

1964

# Security Title Insurance Agency v. Security Title Insurance Company : Petition for Rehearing and Supporting Brief

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

SECURITY TITLE INSURANCE  
AGENCY, now known as SECURI-  
TY TITLE GUARANTY COM-  
PANY, and SECURITY TITLE  
COMPANY, Utah corporations,  
*Plaintiffs-Respondents,*

- vs. -

SECURITY TITLE INSURANCE  
COMPANY, a California corporation,  
*Defendant-Appellant.*

JAN 20 1964

Supreme Court, Utah

Case No.  
9925

## Defendant-Appellant's Petition for Rehearing and Supporting Brief

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- vs. -

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*Defendant-Appellant.*

Case No.  
9925

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## Defendant-Appellant's Petition for Rehearing

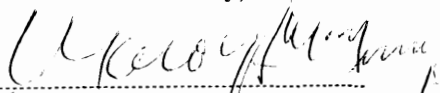
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The Defendant-Appellant, Security Title Insurance Company, a Utah corporation, petitions the Court for a rehearing in the above entitled case, the Court by its opinion filed December 31, 1963, having affirmed the judgment of the trial court.

This petition is based upon the facts which undisputably show that the plaintiffs do not have exclusive use of the words "Security Title" and, therefore, such words as a matter of law, could not have acquired a secondary meaning in favor of the plaintiffs. Further-

more, the Court has overlooked the established law which holds that even though a secondary meaning may have been acquired, such does not give rise to a monopolistic right to the use of the words or name in question, but only a right to require that another user of the name properly distinguish itself.

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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SECURITY TITLE INSURANCE  
AGENCY, now known as SECURI-  
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SECURITY TITLE INSURANCE  
COMPANY, a California corporation,  
*Defendant-Appellant.*

Case No.  
9925

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## Defendant-Appellant's Brief in Support of Petition for Rehearing

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### POINT NO. I

IN AFFIRMING THE DECISION OF THE TRIAL COURT THAT THE PLAINTIFFS HAVE ACQUIRED A SECONDARY MEANING TO THE WORDS "SECURITY TITLE," THIS COURT HAS OVERLOOKED THE UNDISPUTED FACTS WHICH SHOW THAT SUCH WORDS HAVE NOT BEEN EXCLUSIVELY APPROPRIATED BY THE PLAINTIFFS AND HENCE, AS A MATTER OF LAW, NO SECONDARY MEANING CAN ATTACH TO THE SAME IN FAVOR OF THE PLAINTIFFS.

This Court, by its silence, has in effect held, contrary to the well established law in the field, that a secondary meaning may attach to certain words in favor of a non-exclusive user thereof. We call to the Court's attention that apparently, through oversight, no consideration was given to the matters of law referred to in the two points considered in the defendant-appellant's reply brief.

Counsel for the plaintiffs-respondents based a major portion of his argument on the finding of the trial court that the words "Security Title" had acquired a secondary meaning in favor of plaintiffs. It was in reply to this argument that we pointed out in our reply brief on pages 5 through 9, it is imperative that for a secondary meaning to attach to certain words or a name, such words or name must exclusively identify the claimant.

It is clear from the record that Security Title and Abstract Company in Provo, Utah, is a separate entity, not a party to this action, and was the first user of the words "Security Title" in the State of Utah in connection with title activities (T. 123). Such company still exists today. In addition, Security Title Company in Ogden, Utah, and Security Title Company in Kaysville and Farmington, Utah, are separate entities. Neither of plaintiffs owns or controls Security Title & Abstract Company in Provo, Security Title Company of Ogden, or Security Title Company in Kaysville and Farmington. (R. 157, 158, 186, 188).

Plaintiffs did at the time of the trial attempt to



show that the use of the words "Security Title" by these entities and companies other than the plaintiffs was with the consent and agreement of the plaintiffs. However, such agreement and consent, even if they exist, are of no aid to plaintiffs.

