1964

Reliable Furniture Co. v. American Home Assurance Co. et al : Brief of Defendants-Respondents

Utah Supreme Court

Hanson & Baldwin; Rex Hanson; Attorney for Defendants-Respondents;
Robert S. Spooner; Pete N. Vlahos; Attorneys for Plaintiff-Appellant;

IN THE SUPREME COURT
of the
STATE OF UTAH

RELIABLE FURNITURE COMPANY, a Utah corporation,
Plaintiff-Appellant,
vs.
AMERICAN HOME ASSURANCE COMPANY, a corporation, WESTERN GENERAL AGENCY, a corporation, GENERAL ADJUSTMENT BUREAU, a corporation,
Defendants-Respondents

Case No.
10182

BRIEF OF DEFENDANTS-RESPONDENTS

Appeal From The Third Judicial District Court
For Salt Lake County
Honorable A. H. Ellett, Judge

HANSON & BALDWIN
REX HANSON
Kearns Building
Salt Lake City, Utah
Attorney for
Defendants-Respondents

ROBERT S. SPOONER
PETE N. VLAHOS
David Eccles Building
Ogden, Utah
Attorneys for Plaintiff-Appellant

INDEX

CASES CITED

AUTHORITIES CITED

IN THE SUPREME COURT
of the
STATE OF UTAH

RELIABLE FURNITURE COMPANY, a Utah corporation,
Plaintiff-Appellant,
vs.
AMERICAN HOME ASSURANCE COMPANY, a corporation, WESTERN GENERAL AGENCY, a corporation, GENERAL ADJUSTMENT BUREAU, a corporation,
Defendants-Respondents

Case No. 10182

BRIEF OF DEFENDANTS-RESPONDENTS

STATEMENT OF NATURE OF CASE

The appellant appeals from a summary judgment entered by the District Court of Salt Lake County dismissing the appellant's suit against the respondents based on a claim that the respondents through economic duress compelled the appellant to settle an insurance claim for less than the actual loss.

DISPOSITION IN LOWER COURT

The appellant submits the following statement of facts as being the record properly before the Court. The desposition of Samuel Herscovitz will be cited (D), the hearings at pretrial as (P) and the pleadings and other matters as (R):

On March 30, 1961, a fire occurred at the Reliable Furniture Company in Ogden, Utah (R-2, D-3). The Company's operations were conducted primarily by Mr. Samuel A. Herscovitz, the President and General Manager (R-2, D-3). At the time of the fire, the appellant had two insurance policies covering such a difficulty. The first was a standard fire insurance policy covering the stock, inventory and like losses. This policy was issued by Fidelity and Guaranty Insurance Underwiters, Inc., hereinafter referred to as Fidelity, (R-7). The second policy was one covering business interruption losses and was issued by the respondent American Home Assurance Company. The respondent General Adjustment Bureau, a corporation, was engaged to adjust the stock loss for Fidelity (R-8), and also the business interruption loss for American (R-6). The respondent Western General Agency, Inc. was the general agent of both American and Fidelity. Immediately following the fire, agents of General Adjustment met with Mr. Herscovitz in an effort to determine the full extent of the loss (D-4. The salvage loss was determined (D-4), and the parties negotiated with reference to the stock and inventory claim. On May 3, 1961, Herscovitz executed a proof of loss in the amount of $84,923.39, and Fidelity then had 60 days after receipt of the proof of loss to investigate and determine whether payment should be made in the amount demanded (R-34, 38). Subsequently, Herscovitz had several contacts with ad-

justers from General Adjustment, officers of Fidelity and Mr. Jack Day, an officer of Western General Agency, in an effort to settle the loss (D-10). The furniture store was open for business in May, but a "thrift center" (D-33), part of the retail operation, was closed until July 18th (R-33, 44).

Herscovitz had a conversation with Mr. Ball, an agent of General Adjustment, relative to settling the business interruption loss (D-28) at which time Herscovitz indicated that he was in no great hurry to settle this claim. Ball indicated the loss would be settled on the basis of the previous years' operations (D-28) for $48,000.00. Subsequently, a short time later, Herscovitz filed his own proof of loss on the business interruption claim in order to cause the 60 day pre-suit period to begin to run (D-22, 29), although he had shortly before said he was in no hurry to settle (D-27).

On the 17th of June, 1961, Mr. Day said that he thought he could get payment on the claim against Fidelity (D-20, 21). On June 19, 1961, Mr. Day, Mr. Ball, Mr. Herscovitz and Mr. Dykstra, Reliable's bookkeeper, were present in Mr. Herscovitz' office in Ogden. The meeting lasted about four hours in an effort to adjust the losses (D-35). Mr. Ball spent the first two hours figuring and working out loss figures (D-35, 36). Mr. Ball then came to Herscovitz and told him that the business interruption loss should be settled, and the Company would go twelve thousand dollars (D-36). Mr. Herscovitz

indicated that such a sum was not acceptable to him (D-36). According to Mr. Herscovitz, both Mr. Ball and Mr. Day said the business interruption loss would have to be settled along with the stock loss and that payment of the $84,923.39 would not be made unless the business loss was also settled (D-36). Herscovitz allegedly objected but then accepted a settlement in the sum of $12,609.39 which was made out at that time along with a proof of loss release which Herscovitz executed. He also accepted the $84,923.39 from Fidelity (D.-68). Subsequently, Mr. Herscovitz consulted with counsel and presented both drafts for payment and accepted the proceeds (R-35).

