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Skyler Witman, John" W Ashenko, Jonathan Bonnette, Mati Lovelady, and Don Jorgensen, Appellees and Cross-Appellants, v. Richard Bloomfield and Richard bl0o:tv.lfield Cfo, PLLC, Et Al., Appellants and Cross-Appellees.

Utah Supreme Court

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IN THE
SUPREME COURT OF THE STATE OF UTAH

SKYLER WITMAN, JOHN WASHENKO, JONATHAN
BONNETTE, MATT LOVELADY, AND DON JORGENSEN,
Plaintiffs, Appellees and Cross-Appellants,

v.

RICHARD BLOOMFIELD AND RICHARD BLOOMFIELD CFO,
PLLC, *et al.*,
Defendants, Appellants and Cross-Appellees.

REPLY BRIEF OF APPELLEES AND CROSS-
APPELLANTS

On appeal from the Third Judicial District Court, Salt Lake County,
Honorable Katie Bernards-Goodman, District Court No. 120905237

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Introduction

Richard Bloomfield made \$424,000 in connection with Plaintiffs' purchase of securities. At trial, Mr. Bloomfield did not dispute that he made \$424,000 from the transaction or that he was unlicensed to sell securities. The sole issue for the jury to decide was whether Mr. Bloomfield "offered to sale" the securities Plaintiffs purchased. Plaintiffs and Mr. Bloomfield disagreed on a proper jury instruction defining the meaning of "sale" or "offered to sale" for purposes of determining liability under the Utah Securities Act.

Mr. Bloomfield's proposed jury instruction included a list of misleading and irrelevant factors that the jury was told they "may" consider in deciding whether Mr. Bloomfield offered or sold the security. Plaintiffs' proposed jury instruction quoted the definition of "sale" and "offered to sale" straight from the Utah Securities Act's definition.

The trial court adopted all of Mr. Bloomfield's proposed jury instructions and rejected all of Plaintiffs' proposed jury instructions, without explanation or meaningful oral argument. Plaintiffs' counsel attempted to ameliorate the damage caused by the trial court's decision to adopt the erroneous instruction by asking the trial court to add a limiting statement to the jury instruction.

Given the jury instruction read to the jury, it was no surprise to anyone that the jury found that Mr. Bloomfield did not sale or offer to sale a security to Plaintiffs.

Argument

Mr. Bloomfield makes four arguments in opposition to Plaintiffs' appeal of the trial court's decision to erroneously instruct the jury on the definition of sale or offer to sale under the Utah Securities Act: (1) that the standard of review is abuse of discretion, (2) Plaintiffs failed to preserve the issue by attempting to ameliorate the harm caused by the trial court's error, (3) that the jury instruction was not error, and (4) Plaintiffs suffered no prejudice. Plaintiffs address each of these arguments in turn below.

1. The Standard of Review is For Correctness Because the Trial Court Gave an Instruction But That Instruction Misstated the Law.

When a jury instruction is given, this Court's review of whether the instruction correctly states the law presents a question of law, which this Court reviews for correctness. *See State v. Miller*, 2008 UT 61, ¶ 13, 193 P.3d 92 ("Whether a jury instruction correctly states the law presents a question of law which we review for correctness."). "Challenges to jury instructions require interpretations of law; therefore, we review them for correctness." *Daniels v. Gamma West Brachytherapy, LLC*, 2009 UT 66, ¶ 22, 221 P.3d 256. In applying this standard, the reviewing court gives no deference to the district court. *See State v. Jeffs*, 2010 UT 49, ¶ 16, 243 P.3d 1250.

Mr. Bloomfield argues the standard is abuse of discretion but cites to cases applying an abuse of discretion standard when a trial court refuses to *give* an instruction. *See* Bloomfield Reply Brief, 38 (quoting *Miller v. Utah Dep't of Transp.*, 2012 UT 54, ¶ 13 285 P.3d 1208 (noting that the issue presented in that case was "a district court's refusal to give a jury instruction").

Here, a jury instruction was given. This is not a case in which the district court refused to give an instruction. Instead, the issue in this case is whether the jury instruction that was given correctly states the law. Accordingly, the standard of review is for correctness.

2. Plaintiffs Preserved Their Objection to the Jury Instruction by Making a Written Objection and Submitting a Proposed Alternative Instruction.

