

1981

Leigh Furniture And Carpet Company, A Utah Corporation v. T. Richard I Som, dba Richard's Fine Furnishings : Brief of Appellant

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

LEIGH FURNITURE AND CARPET)
COMPANY, a Utah corporation,)
)
Plaintiff-Appellant,)
)
vs.)
)
T. RICHARD ISOM, dba RICHARD'S)
FINE FURNISHINGS,)
)
Defendant-Respondent.)

No. 17,264

* * * * *

BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF THE FIFTH JUDICIAL DISTRICT
COURT IN AND FOR WASHINGTON COUNTY, STATE
OF UTAH, HONORABLE ROBERT F. OWENS, JUDGE

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BRIEF OF APPELLANT

* * * * *

STATEMENT OF THE CASE

The defendant T. Richard Isom by way of a Counterclaim against the Plaintiff Leigh Furniture & Carpet Company asserted that the Plaintiff tortiously breached the contractual relationship existing between the plaintiff and the defendant and interfered with defendant's business relationship.

DISPOSITION IN LOWER COURT

The trial court denied plaintiff's motion for a directed verdict. The jury returned a verdict in favor of the defendant against the plaintiff for \$65,000.00 general damages and \$35,000 in Punitive damages. Plaintiff's Motion for Judgment Notwithstanding

the Verdict and Motion for New Trial were denied. However, the Court granted a remittitur of \$22,000.00 on the award of punitive damages.

RELIEF SOUGHT ON APPEAL

Plaintiff Leigh Furniture & Carpet Company seeks to have the judgment of the lower court reversed, and judgment entered in favor of plaintiff and against the defendant, or in the alternative, be granted a new trial.

STATEMENT OF FACTS

Plaintiff, as the Seller and defendant as the purchaser entered into an "Agreement" dated May 14, 1970, wherein defendant sought to acquire the assets of a retail furniture business located in St. George, Utah. (R. p. 4) In addition the defendant leased from the plaintiff a portion of the building where plaintiff had previously conducted a retail furniture business. Furthermore, the "Agreement" granted to the defendant a conditional option to purchase the entire building. This "Agreement" is the focal point of the case and was prepared for the parties by Mr. Orville Isom, father of the defendant and legal counsel for the plaintiff.

Shortly following the execution of the "Agreement" disputes arose between the parties principally because of the interpretation of the "Agreement". A temporary resolution of the parties' disputes was achieved when the parties executed a supplemental "Agreement" dated September 28, 1972. (Exhibit No. 3). The primary

functions of the latter "Agreement" were to reduce the principal balance of the original contract, provide a means whereby defendant could solicit plaintiff's approval of a potential sale or transfer of the business then being conducted by the defendant, provide a means for obtaining financial records, and to solidify defendant's liability to the plaintiff for taxes paid by the plaintiff. At the time the supplemental agreement was signed in 1972 two lawsuits were pending concerning interpretation of the original "Agreement" and the parties agreed that those issues should be submitted to the Court.

Little, if any contact occurred between the parties following the September 28, 1972 "Agreement" until the summer of 1974, when defendant's counsel commenced solicitation of the plaintiff pertaining to potential investors who were purportedly interested in investing in defendant's business. The solicitation was instigated because of the unprofitability of the defendant's business. Although plaintiff approved of several of defendant's solicitations (Tr. p. 518-542), and disapproved of others (Tr. p. 542), defendant's solicitations eventually centered upon one individual -- Brent Talbot. Mr. Talbot, however, repeatedly denied any interest in the defendant's business and so informed agents of the plaintiff. (Tr. p. 561-580).

Believing its security to be in jeopardy and believing that defendant was in default in performing the provisions of the May 14, 1970 "Agreement" plaintiff filed a Complaint with the District Court seeking a termination of the defendant's interest in the

"Agreement" or in the alternative an audit of defendant's financial condition. (R. p. 1-8). Following the filing of the Complaint the defendant notified the plaintiff that the sum of \$27,000.00 was being deposited with an escrow as payment of the balance of the "Agreement," and said sum was available for the plaintiff upon plaintiff's agreement to the conditions of such tender. Plaintiff refused the conditions of the offer.

A hearing on plaintiff's petition for injunctive relief was heard by the Court before Judge Burns. Both plaintiff and defendant were present and represented by counsel. Following the receipt of evidence and arguments the Court ruled in favor of the plaintiff granting plaintiff's contractual right to an audit of defendant's business and providing certain safeguards to the defendant. (R. p. 15-a). The audit was undertaken by Mr. Rod Savage, CPA (which, incidently, produced several major discrepancies between the statements prepared by the defendant and actual audited figures. See Savage testimony Tr. pp. 583-605) but before the same was concluded the defendant filed bankruptcy on April 4, 1975 (R. p. 20). Defendant's bankruptcy schedules showed him, and hence his business, to be substantially insolvent. (Tr. p. 595-596).

Following defendant's discharge in bankruptcy in April of 1977 the defendant filed a motion to amend his answer to the plaintiff's Complaint and to file a Counterclaim. (R. p. 22). Furthermore, the defendant sought to impress a trust upon the real estate described in the 1970 "Agreement". (R. p. 29) With reference to that effort plaintiff filed a Motion for partial Summary Judgment. (R.

p. 31). The Court again took evidence and heard arguments from the parties and granted plaintiff's motion (R. p. 45), finding that if defendant had any interest in the real estate under the contract he could seek it through money damages. After this, nothing happened in the case for over 18 months.

Prior to trial plaintiff presented an oral motion in limine to seek the Court's interpretation of defendant's theory under his Counterclaim. The Court ruled that defendant's action was in tort and not for tortious breach of contract and ruled that evidence concerning breach of contract was not relevant to the case. Notwithstanding such a ruling the case was tried and submitted to the jury substantially, if not wholly, upon evidence purportedly sustaining a breach of contract rather than a tort.

