

1966

Wendell W. Motter and Betty F. Motter, His Wife v.  
Russell R. Bateman and Myrna Gaye Bateman, His  
Wife : Appellant's Brief

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

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. Maxwell Benley; Attorney for Appellants

---

Recommended Citation

Brief of Appellant, *Motter v. Bateman*, No. 10552 (1966).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/3800](https://digitalcommons.law.byu.edu/uofu_sc2/3800)

This Brief of Appellant 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 (1965 -) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

## TABLE OF CONTENTS

	Page
STATEMENT OF KIND OF CASE .....	1
DISPOSITION IN LOWER COURT .....	1
RELIEF SOUGHT ON APPEAL .....	2
STATEMENT OF FACTS .....	2
STATEMENT OF POINTS .....	3

POINT I. THE TRIAL COURT ERRED BY GIVING THE FOLLOWING INSTRUCTION NO. 7 "IN DETERMINING WHETHER OR NOT THERE WAS MISREPRESENTATION IN THIS CASE YOU MAY AND SHOULD CONSIDER WHETHER OR NOT THERE WAS ANY FALSE OR MISLEADING STATEMENTS MADE BY THE PLAINTIFF WENDELL MOTTER TO THE DEFENDANTS WITH REGARD TO THE COST OR VALUE OF THE INVENTORY, THE REASON FOR SELLING THE BUSINESS, THE GROSS VOLUME OF THE BUSINESS OR THE NET PROFIT WHICH THE BUSINESS WAS PRODUCING OR HAD PRODUCED. YOU MAY AND SHOULD CONSIDER WHETHER IN FACT SUCH STATEMENT OR STATEMENTS WERE KNOWN TO THE SAID PLAINTIFF WENDELL MOTTER TO BE FALSE AND WHETHER THEY WERE MADE WITH INTENT THAT THE DEFENDANT SHOULD RELY THEREON. YOU MAY AND SHOULD CONSIDER ALSO AS TO WHETHER OR NOT THE DEFENDANTS DID IN FACT RELY UPON SUCH STATEMENTS IF THEY WERE FALSE, OR DID MAKE A SEPARATE AND SPECIAL INVESTIGATION OF THE MATTER SO AS TO RELY ON OTHER SOURCES AS DISCLOSED AND UNCOVERED BY SUCH SEPARATE INVESTIGATION. YOU MAY AND SHOULD CONSIDER WHETHER OR NOT THERE WAS IN FACT ANY DISPARITY WITH RESPECT TO THE INTELLIGENCE AND EXPERIENCE OF THE PARTIES IN THIS MATTER, IF ANY YOU FIND, WHICH WOULD IN FACT MAKE THE DEFENDANTS MORE SUSCEPTIBLE TO FRAUD THAN THE ORDINARY PRUDENT PERSON," BECAUSE IT DOES NOT EXPLAIN WHAT

