

1980

Penelko, Inc., A Utah Corporation v. Price Rentals,
Inc., A Utah Corporation And John Price
Associates, Inc., A Utah Corporation. John Price, C.
F. Malstrom, First Doe To Tenth Doe, Inclusive :
Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PENELKO, INC., a Utah
corporation,

Plaintiff and Respondent,

vs.

PRICE RENTALS, INC., a
Utah corporation,

Defendant and Appellant,

No. 16588

and

JOHN PRICE ASSOCIATES, INC.,
a Utah corporation. JOHN PRICE,
C. F. MALSTROM, FIRST DOE to
TENTH DOE, inclusive,

Defendants.

APPELLANT'S BRIEF

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY
HONORABLE BRYANT H. CROFT

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NATURE OF THE CASE

This case involves an action commenced by plaintiff, Penelko, Inc., for claimed violation of certain provisions in its lease of real property and for tortious interference with its theater business.

DISPOSITION BY THE LOWER COURT

Following a trial by jury, a verdict was rendered against appellant and in favor of plaintiff in the amount of \$65,000. The lower court entered its judgment on the verdict in the sum of \$65,000 and denied appellant's motion for judgment notwithstanding the verdict, or in the alternative, for a remittitur, or a new trial.

RELIEF SOUGHT ON APPEAL

Appellant, Price Rentals, Inc., seeks reversal of the lower court's judgment.

FACTS

A. Leases And Agreements Pertaining To 9400 South Shopping Center.

On March 25, 1972, defendants Malstrom leased a parcel of real property located on 9400 South and 700 East, Sandy, Utah, to plaintiff for the construction and operation of a theater business (Pages 3, 1713 and 1714). Subsequently, on January 17, 1975, defendants Malstrom notified plaintiff that they had agreed to lease a large portion of their property to defendant-appellant, Price Rentals, Inc., for the

purpose of constructing a shopping center (Pages 1779, 1780, 1989 and 1990). The lease agreement was to include the property upon which the plaintiff's theater and an adjacent laundromat (owned by two of plaintiff's directors and officers) were located, and provided that appellant was to take the property subject to the lease rights of plaintiff and the laundromat owners (Page 1197). Accordingly, on March 27, 1975, defendants Malstrom executed a formal Offer to Lease in which Price Rentals was given an option to lease two contiguous parcels of real property at the above location (Pages 1838 and 1839).

On September 28, 1975, appellant exercised its option on the first parcel and entered into a Lease Agreement with defendants Malstrom for that parcel (Pages 1838 and 1839). Appellant then entered into a Lease Agreement with Grand Central, and a Grand Central store was constructed on the leased parcel immediately to the northeast of plaintiff's theater (Page 1197). In addition, approximately 1,200 parking stalls were constructed immediately south of Grand Central and immediately to the east of plaintiff's leasehold. (Note: This lease, as well as the other exhibits introduced at trial, were not transmitted with the record).

With the permission and consent of defendants Malstrom, appellant entered into a Lease Agreement with Perkins' Cake

& Steak Restaurant on December 20, 1976 (Page 1791). On March 28, 1977, appellant then formally exercised its option on the second large parcel of property, of which plaintiff's leasehold was a part (Page 1197). On April 4, 1977, appellant entered into a Construction Agreement with Jack L. Kerbs, Inc., for the construction by Kerbs of the Perkins' restaurant on a parcel of property between the Grand Central common parking lot on the east and the common parking area located to the south of plaintiff's theater (Pages 1792 and 1795).

B. Plaintiff's Lease.

The Lease between defendants Malstrom and plaintiff, dated March 25, 1972, expressly provided for the lease to plaintiff of a parcel of real property measuring 70' x 120' "together with parking space and access to be set aside and allotted as hereinafter more particularly described." (Page 8). Paragraph 2 of said Lease provided for the construction by plaintiff of a building on the leased premises for use as a motion picture theater. Paragraph 3 then provided:

There is hereby allotted to the Lessee for parking, a strip of land 70 feet in width and 234 feet in depth. running from the South side of the above described parcel to the North side of 9400 South Street, and an additional tract 40 feet in width and 162 feet in depth. from the parcel next adjoining the West side of this tract. . . . The Lessee shall install and maintain at a grade established by the Lessor and in accordance with the standard of the Albertson's parking lot, all paving, lighting, curbs and gutterings, sidewalks

and other walkways necessary for the possession and use of the said premises or required by any governmental authority for the use of and access to the same. (Emphasis added).

This paragraph was inserted in the Lease because no curbs, gutters, sidewalks or traffic control improvements had then been constructed along 9400 South and the common parking area, and it was contemplated that the city would soon require such items as the shopping center was developed (Pages 1762-1766, 2177-2179).

Under Paragraph 6, plaintiff agreed to the removal and replacement of all signs previously erected by it with a sign in conformity with the rules and regulations of a merchant's association which was to be developed in the shopping center, but which had not been formed at the time of the trial of this case. Again, it was understood that such changes would be made in light of the contemplated shopping center development (Pages 1762-1769, 2177-2179). Plaintiff then agreed in Paragraph 7 as follows:

All parking facilities, lighting facilities and open spaces upon the leased premises are to be used in common with other occupants of property of the Lessor for the maintenance and development of a shopping center and no barriers shall be constructed or permitted which will bar access to such parking facilities and access roads by tenants of other premises or their customers or guests. The Lessor shall provide in leases of adjoining property similar covenants and agreements so that the Lessee shall have similar unobstructed access to parking, lighting and other common facilities of adjoining tenants. (Emphasis added).

paragraph 8 of the Lease further provided:

It is the intention of the parties that this shall be a lease of land only for the purpose of construction of buildings or improvements in connection with an integrated shopping center; that both of the parties hereto will encourage the development of adjoining properties for such purpose. . . . (Emphasis added).

