1981

# First Security Bank of Utah, N.A. v. J.B.J Feedyards, Inc. And Don Allen, dba Mt. Nebo Cattle Company : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

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| FIRST SECURITY BANK OF UTAH, N.A., | : | |
| Plaintiff and Respondent | : | |
| vs. | : | Case No. 17269 |
| J. B. J. FEEDYARDS, INC., a corporation, et al., | : | |
| Defendants. | : | |
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| DON ALLEN, dba MT. NEBO CATTLE COMPANY, et al., | : | |
| Intervenors and Appellants. | : | |

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH
HONORABLE JOSEPH I. DIMICK, JUDGE

# BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from portions of the Judgment granted by the Honorable Joseph I. Dimick, sitting by designation as Judge of the Fourth Judicial District Court, in and for Utah County, State of Utah, on July 26, 1980, which denied an award of certain claimed damages against Plaintiff-Respondent, arising out of an alleged wrongful attachment of certain cattle.

## DISPOSITION IN LOWER COURT

After trial, submission of memoranda and oral argument, the trial court granted a money judgment in favor of Intervenors-Appellants on some of their claims and denied judgment on the other claims which are here under appeal.

## RELIEF SOUGHT ON APPEAL

Intervenors-Appellants seek reversal of the judgment insofar as it denied the award of additional damages in favor of Intervenors against Plaintiff-Respondent.

This Court will observe that the present appeal is a companion to Case No. 17270, wherein First Security is the appellant as to the money judgment actually awarded against it.

## STATEMENT OF FACTS

The issues presented by this appeal concern only the alleged damage liability of Plaintiff-Respondent First Security Bank of Utah, N.A. ("First Security") to the Intervenor, Don Allen, d.b.a. Mt. Nebo Cattle Company, and his wife (for convenience, the term "Intervenors" is used). All other issues as to all other parties have been previously decided. Even though this appeal is limited to the damages which the court below found too speculative to support a judgment, a brief statement of the principal background facts will be helpful to an understanding of the issues presented.

On or about April 20, 1972, First Security made a series of loans to J.B.J. Feedyards, Inc. for the financing of certain

feeder animals (Tr. 486-489). These loans were evidenced by three promissory notes (Tr. 486-89; Exhibits A-42 to A-44) and were secured by a series of properly perfected security interests in, inter alia, the cattle of J.B.J. (Tr. 488, 489; Exhibits A-45 to A-49). The loans totaled $218,200.00.

In the latter part of 1972 and early 1973 it became apparent that the financial condition of J.B.J. was deteriorating rapidly. The notes were seriously delinquent (Tr. 502, 503, Exhibit 60), J.B.J. became overdrawn in its checking account at First Security by as much as $60,000.00 (Tr. 500), and serious shortages (approximately 392 animals) appeared in the inventories of cattle securing the notes (Tr. 494-500, 522). It was also apparent that the cattle kept at the J.B.J. Feedyards premises were not being adequately cared for, and did not have sufficient feed or medication. Also, the corrals were an absolute quagmire (Tr. 405-410, 511). Dr. Jensen, the veterinarian, "felt sorry" for the animals (Tr. 406).

In addition, First Security representatives saw that some of the J.B.J. cattle carried two brands, including a strange brand, "V5" on the right ribs. Many of the then recent sales of J.B.J. cattle included animals bearing the V5 brand (Tr. 102 and Exhibits A-33 to A-37). Upon checking, the Bank determined from the state officials that such brand was registered to a "Mt. Nebo Cattle Co.", Goshen, Utah (Exh. A-3). Mr. Broadbent of the Bank asked Mr. Boswell (who was a "double agent" for both J.B.J. and

Mt. Nebo) about the V5 brand and was told it was Mr. Boswell's brand. Mr. Broadbent assumed that J.B.J., with management of Boswell, was selling animals under a different name (Tr. 505,507). Mr. Boswell paid for and filed the registration (Tr. 242). At that time, no knowledge of Intervenors' interest was held by First Security, and the public filings (Exh. A-3) showing Mt. Nebo Cattle evidenced nothing by which Intervenors themselves could be identified. Two days after First Security filed the attachment action, Mr. Broadbent learned of the claims of Don Allen, Intervenor (Tr. 566) and the litigation proceeded to test those claims.

Plaintiff commenced the initial action on February 7, 1973 to recover the sums owing by J.B.J. Feedyards. (Civil No. 38191, Fourth District Court for Utah County). On the same day, it filed an appropriate Attachment Bond and Affidavit in Support of Writ of Attachment, whereupon the Clerk of the Fourth Judicial District Court duly issued a Writ of Attachment (R. 522). The Writ was thereafter levied by the Sheriff of Utah County upon certain livestock located at the feedyards operated by J.B.J. The cattle were subsequently moved to the Lazy S Ranch, also in Utah County, where the animals received care, medication and proper feeding (R. 405-410, 436-440, 522). The attachment was effected only after consultation with the veterinarian who examined the cattle (R. 405), and after the directors of J.B.J. had requested that First Security take such action (R. 392; Exhibit A-41).

On February 9, 1973, Intervenors were granted leave to intervene in this action and filed a Motion to Quash the Writ of Attachment, claiming that the cattle belonged to them and not to J.B.J. On or about February 21, 1973, all parties, including Intervenors, stipulated that the livestock be sold for the highest obtainable price, and that the funds be held awaiting disbursement in accordance with the findings of the Court (Exhibit A-14).

On April 6, 1973, Intervenors' Motion to Quash Writ of Attachment was granted. The subject cattle were sold prior to trial, and the proceeds were held, subject to the disposition thereof according to the findings of the Court. In the meantime, Zions First National Bank filed suit against First Security, claiming a security interest in the same cattle through Intervenors (Civil No. 38327, Fourth District Court, Utah County, State of Utah).

The trial was held in Civil No. 38327, wherein Judge Ballif found and adjudged that all of the subject cattle belonged to Intervenors. The judgment was appealed by First Security to the Utah Supreme Court, which affirmed the judgment of the trial court in Zions First National Bank v. First Security Bank of Utah, N.A., 534 P.2d 900 (Utah 1975). That decision specifically reserved the issues presented in this appeal, i.e., whether Intervenors are entitled to additional damages resulting from the attachment.

