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 Appellant

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,

vs.

GLOBE LEASING CORPORATION, a Utah corporation; AL WEIGELT and GLORIA MORRISON, individuals,

Plaintiffs-Respondent.

Case No. 15337

BRIEF OF APPELLANT

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

ROBERT M. ANDERSON
DOUGLAS MATSUMORI
Van Cott, Bagley, Cornwall & McCarthy
141 East First South
Salt Lake City, Utah 84111
Attorneys for Appellant

ROBERT M. McRAE
370 East 500 South
Salt Lake City, Utah 84111
Attorney for Respondent

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

SECONDARY SOURCES

IN THE SUPREME COURT

OF THE

STATE OF UTAH

BANK OF SALT LAKE, a Utah corporation, and NORTON PARKER, an individual,

Defendants-Appellant,

vs.

Case No.

GLOBE LEASING CORPORATION, a Utah corporation; AL WEIGELT and GLORIA MORRISON, individuals,

15337

Plaintiffs-Respondent.

BRIEF OF APPELLANT

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

ROBERT M. ANDERSON
DOUGLAS MATSUMORI
Van Cott, Bagley, Cornwall & McCarthy
141 East First South
Salt Lake City, Utah 84111
Attorneys for Appellant

ROBERT M. McRAE
370 East 500 South
Salt Lake City, Utah 84111
Attorney for Respondent

NATURE OF THE CASE

This is an action for damages for the defendant's alleged tortious interference with the business relations of the plaintiffs arising out of defendant's actions in terminating a financing arrangement with the plaintiff Globe; sending a notice of assignment of leases to the lessees of the plaintiff Globe; and dishonoring three checks drawn by Globe on its account with defendant.

DISPOSITION IN LOWER COURT

The case was tried to the court. From a judgment for the plaintiff Globe Leasing and a dismissal of defendant's counterclaims, defendant appeals. The court below found no cause of action for plaintiffs Alfred B. Weigelt and Gloria Morrison Weigelt and dismissed all claims against individual defendant, Norton Parker.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the judgment and judgment in its favor as a matter of law on the question of its liability, or that failing, a new trial on the question of liability. Alternatively, defendant seeks reversal of the award of damages to plaintiff and the denial of any award of damages to plaintiff as a matter of law, or that failing, a new trial on the issue of damages. Finally, and in addition to the foregoing, defendant seeks the reversal

of the judgment of dismissal on its counterclaims and judgment in its favor with an appropriate award of damages on those counterclaims which are addressed in argument hereafter, as a matter of law, or that failing, a new trial on the counterclaims of the defendant.

STATEMENT OF FACTS

The actions of Appellant, Commercial Security Bank of Salt Lake (the Bank) complained of by Appellee, Globe Leasing Corporation (Globe) occurred in and around July of 1974. (Tr Vol. 1 at 47-59) Specifically, on or about July 15, 1974, the Bank mailed letters to persons or entities who had leased automobiles from Globe. (Tr Vol. 1 at 47-48; Vol. 2 at 98-102) The letters so sent informed the respective lessees of Globe that Globe had assigned the lessee's lease to the Bank and, further, that the Bank was now requesting that any further rental payments be made directly to the Bank instead of to Globe. (Exhibit 9-P) Also on July 15, 1974, pursuant to the instructions of Mr. Norton Parker, the then President of the Bank, the Bank determined to terminate further extension of credit to Globe for its automobile leases. (Tr Vol. 1 at 49-50) At or about this same time, Mr. Parker was informed that there were in house, or in process, three additional leases of Globe for which funds by the Bank had not yet been advanced. (Tr Vol. 1 at

51-52; Vol. 2 at 106-108) After a discussion with Mr. Alfred B. Weigelt, the principal owner and chief executive officer of Globe, the only other employee being his wife Gloria, Mr. Parker determined to honor the Bank's commitment to extend financing for those last three leases. (Tr Vol. 1 at 54, 133-134; Vol. 2 at 106-108) After having instructed bank employees to continue processing those three leases, Mr. Parker discovered that, contrary to his past experience or practice in such matters, the Bank had issued credit advices to the account of Globe in the amount of the sums advanced to Globe for the purchase of the automobiles which were to be subject of the three leases. (Tr Vol. 2 at 129-132) Because of a previous experience with one Naylor auto in which it was apparent that the funds credited to Globe for the purchase of an automobile subject to a lease being financed by the Bank, had not been used to purchase that automobile, Mr. Parker wishing to insure that that situation would not again arise, ordered that the credit advices to Globe's account be reversed. (Tr Vol. 2 at 129-130) Upon receipt of notice of the said credit advices, Globe drew checks for the purchase of the three automobiles subject to the leases for which funds had been advanced by the Bank. (Tr Vol. 1 at 52; Vol. 2 at 130-131) The automobile dealers

to whom those three checks were issued brought the checks in person to the Bank to have them cashed. (Tr Vol. 1 at 128-129) Because the credit advices had been reversed at the direction of Mr. Parker, the said automobile dealers were informed that the checks would not be honored by the Bank. Mr. Parker attempted to arrange for an alternate method of advancing the funds on the final three leases. He caused three cashier's checks to be issued in the name of Globe and the respective dealer from whom the automobile would be purchased. Globe was then notified that those checks were available at the Bank and could be picked up for use in payment for the three automobiles. Globe refused to receive the funds advanced to it by the Bank in that form and subsequently, through negotiations between the two parties, a method of payment was agreed upon and checks drawn by Globe to the three dealers were honored. (Tr Vol. 1 at 52-55, 132-134; Vol. 2 at 131)

On or about July 17, 1974 the Bank notified Globe by telegram that it would no longer extend credit to Globe. (Exhibit 30-D)

For an understanding of the context in which the actions of the Bank on or about July 15, 16 and 17 of 1974, took place, it is necessary to provide some history and background of the relationship between the Bank and Globe

prior to that time. The relationship had its beginning sometime in July of 1973 barely a year before the events which gave rise to this lawsuit. Mr. Weigelt, seeking financing for a proposed automobile leasing company which would later become Globe, came to the Bank at that time in 1973 to make a presentation. (Tr Vol. 1 at 3-5) It appears that Mr. Weigelt's contact with the Bank was principally through Mr. James W. Perry, at that time employed by the Bank as a Vice President in the consumer loan area. (Tr Vol. 1 at 3-11; Vol. 2 at 15-16) The record as to the sequence of events at that time is less than clear, however, it appears that Mr. Weigelt also had the opportunity to make a presentation of some kind to other officers of the Bank. (Tr Vol. 1 at 8-9) In any event, the result of Mr. Weigelt's solicitations was that his proposal was presented to the loan committee of the Bank which determined to turn down his application for financing. (Tr Vol. 2 at 15-16)

Shortly after the meeting of the loan committee at which Globe's application for financing was denied, Mr. Parker spoke with Mr. Perry concerning the Globe proposal. At that time, Mr. Parker instructed Mr. Perry to "try a few" of the Globe leases. (Tr Vol. 2 at 16-17) It also appears, that Mr. Parker told Mr. Perry that he should try a few leases up to a limit of about $30,000 or $40,000. (Tr Vol.

