

1989

John P. Sampson and Nelson R. Goff v. Paul H. Richins, Richtron Inc., Richtron Financial Corporation, Richtron General, and Frontier Investments : Petition for Writ of Certiorari

Utah Supreme Court

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UTAH
BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN P. SAMPSON,

Petitioner, Appellant,
and Cross Respondent,

and

NELSON R. GOFF, individually
and as Trustee of NELSON R. GOFF
TRUST, an unincorporated
association,

Plaintiffs,

vs.

PAUL H. RICHINS; RICHTRON, INC.,
a Utah corporation; RICHTRON
FINANCIAL CORPORATION, a Utah
corporation; RICHTRON GENERAL,
a Utah corporation; and FRONTIER
INVESTMENTS, a Utah corporation,

Respondents and Cross
Appellants.

Supreme Court No.

(Priority Category 13)

890146

PETITION FOR WRIT OF CERTIORARI TO
THE UTAH COURT OF APPEALS

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FILED
APR 17 1983

Clerk, Supreme Court, Utah

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Utah Court of Appeals misapply this Court's
decision of Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293
(1982) in determining the elements necessary to prove intentional
interference with economic relations. Specifically, did the Court
of Appeals err in concluding that when a defendant is charged with
interfering with another by "improper means" that the defendant's

good faith belief in such conduct is not relevant in determining whether the means are "improper", that the violation of any statute, regulation, or rule of conduct allows immediate liability, and that "good faith" is equivalent to a "privilege"?

2. Did the Utah Court of Appeals depart from the usual course of judicial proceedings by misapplying appellate rules. Specifically, when findings of fact do not include a basis for special damages and the lower court states to the parties that no specific basis for the award is required to be given since the judgment is for general damages only, can an appellate court affirm the judgment based on its own belief as to what the special damages should have been even when such belief is negated by direct findings of the lower court and even though the amount of damages under such belief is different than initially awarded by the lower court?

CITATION OF COURT OF APPEALS DECISION

The decision of the Court of Appeals entitled Sampson v. Richins is found at 102 Utah Adv. Rpts. 53.

JURISDICTIONAL GROUNDS

The decision of the Court of Appeals was rendered February 22, 1989. An extension of time to file the Petition for Writ of Certiorari was granted on March 24, 1989 by Justice Howell. Jurisdiction to review the decision in question by writ of certiorari is granted pursuant to §78-2-2, U.C.A.

CONTROLLING STATUTES

There are no controlling statutes, ordinances, or constitutional provisions in this matter.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings.

The original complaint in this case sought a judgment giving full faith and credit to a judgment entered in Oregon. Defendants filed a counterclaim alleging various defenses to the Oregon judgment and seeking six affirmative claims for relief on the counterclaim. The counterclaim, which is the heart of the present dispute, alleged that plaintiff John P. Sampson breached a fiduciary duty as an attorney to the defendants, failed to exercise reasonable care and skill of an attorney, made slanderous statements against defendants, intentionally and maliciously interfered with the defendants' existing and prospective contracts, and failed to provide an accounting of funds. Defendants sought compensatory and punitive damages, an accounting, and injunctive relief.

The case was assigned to retired Judge Bryant Croft who conducted an eleven-day trial in February of 1986. In July of 1986 Judge Croft presented the parties with a "Memorandum and Summation of Evidence" consisting of 177 pages and "Findings of Fact and Conclusions of Law and Verdict" consisting of 234 pages. A copy of the Findings of Fact and Conclusions of Law and Verdict is contained as a separate appendix to this Petition because of its size. A judgment was entered by the lower court finding in favor of plaintiff Milton Goff for \$19,057 and finding against plaintiff John Sampson in various amounts totaling approximately \$290,000.

On appeal, this matter was first designated to be heard by

this Court and accordingly a number of motions were filed by both parties as to the composition of the record and in attempts to dismiss Sampson's appeal. Ultimately, this Court denied all of Defendants' efforts to dismiss the appeal of Sampson but also limited the scope of the record to be included to that which was originally designated by Sampson pro se on June 9, 1987.

During this same period of time a complaint was filed by defendant Paul Richins against Sampson with the Utah State Bar. Thirteen separate claims were made by Richins as to Sampson's conduct. On June 15, 1987 the screening panel of the Utah State Bar found Sampson had violated several ethical rules and issued a private reprimand to plaintiff Sampson finding that a more severe penalty was unwarranted since in the committee's opinion there was no dishonesty, deceit or bad motive in Sampson's conduct, and that he was at all times acting in the interest of his limited partner clients. On July 15, 1987 all further complaints filed against Sampson to the Bar Commission were dismissed by bar counsel.

This case was transferred to the Utah Court of Appeals pursuant to §78-2-2(4) U.C.A. A panel of the Court of Appeals, Judge Judy Billings presiding, affirmed the lower court's decision as to Sampson's appeal and also affirmed the lower court's judgment denying punitive damages against Sampson as to Richins' cross appeal. It is from this decision as to the affirmance of the counterclaim that this Writ is now taken.

B. Statement of Facts.

Because of the voluminous nature of this case and the limited space available to present this Petition only a cursory

explanation of the facts which occurred in this case can now be made. All facts stated herein are taken directly from the Findings of Fact and Conclusions of the lower court. Citations are to the page number of the "Findings of Fact, Conclusions of Law and Verdict", with "F" for Findings portion, "C" for Conclusions portion, and "V" for Verdict portion.

Defendant Paul Richins undertook to form a number of limited agricultural partnerships between 1973 through 1980. (F. 28). By 1980 these limited partnerships were in dire financial condition because of numerous problems they were having consisting of judgments, tax and security problems, and the failure of many limited partners to pay their assessed shares. (F. 60-72).

In May of 1980 Sampson was contacted by some of these investors and asked to attend a meeting of one of the limited partnerships. (F. 7). During this meeting Sampson made various statements concerning the conduct of Richins which he thought was illegal. (F. 63). In subsequent meetings other limited partners requested Sampson to take necessary steps to relieve Richins as general partner and to liquidate in an orderly manner. (F. 64).

In June of 1980 Richins as the general partner of the limited partnerships executed quit claim deeds to another of his corporate entities. (C. 168-69). He also signed various promissory notes in an attempt to show a debt owed to the general partner corporate entities. (F. 65-66). In June, Richins sent a letter to some of the limited partners stating he was withdrawing as general partner and requesting that they immediately repay any advances he had made. (F. 66-67).

In the latter part of June a meeting was held at one of these limited partnership meetings at which time it was discussed that Sampson and his associates would buy out Richins' interest in the various partnerships. (F. 37-38, 68). A weak alliance was established during the next few months in which Sampson performed various legal services and assisted Richins in trying to stabilize the financial affairs of the partnerships. (F. 39-43). Both Sampson and Richins sent letters to the limited partners seeking approval of the settlement agreement. (F. 68-69). By November it became obvious that an agreement could not be reached since insufficient numbers of limited partnerships ratified the compromise. (Id.).

In November and January, Richins sent out further notices to the remaining limited partnerships announcing his withdrawal as the general partner and requesting return of any monies advanced. (F. 69). In December of 1980 Sampson sent out letters to all of the limited partners requesting that they return to him a signed power of attorney which would give him the ability to vote their rights. (F. 76). Using these powers of attorneys Sampson undertook to vote the Richins companies out as general partners and voted in his own professional corporation as the new substitute general partner. (F. 76-77). Later, he was notified by the bankruptcy court hearing the matter of one of Richins' companies that his professional corporation could not be a general partner. (F. 78). He subsequently incorporated AG Management, Inc. and attempted to substitute it as the general partner of the various partnerships. (F. 78). During this same period of time

Sampson took control of the limited partnerships and received and disbursed funds. Sampson kept detailed records of these receipts and disbursements. (F. 79).

In October of 1982 Sampson attended an IRS sale and purchased all of Richins' claims in the various partnerships through his corporate entities. (F. 81-82). Later, in November of 1982 a Davis County judge ruled that AG Management was not the general partner of any of the partnerships and that Richins still had control. (F. 80-81). Sampson continued to operate the limited partnerships based upon his purchase of the IRS tax sale. (F. 82).

Subsequently, a Davis County judge on two separate occasions in December of 1982 and July of 1983 ruled that the IRS sale was valid and that Sampson had authority to operate as a general partner. (F. 82). In May of 1984 a federal district judge entered an order voiding the IRS tax sale and stating that Sampson had no interest in the Richins' companies and therefore impliedly could not be a general partner. (F. 83). Richins took no action to vacate the Davis County Judge's order until January of 1985. (F. 83-84). In February of 1985 the state judge vacated his prior orders which were based on the assumption that the IRS sale was valid. (Id.).

The lower court found that from 1980 through October 1984 most of the funds that passed through Sampson's hands were paid out on partnership expenses and that there was no evidence that Sampson ended up with the partnership assets. (F. 86).

The lower court in its Conclusions of Law found that both

parties had done a number of illegal or improper acts during these transactions. As to Sampson, the court concluded that he had given erroneous legal advice at the various limited partnership meetings relating to Richins' power as a general partner (C. 166, 170, 189); Sampson had no legal authority to act on behalf of the limited partners even though the limited partners and Richins had agreed that he could represent them in an attempt to settle and buy out the general partner interest (C. 171); Sampson did not correctly substitute his professional corporation for that of Richins since he improperly signed the amended certificates (C. 182); Sampson improperly purchased a judgment which had been entered against Richins in direct violation of §78-51-27 (F. 109-10); Sampson incorrectly substituted AG Management for his professional corporation and therefore the latter had no legal authority. (C. 192).

At the same time, the lower court found that Richins violated §48-2-9 U.C.A. in attempting to secretly deed the partnership properties to his other corporate entities (C. 168-69); that the promissory notes which he executed did not comply with the various articles of the limited partnerships and therefore was not repayable as a priority interest as he repeatedly proclaimed to the other limited partners (F. 102-03); that he gave contrary instructions to the limited partners telling them to elect a new general partner while at the same time telling them that the partnership had been terminated and the assets would be distributed (C. 170-71); and that he erroneously sent termination letters of the general partner's interest in direct violation of

the partnership agreements and had misinterpreted §48-2-20 concerning the withdrawal of a general partner. (C. 177-78).

