

1968

## Selwyn Vanderpool v. B.K. Hargis, Et Al : Brief of Respondent

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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SELWYN VANDERPOOL,

*Plaintiff-Respondent,*

—vs.—

B. K. HARGIS, et al.,

*Defendant-Appellant.*

CASE NO.

11438

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## BRIEF OF RESPONDENT

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Appeal from Verdict of Jury in Third District  
Court of Salt Lake County, State of Utah  
Honorable Merrill C. Faux, *Judge*

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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SELWYN VANDERPOOL,

*Plaintiff-Respondent,*

—vs.—

B. K. HARGIS, et al.,

*Defendant-Appellant.*

CASE NO.  
11438

---

## BRIEF OF RESPONDENT

---

### STATEMENT OF THE CASE

This is an action commenced by Respondent Vanderpool to collect money allegedly owed to him by B. K. Hargis, et al., the appellants herein.

### DISPOSITION IN LOWER COURT

On September 12, 1968, a jury trial was held, Honorable Merrill C. Faux, judge, presiding, which resulted in a verdict by the jury, dated September 16, 1968, awarding plaintiff judgment against B. K. Hargis, et al in the sum of \$9,560.00 (R. 87). Thereafter, plaintiff made a Motion to Compute Interest and Incorporate in Judgment (R. 85). Plaintiff's motion was heard on November 14, 1968, and interest was added to the judgment by an Order of the court dated November 6, 1968 (R. 89).

## RELIEF SOUGHT ON APPEAL

Appellants ask that the verdict of the jury be reversed, or in the alternative, that the case be remanded for a new trial. Respondent submits that the jury verdict should be affirmed.

## STATEMENT OF FACTS

Appellant's Statement of Facts omits several important details and contains statements inconsistent with the general rule that the Supreme Courts accepts as fact the evidence which supports the jury verdict, and Respondent therefore submits the following statement of facts.

Appellant Hargis operated and owned a business which sold chinchillas in various states. Hargis operated the chinchilla business in Pennsylvania and adjoining states under the name of The Chinchilla Guild of America, Eastern Division (T. 181, Exhibits 13-P, 14-P), hereinafter sometimes referred to as the "Guild," with Leo Crowder managing the operation (T. 118, 197).

In the fall of 1965 Respondent Vanderpool began working for the Guild as a salesman (T. 118, 197).

On December 24, 1965, pursuant to a request by Hargis (T. 122-124, 200, 201), Vanderpool loaned the Guild \$2,000.00 and received in return a Promissory Note



signed "The Chinchilla Guild of America, Eastern Division, by Leo I. Crowder" (T. 125, Exhibit 1-P).

On or about January 1, 1966, Vanderpool, Hargis Crowder and Appellant's attorney met in Las Vegas, Nevada (T. 128). Shortly thereafter, the same persons met in Salt Lake City, Utah. Subsequently, an instrument was prepared and signed which purported to be an agreement between Hargis, Vanderpool and Crowder (T. 131, Exhibit 10-D).

The purported agreement (Exhibit 10-D) contained a blank in paragraph Fifth thereof and contained at the end thereof a written condition precedent to its effectiveness. Vanderpool, Hargis and Crowder each testified regarding the condition (T. 130, 131, 134, 163, 165, 170, 182, 183, 225, 244, 246, 250, 251).

Vanderpool and Crowder returned to Pennsylvania (T. 131).

Pursuant to several requests by Hargis (T. 129, 132-136) Vanderpool loaned the Guild \$5,000.00 (Exhibit 4-P) and received a \$5,000.00 Promissory Note in return (T. 129-136, 203). The \$5,000.00 Note was a form note, was similar to the \$2,000.00 Note and was payable in 90 days (T. 137).

On several occasions Vanderpool requested Hargis to pay the two notes and received assurance from Hargis that Hargis would pay the Notes (T. 145, 146, 148-150).

Crowder testified that Hargis stated that he would pay Vanderpool the \$7,000.00 (T. 205). Hargis stated several times that he would be responsible to Vanderpool for payment of the notes (T. 134, 136, 146, 148).

Hargis stipulated that during the course of Vanderpool's employment Vanderpool earned commissions totaling \$2,560.00 for which Vanderpool was not paid because of alleged offsets (Pre-trial Order R. 26-29; T. 119, 265, 266).

