

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 Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Richard D. Burbidge; Stephen B. Mitchell; Burbidge & Mitchell; Jay D. Gurmankin; Counsel for Appellee.

George A Hunt; Kurt M. Frankenburg; Williams & Hunt; Joseph J. Palmer; Wayne G. Petty; Moyle & Draper; Counsel for Appellants .

Recommended Citation

Brief of Appellee, *Medical Leasing v. Middleton*, No. 930218 (Utah Court of Appeals, 1993).
https://digitalcommons.law.byu.edu/byu_ca1/5096

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU
50
.A10
DOCKET NO. 930218CA

IN THE UTAH SUPREME COURT

MEDICAL LEASING, LTD., a Utah
partnership,

Plaintiff/Appellee,

-vs-

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,

Defendants/Appellants.

93-0218-CA

Case No. 0439

Priority No. 15

BRIEF OF APPELLEE MEDICAL LEASING, LTD.

An Appeal from the Third Judicial District Court
of Salt Lake County
The Honorable Kenneth Rigtrup, Presiding

George A. Hunt
Kurt M. Frankenburg
WILLIAMS & HUNT
257 East 200 South, Suite 500
Salt Lake City, Utah 84111
(801) 521-5678

Attorneys for Defendants/Appellants
Anthony W. Middleton, Jr., Carol
S. Middleton, George W. Middleton
and Jean H. Middleton

Joseph J. Palmer
Wayne G. Petty
MOYLE & DRAPER
15 East 100 South, Suite 600
Salt Lake City, Utah 84111
(801) 521-0250

Attorneys for Defendants/Appellants
Richard G. Middleton, Jane G. Middleton,
Delores B. Middleton, Mary Middleton
Dahl and Richard P. Middleton as
executor of the Estate of Victoria
Ann M. Stearn

Richard D. Burbidge
Stephen B. Mitchell
BURBIDGE & MITCHELL
139 E. South Temple, Suite 2001
Salt Lake City, Utah 84111
(801) 355-6677

Jay D. Gurmankin
215 South State, Suite 500
Salt Lake City, Utah 84111
(801) 532-1036

Attorneys for Plaintiff/
Appellee Medical Leasing, Ltd.

FILED

MAR 5 1993

CLERK SUPREME COURT,
UTAH

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	(v)
I. INTRODUCTION	2
II. STATEMENT OF JURISDICTION	3
III. ISSUES FOR REVIEW	3
IV. STATEMENT OF THE CASE	7
A. Nature of the Case	7
B. Course of Proceedings and Disposition Below	8
C. Statement of Facts	10
The Medical Leasing-Middleton Ground Leases	10
The Zions's Litigation	12
The Boyer Company Negotiations	14
The Wrongful Threats of Groundless Litigation	18
The Prospective Economic Relationship is Destroyed	21
The Boyer Company's Formal Withdrawal	23
Medical Leasing's Damages	24
V. OBJECTIONS TO THE MIDDLETONS' STATEMENTS OF FACT	26

VI.	SUMMARY OF ARGUMENT	32
VII.	ARGUMENT	36
A.	THE EVIDENCE ADMITTED AT TRIAL REGARDING THE ZIONS LITIGATION WAS HIGHLY RELEVANT AND ITS ADMISSION WAS NOT PREJUDICIAL ERROR . . .	36
B.	MEDICAL LEASING WAS NOT REQUIRED TO GIVE WRITTEN NOTICE OF DEFAULT IN ORDER TO RECOVER DAMAGES AND, IN ANY EVENT, SUFFICIENT NOTICE WAS GIVEN	41
1.	Notice Was Not a Condition Precedent	41
2.	In Any Event, Medical Leasing Gave Notice .	44
C.	THERE WAS SUBSTANTIAL EVIDENCE THAT THE MIDDLETONS BREACHED PARAGRAPH 8 OF THE AMENDED GROUND LEASE AND THEIR IMPLIED OBLIGATION OF GOOD FAITH AND FAIR DEALING	45
1.	There Was Substantial Evidence that the Middletons Breached the Provisions of Paragraph 8 of the Amended Ground Lease	45
2.	There Was Substantial Evidence that the Covenant of Good Faith and Fair Dealing Was Breached	47
3.	The Middletons Are Jointly Liable for the Breach of the Covenant of Good Faith and Fair Dealing	50
D.	THE EVIDENCE WAS OVERWHELMING THAT THE MIDDLETONS' WRONGFUL THREATS OF LITIGATION DESTROYED THE TRANSACTION WITH THE BOYER COMPANY	51

E.	THE TRIAL COURT CORRECTLY AWARDED MEDICAL LEASING ATTORNEY'S FEES	63
1.	Notice of Default Was Not Required in Order for Medical Leasing to be Entitled to Attorney's Fees and, In Any Event, Notice Was Given	64
2.	The Middletons Did Breach the Express Terms of the Amended Ground Lease	65
3.	Medical Leasing Was Entitled to Attorney's Fees For Breach of the Implied Covenant of Good Faith and Fair Dealing	68
4.	The Award of Attorney's Fees Was Not Defective Because Medical Leasing Did Not Set Out the Time and Fees Expended for Unsuccessful Claims and Claims For Which There Would Be No Entitlement to Attorney's Fees	69
F.	THE COURT CORRECTLY DETERMINED THAT THE MIDDLETONS WERE JOINTLY LIABLE FOR BREACH OF THE AMENDED GROUND LEASE	73
1.	As the Landlord Under the Amended Ground Lease, the Middletons Were Jointly Liable for Its Breach	73
2.	Whether Or Not All of the Middletons Would Have Had to Join in Litigation on the Amended Ground Lease is Irrelevant	80
3.	Medical Leasing Pled Joint Liability	81
G.	THE JURY'S AWARD OF LOST PROFITS TO BE SUFFERED BY MEDICAL LEASING DURING THE REMAINING TERM OF THE AMENDED GROUND LEASE WAS ENTIRELY PROPER	83
1.	The Middletons Failed to Meet Their Burden of Proving that Medical Leasing Did Not Take Reasonable Action to Mitigate its Damages	84

2.	The <u>Reid</u> Case is Not Applicable to the Case at Bar	88
3.	The Jury Verdict Does Not Allow Medical Leasing a Double Recovery	93
4.	Medical Leasing's Damage Theory Was Fully Supported By the Evidence	97
H.	THE JURY VERDICT THAT ANTHONY MIDDLETON TORTIOUSLY INTERFERED WITH MEDICAL LEASING'S PROSPECTIVE RELATIONSHIP WAS SUPPORTED BY SUBSTANTIAL EVIDENCE	99
1.	Improper Purpose and Improper Means	100
2.	Privilege	105
CONCLUSION		107

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<u>Alexander v. Brown</u> , 646 P.2d 692 (Utah 1982)	93
<u>Alexander v. Wheeler</u> , 407 N.Y.S.2d 319 (A.D. 4 Dept. 1978)	75
<u>Anderson v. Barnes</u> , 671 P.2d 1327 (Colo. App. 1983)	75
<u>Angelos v. First Interstate Bank of Utah</u> , 671 P.2d 772 (Utah 1983)	93
<u>Aster v. Arthur Murray, Inc.</u> , 220 N.Y.S.2d 34 (N.Y. 1961) . .	82-83
<u>Bank of Utah v. Commercial Security Bank</u> , 369 F.2d 19 (10th Cir. 1966)	106
<u>Barson v. E.R. Squibb & Sons, Inc.</u> , 682 P.2d 832 (Utah 1984)	37
<u>Bentley v. Potter</u> , 694 P.2d 617 (Utah 1984)	43
<u>Bergfeld v. Stork</u> , 288 N.E.2d 15 (Ill. App. 1972)	106, 107
<u>Berube v. Fashion Centre, Ltd.</u> , 771 P.2d 1033 (Utah 1989)	48
<u>Bituminous Const., Inc. v. Rucker Enterprises, Inc.</u> , 816 F.2d 965 (4th Cir. 1987)	38
<u>Blake v. Levy</u> , 464 A.2d 52 (Conn. 1983)	104
<u>Bond v. Dunmire</u> , 473 N.E.2d 78 (Ill. App. 1984)	82
<u>Bulaich v. AT&T Information Systems</u> , 778 P.2d 1031 (Wash. 1989)	38
<u>Bunnell v. Bills</u> , 368 P.2d 597 (Utah 1962)	105
<u>Cabal v. Donnelly</u> , 714 P.2d 1071 (Or. App. 1986)	69
<u>Caparrelli v. Rolling Greens, Inc.</u> , 190 A.2d 369 (N.J. 1973)	41

<u>Car Doctor, Inc. v. Belmont</u> , 635 P.2d 82 (Utah 1981) . . .	4, 5, 6
<u>Caruso v. Local Union No. 690, Etc.</u> , 653 P.2d 638 (Wash. App. 1982)	52
<u>Clayman v. Goodman Properties, Inc.</u> , 518 F.2d 1026 (D.C. Cir. 1973)	75
<u>Cluff v. Culmer</u> , 556 P.2d 498 (Utah 1976)	50, 68
<u>Cottonwood Mall v. Sine</u> , 830 P.2d 266 (Utah 1992)	5, 7
<u>Don L. Tullis & Associates, Inc. v. Gover</u> , 577 S.W.2d 891 (Mo. App. 1979)	75
<u>Donzella v. New York State Thruway Authority</u> , 180 N.Y.S.2d 108 (A.D. 3 Dept. 1958)	75
<u>Erlandson v. Pullen</u> , 608 P.2d 1169 (Or. App. 1980)	105
<u>F.D.I.C. v. Bismarck Inv. Corp.</u> , 547 P.2d 212 (Utah 1976)	76
<u>Flagg v. Andrew Williams Stores</u> , 273 P.2d 294 (Cal. App. 1954)	99
<u>Forrester v. Cook</u> , 292 P. 206 (Utah 1930)	68
<u>Gaulden v. Burlington Northern, Inc.</u> , 654 P.2d 383 (Kan. 1982)	37
<u>Geraci v. Crown Chevrolet, Inc.</u> , 444 N.E.2d 1308 (Mass. App. 1983)	69
<u>GHK Associates v. Mayer Group, Inc.</u> , 274 Cal.Rptr. 168 (Cal. App. 1990)	99
<u>Gould v. Mountain States Telephone & Telegraph Co.</u> , 309 P.2d 802 (Utah 1957)	99
<u>Hadlock v. Showcase Real Estate, Inc.</u> , 680 P.2d 395 (Utah 1984)	43
<u>Harrison v. Peuga</u> , 480 P.2d 247 (Wash. App. 1971)	74
<u>Hector, Inc. v. United Savings & Loan Association</u> , 741 P.2d 542 (Utah 1987)	85

