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Wilma L. Schwenke, Tania P. Schwenke, Cindy Lawrence, and Wayne Wong v. Intermountain Inc. dba Intermountain Isuzu v. Wilma L. Schwenke, Tania P. Schwenke, Cindy Lawrence, Wayne Wong, and Victor Lawrence : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WILMA L. SCHWENKE, TANIA P.
SCHWENKE, CINDY LAWRENCE and
WAYNE WONG,

Plaintiffs,

vs.

INTERMOUNTAIN, INC., dba
INTERMOUNTAIN ISUZU,

Defendant, Counterclaimant,
Third-party Plaintiff, and
Appellee,

vs.

WILMA L. SCHWENKE, TANIA P.
SCHWENKE, CINDY LAWRENCE,
WAYNE WONG and VICTOR LAWRENCE,
Counterclaim Defendants,
Third-Party Defendant, and
Appellants.

**AMENDED REPLY BRIEF OF
APPELLANTS VICTOR LAWRENCE
AND CINDY LAWRENCE**

Case No. 20080835

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

Judge Denise Lindberg
Civil No. 000904217

Oral Argument Requested

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IDENTIFICATION OF THE PARTIES

Appellants Victor Lawrence (“Mr. Lawrence”) and Cindy Lawrence (“Ms. Lawrence”) (collectively, the “Lawrences”) were married during the times relevant to this action but have since divorced. Although Ms. Lawrence has remarried and changed her name, this brief will refer to her as “Ms. Lawrence” for the sake of convenience. Appellee is Intermountain, Inc. (“Intermountain”).

INTRODUCTION

The gravamen of the Judgment against the Lawrences is Finding of Fact (“Initial Finding”), ¶ 54, that Wayne Wong (“Mr. Wong”) fraudulently failed to disclose to Intermountain he was promised \$10,000 in exchange for his signature on the leases. However, unlike real property mortgages, the lease agreements at issue in this case (the “Leases”) do not prohibit the payment of an inducement to Mr. Wong. Under the facts of this case and the law, there is nothing unlawful about an inducement offered to Mr. Wong. Since any such inducement is not unlawful, the finding of conspiracy to defraud must fail. There were no other unlawful acts upon which the lower court could base a finding of fraud or conspiracy to commit fraud. Intermountain concedes this, but asks the court to extrapolate a fraud from lawful activities, which extrapolation is not permitted under Utah law.

Further, the judgment against the Lawrences for conversion fails because

Intermountain, fully aware it was leasing three vehicles to an entity or individuals other than Mr. Wong, waived its right to claim and is equitably estopped from claiming the Lawrences did not have the right to possess the vehicles when the leases were signed.

Additionally, the lower court's imposition of punitive damages was in error, let alone such harsh punitive damages, because the underlying findings were in error. The Lawrences conduct was not unlawful, let alone did it rise to the level of malice necessary to award punitive damages. The lower court's inclusion of prejudgment interest in calculating punitive damages was in error. Accordingly, the lower court's judgment should be reversed.

ARGUMENT

POINT 1. THE LOWER COURT'S FINDING OF FRAUDULENT INDUCEMENT SHOULD BE REVERSED

A. An inducement is not unlawful

A conspiracy to defraud is a "fraud committed by two or more persons who share intent to defraud another." *Debry v. Cascade Entert.*, 879 P.2d 1353, 1358 (Utah 1994). In order to prevail on a claim of conspiracy to commit fraud, the plaintiff must prove by clear and convincing evidence the elements of fraud. *See Gildea v. Guardian Title*, 970 P.2d 1265, 1271 (Utah 1998). Here, the Court found the Lawrences not liable for fraud, but liable for the conspiracy. See Initial Findings, ¶¶ 60-65. A true and correct copy of the trial court's Initial Findings are attached to the Lawrences' opening Brief as Addendum "A."

The central finding of the Judgment against the Lawrences for conspiracy to defraud is Initial Finding, ¶ 54, that Mr. Wong fraudulently failed to disclose to Intermountain he was promised \$10,000 in exchange for his signature on the Leases.¹ Ms. Lawrence is then found in ¶ 60 to have “participated in the \$10,000 offered to Mr. Wong,” although in footnote 15, the lower court could not “conclude that Ms. Lawrence had an affirmative duty to disclose that inducement to Intermountain, or that her failure to disclose the inducement constituted a misrepresentation by material omission.” Then, Mr. Lawrence is found in ¶ 64 to have participated in the inducement “[b]ecause Mr. and Mrs. Lawrence were married and cohabitating at the time” The stretch in this finding, and its lack of logic, is obvious. Utmost, these Initial Findings are contrary to the facts² and law and must be reversed.