On July 1, 1977, plaintiff and defendants Malstrom entered into an Addendum to Lease and Agreement relating to the interpretation of certain provisions of the March 25, 1972 Lease and to certain claimed defaults under the terms of said Lease (Page 18). A lawsuit had previously been filed by the Malstroms against plaintiff, in which the Malstroms alleged that plaintiff had defaulted in the performance of certain terms and conditions of its Lease. That suit was resolved and an Addendum to the original Lease of March 25, 1972, was agreed upon as a part of the settlement (Page 1993). Accordingly, Paragraph 4 of that Addendum provided:

The Lessor does hereby acknowledge and confirm that as of the date hereof [July 1, 1977] Lessee is in full and current compliance in all respects as Tenant with all terms, provisions and covenants of said Lease and Agreement dated March 25, 1972, as amended hereby, and Lessee does hereby acknowledge and confirm that as of the date hereof Lessor is in full and current compliance in all respects as Landlord with all terms, provisions and covenants of said Lease and Agreement dated March 27, 1972, which Lease and Agreement is as to both Lessee and Lessor in good standing and subject to no defaults.

The Addendum did not change any of the original Lease provisions quoted above.

As of the date of the Addendum between plaintiff and defendants Malstrom (July 1, 1977), the contractor for the Perkins' Cake & Steak Restaurant had poured the footings and foundations in connection with the construction of the restaurant and had completed the framing of the restaurant building. The precise location of the building in relation to plaintiff's theater and the common parking area to the south of the theater was therefore plainly apparent (Pages 2295 and 2298). Prior to the execution of the Addendum, however, plaintiff had not complained about nor objected to the construction of the restaurant, but rather acknowledged that the Landlord of the shopping center was in full compliance with all terms of plaintiff's Lease at that time (Pages 3 and 894).

C. Construction Of Perkins' Cake & Steak Restaurant And Relocation Of Chantel Theater Sign.

During the negotiation of a permit with Sandy City for the construction of the Perkins' Cake & Steak Restaurant, representatives of Price Rentals, in consultation with Sandy City officials, submitted several drafts of site plans to the Sandy City Planning Department as part of the conditional use permit (C.U.P.) process (Pages 2138-2141, 2148, 2149, 1808, 1809, 1855). Sandy City finally approved a site plan,

but initiated certain changes in the plans submitted (Page 1856). Sandy City then issued a building permit conditioned upon compliance by Price Rentals of certain requirements imposed by the City (Pages 1809-1812, 1852-1861, 2141-2144, 2148-2151). These requirements included: (a) construction of a driveway immediately to the west of Perkins' Cake & Steak Restaurant, extending into common parking areas of the center, approximately half of which was located on the common parking area immediately south of plaintiff's theater, and the other half of which was located on the property leased by Perkins' Cake & Steak; (b) construction of a landscaped area adjoining 9400 South and located immediately to the west of the driveway entrance as a traffic control device; (c) removal of plaintiff's theater sign, as required by the City since the sign was located in the middle of the driveway and therefore constituted a "traffic hazard"; and (d) construction of certain curb, guttering and sidewalks in accordance with the master plan for Sandy City, and as was contemplated in the lease.

Because the issuance of an occupancy certificate for the Perkins' Cake & Steak Restaurant by Sandy City was expressly conditioned upon removal of plaintiff's theater sign, representatives of Price Rentals attempted in June, 1977, to obtain plaintiff's approval for the relocation of plaintiff's theater sign or the construction of a replacement sign (Pages 2298-2301, 2314). Appellant agreed to bear the cost of the con-

struction of such a sign, even though plaintiff had agreed pursuant to Paragraph 7 of its Lease with the Malstroms "not to construct or permit any barriers . . . which will bar access to such (common) parking facilities and access roads by tenants of other premises or their customers or guests" (Pages 2284-2291, 2299-2300). As previously noted, Paragraph 8 of the Lease also committed both parties to "encourage the development of adjoining properties" for the purpose of constructing "buildings and improvements" in connection with an "integrated shopping center". During the course of said conversations, Marv Dobkins of Price Rentals brought to the plaintiff's attention that the sign constituted a traffic hazard and had to be relocated in order to open the restaurant (Pages 2298-2305). Following various unsuccessful attempts to obtain plaintiff's cooperation in the relocation of the sign, Price Rentals informed plaintiff in October and November, 1977, that the restaurant would open on November 7, 1977, and that it would be necessary to remove and relocate the Chantel Theater sign in accordance with Sandy City's requirements (Pages 2284-2291, 2299-2300). Price Rentals also advised plaintiff that it would relocate the sign at its own cost (Pages 2284-2291, 2299-2300).

The parties agreed that the sign would be relocated at a location to be determined, although certain evidence per-

taining to that agreement was not admitted by the Court (Page 2292). This matter is assigned as error and will be discussed hereafter. Accordingly, the sign was removed on November 4, 1977, in accordance with the requirements of Sandy City (Page 2136). Price Rentals immediately arranged for a portable sign containing the name of the theater, which was expected to be used for a brief period while the sign was relocated in accordance with instructions to be provided by plaintiff (Page 1985). As of the time of trial, Price Rentals had paid the entire cost of rental and lighting of the portable sign, which was displayed at the west end of the landscaped island immediately adjacent to 9400 South (Page 1985). Since the time of the initial offer of sign replacement, Price Rentals made several specific proposals to replace plaintiff's sign with an attractive sign in a location acceptable to plaintiff and Sandy City, although again, the Court refused to admit any evidence of such proposals since they were made after the commencement of the present action (Pages 2329-2331). On each such occasion, plaintiff either failed to respond to appellant's proposal or refused to accept the proposal without stating the reasons for such refusal or indicating what its sign specifications were. Again, however, the court refused to permit the introduction of evidence in support of those facts. In addition, from the date of removal of plaintiff's

theater sign on November 4, 1977, plaintiff deliberately refused to construct a replacement sign or to relocate its original sign, despite the fact that Sandy City would clearly have permitted such a relocation (Pages 2318-2320).

