

1959

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Van Cott, Bagley, Cornwall & McCarthy; David E. Salisbury; Counsel for Respondent;

Recommended Citation

Brief of Respondent, *Brandt v. Springville Banking Co.*, No. 9128 (Utah Supreme Court, 1959).
https://digitalcommons.law.byu.edu/uofu_sc1/3470

This Brief of Respondent 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 (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the
Supreme Court of the State of Utah

FILED
DEC 31 1959

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

v.

SPRINGVILLE BANKING COMPANY, a Utah corporation, F. C. PACKARD and HOWARD C. MAYCOCK,
Defendants and Respondents.

Clerk, Supreme Court, Utah

Case No.
9128

BRIEF OF RESPONDENTS

VAN COTT, BAGLEY,
CORNWALL & McCARTHY,
David E. Salisbury,

Counsel for Respondents.

TABLE OF CONTENTS

| | Page |
|---|-----------|
| PRELIMINARY STATEMENT | 1 |
| STATEMENT OF FACTS | 3 |
| STATEMENT OF POINTS | 6 |
| POINT I. THE TRIAL COURT PROPERLY GRANTED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SINCE AS A MAT- TER OF LAW UNDER THE UNCONTRO- VERTED FACTS THE ALLEGED FRAUD OR CONCEALMENT DID NOT PROXI- MATELY CAUSE PLAINTIFFS' ALLEGED DAMAGES | 6, 7 |
| A. Plaintiffs Are Bound By The Allegations of Their Complaint | 6, 7 |
| B. The Alleged Concealment of the Chattel Mortgage Was Not The Proximate Cause of Plaintiffs' Alleged Damages | 6, 8 |
| POINT II. PLAINTIFFS' CAUSE OF ACTION IS BARRED AS A MATTER OF LAW BY THE STATUTE OF LIMITATIONS AS SET FORTH IN SECTION 78-12-26, UTAH CODE ANNO- TATED, 1953, SINCE PLAINTIFFS HAD CONSTRUCTIVE KNOWLEDGE OF THE EXISTENCE OF THE CHATTEL MORT- GAGE | 6, 12, 13 |
| CONCLUSION | 16 |

CASES CITED

| | |
|---|--------|
| Beare v. Wright, 14 N. D. 26, 103 N. W. 632 | 10, 11 |
| Bonneville Lumber Co. v. Peppard Seed Co., 72 Utah 463, 271 Pac. 226 | 15 |

TABLE OF CONTENTS—Continued

| | Page |
|---|--------|
| Downey v. Banker, 32 F. Supp. 874 (S. D. N. Y. 1940) | 8 |
| Haentz v. Loehr, 233 Wis. 583, 290 N. W. 163 | 10 |
| Hindman v. First National Bank, 112 Fed. 931 (6th Cir. 1902) | 10 |
| Hotling v. A. B. Leach & Co., 247 N. Y. 84, 159 N. E. 870 | 10 |
| Iverson v. United States, 63 F. Supp. 1001 (D. C. 1946) | 8 |
| Kosmos Portland Cement Co. v. D. A. Y. Construction Co., 101 F. 2d 893, 896 (7th Cir. 1939) | 11, 12 |
| Manby v. Hibbard, 71 Colo. 296, 206 Pac. 381 | 12 |
| Morgan v. Hodge, 145 Wis. 143, 129 N. W. 1083 | 10 |
| Morrell v. Wiley, 119 Conn. 578, 178 Atl. 121 | 10, 11 |
| Reese Howell Co. v. Brown, 48 Utah 142, 158 Pac. 684 | 14 |
| Smith v. Edwards, 81 Utah 244, 17 P. 2d 264, 269 | 14, 15 |
| Weight v. Bailey, 45 Utah 584, 147 Pac. 899 | 14 |

TEXTS CITED

| | |
|--|----|
| Prosser on Torts, Section 90 | 10 |
| Restatement of Torts, Section 549 | 9 |
| Restatement of Torts, Volume 3, Page 112 | 9 |
| 23 American Jurisprudence, Sections 172, 176 | 11 |

STATUTES CITED

| | |
|---|----|
| Section 78-12-26, Utah Code Annotated, 1953 | 13 |
| Utah Rules of Civil Procedure, Rule 56 | 16 |

In the
Supreme Court of the State of Utah

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

v.

