

2008

Wilma L. Schwenke, Tania P. Schwenke, Cindy Lawrence, and Wayne Wong v. Intermountain, Inc., a Utah corporation, doing business as Intermountain Isuzu; Isuzu LT; a business trust, Isuzu Motors Acceptance Corporation, a California corporation; and Bank of America, N.A.. a DC corporation v. Wilma L. Schwenke; Tania P. Schwenke; Cindy Lawrence; Wayne Wong; Victor Lawrence; cSave.net, LLC; and Paul Schwenke :

## Brief of Appellee

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Utah Court of Appeals

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UTAH COURT OF APPEALS

WILMA L. SCHWENKE, TANIA P.  
SCHWENKE, **CINDY LAWRENCE**  
[Appellant] and WAYNE WONG,

Plaintiffs,

vs.

**INTERMOUNTAIN, INC.**, a Utah  
corporation, doing business as Intermountain  
Isuzu [Appellee]; ISUZU LT; a business  
trust, ISUZU MOTORS ACCEPTANCE  
CORPORATION, a California corporation;  
and BANK OF AMERICA, N.A., a DC  
corporation,

Defendants.

vs.

WILMA L. SCHWENKE; TANIA P.  
SCHWENKE; **CINDY LAWRENCE**  
[Appellant]; WAYNE WONG; **VICTOR**  
**LAWRENCE** [Appellant]; **cSAVE.NET,**  
**LLC; and PAUL SCHWENKE.**

Counterclaim Defendants,  
Third Party Defendants,  
Defendants.

**BRIEF OF APPELLEE**  
**INTERMOUNTAIN, INC.**

Case No. 20080835-CA

Appeal from the Third Judicial District Court  
In and for Salt Lake County, State of Utah

Judge Denise Lindberg  
Civil No. 000904217

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FILED  
UTAH APPELLATE COURTS

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WILMA L. SCHWENKE, TANIA P.  
SCHWENKE, **CINDY LAWRENCE**  
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Isuzu [**Appellee**]; ISUZU LT; a business  
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vs.

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SCHWENKE; **CINDY LAWRENCE**  
[**Appellant**]; WAYNE WONG; **VICTOR**  
**LAWRENCE** [**Appellant**]; **cSAVE.NET,**  
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## **IDENTIFICATION OF PARTIES AND RELATED LITIGATION**

### **I. THE PARTIES ON APPEAL ARE:**

1. Victor Lawrence
2. Cindy Lawrence
3. Intermountain, Inc.

### **II. ADDITIONAL PARTIES IN THE UNDERLYING ACTION INCLUDE:**

1. Wayne Wong (judgment entered against Wong for compensatory and punitive damages, did not appeal).
2. A. Paul Schwenke (default judgment entered).
3. Wilma Schwenke (default judgment entered).
4. Tania Schwenke (default judgment entered).
5. cSave.net, LLC, a Utah limited liability company (default judgment entered).
6. Bank of America (all its rights assigned and the black Rodeo transferred to Intermountain, whereupon Intermountain's counsel thereafter defended Bank of America).
7. Isuzu Motors Acceptance Corp. (all its rights assigned to Intermountain, whereupon Intermountain's counsel defended IMAC).
8. Isuzu LT (all its rights assigned to Intermountain and green and silver Rodeos transferred to Intermountain, whereupon Intermountain's counsel defended Isuzu LT).

### **III. RELATED LITIGATION**

1. Intermountain, Inc. v. Paul Schwenke, Wilma Schwenke, and Wayne Wong, 3<sup>rd</sup> Dist., case no. 000909209 (Medley, J.) (later consolidated with underlying case, case no. 000904217).
2. Lawrence v. Intermountain, Inc. and Watkins, 3<sup>rd</sup> Dist., case no. 020906142 (Iwasaki, J.) (claims tried January 16, 2008, case concluded).

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### **III. STATEMENT OF JURISDICTION**

The Court of Appeals has jurisdiction over the Lawrences' appeal. Utah Code § 78A-4-103(2)(j).

### **IV. STATEMENT OF THE CASE**

This matter began with a Complaint filed on May 25, 2000 by Cindy Lawrence, Wilma Schwenke, Tania Schwenke and Wayne Wong. R. 1. The subject matter of the Complaint concerned three new Isuzu Rodeos that Wayne Wong had leased from Intermountain Isuzu less than a month before. Plaintiffs stated causes of action for breach of contract, "rescission," and "injunction," and sued Intermountain, Bank of America, Isuzu Motors Acceptance Corp., and Isuzu LT. All of plaintiffs' causes of action were eventually dismissed on defendants' motions for summary judgment.

On November 11, 2000, Intermountain filed a separate action, case no. 000909209, against A. Paul Schwenke, Wilma Schwenke, and Wayne Wong, which resulted in the issuance of a writ of replevin and Intermountain's recovery of one of the three Rodeos Wong had leased, which was found in the possession of Paul and Wilma Schwenke in Kanosh, Utah. Case 000909209 was subsequently consolidated with case no. 000904217.

In May, 2001, Intermountain, having obtained leave of court to do so, filed an amended pleading in which it pleaded causes of action for fraud, conspiracy to defraud, and conversion, among other claims, against the four original plaintiffs, Paul Schwenke, and third-party defendants Victor Lawrence and cSave.net, LLC. Intermountain finally recovered from

defendants the remaining two Rodeos but not until 2002, and only after the black Rodeo had been totaled in an accident. It was Intermountain's claims and causes of action that were tried to the Bench on June 4-8, 2007. Following trial, the Court on August 13, 2007 entered detailed Findings of Fact and Conclusions of Law, and a Judgment (R. 2079), in which it found Wayne Wong liable to Intermountain for fraud, and Victor and Cindy Lawrence liable for conspiracy to defraud. The Court entered a judgment holding Wong, Victor Lawrence, and Cindy Lawrence jointly and severally liable to Intermountain for damages in the sum of \$80,412.87 caused by Wong's fraud, in which the Lawrences conspired. The trial court, in response to Intermountain's post-trial motion, amended its judgment for fraud and conspiracy to defraud to include prejudgment interest. The damages awarded to Intermountain, and against Wong and the Lawrences for fraud and conspiracy to defraud, including prejudgment interest, totaled \$138,267.25. R. 2160. Judgment entered August 13, 2007 (R. 2079), as amended September 20, 2007 (R. 2158, 2160).

The trial court, in its Findings and Conclusions, also found Victor and Cindy Lawrence liable for conversion, for which Intermountain was awarded damages. The Court also concluded that punitive damages against Wong, Victor Lawrence, and Cindy Lawrence were warranted.

The Court, in compliance with Utah Code § 18-1-1, scheduled a second trial for the purpose of determining the amount of punitive damages to be awarded. That trial was held March 10 and 11, 2008. The Court, on June 25, 2008, entered detailed Findings of Fact and Conclusions of Law concerning punitive damages, and awarded to Intermountain a judgment for

punitive damages as follows: against Wayne Wong, \$138,267.25; against Victor Lawrence, \$484,000; and against Cindy Lawrence, \$99,999.99. R. 2498-2542.

Victor and Cindy Lawrence appeal from the trial court's Findings of Fact, Conclusions of Law, and Judgments entered following the two trials. Wayne Wong did not appeal.

#### **V. HISTORY OF THE CASE AND STATEMENT OF FACTS**

1. Intermountain, Inc., at the time this matter was tried, was a licenced motor vehicle dealer and Isuzu franchisee with its principal place of business in Salt Lake County, State of Utah. Findings of Fact and Conclusions of Law (hereafter "Findings and Conclusions"), ¶2 (R. 2080).

2. Victor Lawrence is an attorney licensed to practice in the State of Utah. Victor Lawrence and Cindy Lawrence were married at the time the events giving rise to this litigation took place, but have since divorced. Findings and Conclusions, ¶3 (R. 2080).

3. A. Paul Schwenke was a business client of Victor Lawrence who established a business entity named cSave.net, LLC on November 4, 1999. Mr. Lawrence prepared the Articles of Organization and Operating Agreement for cSave.net. According to the Articles of Organization, Wayne Wong was listed as a managing member of the LLC, although he testified that all he did for cSave.net was to "input information into the computer." Findings and Conclusions, ¶4 (R. 2080). A. Paul Schwenke is a disbarred former attorney.

4. cSave.net's intended business objective was to operate an online grocery shopping business. According to Mr. Lawrence and Mr. Wong's testimony, however, cSave.net never

operated in that capacity. The evidence showed that cSave.net never had significant assets nor good credit. Findings and Conclusions, ¶5 (R. 2080).

5. Intermountain Trial Exhibit 24 discloses that in early February, 2000, First Security Bank repossessed at least three vehicles in the possession of Victor and Cindy Lawrence, and Paul and Wilma Schwenke, which Bonneville Investment Group, LLC had leased from West Valley Dodge in late 1998. Exhibit 24 is a Complaint filed on March 31, 2000, one day before Wayne Wong leased three new Isuzu Rodeos from Intermountain. Cindy Lawrence was one of multiple plaintiffs named by the Complaint, and stated a claim against First Security Bank for “breach of the peace” and “unlawful repossession,” for which she sought \$250,000 in damages. Complaint, Int. Trial Exh. 24 at 12-15. She also sought \$400,000 in punitive damages. Cindy Lawrence, Wilma Schwenke, A. Paul Schwenke, and others were represented on the pleading by attorneys Victor Lawrence and Jamis Johnson. The exhibit specifically discloses that a green Durango, in the possession of Cindy Lawrence, and parked outside her home, was repossessed on February 8, 2000. Exhibit 24 at 13, ¶70; see also Findings and Conclusions, ¶¶40-43 (R. 2086). On February 7, 2000, the day before, First Security Bank repossessed a blue Durango that was in the possession of Wilma and Paul Schwenke. Int. Exh. 24 at 7, ¶38.

6. About March 2000, Paul Schwenke, prompted by the loss of the Durangos, determined to lease certain vehicles for personal use by his wife Wilma and his daughter Tania. According to Mr. Lawrence, Mr. Schwenke also intended to lease a vehicle for Mr. and Ms. Lawrence’s personal use as partial payment for legal services provided by Mr. Lawrence. See Findings and Conclusions, ¶6 (R. 2080).

7. In March, 2000, approximately one month after their West Valley Dodge vehicles had been repossessed, Schwenke and Victor Lawrence negotiated the lease of three new Isuzu Rodeos (black, silver and green) from Intermountain. Findings and Conclusions, ¶¶7-8 (R. 2080-2081).

8. Mr. Schwenke's contact with Intermountain was ostensibly on behalf of cSave.net, presumably as the prospective lessee. However, the negotiated leases were not signed on behalf of cSave.net. Instead, they were signed by Wayne Wong, who was presented to Intermountain as being the owner and manager of cSave.net. See Findings and Conclusions, ¶8 (R. 2080).

9. Although Mr. Schwenke appeared to have controlled most of the negotiations with Intermountain, the Court found that Mr. and Ms. Lawrence also were involved in the lease negotiations-at least to the extent that both were aware that the monthly payments on each vehicle were supposed to be approximately \$360. Findings and Conclusions, ¶12 (R. 2081).

10. Mr. Lawrence issued a personal check to Intermountain in the amount of \$3000, which covered \$1000 cash down for each of the three vehicles. Mr. Lawrence claimed he was subsequently reimbursed for that expenditure, although the source of the reimbursement was not made clear at trial. Findings and Conclusions, ¶12. (R. 2081).

11. The three original plaintiffs other than Wayne Wong (Cindy Lawrence, Wilma Schwenke and Tania Schwenke) and also Victor Lawrence and Paul Schwenke, promised to pay Wong \$10,000 if he would use his credit-worthiness and sign the leases for the vehicles that the Schwenkes and Lawrences desired to obtain. Findings and Conclusions, ¶9 (R. 2081); Complaint



at ¶41 (R.1 and Int. Trial Exh. 31); Answer, Second Counterclaim and Second Third Party Complaint, at 13, ¶37 (R. 738, 750).

12. Accepting the Schwenkes' and the Lawrences' offer to pay him \$10,000, Wong signed leases for the three new Isuzu Rodeos. Int. Trial Exhibits 1 (for black Rodeo), 4 (green Rodeo), and 7 (silver Rodeo). Mr. Wong personally signed each of the three leases as the lessee, with no present intention to make the lease payments on any of the three vehicles, as they became due. Findings and Conclusions, ¶¶13, 14 (R. 2081-2082). Although he signed the lease agreements in his personal capacity, Wong testified he did not intend to make the monthly lease payments. Tr. 141:23-142:5 (6/04/07). Wong said he understood that "the people [who were] going to use the vehicles [would] be responsible for paying the payments and insurance and everything else." Tr. 142:2-11 (6/04/07).

13. Neither Mr. Schwenke, nor any of the original plaintiffs, including Mr. Wong, disclosed to Intermountain that plaintiffs were paying Mr. Wong \$10,000.00 in exchange for his signature on the leases. Tr. 144:17-145:4 (6/04/07). Tom Watkins, owner and general manager of Intermountain, testified that had Intermountain been aware of this fact, it would not have leased the vehicles to Mr. Wong. Findings and Conclusions, ¶10 (R. 2081).

14. Wong also did not disclose to Intermountain that he had no intention to make the lease payments as they came due. Tr. 145:5-12 (6/04/07).

15. Also in connection with the signing of the leases, Mr. Wong signed a commitment to maintain insurance on the leased vehicles, and provided Intermountain his automobile insurance information and policy number with Hartford Insurance Company. At some point in

the next several months, however, Mr. Wong allowed his insurance coverage on each of the three leased vehicles to lapse. Findings and Conclusions, ¶18 (R. 2083).

16. Wong did not disclose to Intermountain that he intended to let his insurance on the three Rodeos lapse shortly after he signed the lease agreements.

17. Following Mr. Wong's signing of the leases, Wilma Schwenke, Tania Schwenke, and Cindy Lawrence took possession of the vehicles. Paul Schwenke and Wilma took possession of the silver Rodeo, Tania took possession of the green Rodeo, and Victor and Cindy Lawrence took possession of the black Rodeo. Findings and Conclusions, ¶19 (R. 2083).

