

1979

Ute Cal Land Development Corp. v. Robert R. Sather and Bonnie Lee Sather : Brief of Appellants on Appeal

Utah Supreme Court

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Robert M. McRae; Attorneys for Plaintiff and Respondent;

Cullen Y. Christensen; Attorneys for Defendants and Appellants;

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IN THE SUPREME COURT OF UTAH
STATE OF UTAH

UTE CAL LAND DEVELOPMENT
CORPORATION,

Plaintiff, Respondent
and Cross-Appellant,

Case No. 16017

vs.

ROBERT R. SATHER and
BONNIE LEE SATHER,

Defendants, Appellants
and Cross-Respondents.

APPELLANTS' BRIEF ON APPEAL

APPEAL FROM JUDGMENT ON THE VERDICT OF
FOURTH DISTRICT COURT OF UTAH COUNTY
HONORABLE DAVID SAM, JUDGE

CULLEN Y. CHRISTENSEN, for
CHRISTENSEN, TAYLOR & MOODY
Attorneys for Defendants
and Appellants
55 East Center Street
Provo, Utah 84601

ROBERT M. McRAE, for
DELAND & McRAE
Attorneys for Plaintiff
and Respondent
317 West 1st South
Vernal, Utah 84078

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Clk, Supreme Court, Utah

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STATE OF UTAH

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ROBERT M. McRAE, for
DELAND & McRAE
Attorneys for Plaintiff
and Respondent
317 West 1st South
Vernal, Utah 84078

CULLEN Y. CHRISTENSEN, for
CHRISTENSEN, TAYLOR & MOODY
Attorneys for Defendants
and Appellants
55 East Center Street
Provo, Utah 84601

TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF NATURE OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL.	2
STATEMENT OF FACTS	2
ARGUMENT	9

POINT I

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT OF THE JURY TO THE EFFECT THAT DEFENDANT ROBERT R. SATHER WAS GUILTY OF WILFUL AND MALICIOUS CONDUCT TOWARD THE PLAINTIFF, AND THE COURT BELOW ERRED IN REFUSING TO GRANT THE MOTION OF DEFENDANTS SATHER FOR JUDGMENT NOTWITH- STANDING THE VERDICT IN RESPECT THEREOF. . .	9
--	---

POINT II

THE EVIDENCE REQUIRED A FINDING BY THE JURY THAT DEFENDANTS SATHER WERE ENTITLED TO BE PAID THE SUM OF \$46,560.00, PLUS INTEREST FROM THE PLAINTIFF RATHER THAN ONLY THE SUM OF \$21,500.00	13
--	----

POINT III

THE COURT BELOW ERRED IN FAILING TO AWARD INTEREST TO DEFENDANTS SATHER ON THE AMOUNT DUE FROM THE PLAINTIFF TO THE DEFENDANTS SATHER.	18
---	----

CONCLUSION	22
----------------------	----

AUTHORITIES CITED

22 Am. Jur. 2d 384	20
52 Am. Jur. 2d 161	10
61 Am. Jur. 2d 554-555	20

CASES CITED

	<u>PAGE</u>
Bezner vs. Continental Dry Cleaners Inc., 548 P. 2d 898	10,14
Koer vs. Mayfair Markets, 19 Utah 2d 339, 431 P. 2d 566	10
Lemmon vs. Denver & Rio Grande Western Railroad Company, 9 Utah 2d 195, 341 P. 2d 215.	18
Mourikas vs. Vardianos, 169 F. 2d 53	20
Taylor vs. Keith O'Brien Inc., 537 P. 2d 1022.	10
Sears, Roebuck & Company vs. Blade, 294 P. 2d 140 (California).	20
Utah State Road Commission vs. The Steele Ranch, 533 P. 2d 888	10
Wasatch Mining Company vs. Crescent Mining Company, 7 Utah 8, 24 P. 586	19

RULES CITED

Rule 49 Federal Rules of Civil Procedure	20
Rule 49(a) Utah Rules of Civil Procedure	20,21

STATUTES CITED

Utah Code Annotated 1953, as amended, Section 15-1-1 . .	19
--	----

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and Cross-Respondents.

