

1986

Israel Pagan v. Joseph N. Cannon, Dorius Black,  
Alpha Leasing Company, Robert D. Apgood,  
Joseph N. Cannon, Dorius Black, and Richard  
McKean, Alpha Leasing Company, Bill Brown  
Realty Incorporated, Scott Peatross, Stewart Title  
Company of Utah, Tommy W. Sisk, Capitol Thrift  
and Loan, Backman Title Company, Merlyn Hanks  
: Brief of Appellant

Utah Supreme Court

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BRIEF

DOCKET NO. 860072

IN THE SUPREME COURT  
OF THE STATE OF UTAH

ISRAEL PAGAN,

Plaintiff-  
Respondent,

vs.

JOSEPH N. CANNON, DORIUS  
BLACK, ALPHA LEASING COMPANY,  
a partnership, ROBERT D.  
APGOOD, JOSEPH N. CANNON,  
DORIUS BLACK, and RICHARD  
McKEAN, doing business under  
the name and style of ALPHA  
LEASING COMPANY, BILL BROWN  
REALTY, INCORPORATED, SCOTT  
PEATROSS, PERSONALLY, STEWART  
TITLE COMPANY OF UTAH, TOMMY  
W. SISK, CAPITOL THRIFT & LOAN,  
a financial corporation,  
BACKMAN TITLE COMPANY, a  
financial corporation, and  
MERLYN HANKS,

Defendants-  
Appellant.

860072-CA  
Case No. 20295

BRIEF OF APPELLANT

Appeal from a judgment on jury verdict rendered  
in the Third Judicial District Court, the Honorable  
J. Dennis Fredrick Presiding

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

ISRAEL PAGAN,

Plaintiff-  
Respondent,

vs.

JOSEPH N. CANNON, DORIUS  
BLACK, ALPHA LEASING COMPANY,  
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TABLE OF CONTENTS

Table of Authorities. . . . . ii

Statement of Issues Presented on Appeal . . . . . 1

Statement of the Case . . . . . 2

Summary of Argument . . . . . 11

Argument. . . . . 11

    Point I:       The verdict was not supported by the  
                    evidence . . . . . 11

    Point II:       The Trial court erred when it denied  
                    the motions for directed verdict and  
                    for judgment notwithstanding verdict. . 22

    Point III:     The court erred in instructing the  
                    jury that punitive damages can be  
                    found on a different standard of  
                    proof than the underlying wrongful  
                    act complained of. . . . . 24

Conclusion . . . . . 26

Addendum

    Special Verdict

    Judgment on Jury Verdict

    Jury Instruction #21

    Jury Instruction #26

    Jury Instruction #27

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<u>Behrens v. Raleigh Hills Hospital Inc.</u> , Utah, 675 P 2d 1179 (1983).	24
<u>Crane Co. v. Dahle</u> , Utah, 576 P 2d 870 (1978).	13
<u>E. A. Strout Western Realty vs. W. C. Foy &amp; Sons</u> , Utah, 665 P 2d 1320 (1983).	12
<u>Groen vs. Tri-O-Inc.</u> , Utah, 667 P. 2d 598 (1983)	12
<u>Holland vs. Columbia Mining Co.</u> , 4 Utah 2d 303, 293 P 2d 700 (1956).	15
<u>Leigh Furniture &amp; Carpet Co. vs. Isom</u> , Utah, 675 P 2d 293 (1982).	24
<u>Management Committee, etc. vs. Graystone Pines</u> , Utah, 652 P 2d 896 (1982).	23
<u>Mel Hardman Prod. Inc. vs. Robinson</u> , Utah, 604 P 2d 913 (1979).	23
<u>Taylor v. Gasor Inc.</u> , Utah, 607 P 2d 293 (1980).	13
 <u>OTHER</u>	
72 Am. Jur. 2d Damages § 246	25
15A Am. Jur. 2d Conspiracy § 1 (1), (2)	12
37 C.J.S. Fraud	
§61	14
§115	15
§144	25

IN THE SUPREME COURT OF THE STATE OF UTAH

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ISRAEL PAGAN,	)	
	)	
Plaintiff-	)	
Respondent	)	
	)	
vs.	)	
	)	
JOSEPH N. CANNON, DORIUS	)	
BLACK, ALPHA LEASING COMPANY,	)	BRIEF OF APPELLANT
a partnership, ROBERT D.	)	
APGOOD, JOSEPH N. CANNON,	)	
DORIUS BLACK, and RICHARD	)	
McKEAN, doing business under	)	
the name and style of ALPHA	)	Case No. 20295
LEASING COMPANY, BILL BROWN	)	
REALTY, INCORPORATED, SCOTT	)	
PEATROSS, personally, STEWART	)	
TITLE COMPANY OF UTAH, TOMMY	)	
W. SISK, <u>CAPITOL THRIFT &amp; LOAN</u>	)	
<u>a financial corporation,</u>	)	
BACKMAN TITLE COMPANY, a	)	
financial corporation, and	)	
MERLYN HANKS,	)	
	)	
Defendants-	)	
Appellant.	)	

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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether the evidence supports a finding of conspiracy to defraud.

