1966

Richard Nolan Jardine v. Brunswick Corporation : Reply Brief of Appellant

IN THE SUPREME COURT
of the
STATE OF UTAH

RICHARD NOLAN JARDINE,
Plaintiff-Respondent,

- vs. -

BRUNSWICK CORPORATION,
Defendant-Appellant.

Case No.
10631

REPLY BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE BRYANT H. CROFT, JUDGE

BRAYTON, LOWE & HURLEY
JOHN W. LOWE
1001 Walker Bank Building
Salt Lake City, Utah
Attorneys for Defendant-Appellant

RICHARDS, BIRD & HART
716 Newhouse Building
Salt Lake City, Utah
Attorneys for Plaintiff-Respondent

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CASES AND AUTHORITIES CITED

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1. STATEMENT OF FACTS

Plaintiff in his brief makes various statements which need correcting, at least as to the inferences which he seems to draw therefrom. They are as follows, the page reference being to plaintiff's brief:

Page 10: The quote in the brief inserts a comma after "man," which is not in the transcript, and states that the word "recognized" should be "recommended." The correct quote is as follows:

> "A. Well, they recognized this man said he would have the money on the 15th and they didn't need it until later, so I couldn't see any complication."

He was saying that Brunswick recognized that Charlesworth said he would have the money. He was not saying that Brunswick recommended someone.

Page 11: Tracy did not "direct" the size of the portion to be deeded to Compact. Jardine looked at plans Brunswick had prepared for comparable lanes, in determining the size of the building. (R. 236)

Page 12, 13 and 14: It is stated that after the building was completed Brunswick was going to finance Charlesworth on projects. The implication is that Brunswick had no such intent as to its own future action. There is no evidence as to what Brunswick intended as to future building.

Page 12: It is stated that Mrs. Young was under the impression that Charlesworth had built a good many buildings. The implication is that Brunswick stated that he had done so. The evidence is to the contrary. In answer to the question "Was anything said about the prior experience of Mr. Charlesworth in the bowling building business?" Mrs. Young said,

> "I don't believe there was anything else said about the prior experience but with them making the statement that he knew exactly how to build the building in order to house the Brunswick lanes and the remarks that were made in that way, I was under the impression he had built a good many of them." (R. 252)

Furthermore, the conclusion was Mrs. Young's, not Jardine's.

Page 12: It is stated that, when Charlesworth was arranging mortgage financing, Brunswick indicated that a loan investment group, in which some officers of

Brunswick were interested, would finance it. The statement was made after Jardine had made his loan on which he claims damages and therefore could not be the basis of liability here.

Page 13: It is stated that Compact's license was cancelled. The cancellation occurred after Jardine made his loan on which he claims damages, and after payments from Hill Field were not forthcoming.

2. DEFENDANT'S MOTION TO DISMISS SHOULD HAVE BEEN GRANTED:

(a) REPRESENTATION: It is argued at page 20 that "there is no evidence that he ever constructed a large building for anybody." The converse is true, that there is no evidence that he did *not* construct a large building for anybody. Consequently, Jardine has not shown that Charlesworth was inexperienced. The evidence, in fact, is to the contrary, that he had been in the construction business for fifteen years (R. 291) and that he then was building 15 to 20 houses on one job at Hill Field and had another job at Minot, North Dakota, (R. 211). A similar analysis can be made of the argument at page 20 that there is "no evidence that Brunswick knew of any building Charlesworth had constructed."

It is argued at page 20 that "Brunswick is charged with knowing that Charlesworth didn't have financing in late 1961," implying that Jardine didn't know that a mortgage loan on the ground would be needed, together with the money Compact had coming from Hill Field.

Charlesworth himself told Jardine immediately after the introduction that "he would have to get a mortgage on this ground," which would be needed together with money expected from the Hill Field project. (R. 209)

It is argued, at page 20, that there were 8 representations. We shall show under each of these "representations" that one or more of the requirements set forth in *Stuck vs. Delta Land & Water Company*, 63 U. 495, 227 P. 791, is missing.