TABLE OF CONTENTS—Continued

	Page
EFFECT SUCH DISPARITY IN EXPERIENCE AND INTELLIGENCE BETWEEN THE PARTIES WOULD MAKE NOR WHAT CONSIDERATION SHOULD BE GIVEN BY THE JURORS IF IT FOUND SUCH A DISPARITY THAT WOULD IN FACT MAKE THE DEFENDANTS MORE SUSCEPTIBLE TO FRAUD THAN THE ORDINARY PRUDENT PERSON. ....	3
POINT II. THE TRIAL COURT'S EXPLANATION AND COMMENTS TO THE JURY UPON THE EFFECT OF THE JURY'S ANSWER TO QUESTION NO. 5 WAS PREJUDICIAL ERROR AND CONTRARY TO THE LAW APPLICABLE IN THIS CASE, AND WAS CONTRARY TO PREVIOUS INSTRUCTIONS GIVEN TO THE JURY. ....	9
POINT III. THE TRIAL COURT ERRED IN REFUSING TO GIVE DEFENDANT'S PROPOSED INSTRUCTION NO 8 — "A PURCHASER MAY BE EXCUSED FROM MAKING A THOROUGH INSPECTION OR INVESTIGATION WHEN HE BELIEVES AND RELIES ON THE VENDOR'S STATEMENTS. A VENDOR WHO MAKES FALSE STATEMENTS INDUCING ANOTHER TO BUY PROPERTY WILL NOT BE ALLOWED TO CONTEND THAT BY ORDINARY DILIGENCE AND INQUIRY, THE PURCHASER COULD HAVE LEARNED THE TRUTH. THE FACT THAT THE PURCHASER WAS WITHOUT KNOWLEDGE OF THE TRUTH CONCERNING THE MATTER ABOUT WHICH THE REPRESENTATION WAS MADE JUSTIFIES HIS BELIEF IN AND RELIANCE ON IT." .....	17
POINT IV. THE JURY VERDICT IS CONTRARY TO LAW AND TO THE EVIDENCE AND TESTIMONY PRODUCED AT THE TRIAL. ....	19
CONCLUSION .....	22

TEXTS CITED

23 Am. Jur. Fraud & Deceit, Sec. 158, pp 965-966 .....	17, 18, 19
--	------------

CASES CITED

De Frees v. Carr, (Utah) 8 U 488, 33 P 217 .....	7
Spieß v. Brandt, (Minn) 41 NW2d 561, 27 ALR2d 1.4, 5, 6	

IN THE SUPREME COURT  
of the  
STATE OF UTAH

---

WENDELL W. MOTTER and  
BETTY F. MOTTER, his wife,  
*Plaintiffs and Respondents,*

vs.

RUSSELL R. BATEMAN and  
MYRNA GAYE BATEMAN,  
his wife,  
*Defendants and Appellants.*

} Case No.  
10552

---

APPELLANT'S BRIEF

---

STATEMENT OF KIND OF CASE

This is an action by plaintiffs to recover the balance due on a written contract for the sale of a business and rental of a building and counter-action by defendants for rescision of the contract and return of the monies paid thereon.

DISPOSITION IN LOWER COURT

The case was tried to a jury. From a verdict and judgment in favor of the plaintiffs, defendants appeal.

## RELIEF SOUGHT ON APPEAL

Defendants seek a reversal of the judgment and a new trial.

### STATEMENT OF FACTS

On August 28, 1961 plaintiffs agreed to sell and defendants agreed to purchase a business located in St. George, Utah for the sum of \$25,000.00 and to rent from the plaintiffs the premises housing the business for a period of five years at a monthly rental of \$200.00. Defendants executed and delivered to plaintiffs a promissory note in the sum of \$20,000.00 payable at the rate of \$200.00 per month, beginning September 1, 1961 with interest on the unpaid balance at the rate of 7% per year and gave a mortgage on nine acres of land owned by defendants to the plaintiffs to secure the payment of the promissory note.

Defendants took possession of the business on September 1, 1961 and continued in possession until around January 27, 1962. On January 27, 1962 defendants sent a Notice of Recision to plaintiffs claiming that plaintiffs had made misrepresentations about the business which had induced the defendants to enter into the contract.

Defendants had paid to plaintiffs the sum of \$5,800.00 on the contract of purchase and \$800.00 on the rent prior to the time defendants left the

premises. Plaintiffs filed the present action on December 27, 1962 to recover the amount of \$7,104.43 on the contract of sale; \$2,400.00 as unpaid rent and \$2,500.00 as attorney's fees. On February 7, 1964 defendants filed an answer to plaintiff's complaint and counterclaimed for a rescision of the contract and return of \$7,056.75 paid to plaintiffs.

