

1993

Medical Leasing, LTD., a Utah partnership v.
Anthony W. Middleton, Jr., Carol S. Middleton,
George W. Middleton, Jean H. Middleton, Delores
B. Middleton, Richard G. Middleton, Jane G.
Middleton, Mary Middleton Dahl and Richard P.
Middleton, executor of the Estate of Victoria Ann
M. Stearn : Brief of Appellant

Utah Court of Appeals

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CKET NO. 930218CA IN THE UTAH SUPREME COURT

MEDICAL LEASING, LTD., a Utah
partnership,

Plaintiff/Appellee

v.

ANTHONY W. MIDDLETON, JR., CAROL
S. MIDDLETON, GEORGE W.
MIDDLETON, JEAN H. MIDDLETON,
DELORES B. MIDDLETON, RICHARD G.
MIDDLETON, JANE G. MIDDLETON,
MARY MIDDLETON DAHL and RICHARD
P. MIDDLETON, executor of the
ESTATE OF VICTORIA ANN M.
STEARNS,

Defendants/Appellants.

93-0210-3A

No. 20439

Priority No. 15

**BRIEF OF APPELLANTS/DEFENDANTS ANTHONY W. MIDDLETON, JR.,
CAROL S. MIDDLETON, GEORGE W. MIDDLETON AND JEAN H. MIDDLETON**

AN APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY
THE HONORABLE KENNETH RIGTRUP, PRESIDING

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executor of the Estate of Victoria
Ann M. Stearn

FILED

FEB 8 1993

**CLERK SUPREME COURT
UTAH**

**MEDICAL LEASING, LTD., a Utah
partnership,**

Y.

No. 920439

Priority No. 15

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STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2-2(3)(j) (1989).

ISSUES FOR REVIEW

I. Whether admission of MLL's¹ evidence regarding the Zions litigation was prejudicial error.

Standard of Review: Whether the trial court's ruling was clearly erroneous. Whitehead v. American Motors Sales Corp., 801 P.2d 920 (Utah 1990).

II. Whether the 1980 Amended Ground Lease between these litigants required written notice of default as a condition precedent to suit for express and/or implied breach of the lease, barring MLL's contract claims.

Standard of Review: De novo review for correctness. Kimball v. Campbell, 699 P.2d 714 (Utah 1985).

III. Whether the 1980 Amended Ground Lease, by its terms, provided duties or obligations prohibiting Middletons from interfering with or requiring them to cooperate in efforts of MLL to sublet or develop the subject property.

Standard of Review: De novo review for correctness. Kimball v. Campbell, supra.

IV. Whether the trial court erred as a matter of law by awarding MLL attorneys fees where the verdict failed to specify a

¹ Plaintiff/Appellee will be referred to herein as MLL.

finding of a breach of the express terms of the 1980 Amended Ground Lease.

Standard of Review: De novo review for correctness. Cottonwood Mall v. Sine, 830 P.2d 266 (Utah 1992).

V. Whether the trial court erred by ruling that, as a matter of law, all defendants were jointly and severally liable on the breach of contract claims, even though they leased the property as tenants in common and did not expressly agree to joint liability.

Standard of Review: De novo review for correctness. Kimball v. Campbell, supra.

VI. Whether MLL failed to present substantial evidence to establish that threats of litigation by Anthony W. Middleton, Jr. caused damage to MLL.

Standard of Review: Whether there is any substantial evidence from which the jury could have reasonably reached the verdict without resorting to speculation or drawing unreasonable inferences. Morgan v. Quailbrook Condominium Co., 704 P.2d 573 (Utah 1985).

VII. Whether, as a matter of law, a threat of litigation not followed by suit and adjudication favorable to MLL is legally sufficient to satisfy the "improper purpose and improper means" element of MLL's tortious interference claim.

Standard of Review: De novo review for correctness. Scharf v. BMG Corp., 700 P.2d 1068 (Utah 1985).

VIII. Whether the trial court erred in failing to rule as a matter of law that Middletons, as landlords to MLL and owners of the real property in question, were privileged to interfere in negotiations for sublease of the property.

Standard of Review: De novo review for correctness. Scharf v. BMG Corp., supra.

IX. Whether the jury instructions erroneously stated the applicable law respecting damages, thereby permitting a double recovery and relieving MLL of its duty to mitigate.

Standard of Review: De novo review for correctness. Ramon v. Farr, 770 P.2d 131, 133 (Utah 1989).

DETERMINATIVE RULES

A. Constitutional Provisions.

Sec. 11. [Courts open - Redress of injuries.]

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, by himself or counsel, any civil cause to which he is a party.

B. Rules of Evidence.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

A. Nature of The Case.

This action arises out of a landlord-tenant relationship which has existed between plaintiff and defendants since 1975. It is the second major lawsuit which the lease between the parties has spawned. The plaintiff in this action, Medical Leasing, Ltd. ("MLL") is the lessee of a 10-acre parcel of land on the northwest corner of 39th South and 7th East in Salt Lake City. Defendants (collectively, "Middletons") are the fee owners of the property and landlords to MLL. The instant case arose when consummation of a sublease which MLL had been negotiating with The Boyer Company for some eighteen months was allegedly prevented or interfered with by conduct of defendant Anthony W. Middleton, Jr. MLL had demanded certain amendments and concessions from Middletons to facilitate the Boyer sublease and when they were not forthcoming, threatened to sue and then ultimately commenced this action.

B. Course of Proceedings and Disposition Below.

On February 16, 1990, Medical Leasing filed this action. R. at 2. The original Complaint had five claims. Count I prayed for a declaratory judgment and injunction. Count II was a claim for breach of implied covenants of good faith and fair dealing in the 1980 Amended Ground Lease between the parties. Count III was

for intentional interference with contract. Count IV was for intentional interference with prospective economic relations, and Count V was for attorney's fees under the Amended Ground Lease. All of the claims were asserted against the other Middletons on the basis that Anthony Middleton acted as an agent of the other Middletons; no separate claim of joint and several liability was made. Complaint, R. at 2-26.

Following defendants' Motion to Dismiss, the trial court dismissed Count I, finding that the Middletons had no contractual obligation to consent to attornment or to the proposed Boyer sublease. R. 301-2. (the Order is included in Appellants' Addendum as Exhibit 1). Plaintiff filed an Amended Complaint (R. 319) including all the original claims except those for declaratory judgment and injunctive relief. The claims again asserted the other Middletons were liable because Anthony Middleton acted as their agent; again, no separate claim of joint and several liability was made.

Defendants moved for summary judgment. R. at 447, 584. The court granted summary judgment against plaintiff only on its second claim, for intentional interference with the development contract. The court held as a matter of law that there was no contract between Boyer Company and MLL which could be the subject of an interference claim as it had expired by its own terms. R. at 1078. (See, Appellants' Addendum, Exhibit 2). The case proceeded to trial on the remaining claims.

Over defendants' objections, the Court admitted evidence at trial which Middletons assert should have been excluded, including, among other things: evidence about the Middletons' claims in prior litigation involving Zions Bank, inferring that it was not meritorious, even though that action was settled and compromised. Objections: Motion in Limine, R. at 1215-17; Trial Transcript, R. at 4007, 4024, 4042, 4114, 4115.

Defendants objected to various jury instructions given by the Court, including:

- a. the elements of intentional interference with prospective relations and privileges associated therewith;
- b. submission of any issue of breach of express contract or implied covenant of good faith;
- c. the plaintiff's duty of mitigation; and
- d. the analysis and calculation of damages.

The jury returned a verdict,² finding:

- a. Anthony Middleton and Carol Middleton tortiously and intentionally interfered with Medical Leasing's prospective economic relations [R. at 1569]; and
- b. Anthony and Carol Middleton breached "the express terms of the Amended Ground Lease and/or their implied covenant of good faith and fair dealing." [R. at 1572].

The jury found compensatory damages in the amount of \$2,582,780 (R. at 1574), which is the present value of all of the

² The Special Verdict was incorporated in the Judgment which is included in Appellants' Addendum as Exhibit 6.

lease payments to be made by Boyer to Medical Leasing under the proposed sublease for its full term as though their lease were signed and in effect.

The jury found the other Middletons did not tortiously interfere with plaintiff's prospective economic relations (R. at 1569-70), and did not breach the lease or any covenant of good faith. R. at 1572-73.

After trial, the trial court held, as a matter of law:

a. that neither the Lease nor the law required MLL to give Middletons written notice of the alleged breach of the Lease before claiming default under the Lease;

b. there was substantial evidence that paragraph 8 of the Amended Ground Lease was breached (R. at 2944, 1. 9-13);

c. that all defendants were jointly liable under the Lease for Anthony Middleton's breach of the Lease and/or breach of the covenant of good faith and fair dealing (R. at 2962); and

d. that plaintiff was entitled to attorneys fees under the Lease for defendants' breach of the Lease, in the amount of \$275,000. R. at 2941-42.³ (See, Appellants' Addendum, Exhibit 6.)

³ Middletons reserved their right to contest MLL's claim for attorneys' fees and to contest the award of fees and/or the amount of fees for MLL's failure to "allocate time and fees for (1) successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees." R. at 2951.

The jury found in special interrogatories that (a) Anthony and Carol⁴ Middleton had (i) intentionally interfered with MLL's prospective economic relationship with The Boyer Company (R. at 1569) and (ii) breached the express terms of the lease and/or the covenant of good faith and fair dealing (R. at 1572), (b) the other Middletons did not interfere (R. at 1569-70) or breach the lease (R. at 1572-73), and (c) MLL should recover punitive damages from Anthony Middleton. R. at 1574. The jury found damages to MLL in the amount of \$2,582,780 (R. at 1574) and at a separate hearing, punitive damages of \$75,000. R. at 1584. (See, Appellants' Addendum, Exhibit 6.)

Following the jury's verdict, Judge Rigtrup ruled that all Middletons were jointly liable for the breach of lease by Anthony and Carol Middleton. R. at 2962. After denying defendants' Motions for JNOV or a New Trial, the Court entered judgment in favor of MLL against all Middletons jointly on the claim of breach of lease and/or breach of covenant of good faith and fair dealing and against Anthony and Carol Middleton on the claim of intentional interference with prospective economic relationship, "in the amount of \$2,582,780, together with interest thereon at the rate of 10% per annum from and after February 28, 1992 to the date of judgment . . . and thereafter at the rate of 12% per annum," for attorney's fees "in the amount of \$275,000 together with interest at the rate of 12% per annum from and after the

⁴ Carol Middleton's liability was based on a finding that her husband, Tony Middleton, was her agent.

date judgment is entered," and costs. R. at 2964. (See, Appellants' Addendum, Exhibit 6.) It is from this Judgment that Middletons appeal.

