

1979

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

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH
STATE OF UTAH

UTE CAL LAND DEVELOPMENT :
CORPORATION, :
 :
Plaintiff, Respondent :
and Cross-Appellant, :
 :
vs. : Case No. 16017
 :
ROBERT R. SATHER and :
BONNIE LEE SATHER, :
 :
Defendants, Appellants :
and Cross-Respondents. :

RESPONDENT'S BRIEF ON APPEAL

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

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FILED

APR 22 1979

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CROSS-APPELLANTS' BRIEF OF 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 involved the ownership in real property situate in Uintah County, State of Utah. Plaintiff claims damages from defendants for taking possession of said property, including punitive damages for willful and malicious misconduct in obtaining possession. 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 on special interrogatories. The jury found that plaintiff was the owner of the real

property and was entitled to possession upon paying to defendants Sather the sum of \$21,500.00. The jury further found that a deed delivered to defendants Sather was to be a security device and that defendant Robert R. Sather had acted willfully and arbitrarily toward the plaintiff in taking possession of the property, but awarded no damages to the plaintiff as a consequence thereof. After the jury was discharged, the trial court denied the plaintiff's motion for a new trial on the issue of damages and the defendants' motion to add interest to the money found by the jury to be due from the plaintiff to the defendants as being monies advanced by Sather to defendant First Security Bank to obtain a release of the deed pledged for security on the loan. First Security Bank has been released by plaintiff as a party to this lawsuit after also being found guilty of willful misconduct.

RELIEF SOUGHT ON CROSS-APPEAL

Plaintiff seeks a new trial on the issue of damages in it's cross-appeal and to affirm the jury verdict as to the amount owed Sather for his equitable interest in the real property in question.

STATEMENT OF FACTS

Plaintiff agrees with the Statement of Facts set forth in defendants' brief with the following corrections and additions:

One plaintiff, Pete J. Buffo, and the defendant, Robert R. Sather, had known each other for about ten years during which they had been friends, money had been loaned back and forth for which no documentation was felt necessary. (TR-130, 65, 106) Defendant Sather negotiated with First Security Bank on behalf of Buffo, the principal and president of plaintiff Ute-Cal, who hereafter will jointly be referred to as plaintiff, for the loans from which this lawsuit arose (TR-61, 64, 65, 105) and, on occasion, was authorized to write checks on plaintiff's account with First Security Bank (TR-83). For purposes of these facts, Bonnie Lee Sather only had a passive role as the wife of Robert R. Sather and all facts as between plaintiff and the Sathers are applicable only to Robert R. Sather and hereafter reference to defendant does not include Bonnie Sather as her only liability is to re-convey to plaintiff.

It was at the instigation of defendant that the trust deed note of October 11, 1972 (EX 22-P) was refinanced. As of September 15, 1973, the note was current with all payments. (TR-65, 80) Plaintiff agreed to refinance the note because defendant told him he needed \$25,000 to buy diamonds and cover some overdraft checks. (TR-64, 65, 97)

Plaintiff was not aware that the \$25,000 was used to purchase a savings certificate and pledged as additional security on plaintiff's \$50,000 loan. No pledge agreement was ever presented and this additional security was not

required by the Bank according to the information supplied plaintiff. The loan proceeds were distributed to Ute-Cal without any indication that \$25,000 was to be pledged back to the Bank to secure the loan. (EX 30-P; TR-64, 65, 67).

Ute-Cal and Buffo signed an agreement dated September 15, 1973, (EX 3-P) which provided that if plaintiff defaulted on the renewal \$50,000 note and defendant subsequently paid the note as a guarantor, a deed to property known as the Moss Ranch would be given to defendant. The September 15, 1973 agreement on a carbon copy bore a cancellation clause in handwriting signed by defendant which cancelled any security arrangement as between plaintiff and defendant regarding the escrowed warranty deed and permitted the return of the warranty deed to plaintiff upon finalizing of the renewal note with First Security Bank. (TR-66) Defendant denied ever seeing the September 16, 1973, document of cancellation and only admitted that it bore his signature after Robert Grube, a handwriting expert, was asked to authenticate his signature (EX 26-P; TR-172, 173).

