1964

Reliable Furniture Co. v. American Home Assurance Co. et al : Brief of Appellant

Utah Supreme Court

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Case No. 10182

In the Supreme Court of the State of Utah

RELIABLE FURNITURE COMPANY,
A Utah Corporation,

Appellant,

vs.

AMERICAN HOME ASSURANCE COMPANY, a corporation, WESTERN GENERAL AGENCY, a corporation, GENERAL ADJUSTMENT BUREAU, a corporation,

Respondent.

APPELLANT'S BRIEF

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IN THE SUPREME COURT
of the
STATE OF UTAH

RELIABLE FURNITURE COMPANY,
A Utah Corporation,

Appellant,

vs.

AMERICAN HOME ASSURANCE COMPANY,
a corporation, WESTERN GENERAL
AGENCY, a corporation, GENERAL
ADJUSTMENT BUREAU, a corporation,

Respondent.

APPELLANTS BRIEF

NATURE OF THE CASE

This is an action for special, general, and punitive damages and other relief, in which plaintiff claims defendants conspired to compel plaintiff to accept a lesser amount than was rightfully due under a claim covered by a "business interruption" fire isurance policy, issued to plaintiff by defendant American Home Assurance Company, herein called American Home.

DISPOSITION IN LOWER COURT

The trial court granted a motion of dismissal against plaintiff and in favor of defendants at pre-trial hearing, Plaintiff seeks a reversal.

STATEMENT OF POINTS

POINT 1. As a matter of law, the trial court erred in ruling that a tender of $12,609.39 was necessary before proceeding to trial.

POINT 2. As a matter of law, the trial court erred in ruling that money was not property and so to withhold payment of$84,923.89, admittedly due plaintiff, was not economic duress and therefore was not actionable.

POINT 3. As a matter of law, the trial court erred in accepting carte blanche defendants counsel's statement that there was no evidence of economic fraud or duress even though plaintiffs counsel stated they had such evidence to produce at the trial.

POINT 4. The trial court erred in ruling that if $84,923.89 is available for loan purposes anywhere there could be no economic duress on Plaintiff, because the mere fact he cannot get that money due to his credit and financial condition is no sound reason for not obtaining this loan.

POINT 5. The question of the alleged conspiracy among the defendants or their authorized agents as it relates to the issue of economic duress was one of fact that should have been submitted to a jury, and the trial court erred in granting the motion of the defendants for a dismissal of the complaint and alleged cause of action.

POINT 6. The trial court erred in failing to submit to a jury the issue of the scope of authority of Jack R. Day in acting for defendant, and in granting motion for dismissal for the defendants.

POINT 7. The trial court erred in granting defendant's motion to dismiss in that the facts before the court presented triable issues, and therefore, contrary to the laws of Utah.

STATEMENT OF FACTS

On May 12, 1959, American Home issued its standard form fire insurance policy with "Business Interruption Form No. 3," insuring plaintiff against loss directly resulting from necessary interruption of business caused by damage or destruction of insured preises by fire (R. 1, 9, 29; Answer to Request for Admission of Facts No. 6).

On January 1, 1961, Fidelity and Guaranty Insurance Underwriters, Inc. no longer a defendant herein, issued its policy, insuring plaintiff against loss and damage to stock, furniture and fixtures, resulting from fire (R. 1, 20).

On March 30, 1961, a fire occurred at plaintiff's store in Ogden, Utah causing destruction and damage to stock, furniture and other property.

During May, 1961, plaintiff submitted a proof of loss under its policy with Fidelity which was signed by plaintiff's president, Sam Herscovitz, and subscribed and sworn to before a notary public in Weber County, Utah, May 3, 1961 and which listed the amount claimed under the policy of insurance issued by Fidelity as $84,923.58 (R. 28; Plaintiff's Answer to Request for Admission of Facts No. 2).

Under the terms of the insurance policy against which the proof of loss was submitted by plaintiff, Fidelity was allowed a period of 60 days after receipt of the proof of loss within which to investigate and determine whether the payment should be made in the amount demanded in the proof of loss (R. 28; Plaintiff's Answer to Request for Admission of Facts No. 3).

