

1973

People's Finance & Thrift Company of Ogden, A Utah Corporation v. Michael Doman and Sheryl Doman : Brief of Respondents Michael Doman and Sheryl Doman

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

PEOPLES FINANCE & THRIFT)
COMPANY OF OGDEN, a Utah)
Corporation,)
Plaintiff-Appellant.)
vs.)
MICHAEL DOMAN and SHERYL)
DOMAN,)
Defendants-Respondents.)

BRIEF OF

MICHAEL DOMAN

Appeal from Second District
Honorable

PER, SANDACK & SANDACK
El Paso Natural Gas
at Lake City, Utah
Attorneys for Appellant

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I N T H E S U P R E M E C O U R T
O F T H E S T A T E O F U T A H

PLS FINANCE & THRIFT)
COMPANY OF OGDEN, a Utah)
Corporation,)
Plaintiff-Appellant,)

Case No. 50395

MICHAEL DOMAN and SHERYL)
DOMAN,)
Defendants-Respondents.)

BRIEF OF RESPONDENTS
MICHAEL DOMAN and SHERYL DOMAN

STATEMENT OF THE NATURE
OF THE CASE

This is an action which has been brought against Respondent Michael Doman where it is alleged that he has fraudulently obtained a loan from the Appellant by the use of a false and fraudulent financial statement.

The basis of this action is founded on a financial statement which was completed by the Respondent and his wife, or about the second day of February of 1969. That on June 1, 1969, Respondent and his wife did file Bankruptcy for all assets, including the debt owed to the Appellant. That on the 1st day of July, 1970 a non-jury trial was held before the Honorable John F. Wahlquist, Judge of the Second Judicial District of the State of Utah, wherein the Court did hand down an Order in the form of a Memorandum Decision, in favor of the Defendants, setting forth that although misrepresenta-

tion was evident on the part of Respondent, no reliance was present on behalf of the Appellant with regard to the representation. The Court did subsequently deny Appellant's motion for a new trial and therefrom Appellant did file an appeal which the Respondent here-with and following will answer.

DISPOSITION IN THE LOWER COURT

The Court did find that the wife, Sheryl Doman did not know the extent of what she had signed and as such had done what she had done without premeditation and was guilty of fraud.

The Court further found that Mr. Michael Doman was guilty of gross and wanton deceit. This conclusion was based upon the fact that the Court felt that Mr. Doman was fully cognizant of his financial plight, after losing his job and with the additional expenses of a new child and as a result he did not care to disclose his plight.

However, it was held by this same Court that Peoples First Finance and Thrift, was not misled by this fraud. Further that such a loan as was here regranting would not have been requested unless severe financial problems were present. In conclusion the Court held that the loan officer very much wanted to make the loan and treated the preparation of the financial statement as his own personal defense against the corporation, as an answer to a future bankruptcy. That the loan was granted only

increase his own loan volume, with the full knowledge of existing debts, both large and small.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the Memorandum Decision rendered by the District Court on the 31st day of July, 1970.

STATEMENT OF FACTS

Respondent accepts the statement of facts of Appellants, and the following clarifications and additions:

The Respondent, Michael Doman after entering into the Plaintiff's place of business in Ogden, on or about the 4th day of February, 1969 and after receiving an application and a blank financial statement did take the same financial statement to his home and did fill it out and commit it and did ask his wife to sign it, all of which time and take to complete the form was within the lunch hour of the 4th day of February, 1969. (R.47) That this financial statement was admittedly the first financial statement Doman had ever had to fill out in as much as he had done business with the predecessor of the Peoples First Thrift, Peoples First Finance and Thrift. Mr. Gene Fessler, the Assistant Manager and Loan Officer of Peoples Finance and Thrift had had a number of dealings with Mr. Doman going back to 1966. (R.81-82) Mr. Doman was unaware of what forms he did fill out in as much as he did have great confidence in Mr. Fessler, understanding that Mr. Fessler was attempting to assist him in his financial problems, and as

a result did not read completely the exhibits dealing with the financial statement and security agreement and notes which he did sign in the presence of Mr. Fessler. (R. 75-80)