18. After signing the leases for the three new Rodeos, Wong never again saw any of them. Tr. 145:17-146:1 (6/04/07). He also was not told, and thus did not know who had possession of and was using the three vehicles. Tr. 145:24-146:15 (6/04/07). Wong was curious to know who was using the vehicles, but he never asked. Tr. 146:16-22; 150:20-151:2 (6/04/07).

19. Intermountain sold the silver and green Rodeos, and lease agreements thereon, to Isuzu Motors Acceptance Corporation and Isuzu LT. Intermountain sold the black Rodeo, and the lease thereon to Bank of America. Findings and Conclusions, ¶20 (R. 2083).

20. None of the plaintiffs made any monthly lease payments whatsoever on any of the three vehicles. Neither did Mr. Schwenke, cSave.net, nor Mr. Lawrence make any payments. Findings and Conclusions, ¶21 (R. 2083).

21. A Verified Complaint was filed in this action on May 25, 2000. R. 1. Plaintiffs were at the time represented by attorney Jamis A. Johnson, who has since been disbarred. The Complaint was verified under oath by disbarred and since convicted felon, A. Paul Schwenke.

Attorney Victor Lawrence, Cindy Lawrence's husband, notarized Paul Schwenke's signature on the Complaint. Plaintiffs alleged breach of contract and sought to enjoin lessors from enforcing the terms of three lease agreements. Plaintiffs did not however, return or offer to return the three leased Rodeos, nor did they tender monthly payments as they became due.

22. Beginning in May 2000 and thereafter each month for several months, Mr. Wong received multiple notices from Bank of America that lease payments on the black Rodeo were due, and that late fees were accruing. See Int. Trial Exh. 20. As he did with demand letters he received concerning the silver and green Rodeos, Mr. Wong ignored the Bank of America notices and turned them over to Mr. Schwenke. Mr. Wong did not inquire into who had possession of the Black Rodeo, nor did he make any of the payments as demanded. Findings and Conclusions, ¶24 (R. 2084).

23. Intermountain answered the Complaint on June 26, 2000. R. 29.

24. On September 26, 2000, the Court granted Intermountain's Motion for Partial Summary Judgment (R. 70), in which the Isuzu defendants joined (R.122). The Order and Judgment (R. 153) dismissed with prejudice the claims and causes of action originally pleaded by Cindy Lawrence, Wilma Schwenke and Tania Schwenke against Intermountain and the Isuzu defendants. The Court did not, though, dismiss Wong's claims and causes of action.

25. In October, 2000, Intermountain repurchased from the Isuzu defendants the silver and green Rodeos and the corresponding lease contracts, as the lease agreements were in default. Findings and Conclusions, ¶23 (R. 2083).

26. On November 13, 2000, Intermountain, which at the time was only a defendant in this action, filed a separate action (case #000909209), as a plaintiff, to recover the silver Rodeo which, Intermountain had learned, was in the possession of Paul and Wilma Schwenke at their home in Kanosh, Utah. Intermountain's Complaint in case No. 000909209, R. 393-396, named Paul Schwenke, Wilma Schwenke, and Wayne Wong as defendants and alleged that Intermountain was entitled to recover the silver Rodeo. The Court (Medley, J.) issued a prejudgment writ of replevin, the issuance of which was later affirmed after a hearing demanded by Schwenke. R. 209.

27. In November 2000, pursuant to the Writ of Replevin issued by the Court, a sheriff repossessed the silver Rodeo from Paul and Wilma Schwenke's residence in Kanosh, Utah. On repossession of the vehicle, Intermountain learned that the silver Rodeo had been in an accident and sustained substantial damage. Intermountain repaired the damage and later sold the silver Rodeo to a retail customer for \$13,898.00. Findings and Conclusions, ¶27 (R. 2084); see also Int. Trial Exhibits 47-55.

28. On December 6, 2000, Bryan Fishburn entered an appearance on behalf of Isuzu Motors Acceptance Corp. and Isuzu LT, as well as Intermountain. R. 220.

29. On December 12, 2000, Bank of America answered the original Complaint, and counterclaimed against Wong. R. 228.

30. On January 3, 2001, the court (Henriod, J.) entered an Order Compelling Answers to Interrogatories, which commanded Cindy Lawrence, A. Paul Schwenke, Wilma Schwenke and Wayne Wong each to answer Interrogatories, under oath, that Intermountain had previously

served on them. It would be almost a year before Cindy Lawrence and Mr. and Mrs. Schwenke answered the Interrogatories, and then only after they had been found and held to be in contempt of court.

31. By Order entered on January 30, 2001, R. 355, the trial court (Henriod, J.) ordered that case no. 000909209 be consolidated with this case, no. 000904217. R. 355.

32. Because no monthly lease payments had been made on the black Rodeo during the first ten months of the lease term, Bank of America required Intermountain to repurchase the lease and the black Rodeo at a cost of \$35,278.24. Findings and Conclusions, ¶25 (R. 2084); Int. Trial Exhibits 61 and 62.

33. On January 31, 2001, Bryan Fishburn entered an appearance for Bank of America. R. 358.

34. Also on January 31, 2001, on the same day Intermountain regained ownership of the black Rodeo, Intermountain unsuccessfully attempted to repossess it while in a parking garage adjacent to Mr. Lawrence's law office at the Lexington Law Firm in Salt Lake City. Mr. Watkins was present at the attempted repossession. A confrontation between Mr. Watkins and Mr. Lawrence ensued, and police were called to the scene. Findings and Conclusions, ¶28 (R. 2084).

35. After having returned to the parking garage from his office and seeing that someone was in the process of taking possession of the black Rodeo, Victor Lawrence "without cause or justification . . . attacked Watkins by seizing him and grabbing his head in a headlock. During this altercation, Watkins suffered injuries to the head as a consequence of the attack by

Lawrence.” See Int. Trial Exh. 106 (Findings of Fact made by Third Dist. Court, Judge Iwasaki, Feb. 8, 2008 in Lawrence v. Intermountain, case no. 020906142, Addendum “A” hereto; see also Supp. Findings and Conclusions, ¶1 at 2-3 (R.2499-2500)).

36. When police arrived on the scene, Watkins showed them and Lawrence documentation evidencing Intermountain’s reacquired rights over the black Rodeo. Mr. Lawrence nonetheless said he would not turn over the vehicle without a court order. The police allowed Mr. Lawrence to leave the scene with the black Rodeo. Findings and Conclusions, ¶28 (R. 2084).

37. Immediately after the attempted repossession, Mr. Lawrence turned the black Rodeo over to Mr. Schwenke, notwithstanding Mr. Lawrence’s knowledge that Intermountain was claiming ownership of the black Rodeo. Upon receiving possession of the Black Rodeo, Mr. Schwenke gave permission to a family member to drive the black Rodeo to California, where it was subsequently totaled in a single vehicle accident. Findings and Conclusions, ¶29 (R. 2084).

38. On February 6, 2001, the Court (Henriod, J.), over Wong’s objection, and following a hearing, ordered the Millard County Sheriff to release the silver Rodeo to Intermountain. Minute Entry, R. 367; Order to Millard County Sheriff, R. 368. According to the Court’s Minutes, Jamis Johnson appeared at the hearing on behalf of the Schwenkes and Wayne Wong.

39. Following the hearing on February 6, 2001, the Court authorized the withdrawal of Jamis Johnson as counsel for Wayne Wong, Cindy Lawrence, and Wilma, Tania and Paul Schwenke. R. 486.

40. On May 7, 2001, having obtained leave of court to do so, R. 523, Intermountain filed an amended pleading, which it titled “First Amended Answer, Counterclaim, and Third Party Complaint.” R. 526. In the course of its amended pleading, it pleaded causes of action and sought damages against the original plaintiffs, as well as against A. Paul Schwenke and third party defendant Victor Lawrence, for fraud, conspiracy to defraud, conversion, and unjust enrichment; and against Wong for breach of contract. R. 526, 534-541. Intermountain’s Amended Answer and Counterclaim gave the opposing parties notice of its acquisition of Bank of America’s and Isuzu’s contracts and rights, and the vehicles, ¶¶37 and 39 (R. 533), and was served by mail on Cindy Lawrence, Wayne Wong, Paul Schwenke, and Wilma Schwenke, at their residential addresses, R. 543, as Jamis Johnson had withdrawn as their attorney. This pleading also joined Victor Lawrence, and cSave.net, LLC, which Wayne Wong supposedly managed, as third party defendants. Victor Lawrence was personally served with process.

41. On May 23, 2001, because Intermountain still did not know who had possession of the green and black Rodeos, Intermountain served Interrogatories and Requests for Production of Documents on the Schwenkes, Mr. and Ms. Lawrence, and Mr. Wong, to discover the location of those vehicles. Findings and Conclusions, ¶30 (R. 2084).

42. Despite the obvious conflict of interest created by the fact that he was now a defendant and alleged to have conspired with Wong, Schwenke and other parties, Victor Lawrence, on June 4, 2001, entered an appearance on behalf of all parties adverse to Intermountain, including himself. R. 717. Wong testified at trial that he did not know that Lawrence had entered an appearance on his behalf. He did not authorize Lawrence to appear on

his behalf. And he did not waive potential conflicts of interest in connection with Lawrence's representation of Wong, others, and himself. Wong, Tr. 161:16-162:20 (6/04/07). Although Lawrence, apparently on his own and, initially at least, without Wong's knowledge or consent, entered an appearance on Wong's behalf, he did not disclose to Wong that he and his wife, Cindy, had possessed and used the black Rodeo through January 31, 2001. Tr. 163:6-9 (6/04/07).

43. Victor Lawrence, on June 5, 2001, filed, on his behalf and on behalf of all parties adverse to Intermountain, a pleading in response to the amended pleading that Intermountain had filed on May 7, 2001. Lawrence, et al., called their responsive pleading an "Answer, Second Counterclaim, and Second Third-Party Complaint." R. 738-765.

44. On June 13, 2001, the Lawrences, Schwenkes and Wong notified the Third District Court that they had removed the case to the United States District Court. R. 766, 812. Wong testified at trial that no one told him the action has been removed to federal court, and at the time he was not aware that Victor Lawrence was acting as his attorney. Tr. 164:6-13 (6/04/07).

45. The underlying case languished in federal court until September 2001, when the federal court remanded the case because it lacked removal jurisdiction. Order of Remand (R. 799). The United States District Court assessed sanctions in the sum of \$1,500.00 against those who had removed the case.

46. The trial court entered summary judgment in favor of Intermountain, Inc., as assignee of Bank of America's rights, against Wayne Wong, for breach of his contract/lease agreement on the black Rodeo. This judgment, entered September 21, 2001, awarded



Intermountain damages against Wong in the sum of \$32,852.29 plus costs of court in the sum of \$613.40. Order Granting Motion for Partial Summary Judgment. (R. 786). Although represented still at the time by Victor Lawrence, Wong testified that no one, at the time, informed him that a judgment had been entered against him. Tr. 168:6-169:4 (6/04/07). This judgment debt, for breach of contract, was subsequently discharged in the course of a bankruptcy case that Wong filed in 2003.

47. As part of the Order entered on September 21, 2001, the Court, in addition to entering partial summary judgment in favor of Intermountain against Wong for breach of contract, decreed and ordered as follows:

4. Intermountain is entitled to immediate possession of the black Rodeo, VIN 4S2DM58W7Y4302440.

5. **None of the other parties in this action other than Intermountain are entitled to possession of the black Rodeo.** Each, including all parties other than Wong, is ordered to deliver the black Rodeo to Intermountain immediately and without further delay, if in his/her possession or under his/her control. **Wong was in default and not entitled to continued possession once he missed his first lease payment. None of the other parties who have aligned themselves with Wong were at any time entitled to continued use and possession of the black Rodeo without permission of the lessor, which according to the undisputed material facts before this Court was never sought or obtained.**

R. 786, 788 (Henriod, J.) (emphasis added). The Court, on January 7, 2002, entered an Order which included similar language regarding the green Rodeo. R. 1099, 1101.

48. As part of an Order entered on January 7, 2002, the Court entered summary judgment in favor of Isuzu Motors Corporation and Isuzu LT, and dismissing with prejudice all claims Wong and the other original plaintiffs had alleged against them. R. 1099, 1102.

49. The Court (Henriod, J.) issued a Writ and Order of Replevin on the black Rodeo on October 5, 2001 and a Writ and Order of Replevin on the green Rodeo on January 10, 2002. Neither Order of Replevin resulted in the immediate return of the black and green Rodeos, however. Only after the Court entered an Order on February 26, 2006 finding the parties in contempt of court, did they finally answer the Interrogatories intended to ascertain the location of the black and green Rodeos. Findings and Conclusions, ¶32 (R. 2085).

50. On or about March 11, 2002, Mr. Schwenke finally returned the green Rodeo to Intermountain, at which time Intermountain discovered that it had also sustained substantial damage. Intermountain sold the green Rodeo at auction a few months later for \$8,310.08, after attempting but being unable to sell it on the retail market. Findings and Conclusions, ¶33 (R. 2085).

51. When Mr. Schwenke finally returned the black Rodeo, in 2002, it was delivered to Intermountain on a flatbed truck having been totaled in an accident in California. Intermountain unsuccessfully attempted to sell what was left of the black Rodeo to a wholesaler, but ended up selling the vehicle to one of its employees for \$1,200.00. Findings and Conclusions, ¶34 (R. 2085).

52. After repurchasing the three Rodeos and the leases from Bank of America and Isuzu Motors Acceptance Corporation/Isuzu LT for \$95,752.45, incurring approximately

\$8,000.00 in expenses (not including attorneys fees) in recovering and preparing the vehicles for sale, and reselling the three vehicles for \$23,408.98, Intermountain was left with a net loss of \$80,412.87. Findings and Conclusions, ¶35 (R. 2085); see also Int. Trial Exh. 66.

53. Victor and Cindy Lawrence on May 15, 2002, moved for summary judgment, by which they sought to have all claims pleaded against them by Intermountain dismissed as a matter of law. Their motion was eventually denied, with the exception that the court - on the basis of the Lawrences' argument - dismissed without prejudice Intermountain's equitable claim for unjust enrichment. R. 1555.

54. On July 8, 2002, Victor Lawrence filed a separate civil action against Intermountain and Tom Watkins, in which he sought damages for Watkins' alleged assault and battery against him in connection with Intermountain's and Watkins' failed effort to take possession of the black Rodeo on January 31, 2001. Lawrence v. Intermountain, Inc. and G. Thomas Watkins, Third Dist. Court, case no. 020906142 (Iwasaki, J.). Watkins counterclaimed against Lawrence for assault and battery.

