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Charles B. Petty, Maggie C. Petty, Rachelp. Lunt, Norma P. Strasser, Utahna P. Belnap, Leila P. Shipp, Neuman C. Petty, John K. Russell, Trustee, and Howard O. Miller, Trustee, Partners of Petty Investment Company, A Partnership Doing Business In the State of Utah v. Gindy Manufacturing Corporation : Petition For Rehearing

IN THE SUPREME COURT OF THE STATE OF UTAH

ARLES B. PETTY, MAGGIE C. TTY, RACHEL P. LUNT, RMA P. STRASSER, UTAHNA BELNAP, LEILA P. SHIPP, UMAN C. PETTY, JOHN K. SSELL, Trustee, and HOWARD MILLER, Trustee, Partners of TTY INVESTMENT COMPANY, rtnership doing business in the e of Utah,

Plaintiffs-Appellants

vs.

DY MANUFACTURING PORATION, a corporation,

Defendant-Respondent

Case No. 10274

AINTIFFS-APPELLANT'S PETITION FOR REHEARING AND BRIEF

EAL FROM THE JUDGMENT OF THE RICT COURT FOR SALT LAKE COUNTY ORABLE JOSEPH G. JEPPSON, JUDGE

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PLAINTIFFS STATEMENT OF ERRORS

Come now the appellants dba Petty Investment Company and respectfully petition the Supreme Court of Utah for a rehearing of the above entitled cause and for its order for a new trial in the District Court or in the alternative for a new opinion and

decision for the plaintiffs based on what the appellants respectfully and strongly urge are two chief errors of law and an additional series of cumulative legal errors which led to application of wrong principles of law to the facts.

Appellants concur with this Court in declaring "the controversy devolves upon the second sentence" of the telegram from Gindy Manufacturing Company to Mr. Petty with its surrounding circumstances. It does not devolve upon the doctrine of promissory estoppel as such, but only to the extent that the factual requirements for promissory estoppel also apply to the classified fact situation of this case of an innocent or negligent misrepresentation of an existing fact situation and the opinion judgment of Gindy as to a future condition to flow therefrom, made with a deliberate intention that the plaintiffs would make a substantial loan to Gindy's agent, Freeway Trailer Sales, Inc., which was done.

To further classify this problem of *estoppel in pais* let us observe that it fits into the requirements of liability for negligent representation stated in the Restatement of Torts, Tentative Draft No. 12, Sec. 628.

> One who in the course of his business . . . supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if
>
> (a) he fails to exercise that care and competence in obtaining and communicating

> the information which its recipient is justified in expecting, and
>
> (b) the harm is suffered
>
> (i) by the person or one of the class of persons for whose guidance the information was supplied, (*Burgess v. Calif. Mutual B. & L. Ass'n.* 1930, 290 P. 1029 and
>
> (ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct . . . .

The estoppel problem in this case is one of equitable tortious nature. Under the facts the failure of the duty to provide accuracy of statement to the inquiring plaintiff becomes the proximate cause of his loss if he in good faith relied on the carelessly made representations, and thus defendant and not plaintiffs must bear the loss. Williston, Liability for Honest Misrepresentation, (1911) 24 Harv. L. Rev. 415 and Harper and McNeeley, A Synthesis of the Law of Misrepresentation, (1938) 22 Minn. Law Rev. 939.

Appellants respectfully contend that the controlling errors of the court as to this particular, classified fact situation are:

First, procedurally, the Court erroneously applied the rule that when the trial court dismisses an action with prejudice and makes findings, the evidence is to be reviewed in the light most favorable to the findings. Here the rule has no direct application to two of the trial court's findings namely, that

the defendant was not guilty of fraudulent intent to deceive and that there was no consideration for the promise. The decision of this court clearly implies that those two findings have no bearing on an equitable action of reliance. The third finding was that the representations of "orders in or pending to more than cover" $17,000 of expected commissions to Freeway was not false. The documents of Exhibit 6 conclusively show that there were no "orders . . . pending" on September 25, 1965 the date of the Gindy telegram, when the usual, ordinary and correct legal meaning is given to the word "orders" on which plaintiffs relied. (App. Brief p. 21.) Because of its context the finding regarding falsity cannot be interpreted to mean anything more than a finding that defendant had no dishonest intention to deceive, which for purposes of rehearing may be admitted.

