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IN THE SUPREME COURT OF THE STATE OF UTAH

RESEARCH PLANNING, INC., a Utah corporation, Plaintiff-Appellant,	)	
vs.	)	No. 18968
BANK OF UTAH, Defendant-Respondent.	)	

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT FOR SALT LAKE COUNTY,
HONORABLE DEAN E. CONDER, JUDGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

[illegible]ARCH PLANNING, INC., [illegible] corporation, Plaintiff-Appellant, vs. BANK OF UTAH, Defendant-Respondent.	No. 18968

BRIEF OF RESPONDENT

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IN THE SUPREME COURT OF THE STATE OF UTAH

RESEARCH PLANNING, INC.,)
a Utah corporation,)
)
Plaintiff-Appellant,)
) No. 18968
vs.)
)
BANK OF UTAH,)
)
Defendant-Respondent.)

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an action by the plaintiff-appellant, Research Planning, Inc., against defendant-respondent, Bank of Utah, wherein plaintiff claimed that defendant paid checks drawn against one of its depositor's general checking accounts with knowledge that the depositor was misappropriating funds held by the depositor as a fiduciary, or that checks were paid by defendant from said depositor's account with sufficient information that its actions in paying said checks constituted bad faith under Utah Code Annotated §22-1-9. The Bank of Utah defended the action on the basis that the evidence did not support the claim that it either had actual knowledge of misappropriation or that it acted in bad faith. The Bank of Utah further defended the action on the basis that the plaintiff's claims were barred by Utah Code Annotated §7-3-50 and/or §70A-3-603 because plaintiff made an adverse claim to a deposit or instrument in possession of

the Bank but failed to meet the requirements set forth by the statutes to restrict the Bank's payment of checks drawn against such deposit or instrument.

DISPOSITION IN THE LOWER COURT

The case was tried to the District Court without a jury. Judgement was entered in favor of defendant and against plaintiff on all claims made by plaintiff.

RELIEF SOUGHT ON APPEAL

Affirmance of the judgment.

STATEMENT OF FACTS

On or about August 8, 1980, Roger LeFevre, the Chief Executive Officer of First Capital Mortgage Loan Corporation, opened a general checking account at the Eagle Gate Branch of the Bank of Utah located in Salt Lake City. [Tr. 406-407; Exhibits 4-5]

On August 18, 1980, Research Planning, Inc (hereinafter "Research Planning" or "appellant"), a company which provided investment services for its clients, [Tr. 353] entered into a Real Estate Loan Agreement and also an Escrow Agreement with R. K. Buie & Associates (hereinafter "Buie"). [Exhibits 2, 21] Under the terms of the Real Estate Loan Agreement, Research Planning agreed to loan Buie $260,000 to purchase and develop property in Ogden, Utah. [Tr. 353; Exhibit 2] As part of the Real Estate Loan Agreement and the Escrow Agreement, Research

Planning and Buie agreed to employ First Capital Mortgage Loan Corporation (hereinafter "First Capital") as escrow agent to hold the $260,000 until final closing of the transaction. [Tr. 354; Exhibits 2, 21]

First Capital had a prior lien on the Ogden property, which Research Planning wanted First Capital to subordinate, so that Research Planning would have a first trust deed securing its loan of $260,000 on the property. First Capital agreed to subordinate its lien to Research Planning and signed a subordination agreement. [Tr. 354, 358; Exhibits 2, 21, 22, 23, 24]

On August 18, 1980, Buie executed a Trust Deed covering the subject property in favor of Research Planning, with First Capital acting as trustee. [Exhibit 26] On the same date, Buie executed a note in the amount of $260,000 in favor of Research Planning. The note was also signed by Steven F. Alder, and the note was further personally guaranteed by R. Kent Buie, Chief Executive Officer of Buie, and by Steven F. Alder. [Exhibit 25].

The Real Estate Loan Agreement [Exhibit 2], the Escrow Agreement [Exhibit 21], the Subordination Agreement [Exhibit 24], the Trust Deed Note [Exhibit 25], and the Trust Deed [Exhibit 26] were apparently all executed on August 18, 1980, during a meeting held in Roger LeFevre's office. Present at the meeting in LeFevre's office were Michael Purles, an officer of Research Planning [Tr. 352], Roger LeFevre, Merrill Weech (Research

Planning's attorney), R. Kent Buie, Chief Executive Officer of Buie, and possibly also Steven Alder (attorney for Buie). [Tr. 356-357].

The signing of all the above-referenced documents and the consummation of the above-referenced agreements among Research Planning, Buie and First Capital was the result of negotiations among Mr. Purles, Mr Buie and Mr. LeFevre carried on for in excess of 30 days prior to August 18, 1980. [Tr. 355]

The Bank of Utah (hereinafter "Bank" or "respondent") was not a party to, nor represented at, nor did it have any knowledge of, any of the negotiations among Research Planning, Buie and First Capital or any of the agreements resulting from said negotiations. [Tr. 356-357, 366, 388-389, 439]

Michael Purles brought a check in the amount of $260,000 drawn on Research Planning's trust account to the August 18, 1980, meeting at LeFevre's office, which was the loan amount agreed to. The check was probably made payable to First Capital. [Tr. 357] LeFevre stated that he wanted a cashier's check instead of the trust account check. Pursuant to LeFevre's request, Purles agreed to cancel the trust account check and to obtain a cashier's check. [Tr. 359] When the meeting at LeFevre's office ended on August 18, 1980, Purles immediately went to Walker Bank & Trust in Salt Lake City and obtained a cashier's check payable to Buie and First Capital in the amount of $260,000. R. Kent Buie and Roger LeFevre met Purles at Walker Bank, and Purles delivered the cashier's check to them at the

Bank. [Tr. 359-360] Purles knew that Buie would endorse the cashier's check to First Capital because First Capital was going to be the escrow agent holding the funds. [Tr. 360-361] Purles also knew that First Capital would take the check and deposit it into its account. Purles knew that First Capital would draw against its account and believed First Capital would use the $260,000 in accordance with the terms of the loan agreement and the escrow agreement. [Tr. 361]

The $260,000 cashier's check, which was subsequently endorsed by Buie to First Capital, was presented by LeFevre for deposit to First Capital's general checking account with the Bank of Utah on August 19, 1980. [Tr. 426] The deposit was made to the same checking account opened by First Capital on or about August 8, 1980. First Capital's account was a general checking account, or a demand account. [Tr. 429] Roger LeFevre was the only required signator to draw checks on First Capital's account. [Tr. 429] A Bank is obligated to pay checks drawn on a demand account when presented if the checks contain a proper signature and there is sufficient money in the account to cover the check. Failure of the Bank to make such payment could result in liability to its depositors. [Tr. 429]

Appellant, Buie and Alder were not parties to the First Capital general checking account. None of them were authorized to sign checks on said account, nor did they have any control over the account. [Tr. 368, 397, 398, 430] After the $260,000

cashier's check was presented for deposit at the Bank of Utah, the Bank verified the validity of said check by contacting Walker Bank, the bank which issued the cashier's check, and by also verifying the endorsement of R. Kent Buie on said check. [Tr. 437-438] Once the validity of the cashier's check had been verified, it could not be returned, and the Bank had a duty to pay checks drawn against that deposit in First Capital's account. [Tr. 438]

On August 19, 1980, after the cashier's check had been presented to the Bank for deposit, Steve Alder, Buie's attorney, went to the Bank and spoke with Roger Barth, Assistant Manager of the Eagle Gate Branch of the Bank of Utah. Alder asked if a deposit of $260,000 had been made to First Capital's account and learned that it had. Mr. Alder was a stranger to the account. Mr. Barth had never met Alder before. The only information Barth had regarding Alder was what Alder told him, to-wit, that Alder was a lawyer and that he said he represented Buie. [Tr. 430]