Subsequently, the appellant filed a complaint seeking to set aside the settlement on the grounds of economic duress and sued Fidelity, Western, General Adjustment and American for $303,698.46 claiming business loss and loss of profits by being forced out of business. The appellant's accounting records showed the Company had an operating loss of $16,448.87 in 1959 and $98,078.38 in 1960 (R-56, 65). An answer denying the allegation was filed. Subsequently, an amended complaint setting forth a similar cause of action in two separate counts was served and answers filed. Appellant served a reply, although Rule 7A, U.R.C.P. did not call for such action.

Subsequently, Fidelity, after discovery, moved for summary judgment and it was granted. This

Court affirmed, *Reliable Furniture Co. v. Fidelity Guar. Ins. Underwriters*, 14 Utah 2d 169, 380 P. 2d 135 (1963) noting:

> "We see nothing in the record justifying such accusation [economic duress], or reflecting any incentive on the part of Fidelity so to collude."

At the time of pretrial between appellant and the remaining respondents, the appellant admitted that $12,984.39 was paid by American to the appellant, and that none of the money had been returned or a tender made (P-2). The execution by Herscovitz of the proof of loss in the amount of $12,603.39 was also admitted (P-2). The appellant also admitted that there was no evidence that Jack Day had joint authority from the two Companies, but only single authority from each (P-6). Further, appellant admitted that it had no evidence that Jack Day had joint authority from the two Companies, but only single authority from each (P-6). Further, appellant admitted that it had no evidence that American had told Day to withhold the $84,-923.39 unless the $12,609.39 were paid and that American had no authority to do so (P-8). After argument, the Honorable A. H. Elllett entered judgment for the respondents finding (R-59):

> "From the foregoing and the pleadings it appears conclusively and as a matter of law that return or tender of the said sum of $12,-609.39 was a condition precedent to rescission of the settlement of plaintiff's unliquidated

claim against defendant American Home Assurance Company; that plaintiff can produce no evidence that the said Jack Day in allegedly withholding payment of said sum of $84,000.00 check was acting as the agent of defendants in concert or individually; that in accepting said sum of $12,609.39 plaintiff was not subject to duress which would justify legal action against defendants. . . ."

The appellant has raised in its brief several points upon which it claims a basis for reversal. Many of these points do not appear to have any foundation in the record, and the solemn substance of the appellant's brief can be answered in three general points; consequently, the respondents' brief will not attempt to answer the point-by-point allegations of the appellant but will confine itself to the material issue of fact and law raised by the appeal.

It is submitted that on the evidence and record, this Court must affirm the judgment below.

ARGUMENT

THE TRIAL COURT CORRECTLY RULED THAT THE RESPONDENTS WERE ENTITLED TO JUDGMENT BASED ON THE TIMELY FAILURE OF APPELLANT TO TENDER RETURN OF THE MONIES PAID, AND THE FAILURE TO RETURN THE MONIES PAID IS A RATIFICATION OF THE SETTLEMENT.

A. The Necessity Of Tender.

The evidence in the instant case shows that the appellant made no tender of the money the respondents caused to be paid over for the business interrup-

tion loss. It further shows that the business interruption claim was a disputed and unliquidated claim prior to the settlement reached by the parties. Under these circumstances, it is clear the appellant was required to tender return of the money paid before it could prevail under any theory.

The relevant general principle of law is that one who seeks to avoid the effect of a release or compromise must first tender return of the consideration paid in exchange for the release or compromise, 45 Am. Jur., RELEASE, Section 53:

> "The general principle [is] that one who seeks to avoid the effect of a release must first return or tender the consideration paid him in connection with his execution of the release . . ."

The rule is not limited to releases and applies generally to an attempt to avoid compromises. It is stated 134 A.L.R. 6, 8:

> "The general principle that one who seeks to avoid the effect of a release or compromise of a claim, demand, or cause of action (*whether in an action or proceeding brought solely to cancel or rescind the release or instrument of settlement, or in an action or proceeding brought primarily to enforce the original demand or cause of action brought for the dual purpose of setting aside the release or settlement and recovering on the original claim or demand*) must first return or tender the consideration, whether money or property, paid him in connection with his execution of the settlement or release, has

found application or recognition in a large number of cases involving the release or settlement of a wide variety of claims or demands."

Two major exceptions appear to be grafted on to this general rule by the Courts (1) where the release has been procured by fraud, primarily fraud in the execution, 45 Am. Jur., RELEASE, Section 53; *Indian, D.&W.R. Co. v. Fowler*, 201 Ill. 152, 66 N.E 394, and (2) where the amount paid would be due in any event. *Texas Employers Insurance Ass. v. Kennedy*, 135 Tex. 486, 143 S.W. 2d 583 (1940).