<u>Herbert Products, Inc. v. Oxy-Dry Sprayer Corporation</u> , 145 N.Y.S.2d 168 (N.Y. 1955)	105
<u>Heslop v. Bank of Utah</u> , 839 P.2d 828 (Utah 1992)	45
<u>Home Life Ins. Co. v. Clay</u> , 773 P.2d 666 (Kan. App. 1989)	93
<u>Huggins v. Bacon</u> , 321 S.E.2d 353 (Ga. App. 1984)	75
<u>J.C. Realty, Inc. v. Willey</u> , 758 P.2d 923 (Utah App. 1988)	77
<u>Jacobsen v. Swan</u> , 278 P.2d 294 (Utah 1954)	68
<u>John Call Engineering v. Manti City</u> , 795 P.2d 678 (Utah App. 1990)	85
<u>Kimball v. Campbell</u> , 699 P.2d 714 (Utah 1985)	4, 5
<u>Kirby v. Dole</u> , 736 F.2d 661 (11th Cir. 1984)	39
<u>Leigh Furniture & Carpet Co. v. Isom</u> , 657 P.2d 293 (Utah 1982)	48, 52, 91, 100, 102
<u>Leone v. Zuniga</u> , 34 P.2d 699 (Utah 1934)	68
<u>Lithia Lumber Co. v. Lamb</u> , 443 P.2d 647 (Or. 1968)	77
<u>LMV Leasing, Inc. v. Conlin</u> , 805 P.2d 189 (Utah App. 1991)	74, 89
<u>Lovell v. Commonwealth Thread Co.</u> , 172 N.E. 76 (1930)	76
<u>McKenzie v. Kaiser-Aetna</u> , 127 Cal.Rptr. 275 (Cal. App. 1976)	67
<u>Meyers v. SLC Corp.</u> , 747 P.2d 1058 (Utah App. 1987)	36-37
<u>Moore v. Seabaugh</u> , 684 S.W.2d 492 (Mo. App. 1984)	74
<u>Morgan v. Cincinnati Ins. Co.</u> , 307 N.W.2d 53 (Mich. 1981)	74
<u>New Jersey Office Supply, Inc. v. Feldman</u> , 1990 LW 74477 (U.S.D.C.N.J. 1990)	83
<u>Noble v. Tweedy</u> , 203 P.2d 778 (Cal. App. 1949)	92

<u>Pacific Gas & Electric Co. v. Bear Stearns & Co.,</u> 791 P.2d 587 (Cal. 1990)	104
<u>Penelko, Inc. v. John Price Associates, Inc.,</u> 642 P.2d 1229 (Utah 1982)	90, 98, 99
<u>Pratt v. Board of Education,</u> 564 P.2d 294 (Utah 1977)	85
<u>Ramon v. Farr,</u> 770 P.2d 131 (Utah 1989)	7
<u>Rasmussen v. Allstate Insurance Co.,</u> 726 P.2d 1251 (Wash. App. 1986)	39
<u>Reed v. Reed,</u> 806 P.2d 1182 (Utah 1991)	45
<u>Reichert v. General Ins. Co. of America,</u> 442 P.2d 377 (Cal. 1968)	91
<u>Reid v. Mutual of Omaha Ins. Co.,</u> 776 P.2d 896 (Utah 1989)	84, 88, 92, 93
<u>Reinert v. Carver,</u> 41 So.2d 449 (Fla. 1949)	83
<u>Sagebrush Development, Inc. v. Moehrke,</u> 604 P.2d 198 (Wyo. 1979)	92
<u>Scharf v. BMG Corp.,</u> 700 P.2d 1068 (Utah 1985)	6
<u>Schneider v. Bytner,</u> 481 N.Y.S.2d 777 (A.D.3 Dept. 1984)	74
<u>Sharkey v. Lathram,</u> 156 N.E.2d 502 (Ohio 1959)	83
<u>Skonberg v. Owens-Corning Fiberglass Corp.,</u> 576 N.E.2d 28 (Ill. App. 1991)	38
<u>Smith v. Smith,</u> 620 S.W.2d 619 (Tex. App. 1991)	38
<u>St. Benedict's Dev. v. St. Benedict's Hospital,</u> 811 P.2d 194 (Utah 1991)	48, 66, 100, 102
<u>Ted R. Brown & Associates v. Carnes Corp.,</u> 753 P.2d 964 (Utah App. 1988)	66
<u>Thompson Coal Co. v. Pike Coal Co.,</u> 412 A.2d 466 (Pa. 1979)	52
<u>Trayner v. Cushing,</u> 688 P.2d 856 (Utah 1984)	70
<u>Turner v. Gunderson,</u> 807 P.2d 370 (Wash. App. 1991)	74

<u>Vulcan Hart Corp. v. National Labor Relations Board,</u> 718 F.2d 269 (8th Cir. 1983)	38
<u>Whitehead v. American Motors Sales Corp.,</u> 801 P.2d 920 (Utah 1990)	3, 5
<u>Wiener v. Farm Credit Bank of St. Louis,</u> 759 F. Supp. 510 (E.D.Ark. 1991)	38

Statutes

Utah Rules of Evidence, Rules 803(1) and (3)	58
Utah Code Ann. § 78-2-2(3)(j) (1989)	3

Treatises and Other Authority

3A <u>Corbin on Contracts</u> , § 1039 (1964)	85, 93
3A <u>Corbin on Contracts</u> , § 654A (1991 Pocket Part)	50
Powell, <u>Law of Real Property</u> , § 230[2] (1991)	74, 89
Powell, <u>Law of Real Property</u> , § 606[1] (1991)	80
Prosser & Keeton, <u>The Law of Torts</u> , § 129 (5th Ed. 1984) . . .	52
<u>Restatement (Second) of Contracts</u> , § 289(1)	74
<u>Restatement (Second) of Contracts</u> , § 205	50
<u>Restatement (Second) of Property</u> , § 7.1 (1977)	43, 92
<u>Restatement (Second) of Property</u> , § 10.2 (1977)	92
S. Williston, <u>A Treatise on the Law of Contracts</u> , § 727 (3rd Ed. 1957)	41

IN THE UTAH SUPREME COURT

MEDICAL LEASING, LTD., a Utah partnership,)	
)	
Plaintiff/Appellee,)	Case No. 92 0439
)	Priority No. 15
-vs-)	
)	
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,)	
)	
Defendants/Appellants.)	

BRIEF OF APPELLEE MEDICAL LEASING, LTD.

An Appeal from the Third Judicial District Court
of Salt Lake County
The Honorable Kenneth Rigtrup, Presiding

George A. Hunt
Kurt M. Frankenburg
WILLIAMS & HUNT
257 East 200 South, Suite 500
Salt Lake City, Utah 84111
(801) 521-5678

Attorneys for Defendants/Appellants
Anthony W. Middleton, Jr., Carol
S. Middleton, George W. Middleton
and Jean H. Middleton

Joseph J. Palmer
Wayne G. Petty
MOYLE & DRAPER
15 East 100 South, Suite 600
Salt Lake City, Utah 84111
(801) 521-0250

Attorneys for Defendants/Appellants
Richard G. Middleton, Jane G. Middleton,
Delores B. Middleton, Mary Middleton
Dahl and Richard P. Middleton as
executor of the Estate of Victoria
Ann M. Stearn

Richard D. Burbidge
Stephen B. Mitchell
BURBIDGE & MITCHELL
139 E. South Temple, Suite 2001
Salt Lake City, Utah 84111
(801) 355-6677

Jay D. Gurmankin
215 South State, Suite 500
Salt Lake City, Utah 84111
(801) 532-1036

Attorneys for Plaintiff/
Appellee Medical Leasing, Ltd.

I.

INTRODUCTION

After three weeks of trial and careful deliberation, the jury in this case found that Anthony W. Middleton, Jr. ("Anthony Middleton") and his wife, Carol S. Middleton ("Carol Middleton") intentionally, wrongfully and maliciously interfered with Medical Leasing's prospective economic relationship with The Boyer Company with the dominant purpose to harm Medical Leasing and thereby also breached paragraph 8 of the Amended Ground Lease between the parties and the obligation of good faith and fair dealing implied therein by sabotaging a proposed sublease between Medical Leasing and The Boyer Company with threats of groundless litigation unless Medical Leasing surrendered to Anthony Middleton's demands for additional compensation. The court then properly ruled that all of the Middletons were jointly liable for Anthony Middleton's breach of contract because they were all the "Landlord" under the Amended Ground Lease.

The Middletons now ask this court to cast aside the jury's verdict. The Middletons' protest -- but abjectly fail to demonstrate -- that the evidence as a matter of law was not sufficient to support the jury's verdict and that the court committed errors of law during the trial. In that regard, the Middletons have an absolute obligation to marshal all of the evidence and all reasonable inferences to be drawn therefrom which support the verdict. Only then can they attempt to demonstrate there is no substantial evidence to support the verdict. They do

not even attempt to marshal the evidence. Instead, they select small pieces of the record, typically out of context, cast those small bits in a light favorable to the Middletons and thereby ignore most of the evidence upon which the jury based its verdict.

The jury heard and conscientiously decided this case. The evidence was more than sufficient to support its verdict. The jury was properly instructed concerning the law and no legal errors were committed which would remotely justify the repudiation of the jury's verdict. As will now be demonstrated, the jury's verdict and the judgment rendered thereon should be affirmed in all respects.

II.

STATEMENT OF JURISDICTION

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

III.

ISSUES FOR REVIEW

1. Did the trial court properly admit Medical Leasing's and the Middletons' evidence regarding the Zions Litigation? The standard of review on this issue is whether the trial court's ruling was clearly erroneous. Whitehead v. American Motors Sales Corp., 801 P.2d 920 (Utah 1990).

2. Did the trial court correctly rule that the Amended Ground Lease between the parties did not require written notice of default as a condition precedent to bringing suit for breach of the express terms of the lease and/or the implied covenant of good faith and fair dealing? The standard of review of this is de novo review for correctness. Kimball v. Campbell, 699 P.2d 714 (Utah 1985).