The plain and simple fact is the Leases do not prohibit Mr. Wong from obtaining the leased vehicles on behalf of a principal. See Trial Exhibits 1, 4 & 7. Unlike real property mortgages, there is no language in the Bank of America Lease, attached to Trial Exhibit 23, which prohibits anyone from paying an inducement fee to the lessee. That

¹ Intermountain claims on p. 27 the Lawrences “implicitly concede ... Wayne Wong engaged in fraud” Pursuant to Rule 4, UTAH STANDARDS OF PROFESSIONALISM AND CIVILITY, “Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a ‘record’ that has not occurred.” Nowhere in their opening Brief do the Lawrences concede, implicitly or explicitly, this fact. Furthermore, as argued herein, they contest any such fact.

² Intermountain claims, in pp. 25-26 of its Brief, failure of the duty to marshal the evidence. As is clear in the argument herein, the Lawrences use the trial court’s actual findings to show its conclusions of conspiracy to defraud and conversion are in error.

Lease, in ¶ 16(f), contains the following integration clause: “This Lease constitutes the entire Agreement between you and me; there are not other agreements, oral, written or otherwise.”³ Accordingly, Mr. Watkins’ claim in Initial Findings, ¶ 10, that Intermountain would never have leased the vehicles had it known of the \$10,000 payment to Mr. Wong, upon which the lower court relied in finding fraud, is contrary to the Leases and should not have served as the basis of any duty to disclose. Mr. Watkins’ subjective understanding of the Leases was not expressed to cSave.net, Wayne Wong, Paul Schwenke or any other party at the time the Leases were entered into or subsequently. His understanding was not part of the contracts. *See Richter v. United Cal. Theatres, Inc.*, 177 Cal.App. 2d 126 (1960)(“Contracts are the result of what people say, not what they intend to say.”) Mr. Watkins’ claim and thus Initial Findings, ¶¶ 10 & 55, and all findings based thereon, fail. Specifically, they fail for the following reasons:

(1) The integration clause should be enforced.

Mr. Watkins, the owner of Intermountain, claimed at trial he would not have leased the three vehicles to Mr. Wong had he known Mr. Wong was being paid \$10,000 as an inducement fee. Initial Findings, ¶ 10, Trial Transcript, Vol. I., p. 34. However, the Lease, which was simultaneously assigned to Bank of America, contains no provision barring the payment of an inducement fee nor does it require the disclosure of any inducement fee. Mr. Watkins subjective understanding of the Lease agreement and his

³ The Isuzu Leases, likewise, contained no language prohibiting an inducement fee.

unexpressed intent not to lease if he had known about the \$10,000 inducement is contrary to the Lease and should not be considered part of the contract. The lower court's reliance on Mr. Watkins' statement was in error because the statement was only his unexpressed subjective understanding of the contract, not the contract itself. The contract contains a clear integration clause. Where there is an integration clause, such statements should not be considered. *See Daines v. Vincent*, 190 P.3d 1269, 1275 (Utah 2008).⁴

Intermountain, in making its conversion claim discussed below, insists upon enforcing the Lease term prohibiting anyone but Mr. Wong from possessing the Black Rodeo, except for occasional and incidental use. Intermountain should not be permitted to enforce a provision of the Lease which it believes is favorable (unpermitted use) while choosing to ignore another provision (the integration clause) which is unfavorable.

- (2) There can be no material omission without a duty to speak and there is no such duty in a commercial transaction.

In order to be liable for a fraudulent failure to disclose, there must be a duty to disclose. *See First Security Bank of Utah, N.A. v. Banberry Development Corp.*, 786 P.2d 1326, 1328-29 (Utah 1990). Wayne Wong had no duty to disclose the \$10,000 inducement to Intermountain. A duty to disclose must arise somewhere other than in Mr. Watkins' unexpressed thoughts. As set forth above, there was no duty to disclose set forth in the Leases themselves, even though Bank of America, Isuzu or Intermountain

⁴ This argument was presented to the Court as found in Trial Trans., Vol. IV., pp. 497-498.

could have included such a provision. In a commercial transaction, where the parties deal with each other at arm's-length, there is no duty to disclose similar to that of parties dealing with each other based upon a fiduciary or some other form of trust relationship. *See, e.g., Matter of Estate of Beesley*, 883 P.2d 1343, 1346 (Utah 1994). The only basis the trial court found for holding Mr. Wong had a duty to disclose the \$10,000 payment was Mr. Watkins statement he would not leased had he knew about the \$10,000 payment. This, however, is not sufficient upon which to find a duty to disclose, the breach thereof, and the imputation of the breach to the Lawrences.

