

1992

# LeAnna Robbins v. Old Republic Surety, North Western National Insurance Company of Milwaukee, Wisconsin, Atlas Stock Transfer, Check Rite International, Inc., Cardinal Energy Corporation : Brief of Appellee

Utah Supreme Court

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## Recommended Citation

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UTAH SUPREME COURT

BRIEF

920300

IN THE SUPREME COURT  
OF THE STATE OF UTAH

LeANNA (BROADWATER) ROBBINS,

Appellee/Cross-  
Appellant/Plaintiff,

v.

OLD REPUBLIC SURETY, a Wisconsin  
corporation doing business in  
Utah, NORTH WESTERN NATIONAL  
INSURANCE COMPANY OF MILWAUKEE,  
WISCONSIN, a Wisconsin  
corporation doing business in  
Utah, ATLAS STOCK TRANSFER, a  
Utah Corporation, CHECK RITE  
INTERNATIONAL, INC., f/k/a  
CARDINAL ENERGY CORPORATION, a  
Utah corporation, and SCOTT J.  
FLETCHER, a Utah resident,

Appellants/  
Cross-Appellees/  
Defendants.

APPELLEE (BROADWATER)  
ROBBINS' OPPOSING BRIEF

Case No. 920300  
~~900508~~

Rule 29(b)(16) priority

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UTAH

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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LeANNA (BROADWATER) ROBBINS,  
  
Appellee/Cross-  
Appellant/Plaintiff,  
  
v.

APPELLEE (BROADWATER)  
ROBBINS' OPPOSING BRIEF

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### STATEMENT OF JURISDICTION

Jurisdiction over this appeal is based on Utah Code Ann. §78-2-2(3)(j), as amended, 1989.

### STATEMENT OF ISSUES

1. Whether the lower court abused its discretion in determining that 90 days was a "reasonable time" within which to measure Appellee Robbins' damages, especially when there was a bond, the conversion was willful and knowing, and Appellants' admitted "lulling" of Mrs. Robbins continued uninterrupted beyond such 90 days. In other words, whether it is "reasonable" for the Appellants to allegedly investigate Mrs. Robbins' claim beyond 90 days yet, at the same time, it is not "reasonable" to measure Mrs. Robbins' damages under the Appellants' own standards.

(a) Standard of Review. The standard of review is simply whether the lower court abused its discretion in assessing \$1-5/16ths per share as Mrs. Robbins' damages. See p. 13, bott., p. 14 of Appellants' brief in which it is admitted that such determination is within the trial court's sound discretion (citing Mullen v. J.J. Quinlan & Co., 195 N.Y. 109, 87 N.E. 1078, 1080 (N.Y. Sup. Ct., App. Div., 1909); Fulley v. Wasserman, 319 Pa. 420, 179 A. 595, 598-599 (Sup. Ct. Pa. 1935); Pacific Development Co. v. Stewart, 113 Utah 403, 195 P.2d 748, 751 (Utah 1948)). See also 40 ALR 1285.

2. Based on Mrs. Robbins' one-third/two-thirds contingency fee agreement with her counsel, whether the lower

court abused its discretion in awarding her additional damages of one-third (1/3rd) of her partial summary judgment as reasonable attorney's fees. (Ex. 2 hereto; R. 818-823.) Saying it another way, in an effort to make Mrs. Robbins whole, whether the lower court was justified in determining that what Mrs. Robbins is required to pay her attorney constitutes additional damage. As set forth below, the issue is not whether the lower court awarded Mrs. Robbins attorney's fees as sanctions because it never did. This is clear from the record. Further, because the attorney's fees issue as stated by Appellants was never asserted in the lower court, it is not properly before this Court on appeal.

(a). There is no review, thus, no standard of review, for an issue raised on appeal for the first time. Bangerter v. Poulton, 663 P.2d 100, 102 (Utah 1983).

#### DETERMINATIVE CONSTITUTIONAL PROVISIONS

There are no determinative Constitutional provisions relative to the Old Republic, Atlas, and Check Rite's separate appeal. This is not to ignore that relative to Mrs. Robbins' own cross-appeal, various "determinative Constitutional provisions" are identified. See p. 2 of Mrs. Robbins' brief dated August 27, 1991.

#### STATEMENT OF THE CASE

(a) Nature of the proceedings. This appeal singularly involves the proper measure of damages for conversion of a chattel having a fluctuating value, in this case, the publicly-

held securities of Appellant Check Rite. As a result of the lower court's determination that Mrs. Robbins was entitled to damages of \$1-5/16ths per share, Mrs. Robbins obtained summary judgment on Counts I and II of her amended complaint, claims for wrongful refusal to transfer securities and conversion. See Exhibit "A" to Mrs. Robbins' cross-appeal brief; R. 69-114.

(b) Course of proceedings and disposition below. The parties acknowledged Atlas and Check Rite's liability on Counts I and II and submitted the issue of measuring Mrs. Robbins' damages to the lower court. (See the parties' memorandums in support of their respective cross-motions for partial summary judgment; R. 310-326 and R. 351-378.) The lower court made such determination and granted Appellee Robbins partial summary judgment. Exhibit 1 hereto; R. 710-712.

Mrs. Robbins was further awarded a separate judgment for attorney's fees. Exhibit 2 hereto; R. 818-823. This determination was based on the contingency fee arrangement Mrs. Robbins has with her counsel. See Exhibit 2 hereto. Appellants Old Republic, Atlas Stock Transfer and Check Rite then obtained Rule 54(b) certification to appeal the two judgments. (R. 842-844.) This appeal, including Mrs. Robbins' separate cross-appeal relative to the dismissal of Counts III, IV, and V of her amended complaint, has ensued.

### RELEVANT FACTS

In the interests of non-duplication, Mrs. Robbins incorporates by reference her statement of Relevant Facts contained on pp. 3-11 of her cross-appeal brief on file herein dated August 27, 1991. All that Mrs. Robbins can add is that her damages on Counts I and II were established by her own affidavits, the affidavits of Chuck Burton, Penny Grace, Potter Investment Company and Ernest Muth, each of which is attached hereto respectively as Exhibits 3, 4, 5, 6, 7 and 8 (R. 389-392, 413-416, 379-380, 387-388, 381-383, 384-386). Such affidavits were unrebutted by Old Republic, Atlas, and Check Rite. In addition, since Old Republic, Atlas and Check Rite could not rebut Mrs. Robbins' supporting affidavits, they resorted to the tactic of moving the lower court for an order striking such affidavits. (R. 426-427.) At the same time, Old Republic, Atlas and Check Rite failed to explain why such affidavits should be stricken, leaving it to the lower court to ferret such out on its own. (See R. 428-431, Appellants' supporting memorandum and R. 576-578, Mrs. Robbins' opposing memorandum.) Regardless, the lower court denied Appellants' motion to strike. (Exhibit 1 hereto; R. 710-712, ¶3, p. 2 thereof.)

Lastly, however, the Appellants, in a last ditch effort to defeat Mrs. Robbins' motion for partial summary judgment, filed, on March 5, 1990, a tardy opposing affidavit of Paul S. Guardalabene (R. 518-523). There is no dispute that such

affidavit was "untimely" under Rule 4-501(1)(b), Utah Code of Judicial Administration.<sup>1</sup> Accordingly, Mrs. Robbins made a motion to strike such affidavit, a motion the lower court apparently found unnecessary to rule upon. (R. 583-589, p. 4 thereof.)

Regardless of its inability to assist the Appellants, the Guardalabene affidavit ironically supports the lower court's ruling. This is because if Guardalabene (i.e., Old Republic) acted "reasonably" in investigating the matter for over 90 days -- something to which he attests -- the "reasonable time" within which to measure Mrs. Robbins' damages must necessarily be just as long. Simply put, in investigating her claim, one certainly cannot expect Mrs. Robbins to have acted more "reasonably" than the very entities upon whom the claim is made.

Based on the foregoing, the lower court properly held that Old Republic, Atlas and Check Rite can't have their cake and eat it too. That is to say, Appellants cannot maintain that it is perfectly "reasonable" for Guardalabene to take over 90 days

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<sup>1</sup> Not only was the Guardalabene affidavit filed late under Rule 4-501(1)(b) but the exhibits thereto were separately filed over two months later on May 24, 1990. See R. 651-691. Nonetheless, the Guardalabene affidavit, which is meaningless at best, created no genuine issue of material fact necessary to defeat summary judgment on the issue of damages or otherwise. Guardian State Bank v. Humphreys, 92 Utah Adv. Rep. 11, 762 P.2d 1084, 1087-88 (Ut. Sup. Ct. 1988); Creekview Apartments v. State Farm Ins. Co., 105 Utah Adv. Rep. 18, 772 P.2d 693, 695 (Ut. Ct. App. 1989); Landes v. Capital City Bank, 138 Utah Adv. Rep. 6, 9, 795 P.2d 1127 (Ut. Sup. Ct. 1990)(statements in an affidavit not contradicted by the other parties must be accepted as uncontested facts for purposes of summary judgment).

investigating Mrs. Robbins' claim, but Mrs. Robbins cannot have the same leeway in measuring her damages.

Relying upon Mrs. Robbins' several unrebutted supporting affidavits, the lower court held that approximately one week less than 90 days after May 4, 1989, was a "reasonable time" within which to measure Mrs. Robbins' damages. Because the unrebutted evidence of the highest price of Check Rite stock during that period was \$1-5/16ths per share, the lower court awarded Mrs. Robbins a money judgment on that basis. (Ex. 1 hereto; R. 710-712.)

