

1987

Israel Pagan Estate and Lenor C. Pagan v. Joseph N. Cannon, Dorius Black, Alpha leasing Company, Robert D. Apgood, Joseph N. Cannon, Dorius Black, and Richard McKean, under Alpha Leasing Company, Bill Brown Realty, INC., Scott Peatross, Stewart Title Company of Utah; Tommy W. Sisk, Capitol Thrift and Loan, and Merlin Hank : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

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DOCKET NO. 870503 -----oo0oo-----

ISRAEL PAGAN ESTATE and LEONORE C. :
PAGAN, Personal Representative, :

Plaintiff-Appellants :

vs. :

JOSEPH N. CANNON, DORIUS BLACK, ALPHA :
LEASING COMPANY, a partnership, :
ROBERT D. APGOOD, JOSEPH N. CANNON, :
DORIUS BLACK, and RICHARD MCKEAN, :
doing business under the name and :
style of ALPHA LEASING COMPANY, BILL :
BROWN REALTY, INCORPORATED, SCOTT :
PEATROSS, personally, STEWART TITLE :
COMPANY OF UTAH, TOMMY W. SISK, :
BACKMAN TITLE COMPANY, a financial :
corporation, and MERLYN HANKS, :

Defendants. :

CAPITOL THRIFT & LOAN, a financial :
corporation, :

Respondent. :

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BRIEF OF DEFENDANT-RESPONDENT
CAPITOL THRIFT AND LOAN

Appeal from the Court of Appeal Decision
Reversing a Jury Verdict Rendered in the
Third Judicial District Court

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Case No. 870503

Pr. 13

IN THE SUPREME COURT OF THE STATE OF UTAH

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ISRAEL PAGAN ESTATE and LEONORE C. :
PAGAN, Personal Representative, :

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JURISDICTION AND NATURE OF PROCEEDINGS BELOW

On August 21-23, 1984, the Plaintiffs' action came on for trial before a jury in the Third Judicial District Court of Salt Lake County, the Honorable J. Dennis Frederick presiding. The jury returned a verdict in favor of the Plaintiffs. After the verdict was returned, the Defendant-Respondent Capitol Thrift and Loan's ("Capitol Thrift") motions for directed verdict and for judgment notwithstanding the verdict were denied. TR.421. Capitol Thrift appealed the judgment to this Court, which transferred the case to the Utah Court of Appeals for decision. The Utah Court of Appeals reversed the jury verdict. A copy of the Court of Appeals opinion is attached as Addendum "A".

Plaintiff-Appellants' ("Plaintiff") petition for a rehearing, before the Court of Appeals was denied on December 2, 1987. The Order is attached as Addendum "B". On December 30, 1987, Plaintiff filed a petition for Writ of Certiorari which was granted by this Court on February 23, 1988.

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in reversing the jury verdict when it found that the

evidence was insufficient to support a civil conspiracy claim.

II. Did the trial court err when it denied the motions for directed verdict and for judgment notwithstanding verdict.

III. Did the trial court err in instructing the jury that punitive damages can be awarded on a different standard of proof than that applied to the underlying wrongful act complained of.

REFERENCE TO THE COURT OF APPEALS OPINIONS

1. Opinion filed November 16, 1987 by the Court of Appeals in Case No. 860072-CA, reversing a jury verdict against Capitol Thift and Loan in favor of the Plaintiff. Israel Pagan Estate v. Cannon, 746 P.2d 785 (Utah App. 1987). Attached as Addendum "A".

2. Order of the Court of Appeals dated December 2, 1987, denying the petition for rehearing. Attached as Addendum "B".

CONTROLLING PROVISIONS OF UTAH
CONSTITUTION AND STATUTES

1. Utah Constitution, Article I, Section 10.
2. U.C.A. Section 78-2-2(5)(1988).

3. Rule 43, Rules of the Utah Supreme Court.

These provisions are set forth in the attached Addendum C.

STATEMENT OF THE CASE

Plaintiffs initiated this action alleging that the Defendants conspired to defraud the now deceased Israel Pagan in the sale of his house. In August, 1984, the case came on for trial before a jury in the Third Judicial District Court of Salt Lake County, the Honorable J. Dennis Frederick presiding. The jury returned a verdict in favor of Plaintiffs and awarded both compensatory and punitive damages. The District Court denied Capitol Thrift's motions for directed verdict and for judgment notwithstanding the verdict.

Capitol Thrift appealed the judgment to this Court, which transferred the case to the Court of Appeals for decision. The Court of Appeals reversed the jury verdict as to Capitol Thrift, and remanded for proceedings consistent with the Opinion which is attached as Addendum "A". The Court of Appeals reversed the verdict because it did not find sufficient evidence against Capitol Thrift to support Plaintiffs' conspiracy theory.

STATEMENT OF FACTS

Sometime prior to August 18, 1980, Israel Pagan listed his property for sale with Century 21 for the sales price of \$44,000.00. TR.84. On July 30, 1980, Dorius Black entered into an earnest money receipt and offer to purchase which provided for payment of \$20,000.00, including \$1,000.00 in earnest money, to be paid to the Plaintiff at closing, and a deferred payment of \$24,000.00, for a total purchase price of \$44,000.00. The balance of \$24,000.00 was to be deferred for one year with subsequent payments occurring over the next two year period. TR.749-750. The offer was accepted by Mr. Pagan on July 30, 1980.

Although Mr. Black negotiated the purchase of the home, he never intended to actually buy the home for himself. TR.493. The evidence introduced at trial showed that on occasion Mr. Black, an independent businessman, worked with a Joseph Cannon on various business deals. The evidence showed that Mr. Black signed the earnest money agreement with Mr. Pagan as part of a business arrangement with Mr. Cannon. TR.492-493.

In a separate transaction, Mr. Black approached Capitol Thrift about a loan for the purchase of the home. TR.495. Mr. Black did not apply for the

loan; Mr. Cannon did. TR.594-595,651. Along with his loan application, Mr. Cannon provided financial statements on himself and for Alpha Leasing Company, a partnership in which Mr. Cannon held a partnership interest. TR.595-596. Mr. Cannon also signed a borrower's statement providing that the loan would be used for strictly business purposes. TR.596.

Based on the value of the home and Mr. Cannon's financial strength, the lender agreed to loan \$32,325.00 to Mr. Cannon for the purpose of purchasing the subject property. The subject property had an appraised value of \$43,100.00. The loan officer, Merlyn Hanks, testified that he normally made loans with a loan to value ratio at between 65 and 85 percent and that this \$32,325.00 on the Pagan house fell within this range. TR.611-613.

Although Mr. Cannon did not recall borrowing money from Capitol Thrift, he testified that he personally signed the loan application, the escrow instructions, and the Capitol Thrift promissory note and trust deed. TR.583-596. In fact, Mr. Cannon went to Capitol Thrift and extended his loan payments on two separate occasions when the loan became delinquent. TR.855.

The evidence introduced at trial established that Capitol Thrift lent money directly to Mr. Cannon,

and that Capitol Thrift was not involved in any of the business arrangements between Mr. Black, Mr. Cannon or Alpha Leasing. TR.523-524. The business arrangement to purchase the Pagan home was between Mr. Cannon, Alpha Leasing and Mr. Black. In fact, the loan officer did not even know who Mr. Pagan was at that time.

TR.860. The evidence clearly showed that Capitol Thrift's involvement was limited to the promissory note transaction with Mr. Cannon. TR.860.

On August 18, 1980, the day appointed for closing, a check in the amount of \$32,325.00 was delivered to Stewart Title with specific instructions on how and when the check could be negotiated and the loan proceeds disbursed. TR.613. Mr. Cannon denied endorsing the check, but did acknowledge receiving disbursements according to the instructions. TR.575. The letter of instruction required that title to the property be in the name of Joseph N. Cannon. The letter of instruction also provided that a trust deed in favor of Capitol Thrift was to be recorded as a first trust deed subject to no other liens or encumbrances. In addition, Stewart Title was instructed to disburse the funds as follows:

(1) \$4,848.75 to Capitol Thrift; (2) fees for recording title and for an insurance policy; and (3) the

remainder of the funds to Joseph N. Cannon or as he directed. TR.616, 667.

The \$4,848.75 represented the balance on a loan owed by Mr. Black to Capitol Thrift. The return of the \$4,848.75 to Capitol Thrift to pay off Mr. Black's loan was based on a finder's fee arrangement. A fee of this type was normal practice for a lending institution like Capitol Thrift. TR.865-866.

Bruce L. Moesser was an Executive Vice President with Capitol Thrift at the time of the loan transaction. TR.863. Mr. Moesser supervised the loan to Mr. Cannon. TR.863. Mr. Moesser did not know who Mr. Pagan was at the time of the transaction and did not see anything unusual about the loan to Mr. Cannon. TR.863-864, 867.

Scott Peatross, of Bill Brown Realty, contacted Tommy Sisk of Stewart Title and scheduled the closing for August 18, 1980. TR.689. Mr. Pagan and his interpreter, Emilio Ortiz, Tommy Sisk of Stewart Title, Scott Peatross, Joseph Cannon, Dorius Black, and Jack Rhodes and Vickie Phelps of Century 21 were present at the closing. TR.667, 580. Because of a delay, Mrs. Phelps left before the closing actually took place and was replaced by Mr. Rhodes. TR.750, 718.

Tommy W. Sisk was employed by Stewart Title Company and had 10 years' experience in the title insurance business. He presided over the escrow and closing. TR.663. The testimony clearly establishes that Mr. Sisk conducted the closing in a careful manner so that Mr. Pagan was able to understand the transaction through his interpreter. TR.693. It was also shown that Mr. Pagan asked numerous questions through his interpreter when he did not understand parts of the transaction. TR.693. Mr. Sisk testified that he explained all of the documentation to Mr. Pagan, including the fact that Mr. Cannon, not Mr. Black, was purchasing the property. TR.671. Mr. Sisk testified that it was not inconsistent with the terms of the earnest money agreement to have the substitution of Mr. Cannon as the buyer of the property. TR.690-691.

It was further explained to Mr. Pagan that the total amounts of the first and second trust deeds would exceed the \$44,000.00 sales price of the subject property, and that the trust deed in favor of Capitol Thrift securing its \$32,325.00 promissory note would be recorded ahead of the trust deed securing the \$24,000.00 note in favor of Mr. Pagan. TR.686, 692-696, 706. In addition, it was explained to Mr. Pagan that if Mr. Cannon did not pay for his first mortgage, Mr. Pagan would have to pay in order to protect his

interest. TR.711. There was no objection by Mr. Pagan or his real estate agents to his interest being secured by a second deed of trust. TR.713. Each party accepted the changes in the real estate transaction. TR.702, 734, 792. Mr. Sisk also testified that the transaction between Capitol Thrift and Mr. Cannon was totally separate and distinct from Mr. Pagan's transaction with Mr. Cannon. TR.714.

The loan to Mr. Cannon for the purchase of the home was made when Mr. Cannon was in good financial condition. TR.857, 860-861. The terms of the loan provided for five installments with a balloon payment for the full amount due in six months. TR.619. Such terms were customary for the type of lender that Capitol Thrift was, and for the time period in which the loan was made. TR.635-636, 863.

The note subsequently came into default and notices of default were given to Mr. Cannon. Upon Mr. Cannon's request, he was granted extensions for payments on the loan. TR.637. The defaults continued, however, and the property was foreclosed upon with a deficiency action instituted against Mr. Cannon. TR.640.

After foreclosure of the home, Mr. Pagan brought this action. (Mr. Pagan has since died and his estate and personal representative have since been

substituted as Plaintiffs). Although alleging a cause of action against Capitol Thrift in his complaint, Mr. Pagan testified that he did not claim a cause of action against Capitol Thrift. TR.746.

The case was subsequently appealed to this Court, which referred the case to the Court of Appeals. After filing an extensive opinion, the Court of Appeals found that the evidence was insufficient to support Plaintiffs' conspiracy theory, and ruled that Capitol Thrift was not liable for compensatory or punitive damages. See Addendum "A".

