1978

Bank of Salt Lake, A Utah Corporation, And Norton Parker, An Individual v. Globe Leasing Corporation, A Utah Corporation; Al Weigelt And Gloria Morrison, Individuals : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT

OF THE

STATE OF UTAH

BANK OF SALT LAKE, a Utah corporation, and NORTON PARKER, an individual,	:	
Defendants-Appellant,	:	
v.	:	Case No. 15337
GLOBE LEASING CORPORATION, a Utah corporation; AL WEIGELT and GLORIA MORRISON, individuals,	:	
Plaintiffs-Respondent.	:	

BRIEF OF RESPONDENT

An appeal from a judgment of the Third Judicial District Court of Salt Lake County, State of Utah, the Honorable Peter F. Leary, Judge

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Plaintiffs-Respondent.	:	

BRIEF OF RESPONDENT

OPENING STATEMENT

Respondent accepts without reservation appellant's Statement of the Nature of the Case and Disposition in Lower Court. Respondent accepts appellant's abstract of the trial transcript in toto.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment of the trial court.

STATEMENT OF FACTS

In order to expedite the review of this Court, respondent will accept appellant's Statement of Facts with those reservations pointed out in the Argument. Throughout the Argument this Court's attention will be directed to any facts taken out of context by the appellant and those facts which are misleading or are incorrect statements of fact or law.

Respondent will also point out that appellant often relies on general rules of law as stated in secondary sources but has apparently neglected to read the cases annotated therein which creates distortion and misstatements of certain rules.

Any statements or arguments of the appellant not specifically challenged hereinafter are submitted to this Court on their own merits.

ARGUMENT

I.

THE FINDINGS OF FACT MADE BY THE TRIAL COURT SUPPORT THE CONCLUSION OF LAW THAT APPELLANT IS LIABLE FOR TORTIOUS INTERFERENCE WITH THE BUSINESS RELATIONS OF THE RESPONDENT.

Appellant's Brief correctly states the rule of law in Utah (Mason v. Mason, 108 Utah 428, 160 P.2d 730 (1945) as applied to the instant case. Respondent would iterate and emphasize one sentence therein "...A judgment in conformity with the findings will not be disturbed."

Appellant asserts, inter alia, that one of the Court's Findings of Facts, i.e., that the bank impounded funds in Globe's accounts at the bank, is not alleged in any of the causes of action set forth in the Complaint. Appellant, therefore, ignores count eleven of the first cause of action, "That the Bank of Salt Lake failed to credit Globe Leasing Corporation's checking account for the proceeds of the three leases and that upon subsequent inquiry by the personnel of Globe Leasing Corporation, the representative of the defendant, Bank of Salt Lake, on or about July 1, 1974, advised plaintiff, Globe Leasing Corporation, that the leases would not be honored and that Globe Leasing Corporation account would not be credited with amounts representing proceeds of the three leases." It is certainly not inconceivable that the Court below found the actions of the bank, in effect seizing the value of the three leases, tantamount to impounding funds belonging to Globe.

However, if appellant insists that the Court mistakenly had reference to the two accounts of Globe at the bank which were in fact frozen by the bank (cf Tr. 63, testimony of Mr. Weigelt and Tr. Vol. II 173, testimony of Mr. Stats) and overlooked that the impoundment of some $3,800 [sic] (Tr. Vol. II 173) by the bank was not alleged in any of the causes of action included in the Court's Findings of Fact, appellant should be aware that such erroneous findings have consistently been held by this Court and the majority of jurisdictions to be but harmless error.

Chournos v. Evona Investment Company, 97 Utah 335, rehearing denied 97 Utah 346, 93 P.2d 450, 453, rehearing denied 94 P.2d 470 (1939), stands for the proposition that an erroneous finding by the Court below will not constitute a ground for reversal where, as here, appellant was not prejudiced thereby.

The leading California cases on point go even further. In Gray v. Janss Investment Company, 196 Cal. 634, 200 P. 401, 404 (1921), the Supreme Court of California ruled that a variance in the pleadings and the findings which "could not have so misled or surprised the defendants as to have placed them at a disadvantage... cannot be held to warrant the reversal of the judgment.

> Where a case proceeds upon the hypothesis that an issue has been raised and findings are made upon such an issue, the complaint becomes immaterial and judgment on the findings will be upheld. (Citations omitted). A finding is not to be overthrown merely because it is more

specific than the allegation. Ramos v. Pacheco, 64 C.A.2d 304, 148 P.2d 704, 707 (1944).

The evidence before the Court below clearly demonstrates that the bank could have been in no way surprised by the assertion that they impounded Globe's funds. The record shows that Globe's Motion to Release (those same) Impounded Funds was argued and a minute order entered on August 13, 1974 that the bank "place the impounded funds in a position to draw the highest interest available" (awaiting final disposition of the lawsuit.)

The issue of the impounded funds in the two Globe accounts was raised at trial considerably by both sides and, as in Ramos, is more specific than the Complaint. The significance of a few thousand dollars to the whole of the Findings and Conclusions is hardly significant and is not prejudicial to appellant's case. Appellant's assertion, therefore, if correct, is harmless error, and the other Findings set forth are sufficient to sustain the judgment.

It is a well settled rule of law in Utah that error in the Findings notwithstanding, if there are other Findings which can sustain the judgment, then the judgment shall be sustained. That rule, stated by this Court in Thomas v. Foulger, 71 Utah 274, 264 P. 975 (1928), has not been seriourly challenged.

Appellant also argues that respondent's theory of recovery is "injurious falsehood" or "disparagement" as summar-

ized by W. L. Prosser in his Handbook of the Law of Torts, § 128 at 919 (4th ed. 1971) and cites two Utah cases as support of Prosser's theory; Pender v. Dowse, 1 Utah 2d 283, 265 P.2d 644 (1954) and Western States Title Insurance Co. v. Warnock, 18 Utah 2d 70, 415 P.2d 316 (1966).

