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Juanita J. Meyer v. General American Corporation
A Corporation, Paul J. Angelo v. William R.
Mccurtain : Brief of Respondent

Utah Supreme Court

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Jerry W. James; Attorneys for Respondent Richard J. Leedy; Attorney for Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

JUANITA J. MEYER,)
)
Plaintiff-Respondent,)
)
v.)
)
GENERAL AMERICAN CORPORATION,)
a Utah corporation, and)
PAUL J. ANGELOS,)
)
Defendants,)
)
v.)
)
WILLIAM R. MCCURTAIN,)
)
Intervenor-Appellant.)

BRIEF

Case No. 14805

BRIEF OF RESPONDENT

Appeal taken from the District Court of the
Third Judicial District in and for Salt Lake
County, State of Utah, Judge Peter F. Leary
presiding.

Jerry W. James
IRVINE SMITH & MABEY
225 South 200 East, Suite 100
Salt Lake City, Utah 84111
Attorneys for Plaintiff-Respondent

Richard J. Leedy
2795 Comanche Drive
Salt Lake City, Utah 84108
Attorney for Intervenor-Appellant

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MAR 15 1977

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IRVINE SMITH & MABEY
225 South 200 East, Suite 100
Salt Lake City, Utah 84111
Attorneys for Plaintiff-Respondent

Richard J. Leedy
2795 Comanche Drive
Salt Lake City, Utah 84108
Attorney for Intervenor-Appellant

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I. INTRODUCTION

On October 11, 1974, Respondent (hereinafter referred to as Plaintiff) caused a writ of attachment to be issued against one D-9 caterpillar in order to satisfy judgments previously obtained against Defendants General American Corporation (hereinafter referred to as GAC) and its President, Paul J. Angelos. Subsequently, Appellant (hereinafter referred to as Intervenor) moved to intervene in the present action--claiming that GAC had sold the aforementioned caterpillar to a Terra Corporation and that Terra Corporation had resold the caterpillar to Intervenor. Intervenor claims that he is a bona fide good faith purchaser of the caterpillar and that, therefore, Plaintiff wrongfully attached and levied on the caterpillar.

Plaintiff, on the other hand, claims that Utah Code Ann. § 25-1-15 (1953) establishes her right to attach the caterpillar and to execute on that attachment. It provides that:

Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person, except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase or one who has derived title immediately or mediately from such a purchaser:

- (1) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim; or,
- (2) Disregard the conveyance, and attach, or levy execution upon, the property conveyed.

Section 25-1-15, of course, presupposes the existence of a fraudulent conveyance under Utah Code Ann. § 25-1-4 (1953). However, the essence of a fraudulent conveyance under § 25-1-4 is the same "fair consideration" concept which provides the basis for determining whether Intervenor can qualify for the good faith purchaser exception under § 25-1-15. Therefore, discussion of § 25-1-4's requirements will serve to establish both the existence of a fraudulent conveyance under § 25-1-4 and the failure of Intervenor to qualify under the good faith purchaser exception of § 25-1-15.¹

II. SUBSTANTIAL EVIDENCE SUPPORTS THE LOWER COURT'S FINDING THAT GAC FRAUDULENTLY CONVEYED THE CATERPILLAR TO TERRA CORPORATION AND THAT INTERVENOR DID NOT PURCHASE THE CATERPILLAR FOR "FAIR CONSIDERATION" FROM TERRA CORPORATION.

A. Scope of Review. The question confronting the Court on this appeal:

... is whether the circumstances urged by the [Intervenor as mitigating against a finding of fraudulent conveyance] do so with such certainty that the [lower court] could not reasonably have believed the [Plaintiff's] evidence to the contrary It is to be borne in mind that in pursuing the duty of reviewing the evidence in a case in equity, this court makes considerable allowance for the advantaged position of the [lower court] in close proximity to the parties and the witnesses which provides [it] a better

¹Plaintiff does not dispute Intervenor's contention that an ownership interest takes precedence over an unperfected security interest in personal property. See Intervenor's Brief at 3-7. However, this contention is rendered moot by the lower court's ruling that GAC's conveyance of the caterpillar to Terra Corporation and Terra Corporation's resale of the caterpillar to Intervenor were fraudulent and, therefore, void as against Plaintiff.

basis for insight into the truthfulness of the testimony offered than is afforded by a review of the record. Givan v. Lambeth, 351 P.2d 959, 964 (Utah 1960).