2. Whether the trial court erred by allowing the matter to go to the jury and not granting a directed verdict or judgment notwithstanding the verdict in favor of the Appellant.

3. Whether the trial court erred in its instructions to the jury, numbers 21, 26 and 27, where in the burden for finding punitive damages was stated to be by "the preponderance" of the evidence.

STATEMENT OF THE CASE

The Plaintiff brought an action against each of the Defendants on the theory that they conspired to defraud him of his home.

On August 21-23, 1984, the Plaintiff's action came on for trial before a jury in the Third Judicial District Court in and for Salt Lake County, the Honorable J. Dennis Fredrick presiding. The jury returned a verdict in favor of the Plaintiff and awarded both compensatory and punitive damages. After the verdict was returned, the Appellant's motions for directed verdict and for judgment notwithstanding the verdict were considered resolved and

therefore denied. T. 421. Subsequently, the judgment entered was appealed to this court.

Sometime prior to August 18, 1980, the Plaintiff listed his property with Century 21-Harv Kirkpatrick for the sales price of \$44,000. T. 84. Dorius Black, through Scott Peatross who was a real estate agent with Bill Brown Realty, presented an offer to the Plaintiff and his real estate agents, Vicki Phelps and Harv Kirkpatrick. T. 277. This offer, presented by way of an Earnest Money Receipt and Offer to Purchase, provided for \$20,000.00, including \$1,000.00 earnest money, to be paid to the Plaintiff at closing with the remaining \$24,000 being deferred one year and paid over a two year period. E.23. T. 278. After some negotiation, the offer was accepted by the Plaintiff on July 30, 1980. Those participating in the negotiations were the Plaintiff, through his interpreter, Emilio Ortiz; the Plaintiff's agents, Vicki Phelps and Harv Kirkpatrick; and Mr. Black and his agent Scott Peatross. T. 282, 286.

Although Mr. Black negotiated the purchase of the home, he never intended to actually buy the home himself. T. 19. During this time, he and Joseph Cannon had been involved



in several business deals together. Mr. Black looked for business opportunities which, with the help of Mr. Cannon's strong financial position, could be taken advantage of to increase and strengthen their respective business interests. T.19. Although not mentioning the Plaintiff by name, Mr. Black represented to Mr. Cannon that he had a project that would help him with his lease obligations to Alpha Leasing. T. 104. Mr. Cannon first met the Plaintiff at the time of closing at the offices of Stewart Title. T.87.

Also during this time, Mr. Black approached Capitol Thrift and Loan (the Appellant) about receiving a loan for the purchase of the home. T.21. The lender never met the Plaintiff. In fact, in making the loan, the lender was not involved with the Plaintiff as seller. T. 138, 389. As the value of the home appeared an acceptable risk for a loan, the lender indicated money could be made available. T. 22. Other than providing the financing for the purchase of the home, the lender was not a party to the plans of Mr. Black and Mr. Cannon to purchase the home. T.50.

Subsequently, Mr. Cannon filled out an application with the lender for a business loan to purchase

Plaintiff's property. T.120. Ex 34. Along with the application, Mr. Cannon provided a personal financial statement as well as a financial statement for Alpha Leasing Company, a partnership in which Mr. Cannon held a partnership interest T. 137 Ex. 35-36. An appraisal had earlier been done on the home and was verified by Merlyn Hanks, a loan officer for the lender. T. 137. Based on the value of the home and the financial strength of Mr. Cannon, the lender agreed to extend \$32,325.00 to Mr. Cannon for the purchase of the home.

Accordingly, on August 18, 1980, the day appointed for closing, a check for that amount was delivered to Stewart Title Company with instructions on how and when the check could be negotiated and disbursed. T. 139. Ex. 1. Mr. Cannon denied endorsing the check, but did acknowledge receiving the disbursements according to the instructions. T. 101. The letter of instructions required that fee simple title to the property be in the name of Joseph N. Cannon. The letter of instructions also provided that a Trust Deed in favor of the Appellant be recorded as a first trust deed subject to no other liens or incumbrances. In addition,

Stewart Title was instructed to disburse the funds as follows: (1) \$4848.75, to Capitol Thrift & Loan, (2) fees for recording title and for an insurance policy and (3) the remainder of the funds to Joseph N. Cannon or as he directed.

Scott Peatross, with the Earnest Money Receipt and Offer, contacted Tommy Sisk of Stewart Title and scheduled August 18, 1980 as the time for closing. T. 216. The Plaintiff along with his interpreter, Emilio Ortiz, Tommy Sisk of Stewart Title Company, Scott Peatross of Bill Brown Realty, Joseph Cannon, Dorius Black, and Jack Rhodes and Vickie Phelps of Century 21-Harv Kirkpatrick were present. T.194,106. Because of a delay, Mrs. Phelps left before the closing actually took place and was replaced by Mr. Rhodes. T.279,244.

The delay resulted from changes made at the request of Mr. Black at the time of closing as to where title would lie. T. 230,334. Each of the parties were explained the changes and were explained the documents conveying title to Mr. Cannon. Each party accepted the changes. T.229, 262, 320. Such changes at the time of

closing are usual in real estate transactions. T.230, 334. In addition, the substitution of Mr. Cannon as title holder complied with the provision of the Earnest Money Agreement to determine the title holder at the time of conveyance. T. 217. Although Mr. Cannon maintained that he understood his role in the transaction to be that of a guarantor, he acknowledged signing the documents which clearly show the contrary. T. 93-99. There was no dispute as to their legal effect.