Subsequent to the Utah Supreme Court decision on the prior issues, the Bank satisfied the judgment by paying to Zions First National Bank and Intervenors, on May 16, 1975, the proceeds from the sale of the cattle, less sums awarded by the Court to the Bank as a setoff for costs incurred in feeding the cattle prior to sale. The discharge of that decree is evidenced by a Satisfaction of Judgment signed by Zions Bank and Intervenors (R. 1649). Important to the issues here is the fact that Intervenors or their bank received the sum of $106,720.58 in May, 1975, representing every penny of the net proceeds of the sale of the cattle including interest to the date of satisfaction. (That figure is net of the feed bills paid by First Security to preserve the animals.)

The trial giving rise to this appeal concerned only the issue of whether First Security is liable to Intervenors for damages resulting from the attachment in addition to the sale proceeds already paid. By Judgment dated July 26, 1980, the Honorable Joseph I. Dimick found that First Security had acted maliciously and without probable cause, and thus was liable for damages to Intervenors as a result of the attachment.

Despite the generous nature of the damages which were granted for what was clearly not a wrongful attachment as argued in the companion brief of First Security as appellent (Case No. 17270), Intervenors seek to have this Court impose additional damages which the lower court found conjectural and speculative.

ARGUMENT

POINT I

COMMENTARY ON THE RECORD.

Plaintiff-Respondent First Security believes it will be useful to the Court, in review of the lengthy Record before it, to have this party's designation of those portions of the Record which are most relevant. The complexity requiring such designation arises from the fact that the Record submitted by the clerk of the lower court includes transcripts and pleadings from the prior trial which are not really relevant to this appeal. The case designated below as Civil No. 38,327, Zions First National Bank vs. First Security Bank of Utah, N.A., concerned the issue of title to the cattle, was tried, appealed and disposed of, and the judgment paid. It is not helpful for the Court on the present appeal to look at more than a few of the documents pertaining thereto. Intervenors' Complaint and Petition for Damages on which the subject trial proceeded is part of the record (R. 1653), and is to be deemed part of this case initiated by Plaintiff-Respondent First Security Bank, No. 38,191 below (R. 164). The findings, conclusions, judgment (R. 1592) and satisfaction of judgment (R. 1649) are relevant, as in:

File No. 3, No. 38,327 Civil, Fourth District Court, showing ink stamped pages 1579 to 1734.

Except as just noted, Respondent here submits that this Court should consider as immaterial to this appeal (and a waste of time

to review) the volumes of the Record designated in the following manner:

> File No. 1, No. 38,327 Civil, Fourth District Court, Record on Appeal to the Supreme Court of Utah, No. 13725, beginning with a title page showing both a "1" and a "456" in ink stamped page numbers;
>
> File No. 2, No. 38,327 Civil, Fourth District Court, Supreme Court No. 13725, beginning with a pleading consisting of an Intervenor's Motion, showing both a "219" and a "229" in ink stamped page numbers.
>
> Transcript of trial during various days from January 2, 1974 to February 13, 1974: Vol. I, showing pages 1-322 (typed) and pages 458-779 (ink stamped); Vol. II, showing pages 1-753 (typed) and pages 780-1210 (ink stamped); and Vol. III, showing pages 1-1120 (typed) and pages 1211-1578 (ink stamped).

Respondent here further submits that the relevant portions of the record to be reviewed as part of this appeal, and to which citations are made in the briefs of the parties, and the volumes designated in the following manner:

> File No. 1, No. 38,191 Civil, Fourth District Court, beginning with page 1 of the Complaint of First Security Bank of Utah, N.A., page ink stamped "164", and ending with a minute entry page ink stamped "333";
>
> File No. 2, No. 38,191 Civil, Fourth District Court, beginning with page 1 of an Intervenors' Rebuttal Memorandum, ink stamped page "332", and ending with a certificate page ink stamped "152";
>
> File No. 3, No. 38,191 Civil, Fourth District Court, beginning with a Title Page, Civil No. 38, 191, Supreme Court No. 17269, ink stamped

page "1", and ending with a page of a stipulation and order ink stamped page "151"

Transcripts of trial proceedings December 11, 12 and 13, 1978: Vol. I, showing pages 1-191 (typed) and pages 615-805 (ink stamped); Vol. II, showing pages 191-A-604 (typed) and pages 806-1218 (ink stamped).

Various exhibits marked A-1 through A-78 pertaining to the foregoing.

Intervenors-Appellants and Plaintiff-Respondent refer to the transcript of trial by the typed page numbers in their respective briefs.

## POINT II

### THE ADDITIONAL DAMAGES CLAIMED BY INTERVENORS ARE SPECULATIVE, CONJECTURAL AND EXCESSIVE.

It is not necessary to repeat here the arguments made by First Security in its Appellant's brief in the companion Case No. 17270. The Court is already cognizant of the position taken by First Security to the effect that the attachment of the cattle which were later determined by the court to be those of Intervenors was a good faith act of the Bank taken to protect cattle which it then believed to be collateral to its loans to J.B.J. Feedyards. Based on that position and related arguments, First Security has asserted that no money judgment in favor of Intervenors should have been rendered. The argument here, in contrast, proceeds on the assumption, arguendo, that even if the

lower court's findings regarding a wrongful attachment were correct as partially supporting the judgment now existing in favor of Intervenors, the additional damages for which Intervenors seek relief from this Court are so speculative, conjectural and excessive as to be entirely outside the realm of propriety or law. Accordingly, those portions of the judgment appealed from which denied the additional damages should be affirmed in all respects.

The grounds for additional damages will be analyzed separately as follows.

A. Loss on attached Animals

Intervenors argue that due to the attachment of the cattle and the subsequent theorized weight loss in moving the cattle, that Intervenors' cattle were sold at a loss. The trial court was convinced that a preponderance of evidence did not exist, and denied Intervenors' purported damages for this claim.

1. The Applicable Law.

The law on this proposition is clear. Unless it can be shown by a preponderance of evidence that damage was actually suffered, no damages will be awarded.

> "Formerly the tendency was to restrict the recovery to such matters as were susceptible of having attached to them a pecuniary value, but it is now generally held that the uncertainty referred to is uncertainty as to fact of damage, and not as to its amount . . ." (emphasis added).

Bee v. San Pedro and S.L.R. Company, 50 Utah 167, 167 P. 246, 253 (1917).

In a more recent case the Utah Supreme Court has stated,

> "[D]amages to a business or enterprise need only be proved with sufficient certainty that reasonable minds might believe from a preponderance of the evidence that the damages were actually sufferred." (emphasis added).

Howarth v. Ostergaard, 30 Utah 2d 183, 515 P2d 442, 445 (1973).

In order for Intervenors to recover the purported damages for loss on attached animals they were required to demonstrate by a preponderance of evidence that they actually suffered damages, and with a reasonable amount of certainty the amount of damages suffered. The burden of proof was not met on either proposition.

