

1988

# John P. Sampson v. Milton R. Goff, individually and as Trustee of Milton R. Goff Trust, an unincorporated association : Reply Brief

Utah Court of Appeals

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BRIEF

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880257-CA

IN THE UTAH COURT OF APPEALS

FOR THE STATE OF UTAH

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JOHN P. SAMPSON,

Plaintiff, Appellant,  
and Cross-Respondent,

and

MILTON R. GOFF, individually and  
as Trustee of MILTON R. GOFF TRUST,  
an unincorporated association,

Plaintiffs,

vs.

PAUL H. RICHINS; RICHTRON, INC.,  
a Utah corporation; RICHTRON  
FINANCIAL CORPORATION, a Utah  
corporation; RICHTRON GENERAL,  
a Utah corporation; and FRONTIER  
INVESTMENTS, a Utah corporation,

Defendants, Respondents  
and Cross-Appellants.

Court of Appeals  
No. 880257-CA

Supreme Court Nos.  
860565 and 860570

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COURT OF APPEALS

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REPLY AND CROSS RESPONDENT BRIEF OF SAMPSON  
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Appeal from the Judgment of the  
Second Judicial District Court, Davis County  
Honorable Bryan H. Croft  
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REPLY AND CROSS RESPONDENT BRIEF OF SAMPSON  
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STATEMENT OF THE CASE

Respondents in their "Statement of the Case" (Respondent's Brief, pp. 2-6) have improperly asserted material which is not relevant to this section of the Brief. For example, the discussion concerning the Osborn judgment (Respondent's Brief, pp. 2-3) has no relevance to the procedural context of this case since the Osborn litigation is not now in issue. The Osborn judgment procedure, if it has any relevance, goes to the question of the lower court's finding of improper conduct by Sampson which is discussed in the Argument sections of both Briefs.



Aside from this improper inclusion, it should also be noted that Respondents failed to mention that the Osborn judgment was only purchased by Sampson in 1981 after all negotiations had failed and after all attorney-client relationships had ceased.

Respondents' attack upon the Utah State Bar Committee proceeding is also inappropriate. The Utah Supreme Court has approved the procedure utilized by the Bar Commission in screening complaints against members. Respondents had full and ample opportunity to present witnesses and argue their contentions before the Bar Committee regarding Sampson's alleged unethical conduct. The fact that the Bar Committee failed to find sufficient allegations to go to a full adversarial proceeding does not eliminate the "probative value" of the Committee's conclusion that insufficient evidence of serious misconduct was present justifying such a hearing. This Committee report is certainly collateral evidence supporting the lower court's finding that no punitive damages were justified under the circumstances of this case.

Finally, the discussion by Respondents concerning the "inadequate transcript" (Respondents' Brief, pp. 5-6) is discussed in several other portions of Respondents' Brief and will be addressed in Appellant's Reply Brief herein. As to the procedural events concerning this claim of inadequate transcript, it should be observed that on two separate occasions September 18, 1987 and January 12, 1988 Respondents filed with the Utah Supreme Court motions to dismiss the appeal and for summary affirmance based upon the same contention of an inadequate transcript. In all instances the Utah Supreme Court denied Respondents' motions and subsequently transferred this appeal to this

Court.

#### STATEMENT OF FACTS

Appellant Sampson does not contest the facts contained in Respondents' "Statement of Facts" (Respondents' Brief, p. 6-23) since the actual events which occurred are essentially undisputed. Appellant, however, does not necessarily agree with the characterization of these facts by Respondents or with the titles used by Respondents in their various subdivisions. Because of the extensive findings by the lower court it would conceivably be possible to write several completely different versions of the facts by highlighting those areas of concern to the writer. In this appeal, however, the only facts which are relevant concern those which support the conclusions and judgment of the lower court and any other facts not pertaining to this question are extraneous and irrelevant.

Finally, it should be noted that all record references in the "Statement of Facts" of Respondents relate to the Findings and Conclusions of the lower court. Respondents have made no attempt to cite the underlying transcript upon which the Findings and Conclusions of the lower court are based. Thus, Respondents are relying upon the Findings and Conclusions of the lower court and not upon the testimony of the witnesses at trial. This reliance upon the lower court's findings supports Appellant's position that the actual record in this case is unnecessary in view of the issues presently raised on appeal.

#### ARGUMENT

##### POINT I

THE FAILURE OF SAMPSON TO INCLUDE THE ENTIRE TRIAL TESTIMONY DOES NOT MAKE IT IMPOSSIBLE FOR THIS COURT TO MEANINGFULLY REVIEW THE JUDGMENT.

Respondents contend, as they did in their various motions before the Utah Supreme Court, that the failure of Sampson to designate the entire trial testimony eliminates the ability of Sampson to now appeal the judgment entered against him. (Respondents' Brief, pp. 26-33). Respondents also contend that under the standards of review applicable to this appeal the judgment cannot be reversed. (Respondents' Brief, pp. 33-35). Both of these arguments are without merit.

Sampson readily agrees that the arguments now advanced by Respondents would be correct if the context of this appeal were different. If, for example, Sampson was contesting the factual findings of the lower court on the basis that insufficient evidence existed to justify such finding Respondents' argument would be germane. In the Smith v. Vuicich case cited by Respondents (Respondents' Brief, p. 27) the appellant was arguing that the jury verdict was based upon insufficient evidence. Obviously, without a full and complete record the sufficiency of the evidence cannot be addressed by either the complaining party or an appellate court.

The other decisions cited by Respondents (Respondents' Brief, pp. 27-29) all deal with an attack upon the sufficiency of evidence in one form or another. In all of these cases it is incumbent upon an appellant to include the entire record for review since to selectively exclude portions of the record eliminates any argument the appellant can make that there is no evidence to support the lower court's decision.

Respondents seemingly do not understand the difference between an attack upon a finding of fact based upon sufficiency of evidence as opposed to a conclusion of law based upon an inadequate factual basis.

In this appeal, Appellant Sampson is not attacking the accuracy of the lower court's Findings of Fact as to the events and transactions which occurred in this litigation. Rather, Sampson is attacking the conclusions drawn by the lower court based upon those facts.

To illustrate this distinction the following example is offered. Assume that a traffic accident has occurred and that a trial is held in the lower court. During the court proceeding five witnesses testify that driver "X" ran a red light whereas one witness testifies that driver "Y" ran the red light. The court enters a specific finding that Driver "Y" ran the red light and that driver "X" did not run the red light. On appeal, driver "Y" would contend that the factual finding of the lower court was not supported by substantial evidence in that five of the witnesses were completely to the contrary. He would have to contend that the only witness in support of driver "X" was not capable of belief and should have been ignored by the lower court. In a case such as this it would be essential to have all the testimony relating to all the witnesses and their observations of the light. The holdings of the various decisions cited by Respondent are applicable to this type of situation.

As to the instant case, however, a different situation occurs. Assume in the previous example that all of the witnesses agree that driver "X" ran the red light and that driver "Y" did not run the red light. The court enters a specific factual finding to this effect. The court then concludes, however, that driver "Y" is negligent and that driver "X" is not negligent. On appeal, driver "Y" is merely claiming that even though the facts are not disputed and that the lower court has correctly interpreted the facts based upon the evidence, the

legal conclusion reached from those facts is erroneous. It is not necessary to cite the testimony of the various witnesses since there is no disagreement as to what factually occurred. The only question on appeal is what the court concluded based upon the undisputed facts.