The closing statements indicated that the \$24,000.00 left owing was to be secured by a second deed of trust. Ex. 20 and 27. These documents were explained to the Plaintiff and it was discussed that the total of the first and second trust deeds would exceed the \$44,000.00 sales price, although the exact figure was not known at that time. T. 213. The risk involved was explained to the Plaintiff by Mr. Sisk as well as the Plaintiff's agents. Although the risk was explained, it was generally assumed by the Plaintiff's agents that the first mortgage would not be an amount above \$20,000. T. 251. Although this was assumed, the only representation made was that the buyer would borrow

the \$20,000.00 needed for the down payment. T. 250. There was no limitation expressed in the Ernest Money Agreement or otherwise. T. 249, 287.

The note and Trust Deed in favor of the lender were prepared at the lender's office. T. 242. Stewart Title had nothing to do with the lender except as set forth in the letter of instructions. Stewart Title, in fact had no prior conversations with anyone other than Scott Peatross who scheduled the closing. T. 228. The documents along with the check did not arrive until after the closing had taken place. T. 208. Mr. Rhodes, the agent for the Plaintiff, waited around to see that they arrived but left before reviewing the documents. T. 264. There was no dispute as to the legal effect of the documents executed by the parties.

Stewart Title proceeded according to the Ernest Money Agreement it received and the letter of instructions by recording a first Trust Deed in favor of the lender. T. 236. There was no objection by the Plaintiff's real estate agents to the Plaintiff's interest being secured by a second deed of trust. T. 241. In fact, an escrow account was set up to handle the second trust deed in favor of the Plaintiff. As

part of the escrow instructions, the sellers representative was listed as Leonor C. Pagan, the Plaintiff's daughter. T. 303. Ex. 16.

Complying with the lender's instructions to protect its interest with a first trust deed, Stewart Title proceeded to disburse the funds as required. Each fee paid by Stewart Title was normal and customary.

Having received the down payment, the Plaintiff left for Puerto Rico where he was summoned back by his interpreter, Emilio Ortiz, to instigate this lawsuit. The Plaintiff, having received a serious head injury from an industrial accident, was described as being of "low normal range" of intelligence. T. 66. Plaintiff's mental capacity is difficult to determine unless tested. T. 75. The Plaintiff was able to reach a settlement with Kennecott over his injury and to buy the home which is the subject of the current action. T. 77. The Plaintiff had difficulty understanding English and was assisted in all aspects of the transaction by Emilio Ortiz, his interpreter. Everyone, including the Plaintiff's agents, felt and assumed that the Plaintiff understood and was competent to understand the

transaction he consumated. T. 267, 282, 374.

The loan to Mr. Cannon for the purchase of the home was made when Mr. Cannon was in good financial condition. T. 386, 389, 394. The terms of the loan provided for five installments with a balloon payment for the full amount due in six months. T. 145. Such terms were customary for the type of lender the Appellant was and for the time the loan was made. T. 161, 392. The note subsequently came into default.

Notice of default was mailed and Mr. Cannon asked for and received a couple of extensions. T. 163. Some payments were paid on the loan. However, the defaults continued and the property ultimately was foreclosed, with a deficiency being sought against Mr. Cannon. T. 166.

With the foreclosure of the home, the Plaintiff brought this action. Although alleging a cause of action against the Appellant in his complaint, the Plaintiff testified that he did not claim a cause of action against the Appellant. T. 274.

SUMMARY OF ARGUMENT

The jury's finding that the Appellant conspired to defraud the Plaintiff is not supported by the direct evidence or by circumstantial evidence which can be reasonably and naturally inferred. The verdict is based solely on suspicion and on sympathy for the Plaintiff. The jury instructions on punitive damages introduced a conflicting standard of proof which was confusing and prejudicial to the ultimate finding of the underlying cause of action.

ARGUMENT

I

THE VERDICT WAS NOT SUPPORTED BY THE EVIDENCE

The standard of review of a jury verdict has been stated by the court recently as follows:

It is the exclusive province of a jury to determine the credibility of the witnesses, weigh the evidence, and make findings of fact. (citation omitted). Where the evidence is conflicting and the jury is properly instructed, we do not upset those findings of fact except upon a showing that the evidence, viewed in the light most favorable to the verdict so clearly preponderated in Appellant's favor that reasonable persons could not differ on the outcome of the case.



Groen vs. Tri-O-Inc., Utah, 667 P. 2d 598 (1983). See also E.A. Strout Western Realty vs. W. C. Foy & Sons, Utah, 665 P. 2d 1320 (1983).

The jury in the instant case found by special verdict that the lender, the Title Company and Joseph Cannon engaged in a civil conspiracy to defraud the Plaintiff of his home. To determine whether the evidence preponderated in lender's favor to where reasonable minds would not differ, requires that civil conspiracy and fraud be defined.

