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Howard W. Brandt and Leona J. Brandt v. Springville Banking Co. et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

HOWARD W. BRANDT and LEONA
J. BRANDT, his wife,

Plaintiffs and Appellants,

vs.

SPRINGVILLE BANKING COMPANY
a Utah corporation, F. C.

PACKARD and HOWARD C.
MAYCOCK,

Defendants and Respondents,

FILED

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Clerk, Supreme Court, Utah

Case No. 9128

BRIEF OF APPELLANTS

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STATEMENT OF FACTS

The parties will be referred to as in the court below.

The only factual evidence requested by and submitted to the lower court are the alleged facts set forth in De-

fendants' Motion for Summary Judgment (R 27), Defendants' Affidavit in support thereof (R 29), Plaintiffs' Amended Complaint (R 21) and Plaintiff's Affidavit Opposing Defendants' Motion for Summary Judgment (R 36).

The court did not take any testimony of witnesses as to any factual matter.

Plaintiffs and their family have been patrons and depositors of the Springville Banking Company from approximately 1949 to approximately 1958; that during said time plaintiffs were personal friends of said defendants F. C. Packard and Howard C. Maycock, President and Cashier respectively of said Springville Banking Company; that many times during said period plaintiffs have consulted with said officers of said bank on financial matters pertaining to their personal affairs; that during said time defendant Maycock was the religious teacher and advisor of plaintiffs. (R 42).

Plaintiffs were contacted by said Waldo Jackson and said officers of the Springville Banking Company to put new money into the Jackson Sales & Service Company; that plaintiffs did not want to become involved in Jackson Sales & Service business but were interested in organizing a farm implement corporation with said Waldo Jackson apart from Jackson Sales & Service. Later on Waldo Jackson and the above named defendants proposed that a new corporation be organized under the name of Stockman & Farmers Mart for the purpose of conducting the farm machinery business in which plaintiffs were to invest \$10,000.00; Waldo Jackson was to invest in the new corporation by transferring to it, free of encumbrance, certain of the assets of the Jackson Sales & Service Co. The new corporation was organized by Glen

W. Sumsion, the regular attorney for said defendant bank at the request of and recommendation of Waldo Jackson and said defendants.

That for plaintiffs to go through with their end of the deal it was necessary to borrow \$10,000.00; that the above named defendants suggested that plaintiffs assign their equity in their home in Springville, Utah, to an aunt in California to secure a \$5,000.00 loan from her, and that plaintiff Howard M. Brandt take out a \$5,000.00 policy of insurance on his life with his aunt as beneficiary; that the Santa Monica Branch of the Bank of America made an inquiry at the request of plaintiff's aunt of the Springville Banking Company as to the financial status of plaintiffs and one Waldo Jackson; that the Springville Banking Company through its president, Defendant F. C. Packard, answered said inquiry recommending the loan and the financial integrity of plaintiffs and said Waldo Jackson. (R 37, 50).

Thereafter plaintiffs were successful in procuring the \$5,000.00 loan from said aunt, which sum was deposited to the personal account of plaintiff Howard W. Brandt in the said Springville Banking Company. That said bank then loaned the plaintiffs an additional \$5,000.00 upon their personal note and accepted as security for the payment of same the proceeds from a Salina real estate contract which was escrowed with the bank. This \$5,000.00 was also deposited in the personal account of plaintiff Howard W. Brandt in the said Springville Banking Company.

Up to this point, neither Waldo Jackson, the Springville Banking Company, nor its officers F. C. Packard and Howard C. Maycock, had disclosed to plaintiffs in any way what was to be done with the \$10,000.00 plaintiffs had bor-

rowed for investment in the Stockman & Farmers Mart. That on or about March 2, 1955, plaintiffs met at the Springville Banking Company with the said Waldo Jackson and said defendant, Howard C. Maycock, cashier of the Springville Banking Company, for the purpose of completing the transaction with the Stockman & Farmers Mart. That at said time plaintiffs did not know that the Jackson Sales & Service Co. was indebted to the Springville Banking Company in the sum of \$45,000.00 or any other sum; that at said time plaintiffs did not know that the \$10,000.00 they were putting into the Stockman & Farmers Mart was to be paid out to Jackson Sales & Service Co. and that said Jackson Sales & Service Co. was to immediately pay out said sum to said bank in partial satisfaction of its obligation to the Springville Banking Company; that neither Waldo Jackson nor any of the officers of said bank, each of whom well knew that Jackson Sales & Service Co. was so indebted, made any disclosure to plaintiffs of these facts. That at said meeting, defendant Howard C. Maycock directed that plaintiff Howard W. Brandt make his personal check of \$10,000.00 to the Stockman & Farmers Mart in payment of stock he was to receive in said corporation; that said \$10,000.00 was to be applied by Stockman & Farmers Mart on the purchase price of the inventory of the Jackson Sales & Service Co. which had been taken and evaluated at \$26,500.00. That subsequently, on or about June, 1958, affiant learned that said \$10,000.00 was paid on the said 2nd day of March, 1955, to the defendant, Springville Banking Company, on an indebtedness owing by Jackson Sales & Service to the bank which was in the approximate amount of \$41,194.79 and which was secured by a chattel mortgage in the sum of \$45,000.00 on the personal property of the said Jackson Sales & Service Co., including

the inventory which was to be transferred to the Stockman & Farmers Mart by the said Jackson Sales & Service Co. Said chattel mortgage is the same chattel mortgage referred to in defendants' Motion for Summary Judgment on file in said case. (R. 39) Said chattel mortgage was filed of record with the County Recorder of Utah County on September 24, 1949, as Entry #8708.