55. In November, 2002, Wong and Wilma Schwenke filed an appeal, alleging various errors committed by the trial court. Appeal No. 20021027-CA. The appeal was dismissed because no final judgment had been entered.

56. A few days following the dismissal of Wong's appeal and Remittitur issued September 9, 2003, Wong, on September 18, 2003, filed with the United States Bankruptcy Court a petition for relief under Chapter 7 of the United States Bankruptcy Code. Representing himself, Wong did not list Intermountain, Inc. as a creditor; thus Intermountain was not notified

and did not learn of Wong's bankruptcy filing until too late to file a nondischargeability action under 11 U.S.C. §§523(a)(2)(A) and 523(c).

57. Having finally discovered that Wong had filed bankruptcy in September, 2003, and having researched the issue of its rights as "an omitted creditor," Intermountain, in June, 2005, sought and obtained leave to amend its May, 2001 pleading in order to add a fraud based cause of action against Wong pursuant to federal law, 11 U.S.C. §523(a)(3)(B).

58. The Schwenkes failed to appear personally or through counsel at a pretrial conference held on August 14, 2006 and, also, at a rescheduled pretrial conference held November 27, 2006. As a consequence, their default was certified and a default judgment was entered against them. Order Striking Pleadings and Entry of Default Judgment, entered March 2, 2007 (R. 1946).

59. Intermountain's claims and causes of action were finally tried to the Bench on June 4-8, 2007 (Lindberg, J.). Intermountain tried its claims against three defendants: Wayne Wong, Victor Lawrence, and Cindy Lawrence.

60. On August 13, 2007, the trial court entered detailed Findings of Fact and Conclusions of Law. It also entered Judgment in favor of Intermountain, against Victor Lawrence, Cindy Lawrence, and Wayne Wong. Findings of Fact, Conclusions of Law, Judgment, and Order (R. 2079).

61. The Judgment entered on August 13, 2007, held that "Wayne Wong, Victor Lawrence and Cindy Lawrence are jointly and severally liable to Intermountain for fraud or conspiracy to defraud in the amount of \$80,412.87." R. 2094.

62. The Judgment also found Victor and Cindy Lawrence “jointly and severally liable to Intermountain for conversion of the black Rodeo.” R. 2094. It found that Victor and Cindy Lawrence were jointly and severally liable to Intermountain for damages “in the amount of \$3,625.40 (representing fair rental value of the black Rodeo from April 1, 2000 to January 31, 2001 at \$362.54 per month . . .); but found Victor Lawrence “separately liable to Intermountain for his conversion of the black Rodeo in the amount of \$34,284.20 (representing Intermountain’s cost to recover and repurchase the black Rodeo) less the \$1,200.00 it received by selling it . . . .” R. 2094.

63. By Minute Entry and Order dated September 20, 2007, the Court granted Intermountain’s Motion to Amend the Judgment entered on August 13, 2007, to include prejudgment interest. R. 2158.

Thus, the Court finds that the Defendants should be held jointly and severally liable for fraud or conspiracy to defraud in the amount of \$80,412.87 plus prejudgment interest in the amount of \$57,854.38.

R. 2160. The judgment against Wayne Wong, Victor Lawrence, and Cindy Lawrence, as amended, thus totaled \$138,267.25 as August 13, 2007, the date on which judgment was entered.

64. On January 16, 2008, the claims in the Lawrence v. Intermountain/Watkins case were tried to the Bench, with Judge Iwasaki presiding over the trial.<sup>1</sup> Victor Lawrence’s claims against Watkins for assault and battery were dismissed with prejudice. The trial found in favor of Watkins on Watkins’ counterclaim against Lawrence for assault and battery, but awarded

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<sup>1</sup> Intermountain and Tom Watkins were represented by attorney Wynn Bartholomew. Victor Lawrence was represented by attorney Blake Atkin.

Watkins nominal damages (\$10) because Watkins did not introduce any medical bills into evidence. The court, Judge Iwasaki, made the following findings of fact:

3. On or about March 31, 2000, Wayne Wong entered into a written lease agreement to lease a black Isuzu Rodeo (hereinafter the “vehicle”), VIN 452DM58W7Y4302440, from Intermountain, Even though others may have negotiated and taken actual possession of said vehicle, the vehicle was leased to Wayne Wong.
4. Pursuant to said lease agreement, Wayne Wong did not have authority to sublease or grant permission to anyone except on a temporary basis to use said vehicle without the express permission of Lessor.
5. Although Lawrence testified that he and his family had permission to use said vehicle, his testimony was not credible. There was no credible evidence that Lawrence, or his family, ever had permission to use the vehicle.
6. Wayne Wong was obligated by the lease agreement to make monthly lease payments to Lessor in the amount of \$364.52. Neither Wong nor Lawrence, nor anyone else acting on their behalf, ever made any monthly lease payment on said vehicle.
7. As a result, said written agreement was in default and the vehicle became subject to repossession by the Lessor.
8. Intermountain bought the vehicle back from Bank of America on January 31, 2001, and had authority to repossess said vehicle as Lessor on that date.
9. Later on or about January 31, 2001, said vehicle was located by Watkins in a parking garage located in Salt Lake City, State of Utah.
10. Watkins and Duane Smith of Noorda Towing attempted to repossess said vehicle from the parking garage. Prior to attempting to repossess said vehicle, Watkins called Salt Lake City Police Department and attempted to notify them of his intent to repossess.
11. Said vehicle was secured by a lockbar owned by Lawrence immobilizing the steering wheel of said vehicle.

12. Access to the vehicle was gained by a duplicate key made by Watkins. Watkins and Duane Smith were attempting to saw through the cylinder of said lockbar with a hacksaw when they were approached by Lawrence.

13. Lawrence asked Watkins and his agent what they were doing in the vehicle.

14. Lawrence entered the vehicle and seized personal property of Duane Smith and refused to return said personal property. Lawrence asked Watkins and his agent to leave the vehicle, which they did.

15. Thereafter, Watkins attempted to retrieve Duane Smith's tools from the vehicle. Without cause or justification, Lawrence attacked Watkins by seizing him and grabbing his head in a headlock. During this altercation, Watkins' head and neck were injured, causing a cut to his head and bruise to the neck.

16. Watkins suffered injuries to the head as a consequence of the attack by Lawrence.

Int. Trial Exh. 106 (emphasis added). A copy of the above Findings of Fact is attached hereto at Addendum "A."

65. A second trial in this case was conducted on March 10 and 11, 2008, the purpose of which was to determine the amount of punitive damages to be assessed against Victor Lawrence, Cindy Lawrence, and Wayne Wong.

66. The findings of fact made by Judge Iwasaki were received in evidence during the course of the second trial on punitive damages. The trial court in this case (Judge Lindberg) considered Judge Iwasaki's findings in determining the amount of punitive damages to be assessed against Victor Lawrence. Supp. Findings and Conclusions at 2-3, 30 (R. 2499, 2500, 2527).

67. Following the trial on punitive damages, the trial court, on June 25, 2008, entered its "Supplemental Findings of Fact, Conclusions of Law, and Judgment." R. 2498-2542.

68. The trial court awarded Intermountain punitive damages against the remaining defendants, in the following amounts: against Victor Lawrence, in the sum of \$484,000.00; against Cindy Lawrence, in the sum of \$99,999.99; and against Wayne Wong, in the sum of \$138,267.25. R. 2541-2542.

69. The court made detailed Findings and carefully explained why it concluded the preceding sums were appropriate as punitive damages. R. 2498-2552.

#### **VI. SUMMARY OF APPELLEE'S ARGUMENT**

1. The Court did not err in finding and holding Victor and Cindy Lawrence liable for conspiracy to defraud. A person need not, as the Lawrences contend, have personally misrepresented material facts to a third person, on which it relied to its detriment, in order to be held liable for conspiracy to defraud. The Lawrences do not marshal the evidence that supports the trial court's findings of fact on conspiracy to defraud. The evidence supported the court's findings and conclusions that Victor and Cindy Lawrence conspired with the Schwenkes and Wayne Wong to defraud Intermountain.

2. The Court did not err in finding that Cindy Lawrence had knowledge of an agreement to pay Wayne Wong \$10,000, and knowledge of the conspiracy to defraud Intermountain, based in part on a judicial admission in a Complaint, which named her as one of the plaintiffs. As a plaintiff, Cindy Lawrence is bound to statements of fact, or admissions, in her pleadings. She might have distanced herself from the judicial admission in her Complaint had she timely moved to amend her Complaint, but she did not try until it was too late. Moreover, Cindy Lawrence



ratified the Complaint, as hers, when deposed on March 20, 2002. Intermountain, at trial, proved the elements of a civil conspiracy against Victor and Cindy Lawrence.

3. The Court did not err in finding and holding that Victor Lawrence conspired with others to defraud Intermountain in part, but only in part, based on his marriage to Cindy Lawrence, who the Court concluded knew of the inducement promised to Wayne Wong if he would sign, in his personal capacity, to lease vehicles that were really intended for the Lawrences' and the Schwenkes' personal use. Moreover, Victor Lawrence, in the Answer he prepared as attorney on behalf of the other parties and himself, alleged in a pleading that "Victor Lawrence and A. Paul Schwenke agreed to pay Wayne Wong \$10,000."

4. The Court did not err in finding and holding Victor and Cindy Lawrence liable for conversion of the black Rodeo. Bank of America owned the black Rodeo until January 31, 2001, at which time it conveyed ownership of the black Rodeo and assigned to Intermountain all its rights with regard to the black Rodeo, including implicitly any claim Bank of America had for conversion. Intermountain, as assignee of Bank of America's rights, proved the elements of conversion.

To Intermountain's recollection, the Lawrences did not, at trial, argue that Intermountain lacked standing to plead a cause of action for conversion because the chose-in-action was still held by Bank of America. By failing to plead lack of standing as an affirmative defense, the Lawrences waived that defense.

The trial court was justified in finding that Victor Lawrence was liable for more damages for conversion of the black Rodeo, than was Cindy Lawrence.

5. The evidence at trial and the trial court's findings and conclusions that Victor and Cindy Lawrence conspired to defraud Intermountain, and that they were liable for conversion of the black Rodeo, support the court's conclusion that an award of punitive damages against both Victor and Cindy Lawrence was warranted. The court followed Utah law in arriving at its decision, and in determining what sums were appropriate to award as punitive damages.

6. The punitive damages that the court awarded against Victor Lawrence and against Cindy Lawrence did not violate either of the Lawrences' constitutional rights, and were not excessive.

## **VII. APPELLEE'S ARGUMENTS ON APPEAL**

### **1. THE TRIAL COURT DID NOT ERR IN HOLDING THAT VICTOR LAWRENCE AND CINDY LAWRENCE CONSPIRED WITH WAYNE WONG AND THE SCHWENKES TO DEFRAUD INTERMOUNTAIN.**

The trial court found that both Victor Lawrence and Cindy Lawrence participated in a conspiracy to defraud Intermountain, by which they directly benefitted by securing for their personal use a new black Isuzu Rodeo, which they drove for approximately ten months without making any payments for its use. The trial court correctly defined the tort of conspiracy to defraud, and correctly noted that liability for conspiracy to defraud must be proven by clear and convincing evidence, citing Crane Co. v. Dahle, 576 P.2d 870, 872 (Utah 1978). Findings and Conclusions, ¶46 (R. 2087). The trial court found, by clear and convincing evidence, that Wayne Wong defrauded Intermountain. Findings and Conclusions, ¶¶54-55 (R. 2089). It also found, by clear and convincing evidence, that Victor Lawrence and Cindy Lawrence conspired with Wayne Wong and the Schwenkes to defraud Intermountain, for which it held Wong and the

Lawrences liable in damages. Id., ¶¶62, 65 (R. 2092). The trial court found that the damages caused to Intermountain by the fraud perpetrated by Wayne Wong, with whom the Lawrences and Schwenkes conspired, was \$80,412.87, not including prejudgment interest. Id., ¶¶35, 69 (R. 2085, 2094). With prejudgment interest, the damages caused as a result of the fraud, in which the Lawrences conspired, amounted to \$138,267.15 as of August 13, 2007, the date on which the trial court entered judgment for compensatory damages in favor of Intermountain, against the Lawrences. See Minute Entry and Order (09/20/2007), R. 2158, 2168 (granting Intermountain's motion to amend judgment, to include prejudgment interest).

**A. Elements Required to Prove Conspiracy to Defraud.**

Persons who participate jointly in a fraud may be held jointly liable for damages caused by the fraud. Schwartz v. Tanner, 576 P.2d 873, 875 (Utah 1978). In order to prove civil conspiracy, generally, a plaintiff must establish the following elements: (1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof. Israel Pagan Estate v. Cannon, 746 P.2d 785, 790 (Utah App. 1987).

A person can be held liable in damages under Utah law for conspiring with another person to defraud a third person. See DeBry v. Cascade Construction Co., 879 P.2d 1353, 1359 (Utah 1994). A conspiracy to defraud is a fraud committed by two or more persons who share an intent to defraud another. Id. A conspiracy to defraud “may be inferred from circumstantial

evidence, including the nature of the act done, the relations of the parties, and the interests of the alleged conspirators.” Israel Pagan, 791.<sup>2</sup>

**B. Victor and Cindy Lawrence Fail to Marshal the Facts and Argument that Support the Trial Court’s Findings of Fact and Conclusion that the Lawrences were Liable to Intermountain for Conspiracy to Defraud.**

A court’s determination that a party before it has participated in a conspiracy to defraud involves a mixed question of fact and law. Whether the trial court applied the correct standard and burden of proof in determining that a party is liable for conspiracy to defraud is a question of law, and should be reviewed for correctness. Findings of fact that concern actions and events, conduct, statements, relationships, and other circumstantial evidence that support a trial court’s conclusion that parties before it conspired to defraud a third person should be reviewed as factual determinations.

Findings of fact by a trial court are not to be set aside unless clearly erroneous. Utah R. Civ. P. 52. “Where a trial court’s rulings on highly fact-dependent issues are challenged, the Supreme Court grants broader than normal discretion to the trial court.” Chen v. Stewart, 2004 UT 82, ¶76, 100 P.3d 1177. In order to challenge the Court’s factual findings which it stated as supporting its conclusion that Victor and Cindy Lawrence conspired to defraud Intermountain, Mr. and Mrs. Lawrence, in the course of their appeal, should “first marshal all of the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below.” Wilson Supply, Inc.

