

1981

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

LEIGH FURNITURE AND CARPET)
COMPANY, a Utah corporation,)

Plaintiff-Appellant,)

vs.)

Docket No. 17,264

T. RICHARD ISOM, dba RICHARD'S)
FINE FURNISHINGS,)

Defendant-Respondent)

* * * * *

BRIEF OF DEFENDANT-RESPONDENT

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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IN THE SUPREME COURT OF THE STATE OF UTAH

LEIGH FURNITURE & CARPET CO.,)
a Utah corporation,)
 Plaintiff-Appellant, Case No. 17264
)
 v.)
)
T. RICHARD ISOM, d/b/a)
RICHARD'S FINE FURNISHINGS,)
 Defendant-Respondent.)

BRIEF OF DEFENDANT-RESPONDENT

Nature of the Case

In an action filed by Plaintiff-Appellant Leigh Furniture & Carpet Co. to cancel a contract for the sale of a furniture business located in St. George, Utah, Defendant-Respondent T. Richard Isom counterclaimed against the Plaintiff-Appellant Leigh Furniture, alleging that the Plaintiff and its President, W. S. Leigh, tortiously interfered with Defendant's business and prospective economic advantage by wilful and malicious conduct designed to force the Defendant out of business.

(Respondent will cite the pages in the record as follows: Trial transcript, "Tr.--;" court file, "R.--," and exhibits, "Exh.--.")

Disposition in the Lower Court

On February 24, 1975, Plaintiff-Appellant Leigh Furniture commenced an action against Respondent to cancel a contract between the parties whereby Respondent Isom purchased a furniture business from Appellant. Respondent had paid

\$53,000.00 of the \$80,000.00 purchase price and tendered the balance of \$27,000.00 prior to receiving notice that legal action had been commenced. Appellant also sought to restrain Respondent from conducting any further business on the premises which were under lease from Appellant. (R. 1-8)

Defendant Isom filed a Counterclaim against Appellant, alleging that Appellant and its principal owner, W. S. Leigh, engaged in a concerted course of intentional, malicious conduct designed to force Isom out of business and bring his business relationships to an end so that Plaintiff could take back the business and leased property. (R. 27-30; Appendix A attached hereto)

At the conclusion of trial, the jury returned a verdict in favor of the Defendant and against the Plaintiff in the amount of \$65,000.00 general damages and \$35,000.00 punitive damages.

Plaintiff's Motion for Judgment Notwithstanding Verdict or for New Trial was denied by the trial court. However, the court determined that a remittitur of punitive damages to 20% would be "reasonable" and directed Defendant to accept a reduction of punitive damages to \$13,000.00 or else a new trial "on the issue of punitive damages" would be granted. (R. 115-16) Defendant accepted the remittitur, reserving his right of cross appeal. (R. 117)

Following Plaintiff-Appellant's appeal herein, Defendant cross appealed on the issue of the remittitur of the punitive damages.

Relief Sought on Appeal

Defendant-Respondent seeks affirmance and reinstatement by this Court of the jury's verdict and judgment for the full amount awarded by it.

Statement of Facts

Respondent takes issue with Appellant's Statement of Facts and "Abstract of Witnesses" as being incomplete and laced with conclusions and opinions which appear to reargue the evidence presented to the jury. Appellant states facts favorable to Appellant's contentions and ignores substantial evidence which supports the jury's verdict. Furthermore, many of Appellant's statements are not supported by proper citations to the record on appeal. Therefore, Respondent provides the following statement of facts:

Prior to 1969, W. S. (Dub) Leigh and his family owned and operated a furniture and interior decorating business known as Leigh Furniture & Carpet Co. with stores in St. George, Cedar City and Kanab. (Tr. 90, 523-528) In the fall of 1969 Leigh contacted Respondent T. Richard Isom to see if Isom would be interested in working at the furniture store in St. George, Utah, and later buying the store. (R.⁷⁰ 90, 94, 324-26) Isom terminated his other employment in the State of Washington and came to St. George where he began employment under Leigh in charge of the store's business and sales records. The accounting and bookkeeping for all of the store owned by Leigh was done by Eldon Ashdown at the store in Cedar City. (R.⁷⁰ 326-28)

At first Leigh promised to sell the business to Isom and two other employees, Watkins and Francis Leany. Later discussions about only Isom buying the St. George store occurred in May of 1970 when it appeared that Leany was not interested and Leigh was dissatisfied and unhappy with Watkins. (Tr. 95-97, 329, 354) Leigh requested Respondent's father, Orville Isom (herein referred to as "Orville"), an attorney who had theretofore done some legal work for Leigh, to draw up an agreement of sale between Leigh and Richard Isom. Although attorney Orville Isom advised Leigh to get another attorney, Leigh insisted that Orville prepare the agreement. Several drafts of the agreement were prepared for Leigh, who made suggestions and requested various changes. (Tr. 97-99)

Ultimately, Leigh and Respondent Richard Isom executed a written agreement dated May 24, 1970 (Exh. 1, attached as Appendix B hereto), whereby Isom purchased all inventory, merchandise, equipment, fixtures and accounts, etc. of the St. George store. The purchase price of \$80,000.00 was to be paid \$20,000.00 down, with the balance to be paid over a ten-year period with interest. As security for the payment of the purchase price, Isom agreed to maintain inventory, cash and receivables of \$60,000.00 and to provide Leigh with a physical inventory every three months and monthly financial statements. (Appendix B, pp. 1, 2; Tr. 354-56)

The agreement also granted Isom a ten-year lease of that portion of Appellant's building in which the business was located, with an option to purchase the building when the

purchase price for the business had been paid. (App. B-2, 4)

The store had operated at a loss the first four months of 1970, with a \$8,000.00 deficit when Isom took over the business. (Exh. 44; Tr. 388)

During December, January and February, 1971, Respondent began having problems with Leigh. In the winter of 1970-71, the building furnace required substantial repairs for which Isom paid the portion required by the agreement; but Leigh refused to pay the balance. (Tr. 359-60)

Although he had given Isom an option to purchase the building, Leigh tried to sell it to others. When he discovered he could not sell the property subject to Respondent's ten-year lease and option to purchase, he resolved to cancel the sales agreement and get Isom out. (Tr. 110, 547; Exh. 65) Leigh came to Orville in June, 1971, and voiced his dissatisfaction with the agreement and stated he wanted to sell the building-- "the whole ball of wax"--and that he ought to kick Richard out and put a padlock on the door. (Tr. 111-13)

In a letter to Richard Isom, Leigh declared he had no agreement with Respondent and demanded that the latter walk out and return the business to Leigh. He represented that he had contacted people in Salt Lake City and California regarding purchasing the "complete package." (Exh. 65; Tr. 536-39) During this period Leigh also approached two store employees, offering to sell Isom's business to them. (Tr. 118)

During 1971 and 1972, Appellant, through Leigh and its employees, harassed Richard in the operation of the store,

complaining about Isom's performance and the way he did business, disrupting the employees and reducing the efficiency of the operation. (Tr. 120-24, 362-71, 386, 415-17, 419-20) On one occasion Leigh "stormed" into the store and interrupted Respondent, with a customer. Leigh complained about not getting monthly statements and claimed Respondent was in default of the sales agreement. He demanded a written response to his allegations. The customer left the store. (Tr. 360-61)

Generally, Leigh would come into the store in a hostile manner, look over the business as if he had an interest in it and if it met with his approval. He complained about the parking of automobiles in the parking lot, about the merchandise in the store; told Richard whom he should and should not deal with (R. 362, 515, 533); falsely accused Respondent of subletting the parking lot; and threatened to kick Respondent out and lock the door. (Tr. 371-72)

Such visits occurred at least every week from Mr. Leigh, Mrs. Leigh or Mr. Ashdown. (Tr. 364, 367, 489, 495) Although all payments on the purchase of the store were made within the 60-day grace period permitted by the contract, Leigh continually accused Isom of being in default for late payment. (Tr. 234, 394) Mr. or Mrs. Leigh or Weldon Ashdown would come into the store and interrogate Isom about the inventory or financial statements, demanding that he date accounts receivable and accounts payable and state to whom, for what and when. (Tr. 369-71, 415-17) In one week Richard received four letters complaining about the furnace or not getting statements or

reports. (Tr. 365)

At Leigh's request, his accountant, Huskinson, called Orville to say there had to be a change in the business and that Richard would have to get some outside capital and someone with furniture experience. (Tr. 119-20) Leigh requested Orville to go to Brent Talbot, who owned Dixie Interiors, Richard's competitor, to request that Talbot come into the business. (Tr. 117, 122) When Ashdown learned that the Isoms were talking to a Mr. Hayes Hunter, he informed Mr. Leigh, who in turn told Orville to forget any ideas about bringing in Hunter; that he didn't like him and wouldn't have him in the store. (Tr. 121-22, 544) Leigh also continued to openly complain that he was crazy to give Richard a ten-year lease and option and what he should do was kick Richard out and sell the store again himself. (Tr. 123-24)

In December, 1971, Leigh, through his attorney, Gary Howe, demanded that Richard submit the business to an independent audit. (Exh. 2) Also, as a result of Leigh's refusal to pay all of the furnace plumbing repair bill, a lawsuit was filed by Moss Plumbing against Isom and Leigh in which Leigh asserted the obligation was entirely Isom's responsibility. (Tr. 136, 151) This litigation later resulted in a determination that Leigh was liable for the repair bill.