Vanderpool filed a Complaint alleging that Hargis owed him \$2,000.00 plus interest on the one Promissory Note, \$5,000.00 plus interest on the other Promissory Note and, among other things, \$2,560.00 for commissions due and owing (R. 2, 26-29).

## ARGUMENT

### POINT I

THE COURT DID NOT ERR IN ADMITTING EXHIBIT 10-D ON A CONDITIONAL BASIS NOR IN HAVING PREVIOUSLY REFUSED ITS ADMITTANCE.

Exhibit 10-D purported to be an agreement entered into by and between Hargis, Vanderpool and Crowder. However, the purported agreement was subject to a condition precedent which had to be performed before the

agreement became effective and before the parties thereto became bound thereby. The agreement, Exhibit 10-D, contained a blank in Paragraph Fifth, and at the end thereof the following condition:

"It is agreed that the copy of this contract is not to become completely effective until the amount owed to Hargis is filled in. All other provisions apply."

Regarding the condition precedent Vanderpool testified that the agreement never became effective because the condition was never complied with (T. 131, 163-165, 170, 183). Hargis testified as follows:

"Q. (By Mr. Bishop) Mr. Hargis, was there any discussion as to how Mr. Vanderpool and Mr. Crowder were to be notified of the amount to be put in that particular blank?

A. Yes, *we would notify them in writing*, as soon as the audit was completed." (T. 244)

On voir dire examination Hargis testified as follows:

"Q. (By Mr. Gottfredson) Did you ever mail the letter to Mr. Vanderpool?

A. No.

Q. You just stated, in your testimony, twice previously, did you not, that you were to mail notice to them?

A. This was mailed to Mr. Crowder, because of the fact that he stated, in his own testimony, he was the office manager.

Q. And isn't it true you have never mailed notice to Mr. Vanderpool, as—pursuant to what you said just one minute ago?

A. No, I have never mailed anything to Mr. Vanderpool, personally.” (T. 246)

The letter which Hargis stated he was to send to Vanderpool and Crowder to satisfy the condition was addressed to Crowder (Exhibit 8-D) and, although Hargis testified that he sent the letter (T. 242), Crowder did not remember receiving it (T. 217, 221, 250, 251). Even Appellant's attorney, who was present when the alleged agreement was signed, referred to the cited provision in Exhibit 10-D as a “condition” (T. 244).

The general rule regarding conditions precedent has been authoritatively stated as follows:

“In negotiating a contract the parties may impose any condition precedent, the performance of which is essential before they become bound by the agreement; in other words, there may be a condition precedent to the existence of a contract. 17 Am. Jur. 22, Contracts, Sec. 24, page 360.

A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. If the condition

is not fulfilled, the right to enforce the contract does not come into existence.” Willison on Contract, Third Ed., Sec. 663, Pages 126-127.

The same general rule applies even when the condition which must take place before the agreement is effective has been agreed upon orally, even though the agreement itself is in writing. See *Nuttall v. Berntson*, 83 Utah 535, 30 P.2d 738 and cases cited therein.

Since the agreement contained a condition precedent, the Appellant, who was asserting the validity of the agreement, had the burden of proving that the condition had been complied with. 20 Am. Jur. 2d, Evidence, Sec. 140, Page 175. *Rosenblum v. Sun Life Assurance Company of Canada*, 65 P.2d 399, 401, 51 Wyoming 195. Until Appellant sustained the burden of proving that the condition had been complied with the Court properly refused admittance of the alleged agreement into evidence.

Appellant in his brief cites Pages 175, 218, 244, 251 and 264 of the transcript of Proceedings as evidence that the Court erred in “continually refusing the admission of Exhibit 10-D and in finally allowing its admission on a conditional basis.” (Brief for Appellant, page 4).

A reading of the pages in the transcript of Proceedings cited by Appellant, and pages before and after those cited, will convince the reader that Appellant on different

occasions prematurely offered Exhibit 10-D without offering evidence that proper notice was sent to Vanderpool (T. 244, 251).

