

1988

Mark VII Financial Consultants Corporation v. Dale Smedley and the First National Bank of Layton : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David E. Bean; Bean and Smedley; William Thomas Thurman; Scott C. Pierce; McKay, Burton and Thurman; Attorneys for Appellees.

Jackson Howard; D. Davis Lambert; Leslie W. Slauch; Howard, Lewis and Petersen; Attorneys for Appellant.

Recommended Citation

Brief of Appellant, *Mark VII Financial Consultants Corporation v. Smedley*, No. 880606 (Utah Court of Appeals, 1988).
https://digitalcommons.law.byu.edu/byu_ca1/1383

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU

50

.A10

DOCKET NO. 88-0606 OF THE STATE OF UTAH

ORIGINAL

IN THE COURT OF APPEALS

MARK VII FINANCIAL
CONSULTANTS CORPORATION,

Plaintiff-Appellant,

vs.

DALE SMEDLEY and THE FIRST
NATIONAL BANK OF LAYTON,

Defendants-Appellees.:

Case No. 880606-CA

Category 14b

BRIEF OF APPELLANT

APPEAL FROM THE JURY VERDICT AND JUDGMENT OF THE
SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY,
STATE OF UTAH, THE HON. RODNEY S. PAGE, PRESIDING.

JACKSON HOWARD,
D. DAVID LAMBERT, and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601
ATTORNEYS FOR APPELLANT

DAVID E. BEAN, for:
BEAN & SMEDLEY
190 South Fort Lane Suite 2
Layton, Utah 84041
ATTORNEYS FOR APPELLEE
FIRST NATIONAL BANK OF LAYTON

WILLIAM THOMAS THURMAN and
SCOTT C. PIERCE, for:
McKAY, BURTON & THURMAN
Kennecott Building Suite 1200
Salt Lake City, Utah 84133
ATTORNEYS FOR APPELLEE
DALE SMEDLEY

DEPOSITED BY THE
STATE OF UTAH

AUG 16 1990

*Appellant's Brief
was Amended -*
FILED

NOV 14 1988

COURT OF APPEALS
kept only this

Checklist for Briefs

Case No. _____

Clerk _____

Date _____

If a brief fails to comply with any rule other than the rule relating to the timeliness of filing alone, the brief will not be filed and all copies will be returned to the party with an explanation of the needed corrections.



Timely filing of Brief



Eight copies--one with original signatures.



Cover of Briefs

Heavy weight paper.

Color:

Blue.Appellant or Petitioner
RedRespondent or Defendant
Gray.Reply
GreenAmicus Curiae/Intervenor
TanPetition for Rehearing
White . .Response to Petn. for Rehearing



Name of counsel--attorney filing the brief on lower right;
opposing counsel on lower left.



Argument priority classification.



Size and Binding:

Size of brief must be 8 1/2" X 11". Compact or Vello binding is required; coiled plastic or spiral bindings are not acceptable.



Printing Requirements

Adequate margins. Pica type: 10 pitch (ten characters per inch) Type set: 12 point (approx. ten characters per inch). Print on both sides of the page. Double spaced (1 1/2 line spacing not acceptable).



Content Requirements



List of all parties-- unless the caption on the cover shows all parties.



Table of Contents with page references.



Table of Authorities with page references



Statement showing jurisdiction of Court of Appeals (optional with reply brief).



Statement showing nature of the proceedings (optional with reply brief).

- ☒ Statement of the issues (optional with respondent's and reply brief).
- ☐ Determinative constitutional provisions, statutes, ordinances, and rules set out verbatim OR by citation alone if they are set out verbatim in the addendum (optional with reply brief).
- ☒ Statement of the case (optional with respondent's and reply brief)
- ☒ Summary of the argument.
- ☒ Argument
- ☒ Conclusion
- ☒ Addendum (optional with respondent's and reply brief).
- ☒ Length
Appellant/Respondent--50 pages, not including addendum.
Reply--25 pages, not including addendum.
Petition for Rehearing--15 pages, not including addendum.
- ☒ Original signature of counsel of record, or party appearing without counsel, on one copy of brief.
- ☒ Proof of Service--attorney's original signature on one copy of brief