In September, 1972, in an effort to remove Leigh's threats to terminate Richard's business, Orville proposed to have Richard pay an additional \$10,000.00 on the purchase price. (Tr. 124-26; Exh. 15) Appellant demanded that Isom prepay

\$20,000.00 and submit to a new agreement or else Leigh would sue to cancel and foreclose on Richard's business. (Exh. 21) Leigh's attorney sent Orville a copy of the Complaint which Leigh threatened to file. (Tr. 234-45; Exh. 33, attached as Appendix D)

In an attempt to resolve all the problems between them and avoid "any future conflicts," Richard Isom acceded to Leigh's demand and raised \$20,000.00 which he prepaid on the purchase price of the business. Respondent also signed a supplemental agreement dated September 28, 1972, wherein he agreed, inter alia, to obtain written approval from Leigh before bringing any additional person into the business; authorized Leigh to make biannual audits; and agreed to maintain a minimum of \$64,000.00 in inventory, cash and accounts receivable. (Exh. 3, also attached hereto as Appendix C)

By making the \$20,000.00 prepayment on the contract principal in 1972, the principal balance was paid up to 1976. Only \$27,000.00 was still owing to Leigh. (Tr. 125-35)

Although the September, 1972, agreement was intended to resolve all the disputes between Leigh and Isom, Leigh continued to pursue two separate lawsuits against Richard Isom relating to the unpaid plumbing repair bill and a claim by Appellant against Isom and Frank Leany. (Tr. 136-37, 174, 184-85, 231, 265)

In the action filed by the plumber for his repair bill, Leigh continued to assert that Isom was liable. (Exh. 33, para. 4(g)) After a trial, the court required Leigh to pay

the bill. (Tr. 136-37) Likewise, with respect to Leigh's claim that Respondent was responsible for the amount of furniture drawn from the store by Leany, at the trial in January, 1973, the court dismissed Leigh's Complaint at the conclusion of his evidence. (Exh. 62; Tr. 174-78, 375, 414, 540)

Leigh continued to check up on Richard Isom during 1973. But because of the substantial prepayment, there was not much Leigh could do. (Tr. 137, 375-76, 381-82) Richard Isom was able to operate his business without Leigh's interference and turned a \$27,000.00 net loss in 1970 into a \$5,000.00 net profit in 1972 and a \$17,700.00 net profit at the end of 1973. (Exhs. 45, 47, 48; Tr. 387)

Isom's store continued to do well into the spring of 1974, showing over \$5,000.00 in profit through April, 1974. However, in April, 1974, harassment by Leigh started up again following the conclusion of the "plumbing" lawsuit. (Tr. 382-85)

Leigh continually complained to Isom about the store's inventory, the air conditioner, allegedly delayed financial statements and the format of the financial statements. (Tr. 382-85) Appellant refused to pay for a store window broken by the adjacent bicycle shop. (Tr. 385) The heating bills began to "pile up" since Appellant wouldn't pay its share, requiring Respondent to make trips to Cedar City to clear up the matter. (Tr. 151, 261, 389)

As the visitations by Appellant continued, Isom was required to spend a lot of time to deal with them and Leigh's

renewed threats of cancellation of the purchase contract. Sales began to drop off and the store became unproductive. (Tr. 386, 415-16) Demand was made upon Isom to produce various documents and records, including renewed demands to date accounts payable. Isom was required to give more attention to Leigh than to the business. (Tr. 386, 389, 417, 420, 428, 611)

In the summer of 1974, Orville followed the prior suggestion of Leigh and approached Mr. Brent Talbot about joining Richard's Fine Furnishings. Mr. Talbot had recently left Dixie Interiors. (Tr. 117, 122, 137; Exh. 5) Accordingly, in July, 1974, Orville Isom wrote to Leigh and Leigh's attorney requesting Leigh's approval to bringing Talbot into the business. (Exhs. 5, 6) When no response from Appellant was forthcoming, attorney Orville Isom again wrote to Leigh requesting a response, outlining the advantages to Leigh and the need to proceed so as not to lose the opportunity with Talbot. (Exh. 7) No response was received from Leigh. (Tr. 144, 542)

On July 22, 1974, Leigh's attorney stated to Orville that if Talbot was interested in coming into the business, he would have to contract directly with Leigh and the Leigh/Isom agreement would have to be terminated. (Exh. 34) Even after extensive correspondence and a tentative verbal agreement between Isom and Talbot, Orville was unable to get Leigh to agree to Respondent bringing in Talbot unless Isom agreed to terminate his contract and the ten-year lease. (Tr. 217, 457; Exhs. 24, 26-29, 31, 36) Moreover, Leigh continued to insist that Isom pay him the \$4,000.00 involved in the Leany lawsuit

which had been dismissed by the court. (Exh. 26)

Leigh admitted that he would not let Talbot come into the business under Isom's "long term" lease. Leigh insisted that Isom "step out" of the store and turn it back to Leigh. (Tr. 155-56, 169, 213-16, 547) When Orville also requested Leigh's permission to permit a Mr. Applegate to come into the store under Richard's contract, no response was ever received from Leigh. (Tr. 146-50, 404; Exhs. 10, 11)

The harassment and demands from Leigh continued and occupied a considerable amount of Respondent's time and attention. (Tr. 371-72, 386) By the end of 1974, it became apparent that Isom would have to pay off the \$27,000.00 remaining on the purchase to keep Leigh from active interference in the affairs of the store. Richard spent a lot of time raising the funds instead of operating the business. (Tr. 164, 393-94)

Leigh's continuing threats to kick Richard out had only a demoralizing effect on the business. (Tr. 396, 419, 428, 611) The practice of Leigh and Ashdown coming into the store lost business and Isom received complaints and comments from his customers. (Tr. 466-67) Instead of maintaining the comfortable profit built up by August, 1974, the business steadily declined as a result of the problems with Appellant. By December, 1974, Respondent's books indicated he had suffered a \$6,499.00 net loss. (Exh. 49; Tr. 419, 421, 611)

On December 29, 1974, Orville Isom met with Leigh in San Francisco where he informed Leigh that Richard was making plans to pay the last \$27,000.00 owed. Leigh replied that that was

OK, but he again rejected bringing Talbot into the store with the long-term lease and option. He claimed he "had got to move the property," get rid of the headache and get the property back from Respondent. Leigh again demanded that Richard "step out" of the store, liquidate the stock and turn it back to Leigh. (Tr. 155-57) Leigh also refused to appoint an appraiser as required by the written agreement so that Isom could exercise his purchase option. (Tr. 157; Appendix A-4)

Orville again met with Leigh and his attorney on February 14, 1975, and told them that the \$27,000.00 would soon be paid. Since Leigh claimed to be concerned about the inventory as security, Orville Isom agreed to permit an inventory to be taken if Leigh would appoint an appraiser as required by the contract. (Tr. 158-60) Leigh maintained he had "an offer" to sell the property for \$200,000.00 (without the Isom lease) and therefore would not sell it to Isom for its appraised value of approximately \$125,000.00 to \$140,000.00, subject to the lease. (Tr. 159-60, 273) After the meeting, Leigh again refused to appoint an appraiser so that Isom could exercise his purchase option. (Tr. 161; Exh. 13)

Without giving any notice of default, on February 24, 1975, Leigh filed the Complaint in the instant action to cancel and terminate Isom's interest, forfeit his payments theretofore made and restrain him from doing further business. (Tr. 394; R. 1-8, Complaint attached as Appendix E hereto) This Complaint was substantially identical to Leigh's proposed Complaint in 1972, even though the prior matters had been resolved by Isom's

prepayment of \$20,000.00. (Compare Appendixes D & E; Tr. 234-45, 397-98)

Unaware that the Complaint had been filed, Richard Isom, by letter of February 26, 1975, tendered to Leigh the remaining \$27,000.00 which had been deposited in Dixie State Bank. (Exh. 14) Isom requested that Leigh receipt for the payment, appoint an appraiser to permit the option to be exercised and accept Brent Talbot as an associate with Richard to operate under the present lease. (Exh. 16; Tr. 164-66, 455-57)

When Orville Isom learned of the suit, he contacted Leigh's attorney, who replied not to worry. Since Richard had not been served, they could still negotiate. (Tr. 167-68) When Richard Isom learned of the lawsuit, it had a demoralizing effect; but he still tried to deal with Leigh and continued to do business through February, 1975. No response to the tender was ever received by Richard, although Leigh told Orville he would never allow Talbot to come in under Richard's lease. (Tr. 169-70, 396-97)

In March of 1975, while talking to a customer in his store, Respondent was served with Leigh's Complaint. Upon reading the Complaint, Respondent noted that it reopened the wounds of 1970-72 and looked liked the same Complaint Leigh filed previously. (Tr. 397) Because of the restraining order, Respondent did not feel that he could conduct further business and so he closed the store. (Tr. 396-99) As a result, Richard's Fine Furnishings ceased to do business and Respondent was forced into bankruptcy. (Tr. 400-405, 421-22, 466-67)

SUMMARY OF ARGUMENT

Appellant attempts to re-argue the evidence before this Court, ignoring the substantial evidence in the record contrary to Appellant's claims. A proper review of the entire record will support the jury verdict.

Appellant was properly held liable for tortious interference and intermeddling in Respondent Isom's business expectancies and prospective economic advantages. One who engages in a concerted course of conduct to force another out of business by harassment and tortious conduct is liable to the one injured for the native consequences of the result he intended. There is also ample evidence to support the finding that the Appellant in no way was privileged.

Relating to Respondent's cross appeal, the trial court erred when it invaded the "sound discretion" of the jury by deciding to a remittitur of punitive damage simply because "a reasonable ratio" is twenty percent.

The jury verdict of \$65,000 compensatory damages and \$35,000 punitive damages awarded to Respondent should be reinstated in its entirety. The trial court's remittitur should be reversed and in all other respects the matter should be affirmed.

POINT I

THE JURY VERDICT IS SUPPORTED BY THE EVIDENCE AND SHOULD BE AFFIRMED.

Throughout its Brief, Appellant attempts to reargue the weight of the evidence presented to the jury. In so doing, Appellant ignores much of the evidence contrary to its claims. As specifically set forth in the foregoing Statement of Facts, the jury verdict is supported by substantial evidence and should be affirmed by this Court.

Moreover, Appellant's Notice of Appeal indicates that Appellant appeals only from the denial of its "Motion for Judgment Notwithstanding Verdict or for New Trial." (R. 118) The standard of review for an appeal from the denial of Appellant's post-trial motion is whether the trial court abused its discretion in refusing to grant a new trial. Pollesche v. Transamerican Insurance Co., 27 U.2d 430, 497 P.2d 236 (1972). Appellant makes no showing here that there was any abuse of discretion by the trial court.

Therefore, the issue on appeal is whether the trial court properly submitted the case to the jury, considering the evidence in a light most favorable to Respondent Isom and the verdict. Schow v. Guardtone Inc., 18 U.2d 135, 417 P.2d 643 (1966); Whyte v. Christensen, 550 P.2d 1289 (Utah 1976). The jury had the exclusive duty to find the facts. In so finding, the jury may weigh, accept or reject any conflicting evidence as

it may choose. A jury finding for the claimant must be viewed as accepting the claimant's version of the transaction notwithstanding contrary evidence. Basin Electric Power Cooperative--Missouri Basin Power Project v. Howton, 603 P.2d 402 (Wyo. 1979).