The plaintiff, believing that defendant was in default of the terms and conditions of the "Agreement" filed its action for breach of contract and admitted at trial that it desired a change. However, filing the lawsuit to seek judicial determination of its claims was the only action plaintiff took. Defendant maintained that such action together with other alleged actions tortiously interfered with his contractual and business relations but did not identify one party whom plaintiff interfered with to defendant's detriment. (Tr. p. 420-421).

ABSTRACT OF WITNESSES

The following is a short synopsis of the testimony of the witnesses called by both plaintiff and defendant at trial including

the pages in the transcript where such testimony can be found.

1. Orville Isom

a) Direct: Transcript pp. 88-171. Preliminary discussion with plaintiff re sale of St. George Store; that defendant wanted to move back to Utah; Agreement drawn up to sell to Richard individually; descriptions of the lease provisions; discussion of who was to pay the obligations of the Company after January 1, 1970; discussions of Richard's difficulties with the business; desire of Richard to sell the building; discussion of the audit; Leigh told Orville to bring Brent Talbot into business. Mr. Leigh didn't want Hayes Hunter as an investor in the business; description of the supplemental agreement dated September 28, 1972; discussion of first lawsuits filed by Leigh against Richard, suit by Moss against Leigh and Richard for furnace repair; discussion of letter to Howe re bringing Talbot into business; Leigh's statement that he must have been crazy to get involved in this 10 year lease; Leigh said he would not okay Brent Talbot; appraisal of the St. George property; Orville's surprise at Leigh's suit seeking an audit.

b) Cross-Exam: Transcript pp. 171-231. Orville's desire initially to withdraw; exclusion from the sale of Laney's property; Orville's assurances that Laney would be paid in stock; Orville's acknowledgement of a moral obligation to pay Laney, but admissions that Laney was never paid in fact; Orville's loans of \$27,000.00 to the business; discussion

of Richard's lack of expertise and need to bring someone into the business; security interest of Leigh Furniture Co.; Orville did not include an escalator clause in the agreement; Orville did not know of or include in the agreement provisions to take care of Laney; Orville admits he told Leigh he would take care of Laney through cash payments; Orville got permission to bring in Graf & Hence; discussion of Talbot being brought in, Orville maintained Talbot said he wanted to come in; Talbot to become lessee of entire building; rent never in arrears two months; Orville familiar with the Company's financial condition.

c) Re-Direct: Transcript pp. 231-262. Richard not two months in arrears on lease payments as Complaint alleges; monthly financial statements were supplied; Mr. Talbot not interested in coming into the business; discussion of Leigh's obligation to pay portion of rent and utility bills, and Leigh's default in such payments.

d) Re-Cross: Transcript pp. 262-266. The May 14th agreement was still to be performed.

2. Mr. Clark Houston.

a) Direct: Transcript pp. 266-274. Mr. Houston's appraisal of the property; property worth \$133,000.00 encumbered by Leigh's leasehold interest (vs. \$175,000.00 free of that interest).

b) Cross-Exam: Transcript pp. 274-277. Both Leigh and

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b) Cross-Exam: Transcript pp. 274-277. Both Leigh and

Isom knew of Houston's appraisals; Houston accepted employment by Isom, too, although he was employed by Leigh.

c) Re-Direct Exam: Transcript pp. 277-278. The value of the leasehold interest is \$45,000.00 vs. the \$42,000.00 previously testified to.

3. Frank K. Stuart

a) Direct: Transcript pp. 278-279. (Expert witness on business and economic expectancies).

4. Mr. T. Richard Isom

a) Direct: Transcript pp. 280-285. Richard's tax returns accurate to best of his knowledge but later admitted the financial statements were incorrect.

5. Mr. Frank K. Stuart

a) Direct: Transcript pp. 285-314. Discussion of methods appraisers use to estimate a firm's value; certain assumptions and hypothetical questions posed to Mr. Stuart; as an expert Mr. Stuart had never valued a retail establishment in Southern Utah.

b) Cross-Exam: Transcript pp. 314-322. Stuart did not take account of inventory in valuation; Stuart did not consider entire entrepreneurial capacity of Richard Isom in his valuation.

6. Mr. T. Richard Isom

a) Re-Direct: Transcript pp. 323-330. Richard quit job in Seattle that paid more than his job with the store in St. George; but he came back to St. George because that's where he wanted to live; discussion re Richard's buying of the business.

7. Mr. Garn Huskinson

a) Direct: Transcript pp. 331-353. Mr. Huskinson priced the inventory, and bank balances as part of his audit of Richard's fine furnishings.

8. T. Richard Isom

a) Re-Direct: Transcript pp. 354-405. Richard knowingly entered into the lease; when Richard took over the business he cut expenses and concentrated on sales; began having problems of interpretation of contract within a year after contract was signed; problems with the furnace, waterheater; Leigh came to store and complained of not getting financial statements; Mr. Leigh was hostile to Isom; such hostility would "wring Isom out"; Richard began sending quarterly reports when he found out he was supposed to under the Contract; Mrs. Leigh also had a demoralizing effect on the operation of the business by asking Richard questions; Richard let a friend stay above the business, but denies it was subletting; the Laney lawsuit came up during Richard's Christmas season; Richard was beginning to make a profit with the ultimate intention of buying the business; Richard made lease payments through 1974; Richard paid utility bills by deducting them from the rent checks; Richard raised the \$27,000.00 to buy out Leigh contingent on certain terms, but then learned of complaint filed by Leigh; Richard filed bankruptcy; Richard tried to get Applegate in the business; Leigh never responded to his request to bring Applegate in.