2. No Damage Occurred.

Intervenors were completely unable to show by any credible evidence that damages even occurred. Computations from Exhibit A-16 show that the average weight of 210 bulls one week before attachment was 1264 lbs. At the time of sale after attachment the average weight of these bulls was 1325 lbs. This means that from the period of time of one week before the attachment to immediately after the sale the cattle had an average gain of 61 pounds per animal. When the Court observes from the evidence the deplorable conditions in which the Bank found the cattle prior to the attachment, with overcrowding, lack of

sufficient feed, lack of proper medication, lack of proper segregation, evidence of starvation and dead animals left in the stockyard, it is very evident that Intervenors were not damaged by the attachment and subsequent removal from the J.B.J. yards to another feedyard where the cattle were cared for under supervision of First Security. In fact, Intervenors actually benefitted from having the cattle attached and removed from J.B.J.'s guagmire to the Lazy S yards where they gained an average of 61 pounds. Had the cattle remained in the J.B.J. properties the Intervenors' investment in these cattle would have rapidly diminished.

In their Brief, Intervenors claim $28,929.48 as loss (compared with $44,000.00 claimed in the original Petition for Damages and $37,248.84 claimed in their memorandum after trial). The most recently claimed figure apparently is derived from testimony of Dr. Carpenter (Tr. 135-136) and the rough calculations shown on the first page of Exhibit A-16. None of Intervenors' figures are well founded. They seem to be created from a combination of the supposed loss of weight and loss of sale value, curiously gathered in a convoluted mix of logic and fact. In order for the Court to follow the general ideas of Intervenors and the counter-argument of Respondent herein, it is useful to refer to the respective exhibits and to the original Findings of Fact signed by Judge Ballif at the time he determined that the attached cattle belonged to Intervenors (R. 1592).

Finding No. 23 and paragraph 5 of the June 4, 1974, Judgment (R. 1612) confirm that the subject attached cattle were sold for $114,459.07. The foregoing total of 266 can be retabulated to show a total of 213 bulls, 22 cows, 21 steers and 10 heifers. These are the only cattle with which the Court at any time should be concerned. Yet at the very outset of the analysis of Intervenors' damage claims, we find a gross discrepancy on the first page of Exhibit A-13 wherein some 282 head of cattle are tabulated under the title of "Loss on Attached Animals", consisting of 222 bulls, 22 cows, 23 heifers and 15 steers. This raises the serious question at the outset as to whether Intervenors are even discussing the same cattle in their evidence before the trial court in this action. But giving them some benefit of the doubt regarding both mathematics and identification of cattle, we proceed to demonstrate why Intervenors' claims are still impossible.

3. Purported Loss on Sale Value.

Intervenors' attempt at demonstrating damages isolated 214 bulls (which is only one more than the number tabulated in the Findings of Fact). Boswell's testimony was to the effect that the pages of Exhibit A-16, consisting of weight slips and sale documents, supported the information on which he and Intervenor Don Allen and Dr. Alvin Carpenter based their testimony

(Tr. 140). Carpenter's calculations on the first page of Exhibit A-13 as to weights and costs, however, differ from Carpenter's calculations on Exhibit A-16. Even Mr. Boswell admitted that he could not explain the discrepancies (Tr. 147-148) and Dr. Carpenter acknowledged that he relied on Boswell's figures (Tr. 163, 164, 168). The cost figures on Exhibit A-13 have no foundation or backup documentation or evidence whatever, thus making them entirely unreliable. The purported loss of $13,351.51 on 282 head of cattle cannot possibly relate to the 214 bulls or the 266 cattle referred to in the Findings of Fact, and is simply not supported by credible evidence.

A close study of all of the documentation in Exhibit A-13 and Exhibit A-16 will show that the conclusions reached in rough form by Dr. Carpenter (Tr. 135-136) were based upon incorrect evidence and faulty calculations. Dr. Carpenter could not verify weights on which he based conclusions, or even the dates the animals were weighed (Tr. 170). The following discussion and tabulations will demonstrate that point very convincingly.

An examination of Exhibit A-13 and the backup documents thereto show that Intervenors' attempt to demonstrate the cost (and the purported dollar loss) of the attached animals creates many more questions than can be answered thereby. The invoices from which the cost figures are supposedly taken are invoices or

shipping memoranda during the month of January, 1973, from Don Allen Livestock to Mt. Nebo Cattle Company, covering some 533 animals, of which 317 were shipped to the feedyards operated by J.B.J. Of that latter number, 239 bulls were shipped to the J.B.J. yards. It is assumed by Intervenors that some of the animals which were attached were the same animals thus shipped by Don Allen, but no other evidence really tied the two groups of animals together. Aside from that uncertainty, however, it clearly appears from the tabulation of the backup documents from Exhibit A-13, that after excluding the animals shipped to packers and other destinations, and also excluding the animals other than the bulls, a total of 239 bulls was received at the J.B.J. Feedyards, costing a total of $100,292.62, or an average cost of $419.63 per bull. Comparing that figure with the Findings of Fact, it will be seen that the 266 animals enumerated therein as attached animals were sold for a total price of $114,459.07, or an average sale price of $430.30. Comparing that with the average cost, it shows that Intervenors actually realized a gain of $10.67 per head on the animals, even assuming, arguendo, that the bulls on Exhibit A-13 are the same bulls in part which were made the subject of attachment. These figures are from Intervenors' own evidence, or from the prior findings of the court, and are not subject to any other interpretation in favor of Intervenors. The

following tabulation shows that the evidence presented by Intervenors in Exhibit A-13 simply did not support the claims made regarding a possible loss of the sale of the cattle. Intervenors did not take the occasion to analyze their own evidence carefully enough to see that their evidence disproved their own case:

SUMMARY OF COST OF CATTLE SHIPPED TO J.B.J. FEEDYARDS PER EXHIBIT A-13 BACKUP DOCUMENTS

ANIMALS SENT TO FEEDYARD

| Ref. No. | 1973 Date | Bulls | Other | Total Invoice Cost | Memo of No. Shipped Elsewhere | Total Cost of Bulls in Feedyards |
|---|---|---|---|---|---|---|
| 9001 | 1/15 | 19 | 18 | $15,267.87 | | $ 7,840.25 |
| 9002 | 1/11 | 19 | 22 | 15,467.67 | | 7,167.94 |
| 9003 | 1/12 | 26 | | 14,431.02 | 11 | 10,140.78 |
| 9004 | 1/12 | 30 | 7 | 14,835.84 | | 12,029.06 |
| 9065 | 1/18 | 34 | | 14,051.66 | | 15,051.66 |
| 9006 | 1/18 | 27 | 5 | 13,741.24 | | 11,594.17 |
| 9007 | 1/20 | 35 | | 16,131.26 | | 16,131.26 |
| 9008 | 1/20 | 31 | | 15,176.09 | | 15,176.09 |
| 9009 | 1/20 | | | N/A | 30 | |
| 9010 | 1/23 | 18 | 26 | 12,616.53 | | 5,161.31 |
| 9011 | 1/23 | | | N/A | 52 | |
| 9012 | 1/23 | | | N/A | 41 | |
| 9013 | 1/27 | | | N/A | 81 | |
| 9014 | 1/16 | | | N/A | 1 | |
| | | 239 | 78 | | 216 | $100,292.62 |

$100,292.62 divided by 239 = $419.63 average cost of bulls

From Findings of Fact:
266 animals sold for $114,459.07 - $430.30 average sale price or gain of $10.67 per head

4. Purported Loss on Weight.

A similar analysis with reference to the weight loss claimed under Exhibit A-16 will show that the documents disprove rather than prove the claims of Intervenors. Dr. Carpenter's claim that the attached animals weighed 1,369 pounds each, on the average, and were sold at a weight of 1,325 pounds each, is again a conclusion based upon faulty documentation. The weight slips on which both Dr. Carpenter and Mr. Boswell relied as part of Exhibit A-16 show that all of the bulls weighed therein totaled 210 in number and 265,475 pounds aggregate, for an average weight of 1,264 pounds per head. There is absolutely no evidence whatever supporting Dr. Carpenter's calculation of 1,369 pounds per head at the time of the attachment. The sales invoices which are part of Exhibit A-16 are probably more reliable, since they came from Producers Livestock Marketing Association, an independent cattle auction, and were not manufactured by Intervenors. Using the computation of 1,325 pounds per animal average weight at the time of sale after attachment by First Security Bank, and comparing that figure with the correctly tabulated average weight of 1,264 pounds per head approximately one week before that attachment, it will easily be seen that the cattle had an average weight gain of 61 pounds per animal between the time of the January 31, 1973, inventory, and the subsequent sales after the attachment. Once again, therefore, Intervenors benefitted from the care of the animals by the Bank, rather than receiving a loss thereon.

ANALYSIS OF WEIGHTS AND COUNTS OF ANIMALS

PER WEIGHT SLIPS PART OF EXHIBIT A-16

| Fat Bulls | Feeder Bulls | Weights in Lbs. Bulls Only | Heifers, Cows and Steers | Other Weights in Lbs. |
|---|---|---|---|---|
| 10 | | 15,760 | | |
| | 12 | 14,940 | | |
| | 12 | 14,600 | | |
| | 10 | 12,240 | | |
| 18 | | 17,955 | | |
| | 10 | 12,550 | | |
| 13 | | 18,570 | | |
| | | | 10 | 10,270 |
| | 8 | 9,980 | | |
| | 9 | 11,490 | | |
| | 11 | 13,390 | | |
| | 11 | 15,650 | | |
| | | | 8 | 7,710 |
| 16 | | 19,290 | 14 | 13,030 |
| | 15 | 18,900 | | |
| | 8 | 8,810 | | |
| | | | 22 | 22,800 |
| 12 | | 14,600 | | |
| | 10 | 13,430 | | |
| | 11 | 14,650 | | |
| | 10 | 12,400 | | |
| 4 | | 6,280 | 11 | 9,780 |
| 73 | 137 | 265,475 lbs. | 65 | 63,590 lbs. |

73
137
Total bulls 210 - 1264 lbs. average weight prior to attachment

From Exhibit A-16 average weight upon sale of cattle was 1325 lbs., thus showing an average weight gain of 61 lbs. per animal.

Since both the weight differential and the price differential are properly computed in favor of First Security's defenses and against the claims of Intervenors, it must be concluded by the Court that Intervenors suffered no loss whatever by reason of the attachment, care and subsequent sale of the cattle by the Bank. Therefore, the trial court's determination

that damages for this claim should not be granted must be upheld by the Utah Supreme Court.

B. Loss on Forced Sale of Central Montana Livestock Company.

Here we find an item of damages set forth for the first time at trial and not contained in Intervenors' Petition for Damages or Pre-Trial Statement of Facts. The claim should be disallowed for that reason alone. Additional comments are appropriate, however, on the merits (or lack of merit) of the claim.

Intervenors allege that they were forced to sell a trading company at a loss because all their working capital was tied up in Utah as a result of the attachment of their cattle. Intervenors cite no legal authority for this assertion in their brief to this Court.

Damages will be rejected as speculative, remote or conjectural unless the cause of these damages can be ascertained with reasonable certainty. The court in Donahue v. Pikes Peak Automobile Co., 150 Colo. 281, 372 P2d 443 (1962), citing from Colorado National Bank v. Ashcraft, 83 Colo. 136, 263 P.23 (1928) which in turn quoted with approval from Rule v. McGregor, 117 Iowa 419, 90 N.W. 811 (1902), said,

> Uncertainty as to the amount of damages is not an obstacle in the way of their allowance.

> Uncertainty as to the cause from which they proceed is what has occasioned trouble, and only when it cannot be ascertained with reasonable certainty that these have sprung from the breach alleged are they to be rejected as too remote, or conjectural or speculative (emphasis added).

372 P.2d at 447.

In this fact situation the cause of the sale for a loss, if there was a loss at all, cannot be ascertained with reasonable certainty and the damages claimed are, therefore, speculative. The sale of the attached cattle, which sale was approved in substance by the Intervenors in a stipulation (Exhibit A-14), occurred in the early part of 1973. The proceeds of this sale, less a court approved setoff for feed purchased to sustain and nourish the cattle, were deposited with the lower court pending the outcome of the prior litigation. At the conclusion of that litigation the sum of $106,720.58 representing such net proceeds was promptly handed over to Intervenors in May of 1975 (R. 1649). The livestock auction was sold in 1977 or the first part of 1978 (Tr. 348). Intervenors claim that "working capital" tied up and later paid as sale proceeds in May of 1975 caused the disposition, at a loss, of the auction business in 1977 or 1978.