In support of this proposition, the Court's attention is invited to the case of *Everett O. Fisk & Co. v. Fisk Teachers' Agency*, 3 Fed. (2d) 7 (8CCA 1924), where the Court said:

"The evidence shows that the use of the plaintiff's trade-name by the many local offices, under the sanction of contracts made by the plaintiff assuming to license the use of the trade-name, has caused the name to lose its distinctiveness as the trade-name of the plaintiff. The service rendered to teachers and officers of schools has for many years represented generally to such persons and to the public, not the efforts, the experience, or the responsibility of the plaintiff, but of the persons conducting these local offices. As was said in *Powell v. Birmingham Vinegar Brewing Co.*, 2 Ch. D. (L.R. 1896) 54, 73: "There is another way in which a name originally a good tradename may lose its character and become publici juris, i.e., when the first person using the name does not claim the right to prevent others from using it, and allows others to use it without complaint. The name then comes to denote the article and nothing more; the name becomes publici juris, and any one is at liberty to make the article and call it by the name by which it is usually known'."

The evidence readily demonstrates that there has been no such exclusive use of the words "Security Title"

by either of the plaintiffs. The plaintiffs are both Utah corporations. On December 1, 1944, Security Title Company was incorporated (Ex. 9). This company did business in Salt Lake City until 1957, when it changed its name to "Security Title Insurance Agency" (T. 126). On June 21, 1962, after the commencement of this action, the name was again changed to "Security Title Guaranty Company," which is the present name of one of the plaintiff corporations. The plaintiff "Security Title Company" was incorporated in 1957 and its functions are limited to title activities in Salt Lake County (T.128).

In short, the plaintiffs at the trial would have had to have demonstrated that the words "Security Title" have been used exclusively and solely identified the plaintiffs. See also *Sterling Products Corp., vs. Sterling Products, Inc.*, 45 Fed. Supp. 960 (S. D.N.Y. 1942).

Another case illustrating the principle is *Campbell Soup Co. v. Armour & Co.*, 81 F. Supp. 114 (D.C. Pa. 1948), the Court stated:

"The essence of the trade-mark is that it shall be a true badge of origin indicating that the contents to which it is affixed is the product of the trade-mark proprietor and no others, or as it is put by Nims, *Unfair Competition and Trade-Marks*, Fourth Edition, Vol. Two, p. 1289: "\*\*\*\* it is vital to the existence of a trade-mark that it should be used by one and by only one concern. *A trade-mark cannot serve two masters; it cannot identify two sources at the same time and remain a trade-mark.*"

The Campbell Soup Co. case involved a technical trade-mark. It follows that when considering the concept of secondary meaning, the same rule would be applicable.

Numerous authorities could be cited in support of this proposition.

In short, the plaintiffs at the trial would have had to have demonstrated that the words "Security Title" have been used exclusively by and solely identified the plaintiffs. See also *Sterling Products Corp. vs. Sterling Products, Inc.*, 45 Fed. Supp. 960 (S. D.N.Y. 1942).

In this regard, it is most significant that involved in this case are two plaintiffs, each claiming the benefit of a secondary meaning to the words "Security Title." The very essence of "secondary meaning" is that certain words identify one particular source. The question is appropriately asked which one of the plaintiffs is identified by the words "Security Title"? Furthermore, the words "Security Title" in the Provo area certainly do not refer to either of the plaintiffs. If any secondary meaning has attached to those words, it would be in favor of a local entity in the Provo area which is not even a party to this action. Certainly, the plaintiff should not be entitled to have enjoined the use of the words "Security Title" in the Provo area when such use causes no association whatsoever with either of the plaintiffs in this case. Similarly, in the Farmington and Davis County area, the words "Security Title" do not refer to either of the plaintiffs but again considering the evidence most favorable to the plaintiffs merely identify local entities in that area. The same is true in the Ogden area.

This court has stated that the words "Security Title" have acquired a secondary meaning. The defendant-appellant has a right to ask who is identified by such

words? The Provo Company? Either or both of the plaintiff companies in Salt Lake City? The Davis County company? Or the Ogden company?