On the matter of reliance the Trial Court would have found good faith reliance had it made a finding on that matter. The Court said:

> I am not questioning your reliance. Your evidence is ample on that. (R. 107)

Therefore two findings are immaterial on the question of liability for negligent misrepresentation. There is no finding that the reliance was legally insufficient. Therefore there are no probative findings of fact on which the evidence can be reviewed favorably or unfavorably to the decision of the trial court.

In the matter of this Court declining to grant an order for a new trial, the Court erred in citing "8. *Weadon v. Pearson*" 14 Ut. 2d 45, 376 P. 2d 946. That case is not in point because the defense in that case was one of res adjudicata by reason of a prior judgment which was not appealed and the defense was found to be a valid one. There is here no issue of res adjudicata. The case is still pending and appellants arguments for new trial are still probative. Appellants again respectfully renew their motion for new trial if the Court shall adhere to its first opinion that contributory negligence is a defense to an equitable action of reliance, especially since the issue of contributory negligence was not considered or decided by the trial court which is the usual and proper tribunal to try that kind of issue.

Appellants respectfully contend that this Court fell into a second and controlling substantive error of law in that it applied the outmoded doctrine of contributory negligence as a defense to a wilful, albeit, negligent or innocent misrepresentation by which the defendant definitely intended to induce definite and substantial action by plaintiffs. Appellants contend that the Court should have applied the rule of "good faith reliance" (similar to that legal rule in the law of Bills and Notes) which is the rule of law applied in practically all of the states except Utah. (Citations later.)

Appellants respectfully contend that this Court fell into a third and fourth controlling legal errors in not giving to the words "dealer," and particularly

to the word "order," their established legal meaning as found in the definitions of the respective volumes of Words and Phrases; which meanings are also their usual and customary meanings as understood by all businessmen except Mr. Ginsburg and Mr. Walters of Gindy Manufacturing Company because of their special method of doing business, unknown to plaintiffs.

The definition of "dealer" from Words and Phrases is "a person who buys and sells automobiles" (or trailers, etc.) "for himself and on his own account."

Moore v. State, 79 SE. 76, 148 Ga. 457.
Saunders v. Russel, 78 Tenn. (10 Lea.) 293.
In *re Hemming* (D.C. Miss. 51 F. 2d 850, and numerous other cases all to the same effect.

For a leading case on the distinction between persons operating as dealers and those operating as agents see *S. B. McMaster v. Chevrolet Motor Company*, 3 F. 2d 469 (1925).

In this case the evidence is uncontradicted and conclusive that neither G. H. Mickelson nor Freeway Trailer Sales Inc. ever during the year following the signing of Mirkelson to become a franchised dealer of Gindy ever purchased and resold one Gindy trailer *on either of their own accounts*. That being true Mickelson did not, as this Court finds, operate as a franchised dealer. What was the relation of the parties involved?

No member of this Court will deny the principle of law that either prior to the time for performance

of a contract (or after performance is begun) the parties may agree that one or both (or the corporation dominated by one of the parties) shall do something different from what the original contract specified. Williston and Thompson, Contracts, Rev. ed.; 1938 Vol. 3. Sec. 680.

It was error for the Court to find that the evidence was not offered of a change of parties to the contract and that Freeway operated as a soliciting agent of Gindy. It is not a question of offering of evidence — The evidence was offered and was admitted both documentary (See Exhibits 6, summarized p. 21 of App. orig. brief) and by oral testimony that Freeway did operate as and was approved and accepted as the soliciting agent of Gindy.

That being the uncontradicted and conclusive evidence in the case, Freeway was entitled to the commission earned in the Morrison case where the specifications for an offer became an order by determination of price and by acceptance by Gindy of a note from Morrison. (See Morrison transaction — one of Exhibits 6.) Appellants respectfully contend they are entitled to have the law of agency and assignment ruled in their favor on the Morrison order and on the Peeble's solicitation for an offer from Gindy which failed because of their unwarranted delay in perfecting the agent's work to a completed order.