A civil conspiracy has been defined as a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means. 15A C.J.S. Conspiracy § 1 (1). In general, to constitute civil conspiracy there must be the following elements:

(1) Two or more persons, and for this purpose a corporation is a person; (2) an object to be accomplished; (3) a meeting of minds on object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof.

15A C.J.S. Conspiracy § 1 (2).

The Utah Supreme Court, in Crane Co. v. Dahle, Utah, 576 P 2d 870 (1978), set forth the elements as (1) wrongfully conspiring to violate the Plaintiff rights, (2) the carrying out of such plan; and (3) damages proximately caused thereby. The court further stated that the Plaintiff has the burden of proving civil conspiracy by clear and convincing evidence. Crane Co. at 872.

Fraud is defined by the court In Taylor v. Gasor Inc., Utah, 607 P 2d 293 (1980), as follows:

. . . the making of a false representation concerning a presently existing material fact which the representor either knew to be false or made recklessly without sufficient knowledge, or the omission of a material fact when there is a duty to disclose, for the purpose of inducing action on the part of the other party, with actual, justifiable reliance resulting in damage to that party.

As with civil conspiracy, the court held that a finding of fraud must be shown by clear and convincing proof and will not lie in mere suspicion or innuendo. Furthermore, a person cannot be liable for fraud unless he made the representation himself, authorized someone to make

it for him or participated in some way such as through conspiracy. 37 C.J.S. Fraud § 61.

In the present case, there is no direct evidence showing the Appellant misrepresented a material fact known to be false. There is no direct evidence showing that the lender acted for the purpose of inducing the Plaintiff to sell his home or that the Plaintiff justifiably relied upon the lender's actions. Since the lender did not, by its own actions, defraud the Plaintiff or authorize another, the lender's liability can only be established through some participation in a fraud such as in a civil conspiracy.

The facts established by the Plaintiff don't support the allegation of a civil conspiracy. The lender's acts were lawful and were conducted for a lawful purpose. The evidence showed that, other than providing the financing, the lender did not participate in the plan of Mr. Black to purchase the Plaintiff's home. There were no misrepresentations or omissions shown to have been made by Mr. Cannon through Mr. Black or by Mr. Sisk. The assumptions of the Plaintiffs agents were never expressed nor made known to the parties. Because of this, the jury's finding of

conspiracy to defraud can only rest on inferences drawn from the facts proven.

The Appellant recognizes that inferences play an important role in any findings of fact, especially in cases such as this. Inferences, however, must be reasonably and legitimately drawn. This is particularly so in cases of fraud. See 37 C.J. S. Fraud § 115. Inferences must be made for the purpose of aiding reason and not to override it. They are nothing more than the probable and natural explanation of the facts. Holland vs. Columbia Mining Co., 4 Utah 2d 303, 293 P2d 700 (1956).

In Holland, the court was faced with an appeal of a ruling on Summary Judgment that there was not a fraudulent conspiracy in the business transactions between the parties. After addressing the issue of inferences, the court stated the following:

Common sense and reason dictate that evil inferences should not be permitted to be drawn from routine business transactions where there are no other circumstances. To hold otherwise would throw the door open for attack on each and every transaction that one might enter into.

In the present case, the inferences were not reasonably and legitimately drawn. The result reached by the jury is not probable nor a natural explanation of the facts proven. This conclusion is supported by the following reasons.

1. The lender had been in contact with Mr. Black, Mr. Cannon and Mr. Sisk. These were purely business contacts. Mr. Black inquired of the availability of a loan to purchase the Plaintiff's home. A loan was extended to Mr. Cannon on the basis of the application and financial statements which he had filled out. Contact with Mr. Sisk occurred when the loan and letter of instructions were delivered to Stewart Title on the day of the closing. While the lender's contacts with Mr. Black and Mr. Cannon were before the date of closing, those contacts were after Mr. Black had negotiated for the purchase of Plaintiff's home. Mr. Black testified that the lender was not involved with his and Mr. Cannon's plans for the purchase of the home. These contacts are not enough to infer fraud.

2. The lender had dealt with Mr. Black before. This fact explains the reason for the referral of Mr. Cannon

for the loan. The success of a business depends to a large degree on the returning customer. Evil inferences here are improper.

3. The lender loaned Mr. Cannon \$32,325.00 for the purchase of Plaintiff's property. The Plaintiff's agents felt that this was a substantial deviation of the Plaintiff's agreement. Even if it were a deviation, the lender had no way of knowing of the deviation. There was no limitation of the amount to be borrowed put into writing in the agreement as should have been done by Plaintiff's agents. Furthermore, there was no representation to the Plaintiff that the amount borrowed on the property would be limited. Any "deviation" resulted from a misunderstanding between buyer and seller. The only representation made was that the \$20,000.00 down payment would have to be borrowed. The lender was never notified of any limitation whatsoever on the property. It's loan was based on representations made on Mr. Cannon's application and on the value of the security. The lender acted lawfully. Other inferences simply are unreasonable.

4. The letter of instructions which accompanied the loan check to Stewart Title required that fee simple title be in the name of Joseph N. Cannon and that the lender be secured by a first trust deed. This requirement does not indicate that the lender was trying to cheat the Plaintiff out of his property, but rather to protect its interests in the property which was being used as security for the loan which was made. Such practice is usual in the banking industry. The inference of fraud is an unnatural explanation of the facts.