## ARGUMENT

### POINT I.

THE TRIAL COURT ERRED BY GIVING THE FOLLOWING INSTRUCTION NO. 7 "IN DETERMINING WHETHER OR NOT THERE WAS MISREPRESENTATION IN THIS CASE YOU MAY AND SHOULD CONSIDER WHETHER OR NOT THERE WAS ANY FALSE OR MISLEADING STATEMENTS MADE BY THE PLAINTIFF WENDELL MOTTER TO THE DEFENDANTS WITH REGARD TO THE COST OR VALUE OF THE INVENTORY, THE REASON FOR SELLING THE BUSINESS, THE GROSS VOLUME OF THE BUSINESS OR THE NET PROFIT WHICH THE BUSINESS WAS PRODUCING OR HAD PRODUCED. YOU MAY AND SHOULD CONSIDER WHETHER IN FACT SUCH STATEMENT OR STATEMENTS WERE KNOWN TO THE SAID PLAINTIFF WENDELL MOTTER TO BE FALSE AND WHETHER THEY WERE MADE WITH INTENT THAT THE DEFENDANT SHOULD RELY THEREON. YOU MAY AND SHOULD CONSIDER ALSO AS TO WHETHER OR NOT THE DEFENDANTS DID IN FACT RELY UPON SUCH STATEMENTS IF THEY WERE FALSE, OR DID MAKE A SEPARATE AND SPECIAL INVESTIGATION OF THE MATTER SO AS TO RELY ON OTHER SOURCES AS DISCLOSED AND UNCOVERED BY SUCH SEPARATE INVESTIGATION. YOU MAY AND SHOULD

CONSIDER WHETHER OR NOT THERE WAS IN FACT ANY DISPARITY WITH RESPECT TO THE INTELLIGENCE AND EXPERIENCE OF THE PARTIES IN THIS MATTER, IF ANY YOU FIND, WHICH WOULD IN FACT MAKE THE DEFENDANTS MORE SUSCEPTIBLE TO FRAUD THAN THE ORDINARY PRUDENT PERSON," BECAUSE IT DOES NOT EXPLAIN WHAT EFFECT SUCH DISPARITY IN EXPERIENCE AND INTELLIGENCE BETWEEN THE PARTIES WOULD MAKE NOR WHAT CONSIDERATION SHOULD BE GIVEN BY THE JURORS IF IT FOUND SUCH A DISPARITY THAT WOULD IN FACT MAKE THE DEFENDANTS MORE SUSCEPTIBLE TO FRAUD THAN THE ORDINARY PRUDENT PERSON.

Whether or not the jury found such a disparity with respect to intelligence and experience that made the defendants more susceptible to fraud than the ordinary prudent person would be a determining factor in considering the defendant's right to rely on the representations of plaintiffs or whether the defendants had a duty to investigate the truthfulness of plaintiff's statements.

In *Spiess v. Brandt*, (Minn.) 41 NW2d 561, 27 ALR 2d 1 the court stated:

"Where there is great disparity between the parties, and inexperienced and credulous vendee has a legal right to rescind a contract of purchase from the experienced vendors, who, for the purpose of inducing a sale, represent that their experience in the operation of the business being sold resulted in definite and substantial profits, where such representations are relied upon and actually in-

duce the sale and are found to be false. 23 Am Jur 841, Fraud and Deceit; 26 CJ pp 1069, 1075; Gaetke v. Ebarr Co. 195 Minn 393, 263 NW 448; Dunnell's Dig 3820, 3823, 3828, note 65, 3833; 23 Am Jur, Fraud and Deceit p 850, 76; p 857 80; annotation in 50 ALR 436; Gable v. Niles Holding Co. 209 Minn 445, 296 NW 525.