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

MARK VII FINANCIAL	:	
CONSULTANTS CORPORATION,	:	
	:	
Plaintiff-Appellant,	:	
	:	
vs.	:	Case No. 880606-CA
	:	
DALE SMEDLEY and THE FIRST	:	
NATIONAL BANK OF LAYTON,	:	Category 14b
	:	
Defendants-Appellees.:	:	

BRIEF OF APPELLANT

APPEAL FROM THE JURY VERDICT AND JUDGMENT OF THE
SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY,
STATE OF UTAH, THE HON. RODNEY S. PAGE, PRESIDING.

JACKSON HOWARD,
D. DAVID LAMBERT, and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601
ATTORNEYS FOR APPELLANT

DAVID E. BEAN, for:
BEAN & SMEDLEY
190 South Fort Lane Suite 2
Layton, Utah 84041
ATTORNEYS FOR APPELLEE
FIRST NATIONAL BANK OF LAYTON

WILLIAM THOMAS THURMAN and
SCOTT C. PIERCE, for:
McKAY, BURTON & THURMAN
Kennecott Building Suite 1200
Salt Lake City, Utah 84133
ATTORNEYS FOR APPELLEE
DALE SMEDLEY

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
JURISDICTION AND NATURE OF PROCEEDINGS BELOW	1
DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ETC.	1
STATEMENT OF THE CASE	1
A. <u>Nature Of The Case.</u>	1
B. <u>Course Of Proceedings And Disposition Below.</u>	2
C. <u>Statement Of Facts.</u>	3
SUMMARY OF ARGUMENT	6
ARGUMENT	6
POINT I	
THE JURY AND THE TRIAL COURT ERRED IN ALLOWING THE BANK A SETOFF FOR AN OBLIGATION OWED TO SMEDLEY ONLY.	6
A. <u>The Jury Instructions Precluded Allowing a Setoff to the Bank.</u>	7
B. <u>The Bank Was Not Entitled to a Setoff Based on Smedley's Claims Against Plaintiff.</u>	8
POINT II	
PLAINTIFF WAS ENTITLED TO AN INSTRUCTION ON PUNITIVE DAMAGES.	10
CONCLUSION	11
APPENDIX	
A. Jury Verdict (R.439-41)	
B. Amended Judgment on the Verdict (R. 483-85)	
C. Instruction No. 29 (R. 413)	
D. Instruction No. 30 (R. 414)	
E. Instruction No. 31 (R. 415)	
F. Instruction No. 36a (R. 421)	
G. List of Substantive Jury Instructions	

TABLE OF AUTHORITIES

Cases Cited:

<u>Seal v. Tayco, Inc.</u> , 116 Utah 2d 323, 400 P.2d 503 (1965).	9
<u>Occidental Chemical Co. v. Connor</u> , 124 Ariz. 341, 604 P.2d 605 (1979).	9
<u>Johnson v. Rogers</u> , 90 Utah Adv. Rep. 3 (1988).	10
<u>Amoss v. Broadbent</u> , 30 Utah 165, 514 P.2d 1284 (1973).	11
<u>First Security Bank of Utah v. Utah Turkey Growers, Inc.</u> , 610 P.2d 329 (Utah 1980).	9
<u>International Equipment Service, Inc. v. Pocatello Industrial Park Co.</u> , 107 Idaho 1116, 695 P.2d 1255 (1985).	9

Statutes and Rules Cited:

Utah Code Ann. § 78-2-2(3)(i) (1988).	1
Utah Code Ann. § 78-2-2(4) (1988).	1
Utah Code Ann. § 78-2a-3(2)(h) (1988).	1

Other Authorities Cited:

20 Am. Jur. 2d <u>Counterclaim, Recoupment, and Setoff</u> § 7 (1965).	9
--	---

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

MARK VII FINANCIAL	:	
CONSULTANTS CORPORATION,	:	
	:	
Plaintiff-Appellant,	:	
	:	
vs.	:	Case No. 880606-CA
	:	
DALE SMEDLEY and THE FIRST	:	
NATIONAL BANK OF LAYTON,	:	Category 14b
	:	
Defendants-Appellees.:	:	