B. Even if Wayne Wong's failure to disclose is a fraudulent omission, such omission cannot be attributed to the Lawrences.

Even if failure to disclose to Intermountain the \$10,000 payment was a misrepresentation on the part of Wayne Wong, giving liability to fraud on his part, the payment by itself was not barred by any law and there is no evidence the Lawrences knew of Mr. Wong's failure to disclose. The piece of evidence relied on by the lower court to reach a finding of fraud by Wayne Wong and participation in that fraud by the Lawrences is \$10,000 payment to Wayne Wong by cSave.net for his signature on the leases.

This finding, however, does not create any nexus, let alone a sufficient nexus, to find the Lawrences participated in the fraud. The finding does not establish the Lawrences participated in any misrepresentation to Intermountain or understood the transaction to be anything other than a run-of-the-mill corporate lease. Indeed, the lower court found the Lawrences had no duty to disclose the \$10,000 inducement to

Intermountain. See Initial Findings, n. 15. The finding, reached via a judicial admission, the Lawrences knew of the \$10,000 payment to Mr. Wong does not establish knowledge of Wayne Wong's failure to disclose the inducement to Intermountain. Even if the judicial admission is accepted as fact, it still does not suggest the Lawrences knew of, let alone participated in, any misrepresentation to Intermountain. In order to find the Lawrences liable for conspiracy, the trial court would have had to find they participated in the fraud or acted in concert with Wayne Wong. See *Schwartz v. Tanner*, 576 P.2d 873, 875 (Utah 1978) (“[C]ircumstances may be such to impose liability for representation made by others as where parties *jointly participate in fraud*. Conspiracy is an example thereof ...”) (emphasis added). The trial court did not find facts sufficient to hold, by clear and convincing evidence, the Lawrences participated in the fraud.

A principal may compensate an agent to conduct the principal's business transactions. An agent may sign a contract on behalf of a principal without disclosing the agency relationship. See AM. JUR. *Agency*, § 305:

From the very nature of the situation, the third person's rights do not depend upon his or her knowledge that the agent was acting for someone else, because it is evident that anyone dealing with an agent for a wholly undisclosed principal believes that he or she is dealing with the agent only and relies solely upon the agent individually.

Agents may be compensated for entering into lease agreements on behalf of principals. See 2A C.J.S. *Agency*, § 220. A vendor or lessor may choose to extend credit to an agent, rather than the principal, if the vendor so chooses. See, e.g., *Dinkler Management Corp.*

v. Stein, 155 S.E.2d 442 (Ga. App. 1967); *Brandes v. Illinois Children's Protestant Home, Inc.*, 179 N.E.2d 425 (Ill. App. 1st Dist. 1962); *Wakefield Fortune Inc. v. Brown*, 148 N.Y.S. 2d 633 (N.Y. Sup. 1956). Although a party may seek recourse against an undisclosed principal for breach of contract, Wayne Wong's principals (cSave.net and Paul Schwenke) were disclosed to Intermountain as set forth herein.

CSave.net paid its agent, Wayne Wong, \$10,000 to enter into leases on behalf of cSave.net. cSave.net's involvement was disclosed by its initial communication to Intermountain on cSave.net letterhead (Trial Exhibit #10) and by providing Intermountain cSave.net's Articles of Organization and Operating Agreement. See Initial Findings, ¶ 15 and Trial Exhibits 13 & 17. However, even if cSave.net's principal relationship to Wayne Wong was not disclosed, it was not required to do so.

The law does not prohibit inducements. Here, cSave.net's payment to Wayne Wong to enter the Leases with Intermountain was not fraudulent in and of itself. The only misrepresentation found by the trial court pertaining to the Lawrences was Wayne Wong's alleged failure to disclose he was offered \$10,000 by cSave.net to enter into the transactions. See Initial Findings, ¶¶ 54, 61 and 65. However, even if Wayne Wong's failure to disclose can serve as the basis of fraud, knowledge of his failure to disclose cannot be attributed to the Lawrences. How can the Lawrences be found liable for Wayne Wong's failure to disclose the \$10,000 payment, when the trial court found no duty to disclose on the part of the Lawrences? How can the Lawrences be found liable

for conspiracy to defraud where they made no misrepresentation to Intermountain and where they made no attempt to conceal from Intermountain that cSave.net was the true lessee?