On June 19, 1961, payment in the exact amunt asked in its proof of loss was made to, and accepted by, plaintiff, by draft on Fidelity dated June 16, 1961, which draft was honored by Fidelity on June 23, 1961 (R. 28-291 Plaintiff's Answer to Request for Admission of Facts No 4).

To effect payment to plaintiff of the amount claimed in its proof of loss, as described in the preceding paragraph, Fidelity authorized Jack Day and Edward Mabey, employees of the defendant Western General Agency, to issue and sign the draft of Fidelity in the amount of $84,923.58 and authorized Day to deliver the draft to plaintiff's president, Sam Herscovitz.

Day went to Ogden to deliver the draft to plaintiff and, with a representative of defendant General Adjustment Bureau, to negotiate a settlement with plaintiff of its claim against the American Home policy far business interruption loss. No proof of loss on that claim had yet been presented (R. 3). Plaintiff concedes it received full payment from Fidelity but contends it did so only after Day in furtherance of the alleged conspiracy, withheld delivery of the draft until plaintiff, under economic duress and coercion, agreed with Day and Bell to settle its claim against the business interrup-

tion policy of American Home for about one-fifth the amount actually due (R. 3, 4, 5). No other claimfor damages or for other relief was asserted against Fidelity in the complaint (R. 1-6).

Plaintiff had filed his own sworn proof of loss for $48,386.00 and mailed it to American Home Insurance Company. Thereafter Western General Agency, represented by Mr. Day, and General Adjustment Bureau, represented by Mr. Ball went to plaintiff's place of business and discussed the business interruption loss. Briefly they wound up a four hour hasel when Mr. Day stated in final terms that he would deliver the Fidelity's $84,923.58 draft only on Plaintiff's acceptance of $12,609.39 payment by American Home for business interruption loss as computed by Mr. Ball soley. In desperation and with plaintiff's business about to collapse, after 30 successful years, because it had no credit and no way whatsoever to borrow $84,923.58, Mr. Herscovitz acceded to this economic duress and pressure and signed the proof of loss.

ARGUMENT

POINT 1. AS A MATTER OF LAW, THE TRIAL COURT ERRED IN RULING THAT A TENDER OF $12,609.39 WAS NECESSARY BEFORE PROCEEDIING TO TRIAL.

For many years, with some exception, the general rule has been that it is necessary to return the amount of value received under contract sought to be rescinded, or a release given for settlement of some chose in action, or at least an offer to do so. However, in the last 15 to 20 years or so it appears the trend is away

from this general rule and there are a great many states and a great many cases that have held by way of exception to the general rule that such return, or tender of return, of the values received need not be made as a condition precedent to an action for a balance due on the policy, when the amount received on the fraudlent settlement is smaller than the amount to which insured or beneficiary is entitled*in any event* under the policy, or where the settlement was void for want of a valid consideration. Occidental Life Incurance Company vs. Eiler - 125 Fed. 2nd, 229. "The amount promised on the face of an insurance policy must be deemed the liquidated amount of insurer's debt, when the contingency insured against by the policy's terms occrus, and the payment of a part of the amount unquestionably due on such liquidated debt is no "consideration" for release of the balance of the debt.

In the absence of a bona fide controversy existing between the beneficiary and the insurer, the payment by insurer of a part of its debt upon a dispute asserted by it in bad faith and without any reasonable ground, either in law or fact, constitutes no "consideration" for the release taken by insurer under such circumstances for less than it owes or settlement of the balance, and a release is void, and the beneficiary suing for the balance need not tender or pay into court the amount paid by insurer, but recovery may be reduced by the amount of such payment."