#### SUMMARY OF ARGUMENT

Appellants Old Republic, Atlas and Check Rite contend that the lower court erred in determining that \$1-5/16ths per share is the proper measure of Mrs. Robbins' damages. At the same time, it is undisputed that this figure is the highest price Check Rite stock attained within 90 days after May 4, 1988, the date of Atlas' letter to Mrs. Robbins announcing that it was keeping her stock certificate. See Exhibit "J" to Mrs. Robbins' amended complaint. As set forth below, there are several recognized ways of measuring damages for conversion of chattels having a fluctuating value, any one of which results in the same conclusion: in this case, \$1-5/16ths per share is proper. See Brougham v. Swarva, 661 P.2d 138, 143-44 (Wash. App. 1983)(listing the various recognized ways of measuring damages for conversion of chattels having a fluctuating value).

Appellants argue that the so-called "New York Rule" exclusively applies to this case and that, under such rule, 90 days after May 4, 1988, is not a "reasonable time." Yet as admitted in Appellants' brief, the "reasonable time" rule is designed to give the injured party the time and opportunity to determine what to do. Appellants' brief, p. 11. In this case, the very admitted and undisputed conduct of Old Republic (i.e., Guardalabene) justified extending any shorter "reasonable time" simply because Guardalabene himself investigated the matter for well over 90 days. In fact, Guardalabene never did complete his investigation. Further, Mrs. Robbins was told that she didn't have to do anything during the 90 day period other than apparently wait for Guardalabene to complete his investigation. See Mrs. Robbins' affidavits, Exhibits 3 and 4 hereto. Thus, the Appellants are barred by their very own conduct from arguing that a "reasonable time" should be any less than 90 days.<sup>2</sup>

In addition, it would be against public policy to assess a "reasonable time" in this case at any less than 90 days. This is because it would encourage those like Old Republic, Atlas and Check Rite to purposely stall claimants for a period beyond 10 or 30 days in order to make the very arguments they are now making

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<sup>2</sup> Saying it another way, how can over 90 days be "reasonable" for professionals like Appellants but less than 90 days is not "reasonable" for a lay person like Mrs. Robbins? If one puts oneself in Mrs. Robbins' shoes, how should she have acted differently? Furthermore, in deferring to Old Republic, Atlas and Check Rite, the converters, are stuck with the consequences of Old Republic's action (or inaction).

before this Court. The law must be flexible and attentive to the nuances of each case: a "reasonable time" depends on the facts and circumstances of each case and in this case, 90 days, the time period during which Guardalabene (Old Republic) negotiated directly and continuously with Mrs. Robbins in bad faith, is "reasonable."<sup>3</sup> If 90 days is not a "reasonable time" based on the existence of a bond and the undisputed conduct of Guardalabene and Atlas, then insurance companies and their obligees can merely delay the resolution of a similar bond claim beyond a shorter "reasonable time" in every instance, thus, hoping that claimants like Mrs. Robbins will eventually get tired, disappear, or otherwise compromise themselves.<sup>4</sup>

Appellants' willful, knowing and ignoble conduct is wrong and it should not be rewarded. Brougham v. Swarva supra at p. 144. On the contrary, all the Appellants had to do was go in the market and buy Mrs. Robbins 8,000 shares of replacement stock when she first made her claim. This is not to ignore that by virtue of the bond, Mrs. Robbins had no independent duty to somehow hurry and mitigate her damages as contemplated in the

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<sup>3</sup> See Reynolds v. Texas Gulf Sulphur Company, 309 F.Supp. 548, 565 (D.C. Utah 1970)("What a 'reasonable time' may be will vary from case to case.").

<sup>4</sup> No doubt that had the price of the stock stayed the same after the conversion and then started to increase substantially in price after 90 days, Appellants would themselves be arguing before this Court that 90 days is a "reasonable time." Thus, had it benefited them, and, based on Guardalabene's alleged inability to "get to the bottom" of the matter within at least 90 days, the Appellants would surely be arguing that 90 days is a "reasonable time" within which to measure the damages in this case.



various "New York Rule" cases exclusively relied upon by Appellants, particularly when it is undisputed that no one told her to do so.

Finally, respecting the issue of attorney's fees, the lower court awarded attorney's fees as part of Mrs. Robbins' partial summary judgment damages. This is evidenced by the very language of such judgment and the exhibits attached to it and incorporated by reference. See Exhibit 2; R. 818-823. The same is further evidenced by the lower court having ordered Mrs. Robbins to divulge her agreement with counsel -- after the partial summary judgment award. (R. 800-801, Minute Entry.) There is simply no evidence in the record that the lower court awarded attorney's fees as sanctions. To be sure, Mrs. Robbins never argued that she was entitled to attorney's fees on that basis (R. 351-378, p. 22 thereof and R. 754-778).<sup>5</sup> At the same time, the Appellants never argued that Mrs. Robbins wasn't entitled to attorney's fees because the same is tantamount to sanctions (R. 439-449). Moreover, after arguing over what the attorney's fees should be and, after discovering Mrs. Robbins' agreement with counsel, the parties in effect stipulated to the

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In support of the court's award of attorney's fees, Mrs. Robbins attached a complete copy of South San Pitch Company v. Pack, 97 Utah Adv. Rep. 42, 44-45, 765 P.2d 1279 (Ut. Ct. of App. 1988). See R. 775-778. In South San Pitch, the Court of Appeals held that attorney's fees can, under certain limited circumstances, be awarded as an element of a party's damages.

amount of attorney's fees to be awarded.<sup>6</sup> Furthermore, the lower court specifically denied a separate motion made by Mrs. Robbins for sanctions. (Ex. 1 hereto; R. 710-712, ¶6 thereof.) Thus, the argument that attorney's fees were awarded as "sanctions" is frivolous. The same is also raised on appeal for the first time. Accordingly, this issue, as argued by Appellants on pp. 21-24 of their brief, cannot be considered. Olson v. Park-Craig-Olson, Inc., 167 Utah Adv. Rep. 18, 21, \_\_\_ P.2d \_\_\_ (Ut. Ct. of App., August 14, 1991)(failure to raise issues below precludes raising them on appeal); Bangerter v. Poulton, supra at 102.<sup>7</sup>

#### DETAIL OF ARGUMENT

##### POINT I

THE LOWER COURT WAS CORRECT IN DETERMINING  
THAT \$1-5/16ths PER SHARE IS MRS. ROBBINS' DAMAGES.

The only issue before this Court -- an issue the parties could not agree on -- is the proper measure of damages for conversion of chattels having a fluctuating value. Specifically, what is the appropriate measure of damages for the intentional,

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<sup>6</sup> The record evidences that Mrs. Robbins initially sought \$10,000 in attorney's fees. (Exhibit 3 hereto, ¶3, p. 2 bott., R. 390; R. 351-378, p. 22 thereof; R. 754-778.) When the Appellants disputed such amount and were able -- with the lower court's assistance -- to discover Mrs. Robbins' agreement with her counsel (R. 800-801), the parties agreed in open court that one-third of the partial summary judgment or some-\$4,000 was the proper amount to be awarded. This is because, based on Mrs. Robbins' agreement with counsel, Exhibit "A" to Exhibit 2 hereto, Mrs. Robbins would not be out-of-pocket any more than one-third of the partial summary judgment or approximately \$4,000.

<sup>7</sup> See also R. 782-789, pp. 3-6 therein, Defendants' Objection and Memorandum in Opposition to Award of Attorney's Fees in which Appellants admit that Mrs. Robbins is entitled to attorney's fees for prevailing on Counts I and II.

knowing and willful conversion of and wrongful refusal to transfer Mrs. Robbins' 8,000 shares of of Check Rite stock?

Jurisdictions are split on the measure of damages for conversion of property having a fluctuating value. Brougham supra at p. 144. There is an even greater split depending upon whether the conversion was willful and knowing. Id. Ironically, however, using any one of the several recognized ways of measuring the damages in this case, the result is the same: the appropriate amount is \$1-5/16ths per share. Thus, any way one cares to look at it, the lower court was correct.

A. One recognized measure of damages is the highest price of the stock between the date of conversion and the date of trial. According to the undisputed facts, such is \$1-5/16ths per share and therefore, the lower court was correct.

Reference is made to 40 ALR 1282 which discusses damages for conversion of property having a fluctuating value. In Bennett v. Tucker & Pennington, 20 Ga. App. 288, 123 S.E. 165, 166 (Ga. Ct. of App. 1924), the court recognized the right to recover in trover the highest value between the date of conversion and trial. In this case, Mrs. Robbins' stock was not converted in good faith. The conversion was intentional or as the result of culpable negligence. To be sure, by virtue of the bond, there is no excuse for either Defendant Atlas or Check Rite not going into the market and immediately buying Mrs. Robbins replacement stock. It is further undisputed that Defendants

Atlas, Check Rite, and Old Republic had notice that the stock was proceeding to increase in price up to and through the beginning of August, 1988. (See Ex. 7 hereto, Affidavit of Potter Investment Company and Exhibit "L" to Mrs. Robbins' amended complaint.)