The lower court's finding of conspiracy to defraud as against the Lawrences in Initial Findings, ¶¶ 61 & 64 should be reversed because such findings cannot be sustained under a clear and convincing evidence standard. *See In Re WDW*, 224 P.3d 14, 19 (Wyo. 2010) ("evidence is 'clear and convincing' if it would persuade a trier of fact that the truth of the contention is highly probable). Under Utah law, a trial court's determination under a clear and convincing burden of proof is reviewed for clear error. *See Lunt v. Lance*, 186 P.3d 978, 983 (Utah Ct. App. 2008). Here, the lower court clearly erred in finding the Lawrences liable for conspiracy because there was no requirement in the Leases or anywhere else that Wayne Wong and/or the Lawrences disclose the \$10,000 payment to Intermountain.

POINT 2. THERE WERE NO OTHER UNLAWFUL ACTS TO SUPPORT A FINDING OF CONSPIRACY TO DEFRAUD.

The other findings of fact made by the lower court do not support a finding of conspiracy to defraud against the Lawrences. Initial Findings, ¶¶ 61(a) and 65(a), both determined West Valley Dodge repossessed a Durango from the Lawrences which "had been leased by Mr. Schwenke under a similar arrangement." Exactly what the lower court meant by a "similar arrangement" is not described. From the language of ¶ 69 of the Complaint, Trial Exhibit 24, it appears Ms. Lawrence had authorization from a limited

liability company to possess a green Durango. There is nothing unlawful about what is alleged and nothing more set forth in the Complaint to imply unlawfulness. In fact, the lower court had “no knowledge concerning the outcome of the case ... and makes no findings regarding that case.” Initial Finding, ¶ 40, footnote 9. Accordingly, it is not known if the repossession was ultimately determined to be improper, if the vehicles were paid for or, for example, if the dispute centered over other allegations dissimilar to the instant case. It, therefore, lacks probative value and is not an unlawful act.

Initial Findings ¶¶ 61(c) and 65(c) stated the Lawrences were present at the signing of the leases and were “generally aware of the financial terms.” As set forth below, their presence is another indicium that Intermountain knew the vehicles, especially the Black Rodeo, would not be possessed by Mr. Wong. A finding they were “generally aware of the financial terms,” corresponds with Initial Finding ¶ 12 that they “both were aware that the monthly payments on the vehicles were supposed to be approximately \$360.” It is *not* a finding, however, that they were aware of the Lease terms regarding possession, insurance or similar non-financial terms and there is nothing unlawful about their presence at the closing.

Initial Findings ¶¶ 61(d) and 65(d) state the Lawrences had no present intent of making any payments. This is true; as the trial court found in ¶ 6, Mr. Schwenke intended to lease a vehicle for Mr. and Ms. Lawrence as partial payment for legal services rendered” There is nothing unlawful about such an arrangement.

Concerning ¶¶ 61(e) and 65(e), see the Lawrences opening Brief, at pp. 29-30. Even the filing of a frivolous lawsuit is not unlawful. As to ¶ 65(f), see the discussion regarding guilt by marriage on p. 26 of the Lawrences' opening Brief.⁵

The trial court also found Mr. Wong did not insure the vehicles. The issue of insurance is troubling, not because of anything Lawrences did, but rather because of what Intermountain failed to do. Accompanying each Lease was a First Security Bank insurance form, requiring endorsement of "the Policy Standard Loss Payable Clause" and providing immediate delivery of "written evidence of such coverage" "In the event evidence of such coverage is not received First Security [presumably Bank of America and Isuzu] may, at their option, apply for coverage as required...." See Exhibits 3, 6, and 9. Intermountain's dealer agreement with Isuzu, Trial Exhibit 37, mandates on page 16 that each "vehicle must be covered by liability and physical damage insurance naming IMAC [Isuzu Motors Acceptance Corporation] as additional insured and loss payee." Further, Intermountain on page 18 is "fully responsible for errors" Paragraph 1 of the Assignment of the Black Rodeo from Bank of America to Intermountain specifically "assigns all of its [Bank of America] rights as an insured or loss payee under a contract of insurance...." Finally, the Isuzu leases contained a provision that Isuzu must

⁵ Intermountain conceded in its Brief on p. 43 that none of subparagraphs "(a) – (f) [of ¶¶ 61 and 65] involve wrongful conduct." Intermountain urges this Court to "reasonably infer wrongful conduct" where none is actually found. This is contrary to the admonishment of this Court in *Israel Pagan Estate* that civil conspiracy may only be found from one or more unlawful, overt acts. See *Israel Pagan Estate v. Cannon*, 746 P.2d 745, 790 (Utah Ct. App. 1987).

be named an insured in the insurance policy. See Trial Exhibits 4 & 7, paragraph 15(a).