Alder asked Barth to tell him the balance in First Capital's account. Barth refused to give this information. Alder told Barth that the $260,000 deposit was for a specific purpose. Barth told Alder that First Capital's account was a general checking account and that checks would be paid from the account on a first-come, first-served basis. Alder asked Barth to call him if there were any problems on the account, which Barth said he would do. Alder never told Barth the specific pur-

pose for which the $260,000 was to be used. He did not tell Barth that the funds were to be used for a real estate transaction. He never told Barth that the funds were to be transmitted by First Capital to a title company, and he never mentioned anything about Research Planning's interest in the money. [Tr. 430-431] In fact, the first time Barth learned that Research Planning had an interest in the money was when his deposition was taken later in September of 1980, in a separate lawsuit filed against LeFevre and some of the corporations he was involved with. [Tr. 431]

The Bank proceeded to make payment of several checks drawn on First Capital's account during the course of the day on August 19, 1980. Three of the checks drawn against the account were paid on August 19th by cashier's checks issued by the Bank of Utah. One was payable to First Security Bank in the amount of $66,000, another to National Title Guaranty in the amount of $25,500, and a third to Tracy Collins Bank in the amount of $80,000. Another check was paid by wire transfer to a company called Nature's Estates & Associates, Inc. in the amount of $27,500. Some of these checks had been written prior to August 19th and presented to the Bank of Utah for collection. At the request of another bank or of a person to whom a check has been written, a bank will hold a check for collection if there are insufficient funds to pay the check at the time it is first presented for payment. It is not uncommon for people to write

checks before they actually have money to cover them. [Tr. 433-434]

Late in the afternoon of August 19, 1980, a check in the amount of $250,000 was presented to the Bank for payment from First Capital's account. The Bank became concerned about the account, because there were insufficient funds to cover that large of a check. The Bank was concerned because payment of the check would mean creating a possible overdraft. Therefore, a hold was placed on First Capital's checking account, meaning that checks presented to the Bank through normal banking channels would not be paid, but that checks drawn on the account would be paid upon specific approval by the Bank where the account contained sufficient funds to cover the checks. [Tr. 434, 437, 444, 446, 447, 449] The Bank was not concerned that Mr. LeFevre was misappropriating funds, but that an overdraft might be created. [Tr. 444, 446, 449]

A hold to the extent of $95,500 had been placed on First Capital's account prior to August 19, 1980, because the Bank had learned that a check in the amount of $95,500 payable and deposited to First Capital's account was going to be returned, and would not be available for payment of checks drawn on First Capital's account. However, when the $260,000 cashier's check was deposited on August 19, 1980, it provided First Capital's account with sufficient funds to make payment on the checks which were paid on August 19th and subsequent thereto.

The draws made by First Capital on its account depleted

all of the $260,000, and it was subsequently learned that First Capital used those funds for purposes other than the use for which they were intended.

The Bank had no knowledge of the specific use for which the $260,000 was intended, and the Bank also had no knowledge of the purpose for which First Capital actually used the $260,000 drawn from its checking account. [Tr. 431, 439, 441]

On August 19, 1980, when the $260,000 was deposited to First Capital's account, no one representing appellant notified the Bank that appellant had an interest in the funds, nor did anyone from appellant notify the Bank regarding the purpose to which the funds were to be put. [Tr. 405, 431] The statements made by Mr. Alder to Mr. Barth on August 19, 1980 were made for and on behalf of Buie only. Alder never told Barth that Research Planning had any interest in the $260,000 deposited to First Capital's account. [Tr. 385] Research Planning never made any claim against the Bank until it filed suit against the Bank on July 7, 1981. [Tr. 363-366, 394-396, 447, 455]

Appellant never presented a sworn affidavit, an indemnity bond, or a court-ordered injunction to the Bank to prevent the Bank from paying checks drawn on First Capital's account. [Tr. 366, 367]

The Bank of Utah did not know that the $260,000 was to be used in a real estate transaction. It had no knowledge of who the seller of the property was, who the escrow agent was, who

the title company was, or who may have held liens on the property that needed to be satisfied at closing. All this information was available to plaintiff, Buie, and/or Alder, but none of that information or any documents evidencing such information were ever made available by plaintiff, Buie or Alder to the Bank of Utah. [Tr. 356-357, 366, 388, 389, 439]

As will be set forth more fully below, it is respondent's position that the Bank had no knowledge that First Capital was misappropriating funds it held as a fiduciary. Moreover, the Bank did not act in bad faith when it paid checks drawn on First Capital's account because the account was a general, demand checking account, and the Bank had an obligation to its depositor to pay checks drawn on the account so long as there were sufficient funds to cover the check. Bad faith means dishonesty, and there is no evidence that the Bank acted dishonestly. In addition, it is respondent's position that plaintiff's claims are barred by Utah Code Annotated §§7-3-50 and 70A-3-603 because appellant failed to meet the requirements of those statutes where adverse claims were made to a deposit or instrument held by the Bank.

ARGUMENT

POINT I.

THE TRIAL COURT APPLIED THE PROPER LEGAL STANDARD UNDER U.C.A. §22-1-9 IN RULING THAT THE BANK DID NOT ACT IN BAD FAITH UNLESS IT ACTED DISHONESTLY.

Plaintiff's claim against the Bank of Utah is based on Utah Code Annotated §22-1-9, which states:

> If a fiduciary makes a deposit in a bank to his personal credit to checks drawn by him upon an account in his own name as fiduciary, or of checks payable to him as fiduciary, or of checks drawn by him upon an account in the name of his principal, if he is empowered to draw checks thereon, or if checks payable to his principal or endorsed by him, if he is empowered to endorse such checks, or if he otherwise makes a deposit of funds held by him as fiduciary, the bank receiving such deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary; and the bank is authorized to pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit or in drawing such checks, or with knowledge of such facts that its action in receiving a deposit or paying a check amounts to bad faith.

Under this statute, a bank can be held liable only in two situations. First, if the bank had actual knowledge that its depositor was misappropriating trust funds when checks were paid on its account, and, second, if the bank had sufficient information so that its conduct in paying a check constituted bad

faith.

Appellant's statement of the relief sought on appeal and its points raised in argument clearly indicate that it does not dispute the trial court's finding that the Bank of Utah did not have actual knowledge of misappropriation when it paid checks drawn on First Capital's general checking account. Thus, appellant admits it failed to meet the "actual knowledge" burden of proof. Appellant asks this court to hold that "bad faith" under Utah Code Annotated §22-1-9 does not mean dishonesty. In order for this court to make such a ruling, it would be required to overrule prior Utah law and also apply a definition which is contrary to that applied by numerous other jurisdictions.

"Bad faith" as used in §22-1-9, was defined by the Utah Supreme Court in Sugarhouse Finance Co. v. Zions First National Bank, 21 Utah 2d 68, 440 P.2d 869 (1968). In this case, the plaintiff had a checking account with Walker Bank. The plaintiff's manager, a Mr. Davis, was authorized to draw checks on the Walker Bank checking account with one other required signature on the checks. Davis drew 32 checks on plaintiff's account making them payable to various payees. The checks were endorsed by one other individual, not by any of the named payees, and were then deposited by Davis into his account at Zions First National Bank. The checks drawn on the Walker Bank account were honored and charged against plaintiff's account. Davis withdrew the money from his account at Zions First National Bank and converted it to his own use.