This last example is applicable to the instant case. After reviewing the transcript and the numerous documents in this file Appellant's counsel has concluded that the lower court properly found the sequential facts which occurred in this case but incorrectly made legal conclusions based upon those facts. It is therefore unnecessary to have the supporting record in this case. In other instances, the court made its legal conclusions without sufficient findings to support them. The failure to have sufficient findings negates the validity of the legal conclusions and again the record is not required.

Several cases from Utah and other jurisdictions are helpful in understanding these distinctions. In Ierulli v. Lutz Development Co., 698 P.2d 504 (Or. App. 1985) a case was appealed concerning the validity of the findings and conclusions of the lower court even though no record at all was filed with the Court of Appeals. The court there noted that findings of fact can be inadequate in three situations. First, when they are not supported by any competent, substantial evidence; second, when they are unresponsive to or outside the issues framed by the pleadings; and third, when they do not support the conclusions of law on which judgment is based. The court noted that in the first two instances it was unable to review any contentions without a record but as to the third type of instance, such review was possible since the record was not required.

The New Mexico Court of Appeals also succinctly stated the

principles regarding conclusions of law and factual findings when it said:

A "conclusion of law" is a decision of the court stemming from the ultimate factual issues which determine the result of the dispute in a non-jury trial. A conclusion of law must find support in the findings of fact. Ultimate facts are the facts which are necessary to determine the issues in the case, as distinguished from the evidentiary facts supporting them. The lower court's conclusions of law must find support in the court's findings in order to be sustained on appeal. Romero v. J.W. Jones Construction Co., 651 P.2d 1302 (N.M. App. 1982). (Emphasis added).

As Respondents note in their Brief (Respondents' Brief, p. 33) when attacking the sufficiency of the evidence it is necessary to marshall all of the evidence in support of the trial court's finding and then demonstrate that even reviewing that evidence in a light most favorable to the court the evidence is insufficient to support the finding. Scharf v. BMG Corp., 700 P.2d 1068 (Utah 1985); Hansen v. Stewart, 87 Utah Adv. Rpt. 46 (July 28, 1988).

In the Scharf decision the court noted the distinction between marshalling of facts when the sufficiency of evidence is being questioned as opposed to attacking a conclusion of law. The court stated:

We next consider Erickson's claim that the trial court erred in its conclusions of law. The standard of review differs from that applicable to factual findings; we accord conclusions of law no particular deference, but review them for correctness. 700 P.2d at 1070.

In that decision one of the questions of law was whether a particular sale was commercially reasonable. In affirming the lower court's decision the Supreme Court stated, "The facts found by the trial court provide ample support for the legal conclusion that the

sale was commercially reasonable." Id. at 1071.

In the instant case the same type of question exists; namely, whether the actions of Sampson constituted an improper means or was for an improper purpose and that such actions or purpose was the proximate cause of any damages suffered by Respondents. The conclusions of the lower court in finding damages against Sampson for tortiously interfering with contract can only be sustained if the legal conclusions upon which such judgment is based are also supported by the factual findings of the lower court. With this issue in focus it is not required that the entire record be presented to this Court for review since Appellant accepts for the purposes of this appeal all of the underlying factual findings by the lower court as true but disagrees with the conclusions and characterizations given to these findings by the lower court.

Sampson takes exception, therefore, to the statement by the respondents that Sampson is attempting to "sanitize" the evidence by only selecting that favorable to Sampson's position. (Respondents' Brief, pp. 30-31). Since the lower court in rendering its extensive Findings of Fact and Conclusions of Law based such Findings and Conclusions upon the entire record no such sanitizing has occurred. The lower court effectively took into account all of the testimony introduced by Respondents when the court rendered its opinion.

Next, the Respondents heavily rely upon the statement made by Sampson's counsel before a Utah Supreme Court hearing that the record was totally inadequate to challenge a judgment at the time a request to supplement the record was being made. (Respondents' Brief, pp. 6, 30-31). The reliance upon this statement, however, is greatly

misplaced. At the time the motions occurred before the Utah Supreme Court Appellant's counsel had not had the opportunity to review either the exhibits or the transcripts of the case. He assumed that all avenues of appeal should be left open including a claim of sufficiency of evidence. Naturally, under that situation Appellant attempted to supplement the designation of record since it had been prepared by the court reporter and had already been filed with the Clerk of the Supreme Court.

After the motion was denied Appellant's counsel then reviewed the record and exhibits. After such review it was decided that even had the entire record been preserved for review that a sufficiency of evidence claim would not have been made since the factual Findings of operative facts made by the lower court were essentially all correct and that because of the high standard of review in sufficiency of evidence cases such an effort would have been fruitless. Thus, the fact that the present record is totally inadequate to challenge the judgment on the sufficiency of evidence grounds is not of any consequence to the issues now being raised in this appeal relating to Conclusions of Law and characterizations of facts made by the lower court.

The filing of the cross appeal by Respondents has also complicated the arguments now being advanced by them. While Respondents are adamant that the failure to have a complete record eliminates the possibility of review as to Sampson's claim (Respondents' Brief, pp. 26-35), they make no attempt to justify the ability of this Court to review the cross appeal in which, under the theory advanced by Respondents, a full record is also required. (Respondents' Brief, pp.



57-71).

Several events which occurred during the proceedings of this case can also be cited against the respondents. On November 28, 1986 Respondents filed the following Certificate regarding the record. They stated:

Appellants [Respondents under the present case] above-named, through their counsel, hereby certify pursuant to Rule 11(b)(1), Utah Rules of Appellate Procedure, that they do not intend to rely on any transcript of the proceedings other than those, if any, requested by Respondent [Sampson] in this case or by Appellants [Sampson] in related appeal No. 86-0565.

Respondents, therefore, made no effort to supplement the designation of record made by Sampson and are therefore essentially stuck with the designation, whether it be good or bad, as it now stands.

On October 5, 1987 a hearing was held before the Utah Supreme Court on Sampson's motion to supplement the record. At that time Justice Stewart specifically asked Respondents' counsel whether the additional record would be necessary for Respondents to properly present their cross appeal. Respondents' counsel stated that it would not be required since Respondents were relying entirely upon the findings of the lower court and not upon the record.

The present cross appeal is arguing that the lower court failed to award damages to the respondents based upon the evidence adduced at trial. If, as Respondents argue in the first portion of their brief, a party is precluded from relying upon the findings of the lower court without having the entire record available then none of the arguments advanced by the respondents on their cross appeal can be presented to this Court.

Thus, Respondents are in the horns of a dilemma. Either the

record is insufficient for both the appellant and the respondents to argue any of the issues now before this Court or, in the alternative, the record is sufficient and both sides are entitled to argue upon the designated record and upon the Findings and Conclusions entered by the lower court. Respondents cannot seek to eliminate the appeal of Sampson while at the same time pursuing their own appeal when both appeals are based upon the same premises.

With this explanation of the procedural context of this appeal it now remains to examine the merits of the substantive arguments advanced by Sampson.

#### POINT II

THE COURT ERRED IN FINDING SAMPSON HAD  
INTENTIONALLY INTERFERED WITH THE BUSINESS  
RELATIONSHIPS OF DEFENDANTS.

A. There Was No Factual Finding Sufficient  
to Justify the Conclusion that Sampson Had  
An Improper Purpose in His Dealings With  
The Limited Partnerships.