2.1 Plaintiffs Objected to the Inclusion of the Irrelevant Factors.

Mr. Bloomfield suggests that Plaintiffs failed to preserve their objections, both legal and factual, to the erroneous jury instruction even though Plaintiffs submitted a proposed alternative instruction and submitted a written objection to Mr. Bloomfield's proposed instruction.

In Plaintiffs' written objection to Mr. Bloomfield's proposed Jury Instruction No. 13, Plaintiffs explain that their proposed jury instruction is consistent with the statutory definitions of "offer" and "sale" under the Utah Securities Act. R. 6294 (noting that the language in Plaintiffs' proposed jury instruction "is consistent with the statutory definitions of an 'offer' and 'sale' under the Utah Uniform Securities Act").

Plaintiffs continued to object by taking issue with Mr. Bloomfield's inclusion of additional explanations and a list of misleading factors in his proposed jury instruction, none of which are found in the statutory definition of "offer" or "sale." Plaintiffs stated in their written objection that the inclusion of a list of misleading and irrelevant factors with no application to this case erroneously narrows the scope of the legal definitions of offer and sale under the Utah Securities Act:

The statutory definitions of offer or sale are not intended to be construed so narrowly and could encompass virtually a limitless number of factors based on the unique facts and circumstances of each case. Accordingly, it is inappropriate to include this list of factors in the jury instruction.

R. 6294.

Plaintiffs' objection was clear: Plaintiffs objected to Mr. Bloomfield's proposed jury instruction because it was legally erroneous in that it narrowed the statutory definition of the terms "offer" and "sale" by including a list of factors not included in the statutory definition that had no application to the facts in this case. Further, Plaintiffs' objection to Mr. Bloomfield's instruction was clear when Plaintiffs submitted an alternative instruction that tracked the statutory definitions of "offer" and "sale" and asked the court to adopt Plaintiffs' instruction. R. 6294.

2.2 Plaintiffs Cited *Fed. Sav. & Loan* for the Proposition That a Seller Directly Participates in Soliciting the Plaintiff's Purchase.

Plaintiffs also objected that Mr. Bloomfield's proposed instruction was factually misleading, confusing, and prejudicial to Plaintiffs. Plaintiffs objected that Mr. Bloomfield's proposed instruction was "full of information that is so clearly slanted in Defendants' favor that it would be unduly prejudicial to include it in the instructions to the jury." R. 6294. Plaintiffs continued with their objection by arguing that the list of factors Mr. Bloomfield included in his proposed instruction "are completely detached from the facts of this case. Because none of these factors are factually applicable, a jury may be confused and believe that the Bloomfield Defendants did not offer or sale the securities to Plaintiffs because none of these factors are factually relevant." R. 6294.

Mr. Bloomfield misleadingly claims that Plaintiffs' reference to a federal district court case, *Fed. Sav. & Loan Ins. Corp. v. Provo Excelsior Ltd.*, 664 F. Supp. 1405 (D. Utah 1987) ("*Fed. Sav. & Loan*"), at the bottom of their proposed jury instruction, means that Plaintiffs agreed, despite express objections to the contrary, that the list of factors included in Mr. Bloomfield's proposed instruction were appropriate. *See* Reply Br. 40 ("Plaintiffs cited in support of their proposed instruction the very case they now claim is the source of the errors.").

This argument is disingenuous, misleading and misconstrues the purpose for which Plaintiffs cited the case. In *Fed. Sav. & Loan*, the court discussed whether a person was a seller under federal securities laws. Because the Tenth Circuit had not addressed the issue, the court looked to other jurisdictions for guidance. In one case analyzed by the Utah District Court, "the defendants had helped draft the Prospectus, participated in 'road show' presentations of information to securities brokers and investment analysts, analyzed the market and set the price of Activision shares, and negotiated the agreement with the underwriters." *See Fed. Sav. & Loan*, 664 F. Supp. at 1411 (*quoting In re Activision Securities Litigation*, 621 F. Supp. 415, 521 (N.D. Cal. 1985)). Those activities—participation in road shows, drafting a prospectus, setting the market price—were the activities Mr. Bloomfield incorporated into his proposed jury instruction as factors the jurors should consider in deciding whether a person offered or sold a security.