Unlike cases relied upon by the Old Republic, Atlas and Check Rite -- cases which do not involve a bond -- this is not, by any means, a case of innocent or inadvertent conversion and therefore, the foregoing measure of damages applies. Cases further hold that if a trespass is willful, fraudulent, or under circumstances imputing negligence to the trespasser, thus showing that he is indifferent to the rights of others, and in cases of property of a fluctuating value, the plaintiff, at his option, may sue and recover upon the basis of the highest intermediate value to the date of trial. Burmarsal Company, Inc. v. Lake, 272 S.W. 582, 584 (Tex. Civ. App. 1925).<sup>8</sup>

Based on the theory of continuing conversion, the measure of damages would include a time period up to and until at

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<sup>8</sup> There is but one occasional difficulty with this measure, and it occurs only if the property, after a long time, is still in the possession of the defendant. In Ingram v. Rankin, 47 Wis. 406, 32 Am. Rep. 762, 2 N.W. 755, 764 (Sup. Ct. Wis. 1879), the court stated that in those cases where the market value is very fluctuating, great injustice would be done by this rule to the man who honestly converted such property, in the belief that it was his own, if, after the lapse of five or six years, he should be called upon to pay the highest market value it had obtained during that extended time. Such is not the case here because in this case we are talking about a time period of less than ninety (90) days after the willful and knowing conversion, a time period in which Appellants disingenuously claim that they -- not Mrs. Robbins -- didn't know what to do. Further, there is no dispute that Appellants did not convert the property "in the honest belief that it was their own." Id.

least the first part of August, 1988.<sup>9</sup> The theory of continuing conversion occurs only in cases in which the property remains in the possession of the defendant subsequent to the conversion. This is because in the event the wrongdoer has parted with property to another person, the conversion ceases and passes to that next person. In this case, Defendant Atlas still maintains possession of Certificate 258 and it has refused to issue and deliver Mrs. Robbins a replacement certificate. In doing absolutely nothing and in further shirking its responsibilities by misdirecting Mrs. Robbins to Old Republic, Defendant Atlas has also profited from its own wrongdoing.<sup>10</sup>

In Devlin v. Pike, (N.Y. 1874) 5 Daly (New York Common Pleas Reports) 85, the court stated that if the property at the time of trial is of greater value than it was at the time of the conversion, and the defendant is still in possession of it, the plaintiff is entitled to recover its increased value at the time of trial. In Gowan v. Wisconsin-Alabama Lumber Co., 215 Ala. 231, 110 S. 31, 33 (Sup. Ct. Ala. 1926), an instruction was approved that, if the jury believed that the timber converted had a fluctuating value, they were authorized to find for the

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<sup>9</sup> For a list of authority that the measure of damages is the highest price between the date of conversion and the time of trial, see 48 ALR 1301. See also 87 ALR 818, a supplement to 40 ALR 1282.

<sup>10</sup> In fact, to date, Defendants Atlas and Check Rite are out-of-pocket nothing. This is because under the terms of the open penalty indemnity bond subject of this case, Old Republic has been paying all their attorney's fees.

plaintiff for the highest value as shown by the evidence, with interest from the date of conversion. Accord: Young v. Corbitt Motor Truck Company, 148 S.C. 511, 146 S.E. 534, 544 (Sup. Ct. S.C., 1929)(damages are highest value up to the time of trial with interest thereon).

There is no dispute that the highest price the stock reached between the alleged date of conversion and today (i.e., a date prior to any prospective trial) is one dollar and five-sixteenths cents (\$1-5/16ths) per share. Accordingly, the lower court's judgment, which embraces this amount, is correct.

B. Another recognized measure of damages is the highest price of the stock between the date of conversion and notice of conversion, on the one hand, and a "reasonable time" afterwards, on the other. Because July end/August beginning 1988 is a "reasonable time" after mid-May 1988, the lower court's award of \$1-5/16ths per share is correct.

In Western Securities Co. v. Silver King Consolidated Mining Co. of Utah, 192 P. 664, 672 (1920), this Court applied the so-called "New York Rule."<sup>11</sup> See also Nephi Processing Plant

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<sup>11</sup> Mrs. Robbins submits that a strict application of the New York Rule may be inapplicable to this case. Such rule grew out of New York Stock Exchange cases involving conversion of customers' securities as in the cases cited by Appellants. Such is inapplicable to the facts of this case because, not being a customer and the transaction not involving a sale in the market, Mrs. Robbins was not required to deliver stock to anyone else. Accordingly, Mrs. Robbins was not under any extraordinary duty or other urgency to mitigate her own damages as in situations where the converted securities must be delivered in short order to a third party. Most importantly, however, the cases cited by Appellants do not involve the existence of an open penalty indemnity bond, a fact which excuses Mrs. Robbins from being required to do anything other than what she did.

v. Talbott, 247 F.2d 771 (10th Cir. 1957). Under the "New York Rule," damages are the highest price of the converted property within a "reasonable time" after the owner has notice of the conversion. According to 161 ALR 323, there is no guide under the New York Rule as to what is a "reasonable time."<sup>12</sup> In Mullen v. J.J. Quinlan & Co., 195 N.Y. 109, 24 LRA (N.S.) 511, 87 N.E. 1078, 1080 (N.Y. Sup. Ct., App. Div. 1909), the court held that where the action was for conversion of stock shares and for a quantity of wheat, the prices for which, it was alleged, had increased after the conversion, damages for the conversion would be based on the highest market value within two (2) months of the conversion, if such time, under all of the circumstances of the case was a reasonable one.<sup>13</sup> In Scott v. Rogers, (1864) 31 N.Y. 676, the court held that four (4) months after the conversion was a reasonable time. In Scott, quoted at 40 ALR 1285, the court stated:

. . . If it be clear upon the evidence that an immediate or speedy sale were contemplated, I think such a fact would contract the limits of this reasonable period. If it were clear that months were expected to intervene before a sale should take place, I see no objection to extending this reasonable period to a similar length. If the evidence reflected no light on the subject, then a reasonable period would probably be a question of law. . . .

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<sup>12</sup> See footnote 3 above citing Reynolds v. Texas Gulf Sulphur.

<sup>13</sup> Therein, the trial court was authorized to determine as a question of law what constituted a "reasonable time." Mullen at 87 N.E. 1080. See Standard of Review subsection under Statement of Issues above.

In May 1988, the market price of Check Rite stock was low and no sale was either imminent or contemplated as Mrs. Robbins had not sold her 8,000 shares "short" into the market or to any third party. Under the "New York Rule," Mrs. Robbins is entitled to receive damages of the highest market price which that kind of merchandise may have reached between the time of conversion and a reasonable time within which to replace it or bring an action. [Emphasis added.] In this case, it wasn't reasonable for Mrs. Robbins to have replaced such stock on her own prior to July end/August beginning 1988, because she understood and was repeatedly informed by Old Republic that, because of the bond, her predicament would be taken care of. See Exhibits 3 and 4 hereto. Is there some reason she shouldn't have believed them?

Furthermore, Mrs. Robbins didn't have the available resources to effect "cover" even if someone had instructed her accordingly, which no one did. See Ex. 3 hereto, ¶6, p. 3 thereof. As early as mid-July, Old Republic informed Mrs. Robbins that it was investigating the matter and based on such representations, it would have been totally unreasonable for her to have disbelieved Old Republic and gone around it by filing suit or attempting to solve the problem some other way. This is undisputed.

Ninety (90) days after the alleged date of the conversion in this case is a "reasonable time" as a matter of law. Brougham v. Swarva, supra at p. 144; Gragard's Succession,



106 La. 298, 30 S. 885, 888 (Sup. Ct. La. 1901)(in determining damages for conversion of chattels having a fluctuating value, the owner should be given the benefit of the better price which prevailed within a few months after the conversion).

Because there was a bond, and, as a result, Mrs. Robbins was in continuous negotiations with Old Republic, she was not under a duty to do anything other than what Old Republic was telling her. If she had an additional duty of some kind, what is the basis of such? She had not sold Certificate 258 and didn't need to deliver 8,000 shares to anyone else. Any such duty to "cover," mitigate or replace one's own property is based on the defendant having sold the converted goods and, at the same time, the plaintiff has an obligation to deliver the same to a third party. Such is not at issue here. Certificate 258 had not been sold by Atlas, Check Rite -- or even Mrs. Robbins herself -- to someone else. Thus, Mrs. Robbins did not simultaneously owe 8,000 shares to a third party. Based on Old Republic's bond and the willful and knowing conduct of Old Republic, Atlas, and Check Rite, Mrs. Robbins acted reasonably. Brougham supra at p. 144 ("The innocent victim should not suffer a loss because of the wrongful taking and withholding of his property.")

In sum, a "reasonable time" period after the conversion and notice of conversion should be either tolled or extended to at least 90 days because of the intentional -- if not plain reckless -- "lulling" and stalling activity of Old Republic,

Atlas, and Check Rite. Because slightly less than ninety (90) days is a "reasonable time" in this case under the "New York Rule," the lower court's judgment in Mrs. Robbins' favor is correct.<sup>14</sup>

C. Another recognized measure of damages applicable in this case is the highest price of the chattel between the time of conversion and a "reasonable time" thereafter for commencing an action. Mrs. Robbins commenced her action with reasonable diligence and because the highest price of the stock in that interim was \$1-5/16ths per share, the lower court's judgment is correct.

In Hamer v. Hathoway, (1867) 33 Cal. 117, an action for conversion of hay, the case was remanded for directions to enter judgment for the plaintiff for the sum which constituted the maximum value of the hay between the time of conversion and the beginning of an action.<sup>15</sup> This measure is supported by the more

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<sup>14</sup> The Appellants rely on Western Securities, supra for the proposition that 30 days is a "reasonable time" in this case. However, such proposition does not follow from Western Securities. Western Securities involved the conversion of stock in a pledge situation when the pledgor or borrower wanted the particular collateral allegedly converted by the lender back in his own possession. In this case, Mrs. Robbins was not a borrower; Cert. No. 258 was not collateral on a loan; she didn't even want Cert. No. 258 back: she simply wanted 8,000 shares of free-trading stock. Furthermore, in Western Securities, the sale of the pledged stock at \$1.50 was expressly authorized by the provision of the promissory note between the parties and the issue in that case only became one of resolving the appropriate price of the stock after a perfectly proper sale thereof -- not after any alleged conversion. Western Securities supra at p. 673.