Appellant in his opening brief discussed the standard to be applied in determining an "improper purpose" under the Supreme Court's decision of Leigh Furniture and Carpet. (Appellant's Opening Brief, pp. 30-34). Sampson contended that the legal conclusion of improper motive reached by the lower court was not supported by the actual factual findings of the transaction.

Respondents counter by arguing that the incomplete record in the appeal precludes Sampson from demonstrating that the factual findings were erroneous and that the existing record supports the conclusion. (Respondents' Brief, pp. 42-43).

The present appeal is somewhat unusual in that most cases involve claims that the lower court entered insufficient findings or inadequate

findings based upon the record. In the instant case, however, the court has entered an abundance of findings many of which would be deemed evidentiary findings as opposed to findings of ultimate facts. The Utah Supreme Court has stated that "findings should be limited to the ultimate facts." Pearson v. Pearson, 561 P.2d 1080, 1082 (1977). "Ultimate facts are the facts which are necessary to determine the issues in the case, as distinguished from the evidentiary facts supporting them." Galvan v. Miller, 445 P.2d 961 (N.M. 1968).

Thus, in the instant case not only did the lower court enter a number of ultimate facts but also entered a large number of evidentiary facts thereby making it more difficult to sort and sift the relevant inquiry. In any event, however, both these evidentiary facts and ultimate facts found by the lower court show that Sampson was involved in a commercial battle both for himself and for his clients for the protection of assets and to preserve the limited partnerships. As noted in the Leigh Furniture and Carpet case an improper purpose can only be found "where it can be shown that the actor's predominant purpose was to injure the plaintiff." 657 P.2d at 307.

In rejecting a finding of improper purpose in the Leigh Furniture case the Utah Supreme Court stated the following:

As noted earlier, there is substantial evidence that the Leigh corporation deliberately injured Isom's economic relations. But that injury was not an end in itself. It was an intermediate step toward achieving the long-range financial goal of profitably reselling the building free of Isom's interest. Because that economic interest seems to have been controlling, we must conclude that the evidence in this case would not support a jury finding that the corporation's predominant purpose was to injure or ruin Isom's business merely for the sake of injury alone. Id. at 308. (Emphasis added).

It is therefore respectfully submitted that even if it is assumed

arguendo that Sampson had a vendetta to oust Richins and to take complete control of the limited partnerships that such purpose was no different than that in the Leigh Furniture and Carpet Co. case which the Utah Supreme Court found was not improper. For this reason, therefore, the lower court erred in concluding that Sampson's efforts could be classified as a "improper purpose" under the tort of interference with contract.

B. The Lower Court Erred in Concluding That Sampson Utilized Improper Means During His Relationship With the Limited Partnerships.

Sampson in his opening brief contended that the lower court also erred in categorizing his conduct as an improper means. (Appellant's opening Brief, pp. 34-40). Respondents replied to this argument in their brief. (Respondents' Brief, pp. 35-41). Respondents have, however, both misinterpreted the legal standards and the facts of this case in making their retort.

The Supreme Court in Leigh Furniture stated that to recover damages under the common-law cause of intentional interference with prospective economic relations the plaintiff must prove (1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by an improper means, (3) causing injury to the plaintiff. 657 P.2d at 304.

Respondents have confused the element of improper means with the element of intentional interference. In Respondents' brief they state that six acts of the defendants in the Leigh Furniture case constituted the "improper means of interference". (Respondents' Brief, p. 36). They then quote from page 306 of the opinion in which the Utah Supreme Court stated that the cumulative effect of these various acts resulted

in interference. (Respondents' Brief, p. 37).

If the Leigh Furniture case is examined, however, it is seen that the quotation upon which Respondents rely deals with the question as to the first element of whether the defendants intentionally interfered with the plaintiff's existing or potential economic relations. Subdivision (c) of the opinion beginning on page 305 is entitled "Evidence of Intentional Interference and Causation". The discussion relied upon by the respondents, therefore, only goes to the issue as to whether conduct occurred which caused interference with a business relationship. The court's discussion as to "improper means" does not occur until some three pages later. (Id. at 308-11).

Appellant Sampson readily admits that the actions which occurred during this transaction satisfied the first element of the test in that he intentionally interfered with the respondents' existing or potential economic relations. All of the actions which are listed in Respondents' brief either directly or indirectly had some effect upon the economic relations of Respondents. (Respondents' Brief, pp. 38-40).

The lower court listed nine acts which it believed constituted improper means as defined in the Leigh Furniture case. (See, Appellant's opening Brief, pp. 34-35). Respondents have expanded this list to some 22 acts. (Respondents' Brief, pp. 37-40). Sampson would submit that the lower court's own characterization of the improper acts should be controlling since the lower court did not necessarily have to believe that every alleged wrong of Sampson constituted an improper means. However, even if it is assumed arguendo that all of the acts listed by the respondents constituted the improper means in this case

they are still insufficient to qualify under the Leigh Furniture criteria.

The Utah Supreme Court defined improper means as follows:

The alternative requirement of improper means is satisfied where the means used to interfere with a party's economic relations are contrary to law, such as violations of statutes, regulations, or recognized common law rules. Such acts are illegal or tortious in themselves and hence are clearly "improper" means of interference. . . . "Commonly included among improper means are violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood." Means may also be improper or wrongful because they violate "an established standard of a trade or profession." Id. at 308 (Citations omitted).

In addition, the Supreme Court also stated that the absence of "good faith" is another element to consider when evaluating the conduct of a party. The decision of the Utah Supreme Court utilizing the concept of good faith is in accordance with the numerous authorities cited by Appellant in his opening brief. (Appellant's Brief, pp. 36-39). Respondents' attempt to answer the good faith argument advanced by Sampson by stating that (1) good faith is not applicable to a cumulative number of acts; (2) "the district court did in fact make several references to Sampson's supposed absence of malice in arriving at its conclusion that Sampson used a series of improper means to take control of the limited partnerships;" (3) that "good faith" is nothing more than a claim of legal privilege which was not pled." (Respondents' Brief, p. 41).

As to these contentions Respondents cited no authority to the effect that good faith should not be examined as to each alleged act regardless of the number of acts supposedly constituting an improper means. The second grounds alleged by Respondents is totally

incomprehensible by Appellant in that it would seem to support Sampson's position that he had no malice in his actions. Finally, the element of "good faith" is not the same as the affirmative defense of privilege which is an affirmative defense once the acts charged would be tortious on the part of an unprivileged defendant. 657 P.2d at 304. It is the burden of the asserting party to show that the alleged tortfeasor acted in bad faith and in a malicious manner. (Institutional Food v. Golden State Strawberries, 587 F. Supp. 1105 (D.Mo. 1983)).

Examining those reasons given by the lower court for concluding an improper means existed (see, Appellant's Brief, pp. 34-35) and even examining the expanded list of the respondents (Respondents' Brief, pp. 37-40) shows that the alleged violations were either (1) not sufficient conduct to constitute an improper means as defined in the Leigh Furniture case; (2) actions which had no direct causal interference with the economic relations of the respondents; or (3) actions which were undertaken in good faith for the protection of Sampson's clients and investors. In fact, if this Court examines the claims of Respondents as to the alleged improper acts it will find that the majority of them occurred during various legal proceedings in which Sampson, as found by the lower court, sincerely believed he had the right to do what he was doing and had court approval to do so.

Thus, Respondents' assertions that the conduct in the Leigh Furniture case is parallel to that of the instant case is an incorrect statement. In Leigh there was a clear and consistent pattern on the part of the defendant to eliminate the business of the plaintiff for no other reason than to gain back the building for its own economic use.