There is no indication of any kind that any amount was due the appellant, rather the sum claimed and the subject of the instant contest is unliquidated and the subject of compromise.

With specific reference to insurance policies, the rule is the same that tender is required—absent the above or other non-applicable exceptions. 134 A.L.R. 108 notes:

> "The view has been taken in a number of cases that where it is sought to avoid a settlement or release of a claim under an insurance policy or fraternal benefit certificate a return or tender of the consideration paid for the release or settlement is a condition precedent to the granting of relief."

In *Lyn v. Business Men's Assur. Co.*, 111 S.W. 2d 231 (K.C. App. 1937), the Kansas Court had a claim to set aside a release on the basis of fraud and duress. The Court noted:

> "Plaintiff did not offer to return the amount she received in the settlement and she could not, under the facts of this case, recover on the ground of fraud and duress."

Johnson v. Metropolitan Casualty Insurance Company, 258 App. Div. 775, 14 N.Y.S. 2d 895 (1939), involved an appeal from a dismissal of a complaint seeking to avoid an insurance settlement. The complaint failed to allege the tender or restoration of the compromised amount. The basis of the avoidance was duress. The Court stated:

> "The plaintiff fails to allege that he either restored or offered to restore the $600 received by him from the defendant under the alleged coercive settlement. Th absence of such an allegation is fatal . . . A settlement induced by coercion is not necessarily void. Such a settlement may be ratified by retaining benefits received thereunder."

The Utah Supreme Court has adopted the general rule requiring tender or restoration in avoiding a contract. In *Morris v. Smith*, 76 Utah 162, 288 Pac. 1068 (1930), the Court stated:

> "It is an elementary rule, both of law and equity, that one who is party to a contract, or in privity with such party, may not retain the benefits of such contract and at the same time repudiate is obligations."

In *Eresman v. Overman*, 11 Utah 2d 258, 358 P. 2d 85 (1961), the defendant sought by counterclaim to rescind a real property purchase contract. In reversing a lower court decision in favor of rescission, the Utah Court stated:

> "At no time did the defendant offer to place the parties in status quo, *an essential to recission*, by offering to be charged with and credit plaintiff with a reasonable rental value for the time during which she ocupied the premises."

There are apparently no Utah cases that have concerned themselves with a requirement of tender or restoration as it relates to economic duress, however substantial authority exists that a claim of economic duress is no excuse for failure to restore. In *Meisel v. Mueller*, 261 S.W. 2d 526 (Mo. App. 1953), a release had been executed based upon a trademark abuse claim. The Court noted:

> "Counsel for plaintiff in his brief complains that defendant Telephone Company took advantage of his clients' pressing need for money when it concluded in the release the name of defendant Mueller . . . If economic circumstances and pressing need for money would obviate the necessity for returning the consideration before setting aside a release or any other contractual obligation, we would have very few settlements of litigation or disputes . . . We hold it was necessary for plaintiff to offer to return the $600 before he can escape the binding force of the release."

Dawson, ECONOMIC DURESS—AN ESSAY IN PERSPECTIVE, 45 Mich. L. Rev. 253, 284 (1947) notes:

> "As a condition to recission the party under duress will be required to tender or account for the value received by him."

The cases cited by the appellant relate to insurance contests over double indemnity, where the principal sum is admittedly due. However, in this case, there is no principal sum admittedly due. It is incongruous to allow the appellant to claim duress, and yet keep the benefits which he received where there is no evidence that they were admittedly due.

In the absence of a tender, the trial court correctly ruled the suit could not be maintained.

B. The Conduct Of Appellant Ratified The Settlement.

A contract or release or compromise effected as a result of duress renders the contract or release only voidable not void. RESTATEMENT OF RESTITUTION, Section 70. *State v. Barlow*, 107 Utah 292, 153 P. 2d 647 (1944). As a consequence, if a person intentionally accepts benefits arising from such a contract or otherwise acts inconsistent with the contention of duress, there may be a ratification of the original release, contract or compromise, RESTATEMENT OF RESTITUTION, Section 70a. The rule is stated in 77 A.L.R. 2d 527, 528:

> "A contract entered into under duress is generally considered not void, but merely voidable, and is capable of being ratified after the duress is removed, such ratification resulting if the party entering into the contract under duress intentionally accepts the benefits growing out of it, remains silent, acquiesces in it for any considerable length of time after opportunity is afforded to avoid it or have it

annulled, or recognizes its validity by acting upon it."

In determining ratification, the courts have recognized that retaining the fruits of the compomise is inconsistent with an attempt to repudiate it, and have found ratification. In the instant case, Herscovitz sought the advice of legal counsel and then negotiated both settlement drafts of over $92,000.00. He did not offer to return the monies received. In this regard, the case of *State v. Barlow*, 107 Utah 292, 153 Pac. 2d 647 (1944), is pertinent where the Court stated:

> "As a rule, in a transaction requiring mutual consent, if consent is obtained by coercion, the victim may either affirm or avoid the transaction, but he may not claim the benefits and escape the obligations."