Respondent would point out to the Court that both Pender and Western States Title are slander of title actions.

Pender can be distinguished from the instant case in that the defendant had a valid judgment for costs against the plaintiff. (emphasis added)

> His acts in having the execution issued, levying on the property and having it sold at sheriff's sale all reflected the true nature of the claim; that is, that these actions were taken to satisfy a judgment for costs.... (at 650). (emphasis added).

The bank is now before this Court having actually damaged the respondent's business reputation without benefit of legal process at the time of the injury. In the instant case the bank performed the various acts complained of thereby forcing the other party (Globe) to resort to the courts. (emphasis added). The two cases are squarely in opposition.

Western States Title, plaintiff and appellant, was denied relief by this Court:

> Unless we hold that the language claimed to constitute a libel is libelous per se, since plaintiff does not allege any special damages (therefrom) the ruling of the trial court cannot be reversed. (emphasis added).

Globe alleged, and proved to the satisfaction of the trial court, its damages.

Furthermore, respondent does not accept fully appellant's proffer of Prosser as the controlling authority. 86 C.J.S. § 43 at 956 and 957 (citing cases) avers that wrongful interference with prospective contracts or the right to pursue a lawful business, calling, trade or occupation has been "generally held to constitute a tort,.... Even though no wrongful or unlawful means are employed to accomplish the result ...." Prosser's "injurious falsehood" and "disparagement" theory has only been accepted in the courts of five states (New York, Pennsylvania, Texas, Illinois and Florida) on a limited basis and in only one Federal District Court (New York). 86 C.J.S. 48 at 971.

Appellant addresses argument to tortious interference with contractual relations in Appellant's Brief at 14 which asserts, "Obviously, an element of that cause of action is interference with some existing contractual relationship of the plaintiff. Specifically the action is for inducing a party to breach a contract with plaintiff." Appellant is attempting to mislead this Court. As has been briefly mentioned, supra, the lost business profits prayed for in this action were those profits to be derived from prospective contracts over the years. The amount of loss which resulted from the interference with the existing sixty or so leases is miniscule as compared to the profits to be expected in future years as estimated by Mr. Stuart. That area will be more thoroughly covered, infra.

Appellant also argues at length that the Court below enumerated its Findings of Fact without any mention of the bank's purported privilege to interfere with the business of Globe. Appellant cites Gammon v. Federated Milk Producers Association, 11 Utah 2d 421, 360 P.2d 1018, 1022 as authority for the privileged inducement of breach of contract. Again, we are not so much concerned with the breach of existing contracts as we are Globe's inability to continue in business and acquire additional contracts. The language in Gammon speaks to a different proposition anyway, i.e., that the privilege spoken of is "an absolute right - that is, an act which a person has a definite legal right to do without any qualification." (emphasis added).

The "qualifications" are apparent throughout the trial record.

In the first place, the bank relies on after the fact knowledge to assert their so-called right or privilege. The bank's president at the time of the termination of the agreement with Globe, Mr. Parker, testified that the bank was not even aware of the "double financing matter" (Tr. Vol. II 128) until after the actions of the bank complained of herein. Nor could the bank have had any knowledge of the "forged lease" until some time after the funds were frozen (Tr. 151, 152). The bank surely does not rely on Globe's use of the "security deposits" to assert its so-called privilege. Mr. Stuart testified without objection thereto that not only leasing companies

but also banks and "all types of businesses" traditionally and commonly use security deposits as working capital. For the bank then to assert that the conversion of deposits into working capi is not good practice for a leasing company but is all right if you're a bank is disingenuous and self-serving.

The strongest inference to be drawn from Mr. Parker's testimony is that the bank "pulled the plug," on Globe because Globe had grossly exceeded their lending limits and had undertak too many leases with a company, Leisureamerica, which was not credit worthy (Tr. Vol. II 92 and 97).

The tenuous nature of appellant's position on that matter is pointed out through the testimony of Mr. Perry, who, a the time in question was the bank employee with the immediate authority to approve the Globe lease agreements. Mr. Perry testified that the bank had final approval or veto power on all credit applications of potential leases proposed by Globe (Tr. Vol. 18 and 19). The credit information was telephoned to the bank b Globe whereupon they conducted their own "independent investigati About one third of the credit applications were not approved by the bank. Some of the applications might have gotten through without approval. However, there was nothing in the record to indicate anyone other than the bank was at fault for that.

1. Since Globe had no control over approval of credi how can the bank tortiously assert their "privilege" against Globe because the bank itself was the one who approved too much credit out through Globe accou

2. Likewise, since the bank had total control over credit approval, where is the justification for alarm over the numerous leases out to Leisureamerica? While respondent agrees there is basis for alarm, it is the bank and not Globe which appears from the record to be in need of policing.

Further negating any privilege which might arise under the Uniform Commercial Code, Article 9 (70A-9-502 Utah Code Anno., 1953) is the pure and simple fact that appellant could not prove at trial that Globe was in default on July 15, 1974 when appellant froze Globe's funds. The Court below specifically found no such default at the time the funds were frozen.

Furthermore, in the case cited by appellant as the law in our state concerning the necessity for specific Findings of Fact upon all the material issues, Legrand Johnson Corp. v. Peterson, 18 Utah 2d 260, 420 P.2d 615 (1966), this Court was faced with a very different and unusual decision.

> We are at a loss to understand why no findings of fact were made in the instant case. 420 P.2d 616.

