

1987

Mitchell D. Henderson v. For-Shor Company : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

James C. Jenkins; attorney for appellant.

J. Blaine Zollinger; Zollinger & Atwood; attorney for plaintiffs.

Recommended Citation

Reply Brief, *Mitchell D. Henderson v. For-Shor Company*, No. 870502 (Utah Court of Appeals, 1987).
https://digitalcommons.law.byu.edu/byu_ca1/699

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

BRIEF

UTAH
DOCUMENT
KFU
50

.A10

DOCKET NO. 870502-CA IN THE SUPREME COURT OF THE STATE OF UTAH

MITCHELL D. HENDERSON,
ILEEN BUTTARS, LAURENA B.
HENDERSON, and DAVID HALE

REPLY BRIEF OF APPELLANT

Plaintiffs/Respondents

vs.

FOR-SHOR COMPANY

Supreme Court No. 20626

Defendant/Appellant

870502-CA

REPLY BRIEF OF APPELLANT FOR-SHOR COMPANY

Appeal from the Judgment and Decision of the
FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY, STATE OF UTAH
The Honorable VeNoy Christoffersen, Presiding

James C. Jenkins
JAMES C. JENKINS & ASSOCIATES
67 East 100 North
P.O. Box 3700
Logan, Utah 84321
Telephone: (801) 752-4107

Attorney for Defendant/Appellant

J. Blaine Zollinger
ZOLLINGER & ATTWOOD
256 North First West
Logan, Utah 84231
Telephone: (801) 752-0012

Attorney for Plaintiffs/Respondents

FILED

OCT 10 1985

IN THE SUPREME COURT OF THE STATE OF UTAH

MITCHELL D. HENDERSON,
ILEEN BUTTARS, LAURENA B.
HENDERSON, and DAVID HALE

REPLY BRIEF OF APPELLANT

Plaintiffs/Respondents

vs.

FOR-SHOR COMPANY

Supreme Court No. 20626

Defendant/Appellant

REPLY BRIEF OF APPELLANT FOR-SHOR COMPANY

Appeal from the Judgment and Decision of the
FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY, STATE OF UTAH
The Honorable VeNoy Christoffersen, Presiding

James C. Jenkins
JAMES C. JENKINS & ASSOCIATES
67 East 100 North
P.O. Box 3700
Logan, Utah 84321
Telephone: (801) 752-4107

Attorney for Defendant/Appellant

J. Blaine Zollinger
ZOLLINGER & ATTWOOD
256 North First West
Logan, Utah 84231
Telephone: (801) 752-0012

Attorney for Plaintiffs/Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	1
Additional Facts	2
SUMMARY OF ARGUMENTS	3
ARGUMENTS DIRECTED TO APPELLANT'S	4
ISSUES RAISED ON APPEAL	4
I. THERE IS NO EVIDENCE TO SUPPORT PLAINTIFF'S CLAIM FOR LOSS OF PROFITS OR RENTAL	4
II. THERE IS INSUFFICIENT EVIDENCE TO ESTABLISH THE VALUE OF THE FORMS REPOSSESSED BY FOR-SHOR	7
ARGUMENTS DIRECTED TO RESPONDENT'S	
ISSUES RAISED ON APPEAL	
III. THE TRIAL COURT PROPERLY DISMISSED MITCHELL HENDERSON'S CLAIM FOR INTENTIONAL INFLICTION OF MENTAL DISTRESS	10
IV. THE TRIAL COURT HAD SUFFICIENT BASIS TO REFUSE THE AWARD FOR COSTS AND ATTORNEYS FEES REGARDING THE BANKRUPTCY NOTICE	15
V. THERE IS NO EVIDENCE THAT DEFENDANT INTENTIONALLY INTERFERED WITH THE BUSINESS RELATIONSHIPS OF PLAINTIFFS	16
CONCLUSION	20

TABLE OF AUTHORITIES

TREATISES:

Law of Torts, 4th Edition, William L. Prosser Restatement of the Law., Torts, 1948 Supp.