APPELLANTS' BRIEF ON APPEAL

APPEAL FROM JUDGMENT ON THE VERDICT OF
FOURTH DISTRICT COURT OF UTAH COUNTY
HONORABLE DAVID SAM, JUDGE

STATEMENT OF NATURE OF THE CASE

This case involves the ownership of and the respective interests of the parties in and to real property situate in Uintah County, State of Utah. Plaintiff claims damages from defendants for taking possession of said property, and defendants SATHER claim reimbursement from the plaintiff for money with interest thereon advanced for plaintiff's benefit by defendants SATHER in connection with said land.

DISPOSITION IN LOWER COURT

The case was tried to a jury upon special interrogatories. The jury found that plaintiff was the owner of the real

property and was entitled to possession thereof upon its paying to the defendants SATHER, the sum of \$21,500.00. The jury further found that defendant ROBERT R. SATHER had acted "wilfully and maliciously" toward the plaintiff in taking possession of said property, but awarded no damages to the plaintiff as a consequence thereof. The trial court, upon motion of the defendants after the jury had been discharged, declined to allow defendant's interest on the money found by the jury to be due from the plaintiff to the defendants.

RELIEF SOUGHT ON APPEAL

Defendants seek reversal of the jury finding that defendant ROBERT R. SATHER was guilty of "wilful and malicious" conduct toward the plaintiff; defendants seek a determination that the plaintiff owes defendants the sum of \$46,560.00 for money advanced for plaintiff's benefit by the defendants; and defendants seek a further determination that defendants are entitled to interest on the sums owing from plaintiff to the defendants. Defendants, in the alternative, seek a new trial on such issues.

STATEMENT OF FACTS

On October 11, 1972, the plaintiff signed a note in favor of the FIRST SECURITY BANK OF UTAH (EX 22-P; TR-29), which note was secured by a trust deed to the real property involved in this suit. This real property is referred to by

the parties as the Moss Ranch. In a separate transaction, but also on October 11, 1972, plaintiff and the defendant ROBERT R. SATHER entered into an Agreement which in essence provided that since the defendants SATHER had guaranteed plaintiff's payment of said note to the FIRST SECURITY BANK, if plaintiff failed to pay such note according to its terms and the defendants were required to pay off that note by reason of the said guarantee, defendant SATHER was to receive a Warranty Deed to the same property as that covered by the Trust Deed to the FIRST SECURITY BANK (EX 22-P). Plaintiff also on October 11, 1972, executed a Warranty Deed in favor of defendant SATHER covering the same property known as the Moss Ranch (EX 32-P; TR-63). The said Agreement and the Warranty Deed were both delivered to the FIRST SECURITY BANK in conjunction with said Trust Deed (TR-62).

The note of October 11, 1972, was subsequently refinanced and additional money was loaned by the FIRST SECURITY BANK to the plaintiff on September 15, 1973. On that date, plaintiff signed another Trust Deed Note in the sum of \$50,000.00 in favor of the FIRST SECURITY BANK (EX 24-P; TR-98), \$20,000.00 of which constituted a renewal of the earlier note and \$30,000.00 of which was a new loan (EX 23-P; TR-31). The new note was likewise secured by a Trust Deed dated September 15, 1973, covering the Moss Ranch upon which the FIRST SECURITY BANK was designated as beneficiary (EX 37-D; TR-67,68). The \$30,000.00 of new money was credited to the account of the plaintiff at

FIRST SECURITY BANK, Roosevelt, Utah (TR-67). Also, on September 15, 1973, plaintiff and defendant ROBERT R. SATHER entered into an Agreement similar to their earlier arrangement, which Agreement provided that in consideration of the defendant's guarantee of payment, should the plaintiff default in timely payment to the FIRST SECURITY BANK, and should the defendants pay off the note pursuant to their guarantee, the FIRST SECURITY BANK was to deliver the Warranty Deed of October 11, 1972, to defendant SATHER (EX 3-P; TR-24). The original of this second Agreement between plaintiff and defendant ROBERT R. SATHER was concurrently delivered to the FIRST SECURITY BANK with the Trust Deed and Note signed by the plaintiff (TR-24).

In furtherance of the said Agreement, the defendants SATHER on September 21, 1973, executed and delivered to the FIRST SECURITY BANK a guaranty document in favor of the FIRST SECURITY BANK, whereby the defendants agreed to absolutely guarantee payment of all sums the plaintiff then owed or should ever owe to the FIRST SECURITY BANK. This guaranty was for an unlimited amount (EX 42-D; TR-31).

