exhibit 2P).

Utah Code Annotated 70A-3-201(3) provides in part

> . . . any transfer for value of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified endorsement of the transferor. . .

A prime purpose of the Uniform Commercial Code is to provide uniformity and certainty in commercial and banking transactions.[3/] If a society is to have the convenience of a medium of exchange other than cash, we must know with absolute certainty precisely what will happen under the various possible circumstances and conditions of using commercial paper. For this reason the Code establishes warranties and undertakings which determine, with certainty, the liability on an instrument at any stage of its negotiation, whatever the reason for a dispute as to liability. Such certainty is necessary, for, in today's high-volume banking, there could be no such thing as payment by check if banks were continually embroiled in lawsuits, such as this one, to determine where the loss should lie for one bad check. The Utah Uniform Commercial Code is definite, and it is the law of the State of Utah. Under the Code Miss Madsen has suffered no damage, for under Article 3 on Commercial Paper and Article 4 on Bank Deposits and Collections, Miss Madsen is liable to the Bank for the amount of a check which she deposited to her ac-

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3/ *See* Official Code Comment to Uniform Commercial Code section 4-101, II *Anderson, Uniform Commercial Code*, p. 6.

count and which was later dishonored. The obligation of a customer of a bank to make good a dishonored check deposited to his account is not, of course, new to the Uniform Commercial Code. The effect of the action of the court below, however, is to impose upon the Bank a duty which has never been imposed upon banks either prior or subsequent to the passage of the Uniform Commercial Code, the duty to guarantee to the customer the performance of the customer's own duty in the transaction, that of endorsing the check over to the Bank.

POINT II

THE EVIDENCE DID NOT SHOW THAT THE BANK WAS NEGLIGENT, AND THAT THE ISSUE SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY. THE FINDINGS AND CONCLUSIONS ON THAT ISSUE ARE INSUFFICIENT TO SUPPORT THE JUDGMENT.

Assuming arguendo that the Utah Uniform Commercial Code did not apply to this case, the Bank would still not be liable to Miss Madsen, for the facts do not make out a case of common-law negligence. According to Miss Madsen's own testimony, she endorsed ten to fifteen other checks and gave them to the teller who gave her a receipt. Then Miss Madsen asked the teller to phone the Draper Bank and the teller took the check

and went to the next cage and used the telephone there. (R. 183, 184). The teller then returned with the check and said that the funds were in the Draper Bank and then deposited the amount to Miss Madsen's savings account. (R. 185). Other testimony established that from this point the check would have been picked up with others from the tellers cage by a bank messenger, delivered to the Bank's computer center where deposit amounts were run and balanced, and then the check would have been forwarded to the Federal Reserve Bank for forwarding to the out-of-town payee bank. (R. 109-110). Uncontroverted testimony established that the check handling procedures were in accordance with banking regulations, Federal Reserve Operating Procedures, clearing-house rules, and the customs and usages of banks in Utah. (R. 110-111). Such facts are insufficient as a matter of law to establish liability for negligence.[4/] The Bank's motion to dismiss or for a directed verdict, made at the close of the Plaintiff's case, and re-made at the end of the trial, should have been granted for no prima facie showing of negligence

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4/ The common law presumption that compliance with the custom and usage of the trade constitute the exercise of ordinary care is codified with regard to bank procedures in the Uniform Commercial Code. Utah Code Annotated 70A-4-103(3) provides in part:

> Action or inaction approved by this chapter or pursuant to Federal Reserve Regulations or operating letters constitutes the exercise of ordinary care and, in the absence of special instructions, action or nonaction consistent with clearinghouse rules and the like or with a general banking usage not disapproved by this chapter, prima facie constitutes the exercise of due care.

on the part of the Bank had been made. The submission to the jury of the Special Verdict form (R. 92) was clearly error.