SPRINGVILLE BANKING COM-
PANY, a Utah corporation, F. C.
PACKARD and HOWARD C. MAY-
COCK,
Defendants and Respondents.

Case No.
9128

BRIEF OF RESPONDENTS

PRELIMINARY STATEMENT

As in Appellants' brief, the parties will be referred to as in the Court below.

Plaintiffs have appealed from a Summary Judgment granted to Defendants by the Honorable Maurice Harding,

District Judge of the Fourth Judicial District Court pursuant to a Memorandum Decision dated the 16th day of July, 1959.

This is the second lawsuit commenced by the Plaintiffs in an effort to obtain a judgment based upon the facts involved herein (R. 41).

The Statement of Facts presented by Plaintiffs in their brief is misleading in many respects, inconsistent with the record herein and while some of the facts and inuendos must be deemed admitted for purposes of this appeal they are vigorously denied by the Defendants. The attention of this Court is directed to the record filed herein and particularly the pleadings, for a correct statement of the facts involved on this appeal.

Plaintiffs filed a complaint on February 24, 1959 which purports to allege a cause of action for fraud against Defendants for their alleged failure to disclose the existence of a chattel mortgage in connection with a transaction in which Plaintiffs were involved (R. 3). This transaction referred to took place in February and March of 1955. Defendants filed an Answer and Counterclaim in which they set forth as a defense, among others, the Statute of Limitations (R. 9). Plaintiffs thereafter amended their complaint to allege that the existence of the alleged fraud was not discovered by them until 1958 (R. 21).

Defendants then filed a Motion for Summary Judgment based upon two grounds: (1) that the cause of action alleged by Plaintiffs was barred by the Statute of Limitations because Plaintiffs had constructive notice of the

chattel mortgage by virtue of the filing of said chattel mortgage with the County Recorder; and (2) that as a matter of law, under all of the facts shown by the pleadings and by Plaintiffs own allegations the damages alleged by the Plaintiffs were not proximately caused by the alleged concealment by the Defendants, since the chattel mortgage did not cause any damage or loss to them (R. 27). This motion was based upon an affidavit by one of the defendants which remains uncontroverted despite a lengthy and rambling affidavit prepared by Plaintiffs' attorney (R. 29). The latter affidavit is filled with allegations, conclusions of law and inuendos which although denied by the Defendants still does not alter the facts upon which Defendants' Motion for Summary Judgment was granted.

STATEMENT OF FACTS

For purposes of this appeal certain of Plaintiffs' allegations of facts must be assumed to be correct even though they are denied by Defendants.

During the early part of 1955, Plaintiffs started to negotiate with Waldo W. Jackson, brother of Leona J. Brandt, one of the Plaintiffs and brother-in-law of Howard J. Brandt, the other Plaintiff. Plaintiffs discussed with Mr. Jackson a proposal by which they would invest money in a new hardware and farm implement business to be organized by them. These negotiations were in no way initiated by the Defendant bank or its officers. The new corporation organized by Plaintiffs and Mr. Jackson was known as Stockman & Farmers Mart. This corporation was

to acquire part of the hardware and farm implement inventory and certain equipment owned by Jackson Sales & Service Company, a corporation controlled by Mr. Jackson.

The Defendant bank and its officers assisted Plaintiffs in borrowing the \$10,000.00 which they were to invest in the new corporation. On March 2, 1955 the transaction was closed in the Defendant bank and Plaintiffs and their brother (or brother-in-law) deposited checks representing their investment to the account of the new corporation and a check was drawn by the new corporation to Jackson Sales & Service Company to pay for the inventory and equipment being transferred. The Defendant bank also loaned the new corporation some money upon the personal guarantee of the Plaintiffs.

