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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES D. CONDER,	:	
	:	
Plaintiff and	:	
Appellant,	:	
	:	
vs.	:	
	:	
A.L. WILLIAMS & ASSOCIATES,	:	Case No. 20297
INC., a Georgia corporation;	:	
MASSACHUSETTS INDEMNITY AND	:	
LIFE INSURANCE COMPANY, a	:	
Massachusetts corporation;	:	
and BRYCE D. PETERSON,	:	
	:	
Defendants and	:	
Appellants.	:	

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Third District Court
Salt Lake County, The Hon. Scott Daniels, Judge

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PARTIES TO THIS PROCEEDING

Plaintiff and
Appellant:

JAMES D. CONDER
(Hereinafter, "Conder")

Defendants and
Respondents:

A.L. WILLIAMS & ASSOCIATES,
INC., a Georgia corporation,
(hereinafter, "A.L. Williams")

MASSACHUSETTS INDEMNITY AND
LIFE INSURANCE COMPANY, a
Massachusetts corporation,
(hereinafter, "MILICO")

Defendant:

BRYCE D. PETERSON
(Mr. Peterson did not join
in the motion in the lower
court and is not a party
to this Appeal.)

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ISSUES PRESENTED FOR REVIEW

1. Whether the admissible evidence before the court below was sufficient to establish genuine issues of material fact which would preclude summary judgment as a matter of law.

2. Whether Conder was permitted under Utah law to affirm an employment contract upon learning of the fraud and misrepresentation which induced him to enter into said contract, and pursue his remedy in damages.

3. Whether Conder was required to rescind said contract in order to mitigate his damages.

STATEMENT OF THE CASE

Conder stands on his Statement of the Case set forth in his primary brief.

STATEMENT OF FACTS

Conder stands on his Statement of Facts as set forth in his primary brief.

SUMMARY OF ARGUMENTS

1. Conder's reliance on the fraudulent misrepresentations of A.L. Williams and MILICO was reasonable at the time he was induced to act thereon. The requirements of a prima facie case in fraud are that a person reasonably rely on a misrepresentation and then be induced to act to his injury. Such a case does not depend upon the

reasonableness, or lack thereof, of his acts after learning of the falsity of the statements which induced him to act.

2. The doctrine of avoidable consequences is misapplied at this stage of the proceedings. The issue of damages has not been considered by the court and is a question of fact to be determined by the trier of facts. The doctrine of avoidable consequences is inappropriate to determine whether, as a matter of law, partial summary judgment should be granted.

3. Matters not before the trial court should not be considered on appeal. Deposition testimony, not published in the court below, was not considered by it, and should not be considered on appeal. This issue was disposed of by order of this Court, dated February 19, 1985.

ARGUMENT

POINT I

CONDER'S RELIANCE ON THE FRAUDULENT
MISREPRESENTATIONS OF A.L. WILLIAMS
AND MILICO WAS REASONABLE AT THE TIME
HE WAS INDUCED TO ACT THEREON

A.L. Williams and MILICO argue that Conder's reliance on their fraudulent misrepresentations became unreasonable after he learned of the falsity of the misrepresentations. (Brief, pp. 6,9) By doing so, they concede

that the statements were made and that they were fraudulent and false. More important to the issues on appeal, that argument confuses the requirements for a prima facie case in fraud and misrepresentation with the remedies available to the victims thereof.

Mikkelson v. Quail Valley Realty, 641 P.2d 124 (Utah 1982), citing Pace v. Parrish, 122 Utah 141, 247 P.2d 273 (1952), sets forth the elements of a prima facie case for fraud which have prevailed for years. In that case, this Court said,

To maintain a cause of action for fraud the person must prove by clear and convincing evidence the existence of each of the following elements:

. . .
(6)that the . . .[victim], acting reasonably and in ignorance of its falsity; (7)did in fact rely upon it; (8)and was thereby induced to act; (9)to his injury and damage.

The victim must reasonably rely on a misrepresentation and be induced thereby to act to his damage. That had already occurred when Conder finally learned of the fraud. (R512 ¶10) It is a misapplication of the elements set forth in Mikkelson and Pace to argue that the question of reasonableness can apply after the act occurs which was induced by Conder's reliance on the fraudulent misrepresentations of A.L. Williams and MILICO.

A.L. Williams and MILICO also argue, (Brief,

pp. 7-9) that Conder should have known at the time of signing his Agent Agreement with MILICO that he would only be selling insurance, contrary to what he had been told. This selective view of the facts is not supported by the evidence and gives a distorted view of the picture presented to potential recruits of A.L. Williams and MILICO.

Insurance was only one "side of the house" that was touted by A.L. Williams and MILICO and their representatives. They also claimed to have a "real estate" and an "investment side of the house." (R511 ¶3) By signing the Agent Agreement, Conder believed he was fulfilling the requirements to get started in the "insurance side" of the house. He subsequently asked about his training in real estate and investments but he was "put off, being told that they would get into it later." (R512 ¶9) Signing an Agent Agreement to allow him to get started in insurance did not put Conder on notice that he would not be getting into the real estate and investment business as well, especially in light of the continuing assurances that they would get into it later.