SUMMARY OF ARGUMENT

The jury's finding that the Appellant conspired to defraud the Plaintiffs is not supported by direct or circumstantial evidence which can be reasonably and naturally inferred. The verdict was based solely on suspicion and sympathy for Mr. Pagan. The Utah Court of Appeals did not err in reversing the jury verdict. After viewing the evidence in a light most favorable to the verdict, the Court found that the evidence was insufficient to support the verdict because it was based on conjecture and speculation.

ARGUMENT

I. THE COURT OF APPEALS WAS CORRECT IN REVERSING THE JURY VERDICT WHICH WAS NOT SUPPORTED BY THE EVIDENCE.

The opinion of the Court of Appeals is in harmony with the accepted and usual course of judicial proceedings and has prevented the working of an injustice by reversing a verdict which was not supported by the evidence. The Court of Appeals did not substitute itself into the jury's role as fact finder, but gave due deference to the jury's conclusions. The Supreme Court has found that an appellant may successfully attack a jury verdict which is unsupported by the evidence presented at trial. Von Hake v. Thomas, 705 P.2d 766, 769 (Utah 1985). When the evidence clearly preponderates against the verdict, the Appellate Court may appropriately reverse the decision. Barker v. Dunham, 342 P.2d 867 (Utah 1959); Metropolitan Investment Co. v. Sine, 376 P.2d 940 (Utah 1962).

This Court, in Groen v. Tri-O-Inc., 667 P.2d 598 (Utah 1983) has outlined the standard of a jury verdict review when it stated:

It is the exclusive province of a jury to determine the credibility of the witnesses, weigh the evidence, and make findings of fact. Where the evidence is conflicting and the jury is properly instructed, we do not upset those

findings of fact except upon a showing that the evidence, viewed in the light most favorable to the verdict, so clearly preponderated in Appellant's favor that reasonable persons could not differ on the outcome of the case. (Citation omitted)

See also Von Hake v. Thomas, 705 P.2d 766 (Utah 1985).

The Court of Appeals recognized its responsibility to view the evidence in a light most favorable to the verdict and accorded due deference to the jury as the fact finder. Pursuant to the established law concerning the review of a verdict, the Court of Appeals determined that the evidence did not support Plaintiff's conspiracy theory. Clearly the Court of Appeals did not depart "from the accepted and usual course of judicial proceedings." Rule 43, Rules of the Utah Supreme Court.

In the present case, there is no direct evidence showing that Capitol Thrift misrepresented a material fact known to be false. There is no direct evidence showing that Capitol Thrift acted for the purpose of inducing Mr. Pagan to sell his home or that Mr. Pagan justifiably relied upon Capitol Thrift's actions. Since Capitol Thrift did not, by its own actions, defraud Mr. Pagan or authorize another, Capitol Thrift's liability can only be established through some participation in a fraud through a civil conspiracy.

Plaintiff has failed to support a finding of conspiracy based on the evidence established at trial.

The Court of Appeals found that to establish a civil conspiracy allegation one must show that there was:

(1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof. (Citations omitted)

Israel Pagan Estate v. Cannon, 746 P.2d 785, 790 (Utah App. 1987).

The Utah Supreme Court, in Crane Co. v. Dahle, 576 P.2d 870 (Utah 1978), set forth the elements as (1) wrongfully conspiring to violate the plaintiff's rights, (2) the carrying out of such plan, (3) damages proximately caused thereby. Crane Co. at 872. The plaintiff has the burden of proving civil conspiracy by clear and convincing evidence. Crane Co. at 872.

Plaintiffs assert that Dorius Black, Joseph N. Cannon and Capitol Thrift were working together for the sole purpose of defrauding Mr. Pagan. The record is devoid of evidence establishing that Capitol Thrift was working with the parties to defraud Mr. Pagan.

The evidence established that, other than the transaction concerning the loan to Mr. Cannon, Capitol Thrift did not participate in any other transaction

concerning the purchase of the Pagan home. In fact, the evidence introduced at trial clearly established that the loan officer did not even know who Mr. Pagan was during this transaction and that Capitol Thrift entered into a promissory note arrangement directly with Mr. Cannon for the purchase of the subject property. Plaintiffs have failed to produce any evidence that links the above-named parties together for a common purpose to defraud.

The Plaintiffs attempt to show a common purpose by asserting that Mr. Black was employed by Capitol Thrift to:

"seek out Israel Pagan, a person who is unable to speak or understand English, and a person with a sub-normal mental capacity, for the sole purpose of making him a party to a well-known real estate 'scam' through which Pagan was defrauded out of his home". TR.493, 497, 498.

(Appellants' Brief at 20)

This is a blatant attempt to distort the record to support an unsupported contention. This distortion is simply one example of Plaintiffs' many blatant attempts to do so.

A review of Plaintiffs' cite shows that there is no evidence to establish that Mr. Black was an employee of Capitol Thrift. Mr. Black was never an employee of Capitol Thrift. Further, there is no evidence that Capitol Thrift and Loan used Mr. Black to

seek out Mr. Pagan for the purpose of entering into a real estate "scam". The record clearly establishes that Capitol Thrift did not even know who Mr. Pagan was at the time of the transaction.

The Utah Court of Appeals recognized that a conspiracy theory can be inferred from circumstantial evidence. Pagan at 791. In recognizing the use of circumstantial evidence, the Appellant Court stated:

To prove conspiracy to defraud by circumstantial evidence, though, "there must be substantial proof of circumstances from which it reasonably follows, or at least may be reasonably inferred, that the conspiracy existed. It cannot be established by conjecture and speculation alone". Dill v. Rader 583 P.2d 496, 499 (Okla. 1978)(quoting Chisler v. Randall, 124 Kan. 278, 259 P.687 (1927)).

Pagan at 791.

The Plaintiff has failed to show through direct or circumstantial evidence that there was a meeting of the parties' minds to pursue a course of action against Mr. Pagan. Plaintiffs' theories are based upon conjecture and speculation. The evidence does not establish that the parties were doing anything other than entering into a normal real estate transaction.

As stated above, Capitol Thrift and Loan did not know who Mr. Pagan was at the time of the loan transaction with Mr. Cannon. Furthermore, the record

clearly shows that Capitol Thrift did not even know of Mr. Pagan's mental deficiencies prior to the transaction. In fact, Plaintiffs' own expert testified that a lay person would not be able to tell that Mr. Pagan was mentally disabled by looking at him. Plaintiffs' own real estate agents testified that they felt Mr. Pagan was competent to enter into the transaction. TR.731, 754-755.

Plaintiffs also failed to establish that an unlawful act was performed by Capitol Thrift. Although the Plaintiffs do not clearly assert an unlawful act, they appear to be basing the alleged conspiracy on a fraud theory. The Utah Supreme Court has defined fraud as:

...the making of a false representation concerning a presently existing material fact which the representor either knew to be false or made recklessly without sufficient knowledge, or the omission of a material fact when there is a duty to disclose, for the purpose of inducing action on the part of the other party, with actual, justifiable reliance resulting in damage to the party.

Taylor v. Gasor, Inc., 607 P.2d 293 (Utah 1980).

As with civil conspiracy, The Supreme Court has held that a finding of fraud must be shown by clear and convincing proof which is not based on "mere suspicion or innuendo." Taylor at 294.

A person cannot be liable for fraud unless he made the representation himself, authorized someone to make it for him, or participated in some way, such as through conspiracy. Pagan at 792 citing 37 C.J.S. Fraud 61 (1943). As the Court of Appeals recognized, "evidence is insufficient if it discloses acts just as consistent with a lawful purpose as with an unlawful one." Pagan at 793, citing Accurate Prods. Inc. v. Snow, 67 Wash. 2d 416, 408 P.2d 1, 7 (1965); Dill v. Rader, 583 P.2d 496, 499 (Okla. 1978).

Capitol Thrift recognizes that inferences play an important role in any finding of fact, especially in cases such as the instant one. Inferences, however, must be reasonably and legitimately drawn. This is particularly so in cases of fraud. See 37 C.J.S. Fraud 115 (1943). Inferences must be made for the purpose of aiding reason and not to override it. They are nothing more than the probable and natural explanation of the facts. Holland v. Columbia Iron Mining Co., 293 P.2d 700 (Utah 1956).

In Holland, the Court was faced with an appeal of a ruling on summary judgment that there was no fraudulent conspiracy in a business transaction. After discussing the issue of inferences, the Court stated:

Common sense and reason dictate that evil inferences should not be permitted

to be drawn from the routine business transaction where there are no other circumstances. To hold otherwise would throw the door open for attack on each and every transaction that one might enter into.

Holland at 702.

In the instant case, the inferences were not reasonably or legitimately drawn. The result reached by the jury is neither a probable nor a natural explanation of the facts proven. The evidence does not support a clear and convincing standard that a fraudulent activity had taken place to support Plaintiffs' theory of conspiracy.

The evidence establishes that the transaction entered into by Capitol Thrift was a lawful and legitimate transaction in the banking community. Capitol Thrift had been in contact with Mr. Black, Mr. Cannon and Mr. Sisk. These were purely business contacts.

Mr. Black inquired of the availability of a loan to purchase the subject property. A loan was extended to Mr. Cannon on the basis of his loan application and financial statements. It is undisputed that Mr. Cannon was in a strong financial position, which provided the basis for the loan to him.

Contact with Mr. Sisk occurred when the loan and letter of instructions were delivered to Stewart

Title on the day of the closing. While the lender's contacts with Mr. Black and Mr. Cannon were before the date of closing, these contacts occurred after Mr. Black had negotiated for the purchase of the Pagan home. Mr. Black further testified that Capitol Thrift was not involved in his plans with Mr. Cannon to purchase the home. Clearly, these contacts do not even fall within the realm of a fraudulent transaction.

Capitol Thrift admitted dealing with Mr. Black on prior occasions. This fact substantiates Mr. Cannon's referral for the loan. One would be hard-pressed to find that a successful business does not depend on returning customers.

Capitol Thrift loaned Mr. Cannon \$32,325.00 for the purchase of the Pagan home. Plaintiffs contend that this was a substantial deviation from Mr. Pagan's agreement. Even if this were a deviation, the evidence does not support that Capitol Thrift knew it. There was no limitation on the amount to be borrowed in the earnest money agreement or any representation that the amount borrowed on the property would be limited.

Furthermore, the evidence clearly establishes that all deviations were slowly and clearly explained to Mr. Pagan through his interpreter. At least one of Mr. Pagan's real estate agents was present during these explanations. The closing officer even

explained the consequences of Capitol Thrift's first trust deed on the property to Mr. Pagan and his agents.

Capitol Thrift was never notified of any limitation whatsoever on any liens against it on the property. The loan was based on representations made in Mr. Cannon's loan application and on the value of the security. Clearly, Capitol Thrift acted lawfully in protecting its security for the promissory note.

The letter of instructions which accompanied the loan check to Stewart Title required that the title be in the name of Joseph N. Cannon and that Capitol Thrift be secured by a first trust deed. This requirement does not indicate that the lender was trying to defraud Mr. Pagan out of his property. It shows a proper banking procedure by Capitol Thrift to secure the promissory note.

The letter of instructions also required \$4,848.75 to be paid back to the lender. The evidence produced at trial clearly established that a finder's fee is not an unusual occurrence in the banking industry. The testimony of Bruce Moesser, Executive Vice President of Capitol Thrift and Loan at the time, established that finder's fees of five to six percent were not uncommon.

Mr. Pagan was of low intelligence. His doctor testified that this fact could only be

determined through testing. His own real estate agents felt that Mr. Pagan understood and was competent to enter into the subject transaction. Even if Mr. Pagan's mental capacity could be determined by observation, Capitol Thrift could not have known of the deficiency since it had never met Mr. Pagan during the transactions.

At the time of closing, Mr. Cannon was substituted as buyer. This substitution was in accordance with provisions of the earnest money receipt and offer to purchase. The substitution was explained to parties present at the closing.

The trust deed in favor of the lender was drafted and signed outside the presence of both Mr. Pagan and his agents. The funds received from the lender were also disbursed after the closing had taken place. The evidence produced at trial clearly showed that this was a normal real estate closing practice. There was no objection to this procedure by Mr. Pagan or his agents. In fact, Mr. Rhodes waited around until the check arrived from the lender, but did not take the time to review the documentation.

The loan to Mr. Cannon was payable in six months. This type of loan was not uncommon for the type of lending institution that Capitol Thrift was or for the time period during which the loan was made.