That at said time, to-wit, March 2, 1955, Defendant Springville Banking Co. held said chattel mortgage given by Jackson Sales & Service to Defendant Springville Banking Co. for \$45,000.00 on said inventory, fixtures and equipment; that the unpaid balance on said chattel mortgage on March 2, 1955, was approximately \$41,194.79; that plaintiffs at said time did not know of the existence of said chattel mortgage, and they would not have entered into said new business of Stockman & Farmers Mart, nor invested \$10,000.00 or any sum in said company if they had known of the existence of said chattel mortgage at said time; that plaintiffs did not discover or learn of the existence of said chattel mortgage until on or about June, 1958. (R. 40)

That said defendants, by reason of the relationship which existed between them and the plaintiffs, and by reason of plaintiff's placing confidence in them, and by reason of defendants' having superior knowledge of the facts, had a duty to speak and disclose to plaintiffs the existence of said chattel mortgage and the obligation it secured on the 2nd day of March, 1955, and subsequent thereto; that defendants remained silent and thereby deceitfully and fraudulently concealed from plaintiffs the material fact of the existence of said chattel mortgage and the obligation of \$41,194.79 until plaintiffs learned about the existence of said mortgage on or about June, 1958.

Also at the conference at the bank above mentioned, Defendant Maycock credited the bank account of Stockman & Farmers Mart with \$6,500.00, taking its promissory note for the same and specifically directing that this money be used to pay the debts of Jackson Sales & Service Co. and for no other purpose, which was done.

Furthermore, in May 1955, Defendant Packard of the bank put the pressure on Waldo Jackson and plaintiffs to sell the inventory and assets of the Stockman & Farmers Mart in order that the bank's \$6,500.00 obligation could be liquidated. In September, 1955, at the instance and demand of Defendants, Stockman & Farmers Mart did exchange its assets for a farm at Payson, Utah, owned by one E. A. Smithurst subject to a mortgage in the sum of approximately \$6,751.23; the defendant bank presided throughout this Smithurst transaction; a short time later said farm was sold to John T. Martin and the net proceeds thereof in the sum of \$4,300.00 was paid to said defendant bank upon said \$6,500.00 loan.

That said defendants and one Waldo Jackson concealed the plan which the above facts disclose to induce plaintiffs to borrow the \$10,000.00 to invest in farm equipment sales business, but said defendants fraudulently concealed from plaintiffs the fact that said money was in reality to be used for the purpose of liquidating the obligation of the Jackson Sales & Service Co. to the Springville Banking Company; that the Springville Banking Company knew of and participated in the plan to induce plaintiffs to borrow and invest the \$10,000.00 as aforesaid and conspired with the said Waldo Jackson to conceal from plaintiffs the fact that Jackson Sales & Service Co. owed said money to the bank; that the concealment of said material facts in connection with said

business transaction is actionable where there is a duty to speak; this duty to speak arises because of the confidential relationship existing between plaintiffs and defendants, which gives rise to an obligation to reveal all the facts in connection with the transaction and particularly the existence of the Springville Banking Company's chattel mortgage of \$45,000.00, on which there was owing \$41,194.79, covering the assets of Jackson Sales & Service Co., which assets were transferred by the Jackson Sales & Service Co. to Stockman & Farmers Mart; that the inventory of the assets and personal property so transferred as aforesaid had a reasonable cash value of only \$26,500.00; that if there had been a full disclosure to plaintiffs of the facts hereinabove set forth they would not have invested the sum of \$10,000.00 or any other sum into this enterprise and incurred the financial obligations incident to this bankrupt concern.

Defendant Howard C. Maycock, cashier of said bank, falsely represented to plaintiffs that the \$10,000 supplied by plaintiffs would be put into the business of the Stockman & Farmers Mart and another \$10,000 would be put into said business by Waldo Jackson; that the additional capital would make it a better business. That said defendant falsely represented that the obligations of the new corporation would be approximately \$6,500 and the Stockman & Farmers Mart would pay this obligation.

Deposition of Howard C. Maycock: (R. 42-43)

“Q. Are you acquainted with Mr. Howard W. Brandt?

“A. I am.

“Q. When did you first become acquainted with him?

“A. At the time he purchased his home in Springville.

“Q. Do you know when that was?

“A. I would be guessing, but some time around 1949, I think.

“Q. Then for at least approximately 10 years or 9 years you have been acquainted with Mr. Brandt?

“A. That is right.

“Q. What has been the nature of your acquaintance with him?

“A. The fact that he has been a customer of the bank, a depositor having a checking account there and also in connection with church affairs. I happen to be his ward teacher.”

* * *

“Q. Were you acquainted with the business of Jackson Sales & Service as run by Mr. Waldo Jackson?

“A. As he made deposits, yes.

“Q. Didn't you talk to him about how business at that time was going and what obligations he had at this time?

“A. Yes.

“Q. Preceding the March 2nd date?

“A. *We felt an additional \$10,000 in the business would make it a better business and it would also give a new personality to it. We felt Brandt could add something to the business to make it better. He came in as an active participant in the business, he was not just an investor.*

“Q. He was going to work in the business?

“A. And he did work.

"Q. He quit another job to work in the business?

"A. That is right. I guess he had another job.

"Q. At that time, at the time that you were discussing this business with him (Brandt) and Mr. Waldo Jackson, the nature of this business, was anything said about how much ownership each would have in the Stockman and Farmers Mart?

"A. Each was supposed to have a half interest, \$10,000 apiece.

"Q. So, the \$10,000 that Mr. Brandt put up by means of a check that I referred to here before, dated March 2nd, was what he put in that day?

"A. Yes.

"Q. And the deposit that you referred to her for the \$650.00 plus the \$9,350.00 is what Mr. Jackson put in the business?

"A. Yes.