STATEMENT OF FACTS

Middletons are the owners as tenants in common⁵ of 10 acres of real property at the corner of 7th East and 39th South in Salt Lake City. The property was previously owned solely by R. P. Middleton, Anthony W. Middleton, Sr. and Delores Middleton, brothers and sister. R. P. Middleton gave his interest in the property to his children, R. G. Middleton (R. at 4972), Mary Middleton Dahl and Victoria Ann Stearn, and R. G.'s wife, Jane. Anthony W. Middleton, Sr. gave his interest in the property to his sons, Anthony W. Middleton, Jr. (R. at 4317) and George W. Middleton, and their wives,⁶ Carol and Jean. Delores Middleton, who is a resident of the District of Columbia (R. at 321, ¶ 9, 412, ¶ 9), has retained her interest in the property.

In 1975, the Middletons leased the realty to MLL's predecessor until the year 2025, with a 30-year option for renewal. The tenant proposed to construct a surgical center on two acres of the property. The Middletons consented to subordinate⁷ to the construction lender their fee interest in the

⁵ Ownership as tenants in common was alleged in the Amended Complaint, ¶¶ 5-13, R. at 321-22, and admitted in Middletons' answers, R. at 391-92 and 412. See, also, R. at 899, 1. 16-18.

⁶ George and Jean Middleton have since divorced.

⁷ The original Ground Lease in 1975 stated: "Tenant has represented to Landlord that it will be impossible for it to finance the construction of the Surgical Center without the subordination of the Landlord of its fee title to

two acres where the surgical center would be built. Ex. P-1 at 9-14. The lease also provided that "Landlord does not agree to subordinate the fee title of any of the Lease Property except as to the two acres referred to above." Id. at 14.

An Amended Ground Lease between MLL and Middletons (Ex. P-3), made in 1980, provided for a term to July 31, 2025 with a 15-year option to renew. In that Amended Ground Lease, Middletons agreed to subordinate an additional .75 acre to facilitate construction of an addition to the surgical center. Ex. P-3 at 7-12 (the 1980 Amended Ground Lease is included in Appellants' Addendum as Exhibit 7).

Each of the Middletons signed the Amended Ground Lease ("Lease") separately as "Landlord".

Middletons believed they would be able to participate in further development rentals because they understood that if MLL did undertake to sublease the rest of the property to a major independent developer, as a practical matter, the developer or the developer's lender would very likely insist that MLL obtain the Middletons' agreement to subordinate the fee to the development lender's lien (R. at unnumbered page following 5701) and/or to the developer's or his subtenant's leaseholds, or require other consent or changes in the lease. R. at 4998-99, 5001-2, 5004. The Middletons anticipated that if MLL asked for consent or subordination for development, they could rightfully ask for more income on the Lease in return. R. at 5004. In one

the two acres . . ." Ex. P-1 at 10.

sense MLL had a similar view: if MLL asked Middletons for consent, they knew Middletons would ask for more money. R. at 4916.

In 1980, MLL subleased part of the undeveloped portion of the property to Zions Bank. Ex. P-4. The sublease included a right to cure provision, which mirrored the provision in the Lease:

In the event Lessor receives any notice of any default under said Amended Ground Lease, Lessor shall promptly, no later than three (3) days from the receipt of said notice by Lessor, deliver to Lessee a copy of said notice. Lessee may elect, in its sole discretion, to cure said default on behalf of Lessor and thereby reinstate and continue in effect said Amended Ground Lease. In the event Lessee remedies any such default . . . [Lessor is responsible for Lessee's costs.]

Ex. P-4, ¶ 15.

Although the Middletons were not asked to subordinate their fee, Zions insisted the Middletons expressly consent to Zions sublease and MLL insisted that such consent be given without compensation. Ex. P-6. Zions, over MLL's objections (R. at 4161), sued MLL and the Middletons for consent or a declaration that consent was not necessary. Zions Utah Bancorporation v. Medical Leasing Limited, et al., in the Third District Court of Utah, Civil No. C83-713. See, Zions Complaint, Ex. P-10. In October, 1985, the parties reached a settlement by which MLL paid the Middletons \$21,000 (Ex. P-17, pp. 4-5, 5-9) and the parties agreed to a mutual release of all claims and a stipulation that restated paragraph 8 of the 1980 Amended Ground Lease. Ex. P-16 pp. 4-5 (the Zions Findings of Fact, Conclusions of Law and

Order, including the Stipulation, are included in Appellants' Addendum as Exhibit 8).

In 1987, MLL began to discuss further development of the remaining property with The Boyer Company. R. at 4050. Because MLL did not want to share any proceeds from such development with the owners of the land, neither MLL nor Boyer disclosed the proposed development to the Middletons until late July of 1989. Dr. Wong, R. at 4894-95.

In June, 1988, MLL and Boyer Company signed a development agreement (Ex. P-22) whereby Boyer Company contemplated the sublease and development of the remaining six acres, conditioned, among other things, upon Boyer Company getting the property rezoned for a commercial use and the parties signing a sublease by December 31, 1988. This development agreement specified the exact rents Boyer Company would pay MLL over the 52-year term, including escalation based on the higher of consumer price index increases or the increases in rents Boyer Company might receive from subtenants over a stated baseline. Later, the time within which the sublease was to be signed was extended to January 31, 1989. Ex. P-32.

The Boyer Company obtained rezoning and "was prepared to remove the contingencies of the Development Agreement" (Ex. P-32), but MLL failed to prepare the first draft of the proposed sublease until February 3, 1989, three days after the development

agreement had expired by its terms. Ex. D-30.⁸ After examining the proposed sublease on March 14, 1989, Boyer Company's lawyer Vic Taylor wrote MLL's lawyer John Parsons that a number of "business hurdles" had to be overcome (Ex. D-14), before addressing other concerns with the proposed sublease. The "business hurdles" to overcome included:

(1) that tying the rent to MLL in part on Boyer's rentals from subtenants "violates the letter and spirit" of the provision in paragraph 8 of the Amended Ground Lease under which MLL could sublease without Middleton consent, and that "the Sublessee is unwilling to take the risk of such violation, the result of which could be termination" of the Amended Ground Lease;

(2) that MLL must obtain Middleton consent to the Boyer Company sublease; and

(3) that MLL and the Middletons must again amend the Amended Ground Lease to provide that if MLL defaulted on the ground lease, the Middletons would "attorn" to Boyer Company and perform MLL's obligations to Boyer Company⁹ under the sublease and accept Boyer Company's performance of its

⁸ The trial court, ruling on defendants' Motions for Summary Judgment, specifically concluded that, as a matter of law, the development agreement between MLL and Boyer expired by its terms on January 31, 1989. R. at 1078. See, Appellants' Addendum, Exhibit 2.

⁹ This attornment provision would impose MLL's duties to Boyer Company on Middletons. Under the Lease, Middletons are not required to do so. See, discussion in Point V of the Brief filed by co-defendants.

obligation under the sublease or by any sublessee of or lender to Boyer.

MLL objected to Boyer making requests of the Middletons for such concessions, anticipating that Middletons would ask for more money. R. at 4170. MLL's position was that Boyer Company's lawyer was wrong on the first two points; it refused to change the rent clause and said that Boyer Company ought to be content with the "right to cure" clause which Zions had accepted, rather than the attornment clause Boyer demanded. MLL believed and MLL's lawyer wrote to Boyer Company on April 10, 1989 that the Middletons would find Boyer's requests unreasonable. R. at 4399, Ex. D-15. MLL insisted that Boyer Company was legally bound by the development agreement to sign the proposed sublease without material changes and threatened suit if necessary to force that result. R. at 4570; 4199.

In May, 1989, in an effort to mollify MLL, Boyer Company explained to its mortgage broker, Bonneville Mortgage Company, the nature of the proposed transaction and asked if financing could be arranged. Banks, R. at 5396. Boyer Company's mortgage broker asked its legal counsel, Greg Bell, for an opinion respecting the "financeability of the proposed arrangement," and

If, in your professional opinion the proposed ground lease(s) are not acceptable to our investors, please so advise at your earliest convenience so that we can so advise our client.

Ex. D-17.

Greg Bell advised Bonneville Mortgage Company and Boyer Company that Middletons' consent and attornment, *inter alia*,

would be required by a lender, and that the proposed transaction was likely too complicated to be financed at all. Mr. Bell agreed with Mr. Taylor's opinions set forth in Taylor's letter of March 14, 1989. Ex. D-14, Ex. D-18.

On July 25, 1989, Drs. Ring, Wong and Adair and their lawyer, John Parsons, met with Roger Boyer, his lawyer, Vic Taylor, and Greg Gardner. R. 4116. They discussed the concerns Vic Taylor had previously expressed, which are identified in his March 14, 1989 letter. Parsons, R. at 4531. Dr. Ring interrupted and declared "we are not going to the Middletons." Id. at 4532. According to Dr. Ring, Boyer said "we can work around that," (Dr. Ring, R. at 4121, 1. 5-6) and that Boyer wanted "to make a deal, not break a deal." R. at 4121.¹⁰

Although the Amended Ground Lease directed that all rents and notices be sent to Dr. Richard P. Middleton for all of the Middletons, Boyer, nevertheless, wanted to speak with Dr. Anthony (Tony) Middleton, whom he knew personally, about the project. R. 4122. MLL continued to insist that the sublease go forward without contacting the Middletons at all. Boyer stated to MLL at the July 25, 1989 meeting that he was concerned about getting into a "litigation box," -- that is, he feared he would be sued whether he contacted the Middletons or not. R. 4121.

¹⁰ Middletons objected to Dr. Ring's hearsay testimony on this subject. A lengthy bench conference was held on the objection and the court heard specific argument but eventually allowed the testimony. R. at 4057-4059, 4060-4082, 4105, 4112.