It is primarily for these reasons that the Court should not reverse unless the evidence clearly preponderates against the lower court's findings. See Nelson v. Nelson, 513 P.2d 1011, 1013 (Utah 1973); Brimhall v. Grow, 480 P.2d 731, 734 (Utah 1971); and Givan v. Lambeth, 351 P.2d 959, 960 (Utah 1960).

B. The Evidence. Plaintiff prevailed in the lower court on her claim that GAC fraudulently conveyed the caterpillar to Terra Corporation and Intervenor in violation of Utah Code Ann. § 25-1-4 (1953) (see Findings of Fact and Conclusions of Law, R. 210-214). Section 25-1-4 provides that:

Every conveyance made, and every obligation incurred, by a person who is, or will be thereby rendered, insolvent is fraudulent as to creditors, without regard to his actual intent, if the conveyance is made or the obligation is incurred without a fair consideration.

Both the statute and case law interpreting the statute make it clear that subjective or actual intent to defraud are not elements of a fraudulent conveyance claim. See First Security Bank of Utah v. Vrontikis Bros., Inc., 490 P.2d 1301, 1302 (Utah 1971) and Ned J. Bowman v. White, 369 P.2d 962, 963 (Utah 1962). Plaintiff is obligated to show only (1) that she was a creditor of GAC; (2) that GAC was insolvent at the time the conveyance was made; and (3) that the conveyance was not made for a "fair consideration." This showing can be made "from the facts of each case and from the circumstances surrounding the transaction"
Id. Plaintiff submits that there is sufficient evidence in the record to make this showing.

(1) Creditor. A "creditor" is defined under the Utah Fraudulent Conveyances Act as follows: "... a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent." Utah Code Ann. § 25-1-1 (1953). Intervenor does not challenge Plaintiff's status as a GAC creditor (R. 234 Ls. 19-23). Moreover, the promissory note (Exhibit 19-P) executed by GAC in favor of Plaintiff adequately demonstrates that Plaintiff was a GAC creditor.

(2) Insolvency. The Utah Fraudulent Conveyances Act defines "insolvency" as follows:

A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to satisfy his probable liability on his existing debts as they become absolute and matured. Utah Code Ann. § 25-1-2 (1953).

GAC's insolvency at the time it conveyed the caterpillar to Terra Corporation is adequately reflected in the record on appeal.

First, Intervenor's own witness, Edward Coltharp, a stock broker who traded GAC stock, and a shareholder in GAC, testified that there was no market for GAC stock (R. 302). This market inactivity was one indication of GAC's failing financial condition.

Second, Plaintiff testified, without objection, that in February 1974 she loaned \$12,000.00 (Exhibit 19-P) to GAC because of GAC's inactive and insolvent condition (R. 318 Ls. 14-15). This condition is further reflected by the fact that GAC had no

filed annual reports with the Utah Secretary of State's office since 1971 and had not paid franchise taxes to the Utah State Tax Commission since 1970 and, therefore, these government agencies had revoked GAC's certificate of authority to do business in Utah (Affidavit of David S. Cook in Support of Motion to Dismiss Counter-Claim of GAC, R. 27).

Third, Plaintiff testified, without objection, that in the spring and summer of 1974 GAC failed to make any payments on her loan (R. 328 L. 30 and R. 329 Ls. 1-4). See Larrimer v. Feeney, 192 A.2d 351, 353 (Pa. 1963) ("Insolvency in the equity sense ... is the inability to meet obligations as they mature"). See also, Utah Code Ann. § 25-1-5 (1953).

Finally, Plaintiff testified that her examination of GAC records revealed that GAC liabilities exceeded GAC assets (R. 34 Ls. 14-29). Intervenor objects to the admission of this testimony, claiming that it violates the best evidence rule found at Utah Code Ann. § 78-25-16 (1953). See Intervenor's Brief at 9-10. Plaintiff has several observations with respect to this objection.

First, even without this testimony, as indicated above, there is sufficient credible evidence in the record to support the lower court's finding that GAC was insolvent at the time it conveyed the caterpillar to Terra Corporation; and this evidence was not contradicted by Intervenor at trial.