JURISDICTION AND NATURE OF PROCEEDINGS BELOW

This is an appeal in a civil case from the Amended Judgment on the Verdict entered on June 23, 1988, following a jury trial. (R. 483-85.) Plaintiff filed its Notice of Appeal on July 12, 1988. (R. 490-91.) The Supreme Court had jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(i) (1988). The Supreme Court poured this case over to this Court pursuant to Utah Code Ann. § 78-2-2(4) on October 19, 1988. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(h).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

Appellant does not believe that any constitutional provisions, statutes, ordinances, rules or regulations are determinative of the issues raised herein.

STATEMENT OF THE CASE

A. Nature Of The Case. This is a civil case for conversion and for breach of contract.

B. Course Of Proceedings And Disposition Below. Plaintiff filed its Complaint in the Third Judicial District Court of Salt Lake County on July 31, 1985. (R. 5-11.) By stipulation of the parties, venue of the case was transferred to the Second Judicial District Court of Davis County. (R. 2-4.) Plaintiff filed an Amended Complaint on August 15, 1986. (R. 85-94.) The defendants each filed answers to the Amended Complaint. (Smedley, R. 95-101; First National Bank of Layton, R. 102-07.)

On May 23, 1986, plaintiff filed a Motion for Partial Summary Judgment (R. 51-52), and on March 23, 1987, filed a Reviewed [sic: Renewed] and Amended Motion for Partial Summary Judgment. (R. 113-14.) The Court thereafter entered an Order determining that Smedley, who had made a bid on the subject property at a sale held by the bank, had thereby only redeemed the property as a secured party and did not take pursuant to that sale, and that Smedley's acquisition of the collateral did not destroy the ownership interest of the plaintiff. The court otherwise denied plaintiff's Motions for Summary Judgment. (R. 174-75; 177-80.)

The case was tried before a jury on March 30, April 1, and April 4, 1988. At the conclusion of trial, the jury returned a verdict, a copy of which is attached hereto in Appendix A, awarding damages in favor of plaintiff and against Smedley and the bank for \$586.00, and against Smedley only for \$30,586.00. (R. 439-41.) A Judgment on Verdict was entered on April 18, 1988. (R. 442-44.)

On the same day as the entry of the Judgment on Verdict, plaintiff filed a Motion for Judgment N.O.V. (R. 429-31), a Motion for Judgment and Interest (R. 432-33), a Motion for Attorney's Fees and Costs (R. 434-35), and a Motion for a New Trial or for an Additur. (R. 436-38.) After hearing, the court augmented the judgment in the amount of \$250.00, granted plaintiff pre-judgment interest, costs and attorney's fees against Smedley, and otherwise denied plaintiff's motions. (R. 486-88.) An Amended Judgment on the Verdict reflecting the disposition of plaintiff's post-trial motions was entered on June 23, 1988. (R. 483-85.) Plaintiff filed its Notice of Appeal on July 12, 1988. (R. 490-91.)

C. Statement Of Facts. The dispute in this case centers around a 1973 Chicago pneumatic drill rig mounted on a 1973 International truck ("drill rig"), which served as collateral for a promissory note executed by plaintiff in favor of General Electric Credit Corporation ("GECC"). Payment of the note was guaranteed by defendant Dale Smedley. (Plaintiff's Exhibit 4.)