Plaintiff filed suit against both Walker Bank and Zions First National Bank. The trial court dismissed the claims against Zions with prejudice and plaintiff appealed. Zions defended on the basis of Utah Code Annotated §22-1-9. Referring to the bad faith standard, the Utah Supreme Court stated:

> The statute does not define "bad faith." However, it defines "good faith" as being done honestly, whether it is done negligently or not. "Bad faith" is the antithesis of good faith and has been defined in the cases to be when a thing is done dishonestly and not merely negligently. . . It is also defined as that which imports a dishonest purpose and implies wrong-doing or some motive of self-interest. [440 P.2d at 870]

Thus, in order to prove bad faith under U.C.A. §22-1-9, the plaintiff must prove that the Bank acted dishonestly.

The Sugarhouse Finance court also made some very pertinent comments regarding the purposes of §22-1-9, as follows:

> The purposes to be accomplished by this Act would seem to be to facilitate banking and financial transactions by relieving the depositary banks and others dealing with a fiduciary from the duty imposed at common law of seeing that fiduciary funds are properly applied to the account of the principal. In other words, the statute places a duty upon principals to use only honest fiduciaries, and gives relief to those who deal with fiduciaries except where they know the fiduciary is breaching his duty to his principal or where they have knowledge of such facts that their action in dealing with the fiduciary amounts to bad faith.
>
> . . . .

> . . . There may be a lot of reasons why a principal and his fiduciary may engage in odd and unusual check writing, such, for example, as making a political contribution or putting funds into a secret agent's possession to purchase property and hold it in a name other than that of the principal. The statute was intended to cover just such situations. If a principal cannot trust his agent with money, he ought to put the agent under bond. [Id.]

Thus, the Uniform Fiduciaries Act was intended to limit and narrow the liability of banks. The statute is designed to place the responsibility for the honesty of fiduciaries on the principal.

The Utah Supreme Court made reference to U.C.A. §22-1-9 in Movie Films, Inc. v. First Security Bank of Utah, N.A., 22 Utah 2d 1, 447 P.2d 38 (1968), and stated that "the purpose of [§22-1-9] is to protect the bank where it allows withdrawals on the personal order of a fiduciary who may be breaching his trust, unless the latter fact is known to the bank." [447 P.2d at 40, Footnote 2]

This court approved the Suharhouse Finance definition of bad faith in Braswell Motor Frgt. Lines, Inc. v. Bank of Salt Lake, 28 Utah 2d 347, 502 P.2d 560 (1972), wherein it stated:

> There is no suggestion that the bank knew of any fraudulent scheme or acted in bad faith in its dealings with the depositor Kendall. As to the meaning of the term "bad faith" see Sugarhouse Finance Co. v. Zions First National Bank, 21 Utah 2d 68, 440 P.2d 869 (1968). [502 P.2d at 562]

Appellant suggests that the Utah Supreme Court's prior

holdings that proof of bad faith requires a showing of dishonesty the part of the bank does not comport with the meaning intended for the term "bad faith" by the drafters of the Uniform Fiduciaries Act. Respondent suggests that appellant's argument, not this court's reasoning, is erroneous. This court does not need to look to the intent of the drafters of the Uniform Act to interpret the term bad faith.

On numerous occasions, this court has set down the basic principles relating to statutory construction. In Cannon v. McDonald, 615 P.2d 1268 (Utah 1980), the court stated:

> In interpreting the statutory language care must be taken to construe the words used in light of the total context of the legislation, and when the construction of a section involves technical words and phrases which are defined by statute, the provision must be construed according to such peculiar and appropriate meaning or definition. [615 P.2d at 1270]

The court need not consider the underlying intent of the legislature when interpreting a statute unless there is ambiguity in the language itself. In State v. Archuletta, 526 P.2d 911 (Utah 1974), this court stated that "there is nothing to construe where there is no ambiguity in the statute." This same principle was applied in Matheson v. Crockett, 577 P.2d 948 (Utah 1978), wherein the court stated:

> We may look to the intention of the legislature when there exists an ambiguity in the language of the statute. Here we find no ambiguity at all . . . . [577 P.2d at 949]

In the recent case of Utah State Democratic Committee v.

Monson, 652 P.2d 890 (1982), this court made the following statement:

> Lastly, Huish points out that §20-1-15 and §20-3-3 are legislative expressions that election laws shall be liberally construed to insure persons "full opportunity" to become candidates and for voters to express their choice. Those expressions, however, avail us nothing because there is nothing to construe where there is no ambiguity in the statute. State v. Archuletta, Utah, 526 P.2d 911 (1974); H--L-- v. Matheson, Utah, 604 P.2d 907 (1979). [652 P.2d at 893]

In H--L-- v. Matheson, 604 P.2d 907 (Utah 1979), the argument was raised that the term "if possible" in a statute was ambiguous. This court stated:

> There is no ambiguity in the term "if possible" within the context of subsection (2); and, therefore, there is no basis to construe the term beyond its literal, plain meaning. [604 P.2d at 913]

This court has made it clear, as shown above, that reference to the underlying intent of the legislature or drafters of a statute is unnecessary when construing the terms in the statute unless those terms are ambiguous. Sugarhouse Finance looked to the express language of the statute to determine the meaning of bad faith. Utah Code Annotated §22-1-1 defines good faith as follows: "A thing is done 'in good faith' when it is in fact done honestly, whether it is done negligently or not." The court in Sugarhouse Finance made a logical and reasonable decision when it stated that "'Bad faith' is the antithesis of good faith and has been defined in the cases to be when a thing is done dis-

...stly and not merely negligently." 440 P.2d at 870. The language of the statute is clear on its face. It is not ambiguous, and there is no need to go beyond the plain language of the statute in defining bad faith.

However, even if the legislative intent is considered, the court must "construe [statutes] in light of the total context of the legislation . . . ." Cannon v. McDonald, supra. This was done by the Utah court in Sugarhouse Finance where it defined the purposes of the Fiduciaries Act, which are to facilitate banking by narrowing the bank's liability, and to put the responsibility for honest fiduciaries on the principal. The definition of bad faith applied in Sugarhouse Finance and approved in Braswell Motor Fgt. Lines, Inc., clearly comports with the purposes of the statute.

Respondent notes with interest that nearly every case and legal treatise cited by appellant to support its argument that bad faith does not mean dishonesty predate Sugarhouse Finance and Braswell Motor Fgt. Lines, Inc. Specifically, Goodman v. Simons, 20 How. 343 (1857), does not even involve a claim made against a bank where one of its depositors was a fiduciary. The instant case must be determined within the confines and context of the fiduciaries statute, upon which plaintiff relies. Goodman v. Simons is irrelevant to the instant case because it does not involve a similar fact situation or the same statute. Every case cited by appellant to support its argument,

except two, were available to the Utah Supreme Court at the time it made its decision in Sugarhouse Finance and Braswell. The court chose to follow the clear language of the statute as well as the intent of the legislature in holding that bad faith means dishonesty, and those decisions should not be overruled.

Appellant argues that if a bank remains passive in the face of facts clearly suggesting fiduciary misconduct, then bad faith exists. However, one of the cases cited by appellant belies this very argument. Appellant quotes from the case of Davis v. Penn. Co. for Ins. on Lives and Granting Annuities, 337 Pa. 456, 12 A.2d 66 (1940), at page 16 of its brief as follows:

> At what point does negligence cease and bad faith begin? The distinction between them is that bad faith, or dishonesty is, unlike negligence, wilful. The mere failure to make inquiry, even though there be suspicious circumstances, does not constitute bad faith . . . unless such failure is due to the deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a vice or defect in the transaction, -- that is to say, where there is an intentional closing of the eyes or the stopping of the ears. [emphasis added]

Davis clearly indicates that passive behavior on the part of a bank cannot constitute bad faith. Davis states that bad faith means dishonesty and requires wilful, intentional conduct on the part of a bank.