The very fact that the words "Security Title" identify so many sources in so many places in the State of Utah, nullifies the possibility of a secondary meaning attaching to the words in favor of any one single entity. The fact that the plaintiffs attempted at the trial to show that the use of the words "Security Title" by the other entites and companies other than the plaintiffs was with the consent and agreement of the plaintiffs, does not substitute for the requirement of exclusive use. Such agreement and consent, if such there be, only demonstrates that the plaintiffs have consented to a use which by its very existence defeats a claim to secondary meaning. The very essence of the concept of "secondary meaning" is identification of a single user.

These words of Judge Learned Hand in the case of *Coty v. LeBlume Import Co.*, 292 F. 264 (1923) are squarely in point: "But it is undoubtedly necessary that it must signify a single source . . ." See also: *Shredded Wheat Company v. Humphrey Cornell Company*, 250 Fed 960 (CCA, 2d Cir., 1918); *Bayer Company v. United Drug Company*, 272 F 505 (D.C.S.D. New York, 1921).

The court's attention is called to the fact that the case of *Everett O. Fisk & Co. v. Fisk Teachers' Agency*, supra, was a case involving an agreement. There, the court recognized that such an agreement was futile to prevent the words in question from identifying other sources. Hence, the very essence of "secondary meaning" was lost by agreement.

## POINT NO. II

CONTRARY TO WELL-ESTABLISHED LAW WHICH WOULD ONLY ENTITLE THE PLAINTIFFS TO A RIGHT TO HAVE A SUBSEQUENT USER OF THE WORDS DISTINGUISH ITSELF, THIS COURT IN AFFIRMING THE DECISION OF THE TRIAL COURT HAS INADVERTENTLY GRANTED THE PLAINTIFFS A UNWARRANTED MONOPOLISTIC RIGHT TO THE USE OF THE WORDS "SECURITY TITLE."

This Court has inadvertently granted to plaintiffs a monopolistic right to the use of the words "Security Title" throughout the whole of the State of Utah, contrary to well-established law governing relief that may be granted in fair trade cases involving secondary meaning.

Even if this Court, upon a reconsideration of this matter, should let stand its determination that a secondary meaning had attached to the words "Security Title" in favor of plaintiffs, they are not entitled to a monopoly in their use. This issue is neither new nor novel. Courts throughout the country have considered this problem and the holdings are legion that no such monopolistic right exists.

In fair trade cases involving secondary meaning the only right the person has in whose favor the secondary meaning of words has attached is to have the second user enjoined in the *unfair* use of such words. This is not a technical trade mark case where by statutes governing the registration of technical trademarks, a monopoly to the use of the mark on words is granted, recognized and upheld.

Courts that have considered the problems involved in protecting a party in the use of words to which a secondary meaning has attached, have one after another declared that it is only an unfair use that should be enjoined — not every use. Examples of such holdings were set forth in defendant-appellant's brief on pages 9 through 14 thereof.

Some of authorities there cited, together with additional authorities, are as follows:

*Armstrong Paint v. Nu-Enamel Corp.*, 305 U.S. 315: L.Ed 195 (1938):

"This right of freedom does not confer a monopoly on the use of the words. It is a mere protection against their unfair use as a trademark or trade name by a competitor seeking to palm off his products as those of the original user of the trade name. This right of protection from such use belongs to the user of a mark which has acquired a secondary meaning."

*Barton v. Rex-Oil Co.*, 2 Fed. (2d) 402, 403, (CCA, Third Cir, 1924):

"... the utmost the first user of such a name after it has acquired a secondary meaning can insist upon is that no one shall use it against him in an unfair way. Accordingly, the second user becomes an infringer only when he makes an unfair use of the mark. Not any competition, but only unfair competition on the part of such user is actionable. *Canal Co. v. Clark*, 13 Wall (80 U.S. 311, 324; 20 L.Ed. 581); *Columbia Mills v. Alcorn*, 150 U.S. 464, 14 S. Ct. 151, 37 L.Ed. 1144; *Elgin Watch Co., v. III Watch Co.*, 179 U.S. 665, 21 S. Ct. 270, 45 L.Ed. 365." (Emphasis added.)