However, assuming, but not conceding, that the Court erred in admitting Exhibit 10-D into evidence, the error did not constitute reversible error. In any event, any possible error was rectified when Exhibit 10-D was admitted on a conditional basis.

Appellant's evidence that the condition precedent was complied with consisted of testimony that a letter addressed to Crowder (Exhibit 8-D) was mailed to Chinichilla Guild of America, Eastern Division (T. 260). Crowder did not remember receiving the letter (T. 217, 221, 250, 251). At most the evidence raised a question of fact as to whether the condition had been complied with as pertaining to Vanderpool. Also, Vanderpool testified that the instrument was signed in blank with the understanding that when Hargis obtained *evidence* of the proper amount to fill in the blanks, Crowder and Vanderpool would make another trip back to Salt Lake City and have the blank filled in and completed and the agreement would be effected (Tr. 131). Clearly, Exhibit 10-D, if admissible at all, was only admissible on a conditional basis.

If the court erred it was in admitting Exhibit 10-D into evidence even on a conditional basis. The rule is stated in 29 Am. Jur. 2d, Evidence, Sec. 198, Page 251, as follows:

“The presumption that a letter properly mailed was received by the addressee is not conclusive, but may be rebutted by evidence showing that the letter was not in fact received. Some authority holds that *the presumption is entirely overcome by the uncontradicted testimony of the addressee that the letter was never received . . .*” (citing *Campbell v. Gowans*, 35 Utah 268, 100P 397 and other cases, emphasis added.)

In *Campbell v. Gowans*, Supra at 284, the Supreme Court of Utah stated:

“The mailing of a letter postpaid and properly addressed to a person shown to reside in a city or town to which the letter was addressed creates no legal presumption, but a presumption or inference of fact, that it reached its destination. The testimony of the witness Milner is therefore some evidence that the letter testified to by him was received by the Gowanses in the due course of mail. The defendants, however, testified that no such letter as testified to by Milner was received by them. On such question we think the evidence preponderates in favor of the defendants . . .”

Crowder testified that he did not remember receiving the letter (T. 217, 221, 250, 251) and there is therefore no presumption that the condition was met and Exhibit 10-D was improperly received into evidence on a conditional basis.

The Court should have not allowed Exhibit 10-D admitted into evidence for another reason. As Hargis testified, he was to send notice to both Crowder and Vanderpool, but did not send notice to Vanderpool (T. 246). The letter was written to Crowder only (Exhibit 8-D). Since no notice was sent to Vanderpool (T. 246) and since the letter was written to Crowder only, for his "edification" (Exhibit 8-D), the condition was not complied with as far as Vanderpool was concerned and Exhibit 10-D should not have been admitted even on a conditional basis.

## POINT II

### THE VERDICT OF THE JURY SHOULD BE AFFIRMED

Appellant contends that the verdict of the jury is contrary to the evidence presented by Plaintiff and shows clearly that the jury was adversely affected by the erroneous rulings of the Court on Plaintiff's objections and the attitude of the Court towards counsel for the Defendant.

The principal is well established that whenever there is dispute in the evidence, it is the duty of the Supreme Court on review to accept as fact that evidence and the reasonable inferences to be drawn therefrom which supports the jury verdict. *First Security Bank of Utah v. Ezra C. Lundahl, Inc.*, 22 Utah 2d ....., 454 P.2d 936. See also *Neimann v. Grand Central Market, Inc.* 9 Utah 2d 46, 337 P.2d 424.



The jury could reasonably have found from the evidence presented to it the facts as stated in Respondent's Statement of Facts from which it could have reasonably, validly and lawfully arrived at the verdict it rendered.

A careful reading of the trial transcript will show that the Court did not err in its rulings on Plaintiff's objections, that it maintained a proper attitude towards counsel for the Defendant and that it did not otherwise err to the prejudice of Defendant.

### POINT III

#### THE COURT DID NOT ERR IN GIVING INSTRUCTION NUMBER 9.

During the trial Appellant did not object to the admission of evidence, nor did he ask the Court to strike out evidence, regarding the agency of Crowder to act for Hargis on the ground that agency was never pleaded by Plaintiff (T. 123, 134, 135, 203, 223).

In fact, Appellant's argument at trial appeared to be that Plaintiff failed to show agency that would authorize Crowder to sign the notes (T. 206).