The Utah Supreme Court is not alone in holding that proof of bad faith requires proof of dishonesty. In Board of County Commissioners v. First National Bank, 368 P.2d 132 (Wyo.

1962), the Wyoming Supreme Court adopted the same definition of bad faith as Utah's court adopted in Sugarhouse Finance. The Wyoming court quoted approvingly the following statement from Spiegel v. Beacon Participations, Inc., 297 Mass. 398, 8 N.E.2d 895 (1937):

> "'Bad faith' is a general and somewhat indefinite term. It has no constricted meaning. It cannot be defined with exactness. It is not simply bad judgment. It is not merely negligence. It imports a dishonest purpose or some moral obliquity. It implies conscious doing of wrong. It means a breach of a known duty through some motive of interest or ill will. It partakes of the nature of fraud." [368 P.2d at 139]

National Cas. Co. v. Caswell & Co., 317 Ill.App. 66, 45 N.E. 2d 698 (1942), stated that "Bad faith imports a dishonest purpose and implies wrongdoing through some motive of self-interest."

The New Mexico Supreme Court analyzed the bad faith standard under the Fiduciaries Act in Transport Trucking Co. v. First National Bank, 61 N.M. 320, 300 P.2d 476 (1956), and stated:

> The sections of the Fiduciaries Act mentioned and other sections of the Act indicate exculpation or the relieving of a bank when it is sought to be charged by a fiduciary's principal. The Act provides that the bank may be chargeable when its action in receiving the deposit or paying the check amounts to bad faith, such action of the bank must be wilful and even though there be suspicious circumstances, the failure to make inquiry does not constitute bad faith on the part of the bank. The purpose of the Uniform Fiduciary Act was to facilitate banking transactions by relieving a depository,

> acting honestly, of the duty of inquiry as to the right of its depositors, even though fiduciaries, to check out their accounts. [emphasis added] [300 P.2d at 479]

The New Mexico Supreme Court also quoted approvingly from Davis v. Penn. Co., 337 Pa. 456, 12 A.2d 66 (1940), in the case of Roswell State Bank v. Lawrence Walker Cotton Co., 56 N.M. 107, 240 P.2d 1143 (1952), wherein it was stated:

> "The words 'bad faith' are not defined in the act, but Section 1(a), 20 P.S. §3311(1)(a), states that 'A thing is done "in good faith" within the meaning of this act, when it is in fact done honestly, whether it be done negligently or not.' Since 'bad' is the antonym of 'good,' it follows that a thing is done in bad faith, within the meaning of the act, only when it is done dishonestly and not merely negligently." [240 P.2d at 1148]

One of the earliest cases analyzing the Uniform Fiduciaries Act was Colby v. Riggs National Bank, 92 F.2d 183 (D.C.Cir. 1937). The court defined bad faith as follows:

> [W]e think the . . . expression, acts done with knowledge of such facts as amount to bad faith, means, as indicated by subsection (2) of §1, acts done dishonestly. [92 F.2d at 194]

Subsection (2) of §1, referred to by the District of Columbia Circuit Court in the Colby case is the definition of good faith. It states:

> A thing is done "in good faith" within the meaning of this Act [Chapter], when it is in fact done honestly, whether it be done negligently or not. [92 F.2d at 188, Footnote 4]

The same basic definition of good faith is contained in Utah Fiduciaries Act.

Guild v. First National Bank of Nevada, 553 P.2d 955 (Nev. 1976), cited by appellant in support of its position, in fact requires much more than the passive standard proposed by appellant. The Nevada Supreme Court stated:

> The underlying purpose of the [Uniform Fiduciaries] Act was to facilitate the performance by fiduciaries of their obligations, rather than to favor any particular class of persons dealing with fiduciaries. . . . The Act was clearly meant to relax the standards of care owed by banks to principals and third parties when dealing with fiduciary accounts. . . . Liability cannot be predicated on a showing of lack of due care, or negligence, because "bad faith" imports a moral connotation approximating purposeful or motivated conduct (misconduct). [553 P.2d at 958]

On the basis of the foregoing, respondent respectfully suggests to the court that the definition of bad faith applied in the trial court as set forth in Sugarhouse Finance, is the proper legal standard to be applied under Utah Code Annotated §22-1-9. Since appellant readily admits that it cannot meet the burden of proof to show dishonest conduct on the part of respondent, this court should affirm the decision of the lower court.

POINT II.

THE TRIAL COURT'S FINDINGS OF FACT THAT THE BANK DID NOT HAVE ACTUAL KNOWLEDGE OF MISAPPROPRIATION AND DID NOT ACT IN BAD FAITH ARE SUPPORTED BY THE EVIDENCE AND SHOULD NOT BE DISTURBED ON APPEAL.

Appellant does not dispute in its brief the trial court's finding that the Bank paid out checks on First Capital's account without actual knowledge of misappropriation. "Actual knowledge," as used in U.C.A. §22-1-9 was defined in Colby v. Riggs National Bank, supra, as follows:

> In Union Bank & Trust Co. v. Jirard Trust Co., 307 Pa. 488, 161 A. 865, 867, the Supreme Court of Pennsylvania construed the expression, "actual knowledge of breach of his obligation as fiduciary" -- to be the equivalent of -- misappropriation. Thus wherever the words appear in the Act they are to be read to mean, actual knowledge of misappropriation. . . .
>
> . . . [I]t is obvious that in the use of the words "actual knowledge" Congress meant to change the rule previously applied in many courts, of constructive or implied or imputed knowledge, and we think there can be no doubt that there is a marked distinction between actual knowledge and constructive or implied knowledge. The former consists in expressed information of a fact. [92 F.2d at 194]

In Trenton Trust Co. v. Western Sur. Co., 599 S.W.2d 481 (Mo. 1980), the court stated that "'actual knowledge' of a breach of fiduciary obligation in this context has been defined to mean the 'present awareness' that such a breach is taking place." [599 S.W. at 491]

Thus, in order to prove that respondent had actual knowledge of misappropriation, the evidence would need to show that the Bank was presently aware that First Capital was misappropriating monies it held as a fiduciary for appellant at the time the Bank paid checks drawn on First Capital's account. The evidence clearly does not show this. As set forth in respondent's Statement of Facts, when the Bank paid checks drawn on First Capital's account after the deposit of the $260,000 check, the only thing the Bank knew was that a $260,000 cashier's check had been deposited to First Capital's general, demand checking account; that a person (Mr. Alder) claiming to be the attorney for Buie asserted that the $260,000 was to be used for a specific purpose; and that the Bank owed an obligation to its depositor to pay checks drawn on the account when there was sufficient funds available to make payment. The Bank had no knowledge of the terms of the real estate loan from Research Planning to Buie. The Bank had no knowledge of the terms of the Escrow Agreement among Research Planning, Buie and First Capital. The Bank did not know that the $260,000 was to be used to purchase real estate. The Bank did not know any of the details of the real estate transaction. Even if the Bank had known that the money was to be used for a real estate transaction, when it paid checks drawn on First Capital's account, it could not have known that those checks were being used for an improper purpose. Several of the checks were payable to other banks. One check went to a title company. Such payments are clearly within the

scope of a normal real estate transaction. Plaintiff's attorney Merrill Weech, testified that it is not uncommon for several checks to be drawn payable to various parties at the closing of a real estate transaction. [Tr. 453]