Liability for negligence at common law requires three elements: 1. A duty owed the plaintiff by the defendant; 2. Negligent performance of that duty by the defendant through the lack of the requisite degree of care; 3. Damage to the plaintiff proximately caused by the negligence.[5/] Miss Madsen's case for damages for negligence fails at the outset, for the Bank had no duty at law to discover her error in not endorsing the check. Miss Madsen herself testified that she understood that it was her duty to endorse the check, (R. 199-200, 204) that she understood that the check could not be negotiated if she did not endorse it, (R. 200, 204) that she understood that if she endorsed the check she promised to take it back if it was no good, (R. 205) and that she gave the Bank no special instructions for handling the check. (R. 195-196). In the absence of some special undertaking on the part of the Bank, or of some special contract with Miss Madsen, the Bank's only duty was to use ordinary care in handling the item. There was no evidenciary showing that the Bank used other than ordinary care in handling the item. The only possible time, in the normal handling of the check, for the Bank to catch and correct Miss Madsen's error in not endorsing

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[5/] The Restatement expresses these three elements as (1) an interest protected against unintentional invasion, (2) conduct which is negligent with regard to the person whose interest is protected, and, (3) the conduct is the legal cause of the invasion of the interest. 2 *Restatement of Torts* 2d, § 281.

the check was at the teller's cage, before the teller put the check into the pick-up box for the bank messenger. (R. 271). At the only point in time when the Bank could have caught the error, Miss Madsen was still standing at the teller's window, able to correct the error herself. (R. 200-201). The proximate cause of Miss Madsen's loss was not the manner in which the Bank handled the check, but was her own negligent omission in not endorsing the check in the first place.

POINT III

THE PLAINTIFF-RESPONDENT'S OWN NEGLIGENCE IN FAILING TO ENDORSE THE CHECK WAS THE PROXIMATE CAUSE OF ANY LOSS. THE COURT BELOW IMPROPERLY REFUSED TO INSTRUCT THE JURY ON THE ISSUE OF CONTRIBUTORY NEGLIGENCE.

Assuming, arguendo, that a showing of negligence on the part of the bank had been made, Miss Madsen's recovery of damages would still be barred by her contributory negligence. There is no question from the testimony that Miss Madsen was negligent in depositing the check without first endorsing it, and the court

so concluded.[6/] Having held that Miss Madsen was negligent as a matter of law, the court erred in also holding as a matter of law that the negligence of Miss Madsen did not proximately contribute to her loss. The court apparently applied a "last-clear-chance" theory in so concluding. There is no way in which the last-clear-chance doctrine can be made to fit the facts of this case. The last-clear-chance doctrine applies in situations where there is an extreme risk of injury to the plaintiff and the defendant has the best opportunity to avoid the accident. The application of the doctrine requires the following elements: (1) the negligence of the defendant which brings about a dangerous situation; (2) negligence on the part of the plaintiff which contributes to the dangerous situation; (3) recognition on the part of the defendant that the situation, from the point-of-view of the plaintiff, is out of hand, and that only the defendant has a clear opportunity to try and avoid the damage, the last-clear-chance; and (4) failure on the part of the defendant to take that last clear op-

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6/ The ruling was made in chambers, and does not, therefore, appear in the record. The ruling is referred to by the court, however, in jury instructions number 9.

> The court finds that the plaintiff was negligent in failing to endorse the check. You will not have to deliberate that problem. (R. 85).

The ruling is also reflected in the fact that the court refused to give jury instructions on contributory negligence as a bar to recovery. The Bank's exceptions to the court's jury instructions and objections to the court's not giving instructions on contributory negligence or on the application of the Utah Uniform Commercial Code are found at R. 276-277. The Bank's proposed instructions are found at R. 64-80. The instructions which the court did give are found at R. 81-91.

portunity to avoid the damage. In the case at bar, none of these necessary elements to the application of the doctrine are present, except the contributory negligence of the plaintiff. The situation which caused the damage, the unendorsed check, was not brought about by the negligence of the Bank, but to the contrary was brought about by the negligence of Miss Madsen. The Bank was not presented with a recognizably out-of-control situation which only the Bank could correct. The only time when the Bank could have caught the error was concurrent in time with the last opportunity Miss Madsen had to correct the error, that is, at the teller's cage when Miss Madsen presented the check. When the Bank was made aware of the situation, that is, when the check was returned for an endorsement, the Bank did act. The Bank then supplied a substitute endorsement and sent the check back through the collection process.

The Utah court has addressed the doctrine of last-clear-chance on many occasions, and has quoted with approval the analysis of the last-clear-chance doctrine expressed in the Restatement of Torts.[7/] The Restatement analysis is found in two sections, § 479 which deals with the situation of the helpless plaintiff, and § 480 which deals with the inattentive plaintiff. Neither

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7/ All of the Utah cases are, of course, personal injury accident cases. The application of the doctrine to a bank check case appears without precedent. To consider an unendorsed check as a dangerous situation is patently absured. See especially *Fox v. Taylor*, 10 Utah 2d 174, 350 P.2d 154.

section can be made to fit the facts of this case. Section 479 reads as follows:

> § 479. Last-Clear-Chance: Helpless Plaintiff
>
> A plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent negligence may recover for harm caused thereby if, immediately preceding the harm,
>
> (a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care, and
>
> (b) the defendant is negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm, when he
>
> (i) knows of the plaintiff's situation and realizes or has reason to realize the peril involved in it or
>
> (ii) would discover the situation and thus have reason to realize the peril, if he were to exercise the vigilance which it is then his duty to the plaintiff to exercise.
> 2 *Restatement of Torts* 2d, p. 530.