In the instant case, quite the contrary, the respondents had already placed the assets of the limited partnerships in serious jeopardy and Sampson along with others was attempting to salvage the operations before any further catastrophies occurred. In addition, the respondents had clearly bowed out of the fracas by giving notices of withdrawal and by essentially telling the limited partners that they were on their own.

These circumstances as factually found by the lower court do not give rise to the legal conclusion that Sampson exercised improper means in attempting to salvage the limited partnership. If Sampson's actions are deemed improper then essentially every stockholder takeover or attempted merger of a corporation would also be called improper because of the adversarial relation which two competitors place themselves in while attempting to garner the support of shareholders or other voting members. In addition, if any court proceeding is later determined to be invalid or any action declared invalid when based upon a sincere good faith belief of statutory authority then literally hundreds of thousands of acts dealing with corporations and other businesses each year would also be deemed predatory. Obviously, the Utah Supreme Court and other courts in the country before permitting a plaintiff to recover under the theory of tortious interference require a much greater showing than the battles of the marketplace. Here, the lower court clearly erred in concluding to the contrary.

C. The Lower Court Erred in Concluding  
That the Actions of Sampson Caused  
Injury to the Defendants.

In Sampson's opening brief he contended that the finding of the lower court of causal injury was incorrect because of two factors: (1)



that the contracts were terminable at will and (2) defendants failed to show that but for Sampson's interference the ventures would have been successful. (Appellant's Brief, pp. 40-44). Respondents argue that Sampson's conduct was a substantial factor in causing injury to the respondents and that therefore the doctrine of concurrent negligence is applicable (Respondents' Brief, pp. 43-45); and second, even if application of the "but for" test is required Sampson's conduct was the proximate cause of injury to the defendants. (Respondents' Brief, pp. 45-49). The arguments of Respondents are flawed with illogical and factual deficiencies.

First, Respondents contend that the lower court concluded that it was a combination of both the conduct of Respondents and Sampson which caused the damages in this lawsuit. Respondents then argue that both parties were the concurrent causes of the complained injuries and therefore under the doctrine of concurrent negligence Sampson is solely liable for the injuries suffered. (Respondents' Brief, pp. 44-45).

Effectively, therefore, Respondents are conceding that their mismanagement and other actions were an equal force in the demise of the various limited partnerships. If a third party were suing both Richins and Sampson then the concurrent negligence rule cited by Respondents would be applicable since it is fundamental that where the separate negligent acts of two defendants concur and it appears that the plaintiff would not have been injured but for the concurrence of both then both defendants are jointly liable. However, this is not a case of concurrent liability as between the parties and a third innocent party but is a case between the plaintiffs and the defendants. Thus, the doctrine of comparative negligence under Utah law would be

applicable in apportioning the degree of fault by each of the parties in this lawsuit. (Section 78-27-37, et seq. supp. 1986). See, Acculog, Inc. v. Peterson, 692 P.2d 728 (Utah 1984) (comparative negligence becomes a defense for a defendant where plaintiff's negligent conduct is a contributing factor in causing injury).

Under the doctrine of comparative negligence if, as Respondents contend, the actions of Sampson and Respondents were concurrent causes of the complained-of injuries then neither party could recover from the other for injuries suffered. Section 78-27-38, U.C.A. It is therefore unnecessary under the very arguments advanced by Respondents to examine the conduct of Sampson individually in that the concurrent fault of both parties would preclude the damages now awarded.

The respondents also address the "but for" argument raised in Appellant's opening brief. They apparently do not contest the legal authority cited by Appellant. Instead, Respondents contend that the terminable nature of the contracts and the financial condition of the limited partnerships when Sampson entered the scene are insufficient reasons to eliminate the causal connection which the lower court found. (Respondents' Brief, pp. 46-47).

Sampson after reviewing the Restatement of Torts section cited by Respondents agrees that the issue of "at will" termination is normally one properly of damages rather than causation. However, the very flimsy nature of the limited partnerships belie any claim by Respondents that all of the limited pastners would have stayed with Richins bur for Sampson. Thus, the terminable nature of these agreements affects both proximate causation and damages.

The second argument raised by Respondents concerns the financial

stability of the partnership at the time Sampson undertook his initial representation. Respondents state, "Even charitably assuming for purposes of argument that the limited partnerships were in fact suffering from 'financial instability' on the date Sampson first appeared on the scene" the limited partnerships had been "solvent, viable entities for over seven years by the time Sampson first began tampering with their affairs." (Respondents' Brief, p. 47).

The statement of the respondents is not supported by the record references given in their brief nor is it supported by the factual findings upon which they now rely. There can be no question but that at the time Sampson first entered the fracas the limited partnerships were all in serious financial difficulty. A brief review of some of the findings and conclusions of the lower court shows this financial instability.

[T]he existing problems began to surface in May, 1980, [when] some limited partners began to lose trust and confidence in Richins to the point that those limited partnership who were still actively concerned about their investments refused to pay over to Richins any further funds either on past or current assessments and began to consider the need to seek the advice of counsel with respect to their various partnership interests. (R. 2103)

On June 22, 1979 Richins was advised by attorney Baker for Agricultural Services that notice of non-payment on installment contracts due on irrigation contracts for Shoshone, Randlett, and Young at the Idaho State Bank had been issued. . . . (R. 2104).

On September 12, 1979 notice was given that a \$300,000 loan by Utah Mortgage to RFC and assigned to Northwest National Life and guaranteed by Paul and Shari Richins was in default and if payments were not made in full by September 25, a foreclosure proceeding would be started. (R. 2105).

On November 20, 1979 two lien claims were filed by the Sages against Shoshone, RFC and Richins for over \$30,000 which had gone to judgments later. (Id.).

At a Taber Partnership meeting on April 3, 1980, it was reported that some RFC checks to PCA had been returned for insufficient funds. (R. 2106).

Two judgment liens were made of record, one on August 17, 1979 by Rex Clemmons for \$2,340 and one on October 5, 1979 by Lemon White Drilling for \$3,264. (Id.).

At the May 29, 1980 meeting the evidence established that mention was made that the \$17,600 payment due Glenn in September, 1979, had not been paid; that from \$30,000 to \$50,000 would be needed to complete the Minter-Wilson wells; that a total of \$240,000 was needed to meet current Catlow Valley obligations and that as Richins did not have such money, the limited partners were the only source for it. . . . (R. 2107).

Dissatisfaction of Richins' handling of the partnership affairs was voiced in May, 1980. This coupled with other problems extant in 1980, including a lack of meaningful information from the general partner, the existence of judgments, troublesome tax problems, the state securities commission's investigations, the revocation of RFC's certificate of authority in Oregon, the failure of many limited partners to pay their assessments and Richins' failure to do anything about it, and Richins' invitation to the Catlow Valley partners at the May 29, 1980 meeting to replace him, all added up to a compelling reason for the partnerships to so act as provided in the agreement. (R. 2116-17).

As stated in prior findings, by May, 1980, Richins and his companies had become confronted with substantial financial problems, as well as others likewise mentioned elsewhere, which were of such magnitude that success in overcoming them seemed doubtful. (R. 2141-42).

I do not find that the evidence preponderates proving that, but for Sampson's statements to the investors that such advances were not debts owed to the partners, the partnerships would have in fact repaid the amount of such advances in full as shown in the partnership books and records, or indeed any part thereof. (R. 2149).