"(1) Jack Charlesworth is president of Compact Building Company."

This could be a representation, and, technically, it was false because the corporation had not yet been formed. As indicated at page 24, Jardine has no direct evidence as to who became president, but it appears from Exhibit P 5 that Charlesworth took the office of secretary-treasurer instead of president. It was an immaterial representation, however, because Jardine ultimately dealt with the corporate entity. At the time of the introduction, no loan by Jardine was contemplated, so that any reliance could not have been in the manner reasonably contemplated. Jardine, however, knew, before he made any loans to Compact, that Charlesworth was secretary-treasurer as shown by Charlesworth's signing the agreement with Jardine relating to the advance of the down payment, as secretary-treasurer. (Ex. P 5) Consequently, there was neither reliance nor right to rely. Furthermore, any claimed injury was not the proximate result of this statement.

"(2) He could build these buildings."

and

"(3) He could finance these buildings."

These are discussed fully in our main brief, wherein one of the points discussed is that a "representation" cannot be based upon an expression of opinion. A recent decision by the Tenth Circuit Court involving a very similar attempt to impose liability upon Brunswick for an expression of opinion is *Weber v. Brunswick Corporation,* Case No. 8524, decided 17 November 1966 (not yet reported). There, Brunswick had made a survey of a community and stated to a prospective purchaser that the community would "support" a stated number of bowling alleys. The court cited and relied upon Wyoming cases holding that "statements of opinion and statements as to future events" cannot be the basis of liability for misrepresentation. Jardine is relying upon statements of that type.

"(4) There is nothing to worry about."

This is a matter of opinion rather than of fact. The statement was made at the initial introduction, long before any loan by Jardine was contemplated. It was not shown that at the time of the introduction there was anything to worry about. It has not been shown how the statement is material. Any reliance was not in the manner reasonably contemplated, because, at the time the statement was made, Compact, not Jardine, was to finance the building. Jardine had no right to rely on any such general comment, particularly after realizing

that Compact could not get financing and after being warned to protect himself.

"(5) Sign the slip giving Charlesworth 60 days to decide because everybody has to have time to decide to do a job that big."

This is advice, not a representation of fact. Therefore the requirements relating to falsity, materiality, knowledge of Brunswick or of Jardine cannot even be applied. Jardine makes quite a point of the fact that something was signed to give Compact time within which to decide whether or not to undertake the job. He described it as being an agreement whereby Jardine was bound by the agreement but Compact was not. (R. 135) If this be so, the agreement would fail because of lack of consideration. But, in any event, no damage flowed therefrom. The claimed damage arises not from having given Compact time to decide whether or not to take the job, but rather, from a subsequent loan financing the job.

"(6) Just prior to the advance of the first $9,000.00, Dinius said that Charlesworth 'knew exactly how to build the buildings in order to house the Brunswick lanes' and gave the 'impression he had built a good many of them.' "

As to the first phrase, Charlesworth had had 15 years experience. (R. 291) There is no evidence that Charlesworth did not know how to build the buildings. The statement therefore is not false. It is not material

because the failure to complete the building was not due to any lack of skill as a builder. There is no evidence of Brunswick's knowledge or lack of knowledge of Charlesworth's ability.

As to the second phrase, the argument that Brunswick gave the "impression that he had built a good many of them" is based upon Ida Young's testimony that *she* had that impression. Her "impression" is not competent evidence of any statement. Her testimony is quoted above at page 2. (R. 252) There was no representation of fact, therefore the requirements relating to falsity, etc., cannot be applied.

"(7) Tracy told Jardine that if anything went wrong there were other contractors he could get, implying that Brunswick would see to it."