<sup>15</sup> The same measure was not followed in the case of Page v. Fowler, (1870) 39 Cal. 412, 2 Am. Rep. 462, only because the hay price went up ten times the following year and trial of the action occurred six years after the time of conversion.

recent Reed v. White, Weld & Co., Inc., 571 S.W.2d 395, 397 (Tex. Civ. App. 1978)(holding that if the conversion is willful, fraudulent or attended with gross negligence, the owner may recover the highest value between the date of conversion and the filing of suit). In this case, there can be no doubt that, at a minimum, Defendant Atlas was willful, grossly negligent or inexcusably reckless in not only doing nothing, but in directing Mrs. Robbins to Old Republic and when it knew very well that it and Check Rite, not she, were the obligees on the bond. See also Imperial Sugar Co., Inc. v. Torrans, 602 S.W.2d 275, 276-77 (Tex. Civ. App. 1979)(where conversion is attended with fraud, willful wrong, or gross negligence and the property converted is of changing or fluctuating value, measure of damages is highest market value of such property between date of conversion and filing of the suit).

In Hall v. Bache, 235 App. Div. 256, 256 N.Y. Supp. 693, 695 (Sup. Ct. N.Y., App. Div. 1932), it was held that as to damages for the conversion of cotton, the plaintiff was limited by the highest price reached between the date of the conversion and a reasonable time after termination of negotiations between the parties respecting a settlement. Accordingly, it was held that where the last interview between the plaintiff and the defendants' attorneys respecting settlement was on March 9, such reasonable time for the plaintiff's decision expired on March 21 following. In this case, negotiations between counsel to

Mrs. Robbins and counsel to Old Republic (Guardalabene) terminated in December, 1988 -- months after the stock reached its highest price -- and Mrs. Robbins brought her action in April, 1989. Based on this measure, as with the preceding measures, Mrs. Robbins' measure of damages is still July end/August beginning 1988 when Check Rite stock achieved a price of one dollar and five sixteenths cents (\$1-5/16ths) per share.<sup>16</sup>

#### POINT II

THE LOWER COURT'S DECISION NOT TO STRIKE THE AFFIDAVITS OF MRS. ROBBINS, CHUCK BURTON, PENNY GRACE AND POTTER INVESTMENT COMPANY WAS CORRECT. THIS IS BECAUSE NO BASIS WAS EVER ASSERTED BY THE APPELLANTS AS TO WHY ANY AFFIDAVIT SHOULD BE STRIKEN AND NO BASIS EXISTS REGARDLESS.

Appellants' lower court motion to strike Mrs. Robbins' several affidavits is legal boilerplate wholly lacking in substance. No attempt was made to connect any objection to the actual text of any such affidavit, thereby indicating to the lower court why any affidavit is objectionable. See R. 428-431. All the Appellants put forth -- without any basis whatsoever -- is that such affidavits contain "hearsay," "lack foundation," or contain "legal conclusions."<sup>17</sup> For instance,

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<sup>16</sup> According to 40 ALR 1297, it is a question of law whether an action was begun and prosecuted with reasonable diligence. At the same time, there can be no dispute that Mrs. Robbins did indeed prosecute her action with reasonable diligence and therefore, if one were to apply this measure, the lower court's judgment is correct.

<sup>17</sup> Under Rule 104(a), Utah Rules of Evidence, the trial court has ample discretion to consider affidavits over objections based on either foundation or the competence of the affiants. McCormick §53; Morgan, Basic Problems of Evidence, 45-50

Potter Investment Company sold Certificate No. 258 to Mrs. Robbins. Certainly it knows whether Mrs. Robbins bought the stock from it and whether it alone delivered Certificate No. 258 to her. Further, the Potter affidavit refers to a conversation that Mr. George "John" Potter had with Guardalabene, Old Republic's agent and employee. The affidavit says nothing of what Guardalabene purportedly said, and surely Mr. Potter is competent to testify as to what he talked about or what he said to Guardalabene.

With respect to the Penny Grace affidavit, Ms. Grace, a Vice President of the national stock brokerage firm of Thompson McKinnon Securities, Inc., certainly has personal knowledge of the price at which she personally sold Check Rite stock to her own customers. What could possibly be objectionable about that? The same is true with respect to the Chuck Burton affidavit: he knows what he said to Mrs. Robbins and he knows the price at which his firm, Fitzgerald, Talman, sold Check Rite stock at July end/August beginning 1988. How could Mr. Burton not have personal knowledge of that contained in his affidavit as well? Further, since the Burton affidavit attests to a lower price than that of Thompson McKinnon (Penny Grace), the Burton

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(1962). See Federal Rule of Evidence 104. See also Advisory Committee's Note to Subsection (a), Rule 104, Federal Rules of Evidence, 56 F.R.D. 183, 196. Furthermore, the lower court, in considering Mrs. Robbins' various affidavits, clearly did not consider the weight of testimony or the credibility of witnesses. Singleton v. Alexander, 19 Utah 2d 292, 431 P.2d 126 (Utah 1967); Sandberg v. Klein, 576 P.2d 1291 (Utah 1978). Thus, the lower court committed no error in this regard.

affidavit was primarily submitted by Mrs. Robbins to demonstrate that she was indeed closely following the price of Check Rite stock and that had she had a certificate to deliver at July end/August beginning 1988, she would have sold it.

The foregoing is also true of Mrs. Robbins' two affidavits, Exhibits 3 and 4 hereto. There can be little dispute that she is competent to attest to that contained in both such affidavits and that neither contain hearsay.

Mrs. Robbins' several affidavits submitted in support of her motion for partial summary judgment, Exhibits 3-8 hereto, are not in the least objectionable. Amica Mutual Insurance Co. v. Schettler, 100 Utah Adv. Rep. 17, 768 P.2d 950, 963-64 (Ut. Ct. App. 1989)(is proper for lower court to assess damages on the basis of affidavits); Norton v. Blackham, 669 P.2d 857, 859 (Utah 1983)(affidavit in support of summary judgment must set forth facts that would be admissible in evidence).<sup>18</sup> Because Mrs. Robbins' several supporting affidavits each contain facts which would be admissible in evidence, the lower court committed no error in considering them.

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<sup>18</sup> See also generally D & L Supply v. Saurini, 110 Utah Adv. Rep. 10, 775 P.2d 420, 421 (Ut. Sup. Ct. 1989); Bruno v. Plateau Mining Company, 73 Utah Adv. Rep. 89, 747 P.2d 1055, 1056-57 (Ut. Ct. App. 1987); Webster v. Sill, 675 P.2d 1170, 1192 (Utah 1983). In addition, recent Utah authority holds that where a party's motion for summary judgment is challenged by a motion to strike portions of the supporting affidavits, the movant should be given an opportunity to supplement his affidavit to meet the standards of Rule 56(e) before the summary judgment motion is ruled upon. Gillmor v. Cummings, 155 Utah Adv. Rep. 15, 17, 806 P.2d 1205 (Ut. Ct. of App. 1991).

### POINT III

A LOWER COURT IS NOT REQUIRED TO ISSUE FINDINGS  
IN ORDER TO AWARD ATTORNEY'S FEES ON SUMMARY  
JUDGMENT. FURTHER, THE ATTORNEY'S FEE ISSUE, BEING  
RAISED ON APPEAL FOR THE FIRST TIME, SHOULD BE IGNORED.

A trial court is not required to issue findings in  
awarding summary judgment because it defeats the purpose of  
summary judgment. Neerings v. Utah State Bar, 166 Utah  
Adv. Rep. 13, 14, \_\_\_ P.2d \_\_\_ (Ut. Sup. Ct., August 2, 1991).  
Naturally, this principle embraces an award of attorney's fees on  
summary judgment. Nonetheless, in an ignoble attempt to get this  
Court to review the lower court's award of attorney's fees,  
Appellants argue for the first time that the lower court awarded  
attorney's fees as "sanctions."<sup>19</sup> This is not true. The lower  
court based its award of attorney's fees on South San Pitch  
Company v. Pack, 97 Utah Adv. Rep. 42, 44-45, 765 P.2d 1279  
(Ut. Ct. of App. 1988) and Nephi Processing Plant,  
Inc. v. Talbot, 247 F.2d 771 (10th Cir. 1957), the latter of  
which Appellants themselves ironically rely upon. See p. 12-13,  
Appellants' brief. Nephi holds that a plaintiff victimized by  
conversion is entitled to lost profits, including the cost of  
minimizing damages. Nephi at p. 773-774. This would include

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<sup>19</sup> In other words, by arguing for the first time that the attorney's fees  
awarded are "sanctions", the Appellants are relying on recent case law holding that the  
lower court must make a specific finding as to the basis thereof. In this case, the lower  
court not only did not award attorney's fees as sanctions but it specifically denied Mrs.  
Robbins' motion for sanctions. (Exhibit 1 hereto; R. 710-712, ¶16 thereof.) Thus, there is no  
reason why the lower court should have issued findings as to the basis of attorney's fees it  
did not award as "sanctions."

attorney's fees necessarily incurred to be made whole. As further contemplated in Nephi such losses are within the contemplation of the parties to this appeal because Mrs. Robbins had already made her claim and the Appellants knew that the price of Check Rite stock was on the rise. See Exhibit "L" to amended complaint; see also Potter affidavit.

The contention that the lower court awarded attorney's fees as "sanctions" is frivolous and wholly unsupported by the record. See Ex. 2 hereto. Because Appellants have manufactured this issue for purposes of appeal, it should be ignored. Olson v. Park-Craig-Olson, Inc., 167 Utah Adv. Rep. 18, 21, \_\_\_ P.2d \_\_\_ (Ut. Ct. of App., August 14, 1991)(failure to raise issues below precludes raising them on appeal); accord: Bangerter v. Poulton, 663 P.2d 100, 102 (Utah 1983).