CASE LAW:

First Security Bank v. J.B.J. Feed Yards Utah, 653 P.2d 591
(1982)

Leigh Furniture and Carpet Company v. Isom, Utah, 657 P.2d
293 (1982)

Midas Muffler v. Ellison, 650 P.2d 496 (Arizona App., 1982)

Samms v. Eccles, P.2d 289, 358 P.2d 344 (1961)

Venerias v. Johnson, 622 P.2d 55 (Arizona App., 1982)

IN THE SUPREME COURT OF THE STATE OF UTAH

MITCHELL D. HENDERSON,
ILEEN BUTTARS, LAURENA B.
HENDERSON, and DAVID HALE

REPLY BRIEF OF APPELLANT

Plaintiff/Respondents

vs.

FOR-SHOR COMPANY

Supreme Court No. 20626

Defendant/Appellant

STATEMENT OF ISSUES PRESENTED ON APPEAL

The Court is referred to Appellant's original brief and to Respondents' Brief for a statement of issues presented on appeal.

STATEMENT OF THE CASE

Nature of the Case and Disposition of the Court Below

The Court is referred to Appellant's original brief and Respondents' brief for a statement regarding the nature of the case and disposition in the Court below.

Statement of Facts

In addition to facts outlined by Appellant in its original brief, Appellant offers the following facts:

1. For-Shor's invoices for rentals and purchases of forms and equipment from For-Shor included a title retention agreement. For-Shor retained title to all equipment rented and then purchased by Henderson until the equipment had been completely paid for.

2. The payment of \$6,400.00 by Mitchell Henderson was applied to his then outstanding account and, pursuant to the contract, was applied first to accrued interest, costs, and most

recent purchases and then applied to the purchase of the forms. At no time did Henderson direct that said \$6,400.00 payment was to be applied to the purchase the forms or to give any directions other than to apply said \$6,400.00 on the account. (TV II p. 270, 1.19 - p. 271, 1.22) As such, the forms had not been paid for and title remained with For-Shor.

3. The only forms that would or could have been purchased by Ileen Buttars were the forms in which First Security Bank held a security interest. At no time did Mrs. Buttars believe or understand that she was purchasing any other forms. As stated in Respondents Brief, Mrs. Buttars knew nothing of For-Shor, and, therefore, could not and did not purchase forms originally received from For-Shor.

4. Although Mrs. Buttars had allegedly owned the forms for a period of almost three years, the only time during the entire three year period of claimed ownership in which any revenue was generated from the forms was during a very brief three month period from April, 1981 to July, 1981.

5. Neither Mrs. Buttars nor Mitchell Henderson made any effort after July 9, 1981, when the forms were repossessed, to attempt to rent out the remaining forms or otherwise mitigate possible damages. This is so even though For-Shor repossessed only approximately one-half of one set, and Mrs. buttars allegedly purchased two and one-half sets, leaving two sets available to rent.

6. At no time during the trial did Plaintiff/Respondents ever definitively state an amount claimed as damages for loss of

rentals. Even in Respondents Brief, Respondents state that the "revenue for those three to four months was approximately \$2,500.00". (See Respondents Brief, last line of page 5 to first line of page 6, emphasis added.)

7. At no time during the Trial did Plaintiffs/Respondents offer sufficient evidence regarding the value of the forms. At no time did any witness give any specific value for the forms repossessed by For-Shor Company.

8. Exhibit 28, which contained a 1982 suggested price list, was not introduced for the purpose of establishing the value of the forms nor was it accepted for that purpose, and was specifically objected to by Appellant's attorney.

9. Even if For-Shor employees trespassed on Laurena Henderson's property at the time of repossessing the forms, there was no damage done to her property and there is no evidence in support of an award of damages in any amount, let alone \$100.00.

SUMMARY OF ARGUMENTS

The court is referred to Appellant's original Brief for a summary of Appellant's arguments and the issues raised by Appellant on appeal.

In addition, Appellant replies to Respondents issues raised on appeal as follows:

1. Intentional Infliction of Emotional Distress. There is no evidence that would justify an award of damages for intentional infliction of emotional distress and the Trial Court's refusal to award any damages was proper.