Second, both § 78-25-16 and Utah Rules of Evidence 70 make an exception to the best evidence principle "when the

original has been lost or destroyed, in which case proof of the loss or destruction must first be made." Utah Code Ann. § 78-25-16(1) (1953). This exception is consistent with the basic premise of the best evidence rule:

The production-of-documents rule is principally aimed, not at securing a writing at all hazards and in every instance, but at securing the best obtainable evidence of its contents. Thus, if as a practical matter the document cannot be produced because it has been lost or destroyed, the production of the original is excused and other evidence of its contents becomes admissible. Failure to recognize this qualification of the basic rule would in many instances mean a return to the bygone and un lamented days in which to lose one's paper was to lose one's right. Recognition of the same qualification also squares with the ancillary purpose of the basic rule to protect against the perpetration of fraud, since proof that failure to produce the original is due to inability to do so tends logically to dispel the otherwise possible inference that the failure stems from design. (Emphasis in original.) D. McCormick, McCormick's Handbook of the Law of Evidence § 237 at 570 (2d Ed. 1972).

Given this premise, courts generally require a reasonably diligent search for original documentary evidence before secondary evidence to prove the content of writings is admitted. Id. at 570-571. Questions relative to the adequacy of this search are matters largely within the trial court's discretion. "Such discretion is particularly appropriate since the character of the search required to show the probability of loss or destruction will, as a practical matter, depend on the circumstances of each case." Id. See also, J. H. Wigmore, Evidence § 1194 at 442 (Chadbourn Rev. 1972) ("...the determination of the sufficiency of the search and in general of the fact of loss should be left entirely to the trial court's discretion") (emphasis in original). Utah has apparently followed this approach. See

Stevens v. Gray, 259 P.2d 889, 891 (Utah 1953) ("Ordinarily, if an explanation of failure to produce such record is satisfactory to the trial court it is within his discretion to receive other evidence concerning such facts"). Indeed, modern authorities suggest that it is a "waste of time" for appellate courts to review such discretionary rulings. See J. H. Wigmore, Evidence § 1195 at 445-446 (Chadbourn Rev. 1972). See also, D. McCormick, McCormick Handbook of the Law of Evidence § 243 at 577-578 (2d Ed. 1972) (Admission of secondary evidence is harmless error in absence of good faith dispute relative to accuracy of secondary evidence).

The record shows that Plaintiff made an adequate search for GAC's business records (R.339-340). These records were in the custody of GAC's president, Paul J. Angelos (R. 340 Ls. 10-12). Mr. Angelos, who was an adverse party in this action (R. 2-7) refused to grant Plaintiff access to these records (R. 339 Ls. 27-30 R. 340 Ls. 1-3), even after Plaintiff had made requests for their production (R. 30-31). This fact alone is sufficient to justify the lower court's admission of the disputed testimony. See J. H. Wigmore, Evidence § 1212 at 487 (Chadbourn Rev. 1972) ("It is also often said that where the third person is hostile and fraudulently detains the document, this fact of itself suffices to excuse nonproduction, although such an instance is perhaps equally well disposed of by the doctrine of loss ... ") (emphasis in original). See also Snow v. Utah Automobile Dealers, 188 P.2d 742, 744 (Utah 1948). Additionally, Mr. Angelos had left

the country; and, although he had come back to the United States, it was impossible to locate him (R. 340 Ls. 16-17). The lower court could reasonably have inferred from these circumstances that Mr. Angelos was not within the State of Utah. Again, this fact alone is sufficient to justify the lower court's admission of the disputed testimony. See Utah Rules of Evidence 70(1)(b); Johnson v. Union Pacific Railroad Company, 100 P. 390, 395 (Utah 1909) ("... the letter in question was not within the jurisdiction of the court, and the rule, as declared by the great weight of authority, is that when a writing which is necessary in evidence is traced to the hands of a party not within the State, secondary evidence, without further showing, may be given to prove the contents of such writing"); and Dwyer v. Salt Lake City Copper Mfg. Co., 47 P. 811, 812 (Utah 1896). Finally, Plaintiff made extensive personal efforts to locate Mr. Angelos (R. 340 Ls. 18-25). This evidence justifies the lower court's exercise of discretion in admitting the disputed testimony.