5. The letter of instructions also required \$4,848.75 to be paid back to the lender. This fact is perhaps the only fact where an evil inference could be drawn. However, even here there is a more reasonable and natural explanation. It was testified that finders fees were paid for loans which resulted from referrals. It was testified that it was probable that this amount was paid as a finders fee to Mr. Black and was credited against obligations he owed to the lender. The amount was paid by Alpha Leasing at the direction of Mr. Cannon whose business dealings with Mr. Black in no way involved the lender.

6. The Plaintiff was of low intelligence.

Plaintiff's doctor testified that this fact could only be determined through testing. All those who had dealt with the Plaintiff, including his own real estate agents, felt that the Plaintiff understood and was competent to enter into the subject transaction. Even if the Plaintiff's mental capacity could be determined by observation, the lender could not have known since it never met nor was involved with the Plaintiff. Evil inferences here are improper.

7. Certain sums were deducted from the

Plaintiff's down payment and paid to the real estate agents and Stewart Title. These amounts were explained by Stewart Title and testified as being the usual and customary practice of the real estate business. There was nothing improper here to infer the jury's finding.

8. At the time of closing, Mr. Cannon was

substituted as buyer. This substitution is clear on the documents and was done according to the express provision of Earnest Money Receipt and Offer to Purchase. This fact was also explained to each party. The lender had nothing to do



with the change other than lending the money to Mr. Cannon as the buyer.

9. The Plaintiff was not made aware of the changes made at the time of closing. The evidence shows that the documents clearly indicated that Mr. Cannon was the buyer and that the remaining obligation owed to the Plaintiff was secured by a second trust deed. The legal effect of the documents executed by the parties was not disputed. Discussions were held between the Plaintiff and Mr. Sisk and Mr. Rhodes, the agent for the Plaintiff, concerning the risk involved in such a transaction. The evidence shows that an explanation or at least an opportunity to be explained existed but that the Plaintiff simply did not understand. This is underscored by the escrow documents which listed Plaintiff's daughter as representative. Although there may have been misunderstanding, information was in fact going back and forth.

10. The trust deed in favor of the lender was drafted and signed outside of the Plaintiff's presence. This was the usual practice in that the transaction between

Mr. Cannon and the lender was a separate transaction from that between Mr. Cannon and the Plaintiff.

11. The funds received from the lender were disbursed after the closing had taken place. This was testified to as being the usual practice. There was no objection indicated by the Plaintiff or his agents. In fact, Mr. Rhodes waited around until the check arrived from the lender but did not take the time to review the documentation.

12. The loan to Mr. Cannon was payable in six months. This type of loan was not unusual for the type of lending institution that the Appellant was and for the time that the loan was made. Mr. Cannon testified that at the time the loan was made, he could financially meet the terms. A foreclosure sale did not immediately follow the defaults as Mr. Cannon was allowed to extend the loan. The Appellant did not agree to extend the loan with the thought of immediately foreclosing Plaintiff's interest in the property. Some payments were made by Mr. Cannon on the loan.

The only inference which can reasonably be drawn from these facts is that the lender was used by Mr. Black and Mr. Cannon to fund part of their business ventures which ultimately soured. Any other finding simply is not reasonable based on the evidence. This is particularly so given the fact that the Plaintiff himself testified that he did not have a cause of action against the Appellant. The evil inferences drawn by the jury are at most suspicion and suspicion is not enough to support an inference of fraud. One may only assume that they used the "deep pocket" theory in their judgment. Even at that, the suspicions do not reasonably and naturally follow the facts proven. The verdict rendered by the jury clearly was an act of sympathy for the Plaintiff who was continuously described as being physically and mentally impaired and who did not understand the english language. While sympathy may be warranted for the Plaintiff, the verdict is not.

## II

THE TRIAL COURT ERRED WHEN IT DENIED THE  
MOTIONS FOR DIRECTED VERDICT AND FOR  
JUDGMENT NOTWITHSTANDING VERDICT.

The Appellant recognizes that the right of trial by jury is one which should be safeguarded by the courts. There are, however, circumstances where the issues of fact should be taken from the jury. This Court has set forth those circumstances as follows.

. . . In ruling on motions which take issues of fact from the jury (this includes both motions for directed verdict and judgment notwithstanding the verdict), the trial court is obligated to look at the evidence and all reasonable inferences that fairly may be drawn therefrom in the light favorable to the party moved against; and the granting of such a motion is justified only if, in so viewing the evidence, there is no substantial basis therein which would support a verdict in his favor.

Mel Hardman Prod. Inc. vs. Robinson, Utah, 604 P 2d 913, (1979). Management Committee, Etc. vs. Graystone Pines, Utah, 652 P 2d 896 (1982).

In the present case, the evidence was not sufficient for the reasons argued above. As a result, the Plaintiff failed to establish his prima facie case against the Appellant. The elements of both fraud and conspiracy were not established by evidence which was clear and convincing. Therefore, as a matter of law, there could not

be a finding of conspiracy to defraud the Plaintiff and his cause of action must fail. This result is underscored by the fact that the Plaintiff, under oath, testified that he did not make any claim against the Appellant. This case should not have been allowed to go before the jury. The trial court was incorrect when it ruled that the Appellant's motions to take the case from the jury were resolved by the return of the jury's verdict. The jury's verdict does not change Plaintiff's testimony or the lack of a prima facie case.