Implicit in the Court's language is the conclusion that accepting the benefits after the duress ends constitutes ratification.

In *Ellison v. Pingree*, 64 Utah 468, 231 Pac. 826 (1924), the Utah Court stated:

> ". . . he had the benefit of able counsel who had been his faithful legal counsel for 25 years . . . Moreover, he was a business man of great and varied experience and influence . . . In addition to all that he was largely benefited in being released from the terms of the first contract, which was accomplished by entering into the second one. Apart from the fact, therefore, *that the second contract was in essence and effect a ratification and confirmation of the first one*, under the undis-

puted facts and circumstancess there was no duress in the sense that the term is used and understood."

Thus, the Utah Court noted that actions inconsistent with the agreement claimed to be obtained by duress result in ratification. Additionally, the Court recognized that legal advice may bear on (1) the initial claim of duress and (2) subsequent ratification, if claimed.

In *Farrington v. Granite Stake Fire Insurance Company*, 120 Utah 109, 232 Pac. 2d 754 (1951), the Supreme Court rejected the right of an insurance company to rescind for misrepresentation where the insurer knew of the facts a few days after a fire and accepted a premium payment knowing of the fire, and did nothing 'till suit was brought. The Court noted:

> "One who claims a right of rescission must act with reasonable promptness, and if after such knowledge, he does any substantial act which recognizes the contract as in force, *such as the acceptance of the more than half of the premium would be,* such an act would usually constitute a waiver of his right to rescind."

The old addage of "what is good sauce for the goose, is also good sauce for the gander," is pertinent.

LeVine v. Whithouse, 37 Utah 260, 109 Pac. 2 (1910), was a case of fraud, but the Court stated the rule:

> "The rule is that, where a party has been reduced to enter into a contract by false and

> fraudulent representations, he may . . . rescind the contract, but the great weight of authority holds that, if the party defrauded continues to receive benefits under the contract after he has become aware of the fraud, he will be deemed to have affirmed the contract and waived his right to rescind."

Of importance is the fact that the Court accepted the following quote from 9 Cyc. 436:

> "The party defrauded will generally lose his right to rescind if he takes any benefit under the contract or does any act which *implies an intention to abide by it or an affirmance of it after he has become aware of the fraud.*"

The importance of the wording is the recognition of an intention or implication to affirm from the act of accepting the benefits.

In *Taylor v. Moore*, 87 Utah 493, 51 Pac. 2d 222 (1935), another fraud case, the Court approved the following quote from *Shappirio v. Goldberg*, 192 U.S. 232:

> " 'He cannot . . . treat the property as his own and exercise acts of ownership over it which shows an election to regard the same as his, and at the same time preserve his right to rescission (sic.)'."

In *McKellar Real Estate & Insurance Co. v. Paxton*, 62 Utah 97, 218 Pac. 128 (1923), the Court speaking of rescission as to real estate purchase contract made it clear that a person seeking to disaffirm must do it in unequivocal terms and not exercise dominion over the property.

In 77 A.L.R. 426, 343, it is stated:

> "While a contract voidable for duress may be ratified, either by express consent, or by conduct inconsistent with any other hypothesis than that of approval, still the *intention to ratify* is an essential element and is at the foundation of the doctrine of waiver or ratification."

Thus, intention being manifestly important in determining ratification, the *LeVine v. Whithouse* case dealing with fraud and rescission is important in approving language that indicates a party will lose his right of rescission by doing an act that "implies an intention" to be bound.

In the instant case, the facts before the trial court clearly demonstrated ratification which when coupled with the failure to make tender required that judgment be given for the respondents, *Gallon v. Lloyd Thomas Co.*, 264 F. 2d 821; Restatement of Contracts, Sections 499, 484. First, after Herscovitz accepted both checks the claimed duress ended. Especially so when he cashed the $84,000.00 check, since that eliminated the essence of any "wrongdoing" in the theory of economic duress. Thereafter, instead of repudiating the $12,000.00 payment, he retained it and sought to "keep his cake and eat it too." He cashed the check, exercised sufficient dominion over the rest of the compromise so as to indicate an acceptance of the settlement. He could not legally negotiate the check after the duress had terminated. This is to be distinguished from the

situation where the fraud or duress is not terminated prior to cashing the check or receiving money. Further, full consultation with counsel was had before any action was taken. Counsel must have advised of the danger of negotiating the check. As a consequence, ratification or waiver exists, as a matter of law. Finally, it is inconsistent for appellant to claim that the economic duress still continued, since this would mean the alleged refusal of the $84,000.00 payment, without the other, was not the real source of his trouble, but it was actually his own business and financial problems not related to the defendants' actions, and thus his claim of economic duress, to the extent it involves a wrongful act of the defendant, would not exist.

The trial court correctly ruled that the circumstances in failing to make a tender precluded appellant from maintaining its suit.