(3) Fair Consideration. The Utah Fraudulent Conveyances Act defines "fair consideration" as follows:

Fair consideration is given for property, or obligation:

(1) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied Utah Code Ann. § 25-1-3 (1953).

Section 25-1-3 requires that the conveyance be made for both a "fair equivalence" and in "good faith." Thus, a showing that either of these elements is lacking is sufficient to support the lower court's finding of fraudulent conveyance in the present case.

(a) Fair Equivalence. Although this court has indicated that fair equivalence does not mean exact equivalence or equal value, "fair valuation [does] mean such a price as a capable and diligent businessman could presently obtain for the property after conferring with those accustomed to buy such property" Utah Assets Corporation v. Dooley Brothers Association, 70 P.2d 738, 741 (Utah 1937). Thus, for example, this court has upheld a lower court's finding that giving \$38,120.00 in exchange for property with a proven worth of \$290,000.00 (only 13% of the property's proven worth) was not a fair equivalence. See First Security Bank of Utah v. Vrontikis Brothers, Inc., 490 P.2d 1301 (Utah 1971). Judged by this standard, the caterpillar's sale price to both Terra Corporation and Intervenor (\$2,500.00) was grossly disproportionate to the caterpillar's real value (\$20,000.00 to \$30,000.00).

Intervenor attacks the lower court's finding that the caterpillar was not sold for a fair equivalence on two grounds. First, Intervenor suggests that the court erred in basing its fair equivalence finding on retail rather than wholesale value.

Intervenor fails to cite any case supporting the proposition that wholesale rather than retail value should be used in ascertaining the fair equivalence of an alleged fraudulent conveyance. This failure is not surprising in light of the Dooley court's fair equivalence standard: "Such a price as a capable and diligent businessman could presently obtain for the property after conferring with those accustomed to buy such property." Utah Assets Corporation v. Dooley Brothers Association, 70 P.2d 738, 741 (Utah 1937). In seeming anticipation of this standard, Intervenor himself testified that "I had the tractor sold for \$20,000, so that establishes a pretty good value." (R. 278 Ls. 27-28. See also R. 279 Ls. 13-19.)²

In addition to his own testimony on this point, Intervenor produced two experts at trial. One expert, Mr. Coltharp, testified that the caterpillar's value was \$20,000 to \$25,000 (R. 301 Ls. 21-29). Intervenor's other expert, Mr. Bateman, whose testimony is set forth in part in Intervenor's Brief at 7-8, testified that the caterpillar's wholesale value was approximately \$10,750; but Mr. Bateman further testified that brokers of heavy equipment would raise this price to "whatever"

²According to Intervenor's Deposition, this \$20,000 price was based on the caterpillar in its present unrehabilitated condition (McCurtain Deposition at 26). Intervenor further admits that when necessary repairs are made the caterpillar could be worth as much as \$30,000 (R. 290 Ls. 17-24. See also McCurtain Deposition at 42).

market would stand." (R. 260 L. 8.)³

This evidence reveals considerable disparity between the caterpillar's fair value and the amount Intervenor actually paid for the caterpillar. Thus, it was not unreasonable for the lower court to rule that "fair consideration" was not given in exchange for the caterpillar. Even accepting Intervenor's wholesale figure of \$10,750, it would not be unreasonable for the lower court to conclude that 25% of value was not "fair consideration" under the circumstances of the present case. This conclusion is reinforced by the fact that each decision as to the fairness of consideration in fraudulent conveyance cases must be made from the standpoint of creditors. See Larrimer v. Feeney, 192 A.2d 351, 354 (Pa. 1963) and Osawa v. Orishi, 206 P.2d 498, 504 (Wash. 1949).

Second, Intervenor contends that he paid more than \$2,500 for the caterpillar because he had an oral agreement to split profits with H. E. Thomas, president of Terra Corporation, in the event that Intervenor resold the caterpillar. However, the lower court could have found this testimony implausible for several reasons.

³ It is possible that the lower court attached greater weight to the testimony of Intervenor and Mr. Coltharp with respect to the caterpillar's value because (1) counsel for Intervenor insisted in his opening remarks that "the evidence will show the tractor is worth approximately \$20,000-twenty to thirty is my client's opinion and he is a dealer" (R. 236 Ls. 25-57) (even on appeal, Intervenor insists that, for purposes of assessing wrongful attachment damages against Plaintiff \$20,000 is the proper figure, see Intervenor's Brief at 11-12); and because (2) Mr. Bateman's testimony was substantially impeached at trial (R. 261-270).