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<sup>2</sup>The Utah Supreme Court added that conspiracy, however, “cannot be established by conjecture and speculation alone.” Israel Pagan, 791.

v. Fradan Mfg. Co., 2002 UT 94, ¶21, 54 P.3d 1177. The Utah Court of Appeals recently explained that “in order to properly discharge the debt of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of evidence introduced at trial which supports the very findings the appellant resists.” Neely v. Bennett, 2002 UT App 189, ¶11, 51 P.3d 724 (cited with approval by Utah Supreme Court in Chen, at ¶77). The process of marshaling, which is admittedly a counter-intuitive task, requires that the challenger “temporarily remove its own prejudices and fully embrace the adversary’s position”; and he or she must play the “devil’s advocate.” Chen, ¶78. “In so doing, appellants must present the evidence in a light most favorable to the trial court . . . and not attempt to construe the evidence in a light favorable to their case.” Id. “In sum, to properly marshal the evidence the challenging party must demonstrate how the court found the facts from the evidence and then explain why those findings contradict the clear weight of the evidence.” Id. If the challenger does not comply with the marshaling requirement, his or her appeal may be dismissed for that reason alone. Chen, ¶80; Wilson Supply, ¶26.

Victor and Cindy Lawrence do not marshal the evidence that supports the trial court’s findings and conclusion that they both conspired to defraud Intermountain. Instead they pick at the Court’s findings, choosing to focus on individual facts which, in isolation, they contend cannot support the Court’s findings and its conclusions that they conspired with Wayne Wong and the Schwenkes to defraud Intermountain.

**C. The Trial Court did not Need to Find that Victor and Cindy Lawrence Personally Made to Intermountain one or more Misrepresentations in Order for Them to be Found Liable for Conspiracy to Defraud.**

Victor and Cindy Lawrence implicitly concede that the evidence at trial supports the court's findings and conclusions that Wayne Wong engaged in fraud, and that he is liable to Intermountain for damages caused by his fraud. See also Findings and Conclusions, ¶¶9-10, 13, 17-18, 45, and 54-55 (R. 2081-2083, 2087, 2089). Nonetheless, the Lawrences contend that as "the trial court . . . could not find any affirmative misrepresentations made directly by the Lawrences to Intermountain," the trial court "for that reason, could not find the Lawrences liable for fraud." Appellants' Brief, at 15. According to the Lawrences' interpretation of the law, "In order to find the Lawrences liable for conspiracy to defraud, the trial court must find the elements of fraud were met with respect to the Lawrences themselves, and not with respect to a co-defendant." Appellants' Brief, at 20, with citation to DeBry, 1358. According to the Lawrences, "If neither Lawrence committed a fraud because, among other elements, they made no affirmative misrepresentations, they cannot be found liable for conspiracy to defraud, even if Mr. Wong was found to have committed civil fraud." Appellants' Brief, at 20.

The Lawrences' argument does not accurately state the law. According to the Utah Supreme Court, a person, under the appropriate circumstances, may be found liable for damages based on intentional misrepresentations made by another person, on which a third person relied to his detriment:

A person cannot be held liable for a fraudulent misrepresentation unless he made it himself or authorized another to make it for him or in some way participated therein. **However, the**

**circumstances may be such as to impose liability for representations made by others as where parties jointly participate in fraud. Conspiracy is an example thereof** but it is not essential that a conspiracy existed.

Schwartz v. Tanner, 576 P.2d 873, 875 (Utah 1978) (emphasis added). Although the Lawrences cite DeBry v. Cascade Enterprises in support of their interpretation of the law, a reading of that case indicates that the Utah Supreme Court considered whether Mr. and Mrs. DeBry were liable for conspiracy to defraud, having first held that they were not liable for fraud. DeBry, 1358-1359.<sup>3</sup> If the Lawrences' argument correctly states the law, there would be no reason to recognize what courts label "secondary fraud claims." See Coroles v. Sabey, 2003 UT App 339, ¶¶35-41, 79 P.3d 974.

The Restatement (Second) of Torts (1979) establishes that a person can be liable for an intentional tort committed by another person, under a variety of circumstances. See §§ 875-877.

For example, § 877 states that:

For harm resulting from the tortious conduct of another, one is subject to liability **if he** (a) orders or **induces the conduct**, if he knows or should know of circumstances that would make the conduct tortious if it were his own.

Restatement (Second) of Torts, § 877(a) (emphasis added).

Individuals who conspire with one another to orchestrate and/or carry out a fraudulent plan or scheme can be held liable for their conduct. **Even if a person does not commit a fraudulent act, he or she can be liable for the conspiracy.**

15A C.J.S. Conspiracy § 46 (2002) (emphasis added).

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<sup>3</sup> Under the facts of that case the Utah Supreme Court held that Mr. and Mrs. DeBry could not be found liable for conspiracy to defraud.

It is true that “secondary fraud claims,” which include conspiracy to defraud, require proof of an underlying fraud. Coroles, ¶36; Gildea v. Guardian Title Co., 970 P.2d 1265, 1271 (Utah 1998) (affirming dismissal on the pleadings of Gildea’s claim for conspiracy to defraud because plaintiffs did “not appeal the dismissal of their original fraud claim for failure to plead sufficient facts”); see also 15A C.J.S. Conspiracy § 46 (2002). In this case, an underlying fraud was proved; committed by Wayne Wong. Although the Lawrences did not personally make misrepresentations directly to Intermountain, they participated in the conspiracy by which they and the Schwenkes arranged for Wong to lease vehicles, under false pretenses, for their use. They knew, the court found, of the promise to pay Wong \$10,000 in order to induce him to sign leases for three new Isuzu Rodeos, for their and the Schwenkes’ use.

It was not necessary for Intermountain to prove that Victor or Cindy Lawrence directly misrepresented material facts to Intermountain, on which it relied to its detriment, for the trial court to find each of them liable for conspiracy to defraud.

**D. Intermountain at Trial Proved the Elements of a Civil Conspiracy to Commit Fraud.**

Intermountain proved the elements of a civil conspiracy, as Israel Pagan identifies those elements:

1. A combination of two or more persons: Paul and Wilma Schwenke, Victor Lawrence, and Cindy Lawrence acting in concert with Wayne Wong.



2. An object to be accomplished: to obtain three new vehicles for the Schwenkes and Lawrences to drive, for free; while inducing Wong to sign lease agreements which imposed on him the contractual liability. The trial court found that:

The goal of the conspiracy to defraud, in this case, was to acquire the free use of vehicles from a motor vehicle dealer and/or leasing company. Lawrence and the others engaged in conduct calculated to enable the conspirators to use the vehicles for as long as possible, to the extent even of ignoring court orders compelling discovery of their location and directing that the vehicles be returned to Intermountain.

Supp. Findings and Conclusions at 29 (R. 2526).

3. A meeting of the minds on the object or course of action: the Lawrences knew of and agreed with the object of the plan, as established by circumstantial evidence. Although there must be a meeting of minds on the object to be accomplished or course of action, “the agreement need not be formal” and “the understanding may be a tacit one.” 15A C.J.S. Conspiracy § 47 (2002). A conspiracy to defraud, according to the Utah Court of Appeals, can be inferred from circumstantial evidence. Israel Pagan, 791. According to the Restatement (Second) of Torts, “the agreement need not be expressed in words and may be implied and understood from the conduct itself.” § 876, comment (a) (1979). “Inferences of concerted action may be drawn from joint participation in the transactions and from enjoyment of the fruits of the transaction.” Lesikar v. Rappeport, 33 S.W.3d 282, 302 (Tex. App. 2000). Each conspirator need not have knowledge of all or even most details of the conspiracy. 15 C.J.S. Conspiracy ¶48 (2002).

4. One or more unlawful, overt acts: Wong's misrepresentations to Intermountain are the unlawful, overt act. Fraud is an "unlawful act" on which a civil conspiracy, and liability therefore may be based. Lesikar, 302.

5. And damages as a proximate result: Court found damages to be in the sum of \$80,412.87 plus prejudgment interest.

**E. An Attorney may be Liable for Conspiracy to Defraud**

Throughout his Brief, Victor Lawrence suggests that his privileged status as an attorney protects him against a finding that he conspired with other defendants to defraud Intermountain. According to Lawrence, he was just representing his clients.

"An attorney may be liable for conspiracy to defraud if he knowingly agrees with others to defraud a third person." Lesikar, 318; see also Celano v. Frederick, 203 N.E.2d 774, 778 (Ill. App. 1964) (holding that an attorney "may not use his license as a shield to protect himself from the consequences of his participation in an unlawful or illegal conspiracy"). The trial court found that Victor Lawrence conspired with the Schwenkes and Cindy Lawrence, and with Wong, to obtain new vehicles for the Lawrences' and Schwenkes' personal use, without intending to pay for them. Moreover, there was a strong indication he had engaged in the same scheme with the Schwenkes before, although Wong was not involved in the earlier case. Findings and Conclusions, ¶¶40-43 (R. 2086); Int. Trial Exh. 24. Victor Lawrence's involvement in the conspiracy to defraud Intermountain began more than a year before he appeared in the underlying case as attorney for the Schwenkes, Cindy Lawrence, Wong, and himself.

If an attorney conspires with others to defraud a third person and then, thereafter undertakes to represent his co-conspirators as well as himself in a civil action, it is easy to see how he, as an attorney, could use his knowledge of civil procedure to buy time and protect the object of the conspiracy. The trial court found that Victor Lawrence did just that after he entered his appearance on behalf of alleged co-conspirators, and engaged in a delaying action that bought months more additional time in which the Schwenkes, or their relatives, continued to use and drive the black and green Rodeos for free. Findings and Conclusions, ¶¶31-32, 66 (R. 2085, 2093); Supp. Findings and Conclusions, at 29-33 (R. 2526-2530).

**F. Each Party to a Civil Conspiracy to Defraud is Liable for All Damages that Result from the Underlying Fraud.**

A plaintiff is entitled to recover all damages that flow from a civil conspiracy. 15A C.J.S. Conspiracy § 44 (2002). Furthermore, each member of the conspiracy is liable for all damages resulting from the object of the conspiracy. *Id.*, § 18; Brown v. Birman Managed Care, Inc., 42 S.W.3d 62, 67 (Tenn. 2001). According to the Restatement, “one who accomplishes a particular consequence is as responsible for it when accomplished through directions to another as when accomplished by himself.” Restatement (Second) of Torts, § 877, comment (a) (1979). If Intermountain’s damages caused by Wayne Wong were, as the trial court found, \$138,267.15 as of August 13, 2007 (including prejudgment interest), R. 2160, then each conspirator is liable, as is Wong, for damages in that amount.

The Lawrences do not appeal the measure of damages against each of them for conspiracy to defraud.

**2. THE TRIAL COURT DID NOT ERR IN FINDING THAT CINDY LAWRENCE HAD KNOWLEDGE OF THE CONSPIRACY TO DEFRAUD INTERMOUNTAIN, AND WAS A PARTY TO THE CONSPIRACY BASED IN PART ON HER JUDICIAL ADMISSION.**

Cindy Lawrence claims on appeal that the trial court erred in finding that she had knowledge of the plan and conspiracy to defraud Intermountain given that the court's findings and conclusion was [she alleges] based solely on her "judicial admission, and where the evidence clearly indicates she had no actual knowledge" of the conspiracy or the inducement of \$10,000 promised to Wong if he would sign lease agreements in his personal capacity. Appellant's Brief, at 23. The "judicial admission" to which Cindy Lawrence refers is ¶41 of her Complaint (R. 9), in which Cindy Lawrence and the other plaintiffs, including Wayne Wong, stated that "In order to induce plaintiff Wayne Wong to sign the leases, plaintiffs agreed to pay him \$10,000." See Findings and Conclusions ¶9 (R. 2081). This statement, if Cindy Lawrence is bound by it, establishes Cindy Lawrence's knowledge of a plan to compensate Wong to sign lease agreements for three new Isuzu Rodeos that would be used and driven by the Schwenkes and the Lawrences; under circumstances where neither Wong (notwithstanding his contractual commitment) nor the other plaintiffs intended to make the monthly lease payments.

The Complaint also stated, as fact, that plaintiffs, who included Cindy Lawrence, understood and intended that the black Rodeo was "Cindy's car," Complaint, ¶¶34(4) and 35(3) (R. 6, 7). This is a fact material to Intermountain's fraud and conspiracy to defraud claims because Wayne Wong presented himself to Intermountain as the lessee of the vehicles, without disclosure that one of the vehicles, instead, was intended for Cindy Lawrence's personal use; and

without disclosure that neither he nor Cindy Lawrence intended to make the lease payments on the black Rodeo that later came due.

**A. Parties, Including Plaintiffs, are Bound by Judicial Admissions.**

According to the Utah Supreme Court, “an admission of fact in a pleading is a judicial admission and is normally conclusive on the party making it.” Baldwin v. Vantage Corporation, 676 P.2d 413, 415 (Utah 1984) (citing to Yates v. Large, 585 P.2d 697 (Ore. 1978).) “A statement of fact in a party’s pleading is an admission that the fact exists as stated.” Moore v. Drennan, 523 P.2d 1250, 1252-53 (Ore. 1974). According to 71 C.J.S. Pleadings § 90 (2000):

The allegations in the pleadings are admissions against the party making them. Moreover, the allegations, statements, or admissions contained in a pleading are conclusive against the pleader.

According to the Iowa Supreme Court, “Averments in a pleading \* \* \* not withdrawn or superseded **are conclusive admissions of the facts pleaded.**” Hansen v. Lassek, 154 N.W.2d 871, 872 (Iowa 1967) (emphasis is added). Statements of fact contained in pleadings are “judicial admissions and, **as such, cannot later be contradicted by the party who has made them.**” Tops Apparel Manufacturing Co. v. Rothman, 244 A.2d 436, 438 (Pa. 1968) (emphasis added). “As to such admissions, there is no issue; no proof is required; and the party making them is bound thereby.” Hanson, 872. It follows that a party cannot subsequently take a position contradictory to her pleadings, and

that the facts which are admitted by the pleadings are to be taken as true against the pleader \* \* \*, whether or not they are offered as evidence.