On the date of the above transaction the Defendant, Springville Banking Company, held a note of Jackson Sales & Service Company, dated September 19, 1949, the unpaid balance of which on March 2, 1955 was \$40,194.79. This note was secured by a real estate mortgage on considerable real property owned by said corporation in Springville, Utah and a chattel mortgage dated September 19, 1949, covering certain personal property (R. 29). This chattel mortgage was filed with the County Recorder of Utah County on September 24, 1949 as Entry No. 8708. It is alleged that this chattel mortgage covered part of the personal property transferred by Jackson Sales & Service Company to Stockman & Farmers Mart and for purposes of this appeal this allegation is admitted. There is no allegation in Plaintiffs' complaint and there is no factual

basis for Plaintiffs' statement in their brief that the \$10,000.00 paid by Plaintiffs to the new corporation, of which Plaintiffs were President and Vice-President, was used to apply on the chattel mortgage indebtedness.

It is alleged that at the time of the above transaction in the Defendant bank in March of 1955 Defendants did not disclose to Plaintiffs the existence of the above chattel mortgage dated September 19, 1949.

As shown by the affidavit of defendant Howard C. Maycock, Cashier of the Springville Banking Company, the note secured by the real estate and chattel mortgage was later paid and discharged by Jackson Sales & Service Company or Waldo W. Jackson (R. 29). This was done by the conveyance to the bank of part or all of the real estate covered by the mortgage. The chattel mortgage was never foreclosed and the property described in the chattel mortgage was never attached by the bank or in any way affected by said chattel mortgage (R. 29). The said Stockmen & Farmers Mart and the Plaintiffs herein did not sustain any loss as a result of the existence of said chattel mortgage.

Plaintiffs' claim for recovery as set forth in their Amended Complaint was based upon the allegation in Paragraph 10 "that as a proximate result of said Chattel Mortgage and the concealment thereof by Defendants, plaintiffs lost said \$10,000.00 *when said business of Stockman & Farmers Mart failed.*" (Emphasis added.) (R. 23.) As stated in this allegation, Plaintiffs' damages, if any, resulted from the failure of the business, not from the existence of the chattel mortgage.

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT PROPERLY GRANTED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SINCE AS A MATTER OF LAW UNDER THE UNCONTROVERTED FACTS THE ALLEGED FRAUD OR CONCEALMENT DID NOT PROXIMATELY CAUSE PLAINTIFFS' ALLEGED DAMAGES.

A. *PLAINTIFFS ARE BOUND BY THE ALLEGATIONS OF THEIR COMPLAINT.*

B. *THE ALLEGED CONCEALMENT OF THE CHATTEL MORTGAGE WAS NOT THE PROXIMATE CAUSE OF PLAINTIFFS' ALLEGED DAMAGES.*

POINT II.

PLAINTIFFS' CAUSE OF ACTION IS BARRED AS A MATTER OF LAW BY THE STATUTE OF LIMITATIONS AS SET FORTH IN SECTION 78-12-26, UTAH CODE ANNOTATED, 1953, SINCE PLAINTIFFS HAD CONSTRUCTIVE KNOWLEDGE OF THE EXISTENCE OF THE CHATTEL MORTGAGE.

ARGUMENT

POINT I.

THE TRIAL COURT PROPERLY GRANTED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SINCE AS A MATTER OF LAW UNDER THE UNCONTROVERTED FACTS THE ALLEGED FRAUD OR CONCEALMENT DID NOT PROXIMATELY CAUSE PLAINTIFFS' ALLEGED DAMAGES.