The principle was applied to double indemnity insurance, when there was never a dispute as to the single indemnity, which was paid. It was said that by

paying it the insured obtained nothing to which she was not entitled, and insurer paid nothing it could rightfully retain. So that there was no consideration for releasing double indemnity. That theory was also given effect in American Nat. Ins. Co. v. Reed, 26 Ala., App. 350 (3), 160 543 (certiorari denied 230 Ala, 221, 160 So. 546); and see Richter v. Richter, 180 Ala. 218, 60 So. 880; Crownover v. Crownover, 216 Ala. 286, 113 So. 42 and also, 175 So. 554 - American Life Ins. Co. v. Williams; 17 N.E. 2 851 - Equitable Life Ins. Co. v. Taylor et al; 75 S.W. 2 774 - Kentucky Central Life and Accident Ins. Co. c Burrs; 187 S.W. 2-56 - Butler v| Missouri Inc. Co.; 108 S.W. 2 1052 - Schreiber et al v. Central Mutual Ins. Ass'n; 77 S.W., 2-149 - Yancey v. Central Mutual Ins. Ass'n; 77 S.W. 2 140 - Sappengton v. Central Mutual Ins. Ass'n. See also 112 A. L. R. 1215.

But, notwithstanding the many that have made an exception to the general rule based on the "in any event rule" when at the pre-trial the trial judge asked counsel if they were in a position to tender the$12,609.39 to the defendant American Home, Counsel for the plaintiff informed the trial judge that they did not have that much money with them at that time but could get it before the business day was out, and, would then and there make a tender of such payment. The trial judge made no further mention of this matter nor suggested that Plaintiff should or should not make such a tender.

POINT 2. AS A MATTER OF LAW, THE TRIAL COURT ERRED IN RULING THAT MONEY WAS NOT PROPERTY AND SO TO WITHHOLD PAYMENT OF $84,923.89, ADMITTEDLY DUE PLAINTIFF, WAS NOT ECONOMIC DURESS AND

THEREFORE WAS NOT ACTIONABLE.

The pre-trial judge flatly ruled that money was not property. There was no question that the Fidelity draft in the amount of $84,923.58 and been made out and signed by Mr. Mabey and Mr. Day, officers of the defendant Western General Agency, on authority of the company, and authorization given to deliver the said draft immediately to plaintiff. There was no authority given by it to defendant, Western General Agency, to withhold delivery unless a proof of loss for $12,609.39 was signed by plaintiff as full consideration of its business interruption loss. So that so far as all parties were concerned, for all practical purposes, this draft was the property of the Plaintiff.

A check is "property" within Laws 1923, p. 253, as to obtaining property by confidence game. Roll v. People, 243 P. 2d 641, 642, 78 Colo. 589.

A cashier's check is "property," within the meaning of the confidence game statute, when delivered and put into circulation. People v. Miller, 116 N. E. 131, 138, 278 Ill. 490, L. R. A. 1917 E, 7997.

"Check is Property,"ownership and possession of which are safeguarded by general laws to same extent as other classes of property. Central Trust Co. v. Backsman, 198 N. E. 730, 50 Ohio App. 512.

A check, draft, or order which is honored by a bank when the books of the bank show that the account of the depositor is thereby overdrawn, or any written record of such overdraft amounting to primary evidence thereof, is "property" within the meaning of the Em-

bezzlement Statute. State v. Lottridge, 162 Pac. 673, 29 Idaho, 822.

Express company checks, which had not been signed or countersigned by original payee, but in other respects were complete, held "property" subject embezzlement, being evidence of debt, within West's Ann. Pen. Code, & 7, subde, 10, 12, and section 484, 503, 510, 514. People v. Cohen, 235 Pac. 658, 659, 71 Cal. App. 367.

Six blank checks, with stubs attached, each of the value of one cent, the property of the United States, constituted "property," the subject of larceny, under Rev. St. & 5456, 18 U. S. C. & 2112, making it a felony to steal any kind or description of property belonging to the United States, 168 F.. 697, 94 C. C. 368.

"Property" is nomen generalissimum, and extends to every species of valuable right and interest. McAlister v. Pritchard, 230 S. W. 66, 67, 287 Mo. 491.

Generally speaking, the word "property" includes all property of whatever description whether tangible or intangible. Bank of Fairfield v. Spokane County, 22 P. 2d 646, 173 Wash. 145.

In its proper sense property includes everything which goes to make up one's wealth or estate. Carlton v. Carlton, 72 Me. 115, 116, 39 Am. Rep. 307.