D. Nature Of Plaintiff's Claims.

Pursuant to Paragraph 8 of the Complaint (Page 3), plaintiff sought damages against each of the defendants, alleging as follows:

1. Since the execution of the Addendum to the Lease on July 1, 1977, defendants entered into a "deliberate and malicious course of conduct" in violation of the two Leases, "designed to destroy the business of the plaintiff" with the intent to "force plaintiff to forfeit and abandon said Leases."

2. Defendants entered into a Lease with Perkins' Cake & Steak, which did not contain "similar covenants and agreements" to those of Paragraph 7 of its lease, "so that Lessee, (plaintiff) shall have similar unobstructed access to parking, lighting and other common facilities to the joint tenants."

3. Defendants tore down the sign and marquee for plaintiff's theater.

4. Defendants removed two lights that the plaintiff had installed on the parking space to the south of its

space to the south of its theater. (These lights were located in the common parking area).

5. Defendant Perkins' Cake & Steak erected a proposed restaurant, blocking the view of the plaintiff's marquee.

6. Defendant Perkins' Cake & Steak "trespassed on plaintiff's leased parking space by landscaping and by asphaltting over the same."

7. Defendants constructed a flagpole on plaintiff's alleged leased parking space.

8. Defendants have trespassed upon plaintiff's leased parking area.

It is significant that at no time has Penelko claimed any damage prior to July 1, 1977. In fact, it specifically stated in its Complaint and Response to Defendants' Motion in Limine that it claimed no damage prior to that time (Pages 3 and 894).

Upon the conclusion of the evidence, the Court submitted all of the above claims to the jury in a single instruction, without distinguishing between plaintiff's tort claims and its claims for breach of lease. The jury was therefore permitted to return a general verdict without specifying the nature of any wrongful conduct of any of the defendants. Further, the court's Instruction No. 21 permitted the jury to find any damages that would fairly and adequately compensate

plaintiff for any injury sustained by defendants' wrongful conduct and then it stated:

Such damages may include damages from loss of profits, if any, and punitive damages, if any, as you may find pursuant to the next instructions that follow. (Emphasis added) (Page 1205).

The instruction, however, did not advise the jury that it could not award any damages for the time period prior to July 1, 1977, which was the date alleged in plaintiff's Complaint as the beginning date for defendants' alleged by wrongful conduct. Instruction No. 21 also stated that compensation for wrongful damage to the plaintiff's property could be awarded. Finally, Paragraph 7 of Instruction No. 17, as submitted to the jury, stated that the plaintiff was claiming wrongful violation of its rights because of a willful and malicious course of conduct by defendants designed to destroy plaintiff's business and force abandonment of its theater and lease. This claim was clearly founded in tort, but the jury was not instructed that in order to recover on this claim, plaintiff must show that defendants' conduct proximately caused injury to plaintiff.

At the conclusion of plaintiff's evidence, defendants moved the court for a directed verdict with respect to the issues of liability and damages in the case (Pages 2229-2232). Specifically, defendants contended first, that plaintiff, in the event defendants were found to be liable,

was entitled to the recovery of lost "net profits" only, and second, that plaintiff had scrupulously avoided putting on any evidence to prove its "net income." The court denied said motion with respect to appellant and John Price personally (Page 2245). Defendants renewed their motion for a directed verdict upon completion of their case, and again, that motion was denied with respect to all of plaintiff's claims (Pages 2455-2457, and 2469). The court then submitted all of plaintiff's claims to the jury, and a general verdict in the amount of \$65,000.00 was returned against appellant.

Appellant contends on appeal that this Court should:

(1) reverse the trial court's judgment on the verdict with instructions that the trial court enter a judgment notwithstanding the verdict because of plaintiff's failure to produce any evidence of lost "net profits"; (2) reverse the trial court's judgment on the basis that the above instructions were improper and that the trial court erred in refusing to permit the introduction of critical evidence relating to (a) plaintiff's obligation to mitigate its damages, (b) to the existence of an agreement between the parties for the relocation of the sign, and (c) to the existence of a laundromat lease for property contiguous to plaintiff's theater, which also provided for common parking facilities;

and (3) reverse the court's judgment because of the highly prejudicial conduct of the court during the trial.

ARGUMENT

POINT I

THE JUDGMENT AGAINST APPELLANT SHOULD BE REVERSED BECAUSE OF THE TRIAL COURT'S ERROR IN DENYING APPELLANT'S MOTIONS FOR A DIRECTED VERDICT.

In cases where a party seeks recovery for interference with its business operations or for breach of contract, loss of net profits is the proper measure of recovery. Leppla v. Schroeder, 532 P.2d 370, 372 (Colo. 1974); Williams v. Bone, 74 Idaho 185, 259 P.2d 810, 811-12 (1953); American Fire Protection Service v. Williams, 340 P.2d 644, 647 (Cal. 1959); Guntert v. City of Stockton, 126 Cal.Rptr. 690, 55 Cal.App.3d 131 (1976). The term "net profits" is defined as "the gains made from sales after deducting the value of the labor, materials, rents and all expenses. . . ." Guntert v. City of Stockton, supra, at 700.

A judgment in favor of plaintiff based on gross income or calculated without proper proof of all expenses to arrive at lost net profits must be reversed. Williams v. Bone, supra; Benfield v. H. K. Porter Co., 137 N.W.2d 273 (Mich. 1965). In Benfield, for example, plaintiff introduced evidence of lost gross receipts only but failed to offer proof of proper allocable expenses to show its loss of "net profits."