POINT II

THE TRIAL COURT DID NOT ERR IN FINDING THAT APPELLANT HAD NO CAUSE OF ACTION BASED UPON A CLAIM OF ECONOMIC DURESS.

In points 2 through 5, the appellant in effect contends the trial court erred in granting judgment for the respondent based upon the appellant's claim of economic duress.

As to point 3 of appellant's brief, there is no evidence that the Court relied upon statements of the respondents' counsel to find appellant could not

prove a claim based on economic duress. The record shows that the appellant's counsel admitted no "duress of goods" and that the Court based upon the best evidence the appellant could offer, correctly ruled that no claim of economic duress could be sustained.

The essence of the claim of appellant is one of duress. At common law, duress of an economic nature was usually associated with the detention of a person's goods or chattel to extract an unnecessarily rigorous payment. *Astky v. Reynolds*, 2 Strange 915, K.B. 1732:

> "We think also, that this is a payment by compulsion; the plaintiff might have such an immediate want of his goods, that an action in trover would not do his business where the rule volenti nonfit injura is applied . . ."

The common law concept was therefore primarily limited to duress of goods. 13 C.J., CONTRACTS, Section 316(3). However, the common law theory of "economic duress" has been expanded. 17A Am. Jur., *Duress and Undue Inflence*, Section 7, notes:

> "There is no doubt that the early common law doctrine of duress has gradually expanded and broken through its original limitations, with the result that many states have adopted the modern doctrine of 'business compulsion' or what is sometimes referred to as 'economic duress or compulsion'."

As to what specifically amounts to economic duress, the texts and authorities have more often spoken in terms of what it is not, 17A Am. Jur.,

DURESS AND UNDUE INFLUENCE, Section 7, notes:

> " 'Business compulsion' is not established merely by proof that consent was secured by the pressure of financial circumstances. But it is said that a threat of serious financial loss is sufficient to constitute duress and ground for relief *where an ordinary suit at law or equity might not be an adequate remedy.*
>
> "To constitute duress or businesss compulsion there must be more than a mere threat which might result in injury at some future time, such as a threat to injury to credit in the indefinite future. It must be such a threat that, in conjunction with other circumstances and business necessity, the party so coerced fears a loss of business unless he does so enter into the contract demanded."

In 17 C.J.S., CONTRACTS, Section 177, p. 536, it is noted:

> ". . . the exercise of business pressure falling short of tortious conduct is ordinarily not regarded as duress, and business compulsion exercised by an illegal combination of persons has been held not to constitute duress."

Appelman, INSURANCE LAW AND PRACTICE, Vol. 3, Section 1715, notes:

> "Inducement of a settlement when a beneficiary was in financial difficulties does not constitute duress. It has even been held that threats of criminal prosecution do not fall in this category."

In *Kelley v. United Mutual Insurance Assn.*, 112 S.W. 2d 929 (Mo. App. 1938), plaintiff filed suit

to recover on several life insurance policies, which she had compromised for $1,000.00. The plaintiff contended, among other things, that she settled the claim because of being pressed by severe economic problems. The Court noted in holding that the claim was without merit:

> "Our examination of the evidence causes us to conclude that there was no evidence to justify the submission as to alleged duress. True it was shown that the beneficiary was pressed with financial difficulties and such may have been an inducement to the signing of the agreement. Such, however, does not constitute duress."

In *Manno v. Butual Beneficial Health & Accident Assoc.*, 187 N.Y.S. 2d 709 (1959, Sup. Ct.), the plaintiff sued to received certain accident and health insurance settlements. The essence of the claim was that the plaintiff had sustained injuries which prevented him from working, and that defendant refused to pay what was properly due and was forced into a settlement. The complaint alleged:

> "That solely by reason of the economic duress practiced upon him and the coercion and other acts of the defendant[s], including the willful and deliberate breach of * * * [their] contract[s] with the plaintiff, and the physical condition and ill health of the plaintiff at the time defendant[s'] representative imposed the defendant[s'] demands upon him, plaintiff was unable to resist the defendant[s'] coercion and surrendered the aforesaid policies of insurance to the defendant[s']

representative, receiving drafts totaling $6,700."

The defendant contended the complaint stated no claim for relief. The Court granted the motion to dismiss, and in doing so spoke of an awareness of "modern doctrine of economic duress." The Court, however, felt a claim was not stated. The Court noted:

> "The plaintiff has alleged, in substance, no more than that he has suffered a total and permanent disability, that defendants refused to make payments under the policies and deliberately breached the contracts and that while he was alone and in bed due to his heart condition he acceded to the defendants' demand to surrender the policies for a consideration of $6,770. This, the plaintiff has characterized as 'economic duress' and 'coercion' practiced by the defendants. However, to allege that an agreement or setlement was made under 'duress' or 'coercion' is to state no more than a conclusion [citing authorities]. Generally, it is not duress to do what one has the legal right to do [cit. Ath.]. Similarly, a threat to breach a contract does not, without more constitute duress [CA]."