Property signifies every species of property. It is nomen generalissimum, and comprehends all a man's worldly possessions. Rossetter v. Simmons, Pa. 6 Serg. & R. 452.

The term "property" includes everything of value,

tangible or intangible, capable of being the subject of individual right or ownership. First Nat. Bank of Estherville v. City Council of Estherville, 112 N. W. 829, 832, 136 Iowa, 203.

A bank deposit is "property" within statute authorizing proceeding to discover money or other personal property or the proceeds or the value thereof belonging to decedent. In re Trevor's Estate, 123 N. Y. S. 2d 527, 529.

Moneys deposited in a bank in a general or ordinary account became the "property" of the bank, and a part of its moneys, funds, and credits, within the meaning of Rev. St. 9-140, relating to embezzlement of bank's funds by bank official. State v. Wacker, 243 Pac. 1026, 1028, 120 Kan. 387.

The word "property" may be property used to signify any valuable right of interest protected by law. Franklin v. Franklin, 155 P. 2d 637, 641, 642, 67 Cal. App. 717.

"Property" is a generic term, and includes money. Commonwealth v. Morrison, 9 Ky. (2 A. K. March.) 75, 90.

The word "property has been frequently held to embrace money and securities. Fry v. Shipley, 29 S. W. 6, 8, 94 Tenn. (10 Pickle) 252.

The word "property" embraces money. Fullerton v. Young, 94 N. Y. S. 511, 512, 46 Misc. 292, citing Laws 1892, p. 1486, c. 677, & 2-4.

Money is "property" subject to levy by execution.

Exchange Nat. Bank of Montgomery v. Stewart, 48 So. 487, 489, 158 Ala. 218.

POINT 3. AS A MATTER OF LAW, THE TRIAL COURT ERRED IN ACCEPTING CARTE BLANCHE DEFENDANTS COUNSEL'S STATEMENT THAT THERE WAS NO EVIDENCE OF ECONOMIC FRAUD OR DURESS EVEN THOUGH PLAINTIFFS COUNSEL STATED THEY HAD SUCH EVIDENCE TO PRODUCE AT THE TRIAL.

Defendants counsel made a flat statement that as far as he was concerned he saw no evidence of economic fraud or duress in the record and for that reason thought the court ought to make such a ruling and grant his motion for a judgment of dismissal on that basis alone. So far as plaintiff's counsel are concerned, the court gave the impression that he accepted such statement as fact and inclined his thinking along those lines. Certainly if every pre-trial statement of counsel as to what could or could not be proven, and, if it were taken by the judge as a matter of fact, it would appear to us that no case would ever get past the pre-trial stage. Neither side is expected or obligated to produce witnesses at a pre-trial. Plaintiff's alleged economic duress and coersion in its complaint and it would have to produce evidence and witnesses to substantiate these allegations at the trial, so that it is reversible error for the pre-trial judge to accept a statement of counsel for either party as proven fact. The other party whom the judge rules against has had no opportunity to produce evidence to prove the allegations of his complaint. This proposition is so basic and axiomatic

that certainly no law can be found on the subject, Specifically the sole purpose of the pre-trial is to set and determine the issues and to learn in advance what each parey claims he can prove. This was not done in this case.

POINT 4. THE TRIAL COURT ERRED IN RULING THAT IF $84,923.89 IS AVAILABLE FOR LOAN PURPOSES ANYWHERE THERE COULD BE NO ECONOMIC DURESS ON PLAINTIFF, BECAUSE THE MERE FACT HE CANNOT GET THAT MONEY DUE TO HIS CREDIT AND FINANCIAL CONDITION IS NO SOUND REASON FOR NOT OBTAINING THIS LOAN.