2 at 43-44) Pursuant to that discussion, Mr. Perry sent a letter to Mr. Weigelt purporting to confirm an agreement entered into between Globe and the Bank. In that letter, Mr. Perry informed Mr. Weigelt that:

> This agreement covers the assignment of lease contracts to this bank from time to time as generated through your normal business activities, and will remain in force until written notice is received by either party to effect the termination.

(Exhibit 8-P) That letter from Mr. Perry apparently began a series of transactions between Globe and the Bank on some 64 motor vehicle leases generated by Globe. (Exhibit 17-P)

The apparent procedure used in effecting those transactions was as follows: Globe as an automobile leasing company would locate prospective lessees. Globe would make its own credit check of the prospective lessee and provide the Bank with credit information necessary for the Bank to complete its own independent credit check of the prospective lessee. After approval by the Bank, both of the credit of the prospective lessee and the amount to be advanced by the Bank on the lease, Globe would apparently complete the lease transaction by ordering the car subject of the lease, execute the lease, execute a motor vehicle security agreement with the Bank as secured party, and execute an assignment of the lease. The lease, lease assignment and security agreement would then be forwarded to the Bank at which time

a credit advice in the amount to be advanced on the lease would be issued by the Bank to the account of Globe. (Exhibit 17-P) The Bank apparently set up the accounting for the transactions with Globe on a main computer account with Globe as the "dealer" and with each of the individual leases which had been assigned to the Bank on a separate sub-account. (Tr Vol. 1 at 11-26; Vol. 2 at 19-42) Each month, the Bank would debit Globe's operating account with the Bank for the sums owing on each of the lease accounts.

There were some exceptions to the above mode of effectuating the lease and lease assignment transaction between Globe and the Bank. Although originally the amount of the funds which Globe requested that the Bank advance on each lease was in the amount of the purchase price of the automobile subject to the lease, Globe changed that practice and began requesting the amount of the purchase price of the automobile plus 10% additional. (Tr Vol. 1 at 12-13, 41-42; Vol 2. at 57, 123) In one specific instance, Globe received as the proceeds of the loan on a lease to Donald L. Hildreth the sum of $8,546.41. The lease which was assigned by Globe to the Bank in exchange for the advance of the funds was not in fact a valid lease as the signature of Mr. Hildreth had been forged thereon. (Tr Vol. 1 at 42-47, 66, 89-104, 146-156) There had been, in fact, a lease of an

automobile to Mr. Hildreth by Globe. However, the lease of said automobile to Mr. Hildreth was not upon the same terms as those represented in the lease with the forged signature which was assigned to the Bank by Globe. (Exhibit 26-D) (Tr Vol. 1 at 92). The actual lease between Globe and Mr. Hildreth provided for a prepayment of the rentals on that lease in the sum of $3,500.00. (Tr Vol. 1 at 92-94) Each assignment of lease executed by Globe to the Bank contained a provision prohibiting such prepayment without the written consent and authorization of the Bank. (Exhibit 20-P) Neither the prepayments nor any sums received in payment for the purchase of the automobile were paid to the Bank at the time of their receipt by Globe. Rather, Globe allowed the Bank to continue to debit its account in accordance with the lease payment terms of the lease which had been given to the Bank. (Tr Vol. 1 at 100)

Another instance of departure from the procedure above described, was an instance in which Globe received funds from the Bank for the purchase of a 1974 Pontiac subject to a lease which was to be assigned to the Bank. Contrary to the terms of the Motor Vehicle Security Agreement given to the Bank in conjunction with the lease assignment of that Pontiac, Globe had, in fact, previously received a loan for the purchase of that same automobile from

Valley Bank & Trust Company and had granted to Valley Bank & Trust Company a security interest in the same vehicle. Upon discovery of this instance of double financing, and in order to make good its security interest in the automobile, the Bank paid to Valley Bank & Trust Company the sum of $3,165.95. (Tr Vol. 1 at 111-115; Vol. 2 at 158-160)

In a further departure from the established procedure which departure was a major factor in the actions taken by the Bank at the direction of Mr. Parker on July 15, 1974, Globe obtained the approval of Mr. Perry on one lease to a company called Leisureamerica. However, fourteen other leases to that same company were processed by the Bank apparently without the knowledge or approval of Mr. Perry. (Tr Vol. 1 at 116-118; Vol. 2 at 66-75, 110) Leisureamerica Company was, in fact, a very bad credit risk. Just prior to July 15, 1974, Mr. Perry was on vacation. During the period of Mr. Perry's absence, Mr. Parker had occasion to make inquiry concerning the relationship of the Bank with Globe. (Tr Vol. 2 at 96-98) He discovered that instead of a total sum of $30,000 to $40,000 in leases, the Bank had advanced in excess of $390,000 on Globe leases and Mr. Parker thereupon began an immediate investigation of the files relating to Globe. In the process of such investigation, he discovered the leases to Leisureamerica. (Tr Vol. 2 at

96-98)

Globe began operations sometime in July of 1973. At that time, because of the letter from Mr. Perry to Mr. Weigelt, Globe, a previously non-existent entity began operation as a Utah corporation. Previous to the time of the Bank's indication that it was willing to advance funds for the leasing operation contemplated by Mr. Weigelt, Globe had been unable to begin operation as a result of Mr. Weigelt's inability to obtain financing from any other banking institution. (Tr Vol. 1 at 122-123) This failure was not withstanding the considerable efforts of Mr. Weigelt in making presentations at a number of other institutions in the community. Globe was capitalized for only about $3,000.00. (Tr Vol. 1 at 120, 219) On that capitalization, Globe proceeded to generate over $390,000 in outstanding leases. (Tr Vol. 1 at 219) Then, one year after the initiation of the relationship between the Bank and Globe (Tr Vol. 1 at 219), the latter failed to obtain alternate financing and closed its business with the exception of operating as a broker for some six leases later in 1974. (Tr Vol. 1 at 216-218)

ARGUMENT

I.

THE FINDINGS OF FACT MADE BY THE TRIAL COURT DO NOT SUPPORT THE CONCLUSION OF LAW THAT APPELLANT IS LIABLE FOR TORTIOUS INTERFERENCE WITH THE BUSINESS RELATIONS OF THE APPELLEE.

In Mason v. Mason, 108 Utah 428, 160 P.2d 730 (1945) the court held, citing earlier Utah cases:

> "It is fundamental that the conclusions of law must be predicated upon and find their support in the findings of fact, and the judgment must follow the conclusions of law" and if the conclusions are at variance with the findings, the Supreme Court will order the lower court to set aside its erroneous conclusions and substitute correct ones therefor . . . . A judgment in conformity with the findings will not be disturbed. And, of course, the converse is true. A judgment not in conformity with the findings cannot be permitted to stand. (Emphasis added.)