#### CONCLUSION

The conversion in this case is willful and knowing, if not fraudulent, particularly when a bond existed solely to prevent such a conversion. Old Republic, Atlas and Check Rite provide no explanation as to why the "reasonable time" in this case --assuming one applies the New York Rule -- should be any less than 90 days. In fact, their figure of 30 days could not be more arbitrary and "unreasonable." Old Republic, Atlas and Check Rite have simply picked 30 days "out of thin air" because it is the longest time period after May 4, 1988 before the price of Check Rite stock started to rise. Thus, 30 days is only

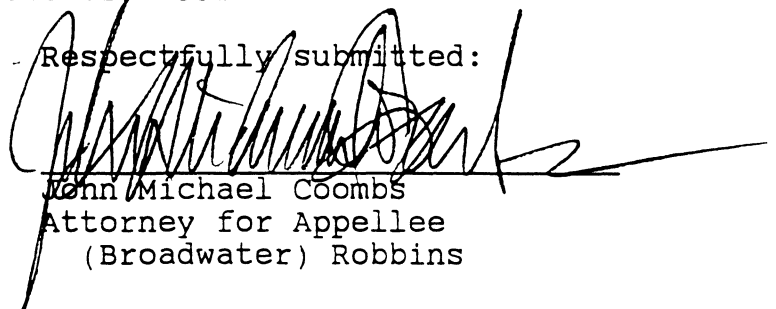


"reasonable" because it is economical to them. The New York Rule is not designed to economically assist the converter.

Based on the foregoing, the lower court's partial summary judgment in Mrs. Robbins' favor should be left intact and undisturbed.

DATED this 3rd day of October, 1991.

Respectfully submitted:

A large, stylized handwritten signature in black ink, appearing to read 'John Michael Coombs', is written over the typed name and title.

John Michael Coombs  
Attorney for Appellee  
(Broadwater) Robbins

In re: LeAnna (Broadwater) Robbins v. Old Republic Surety, et al., Case No. 900508

Appellee (Broadwater) Robbins' Opposing Brief.

PROOF OF SERVICE

The undersigned hereby certifies that on the 3rd day of October, 1991, (s)he hand-delivered or mailed, postage prepaid, sufficient true and correct copies of the foregoing OPPOSING BRIEF OF APPELLEE (BROADWATER) ROBBINS by regular mail to:

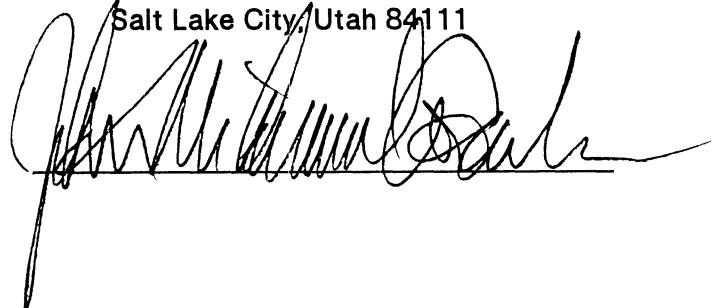
Hand-delivered:

Robert A. Burton, Esq.  
Stephen J. Trayner, Esq.  
H. Burt Ringwood, Esq.  
STRONG & HANNI  
Attorneys for Defendants Old  
Republic Surety and Northwestern  
National Insurance Company of  
Milwaukee, Wisconsin  
Sixth Floor, Boston Building  
Salt Lake City, Utah 84111

Mailed:

Larry G. Reed, Esq.  
CROWTHER & REED  
Attorneys for Defendant Atlas  
445 South 300 East, Suite 300  
Salt Lake City, Utah 84111

Phillip R. Hughes, Esq.  
Attorney for Defendant Check Rite  
884 South 200 East, Suite 100  
Salt Lake City, Utah 84111

A large, stylized handwritten signature in black ink, likely belonging to Phillip R. Hughes, is written over a horizontal line.

0200.01:OBRIEF.1-11(FOOT.2-3)

EXHIBIT "1"

FILED DISTRICT COURT  
Third Judicial District

JOHN MICHAEL COOMBS, No. 3639  
Attorney for Plaintiff  
72 East 400 South, Suite 220  
Salt Lake City, Utah 84111  
Telephone No.: (801) 359-0833

JUN 6 1990  
*[Signature]*  
By \_\_\_\_\_  
Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

LeANNA BROADWATER,

Plaintiff,

v.

OLD REPUBLIC SURETY, a Wisconsin  
corporation doing business in  
Utah, NORTHWESTERN NATIONAL  
INSURANCE COMPANY OF MILWAUKEE,  
WISCONSIN, a Wisconsin  
corporation, doing business in  
Utah, ATLAS STOCK TRANSFER, a  
Utah Corporation, CHECK RITE  
INTERNATIONAL INC., f/k/a  
CARDINAL ENERGY CORPORATION, a  
Utah corporation, and SCOTT J.  
FLETCHER, a Utah resident,

Defendants.

JUDGMENT AND ORDER

2157473  
6-13-90 8:01 am

Civil No. 89-0902684-CV

Judge Raymond S. Uno

The Court having reviewed the file, having heard oral argument on May 1, 1990, including the memorandums and affidavits filed in support of and in opposition to several motions, the Court being fully advised and good cause further appearing, hereby enters judgment and further orders as follows:

1. Defendants' motion for summary judgment on plaintiff's first and second causes of action is denied.

2. Plaintiff's motion for summary judgment on Counts I and II of her amended complaint is granted and judgment is hereby entered in favor of plaintiff and against defendants Atlas Stock Transfer and Check Rite International, Inc., in the amount of \$10,500.00 with interest thereon at 10% per annum since July 31, 1988. Pursuant to Rule 54(d)(1) of the Utah Rules of Civil Procedure plaintiff is hereby awarded costs. Further, pursuant to §15-1-4, Utah Code Ann., interest shall accrue on this judgment from the date of its entry at the rate of 12% per annum. The matter of plaintiff's attorney's fees is taken under advisement and will be ruled upon after the submission of a detailed affidavit in support of such an award.

3. Defendants Old Republic Surety and Northwestern National's motion for an order striking the affidavits of plaintiff, Chuck Burton, Potter Investment Company, and Penny Grace is denied.

4. Defendant Old Republic Surety and Northwestern National's motion to strike certain portions of plaintiff's memorandum in opposition to defendants' motion for partial summary judgment and plaintiff's memorandum in support of her motion for partial summary judgment is granted.

5. Defendants Old Republic Surety and Northwestern National's motion for summary judgment dismissing plaintiff's third, fourth, and fifth causes of action in her amended complaint as against them is granted, but any award of attorney's fees is denied.

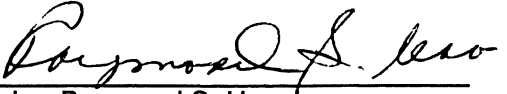
6. Plaintiff's motion for sanctions against the insurance company defendants and their counsel is denied.

IT IS SO ORDERED, ADJUDGED AND DECREED.

DATED this 6<sup>th</sup> day of June, 1990.

In re: Broadwater v. Old Republic Surety, et al.  
Civil No. 89-0902684-CV  
JUDGMENT AND ORDER

Third District Court

  
\_\_\_\_\_  
Judge Raymond S. Uno

0200:JUDG.1

EXHIBIT "2"

FILED SEP 17 1990  
Third Judicial District

JOHN MICHAEL COOMBS, No. 3639  
Attorney for Plaintiff  
72 East 400 South, Suite 220  
Salt Lake City, Utah 84111  
Telephone No.: (801) 359-0833

SEP 17 1990

By *[Signature]*  
SALT LAKE COUNTY  
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

LeANNA BROADWATER,

Plaintiff,

v.

OLD REPUBLIC SURETY, a Wisconsin  
corporation doing business in  
Utah, NORTH WESTERN NATIONAL  
INSURANCE COMPANY OF MILWAUKEE,  
WISCONSIN, a Wisconsin  
corporation, doing business in  
Utah, ATLAS STOCK TRANSFER, a  
Utah Corporation, CHECK RITE  
INTERNATIONAL INC., f/k/a  
CARDINAL ENERGY CORPORATION, a  
Utah corporation, and SCOTT J.  
FLETCHER, a Utah resident,

Defendants.

JUDGMENT FOR ATTORNEY'S  
FEES

Civil No. 89-0902684-CV

Judge Raymond S. Uno

A hearing having been held in the above-entitled Court on September 6, 1990,  
at the hour of 9:30 a.m., on the issue of attorney's fees; John Michael Coombs having  
appeared for plaintiff Broadwater; Stephen J. Trayner having appeared on behalf of  
defendants Old Republic Surety and Northwestern National Insurance Company of  
Milwaukee, Wisconsin; Larry G. Reed having appeared for defendant Atlas Stock Transfer;



no appearance having been made by defendant Check Rite International, Inc., in that its local counsel claims to have had no notice of the hearing, and <sup>Local</sup> Counsel for Check Rite was not included on the mailing Certificate. PRT

The Court having heard the arguments of counsel and read the affidavits and memorandums on file; it having also heard the parties' oral stipulation that plaintiff is bound by the terms of her contingency fee arrangement with her counsel, and, in that regard, the Court having further acknowledged that plaintiff has a one-third (1/3)/two-thirds (2/3's) contingency fee arrangement with her counsel, as set forth in Exhibit "A" attached hereto and incorporated by reference, and good cause further appearing, the Court ruled as follows:

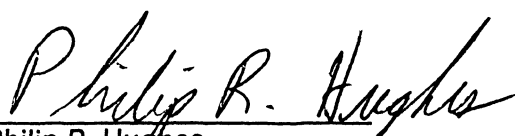
Plaintiff LeAnna Broadwater is hereby awarded a judgment against defendants Atlas Stock Transfer and Check Rite International, Inc., for attorney's fees in the amount of one-third (1/3) of the amount of the judgment entered against such defendants on June 6, 1990, a true and correct copy of which is attached hereto and incorporated into this judgment by reference as Exhibit "B".