However, Intervenors admitted that other factors related to the decrease in cattle sales and profitability of the auction, such as adverse financial transactions with one David Pedley,

heavy obligations on the ranch and the business, adverse business conditions, as well as the lack of capital (Tr. 349). The gap in time between the time the $106,720.58 was paid to Intervenors and the time of sale of the auction was at least a year and a half, and at most two and a half years, during which time any one of a number of factors could have caused the sale. It cannot be stated, and was not stated with reasonable certainty by Intervenors, that they were forced to sell the auction in 1977 or 1978, on the ground that they didn't receive the proceeds from the sale of the cattle prior to 1975.

Even assuming that by some stretch of mental processes it could be shown by Intervenors that the attachment of cattle in 1973 caused the forced sale of the auction in 1977 or 1978, the measure of damages sought is totally inappropriate. The figure of $76,950.94 was reached by taking the "cost" of the company, $176,950.94, and subtracting from that the sale price of approximately $100,000.00. Interestingly enough, official reports to a government agency (Exhibit A-21) show the Intervenors carrying the auction as an asset valued at $166,000.00 in 1972, $166,000.00 in 1973, $110,000.00 in 1974 and $124,000.00 in 1975. None of these figures correspond in any degree with the claim that the company "cost" $176,950.94 contrasted with the alleged sale price of $100,000.00.

Another point becomes painfully evident. Even assuming that Intervenors had made some connection between the proceeds of the cattle received in May, 1975, and the working capital needed for the auction business (which connection was never made in the evidence), it is clear that it would have been the same fund of working capital which Intervenors also claim was necessary for the business of buying and selling livestock and, in part, the purported commodity market transactions. This court cannot countenance an attempt to seek damages where the Intervenors think they could have used the same fund of money three different places at the same time!

C. Lost Business Opportunities in Trading Livestock in Montana.

Intervenors claims that sales in livestock trading had increased every year up until the year of attachment. The year after the attachment sales were cut in half and in each succeeding year sales decreased. Intervenors estimate that they lost trades of 83,717 head of cattle over the period in question and that the "conservative" gross profit on each head of cattle was $8.00. As with the preceding claim, no legal authority is cited for the proposition, only that, "this is not speculation as to either the fact of damage or the amount of the damage." (P.26 of Intervenors' brief) The trial court awarded $126,000.00, plus prejudgment interest of $39,574.80. By asking for another $514,207.24,

Intervenors apparently believe that by continuing to escalate the astronomical estimates of damages, the legal foundation therefor will somehow improve.

The law in Utah reflects an aversion to speculation about lost anticipated profits. The exact amount of lost profits does not have to be shown precisely, but there must be a reasonable basis for their estimation, as well as their foreseeability and causation by First Security Bank.

> The basis and general rule is that loss of anticipated profits of a business venture involve so many factors of uncertainty that ordinarily profits to be realized in the future are too speculative to base an award of damages thereon. The other side of the coin is that the damages to a business or enterprise need only be proved with sufficient certainty that reasonable minds might believe from a preponderance of the evidence that the damages were actually suffered.

Howarth v. Ostergaard, 30 Utah 2d 183, 187, 515 P.2d 442, 445 (1973) (claim for lost profits from Christmas tree venture considered too speculative to be submitted to jury). Accord, Gould v. Mountain States Telephone and Telegraph Company, 6 Utah 2d 187, 194, 309 P.2d 802, 806-07 (1957) (plaintiff's claim for lost profits due to telephone directory error rejected as speculative without proof of particular lost clients); United States v. Griffith, Cornall & Carman, Inc., 210 F.2d 11, 13 (10th Cir. 1954) (corporation's evidence of lost profits due to government's negligence considered speculative and claim denied);

DeVries v. Starr, 393 F.2d 9, 14-20 (1968) (lost profits awarded only where plaintiff's business was predictable and elements of prediction were well-documented.)

Courts of other jurisdictions have held that in order for anticipated profits to be claimed as an element of damages the business claimed to have been interrupted must be an established one and it must have been successfully conducted in order to ascertain the lost profits.

> "In 25 C.J.S, Damages, § 42b p. 518, it is stated that in cases where the loss of anticipated profits is claimed to have been interrupted it must be an established one, and it must be shown that it has been successfully conducted for such a length of time and has such a trade established that the profits therefrom are reasonably ascertainable. (emphasis added)

Dieffenbach v. McIntyre, 254 P.2d 346, 349 (Okla. 1953).

Intervenors have again failed to show causation between the effects of the attachment and the alleged loss of sale of 83,717 head of cattle. Intervenors would have this Court believe that the attachment of 266 cattle in 1973 brought about the sales loss of 83,717 head of cattle. As mentioned earlier, Intervenors admitted that other factors related to the decrease in the cattle sales (Tr. 349). Intervenors simply cannot talk this Court into believing that the adverse results of the attachment, for which the Intervenors were ultimately paid every dollar in May 1975, represented the only negative factor in the cattle business for Intervenors during the succeeding years.

Even if the Court were to find that the effects of the attachment proximately caused the lost business opportunities or anticipated profits, the damages claimed are far too speculative. The calculations and evidence presented by Intervenors are incapable of convincing reasonable minds with any degree of certainty that these damages were actually suffered by the Intervenors. The hard evidence painfully but surely brings death to the damages computations which so mercilessly burden the record.

In the initial testimony of Intervenor Don Allen, and the corresponding testimony of Dr. Carpenter, it appeared that the damage figures testified to regarding livestock sales represented a "net profit" projection of $8.00 per head (Tr. 205). However, upon cross-examination, Don Allen admitted that such figures were "gross profit" figures, and that expenses would have to be deducted from such gross profits (Tr. 354). Yet at no time did Intervenors attempt to modify the astronomical gross profit projections by any meaningful expense projections, thus making the profit projections entirely unrealistic ab initio!

The absence of any evidence whatsoever to support the $8.00 figure completely undermines the foundation for the testimony of Dr. Carpenter, and also renders thoroughly unreliable the testimony of Intervenor Don Allen, so far as the damage computations are concerned.

ANALYSIS OF NET PROFITS FROM

LIVESTOCK TRADING PER EXHIBIT A-21

| Year | Gross Value of Livestock Purchased | Gross Dealer Profit | No. of Animals Sold | Expenses | Net Profit |
|---|---|---|---|---|---|
| 1972 | $5,004,877.75 | $181,614.11 Average: $3.91 | 46,500 | $167,154.36 | $14,459.75 |
| 1973 | $5,083,456.20 | $136,679.00 Average: $6.20 | 22,053 | $150,130.29 | ($13,451.29) |
| 1974 | $4,289,444.67 | $ 87,346.00 Average: $4.63 | 18,876 | $132,553.00 | ($42,207.00) |
| 1975 | $2,818,359.11 | $ 22,567.10 Average: $1.52 | 14,854 | $128,805.41 | ($83,022.06) |

The $8.00 per head gross profit figure used by Intervenors (brief, pg. 26) is patently absurd. Analysis of Exhibit A-21 demonstrates that the gross dealer profit, divided by the number of animals sold, ranged from a low of $1.52 in 1975 to a high of $6.20 in 1973. In 1972, the year before the attachment, before any of the alleged effects of the attachment took place, the gross profit figure was only $3.91, a far cry from the "conservative" $8.00 gross profit figure advanced as legitimate by Intervenors.