Plaintiff in this case together with his family have carried on a highly successful furniture business for over 30 years. However, in late years other furniture stores have started in Ogden and vicinity. Many Ogden City residents have gotten in the habit of journeying to Salt Lake City to do business because of a wider selection of items. All these things have made the furniture business highly competitive in Ogden, and have lowered very substantially the extent of credit that any one firm or individual can expect to receive on the purchase of merchandise. $84,923.89 is a very large sum of money for most any business and is certainly a staggering sum of money to expect the plaintiff to be able to borrow. In this fire, plaintiff lost substantially all his merchandise and it was impossible for him to borrow sufficient money to re-stock and be prepared to carry on business. Plaintiff had numerous orders for carpeting which were lost due to the impossibility

of getting new carpeting to replace the old. Plaintiff had no collateral or other means of negotiating for a loan for the large sum of money needed. No company in the country would send this amount of merchandise to the plaintiff without a very substantial payment in advance which plaintiff did not have. Even if plaintiff could have borrowed $85,000.00 the interest payments would be prohibitive. Plaintiff also had a number of well-trained employees, who had been with him for a long time so that in order to assure their continued services he kept them on the payroll. Every week that went by crippled the plaintiff substantially and greatly undercut chances of re-building and recouping. Had the plaintiff had any means whatsoever of obtaining credit or making a loan in the amount of $85,000.00 to immediately obtain merchandise to continue business he would have done so, and should have done so, but this is not the fact in this case, as plaintiff can prove by facts, figures, and witnesses that this $84,923.99 was indispensible to the life of its continued operation. So we submit that it was reversible error for the pre-trial judge to rule that if $85,000.00 is available for loan purposes any where in the world that plaintiff had the obligation to get hold of this money and file suit, and, if he fails to do so, no matter what the reason there is no economic duress, we feel this proposition is so elementary that further argument would merely impose upon the court's good nature.

POINT 5. THE QUESTION OF ALLEGED CONSPIRACY AMONG THE DEFENDANTS OR THEIR AUTHORIZED AGENTS AS IT RELATES TO THE ISSUE OF ECONOMIC DURESS WAS ONE

OF FACT THAT SHOULD HAVE BEEN SUBMITTED TO A JURY, AND THE TRIAL COURT ERRED IN GRANTING THE MOTION OF THE DEFENDANTS FOR A DISMISSAL OF THE COMPLAINT AND ALLEGED CAUSE OF ACTION.

Plaintiff had no funds with which to purchase new merchandise. Interest on a loan of that size was prohibitive and Plaintiff's merchandise had been depleted by the Pacific Underwriters Salvage having taken the merchandise from plaintiff's place of business during the first week in April, 1961. The result being plaintiff was unable to offer merchandise to the general public and clearly points up the duress that the Court referred to in the case of Whitman Realty and Investment Co. v. Day, 161 Wash. 72, 296 Pac. 171, 173, wherein the Court said that duress exists whenever one is induced by another:

"To make a contract under circumstances which deprive him of the exercise of his free will." In the case of Riney v. Doll, 116 Kan. 26, 225 Pac. 1059, 1061, the Supreme Court of Kansas (while finding that no duress existed said:

"When one uses the bludgeon of duress to break the will of his adversary and thereby gains a wrongful or unconscionable advantage, a Court will relieve the victim of the consequences of the act he was thus forced to perform, whether his will be weak, requiring but one blow to shatter it, or whether it be of ordinary firmness, requiring several, or whether it be adamant, requiring many."

"The Courts now quite generally recognize the inaccuracy of defining duress by applying it to a person of ordinary firmness."

As stated in Colton v. Stanford, 82, Cal. 403, 23 Pac. 16, 21, "The question whether there has been an undue advantage, an unconscionable exercise of superior power, depends largely upon the situation of the parties at the time of the negotiations."

The California court further stated in Blottman v. Gadd, 296 Pac., on page 687:

"And intermixed among the elements going to constitute a contract unconscionable are the elements of fairness, reasonableness, oppression and injustice, each and all dependent on the facts of each particular case."