Hanson v. Lassek, 154 N.W.2d at 873; see also 71 C.J.S. Pleading § 90 (2000).

**B. Cindy Lawrence is Bound by the Statements of Fact in her Complaint.**

The Complaint identifies Cindy Lawrence as a plaintiff. Thus, the statement at ¶41 is properly attributed to Cindy Lawrence. As a statement in a pleading, the statement at ¶41 was a judicial admission by Cindy Lawrence to which she was conclusively thereafter bound and was not at liberty, at trial, to contradict. The trial court, absent good reason to relieve Cindy Lawrence of her admission, was entitled to rely on the statement as an admission, as was Intermountain.

**C. Cindy Lawrence did not Give the Trial Court Good Reason to Relieve her of her Admission in the Complaint.**

The Utah Supreme Court, in Baldwin observed that, “the court **may** relieve a party from the consequences of a judicial admission.” Baldwin, 415 (emphasis added). There is, however, no requirement that it do so, especially where there is no good reason to do so.

**(1). Cindy Lawrence did not amend her Complaint to delete ¶41.**

One way in which a party may distance itself from a statement made in a pleading is to amend her pleading; upon which the statement remains admissible as evidence against the party who made it, but is no longer conclusive against the party who made it. According to Yates v. Large, the Oregon case which the Utah Supreme Court cited in Baldwin, “Upon the filing of an amended answer . . . any admission of fact in the superseded answer is no longer a judicial admission, but is admissible as evidence to establish plaintiff’s case.” Yates, 585 P.2d at 700; see also 71 C.J.S. Pleading § 91 (2000).

Seven years, however, lapsed between May 2000, when the Complaint was filed, and the first trial in this case, without any of the plaintiffs moving to amend their initial pleading. Victor

Lawrence, in his capacity as an attorney, entered an appearance on his wife's behalf on June 4, 2001, R. 717, undertaking her representation as the case stood at the time. In entering an appearance on behalf of Cindy Lawrence, his wife, Victor surely must have obtained and showed to her the Complaint that identified her as a plaintiff, and disclosed to her the allegations ascribed to her therein. Cindy Lawrence was shown a copy of the Complaint by Intermountain's counsel, if not earlier by Victor Lawrence or Jamis Johnson, when Intermountain deposed her on March 20, 2002; so clearly she had knowledge of the Complaint and its content by no later than March 20, 2002. Yet, over the next five years, and even though represented by her husband for much of that time, she did not move to amend her Complaint.

According to Yates, as would be the case in Utah, "whether to permit a party to file an amended pleading is ordinarily a matter within the sound discretion of the trial court." Yates, 585 P.2d 700. The gravity and consequence of her judicial admission finally having become apparent, Cindy Lawrence moved to amend her Complaint, by which she sought to delete ¶41. However, she waited until trial and closing argument to do so. Findings and Conclusions, ¶59 (R. 2091). By that time, Intermountain had introduced the Complaint into evidence (Int. Trial Exh. 31); Intermountain had relied on the statement at ¶41 to establish its claim against Cindy Lawrence for conspiracy to defraud, Trial Brief at 13 (R. 1961, 1973), Tr. 5-6 (6/04/07), Tr. 479:8-23 (6/08/07); and Judge Lindberg had identified Cindy Lawrence's judicial admissions made in her Complaint as part of her reason for denying Cindy Lawrence's motion to dismiss made at the close of Intermountain's case, Tr. 301-302 (6/05/07). In denying Cindy Lawrence's belated motion to amend, the trial court observed, in part, as follows:

¶59 Cindy Lawrence’s Motion to Amend Pleadings per Rule 15(b). At closing argument, Ms. Lawrence’s counsel moved to amend the pleadings so as to alter the effect of her prior judicial admissions. Specifically, Ms. Lawrence sought to amend paragraph 41 of the original complaint that stated “[I]n order to induce plaintiff Wayne Wong to sign on the leases, plaintiffs agreed to pay him \$10,000.00.” Under Rule 15(b), when issues not addressed in the pleadings are tried by express or implied consent, amendment may be made to conform to the evidence. Those circumstances are not applicable here.

\* \* \*

Additionally, this case has been pending since 2000, yet it was not until the Court noted that the allegations in the complaint were judicial admissions admissible against Ms. Lawrence, that she sought to amend the complaint to eliminate the effect of that admission. Ms. Lawrence has been represented by counsel at every stage of these proceedings, and either she or her counsel knew, or should have known, that Intermountain was relying on that statement in the complaint as support for its claims against her. Notwithstanding that knowledge, Ms. Lawrence waited until the last possible minute to challenge this particular admission. For all these reasons, the Court denies Ms. Lawrence’s motion to amend the pleadings.

Findings and Conclusions, ¶59 (R. 2090). As the trial court denied Cindy Lawrence’s last minute motion to amend her Complaint, she remained bound to the statements of fact and judicial admissions therein. It should be noted that **Cindy Lawrence has not appealed the trial court’s denial of her “last minute” motion to amend her Complaint.**

**(2). The trial court did not believe and dismissed Cindy Lawrence’s protestations that she knew nothing of the Complaint and the allegations therein, and that she did not authorize the Complaint to be filed on her behalf.**

Cindy Lawrence, in a desperate effort at trial to disassociate herself from ¶41 and other “admissions” in the Complaint, testified that she did not know a Complaint had been filed on her behalf in May 2000, that she had never read the Complaint, that she had not retained or authorized attorney Jamis Johnson to represent her, and that, prior to trial she had not known



what the Complaint said. Her testimony as to such things, first, does not establish their truth. A trial court is free to disregard the testimony of a witness. In fact, Rule 52(a), Utah R. Civ. P., states that “findings of fact . . . shall not be set aside unless clearly erroneous, **and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.**” Emphasis added. The trial court did not believe Cindy Lawrence’s testimony, and explicitly said so in its Findings of Facts:

Notwithstanding this judicial admission [referring to ¶41 of the Complaint], at trial Ms. Lawrence denied any knowledge of, or participation in, the payment offered to Mr. Wong . . . . Throughout the trial, Ms. Lawrence’s testimony was vague and inconsistent. As a result, the Court does not find Ms. Lawrence’s testimony credible.

Findings of Fact, ¶9 (R. 2081). According to ¶59 of the trial court’s Conclusions of Law:

This Court rejects Ms. Lawrence’s argument that all of the evidence at trial showed she knew nothing of the \$10,000 promised to Mr. Wong.

R. 2090. Also according to the trial court:

In testifying at trial, Ms. Lawrence seemed to have little regard for the truth, in that her testimony contradicted statements she had made in her Complaint, her sworn statements in answers to interrogatories filed September, 2001, her sworn testimony when deposed in 2002, and even testimony given during trial.

Supp. Findings and Conclusions, at 39 (R. 2536).

The fact that the trial court found Cindy Lawrence’s testimony on the above issues not to be credible, and it did not believe Mrs. Lawrence’s protestations, see ¶¶9 and 59 of the Court’s Findings and Conclusions, distinguishes this case from Malpica v. Sebastian, 99 Ill. App 3d, 425 N.E.2d 1029 (1981) (cited at p. 25 of Appellant’s Brief) (in which the trial court expressly found

that there had never in that case existed an attorney-client relationship between the defendant and the attorney who had drafted the Answer in question).

**(3). Cindy Lawrence Ratified the Complaint.**

At trial, Cindy Lawrence had just testified, under oath, that the very first time she had seen Int. Trial Exh. 31, her original Complaint containing ¶41, was “yesterday,” June 5, 2007, when she had been shown it while testifying. Tr. 345-346 (6/06/07). She had also just testified that she had not known that she was a plaintiff in a civil action by virtue of the Complaint that named her as a plaintiff. Tr. 345:16-19 (6/06/07).

In the subsequent cross-examination by Intermountain’s attorney, Cindy Lawrence acknowledged she had been deposed on March 20, 2002. The deposition transcript, which was received as Int. Trial Exh. 91, indicates that Cindy Lawrence was shown the original Complaint on March 20, 2002, when she was deposed. (Deposition Transcript, Cindy Lawrence Depo., Int. Trial Exh. 91 at 20.) The fact that Cindy Lawrence was shown a copy of the original Complaint when she was deposed on March 20, 2002, first, establishes the untruthfulness of her just completed testimony that she had first seen a copy of the original Complaint only the day before, on June 5, 2007. Intermountain’s attorney then read into the trial record Cindy Lawrence’s answer to a question asked in the course of the deposition by her co-conspirator, A. Paul Schwenke. It was Schwenke, in the March 20, 2002 deposition who asked:

Schwenke: So even though you have never seen this Complaint before as testified, this would have been the cause of action you would have asserted and in fact would have supported and consented for, is that correct? Your answer?

Cindy Lawrence, on March 20, 2002, answered:

C. Lawrence: Yes.

Tr. 349:18-25 (6/06/07). At trial, Intermountain also confronted Cindy Lawrence with her prior deposition testimony in response to a question asked at the deposition by her husband/attorney, Victor Lawrence, who, first noting that A. Paul Schwenke had signed the original Complaint under oath and that he, Victor Lawrence, had notarized Schwenke's signature verifying that the allegations in the Complaint were true, asked:

V. Lawrence: Did you have any reason to dispute that Mr. Schwenke was lying in this document?<sup>4</sup>

To which Cindy Lawrence responded:

C. Lawrence: No.

Tr. 350:1-351:8. Then, apparently trying to distance herself from her prior deposition testimony, Cindy Lawrence volunteered "But I did not read it that day, either, I looked at it. I didn't read it. \* \* \* Which I wish I had." Tr. 351:9-12 (6/06/07).

Cindy Lawrence on March 20, 2002, when deposed, thus ratified the statements attributed to her in the original Complaint, as a plaintiff. Cindy Lawrence, on March 20, 2002, was readily willing to endorse the content of the original Complaint even if she, as she later testified on June 6, 2007, [maybe] never actually read the original Complaint, which identified her as a plaintiff.

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<sup>4</sup>Intermountain believes that Lawrence meant to ask his wife if she had any reason to dispute that Schwenke was "telling the truth" and that this is how Cindy Lawrence interpreted his question, in answering it.

Cindy Lawrence now contends on appeal that she ratified only “the cause of action” asserted in the Complaint, but not the precise statements and allegations made in the Complaint. Appellant’s Brief, at 24. She did not make this argument at trial. Moreover, how can she now claim that she was, by her testimony in March 2002, endorsing only the “cause of action” stated by the Complaint but not particular statements and allegations made therein, if she (as she testified on June 6, 2007) had not before read the Complaint? Moreover, it is a distinction without significance. The allegation at ¶41, which goes to Cindy Lawrence’s knowledge of the monetary inducement promised to Wong, is part of the “cause of action” stated by her Complaint.

The court did not err in concluding that Cindy Lawrence, by her testimony on March 20, 2002, ratified the Complaint and the statements therein. The trial court’s conclusion as to ratification, furthermore, is supported by Cindy Lawrence’s failure, despite being represented by her husband for a significant portion of the time between her deposition and trial, to move to amend the original Complaint in order to omit Cindy Lawrence as a plaintiff or to delete ¶41.

**3. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN IMPUTING KNOWLEDGE OF THE CONSPIRACY TO VICTOR LAWRENCE BECAUSE OF HIS MARRIAGE TO CINDY LAWRENCE.**

Victor Lawrence claims on appeal that the trial court erred in imputing to him knowledge of the conspiracy involving his wife and Wayne Wong, because he was married to her at the time.

First, the trial court did not err in drawing certain inferences from the fact that Victor and Cindy were married, especially given Cindy’s participation in purchasing the vehicle and her and

Victor's subsequent free use of the black Rodeo. A conspiracy "may be inferred from circumstantial evidence, including the nature of the act done, **the relations of the parties**, and the interests of the alleged conspirators." Israel Pagan, 791 (emphasis added).

Second, Victor Lawrence's marriage to Cindy Lawrence was only one of several factors that the trial court considered in inferring that Victor Lawrence, too, participated in the conspiracy and, in particular, knew of the general plan as well as the monetary inducement promised to Wong. See Findings and Conclusions, ¶65 (R. 2092) (stating a list of reasons other than marriage, identified as "a" through "e," why the trial court concluded that Victor Lawrence conspired with others to defraud Intermountain):

Conspiracy to Defraud. . . . the Court concludes that Mr. Lawrence conspired to defraud Intermountain. **The following facts point to Mr. Lawrence's knowing and intentional participation in the fraud: (a) Approximately one month before Mr. Lawrence obtained possession of the Black Rodeo, West Valley Dodge repossessed a Durango from the Lawrences that had been leased by Mr. Schwenke under a similar arrangement. (b) Shortly thereafter, Mr. Lawrence assisted Mr. Schwenke in his efforts to secure a new vehicle by contacting a Bountiful dealership, and attempting to negotiate a new set of leases. (c) Mr. Lawrence was present at the negotiations the day Mr. Wong signed the leases and knew the general financial terms of the leases. Mr. Lawrence even testified that at one point he told Mr. Schwenke to go back to the Bountiful dealership if Intermountain could not meet the terms offered by that dealership. (d) Mr. Lawrence provided the down payment for each of the three Rodeos. (e) Mr. Lawrence took possession of the Black Rodeo with no intent or expectation to pay for the vehicle, and without ensuring that payment would be made. (f) Because Mr. and Ms. Lawrence were married and cohabiting at the time Ms. Lawrence participated in the inducement to Mr. Wong, it is reasonable to infer that Mr. Lawrence was also aware of that inducement. The Court thus concludes that on the day Mr. Wong signed the leases at Intermountain, Mr. Lawrence was fully aware of, and intentionally participated in, the scheme to obtain and use vehicles without intent to pay for their use. As a result of Mr. Lawrence's participation in the scheme, he benefitted personally to the detriment of Intermountain. Intermountain suffered actual and substantial**

financial damage from this fraudulent scheme. The Court holds that Mr. Lawrence was also a knowing and intentional participant in the fraud perpetrated by Mr. Schwenke and Mr. Wong.