The record in summary thus shows that in May, 1980, Richins and his companies had control of at least 25 limited farm partnerships with assets and liabilities of such a nature that they had serious

financial problems in May, 1980, when Sampson first became involved. (R. 2158).

By May, 1980, Richins had so mismanaged partnership affairs that they did not have funds to pay installments owed to RFC, so RFC could not pay its installment obligations to the contract sellers. Substantial judgments were obtained for failure to pay partnership obligations. Some partners were angry because of Richins' failure to follow the partnership agreements upon assessment and failure to pay; to give an annual audited report to each; to have the properties appraised by a qualified appraiser and give the partners a report on the value of their holdings, to advise them regarding advances and obligations with respect thereto; and to keep them advised of the problems that develop. (R. 2273).

With the preceding examples together with those noted in Appellant's opening brief it is difficult to understand how Respondents can claim that the limited partnerships had been "solvent, viable entities until Sampson first began tampering with their affairs."

Likewise, Respondents' statement that while the properties were under the supervision of the Richtron companies that none of them were ever foreclosed upon is equally unsupported by the record. To the contrary, the findings cited by Respondents show that the lower court had no evidence submitted by either party as to the specifics of the foreclosures. The court stated on several occasions that it had no way of knowing the disposition of the properties or the status of the funds received from such property. (R. 2128-29, 2228). In addition, since the respondents immediately attempted to "bail out" almost as soon as Sampson entered the picture the fact that Sampson could not salvage the dilapidated condition of these partnerships cannot be attributed solely to Sampson's conduct. Essentially, therefore, the evidence as to foreclosures proves nothing as to either party.

Next, Respondents contend that it was solely the conduct of

Sampson which prevented the limited partners from paying their pro rata proportion of expenses. (Respondent's Brief, pp. 47-48). Sampson would refer this Court to the previous quotations above relating to Richins' failure to obtain contributions in 1979 and 1980. In addition, the lower court specifically found that the erroneous statements of Sampson concerning mark-ups and other claims had no effect upon the payment by the limited partners. The court stated:

I do not find that the evidence preponderates in proving that, but for Sampson's statements to the investors that such advances were not debts owed to the partners, the partnerships would have in fact repaid the amount of such advances in full as shown in the partnership books and records, or indeed any part thereof. (R. 2149).

Respondents' statement concerning the "long standing viability of the limited partnerships and their ability to obtain all required operating capital from the investors" is again a complete misstatement of the findings of the lower court.

Respondents argue that because a settlement agreement has been tentatively reached in May of 1980 for \$700,000 it is a reasonable inference that the going concern value of the limited partnership was substantial. (Respondents' Brief, p. 48). Had the respondents gracefully bowed out in May of 1980 and allowed Sampson to operate the partnerships without interference, then the argument made by Respondents would have some relevance. However, Respondents continued to engage in a virtual four-year proxy battle with Sampson thereby destroying any inherent value that a peaceful take-over would have had. It can be just as easily said that had the respondents not interfered with Sampson's management and efforts to revitalize the faltering partnerships, that the operation would have been successful and all of

the parties would have come out ahead. Instead, however, the battle raging between the two entities continued to drain each of their resources together with being their ability to confront all of the problems facing the partnerships prior to Sampson's arrival. It cannot be said with the legal certainty required that the actions of Sampson caused the financial demise of these partnerships in 1986 after the opposition of Respondents during the prior five-year period.

Finally, Respondents contend that the quotations in Sampson's opening brief only referred to damages inflicted upon Richtron Financial and not to the other entities. (Respondents' Brief, p. 49). Again, this statement is entirely incorrect since the court in those findings (listed on pages 40 and 41 of Appellant's Brief) was speaking both in terms of RFC, the general partners, and Richins as an individual. In addition, the other quotations made in this Brief clearly address all of the individual Respondents and their unstable financial condition.

It is impossible to read the findings of the lower court and to then agree with the concluding statement of Respondents that "the record establishes that but for Sampson's seizure of the limited partnerships, the Richtron companies would have obtained the various economic benefits embodied by the limited partnership agreements." (Respondents' Brief, p. 49). Further discussion as to this misstatement is not required.

D. The Lower Court Erred in Concluding  
that the Affirmative Defenses of Waiver  
and Estoppel were not Applicable to the  
Defendants in this Case.

Appellant in his opening brief contended that the lower court failed to legally conclude that the affirmative defenses of waiver and

estoppel had been established. (Appellant's Brief, pp. 44-47). Respondents simply retorted that Sampson had failed to marshal all evidence relevant to the findings and therefore appellate review cannot be undertaken. (Respondents' Brief, pp. 49-50).

Again, Respondents are mistaken as to their notion of the "marshalling of evidence" rule. Sampson is not contesting any factual finding as to what occurred in this case but is contesting the legal conclusion based upon such findings. It is Sampson's belief that the factual findings entered by the court as to the conduct of the respondents clearly justifies a legal conclusion of waiver and estoppel.

It would serve no useful purpose of marshal additional evidence of factual support for these defenses since the lower court's factual findings have adequately provided a sufficient foundation for legal review. The very effort of the respondents to continuously withdraw from the partnership arrangement is the very type of factual context that these legal doctrines are based upon. As observed by the lower court "one wonders what Richins thought the partnerships were expected to do. The Richtron general partners' withdrawal had left them with an uncertain future." (R. 2186).

Since Respondents have failed to address these factual arguments further discussion is unnecessary.

### POINT III

THE LOWER COURT ERRED IN ITS AWARD OF DAMAGES  
IN FAVOR OF DEFENDANTS.

A. The Factual Findings of the Lower  
Court do not Justify the Imposition  
of \$250,000 as Consequential Damages.

Appellant in his opening brief contended that the findings of the



lower court do not justify the imposition of a \$250,000 award of damages. (Appellant's Brief, pp. 47-54). Respondents contend that damages were proper because (1) the absence of the complete trial record is fatal to Sampson's challenge of damages and (2) the award is consistent with applicable law and abundantly supported by the existing record on appeal. Both of these arguments will now be addressed.

Sampson is solely relying upon the findings of the lower court for his assertion that the factual findings do not justify the legal conclusion of \$250,000 damages. While the factual findings of the lower court are necessarily based upon the evidence which was introduced at trial, it is not the contention of Sampson that a review of such evidence is now required. Thus, any attempt by Respondents to convert this appeal to a sufficiency of evidence case is a fruitless venture.

This is not the type of case in which an award of a fixed sum of damages is being appealed as to the insufficiency of the supporting record. For example, if a trial court awarded a plaintiff \$40,000 for loss of wages the defendant could claim that the evidence adduced at trial did not support the \$40,000 award. In such an instance the complete record would be imperative for appellate review.

The present appeal is analogous to a situation in which the lower court awards \$40,000 for lost wages in its judgment and conclusions of law with no factual findings to support such judgment that any lost wages occurred or any factual finding as to how such wages were computed. In these type of instances the underlying record is not required since only the factual findings and conclusions of law and judgment are needed for review. State v. Deplonty, 749 P.2d 621 (Utah

1987). Thus, the "marshalling of evidence" argument again advanced by Respondents is not applicable to Appellant's present claim.

Next, Respondents argue that the award of consequential damages is consistent with applicable law. (Respondents' Brief, pp. 52-54). Respondents do not address the problem raised initially by Appellant that the lower court simply failed to give any factual road map as to the composition of the \$250,000 award. It is elementary that the findings of fact of a lower court must provide a basis for determining whether there is a rational basis for the award of damages. Proper findings are essential to enable a reviewing court to perform its function of assuring that the findings support the judgment. Romrell v. Zions Bank, 611 P.2d 392 (Utah 1980).