### III

THE COURT ERRED IN INSTRUCTING THE JURY  
THAT PUNITIVE DAMAGES CAN BE FOUND ON A  
DIFFERENT STANDARD OF PROOF THAN THE  
UNDERLYING WRONGFUL ACT COMPLAINED OF.

Punitive damages are awarded only where the nature of the wrong complained of goes beyond merely violating the rights of another. For an award of punitive damages to be proper, the wrongful act complained of must be characterized by some circumstance of aggravation such as conduct which is willful, malicious or in knowing or reckless disregard for the rights of others. Behrens v. Raleigh Hills Hospital Inc., Utah, 675 P2d 1179 (1983). Leigh Furniture & Carpet

Co. vs. Isom, Utah, 675 P2d 293 (1982). 72 Am. Jur. 2d  
damages § 246.

Even in cases of fraud, Punitive damages are the exception. The basic elements of fraud, as indicated above, must be established by clear and convincing evidence and not by mere suspicion or innuendo. Punitive damages may be awarded in such cases of fraud where there is, in addition to the basic elements of fraud, "other extraordinary or exceptional circumstances clearly indicating malice or willfulness." 37 C.J.S. Fraud § 144 (emphases added).

In the present case, the trial court instructed the jury in instructions Nos. 21, 26, and 27 that punitive damages could be found from a preponderance of the evidence that the Defendant's conduct was willful and malicious in conspiring to defraud the Plaintiff. Since punitive damages are the exception, even in cases of fraud, the basis for the award must be found in additional facts above and beyond the elements of the underlying wrongful act. Because of this, the standard of proof for the findings upon which the award of punitive damages is based must coincide with the standard of proof necessary for a finding of the underlying wrongful

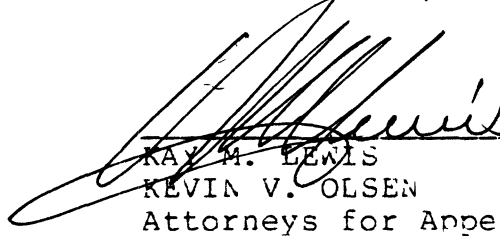
act. In this case, the underlying wrongful act is conspiracy to defraud which must be found by clear and convincing evidence. The court's use of the preponderance standard in this instance was at the least, confusing to the jury and, at most, prejudicial in the jury's awarding compensatory damages on the Plaintiff's cause of action.

CONCLUSION

The jury verdict awarding the Plaintiff compensatory and punitive damages must be reversed.

RESPECTFULLY submitted this 12th day of March, 1985.

JENSEN & LEWIS, P.C.

  
RAY M. LEWIS  
KEVIN V. OLSEN  
Attorneys for Appellant

MAILING CERTIFICATE

(4 copies)

I hereby certify that a true and correct copy of the foregoing Appellant's Brief was mailed, postage prepaid, to Mark S. Miner, 525 Newhouse Building, 10 Exchange Place, Salt Lake City, Utah 84111 this 12<sup>th</sup> day of March, 1985.

  
Kevin V. Olsen

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ISRAEL PAGAN,

Plaintiff,

vs.

JOSEPH N. CANNON, DORIUS  
BLACK, ALPHA LEASING  
COMPANY, a partnership,  
ROBERT G. D. APGOOD, JOSEPH  
N. CANNON, DORIUS BLACK  
and RICHARD MCKEAN doing  
business under the name and  
style of Alpha Leasing  
Company, BILL BROWN REALTY,  
INCORPORATED, SCOTT PEATROSS,  
individually, STEWART TITLE  
COMPANY OF UTAH, TOMMY W.  
SISK, CAPITOL THRIFT &  
LOAN, a financial  
corporation, BACKMAN  
TITLE COMPANY, a financial  
corporation, and MERLYN  
HANKS,

Defendants.

SPECIAL VERDICT

Civil No. C-82-5710

JUDGE FREDERICK

We, the jury in the above case, find the following:

1. Did Capitol Thrift & Loan Company, through its agent, Merlyn Hanks, by clear and convincing evidence engage in a civil conspiracy to defraud plaintiff incident to the transaction in question?

~~Yes~~

No

2. Did Stewart Title Company of Utah, through its agent, Tommy W. Sisk, by clear and convincing evidence engage in a civil conspiracy to defraud plaintiff incident to the transaction in question?

~~Yes~~

No



3. Was Scott Peatross, at the time in question, an agent of Bill Brown Realty, Inc.?

\_\_\_\_\_  
Yes

\_\_\_\_\_  
No

4. If you answered No. 3 above "yes", then answer this question:

Did Bill Brown Realty, Inc., through its agent, Scott Peatross, by clear and convincing evidence engage in a civil conspiracy to defraud plaintiff incident to the transaction in question?

\_\_\_\_\_  
Yes

\_\_\_\_\_  
No

5. If you answered No. 3 above "no", then answer this question:

Did Scott Peatross, individually, by clear and convincing evidence, engage in a civil conspiracy to defraud plaintiff incident to the transaction in question?