3. Even if written notice of default had been required by the Amended Ground Lease, did Medical Leasing give the required written notice of default before commencing suit? The standard of review on this issue is whether taking all the evidence supporting the jury's verdict and all reasonable inferences to be derived therefrom and viewing the evidence in a light most favorable to the verdict, the jury's determination is clearly erroneous. Car Doctor, Inc. v. Belmont, 635 P.2d 82, 83 (Utah 1981).

4. Did Anthony Middleton's intentional and malicious threats of groundless litigation, made with the dominant purpose and/or intended immediate effect to injure Medical Leasing by derailing its sublease with The Boyer Company, constitute a breach of the express provisions of paragraph 8 of the Amended Ground Lease under which the Middletons agreed that Medical Leasing could lease the Property to an unrelated third party for development without the Middletons' consent unless subordination was sought? The standard of review with respect to Anthony Middleton's conduct is whether taking all the evidence supporting the jury's verdict and all reasonable inferences to be derived therefrom and viewing the evidence in a light most favorable to the verdict, the jury's

determination is clearly erroneous. Car Doctor, Inc. v. Belmont, supra. The standard of review with respect to the interpretation of the provisions of paragraph 8 of the Amended Ground Lease is de novo review for correctness. Kimball v. Campbell, supra.

5. Did the trial court properly award Medical Leasing attorney's fees in view of the jury's verdict that the Middletons breached the lease and that Anthony Middleton and Carol Middleton interfered with Medical Leasing's prospective business relationship with The Boyer Company? The standard of review on this issue is de novo review for correctness. Cottonwood Mall v. Sine, 830 P.2d 266 (Utah 1992).

6. Did the trial court properly rule that as a matter of law all of the Middletons were liable on the breach of contract claims because they were the "Landlord" under the Amended Ground Lease between the parties and undertook the same obligations and duties and promised the same performance thereunder? The standard of review on this issue is de novo review for correctness. Kimball v. Campbell, supra.

7. Did the trial court properly rule that Medical Leasing had pled sufficient facts in its Amended Complaint to raise the issue of whether the Middletons were jointly liable for breach of contract as "Landlord" under the Amended Ground Lease? The standard of review on this issue is whether the trial court's decision was clearly erroneous. Whitehead v. American Motors Sales Corp., supra.

8. Was there any substantial evidence to support the jury's verdict that Anthony Middleton's threats of groundless

litigation caused damage to Medical Leasing? The standard of review on this issue is whether taking all the evidence supporting the jury's verdict and all reasonable inferences to be derived therefrom and viewing the evidence in a light most favorable to the verdict, the jury's determination is clearly erroneous. Car Doctor, Inc. v. Belmont, supra.

9. Was the jury's verdict that Anthony Middleton intentionally and maliciously made threats of groundless litigation with the dominant purpose and/or the intended immediate effect to harm Medical Leasing supported by any substantial evidence and, if so, was that sufficient to satisfy the improper purpose or improper means element of Medical Leasing's interference with prospective business relationship claims? The standard of review with respect to the jury's findings is whether taking all the evidence supporting the jury's verdict and all reasonable inferences to be derived therefrom and viewing the evidence in a light most favorable to the verdict, the jury's determination is clearly erroneous. Car Doctor, Inc. v. Belmont, supra. The standard of review on the issue of the legal requirements of the improper purpose and improper means elements is de novo review for correctness. Scharf v. BMG Corp., 700 P.2d 1068 (Utah 1985).

10. Did the trial court correctly reject the Middletons' contention that they were privileged, as a matter of law, to intentionally and maliciously make threats of groundless litigation with the dominant purpose, or intended immediate effect, to harm Medical Leasing? The standard of review on this issue is de novo review for correctness. Scharf v. BMG Corp., supra.

11. Did the trial court correctly instruct the jury on recovery of future lost profits and damages? The standard of review on this issue is de novo review for correctness. Ramon v. Farr, 770 P.2d 131, 133 (Utah 1989).

12. Was the trial court's decision on the amount of attorney's fees Medical Leasing was entitled to recover supported by the evidence? The standard of review on this issue is whether there was any substantial evidence to support the court's exercise of its discretion. Cottonwood Mall v. Sine, supra.

IV.

STATEMENT OF THE CASE

A. Nature of the Case.

This case arises out of an Amended Ground Lease entered into between Medical Leasing and the Middletons in 1980 with respect to an approximately nine (9) acre parcel of land on the northwest corner of 3900 South and 700 East in Salt Lake County (the "Property"). The Amended Ground Lease, before and after it was modified by a settlement stipulation entered into in the previous Zions Litigation (discussed below), gave Medical Leasing the right to sublease the undeveloped portion of the Property for development by an independent third party without the Middletons' consent unless subordination was sought.

When Medical Leasing attempted to sublease a portion of the Property to The Boyer Company for a large commercial

development on a long-term sublease which would have netted Medical Leasing millions of dollars over the life of the sublease, Anthony Middleton intentionally and maliciously interfered and eventually sabotaged the transaction by making threats of groundless litigation unless his demands that the Middletons share in the revenues were met. After The Boyer Company withdrew from the transaction, Medical Leasing commenced this action seeking recovery for breach of the express provisions of paragraph 8 of the Amended Ground Lease and the implied covenant of good faith and fair dealing and for interference with prospective economic relations and other relief.

B. Course of Proceedings and Disposition Below.

Medical Leasing commenced this lawsuit on February 16, 1990. [R. 2]. In addition to claims for the breach of express and implied contract and interference with prospective economic relations, the original Complaint also contained a claim for interference with contract and for a declaratory judgment and injunction. The Complaint alleged that all of the Middletons were the Landlord under the Amended Ground Lease, that Anthony Middleton acted as their agent and that all the Middletons were liable for the damages alleged in the Complaint.

The Middletons filed a Motion to Dismiss the Complaint. The trial court dismissed Count I for declaratory judgment and injunction. Medical Leasing then filed an Amended Complaint containing the same claims for relief, except for the declaratory

relief and injunction claim which had been dismissed. [R. 319]. The Middletons moved for summary judgment. The court granted that motion with respect to the Second Claim for Relief for interference with contract on the basis that the Development Agreement between Medical Leasing and The Boyer Company upon which that claim was based had expired by its own terms. The remainder of the Middletons' motion was denied. [R. 1078].

On February 11, 1992, the case went to jury trial. After approximately three weeks of trial, the jury returned its verdict determining that Anthony Middleton and his wife, Carol Middleton,¹ were liable for breach of contract and interference with prospective business relationship and awarding compensatory damages in favor of Medical Leasing in the amount of \$2,582,780.00, together with interest and punitive damages against Anthony Middleton in the sum of \$75,000.00. [R. 1569, 1584].

Judge Rigtrup had reserved the issue of whether the other Middletons were liable for Anthony Middleton's breach of contract pending receipt of the jury verdict. After the jury returned its verdict, Judge Rigtrup ruled that because the Middletons had all executed the Amended Ground Lease with Medical Leasing as the "Landlord" and had promised the same performance thereunder that the Middletons were all liable for the breach of contract. [R. 2962]. The Middletons then filed Motions for Judgment Notwithstanding the Verdict and for New Trial which were denied by the trial court. [R. 1903-2248].

¹ Carol Middleton's liability was co-extensive with that of Anthony Middleton by her testimony that he acted as her agent with respect to the Property and in all respects. [R. 5034].

Pursuant to previous agreement between the parties, the issue of attorney's fees was reserved for ruling by the trial court upon affidavits. Medical Leasing's Motion for Award of Attorney's Fees and Costs was supported by extensive affidavits, including copies of all billings substantiating the services performed on behalf of Medical Leasing. Medical Leasing sought attorney's fees in the amount of \$319,502.00 and costs consisting principally of expert fees in the amount of \$55,536.26. The court determined that \$275,000.00 was a reasonable attorney's fee and the Middletons stipulated not to contest that amount except they reserved their right to contend that Medical Leasing had not properly allocated its fees between claims on which attorney's fees could be awarded and claims on which attorney's fees could supposedly not be awarded.

Thereafter, the court entered judgment in favor of Medical Leasing on August 28, 1992 in the amount of \$2,582,780.00 plus attorney's fees in the amount of \$275,000.00, together with interest at the rate of 12% per annum. [R. 2954]. It is from this judgment that the Middletons appeal.

C. Statement of Facts.

The Medical Leasing-Middleton Ground Leases

1. The Middletons are owners as tenants in common of the real property which is the subject of this action consisting of approximately nine (9) acres located at the northwest corner of 700 East 3900 South in Salt Lake County (the "Property"). The Property

was previously owned by Richard P. Middleton, Anthony W. Middleton, Sr. and Delores Middleton, who were brothers and sister. [R. 4317 and 4972]. Medical Leasing is a partnership comprised of Dr. Wallace H. Ring ("Ring"), Dr. John C. Adair ("Adair") and Dr. Harry C. Wong ("Wong"). [R. 3988].

2. On July 21, 1975, the Middletons leased the Property to Medical Leasing's predecessor, Salt Lake Surgical Center, Inc., for a term of fifty years with an option to renew for an additional thirty years. Salt Lake Surgical Center, Inc. intended to and did construct a surgical center on two acres of the Property. The Middletons agreed to subordinate their ownership interest to the construction lender's Trust Deed in order to facilitate the project. [Plaintiff's Ex. 1].

3. In 1980, Medical Leasing proposed to expand the surgical center and the parties entered into an Amended Ground Lease dated August 1, 1980 pursuant to which the Middletons agreed to subordinate an additional .75 acres for the expansion of the surgical center in return for lease concessions to the Middletons. [Plaintiff's Ex. 3].

4. Paragraph 8 of the Amended Ground Lease dealt with Medical Leasing's right to develop additional portions of the Property in the future. Paragraph 8 provided that the Middletons were not obligated to subordinate any additional portion of the Property and that Medical Leasing could not further develop the Property without the Middletons' consent, except that Medical Leasing was not precluded "from selling or subleasing its interest in the remaining portion of the Leased Premises to an independent

third party for development or otherwise, provided Lessee is not a joint venturer, partner, stockholder, participant, or otherwise involved, directly or indirectly in the development of the Property with such third party." [Plaintiff's Ex. 3].