Moreover, the 30% expense figure arbitrarily used to subtract from the "conservative" $8.00 gross profit figure has absolutely no foundation. Again, Exhibit A-21 graphically points out how low the 30% expense figure used by the Intervenors is.

The percentage of expenses to gross dealer profit ranged from a low of 92.03% in 1972 to a 570.7% figure in 1975. The 1972 expense to gross profit figure of 92.03% is more than three times the figure used by Intervenors to calculate the anticipated profits they seek to recover as damages. The 30% figure used in the brief defies reason and has absolutely no basis in past performance for credible use in a damage calculation.

The Intervenors' brief (p. 14) graciously admits that Intervenors did not show a high net profit in 1972 or in 1973, and a quick perusal of Exhibit A-21 reveals that a net profit wasn't achieved in either 1974 or 1975. In order to recover anticipatory damages, one must reasonably expect to make profits in the future. The years 1972 through 1974 show a miserable track record in regard to net profits. As was stated in the Oklahoma case Diffenbach v. McIntyre, supra, pg. 24, in order for loss of profits to be recovered as damages "[i]t must be shown that it has been successfully conducted for such a length of time and has such a trade established that the profits therefrom are reasonably ascertainable."

Phrased another way, in 1972, the year before the attachment and the year of the highest volume of livestock sold by Intervenors, a net profit of only $14,459.75 was realized. Yet Intervenors would have us believe that if not for the attachment, they could have earned somewhere between $400,000.00 and

$670,000.00 over the next three years in following the same business! Such claim is patently absurd.

The lost business opportunities or anticipated profits damages sought by Intervenors should not be awarded because, 1) it has not been shown with a reasonable certainty that the effects of the attachment in fact caused the decline in sales; 2) the figures used by Intervenors to calculate these damages have no basis in fact or logic; and 3) The court cannot award damages for anticipated profits, when the Intervenors have not demonstrated the prior ability to have a consistent profit-making concern.

D. Loss on Prospective Future Commodity Market Transaction

Intervenors allege that they entered into an enforceable contract with a broker to invest $10,000.00 in the cattle futures commodity market right after the Bank released its attachment of the cattle. Dr. Carpenter testified that if the Intervenors had made the investment, they would have made an astounding $926,608.00 profit! The trial court, realizing the blantantly speculative nature of damages sought in this claim, declined to award a judgment. Nevertheless, Intervenors continue to press this conjectural claim.

Respondent must comment that the purported damages arising from the "phantom" commodities market transactions are

those which should be most shocking to the conscience of the Court. For Intervenors to claim that with a $10,000.00 investment in February, 1973, profits of $926,608.00 would have been realized in the ensuing months, is so incredulous as to defy the imagination. The Court must consider:

1. Intervenor Don Allen had never engaged in the commodities futures market in the past, and, therefore, had no established business and no experience on which he could base his speculation as to when he might have bought and sold the futures contracts (Tr. 57).

2. The stockbroker, Bert Thurber, described the rather casual discussions in which he had engaged with Intervenor Don Allen concerning the possibility of a futures commodity investment. Thurber himself was not licensed as a broker in that business at the time. On what was purported to be an oral contract, unenforceable because of the statute of frauds, as well as other reasons, Don Allen expressed his desire to invest $10,000.00, contingent upon his receipt of that money from Utah or some other source. When asked why the brokerage firm did not seek to enforce the purported contract against Don Allen, when he failed to invest the $10,000.00, Thurber clearly stated as his last response in the cross-examination: "He had no obligation" (Tr. 116). That admission alone completely destroys the

supposition of Intervenors that any damage claim can be built upon an unenforceable non-obligatory discussion about the possibility of a commodities market investment.

3. Even assuming, without admission, that some kind of a contract was entered into relating to the commodities futures transaction, computing any possible profits therefrom assumes so many variables that the evidence becomes speculative and conjectural beyond belief. Nothing whatsoever was forseeable. All of the witnesses testifying on this matter, Don Allen, Bert Thurber and Alvin Carpenter, agreed that no person could have known in advance of the proper time to purchase, sell, and purchase again the various commodities contracts which would be involved, for the purpose of realizing the profits now claimed by Intervenors (Tr. 353). The damages computations were based upon the supposition that Don Allen would enter the market in February of 1973, sell the contracts in August, 1973, and make his first profit; re-enter the market again on the down side of the commodities futures, and sell all of the contracts in April, 1974, at which time another profit would supposedly have been realized (Tr. 178, 352). Neither the court nor the witnesses could possibly believe that the parties contemplated in February, 1973, at the time of the loose talk concerning a $10,000.00 possible investment, that either Don Allen or the brokerage firm would be

able to have such powers of future prediction as to be able to enter the market, sell again, re-enter and sell again at all of the right times, in order to achieve the unbelievable and astronomical profits so claimed. Again, Respondent submits that all of such evidence is nothing but speculation and conjecture, and cannot possibly have solid evidence enough to be a foundation for any damage award in any dollar amount.

The law cited with respect to the preceding claim applies to this claim also, except that the Court should be even more stringent in its analysis when the claim resembles one for profits expected of a new enterprise. Intervenors had never engaged in the commodities futures market in the past (Tr. 57). The policy of the law opposing such speculation is demonstrated in this situation, for no solid basis exists upon which profits can be predicted. "All the authorities are unanimous in holding that prospective profits to be derived from a business which is not yet established but one merely in contemplation are generally too uncertain and speculative to form a basis for recovery." Jenkins v. Morgan, 123 Utah 488, 486, 260 P2d 532, 535 (1953) (evidence of damages for loss of use of land for farming purposes considered too speculative and uncertain to constitute basis for award). Accord, Sims v. Western Steel Company, 403 F. Supp. 450, 454 (D. Utah 1975), rev'd on other grounds, 551 F.2d 811 (10th Cir. 1975) (patent licensor allowed damages for lost prospective profits due

to breach of licensing agreement. On appeal, no evidence of injury or damage was found, and liability for the breach was reversed), and Van Zyverden v. Farrar, 15 Utah 2d 367, 393 P.2d 468, 471 (1964) (damages for anticipated profits from ranch disallowed as speculative and uncertain).