First, the written documents accompanying Terra Corporation's sale of the caterpillar to Intervenor made no mention of a profit sharing agreement. Indeed, the bill of sale (Exhibit 16-D) specifically recites that the "caterpillar is free and clear of any liens, claims or demands of any person whatsoever ..."

Second, after purchasing the caterpillar from Terra Corporation, Intervenor pledged it for a \$6,000 bank loan. This pledge agreement bore only Intervenor's and not Terra Corporation's signature (R. 289 Ls. 18-23). It seems improbable that a bank would loan \$6,000 without first ascertaining and binding every party who had any interest in the loan collateral. Indeed, the pledge agreement (R. 182) specifically recites at paragraph 5 that "the debtor is ... the owner of the collateral ... [and] the collateral is ... free and clear of all liens, claims, charges, encumbrances, taxes and assessments," and at paragraph 7(e)(3) Intervenor promises to "keep the collateral free from all liens, claims, charges, encumbrances, taxes and assessments."

Finally, the profit sharing agreement is arguably inconsistent with Intervenor's testimony that he purchased the caterpillar "sight unseen" because of its extraordinarily low price (R. 296 Ls. 21-27. See also R. 284 Ls. 27-30).

All of these facts could have persuaded the lower court that the caterpillar was not purchased by Terra Corporation and Intervenor for a "fair equivalence" within the meaning of the Utah Fraudulent Conveyances Act.

(b) Good Faith. Not only must Intervenor show that there was insufficient evidence to support the lower court's findings with respect to the "fair equivalence" issue, but also Intervenor must show the same insufficiency with respect to the "good faith" of the Terra Corporation-Intervenor transaction.

Intervenor claims that he purchased the caterpillar in "good faith" because "there is no evidence in the record indicating [Intervenor] had previous knowledge of any fraudulent intent." Intervenor's Brief at 9. However, the statute which Intervenor relies on in support of this claim does not speak in terms of "previous knowledge" but rather in terms of "previous notice." See Utah Code Ann. § 25-1-13 (1953). In Utah "whatever is notice enough to excite attention and put [Intervenor] on his guard and call for inquiry is notice of everything to which such inquiry might have led." McGarry v. Thompson, 261 P.2d 288, 290 (Utah 1948). There was considerable evidence at trial from which the lower court could have found that Intervenor was put on notice that all was not right with respect to his purchase of the caterpillar.

1. Intervenor himself testified that the caterpillar's low purchase price was unusual.

Q. Mr. McCurtain, you've said that this was a normal transaction. I'm confused by what you meant as "normal." Is it normal to purchase a caterpillar tractor for 10% of its value in the trade; is that a normal transaction in your dealings in heavy equipment, or is that a little unusual to have that kind of a deal?

A. That is unusual. (R. 296 Ls. 21-27.)

In fact, the caterpillar's purchase price was so unusually low that Intervenor did not bother to inspect the caterpillar before purchasing it.

Q. Is it your custom, Mr. McCurtain, to purchase heavy equipment sight unseen?

A. When they're as low priced as that equipment is, it certainly is. (R. 284 Ls. 27-30. See also R. 288 Ls. 20-25.)

2. There was evidence to suggest that the Terra Corporation-Intervenor transaction was a "sham"; and that, despite the appearance of a conveyance from Terra Corporation to Intervenor, GAC and Terra Corporation actually retained "possession" of the caterpillar. The Utah Fraudulent Conveyance Act defines this circumstance as "conclusive evidence of fraud as against ... creditors ..." Utah Code Ann. § 25-1-14 (1953). See also, Givan v. Lambeth, 251 P.2d 959, 962 (Utah 1960) (defining this circumstance as a "badge of fraud").