\* \* \* Although the element of disparity in business experience is not of itself a sufficient ground for relief, nevertheless, the law does not ignore such disparity, especially where, as here, the inexperience of youth is coupled with an added factor of special trust and confidence growing out of a reasonable assumption by plaintiffs that a genuine and close friendship existed between them and defendants. See Gable v. Niles Holding Co. 209 Minn 445, 296 NW 525. On various occasions when plaintiffs visited the resort to enjoy the out of doors, defendants had exhibited many manifestations of friendship. In youth, every manifestation of friendship seems genuine and deserving of special trust and confidence. Disparity may under some circumstances be a factor of considerable importance when we keep in mind that the question is not whether the representation would deceive the average man. In rescission actions for fraud, the question is whether the representations were of such a character and were made under such circumstances that they were reasonably calculated to deceive, not the average man, but a person of the capacity and experience of the particular individual who was the recipient of the representations. Kempf v. Ranger, 182 Minn 64, 155 NW 1059.



\* \* \* In cases involving false representations as to rents, profits, or income, it has been held that the question whether there is actionable fraud is determined with respect to the intelligence and experience of the victim of the fraud rather than by what the effect would have been on the average person. (Cases Cited including De Frees v. Carr (1893) 8 Utah 488, 33 P 217)

In the present case the defendant Russell Bateman had known the plaintiff Wendell Motter since 1950 or a period of eleven years prior to the transaction. (T 21, L 24 to T 22, L 30) Plaintiff Motter had been in the electronic business, off and on, in one form and another, probably 15 years (Depo. of Wendell Motter, page 2, line 30) had resided in St. George 30 or 25 years (T 24, L 11) and had fixed things for people all his life. (T 25, L 1). Defendant Russell Bateman had not had any previous business experience. (T 7, L 20-25).

In addition to this disparity between the parties as to business there existed a friendly relationship between the parties resulting from plaintiff's having done a favor to defendant as early as 1950 when plaintiff made possible a telephone-radio conversation between defendant Russell Bateman, then in Alaska, and his parents, then in St. George. (T 22, L 11 to 17) In addition to this friendly relationship defendant Motter was a very good friend of defendant's brother. (T 23, L 4 - 6)

The court's failure to explain the effect of such a disparity between the parties should also be considered in connection with the court's explanation of Special Interrogatory No. 5 when it said, "So you will fully understand it, if you find that Mr. Motter willfully with intention that the defendants rely on his statements did in fact make false and fraudulent statements to the defendant and they did in fact rely on them without an opportunity to check them or without any reasonable opportunity to check them, why, then, the determination of the Court would be for the defendants."

With this statement given to the jurors after they had requested an explanation of the effect of their answer to Question No. 5 the jury could not find for the defendants if it believed the defendants had an opportunity to check the statements of the plaintiff or without any reasonable opportunity to check them.

Even if the defendants had an opportunity to check the statements of plaintiff, there was no obligation to do so and the failure to avail themselves of such an opportunity, if it existed, would not have affected their right to rescission of the contract. The Court said in *DeFrees v. Carr* (ibid) :

\* \* \* Counsel for defendants contend that the plaintiff had the opportunity to examine the books of the company to ascertain its condition, and satisfy himself as to its responsibility, before the trade was made; but, even

if this were the case, it would not license the defendants to lull the plaintiff into a state of security by false but apparently reliable statements of facts, such as are complained of in this case. The defendant George W. Carr was manager of the company, and its condition and financial responsibility will be presumed to have been within his knowledge. He cannot escape from the effects of his statements by saying that the plaintiff could have ascertained its true condition. Where one party to a contract misrepresents a material fact, which operates as a surprise and as an inducement to the other party, relief will be granted. \* \* \*.”

It should be noted that the jury was divided on the effect of their answer to Question No. 5 which was to be answered in the event they answered Question No. 3 in the affirmative.

Question No. 3 of the Verdict and Answers to Special Interrogatories was:

“If your answer to question No. 2 is “Yes”, then — Did the plaintiff Wendell W. Motter, prior to the execution of said documents by the defendants, willfully make any false representations to the defendants of and concerning the said business, with intention that the defendants would rely thereon?”

ANSWER: .....

Question No. 5 was:

“If your answer to question No. 3 is “Yes”, then — Did the defendants have any reasonable opportunity to ascertain the truth

of and concerning the said business and with regard to the said representations, if any, of the plaintiff with regard thereto, prior to their executing the said documents?"

