

1990

# Zions First National Bank v. Rocky Mountain Arrigation, Inc., et al. : Unknown

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Unknown.

Unknown.

---

## Recommended Citation

Legal Brief, *Zions First National Bank v. Rocky Mountain*, No. 199020985.00 (Utah Supreme Court, 1990).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/3355](https://digitalcommons.law.byu.edu/byu_sc1/3355)

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

DOCUMENT

KFU

45.9

EARL S. SPAFFORD

L. CHARLES SPAFFORD

J. DONALD HUE

CHASE KIMBALL

SCOTT B. MITCHELL

OF COUNSEL

H. DELBERT WELKER

KEITH E. SOHM

WESLEY M. BADEN

FAXNUMBER (801) 363-3811

UTAH SUPREME COURT

LAW OFFICES

BRIEF SPAFFORD & SPAFFORD

A PROFESSIONAL LAW CORPORATION

425 EAST FIRST SOUTH

SALT LAKE CITY, UTAH 84111

TELEPHONE (801) 363-1234

CALIFORNIA AFFILIATE

SOL LEVITT

ATTORNEY AT LAW

950 WEST 17TH STREET

SANTA ANA, CA 92706

ARIZONA AFFILIATE

GERALD D. SHERRILL

ATTORNEY AT LAW

2025 NORTH 3RD STREET

SCOTTSDALE, AZ 85004

March 28, 1990

**FILED**

**MAR 28 1990**

Utah Supreme Court

Att: Geoffrey Butler, Clerk of the Court

332 State Capital Building

Salt Lake City, Utah 84114

Clerk, Supreme Court, Utah

Re: Zions First National Bank v. Rocky Mountain  
Arrigation, Inc., et al. No. 20985  
(Category No, 13. b.)

Dear Mr. Butler:

In conformance with Rule 24(j), R. Utah S. Ct., we ask that the Court review the case of Doyle v. Trinity Savings and Loan Association, TSL., 869 F.2d 558 (10th Cir. 1989). We believe that this Tenth Circuit opinion is well written and demonstrates, contrary to respondents' brief, that the trial court's actions constitute prejudicial error.

We appreciate your efforts in moving this matter along towards a proper resolution.

Very truly yours,

SPAFFORD & SPAFFORD

A Professional Corporation



L. CHARLES SPAFFORD

LCS:kp

cc: Adam M. Duncan

**Michael L. DOYLE, Plaintiff-Appellee,**

**v.**

**TRINITY SAVINGS AND LOAN ASSOCIATION, TSL Service Corporation;  
STM Mortgage Company, Defendant-Appellant,**

**and**

**Federal National Mortgage Association, Defendant.**

**Michael L. DOYLE, Plaintiff-Appellee,**

**v.**

**TRINITY SAVINGS AND LOAN ASSOCIATION, TSL Service Corporation,  
STM Mortgage Company, Defendant-Appellee,**

**and**

**Federal National Mortgage Association, Defendant-Appellant.**

**Nos. 86-2236, 86-2309.**

United States Court of Appeals,  
Tenth Circuit.

March 9, 1989.

Mortgagor brought action against mortgagee to recover for fraudulent alteration of note. The United States District Court for the Western District of Oklahoma, Wayne E. Alley, J., held for mortgagor, and mortgagee appealed. The Court of Appeals, Seymour, Circuit Judge, held that, under Oklahoma law, alterations of note were material, thus entitling mortgagor to cancellation.

Affirmed.

### **1. Mortgages ¶78**

Test for fraud, such as would allow mortgagor to cancel note, is whether mortgagor can show existence of overreaching by mortgagee in bad-faith effort to gain unfair advantage.

### **2. Alteration of Instruments ¶20**

Under Oklahoma law, mortgagee's unauthorized alterations of note, in order to be able to sell it on secondary market, were

material, thus warranting cancellation of note and mortgage; alterations changed legal rights and liabilities of parties. 15 O.S.1981, § 239.