Terra Corporation purportedly sold the caterpillar to Intervenor on July 9, 1974 (Exhibits 15-D and 16-D). However, the caterpillar was hauled at Terra Corporation's request into Wheeler Machinery Company's yard on July 18, 1974 (R. 247 Ls. 23 and Exhibits 2-D and 3-D. See also R. 252 Ls. 3-12). Thereafter, GAC and Terra Corporation principals requested Mr. Bateman, a heavy equipment dealer, to inspect the caterpillar (R. 269 Ls. 10-13). These same principals wanted Mr. Bateman to make

offer to purchase the caterpillar (R. 270 Ls. 4-6). In October, 1974, these principals requested a Burt Gallo to do repair work on the caterpillar (Affidavit of Juanita J. Meyer in Opposition to Defendant's Motion for Summary Judgment ¶ 11, R. 83-88) and GAC's attorney proposed to Plaintiff that GAC sell the caterpillar to a buyer in Emery County, Utah and split the proceeds with Plaintiff (Id. ¶ 13). During this same time period, Wheeler notified GAC that storage charges were being assessed against the caterpillar (R. 254-255) and Wheeler billed Terra Corporation for those charges (Exhibit 2-D). The lower court could have found these circumstances suspect in light of GAC's professed sale of the caterpillar to Terra Corporation on July 8, 1974, and Terra Corporation's professed resale of the caterpillar to Intervenor on July 9, 1974.⁴

Intervenor did not attempt to remove the caterpillar from Wheeler's yard from July 9, 1974 when he allegedly purchased the caterpillar until almost a year later in April, 1975 when he filed his complaint in intervention in the present case.

⁴ Terra Corporation may argue that it incurred these added expenses and took this added interest in the caterpillar because of its supposed agreement to split profits with Intervenor in the event that he resold the caterpillar. However, this reasoning does not explain GAC's continued interest in the caterpillar. Moreover, this reasoning is inconsistent with Mr. Thomas' testimony that Terra Corporation was willing to sell the caterpillar for only \$2,500 because it had no experience in heavy equipment dealing and because it wanted to break even at \$2,500 with its sale of the caterpillar to Intervenor (R 308 Ls. 38-30, R. 309 Ls. 1-9. See also R. 313 Ls. 2-9, R. 314 Ls. 9-12).

Intervenor may argue that he was unable to remove the caterpillar because Plaintiff's counsel had instructed Wheeler not to release the caterpillar. However, Plaintiff's counsel had not attached the caterpillar at that point in time. Intervenor made no effort whatsoever, e.g., by legal process or even by contacting Plaintiff's counsel, to remove the caterpillar. Indeed, after being notified by Wheeler in July that Plaintiff asserted an interest in the caterpillar, Intervenor nevertheless returned to Wyoming and solicited offers for resale of the caterpillar (R. 291-292). The lower court could have found that this was abnormal behavior in light of Intervenor's professed concern about removal of the caterpillar from Wheeler's yard.

Even as late as October, 1974, when Plaintiff finally threatened to attach the caterpillar, Paul Angelos, president of GAC, and not Intervenor, responded to this threat. Mr. Angelos' attorney wrote to Wheeler informing them that "Paul Angelos will deliver this letter to you and will expect to remove the D-9 caterpillar upon paying your bill for its repairs." (Exhibit 6-D. See also R. 248 Ls. 21-25.) Again, the lower court could have found such a letter anomalous in light of GAC's purported sale of the caterpillar to Terra Corporation in July, 1974. The lower court could have further found it odd that the purportedly true owner of the caterpillar, Intervenor, failed to take steps during this time period to protect his interest in the caterpillar.

Finally, evidence that Terra Corporation filed a financing statement against the caterpillar after Plaintiff attached the caterpillar (compare Exhibit 1-D and R. 13-14) and when Terra Corporation supposedly had no further interest in the caterpillar could have convinced the lower court that there was a collusive scheme to defraud Plaintiff as between GAC, Terra Corporation and Intervenor.⁵

All of the facts outlined above suggest that GAC and Terra Corporation were in constructive possession of the caterpillar throughout 1974 and that no delivery of the caterpillar was made to Intervenor when such delivery was possible. Under the mandate of § 25-1-14 the lower court could have treated these circumstances as conclusive evidence of a scheme to defraud Plaintiff.

3. Finally, there was evidence to suggest that the principals of GAC and Terra Corporation and Intervenor were attempting to "keep secret" their transactions with respect to the caterpillar. This court has also labeled these circumstances

⁵The lower court's suspicions could have been further aroused in this regard by the fact that Plaintiff was precluded from filing her own financing statement against the caterpillar in the early summer of 1974 because her statement lacked the debtor, GAC's, signature. This signature may have been fraudulently withheld from Plaintiff (see Affidavit of Juanita J. Meyer in Opposition to Defendants' Motion for Summary Judgment ¶ 9, R. 83-88).

as a "badge of fraud." See Givans v. Lambeth, 351 P.2d 959, 961 (Utah 1960).