"Q. *At that time they were going over the inventory and this merchandise, did they discuss with you the amount of the obligations? You said something—it was being taken subject to the obligations?*

"A. *My recollection is that it was approximately \$6,500 and Stockman & Farmers Mart would pay that obligation.*

"Q. *To whatever creditors there were of Jackson Sales & Service, is that correct?*

"Yes, *that is correct.*"

* * *

(R. 44)

"Q. On the date of March 2, 1955, did you advise Mr. Howard W. Brandt that the bank had a chattel mortgage on the equipment as shown upon the chattel mortgage and the balance was some \$40,000.00?

“A. I don’t recall.

“Q. When you say you don’t recall, do you recall the conversation?

“A. I don’t know what I told him.”

* * *

“Q. Do you have any reason that you know of not telling Mr. Brandt about the bank’s loan to Mr. Jackson or Jackson Sales & Service for this \$40,000.00?

“A. I said I didn’t tell him. I said I could not remember.

“Q. You don’t think you mentioned it to him?

“A. No.

“Q. Do you know of any reason?

“A. No, I felt this was a separate corporation and had nothing to do with the other one, after the transfer of the physical assets.”

Waldo Jackson in his deposition testified that he did not nor did Jackson Sales & Service Co. invest any money in the Stockman & Farmers Mart; that the two checks of \$650.00 and \$9,350.00 respectively, as testified to by Defendant Maycock, as above set forth, did not represent any cash contribution to the Stockman & Farmers Mart but were simply used as a matter of bookkeeping. The following testimony is taken from the deposition of *Waldo Jackson* (R. 47-48):

“Q. Had you borrowed any money from the bank on Jackson Sales & Service?

“A. Yes, I borrowed money from the bank.

“Q. Under the date of March 2, 1955, do you know how much you owed the bank?

“A. \$40,100.00 and some odd dollars.

“Q. Is that from your own recollection?

“A. That is the note I paid off finally and that was the balance that was owing at the time the deal was set up with Mr. Brandt.

“Q. Did you ever advise Mr. Brandt that this amount was due and owing to the bank?

“A. No, because I didn’t think it concerned him.” (pages 6-7)

* * *

“Q. How much money did you invest in Stockman & Farmers Mart, you personally?

“A. I didn’t invest any, none.

“Q. Did Jackson Sales & Service put anything into it?

“A. How much did they put in?

“Mr. Howard: Are you talking about money?

“Mr. Conder Yes.

“A. Money? None, then. .

“Q. You heard the desposition of Mr. Maycock referring to two checks shown and deposits for Jackson Sales & Service; one for \$650.00 and one for \$9,350.00?

“A. Yes.

“Q. Did you prepare such checks?

“A. Yes, I prepared the checks.

“Q. You say there was no money invested by Jackson Sales & Service?

“A. No.

“Q. Where did the money come from on these checks?

“A. It was to satisfy the inventory transfer, the inventory in Stockman & Farmers Mart, it was just a fixture or instrument in your language, a fixture in mine.”

* * *

“Q. Do you recall borrowing \$6,500.00 from the bank?

“A. Yes, I recall that.

“Q. And signing a note?

“A. I didn’t sign a note.

“Q. I show you the note here for \$6,500.00 which is signed by Mr. Brandt; did you authorize that loan for Stockman & Farmers Mart?

“A. Yes.

“Q. And had you signed anything in connection with this note with the bank?

“A. Not that I recall.” (page 15)

Referring to said chattel mortgage, the President of the Defendant Bank testified in his deposition that said chattel mortgage covered all of the inventory and merchandise of Jackson Sales & Service; that said mortgage was not paid by 1955. (R 46)

Waldo Jackson in his deposition testified he did not disclose to plaintiffs the amount due and owing defendant bank on said chattel mortgage in the sum of \$40,100.00 and some odd dollars at the time the deal was set up with Mr. Brandt. (R 47)

The lower court in his Memorandum Decision stated: (R 54)

“The plaintiffs’ case appears to be based on the making of, and losing an investment of \$10,000 in a corporation known as the Stockman & Farmers Mart in reliance on the representation that the personal property transferred to the corporation was free from liens and encumbrances when in fact there was a chattel mortgage on such property, securing a note

to the defendant bank with an unpaid balance of \$41,194.79. *All particulars were known to the defendants, none of whom disclosed the indebtedness or lien to plaintiffs at the time the plaintiffs discussed with defendants the making of, and arranged and made, the aforesaid investment. The corporation later failed and plaintiffs' investment was lost."*

STATEMENT OF POINTS

I.

PLAINTIFFS' CAUSE OF ACTION IS NOT BARRED BY THE STATUTE OF LIMITATIONS AS SET FORTH IN SECTION 78-12-26, UTAH CODE ANNOTATED, 1953, AND AS A MATTER OF LAW PLAINTIFFS DID NOT HAVE ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE EXISTENCE OF SAID CHATTEL MORTGAGE MORE THAN THREE YEARS PRIOR TO THE COMMENCEMENT OF SAID ACTION.

II.

THE DEFENDANTS' CONDUCT IN THE SUPPRESSION OF TRUTH, AS WELL AS BY POSITIVE STATEMENTS OF FALSEHOOD, WAS A SUBSTANTIAL FACTOR IN CAUSING PLAINTIFFS' DAMAGE IN THE SUM OF \$10,000.00, AND THE COURT ERRED IN GRANTING A SUMMARY JUDGMENT IN SAID CASE.