Finally, MLL reluctantly acquiesced and agreed Boyer could talk to Tony Middleton. R. at 4298. Boyer contacted Tony Middleton in late July of 1989 (R. at 5530) to tell him of the proposed development and to seek assurance that the Middletons would not sue. This was the first time any of the Middletons knew of the negotiations between MLL and Boyer Company (R. at 4895, 4981, and 5530) which had been going on for almost two years. Tony Middleton told his cousin, Dr. Richard G. Middleton ("R.G."), of the conversation with Boyer. R. at 4981. MLL's Dr. Harry Wong, who worked daily in the same hospital with R.G., told R.G. that Boyer was going to develop the property without subordination, that Roger Boyer was going to talk to Tony Middleton about it in a few days and asked if R.G. wanted to attend. R. at 4895, 4909. R.G. told Dr. Wong that his presence was not necessary if subordination were not required (Id.) and said that Tony did not speak for the other two-thirds of the Middleton family. R. at 4910. Dr. Wong acknowledged this conversation and admitted that he knew that the rest of the Middleton family sometimes disagreed with Tony. R. at 4910.

On August 7 or 8, 1989, Boyer met with Tony Middleton. Boyer told Tony that his lawyers were of the opinion that the Middletons' consent to the sublease was needed and that Boyer was of the same opinion. R. 5534; R. 5601. Boyer also told Tony that MLL had threatened to sue Boyer Company if it didn't proceed with the project. R. 5539, 5540.

Other meetings were held among Tony, Boyer and MLL representatives. At those meetings, Tony Middleton stated he was in favor of Boyer developing the property and when asked to assure that the Middletons would not sue, said he believed the Middletons would agree not to contest the contract in court in exchange for more rent. R. at 4463. He said:

Basically that, in my opinion, that if this project, with The Boyer Company, was not appropriately dealt with so that all parties involved were appropriately part of the project, that it would inevitably lead to future litigation by this generation of the Middleton family or by subsequent generations of the Middleton family.

R. at 5543.

Dr. Wally Ring characterized Tony Middleton's statement more graphically, suggesting that: "If a stake goes in the ground, the Middletons will sue." R. at 4126-27. After this September 26, 1989 meeting, Tony Middleton recorded his impressions of the meeting in his diary. Ex. P-37. In October and early November, 1989, Drs. Ring and Wong discussed with Tony Middleton the possibility of MLL paying the Middletons \$10,000 to \$25,000 in exchange for the Middletons' cooperation in providing Boyer an acceptable sublease arrangement. R. at 4135-44, 4926-34, 5546-48. Ultimately, however, MLL refused to pay the Middletons any money. Dr. Ring, moreover, verbally threatened Tony Middleton with suit if the Middletons would not amend the 1980 Amended Ground Lease. He told Tony Middleton that MLL had a \$100,000 war chest in reserve for such a suit. R. at 4144-45, 5552. Dr. Ring

testified that Tony Middleton also threatened to sue in these October and November meetings. R. at 4141-44.

On November 17, 1989, MLL wrote to Anthony Middleton, threatening suit if the Middletons did not amend the 1980 Amended Ground Lease to provide an attornment clause, give further consent to the Boyer sublease and agree to other concessions asked by Boyer's lawyer in his March 14, 1989 letter. Ex. P-39. When Anthony's lawyer asked for a copy of the proposed sublease to consider approving it (Ex. D-31), MLL refused to provide it unless the Middletons first agreed not to ask for more rent and not to sue. Ex. P-42.

Also on November 17, 1989, MLL wrote Boyer Company threatening suit if Boyer did not sign the proposed sublease in 10 days and stating that Anthony's "threats of litigation" "as a representative of the Middleton family" were unfounded. Ex. P-40.

Boyer's lawyer responded twice, first writing that "The Boyer Company does not view the threats made by Tony Middleton as 'without basis in law or fact . . .'" Ex. D-30. He later wrote on February 5, 1990 that Boyer was not bound to sign the sublease because the Development Agreement had expired months before and Boyer was terminating negotiations because "Medical Leasing has been unable to obtain the necessary cooperation of the landowner to make the ground lease financeable." Ex. D-39.

At a meeting on February 15, 1990, MLL's Dr. Ring continued to ask Boyer if he would not be satisfied with a right to cure

clause, as Zions had accepted, instead of the attornment clause Boyer's lawyer wanted; But Boyer still did not agree to go forward. He said his lawyer would have to review it. Ex. D-58.

The Amended Ground Lease requires a defaulting party to pay the prevailing party's attorney's fees. It specifically provides that a party is not in default until 30 days after written notice from the other specifying the particulars on which a party has failed to perform and those particulars remain unrectified for that period. Ex. P-3, ¶ 8, p. 6-7 (See, Appellants' Addendum, Exhibit 7). It further requires notice to the landlord be given by certified mail addressed to the person to whom rent is payable, which is Dr. Richard P. Middleton. Ex. P-3, ¶ 12, p. 15. No such notice was given to Anthony, to Richard P. Middleton, nor to the prior counsel for the Middletons, Moyle & Draper, with whom prior negotiations had been conducted. Neither did Dr. Harry Wong ever mention any complaint about Anthony to Dr. Richard G. Middleton (R. at 4909), notwithstanding that they continued to work daily in the same hospital, Dr. Wong often attending as anesthesiologist in R.G.'s surgeries. R. at 4908.

Neither the Middletons nor Boyer acceded to MLL's November 17, 1989 demands. On or about February 16, 1990, MLL filed this action against the Middletons. R. at 2.

SUMMARY OF ARGUMENT

Over objections raised by Motion in Limine and continued through trial, the lower court admitted evidence, claims and allegations from a previously settled case to prove its claims in

this matter. Admission of such evidence was legally precluded, highly prejudicial and plain error.

MLL failed to properly perfect its breach of contract claims by giving notice of breach and a right to cure as required by the lease between the parties. Moreover, the lease provides no affirmative duty which was breached by Middletons or which was sufficient to support implication of the covenant of good faith and fair dealing.

The evidence connecting MLL's damage claim to conduct of the Middletons is entirely inference. From the primary facts that The Boyer Company did not wish to be involved in litigation and Tony Middleton threatened litigation, the jury concluded that the threat caused Boyer to refuse MLL's proposed sublease. This inference, however, is contradicted and destroyed by direct, un rebutted evidence from Roger Boyer and his lawyer. Not only did they testify that MLL's unwillingness to compromise and inability to obtain financing were indeed the reasons why the deal failed, but they also testified that they never intended to accept the terms of MLL's proposed sublease. With the inference destroyed, MLL has no substantial evidence upon which to sustain its causation element and damage calculations.

The gravamen of MLL's tortious interference claim is a "threat of suit" by Tony Middleton. This thin reed supports MLL's entire tort and punitive damage claim. As a matter of sound public policy, a threat of suit should never be sufficient to support a claim unless the threatened suit is first proven to be groundless and unfounded. To hold otherwise has a very real

chilling effect upon the rights of citizens to contemplate and utilize the courts of this state for resolution of disputes. With a tort as nebulous as interference with a prospective economic relationship, not only should citizens be allowed to talk about protecting their rights in court but they should be privileged to do so as a matter of law.

Finally, the trial court erred in allowing MLL to both recover future rental income and retain possession of the property. The Judgment is contrary to the rule of law encouraging continuing mitigation.

ARGUMENT

POINT I

ADMISSION OF MLL'S EVIDENCE REGARDING THE ZIONS LAWSUIT WAS PREJUDICIAL ERROR.

Several years before commencement of the instant case, Zions Bank sued MLL and the Middletons (the "Zions Litigation"). That suit was resolved through a Stipulation, Mutual Release of Claims and Order of Dismissal with Prejudice entered in March of 1986. Exs. P-16, P-17 (See, Appellants' Addendum, Exhibit 8). Prior to trial of the present case, Middletons filed Motions In Limine seeking to preclude MLL from introducing at trial certain testimony and documents pertaining to the Zions Litigation. In their Motions In Limine, Middletons argued that evidence relating to the claims alleged and factual context of the Zions case was precluded on the grounds of relevance, materiality, principles of

issue preclusion and operative language in the Mutual Release entered between the parties. R. at 1215-17.

The trial court denied Middletons' Motions In Limine and, over Middletons' continuing objections¹¹, allowed MLL to introduce into evidence pleadings¹², correspondence, and deposition testimony from the Zions case and testimony regarding the merits of the Middleton claims in that litigation. Allowing the introduction of this evidence was plain error, highly prejudicial to defendants.

It is undisputed that the Zions case was settled and resolved by means of a Stipulation and Mutual Release Of Claims and Order of Dismissal entered among MLL and the Middletons in 1985.¹³ Exs. P-16 and P-17 (See, Appellants' Addendum, Exhibit 8). Paragraph 7 of the Stipulation provides:

The defendants Middleton, third party defendants and Medical Leasing do hereby mutually release, acquit and forever discharge each other from all claims, causes of action alleged in or arising out of, or in any way connected with the action referred to above, or relating to any delay in commencing construction by Zions. Provided, however, the Stipulation as to the intent and meaning

¹¹ See R. at 4007, 4024, 4042, 4114, 4115.

¹² Plaintiffs introduced correspondence, the Complaint, Third Party Complaint, Order And Judgment, Answer and Counterclaim, Stipulation And Mutual Release of All Claims, and Findings of Fact, Conclusions of Law and Order. See, Plaintiff's Exhibits 6, 7, 8, 9, 10, 11, 12, 15 and 16. Middletons did not object to admission of the Stipulation, Order of Dismissal and Findings of Fact. It is the pleadings, testimony, and correspondence relating to facts and claims leading up to the Stipulation and resolution of the Zions case to which Middletons objected.

¹³ MLL, not Zions, paid Middletons \$21,000 to effect settlement. Exs. P-16 and P-17 (See, Appellants' Addendum, Exhibit 8).

of Paragraph 8 of the Amended ground Lease,
as set forth in Paragraph 5, herein, is not
affected by this mutual release.

Id. [emphasis added.] The Mutual Release between the parties plainly precludes MLL from again raising, in support of their claims in this case, the underlying facts and assertions of the Middleton claims in the Zions case. By allowing introduction of MLL's evidence from the old Zions case, the trial court effectively allowed MLL to try the Zions case within the framework of this action.