Therefore, there is substantial evidence to support the trial court's finding that the Bank paid the checks drawn on the First Capital account without actual knowledge of misappropriation. The trial court's finding that the Bank did not act in bad faith when it paid checks drawn on First Capital's account is also supported by the evidence. As set forth in Point I, supra, in order to prove bad faith under Utah Code Annotated §22-1-9, the evidence must show that the Bank acted dishonestly. Not only does the evidence show that the Bank did not act dishonestly, but appellant admitted in closing argument that the Bank did not act dishonestly. [Tr. 461-464] This court will not reverse the trial court's findings of fact so long as they are supported by substantial or sufficient evidence and unless they are clearly erroneous or are clearly against the weight of the evidence. See Erickson v. Beardall, 20 Utah 2d 287, 437 P.2d 210 (1968); Nunley vs. Walker, 13 Utah 2d 105, 369 P.2d 117 (1962); Knight v. Leigh, 619 P.2d 1385 (Utah 1980); Garcia v. Schwendiman, 645 P.2d 651 (Utah 1982); Kinkella v. Baugh, _____ P.2d ______ (Utah 1983), No. 17967, filed March 7, 1983. Since the trial court's findings of fact are supported by substantial evidence and are not clearly erroneous nor clearly against the

weight of the evidence, the findings should not be disturbed on appeal, and the judgment should be affirmed.

POINT III.

THE EVIDENCE SHOWS, AS A MATTER OF LAW, THAT THE BANK OF UTAH IS NOT LIABLE TO RESEARCH PLANNING EVEN UNDER THE BAD FAITH STANDARD ESPOUSED BY RESEARCH PLANNING.

Even if this court were to interpret bad faith to require proof of something less than dishonesty, the evidence is still inadequate, as a matter of law, to prove bad faith on the part of respondent. Appellant relies heavily on the case of Trenton Trust Co. v. Western Sur. Co., 599 S.W.2d 481 (Mo. 1980), in support of its argument that bad faith means something less than dishonesty. In Trenton Trust Co., a Mrs. Hook was appointed guardian of the estates of her two minor children, which estates were funded with monies obtained from the proceeds of a life insurance policy on the father of the children, which benefits were paid to the children when the father died. Since the children were still under the age of majority at that time, their mother was appointed guardian. Two checks of approximately $12,000 were issued by the life insurance company payable to Mrs. Hook as guardian for each of the children, respectively. Mrs. Hook took these checks to the Trenton Trust Company to invest them. She showed the checks to a Mr. Patterson, an officer of the trust company. He told Mrs. Hook to endorse the checks in the exact same language as they were made payable. This she did. He then invested $11,000 of each check in money market cer-

tificates. He personally saw both checks and Mrs. Hook's endorsements on both checks as guardian. However, when the certificates of deposit were issued, also under Mr. Patterson's signature, the owners were shown to be Mrs. Hook and each respective child. No indication was made that the certificates of deposit were held by Mrs. Hook as guardian only.

A few months later, Mrs. Hook and her new husband went to the same Mr. Patterson at the Trenton Trust Company to obtain a loan. He suggested to them that the certificates of deposit could be used as collateral for the loan. The Hooks pledged the certificates as collateral for the loan.

Subsequently, it was learned that the guardianship funds had been used improperly, a new guardian was appointed, who made demand on the Trenton Trust Company for a return of the certificates of deposit. Trenton Trust Company filed a declaratory action to determine whether it could retain the certificates of deposit as collateral for the loan.

Based on the facts as set forth above, the court concluded that Trenton Trust Company had actual knowledge that the fiduciary (Mrs. Hook) was misusing the guardianship funds. The same bank officer not only discussed the guardianship situation with and saw the checks made payable to Mrs. Hook as guardian, but also issued the certificates of deposit in the improper name, and finally handled the application of the certificates as collateral for loans to Mrs. Hook and her new hus-

hand. The bank officer obviously knew the certificates were being used for the benefit of persons other than the children to whom the money belonged. Once the "actual knowledge" standard was met, it was not difficult for the court to find that the bank had sufficient information that it acted in bad faith. The court stated:

> Although a showing of knowledge that the fiduciary is committing a breach of his fiduciary obligations is not necessary to prove bad faith, such a showing is clearly sufficient to prove bad faith. [599 S.W.2d at 492]

Moreover, the Trenton Trust Company had a monetary interest in the transaction because it had made a loan to Mrs. Hook and was drawing interest on that loan. The combination of "actual knowledge" and monetary interest left the court no choice but to find bad faith.

The facts in the instant case are much different from those in Trenton Trust Co. The actual knowledge standard has not been met in the instant case. Therefore, the court cannot rely on proof of actual knowledge for a finding of bad faith. Furthermore, the Bank of Utah had no pecuniary interest in the First Capital account. In other words, when the Bank paid checks drawn on First Capital's account, it was not receiving any financial benefit. It was simply performing its duty to its depositor. None of the checks paid by the Bank are alleged by appellant to have gone directly to the Bank to pay loans or other items or to act as collateral for loans.

Appellant suggests at pages 20 and 21 of its brief that the Bank acted out of a motive of self-interest when it failed to contact Mr. Alder on August 19 or 20 after making payments on several checks drawn against First Capital's account. Appellant not only misreads the evidence in this assertion, but it also assumes facts that simply are not in evidence in the case. Appellant states that "If what Mr. Alder said was true, the $260,000 deposit was not intended to cover the advances. The use of the deposit to satisfy the advances served to eliminate its [the Bank's] customer's debt to the bank and was, therefore, a direct financial benefit to the bank." Appellant's Brief at 20.

The evidence shows that the Bank did not know for what purpose the checks drawn on First Capital's account were being paid on August 19. Even assuming everything Mr. Alder said was true, the Bank had no reason to believe that it was paying checks for any purpose other than the purpose for which they were intended. It did not know who the seller of the property was. It did not know where the property was. It did not know who may have held liens on the property or who the title company handling the closing was. Appellant assumes that on the basis of the statement by Mr. Alder that the $260,000 was to be used for a specific purpose, the Bank immediately is to become a detective and find out whether every check drawn against First Capital's account was for that specific purpose. This is simply not the Bank's obligation. See Point I, supra.

Appellant also fails to appreciate the position the Bank

was in. This was a general checking account. It was a demand account. It was not a trust account. The Bank and First Capital were in the position of debtor and creditor. The Bank was indebted to First Capital, not vice versa, as appellant suggests. The Bank was obligated to pay checks drawn on First Capital's account on a first-come, first-served basis so long as sufficient funds were in the account to make payment. Mr. Barth made this very clear to Mr. Alder when they spoke on August 19. Although appellant suggests that Mr. Barth was to take everything Alder said at face value, appellant also seems to be arguing that Alder was not required to believe anything Barth said, if we are to accept appellant's version. It would have been a very easy matter for Alder or appellant to provide the Bank with copies of all relevant documents setting forth the nature of the escrow and the obligations of First Capital. This they failed to do. As indicated under Point I, the Bank had no obligation to make inquiry simply because there may have been some suspicious circumstances. The evidence makes very clear, however, that the Bank's concern was not that First Capital was misappropriating trust funds, but that an overdraft might occur in the account.