This apparently is based upon the following statement:

> "Well, it was — it was ahead of my meeting with Charlesworth. But Harold told me if anything went wrong — there was any chance he couldn't build this building there were other contractors he could get." (R. 141)

It is a statement of opinion as to arrangements which could be made in the future and therefore cannot be a representation of fact. The statement was made prior to Jardine's being introduced to Charlesworth, when Jardine and Brunswick wanted to find an investor to build and lease to Jardine. The statement related to the availability of others if Charlesworth was not inter-

ested. It was not an agreement that if Charlesworth undertook to build, and partially completed the building, another contractor would be obtained to complete it. Furthermore, Jardine is not suing in contract. Elements of fraud such as falsity, etc., are lacking.

"(8) Dinius told Jardine that Charlesworth 'had a nice set up' at his Hill Field project."

This is strictly a matter of opinion and therefore not a representation of fact. So far as the record shows it was true when stated, although *ultimately* payments were not forthcoming from the Hill Field project. There is no evidence as to Brunswick's knowledge or lack thereof as to whether or not there was a "nice set up." Jardine took a look for himself and therefore did not rely thereon.

In addition to the analysis of the claimed eight "Representations," we have the following comments relating to various assertions in plaintiff's brief:

At pages 24 and 25 it is asserted that Charlesworth's ability to complete and finance the building is proven false. It was proven false *after* any statement was made by Brunswick and *before* Jardine made any loan.

Cancellation of license occurred after any representation.

Inability to obtain financing occurred after any representation.

The mortgage for $5500 (Ex. P 12) was not part

of any financing plan but, rather, was a mortgage given to a lien claimaint in lieu of his filing a mechanic's lien.

The record at 297 does not reflect that Charlesworth told Dinius that things were not going well at Hill Field, as stated in plaintiff's brief at page 27.

(b) PLAINTIFF IS BARRED FROM RECOVERY BECAUSE OF A RELEASE EXECUTED BY HIM.

Plaintiff argues that the release by him of Compact did not have the effect of releasing Brunswick because:

(a) Brunswick was not a guarantor,

(b) Brunswick was not a co-obligor because (1) there was no obligation from Brunswick to plaintiff until the judgment against Brunswick, and (2) because Brunswick was not bound for the same performance as was Compact.

We shall discuss these points in order.

(a) The fact that Brunswick did not enter into an *agreement* whereby it guaranteed performance by Compact, should not be controlling. There is just as much, if not more reason to apply the rule, that the one secondarily liable is released by a release of the primary obligor, where the one secondarily liable did not expressly undertake, and therefore, did not expect to have any liability at all, but was, as a matter of law, liable. Brunswick, if it pays Jardine would be entitled to be indemnified by Compact, who borrowed and agreed to repay. As stated in Restatement Restitution, Par. 76,

> "A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity . . . ."
>
> See: *Hollywood Barbeque Co. v. Morse*, ... Mass. ...., 50 NE 2d 55.

It is in such situations that a release of the indemnitor releases the indemnitee.

The rule of discharge of the one secondarily liable by releasing the one ultimately liable is not limited to contract situations. The reason for the rule is just as applicable whether the secondary liability arises from contract, from the relationship of the parties or from a statute.

An example, where a release of one primarily liable is effective to release one whose secondary liability was created by contract, is a guaranty. Instances thereof are cited in our main brief.

An example, where secondary liability is created by the relationship of the parties, is the liability of a master for obligations of his servant. 35 Am. Jur. Master and Servant, par. 535. In a case wherein a negligent employee was released, and further action against the employing company was enjoined, the court applied the law of principal and surety, even though there was no suretyship *agreement*, because, *in effect*, the employer was in the position he would have been in had he agreed thereto. The court said:

> "The company was, in effect, the plaintiff's surety, and could therefore, recover over against him if compelled to pay damages for his negligence while he was acting as its agent within the scope of his authority. *Kramer v. Morgan,* 2 Cir. 85 F (2d) 96. See *Pittsley v. Allen,* Mass. 7 NE (2d) 442. It is a principle of law of suretyship that a release or covenant not to sue the person known by the covenantor to be the principal will discharge the surety. *Potter v. Green,* 6 Allen 442, 444. See 2 Williston on Contractors (Rev. ed.) s. 342; compare *Tobey v. Ellis,* 114 Mass. 120; See *Matheson v. O'Kane,* 211 Mass. 91, 94, 95, 97, 17 NE 638, 39 LRA (NS) 475, Ann Cas 1813B, 267. But such a covenant not to sue does not so operate where it contains an express reservation of the covenantor's rights against others. *Sohier v. Loring,* 6, Cush 537; *Hutchins v. Nichols,* 10 Cush 299. *Kenworth v. Sawyer,* 125 Mass 28. In the case at bar the covenant contained no such reservation."
>
> *Karcher v. Burbank,* 303 Mass. 303, 21 NE (2d) 542, 124 ALR 1292.

An example where secondary liability arises from statute is the liability of a city which, by statute, has the right to recover from an abutting owner any amount the city has to pay because of a defective sidewalk. A release of the one ultimately liable (the abutting owner) as a matter of law, releases the city. The reasoning is that otherwise, the city would be deprived of its right of reinbursement, just as Brunswick has been deprived of its right of reimbursement from Compact by virtue of the release.

Hillyer v. East Cleveland, 155 Ohio St. 552, 99 NE 2d 772. Annotation 20 ALR 2d 1044.

A plaintiff will not be permitted to realize the benefits of a compromise settlement with the one primarily responsible and then look to the one secondarily liable for further payment. If the primary obligor had not been released, he would otherwise have been required to indemnify the one secondarily liable.

Annotation 20 ALR 2d 1044;
45 Am. Jur. Release, par. 39;
Restatement Restitution, par. 76.

In *Barry v. Keeler,* 322 Mass. 114, 76 NE 2d 158, plaintiffs, injured in an automobile accident, sued the driver and his employer. The amount of the judgment against the driver was held to be the maximum that could be recovered against the employer. The court said:

> "The reason for the rule is this. The indemnitee is in effect a surety of the indemnitor, and, to the extent that the latter's wrongful conduct has subjected him to liability to a third person, he is entitled to be indemnified. Restatement: Restitution, s. 96. . . . But inasmuch as the right of the surety to indemnification is derivative, it can rise no higher than that of the third person in whose right he sues. *Kramer v. Morgan*, 2 Cir., 85 F 2d 96. Thus it is considered unfair to the indemnitee to permit a recovery against him in excess of that which he could recover over against the indemnitor. Restatement: Judgments, par. 96, commented."

Applying this to our case, Jardine could not recover from Compact after having given it a release, and Bruns-

wick's liability "can rise no higher" than that of Compact.

In *Globe Indemnity Co. v. Woburn National Bank*, 133 F. Supp. 833, an adjuster, Cushing, cashed drafts of plaintiff insurance company at defendant's bank. The drafts were for fictitious claims. Plaintiff stated to the judge, in the adjuster's criminal trial, that it would settle its civil claim against the adjuster. Plaintiff then sued the bank for negligently failing to detect that the drafts were fraudulent. The action was dismissed. The court said:

> "Since if defendant bank were in the instant action required to pay a judgment to plaintiff insurance company, defendant bank would have a right to indemnification from Cushing, plaintiff is barred from procuring judgment in this action. . . . In short, if one gives a promise not to hold another liable he discharges himself from procuring judgment not only from that other, but from anyone else standing in the relation of an indemnitee to that other."

(b) (1) Plaintiff's argument that there was no relationship of co-obligor because there was in fact no obligation from Brunswick to plaintiff until the judgment and that the release was executed before judgment, therefore there was no release of a co-obligor, cannot stand analysis. If there was no obligation from Brunswick to plaintiff prior to the judgment, there was nothing upon which to base a judgment. A judgment, of necessity, is based upon a pre-existing obligation, and is an adjudication thereof.