"[S]ettlements are favored by the law and should be encouraged, because of the obvious benefits accruing not only to the parties, but also to the judicial system." Murray v. State of Utah, 737 P.2d 1000 (Utah 1987) (quoting Tracy-Collins Bank & Trust v. Travelstead, 595 P.2d 605, 607 (Utah 1979)). "[O]ne who agrees to settle his claim cannot subsequently seek both the benefit of the settlement and the opportunity to continue to press the claim he agreed to settle." Kirby v. Dole, 736 F.2d 661, 664 (11th Cir. 1984). The settlement agreement is res judicata of and bars litigation of "all matters relating to the subject matter of the dispute." Rasmussen v. Allstate Insurance Co., 726 P.2d 1251, 1253 (Wash. Ct. App. 1986). [R]egardless of what the actual merits of the antecedent claim may have been, they will not be afterward inquired into and examined." 15 Am.Jur.2d, Compromise and Settlement, § 25 (1976 & Supp. April 1992) [emphasis added.]

The finality and certainty afforded by settlement of a lawsuit is perhaps the single most important advantage of settlement. Only by ignoring the language of the Mutual Release and the well-established policy of encouraging negotiated settlement of lawsuits could the court permit MLL to introduce its evidence relating to the old claims asserted in the Zions case and then allow it to directly attack the merits of those claims.

In fairness to the trial court, it was misled by MLL's representations at the commencement of trial. MLL's counsel, Mr. Burbidge, stated in support of the admission of evidence relating to the Zions litigation:

I will also, for clarification, make clear that no claims are made in this litigation relating to the Zions litigation. That's over. We are simply trying to show what the contentions were so we can understand what was settled.

R. at 4115.

Despite the representations of MLL's counsel at trial, it is apparent that MLL presented the pleadings, correspondence and testimony relating to the Zions case so it could argue that Middletons' claims in the Zions case were unfounded, made in bad faith and that the present case was a continuation of that same conduct. As MLL admitted in its own Memorandum In Opposition to Defendants' Motions For JNOV or New Trial:

[M]ost of the evidence regarding the Zions litigation didn't have anything to do with settlement discussions, but rather focused on Richard G. Middleton's admissions that the Zions suit was groundless, and that the repeat of the same threats of groundless litigation was an intentional wrong.

R. at 2419.

MLL argued that the Zions case was evidence of Middleton's engagement in an improper course of conduct designed to thwart all efforts of MLL to develop the leased property. The merits of the claims and defenses asserted by the Middletons in the Zions case were argued and repeatedly raised in examination of witnesses by MLL in an attempt to establish in this case, breach of the Amended Ground Lease, improper conduct, inconsistent statements and conduct warranting punitive damages. R. at 4028, 5032, 5720, 5747, 5749-50, 5818-19 and 5825.

An example of such improper evidence is the testimony Mr. Burbidge elicited from MLL partner Dr. Ring regarding the events and discussions that led directly to the Zions lawsuit:

Q. All right. Tell the jury who spoke and what they said.

A. After we had finished our discussions and we were getting up to leave, and just about ready to leave the yard, Richard G. jumped up and said, "Just a minute," and ran over to us. And he caught John [Adair] and me, and he said: "I just think that maybe I'd better tell you to be careful." He said that, "Tony and George have never really liked this lease. They don't think that Dad did a very good job with it, and they've expressed their intention to try and break it."

R. at 4018. [emphasis added.]

Mr. Burbidge even went so far as to attack the veracity of specific allegations included in the defendants' pleadings in the Zions' case. For example, in direct examination of defendant Richard G. Middleton, after a colloquy where Mr. Middleton testified that he had not read the pleadings in the Zions case, the questioning proceeded as follows:

Mr. Burbidge: Would you turn to Paragraph 15 -- or Exhibit 15? Do you see that in front of you? You identified it yesterday as the Answer and Counterclaim filed on your behalf against Medical Leasing and Zions Bank -- excuse me, against Medical Leasing and Drs. John Adair, his wife, Alice Jane Adair; Wallace H. Ring, Harry C. Wong, June A. Wong, John E. Pace and Nancy K. Pace. Do you see that?

A. I see that.

Q. And if you would be so kind to turn over to page 5 of that Counterclaim, Paragraph 2, it reads, doesn't it, that under the terms of the aforesaid Amended Ground Lease, the consent of the Middleton, Defendants, is required for any sublease or agreement or contract providing for the construction of any building or improvement on the premises. Do you see that?

A. I see that.

Q. And you knew, whether you [had] read that allegation or not, that that allegation was false, didn't you?

Mr. Palmer: I object.

The Court: Overruled.

The Witness: That is not the way my understanding is of that Amended Ground Lease, no.

Mr. Burbidge: Exactly. So, do you still wonder why Medical Leasing is not anxious to talk to you about other developments on the property, Dr. Middleton?

R. at 5032.

If this questioning were not enough, the improper use of evidence going directly to the foundation and nature of the claims in the Zions suit is further exposed in Mr. Burbidge's closing argument where he stated:

Zions asked: "Is your consent necessary?" and the answer was "no." A simple straightforward answer, and they wouldn't give it. Hardly the spirit of Paragraph 12, which says that you have an absolute obligation to certify whether you are in compliance with the agreement.

And so, we take it to R. P. Middleton.¹⁴ He says: "I don't see any problem with this." And then the kids and the lawyers get ahold of it. And Zions has to bring a lawsuit to get a simple statement of rights under the contract.

And the Middletons file false claims trying to overturn the contract. And they invent things that didn't happen. R.G. Middleton took the stand, and he agreed, that the allegations that I read to him were false. [R. at 5720.]

.....

They go to R. P. Middleton to get consent in the Zions deal, and they all jump on the bandwagon, and they all file suit. The Zions litigation is informative because it demonstrates their willingness, all of their willingness, to participate in that kind of an activity. [R. at 5747.]

....

Medical leasing had the right to sublease without interference, without threats, without intimidation, without interference, without the false statements made in the Zions litigation; and it didn't get what it bargained for. And that stopped the deal. There was a breach of the Lease. And the damages were substantial. [R. at 5749-5750.]

....

In Instruction No. 15, it says: "The elements are that there was -- that he intentionally interfered with Plaintiff's existing or potential economic relationship."

No question about that. Tony Middleton, in his diary, articulates what the reasonable business expectation is. For improper purpose? Absolutely. To get more money he was not entitled to. Making false claims. Making false claims that he made in Zions. And thereby causing economic injury. [R. at 5750.]

....

¹⁴ R. P. Middleton is aged and infirm. He did not testify at trial. Rather, Mr. Burbidge read portions of his deposition from the Zion's case into the record - over the objections of defense counsel. R. at 5693-5700.

Zions wanted something. They wanted a statement of the truth. "Is your consent required, Middletons?" And the truth was, as R. P. testified: "No." And it cost two years and \$21,000 to get them to say that. They shouldn't have to pay \$21,000 to get just an honest answer." [R. at 5818-19.]

....

[Middletons] hadn't been asked for anything but consent. And the answer to consent is the same answer that should have been given in good faith in Zions, and it wasn't. [R. at 5825.]

As evidenced by both MLL's own admission and its counsel's repeated statements in closing argument, facts alleged in, connected to, giving rise to and arising out of the Zions case were introduced by MLL in this action to prove elements of its claims in this case, including the punitive damage claim against Tony Middleton. It is undisputed that the Zions litigation terminated in a negotiated, compromise settlement. Both the express terms of the Stipulation of settlement and the relevant case law preclude MLL from basing any of its claims, even in part, upon allegations or evidence that the Middletons' claims in the Zions litigation were meritless. It was prejudicial error to allow this evidence to be introduced and the verdict, on all claims, must therefore be set aside.

POINT II

**THE 1980 AMENDED GROUND LEASE
REQUIRED WRITTEN NOTICE OF DEFAULT AS A
CONDITION PRECEDENT TO SUIT FOR BREACH OF THE
LEASE.**

These Middleton appellants hereby adopt by reference the argument set forth under Point I, of the co-appellants' Brief filed by the law firm of Moyle & Draper.

POINT III

**THE 1980 AMENDED GROUND LEASE
DID NOT CONTAIN ANY EXPRESS TERMS REQUIRING
MIDDLETONS TO COOPERATE IN DEVELOPMENT OR
PROHIBITING THEM FROM INTERFERING WITH MLL'S
EFFORTS TO DEVELOP THE PROPERTY.**

These appellants hereby adopt by reference the argument set forth under Points V A. and B. of the co-appellants' Brief. George and Jean Middleton adopt by reference the argument set forth under Point V C. of that Brief.

POINT IV

**THE TRIAL COURT ERRED BY AWARDED MLL
ATTORNEYS FEES.**

These Middleton appellants hereby adopt by reference the argument set forth under Point VII, of the co-appellants' Brief.

POINT V

**THE TRIAL COURT ERRED IN
RULING THAT ALL DEFENDANTS WERE JOINTLY AND
SEVERALLY LIABLE ON THE BREACH OF CONTRACT
CLAIMS.**

Appellants George W. Middleton and Jean H. Middleton hereby adopt by reference the argument set forth under Points II and III and IV of the co-appellants' Brief.

POINT VI

**MLL'S CLAIMED DAMAGES WERE NOT SUPPORTED BY
ANY SUBSTANTIAL EVIDENCE.**

The damage evidence MLL presented at trial was based entirely on the assumption that, but for Tony Middleton's threats, Boyer would have signed the first draft of the sublease MLL prepared and delivered to Boyer on February 3, 1989 (or a virtually identical sublease) and performed thereunder for its 50-year duration. R. at 5202-5204. MLL had the burden at trial of presenting substantial evidence in support of the damages claimed and awarded. For MLL to have met its burden,

[the] evidence must provide a sufficient basis from which the jury could have reasonably reached a verdict without speculation or drawing unreasonable inferences which conflict with the undisputed facts.

Selle v. Gibb, 741 F.2d 896, 900 (7th Cir. 1984) (citing Brady v. Southern Railway, 320 U.S. 476, 480 (1943)). "A mere scintilla of evidence is insufficient to present a question for the jury." Boeing Company v. Shipman, 411 F.2d 365, 374-375 (5th Cir. 1969);

and see Crookston v. Fire Insurance Exchange, 817 P.2d 789 (Utah 1991).

In essence, MLL argued to the jury that it should assume that, but for Tony Middleton's actions, Boyer would have agreed to and performed under the "wish list" terms of the first sublease draft MLL unilaterally proposed. This assumption is not a reasonable inference and is not supported by substantial evidence. It is, in fact, contrary to direct, competent evidence to the effect that even the basic concept of the Sublease was still being negotiated and would have changed before and through the time the Middletons first learned of Boyer's involvement in the summer of 1989.