On September 25, 1973, plaintiff issued its check payable to defendant ROBERT R. SATHER for the sum of \$25,000.00, which check was drawn on the Roosevelt Utah office of the FIRST SECURITY BANK (EX 31-P). Plaintiff contended at the trial that this money was a loan to enable defendant Sather to buy diamonds and to cover some overdraft checks (TR-64-66). Defendant SATHER contended that the money was given to him by plaintiff toward..

repayment of prior debts owed to the defendant SATHER by the plaintiff and plaintiff's president, Pete Buffo (TR-257,258; EX 60-D; TR-106).

On September 25, 1973, defendant SATHER, using said check given him by the plaintiff, purchased Savings Certificate No. 19479 in the amount of \$25,000.00 from the FIRST SECURITY BANK (EX 56-P; TR-30,31), and immediately pledged said certificate to the FIRST SECURITY BANK as additional security for the plaintiff's \$50,000.00 loan which had been guaranteed by the defendants (EX 24-P; EX 23-P; EX 68-P; TR-161,162,258, 259).

By March 1974, plaintiff was in default in making timely payments on the note of September 15, 1973, to the FIRST SECURITY BANK (TR-136,261). On March 15, 1974, defendant SATHER paid off the existing unpaid balance of said note to the FIRST SECURITY BANK in the sum of \$46,560.00 pursuant to defendants' guaranty (EX 49-P; TR-39,143,194,260,261; EX 27-P). In making said payoff, defendant SATHER cashed in and applied the said Savings Certificate No. 19479 (EX 56-P), and drew the rest of the money from his business accounts (EX 58-P; EX 68-P; TR-261).

After paying off said note, defendant SATHER requested the FIRST SECURITY BANK to deliver to him the Deed of October 11, 1972 (EX 32-P), then being held by the FIRST SECURITY BANK under the provisions of the Agreement between plaintiff and defendant SATHER dated September 15, 1973 (EX 3-P). The FIRST SECURITY BANK, in compliance with said request, on or about March 15, 1974,

delivered said Warranty Deed to defendant SATHER (EX 27-P; TR-194).

On or about March 15, 1974, defendant ROBERT R. SATHER entered into some arrangements with James A. Sheya to borrow the sum of \$70,000.00, which arrangements contemplated that defendant SATHER would deed the Moss Ranch property to Sheya as security for that loan. Such a deed was recorded by defendant SATHER on March 25, 1974, in the office of the Uintah County Recorder (EX 9-P; EX 72-P). However, no money was ever actually advanced by Sheya to SATHER because it was then discovered by defendant SATHER before he obtained any money from Sheya that plaintiff on November 2, 1973, had caused a Trust Deed to be recorded against the Moss Ranch ostensibly to secure a loan from Silvio Fassio to plaintiff for the sum of \$150,000.00 (EX 59-D; TR-181,183,262,263). A deed back from Sheya to defendant SATHER was later recorded on May 15, 1975 (EX-10-P; TR-263).

When defendant ROBERT R. SATHER discovered the said \$150,000.00 Trust Deed on the county records in favor of Silvio Fassio, he requested and received from the FIRST SECURITY BANK an assignment of plaintiff's \$50,000.00 Trust Deed dated September 15, 1973, which had been paid off by defendant SATHER on or about March 15, 1974. This Assignment was dated and delivered to defendant SATHER by FIRST SECURITY BANK on or about April 5, 1974 (EX 48-P; TR-195,262).

During or about the month of April 1974, plaintiff learned that the Deed of October 11, 1972 (EX 32-P) had been

delivered to the defendant SATHER by the FIRST SECURITY BANK (TR-82,262). Plaintiff at that time demanded a reconveyance of the property, but defendant SATHER declined to do so until he was paid the sum of \$46,560.00 by plaintiff, which amount is the sum defendant SATHER paid to the FIRST SECURITY BANK in connection with defendant SATHER'S guarantee of plaintiff's \$50,000.00 Trust Deed Note (TR-86,261,264,265).

