

No. S207172

JAN -7 2013

Frank A. McGuire Clerk

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA Deputy

HARTFORD CASUALTY INSURANCE COMPANY,

Plaintiff and Respondent,

v.

**SWIFT DISTRIBUTION, INC. DBA ULTIMATE SUPPORT
SYSTEMS; MICHAEL BELITZ; ROBIN SLATON,**

Defendants and Appellants.

REPLY TO PETITION FOR REVIEW

After a Decision By the Court of Appeal, Second Appellate District,
Division Three, Case No. B234234, from
Los Angeles County Superior Court, Case No. BC442537
The Honorable Debre K. Weintraub

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Swift Distribution, Inc. DBA Ultimate Support
Systems; Michael Belitz; and Robin Slaton

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I. INTRODUCTION

Without this Court's granting the Petition for Review, the applicable law regarding disparagement pertaining to insurance policies cannot be determined.

The Respondent¹ would have this Court believe that the Court of Appeal's decision in the underlying *Hartford* Action and the holding in *Travelers Prop. Cas. Co. of Am. v. Charlotte Russe Holding*, 207 Cal. App. 4th 969 (2012) are "reconcilable" (Resp't Answer to Pet. For Review at 1, Dec. 28, 2012); however, as discussed below, it is wrong for Respondent to assert the holdings are consistent when the Court of Appeal expressly states that *Charlotte Russe* "has no objectively reasonable basis."²

Furthermore, the Court of Appeal invited review by this Court by finding that there was not an express or implied reference to the claimant's disparaged product, even after both parties expressly acknowledged the implied reference was present. Respondent conveniently fails to address its admission regarding the implied reference.

The Court of Appeal's decision, in stating that disparagement cannot be found unless there is an express reference to a claimant's product, is

¹ Hartford Casualty Insurance Company ("Hartford" or "Respondent") and Swift Distribution, Inc. d.b.a. Ultimate Support Systems, Michael Belitz, and Robin Slaton (collectively "Ultimate" or "Appellants").

² "*Charlotte Russe* held that the allegations in the complaint could be reasonably be interpreted to allege that the insured retailer disparaged the People's Liberation brand, and that the advertising injury provision of an insurance policy provided coverage of, and the insurer had a duty to defend the insured against, this claim of disparagement. (*Id.* at p. 981.) We disagree. As discussed below, we believe such a conclusion has no objectively reasonable basis." *Infra* Swift Distribution, 210 Cal. App. 4th at 924.

contrary to California coverage law, which holds that for duty to defend purposes, the complaint and/or extrinsic evidence need not make specific references to the disparaged party, and that disparagement by reasonable implication is enough to trigger an insurer's duty to defend.

This Court should grant review to settle the clear conflicts derived from the Court of Appeal's holding that directly opposes the *Charlotte Russe* holding and to ensure courts do not have the ability to ignore evidentiary admissions by both parties to reach an unfounded holding.

II. DISCUSSION

A. Ultimate Has Provided Sufficient Basis for this Court's Granting of Review

As outlined in more detail in Ultimate's Petition for Review, and contrary to Hartford's unsupported assertions, sufficient basis exists for this Court's review of the Court of Appeal's decision styled as: *Hartford Cas. Ins. Co. v. Swift Distribution, Inc.*, 210 Cal. App. 4th 915 (2012) (the "*Hartford Action*").

California Rules of Court Rule 8.500(b)(1) states that this Supreme Court may order review of a Court of Appeal decision "when necessary to secure uniformity of decision or to settle an important question of law." The present case satisfies both grounds for review.

