

1988

John P. Sampson v. Milton R. Goff, individually and as trustee of Milton R. Goff Trust, an unincorporated association : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH
DOCUMENT

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 CORPORA-
TION, a Utah corporation;
RICHTRON GENERAL, a Utah
corporation; and FRONTIER
INVESTMENTS, a Utah corpor-
ation,

Defendants, Respondents
and Cross-Appellants.

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DOCKET NO.

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88-0257-CA

Case No. 860565 and
860570

RESPONDENTS' BRIEF

Appeal from a Judgment of the District Court
of Davis County, State of Utah

Honorable Bryant H. Croft, Presiding

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MAR 13 1988

IN THE SUPREME COURT OF THE STATE OF UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

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.	:	Case No. 860565 and
	:	860570
PAUL H. RICHINS; RICHTRON,	:	
INC., a Utah corporation;	:	
RICHTRON FINANCIAL CORPORA-	:	
TION, a Utah corporation;	:	
RICHTRON GENERAL, a Utah	:	
corporation; and FRONTIER	:	
INVESTMENTS, a Utah corpor-	:	
ation,	:	
	:	
Defendants, Respondents	:	
and Cross-Appellants.	:	

STATEMENT OF THE CASE

Respondents, Paul H. Richins ("Richins"), Richtron, Inc. ("Richtron, Inc."), Richtron Financial Corporation ("Richtron Financial"), and Richtron General ("Richtron General") (collectively, the "Richins Parties")¹, accept generally the statement of the case set forth by appellant, John P. Sampson ("Sampson"). However, the proper determina-

¹ Richtron, Inc., Richtron General and Richtron Financial will sometimes hereinafter be referred to collectively as the "Richtron Companies."

tion of this appeal requires Sampson's statement to be clarified and supplemented in several important respects.

First, as Sampson accurately states, the original complaint in this case was filed in the name of Robert J. Osborn ("Osborn") for the ostensible purpose of enforcing in the State of Utah a judgment obtained by Osborn (the "Osborn Judgment") against the Richins Parties in the State of Oregon. However, Sampson fails to state that the Osborn Judgment was one of the many litigation matters for which the Richins Parties retained Sampson to protect their interests (R. 2079, 2083; Exhibits 64 and 67); that rather than negotiating a compromised settlement of the Osborn Judgment as requested by the Richins Parties, Sampson purchased in his own name the Osborn Judgment for the purpose of bringing suit against his former clients, the Richins Parties (R. 2050-51, 2058-59); that after the Richins Parties were served with the summons and complaint in this case, they learned from Osborn that he had previously sold the Osborn Judgment to Sampson and asserted no further interest in the judgment (R. 2051); that upon discovering that fact, the Richins Parties moved to dismiss the action on the basis that it was not being prosecuted in the name of the real party in interest Id.; that in response to that motion, Sampson admitted that he had acquired the Osborn Judgment and was indeed the real party in interest

Id.; and, that the primary purpose for which Sampson purchased the Osborn Judgment was to preserve claims against his former clients in his ongoing efforts to take control of the twenty-five limited partnerships in which either Richtron, Inc. or Richtron General was the sole general partner (collectively, the "Limited Partnerships") (R. 2058-59).

In addition, it is important to understand that during the summer of 1982, Sampson was in frequent contact with the United States Internal Revenue Service (the "IRS") for the purpose of providing it with information regarding the internal structure and business affairs of his former clients, the Richins Parties.² With that assistance, the IRS conducted a public auction in October, 1982 to sell a number of assets of the Richtron Companies (R. 2125-26). Sampson, appearing on behalf of several investors in the Limited Partnerships, submitted the highest bid and thereby apparently³ acquired substantially all of the assets of

² The exhibit on which this fact is based consists of certain minutes of a limited partnership meeting conducted by Sampson in June, 1982. That exhibit, however, was contained in a box of documents previously on file with the Weber County Court Clerk -- a box that is now inexplicably missing. Therefore, the Richins Parties are not now able to cite that exhibit to the record.

³ After the IRS sale, the Richins Parties sought and obtained from the United States District Court for the District of Utah in proceedings entitled Richtron, Inc. et. al. v. John P. Sampson, et. al., an order voiding the sale on the grounds that the IRS failed to comply

the Richtron Companies. Id. Shortly thereafter, Sampson issued a threat to the Richins Parties' legal counsel that unless counsel permanently ceased his representation, Sampson would seek "sanctions" and unspecified "other" relief against him. (R. 2131-32, 2231-32). The district court concluded that Sampson's threat was "bizarre" and constituted "unprofessional conduct." Id.

Next, in his statement, Sampson appears to take substantial comfort from the fact that the disciplinary committee of the Utah State Bar Association issued only a private reprimand against him for his conduct in this case. He asserts that a "...more severe penalty was unwarranted since in the committee's opinion there was no dishonesty, deceit or bad motive..." (Brief, p. 4). Obviously, no portion of the committee's proceedings is, or has ever been, a part of the record on which the district court entered its findings of fact, conclusions of law and judgment. And, the statutory inability of the Richins Parties to confront and cross-examine Sampson in those disciplinary proceedings, and thereby elucidate the nuances of his ethically proscribed conduct, extinguishes the probative value, if any, of the committee's conclusions.

with several requirements governing the sale of a taxpayer's assets.

Finally, despite the fact that Sampson is seeking this court's review of the factual predicates on which the district court based its award of damages, Sampson ordered transcripts of the testimony of only 14 of the 23 witnesses at trial. See Affidavit of John T. Anderson dated September 18, 1987. He also ordered transcripts of the testimony of the Richins Parties' primary witness -- Richins -- only to the extent that that testimony was adduced by Sampson's own counsel. Id. He nowhere designated for inclusion in the record the 15 hours of direct examination of Richins by Richins' legal counsel. Id. Thus, Sampson designated for inclusion in the record the testimony of only some of the witnesses whom he called and he totally omitted to include the testimony of any of the witnesses called by the Richins Parties.

Accordingly, this court later prohibited Sampson from seeking to designate any additional portions of the record. (Brief, p. 3). At the oral argument on the Richins Parties' renewed motion to dismiss Sampson's appeal, Sampson's counsel acknowledged to the court that the partial portions of the record timely ordered by Sampson were "totally inadequate" to permit meaningful review of the judgment Sampson now seeks to have reversed.

STATEMENT OF FACTS

A. The Structure And Status Of The Richtron Empire Between 1973 And May, 1980: The Pre-Sampson Years.

Between October 1973 and March, 1980, Richins, as president of the Richtron Companies established 29 limited partnerships for the purpose of acquiring, operating and holding for resale farm properties located in the states of Utah, Idaho and Oregon. (R. 2068).⁴ Each of the Limited Partnerships was evidenced by a written agreement under which either Richtron, Inc. or Richtron General was designated as the sole general partner. (R. 2068; Exhibit 115).

The agreements provided in pertinent part that (i) the general partner was vested with exclusive authority to manage and conduct the affairs of the Limited Partnerships (R. 2068-69; Exhibit 115); (ii) the limited partners were prohibited from taking part in the conduct or control of the Limited Partnerships' affairs Id.; (iii) each of the limited partners was required to contribute annually, in cash, to the capital of the Limited Partnerships his pro rata share of the funds necessary to pay the annual expenses of the Limited Partnerships Id.; (iv) the Limited Partnerships had a designated term of the earlier of (a) twenty years, or (b) the withdrawal of the general partner, the distribution,

⁴ Of those 29 limited partnerships, only 25 were targeted for takeover by Sampson; accordingly, no claims were asserted in the action with respect to the other 4 limited partnerships.

sale or abandonment of all Limited Partnership assets or the affirmative vote of not less than a majority in interest of the limited partners to remove the incumbent general partner and elect a new general partner Id.; and, (v) the primary asset of each of the Limited Partnerships consisted of agricultural property purchased on contract by one of the Richtron Companies and resold to the Limited Partnerships at a disclosed profit. (Brief, pp. 7, 8; R. 2268).