Intermountain was negligent in failing to provide, through its Finance and Insurance Department, insurance coverage of the leased vehicles until the vehicles were returned or recovered. The Silver Rodeo, having been in an accident, was recovered in November 2000. See Initial Finding, ¶ 27. By then, Intermountain had actual notice Mr. Wong and cSave.net had not insured the vehicles themselves. The Black Rodeo was not damaged until long after November 2000. See Initial Finding, ¶ 29. Had Intermountain insured the vehicle, as required to do, it would have been made whole for the loss of the vehicle. A court will not help a party who was damaged through its own negligence. *See, e.g., First Nat. Bank & Trust Co. in Larned v. Wetzel*, 219 P.3d 819, 824 (Kan. App. 2009)(“Equity cannot be invoked to relieve one of the consequences of his own negligence.”)(internal citation omitted).

POINT 3. THE LOWER COURT’S DETERMINATION THE LAWRENCES WERE NOT ENTITLED TO POSSESSION OF THE BLACK RODEO PRIOR TO JANUARY 31, 2001 SHOULD BE REVERSED.

Intermountain seeks to enforce the Lease provision limiting possession of the Black Rodeo to Mr. Wong.⁶ However, based upon the facts and applicable law, the Lawrences were entitled to possession. Intermountain certainly knew Wayne Wong was not leasing three vehicles for himself. The day before Mr. Wong appeared at

⁶ Again, Intermountain accuses the Lawrences of failure to marshal the evidence. The gravamen of the trial court’s determination of conversion is that the Lawrences “possession of the Black Rodeo was never lawful under the terms of the lease.” Initial Findings, ¶¶ 62 & 66. No

Intermountain to sign the leases, cSave.net faxed a letter to Intermountain on its letterhead indicating its interest in leasing three vehicles. See Trial Exhibit #10. The lower court took note of this fact in footnote 2 of its Initial Findings by stating, “Mr. Schwenke’s initial communication with Intermountain was a facsimile on cSave.net letterhead, dated March 29, 2000.” The lower court also noted in Initial Finding ¶ 6, “Mr. Schwenke also intended to lease a vehicle for Mr. and Ms. Lawrence’s personal use as partial compensation for legal services rendered by Mr. Lawrence.” Mr. Schwenke was a business client of Mr. Lawrence. Initial Finding, ¶ 4. Also, cSave.net’s Articles of Organization and Operating Agreement were provided to Intermountain. See Initial Findings, ¶ 15 and Trial Exhibits 13 & 17. Further, cSave.net’s balance sheet, tax identification number and P&L were provided to Intermountain. See Trial Exhibits 14 & 15. Additionally, cSave.net’s loan application to the Larry H. Miller Group was in Intermountain’s deal jacket. See Trial Exhibit 19.

Finally, the fact Mr. Wong leased three vehicles, instead of just one, served to signal to Intermountain he wasn’t leasing them for just himself, but on behalf of others. “On or about March 31, 2000, Mr. Schwenke, Wilma, Tania and Mr. and Mrs. Lawrence each went to Intermountain’s offices for the purpose of selecting the three vehicles.” Initial Finding, ¶ 11. “Following Mr. Wong’s signing of the leases, each of the original plaintiffs except Mr. Wong took possession of the vehicles. Mr. Schwenke and Wilma

marshalling, other than reference to the Lease terms, is mandated.

took possession of a silver Isuzu Rodeo (the “Silver Rodeo”), Tania took possession of a green Isuzu Rodeo (the “Green Rodeo”), and Mr. and Mrs. Lawrence took possession of a black Isuzu Rodeo (the “Black Rodeo”).” Initial Findings, ¶ 19. Without doubt, Intermountain gave possession of all three vehicles to individuals other than Mr. Wong. Intermountain even accepted a \$3,000 personal check from Mr. Lawrence for the down payment for each of the three vehicles. Initial Finding, ¶ 12. Taking into consideration all of the facts listed above, it would require a stretch of the imagination to believe Intermountain did not know it was negotiating a group lease, and not just with Mr. Wong individually. It would take an even greater stretch of the imagination to find the Lawrences were attempting to commit conversion, perpetrating or profiting from a fraud, or acting in willful and wonton disregard of Intermountain’s rights sufficient to support an award of punitive damages. There is no evidence, let alone clear and convincing evidence, that the Lawrences viewed the transaction as anything other than a corporate lease. *See Child v. Child*, 332 P.2d 981, 986 (Utah 1958)(clear and convincing “implies something more than the usual requirement of a preponderance, or greater weight, of the evidence”).