This is particularly true in light of the interest rate at the time of this transaction.

The undisputed testimony clearly showed that notices of default on Mr. Cannon's loan were sent to him. Although the Utah statutes provide for specific time periods to foreclose real property secured by a trust deed, Capitol Thrift agreed to extensions on the payment of the loan by Mr. Cannon. Clearly, these extensions do not evidence an intent to immediately foreclose upon Mr. Pagan's home as Plaintiffs try to infer. In fact, the evidence shows that payments were made on the loan.

The only inference which can reasonably be drawn from these facts is that Capitol Thrift was used by Mr. Black and Mr. Cannon to fund part of a business venture which ultimately soured. Any other finding simply is not reasonable, based on the evidence. This is particularly true in light of the fact that Mr. Pagan himself testified that he did not have a cause of action against Capitol Thrift.

The fraudulent inferences drawn by the jury are, at most, suspicion, and suspicion is not enough to support an inference of fraud. One may only assume that the jury used the "deep pocket" theory in awarding judgment. Even at that, the suspicions do not reasonably and naturally follow the facts proven. The

verdict rendered by the jury clearly was an act of sympathy for Mr. Pagan who was continuously described as being physically and mentally impaired. Capitol Thrift does not assert that sympathy is not warranted for the Plaintiff, but sympathy should not provide the basis for a verdict.

II. THE TRIAL COURT ERRED WHEN IT
DENIED THE MOTIONS FOR DIRECTED VERDICT
AND FOR JUDGMENT NOTWITHSTANDING THE
VERDICT.

Capitol Thrift recognizes the right of trial by jury as one that should be safeguarded by the courts. There are, however, circumstances where the issues of fact should be taken from the jury. Both the Utah Supreme Court and the United States Supreme Court have ruled that the reversal of a judgment on the ground that the evidence was insufficient to sustain a verdict does not deny a party of a constitutionally guaranteed jury trial. Creamer v. Ogden Union Ry & Depot Co., 242 P.2d 575, 577-578 (Utah 1952). This Court has stated:

The right to have a jury pass upon issues of fact does not include the right to have a cause submitted to a jury in the hope of a verdict where the facts undisputably show that the Plaintiff is not entitled to relief.

Raymond v. Union Pac. R. R., 191 P.2d 137, 141 (Utah 1948).

This Court has set forth the circumstances under which the issues of fact should be taken from the jury,

...in ruling on motions which takes issues of fact from the jury (this includes both motions for directed verdict and judgment notwithstanding the verdict), the trial court is obligated to look at the evidence in all reasonable inferences that fairly may be drawn therefrom in the light favorable to the party moved against; and the granting of such a motion is justified only if, in so viewing the evidence, there is substantial basis therein which would support a verdict in his favor.

Mel Hardman Prod., Inc. v. Robinson, 604 P.2d 913 (Utah 1979); Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc., 652 P.2d 896 (Utah 1982).

In the instant case, the evidence was not sufficient for the reasons argued above. As a result, the Plaintiffs failed to establish a prima facie case against Capitol Thrift. The elements of both fraud and conspiracy were not established by evidence which was clear and convincing. Therefore, as a matter of law, there could not be a finding of conspiracy to defraud Mr. Pagan and Plaintiffs cause of action must fail.

The result is underscored by the fact that Mr. Pagan, under oath, testified that he did not make any claim against Capitol Thrift. This case should not have been allowed to go to the jury. The trial court was incorrect when it ruled that Capitol Thrift's

motions to take the case from the jury were resolved by the return of the jury's verdict. The jury's verdict does not change Mr. Pagan's testimony or establish a prima facie case on behalf of the Plaintiffs.

III. THE COURT ERRED IN INSTRUCTING THE JURY THAT PUNITIVE DAMAGES CAN BE FOUND ON A DIFFERENT STANDARD OF PROOF THAN THE UNDERLYING WRONGFUL ACT COMPLAINED OF.

Punitive damages are awarded only where the nature of the wrong goes beyond merely violating the rights of another. For an award of punitive damages to be proper, the wrongful act complained of must be characterized by some circumstance of aggravation such as conduct which is willful, malicious or in knowing or reckless disregard for the rights of others. Behrens v. Raleigh Hills Hospital, Inc., 675 P.2d 1179 (Utah 1983). Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982).

Even in cases of fraud, punitive damages are the exception. The basic elements of fraud, as indicated above, must be established by clear and convincing evidence and not by mere suspicion or innuendo. Punitive damages may be awarded in such cases of fraud where there is, in addition to the basic elements of fraud, "other extraordinary or exceptional circumstances clearly indicating malice or

willfulness." 37 C.J.S. Fraud 144 (1943)(emphasis added).

In the present case, the trial court instructed the jury in Instruction No. 21, 26, and 27 that punitive damages could be found from a preponderance of the evidence that the Defendants' conduct was willful and malicious in conspiring to defraud Mr. Pagan. Since punitive damages are the exception, even in cases of fraud, the basis for the award must be found in additional facts above and beyond the elements of the underlying wrongful act. Because of this, the standard of proof for the findings upon which the award of punitive damages is based, must coincide with the standard of proof necessary for a finding of the underlying wrongful act. In this case, the underlying wrongful act is conspiracy to defraud, which must be found by clear and convincing evidence. The Court's use of the preponderance standard in this instance was, at least, confusing to the jury and, at most, prejudicial in the jury's awarding of damages on the Plaintiffs' cause of action.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the decision of the Utah Court of Appeals should be affirmed.

Respectfully submitted this 29 day of
April, 1988.

JENSEN & LEWIS, P.C.



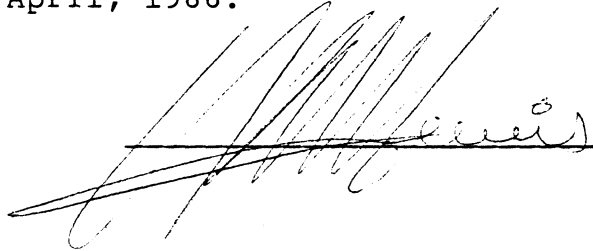
KAY M. LEWIS

BRUCE H. SHAPIRO

Attorneys for Respondent
Capitol Thrift and Loan

MAILING CERTIFICATE

I hereby certify that I caused to be mailed,
postage pre-paid, four (4) true and correct copies of
the foregoing Opposing Brief of Respondent Capitol
Thrift and Loan, to Mark S. Miner, 525 Newhouse
Building, 10 Exchange Place, Salt Lake City, Utah
84111, this 29 day of April, 1988.



ADDENDUM "A"

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

Israel Pagan Estate and)
Lionor C. Pagan, Personal)
Representative,)
)
Plaintiff and Respondent,)
)
v.)
)
Joseph N. Cannon, Dorius Black,)
Alpha Leasing Company, a)
partnership; Robert D. Apgood,)
Joseph N. Cannon, Dorius Black,)
and Richard McKean, doing)
business under the name and)
style of Alpha Leasing Company;)
Bill Brown Realty, Incorporated;)
Scott Peatross, personally;)
Stewart Title Company of Utah;)
Tommy W. Sisk;)
Capitol Thrift and Loan,)
a financial corporation;)
and Merlyn Hanks,)
)
Defendants and Appellant.)

OPINION
(For Publication)

Case No. 860072-CA

FILED

NOV 16 1987

Timothy M. Shea
Clerk of the Court
Utah Court of Appeals

Before Judges Bench, Garff and Jackson.

GARFF, Judge:

Defendant Capitol Thrift and Loan (Capitol) appeals from a jury verdict finding it liable to plaintiff Israel Pagan Estate for damages arising out of Capitol's alleged conspiracy with defendants Stewart Title Company (Stewart Title) and Joseph Cannon (Cannon) to defraud Pagan of his home. We reverse.

Pagan, a native of Puerto Rico, is unable to speak or understand English, and has subnormal mental capacity due to injuries suffered in an industrial accident. On July 30, 1980, with the help of his friend and interpreter, Emilio Ortiz, he listed his home for sale with Century 21 Real Estate. Ortiz, with a tenth grade education, was unsophisticated in real estate transactions.

On occasion, Cannon, who was a partner in defendant Alpha Leasing, worked with Dorius Black, an independent businessman. Black, as part of a business arrangement with Cannon, signed an earnest money agreement with Century 21 on July 30, 1980, and executed a \$1,000.00 promissory note for the purpose of purchasing Pagan's home. This earnest money agreement specified that Black was the purchaser of the home,¹ that he deposited \$1,000.00 earnest money in the form of a promissory note, and that the purchase price of the house was \$44,000.00. Of this price, \$20,000.00 was payable as a down payment at closing, and the remaining \$24,000.00 balance was payable as follows: payments were to be deferred for the first year; on August 1, 1981, a \$2,630.88 interest payment was due; and on September 1, 1981, monthly payments of \$242.67 were to begin, which were to be paid until August 1, 1982 when the balance was to be paid off with a balloon payment.

Stewart Title, acting as the escrow agent for this transaction, drew up the following documents: an escrow agreement, a trust deed note for the \$24,000.00 balance bearing the same terms as the earnest money agreement, a request for reconveyance, copies of the buyer's and seller's closing statements, and a trust deed. Pagan and Cannon each paid \$25.00 to set up this escrow account. Nothing in any of these documents indicated the existence of any other trust deed.

Black, who owed Capitol \$4,848.75 at the time, referred Cannon to Capitol to obtain a loan for the \$20,000.00 down payment. Although Cannon testified that he never actually applied for or negotiated with Capitol for this loan, Merlyn Hanks, a loan officer with Capitol, testified that Cannon had requested such a loan. The record indicates that Cannon filled out an application with Capitol for a \$32,325.00 loan on August 13, 1980, five days prior to the closing; submitted to Capitol a signed personal financial statement, an Alpha Leasing financial statement, and a signed borrower's statement that the loan was to be used for strictly business purposes; and signed a business promissory note and security agreement for a \$32,325.00 commercial loan from Capitol at 22% interest, payable in five monthly payments of \$668.15, beginning September 18, 1980, with a balloon payment of \$32,518.72 due on or before February 18, 1981. This loan was to be secured by a first trust deed against the Pagan property. These documents were not available to the parties during closing.

1. The earnest money agreement also stated that title to the property would vest as designated at closing, so another purchaser could be substituted for Black under the terms of the agreement.

Pagan's house was appraised at \$43,100.00. Hanks testified that he normally made loans for between 65 to 85% of the appraised value of a house, and that the \$32,325.00 loan fell within this range (\$28,015.00 to \$36,365.00). He also testified that he was aware that Black and Cannon had a working relationship, and that Black had referred Cannon to Capitol to obtain the loan. However, he was unaware of the \$24,000.00 agreement between Cannon and Pagan.

Closing was originally scheduled to take place at Stewart Title on the morning of August 18, 1980. Because the documentation was not completed, the closing was delayed until that afternoon. Pagan, Ortiz, Black, and Cannon were present during the entire two-and-one-half hour afternoon meeting, but agents from Century 21 and Bill Brown Realty, representing Pagan and the buyers respectively, were only present during portions of the transaction.

Tommy Sisk, representing Stewart Title, presided over the closing. He conducted it slowly so that Ortiz, who was translating for Pagan, would not be rushed. He stated that Pagan asked him questions about the transactions through Ortiz, which he answered, that he explained the documentation prepared by Stewart Title to all the parties, and that he explained to Pagan the following changes from the earnest money agreement: the substitution of Cannon for Black as buyer;² the existence of the Capitol trust deed; that the total loan amounts would exceed the \$44,000.00 purchase price of the property; and that the trust deed in favor of Capitol securing the \$32,325.00 commercial note would be recorded ahead of the trust deed in favor of Pagan which secured the \$24,000.00 note. However, he also stated that he did not know at that time what the exact amount of the loan from Capitol would be. He further explained to Pagan that Pagan would be in a second rather than a first position, and if Cannon did not pay, Pagan would have to pay on the Capitol loan to avoid losing his house. Sisk stated that he went through the entire closing before Pagan executed any documents. At the end of the closing, the parties signed the documents and copies were distributed.

