

1968

# Sugarhouse Finance Company v. Zions First National Bank And Walker Bank & Trust : Appellant's Brief

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## In the Supreme Court of the State of Utah

SUGARHOUSE FINANCE COMPAN-  
Y, A Corporation,

*Plaintiff and Appellant,*

- vs. -

ZIONS FIRST NATIONAL BANK, A  
Corporation,

*Defendant and Respondent,*

and

WALKER BANK & TRUST COMPAN-  
Y, A Corporation,

*Defendant.*

Case No.  
11029

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### APPELLANT'S BRIEF

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Appeal From Judgment For Defendant of the  
Third Judicial District Court in and for Salt Lake County  
Honorable Stewart M. Hanson, Judge.

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# **In the Supreme Court of the State of Utah**

SUGARHOUSE FINANCE COMPAN-  
Y, A Corporation,

*Plaintiff and Appellant,*

- vs. -

ZIONS FIRST NATIONAL BANK, A  
Corporation,

*Defendant and Respondent,*

and

WALKER BANK & TRUST COMPAN-  
Y, A Corporation,

*Defendant.*

Case No.  
11029

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## **APPELLANT'S BRIEF**

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### **NATURE OF THE CASE**

This is an action to recover funds disbursed on checks drawn on appellant's account with defendant, Walker Bank & Trust Company, after having been presented to and honored by respondent bank. The endorsements on the checks may have been forged by one Guy E. Davis, an employee of appellant, and in some cases the checks bore no endorsement whatsoever. Other checks were made directly to Zions First National Bank as payee and the proceeds from all of the checks negotiated with Zions First National Bank are believed to have been

deposited to the personal account of the said Guy E. Davis.

## DISPOSITION IN LOWER COURT

On the 12th day of January, 1967, an Order of Dismissal without prejudice was entered in favor of respondent, Zions First National Bank, and against appellant. Appellant then filed a Petition for Intermediate Appeal which Petition was denied. On the 6th day of February, 1967, appellant filed a new Complaint against respondent, Zions First National Bank, and against defendant, Walker Bank & Trust Company. On the 30th day of August, 1967, an Order of Dismissal with prejudice was entered in favor of respondent and against appellant. From this Order and Final Judgment this appeal is prosecuted.

## RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment of the Lower Court, remanding the case back to the Lower Court for a trial on the issues of fact in dispute in this matter.

## STATEMENT OF FACTS

During the period beginning September 11, 1964, and ending July 26, 1965, thirty-five checks were drawn

against appellant's checking account at defendant, Walker Bank & Trust Company's Sugarhouse Branch. During one sixty day period beginning April 1, 1965 and ending May 30, 1965, twelve checks totalling \$90,000.00 were honored by respondent bank and the proceeds therefrom deposited to accounts of Guy E. Davis. The checks were signed by Guy E. Davis, the then manager of appellant, Sugarhouse Finance Company, and co-signed by one other person authorized to sign checks on the checking account of appellant. Thirty-two of the checks were made payable to various payees and the endorsement in each case was a signature other than the named payee. In some cases no endorsement whatsoever appears on the checks thus negotiated. The endorsements were made either by Davis, by someone acting in his behalf, or perhaps by a stranger to the whole transaction. Upon presenting the checks to respondent bank for payment, the checks were honored by tellers of respondent bank without any effort having been made to discover whether or not the endorsements were genuine and indeed in some cases without requiring any endorsement whatsoever. The amount of each check so presented was then credited to an account or accounts belonging to Guy E. Davis. The checks ranged in amount from \$2,300.00 to \$5,550.00 and the total amount of all checks thus honored being the sum of \$150,265.00.

Three of the checks honored by Zions First National Bank were payable directly to Zions First National Bank as named payee. These three checks totalling \$47,000.00



were negotiated during a six day period from May 21, to May 27, 1965, and the proceeds therefrom credited to the account or accounts belonging to Guy E. Davis. Although attempts have been made to recover the sums involved, the attempts have met with little success.

The Lower Court dismissed without prejudice the original Complaint of the plaintiff on the ground that it failed to state a claim against defendant, Zions First National Bank, upon which relief can be granted and on the ground that the allegations of said Complaint are insufficient as a matter of law to state a claim against defendant, Zions First National Bank, by reason of Title 22, Chapter 1, Utah Code Annotated (1953). Plaintiff's Amended Complaint was dismissed with prejudice on the ground that plaintiff's Complaint fails to state a claim against defendant, Zions First National Bank, upon which relief can be granted.