ARGUMENT

As to Point I, plaintiffs' cause of action is not barred by the statute of limitations as set forth in Section 78-12-26, Utah Code Annotated, 1953.. Section 78-12-26, Utah Code Annotated, 1953, provides a three-year limitation on actions

set forth in said section. Subparagraph (3) reads as follows:

“(3) An action for relief on the ground of fraud or mistake; *but the cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.*”

In the case of SMITH VS. EDWARDS (1932) 81 Utah 244, 17 P 2d 265, the court held:

“Under the laws of Utah it is clear that the limitation does not begin to run until the facts constituting the fraud are discovered. There is therefore a great deal said in these cases about what amounts to discovery. *** The question is, what constitutes a ‘discovery’ within the meaning of the statute? *Mere constructive notice of the deed by reason of its being filed for record is not notice of the facts constituting the fraud.* ***

To ascertain what constitutes ‘a discovery of the facts constituting the fraud,’ reference must be had to the principles of equity. ***Hence, in actions in equity, the rule was that the means of knowledge were equivalent to actual knowledge; that is, that a knowledge of fact which would have put an ordinarily prudent man upon inquiry which, if followed up, would have resulted in a discovery of the fraud, was equivalent to actual discovery.”

The Memorandum Decision of the lower court in granting Defendant’s Motion for Summary Judgment placed no credence in defendants’ contention that plaintiffs’ cause of action was barred by the statute of limitations. The allegation in plaintiffs’ Amended Complaint that they did not discover or learn of the existence of said chattel mortgage until on or about June, 1958 (R 22-23) is controlling in absence of any evidence to the contrary.

POINT II. THE DEFENDANTS' CONDUCT IN THE SUPPRESSION OF TRUTH, AS WELL AS BY POSITIVE STATEMENTS OF FALSEHOOD, WAS A SUBSTANTIAL FACTOR IN CAUSING PLAINTIFFS' DAMAGE IN THE SUM OF \$10,000.00, AND THE COURT ERRED IN GRANTING A SUMMARY JUDGMENT IN SAID CAUSE.

The following excerpts from the Law of Torts by William L. Prosser, 2nd Edition (1955) are pertinent in explanation of the legal questions set forth in plaintiffs' Point II:

"CAUSATION IN FACT: (p. 218-223)

"The defendant is not liable for the plaintiff's injury unless he has in fact caused it. Causation is a matter of what has in fact occurred. The fact of causation is essential to liability, but does not alone determine it, since other considerations may prevent it although causation is established.

"If the defendant's act or omission was a substantial factor in bringing about the result, it will be regarded as a cause in fact. Ordinarily it will be such a substantial factor if the result would not have occurred without it.

"The plaintiff is not required to establish the fact of causation with absolute certainty. It is sufficient that he introduces evidence from which reasonable men may conclude that it is more probable that the defendant's conduct was a cause than it was not.

"An essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered. This connection usually is dealt with by the courts in terms of what is called "proximate cause," or "legal cause." There is perhaps nothing in the entire field of law

which has called forth more disagreement, or upon which the opinions are in such a welter of confusion. Nor, despite the manifold attempts which have been made to clarify the subject, is there yet any general agreement as to the proper approach. Much of this confusion is due to the fact that no one problem is involved, but a number of different problems, which are not distinguished clearly, and that language appropriate to a discussion of one is carried over to cast a shadow upon the others.

*“Proximate cause”—in itself an unfortunate term—is merely the limitation which the courts have placed upon the actor’s responsibility for the consequence of his conduct. * * **

“This limitation is sometimes, but rarely, one of the fact of causation. More often it is purely one of policy, not connected with questions of causation at all. If the defendant excavates a hole by the side of the road, and the plaintiff’s runaway horse runs into it, it scarcely can be pretended that the hole was not a cause of the harm, and a very important one. If the defendant escapes responsibility, it is because the policy of the law does not require him to safeguard the plaintiff against such a risk. On the same basis, if the defendant drives through the state of New Jersey at an excessive speed, and arrives in Philadelphia in time to be struck by lightning, his speed is a not unimportant cause of the accident, since without it he would not have been there in time; and if he is not liable to his passenger, it is because in the eyes of the law his negligence did not extend to such a risk. The attempt to deal with such cases in the language of causation can lead only to confusion.

“The simplest and most obvious problem connected with “proximate cause” is that of causation. Of all the questions involved, it is easiest to give an answer to that which traditionally is regarded as most

difficult: has the conduct of the defendant caused the plaintiff's loss? This is a *question of fact, and one on which any layman is quite as competent to sit in judgment as the most experienced court. In the ordinary case, it is peculiarly for the jury.*

“Causation is a fact. It is a matter of what has in fact occurred. A cause is a necessary antecedent: In a very practical sense the term embraces all things which have so far contributed to the result that without them it would not have occurred. It covers not only positive acts and active physical forces, but also pre-existing passive conditions which have played a material part in bringing about the event. In particular, it covers the defendant's omissions as well as his acts. The failure to extinguish a fire may be quite as important in causing the destruction of a building as setting it in the first place. The failure to fence a railway track may be a cause, and an important one, that a child is struck by a train. It is familiar law that if such omissions are culpable they will result in liability.

* * *

“ * * A stabs C with a knife, and B fractures C's skull with a rock; either would be fatal, and C dies from the effects of both. The defendant sets a fire, which merges with a fire from some other source; the combined fires burn the plaintiff's property, but either one would have done it alone. In such cases it is clear that each cause has played a part in the result, and it is also clear that neither can be absolved from responsibility upon the ground that the harm would have occurred without it, or there would be no liability at all.*

“It was in a case of this type that the Minnesota Court applied a broader rule, which has found general acceptance: The defendant's conduct is a cause

of the event if it was a material element and a substantial factor in bringing it about. Whether it was such a substantial factor is for the jury to determine, unless the issue is so clear that reasonable men could not differ. "Substantial factor" is a phrase sufficiently intelligible to the layman to furnish an adequate guide in instructions to the jury, and it is neither possible nor desirable to reduce it to lower terms. As applied to the fact of causation alone, no better test has been devised.