The seller's statement of account, naming Pagan as the seller and Cannon as the buyer, indicated that the sales price of the house was \$44,000.00, that there was a deed of trust on

2. Black testified that he was not purchasing the home for himself, but was purchasing it as part of a business venture with Cannon, and that the arrangement was between him, Cannon and Alpha Leasing only.

the property for \$24,000.00, and that the following closing costs were payable by Pagan from the \$20,000.00 down payment: current taxes of \$224.07, a title insurance fee of \$211.00, an escrow fee of \$37.50, a sales commission of \$2,640.00, and a closing fee of \$30.00. The balance due Pagan was \$16,857.43, which he received.

Sisk stated that he did not review the disbursement checks, and that Cannon did not sign the note for \$32,352.00, the accompanying trust deed in favor of Capitol, and the mortgage at the closing because these documents were delivered afterwards. He also indicated that the transaction between Pagan and Cannon was totally separate from Cannon's transaction with Capitol, that he had nothing to do with the transaction between Capitol and Cannon, that he had no knowledge that the closing involved Alpha Leasing, and that the substitution of Black for Cannon was not inconsistent with the terms of the earnest money agreement. He testified that the transaction did not close in accordance with the earnest money agreement because of last minute changes, but that such last minute changes were common.

The broker representing the buyers³ believed that Black and Cannon were working together as partners, and that Cannon was a more qualified buyer than Black. He understood that Black was the buyer, and was using Cannon as a guarantor on the loan, but that, at closing, the parties decided to make Cannon the buyer of record because Cannon was more qualified and they did not want to complicate the transaction further by adding an additional buyer. He stated that he was aware that there would be a first mortgage ahead of Pagan's trust deed, and that it would be for more than \$20,000.00, but was not aware of the exact amount or the terms of the Capitol note.

Cannon testified that he attended the closing at Black's request, believing that he was only to be a guarantor of the loan. He was induced to do so on the grounds that Black, who was in arrears on lease payments owed to Alpha Leasing, had projects which, if funded, might be made sufficiently profitable to enable him to make the lease payments. During closing, however, Cannon was substituted for Black as purchaser, and, consequently, signed the following documents as

3. The broker testified that he did not discuss the transaction with Capitol or Hanks, that none of the \$4,848.75 returned to Capitol was paid to him, that he did not pay Black for bringing the transaction to his company, and that he was not representing Alpha Leasing.

the only obligor: the trust deed in favor of Stewart Title for \$24,000.00, the escrow agreement for this trust deed, and a statement of account naming him as the buyer of the property. None of these documents indicated that Cannon was a guarantor rather than the purchaser. Nevertheless, he testified that he did not know that he was the purchaser, stating that although he had an opportunity to read the documents, he did not do so. He also testified that he was not aware that Black had signed any of the documents.⁴

The real estate agent representing Pagan at the closing indicated that he was aware that the \$20,000.00 down payment would be borrowed, but did not know if it would be a first or second mortgage. He understood, however, that Cannon was financially stable, and believed that the documentation prepared by Stewart Title was exactly according to the earnest money agreement. He stated that he discussed the contents of the documents with Pagan, and that he was not aware of any misrepresentation made at the time. However, he never saw the documents brought over from Capitol after the closing and was not aware that more than \$20,000.00 was to be placed against the home. He also believed that the terms and conditions had been significantly altered from the earnest money agreement because the loan was greater than \$20,000.00, and that Pagan could not have understood the alterations unless they had been discussed with him when the agent was not present.

After the closing, Hanks brought the \$32,325.00 loan check from Capitol to Stewart Title. This check, jointly payable to Stewart Title and Cannon, was accompanied by an instruction letter which directed that acceptance of the check would guarantee title insurance covering the Pagan property, title would be in Cannon's name, the trust deed would be the first recorded, and the funds would be disbursed as follows: \$4,848.75 back to Capitol, recording and title insurance fees, and the remainder to Cannon or as he directed.

Cannon and Stewart Title endorsed the Capitol loan check and deposited it with Stewart Title to be disbursed according to instructions. Cannon, although his signature appeared on the back of the check, denied that he had ever seen the check or that he had endorsed it. From the loan proceeds, \$4,848.75 was returned to Capitol, \$331.00 was paid out for recording and

4. That Cannon apparently consistently lied about his involvement in the transaction only goes to the issue of his credibility, and does not directly support any inference that Capitol was involved in this transaction as a conspirator.

title fees, \$1,640.00 went to Bill Brown Realty as the buyer's share of the real estate commission, and \$25.00 went for the buyer's share of the escrow fee.

Sisk recorded the trust deeds on August 19, 1980, recording the deed in favor of Capitol ahead of the deed in favor of Pagan as per Capitol's instructions.

Cannon received a check from Stewart Title for \$13,471.57, representing his share of the proceeds from the Capitol loan. He deposited this check in the Alpha Leasing account. He testified that he then paid \$1,000.00 earnest money to Bill Brown Realty, \$4,848.75 to Capitol, and the remainder according to Black's direction, indicating that he received none of these proceeds personally. Black, however, testified that he did not receive the proceeds except for the \$4,848.75 returned to Capitol which was applied to his pre-existing debt with Capitol.

Although Cannon testified that he did not recall making any payments on the loan personally or through Alpha Leasing, a \$668.15 payment was made on October 14, 1980 on the \$32,325.00 loan.⁵ Cannon thought Black was going to be making the payments, but became aware that Black was not doing so when Capitol contacted Cannon about the loan. Cannon then contacted Black, who indicated that he would be taking care of the problem. Black did not make any further payments, however, and Cannon, whose financial condition had deteriorated substantially, was not then in a position to make the payments.

Cannon personally extended the loan in January, 1981, at which time a \$2,700.00 payment was made. Capitol sent notices of default to Cannon on the balance of the loan on May 11, 1981, and on September 1, 1981. Capitol then sold the property at a trustee's sale for \$39,300.00, and initiated an action against Cannon to recover the remaining \$12,726.58 balance.

At trial, Pagan had no recollection of the transaction. He also had no recollection of listing his home for sale, selling it, going to Stewart Title for the closing, or even what had happened to his house. Ortiz testified that he translated the events but did not understand what was happening, nor did Pagan. Ortiz stated that there was never any discussion concerning the \$32,325.00 note, and that there was no discussion concerning the documents that Pagan was

5. Plaintiff's assertion that this payment was made prior to the August 18, 1980 closing date is without support in the record.

requested to sign. Ultimately, Pagan received nothing more for his \$44,000.00 equity than the \$16,857.43 down payment he received at closing.

A banking expert associated with Capitol testified that he had supervised the loan to Cannon and did not see anything unusual in it. At the time the loan was made, the prime rate was between 20 and 21%, first mortgage money was nearly non-existent, and many people were borrowing with short-term "bridge" loans, anticipating that when they matured, they could arrange for long-term financing. Because Capitol was primarily a second mortgage lender, many people unable to get first mortgages came to Capitol during that time for short-term financing. He also indicated that it was normal practice for such lending institutions to pay finder's fees of 2 to 3%, and that such a fee was paid to Black on the Cannon loan.

The jury concluded that there was clear and convincing evidence that Cannon, Capitol through Hanks, and Stewart Title through Sisk, were guilty of conspiracy to defraud Pagan of his property. It found Cannon liable for \$12,000.00 compensatory and \$4,000.00 punitive damages, Capitol liable for \$12,000.00 compensatory and \$4,000.00 punitive damages, and Stewart Title liable for no compensatory and \$2,000.00 punitive damages.

Counsel for Pagan argues that the evidence supports a finding of conspiracy, in which Hanks, Black, and Cannon engaged in a confidence game to defraud Pagan.⁶

The sole appellant, Capitol, asserts that the verdict is not supported by the evidence, but that the evidence indicates a normal business transaction that unfortunately happened to go sour.

To prove a civil conspiracy, the plaintiff must show the following elements: (1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof. Citizen State Bank v. Gilmore, 226 Kan. 662, 603 P.2d 605, 613 (1979); Duffy v. Butte Teachers' Union, 168 Mont. 246, 541 P.2d 1199,

6. Pagan's brief left much to be desired as far as presenting a coherent statement of the facts and their application to the legal issues.

1202 (1975)(quoting 15A C.J.S. Conspiracy §§ 1, 2).⁷ The plaintiff must present clear and convincing evidence to carry his burden of proof on a charge of civil conspiracy. Crane Co. v. Dahle, 576 P.2d 870, 872 (Utah 1978).

I & II: Two or More Persons and Object to be Accomplished

Plaintiff asserts the following theory: All persons involved in this transaction joined in the alleged conspiracy. Their object was to defraud Pagan, whom they previously knew to be mentally deficient and, therefore, helpless, by taking his \$44,000.00 property for \$16,857.43, each obtaining some of the profit for himself. Capitol was to immediately receive a "kick-back" payment of \$4,848.75 from Black; later, \$39,300.00 from a trustee's sale of the property; and an additional \$32,325.00 from a deficiency judgment against Cannon. Thereby, it could realize a \$76,473.75 return from an initial investment of \$32,325.00. Hanks, Cannon, and Black, immediately after closing, were to jointly receive \$13,471.57 over the agreed first mortgage price, while the real estate agents were to receive exorbitant fees for their services.

Supporting this theory were the facts that Pagan only received \$16,857.43 from the transaction, that \$4,848.75 was, indeed, paid to Capitol immediately after the transaction took place, and that Capitol ultimately received \$39,300.00 from the trustee's sale of the property. However, the record also indicates that Capitol's deficiency action was for only \$12,726.58. The difference between the original principal amount and the amount Capitol attempted to recover was accrued interest at 22%. Further, the record does not indicate that Hanks received any proceeds from the \$13,471.57 loan, but that the loan was disbursed to Cannon, and fails to indicate why Cannon would enter into such an unfavorable agreement. Thus, we find that there is no clear and convincing evidence that the parties' evil object was to defraud Pagan.

7. Utah has no civil conspiracy statute, as such, but it is well settled that such an offense exists at common law. The criminal conspiracy statute, Utah Code Ann. § 76-4-201 (1987), requires a showing of substantially similar elements: (1) intention that the conduct constituting a crime be performed, (2) agreement between two or more persons to engage in or cause the criminal conduct, and (3) commission of an overt act in pursuance of the conspiracy by any one of the conspirators. A civil action further requires that there be damage as a proximate result of the conspiracy. Duffy, 541 P.2d at 1202.

III. A Meeting of the Minds

There is no direct evidence in the record of a meeting of the parties' minds with respect to defrauding Pagan of his property. However, it is not necessary in a civil fraud action to prove that the parties actually came together and entered into a formal agreement to do the acts complained of by direct evidence. Holmes v. McKey, 383 P.2d 655, 665 (Okla. 1962). Instead, conspiracy may be inferred from circumstantial evidence, including the nature of the act done, the relations of the parties, and the interests of the alleged conspirators. Wyatt v. Union Mortgage Co., 24 Cal. 3d 773, 598 P.2d 45, 51-52 157 Cal. Rptr. 392 (1979); Chicago Title Ins. Co. v. Great Western Fin. Corp., 69 Cal. 2d 305, 444 P.2d 481, 488, 70 Cal. Rptr. 849 (1968). To prove conspiracy to defraud by circumstantial evidence, though, "there must be substantial proof of circumstances from which it reasonably follows, or at least may be reasonably inferred, that the conspiracy existed. It cannot be established by conjecture and speculation alone." Dill v. Rader, 583 P.2d 496, 499 (Okla. 1978)(quoting Chisler v. Randall, 124 Kan. 278, 259 P. 687 (1953)).

The act in question is a real estate transaction, which normally requires the services of real estate agents, loan companies, title companies, and the existence of a buyer and seller. Such parties were present in this transaction.

The record clearly indicates that Black and Cannon, the buyers, were working together and that Hanks and the real estate agents were aware of that relationship. Stewart Title drew up all the documents except those prepared by Capitol. Black had a prior relationship with Capitol, including a \$4,848.75 debt, which he paid off with proceeds from the \$32,325.00 loan. Capitol required Stewart Title to pay back the \$4,848.75 sum, to record its interest in the Pagan property first, and to disburse the proceeds of the loan to Cannon. Sisk, of Stewart Title, recorded Capitol's trust deed prior to Pagan's, pursuant to Capitol's instructions. The record indicates that the parties did not know of Pagan's mental infirmity prior to the transaction, but met Pagan for the first time at the closing. Pagan's expert witness, Dr. William Barrett, testified that a lay person would not be able to tell that Pagan was mentally disabled by looking at him.