The evidence is unrebutted that MLL's proposed Sublease (Plaintiff's Ex. 33) never even got beyond the initial draft. R. at 4557. Moreover, in drafting that proposed Sublease, MLL's attorney, Mr. John Parsons, was not even in contact with Boyer to negotiate the provisions. R. at 4557. He simply prepared an initial draft as instructed by his client and delivered it to Boyer for consideration. Id. Furthermore, MLL did not send Boyer the first draft of a proposed sublease until February 3, 1989, several days after the original Development Agreement expired.¹⁵

¹⁵ The trial court ruled that, as a matter of law, the Development Agreement expired by its terms on January 31, 1989 and, thereafter, MLL did not have an enforceable contract or legally binding development commitment with Boyer. R. at 1078 (See, Appellants' Addendum, Exhibit 2). The court's ruling was consistent with the express position taken earlier by Boyer in his lawyer's correspondence of November 22, 1989 and February 5, 1990. Ex.s 30 and 39.

Under questioning by MLL's counsel, Boyer testified that the deal being negotiated with MLL after January 1989 would not have been the same and would not have included the same rental terms as provided for in the 1988 Development Agreement and the February 3, 1989 proposed Sublease:

Q. [by Mr. Burbidge] Do you recall negotiations and meetings occurring after January having as their purpose the negotiations of the Sublease?

A. Yes.

Q. All right. Even though the January 31, date had passed?

A. Yes, it had passed and -- without a lease being executed.

Q. All right. But the parties continued negotiating the lease?

A. In good faith, we were trying to come together with some agreement, yes.

Q. And the Sublease -- the business terms of the Sublease were the same business terms as the Development Agreement, correct?

A. Well, there were numerous negotiations that would have changed the terms for different permutations on the agreement. It would have been several different agreements.

Q. But in terms of the rent to be paid, do you know of that changing?

A. I think there were some scenarios that would have allowed the rent to change, yes.

Q. That it be escalators?

A. Or the basic concept of the agreement.

R. at 4851-4852. (emphasis added). In short, Boyer's testimony made it apparent that, after January 1989, the entire deal was up

in the air. This testimony is fully consistent with the fact that the sublease was never executed.

Consistent with Mr. Boyer's testimony and contrary to MLL's argument, Boyer's counsel, Vic Taylor testified that after reviewing the February 3, 1989 proposed sublease, he responded on Boyer's behalf by voicing concerns over various significant provisions in the draft, including the rent formula, and by sending his letter of March 14, 1989, requesting substantial changes in the sublease, concessions from the Middletons as well as identifying "major business hurdles." R. at 4558; Ex. D-39. Mr. Taylor specifically stated in his letter:

As we have indicated, the foregoing items do not constitute all of the substantive areas of concern with respect to the sublease, but only some of the major business hurdles to be resolved before proceeding.

Id. at p. 4. Mr. Taylor's letter clearly indicates that Boyer was not accepting the first draft of the sublease as defining "the deal." It was merely a starting point.

At trial, MLL attempted to make the concerns outlined in Mr. Taylor's letter disappear by arguing that Boyer ignored his own attorney's advice. MLL's "substantial" evidence in support of this was rank hearsay testimony from MLL partner Wally Ring regarding a meeting on July 25, 1989 with Roger Boyer, Greg Gardner, Vic Taylor and MLL's attorney, John Parsons. R. at 2378. Dr. Ring testified as follows:

Q. What did you understand the purpose of this meeting in July to be?

A. Well, to continue the process of developing this lease that we had agreed we were going to sign.

....

Q. Did the meeting relate to specific provisions of the proposed settlement?

A. It did.

Q. All right. Do you recall any specific provisions or issues being mentioned, and just answer that "yes"; and then, if so, tell me just generally what provisions?

A. Yes.

Q. All right.

A. There were requests that Boyer be provided with notice, right to cure, attornment, those are the things that I can remember.

Mr. Burbidge: All right. And with respect to those issues, who brought up that on behalf of Boyer?

A. Vic Taylor.

Q. And with respect to those issues, did Roger Boyer express his view about whether or not those could be resolved?

A. Yes.

Q. All right. And in that respect, what did Roger Boyer say?

Mr. Hunt: Objection; Hearsay.¹⁶

The Court: Overruled.

....

The Witness: Boyer said that those problems could be dealt with, don't pay any attention to his attorney, it was not a point of issue.

¹⁶ Shortly before this objection, and out of the jury's presence, the court heard considerable argument by counsel on the hearsay objections to this testimony, but ultimately allowed the testimony. R. at 4105-4112.

....

Mr. Burbidge:What did Mr. Boyer say?

A. He said: "That's not important. We don't need to deal with that. We can work around that. Let's get -- go ahead and make this deal." He said: "I came here to make a deal. I didn't come here to break one."

R. at 4117-4121. On cross examination by Mr. Palmer, Dr. Ring repeated that, at that same meeting, Mr. Boyer told Mr. Taylor that there was nothing there "that we can't work around." R. at 4424.

MLL presented similar hearsay testimony from its attorney, John Parsons, regarding the same July 25, 1989 meeting:

A. The meeting started with Vic Taylor putting out his concerns, the same concerns that he had had over the last several months.

....

He [Taylor] talked about attornment and nonrecognition, talked about consent and he talked about participation.

Shortly into that discussion, Dr. Ring, who at that point was adamantly exercised, stopped him, and with a raised voice said, "We are not going to the Middletons. We've told you many times we are not going to Middletons with any of those things."

Roger Boyer jumped into the conversation, and, in effect, waiving off his lawyer, said, "We are here to make a deal, not break a deal. Let's get on with the deal"--¹⁷

Mr. Gurmankin:[W]hat do you mean in effect waiving off his lawyer?

A. Well we lawyers sometimes get carried away -- excuse me to the rest of the lawyers in the room-- but we lawyers sometimes get carried away in negotiating transactional propositions for our clients. And what I

¹⁷ Mr. Palmer interjected here an objection to Mr. Parsons' characterization of Mr. Boyer's statement. The objection was overruled.

meant by that was -- and I'm subject to this too -- I may be pressing points for my client, my client, in effect, tells me: "Stop", and waives me off; "I'm not interested in those things." And that's what I understood Boyer to be doing, saying: "Stop. I'm not interested in those things. We are here to get this deal done."¹⁸

R. at 4530-4533. In further hearsay, Mr. Parsons testified that, in a June, 1989 telephone conversation, Mr. Gardner, Boyer's project manager, told him that Boyer was still interested in the property and wanted to make a deal. R. at 4527-28. MLL also relies on Mr. Gardner's testimony that he and Mr. Boyer relied on their own judgment, rather than their attorney's, where business issues were concerned. R. at 4791-4792.

In spite of MLL's assertions and hearsay, there is simply no substantial, competent, admissible evidence in the record that Mr. Taylor or Boyer ever withdrew any of their requests or concerns regarding the sublease. In fact, the direct evidence from these witnesses at trial is that neither Mr. Boyer nor Mr. Taylor ever changed their opinions that these financing issues and business hurdles had to be addressed. R. at 4876-77.

Roger Boyer himself specifically testified at trial that he believed the items requested in Mr. Taylor's letter were necessary to obtain financing and that he did not change his mind in that regard:

¹⁸ Mr. Palmer again objected and moved to strike this testimony, but was overruled. Mr. Parson's understanding of what Roger Boyer was doing or saying is certainly not competent evidence on the issue of Boyer's intentions respecting the deal.

Q. [by Mr. Hunt] Did you believe that the requirement or the items stated in Mr. Taylor's March 14th letter would be necessary in order to get some financing on the project?

A. Yes.

Q. Did Mr. Parsons, the attorney for Medical Leasing, ever change your mind about whether or not Mr. Taylor's concerns would have to be addressed in order for you to get financing?

A. No.

R. at 4876-4877. MLL made no attempt to impeach this testimony, which came from its own witness.

Mr. Taylor also testified that his position on the "major business hurdles" identified in the March 14, 1989 letter never changed despite arguments by MLL and its attorney. Nor did Mr. Taylor's position change after he received additional information, including the Stipulation entered in the Zions litigation. (Exs. P-16, P-17). R. at 5443-44.

In May of 1989, The Boyer Company contacted Gary Banks, a mortgage broker with whom Boyer regularly did business, to seek a second opinion on the financeability of the proposed project with MLL. R. at 4800-01. Although Mr. Banks believed that the project was too complicated to attract financing, he contacted Mr. Greg Bell, a lawyer representing commercial lenders and familiar with Boyer, to get his input. R. at 5396-99. On May 30, 1989, Mr. Bell wrote back to Messrs. Banks and Boyer, stating his opinion that the project was too complicated to attract a lender. Ex. D-18. Mr. Bell specifically stated in his letter

that he was in agreement with Vic Taylor's March 14th letter.

Id.

When Tony Middleton was first contacted in August, 1989, MLL had made no effort to redraft the sublease to accommodate any of Boyer's requests or concerns even though it was presented to Boyer and his counsel six months before anyone contacted Tony Middleton, and despite MLL's repeated requests that Boyer execute the sublease. R. at 4199, 4557; Exs. D-30, P-33.

The only inference which can be drawn is that, before he had any communications with Tony Middleton, Boyer had refused the deal in the form presented in the draft sublease. MLL went to the jury with only this particular "deal" with Boyer and claimed it was the only possible productive use for the property and that the Middletons did and would prevent every other possible productive use on the property.

MLL has maintained steadfastly that there was a deal with Boyer and that "but for" Tony Middleton's alleged threats it would have been consummated. As the theory goes, the deal embodied in the February 3, 1989 proposed Sublease was alive until late September when the alleged threats were made and thereafter, everything became a giant salvage operation. The theory is clever in its attempt to capture a moment in time and attribute all things to it, but it finds no support in the evidence. MLL relies upon mere speculation to establish that but for Tony Middleton's interference, Boyer would have executed the Sublease MLL proposed. This is not enough to sustain the

Verdict. See, Gregory v. Fourthwest Investments, Ltd., 754 P.2d 89 (Utah 1988).