On appeal, the Court held that plaintiff had the burden of showing loss of "net profits" and that proof of expenses is part of that burden. The judgment, which failed to take into account deduction of properly allocable expenses from lost gross receipts, was therefore reversed by the court and the lower court was directed to enter a verdict of no cause of action. Id. at 274.

Similarly, in Williams v. Bone, supra, the Idaho Supreme Court reviewed an appeal in which an operator of a taxicab business brought an action against a lessee for removal of the operator's neon sign which advertised his business. To prove loss of business subsequent to removal of the sign, plaintiff submitted bank statements of gross business income for a period of six months prior to the time the sign was removed and for a period of six months after removal. No evidence was offered, however, with respect to "net loss" or "net decrease in income." The Court concluded that expenses and costs of operation, from which the net profits or decrease in net income could be derived, must be shown by plaintiff. The Court then stated:

Where a regular and established business is injured, interrupted or destroyed by the wrongful acts of another, the measure of damages, when and if recoverable, is the net loss and not the diminution in gross income.

.

[T]his Court [has] held that damages could not be predicated on proof of gross receipts of the business, and that such evidence standing alone, is insufficient proof of damages. 259 P.2d at 812.

Because of plaintiff's failure to produce evidence of such lost net profits, the Court therefore held that the jury verdict and the judgment entered thereon should be reversed.

As noted previously, plaintiff in this case also failed to produce any evidence of lost "net profits" at the trial of the present case. In fact, when counsel for appellant attempted to cross-examine plaintiff's expert accountant regarding the computation of certain entries on plaintiff's tax returns in order to determine if he had calculated the net income from plaintiff's theater business, the court refused to permit the examination (Pages 1931-1934). As a result, only evidence of gross receipts and gross income of plaintiff's business, without proper deduction of expenses, from 1973 to 1979 were before the jury (Pages 1905, 1906, and 1913-1916). The jury's verdict and the court's judgment on the verdict, therefore, should be reversed because they are based upon a false premise and the trial court should be required to enter a judgment of no cause of action against plaintiff.

POINT II

THE COURT ERRED IN THE APPLICATION OF THE LAW TO THE FACTS OF THE PRESENT CASE.

A. The Court Failed To Instruct The Jury That The Proper Measure Of Damages Was Loss Of "Net Profits."

Instruction No. 21 stated that the jury could find any damages that would fairly and adequately compensate plaintiff for any injury sustained by defendants' wrongful conduct and that such damages could include "damages from loss of profits, if any. . . ." The instruction, however, did not define "loss of profits" nor did it restrict such loss to "net profits". Accordingly, following preparation of the court's instructions to the jury, appellant excepted to the giving of Instruction No. 21. Similarly, appellant objected to the giving of Instruction No. 22 because that instruction failed to define "lost profits", as that term was used in the court's instructions, and to limit such lost profits to "net profits" (Pages 2531 and 2532).

As stated above, the proper measure of damages in the present case, as in other cases of alleged tortious interference with business and breach of contract, is the loss of "net profits." In order to determine net profits, it is imperative that all expenses be deducted from a company's gross income or receipts. Guntert v. City of Stockton, supra, at 700; Williams v. Bone, supra, at 812; Benfield v.

H. K. Porter Co., supra, at 274. An instruction defining "net profits" must be submitted to the jury by the Court. Leppla v. Schroeder, supra, at 372. In addition, the jury must be properly instructed as to the correct measure of damages, which is clearly limited to lost "net profits", not "gross profits". Guntert v. City of Stockton, supra, at 700-01.

Failure to give such an instruction in the present case constituted prejudicial error which had the effect of permitting the jury to determine damages by use of a false standard. In this regard, it is significant that the reduction of gross receipts from the operation of plaintiff's theater from January 1, 1977, to April 1, 1979, and the jury's verdict of \$65,000.00 are almost identical. The calculations of plaintiff's expert accountant, for example, show the following declines in gross revenue (using 1976 as a base year) during the above time period (Pages 1912-1915):

1977	\$ 20,306.84
1978	39,288.73
1979 (first 3 months)	<u>5,332.04</u>
Total:	<u>\$ 64,927.61</u>

The jury's verdict, on the other hand, was \$65,000.00, thus leading to the inescapable conclusion that the jury relied

on plaintiff's accounting summary of gross receipts in making its award. The court's instruction concerning damages justified that erroneous result. As stated by this Court in Gull Laboratories, Inc. v. Louis A. Roser Co., 589 P.2d 756, 759 (Utah 1978):

Generally, a jury verdict will only be upset where the error committed was so substantial and prejudicial that there is a reasonable likelihood that the result would have been different in the absence of such error. In the instant case, the damages found by the jury are exactly as claimed in the inadmissible summary; hence, we are compelled to conclude that the jury relied on the summary in making its award. For these reasons the judgment is reversed and the case is remanded for a new trial.

B. The Court Did Not Instruct The Jury As To The Relevant Time Period For Which Damages Could Be Computed.

Instruction No. 21 submitted by the Court not only failed to instruct the jury that no damages could be awarded for the time period prior to July 1, 1977, but permitted the jury to speculate concerning future damages beyond the date of trial. In plaintiff's Complaint and its Response to Defendants' Motion in Limine, the plaintiff stated that it did not claim any damages for any act that occurred prior to July 1, 1977 (Page 894). Accordingly, defendants requested that the Court instruct the jury that it must limit its consideration of the plaintiff's claims and damages to the period following July 1, 1977 (Page 1010). The instruction was rejected by the Court.

In Guntert v. City of Stockton, supra at 699, the Court stated that a computation of damages which included a time period preceding any actual breach of contract or wrongful conduct would not be permitted. In addition, the Court stated that in cases where only a partial breach occurs, the injured party may recover damages for non-performance only to the time of trial and may not recover future damages. Id. at 702. Such a result is particularly mandated where the plaintiff continues in business and seeks injunctive relief, as in the present case. Id.

