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IN THE SUPREME COURT OF THE STATE OF UTAH

RESEARCH-PLANNING, INC.	:	
Plaintiff and appellant,	:	
vs.	:	Case No. 18968
BANK OF UTAH,	:	
Defendant and respondent	:	

REPLY BRIEF OF PLAINTIFF AND APPELLANT

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

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REPLY BRIEF FOR PLAINTIFF AND APPELLANT

A.

THE BANK OF UTAH HAS NOT SHOWN ERROR IN RESEARCH-PLANNING'S POSITION

For clarity, we will examine the bank's arguments under the headings of Research-Planning's opening brief.

I

A BANK DOES NOT HAVE
TO ACT DISHONESTLY TO
ACT IN BAD FAITH UNDER
THE STATUTE

A. The term "bad faith" as it is used in the Uniform Fiduciaries Act was intended to have the same meaning that the term had in the Uniform Negotiable Instruments Act:—The bank has not shown the error of this position. It has cited no authorities to the contrary. The principles of statutory construction cited by the bank have no application here. Research-Planning is not contending that the term "bad faith" is ambiguous. Since the drafters of the Uniform Fiduciaries Act rejected the idea of defining the term "bad faith" (Opening brief, p. 12) and since "section 9 of the Uniform Fiduciaries Act lays down the same test of responsibility in this respect that section 56 of the Negotiable Instruments Law * * * does in regard to notice of an infirmity in a negotiable instrument or defect in the title of the person negotiating it," Davis v. Pennsylvania Company For Insurance On Lives, Etc., 12 A.2d 66, 68-69 (Pa. 1940), it only makes sense to give to the term in the context of this case the common meaning that it had under the earlier uniform Act. As we endeavored to show in our opening brief, (pp. 10-17), the term "bad faith" has had a common meaning in the law of negotiable instruments since at least the case of Goodman v. Simonds, 20 How. 343 (1857).

B. It is bad faith for a bank to remain passive in the face of facts clearly suggesting fiduciary misconduct, particularly where the bank has a monetary interest in the transaction:—The bank argues for a narrow interpretation of "bad faith" that would exclude all but dishonest conduct. "Dishonest" means a willful

perversion of truth in order to deceive, cheat or defraud." Webster's Seventh New Collegiate Dictionary (1967). With such a restricted interpretation of "bad faith" a bank could be liable under the Uniform Fiduciaries Act only if it undertook to deceive, cheat or defraud. None of the bank's authorities limits liability under the Act so narrowly. No case that we have been able to find has held that a bank's avoidance of knowledge out of self-interest is not bad faith under the Act. Such an avoidance is willful and not mere negligence and, therefore, is well within the common meaning of the term "bad faith". The avoidance of knowledge out of self-interest has been the common thread running through nearly all of the judicial interpretations of "bad faith" since the decision in Goodwin v. Simonds, 20 How. 343 (1857). That thread runs through the cases involving negotiable instruments and through the cases under the Uniform Fiduciaries Act summarized in Trenton Trust Co. v. Western Sur. Co., 599 S.W. 2d 481, 492 (Mo. 1980). (Opening brief, pp. 12-17.)

This court's opinion in Sugarhouse Finance Co. v. Zions First National Bank, 21 U.2d 68, 440 P.2d 869, 670 (1968) is not contrary to the common or settled meaning of "bad faith". That opinion recognizes that "bad faith" is defined not only as a thing done dishonestly but also as that which imparts "some motive of self-interest." Contrary to the bank's position (Br. 12), this court does not have to overrule prior Utah law to hold that a bank does not have to deceive, cheat or defraud to be liable for acting in bad faith under the statute.