The transactions that led to the signing of the promissory note started sometime prior to October, 1983. Smedley owned approximately 200 acres of land in Morgan County, Utah, subject to a mortgage in favor of GECC in the approximate amount of \$112,500.00. Smedley and plaintiff entered into negotiations under which the parties would form a joint venture with plaintiff infusing capital and the parties developing the property. (Plaintiff's Exhibit 1.) The negotiations culminated in an

agreement dated June 8, 1984, under which plaintiff paid \$100,000.00 cash to GECC and executed a promissory note for the balance due on the mortgage. (The promissory note was for \$13,250.00.) The promissory note was secured by the drill rig and by the personal guarantee of Smedley. (Plaintiff's Exhibit 2; R. 277-78.) Smedley executed a bill of sale to the drilling rig conveying title to the plaintiff. (Plaintiff's Exhibit 3.) Smedley, however, had the right to reacquire title to the drill rig by performing \$65,000.00 worth of work towards developing the 200 acres of real property. (R. 278; Plaintiff's Exhibit 2.) Actual possession of the drill rig, however, at all times remained with Smedley. (R. 201, 279.)

The promissory note became due on January 1, 1985 (Plaintiff's Exhibit 4), and plaintiff did not make the payment. (R. 279.) At the request of Smedley, the First National Bank of Layton ("bank") purchased the position of GECC in the promissory note, chattel mortgage and guaranty agreement. (R. 201-02; Defendant's Exhibits 14, 15.) Smedley was indebted to the bank for an amount far in excess of the value of the drilling rig (R. 202) and worked with the bank to develop a plan to obtain the equity in the drilling rig and apply it against Smedley's loan with the bank. (R. 279.) The bank sent a notice to plaintiff of its intention to dispose of the drilling rig, and asserted in the notice that the amount necessary to redeem the collateral was the outstanding principal and interest, together with costs of repossession and sale and attorney's fees. (Plaintiff's

Exhibit 7.) In response to the notice, plaintiff submitted a written tender offering to pay the amount of the principal and interest to redeem the collateral. (Plaintiff's Exhibit 8.) The bank did not respond to the tender. (R. 202.) The bank proceeded with its sale, and at the sale, Smedley redeemed the collateral for the amount demanded by the bank. (R. 175, 178, 202.)

In accordance with his prior understanding with the bank, Smedley thereafter sold the drilling rig to a third party and paid the surplus proceeds from the sale to the bank for application against his outstanding indebtedness. (R. 203.) Neither Smedley nor the bank gave any notice to plaintiff prior to the sale by Smedley. (Id.)

Plaintiff filed this action to recover damages for Smedley's and the bank's conversion of his property. (R. 85-94.) Smedley filed an answer raising several affirmative defenses and also claiming a right of setoff for the work he had performed on the 200 acres of property. (R. 106.) The bank filed an answer but did not assert a right to setoff in its answer. (R. 95-101.)

The jury found that both the bank and Smedley had converted plaintiff's property. The jury found plaintiff's damages by reason of the conversion to be \$30,586. The jury further found that Smedley had performed \$20,139.00 worth of work on the 200 acres of property, and granted Smedley a setoff for that amount and for the amount Smedley had paid to the bank on the GECC

note. (R. 441.) The jury, however, also granted the bank a setoff for the same amounts. (Id.; R. 483-85.) Plaintiff thereafter perfected this appeal. (R. 490-91.)

SUMMARY OF ARGUMENT

The jury found that the bank had converted plaintiff's property and that the damages caused to plaintiff by the conversion were \$30,586.00. The jury setoff against that judgment, however, and indebtedness owned by plaintiff to another party. The setoff was contrary to the jury instructions. In addition, the setoff was contrary to law. Setoffs may only be allowed as between parties with a mutuality of obligation.

The trial court also erred in failing to instruct the jury of the issue of punitive damages. The evidence presented to the jury established, and the jury found, that the bank and Smedley entered into a conspiracy to intentionally deprive plaintiff of the equity in his property. The conduct was wilful and malicious, and an instruction on punitive damages should have been given.

ARGUMENT

POINT I

THE JURY AND THE TRIAL COURT ERRED IN ALLOWING THE BANK A SETOFF FOR AN OBLIGATION OWED TO SMEDLEY ONLY.