Plaintiff asserts that these facts adequately support the inference that Hanks, Black, and Cannon engaged in a confidence game to defraud Pagan, whom they previously knew to be mentally deficient, of his property, indicating that the parties had a meeting of the minds on the object of the conspiracy.

However, not only does the evidence directly contradict plaintiff's desired inference that the conspirators knew about Pagan's mental deficiency prior to the transaction, but the other facts do not necessarily or even reasonably lead to the inference that the parties were doing anything but engaging in a normal real estate transaction. Specifically, uncontroverted evidence was presented at trial that finder's fee arrangements were normal banking practice for this type of loan, as was Capitol's requirement of taking a first trust deed against the property. Further, the record indicates that Stewart Title was not aware of the details of the Capitol loan prior to the transaction. Thus, the evidence does not provide anything more substantial than conjecture and speculation to show the existence of a conspiratorial relationship between the parties.

IV. Unlawful Act

To assert civil conspiracy, the plaintiff must also prove that the alleged conspirators performed one or more unlawful, overt acts. If the object of the alleged conspiracy or the means used to attain it is lawful, even if damage results to the plaintiff or the defendant acted with a malicious motive, there can be no civil action for conspiracy. "If such were not the rule, obviously many purely business dealings would give rise to an action in tort on behalf of one who may have been adversely affected." Duffy, 541 P.2d at 1202.

Plaintiff's brief suggests that the allegedly unlawful overt act at issue is fraud. The Utah Supreme Court, in Taylor v. Gasor, Inc., 607 P.2d 293, 294 (Utah 1980), defines fraud as:

the making of a false representation concerning a presently existing material fact which the representor either knew to be false or made recklessly without sufficient knowledge, or the omission of a material fact when there is a duty to disclose, for the purpose of inducing action on the part of the other party, with actual, justifiable reliance resulting in damage to that party.

A person cannot be liable for fraud unless he made the false representations himself, authorized someone to make them for him, or participated in the misrepresentation in some way, such as through a conspiracy. 37 C.J.S. Fraud § 61 (1943). There is no direct evidence in the present case that Capitol misrepresented a material fact known to be false. Nor is there direct evidence that Capitol acted for the purpose of inducing

Pagan to sell his home or that Pagan relied upon Capitol's actions. Since Capitol did not, by its own actions, defraud Pagan or authorize another to do so, Capitol's liability can only be established by proving that it was engaged in a conspiracy to defraud. However, the evidence shows that, other than providing financing, Capitol did not participate in Black's plan to purchase the home.⁸

Plaintiff argues that the evidence supports the following inferences: Hanks and Capitol were fully aware that the "notorious" real estate promoter, Black, was acting in concert with Cannon, whom they knew at the time to be a judgment-proof "straw man" unable to repay a \$32,325.00 loan at 22%. They also knew that Black and Cannon had never requested or applied for a loan. Nevertheless, Capitol drafted the note and the first trust deed in Cannon's name without considering the \$44,000.00 sales price of the property and disregarded the \$24,000.00 mortgage, of which Hanks was fully aware, between Pagan and Cannon. At the closing, judgment-proof Cannon was switched for Black as the buyer, while Hanks deliberately concealed the terms of the \$32,325.00 loan from Pagan during the closing by delivering the loan documents to Stewart Title prior to the closing, but not disclosing them until after the closing was completed and the parties had left. The promoters, Cannon and Black, refused to make any payments on the \$32,325.00 note or on the \$24,000.00 contract, knowing that the trust deed on the \$32,325.00 note would be foreclosed long before the due date on the \$24,000.00 contract, and that because they were judgment-proof anyway, they would not be required to repay the loan. Furthermore, the entire transaction was financed entirely out of Pagan's equity, while the other parties received all the benefits without paying for them.

8. "[I]t is not sufficient that the circumstances lead to a mere suspicion of fraud, nor are they sufficient where they are as consistent with honesty and good faith as with fraud (footnote omitted). When the proved or admitted facts are consistent with any reasonable theory of good faith and honest intent, they should be so construed (footnote omitted). Fraud cannot be inferred or presumed from ambiguous evidence (footnote omitted). . . . When it is sought to prove fraud by circumstantial evidence, the fraud must be such as would reasonably and naturally follow from the circumstances so proved, and fraud will not be lightly inferred (footnote omitted). The collateral facts from which the inference of fraud is sought to be drawn must be proved precisely as facts are proved in other cases (footnote omitted). Presumptions of fact from presumptions are not sufficient." 37 C.J.S. Fraud § 115 (1943).

The plaintiff has the burden of presenting clear and convincing evidence supporting his conspiracy theory. Dill, 583 P.2d at 499; Crane v. Dahle, 576 P.2d 870, 872 (Utah 1978). This evidence must do more than merely raise a suspicion -- it must lead to belief that the conspiracy existed. Dill, 583 P.2d at 499 (emphasis in original). Such evidence is sufficient if it shows that the circumstances are consistent only with the existence of a conspiracy. John Davis and Co. v. Cedar Glen No. Four, Inc., 75 Wash. 2d 241, 450 P.2d 166, 172 (1969). Evidence is insufficient if it discloses acts just as consistent with a lawful purpose as with an unlawful one. Accurate Products, Inc. v. Snow, 67 Wash. 2d 416, 408 P.2d 1, 7 (1965); Dill, 583 P.2d at 499.⁹ "Common sense and reason dictate that evil inferences should not be permitted to be drawn from routine business transactions where there are no other transactions. To hold otherwise would throw the door open for an attack on each and every transaction that one might enter into." Holland v. Columbia Iron Mining Co., 4 Utah 2d 303, 293 P.2d 700, 702 (1956). Evidence, viewed in the light most favorable to the verdict, "disregarding evidence and inferences to the contrary," is, therefore, considered as a whole to determine whether the alleged conspirators were actually united in a scheme to defraud the plaintiff. Morris v. Dodge Country, Inc., 89 N.M. 491, 513 P.2d 1273, 1274 (1983).

We accord due deference to the jury as the fact finder and do not substitute ourselves in this role. However, an appellant may successfully attack a jury's verdict by "[marshalling] all the evidence supporting the verdict and then

9. "Facts of trifling importance when considered separately, or slight circumstances trivial and inconclusive in themselves, may afford clear evidence of fraud when considered in connection with each other. It has been said that in most cases fraud can be made out only by a concatenation of circumstances, many of which in themselves amount to very little, but in connection with others make a strong case." Holmes v. McKey, 383 P.2d 655, 666 (Okla. 1963) (citing Griffith v. Scott, 128 Okla. 125, 261 P. 371 (1927)). However, "[w]here subsequent acts are relied upon to establish a conspiracy, they must clearly indicate the prior collusive combination and fraudulent purpose and must warrant the conclusion that the subsequent acts were done in furtherance of the unlawful combination and in pursuance of the fraudulent scheme. Disconnected circumstances, any one of which, or all of which, are just as consistent with a lawful purpose as with an unlawful undertaking, are insufficient to establish a conspiracy (emphasis in original)." Dill, 583 P.2d at 499. (quoting Ballantine v. Cummings, 220 Pa. 621, 70 A. 546, 547.)

[demonstrating] that, even viewing the evidence in the light most favorable to that verdict, the evidence is insufficient to support it." Von Hake v. Thomas, 705 P.2d 766, 769 (Utah 1985).

In the present case, the facts viewed as a whole not only do not compel an inference of conspiracy, but directly contradict plaintiff's conspiracy theory in many respects: First, Black's "notorious" reputation, with which Hanks was supposedly familiar, is unsupported by the record. Documentary evidence discloses that Cannon, rather than being judgment-proof at the time of the transaction, was in a strong financial position, but his fortunes reversed, making him judgment-proof at the time of trial. Despite Cannon's assertions to the contrary, documentary evidence indicates that he did, in fact, personally apply for the loan with Capitol, and that the loan was granted on the basis of his then financial strength. The amount of the loan was not made in total disregard of the value of Pagan's property, but was well within reasonable limits (65 to 85% of the appraised value of the property). The substitution of Cannon for Black was not only within the terms of the earnest money agreement, which directed that the name in which title would be vested would be designated at the time of closing, but was fully disclosed to Pagan, and was made on the basis of Cannon's relative financial strength as compared to Black's. Furthermore, it is uncontroverted that Hanks delivered the loan documents to Stewart Title after, not, as plaintiff's attorney alleges, before the closing; that the parties were aware of the loan's existence, approximate amount, and priority; and that Pagan had been informed of it.

The purchasers did, indeed, have some equity in the property and did, in fact, make efforts to repay the loan. Documentary evidence indicates that Cannon paid \$1,000.00 earnest money directly from the loan proceeds, and personally extended the loan when it went into default. An unidentified person made a \$2,700.00 payment on the loan pursuant to its being extended. Finally, the record shows that while Pagan paid closing costs customarily paid for by the seller, Cannon paid the closing costs customarily paid for by the buyer from his loan proceeds. Thus, many of the inferences upon which plaintiff relies to prove his fraud charge are totally unfounded because they are directly contradicted by uncontroverted evidence. Therefore, to adapt plaintiff's theory, the jury's finding would have to be based on conjecture and speculation.

V. Damages

Finally, to assert a claim for civil conspiracy, the plaintiff must show that he sustained damage as a proximate result of the conspiracy's activities because the conspiracy itself is not what gives rise to the right to action, but the torts committed in the furtherance of the conspiracy. Duffy, 541 P.2d at 1202; Chicago Title Ins. Co., 444 P.2d at 488.

Plaintiff asserts that Pagan was damaged by losing \$27,147.57 as a result of this transaction because he received only \$16,857.43 in exchange for his \$44,000.00 equity. Pagan sustained damage. However, because plaintiff has not shown sufficient evidence to reasonably imply the existence of a conspiracy, he cannot say that Pagan's loss was caused by the alleged conspiracy.

The purpose of a civil conspiracy action is to connect participating members in a transaction who otherwise would not be liable to the plaintiff. Duffy, 541 P.2d at 1202. Because Cannon, against whom Pagan could legitimately have a right of action, is judgment-proof, plaintiff's presumed purpose in arguing a conspiracy theory against Capitol is to obtain a judgment payable from Capitol's resources. However, even though the results of this transaction are unfortunate and possibly unfair, we find that there is insufficient evidence to support the jury's finding that Capitol acted together with Cannon in a conspiracy to defraud Israel Pagan. Therefore, we reverse and remand for proceedings consistent with this opinion.

Because we do not find sufficient evidence to support plaintiff's conspiracy theory, Capitol is not liable for compensatory and punitive damages. Therefore, it is not necessary to address the issue of punitive damages.

Regnal W. Garff, Judge

I CONCUR:

Norman H. Jackson, Judge

I CONCUR IN RESULT ONLY:

Russell W. Bench, Judge

is known by) the same name as that appearing on the extradition papers.

When the state has made its prima facie case, the petitioner has the burden of going forward with *affirmative evidence* that he is not the person named in the extradition papers. Where the petitioner does this by sworn testimony or by a verified pleading and where the state provides no evidence in addition to its bare prima facie case (as defined above) to corroborate the petitioner's identity with the person named in the extradition papers, the petitioner is entitled to release.

(Emphasis added; citations omitted.)

[1] In the instant case, the State presented its prima facie case against Topp, who then had the burden of going forward with affirmative evidence, not with a bare allegation that he was not the person sought. To meet his burden that he was not a fugitive from justice, i.e., that he was not in the demanding state on the date of the crime or that he was not the person named in the extradition warrant, Topp had to do so by clear and convincing evidence. *Emig v. Hayward*, 703 P.2d at 1051 (citing *Langley v. Hayward*, 656 P.2d at 1022). The trial court found that the documentation, together with the testimony of the sheriff, provided sufficient identification for extradition. In light of Topp's utter failure to make more than naked allegations of mistaken identity, the court's finding was clearly not erroneous and will therefore be upheld by this Court. Utah R.Civ.P. 52(a); *State v. Ashe*, 745 P.2d 1255 (Utah 1987); *State v. Walker*, 743 P.2d 191 (Utah 1987).