b) Cross'Exam: Transcript pp. 405-458. It was Mr. Hayfen's fault that Leigh didn't get financial statements; Richard felt no need to replace sewing machines, despite such a provision in the contract; Richard agreed with Orville to "take care of" Laney; but Laney refused their attempts; Richard admits he never paid Laney; Ashdown & Mrs. Leigh visited Richard "many, many times"; Leigh et al demand things not required in the contract; Richard filed bankruptcy solely because of Leigh's actions; decision to close doors was Richard's; Richard admits he was under obligation to replace inventory; the \$27,000.00 was put in the bank, with conditions that Leigh must fulfill to get it.

c) Re-Direct: Transcript pp. 458-468. Richard would not have closed the business without the many complaints.

d) Re-Cross Exam: Transcript p. 468. Conflict between inventory amounts on balance sheet and on bankruptcy petition.

9. Eldon Ashdown

a) Direct: Transcript pp. 476-481. The only reason Ashdown occasionally saw Isom was to get him to bring his account up to date; Ashdown never made threats to Isom, never harrassed him.

b) Cross Exam: Transcript pp. 481-489. Ashdown never went into the store to interrupt Isom or harrass him; never interrupted him when he was with customers.

10. Mrs. Grace Leigh

a) Direct: Transcript pp. 489-492. Mrs. Leigh never

talked to Richard on any trip to St. George in 1972; she never threatened him either.

b) Cross Exam: Transcript pp. 492-496. Purpose of going to St. George was to take care of Leigh's 17 apts.; Mrs. Leigh never went into the store on her visits to St. George.

11. Mr. William S. Leigh

a) Direct Exam: Transcript pp. 496-523. Mr. Leigh agreed not to go into the store for 3-1/2 months after Richard took over; He was only in Utah 4 or 5 days during 1971; maybe the same in 1970; there was no problem with the furnace before, when it was properly taken care of; the lawsuit over the furnace was brought because it was Richard's obligation to pay for the furnace; he told Richard it was a breach of contract to shut off the parking lot the way he had done.

b) Cross Exam: Transcript pp. 523-553. Orville told Leigh to stay away from Richard and the store; Leigh had little contact with Richard after that; Leigh was occasionally on the store property to deal with his apartments; Leigh told Richard he would contact people in California about selling them the business if Richard didn't live up to the terms of the contract; Leigh did tell Richard that he would "cancel him out" if he didn't live up to terms of the lease agreement, but only because Richard was not keeping up his end of the agreement; Mr. Leigh didn't approve of Hayes Hunter to come into the business.

12. Brent Talbot

a) Direct Exam: Transcript pp. 553-569. Mr. Talbot was not interested in Mr. Isom's offers from him to come into the business; he never told Leigh that he was interested in going into the business.

b) Cross Exam: Transcript pp. 569-583. Mr. Talbot at no time encouraged Mr. Isom into thinking he (Mr. Talbot) would ever be interested in coming into the business.

13. Ron Savage

a) Direct Exam: Transcript pp. 583-596. No January 31, 1975 balance sheet was ever prepared by the business; the February 28th balance sheet was not prepared until April 4, 1975.

b) Cross Exam: Transcript pp. 596-603. Richard was very responsive and cooperative regarding the audits.

c) Re-Direct: pp. 603-604.

REBUTTAL EXAM

14. Richard Isom

a) Rebuttal Exam: Transcript pp. 605-609. Mr. Isom had no liquidation sale in 1975; Mr. Talbot had conversations indicating he might come into the business.

b) Cross-Exam on Rebuttal: Transcript pp. 609-610.

c) Re-Direct Exam on Rebuttal: Transcript pp. 610-611. Isom sustained loss ever since "things" with Leigh began.

15. Mr. Orville Isom

a) Direct Rebuttal Exam: Transcript pp. 611-616. Orville

and Talbot went to Premises (store) to discuss Talbot's coming into the business; Talbot mentioned that if he were going to buy part of the business, he would like to look at the vacant apts; Talbot also went all through the store to look at it;

SUMMARY OF ARGUMENT

It is the right of every person in society to enter contracts for any lawful purpose. Correlative to that right is the duty of the parties once they enter the contract to fulfill their obligations thereunder and uphold their ends of the bargain. As a protection and enforcer of these rights and duties it is the right of contracting parties to enforce their contracts by appeal for redress to the courts.

But when parties seek to enforce their claims in court they must follow established rules of procedure and state a precise claim upon which relief can be granted. If a party chooses, for example, to plead his/her case in contract instead of properly pleading it in tort, and yet refuses to plead the tort remedy in the alternative so as to cover all possible bases of relief, he/she assumes the risk that his/her single claim will fail and that he/she will be left without the remedy sought. The same rule applies to the person who pleads in tort a claim that should be plead in contract as was done by the defendant in the case at bar.

Contrary to the trial court's ruling and the defendant's plea in his counterclaim, the law of torts has not expanded to cover

breach of contract actions. Hence, permitting recovery in this case for a claim based in tort which ought properly to be plead in contract, if indeed there is even a basis for such a plea, is wholly improper and must not be allowed by this court.

ARGUMENT

- I. BASED UPON ESTABLISHED PRINCIPLES OF TORT LAW THAT A PARTY TO A CONTRACT CANNOT HIMSELF TORTIOUSLY INTERFERE THEREWITH, DEFENDANT'S CLAIM THAT PLAINTIFF TORTIOUSLY INTERFERED WITH DEFENDANT'S CONTRACTUAL OR BUSINESS RELATIONS MUST FAIL FOR LACK OF A SHOWING THAT THERE EXISTED A THIRD PARTY CONTRACT

In pre-trial hearings, defendant attempted to clarify the nature of his counterclaim and to specify that it was an action in tort for interference with his contractual or business relations. The Common law historical origin of this tort, as well as modern expert treatises and case law demonstrate that the tort of interference with contractual or business relations requires that the interferor be a third party, a stranger to the contract or business relations. Indeed, defendant's claimed cause of action here is nothing more than a breach of contract action erroneously and misleadingly clothed in the form of a tort. Such a confused claim must be denied by this Court.