"If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from responsibility merely because other causes have contributed to the result. Nothing occurs in a vacuum, and the event without multiple causes, numbered in the thousands, is inconceivable. In particular, the defendant is not necessarily relieved of liability because the negligence of another person is also a contributing cause. Thus where two vehicles collide and injure a bystander, or a passenger in one of them, each driver may be liable for the harm inflicted. The law of joint tortfeasors rests largely upon recognition of the fact that each of two causes may be charged with a single result.

* * *

"PROOF:

"On the issue of the fact of causation, as on other issues essential to his case, the plaintiff has the burden of proof. He must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in the result. * * *

"The plaintiff is not, however, required to prove his case beyond a reasonable doubt. He need not negative entirely the possibility that the defendant's conduct was not a cause, and it is enough that he in-

troduces evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no man can say with absolute certainty what would have occurred if the defendant had acted otherwise. Proof of what we call the relation of cause and effect, that of necessary antecedent and inevitable consequence, can be nothing more than the "projection of our habit of expecting certain consequents to follow certain antecedents merely because we had observed these sequences on previous occasions." If as a matter of ordinary experience a particular act or omission might be expected, under the circumstances, to produce a particular result, and that result in fact has followed, the conclusion may be permissible that the causal relation exists.

"Circumstantial evidence or common knowledge may provide a basis from which the causal sequence may be inferred. Thus it is every day experience that unlighted stairs create a danger that someone will fall. Such a condition "greatly multiplies the chances of accident, and is of a character naturally leading to its occurrence.." When a fat woman tumbles down the steps, it is a reasonable conclusion that it is more likely than not that the bad lighting has played a substantial part in the fall. When a child is drowned in a swimming pool, no one can say with certainty that a lifeguard would have saved him but the experience of the community permits the conclusion that the absence of the guard played a significant part in the drowning. SUCH QUESTIONS ARE PECULIARLY FOR THE JURY; AND WHETHER PROPER CONSTRUCTION OF A BUILDING WOULD HAVE WITHSTOOD AN EARTHQUAKE, OR WHETHER REASONABLE POLICE PRECAUTIONS WOULD HAVE PREVENTED A BOY FROM SHOOTING

THE PLAINTIFF IN THE EYE WITH AN AIR-GUN, ARE QUESTIONS ON WHICH A COURT CAN SELDOM RULE AS A MATTER OF LAW.

(Prosser on Torts, 2nd Ed. p. 532-536):

“Representation and Nondisclosure:

“The representation which serves as the foundation for an action of deceit may consist of words or conduct. Any active concealment of the truth, by words or conduct creating a false impression or removing an opportunity to discover the facts, is treated as the equivalent of a representation that such facts are not true.

“It is commonly stated as a general rule that deceit will not lie for mere silence, or passive nondisclosure. To this rule a number of poorly defined exceptions have been developed, particularly where the parties stand in some confidential or fiduciary relation, or the contract is one which is regarded as requiring the utmost good faith. There is a tendency on the part of some courts to require disclosure in any case where the defendant has special information not available to the plaintiff, and fair conduct demands it.

“Equitable relief, or estoppel, also usually is held to be available for nondisclosure of basic facts.

“The representation which will serve as a basis for an action of deceit, as well as other forms of relief, usually consists, of course, of oral or written words; but it is not necessarily so limited, and the exhibition of a document, turning back the speedometer of an automobile offered for sale, drawing a check without funds, or a wide variety of other conduct calculated to convey a misleading impression under the circumstances of the case, may be suffi-

ent. Here, as elsewhere, "actions may speak louder than words."

*"The significance to be assigned to such words or conduct will be determined according to the effect they would produce, under the circumstances, upon the ordinary mind. * * **

"In addition to such representations by word or conduct, which might be called definite or positive, deceit, as well as other remedies, may be based upon an active concealment of the truth. Any words or acts which create a false impression covering up the truth, or which remove an opportunity that might otherwise have led to the discovery of a material fact—as by floating a ship to conceal the defects in her bottom, sending one who is in search of information in a direction where it cannot be obtained, or even a false denial of knowledge by one in possession of the facts—are classed as misrepresentation, no less than a verbal assurance that the fact is not true.

"Nondisclosure:

*"A much more difficult problem arises as to whether mere silence, or a passive failure to disclose facts of which the defendant has knowledge, can serve as the foundation of a deceit action. It has commonly been stated as a general rule, particularly in the older cases, that the action will not lie for such tacit nondisclosure. * * **

*"To this general rule, if such it be, the courts have developed a number of exceptions, some of which are as yet very ill defined, and have no very definite boundaries. The most obvious one is that if the defendant does speak, he must disclose enough to prevent his words from being misleading, * * **

"Another exception is found where the parties stand in some confidential or fiduciary relation to one

another, such as that of principal and agent, executor and beneficiary of an estate, bank and investing depositor, or numerous others where special trust and confidence is reposed. In addition, certain types of contracts, such as those of suretyship or guaranty, insurance, partnership and joint adventure, are recognized as creating something in the nature of a confidential relation, and hence as requiring the utmost good faith, and full and fair disclosure of all material facts.

“ * * In a number of recent decisions, however, the same duty of disclosure has been found in other types of transactions where one party remains silent as to a fact which he knows to be of importance to the other. The law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it.*

*“When the plaintiff seeks relief of an equitable character, as by rescission of the transaction and recovery of what he has parted with, a more liberal rule usually is applied. * * * The greater liberality found as to such remedies is probably due to the fact that they are primarily concerned with preventing the defendant from obtaining an unfair advantage of his own, while the action of deceit requires him to go further, and compensate the plaintiff for the loss he has sustained.”*

Prosser quotes the case of *BRASHER V. FIRST NATIONAL BANK* (1936) 232 Ala 3480, 168 So. 42. Also, the case of *EDWARD BARRON ESTATE CO. vs. WOODRUFF CO.* (1912) 163 Cal 561, 126 P 351, 42 LRA NS 125. This latter case cites the following relationships where special trust and confidence reposed:

“* * * for instance, the relations of trustee and cestui que trust, principal and agent, attorney and client, physician and patient, priest and parishioner, partners, tenants in common, husband and wife, parent and child, guardian and ward, and many others of like character.”

