

1988

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

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Mark VII Financial Consultants Corporation v. Smedley*, No. 880606 (Utah Court of Appeals, 1988).
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BRIEF

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DOCKET NO. 88-0606 OF THE STATE OF UTAH

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

AMENDED 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
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FIRST NATIONAL BANK OF LAYTON

DEPOSITED BY THE
STATE OF UTAH

AUG 16 1990

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SCOTT C. PIERCE, for:
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Salt Lake City, Utah 84133
ATTORNEYS FOR APPELLEE
DALE SMEDLEY

FILED

NOV 29 1988

COURT OF APPEALS

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.:	:	

AMENDED BRIEF OF APPELLANT

APPEAL FROM THE JURY VERDICT AND JUDGMENT OF THE
SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY,
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Cases Cited:

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<u>First Security Bank of Utah v. Utah Turkey Growers, Inc.</u> , 610 P.2d 329 (Utah 1980).	11
<u>International Equipment Service, Inc. v. Pocatello Industrial Park Co.</u> , 107 Idaho 1116, 695 P.2d 1255 (1985).	11

Statutes and Rules Cited:

Utah Code Ann. § 78-2-2(3)(i) (1987).	1
Utah Code Ann. § 78-2-2(4) (1987).	1
Utah Code Ann. § 78-2a-3(2)(h) (1987).	1

Other Authorities Cited:

20 Am. Jur. 2d <u>Counterclaim, Recoupment, and Setoff</u> § 7 (1965).	11
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IN THE COURT OF APPEALS

OF THE STATE OF UTAH

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

AMENDMENT

This Amended Brief of Appellant amends and replaces the Brief of Appellant filed in this matter dated November 9, 1988.

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) (1987). The Supreme Court poured the 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 assert 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 the Judgment on Verdict was entered, 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 Ex. 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 Ex. 1.) The negotiations culminated in an agreement dated June 8, 1984, under which plaintiff discharged Smedley's obligation to GECC by paying \$100,000.00 cash to GECC and executing 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 Ex. 2; R. 277-78.) Smedley executed a bill of sale to the drilling rig conveying title to the plaintiff. (Plaintiff's Ex. 3.) Smedley 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 Ex. 2.) Actual possession of the drill rig at all times remained with Smedley. (R. 201, 279.)

The promissory note to GECC became due on January 1, 1985 (Plaintiff's Ex. 4), and plaintiff did not make the payment. (R. 279.) Plaintiff demanded that Smedley deliver to it the rig and would have made payment to GECC if Smedley had released the rig. Smedley refused. Rather than release the rig to the plaintiff, Smedley induced the First National Bank of Layton ("bank") to purchase the position of GECC in the promissory note, chattel mortgage and guaranty agreement. (R. 201-02; Defendant's Exs. 14, 15.) Smedley was indebted to the bank for an amount far in excess of the value of the drilling rig (R. 202) and the bank stood to lose several hundred thousand

dollars, so Smedley and the bank developed 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 Ex. 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 Ex. 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.) The bank did not cash Smedley's check to it for the GECC loan until after the check from Doxey, Smedley's purchaser, had cleared the bank some six days later.

In accordance with his prior understanding with the bank, Smedley thereafter sold the drilling rig to a third party, Doxey, 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 offset 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 offset in its answer. (R. 95-101.) The jury found that Smedley was indebted to the plaintiff in the amount of \$65,000.00, less the amount of work he had performed in the amount of \$20,139.00, and the amount he had paid the bank on the GECC loan, \$14,275.00, for a net amount of \$30,586.00.

The jury also found that both the bank and Smedley had converted plaintiff's property. The jury had been instructed that the damages for conversion was the fair market value of the drill rig (R. 408), which the parties had stipulated was \$35,000.00. (R. 412.) The jury further found that Smedley had performed \$20,139.00 worth of work on the 200 acres of property, and granted Smedley an offset 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 an offset 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 had been instructed that the damages from the conversion was the stipulated fair market value of the drill rig, \$35,000.00, less allowable offsets. The jury offset against that judgment, however, an indebtedness owed by plaintiff to another party. The offset was contrary to the jury instructions. In addition, the offset was contrary to law,

because offsets may only be allowed as between parties with a mutuality of obligation.

The trial court also erred in failing to instruct the jury on 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 AN OFFSET 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 had been instructed that the measure of damages for conversion was the fair market value of the drill rig (\$35,000.00), less allowable offsets. The jury allowed the bank an offset based on an obligation owed by plaintiff to Smedley. The allowance of this offset 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 an Offset to the Bank.