"Reviewing courts will view the facts in the light most favorable to the prevailing party, will indulge in all reasonable inferences in support of the verdict and will disregard all inferences and evidence to the contrary." Terrel v. Duke City Lumber Co., Inc., 86 N.M. 405, 524 P.2d 1021 (1974), modified 540 P.2d 229 (1975)

This Court does not substitute its views for the jury's unless there is no competent evidence to support the verdict. Fillmore Products Inc. v. Western States Paving Inc., 592 P.2d 581 (Utah 1979); Snyderville Transportation Co., Inc. v. Christensen, 609 P.2d 939 (Utah 1980); Uinta Pipeline Corp. v. White Superior Co. 546 P.2d 885 (Utah 1976).

It is axiomatic that the reviewing court will presume that the jury believed the evidence which sustains its finding. Appellant's claims that Respondent had no business expectation or relationship or that the Appellant was justified in his malicious, intentional conduct were rejected by the finders of fact. Gossner v. Dairymen Association, Inc., 611 P.2d 713 (Utah 1980). It was the jury's prerogative to judge the credibility of the witnesses and determine the facts. Whether or not Respondent Isom had a reasonable expectation of business

success or advantage or whether Appellant acted reasonably or was justified were jury questions to be determined from the evidence in the record and, having been properly submitted to the jury, the latter's findings will not be interfered with on appeal. Moore v. Prudential Insurance Co. of America, 26 U.2d 43, 491 P.2d 227, 230 (1971).

Appellant has not demonstrated any "substantial prejudice" or "injustice." Bezner v. Continental Dry Cleaners, Inc., 548 P.2d 898, 901 (Utah 1976). Indeed, it appears to Respondent that "justice" has been well served in this matter by the jury's verdict. Therefore, the jury's verdict should be affirmed and reinstated in its full amount as hereinafter set forth.

POINT II

THE FINDING OF THE JURY THAT APPELLANT IS LIABLE TO ISOM FOR ITS INTENTIONAL INTERFERENCE WITH ISOM'S BUSINESS RELATIONSHIPS SHOULD BE AFFIRMED.

Appellant Leigh claims that Respondent's Counterclaim must fail because Respondent failed to prove a specific existing contract with a third party. (Appellant's Brief at 14-16) As previously cited, the evidence before the jury amply supports Respondent's claims that the actions of Leigh were designed and, in fact, did drive Richard Isom out of business, thereby terminating his business relationships with his customers and others. By greatly over simplifying of Respondent's claim and the developing law regarding interference with business relationships, Appellant mischaracterizes both. Throughout its Brief, Appellant merely attempts to knock down a "straw-man" of its own fabrication.

Although of comparative recent development, the law has long recognized that a broad range of economic relationships are entitled to its protection from unreasonable interferences. Many courts have tended to avoid a complete analysis of the problem and taken refuge in simplified formulas, thereby enshrouding the law in "a fog of catch words and rubber-stamped phrases" upon which Appellant attempts to rely. B. Izett, "Interference with Contracts at Will, A Problem of Public Policy," 25 Brooklyn L. R. 73, 74 (1957-59); Prosser, Handbook of the Law of Torts, §129, p. 927 (4th Edit., 1971).

By attempting to hide behind a purported lack of a valid, existing third-party contract, Appellant ignores the fact that

interference with a specific contract is merely a "subclass" of the responsibility imposed on those who intentionally interfere with business relationships. It is only one of several segments of the law in which damages may be recovered for unlawfully causing loss to a person in his business relationships.

Buckaloo v. Johnson, 122 Cal. Rptr. 745, 537 P.2d 865 (1975); Prosser, Handbook of the Law of Torts, §130, pp. 949-53 (4th Ed., 1971); Restatement of Torts, Second, Chapt. 37, §§766A, 766B, pp. 4-23 (1977); G. Alexander, Commercial Torts, §6.1, 6.4, pp. 337, 348 (1973); 1 F. Harper and F. James, Law of Torts, §6.5, pp. 489-495 (1956); J. Estes, "Expanding Horizons in the Law of Torts--Tortious Interference," 23 Drake Law Review 341, 342 (1973-74); F. Harper, "Interference with Contractual Relations," 47 Northwestern U. L. R. 873 (1953).

Included in this area of the law entitled to protection from wrongful interference are the expectancies of future contractual relations, the opportunity of obtaining and maintaining customers and the right to conduct and operate one's own business. Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946, 947 (1909); Sumwalt Ice Co. v. Knickerbocker Ice Co., 114 Md. 403, 80 Atl. 48, 50 (Md., 1911); Guillory v. Godfrey, 134 C.A.2d 796, 286 P.2d 474 (1955); Williams v. Maloof, 157 S.E.2d 479 (Ga., 1969); Calbom v. Knudzton, 65 Wash.2d 157, 396 P.2d 148, 151-52 (1964); Shamhart v. Morrison Cafeteria Co., 159 Fla. 629, 32 So.2d 727 (1947); General Beverage Sales Co.--OSH KOSH v. East Side Winery, 396 F. Supp. 590 (E.D. Wis. 1975); F. Sayre, "Inducing Breach of Contract," 36 Harvard L. R. 663, 701-702

(1922-23); J. Dale, "Interference with Business Relation," 5 U.C.L.A. L. R. 341 (1958); 45 Am. Jur. 2d, Interference, §§49-51, pp. 321-24 (1964). Prosser recognizes that one of the business expectancies covered by the tort is "the opportunity of obtaining customers;" the loss resulting from interference can be measured by looking at the "background of business experience" rather than a specific, narrow relationship. Prosser, supra, at 950.

Society seeks to protect the interest of the individual in the security and integrity of business transactions and the freedom of the individual to make contracts. The law also draws a line beyond which no member of the community may go in interrupting contractual negotiations or otherwise intentionally intermeddling in the business affairs of others. Instead of the interest in the security of contracts already made, Respondent's interests to be protected are those of a reasonable expectation of economic advantage and a fair opportunity to conduct a legitimate business without interruption. 1 Harper and James, supra, at 510. Prosser, supra, at 949-51; 36 Harvard L. R., supra.

While this Court has in the past encountered cases involving interference with existing contractual relationships, Respondent is not aware of any case where a claim of interference with business expectancies or other relationship not solidified by contract has come before the Court. See Gammon v. Federated Milk Producers Association, Inc., 14 U.2d 291, 383 P.2d 402 (1963); Soter v. Wasatch Development Corp., 21 U.2d 224, 443

Appellant's confusion in this area of the law is readily apparent when viewing the inconsistencies of its argument. Appellant claims that Respondent failed to prove a specific third-party contract and that Appellant Leigh is not liable in tort for malicious conduct in breaching its own contract with Richard Isom. Even assuming that to be the case, such is a mischaracterization of Respondent's claim. The gravamen of Respondent's claims, as stated in the Counterclaim, is that by intentional, malicious conduct in breach of its contract with Isom, Appellant Leigh forced Isom out of his retail furniture business, achieving the very result he intended. Counterclaim, Appendix A.

More specifically, the evidence presented to the jury was conclusive that Leigh interfered with Richard's business by Leigh's complaints, harassment, falacious claims and lawsuits and threats to "kick Richard out." (R. 113, 118, 122, 133-35, 144-47, 155-57, 169, 185, 261; Exh. 65) Having received \$53,000.00 of the purchase price, Leigh deliberately refused to comply with his agreement to appoint an appraiser or to even respond to Richard's requests to associate others in his business. All this was motivated by Leigh's animosity for Richard and by an apparent compulsion to cancel the lease and take back the business so that Leigh could resell it and the property at a greater profit. (Tr. 158, 161, 213-16, 272-73, 547; Exh. 65)

Substantial evidence in the record indicates that Leigh's conduct adversely affected Isom's operation of the business and

his relationship with his customers. (Tr. 361, 363-64, 368-71, 386, 419-20, 466) And it cannot be ignored that, when left alone, Respondent was successful enough to turn Leigh's \$8,000.00 loss in 1970 into a \$5,500.00 net profit in 1972 and a \$17,000.00 net profit in 1973. (Tr. 388; Exhs. 47, 48) Isom's business continued profitable in 1974 until Leigh resumed his harassment tactics. (Tr. 386; Exh. 49) By the beginning of 1975, when served with the Complaint and Restraining Order, it was obvious to Isom that he could not continue when his time, attention and resources were being drained by Appellant. (Tr. 386, 393-98, 417, 421, 428-29, 455, 611)

Appellant does not seem to recognize that it substantially interfered with Respondent's valid business expectancies and potential economic advantages with Respondent's customers and suppliers--relationships to which Appellant was not a party. Certainly it would be reasonable to expect that absent Leigh's interference, Isom would continue a profitable business relationship with past and future customers and suppliers. Clark v. Figge, 181 N.W.2d 211, 213-14 (Iowa, 1970). Although Respondent showed substantial harm to his business resulting in bankruptcy, he need only have shown injury to economic relationships with only a "probability of future economic benefit." Buckaloo v. Johnson, supra, at 872.

Liability for interference with a business may be predicated upon conduct making performance of one's business more burdensome, more expensive, less profitable. Goodall v. Columbia Ventures Inc., 374 F. Supp. 1324, 1331 (S.D.N.Y., 1974); Lipman v. Brisbane

Elementary School District, 55 C.A.2d 224, 359 P.2d 465 (1961); North Carolina Mutual Life Insurance Co. v. Plymouth Mutual Life Insurance Co., 266 F. Supp. 231 (E.D. Pa., 1967); Scymanski v. Dufault, 80 Wash.2d 77, 491 P.2d 1050 (1972); Tippett, Jr. v. Hart, 497 S.W.2d 606 (Tex. App., 1973), aff'd 501 S.W.2d 874; 1 Harper & James, supra, at 499-500; Restatement of Torts, Second, §766B, p. 22; C. Carpenter, "Interference with Contract Relations," 41 Harvard L. R. 728 (1927-28).

Liability attaches to one who by his unlawful or belligerent conduct drives away or interferes with the customers of a business. Drouet v. Moulton, 245 C.A.2d 667, 54 Cal. Rptr. 278 (1966); Guillory v. Godfrey, supra; Twin Falls Farm & City Distributing, Inc. v. D&B Supply Co., Inc., 96 Ida. 351, 528 P.2d 1286, 1294 (1974); Shamhart v. Morrison Cafeteria Co., 159 Fla. 629, 32 So.2d 727 (1947); Prosser, supra, at 949. And, the interference by Appellant directly with Isom's business and Isom's performance of his relationships with his customers is just as much an actionable wrong to Respondent as an inducement of some breach by the third-party customer. Goodall v. Columbia Ventures, Inc., supra, 1 Harper & James, supra, at 500; Corbin, Contracts, §947; Restatement of Torts, Second, §766A, pp.8, 17; 23 Drake L. R., supra, at 883; 47 Northwestern U. L. R., supra, at 883.