The following excerpts from the Brasher case are pertinent:

“Where a relation of trust and confidence exists between the parties it is the duty of the party in whom the confidence is reposed to make full disclosure of all material facts within his knowledge relating to the transaction in question and any concealment of material fact by him is a fraud.” (232 Ala 340 at page 344)

12 RCL 311. 45 AM REP 75, reads:

“Where confidential or fiduciary relations exist, which afford the power and means to one party to a transaction to take undue advantage of the other party and there is found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party.”

12 RCL p. 305, par. 66:

“Fraud may be committed by the suppression of truth as well as by the suggestion of falsehood and it is equally competent for the court to relieve against it whether it is committed in one way or the other. The one acts negatively, the other positively; both are calculated, in different ways, to produce the same results.”

215 Ala 200, 110 So. 286:

“Courts of Justice will not look for naked technicalities and mere sentimentalism as to shield one who by his fraud and deceit inflicts damage on another.”

(Prosser on Torts, 2nd Ed. p. 566-671):

“Damages:

“Proof of damage is essential in an action of deceit. The damages recoverable are limited to those which might foreseeably be expected to follow from the character of the misrepresentation. The better view is that damage is not essential to restitution, in equity or at law, but that it is merely one factor to be considered in determining whether equitable relief should be granted.

“The courts are divided as to two measures of damages in a deceit action. The majority adopt the “loss-of-bargain” rule, which gives the plaintiff the difference between the value of what he has received and the value he would have received if the representation had been true. The minority adopt the “out-of-pocket” rule, which gives him the difference between the value received and the value he has parted with. There is a tendency toward a flexible rule, adopting either measure as the justice of the particular case may require.

* * *

*“Furthermore, the damage upon which a deceit action rests must have been “proximately caused” by the misrepresentation. So far as the fact of causation is concerned, any loss which follows upon a transaction into which the misstatement induces the plaintiff to enter may be said to be caused by it; * * **

“When restitution is sought, either in equity or at law, a much more liberal policy has been adopted. Since the purpose is not to compensate the plaintiff’s loss, but to restore what the defendant has received, the courts look to the inequity of allowing him to retain it, rather than to the damage which the plaintiff has sustained. It is often repeated that damage

must be shown for rescission, and recovery has been denied on that basis; but the assertion is so far honored in the breach that it has little or no validity.— (Prosser quotes Restatement of the Law of Contracts, pars. 476 (c) and 477, which read as follows: (par. 476 (c): “No legal effect is caused by either fraudulent or other misrepresentation unless it induces affirmative or negative conduct, *but it is not necessary that misrepresentation should be the only inducement for entering into a contract or for giving a discharge, voidable. It is enough that the misrepresentation is relied on as an inducement. It is immaterial whether damage is caused.*”

(par. 477): “Fraud or material misrepresentation by a third person renders a transaction voidable by a party induced thereby to enter into it if the other party thereto has reason to know of the fraud or misrepresentation before he has given or promised in good faith something of value in the transaction or changed his position materially by reason of the transaction.” See 48 Harv. L. Rev. 480.

(Prosser cont'd “Damages” p. 567):

“The plaintiff will not be permitted to rescind where he has received substantially what he has bargained for, or where subsequent events have made the representation good. But sufficient “damage” has been found, or dispensed with, where the plaintiff has received property of a different character or condition than he has promised, although of equal value, where the transaction proves to be less advantageous than as represented, although there is no actual loss; and where the false statement was important to the plaintiff for reasons personal to himself, not affecting any financial value or profit. *It seems correct to say rather that damage is not essential to rescission, but that it is merely one factor to be considered in*

determining whether it is equitable to allow the transaction to stand.

“Measure of Damages:

“The proximity of other forms of relief has been reflected in the conflicting rules which have been adopted as to the normal measure of damages in the action of deceit. The American courts are divided over two standards of measurement. One of these, the so-called “out-of-pocket” rule, looks to the loss which the plaintiff has suffered in the transaction, and gives him the difference between the value of what he has parted with and the value of what he has received. If what he received was worth what he paid for it, he has not been damaged, and there can be no recovery. This rule is followed in deceit actions by the English courts, and by a minority of perhaps a dozen American jurisdictions. It is always adopted as to a defense in the nature of recoupment, and is of course the practical result reached by rescission where each party is restored to his original position. The other measurement, called the “loss-of-bargain” rule, gives the plaintiff the benefit of what he was promised, and allows recovery of the difference between the actual value of what he has received and the value that it would have had if it had been as represented. This, of course, is the rule applied in contract actions for breach of warranty, and it is consistent with the result in cases of estoppel. *It has been adopted by some two-thirds of the courts which have considered the question in actions of deceit. There is the same conflict where the recovery is based on negligent misrepresentation.*

“As a matter of the strict logic of the form of action, the first of these two rules is more consistent

with the purpose of tort remedies, which is to compensate the plaintiff for a loss sustained, rather than to give him the benefit of any contract bargain. *Also, it must of necessity be adopted where the defendant is a third party who has made no contract with the plaintiff, and it has been contended that the presence of a contract should not change the damages where the action is not on the contract itself.* On the other hand, it is urged in support of the majority rule that the form of the action should be of little importance, that in an action in the form of tort for breach of warranty the plaintiff is given the benefit of his bargain and the addition of an allegation of intent to deceive should certainly not decrease his recovery, and that in many cases the out-of-pocket measure will permit the fraudulent defendant to escape all liability and have a chance to profit by the transaction if he can get away with it.