## ARGUMENT

### POINT I

THE LOWER COURT ERRED IN DISMISSING THE ORIGINAL COMPLAINT FILED HEREIN FOR THE REASON THAT THE PROVISIONS OF TITLE 22, CHAPTER 1, UTAH CODE ANNOTATED (1953), ARE INAPPLICABLE TO THE INSTANT PROCEEDINGS IN THAT THE EMPLOYEE OF THE APPELLANT WAS NOT A FIDUCIARY WITHIN THE MEANING OF THAT TERM AS USED IN SAID ACT.

The term "fiduciary" as used in Title 22, Chapter 1, Utah Code Annotated, (1953) is not identical with the meaning of that term as it is used generally, wherein an agent is said to be in a fiduciary relationship with his principal. It is stated by authorities on Agency that the fiduciary capacity of an agent imposes upon an agent a duty of loyalty of his principal. An agent must exercise his powers in accordance with that duty and do so only for the benefit of his principal. It is submitted that the fiduciary relationship required by the Fiduciaries Act is something more than a mere agency relationship and the fiduciary responsibilities of an agent associated with such a relationship. Such a distinction has been recognized by this Court as well as others. In *Tatsuno v. Kasai*, 70 Utah 203, 259 P. 318 (1927), this Court stated:

"That there was here a fiduciary relation, one not only as generally exists between a mere principal and agent, but that of a trustee and cestui que trust, is clearly shown in the record."

See also, *In re Arbuckle's Estate*, 220 P. 2d 950, 955 (Cal. 1950).

Although there are few cases in which the Courts have attempted to define "fiduciary" as it is used in the Fiduciaries Act, there are cases in which some distinction has been attempted to be drawn. In *Harlan E. Moore & Co. v. Champaign National Bank*, 141 N.E. 2d 97 (Ill. App. 1957), the plaintiff in count II of its Com-

plaint had alleged the language of Section 8 of the Fiduciaries Act (our Section 22-1-8) for its contention that by showing bad faith on the part of the defendant bank, the bank would be liable for certain acts of an agent of the plaintiff. The appeal court affirmed a directed verdict in favor of defendant on the ground that:

“There was a failure of proof that Wilkie as an agent of plaintiff, was a fiduciary within the meaning of Section 1, Fiduciaries Obligations Act. . . .” Id. at 103.

The agent Wilkie had basically the same duties and position that Guy E. Davis held with appellant in the instant case. The clear interpretation of the holding of the above quoted words is that there must be some proof of fiduciary capacity in the typical sense of trustee, before a corporate agent can be held to be within the Act. It is interesting to note that some states have enacted laws much more stringent than the Fiduciaries Act for the purpose of protecting banks from liability. In *General Casualty Co. of America v. Seattle First National Bank*, 256 P.2d 287 (Wash. 1953), the Court had before it a statute designed to relax some of the common law rules under which banks were formerly held liable for certain transactions. This statute contains the following language:

“Where a check or other negotiable instrument is drawn, made or endorsed in the name of or for a corporation, firm, association, estate or person

hereinafter called the principal, by an officer, trustee, attorney, *or other agent or fiduciary*, hereinafter called agent . . . neither the fact that such check or other negotiable instrument is so drawn or endorsed, or is paid by the drawee, or is deposited in the general account of such agent or is given by him or its proceeds used in payment of his private debt to the bank in which deposited or to any other person or is negotiated by him in any personal transaction, shall singly, or collectively be sufficient to put the depository or drawee bank or any other person, bank, firm, or corporation, upon inquiry as to the authority of such agent or constitute notice of an infirmity in the check or other negotiable instrument or defect in the title of the agent, *in the absence of actual knowledge* upon the part of such bank or person that such check or other negotiable instrument was drawn, endorsed, negotiated, deposited or paid without the authority of the principal.” R.C.W. 62.01.0195. (Emphasis added.)

The Washington Supreme Court in construing this statute stated:

“This statute goes even further than the Uniform Fiduciaries Act, 9A Uniform Laws Annotated, 19, Section 5, in relaxing the common law rule for the purpose of protecting banks from liability.”