It was the understanding of plaintiff that both he and defendant would be responsible for making the payments on the \$50,000 note (TR-124, 125) and that if plaintiff could make the first payment, defendant could probably handle the next two (TR-98). Plaintiff made the first payment of \$5,000 plus \$1,500 interest on December 10, 1973 (TR-138), and assumed that defendant paid the \$15,000 January payment. Plaintiff was not aware the note was in default until March

after the defendant returned to Utah he made demand upon First Security Bank for the deed to the Moss Ranch (TR-194) and paid First Security Bank \$46,500, \$25,000 from the savings certificate and \$21,500 personally. Plaintiff did make several offers to pay defendant for the re-conveyance of the Moss Ranch (TR-107).

ARGUMENT

POINT I

THE EVIDENCE OF DEFENDANT'S CONDUCT TOWARDS PLAINTIFF WAS SUFFICIENT FOR A FINDING BY THE JURY THAT DEFENDANT WAS GUILTY OF WILLFUL AND MALICIOUS CONDUCT.

In BEZNER V. CONTINENTAL DRY CLEANERS, INC. 584 P.2d 898 the Court stated that it would not disturb the findings of the jury and the actions of the trial court "...unless it appears that there is substantial prejudicial error, or that the evidence so clearly preponderates against them that we are persuaded that injustice has result." Since the defendant has made no showing of prejudice, he is basing his appeal on a claimed lack of evidence for the jury to make it's finding.

The jury was instructed that in order to find the defendant acted with malice towards plaintiff, they must find that defendant had a motive and willingness to vex, harass, annoy or injure (Jury Instruction No. 25, R-516). In determining that the defendant had such a motive, the jury had before it evidence that defendant:

1. Approached plaintiff with a request that plaintiff refinance the \$20,000 with First Security Bank to the sum of \$50,000 so that defendant could obtain \$25,000 with which to cover over-drafts and buy diamonds (TR-64, 65, 97).

2. Renegotiated with First Security Bank the renewing of the note to the sum of \$50,000 and agreed to act as a personal guarantor using as security the trust deed note to the Bank for the Moss Ranch (EX 24-P, 37-D; TR-67, 68).

3. Informed plaintiff that the Bank would require an additional agreement providing that if plaintiff defaulted on the note and he was to pay it off, the Bank should deliver the warranty deed it held to the Moss Ranch to defendant (EX 3-P, TR-66). It was conceded by defendant that this was a security device for his benefit (TR-178).

4. Agreed to cancel the warranty deed agreement (EX 3-P) as soon as the bank papers were signed renewing the note as an inducement to plaintiff to sign the warranty agreement (TR-66).

5. Signed a document (EX 4-P) cancelling the warranty deed agreement (EX 3-P) the day after the warranty deed agreement was signed by plaintiff for the renewal of the note, but failed to inform the Bank that the agreement had been cancelled (TR 180, 202).

6. Accepted a check from plaintiff for \$25,000 from the proceeds of the \$50,000 note, at 12% interest, and immediately purchased a savings certificate for \$25,000 at

5 1/2% interest and pledged it as security on the \$50,000 note without informing plaintiff that this additional security was supposedly required, a hard to understand Bank requirement. Defendant didn't recall this transaction in his deposition (TR-277).

7. Failed to make the second payment of \$15,000 on the \$50,000 note as it came due, after representing to plaintiff that he would do so (TR-99), so that the note went into default.

8. Without informing the plaintiff that the note was in default, make arrangements to pay off the note with the Bank, (TR-98) and then attempted to encumber the Moss Ranch to James Sheya on March 15, 1974, for \$70,000 before paying off the note to the Bank (EX 9-P, 72-P). The pay off on the note was in part the \$25,000 savings certificate which was deposited to defendant's bank account on March 18, 1974, and cashed on March 25, 1974 (TR-27).

9. Accepted the warranty deed to the Moss Ranch from the Bank even though he had signed a document cancelling the agreement.

10. Took an assignment of the trust deed note from the Bank and took possession of the Moss Ranch even though the warranty deed was only intended as a security device.

11. Took economic advantage of ownership in the form of tax losses on the Moss Ranch in 1974, 1975, 1976 (EX 17, 18, 19-P) and royalty payments for mineral rights (TR-271).

This record of activity, while disputed in some points by the testimony of defendant, is sufficient to show an intent by defendant to systematically gain control of property belonging to plaintiff for a sum at a minimum of less than one-half of it's appraised value, accomplished by taking advantage of the trust and friendship which plaintiff had in defendant (TR-61, 65, 66, 106, 130).

The jury was instructed that they were the exclusive judges of the credibility of the witnesses and the weight of the evidence, had a right to consider the bias interests and motives of the witnesses, as well as their deportment, candor and understanding of the facts in question. (Jury Instruction No. 3, R-493). The findings of the jury that the action of defendant in gaining control of the Moss Ranch amounted to willful and malicious conduct are certainly justified by evidence before the jury and should be upheld.