Id. at 732. That fundamental proposition has applicability in the review of the findings of fact and conclusions of law, which resulted in a judgment of liability against Appellant, Commercial Security Bank of Salt Lake ("Bank") in this case.

In paragraph 1 of the Conclusions of Law, the court states:

> The acts of defendant Bank of Salt Lake outlined in the First, Second, Third, and Fifth Causes of Action constitute a tortious interference by the Bank of Salt Lake in the business activities of Globe Leasing, and all four causes are deemed merged. (Emphasis added.)

The findings of fact entered by the court do not support the conclusion that there was "tortious interference" by the Bank. The substance of the relevant findings made by the

court is that:

1. The Bank extended credit to the Appellee, Globe Leasing ("Globe"), to finance leases generated by Globe;

2. The credit was extended pursuant to an agreement evidenced by a letter signed by an officer of the Bank, James W. Perry;

3. Certain security devices were employed to secure credit extended, such devices including an assignment of each and every lease generated with funds advanced by the Bank;

4. On or about July 15, 1974, the Bank "commenced dishonoring" Globe's checks, terminated the line of credit (notification of the same was given by telegram July 17, 1974), directed letters to all of Globe Leasing's lessees requesting that payment be made to the Bank on the leases, and impounded funds in Globe's accounts at the Bank;[1/]

5. The above actions caused damage to Globe.

The holding of the trial court was simply that because the Bank had dishonored checks (for whatever reason, justified or not), sent letters to lessees directing that lease payments be made to the Bank instead of to Globe

---

1/ There is no allegation in the First, Second, Third, and Fifth Causes of Action concerning the impoundment of funds by the Bank.

(whether or not a right to do so existed in the assignment agreement and under the applicable provisions of Utah law) and terminated further financing (whether or not a right to so terminate was included in the financing agreement), the Bank tortiously interfered in the business relations of Globe. Under no theory of tortious interference would the general factual finding of the above actions by a defendant be sufficient to establish a finding of tortious interference with business relations.

One of the theories advanced by Globe as a basis for the liability of the Bank is that of slander of credit or libel of business. One prominent commentator has characterized this theory of tortious interference as "injurious falsehood" or "disparagement".[2/] In summarizing the elements of tortious interference, that same authority states:

> The cause of action . . . resembles that for defamation, but differs from it materially in the greater burden of proof resting on the plaintiff and the necessity for special damage in all cases. The falsehood must be communicated to a third person, since the tort consists of interference with the relation with such persons. But the plaintiff must plead and prove not only the publication and its disparaging innuendo, as in defamation, but something more. There is no presumption, as in the case of slander, that the disparaging statement is false, and the

2/ W. L. Prosser, Handbook of the Law of Torts, §128 at 919 (4th ed. 1971).

> plaintiff must establish its falsity as a part of his cause of action. (Emphasis added.)

W. L. Prosser, Handbook of the Law of Torts, §128 at 920 (4th ed. 1971). Utah law comports with this general statement of the elements of the cause of action. Accord, Pender v. Dowse, 1 Utah 2d 283, 291, 265, P.2d 644 (1954) and Western States Title Insurance Co. v. Warnock, 18 Utah 2d 70, 415 P.2d 316, 318 (1966). The court made no finding of fact that any statement or publication or action constituting a statement or publication of the Bank was disparaging or was false as applied to Globe.

Another form of tortious interference which is generally recognized is that of interference with contractual relations. 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 the plaintiff. There was no evidence and no finding of fact by the trial court that any party with whom Globe had an existing contractual relationship was induced to breach such a contract. The fact, if the court had so found, that lessees made lease payments, pursuant to notice, directly to the Bank rather than to Globe is no showing of a breach of contract with Globe on the part of the lessees.

Further, the law concerning liability for inducing a breach of contract includes the opportunity for a defendant to plead and prove an absolute privilege for taking the action complained of by the plaintiff. See Bunnell v. Bills, 13 Utah 2d 83, 90, 368 P.2d 597, 602-03 (1962) and Gammon v. Federated Milk Producers Ass'n., 11 Utah 2d 421, 426, 360 P.2d 1018, 1022 (1961). The record contains ample evidence of the existence of such a privilege for the Bank pursuant to the terms of the assignment agreements. The undisputed facts and law relating to such rights will be discussed more completely hereinafter. Notwithstanding, the factual findings of the trial court are absolutely devoid of any statement that the Bank was not privileged to take the actions which it did. The conclusion that liability exists for tortious interference on the basis of those actions is, therefore, faulty and must be reversed with directions to enter a conclusion of law to the contrary.

Globe may, however, argue that there is implied in the findings of fact, as presently constituted, a finding that no absolute privilege existed. Because evidence on the issue of privilege was presented at trial, a finding of liability by the trial court impliedly negates the existence, in fact, of any such privilege. However, the established

law in our state has been announced as follows:

> We are at a loss to understand why no findings of fact were made in the instant case. The right to resort to the courts for the adjudication of grievances and the settlement of disputes is a fundamental and important one! An indispensable requisite to fulfilling that responsibility is the determination of questions of fact upon which there is disagreement. It is for this reason that our rules impose the duty of making findings on all material issues. Rule 52 U.R.C.P. provides that: "In all actions tried upon the facts without a jury *** the court shall unless the same are waived, find the facts specially and state separately the conclusions of law thereon." In Baker v. Hatch, the court declared:
>
> *** It is the duty of the trial court to find upon all issues raised by the pleadings, and the failure to do so is reversible error. [Citing authorities] (Emphasis added.)

Legrand Johnson Corporation v. Peterson, 18 Utah 2d 260, 420 P.2d 615, 616 (1966). The trial court has not "found the facts specially" upon the issue of privilege. There is, therefore, reversible error in this case.

The rationale announced in Peterson, supra, for making findings on all disputed issues is sound policy. Without specific findings upon disputed issues, the parties and others who rely upon the judgment of the court to guide their later actions are left to speculate upon the nature of the applicable law.

Likewise, if the judgment in this case is allowed

to stand, it will appear that the court has ruled that the Bank is strictly liable for the demise of any business whose financing, pursuant to agreement, it terminates especially where it exercises its rights in agreements and relationships connected thereto. That certainly cannot be and is not the law and the Bank and others should not be required to act in accordance therewith now or in the future.

Finally, some additional comments must be addressed to the most amorphous form of the cause of action for tortious interference, "interference with prospective advantage." As with the cause of action for inducing a breach of contract, the actions which interfere must not be privileged actions.

> No case has been found in which intended but purely incidental interference resulting from the pursuit of the defendant's own ends by proper means has been held actionable.

W. L. Prosser, Handbook of the Law of Torts, §130 at 952 (4th ed. 1971). As has already been discussed, the court made no finding of fact that the actions of the Bank were not pursuant to legal rights, contractual, statutory, or otherwise, and, therefore, not privileged. In the face of ample evidence of the existence of such rights and privilege, the statement of liability in paragraph 1 of the Conclusions of Law must be reversed.

II.