Thus also it was a controlling error for this Court by means of interpretation to excise the word "order" from the phrase "orders pending" found in

the Gindy telegram and to replace it by erroneous interpretation with the word "negotiations" by giving an unusual, non-customary, unnatural, strained and entirely different meaning to the phrase "orders pending" than the ordinary prudent businessman would understand from "orders pending." We respectfully submit that it was error to force plaintiffs to accept the unnatural meaning adopted by the Court, namely, that "orders pending" meant not "orders pending" but meant only "negotiations pending for later hoped-for orders." The writings were merely solicitations for offers from Gindy. Had the written representation by Gindy read "negotiations pending for later hoped-for orders" or "deals in progress" it would have been preposterous for plaintiffs to have relied; and it is impossible to believe they would have relied on any such a representation because after the first telephone call, it was made clear to Gindy by the second telephone call that no loan would be made if Gindy merely stated that they would *only* acknowledge an assignment of commissions. A representation of assurance of repayment was demanded and was received and relied on and acted on.

The above controlling errors resulted primarily from the Court's error of applying the old historical rule of the early nineteenth century of caveat emptor which did in those years allow the defense of contributory negligence to an action of deceit. The general middle nineteenth century rule is that contributory negligence is not a defense to a fraudulent, nor

a non-fraudulent, representation which the representator deliberately intends the representee to rely upon to his substantial detriment. Prosser, Torts, 3rd ed., Reliance, 370-374. Law is more and more coming to regard substance more than form. Today's law is more and more caveat venditor. Whether a representation intended to produce substantial reliance be fraudulent or non-fraudulent the out-of-pocket damages to the representee relying thereon will, as in this case, be the same. That is the true substance of the transaction. It is generally and should be the substance of the law. This is wherein the liability arises for negligent or innocent misrepresentation intended to induce a substantial change of position by the representee.

Additional cumulative errors are:

(a) The Court erred in failing to recognize that a loan to Freeway Sales Inc. as Gindy's agent would indirectly benefit the defendant by having its agent financed by another which is a fact helping to classify different types of representation situations — See classes of representation and promissory estoppel situations in the Williston and Harper and McNeeley articles, *supra*.

(b) The Court erred in holding that plaintiff's claim for recovery is based on promissory estoppel as stated earlier. The Court stated plaintiff's position correctly in paragraph 11 when it wrote: "The controversy devolves upon the second sentence." Plaintiff's claim of right to recover damages rests

not on the terms of the dependent and subordinate promise but rests solely on good faith reliance of plaintiffs on the false representations of Gindy that it had received from G. H. Mickelson and or Freeway Sales Inc. "sufficient" . . . "*orders* in or pending to more than cover" a loan of $12,000 which the telegram was intended to and did induce. (See appellant's reply brief 1-7.)

(c) The Court erred in putting any weight on the statement in the Monday assignment, that Freeway was assigning future earnings "after deals were finalized and financing arrangements completed." There was only talk of an assignment on Saturday. No assignment was written on September 25, 1962. The reliance on the representation in the telegram occurred on that Saturday. The assignment was two days after the fact and concurrent with the delivery of the check and there was no reason for Mr. Petty to examine it except to see the figure $44,300.00 was there. There is no evidence whatever that the above phrase relied on in part by the Court was brought to the attention of Mr. Petty. *Certainly Mr. Mickelson would not call that phrase to Mr. Petty's attention on Monday* when he came for the check. He would not prejudice his chances to get the check. Mr. Petty testified he would not rely on anything Mickelson said. He would rely only on whatever Gindy would say.

(d) The Court erred in adopting the reasoning of equating an equitable action based on an innocent or negligent misrepresentation with legal suretyship

or guaranty. Williston's article *supra* on Liability for Honest Misrepresentation is conclusive that liability for innocent or negligent misrepresentation has been recognized as distinct equitable action in equity, at least since *Burrows v. Lock*, 10 Ves. Jy. 470, 32 Eng. Rep. 927 (1905).

THE LAW OF GOOD FAITH RELIANCE

The Supreme Court of Nebraska in the comparatively recent case of *May et. al. v. City of Kearney et. al.* (1945) 145 Neb. 475, 17 N.W. 2d 448, upheld an *estoppel in pais* against honest representations of city officials that general obligation bonds would not be issued to purchase a Consumer's Power Plant and declared the good faith reliance rule as the governing rule in relying on representations of opinion, under the circumstances of that case.