It is likewise true as set forth in the record, the financial statement and loan application made to the Appellant, did not contain the debts listed as follows: Zions First National Bank, \$1,376.06: in as much as Mr. Doman in his testimony did admit to his negligence in failing to list this account because he was in a financial panic and was negligent in failing to list this particular account. He later stated upon recalling this account that he understood that Mr. Fessler, did run a credit check upon him which he assumed would result in the discovery of this account; Thomas Dee Memorial Hospital account, it is explained that the amount of \$612.04 was an obligation which his wife had been discharging by automatic deductions from her pay check from the Thomas Dee Memorial Hospital in as much as she had been an employee at that institution and that he ignorantly forgot to list this account; as to the Block's Clothing Company account and miscellaneous accounts at the Bon Marche and B and B Clothes Shop and other retail establishments, these various accounts being in the approximate amount of \$500.00 were of such a nature that he had been informed by Mr. Fessler, that he would not have to include these small open charge accounts. (R.58-59)

That a credit check was made and it was the understanding of Mr. Doman that the credit check would indicate

whatever loans were against him so as to give Mr. Fessler a complete picture of his then financial position. (R.65,66)
The Ogden Credit Bureau was contacted which Bureau has a charge which is not limited, except for those institutions which do not belong to the same institution. (R. 86)

That the amount of obligations which Mr. Doman did inform Mr. Fessler of did not exceed \$2,500.00, much of which was owed on open accounts and contrary to Appellant's representatives statement that \$3,600.00 in accounts were included. It is true that approximately \$1,400.00 was thought to be a liability only in the eyes of Mr. Doman in as much as it arose out of commission checks given to him through the sale of insurance, when he did find himself in the employ of Security National Life Insurance Company. Wherein Mr. Doman understood subsequent to his having received the loan that the said life insurance company was attempting to deduct on commissions paid for insurance policies received, and which insurance policies had been revoked within a one year period. (R. 53-57)

Mr. Doman did state that on numerous occasions he had obtained loans and extensions from Mr. Fessler as a loan officer both of the First Finance and Thrift and of Peoples First Finance and Thrift and that Mr. Fessler had assisted himself and his wife in advising them on their financial predicaments and had become a good friend, therefore, when applying for this loan it was understood that Mr. Fessler was assisting them in their financial problems and was going

to grant to them consolidation of other debts to the pre
loan of Peoples First Finance and Thrift. (R. 59,70)

There were certain items of personal property which
were listed with the appellant as security which had pre
viously been pledged to other creditors. It was Mr. Dom
understanding that the items so pledged with Zions First
National Bank had been discharged to Zions First Nationa
Bank and that he was at this time free to claim them as
security for People's First Finance and Thrift. (R. 51)
It was likewise though by Mr. Doman that these items of
furniture dually pledged were on a sales contract to Zio
First National Bank and that he did not understand the
financing of this arrangement. (R. 50)

The Appellant emphasizes the statement made by the
endant Respondent Mr. Doman, wherein he stated that his
ancial obligations were to a critical point wherein bot
he and his wife resorted to making smaller payments on th
accounts and paying those who were pressing them, more th
those who were pressing them less for the payments. He
made a statement that he was robbing Peter to pay Paul, i
in a literal sense that he was robbing one creditor to g
to another creditor, but that he was only paying those c
itors who were demanding more from him then other credito
(R. 68-69, 76)

Mr. Doman did set forth the reason for his filing t
ruptcy as being, when he was laid off from the Weber Offi

ly Company in a reduction effort, he was unable to gain
employment for a period of six weeks and then only to
a part time job at the Dee Hospital, where he had worked
previously. He decided at this point that he should attempt
return to school so that he could get a better education
to gain a better position. A child was born with additional
expenses. His father-in-law gave him advice that he should
probably take out bankruptcy. He attempted several times to
consolidate all of his bills so that he could go back to
work at that time, but was unsuccessful. (R. 71)

The original loan in question did arise with First
Finance and Thrift in June of 1968, prior to their purchase
Peoples Finance and Thrift later in that same month. In
February of 1969 in an attempt to consolidate another loan
to the Peoples First Finance and Thrift obligation Mr. and
Mrs. Doman did sign an additional contract and note for the
figure after consolidation. By reason of said consolidation,
Doman joined the consolidated amount owed to the American
Finance of \$478.25 to the Peoples First Finance and Thrift Loan.
With various charges and interest this increased his loan to
Peoples First Finance and Thrift to \$2,543.76, by doing this
Doman discharged the American Finance obligation on which he
was paying \$21.00 a month and increased his Peoples First
Finance and Thrift payment per month by \$14.00 or a savings of
\$7.00. (R. 67,95, and TR. 29)

ARGUMENT I

THE TRIAL COURT DID NOT ERROR AS A MATTER OF LAW IN HOLDING THAT THE APPELLANT DID NOT RELY ON THE FALSE AND FRAUDULENT FINANCIAL STATEMENT.