The court found that as to Count I Sampson had violated the attorney-client relationship but found no evidence of any damage having occurred. As to Count II he found that Sampson was negligent in handling several lawsuits and awarded some \$2,000 for the cost incurred in setting aside a default judgment which had been entered.

The court found that Sampson had intentionally interfered with some of the defendants as claimed in the Fourth Cause of Action on the Counterclaim. The Court specifically rejected each and every damage theory asserted by Defendants but concluded that they were entitled to an award of \$250,000 as "consequential damages" and some \$40,000 as damages for equity of defendants' own limited partnerships. The court rejected any claim for an accounting as well as a claim for an injunction.

The lower court denied punitive damages against Sampson. The court found that Sampson acted in good faith in attempting to negotiate settlements with Richins for the benefit of the limited partnerships. (F. 140). The court specifically found that Sampson honestly believed that he was empowered to act for the limited partnerships through various devices during the four-year operation. (F. 143-44).

ARGUMENT FOR ISSUANCE OF THE WRIT

POINT I

THE COURT OF APPEALS HAS MISCONSTRUED THIS COURT'S DECISION OF LEIGH FURNITURE AND HAS MISSTATED THE ELEMENTS REQUIRED TO FIND THE TORT OF INTENTIONAL INTERFERENCE WITH

ECONOMIC RELATIONS.

In 1982 this Court in Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, for the first time recognized the tort of intentional interference with prospective economic relations. Since that decision there has been no other reported Utah appellate case involving the interpretation of that decision or of the elements required to establish this cause of action. The instant case is therefore the most recent pronouncement of the Utah law as to this often-used claim for relief. The decision of the Court of Appeals, however, has misinterpreted both this Court's prior decision and the necessary elements required for a plaintiff to prevail. It is for this reason that this Court should review the present controversy in order to correct the necessary elements of this tort.

In the Leigh Furniture case this Court adopted an approach utilized by the Oregon Supreme Court in defining the elements required to prove an action for intentional interference of economic relations. 657 P.2d at 304. In order to recover damages this Court held that a plaintiff must prove (1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff. Furthermore, "privilege is an affirmative defense which does not become an issue unless 'the acts charged would be tortious on the part of an unprivileged defendant'." Id. at 304.

In Leigh Furniture this Court concluded that in spite of protracted action by the defendant against the plaintiff the

evidence would not support a jury finding that the defendant's predominant purpose was to ruin Isom's business merely for the sake of injury alone and therefore refused to find an improper motive in the actions of the defendant. Id. at 308.

As to improper means this Court stated:

The alternative requirement of improper means is satisfied when the means used to interfere with a party's economic relations are contrary to law, such as violations of statutes, regulations, or recognized common-law rules. Such acts are illegal or tortious in themselves and hence are clearly "improper" means of interference. . . . "Commonly included among improper means are violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood." Means may also be improper or wrongful because they violate "an established standard of a trade or profession." Id. at 308. (Citing Top Service Body Shop, Inc., 582 P.2d at 1371).

This Court concluded that the defendant's pursuit of two groundless lawsuits against the plaintiff was an improper means. It also sustained a finding of punitive damages since there was sufficient evidence of malice to justify such an award. Id. at 313.

In its extensive decision the lower court listed nine specific acts which it believed constituted improper means as defined in the Leigh Furniture case. These included: (1) erroneous advice by Sampson that the markup charge by the defendants was a breach of a fiduciary duty owed to the partnership (Findings, p. 101); (2) Sampson's erroneous advice that the advances made by the general partners would not have to be repaid by the partnerships (Findings, pp. 103-05); (3) Sampson's acts of collecting money on behalf of the partnerships

(Findings, p. 105); (4) refusal of Sampson to deliver documents of foreclosure to Richins after requested (Findings, p. 106); (5) wrongfully utilizing a power of attorney to substitute general partners (Finding, p. 107); (6) failing to properly amend the limited partnership certificates (Findings, p. 109); (7) obtaining an assignment of the Osborn judgment in violation of §78-51-27 (Findings, p. 109); (8) Sampson substituting his clients as plaintiffs in the Osborn case in violation of §78-51-27 (Findings, p. 110); and (9) making use of facts obtained while involved as an attorney client in violation of ethical standards (Findings, p. 116).

Richins in the Court of Appeals expanded the "improper means" actually relied upon by the lower court to a claimed 22 separate acts. (Respondents' and Cross Appellants' Brief, pp. 37-40). The Court of Appeals listed 13 specific acts that "taken together constitute improper means as defined by the Utah court in Leigh Furniture." 102 Utah Adv. Rpt. at 56-57.

The Court of Appeals also found that "negating 'good faith' is not an element of a prima facie case of intentional interference with economic relations in Utah." The Court concluded that if Sampson uses the term "good faith" in the sense that he is claiming his acts were "privileged" then Sampson had the burden of raising this issue as an affirmative defense. 102 Utah Adv. Rpt. 57.

Petitioner submits that the decision by the Court of Appeals is erroneous for three reasons: first, the majority of the acts listed by the Court of Appeals do not constitute "improper means"

under this Court's decision in Leigh or in the Oregon decisions upon which this Court relied; second, the lower court and the Court of Appeals failed to recognize that a lack good faith is a prima facie element for a plaintiff to establish to show certain actions are indeed "improper"; third, the element of "good faith" is not equated to a privilege and therefore is not an affirmative burden upon a defendant.

Many of the "improper means" listed by the Court of Appeals concerned improper advice or actions taken under erroneous assumptions. For example, Sampson's statements to the limited partners concerning the markups and the loan advances while characterized by the Court of Appeals as being "misrepresented" and "false" were found by the lower court merely to be errors in legal opinion. (Conclusions, p. 189; 166, 170). Other alleged improper means include technical violations of statutes such as the failure to properly amend the certificates of limited partnerships or to properly substitute one general partner for another. The third category concerns violations of the Code of Professional Responsibility as an attorney. The fourth and final category includes alleged wrongful action taken with regard to the corporate assets and liabilities during the four years that Sampson acted as general partner.

The majority of the listed acts are not the type of predatory conduct which should give rise to a claim of intentional interference with economic relations and, for example, the failure to give proper legal advice should not subject every practicing attorney to a subsequent claim five years later. In Leigh

Furniture, for example, in spite of the numerous acts of the defendant against the plaintiff in the operation of the business, 657 P.2d at 306, this Court found only the bringing of "two groundless lawsuits" as the improper means of interference. Id. at 308-309. Thus, not every act undertaken in a business controversy can be deemed to be a "improper means."

Likewise, merely because a person fails to amend limited partnership agreements should not make him subject to a tortious interference claim. This Court and the Oregon Courts did not intend every innocent violation of any rule or statute to give rise to liability when no predatory conduct is involved. Here there was no violence, deceit, or unfounded litigation which is the conduct that the "improper means" test was designed to prevent.

The second error committed by the Court of Appeals was failing to give any credance to Sampson's intent. The Court of Appeals and the lower court merely concluded that once a statute has been shown to have been violated that this violation on its face constitutes grounds for allowing imposition of damages. The good faith or intent of the perpetrator was not considered relevant by either the Court of Appeals or the lower court.

Although the lower court found that Sampson had an improper purpose in the actions he took, the Court of Appeals did not address the issue of "improper purpose" but chose to affirm only upon "improper means". 102 Utah Adv. Rpt. at 56. Petitioner submits that the lower court was clearly wrong in concluding that an improper purpose existed in Sampson's conduct since there is no

question from the court's own factual findings that he was representing a number of limited partners who had substantial investments in the partnerships and who had a real motive in trying to keep the businesses operating. See, Serafino v. Palm Terrace Apts., Inc., 343 S.2d 851 (Fla. App. 1976); Restatement of Torts 2d, §769.

The lower court specifically found in denying punitive damages that Sampson acted in good faith throughout these proceedings even though many of his actions were ultimately declared wrong or illegal by courts along the way. See, Findings of Fact, pp. 139-144. In one particular passage the lower court made this summary:

[I]t is my opinion that as wrong as Sampson was in many of the things he did, I think he believed himself to be right in doing what he did and the way he did them. He should have known the law, but I do not believe he intentionally violated it. For almost six months he worked amicably with Richins on settlement. When that failed, by powers of attorney he got proxies to vote the limited partners' interests. He did so, electing his PC general partner. When that was said to be contrary to law, he voted AG Management in as a general partner and so operated. By the time Judge Palmer ruled that illegal, Sampson was able to carry on under a color of authority by receipt of an IRS certificate of sale, followed by two favorable rulings by Judge Cornaby until the IRS sale was voided in May, 1964 (sic) by a federal court order.

The bitterness and contention that developed and existed between the two men was long and drawn out and led to prolonged controversies which had its roots in serious problems already existing before Sampson entered the ring. But I do not believe the evidence preponderates in establishing the type of willful and malicious conduct, nor the lessened type, required by our Supreme Court decision to justify or support an award of punitive damages and I so find. Findings of Fact, pp. 143-44.

Thus, in spite of the conclusion by the lower court that Sampson sincerely believed that the actions he was taking were valid during the entire course of proceedings, the court concluded that the acts themselves constituted an illegal means giving rise to liability. Thus, intent and motivation behind the acts was not considered relevant by either the lower court or the Court of Appeals. The failure to examine good faith and intent is clearly improper under the standards adopted by this Court.

Before a "means" can be deemed to be "improper" the conduct of the accused must be examined. For example, in GM Ambulance v. Canyon State Ambulance, 739 P.2d 203 (Ariz. App. 1987) an ambulance company was sued by a competitor on the basis that it had violated a state law. The defendant countered by stating it had received written permission from the governing state agency to perform the conduct which was later ruled illegal. The Arizona Court of Appeals cited the Leigh Furniture case as standing for the proposition that conduct specifically in violation of statutory provisions has been held as an improper interference. The Court stated, however:

We believe, however, that Canyon State's violation of the statute is outweighed by the good faith reliance on the letter. Canyon State relied on the opinion of the very department charged with regulating its conduct. Under such circumstances we do not believe that it acted improperly so as to subject itself to liability for the tort of interference with contract. Id. at 205.