Plaintiff established at trial that the bank and Smedley had agreed and conspired between themselves to deprive plaintiff of its equity in the drilling rig and to apply that equity in

partial satisfaction of Smedley's obligation to the bank. The jury found the facts as contended by plaintiff, and awarded a judgment against both Smedley and the bank for conversion. The jury determined plaintiff's damages from the conversion to be \$30,586.00, but then, in a hand-written addendum to its verdict, proceeded to take away what it had given by allowing an improper setoff against the judgment. The jury allowed the bank a setoff based on an obligation owed by plaintiff to Smedley. The allowance of this setoff was contrary to the express instructions given to the jury, and also contrary to the established law concerning the subject.

A. The Jury Instructions Precluded Allowing a Setoff to the Bank.

The instructions to the jury regarding plaintiff's claims against the bank are set forth predominately in instructions 29, 30, 31, and 36a, copies of which are set forth in the appendix as Items C, D, E, and F, respectively.¹ The measure of damages against the bank was set forth in Instruction No. 31 as follows:

In the event you find the bank has conspired with Smedley has heretofore instructed, you should also enter judgment against the bank for the amount of any judgment against Smedley for conversion or wrongful sale.

This instruction essentially provides that the bank and Smedley would be jointly and severally liable for any damages

¹ A complete list of the substantive jury instructions (omitting the stock instructions) appears in Appendix G.

awarded to plaintiff for conversion. In other words, the jury could not find both Smedley and the bank guilty of conversion, but find that plaintiff's damages as a result of the conversion by the bank was "x" dollars, while plaintiff's damages as a result of conversion by Smedley was "y" dollars. The award of damages had to be the same against each defendant. Other instructions permitted the jury to grant Smedley a setoff for any amounts which plaintiff owed Smedley. (E.g., Instructions 24, 25 (R. 408-09).) No instruction, however, authorized any setoff against the damages found against the bank.

On the second page of its verdict (R. 440), the jury found that plaintiff was entitled to an award of damages against Smedley in the sum of \$30,586.00. Pursuant to the clear terms of instruction No. 31, the jury was required, upon finding that the bank participated in the conversion, to find a verdict against the bank in the same amount of \$30,586.00.² The case should be remanded to the trial court with instructions to enter judgment against the bank for the sum of \$30,836.00.

B. The Bank Was Not Entitled to a Setoff Based on Smedley's Claims Against Plaintiff.

Setoff is an equitable doctrine, allowed when two parties are each indebted to the other on separate claims. Under the circumstances, justice requires that the debts be

² Pursuant to plaintiff's Motion for Judgment N.O.V., the Court did grant an additur in the amount of \$250.00, so the amount of the judgment against Smedley and the bank should have been \$30,836.00. (R. 487).

setoff and only the difference between the debts recovered. International Equipment Service, Inc. v. Pocatello Industrial Park Co., 107 Idaho 1116, 695 P.2d 1255, 1258 (1985); 20 Am. Jur. 2d Counterclaim, Recoupment, and Setoff § 7 (1965). Setoff is only allowed, however, where there is a mutuality of obligation. First Security Bank of Utah v. Utah Turkey Growers, Inc., 610 P.2d 329, 333 (Utah 1980). Stated another way, a party may not obtain the benefit of a setoff unless that party could have maintained a direct action for the amount of the setoff. Seal v. Tayco, Inc., 116 Utah 2d 323, 400 P.2d 503, 505 (1965) ("[A]llowance of damages on a counterclaim by way of setoff is tantamount to a suit on such cause of action."); Occidental Chemical Co. v. Connor, 124 Ariz. 341, 604 P.2d 605, 607 (1979) ("If one is not entitled to relief in a direct action, he is not entitled to assert a setoff or counterclaim.").

In the instant case, the setoff allowed to the bank was based on the amounts which plaintiff owed to Smedley for work Smedley had performed in development of the 200 acre parcel of property. The claim arose pursuant to a contract between plaintiff and Smedley. It is clear that the bank could not have maintained a direct action against plaintiff based on that contract. Where the bank could not have maintained a direct action against plaintiff, it follows that the bank is not entitled to the benefit of setoff for that same obligation.