The Zions's Litigation

5. In August, 1980, Medical Leasing entered into a sublease with Zions First National Bank ("Zions") for the sublease of a portion of the Property for the construction by Zions of a branch office. [Plaintiff's Ex. 4]. After Zions obtained the proceeds of an industrial revenue bond offering for the construction of a permanent facility, it became concerned as to whether paragraph 8 of the Amended Ground Lease required that the Middletons' consent be obtained for the proposed development and requested that the Middletons simply confirm that their consent was not necessary or, in the alternative, give their consent. The Middletons refused to do either and, through their attorney, simply told Zions it would have to proceed at its peril. [R. 4010-4016, 4026-4050; Plaintiff's Exs. 7, 8 and 9]. Accordingly, in January, 1983, Zions commenced litigation (the "Zions Litigation") against the Middletons and Medical Leasing seeking a declaration that no consent of the Middletons was necessary for Zions' proposed development or, if it were necessary, that Medical Leasing was obligated to obtain such consent. [R. 4037; Plaintiff's Ex. 10].

6. The Middletons filed a Third Party Complaint and Counterclaim in the Zions Litigation in which, among other things, they asked for a declaration as to whether their consent was necessary for the Zions development, and alleged that at the time

the Amended Ground Lease had been negotiated and executed they had understood that their consent would be necessary before any significant future development of the Property was undertaken, that by mistake the Amended Ground Lease did not accurately reflect that supposed right, and therefore they were entitled to reformation of the Amended Ground Lease. [R. 4113-4115; Plaintiff's Exs. 11 and 15]. At the trial subject of this appeal, it was admitted that such allegations were not true. [R. 5031-5032, 5693-5700, 4013-4020, 4324-4338, 5578-5584].

7. In July, 1983, the Third District Court, the Honorable Judith M. Billings, Judge, entered partial summary judgment in favor of Zions determining as a matter of law that the consent of the Middletons was not required for Zions' development of the Property. [Plaintiff's Ex. 12].

8. Thereafter, in 1985, the Zions Litigation was fully settled pursuant to a Stipulation and Mutual Release of All Claims. As part of the settlement, Medical Leasing paid the Middletons \$21,000 and paragraph 8 of the Amended Ground Lease was restated as follows:

[C]onsent of the Middletons to the future development of the Leased Premises is not required unless the Lessee shall seek to develop the Property or an independent third party sublessee or assignee requires that the interest of the Middletons be subordinated to the interest of a development lender. In other words, the lessee may not develop the property without the consent of the Middletons, but a third party sublessee or assignee totally independent of the lessee may further develop the Property without the consent of the Middletons using its own or borrowed capital provided subordination of the interest of the Middletons is not required for said development.

[R. 4042-4044 and Plaintiff's Ex. 16].

The Boyer Company Negotiations

9. After soliciting Medical Leasing's interest, on or about March 8, 1988, The Boyer Company made a written proposal to lease 5.135 acres of the Property for an annual ground lease payment of \$111,840.00 with escalations. [R. 4059 and Plaintiff's Ex. 20]. In the initial discussions, Medical Leasing made it clear that Boyer would have to live with the terms of the Amended Ground Lease and that no subordination or amendments could be requested of the Middletons. Boyer responded to the effect that if Zions could develop the Property on that basis, so could he. [R. 4052-4053].

10. Thereafter, Medical Leasing and The Boyer Company engaged in negotiations which culminated in the execution of a Development Agreement dated June 14, 1988. The Development Agreement provided for rental at the rate of \$111,840.00 per year with escalations. Boyer's obligation to lease the Property was subject to the fulfillment of certain conditions precedent such as rezoning of the Property and other matters. The agreement provided that the lease would be executed no later than December 31, 1988. The Development Agreement did not contain any contingency regarding The Boyer Company's ability to obtain financing for the proposed commercial business and professional office space development. Boyer understood that the Development Agreement would be subject to the Amended Ground Lease. [R. 4088, 4840; Plaintiff's Ex. 22].

11. The Boyer Company prepared drawings, site plans and financial proformas. [Plaintiff's Exs. 23 and 50]. The Boyer Company undertook to fulfill the conditions precedent contained in

the Development Agreement and after what Greg Gardner of The Boyer Company described as "a long and arduous process" was successful in having the Property rezoned in October, 1988. [Plaintiff's Ex. 28].

12. By letter dated December 22, 1988, H. Roger Boyer ("Boyer") of The Boyer Company notified Medical Leasing that the contingencies set forth in the Development Agreement had been fulfilled and requested an extension of the December 31, 1988 deadline for executing a written lease to January 31, 1989. Medical Leasing agreed to this request. [Plaintiff's Ex. 32].

13. On February 3, 1989, John Parsons ("Parsons"), the attorney for Medical Leasing, transmitted to Greg Gardner at The Boyer Company a proposed sublease. Although the January 31, 1989 deadline had expired, Medical Leasing and The Boyer Company continued negotiating the sublease in good faith without any mention that the deadline had expired. [R. 4499-4500, 4517, 4521-4522, 4537; Plaintiff's Ex. 33].

14. The Boyer Company sent the proposed sublease to its attorney, Victor A. Taylor ("Taylor") at Kimball, Parr, Crockett & Waddoups for review. Taylor then delivered a letter dated March 14, 1989 to Parsons containing his comments on the proposed sublease. In that letter, Taylor requested that there be included in the sublease a non-disturbance and attornment clause pursuant to which the Middletons would consent to and approve of the sublease and agree that in the event the Amended Ground Lease with Medical Leasing was terminated that The Boyer Company's rights would not be adversely affected and the sublease would continue in

full force and effect between the Middletons and The Boyer Company. Taylor also expressed concern that § 5.3(ii) of the sublease which provided for an annual rental escalation based upon increases in the rental income received from the premises by The Boyer Company constituted a breach of paragraph 8 of the Amended Ground Lease between the Middletons and Medical Leasing because paragraph 8 of the Amended Ground Lease only gave Medical Leasing the right to sublease the Property for development by a third party if Medical Leasing was not "a joint venturer, partner, stockholder, participant, or otherwise involved, directly or indirectly in the development of the Property with such third party." In this regard, the purported language which gave rise to Taylor's concern had been superseded by the settlement stipulation in the Zions Litigation which did not contain any such limitation on Medical Leasing's right to sublease. Taylor later admitted he was not aware of the later agreement. [R. 4499-4501, 4506, 5475; Plaintiff's Ex. 16; Defendants' Ex. 14].

15. Two days later, on March 16, 1989, Boyer, Gardner and Taylor, representing The Boyer Company, met with Dr. Wong and Parsons, representing Medical Leasing, to discuss the concerns raised in Taylor's March 14, 1989 letter. During that meeting, Parsons explained to Taylor that the language that Taylor relied upon from the Amended Ground Lease concerning Medical Leasing's participation in the development of the project as a joint venturer, partner, etc. had been deleted. Parsons further explained to Taylor that in the Zions sublease the parties had included a requirement that in the event Medical Leasing received

any notice of default from the Middletons that the notice be promptly given to Zions and Zions would have a right to cure the default. Parsons suggested that provision was a good substitute for the requested non-recognition and attornment provisions. Parsons agreed to send Taylor a copy of the Zions stipulation and the relevant provision of the Zions sublease. Boyer expressed his desire to go forward with the project. No one said anything about the Development Agreement having expired or the deal being off. [R. 4509-4515, 4884-4888].

16. On or about April 10, 1989, Parsons sent a letter to The Boyer Company enclosing a copy of the relevant portion of the Zions sublease. [R. 4517-4518; Defendants' Ex. 15].

17. On July 25, 1989, a meeting was held in the Board room of Parsons' law office. Drs. Adair, Wong and Ring and Parsons attended representing Medical Leasing, and Boyer, Gardner and Taylor attended representing The Boyer Company. Taylor again started expressing his concerns expressed in his March 14, 1989 letter. Dr. Ring heatedly told Taylor that Medical Leasing had made it clear before that it was not going to ask for any concessions from the Middletons and that Medical Leasing would not deal with those issues. Boyer waived off his attorney, saying: "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. I came here to make a deal, I didn't come here to break one." Boyer then expressed that his major concern was that he did not want to get into the litigation box Zions had gotten itself into and that he wanted to talk with his good friend, Anthony Middleton, to

determine the Middletons' attitude on development of the Property. Medical Leasing finally agreed that Boyer could talk with Anthony Middleton provided that he would not ask for anything from the Middletons and no money would be offered. Boyer stated that the only thing that he could see that would stop The Boyer Company from going forward with the sublease was the threat of litigation from the Middletons. [R. 4116-4122, 4281, 4531-4536, 4888-4894].

18. Anthony Middleton and Boyer were good friends, having attended East High School together. As of 1989-1990 they were serving together in their church, Boyer being in the Stake Presidency and Anthony Middleton on the Stake High Council, overseeing the religious affairs of their Stake. Their relationship continued through the time of the trial. [R. 4341-4342].

The Wrongful Threats of Groundless Litigation

19. After the July 25, 1989 meeting, Boyer contacted Anthony Middleton and explained that The Boyer Company was going to develop the Property. Anthony Middleton's entry in his diary on August 6, 1989 demonstrated his knowledge that Medical Leasing was entitled to sublease the Property to The Boyer Company without the Middletons' consent and his chagrin that the Middletons would not be entitled to any share of the profits:

I just learned two weekends ago from Roger Boyer that something was up with the 39th South property and his comment to me just in passing at church was that we needed to talk for a few minutes about what was going on there, and he implied that I must already know. In fact, I had heard nothing about it and I called up Dick Middleton and asked if he had heard something and he had not.

Last night I got ahold 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 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.

[R. 4345-4347; Plaintiff's Ex. 37].

20. On August 7 or 8, 1989, Anthony Middleton met with Boyer to review The Boyer Company's plans for the project. Anthony Middleton discussed with Boyer whether the consent of the Middletons was necessary for development of the Property by The Boyer Company. Anthony Middleton told Boyer that it was his position and that of the other family members that, "any development would require compensation to the owner" and "that they had to be part of the eventual development mix." That was the same position that the Middletons had taken in the Zions Litigation. Anthony Middleton reported this conversation and his statement of the position of the Middletons to both George Middleton and Richard G. Middleton. Either at this meeting or at subsequent meetings, Anthony Middleton told Boyer that if the Middletons were not compensated there would be litigation. Boyer told Anthony Middleton he was not interested in doing the development if there was going to be litigation. [R. 4347-4354].