\_\_\_\_\_  
Yes

\_\_\_\_\_  
No

6. Was Joseph Cannon, at the time in question, an agent of Alpha Leasing Company?

\_\_\_\_\_  
Yes

\_\_\_\_\_  
No

7. If you answered No. 5 above "yes", then answer this question:

Did Alpha Leasing Company, through its agent, Joseph Cannon, by clear and convincing evidence engage in a civil conspiracy to defraud plaintiff incident to the transaction in question?

\_\_\_\_\_  
Yes

\_\_\_\_\_  
No

8. If you answered No. 6 above "no", then answer this question:

Did Joseph Cannon, individually, by clear and convincing evidence, engage in a civil conspiracy to defraud plaintiff incident to the transaction in question?

Yes X No

9. Was Richard McKean, at the time in question, an agent of Alpha Leasing Company?

Yes X No

10. If you answered No. 7 above "yes", then answer this question:

Did Alpha Leasing Company, through its agent, Richard McKean, by clear and convincing evidence engage in a civil conspiracy to defraud plaintiff incident to the transaction in question?

Yes No X

11. If you found by clear and convincing evidence that Capitol Thrift & Loan Company, through its agent, Merlyn Hanks, engaged in a civil conspiracy to defraud the plaintiff incident to the transaction in question, what damage, if any, do you find was caused to the plaintiff:

Compensatory \$ 12,000.00 (not to exceed \$24,000.00)  
Punitive \$ 4,000.00

12. If you found by clear and convincing evidence that Stewart Title Company of Utah, through its agent, Tommy Sisk, engaged in a civil conspiracy to defraud the plaintiff incident to the transaction in question, what damage, if any, do you find was caused to the plaintiff:

Compensatory \$ \_\_\_\_\_ (not to exceed \$24,000.00)  
Punitive \$ 2,000.00

13. If you found by clear and convincing evidence that Bill Brown Realty, Inc., through its agent, Scott Peatross, engaged in a civil conspiracy to defraud the plaintiff incident to the transaction in question, what damage, if any, do you find was caused to the plaintiff:

Compensatory \$           —           (not to exceed \$24,000.00)

Punitive \$           —          

14. If you found by clear and convincing evidence that Scott Peatross, individually, engaged in a civil conspiracy to defraud the plaintiff incident to the transaction in question, what damage, if any, do you find was caused to the plaintiff:

Compensatory \$           —           (not to exceed \$24,000.00)

Punitive \$           —          

15. If you found by clear and convincing evidence that Alpha Leasing Company, through its agent, Joseph Cannon, engaged in a civil conspiracy to defraud the plaintiff incident to the transaction in question, what damage, if any, do you find was caused to the plaintiff:

Compensatory \$           —           (not to exceed \$24,000.00)

Punitive \$           —          

16. If you found by clear and convincing evidence that Joseph Cannon, individually, engaged in a civil conspiracy to defraud the plaintiff incident to the transaction in question, what damage, if any, do you find was caused to the plaintiff:

Compensatory \$ 12,000<sup>00</sup> (not to exceed \$24,000.00)

Punitive \$ 4,000<sup>00</sup>

17. If you found by clear and convincing evidence that Alpha Leasing Company, through its agent, Richard McKean, engaged in a civil conspiracy to defraud the plaintiff incident to the transaction in question, what damage, if any, do you find was caused to the plaintiff:

Compensatory \$           —           (not to exceed \$24,000.00)

Punitive \$           —

18. If you found by clear and convincing evidence that Richard McKean, individually, engaged in a civil conspiracy to defraud the plaintiff incident to the transaction in question, what damage, if any, do you find was caused to the plaintiff:

Compensatory \$           —           (not to exceed \$24,000.00)

Punitive \$           —          

DATED this 24 day of August, 1984.

En  
Foreperson

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH

ISRAEL PAGAN

Plaintiff,

vs.

JOSEPH N. CANNON, DORIUS  
BLACK, ALPHA LEASING COMPANY,  
a partnership, ROBERT D.  
APGOOD, JOSEPH N. CANNON,  
DORIUS BLACK, and RICHARD  
McKEAN, doing business under  
the name and style of ALPHA  
LEASING COMPANY, BILL BROWN  
REALTY, INCORPORATED, SCOTT  
PEATROSS, personally, STEWART  
TITLE COMPANY OF UTAH, TOMMY  
W. SISK, CAPITOL THRIFT AND  
LOAN, a financial corporation;  
BACKMAN TITLE COMPANY, a  
financial corporation, and  
MERLYN HANKS,

Defendants.