2. Failure to Admit. There is no basis to the claim that the Trial Court abused its discretion in failing to award

attorney fees to Plaintiffs. Defendant offered several reasons as justifications for the appearance of the bankruptcy notice in Defendant's files and the Court did not abuse its discretion in accepting Defendant's reasons.

3. Interference With Favorable Business Relationships.

There is no evidence of intent by For-Shor to interfere with any business relationships. For-Shor repossessed the forms in a reasonable and prudent manner and relied on legal counsel in repossessing forms. Furthermore, there is no evidence of damages caused nor was it established that there was a business relationship.

ARGUMENTS DIRECTED TO APPELLANT'S
ISSUES RAISED ON APPEAL

I.

THERE IS NO EVIDENCE TO SUPPORT PLAINTIFF'S
CLAIM FOR LOSS OF PROFITS OR RENTAL

Respondents claim that they are entitled to damages for loss of rentals for a period of approximately three years from the time the forms were repossessed by For-Shor until the trial, even though no efforts were made by Plaintiffs to rent to forms for the first three years that Mrs. Buttars claims to have owned the forms. Respondents claim that when Mitchell Henderson decided to try to rent the forms, there were "plenty of takers" and that "all of the forms in Cache Valley were being used that summer," (Respondents' Brief, p. 23) supposedly indicating that Plaintiffs would have had no problem renting the forms steadily for the additional three years. The fact still remains that Plaintiffs'

only history of rentals was during a brief three month period from April, 1981 to July, 1981, even though Mrs. Buttars had allegedly owned the forms for three years. To assume that Plaintiffs would have continued to rent the forms at the same rate, if at all, or that they would have completely rented the forms to contractors for the entire forming season for the years 1982, 1983 and 1984, is totally speculative. Plaintiffs offered testimony indicating that Mitchell Henderson's health had been poor for several years, eventually causing him to discontinue his business in 1978 and seek help from his grandmother to pay the loans on the forms to keep the bank from foreclosing on the forms. Plaintiff also claimed that his health was poor after the repossession. This testimony shows that Plaintiff did not have the ability to rent the forms.

In addition, Plaintiffs were not engaged in any ongoing venture at the time of the repossession. Plaintiffs had only a sporadic history of rentals over the three years of claimed ownership.

Even if the Court were to allow damages for loss of rentals, those rentals must be apportioned over the full three years of claimed ownership, and the Court must consider that any rentals generated were from two and one half sets. Defendant only repossessed one-half set. Thus, Plaintiffs claimed rentals of "approximately \$2,500.00" (Defendant points out on page 33 of its original brief that the Exhibits indicate rentals of only \$2,034.55) must be attributed to all of the forms for the full three years, for total damages allowable over the next three

years claimed by Plaintiffs on the half-set repossessed by For-Shor (1981-1984) of \$500.00 (\$2,500.00 X .25).

Plaintiffs also made no effort whatsoever to attempt to rent the remaining forms or otherwise mitigate their damages. Plaintiffs still had two full sets of forms available, even after the half set had been repossessed by For-Shor. There is no testimony that Plaintiffs would have been required to combine Mod-U-Form forms with Wall Master forms, because there was apparently a full set of each kind. Plaintiffs still had forms to rent, but completely failed to rent any more forms following the July 9, 1981 repossession.

It also makes no difference whether other Cache Valley contractors were successful in keeping busy or that For-Shor Company rented the forms it had repossessed for the three years. Both Mr. Mortenson (a contractor) and For-Shor Company are highly successful businesses with a proven track records spanning many years. The same cannot be said for either Mitchell Henderson or David Hales.

In short, there is no evidence to justify a holding and award of damages for loss of rents for a period of three years. The evidence as presented to the Court simply does not justify such an award. Plaintiffs did not establish that they had the ability and could have rented the forms for the entire three year period had the forms been available, nor did Plaintiffs establish the amount of rentals which would have been received even if the forms had been available and had Plaintiffs been able to rent the forms. The Trial Court also did not properly apportion the rentals over the full three years. The loss of profit from

rentals claimed by Plaintiffs is simply too speculative and the Court's award of damages for loss of rentals should be reversed.