The evidence before the court in the present case clearly showed that the plaintiff was not claiming any damages prior to July 1, 1977. However, the evidence also showed that, during the first six months of 1977 (prior to any allegedly unlawful conduct by defendant), plaintiff's gross income was \$25,869, compared to gross income of \$34,497 during the same six-month period in 1976. Consequently, plaintiff had experienced an actual decline of gross income from its theater operations during the above time period of \$8,628, representing a 25% decrease, prior to the time the plaintiff claimed that defendant engaged in any unlawful conduct (Pages 1916-1917). Instruction No. 21 provided no time limitation for the computation of damages and permitted the jury to speculate that the loss of gross receipts, as well as any other

losses for the entire year of 1977 and future losses, could be awarded. It should also be stressed that the above instruction permitted the jury to review plaintiff's claims in total in assessing damage, without any guidance from the court with respect to the fact that the sign was not removed until November 4, 1977, and the Perkins' restaurant did not even open for business until November 7, 1977. Even so, Instruction No. 21 permitted the jury to assess damages without regard for these dates.

C. The Court's Instructions Permitted The Jury To Award Damages For Diminution Of The Parking Area To The South Of Plaintiff's Theater.

Instruction No. 21 stated that compensation for wrongful damage to the plaintiff's property could be awarded. Again, this instruction is too broad and erroneously permitted the jury to conclude that it was authorized to find damages to plaintiff's leasehold interest resulting from claimed improper construction by defendant in the common parking area to the south of the theater. It should be emphasized that there was absolutely no evidence presented at trial in support of any damage resulting from the construction of the accessway and landscaped area, even assuming that such construction was wrongful. Plaintiff failed to lay any foundation whatever for the testimony of John Brown, its real estate appraiser (Pages 2098-2101). Nevertheless,

much of Mr. Brown's testimony was permitted to go to the jury, thus permitting it to speculate concerning "the measure of value" of plaintiff's leasehold under Instruction No. 21 (Pages 2040-2071).

In Birge v. Toppers Menswear, Inc., 473 S.W.2d 79 (Tex. 1971), the Court stated that a tenant cannot recover lost profits and the market value of his lease also, for such a theory would allow him a double recovery. The Court therefore concluded that a tenant, who sustains injury to his business, would be made whole by allowing recovery of lost net profits without regard to the rental value of the premises. Accordingly, the lower court erred in the present case in failing to instruct the jury that no recovery could be had for the market value of the plaintiff's Lease.

D. The Court Failed To Instruct The Jury With Respect To Proximate Cause On Plaintiff's Claim For Tortious Conduct.

Paragraph 7 of Instruction No. 17 stated that the plaintiff was claiming wrongful violation of its rights because of a willful and malicious course of conduct by defendants designed to destroy plaintiff's business and force abandonment of its theater and lease. The Court lumped all of plaintiff's claims together in Instruction No. 17 and permitted the jury to render a verdict without differentiation as to its findings based upon tortious injury to plaintiff's

business or to plaintiff's claims of breach of lease. Finally, and most importantly, the jury was not instructed that, in order to recover on its claim for tortious interference with plaintiff's business, plaintiff must show that defendants' conduct proximately caused the injury. Clearly such an instruction was required. See Charvos v. Bonneville Irrigation District, 235 P.2d 780 (Utah 1951).

POINT III

THE COURT ERRED WHEN IT REFUSED TO PERMIT THE INTRODUCTION OF EVIDENCE THAT WAS RELEVANT AND MATERIAL TO VITAL DEFENSES RAISED BY DEFENDANT.

- A. The Court Refused To Permit Defendants' Representatives To Testify That They Had Offered To Erect A Sign For Plaintiff In The Common Parking Area To The South Of Plaintiff's Leased Premises.

The unrefutable evidence presented at the trial of the present case showed that, following the removal of plaintiff's theater sign from the middle of the driveway in the common parking area to the south of plaintiff's theater, the sign sat to the side of the theater for over one and one half years. Mr. Bernard Reynolds, the Sandy City Planner, testified unequivocally that the City would have permitted relocation of plaintiff's sign in any part of the common parking area to the south of the theater, provided that the location would not create a safety problem (Pages

2318-2320; see also pages 1874-1875). The evidence was also clear that a double sign on the same pylon, one for plaintiff's theater and the other for the laundromat located immediately adjacent to plaintiff's theater, could have also been placed in the parking lot (Page 1884). Doyle Nelson, a director and officer of plaintiff corporation, and Mr. Reynolds further testified that plaintiff never filed an application with Sandy City for relocation of its sign (Pages 2037 and 2320).

However, when appellant attempted to introduce evidence that it had offered, on various occasions following commencement of the present action, to construct a replacement sign or a double sign in the common parking area, the Court refused to permit any such evidence pertaining to appellant's offers (Pages 2292 and 2399-2431). Similarly, the court refused to permit the owner of the adjacent cleaning business testify that he had no objection to the erection of a double sign consisting of one sign for the cleaners and one for the theater (Page 2356). When appellant first attempted to introduce its evidence of sign proposals, the Court stated: "Don't want any conversation or testimony about what took place after this lawsuit was started." (Page 2292). Defendant then made a proffer of proof with respect to the evidence that it intended to submit,

showing that on September 22, 1978, it submitted to plaintiff an additional proposal for a double sign for which preliminary approval from Sandy City had been obtained. Included with a letter to plaintiff of the same date were copies of the drawing from a sign company for plaintiff's review. The letter also stated that "consistent with our previous proposals in the matter, we will bear the cost of construction and installation of such a sign upon receipt of your approval without prejudice to any of the claims of Penelko, Inc., in the pending litigation." (Page 2329). Like the earlier proposals made by defendant to plaintiff, the proposal did not relate to settlement. It was made simply to enable plaintiff to mitigate its damages without any prejudice to its claims.