The decision is important because multiple defendants and policies were involved which is the situation in the instant matter. Certainly, if American had taken advantage of Reliable's financial difficulties and forced a stringent bargain, no one could contend economic duress existed. Thus, see 17A Am. Jur., supra., Section 7, cited infra.

In *Starks v. Field*, 198 Wash. 593, 89 P. 2d 513 (1939), the plaintiff contended he was compelled to sign collateral crop financing agreements because of economic duress. In rejecting the argument, the Washington Courte stated:

> "Contracts, sales, or compromises made under stress of pecuniary necessity are of daily occurrence, and if such urgency is to affect their validity, no one could safely negotiate with a party who findss himself in difficulty by virtue of financial adversities."

The *Manno* case, supra, is additionally important since it seems to recognize that the presence of mulitiple policies and an effort to fully compromise between many defendants offers no greater basis for a claim of duress than otherwise.

In *Steward v. World-Wide Automobiles Corporation*, 189 N.Y.S. 2d 540 (1959, Sup. Ct.), the Court followed the *Manno* case and held "no cause of action" where defendants threatened to dissolve plaintiff's franchise, which would have been a breach of contract, unless the plaintiff sold her stock. The Court determined a mere threat to breach a contract cannot amount to duress.

In *Doernbecher v. Mutual Life Insurance Company*, 16 Wash. 2d 64, 132 P. 2d 751 (1943), the Washington Court was faced with another insurance compromise case. The insurance company obtained a release of insurance policies for a premium payment from the beneficiary with a threat of civil action, where the beneficiary due to her husband's

illness could not undertake court action. The Washington Court found no cause of action.

In *Hackley v. Headly*, 47 Mich. 489, 8 N.W. 511, a dispute over scaling logs arose between the parties. One party was in severe financial straits and the other refused to make payment forcing a settlement for an amount less than claimed. In refusing to find duress, the Michigan Supreme Court ruled:

> "In what did the alleged duresss consist in the present case? Merely in this: that the debtors refused to pay on demand a debt already due, though the plaintiff was in great need of the money and might be financially ruined in case he failed to obtain it. It is not pretended that Hackley & McGordon had done anything to bring Headley to the condition which made the money so important to him at this very time, or that they were in any manner responsible for his pecuniary embarrassment except as they failed to pay this demand. The duress, then, is to be found exclusively in their failure to meet promptly their pecuniary obligation. But this, according to the plaintiff's claim, would have consttiuted no duress whatever if he had not happened to be in pecuniary straits; and the validity of negotiations, according to this claim, must be determined, not by the defendants' conduct, but by the plaintiff's necessities. The same contract which would be valid if made with a man easy in his circumstances, becomes invalid when the contracting party is pressed with the necessity of immediately meeting his bank paper. But this would be a most dangerous, as well as a most unequal

> doctrine; and if accepted, no one could well know when he would be safe in dealing on the ordinary terms of negotiation with a party who professed to be in great need."

It would be concluded that in insurance settlement and other like cases, mere economic pressure usually will not constitute duress.

Other cases, not directly relating to the insurance situation, are relevant in weighing whether economic duress exists in the instant situation.

In *Hartsville Oil & Mill v. United States*, 271 U.S. 43 (1926), plaintiff sued for additional compensation under a war contract, which petitioner claimed was still in effect and not superseded by another contract, which it contended was procured by duress. After the end of the war (W.W. I), the government threatened to terminate plaintiff's contract with the government providing for the purchase of certain items. The government contract contained a clause so allowing but the government also would refuse accrued obligations. The government told plaintiff if he would execute a new contract it would continue to purchase at a reduced rate, otherwise not. The plaintiff contended he would have been economically ruined if the government had cancelled outright and therefore signed the reduced contract. The Supreme Court denied recovery feeling that this was merely a threat to breach a contract (so also is the wrongful refussal to settle an insurance claim). The Court said:

> "But a threat to break a contract does not in itself constitute duress. Before the coercive effect of the threatened action can be inferred, there must be evidence of some probable consequences of it to person or property for which the remedy afforded by the courts is inadequate."

Certainly, if Reliable would only suffer a loss of money or economic injury, which would be compensable by the courts, it cannot complain. Indeed, Herscovitz stated he was aware of his court remedies (D-38, 47).

Other cases have reached similar conclusions. *French v. Shoemaker*, 14 Wall. 314 (U.S.); *Gill v. S.H.B. Corporation*, 322 Mich. 700, 34 N.W. 2d 526.

French v. Shoemaker, supra, is of relevance in this area and is a landmark case There four parties, owners of interests in a railroad company, had a dispute as to their relative ownership. They negotiated a settlement contract dividing the ownership proportionately among themselves. One of the parties thereafter contended that because of the dangerous nature of his pecuniary situation and threats of further damage from the other parties, he was forced to compromise. The Supreme Court rejected a contention of economic duress noting:

> "Enough appears in the record to convince the Court that the respondent was in straitened circumstances, that his business affairs had become complicated, that he was greatly embarrassed with litigations, and that he was in pressing want of pecuniary means, but the

> Court is wholly unable to see that the complainant is *responsible for these circumstances or that he did any unlawful act to deprive the respondent of his property*, or to create those necessities or embarrassements . . ."