POINT II

THE JURY HAD EVIDENCE BEFORE IT TO FIND THAT DEFENDANT WAS ENTITLED TO RECEIVE THE SUM OF \$21,500 FROM THE PLAINTIFF FOR RETURN OF THE MOSS RANCH.

Plaintiff again points out to the Court that the findings of the jury are to be upheld unless the evidence so clearly preponderates against them that the Court concludes substantial injustice has resulted.

Appellant argues in his brief, page 17, that:

"...there is absolutely no evidence in the record to indicate when the money (\$25,000) 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."

Plaintiff testified that as part of the ongoing relationship of friendship and trust which existed between the parties, both parties were to be responsible for making payments on the \$50,000 note. The arrangement was if he could make the first payment of \$5,000 plus \$1,500 interest, defendant could probably handle the next two payments or portions thereof (TR-98, 99). Having received no notice that the second payment was delinquent, plaintiff testified that he assumed defendant had the arrangements for repaying the loan under control (TR-94).

In fact, defendant did not take care of the second payment which was due in January of 1974. In March 1974 he violated the trust and friendship of plaintiff by obtaining the deed to the Moss Ranch in return for paying off the note using \$21,500 of his own money and the savings certificate (TR-261).

Plaintiff submits that this is sufficient evidence for the jury to base it's finding that plaintiff only owed defendant \$21,500 in return for possession of the Moss Ranch.

POINT III

THE COURT WAS ACTING WITHIN IT'S PROPER AUTHORITY
IN FAILING TO GRANT DEFENDANT'S MOTION TO ADD INTEREST:

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A. DEFENDANT SATHER WAIVED THE RIGHT TO INTEREST BY FAILING TO OBJECT TO THE SPECIAL VERDICT BEFORE THE JURY WAS DISMISSED.

B. THE COURT, IN CONSIDERING DEFENDANT'S MOTION TO ADD INTEREST, REVIEWED THE EVIDENCE AND FOUND THAT THE JURY COULD HAVE INCLUDED INTEREST IN THE AMOUNT FOUND TO BE DUE DEFENDANT.

A. In LANGTON V. INTERNATIONAL TRANSPORT, 26 U.2d 452, 491 P.2d 1211 (1971) is clear authority for the proposition that a failure to object to an insufficiency in a special verdict before the jury is dismissed constitutes a waiver of any objection to that insufficiency. In so holding the Court quoted from BROWN V. REGAN 10 CAL.2d 519, 75 P.2d 1063, 1065-66 (1938):

" . . . The proper procedure where an informal or insufficient verdict has been returned is for the trial court to require the jury to return for further deliberation.
. . . It is well established by numerous authorities that, when a verdict is not in the proper form and the jury is not required to clarify it, any error in said verdict is waived by the party relying thereon who at the time of it's rendition failed to make any request that it's informality or uncertainty be corrected. . . "

This holding was followed in COHN V. J.C. PENNY CO., 15 537 P.2d 306 (1975), stating that where counsel failed to object to a special verdict and have the jury sent back for further deliberations, counsel had waived any error in the special verdict.

In the case at hand the jury was asked if plaintiff was required to make a valid tender of \$46,500, being the

amount paid by defendant to obtain the release of the warranty deed and assignment of trust deed and trust note from the Bank or any part thereof to defendant in order to regain possession of the Moss Ranch, which the jury answered in the affirmative (Special Verdict No. 12 R-600.) The jury was then asked if the plaintiff was entitled to the return of the Moss Ranch. It again answered "yes" (Special Verdict No. 13, R-600.) It was obvious that this special verdict was insufficient and at the request of the plaintiff after these verdicts were received and read, two additional interrogatories were submitted to the jury for their further deliberation.

"14. Since your answer to Interrogatory No. 13 is yes, does the plaintiff owe any sum of money to the defendant Sather? Yes x No ____.