It can be clearly seen that this statute is more stringent in the protection it affords banks than the Uniform Fiduciaries Act in two ways: (1) The statute provides that either an *agent OR fiduciary* may deal with funds of the

principal without the depository or drawee bank having the duty to inquire into the authority by which such funds are dealt. (2) This statute excepts from its application only cases in which the bank has "actual knowledge" the check was drawn, etc. without authority. The Uniform Fiduciaries Act, however, also excepts cases in which there is knowledge of facts which indicate that the bank's action in taking the instrument "amounts to bad faith." Had the Utah State Legislature intended to include all agents within the realm of the Fiduciaries Act it could have done so in the manner in which it was done in the above quoted statute by the Washington State Legislature. However, the obvious intent of the legislature was that the Fiduciaries Act should apply only to a person holding funds in a true fiduciary capacity — that is, funds held in the sense of a typical trust for payment out by the trustee or fiduciary for certain specified purposes. Whether or not Guy E. Davis held such a relationship with appellant in this case is a question of fact which should be left for jury determination. Indeed, the only evidence of the relationship of Guy E. Davis to appellant in the record of this case is an Affidavit of the vice-president of Zions First National Bank stating that based upon records in his custody he believed that Guy E. Davis was the manager of Sugarhouse Finance Company during the times pertinent to this litigation. There is no evidence stating or setting forth the duties and authority of Guy E. Davis in his position of manager of Sugarhouse Finance Company.

It is therefore submitted that Guy E. Davis was not a fiduciary within the meaning of the Utah Fiduciaries Act. It is further urged that the question of whether he had the fiduciary relationship necessary to bring his transactions within the Act is a question of fact which could not be decided by a Judge on a Motion of Dismissal.

## POINT II

THE FAILURE OF THE BANK TO REQUIRE THE PERSONAL ENDORSEMENT OF GUY E. DAVIS ON ALL THE CHECKS NEGOTIATED WITH ZIONS FIRST NATIONAL BANK WAS A BREACH OF THE CUSTOM AND PRACTICES OF BANKING INSTITUTIONS AND AS SUCH CONSTITUTED NEGLIGENCE ON THE PART OF THE BANK.

There is some dispute as to whether or not the checks negotiated by Guy E. Davis with Zions First National Bank were in fact forged instruments or fictitious payee checks. Plaintiff's original Complaint alleges that the checks were forgeries. Final determination of whether the checks were forgeries or fictitious payee checks is a question of fact which must ultimately be decided by a jury. However, for the purpose of establishing the negligence of Zions First National Bank it is immaterial whether or not the checks are found to be fictitious payee checks or forged instruments. The bank violated a duty established by custom and usage of requiring the personal endorsement of the person negoti-

ating a check. This practice is believed followed uniformly by banking institutions whether the check presented be bearer paper or a check endorsed over to a third party. Thus, while technically a bearer instrument requires no endorsement for negotiation, the custom and usage of banks has modified this rule. The reason for the rule is self-evident. The endorsement on a bearer instrument gives the bank negotiating the check, the drawee bank, and the depositor a record of the person receiving the proceeds therefrom.

In the instant case, if the bank had required the personal endorsement of Davis on all of the checks he negotiated, appellant could have discovered that the proceeds of the checks were actually going to Davis rather than the named payees and might easily have uncovered the plot at a point where much of the misappropriated funds might have been recovered.

Custom and usage plays an important part in the development of Commercial Law. Indeed, the new Uniform Commercial Code expressly provides:

“(1) This act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this act are . . .

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties.” Utah Code Annotated, Section 70A-1-102 (1953).

While admittedly the Uniform Commercial Code has no direct bearing on the instant case the above quoted section demonstrates the importance of custom and usage to the development of Commercial Law.

Especially has cusom and usage been important in the development of banking law. It is stated at *10 Am Jur 2d, Section 6 (1963)* that:

“Usages and customs have played an important role in developing the law of banking. Indeed, much of the law of banking has grown out of custom, and, notwithstanding the extent to which the law has been embodied in statutes, there is a large part of it which still remains unwritten.”