The Respondent understands that in order for a case of fraud to be made out by the Appellant, that a material misrepresentation of the facts must be set forth in the evidence together with sufficient evidence to show a reliance upon the misrepresentation to the damage of the Appellant. It was the District Courts decision upon hearing the evidence and viewing the demeanor of the witnesses, called by both the Appellant and the Respondent that as to Mr. Doman, a material misrepresentation of the facts had been made out, therefore indicating a fraud to that extent had been perpetrated by the Respondent. However, it was determined that the Appellant did not rely upon any material representation. Therefore, the essential element of reliance was lacking so that liability could not attach. Although, the Respondent denies that such misrepresentation had been made, the issue at this time before the court is not as to misrepresentation, although it must be considered, but the real issue before the court is whether the Appellant relied upon the misrepresentation to his detriment. The findings of Fact of the District Court as to this particular issue is as follows:

No. 7. I also find that plaintiff in this case was misled by this fraud. The so called budget analysis in exhibit D is openly unrealistic, in fact a loan such as that regrantd here would not be requested un-

less financial problems were severe.

In total I think that the loan officer very much wanted to make this loan, and treated the preparation of Exhibit A as his own personal defense against the corporation, and in answer to future bankruptcy; in an opportunity to increase his loan volume, and he knew that there would be numerous small and large debts existing.

conclusion therefore, of the District Court was based on the evidence presented by both the Appellant and the Respondent. The Respondent submits that as a matter of law testimony taken at the trial in the District Court in and Weber County, was such that the court was compelled to rule favor of the Respondent on all elements of the action of fraud. The Appellant has attempted to show that there was reliance upon misrepresentation allegedly made by the Respondent, fails in light of the trial as a whole to show by clear and convincing evidence that there was in fact a reliance by the Appellant. It is therefore, submitted by the Respondent that following outlined evidence indicates the relationship existing between the Appellant's manager, Mr. Gene Fessler and Respondent in regard to the application and receipt of a loan from the Appellant:

A. On cross examination, Mr. Gene Fessler testified as follows with regard to: 1. Numerous loans granted to Mr. Doman since 1966 by Mr. Fessler; 2. His definite friendly relationship with Mr. Doman; 3. In auditing the reason behind not granting a loan immediately to Mr. Doman; 4. Mr. Fessler's knowledge of financial problems of Mr. Doman; 5. Mr. Fessler's inability to recall if Mr. Doman explained the financial statement he had

A. Yes.

Q. What about a loan for extending the present loan that you already had with the person?

A. The same procedure under Peoples.

Q. The same procedure?

A. Yes, treating each application as a new loan is their policy.

Q. Is there any reason why you told Mr. Doman that you couldn't get him a loan on the 4th of February 1969 but could on the 6th, two days later?

A. The possibility that the bank commissioner was there auditing which was an annual thing, I am not sure that is when he was there.

Q. Were you concerned about this type of loan going through because of Mr. Doman's financial condition?

A. No.

Q. Could there have been a possibility that you could have granted the loan on that date because of your past dealings with Mr. Doman?

A. The only reason for the delay would have been because our loan cards and our books were tied up in audit procedure.

Q. From your direct testimony in answer to direct examination of Mr. Wilcox, you have stated that you never did on any occasion tell Mr. Doman that he would not have to list his open accounts? Is this correct?

A. It is the only time that he had been required to list his debts and there was no mention at this time.

Q. You had known Mr. Doman for quite some time, hadn't you? You had had quite a few dealings with him, isn't this correct?

A. It could have been possible.

Q. Isn't it possible that you failed to do this because you knew his financial condition as well as you did?

MR. WILCOX: I object to that question in the sense that this is implying that he did know his financial condition. You should ask him.