15. If yes, how much? \$21,500 " (R-601)

The defendant waived his opportunity to question the jury as to how they reached this sum or if the jury considered or included interest in that sum or to have additional interrogatories inquire of the jury to clarify answer No. 15, i.e.: "plus or including interest, or plus interest at ____% rate". Apparently defendant assumes that because no specific references to interest were made in the special interrogatories or in the answers, the jury failed to include interest in arriving at the sum found to be owed

defendant. Assuming this to be true, the verdict was defective on it's face and the defendant, by failing to object before the jury was dismissed, waived his right to object to such defect. Since defendant renewed a \$20,000 note for \$50,000 at 12% interest and received 5 1/2% interest on his savings certificate for one-half of the note, the jury just as reasonably could have assumed that each party should pay it's own interest expense. Further, but for the inducement to renew the note by defendant, plaintiff would not have been in the financial bind created by defendant's acts and therefore waiver of interest from the date of paying the Bank in March, 1974 until date of jury verdict was a proper result.

B. THE COURT AFTER REVIEWING THE EVIDENCE IN CONSIDERING DEFENDANT'S MOTION TO ADD INTEREST FOUND THAT THE JURY INCLUDED INTEREST IN THE AMOUNT DUE DEFENDANT.

RULE 49(a) U.R.C.P. 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 it's 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 it's 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."

Pursuant to the above Rule, defendant submitted a proposed judgment on the verdict to the court below relative to the award of interest together with a motion to add interest.

After considering the above proposals and motions, the court

stated:

"As to the issue of interest, the court after reviewing the evidence and the case authority submitted by counsel finds that the jury included interest in the amount found to be due to the defendants Sather ... It is the opinion of the Court that the jury was alert and considerate of all questions before it being in deliberation for the time as noted above (about 10 hours). The Court in reviewing their answers to the questions on special verdict form finds that a portion of the interest assessed to the defendant Sather by the defendant First Security Bank was included in the amount found to be due the Defendant Sather . . . " (R-669).

It should again be noted that the defendant collected approximately \$1,000 interest on the savings certificate when it was cashed in (TR-252) and had the use or rental value of the Moss Ranch from March, 1974 to the time of trial.

The court below acknowledged that it had authority under RULE 49(a), U.R.C.P. and the case of MOURIKAS V. VARDIANOS, 169 F. 2d 53, to award interest on the amount found due but declined to do so because, as MOURIKAS points out:

"...ordinarily the question of whether or not interest should be allowed and from what date is for the jury"

and was of the opinion the jury had included interest in it's award (R-667).

As pointed out above, defendant had an opportunity to request a breakdown of the amount due or failed to do so. Having failed to do so, the defendant waived his right to object to the insufficiency of the verdict. The verdict of the jury and the findings of the trial court are to be given

every benefit of the doubt and are to be upheld so long as they are supported by:

"...evidence which, together with the fair inferences that may be drawn therefrom, reasonable minds could conclude as the jury did." GORDON V. PROVO CITY, 15 UT 2d 287, 391 P.2d 430 (1964)

Plaintiff submits there is substantial evidence to support the verdict of the jury and the ruling of the trial court denying defendant's motion to add interest and this Court should deny defendant's appeal.

PLAINTIFF'S CROSS-APPEAL

THE EVIDENCE REQUIRED A FINDING BY THE JURY THAT PLAINTIFF SUFFERED DAMAGES FROM THE WILLFUL AND MALICIOUS CONDUCT OF THE DEFENDANT IN TAKING TITLE TO THE MOSS RANCH AND THE TRIAL COURT ABUSED IT'S DISCRETION IN REFUSING TO GRANT A NEW TRIAL ON THE ISSUE OF DAMAGES.

"The fundamental principle of damages is to restore the injured party to the position he would have been in had it not been for the wrong of the other party." HILL V. VARNER 4 UT 2d 166, 241 P.2d 448 citing PARK V. MOORMAN MANUFACTURING CO., 241 P.2d 914

RULE 59(a) U.R.C.P. was created to give the trial judge authority to grant a new trial when:

"It seems clear that the jury has missapplied or failed to take into account proven facts, or misunderstood or disregarded the law; or made findings clearly against the weight of the evidence." WELLMAN V. NOBLE 12 UT 2d 350, 336 P.2d 701 at 703 citing HOLMES V. NELSON 7 UT 2d 435 at 437, 441; 326 P.2d 722 at 725.

In BODON V. SUHRMANN, 8 UT 2d 42, 327 P.2d 826,
the Court ordered the defendant to accept an additor to \$500

or face a new trial after the jury awarded the plaintiff only \$100 in damages. The Court noted that it was undisputed the plaintiff had lost a total of \$64.00 in out of pocket damages, leaving only \$31.00 as general damages for the "pain, distress and inconvenience of having the disease." It then said:

"We affirm the responsibility of this Court to be indulgent toward the verdict of the jury, and not to disturb it so long as it is within the bounds of reason . . . also that it is primarily the prerogative and duty of the trial court to pass upon the adequacy of the verdict and to order any necessary modification thereof. Nevertheless, when the verdict is outside the limits of any reasonable appraisal of damages as shown by the evidence, it should not be permitted to stand, and if the trial court fails to rectify it, we are obligated to make the correction on appeal." 327 P.2d at 830 citing JENSEN V. DENVER & R.G.R.R. CO. 44 Ut. 100, 138 P. at 1192.