Plaintiff testified that she made extensive efforts over a period of months to communicate with GAC and Terra Corporation principals but received no response from them (R. 329-331 and Exhibit 7-D. See also R. 331 Ls. 20-30 and R. 332 Ls. 1-2). Intervenor's failure during this same time period, despite his knowledge of Plaintiff's asserted claim in the caterpillar, to come forward and notify Plaintiff of his asserted claim in the caterpillar could have also aroused the suspicions of the lower court.

For all of the foregoing reasons, Plaintiff submits that the trial court was justified in finding that the Terra Corporation-Intervenor transaction was not made in "good faith" and, therefore, violated the Utah Fraudulent Conveyances Act.

III. PLAINTIFF IS NOT LIABLE TO INTERVENOR FOR WRONGFUL ATTACHMENT OF THE CATERPILLAR.

Intervenor argues in his Brief at 11-12 that he is entitled to damages for Plaintiff's "wrongful attachment" and "conversion"⁶ of the caterpillar.

⁶Intervenor's complaint does not plead conversion and a conversion claim was not tried in the lower court. Therefore, Intervenor cannot raise this issue for the first time on appeal. See e.g., Simpson v. General Motors Corp., 470 P.2d 399, 401 (Utah 1970). Examination of the two cases cited in Intervenor's Brief at 11-12 reveals that they are both conversion cases and are thus inapposite.

Intervenor's Complaint (R. 50-53) attempts to state two claims. The second claim is for malicious prosecution and abuse of process. Intervenor waived this claim at trial (R.233 Ls. 24-29). This left Intervenor's first claim, which he characterizes on appeal as a claim for wrongful attachment (R. 233 L. 30 and 234 Ls. 1-4).

However, it appears that Intervenor's second claim is in reality his claim for wrongful attachment. "It is well settled that an action may be maintained against the attaching plaintiff for a wrongful and malicious attachment, this being in the nature of a malicious prosecution or malicious abuse of process and governed by essentially the same rules." 7 C.J.S. Attachment § 516 at 663 (1937). If so, then by waiving his second claim at trial, Intervenor has waived his wrongful attachment claim.

Even assuming that Intervenor has not waived and has properly plead a wrongful attachment claim,⁷ Intervenor must show that Plaintiff was actuated by malice or that she acted wrongfully before he can prevail on this claim.

⁷ Intervenor's Complaint contains no allegation that Plaintiff lacked probable cause in procuring her writ of attachment. One early Utah case suggests that such an allegation is necessary to state a claim for wrongful attachment. See Cahoon v. Hoggan, 86 P. 763, 764 (Utah 1906). But cf. Freeway Park Building, Inc. v. Western States Wh. Sup., 451 P.2d 778, 783 (Utah 1969) (dictum). Moreover, Count I of Intervenor's Complaint does not allege that Plaintiff's attachment of the caterpillar was wrongful or malicious. Under Utah law it is clear that such an allegation is necessary to state a claim for wrongful attachment. See Cahoon v. Hoggan, 86 P. 763, 764 (Utah 1906). Cf. Freeway Park Building, Inc. v.

See Cahoon v. Hoggan, 86 P. 763, 764 (Utah 1906). See also Freeway Park Building, Inc. v. Western States Wh. Sup., 451 P.2d 778, 783 (Utah 1969) (dictum) and St. Joseph Stock Yards Co. v. Love, 195 P.2d 305, 311 (Utah 1921) (dictum).

There is absolutely no evidence in the record to indicate that Plaintiff acted either wrongfully or with malice. The record reveals no procedural irregularities with respect to Plaintiff's writ of attachment (R. 3-14); Terra Corporation did not file its financing statement, thereby giving Plaintiff constructive notice of an adverse claim on the caterpillar, until after Plaintiff had obtained her writ of attachment (compare R. 3-14 with Exhibit 1-D); and Plaintiff testified, without contradiction, that the first time she had heard of Intervenor was when he filed his Complaint in this case (R. 332 Ls. 3-8). Under these circumstances, the lower court could not have found that Plaintiff wrongfully or maliciously attached the caterpillar; especially in light of Plaintiff's good faith efforts throughout 1974 to locate individuals who claimed any interest in the caterpillar and Intervenor's unresponsiveness to those efforts, despite his obvious ability to respond.