The Court said:

> Equitable estoppels operate as effectually as technical estoppels. They cannot in the nature of things be subjected to fixed and settled rules of universal application, like legal estoppels, nor hammered by the narrow confines of a technical formula . . . .
>
> The following however may be ventured as the sum of all cases: That a person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another, who having a right to do so, under all the circumstances of the case, has *IN GOOD FAITH RELIED*

THEREON. Such estoppel is founded on morality and justice, and especially concerns conscience and equity. 10 R. D. L., p. 236. (17 N.W. R. 2d, 448, 458.)

A check upon C.J.S. Sec. 59 and the 1964 Supplement, Sec. 59 thereto shows the following states as adhering to the good faith reliance rule which necessarily rejects the old contributory negligence rule: Ariz., Ark., Cal., Colo., Conn., Fla., Ga., Ill., Ind., Ky., Me., Md., Minn., Miss., Mo., Mont., Neb., N.J., N. Mex., N.Y., N.C., N.D., Ohio., Okla., Ore., Pa., R.I., Tenn., Tex., and Wash.

The thoroughly and extensively analyzed case of *Schafer v. Fraser*, (1955) 206 Ore. 466, 290 P. 2d. 190, 48 A.L.R. 2d 1087 places the duty of care where it should be and uses the ordinary test of tort law: That the representor will be liable to the person proximately injured in good faith reliance provided the representator could forsee as a reasonably prudent man that the "language" used will induce conduct of the kind that occurred.

Why is good faith reliance justifiable reliance upon representations deliberately made to an interested inquirer to produce reliance by him to his substantial detriment?

The answer lies first in the justice and fairness of requiring not only honesty but due care in making representations to an inquirer whom the representor

intends shall rely and act on the answer to the inquiry.

Williston in his article on Liability for Honest Representation cites the early case of *Burrows v. Lock*, 10 Ves. Jr. 470 32 Eng. Rep. 927 as declaring the correct rule of liability in such a case as we have here.

Lord Herschell in the leading English case of *Derry v. Peek*, (1889) 14 App. Cases (H.L.) 337, 188 in holding that dishonesty was required for an action of deceit declared that liability for honest misrepresentation existed in an equitable action on good faith reliance in a class of actions such as this Petty case. He wrote,

> There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and had been held bound to make good the assurance he has given. *Burrows v. Lock*, 10 Ves. Jr. 470, may be cited as an example, where a trustee had been asked by an intended lender, upon the security of a trust fund, whether notice of any prior incumbrance upon the fund had been given him. The defendant innocently and honestly gave the answer that there was no prior encumbrance on the trust fund which turned out to be false . . . .

> In cases like this it has been said that the circumstances, that the answer was honestly made, in the belief that it was true affords no defense to the action. Accord, *Williston & Thompson Contracts*, Vol. 5, Sec. 1508, (1938) pp. 4208-9.

The second reason for applying the modern rule of liability to honest but careless or inaccurate representations intended to induce substantial reliance and which do so is well stated by the Arkansas Supreme Court in *Peoples National Bank of Little Rock v. Linberger Const. Co.*, 1951, 219 Ark. 11, 240 S.W. 2d 12, 48 A.L.R. 2d 1086 — (cited as the case in point, plaintiff's reply brief p. 15.) The Court said that the development toward increasing actions based on promissory estoppel which equally applies to equitable actions of *estoppel in pais* based on reliance in good faith upon a representation of a future event.

> is an attempt by courts to keep abreast of increased moral consciousness of honesty and fair representations in all business dealings. (Cases from part of the states mentioned above are cited by way of illustration.)

The evolution in the law of deceit to the modern rule rejecting contributory negligence as a defense to intended deception is paralleled by similar development in actions for negligent or innocent misrepresentation in a shift to duty of care and assumption of risk by the representor. Prosser, Torts 3rd ed. 732.

The Prosser statement points the way the courts are going and the way we respectfully submit this Court should go in deciding loss between a negligent representor to a good faith inquirer in this particular class of case.