This case states the general rule that before breach of contract or pressure on a person in financial difficulties will be deemed duress, the party so taking advantage must have in part been responsible for the plight.

In the Government Contractor, BRIEFING PAPERS, ECONOMIC DURESS[1], page 3, (April 1964), it is noted:

> "When, however, *financial difficulties* prevent you from taking an alternative course, it has been held that the Govt must in some way be *responsible* for your financial plight (e.g., by its withholding payments lawfully due you). The mere stress of business conditions is *not* necessarily sufficient to spell out the 'no alternative' element of duress (or, for that matter, the 'forced consent' (element)."
>
> * * *
>
> "If it is financial difficulties which leave you with no alternative course other than to consent to the Govt's demands, be prepared to prove that the Govt is in some way *responsible* for (or has materially contributed to) your financial plight."

[1]The Government is often pressed with claims of economic duress, in contract termination settlements. Consequently, many of the landmark cases are decisions from the Supreme Court or lower federal courts.

In *Fruhauf Southwest Garment Co. v. United States*, 126 Ct. Cls. 51, (1953), the plaintiff alleged that he accepted a price revision because the government had used economic duress. In denying the claim, the Court stated:

> ". . . In order to substantiate the allegation of economic duress or business compulsion the plantiff must go beyond the mere showing of a reluctance to accept and of financial embarrassment. There must be a showing of acts on the part of the defendant which produced these two factors. The assertion of duress must be proven to have been the result of the defendant's conduct and not by the plaintiff's necessities. In *DuPuy v. United States*, 68 C.Cls. 348, 381, this court stated:
>
> > '* * * In order to successfully defend on the ground of force or duress, it must be shown that the party benefited thereby contrained or forced the action of the injured party, and even threatened financial disaster is not sufficient. * * *'
>
> "It has become settled law that the mere stress of business conditions will not constitute duress where the defendant was not responsible for those circumstances. *Lawrence v. Muter Co.*, 171 F. 2d 380, 382, cert. den., 337 U.S. 907; *Silliman v. United States*, 101 U.S. 465, 471."

See also *Silliman v. United States*, 101 U.S. 465.

The appellant's financial plight was in no sense the fault of the respondents. Indeed, appellant had been operating at a loss for sometime, and was primarily in economic difficulty due to the fire and

business circumstances wholly without the fault of respondents. Clearly, this alone justifies the trial court's result.

Where an adequate remedy at law exists, there can be no claim of economic duress. *Board of Trustees v. Wilson Company*, 133 F. 2d 399 (app. D.C. 1943), where the Court said:

> "Its denial of the right to rescind did not conclude the question. Appellee could litigate it. Appellant was equally entitled to litigate it or, as it did in effect, threaten to litigate it. It follows there was no duress."

Also, Hale, BARGAINING, DURESS AND ECONOMIC LIBERTY, 43 Col. L. Rev. 603.

The Utah cases are not particularly helpful since in *Buford v. Lonegran*, 6 Utah 301, 22 Pac. 164 (1889), the Territorial Supreme Court was involved only with a duress of goods problem, not a true situation of economic bargaining.

In *Flack v. National Bank*, 8 Utah 193, 30 Pac. 746 (1892), the Territorial Court again had a claim of duress. This case is more directly applicable to the instant case than the *Buford* case. There, the bank induced the plaintiff by threat of attachement to transfer funds to satissfy payment of a note. The bank was aware of the serious economic straits of plaintiff and possibility of creditor attachment and used this to induce transfer. The Court did not speak of the economic aspects except to note they were real, but the Court found nothing wrong with

pressing for early payment when plaintiff was bad off, noting:

> "Under all the evidence of the case, we think the defendant had good reason to feel uneasy about the ultimate payment of the note, and it is not strange that security should have been demanded."

This is a recognition of the previously stated principle that pressing for a legally proper settlement is not improper merely because the circumstances of the party pressed are economically difficult.

Ellison v. Pingree, 64 Utah 468, 231 Pac. 826 (1924), is the only Utah Supreme Court case dealing with economic duress and strongly supports a conclusion that something more than financial embarrassment is necessary. Pingree was a wealthy corporate officer and financier who made personal loans to the company to secure creditors. The corporation was in some difficulty and might otherwise have been pressed into receivership. Certain creditors of the company had threatened Pingree also with criminal prosecution if he had not loaned the money to the company. Pingree sought to void the loan. In effect, Pingree claimed he had been coerced into accepting the business settlements.

On appeal, Pingree's counsel in their brief contended as to Pingree that:

> ". . . at the time he signed these contracts he was so environed, so circumstanced in financial matters that he was compelled on

account of the threats that were made against him, to sign the contracts in controversy, and that if it had not been for this environment and these threats he never would have signed them."