As set forth above, the instructions to the jury did not allow the bank a right of setoff for the obligations owed by

plaintiff to Smedley. To the extent that the instructions can be read as allowing such a right of setoff, they are clearly erroneous. It is possible that the jury misunderstood the instructions. It is clear in any event, however, that the jury found that plaintiff was damaged in the amount of \$30,586.00 (augmented to \$30,836.00 pursuant to plaintiff's Motion for Judgment N.O.V.), but then allowed the bank a setoff against that amount based on claims owed by plaintiff to Smedley. The allowance of the setoff was error, and the case should be remanded for entry of judgment against the bank in the amount of \$30,836.00.

POINT II

PLAINTIFF WAS ENTITLED TO AN INSTRUCTION ON PUNITIVE DAMAGES.

Plaintiff's amended complaint prayed for an award of punitive damages (R. 94), and plaintiff requested that the jury be instructed concerning punitive damages. (R. 336-37.) The trial court denied plaintiff's requested instructions, and instructed the jury that no punitive damages could be awarded. (R. 417.)

In order to give rise to punitive damages, a defendant's conduct must be both wilful and malicious. The defendant must have demonstrated a knowing and reckless disregard toward the rights of others. Johnson v. Rogers, 90 Utah Adv. Rep. 3, 4 (1988) (citations omitted). Plaintiff acknowledges that in order to recover punitive damages, it was required to show more than

mere conversion. Amoss v. Broadbent, 30 Utah 165, 514 P.2d 1284 (1973).

In the instant case, however, the jury found that the bank had converted plaintiff's property, in accordance with the following instruction:

If you find for the plaintiff on either plaintiff's claim for conversion or wrongful sale, before you may find that the bank conspired with Smedley you must find that defendant Smedley and the bank entered into a mutual agreement expressly or impliedly to pursue a joint enterprise to convert the rig or to conduct a wrongful sale of the rig in which they both engaged. With both acting in pursuit of that common purpose, so that each is acting for both in furthering it.

Jury Instruction 30 (R. 414).

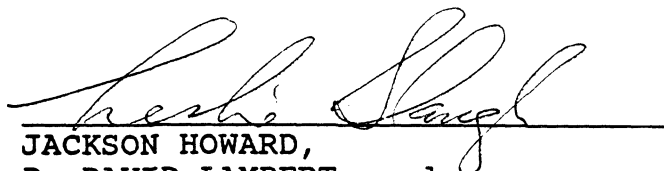
The jury found, therefore, that the bank intentionally entered into an agreement with Smedley for the express purpose of wrongfully depriving plaintiff of his equity in the property. This is sufficient to support an award of punitive damages, and the jury should have been so instructed.

CONCLUSION

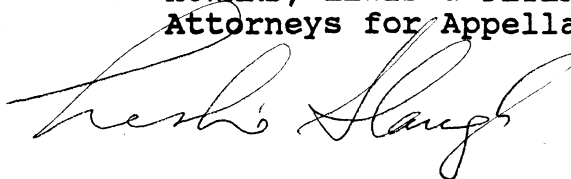
The instructions given to the jury and established case law prohibit allowing the bank a setoff for amounts owed by plaintiff to Smedley. The entry of the judgment allowing such a setoff was in error. This case should be remanded with instructions to enter a judgment in favor of plaintiff and against the First National Bank of Layton in the sum of \$30,836.00, plus costs and interests as provided by law.

Plaintiff was entitled to an instruction on punitive damages, and the case should be remanded for a new trial on the issue of punitive damages.

DATED this 9th day of November, 1988.



JACKSON HOWARD,
D. DAVID LAMBERT, and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellant

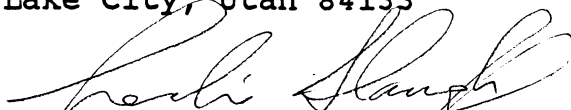
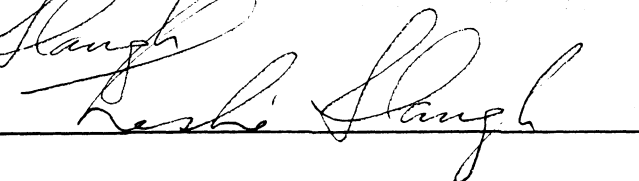


MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 9th day of November, 1988.