THE COURT: Tell us what you knew about his financial conditions.

A. His total indebtedness. (R.87-90)

THE COURT: FURTHER;

Q. Knowing Mr. Doman as you did, did you feel that you would have made, and knowing his financial condition as you did, and having had experience with Mr. Doman, did he in anyway indicate to you that he was attempting to deceive you in making you rely on his financial statement?

MR. WILCOX: I object to that question, Your Honor. He asked one question whether there was anything that would make him be deceived and then said, relying on that, I don't think they go together.

THE COURT: Simplify your question.

Q. Did Mr. Doman's approach to you and your resulting granting this extension on this loan and this relationship at that time, did anything, the way Mr. Doman reacted, show to you that he was attempting to deceive you at that time?

A. Yes, many times.

Q. Who have you always dealt with?

A. Always with Mr. Fessler.

Q. Now, Mr. Wilcox has shown you schedules which you agreed were signed by yourself in your schedules for bankruptcy is that correct?

A. Yes.

Q. In reference to Plaintiff's Exhibit B. (TR. 23) that is a Zions First National Bank. Now, in listing this in your bankruptcy there, Mr. Doman--.

A. (Interposing) Yes.

Q. --in listing that in your bankruptcy in this obligation can you recall ever having informed Mr. Fessler of this obligation when you received your loan from them?

A. Not of Zions, no.

3. AND FURTHER, in answer to why he failed to list the Zions obligation and in following reference to Mr. Fessler's procedure for always running a credit check. (R.64-65, TR. 23)

Q. And, do you recall why you wouldn't put that loan down, Mr. Doman?

A. I really don't, other than the fact that I was in such a financial mess at the time, it just slipped my mind.

Q. Were you attempting to hide this?

A. No, in fact, every time I went in Gene's they always did make a credit check, and it never entered my mind to bother with it.

Q. What do you mean by credit check, did Mr. Fessler

r explain what a credit check of you was?

A. Yes, I asked him many, many times what my credit rating was. It was important to me. I tried to maintain every good credit rating and it was right up until the time we took out bankruptcy. And, he showed it to me and showed me what mine was.

Q. Do you recall in February of 1969 when you approached Fessler for the consolidation of the ones that he did the a credit check on that particular day?

A. I couldn't say whether he did or not, but I would assume he did. That seemed to be standard procedure. He every other time. (R.65-66)

ig: 4. AND FURTHER;

li: Q. You stated to Wilcox's question that there have been various charges, various accounts that Mr. Fessler told you, didn't have to write down. Is that correct?

the A. That is correct.

's Q. And, looking at this schedule A-3, of Plaintiff's 23) Exhibit B, A-3 is Creditors whose claims are unsecured, what e, basically, most of these accounts? (TR. 24)

A. Open charge accounts.

Q. Most of these are in that way. When Mr. Fessler told you, you didn't have to list any open accounts, you assumed that this would not have to be listed. Is that correct?

ay) A. That is right.

th Q. Were you paying regularly on these accounts?

A. Well, there were a few of them that had regular

monthly payments, yes. On the open charge accounts that I have, just what you could make.

Q. Were you attempting to pay on these regularly?

A. Yes.

Q. At that time you were employed by Weber Office Sup

A. Yes

Q. Taking home \$196.70 ever two weeks?

A. Yes, sir, plus overtime.

Q. You were likewise employed at Weston Deseret Inn?

A. Yes.

Q. And, your net take-home was around a hundred dolla

A. Yes.

Q. Now, together with these two amounts, would that c
close to five hundred dollars a month you were taking home.

A. Yes, that is correct.

Q. And, your obligations when you went to Peoples Fin
and discussed these with Mr. Fessler, this income was stated
on a financial statement, is that correct?

A. Yes.

Q. Then it being stated on there, this put it right
around five hundred dollars, and the obligations which were
listed were rent, \$95.00; Peoples First Thrift, \$56.00; the
1965 Chevrolet to the First Security Bank, \$32.00; Federal
Employees Union \$56.60 per month; Aetna Finance, \$26.00; and
American Finance \$21.00. Is that correct?