The cases cited by A.L. Williams and MILICO in support of their position, (Brief, pp. 7-8) all hold that where a person has information in his possession to refute the false representations he has received, he

cannot reasonably say he relied upon the misrepresentations. In this case, Conder does not deny that he knew that he was going to be involved with insurance. However, the insurance Agent Agreement did not reveal that he would not be engaged in the other areas of asset management and investment counseling as he had been assured he would be.

The facts before the court below show that, when Conder left his former employment and went to work for A.L. Williams and MILICO, he had no reason to believe that they were misrepresenting to him the nature of their authority to conduct business, and his reliance upon said misrepresentations was reasonable under the circumstances.

POINT II

THE DOCTRINE OF AVOIDABLE CONSEQUENCES IS MISAPPLIED AT THIS STAGE OF THE PROCEEDINGS

A.L. Williams and MILICO next invoke the avoidable consequences doctrine to claim that Conder did not mitigate his damages after learning of the fraud by seeking employment elsewhere. Conder contends that even if that doctrine were applicable, it would not justify the granting below of the Motion for Summary Judgment. Whether he had properly mitigated his damages would have to be a question of fact to be determined by the trier of fact.

A.L. Williams and MILICO assume that the only way to mitigate damages in this case would be for Conder to quit his employment. Such a solution would have been highly questionable during the period of economic recession and relatively high unemployment that prevailed at the time. More important, the doctrine relates to the amount of damages that may be awarded if a prima facie case is proved. It cannot be invoked to destroy a prima facie case.

Conder believes that his actions, after learning of the fraud, fall within the rule of Dugan v. Jones, 615 P.2d 1239, 1247 (Utah 1980), relating to the remedies available to the victims of fraud:

The plaintiff in an action for fraud has the option to elect to rescind the transaction and recover the purchase price or to affirm the transaction and recover damages. The choice of remedy belongs to the victim of the fraud, and a choice cannot be forced upon him.

By not leaving A.L. Williams and MILICO upon learning of the fraud, Conder was exercising his option to affirm the contract as permitted by Dugan, supra. A.L. Williams and MILICO would have limited Conder to rescinding the contract by requiring him to leave the position he held with them. However, the choice belongs to the victim of the fraud, as noted in Dugan, not the perpetrator thereof.

POINT III

MATTERS NOT BEFORE THE TRIAL COURT
SHOULD NOT BE CONSIDERED ON APPEAL

Points III, IV and V of the Brief of Respondent, pp. 11-16, attempt to revive the issue disposed of by this Court upon the Motion of A.L. Williams and MILICO to Supplement the Record at the hearing thereon held by this Court on February 19, 1985. Said Motion was denied by Order dated the same day.

A.L. Williams and MILICO again claim that Conder is raising an objection to the deposition testimony for the first time on appeal, and assert that Conder argues that Judge Daniels erred by relying upon deposition testimony in granting partial summary judgment. That is incorrect. No such argument has been made. Judge Daniels did not rely upon the deposition testimony of Conder for his decision because it was not properly before him.

Conder simply mentioned the issue in his Introduction to his Statement of Law while setting forth the standards which are followed in considering an appeal of a summary judgment. His argument on the substantive issues then followed.

Conder did not object to the statements made in the Memorandum filed by A.L. Williams and MILICO because the Memorandum, being the statement of counsel, was not

evidence. No objections were interposed by Conder to the admission of evidence at that hearing because no evidence was offered by A.L. Williams and MILICO.

The argument is made that Conder waived his right to object to the use of the deposition testimony by citing from the deposition himself. This argument fails and would have failed had it been raised by Conder in an attempt to have the Court consider the matters he quoted. In Thompson v. Ford Motor Co., 14 Utah 2d 334, 384 P.2d 109 (1963), both parties cited from the depositions in their briefs, although the deposition remained sealed and had never been seen by the lower court or this Court. In a footnote to its decision, this Court noted that the correctness of the deposition copies used by the parties was not known. That point is well taken. Since the deposition of Mr. Conder remained in the sealed envelope in the clerk's office during the entire proceeding below, there is no way to check the accuracy of the citations or the context in which they are found.

Conder did not attempt to establish his entire case in the proceeding below on the Motion for Summary Judgment. It was only incumbent upon him to establish that there were genuine issues of material fact and that A.L. Williams and MILICO were not entitled to judgment

as a matter of law. He cited the depositions in his argument because A.L. Williams and MILICO had done so, but he also introduced evidence in the form of affidavits and sworn answers to interrogatories in support of his position. The statements in the depositions, cited by both parties, would also have established clearly that there were genuine issues of material fact had they been introduced, but since they were not, that determination must be made by whatever was, in fact, properly before the court.

The decision of this Court in denying the Motion of A.L. Williams and MILICO to Supplement the Record with Conder's depositions, entered on February 19, 1985, was correct.

CONCLUSION

Conder respectfully requests, based upon the foregoing and his primary brief, that this Court set aside the Partial Summary Judgment entered by the court below and remand the case for trial.

DATED this 27th day of March, 1985.

RESPECTFULLY SUBMITTED,



Dennis L. Wright
Attorney for Appellant

CERTIFICATE OF DELIVERY

I hereby certify that I hand delivered four true and correct copies of the foregoing APPELLANT'S REPLY BRIEF on this 27th day of March, 1985, to:

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