Appellant further suggests that respondent should have held up the payment of checks because of the hold that was placed on First Capital's account. However, the evidence clearly shows that a cashier's check is the same as cash. Failure of the Bank to pay checks drawn against the $260,000 would have been a breach

of the Bank's contract with its depositor. In Rivera v. Central Bank & Trust Co., 395 P.2d 11 (Colo. 1964), the Colorado Supreme Court stated:

> The relationship between a bank and a depositor is that of debtor and creditor. American National Bank v. First National Bank, 130 Colo. 557, 277 P.2d 951. There it was held "that a bank's obligation to its depositors to pay out his funds only to him are upon his written order."
>
> . . . .
>
> It thus appears that a bank cannot unilaterally or in conjunction with a third person alter the relationship between it and its depositor, nor can it unilaterally or acting with a third person change its liability to its depositor. [395 P.2d at 13]

Even in a jurisdiction which has applied a less stringent standard for proof of bad faith, such as Missouri, the factual basis necessary to prove bad faith has been one not easily met. In General Ins. Co. of America v. Commerce Bank of St. Charles, 505 S.W.2d 454 (Mo. 1974), a guardianship account was involved, wherein the guardian drew 25 checks payable to himself, signed by himself and drawn against the guardianship account. Some of the checks contained notations stating that they were in payment of services rendered by him to the guardian estate. The court stated that bad faith could be proved by a showing that "it is 'commercially' unjustifiable for the (bank) to disregard or refuse to learn facts readily available." In spite of this less stringent bad faith standard, the court held that the bank did not act in bad faith. Moreover, the court

indicated that if a trustee draws a check in proper form, the bank is obligated to pay the check and to presume that the trustee is performing his duties properly.

In General Ins. Co. of America, the bank knew that a fiduciary account was involved because it was a guardianship account. But having that knowledge, and also having checks drawn by the guardian payable to himself, the court still refused to hold that the bank had acted in a commercially unjustifiable manner by disregarding or refusing to learn more facts about the situation. In the instant case, the Bank of Utah had only an oral representation from Mr. Alder that a fiduciary relationship was involved. The checking account itself gave no indication that First Capital was holding funds as a fiduciary. Of all the checks drawn on First Capital's account and made exhibits by appellant to the instant action, only one was made payable to Roger LeFevre, and that one was in the relatively small amount of $5,000.00, [Exhibits 9-17], and there were sufficient funds in First Capital's account prior to the $260,000 deposit to cover a $5,000 check. In General Ins. Co. of America, 25 checks were made payable to the guardian himself, and still the court did not find the bank's conduct to be commercially unjustifiable. The information provided by Mr. Alder was simply insufficient to require further inquiry by the Bank and even under the commercially unjustifiable standard, the Bank cannot be found to have acted in bad faith, as a matter of law.

Appellant lists, in paragraphs numbered 1 through 10, items which it asserts show the Bank had sufficient information to prove that it acted in bad faith under the Missouri standard. Brief of Appellant at 18-19. A review of these items will show that they simply do not prove what appellant claims. Item 1 is that the account was 13 days old. Appellant certainly is not suggesting that the Bank should be suspicious of all accounts that are 13 days old when paying checks drawn on those accounts. Items 3 and 4 simply indicate the bank learned that a $95,500 check made payable to First Capital and deposited in its account was not going to clear and could not be credited as collected funds. This is no reflection on the activities of First Capital. It is simply an indication that a person or entity who made a check payable to First Capital did not have the funds sufficient to cover the check. Item 5 indicates that when it was learned the $95,500 check could not be collected, a hold equal to that amount was placed on the account, so that no payments would be made against the $95,500. This was done to avoid an overdraft. That hold was not ignored when checks totaling $201,806.15 were paid by the assistant manager. There were sufficient funds in the account from the cashier's check in the amount of $260,000 to pay those checks. Item 6 indicates a second hold was placed on the account. This was explained by Mr. Barth. The hold was placed on the account because a $250,000 check was presented for payment late in the day on August 19, and Mr. Barth knew the account could not cover that check. However, on August 20, when

First Capital's executive officer asked for a $5,000 check, Mr. Barth issued that check because there were sufficient funds to cover that amount. He could not deny his customer access to monies held in the demand account.

In Items 7 and 8, appellant appears to be using the information set forth therein to claim that the Bank knew that the one purpose for which the $260,000 was intended was not being met because checks payable to four different persons were issued and drawn on the account. The fact that the $260,000 was meant for a specific purpose certainly did not mean that more than one check could not be drawn to meet that purpose. Mr. Alder did not give sufficient information to Barth to support a claim that only one check could be issued for the entire $260,000.

Items 9 and 10 reflect Mr. Barth's concern that the account might incur an overdraft, not that Mr. LeFevre was misappropriating funds. Mr. Barth simply did not know enough to suspect misappropriation by First Capital. It is clear under Point I, supra, that more than suspicious activity must be shown before a bank must make further inquiries. Mr. Purles, Research Planning's officer, and Mr. Weech, Research Planning's attorney, both testified that they had no reason to question the honesty of Mr. LeFevre. [Tr. 361, 453] They certainly had had more experience dealing with Mr. LeFevre than had Mr. Barth. Yet, appellant believes that Mr. Barth, a person who had little or no

contact with Mr. LeFevre and had no knowledge of the transactions between First Capital and Research Planning, should automatically suspect Mr. LeFevre of wrongdoing because his account might be overdrawn. This is clearly an exaggerated approach to the evidence. The Bank acted honestly and in good faith, and even under the Missouri approach to bad faith, there are simply no facts to prove bad faith. Therefore, even if this court accepts appellant's definition of bad faith, the Bank of Utah is, as a matter of law, not liable.

POINT IV.

PLAINTIFF'S CLAIMS ARE BARRED AS A MATTER OF LAW UNDER UTAH CODE ANNOTATED §7-3-50 AND/OR §70A-3-603.

Utah Code Annotated §7-3-50 was in effect on August 19, 1980, when Steve Alder came to the Bank of Utah. Section 7-3-50 states:

> Notice to any bank or trust company doing business in this state of an adverse claim to a deposit standing on its books to the credit of any person shall not be effectual to cause such bank or trust company to recognize such adverse claimant, unless such adverse claimant shall either procure a restraining order, injunction or other appropriate process against such bank or trust company in an action instituted by him wherein the person to whose credit the deposit stands is made a party, or shall execute to such bank or trust company a good and sufficient bond, in double the amount claimed, indemnifying it from any and all liability, loss, damage, costs, and expenses for and on account of the payment of such adverse claim or the dishonor of the check or other order of

> the person to whose credit the deposit stands on its books; provided, that this section shall not apply in any instance where the person to whose credit the deposit stands is a fiduciary for such adverse claimant and the facts constituting such relationship, and also the facts showing reasonable cause for belief on the part of such claimant that the fiduciary is about to misappropriate such deposit, are made to appear by the affidavit of such claimant.

The facts of the instant case fall squarely within the terms of §7-3-50. Steve Alder asserted an adverse claim to the $260,000 deposited in First Capital's account at the Bank of Utah on August 19, 1980, during Alder's conversation with Roger Barth. Alder told Barth that the $260,000 was to be used for a specific purpose. It goes without saying that if Alder had never come to the Bank of Utah and made this statement to Roger Barth, appellant would never have even filed suit. Alder's statements to Barth are the only basis upon which appellant can claim the Bank had only information regarding First Capital's fiduciary status.