### **3. Alteration of Instruments ¶20**

Under Oklahoma law, mortgagor was entitled to cancellation of note and mortgage due to unauthorized alterations made by mortgagee's employee, although there was no evidence that mortgagee had authorized its agent to make alterations, in that alterations allowed mortgagee to sell note on secondary market, thus benefiting mortgagee's business. 15 O.S.1981, § 239.

### **4. Bills and Notes ¶158**

Purchaser of mortgage and note on secondary market was not holder in due course, in that note pegged interest rate to external index, so that amount payable could not be determined from instrument itself; because note did not contain promise to pay sum certain, note itself could not be negotiable instrument. 12A O.S.1981, § 3-104.

Jack S. Dawson and Janice M. Dansby, Miller, Dollarhide, Dawson & Shaw, Oklahoma City, Okl., for plaintiff-appellee.

Linda G. Scoggins and Jeffrey H. Contreras, Spradling, Alpern, Friot & Gum, Oklahoma City, Okl., for appellant Federal Nat. Mortg. Ass'n.

Carl Hughes, Michael G. McGuire, and J.W. Coyle, III, Hughes & Nelson, Oklahoma City, Okl., for appellants Trinity Sav. & Loan Ass'n, TSL Service Corp., and STM Mortg. Co.

Before McKAY, BARRETT, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

Michael L. Doyle brought this action against Trinity Savings & Loan Association (Trinity) and the Federal National Mortgage Association (FNMA) asserting that he is entitled to damages and cancellation of a note and real estate mortgage as a result of the fraudulent alteration of the note. Judgment was entered for Doyle on all

claims. Both defendants appeal, and we affirm.<sup>1</sup>

The relevant undisputed facts are briefly as follows. Doyle executed an adjustable rate promissory note in favor of Trinity, secured by a real estate mortgage with an attached adjustable rate rider. Trinity's first attempt to sell the note and mortgage to FNMA was rejected because the instruments had been incorrectly completed by placing on the face of the note, as the initial interest rate, the lower rate of interest upon which the initial monthly payment was based (11.375%), instead of the actual rate of interest accruing for one year from the date of execution (15.875%).<sup>2</sup> The note ultimately purchased by FNMA showed corrections and alterations, adjacent to which appeared Doyle's initials. Doyle asserted that these alterations were made without his knowledge or consent after he had executed the note and before FNMA purchased it, and that his initials were forged. FNMA, which had no reason to believe that Doyle had not approved and initialed the changes, purchased the loan in good faith. A jury awarded Doyle actual and punitive damages against Trinity, and the trial court ordered cancellation of the note and mortgage against FNMA.

The primary issues raised by defendants on appeal are whether Doyle is entitled to both damages and cancellation of the note and mortgage; whether Doyle established the elements of fraud; whether the note and mortgage were materially altered; and whether FNMA is a holder in due course.<sup>3</sup>

While the appeal of this case was pending, the Oklahoma Court of Appeals decided *Goss v. Trinity Sav. & Loan Ass'n*, No. 67,298 (Okla.Ct.App. filed Aug. 23, 1988). In *Goss*, which involves facts virtually identical in all relevant respects to those underlying

the instant suit, the court considered the above issues and decided them in favor of the plaintiff. That opinion was released for publication by the Oklahoma Court of Appeals. Under Rule 1.200 C.B. of the Rules of Appellate Procedure in Civil Cases, Okla.Stat. tit. 12, ch. 15, app. 2 (1988), such an opinion, although without precedential effect, may be considered persuasive. In examining Oklahoma law in a diversity case under these circumstances, this court has held that "in the absence of a state supreme court ruling, the federal court must follow an intermediate state court decision unless other authority is convincing that the state supreme court would decide otherwise." *O'Neil v. Great Plains Women's Clinic, Inc.*, 759 F.2d 787, 790 (10th Cir.1985). We have found no such contrary authority, and will therefore follow *Goss* in assessing defendants' arguments.

[1] Defendants contend that Doyle failed to establish the elements of fraud. Defendants erroneously base their argument on an analysis of fraud in the inducement. The appropriate test as set out by the court in *Goss*, however, is whether a plaintiff can show the existence of overreaching by the defendant in a bad faith effort to gain an unfair advantage. See *Goss* (citing *Holliman v. Ed Grier Volkswagen, Inc.*, 554 P.2d 117 (Okla.App.1976)). The same analysis applies here.