This Court was disturbed that absolutely no Findings of Fact were presented by the trial judge. In the instant case the trial judge has enumerated seventeen Findings of Fact. That the Court was convinced no absolute right or privilege existed in the bank is implicit in the Findings. If the Court below chose to find such a privilege, the Court could have done so

since the privilege grows out of the same relationship the acts complained of arose from. Respondent asserts that by finding that the bank's acts were tortious the Court implicitly found no privilege because one did not exist.

One additional attempt by appellant, in their (mis)Statement of Fact, to attribute culpable behavior to Globe in order to justify the bank's tortious freezing of the Globe accounts should be briefly mentioned. In Appellant's Brief at page seven it is explained that the bank at first advanced credit to Globe on each lease for the amount of each lease but that Globe later "changed that practice" and began getting an additional 10% (Tr. 12-13, 41; Vol. II 57, 123). Now who holds the cards here? As in the aforementioned credit approvals/investigations and the Leisureamerica leases it is the bank in the position to approve or deny and it is the bank who now comes before this Court and says "we did it wrong and now we want our money back." Further, a more careful reading of the trial transcript quoted above will reflect that Mr. Perry, albeit reluctantly, approved Globe's practice of adding 10% to the price of each lease.

II.

THE EVIDENCE PRESENTED AT TRIAL SUPPORTS THE CONCLUSION OF LAW THAT APPELLANT TORTIOUSLY INTERFERED WITH THE BUSINESS RELATIONS OF THE RESPONDENT.

As already pointed out above, the Findings of Fact are sufficient to support the Conclusions of Law in this matter

A. That the bank's actions herein complained of were sufficient to create the innuendo of lack of credit worthiness is apparent from the record. Appellant's Brief at pages 18 and 19 admits that Globe was not delinquent in any of its payments to the bank, then dismisses Globe's payment record as insubstantial in light of its use of security deposits as operative capital (a common practice in the business according to the evidence); Globe's double financing of one automobile (a fact unknown to the bank at the time of their actions); the issuance of a forged lease (again, only known to the bank after the actions of July 15 and furthermore, the evidence did not inculpate any of Globe's employees or agents re the forgery); and Globe's thin capitalization (which was known to the bank before they extended nearly $400,000 in credit).

The bank does not dispute that their actions put Globe out of business, i.e., created the innuendo and the atmosphere whereby Globe could not obtain further financing after having relied to their detriment on the bank. The bank merely alleges misconduct on the part of Globe after the damage is done. Respondent submits that the bank merely panicked at the sight of so much money being out to one account, then set out to eliminate that problem by eliminating the account itself, i.e., Globe, rather than policing the same and now comes before this Court and says, "yeah, but we were right after all." Respondents

do not deny the bank their right to correct their mistakes; however, the issue here is that in doing so, they don't cause injury to others as they have chosen to do here.

It is not totally without significance that Mr. Parker may have never known about the abundance of Globe leases had he not observed a "very striking lady" (Mrs. Weigelt) and asked to see her file (Tr. 92). We are left to wonder whether or not Globe would be a flourishing business today if Mr. Weigelt's taste in women were not so good.

B. Appellant again speaks of privilege and claims a statutory right (Appellant's Brief at page 19) to take the action it did. In plain fact there is no such statutory right. Appellant mentions no statute; the record contains no such statute. If appellant is referring to Article 9 of the U.C.C., respondent would stipulate that that is the test (70A-9-502 Utah Code Anno., 1953); however, by appellant's own admission that the Globe accounts were not delinquent, it is Globe and not the bank who should find comfort with Article 9.

Appellant cites Flinco, Inc. v. Goodyear Tire and Rubber Company, 17 Utah 2d 173, 406 P.2d 911 as authority for its right to terminate an existing contract. A closer reading of that decision shows that Goodyear terminated its contract by giving thirty days' written notice pursuant to a specific term, paragraph 14," of the contract.

If appellant relies on Flinco, then appellant impliedly relies on the written terms of each existing lease assignment. Exhibit 20-P to the trial transcript is one such representative agreement. Paragraph five sets forth default in payment, inter alia, as the basis for terminating the contract. Paragraph six is titled "REMEDIES" and directs the Secured Party to the U.C.C., inter alia, for redress for the default.

After citing Flinco the appellant states that oral notice was given to Globe followed by written notice (telegram). In fact, the record is devoid of any such oral notification.

Appellant makes a very strong argument that case law and the Utah Code Annotated allows appellant to terminate the agreement in question "at will" and without any default by respondent.

Appellant cites the language of 70A-1-208, Utah Code Anno., 1953 wherein appellant may so act "at will" or "when he deems himself insecure," etc. The Code also states in that same sentence of that same section ... "(H)e shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired." It is obvious that the court below found the element of good faith to be absent.

Appellant believes Mr. Norton Parker's good faith can be found in his concern over the Leisureamerica leases (which, interestingly enough after all was said and done about their doubtful credit worthiness, the record reflects that Leisureamerica was not in default); the lack of bank authorization for

some leases (however, as argued previously, the bank's own forbearance is not in any way attributable to Globe, Leasureamerica or any other entity other than the bank); and Mr. Parker's "belief" that someone at the bank was being "paid off" by Globe. This latter rather incredible accusation is not supported by even one shred of evidence at any point in the record and, in fact, there is no evidence that the bank believed the theory strongly enough to pursue the possibility of internal misconduct. The bank allowed their lending to go unchecked and get out of hand, then came in attempting to point the finger at one of their own employees in order to justify closing down the respondent's business.

Appellant cites First Security Bank of Utah, N.A. v. Wright, 521 P.2d 563 (1974) as a case being "directly on point" re lack of tortious interference liability for giving notice of one's security interest. Actually the case goes much deeper than that and supports respondent's position.