Another case in which the Court held that there was duress is set forth in House v. Carry, 112 Va. 362, 71 S. E. 551, 70 A. L. R. 711, 712, where a majority stock holder in control of a company threatened to conduct its business in such a way as to render its stock valueless, and refused to deliver any stock to the complainant, who was under financial stress, unless he would agree to accept a smaller percentage of stock than he was entitled to under his contract, the Court in holding the agreement invalid as made under compulsion said on page 712 of 70 A. L. R.:

"The doctrine appears to be well established that, where one party has possession or control of the property of another, and refuses to surrender it to the control and use of the owner, except under compliance with an unlawful demand, a contract made by the owner under such circumstances, to emancipate the property is to be

regarded as made under compulsion and duress. Nor can it be doubted that a contract procured by the threats inducing fear of the destruction of one's property may be avoided on grounds of duress, there being nothing in such a case but the form of a contract, wholly lacking the voluntary assent of the party to be bound by it. To constitute duress, it is sufficient if the will be constrained by unlawful presentation of a choice between comparative evils; as, inconvenience and loss by the detention of property, loss of property altogether, or compliance with an unconscionable demand. In civil cases, the rule as to duress has a broader application at the present day that it formerly had. So when concessions are exacted through the necessity of a person, in order to save his property, illegally withheld by another, from destruction or irreparable injury, such a transaction may be voided on the ground of compulsion though not amounting to technical duress."

In the case of Ingram v. Lewis, 37 A. (2d) 259, 70 A. L. R. 710, the Supreme Court stated that the defendant Lewis had all of plaintiff's cash that was in his Estate save and accept for $496.00 and that they, defendant Trustees, could cut off plaintiff's income indefinately by refusing to turn over his proerty or sign a division order. If the evidence adduced is true plaintiff had the choice of signing or starving. Such a release falls squarely within the two decisions of the Supreme Court decided in Lonegran v. Buford, set forth hereinafter and Radich v. Hutching, 95 U. S. 210, 213.

The Supreme Court of the State of Utah had befor it the question of payments made under duress in

the case of Buford et al. v. Lonergen, et. al 22 Pac. 164, wherein judgment was rendered for the plaintiff and defendant appealed to the Supreme Court of The United States in the case of Lonergan et. al. v. Buford, et. al. 148 U. S. 581, 590, 13 S. Ct. 684, 37 L. ed. 569, cited in 70 A. L. R. 710.

"Delivery was refused by defendants until an illegal and unjust demand for property not delivered was paid. It was in the midst of winter when the property required the personal care of the owner. Plaintiff's were compelled to either pay this demand or seek redress by tedious and expensive litigation, the property remaining meantime in the possession of the parties hostile to plaintiff's interest, and liable to great deterioration and loss. Payment under such circumstances was not a voluntary payment, and being made under duress may be recovered back; and the fact that it was made with knowledge of all the facts makes no difference."

The Utah Supreme Court cited from Peyser v. Mayor, 70 N. Y. 497, wherein Judge Folger speaking for the Court said on page 167 of 22 Pac.

"I have spoken of coercion in fact and coercion by law. By the first I mean that duress of person or goods where present liberty of person or immediate possession of goods is so needful and desirable as that an action or proceedings at law to recover them will not at all answer the pressing purpose."

Also, Stenton v. Jerome, 54 N. Y. 480:

Wheelock Bros. v. Bankers Warehouse Company

171 P. 2d 405, 1946.

POINT 6. THE TRIAL COURT ERRED IN FAILING TO SUBMIT TO A JURY THE ISSUE OF THE SCOPE OF AUTHORITY OF JACK R. DAY IN ACTING FOR DEFENDANT, AND IN GRANTING MOTION FOR DISMISSAL FOR THE DEFENDANTS.

Plaintiff contends Jack R. Day was the general agent of Fidelity Insurance Company (now out of this action) and American Home Insurance Company, Fidelity denied a General Agency, American Home never has. The deposition of Mr. Day strongly indicates a General Agency for both companies, and we have positive proof of it but we can only produce it by witnesses. The question of agency can only be resolved at a trial and not a pre-trial.

The facts will show what transpired in the Reliable Furniture Company office on June 19, 1961, between the hours of 2:00 p.m. and 6:30 p.m. as the President of the plaintiff's Corporation great reluctance to accept the representations as made by general agent, Jack R. Day.