21. On September 26, 1989, a meeting was held at The Boyer Company's offices attended by Boyer, Anthony Middleton and Dr. Ring to attempt to alleviate Boyer's concerns about the Middletons

filing suit. In that meeting, Boyer repeated that The Boyer Company wanted to do the development, but that he was not interested in going forward if there was going to be litigation. Boyer stated that Anthony Middleton seemed to have the idea that consent of the Middletons was required before he could build anything; but it seemed clear under the lease between the Middletons and Medical Leasing that Middletons' consent to the sublease was not required. Anthony Middleton responded that it was his position and the position of the Middletons that if there was any further development of the Property they had a right to participate and that, "If so much as a stake was driven into the ground, there would be a lawsuit, unless we participate." Boyer asked Anthony Middleton his basis for threatening suit and Dr. Middleton responded, "I have a philosophical basis, as the rightful landowner, to participate, that's the only basis I need." Dr. Middleton did not contend that there was any provision in the Amended Ground Lease requiring the Middletons' consent or entitling them to any compensation. The only thing asked of Anthony Middleton at that meeting was to withdraw the threats of litigation. Anthony Middleton made the following entry in his diary concerning that meeting:

The following night, September 26th, I met with Roger Boyer concerning the development of the 39th South and 7th East property owned by the Middleton family. It turns out that Wally Ring and that bunch talked Boyer into developing the rest of the property with commercial development, putting up an office complex as well as a few retail shops. Roger Boyer kindly tipped me off to the whole thing, wondering if the family was acquiescing to that. On the 26th I met with Roger, Greg Gardner (Kim's brother) [sic], and Wally Ring at Roger's offices. We sat down and went through the history of the contract and leases, me giving my side of it, and Wally Ring giving his side

of it, and in a rather amicable session I felt that everybody had agreed that there would be some compensation paid the Middleton family . . .

At any rate, we got the point made since then that the only thing we are interested in is increasing the income realized from the property in return for which the Middleton family will agree not to challenge the contract in court.

[R. 4126-4127, 4271-4272, 4282, 4357-4361; Plaintiff's Ex. 37].

The Prospective Economic Relationship is Destroyed

22. Before the meeting of September 26, 1989 broke up, Boyer expressed, as he had previously expressed to Anthony Middleton, that the threats of litigation would not allow him to go forward. [R. 4134-4135]. Clearly, those threats caused The Boyer Company to withdraw from the sublease. The litigation threats were made notwithstanding the fact that the Middletons had not been asked for any concessions and they knew very well that their consent to the transaction was not required. After the September 26, 1989 meeting, every discussion related to the threats of litigation, and Medical Leasing was forced to conduct a salvage operation in an attempt to put back together the deal with The Boyer Company which the Middletons had subverted. Medical Leasing's efforts were unavailing and after that all the discussions, which had previously narrowed to boiler plate clauses of a draft sublease, instead centered on the threats of litigation and the original deal was never retrieved. [R. 4127-4129; 4132-4133; 4542; 4656].

23. On November 11, 1989, Boyer, Anthony Middleton and Drs. Ring and Wong met at Boyer's home, in what was a continuing effort by Medical Leasing to resolve the Middletons' threats of litigation. However, at the meeting, Anthony Middleton would not

relent and in fact repeated his threat of litigation if the Middletons were not compensated. Boyer stated that he was in a litigation box; if he went forward with the development the Middletons would sue and if he refused to go forward Medical Leasing would sue. Anthony Middleton would not withdraw the threats of litigation. [R. 5622-5627; Defendants' Ex. 27; Plaintiff's Ex. 37].

24. On November 17, 1989, in an effort to have the Middletons take back their threats of litigation so the sublease with The Boyer Company could proceed, Medical Leasing's attorney, Parsons, sent a letter to Anthony Middleton demanding that the litigation threats be withdrawn and that the Middletons execute a Second Amended Ground Lease expressly containing a provision calling for attornment and recognition, a right for The Boyer Company to cure any default by Medical Leasing and an agreement to give The Boyer Company a notice of default by Medical Leasing. These concessions, not previously needed, were requested in the hope that they would remedy the problems caused The Boyer Company by the prior threats and would mitigate Medical Leasing's damages. [R. 4538; Plaintiff's Ex. 39]. Thereafter, on December 8, 1989, Parsons sent a copy of the November 17 letter to Richard P. Middleton, requesting that he send copies to all of the Middletons. The Middletons would not withdraw the threats. [Defendants' Ex. 32].

25. Parsons, on behalf of Medical Leasing, engaged in various communications with George Hunt, attorney for Anthony Middleton, during December and January, 1990 in an attempt to

persuade the Middletons to withdraw the threats and mitigate the damages caused by their wrongful conduct. On January 4, 1990, Parsons wrote to Mr. Hunt informing him that unless some communication was received from the Middletons by January 15, 1990 regarding the assurances requested in Parsons' December 8, 1989 letter, that Medical Leasing would proceed with litigation. [R. 4546-4547; Plaintiff's Ex. 44].

The Boyer Company's Formal Withdrawal

26. On February 5, 1990, Taylor wrote a letter on behalf of The Boyer Company to Parsons on behalf of Medical Leasing informing Medical Leasing that The Boyer Company was not interested in pursuing further negotiations with respect to the sublease until such time as Medical Leasing was able to obtain the cooperation of the Middletons "reasonably necessary to make the Ground Lease financially." [R. 4548-4549; Defendants' Ex. 39].

27. Shortly thereafter, on February 15, 1990, Boyer acknowledged, consistent with his prior statements that only threats of litigation would kill the deal, that the reason The Boyer Company was backing off from the development was because of the litigation threats. Boyer stated, in a meeting with Medical Leasing:

Well, we had, you know, Tony, he's called a couple of times. In fact, he called me I think it was last week and told me, I guess the essence of his comment was, I feel more strongly about the strength of my position, that almost is a direct quote, than I have ever before, after having gotten into this, which I honestly don't know how he could arrive at that conclusion, but that is his conclusion.

. . .

We had a discussion with Vic and he has suggested, and I don't know, if they have even been sent, but we are sending you a letter saying, look, this is a draft of it, saying, look, get your act

together, when we can make a deal, let's talk about a deal. In the meantime, we're kind of stepping back.

[Defendants' Ex. 58 at p. 4].

Medical Leasing's Damages

28. Absent the Middletons' threats of litigation, The Boyer Company could have financed the development of the Property without requiring any concessions from the Middletons or any changes in the Amended Ground Lease between the Middletons and Medical Leasing. The Boyer Company was one of the best developers in the business and the Property was one of the best commercial locations in the valley. The year 1989 was at the height of a boom period in the commercial real estate finance industry. Mr. Henry Schwendiman, Medical Leasing's financing expert, concluded, after reviewing all of the relevant factors and documents, that it was more probable than not -- 60/40 -- that The Boyer Company could have financed the project and that if The Boyer Company had accomplished a few routine steps such as execution of a sublease and pre-leasing 30% of the project that, in his opinion, The Boyer Company could certainly have obtained financing. [R. 5094, 5147-5148, 5080-5081, 5100-5101, 5119, 5107-5108]. Boyer himself expressed confidence from the beginning that The Boyer Company could finance the project and said if Zions could do it so could he [R. 4051-4052]; in fact, Boyer was so confident about financing that he never even made financing a condition of signing a sublease with Medical Leasing. [Plaintiff's Ex. 22].

29. The uncontradicted evidence at trial demonstrated that because of the wrongful litigation threats Medical Leasing lost a unique opportunity for development of the Property and thereby

suffered millions of dollars in damages. The only evidence on damages presented at trial was the testimony of Plaintiff's experts, Henry Schwendiman and Merrill Norman. In summary, Mr. Schwendiman testified that because of the state of commercial lending and the economy relating to commercial office space after the Middletons torpedoed the deal with The Boyer Company, there would only be a remote chance that a developer could obtain financing for the development on Medical Leasing's ground lease within the ten years following the trial and that because at the end of ten years the remaining term of the Amended Ground Lease would be insufficient to amortize the developer's loan so the developer could realize an adequate return on his investment, that Medical Leasing would not be able to get a developer interested in developing the Property in the future. [R. 5100-5101, 5124-5127, 5136-5145]. Thus, Medical Leasing's transaction with The Boyer Company was an opportunity which was lost because of the Middletons' threats of litigation. As a result, Mr. Norman prepared a detailed damage study with precise calculations which supported his testimony that Medical Leasing was damaged in the amount of \$2,582,780.00, representing, inter alia, the present value of the rent which Medical Leasing would have received from The Boyer Company under the proposed sublease. [Plaintiff's Ex. 47].

30. The damage evidence of Medical Leasing was entirely un rebutted by the Middletons. [R. 5218-5220; Plaintiff's Ex. 47]. In fact, opposing counsel argued that no development could occur

under Medical Leasing's Amended Ground Lease then or at any time.
[R. 4258].

V.

OBJECTIONS TO THE MIDDLETONS' STATEMENTS OF FACT

Medical Leasing specifically objects to the following "facts" set forth in the Middletons' Statements of Facts:

1. The Middletons state that they signed the Amended Ground Lease separately as "Landlord". [Williams & Hunt Brief, p. 10; Moyle & Draper Brief, p. 7]. This is a mischaracterization. In fact, the Middletons were referred to in the Amended Ground Lease collectively as the "Landlord" and all signed the same Amended Ground Lease in that capacity. [Plaintiff's Ex. 3].

2. The Middletons claim that they believed they would be able to participate in further development of the Property because they understood that if Medical Leasing subleased any portion of the Property that the developer's lender would very likely insist that the Middletons subordinate their fee ownership interest to the lender's lien and that if Medical Leasing asked for consent or subordination for development, they could rightly ask for more income on the lease in return. [Williams & Hunt Brief, p. 10]. The Middletons cite pages 4998-5004 and the unnumbered page following 5701 of the record. Aside from the fact that this evidence is irrelevant because no one asked them for the subordination, the record does not support these claims. In fact, the cited portions of the record dealt for the most part with

Richard P. Middleton's goals and expectations for the Property in years past and not at the time of the transaction with The Boyer Company. There is testimony that Anthony and Richard G. Middleton thought that if subordination or some other changes were required to make the project feasible, then they ought to be able to participate, but not that subordination or other changes would be required.

3. The Middletons claim that Zions insisted that they expressly consent to the Zions sublease. [Williams & Hunt Brief, p. 11; Moyle & Draper Brief, p. 8]. In fact, Zions requested that the Middletons either acknowledge that their consent was not necessary for the construction of a branch bank on the Property or, in the alternative, that the Middletons consent to such construction. [R. 4010-4016, 4026-4050; Plaintiff's Exs. 7, 8 and 9].