Western States Wh. Sup., 451 P.2d 778, 783 (Utah 1969) (dictum) ("... the jury should have had a chance to determine whether or not the actions of the landlord were a mere subterfuge to dispossess the tenants and thus be unlawful and malicious under the evidence given in this case") and St. Joseph Stock Yards Co. v. Love, 195 P.2d 305, 311 (Utah 1921) (dictum) ("Moreover, if a plaintiff is actuated by malice and acts without probable or any cause in bringing an action, and is guilty of oppression in suing out a writ of attachment, anyone may obtain relief in a proper proceeding against such malice and oppression, and may recover, not only his actual damages, but may recover exemplary damages as well. See generally 7 C.J.S. Attachment § 516 at 663 (1937).")

plaintiff, therefore, concludes that Intervenor's request for damages for wrongful attachment, in the event the court chooses to reverse on the fraudulent conveyance issue, is not well-founded.⁸

IV. CONCLUSION

For the reasons set forth above, Plaintiff respectfully submits that the lower court's judgment in the present case should be affirmed.

DATED this _____ day of March, 1977.

Respectfully submitted,

Jerry W. James
IRVINE SMITH & MABEY
Attorneys for Plaintiff-Respondent

⁸ It appears that the court could not assess damages in excess of \$10,000 in any event. U.R.C.P. 64(C)(b) provides that individuals suing for a writ of attachment must file a written undertaking. Plaintiff has done this in the present case in the amount of \$10,000 (see Intervenor's Complaint ¶14, R. 50-54). The Rule further provides that "... if the attachment is wrongfully issued, the Plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking." (Emphasis supplied.)

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the _____ day of March, 1977, two copies of the foregoing Brief were mailed to Richard J. Leedy, Esq., 2795 Comanche Drive, Salt Lake City, Utah 84108.

IN THE SUPREME COURT
OF THE STATE OF UTAH

M. B. POWERS, JAMES M. :
POWERS and VERN PETERSON, :
dba POWERS AND PETERSEN, :

Plaintiffs and :
Respondents, :
:

AFFIDAVIT

vs.

GENE'S BUILDING MATERIALS, :
INC., :

Case No. 14812

Defendant and :
Appellant. :

FILED

MAY - 9 1977

STATE OF UTAH)
: ss.
County of Salt Lake)

Clerk, Supreme Court, Utah

This affiant, Matt Biljanic, being first duly sworn on his oath,
deposes and says, as follows:

1. That the affiant herein is the attorney for the Defendant/
Appellant, Gene's Building Materials, Inc.
2. That the trial in this matter was scheduled for hearing on
September 1, 1976. That this affiant received notification from the Clerk's
Office at approximately 9:30 A.M., September 1, 1976, that the Honorable
Bryant H. Croft was to be the presiding judge in this case.
3. This affiant did not have an opportunity to prepare an Affidavit
of Prejudice; however, this affiant spent twenty minutes prior to the begin-
ning of the trial in chambers with the Honorable Bryant H. Croft, specifying
the reasons why the Honorable Bryant H. Croft should assign the case to
another judge and honor the oral request of this affiant to so remove himself.
The conference with the Honorable Bryant H. Croft was outside the presence

of opposing counsel, based upon this affiant's judgment that the personal feelings that might have existed between this affiant and the Court should not have been discussed openly.

4. That the Honorable Bryant H. Croft denied this affiants request to withdraw from the case even though other judges were available to hear the matter.

DATED this 21st day of April, 1977.

Matt Biljanic
MATT BILJANIC

SUBSCRIBED AND SWORN to before me this 21st day of April, 1977.

Jamie L. Hordager
NOTARY PUBLIC

My Commission Expires:

April 15, 1980

Residing at:

Nikele, Utah

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Affidavit to Richard H. Thornley, attorney for Plaintiffs/Respondents, 2610 Washington Boulevard, Ogden, Utah, 84401, postage prepaid, this 21st day of April, 1977.

Matt Biljanic
MATT BILJANIC