- A. The Tort of Interference With Contractual or Business Relations Requires That The Contract Upon Which The Action Is Based Be With A Third Party.

The tort of interference with contractual or business relations developed at common law as a remedy for those whose contracts had

been breached as a result of outside inducement. The Court in Stauffer v. Fredericksburg Ramada, Inc., 411 F. Supp. 1136 (E.D.Va. 1976) explains its origin:

The essence of the tort here in question is interference with contractual relations. Its origin is the Queens Bench decision of Lumley v. Gye, 2 EL. S. BL. 216, 118 Eng. Rep. 749. (1953) In that famous case a competitor had induced opera star Johanna Wagner to breach her contract to perform for plaintiff. The Court held that, as between contracting parties, the contract itself provided a sufficient remedy. To compensate for the wrong done by the non-contracting party in inducing breach of contract, however, the Court felt a tort action was required. Hence, consistent with the reasoning behind the origin of this action the law has developed that 'the defendant's breach of his own contract with plaintiff is, of course, not the basis of the tort.'" Id. at 1138, citing Prosser, The Law of Torts, §129 at p. 934 (4th ed. 1971).

Thus, the origin of this tort was meant to provide a method by which an action could be brought against the interfering third party. A breach of contract action was thought to be a sufficient remedy for the contracting parties themselves. Consistent with this common law origin, current case law in America has developed and refined the essential elements of this tort. As stated by the Court in Carmen v. Heber, 601 P.2d 646 (Colo. App. 1979), they are:

(1) The existence of a contract between the plaintiff and a third party; (2) Knowledge by the defendant of this contract or knowledge of facts which would lead him to inquire as to the existence of the contract; (3) Intent by the defendant to induce a breach of contract with a third party; (4) Action by the defendant which induces a breach of the contract; and (5) Damages to the plaintiff. Id. at 647; See also Control, Inc. v. Mountain States Telephone & Telegraph Co., 32 Colo. App. 384, 513 P.2d 1082 (1973).

In the instant case, defendant Isom has failed to prove or even allege the existence of a third-party contract or substantial business relations with which plaintiff Leigh tortiously interfered. Indeed, no such contract existed here, let alone plaintiff Leigh's knowledge of such a contract. Furthermore, most courts hold, as the Carmen elements require, that the interference be intentional. Mere negligent interference is not enough. See Prosser, supra at 934; Chanay v. Chittenden, 115 Ariz. 32, 563 P.2d 287 (1977).

The Restatement of Torts (Second) has summarized this tort in three sections, all three of which call for an existing or prospective relationship with a person other than the alleged tortfeasor:

§766. Intentional Interference with Performance of Contract by Third Person.

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

§766A. Intentional Interference with Another's Performance of His Own Contract.

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

§766B. Intentional Interference with Prospective Contractual Relation.

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of:

- (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
- (b) preventing the other from acquiring or continuing the prospective relation.

The Restatement of Torts (First) §766 contains a similar provision:

[O]ne who, without a privilege to do so, induces or otherwise purposely causes a third person not to

- a) perform a contract with another, or
- b) enter into or continue a business relation with another

is liable to the other for the harm caused thereby.

In Olson v. Scholes, 17 Wash. App. 383, 563 P.2d 1275 (1977)

the court cites this latter section of the Restatement and then interprets it in light of a claim by plaintiff landlord of tortious interference with contractual or business relations by defendant lessees:

The tort as defined in the Restatement is divided into two parts: (a) dealing with the cause of action arising when a third person induces a breach of contract and (b) dealing with the cause of action which arises when a third person induces one person not to enter into a contract with another. The first subdivision deals with present relationships, and the second with future relationships. 563 P.2d at 1279.

The Court then cites the necessary elements of this tort theory, elements similar to those already cited in Carmen v. Heber, and states:

However, this theory does not apply to actions where the contest is between parties to an existing contract. The cause of action exists only against outsiders who interfere with contractual relationships or business expectancies of others. A landlord-tenant relationship existed between the plaintiff and the defendants when the claimed tortious acts occurred, and therefore, any right to redress cannot be based upon the tort theory of business interference. If the plaintiff is to recover, his cause of action must arise from the violation or breach of the contractual relationship. Id. at 1280. [Emphasis added.]

Similarly, the Supreme Court of Wyoming recently adopted the same elements cited in Carmen and Olson as being necessary prerequisites to maintenance of a claim based on the tort theory of interference with contractual or business relations, but stated specifically that, "These theories . . . do not apply to actions between parties to an existing contract -- they lie only against outsiders who interfere with the contractual expectancies of others. Board of Trustees, Etc. v. Holso, 584 P.2d 1009, 1017 (Wyo. 1978). [Emphasis the Court's.]

The Law in this area is so settled that an inordinate recitation of further decisions would border on redundancy. Hence, to avoid ^{ex} only a few of the significant recent decisions which have developed this tort will be cited.