The authorities universally agree that when interference with future or potential business relationships (including customers) or other economic advantage is shown, proof of a specific, existing contract is not necessary. Skeels v.

Universal C.I.T. Credit Corp., 335 F.2d 846, 848 (3d Cir., 1964); Buckaloo v. Johnson, supra, at 871; Azar v. Lehigh Corp., 364 So.2d 860 (Fla. App., 1978); Glenn v. Point Park College, 441 Pa. 474, 242 A.2d 895 (1971); King v. City of Seattle, 84 Wash.2d 239, 525 P.2d 228 (1974); Scymanski v. Dufault, supra, at 1054; Restatement of Torts, Second, §766B (1977); _____, "Intentional Interference with Basic Relations," 3 Rutgers L. R. 277, 278-79 (1948-49); 23 Drake L. R., supra, at 344.

In addition to the relationship between Isom and his "third-party" customers, Appellant also interfered with Isom's agreement and business relationship with Brent ^{Talbot}~~Hunter~~ in demanding that Richard agree to cancel his ten-year lease before Leigh would okay ^{Talbot}~~Hunter~~. (Tr. 169-70; Exhs. 26, 34) No reason was given for this refusal other than that Leigh wanted his property back, freed from Isom's option to purchase. Leigh also demanded that ^{Talbot}~~Hunter~~ contract directly with Leigh Furniture--at more favorable terms to Appellant, of course. (Exhs. 26, 31; Tr. 169, 213-16, 252) Leigh even tried to deal privately with ^{Talbot}~~Hunter~~, behind Isom's back. (Exh. 37)

Both Orville and Richard Isom testified that Richard had reached an oral agreement from ^{Talbot}~~Hunter~~ as to his association with Richard and the purchasing of the property. (Tr. 217, 457, 612-14) Whether the relationship between Isom and "third-party" ^{Talbot}~~Hunter~~ was an oral agreement or just still "prospective," it was still a relationship entitled to protection from Appellant's intermeddling and interference.

Appellant claims that because it did not induce the breach

of a third-party contract, Respondent had only a remedy for breach of contract. (Appellant's Brief at 25-26) Yet the authorities cited by Appellant do not support Appellant's position. For example, Corbin, Contracts, specifically states that breach of an implied promise not to prevent or hinder performance of the contract can be the basis for an action in tort.

. . . [A] and prevention or hindrance should clearly be regarded as wrongful. It is practically immaterial whether the implied promise is a fiction of the court to attain a desirable result or is a justifiable inference of fact. In some cases the wrongful conduct could have been treated as a tort; and it can still be so treated if the courts find it of advantage in the course of justice. . . . Corbin on Contracts, §947, p. 814.

Even as to the contract between Appellant and Respondent, Leigh's conduct in forcing Isom out of business was beyond a mere breach of contract.

Respondent submits that Appellant's conduct was not just a breach of contract, but also constituted unlawful, tortious interference with Isom's business. 23 Drake L. R., supra, at 350-51. In Buxbom v. Smith, 145 P.2d 305 (Cal., 1944), liability was affirmed for interference with the plaintiff's business where the defendants gained "unfair advantage" over the plaintiff through their contractual arrangements with the plaintiff. The California court noted the plaintiff's reliance upon the defendants' performance of the contract and the defendants' unjustified repudiation of their obligations and attempting to take over the business. Id. at 311.

Other courts have affirmed liability for the tortious conduct of trying to force a plaintiff out of business when a

contract between the parties was the basis for the defendants' malicious conduct, such as in the instant case. Cherberg v. Peoples National Bank of Washington, 88 Wash.2d 595, 564 P.2d 1137 (1977); Drouet v. Moulton, supra; Terrell v. Duke City Lumber Company, Inc., supra; Skeels v. Universal C.I.T. Credit Corp., supra.

In Cherberg, a landlord refused to repair the leased premises and terminated plaintiff's lease, forcing the plaintiff restaurant to close. The evidence disclosed that the landlord merely desired to regain control of the premises in order to erect a new building "which they felt might be more profitable." The appeals court held that a lessee should not recover in tort for breach of duty arising out of the lease. The Washington Supreme Court reversed the appellate court, reinstating the jury award.

The court held that the wilful refusal by the landlord to make repairs when under a contractual duty gave rise to an action in tort for intentional interference with the tenant's business relationship with its customers. Recovery in tort was not denied simply because the tortious conduct "may also be viewed as a breach of an implied duty under the lease." 564 P.2d at 1142.

The court stated that:

It appears to be the general view that, in those instances in which the conduct of the breaching party indicates a motive to destroy some interest of the adverse party, a tort action may lie and items of damage not available in contract actions will be allowed. 564 P.2d at 1143.

That court wisely distinguished the older cases of Hein v. Chrysler Corp., 45 Wash.2d 586, 277 P.2d 708 (1954); and Glazer

v. Chandler, 414 Pa. 304, 200 A.2d 416 (1964) (cases cited in Appellant's Brief, pp. 18, 24) as incidents where interference with business were only an incidental consequence of the defendant's conduct. But, in Cherberg, as in the instant case, the motive and purpose of the defendant's conduct was to force its lessee out of business in order to retake the property--a result achieved in each case. (Tr. 169-70, 547)

In Drouet v. Moulton, supra, the defendant sold his tavern to the plaintiff. With the purchase payments still owing, the defendant engaged in conduct intent to destroy plaintiff and regain control of the business. The defendant attempted to accelerate plaintiff's payments under the contract and harassed plaintiff and plaintiff's customers to the extent that plaintiff's liquor license was revoked and plaintiff could no longer operate as a tavern. The court found it was reasonable for the plaintiff to elect to close up rather than continue to accumulate expenses without receipts to meet them. In sustaining the jury's verdict of general and punitive damages, the court stated that

. . . malicious interference with a business is a tort . . . for which general damages may be recovered to the extent of the foreseeable consequences of appellant's conduct. . . . These damages may include loss of profits and injury to the value and reputation of a business. (citations omitted) 54 Cal. Rptr. at 282.

See, also, Guillory v. Godfrey, supra.

The Third Circuit Court of Appeal likewise held that a defendant creditor's breach of financing arrangements with the plaintiff by seizure and removal of the financed vehicles would present a jury question of whether such conduct constituted interference with "prospective economic advantage." Skeels v.

Universal C.I.T. Credit Corp., supra. Although reversing an award of punitive damages, the court affirmed the jury verdict that the defendant's wilful, tortious conduct destroyed plaintiff's business.

In Terrel v. Duke City Lumber Co., Inc., supra, that court affirmed that the conduct of the business lender directed toward the goal of ruining the plaintiff's business and acquiring its assets was tortious. Defendant Duke City contracted to finance the plaintiff but later refused to advance more money unless the plaintiff acceded to various demands to turn over portions of the business to the defendant. Additionally, the defendant usurped much of plaintiff's time and forced the defendant to sign a disadvantageous supplemental agreement. Although the amount of damages awarded Terrel was modified by the New Mexico Supreme Court, the defendant's liability in tort was affirmed. 540 P.2d at 229.

Although Leigh relies upon the Restatement of Torts, Second, Appellant ignores its very language in its argument. (Appellant's Brief at 16-17) Section 766 relates to liability for inducing the breach of a subsisting contract by a third person. Restatement of Torts, Second, §766, supra, at 7-8. As previously noted, Respondent has not exclusively relied upon such a claim in this case.

Section 766A of the Restatement, Second, states the rule for intentional interference with another's performance of his own contract with a third person. Liability is imposed upon improper interference with a contract between another and a

third person by preventing the performance of the other or by causing his performance to be more expensive. Restatement, Second, supra, at 17. There cannot be any question from the record that Leigh's conduct did, in fact, increase the burden and expense to Isom in enjoying his reasonable business relationships with customers and suppliers. (Exhs. 45-49)

Appellant argues "no contract shown--therefore, no liability." Yet Section 766B expressly imposes liability on the intentional interference with "prospective contractual relations" by "preventing the other [Isom] from acquiring or continuing the prospective relation." Restatement, Second, supra, at 20. This section is designed to protect against interference if the "potential contract" would be of pecuniary value to Plaintiff. Included are "interferences with the . . . opportunity of selling or buying land or chattels or services and any other relations leading to potentially profitable contracts." Ibid. at 22. As previously discussed, this section of the Restatement is designed to afford protection to business relations, including those of customer and supplier, and the freedom to conduct one's own business affairs.

Appellant argues that the primary reason for Isom's business problem was a lack of working capital. (Appellant's Brief at 22) In its attempt to reargue the weight of evidence, Appellant has selectively culled Respondent's testimony out of context, ignoring other substantial evidence supporting the jury's verdict. (Tr. 371-72, 386-87, 389, 396, 415-22, 428, 466) Appellant even omits Respondent's following testimony that there

was "no other basis upon which [Respondent] filed bankruptcy other than the actions of Leigh Furniture. . . ." (Tr. 421)

While claiming that Respondent's business failed for lack of working capital, Appellant conveniently avoids the fact that in 1972, Richard Isom had raised \$20,000.00 for additional working capital for the business but was forced to make a substantial prepayment to Leigh to alleviate Leigh's continual threats to cancel the contract. (Exh. 21; Tr. 421, 122-25) But for Leigh's unreasonable, extra contractual demands, Respondent would have had additional operating capital.

All the evidence was properly submitted for the jury's consideration, including the testimony claimed by Appellant to support its opinions. Appellant's views were properly rejected by the jury on the basis of the entire record. The jury's determination that Leigh intentionally and maliciously interfered with Respondent's business relationships, both present and future, is adequately supported by the record. Leigh was properly held liable by reason of his conduct of tortious interference and the jury verdict should be affirmed.

POINT III

APPELLANT'S MALICIOUS AND INTENTIONAL CONDUCT WAS NOT PRIVILEGED.

Appellant also claims a privilege by its harassment and interference with Respondent's business in that Leigh acted to protect his investment. It should be noted that the only evidence from the record from which Appellant can support its claim of privileged conduct is Leigh's own self-serving testimony. (Appellant's Brief, p. 29)

Respondent certainly agrees that in certain cases, lawful conduct which interferes with the business of others may amount to justification. However, that was not the situation in this case. The burden was upon Appellant to establish a defense, a lawful justification or an intention other than to drive Isom out of business. Calbom v. Knudtson, supra, at 152.

The record adequately supports the jury's rejection of Leigh's claim of justification. On numerous occasions Leigh was heard to complain--not about Isom's alleged failure to live up to the contract--but, rather, that Leigh "must have been crazy" to give Isom a ten-year lease and that Leigh had to get the business back so that he could sell the "whole package" for a greater profit. Having received the benefit of his bargain from Isom (e.g., \$53,000.00), Leigh sought to deprive Isom of his benefit.