Plaintiff contended that the FIRST SECURITY BANK should have never in any event delivered the Deed of October 11, 1972 (EX 32-P), to the defendants SATHER because the Agreement of September 15, 1973 (EX 3-P), providing for delivery of the deed to the Moss Ranch to the defendant SATHER in the event the defendant SATHER paid off plaintiff's \$50,000.00 note, was cancelled by further agreement between plaintiff and defendant SATHER as of September 16, 1973 (EX 4-P). At the trial, defendant SATHER did not deny that said document of cancellation (EX 4-P) bore his signature, but he did not recall signing the same and did not recall ever seeing such document until he was served with a copy of the Complaint in this matter (TR-180,260). Plaintiff testified that plaintiff's Exhibit #4 was signed by defendant ROBERT SATHER at plaintiff's office in Torrence, California on or about September 15, 1973 (TR-64,67). Plaintiff further testified and offered evidence that it notified the FIRST SECURITY BANK of said cancellation (EX 4-P), both by telephone and in writing, in December of 1973, and again in March of 1974 (EX 5-P; EX 6-P; TR-70-76). The officers of

FIRST SECURITY BANK denied ever receiving any such notices of cancellation, as did defendant SATHER (TR-260).

Plaintiff did not at any time tender any sum to defendant SATHER for a reconveyance of the Moss Ranch (TR-264-266), although plaintiff did by letter addressed to defendant SATHER on September 25, 1974, acknowledge a responsibility for the sum of \$46,000.00 in connection with the property in question (EX 71-D).

Plaintiff filed suit on or about January 29, 1976, against defendants SATHER (R 1-17) seeking compensatory and punitive damages for the withholding of the property; to reform the Warranty Deed of October 11, 1972 (EX 32-P), to a security instrument securing the guarantee of defendant SATHER (EX 3-P; EX 42-D); and to permit plaintiff to regain the Moss Ranch by its paying to the defendant SATHER the amount of the plaintiff's Trust Deed to the FIRST SECURITY BANK (EX 37-D), which had been assigned by the FIRST SECURITY BANK to defendant SATHER (EX 48-P).

The case was tried to a jury. At the close of plaintiff's case, defendant SATHER moved the Court for a directed verdict (TR-249), and the Court denied the motion with leave to renew the motion at the conclusion of all of the evidence (TR-268). Defendants SATHER renewed their motion for a directed verdict at the conclusion of all of the evidence (TR-296), which motion was denied by the Court (TR-301).

The case was thereupon submitted to the jury upon special interrogatories (R 598-601). The jury found that defendant ROBERT R. SATHER was guilty of wilful and malicious conduct toward the plaintiff, but that the plaintiff suffered no damages by reason thereof, and that the plaintiff owed the sum of \$21,500.00 to the defendant SATHER in order to regain possession of the Moss Ranch (R 600-601).

Defendants SATHER subsequently filed a Motion for Judgment Notwithstanding the Verdict (R 605-608), and submitted proposed Findings of Fact and Conclusions of Law and a proposed Judgment on the Verdict which provided for interest on the money found by the jury to be due from the plaintiff to the defendant SATHER as a condition for the return of the Moss Ranch to the plaintiff (R 625-626; R 653-657; R 661-666). The court below denied defendants' Motion for Judgment Notwithstanding the Verdict, declined to award interest to the defendants SATHER (R 669), and entered its Order and Judgment accordingly (R 670-671). From this Order and Judgment defendants SATHER have taken their appeal (R 672-673).

ARGUMENT

POINT I

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT OF THE JURY TO THE EFFECT THAT DEFENDANT ROBERT R. SATHER WAS GUILTY OF WILFUL AND MALICIOUS CONDUCT TOWARD THE PLAINTIFF AND THE COURT BELOW ERRED IN REFUSING TO GRANT THE MOTION OF

DEFENDANT SATHER FOR JUDGMENT NOTWITHSTANDING THE VERDICT IN RESPECT THEREOF.

Defendants recognize that under the law of this state, the verdict of the jury and the actions of the trial court thereon should be upheld unless it appears that the evidence so clearly preponderates against them that it is evident an injustice has resulted. (BEZNER VS. CONTINENTAL DRY CLEANERS INC., 548 P. 2d 898; UTAH STATE ROAD COMMISSION VS. THE STEELE RANCH, 533 P. 2d 888; KOER VS MAYFAIR MARKETS, 19 Utah 2d 339, 431 P. 2d 566; TAYLOR VS. KEITH O'BRIEN INC., 537 P 2d 1022). Defendants submit that the evidence in this case clearly preponderates against a finding of malice on the part of defendant ROBERT R. SATHER.