DAVID E. BEAN
BEAN & SMEDLEY
190 South Fort Lane Suite 2
Layton, Utah 84041

WILLIAM THOMAS THURMAN
SCOTT C. PIERCE
MCKAY, BURTON & THURMAN
Kennecott Building Suite 1200
Salt Lake City, Utah 84133

APPENDIX "A"

Jury Verdict (R.439-41)

FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH

1988 APR -5 PM 12:30

MICHAEL S. ALLEN, CLERK
2ND DISTRICT COURT

BY AC
CLERK OF COURT

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR DAVIS COUNTY
STATE OF UTAH

MARK VII FINANCIAL,)	
)	Civil Action No. 40864
Plaintiff,)	
)	
vs.)	<u>VERDICT</u>
)	
DALE SMEDLEY, and)	
FIRST NATIONAL BANK OF LAYTON,)	
)	
Defendants.)	
)	

WE THE JURY empanelled in the above entitled matter
Find the issues in favor of the plaintiff and against the
defendants Smedley and the Bank and award damages as follows:

\$ 586.00

Signed this 4 day of April, 1988.

Michael S. Cole
Foreperson

FILMED

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR DAVIS COUNTY
STATE OF UTAH

MARK VII FINANCIAL,)	
)	Civil Action No. 40864
Plaintiff,)	
)	
vs.)	<u>VERDICT</u>
)	
DALE SMEDLEY, and)	
FIRST NATIONAL BANK OF LAYTON,)	
)	
Defendants.)	
)	

WE THE JURY empaneled in the above entitled matter,
Find the issues in favor of the plaintiff and against the
defendant Smedley and award damages in the following sum:

MSC
\$ ~~65,000.00~~ # 30,586.00

Signed this 4 day of April, 1988.

Michael S. Cole
Foreperson

CONVERSION

\$ 35,000.⁰⁰ - Value
14,275.⁰⁰ - NOTE
20,139.⁰⁰ - OFFSET

Michael S. Cole

April 4, 1988

APPENDIX "B"

**Amended Judgment on the Verdict
(R. 483-85)**

FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH

1988 JUN 23 AM 9:06

MICHAEL G. ALLPHIN, CLERK
2ND DISTRICT COURT

BY Am
DEPUTY CLERK

JACKSON HOWARD, (A1548) for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW

120 East 300 North Street
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6345

Our File No. 16,607

Attorneys for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

MARK VII FINANCIAL CONSULTANTS :
CORPORATION, :

Plaintiff, :

vs. :

DALE SMEDLEY and FIRST NATIONAL
BANK OF LAYTON, :

Defendants. :

AMENDED JUDGMENT
ON THE VERDICT

Civil No. 40864
Judge Rodney S. Page

The above-captioned matter came on for its regularly scheduled trial beginning on March 30, 1988, continuing on April 1, and again continuing on April 4, 1988. The Hon. Rodney S. Page presided over the trial, and the matter was tried to a duly impaneled jury consisting of eight members. At the conclusion of the evidence, the jury was instructed on the law and thereafter, the jury received the arguments of counsel. The jury, through its foreperson, Michael S. Cole, returned its verdict and based upon said verdict, and with the amendments the Court has made by separate Order, the Court now makes and enters the following judgment on the verdict:

JUDGMENT ENTERED

FILMED

1. The defendants jointly converted the property of the plaintiff damaging the plaintiff as set forth hereafter.

2. Damages were calculated against the bank and the defendant Smedley, jointly and severally, for conversion as follows:

a.	Value of property converted:	\$ 35,000.00;
b.	Monies owed on the property:	(\$14,025.00);
c.	Offset for work performed by Smedley:	(\$20,139.00);
	Total:	\$ 836.00.

3. In addition, the jury found damages against defendant Dale Smedley for conversion in the sum of \$30,836.00.

4. The plaintiff is granted judgment against The First National Bank of Layton in the amount of \$836.00 and interest in the amount of \$247.32 and costs in the amount of \$479.45.