*88¢ Stores, Inc., v. Martinez*, 361 P. (2d) 809, (Ore.) (1961):

*“But even assuming that plaintiff has created a secondary meaning in the use of the name ‘The 88¢ Store’ or any other name, plaintiff has no right to restrict the use of that name except as the use interferes with plaintiff’s sale of merchandise, or the sale of merchandise by plaintiff’s franchisees over which plaintiff has controls relevant to the quality of the goods or services which the alleged trade name purports to represent. Smith v. Dental Products Co., 7 Cir., 1944, 140 F. (2d) 140, 145-148; Everett O. Fisk & Co. v. Fisk Teachers’ Agency, 8 Cir., 1924, 3 F. (2d) 7, 8-9; Morse-Starrett Products Co. v. Steccone, D.C. N.D. Cal. 1949, 86 F. Supp. 796, 805; Sage, Trade-Mark Licenses and ‘Control,’ 43 Trade-mark Reporter 675 (1953); Comment, Developments in the Law; Trade-Marks and Unfair Competition, 68 Harv. L. Rev 814, 867, 874 (1955); Note, Trade Mark-Law — Valid Use of Trade Mark by Other Than Owner, 23 N.Y.U.L.Q. Rev. 482 (1948). (Emphasis added.)*

*Sterling Products Corporation v. Sterling Products, Inc.*, 45 F. Supp. 960, 961, (1942):

*“It is not the mere use of the word ‘Sterling,’ but the method or manner of its use which determines the rights of the parties; in order for the plaintiff to prevail it must show that defendants make an unfair use of it.”*

*Richmond Remedies Co. v. Dr. Miles Medical Co.*, 16 F. (2d) 598, p. 602 (CCA, 8th Cir. 1926):

If the trade-name consists of a descriptive word, no monopoly of the right to use the same

can be acquired. This is but a corollary of the proposition that a descriptive word cannot be the subject of a trademark. *G. & C. Merriam Co. v. Saalfield* (C.C.A.) 198 F. 369. Others may use the same or similar descriptive word in connection with their own wares, provided they take proper steps to prevent the public being deceived. *Standard Paint Co. v. Trinidad Asphalt Co.*, supra; *Vacuum Oil Co. v. Climax Refining Co.*, supra; *Allen B. Wrisley Co. v. Iowa Soap Co.*, 122 F. 796 (C.C.A. 8); *Heide v. Wallace & Co.*, (C.C.A.) 135 F. 346; *Trinidad Asphalt Co. v. Standard Paint Co.*, 163 F. 977 (C.C.A. 8); *Walter Baker & Co. v. Gray*, 192 F. 921, 52 L.R.A. (N.S.) 889 (C.C.A. 8); *G. & C. Merriam Co. v. Saalfield* (C.C.A.) 198 F. 369; *S.R. Feil Co. v. Jn. E. Robbins Co.* (C.C.A.) 220 F. 650.

*Houston v. Berde*, 2 N.W. 2d 9 p. 10, (Minn. 1942):

Where generic words are used in a trade-name, it is only the manner of their use by another that is considered and restrained. There must be confusion or deception with implicit representation that the goods of the latter are those of the first user. Even so, only use which makes unfair competition can be enjoined. *Yellow Cab Co. v. Cook's T. & T. Co.*, 142 Minn. 120, 171 N.W. 269.

*United Lace & Braid Mfg. Co. v. Barthals Mfg. Co.*, 221 Fed. 456 (D.C., E.D. New York, 1915):

A word may acquire in trade a secondary signification, differing from its primary meaning, and if it is used to persons in the trade who will understand it, and be known and intended to understand it, in its secondary sense, it will be none the less a falsehood, although in its primary sense it may be true. One who uses



language which will convey to persons reading or hearing it a particular idea which is false, knowing and intending this to be the case, is not to be absolved from a charge of falsehood because in another sense, which will not be conveyed and is not intended to be conveyed, it is true. In such a case, however, mere proof of the use by another of such make or word will not of itself entitle the complainant to relief, for this would be to give to the word full effect as a trade-mark while denying its validity as such. The complainant must prove, further, that the defendant used it under such circumstances or in such a manner as to pass off his goods as the goods of the complainant. Such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of. When this is done, relief against unfair competition will be awarded by requiring the use of the mark by another to be confined to its primary sense by such limitations as will prevent misapprehension upon the question of origin.