During the seven year period in which the Richtron Companies managed and operated the Limited Partnerships, none of the Limited Partnerships' property was ever foreclosed upon. (R. 2128-29, 2157-58, 2228). In late May, 1980, Sampson and two of his limited partner clients offered to purchase the capital stock of the Richtron Companies for \$700,000.00. (R. 2049, 2077-78, 2141). Accordingly, as the district court concluded:

As floundering as the partnerships were, Sampson saw value [of at least \$700,000.00] there and spent what now totals six years in achieving what he now has, whatever it may be, leaving Richins and his companies with no tangible assets or values.

(R. 2275).

B. Some Of The Limited Partners Begin To Stop Paying Their Assessments.

During 1979 and early 1980, many of the limited partners refused to pay assessments made by their general partner (Richtron, Inc. or Richtron General). (R. 2101).

Accordingly, Richtron, Inc. and Richtron General, although under no obligation to do so, made substantial loan advances to the Limited Partnerships for the purpose of satisfying delinquent and current land contract installment obligations, irrigation equipment obligations, well drilling expenses and other operating expenses. (R. 2100). By June, 1980, the aggregate amount of those advances, all of which were required by the partnership agreements to be repaid, exceeded \$300,000.00. Id.

C. Richins' Good Faith And Low Profile Efforts To Elicit The Cooperation Of The Non-Paying Limited Partners.

Under the Limited Partnership agreements, the general partner, Richtron, Inc. or Richtron General, had the power to terminate the interests of any limited partners who failed to pay their pro rata portion of the Limited Partnerships' operating expenses. (R. 2101). As the district court found:

It appears Richins was reluctant to stir up trouble with such defaulting investors, hoping time would take care of the problem, and that the advances made by the general partners, though unknown to have been made by the limited partners until the bubbles began bursting about May, 1980, would take care of the debts and expenses until better times evolved.

(R. 2102)

D. Sampson Begins Interfering With The Richins Parties' Management And Control Of The Limited Partnerships.

On May 29, 1980, Richins conducted a meeting of the Catlow Valley Farms Limited Partnership at which many of the limited partners were in attendance. (R. 2103, 2107-08). Sampson, who was retained by two of the limited partners to evaluate their interests in that partnership, also attended the meeting. (R. 2076-77). After Richins informed those in attendance that two judgments (including the Osborn Judgment) had recently been entered against the Richins Parties, Sampson began sowing the seeds of investor discontent:

His [Sampson's] actions there were a bit more than just privately counseling his two clients, for he not only recommended to those at the meeting and got started the movement to have Richtron Financial file for bankruptcy under chapter 11 proceedings, but he also expressed the legal opinion to all present that he did not think Richtron Financial could keep the mark-up equity arising from Richtron Financial's resale of the farm property to the Catlow Valley Partnership for an amount in excess of what it paid for it, which was a theme which Sampson repeatedly [and erroneously] expressed in the months and years ahead.

(R. 2076-77).

As set forth below, Sampson continued to agitate against the interests of the Richins Parties and gradually seize control of the Limited Partnerships through a variety of predatory maneuvers.

1. Sampson's Tenure As Legal Counsel For The Richins Parties And His Betrayal Of Their Trust.

At a Limited Partnership meeting on June 26, 1980, Sampson and two of his clients agreed to purchase the capital stock of the Richtron Companies for \$700,000.00. (R. 2078). At that time, Richins informed Sampson that he anticipated that several creditors would be filing lawsuits against the Richtron Companies in the near future. (R. 2078-79). Sampson instructed Richins to send him any such complaints and told Richins that he "...would answer and stall them off." Id. Pursuant to that understanding, Sampson "...soon became involved in handling certain legal matters for Richins and his companies." (R. 2079). Specifically, Sampson agreed to represent the Richins Parties and protect their interests in at least fourteen separate matters. (R. 2079-83). After agreeing to answer and otherwise take care of those litigation matters, Sampson failed to do so, thereby allowing at least five cases to result in the entry of default judgments against the Richins Parties. (R. 2081).

During this same time period -- August, 1980 -- the Richins Parties' prior legal counsel, David Gillette, sent Sampson a check in the amount of \$10,713.00 payable to Sampson for the account of one of the Limited Partnerships. (R. 2082). In the transmittal letter accompanying that check, Mr. Gillette informed Richins that the funds were to

be used exclusively for the Catlow Valley Limited Partnership and were to be released to the general partner, Richtron, Inc., after Sampson and Richins had finalized their arrangements to "work together." Id. However, Sampson promptly disregarded those instructions by endorsing and transferring the check to his newly hired farm manager, Keith Blanch. Id.

Notably, one of the matters in which Sampson agreed to assist the Richins Parties was negotiating a compromised settlement of the Osborn Judgment. In that regard, Sampson participated with Richins in seeking to negotiate a settlement of Osborn's claim during a meeting on July 1, 1980. (R. 2079). While the district court found that the "...certainty of the existence of an attorney/client relation between Sampson and Richins during discussions with... Osborn... is by no means clear," R. 2079, the record is undisputed that one of the files that Mr. Gillette turned over to Sampson for Sampson's attention in August, 1980 was the Osborn file. (R. 2083; Exhibits 64 and 67). That was consistent with Richins' understanding. (Exhibit 118).

In evaluating the extent to which Sampson's conduct deviated from the standard of care customarily imposed upon lawyers in the representation of their clients, the district court concluded that:

Sampson's acceptance of the representation of defendants in various lawsuits as set forth in the findings and his failure to

answer or otherwise respond, or to take steps for defendants to obtain other counsel and thereby avoid defaults, constituted negligence and a failure to measure up to the standard of care to be expected of members of the legal profession.

(R. 2209).

2. Sampson's Solicitation, Receipt And Wrongful Retention Of Capital Contributions And Crop Proceeds.

Beginning in late June, 1980, some of the limited partners insisted, and Richins consented, that Sampson serve as the repository of capital contributions. (R. 2112). That mechanism was put in place to insure some degree of control over how the funds were spent. Id. (R. 2150). Importantly, Sampson was in all instances to "...pass the funds through to Richins for payment on pressing obligations" of the Limited Partnerships. (R. 2112). In classic understatement, the district court sardonically observed:

That plan was not followed to the letter and Sampson began placing and retaining partner contributions in his trust accounts at his bank, and particularly so when the settlement agreement [between the Richins Parties and the limited partners] was not approved.

(R. 2150). Indeed, the extent to which Sampson deviated from the "letter" of the agreement is staggering: from June 27, 1980 to October 29, 1984, he solicited and received approximately \$1,522,000.00 of capital contributions and proceeds derived from the sale of crops cultivated on the

Limited Partnerships' properties. (R. 2265). Richins repeatedly made demand on Sampson to comply with the original agreement by relinquishing the proceeds to the Richtron Companies that were then (and, as the district court concluded, always) the sole general partner of the Limited Partnerships. (R. 2056, 2226; Exhibits 54, 147, 161, 162, 163, 179, 182, 184, 188, 195, 196, 198, 204, 206, 209).

3. Sampson's Repeated Efforts To Stop The Richins Parties From Being Repaid Loan Advances.

In early June, 1980, Sampson informed numerous limited partners that the Richins Parties were not entitled to the repayment of any loan advances they had previously made to the Limited Partnerships. (R. 2100-01, 2148). He "repeatedly" reiterated that statement "both orally and in letters." (R. 2148). The amount of those advances exceeded \$300,000.00. (R. 2100). As a result of Sampson's statements, the limited partners refused to consent to the Limited Partnerships' repayment of the loan advances to the Richins Parties (R. 2110-2112).

Another important result of Sampson's statements regarding repayment of advances was to prevent consummation of an early settlement of the Limited Partnerships' affairs. (R. 2112-13). In the words of the district court:

A major stumbling block [to settlement] was the insistence of a few partners that nothing should be paid to Richins which factor, I believe, and so find, was based

in part upon Sampson's early and repeated statements that the partnerships were not obligated to repay advances. Id.

4. Sampson Floods The Limited Partners With Letters Criticizing The Richins Parties And Urging The Limited Partners To Insert His Corporations As General Partner.