4. The Middletons state: "The Amended Ground Lease specifically states the Middletons are not required to give further consent or subordination for development, but that such consent is 'solely at Landlord's discretion.'" This is a blatant misstatement. [Moyle & Draper Brief, pp. 7-8]. The restated paragraph 8 doesn't say the Middletons aren't required to give consent. What it really says is, "consent of the Middletons to future development of the leased premises is not required" unless subordination is required. And far from suggesting that their consent is "solely at the Landlord's discretion", the revision struck that language and, to make sure of its meaning, stated: "In other words . . . a third party sublessee . . . may further

develop the property without the consent of the Middletons. . . ."
[Plaintiff's Ex. 16, pp. 4-5].

5. Counsel for Anthony Middleton suggests that Boyer testified that items requested by Taylor were necessary to obtain financing and that such testimony was unimpeached. [Williams & Hunt Brief, pp. 36-37].² Characteristically, the Middletons ignore the portions of the record favorable to the position of Medical Leasing. For example, Ring testified that in fact Boyer stated he was not concerned with the points brought up by Taylor. [R. 4119-4121]. Moreover, Boyer testified at trial that he believed financing was available. [R. 4843].

6. The Middletons claim that in May, 1989, "In an effort to mollify" Medical Leasing that The Boyer Company asked Bonneville Mortgage Company if financing could be arranged. [Williams & Hunt Brief, p. 14]. The evidence was that this request was not made "in an effort to mollify" Medical Leasing, but because The Boyer Company was anticipating developing a project on the Property. [R. 5396].

7. The Middletons state that Greg Bell advised The Boyer Company that, "The proposed transaction was likely too complicated to be financed at all." [Williams & Hunt Brief, pp. 14-15; Moyle & Draper Brief, pp. 11-12]. However, Mr. Bell admitted at trial, inter alia, that he never took the transaction to a lender or reviewed any proformas or site plans and that he is not involved in the application process or in negotiating financing. Mr. Bell

² The testimony of Boyer cited by Middletons was singularly unpersuasive as counsel simply asked one blanket question concerning all the positions taken by counsel in a letter, without asking the witness for either his recollection or position with respect to specific statements or issues.

further acknowledged that in his letter upon which the Middletons rely [Defendants' Ex. 18] that he had expressed that he did not know whether or not lenders would finance the proposed project. [R. 5364-5381]. The Middletons also neglect evidence that Boyer told Medical Leasing that he did not agree with Mr. Bell's letter. [R. 4115-4121, 4422-4424].

8. The Middletons state that Boyer contacted Anthony Middleton to seek assurance that the Middletons would not sue. [Williams & Hunt Brief, p. 16]. The evidence was that Boyer did not ask Anthony Middleton during that meeting for any assurance that the Middletons would not sue, but only wanted to know what the Middletons' opinion was with respect to development of the Property by The Boyer Company. [R. 5530-5531].

9. The Middletons assert that at a meeting on August 7 or 8, 1989 that Boyer told Anthony Middleton that Boyer's lawyers were of the opinion that the Middletons' consent to a sublease was needed and that Boyer agreed. [Williams & Hunt Brief, p. 16; Moyle & Draper Brief, p. 13]. The Middletons rely solely upon Anthony Middleton's testimony while being examined by his attorney. In fact, Anthony Middleton could not recall whether this claimed statement was made at the August 7 or 8 meeting or at the September 26, 1989 meeting. [R. 5601-5602]. The jury obviously was not bound to accept this self-serving testimony, especially in light of the substantial contravening proof which the Middletons failed to marshal. [R. 4348-4349, 5601-5603].

10. The Middletons relate certain events of the meeting between Boyer and Anthony Middleton on August 7 or 8, 1989 by

saying, "But Boyer did not tell Anthony the specifics of why his lawyer said Middletons' consent was necessary, nor of the concessions necessary to make the sublease financially." ³ What they leave out is Anthony Middleton's own testimony that he issued threats of litigation to Boyer at this first meeting stating that the Middletons would have to be part of any development project. [R. 4353].

11. The Middletons claim that Medical Leasing knew during the meetings with Anthony Middleton in September, October and November, 1989 that he did not have authority to speak for the rest of the Middletons, citing pages 4460-4461 of the record. [Moyle & Draper Brief, p. 17]. This reference does not support that claim.

12. The Middletons refer to the fact that on November 17, 1989, Medical Leasing's attorney, Mr. Parsons, wrote to Anthony Middleton threatening suit if certain actions were not taken and that when Anthony Middleton's lawyer asked for a copy of the proposed sublease to consider approving it, Medical Leasing refused to provide it unless the Middletons first agreed not to ask for more rent and not to sue. [Williams & Hunt Brief, p. 18; Moyle & Draper Brief, p. 18]. In fact, the November 17, 1989 letter also demanded that the Middletons withdraw their threats of litigation. [Plaintiff's Ex. 39]. The Middletons also ignore that at the very time Anthony Middleton's lawyer was asking for a copy of the proposed sublease to supposedly consider approving it, the lawyer

³ In that regard, the Middletons confirm that nothing was asked of Anthony Middleton when Boyer first spoke with him about the project.

already in fact had a copy of the sublease in his possession, having received it from Greg Gardner on or about December 22, 1989. The Middletons were simply using Medical Leasing's reluctance to give them a copy of the sublease as a pretext to refuse consent and to continue their threats and demands. [R. 4693-4697; Plaintiff's Ex. 43].

13. The Middletons argue that the Amended Ground Lease provides that a party is not in default until thirty days after written notice from the other party specifying the particulars in which a party has failed to perform and that no such notice was given to any of the Middletons. [Williams & Hunt Brief, p. 19; Moyle & Draper Brief, p. 19]. Both these statements are incorrect. The Amended Ground Lease provides that after a party gives a thirty day notice of default which is not complied with, that party can then incur expenses in performing the defaulting party's duties under the agreement. The provision specifically provides that it does not preclude any remedies provided by law. [Plaintiff's Ex. 3]. Moreover, notice was given to Anthony Middleton by letter dated November 17, 1989 [Plaintiff's Ex. 39] and to Richard P. Middleton and all the other Middletons by letter dated December 8, 1989, which enclosed a copy of the November 17, 1989 letter. [Defendants' Ex. 32].

14. The Middletons state that Boyer testified that Medical Leasing's attorney never changed his mind about whether the items mentioned by Taylor in his March 14, 1989 letter would have to be addressed, that he had no recollection of Anthony Middleton threatening to sue him or The Boyer Company, and that Boyer agreed

with his attorney's letter of February 5, 1990 that Medical Leasing had been unable to obtain the necessary cooperation of the landowner in order to make the ground lease financially. [Moyle & Draper Brief, pp. 20-21]. This is entirely misleading and cannot withstand even a modest marshaling of the evidence. The Middletons ignore the evidence favorable to Medical Leasing which demonstrated that Boyer clearly stated that the concerns raised by Taylor were not a problem and that the only thing that would keep the deal from going forward was Boyer's concern about litigation from the Middletons, that by his own admission Anthony Middleton threatened litigation and that the threatened litigation was exactly the reason The Boyer Company withdrew from the proposed sublease. [See, e.g., R. 4116-4122, 4531-4536, 4888-4894, 4347-4354, 4271-4272, 4357-4361; Defendants' Ex. 27].

15. The Middletons remarkably contend that the evidence that The Boyer Company did not proceed with the project because Medical Leasing "did not provide a ground lease in form suitable to Boyer was uncontradicted." [Moyle & Draper Brief, p. 21]. The record citations set forth in paragraph 11 above and in paragraphs 19-27 of Medical Leasing's Statement of Facts, supra, lay bare this frivolous claim. There was, in fact, overwhelming evidence that The Boyer Company walked from the transaction solely because of the threats of groundless litigation.

VI.

SUMMARY OF ARGUMENT

1. The evidence admitted regarding the Zions Litigation

was highly relevant and admissible. The evidence was not precluded by the terms of the Stipulation and Mutual Release and it demonstrated, inter alia, that the groundless threats of litigation by Anthony Middleton were known to be groundless even when the claims underlying those threats were made in the Zions Litigation. Further, the Stipulation and Mutual Release in the Zions Litigation had to be introduced because it contained a material amendment to the lease. In any case, no evidence of the Zions Litigation was admitted to demonstrate liability in connection with the Zions claim, the only basis for exclusion under Rule 408 Utah Rules of Evidence. Medical Leasing's counsel did not mislead the court with respect to the purpose for admitting this evidence.

2. Written notice to the Middletons was not a precondition to filing a suit for damages and, in any case, such notice was given. Paragraph 6 of the Amended Ground Lease only calls for notice before a party can incur expenses to perform the other parties' obligation. The paragraph expressly retains all other remedies, which includes suits for damages. Moreover, Medical Leasing, in fact, gave written notice specifying the harm that Anthony Middleton was inflicting upon it and demanding a withdrawal of the threats.

3. There was substantial evidence showing that the Middletons breached both the express provisions of paragraph 8 of the Amended Ground Lease and the implied obligation of good faith and fair dealing. Paragraph 8 clearly allowed Medical Leasing to sublease to another entity for the development of the Property and the jury found that the groundless threats of litigation issued by

Anthony Middleton were made for the express and dominant purpose of interfering with that right. The same activities breached the implied covenant of good faith and fair dealing as the Middletons well knew that Medical Leasing had the right to sublease for development without their consent. No one asked the Middletons for anything before the threats of litigation were issued and they were issued with knowledge that the Middletons had no right to interfere. All the Middletons share joint liability for breach of the covenant of good faith and fair dealing as their liability arises from the express provisions of the contract which were breached.

4. The overwhelming evidence demonstrated that the Middletons' wrongful threats of litigation destroyed the transaction with The Boyer Company. The Middletons make no effort to marshal the evidence which demonstrated that Medical Leasing had a reasonable probability that the sublease would be executed and that the wrongful threats, made maliciously and intentionally by Anthony Middleton for the purpose of sabotaging that transaction, had the intended effect. Without having been asked for anything, Anthony Middleton knowingly issued threats of litigation which were groundless, which The Boyer Company received and which caused The Boyer Company to withdraw.

5. The trial court properly awarded Medical Leasing its attorney's fees, in accordance with the stipulation between the parties, whether the acts of the Middletons constituted a breach of the express terms of the Amended Ground Lease or a breach of the implied covenant of good faith and fair dealing, or both.

6. The Middletons are jointly liable for the breach of the Amended Ground Lease having each signed as the "Landlord" undertaking the same obligations and promising the same performance to Medical Leasing.