This Court in Leigh Furniture recognized that the terms "improper means or improper purpose" are functionally equivalent to "wrongful or malicious". 657 P.2d at 305. Certainly, the mere

fact that a person improperly amends a certificate of limited partnership, in good faith attempts to use an invalid power of attorney, or fails to properly transfer authority from one general partner to another should not give rise to tortious liability without the showing of bad faith or maliciousness.

This error is further compounded by the Court of Appeals' conclusion that "good faith" and "privilege" are the same and that it is up to Sam[pson to bear that burden. 102 Utah Adv. Rpt. at 57. The Oregon Supreme Court upon which this Court based its standard of intentional interference defined a privilege as follows:

In Wampler, we said that a person who interferes with a contract is not always responsible for the resultant injury. When the person acts to promote ". . . an interest which is equal or superior in social value to that with which he interferes, his actions are said to be privileged or justified. Welch v. Bamcorp Management Advisors, Inc., 675 P.2d 172, 176 (Or. 1983).

Thus, even after a court has concluded that certain conduct would give rise to liability a defendant can claim a privilege on the assertion that he is essentially exempt from such liability because of a status or other reason. For example, a business advisor is privileged to give advice without fear of a tortious suit. Parker v. Gordon, 442 S.2d 273 (Fla. App. 1984); Los Angeles Airways, Inc. v. Davis, 687 F.2d 321 (9th Cir. 1982). This privilege exists even if the financial advisor receives a financial gain himself. Lichtie v. U.S. Home Corp., 655 F. Supp. 1026 (D. Utah 1987).

If the standard of tortious interference is as stated by the

Utah Court of Appeals a defendant who can claim no legal privilege but who acts in complete good faith in a transaction is subject to liability even upon the showing of a technical violation of a statute or regulation. Under the Court of Appeals' interpretation there is no opportunity for a defendant to argue his motive if the plaintiff is proceeding under the "improper means" course of proving liability. The filing of any lawsuit which is later lost, the reliance upon any legal advice which is later proven wrong, or a number of other occurrences which happen daily in business transactions would, under the Court of Appeals' analysis, give rise to immediate liability regardless of the motive or intention of the party.

It is therefore essential that this Court accept certiorari of this case so that it can clarify that before the violation of a statute, regulation, or course of conduct can be deemed "improper" there must be established a malicious or bad faith motive in perpetrating these acts. Furthermore, it is critical that this Court clearly define the types of "means" which can give rise to liability to eliminate conduct which clearly was never intended to give rise to tortious liability.

POINT II

THE COURT OF APPEALS IMPROPERLY APPLIED
APPELLATE RULES OF CONSTRUCTION IN
CREATING A FINDING OF FACT FOR SPECIAL
DAMAGES WHICH WAS NEVER MADE BY THE
LOWER COURT AND WHICH WAS CONTRARY TO
THE LOWER COURT'S SPECIFIC FINDINGS.

Anyone reading the 234-page opinion of Judge Croft would believe that no substantial damage had been awarded to the defendants against Sampson until the very last page of the opinion

is read. In other words, the \$250,000 figure appears like a phantom in the night. There is no previous reference to this amount in either the Findings, Conclusions or Verdict.

The lower court specifically rejected each and every damage claim asserted by Richins against Sampson. See, Verdict, pp. 228-30; Findings, p. 105, 124-37; Conclusions, p. 198-205, 215-16; and Verdict, p. 209-32.

The only reference to the \$250,000 judgment is found on page 232, two pages before the decision ends. The court stated:

As stated before, damages are in tort, not in contract, rendering liability for damages for either the pecuniary loss of the benefits of the contract or consequential for which the tortious interference is the legal cause. I think as to some claim for damages, of at least a consequential nature, have been shown with a reasonable degree of certainty by a preponderance of the evidence.

The only other indication giving any enlightenment as to the composition of the \$250,000 figure is seen in the Court's oral colloquy with Sampson's trial counsel during the hearing to amend the Findings. A copy of this portion of the transcript is contained in the appendix of this Petition. The lower court basically took the position that the \$250,000 figure was analogous to a jury bringing in a \$25,000 figure in a \$100,000 suit. (Tr. 26). The Court stated that it was not obligated to say what the \$250,000 is comprised. (Tr. 31). The Court stated that "recovery wasn't based upon contract relationships. It was a tort just like you run a red light and crash into your car. I commit a tort and you are injured. And you are entitled to recover damages. But how much? Well, the jury said \$25,000. You wanted

\$100,000. You get \$25,000, you see." (Tr. 28).

The Court concluded by saying that in no sense of the word could it give Richins \$5 million, \$6 million, \$9 million or \$12 million as he requested because the evidence wasn't there. The \$250,000 is just the amount the court came up with. It is not, according to the court, required to break it down into advances not recovered, improper expenditure of attorney fees by Sampson, or overhead expenses. (Tr. 31).

It is therefore obvious from reviewing the Findings of the lower court together with the court's own explanation that it regarded the award of \$250,000 as general damages with no requirement to specifically explain the basis. Sampson vigorously argued before the Court of Appeals that awards in tortious interference cases are of a nature of a special damage and that the lower court's reasoning was incorrect. See, Restatement of Torts 2d, §774A; 25 C.J.S. §2 Damages, p. 617; Hycel Inc. v. American Airlines, Inc., 328 F. Supp. 190, 193 (D. Tex. 1971); Clark v. Ferro Corp., 237 F. Supp. 230, 238 (D. Tenn. 1964).

The Court of Appeals agreed with Sampson's assertion by stating "we agree that Judge Croft was under the mistaken belief that he need not identify the exact basis for his award." The Court of Appeals then stated, "However, this Court can affirm the judgment if any legal basis exists to justify the trial court's award. See, e.g., Buehner Block Co. v. U.W.C. Associates, 752 P.2d 892, 895 (Utah 1988)."

The Court of Appeals then undertook to justify the award of damages based upon the preceding rule of appellate review together

with the other principle that once damages have been established the exact amount may be based upon estimations since the defendant may not escape liability because the amount of damage cannot be proved with precision. 102 Utah Adv. Rpt. at 58.

The Court of Appeals then took an incredible leap and essentially wrote its own Finding of Fact as to what the \$250,000 was based upon. The Court concluded that because Judge Winder in May of 1984 had found the IRS sale to be invalid that from that point on all money retained in the bank account of the general partner by Sampson must necessarily have been damages accruing to the defendant.

This conclusion is remarkable for several reasons. First, by Judge Croft's own finding the amount in the bank account as of October 29, 1984 would have been \$288,597--not \$250,000. The rule cited by the Court of Appeals as to the approximation of uncertain damages applies to cases involving damages such as lost profits or loss of a bargain but certainly does not apply to a simple arithmetic calculation of a bank account. Second, while the final accounting may have occurred on October 29, 1984 it was not until January 5, 1985 that Richins obtained an order from Judge Cornaby vacating his prior orders which gave Sampson the right to control the partnership. (F. 83-84). Thus, if any date was to have any relevance at all when Sampson ceased having legal authority to operate the corporation it would have been the January date to which no evidence was ever offered by Richins.

Next, the "finding" of the Court of Appeals assumed that the assets in the bank were not used on behalf of the limited

partnerships but were retained by Sampson. The lower court specifically found this not to be the case. The Court stated:

Upon closing argument counsel for defendants stated that Sampson and twelve people ended up with all the "Richtron assets". He probably meant partnership assets, but as I noted in my Findings and Conclusions, no evidence was placed in the record establishing that such was in fact the case, but if so, absent any such evidence, I cannot consider this statement as a factor upon which this decision can be made. I have repeatedly noted the absence of evidence as to what finally happened to the partnerships and their properties other than a schedule showing only the date upon which foreclosures presumably took place. (F. 221-222).

The Court also noted a short time later, "I think it is clear from the evidence that most of the funds that passed through Sampson's hands were paid out on partnership expenses." (F. 222).

The Court of Appeals recognized the inconsistency in its creation of a finding not made by the lower court. It stated, however:

There are admittedly alternative, inconsistent findings before this Court, and ordinarily we would resort to the underlying record to determine which finding of fact is accurate. However, Sampson's failure to provide a complete transcript prevents us from reviewing the underlying evidence. Thus, we assume the evidence supports the trial court's Findings of Fact which in turn supports its ultimate damage award. See, e.g., Cornish Town v. Koller, 758 P.2d 919, 922 (Utah 1988). 102 Utah Adv. Rptr. at 58.

Certiorari is appropriate in this case since the Court of Appeals has departed from the accepted and usual course of judicial proceedings which requires this Court's power of supervision to be exercised. The rule concerning affirming a judgment of the lower court was never meant to allow an appellate court to create a factual finding which does not exist. The rule

is strictly limited to alternative legal theories. See, e.g. Buehner Block Co. v. U.W.C. Associates, 752 P.2d 892 (Utah 1988) (while one construction of the contract was erroneous another construction allowed affirmance of the lower court); Rice, Melty Enterprise, Inc. v. Salt Lake County, 646 P.2d 696 (Utah 1982) (decision based upon statute of limitation not addressed since parole evidence rule precluded judgment in plaintiff's favor); Matter of Estate of Hock, 655 P.2d 1111 (Utah 1983) (lower court decision based on constructive trust erroneous but decision affirmed on basis of a purchase money resulting trust). The appellate rule of construction cannot be used to create factual findings which are not present in the lower court's findings of fact and conclusions of law.