As to defendant's contention that the Western General Agency by and through its Vice-President, Jack R. Day, acted outside the authority granted, it must be noted again that the Restatement of the Law on Agency, Second Volume, Section 229, Page 506 set down certain elements that the Court may use in determining what authority a general agent has and what acts would make the principal liable for the general agent's acts and is set forth as follows: Section 229 KIND OF

CONDUCT WITHIN SCOPE OF EMPLOYMENT:

Restatement of the Law on Agency sets out the principals' liability in Sections 261, 262, and 265, on Pages 570, 571, and 575.

Section 261 AGENT'S POSITION ENABLES HIM TO DECEIVE.

A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third person for the fraud. Section 262.

AGENT ACTS FOR HIS OWN PURPOSES

A person who otherwise would be liable to another for misrepresentations of one apparently acting for him is not relieved from liability by the fact that the servant or other agent acts entirely for his own purposes, unless the other has notice of this.
Section 265

CONDDUCT WITHIN APPARENT AUTHORITY OR EMPLOYMENT GENERAL RULE

A case in support of this position is set forth in Hartford Life Insurance Company v. Sherman, 233 Ill. 329, 78 N. E. 923 (1906).

A principal or master is liable for exemplary damages for the wrongful, wanton, and oppressive acts of his agents or servants when acting within the csope of his employment although the particular acts were not authorized or ratified, 134 Pac. 753. Forrester v. Southern Pac. Company. (Nevada 1913)

Other cases wherein the Courts have held that the principal was liable for representations made by its agent are hereinafter set forth:

Ware v. State Farm Mutual Automobile Insurance Company, 311 P. 2d 316, 181 KAN. 291, 1957 Case.

Topinka v. American Eagle Fire Insurance Company, 167 Kan. 181, 185, 205 P. 2d 991, 993; Pages 319, 320, of the Ware Case.

Duarte et ux. v. Postal Union Life Insurance Company, 171 P. 2d 574, 584, 1946.

Utilities Engineering Institute v. Criddle, 141 P. 2d 981.

Land Finance Corp. v. Sherwin Electric Co., 102 Vt. 73, 146 A. 72; 75, A. L. R. 1025, 1030.

Martin v. Letham 71 P. 2d 336, 338.

Otis Elevator Company v. The First Nat. Bank, 163 California, 31, 39, 124, Pac. 704, 41 LRA. (N. S.) 529.

Keller v. Safeway Stores, Inc., et al. 108 P. 2d 605, 610, 611.

Grorud v. Lossl 48 Mont. 274, 136 Pac. 1069

POINT 7. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS IN THAT THE FACTS BEFORE THE COURT PRESENTED TRIABLE ISSUES, AND THEREFORE, CONTRARY TO THE LAW OF UTAH.

At no time has the defendants taken issue with the complaint or amended complaint as failing to state

a cause of action -- they merely deny the allegations. All depositions and interrogatories are merely contrary to each other giving rise to triable issues which can only be resolved by producing witnesses and presenting documents for the consideration of a jury. A cursory examination of the file will bear this out.

The pre-trial judge either ignored or overlooked the law of the State of Utah as laid down by this court a little over a year ago in the case of Baur v. Pacific Finance Corp. et al found at 383 P. 2d. 397. In that case the Court unanimously held and stated as follows: "As we have heretofore declared, the granting of a motion to dismiss, which deprives the party of the privileges of presenting his evidence, is a harsh measure which courts should grant only when it clearly appears that taking the view most favorable to the complaint and any facts which might properly be proved thereunder, unless it so clearly appears, doubt should be resolved in favor of allowing him the opportunity to present his proof."

See also; Samms v. Eccles, 11 Utah 2d 289, 358 P. 2d 344.

Issue was formed on many points of difference which can only be determined by testimony from both sides together with documentary proof. The pre-trial judge evidentally had formed a preconception of what stipulations had to be made without regard to the plaintiffs intended evidence and theory of the case, for the minute plaintiff's counsel stated that we could not answer "yes or no" to a stipulation the court had formulated but instead tried to explain why a "yes or

no" answer would alter the course of plaintiff's proposed intended proof, the court summarily granted the motion to dismiss and refused to consider an explanation.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the granting of a motion to dismiss made by defendants at the pre-trial was erroneously granted and should be reversed and remanded to the trial court for trial.

Respectfully submitted,

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