First Security, on this issue, is a bifurcated decision (at 567) wherein Justice Crockett, writing for the majority, said:

> The first is that a creditor who has a security interest in personal property has a right to notify any third party of his interest; and doing so does not constitute an actionable interference with the debtor's business.

Of course we know in this case we had more than mere notice of a security interest. We had intentional, affirmative

acts by the bank which far exceeded the mere notice spoken of by Crockett, J. However, the stronger basis for the ruling seems to be that the defendant (Wright):

> (D)id not make nor proffer any sufficient proof to justify a finding that he suffered compensable damage to his business as a result of First Security giving notice to the named debtors.

Respondent has shown such proof of loss through its witnesses and the trial court accepted said proffer as the Findings and Conclusions so indicate.

C. In attempting to deny that the Bank's actions were the proximate cause of Globe's demise, appellant first asserts that Globe presented no evidence to show their ability to buy automobiles from automobile dealers was in any way diminished. The plain and simple fact of the matter is you can't buy cars without money to pay for them. Appellant's position is absurd with respect to that assertion. If Globe could have "borrowed" the cars they needed for their leasing business, they would not have had to seek financing from the bank in the first place. Appellant's comments about Globe's credit reputation with such dealers "not (being) very good in any event" are self-serving and not relevant. Even if that were the case, you don't need credit if you pay cash ... and that was what Globe was doing before the bank withdrew its line of credit.

Appellant also claims that there is no evidence that current or prospective lessees refrained from doing business

with Globe. We suppose that is because there was no more Globe to do business with, i.e., the bank's actions put Globe out of business. If certain of the lessees were confused by the "clear language" of their lease agreements (Appellant's Brief at page 27) it was only through the confusion brought about by the actio of the bank. Appellant suggests in the Brief that perhaps the confusion was due to "some representation by Globe's Mr. Weigelt that, notwithstanding such language, he would not assign the leases." Such self-serving comments are not only not contained anywhere in the record--no such conduct by Mr. Weigelt was even suggested at trial by appellant's counsel or appellant's witnesses.

As to appellant's claim that Globe had failed to show they could not obtain financing from other financial institution after the bank's actions, one only has to wonder what bank or loan company will advance a loan to a company that has just had its line of credit taken away and has just been put out of the leasing business by another financial institution. When someone loses a leg due to a tortious act, the courts don't demand the victim try all of the hospitals to try to get the severed leg sewn back on before resorting to an action in tort. The irreparable damage had already been done.

If, as appellant claims, the Bank of Salt Lake was the only place Globe could obtain financing and then the bank terminated Globe and then Globe necessarily went out of busi-

ness, it would only seem to make the issue of proximate cause more clear. Further, it is common knowledge that fledgling businesses build their credit reputation as they grow, buy and sell, and generally perform in the commercial world much like a young married couple builds their credit up through purchases, loans, etc. While it's true in July 1973 the Bank of Salt Lake loaned money to Globe when others would not, after one year of performing without delinquent accounts, with an increase of business to include some 64 leases worth some $400,000 and a good overall "track record" as the expert witness, Mr. Stuart, testified (Tr. 220), it would seem that Globe's credit worthiness would have to have been enhanced considerably, if however, the bank had not pulled the rug out from under all that. The test is not whether Globe could borrow money after July 15, 1974, but whether they could have borrowed from another bank on July 14, 1974. Aside from the one loan from Valley State Bank, Mr. Weigelt never tried any other banks because the Bank of Salt Lake was taking care of all his needs.

Mr. Stuart testified as a banking expert (Tr. 220) that he would have turned down ("recommended against") Globe's initial application to the bank but, based on perusal of the bank's records in dealing with Globe, Globe's dealings with its lessees and Globe's favorable eleven month "track record," he would have done so. Respondent submits that if other banks would have

financed Globe's operations on July 14, 1974, as Mr. Stuart suggested they might, they surely would not have done so on the following date. The evidence of that is implicit in all the facts and circumstances surrounding the financial climate at the time as reflected in the record.

Appellant attacks Mr. Stuart's credentials as an expert witness referring to him as an "alleged" expert (at page 29 of Appellant's Brief), but respondent submits that Mr. Stuart is an extremely qualified expert in the areas of economics, banking and leasing as the record will reflect (Tr. 156-162). Mr. Stuart's qualifications and testimony were obviously accepted and given great weight by the court below.

At page 29 of the Brief appellant claims to have found Mr. Stuart giving contrary testimony at pages 209 and 220 of the trial transcript when, in fact, if taken in context, there is no such disparate testimony.

> Q: ... do you have--have you formulated an opinion as to whether or not Globe Leasing, under the bank's financial situation that existed, the banking circles and lending circles in July of 1974, and with the action of the bank in claiming ownership of the leases and its entitlement to one of the security deposits, the accounts of Globe Leasing in the bank, and the directing or the mailing of the letters such as letters identified as 9P to Mr. Weigelt's customer, do you know of any conceivable way that Globe Leasing could remain in business?
>
> (Objections omitted)

A: No.

Q: What is the import of cash flow to a company seeking a line of credit?

A: Bankers rely heavily on the sources that are to be used to be paid funds that are advanced. If the bank can't see where it's going to obtain those funds, usually the loans will be denied.

Appellant speaks of the disparate testimony contained in the trial transcript at page 220. A careful reading of page 220 in its entirety shows no such testimony. Respondent would invite this Court's attention to pages 216 through page 222 wherein Mr. Stuart explains in substance that he would have "been willing to back Globe" based on their track record were it not for the bank's acts in terminating Globe. At that point, Globe's good record was suddenly undone by the actions of the bank making another bank's extension of credit unlikely. Mr. Stuart's testimony throughout the record, particularly under cross-examination, was that he would have loaned money to Globe based on their eleven month "track record," i.e., the sum total of all the circumstances of the 64 leases but that no bank would loan money to Globe after July 15 in the face of the alleged defaults which the bank's actions implied.