Recently, the Court of Appeal in the case *Charlotte Russe*, held that mere price discounting of a product is sufficient to trigger coverage under the disparagement offense of general liability policies. *Charlotte Russe*, 207 Cal. App. 4th 969. In *Charlotte Russe*, there was no comparison of the products at issue with a competitor or any explicit false or derogatory statements about the products at issue. *Id.* By finding that unauthorized

discounting of premium goods by a retailer can be potentially covered disparagement on the facts of that case, the Court of Appeal clarified what constitutes disparagement, and if the Court in the *Hartford* Action had followed the *Charlotte Russe* Court's holding, it would have easily found coverage under the disparagement offense in that case.

Nonetheless, the Court in the *Hartford* Action made it clear that it found the *Charlotte Russe* Court had applied illogical reasoning in finding that that a retailer selling premium clothing at discounted prices had disparaged the premium clothing's brand or reputation. *Swift Distribution, Inc.*, 210 Cal. App. 4th at 924. For Hartford to claim that the Court's "philosophical disagreement with the *Charlotte Russe* outcome was irrelevant to the actual decision in this case" is wrong. Resp't Answer to Pet. For Review at 6, Dec. 28, 2012.

The crux of Hartford's argument is that the *Charlotte Russe* decision and the decision in the *Hartford* Action are inconsistent because the facts are not the same. This is a very weak argument, as no two cases have identical facts; however, the legal principles applied to the facts must conform. Review by this Court is necessary to secure uniformity of decision and to clarify for both insurers and policyholders when coverage is triggered under the disparagement offense.

B. The Appellate Court's Holding is Inconsistent with Clear Precedent that, if Applied, Would Have Resulted in a Different Outcome

The Court in the *Hartford* Action held that Ultimate cannot recover, because it did not publish a disparaging statement. *Swift Distribution, Inc.*, 210 Cal. App. 4th at 924. The Court stated:

Even if the use of “Ulti-Cart” could reasonably imply a reference to “Multi-Cart,” however, Ultimate’s advertisement contained no disparagement of “Multi-Cart.” As stated, disparagement involves “an injurious falsehood directed at the organization or products, goods, or services of another . . .” (Atlantic Mutual, *supra*, 100 Cal.App.4th at p. 1035.) The injurious falsehood or disparagement may consist of matter derogatory to the plaintiff’s title to his property, its quality, or to his business in general. (*Ibid.*) The advertisements for the “Ulti-Cart” did not include any of these derogations. Ultimate’s advertisements referred only to its own product, the Ulti-Cart, and did not refer to or disparage Dahl’s Multi-Cart.

Id.

This conclusion is contrary to California law and the facts of this case. As both the Dahl Complaint and the evidence submitted in support of the Complaint clearly show that Ultimate references its “Ulti-Cart” as a “patent-pending” product from “the leading innovator of **unique** music accessories.” (bold provided) Joint Appendix on Appeal (“JA”) Vol. 2, Ex. 11, 322. Ultimate was unequivocally asserting its “Ulti-Cart” was purportedly designed, manufactured and distributed solely by Ultimate. Consequently, Ultimate is necessarily implying that all other similar carts are inferior imitations, which undoubtedly qualifies as an implied disparaging statement against Dahl’s “Multi-Cart.”

Contrary to Hartford’s contentions (Resp’t Answer to Pet. For Review at 6, Dec. 28, 2012), Dahl did not only allege that it was being harmed by Ultimate’s copying of Dahl’s purportedly patented “Multi-Cart,” but, as discussed below, Dahl also repeatedly expressed that it was being harmed by Ultimate’s implication in Ultimate’s advertisements that Ultimate, and not Dahl, was the true owner of the rights to the cart, which

Dahl purportedly had the sole right to manufacture and distribute at that time. JA Vol. 1, Ex. 11, 252. Thus, Hartford's misguided attempt to compare this case to the facts of *Homedics, Inc. v. Valley Forge Ins. Co.*, 315 F.3d 1135, (9th Cir. 2003) is futile. In *Homedics*, the Court held that the mere copying of a product was insufficient to support a finding of disparagement (*Id.*); however, the Dahl Complaint alleges the implications in Ultimate's advertisements were injurious falsehoods causing damages beyond the allegations of copying of Dahl's product, which were additionally alleged. JA Vol. 1, Ex. 11, 252-53.