Plaintiff submits that the instant case falls within RULE 59(a)(6) U.R.C.P. as interpreted in BODEN V. SUHRMANN. Defendant testified that he received "one or two royalty payments of \$260.00" for mineral rights during his occupancy of the Moss Ranch (TR-271). While the exact amount of royalties defendant received may be uncertain, it is undisputed that he did receive royalties and had possession of the property. The jury's finding of no damages suffered by plaintiff is to this extent outside the limits of any reasonable appraisal of damages as shown by the evidence, against the law, and the fundamental principal of damages.

These facts are similar to the Utah case of HILL V.

VARNER, Supra, in which there was nothing in the record

refuting the fact of physical damage which the trial court had determined was due to the negligence of the defendant. The trial court awarded only nominal damages because the actual amount of physical damage incurred had not been established to its satisfaction. On appeal the case was reversed and remanded for a new trial on the issue of damages alone because:

" . . . the injured party had not been restored to the position it would have been had it not been for the wrong of the other party."

The jury's verdict in the instant case is especially inadequate because by finding that there were no actual damages suffered by the plaintiff the jury was prevented from considering whether punitive damages should be assessed against the defendant for his "willful and malicious" conduct. The jury was instructed that it could consider:

"In any punitive damage awarded to plaintiff it's attorney's fee incurred in bringing this civil action in the amount of which was \$11,500."
(Jury Instruction No. 24, R-515)

The jury's verdict not only fails to restore the injured party to its original position, but thereafter allows the defendant by his willful and malicious actions, to force plaintiff to incur \$11,500 in attorney fees to regain control over property which was rightfully theirs.

The reason for limiting a retrial to a single issue is set forth in 58 AM, JUR. 2d, NEW TRIAL, § 22, P.210.

"The guiding principle is that although a verdict ought not to stand which is tainted with illegality,

there ought to be but one fair trial upon any issue, and that parties ought not to be compelled to try anew a question once disposed of by a decision against which no illegality can be shown. Thus the parties and the state have been saved the expense, annoyance, and delay of a retrial of issues once settled by a trial as to which no reversible error appears."

In 58 AM JUR. 2d NEW TRIAL § 27 the principles governing the propriety of limiting a new trial to the issue of damages are expressed:

"As in any other case, to justify limiting a new trial to the single issue of damages it must appear that the issue is clearly severable from the other issues in the case, and that a retrial limited to the issue of damages may be had without injustice . . . Yet, when the Court is convinced upon review of the whole case that the jury have settled the issue as to responsibility fairly and upon sufficient evidence - so that disassociated from other questions it ought to stand as the final adjudication of the rights of the parties - and that there has been such error in the determination of damages as to require the setting aside of the verdict, a new trial as to damages alone may properly be ordered although this cuts off evidence which, if introduced with respect to other issues, might mitigate damages, all such evidence being admissable as to damages." See also PHILLIPS V. CLEEVE 187 P.2d 80 (Cal.)

The verdict in the case at hand was divided into fifteen special verdicts so that the liability of defendant was established without equivocation. The various issues were separated making it possible to limit a new trial to damages without injustice. Questions 1, 2, 3 and 13 establish the liability of the defendant. Questions 8 and 10 establish that the defendant acted willfully and maliciously. Questions 12, 13 14 and 15 dealt with the right of return of the Moss Ranch to the plaintiff, while questions 4, 5, 6 and 7 dealt with actual damages and 9 and 11 with punitive damages. The

question of damages could be retried without considering the issue of liability or the mechanics of the return of the Moss Ranch to the plaintiff.