5. The plaintiff is granted judgment against Dale Smedley in the amount of \$30,836.00, plus interest in the amount of \$11,691.98, attorney's fees in the amount of \$20,000.00, and costs in the amount of \$479.45.

DATED at Farmington, Utah, this 22 day of June, 1988.

BY THE COURT:


JUDGE RODNEY S. PAGE

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 7th day of June, 1987.

Scott Pierce
Attorney at Law
Kennecott Building #1200
Salt Lake City, UT 84113

David E. Bean
Attorney at Law
190 South Fort Lane #2
Layton, UT 84041



SECRETARY

APPENDIX "C"

**Instruction No. 29
(R. 413)**

INSTRUCTION NO. 29

You are instructed that the Court has determined as a matter of law that the bank did not conduct a private sale, but rather, the action of Smedley in purchasing the drill rig on April 29, 1985, was a redemption that did not cut off the rights of Mark VII. You are, therefore, instructed that if you find that the bank at the time of the receipt of the money from Doxey, May 3, 1985, knew that Smedley had redeemed as guarantor, knew that he did not have a right to sell the rig so as to extinguish the interest of Mark VII and retain the proceeds. Then the act of the bank in taking Doxey's money and crediting the account of Smedley was an act of conversion of the property interest of Mark VII.

APPENDIX "D"

**Instruction No. 30
(R. 414)**

INSTRUCTION NO. 30

If you find for the plaintiff on either plaintiff's claim for conversion or wrongful sale, before you may find that the bank conspired with Smedley you must find that defendant Smedley and the bank entered into a mutual agreement expressly or impliedly to pursue a joint enterprise to convert the rig or to conduct a wrongful sale of the rig in which they both engaged. With both acting in pursuit of that common purpose, so that each is acting for both in furthering it.

The plaintiff must prove this proposition be a preponderance of the evidence.

APPENDIX "E"

**Instruction No. 31
(R. 415)**

INSTRUCTION NO. 31

In the event you find the bank has conspired with Smedley as heretofore instructed, you should also enter judgment against the bank for the amount of any judgment against Smedley for conversion or wrongful sale.

APPENDIX "F"

**Instruction No. 36a
(R. 421)**

INSTRUCTION NO. 36e

You are instructed that you may find in favor of the plaintiff and against the defendant Smedley and reach a verdict consistent with these instructions. You may also find in favor of the plaintiff and against both defendants consistent with these instructions so as to return two consistent verdicts in favor of the plaintiff, however, if you find against Smedley in both instances the amount of the joint verdict against both Smedley and the Bank will be deducted by the Court from the amount you award in the verdict form against Smedley alone so as to prevent a double recovery.

Nothing contained herein requires that you do either or both and you are instructed that you are free to return a verdict as you see fit based upon the evidence and facts as you find them under the law.

APPENDIX "G"

List of Substantive Jury Instructions

SUMMARY OF SUBSTANTIVE JURY INSTRUCTIONS

- 14. Claims of the parties
- 15. Written agreements are ambiguous
- 15a Ambiguity construed against drafter
- 16. Elements of breach of contract claim against Smedley
- 17. Elements of conversion
- 18. Smedley redeemed rig from Bank
- 19. Requirements of commercially reasonable sale
- 20. Elements of wrongful sale claim against Smedley
- 21. Elements of Smedley's breach of agreement claim against plaintiff
- 22. Smedley entitled to reasonable value of services
- 23. Measure of damages for breach of contract against Smedley
- 24. Measure of damages for conversion against Smedley
- 25. Measure of damages for wrongful sale against Smedley
- 26. Waiver and relinquishment defined
- 27. Plaintiff had no duty to attend bank's sale
- 28. Fair market value of rig was \$33,000 plus \$2,000 for hammer
- 29. Elements of conversion against bank
- 30. Elements of conspiracy against bank
- 31. Measure of damages against bank (conspiracy to convert)
- 36a Effect of verdicts against both bank and Smedley (double recovery)