In the case of Hein v. Chrysler, 45 Wash. 2d 586, 277 P.2d 708 (1954), the plaintiff, a former automobile dealer, brought suit against Chrysler, an automobile manufacturer. Plaintiff maintained that his action was for tortious interference with business generally.

and not just for malicious inducement of breach of contractual relations and hence would lie against a party to a contract. The court rejected this distinction, for every item of damage sought by the plaintiff arose from the alleged breach of the contract by Chrysler to supply automobiles. Consequently the court stated:

We must hold that appellant cannot recover in tort against Chrysler for two reasons: (1) Chrysler is not a third party but is one of the two parties to the contract, the breach of which it is charged with inducing, and hence cannot be liable for inducing itself to breach the contract, and (2) an injured party in the position of appellant (assuming that the contract did bind Chrysler to deliver the forty-five cars) is entitled to recover in his breach of contract actions all of the damages which normally and naturally can be expected to flow from such breach. [citations omitted]. Where the breach of contract must necessarily cause damage to, or the destruction of, the business of the other contracting party, the damages for such harm to, or destruction of, his business may be fully recovered by the injured party in his breach of contract action. 277 P.2d at 715.

The Wyoming Supreme Court recently made a similar holding in Kvenild v. Taylor, 594 P.2d 972 (Wyo. 1979). In Kvenild plaintiff entered an agreement with defendants Kvenild and Barrett, defendant Kvenild being the broker through whom Barrett's house was offered for sale to plaintiffs. Plaintiffs took possession of Barrett's house after having paid a small amount of earnest money, and promised defendants that they would soon obtain sufficient funding for a down payment. Plaintiffs' plans were frustrated and they did not obtain enough money for the down payment. Defendant Barrett waited as long as she possibly could for plaintiffs to meet the requirements for closing the sale, but they never did. Defendant Kvenild, the

realtor, sold the house to a third party, an action which gave rise to plaintiff's suing in tort for interference with the contract between them and defendants. The Court cited the rule laid down in Holso and then said:

Under the above cited-rule, Barrett [defendant] cannot be held liable for tortious interference with the contract because she was a party to the contract she is alleged to have interfered with. The defendants [Kvenild] cannot be held liable either because they stood in a relationship of responsibility to Barrett. They were not strangers to the contract. . . . We hold that there was no evidence to sustain that necessary element of a claim of tortious interference with a contract. 594 P.2d at 977.

Similarly, in Houser v. City of Redmond, 91 Wash. 2d 36, 586 P.2d 482 (1978) the Washington Supreme Court held that, "Recovery for tortious interference with a contractual relation requires that the interferor be an intermeddling third party; a party to a contract cannot be held liable in tort for interference with that contract." 586 P.2d at 484. And just last year that same court in Olympic Fish Products, Inc. v. Lloyd, 93 Wash. 2d 596, 611 P.2d 737 (1980), held that, "An action for tortious interference with a contractual relationship lies only against a third party. A party to the contract cannot be liable in tort for inducing its own breach." 611 P.2d at 738.

The Federal Courts have made similar rulings when confronted with facts to which such holdings would apply. In Allison v. American Airlines, 112 F. Supp. 37 (N.D. Okla, 1953), the Court, applying the law of Oklahoma said, "[A]lthough an employer may be guilty of breaching its contract, it cannot be guilty of 'inducing'" the

breach of its own contract; . . . Id. at 38. And in Canister Co. v. National Can Corp., 96 F. Supp. 273 (D. Del. 1951) the plaintiff alleged that:

[D]efendant voluntarily, deliberately and maliciously breached its agreements with plaintiff, and is continuing so to do, with the purpose and intent of injuring, damaging, or even destroying plaintiff's business and good will to the end that defendant, either alone or with others acting in concert with defendant, may thereby, in large measure, acquire plaintiff's customers and business, and consequently profit more largely than through the faithful performance of its agreements with plaintiff. Id.

The court ruled that the plaintiffs' claim was for breach of contract, for which suit had already been brought, and that an action for inducing breach of contract would not lie against a party to the contract for inducing himself to commit a breach of that contract or for conspiring to breach it. Id. at 274.

Thus, the law is clear that for the tort theory of interference with contractual or business relations to succeed, the interference must be by a third-party stranger to the contract. Since no third-party contract existed here, plaintiff Leigh could not possibly have interfered with such a third-party contract, and hence, defendant's counterclaim based on this tort theory must necessarily fail. Consequently, the trial court erred in its conclusion that a party to a contract can tortiously interfere with his own contract or business.

Moreover, defendant in his counterclaim makes the claim that Plaintiff Leigh intentionally wilfully and maliciously harassed

defendant and tried to force him out of business. Yet the defendant, when asked during the trial to identify those actions by the plaintiff or his agents that interfered with his contractual or business relations, could not do so. Indeed, the primary reason for defendant's business problems was not any interference by plaintiff, but defendant's lack of working capital. At trial, defendant put it this way:

Q: And do you contend that Eldon Ashdown and Grace Leigh made it difficult for you to do business at this particular time?

A: It would hamper it to a degree. I cannot establish --

Q: Do you know of any business that you lost by virtue of them coming down there and making visits in 1974?

A: The knowledge of this would be strictly hearsay from customers.

Q: Richard, isn't it true that you perceived that you were having financial difficulties with the business in late 1974?

A: I had a lack of working capital and that was my primary problem.

Q: When did you first realize that unjust [sic] position of the year 1974? When you first came to the realization that you had that problem?

A: I did that in the fall of 1972, I realized that when I had gone out and -- I raised \$20,000.00 to put in --

Q: Now, that's not responsive to my question. I said in 1974 when did you first realize that you had problems with capitalization for your business?

A: The first day of 1974.

Q: Is it correct that you realized that was a problem throughout your operation of the store; is that not correct?

A: Yes, it was a lack of working capital. (Tr. 420-421).

Thus, not only did defendant admit that a lack of working capital was the major reason for the breakdown of the business, but defendant also could not identify any business at all which was lost because of plaintiff's or his agents' so-called "interference." Hence, there was not here any third-party contract with which plaintiff could have interfered, and not one identifiable instance of any loss of business because of plaintiff's alleged interference. Defendant's claims are therefore wholly without merit.