The application of § 479 to the facts of the case, and the Respondent's theory of the case, reveals that

the doctrine does not apply. If it is said that Miss Madsen's negligence in not endorsing the check subjected her to risk of harm from the Bank's subsequent negligence in not discovering that Miss Madsen had failed to endorse the check, she still may not recover, for at the time and place when the Bank could have discovered the error, that is, when the check was presented to the teller, Miss Madsen herself could have avoided harm by the exercise of reasonable diligence and care. (§ 479(a)). Furthermore, even if Miss Madsen were helpless to avoid the harm, it would have to be established that the Bank either knew of her helplessness or should have discovered her helplessness and subsequently failed to help her. (§ 479(b)). There is no reason under the facts for the teller to suppose that Miss Madsen was helpless to endorse the Hafen check when she had, a moment before, deposited ten to fifteen other checks all properly endorsed.

A similar application of the facts of the case, to § 480 brings the same result. § 480 reads as follows:

> § 480. Last-Clear-Chance: Inattentive Plaintiff
>
> A plaintiff who, by the exercise of reasonable vigilance, could discover the danger created by the defendant's negligence in time to avoid the harm to him, can recover if, but only if, the defendant
>
> (a) knows of the plaintiff's situation, and
>
> (b) realizes or has reason to realize that

> the plaintiff is inattentive and therefore unlikely to discover his peril in time to avoid the harm, and
>
> (c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm. 2 *Restatement of Torts* 2d, p. 535.

§ 480 cannot apply to this case because the danger was created not by the Bank's negligence, but by her own negligence in not endorsing the check; because the Bank did not know that she failed to endorse the check; and because the Bank did take action to correct her error upon discovering her mistake.

The latest Utah case in point, *Reese v. Proctor,* 26 Utah 2d 219, 487 P.2d 1267 (1971), discusses § 479 and § 480 of the *Restatement of Torts* in the concurring opinion of Justice Crockett, which notes that "We have heretofore had occasion to discuss 'last-clear-chance' situations and approve the law as summarized in *Restatement of Torts,* §§ 479 and 480." 26 Utah 2d 219 at 223. The main opinion in *Reese v. Proctor* succinctly states the aspect of the doctrine which applies to this case.

> "The last-clear-chance doctrine is applicable to a situation where plaintiff's position of extricable peril has arisen from his own negligence only if the defendant *actually knew* of plaintiff's extricable peril, *Fox v. Taylor,* 10

Utah 2d 174, 350 P.2d 154, and cases cited therein." 26 Utah 2d 219 at 221.

In this case, Miss Madsen's position arose from her own negligence in not endorsing the check. There was no showing that the Bank had any knowledge that Miss Madsen had failed to endorse the check until it was returned for lack of Miss Madsen's endorsement. It was through no fault of the Bank, furthermore, that the maker's account had been attached because of alleged fraud; Miss Madsen, not the Bank, had all of the dealings with the signer of the check.

CONCLUSION

In order that checks and other negotiable instruments can be used as a money substitute, a primary purpose of the law of negotiable instruments at common law, in prior codifications and in the present Uniform Commercial Code has been to provide the certainty in banking transactions without which no system of exchange can operate. The law is certain, and under that law the Bank is not liable to Miss Madsen. Miss Madsen's proper remedy is against the maker of the check, and that remedy is still available to her.

It is respectfully submitted that the court erred in not granting the Appellant's motion to dismiss or for a directed verdict; in refusing to instruct the jury on the applicability of the Utah Uniform Commercial Code to the case; in refusing to instruct the jury on

contributory negligence; and in not granting the Appellant's motion for judgment N.O.V. or for a new trial. It is respectfully submitted that the judgment of the trial court should be reversed and that this court should hold that recovery of damages by Miss Madsen from Walker Bank is barred as a matter of law, and that the complaint of Miss Madsen against Walker Bank should be dismissed.

Respectfully submitted,

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