A court in another jurisdiction, in a case involving speculation profits, held: "But lost profits must be proved with reasonable certainty; damages which are remote and speculative cannot be recovered (citations omitted) where a plaintiff is conducting a new business with costs unknown, prospective profits cannot be awarded." O'Brien v. Larson, 11 Wash. App. 52, 521 P.2d 228, 230 (1974) The idea of investing in the commodity futures market is clearly a new business for Intervenors, and under no circumstances can such prospective profits, let alone unconscionably high profits, be awarded.

Damages should not be awarded under this claim because any damages sought would be utterly speculative and unconscionable.

E. Failure to Award Sufficient Attorneys Fees

The trial court awarded the intervenor $10,000.00 in attorneys fees, and $2,000.00 in prejudgment interest. Intervenors' counsel seeks an additur of $67,420.46. He bases this claim for additional attorneys fees on the case of Pacific Coast Title Insurance Company v. Hartford Accident and Indemnity Company, 7 Utah 2d 377, 325 P.2d 906 (1958), which counsel

improperly interprets to say that "attorneys fees should be treated as the legal consequences of the original wrongful act and may be recovered as damages" (P. 28 of Intervenors' brief).

As to the claim that this Court held in Pacific Coast Title that attorneys fees should be treated as the legal consequences of the original act and are recoverable, Chief Justice Crockett in a concurring opinion in a later case stated,

> It has been consistently declared in our cases over the years that attorney's fees cannot be awarded except in three instances: as provided by statute, or as agreed by contract, or where it is a legitimate item of damage resulting from a wrongful act. (cite to Pacific Coast Title)

Capson v. Brisbois, 592 P.2d 583, 586 (Utah 1979).

Judge Crockett then added, in defining a "legitimate item":

> (speaking of an interpleader action) [I]f the court is convinced that the ends of justice so require, he may award reasonable and necessary attorney's fees. However, that should be done only when such an award comes within the standard rule for awarding damages: i.e. those damages which should reasonably have been foreseen would result from the wrongful conduct.

592 P.2d at 586.

From the reading of both Pacific Coast Title and Capson, a two dimensional test appears of whether attorney's fees should be awarded

1. Is this a legitimate item of damage resulting from a wrongful act?

2. Are the attorneys fees damages that should have been reaonsably foreseen as a result of the wrongful conduct?

The situation at hand presents some interesting matters of interpretation. First, the Bank's act was not "wrongful". Secondly, the attorneys fees sought by Intervenors were extremely unreasonable. The attorney for Intervenors sought $75.00 per hour for non courtroom work and $100.00 per hour for courtroom work; both of these figures are well in excess of what a small law firm in the city of Provo would charge during the years involved. Interestingly enough, of the $67,420.46 asked for by Intervenors' lawyer, only $1,251.70 was actually paid by Intervenors between the years of 1972 and 1975 (Exhibit A-21). Where such generous and expensive attorney's fees are claimed, the court can only speculate as to why such were not billed to or paid by the client in the relevant years.

In conclusion, this Court may not award attorneys fees as damages, because it was not reasonably foreseeable to the Bank that an attachment would result in litigation and consequent attorneys fees, the Bank's attachment was not a wrongful act, and the attorneys fees sought as damages are highly unreasonable.

F. Additur For Damages Due to Anxiety, Embarrassment, Worry & Concern

Intervenors ask for an additur in the sum of $50,000.00 plus prejudgment interest of $22,500.00 in this claim. Inter-

venors contend that they suffered humiliation in their small town because of the after-effects of the alleged wrongful attachment. In addition they have suffered anxiety evidenced by sleepless nights over the last few years as a result of the actions of a "large, powerful national bank".

The issue of whether damages can be awarded for anxiety, etc., turns on the question of whether the acts of the Bank can be termed as wrongful, which in turn depends upon whether the court finds that a wrongful attachment took place. Again, this issue was addressed at length in First Security's brief to the court as appellant in case No. 17270.

Intervenors claim that the cases of Deevy v. Tossi, 21 C.2d 109, 130 P2d 389 (1942), and Hyde v. Southern Grocery Stores, 197 S.C. 263, 15 S.E. 2d 353 (1941), allow damages for mental anguish without showing malice or ill-will. Deevy involved an action for malicious assault and battery, and certainly doesn't stand for what Intervenors claim. In Hyde, malice was an issue, contrary to Intervenors' claim, but was a jury question. The court in Hyde said:

> "Malice may be inferred from the want of probable cause; it may be inferred from facts and circumstances. Probable cause is said to consist in a reasonable belief in the existence of facts necessary to sustain an attachment, such belief being founded on circumstances which would be sufficient to produce such a belief in a man of ordinary caution, that is, founded upon

> reasonable grounds . . . Under the admitted facts, the question of malice and probable cause was properly left to the jury (emphasis added).

15 S.E. 2d at 359.

It is obvious that the Bank had probable cause to attach the cattle. The Bank had no desire or intent to inflict tortious damages on anyone at the time of the attachment. It was thoroughly convinced that the cattle attached were those under the security interest from J.B.J. Feedyards, and no other possiblity seemed plausible.

The anxiety complained of by Intervenors did not create any actual damages and, in any event, was not proximately caused by the Bank. Such anxiety, not resulting from an intentional tort, nor from any wrongful act whatever, was remote from the good faith actions taken by the Bank, and is of such uncertain and speculative nature as to be outside the scope of permissible damages in this case.

G. Additional Punitive Damages

Intervenors rely heavily on the finding of the trial court regarding the attachment, the very foundation of which is questioned in case No. 17270. Intervenors then emphasize melodramatically the great wealth of First Security and demand an addition of $400,000.00 and prejudgment interest of $180,000.00, to the existing damage award of $143,101.48 of the trial court.

The standard for awarding punitive damages in the courts of Utah is set forth in Paombi v. D&C Builders, 22 Utah 2d 297, 452 P.2d 325, 328 (1969), "In order to justify their imposition it must appear, not only that there was a wrongful invasion of the plaintiff's rights, but that it was done willfully and maliciously" (emphasis added). Accord, Powers v. Taylor, 14 Utah 2d 152, 374 P.2d 380 (1963); Prince v. Peterson, 538 P.2d 1325 (Utah 1975). Malice in the context as a prerequisite for an award of punitive damages has been defined in the following way.