R. 2092 (emphasis added). As to (a)-(f), Lawrence argues on appeal that none of these acts or instances involve wrongful conduct. Appellant's Brief, at 18-19. His argument misses the point. The point is not that (a)-(f) involve wrongful conduct, but that from such conduct and facts it can reasonably be inferred that Lawrence knew of the \$10,000 inducement offered to Wong to sign the leases in his personal capacity, and the plan to obtain from Intermountain new vehicles for the Schwenkes' and Lawrences' personal use without paying for them.

Third, Victor Lawrence's knowledge of the allegations in the original Complaint, including ¶41, at the time the original Complaint was filed, may be inferred from the fact that Victor Lawrence notarized Paul Schwenke's signature on the original Complaint. Int. Trial Exh. 31; R. 1, 10. As such, Victor Lawrence was aware of the Complaint's existence on May 25, 2000. It is incredulous that Victor Lawrence would, as an attorney, notarize the signature of a disbarred attorney to a Complaint that identified his wife as a plaintiff without reading the content of the Complaint. Victor Lawrence's knowledge of the original Complaint and the allegations therein may also be inferred from the fact that Lawrence and Jamis Johnson, at the time, were co-counsel on another case in which Paul Schwenke, Mrs. Schwenke, and Cindy Lawrence were parties, see Int. Trial Exh. 24 (Complaint dated March 30, 2000), and that Jamis Johnson was the attorney of record on the original complaint filed in this action. Clearly, Victor Lawrence at the time collaborated with Jamis Johnson on pleadings that involved his wife, Cindy, and the Schwenkes.

Finally, in making this argument on appeal, **Victor Lawrence either forgets or intentionally chooses not to disclose that he made the very same admission in the course of a pleading he prepared**, and filed with the district court on June 5, 2001. R. 738. Lawrence, as attorney representing himself as well as all parties then joined (who by now included Paul Schwenke and Victor Lawrence), stated as follows at p. 13, ¶37 of a pleading he titled “Answer, Second Counterclaim, and Second Third Party Complaint:”

Additionally, in order to induce WW to sign on the leases, buyers, **VL and APS agreed to pay WW \$10,000.00**, \$7,500.00 of which had already been paid and \$2,500 is still owing . . . .

R. 750 (throughout this pleading and at ¶37, above, Lawrence refers to the parties by their initials, using “WW” for Wayne Wong; “VL” for Victor Lawrence, “APS” for A. Paul Schwenke; and “CL” for Cindy Lawrence).<sup>5</sup> This statement, which is an admission by Victor Lawrence, as a party, in the course of a pleading that he, as an attorney, prepared, affirmatively alleges that he and Paul Schwenke agreed to pay Wong \$10,000 in order to induce Wong to sign the lease agreements. **This admission, by Victor Lawrence**, corroborates the trial court’s finding of fact that Victor Lawrence, too, knew about and participated in the agreement and plan to pay Wong \$10,000 if he would sign leases for three new vehicles, which Wong did under false pretenses. It also reveals Victor Lawrence’s duplicity.

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<sup>5</sup>This June 2001 pleading, incredibly, given Cindy’s subsequent “know nothing, knew nothing, did not know anything about it” testimony at trial, actually states that the three original plaintiffs other than Wong, who included Cindy Lawrence, “were to each be responsible for the monthly payments on the vehicle in her possession.” R. 741, ¶7.

The trial court did not commit reversible error in inferring that Victor Lawrence had knowledge of the plan, including the agreement to offer and pay Wong \$10,000 if he would sign lease agreements and promise to make the monthly lease payments that were due thereon, based **in part** on Victor Lawrence's marriage to Cindy Lawrence.

**4. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT VICTOR LAWRENCE AND CINDY LAWRENCE WERE LIABLE TO INTERMOUNTAIN FOR CONVERSION OF THE BLACK RODEO.**

**A. Elements of Conversion.**

Conversion is the "willful interference with a chattel done without lawful justification by which the person entitled thereto is deprived of its use and possession." Phillips v. Utah State Credit Union, 811 P.2d 174, 179 (Utah 1991). Although conversion "results only from intentional conduct it does not, however, require conscious wrongdoing, but only an intent to exercise dominion or control over the good inconsistent with the owner's right." Id. A person may be found liable for conversion of personal property even where he believes - or says he believed that he had a right to possess the item of personal property in question, if, in fact, he did not. See Mahana v. Onyx Acceptance Corp., 2004 UT 59, 96 P.3d 893; Lake Philgas Service v. Valley Bank & Trust Co., 845 P.2d 951 (Utah App. 1993).

**B. Intermountain had Standing to Assert a Claim for Conversion Against Victor and Cindy Lawrence for their Unauthorized Use of the Black Rodeo from April 1, 2000 to January 31, 2001, as Assignee of Bank of America's Rights.**

Victor and Cindy Lawrence contend on appeal that because Bank of America owned the black Rodeo from April 1, 2000 until January 31, 2001, Intermountain cannot therefore be



entitled to recover damages based on Mr. and Mrs. Lawrences' use and conversion of the black Rodeo from April 1, 2000 to January 31, 2001. Appellants' Brief at 27-28. Intermountain does not recall that the Lawrences made this argument to the trial court. Nonetheless, the argument is unpersuasive.

**(1). Bank of America assigned to Intermountain all its rights that concerned the black Rodeo and Wong's lease of the black Rodeo which, implicitly, included any cause of action Bank of America had against the Lawrences for conversion.**

Having received no lease payments for months, and Wong and other plaintiffs having in their Complaint contended that the lease agreements were void, Bank of America demanded that Intermountain repurchase the black Rodeo and Bank of America's rights under its lease agreement, which Intermountain did on January 31, 2001. See Int. Trial Exh. 61 (assignment by Bank of America to Intermountain of its rights, and transfer of its ownership of the black Rodeo); Trial Exh. 62 (Intermountain's check to Bank of America in the sum of \$35,278.24); Trial Exh. 63 (certificate of title endorsed by Bank of America to Intermountain); Findings and Conclusions, ¶25 (R. 2084).

As the assignee of Bank of America's rights, Intermountain is entitled to recover of the Lawrences damages for their conversion, i.e., their unauthorized use and possession of the black Rodeo for the ten month period prior to January 31, 2001. The Assignment executed by Bank of America assigned to Intermountain "all of its right, title and interest in the Lease Agreement . . . and the Leased Vehicle." Int. Trial. Exh. 61. According to the Indiana Court of Appeals:

As a general rule, a valid and unqualified assignment operates to transfer to the assignee all the right, title, or interest of the assignor

in or to the property or property rights that are comprehended within the terms of the assignment. Such transfer confers a complete and present right in the subject matter to the assignee.

Rasp v. Hidden Valley Lake, Inc., 519 N.E.2d 153, 158 (Ind. App. 1988). Bank of America sold and assigned to Intermountain “all rights” related to the black Rodeo. “All rights” would include claims that belonged to Bank of America prior to January 31, 2001 for the Lawrences’ unauthorized use and possession of the black Rodeo.

**(2). The Lawrences’ argument on appeal that Intermountain lacked standing to allege against them a cause of action for conversion because that cause of action belonged instead to Bank of America, is an affirmative defense that the Lawrences waived by not pleading it.**

In its First Amended Answer, Counterclaim, and Third-party Complaint filed May 7, 2001 (R. 526), Intermountain disclosed that it had repurchased from Bank of America the black Rodeo and obtained an assignment of Bank of America’s rights. ¶39 (R. 533). Intermountain pleaded a cause of action against the Lawrences for conversion, as Bank of America’s assignee, for the Lawrences’ unauthorized ten month possession of the black Rodeo, Victor Lawrence’s interference with Intermountain’s attempted repossession, and Victor Lawrence’s delivery of the black Rodeo to A. Paul Schwenke. Answer/Counterclaim at 13-15 (R. 526, 538-40); see also ¶¶31-32, 36, 39-43 of Intermountain’s Answer/Counterclaim (R. 532-534). In response to Intermountain’s pleading and stated cause of action for conversion, the Lawrences did not plead that Intermountain lacked standing to assert, as assignee of Bank of America’s rights, the conversion claim Bank of America had for the Lawrences’ unauthorized use of the black Rodeo. See Lawrences’ and others’ Answer (R. 738, 740-745).

“Lack of standing” to plead a certain cause of action is an affirmative defense. 61 Am.Jur.2d Pleading §316 (1999). An affirmative defense that is not pleaded is waived. Utah R. Civ. P. 8(c) and 12(h); Golding v. Ashley Cent. Irr. Co., 793 P.2d 897, 899 (Utah 1990) (failure to plead statutory immunity as an affirmative defense); Mabey v. Kay Peterson Constr. Co., 682 P.2d 287, 289 (Utah 1984) (failure to plead mutual mistake as an affirmative defense); Bezner v. Continental Dry Cleaners, Inc., 548 P.2d 898, 901 (Utah 1976) (failure to plead waiver as an affirmative defense).

**C. The Lawrences, again, fail to Marshal the Facts and Arguments that Support the Trial Court’s Findings of Fact and its Conclusion that Victor Lawrence and Cindy Lawrence were Each Liable in Conversion.**

Again, the Lawrences pick at selected issues and findings, and argue as they did below that they should not be found liable for conversion. They make no effort, though, to marshal the evidence that supports the trial court’s findings of fact on conversion or its conclusion that Victor and Cindy Lawrence were liable in conversion.

**D. The Court’s Findings of Fact Support its Conclusion that Victor Lawrence and Cindy Lawrence were Liable to Intermountain for Conversion.**

The trial court made detailed Findings of Fact, ¶¶2-43 (R. 2079), which, for the most part, the Lawrences ignore. The trial court, furthermore, in very specific fashion, stated its reasons for concluding, based on the facts it found, why Victor Lawrence was liable for conversion, ¶66 (R. 2093), and why Cindy Lawrence was liable for conversion, ¶62 (R. 2092). See also, especially Findings of Fact ¶¶6-7, 11-12, 19, 28-29 and 34 (R. 2080-2085).

Bank of America, not Wayne Wong and not Cindy or Victor Lawrence, owned the black Rodeo during the time period May 1, 2000 through January 31, 2001. As lessee, Wong had the right to possess the black Rodeo so long, but only so long as he made the monthly lease payments to Bank of America, according to the terms of his contract. See Int. Trial Exh. 1. Neither Victor nor Cindy Lawrence, though, had any right to possess and use the black Rodeo. Wong's contract with Bank of America prohibited Wong from assigning his interest in the lease or the vehicle, and he was not allowed to sublease the vehicle. Lease Agreement, general provision 16 (at R. 49, 52); also Int. Trial Exh. 1. Moreover, Wong testified at trial that he did not authorize Victor or Cindy Lawrence's use of the black Rodeo. According to Wong, he never saw any of the leased vehicles after he signed lease agreements and he did not know who thereafter possessed them.

The Complaint nonetheless identified the black Rodeo as "Cindy's car." Complaint, ¶¶ 34(4) and 35(3) ( R. 6-7). Plaintiffs' Answers to Interrogatories, dated October 17, 2000, also identified the black Rodeo as being "Cindy's car." Int. Trial Exh. 83, pp. 2-3. Cindy and Victor Lawrence used and drove the black Rodeo for ten months, although neither they nor Wong paid for its use. Cindy and Victor continued to drive it, despite the demands for payment made by Bank of America on co-plaintiff and co-conspirator Wayne Wong, see Int. Trial Exh. 20, which were ignored. It appears they intended to keep on using the black Rodeo – for free – until and unless someone with the right and means to do so took it from them.

When Intermountain attempted to repossess the black Rodeo on January 31, 2001, it was in Victor Lawrence's possession, as he had driven it to work. Moreover, when Victor Lawrence

was confronted with the realization that Intermountain was trying to repossess the black Rodeo, he deliberately chose to deliver it to Paul Schwenke, even though the trial court found that he knew that Wong, not Schwenke, was the lessee. He did so, reasonably knowing that Schwenke intended not to surrender the vehicle to Intermountain or to Bank of America. In doing so, he interfered with Intermountain's legal right to take possession of the black Rodeo. See Utah Code § 70A-2a-525 (as amended 1993).<sup>6</sup> This act of interference with Intermountain's lawful right on January 31, 2001 to possession of the black Rodeo itself establishes a basis on which to hold Victor Lawrence liable for conversion, as the trial court did. Findings and Conclusions ¶¶ 28 and 29 (R. 2084); Id., ¶66 (R. 2093). "A conversion may be based upon the unreasonable withholding of possession from one who has the right to possess it." Queen v. Lynch Jewelers, LLC, 55 P.3d 914, 921 (Kan. App. 2002); see also Restatement (Second) of Torts, § 237 (1965), which states that:

One in possession of a chattel as bailee or otherwise who, on demand, refuses without proper qualification to surrender it to another entitled to its immediate possession, is subject to liability for conversion.

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<sup>6</sup> Victor Lawrence argued below, and argues in his Brief on appeal that Intermountain had no legal right to possess the black Rodeo until and unless armed with a court order or writ of replevin. See, Appellant's Brief at 28. His position is incorrect, as a Writ of Replevin or Court Order confirms a right to possession that exists before entry of a Writ or Order. Lawrence also argues that Intermountain could take possession of the black Rodeo only if it could do so without breaching the peace. Appellant's Brief at 28. In making this argument, Lawrence relies on Utah Code § 70A-9a-609(2), which applies to secured transactions, not leases. Finally, it was Lawrence who breached the peace, by physically attacking Mr. Watkins.

**E. The Trial Court was Justified in Assessing Greater Damages against Victor Lawrence than Against Cindy Lawrence for Conversion.**

The trial court awarded to Intermountain compensatory damages in the sum of \$3,625.40 for Cindy Lawrence's conversion of the black Rodeo which, it explained, represented "the fair rental of the black Rodeo from April 1, 2000 to January 31, 2001 at \$ 362.54" per month, plus prejudgment interest thereon. Findings and Conclusions, ¶69 (R. 2094). It held Victor Lawrence jointly and severally liable for this amount of damages, for the same reason. Id.