ANSWER: .....

Unless the jury had intended to answer Question No. 3 "Yes" there was no need to concern itself with answering Question No. 5. The Court's failure to explain the legal effect of the disparity which the jury was instructed to consider in Instruction No. 7, together with the Court's misstatement of the law applicable in this case to the effect that if defendants had an opportunity or any reasonable opportunity to check the statements of plaintiff that the determination of the court would be for the plaintiffs, clearly prejudiced the jury and literally amounted to an instruction to hold for the plaintiffs, inasmuch as there was never a doubt expressed during the trial as to whether or not the defendant had some opportunity to investigate the statements made by the plaintiff Wendell W. Motter.

## POINT II.

THE TRIAL COURT'S EXPLANATION AND COMMENTS TO THE JURY UPON THE EFFECT OF THE JURY'S ANSWER TO QUESTION NO. 5 WAS PREJUDICIAL ERROR AND CONTRARY TO THE LAW APPLICABLE IN THIS CASE, AND WAS CONTRARY TO PREVIOUS INSTRUCTIONS GIVEN TO THE JURY.

After deliberating from 5:40 p.m. until 9:55

p.m. the jury requested the court's explanation on Question No. 5. The Court stated:

“Well, the Sheriff has handed me this question which you have written out; and I quote, “We are divided on Question Number 5. Please explain what effect this will have on the following questions in regard to the verdict.” Is that the question that is bothering you people?

After Juror Judd (jury foreman) answered, “Yes”, the Court continued:

“I have a copy of the form of verdict in answer to special interrogatories, and Question Number 5 is this: “If your answer to Question Number 2 is yes,” and Question Number 2 refers to the question, “Did the defendant execute the documents with knowledge of what they were doing and with knowledge of the contents of the documents?” I assume that you have answered that question because you then are concerned about Question Number 3. If your answer to Question Number 2 is yes, “then, did plaintiff, Wendell W. Motter, prior to the execution of the said documents by the defendants,” that would be before the defendants signed and executed the documents, “did Mr. Motter willfully, that is, intentionally and with knowledge —” you will recall the instructions of what willfully meant and that is, not accidentally and unintentionally, make any false representations to the defendants concerning the business and with the intention that the defendants would rely thereon. Now, I think

you can find either yes or no, he did make false statements or he did not. Maybe I am missing the point of your question. If you find that he did, why, then, you would answer the next question: "Did they in fact rely on his representation." And Number 5: "If you find that they did rely on it, did they have reasonable opportunity to ascertain the truth of and concerning the business with regard to these representations prior to executing the documents." If your answer to that is yes, then, you are down to Number 6, "Did the defendants in executing the documents rely on their own observation and investigations of and concerning the business and the plaintiff's statements with regard thereto rather than merely on the representations of plaintiffs." You can answer that yes or no. Then, of course, Number 7 and Number 8 would be a judgment, would be entered depending on the answer to your previous questions; and the Court would use either Number 7 or Number 8 depending on how you answered the previous questions. So you will fully understand it, if you find that Mr. Motter willfully with intention that the defendants rely on his statements did in fact make false and fraudulent statements to the defendant and they did in fact rely on them without an opportunity to check them or without any reasonable opportunity to check them, why, then, the determination of the Court would be for the defendants.

If, on the other hand, Mr. Motter didn't make any false statements, or even if he did, if he didn't make them knowingly or willfully without knowledge of them and made

statements that were in fact improper or false but without his knowing they were false or even if he knew they were false yet he didn't make them with the intentions that those people should rely on them, or if they relied on something else, their own investigation, why, then, these people had a contract; and they should be bound to it."