[2] Defendants' argument that the alterations were not material is likewise precluded by *Goss*. There the court held that an alteration virtually identical to that at issue here "changed the legal rights and liabilities of the parties and therefore was a material alteration" under Okla.Stat. tit. 15

to cover the interest accruing on the principal. The shortage is added to the outstanding principal balance, resulting in negative amortization. The adjustable rate of interest is determined by reference to the monthly average yield on U.S. Treasury securities.

1. After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R. App.P. 34(a); 10th Cir.R. 34.1.9. The cause is therefore ordered submitted without oral argument.

2. An adjustable rate mortgage such as this one contains negative amortization features and graduated payments. During the early part of such a loan, the payments are often not enough

3. Defendants also raise two evidentiary issues which we have carefully considered and do not find persuasive.

§ 239 (1966).<sup>4</sup> *Id.* As a result, the note and mortgage were ordered cancelled under section 239. The district court's conclusion of materiality and its cancellation of the note and mortgage in the present case were correct under this analysis.

[3] Defendants contend that cancellation was improper here because Doyle presented no evidence showing that Trinity had authorized its agent to make the alterations. This argument was expressly rejected in *Goss*:

"In responding to Plaintiffs' allegation that Trinity gave one of its employees authority to alter the interest rate on the note, Trinity contends that no such evidence was presented to prove it gave its employees authority to alter the note. It contends even if its employees did make such an alteration, it resulted in a mere spoliation, which would not void the instruments, not a material alteration, which would in fact, vitiate the instruments. Nonetheless, it is settled that an employer is liable for tortious acts of his employee even though the actions exceed the authority conferred or were willfully or maliciously committed if such acts are incidental to and in furtherance of the business of the employer. *Dill v. Rader*, 533 P.2d 650 (Okla.App.1975). Because the alteration by an unknown employee of Trinity allowed Trinity to sell the note and mortgage to FNMA, Trinity benefited from its employee's actions, and it furthered Trinity's business. The court properly found a material alteration, not a mere spoliation, existed in the note and mortgage."

*Id.*

[4] Finally, we reject FNMA's argument that it is a holder in due course of the note and thus entitled to enforce it despite the prior unauthorized alterations. This note, like the one in *Goss*, pegs the interest rate to an external index, so that the amount payable cannot be determined from the instrument itself. "Because the note

does not contain a promise to pay a certain, the note itself cannot be a negotiable instrument pursuant to [Okla.Stat. tit. 12A, § 3-104 (1981)]. Therefore FNMA cannot be accorded the status of holder in due course." *Id.* at — (cit. *Shepherd Mall State Bank v. Johnson*, 603 P.2d 1115 (Okla.1979)).

Defendants' remaining arguments, to the extent we have not expressly addressed them, are foreclosed by *Goss* and its application to this case. Accordingly, in reliance on the *Goss* opinion, which has solved the issues raised in this appeal: adversely to defendants and which we are obligated to follow, we affirm.



ZENITH DRILLING CORPORATION  
Plaintiff-Appellee/Cross-Appellant,

v.

INTERNORTH, INC. and Belnorth Petroleum Corporation,  
Defendants-Appellants/Cross-Appellee

Nos. 86-1355, 86-1436.

United States Court of Appeals,  
Tenth Circuit.

March 10, 1989.

Drilling rig lessor brought suit against lessees for breach of contract. The United States District Court for the Western District of Oklahoma, David L. Russell, J. granted summary judgment in favor of the lessor on its breach of contract claim and summary judgment for the lessees on the lessor's claim for punitive damages, and both sides appealed. The Court of Appeals, Logan, Circuit Judge, held that: (1) lessee's deliberate refusal to pay invoiced standb

4. "The intentional destruction, cancellation, or material alteration of a written contract, by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor, against parties who do not consent to the act." Okla. Stat. tit. 15, § 239 (1966).