THERE IS NO EVIDENCE TO SUPPORT THE CONCLUSION OF LAW THAT APPELLANT TORTIOUSLY INTERFERED WITH THE BUSINESS RELATIONS OF THE APPELLEE.

A careful examination of the trial court record reveals the reason why that court failed to make the specific findings of material fact issues necessary to the conclusion of law that the Bank is liable for tortious interference, i.e., no such findings could be made on the evidence presented in the record because there was no substantial evidence to support such findings.

A. THERE IS NO SUBSTANTIAL EVIDENCE OF THE FALSITY OF ANY INNUENDO TO BE DRAWN FROM THE ACTIONS OF APPELLANT.

There was no substantial evidence that any disparaging innuendo which might have been drawn from the actions of the Bank was, in fact, false. All of the evidence in the record is to the contrary. The only "scintilla" of evidence which was introduced by Globe which would tend to show its creditworthiness was testimony by various witnesses that the Bank's computer runs showed no payment delinquencies from Globe to the Bank. That evidence is without any substantiality in light of undisputed evidence that Globe's currency on its loan accounts with the Bank for the brief period of its operation, are explained by the fact that Globe used a prepayment on one lease and security deposits,

for which later refund or other use would be required, to pay its current liabilities. In other words, the evidence was that Globe may only have been staying current by using funds obtained in the present which were already subject to future commitment or which were actually held on behalf of lessees. This, added to the undisputed evidence of double-financing (Tr Vol. 1 at 111-115), the issuance of a forged lease to obtain loaned funds (Tr Vol. 1 at 42-47, 66, 89-104, 146-156), and the thin capitalization of the corporation (Tr Vol. 1 at 120, 219), establish without any contrary evidence, that any innuendo of lack of creditworthiness was founded in truth and could not possibly constitute a libel or slander of Globe's credit or business.

B. THERE IS NO EVIDENCE THAT APPELLANT WAS WITHOUT THE ABSOLUTE PRIVILEGE TO ACT AS IT DID IN EVERY INSTANCE.

There is no evidence in the record to support a finding that the actions taken by the Bank were wrongful or contrary to contractual and statutory rights. The Bank had the legal right to take each action. The Bank's termination of any further financing to Globe was pursuant to the undisputed contractual right to do so. (Exhibit 8-P) That the exercise of the right of termination pursuant to the terms of a contract may be taken, is a clearly established proposition of law. See, Flinco, Inc. v. Goodyear Tire and

Rubber Company, 17 Utah 2d 173, 406 P.2d 911 (1965). The Bank gave oral notice of termination of further credit advances. Thereafter, proper written notification of termination was given by telegram. (Exhibit 30-D)

Secondly, the terms of the assignment of lease which was used in every instance, places no condition upon the right of the assignee, Bank, to give notice to the lessees to make payment directly to the Bank. The language of each assignment is unequivocal (Exhibit 20-P):

> For like consideration and said Bank of Salt Lake is authorized and empowered to collect all sums of money presently due or that at any time hereafter may become due and owing as rental under the provisions of said lease and to receipt thereof, as fully and completely and for all purposes as the undersigned [Globe] might, or could, have done had this assignment not been made and given. (Emphasis added.)

Globe has argued that because, as the further language indicates, the assignment of rentals is made "as and for collateral security," that any direct rental collection by the Bank was conditioned upon the occurrence of a default in payment of sums owing the Bank. There is no evidence to support that restrictive construction of the agreement and even the trial court found differently, albeit, as will be shown below, not in accord with the law. The trial court found in paragraph 4 of its findings of fact that the Bank's

right to collect rentals was simply conditioned upon "default" by Globe.

There is no evidence to support the imposition of any condition on the Bank's rights to collect rentals. Notwithstanding an assignment of lease payments for "collateral," direct collection by the secured party can be made without any condition of default. In §70A-9-502(1) of the Utah Code Annotated it is provided that:

> When so agreed and in any event on default the secured party is entitled to notify an account debtor or the obligor on an instrument to make payment to him whether or not the assignor was theretofore making collection on the collateral . . . . (Emphasis added.)

Where there is ambiguity in the terms of a written agreement, the well-established rule of law is that "in case of doubt or ambiguity a contract will be construed most strongly against the party who drew or prepared it . . . ." See 17 Am Jur 2d §276 at 690; Accord, Bryant v. Deseret News Publishing Co., 233 P.2d 355, 356 (1951). Accordingly, whatever ambiguity exists in the lease assignments as to the existence and content of any condition precedent to direct collection of rental payments by the Bank must be construed in favor of the Bank since the undisputed evidence is that the assignment agreement was a document drafted by and provided by Globe. Accordingly, in light of the unequivocal

language of the assignments, quoted above, giving the Bank authorization and power for collection and receipt of rentals, the conclusion of the trial court that a condition precedent to collection existed is contrary to law and the facts. The construction most favorable to the Bank, justified by the assignment agreement on its face, is that part of the collateral security afforded under the agreement to the Bank is the unconditional right at any time to collect payments directly from the lessees.

Even if there were some condition precedent to the Bank's collection right, a fair and reasonable construction of the condition would necessarily be broader than default in "payments" to the Bank by Globe. The court found the condition to be "plaintiff's default." As evidenced by the language of the Motor Vehicle Security Agreements executed in conjunction with the leases assigned to the Bank, "default" is a broad term which can include the secured party "deeming itself to be insecure for any reason whatsoever." Specifically, §70A-1-208, of Utah Code Annotated, provides as follows:

> A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or words of similar import shall be construed to mean that he

> shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is upon the party against whom the power has been exercised. (Emphasis added.)

The undisputed evidence is that Mr. Norton Parker, the Bank's president, took action to notify lessees to make payments to the Bank for several reasons including the existence of leases to Leisureamerica, an entity of doubtful creditworthiness. (Tr Vol. 2 at 97, 125-126) The existence of fifteen or so bad leases appearing to have no proper Bank authorization would constitute an event of default and certainly justify a good faith belief that the prospects of payment or performance were impaired. In any event, there was an absolute absence of any evidence by Globe tending to show any "lack of good faith" by the Bank in its belief of some insecurity with respect to Globe. In fact, the evidence was that Mr. Parker believed that Globe had been making payoffs to someone at the Bank in exchange for the credit advances. (Tr Vol. 1 at 50) All of the evidence before the court justified such a belief since the thirty to forty thousand dollar cap which he had given Mr. Perry was exceeded almost twelve-fold and since a number of doubtful leases to Leisureamerica appeared to have been processed without appropriate approval. (Tr Vol. 2 at 126)

Because there was a "default," the notices sent by the Bank to the lessees were in strict compliance with its rights under the assignment agreement and pursuant to collection rights afforded under §70A-9-502(1), Utah Code Annotated. No liability for tortious interference can arise from notices given in accordance with contractual and statutory rights. In a case directly on point, this court so held.

> [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.

First Security Bank of Utah, N.A. v. Wright, 521 P.2d 563, 567 (1974). In that case, defendant Wright had assigned certain proceeds from crops to First Security to secure a loan. Certain of those crops had been sold to Mountain View Dairy and Moroni Feed. Before payment could be made First Security notified Mountain View and Moroni of its security interest and demanded payment. On Wright's counterclaim on the basis of such notice, the Court held the notice was proper and appropriate.