The jury was presented with several different causes of action and measures of damages. The claims against Smedley resulted in two measures of damages. For the claims of conversion and wrongful sale, the jury was instructed to award the fair market value of the drill rig (\$35,000.00), less an offset of \$14,274¹ for the money paid by Smedley to redeem the drill rig from the bank's foreclosure sale, and less an additional offset for the work performed by Smedley on the 200 acres, which the jury found to have a value of \$20,139.00. (Instructions 24, 25 (R. 408, 409).) For the claim of breach of contract, the jury was instructed to award plaintiff the contract amount of \$65,000.00, less the same offsets. (Instruction 23 (R. 407).)

The jury found for plaintiff on each of these claims, and awarded damages in accordance with the instructions. On the breach of contract claim, the jury awarded \$65,000.00, less offsets of \$14,275.00 and \$20,139.00, for a net judgment on the breach of contract claim of \$30,586.00. (R. 440.) On the conversion and wrongful sale claims, the jury awarded Smedley \$35,000.00, less offsets of \$14,375.00 and \$20,139.00, for a net judgment on the conversion and wrongful sale claims of \$586.00. (R. 439.)

¹Instructions 24 and 25 stated the offset for payments to the bank was to be \$14,274.00. The jury allowed an offset of \$14,275.00. Plaintiff has not claimed error in the \$1.00 increased offset.

The offset of \$14,275 was reduced to \$14,025.00 by the trial court in response to plaintiff's post-trial motions, apparently because the offset included \$250.00 for costs of repossession claimed by the bank but which was not actually spent.

A summary of the verdict calculations is presented in Appendix "D".

The instructions to the jury regarding plaintiff's claims against the bank for conspiracy, conversion, and wrongful sale are set forth predominately in instructions 29, 30, 31, and 36a, copies of which are set forth in Appendix "C".² 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 as heretofore instructed, you should also enter judgment against the bank for the amount of any judgment against Smedley for conversion or wrongful sale.

The evident purpose of this instruction was to insure that the jury could not find Smedley and the bank each 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 an offset for any amounts which plaintiff owed Smedley. (E.g.,

² A complete list of the substantive jury instructions (omitting the stock instructions) appears in Appendix "E".

Instructions 24, 25 (R. 408-09).) No instruction, however, authorized any offset against the damages found against the bank.

The jury apparently misunderstood Instruction No. 31 as requiring that the judgment against the bank be equal to the net judgment against Smedley. The instruction should properly be read as requiring that the judgment against the bank be equal to the judgment against Smedley before the allowance of the offsets.

The case should be remanded to the trial court with instructions to enter judgment against the bank for the sum of \$35,000.00, plus interest and costs.

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

The discussion above establishes that the jury was required, under the instructions given, to make an award against the bank for conversion and wrongful sale for \$35,000.00, and that the bank was not entitled to the benefit of the offsets awarded to Smedley. If, however, the jury instructions are read as allowing the offsets to be credited against the judgment against the bank, those instructions were clearly erroneous for the reasons shown below.

Offset is an equitable doctrine, allowed when two parties are each indebted to the other on separate claims, and where under the circumstances justice requires that the debts be offset 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 Offset § 7 (1965). Offset 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 an offset unless that party could have maintained a direct action for the amount of the offset. Seal v. Tayco, Inc., 116 Utah 2d 323, 400 P.2d 503, 505 (1965) ("[A]llowance of damages on a counterclaim by way of offset 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 an offset or counterclaim.").

In the instant case, the offset 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 offset for that same obligation.

As set forth above, the instructions to the jury did not allow the bank a right of offset for the obligations owed by plaintiff to Smedley. To the extent that the instructions can

be read as allowing such a right of offset, 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 the bank had converted or wrongfully sold plaintiff's property valued at \$35,000.00, but then allowed the bank an offset against that amount based on claims owed by plaintiff to Smedley. The allowance of the offsets was error, and the case should be remanded for entry of judgment against the bank in the amount of \$35,000.00 plus interest and costs.

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 finding of conspiracy necessarily implies the type of deliberate action which the courts have held constitute wilful and malicious conduct. This is sufficient to support an award of punitive damages, and the jury should have been so instructed.

CONCLUSION

The jury instructions and the established case law prohibit an offset to the bank for amounts owed by plaintiff to Smedley. The entry of the judgment allowing such an offset 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 \$35,000.00, plus costs and interest as provided by law.

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

DATED this 29th day of November, 1988.