It is fundamental that the failure of the trial court to make findings on all material issues is reversible error unless the facts in the record are "clear, uncontroverted, and capable of supporting only a finding in favor of the judgment." Kinkella v. Baugh, 660 P.2d 233, 236 (Utah 1983). The findings of fact must show that the court's judgment or decree "follows logically from and is supported by, the evidence." Smith v. Smith, 726 P.2d 423, 426 (Utah 1986). The findings "should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusions on each factual issue was reached." Rucker v. Dalton, 598 P.2d 1336, 1338 (Utah 1979). Where special findings have been made, an appellate court cannot assume a non-existent factual finding which is a material issue to recovery. "Because the trial judge elected to make special

findings and because he did not make a finding on all material factual issues necessary to recovery, the judgment must be reversed." Briscoe v. Pittman, 522 P.2d 886 (Or. 1974). The Supreme Court of New Mexico found reversible error in the failure of the lower court to enter findings respecting special damages allegedly suffered by plaintiffs caused by odors emitted by the defendant's plant. Aguayl v. Village of Chama, 449 P.2d 331 (N.M. 1969).

It is difficult to conceive of a more flagrant violation of the preceding rules of appellate construction than in the instant case. Here, the lower court entered the figure of \$250,000 as damages with no attempt to explain the special nature of such award. The reason for such failure was simply the lower court's erroneous conclusion that consequential damages in tortious interference cases are of a general nature and do not have to be itemized. The court clearly stated this to counsel in the motion to amend the findings.

The Court of Appeals recognized the error committed by the lower court but rather than vacating the decision or, at the minimum, remanding it for further proceedings undertook to create findings of special damages on its own accord even though (1) the amount of damages was different than that awarded by the lower court; (2) the time utilized by the Court of Appeals was inconsistent with the lower court's findings as to when Sampson lost the color of authority to act on behalf of the partners; (3) the award was inconsistent with the lower court's specific conclusions that there was no showing that Sampson retained any of

the funds for his own personal use.

This Court should therefore exercise its supervisory powers to correct this erroneous application of established rules of appellate procedure.


CONCLUSION

The decision of the lower court and the Court of Appeals must be reviewed by this Court in order to avoid misapplication of principles governing causes of action in claims of tortious interference. The decision as it is now written allows any plaintiff to claim damages for the violation of any trifling regulation, statute, or code of ethics without any regard of the motivation or intent of the defendant. This Court should accept this case for the purpose of clarifying the type of "improper means" which give rise to liability as well as clarifying how the element of "good faith" comes into play as to the various burdens of the parties.

Second, while the issue of damages will not affect any other persons except that of the defendant the Court of Appeals' misapplication of established rules of appellate procedure require this Court's exercise of its supervisory powers to correct an obvious injustice.

For these reasons it is respectfully submitted that the Writ of Certiorari be granted.

DATED this 17th day of April, 1989.



Craig S. Cook
Attorney for John P. Sampson

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and correct copies of the foregoing Petition for Writ of Certiorari to John T. Anderson, Attorney for Respondents, Suite 600, Valley Tower, 50 West Broadway, Salt Lake City, Utah this 17th day of April, 1989.

Craig Shook

APPENDIX

COPY OF THE LOWER COURT FINDINGS OF FACT,
CONCLUSIONS OF LAW AND VERDICT ARE CONTAINED
IN A SEPARATE VOLUME ACCOMPANYING THIS PETITION

the court must consider the juvenile's right to a fair trial under the sixth amendment. *Id.* The court concluded that closure should not occur unless the court makes specific supported findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The court then reversed the trial court's closure order due to unsupported factual findings. *Id.* at 580-81.

In *Taylor v. State*, 438 N.E.2d 275 (Ind. 1982) cert. denied 459 U.S. 1149, the court affirmed the juvenile court's order permitting the media to attend a hearing involving a juvenile charged with committing robbery resulting in bodily injury. The Indiana statute permitted the juvenile court to determine whether the public should be excluded from the proceedings and stated that the court shall consider that the best interests of the community are generally served by the public's ability to obtain information about charges that would be a felony if committed by an adult. The court concluded that under the express language of the statute, the charged crime fell within the class of cases for which access and disclosure are deemed generally to serve the best interest of the public. *Taylor*, 438 N.E.2d at 280-81.

3. Kearns-Tribune has not differentiated the two types of proceedings in its arguments, and, therefore, contends that all types of juvenile court proceedings should be presumptively open to the public.

4. Section 78-3a-1 was amended in 1988, but because the section is substantive rather than procedural, we apply the version of the statute in effect at the time the cause of action arose. *Carlucci v. Utah State Indus. Comm'n*, 725 P.2d 1335, 1336 (Utah 1986)). Also, the changes made in the statute do not affect our analysis.

5. Kearns-Tribune also asserts that article I, section 11 of the Utah Constitution, which states "[a]ll courts shall be open," provides further support for its position that juvenile court proceedings should be presumptively open. Article I, section 11 provides, "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State ... any civil cause to which he is a party." The Utah Supreme Court has stated that section 11 "guarantees access to the courts and a judicial procedure that is based on fairness and equality." *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 675 (Utah 1985). In addition, the constitutional guarantee of access to the courthouse was intended to confer a remedy by due course of law for injuries to person, property or reputation. *Id.* We reject Kearns-Tribune's suggestion that section 11 mandates that all courts should be physically open. In addition, Kearns-Tribune has not asserted how the guarantee of access to the courthouse for a remedy to injury is relevant to arguments relating to freedom of the press.

Cite as
102 Utah Adv. Rep. 53

IN THE UTAH COURT OF APPEALS

John P. SAMPSON and Milton R. Goff,
individually, and as trustee of Milton R. Goff
Trust, an unincorporated association,
Plaintiffs, Appellant, and Cross-
Respondent,

v.

Paul H. RICHINS; Richtron, Inc., a Utah
corporation; Richtron Financial Corporation,
a Utah corporation; Richtron General, a Utah
corporation, and Frontier Investments, a Utah
corporation,
Defendants, Respondents, and Cross-
Appellants.

No. 880257-CA
FILED: February 22, 1989

Second District, Davis County
Honorable Bryant H. Croft

ATTORNEYS:

Craig S. Cook, Salt Lake City, for Appellant
John T. Anderson, Salt Lake City, for
Respondent

Before Judges Billings, Jackson, and Orme.

OPINION

BILLINGS, Judge:

Plaintiff-appellant, John P. Sampson, appeals the money judgment entered against him in favor of defendants-respondents, Richtron, Inc., Richtron Financial Corporation, and Richtron General (referred to collectively throughout this opinion as "Richtron"). The trial court found Sampson intentionally interfered with Richtron's economic relations and awarded judgment to 1) Richtron Financial Corporation, as a limited partner, in the amount of \$30,974.50, 2) Richtron, Inc., as a limited partner, in the amount of \$4,222.50, and 3) Richtron, Inc. and Richtron General, as general partners, in the amount of \$250,000. Richtron cross-appeals the trial court's refusal to award additional compensatory and punitive damages. We affirm.

PROCEDURAL POSTURE

Sampson filed the original complaint in this case to enforce an Oregon judgment previously obtained by Robert Osborn against Richtron which Sampson subsequently purchased from Osborn. Richtron answered the complaint alleging a variety of defenses to the Oregon judgment, and counterclaimed seeking six affirmative claims for relief against Sampson.

The case was tried without a jury before Senior Judge Bryant Croft. During the eleven-day trial, the court heard twenty-three witnesses and received approximately 398 exhibits. Judge Croft

drafted a 177 page "memorandum and summation of evidence" and entered "findings of fact and conclusions of law and verdict" consisting of 234 pages. Both counsel in their briefs and this court commend Judge Croft for his extraordinary efforts.

In bringing this appeal, Sampson ordered only a portion of the transcript of the proceedings below. Subsequent motions to supplement the record were denied. Richtron did not order additional portions for purposes of its cross-appeal. Consequently, both parties concede they are bound by Judge Croft's voluminous findings of fact, and only contend on appeal that the trial court's findings of fact do not support its conclusions of law and judgment. Specifically, Sampson claims the trial court's findings do not support the elements of intentional interference with Richtron's economic relations nor the corresponding damages awarded to Richtron. Richtron cross-appeals claiming the trial court erred 1) in refusing to award additional compensatory damages for partnership funds diverted by Sampson and for loans Richtron advanced to the partnerships, and 2) in refusing to award Richtron punitive damages.

FACTS

We set out only those facts found by the trial court that are relevant to the issues on appeal. Between October 15, 1973, and March 1, 1980, Paul Richins created twenty-five limited partnerships in which either Richtron, Inc., or Richtron General, its subsidiary, acted as the sole general partner. Both Richtron, Inc. and Richtron General were owned and controlled by Richins. The limited partnerships were created for the purpose of acquiring, operating, and holding for resale farm properties located in the states of Utah, Idaho, and Oregon.

Substantially identical limited partnership agreements were prepared for each of the twenty-five partnerships providing, in relevant part, that the general partner had the exclusive authority to conduct the affairs of the limited partnerships, and that the limited partners were required to make annual cash contributions to meet partnership expenses. The agreements disclosed that the agricultural properties previously purchased on contract by one of the Richtron companies were being resold to the limited partnerships at a profit.

During 1979 and early 1980, many of the limited partners refused to pay the partnership expense assessments made by Richtron. By May 1980, the limited partnerships were confronted with substantial and increasing financial difficulties due, in part, to the failure of many limited partners to pay their agreed assessments and, in part, to overall management problems. As a result, Richtron loaned substantial amounts of money to the limited partnerships to meet delinquent and current land contract installment obligations, well-drilling expenses, as well as other operating expenses. By June 1980, the aggregate amount of Richtron's loans, all of which were required by the partnership agreements to be repaid, exceeded \$300,000.

Sampson first became involved with the limited partnerships in May 1980, when he was retained as an attorney by two limited partners to attend a meeting of the Catlow Valley limited partners. Richins called the meeting to discuss, among other financial concerns, the existence of the "Osborn judgment" and that Osborn was willing to settle the dispute upon payment of a stipulated sum. The trial court made the following findings concerning Sampson's participation in the May 1980 meeting:

[Sampson's] actions there were a bit more than just privately counseling his two clients, for he not only orally recommended to those at the meeting and got started the movement to have Richtron Financial file for bankruptcy under Chapter 11 proceedings, but he also expressed the legal opinion to all present that he did not think Richtron Financial could keep the mark-up equity arising from Richtron Financial's resale of the farm property to the Catlow Valley partnerships for an amount in excess of what it paid for it, which was a theme which Sampson repeatedly expressed in the months and years ahead.