> Malice as a basis for punitive damages means the intentional doing of a wrongful act without just cause or excuse. This means that the defendant not only intended to do the act which is ascertained to be wrongful, but that he knew it was wrong when he did it.

Loucks v. Albergquerque National Bank, 76 N.M. 735, 418 P.2d 191, 199 (1966). Malice has also been defined as "the motive and willingness to vex, harass, annoy, or injure". Haun v. Hyman, 223 C.A. 2d 615, 36 Cal. Rptr. 84 (1964)

In order to award punitive damages, actual malice, not just legal or implied malice, must be present. An Ohio case, Columbus Finance Inc. v. Howard, 38 Ohio App. 2d 7, 311 N.E 2d 32 (1973), involving an action for wrongful attachment, stated:

> In tort actions the question of punitive damages may not ordinarily be submitted to a jury in the absence of actual malice. (emphasis added)

The court in Columbus then went on to say:

> Thus, ordinarily, proof of only legal malice is not sufficient to justify an award for punitive damages but, rather, actual malice must be proved before punitive or exemplary damages may be awarded. Legal malice and actual malice are not synonomous. (emphasis added).

311 N.E. at 35.

The Columbus court then cited the case of Pickle v. Swinehart, 170 Ohio St. 441, 166 N.E. 2d 227 (1960), for a definition of "actual malice".

> Actual or express malice has been defined as that state of mind under which a person's conduct is characterized by hatred or ill will, a spirit of revenge, retaliation or a determination to vent his feelings upon other persons.

311 N.E. 2d at 35.

Intervenors have not even remotely shown that the Bank's conduct was malicious and willful, let alone the even more stringent standard of actual malice, "that state of mind under which a person's conduct is characterized by hatred or ill will, a spirit of revenge, retaliation or a determination to vent his feelings upon other persons." Quite to the contrary, First Security has taken great pains to show in its appellant's brief in Case No. 17270 that its actions were actuated by an abundance of probable cause, good faith and lack of malicious intent (p. 7-15).

Moreover, punitive damages should be granted with great caution.

> [T]he purposes of punitive damages . . . are: a punishment of the defendant for particularly grevious injury caused by conduct which is not only wrongful, but which is willful and malicious so that it seems to one's sense of justice that mere recompense for actual loss is inadequate and that the plaintiff should have added compensation; and that the defendant should suffer some additional penalty for that character of wrongful conduct; and also that such a verdict should serve as a wholesome warning to others not to engage in similar misdoings . . . [T]his is an extraordinary remedy . . . [I]t should be applied with caution lest, engendered by passion or prejudice because of defendant's wrongdoing, the award becomes unrealistic or unreasonable . . .

Kesler v. Rogers, 542 P.2d 354, 359 (Utah 1975).

An award of punitive damages must not be the result of passion and prejudice. Intervenors' brief is replete with passion-filled pleas for punitive damages (page 32). The pleas are not based on facts in the record.

In addition, there must be some sort of correlation between the actual damages and the punitive damages award. The actual damages awarded at trial, excluding interest and attorneys fees, was $165,506.56. The trial court awarded $100,000.00 in punitive damages, nearly 60% of actual damages, this is clearly excessive. Intervenors ask for an additional $723,101.48 in punitive damages which is over 430% of actual damages, found by the trial court!

Intervenors rely on two Utah cases that hold that the wrongdoer's wealth is a factor and can be examined in reaching a punitive damage award. The action in Terry v. ZCMI, 605 P.2d 314 (Utah 1979), was one for malicious prosecution, false arrest and false imprisonment arising from an alleged shoplifting incident. The plaintiff sought, along with other damages, punitive damages of $15,000.00. The jury awarded actual damages and $15,000.00 for punitive damages. The trial judge refused to grant $15,000.00 for punitive damages declaring them excessive, and found that $2,000.00 would be more appropriate. The plaintiffs appealed the judges award of $2,000.00 for punitive damages to the Utah Supreme Court, whereupon the Court held that $15,000.00 was reasonable and that the wealth of the defendant is a factor to be looked at. Even with that precedent, Intervenors' claim of over $723,000.00 is astoundingly excessive, especially where the lack of malice is evident.

The punitive damages sought by Intervenors are based on, according to their brief, "uncontroverted facts" and "unequivocal facts". However, most if not all are disputable, or have been neutralized by the probable cause and good faith actions of the Bank.

In conclusion, punitive damages can only be awarded when there is a wrongful act, willfully and maliciously performed by

the wrongdoer. The Bank has carefully established that its actions were prompted by an abundance of probable cause and good faith, not at all motivated by hatred or ill-feeling toward the Intervenors. The denial of this claim must be affirmed.

H. Pre-Judgment Interest

In the trial court below, the judge awarded pre-judgment interest to all five (5) items of damage granted. Intervenors seek additional prejudgment interest.

The law in Utah regarding prejudgment interest would require a denial of all such prejudgment interest.

> "The law in Utah is clear, . . . where the damage is complete and the amount of the loss is fixed as of a particular time, and that loss can be measured by facts and figures, interest should be allowed from that time and not from the date of judgment. On the other hand, where damages are incomplete or cannot be calculated with mathematical accuracy, such as in case of personal injury, wrongful death, defamation of character, false imprisonment, etc. the amount of damage must be ascertained and assessed by the trier of fact at the trial and in such cases prejudgment interest is not allowed (emphasis added).

Bjork v. April Industries Inc., 560 P2d 315 (Utah 1977).

All of the damages awarded were totally in the control of the trier of fact, and incapable of being calculated with mathematical accuracy. Therefore, under the test as outlined above in Bjork, it is clear that interest should not have been allowed on any of the Intervenors' claims until the date of judgment.

I. Commentary On Legal Precedents

Respondent First Security is reluctant, but in candor and good conscience required, to observe for the benefit of the Court that Intervenors' brief is replete with serious erros in legal citations. For example, pages 23 and 234 contain purported quotations from six cases. Yet not one of those quotations actually appears in the cited court decisions! Moreover, the Pacific Reporter citations on Gould and Stewart are not correct. It appears to the Respondent that the lack of care and diligence in presenting evidence in the trial court is continued in the lack of care with respect to legal precedents cited to the Court. These factors combine to persuade the Court that Intervenors' claims here under appeal are not well founded in any degree, legally or factually.

CONCLUSION

Respondent First Security moves this Court to affirm all portions of the lower court judgment which denied the additional claims for damages sought by Intervenors, for the reasons argued at length in this brief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 1981, two (2) true and correct copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Thomas S. Taylor, Attorney for Intervenors, 55 East Center Street, Provo, Utah 84601.