Appellant speculates there must have been some other reason for Globe's inability to obtain credit from other banks after July 15. Appellant posits other possibilities; viz., the banks were simply not interested in financing leasing com-

panies. All one has to do is look in the yellow pages under automobile leasing companies to discover the abundance of said businesses. Somebody has to be financing them. Appellant cites Mr. Weigelt's testimony (Tr. 72-73) that he went to seven or eight banks to seek continued financing for Globe (unsuccessfully) and only encountered common knowledge of the "Bank of Salt Lake matter" at two (to show, we suppose, that word of that matter really didn't get around the banking community.) We hardly expect a closed community like the banking circle to divulge such knowledge to Mr. Weigelt but we hardly doubt that such knowledge wasn't commonly held in the banking industry.

III.

THE AWARD OF DAMAGES BASED ON LOST PROFITS WAS A CORRECT APPLICATION OF THE LAW.

The older cases tended to exclude lost profits as being too speculative in nature. The recent cases, however, comport with the idea that ... "the right to recover profits claimed to have been lost as a result of either a tort or a breach of contract is now determined by the same rules that govern the recovery of other damages". 22 Am. Jur. 2d § 172 at 242. The test for allowing lost profits as damages is: (1) their loss is proved with a reasonable degree of certainty; and (2) is caused by defendant's wrongful act. Id.

Two cases decided in Utah Federal District Courts, both appealed to the 10th Circuit Court of Appeals are on point. In U.S. v. Griffith, Gornan and Carman, Inc., 210 F.2d 11, 13-14 (1954), the Court overruled an award of prospective lost profits because the plaintiff relied entirely on the testimony of its president who never produced the books from which he made his calculations. The Court affirmed the rule that:

> Prospective profits are necessarily somewhat uncertain and problematical, but in cases where damages are definitely attributable to the wrong of the defendant and are only uncertain as to amount they will not be denied even though they are difficult of ascertainment.

In Randy's Studebaker Sales, Inc. dba Randy's Datsun Sales v. Nissan Motor Corp. In U.S.A., 533 F.2d 510 (1976, the 10th Circuit upheld the award of $6000,000.00 lost profits (mostly future)

based on the testimony of an expert witness (coincidentally the same expert witness as in the case before bar, Mr. Stuart, using the same "ten-year" method of computing damages). Over Nissan's argument on appeal, the court said at 517, 518:

> We are mindful that computations by experts cannot be based on conjecture or be unsupported by the record (cases cited). But, here, Stuart's damage calculations were based on records and data that were put into evidence through both testimony and exhibits, all of which were available to the jury during its deliberations.

The court further stated at page 518:

> While damage claims (of lost profits) may not be speculative, they also do not have to be mathematically precise; it is sufficient if damages are proved to a reasonable certainty (cases cited). And, where the defendant's wrongdoing created the uncertainty, it must bear the risk of that uncertainty and cannot complain.
>
> (Emphasis added.)

The rules of law cited by appellant in Howarth v. Ostergaard, 30 Utah 183, 187, 515 P.2d 442 (1973) are correct; however respondent would point out that in Howarth, plaintiffs wanted to use their mortgage as collateral for a loan from which they hoped to buy Christmas trees which they hoped to sell for a profit, a venture which plaintiffs apparently had not ever attempted in the past. This Court correctly held that damages were too speculative in that case. However, in the case at bar the "Christmas trees" were already established and capable of being projected into the future with reasonable certainty.

A. APPELLANT HAS MISSTATED THE NEW BUSINESS RULE.

Appellant's argument regarding the so-called "new business rule" is without merit.

Appellant argues that the "new business rule" precludes recovery in this case and cites, inter alia, 22 Am Jur 2d Section 173 at 245. Appellant is referring to the following language:

> The general rule is that evidence of expected profits from a new business is too speculative, uncertain, and remote to be considered and does not meet the legal standard of reasonable certainty.[16]

If appellant would have examined the cases cited in note 16 at 245, appellant would have discovered that virtually all of the recent cases cited in support of the above rule of law refer expressly to businesses "contemplated but not yet established" (emphasis added). E.g. Greenwood County V. Duke Power Co., (CA4 SC) 107 F2d 484, 131 ALR 870, cert den 309 U.S. 667, 84 L.Ed. 1014, 60 S.Ct. 608 (1939); Handley v. Guasco, 165 Cal App 2d 703, 332 P.2d 354, 359 (1958); Head v. Crone, 76 Idaho 196, 279 P.2d 354, 359 (1955); Jenkins v. Morgan, 123 Utah 480, 260 P.2d 532 (1953).

In Jenkins this Court held . . . "prospective profits to be derived from a business which is not yet established but one merely in contemplation are generally too uncertain and speculative to form a basis for recovery" (emphasis added).

The 22 Am Jur 2d Section 173 annotation continues:

> If, in the particular case, it is possible to show, by competent evidence and with reasonable certainty, that profits would have been made and the amount of those profits, they can be recovered.

In at least one of the cases cited as authority for that langua

Pace Corporation v. Jackson, 155 Tex. 179, 284 S.W.2d 340, 348

(1955), the business was not even established when the contract

was made between the parties. A few months after the business

plaintiff was established, defendant withdrew from its obligatio

of supplying plaintiff with cigarettes at a bargain price. That

court would go even further then than did the court in the insta

case.

Appellant also cites 25 Corp. Jur. Sec. Section 42 at

197 in support of its position:

> New or Contemplated Business. Where a new business or enterprise is floated and damages by way of profit are claimed with respect thereto, as for its interruption or prevention, they will generally be denied, for the reason that such business is an adventure, as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation . . . on the other hand, lost profits will not be derived merely because a business is new if factual data are available to furnish a basis for computation of probable loss of profits.