It was at this meeting that Sampson began his concentrated efforts to take control of the twenty-five limited partnerships. Sampson never invested in any of the partnerships, and from all indications, throughout his efforts, represented only two of approximately 130 limited partners.

In June 1980, as a result of ongoing pressure from Sampson, Richins purported to cause the withdrawal of Richtron, Inc. and Richtron General as general partners of the limited partnerships. Richins informed the limited partners that he would proceed to wind up and terminate partnership affairs, but none of the partnerships were ever terminated. Following his announcement, Richins agreed to permit Sampson to receive partnership assessments. Under this agreement, Sampson was required to forward funds to Richtron to pay pressing partnership obligations. Sampson did not comply with the agreement, and instead placed partnership contributions in his trust accounts.

At the Catlow Valley partnership meeting, Sampson suggested to his clients that they purchase all of Richtron's interests in the limited partnerships. Thereafter, Sampson and Richins attempted to negotiate a buy-out of Richtron's interests for \$700,000. The buy-out agreement provided that Richtron would be reimbursed for the loans it had made to the limited partnerships. Despite the negotiations between Sampson and Richins, Sampson informed a number of limited partners that Richtron was not entitled to repayment. Sampson expressed this opinion frequently both orally and through letters sent to all investors. As a result of Sampson's statements, many of the limited partners objected to the buy-out agreement, and no sale of Richtron's interest occurred. Soon after the buy-out agreement failed, Sampson resumed his efforts to take

control of the partnerships and exclude Richins.

Sampson first attempted to gain control by requesting the limited partners to execute powers of attorney. Sampson told the partners that such action was necessary to remove Richins and his companies as general partners and to commence legal action against them.

After obtaining powers of attorney from an unknown number of limited partners, Sampson incorporated the John P. Sampson Professional Corporation. Relying on the powers of attorney, Sampson attempted to elect his professional corporation as the successor general partner of each of the limited partnerships, in violation of the Utah Professional Corporation Act, Utah Code Ann. §§16-11-1 to 15 (1987).

Sampson was notified by court order that his corporation was not authorized to become a general partner in an agricultural enterprise. Thereafter, Sampson incorporated Ag Management, and attempted to substitute it as general partner of the limited partnerships. On November 24, 1982, a district court ruled that Sampson's efforts to substitute Ag Management as the general partner were legally invalid, and that Richtron was and always had been the only authorized general partner to act on behalf of the limited partnerships.

Within seven months of Sampson's attendance at the Catlow Valley partnership meeting, Sampson had assumed actual but not legal control of the twenty-five partnerships through a variety of means and was receiving and disbursing all partnership funds at his discretion. He continued his unauthorized control for over four years acting both in his individual capacity and as an attorney representing the interests of two limited partners. During this same period, Sampson also acted as legal counsel for Richtron, and on several occasions defended Richtron in lawsuits. In at least five instances, however, Sampson neglected the lawsuits against Richtron and allowed them to go to default. Sampson, on other occasions, revealed to third parties confidential information he had obtained in the course of his representation of Richtron.

During the summer of 1982, Sampson frequently contacted the Internal Revenue Service, and provided it with information concerning Richtron's internal business affairs. Eventually, the IRS conducted a tax sale wherein Sampson appeared as the only bidder, and purportedly acquired substantially all of Richtron's assets. A United States district court judge voided the tax sale by court order dated May 16, 1984.

From June 27, 1980, to October 29, 1984, approximately \$1,522,000 in limited partnership funds were deposited in the various accounts over which Sampson had control. From these accounts, Sampson withdrew over \$100,000 in attorney fees and \$78,000 to cover miscellaneous overhead expense. Despite several federal and state court orders declaring that neither Sampson nor Ag Management were authorized to act as general partners, Sampson continued to solicit and receive funds from limited partners and exercise control over the various limited partnerships. The trial court also found that throughout

Sampson's four-year period of control, he repeatedly ignored Richtron's limited partnership interests by failing to communicate and generally keep Richtron abreast of partnership activities.

Based on the facts set forth above, Judge Croft concluded that Sampson's intentional neglect of Richtron Financial's and Richtron, Inc.'s limited partnership interests caused them to lose their original capital contributions. Accordingly, Judge Croft awarded Richtron Financial \$30,974.50, and Richtron, Inc. \$4,222.50, which represented their respective capital interests. Finally, Judge Croft awarded Richtron General and Richtron, Inc., as general partners, \$250,000 based on Sampson's intentional interference with their economic relations.

Both Sampson and Richtron argue on appeal that the trial court's legal conclusions and judgment are not supported by its findings of fact. As a subsidiary issue, Sampson claims that many of Judge Croft's "findings of fact" are really "conclusions of law," and therefore, his challenges are properly before this court notwithstanding his failure to order a complete transcript of the proceedings below.

STANDARD OF REVIEW

R. Utah Ct. App. 11(e)(2) provides, with our emphasis, "[i]f the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion." In essence, Rule 11 directs counsel to provide this court with all evidence relevant to the issues raised on appeal. "Where the record before us is incomplete, we are unable to review the evidence as a whole and must therefore presume that the verdict was supported by admissible and competent evidence." *Smith v. Vuucich*, 699 P.2d 763, 765 (Utah 1985). *Accord Bevan v. J.H. Constr. Co.*, 669 P.2d 442, 443 (Utah 1983) (in absence of a transcript, we presume the trial proceedings were proper and judgment was supported by the evidence).

Accordingly, because the entire record in this case is not before this court, we presume the trial court's findings are supported by competent and sufficient evidence, "[h]owever, ... the findings must themselves be sufficient to provide a sound foundation for the judgment, and conversely ... any proper judgment can only be entered in accordance with the findings." *Forbush v. Forbush*, 578 P.2d 518, 519 (Utah 1978). Therefore, our review is strictly limited to whether the trial court's findings of fact support its conclusions of law and judgment.

In this regard, findings of fact "must clearly indicate the 'mind of the court' and must resolve all issues of material fact necessary to justify the conclusions of law and judgment entered thereon." *Parks v. Zions First Nat'l Bank*, 673 P.2d 590, 601 (Utah 1983) (footnotes omitted). See also *Kinkella v. Baugh*, 660 P.2d 233, 236 (Utah 1983) (failure to enter adequate findings of fact is generally reversible error). "Findings should be limited to the ultimate facts and if they ascertain ultimate facts, and sufficiently conform to the

pleadings and the evidence to support the judgment, they will be regarded as sufficient" *Pearson v. Pearson*, 561 P.2d 1080, 1082 (Utah 1977). A trial court need not resolve every conflicting evidentiary issue, "[n]or is the court required to negate allegations in its findings of facts." *Sorenson v. Beers*, 614 P.2d 159, 160 (Utah 1980).

INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS

In order to sustain a claim for intentional interference with prospective economic relations in Utah, a plaintiff must establish, "(1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations,¹ (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff." *Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982).²

Improper Purpose or Means

In order to establish "improper purpose" a plaintiff must demonstrate that the defendant's interference is maliciously motivated, "in the sense of spite and a desire to do harm to the plaintiff for its own sake" *Leigh Furniture*, 657 P.2d at 307 (quoting W. Prosser, *Handbook of Law of Torts* §129 at 943 (4th ed. 1971)). In a case of mixed motives, a court must determine the defendant's predominant purpose underlying his conduct. *Id.* "Problems inherent in proving motivation or purpose make it prudent for commercial conduct to be regulated for the most part by the improper means alternative, which typically requires only a showing of particular conduct." *Id.*

The improper means element "is satisfied where the means used to interfere with a party's economic relations are contrary to law, such as violations of statutes, regulations, or recognized common-law rules. Such acts are illegal or tortious in themselves and hence are clearly 'improper' means of interference." *Leigh Furniture*, 657 P.2d at 308 (citations omitted). Improper means may also include "violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehoods." *Id.* (quoting *Top Serv. Body Shop, Inc.*, 582 P.2d at 1371). "Means may also be improper or wrongful because they violate 'an established standard of a trade or profession.'" *Id.*

With the foregoing principles in mind, we address Sampson's challenges in this appeal. First, Sampson claims the trial court's "findings" that Sampson had an "improper purpose" and employed "improper means" are ultimate facts or, in the alternative, conclusions of law, and are not supported by the trial court's operative findings of fact. Conversely, Richtron claims that these "findings" are indeed findings of fact, and absent the entire record, are not subject to attack on appeal. See, e.g., *Cornish Town v. Koller*, 758 P.2d 919, 922 (Utah 1988).

We think the trial court's "findings of fact" that Sampson employed "improper means" or had an "improper purpose" are more accurately considered "mixed questions of law and fact." Cases

involving the application of law to facts are hopelessly at odds with one another as to whether the issue should be reviewed as a factual finding or a legal conclusion. See Weiner, *The Civil Nonjury Trial and Law-Fact Distinction*, 55 Calif. L. Rev. 1020, 1021-22 (1967). See also Calleros, *Title VII and Rule 52(a): Standards of Appellate Review in Disparate Treatment Cases - Limiting the Reach of Pullman-Standard v. Swint*, 58 Tul. L. Rev. 403, 416-17 (1983). However, we need not resolve the appropriate standard of review, as we find the trial court's voluminous and detailed operative factual findings overwhelmingly support its ultimate determination that Sampson employed *improper means* as is discussed more fully below. Furthermore, because we need only find either "improper purpose" or "improper means" to uphold the trial court, we do not address the issue of "improper purpose."