DATED this 17<sup>th</sup> day of September, 1990.

THIRD DISTRICT COURT

  
Third District Judge Raymond S. Uno

Approved as to form:

  
Philip R. Hughes  
Counsel to Check Rite International, Inc.

March 22, 1989

Mr. John Michael Coombs, Lawyer  
72 East 400 South, Suite 220  
Salt Lake City, Utah 84111

Dear Michael:

I have searched my telephone records and, apparently, have given you all the information on calls I made to Guardalabene.

I have recieved the most recent offer and find it absolutely ridiculous. As you will note, in previous correspondence I sent to Guardalabene, dated July 11th, he had proposed over the phone to pay me the amount I had paid for the stock for settlement, which was \$2,480, and I flatly refused and asked that he just simply replace the stock and allow me to sell it at whatever price I chose. That is why I am so adamant about their paying me the highest price the stock traded at plus punitive damages or attorneys fees because of their unwillingness to settle the matter with me at that time.

I'm not sure we want to go into such detail with Fletcher, but you're the expert and I will leave that decision up to you. You had mentioned previously about asking for a Summary Judgment. What is your thinking on that now?

Below I have outlined our agreement the way I believe we discussed it. If it is satisfactory to you, please make a copy, sign it and return for my files.

I have previously submitted a \$1,500 retainer to you which is to be deducted from your total fees.

It is agreed that you are entitled to one third of whatever is recovered. However, it is further agreed that if it is necessary to go to trial then you will be entitled to half of whatever is recovered. Except if punitive damages are awarded, I will be entitled to the first \$8,000 of whatever is awarded and then we will split the remainder on a 50/50 basis.

Sincerely,

  
LeAnna (Broadwater) Robbins

lr

AGREED AND ACCEPTED THIS 22<sup>th</sup> DAY OF March, 1989.

SIGNED:

  
J. Michael Coombs, Lawyer

00820

FILED DISTRICT COURT  
Third Judicial District

JOHN MICHAEL COOMBS, No. 3639  
Attorney for Plaintiff  
72 East 400 South, Suite 220  
Salt Lake City, Utah 84111  
Telephone No.: (801) 359-0833

JUN 6 1990  
*[Signature]*  
By \_\_\_\_\_ Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

LeANNA BROADWATER,

Plaintiff,

v.

OLD REPUBLIC SURETY, a Wisconsin  
corporation doing business in  
Utah, NORTHWESTERN NATIONAL  
INSURANCE COMPANY OF MILWAUKEE,  
WISCONSIN, a Wisconsin  
corporation, doing business in  
Utah, ATLAS STOCK TRANSFER, a  
Utah Corporation, CHECK RITE  
INTERNATIONAL INC., f/k/a  
CARDINAL ENERGY CORPORATION, a  
Utah corporation, and SCOTT J.  
FLETCHER, a Utah resident,

Defendants.

JUDGMENT AND ORDER

2157473  
6-13-90 8:01 am

Civil No. 89-0902684-CV

Judge Raymond S. Uno

The Court having reviewed the file, having heard oral argument on May 1, 1990, including the memorandums and affidavits filed in support of and in opposition to several motions, the Court being fully advised and good cause further appearing, hereby enters judgment and further orders as follows:

1. Defendants' motion for summary judgment on plaintiff's first and second causes of action is denied.

2. Plaintiff's motion for summary judgment on Counts I and II of her amended complaint is granted and judgment is hereby entered in favor of plaintiff and against defendants Atlas Stock Transfer and Check Rite International, Inc., in the amount of \$10,500.00 with interest thereon at 10% per annum since July 31, 1988. Pursuant to Rule 54(d)(1) of the Utah Rules of Civil Procedure plaintiff is hereby awarded costs. Further, pursuant to §15-1-4, Utah Code Ann., interest shall accrue on this judgment from the date of its entry at the rate of 12% per annum. The matter of plaintiff's attorney's fees is taken under advisement and will be ruled upon after the submission of a detailed affidavit in support of such an award.

3. Defendants Old Republic Surety and Northwestern National's motion for an order striking the affidavits of plaintiff, Chuck Burton, Potter Investment Company, and Penny Grace is denied.

4. Defendant Old Republic Surety and Northwestern National's motion to strike certain portions of plaintiff's memorandum in opposition to defendants' motion for partial summary judgment and plaintiff's memorandum in support of her motion for partial summary judgment is granted.

5. Defendants Old Republic Surety and Northwestern National's motion for summary judgment dismissing plaintiff's third, fourth, and fifth causes of action in her amended complaint as against them is granted, but any award of attorney's fees is denied.

6. Plaintiff's motion for sanctions against the insurance company defendants and their counsel is denied.

IT IS SO ORDERED, ADJUDGED AND DECREED.

DATED this 6<sup>th</sup> day of June, 1990.

In re: Broadwater v. Old Republic Surety, et al.  
Civil No. 89-0902684-CV  
JUDGMENT AND ORDER

Third District Court

Raymond S. Uno  
Judge Raymond S. Uno

THAT THIS IS A TRUE COPY OF  
DOCUMENT ON FILE IN THE  
COURT, SALT LAKE COUNTY, STATE OF  
UTAH  
DATE: 9-8-98  
Charlene Johnson  
DEPUTY COURT CLERK

0200:JUDG.1

EXHIBIT "3"

JOHN MICHAEL COOMBS, No. 3639  
Attorney for Plaintiff  
72 East 400 South, Suite 220  
Salt Lake City, Utah 84111  
Telephone No.: (801) 359-0833

FILED  
COURT  
FEB 19 10 31 AM '99  
CLERK

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

LeANNA BROADWATER,

Plaintiff,

v.

OLD REPUBLIC SURETY, a Wisconsin  
corporation doing business in  
Utah, NORTH WESTERN NATIONAL  
INSURANCE COMPANY OF MILWAUKEE,  
WISCONSIN, a Wisconsin  
corporation, doing business in  
Utah, ATLAS STOCK TRANSFER, a  
Utah Corporation, CHECK RITE  
INTERNATIONAL INC., f/k/a  
CARDINAL ENERGY CORPORATION, a  
Utah corporation, and SCOTT J.  
FLETCHER, a Utah resident,

Defendants.

AFFIDAVIT OF PLAINTIFF IN  
SUPPORT OF HER MOTION FOR  
SUMMARY JUDGMENT ON COUNTS  
I AND II OF HER AMENDED  
COMPLAINT

Civil No. 89-0902684-CV

Judge Raymond S. Uno

STATE OF UTAH       )  
                          )ss.  
SALT LAKE COUNTY    )

LeAnna Broadwater, on her oath, deposes and says as follows in Support of  
her Motion for Summary Judgment on Counts I and II of her Amended Complaint:

1. That your affiant is the sole plaintiff in the above-matter and she has  
personal knowledge and experience as to that which is contained herein.

2. That your affiant has carefully read and helped prepare the Statement of Undisputed Facts in her Memorandum in Support of her Motion for Summary Judgment on counts I and II of her Amended Complaint and in fact, she personally participated in the drafting thereof. That in an effort not to duplicate each of such enumerated Facts as detailed therein in this affidavit, your affiant can attest that each and every such Statement of Undisputed Fact therein as it pertains to her and her knowledge and experience as to how she was mistreated, misled, and "lulled" by certain of the defendants and, as to what otherwise transpired in this case, is true and correct in all particulars.

3. That your affiant can attest that had she had a replacement certificate for Certificate 258 at July end/August beginning 1988 she would have sold it. She further believes that she would have received the highest price that such stock reached in 1988, namely, \$1-5/16ths per share, or, at a minimum, at least \$1.25 per share. This is because your affiant knew of a pending Check Rite merger and she also had a brokerage account with Ernest Muth and was daily, if not very closely, following the price of the stock at that time. For instance, your affiant would have had an open order placed in which to sell the stock at that time. On the other hand, your affiant believes that had she had a replacement certificate at such time, she may have well received \$1-5/16ths per share as set forth in the supporting affidavit of Penny Grace. Thus, your affiant believes that she is entitled to at least \$10,000 in damages (8,000 shares x \$1.25 per share) and perhaps \$10,500 in damages (8,000 shares x \$1-5/16ths per share). Your affiant further believes that she is entitled to pre-judgment interest at the highest legal rate or at a rate of no less than 12% and in her Amended Complaint she has indeed asked for pre-judgment interest. Lastly, your affiant has incurred attorney fees of at least \$10,000 just trying to protect and enforce her rights,



and she believes that such incurred fees have caused her additional damage which would not have occurred but for the wrongful conduct of the insurance company defendants and defendants Atlas and Check Rite.

4. That your affiant believes that the defendants (with the exception of defendant Fletcher) had a duty to make her whole, a duty which included immediately going out into the market in May 1988 and buying 8,000 shares of stock to replace Certificate 258 on which a lost instrument bond had been posted. That the misfortune of this entire case is that no responsible entity or person would help your affiant in any way and no one wanted to take responsibility for the problem until there was nothing left to do but file a lawsuit -- and even then, the defendants would rather spend more money litigating this case than giving your affiant what she truly deserves.

5. That your affiant believes that Guardalabene's investigation of the matter was exclusively for his own employer and Fletcher, the principal on the bond, and had nothing to do with her inasmuch as she is and was a totally innocent victim. That your affiant believes that Atlas, Check Rite, and the insurance company defendants have no excuse not to have immediately purchased 8,000 shares of replacement stock in May 1988 and thereafter and immediately delivered the same to her.