The Court of Appeal reasoned that Dahl needed to specifically allege Ultimate's publications disparaged Dahl's product in order to trigger Hartford's defense obligations to Ultimate, stating:

Because Dahl did not allege that Ultimate's publication disparaged Dahl's organization, products, goods, or services, Dahl was precluded from recovery on a disparagement theory. (*Nichols v. Great American Ins. Companies* (1985) 169 Cal.App.3d 766, 774.) Thus Dahl alleged no claim for injurious false statement or disparagement that was potentially within the scope of the Hartford policy coverage for advertising injury.

Id.

Again, this is an inaccurate representation of the law and the facts and evidence presented to the Court of Appeal. Under California law, covered disparagement does not require a disparaging statement expressly naming the disparaged party or its product; implicit disparagement is sufficient to trigger coverage, which Hartford explicitly acknowledges. Resp't Answer to Pet. For Review at 8, Dec. 28, 2012. On August 24, 2010, Dahl responded to Ultimate's Second Set of Interrogatories in the *Dahl*

Action, declaring the following:

Defendants intended to mislead the public into believing that its products are the same as Dahl's, affiliated with the MULTI-CART brand products or otherwise authorized by or related to Dahl. Defendants' **advertising** was, and continues to be, **untrue and misleading** and likely to deceive the public in that **it appears therefrom that Defendants are the originator, designer, or are otherwise authorized to manufacture and distribute Defendants' Infringing Products** (Le., the "Ulti-Cart" carts, which name and cart design appear nearly identical to the "Multi-Cart" brand carts under Dahl's Mark), and further, that Defendants own the intellectual property underlying Defendants' Infringing Products and/or have the manufacturing rights to the patent and trademark-S protected Cart, all of which are untrue. . . .

JA Vol. 1, Ex. 11, 252-55. (bold provided)

This clearly shows Dahl alleged its business was being harmed by the disparaging statements implicitly contained in Ultimate's advertisements. It is unreasonable for either Hartford or the Court of Appeal to conclude that this is not an allegedly injurious falsehood, which triggers coverage.

Both Hartford and the Court of Appeal focus on the fact that Dahl alleged Ultimate had infringed upon Dahl's purported patent rights; however, both Hartford and the Court of Appeal fail to discuss Dahl's allegations that it was being harmed through the implications in Ultimate's advertisements that Dahl was producing inferior imitations. Hartford even boldly states that Dahl's Complaint makes no mention of an injurious falsehood in any manner (Resp't Answer to Pet. For Review at 7, Dec. 28, 2012) contrary to the explicit language referenced herein from Dahl's Complaint.

The Respondents would like this Court to believe that the implication was “drawn out of thin air” (*Id.* at 8), and erroneously compares it to the holding of *Total Call Internat v. Peerless Ins. Co.*, 181 Cal. App. 4th 161 (2010). *Total Call* does not stand for the proposition that coverage for “disparagement” is only available if there is a specific reference to the injured competitor. The Court in *Total Call* merely held that a phone card company’s false advertisements regarding its own cards’ number of minutes per dollar did not implicitly disparage the competitors’ phone cards. *Id.* at 169. In *Total Call*, the product at issue, phone cards, was not a specialty item that was only manufactured by two companies, as the “Ulti-Cart” and “Multi-Cart” products. In fact, in *Total Call*, the Court states that the phone card industry generates over \$2 billion in annual retail sales revenue by a number of companies. *Id.* at 168. It was not possible for the Court to find coverage for disparagement, because the underlying defendant falsely advertised its own product, and from that advertisement, it was not clear that it was claiming its product was better than a specific competitor, since that industry has a large number of competitors.