Appellant also contended at the trial that the sign proposals related to defendant's good faith and were therefore material to the issue of punitive damages. Counsel for appellant took the further position that such evidence was material to the issue of mitigation of damages, but the Court stated that the plaintiff had "the responsibility of doing what it can to mitigate damages, independent of an offer from the defendants to help them do that" (Page 2331). The Court stated that the two documents relating to the sign proposals would not be admitted for any purpose.

Under Utah law, an injured party must make a reasonable effort to avoid loss and cannot sit idly by and uselessly abide its time after another's breach of contract or duty, assuming that such breach exists. University Club v. Invesco Holding Corporation, 504 P.2d 29 (Utah 1972); Casey v. Nelson Brothers Construction Company, 465 P.2d 173 (Utah 1970); Thompson v. Jacobsen, 463 P.2d 801 (Utah 1969). This Court's position in this regard is consistent with that of other jurisdictions. In Hill v. Liner, 336 A.2d 533 (D.C. 1975), the Court stated:

Damages which may be avoided . . . are not the direct or natural consequences of the defendant's wrong, since it is plaintiff's option to suffer them. In such a situation, the plaintiff is damaged, not by the defendant's act, but by his own negligence or indifference to the consequences. . . . If a party fails to take reasonable precautions or make a reasonable effort to avoid injury to his property or business, he cannot recover damages for such injuries as he could have avoided.

Such action is especially required where the effort to mitigate is trifling but the damage resulting from a failure to make such effort would be large. 49 Am.Jur.2d 849.

Further, the law is clear that an offer of the defendant to enable plaintiff to mitigate his damages is admissible in a contract action where plaintiff fails to avail himself of such offer. In Wawak v. Stewart, 449 S.W.2d 922

(Ark. 1970), for example, a homeowner brought an action against the defendant contractor for damage caused by defective construction, which led to the flooding of plaintiff's house. Soon after the defect became apparent, defendant proposed the installation of an automatic sump pump below the level of the ducts to prevent the flood damage. Plaintiff, however, refused to allow the automatic pump to be installed, insisting that he wanted to know where the water was coming from and would accept nothing less. A period of two years then elapsed before the action was finally brought. In its decision, the Court stated:

In the main, Wawak is correct in his argument that the Stewarts should have mitigated their damages by permitting the installation of the automatic pump. On the record made below it is an undisputed fact that such a pump would have avoided practically all the itemized damages that were allowed by the trial court. Id. at 927.

Although the pump would not have corrected the basic defect, the Court held that the amount of plaintiff's judgment should have been reduced to the amount necessary to correct the defect and that plaintiff was not entitled to recovery for its damage because of its refusal to accept defendant's proposal.

The undisputed evidence at trial in the present case showed that plaintiff deliberately refused to take any action to relocate its sign. The refusal of the court, however,

to permit defendant to introduce proper evidence relating to defendant's repeated proposals to relocate the sign or to construct a replacement sign at its expense constitutes a misapplication of the law by the lower court. Plaintiff's duty to avoid the direct and natural consequences of any wrong committed by defendant extends not only to what it could do to mitigate its damages independent of an offer from defendant to assist in such efforts, but also to reasonable proposals from defendant to assist plaintiff in avoiding any loss that might arise from the removal of the sign. Identical policy considerations in favor of mitigation of damages are applicable in both instances as clearly illustrated in Wawak and certainly would have mandated introduction of defendant's proposals in the present case, especially since those proposals were made expressly without prejudice to any of plaintiff's claims. Otherwise, a plaintiff would be encouraged to file a suit and thereby preclude the defendant from taking reasonable action to assist plaintiff in mitigating damages, a result offensive to the law and contrary to proper public policy.

- B. The Court Erred In Refusing To Admit Into Evidence The Laundromat Lease To Show That Additional Common Parking Facilities Existed Immediately Adjacent To The Common Parking Lot Described In Plaintiff's Lease.

One of the major issues during the trial of the present case related to plaintiff's claim that defendants had tres-

passed upon "plaintiff's leased parking area." During the presentation of plaintiff's case, plaintiff's officers testified that patrons of the Perkins Cake & Steak Restaurant used many of the parking stalls in the parking area to the south of plaintiff's theater. These officers also testified that the theater patrons had very few, if any, parking spaces within "plaintiff's leased parking area" within which to park. When, however, defendant attempted to introduce into evidence the laundromat lease, showing that that lease also provided for common parking facilities immediately adjacent to the parking area described in plaintiff's lease, the court refused to permit its introduction (Pages 1776-78). In sustaining plaintiff's objection to keep the lease from being admitted into evidence, counsel for defendant stated that the lease pertained to the common parking areas. In response, the court stated: "That doesn't matter" and refused to consider the lease further (Pages 1776-1777).

Inasmuch as plaintiff had claimed that defendants were trespassing on its "leased parking area," leases for properties adjacent to plaintiff's were relevant to show that parking facilities, like the parking area to the south of plaintiff's theater, were to be used in common by all tenants of the center and that additional common parking spaces

existed immediately adjacent to this theater. Throughout the trial plaintiff referred to the area south of the theater as its "leased parking area" when in fact it was a common parking area. The lower court's refusal to admit the laundromat lease into evidence for purposes of showing the reciprocal and common nature of parking adjacent to plaintiff's theater denied appellant the right to prove to the jury the extent and nature of the common parking areas within the center, which were available for use by plaintiff's patrons.