Many courts have held admissible evidence of banking custom and usage for the purpose of indicating to the jury the ordinary practice of others, in order to formulate a standard of reasonable care, although the custom in and of itself does not necessarily establish the standard. Thus, it was held in *Martin v. First National Bank*, 219 SW 2d 312, 8 ALR 2d 435 (Missouri 1949) that evidence of the customs of banks in the vicinity to accept an instruction as to the issuance of cashier's checks from one who had been to the bank on previous occasions on behalf of the same depositor transacting the depositor's business with the bank, is admissible on the issue of the bank's negligence in issuing to one who handled the depositor's account, in exchange for checks on itself,



cashier's checks which were then wrongfully converted. Furthermore, it has been held that the court may take judicial notice of certain banking customs. It is generally recognized that in order for a court to take judicial notice of a matter there are three material requisites:

1. The matter of which the court will take judicial notice must be one of common and general knowledge, although such knowledge need not be universal;

2. The matter must be known; that is, well established and not doubtful or uncertain; and

3. The matter must be known within the limits of the jurisdiction of the court. 89 ALR 1336.

Following these rules it has been held that a court will take judicial notice of the fact that, when a customer of a bank deposits with it for collection a check drawn on an institution in another city or state, it is not anticipated either by the customer or by the receiving bank that the collecting bank will send one of its own officers or servants out of town to present the check to the drawee for payment. The court held the defendant bank negligent in forwarding of the check in question directly to the drawee bank which was located in another town when there was another bank in the same town. The court took judicial notice that such a procedure was not customary among banks. *City of Douglas v. First National Bank*, 239 P. 785 (Arizona 1925). It is therefore herein

submitted that the custom and usage of banks in this vicinity is to require the endorsement of the person presenting a check for payment whether said check be a bearer instrument or otherwise. The violation of a custom and usage of such wide spread occurrence and uniform application certainly goes to the question of negligence on the part of the collecting bank. Indeed, the practice is so prevalent and known in this jurisdiction that judicial notice of such a practice is proper.

### POINT III

THE CHECKS NEGOTIATED BY DAVIS MUST BE CONSIDERED TO BE FORGED INSTRUMENTS RATHER THAN FICTITIOUS PAYEE CHECKS. THEREFORE, THE PROVISIONS OF TITLE 22, CHAPTER 1, UTAH CODE ANNOTATED (1953) ARE INAPPLICABLE, FOR THE REASON THAT SAID ACT WAS NOT INTENDED TO RELIEVE THE BANK OF THE RESPONSIBILITY OF ASCERTAINING THE GENUINENESS OF ENDORSEMENT ON CHECKS.

Plaintiff's original Complaint alleges that the thirty-two checks of which a list is contained in Exhibit "A" of plaintiff's original Complaint, contain forged endorsements. Since there has been no Answer filed by the defendants in this action and no other evidence introduced to contradict this allegation, at this point in the litigation it must be deemed that the endorsements on

said checks were indeed forgeries. However, there are other compelling reasons for believing that said endorsements are indeed forgeries and that the checks are thus forged instruments rather than fictitious payee checks.

While it is readily admitted that Guy E. Davis did have authority to draw checks on the deposits of Sugarhouse Finance Company it was required that such checks have a second signature before they were valid. All of the checks negotiated by Guy E. Davis with Zions First National Bank did in fact bear one other signature than that of Guy E. Davis. The question of whether a check is a forged instrument or fictitious payee check is determined by the intent of the person making it so payable. Utah Code Annotated, §44-1-10 (3) (1953). There is no evidence on record as to the intent of Davis or the second person signing the thirty-two checks negotiated with Zions First National Bank. In a similar case in which it was required that two signatures be upon the check before it was negotiable, the Court stated the following:

“In our opinion, the difficulty in the instant case is, in view of the facts, created by the theoretical significance attached to the second signature. We do not question the proposition that the intention with which the check is drawn is all important to a decision as to whether or not it was drawn to a fictitious payee. We reassert said principle. There is, however, no more reason to say that the intent must be that of a co-signer than to say

it must be that of the actual maker, to-wit: the corporation. The controlling intent is that of the person who within the scope of his authority does the final thing which gives vitality to the check or who places it in circulation." *Goodyear Tire & Rubber Co. v. Wells Fargo Bank & Union Trust Co.*, 1 Cal. App. 2d 694, 37 P.2d 483 (1934).