“Few courts have followed either rule with entire consistency, and various proposals have been made to introduce some flexibility into the measure of damages. Thus it has been suggested that the loss-of-bargain rule should be applied in cases of intentional misrepresentation, the out-of-pocket rule where it is innocent; that the plaintiff be given the option of either rule, or that the court should adopt the rule which best fits the certainty of the damages proved, and so avoid the possibility that a plaintiff who has suffered a real damage may be denied recovery because he is unable to prove values. A leading Oregon decision (Selman vs. Shirley, 1938, 161 Or. 582, 85 P 2d 384, 91 P 2d 312, 124 ALR 1), which seems to have given more careful consideration to the problem than any other, and is beginning to be followed in other jurisdictions, reduces the matter to four rules, as follows:

“1. If the defrauded party is content with the recovery of only the amount he has actually lost, his damages will always be measured under that rule.

“2. If the fraudulent transaction also amounted to a warranty, he may recover for loss of the bargain, because a fraud accompanied by a broken promise should cost the wrong-doer as much as the breach of promise alone.

“3. Where the circumstances disclosed by the proof are so vague as to cast virtually no light upon the value of the property had it conformed to the representations, damages will be awarded equal to the loss sustained, and

“4. Where the damages under the benefit-of-bargain rule are proved with reasonable certainty, that rule will be employed.

“ * * If the deception is found to have been deliberate or wanton, punitive damages may be recovered, as in the case of other torts of similar character.”*

The treatment of deceit and fraud is exhaustively gone into in Vols. 23 and 24, American Jurisprudence, under the title “What Constitutes Damage; Time of Accrual.” This authority cites on page 994, Vol. 23, par. 175, the following:

*“Although proof of a material injury is essential in an action of deceit, the loss or injury need not be of a specifically pecuniary character. It is sufficient if the fraud has resulted in the loss of a right which the law recognizes as of pecuniary value, * * * The mere difficulty of estimation of injury, or that the right is personal, does not bar recovery.”*

In support of this proposition American Jurisprudence cites the case of *KUJEK V. GOLDMAN*, 150 NY 176, 44 NE 773:

“1. A man who induces another to marry a girl by false representations that she is virtuous when in fact she has been seduced by himself and has become pregnant is liable for damages in an action by the husband for fraud.

“2. Exemplary damages are recoverable for fraud in inducing a man to marry a woman who is pregnant by another.

“3. A direct precedent for the action is not necessary to give a right of action for the wrong.

“4. Loss of the comfort founded upon affection and respect derived from conjugal society is sufficient, irrespective of any pecuniary damages, to sustain an action by a husband against one who has fraudulently induced him to marry a woman who is pregnant by another.”

The court said: “While no precedent is cited for such an action, it does not follow that there is no remedy for the wrong, because every form of action when brought for the first time must have been without a precedent to support it. Courts sometimes of necessity abandon their search for precedents and yet sustain a recovery upon legal principles clearly applicable to the new state of facts, although there was no direct precedent for it, because there had never been an occasion to make one.”

American Jurisprudence quotes the following principles which are pertinent to the issues in the instant case: (Vol 23)

Par. 175, p. 994:

“One who is defrauded through false representations respecting the solvency of another is damnified as soon as he is induced to act in the manner occasioning the loss, and may maintain an action therefor at once.”

Par. 179, p. 998:

“Dispensability of Benefit to, or Interest of, Wrongdoer.—It is well settled that in order to render one liable for damages in an action of deceit, it is not necessary that he shall have derived any benefit from the deception or have colluded with the person who was so benefited. *Nor is it necessary, in order to established remediable damage, that the person charged with fraud shall have had any interest in the contemplated transaction, or in the subject matter thereof, or in making the representation, or that he shall have expected to reap any benefit from the fraud.* The fact that he happens to have such an interest is a matter of which the law takes no cognizance in such an action. It is not necessary to allege or prove it; and proof of it does not affect the rights of the parties, unless it goes far enough to create a liability of another kind, although the fact that he did derive a benefit may serve to strengthen the plaintiff’s case on the evidence.”

Par. 187, p. 1011:

“*Third Persons Not parties to Transaction.—A person may be charged with fraud, although he is not a party to the transaction into which the complainant is induced, by the misrepresentation, to enter. To render one liable in an action of deceit, no privity of contract between the plaintiff and defendant need be shown, the character of representee being sufficient.*”

See the following cases:

PICHE V. ROBBINS, 24 RI 325, 53 ATL 92, 28 LRA (NS) 205. The Court in this case said:

“If the vendor of property in selling same, asserts that the property is unencumbered, which statement is untrue, although he believes it to be true, he is nevertheless liable to the vendee in an action for deceit.”

CARPENTER V. WRIGHT, 52 KAN 221, 311 Pac 798:

“The fact that a person who makes a fraudulent representation had no personal interest in the sale of real estate, the title of which he misrepresented, and that he received no portion of the purchase price, does not relieve him from liability to the vendee where the latter relied upon the representation.”

HOTALING Vs. A. B. LEACH CO. (1928) 247 NY 84, 159 NE 870. The Court in this case held:

“The loss proximately caused by the defendants’ fraud is the difference between the price he paid and the value of what he received when put to the use contemplated by the parties.”

In the case of HECHT V. METZLER (1897) 14 Utah 408, 48 P 37, 60 Am St Rep 906, the court stated:

“In an action for fraud and deceit in the sale or exchange of property, the measure of damages is the difference between the actual value of the property as it would have been if as represented and as it actually was.”