6. That your affiant does not believe that she had an obligation to go out and "cover", namely, to go out into the market herself and with her own money buy replacement stock for four reasons: (1) the problem was not her fault, (2) no one ever told her to "cover" or do anything else at any time, (3) she did not have the resources or cash on hand to have so bought replacement stock herself, and (4) she was not "short" the stock herself, namely, she had not sold it to or by or through anyone else and therefore she had no duty herself to

deliver 8,000 shares of replacement stock to any third party. That your affiant believes that had she been "short" 8,000 shares herself then she arguably would have had a duty to "cover", but under the circumstances of this case, she did not. That if anyone involved in the case had simply informed your affiant that your affiant should have "covered" -- just to avoid this lawsuit your affiant would have done so. Unfortunately, no one did and your affiant had no reason to think she was acting other than as reasonably as could be expected of anyone.

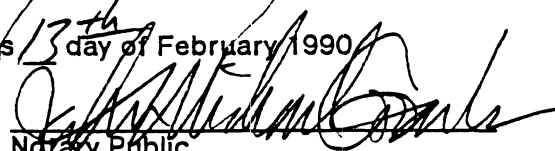
7. That your affiant has incurred additional damages of substantial unwarranted attorney fees, costs, including out-of-pocket expenses, and time expended and she believes that she is entitled to such additional damages on which there should be an evidentiary hearing.

FURTHER SAITH AFFIANT NAUGHT.

DATED this 13 day of February, 1990.

  
LeAnna Broadwater) Plaintiff

SUBSCRIBED and SWORN to before me this 13<sup>th</sup> day of February 1990

  
Notary Public  
Residing at Salt Lake City, UT

My Commission Expires:

1/6/91

B:AFDVT.8

EXHIBIT "4"



1. That your affiant is the sole plaintiff in the above-matter and she has personal knowledge and experience as to that which is contained herein. That your affiant incorporates by reference her affidavit filed in support of her cross-motion for summary judgment on Counts I and II of her Amended Complaint.

2. That your affiant disputes the defendants' calculation of a "reasonable time" as set forth in their memorandum in support of their motion for partial summary judgment. That your affiant believes that she could not have acted more reasonably under the facts and circumstances of this case and she believes that defendants Atlas, Check Rite, Northwestern National, and Old Republic did not. That in fact, none of the responsible parties would assist her or do anything to resolve the problem and in fact there was nothing she could do under the circumstances other than eventually file this lawsuit.

3. That your affiant believes that the conduct of the above-mentioned defendants "lulled" her into thinking that they would resolve the matter when they would not and did not, and if the Court invokes a "reasonable time" period after the conversion and notice of conversion, such a period should be tolled or extended by virtue of the misconduct of the above-named defendants -- certainly not by any conduct on your affiant's part. That less than 90 days after the alleged date of conversion is a "reasonable time" in this case because your affiant acted reasonably during all that period and she does not know how it is possible that she could have acted more reasonably or diligently. That your affiant believes that no reasonable person in her shoes would have acted any differently and certainly no one, under the same circumstances, would have thought that he or she had an independent duty to effect "cover" and buy replacement stock, especially when no defendant informed your affiant of such and such only became an issue after this

case was filed. That your affiant believes that no reasonable person would have spent several thousand dollars of his or her own money buying replacement stock when any such person, and your affiant in particular, is the sole victim of the gross negligence, malfeasance, misfeasance, and overall intentional conduct of the defendants.

4. Because your affiant acted reasonably and the culpable defendants did not, a "reasonable time" after the conversion and notice of conversion should include a time period up to and until July end/August beginning 1988 when the price of Check Rite stock admittedly attained its highest price of \$1-5/16th per share.

5. Lastly, your affiant should add that during one conversation with Guardalabene, Guardalabene tried to get your affiant to deal directly with Fletcher to resolve the problem. Your affiant responded that she did not think such was her responsibility. At that point, Guardalabene informed your affiant that because she was a "layman" and apparently didn't understand the situation, she should get a lawyer. Your affiant then understood Guardalabene to say that he would no longer deal with her directly until she consulted with legal counsel and had him talk directly to Guardalabene. Your affiant can attest that after she retained counsel, who in fact tried to negotiate unsuccessfully with Guardalabene, Guardalabene was still unwilling to resolve the problem and therefore, Guardalabene caused your affiant to incur unwarranted and unjustified attorney fees, not only prior to filing suit, but thereafter as well.

FURTHER SAITH AFFIANT NAUGHT.

DATED this 5<sup>th</sup> day of February, 1990.

  
LeAnna Broadwater, Plaintiff

SUBSCRIBED and SWORN to before me this 13<sup>th</sup> day of February 1990.

My Commission Expires:

1/6/91  
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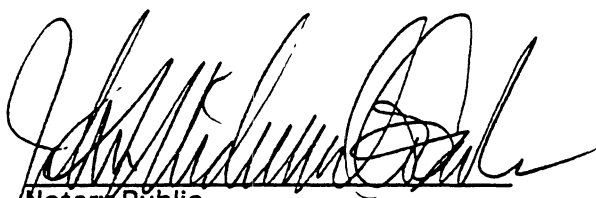
  
Notary Public  
Residing at Salt Lake City, UT

EXHIBIT "5"



JOHN MICHAEL COOMBS, No. 3639  
Attorney for Plaintiff  
72 East 400 South, Suite 220  
Salt Lake City, Utah 84111  
Telephone No.: (801) 359-0833

FILED  
COURT

SEP 13 1988  
CLERK OF COURT

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

LeANNA BROADWATER,

Plaintiff,

v.

OLD REPUBLIC SURETY, a Wisconsin  
corporation doing business in  
Utah, NORTH WESTERN NATIONAL  
INSURANCE COMPANY OF MILWAUKEE,  
WISCONSIN, a Wisconsin  
corporation, doing business in  
Utah, ATLAS STOCK TRANSFER, a  
Utah Corporation, CHECK RITE  
INTERNATIONAL INC., f/k/a CARDINAL  
ENERGY CORPORATION, a Utah  
corporation, and SCOTT J.  
FLETCHER, a Utah resident,

Defendants.

AFFIDAVIT OF CHUCK BURTON

Civil No. 89-0902684-CV

Judge Raymond S. Uno

STATE OF COLO. ) *COLORADO*  
 )ss.  
COUNTY OF \_\_\_\_\_ ) *DENVER*

Chuck Burton, on his oath, deposes and says as follows:

1. That your affiant has personal knowledge of that which is contained herein.

That during July and August 1988 your affiant was employed as an account executive with

~~Keller Financial~~, a securities broker-dealer in Denver, Colorado.

*FITZGERALD TALMAN INC.,*  
*(CB)*

2. That during the time your affiant was an account executive with ~~Kober~~ <sup>FITZGERALD TALMAN</sup> Financial, it made a "market" in the stock of Check Rite International, Inc. (CB)

3. That your affiant recalls a conversation he had with Plaintiff LeAnna Broadwater some time in July 1988 in which she sought a quote on the stock of Check Rite.

4. That your affiant specifically recalls a transaction at ~~Kober~~ <sup>FITZGERALD TALMAN INC</sup> Financial in (CB) which a sale of Check Rite stock occurred at \$1 3/8 per share, exclusive of commissions.

5. That your affiant believes and recalls that such transaction occurred at July 1988 end or early August 1988 and such was soon after your affiant's telephone conversation with Plaintiff LeAnna Broadwater.

FURTHER SAITH AFFIANT NAUGHT.

DATED this 18 day of ~~August~~ <sup>SEPTEMBER</sup> 1989. (CB)

  
Chuck Burton

SUBSCRIBED and SWORN to before me this 18th day of ~~August~~ <sup>SEPTEMBER</sup> 1989.

  
Notary Public  
Residing at Denver, Colorado

My Commission Expires:

11/2/91

STATE OF COLORADO  
COUNTY OF ARAPAHOE

EXHIBIT "6"

JOHN MICHAEL COOMBS, No. 3639  
Attorney for Plaintiff  
72 East 400 South, Suite 220  
Salt Lake City, Utah 84111  
Telephone No.: (801) 359-0833

FILED  
COURT

FEB 17 1999

CLERK

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

LeANNA BROADWATER,

Plaintiff,

v.

OLD REPUBLIC SURETY, a Wisconsin  
corporation doing business in  
Utah, NORTH WESTERN NATIONAL  
INSURANCE COMPANY OF MILWAUKEE,  
WISCONSIN, a Wisconsin  
corporation, doing business in  
Utah, ATLAS STOCK TRANSFER, a  
Utah Corporation, CHECK RITE  
INTERNATIONAL INC., f/k/a  
CARDINAL ENERGY CORPORATION, a  
Utah corporation, and SCOTT J.  
FLETCHER, a Utah resident,

Defendants.

SUPPORTING AFFIDAVIT OF  
PENNY G. GRACE

Civil No. 89-0902684-CV

Judge Raymond S. Uno

---

Attached hereto in support of Plaintiff's Motion for Summary Judgment on  
Counts I and II of her Amended Complaint is the Affidavit of Penny G. Grace, Assistant Vice  
President of Thomson McKinnon Securities, Inc.