Despite all of the allegations which Plaintiffs attempted to set forth in their affidavit, the fact remains that the single issue raised by Plaintiffs' complaint is the alleged failure of the Defendants to disclose the existence of a chattel mortgage, executed 6 years before, that might have affected personal property being transferred to a corporation Plaintiffs helped organize. It is undisputed that this chattel mortgage was incidental to a real estate mortgage and that the note secured by said mortgage was subsequently discharged without any loss to the Stockmen & Farmers Mart or to the plaintiffs. Plaintiffs even admit that their loss of investment resulted from the failure of the business.

A. *PLAINTIFFS ARE BOUND BY THE ALLEGATIONS OF THEIR COMPLAINT.*

For purposes of the Defendants' Motion for Summary Judgment the allegations of the Amended Complaint must be deemed admitted. Plaintiffs cannot seek to vary or alter

the allegations of their Complaint. They cannot seek to set forth new causes of action by affidavit.

Under Plaintiffs' Amended Complaint and the undisputed facts, there is no genuine issue of fact on the question of causation.

It is clear that for purposes of a Motion for Summary Judgment the Court must accept the allegations of the Complaint as true. *Iverson v. United States*, 63 F. Supp. 1001 (D. C. 1946) ; *Downey v. Banker*, 32 F. Supp. 874 (S. D. N. Y. 1940).

The District Court was therefore justified in relying upon Plaintiffs' own allegations in granting the Motion for Summary Judgment.

**B. THE ALLEGED CONCEALMENT OF THE
CHATTEL MORTGAGE WAS NOT THE
PROXIMATE CAUSE OF PLAINTIFFS'
ALLEGED DAMAGES.**

The alleged concealment of the chattel mortgage was not the proximate cause of any damage to the Plaintiffs. In order to make out a case for fraudulent misrepresentation a plaintiff must prove actual damage.

It is evidently plaintiffs' reasoning that had they known of the existence of the mortgage they would not have gone into this business and if they had not gone into the business they would not have lost their money when the business failed. This is not sufficient proximate cause. By the same reasoning they could contend that if they were injured while working for the business or if the building

burned down causing them loss that the Defendants would be responsible.

The Restatement of Torts summarizes the law on this question. Section 549, covering the measure of damages for fraudulent misrepresentation, states that "The measure of damages which the recipient of a fraudulent misrepresentation is entitled to recover from its maker as damages under the rule stated in Section 525 is the pecuniary loss which results from the falsity of the matter misrepresented

* * *'' The comment under this Section states:

"Under the rule stated in this clause the recipient of a fraudulent misrepresentation is entitled to recover from its maker only the actual loss which because of its falsity he sustains by his action or inaction in reliance upon it."

It must then be the falsity of the matter misrepresented that causes the loss. On page 112 of Volume 3 of the Restatement of Torts the following further statement is made:

"One who, having acquired securities, retains them in reliance upon another's fraudulent representation is not entitled to recover from him a loss in value of the securities which is in no way due to the falsity of the representation but is caused by some other subsequent event which has no connection with or relation thereto."

The plaintiffs in this case claim their stock in the Stockman & Farmers Mart became worthless and they therefore lost their investment. Under their allegations, this may well have been the case, but the loss did not result from the alleged misrepresentations of the Defendants.

A great portion of the legal argument of Appellants' brief is devoted to extensive quotations from Prosser on Torts. In Section 90, Page 769, (1st Edition) this author discusses the question of causation in a deceit action:

"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; but the same considerations which limit liability in cases of tangible harm have operated here. In general, with only a few exceptions, the courts have restricted recovery to those damages which might foreseeably be expected to follow from the character of the misrepresentation. Thus, if false statements are made in connection with the sale of corporate stock, a subsequent decline of the market or insolvency of the corporation will not afford a basis for recovery, unless the fact misstated was of a nature calculated to bring about such a result. Often this is expressed by saying that the representation is 'immaterial' in such a case; but the conclusion is reached even though the plaintiff has relied, and justifiably so, upon what he has been told."