Here, Ultimate and Dahl are the only competitors in manufacturing and distributing this specific cart. Consequently, when Ultimate advertises a product that is similar to Dahl’s product in name, style, functionality, yet purportedly is of inferior quality, and all these factors combined result in confusion in the marketplace and loss of business by Dahl, it is evident that Ultimate’s advertisements implicitly reference Dahl’s products.

Dahl stated the “Defendants’ advertising was, and continues to be, **untrue and misleading.**” (bold provided) JA Vol. 1, Ex. 11, 111. Dahl went on to state in Count IV of its Complaint for “Unfair Competition

Under the Lanham Act – 15 U.S.C. § 1125(a)” that the misleading advertising would cause compensable damage, asserting that Ultimate’s advertisements were unlawful and **“all to the detriment and damage of Dahl’s reputation, goodwill and sales.”** (bold provided) JA Vol. 1, Ex. 11, 111-12. Thus, Dahl clearly and unambiguously alleged that beyond infringing any purported patent rights, Ultimate’s advertisements were injurious falsehoods that were causing damage to Dahl’s business, which undeniably qualifies as disparagement and triggers Hartford’s duty to defend Ultimate in the *Dahl* Action.

C. The Court of Appeal’s Rejection of the Analysis in *Charlotte Russe* Necessitates Review by This Court

Hartford admits that the Court of Appeal in the *Hartford* Action rejected the holding of *Charlotte Russe* decision, but would have this Court believe that said rejection was not “essential to its decision here.” Resp’t Answer to Pet. For Review at 10, Dec. 28, 2012. Hartford then backtracks and states that “the *Swift* Court disagreed with *Charlotte Russe*’s analysis of the facts of that case. . .” *Id.* Hartford’s characterization of the Court of Appeal’s handling of the *Charlotte Russe* decision is distorted. The Court of Appeal held that Ultimate was precluded from relying on *Charlotte Russe*, because the *Charlotte Russe* Court purportedly applied illogical reasoning in finding that a retailer’s unauthorized selling premium clothing at discounted prices had disparaged the premium clothing’s brand or reputation. *Swift Distribution*, 210 Cal. App. 4th at 924-926.

The Court of Appeal stated its disagreement with the logic in *Charlotte Russe* for a finding of disparagement, as follows:

In spite of the requirements that there be a publication (*Shanahan v. State Farm General Ins. Co.* (2011) 193 Cal.App.4th 780, 789) that specifically refers to the plaintiff (*Total Call Internat., Inc. v. Peerless Ins. Co.*, *supra*, 181 Cal.App.4th at p. 170), *Charlotte Russe* held that this reduced pricing was enough to constitute disparagement, which triggered the duty to defend. We fail to see how a reduction in price—even a steep reduction in price—constitutes disparagement.

...

[T]here was neither a publication nor a specific reference to the manufacturer's products. For these reasons, we reject the **analysis** of *Charlotte Russe*.

Swift Distribution, 210 Cal. App. 4th at 924-926. (bold provided)

Regardless of these bold claims made by the Court of Appeal in the *Hartford* Action, Hartford attempts to assert that the Court of Appeal is in no way attempting to reject *Charlotte Russe*, but rather the Court of Appeal is merely distinguishing it from the *Hartford* Action. Resp't Answer to Pet. For Review at 10-11, Dec. 28, 2012. This argument is inaccurate. The Appellate Court in the *Hartford* Action unmistakably held that *Charlotte Russe* was not good law and that the *Charlotte Russe* Appellate Court used a clearly erroneous standard in its finding of coverage for disparagement. *Swift Distribution*, 210 Cal. App. 4th at 924-926. The Court of Appeal stated:

More importantly, we disagree with the theory of disparagement apparently recognized in *Charlotte Russe*... For these reasons, we reject the analysis of *Charlotte Russe*.

Id.