The Utah Supreme Court in describing the requirement of findings stated:

The importance of complete, accurate and consistent findings of fact in a case tried by a judge is essential to the resolution of dispute under the proper rule of law. To that end the findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusions on each factual issue was reached. Rucker v. Dalton, 598 P.2d 1336, 1338 (Utah 1979).

More recently the Utah Supreme Court stated:

Rule 52(a) requires that a trial court finds facts specially in all actions tried upon the facts without a jury. Such findings of fact must clearly indicate the "mind of the court," and must resolve all issues of material fact necessary to justify the conclusions of law and judgment entered thereon. Furthermore, failure of a trial court to enter adequate findings requires the judgment to be vacated. Parks v. Zions First National Bank, 673 P.2d 599, 601 (Utah 1983).

It is submitted that the lower court in this case failed to follow this requirement. It is pure speculation on the part of Respondents that the \$250,000 consisted of money which was left in the bank account

of Sampson after October 29, 1984. (Respondents' Brief, pp. 54-56). In the first place, if this in fact were the measure of damages it would be \$288,597 and not the even figure of \$250,000. Second, while the final accounting may have occurred on October 29, 1984 it was not until January 5, 1985 that Richins obtained an order from Judge Cornaby vacating his two prior orders which gave Sampson the right to control the partnership. (R. 2185). Thus, if any date was to have any relevance at all when Sampson ceased having legal authority to operate the corporation it would have been the January date to which no evidence was ever offered.

Next, the lower court specifically rejected Respondents' contention that Sampson "and twelve people" ended up with all of the assets of the limited partnerships. The court stated:

[N]o evidence was placed in the record establishing that such was in fact the case, but if so, absent any such evidence, I cannot consider this statement [closing argument of Respondents' counsel] as a factor upon which this decision can be made. I have repeatedly noted the absence of evidence as to what finally happened to the partnerships and their properties other than a schedule showing only the dates upon which foreclosures presumably took place. Id. at 2265-2266.

The court also specifically denied Respondents' claim for an accounting and while the court noted that the record contained no evidence as to what happened to the partnerships and their properties the court would not allow such curiosity to further prolong a decision in this case. (R. 2277). Thus, the lower court was obviously not convinced that whatever money remained in the Sampson accounts in the latter part of 1984 and the early part of 1985 was for the benefit of Respondents and essentially concluded that all the money had been used in one way or another on behalf of the limited partnerships.

The explanation given by the Respondents is in direct contradiction to that given by the lower court itself in the post-trial motions which is contained in the Appendix to the opening brief. Certainly, it would have been an easy matter for the lower court to have stated the composition of the amount had it been so simple as the remaining balance in a bank account on a given date. Instead, the court went through its analogy of an automobile tort case and general damages obtained from a jury. Such analogy certainly would have not been required had the explanation offered by Respondents been the true "mind of the court".

Finally, the award of the sum remaining in the bank accounts would be equivalent of conceding that the respondents were entitled to receive all of the proceeds and assets gathered by Sampson during his operation of the limited partnerships. As is noted by the respondents in their cross appeal, the lower court specifically rejected this notion and refused to award them damages for the amounts collected and disbursed by Sampson during his control of the limited partnerships. (Respondents' Brief, pp. 65-68). Thus, the \$250,000 figure has no basis in the findings of the court.

Next, Respondents contend that the award of "consequential" damages is of a general nature and did not require either the pleading or proof previously asserted by Sampson in his opening brief. (Appellant's Brief, pp. 52-54; Respondents' Brief, pp. 52-53). The arguments advanced by Respondents are clearly and unequivocally dead wrong.

The Restatement of Torts 2d §774A uses the term "pecuniary" loss and "consequential" loss in defining the liability for damages.

Respondents acknowledge that "pecuniary" loss is a special damage. This acknowledgement is correct since normally "pecuniary" damages are those which can be accurately estimated such as loss of wages, costs of medical attendance, etc. whereas "non-pecuniary" damages are those which depend on the enlightened judgment of an impartial court or jury such as damages for pain, suffering, loss of reputation, etc. 25

C.J.S. §2 Damages, p. 622.

Respondents then argue that since pecuniary losses are special then consequential losses must necessarily be general. This argument is incorrect. "Consequential" damages have been defined as follows:

Consequential damages are such as are not produced without the concurrence of some other event attributable to the same origin or cause; such damage, loss, or injury as does not flow directly and immediately from the act of the party, but only from the consequences or results of such act. The term may include damage which is so remote as to not be actionable. It has also been defined as synonymous with the term "special damages". 25 C.J.S. §2 Damages, p. 617 (Emphasis added).

Numerous courts have also recognized that "consequential" damages are merely a form of special damages which must be proven with certainty. In Piedmont Plastics, Inc. v. Mize Co., Inc., 293 S.E.2d 219 (N.C. App. 1982) the court stated:

Incidental and consequential damages are "special damages," those which do not necessarily result from the wrong. Special damages "must be pleaded, and the facts giving rise to [them] must be alleged so as to fairly inform the defendant of the scope of plaintiff's demand." An instruction on special damages is appropriate, however, only when such damages are particularly alleged in the complaint and the allegation is sustained by the evidence. Id. at 223 (citations omitted).

See also, Hycel, Inc. v. American Airlines, Inc., 328 F. Supp. 190, 193 (D. Tex. 1971) ("consequential damages are synonymous with

special damages").

Normally, in order for consequential damages to be awarded it is necessary to show that the loss which was incurred was within the contemplation of the parties to the contract at the time it was made. This requirement has been eliminated by the Restatement of Torts 2d provided that the consequential damages were legally caused by the defendant's interference. See, §774A, Comment d. The fact that such damages do not need to be in contemplation of the parties, however, does not change the nature of the damages as special rather than general. Clark v. Ferro Corp., 237 F. Supp. 230, 238 (D. Tenn. 1964); Seekings v. Jimmy GMC of Tucson, Inc., 638 P.2d 210, 215 (Ariz. 1982).

Thus, in cases involving torts of intentional interference with contracts claims made under Subsection (a) and (b) of the Restatement of Torts 2d §774A damages must be pled and proved specially since there is no provision for general damages to be awarded in those instances. The lower court's characterization of the \$250,000 as equivalent to pain and suffering in a jury case was clearly a misconception of the law.

Finally, Sampson has no dispute with the authorities cited by Respondents concerning the certainty of damages. (Respondents' Brief, p. 54). These cases, however, are completely inapplicable to the facts of this case since all of the case cited by Respondents involve instances where the fact of special damages had been established but the amount of damages was uncertain because of various evidentiary problems. Here, neither the court nor the respondents can show what consequential damages were being awarded so that the question of

computing the amount never comes into play.

For these reasons, therefore, the award by the lower court of \$250,000 as consequential damages was incorrect and should be vacated.

B. The Lower Court Erred in Awarding  
Damages to Richtron, Inc. and to RFC  
for their Respective Limited Partnership  
Interests in Several Farm Properties.

Sampson in his opening brief maintained that the award of some \$35,000 to RFC and to Richtron, Inc. for their interest as limited partners was erroneous. (Appellant's Brief, pp. 54-56). Respondents retort that there was some evidentiary basis contained in the findings supporting the lower court's conclusion. (Respondents' Brief, pp. 56-57).