Appellant admitted at trial that it had not met the requirements of §7-3-50 or §70A-3-603, which will be discussed below. However, appellant apparently takes the position that neither §7-3-50 nor §70A-3-603 apply to this case and that Alder did not make an adverse claim to the $260,000 by his statements on August 19 to Mr. Barth. It is true that Alder did not specifically object to First Capital having possession of the $260,000 in its account. Indeed, the escrow agreement con-

templated and required First Capital to hold $260,000. The fact that Alder did not object to First Capital's having possession of the $260,000 is not the relevant or critical issue when determining whether Alder made an adverse claim by his statements to Barth.

The key point is the context in which Alder's statements were made to the Bank. The Bank stood in a debtor-creditor relationship to First Capital. Rivera v. Central Bank & Trust Co., supra. First Capital had a general checking account with the Bank of Utah. Roger LeFevre's signature was the only one required on checks drawn against First Capital's account. It was a demand account, meaning that so long as sufficient funds were available to cover checks, and the funds had been collected, the Bank was obligated to pay the checks. When a deposit is made to such an account, from the Bank's standpoint, all funds deposited to the account are available to pay checks drawn by the authorized signator against the account. There are no restrictions as to when, where or how the money can be used. The Bank had no knowledge of the real estate loan transaction and escrow agreement among Research Planning, Buie and First Capital. The Bank knew nothing about the sale of real estate in Ogden. When First Capital presented the $260,000 cashier's check for deposit to its account on August 19, 1980, except for the large amount of the check, it was treated no differently than any other deposit made by any other individual or company to a general checking account. The Bank had no reason to believe that any restrictions

were to be placed on First Capital's use of the $260,000.

Into this context came Steve Alder, who told Roger Barth that the $260,000 was to be used for a specific purpose. This statement implied that First Capital was excluded from using it for any other purposes. An adverse claimant to a deposit is defined generally as a stranger making claim to the account. _See First National Bank of Ariz. v. Butler_, 82 Ariz. 361, 313 P.2d 421 (1957). Alder had no contractual rights with the Bank of Utah relating to First Capital's general checking account. Alder was a stranger to the bank account insofar as the Bank was concerned. He made a statement, which if true, would restrict First Capital's use of the deposit and therefore would substantially change the normal use of a general checking account insofar as the Bank (debtor) and its depositor (creditor) were concerned.

An adverse claimant has also been defined as "one who is not shown on the books of the bank as a depositor." _Perdue v. State National Bank_, 47 So.2d 261 (Ala. 1950). Alder was not a depositor of the Bank, Research Planning was not a depositor with the Bank of Utah, and therefore, any claims made by Alder that the money was to be used for a specific purpose, were adverse to that deposit.

When Alder made his statements regarding the $260,000 deposit to Barth, the Bank was placed in a position where it either held up payments on checks drawn by First Capital on the account, and faced potential liability to First Capital, or it

paid the checks drawn by First Capital and faced the potential of liability to the adverse claimant if the adverse claim proved to be valid. Section 7-3-50 was enacted to remedy just such a dilemma. A bank need not heed notice of an adverse claim unless a court order restraining the bank is obtained by the adverse claimant, or the adverse claimant provides the bank with an indemnity bond, or, if the depositor is a fiduciary, the adverse claimant provides an affidavit setting forth such relationship and facts showing reasonable cause to believe the fiduciary is about to misappropriate the deposit. Neither Alder nor Research Planning met any of the above requirements of §7-3-50. Their failure to meet those requirements precludes Research Planning from now asserting a claim of liability against the Bank for its payment of checks drawn against the $260,000 deposit.

In National City Bank v. Continental National Bank & Trust Co., 83 F.2d 134 (10th Cir. 1936), a Mr. Waggoner fraudulently procured approximately $30,000 from plaintiff. Waggoner then deposited the money in a checking account in the name of a Mr. Anderson in Continental Bank in Salt Lake City. Waggoner had a $25,000 note secured by certain collateral with Continental Bank. After the deposit of $30,000 to Anderson's account at Continental Bank, Anderson advised Continental Bank that he would purchase the $25,000 note. The bank credited $25,000 towards payment of the note, transferred the note and collateral to Anderson, leaving a balance of approximately $5,000 in Anderson's account. Shortly thereafter, plaintiff notified defendant of

[illegible]er's fraudulent conduct in procuring the $30,000. A few [illegible] after this notification, Anderson wrote a check for the remaining $5,000 payable to a Mr. Webster. Continental Bank paid the check to Webster, thus depleting the entire $30,000.

Plaintiff filed suit against defendant nearly four years after the above-described transactions were completed. The lower court entered a decree in favor of defendant, and plaintiff appealed. In discussing the $5,000 check drawn against the account, the Tenth Circuit Court stated:

> This sum [approximately $5,000] then stood to the credit of Anderson as a depositor in the bank and, upon presentation of his check by an identified payee, the bank was confronted with an embarrassing situation. Although having been notified that the money then on deposit was part of a fund procured by fraud which others claimed, but no proof of this claim having been presented, the demand was being made by defendant's depositor through his check for the amount standing to his credit and it [the bank] elected to pay its depositor upon his tendered check. Whether or not the bank is protected in its action in this respect is the question now presented.
>
> The determination must be predicated upon the basis of two defenses: First, the consideration of a Utah statute; and, second, laches on the part of plaintiffs. [83 F.2d at 136-137]

The court then quoted Utah R. S. 7-3-52, which was later recodified and became Utah Code Annotated §7-3-50, and stated:

> This statute appears to be the embodiment in statutory form of a rule having its roots in the decisions of numerous courts. In <u>Nehawka Bank v. Ingersoll</u>,

> . . . the language of the court is as follows:
>
> > 'Deposits in the bank create between it and the depositor, or the person to whom the credit for the deposit is given, the relation of debtor and creditor. So, where a bank receives money from a person, and gives him credit therefor, it is in duty bound to honor his checks to the amount of such deposit, and it cannot refuse to honor his checks or drafts against the fund on the ground that the money deposited belonged to some other person, or that the title of the depositor to it is defective. These are matters in which the bank is not interested or concerned until the third party who claims to own the fund shall proceed to enforce his rights.' [Id. at 137]

The court then concluded:

> [T]he statute here involved has been enacted for the protection of banks in situations like the present by placing the burden upon some claimant to a bank deposit to take some affirmative steps by restraining order, indemnifying bond, or affidavit which will serve to protect the bank against damages which may be suffered by its depositor through the refusal of the bank to pay. [Id.]

The Tenth Circuit affirmed the lower court's decision in favor of defendant. The court also found that the plaintiffs were guilty of laches due to their failure to take any affirmative action against the bank until nearly four years after the fraudulent transactions.

In Ginsberg v. Manufacturers Hanover Trust Co., 55 Misc.2d 1052, 287 N.Y.S.2d 818 (1968), plaintiff claimed that the defendant trust company had been properly notified of an

adverse claim to the depositor's accounts when plaintiffs sent a copy of a summons to the trust company. The New York court held that sending a copy of the summons did not meet the requirements of New York's adverse claims statute, which contains nearly identical language as U.C.A. §7-3-50, and that in the absence of a restraining order or indemnifying bond, or some other legal process, the defendant could not be held liable for failing to restrain the accounts.