By early December, 1980, the long hoped-for settlement between the Richins Parties and the limited partners had fallen through. (R. 2112). At that point, Sampson prepared and sent to all of the limited partners of the Limited Partnerships a letter dated December 2, 1980. (R. 2119-20; Exhibit 7). That letter sets forth in astonishing detail and with almost palpable rage, a plan that Sampson and several of the limited partners had conceived to wrest control of the Limited Partnerships from the Richtron Companies. In that letter, Sampson made a number of inflammatory and ultimately destructive recommendations to all of the limited partners.⁵ Among those recommendations was that the investors refuse to settle with the Richins Parties; that the investors not pay any monies to the Richins Parties; that the investors stop payment on any checks previously issued to the Richins Parties; that the investors sue the Richins Parties for fraud and breach of

⁵ It is important to recall that Sampson represented only 2 of the 130 investors in the Limited Partnerships. As the district court concluded with apparent exasperation, Sampson "never fully specifically identified" any of the additional clients whom he purportedly represented.

fiduciary duty; that the investors send all further monies to Sampson, and not the Richins Parties; that the investors consent to Sampson inserting his professional corporation as successor general partner of the Limited Partnerships; that the investors give their voting proxies to Sampson; and, that the investors pay substantial compensation to Sampson. Id.

During the next three years, Sampson sent numerous letters to the investors in which he denigrated the Richins Parties and sought to obtain investor support for his plan to seize control of the Limited Partnerships. In so doing, Sampson "...had for all practical purposes reduced Richins' control in partnership affairs to a letter writing role." (R. 2161).

5. Sampson's Acquisition Of The Osborn Judgment.

Immediately after sending the December 2, 1980 letter, Sampson contacted Osborn and Osborn's legal counsel for the purpose of buying the Osborn Judgment. (R. 2050). Those discussions resulted in a January, 1981 agreement whereby Osborn agreed to sell the Osborn Judgment to Sampson for \$40,000.00, \$20,000.00 of which was to be paid immediately and the balance of which was to be paid within three months. Id. Accordingly, on January 23, 1981, Sampson sent a check in the amount of \$20,000.00 to Osborn's legal counsel. Id. Several days later, counsel transmitted to

Sampson an assignment of the Osborn Judgment that recited on its face that in consideration of the sum of \$40,000.00, Osborn assigned to Sampson personally all of his right, title and interest in and to the Osborn Judgment. (R. 2050-52). In a cover letter accompanying that assignment, Osborn's counsel wished Sampson "good luck on your proceedings against the [Richins Parties]." (Exhibit 17). For obvious reasons, Sampson did not inform the Richins Parties of that acquisition. (R. 2051).

Both the initial \$20,000.00 (and the additional \$45,000.00 that Sampson later paid to Osborn after Sampson defaulted in his payment of the required initial installments) were derived from monies paid to Sampson by investors in the Limited Partnerships. (R. 2050). Sampson's admitted purpose for acquiring the Osborn Judgment was for the purpose of preserving and asserting a claim against the Richins Parties by bringing an action thereon. (R. 2059, 2203). Accordingly, the district court concluded that Sampson's purchase of the Osborn Judgment violated Utah Code Ann. §78-51-27, which prohibits a lawyer from acquiring a "...demand of any kind for the purpose of bringing an action thereon..." (R. 2202-03). It further concluded that Sampson's dual violations of that statute were "a serious violation of law." (R. 2124).

6. Sampson's Inability To Comply With The Requirements Of Utah Law Regarding The Substitution Of A Successor General Partner In The Limited Partnerships.

In an effort to carry out one of the primary objectives articulated in his December 2, 1980 letter -- to substitute his professional corporation as successor general partner of each of the Limited Partnerships -- Sampson sought to solicit from each of the limited partners a limited power of attorney authorizing Sampson to vote each such partner's interest in the Limited Partnerships. (R. 2119-20). As the district court concluded, Sampson's attempted solicitation of the powers of attorney was one of the first steps in Sampson's "...significant effort to obtain control of all the partnerships and to exclude Richins therefrom." Id. "This activity [the solicitation of the limited powers of attorney] marks the beginning of Sampson's concerted efforts to interfere in each partnership business and to seize and take control thereof to the exclusion of Richins and his companies." Id.

Relying upon the limited powers of attorney that he actually obtained, Sampson purported to elect his own professional corporation, John P. Sampson, P.C., as successor general partner of each of the Limited Partnerships. (R. 2152-53). However, he was soon informed by the court of the self-evident fact that under the Utah Professional Corporation Act, professional corporations were and are precluded

from operating businesses other than those for which they are specifically formed. (R. 2154). In other words, Sampson's professional corporation organized for the express purpose of practicing law could not be utilized as an entity engaged in the management of agricultural enterprises. Id.

The district court then adroitly summarized the numerous steps and attempted corrective measures Sampson undertook to insert his other corporation, Ag-Management, as successor general partner of the Limited Partnerships. (See, R. 2120-2123). The manner in which those multiple efforts ran afoul of the requirements of the Utah Uniform Limited Partnership Act contained in §48-1-1 et. seq., Utah Code Ann. (1953) is set forth at R. 2121-23.

In November, 1982, Richins sought and obtained in a related state court proceeding entitled Blackfoot Farms, et. al. v. Paul H. Richins, et. al., (Second Judicial District Court of Davis County, Utah, Civil No. 30994) a determination that Sampson's various efforts to substitute his corporations as successor general partner of the Limited Partnerships did not comply with the Utah Uniform Limited Partnership Act. (R. 2124-25). In making that determination, the court entered detailed findings of fact and conclusions of law that the Richtron Companies were, and

always had been, the sole authorized general partners of the Limited Partnerships.⁶

7. Sampson's Cooperation With The IRS As An Additional Vehicle For Dismembering The Richins Parties.

During 1982, and while simultaneously pursuing the conduct described above, Sampson also communicated freely with the IRS in seeking to assist it in identifying and describing various assets owned by the Richtron Companies. See n.2, supra.

Shortly thereafter, on October 29, 1982, the IRS conducted a public auction for the purpose of seeking to sell the various assets of the Richtron Companies. (R. 2125-26). Sampson, as the only bidder at that sale, purported to acquire the Richtron Affiliates' assets. Id.⁷

8. Sampson's Ongoing Solicitation And Use Of Monies From Some Of The Limited Partners Of The Limited Partnerships.

From June, 1980 to November, 1982 (just after the IRS sale at which Sampson purported to acquire whatever interest the Richtron Companies had in the Limited Partnerships), Sampson solicited, received and disbursed "...at

⁶ In the present case, Judge Croft declined to accord preclusive effect to the Blackfoot Farms judgment, but nevertheless, with only one exception, reached the same result Judge Palmer did in the Blackfoot Farms case.

⁷ As indicated at n. 3, supra, that sale was, at the instance of the Richins Parties, later voided by the United States District Court for the District of Utah.

least \$645,000.00 from and for the limited partners and their partnerships." (R. 2123). In doing so, he directed the investors to send the monies to "...him and not to Richins." Id.⁸ From November, 1982 to October, 1984, Sampson received an additional \$900,000.00, resulting in total receipts for the four and one-half year period of approximately \$1,522,000.00. (R. 2265). Thus, during that period of time, "...Sampson had taken over and assumed control of the twenty-five partnerships, and he was receiving all of the funds, disbursing them and using them in whatever way he determined. He continued such control for five years, yet produced no evidence as to what had happened to those partnerships." (R. 2158). His use of those partnership funds was determined by the district court to be "unauthorized" because the Richtron Companies "...remained general partner with complete control over partnership affairs." (R. 2236). So long as Sampson failed to lawfully install his corporations as successor general partner of the Limited Partnerships, he had "no legal authority to make such decisions regarding partnership assets." (R. 2056).

⁸ Indeed, Sampson's solicitation of monies from investors in the Limited Partnerships was shockingly direct. For example in a letter dated January 7, 1981 sent to all investors, Sampson stated: "...since we are now taking over all of the partnerships would you please make all those payments [assessments previously made by the Richtron Companies] to me." Exhibit 183.