But the *Activision* court had found those factors irrelevant to a determination of who was a seller. The Utah District Court noted that the *Activision* court "distinguished the above activities from other cases where a defendant had met personally with investors and

had spoken at broker-dealer seminars.” *Id.* The take away from *Fed. Sav. & Loan* is that the important factor for determining seller liability is whether a defendant met personally with investors, not whether a defendant engaged in activities such as participating in road shows, setting the market price, or drafting a prospectus.

Plaintiffs’ reference to *Federal Sav. & Loan* in their proposed jury instruction was to support the inclusion of the last sentence of Plaintiffs’ proposed jury instruction: “For a person other than the person who actually transfers title in the stock to qualify as a seller or offeror, that person must actively and directly participate in soliciting a person’s purchase of the security.” R 6239.

Compare the last sentence in Plaintiffs’ proposed jury instruction to the holding of the Utah District Court in *Federal Sav. & Loan*: “we rule that ‘seller’ status for § 12(2) will exist as to the person who transfers title to the stock and such additional persons who actually and directly participate in soliciting a plaintiff’s purchase.” *Fed. Sav. & Loan*, 664 F. Supp. at 1411 The statements are the same. It is clear Plaintiffs cited *Federal Sav. & Loan* for its holding and not to support a list of inapplicable factors that Plaintiffs did not include in their proposed jury instruction and that they objected to in Mr. Bloomfield’s proposed instruction.

2.3 Plaintiffs Did Not Waive Their Objections by Attempting to Ameliorate the Harm Caused When the District Court Adopted an Errant Jury Instruction.

Mr. Bloomfield also argues that Plaintiffs did not preserve their objections once the district court made a modification to the jury instruction that did not remove the offending list of misleading and irrelevant factors. R. 8865. Once the court had decided to adopt the

erroneous instruction and left all of the offending language in the jury instruction, Plaintiffs' counsel attempted to ameliorate the harm of the erroneous decision by asking the court to include additional language in the instruction that the list of misleading and irrelevant factors should not be given equal weight. R. 8866.

This Court's decisions in similar circumstances support Plaintiffs' counsel's attempt to ameliorate the damage caused by the trial court's error. For example, this Court has held that a party does not waive an objection to inadmissible evidence when the objecting party attempts to ameliorate the damage caused by that evidence during cross-examination. "A party does not evince a distinct intent to waive his objection to improperly admitted evidence by attempting to ameliorate the damage caused by that evidence." *Wilson v. IHC Hosps., Inc.*, 2012 UT 43, ¶ 62, 289 P.3d 369. This Court has stated, "It would be unfair for a prosecutor to question a witness on prohibited information or issues, but then require the defendant to forego cross-examination, which could ameliorate the damage caused, to preserve an objection to the prosecutor's misconduct." *State v. Span*, 819 P.2d 329, 334 (Utah 1991).

Similarly, it would be unfair for this Court to find that Plaintiffs waived their objections to the inclusion of a misleading and irrelevant list of factors when, after the court decided to allow the list to be included in the jury instruction, Plaintiffs' counsel suggested additional language to ameliorate the damage caused by the erroneous instruction.

3. Jury Instruction 13 was Not a Correct Statement of the Law.

Mr. Bloomfield argues that the inclusion of misleading and irrelevant factors was not error and, in doing so, continues to misrepresent to the court the holding in *Federal Savings & Loan* and *Activision*. Mr. Bloomfield argues that the factors it included in its proposed jury instruction were proper because they “were taken directly from *Federal Sav. & Loan*.” Reply Br. at 48. Mr. Bloomfield points to the fact that Plaintiffs referenced the case in its proposed jury instructions but fails to explain the holding in the case or explain why Plaintiffs referenced the case.

3.1 *Federal Sav. & Loan* Stands for the Proposition that a Seller Is Actively and Directly Involved in Soliciting a Person’s Purchase.

Plaintiffs’ reference to *Federal Sav. & Loan* was to support the inclusion of the last sentence of Plaintiffs’ proposed jury instruction: “For a person other than the person who actually transfers title in the stock to qualify as a seller or offeror, that person must actively and directly participate in soliciting a person’s purchase of the security.” R 6239. Plaintiffs did not reference *Federal Sav. & Loan* for any other reason but the holding of the case, which support Plaintiffs’ proposed jury instruction.