C. The Court Erred In Excluding An Admission Of Counsel That Plaintiff Had Agreed To A Relocation Of Its Theater Sign.

During the course of legal proceedings, all parties are bound by the formal admissions of their counsel in the action, whether such admissions be in the pleadings or in open court. Dick v. Drainage District No. 2, 358 P.2d 744 (Kan. 1961); Anderson v. Thomas, 336 P.2d 821 (Kan. 1959). In plaintiff's petition for intermediate appeal, filed approximately one month following the removal of plaintiff's theater sign, counsel for plaintiff stated that he, while acting as counsel for plaintiff in this matter, had an agreement with counsel for defendant "that Carley Coplin, plaintiff's representative, and Marv Dobkins, defendant's representative, would meet and select an alternative place for the erection of plaintiff's marquee." During the cross-

examination of Mrs. Coplin, counsel for defendant stated that he would read a statement to Mrs. Coplin and ask if the statement accurately reflected her understanding. The court, however, stated: "I am not going to allow you to question her concerning anything that is set forth in that document" (Page 1991). Counsel for defendant then asked Mrs. Coplin if it was her understanding that an agreement existed for the removal and relocation of the sign in an area to be selected by plaintiff. Mrs. Coplin was permitted to answer in the negative with no opportunity for counsel for defendant to use plaintiff's prior admission through counsel as set forth in the above petition for intermediate appeal. The jury, therefore, heard substantial evidence from Mrs. Coplin that defendant removed the theater sign over her objections, when, in fact, the parties had an understanding that the sign would be relocated in an area of plaintiff's choice, and appellant was denied the right to introduce evidence in support of it.

POINT IV

DEFENDANT IS ENTITLED TO A REVERSAL OF
THE JUDGMENT BECAUSE OF THE COURT'S
PREJUDICIAL STATEMENTS DURING THE TRIAL.

As a general rule, any misconduct on the part of the trial judge from which it may be rightfully determined that the jury was influenced in rendering its verdict constitutes

prejudicial error, requiring a reversal of the judgment. Etzel v. Rosenbloom, 189 P.2d 848, 850 (Cal. 1948). The judge presiding at the trial should conduct it in a fair and impartial manner, refraining from making comments during the course of the trial which may lead to a prejudicial result to one of the parties. Id. Under Utah law, a reversal of the trial court's judgment is warranted when the conduct of the judge is so prejudicial that there is a reasonable likelihood that the jury verdict would have been different in the absence of such conduct. See Gull Laboratories, Inc. v. Louis A. Roser Co., 589 P.2d 756, 759 (Utah 1978); Brunson v. Strong, 17 Utah 2d 364, 412 P.2d 451 (1966). Such a result is particularly appropriate where, as provided by Rule 61 of the Utah Rules of Civil Procedure, the substantial rights of the parties are prejudiced by the court's conduct during the course of the trial.

It is also clear that a party is entitled to a reversal of the judgment based upon a court's comment on the evidence or other improper statements in the presence of the jury. See Rule 51, Utah Rules of Civil Procedure. Such statements will constitute reversible error if a party is deprived of a fair and impartial trial. Glowacki v. A. J. Bayless Markets, 263 P.2d 799, 801 (Ariz. 1953). Further, even in cases where the comments of a judge, taken separately, may not

justify a reversal of the judgment, if the cumulative effect of various comments or remarks by the trial judge prejudice the appellant's case, then the judgment will be reversed and a new trial ordered. Delzell v. Day, 223 P.2d 625, 626 (Cal. 1950). Again, the test to determine such prejudice, is whether in the absence of such comments and judicial misconduct, there is a reasonable likelihood that the result would have been different. See Id.

In the present case, plaintiff sought repeatedly to qualify its expert real estate appraiser to testify concerning diminution in the value of its leasehold as a result of the construction of a landscaped island and access way in a portion of the common parking area to the south of plaintiff's theater (Pages 2052-2093). During the course of such examination, the court reiterated at least four times that the evidence was clear that defendants had constructed improvements in the parking area leased by plaintiff and that what the court was concerned with was the damage caused by such construction on plaintiff's leasehold (Pages 2060-2061). It was evident that the court had taken a position that the construction was wrongful and that the only issue was whether plaintiff had sustained any damage:

I don't think we need to go into what the building itself would rent for. These people built the building; they own it. They lease the land on which it is built. They lease the parking area

in front of it. The defendants came along and made some changes in the parking area, and what we are concerned with here is what damages, if any, were caused by those changes. And so, the theater itself remains the same; there is no difference there. It's the damage, if any, to the leasehold because of the changes in the parking area, we are concerned with here, and I think he has got to limit his testimony and opinion with respect to change in value of the leasehold in that light. (Emphasis added).

Then, during the examination of Mr. John Price, president of appellant corporation, the following exchange occurred:

Mr. Miner: Mr. Price, would you be willing to have the landscape and the roadway placed on the east side of the Perkins Cake & Steak Restaurant?

Mr. Lybbert: Well, your Honor please, it is not placed there. There is no prayer that it be placed there.

The Court: Well, I will overrule the objection and let him answer the question.

. . . .

The Witness: Well, may I please state this again, your Honor, I am not trying to avoid the question but if the lease conditions, which is a legal document, indicates the roadway is to be on the west, in my frame of thinking, I would have to say that this is the place I would put the roadway.

The Court: This lawsuit arises because the roadway and landscaping is put upon the property leased to the theater property. It is on their lease and this lawsuit is because of the fact that that roadway and that landscaping was constructed on the parking area leased to the Penelko theater.

The Witness: Which, your Honor, I thought we had the common right of use also, and I guess that is why the layout was laid out in this way, Sir.

Mr. Lybbert: Your Honor, may I note an objection for the record. I do not believe this statement of the Court is wholly accurate in view of the lease document.

The Court: Well, that is what the lawsuit is about and had Mr. Price been here throughout the trial last week, he might have understood more fully what Mr. Henderson's question was. I simply tried to make it more clear to him. The objection the plaintiff has here, is you built the roadway and the landscaped island there on their leased property, and he asked you whether or not you would have any objection to moving it to the east side of the restaurant building.