7. The jury properly awarded Medical Leasing lost profits through the remaining term of the Amended Ground Lease in accordance with the undisputed evidence which demonstrated that Medical Leasing had permanently lost the opportunity to sublease the Property for development. Not only did the Middletons fail to counter that evidence, they sought to prove by expert testimony that Medical Leasing could not sublease the Property for development either then or in the future.

8. The jury verdict that Anthony Middleton tortiously interfered with Medical Leasing's prospective relationship with The Boyer Company was supported by substantial, if not overwhelming, evidence. The evidence, including his own admissions and diary entries, showed, and the jury found, that Anthony Middleton intentionally and maliciously issued groundless threats of litigation for the dominant purpose of destroying the prospective business opportunity between Medical Leasing and The Boyer Company.

VII.

ARGUMENT

A. THE EVIDENCE ADMITTED AT TRIAL REGARDING THE ZIONS LITIGATION WAS HIGHLY RELEVANT AND ITS ADMISSION WAS NOT PREJUDICIAL ERROR.

The Middletons argue that the trial court committed prejudicial error by receiving into evidence testimony, pleadings and correspondence regarding the previous Zions Litigation because this evidence was supposedly inadmissible under the terms of the Stipulation and Mutual Release of Claims entered into in settlement of the Zions Litigation and the case law on the effect of settlement agreements.⁴ The Middletons' position is without merit.

In the first place, the Middletons are barred from arguing on appeal that this evidence was inadmissible under the terms of the settlement stipulation and the case law regarding the effect of settlement because that was not the basis upon which they objected to the evidence at trial.⁵ Meyers v. SLC Corp., 747 P.2d

⁴ Inconsistently, the Middletons admit that evidence of the Stipulation and Mutual Release, Order of Dismissal and Findings of Fact was properly admitted. [Williams & Hunt Brief, p. 22, fn. 13]. It should also be noted that it was the Middletons themselves who first referred to the Zions Litigation in their Motion for Summary Judgment [R. 454]. The Middletons also introduced evidence at trial concerning the Zions Litigation.

⁵ Prior to trial, the Middletons filed Motions in Limine to exclude evidence of the Zions Litigation [R. 1215-1221], asserting only that the evidence was irrelevant and that the final judgment in the Zions Litigation was *res judicata* and the "pleadings, claims and circumstances" of that case "merged into a final judgment and order." [R. 1215-1221]. Judge Rigtrup denied the motions. At trial, the only objection raised by the Middletons to evidence of the Zions Litigation was irrelevance. [See, e.g., R. 4038 and 4042]. Mr. Hunt later objected to the admission of the Third Party Complaint filed on behalf of Anthony and George Middleton and the Answer and Counterclaim filed by the other Middletons in the Zions Litigation [Plaintiff's Exs. 11 and 15] on the additional basis that those specific pleadings were irrelevant and had been merged into the final judgment.

Finally, long after all parties had introduced evidence concerning the Zions Litigation, Mr. Palmer moved to strike all of that evidence on the basis that the evidence was irrelevant and "potentially inflammatory with the jury." [R. 5101-5102].

1058, 1060 (Utah App. 1987); Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832 (Utah 1984); Gaulden v. Burlington Northern, Inc., 654 P.2d 383, 393 (Kan. 1982).

More importantly, the evidence was highly relevant. Medical Leasing contended that the Middletons intentionally and in bad faith interfered with Medical Leasing's relationship with The Boyer Company by making threats of groundless litigation based upon claims that they were entitled to participate in any future development.

To prove these contentions, Medical Leasing introduced evidence that the Middletons had made the very same claims when Medical Leasing proposed to sublease a portion of the Property to Zions, including claims that the Amended Ground Lease was ambiguous regarding whether their consent was necessary and that, in fact, their consent was required. The evidence presented at trial demonstrated that the Middletons knew full well at the time they were litigating the Zions case that their claims were groundless. [See, e.g., R. 4013-4020, 5031-5032, 5693-5700, 4324-4338, 5578-5584]. After Judge Billings ruled on summary judgment that the Middletons' consent was not required, the parties ultimately in 1985 settled all disputes in the Zions Litigation by way of a Stipulation and Mutual Release of Claims and Order of Dismissal, one of the basic purposes of which was to make crystal clear the already clear and well understood language of paragraph 8 of the Amended Ground Lease that consent was not required for further development of the Property by an independent third party.

In this connection, the Stipulation and Mutual Release in the Zions Litigation had to be introduced into evidence below because paragraph 5 of that document modified paragraph 8 of the Amended Ground Lease as follows:

Consent of the Middletons to the future development of the Leased Premises is not required unless the Lessee shall seek to develop the property or an independent sublessee or assignee requires that the interest of the Middletons be subordinated to the interest of a development lender. In other words, the lessee may not develop the property without the consent of the Middletons, but a third party sublessee or assignee totally independent of the lessee may further develop the property without the consent of the Middletons using its own or borrowed capital provided subordination of the interest of the Middletons is not required for said development.

[Plaintiff's Ex. 16].

The evidence concerning the Zions Litigation was not introduced below to show that the Middletons were liable for the claims made in the Zions Litigation, which is the only purpose for which Rule 408 of the Utah Rules of Evidence would have prohibited introduction of that evidence. See, e.g., Bituminous Const., Inc. v. Rucker Enterprises, Inc., 816 F.2d 965 (4th Cir. 1987); Wiener v. Farm Credit Bank of St. Louis, 759 F. Supp. 510, 521 (E.D.Ark. 1991); Vulcan Hart Corp. v. National Labor Relations Board, 718 F.2d 269, 277 (8th Cir. 1983); Skonberg v. Owens-Corning Fiberglass Corp., 576 N.E.2d 28, 34 (Ill. App. 1991); Smith v. Smith, 620 S.W.2d 619, 624 (Tex. App. 1991); Bulaich v. AT&T Information Systems, 778 P.2d 1031, 1036-37 (Wash. 1989). The Middletons' notion that by settling their groundless claims in one lawsuit they can prevent evidence thereof in a second lawsuit on the issues of knowledge, intent

and purpose flies in the face not only of the specific language of Rule 408 permitting such evidence, but of common sense.

Further, the Middletons' contention that the language of the Stipulation and Mutual Release of Claims barred Medical Leasing from introducing this evidence is wrong. There is no such language. Nor do the cases cited by the Middletons support their position. Not one of those cases holds that the mere fact that the parties signed a release of claims in settlement of litigation bars evidence concerning that litigation in future litigation on other claims.⁶

Finally, the Middletons' charge that Medical Leasing's counsel misled Judge Rigtrup at the commencement of the trial concerning the purpose for the admission of evidence relating to the Zions Litigation is not only insulting, it is disingenuous. The Middletons take out of context a passage from the transcript in which Medical Leasing's counsel stated to the court that he wanted to make it clear that no claims were being made in this litigation relating to the Zions Litigation and that "we are simply trying to show what the contentions are so

⁶ For example, in Kirby v. Dole, 736 F.2d 661 (11th Cir. 1984), cited by the Middletons, the Eleventh Circuit merely held that the employee's decision to invoke the term of the settlement agreement permitting him one remedy necessarily precluded him from asserting whatever other remedies might have been available. The case had nothing to do with the admissibility of evidence in subsequent proceedings.

In Rasmussen v. Allstate Insurance Co., 726 P.2d 1251 (Wash.App. 1986), cited by the Middletons, the insurance company for a car rental agency settled a claim with an injured passenger. The release included a release of any claims for underinsured motorist benefits. The court simply held that the release was binding on the issue of the scope of coverage in subsequent litigation between the rental car insurer and the passenger's insurance company. Again, there was no issue concerning the admissibility of evidence in subsequent litigation.

we can understand what was settled."⁷ The Middletons neglect to bring to the court's attention that this statement was made only with respect to the introduction of Exhibit 10, the complaint filed by Zions against the Middletons and Medical Leasing, and only after the exhibit had been admitted and the jury had been cautioned by the court that the allegations of the Complaint had not been proven. As the Middletons well know, that statement was not intended as an exhaustive list of the reasons for which all evidence concerning the Zions Litigation would be introduced.⁸ Judge Rigtrup was not misled; he was well informed and ruled correctly.

In short, evidence concerning the Zions Litigation was not introduced to prove that the Middletons were liable for the claims made in the Zions Litigation. This evidence, together with all the other evidence presented at trial, persuasively demonstrated that the Middletons knew very well that the litigation threatened by Anthony Middleton was groundless and that the repeat of the same threats of groundless litigation as were made in the Zions Litigation was an intentional wrong, justifying not only compensatory, but punitive damages.

⁷ The Middletons cite page 4115 of the record in error. In fact, this statement is contained at page 4039 of the record.

⁸ In fact, both the court and counsel had well in mind the arguments made by Medical Leasing's counsel in opposition to the Middletons' Motion in Limine to exclude this evidence which were set forth at length in Medical Leasing's memorandum in opposition to the Motion in Limine. [R. 1242, 1246-1250]. Medical Leasing argued the evidence was admissible at that time on the same basis that Medical Leasing now contends the evidence was admissible.

B. MEDICAL LEASING WAS NOT REQUIRED TO GIVE WRITTEN NOTICE OF DEFAULT IN ORDER TO RECOVER DAMAGES AND, IN ANY EVENT, SUFFICIENT NOTICE WAS GIVEN.

The Middletons attempt to avoid the judgment entered against them by raising the argument that Medical Leasing was barred from bringing suit because Medical Leasing purportedly failed to give written notice of default which the Middletons say was required under paragraph 6 of the Amended Ground Lease and under the law. The Middletons are wrong on both counts.