"Malice" means a motive and willingness to vex, harass, annoy or injure (52 AM. JUR. 2d 161). The court below so instructed the jury (Inst. #25, R 516). The evidence received at the trial and offered by the plaintiff to support its contention that defendant ROBERT R. SATHER acted with malice shows the following:

- (a) Defendant ROBERT SATHER signed plaintiff's Exhibit #4 purporting to cancel the agreement between the parties pertaining to the Warranty Deed from plaintiff to defendant SATHER (EX 32-P; TR-64,67).
- (b) Plaintiff had letters prepared and addressed to the FIRST SECURITY BANK advising that the Agreement between the plaintiff and the defendant SATHER with...

respect to the said Warranty Deed had been cancelled. Said letters also contained wording to the effect "cc: R.R. Sather and cc/Robert Sather" (EX 5-P; EX 6-P); however, defendants cannot find in the record that plaintiff presented evidence that copies of such letters were actually mailed to the defendant SATHER (TR-71).

- (c) Pete Buffo, president of plaintiff, testified that he talked to defendant ROBERT SATHER on the telephone about the cancellation document in December of 1973 (TR-72).
- (d) Defendant ROBERT SATHER did not tell the FIRST SECURITY BANK about the cancellation document (EX 4-P) prior to obtaining the Warranty Deed to the Moss Ranch from the FIRST SECURITY BANK (TR-201,202).
- (e) Defendant obtained the Warranty Deed from the plaintiff to defendant SATHER from the FIRST SECURITY BANK in March of 1974 upon the strength of the agreement of September 15, 1973 (EX 3-P), which plaintiff contended was cancelled as of September 16, 1973 by plaintiff's Exhibit #4.
- (f) Defendant SATHER attempted to encumber the Moss Ranch to James A. Sheya on March 15, 1974 (EX 9-P; EX 72-P).
- (g) Defendant SATHER obtained an Assignment of the First Security Bank Trust Deed of September 15, 1973, on April 5, 1974 (EX 48-P).

Evidence in the record which belied any malice on the part of defendant SATHER is as follows:

- (a) Defendants SATHER personally guaranteed plaintiff's \$50,000.00 note of September 15, 1973 (EX 42-D).
- (b) Plaintiff defaulted in the payment of said note and defendants SATHER paid the sum of \$46,560.00 to the FIRST SECURITY BANK pursuant to said guarantee (EX 49-P; TR-39,143,194,260,261; EX 27-P).
- (c) Defendant SATHER was entitled to reimbursement from plaintiff for such payment and was entitled to at least a security interest in the Moss Ranch in connection therewith. Plaintiff acknowledged as much by letter and in its Complaint (EX 71-D; R 4,5; Plaintiff's Requested Instruction No. 7, R 556).
- (d) Defendant SATHER offered to release any interest in the Moss Ranch to the plaintiff in exchange for reimbursement for the payment made by the defendant SATHER to the FIRST SECURITY BANK (TR-265).
- (e) The plaintiff did not at any time offer or tender reimbursement to the defendant SATHER in any amount (TR-264,265).

A fair interpretation of the evidence as a whole and in a light most favorable to the finding of the jury on the issue of malice does not demonstrate that the defendant acted maliciously toward the plaintiff. The defendant SATHER, by even the plaintiff's standard, was entitled to assert a security interest in the Moss

Ranch and the actions of the defendant were not calculated to do otherwise. The evidence is undisputed that the plaintiff made no offer of any amount of money to secure a release of defendant SATHER'S security interest in the property. Defendant SATHER conceded that the Warranty Deed was initially considered to be a security device and his actions in taking an assignment of the Trust Deed from the FIRST SECURITY BANK rather than obtaining a release upon payment of the note was justifiably precipitated by the defendant's discovery that the plaintiff had encumbered the property for an additional \$150,000.00 without the knowledge of the defendant SATHER within less than two months after the defendant SATHER had personally guaranteed plaintiff's note for \$50,000.00 to the FIRST SECURITY BANK (EX 59-D).

There is no reasonable basis in the evidence to support a finding of malice on the part of defendant ROBERT R. SATHER toward the plaintiff, and the finding of the jury to that effect should be reversed.

POINT II

THE EVIDENCE REQUIRED A FINDING BY THE JURY THAT THE DEFENDANTS SATHER WERE ENTITLED TO BE PAID THE SUM OF \$46,560.00, PLUS INTEREST, FROM THE PLAINTIFF RATHER THAN ONLY THE SUM OF \$21,500.00.