II

THERE IS INSUFFICIENT EVIDENCE TO ESTABLISH THE VALUE OF THE FORMS REPOSSESSED BY FOR-SHOR

At no time did Plaintiffs establish the value of the forms at the time they were taken from Laurena Henderson's property on July 9, 1981. During the trial, Plaintiff's attorney was questioning James Snarr, the general manager of For-Shor Company, attempting to have Mr. Snarr interpolate the value of new forms as of 1984 based on a 1982 suggested price. Defendant's counsel then suggested to Plaintiff's attorney that he ask Mr. Snarr to calculate and give testimony regarding the value of the forms that were taken on July 9, 1981 as of the time they were taken. This suggestion, however, was refused by Plaintiff's attorney. The discussion was as follows (beginning with line 12 on page 440, TV III):

MR. JENKINS: Counsel, maybe to save time, are you asking him to calculate the value of the forms that were taken on July 9, 1981?

MR. ZOLLINGER: Uh-huh.

MR. JENKINS: Why don't you just ask him? He can do that. He's already done it.

MR. ZOLLINGER: Afraid I might get the wrong answer.

MR. JENKINS: He's already done it. Well, if you want his testimony.

Shortly thereafter, on cross examination, Defendant's counsel asked Mr. Snarr if he could determine the value of the forms at the time they were repossessed on July 9, 1981. (TV III p. 442 l. 9-19, p. 443.) Plaintiffs objected to the question, claiming it to be based on hearsay and statements by Dan Sharp, who had actually picked up the forms. The Court overruled the Plaintiff's objections and allowed the testimony. The witness then stated that he needed to make a few calculations. Rather than have Mr. Snarr make the calculations at that time to determine the 1981 price, Defendant's attorney decided to move on to other questioning and never did ask Mr. Snarr to give a 1981 value. At no other time during the entire trial did any person offer testimony regarding the value of the forms at the time they were taken.

Plaintiffs, however, attempted to determine the price for the forms as follows:

	<u>1982 Price</u>	<u>1984 Price</u>	<u>Totals</u>
55 2' X 8' panels	96.00 X 8% =	103.68	5,702.40
24 2' X 8" panels	53.00 X 8% =	57.24	1,373.76
2 8' X 6' inside corners	65.00 X 8% =	68.04	136.08
2 8' X 6' inside corners	32.00 X 8% =	34.56	69.12
900 wedge bolts	.28 X ? =	.28	<u>252.00</u>
			7,533.36
	Deduct 24% for used		<u>.76</u>
			\$5,725.35

The above figures are based on Mr. Snarr's testimony indicating that the 1984 price for the forms was approximately 8% higher than the 1982 price. Plaintiffs then used the 1982

suggested price list (Exhibit 28) to obtain a figure for the forms as of 1982, multiplied that figure by 8%, and then reduced the figure by 24% for used forms, which was based on Mr. Snarr's testimony calculating that the cost of reconditioning forms was approximately 23.8% of the new price.

It should be noted, as stated in Appellant's original brief, that Exhibits 26 and 28, which are the original and a copy of the same thing were objected to by Defendant's counsel because the Exhibits are prepared in an attempt to settle the law suit and as an offer to settle the law suit. The Court received the documents under Rule 803 (6) of the Utah Rules of evidence as a business record used by For-Shor in its business and only for that purpose. Thee Court further stated "I can't interpret it," (TV II p. 253 1. 11-13.) Exhibits 26 and 28 were not accepted into evidence for the purpose of establishing the value of the forms as they were taken in 1981, but only for the purpose of an in-house record. The method used by Plaintiffs, however, does not determine nor offer any evidence as to the value of the forms repossessed by For-Shor Company in July 1981. The proper determination of damages would be to establish the value of those specific forms which were taken by For-Shor on July 9, 1981, and not to attempt to take some other figure for other forms and attempt to adjust those nebulous values to current values and then reduce those values by a certain percentage because they were used. The forms repossessed by For-Shor could have been in better or worse shape than the mythical forms for which Plaintiffs attempted to establish a value. Also, the forms were

repossessed in 1981 and the base price used by Plaintiff is an alleged 1982 price. Plaintiffs then tried to increase the price to a 1984 price, the time of the trial, rather than showing a 1981 value.