[2] Topp's argument that the photo spread shown to the victim and his mother may have been suggestive is not properly raised in a habeas corpus hearing. The cases cited by Topp address the guilt or innocence of a defendant in a trial setting and are inapposite here. Beyond establishing the identity of the person held as the person charged with the crime, neither the governor of the holding state nor a judge in a habeas corpus hearing may inquire

into the guilt or innocence of the accused. Utah Code Ann. § 77-30-20 (1982).

Affirmed.



ISRAEL PAGAN ESTATE and Leonor
C. Pagan, Personal Representative,
Plaintiff and Respondent,

v.

Joseph N. CANNON, Dorius Black, Alpha Leasing Company, a partnership; Robert D. Appgood, Joseph N. Cannon, Dorius Black, and Richard McKean, doing business under the name and style of Alpha Leasing Company; Bill Brown Realty, Incorporated; Scott Peatross, personally; Stewart Title Company of Utah; Tommy W. Sisk; Capitol Thrift and Loan, a financial corporation; and Merlyn Hanks, Defendants and Appellant.

No. 860072-CA.

Court of Appeals of Utah.

Nov. 16, 1987.

Rehearing Denied Dec. 2, 1987.

Vendor's estate brought action against, among others, purchaser's lender, alleging civil conspiracy to defraud vendor of his home. The Third District Court, Salt Lake County, J. Dennis Frederick, J., entered judgment on jury verdict in favor of vendor's estate, and lender appealed. The Court of Appeals, Garff, J., held that evidence was insufficient to support civil conspiracy claim.

Reversed.

Bench, J., concurred in result only.

1. Conspiracy ¶1

To prove civil conspiracy, plaintiff must show combination of two or more persons, object to be accomplished, meeting

of minds on object or course of action, one or more unlawful, overt acts, and damages as a proximate result of such conduct.

2. Conspiracy ⚡19

Evidence did not establish that purchaser's lender, whose \$20,000 loan for down payment for purchase of home was secured by first deed of trust on home, engaged in conspiracy with purchaser and various other individuals to defraud vendor of his home, even though vendor received approximately \$16,000 for his \$44,000 equity in his home, and even though lender received almost \$5,000 following sale transaction.

3. Conspiracy ⚡19

In civil action involving conspiracy to defraud, it is not necessary to prove by direct evidence that parties actually came together and entered into formal agreement to do acts complained of, and conspiracy may be inferred from circumstantial evidence, including nature of act done, relations of parties, and interest of alleged conspirators.

4. Conspiracy ⚡19

Circumstantial evidence did not support vendor's claim that purchaser's lender, whose \$20,000 loan for down payment for purchase of home was secured by first deed of trust on home, as well as purchaser, title company, and various others, worked together to defraud vendor of his home, even though vendor received only approximately \$16,000 for his \$44,000 equity in his home and even though vendor alleged that sale negotiations took place despite knowledge of parties involved that vendor did not speak English and was mentally deficient.

5. Conspiracy ⚡3, 4

There can be no civil action for conspiracy if object of alleged conspiracy or means used to attain it is lawful, even if damage results to plaintiff or even if defendant acted with malicious motive.

6. Fraud ⚡30

Person cannot be held liable for fraud unless he made false representations himself, authorized someone to make them for

him, or participated in misrepresentation in some way, such as through a conspiracy.

7. Conspiracy ⚡19

Evidence was insufficient to establish that purchaser's lender, whose \$20,000 loan for down payment for purchase of home was secured by first deed of trust on home, either made any material misrepresentation or acted for purpose of inducing vendor to sell home so as to support vendor's claim that lender and others engaged in conspiracy to defraud him of his home.

8. Conspiracy ⚡6

To assert claim for civil conspiracy, plaintiff must show that he sustained damage as proximate result of conspiracy's activities, because conspiracy itself is not what gives rise to right to action, but torts committed in furtherance of conspiracy.

Kay M. Lewis, Salt Lake City, for appellant.

Mark S. Miner, Salt Lake City, for respondent.

Before BENCH, GARFF and JACKSON, JJ.

OPINION

GARFF, Judge:

Defendant Capitol Thrift and Loan (Capitol) appeals from a jury verdict finding it liable to plaintiff Israel Pagan Estate for damages arising out of Capitol's alleged conspiracy with defendants Stewart Title Company (Stewart Title) and Joseph Cannon (Cannon) to defraud Pagan of his home. We reverse.

Pagan, a native of Puerto Rico, was unable to speak or understand English, and had subnormal mental capacity due to injuries suffered in an industrial accident. On July 30, 1980, with the help of his friend and interpreter, Emilio Ortiz, he listed his home for sale with Century 21 Real Estate. Ortiz, with a tenth grade education, was unsophisticated in real estate transactions.

On occasion, Cannon, who was a partner in defendant Alpha Leasing, worked with

Dorius Black, an independent businessman. Black, as part of a business arrangement with Cannon, signed an earnest money agreement with Century 21 on July 30, 1980, and executed a \$1,000.00 promissory note for the purpose of purchasing Pagan's home. This earnest money agreement specified that Black was the purchaser of the home,¹ that he deposited \$1,000.00 earnest money in the form of a promissory note, and that the purchase price of the house was \$44,000.00. Of this price, \$20,000.00 was payable as a down payment at closing, and the remaining \$24,000.00 balance was payable as follows: payments were to be deferred for the first year; on August 1, 1981, a \$2,630.88 interest payment was due; and on September 1, 1981, monthly payments of \$242.67 were to begin, which were to be paid until August 1, 1982 when the balance was to be paid off with a balloon payment.

Stewart Title, acting as the escrow agent for this transaction, drew up the following documents: an escrow agreement, a trust deed note for the \$24,000.00 balance bearing the same terms as the earnest money agreement, a request for reconveyance, copies of the buyer's and seller's closing statements, and a trust deed. Pagan and Cannon each paid \$25.00 to set up this escrow account. Nothing in any of these documents indicated the existence of any other trust deed.

Black, who owed Capitol \$4,848.75 at the time, referred Cannon to Capitol to obtain a loan for the \$20,000.00 down payment. Although Cannon testified that he never actually applied for or negotiated with Capitol for this loan, Merlyn Hanks, a loan officer with Capitol, testified that Cannon had requested such a loan. The record indicates that Cannon filled out an application with Capitol for a \$32,325.00 loan on August 13, 1980, five days prior to the closing; submitted to Capitol a signed personal financial statement, an Alpha Leasing financial statement, and a signed borrower's state-

ment that the loan was to be used for strictly business purposes; and signed a business promissory note and security agreement for a \$32,325.00 commercial loan from Capitol at 22% interest, payable in five monthly payments of \$668.15, beginning September 18, 1980, with a balloon payment of \$32,518.72 due on or before February 18, 1981. This loan was to be secured by a first trust deed against the Pagan property. These documents were not available to the parties during closing.

Pagan's house was appraised at \$43,100.00. Hanks testified that he normally made loans for between 65 to 85% of the appraised value of a house, and that the \$32,325.00 loan fell within this range (\$28,015.00 to \$36,365.00). He also testified that he was aware that Black and Cannon had a working relationship, and that Black had referred Cannon to Capitol to obtain the loan. However, he was unaware of the \$24,000.00 agreement between Cannon and Pagan.

Closing was originally scheduled to take place at Stewart Title on the morning of August 18, 1980. Because the documentation was not completed, the closing was delayed until that afternoon. Pagan, Ortiz, Black, and Cannon were present during the entire two-and-one-half hour afternoon meeting, but agents from Century 21 and Bill Brown Realty, representing Pagan and the buyers respectively, were only present during portions of the transaction.

Tommy Sisk, representing Stewart Title, presided over the closing. He conducted it slowly so that Ortiz, who was translating for Pagan, would not be rushed. He stated that Pagan asked him questions about the transactions through Ortiz, which he answered, that he explained the documentation prepared by Stewart Title to all the parties, and that he explained to Pagan the following changes from the earnest money agreement: the substitution of Cannon for Black as buyer;² the existence of the Capi-

1. The earnest money agreement also stated that title to the property would vest as designated at closing, so another purchaser could be substituted for Black under the terms of the agreement.

2. Black testified that he was not purchasing the home for himself, but was purchasing it as part of a business venture with Cannon, and that the arrangement was between him, Cannon and Alpha Leasing only.

tol trust deed; that the total loan amounts would exceed the \$44,000.00 purchase price of the property; and that the trust deed in favor of Capitol securing the \$32,325.00 commercial note would be recorded ahead of the trust deed in favor of Pagan which secured the \$24,000.00 note. However, he also stated that he did not know at that time what the exact amount of the loan from Capitol would be. He further explained to Pagan that Pagan would be in a second rather than a first position, and if Cannon did not pay, Pagan would have to pay on the Capitol loan to avoid losing his house. Sisk stated that he went through the entire closing before Pagan executed any documents. At the end of the closing, the parties signed the documents and copies were distributed.

The seller's statement of account, naming Pagan as the seller and Cannon as the buyer, indicated that the sales price of the house was \$44,000.00, that there was a deed of trust on the property for \$24,000.00, and that the following closing costs were payable by Pagan from the \$20,000.00 down payment: current taxes of \$224.07, a title insurance fee of \$211.00, an escrow fee of \$37.50, a sales commission of \$2,640.00, and a closing fee of \$30.00. The balance due Pagan was \$16,857.43, which he received.

Sisk stated that he did not review the disbursement checks, and that Cannon did not sign the note for \$32,352.00, the accompanying trust deed in favor of Capitol, and the mortgage at the closing because these documents were delivered afterwards. He also indicated that the transaction between Pagan and Cannon was totally separate from Cannon's transaction with Capitol, that he had nothing to do with the transaction between Capitol and Cannon, that he had no knowledge that the closing involved Alpha Leasing, and that the substitution of Black for Cannon was not inconsistent with the terms of the earnest money agreement.

He testified that the transaction did not close in accordance with the earnest money agreement because of last minute changes, but that such last minute changes were common.

The broker representing the buyers³ believed that Black and Cannon were working together as partners, and that Cannon was a more qualified buyer than Black. He understood that Black was the buyer, and was using Cannon as a guarantor on the loan, but that, at closing, the parties decided to make Cannon the buyer of record because Cannon was more qualified and they did not want to complicate the transaction further by adding an additional buyer. He stated that he was aware that there would be a first mortgage ahead of Pagan's trust deed, and that it would be for more than \$20,000.00, but was not aware of the exact amount or the terms of the Capitol note.

Cannon testified that he attended the closing at Black's request, believing that he was only to be a guarantor of the loan. He was induced to do so on the grounds that Black, who was in arrears on lease payments owed to Alpha Leasing, had projects which, if funded, might be made sufficiently profitable to enable him to make the lease payments. During closing, however, Cannon was substituted for Black as purchaser, and, consequently, signed the following documents as the only obligor: the trust deed in favor of Stewart Title for \$24,000.00, the escrow agreement for this trust deed, and a statement of account naming him as the buyer of the property. None of these documents indicated that Cannon was a guarantor rather than the purchaser. Nevertheless, he testified that he did not know that he was the purchaser, stating that although he had an opportunity to read the documents, he did not do so. He also testified that he was not aware that Black had signed any of the documents.⁴

3. The broker testified that he did not discuss the transaction with Capitol or Hanks, that none of the \$4,848.75 returned to Capitol was paid to him, that he did not pay Black for bringing the transaction to his company, and that he was not representing Alpha Leasing.

4. That Cannon apparently consistently lied about his involvement in the transaction only goes to the issue of his credibility, and does not directly support any inference that Capitol was involved in this transaction as a conspirator.

The real estate agent representing Pagan at the closing indicated that he was aware that the \$20,000.00 down payment would be borrowed, but did not know if it would be a first or second mortgage. He understood, however, that Cannon was financially stable, and believed that the documentation prepared by Stewart Title was exactly according to the earnest money agreement. He stated that he discussed the contents of the documents with Pagan, and that he was not aware of any misrepresentation made at the time. However, he never saw the documents brought over from Capitol after the closing and was not aware that more than \$20,000.00 was to be placed against the home. He also believed that the terms and conditions had been significantly altered from the earnest money agreement because the loan was greater than \$20,000.00, and that Pagan could not have understood the alterations unless they had been discussed with him when the agent was not present.