It is obvious that Questions 4, 5 and 6 were to be answered only if the answer to No. 3 was "Yes." That is, the jury must find that plaintiff Wendell W. Motter, prior to the execution of said documents by the Defendants, willfully made some false representations to the defendants of and concerning the said business, with intent that the defendants would rely thereon, before they were to answer with respect to defendant's actual reliance thereon (Question No. 4) or whether defendants had any reasonable opportunity to check the statements of the plaintiff (Question No. 5) or whether the defendants relied on their own observations and investigations rather than merely on the representations of the plaintiffs. (Question No. 6)

With respect to the Questions to be answered and the verdict the jury was instructed by the court as follows: (Pleadings 51)

Instead of finding generally in favor of the plaintiff or the defendant, you are directed to answer the questions which are submitted to you and thereby determine the facts at issue in this case. The Court will apply the

law to the facts and enter judgment in accordance therewith. \* \* \*.

The form of the Verdict and Answers to Special Interrogatories did not provide for the jury to make a determination as to the validity or invalidity of the contract between the parties nor did it provide for a general verdict in favor of either party.

Question 7 was:

Assuming the documents executed by and between the parties to be in full force and effect, what amount exclusive of interest is due and owing from the defendants to the plaintiffs,

- (a) For the sales of the business?  
\$.....
- (b) For the rental of the buildings?  
\$.....

Question 8 was:

Assuming the documents executed by and between the parties to be null and void, what amount exclusive of interest is due and owing from the plaintiffs to the defendants?

ANSWER: \$.....

The jury answered No. 7 but ignored No. 8. The Court's statement at the 9:55 p.m. session to the jury that its determination would be for the defendants if the jury found that Motter willfully with intention that the defendants rely on his statements did in fact make false and fraudulent state-



ments to the defendant and they did in fact rely on them without an opportunity to check them or without any reasonable opportunity to check them constituted an error which was prejudicial to the defendants. Except for the court's statement and explanation the jury could have answered all of the applicable Questions (including both Questions 7 and 8) and the facts having then been determined the Court could have applied the law and entered judgment accordingly. As Question 5 was to be answered only if Question Number 3 was answered "Yes" the fact that the jury was divided on Question Number 5 and wanted to know what legal effect it would have on the following questions and the verdict makes it obvious that prior to the Court's explanation the jury's answer to Question No. 5 was "Yes." After the Court's explanation the jury again retired to continue their deliberations and within ten minutes had returned to the courtroom with Question Number 3 answered, "No", and Questions 4, 5, 6 and 8 disregarded. Clearly the court's comments were prejudicial to the defendants and affected the outcome of this case.

By way of further explanation to the jury in answer to their query regarding Question Number 5, the Court stated:

If, on the other hand, Mr. Motter didn't make any false statements, or even if he did, if he didn't make them knowingly or willfully without full knowledge of them and made

statements that were in fact improper or false but without his knowing they were false or even if he knew they were false yet he didn't make them with the intentions that those people should rely on them, or if they didn't actually rely on them, that they relied on something else, their own investigation, why, then, these people had a contract; and they should be bound to it."

This statement was not only confusing but was an incorrect statement of the law applicable in this case and the comment to the effect that if the defendants didn't actually rely on the false statements of the plaintiff, but relied on something else, their own investigation, then, they had a contract and should be bound by it was prejudicial to defendants side of the case.

Prior to the 9:55 p.m. session the jury could have found that even if defendants had a reasonable opportunity to investigate the truthfulness of plaintiff's statements they may have been thwarted in so doing and still been entitled to recover. By Instruction No. 3 and No. 4 the Court explained that before the plaintiffs would be precluded from recovery the jury would have to find that the defendants had no reasonable opportunity to determine the truthfulness or falsity of the alleged misrepresentations, or although the defendants had a reasonable opportunity to determine the truth or falsity of the alleged misrepresentations the defendants were thwarted by actions or devices of the plaintiffs so

as to prevent such discovery. (Instructions 3 and 4) During the 9:55 p.m. session the Court failed to mention that even if the defendants had an opportunity to ascertain the truth that they may have been thwarted in their efforts to do so and if such were the case that they still could have been entitled to recovery.