As early as June, 1971, Leigh openly complained that he

wanted to sell the property but couldn't do so with Richard's lease. Leigh had to do something, he said, and the thing to do was to get Richard out. (Tr. 110-13)

In August, 1972, Leigh again bemoans the ten years, wants to kick Richard out and sell the building. (Tr. 122-24) Leigh requests an appraiser to appraise the property without Isom's lease. (Tr. 273) Later, in 1974 when Isom tried to get Leigh to appoint an appraiser as required by the contract, Leigh boasted that he could sell the property for \$200,000.00 and so there was no reason for him to honor his lease with Richard and sell the property for a lesser sum. (Tr. 158-61) Leigh again admitted he wanted Richard out so he could terminate the lease. (Tr. 169, 547)

Appellant's self-serving claim that Leigh had "fully performed his obligations" (Appellant's Brief, p. 30) flies in the face of his own prior conduct and statements. The claim that Defendant was in default of the purchase and lease agreement is nothing more than Appellant's biased and brazened opinions, unsupported by the record. (Appellant's Brief, p. 30-31) The record does not reflect that Respondent ever refused to comply with the terms of the contract. (Tr. 110, 125, 155-56, 169)

Even if Appellant were motivated by a desire to protect his contractual investment, his refusal to pay his maintenance bills, refusal to even respond to proper requests for approval, his attempts to sell the business to others, his reassertion of the Leany matter after it had been adjudicated, his refusal

to appoint appraisers and his attempts to impose extra-contractual obligations on Isom are not in any way justifiable means to protect a purported investment interest. Respondent submits that Appellant cannot point to any properly protected interest that was served by Leigh's malicious, intentional attempts to force Isom to walk away from the store.

Even more telling is Leigh's refusal to accept Isom's tender of the remaining balance due on the contract. If Leigh's motive was to protect his investment, why, then, would he not accept the final payment rendered five years before it was even due? The reliability of Leigh's testimony, which the jury weighed, is amply demonstrated in Leigh's letter to Isom wherein Leigh claims he has "no agreement" with Isom and is contacting people to sell the "complete package." (Exh. 65) Yet on the witness stand, ^{Leigh}~~Isom~~ claimed that the letter and his deposition testimony were a fabrication. (Tr. 636-39)

Appellant agrees that the jury may look to a "predominate motive." (Appellant's Brief, p. 28) There was substantial, convincing evidence from which the jury properly found that the Appellant did not act reasonably to protect economic interests and that Appellant was not asserting honest claims against Respondent. (Tr. 622) Just because Appellant argues it is so does not make it so, ipse dixit. In its essence, Appellant's motivation throughout this transaction was "personal greed," which motive does not supply a justification for participating

in preventing performance. Corbin on Contracts, §654H (1980 Supp.) at 472. A person is not justified simply in attempting to further his own economic advantage at the expense of another. 47 Northwestern L. R., supra, at 881.

Appellant cannot be heard to reargue the evidence on appeal. The jury's is amply supported by the record. Skeels v. Universal C.I.T. Credit Corp., 335 F.2d 846 (3d Cir., 1964); Barlow v. International Harvester Co., 95 Idaho 881, 522 P.2d 1102, 1114 (1974).

Appellant failed to show any valid and proper interest which Appellant sought to protect. Appellant's conduct was clearly motivated by malice and greed sufficient to belie any claim that his actions were privileged.

POINT IV

RESPONDENT IS ENTITLED TO THE FULL AMOUNT OF DAMAGES AWARDED BY THE JURY AND THEREFORE THE JURY'S VERDICT SHOULD BE REINSTATED BY THIS COURT.

During the course of the trial, Respondent presented substantial testimony of the wilful, malicious conduct of Appellant and "Dub" Leigh to force Respondent Isom out of the furniture business so that Leigh could retake the business and property, after having received \$53,000.00 on the purchase price. Appellant's harassment and intimidations effectively precluded Respondent from making meaningful business decisions or even attending to his business needs. (Tr. 386, 428, 611, 371)

Based upon this and other testimony and Respondent's evidence that his compensatory damages were in excess of \$100,000.00, the jury returned its verdict in favor of Respondent and against Appellant for the sums of \$65,000.00 compensatory damages and \$35,000.00 punitive damages. (R. 84) The court thereupon entered judgment for that amount. (R. 85)

In response to Appellant's Motion for Judgment Notwithstanding the Verdict, claiming that excessive damages were awarded, the court properly stated the rule that punitive damages must bear a "reasonable relationship" to compensatory damages. However, the court then determined that a ratio of only 20% of compensatory damages was "reasonable" since that same approximate percentage had resulted in other cases. The

\$35,000.00 in punitive damages was then reduced to \$13,000.00.
(R. 115-16)

By imposing a fixed percentage ratio, the trial court clearly abused its discretion as a matter of law. The court did not even purport to make its decision based upon the facts of this case (which facts were the jury's prerogative to determine), but erroneously applied a mathematical ratio predetermined by it on the basis of certain prior cases. [See Kesler v. Rogers, 542 P.2d 354 (Utah 1975); and Prince v. Peterson, 538 P.2d 1325 (Utah 1975).]

This Court has properly determined that it is the nature of the wrongful conduct, and not the amount of the actual damage awarded, that determines the propriety and amount of punitive damages. Nash v. Craigco, 585 P.2d 775, 778 (Utah 1978); "Developments in Utah Law," Utah Law Review 1979:347, 367-68. In Boise Dodge, Inc. v. Clark, 92 Ida. 902, 907, 453 P.2d 551, 556 (1969), the Idaho court approved the rule that there is "no fixed or mathematical proportion, ratio or relation between . . . actual damages and . . . punitive damages, which in a proper case may be awarded" In that case the court affirmed punitive damages of \$12,500.00 compared to \$350.00 actual damages. See, also, Elkington v. Foust, 618 P.2d 37, 41 (Utah 1980); Petsch v. Florom, 538 P.2d 1011, 114 (Wyo. 1975); and Oakes v. McCarthy, 267 C.A.2d 231, 73 Cal. Rptr. 127, 147 (1968).

In Evans v. Gainsford, 122 Utah 156, 247 P.2d 431 (1952), this Court stated that there is

. . . no method of precise calculation as to the quantum of . . . [punitive] damages, the exact amount thereof must necessarily be left to the sound discretion of the jury as related to the facts and circumstances in each individual case. 247 P.2d at 434.

This Court in Evans affirmed the trial court's award of punitive damages in an amount approximately equal to the special and general damages awarded--a far cry from the 20% ratio of "reasonableness" set by the trial court here.

In Kesler v. Rogers, supra, the court repeated that

. . . It is sometimes said that such damages should not be unreasonably disproportionate to the actual damages suffered or, perhaps more appropriately, to the nature of the wrong done and the injury caused. 542 P.2d at 359. (Emphasis added)

Unlike the instant case, Kesler and Prince v. Peterson, supra, involved suits in equity where this Court was able to review the decisions of the lower court as the trier of fact and substitute its judgment for that of the trial court. As previously noted, the court should not so regard the jury's verdict. Elkington v. Foust, supra, at 41.

In light of Respondent's evidence that his actual damages were over \$100,000.00, Respondent submits that the jury award of \$35,000.00 punitive damages is not at all disproportionate but actually necessary to adequately reimburse Respondent for the tortious conduct of the Appellant. (Tr. 405, 272, 278, 637, 313) Such an award that merely restores Respondent Isom

and barely makes him whole cannot be said to be shocking to anyone's conscience nor indicate any corruption or passion on the part of the jury. Terry v. Zions Co-op Mercantile Institution, 605 P.2d 314, 328 (Utah 1980), modified on rehearing, 617 P.2d 700 (Utah 1980).

In his majority opinion, in Terry, Mr. Justice Maughan opined that because of the variables involved and the "imprecisions inherent in any award," the amount of a punitive award is in the discretion of the jury in the particular case. 605 P.2d at 328. In that case, this Court reinstated the jury verdict even though the punitive damage award was substantially greater than the compensatory award. Upon rehearing, the reinstatement was reversed because the plaintiff had not properly perfected her appeal. 617 P.2d, supra.

Respondent Isom submits that there was no proper basis upon which the trial judge remitted punitive damages to less than one-half the amount awarded by the jury. The court's Order neither finds the award "shocking" nor engendered by passion, prejudice or corruption by the jury. (R. 115-16) It was an abuse of the trial court's discretion to remit any portion of the punitive damage award. The full sum of the jury's verdict should be reinstated by this Court--\$65,000.00 compensatory damages and \$35,000.00 punitive damages.


CONCLUSION

The evidence before the jury was more than sufficient to find that Appellant Leigh maliciously and intentionally interfered with Defendant's business relations and forced Defendant out of business. In no wise was Plaintiff justified in his tortious conduct. Therefore, the jury's determination of liability should be affirmed.

With regard to punitive damages, the trial court erred in remitting a portion of the punitive damages as there is no evidence or indication of passions or prejudice or that the sum awarded was not reasonable.

The jury verdict should be reinstated in its entirety by this Court and Defendant awarded \$65,000.00 actual damages and \$35,000.00 punitive damages.

Respectfully submitted this 26th day of March, 1981.



Arthur H. Nielsen
Clark R. Nielsen
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1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 532-1900

Attorneys for Defendant-Respondent

MAY 31 1977

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Attorneys for Defendant
410 Newhouse Building
Salt Lake City, Utah 84111

Telephone: 521-3350

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY
STATE OF UTAH

LEIGH FURNITURE AND CARPET)	
COMPANY, a Utah Corporation,)	
)	AMENDED ANSWER
Plaintiff,)	AND COUNTERCLAIM
)	
v.)	
)	
T. RICHARD ISOM, d/b/a)	Civil No. 5463
RICHARD'S FINE FURNISHINGS,)	
)	31334
Defendant.)	

Leave of Court having been obtained, Defendant hereby
files his Amended Answer and Counterclaim against the Plaintiff
as follows:

FIRST DEFENSE

Said Complaint fails to state a claim upon which relief
can be granted.

SECOND DEFENSE

Answering the allegations of said Complaint, Defendant
admits, denies, and alleges as follows:

1. Defendant admits the allegations of Paragraph 1.
2. Defendant admits the allegations of Paragraph 2.
3. Defendant admits the allegations of Paragraph 3.
4. Answering the allegations of Paragraph 4, Defendant
denies that he has breached the covenants of the contract between
the parties and specifically denies the subparagraphs of said
Paragraph 4 except as hereinafter admitted.