II

THE EVIDENCE SHOWS THAT THE BANK ACTED IN BAD FAITH

To avoid the issue of self-interest, the bank takes the position that it "had no pecuniary interest in the First Capital account" and that on August 19 and 20, when it paid checks drawn on that account, "it was not receiving any financial benefit." (Br. 27.) It is true that the bank was receiving no financial benefit in paying the checks. But the bank did give a financial benefit to its customer First Capital in paying the checks when the available balance in the account was not sufficient to cover the payments. Mr. Barth testified that the deposit of the $260,000 of fiduciary funds (opening brief, p. 4) was a "provisional" credit. As such, the deposit was not available for withdrawal as of right by First Capital. U.C.A. § 70A-4-213 (4). The provisional credit could have been withdrawn, as Mr. Barth testified. (Tr. 425-427.) The bank has not contradicted Mr. Barth's testimony or shown that U.C.A. § 70A-4-213 (4) does not apply on the facts of this case.

The bank did have a pecuniary interest in the account—that of a creditor—because of the overdrafts it created by paying the checks. It was the overdrafts that concerned Mr. Barth (bank's brief, p. 8; our opening brief, p. 8). It was the overdrafts that created the bank's self-interest. The bank took to itself a financial benefit when it chose to cover the overdrafts with the fiduciary funds rather than charge the overdraft to its customer First Capital.

The bank has not contradicted any of the facts of this case as they are reviewed at pages 17-21 of our opening brief. Nor does the bank deny that all of the facts were in the knowledge of one of its officers. The bank does not deny

that the further information in Mr. Alder's possession was available to the bank if Mr. Barth had called Mr. Alder. The "means of knowledge" was "at hand", Goodman v. Simonds, 20 How. at 367, the reason to inquire existed and the means of protecting all of the interested parties except the bank—by leaving the $260,000 in provisional status, as Mr. Barth said could be done (Tr. 427, 428; opening brief, p. 20)—was available. The bank chose instead to shut its eyes and protect itself.

B.

U.C.A. SS 7-3-50 and 70A-3-603

DO NOT APPLY TO THE FACTS

OF THIS CASE

The statutes on which the bank relies apply to those situations when a claim that is adverse to the bank's customer is made against funds on deposit or against commercial paper held by the bank. This case does not present such a situation. Mr. Alder asserted no right to the money in the First Capital account. His purpose was to "make sure that the money had been deposited * * * ." (See our opening brief, pp. 4-6). As the bank has conceded (Br. 35-36), the escrow agreement contemplated and required that the bank's customer First Capital hold the $260,000 of fiduciary funds. First Capital was entitled to the money subject only to its fiduciary obligation as an escrow agent.

An "adverse claimant", within the meaning of the U.C.A. S 7-3-50, is one who says that funds in an account belong to him instead of to the one to whose credit they stand on the books of the bank. Baden Bank of St. Louis v. Trapp, 180 S.W. 2d 755 (Mo. App. 1944) and the case cited by the bank, First National Bank of Ariz. v. Butler, 313 P.2d 421 (Ariz. 1957). Mr. Alder did not say that the

money belonged to him. A statement that money is held in escrow is not a "claim" to the money.

U.C.A. § 70A-3-603 deals with adverse claims to a negotiable instrument and with the discharge of parties from "liability on an instrument". U.C.A. § 70A-3-601(1). No such issues are involved here. There is no claim "on an instrument" in this case.

Since the statutes on which the bank relies deal with situations entirely different from the involvement of a bank in the handling of fiduciary funds, there is no conflict between those statutes and the Uniform Fiduciaries Act. The district court was correct in holding that the bank's statutes do not apply to the facts of this case. If there appeared to be a conflict between the Uniform Fiduciaries Act and the statutes in which the bank relies, the proper approach would be that set forth in Pride Club v. Miller, 572 P.2d 385 at 387 (Utah 1977):

> Even when [statutes] seem to overlap in some areas, they should be construed to give effect to both if possible; and the latter statute neither supersedes nor repeals the prior one unless its terms are irreconcilable with the former statute.

CONCLUSION

It is respectfully submitted that the judgment of the district court should be reversed and the case remanded for entry of judgment in favor of the plaintiff.

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CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing brief was mailed to the following this 20th day of June, 1983:

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