Even though Bank of America, as the subsequent owner of the vehicle and presumably bona fide purchaser, may have been able to enforce the Lease provision limiting the use of the vehicle to the named lessee, Intermountain waived its right and is estopped from enforcing that provision when it knew other parties were driving the

vehicles and did not object.⁷ See *Red Cliffs, LLC v. J.J. Hunan, Inc.*, 219 P.3d 619 (Utah Ct. App. 2009)(waiver is the relinquishment of a known right). For the elements of equitable estoppel, please see *Bahr v. Imus*, 211 P.3d 987, 989 (Utah Ct. App. 2009)(elements of equitable estoppels are “a ... failure to act [that is] inconsistent with a claim later asserted; (ii) reasonable action ... taken ... on the basis of the ... failure to act; and (iii) injury ... would result from allowing [a repudiation of] such ... failure to act.” Intermountain cannot be accorded the status of “bona fide purchaser” because it had full knowledge Mr. Wong was not driving the vehicles himself. See *Johnson v. Higley*, 989 P.2d 61, 70 (Utah Ct. App. 1999). Here, Intermountain was aware, at the signing of the leases and the departure of the vehicles from its lots, that individuals other than Mr. Wong were driving the vehicles. Intermountain thereby waived its right to subsequently claim the Lawrences had no right to possession.⁸ Clearly, the Lawrences had the right to possession through January 31, 2001. For the same reasons, there was no conversion of the Silver or Green Rodeos based upon allegedly non-permissive use.

POINT 4. THE COURT ERRED IN FINDING VICTOR LAWRENCE LIABLE FOR CONVERSION AFTER HE RETURNED IT TO CSAVE.NET

The lower court’s finding Victor Lawrence liable for conversion of the Black

⁷ Intermountain pleaded waiver and estoppel as affirmative defenses. See R735 et seq.

⁸ This argument was presented to the lower court during closing argument, Trial Transcript Vol. IV, p. 495 (“Everybody that was there, an all the evidence in the deal jacket suggests that everybody thought Wayne Wong was going to be the second guy on the deal, the guarantor, the co-signor ...”).

Rodeo after January 31, 2001, when he no longer possessed it, was in error. Intermountain argues Mr. Lawrence's decision to return the vehicle to the owner of cSave.net, which is Mr. Schwenke and Mr. Wong, after he learned Intermountain claimed the right to possess it, constituted a continuing conversion of the automobile. Intermountain relies on a single case to support its proposition – *Queen v. Lynch Jewelers, LLC*, 55 P.3d 914 (Kan. App. 2002). However, *Queen v. Lynch Jewelers* did not address the question of whether an individual may be liable for conversion when the individual does not possess or control the chattel.

Intermountain's claim of conversion rests on the assertion Mr. Lawrence refused to surrender the chattel to Intermountain and misdelivered it to cSave.net. The Restatement (Second) Torts § 237, cited by Intermountain in its brief, states a possessor is to return a chattel when it is demanded by its rightful owner. However, there are exceptions to the general rule. For example, a possessor does not become a converter by making a refusal to surrender the chattel to the claimant for the purpose of affording a reasonable opportunity to inquire into such a right.

Here, the circumstances under which Intermountain demanded an immediate return of the vehicle were unreasonable. Intermountain attempted a repossession of the vehicle at Mr. Lawrence's place of business. Mr. Lawrence was unaware, until that day, that Intermountain claimed the right to possess. Mr. Lawrence, when he learned Intermountain was attempting to repossess, confronted Intermountain and requested they

either discuss with him the situation or leave. Because of the physical confrontation between Mr. Lawrence and Intermountain's principal, the police were summoned. Intermountain's assignment from Bank of America was presented to the police officer. Upon reviewing the assignment, the police resolved the situation by telling Mr. Lawrence he could take the vehicle with him. See Trial Transcript, Vol. III, p. 372, lines 7-19. It was then that Mr. Lawrence returned the vehicle to cSave.net so cSave.net could resolve its dispute with Intermountain. Intermountain's harsh tactic in seeking repossession was an unreasonable demand for return of the vehicle and Mr. Lawrence's refusal to return it was reasonable. To proceed with self-help procedures when confronted with a breach of the peace is a violation of the self-help remedy under Utah Uniform Commercial Code, UTAH CODE ANN. § 70A-9a-609(2)(b). By even orally protesting the repossession, many cases hold that a debtor prohibits the creditor's right to possess the collateral. White & R. Summers, Uniform Commercial Code § 26-6, p. 110-11 (2d ed. 1980).