Had Plaintiff simply asked Mr. Snarr during his testimony what the value of those forms was at the time they were taken, Mr. Snarr being an expert witness in such matters, the value could have been established. Plaintiffs could have further offered other experts to determine a value of the forms at the time that they were taken. However, Plaintiffs attempted to use some circuitous method to arrive at their suggested value, and by doing so utterly failed to establish any value for the forms.

Since there is no evidence or insufficient evidence, regarding the value of the forms at the time they were taken, the Trial Court's award of damages for the value of those forms must be reversed.

ARGUMENTS DIRECTED TO RESPONDENT'S

ISSUES RAISED ON APPEAL

III

THE TRIAL COURT PROPERLY DISMISSED MITCHELL
HENDERSON'S CLAIM FOR INTENTIONAL INFLICTION
OF MENTAL DISTRESS.

Plaintiff, Mitchell Henderson, claims that he should be compensated for his alleged mental anguish caused by For-Shor's repossession of the forms. The Trial Court refused to award Mr. Henderson damages, stating that no damages were awarded because the forms were not his forms. Even if the Court ruled that the

forms belonged to Mr. Henderson or that it made no difference who owned the forms, the Court could not have awarded damages for Henderson's claim for intentional infliction of mental distress. In order for Mr. Henderson to prevail on a claim for intentional infliction of mental distress, the following elements must be proven:

1. The Defendant intentionally engaged in some conduct toward the Plaintiff, (a) with the purpose of inflicting emotional distress, or, (b) where any reasonable person would have known that such would result; and

2. his actions are of such a nature as to be considered outrageous and intolerable and that they offend against the generally accepted standards of decency and of morality. Sams v. Eccles, 11 U.2d 289, 358 P.2d 344, 347 (1961).

The Arizona Supreme Court in the matter of Venerias v. Johnson, 622 P.2d 55, 58 (Ariz. App., 1982), outlined the elements of the tort as follows:

There are four elements which must coincide to impose liability for intentional infliction of emotional distress: (1) The conduct must be intentional or reckless; (2) The conduct must be extreme and outrageous; (3) There must be a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress must be severe.

It should be noted that in Samms v. Eccles the Court recognized a cause of action for intentional infliction of severe emotional distress, thus closely paralleling the Arizona elements, Arizona only adding the requirement for a causal connection between the wrongful conduct and the emotional distress, which would be necessary in any claim for relief.

The following statements from the Restatement of Torts and Prosser also indicate the requirements necessary to establish a cause of action for intentional infliction of emotional (mental) distress:

In short, the rule stated in this section imposes liability for intentionally causing severe emotional distress in those situations in which the actor conduct has gone beyond all reasonable bounds of decency. The prohibited conduct is conduct which in the eyes of decent men and women, in a civilized community, is considered outrageous and intolerable. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim "outrageous". Restatement of the Law, Torts, 1948 Supp., Sec. 46, Comment G.

So far as it is possible to generalize from the cases, the rule which seems to have emerged is that there is liability for conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind. Law of Torts, 4th Edition, William L. Prosser, page 56.

In Samms v. Eccles, the Supreme Court of Utah reversed the District Court's dismissal of the action of Mrs. Samms, a married woman, for injury resulting from severe emotional distress she claimed to have suffered because the defendant persistently annoyed her with proposals to have elicit sexual relations. The defendant had repeatedly and persistently called Mrs. Samms by phone at various hours including late at night and on one occasion came to her residence in connection with a solicitation and made an indecent exposure of his person. The trial court had dismissed the claim for no cause of action on the basis that the courts had been historically wary of the possible dangers in opening doors for recovery of emotional distress because of the highly subjective and volatile nature of the tort and the difficulty of establishing damages. The Supreme Court, however, allowed the cause of action basing it on the elements as stated above.