With respect to the Moss Ranch, the real property involved in this action, the jury found that the plaintiff was..

the owner thereof and that the plaintiff was entitled to regain possession upon payment of the sum of \$21,500.00 to the defendants SATHER (R 600-601). Defendants SATHER contend that there was no credible evidence received at the trial to justify limiting defendants' entitlement to \$21,500.00. The only substantial evidence before the Court requires a finding that defendants SATHER were entitled to be awarded the sum of \$46,560.00 as their security interest in the Moss Ranch.

Defendants again recognize that the evidence on appeal after a jury verdict is to be viewed and construed most strongly in support of the jury's findings and that the Supreme Court should not change the findings of the jury where there is competent evidence to sustain them. (BEZNER VS. CONTINENTAL DRY CLEANERS INC., *supra.*) In this case the defendants submit that there is no such evidence to sustain the finding of the jury on this point. Evidence before the jury not in dispute shows the following:

- (a) Defendants SATHER personally guaranteed plaintiff's \$50,000.00 note to the FIRST SECURITY BANK (EX 3-P; EX 24-P; EX 42-P). Plaintiff received all of the proceeds from the loan (TR-35).
- (b) The loan approval required as further security a pledge to the FIRST SECURITY BANK of a savings certificate in the sum of \$25,000.00 (EX 23-P).
- (c) Defendant SATHER received a \$25,000.00 check from plaintiff (EX 31-P).

- (d) Defendant ROBERT SATHER purchased a \$25,000.00 Savings Certificate No. 19479 from the FIRST SECURITY BANK (EX 56-P) and pledged the same with the FIRST SECURITY BANK as additional collateral for plaintiff's loan (EX 68-P).
- (e) Plaintiff defaulted under the terms of its said note to the FIRST SECURITY BANK (TR-136,261).
- (f) Defendant SATHER in March 1974, when said note was then delinquent, paid off the same to the FIRST SECURITY BANK in the amount of \$46,560.00 pursuant to the terms of defendants' guarantee to the bank (EX 49-P).
- (g) In order to raise the said sum of \$46,560.00, defendant SATHER cashed in Savings Certificate No. 19479 in the amount of \$25,000.00 and made up the difference from his business accounts (TR-261).
- (h) Defendant SATHER took an assignment of plaintiff's note to the FIRST SECURITY BANK from the FIRST SECURITY BANK so that defendants then became the owners of said note and Trust Deed securing the same (EX 48-P).
- Instruction #13 (R 504) given by the court below to the jury, and to which the plaintiff took no exception (TR-309), reads as follows:

"When one person guarantees to pay a past due obligation that a debtor owes to a creditor, and when the guarantor actually pays to the creditor a past due obligation owed the creditor by the debtor, the guarantor then stands in the shoes

of the creditor and is entitled to all rights and security the creditor had against the debtor. Therefore, if you find by a preponderance of the evidence that the defendant ROBERT SATHER guaranteed the obligation UTE-CAL LAND DEVELOPMENT CORPORATION owed to the defendant bank, and that after default by UTE-CAL LAND DEVELOPMENT CORPORATION, ROBERT SATHER paid the bank the money that UTE-CAL owed by reason of UTE-CAL'S default, then upon payment, MR. SATHER was entitled to have assigned to him all rights the bank originally had against UTE-CAL LAND DEVELOPMENT CORPORATION, including the assignment of the bank's interest in the Trust Deed of September 15, 1973."

The only possible evidence in the record of the trial to justify reducing defendant SATHER'S claim under the said security arrangement to \$21,500.00, rather than the \$46,560.00 actually paid by defendant SATHER on plaintiff's note to the FIRST SECURITY BANK arises from the circumstances as above indicated, whereby defendant SATHER received \$25,000.00 from plaintiff in the form of a check shortly after plaintiff received the proceeds of plaintiff's loan from the FIRST SECURITY BANK; defendant SATHER thereupon used said check to purchase a \$25,000.00 savings certificate and pledged said certificate with the FIRST SECURITY BANK as additional security for plaintiff's loan; and thereafter used the proceeds of such savings certificate toward paying off the plaintiff's note to FIRST SECURITY BANK after such note became delinquent. In other words, it is plaintiff's contention and the jury in effect found that plaintiff only really borrowed \$25,000.00 from the FIRST SECURITY BANK even though its note as guaranteed by defendants SATHER was for \$50,000.00, because the \$25,000.00 which was given to SATHER by plaintiff was used by SATHER to buy a savings certificate ...

which was ultimately used by the defendant SATHER to partially pay off the very loan which generated the \$25,000.00 made available to SATHER by plaintiff in the first place.