The factors erroneously included in the jury instruction were found in *Federal Sav. & Loan*. But, the Utah District Court found those factors to be irrelevant in determining seller liability and so did the court in *Activision*. Moreover, the *Federal Sav. & Loan* decision provides no basis to include factors in a jury instruction that have nothing to do with the facts in the case to be decided by the jury. Mr. Bloomfield’s treatment of the decision in *Federal Sav. & Loan* is grossly misleading; a review of the holding in the case,

and the *Activision* case relied on by the Utah District Court, demonstrate that the factors to which Plaintiffs objected and to which they object here on appeal are irrelevant to a determination of whether a person offered or sold a security.

A discussion of the case demonstrates that it cannot support the inclusion of the list of factors in the jury instruction. *Federal Sav. & Loan* was a ruling on a *motion to dismiss* for failure to state a claim. Federal Savings & Loan was a shareholder of an entity that agreed to pay the principal of bonds that were issued to pay costs to build a hotel if the bonds entered default. The bonds went into default and the lawsuit ensued. Federal Savings & Loan sued, among others, a bank, Mercantile Bank National Association (“Mercantile”), that acted as a trustee for the bonds and drafted and reviewed documents necessary for the issuance of the bonds.

Federal Savings & Loan also sued a company, The Marling Group (“Marling”), that was hired to conduct a market and feasibility analysis for the hotel, which analysis Marling knew would be used to obtain financing. Federal Savings & Loan sued both Mercantile and Marling for violation of § 12(2) of the Securities Act of 1933 and for violation of the Utah Securities Act.

Both Mercantile and Marling filed motions to dismiss the claims against them under 12(b)(6) for violation of § 12(2) of the Securities Act of 1933 and for violation of the Utah Securities Act for failure to state a claim. The Utah District Court analyzed who could be a seller under both federal and state securities laws. The court noted that the Tenth Circuit had not addressed the scope of persons potentially liable for violating § 12(2) so it looked to other jurisdictions for guidance.

3.2 The List of Factors Taken from *Activision* Are Not Determinative of Whether Someone is a Seller.

The case that the Utah District Court found persuasive was *In re Activision*. In *Activision*, shareholders who purchased shares of stock in a public offering that declined significantly in value shortly after the public offering, filed claims under § 12(2) against corporate officers and directors of Activision, among others. Activision's corporate officers and directors filed a motion to dismiss the complaint, arguing that they were not sellers of the securities. The allegations against these corporate officers and directors were that they engaged in some of the conduct which was the conduct included in the list of factors in Jury Instruction 13 in this case: "planning the offering, drafting the prospectus, and negotiating the price of the stock." 621 F. Supp. at 420. The court granted the motion to dismiss, holding that those activities were not relevant to a determination of seller status because those activities "were merely typical of what any corporation and its officers would engage in prior to a public offering." *Id.*

The *Activision* court granted the shareholders an opportunity to amend their complaint to provide other allegations to support their claims that the corporate officers and directors offered or sold securities. The shareholders amended their complaint to allege that "defendants helped draft the Prospectus, participated in 'road show' presentations of information to securities brokers and investment analysts, analyzed the market and set the price for Activision shares, and negotiated the agreement with the underwriters." *Id.* at 421.

This is the same list of activities that the jury in this case was told they "may" consider in determining if Mr. Bloomfield was a seller. But the *Activision* court held that

even if the defendants engaged in *all* of those activities, “they are inadequate to impose liability under 12(2).” *Id.* . Those activities had no bearing whatsoever on whether the corporate officers and directors were sellers. In other words, the factors that the district court instructed the jury here to consider had no factual basis in this case and, in any event, had been found legally insufficient to determine liability anyway.

The *Activision* court distinguished cases cited by the shareholders where officers and directors were found to be sellers because, in those cases, the defendants “met personally with investors and spoke at broker-dealer seminars.” *Id.* (citing *Securities and Exchange Commission v. Murphy*, 626 F.2d 633 (9th Cir. 1980)). Or the defendants “travelled to Florida to find the original subscribers for the corporation [and] personally instructed these individuals as to how to solicit additional investors.” *Id.* (citing *Hill York Corp. v. Am. Int’l Fran., Inc.*, 448 F.2d 680, 692–93 (5th Cir. 1971)).