In a more recent case, First Security Bank v. J.B.J. Feed Yards, Utah, 653 P.2d 591, 598 (1982), this Court cautioned that "damages for mental anguish are an extreme remedy, which should be dispensed with caution." In Midas Muffler v. Ellison, 650 P.2d 496 (Ariz. App., 1982) the Arizona Court recognized and cited with authority the elements necessary to impose liability for intentional infliction of emotional distress as stated in Venerias v. Johnson, supra., in refusing to award damages for an alleged infliction of severe emotional distress. The Court stressed the necessity of strictly complying with all of the elements of the tort. In that case, Midas Muffler was owed \$178.50 for the installation of a muffler on Ellison's vehicle. The account was turned over to a collection agency and although Ellison's had paid the amount claimed, the amount was not properly credited by Midas. Midas then referred the account to a second collection agency which made six telephone calls over a three month period, using abusive language, threatening to sue and calling Mrs. Ellison a liar. Mrs. Ellison claimed that she became greatly distraught, had difficulty sleeping, and that the calls made her cry. The Arizona court ruled that the conduct was not so extreme and outrageous as to permit recovery, stating:

"certainly six phone calls by Kiva [the collection agency] over a period of three months cannot be considered excessive nor can we say that the language used by Kiva's employee was so atrocious as to be utterly intolerable in a civilized community." 650 P.2d at 500.

In the instant action, Plaintiff Mitchell Henderson has not met any of the necessary elements in order to prove a cause of action for intentional infliction of mental distress. There is no testimony, nor even an indication, that For-Shor intended to

cause any emotional distress to Mitchell Henderson. For-Shor's claim to the forms is based on its title retention agreement and its belief, after consultation with legal counsel, that it had a right to properly repossess the forms. The forms were repossessed without incident and only the forms claimed by For-Shor were repossessed.

The testimony also indicated that Mitchell Henderson had a history of health problems leading to the failure of his business and the resulting bankruptcy. Any anguish caused by For-Shor's repossession of the forms could not be considered to have been caused by the repossession, but was a result of Mr. Henderson's previous illnesses, physical infirmities, and business failure prior to the repossession. Furthermore, there was no showing of any emotional distress after the repossession or that any distress as may have been suffered by Mr. Henderson was severe. Plaintiff complained only of headaches, sick stomach and other stress-type illnesses as ulcers.

Plaintiff Mitchell Henderson failed to meet even one of the elements necessary to allow the Court to award damages for intentional infliction of emotional distress and he further failed to prove any amount for damages, nor did Plaintiff attempt to prove damages even had he been successful in making the claim. The Trial Court's refusal to grant Mitchell Henderson's claim for intentional infliction of emotional distress must be sustained.

IV

THE TRIAL COURT HAD SUFFICIENT BASIS TO REFUSE
THE AWARD FOR COSTS AND ATTORNEYS FEES REGARDING
THE BANKRUPTCY NOTICE.

Plaintiffs claim that they should have been awarded costs and fees for proving that the bankruptcy notice discovered in Defendant's files was of the same generation of copies originally sent by the Bankruptcy Court. Even assuming the copy came from the Bankruptcy Court, that in no way proves that Defendant knew or was aware of Mitchell Henderson's bankruptcy. James Snarr, general manager of For-Shor Company, testified that he had no knowledge and at no time was aware of Mitchell Henderson's bankruptcy until the filing of the action of Mr. Henderson. (TV II, p.235, l. 9-14) Dan Sharp, the former collection manager for For-Shor Company, also testified that he did not know of any bankruptcy filed by Mr. Henderson. (TV II, p. 305, l. 6-12). Even For-Shor's attorney, Mr. Burnett, was not aware of the Bankruptcy. (TV I, p. 152). Mr. Burnett stated that he had been able to obtain a copy from the bankruptcy file in an effort to explain how the notice could have been placed in the For-Shor file. Furthermore, Mr. Snarr testified that the address indicated on the bankruptcy notice may have been sent to its neighbor, Con-Shor Company. The notice could have then been later delivered to an employee of For-Shor who placed it in the file without informing Mr. Snarr or other managers of the company.