Defendant Russell Bateman testified: (T 135, L 22 - 30)

“The fact it was actually suggested by Wendell that I go over and look at the books, but he had mentioned it probably wouldn’t reveal too much to me, not to take too much interest; and, then, he would go on to say the real value, as you can see, “what I am getting out of this, I have got this store free and clear and got my home in Pine Valley and I have got my home here in town free and clear.” He said those are the thing you really need to look at.”

In answer to the question, “Now, what did he (Mottter) say with respect to your examining all of the books that Dexter Snow had?”, Bateman testified:

He mentioned that the books were a necessary evil and you had to supply so much information for tax purposes and so forth; but he said that the stock and the merchandise and the income he had far exceeded what was shown on the books.”

From such testimony the jury could easily have found that although the defendants had an oppor-

tunity to check the records that they were thwarted or discouraged in their efforts to do so and if that were the case that their failure to do so would not prevent them from recovery.

### POINT III.

THE TRIAL COURT ERRED IN REFUSING TO GIVE DEFENDANT'S PROPOSED INSTRUCTION NO. 8 — "A PURCHASER MAY BE EXCUSED FROM MAKING A THOROUGH INSPECTION OR INVESTIGATION WHEN HE BELIEVES AND RELIES ON THE VENDOR'S STATEMENTS. A VENDOR WHO MAKES FALSE STATEMENTS INDUCING ANOTHER TO BUY PROPERTY WILL NOT BE ALLOWED TO CONTEND THAT BY ORDINARY DILIGENCE AND INQUIRY, THE PURCHASER COULD HAVE LEARNED THE TRUTH.

THE FACT THAT THE PURCHASER WAS WITHOUT KNOWLEDGE OF THE TRUTH CONCERNING THE MATTER ABOUT WHICH THE REPRESENTATION WAS MADE JUSTIFIES HIS BELIEF IN AND RELIANCE ON IT."

The proposed instruction was necessary to properly inform the jury of the law with respect to the defendant's right to rely on the statements made by plaintiff with respect to the business and unless the jury were properly informed on the law they could not render a correct verdict.

It is stated in 23 American Jurisprudence Fraud & Deceit § 158, pp 965-966.

Referring a representee to the sources of the speaker's information does not necessarily relieve the representor from liability for false statements, since the representee's right to

rely on such statements without an investigation of the sources of information mentioned is not necessarily destroyed by such reference,  
\* \* \*

A representor cannot escape liability for his misrepresentation by advising the representee to investigate and to satisfy himself as to the property before acquiring it. (Annotation 61 A.L.R. 515)  
\* \* \*

It is well settled that a representee has a right to rely upon representations where a confidential relationship exists between the parties. In such cases a high degree of frankness and fair dealing is required, and the representee cannot be charged with lack of diligence in failing to make an independent investigation, either at the time or afterward. Similarly, where, by reason of the representor's superior knowledge or experience with respect to the thing dealt with or because of relations of friendship or trust existing between the parties, the representee expressly relies upon the honesty of the representor and the latter's representations as to the subject matter, without attempting to ascertain the truth of the representations, the representor is bound to act honorably and deal fairly with the representee and is generally held liable for fraud or misrepresentations, although the representee might have ascertained the facts by an independent investigation. \* \* \*

The fact that the party to whom representations are made may have discovered the truth by investigation is immaterial where he is fraudulently induced to forego making in-

quiries or investigations, in whole or in part, which he otherwise would make, where the representations are of such a character or are made in such a way as to disarm his vigilance, lull his suspicions, and induce him to refrain from making such inquiries or examinations. \* \* \*.

\* \* \*

Unusual difficulty in examining, or in securing information concerning, the property commercially dealt with has in various situations been held to warrant justification in reliance upon representations as to such property without an investigation. The principle has been applied to transactions involving such personalty as a stock of goods or other property consisting of numerous items. (Annotation 61 A.L.R. 528 et seq)

Thus, the purchaser of a stock of merchandise has been held to have the right to rely upon the seller's fraudulent misrepresentations of these matters, although, he could have examined the whole stock and discovered the falsity of the representations. \* \* \*.