Based on our review of Judge Croft's findings of fact, we note at least thirteen acts that, taken together, constitute improper means as defined by the Utah Court in *Leigh Furniture*. Specifically, these acts include:

1. Sampson repeatedly misrepresented to the limited partners that Richtron was not entitled to be reimbursed for the capital advances it made to the limited partnerships or the disclosed mark-ups on the agricultural property sold to each of the limited partnerships.
2. Sampson's frequent false statements that Richtron was not entitled to its loan advances or mark-ups prevented an early settlement of the limited partnership affairs.
3. Sampson undertook representation of Richtron in several matters and at the same time, undertook representation of interests that were clearly adverse to Richtron in violation of the Code of Professional Responsibility.
4. After agreeing to represent Richtron's legal interest in civil matters, Sampson ignored these matters, and allowed at least five cases to go to default judgments against Richtron.
5. Sampson disclosed to third parties confidential information he obtained during the course of his representation of Richtron in violation of his professional and fiduciary obligations.
6. Sampson repeatedly breached his original agreement to serve as a repository for the deposit of partnership funds and insure that all such funds were duly transmitted to Richtron. Instead, Sampson placed partnership funds in his trust accounts.
7. Sampson's unauthorized control over the various limited partnerships for a period in excess of four years included receiving and disbursing said limited partnership funds. In doing so, Sampson repeatedly directed limited

partners to send money to him and not to Richtron.

8. Sampson executed invalid powers of attorney, and attempted to use those powers to substitute his newly created professional corporation organized for the purpose of practicing law, as a general partner to an agricultural partnership, in violation of the Utah Professional Corporation Act, Utah Code Ann. §§16-11-1 to-15 (1987).

9. After discovering he could not substitute his professional corporation as a general partner, Sampson attempted to substitute his newly created corporation, Ag Management, as general partner of the partnerships. Despite a district court order in 1982, declaring that Sampson's efforts were legally invalid, Sampson continued to exercise unauthorized control over the partnerships.

10. Sampson violated the Utah Limited Partnership Act, Utah Code Ann. §§48-2-1 to-27 (1989), by refusing to amend the certificates of the limited partnerships.

11. Sampson provided information to the Internal Revenue Service for the purpose of expediting a tax sale of Richtron's interests. Thereafter, Sampson appeared as the only bidder at the sale.

12. Despite a federal district court ruling that the IRS tax sale was void, Sampson continued to exercise control over the partnerships, and also continued to receive partnership funds.

13. Sampson purchased the "Osborn judgment" in violation of Utah Code Ann. §78-51-27 (1987).⁴

Notwithstanding the overwhelming nature of his conduct, Sampson claims the trial court failed to consider his "good faith efforts" in undertaking a majority of the actions which the trial court ultimately found constituted improper means. His position is untenable. Negating "good faith" is not an element of a prima facie case of intentional interference with economic relations in Utah.⁵ *Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982). Moreover, the trial court's findings negate any conclusion that Sampson acted in "good faith."

Finally, if Sampson uses the term "good faith" in the sense that he is claiming his acts were "privileged," Sampson bears the burden of raising this issue as an affirmative defense. See *Leigh Furniture*, 657 P.2d at 304. Sampson did not raise good faith or privilege as an affirmative defense, and he is now precluded from raising it for the first time on appeal. See *James v. Preston*, 746 P.2d 799, 801 (Utah Ct. App. 1987). In conclusion, Sampson's conduct is far more egregious than the conduct found sufficient to constitute improper means in *Leigh Furniture*. See 657 P.2d at 306. We have identified thirteen acts justifiably labeled "improper means," spanning a period of

well over four years, and although "[t]aken in isolation, each of the foregoing interferences with [Richtron's interests] might be justified as an overly zealous attempt to protect [Sampson's interests in representing his clients]," *Leigh Furniture*, 657 P.2d at 306, the cumulative effect, culminating in the failure of the limited partnerships, "cross[ed] the threshold beyond what is incidental and justifiable to what is tortious." *Id.*

Causation

Sampson claims the trial court's "conclusion" that Sampson's interference caused Richtron injury is not supported by the trial court's findings of fact, or in the alternative, the findings are inconsistent with a conclusion of causation. Whether causation has been established is a question of fact, see W. Prosser & W. Keeton, *Prosser and Keeton on the Law of Torts* §129 at 991 (5th ed. 1984), and in the absence of a complete record, we assume the trial court's finding of causation is supported by the evidence. See, e.g., *Cornish Town v. Koller*, 758 P.2d 919, 922 (Utah 1988).

Furthermore, Sampson's claims of error with regard to causation are more appropriately directed to the issue of damages. First, Sampson claims that the limited partnership agreements were terminable at will, thereby giving either party the absolute right to withdraw from the obligation at any time. Therefore, according to Sampson, Richtron had no right to continue its control over the limited partnerships in the future. Second, Sampson claims the court's finding that "by May, 1980, Richins and his companies had become confronted with substantial financial problems, as well as others likewise mentioned elsewhere, which were of such magnitude that success in overcoming them seemed doubtful," precludes or is inconsistent with a conclusion that Sampson's intentional interference caused Richtron injury.

As to the first claim, Sampson acknowledges in his brief "at will termination is normally one properly of damages rather than causation." As to the second claim, there are substantial findings to support the trial court's ultimate finding that Sampson's conduct caused Richtron loss. Richtron operated the partnerships for many years without foreclosures, and despite financial difficulties in 1980, Sampson offered \$700,000 for Richtron's interests in the limited partnerships at the time he now claims those interests had no value. Sampson's offer is evidence that he considered Richtron's interests worth a substantial amount of money notwithstanding the purported financial difficulties of the time. Based on the foregoing, we affirm the trial court's finding of causation.⁶

DAMAGES

Sampson's primary argument on appeal is that the damage awards are not supported by the trial court's findings of fact. Specifically, Sampson claims the court erred in awarding 1) \$250,000 to Richtron, Inc. and Richtron General as "consequential damages," and 2) \$30,974.50 to Richtron Financial and \$4,222.50 to Richtron Inc. representing their original capital contributions to

certain limited partnerships.

We emphasize that neither party is in a position to challenge the sufficiency of the evidence to support damages or the trial court's findings of fact based thereon. Rather, our review is limited to whether the trial court's findings of fact support its award of damages.

The Restatement (Second) of Torts §774A at 55 (1979), provides that one who is ultimately deemed liable to another for interference with economic relations is liable for "the pecuniary loss of the benefits of the contract or the prospective relation; [or] consequential losses for which the interference is a legal cause" Thus, Judge Croft's findings must identify actual pecuniary losses suffered by Richtron as a result of Sampson's conduct.

With respect to the \$250,000 award to Richtron, Inc. and Richtron General, the trial court made the following observation:

As stated before, damages are in tort, not in contract, rendering liability for damages for either the pecuniary loss of the benefits of the contract or consequential for which the tortious interference is the legal cause. I think that as to some claims for relief, damages, of at least a consequential nature, have been shown with a reasonable degree of certainty by a preponderance of the evidence.

Sampson claims it was error for the trial court to refuse to identify the precise composition of the \$250,000 award. We agree that Judge Croft was under the mistaken belief that he need not identify the exact basis for his award. However, this court can affirm the judgment if any legal basis exists to justify the trial court's award. See, e.g., *Beuhner Block Co. v. UWC Assocs.*, 752 P.2d 892, 895 (Utah 1988).

We note that in the context of a damage award, a trial court's findings of fact must provide a sufficient basis for this court to determine whether there is a rational legal basis as well as a sufficient factual basis for the award of damages. See, e.g., *Bastian v. King*, 661 P.2d 953, 957 (Utah 1983). However,

[a]lthough an award of damages based only on speculation cannot be upheld, it is generally recognized that some degree of uncertainty in the evidence of damages will not suffice to relieve a defendant from recompensing a wronged plaintiff. As long as there is some rational basis for a damage award, it is the wrongdoer who must assume the risk of some uncertainty. Where there is evidence of the fact of damage, a defendant may not escape liability because the amount of damage cannot be proved with precision.

Id. at 956 (emphasis added).

Further, "[o]nce a defendant has been shown to have caused a loss, ... the reasonable level of certainty required to establish the amount of a

loss is generally lower than that required to establish the fact or cause of a loss." *Cook Assocs., Inc. v. Warnick*, 664 P.2d 1161, 1166 (Utah 1983)(citations omitted)(emphasis in the original). Accord *Sawyers v. FMA Leasing Co.*, 722 P.2d 773, 774 (Utah 1986); *Terry v. Panek*, 631 P.2d 896, 898 (Utah 1981). "The amount of damages may be based upon approximations, if the fact of damage is established, and the approximations are based upon reasonable assumptions or projections." *Atkin Wright & Miles v. Mountain States Tel. & Tel. Co.*, 709 P.2d 330, 336 (Utah 1985).

Judge Croft found that as of May 16, 1984, "Judge Winder's order ended then and there ... [Sampson's] right to take any further steps in the windup of any affairs of any partnership in which the Richtron Companies remained as general partners" Despite Judge Winder's order, Sampson continued from that point to hold and collect additional partnership funds. Accordingly, Judge Croft's finding provides a reasonable legal basis for awarding Richtron damages for Sampson's wrongful use and control of partnership funds from the date of Judge Winder's order.

Judge Croft's findings as to the amount of funds wrongfully retained by Sampson after May 16, 1984, include:

From the evidence the only information the court has is that as of the date Judge Winder made his ruling, the Ag Management account had a balance of about \$28,700 which by October 29, 1984 had increased to over \$43,000, while the account balance of Consolidated Farms as of October 29, 1984 was \$245,597, with \$74,320 having been received since Judge Winder's ruling and \$12,000 having been disbursed

From these findings, it is clear that following Judge Winder's order, which unequivocally denounced Sampson's interest in partnership assets, the trial court concluded that Sampson deprived Richtron of the use and control of approximately \$290,000. There are admittedly alternative, inconsistent findings before this court, and ordinarily we would resort to the underlying record to determine which finding of fact is accurate. However, Sampson's failure to provide a complete transcript prevents us from reviewing the underlying evidence. Thus, we assume the evidence supports the trial court's findings of fact which in turn supports its ultimate damage award. See, e.g., *Cornish Town v. Koller*, 758 P.2d 919, 922 (Utah 1988). Accordingly, we find that the trial court's award of damages to Richtron, Inc. and Richtron General has a rational basis and is supported by the trial court's findings of fact.