JUDGMENT ON JURY VERDICT

Civil No. C-82-5710

Judge J. Dennis Frederick

The above entitled matter came on regularly for trial before the Court sitting with a jury on August 21-24, 1984, the Honorable J. Dennis Frederick, District Judge, presiding. The plaintiff, ISRAEL PAGAN, was represented by his counsel, Mark S. Miner. The defendants JOSEPH N. CANNON, ALPHA LEASING COMPANY, a partnership, and RICHARD McKEAN were represented by

their counsel, Richard N. Cannon. BILL BROWN REALTY, INCORPORATED, and SCOTT PEATROSS were represented by their counsel, Duane A. Burnett. STEWART TITLE COMPANY OF UTAH and TOMMIE W. SISK were represented by their counsel, Robert D. Merrill. CAPITOL THRIFT AND LOAN and MERLYN HANKS were represented by their counsel, Kay M. Lewis. ROBERT D. APGOOD was represented by his counsel, Richard I. Ashton and Thomas R. Vuksinick. The defendant DORIUS BLACK, having not been duly served with summons and complaint in this matter, did not appear other than as a witness and did not otherwise participate in the trial.

At the conclusion of the presentation of the evidence, it was stipulated by, between and among the parties that the complaint could be dismissed with prejudice as against the defendants ROBERT D. APGOOD, TOMMIE W. SISK and MERLYN HANKS.

With respect to plaintiff's remaining claims against the defendants, the jury answered special interrogatories and rendered its verdict on August 24, 1984. Following the announcement of the verdict, the Court heard and duly considered various motions by the defendants for the entry of judgments notwithstanding the verdict and the Court having determined and ruled that said motions should be denied, it is therefore,

ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff's complaint against the defendants ROBERT D. APGOOD, TOMMIE W. SISK and MERLYN HANKS be and the same is hereby dismissed with prejudice, no cause of action.

2. Plaintiff's complaint against the defendants BILL BROWN REALTY, INCORPORATED, SCOTT PEATROSS and ALPHA LEASING COMPANY be and it is hereby dismissed with prejudice, no cause of action.

3. Plaintiff is awarded judgment against CAPITOL THRIFT AND LOAN in the amount of \$12,000.00 compensatory damages, and \$4,000.00 punitive damages.

4. Plaintiff is awarded judgment against the defendant STEWART TITLE COMPANY OF UTAH in the amount of no compensatory damages and \$2,000.00 punitive damages.

5. Plaintiff is awarded judgment against the defendant JOSEPH N. CANNON in the amount of \$12,000.00 compensatory damages, and \$4,000.00 punitive damages.

MADE AND ENTERED this \_\_\_\_ day of \_\_\_\_\_, 1984.

BY THE COURT:

---

J. Dennis Frederick  
District Judge

CERTIFICATE OF SERVICE

SERVED the foregoing Judgment on Verdict by mailing a copy thereof, postage prepaid, to the following this \_\_\_\_ day of August, 1984:

Duane A. Burnett, Esq.  
Attorney for Bill Brown  
Realty and Scott  
Peatross  
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Richard I. Ashton, Esq. and  
Thomas R. Vuksinick, Esq.  
57 West 200 South,  
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Salt Lake City, Utah 84101

Dorius Black  
Cascade Drive  
Morgan, Utah 84050

  
Robert D. Merrill

5953M



Under the law, it does not necessarily follow from a finding that one member of a partnership is liable for punitive damages that any or all of other members of the partnership are also liable for punitive damages. The acts or omissions of one partner will justify an award of punitive damages against another partner or partners if and only if those acts or omissions are within the ordinary course and scope of partnership business and the other partner or partners against punitive damages are awarded authorized, participated in, or ratified those acts or omissions.

If you find that the acts or omissions of Joseph N. Cannon justify an award of punitive damages against him, punitive damages may be awarded against the other partners of Alpha Leasing if, and only if, you find by the preponderance of the evidence each of the following elements:

1. That at the time of the events at which this lawsuit occurred Joseph N. Cannon was acting as a partner of Alpha Leasing Company;
2. That the acts of Joseph N. Cannon were within the ordinary course and scope of Alpha Leasing's business;
3. That each of the partners against whom punitive damages are awarded sought, authorized, participated in, or ratified the acts or omissions of Joseph N. Cannon.

INSTRUCTION NO. 26

In addition to the actual damages plaintiff alleges he has sustained, he also seeks to recover punitive or exemplary damages against the defendants. If you find the issues in favor of the plaintiff and that he is entitled to recover actual damages, you may also consider whether the plaintiff is entitled to such punitive damages.

Before punitive damages may be awarded, you must find the issues in favor of the plaintiff and against the individual defendants, and further you must find from a preponderance of the evidence that the individual defendants' conduct in injuring the plaintiff was willfull and malicious. If you so find, you may award, if you deem it proper to do so, such sum as in your judgment would be reasonable and proper as a punishment to that defendant for such wrongs, and as a wholesome warning to others not to offend in like manner. If such punitive damages are given, you should award them with caution and you should keep in mind that they are only for the purpose just mentioned and are not the measure of actual damage. Such damages must not exceed the amount prayed for by the plaintiff.

If you find that plaintiff suffered damage as a proximate result of the conduct of any of the defendants on which you base a finding of liability, you may then consider whether you should award punitive or exemplary damages against such defendant for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by a preponderance of the evidence that said defendant's acts were wilful or malicious in the conduct on which you base your finding of liability.

In arriving at any award of punitive damages, you are to consider the following:

1. The reprehensibility of the conduct of the defendant.
2. The amount of punitive damages which will have a deterrent effect on the defendant.
3. That the punitive damages must bear a reasonable relation to the actual damages.