The following cases also illustrate the principle that the damages must proximately result from the fraudulent statement or concealment; *Morrell v. Wiley*, 119 Conn. 578, 178 Atl. 121; *Beare v. Wright*, 14 N. D. 26, 103 N. W. 632; *Morgan v. Hodge*, 145 Wis. 143, 129 N. W. 1083; *Hindman v. First National Bank*, 112 Fed. 931 (6th Cir. 1902); *Hotling v. A. B. Leach & Co.*, 247 N. Y. 84, 159 N. E. 870; *Haentz v. Loehr*, 233 Wis. 583, 290 N. W. 163.

In the *Morrell* case, cited above, the Court said:

“* * * the damages are measured by the difference between the actual value of the property received and its value had it been as represented.”

In the *Beare* case, the Court said:

“Respondent asserts that he was inveigled into the speculation by the deceit of the appellants and, therefore, the false representations are the proximate cause of the loss he has suffered. The argument is more plausible than sound.”

“The measure of damages in such cases is the difference between the value of the property as it actually was and its value as it would have been if it were such as represented to be in those particulars in relation to which the false and fraudulent representations were made.”

It is a fundamental rule that in order to maintain a suit for fraud or deceit, some damage must be proved. In 23 American Jurisprudence, Section 172, Page 985, it says:

“It is a fundamental principle of law that with the exception of special cases recognized only in some jurisdictions, in order to secure relief on a basis of fraud either in law or equity, the person seeking redress must be damaged, injured or harmed as a result of an asserted fraud.”

In Section 176, the following statement is made:

“To sustain an action for deceit, the fraud and injury must be connected and must bear to each other the relation of cause and effect.”

In the case of *Kosmos Portland Cement Co. v. D. A. Y. Construction Co.*, 101 F. 2d 893, 896, (7th Cir. 1939) the following statement appears:

“It is a rule of universal application that to constitute an actionable fraud, it must appear that

the complaining party has been in some way damaged or prejudiced. * * * The fraud and injury must be connected and bear to the other the relation of cause and effect; the damage must flow from the fraud as the proximate and not the remote cause."

In the case of *Manby v. Hibbard*, 71 Colo. 296, 206 Pac. 381, the Court said:

"It is elementary that the damages recoverable are those which result directly and proximately from the deceit complained of."

The Plaintiffs by their complaint have alleged the existence of fraud by concealment and they have also alleged that they sustained damages by the loss of their investment when the business venture failed. They have failed to allege, however, and under the undisputed facts they cannot prove that the alleged fraud was the proximate cause of their damages. While, for purposes of argument, it might be said that they would not have made the investment had they known of this chattel mortgage, the fact remains that the chattel mortgage did not cause the loss of which they complain.

We have found no Utah case specifically dealing with the issue of causation in a deceit action but the law as quoted above from the Restatement of Torts is unanimously accepted. It must be the falsity of the fact misrepresented that causes the loss to the recipient.

POINT II.

PLAINTIFFS' CAUSE OF ACTION IS BARRED AS A MATTER OF LAW BY THE STATUTE

OF LIMITATIONS AS SET FORTH IN SECTION 78-12-26, UTAH CODE ANNOTATED, 1953, SINCE PLAINTIFFS HAD CONSTRUCTIVE KNOWLEDGE OF THE EXISTENCE OF THE CHATTEL MORTGAGE.

As noted, the trial court relied upon the argument and legal reasoning set forth in Point I in granting Defendants' Motion for Summary Judgment. Equally valid, however, is the first ground set forth in the Motion for Summary Judgment (R. 27).

Plaintiffs' Amended Complaint purports to state a cause of action based upon the alleged concealment of the existence of a chattel mortgage dated September 19, 1949 given by Jackson Sales & Service Company to Defendant Springville Banking Company. The concealment of this fact was alleged to have taken place in March of 1955. This lawsuit was not commenced within three years after the date of the alleged fraud. Plaintiffs amended their original complaint, however, to allege that the fraud was not discovered until June of 1958. The chattel mortgage involved was filed of record in the office of the Utah County Recorder in September of 1949 and was on file at the time of the alleged fraud.