In any event, the testimony is quite clear that For-Shor was not aware of the Bankruptcy. Even if the form discovered in For-Shor's file came from the Bankruptcy Court, it does not prove

that For-Shor knew of the bankruptcy. Therefore, the Trial Court was justified in not awarding costs and fees to Plaintiffs and the Trial Court's decision should be upheld.

V

THERE IS NO EVIDENCE THAT DEFENDANT INTENTIONALLY
INTERFERED WITH THE BUSINESS RELATIONSHIPS OF
PLAINTIFFS

Plaintiffs claim that For-Shor's repossession of the forms terminated the potential sale of forms from Mrs. Buttars to David Hale, and further caused damage to Mr. Hale for losing business.

Although Defendant had learned of the existence of the forms through David Hale, Defendant was not aware that David Hale was intending to purchase those specific forms nor did Defendant intend to interfere with any business relationships or contraacts that may have existed between the Plaintiffs. Defendant was acting in a reasonable manner soley for the purpose of protecting its interest.

The elements necessary to establish a claim for intentional interference with prospective economic relations is outlined in Leigh Furniture and Carpet Company v. Isom, Utah, 657 P.2d 293 (1982). The Court outlined the elements as follows:

We recognize a common law cause of action for intentional interference with prospective economic relations, and adopt the Oregon definition of this tort. Under this definition, in order to recover damages, the Plaintiff must prove (1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff. 657 P.2d at 304.

In Leigh v. Isom, Leigh Furniture had pursued Isom to repossess Isom's interest in a furniture business, which Leigh had sold to Isom, and to obtain a deficiency judgment. Isom counterclaimed for intentional interference with contractual relations. The jury entered a verdict for Isom on all matters. Isom had purchased the furniture business from Leigh on contract in 1970. The contract also included a long term lease on the building for ten years with an option to renew for an additional ten years and also an option to purchase the building. The facts indicated that shortly after approximately one year, Leigh began to harass and otherwise cause problems for Isom which lasted for a period of more than three and one-half years, culminating in the failure of Isom's business. Mr. Leigh and other associates, including his wife, visited Isom at the store on an almost weekly basis during one period of time to make demands and accusations of Isom. Leigh further made other demands of Isom to obtain a partner and then refused to permit the association of the partner. Leigh refused to make payments or to provide maintenance for the building pursuant to the lease agreement and caused two frivolous law suits to be filed against Isom. The facts also indicated that Leigh wanted the building returned to him and intended to force Isom out of business for the purpose of terminating the lease in order to sell the building for a greater profit. This Court concluded that the incidents taken separately would not have been, in and of themselves, tortious, and stated:

Even in small groups, these acts might be explained as merely instances of aggressive or abrasive - though not illegal or tortious - tactics, excesses that occur in contractual or commercial relationships. But in total and in cumulative effect, as a course of action extending over a period of three and one-half years and culminating in the failure of Isom's business, the corporation's acts cross the threshold beyond what is incidental and justifiable to what is tortious. 657 P.2d at 306.

The facts of the instant case are very distinguishable and are in no way similar to the facts in the Leigh case giving rise to damages, and the facts and evidence in the instant action do not satisfy the elements necessary for the Court to have awarded damages for intentional interference with economic relations. Those actions can be reviewed as follows:

Intentional Interference and Causation

There was no evidence at trial to indicate that For-Shor Company intended to interfere with the prospective business dealings between Mr. Hale and Mrs. Buttars. Plaintiffs merely speculate in their brief that For-Shor repossessed the forms upon the supposition that it would destroy Mitchell Henderson's business, eliminate competition, and require David Hale to rent forms from For-Shor Company. Such speculation goes beyond reason. For-Shor had ample business and did not need to "squeeze out its competitors" nor did it need to resort to such tactics in order to get business. In fact, For-Shor was unaware that Mitchell Henderson had even rented out the forms and did not know that Mitchell Henderson considered himself to be in the business of renting forms and, thus, in competition with For-Shor.