(b) (2) The Uniform Joint Obligations Act requires that the obligors be bound for the same *performance.* Plaintiff's argument that Compact's obligation was contractual and Brunswick's obligation was in tort, ignores the fact that the "obligations" need not be the same, but only the "performance." Plaintiff's claim against Brunswick is that he was damaged because of his loan to Compact, which was not repaid. Compact's "performance" would have eliminated all liability of Brunswick. If Brunswick ultimately has to pay, it will be paying the amount lost by plaintiff on his loan to Compact. Brunswick and Compact are thus several obligors.

Regardless of this, however, the effect of the release of Compact was to release Brunswick. The Uniform Joint Obligations Act has the effect of limiting the common law rule, that the release of one co-obligor releases the other, by permitting the one releasing to expressly reserve rights against the other obligor. Before the statute was enacted, the common law rule was, generally, that the release of one obligor released the other, regardless of expressed intention otherwise. 20 ALR 2d 1044 Thus, it does not help plaintiff to attempt to show that Brunswick and Compact are not co-obligors within the definition of the act, because if the situation is not covered by the Joint Obligations Act, the common law rule would be effective that the release of one primarily liable releases the one secondarily liable.

Hansen v. Collett, 79 Nev. 159, 380 P.2d 301, cited by plaintiff to the effect that the release of one causing

an original injury does not as a matter of law release a doctor from damages arising from his negligent treatment, is not analogous to this case. The doctor was liable only for the damages caused by his own subsequent negligence and would have had no right to reimbursement from the original wrongdoer; whereas, Compact was primarily liable for all of Jardine's loss. Furthermore, the *Hansen* case is admittedly an expression of a minority rule as to a doctor's liability.

Frieders v. Krier, 180 Wis. 430, 193 NW 77, 31 ALR 118, cited by plaintiff is inapplicable, because it was decided as a matter of construction of the wording of the release, which construction was that there was a release from tort liability, but not from contractual liability, to provide for a nephew in a will. It was not a case in which one primarily liable was released from an obligation that one secondarily liable was asked to pay, but rather a case in which a release was given to the predecessor of one against whom claim was later made, and it was a question of whether or not the releasor had intended to release his cause of action.

Bank of Verona v. Stewart, 223 Wis. 577, 270 NW 534, cited by plaintiff, is not in point. It involved the question of tolling a statute of limitations. The court was construing a statute which provided that payment by a "joint contractor" did *not* toll the statute "by reason only of any payment made by any other." The statute provided that *even if* the liability was joint, the statute was not tolled. *A fortiori*, if the liability was not joint the statute would not be tolled.

(c) ANALYSIS OF PLAINTIFF'S AUTHORITIES RE NEGLIGENT MISREPRESENTATIONS.

Plaintiff cites no authority which would support an award to him based on his eight alleged negligent "misrepresentations." An analysis of his citations follows:

Elder v. Clawson, 14 U. 2d 379, 383, 384 P.2d 802

This was a case wherein there was a fraudulent, not negligent, failure to disclose that the land sold was quarantined. The requisite elements of fraud were all clearly present.

H. W. Broaddus Co. v. Binkley, (Tex. App. 1932) 54 SW 2d 586.

Plaintiff's brief states that this involves a negligent misrepresentation. This is not so. It is a fraud case. It involves a misrepresentation of many "*facts* concerning the financial responsibility" as distinguished from opinion of financial responsibility, as shown by the following quotation:

> "Binkley asked about them; whether they were good tenants. Broaddus said they were all good tenants, that he had made the leases himself; he inquired why the doors of the Brownlee Laundry were closed. Broaddus said Brownlee had been sick, he was a good tenant; that he had investigated Brownlee and found he was a rich man, and you need not worry about him because he was not doing business; they were all A-1 good tenants because he had looked them all up and found them — their credit — in A-1 condition; that he had made the leases himself and knew the

> people; 'he had looked up every one of them and found them to be financially responsible. I asked him what he meant by good tenants and he said tenants that had been investigated and found to be responsible' and that they were paying their rent as it became due."