Finally, Sampson appeals the trial court's award of damages to Richtron Financial and Richtron, Inc. in the amount of their original capital investment in their respective limited partnerships. Sampson claims the damages were awarded without a showing by Richtron that at the time Sampson took control of the partnerships, their limited partnership interests were worth

the original amounts contributed. In other words, Sampson claims the evidence does not support the trial court's findings. As we have stated repeatedly throughout this opinion, Sampson is precluded from raising this challenge because he has failed to marshal the evidence. See, e.g., *Harline v. Campbell*, 728 P.2d 980, 982 (Utah 1986). Accordingly, the trial court's award to Richtron Financial and Richtron, Inc. is affirmed.

Richtron's Cross-Appeal

In its cross-appeal, Richtron claims the trial court erred in refusing to award as damages the full amount collected and disbursed by Sampson during the first twenty-eight months of his unauthorized control of the limited partnerships. Richtron also claims the trial court erred in declining to award damages to Richtron for all the loan advances it made to the limited partnerships. We reemphasize that Richtron is held to the same standards of review previously set forth in this opinion.

As to Richtron's first claim, the trial court found that most of the funds that passed through Sampson's hands were paid out to satisfy partnership expenses. As a result, the trial court held that to any extent the funds were used to pay legitimate partnership obligations, Sampson was entitled to a credit. Based on this finding, the trial court refused to award any of the \$645,000 requested by Richtron. In the absence of a complete record, we assume the court's findings are supported by the evidence, *Cornish Town v. Koller*, 758 P.2d 919, 922 (Utah 1988), and the findings clearly support the trial court's refusal to award Richtron damages for the total amount collected and disbursed by Sampson.

As to the second claim of error, the trial court refused to award Richtron its loan advances based on the following findings:

The evidence did not contain anything about loan instruments having been prepared when such advances were made or repayments being made out of gross receipts in accordance with the "terms of the loan instruments," it being noted here and I so find that the promissory notes which Richins prepared on or about June 5, 1980 and signed for the partnerships as president of the general partner, did not constitute "loan instruments" as that term was used in the partnership agreement.

In addition, the court found that the circumstances triggering repayment as required by certain other partnership agreements had not occurred.

Finally, the court observed:

[I]t is apparent that repayment of the advances to the general partners was conditional upon the end results of each partnership, which leaves no assurance that any partnership, if properly wound up, as provided by law and the partnership agreements, would have been able to repay any of the obligations owed by it to the general partner for such advances.

In sum, the trial court's findings do not support Richtron's claim that Sampson's intentional interference deprived Richtron of the money it had advanced to the limited partnerships, and accordingly, we affirm the trial court's refusal to award such advances.

Punitive Damages

Richtron's final claim of error on cross-appeal is that the trial court erred in refusing to award Richtron punitive damages. In order to recover punitive damages, a plaintiff must prove the defendant's conduct was willful and malicious, or manifested a knowing and reckless indifference and disregard toward the rights of others. See, e.g., *Johnson v. Rogers*, 763 P.2d 771, 774 (Utah 1988). "Whether punitive damages [should be] awarded is generally a question of fact within the sound discretion of the [fact finder]," and will not be disturbed absent an abuse of discretion. *Biswell v. Duncan*, 742 P.2d 80, 86 (Utah Ct. App. 1987).

Although there are sufficient findings to support the reckless disregard standard for the award of punitive damages, especially in light of Sampson's professional and fiduciary obligations as an attorney, we will not substitute our judgment for that of the trial court. The court heard the evidence, and had the opportunity to observe the witnesses. The trial court clearly considered the appropriate legal standards for imposing punitive damages, and concluded Sampson's conduct did not rise to the necessary level. Based on the foregoing, the trial court's refusal to award punitive damages was not an abuse of discretion, and accordingly, we affirm.

CONCLUSION

In sum we hold that the trial court's findings of fact support its conclusion that Sampson interfered with Richtron's economic relations by improper means, causing Richtron pecuniary loss. We further find that the court's findings support its award of damages to all of the Richtron parties. Finally, we conclude the trial court's findings support its refusal to award additional compensatory damages to Richtron and its refusal to award punitive damages. Based on the foregoing, the trial court's judgment is affirmed.

Judith M. Billings, Judge

WE CONCUR:

Gregory K. Orme, Judge

Norman H. Jackson, Judge

1. In *Richmond*, the Court observed that while the issue of access to civil cases is not before the Court, civil trials have historically been open to the public. *Richmond*, 448 U.S. at 581 n.17. On the other hand, in Justice O'Connor's concurring opinion in *Globe*, she states that she interprets "neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside the context of criminal trials." *Globe*, 457 U.S. at 611.

2. Two jurisdictions have examined statutes which, unlike the Utah statute, presume juvenile court proceedings open unless closure is requested. In *Associated Press v. Bradshaw*, 410 N.W.2d 577 (S.D. 1987), the court interpreted its state statute to

allow judges discretion to admit certain enumerated parties to the juvenile proceeding. *Id.* at 579. The court declined to interpret the statute to mean that the judge must allow all enumerated persons access to the hearing and stated that once closure is requested, the court must hold a hearing and take evidence on the need for closure. *Id.* The court stated that the juvenile court must balance the competing interest in the confidentiality and anonymity of a juvenile court proceeding against the media's rights under the first amendment. *Id.* at 578. In addition, the court must consider the juvenile's right to a fair trial under the sixth amendment. *Id.* The court concluded that closure should not occur unless the court makes specific supported findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The court then reversed the trial court's closure order due to unsupported factual findings. *Id.* at 580-81.

In *Taylor v. State*, 438 N.E.2d 275 (Ind. 1982) cert. denied 459 U.S. 1149, the court affirmed the juvenile court's order permitting the media to attend a hearing involving a juvenile charged with committing robbery resulting in bodily injury. The Indiana statute permitted the juvenile court to determine whether the public should be excluded from the proceedings and stated that the court shall consider that the best interests of the community are generally served by the public's ability to obtain information about charges that would be a felony if committed by an adult. The court concluded that under the express language of the statute, the charged crime fell within the class of cases for which access and disclosure are deemed generally to serve the best interest of the public. *Taylor*, 438 N.E.2d at 280-81.

3. Kearns-Tribune has not differentiated the two types of proceedings in its arguments, and, therefore, contends that all types of juvenile court proceedings should be presumptively open to the public.

4. Section 78-3a-1 was amended in 1988, but because the section is substantive rather than procedural, we apply the version of the statute in effect at the time the cause of action arose. *Carlucci v. Utah State Indus. Comm'n*, 725 P.2d 1335, 1336 (Utah 1986)). Also, the changes made in the statute do not affect our analysis.

5. Kearns-Tribune also asserts that article I, section 11 of the Utah Constitution, which states "[a]ll courts shall be open," provides further support for its position that juvenile court proceedings should be presumptively open. Article I, section 11 provides, "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State ... any civil cause to which he is a party." The Utah Supreme Court has stated that section 11 "guarantees access to the courts and a judicial procedure that is based on fairness and equality." *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 675 (Utah 1985). In addition, the constitutional guarantee of access to the courthouse was intended to confer a remedy by due course of law for injuries to person, property or reputation. *Id.* We reject Kearns-Tribune's suggestion that section 11 mandates that all courts should be physically open. In addition, Kearns-Tribune has not asserted how the guarantee of access to the courthouse for a remedy to injury is relevant to arguments relating to

freedom of the press.

1. The Utah Supreme Court has declared that the tort of intentional interference with economic relations protects both a party's existing contracts and "interest in prospective relationships not yet reduced to a formal contract (and perhaps not expected to be)." *Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293, 302 (Utah 1982).

2. In announcing the elements of a prima facie case, the Court discussed the history and development of intentional interference with economic relations, noting that the "blend of intentional and negligent tort principles has produced two different approaches to the definition of this tort." *Leigh Furniture*, 657 P.2d at 302. The first approach, followed by many jurisdictions and included in the first Restatement of Torts, requires a plaintiff to demonstrate that "the defendant intentionally interfered with his prospective economic relations and caused him injury." *Id.* The defendant then bears the burden of asserting privilege or justification as an affirmative defense. *Id.* The second approach, modeled after other negligent torts, requires a plaintiff to prove "liability based on the interplay of various factors." *Id.* at 303. This alternative approach is memorialized in the Restatement (Second) of Torts §766B (1979). It is important to emphasize that the Utah Court expressly rejected both approaches and chose, instead, to follow "a middle ground" previously adopted by the Oregon courts. *Id.* at 304 (citing *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 283 Or. 201, 582 P.2d 1365 (1978)). Under Utah's approach, improper purpose or means must be established as part of a prima facie case and privilege is an affirmative defense, which only becomes relevant if "the acts charged would be tortious on the part of an unprivileged defendant." *Id.* at 304 (quoting *Top Serv. Body Shop, Inc.*, 582 P.2d at 1371).

4. Section 78-51-27 provides:

An attorney or counselor shall not:

(1) directly or indirectly buy, or be in any manner interested in buying or having assigned to him, for the purpose of collection, a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon.

(2) by himself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person as an inducement to placing, or in consideration of having placed, in his hands or in the hands of another person a demand of any kind for the purpose of bringing action thereon or of representing the claimant in the pursuit of any civil remedy for the recovery thereof; but this subdivision does not apply to any agreement between attorneys and counselors to divide between themselves the compensation to be received.

An attorney or counselor who violates either of the foregoing subdivisions of this section is guilty of a misdemeanor and shall be punished accordingly, and his license to practice may be revoked or suspended.