Section 78-12-26, Utah Code Annotated, 1953, provides for a 3-year statute of limitations on "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."

Our Supreme Court has clearly held that the discovery of the fraud does not require actual notice of the facts and that a person is deemed to have discovered the existence of the fraud if he has the means of obtaining the information or has knowledge which would lead a reasonable person to discover the facts.

In *Reese Howell Co. v. Brown*, 48 Utah 142, 158 Pac. 684, at page 690, the Court said:

“If a mistake occurred therefore, as alleged, he at least had all the means in his possession of ascertaining that fact and hence must be deemed to have known of the alleged mistake, under such circumstances our statute of limitations which was pleaded as a defense to the cause of action in question constitutes a complete bar.”

The Court then cited the case of *Weight v. Bailey*, 45 Utah 584, 147 Pac. 899 and stated:

“We there held that where the facts constituting the alleged fraud or mistake are known, or where circumstances are as in this case, that is, if facts should have been known to the complaining party, he cannot successfully maintain an action. * * *”

Certainly the Plaintiffs in this case had the means of discovering the alleged fraud at the time of the transaction. An examination of the county records would have disclosed the existence of the mortgage.

This Court has stated that where an instrument is recorded all persons are deemed to have knowledge of this fact. In *Smith v. Edwards*, 81 Utah 244, 17 P. 2d 264, 269, involving a real estate mortgage, the Court said:

“From the time of recording these conveyances all persons, including plaintiffs, notice was imparted

to them that the conveyances contained the statements above quoted. That the plaintiff and all other persons had notice that such conveyances had been made and recorded seems to go without saying, for surely, if one is charged with notice of the contents, he must be charged with notice of the existence of the document itself."

With reference to a chattel mortgage the Supreme Court in *Bonneville Lumber Co. v. Peppard Seed Co.*, 72 Utah 463, 271 Pac. 226, said:

"The mortgage, as executed and recorded, was unquestionably constructive notice to the defendant and all the world of the existence of a chattel mortgage valid on its face."

Plaintiffs cite the case of *Smith v. Edwards, supra*, in which the Court said "Mere constructive notice of the deed by reason of its being filed for record is not notice of the facts constituting the fraud." In the present case it is the mere existence of the mortgage that is in issue, not the existence of any fraud surrounding the execution of the mortgage. Certainly the Court did not intend by the above language to hold that the parties were not charged with knowledge as to the existence of the deed.

The courts have made a distinction between this type of case where a failure to disclose the existence of a recorded instrument is involved and the cases where the defendant affirmatively tells the plaintiff that there are no encumbrances. In the latter situation the courts in some states have held that the plaintiff is excused from examining the records. In the present case, however, no conten-

tion is made that the defendants made any oral misrepresentations or that they discouraged plaintiffs from searching the county records.

A conclusion such as the plaintiffs and appellants seek to reach would nullify the purpose of our recording statutes in imparting constructive notice of the instrument filed of record.

CONCLUSION

The District Court properly granted Defendants' Motion for Summary Judgment pursuant to Rule 56, Utah Rules of Civil Procedure, and the Memorandum Decision of Judge Harding in which he states: "There is no allegation or showing of any kind as to the cause of the failure and whether the failure had any connection with the undisclosed indebtedness or chattel mortgage" is fully supported by the record. It is also conclusively shown that as a matter of law the cause of action alleged by plaintiffs is barred by the Statute of Limitations. The summary judgment should be affirmed.

Respectfully submitted,

VAN COTT, BAGLEY,
CORNWALL & McCARTHY,
David E. Salisbury,

*Attorneys for Defendants
and Respondents.*