(a) Defendant denies that he was two months de-
linquent in the payment of rent at the time of the commencement of
this action.

(b) Defendant denies that he was in default at any time in respect to the matters set forth in subparagraph (b), but alleges affirmatively that if there had ever been any default in this particular, the same was waived by the Plaintiff.

(c) Defendant denies that he was in default in respect to the matters set forth in subparagraph (c) at the time of the filing of the action.

(d) Defendant admits the provisions of the contract as therein set forth and alleges that he has performed the terms and conditions of said agreement in respect to maintaining an inventory.

(e) Defendant denies that he has been in violation of the provisions of the contract referred to in Paragraph (e) and alleges that in any event any failure on Defendant's part to comply strictly with the terms of such paragraph has been waived by the Plaintiff.

(f) Defendant denies the allegations contained in subparagraph (f) and alleges affirmatively that any action in apparent derogation of the written provisions of the contract has been waived by the Plaintiff.

5. Answering the allegations of Paragraph 5, Defendant denies each and every allegation therein contained and alleges that the security to be held for the Plaintiff under the agreement was greatly in excess of the \$27,000.00 still owed under the contract.

6. Answering the allegations of Paragraph 6, Defendant alleges that an audit was commenced by Plaintiff's auditors and Defendant specifically denies that he has failed to comply in any way with the requirements therein alleged.

7. Answering the allegations of Paragraph 7, Defendant denies that he has in any way breached the agreement of May 14, 1970, entitling the Plaintiff to cancel the contract and terminating the Defendant's interests therein. Defendant further alleges that he

had prepaid payments on the contract and an additional payment was not due until December, 1975. Defendant further alleges that Plaintiff was offered the last \$27,000.00 due under the contract of May 14, 1970, but Plaintiff refused to take said payment.

Defendant further alleges that the Plaintiff has never exercised any option to cancel said agreement and has not given to the Defendant any notice of intention to terminate said agreement; that by reason of said failure and also by reason of the Plaintiff's refusal to accept the final payment of \$27,000.00 due under the contract, Plaintiff is not entitled to have a cancellation of said agreement.

8. Answering the allegations of Paragraph 8, Defendant denies that the Plaintiff is entitled to any relief thereunder.

9. Defendant denies each and every allegation of Plaintiff's Complaint not herein specifically admitted or denied.

THIRD DEFENSE

Further answering said Complaint and by way of affirmative defense thereto, Defendant alleges that any failure on the Defendant's part to fulfill any of the terms and conditions of said contract has been waived by the Plaintiff.

FOURTH DEFENSE

Further answering said Complaint and by way of affirmative defense thereto, Defendant alleges that Plaintiff is estopped to assert any alleged failure on the part of the Defendant to comply with the terms of said contract by virtue of the acts and conduct of the Plaintiff.

WHEREFORE, Defendant demands judgment as hereinafter set forth.

COUNTERCLAIM

As a Counterclaim against the Plaintiff, Defendant alleges as follows:

1. On May 14, 1970, Defendant entered into the contract with Plaintiff referred to in Plaintiff's Complaint, and pursuant to said contract the Defendant took possession of the property and business being purchased and the real property leased and commenced the operation of a furniture business and started the performance of said agreement.

2. Approximately one year after entering into said agreement, Plaintiff commenced a course of intentional, wilfull, and malicious conduct designed to force the Defendant out of business and designed to bring the business relationship to an end so that Plaintiff could take back the property.

3. In furtherance of such plan and design, Plaintiff continually harrassed Defendant and made threats of cancelling said agreement. Plaintiff attempted to sell the business and property to others even though the agreement was still in good standing.

4. At the time this action was commenced by the Plaintiff, Defendant was approximately ten months prepaid on the contract of purchase and at that time had paid \$53,000.00 of the original purchase price of \$80,000.00, leaving only a balance of \$27,000.00 owing. Within two days after the action was filed and before summons was served upon the Defendant, Defendant paid the remaining \$27,000.00 in escrow for the use of the Plaintiff and so notified the Plaintiff, but the Plaintiff refused to accept said payment.

5. The conduct of the Plaintiff as aforesaid, and in other particulars not specifically alleged, was malicious, wilfull, wanton and reckless, and designed to force the Defendant out of business so that the Plaintiff could retake and resell the property to other parties at greatly increased profit, and said actions have been carried on by the Plaintiff in reckless disregard for the rights of the Defendant and the Plaintiff's obligations under the contract.

6. Plaintiff's course of misconduct caused Defendant to be evicted from the premises, forced Defendant out of business and into bankruptcy, and otherwise caused him to suffer loss of business and damage to his reputation, to his damage in the sum of \$100,000.00; that Plaintiff's actions have been wilfull, malicious, and intentional, for which Plaintiff should pay punitive damages of \$100,000.00.

7. By reason of the payments made by him, Defendant has an interest in the real property described in the agreement (and hereinafter described), which interest should be determined and awarded to him. Any interest in said property determined to belong to Plaintiff should be impressed with a lien to satisfy any judgment which Defendant might obtain against Plaintiff.

The ground floor and basement and all other space, including the warehouse and outside parking area now used by the present furniture store on the property at 8 East Tabernacle Street, St. George, Utah and described as follows:

Commencing at a point 37.5 feet east of the northwest corner of Lot 5, Block 15, Plat A. St. George City Survey and running thence east 78.25 feet; south 40 feet; east 16.5 feet; south 92 feet; east 33 feet; south 119 feet; west 165 feet more or less to the west line of Lot 5; thence north 197 feet 11 inches; east 37 feet 3 inches; north 53 feet 1 inch to beginning, BUT SUBJECT to the right of way for the adjoining Watson property.

BUT EXPRESSLY EXCLUDING all upstairs rental partments in the building on the property.

8. Defendant is entitled to recover a reasonable attorney's fee in connection with this action.


WHEREFORE, Defendant prays for judgment against the Plaintiff as follows:

1. That Plaintiff's Complaint be dismissed.
2. That Defendant be awarded compensatory damages in the sum of \$100,000.00 and punitive damages in the sum of \$100,000.00.
3. That Defendant's interest in and to the above-described real property be determined and awarded to him and any

remaining interest of Plaintiff be impressed with a lien to secure the payment of any judgment in Defendant's favor.

4. Defendant prays for interest, attorney's fees, and for his costs incurred herein and for such other and further relief as may be just and equitable.

DATED this 26th day of May, 1977.



Arthur H. Nielsen
Clark R. Nielsen
NIELSEN, HENRIOD, GOTTFREDSON & PECK
Attorneys for Defendant
410 Newhouse Building
Salt Lake City, Utah 84111

CERTIFICATE OF SERVICE

SERVED the foregoing Amended Answer and Counterclaim by mailing a copy thereof, postage prepaid, to Gary R. Howe, Callister, Greene & Nebeker, Attorneys for Plaintiff, at his office address 800 Kennecott Building, Salt Lake City, Utah 84133, this 26th day of May, 1977.



AGREEMENT

THIS IS AN AGREEMENT made and entered into this 14
day of May, 1970 by and between Leigh Furniture and
Carpet Company, a corporation, SELLER and T. Richard Ison, PURCHASER
of St. George, Utah, WITNESSETH:

In consideration of the performance of the mutual covenants herein contained, the parties agree as follows:

The seller hereby agrees to sell, transfer and deliver to the purchaser, the following described personal property:

1. The complete inventory of furniture, carpet, appliances and merchandise of the seller at its store at 8 East Tabernacle St. St. George, Utah, but excluding the property of Francis L. Ison.
2. All trucks, motor vehicles and delivery equipment and all fixtures and other equipment owned by the seller and used at the above described store.
3. All other merchandise, equipment, fixtures and personal property owned by the seller and in or used at said store, whether herein specifically mentioned or not, including all cash and bank accounts and all notes, contracts and accounts receivable taken or acquired since January 1, 1970.

As the purchase price for the above property, the purchaser agrees to pay the sum of \$80,000.00 of which the sum of \$10,000.00 is to be paid on the date hereof, receipt of which is hereby acknowledged, another \$10,000.00 within two weeks from date and the deferred balance, together with interest at the rate as hereinafter set forth, in monthly payments of \$500.00 principal, plus accrued interest, continuing over a period of ten years and until paid, the first monthly payment to be made June 1st, 1970 and on the same date of each month thereafter. It is expressly agreed, however, that said deferred balance may be sooner paid if the purchaser so desires, without penalty or premium.

The interest rate on the deferred balance shall be the average between the pass book savings rate and the basic interest rate charged on loans at the State Bank of Southern Utah at Cedar City, Utah, the average interest rate now being 7% but subject to



Change if interest rates change.

It is agreed that the stock of merchandise will be sold in the usual course of business and with the usual purchases and replacements and also that the fixtures and equipment will also be subject to replacement but that all replacements of merchandise and equipment shall be subject to the seller's lien on said property until paid for and in this connection, the seller agrees to transfer the title to any equipment necessary for replacement. Also the purchaser agrees to keep up the merchandise inventory at all times so that it, together with the cash in the bank and accounts receivable shall equal at least \$60,000.00. The purchaser also agrees to furnish to the seller an accurate physical inventory of all merchandise and equipment each three months and also to supply monthly financial statements.

The seller hereby leases and lets to the purchaser the following described property:

The ground floor and basement and all other space, including the warehouse and outside parking area now used by the present furniture store on the property at 8 East Tabernacle Street, St. George, Utah and described as follows:

Commencing at a point 37.5 feet east of the northwest corner of Lot 5, Block 15, Plat A, St. George City Survey and running thence east 78.25 feet; south 40 feet; east 10.5 feet; south 92 feet; east 33 feet; south 119 feet; west 165 feet more or less to the west line of Lot 5; thence north 197 feet 11 inches; east 37 feet 3 inches; north 53 feet 1 inch to beginning, BUT SUBJECT to the right of way for the adjoining Watson property.

BUT EXPRESSLY EXCLUDING all upstairs rental parlments in the building on the property.

The term of this lease shall be for ten years from date, with an option to renew for an additional 10 years under the same terms and conditions except that the minimum monthly rent/as hereinafter set forth shall be governed by the Consumers' Price Index at the time of the beginning of the re-newal term as compared with the Consumers' Price index at the date hereof/ using \$600.00 per month as the base rental. The property is to be used at all times for the operation of a furniture and interior decorator store. The rent shall be paid monthly and shall be 3% of gross sales for the previous month, payable on June 1st, 1970 and on the same day of each month thereafter, but with a minimum-monthly rental of \$500.00 per month in the first year of this lease and a minimum monthly rental of \$600.00 per month

thereafter. It is agreed that the seller is to pay all real property taxes assessed against the property and also is to keep the improvements insured at all times and including liability insurance for damage caused to merchandise of the purchaser from the occupancy of the upstairs rental units by tenants.