Notably, from the moment the federal court voided the IRS tax sale on May 16, 1984 (R. 2157), the legal ability of Sampson and his limited partner clients to undertake any further efforts to wind up the affairs of any of the Limited Partnerships "...ended then and there." (R. 2231). However, even after the entry of that order, the two bank accounts utilized by Sampson -- the Ag Management account and the Consolidated Farms account -- had a balance of approximately \$289,000.00. (R. 2229, 2244, 2263, 2276). That amount, all of which legally belonged to Richtron, Inc. and Richtron General, is greater than the amount of consequential damages awarded to Richtron, Inc. and Richtron General. (R. 2278).

9. Sampson's Concealment Of His Predatory Conduct.

Sampson boasted in a letter sent to all investors that he had creatively concealed from the Richins Parties -- his own former clients -- the financial information necessary to trace his use of the Limited Partnerships' funds:

I wanted him [Richins] to spend all his time occupied at doing something, trying to figure out what we had done. I have always known that if he went through the proper procedures in court he could get the information. I simply wanted him to spend the time and money to do it. (Exhibit 88).

E. General Overview Of Case.

The district court cogently summarized its decision as follows:

The record in summary thus shows that in May, 1980, Richins and his companies had control of at least twenty-five 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. It further shows that when Sampson first got involved he had nothing in the twenty-five partnerships except two clients that wanted advice. By Sampson's act and conduct by the end of 1980 -- within seven months -- Sampson had taken over and assumed control of the twenty-five partnerships, that he was receiving all of the funds, disbursing them and using them in whatever way he determined.

...
Sampson suggested from time to time that his sole objective was to salvage the partnership assets for the limited partners to the point of at least getting back their investments. The evidence does not show that all investors joined in retaining Sampson as their attorney or their proxy, but the evidence does make clear that Sampson's main goal and effort soon became one of getting rid of Richins from all partnerships and obtaining control thereof for himself and his clients whom he never fully specifically identified. I think the evidence shows, and so find, that his self-declared benevolent motive soon changed to one of greed and a vendetta to oust Richins and take complete control.

...
As floundering as the partnerships were, Sampson saw value there and spent what now totals six years in achieving what he now has, whatever it may be, leaving Richins and his companies with no tangible assets or values.

(R. 2158-59, 2275) (Emphasis added).

Finally, as the court concluded, "it was problems created by Richins' mismanagement followed by Sampson's

tortious conduct that brought this case to court for a decision as to whether any damages are recoverable upon the counterclaim." (R. 2275).

SUMMARY OF ARGUMENTS

I. Sampson included in the record in this appeal only a portion of the trial testimony. His selective presentation of only a fragmentary record makes it impossible for the court to meaningfully review the judgment. Absent the missing portions of the record, there is no way that Sampson can establish that the district court's findings of fact are "clearly erroneous" or that the judgment be reversed.

II. Even ignoring the serious problems created by Sampson's failure to include the entire record on appeal, Sampson, like any other appellant, has the burden of marshalling all of the evidence in support of the trial court's findings and to then demonstrate, that even when viewed in the light most favorable to those findings, the evidence is insufficient to support those findings. Because Sampson has only nominally sought to marshall the trial court's facts, he has failed to meet the heavy burden of establishing the existence of reversible error.

III. The district court properly identified at least twenty-two separate improper means that Sampson used to seize control of the Limited Partnerships and extinguish

the interest of the Richins Parties. When aggregated, those findings establish improper means far more extensive and serious than those deemed to be actionable in this court's seminal holding in Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982).

IV. The district court properly concluded that Sampson's takeover of the Limited Partnerships was actuated by an improper purpose. In reaching that conclusion, the district court reasonably inferred the existence of an improper purpose from the extensive series of predatory unlawful means utilized by Sampson to take control of the Limited Partnerships.

V. The district court properly concluded that Sampson's tortious conduct was the proximate cause of injury and damages to the Richins Parties. Under the two possible tests of proximate cause -- the "substantial factor" test or the "but for" test -- Sampson's unlawful interference was the legal cause of injury and damages to the Richins Parties.

VI. In asserting that the district court improperly concluded that the Richins Parties did not waive or are estopped from complaining about Sampson's conduct, Sampson has failed to marshall all evidence relevant to those findings. Therefore, appellate review of Sampson's contention cannot be undertaken.

VII. The district court's award to Richtron, Inc. and Richtron General of consequential damages in the amount of \$250,000.00 and to Richtron Financial and Richtron, Inc. of special damages in the amount of \$35,197.00 cannot be challenged in the face of an incomplete record. If, however, the court elects to overlook the problems posed by the incomplete record, it is nevertheless clear that the damage awards are consistent with applicable law and have a "rational basis" in the record.

ARGUMENT I

SAMPSON'S SELECTIVE INCLUSION OF ONLY A
PORTION OF THE TRIAL TESTIMONY MAKES IT
IMPOSSIBLE FOR THE COURT TO
MEANINGFULLY REVIEW THE JUDGMENT

Rule 11(e)(2), Supreme Court Rules, provides that:

If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion.

This Court has repeatedly held that an appellant's failure to ensure the inclusion of the entire transcript of testimony in the record is fatal to appellate review of challenged action by the lower court. In Smith v. Vuicich, 699 P.2d 763 (Utah 1985), the court was confronted with a situation identical to that in this proceeding: Like Sampson, the appellant ordered only a partial transcript of the trial consisting exclusively of her own testimony and

that of her own witnesses. As the court pointedly observed, the appellant had failed to include any of the respondent's evidence. In affirming the trial court's judgment, this court held that:

Where the record before us is incomplete, we are unable to review the evidence as a whole and must therefore presume that the verdict was supported by admissible and competent evidence.

Id. at 765. Accord, Stevens v. Schwendiman, 688 P.2d 466 (Utah 1984).

Similarly, in James Manufacturing Co. v. Wilson, 15 Utah 2d 210, 390 P.2d 127 (1964), the appellant sought review of the trial court's determination regarding the timeliness of appellant's notification of allegedly defective conditions in certain equipment. However, appellant designated only a portion of the trial testimony on appeal. In affirming the trial court's determination, this court held in pertinent part that:

Plaintiff argues that there was not sufficient evidence to support defendant's counterclaim and that defendant had not notified plaintiff of any alleged defects in the equipment within a reasonable time. However, plaintiff saw fit to include only a portion of the testimony in the record upon this appeal. Under the circumstances it is impossible for this court to properly assess the entire evidence and determine whether the trial court was correct in denying these motions of the plaintiff. It must, therefore, be presumed that the ruling was supported by the evidence produced at the trial.

Id. at 129. Accord, First Federal Savings & Loan Assoc. of Salt Lake City v. Schamanek, 684 P.2d 1257 (Utah 1984); In re Voorhees' Estate, 12 Utah 2d 361, 366 P.2d 977 (1961); Sandall v. Sandall, 57 Utah 150, 193 P. 1093 (1920).

This court's insistence that presentation of the entire record underlying the trial court's factual determinations is a condition precedent to review of those determinations is shared by all courts that have considered the question. Bliss v. Treece, 658 P.2d 169, 172 (Ariz. 1983) ("Where the record is incomplete, a reviewing court must assume any evidence not available on appeal supported the trial court's action."); In the Matter of Dana P. v. State, 565 P.2d 253, 256 (Okla. 1982) ("In the absence of a complete record (here, the failure to make a record of the termination hearing), the findings of fact and law by the trial court are presumed to be true."); Lau v. Nelson, 92 Wash. 2d 823, 601 P.2d 527, 530 (1979) ("Here, the appellant has brought up only a part of the record, which does not reveal the evidence which was placed before the jury in regard to the circumstances of the accident. Consequently, we must assume that there was evidence upon the question of causation which the jury was capable of understanding without the aid of an expert. We are in no position to say that the lower court abused its discretion in excluding this opinion testimony and must hold the assignment of error to

be without merit."); Visco v. Universal Refuse Removal Co., 11 Ariz. App. 73, 462 P.2d 90, 92 (1969) ("A finding of fact cannot be 'clearly erroneous' if there is substantial evidence to support it. How can this court test whether or not there is substantial evidence to support the judgment, when part of the evidence, including file no. 180825, is missing? The question answers itself - this court cannot review the evidence.")