*Spicer v. W. H. Bull Medicine Co.*, 49 F. (2d) 980, 982 (1931):

"We think it is well established by the above and other cases that, even where a secondary meaning of a word is established, others have the right to use such word in its primary sense, provided it is so used as not to lead the public to believe that it is purchasing the goods of one who has established such secondary meaning."

*G. & C. Merriam Co. v. Saalfeld*, 198 Fed. Rep. 369, 373 (CCA, 6th Cir., 1912):

"Here, then, is presented a conflict of right. The alleged trespassing defendant has the right

to use the word, because in its primary sense or original sense the word is descriptive; but, owing to the fact that the word has come to mean, to a part of the public, something else, it follows that when the defendant approaches that same part of the public with the bare word, and with nothing else, applied to his goods, he deceives that part of the public, and hence he is required to accompany his use of the bare word with sufficient distinguishing marks normally to prevent the otherwise normally resulting fraud."

*American Waltham Watch Co. v. U. S. Watch Co.*,  
173 Mass. 85:

"Thus it appears that while the first selection of a descriptive name which later has acquired a secondary meaning does not carry with it an exclusive right to its use, yet the first user has a right to be protected against one who subsequently so uses the name as to deceive the public and thereby take his trade from him; and in affording him this protection the later comer, when using the name, will be required to distinguish his goods and enlighten the trading public."

*Dennison Mfg. v. Thomas Mfg.*, 94 Fed. 651 (Cir.  
Ct., D. Del., 1899):

". . . if such words, marks or symbols were used by one of them before the other and by association have come to indicate to the public that the goods to which they are applied are of the production of the former, the latter will not be permitted, with intent to mislead the public, to use such words, marks, or symbols in such a manner, by trade dress or otherwise, as to deceive or be capable of deceiving the public as to the origin, manufacture or ownership of the articles to which they are applied; and the latter may be

required, when using such words, marks, or symbols, to place on articles of his own production or the packages in which they are usually sold something clearly denoting the origin, manufacture or ownership of such articles, or negating any idea that they were produced or sold by the former.”

Consistent with the law that the only relief the plaintiffs are entitled to is to have the defendant properly identify itself are the numerous decisions which have considered similar questions wherein specific identification requirements have been imposed. See for example the cases cited on page 17 of the defendant-appellant's initial brief and cases found among the many collected by the annotator in 66 A.L.R. 948.

## CONCLUSION

From the cases which have decided matters concerning the acquisition of a “secondary meaning” of generic words it would appear conclusive as a matter of law that neither of the plaintiffs could have acquired in their favor a secondary meaning to the words “Security Title.” Neither of the plaintiffs was the first user of the words in the State of Utah nor has either of the plaintiffs used the words exclusively, but have permitted separate entities in Provo, Farmington and Ogden areas to use the words to identify sources other than the plaintiff.

Nevertheless, even if the Court is not disposed to reconsider the finding that a secondary meaning has attached to the words “Security Title” in favor of the

plaintiff, the plaintiffs are not entitled to a monopoly in the use of the words in question but are only entitled to have the defendant appropriately identify itself. We again invite the Court's review of the numerous decisions cited in this and prior briefs supporting this contention.

In the briefs submitted and oral argument to the Court, Counsel has pointed out that the defendant has already taken what it thought to be appropriate steps of identification. It will, no doubt, be recalled that in the use of its corporate name the defendant has consistently identified itself as being a company from Los Angeles, California. However, the defendant is willing to take any additional steps that this Court deems necessary to remove any probability of confusion between itself as a California insurance company and the plaintiff Utah corporations.

Respectfully submitted,

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