B. Defendant's Claim Amounts to Nothing More Than a Breach of Contract Action Erroneously and Misleadingly Plead In The Form of a Tort Action.

Defendant Isom has been ambivalent at best regarding the character of his claim. Even the trial court was confused regarding the exact nature of defendant's counterclaim. Notwithstanding the court's ultimate ruling, the trial judge was confused regarding defendant's "hybridization" of the tort and contract claim, and desired that defendant make an election between the two:

I conceptually have real problems in riding the rail between the two of them, and jumping to one side and then the other side as may suit convenience. I would think that you would have to make an election, Mr. Nielsen, as to whether you're suing in contract or in tort. Now, if you decide that you're suing in tort then the thought that a contract did exist between the parties may be relevant to show the jury as furnishing the background and it may be relevant in several ways to the existence [sic], but the duty -- source of the duty that's violated would have to sound in tort rather than from the contract. If, however, it's a contract action, if you're alleging breach of the contract then there are other implications that arise from that fact, and I don't think I can intelligently rule on objections during the trial. I don't think that the two

of you can't make opening statements really, unless that election is made, unless there's something in the law that I don't know about that involves a Hybrid Cause of Action. (Tr. p. 43).

Thus, the court was confused and asked the defendant to clarify his position and make an election between the two causes of action. If he had plead breach of contract, then at least the legal requirements for the claim would exist and the factual determination could then be properly made by the trier of fact based upon an accurate understanding of the legal claim. But instead, defendant chose to couch his claim in the form of a tort, a tort claim which in this case amounts to nothing more than a breach of contract action. Such a method by claimants has been strictly condemned by the courts. The Federal District Court for the Eastern District of Pennsylvania, applying Pennsylvania law stated it this way:

[P]laintiff's claim of interference with contract relations must fail in that the law . . . is clear that a promisor cannot sue his promisee or vice versa for interference with the plaintiff's business relationship with third parties where the claimed interference amounts to nothing more than a breach of the contract. Sherman v. Weber Dental Manufacturing Co., 285 F. Supp. 114, 116 (E.D. Pa. 1968).

Similarly, the Pennsylvania Supreme Court noted the necessity of avoiding the confusion that can be caused by pleading in tort actions that really are nothing more than contract actions. In Glazer v. Chandler, 414 Pa. 304, 200 A.2d 416 (1964), the Court reversed a decision in plaintiff's favor wherein the plaintiff claimed tortious interference with contractual relations. The Court in thus holding stated:

The tort of inducing breach of contract or refusal to deal is defined as inducing or otherwise causing a third person not to perform a contract with another, or not to enter into or continue a business relation with another, without a privilege to do so. Numerous cases in this Commonwealth are in accord with this definition.

Every case in Pennsylvania granting recovery for this tort has involved a defendant's interference with known contracts or business relations existing between third persons and a plaintiff.

* * *

However, where, as in this case, the allegations and evidence only disclose that defendant breached his contracts with plaintiff and that as an incidental consequence thereof plaintiff's business relationships with third parties have been affected, an action lies only in contract for defendant's breaches, and the consequential damages recoverable, if any, may be adjudicated only in that action.

To permit a promisee to sue his promisor in tort for breaches of contract inter se would erode the usual rules of contractual recovery and inject confusion into our well-settled forms of actions. Most courts have been cautious about permitting tort recovery for contractual breaches and we are in full accord with this policy. [Citation omitted.] The methods of proof and the damages recoverable in actions for breach of contract are well established and need not be embellished by new procedures or new concepts which might tend to confuse both the bar and litigants." 200 A.2d at 418.

In the instant case, the damages claimed by the defendant for loss of business, interest in real property and damage to reputation are claimed to be the result of the alleged conduct of plaintiff in threatening to cancel the contract, seeking new purchasers, and refusing defendant's tender of payment. Such allegations are breach of contract allegations, i.e., breach of an implied obligation under

the contract not to prevent or hinder the performance of the contract by the other party. See Orton v. Embassy Realty Associates, 91 Cal. App. 2d 434, 205 P.2d 427 (1949); Corbin on Contracts §947 (1 Vol. 1952).

Thus, this court's tolerance of defendant's categorization of the claim as a tort would only serve to confuse the Law of Torts in this state. To avoid that confusion, this Court is respectfully requesting to overturn the trial court's ruling which is indeed a confused view of the Law of Torts.

II. EVEN ASSUMING ARGUENDO THAT DEFENDANT ISOM COULD BRING AN ACTION IN TORT FOR PLAINTIFF'S INTERFERENCE WITH HIS OWN CONTRACTUAL RELATIONS WITH DEFENDANT, PLAINTIFF'S ACTIONS WERE PRIVILEGED AND HE WAS FULLY JUSTIFIED IN TAKING SUCH ACTIONS.

This Court has recognized that actions which are privileged do not constitute the basis for breach of contract. In Gammon v. Federated Milk Producers Ass'n., Inc., 11 Utah 2d 421, 360 P.2d 1011 (1961), the Utah Supreme Court stated that "Ordinarily, there is no liability for procuring a breach of contract where the breach is caused by the exercise of an absolute right -- that is, an act which a person has a definite legal right to do without any qualifications." 360 P.2d at 1022. Thus, if a defendant has a legal right or justification for taking certain actions, he is said to have a privilege which will limit his liability if his actions tend to produce what otherwise could be characterized as interference in contractual or business relations.