The reply of Respondents does not address the arguments raised by Sampson. First, even the evidence relied upon by Respondents only concerns a portion of the total \$35,000 award. Second, it was the respondents' burden, not Sampson's, to show damages which included proof that the value of the limited partnerships was worthless at the time of trial and that they had therefore suffered the loss of their capital contribution.

Finally, Respondents do not even address the contention that Richins waived any claim he may now have as to the interest of the limited partnerships when he failed, as a general partner, to properly terminate and wind up the affairs of those interests. Richins should not be allowed a preferential treatment over the other limited partners involved in this case especially since Richins had the power to preserve and protect his interests in these limited partnerships. Had Sampson's efforts succeeded and the venture been successful certainly these limited partnerships would have been entitled to no more than the

others.

For these reasons, therefore, the approximate \$35,000 award to Richins Financial and Richtron, Inc. should be vacated.

#### CROSS APPEAL

##### POINT I

THE DISTRICT COURT DID NOT ERR IN DECLINING  
TO IMPOSE PUNITIVE DAMAGES AGAINST SAMPSON.

In Respondents' Cross Appeal they contend that the lower court erred in failing to award any punitive damages against Sampson. (Respondents' Brief, pp. 57-64). They note that the lower court failed to make such award "despite the fact that it identified and enumerated dozens of facts establishing Sampson's reckless disregard for the rights of the Richins parties." Respondents then list some twenty-six such facts and circumstances justifying the imposition of an award. (Respondents' Brief, pp. 59-63).

Before proceeding into the merits of Respondents' arguments a procedural note should be made. The Respondents are now arguing that the findings of the lower court do not support the legal conclusion of punitive damages. Since Respondents did not designate any additional portions of the record than those designated by Sampson, the respondents must necessarily rely upon the Findings of Fact and Conclusions of law for its present contentions concerning not only punitive damages but the other damage claims in the remainder of their brief.

Thus, as noted earlier in this brief, Respondents scream loudly about the failure of Sampson to designate the entire record and to marshall the evidence but in no way attempt to distinguish their claims



of damages when an incomplete record also exists. It is submitted, therefore, that this is additional proof that the respondents themselves do not believe that an underlying record is necessary in this case, either as to their own claims or as to the claims of Sampson, and that if their contentions are correct then both the appeal and the cross appeal must necessarily fail equally in that no logical distinction can be made.

The award of punitive damages is an extraordinary event which should only occur in extremely limited situations. "Although punitive damages may be awarded in an appropriate case, the general rule is that only compensatory damages are appropriate and that punitive damages may be awarded only in exceptional cases." Behrens v. Raleigh Hills Hospital, Inc., 675 P.2d 1179, 1186 (Utah 1983). Punitive damages should be imposed cautiously. Von Hake v. Thomas, 705 P.2d 766, 771 (Utah 1985).

"Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence." Restatement (2d) of Torts, §908, Comment b at 465 (1979); C.F. Palombi v. D & C Builders, 452 P.2d 325 (Utah 1969). In addition, punitive damages cannot be awarded for mere breach of contract unless the breach amounts to an independent tort. Highland Construction Co. v. Union Pacific Railway Co., 683 P.2d 1042 (Utah 1984); Jorgensen v. John Clay & Co., 660 P.2d 229 (Utah 1983).

An award of punitive damages cannot stand unless compensatory damages are also shown. Atkin, Wright & Miles v. Mountain States Telephone, 709 P.2d 330 (Utah 1985). Punitive damages "are not intended as additional compensation to a plaintiff, and must, if

awarded, serve a societal interest of punishing and deterring outrageous and malicious conduct which is not likely to be deterred by other means." Behrens v. Raleigh Hills Hospital, Inc., 675 P.2d 1179, 1186 (Utah 1983). Before punitive damages may be awarded, the plaintiff must prove conduct that is willful and malicious, First Security Bank of Utah v. J.B.J. Feed Yards, Inc., 653 P.2d 591, 598 (Utah 1982); or that manifests and knowing and reckless indifference and disregard towards the rights of others. Branch v. Western Petroleum, Inc., 657 P.2d 267, 277-78 (Utah 1982).

"The jury (or other factfinder) has 'a broad discretion' in weighing the various factors and arriving at its determination of an appropriate award of punitive damages." Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 312 (Utah 1982). Punitive damages are not properly given against one who acts in good faith under an erroneous sense of duty. U.S. Through Farmers Home Administration v. Redland, 695 P.2d 1031 (Wyo. 1985). "One is not liable for exemplary damages if he acts in good faith under an erroneous sense of duty or right, without any intention to oppress or defraud or without any actual oppression or indignity." 22 Am.Jur.2d §778, Damages, p. 831-32.

It should be observed that in all the cases cited by Respondents as well as cases independently researched by Appellant, there have been no instances where an appellate court has imposed punitive damages when such imposition was initially rejected by the fact finder. Thus, for Respondents to prevail in their claim of punitive damages it will be necessary for Respondents to convince this Court that the trial judge's conclusions of good faith and lack of willful misconduct is not supported by the factual findings supporting such conclusions.

Appellant Sampson submits that a review of the lower court's decision as to punitive damages shows that such conclusions were properly based upon an analysis of the events and that the decision of the lower court should therefore not be disturbed.

The lower court in Findings of Fact No. 118 extensively examined the factual basis for the award of punitive damages. The court examined the various legal rulings which supported Sampson's authority as well as the actions of the respondents in abandoning and turning over complete control of the entities to Sampson during various periods of time. The court entered the following finding to justify its conclusion that the type of willful and malicious conduct necessary for punitive damages was simply not present in this case. The court stated:

One wonders what Richins thought the partnerships were expected to do. The Richtron general partners' withdrawal had left them with an undercertain future. Many limited partners had sought legal advice from Sampson and he gave it to them. The fact that he erred in the advice given them does not render his actions malicious. They, too, could read and write, and a simple sentence in the partnership agreement gave them the authority by simple vote to remove the general partner, elect a new one and carry on the business of the partnerships. Or, they could have petitioned the Court to terminate the partnerships and wind up its affairs. They did neither. They had Sampson. When this case was filed February 11, 1981, Richins could have requested a restraining order against Sampson's interference with partnership affairs. Instead, no doubt influenced by continued settlement negotiations, he entered into a stipulation delaying the filing of any responsive pleading. An answer and counterclaim finally made it to the court in July, 1982.

The court then made the following comments with reference to Sampson's state of mind:

By my comments in this Finding it is not my intent to point the finger of blame at Richins and exonerate Sampson, for I have already made my findings of his

wrongdoing, but I think it necessary to view Richins' role in judging Sampson's conduct, in considering the claim for punitive damages, and in doing so it is my opinion that as wrong as Sampson was in many of the things he did, I think he believed himself to be right in doing what he did and the way he did them. He should have known the law, but I do not believe he intentionally violated it. For almost six months he worked amicably with Richins on settlement. When that failed, by powers of attorney he got proxies to vote the limited partners' interests. He did so, electing his PC general partner. When that was said to be contrary to law, he voted AG Management in as general partner and so operated. By the time Judge Palmer ruled that illegal, Sampson was able to carry on under a color of authority by receipt of an IRS Certificate of Sale, followed by two favorable rulings by Judge Cornaby until the IRS sale was voided in May, 1984, by a federal court order.