After the closing, Hanks brought the \$32,325.00 loan check from Capitol to Stewart Title. This check, jointly payable to Stewart Title and Cannon, was accompanied by an instruction letter which directed that acceptance of the check would guarantee title insurance covering the Pagan property, title would be in Cannon's name, the trust deed would be the first recorded, and the funds would be disbursed as follows: \$4,848.75 back to Capitol, recording and title insurance fees, and the remainder to Cannon or as he directed.

Cannon and Stewart Title endorsed the Capitol loan check and deposited it with Stewart Title to be disbursed according to instructions. Cannon, although his signature appeared on the back of the check, denied that he had ever seen the check or that he had endorsed it. From the loan proceeds, \$4,848.75 was returned to Capitol, \$331.00 was paid out for recording and title fees, \$1,640.00 went to Bill Brown Realty as the buyer's share of the real estate commission, and \$25.00 went for the buyer's share of the escrow fee.

5. Plaintiff's assertion that this payment was made prior to the August 18, 1980 closing date

Sisk recorded the trust deeds on August 19, 1980, recording the deed in favor of Capitol ahead of the deed in favor of Pagan as per Capitol's instructions.

Cannon received a check from Stewart Title for \$13,471.57, representing his share of the proceeds from the Capitol loan. He deposited this check in the Alpha Leasing account. He testified that he then paid \$1,000.00 earnest money to Bill Brown Realty, \$4,848.75 to Capitol, and the remainder according to Black's direction, indicating that he received none of these proceeds personally. Black, however, testified that he did not receive the proceeds except for the \$4,848.75 returned to Capitol which was applied to his pre-existing debt with Capitol.

Although Cannon testified that he did not recall making any payments on the loan personally or through Alpha Leasing, a \$668.15 payment was made on October 14, 1980 on the \$32,325.00 loan.⁵ Cannon thought Black was going to be making the payments, but became aware that Black was not doing so when Capitol contacted Cannon about the loan. Cannon then contacted Black, who indicated that he would be taking care of the problem. Black did not make any further payments, however, and Cannon, whose financial condition had deteriorated substantially, was not then in a position to make the payments.

Cannon personally extended the loan in January 1981, at which time a \$2,700.00 payment was made. Capitol sent notices of default to Cannon on the balance of the loan on May 11, 1981, and on September 1, 1981. Capitol then sold the property at a trustee's sale for \$39,300.00, and initiated an action against Cannon to recover the remaining \$12,726.58 balance.

At trial, Pagan had no recollection of the transaction. He also had no recollection of listing his home for sale, selling it, going to Stewart Title for the closing, or even what had happened to his house. Ortiz testified that he translated the events but did not

is without support in the record.

understand what was happening, nor did Pagan. Ortiz stated that there was never any discussion concerning the \$32,325.00 note, and that there was no discussion concerning the documents that Pagan was requested to sign. Ultimately, Pagan received nothing more for his \$44,000.00 equity than the \$16,857.43 down payment he received at closing.

A banking expert associated with Capitol testified that he had supervised the loan to Cannon and did not see anything unusual in it. At the time the loan was made, the prime rate was between 20 and 21%, first mortgage money was nearly non-existent, and many people were borrowing with short-term "bridge" loans, anticipating that when they matured, they could arrange for long-term financing. Because Capitol was primarily a second mortgage lender, many people unable to get first mortgages came to Capitol during that time for short-term financing. He also indicated that it was normal practice for such lending institutions to pay finder's fees of 2 to 3%, and that such a fee was paid to Black on the Cannon loan.

The jury concluded that there was clear and convincing evidence that Cannon, Capitol through Hanks, and Stewart Title through Sisk, were guilty of conspiracy to defraud Pagan of his property. It found Cannon liable for \$12,000.00 compensatory and \$4,000.00 punitive damages, Capitol liable for \$12,000.00 compensatory and \$4,000.00 punitive damages, and Stewart Title liable for no compensatory and \$2,000.00 punitive damages.

Counsel for Pagan argues that the evidence supports a finding of conspiracy, in which Hanks, Black, and Cannon engaged in a confidence game to defraud Pagan.⁶

The sole appellant, Capitol, asserts that the verdict is not supported by the evi-

dence, but that the evidence indicates a normal business transaction that unfortunately happened to go sour.

[1] To prove a civil conspiracy, plaintiff must show the following elements: (1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof. *Citizen State Bank v. Gilmore*, 226 Kan. 662, 603 P.2d 605, 613 (1979); *Duffy v. Butte Teachers' Union*, 168 Mont. 246, 541 P.2d 1199, 1202 (1975) (quoting 15A C.J.S. *Conspiracy* §§ 1, 2).⁷ Plaintiff must present clear and convincing evidence to carry his burden of proof on a charge of civil conspiracy. *Crane Co. v. Dahle*, 576 P.2d 870, 872 (Utah 1978).

I & II: Two or More Persons and Object to be Accomplished

Plaintiff asserts the following theory: All persons involved in this transaction joined in the alleged conspiracy. Their object was to defraud Pagan, whom they previously knew to be mentally deficient and, therefore, helpless, by taking his \$44,000.00 property for \$16,857.43, each obtaining some of the profit for himself. Capitol was to immediately receive a "kick-back" payment of \$4,848.75 from Black; later, \$39,300.00 from a trustee's sale of the property; and an additional \$32,325.00 from a deficiency judgment against Cannon. Thereby, it could realize a \$76,473.75 return from an initial investment of \$32,325.00. Hanks, Cannon, and Black, immediately after closing, were to jointly receive \$13,471.57 over the agreed first mortgage price, while the real estate agents were to receive exorbitant fees for their services.

[2] Supporting this theory were the facts that Pagan only received \$16,857.43

intention that the conduct constituting a crime be performed, (2) agreement between two or more persons to engage in or cause the criminal conduct, and (3) commission of an overt act in pursuance of the conspiracy by any one of the conspirators. A civil action further requires that there be damage as a proximate result of the conspiracy. *Duffy*, 541 P.2d at 1202.

6. Pagan's brief left much to be desired as far as presenting a coherent statement of the facts and their application to the legal issues.

7. Utah has no civil conspiracy statute, as such, but it is well settled that such an offense exists at common law. The criminal conspiracy statute, Utah Code Ann. § 76-4-201 (1987), requires a showing of substantially similar elements: (1)

from the transaction, that \$4,848.75 was, indeed, paid to Capitol immediately after the transaction took place, and that Capitol ultimately received \$39,300.00 from the trustee's sale of the property. However, the record also indicates that Capitol's deficiency action was for only \$12,726.58. The difference between the original principal amount and the amount Capitol attempted to recover was accrued interest at 22%. Further, the record does not indicate that Hanks received any proceeds from the \$13,471.57 loan, but that the loan was disbursed to Cannon, and fails to indicate why Cannon would enter into such an unfavorable agreement. Thus, we find that there is no clear and convincing evidence that the parties' evil object was to defraud Pagan.

III. A Meeting of the Minds

[3] There is no direct evidence in the record of a meeting of the parties' minds with respect to defrauding Pagan of his property. However, it is not necessary in a civil conspiracy action to prove that the parties actually came together and entered into a formal agreement to do the acts complained of by direct evidence. *Holmes v. McKey*, 383 P.2d 655, 665 (Okla. 1962). Instead, conspiracy may be inferred from circumstantial evidence, including the nature of the act done, the relations of the parties, and the interests of the alleged conspirators. *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 157 Cal.Rptr. 392, 398-99, 598 P.2d 45, 51-52 (1979); *Chicago Title Ins. Co. v. Great Western Fin. Corp.*, 69 Cal.2d 305, 70 Cal.Rptr. 849, 856, 444 P.2d 481, 488 (1968). To prove conspiracy to defraud by circumstantial evidence, though, "there must be substantial proof of circumstances from which it reasonably follows, or at least may be reasonably inferred, that the conspiracy existed. It cannot be established by conjecture and speculation alone." *Dill v. Rader*, 583 P.2d 496, 499 (Okla. 1978) (quoting *Chisler v. Randall*, 124 Kan. 278, 259 P. 687 (1927)).

The act in question is a real estate transaction, which normally requires the services of real estate agents, loan companies, title companies, and the existence of a buy-

er and seller. Such parties were present in this transaction.

The record clearly indicates that Black and Cannon, the buyers, were working together and that Hanks and the real estate agents were aware of that relationship. Stewart Title drew up all the documents except those prepared by Capitol. Black had a prior relationship with Capitol, including a \$4,848.75 debt, which he paid off with proceeds from the \$32,325.00 loan. Capitol required Stewart Title to pay back the \$4,848.75 sum, to record its interest in the Pagan property first, and to disburse the proceeds of the loan to Cannon. Sisk, of Stewart Title, recorded Capitol's trust deed prior to Pagan's, pursuant to Capitol's instructions. The record indicates that the parties did not know of Pagan's mental infirmity prior to the transaction, but met Pagan for the first time at the closing. Pagan's expert witness, Dr. William Barrett, testified that a lay person would not be able to tell that Pagan was mentally disabled by looking at him.

Plaintiff asserts that these facts adequately support the inference that Hanks, Black, and Cannon engaged in a confidence game to defraud Pagan, whom they previously knew to be mentally deficient, of his property, indicating that the parties had a meeting of the minds on the object of the conspiracy.

[4] However, not only does the evidence directly contradict plaintiff's desired inference that the conspirators knew about Pagan's mental deficiency prior to the transaction, but the other facts do not necessarily or even reasonably lead to the inference that the parties were doing anything but engaging in a normal real estate transaction. Specifically, uncontroverted evidence was presented at trial that finder's fee arrangements were normal banking practice for this type of loan, as was Capitol's requirement of taking a first trust deed against the property. Further, the record indicates that Stewart Title was not aware of the details of the Capitol loan prior to the transaction. Thus, the evidence does not provide anything more substantial than conjecture and speculation to show the ex-

istence of a conspiratorial relationship between the parties.

IV. Unlawful Act

[5] To assert civil conspiracy, plaintiff must also prove that the alleged conspirators performed one or more unlawful, overt acts. If the object of the alleged conspiracy or the means used to attain it is lawful, even if damage results to plaintiff or defendant acted with a malicious motive, there can be no civil action for conspiracy. "If such were not the rule, obviously many purely business dealings would give rise to an action in tort on behalf of one who may have been adversely affected." *Duffy*, 541 P.2d at 1202.

Plaintiff's brief suggests that the allegedly unlawful overt act at issue is fraud. The Utah Supreme Court, in *Taylor v. Gator, Inc.*, 607 P.2d 293, 294 (Utah 1980), defines fraud as:

the making of a false representation concerning a presently existing material fact which the representor either knew to be false or made recklessly without sufficient knowledge, or the omission of a material fact when there is a duty to disclose, for the purpose of inducing action on the part of the other party, with actual, justifiable reliance resulting in damage to that party.

[6,7] A person cannot be liable for fraud unless he made the false representations himself, authorized someone to make them for him, or participated in the misrepresentation in some way, such as through a conspiracy. 37 C.J.S. *Fraud* § 61 (1943). There is no direct evidence in the present case that Capitol misrepresented a material fact known to be false. Nor is there direct evidence that Capitol acted for the purpose of inducing Pagan to sell his home or that Pagan relied upon Capitol's actions. Since

Capitol did not, by its own actions, defraud Pagan or authorize another to do so, Capitol's liability can only be established by proving that it was engaged in a conspiracy to defraud. However, the evidence shows that, other than providing financing, Capitol did not participate in Black's plan to purchase the home.⁸

Plaintiff argues that the evidence supports the following inferences: Hanks and Capitol were fully aware that the "notorious" real estate promoter, Black, was acting in concert with Cannon, whom they knew at the time to be a judgment-proof "straw man" unable to repay a \$32,325.00 loan at 22%. They also knew that Black and Cannon had never requested or applied for a loan. Nevertheless, Capitol drafted the note and the first trust deed in Cannon's name without considering the \$44,000.00 sales price of the property and disregarded the \$24,000.00 mortgage, of which Hanks was fully aware, between Pagan and Cannon. At the closing, judgment-proof Cannon was switched for Black as the buyer, while Hanks deliberately concealed the terms of the \$32,325.00 loan from Pagan during the closing by delivering the loan documents to Stewart Title prior to the closing, but not disclosing them until after the closing was completed and the parties had left. The promoters, Cannon and Black, refused to make any payments on the \$32,325.00 note or on the \$24,000.00 contract, knowing that the trust deed on the \$32,325.00 note would be foreclosed long before the due date on the \$24,000.00 contract, and that because they were judgment-proof anyway, they would not be required to repay the loan. Furthermore, the entire transaction was financed entirely out of Pagan's equity, while the other parties received all the benefits without paying for them.