The Witness: Yes, I would, because as I was concerned and informed under the conditions of our lease that this property was in common (Pages 2206 and 2207).

In each of the above instances, the Court's comments regarding the evidence were made in the presence of the jury. Not only were the Court's comments on the evidence incorrect, but they were highly prejudicial to defendant's case. First, the lease provisions quoted above clearly show that the property to the south of plaintiff's theater was for the common parking of all tenants within the shopping center. The preamble to the lease stated that certain parking space and access would be set aside and allotted "as hereinafter more particularly described." Paragraph 7 of plaintiff's lease then clearly provided:

All parking facilities, lighting facilities and open spaces upon the leased premises are to be used in common with other occupants of property of the lessor for the maintenance and development of a shopping center. . . .

In addition, paragraph 3 stated that the lessee would install and maintain "all paving, lighting, curbs and gutterings, sidewalks and other walkways necessary for the possession and use of the said premises or required by any governmental authority for the use of and access to the same." In this regard, the undisputed evidence at trial clearly established that when the plaintiff executed its lease, there were no sidewalks, curbs or gutters between the common parking lot to the south of its theater and 9400 South. Accordingly, cars could enter into the parking facility without any control lanes or direction markers. The undisputed evidence also showed that Sandy City had required construction of an access way on a portion of the common parking and access area to the south of plaintiff's theater, as well as the landscaped area, which was required as a traffic control island for purposes of ingress and egress to and from 9400 South.

Based upon the above evidence, the judge's comments were clearly erroneous. The misstatement "that the roadway and that landscaping was constructed on the parking area leased to the Penelko theater" was made without regard to

the clear provisions of the lease authorizing the construction. The Court's repeated statements tended to reaffirm in the minds of the jurors that the parking area belonged to plaintiff under its lease and that the only question was whether the construction of the "driveway and landscaping" caused any damage to plaintiff. It is evident that the judge's continued comments and conclusions on this evidence and the context in which they were made, were of such a character as to cause the jury to believe that the court had determined that defendant had no right to place the landscaping and access way in the common parking lot, that Mr. Price was not telling the truth, and that the plaintiff was entitled to any damages which the jury might find. Further, the repetition by the Court of such statements prejudiced the rights of defendant and precluded defendant from having a fair opportunity to have the jury decide the evidence without the misstatements of facts and conclusions by the Court on these crucial issues.

The context and reasons for the above improper comments on the evidence by the Court are illustrated by the following statements of the Court following plaintiff's attempted proffer of proof with respect to the testimony of Mr. Brown:

I will say unequivocally that Sandy City and John Price, or Price Rentals, had no right whatsoever to allocate to the restaurant as its parking stalls any of the parking space on the plaintiff's leased land. Notwithstanding the fact that Sandy City

has some statutory authority to control construction and zoning and improvements and signs and things like that. I do not recognize that Sandy City or John Price or Price Rentals had any authority to give the restaurant any more interest in the plaintiff's leased land than the regular public had to use in that property. . . . As I see it, what Price did in connection with the construction of the restaurant, by that I mean Price as grantor and Price Rentals as the lessor to the restaurant or as the builder of the restaurant, building on property that it had leased from the Malstroms, I don't see that Price or Price Rentals had any authority to authorize any construction upon the plaintiff's facilities, nor do I see that Sandy City had any authority to authorize Price Rentals or the restaurant people to encroach upon the plaintiff's facilities, other than the fact that I think its customers, along with the customers of the other lessees there under the lease to the plaintiff, had a right to use the parking spaces in the leased parking area. And, as I view it, your primary problem here is the question of damages (Pages 2098-2099).

Although the above statement by the court was made outside the presence of the jury, it is evident that the court had taken a position early in the case, despite the clear language of the lease which authorized the construction of curb, sidewalk and driveway improvements as required by Sandy City, that defendant had engaged in wrongful conduct and that the only issue was the issue of damages. The court's position was reaffirmed in the presence of the jury on several occasions and improperly created an impression in the mind of the jury that appellant had no right to do what it did, and that the only issue was whether any damage had been sustained by the plaintiff as a result of the construction of

the access way and landscaped area. Under the circumstances, appellant's right to a fair trial was substantially impaired by the court's improper and prejudicial conduct and comments on the evidence.

CONCLUSION

Inasmuch as plaintiff failed to present evidence of lost net profit at the trial, appellant is entitled to a reversal of the court's judgment and a judgment against plaintiff of no cause of action. In the alternative, appellant is entitled to a reversal of the judgment on the grounds that the lower court committed substantial and prejudicial error which had the effect of depriving appellant of its right to a full and fair presentation and consideration of the disputed issues in this case. First, the court refused to admit proper evidence relating to mitigation of damages, admissions of counsel for plaintiff that an agreement existed for the relocation of plaintiff's sign, and an adjacent laundromat lease which provided for common parking facilities immediately adjacent to those allotted to plaintiff for its use in common with other tenants of the shopping center. Second, the court failed to submit an instruction to the jury that in the event defendants were liable, plaintiff only was entitled to recover its loss of "net profits", if any, and that such lost net profit would be limited to the time period

between July 1, 1977, and the time of trial. Third, the court committed material error in making repeated and improper comments on the evidence, which were not supported by the facts of the case, and which seriously prejudiced defendant's rights during the trial.

Respectfully submitted this 27th day of March, 1980.

SNOW, CHRISTENSEN & MARTINEAU

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CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing Appellants' Brief by mailing the same, postage prepaid, respectively to William H. Henderson, 431 South 300 East. No. 208, Salt Lake City, Utah 84111, Mark S. Miner, Newhouse Building, Salt Lake City, Utah 84101, and Ben Bagley, 29 East 200 South, Salt Lake City, Utah.

DATED this 27th day of March, 1980.

Alison McCandless