Obviously, an appellant's failure to include the entire trial record makes it impossible for a reviewing court to determine whether, in any given case, the appellant was the victim of reversible error. As this court cogently noted in Sawyers v. Sawyers, 588 P.2d 607, 608 (Utah 1976):

Appellate review of factual matters can be meaningful, orderly and intelligent only in juxtaposition to a record by which lower court's rulings and decisions on disputes can be measured.

In the case at bar, Sampson has accurately identified the primary issue in this case as whether the district court's award of damages was premised on "substantial evidence of facts and not by mere conclusions nor by conjecture." (Docketing Statement, p. 3). However, to obtain appellate review of that issue (as well as the correctness of a variety of "ultimate" facts regarding both liability and damages), Sampson offers this court only selective fragments of the testimonial and documentary

evidence adduced at trial. Specifically, he offers only that evidence that he believes supports his view that (i) there is an insufficient factual basis for damages and (ii) there is little or no logical connection between the district court's "probative" facts (which Sampson accepts as true) and the district court's "ultimate" facts (which Sampson seeks to challenge). (Brief, pp. 6, 25) He totally ignores the evidence established by nine of the Richins Parties' witnesses and seeks, in effect, to sanitize the evidence of respondents' main witness, Paul Richins, by ordering that testimony only to the extent it was elicited from Sampson's own counsel. In doing so, Sampson has excised from the record extensive testimony crucial to the Richins Parties' case. His studiously selective ordering of the record prompted his own counsel to acknowledge to this court that the existing record on appeal was "totally inadequate" to challenge the judgment.⁹ The Richins Parties agree.

Apparently recognizing the obvious jeopardy to which his appeal is subjected, Sampson now argues in his brief that with "only few exceptions," he does not contest the "probative findings" of the district court and therefore

⁹ That admission was made at the September 7, 1987 hearing on the Richins Parties' renewed motion to dismiss Sampson's appeal.

has not relied upon the underlying record..." (Brief, p. 25). He proposes to "focus" upon and challenge the "ultimate facts" determined by the district court based upon "these probative facts." Id. at pp. 6 and 25. And, he frankly acknowledges that his challenge to the district court's award of damages is premised on both a lack of "evidentiary support" and "sufficient findings." Id. at p. 5. However, as shown below, Sampson's effort to save his appeal by asking this court to accept as correct "essentially all" of the "probative" or subordinate facts and reject the "ultimate" facts is, in the face of an incomplete factual record, unavailing.

Under Rule 52, Utah R. Civ. P., the district court is, of course, required to "...find the facts specially and state separately its conclusions of law thereon..." As a general rule, "findings should be limited to the ultimate facts and if they ascertain ultimate facts, and sufficiently conform to the pleadings and evidence to support the judgment, they will be regarded as sufficient, though not as full and complete as may be desired." Pearson v. Pearson, 561 P.2d 1080, 1082 (Utah 1977). However,

Rational decision making by the trial court requires that the court address and resolve all pertinent subordinate and ultimate factual issues which must be resolved on the basis of the evidence presented and applicable rules of law. This process is even more important to the proper functioning of a reviewing court. Appellate courts are simply not in a

position to evaluate and resolve conflicting oral testimony as accurately as a trial court. (Emphasis added).

Romrell v. Zions First National Bank, N.A., 611 P.2d 392, 395 (Utah 1980).

Therefore, to the extent the district court addresses and resolves both subordinate and ultimate factual issues, appellate review of their correctness can be based only upon resort to the "evidence presented." Where, however, as in this case, only a selective portion of the trial evidence is made a part of the record on appeal, there is no principled basis on which this Court can accept or reject the hundreds of factual findings of the district court. In other words, the absence of the complete record renders impossible any meaningful review of the district court's findings, regardless of whether those findings are characterized as "subsidiary" or "ultimate."

There is simply no way Sampson can come remotely close to discharging his burdens of (i) including a "...transcript of all evidence relevant to such finding...", as required by Rule 11(e)(2), Supreme Court Rules, (ii) marshalling a sufficiently complete record to enable this Court to say with confidence that some or all of the findings are "clearly erroneous" within the meaning of Rule 52(a), Utah R. Civ. P. or (iii) assembling and marshalling the evidence "supporting his version of the facts" as

required by this court in Scharf v. B.M.G. Corporation, 700 P.2d 1068, 1070 (Utah 1985).

As such, the court should decline to review Sampson's contentions and affirm the judgment.

ARGUMENT II

UNDER THE STANDARDS OF REVIEW APPLICABLE
TO THIS APPEAL, THE DISTRICT COURT'S
FINDINGS OF FACT AND CONCLUSIONS OF LAW CANNOT BE
ASSAILED AND THE JUDGMENT CANNOT BE REVERSED

Fewer principles could be better settled than the proposition that on appellate review the findings of fact and judgment of the trial court are presumed to be valid and correct and the heavy burden of establishing error rests with the appellant. Hal Taylor Associates v. Union America, Inc., 657 P.2d 743, 747 (Utah 1982); Hutcheson v. Gleave, 632 P.2d 815, (Utah 1981). And, upon review, "this court views the evidence and all the inferences that can reasonably be drawn therefrom in a light most supportive of the trial court's findings." Horton v. Horton, 695 P.2d 102, 106 (Utah 1984).

Unless clearly erroneous, findings of fact will not be set aside, and, if there is a reasonable basis in evidence, a trial court's award of damages will be affirmed on appeal. Utah R. Civ. P. 52(a); Katzenberger v. State, 735 P.2d 405 (Utah App. 1987). Findings will not be disturbed unless they are clearly against the weight of the evidence or unless it manifestly appears that the court

misapplied the law to established facts. Brown v. Board of Education of Morgan County School District, 560 P.2d 1129, (Utah 1977).

The heavy burden imposed upon an appellant has been cogently expressed by this court as follows:

It is incumbent upon the appellant to marshal all of the evidence in support of the trial court's findings and to then demonstrate even when viewed in the light most favorable to the factual determinations made by the trial court, that the evidence is insufficient to support its findings.

Harline v. Campbell, 728 P.2d 980, 982 (Utah 1986).

In this case, and even charitably ignoring the problems created by the incomplete record, Sampson has failed to marshal more than a fraction of the evidence underlying the district court's findings, regardless of whether those findings are deemed to be "probative" or "ultimate." In his brief, he nowhere recites that his frequent statements that the Richins Parties' loan advances were not required to be repaid rendered impossible an early settlement of the Limited Partnerships' affairs and choked off their cash flow (R. 2100-01, 2110-12, 2148); that his statements that the Richins Parties had breached various fiduciary duties had the same effect (R. 2076-77); that he lent substantial assistance to the IRS as an additional means for acquiring control of the Limited Partnerships See n.2, supra; that he threatened to seek sanctions and "other

relief" against the Richins Parties' legal counsel if counsel continued to challenge the propriety of Sampson's conduct (R. 2131-32); that he wrongfully solicited and received investor monies and crop proceeds in excess of \$1,500,000.00 (R. 2150, 2265); and, that he actively sought to conceal his acquisition of the Osborn Judgment and the methods through which he seized control of the Limited Partnerships (R. 2051; Exhibit 88), to name a few.

Sampson's failure to assemble, marshall and explain those vital facts is fatal to his appeal.

ARGUMENT III

THE DISTRICT COURT PROPERLY CONCLUDED THAT
SAMPSON USED A VARIETY OF IMPROPER MEANS TO
SEIZE CONTROL OF THE LIMITED PARTNERSHIPS AND
EXTINGUISH THE INTERESTS OF THE RICHINS PARTIES

The seminal case in this jurisdiction defining the required elements of the tort of intentional interference with economic relations is, of course, Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982). In adopting the Oregon definition of this tort, the court held that in order to recover damages, the plaintiff must:

...prove (1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff.

Id. at 304.