8. "[I]t is not sufficient that the circumstances lead to a mere suspicion of fraud, nor are they sufficient where they are as consistent with honesty and good faith as with fraud. When the proved or omitted facts are consistent with any reasonable theory of good faith and honest intent, they should be so construed. Fraud cannot be inferred or presumed from ambiguous evidence.... When it is sought to prove fraud by cir-

cumstantial evidence, the fraud must be such as would reasonably and naturally follow from the circumstances so proved, and fraud will not be lightly inferred. The collateral facts from which the inference of fraud is sought to be drawn must be proved precisely as facts are proved in other cases. Presumptions of fact from presumptions are not sufficient." 37 C.J.S. *Fraud* § 115 (1943) (footnote omitted).

Plaintiff has the burden of presenting clear and convincing evidence supporting his conspiracy theory. *Dill*, 583 P.2d at 499; *Crane v. Dahle*, 576 P.2d 870, 872 (Utah 1978). This evidence *must do more than merely raise a suspicion—it must lead to belief that the conspiracy existed*. *Dill*, 583 P.2d at 499 (emphasis in original). Such evidence is sufficient if it shows that the circumstances are consistent *only* with the existence of a conspiracy. *John Davis and Co. v. Cedar Glen No. Four, Inc.*, 75 Wash.2d 214, 450 P.2d 166, 172 (1969). Evidence is insufficient if it discloses acts just as consistent with a lawful purpose as with an unlawful one. *Accurate Prods., Inc. v. Snow*, 67 Wash.2d 416, 408 P.2d 1, 7 (1965); *Dill*, 583 P.2d at 499.⁹ “Common sense and reason dictate that evil inferences should not be permitted to be drawn from routine business transactions where there are no other transactions. To hold otherwise would throw the door open for an attack on each and every transaction that one might enter into.” *Holland v. Columbia Iron Mining Co.*, 4 Utah 2d 303, 293 P.2d 700, 702 (1956). Evidence, viewed in the light most favorable to the verdict, “disregarding evidence and inferences to the contrary,” is, therefore, considered as a whole to determine whether the alleged conspirators were actually united in a scheme to defraud the plaintiff. *Morris v. Dodge Country, Inc.*, 85 N.M. 491, 513 P.2d 1273, 1274 (1973).

We accord due deference to the jury as the fact finder and do not substitute ourselves in this role. However, an appellant may successfully attack a jury’s verdict by “[marshalling] all the evidence supporting the verdict and then [demonstrating] that, even viewing the evidence in the light most

favorable to that verdict, the evidence is insufficient to support it.” *Von Hake v. Thomas*, 705 P.2d 766, 769 (Utah 1985).

In the present case, the facts viewed as a whole not only do not compel an inference of conspiracy, but directly contradict plaintiff’s conspiracy theory in many respects: First, Black’s “notorious” reputation, with which Hanks was supposedly familiar, is unsupported by the record. Documentary evidence discloses that Cannon, rather than being judgment-proof at the time of the transaction, was in a strong financial position, but his fortunes reversed, making him judgment-proof at the time of trial. Despite Cannon’s assertions to the contrary, documentary evidence indicates that he did, in fact, personally apply for the loan with Capitol, and that the loan was granted on the basis of his then financial strength. The amount of the loan was not made in total disregard of the value of Pagan’s property, but was well within reasonable limits (65 to 85% of the appraised value of the property). The substitution of Cannon for Black was not only within the terms of the earnest money agreement, which directed that the name in which title would be vested would be designated at the time of closing, but was fully disclosed to Pagan, and was made on the basis of Cannon’s relative financial strength as compared to Black’s. Furthermore, it is uncontested that Hanks delivered the loan documents to Stewart Title *after*, not, as plaintiff’s attorney alleges, *before* the closing; that the parties were aware of the loan’s existence, approximate amount, and priority; and that Pagan had been informed of it.

9. “Facts of trifling importance when considered separately, or slight circumstances trivial and inconclusive in themselves, may afford clear evidence of fraud when considered in connection with each other. It has been said that in most cases fraud can be made out only by a concatenation of circumstances, many of which in themselves amount to very little, but in connection with others make a strong case.” *Holmes v. McKey*, 383 P.2d 655, 666 (Okla. 1963) (citing *Griffith v. Scott*, 128 Okl. 125, 261 P. 371 (1927)). However, “[w]here subsequent acts are relied upon to establish a conspiracy, they must

clearly indicate the prior collusive combination and fraudulent purpose and must warrant the conclusion that the subsequent acts were done in furtherance of the unlawful combination and in pursuance of the fraudulent scheme. *Disconnected circumstances, any one of which, or all of which, are just as consistent with a lawful purpose as with an unlawful undertaking, are insufficient to establish a conspiracy.*” *Dill*, 583 P.2d at 499. (emphasis in original) (quoting *Ballantine v. Cummings*, 220 Pa. 621, 70 A. 546, 547 (1908).)

The purchasers did, indeed, have some equity in the property and did, in fact, make efforts to repay the loan. Documentary evidence indicates that Cannon paid \$1,000.00 earnest money directly from the loan proceeds, and personally extended the loan when it went into default. An unidentified person made a \$2,700.00 payment on the loan pursuant to its being extended. Finally, the record shows that while Pagan paid closing costs customarily paid for by the seller, Cannon paid the closing costs customarily paid for by the buyer from his loan proceeds. Thus, many of the inferences upon which plaintiff relies to prove his fraud charge are totally unfounded because they are directly contradicted by uncontroverted evidence. Therefore, to adapt plaintiff's theory, the jury's finding would have to be based on conjecture and speculation.

V. Damages

[8] Finally, to assert a claim for civil conspiracy, plaintiff must show that he sustained damage as a proximate result of the conspiracy's activities because the conspiracy itself is not what gives rise to the right to action, but the torts committed in the furtherance of the conspiracy. *Duffy*, 541 P.2d at 1202; *Chicago Title Ins. Co.*, 444 P.2d at 488.

Plaintiff asserts that Pagan was damaged by losing \$27,147.57 as a result of this transaction because he received only \$16,857.43 in exchange for his \$44,000.00 equity. Pagan sustained damage. However, because plaintiff has not shown sufficient evidence to reasonably imply the existence of a conspiracy, he cannot say that Pagan's loss was caused by the alleged conspiracy.

The purpose of a civil conspiracy action is to connect participating members in a transaction who otherwise would not be liable to the plaintiff. *Duffy*, 541 P.2d at 1202. Because Cannon, against whom Pagan could legitimately have a right of action, is judgment-proof, plaintiff's presumed purpose in arguing a conspiracy theory against Capitol is to obtain a judgment payable from Capitol's resources. However, even though the results of this transaction are unfortunate and possibly unfair,

we find that there is insufficient evidence to support the jury's finding that Capitol acted together with Cannon in a conspiracy to defraud Israel Pagan. Therefore, we reverse and remand for proceedings consistent with this opinion.

Because we do not find sufficient evidence to support plaintiff's conspiracy theory, Capitol is not liable for compensatory and punitive damages. Therefore, it is not necessary to address the issue of punitive damages.

JACKSON, J., concurs.

BENCH, J., concurs in result only.



Wayne TRIPP, dba Modern
Drywall, Plaintiff,

v.

Jeff VAUGHN, dba Jeff Vaughn
Construction, et al., Defendants.

BASIN STATE BANK, INC., Plaintiff
and Respondent,

v.

LINCOVE PARTNERSHIP, Richard L.
Buchanan and Lucille Buchanan,
Defendants and Appellants.

No. 860129-CA.

Court of Appeals of Utah.

Dec. 2, 1987.

Action was brought to foreclose mechanics' lien on property that secured trust note. Creditor that held trust deed then filed foreclosure action. Upon creditor's motion, cases were consolidated. Debtor brought motions to bring in third-party defendants, to allow counterclaim and to set aside partial summary judgment entered in favor of subcontractors. The Seventh District Court, Uintah County, Richard C.

ADDENDUM "B"

IN THE UTAH STATE COURT OF APPEALS

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Israel Pagan Estate and Leonor C. Pagan,
Personal Representative,
Plaintiff and Respondent,

ORDER

v.

860072-CA

Joseph H. Cannon, Dorius Black, Alpha Leasing
Company, a partnership; Robert D. Appgood,
Joseph H. Cannon, Dorius Black, and Richard
McKean, doing business under the name and
style of Alpha Leasing Company; Bill Brown
Realty, Incorporated; Scott Peatross, personally;
Stewart Title Company of Utah; Tommy W. Sisk;
Capitol Thrift and Loan, a financial corporation;
and Merlyn Hanks,
Defendants and Appellant.

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Before Judges Garff, Bench, and Jackson.

Pursant to the Rules of the Utah Court of Appeals 3(a),
appellant's petition for rehearing is denied.

Dated this 2nd day of December, 1987.

FOR THE COURT:



Timothy M. Shea
Clerk of the Court

ADDENDUM "C"

1. UTAH CONSTITUTION, ARTICLE I, SECTION 10

In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

2. U.C.A. SUBSECTION 78-2-2(5)(1988)

The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

3. RULE 43, RULES OF THE UTAH SUPREME COURT
--CONSIDERATIONS GOVERNING REVIEW OF
CERTIORARI

Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor wholly measuring the Court's discretion, indicate the character of reasons that will be considered:

(1) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;

(2) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of this Court;

(3) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision; or

(4) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by this Court.

ADDENDUM "D"

Under the law, it does not necessarily follow from a finding that one member of a partnership is liable for punitive damages that any or all of other members of the partnership are also liable for punitive damages. The acts or omissions of one partner will justify an award of punitive damages against another partner or partners if and only if those acts or omissions are within the ordinary course and scope of partnership business and the other partner or partners against punitive damages are awarded authorized, participated in, or ratified those acts or omissions.

If you find that the acts or omissions of Joseph N. Cannon justify an award of punitive damages against him, punitive damages may be awarded against the other partners of Alpha Leasing if, and only if, you find by the preponderance of the evidence each of the following elements:

1. That at the time of the events at which this lawsuit occurred Joseph N. Cannon was acting as a partner of Alpha Leasing Company;
2. That the acts of Joseph N. Cannon were within the ordinary course and scope of Alpha Leasing's business;
3. That each of the partners against whom punitive damages are awarded sought, authorized, participated in, or ratified the acts or omissions of Joseph N. Cannon.

INSTRUCTION NO. 26

In addition to the actual damages plaintiff alleges he has sustained, he also seeks to recover punitive or exemplary damages against the defendants. If you find the issues in favor of the plaintiff and that he is entitled to recover actual damages, you may also consider whether the plaintiff is entitled to such punitive damages.

Before punitive damages may be awarded, you must find the issues in favor of the plaintiff and against the individual defendants, and further you must find by a preponderance of the evidence that the individual defendants' conduct in injuring the plaintiff was willful and malicious. If you so find, you may award, if you deem it proper to do so, such sum as in your judgment would be reasonable and proper as a punishment to that defendant for such wrongs, and as a wholesome warning to others not to offend in like manner. If such punitive damages are given, you should award them with caution and you should keep in mind that they are only for the purpose just mentioned and are not the measure of actual damage. Such damages must not exceed the amount prayed for by the plaintiff.

JURY INSTRUCTION NO. 22

If you find that plaintiff suffered damage as a proximate result of the conduct of any of the defendants on which you base a finding of liability, you may then consider whether you should award punitive or exemplary damages against such defendant for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by a preponderance of the evidence that said defendant's acts were wilful or malicious in the conduct on which you base your finding of liability.

In arriving at any award of punitive damages, you are to consider the following:

1. The reprehensibility of the conduct of the defendant.
2. The amount of punitive damages which will have a deterrent effect on the defendant.
3. That the punitive damages must bear a reasonable relation to the actual damages.