5. Sampson relies on authority from jurisdictions taking a different approach to the tort of intentional

interference with economic relations. For instance, Sampson cites a Texas decision wherein the court found that the defendant acted in good faith which justified his interference with the plaintiff's contract. See *American Petrofina, Inc. v. PPG Indus., Inc.*, 679 S.W.2d 740, 758 (Tex. Ct. App. 1984). However, Texas courts do not require, as part of a prima facie showing, that the defendant acted "improperly." Rather, a plaintiff need only demonstrate 1) the existence of a contract, 2) intentional and willful interference, 3) proximate causation, and 4) actual loss. *Id.* Additionally, on at least one other occasion, a Texas court held that it was incumbent upon the defendant to prove that his acts were either justified or privileged. *Armendariz v. Mora*, 553 S.W.2d 400, 405 (Tex. Civ. App. 1977).

Similarly, Sampson cites Arizona authority where the court found that the violation of a statute was outweighed by the defendant's good faith reliance on a letter from a state agency authorizing his conduct. See *G.M. Ambulance and Medical Supply Co., v. Canyon State Ambulance, Inc.*, 153 Ariz. 551, 739 P.2d 203, 205 (Ct. App. 1987). However, Arizona follows the Restatement (Second) of Torts approach, one specifically rejected by our Supreme Court. See *Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982).

6. Sampson further asserts that Richtron's claim for intentional interference with economic relations is barred by the doctrines of waiver and estoppel, and the trial court's failure to so find constitutes reversible error. A trial court is not required to negate all allegations in its findings of fact, *Sorenson v. Beers*, 614 P.2d 159, 160 (Utah 1980), and based on the findings of fact, we affirm the trial court's conclusion that Sampson failed to establish waiver or estoppel.

Cite as
102 Utah Adv. Rep. 61

IN THE
UTAH COURT OF APPEALS

CITY OF MONTICELLO,
Plaintiff and Respondent,

v.

Lee CHRISTENSEN,
Defendant and Appellant.

No. 880343-CA
FILED: February 23, 1989

Seventh Circuit, San Juan County
Honorable Bruce K. Halliday

ATTORNEYS:

Lee Christensen, Pro Se, for Appellant
Lyle R. Anderson, Monticello, for Respondent
Before Judges Bench, Davidson and Jackson.

MEMORANDUM DECISION

PER CURIAM:

Defendant appeals his conviction of driving without a valid Utah license. The charge originated in the justice of the peace court where defendant was convicted. Upon his appeal to the circuit court he was again convicted. Defendant contends that he is a citizen of Wyoming and possesses a valid Wyoming driver's license. His Wyoming license was introduced as a trial exhibit.¹ Therefore, he argues, he was not driving without a valid driver's license.

Plaintiff Monticello City filed a motion to summarily dismiss this appeal, asserting that under Utah Code Ann. §77-35-26(13)(a) (1988), this court has no jurisdiction. We deferred ruling upon the jurisdictional issue until after the briefs were filed and the case was at issue in order that defendant have a full opportunity to present his case and because we had no record before us of the justice and circuit court proceedings. We now discuss the issue of our appellate court jurisdiction over appeals which originate in the justice of the peace courts and are reviewed by trial "anew" in the circuit courts.

We are prevented from reaching the merits of defendant's appeal if we do not have jurisdiction over the case. *Thompson v. Jackson*, 743 P.2d 1230, 1232 (Utah Ct. App. 1987) (the initial inquiry of a court is to determine its own jurisdiction). Under section 77-35-26(13)(a), we have jurisdiction over a criminal matter originating in a justice court only when the validity or constitutionality of an ordinance or statute has been raised in the justice court. We therefore examine the record to determine what issues were raised and argued in the justice court.

We recognize that a justice of the peace court is not a court of record, Utah Code Ann. §78-5-0.5 (1987), and a tape recording or transcript of the proceedings in justice court is not necessarily available. Section 77-35-26(13)(a) requires that the requisite constitutional challenge be initiated in the justice court. Without a reliable record of the proceedings there it is difficult to ascertain whether the proper issue was adequately raised and preserved for review. However, an appeal from the justice court affords defendant a trial "anew" in the circuit court, which is a court of record. Utah Code Ann. section 78-4-2 (1987). We presume that if the challenge was properly and adequately raised in the circuit court, then it was also properly raised in the justice of the peace court. Conversely, if a specific challenge to the constitutionality or validity of a statute or ordinance was not raised in the circuit court, we assume that it was not previously made an issue in the justice court. Therefore, in order that the proper, specific constitutional or statutory challenge be preserved, that challenge must clearly have been raised in and presented to the circuit court.

Upon review of the record filed herein, we find that defendant did file a written motion to dismiss the charge in the justice court. That motion was essentially renewed in the circuit court and was based upon his assertion that the city ordinance

DECISION OF THE UTAH COURT OF APPEALS

COPY OF TRANSCRIPT HEARING ON SEPT. 11, 1986

COPY OF TRANSCRIPT HEARING ON SEPT. 11, 1986
Pages 26-31

MR. HARMON:

In Objection No. 5, Your Honor, the Court in finding 232 acknowledges that there are damages of a consequential nature and then, however, the Court does not go on with any to identify what damages the Court is referring what evidence supports that particular statement, and then the Court goes on and awards the \$250,000 in favor of the general partners and against Mr. Sampson. As we have outlined here on page 5, I think the Court walked through all the various theories, and then the Court dispelled most of these theories, and I guess our position is we don't have any idea, Your Honor, where the \$250,000 comes from.

THE COURT:

Do you have any idea when a jury comes in with a verdict for \$25,000 in a \$100,000 as to where it got that figure? I have seen that hundreds of times in trials that I have presided over. You don't know how they have arrived at those figures, generally.

I gave considerable thought to this problem. It was, I guess, one of my major things that I wrestled with. There wasn't any doubt in my mind based upon the record made during the trial that John Sampson had intentionally interfered with an existing economic relationship, and that all of the elements, both the means and the manner that were spelled out by our Supreme Court as constituting elements of that particular tort to me were clearly established by the evidence.

I think you will recall that while I could see Sampson's representation of Richtron companies in various lawsuits was probably--turned out to be a conflict of interest when he was also opposing them, and that that might have been a breach of duty, maybe there was a negligence on the part of Sampson as alleged in one of the counts. I felt that while those particular counts may have been proven insofar as allegations of wrong doing was concerned, the record didn't present specific evidence that enabled me to say, yes, because he represented, and I expect maybe Mr. Anderson might talk about this in his, because he represented us in a dozen lawsuits, or was supposed to represent us and failed to do so we had default judgments taken against us.

The record doesn't tell me what the defendants' damages were as a result of proximate cause of those factors. And I felt that the tort, and I stress the tort aspect of the cause of action about the intentional interference with an existing economic relation, and I don't think we'll ever get a more clear cut example of that being done than we have in

this case.

But that particular thing was not a contract violation. Recovery wasn't based upon contract relationships. It was a tort just like you run a red light and crash into your car. I commit a tort and you are injured. And you are entitled to recover damages. But how much? Well, the jury says \$25,000. You wanted \$100,000. You get \$25,000, see.

And, so, I considered the evidence at substantial length. What exactly was the total of the advances made by the general partners to the limited partners. I am trying to say I don't know. Because various exhibits that came into evidence gave us different amounts. \$75,000 goes for overhead expenses. I don't know what they were. Maybe they were to pay John Sampson's law office expenses. I don't know.

\$100,000 goes out to Sampson as attorneys' fees. Well, I can't say that he's not entitled to attorneys' fees for all that he did in this case, and, therefore, I wouldn't say the money was spent for attorneys' fees or that Sampson took for attorneys' fees was all wrongfully taken in view of the history of this thing and, therefore, that's one specific element of damage that the general partners

are entitled to recover.

I think if I took the time I could think of other similar examples. A factor that I examined closely and brought out in my findings was Richins' contention with respect to the value of all the property which--for which he was seeking millions of dollars in damages, you see. Yet on his bankruptcy schedules the value of the properties listed as being properties in which RFC had an interest fell far below his \$9 and \$12 million figures that he set forth in some of his exhibits. I have no way of knowing what value of the loss of those properties could be assessed if any.

I guess I will talk more about this when I hear from Mr. Anderson. But I concluded that Richins' conduct was indeed intentional. That it was an interference.

I don't mean Richins. I mean Sampson. That it was an interference with an existing economic relationship--several existing economic relationships. As I pointed out in seven months at the end of 1980 he literally controlled all of the partnerships. And there is something to be said for his doing that on the other side of the question, too. And I recognize that. And we'll probably talk about that some more with Mr. Anderson.

But the end result is that is the defendants in the case end up with nothing because of Sampson's conduct. And I felt that his conduct justified as a substantial recovery. And as I said, I wrestled with my thoughts for hours trying to think of a basis for fixing a figure, and that's the figure I came up with. It's less than what some exhibits claim the advances were. I think I pointed out in my findings that the repayment of those advances had substantial uncertainty if all of the partnerships had been dissolved and liquidated in an orderly, proper fashion, all expenses paid and the property sold for the best price they could collect.

I point out that there still may not have been any money left to pay all or even part of the advances. So, I don't think that the advances gives me necessarily an accurate measure of damages that I could award to them. If I had done so it would be, maybe, \$100,000 more than it is.

There were many factors that I weighed and considered and you see them scattered throughout my findings. And, so, I just concluded this is a tort. Damages was caused by Sampson through his conduct. I find it was not such conduct as justified punitive damages, and will be talking about that, I am sure, but that the defendants were entitled to a substantial

recovery. In no sense of the word could I go to Richins \$5 million and \$6 million and \$9 million and \$12 million figures in arriving at damages because the evidence wasn't there. Credible evidence wasn't there that I could accept as being a proper foundation for a measure of damages. But I just say that that's the amount I came up with and I don't think I am obligated to say that the \$250,000 is made up of \$250,000 in advances which I think he would have recovered if they'd have orderly liquidated all of the partnerships or that it is made up of \$100,000 attorneys' fees Sampson took plus the \$75,000 that he used for overhead, plus another \$75,000 for some other specific item.

You see, and that's the reason I did what I did, and I don't think I can really--need to do or can do any different.