Thirdly, there is no evidence to support any conclusion that the Bank was not within the exercise of its lawful rights to refuse payment on Globe's three checks. There has been no evidence that funds were in the account at the time the checks were presented for payment. In fact,

the evidence is that credits given for the final three leases negotiated with the Bank were reversed in order to utilize a different fund advancement procedure. (Tr Vol. 2 at 107 and 130) Further, there is no evidence nor any legal reason in the record to preclude the Bank from adopting an alternate mode for advancing funds to Globe on approved leases and acting in accord with its determination to adopt that alternative. Mr. Weigelt testified that he discussed alternative methods for advancing funds to Globe in one of his original meetings with Bank officers. (Tr Vol. 1 at 10)

C. THERE IS NO EVIDENCE TO SUPPORT A FINDING BY THE TRIAL COURT THAT ANY INJURY TO THE APPELLEE, IF ANY, WAS THE PROXIMATE RESULT OF THE ACTIONS OF THE APPELLANT.

Even assuming that the actions of the Bank in terminating Globe's credit, sending notices to lessees, and refusing payment on three checks drawn by Globe somehow satisfy one of the elements of the alleged tort of interfering with business relationships, there is absolutely no evidence to show that such actions "caused" any interference with Globe's business relations, past, present, future, contractual, or otherwise. It is fundamental that there must be a showing of interference with some business relationship caused by Bank's actions before liability can be found. To properly evaluate Globe's claim of tortious interference,

it is helpful to delineate the parties with whom Globe either had or anticipated having business relationships. Such parties would be fully included in the following listing:

1. Financial institutions, including banks;

2. Current and prospective lessees;

3. Automobile dealers from whom car purchases were and would be made.

Taking these groups in reverse order, consider first "automobile dealers." There is absolutely no evidence that Globe's ability to purchase automobiles from relevant dealers was in any way diminished. Notwithstanding the dishonor of checks drawn to the order of three particular dealers, there is no evidence that they refused to do further business with Globe. In fact, the evidence shows that the three purchases were ultimately consummated on checks drawn by Globe. Further, the evidence is that Globe's credit reputation with such dealers was not very good in any event. (Tr Vol. 1 at 128-129) The three dealers took the checks from Globe directly to the Bank to be cashed. As Mr. Weigelt testified, that was highly unusual and indicated some doubt, prior to knowledge of the actions of the Bank, about the creditworthiness of Globe.

Second, as to current and prospective lessees, it

has already been pointed out there is no evidence that any lessee breached a contract with Globe as a result of the Bank's actions. There is also a lack of substantial evidence to support any conclusion that the Bank's notice caused either current lessees or prospective lessees to refrain from doing further business with Globe. There is, however, evidence in letters (Exhibit 22-P) that certain of the lessees were confused about the payment notices sent by the Bank and threatened to cease referring others to Globe or to do future business with Globe. As is clearly evidenced by those letters, however, that confusion and any negative impact which the notice of assignment had upon the lessees' regard for Globe were the result of either their failure to understand the clear language of their lease agreements or some representation by Globe's Mr. Weigelt that, notwithstanding such language, he would not assign the leases. Paragraph 13 of each lease explicitly grants to Globe the right to assign without notice. (Exhibit 17-P) Fault, therefore, cannot be placed with the Bank. There is no showing that lessees ceased doing business with Globe nor is there any showing of actual damages as a result of the notices.

Finally, with respect to other financial institutions, there is no evidence to indicate that any action of

the Bank, taken singly or in the aggregate, interfered with Globe's relationship, present or prospective, with such institutions. The only existing relationship, outside of that with Appellant Bank, was with Valley Bank & Trust Co. There is no evidence showing that Valley Bank refused financing or further dealings with Globe because of the acts of the Appellant Bank. Mr. Weigelt testified that he "thought" that he had spoken with Mr. Benson at Valley subsequent to the events which precipitated this lawsuit. (Tr Vol. 1 at 72) Mr. Benson's unequivocal testimony, however, was that no contact for lease financing was made with Valley after "early" 1974. (Tr Vol. 2 at 162)

The evidence, with nothing to the contrary, is also that no bank except Appellant would finance Globe prior to the July, 1974 events. The uncontroverted evidence is also that no bank including Appellant would finance Globe's operations after the events of July, 1974. To show that the Appellant Bank interfered with any prospective advantage with these other banks, there must be some evidence that something of significance after Globe's initial approach had occurred which would have made the initial refusals of those banks turn into acceptances of the financing package. In other words, there must be substantial evidence in the record to show that <u>but for</u> the Bank's actions in

July of 1974, other banks would have agreed to assume financing. There simply is no such evidence.

The testimony of Mr. Frank Stuart, an alleged expert witness on leasing and damages, was to the effect that there was no way that Globe could have continued in business after July, 1974 because the crucial consideration was "cash flow" which was absent because of the Bank's actions. (Tr Vol. 1 at 209) That evidence is without any substantial value since Mr. Stuart also testified that in the absence of any cash flow he would have as a banking expert recommended credit extension because of Globe's "track record."[3/] (Tr Vol. 1 at 220) The evidence, then, is that the absence of cash flow, though a consideration in determining creditworthiness would not, in the opinion of a banking expert, have caused the inability of Globe to obtain credit.

Mr. Stuart's testimony was to that effect because Globe's track record was a strong "plus." (Tr Vol. 1 at 235-241) In other words, if he had been a banker in the period of time immediately following the events of July, 1974, he would have extended credit to Globe. No bank did, in fact, extend credit to Globe at that time and

3/ In substance, Mr. Stuart testified that his negative assessment of Globe as a marginal operation was changed because of the proven ability to generate leases "which appeared on the surface to be good."

under those circumstances. Globe would draw from the juxtaposition of that fact and Mr. Stuart's opinion that some other factor, hopefully attributable to some wrongful act or acts of the Bank caused the unfavorable results on the applications for credit which Globe made at that time.

The only other unfavorable factor attributable to the Bank's actions which could account for the denial of credit would be some disparagement of Globe's credit. As has already been emphasized in this breif, the court made no finding that such disparagement occurred (i.e., no false statements about Globe's creditworthiness) and could not make such a finding because all evidence was to the contrary (i.e., that Globe was not creditworthy). Even if any innuendo concerning Globe's credit arose from the Bank's conduct, there is no substantial evidence that banks refused credit to Globe for that reason. Mr. Weigelt testified that he only encountered common knowledge of the "Bank of Salt Lake matter" at two of the seven or eight banks at which he made credit application. (Tr Vol. 1 at 72-73) There is no evidence by Mr. Weigelt or any other witness as to whether or not the "Bank of Salt Lake matter" was the reason that those two banks or any bank refused an extension of credit. Other evidence in the record is to the contrary. When Mr. Stuart was questioned as a banking expert as to

what negative effect on Globe's credit, instances of double financing, assignment of a forged lease, and leases to Leisureamerica would have, he indicated that the track record of Globe would justify continued financing. (Tr Vol. 1 at 235-241) That evidence would suggest that some factor not attributable to the Bank's acts was the reason for the denial of Globe's credit applications after July of 1974. As the testimony of Larry Benson indicates, the reason for such denials may have been, as it was in the case of Valley Bank, because the banks were simply not interested in financing that kind of operation. (Tr Vol. 2 at 170) In fact Valley Bank's denial of credit in "early" 1974 to Globe notwithstanding its "track record" and no problems with Bank, suggests strongly that the banking community was simply not interested.