The same cases are cited as authority as were cited i

22 Am Jur Section 173.

Appellant also cites as controlling a Washington case,

Carolene Sales Co. v. Canyon Milk Products Co., et al., 122 Was

220, 210 P. 366 (1922), a 55-year old case which is relied upon

this Court in deciding Jenkins v. Morgan, supra. As this Court

aware, however, Jenkins stands for the proposition that prospe

profits are too speculative when the business is only being co

plated and is not yet established.

Appellant's proffer of Price v. Van Lint, 46 N.M. 58, 420 P.2d 611, 618 (1941) could not be examined because the citations are erroneous.

Appellant's continued argument regarding the Carolene Sales rule as to permanence and recognition of the business again relies upon the after acquired knowledge of the bank with respect to the "forgery", the double financing and the Leisureamerica leases. Respondent will not belabor the point with respect to appellant's tenuous reliance upon Globe's alleged "bad deeds" to show it was not a permanent or recognized business; the court below had the evidence before it and as the trier of fact that court apparently found the preponderance of the evidence to weigh in favor of the respondent on that issue.

Appellant cites further examples of "proof" of Globe's lack of permanence at page 35 of its brief through the proffer of Mr. Stat's testimony (TR. Vol. II 173-178) concerning three leases. The first example given in the record, at 175, is a vehicle which the bank repossessed in December, 1975, a full year and a half after Globe's termination; the second (at 176, 177) came back to the bank in May, 1976 as per agreement in "super" condition; the third lease was terminated in April, 1976, a full twenty-one months after Globe's termination, due to an out-of-state licensing problem not attributed to Globe (at 178). Respondent fails to see what support appellant gains from the foregoing testimony. If

there were any problems with the individual leases we would submit that the bank's interference was the catalyst, at any rate.

At page 35 of appellant's brief the assertion is made, "The testimony of Mr. Stuart concerning those leases was not, with the exception of the problem leases to Leisureamerica, based upon his appraisal of the soundness of any of the particular lessees' credit." We would again submit that it was the bank's duty by virtue of their own insistence to appraise the soundness of each and every prospective lessee. It is up to the bank, and not Mr. Stuart to explain the folly of appellant's ways.

Respondent argues further that appellant has not disputed that Globe's record of collection was a good one, and submits that the only test appellant would seem to recommend would be an exact measurement of profits <u>after</u> said profits have been realized. Unfortunately, the bank's activities of July, 1974 preclude the eventuality of such calculations.

Appellant attacks Mr. Stuart's credibility on yet another point, i.e., that his background is entirely with "large and successful" leasing operations operating as "adjuncts to automobile dealerships" (at page 36 of appellant's brief referring to TR. 159-161, 189). There is absolutely nothing on those pages or anywhere else in the record to show that Globe's operation was not analogous to the operations Mr. Stuart was familiar with. In point of fact, appellant's counsel asked no such questions and produced no witnesses of his own to controvert Mr. Stuart's qualifications or testimony. Counsel's closest intrusion in that area was to ha

Mr. Stuart agree that the previous operations within his knowledge were, "very well run," and had been in business, "quite a number of years" (TR. 189).

Since appellant persists in arguing that Globe's permanence is suspect due to their meeting their demise upon termination of only one line of credit and, of course, the revival of the after the fact bad acts, we should point out one's memory does not have to be altogether perfect to recall that the summer of 1974 was marked by extremely tight money in the financial sphere. Mr. Stuart's explanation (TR. 195, 196) of the "Federal Funds" barometer is very persuasive evidence of just how tight money was in the summer of 1974.

B. THE AWARD OF LOST PROFIT WAS BASED ON COMPETENT EVIDENCE BEFORE THE COURT.

Mr. Stuart's calculations were valid and reliable and were based on sound standard economic statistical analysis. Mr. Stuart, to determine Globe's projected growth rate, compared the first six months' operation (an average of 3.2 leases per month) with the last six months' operation (7.5 monthly average; without Leisureamerica, 5.8 leases) (TR. 191). He testified that if that growth rate continued and was verified by linear correlation and exponential smoothing, Globe would increase leases by 32 leases annually, exclusive of Leisureamerica's leases (TR. 191).

Mr. Stuart's expert opinion was that Globe's management and accounting were "excellent" and for a new business, particularly a leasing business with very little capital, "in all the business

evaluations I have made, this (Globe) was one of the better operations." (TR. 193.)

Mr. Stuart prepared an analysis of profit and loss for a lessor leasing the same number of vehicles as Globe from available market publications and acceptable accounting methods and determined that the price Globe would be selling their leased ca for in the future would be consistent with market prices, theret keeping their bad debt expense very low, as would the releasing of repossessed automobiles (TR. 193, 194). He added that he did not add that eventuality into his computations (Globe's possibl releasing of automobiles) contrary to appellant's assertion at page 38 of appellant's brief that he did so without any evidence to support his method (emphasis added).

Using "accepted economic and accounting principles", Mr. Stuart testified that he used a ten-year projection figure and stated why:

> There are a number of reasons why ten years was used. Ten years conforms to standard practice in valuation of using the ten-times multiplier of earnings. Ten years is also, when applied as a multiplier, the approximate amount of the discounted present value of stream of future receipts using exponential smoothing of cash flows. And, third, because the period of ten years has been sustained by courts as a reasonable period (TR. 213).

