

1960

# Howard W. Brandt and Leona J. Brandt v. Springville Banking Co. et al : Petition for Rehearing

Utah Supreme Court

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McCullough, Boyce & McCullough; Attorneys for Plaintiffs and Appellants;

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AUG 26 1960

IN THE SUPREME COURT

of the

STATE OF UTAH FILED

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

AUG 1 1960

Clerk, Supreme Court, Utah

—vs.—

Case No.  
9128

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

PETITION FOR REHEARING

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HOWARD W. BRANDT and  
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PETITION FOR REHEARING

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Come now Howard W. Brandt and Leona J. Brandt, the above named Plaintiffs and Appellants, and respectfully petition the Honorable Supreme Court of the State of Utah for rehearing of the appeal, and the decision thereon rendered and filed by the court on June 29, 1960. Said petition is based upon the following points, in which the court erred in rendering said decision:

## POINT I.

JUSTICE HENROID ERRED IN HIS CONCURRING OPINION IN HOLDING THAT THE STATUTE OF LIMITATIONS, 78-12-26, UCA, 1953, WAS A BAR TO PLAINTIFFS' ACTION AND THE THEORY ON WHICH IT WAS BASED AS AGAINST DEFENDANTS.

## POINT II.

THE RECITAL OF FACTS IN SAID PREVAILING OPINION SHOULD NOT HAVE BEEN THE BASIS FOR THE JUDGMENT RENDERED BY YOUR HONORABLE COURT IN SAID ACTION. THAT THE FACTUAL EVIDENCE REQUESTED BY AND SUBMITTED TO THE LOWER COURT ARE THE ALLEGED FACTS SET FORTH IN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (R. 27), DEFENDANTS' AFFIDAVIT IN SUPPORT THEREOF (R. 29), PLAINTIFFS' AMENDED COMPLAINT (R. 21) AND PLAINTIFFS' AFFIDAVIT OPPOSING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (R. 36) AND THE COURT WAS OBLIGATED TO REVIEW SAID FACTUAL RECORD IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFFS AND APPELLANTS. *Morris v. Farnsworth Motel*, 123 Utah 289, 259 P 2d 297.

## POINT III.

THE COURT ERRED IN HOLDING THAT THE FACTS SHOWN AS TO THE BANK'S INVOLVEMENT IN THE TRANSACTION DID NOT SUPPORT THE CONTENTION THAT A FIDUCIARY RELATIONSHIP EXISTED BETWEEN THE DEFENDANT BANK OR ITS OFFICERS, AND THE PLAINTIFFS, AND IN THE ABSENCE OF SUCH SHOWING A MOTION FOR SUMMARY JUDGMENT WAS WELL TAKEN.

## POINT IV.

PLAINTIFFS CONTEND THAT THE CONCEALMENT OF MATERIAL FACTS PERTINENT TO THE TRANSAC-

TION IN QUESTION BY THE OFFICERS OF THE DEFENDANT BANK DOES NOT HAVE TO BE BASED UPON A FIDUCIARY RELATION TO MAKE THE DEFENDANTS LIABLE IN SAID ACTION.

#### POINT V.

PLAINTIFFS CONTEND THAT DEFENDANTS ARE LEGALLY LIABLE FOR FALSE OR MISSTATEMENTS OF FACTS IRRESPECTIVE OF THE COURT'S HOLDING THAT THE FACTUAL EVIDENCE DOES NOT SHOW A FIDUCIARY RELATION BETWEEN THE PARTIES.

#### POINT VI.

THE COURT ERRED IN HOLDING THAT THERE WAS NO BASIS UPON WHICH IT COULD BE FOUND THAT THE EXISTENCE OF THE CHATTEL MORTGAGE HAD ANY CONNECTION WITH THE FAILURE OF THE STOCKMAN & FARMERS MART.

At 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. We respectfully request your Honorable Court to review this point in our Brief, pages 13 and 14, and particularly the case of SMITH vs. EDWARDS, 81 Utah 244, 17 P. 2d 265, in which 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.*\*\*\*”



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.

Subsection (3) of Section 78-12-26 U.C.A. 1953, 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.”

See annotations under said subdivision (3):

“4. Subdivision 3 in general.

“A plea of the statute of limitations is a matter of affirmative defense, and it is rather unusual to require plaintiff to anticipate such a defense by allegations in his complaint. *Nunnelly v. First Federal Building & Loan Assn.*, 107 U. 347, 154 P. 2d 620, 632, followed in *Bennion v. First Federal Savings & Loan Assn.*, 107 U. 381, 154 P. 2d 634.”