Even assuming that For-Shor intended to interfere with Plaintiffs business, Plaintiffs did not prove that such

interference was the cause of any damages which may have been suffered by Plaintiffs. There was no contract for the sale of the forms. At best, Hale and Henderson merely contemplated the transaction. The testimony indicated that Mr. Hale was unable to obtain financing and that he had no assets with which to purchase the property. Furthermore, Mr. Hale had never been in business for himself, had only two confirmed jobs on which he anticipated making only a few hundred dollars. Quite clearly he had no history or background with which to support or substantiate a claim for future loss of profit or loss of business. If indeed Defendant did intend to put Hales out of business, the evidence suggests that Defendant did him a favor because his "business" was so poorly run he was losing money on each job. The evidence presented at trial was insufficient and would force the Trial Court, or this Court, to speculate at best as to what the nature of the damages were. Even in Plaintiff's Trial Brief, Plaintiffs state that David Hale was forced to "expend approximately \$1,500.00 -- \$2,000.00 in extra time, wages, rent and other expenses to get jobs done." (Plaintiff's Trial Brief, top of page 9.) Plaintiffs are still unsure of any damages which may have been caused by any interference.

Therefore, even if Plaintiffs had been able to prove that Defendant intentionally interfered with their business relations, Plaintiffs did not and could not prove that such interference caused any damages because Plaintiffs could not prove that they had an ability to carry out their contemplated transactions.

Improper Purpose or Improper Means

Defendant reasonably believed that it had a right to repossess the forms pursuant to its title retention agreement and did so by proper means. Defendant complied with all requirements of the Utah Uniform Commercial Code in repossessing the property and did not repossess the property for the purpose of injuring the Plaintiffs or interfering with their relationships. Therefore, Plaintiffs can not satisfy the second element required.

Injury to Plaintiff

As stated earlier, Plaintiffs have been unable to show that they have been injured or otherwise prove damages.

It should be further noted that Plaintiffs did not plead as a cause of action interference with contract or interference with business relationship. However, as noted in Leigh, Defendant had a privilege and a right to repossess the forms under the title retention agreement.

CONCLUSION

Defendant has shown in this brief and in Defendant's original brief that there was either no evidence or insufficient evidence presented to the court in order to allow the Court to award damages to Plaintiffs for loss of rentals and for the value of the forms. The only evidence presented at trial was sketchy, inconclusive and speculative. Therefore, the judgment of the District Court awarding damages to Plaintiffs should be reversed on all counts.

Similarly, Plaintiffs failed to establish a claim for intentional infliction of emotional distress or intentional interference with prospective business relationships. The District Court's decision not to grant judgment to Plaintiffs for no cause of action should be sustained, as well as the District Court's refusal to grant attorneys fees and costs to Plaintiffs for attempting to prove that Defendant was aware of Mitchel Henderson's bankruptcy.

Respectfully submitted this 9 day of October, 1985.

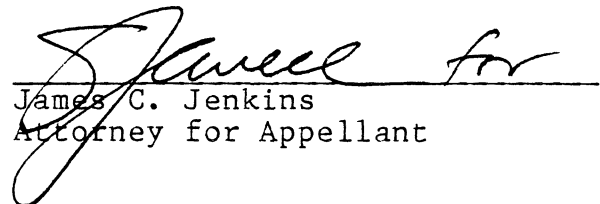
JAMES C. JENKINS & ASSOCIATES


James C. Jenkins

CERTIFICATE OF SERVICE

I hereby certify that four (4) copies of the Appellant's Reply Brief were served on Plaintiff/Respondents' counsel, J. Blaine Zollinger, at 256 North 100 West, Logan, Utah 84321.

DATED this 9 day of October, 1985.


James C. Jenkins
Attorney for Appellant