Mr. Stuart then explained to the court (beginning at TR. 214) that he prepared Exhibit 39P by using the aforementio ten-year projections vis a'vis "base year cash flow" and "adj ments", e.g., he substracted $15,000.00 from the positive side

the ledger as the estimate of Globe's losses on Leisureamerica leases and compared the same with the economic situation in the financial and automobile sales industry. He then observed that Globe's rate of growth (32 leases per year) could not be sustained so he reduced that number to what he thought Globe could sustain, i.e., ten new leases per year (TR. 215).

> The amount that attributed to the net cash flow associated with each new lease, after deducting my estimate of variable costs, was $600.00 per lease. That would represent the amount projected for 1975 and 1976, and thereon.

Mr. Stuart's estimate which he characterized as "conservative" based on the evidence before the Court of Globe's operations as well as the rate of growth of other leasing companies within his knowledge, would be that Globe could expect about 164 leases ten years from their termination by the bank (had they, of course, not been terminated) (TR. 215). After discounting his figures by 6.29 percent and making other observations about his computations (TR. 215-216), Mr. Stuart estimated:

> The $225,704.00 would be my estimate of the damages because of the termination of the business of Globe Leasing (TR. 216).

That figure took into account payment of all "costs, expenses and salaries" (TR. 216).

It is a long standing rule of law that it is the trier of fact who determines the credibility and reliability of witness testimony. The weight and sufficiency of the evidence presented at trial are entirely within the province of the jury, or, when tried by the court, within the sole province of the court.

There has been ample evidence presented by respondent to sustain the findings of the court below. The trial judge had the opportunity to hear the evidence, particularly the testimony of Mr. Stuart, and determine its sufficiency. Appellant had the opportunity to rebut and cross-examine, to call witnesses, expert or otherwise, and to present any competent evidence to controvert the testimony of Mr. Stuart as to the computation of lost profits and the projections of Globe's business future absent bank interference. That the trial court believed there was sufficient evidence from which to support a judgment for respondent is apparent from the decision by that court. The court below is the judge of whether Mr. Stuart's computations were too remote and speculative to be probative. The judgment speaks for itself.

> If there is substantial evidence to support the findings upon which the judgment is rendered, the judgment must be sustained. Charlton v. Hackett, 11 Utah 2d 389, 360 P.2d 176 (1961).
>
> The fact that it is difficult to calculate damages will not prevent an injured party from recovery. However, a judgment cannot be based on mere speculation. Monter v. Kratzer, 29 Utah 2d 18, 504 P.2d 40, 43 (1972).

Appellant also cites Kratzer but omits the first of the above two sentences. In Kratzer, Ellett, J., writing for the majority, held that future profits were speculative for a number of reasons. In the first place, there was no written agreement between the defendant-counterclaimant (supplier of bakery goods) and the company (Continental Baking Company) to whom Kratzer was supplying the goods. This Court in reversing the trial court's award

lost profits stated that although business with Continental had been ongoing for 17 years and had amounted to $5,000.00 per month, a recent management change at Kratzer had apparently started a steady decline in business to where, at the time of the interference, business was averaging only $2000.00 per month.

> There was no evidence to justify an inference that Continental would order $2000.00 worth of products from Kratzer (at 44) for ten years.

In Kratzer it was stipulated that gross sales were $2000.00 per month. No evidence was presented to show daily sales; no expert witness was called to calculate by sound economic methods what projected profits would be.

Respondent submits that he has met the burden of proving up those prospective damages as the court below so found.

Kratzer was a business on the decline. Globe was a business clearly on the rise. Appellant did not show any propensity for Globe to decline or even level off. The only evidence presented at trial at all probative of that was Mr. Stuart's expert "conservative" opinion that Globe would increase their number of leases by ten per year for the ensuing ten years (TR. 215).

Appellant relies heavily on the decision of this Court in Gould v. Mountain States Telephone and Telegraph Co., 6 Utah 2d 187, 309 P.2d 802 (1957) wherein future profits were denied a young attorney whose professional listing was omitted from the yellow pages of the telephone directory.

This Court reaffirmed the rule of law in Utah as to future profits:

> The prospective profits were based on the speculative assumption that the potential clients lost through non-referral would have resulted in the referral of other clients or business by the clients presumably lost (at 806).

Respondent is clearly distinguished from Gould. This Court found that future profits based on referral was too remote too speculative. There is nothing in the record to indicate tha Globe was relying on the double referral method of gaining new business. Mr. Stuart's calculations were based upon only ten ne leases per year (TR. 215).

All this Court was asking in Gould was that future pla tiffs prove their prospective profits with reasonable certainty.

In a 1975 case, Mahar v. General Motors Corporation, a unpublished opinion from the United States Court of Appeals, 10t Circuit, an appeal from the United States District Court for the District of Utah (attached hereto as Appendix A) has gone even further in sustaining a verdict for prospective earnings of a college student who had been accepted to the University of Utah College of Law previous to having sustained the injuries sued u The Court relied upon the testimony of an expert economist in fixing some $600,000.00 based on evidence of future earnings of practicing lawyer in the State of Wyoming (at page 12).

Crockett, J., concurring with the dissent in Gould in favor of allowing future damages, provided us with the test to apply in determining whether the evidence will support an award future damages:

> The traditionally accepted test of the law is that a fact may be found if minds may believe it by a preponderance of the evidence. This means that if it can reasonably be believed that it is more probable than not, or that it will with reasonable certainty occur, a finding of such fact is justified. (Citation omitted.) at 807.

Respondent submits that the proof at trial has met the test.

When damages are obvious but difficult to prove the wrongdoer should not benefit.

> Rather than conferring an advantage upon him, doubts should be resolved in favor of compensating the injured person for his equity. Id. at 808.

Equity would dictate that the "ten-year rule" is the most just measure of damages. Randy's Datsun, supra.

C. THE MOTION OF THE BANK TO STRIKE MR. STUART'S TESTIMONY WAS PROPERLY OVERRULED. DAMAGES WERE AWARDED BASED ON COMPETENT EVIDENCE BEFORE THE COURT.