If in a new trial it was determined that actual damages should be assessed, the Court could admit all evidence of the willfulness and malice of the defendants in order to determine whether punitive damages should be assessed. This is analogous to a comparative negligence situation. In 58 AM. JR. 2d NEW TRIAL § 27 P. 213 the general rule is expressed thusly:

"Where the verdict on the first trial establishes the responsibility of the defendant the new trial may be confined to the issue of damages, but the Court will admit all evidence bearing on the negligence of the defendant and the contributory negligence of the plaintiff so as to permit the application of the rule on comparative negligence." (if applicable) See CASTER V. MOELLER 176 NEB. 446, 126 N.W. 2d 485

There have been a number of cases in which courts have ordered a new trial to be held on the issue of exemplary or punitive damages or in conjunction with a new trial limited to the issue of damages, punitive damages have also been retried. In FOSTER V. KEATING 261 P.2d 529 (CAL) and MONAHAN V. METROPOLITAN NATIONAL BANK 500 P.2d 158 (COLO 1972) the Courts held that where both compensatory and exemplary damages could be awarded and a new trial was ordered on the issue of compensatory damages, a redetermination of exemplary damages would also be required. Following this reasoning, in the instant case if a new trial is awarded on the issue of damages it should include a redetermination of both compensatory

A final issue which must be dealt with on appeal is the possibility that the plaintiff has waived his right to ask for a partial new trial by failing to ask the jury to consider the damage issue further before it's dismissal.

Restating LANGTON V. INTERNATIONAL TRANSPORT COMPANY, Supra,:

"When a verdict is not in proper form and the jury is not required to clarify it, any error in said verdict is waived by the party relying thereon who at the time of it's rendition failed to make any request that it's informality or uncertainty be corrected."

A close reading of LANGON and COHN, Supra, along with SUNILAND CORP. V. RADCLIFFE 576 P.2d 805, indicates that the purpose for this ruling was to control the termination of litigation and prevent a party from gaining an unfair strategic advantage by gaining a new trial before a more sympathetic jury. See LANGTON 491 P.2d at 1215. The defect must be apparent on the face of the verdict so that counsel would be aware that the verdict is deficient before waiver occurs. See dissenting opinion of Justice Manghan in SUNILAND 567 P.2d at 850.

In the instant case, it would appear at first glance that an award of no general damages would be a patently insufficient verdict, putting counsel on notice. However, this is a complex case with several issues. The original verdict was deficient in more than one area. Counsel for the plaintiff did send the jury back to clarify it's verdict by answering two additional special interrogatories on money owed defendant (TR-323, 328).

However, the jury having found plaintiff had sustained no general damages and therefore could not award punitive damages as heretofore discussed, plaintiff's only alternative was RULE 59(a) U.R.C.P. Plaintiff's counsel therefore sought to permit the trial judge to correct the no damages error in a motion for a new trial which was denied notwithstanding the clear and uncontroverted evidence of the receipt of royalty payments and use of the Moss Ranch by plaintiff for over four years.

Unlike LANGTON there is no evidence that this was a compromise verdict which compelled correcting. The jury was consistent in it's findings in favor of the plaintiff in establishing the willful and malicious nature of defendant's actions and the right of the plaintiff to a return of property. For the Court to have directed the jury to return and reconsider a specific interrogatory on which an unequivocal negative finding had been made could well constitute a comment on the evidence by the trial judge or a directing of a verdict by the trial judge that damages occurred, either of which at that point in a jury trial would probably constitute reversible error.

CONCLUSION

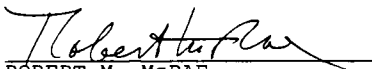
The verdict of the jury with respect to it's finding of willful and malicious action on the part of defedant Robert R. Sather is fully supported by evidence submitted to the jury for it's consideration. Likewise the verdict of the jury with respect to it's finding that

the defendant is entitled to the sum of \$21,500 is supported by competent and substantial evidence and this Court should uphold the jury in it's findings.

The refusal of the court below to add interest to the amount due from the plaintiff is a correct interpretation of the law and supported by evidence that the jury considered interest in determining the amount due to the defendant from plaintiff. In any event, the defendant waived any defect in the jury's verdict and finding on the amount defendant could recover by failing to object to the jury's findings before the jury was dismissed.

The verdict of the jury with respect to it's finding of no damages suffered by plaintiff from the willful and malicious conduct of defendant in gaining control of the Moss Ranch is outside the limits of a reasonable appraisal of damages and should not be permitted to stand. The court below abused it's discretion in refusing to grant a new trial on the issue of damages and the rules of the court below on that motion should be reversed and this case remanded for a new trial on the issue of damages.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing to Cullen Y. Christensen, CHRISTENSEN, TAYLOR & MOODY, Attorneys for Defendants and Appellants, 55 East Center Street, Provo, Utah 84601 on this 24th day of April, 1979.


ROBERT M. McRAE