The Court held there was no sufficient duress shown to make out a prima facie case, although the threats were receivership and financial injury to the corporation and financial injury and criminal prosecution for Pingree. The Court stated:

> "This statement is made so often and in so many ways, that there is no room for doubt that it was not fear of imprisonment or loss of liberty, or of any personal injury, violence, or harm that induced Mr. Pingree to sign the contracts. He, however, said that what he was afraid of was that complaints against him might affect his credit and might hurt the credit of the institutions with which he was connected, namely, the various banks."

The Court concluded:

> "In our judgment the district court was clearly right in holding that under Mr. Pingree's own statements he utterly failed to establish duress as that term is understood and applied by the courts."

Thus, Utah follows the rule that mere threat of business injury, even when coupled with a threat of criminal prosecution will not give rise to a cause of action. This is the general rule. Restatement, CONTRACTS, Section 493 Illus. 15: Williston, CONTRACTS, Rev. Ed. Section 1608.

The appellant cannot, by calling money "Prop-

erty", prevail in any sense. First, because the historical setting of the law of duress amply sustains the contention that duress of property, meant chattels owned by the person claiming duress. 1 Blackstone, COMMENTARIES 131; *Berger v. Bonnell Motor Co.*, 4 N.J. Misc. 589, 133 Atl. 778; *Cobb v. Charter*, 32 Conn. 350 (1865); *Cowley v. Fabien*, 204 N.Y. 566, 97 N.E. 458 (1912); Woodward, QUASI CONTRACTS, Section 216; Dawson, supra, 45 Mich. L. Rev. 253, 254 (1947). Second, the appellant did not own anything; it may or may not have been entitled to money, but if so, it arose by contract and appellant only had right to recover if he could show a right under the contract. Under each insurance contract, appellant bore the burden of proof, and no set sum was payable. Clearly therefore, appellant's attempt to bring itself within the "duress of property" rule is erroneous. Finally, the Courts have consistently ruled a threat not to pay a contractual demand is not economic duress. This is hornbook law. Patterson, RESTITUTION, page 9 (1950):

> "By the weight of authority, threatened breach of contract is held not to be duress, the remedy for breach of contract being deemed adequate to relieve the promisee of coercion."

See *Goebel v. Linn*, 47 Mich. 489, 11 N.W. 284; *Cable v. Foley*, 45 Minn. 421, 47 N.W. 1135 (refusal to pay plaintiff money which he needed to pay employees).

As to point 4 of appellant's brief, relating to

borrowing money, it has no basis in the record, but only goes to show that the economic difficulties of appellant were its own and not attributable to respondents.

As to point 5, the appellant indicates that a fact situation exists. This misapplies the question of whether the conduct was economic duress, which is a question of law. As noted in The Government Contractor, *supra*, page 6:

> ". . . whether the events and circumstances you allege as constituting duress really occurred—these are questions of fact.
>
> "Finding that such events did occur—do they spell 'economic duress'? This is a question of law."

See *Meyer v. Guardian Trust Co.*, 296 Fed. 789 (1924):

> "What constitutes duress is a matter of law."

The summary judgment admits the evidence that is now before the Court. The question, therefore, is does this amount to duress? This is a question of law which from the cases and authorities it clearly appears the trial court correctly ruled against the appellant.

POINT III
THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT.

The evidence was before the trial court, and it was a proper forum to rule on whether duress was present, or whether a tender should have been made. This being so, all other questions are irrelevant if

tender should have been made or if actionable duress was not present. Both of these questions, from what has been set out before, must be answered against the appellant. Indeed, the case of *Reliable Furniture Co. v. Fidelity Guaranty Ins. Underwriters, Inc.*, 14 Utah 2d 169, 380 P. 2d 135 (1963), where this Court sustained a motion for summary judgment, removing Fidelity from the case, would compel as much in this case.

The question of the agency of the alleged acting persons is rendered immaterial; however, it is enough to note that a pretrial, the appellant admitted that there was no evidence that Day had joint authority to serve both companies or joint duties. The only evidence is that a general agency agreement with Day's company had been entered into some years before. But, this is not enough to show agency to act in this case, but is merely the right to sell or issue policies and otherwise act as a general insurance agent.

The posture of the case was properly one for summary judgment; *Dupler v. Yates*, 10 Utah 2d 251, 351 P. 2d 624 (1960), and this Court should affirm.

CONCLUSION

The appellant has raised several points, but few issues, on appeal. Most of the appellant's contentions are unsupported by the record, and therefore afford no means by which this Court could review the

claimed error. What is before this Court is the failure of the appellant to tender return of the money which was the subject of the alleged duress compromise. In the absence of a return or proper tender, the instant action was properly dismissed. Additionally, the trial court correctly ruled that the fact situation before it did not constitute economic duress. This being the legal basis of the appellant's claim for relief, the trial court correctly granted summary judgment. This Court should affirm.

Respectfully submitted,

REX J. HANSON
515 Kearns Building
Salt Lake City, Utah
Attorney for
Defendants-Respondents