#### POINT IV.

THE JURY VERDICT IS CONTRARY TO LAW AND TO THE EVIDENCE AND TESTIMONY PRODUCED AT THE TRIAL.

The jury was not requested to render a general verdict but rather to answer the questions submitted by the Court and determine the facts at issue in the case. (First page of Instructions to the Jury or page 51 of the Pleadings) Instead of

answering all of the questions applicable the jury rendered what amounted to a general verdict and ignored Question No. 8. From the form of the Verdict and Answers to Special Interrogatories it is difficult to determine how the jury's answer to Question No. 7 became the general verdict and the answers to the parts of that question became the amount of the judgment. Question No. 7 was:

“Assuming the documents executed by and between the parties to be in full force and effect, what amount exclusive of interest is due and owing from the defendants to the plaintiffs.

- (a) For the sale of the business?  
\$.....
- (b) For the rental of the building?  
\$.....”

The jury's answer for part (a) was: \$7,104.43 and for part (b) was \$2,400.00, and Judgment on Verdict for said amounts was entered accordingly. The Question was based upon an assumption and the answer of the jury was to assist the Court by determining the facts. The Court would apply the law thereto and render a judgment thereon.

Question No. 8 was:

Assuming the documents executed by and between the parties to be null and void, what amount exclusive of interest is due and owing from the plaintiffs to the defendants?

ANSWER: \$.....”

This question was not answered by the jury. Inasmuch as it was based upon an assumption, as

was No. 7, it should have been answered by the jury and the Court should have rendered the general verdict either for the plaintiffs or the defendants.

After the jury had submitted its answers to the special interrogatories and had been dismissed defendant's attorney moved the Court to set aside the verdict of the jury and grant a judgment of no cause of action as against the plaintiffs notwithstanding the verdict and the answers to the special interrogatories rendered by the jury. The motion was taken under advisement and as yet has not been ruled upon. (T 180 and T 181)

That the Judgment on Verdict is contrary to the law applicable in this case is the fact that it would constitute unjust enrichment to the plaintiffs and a harsh penalty to the defendants, if allowed to stand. As pointed out to the trial judge when the motion was made for judgment notwithstanding the verdict the defendants had already paid to the plaintiffs the sum of more than \$7,000 for a period of five months possession of the property. Exhibit D-4 shows total payments from defendants to plaintiffs of \$7,056.75. Defendant Russell Bateman testified that he had invested approximately \$14,000.00 in the business including the \$7,056 he paid the plaintiffs. (T 154, L 9-12) Defendants made improvements to the building which plaintiff Wendell Motter stated were good except for the timing. (T 69, L 6-30). Defendants payment to plaintiffs of



\$7,056.75 and the improvements to plaintiff's building constitute sufficient penalty to have to pay for a first business venture. An additional judgment of \$11,796.73 or for any amount against the defendants would constitute a harsh and cruel punishment and would not only amount to an unjust forfeiture but would result in an unjust enrichment of the plaintiffs.

## CONCLUSION

Appellants submit that from the foregoing it is evident that the lower court erred in failing to correctly instruct the jury on the law applicable to the case; in not requiring the jury to follow the court's instructions; in failing to correctly explain Question No. 5 at the 9:55 P.M. session; in allowing the Jury's answer to Question No. 7 to constitute a general verdict; in not rendering a general verdict itself; in requiring the jury to assume the validity of the contract between the parties and in not ruling upon defendant's motion for judgment notwithstanding the verdict and answers to special interrogatories by the jury.

The verdict judgment should be set aside and the cause remanded for a new trial.

Respectfully submitted,

MAXWELL BENLEY  
412 Kearns Building  
Salt Lake City, Utah  
*Attorney for Appellants*