Any inference to be drawn from the circumstances is, moreover, completely destroyed by overwhelming direct evidence to the contrary. Selle v. Gibb, supra. The most telling evidence comes from Roger Boyer and Vic Taylor. On November 22, 1989, Vic Taylor wrote in response to John Parson's demand letter of November 17th and stated:

Contrary to the statement made in your letter, representatives of The Boyer Company have not at any time made any representations ". . . that the Land Lease would be executed, construction commenced, and that the Development Agreement would be extended and considered enforceable, . . ." (emphasis added).

Ex. D-30.

When questioned about this letter, Roger Boyer testified:

Q. (By Mr. Hunt) Are you taking a look at Exhibit D-30, Mr. Boyer?

A. Yes.

Q. And did you receive a copy of that letter on or about the time Mr. Taylor sent it?

A. Yes.

Q. Did you agree with what Mr. Taylor stated in that letter?

A. Yes.

R. at 4880.

The direct evidence completely contravenes the inferences and hearsay which MLL claims to support its verdict. There was no viable deal at any time after the Development Agreement

expired, and MLL had stubbornly refused to take the action necessary to make the deal financeable and hence acceptable to Boyer. To blame this failure on Middletons after the fact is nothing more than sleight of hand. It finds no substantial support in the record.

Thus, not only was the jury improperly instructed on the theory of damages (as noted infra), but the record contains insufficient evidence to justify application of the theory. Middletons are entitled to have the judgment below reversed or, at the very least, a new trial.

POINT VII

AS A MATTER OF LAW, MLL FAILED TO SATISFY THE IMPROPER PURPOSE AND IMPROPER MEANS ELEMENTS OF ITS TORTIOUS INTERFERENCE CLAIM.

In Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982), the Utah Supreme Court adopted the Oregon definition of intentional interference with prospective economic relations. Leigh, 657 P.2d at 304. That definition was elaborated on in Straube v. Larson, 600 P.2d 371, 374 (Ore. 1979) as follows:

[T]he defendant's improper intent, motive or purpose to interfere was a necessary element of the plaintiff's case, rather than a lack thereof being a matter of justification or privilege to be asserted as a defense by the defendant. Thus, to be entitled to go to a jury, plaintiff must not only prove that defendant intentionally interfered with his business relationship but also that defendant had a duty of noninterference' i.e., that he interfered for an improper purpose rather than a legitimate one or that defendant used improper means which resulted in injury to plaintiff.

Thus, even if MLL could establish interference and causation, it must be able to satisfy one of the alternative elements of "improper purpose or improper means."

A. Improper Purpose

In determining whether improper purpose exists, courts "look to the predominant purpose underlying the defendant's conduct." Leigh, 657 P.2d at 307 (citing W. Prosser, Handbook of The Law of Torts, § 129 at 943 (4th Ed. 1971)). "A purely malicious motive, in the sense of spite and a desire to do harm to the plaintiff for its own sake, will make the defendant liable for interference." Id. Where the defendant has a proper purpose in view, however, "the addition of ill will toward the plaintiff will not defeat his privilege." Id.

MLL claims that Tony Middletons' improper purpose was "To get more money he was not entitled to." R. at 5755. To support this, MLL points to Tony Middleton's diary entries and testimony, and Wally Ring's testimony. R. at 4361 and 4127-29. All of this evidence essentially established that Tony Middleton's purpose in "interfering" was to obtain additional money for the Middletons.¹⁹ There is no evidence, that Tony Middleton's goal

¹⁹ Tony Middleton's relevant diary entries read as follows:

Last night I got a hold of Roger after having tried through the week without success to do so and it turns out that Dr. Wong, Ring and Adair are trying to get the Boyer Company to develop both retail shops as well as business offices on the property. Roger's company is so strong that they can do without subordination, and I suspect we are dead in the water the way that stupid contract is put together by Uncle Dick and William Morel. I am going to meet with Roger this coming Tuesday morning to go over the plans and see if

was anything other than to obtain additional financial gain for his family. Such purpose is not sufficiently "improper" to support a tortious interference claim.

In Leigh, the court found that there was substantial evidence that the defendant had deliberately injured the plaintiff's economic relations but that injury was only an intermediate step toward a "long-range financial goal." Leigh, 657 P.2d at 308. Because the court concluded that economic interest was controlling, it held that the evidence would not support a jury finding of improper purpose. Id.

Thus, to satisfy the improper purpose element, MLL had to present substantial evidence to show that the Middletons' predominant purpose was to injure MLL. MLL was unable to do so. See, Leigh, 657 P.2d at 307 (citing St. Louis-San Francisco Railway Co. v. Wade, 607 F.2d 126, 133 (5th Cir. 1979)). The evidence adduced at trial instead established that Tony Middleton's predominant purpose was financial gain.

B. Improper Means

The evidence adduced at trial similarly fails to support a finding of the alternative element of "improper means". The improper means requirement is satisfied where:

there is something that can be done about it, but my strong hunch is that we are sunk and will have to live with the idea that those birds will derive a very handsome income off the development without actually including the actual owners of the land at all.

Ex. P-37.

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, 657 P.2d at 308 (citing Searle v. Johnson, 646 P.2d 682 (Utah 1982)).

Commonly included among improper means are violence, threats or other intimidation, deceit or other misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood. [emphasis added.]

Id. (citing Top Service Body Shop, Inc. v. Allstate Ins. Co., 582 P.2d at 1371, (Ore. 1978), n. 11).

MLL claims that Tony Middletons' improper means were his threats of suit if the Middletons were not allowed to participate financially in the benefits of the development of their own property. The evidence at trial demonstrated that Tony Middleton said to Boyer that "if there was going to be any development, Middletons were entitled to receive some proceeds" and "there was a significant possibility that if the property was developed without Middleton participation, there would be a suit." R. at 4361.

These acts of Tony Middleton are certainly not "illegal or tortious in themselves." MLL, however, takes the position that the threatened litigation would have been unfounded and therefore the threat of suit itself constituted improper means. The question for this court is simply whether a threat of suit by one party to a contract, without more, can form the basis of the

other contracting party's tortious interference claim. As a matter of law, such threats are not actionable.

Leigh, suggests, as indicated above, that "threats or other intimidation" or "unfounded litigation" may constitute improper means. 657 P.2d at 308. The phrases quoted in Leigh actually constitute the core conduct of a number of recognized torts. They are not simply random descriptions of characteristic conduct. In this case, the evidence does establish that Tony Middleton threatened litigation. It does not establish that there was litigation. It is, in fact, undisputed that no suit regarding the proposed Boyer development was ever filed. Whether a threat itself is actionable must, obviously, depend on the nature of the threat. A threat to bring a legal action in court should never be actionable.

In Pacific Gas & Electric Co. v. Bear Stearns & Co., 791 P.2d 587, 590 (Cal. 1990), the Supreme Court of California considered the closely analogous issue of "whether it is proper to impose liability for inducing a potentially meritorious lawsuit." The court concluded:

[A] plaintiff seeking to state a claim for intentional interference with contract or prospective economic advantage because defendant induced another to undertake litigation, must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor.

Id. at 598. The court noted that its decision was based on concern "not to chill the rights to petition the courts for redress of grievances." Id. at 597. The Pacific Gas court went to explain:

The torts of inducing breach of contract and interference with prospective economic advantage have been criticized as protecting the secure enjoyment of contractual and economic relations at the expense of our interest in a freely competitive economy. We have been cautious in defining the interference torts, to avoid promoting speculative claims Given the criticism of these causes of action and the dangers inherent in imposing tort liability for competitive business practices, we have no motivation to expand these torts so that they begin to threaten the right of free access to the courts. Our legal system is based on the idea that it is better for citizens to resolve their differences in court than to resort to self-help or force. It is repugnant to this basic philosophy to make it a tort to induce potentially meritorious litigation. To permit a cause of action for interference with contract or prospective economic advantage to be based on inducing potentially meritorious litigation on the contract would threaten free access to the courts by providing an end run around the limitations on the tort of malicious prosecution.

Id. at 597-98 [emphasis added and citations omitted.]

In reaching its decision in Pacific Gas, the California Supreme Court approvingly cited the Connecticut Supreme Court's decision in Blake v. Levy, 464 A.2d 52, 56 (Conn. 1983). There, the Connecticut court adopted elements of a tortious interference claim as applied in Utah. Noting that "there is no basis of policy for distinction between" tortious interference and malicious prosecution claims, the court held that a party alleging a tortious interference claim based on unfounded litigation must allege and prove termination of the preceding suit in its favor. Id. at 56.

Where courts have held that a party alleging tortious interference based on the filing of unfounded litigation must allege and prove resolution of the litigation in its favor, it

necessarily follows that a mere threat to file unfounded litigation is likewise insufficient basis for such a claim. The threat to sue is even further removed from resolution of that suit. It is repugnant to public policy to discourage potential litigants from stating their positions and alleged rights before resorting to the courts.

There is no question that allowing a threat of litigation alone to support an interference claim would threaten free access to the courts, settlements short of litigation, and even business negotiations. Such a result is not only repugnant to sound public policy, but also directly contrary to this court's pronouncements supporting free access to the courts for redress of grievances as guaranteed by the Utah Constitution, Art. 1, § 11. See, Berry v. Beech Aircraft, 717 P.2d 670 (Utah 1985).

The instant case exemplifies the dangers recognized in Pacific Gas and Blake. After being approached by Boyer regarding the proposed development on the Middletons' property, Tony Middleton attempted to negotiate for the Middletons to participate in the economic benefits of development. Ex. P-37. He subsequently told Boyer and Wally Ring that, if development proceeded without participation by the Middletons, members of the family would probably sue. R. at 4361. The Boyer Company's lawyer, Vic Taylor, believed that the Middletons would, in fact,

have a colorable claim if development proceeded as structured in MLL's proposed Sublease.²⁰ Exs. D-14 and D-30; R. at 5437-39.

Although MLL now argues that any suit by the Middletons would have been unfounded and frivolous, MLL and Boyer obviously weren't willing to stand on that argument at the time. If the threats were so obviously frivolous, why didn't MLL and Boyer simply proceed with the development as proposed and take their chances in court? If they subsequently prevailed in court and established that the Middletons claims were in fact frivolous, they could then have brought an action for abuse of process.