III.

THE AWARD OF DAMAGES BASED ON LOST PROFITS WAS ERRONEOUS AS CONTRARY TO THE LAW AS APPLIED TO THIS CASE.

> "The basic and general rule is that loss of anticipated profits of a business venture involve so many factors of uncertainty that ordinarily profits to be realized in the future are too speculative to base an award of damages thereon."

Howarth v. Ostergaard, 30 Utah 2d 183, 187, 515 P.2d 442 (1973). Conversely, the court said:

> The other side of the coin is that damages to a business or enterprise need only be proved with sufficient certainty that reasonable minds might believe from a preponderance of the evidence that the damages were actually suffered.

Id. at 187. Under this general rule, an award of damages measured by lost profits was erroneous because highly speculative and conjectural.

As has already been argued, the "finding of fact" by the trial court that the actions of the Bank caused damage to Globe is insufficient because it does not adequately address issues of fact presented at trial as to how the Bank's actions became the cause of those damages. The ambiguity and inadequacy of the finding is magnified by an attempt to specify whether the damages measured by lost profits were sustained by reason of a termination of the business allegedly caused by the Bank or a diminution of the business of Globe, the actual termination being the consequence of factors independent of the alleged wrongdoing of the Bank.

If the trial court awarded damages measured by lost profits for a diminution of the business of Globe caused by the wrongdoing of the Bank, the award must be reversed for an absolute absence of any evidence or findings of fact to support such a conclusion. There was no evi-

dence at trial indicating the extent of any such diminution and an award of lost profits so based would be totally arbitrary and based upon the speculation of the trial judge.

Under a second theory, as argued by counsel for Globe, the award of damages measured by lost profits is based upon the conclusion that the Bank's actions caused a wrongful termination of the business of Globe. We speculate that the trial court based its award upon that theory. Under that theory evidence was submitted to the court via the expert testimony of Mr. Stuart to establish the amount of such lost profits. Under the general rule expressed by the Utah Supreme Court in Howarth, supra, no award of damages should have been made for a number of reasons.

A. NO AWARD UNDER NEW BUSINESS RULE

In the first place, the evidence before the court shows Globe to be a new business having actually operated for only one year. The general rule for awarding damages in the form of lost profits is given an added dimension of restrictiveness and caution when applied to new businesses. This Court in an opinion which would be considered dicta[4/] when applied to the facts of the case in which it was stated,

4/ That the "new business" rule quoted by the court is well-established and accepted is amply evidenced by its reiteration in 22 Am Jur 2d §173 at 245; 25 Corp. Jur. Sec. §42 at 741; C. T. McCormick, Handbook on the Law of Damages, §29 at 197 (1931); 64 Harv. L. Rev. 317, 319 (1950).

albeit stated in a manner suggesting a strong disposition to adopt the broader principle enunciated, quoted from Carolene Sales Co. v. Canyon Milk Products Co., 122 Wash 220, 210 P. 366, 367 (1922) as follows:

> [B]efore special damages for loss of profits to a general business occasioned by the wrongful acts of another may be recovered, it must be made to appear that the business had been in successful operation for such a period of time as to give it permanency and recognition, and that such business was earning a profit which could be reasonably ascertained and approximated. (Emphasis added.)

Jenkins v. Morgan, 123 Utah 480, 260 P.2d 532, 535 (1953). Accord, Price v. Van Lint, 46 N.M. 58, 120 P.2d 611, 618 (1941).

The application of the Carolene Sales rule is but another safeguard against the award of speculative damages. The imposition of the requirements of "permanency" and "recognition" is but a shorthand method of insuring that many of the uncertainties and contingencies associated with the successful operation of a business have been eliminated.

Applying the Carolene Sales criteria to Globe, it is evident that not only should an award of future profits have been denied, but any evidence concerning the same should have been excluded pursuant to the motion of the Bank's counsel at trial. With regard to the permanency of the business of Globe, there is no substantial or credible evi-

dence in the record to show permanency of the operation. All indications are to the contrary. There is undisputed evidence of bad credit practices which were not merely unsound in a business sense, but fraudulent. The two specific instances of significance were the Hildreth leases, one of which was forged, and the double financing of a lease with Bank and Valley Bank. There is no inference of permanence to be drawn from those facts for a company which engages in such practices.

It might be argued that the large number of leases generated by the company over a very short period of time is evidence of permanence. However, there is no credible evidence in the record which would support the profitability of those leases or continuation of those customers. In fact, the evidence as concerns a random sampling of leases generated by Globe shows a net loss both due to faulty calculation of residuals and due to the lack of creditworthiness of the leases. (Tr Vol. 2 at 173-178) 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. (Tr Vol. 1 at 212) Mr. Stuart's testimony was that he felt the leases were sound credit-wise because the Bank's printout showed timely payment from Globe to the Bank. (Tr

Vol. 1 at 212-213) However, the conclusion was based upon the erroneous assumption that there were no lease prepayments which would allow Globe's payments to the Bank to be current while some of the lessee's payments to Globe were not. (Tr Vol. 1 at 223-224) Mr. Stuart's calculations with respect to those leases were premised upon his experience with leasing operations, large and successful, and operated as an adjunct to automobile dealerships. (Tr Vol. 1 at 159-161, 189) There is nothing in the evidence, except Mr. Stuart's testimony of Globe's high rate of generating leases, to show any analogy whatsoever between the leasing operations upon which Mr. Stuart based his expertise and Globe's actual operations.

Additionally, there is substantial evidence in the record to show that there was little interest in the banking community for an auto leasing enterprise like Globe's. (Tr Vol. 1 at 122-123; Vol. 2 at 170) Reliance on one bank with a relatively low lending limit, both in terms of common business sense and legal requirements, does not suggest permanency at all.

Finally, the fact that the termination of the one line of credit established could result in the demise of the business suggests both lack of permanency and recogni-

tion, notwithstanding any negative reflections upon Globe's credit which may have resulted from the Bank's actions. Indeed, the negative reflections on credit occasioned by the Bank's action should have been substantially discounted by bankers according to Mr. Stuart. As previously noted herein, he testified that double financing, a forged lease, and a series of bad leases to one company would not really bother him in the face of Globe's stellar performance, supra. He also, as earlier indicated, testified that track record, as opposed to existence of present cash flow, is the determinative factor in extending credit. All this would suggest that Mr. Stuart's assessment of the permanence and recognition of Globe was overstated since no bank with the same or greater expertise as Mr. Stuart advanced funds in reliance thereon.