A discussion of this privilege, of course, assumes that in the case at bar, defendant Isom has some sort of cause of action against the plaintiff in the first instance. Assuming that such an action could be brought, plaintiff would be left with the defense of "Justification" or that its actions were privileged, a defense formulated to defend the actions of third-party interferors. Nevertheless, proceeding on the assumption that defendant has a cause of action, plaintiff would have to defend on the basis that its actions were privileged. The Supreme Court of Washington in Cherberg v. Peoples National Bank of Washington, 88 Wash. 2d 595, 564 P.2d 1137 (1977), outlined such a privilege and the factors which give rise to it:

[I]n some instances, intentional interference with a business expectancy may be "privileged" and therefore, not a basis for tort recovery. A privilege to interfere may be established if the interferor's conduct is deemed justifiable, considering such factors as: the nature of the interferor's conduct; the character of the expectancy with which the conduct interferes; the relationship between the various parties; the interest sought to be advanced by the interferor; and the social desirability of protecting the expectancy of the interferor's freedom of action. 564 P.2d at 1143-1144. [Citations omitted.] See also Calbom v. Knudtson, 65 Wash. 2d 157, 396 P.2d 148 (1964).

Thus, a determination of whether plaintiff's actions were privileged is a factual determination based on such factors as the nature of his conduct, his relationship with defendant and the interest he was attempting to protect. Once those factors are established an interferor's conduct, considering such factors, must be shown to have been unreasonable under the circumstances. As stated in Basin Elec. Power Co-op., v. Howton, 603 P.2d 402 (Wyo. 1979), "The term justification is broad and the question of

whether there was an unjustified interference depends upon the facts of each case. However, as we stated in Wartensleben, 415 P.2d 613, 'we still must concern ourselves with a determination as to whether defendants were reasonably justified in doing what they did. . . . 603 P.2d at 404-405. [Emphasis the Court's]. Thus, an interferor's actions must be "reasonably justified" or, as the Basin Court goes on to say, the key factor which gives rise to the privilege to interfere is that the interferor act in "good faith". 603 P.2d at 405.

Prosser has gone so far as to modify this good faith requirement and state that even the existence of some ill-will cannot defeat the privilege if the interferor's actions were justified in the first instance:

Since Lumley v. Gye there has been general agreement that a purely "malicious" motive, in the sense of spite and a desire to do harm to the plaintiff for its own sake, will make the defendant liable for interference with a contract. The same is true of mere officious intermeddling for no other reason than a desire to interfere. On the other hand, in the few cases in which the question has arisen, it has been held that where the defendant has a proper purpose in view, the addition of ill will toward the plaintiff will not defeat the privilege. It may be suggested that here, as in the case of mixed motives in the exercise of a privilege in defamation and malicious prosecution, the court may well look to the predominant purpose underlying the defendant's conduct. Prosser, §129 at 943. [Emphasis added.]

Thus, if plaintiff Leigh's predominant purpose in taking the actions he did against the defendant (and in particular the filing of the Complaint for breach of contract) was proper, his privilege

to take such actions will not be negated even by the existence of some ill-will. Indeed, an inference could be drawn that plaintiff had some ill-will toward defendant, but such was only aroused when defendant refused to comply with the terms of the contract. Plaintiff stated such on cross-examination:

Q: Isn't it true, Mr. Leigh, that you had contacted Mr. Orville Isom about what you might do to sell the property and he told you that you would have to sell it subject to the lease?

A: I knew that already.

Q: You knew that already?

A: Sure.

Q: And so, you were trying to get rid of the lease at this time so you could sell the property in a package?

A: I was trying to get Richard to keep up his agreement and portions of the lease.

Q: Now, the last paragraph says, "I trust you will come up with something that would be satisfactory for both of us if you are still interested." Now, did you ever, after the signing of the supplemental agreement in September of 1971 [sic] ever write another letter to Richard Isom making a demand on him to live up to the terms of the contract?

* * *

I will ask you, Mr. Leigh, if at any time after September 28th, 1972, that you ever wrote a demand letter to Richard Isom telling him that if he didn't live up to the contract, that you were going to cancel him out?

A: That could be.

Q: Do you have any such document that you have?

A: No. I don't know of it, but I could have.

Q: Now, in this letter you did tell him that you were going to cancel him out, didn't you?

A: That's right. (Tr. p. 538-539).

Plaintiff's ill-will then, indeed if any existed was merely a function of his frustration over defendant's refusal to keep the terms of the contract. And the reason he filed the lawsuit was only to seek an audit which would demonstrate that his breach of contract claims were correct. The Complaint only sought the opportunity to take a complete physical inventory and audit of the business (R. pp. 2-3), an opportunity guaranteed the plaintiff by the lease. It would thus be folly to contend that plaintiff was justified in taking the actions he did. He was acting to protect his own financial interest and property, an interest which he in good faith sought to protect in the first instance when the lease was formed. He fully performed his obligations and was seeking only to obtain defendant's performance or, if such was not obtainable, to exercise his right to terminate the agreement. The agreement on which plaintiff Leigh had relied for protection provided:

Time is of the essence of this purchase agreement and lease and in the event of a default in any payment provided for herein, or a default in the performance of any other condition herein set forth and for 60 days after said payment or performance is due, the seller may at its option, cancel and terminate this agreement and lease and be relieved of all obligations of performance and all payments theretofore made shall be forfeited as liquidated damages and the seller shall be entitled to the immediate possession of the merchandise and property herein agreed to be sold and also shall be entitled to the possession of the real property herein leased and the purchaser will surrender the property to the seller. (R. pp. 7-8).