Thus, Hartford's argument that the Court merely attempted to factually distinguish the cases is misleading, because the Court of Appeal did not

focus on the factual distinction. *Id.* The Court of Appeal focused on the analysis it believed the *Charlotte Russe* Court erroneously applied. *Id.* If the Court of Appeal in Hartford had agreed with and followed the reasoning in *Charlotte Russe*, it would have easily found in favor of Ultimate, because in *Charlotte Russe*, as in the *Hartford* Action, there was no specific reference to the competing product. The disparagement at issue was by implication.

When the Court of Appeal in the *Hartford* Action attacks the analysis of the *Charlotte Russe* holding, it renders Hartford's assertion that "one appellate panel" has simply "criticized another panel's characterization of the factual record" utterly inaccurate. Resp't Answer to Pet. For Review at 11, Dec. 28, 2012. The Court of Appeal in the *Hartford* Action could have limited its Opinion to distinguishing the cases based on a factual distinction; however, once the Court decided to focus primarily on the legal analysis, and did not dispute the factual record of *Charlotte Russe* as Hartford asserts (*Id.*), the Court of Appeal invited this Court to review its decision.

The Supreme Court's denial of the Petition for Review and Depublication of the *Charlotte Russe* holding implies that *Charlotte Russe* is valid law in California; however, the Appellate Court's ruling in the *Hartford* Action rejects clear precedent and diminishes the implication of the *Charlotte Russe* decision. *Swift Distribution*, 210 Cal. App. 4th at 924-926. Thus, there is now no uniformity of California law.

D. Contrary to Hartford's Assertion, This Case is About Implicit Disparagement

Hartford concedes that “implicit disparagement” triggers coverage; however, in Hartford’s Answer to the Petition for Review it asserts that Ultimate does not implicitly reference Dahl’s products in its advertisements. Resp’t Answer to Pet. For Review at 9, Dec. 28, 2012. Hartford conveniently fails to address its previously held position, where Hartford explicitly noted there was **only** an implied reference. In Hartford’s letter dated July 2, 2010, Hartford refused to defend Ultimate, because “as discussed above, there is no stated ‘comparison’ of the Ulti-Cart and the Multi-Cart **except by implication;**” [JA Vol. 2, Ex. 12, 543] (bold provided) however, the Appellate Court states:

As we have explained, the *Dahl* complaint did not allege that Ultimate disparaged Dahl’s products by implication [...] Ultimate’s advertisements did not disparage another’s product, either expressly or by implication.

Swift Distribution, 210 Cal. App. 4th at 927.

Thus, the Appellate Court’s conclusion is in direct opposition to both parties’ acknowledgement that Ultimate’s advertisements for the “Ulti-Cart” implicitly references Dahl’s “Multi-Cart.” *Id.*

Not only did Ultimate include the July 2, 2010 coverage denial letter in its Separate Statement of Undisputed Facts in Support of its Motion for Summary Judgment, but Hartford also included the letter in its Separate Statement of Undisputed Facts in Support of its Motion for Summary Judgment, which unambiguously reasserts its belief that Ultimate’s advertisements contain an implicit reference to Dahl’s product. JA Vol.1, Ex. 6, 81:¶22; JA Vol.3, Ex. 14, 656:¶24. Thus, by relying on its July 2,

2010 coverage denial letter throughout the Superior Court and Court of Appeal proceedings, Hartford has reasserted its original position that there is a comparison in Ultimate's advertisements of its "Ulti-Cart" to Dahl's "Multi-Cart," by implication, which is sufficient to trigger Hartford's defense obligations.

The Court of Appeal held that there was no finding of an implied disparagement that references Dahl's product, but could have been found if:

Ultimate's advertising falsely stated it was the only producer of a product with features also available on Dahl's "Multi-Cart;" that Ultimate's advertising suggested that its competitor's technology was behind that of Ultimate; or that Ultimate made false claims about the superiority of the Ulti-Cart which necessarily implied the inferiority of Dahl's competing product.

Swift Distribution, 210 Cal. App. 4th at 927.