It is true that in that case the controlling intent was found to be that of the defrauding employee for the reason that the second person signing the check was held to be a mere automaton who had no real intent that could be attributed to the corporation. In the instant case there is no evidence whatsoever that the second person signing the checks was a party to the fraud or that said person had any other intent than that the proceeds of the checks should go to named payees. There is evidence that the second person signing the check did in fact know personally many of the named payees in said checks and that said person intended fully that the named payees should receive the proceeds therefrom. Viewed in this light the thirty-two checks must be considered to contain forged endorsements and are not bearer paper within the meaning of Fictitious Payee Doctrine. Certainly, the determination of the intent of both Guy E. Davis and the second person signing said checks is a question of fact that may not be decided by a Judge considering only the question of whether a Complaint states a valid claim.

A second reason supporting the allegation that the endorsements on the checks were forgeries involves the definition of a fictitious payee check and the effect of the Fictitious Payee Doctrine upon the duty of a bank to ascertain the genuineness of endorsements and the right of the person presenting the check to receive payment therefor. Assuming that the checks in question were in fact fictitious payee instruments, does the bank have no duty to ascertain the genuineness of endorsements on an instrument when the bank has no knowledge that the check is a fictitious payee check at the time of negotiating said check? In other words, the question that must be decided is whether or not the bank has the duty to ascertain the genuineness of endorsements or to require an endorsement on a check which it does not know to be a fictitious payee check at the time of negotiation. Certainly an intermediary bank which received a check on a forged endorsement and collects it from the drawee bank is liable to the drawer of the check for his loss. 10 Am. Jur. 2d §629. The logical interpretation of the Fictitious Payee Doctrine would require that the bank be aware that the check is a fictitious payee check at the time of negotiation. If the bank does not know that the check is a fictitious payee check at the time of negotiation the bank is still held to the duty to inquire as to the genuineness of endorsements on said check, the same as it would if the check were a check with a real named payee.

Furthermore, when the bank in the regular course of business stamps upon the check its guarantee of prior endorsements and transmits the check to the drawee bank for collection it is a ridiculous result to believe that the bank is guaranteeing the endorsement of a fictitious person. While there is no contract relationship between a depositor and an intermediary bank accepting a check for negotiation, the depositor is the third party beneficiary of the intermediary bank's guarantee of prior endorsements to the drawee bank. Therefore, if the bank stamps upon a check its guarantee of prior endorsements the fact that the check is a fictitious payee check has no bearing upon the rights of the depositor to hold liable the intermediary bank for acts in making payment on said check. The intermediary bank by stamping its guarantee of prior endorsements is estopped from at a later point alleging that the check is a fictitious payee check.

For these reasons it can be seen that a bank does have the duty to ascertain the genuineness of endorsements at the time of negotiation and further to ascertain whether or not a check is a fictitious payee check and thus bearer paper at that time. If the bank pays the check and transmits it with its guarantee of prior endorsements the check's endorsement must then be held to have been a forged endorsement. See *Standard Acc. Ins. Co. v. Pellecchia*, 15 N.J. 162, 104 A.2d 288 (1954).

It is therefore submitted that the checks were in fact checks containing forged endorsements rather than fictitious payee checks, and that the provisions of the Utah Fiduciaries Act do not apply to a transaction in which such a forged instrument is involved. In the Commissioner's prefatory note to the Uniform Fiduciary Act, 9B *Uniform Laws Annotated* (1966), at page 22, it is said:

"The general purpose of the Act is to facilitate the performance by fiduciaries of their obligations, rather than to favor any particular class of persons dealing with fiduciaries."

In order to facilitate that purpose, it was necessary to relieve a bank from the duty of inquiring into the authority of a fiduciary to draw a check, to transfer a check, or to deposit a check. For example, if the checks in this case had been made payable to cash, Guy E. Davis keeping the cash proceeds, the bank probably would not be liable. Also, if the checks were made payable to John Doe who cashed them and gave the money to Davis, the bank probably would not be liable. Even assuming that Guy E. Davis was a fiduciary within the meaning of the Act, which is not admitted, where a fiduciary check is regular on its face a bank would not necessarily be liable for any breach of duty by the fiduciary. But in this case, it is alleged that the checks were not regular on their face; that they do bear forged endorsements. Under the Fiduciaries Act, a bank may

be relieved from any duty of inquiring into the extent of the authority of a named fiduciary, but all of the other duties of the bank towards its depositors remain intact, including, the duty of determining the genuineness of endorsements. Nothing in the Act purports to relieve any bank from that duty. It is therefore submitted that the payment of the checks was made on forged endorsements and that the provisions of the Utah Fiduciaries Act are not applicable.