In characterizing the type of conduct in this case the court stated:

The bitterness and contentions that developed and existed between the two men was long and drawn out and led to prolonged controversies which had its roots in serious problems already existing before Sampson entered the ring. But I do not believe the evidence preponderates in establishing the type of willful and malicious conduct, nor the lessened type, required by our Supreme Court decisions to justify or support an award of punitive damages and I so find. (R. 2186-88). (Emphasis added). See also, Conclusion of Law No. 76 (R. 2249).

The above-quoted Finding of the lower court effectively answers the majority of those items now listed by the respondents as constituting predatory conduct. The Findings of the court also negates Respondents' contention that Sampsons' actions showed a knowing and reckless indifference and disregard for the rights of others. The Findings, to the contrary, shows that while Sampson made many mistakes in judgment during the course of these proceedings, he did so in order to protect the financial investments of the limited partners and always acted in good faith via a court order or other legal badge of authority. The contrary positions taken by Respondents throughout this

affair hardly gives them the right to complain of Sampson's conduct since their conduct was much more recklessly indifferent towards the rights of the limited partners when they essentially abandoned them and left them to their own devices.

For these reasons, the decision of the lower court in refusing to award punitive damages must affirmed.

#### POINT II

THE LOWER COURT DID NOT ERR IN REFUSING TO AWARD RICHTRON, INC. AND RICHTRON GENERAL THE FULL AMOUNT COLLECTED AND DISBURSED BY SAMPSON DURING HIS CONTROL OF THE LIMITED PARTNERSHIPS.

On cross appeal, Respondents argue that the lower court should have credited to them all of the monies received by Sampson between June of 1980 and November of 1982. It is unknown why Respondents have chosen this time period for their claim since Sampson continued to operate the company well into 1985 and collected much more than the \$645,000 now requested by Respondents. (R. 2262-67).

The lower court, as previously mentioned, found that Sampson during this entire period of time was acting as a general partner on behalf of the limited partners under one legal basis or another and that the funds received by Sampson were properly paid on behalf of the limited partnership ventures. (R. 2267). Thus, Respondents are now demanding that they be given a judgment for the entire proceeds during this 28-month period even though they do not contest (nor can they contest without the record) the finding of the lower court that such funds were properly paid for partnership expenses.

Respondents also fail to address the problems created by their own conduct. It is to be remembered, for example, that Richins formally

withdrew as general partner from all of the entities by January 1981. (R. 2184). Moreover, Richins consented to Sampson's role in the collection of funds and for many months worked with Sampson in their attempt to settle the problems surrounding the limited partnerships. (R. 2112, 2215-16) and in addition he continually delayed any effort to seek help from the courts to remove Sampson from his position of general partner. (R. 2248-49).

Since a general partner is obligated by law to pay the debts of the limited partnerships the argument advanced by Respondents is unusual to say the least. Essentially Respondents seek an award of all the monies collected by Sampson during this period of time even though the money was used, as found by the court, for the benefit of the limited partnerships. Thus, the respondents wish to have the income returned to them without the requirement of paying the outgoing expenses.

Respondents have cited no legal authority for this unique proposition nor is there any. The facts of this case as well as the circumstances relating to Respondents' own conduct during this period of time clearly justifies the lower court's conclusion that Respondents were not entitled to a credit for the income used by Sampson for the benefit of the limited partnerships.

### POINT III

THE LOWER COURT CORRECTLY DECLINED TO AWARD  
DAMAGES TO THE RESPONDENTS FOR THE LOAN  
ADVANCES THEY HAD MADE TO THE LIMITED  
PARTNERSHIPS.

The final contention made on the cross appeal is that the lower court should have awarded to the respondents some \$700,000 which consists of loan advances and interest supposedly made by the general

partners to the limited partners. Respondents claim that the lower court "inexplicably declined to require Sampson to pay damages" for his tortious interference. (Respondents' Brief, pp. 68-70).

A review of the Findings, however, shows that the lower court on several occasions explained in detail why the advances should not be credited to the respondents. First, the court noted the terms of the partnership agreements. Article 5 allowed the general partner in its discretion to advance monies to the partnerships for use in the operation of the partnerships. The agreements provided that such advances were not to be deemed capital contributions but that they would be immediately due and payable upon the sale of the property or the termination and dissolution of the partnership unless otherwise agreed upon. (R. 2100).

Next, the lower court disputed the figures now urged by the respondents in this appeal. The court observed that the original settlement agreement between the parties in June of 1980 reflected an alleged advance of \$393,840 rather than the \$585,036 claimed by Respondents. (R. 2146).

The court stated that the proper documentation did not occur:

The evidence did not contain anything about loan instruments having been prepared when such advances were made or repayments being made out of gross receipts in accordance with the "terms of the loan instruments". It being noted here and I so find that the promissory notes which Richins prepared on or about June 5, 1980 and signed for the partnership as president of the general partner, did not constitute the "loan instruments" as that term was used in the partnership agreement. (R. 2146-47).

Thus, the lower court found that the required paperwork necessary for a proper advance to be credited to the respondents had not been made.

In addition, the court found that the circumstances triggering the repayment requirements of any advance had not occurred. The court stated:

The evidence does not preponderate in showing that any of the circumstances mentioned in the partnership agreements as triggering the repayment requirements was proven to have occurred. (R. 2149).

In its Conclusions of Law the court referred to §48-2-23 which provides that in settling accounts after dissolution of a limited partnership the liabilities shall be entitled to payment in a fixed order. The court observed that obligations to general partners was fourth on the list after payment to creditors and to limited partners with respect to their capital contributions. The court observed:

It is apparent that repayment of the advances to the general partners was conditional upon the end results of each partnership, which leave no assurance that any partnership, if properly wound up, as provided by law and the partnership agreements, would have been able to repay any of the obligations owed by it to the general partner for such advances. (R. 2260).

Thus, contrary to the statements contained in Respondents' Brief the lower court found that (1) the amount of advances was considerably less than that now claimed by the respondents; (2) that the respondents had failed to execute the necessary documents and to follow the required procedure when advances were allegedly made; (3) that in any event, none of the conditions which would have allowed a repayment of advances was shown to have occurred and the probability was that the partnerships would have no funds sufficient after dissolution to pay any obligation remaining to the general partners.

Again, it should also be noted that had the respondents desired to assert their claim of advances it would have been a simple matter back in 1980 or 1981 to undertake a dissolution of the partnerships and to



wind up the affairs of each partnership. At that time, the general partners could have asserted the validity of any claim and distributed any assets which were then existing. Instead, however, the respondents essentially waited some four or five years to assert their belated claim of unpaid advances.

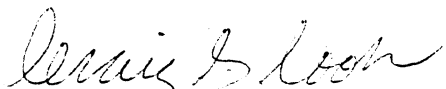
The Finding and Conclusion of the lower court was therefore correct and Respondents are not entitled to any additional judgment for alleged advances made.

#### CONCLUSION

Respondents have failed to rebut the arguments made by Sampson in support of his contention that the lower court erred in awarding damages against him. For the reasons previously stated, therefore, those awards should be vacated.

The Respondents on their cross appeal have likewise failed to rebut the factual findings and legal conclusions of the lower court relating to their claim for additional damages. The lower court was correct in denying these damages based upon the facts and circumstances of this case.

Respectfully submitted this 8th day of August, 1988.

  
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#### CERTIFICATE OF HAND DELIVERY

I hereby certify that I personally delivered four copies of the foregoing Reply Brief of Appellant to John T. Anderson, Attorney for Respondents, Suite 400, Valley Tower, 50 West Broadway, Salt Lake City,

Utah 84101 this 8th day of August, 1988.

Henry G. Cook