The court explained that the test to determine seller status “has to be predicated on actual participation in the selling process.” *Id.* This determination, the court noted, is made “on a case-by-case basis.” *Id.*

The *Activision* court granted the corporate officers and directors’ second motion to dismiss because none of the alleged conduct, which was the conduct the trial court told the jurors they may consider in Jury Instruction 13, were relevant to the determination of seller liability.

3.3 The Utah District Court's Adoption of the *Activision* Position Is Not a Basis for Including the Factors in the Jury Instructions.

The Utah District Court adopted the position taken by the court in *Activision* that “seller status has to be predicated on actual participation in the selling process” and noted that the *Activision* court “distinguished the above activities [which form the list of factors included in Jury Instruction 13] from other cases where a defendant had met personally with investors.” *Fed. Savings & Loan*, 664 F. Supp. at 1411.

The Utah District Court then turned to the alleged conduct of Mercantile and Marsing. The court noted that the alleged conduct by Mercantile was limited to drafting and reviewing documents necessary to issue the bonds. *Id.* at 1412. The court then granted Mercantile’s motion to dismiss because simply drafting and reviewing documents is not sufficient to show that it directly participated in the sale of securities. *Id.*

The court also granted Marling’s motion to dismiss because the allegation that it provided professional services to do a market and feasibility analysis was insufficient to make it a direct solicitor of the purchase of the securities. *Id.*

3.4 Application of Decisions Cited by Bloomfield to This Case.

In this case, the trial court instructed the jurors that they “may” consider factors that are not ever applicable in determining whether a person sold securities. The *Activision* court held that even if a person engages in all of the activities included in the factors Mr. Bloomfield inserted into his proposed Jury Instruction, which became Instruction 13, that person still would not necessarily be considered a seller. These factors cannot be considered a “guide” to the jury, as Mr. Bloomfield suggests, when none of the conduct

included in the list of factors can ever, as a matter of law, support a finding of seller liability. They are also not a “guide” where they are a confusing list of conduct that has nothing to do with the evidence adduced in the trial the jury attended. The trial court should have never given permission to the jury to choose to consider a list of factors that, either individually or in the aggregate, could never support a finding of seller liability.


4. Plaintiffs Were Harmed by the Jury Instruction.

Plaintiffs were able to present evidence similar to the evidence in *State v. Bolson*, 2007 UT App 268, 167 P.3d 539: Mr. Bloomfield approached Plaintiffs with the investment, Mr. Bloomfield introduced Plaintiffs to the promoter, Mr. Feldman [R. 9219; 9017-18; 9236; 9275-76; 9457; 9868-70]; Mr. Bloomfield helped Plaintiffs determine how much to invest [R. 9057-58; 9287-91; 9463-64; Tr. Ex. 53; R. 9707-08], Mr. Bloomfield promised high returns on the investment [R. 9021; 9122-23; 9276; 9401; 9454; 9496; 9721], Mr. Bloomfield received a substantial commission to convince Plaintiffs to invest [R. 9028-29; 9219-23; 9465; 9496-97; 9245], and Mr. Bloomfield was the Plaintiffs’ primary contact person for information about the investment [R. 9058-59; 9291; 9464; 9280-81]. Based on the foregoing, a jury could have found that Mr. Bloomfield effectuated the sale of securities to Plaintiffs. And had the factors and exemptions not been listed in Jury Instruction No. 13, the jury would have found Defendants liable for selling a security without a license, which Mr. Bloomfield admitted to at trial. [R.6235.]

Conclusion On Cross-Appeal

Because the district court erroneously included factually irrelevant factors in Jury Instruction No. 13, this Court should reverse the judgment on the Securities Claims and grant Plaintiffs a new trial on those causes of action.

DATED: May 25, 2017



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D. LOREN WASHBURN

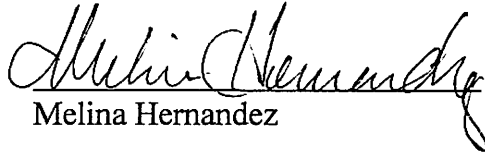
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