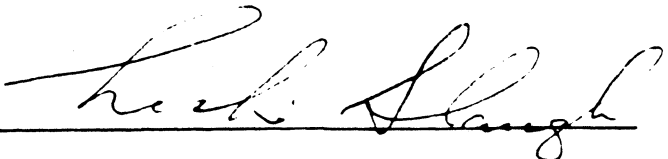
JACKSON HOWARD,
D. DAVID LAMBERT, and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellant

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 29th 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)

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

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DAVIS COUNTY, UTAH

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MICHAEL S. COLE, CLERK
2ND DISTRICT COURT

BY MC
DEPUTY CLERK

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)**

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2ND DISTRICT COURT

BY Am
DEPUTY CLERK

JACKSON HOWARD, (A1548) for:
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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

BY Am

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.

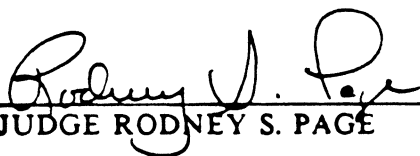
3. In addition, the jury found damages against defendant Dale Smedley for conversion in the sum of \$30,836.00.

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:

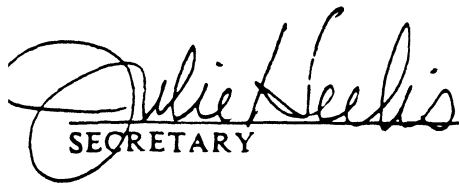

JUDGE RODNEY S. PAGE

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"

Selected Jury Instructions

INSTRUCTION NO. 23

If you find that defendant Smedley breached the contract to repay to the plaintiff the sum of \$65,000 you should grant judgment in favor of plaintiff and against Smedley in the sum of \$65,000 less the \$14,274 defendant Smedley paid the bank less any offset you may find Smedley was entitled to under his claim against the plaintiff.

INSTRUCTION NO. 24

If you find that the defendant Smedley converted an interest in property belonging to the plaintiff, you should award damages to the plaintiff equal to the fair market value at the time of the conversion less the \$14,274 Smedley paid the bank and less any offset you may award Smedley on his claim against the plaintiff.

INSTRUCTION NO. 25

If you find that defendant Smedley sold the rig to Doxey in violation of Utah Law, then you should award to plaintiff judgment against defendant Smedley equal to the market value of the rig at the time of sale less the \$14,274 Smedley paid the bank and less any offset you may award Smedley on his claim against plaintiff.

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.

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.

INSTRUCTION NO. 21

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.

INSTRUCTION NO. 36e

You are instructed that you may find in favor of the plaintiff and against the defendant Smedley and reach a verdict consistant 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 "D"

Summary of Verdict Calculations

SUMMARY OF VERDICT CALCULATIONS

	Award per jury verdict	Correct Award per Appellant
<u>Against Dale Smedley</u>		
<u>Breach of Contract (Jury Instruction 23) ¹</u>		
Debt owed by Smedley to Mark VII	\$65,000.00	\$65,000.00
Less: improvements to land	20,139.00	20,139.00
payment to Bank	14,025.00 ²	14,025.00
Subtotal for breach of contract	\$30,836.00	\$30,836.00
Plus: interest	11,691.98	11,691.98
attorney's fees	20,000.00	20,000.00
costs	479.45	479.45
Total for breach of contract	\$63,007.43	\$63,007.43
<u>Conversion or Wrongful Sale</u> <u>(Jury Instructions 24 & 25)</u>		
Value of property (Jury Instruction 28)	\$35,000.00	\$35,000.00
Less: improvements to land	20,139.00	20,139.00
payment to Bank	14,025.00 ²	14,025.00
Total for conversion	\$ 836.00	\$ 836.00 plus punitive damages
<u>Against First National Bank of Layton</u>		
<u>Conversion or Wrongful Sale</u> <u>(Jury Instructions 24 & 25)</u>		
Value of property (Jury Instruction 28)	\$35,000.00	\$35,000.00
Less: improvements to land	20,139.00	-0-
payment to Bank	14,025.00 ²	-0-
Total for conversion	\$ 836.00	\$35,000.00 plus punitive damages

¹The judgment for breach of contract is inclusive of the judgment for conversion except for the plaintiff's claim for punitive damages.

²The jury allowed an offset of \$14,275.00. The offset was reduced to \$14,025.00 by the trial court in response to plaintiff's post-trial motions.

APPENDIX "E"

List of Substantive Jury Instructions

LIST 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)