Regarding the outside parking lot above referred to, it is agreed that the seller is reserving for the use of his upstairs apartment tenants, parking stalls for 25 cars and that the area adjoining the store on the west side from the store to the gutter is to be used for store parking during store hours but may be used at night or when the store is not open for business, by tenants of the upstairs apartments, with all other space to be the parking space for the purchaser's business.

It is also agreed that the seller shall have the obligation of all exterior maintenance and repairs to the building but that the purchaser shall have the obligation for all interior repairs and re-modeling and decorating. It is agreed also that the purchaser shall have the obligation of all maintenance and repairs of the heating, air conditioning, plumbing and electrical systems for the furniture store space leased to the purchaser to the extent of the first \$500.00 for the cost of repairs and replacements, with the seller standing all expense of replacements and repairs in excess of \$500.00 for any one replacement or repair.

It is further agreed that the upstairs apartments shall pay for their own electricity and also the total cost of hot water heating and also the purchaser agrees to maintain and keep in operation the hot water heater and furnace which supply the heat and hot water for the furniture store and also the upstairs apartments but it is agreed that the seller is to stand and pay 60% of the cost of space heating, payable each month heat is furnished the apartments.

It is also agreed that no part of the property herein or this lease assigned leased may be sub-leased to any other party without the consent of the seller first had and obtained. The purchaser also agrees to keep his stock of merchandise and also the equipment insured against loss by fire and also to maintain liability insurance at all times.

It is agreed that at such time as the seller

balance of the purchase price has been paid, the purchaser shall have the option to purchase the above described real property, including the upstairs rental apartments, at a price to be determined by a committee of three appraisers, one of whom shall be appointed by the seller, one by the purchaser and the two so appointed shall appoint a third member and all shall be business men or real estate appraisers of St. George, Utah. Upon payment of the purchase price so determined, the purchasers shall be entitled to a Warranty Deed for the property and also an abstract of title or policy of title insurance, showing title thereto to be in the seller, free and clear of all liens, claims, clouds and encumbrances.

It is further agreed by the parties, that the above described stock of merchandise and equipment and fixtures are being sold free and clear of all liens, claims and indebtedness incurred prior to January 1, 1970, with the purchasers to pay all claims and indebtedness incurred after said date and the seller also agrees to comply with the Bulk Transfer Laws of the State of Utah in reference to this sale.

The seller expressly agrees that for a period of ten years from the date hereof, it will not either directly or indirectly, engage in or be connected with a furniture, appliance or interior decorator store in Washington County, Utah and this restriction shall also apply to the said W. S. Leigh personally.

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.

Upon payment in full of the purchase price and interest, this agreement shall be deemed a bill of sale for the inventory of merchandise, fixtures and equipment and personal property then on hand.

WITNESS the hands of the parties the day and year first above written.

LEIGH FURNITURE and CARPET COMPANY
a corporation,

By W. S. Leigh
President

Signed in the presence of

SELLER

Arthur Sosa

Richard Isom

PURCHASER

STATE OF UTAH)

SS

County of Iron)

On this 14 day of May, 1970 personally appeared before me W. S. Leigh, President of Leigh Furniture and Carpet Company, a corporation, one of the signers of the within instrument, who duly acknowledged to me that he executed said instrument for and on behalf of the corporation by authority of a Resolution of the corporation and he duly acknowledged to me that the corporation executed the same.

Also on this 14 day of May, 1970 personally appeared before me T. Richard Isom, signer of the within instrument, who duly acknowledged to me that he executed the same.

Arthur Sosa

Notary Public

My Commission Expires

July 10 1971

AGREEMENT

THIS AGREEMENT made and entered into this 28 day of September, 1972, by and between LEIGH FURNITURE AND CARPET COMPANY, a corporation, (hereinafter referred to as "LEIGH") and T. RICHARD ISOM (hereinafter referred to as "ISOM") an individual doing business as "Richard's Fine Furnishings" of St. George, Utah, WITNESSETH:

WHEREAS, the parties to this Agreement had previously entered into an agreement dated the 14th day of May, 1970, wherein "Leigh" as the seller and "Isom" as the purchaser agreed, among other things, as follows:

- a) "Leigh" sold to "Isom" the complete inventory and equipment of a furniture business located in St. George, Utah;
- b) "Leigh" leased to "Isom" certain real property located in St. George, Utah, said property to be used by "Isom" for the purpose of operating a retail furniture business. Lease was to run ten years with an option of renewal for ten years;
- c) "Isom" also was granted an option to purchase the leased premises upon payment in full of the purchase contract for the inventory and equipment; and

WHEREAS, there has accrued during the term of the prior agreement various disputations between the parties thereto giving rise to a threatened impairment of "Leigh's" security for completion of the aforesaid agreement; and

WHEREAS, the parties hereto are desirous of clarifying their respective positions relative to the prior agreement and avoiding any future conflicts arising from interpretation of said prior agreement:



NOW THEREFORE, Leigh Furniture and Carpet Company, a corporation, and T. Richard Isom, mutually covenant and agree as follows:

1. This Agreement does not alleviate the obligations incurred by the parties pursuant to the agreement dated May 14, 1970. Neither party relinquishes or waives any rights to enforce the terms of that prior agreement. However, where the terms and covenants of this Agreement clearly and unmistakably conflict with or modify the terms of the prior agreement, the terms of this agreement shall govern the rights and obligations of the parties.

2. "Isom" agrees to pay to "Leigh" upon execution of this Agreement the sum of Ten Thousand Dollars (\$10,000.00). "Isom" further agrees to pay to "Leigh" an additional Ten Thousand Dollars (\$10,000.00) on or before January 15, 1973. The aforementioned payments shall be credited to the unpaid purchase price of the May 14, 1970, agreement and "Isom" agrees to continue to make the lease and interest payments as set forth in that agreement.

3. "Isom" agrees that should he default in making the payments provided for in the preceding paragraph that he will immediately turn over the operation and management of the business known as "Richard's Fine Furnishings" to "Leigh". "Isom" agrees that should said default occur the same shall terminate all of "Isom's" claim or right to enforce the prior agreement of May 14, 1970. In essence, "Isom" agrees that default on this Agreement will also be construed as a material breach of the former agreement and hence immediate forfeiture of "Isom's" interest in said agreement.

4. It is agreed that for purposes of calculating the \$60,000.00 minimum of "merchandise inventory . . . together with the cash in the bank and accounts receivable" as provided for in

the second page of the prior agreement, there shall be deducted the sum of Four Thousand Dollars (\$4,000.00) from the inventory as indicated on the financial statement of "Isom". This sum represents a contingent claim to inventory by Mr. Francis L. Leany. "Isom" does not acquiesce to the validity of said contingent claim but does agree to the reduction for the purposes set forth above.

5. It is agreed between the parties that before "Isom" sells, transfers or in any manner diffuses his present ownership interest in the business known as "Richard's Fine Furnishings" or any furniture business wherein "Isom" has an ownership interest and which is located in St. George, Washington County, State of Utah, he shall first obtain written approval of "Leigh". Diffusion of "Isom's" present ownership interest could take the form of a partnership arrangement (limited or general), sale of a portion of the business, selling a corporate interest if the business is incorporated or any other method of reducing "Isom's" present 100% ownership of the business. "Isom" shall seek approval by submitting a written request disclosing the person, persons or business entity that proposes to become involved, as an owner, or capital investor of "Richard's Fine Furnishings" its successors and assigns. "Leigh" shall respond to "Isom's" request without inordinate delay, by either approving said request or stating the basis upon which "Leigh" refuses the request.

6. "Isom" agrees that "Leigh" is entitled to make bi-annual audits of "Isom's" business records beginning January 1, 1973, and every six months thereafter. "Leigh" agrees that said audits shall be made at "Leigh's" expense and shall be so conducted as to avoid any interference with the normal operation of "Isom's" business.

7. "Isom" agrees to furnish "Leigh" a policy of fire insurance covering the inventory of the furniture business wherein

"Leigh" shall be designated as a "Loss Payee". Said policy shall be in an amount equal to or exceeding the unpaid balance on the inventory-equipment purchase agreement. Failure to maintain said fire insurance in full force and effect during the duration of the purchase agreement shall constitute a material breach of contract.

8. "Isom" agrees that "Leigh" is entitled to a security interest in and to all accounts receivable of "Richard's Fine Furnishings". Isom further agrees to execute any and all documents necessary to pledge said accounts receivable as security for payment of the balance of the inventory-equipment purchase agreement. "Leigh" agrees that upon receipt of payment in full of said agreement, to release said security interest and also the security interest that "Leigh" presently has in "Isom's" inventory, merchandise and equipment.

9. "Isom" agrees that after the expiration of the period to which the prepayment of principal is applicable as set forth in paragraph #2 herein, he shall resume payments on the unpaid balance as required in the May 14, 1970, agreement.

10. "Isom" further agrees to pay to "Leigh" the sum of Three Hundred Fifty Six and 70/100 Dollars (\$356.70), representing the 1971 inventory tax mistakenly paid by "Leigh", said tax being an obligation of "Isom's".

Dated the date first appearing above.

LEIGH FURNITURE AND CARPET COMPANY

BY *W. D. Leigh*

ITS *T. Richard Isom*

T. Richard Isom

Gary R. Howe of
CALLISTER, KESLER & CALLISTER
ATTORNEYS FOR PLAINTIFF
SUITE 800 KENNEDY BUILDING
SALT LAKE CITY, UTAH 84111
TELEPHONE 363-3819

IN THE DISTRICT COURT FOR WASHINGTON COUNTY

STATE OF UTAH

LEIGH FURNITURE AND CARPET
COMPANY, a Utah Corporation.

Plaintiff.

Civil No. _____

-vs-

COMPLAINT

T. RICHARD ISOM, d/ba RICHARD'S
FINE FURNISHINGS,

Defendant.

FIRST CAUSE OF ACTION

The plaintiff complains of the defendant, T. Richard Isom,
and for cause of action alleges as follows:

1. The plaintiff herein is a corporation existing by virtue
of the laws of the State of Utah with its principal place of busi-
ness in Cedar City, Iron County, State of Utah.

2. Defendant is a resident of Washington County, wherein
he operates a retail furniture store known as Richard's Fine
Furnishings.