Further, Mr. Lawrence committed no conversion by delivering the vehicle to cSave.net, which is comprised of Mr. Schwenke and Mr. Wong. Although Intermountain claimed the right to possess the vehicle, its actual legal right to do so was in doubt at that time. Intermountain only presented a piece of paper to the police officer indicating ownership of the vehicle had been reassigned to Intermountain from the lender. See Trial Transcript, Vol. III, p. 372, lines 7-19. In *Underwood v. Dillon Companies*, 936 P.2d 612 (Colo. App. Ct. 1997), the lessee of computer equipment refused to return the equipment

to the lessor upon terms demanded by the lessor. The lessor sued the lessee for conversion. The court held, “A bailee may refuse to surrender an item of personal property in order to investigate the bailor's rights to return of the property if the bailee distinctly communicates the reason for the qualified refusal to the bailor.” *Id.* at 614. Here, when Mr. Lawrence realized Intermountain claimed the right to possess the vehicle, he refused to surrender it but turned it over to cSave.net so it could resolve the dispute. Mr. Lawrence testified at trial that he inquired of the parties at the repossession whether there was a court order [writ of replevin]. Upon learning there was no writ of replevin, he asserted his present right to the vehicle and communicated his wish to have the courts decide who had the ultimate right to it. The police allowed him to keep the vehicle. Trial Transcript, Vol. II, pp. 242 – 244. His refusal to surrender the vehicle to Intermountain on January 31, 2001 and his choice to return it to cSave.net does not make him a converter.

Intermountain argues Mr. Lawrence knew Wayne Wong was the lessee. Mr. Lawrence only knew Wayne Wong was the personal guarantor of three leases entered into on behalf of cSave.net. See Trans., Vol. I, p. 193, lines 20 & 21; Trans., Vol. I, p. 194, line 20 through p., 195, line5 ; Trans., Vol. I, p. 199, lines 9 -17; & Trans., Vol. II, p. 220, lines 1-6. Intermountain further argues Mr. Lawrence knew “Schwenke intended not to surrender the vehicle to Intermountain or to Bank of America.” See Appellee Brief, p. 50. The trial court made no such finding and Intermountain offers no

authority for ascertaining Mr. Lawrence's purported knowledge of the future actions of Mr. Schwenke. On January 31, 2001, Mr. Lawrence ascertained only a contractual dispute between cSave.net and Intermountain, not the grand fraudulent scheme Intermountain presented to the trial court.

POINT 5. THE LOWER COURT'S AWARD OF PUNITIVE DAMAGES SHOULD BE REVERSED BECAUSE ITS UNDERLYING FINDINGS WERE IN ERROR

Utah Code Ann. § 78B-8-201(1) states,

[P]unitive damages may be awarded only if ... 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.

The trial court based its finding of punitive damages against the Lawrences on its finding they "conspired to defraud Intermountain" and their conduct "constitute[d] knowing and reckless indifference toward Intermountain." See Initial Findings, ¶ 67. As argued herein, the trial court's finding the Lawrences liable for conspiracy to defraud was in error; Wayne Wong's failure to disclose \$10,000 in consideration was not unlawful and cannot be imputed to the Lawrences. Further, no other unlawful acts were found and the Lawrences did not commit conversion. For these reasons, the imposition of punitive damages was also in error.

The trial court also imposed punitive damages on Mr. Lawrence because he turned the Black Rodeo over to cSave.net upon learning of Intermountain's attempted repossession. See Initial Findings, ¶ 66. It was not wrongful to do so and therefore Mr.