The trial court, in distinguishing Victor's conduct from Cindy's, held that Victor Lawrence's liability for damages caused by conversion was greater than Cindy's. It did so, first, because Victor Lawrence, on January 31, 2001, thwarted Intermountain's attempt to recover the black Rodeo and, thus, interfered with Intermountain's right to immediate possession of the vehicle, as its owner. Second, knowing that Intermountain had attempted to repossess the black Rodeo, and knowing that he had no right to its continued possession or use, Victor Lawrence gave the black Rodeo to Paul Schwenke (and not to Intermountain, Wayne Wong, or Bank of America) – who delivered the black Rodeo to his relatives in California, who also drove it without paying for its use until they totaled it in a single vehicle accident outside Compton, California. In distinguishing Victor Lawrence's conduct on and after January 31, 2001, the court concluded that the damages to be assessed against him, for conversion, were properly in the amount of \$34,284.20, "representing Intermountain's cost to recover and purchase the black Rodeo less the \$1,200 it recovered by selling it." Findings and Conclusions, ¶¶35, 66, 69 (R. 2085, 2093-2094); see also Mahana, ¶26 (holding that, "To the extent possible, the fundamental

purpose of compensatory damages is to place the plaintiff in the same position he would have occupied had the tort not been committed.)”

Whether a trial court applied the correct rule for measuring damages is a question of law that an appellate court reviews for correctness. Mahana, ¶25. Victor Lawrence does not, on appeal, however, contend that the court’s method of determining his damages for conversion was erroneous. See Appellant’s Brief, Point 4 on conversion, at 27-30. Instead, the Lawrences’ argument on appeal appears to be limited to whether Intermountain had standing to assert a claim against them for conversion, given that (1) Bank of America owned the black Rodeo from April 1, 2000 to January 31, 2001, and (2) that Intermountain, allegedly, breached the peace when it tried to repossess the black Rodeo on January 31, 2001.

**5. THE TRIAL COURT DID NOT ERR IN IMPOSING ON VICTOR AND CINDY LAWRENCE PUNITIVE DAMAGES.**

Utah Code § 78B-8-201(1) (formerly codified at § 78-18-1) provides:

Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.

Subsection (2) of § 78B-8-201 provides that:

Evidence of a party’s wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made.

The commission of an intentional tort may warrant the imposition of punitive damages. Punitive damages thus may be awarded where the defendant is found liable for conversion, see Mahana v. Onyx Acceptance Corp., 2004 UT 59; for fraud, see Crookston v. Fire Ins. Exchange, 817 P.2d 789 (Utah 1991); and for conspiracy to defraud, 15A C.J.S. Conspiracy § 45 (2002).

The Court, following the trial in June, 2007, determined that the conduct of Victor Lawrence, Cindy Lawrence, and Wayne Wong warranted the entry of punitive damages, in addition to compensatory damages. See Findings and Conclusions, ¶¶67. It thereafter scheduled and held a second trial, at which time it received evidence concerning the Lawrences' and Wayne Wong's financial situation, and other evidence concerning factors to be considered in assessing punitive damages. Following the second trial, the court awarded punitive damages against the three defendants in the following amounts: against Cindy Lawrence, in the sum of \$99,999.99; against Victor Lawrence, in the sum of \$484,000; against Wayne Wong, in the sum of \$138,267.25.

The trial court correctly premised its conclusion that punitive damages were warranted against Victor and Cindy Lawrence, on Utah Code § 78-18-1 (now § 78B-8-201). Findings and Conclusions, ¶¶53, 67, and 70 (R. 2088-2094); and Supp. Findings and Conclusions, ¶¶1 and 21 (R. 2499-2505). It made extremely detailed findings of fact following the second trial, see Supp. Findings and Conclusions, ¶¶1-67 (R. 2498-2518). It considered and weighed the seven factors that the Utah Supreme Court, in Crookston v. Fire Ins. Exchange, 817 P.2d 789, 808 (Utah 1991), held that trial courts should consider in determining what quantum of punitive damages is appropriate. See Supp. Findings and Conclusions, at 27-44 (R. 2524-2541). It analyzed,



separately, the conduct of each of the remaining defendants with reference to Crookston's seven factors. It acknowledged constraints on the amount of punitive damages to be awarded imposed by BMW of North America v. Gore, 217 U.S. 559 (1966) and defended its conclusions in light of, and by reference to Gore. Supp. Findings and Conclusions, at 26-27 (R. 2523-2524).

The seven factors that a trial court must consider in determining the amount of punitive damages are, according to Crookston: (1) the relative wealth of the defendant; (2) the nature of the alleged conduct; (3) the facts and circumstances surrounding such conduct; (4) the effect thereof on the lives of the plaintiff and others; (5) the probability of future recurrence of the misconduct; (6) the relationship of the parties; and (7) the amount of actual damages awarded.

No relative weights, however, are assigned or have been assigned to the seven factors.

Crookston, 808. None of the factors are more conclusive or more important than another.

Campbell v. State Farm Mutual Automobile Ins. Co., 2001 UT 89 ¶49, reversed and remanded, 538 U.S. 408 (2003). The seven factors are guidelines and not elements to be proven, and the absence of one of the factors in a given case does not mean that punitive damages are unwarranted. See e.g., Hall v. Wal-Mart Stores, 959 P.2d 109 (Utah 1998) (plaintiff's failure to introduce any evidence concerning defendant's wealth did not preclude an award of punitive damages). "Whether punitive damages should be awarded is generally a question of fact within the sound discretion of the fact finder and will not be disturbed absent an abuse of discretion."

Firkins v. Ruegner, 2009 UT App 167, 213 P.3d 895.

Against the trial court's very deliberate approach to determining the appropriate measure of punitive damages to be awarded, and its detailed Supplemental Findings of Fact and

Conclusions of Law (R. 2498), the Lawrences, for the most part, simply restate the argument they made in their Trial Brief (R. 2426) and in their closing argument on March 11, 2008, Tr. 247-253. They make no effort to marshal facts or argument that supports the trial court's decision that punitive damages were warranted, or that support the amount of punitive damages it concluded was appropriate. The Lawrences, for the most part, ignore the trial court's "Crookston analysis," R. 2524-2538, and instead re-argue the position they presented to the trial court. They, in effect, ask that the Court of Appeals close its eyes to the trial court's analysis and adopt the Lawrences' analysis instead.

The Lawrences do argue that the court erred in imposing on them punitive damages for conspiracy to defraud Intermountain, because they could not be liable for conspiracy to defraud unless they, personally, misrepresented material facts to Intermountain on which it relied to its detriment. As the Lawrences' legal argument on this point is incorrect, their liability for conspiracy to defraud alone supports the trial court's award of punitive damages.

The Lawrences argue that punitive damages against them, if affirmed, should be based only on conversion, and on compensatory damages in the amount of only \$3,625.40 – the fair rental value of the black Rodeo for the ten months the Lawrences used and drove it. First, this argument is moot if the Court of Appeals affirms the trial court's findings and conclusion that the Lawrences were liable based on conspiracy to defraud which, the trial court found, caused Intermountain damages in the amount of \$80,412.87, plus prejudgment interest in the amount of \$57,854.38. Second, it ignores, as to Victor Lawrence, the greater amount of compensatory damages awarded against him for conversion, \$34,284.20 plus prejudgment interest, because of

his forceful and unjustified interference on January 31, 2001 with Intermountain's effort to repossess the black Rodeo which, with Lawrence's subsequent delivery of the black Rodeo to Paul Schwenke, enabled Schwenke to spirit it off to California – where the vehicle was destroyed. See Findings and Conclusions, ¶¶ 38-29, 31, 66, and 69 (R. 2084-2085, 2093-2094).

**6. THE PUNITIVE DAMAGES THAT THE TRIAL COURT AWARDED AGAINST VICTOR AND CINDY LAWRENCE WERE NOT EXCESSIVE, AND DID NOT VIOLATE EITHER OF THE LAWRENCES' CONSTITUTIONAL RIGHTS.**

**A. The Court's Award of Punitive Damages Against Cindy Lawrence in the sum of \$99,999.99 was Appropriate and Not Excessive.**

On August 10, 2007, the trial court entered Findings of Fact and Conclusions of Law that found Cindy Lawrence liable to Intermountain for conspiracy to defraud, and for conversion. With regard to conspiracy to defraud, it found that Intermountain had sustained damages caused by Wong's fraud in the sum of \$80,412.87, plus prejudgment interest in the sum of \$57,854.38 (R. 2160), for which Cindy Lawrence, as a conspirator, was also found liable. It found, separately, that Cindy Lawrence's conversion of the black Rodeo resulted in damages to Intermountain in the sum of \$3,625.40, plus prejudgment interest. Following the second trial on punitive damages, the court entered judgment in Intermountain's favor, against Cindy Lawrence, for punitive damages in the amount of \$99,999.99. R. 2498, 2541.

The trial court's reason for awarding not more in punitive damages was based on a dearth of evidence at the second trial concerning Cindy Lawrence's wealth. According to Cindy Lawrence's testimony at the second trial she was not employed, had no assets, and kept no money in bank accounts, as she dealt in cash. Supp. Findings and Conclusions, at 37-38 (R.

2534-35). She claimed that she did not own, and had not owned, any interest in any businesses. Id. That testimony was proven not to be true. See Int. Trial Exhibit 103 (Articles of Organization for Lupus Lost, LC., designating Cindy Lawrence as a member; also identifying Cindy Lawrence as the manager of PCP, LC); Int. Trial Exhibit 115 (Articles of Organization for Hawaiian Investments, LC, designating Cindy Lawrence as “managing member”); trial testimony, Tr. 131-132 (3/11/08) (conceding, after first denying that she had any interests in any other businesses, that she had owned a 49% interest in a business called Rusty Roots, LC). Cindy Lawrence nonetheless insisted that, at least to her knowledge, none of these business entities had any assets, or income.

If the punitive damages to be assessed against a particular defendant are under \$100,000.00, and are less than three times the amount of compensatory damages, then the Utah Court of Appeals has held that it will be “presumed that the award of punitive damages is not excessive **and no evidence of relative wealth is required to sustain the award.**” Bennett v. Huish, 2007 UT App 19 at ¶38 (emphasis added); see also Hall v. Wal-Mart Stores, Inc., 959 P.2d 109, 113 (Utah 1998) (holding that a plaintiff’s failure to introduce any evidence concerning a defendant’s wealth does not preclude an award of punitive damages). The lack of evidence concerning Cindy Lawrence’s earnings and assets was, obviously, a reason why the trial court chose to award punitive damages in the amount of one cent less than \$100,000.00. See Supp. Findings and Conclusions, at 37-38 (R. 2536).

**B. The Court's Award of Punitive Damages Against Victor Lawrence in the sum of \$484,000 was not Excessive.**

Before the Court of Appeals should consider reducing the trial court's award of punitive damages against Victor Lawrence, it should read and consider the trial court's findings and conclusions, which detail the reasons why the trial court concluded that an award of punitive damages against Victor Lawrence should equal three-and-one-half times compensatory damages. As to wealth, the second trial revealed considerable income received by Victor Lawrence in the years immediately preceding the trial, even though he had represented to the court just prior to trial that he was financially destitute, Lawrence's Trial Brief, at 4 (R. 2426, 2429). The trial court explained, carefully and in great detail, why Victor Lawrence's conduct, and his history of considerable income, justified a large award of punitive damages. See Supp. Findings of Fact, at 2-3 and 29-37 (R. 2499-2500 and 2526-2534).

**(1). The Trial Court did not err in Considering Prejudgment Interest to be a Component of Compensatory Damages.**

The trial court recognized that punitive damages must bear a reasonable relationship to compensatory damages. Supp. Findings and Conclusions at 36, R. 2533 (citing Crookston v. Fire Ins. Exchange, 817 P.2d 789, 808 (Utah 1991)). The compensatory damages against which an award of punitive damages should be compared was, it concluded, \$138,267.15 – a sum that included prejudgment interest. R. 2533.

Victor Lawrence argues on appeal that the trial court erred in including prejudgment interest in compensatory damages, which becomes the denominator in any ratio that compares punitive damages to compensatory damages. Appellant's Brief at 31, 34; compare with trial

court's analysis, Supp. Findings and Conclusions at 24-25 (§§12-15) (R. 2521-2522), at 36 (R. 2533), and at 44 (R. 2541).

Lawrence relies on Campbell v. State Farm Ins. Co., 98 P.3d 409 (Utah 2004). In Campbell, the Utah Supreme Court held that attorneys fees and costs should not be included in the denominator, with compensatory damages, to determine the ratio of punitive to compensatory damages. If they were to be included, that would allow a higher amount of punitive damages than would otherwise be the case, without exceeding the 3-to-1 ratio above which, the Utah Supreme Court held in Crookston, is presumptively excessive. Prejudgment interest, though, differs in character and purpose from costs of court, and attorneys fees. The Utah Court of Appeals has held that, "Prejudgment interest represents an amount awarded **as damages** due to the opposing party's delay in tendering the amount owing under an obligation." Vasels v. LoGuidice, 740 P.2d 1375, 1378 (Utah App. 1987) (emphasis added). **As damages**, it is proper to include prejudgment interest in the denominator. Including prejudgment interest in the denominator in this case yields a punitive damages to compensatory damages ratio that is \$484,000.00 / \$138,267.25, which is a ratio of 3.5 to 1.

**(2). The Trial Court did not err in awarding Intermountain punitive damages against Victor Lawrence, which exceeded compensatory damages by a factor of 3.5 times.**

Punitive damages should bear a reasonable relationship to actual damages. Crookston v. Fire Insurance Exchange, 817 P.2d 789, 808 (Utah 1991). The Utah Supreme Court in the Crookston case, based on a review of Utah case law up to that time, established a general guideline concerning the appropriate ratio of punitive to compensatory damages. Crookston, 817

P.2d at 810. According to Crookston, a ratio of more than 3-to-1 is presumptively excessive where the punitive damage award is less than \$100,000. Where the punitive damage award is in excess of \$100,000, the Supreme Court stated, “we have indicated some inclination to overturn awards having ratios of less than 3 to 1.” The Supreme Court conceded, however, that up to that point in time, it had seldom been asked to review punitive damage awards greater than \$100,000.

Crookston, in any event, does not preclude an award of punitive damages in excess of the prior observed ratios, or a 3-to-1 ratio, if warranted by the facts and circumstances in a particular case. In the Crookston case itself, the trial court on remand upheld an award of punitive damages in the amount of \$4 million, which exceeded compensatory damages by a factor of 5. Crookston v. Fire Ins. Exchange, 860 P.2d 937 (Utah 1993) (affirming trial court’s justification for awarding punitive damages 5 times the amount of compensatory damages). In Smith v. Fairfax Realty, 2003 UT 41, ¶¶44-48, the Utah Supreme Court affirmed a trial court’s award of \$5.5 million in punitive damages, which exceeded compensatory damages by a factor of 5.5 to 1. In Campbell v. State Farm, the Utah Supreme Court, on remand by the United States Supreme Court, determined that punitive damages of just over \$9 million, equal to nine times compensatory damages, was appropriate. Campbell v. State Farm Mutual Auto Ins., 2004 UT 34.