Appellant argues that Mr. Stuart's testimony should be stricken because his opinion is based in part on the unaudited financial statements and records of Globe (which were present in Court and open to inspection, audit, and/or cross-examination of appellant); and the accountant's working papers which were not in evidence.

32 C.J.S. Section 546 (63) at 269-270 recites the following general rules of law:

> (E)xperts may rely on and testify as to factual data obtained from others. Opinion testimony based in part on reports

> of others which are not in evidence but which the expert customarily relies upon in practice of his profession is admissible. Jenkins v. U. S., 307 F.2d 637, 641 (1962); Accord, McCormick, Evidence Section 15 (1955), 3 Wigmore, Evidence Section 688 (3d ed. 1940).

The Jenkins court also pointed out the "well-known practice of psychiatrists of relying upon psychologists' reports in making of diagnosis."

32 C.J.S. Section 546 (85) continues at 269:

> The fact that an expert's judgment is not based on all the facts of the case has been said to go to its weight rather than to its competency. (Citing Dunagan v. Appalachian Power Co., 33 F.2d 876 (1929), cert. denied 50 S.Ct. 152, 280 U. S. 606; Alward v. Paola, 179 P.2d 5, 9, 79 C. A. 2d 1 (1947).

Id. at 270:

> (A)n expert's testimony, although based on knowledge gained from inadmissible sources, is entitled to credit where it has the added sanction of the expert's general experience.

The rule stated immediately above is the well settled rule in California. Young v. Bates Valve Bag Corporation, 52 C. 2d 86, 125 P.2d 840, 846.

A careful review of the record shows that Mr. Stuart did not base his opinion entirely, or even substantially on the "unaudited" financial statements or on the accountant's working papers not in evidence. He testified to relying upon Globe's general ledger, Globe's books of original entry, all of Globe's basic documents, computer runs from the appellant bank, its bank statements, deposition jackets containing miscellaneous papers for each of the

leases in evidence, the accountant's work sheets, exhibits 2P, 17P, 22P, 26P, 28D, 8P, 20P, 30D, 19P, 7P, 6P, 5P, 4P, 24P, Kelly "Blue Books", N.A.D.A. "Blue Books", newsletters and handbooks published by the automobile industry, various studies of the automobile industry, etc. (TR. 162-165).

All of Globe's records were available for inspection by appellant (Rule 34, Utah Rules of Civil Procedure). Stuart's identity and the materials on which his opinions would be based were also available (Rule 26 (b)(4)(A), Utah Rules of Civil Procedure).

The relevance of asserting that Globe's records were "unaudited" is questionable. It is for the trial court to determine their business sufficiency. Defense counsel raised no objection at trial as to the "unaudited" status of Globe's financial records. Nor does the record reflect that appellant ever, by their own expert, challenged the accuracy of these books of account.

Appellant's objection to Mr. Stuart's testimony being based in part on records not in evidence also goes to, in appellant's opinion, the trial court's going outside the evidence to render judgment. Appellant cites Salt Lake City v. United Park City Mines Company, 29 Utah 2d 409, 412, 503 P.2d 850, 852 (1972). Park City is not on point. In that case the trial court heard the plaintiff's expert witnesses, commented on their excellent qualifications and testimony then based his judgment on a book unseen by either counsel and on a computer program prepared by the judge's student-son whose qualifications were never made known. This Court overruled the trial court's decision which was apparently based entirely, or almost

entirely on information which was not on the record in the face of sound expert testimony which was.

IV.

THE CONCLUSION OF THE TRIAL COURT THAT RESPONDENT SUFFERED $50,000.00 DAMAGES IN LOST PROFIT AFTER COUNTERCLAIM LOSSES OFFSETS IS SUPPORTED BY THE FINDINGS OF FACT AND THE EVIDENCE.

The court below found, "Globe Leasing has been damaged by the foregoing acts and the measure is Globe Leasing's loss of profit . . . The Court finds the reasonable amount of lost profit and, therefore, damage is the sum of $50,000.00 after any claims offsets of the Bank of Salt Lake including retention by the Bank Salt Lake of the above impounded funds." (Findings of Fact 9 and 10 at R. 373).

It was testified to by Mr. Stuart that in his expert opinion, damages amounted to $225,704 (TR. 216). Appellant surely does not dispute that it is within the province of the Court, sitting without a jury, to mitigate damages by whatever amount it feels excessive. The duty of the Court is to factually find to what extent plaintiff was damaged, if any. We know of no rule of law or any authority which dictates to the trier of fact that he must itemize and explain his formula for arriving at that finding. The court is not required to be that specific.

Appellant's argument again relies on Legrand Johnson which we pointed out, supra, to be a rather strange case where absolutely no Findings of Fact were presented. That was the issue addressed by the court. Here, the appellant complains that

Findings are not enough (emphasis added).

Respondent submits without argument that the trial court merged any damages arising under any counterclaim of appellant into the damage award.

CONCLUSION

Based on all the foregoing arguments and the conclusions already reached by this Court in setting forth the facts in Globe Leasing Corporation v. Bank of Salt Lake, 547 P.2d 197 (1976), the judgment of the trial court should be affirmed including the award of damages and dismissal of appellant's counterclaim.

Respectfully submitted this 23rd day of January, 1978.

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CERTIFICATE OF DELIVERY

I hereby certify that I delivered true and correct copies of the foregoing personally to the offices of Van Cott, Bagley, Cornwall & McCarthy, 141 East First South, Salt Lake City, Utah 84111,

and Kipp and Christian, 600 Commercial Club Building, Salt Lake City, Utah 84111, as attorneys for appellant, on this 23rd day of January, 1978.