One need look no further than the shocking outcome of this case -- a verdict in excess of \$2.5 million dollars -- to realize the chilling effect MLL's suggested rule of a law would have on business negotiations between parties to a contract and on free access to the courts. What should Tony Middleton have done when Boyer arranged their meeting? Should he have said nothing? Or should he have said, "The Middletons will never sue anyone," thereby waiving rights Boyer's own lawyer recognized the family might have to challenge the sublease? Under MLL's theory, it could have sued the Middletons for silence or any statement other than a blanket waiver of rights. MLL placed Tony Middleton in a "no win" situation. A situation in which, regardless of Tony's

²⁰ In his letter of March 14, 1989, Vic Taylor stated that he believed the rental structure of the Sublease "violated the letter and spirit" of the 1980 Amended Ground Lease with the Middletons. Ex. D-14. Mr. Taylor subsequently testified at trial that, even after hearing MLL's arguments, he never changed his opinion on this issue. R. at 5443-44.

response, MLL could effectively blame him for its own failure to close its proposed deal with Boyer.

It is certain that, although MLL and the Middletons are still parties to the 1980 Amended Ground Lease, none of the Middletons will ever discuss this Lease or any matters regarding the subject property with MLL again. Such a result impairs both access to the courts and the effective operation of contracts in a business setting.

The judgment on the tortious interference claim should accordingly be reversed.

POINT VIII

MIDDLETONS, AS OWNERS OF THE SUBJECT REAL PROPERTY AND LANDLORDS TO MLL, WERE ABSOLUTELY PRIVILEGED TO INTERFERE IN SUBLEASE NEGOTIATIONS.

The trial court erred in failing to rule, as a matter of law, that Middletons were absolutely privileged to interfere in MLL's sublease negotiations with Boyer. Privilege is an affirmative defense which does not become an issue unless the plaintiff is able to establish that "the acts charged would be tortious on the part of an unprivileged defendant." Leigh, 657 P.2d at 304 (citing Top Service, 582 P.2d at 1371).

This Court has recognized that "even though a defendant's action brings about a breach of contract, he is not liable where the breach was caused by the doing of an act which he had a legal right to do." Bunnell v. Bills, 368 P.2d 597, 602-603 (Utah 1962). In Bunnell, this court recognized Prosser's application of the rule as follows:

If [defendant] has a present, existing economic interest to protect, such as the ownership or condition of property, or prior contract of his own, or a financial interest in the affairs of the person persuaded, he is privileged to prevent performance of the contract of another which threatens it . . .

Id. [emphasis added.]

The chief practical difference between a claim for intentional interference with contract and a claim for intentional interference with prospective economic relations is that "a broader range of privilege to interfere is recognized when the relationship . . . interfered with is only prospective." Pacific Gas, 791 P.2d at 590; gad. inc. v. ALN Assocs., Inc., 757 F.Supp. 901, 906 (N.D. Ill. 1991). This is because the latter claim is much more speculative and the interest being protected is less certain. As noted above, the trial court granted Middletons' Motion for Summary Judgment on MLL's interference with contract claim, but submitted the interference with prospective economic relations claim to the jury. R. at 1077-79, 1532.

Middletons have an existing economic interest of the type recognized by Utah courts. Not only are they the fee owners of the land which is the subject of MLL's proposed sublease and development, (R. at 4216-18) but they have a prior, existing lease with MLL. Ex. P-3. Courts have recognized a privilege under similar circumstances. In Bergfeld v. Stork, 288 N.E.2d 15, 18 (Ill. 1972), the court concluded "that a lessor had a sufficient economic interest in his property to interfere in a sublease that caused a potential purchaser not to buy a tenant's

business." Indeed, it is difficult to conceive of an economic interest more acute than that of a property owner in the development of his land or that of a lessor in the lessee's compliance with the terms of their lease.

The trial court erred, in failing to rule that the Middletons were privileged as a matter of law. The issue should not have been submitted to the jury. Accordingly, the Judgment on the tortious interference claim should be reversed.

POINT IX

**THE JURY INSTRUCTIONS ERRONEOUSLY
PERMITTED A DOUBLE RECOVERY AND THE JUDGMENT
IMPROPERLY RELIEVED MLL OF ITS DUTY TO
MITIGATE DAMAGES.**

A. The Verdict was Based Upon Improper Damage

Instructions.

Jury Instruction No. 29, entitled "Compensatory Damages" was submitted to the jury over Middletons' objections.²¹ It provided in relevant part:

If, after considering the evidence in this case and the instructions I have given, you should find the issues in favor of the Plaintiff, then it is my duty to tell you what damages the plaintiff would be entitled to recover. It would be a sum which you believe, from the evidence, will fairly and reasonably compensate the Plaintiff for any damage Plaintiff has suffered as a proximate result of the Defendants' acts, which includes the anticipated profits of which Plaintiff was deprived, provided they are not mere speculation.

Instruction No. 29, R. at 1547 (See, Appellants' Addendum, Exhibit 4).

²¹ See, Transcript of Exceptions To Jury Instructions, R. at 5915.

The compensatory damage figure the jury subsequently included in the Verdict was presented to the jury as MLL's expert's calculation of the present value of the rental income MLL would have received from Boyer if Boyer had entered a sublease as contemplated in the 1988 Development Agreement (Ex. P-22) and paid rent thereunder through the year 2040.²² MLL's expert, Mr. Norman²³, further testified that the damage figure included in the verdict was based on the assumption that there can be no productive use of the property for the remaining 48-year term of the 1980 Amended Ground Lease. R. at 5204. The fatal problems with this theory and the instructions are that they allow a double recovery and completely relieve MLL of its duty to mitigate ongoing damage.

The jury's Verdict awarding MLL the present value of the next 48 years' rental income on the property released MLL from any incentive to relet the premises and left it with the very likely opportunity to enjoy a double recovery. The Verdict gave MLL the full 48-year value of the Boyer sublease in addition to

²² MLL presented its damage calculations in Exhibit 47, prepared by Mr. Norman. Exhibit 47 set forth three alternative scenarios: 1) assuming that MLL would never be able to receive any income from the property over the remaining 48 years under its Lease, the present value of MLL's damages was calculated to be \$2, 582,780 (R. at 5210); 2) assuming that MLL would be able to secure a sublease ten years from the trial date, damages were calculated to \$1,419, 049.00 (R. at 5210-11); and 3) assuming MLL secured a sublease five years from the trial, damages were calculated to be \$1,005,179.00 (R. at 5215-16). The Jury's Verdict accepted the amount presented in scenario No. 1. R. at 1574.

²³ Mr. Norman presented himself as an expert in accounting and finance. R. at 5241-42.

all benefits of the possession and control of the property for the next 48 years.

It is axiomatic that the law abhors double recovery of damages. Restatement (Second) of Property, § 10.2, provides that: "damages may include one or more of the following items as may be appropriate so long as no double recovery is involved"[emphasis added]. See, also, Angelos v. First Interstate Bank of Utah, 671 P.2d 772, 778 (Utah 1983); Ohio Casualty Ins. Co. v. Brundage, 674 P.2d 101 (Utah 1983).

Although MLL argued that, as a result of Tony Middleton's threat of litigation in 1989, the property could not be put to any economically beneficial use for the remaining 48 years under the lease, such a notion is patently absurd. MLL's own expert, Henry Schwendiman, testified that this property, which is zoned C-2 is located at "one of the top ten intersections in the state." R. at 5094. Furthermore, the transcript of a meeting on February 15, 1990 (after the filing of this lawsuit) between Boyer and MLL established that, even after commencement of this lawsuit, Boyer was still interested in doing some kind of development on the property. R. at D-58. Any economically beneficial use of the property, whether as a parking lot, Christmas tree lot or office building, would result in a windfall or double recovery to MLL.²⁴

²⁴ Illustratively, Middletons' counsel, by chance, noticed that a Christmas tree lot was, in fact, in business on the subject property in December, 1992, and the Boyer Company still had a "To Lease" sign on the property.

B. The Judgment Improperly Relieved MLL of its Ongoing Duty to Mitigate Damages.

In Reid v. Mutual of Omaha Insurance Co., 776 P.2d 896 (Utah 1988), this Court addressed the very problem presented by the verdict in this case. The rule the Court adopted provides:

[I]f the trial occurs before the end of the lease term, a judgment cannot be entered for rents that have not yet accrued; any damage award must be limited to taking account only of rents that have accrued as of the trial date. To recover for later accruing rents, the landlord must bring a supplemental proceeding or proceedings in which it can prove that additional rents have accrued and that reasonable efforts to mitigate those losses have been taken.

Id. at 906. Only such a rule ensures, as to the party in possession, that "serious efforts are made to redeploy the rental property in a productive fashion by those who are best able to accomplish that end and who are best able to prove that required mitigation efforts have been carried out." Id.

[W]hen the [lease] term has not expired by the time of trial, it is impossible to evaluate the mitigation efforts the landlord will have to make in the future with respect to rents that have not yet come due, and it is equally impossible to determine whether those efforts will be successful in reducing losses from future accruing rents. Some means must be devised to permit recovery of actual losses occasioned by future accruing rents while ensuring that the landlord fulfills its duty to mitigate losses.

Id. at 907.

To avoid both the possibility of a double recovery and to encourage ongoing mitigation and development of the property by MLL, Middletons expressly requested a jury instruction consistent

with the rule of the Reid case. R. at 1505, 1512-13. When the trial court declined to accept Middletons' requested damage instruction, Middletons specifically objected on the record to the damage instruction given for its failure to comply with Reid. R. at 5914-15.²⁵

Recognizing that the Verdict allowed MLL a virtually certain double recovery and provided no other incentive to put the subject commercial property to beneficial use, the trial court made a well-intentioned, but flawed attempt to remedy the situation by including in the Judgment provisions allowing the possibility of some future income from the property being paid back to the Middletons. In denying Middletons' post-trial motions, Judge Rigtrup noted his concerns:

The prospect of a 2.6 -- roughly -- million dollar judgment and the further prospect of landlocking the use of the land for 48 years is not, it seems to the Court, a good result. There might be those who think the property would best be utilized by greenbelting it, maybe. But the Court in the Reed [sic] case suggested

²⁵ Counsel, Mr. Frankenburg, presented Middletons' exceptions to the jury instruction on damages:

We also take exception to Instruction No. 29, and object to that instruction. That is the compensatory damages instruction. The grounds for our objections to that instruction are: What we have in this case are claims made by the Plaintiffs for loss of projected income from a lease of real property. And by failing to instruct the jury that compensatory damages must be limited to those proven to have accrued as of the date of trial, the Court is allowing Plaintiffs a possible double recovery, failing to encourage mitigation and failing to encourage the economic development of real property in accordance with public policy. And, in support of this objection, we cite the Reid v. Mutual of Omaha case, the Utah Supreme Court case from 1986, at 776 P.2d 896.