In affirming the trial court's entry of judgment on a jury verdict in favor of the plaintiff in Leigh Furniture, this court cataloged the various acts of the defendant deemed to constitute improper means of interference. Those improper means included (i) frequent visits to the plaintiff's store during business hours to confront, question and accuse the owner of deficiencies in the operation of the business (ii) the preparation and sending of numerous letters complaining of the manner in which the store owner was performing his contract of purchase with the defendant (iii) the unilateral imposition of conditions not required by the purchase contract (iv) cajoling the owner to employ a business consultant with whom the defendant was acquainted, but whom the owner was not inclined to hire (v) the filing of two apparently groundless lawsuits, and (vi) the filing of a complaint, without prior notice, to terminate the purchase contract and repossess the owner's business. Id. at 297-301, 306. In focusing on the cumulative effect of those improper means, the court compellingly observed that:

Taken in isolation, each of the foregoing interferences with Isom's business might be justified as an overly zealous attempt to protect the corporation's interest under its contract of sale. As such, none would establish the intentional interference element of this tort, though some might give rise to a cause of action for breach of specific provisions in the contract or the duty of good faith performance which inheres in every contractual relation. Even in small groups, these acts might be explained as

merely instances of aggressive or abrasive -- though not illegal or tortious -- tactics, excesses that occur in contractual and commercial relationships. But in total and in cumulative effect, as a course of action extending over a period of three and one-half years and culminating in the failure of Isom's business, the Leigh Corporation's acts crossed the threshold beyond what is incidental and justifiable to what is tortious.

Id. at 306.

The parallels between the improper means identified in Leigh Furniture and those identified by the district court in this case are striking. The improper means in this case included (i) Sampson's breach of his agreement to represent the interests of the Richins Parties in pending litigation, thereby allowing numerous default judgments to be entered against the Richins Parties, supra pp.10-12; (ii) Sampson's breach of his agreement to serve solely as an initial repository for the deposit of investor funds and insure that all such funds were duly transmitted to the Richtron Companies, thereby completely choking off the entire cash flow of the Limited Partnerships supra pp.12, 13; (iii) Sampson's first effort to purchase, with Limited Partnership funds, the Osborn Judgment for the admitted purpose of suing on it to the profound detriment of his former clients and in violation of Utah Code Ann. §78-51-27 supra pp.15, 16; (iv) Sampson's second effort to purchase the Osborn Judgment from the same source and for the same

purpose Id.; (v) Sampson's concealment from the Richins Parties of his intent to acquire the Osborn Judgment Id.; (vi) Sampson's failure to provide the Richins Parties with any advance notice of his intent to enforce the Osborn Judgment by suing his former clients on it in the State of Utah Id.; (viii) Sampson's preparation and sending of dozens of letters to the limited partners of the Limited Partnerships in which he repeatedly criticized, denigrated and sought to humiliate the Richins Parties supra pp.14, 15; (ix) Sampson's numerous oral statements to limited partners of the Limited Partnerships to the same effect Id.; (x) Sampson's frequent and patently erroneous statements that the markup, i.e. the favorable writeup in the terms and conditions on which the Richtron Companies sold the farm properties to the Limited Partnerships vis a vis the terms and conditions on which the Richtron Companies obtained the farm properties from the original owners, was a breach of an unspecified fiduciary duty supra p.9; (xi) Sampson's repeated and patently erroneous statements that the massive loan advances made by the Richins Parties for the benefit of the Limited Partnerships would not have to be repaid by the Limited Partnerships supra pp.13, 14; (xii) Sampson's failure and refusal to deliver to the Richins Parties certain foreclosure documents that he was duty bound to return (R. 2150-51); (xiii) Sampson's legally improper use

of limited voting powers of attorney to substitute his various corporations as successor general partner of the Limited Partnerships supra pp.17-19; (xiv) Sampson's ill-fated effort to designate a professional corporation organized for the purpose of practicing law as the manager of agricultural properties in violation of the Utah Professional Corporations Act Id.; (xv) Sampson's consistent inability or unwillingness to amend the certificates of the Limited Partnerships to reflect his supposed admittance as successor general partner as required by the Utah Uniform Limited Partnership Act Id.; (xvi) Sampson's unauthorized disclosure to third parties of confidential information obtained during the course of his representation of the Richins Parties (R. 2160); (xvii) Sampson's predatory reliance on the IRS's attempt to sell the assets of the Richtron Companies at public auction; (xviii) Sampson's "bizarre" and "unprofessional" threats to the Richins Parties' legal counsel that unless counsel immediately refrained from further representation of the Richins Parties, Sampson would seek "sanctions" and "other relief" against counsel supra p.4; (xix) Sampson's filing of a patently meritless lawsuit seeking to have himself appointed as receiver for the Limited Partnerships, which action was dismissed by reason of Sampson's failure to substitute his corporations as successor general partner of the Limited

Partnerships in the manner required by the Utah Uniform Limited Partnership Act (R. 2124-25); (xx) Sampson's pirating away of the Richtron Companies' employees (R. 2141); (xxi) Sampson's gloating statement to the limited partners of the Limited Partnerships that he had purposely stonewalled the Richins Parties in their efforts to obtain an accounting of the manner in which he had received and disbursed Limited Partnership funds supra p.21; and (xxii) Sampson's continued receipt and disbursement of Limited Partnership funds even after the federal district court voided the tax sale from which Sampson traced his claim of title to the Richtron Companies' assets Id.

In the face of those findings, Sampson's assertion that the means he used to take control of the Limited Partnerships were not "predatory" and involved only "errors in judgment or technical legal violations" (Brief, p. 36), is interesting indeed. It is simply impossible to conceive of a pattern of conduct, extending as it does over a period of more than four years, that constitutes a more disturbing blend of fraudulent, deceptive and otherwise illegal conduct.¹⁰

¹⁰ Contrary to Sampson's suggestion that the district court failed to apply a "good faith" standard in determining his conduct, there are at least three ready answers. First, the cumulative effect of Sampson's deployment of multiple means of contract interference makes any finding of "good faith" both factually and legally impossible. Second, the district court did in fact make several references to Sampson's supposed absence of

Therefore, the district court's conclusion that Sampson's seizure and control of the Limited Partnerships was effectuated through a series of improper means is abundantly supported by the meticulous and extensive factual findings. As such, there is no basis for invalidating either the judgment or the findings on which the judgment is based.

ARGUMENT IV

THE DISTRICT COURT PROPERLY CONCLUDED THAT SAMPSON'S TAKEOVER OF THE LIMITED PARTNERSHIPS WAS ACTUATED BY AN IMPROPER PURPOSE

- A. The Incomplete Record In This Appeal Precludes Sampson From Sustaining His Burden Of Demonstrating That The District Court's Factual Findings On This Issue Were Clearly Erroneous.

Sampson argues in his brief that the district court erred in concluding that Sampson's takeover of the Limited Partnerships was actuated by an improper purpose because there are "...no factual findings nor evidence to justify this conclusion." (Brief, p. 34). The determination of

malice in arriving at its conclusion that Sampson used a series of improper means to take control of the Limited Partnerships. Finally, Sampson's reliance on a standard of "good faith" appears to be nothing more than an assertion that he was legally privileged to carry out the conduct that he did. His effort to cast his argument in those terms is understandable in light of his failure to plead privilege as an affirmative defense in his reply to the Richins Parties' second amended counterclaim. (R. 1656-63). That failure, of course, constitutes a waiver of that affirmative defense and cannot now be raised for the first time on appeal. Utah R. Civ. P., 12(h); Manger v. Davis, 619 P.2d 687 (Utah 1980).

whether there is sufficient "evidence" supporting the district court's decision cannot be made on the basis of the partial record available to the court. See, Arguments I and II, supra. Absent the complete record, there is no possible way to determine whether the factual findings on this issue are "clearly erroneous" within the meaning of Rule 52(a) and the cases interpreting it.

B. The Existing Record Abundantly Supports The District Court's Conclusion That Sampson's Seizure Of The Limited Partnerships Was Actuated By An Improper Purpose.

In considering and analyzing the massive evidence establishing Sampson's use of improper means in intruding in the affairs of the Limited Partnerships, See, pp. 36-39, supra, the district court had before it substantial evidence justifying the eminently reasonable inference that:

...the evidence does make clear that Sampson's main goal and effort soon became one of getting rid of Richins from all partnerships and obtaining control thereof for himself and his clients whom he never fully specifically identified. I think the evidence shows, and so find, that his self-declared benevolent motive soon changed to one of greed and a vendetta to oust Richins and take complete control.