A. Yes.

Q. For the Courts information I total these. They

the right around \$191.00 in payments that he did list together with the \$95.00 that comes right around \$286.00, \$100.00 in reference to the rent. This \$296.00, leaves you approximately \$210.00 per month over and above your obligations as listed here.

A. (Nodding his head up and down.)

Q. Could you give an approximation as to what your monthly expenses for your wife and yourself were after these are deducted?

MR. WILCOX: Your Honor, I think he has already stated that in my examination and in the document itself. I think this is just repetitive.

THE COURT: It is clarification of something. You may proceed.

Q. Go right ahead.

A. You mean our whole living expenses, all of our bills everything?

Q. This is excluding those obligations that you listed in this financial statement, in reference to Plaintiff's Exhibit A.

A. What it would cost us to live without these payments?

Q. No.

A. I don't understand.

Q. Over and above these total payments, they total right around \$286.00 per month.

A. All right.

Q. Leaving to you \$500.00 income per month, net income

per month, which would leave you a little over \$214.00?

A. Yes.

Q. That \$214.00 you have to go towards other open charge accounts?

A. Yes, plus food and regular living expenses and clothing and whatnot. (R. 66-68, TR. 24)

5. AND FURTHER:

Q. Tell the Court, Mr. Doman, why you didn't read this financial statement?

A. Well, I know you should, but I never have, insurance contracts or anything else. I just never read them because half of the time I couldn't understand the language they were written in. Like I say, I knew Gene. He was a friend.

Q. What do you mean by this. You have stated this several times in your testimony. What do you mean by "he is a friend."

A. I had dealt with him every time we needed financial help and this and that, and he has always helped us out with that. I just felt I could trust him.

Q. How did he help you out, financially, personally or with loans, or both?

A. Both. Not necessarily in the sense that he gave us money out of his pocket. No, he advised us several times on odds and ends. He was just a big help to us. He really was. (R. 70-71)

C. On Direct examination Mr. Doman stated as to Mr. Fessler's desire to wait until after audit before extending

credit.

Q. Did Mr. Fessler give any reason why the loan would not be granted on that date that you returned the financial statement?

A. I remember him telling me that they were being audited at that time, that he was a little over extended and they were auditing just like a bank and it would be a couple days, to check back.

D. On courts question of Mr. Doman: (R. 97-98)

THE COURT: Why did you tell him you wanted this loan?

A. Pardon?

THE COURT: Why did you tell him you wanted this loan?

A. This last one, the one that we consolidated?

THE COURT: Yes.

A. My wife, actually, I got the first call from American Finance where we had a loan stating that we were in default on a couple payments which we were not, and I called him back, in fact, I went down there and talked to him and he was just really ignorant about it all. After talking about it, we found that his bookkeeper was a little wrong and I wasn't, because of the situation and the way he treated us after not being in default, I went and told this to Mr. Fessler and asked him if he could consolidate this and put it in his. I didn't want to have any more dealings with him.

E. On re-direct of Mr. Doman, by counsel for Appellant, it is attempted to show that Mr. Doman literally robbed one creditor to pay another. (R.76)

have hindered the granting of the loan to Mr. Doman, with Mr. Doman himself being unaware as to whether all was told to Mr. Fessler or whether it was necessary because he understood that Mr. Fessler's "credit check" would reveal any obligations which Mr. Doman might have negligently failed to list. In total Mr. Fessler's testimony is such that he had a great familiarity with the conditions of the Respondent and through an understanding of the Respondent's financial position was ready to grant to him a loan or in this case an extension of a loan of \$478.25.

Mr. Doman's testimony was in a way of self serving nature in light of the courts decision that Mr. Doman, Respondent did perpetrate a deceit upon the Appellant is such that he was openly frank, telling the truth that he had taken a number of loans from Mr. Fessler and through Mr. Fessler and that he felt because of this relationship with Mr. Fessler as a loan counselor that Mr. Fessler would do his best to assist Respondent in solving his financial problems. Mr. Doman has openly admitted that he was in severe financial position and had looked to Mr. Fessler for assistance on many occasions in hope that Mr. Fessler could assist him in solving his financial problems not only as a loan counselor but also as a friend.