Whether defendant SATHER'S receipt of the \$25,000.00 from plaintiff was in itself a loan from plaintiff to defendants SATHER as contended by plaintiff (TR- 64,65,67), or a payment to defendant SATHER on a previous debt owed by plaintiff as contended by defendant SATHER (TR-257,258; EX 60-D; EX 71-D) really is immaterial. In either event, the \$25,000.00 received by defendant SATHER from the plaintiff was defendant SATHER'S money. What defendant SATHER did with it was of no concern to the plaintiff. If in fact the money was a loan from the plaintiff to defendant SATHER, there is absolutely no evidence in the record to indicate when the money was to be repaid by defendant SATHER or that it was due when defendant SATHER paid off the FIRST SECURITY BANK in March of 1974, or that it was due at any other time up to and including trial of the case, so as to permit the plaintiff to rightfully claim an offset against the money paid by defendant SATHER on plaintiff's note to the FIRST SECURITY BANK in the amount of \$46,560.00.

There was absolutely no evidence before the jury upon which they could rightfully base a finding that defendants SATHER were entitled to anything less than the sum of \$46,500.00 in satisfaction of defendant's security interest in the Moss Ranch and this Court on appeal should so hold. This Court

stated in the case of LEMMON VS. DENVER & RIO GRANDE WESTERN RAILROAD COMPANY (9 Utah 2d 195, 341 P. 2d 215) as follows:

"One of its most fundamental tenets is that the determination of the facts is left exclusively to the jury. It is not our prerogative to let our suspicions or predilections obscure our duty to abide by that rule. The only limitation thereon is that if findings are made which are not supported by any substantial evidence, or the evidence is so clear that all reasonable minds would find one way, so that a verdict contrary thereto must have resulted from passion or prejudice, or misconception of the law or the evidence, or in arbitrary disregard thereof, the court will exercise its inherent supervisory powers to administer justice, and will set the verdict aside."

Defendants respectfully submit that the present case is one in which the Court should exercise its inherent supervisory powers to administer justice and determine that because of the evidence before the Court, defendants' basic entitlement from the plaintiff is the sum of \$46,560.00, rather than the sum of \$21,500.00 as found by the jury.

POINT III

THE COURT BELOW ERRED IN FAILING TO AWARD INTEREST TO DEFENDANTS SATHER ON THE AMOUNT DUE FROM THE PLAINTIFF TO THE DEFENDANTS SATHER.

Plaintiff in its Complaint alleges the validity of plaintiff's \$50,000.00 Trust Deed and Note to the FIRST SECURITY BANK, which Note and Trust Deed were paid by the defendants SATHER and then assigned to the defendants SATHER by the FIRST SECURITY BANK (R 4; EX 37-D; EX 48-P). The jury found ..

that the defendant SATHER was entitled to be reimbursed for only the sum of \$21,500.00 out of the total sum of \$46,560.00 paid by defendant SATHER to the FIRST SECURITY BANK on March 15, 1974 (R 600-601; EX 49-P).

Defendants seek interest on such sum and any additional sum which this Court may allow from March 14, 1974, until payment is made by the plaintiff. In Point II above, defendants have addressed their position to the effect that the jury was in error, reversible by this Court, for failing to find that defendants were entitled to reimbursement from the plaintiff for the full amount of \$46,560.00 paid by the defendant SATHER to the FIRST SECURITY BANK under defendant SATHER'S guarantee of plaintiff's said note to the FIRST SECURITY BANK.

No specific reference to interest was included in the special interrogatories submitted to the jury (R 598-601), but defendants SATHER submit that the law and equity nevertheless allow and require the Court to assess interest on the amount due defendants from the plaintiff. The Trust Deed Note under which plaintiff concedes liability in some amount provides for interest at the rate of 12% per annum (EX 24-P). Even in the absence of such a provision, the law would impose a legal rate of interest of 6% per annum. (See SECTION 15-1-1, UTAH CODE ANNOTATED 1953, as amended). This Court has previously held in the case of WASATCH MINING COMPANY VS. CRESENT MINING COMPANY, 7 Utah 8, 24 P. 586, that:

"Interest is allowed on debts overdue, even in the absence of statute or contract providing therefor."