B. NO AWARD BECAUSE ALL LOST PROFIT WAS SPECULATIVE ON EVIDENCE BEFORE THE COURT.

Even if Globe managed to satisfy the Carolene Sales test, lost profit damages would remain purely speculative. In making his projections as to the profitability of Globe's operation, Mr. Stuart used a figure for bad debt based on "his experience with automobile leasing businesses" with which he had been associated. (Tr Vol. 1 at 188) His later testimony was that the bad debt expense in

such companies and, therefore, also with his calculations for Globe, were very low. (Tr Vol. 1 at 194) There is nothing in the evidence to support a low bad debt allowance for Globe. Nothing in the evidence shows that Globe had, or ever would, operate in the same manner as the four, very well run, businesses upon which Mr. Stuart based his bad debt allowance for Globe.

Based upon an estimate of bad debt reserve which is "very low," because derived from operations which were conducted by successful long-term leasing operations for which there is no evidence of comparability with Globe nor evidence that Globe did, could, or would "release" cars subject to repossession, Mr. Stuart calculated a net cash flow of $4,800.00. (Tr Vol. 1 at 189) He then used that data to calculate the lost profits to Globe. (Tr Vol. 1 at 214-216) Without credible or reliable evidence as to what should have been the bad debt reserve for Globe's operation, any calculation of a loss of future profits is mere speculation.

A further reason for disallowing any award of damages as to loss of profits relates closely to the question of permanency and recognition. Mr. Stuart made his calculation of lost profits on the basis of a ten-year period of continued business. Any estimation as to the

duration of Globe's operation absent the alleged wrong-doing of the Bank would be pure speculation and an award of damages based thereon would be in error. In Monter v. Kratzer, 29 Utah 2d 18, 504 P.2d 40, 43 (1972), it was held that:

> [A] judgment cannot be based upon mere speculation.
>
> Where the loss is pecuniary and is present and can be measured but no sufficient evidence is given as to duration, or from which the duration, of time during which the damage will continue can be inferred, the jury, or the court sitting without a jury, can allow only nominal damages. (Emphasis added.)

The facts in Kratzer on the question of duration present a striking similarity to the evidence in this case. In Kratzer the defendant counterclaimant was wrongfully evicted for one day from his bakery by the plaintiff. On that day Continental Baking Company was unable to obtain an order from defendant. Thereafter Continental did no further business with the defendant although it had previously placed orders with defendant for some 17 years. The trial court awarded damages to defendant on his counterclaim for profits lost as a result of Continental's termination. This Court reversed that award based upon the above principle of law. The evidence at trial was that Continental's business with defendant was on the decline and that there was a likeli-

hood of termination in the very near future notwithstanding the wrong-doing of the plaintiff.

This case is similar. The Bank may well have terminated financing at any point which it had the right to do. It could accept or reject any lease. Without another source of financing, and there is no credible evidence that any would have been available even absent any "wrong-doing" by the Bank, Globe may have been out of business a few months or a year later. The holding of Kratzer requires that only nominal damages, if any, be awarded. In another case, Gould v. Mountain States Telephone & Telegraph Co., 6 Utah 2d 187, 309 P.2d 802 (1957) this court applied a fairly liberalized standard of certainty to a claim for lost profits arising from a failure by the defendant to properly list plaintiff in the telephone directory. After concluding that in those instances where it is clear that plaintiff has damaged defendant, liability should not be escaped because of uncertainty in the amount of damages resulting, this Court said:

> The rule remains, however, proof of loss of profits must not be completely speculative nor uncertain as to fact, although permissible as to measure or extent, and on the present state of proof it appears that the award for loss of prospective profits is wholly speculative and cannot be allowed. 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.

> Plaintiff has not shown a single instance of the loss of prospective business caused by the defendant's breach, and any award for loss of prospective profits must necessarily be based upon speculation and conjecture. (Emphasis added.)

Id. at 194. The parallel to this case is compelling. Globe has made absolutely no showing that it could have obtained alternate financing; and, certainly with the loan limit questions and questionable practices involved, there is nothing to show any reasonable expectancy of continued financing from the Bank. Gould also requires a denial of any damages for lost profits.

C. THE MOTION OF THE BANK TO STRIKE MR. STUART'S TESTIMONY SHOULD HAVE BEEN GRANTED AT LEAST IN PART AS UNSUPPORTED BY EVIDENCE BEFORE THE COURT. THE FAILURE TO STRIKE WAS PREJUDICIAL ERROR AS TO AN AWARD OF DAMAGES BASED UPON LOST PROFITS, BECAUSE IT RESULTED IN THE COURT'S AWARD OF DAMAGES ON EVIDENCE NOT BEFORE IT.

Fundamental to the opinions and calculations of Mr. Frank Stuart as to the future profits of Globe and its "track record" as a basis for credit extension, was his assessment of the business as a whole, and of the unaudited financial statements and other accounting records of Globe in particular. In his step by step calculation of profits for Globe, figures were taken directly from those accounting records and statements. (Tr Vol. 1 at 162-166) His

evaluation of the business as a whole and, therefore, his high opinion of its quality were based in part upon those same unaudited financial statements and records. His rather strong reluctance, while testifying in his role as an alleged expert banker, to discontinue or limit lending to Globe in the face of the fifteen bad credit risk Leisureamerica leases, the double financing, a forged lease, and very thin capitalization, must have also been founded, as any banker's opinion would be, upon those accounting records and statements. (Tr Vol. 1 at 234-241)

The court too had the opportunity to view those same accounting records and to attempt to draw therefrom findings of fact. (Exhibits 3-P; 4-P; 5-P) However, fundamental to the interpretation and understanding of those accounting records were the preparing accountant's working papers. Mr. Stuart testified that he relied on those working papers to "assist in a total understanding of" those records. Yet, the working papers were not introduced into evidence and the court, therefore, could not possibly have checked Mr. Stuart's understanding of the accounting records by referring to the working papers. Not only were Mr. Stuart's opinions, therefore not based totally upon matters in evidence; the conclusions of the court, if based in any part upon those opinions, were also not based upon

evidence properly before the court and subject to cross-examination.

In that regard, this Court has ruled unequivocably that:

> In deciding a case tried without the aid of a jury, the court has great leeway in deciding what are the facts as presented by the evidence before him. However, neither a judge nor jury is permitted to go outside the evidence to make a finding. (Emphasis added.)

Salt Lake City v. United Park City Mines Company, 29 Utah 2d 409, 412, 503 P.2d 850, 852 (1972). In that case, the trial judge had made computations on the basis of a book which was never in evidence. Id. at 852.