In the *Nunnelly* case (*supra*) the plaintiffs allege that they did not discover the fraud perpetrated by the defendants until 2½ years before the commencement of this action, apparently in anticipation of a plea of the statute of limitations.

“Had the complaint totally failed to include any allegation regarding the date of the discovery of the fraud it would nevertheless still have stated

a cause of action. Statutes of limitations are matters of repose which can be either raised or waived by the defendant. Until it is made to appear that the defendant desires to seek repose behind a statute of limitations the benefits of such a statute will not be given to him. A plea of the statute of limitations is a matter of affirmative defense and at the outset it might be noted that it is rather unusual to require the plaintiff to anticipate such a defense by allegations in his complaint. Rather it would seem that the complaint could be filed with the assumption that no such defense would be interposed. If by answer the defendant claimed such affirmative defense, the plaintiff could meet such defense by his reply. Otherwise, the complaint might be burdened with many allegations set forth solely for the purpose of anticipating a defense which might never be raised. Under this line of reasoning no allegations regarding the discovery of the fraud should logically be needed in the complaint."

As to Points II, III, IV, V and VI of Plaintiffs' Petition for Rehearing, we respectfully request your Honorable Court to review Point II of Plaintiffs' Brief beginning with page 15 thereof and particularly the statement of Prosser on Torts, 2d Ed. p. 532-536 (Brief 21) in which Prosser states:

*"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. v. 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, hus-

band and wife, parent and child, guardian and ward, and many others of like charcter."

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."*

The following statement is contained in paragraph two on the second page of the prevailing opinion:

*“In dealing with the above contention, it should first be observed that under the facts shown as to the bank’s involvement in the transaction, we see no basis to support the contention that a fiduciary relationship existed between it, or its officers, and the plaintiffs.”*

This statement is not sustained by the factual evidence and the law as shown by the quotations from Pomeroy’s Equity Jurisprudence 5th Ed. Vol. 3, as hereinafter set forth.

Plaintiffs contend the undisputed factual evidence before your Honorable Court shows a fiduciary relationship between the parties. Howard C. Maycock, cashier of the defendant bank, testified in his deposition as follows: (R. 42-43 — Brief 7)

“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 sometime 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.*”  
(spiritual advisor)

Howard W. Brandt testified in his Affidavit Opposing Defendants’ Motion for Summary Judgment as follows:

*“That 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.”*

A MOTION FOR SUMMARY JUDGMENT IS MADE ON PLEADINGS AND AFFIDAVITS. DETAILED EVIDENCE INCIDENT TO TRIAL TESTIMONY IS NOT BEFORE US. PLAINTIFFS’ PLEADINGS AND AFFIDAVIT OPPOSING SAID MOTION FOR SUMMARY JUDGMENT ARE REplete WITH FACTUAL EVIDENCE THAT A FIDUCIARY RELATIONSHIP EXISTED BETWEEN THE PARTIES.

PLAINTIFFS FURTHER CONTEND THAT EVEN IF YOUR HONORABLE COURT HOLDS

THAT THERE WAS NO FIDUCIARY RELATION BETWEEN THE PARTIES, THE MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

POMEROY'S EQUITY JURISPRUDENCE Vol. 3, 5th Ed.

Par. 956a. CASES TO WHICH PRINCIPLE EXTENDS—Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side, and the resulting superiority and influence on the other. *The relation and the duties involved in it need not be legal; it may be moral, social, domestic, or merely personal. (If a relation of trust and confidence exists between the parties — that is to say, where confidence is reposed by one party and a trust accepted by the other, or where confidence has been acquired and abused — that is sufficient as a predicate for relief. The origin of the confidence is immaterial.)*

Par. 902. “WHEN DUTY TO DISCLOSE EXISTS—Concealment becomes fraudulent only when it is the duty of the party having knowledge of the facts to discover them to the other (see par. 901); and this brings back the question, When does such duty rest upon either party to any transaction? *All the instances in which the duty exists, and in which a concealment is therefore fraudulent, may be reduced to three distinct*

*classes. These three classes are, in general, clearly distinct and separate, although their boundaries may sometimes overlap, or a case may fall within two of them:*

“1. The first class includes all those instances in which, wholly independent of the form, nature, or object of the contract or other transaction, there is a previous, existing, definite fiduciary relation between the parties, so that the obligation of perfect good faith and of complete disclosure always arises from the existing relations of trust and confidence, and is necessarily impressed upon any transaction which takes place between such persons. Familiar examples are contracts and other transactions between a principal and agent, a client and attorney, a beneficiary and trustee, a ward and guardian, and the like.