But in spite of the lease, plaintiff's interests were threatened because of defendant's continued violation of several lease provisions, which violations were admitted by defendant, including being delinquent in making payments on the lease, selling fixed assets not part of inventory without replacing them, and failing to keep the inventory, cash in the bank, and accounts receivable at all times in a sum total greater than or equal to \$60,000.00. As defendant continued to violate these provisions, it became obvious to the plaintiff that the contract would no longer afford him the reasonable protection he deserved, and he was left with seeking protection from the courts. He had to act to protect his property and financial interests, an action recognized by the Utah Supreme Court as being fully justified. In Soter v. Wasatch Development Corp., 21 Utah 2d 224, 443 P.2d 663 (1968) plaintiff was a mortgagor whose payments on the mortgage to defendant were seriously in arrears. Defendants kept making demands on the plaintiffs for payments of past due arrearage and even granted a reduction in the amount due and an extension of time in which to pay it. But even during this extension plaintiff continued in default on the payments, until, when the situation began to seriously threaten defendants' financial interests, they demanded the property back. The plaintiffs then sued, contending that the defendants had interfered with their contract by not cooperating with them to obtain new financing and had spoiled their deal with the Wasatch Development Corporation, a finance company. The Court said that "In order to establish a right to recover on such a cause of action the plaintiffs would have to show that the

defendants, without justification, by some wrongful and malicious act, interfered with the plaintiff's right of contract, and that actual damage resulted." 433 P.2d at 664. The Court then goes on to explain why such a privilege is justified:

In addition to the fact that . . . [plaintiffs] were aware of and apparently approving [defendants'] negotiations with Wasatch, the [defendants] had a legitimate interest in seeing what was being done about their property and in seeing that someone who was willing and able should become responsible for paying out the contract. . . . [I]f a party has an interest to protect, he is privileged to prevent performance of a contract which threatens it. The [plaintiffs] had long been in default, and had not remedied the same during a six-month extension granted them, nor in an additional two months.

* * *

It is our opinion that the trial court was justified in granting the defendants . . . Motion to Dismiss because the undisputed facts shown preclude any reasonable possibility that the Soters could make out a cause of action for wrongful interference with a contractual relationship between the Soters and Wasatch Development Corp. Id. at 665.

Thus, although discussed in Soter as regarding an interfering third party, interference is justified if it is for the protection of financial or property interests. Such a justification includes the bringing of a suit to protect the financial interests involved. As stated by Prosser:

If [defendant] has a present, existing economic interest to protect, such as the ownership or condition of property, or a prior contract of his own, or a financial interest in the affairs of the person persuaded, he is privileged to prevent performance of the contract of another which threatens it, and for obvious reasons of policy [a defendant] is likewise privileged to assert an honest claim, or bring or threaten a suit in good faith. . . . " Prosser §129, at 944-945.

In spite of this, defendant Isom claims that the filing of the lawsuit by the plaintiff was the precipitating factor which forced him to close the doors of the business. Such a claim, however, cannot be seriously maintained when in fact the decision to close the doors and file bankruptcy was defendant's alone. At trial, defendant admitted it was his decision alone to shut down the business.

Q: Let's talk about your business ceasing to operate. When did you close the doors of Richard's Fine Furnishings?

A: Upon service of the Complaint date I think it was March 11th.

Q: March 11th, the decision to close the doors of Richard's Fine Furnishings was yours only, was it not?

A: Well, I read in the statement --

Q: No, I'm just asking whose decision it was to close the doors?

A: It was my decision.

* * *

Q: The decision to close the doors of Richard's Fine Furnishings on March 11th of 1975 was whose?

A: Was mine.

Q: Were you ordered by any court to close your doors?

A: Not at that time.

Q: Were you asked by any officer or director or agent of Leigh Furniture and Carpet Company to close your doors?

A: I'd say the document speaks for itself.

Q: I'm just asking you did you have any personal contact or did they tell you to close your doors?

A: No. No.

Q: The decision was yours?

A: Yes. (Tr. pp. 422-423)

Thus, plaintiff's good faith assertion in court of his honest claim had no real impact at all on defendant's decision to close the business. The decision was his and his alone, and he cannot foist responsibility for that decision onto the plaintiff.

It is obvious that plaintiff Leigh was merely attempting to protect his own financial and property interests, a purpose for which the lease proved futile because of defendant's persistent violations thereof. Plaintiff was left with no other remedy than that provided by the courts. Public policy is certainly against taking "self-help" remedial measures, and plaintiff was thus effectively left with no other means by which redress could be obtained. Indeed, the social desirability of being allowed to assert an honest claim in the court for the protection of individual rights is paramount to any private desires to let injustices go uncorrected. The plaintiff was merely exercising that right in good faith. In fact his right to do so was recognized by the court in its initial granting of an injunction enjoining defendant's continuance of the business without an audit being taken. The court thus recognized the social desirability of plaintiff's right to utilize the courts in good faith for protection. As stated by the Alaska Supreme Court in Alyeska Pipeline Service v. Aurora Pipeline Service, 604 P.2d 1090 (Alaska 1979), "One is privileged to invade the contractual interest of himself, others, or the public, if the interest advanced by him is superior in social importance to the interest intended." Id. at 1094.

The interest which plaintiff sought to invade by bringing suit against defendant was merely defendant's interest in continued violation of the lease. The invasion of that unjustified interest was plaintiff's predominate purpose. In no other way could be obtain a remedy. This court is now respectfully requested to recognize that remedy and to overturn the trial court's decision which left plaintiff helpless. Plaintiff acted in good faith and his predominate purpose, as in Soter, was merely to protect his financial interests. His actions taken to protect such interests were thus justified and constitute a privilege for plaintiff to "interfere" with defendant's "contractual or business relations."

CONCLUSION

For the reasons stated herein, the trial court's judgment in favor of defendant must be overturned or, in the alternative, plaintiff should be granted a new trial.

Respectfully submitted this 5th day of January, 1981.

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