#### POINT IV

EVEN ASSUMING THAT THE PROVISIONS OF TITLE 22, CHAPTER 1, UTAH CODE ANNOTATED (1953) ARE APPLICABLE TO THE INSTANT PROCEEDINGS, THE LOWER COURT ERRED IN DISMISSING PLAINTIFF'S AMENDED COMPLAINT FOR THE REASON THAT THE QUESTION OF WHETHER RESPONDENT BANK ACTED IN BAD FAITH IS A QUESTION OF FACT PROPERLY THE SUBJECT OF JURY DETERMINATION.

Even assuming that either by operation of law or through a fact determination Guy E. Davis was found to have had the requisite relationship with Sugarhouse Finance Company to bring him within the requirements of the Utah Fiduciaries Act, the question of whether or not bad faith was shown the part of the bank is one not properly the subject of a motion for dismissal. The question of bad faith is one which should be determined



by the triers of fact rather than a judge considering only whether or not a Complaint states a valid claim. There is sufficient evidence pointing to the fact that the respondent bank did act in bad faith to give the jury ample evidence to consider that question.

In discussing the requisites necessary for a showing of bad faith one court defined "bad faith" as knowledge by a responsible agency, officer, or employee of the bank of an incriminating state of facts, short of actual knowledge of the breach of trust, but conscious of it, and aiding and abetting or acquiescing, in the breach. *New Amsterdam Casualty Co. v. National Newark & East Building Co.*, 175 A. 609 (N.J. 1934). Furthermore, it was held in another case that circumstances showing a transfer not in the ordinary course of business were sufficient to show bad faith in the meaning of §6 of the Uniform Fiduciaries Act. *Norristown-Penn. Trust Co. v. Middleton*, 150 A. 885 (Penn. 1930). In that case a firm of stock brokers received a draft in payment of the individual debt to them of the drawer. The draft was drawn by the treasurer of a bank on its funds in another bank payable to a fictitious person, and was delivered by the treasurer to the brokers, with the endorsement of the name of the fictitious person, and without the personal endorsement of the drawer. In discussing the application of §6 of the Uniform Fiduciaries Act (our §22-1-6) in discussing whether or not "bad faith" within the meaning of the act was shown by the stock brokers in accepting the check the Court stated:

“While notice of defect in title to paper, or bad faith, is not presumed, the fact may be established by circumstances. Where fraud in the inception of a transaction appeared, the conclusion of notice to the holder may be justified, and the fact that the manner of negotiation is unusual, as here, and not the way ordinarily followed in the course of business, is some evidence of bad faith. In this case, the maker was the treasurer, whom the defendants were bound to know had no right to use the bank’s draft to pay his own debts. It was produced from his possession to another unknown who was named as payee, who seemingly endorsed the paper, and defendants accepted it without the individual endorsement of Maurer (the treasurer). The jury might find from the use of the draft for a personal debt by the officer who executed it, and to whom it had been returned, evidence of improper conduct by the transferor.” Id. at 888.

The court held, therefore, that the circumstances showing a transfer not in the ordinary course of business were sufficient to show bad faith within the meaning of §6 of the Uniform Fiduciaries Act.

The analogy to the instant case can readily be seen. Guy E. Davis delivered to respondent bank certain checks made out to either fictitious persons or persons not intended to receive the proceeds of the checks. The respondent bank did not require that Guy E. Davis personally endorse the checks with his name. Such circumstances are not in the ordinary course of business as practiced

by banks in this area. Considering the multiplicity of transactions in which thirty-two checks were thus negotiated by Guy E. Davis through respondent bank and the large amounts involved, all amounts being in excess of \$2,000.00 and some being in amounts as high as \$5,000.00, the ordinary course of business would certainly dictate that the bank demand of Davis that he personally endorse each check before its negotiation. The failure of the bank to require the personal endorsement of Guy Davis on all of the thirty-two checks thus negotiated must certainly be evidence showing bad faith on the part of the bank. Bad faith does not require actual knowledge of the use of the funds of the principal by the agent for purposes outside the scope of his agency. As can be seen in the New Amsterdam Casualty case cited above, bad faith requires only knowledge of an incriminating state of facts from which it reasonably might be inferred that the agent is not acting honestly.