Lawrence's decision does not meet the clear and convincing threshold of proving willful, malicious or intentionally fraudulent behavior which would give rise to punitive damages. *See Crookston v. Fire Ins. Exchange*, 817 P.2d 789, 807 (Utah 1991)(willful and malicious conduct is "conduct which manifests a knowing and reckless indifference toward, and disregard of, the rights of others"). Rather, Mr. Lawrence's decision was reasonable in light of all circumstances. He did not know at that time who had the right to possess the vehicle, but understood cSave.net to be the lessee. He was not presented with a writ of replevin or other court order establishing Intermountain's legal right to the vehicle. The police officer on the scene who inspected the re-assignment to Intermountain resolved the immediate situation by indicating Mr. Lawrence should leave with the vehicle. See Initial Findings, ¶ 28. Mr. Lawrence's decision, at worst, was an honest error. However, there is nothing to suggest he did anything improper by relinquishing the vehicle to the entity who provided it to him.

POINT 6. ALTERNATIVELY, THE AMOUNT OF PUNITIVE DAMAGES SHOULD BE REVERSED BECAUSE IT SHOULD NOT HAVE BEEN CALCULATED USING PREJUDGMENT INTEREST IN THE DENOMINATOR AND THE LAWRENCES' CONDUCT WAS NOT REPREHENSIBLE

A. Prejudgment Interest

Intermountain argues the inclusion of prejudgment interest in the denominator when calculating punitive damages is appropriate. See Appellee Brief, p. 59. In support of its argument, Intermountain relies on *Vasels v. LoGuidice*, 740 P.2d 1375, 1378 (Utah App. 1987)("Prejudgment interest represents an amount awarded as damages ...")

However, *Vasels* did not address punitive damages at all, let alone conclude prejudgment interest should be included when calculating punitive damages.

It does not make sense to include prejudgment interest in the baseline calculation when computing punitive damages. For example, two parties suffering the same injury on the same date by the same act of a defendant will obtain variant punitive damage awards if one plaintiff's case goes to trial at a later date than the other. Such cannot be the result intended by the statute allowing for punitive damages. It could create a perverse incentive for plaintiffs to drag their cases out in order to increase the dollar amount of pre-judgment interest and thereby increase the amount of punitive damages. Again, if the court were to include prejudgment interest in calculating punitive damages, the punitive damage amount would increase the longer it took to try the case, not because the harm to the plaintiff was greater, but because it took longer to reach a verdict regarding the amount of compensatory damages. Essentially, pre-judgment interest is meant to fully restore the plaintiff with respect to compensatory damages, but not to augment punitive damages.

Although sometimes prejudgment interest has been included in calculating punitive damages, see *Crookston v. Fire Ins. Exchange*, 817 P.2d 789 (Utah 1991), other cases have separated it from the calculation. See *Kealamakia, Inc. v. Kealamakia*, 213 P.3d 13 (Utah Ct App. 2009). It appears the Court has never directly addressed the issue. Here, if the punitive damage award against the Lawrences is to remain, it should be

recalculated to exclude pre-judgment interest from the baseline calculation.

B. The Lawrences' conduct was not reprehensible.

“The most important indicium of punitive the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” *State Farm Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003). The case is, at its heart, about Intermountain’s failure to get paid on three leases and eventual loss of three vehicles, only one of which was ever possessed by the Lawrences. The fair rental value of the Black Rodeo of the period of time the Lawrences possessed it was \$3,625.40. For this, Victor Lawrence was adjudged liable to Intermountain for over \$600,000 and Cindy Lawrence was adjudged liable for over \$200,000.

The Supreme Court has instructed courts:

“to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced indifference to or reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.” *Id.* (internal citations omitted).

Of the five factors listed above, only one has potential application to the present matter. The harm caused to Intermountain was economic, not physical. The conduct did not involve indifference to health or safety. Intermountain was not financially vulnerable. The conduct was not repeated.⁹ The only applicable factor to determine the

⁹ Although the trial court stated, “the evidence at trial strongly suggested that Lawrence and Schwenke had orchestrated a similar fraud before,” it entered no finding of such previous

reprehensibility of the Lawrences' conduct is whether such conduct involved trickery or deceit. The trial court found the Lawrences benefited from a misrepresentation made by Wayne Wong. However, as argued herein, there was no unlawful conduct to support any finding of conspiracy to defraud nor was the Lawrences' possession of the Black Rodeo wrongful. Such conduct is certainly not reprehensible.

conduct and there is no evidence of such conduct.

CONCLUSION

For the reasons set forth herein, the trial court's judgment should be reversed.

Respectfully submitted this 15 day of April, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April, 2010, two true and correct copies of the foregoing Appellants' Reply Brief were mailed, postage prepaid, to the following:

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