In summary, the undisputed facts as hereinabove set forth, clearly disclose that the defendants entered into a conspiracy with one Waldo Jackson, the operator of the Jackson Sales & Service Co., to obtain \$10,000 in cash from plaintiffs to apply on the chattel mortgage indebtedness of Waldo Jackson and Jackson Sales & Service Co. to

the defendant Springville Banking Co. The application of the basic principles of law of fraud and deceit as hereinabove set forth to the factual picture of this conspiracy clearly justifies the court in reversing the decision of the lower court in granting defendants' motion for summary judgment. Plaintiffs contend that the misconduct of defendants in failing to disclose to plaintiffs the said mortgage lien against the stock and equipment transferred to the Stockman & Farmers Mart at its very inception, coupled with the defendants maliciously false representations as to the financial stability and capital structure of said corporation, as more particularly hereinabove set forth, not only caused plaintiffs to suffer damages in the sum of \$10,000 but it was also the basic cause of the insolvency of the Stockman & Farmers Mart. It is well to keep in mind that under the law of fraud and deceit it is only necessary for the plaintiffs to show that the misconduct of the defendants was one of the basic causes of plaintiffs' damage. It may be argued there were other contributory causes, but the factual picture now before the court does not disclose any other factors for the insolvency of the Stockman & Farmers Mart and the resultant damage to plaintiffs in the sum of \$10,000. We reiterate the rule laid down by William L. Prosser in his Law of Torts as found on pages 18 and 19 of this brief:

"The plaintiff is not, however, required to prove his case beyond a reasonable doubt. He need not negative entirely the possibility that the defendant's conduct was not a cause, and it is enough that he introduces evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant than it was not. The fact

of causation is incapable of mathematical proof, since no man can say with absolute certainty what would have occurred if the defendant had acted otherwise. Proof of what we call the relation of cause and effect, that of necessary antecedent and inevitable consequence, can be nothing more than the 'projection of our habit of expecting certain consequents to follow certain antecedents merely because we had observed these sequences on previous occasions.' If as a matter of ordinary experience a particular act or omission might be expected, under the circumstances, to produce a particular result, and that result in fact has followed, the conclusion may be permissible that the causal relation exists."

Certainly a person of ordinary experience would conclude that the misconduct of defendants resulted in the insolvency of the said corporation and the damage to plaintiffs in the sum of \$10,000. In the first place, the proposed corporation was to have an unencumbered inventory of stock and equipment of the reasonable value of approximately \$26,500. As a matter of fact there was a chattel mortgage outstanding against these assets in the sum of \$45,000 with an unpaid balance of \$41,194.79. According to the misrepresentations of the defendants, these assets were free and clear of encumbrances except the sum of \$6,500, which sum said corporation borrowed from the defendant bank to discharge obligations of creditors of Jackson Sales & Service Co. Defendant Maycock testified this \$6,500 was the total obligations against these assets. This was a maliciously false statement as there was an outstanding mortgage indebtedness of some \$41,194.79. *From these facts any ordinary person would say that the company was insolvent*

from its very inception. The Defendant Maycock also testified that the \$10,000 which plaintiffs were putting into the business was to pay for their stock in the corporation; that this would give the corporation \$10,000 in capital to operate the company. Maycock testified: *"We felt an additional \$10,000 in the business would make it a better business and it would also give a new personality to it."* (R. 42) This statement is also false. Under the conspiracy of the defendants, the \$10,000 was transferred immediately on the date of its reception to the defendant bank. There was also a statement made by Defendant Maycock that \$10,000 was being put into the business by Waldo Jackson. These representations were all made when this corporation was finally brought into being on March 2, 1955. This statement was false as shown by the sworn testimony of Waldo Jackson in his deposition as hereinabove set forth. (R. 47-48) So instead of having a capital of \$20,000 this company had absolutely no capital at all, as the \$6,500 which they borrowed was solely for the purpose of discharging obligations of the creditors of Jackson Sales & Service Co. The facts show that this amount was paid to these creditors. From the beginning this corporation has \$26,500 of stock and equipment subject to a mortgage indebtedness of \$41,194.79 and note of \$6,500 owing to defendant Springville Banking Co. Certainly no one would loan any money for working capital on assets which were encumbered with liens far in excess of their value. Is it any wonder that on or about May of 1955 approximately two months after the organization of this corporation the defendants put the pressure on Waldo Jackson and plaintiffs to sell the inventory and assets of the Stockman & Farmers Mart in order that the \$6,500 obligation to the bank could be liquidated.

Finally on or about September of 1955 at the instance and demand of defendants, Stockman & Farmers Mart did exchange its assets for a farm at Payson, Utah, owned by one E. A. Smithurst, which farm was subject to a mortgage in the approximate sum of \$6,751.23. The facts show that defendant bank presided throughout this Smithurst transaction. Then to complete the financial capitulation of this company, the defendants demanded that the farm be sold to John T. Martin and after the mortgage was paid on the farm, the net proceeds of \$4,300 was paid to said defendant bank upon said \$6,500 loan. Applying Prosser's test of causation, no sane person could possibly arrive at any conclusion other than that the misconduct of the defendants was not only a *basic cause* of the insolvency of the Stockman & Farmers Mart, but was *the basic cause* of said insolvency. Certainly the misconduct of defendants was clerally and definitely a *basic cause* and in the opinion of any reasonable person *the basic cause* of the damage suffered by plaintiffs in the sum of \$10,000. The cases of *Hotaling vs. A. B. Leach Co.* and *Hecht vs. Metzler*, hereinabove quoted, lay down the rule "*that the loss proximately caused by defendant's fraud is the difference between the price he paid and the value of what he received when put to the use contemplated by the parties.*" If the representations by defendants had been true and the Stockman & Farmers Mart had enjoyed the capital structure incident to these representations, the dire consequences that befell this corporation would never have occurred and plaintiffs would not have suffered damages in the sum of \$10,000 or any other sum.

Furthermore, no sane person would have invested \$10,000 in such an enterprise if defendants had disclosed

to plaintiffs that defendant bank had a \$41,194.79 mortgage encumbrance against the total inventory assets of \$26,500.

Respectfully submitted,

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