This case is not different. Here, in awarding damages, the trial judge concluded that the proper measure was "lost profits." (R. at 373-374) The only evidence and calculation as to the lost profits was presented by Mr. Stuart whose evaluations were based in part upon the total understanding of working papers not in evidence. There is no meaningful distinction to be drawn between reliance by a judge directly upon matters not in evidence or indirectly through the conclusions of an expert witness, to make damage calculations. Accordingly, the damage award was in error. In the absence of either the working papers, themselves, or the opinions and calculations of Mr. Stuart

based thereon - such opinions and testimony were before the court by reason of a denial of the Bank's motion to strike the same - no credible evidence of Globe's profitability was before the court and no calculation of lost profits, except upon pure speculation, could have been made.

IV.

THERE ARE NO FINDINGS OF FACT TO SUPPORT THE CONCLUSION OF THE TRIAL COURT THAT APPELLEE SUFFERED DAMAGES MEASURED BY LOST PROFIT IN THE SUM OF FIFTY THOUSAND DOLLARS ($50,000.00).

A dominant theme of this appeal is the inadequacy of the findings of fact (and lack of evidence therefor) entered by the trial court in supposed support of the conclusions of law. A highly contested issue of fact in this case was the amount, if any, and measure of damages to be awarded if liability was found against the Bank. The issue was a rather complex one based upon rather sophisticated economic and business calculations and projections. Yet, the court in awarding damages in the amount of $50,000.00 "for lost profits" did not enter a finding of fact as to what could reasonably have been the expected duration of Globe's operation at a profit or the amount of the profit. Nor did the court enter a finding of fact on the well-debated issue of whether or not Globe's operation was, or

even would be, a profit-making venture.[5/] Further, the figure of $50,000.00 for lost profits bears not even the slightest resemblance to any evidence presented to the court on the issue and is merely a gross invention produced by some unknown method of judicial legerdemain.

There was an absence of specific fact findings on material issues which would support the figure advanced by the court. The holding in Legrand Johnson Corp. v. Peterson, supra, was designed to avoid such results.

V.

THE DISMISSAL OF ALL COUNTERCLAIMS OF THE APPELLANT IS NOT SUPPORTED BY FINDINGS OF FACT MADE BY THE COURT OR BY EVIDENCE IN THE RECORD AND SHOULD THEREFORE, BE REVERSED.

The undisputed evidence at trial was that Globe assigned to the Bank a lease with the forged signature of the purported lessee, Donald Hildreth. Said lease was assigned to the Bank in consideration of a sum of $8,546.41 advanced to Globe. (Tr Vol. 1 at 89) The uncontroverted evidence was also that Globe had previously executed a valid lease with said Donald Hildreth, which lease contained terms completely at variance with the forged lease which was assigned to the Bank. (Tr Vol. 1 at 90-104; Exhibit 29-D) The ori-

5/ In fact, the unaudited financials of Globe, without any expert interpretation and reworking, show actual operating losses for Globe for the first year. (Tr Vol. 1 at 135 and Exhibits 3-P, 4-P and 5-P)

ginal and valid lease executed by said Donald Hildreth was shown by the evidence to have been prepaid in full in advance and that the Bank suffered damage as a result of said fraudulent action in the amount of Three Thousand One Hundred Eleven Dollars ($3,111.00). (Tr Vol. 2 at 197) The uncontroverted evidence that was introduced at trial showed the forged document to have been totally within the control of Globe's only two officers, Mr. and Mrs. Weigelt.

There was also undisputed evidence at trial that, contrary to express representations made in a security agreement with the Bank and, upon which the Bank relied in advancing funds for the assignment of the motor vehicle lease of a 1974 Pontiac, No. 0701-01-01, Mr. Weigelt, as President of Globe, had obtained a loan previously from Valley Bank & Trust Company and had given a security interest in that same automobile. (Tr Vol. 1 at 111) The further uncontroverted evidence at trial was that the Bank was damaged in the sum of Three Thousand One Hundred Sixty Five and 95/100 Dollars ($3,165.95) incurred in making good the representation of Globe that no such prior security interest existed. (Tr Vol. 2 at 160)

Despite the presence of such uncontroverted evidence in the record, the trial court made no findings of fact with respect to the above-described claims of the

Bank.[6/] As has already been argued the failure to make such findings is reversible error. See Legrand Johnson Corp. v. Peterson, supra.

Furthermore, the court not only failed to make specific findings of fact as to those two claims of the Bank, it concluded, without any evidence in support thereof, that the counterclaims of the Bank should be dismissed. In paragraph 12 of the findings of fact, the court found that "factually the defendant Bank of Salt Lake's Counterclaim should be dismissed." In paragraph 5 of the Conclusions of Law, the court states:

> The Counterclaim of the Bank of Salt Lake having been considered in determining Globe Leasing's damages should be dismissed.

(R. at 371-374) Both statements are totally inexplicable either on the basis of the court's fact findings or, more so, on the basis of the evidence at trial.

Neither Mr. or Mrs. Weigelt ever denied that the

6/ The substance of the claim on the Hildreth lease was pleaded in the counterclaim as filed with the court. (R. at 39) As for the claim of the Bank for double financing of the 1974 Pontiac, in a stipulation between the Bank and Mr. Weigelt, Globe's principal owner and officer, which stipulation was entered in the bankruptcy proceedings of Mr. Weigelt, it was agreed that this claim was one which would be adjudicated in the trial proceedings in this case. Although the record shows no formal amendment to include this claim in the original counterclaim, the proof of the claim was introduced at trial without objection by Globe's counsel. (R. at 350-351)

second Hildreth lease was forged. Mrs. Weigelt simply disclaimed knowledge of how the forgery came about. (Tr Vol. 1 at 269-270) The line of questioning employed by counsel for Globe suggested that the explanation was that Mr. Hildreth authorized Mr. Weigelt to sign on his behalf. The uncontested testimony of Mr. Hildreth was that he had never given such authorization. (Tr Vol. 1 at 152)

Nor was there any denial of the fact of the double financing on the '74 Pontiac lease. Indeed, there was no denial of responsibility therefor. Mr. Weigelt simply attempted to explain the matter away as administrative oversight. (Tr Vol. 1 at 112-114, 136-137) Oversight or fraud, the damage was done. On either theory, the problem hardly supports the opinion testimony offered by Mr. Stuart that Globe was an efficient, well-run, successful business.

In the face of such clear evidence with nothing of substance to the contrary, the dismissal of all of the Bank's counterclaims must be reversed and judgment entered in the sums claimed.

CONCLUSION

Based upon the foregoing arguments, the Appellant Commercial Security Bank of Salt Lake is entitled to a judgment by this Court reversing the judgment of liability and award of damages made on behalf of the Appellee by the

trial court. Further, from the foregoing, Appellant is entitled to a reversal of the trial court's dismissal of its counterclaims, an entry of judgment on its behalf and an award of the appropriate damages.

Respectfully submitted,

ROBERT M. ANDERSON
DOUGLAS MATSUMORI
Van Cott, Bagley, Cornwall & McCarthy
141 East First South
Salt Lake City, Utah 84111
Attorney for Appellant

Of Counsel:

Carman E. Kipp
J. Anthony Eyre
Kipp and Christian
600 Commercial Club Building
Salt Lake City, Utah 84111