Plaintiff's Answers to Interrogatories state in detail the agency relationship between Hargis and Crowder (R. 15-23). Attached to the Answers is a copy of the \$2,000.00 Promissory Note sued upon (R. 23).

The general rule regarding pleading agency has been variously stated as follows :

“Generally it is held, in the absence of express statutory provision, that in actions on contracts either by or against the principal, there is no necessity of alleging that the contract was executed through an agent; in other words, the contract may be pleaded as if it were the contract of the principal, without mentioning the agency. The theory of this rule of pleading is that the act of the agent is the act of the principal, and hence may be declared upon as such. An additional reason advanced in support of the general rule is that it would savor strongly of pleading evidence, or at least redundancy, for the pleader to state that the business under consideration was done by an agent or that, having been transacted without the Defendant’s sanction, it was afterwards ratified by him.” 3 Am. Jur. 2d, Agency, Sec. 343, page 700.

“It is clear that under the general rule upholding a pleading stating that the principal himself performed the act sued upon, the agent, since he is not even mentioned, need not be named or otherwise identified.” 45 A.L.R. 2d 597, Sec. 7.

“It is a well-settled rule of pleading that in actions on contracts either by or against the principal, there is no necessity of alleging that the contract was executed through an agent; or in other words, the contract may be pleaded as if it were the contract of the principal, without mentioning the agency . . .” 89 A.L.R. 895.

In fact the rule is stated in 89 A.L.R. 896 that “when an action is brought on a contract made by an agent, it is both *customary and proper to plead the contract as that of the principal*; and if the execution of the contract is denied, the Plaintiff must prove both its execution and the authority of the person by whom it was executed.” (Emphasis added.)

It is submitted that the rule governing contracts is applicable to promissory notes.

It is submitted that Respondent was not required to plead agency. However, in any event, agency was sufficiently spelled out in Plaintiff’s Answers to Interrogatories and Appellant waived any defense of failure to plead agency when he failed to object to the admission of evidence regarding agency or when he failed to request that evidence regarding agency be stricken.

Appellant failed during the trial to object to the admission of evidence, nor did he request the court to strike out evidence, regarding ratification (T. 136, 146, 148, 205, 227).

In good conscience, Appellant could not object to evidence regarding ratification. Note the following dialogue between the Court and Mr. Bishop, Appellant’s attorney, found on Pages 206 and 207 of the transcript of Proceedings:

"THE COURT: No, both of the witnesses have now testified Mr. Hargis said he would take care of the notes.

MR. BISHOP: *I will grant he said that. We have admitted all along he was going to take care of it by getting money from Crowder; when Crowder filed bankruptcy, not going to take on anything for him. (Emphasis added.)*

MR. GOTTFREDSON: Based on that admission I would like to move for a directed verdict; there is no—

MR. BISHOP: I can't admit anything for my client on that basis."

The record is void of any denial by Hargis that he told Vanderpool and Crowder on separate occasions that he would pay the two notes.

Appellant's cited authority in his Point III (Brief for Appellant, page 5, 6) is not applicable to his argument. In 45 A.L.R. 583, from which Appellant's authority was taken the question discussed is the sufficiency of the pleading once agency has been pleaded, For instance, the article states the general rule at page 586 as follows:

"Since it is a general rule in most jurisdictions that one suing upon a contract made for the benefit of a third party by an agent need not ordinarily

*refer to the agency at all in his pleadings, but may allege the legal effect of the agent's action by averring that the contract was made by the principal himself, it is not surprising that the courts have permitted to a large degree of generality in pleadings in which the party attempting to enforce the contract against the principal attempts to affirmatively allege the agency. (Emphasis added)*

Again, in the section from which Appellant took his quote, the article at Page 610 states :

*"As a general rule, an inadequacy or ambiguity in an allegation of authorized agency is cured by an allegation in the same pleading to the effect that the party ratified the transaction.*

In other words, if agency is pleaded, it is pleaded sufficiently if a technical ratification is properly pleaded.

It is submitted that the law does not require that ratification be pleaded. Also, even assuming that the law is to the contrary, Appellant waived objection thereto when he allowed ratification, when he, through his attorney admitted ratification, and when he failed to deny ratification.