Defendants SATHER, in their Answer and Counterclaim, prayed:

"For such other relief as to the court may seem equitable and just". (R-29)

The pleadings of plaintiff and the evidence at the trial clearly show that defendants SATHER, under their personal guarantee, paid money owed by the plaintiff on which an obligation for interest existed (EX 24-P). The general prayer of defendants SATHER is adequate to support an award of interest under such circumstances. (See 61 AM. JUR. 2d 554-555; 22 AM. JUR. 2d 384). As pointed out in the case of SEARS, ROEBUCK & COMPANY VS. BLADE, 294 P. 2d 140 (California):

"The matter of interest for withholding of money is 'embraced within the issues' and the appropriate interest may be allowed even though not prayed for or the prayer is for less interest than the evidence shows to be allowable."

The issue of interest was not specifically submitted to the jury, but it was an issue within the facts and evidence of the case as to which the Court might make a finding. A federal case in point, decided under RULE 49 OF THE FEDERAL RULES OF CIVIL PROCEDURE, which rule is similar to SECTION 49 of the UTAH RULES OF CIVIL PROCEDURE, is the case of MOURIKAS VS. VARDIANOS, 169 FED. 2d 53, in which the Court held:

"No interrogatory was submitted to the jury as to interest, and neither plaintiff nor defendants made any demand that the question of interest

be submitted to the jury. Rule 49 of the Federal Rules of Civil Procedure, 'Special Verdicts and Interrogatories', provides in part 'as to an issue omitted without such demand, the Court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the verdict'. It therefore seems clear that it was entirely proper for the Court, after return of the special verdict, to pass upon the question of interest, although ordinarily the question of whether or not interest should be allowed and from what date is for the jury."

RULE 49(a) of the UTAH RULES OF CIVIL PROCEDURE

provides in part as follows:

"The court shall give to the jury, such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing, the Court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted, unless before the jury retires, he demands its submission to the jury. As to any issue omitted without such demand, the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accordance with the judgment of the special verdict." (Underlining added)

Defendants, pursuant to RULE 49(a), UTAH RULES OF CIVIL PROCEDURE, submitted proposed Findings of Fact and Conclusions of Law, and a proposed Judgment on the Verdict to the court below relative to the award of interest to the defendants (R 625-626; R 653-657; R 665-666). The court below declined to sign the same and denied the defendants' motion to add interest (R 669-670). For the reasons and based upon the authorities above cited, defendants submit that the court below was in error in refusing to add interest to the amount owing from plaintiff to the defendants and they urge this Court on appeal to so hold.


CONCLUSION

The verdict of the jury with respect to its finding of wilful and malicious action on the part of defendant ROBERT R. SATHER toward the plaintiff is not supported by any competent or substantial evidence. The verdict of the jury with respect to its finding that the defendants SATHER are only entitled to reimbursement from the plaintiff for the sum of \$21,500.00 of the \$46,560.00 paid by the defendants on plaintiff's past due Trust Deed Note, guaranteed by the defendants, is likewise not supported by any competent or substantial evidence. This Court, in the interest of justice, should reverse the finding of malicious conduct on the part of defendant ROBERT R. SATHER, and should award the defendants SATHER the full sum of \$46,560.00 against the plaintiff as reimbursement for their payment of plaintiff's obligation to the FIRST SECURITY BANK.

The refusal of the court below to add interest to the amount due from the plaintiff to the defendants is likewise not supported by the law and equity, and the ruling of the court below in that regard should be reversed.

In any event, should this Court decline to grant the affirmative relief sought herein by the defendants SATHER, the defendants SATHER should be granted a new trial on the issues herein raised.

Respectfully submitted,


Cullen Y. Christensen, for ..
CHRISTENSEN, TAYLOR & MOODY
Attorneys for Defendants

CERTIFICATE OF MAILING

Two copies of the foregoing were mailed, postage prepaid, to McRae & Deland, attorneys for plaintiff and respondent, 317 West 1st South Street, Vernal, Utah 84078, this 29 day of January, 1979.


CULLEN Y. CHRISTENSEN, Attorney