The conclusion is that §7-3-50 provides respondent with a complete defense to appellant's claims in this action because appellant failed to comply with the requirements of the statute. Appellant did not obtain a court order restraining the Bank from paying checks on the First Capital account, and appellant did not obtain an indemnity bond for respondent on said account. Even assuming that First Capital was a fiduciary for appellant, appellant still failed to meet the statute's requirement of providing the Bank with the required affidavit. Therefore, appellant's failure to comply with the statute precludes it from obtaining relief from the Bank. See, also Sanders v. First National Bank & Trust Co. of Tulsa, 292 P.2d 160 (Okla. 1955); Ciriello v. East Chester Savings Bank, 343 N.Y.S.2d 526 (1973); Fletcher v. Bank of Meeker, 376 P.2d 263 (Okla. 1962); Staley v. Brown, 146 So.2d 739 (Miss. 1962); Solicitor for the Affairs v. Banker's Trust Co., 94 N.Y.S.2d 658 (1949); and Desert Bermuda Properties v. Union Bank, 71 Cal.Rptr. 93 (1968).

Although U.C.A. §7-3-50 was repealed in 1981 with the

passage of the "Financial Institutions Act of 1981," it was the applicable law as of August-September, 1980, governing the transactions involved in this case, and is still controlling as to the issues involved in this case. See Okland Construction Co. v. Industrial Commission, 520 P.2d 208 (Utah 1974).

Moreover, §7-1-601 of the "Financial Institutions Act of 1981," sets forth the same basic requirements as §7-3-50, as follows:

> Receipt of a notice of an adverse claim to a deposit or other account standing on the books of any depository institution doing business in this state, does not obligate the depository institution to the adverse claimant, unless the notice is given pursuant to an appropriate court order, obtained by the adverse claimant in a legal action instituted by him in which the person to whose credit the deposit stands is made a party. Such depository institution may also pay the adverse claim, if the claimant executes to the depository institution a good and sufficient bond in double the amount claimed, indemnifying it from any and all liability, loss, damage, costs and expenses including attorneys' fees for and on account of the payment of the adverse claim or the dishonor of a check or other instrument of the person to whose credit the deposit stands on its books.

Under U.C.A. §7-3-50, plaintiff's claims are barred.

Alternatively, plaintiff's claims are barred by Utah Code Annotated §70A-3-603, which states, in part:

> The liability of any party is discharged to the extent of his payment or satisfaction to the holder even though it is made with knowledge of a claim of another per-

> son to the instrument unless prior to such payment or satisfaction the person making the claim either supplies indemnity deemed adequate by the parties seeking the discharge or enjoins payment or satisfaction by order of a court of competent jurisdiction in an action in which the adverse claimant and the holder are parties.

The Bank of Utah was a party under the terms of the above-referenced statute. The individuals and/or companies to whom the bank made payments on checks drawn by First Capital, were holders under the terms of the statute, and the Bank of Utah's liability is discharged to the extent of payment made to those holders even if the bank had knowledge of an adverse claim to the proceeds represented by those checks. The bank can only be held liable if the adverse claimant either supplied indemnity or enjoins payment by order of court. Research Planning met neither of the above-referenced requirements, and, therefore, is barred from recovery against the bank by §70A-3-603.

In French Bank of Cal. v. First National Bank of Louieville, 585 S.W.2d 431 (Ky. 1979), the Kentucky Court of Appeals applied the policy underlying both §70A-3-603 and §7-3-50. French Bank mistakenly wired $30,000 twice, instead of just once, to defendant to be credited to one of defendant's depositors. After the mistake was noticed, a vice-president at French Bank contacted a vice-president at the defendant bank requesting the return of the second $30,000 deposit or requesting that it be frozen to prevent withdrawal. French Bank also promised to indemnify defendant if defendant would return the

$30,000, but no actual indemnity bond or agreement was ever given to defendant. Another of defendant's officers contacted the depositor and asked to meet with him, but the depositor subsequently came to defendant bank, contacted an employee who was not aware of the request for return of the money, and the depositor withdrew $30,000 and placed it in another account. The depositor subsequently became insolvent and French Bank sought to be reimbursed from defendant.

The Kentucky court stated that the adverse claims statute would probably apply to this situation, but also stated that the policy under U.C.C. §3-603 [U.C.A. §70A-3-603] was applicable. The adverse claim statute was a new one in Kentucky and the court stated:

> The policy is sound, and with or without the new statute, it is appropriate in this situation. First National innocently received the $30,000 and made the deposit as instructed. Ten days later it was informed by one side of a mistake. First National could either ignore the claim, until protected, and incur the wrath of French Bank, or honor the claim and subject itself to damages by its customer for potential wrongful dishonor, a no win situation. The protection was not provided, and we agree with the trial court that the law in this situation was for First National. [27 U.C.C. Reporting Service at 1055-1056]

Thus, the policy provisions under §70A-3-603 are basically the same as under §7-3-50, requiring a plaintiff/adverse claimant to provide a bank with either court order or indemnity before it can claim the bank is liable for paying out on deposits

against which it has an adverse claim. Appellant failed to meet the requirements of either §7-3-50 or §70A-3-603, and therefore claims against respondent are barred, as a matter of law.

Moreover, since the requirements of U.C.A. §7-3-50 conflict with U.C.A. §22-1-9, the statute passed later is controlling. 82 C.J.S. Statutes §363; Becker Products Co. v. State Tax Commission, 89 Utah 587, 58 P.2d 36 (1936); Pacific Intermountain Exp. Co. v. State Tax Commission, 7 Utah 2d 15, 316 P.2d 549 (1957); Bateman v. Board of Examiners of State of Utah, 7 Utah 2d 221, 322 P.2d 381 (1958).

U.C.A. §22-1-9 was first enacted in 1925, while U.C.A. §7-3-50 was first enacted in 1929. Thus, §7-3-50 controls.

U.C.A. §70A-10-103 is a general repealer section applicable to the Utah Uniform Commercial Code, of which §70A-3-603 is a part. Section 70A-10-103 states: "Except as provided in the following section, all acts and parts of acts inconsistent with this act are hereby repealed." The "following section," §70A-10-104, lists certain statutes not repealed by the Utah Uniform Commercial Code, but U.C.A. §22-1-9 is not on the list. Section 70A-10-103 was enacted in 1965. Thus, to the extent §22-1-9 is inconsistent with §70A-3-603, §22-1-9 is repealed.

Definite, irreconciliable inconsistency exists between §22-1-9 and §§7-3-50 and 70A-3-603. Therefore, §22-1-9 is not controlling, and under §§7-3-50 and/or 70A-3-603 appellant's claims are barred.

CONCLUSION

This court should affirm the judgment in favor of respondent because the trial court applied the proper standard in ruling that proof of bad faith under Utah Code Annotated §22-1-9 requires proof of dishonesty. Appellant readily admits it cannot prove dishonesty on the part of the Bank of Utah.

The trial court's findings of fact that the Bank had no knowledge of misappropriation and also that the Bank did not act dishonestly or in bad faith are supported by the evidence and should not be disturbed.

Even if this court were to apply a less stringent bad faith standard, respondent, as a matter of law, on the basis of the evidence set forth at trial, did not act in bad faith and cannot be held liable.

Alternatively, appellant's claims against respondent are barred under Utah Code Annotated §7-3-50 and/or §70A-3-603 because appellant failed to meet the requirements set forth under those statutes for asserting an adverse claim to a deposit and/or instrument held by the Bank.

A bank cannot act as a detective for a principal who makes the mistake of using a dishonest fiduciary. Utah Code Annotated §§22-1-9, 7-3-50, and 70A-3-603 are all designed to protect banks and to limit and narrow their liability where a dishonest fiduciary has defrauded his principal. In today's society where banks are required to handle thousands of transactions, much more is required than an oral statement by a total

stranger to the bank in order to prove actual knowledge or bad faith, or to require the bank to respond to an adverse claim.

Respectfully submitted this ___ day of May, 1983.

STRONG & HANNI

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CERTIFICATE OF MAILING

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