3. On or about the 14th day of May, 1970, the plaintiff
and defendant entered into a written agreement, a copy of which is
attached hereto as Exhibit "A" and by reference made a part hereof,
whereby the plaintiff (a) sold various items of inventory and equip-
ment for which the defendant agreed to make payment and (b) the
plaintiff leased to the defendant a store located in St. George,
Washington County, State of Utah.



4. The defendant has materially breached the covenants of the aforementioned contract in the following manner:

(a) The defendant is two months delinquent in making payment of principal and interest on both the personal and real property portions of the agreement.

(b) The defendant has sold various sewing machines (not part of the inventory but fixed assets) without replacing the same as agreed to on page #2 of the agreement.

(c) The defendant agreed to replace the stock of merchandise sold in the ordinary course of business, which defendant has not done.

(d) Defendant agreed to keep the merchandise inventory cash in bank and accounts receivable at all times in an amount equal to or in excess of \$60,000.00 in value, which defendant has failed to do.

(e) Defendant agreed to furnish the plaintiff "an accurate physical inventory of all merchandise and equipment each three months and also to supply monthly financial statements" which defendant has partially failed to comply with or has been unreasonably slow in furnishing said statements.

(f) It was further agreed by the defendant that he would make all necessary repairs of the heating, plumbing, air conditioning and electrical systems for the furniture store leased to the defendant up to the first \$500.00 of such repairs. Plaintiff alleges that defendant has failed to pay for repairs that have been performed on said plumbing, heating and air conditioning systems.

(g) Plaintiff believes and therefore alleges upon such information and belief that defendant has sub-let certain portions of premises, in particular, certain parking areas, in contravention of the agreement.

5. Pursuant to the default provisions of the agreement the plaintiff seeks an order of this Court terminating defendant's interest in the contract and directing the defendant to immediately vacate the premises allowing the plaintiff to take possession thereof.

SECOND CAUSE OF ACTION

6. The plaintiff realleges paragraphs #1 - #5 of plaintiff's First Cause of Action and incorporates the same herein.

7. Plaintiff alleges that pursuant to the aforementioned contract the plaintiff was granted a security interest in all merchandise and inventory located on the business premises of the defendant, including replacements and additions to said merchandise and equipment.

8. The defendant further indicated the nature of plaintiff's security interest by executing a Financing Statement, a copy of which is attached hereto as Exhibit "B" and by reference made a part hereof.

9. Pursuant to the defendant's most recent balance (copy attached as Exhibit "C") the defendant's inventories of merchandise is listed as \$54,743.70, however, plaintiff alleges that said inventory is overstated by \$4,000.00, said amount representing inventory belonging to Mr. Francis Leany as per page one of the contract between plaintiff and defendant. Thus the inventory should be properly shown as \$50,743.70.

10. Plaintiff believes and upon information and belief alleges that the Accounts Payable shown on Exhibit "C" of \$52,156.60 represent almost entirely creditors who have supplied inventory to the defendant.

11. Although plaintiff claims a priority interest in the aforesaid merchandise inventory it is apparent that plaintiff's claim of \$47,000.00 due on the contract between plaintiff and

defendant is in serious jeopardy from claims of creditors wherein the plaintiff would be subjected to numerous defenses of its priority position.

12. Plaintiff alleges that the defendant has a current inventory of \$50,743.70 with real and possible or contingent claim to said merchandise in the amount of \$100,352.88. (Plaintiff's claim of \$47,000.00; inventory creditors' claim of \$52,156.60; and accrued taxes of \$2,196.28).

13. Plaintiff alleges that its security position is materially threatened by the current financial status of the defendant's business; that unless a receiver is appointed by the Court immediately the plaintiff stands to lose considerable investment as will other creditors of the defendant. Wherefore the plaintiff alleges that it would be in the best interests of all parties concerned that the Court set a time and place for a hearing pursuant to Rule 66 of the Utah Rules of Civil Procedure, for the purpose of appointing a Receiver to take immediate operation of Richard's Fine Furnishings for the protection of plaintiff and other creditors of the defendant.

14. Plaintiff believes and alleges upon such belief that because of the nature of defendant's business all inventory to which plaintiff's security interest attaches is subject to removal, disposal or being lost or liquidation.

WHEREFORE, plaintiff prays for judgment against the defendant as follows:

FIRST CAUSE OF ACTION

1. For termination of the contract (Exhibit "A") pursuant to the terms of said contract arising from defendant's material breach of the same.

2. For an order of the Court directing defendant to turn over immediate possession of the premises, including the merchandise and equipment to the plaintiff.

3. For the forfeiture pursuant to the contract, of all amounts paid pursuant to the contract as liquidated damages.

4. For costs of court incurred herein and such other and further relief as the Court deems just to award in the premises.

SECOND CAUSE OF ACTION

1. For termination of the contract (Exhibit "A") pursuant to the terms of said contract arising from defendant's breach of the same.

2. For the appointment of a Receiver pursuant to Rule 66, Utah Rules of Civil Procedure to take immediate possession of the business known as Richard's Fine Furnishings to either liquidate the same or to operate the business until such time as the Court deems it appropriate to liquidate the business or should the business establish a more stable financial status, then to turn the operation over to the defendant.

3. For costs of court incurred herein and such other and further relief as the Court deems just to award in the premises.

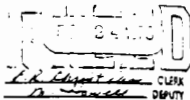
Dated this _____ day of September, 1972.

CALLISTER, KESLER & CALLISTER

BY /s/ Gary R. Howe
Attorneys for Plaintiff
Suite 800 Kennecott Building
Salt Lake City, Utah 84111

Address of Plaintiff:
Cedar City, Utah

Gary R. Howe
CALLISTER, GREENE & NEBEKER
Attorneys for Plaintiff
Suite 800 Kennecott Building
Salt Lake City, Utah 84133
Telephone 531-7676



IN THE DISTRICT COURT FOR WASHINGTON COUNTY

STATE OF UTAH

LEIGH FURNITURE AND CARPET)
COMPANY, a Utah Corporation.)

Plaintiff,)

vs.)

T. RICHARD ISOM, dba RICHARD'S)
FINE FURNISHINGS,)

Defendant.)

COMPLAINT

Civil No. 5463

N° 34325

The plaintiff complains of the Defendant, T. Richard Isom, and for cause of action alleges as follows:

1. The plaintiff herein is a corporation existing by virtue of the laws of the State of Utah with its principal place of business in Cedar City, Iron County, State of Utah.
2. Defendant is a resident of Washington County, where he operates a retail furniture store known as Richard's Fine Furnishings.
3. On or about the 14th day of May, 1970, the plaintiff and defendant entered into a written agreement, a copy of which is attached hereto as Exhibit "A" and by reference made a part hereof, whereby the plaintiff (a) sold various items of inventory and equipment for which the defendant agreed to make payment and (b) the plaintiff leased to the defendant a retail furniture store located in St. George, Washington County, State of Utah.
4. The defendant has materially breached the covenants of the aforementioned contract in the following manner:
 - (a) The defendant is two months delinquent in making payment on the lease portion of the agreement.

(b) The defendant has sold various sewing machines (not part of the inventory but fixed assets) without replacing the same as agreed to on page 2 of the agreement.

(c) The defendant agreed to replace the stock of merchandise sold in the ordinary course of business, which defendant has not done.

(d) Defendant agreed to keep the merchandise inventory, cash in bank and accounts receivable at all times in an amount equal to or in excess of \$60,000.00 in value, which defendant has failed to do.

(e) Defendant agreed to furnish the plaintiff "an accurate physical inventory of all merchandise and equipment each three months and also to supply monthly financial statements" which defendant has partially failed to comply with or has been unreasonably slow in furnishing said statements.

(f) Plaintiff believes and therefore alleges upon such information and belief that defendant has sub-let certain portions of premises, in particular, certain parking areas, in contravention of the agreement.

5. The plaintiff believes and alleges upon information and belief that the present market value of defendant's given inventory is less than the amount due and owing to the plaintiff pursuant to the attached agreement. That amount being in the sum of \$27,000.00. Plaintiff further alleges upon information and belief that defendant's equity interest in the available inventory is virtually nil.

6. Plaintiff has requested the opportunity to take a physical inventory and complete audit of defendant's business at plaintiff's expense. Said audit having been agreed to by defendant in an agreement between the parties dated September, 1972; however, defendant has refused plaintiff's request for such an audit.

7. Pursuant to the default provisions of the attached agreement the plaintiff seeks an order of this Court terminating defendant's interest in said agreement and directing the defendant to immediately vacate the premises allowing the plaintiff to take possession thereof.

8. In the alternative the plaintiff seeks a Temporary Restraining Order from the above-entitled Court restraining defendant from further conducting

business in any manner whatsoever at the location of "Richard's Fine Furnishings" in St. George, Utah, until such time as a complete certified audit can be taken of said business. Plaintiff further requests that if, in fact, said audit should disclose that plaintiff's security is in jeopardy or that the terms and conditions of the attached agreement have not been complied with by the defendant as alleged herein, that pursuant to Rule 66 of the Utah Rules of Civil Procedure a receiver be appointed by the Court for purposes of liquidating the existing inventory pursuant to the terms and conditions of the attached agreement.

WHEREFORE, plaintiff prays for judgment against the defendant as follows:

1. For an order of the above-entitled court terminating defendant's interest in the agreement dated the 14th day of May, 1970, and vesting in plaintiff immediate possession to the premises described in said agreement.

2. That a Temporary Restraining Order be issued forthwith restraining defendant from further conducting any business whatsoever at the business known as "Richard's Fine Furnishings," St. George, Utah, until such time as a certified audit can be taken and filed with the above-entitled court. If in the opinion of this court the aforesaid audit evidences a failure on the part of the defendant to maintain proper security for repayment of the obligation presently due and owing to the plaintiff, that in that event a receiver be immediately appointed for purpose of liquidating the business known as "Richard's Fine Furnishings." Said liquidation to proceed in accordance with the terms and conditions of the May 14, 1970 agreement. If reasonable liquidation fails to produce the sum of \$27,000.00 then upon said occurrence plaintiff prays for judgment against the defendant for the amount of said deficiency.

3. For other and further relief as the Court deems just to award in the premises.

DATED this 18th day of February, 1975.


Gary R. Howe

MAILING CERTIFICATE

I hereby certify that I served the forgoing Brief by mailing two copies, postage prepaid, to Gary R. Howe and W. Clark Burt, 800 Kennecott Building, Salt Lake City, Utah 84133, Attorneys for Appellant, this 26th day of March, 1981.