R. at 5914-15.

R. at 5915. On Behalf of Richard G. Middleton, et al., Mr. Palmer joined in this objection. R. at 5914.

that that was not good public policy. And since the property is zoned Commercial, the Court doesn't view that as appropriate public policy.

R. at 2915 (See, Appellants' Addendum, Exhibit 5).

After reaching the puzzling conclusion that Reid did not apply because this case involved "loss of future profits . . . through the vehicle of rents" and is "not a case of rents," (R. at 2916) Judge Rigtrup nonetheless ordered:

But to avoid the possibility of the property being tied up, the Court will require in the order that the Court have continuing jurisdiction in this case should any development plan come forward. And the Court reserves the option of treating that in the way of mitigation of the awarded damages.

R. at 2920. He further clarified that this would not affect MLL's ability to collect the Judgment. Id.

Pursuant to the trial court's ruling the final Judgment provided:

It Is Further Hereby Ordered that notwithstanding the finality of the judgment, the court shall retain jurisdiction of this matter in the following limited respect: In the event that either Plaintiff or Defendants obtain a development agreement for the undeveloped portion of the subject property during the period of time that the subject Amended Ground Lease is in effect on said property, Defendants may apply to the court for consideration of whether and to what extent they may share in any proceeds from such development agreement as credit against the final judgment.

R. at 2966.

Thus, although the trial court properly recognized the concept of retained jurisdiction, it erroneously omitted the most important steps - limiting the current Judgment to damages accrued as of the date of trial, and concurrently imposing a duty of mitigation on the party in possession. Despite the trial

court's intentions, its ruling and consequent modification of the Judgment clearly serves to completely relieve MLL of all incentive to fulfill its ongoing duty to mitigate! By awarding MLL a final judgment including all its claimed rental income through the end of the Lease²⁶, the court quite effectively relieved MLL of any duty to mitigate its damages for the remaining 48 years under the lease. Obviously, if MLL collects the judgment, it has absolutely no incentive to relet the property, as the court might then require some, or all, of the rental proceeds to be passed on to the Middletons. R. at 2920-21 and 2966.

The Middletons, who might stand to receive a benefit if the property is relet, are not in possession and thus are unable to put the property to any beneficial use. They can't employ a realtor or make a single commitment to a prospective tenant without the concurrence of MLL and the court - which neither are required to give. This unworkable situation exemplifies the mischief which results when the policy of mitigation is turned on its head.

The concept of mitigation of damages is grounded in traditional contract law principles and requires that "a party injured by contract breach may not recover damages that he or she, with reasonable effort, could have avoided. Reid, 776 P.2d at 906, n. 8. It is well established that a repossessing

²⁶ It should also be noted that MLL also has the significant benefit of interest on this award, at the rate of 12% per annum, until paid.

landlord has a duty to mitigate its losses through taking commercially reasonable action, which usually means seeking to relet the premises. Reid, at 906.

In Reid this Court recognized:

[T]he economies of both the state and the nation benefit from a rule that encourages the reletting of premises, which returns them to productive use, rather than permitting a landlord to let them sit idle while it seeks rents from the breaching tenant.

776 P.2d at 905.

In the instant case, MLL is both a tenant and a landlord. Its alleged loss arises solely out of its claimed lost rental income as a landlord to Boyer. R. at 5255. The only evidence in the record concerning the subject of mitigation establishes that MLL took no steps as a landlord to sublease the property to anyone other than Boyer. Dr. Wong testified that MLL had made no effort to find a subtenant or developer other than Boyer:

Q. [by Mr. Frankenburg] Isn't it true, Dr. Wong, that neither you nor your partners have made any attempt, since January of 1990, to find another tenant, other than The Boyer Company, or another developer, for the 3900 South property?

A. It is true we have not sought to get anyone else to develop the property.

Q. And the same is true since September of 1989, isn't it?

A. That's correct.

R. at 4937-4938. This testimony was direct, unrebutted and met the traditional defense burden of initial proof on the issue of

mitigation. Dr. Ring testified as well that no efforts were made to re-let the premises. R. at 5046.

This case, just like Reid, involves a landlord suing for unpaid rent. It is undisputed that the tort and contract damages MLL claimed at trial were based entirely on calculated lost rental income MLL argued it would have received from Boyer over a 50 year period. MLL's expert, Mr. Norman, who formulated the damage calculations presented to the jury testified as follows:

Q. [A]ll your calculations are based upon income from [the] lease, right?

A. Income from the Lease?

Q. Right.

A. Income as contemplated from the Boyer lease, yes.

Q. Rental Income?

A. That is correct.

R. at 5255. That the Middletons are also landlords and not tenants is immaterial. As the party in possession, MLL's duty to mitigate is the same in either case.

What distinguishes Reid from other cases involving lost profits is that in Reid, the claimed lost profits were in the form of real property rents. The Utah Supreme Court expressly approved of public policy considerations which apply equally to any case which involves "lost profits" from real estate rental:

[W]e find persuasive the reasons advanced in support of the trend rule requiring the landlord to mitigate its losses. For example, the economies of both the state and the nation benefit from a rule that encourages the reletting of premises, which returns them to productive use

Id. at 905.

Like any other landlord, MLL has a duty to mitigate by returning the property in its possession to productive use. The retained jurisdiction approach adopted in Reid is designed to encourage the fulfillment of this duty.

This approach, therefore, should provide an incentive to the landlord to see that its mitigation duty is fulfilled, lest it be denied some of the damages it would otherwise be entitled to.

Id. at 908.

On the issue of damages, this case is indistinguishable from Reid. Whether the defendants are breaching tenants or in some other position is of no significance. The policy rationale is the same wherever the plaintiff seeks damages for lost future rent from real property of which it retains possession.

MLL has, in an effort to circumvent the requirements of Reid, argued that the jury already determined that mitigation was impossible. This, however, is exactly the type of theory which Reid is specifically designed to preclude. Reid recognizes that such a theory can only be based on highly speculative evidence and would improperly relieve the plaintiff of its ongoing duty to mitigate.²⁷

²⁷ Referring to the retained jurisdiction approach, the Court in Reid stated:

This approach does not depend on speculative projections of future events that may lead to under- or overestimation of the landlord's losses.

[emphasis added.] 776 P.2d at 908.

This Court has expressly stated the rule which must be applied to encourage ongoing mitigation. The trial court erred in failing to instruct the jury that it could not award MLL any future damages and in including in the Judgment provisions relieving MLL of any incentive to mitigate. This Court should remand for a new trial to correct the error in the jury instructions and instruct the trial court to fully apply retained jurisdiction consistent with Reid.

POINT X

**MIDDLETONS ARE ENTITLED TO THEIR ATTORNEYS
FEES PURSUANT TO PARAGRAPH 16 OF THE 1980
AMENDED GROUND LEASE.**

The 1980 Amended Ground Lease, ¶ 16, provides:

16. Attorney's Fees. If landlord or tenant default hereunder or file a suit against the other which is in any way connected with this lease, the defaulting party shall pay to the prevailing party a reasonable sum for attorney's fees, which shall be deemed to have accrued on the commencement of such action and shall be enforceable whether or not such action is prosecuted to judgment.

Exhibit P-3, ¶ 16.

In other words, a defendant may recover if the plaintiff pleads but fails to prove a breach of an express provision of the Lease. In that situation, there is no default, but defendant is the prevailing party in a suit" in any way connected with the lease."

Middletons therefore request that this Court grant them reasonable attorney's fees incurred in defending those claims the Court resolves in their favor.

CONCLUSION

This appeal presents error in at least three fundamental areas where sound legal and policy considerations mandate reversal.

The policy of finality upon which settlement of cases depends, and which in turn, administration of justice relies, is flaunted by the admission of the Zions evidence in the court below. Its admission prejudiced the jury and effectively led to re-trial of the Zions case within the framework of this action. Prejudicial error resulted.

The policy requiring mitigation of damages and fostering beneficial use of realty was ignored by the lower court's damage instruction. Disguised by the rubric that MLL's damages were "future profits" not rents, the trial court circumvented the rule of the Reid case and the important policies which it furthers. This court should require the lower court to follow the rule in Reid to foster the important policies the case encourages.

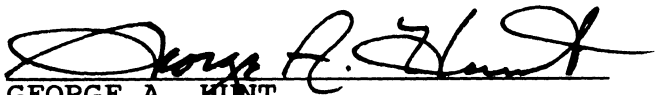
There exists no more important policy in our form of government than preserving and facilitating the resolution of disputes through the courts. Chilling those rights by discouraging would-be litigants from using the process promotes far less civilized methods of dispute resolution contrary to the public interest. It would be grave error for this court to allow a "threat of suit", standing alone, to form the core of a business tort upon which a multi-million dollar judgment rests. To allow such a judgment to stand sends precisely the wrong

message. That message is: Don't use the system to defend your rights - resort to other means - the system isn't safe. This court can and must send the opposite message. This court must say: Using the system or threatening to use the system is a safe harbor; until abuse of the system is established, it is safe to use. Without such a message, Utah's constitutional provision guaranteeing open courts for redress of grievances will be hollow rhetoric indeed.

These Appellants hereby request that the Judgment of the lower court be reversed, or in the alternative, that they be granted a new trial and that they be awarded their attorney's fees and costs on appeal.

RESPECTFULLY SUBMITTED this 8th day of February, 1993.

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CERTIFICATE OF SERVICE

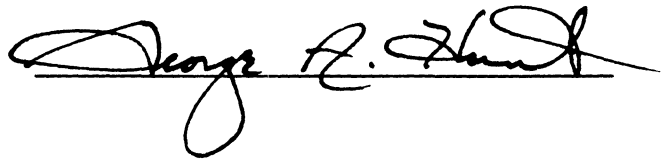
I hereby certify that I mailed four (4) true and correct copies of the foregoing Brief of Appellants, postage prepaid thereon, by First Class Mail in the United States Mail, to the following:

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on the 8th day of February, 1993.

A handwritten signature in black ink, appearing to read "George A. Hunt", is written over a horizontal line.