It is submitted that the multiplicity of transactions and the amounts of the checks involved together with the fact that the bank did not require proper endorsements as is required in the ordinary course of business, amounts to a knowledge by the bank or its agent of just such an incriminating state of facts and that such state of facts should certainly show bad faith on the part of the bank. It is therefore submitted that the Lower Court erred in granting respondent's Motion for Dismissal. There are facts sufficient to point toward a showing of bad faith on the part of respondent bank even though

it should be found that provisions of the Uniform Fiduciaries Act apply to the facts in the instant proceedings.

#### POINT V

THE LOWER COURT ERRED IN DISMISSING THE SECOND CAUSE OF ACTION OF PLAINTIFF'S ORIGINAL AND AMENDED COMPLAINTS FOR THE REASON THAT TITLE 22, CHAPTER I, UTAH CODE ANNOTATED, (1953) EXPRESSLY PROVIDES THAT THE NAMED PAYEE OF A CHECK IS LIABLE TO THE PRINCIPAL IF SUCH PAYEE HAS ACTUAL KNOWLEDGE THAT THE PROCEEDS THEREFROM ARE FOR THE PERSONAL BENEFIT OF THE FIDUCIARY, IF THE FIDUCIARY IN FACT COMMITS A BREACH OF HIS OBLIGATION IN DRAWING OR DELIVERING THE INSTRUMENT.

Plaintiff's original and amended Complaints both allege that the proceeds from the three checks negotiated with Zions First National Bank in which Zions First National Bank was a named payee were deposited to the account or accounts of Guy E. Davis in Zions First National Bank. Section 22-1-5, Utah Code Annotated (1953) expressly provides that the payee of a check drawn by a fiduciary is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in drawing or delivering the instrument.

However, a proviso of that section states:

“If, however, such instrument is payable to a personal creditor of the fiduciary and delivered to the creditor in payment of, or as security for, a personal debt of the fiduciary to the actual knowledge of the creditor, *or is drawn and delivered in any transaction known by the payee to be for the benefit of the fiduciary, the creditor or other payee is liable to the principal, if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the instrument.*” (Emphasis added.)

A proper application of this section would require that Zions First National Bank upon being presented with a check in which Zions First National Bank was a named payee be liable for misappropriated funds of such a fiduciary if, in fact, Zions First National Bank had actual knowledge that the proceeds of the check were to go for the benefit of the fiduciary. Since the original and Amended Complaints of the plaintiff allege that the proceeds from the three checks in which Zions First National Bank was a named payee went directly into the account or accounts of Guy E. Davis it must be deemed that the bank had actual knowledge that such proceeds were to go to the personal benefit of Guy E. Davis. In the absence of any allegations or facts to the contrary, the bank must be held to be liable for the proceeds wrongfully paid to Guy E. Davis and the Order of Dismissal of the Lower Court in both the original and Amended Complaints was thus improper.

## CONCLUSION

The test of the correctness and validity of an Order of Dismissal for failure to state a claim is whether in the light most favorable to plaintiff, and with every intendment regarded in his favor, the complaint is sufficient to constitute a valid claim. *Barron & Holtzoff, Federal Practice & Procedure* §356 (Rules Edition 1960).

It is appellant's contention that an Order of Dismissal was improper in plaintiff's original Complaint for two reasons: First, the record is replete with allegations and facts, which if taken in the light most favorable to plaintiff, does make out a valid claim. Second, the Lower Court incorrectly construed the purpose and intent of the Utah Fiduciaries Act, which act has no application to the facts and allegations of the instant case.

Furthermore, the Motion to Dismiss plaintiff's Amended Complaint was improperly granted because the record shows sufficient facts and allegations to make a valid Complaint, if such facts are taken in the light most favorable to plaintiff.

Therefore, appellant respectfully submits that the decision of the Lower Court should be reversed and the matter remanded for further proceedings in accordance with law.

Respectfully submitted,

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