“2. *The second class embraces those instances in which there is no existing special fiduciary relation between the parties, and the transaction is not in its essential nature fiduciary,* but it appears that either one or each of the parties, in entering into the contract or other transaction, expressly reposes a trust and confidence in the other; or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied. The nature of the transaction is not the test in this class. Each case must depend upon its own circumstances. The trust and confidence, and the consequent duty to disclose, may expressly appear by the very language of the parties, or they may be necessarily implied from their acts and other circumstances.

“3. *The third class includes those instances where there is no existing fiduciary relation be-*



*tween the parties, and no special confidence reposed is expressed by their words or implied from their acts, but the very contract or other transaction itself, in its essential nature, is intrinsically fiduciary, and necessarily calls for perfect good faith and full disclosure, without regard to any particular intention of the parties."*

As to Point VI, the court erred in holding that there was no basis upon which it could be found that the existence of the chattel mortgage had any connection with the failure of the Stockman & Farmers Mart.

MAY WE EMPHASIZE THAT THIS MOTION FOR SUMMARY JUDGMENT IS NOT PREDICATED ON EVIDENCE ADDUCED AT THE TRIAL OF THE ISSUES INVOLVED.

Defendants' motion for summary judgment must be based upon defendants' affidavit in support of said motion, plaintiffs' complaint and plaintiffs' affidavit opposing said motion for summary judgment.

The ultimate fact which is important is clearly stated in plaintiffs' complaint (R. 23) "*that as a proximate result of said chattel mortgage and concealment thereof by defendants, plaintiffs lost said \$10,000.*"

Our code of civil procedure does not require a litigant to set forth trial evidence in opposing a motion for summary judgment. Ultimate facts are properly pleaded. Factual evidence in support thereof are usually reserved for the lower court at the trial of the issues. Evidence may be included in an affidavit opposing a motion for

summary judgment, as was done by the plaintiffs in which part of the deposition of Howard C. Maycock, cashier of the defendant bank, was made a part of plaintiffs' affidavit (R. 41). This evidence clearly established the false statement of defendant Maycock that the only encumbrance against the assets transferred to the Stockman & Farmers Mart was \$6,500 owing to the creditors of the Jackson Sales & Service Co. *This evidence disclosed a positive misrepresentation* which should be carefully reviewed in connection with defendants undisputed concealment of material facts. (See R. 41-44.)

The prevailing opinion indicates that the chattel mortgage had nothing to do with the business going broke. That the real estate mortgage and the chattel mortgage referred to were satisfied and discharged by conveyance to the bank of real estate by Waldo Jackson and his company. In support of this statement defendants in their brief cite the affidavit of defendant Howard C. Maycock (R. 30).

*There is not a scintilla of evidence before your Honorable Court as to when this mortgage debt was discharged. Plaintiffs evidence at the trial would show it was years after the insolvency of the Stockman & Farmers Mart that this debt was discharged by Waldo Jackson or the Jackson Sales & Service Company by virtue of a real estate transaction on out-of-state property. THIS IS A GOOD ILLUSTRATION OF THE FALLACY OF ACCEPTING A HALF TRUTH IN*

SUPPORT OF A MOTION FOR SUMMARY JUDGMENT. SUCH QUESTIONS ARE FOR THE TRIAL JURY.

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

“Damages:

\*\*\* *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.*”

\* \* \*

“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; \*\*\**”

“\*\*\* *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.*”

Prosser quotes Restatement of the Law of Contracts, par. 476 (c) which reads as follows:

“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.*”

Am Jur 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.” (See cases cited.)

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, R. 41-43. 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 through 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 clearly 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 case of *HOTALING vs. A. B. LEACH CO.* (1928) 247 NY 84, 159 NE 870 lays down the rule "*that the loss proximately caused by 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.*" If the representations by defendants had been true and the Stockman & Farmers Mart had en-

joyed 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 and especially if such investor had been informed that Defendant Maycock's statement, that there were only \$6,500 encumbrances against said assets, was false.

Respectfully submitted,

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