(R. 2159).

Obviously, the issue of whether an improper purpose has, in any given case, been established requires that inferences be drawn from the underlying conduct. Like most cases, the record in this case does not contain a frank admission by the tortfeasor that he had an improper purpose

in mind while engaging in the conduct deemed to be actionable. That purpose can only be deduced from the determined facts. That is precisely what the district court did. Its conclusion on this issue must be sustained.

ARGUMENT V

THE DISTRICT COURT PROPERLY CONCLUDED THAT SAMPSON'S CONDUCT PROXIMATELY CAUSED INJURY TO THE RICHINS PARTIES

A. Sampson's Conduct Was A Substantial Factor In Causing Injury To The Richins Parties.

In his brief, Sampson asserts that even assuming his conduct was carried out through improper means or by an improper purpose, he is nevertheless insulated from liability because he was not the proximate cause of injury to the Richins Parties. Specifically, he suggests that the district court should have applied a "but for" test of causation. (Brief, p. 42). That assertion, however, badly misconceives the legal standard of proximate cause applicable to this case.

The district court expressly concluded that it was a combination of the Richins Parties' supposed negligence (mismanagement) and Sampson's tortious conduct that "brought this case to court for a decision as to whether any damages are recoverable..." (R. 2275). Thus, the district court concluded that the conduct of the Richins Parties and Sampson were concurrent causes of the complained-of injuries -- that is, that either of the causes, operating alone,

would have been sufficient to result in the Richtron Companies' inability to enjoy the benefits of the Limited Partnership agreements. As such, Sampson's conduct is deemed to be the legal cause of that injury "...if it was a material element and a substantial factor in bringing it about." W. P. Prosser, Handbook of the Law of Torts §41 at 240 (4th Ed. 1971). Thus, "if a defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present." Id.

Clearly, the nature and extent of Sampson's efforts to displace the Richtron Companies and insert himself as their successor easily rise to the level of being a "material element and a substantial factor" within the meaning of applicable case law. However badly managed Sampson would like to believe the Limited Partnerships were, he cannot validly contend that his conduct was anything other than a substantial factor in bringing about injury to the Richtron Companies. Standing alone, each of the improper means of tortious interference found by the district court constitute a material element and substantial factor in the injury inflicted on the Richtron Companies. When aggregated, they constitute an overwhelming body of evidence that those

injuries were not proximately caused by anything other than Sampson's conduct.

B. Even Application Of The "But For" Test Supports The Conclusion That Sampson's Tortious Conduct Was The Proximate Cause of Injury To The Richtron Companies.

In the event it is determined that the district court applied a "but for" test of proximate cause, it is clear that its factual findings adequately support the conclusion that Sampson's conduct was the proximate cause of the Richtron Companies' injuries.

At the outset, it is important to recognize that the factual findings set forth by Sampson in his brief represent only one side of the proximate cause equation, and an incomplete one at that. The only two relevant factual findings relied upon by Sampson to support his conclusion that he is not the factual and proximate cause of the Richins Parties' injuries is (i) the fact that the Limited Partnerships' agreements were terminable at will, and (ii) the "fact" that the Limited Partnerships were suffering from "financial instability." (Brief, p. 40). However, what Sampson fails to recognize is that the terminability of a contract is a factor that has relevance only with respect to the issue of damages. As the Restatement (Second) of Torts, §766(g) makes clear:

A similar situation [to voidable contracts] exists with a contract that, by its terms or otherwise, permits the third person to terminate the agreement at will. Until he has so terminated it, the

contract is valid and subsisting, and the defendant may not properly interfere with it. The fact that the contract is terminable at will, however, is to be taken into account in determining the damages the plaintiff has suffered by reason of its breach.

Thus, the mere fact that the contract is terminable at will has no relevance to the issue of whether, and to what extent, the promisee's right to performance has been impaired by the third party's tortious interference.

Next, 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, it is essential that that "fact" be placed in proper context. For example, the Limited Partnerships had been solvent, viable entities for over seven years by the time Sampson first began tampering with their affairs. (R. 2068, 2128-29, 2228). In addition, there is no evidence that any of the contracts under which the Richtron Companies were purchasing the farm properties were ever foreclosed upon. Indeed, the inference is irresistible that any default in the performance of those obligations was timely cured because the court properly found that while they were under the supervision of the Richtron Companies, none of the farm properties were ever foreclosed upon. Id. All of the properties were, however, foreclosed upon or otherwise lost under Sampson's reign. Id.

Moreover, under the Limited Partnership agreements, the limited partners were contractually obligated to pay their pro rata portion of all expenses incurred by the Limited Partnerships. (Exhibit 115). Therefore, the continued ability of the Limited Partnerships to operate and ultimately persevere depended in the final analysis upon the willingness of the limited partners to pay their pro rata portion of those expenses. Obviously, an event like Sampson's unlawful solicitation and seizure of limited partner funds had the effect of choking off all cash flow available to the Limited Partnerships. When coupled with his repeated statements that the Richtron Companies were not entitled to be repaid their advances and that the limited partners were not obligated to honor their agreement to pay the Richtron Companies any "mark-up," it is a reasonable conclusion, as the district court so determined, that any "financial instability" was created, exploited and exacerbated by Sampson. The long-standing viability of the Limited Partnerships and their ability to obtain all required operating capital from the investors (and thereby fund any operating deficits) militates strongly against Sampson's assertion that he is not legally responsible for injuries to the Richtron Companies.

In addition, and perhaps most importantly, however "financially instable," the Limited Partnerships may have

been as of May, 1980, Sampson and his two limited partner clients agreed that the value of the Richtron Companies' capital stock at that time was at least \$700,000. (R. 2049, 2077-78, 2144, 2270). Because the primary value of that stock was based upon the Rictron Companies' interest in the Limited Partnerships, it is a reasonable inference that the going concern value of the Limited Partnerships was substantial. As the district court noted:

As floundering as the partnerships were, Sampson saw value there and spent what now totals six years in achieving what he now has, whatever it may be, leaving Richins and his companies with no tangible assets or values.

(R. 2275)

Finally, it is crucial to understand that each of the findings and conclusions set forth by Sampson on page 41 of his brief relate only to Sampson's liability for injuries and damages inflicted on Richtron Financial -- an entity to whom the district court granted only nominal damages in the amount of \$100.00. The district court's articulated concerns regarding the limited nature of legal injury to Richtron Financial is wholly irrelevant to evaluating the extensive extent to which the other Richtron Companies, Richtron, Inc. and Richtron General, were injured and damaged.

Accordingly, 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. The district court's conclusion to that effect should be affirmed.

ARGUMENT VI

THE DISTRICT COURT'S FINDINGS REGARDING WAIVER AND ESTOPPEL ARE UNASSAILABLE

In asserting that the district court improperly concluded that the Richins Parties did not waive or are estopped from complaining about Sampson's conduct, Sampson has failed to marshall all evidence relevant to that finding and to establish that even in the face of such evidence, the district court erred in reaching the conclusions that it did. Therefore, appellate review of that contention cannot be undertaken.

ARGUMENT VII

THE DISTRICT COURT PROPERLY AWARDED TO THE RICHINS PARTIES DAMAGES OF MORE THAN \$285,000.00

Sampson asserts in this appeal that the district court erred in awarding \$250,000.00 in consequential damages to Richtron, Inc. and Richtron General, \$31,074.50 in special damages in favor of Richtron Financial, and \$4,222.50 in special damages in favor of Richtron, Inc. As demonstrated below, (i) Sampson's inclusion of only a fraction of the trial transcript precludes him from challenging the damage awards and, (ii) to the extent the court

elects to consider his claimed assignment of error, the district court's findings of fact, conclusions of law and judgment on that issue are unassailable.