**THOMSON  
MCKINNON SECURITIES INC.**

333 CHESTERFIELD CENTER BLDG., SUITE 100, CHESTERFIELD, MISSOURI 63017 314 532-2400

August 8, 1989

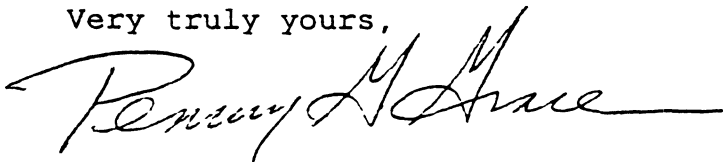
Mr. Michael Coombs  
72 East-400 South  
Suite 220  
Salt Lake City, Utah 84111

Dear Mr. Coombs:

In regard to your inquiry on the Checkrite stock, I can attest to the fact that I have been purchasing Checkrite stock for clients since September 17, 1987. I have purchased these shares for clients at various prices. The highest price I paid for the stock was at 1-5/16 on July 28, 1988 when I purchased 20,000 shares of Checkrite for various clients.

I have enclosed my business card. Please let me know if I can be of further assistance.

Very truly yours,



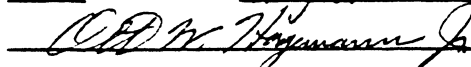
Penny G. Grace  
Asst. Vice President

PGG/kk

STATE OF *Missouri*  
COUNTY OF *ST Louis*

PENNY GRACE BEING DULY SWORN, DEPOSES AND SAYS THAT SHE PERSONALLY APPEARED BEFORE ME AND SWORE TO THE ABOVE STATEMENT ON THIS

8th DAY OF August, 1989



NOTARY PUBLIC

MY COMMISSIONS EXPIRES Nov 28, 1990

00383

EXHIBIT "7"

JOHN MICHAEL COOMBS, No. 3639  
Attorney for Plaintiff  
72 East 400 South, Suite 220  
Salt Lake City, Utah 84111  
Telephone No.: (801) 359-0833

FILED  
COURT  
FEB 17 10 02 AM '89  
CLERK

---

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

LeANNA BROADWATER,

Plaintiff,

v.

OLD REPUBLIC SURETY, a Wisconsin  
corporation doing business in  
Utah, NORTH WESTERN NATIONAL  
INSURANCE COMPANY OF MILWAUKEE,  
WISCONSIN, a Wisconsin  
corporation, doing business in  
Utah, ATLAS STOCK TRANSFER, a  
Utah Corporation, CHECK RITE  
INTERNATIONAL INC., f/k/a  
CARDINAL ENERGY CORPORATION, a  
Utah corporation, and SCOTT J.  
FLETCHER, a Utah resident,

Defendants.

AFFIDAVIT OF POTTER  
INVESTMENT COMPANY

Civil No. 89-0902684-CV

Judge Raymond S. Uno

---

STATE OF UTAH            )  
                                  )ss.  
SALT LAKE COUNTY        )

George "John" Potter, being first put on his oath deposes and says as follows  
on behalf of Potter Investment Company:

1. That your affiant is a principal of the securities brokerage firm here in Salt  
Lake City known as Potter Investment Company. That your affiant has power and authority

to make this affidavit on behalf of Potter Investment Company. That since the 1950's your affiant has been in the securities brokerage business and he has been a registered representative with the National Association of Securities Dealers, Inc., ("NASD") and the Utah Securities Division. That he has personal knowledge and experience as to that which is contained herein.

2. That Potter Investment Company bought certificate 258 from defendant Scott J. Fletcher and sold the same to plaintiff LeAnna Broadwater. That such certificate was properly endorsed by Fletcher and properly signature guaranteed as required in the industry. In the industry such a certificate is known as "street stock" and it was delivered to and accepted by plaintiff Broadwater on the settlement date of her purchase transaction with Potter Investment Company. That because Potter Investment Company received valuable consideration from Ms. Broadwater for her purchase of 8,000 shares of Check Rite, Potter Investment Company has and would have had no dispute as to whether Ms. Broadwater then became the true and lawful owner of certificate 258.

3. That sometime in mid-1988, Potter Investment Company learned about plaintiff's problem with respect to her request of Atlas Stock Transfer, Check Rite's transfer agent, to transfer and register Check Rite certificate 258 into her name.

4. That sometime in the end of June or the first week of July 1988 your affiant recalls engaging in a telephone conversation with an individual who identified himself as Paul S. Guardalabene and who further identified himself as an employee or agent of Old Republic Surety, the insurance company that had written a lost instrument bond on Check Rite certificate 258. That your affiant had a lengthy discussion with Mr. Guardalabene about penny stocks and lost instrument bonds, etc., one that lasted probably at least 30



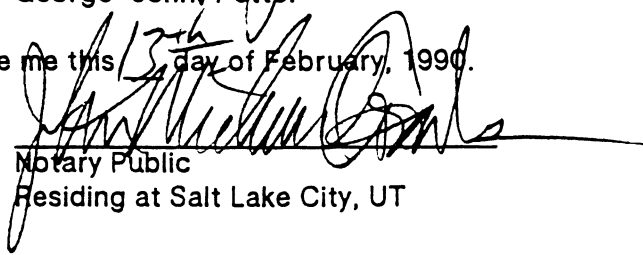
minutes or more. That during such conversation with Mr. Guardalabene, your affiant informed Mr. Guardalabene that penny stocks such as Check Rite were highly volatile and it was your affiant's suggestion to Mr. Guardalabene that it would be in Guardalabene's best interest to quickly resolve any dispute with plaintiff LeAnna Broadwater as the stock could appreciate in value.

FURTHER SAITH AFFIANT NAUGHT.

DATED this 13 day of February, 1990.

  
George "John" Potter

SUBSCRIBED and SWORN to before me this 13<sup>th</sup> day of February, 1990.

  
Notary Public  
Residing at Salt Lake City, UT

My Commission Expires:

4/6/91  
AFDVT.7

EXHIBIT "8"

JOHN MICHAEL COOMBS, No. 3639  
Attorney for Plaintiff  
72 East 400 South, Suite 220  
Salt Lake City, Utah 84111  
Telephone No.: (801) 359-0833

FILED  
CLERK OF COURT

FEB 13 9 13 AM '90  
BY [Signature]

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

LeANNA BROADWATER,

Plaintiff,

v.

OLD REPUBLIC SURETY, a Wisconsin  
corporation doing business in  
Utah, NORTH WESTERN NATIONAL  
INSURANCE COMPANY OF MILWAUKEE,  
WISCONSIN, a Wisconsin  
corporation, doing business in  
Utah, ATLAS STOCK TRANSFER, a  
Utah Corporation, CHECK RITE  
INTERNATIONAL INC., f/k/a  
CARDINAL ENERGY CORPORATION, a  
Utah corporation, and SCOTT J.  
FLETCHER, a Utah resident,

Defendants.

AFFIDAVIT OF ERNEST MUTH

Civil No. 89-0902684-CV

Judge Raymond S. Uno

STATE OF UTAH            )  
                                  )ss.  
SALT LAKE COUNTY        )

Ernest Muth on his oath deposes and says as follows:

1. That your affiant is a stock broker employed by Bagley Securities, Inc., and  
for several years he has been a registered representative with the National Association of

Securities Dealers, Inc., ("NASD") and the Utah Securities Division. That he has personal knowledge and experience as to that which is contained herein.

2. That your affiant's firm, Bagley Securities, Inc., undertook transactions in the securities of Check-Rite from ~~May~~ <sup>now JUNE</sup> through August, 1988. That based on official records in the possession of Bagley Securities which your affiant has examined, the following is a list of the highest prices that the stock of Check-Rite was either bought or sold by Bagley Securities for the period(s) so indicated:

MAY, 1988:

FIRST WEEK:  
SECOND WEEK:  
THIRD WEEK:  
FOURTH WEEK:

HIGHEST  
PRICE

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

JUNE, 1988:

FIRST WEEK:  
SECOND WEEK:  
THIRD WEEK:  
FOURTH WEEK:

HIGHEST  
PRICE

\* .25  
.41  
.30  
.40

JULY, 1988:

FIRST WEEK:  
SECOND WEEK:  
THIRD WEEK:  
FOURTH WEEK:

HIGHEST  
PRICE

.38  
.40  
.65  
\$1.25

AUGUST, 1988:

FIRST WEEK:  
SECOND WEEK:

HIGHEST  
PRICE

~~34.00~~ No Trans  
0 ✓ ✓

THIRD WEEK:  
FOURTH WEEK:

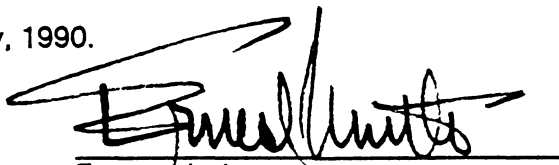
NO TRADES  
NO TRADES

3. To your affiant's best knowledge and belief, the highest price that the stock traded in Salt Lake City in 1988 was \$1.25 per share as evidenced by Exhibit "A" attached hereto and incorporated by reference, a true and correct copy of a Bagley Securities stock confirmation.

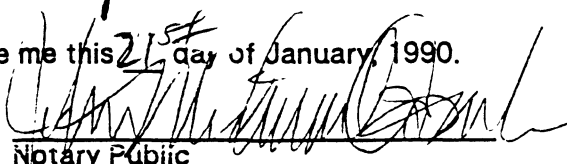
4. That Plaintiff LeAnna Broadwater has a brokerage account with your affiant and during the latter part of July and the beginning of August, 1988, your affiant was in regular communication with her about the price of Check Rite stock. That your affiant believes and is informed that if Ms. Broadwater had had a certificate of Check Rite to deliver, she would have sold it during the end of July or early August, 1988 when the price of the Company's stock achieved its highest price in 1988.

FURTHER SAITH AFFIANT NAUGHT.

DATED this 21<sup>st</sup> day of January, 1990.

  
Ernest Muth

SUBSCRIBED and SWORN to before me this 21<sup>st</sup> day of January, 1990.

  
Notary Public  
Residing at Salt Lake City, UT

My Commission Expires:

1/6/91

AFDVT.3