In fact there were other tenants.

Jardine has no such misrepresentations.

Clar v. Board of Trade of San Francisco, (Cal. App. 1958), 331 P.2d 89, 94.

There the purchaser of a bankrupt's stock of plumbing supplies was made based upon prices determined according to defendant by using a "current price book." Said book was not used. Liability was affirmed. This is distinguishable because: Liability is based upon California statutes; the seller knew that bids would be based upon the information given; the statement was false; the statement was of fact, not opinion. The court said that "representations of opinion are not generally actionable."

Courteen Seed Co. v. Hong Kong and Shanghai Bank, 245 NY 377, 157 NE 272, 273.

This is a case holding there was *no* fraud. A foreign Bank was held not liable for a negligent misrepresentation that a draft had been purchased under a letter of credit even though such representation induced plaintiff to accept goods.

Duncan v. Stoneham, 170 NE 571, 253 NY 183.

A broker selling his business to a successor stated to his customer that "*we have investigated* and believe them to be financially responsible and fully capable of carrying out any obligation they assume." Liability was imposed because in fact no investigation had been made.

Brunswick made no such statement.

Ellis v. Hale, 13 U.2d 279, 282, 373 P.2d 382.

The complaint alleged fraud in conveying lots in an unimproved subdivision. The complaint was dismissed, which was affirmed. The holding of the case is that *no* fraud is alleged by the complaint.

Freeman v. R. P. Harbaugh Co., (Minn. 1911), 130 N.W. 1110.

There were representations of *fact* as distinguished from opinion. The facts represented were that Graf owned 160 acres of land worth $40.00 per acre subject only to a $1400 mortgage and that there were no encumbrances on a thresher offered as security. In truth, Graf didn't even own the land and the defendant itself had a mortgage on the thresher which it had subsequently foreclosed.

Glanzer v. Shephard, 233 NY 236, 135 NE 275, 23 ALR 1425.

A public weigher was held liable to one relying upon the results of his weighing for a shortage in weight. This is really a case of careless weighing rather than a negligent misrepresentation. The court imposed liability be-

cause the weigher knew the buyer, in making payment, was relying on the weights, and the weigher intended that the results of his weighing be used in the contemplated transaction.

Granberg v. Turnham, 166 Cal. App. 2d 390, 333 P.2d 423 (1958).

In this case, the issue was whether or not a contributory negligence plea could be added after the trial of the case. The court held that it was properly denied by the trial court within its discretion.

International Products Co. v. Erie R. Co., 244 NY 331, 155 NE 662, 663.

The owner asked the railroad where it had stored goods on its dock, *stating that the information was necessary to obtain insurance.* The railroad stated that the goods were stored on the wrong dock which invalidated the owner's insurance. The court held that there was liability because of these factors:

> ". . . the inquiry was made by him with whom it was dealing for the purpose, as it knew, of obtaining insurance, the realization that the information it gave was to be relied upon, and that if false the insurance obtained would be worthless. We have an inquiry . . . made of one who alone knew the truth."

This is distinguishable because there the claimant specifically requested the information, stated the reason it was needed and relied upon it in the manner in which he stated he was going to rely upon it. The means of

knowledge were peculiarly defendant's. It was a representation of fact, not opinion. It was false.
Murray v. Lamb, 174 Ore. 239, 148 P.2d 797, 801.

One making a donation to build a basilica did so on the basis that the money would be repaid when a millionaire made a donation which was expected shortly. The court reversed a dismissal of the action because the representations did, as they "must, amount to more than a mere expression of opinion." There the specific representation of facts, all untrue, were that the millionaire had great wealth, was of the British Royal Family, his wife, a Duchess, was to be coronated; he was solvent; had good credit; had grants in Canada and London; had oil leases and concessions in Nicaragua, had many millions, a townsite in Sidney and was willing to advance $250,000. We agree there was fraud there.