The testimony goes to the point that Mr. Doman expressed his concern to Mr. Fessler as to why he desired Peoples First Finance assume the obligation owed to American Finance in as much as the American Finance Loan Officer had

been pressing Mr. Doman on this particular obligation. Mr. Fessler understanding this did prepare whatever papers were necessary to assume this obligation which the court record does show that the assumption of a \$478.00 loan owed to American Finance was assumed by Peoples Finance and Thrift on behalf of Mr. Doman, the Respondent.

All of the testimony of Mr. Doman and Mr. Fessler illustrate one point and one point alone, that being, that Mr. Fessler as a representative of the Appellant, did fully comprehend the total indebtedness and financial condition of Mr. Doman without the benefit of the financial statement and the budget analysis (Exhibits A and D, respectively). Mr. Fessler's position as not only a friend but as a loan counselor and financial consultant were such that Mr. Doman did rely upon this relationship that Mr. Fessler would assist him in any financial problems, and his informing of Respondent Mr. Doman, that after the audit of his books was completed and in as much as he was over extended on his loan volume at that particular time that he would grant to Mr. Doman the loan to assume the American Finance Loan, is such that it gives credence to the court's determination that there was no reliance made upon the financial statement and budget analysis as prepared by Mr. Fessler and Mr. Doman, Respondent.

ARGUMENT II

THE RESPONDENT CONTENDS AS A MATTER OF LAW THAT THE EVIDENCE MUST BE REVIEWED IN LIGHT MOST FAVORABLE TO THE TRIAL COURT.

Respondent cites *Malstrom vs. Consolidated Theatres*, (1) 290 P 2d 689 (690), 4 Utah 2d 181, p. (1955) wherein the Appellant had claimed that where findings were not supported by evidence, the Supreme Court found that it was their "...duty to review the evidence in light most favorable to the trial court." Further in cases of conflicting evidence, the Supreme Court of Utah in a 1960 case, ruled that,

"The Rule which we deem to be controlling in regard to the facts of this accounting was expressed by this court through Justice McDonough in the case of *Keller vs. Wixam* (2) "...the presumption is in favor of the trial court's findings on contested items..." 255 P 2d 118, 119, 123, Utah 103, 106 (1953). This is supplemented by the generally accepted precept that in case of doubt or uncertainty as to the interpretation of the findings themselves they are to be reviewed in such a manner as will support the judgment. *Leithead vs. Adair* (3) 351 P 2d 956, 957, 10 Utah 2d 282 (1960).

The Respondent submits on basis of Memorandum Decision of District Court, Honorable John F. Wahlquist, presiding that findings were such that they did arise out of conflicting evidence and were found by this same court in favor of the defendant. Therefore, bringing respondent to the conclusion that the trial court was correct in its findings based upon the opportunity to bear the evidence as presented and to observe the demeanor of the witnesses, and thereafter to fairly conclude into deliberation in favor of Respondent.

ARGUMENT III

APPELLANT HAS FAILED TO SUSTAIN ITS BURDEN OF PROVING WITH CLEAR AND CONVINCING EVIDENCE, THAT WILFUL, INTENTIONAL REPRESENTATIONS WERE MADE, UPON WHICH THE APPELLANT RELIED.

The burden of proof must be one where the Appellant with clear, and convincing evidence showed that the representations of Mr. Doman, who was merely attempting to stay above his obligations and thereby satisfy his creditors was wilfully and intentionally attempting to deceive appellant so that appellant would rely upon such a representation to his detriment. Universal C.I.T. Credit Corporation vs. Solum 391 P 2d 262, (1964), 15 Utah 2d 262.

It is submitted by the Respondent that no where was their any evidence submitted to trial court that such a reliance was based upon clear and convincing evidence. On the other hand, Respondent was in a position where he was only changing creditors from American Finance to Appellants in an attempt to lower his monthly payments. (TR. 29, R. 95). It is respectfully by respondent to be concluded that the burden of proof, of clear and convincing evidence, was not sustained as to the essential element of reliance on Respondent representations.

CONCLUSION

The evidence supports the Findings of Fact made by the Trial Court. That all evidence presented by the Respondent has been carefully weighed by the same Trial Court. It is therefore, respectfully submitted that the Trial Court's findings be affirmed and that the relief sought by the Appellant be denied.

Respectfully submitted,

L. KENT BACHMAN of
BACHMAN & SAMPSON