A high ratio of punitive damages to compensatory damages is not by itself determinative of excessiveness. Diversified Holdings, LC v. Turner, 2002 UT 129 at ¶24. Where, however, an award of punitive damages exceeds the presumptive guidelines observed in Crookston, a trial court judge “must make a detailed and reasoned articulation of the grounds for concluding that the award is not excessive in light of law and the facts.” This articulation should generally be

couched in terms of one of more of the aforementioned seven factors “unless some other factor seems compelling to the trial court.” Crookston, 817 P.2d at 811. An award that is presumptively excessive may be justified by an explanation of why the case is unique, usually in terms of one of the established seven factors.” Bennett v. Huish, 2007 UT App. 19 at n. 11.

The trial court in great detail explained why it believed an award of punitive damages against Victor Lawrence, equal to 3.5 times the amount of compensatory damages it awarded, was appropriate. See Supp. Findings and Conclusions, at 27-37 (R. 2524-2534). In so doing, the trial court discharged its duty to explain why this case justified a modest deviation from the 3-to-1 ratio set by Crookston as a guideline for courts to follow in determining when punitive damages become excessive. The trial court’s explanation, furthermore, is well-founded and reasonable.

**(3). The Trial Court’s award of punitive damages against Victor Lawrence in the sum of \$484,000.00 did not violate his constitutional rights.**

Victor Lawrence cites to this court on appeal, as he did to the trial court (Tr. 247, 3/11/08); Lawrence Trial Brief (R. 2426, 2427), BMW of North America v. Gore, 517 U.S. 559 (1996). He does not, however, explain why Gore requires or warrants a reduction in the amount of punitive damages that the trial court assessed against him. In fact, the Lawrences, in their Appellant’s Brief at 37, mention Gore only in passing, then collapse to an analysis of six of the seven factors that Crookston identified as factors to be considered in determining the amount of punitive damages. Appellant’s Brief at 37-41; compare to trial court’s recognition and analysis of Gore and State Farm Mutual Ins. Co. v. Campbell, 528 U.S. 408 (2003) in its Supp. Findings



and Conclusions at 26-27 (R. 2523-2524), and its analysis and application of the **seven Crookston** factors to Victor Lawrence's situation and conduct, Supp. Findings and Conclusions at 27-37 (R. 2524-2534).

The seventh factor which Victor Lawrence declines to discuss, his wealth and considerable earnings, trace back to his sole ownership of the Lexington Law Firm, a "credit-repair" law firm with 45,000 to 55,000 active clients in 2005; and his continued relationship with affiliated companies. See Supp. Findings and Conclusions, ¶¶7-42 (R. 2501-2511). Perhaps he avoids the issue of wealth, because the evidence at trial revealed that he was not telling the truth when he informed the trial court, prior to the second trial, that he had little income and was destitute. Lawrence Trial Brief, R. 2426, 2429. On the criterion of "wealth," the trial court found and observed as follows:

It is difficult to determine with any exactness Mr. Lawrence's wealth, measured by assets or income, for the very reason that he has tried hard over the years to disguise and hide the amount and sources of his income, including from the Internal Revenue Service. Mr. Lawrence has also been less than candid concerning his assets and income.

\* \* \*

Notwithstanding Mr. Lawrence's lack of candor, and notwithstanding his hollow protestations of poverty, it is apparent that he has since at least the early 2000s received substantial income, far and above what would be considered average annual income. In mid 2004, Mr. Lawrence's income approached \$40,000/month, derived primarily from his ownership of the Lexington Law Firm. Far Cliffs Media and RevGen have, since sometime in 2005 or before, regularly and faithfully paid Lawrence \$35,000 per month in consulting fees, which have continued at least through February, 2008. Lexington paid Lawrence additional sums for his consulting services, amounting to more than \$200,000 (or about \$50,000 per year on average) since Lawrence ostensibly sold Lexington to John Heath in June, 2004.

In addition, Mr. Lawrence also owns at least one significant asset, consisting of software, the licensing of which has generated huge if unspecified royalty income to Mr. Lawrence.

What is known about Mr. Lawrence's income and wealth, including his ownership of at least one asset of substantial value, warrants a significant award of punitive damages.

Supp. Findings and Conclusions, at 28-29 (R. 2525-2526). **It should be noted that the evidence at the second trial indicated that Lawrence, notwithstanding his pretrial protestation of adverse financial circumstances, had been regularly receiving income of \$35,000 a month paid by Far Cliffs Media and RevGen, up to and including the month prior to trial.**

Lawrence also avoids any discussion of his role in thwarting Intermountain's recovery of the black Rodeo, in which he "without cause or justification, attacked Mr. Watkins, seizing him and grabbing him in a headlock," causing injury to Mr. Watkins, Supp. Findings and Conclusions at 2-3, ¶1 (R. 2499-2500) and Int. Trial Exh. 106), which the trial court considered to be an aggravating factor that warranted a greater award of punitive damages. *Id.* at 30 (R. 2527). It was Lawrence's conduct and interference with Intermountain's right to possess the black Rodeo, on January 31, 2001, furthermore, that allowed Paul Schwenke to transport the vehicle out-of-state, where Schwenke's relatives drove it without paying for its use, until they destroyed it.

The trial court's award of punitive damages against Victor Lawrence in the amount of \$484,000 was, in sum, not excessive, and did not violate Lawrence's constitutional right of due process.

#### **VIII. RELIEF ON APPEAL REQUESTED BY APPELLEE.**

Intermountain, Inc. requests that the Court of Appeals:

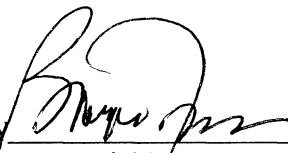
1. Affirm and uphold the judgments for compensatory damages awarded in favor of Intermountain against Victor Lawrence and Cindy Lawrence, as entered on August 13, 2007, including as amended on September 20, 2007 to include and add prejudgment interest.

2. Affirm and uphold the judgments for punitive damages in favor of Intermountain against Victor Lawrence and Cindy Lawrence, as entered on June 25, 2008.

3. Award Intermountain its costs on appeal.

4. Implement disciplinary proceedings against Victor Lawrence, and potential disbarment.

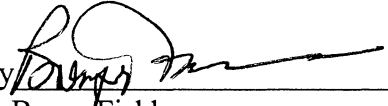

Dated: February 5<sup>th</sup>, 2010

By   
\_\_\_\_\_  
P. Bryan Fishburn  
Attorney for Intermountain, Inc.

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing BRIEF OF APPELLEE INTERMOUNTAIN, INC. was mailed, postage prepaid, on the 5 day of February, 2010 to the following:

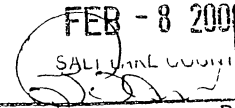
Donald J. Winder  
Lance F. Sorenson  
WINDER & COUNSEL, P.C.  
175 West 200 South, Suite 4000  
P.O. Box 2668  
Salt Lake City  
Utah 84111

By   
P. Bryan Fishburn  


# **ADDENDUM A**

WYNN BARTHOLOMEW, ESQ. (0233)  
Attorney for Defendants  
4925 Westmoor Road  
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PH: (801) 631-3610  
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*Attorney for Defendants*

**FILED DISTRICT COURT**  
Third Judicial District

FEB - 8 2008  
SALT LAKE COUNTY  
By  Deputy Clerk

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

VICTOR LAWRENCE,

Plaintiff,

vs.

INTERMOUNTAIN, INC., a Utah  
corporation, doing business as  
Intermountain Isuzu; and G. THOMAS  
WATKINS,

Defendants.

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

Civil No. 020906142

Judge Glenn K. Iwasaki

This matter came up regularly for trial on Wednesday, January 16, 2008 pursuant to notice. The Plaintiff appeared through counsel, Blake S. Atkin, and the Defendants appeared through counsel or record, Wynn E. Bartholomew. Plaintiff Victor Lawrence (hereinafter "Lawrence") had made claims for damages for assault and battery, intentional infliction of emotional distress and trespass to chattels against Defendants. Claims made by the Plaintiff for breach of the peace and, by implication, negligence relating to a breach of the peace were previously dismissed

by the court as a matter of law in a Memorandum Decision dated March 19, 2007 Defendant G Thomas Watkins (hereinafter "Watkins") made claim under a counterclaim against Plaintiff Lawrence for assault and battery seeking damages for injuries, pain and suffering, and emotional distress The Court took testimony from witnesses, heard the arguments of the parties, and considered various documents entered into evidence Based upon the foregoing, the Court now makes the following Findings of Fact

#### FINDINGS OF FACT

1 Watkins is a resident of Salt Lake County, State of Utah and an office, co-owner, and agent of Defendant Intermountain, Inc , a Utah corporation licensed to do business in Salt Lake County, State of Utah as a motor vehicle dealer

2 Lawrence is a resident of Davis County, State of Utah

3 On or about March 31, 2000, Wayne Wong entered into a written lease agreement to lease a black Isuzu Rodeo (hereinafter the "vehicle"), VIN 452DM58W7Y4302440, from Intermountain, Even though others may have negotiated and taken actual possession of said vehicle, the vehicle was leased to Wayne Wong

4 Pursuant to said lease agreement, Wayne Wong did not have authority to sublease or grant permission to anyone except on a temporary basis to use said vehicle without the express permission of Lessor

5 Although Lawrence testified that he and his family had permission to use said vehicle, his testimony was not credible There was no credible evidence that Lawrence, or his family, ever had permission to use the vehicle

6 Wayne Wong was obligated by the lease agreement to make monthly lease

payments to Lessor in the amount of \$364.52. Neither Wong nor Lawrence, nor anyone else acting on their behalf, ever made any monthly lease payment on said vehicle.

7. As a result, said written agreement was in default and the vehicle became subject to repossession by the Lessor.

8. Intermountain bought the vehicle back from Bank of America on January 31, 2001, and had authority to repossess said vehicle as Lessor on that date.

9. Later on or about January 31, 2001, said vehicle was located by Watkins in a parking garage located in Salt Lake City, State of Utah.

10. Watkins and Duane Smith of Noorda Towing attempted to repossess said vehicle from the parking garage. Prior to attempting to repossess said vehicle, Watkins called Salt Lake City Police Department and attempted to notify them of his intent to repossess.

11. Said vehicle was secured by a lockbar owned by Lawrence immobilizing the steering wheel of said vehicle.

12. Access to the vehicle was gained by a duplicate key made by Watkins. Watkins and Duane Smith were attempting to saw through the cylinder of said lockbar with a hacksaw when they were approached by Lawrence.

13. Lawrence asked Watkins and his agent what they were doing in the vehicle.

14. Lawrence entered the vehicle and seized personal property of Duane Smith and refused to return said personal property. Lawrence asked Watkins and his agent to leave the vehicle, which they did.

15. Thereafter, Watkins attempted to retrieve Duane Smith's tools from the vehicle. Without cause or justification, Lawrence attacked Watkins by seizing him and



grabbing his head in a headlock. During this altercation, Watkins' head and neck were injured, causing a cut to his head and bruise to the neck.

16. Watkins suffered injuries to his head as a consequence of the attack by Lawrence.

17. Watkins sustained damages as a result of said assault and battery. The court finds those damages to be in the sum of \$10.00 because Mr. Watkins testified that was the amount of his co-pay. No further credible evidence was offered regarding the actual medical costs of Watkins' injuries.

18. Lawrence testified that he was the victim of a verbal and physical attack by Watkins, but his testimony was not credible, and was contradicted by the testimony of other witnesses including Mr. Watkins.

19. Lawrence sustained no physical injury in the course of the altercation and incurred no medical bills as a result of the altercation.

20. There was no credible evidence or testimony offered establishing the elements of an intentional infliction of emotional distress by Watkins on Lawrence.

21. Lawrence did not present the lockbar as an exhibit and there was no credible evidence that it was damaged, and no evidence of the amount of damages assuming that it was.

Based upon the foregoing Findings of Fact, the Court now enters the following Conclusions of Law:

#### CONCLUSIONS OF LAW

1. Jurisdiction and venue are proper.

2. Watkins was authorized as an agent of Intermountain to repossess said

vehicle on January 31, 2001, and Intermountain was authorized to employ third parties to assist it in that endeavor.

3. While engaged in attempting to repossess said vehicle, Lawrence, unlawfully and without legal justification, physically and verbally assaulted Watkins causing him bodily injury and harm.

4. Watkins is entitled to an award of general and emotional damages on his counterclaim in the sum of \$10.00.

5. Lawrence failed to prove his claims for assault and battery, intentional infliction of emotional distress, and trespass to chattel and, therefore, these claims were dismissed with prejudice at the conclusion of the Plaintiff's case, no cause of action.

DATED: For 8 January 8, 2008.

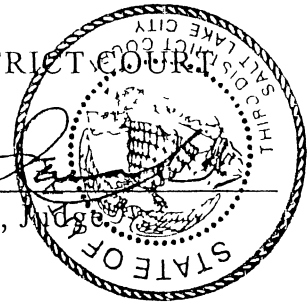
I CERTIFY THAT THIS IS A TRUE COPY OF  
AN ORIGINAL DOCUMENT ON FILE IN THE  
THIRD DISTRICT COURT, SALT LAKE  
COUNTY, STATE OF UTAH.

DATE: February 19th 2008

[Signature]  
DEPUTY COURT CLERK

THIRD JUDICIAL DISTRICT COURT

[Signature]  
Honorable Glen Iwasaki, Judge



Proposed Findings of Fact and Conclusions of Law proposed

by [Signature]  
Wynn Bartholomew, attorney for defendants

**CERTIFICATE OF MAILING**

A true and correct copy of the foregoing [proposed] FINDINGS OF FACT AND CONCLUSIONS OF LAW was mailed in the United States mail, first class postage prepaid, on the 22 day of January, 2008, to the following:

Blake Atkin, Esq.  
136 South Main Street, #401A  
Salt Lake City, Utah 84101

  
\_\_\_\_\_  
Wynn Bartholomew