While Dahl did not expressly make such allegations in its Complaint, an examination of the extrinsic evidence provided to Hartford regarding Ultimate's advertisements, clearly shows the criteria described above by the Court is satisfied. For example, Ultimate always described the technology, which was allegedly the same that the "Multi-Cart" possessed, as "patent-pending" technology, which would imply that Ultimate is asserting its "Ulti-Cart" contains new technology that it had sole access to utilize. JA Vol. 2, Ex. 11, 288. Ultimate goes on to describe its products as "**unique** support solution[s] that are crafted with **unparalleled innovation** and accompanied by **superior** customer service." (bold provided) JA Vol. 2, Ex. 11, 281. Dahl alleges that Ultimate has made statements in its advertising that Ultimate is the originator, designer or the authorized manufacturer and distributor of a cart that is nearly identical to Dahl's carts, when in fact Dahl is the originator, designer and patent holder of the cart at

issue. Dahl alleges injury due to Ultimate's products allegedly being inferior to Dahl's products and publications by Ultimate allegedly inferring its products are connected to Dahl's products.

As previously noted, Ultimate and Dahl are the only competitors manufacturing and distributing this specific cart, so when Ultimate advertises a product that is similar to Dahl's product in name, style, functionality, yet purportedly is of inferior quality, and all these factors combined result in confusion in the marketplace and loss of business by Dahl, it is evident that implicit disparagement is being alleged. The Court of Appeal sets out the criteria under which it would have found implicit disparagement, but then ignores the evidence which supports a finding of implicit disparagement under the Court's own criteria. Accordingly, the Court of Appeal has erred both in its application of the evidence presented and in its analysis of California law.

CONCLUSION

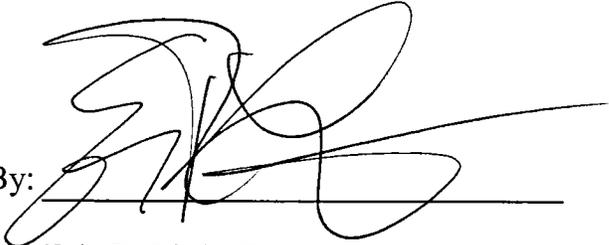
For all of the foregoing reasons, Ultimate respectfully requests that this Court grant review.

Respectfully submitted,

Dated: January 4, 2013

LITTLE REID & KARZAI, LLP

By: _____



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CERTIFICATE OF WORD COUNT
[Cal. Rules of Court, Rule 8.504(d)(1)]

The text of this brief consists of 3,417 words as counted by the Microsoft Word 2007 word-processing program used to generate this brief.

Dated: January 4, 2013

LITTLE REID & KARZAI, LLP

By:  _____

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PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the subject action. My business address is 3333 Michelson Dr., Ste. 310, Irvine, CA 92612.

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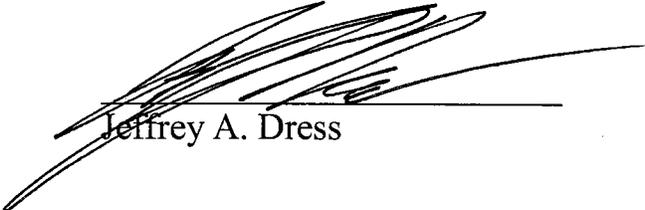
on the interested parties in this action as follows and by the method listed below:

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[BY USPS MAIL] I placed the original or a true copy of the foregoing document in a sealed envelope or package designated by USPS with delivery fees paid or provided for, individually addressed to each of the parties on the attached service list, and caused such envelope or package to be delivered at 3333 Michelson Dr., Suite 310, Irvine, CA 92612, to an authorized courier or driver authorized by USPS to receive documents.

[STATE] I declare under penalty of perjury, under the laws of the State of California and the United States of America, that the foregoing is true and correct.

Executed on January 4, 2013, at Irvine, California.


Jeffrey A. Dress