#### POINT IV

IN THE ABSENSE OF A SHOWING BY APPELLANT OF GROSS INJUSTICE OR INEQUITY, HE MAY NOT ASSIGN AS ERROR THE GIVING OF INSTRUCTION 10 SINCE HE FAILED TO TAKE EXCEPTION THERETO.

Appellant failed to object at the trial to the giving of instruction 10 (T. 325-327) and may not now do so unless he shows injustice or inequity and special circumstances warranting departure from the general rule, that a party must state distinctly the matter to which he objects and the grounds for objection or he will be precluded from assigning the giving of such instruction. *Utah Rules of Civil Procedure*, Rule 51, *McCall v. Kendrick*, 2 Utah 2d 364, 274 P.2d 962.

It is respectfully submitted that the statement in Appellant's brief "no argument necessary" does not meet the requirements stated in the case and rule above referred to (Brief for Appellant Page 6).

However, even assuming, but not conceding, that Appellant has shown or will be able to show gross injustice or inequity and special circumstances warranting departure from the general rule, Vandepool, Hargis and Crowder all testified that the purported agreement was subject to a condition precedent. (T. 131, 244). The purported agreement contained a condition precedent (Exhibit 10-D Note also Instruction 11 (T. 68) which phrases the question of a condition precedent favorably to Appellant.

#### POINT V

THE COURT DID NOT ERR IN GIVING INSTRUCTION NUMBER 13.

Contrary to Appellant's contention, agency was an issue in the case and the jury could reasonably have found that Crowder was acting within the scope of his authority (T. 123, 124, 134, 135, 203, 233, Exhibit 1-P).

Contrary to Appellant's contention that the Court failed to instruct the jury that the burden of proving an agent's authority to borrow money is on the person borrowing the money, the court so instructed the jury. See Instruction 6 (R. 63), Instruction 9 (R. 66), Instruction 13 (R. 70) and Instruction 19 (R. 76).

#### POINT VI

THE COURT DID NOT ERR IN GIVING INSTRUCTIONS  
NUMBERED 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23.

Appellant contends that the above-stated instructions are duplicitous, unduly repetitious and do not contain a full statement of the law.

Even assuming, but not conceding, that the above-stated instructions are duplicitous and repetitious, Appellant must show both error and prejudice, that is, that his substantial rights are affected, before he is entitled to prevail. *Startin v. Madsen*, 120 Utah 631, 237 P.2d 834; see also, *Utah Rules of Civil Procedure*, Rule 61.

It is submitted that the above-stated instructions were not duplicitous and repetitious but that, in any event, the substantial rights of Appellant were not affected thereby.

Each of the instructions given by the Court, when considered in accordance with instruction 27 (T. 82) that the instructions given by the court are to be considered and construed by the jury as one connected whole, are in accordance with well settled law. For instance, regarding:

Instruction 14 see

*Graham v. Ashley*, 392 P.2d 667, 74 NM 251;  
*Kennedy v. Justus*, 325 P.2d 716, 64 NM 131;  
 49 Am. Jur. St. of Frauds, Section 405;  
 3 Am. Jur. 2d, Agency, Section 70;  
 Uniform Commercial Code 70A-3-403; UCC  
 1953.

regarding Instruction 15 see

3 Am. Jur. 2d Agency, Sections 68-73;

regarding Instruction 16 see

Uniform Commercial Code 70A3-403 (1);

regarding Instruction 20 see

Uniform Commercial Code, 70-A-3-404;

regarding Instruction 21 see

*Moses v. McFarland*, 119 Utah 602, 230 P.2d  
 571;

regarding Instruction 23 see

*Cram v. Etipperry*, 155 P.2d 558, 175 or 577



Instructions 17, 18 and 19 are in accordance with general law so well settled that citations therefore are unnecessary. However, even assuming error, it was harmless to the Appellant.

## CONCLUSION

The Trial Court did not err in admitting evidence nor in denying admittance of evidence offered. Appellant has failed to show where the verdict of the jury was contrary to the evidence presented. Appellant has not shown error in the instructions and if error there be it was harmless in view of the instructions viewed as a whole.

The verdict of the jury should be affirmed.

Respectfully submitted,

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