Nelson v. Union Wire Rope Corporation, 39 Ill. App. 2d 73, 187 NE 2d 425, 446-453 reversed at 199 NE 2d 769, 773-779.

This case involves the liability of one acting gratuitously in a situation "which if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons."

It is therefore inapplicable.
Pattridge v. Youmans, 107 Colo. 122, 109 P.2d 646, 648.

The seller of a lot said he owned a particular lot, pointing it out to the buyer. The lot belonged to another. The contract of sale specifically provided that the buyer

was going to build a house thereon. The court affirmed liability saying that the representation of ownership was as of his own knowledge.

This is distinguishable because Brunswick did not state anything of its own knowledge nor indicate that investigation had been made by it. The Pattrdige court distinguished a case in which plaintiff "was advised by vendor to make his own investigation, which he did to some extent. This substantially weakens her testimony of full reliance." Jardine was told to protect himself. *Swanson v. Solomon,* 50 Wash. 2d, 825, 314 P.2d 655, 657.

The seller of land falsely stated that there was room between his house and the lot boundary for a path, whereas the house was partly on a public way. The elements of fraud were found to exist. No such representation of fact was made to Jardine.

Jardine cites the Restatement of Torts 2d, 12th Tentative Draft, Section 552. If it is adopted in its present form it is authority that Jardine could not recover. The illustrations cited and the analysis thereafter show that if there be liability for a negligent misrepresentation, which in itself is a recent development, the liability is not so broad as for an intentional misrepresentation, nor is it so broad where financial and not physical harm is involved. The loss must be incurred in the type of transaction contemplated when the representation was made. The draft provides as follows:

"Illustrations:

8. A, a title insurance company, negligently prepares an abstract of the title to B's land, which shows that B has good title, although his title is in fact defective. A knows that B intends to exhibit the abstract to C Bank, as a basis for applying for a loan secured by a mortgage on the land. In reliance upon the abstract, C Bank buys the land from B for use as a parking lot, and as a result suffers pecuniary loss. A is not liable to C Bank.

9. A, a certified public accountant, negligently certifies a balance sheet for B Corporation, which shows it to be in a favorable financial condition, although it is in fact insolvent. A knows that B corporation intends to exhibit the balance sheet to C Corporation, as a basis for applying for credit for the purchase of goods. In reliance upon the balance sheet, C Corporation buys the controlling interest in the stock of B Corporation, and as a result suffers pecuniary loss. A is not liable to C Corporation.

10. The same facts as in Illustration 9, except that A expects that C Corporation will be asked to extend credit for the purchase of washing machines, and credit is extended instead for the purchase of electric refrigerators. A is subject to liability to C Corporation.

j. Comparison with other Sections. Where a misrepresentation creates a risk of physical harm to the person, land or chattels of others, the liability of the maker extends, under the rules stated in §§ 310 and 311, to any person to whom he should expect physical harm to result through action taken in reliance upon it. Where a misrepresentation is fraudulent, and results in pecuniary loss, the liability of the maker extends, under the

rule stated in §531, to any of the general class of persons whom he intends or has reason to expect to act in reliance upon it, and to loss suffered by them in any of the general type of transactions in which he intends or should expect their conduct to be influenced.

Under the rule stated in Subsection (2) of this Section, where the misrepresentation is merely negligent and results in pecuniary loss, the scope of the liability is somewhat more narrow. The maker of the negligent misrepresentation is subject to liability only to those persons for whose guidance he knows the information to be supplied, and to them only for loss incurred in the kind of transaction in which it is intended to influence them."

3. CONCLUSION

The judgment should be reversed.

Respectfully submitted,

BRAYTON, LOWE & HURLEY
By JOHN W. LOWE