A. The Absence Of The Complete Trial Record Is Fatal To Sampson's Challenge To The District Court's Award Of Damages.

In asking the court to reverse the district court's damage award, Sampson asserts generally that the award was "...without any evidentiary basis." (Brief, p. 52).¹¹ However, the "evidentiary basis" on which his appeal of damages is based is hopelessly incomplete. Numerous courts have held that an appellant's failure to produce the transcript of all evidence bearing on the issue of damages precludes it from obtaining appellate review. Herron v. Rozelle, 480 F.2d 282, 288 (10th Cir. 1973) ("Appellant has failed to bring up a transcript of all evidence bearing on the issue of damages to him. We decline review since we cannot make a meaningful evaluation of the claim of error."); Grimard v. Carlston, 567 F.2d 1171, 1173 (1st Cir. 1978) (Where the court lacked a record of the lower court's denial of a motion for preliminary injunction, the sufficiency of those proceedings would not be reviewed because

¹¹ He further asserts in his brief that "as to the issue of damages... there is neither evidentiary support nor sufficient findings to support the award." (Brief, p. 5). For the reasons set forth in Argument I above, further appellate review of the damages issue is impossibly speculative.

there was no way of saying in the absence of that record whether the court abused its discretion.)

For that reason alone, the court should decline to review Sampson's challenge to the district court's award of damages and affirm its judgment.

B. The District Court's Award Of Consequential Damages To Richtron Inc. And Richtron General In The Amount Of \$250,000.00 Is Consistent With Applicable Law And Abundantly Supported By The Existing Record On Appeal.

Sampson argues that the \$250,000.00 award of consequential damages to Richtron, Inc. and Richtron General should be reversed for several reasons. The first reason he advances is that the district court refrained from identifying the precise composition of the \$250,000.00 figure. Sampson argues that the district court was required to provide that information because the district court's use of the term "consequential" is, he believes, tantamount to "special" damages. (Brief, pp. 52, 53). However, in advancing that argument, Sampson fails to adhere to the specific distinctions enunciated by the drafters of the Restatement (Second) of Torts §774A that:

(1) One who is liable to another for interference with a contract or prospective contractual relation is liable for damages for (a) the pecuniary loss of the benefits of a contract or the prospective relation; (b) consequential losses for which the interference is the legal cause; and (c) emotional distress or actual harm to reputation, if they are reasonably expected to result from the interference. (Emphasis added).

Clearly, subparagraph (a) of §774A is referring to special damages when it uses the term "pecuniary loss." By the same token, subparagraph (b), in using the term "consequential losses," appears to denote general damages that are deemed to flow naturally and necessarily, albeit indirectly, from the harm done. Indeed, the dictionary definition of "consequential damages" is that they are damages that do not flow directly and immediately from the act of the party, but only from some of the consequences or a result of such act. Black's Law Dictionary, p. 457 (4th edition 1968). That is the sense in which the district court intended to use the term. (R. 2261).

Numerous other courts have used the term "consequential" in the same way. State of Maryland for use of Pumphrey v. Manor Real Estate and Trust Co., 83 F. Supp. 91, 102 (D. Md. 1938) (Consequential damages are those which the cause in question naturally but indirectly produces.); Deetz v. Cobbs and Mitchell Co., 120 Or. 600, 253 P. 542, 544 (1935) (Consequential damages are those that follow naturally, but indirectly, from a wrongful act.).

It would appear that the district court's choice of the term "consequential" in defining the damages recoverable by the Richins Parties was intended only to denote that the damages, while flowing naturally from Sampson's tortious conduct, only indirectly caused the loss. The context

within which that term is used is incompatible with the notion that the district court intended to award the functional equivalent of special damages for which specific proof of precise loss would be required.

Next, Sampson fails to recognize that the district court is not required to calibrate with absolute precision the amount of damages to be awarded. As this court has consistently held:

Although an award of damages based only on speculation cannot be upheld, it is generally recognized that some degree of uncertainty in the evidence of damages will not suffice to relieve a defendant from recompensing a wronged plaintiff. As long as there is some rational basis for a damage award, it is the wrongdoer who must assume the risk of uncertainty. (Emphasis added).

Bastian v. King, 661 P.2d 953, 956 (Utah 1983); Winsness v. M. J. Conoco Distributors, 593 P.2d 1303 (Utah 1979). And, "where there is evidence of the fact of damage, a defendant may not escape liability because the amount of damages cannot be proved with precision." 661 P.2d at 956. That principle has also been expressed as follows:

Once a defendant has been shown to have caused a loss, he should not be allowed to escape liability because the amount of the loss cannot be proved with precision. [citations omitted] Consequently, the reasonable level of certainty required to establish the amount of a loss is generally lower than that required to establish the fact or cause of a loss.

Cook Associates, Inc. v. Warnick, 664 P.2d 1161 (Utah 1983).

When evaluated in the light of those principles, it is clear that the district court's award of consequential damages in the amount of \$250,000.00 has a "rational basis" in the existing record. Specifically, the district court expressly found and concluded that the date on which the federal district court voided the IRS tax sale on which Sampson based his claim of interest in the Limited Partnerships -- May 16, 1984 -- "ended then and there" Sampson's right to take "...any further steps in the winding up of any affairs of the partnerships in which the Richtron Companies remained as general partner." (R. 2231). The court then observed that despite the entry of that order, Sampson "undauntingly"¹² continued from that point to collect and receive additional limited partner monies which, as of October 29, 1984 (the last day for which the Richins Parties were able to obtain Sampson's accounting records) totalled \$288,597.00 -- \$245,597.00 of which were contained in the Consolidated Farms account and \$43,000.00 of which were contained in the Ag Management account. (R. 2229, 2263, 2276). Immediately after rendering its conclusions regarding Sampson's unlawful collection and retention of those monies after the federal court order, the court concluded that the Richins Parties had established damages "of at least a consequential nature" that had been established with

¹² R. 2276.

"...a reasonable degree of certainty by a preponderance of the evidence." (R. 2276).

Therefore, in fixing the Richins Parties' damages at \$250,000.00, the court had before it an eminently certain basis for fixing those damages -- the aggregate amount of all monies collected and retained by Sampson after entry and in violation of the federal court order. Thus, the \$250,000.00 damage award suffers from none of the lack of precision of which Sampson complains. It has an abundantly "rational basis" in the record and cannot be overturned.

C. The Lower Court Properly Awarded To Richtron, Inc. And Richtron Financial Damages Arising From Sampson's Termination Of Their Limited Partnership Interest In Several Of The Limited Partnerships.

The district court properly awarded \$30,974.50 to Richtron Financial to compensate it for the loss of its limited partner interest in three of the Limited Partnerships and \$4,222.50 to Richtron, Inc. to compensate it for its loss in one of the Limited Partnerships. (R. 2087-88, 2239, 2272, 2277). The sole basis on which Sampson seeks to reverse that award is that there is supposedly "...no showing by [the Richins Parties] that at the time Sampson took over the operation of the partnerships that their original capital contributions were at the same value as when they were initially contributed." (Brief, p. 55). That assertion is contradicted by the record. The district court specifically determined that Sampson filed various tax

returns for the Limited Partnerships for the tax year ending December 31, 1980. (R. 2087-88). Those returns clearly reflected Richtron Financial's capital interest in the Catlow Limited Partnerships in the amount of \$10,212.00. Id. Therefore, Sampson's own documents establish the then existing value of Richtron Financial's capital interest in those partnerships.

In addition, Sampson asks the court in his brief to consider that the Catlow Limited Partnerships were in foreclosure in May, 1980 and that an additional \$240,000.00 had to be raised to save the property. (Brief, p. 55). He thereby implies that the value of those, and perhaps other, partnerships was worthless. However, in a letter dated June 26, 1981, Sampson informed the limited partners that: "as far as the properties are concerned, all except perhaps Kanosh, are in as good or better shape than ever before."¹³ Therefore, Sampson's own admissions to the limited partners validate and give credence to the values determined by the district court. Those valuations should not be modified.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's judgment and thereby enable the Richins

¹³ That exhibit is also contained in the missing box of documents described at n. 2 supra.

Parties to be compensated for at least a portion of their extensive losses.

Respectfully submitted this 18 day of March, 1988.

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MAILING CERTIFICATE

I hereby certify that I caused to be mailed four copies of the foregoing Respondents' Brief to the person listed below, postage prepaid this 18 day of March, 1988.

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