Prosser writes at pages 372-373:

> The last half-century has seen a marked change in the attitude of the courts toward the question of justifiable reliance. Earlier decisions, under the influence of the prevalent doctrine of "caveat emptor," laid great stress upon the plaintiff's "duty" to protect himself and distrust his antagonist, and held that he was not entitled to rely even upon positive assertions of fact made by one with whom he was dealing at arm's length. It was assumed that any one may be expected to overreach another in a bargain if he can, and that only a fool will expect common honesty. Therefore the plaintiff must make a reasonable investigation, and form his own judgment. The recognition of a new standard of business ethics, demanding that statements of fact be at least honestly and carefully made, and in many cases that they be warranted to be true, *has led to an almost complete shift in this point of view.* Prosser on Torts, 3rd ed.

We respectfully submit that the cases cited by the Court to support its decision are either distinguishable, hold centra or do not discuss at all the question of whether the law of good faith reliance or of contributory negligence should govern.

True, the Wheat case uses the doctrine of contributory negligence to defeat the general contractor's recovery against the sub-contractor, — the expert on painting. However, although the California Supreme Court case of *Drennan v. Star Paving Company*, 333 P. 2d 757 is cited by this Court in deciding the Wheat case, the references to reasonable reliance are only dicta. The California Court found a failure of the duty of accuracy of representation by the defendant sub-contractor and held that "*the fact that the sub-contractor's bid was the result of a mistake was no defense.*" It found no duty of investigation as did this Court.

The well reasoned Wycoff case rides off on the special fact of lack of definite and substantial injury and so is distinguishable. The Hilton case is one in which estoppel is used as a defense not as basis for a cause of action. Plaintiff's brief pp. 6-7 summaries the combination of facts necessary to recover on an equitable action of reliance. Only good faith actual reliance is required as in this Petty case when all the other requirements concur.

Very few courts can and none ought to deny the forceful reasoning of Williston in rejecting the doctrine of contributory negligence as a defense to an equitable action of reliance for damages. He writes:

> Again, the doctrine of contributory negligence would be troublesome to apply. Is it contributory negligence for a man to rely on

> what he is told by a person in a position to know, and to fail to make an investigation for himself? Though many decisions require that a plaintiff should not have been to foolish in believing what no reasonable man in his position should believe, it is going too far, both in reason and on the authorities, to say that a plaintiff, unless his conduct was not wholly irrational, should lose his rights because he failed to make independent investigation and believed what he was told. It should not lie in the mouth of the man who induced his reliance to assert that the reliance was negligent. If a man makes a statement in regard to a matter upon which his hearer may reasonably suppose he has the means of information, and that he is speaking with full knowledge, and the statement is made as part of a business transaction, or to induce action from which the speaker expects to gain an advantage, he should be held liable for his misstatement. Such a principle most nearly harmonizes the law of misrepresentation in its various aspects. 22 Harv. L. R. 415, 437.

It was reasonable for Gindy on September 25, 1962 to anticipate as Freeway did that more than $17,000 commissions could be earned on what Gindy and Mickelson expected to ultimately materialize into orders for more than $400,000. That being true it was reasonable for Mr. Petty to place good faith reliance that the existing fact situation would produce more than $17,000 in commissions. See *Peoples National Bank* case *supra* and C.J.S. Sec. 80 approving recovery on honest representation of future con-

dition based on judgment opinion regarding present fact situation.

Let's summarize. The fact situation in each equitable action of reliance on negligent, innocent misrepresentations must be carefully classified to apply *estoppel in pais*. The induced loan-of-money cases have all granted recovery: — Burrows case, 1805 *supra;* the Burgess case, 1930 *supra*, and People's National Bank case, 1951 *supra*. Also approved in Derry v. Peek, H.L., 1889 *supra*.

The six factual requirements given by Pomeroy, Equity Jurisprudence, 1941, Sec. 805, (App's Brief 6-7) declare the risk of carefulness is on the representator. It is sufficient if the circumstances are such "that knowledge of them (the facts) is necessarily imputed to him." The honest inquirer with a known interest has no duty of investigation. He need only honestly rely, unless as Williston and Prosser state, his reliance is so foolish that no reasonable man would have relied under the circumstances. The reason for the good faith rule in equity is that the representor deliberately intends that his language shall produce the specific substantial and detrimental change of position which occurs, and the damages if the representation be negligently or innocently made are the same as if it were done fraudulently. This situation imposes the equitable duty of carefulness.

Appellants respectfully pray for an order for a new trial or for application of the good faith rule.

Respectfully submitted,

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