1. Notice Was Not a Condition Precedent.

First, the law is clear that absent an express contractual provision making the giving of notice a condition precedent to filing suit, no notice is necessary. See, e.g., Caparrelli v. Rolling Greens, Inc., 190 A.2d 369, 373-74 (N.J. 1973); S. Williston, A Treatise on the Law of Contracts, § 727 at 395 (3rd Ed. 1957). Paragraph 6 of the Amended Ground Lease in the present case contains no such provision.⁹

Paragraph 6 of the Amended Ground Lease provides:

Paragraph 6. Default. A party shall be deemed to be in default upon the expiration of thirty (30) days from the date of written notice from the other party specifying the particulars in which such party

⁹ The Middletons note that earlier in this case Medical Leasing unsuccessfully sought to exclude evidence of Middletons' attorney's fees on the basis that since no notice of default had been given by the Middletons, Medical Leasing could not be a "defaulting party." That argument, which was rejected by the court, related to the specific definition of "defaulting party" under the attorney's fee provision of paragraph 16. Further, the Middletons do not point out to the court that their understanding of paragraphs 6 and 16 has changed. In response to Medical Leasing's Motion in Limine, they argued that paragraph 6 did not bar them from recovery of attorney's fees even if no notice had been given, and further that their pleadings in this lawsuit constituted sufficient notice under paragraph 6. [R. 1261-1264].

has failed to perform the obligations of this Lease unless that party, prior to the expiration of said thirty (30) days, has rectified the particulars specified in the notice. Upon such default occurring, the defaulting party may incur any expenses necessary to perform the obligation of the other party as specified in such notice, and if the defaulting party is the landlord, tenant may deduct such expenses from the rents thereafter to become due. If the defaulting party is the tenant, landlord may decree the term ended and enter the Leased Premises with or without process of law. The remedies in this article conferred do not exclude any other remedies provided in the Lease or by law. [Emphasis added].

As Judge Rigtrup found, the clear import of paragraph 6 is only to require written notice of default before the non-defaulting party may incur expenses necessary to perform the obligation of the other party as specified in the notice or before the Middletons could terminate the lease. Those are the only remedies so conditioned. Paragraph 6 clearly states that it does not "exclude any other remedies provided in the Lease or by law." No provision of the Amended Ground Lease requires formal written notice of default before commencement of a suit for damages.

The Middletons argue that a contract should be interpreted so as to harmonize all of its provisions, a truism with which Medical Leasing agrees. Having said this, the Middletons then attempt to interpret paragraph 6 in such a manner as to entirely read out of the lease the last sentence of the paragraph. The language of the lease and specifically paragraph 6 is readily harmonized by only requiring that a party give a written notice of default before a party seeks to hold the other party responsible for expenses incurred by the non-breaching party in performing the breaching party's obligations or before the landlord terminates the lease.

The Middletons rely on Bentley v. Potter, 694 P.2d 617 (Utah 1984), to support their notice argument. Bentley is not on point because, unlike the present case, there the lease clearly required a written notice of default before the lease could be terminated. The Middletons' reliance on Hadlock v. Showcase Real Estate, Inc., 680 P.2d 395 (Utah 1984), is similarly misplaced. In Hadlock, paragraph 16A of the Uniform Real Estate Contract specifically required five days prior written notice before the seller could forfeit the buyer's interest in the property. Again, there is no such requirement in the case at bar.

Unable to find any case law to support their argument that notice was required, the Middletons seek to rely upon § 7.1 of the Restatement (Second) of Property. All that section states is that if a landlord fails to perform certain promises contained in a lease after being requested to do so by the tenant, then the tenant has specific remedies. That section has nothing to do with the circumstances of this case. Moreover, that section does not require written notice from a tenant and the record is replete with evidence that both Boyer and Medical Leasing orally requested Anthony Middleton to acknowledge Medical Leasing's right to sublease to Boyer.

Finally, it would be folly to bar Medical Leasing from suit for lack of notice where the Middletons made no effort to retract their litigation threats after suit was filed and they were undeniably on notice of their default. Any perceived lack of notice made no difference.

2. In Any Event, Medical Leasing Gave Notice.

Furthermore, even if written notice had been required, the plain fact of the matter is that Medical Leasing did give the Middletons the very notice they assert they were entitled to receive. The Middletons argue that Medical Leasing was required to give that notice in writing to Richard P. Middleton, who was the individual to whom rent was payable. On November 17, 1989, Medical Leasing's attorney, Mr. Parsons, sent Anthony Middleton a letter demanding, among other things, that the threats of litigation against The Boyer Company be withdrawn. [Plaintiff's Ex. 39]. Thereafter, on December 8, 1989, Parsons sent a copy of the November 17 letter to Richard P. Middleton (the very individual whom the Middletons now contend was required to be given notice) requesting that he forward copies to all of the Middletons. [Defendants' Ex. 32]. Notwithstanding this notice, and the numerous communications between counsel and the parties, the Middletons refused to withdraw their threats of litigation either within thirty days or thereafter.

In short, the Middletons' attempt to hide behind the lack of a formal written notice of default is not supported by the provisions of the lease, the applicable law or the facts, and was properly rejected by the trial court.

C. THERE WAS SUBSTANTIAL EVIDENCE THAT THE MIDDLETONS BREACHED PARAGRAPH 8 OF THE AMENDED GROUND LEASE AND THEIR IMPLIED OBLIGATION OF GOOD FAITH AND FAIR DEALING.

The Middletons insist that the judgment below was erroneous because they did not breach the express provisions of paragraph 8 of the Amended Ground Lease or the covenant of good faith and fair dealing and that, in any event, a breach of the covenant of good faith and fair dealing does not give rise to joint liability. These arguments are made out of whole cloth.

Initially, it should be noted that here, as elsewhere in their briefs, the Middletons attempt to attack the sufficiency of the evidence below without complying with their obligation to marshal all of the evidence and inferences supporting the judgment and then demonstrate that the evidence is insufficient to support the judgment. That failure is grounds alone to affirm the judgment. See, e.g., Heslop v. Bank of Utah, 839 P.2d 828, 839 (Utah 1992); Reed v. Reed, 806 P.2d 1182, 1184 (Utah 1991).

1. There Was Substantial Evidence that the Middletons Breached the Provisions of Paragraph 8 of the Amended Ground Lease.

Paragraph 8 of the Amended Ground Lease as restated in the stipulation for settlement in the Zions Litigation provides:

[C]onsent of the Middletons to the future development of the Leased Premises is not required unless the Lessee shall seek to develop the property or an independent third party sublessee or assignee requires that the interest of the Middletons be subordinated to the interest of a development lender. In other words, the lessee may not develop the property without

the consent of the Middletons, but a third party sublessee or assignee totally independent of the lessee may further develop the property without the consent of the Middletons using its own or borrowed capital provided subordination of the interest of the Middletons is not required for said development.

Incredibly, the Middletons now assert that because no affirmative action was required from the Middletons under paragraph 8 that the Middletons did not, under paragraph 8, "promise to do anything and they did not promise not to do anything." Thus, so say the Middletons, they could not have breached the express provisions of paragraph 8. This argument is pure sophistry.

The Middletons agreed in paragraph 8 that Medical Leasing could sublease the property to an independent third party such as The Boyer Company to develop without further compensation and without any consent from the Middletons. In direct contravention to and breach of paragraph 8, Anthony Middleton maliciously threatened groundless suit to stop the development unless the Middletons received tribute. Anthony Middleton's conduct in attempting to stop the development breached the Middletons' affirmative agreement that Medical Leasing could sublease the property to a third party for development. The situation is no different in principle than if the Middletons had agreed to allow development of the Property and then destroyed the buildings constructed. Would the Middletons defend by insisting they had not affirmatively agreed to do or not to do anything? Understandably, the Middletons can find neither logic nor case authority to support their position.

2. There Was Substantial Evidence that the Covenant of Good Faith and Fair Dealing Was Breached.

Perhaps the most frivolous argument made by the Middletons on this appeal is that the evidence was insufficient to show that there was a breach of the implied covenant of good faith and fair dealing because Anthony Middleton's conduct in threatening Medical Leasing with suit for more rent "was consistent with both parties' expectations that to get further consent or lease changes, more rent had to be paid . . ." [Moyle & Draper Brief, p. 45]. This argument is a gross distortion of the record.

The language of paragraph 8 of the Amended Ground Lease as restated in the settlement stipulation in the Zions Litigation quoted above is absolutely clear that Medical Leasing was entitled to sublease the Property to an independent third party developer such as The Boyer Company for development without the consent of the Middletons and without compensation so long as no subordination was requested. Anthony Middleton himself, in his August 6, 1989 diary entry, demonstrated his understanding of that fact:

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 . . . [M]y 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.

[Plaintiff's Ex. 37].

Indeed, Anthony Middleton never contended that under the Amended Ground Lease the Middletons' consent was necessary; he simply asserted the Middletons' philosophical belief that they were

entitled to compensation and would litigate unless they got it. The evidence also demonstrated that the other Middletons, including George, Richard P. and Richard G., all understood that their consent was not necessary and they were not entitled to compensation. What the evidence proved was that the Middletons did not like the bargain they had made in the Amended Ground Lease and were bound and determined not to honor it.

It is well settled in Utah that a covenant of good faith and fair dealing is implied in contractual relationships. This covenant requires that the parties act in good faith to achieve the purposes of the contract and not purposely do anything to deprive the other party of the benefits of the contract. See, e.g., St. Benedict's Dev. v. St. Benedict's Hospital, 811 P.2d 194 (Utah 1991); Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1046 (Utah 1989); Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 311 (Utah 1982).

The Middletons argue that Anthony Middleton's threats were justified because Boyer supposedly told him that Boyer's lawyer said the Middletons' consent was required and therefore that Anthony Middleton at the time he made the threats believed the Middletons would at a later date be requested to give some concession or change the Amended Ground Lease. This argument is unavailing for at least three reasons. First, Anthony Middleton actually testified that the basis for his threats was a "philosophical belief" that the Middletons should get a cut of future development and had nothing to do with whether requests were or were not made of them. Second, with the substantial conflict

in his testimony, the jury was not required to nor did it believe all or any portion of Anthony Middleton's testimony. Third, no one asked Anthony for any concessions before he started making his threats of litigation and, in fact, it was made clear to Anthony that no concessions were being requested. The Middletons attempt in this regard to distort Dr. Wong's testimony that it was his expectation that if Medical Leasing asked for consent or changes from the Middletons that the Middletons would ask for more rent. The plain truth of the matter is that Medical Leasing did not believe the Middletons' consent to development was necessary and did not ask for any consent or changes from the Middletons before the transaction with The Boyer Company was sabotaged by the litigation threats.

Finally, the Middletons argue that if consent was not necessary, then Medical Leasing and Boyer had no "business approaching Anthony on the subject to make the specious "request for assurance of no suit . . ." and that this request caused Anthony to be suspicious and to threaten suit. [Moyle & Draper Brief, p. 45]. That, of course, is argument for the jury, which rejected it. The jury found that Anthony Middleton knew very well consent was not required and intentionally sabotaged the transaction. Of course, Medical Leasing did not approach Anthony to request an assurance that the Middletons would not sue. Nor did Boyer. Boyer was aware, however, of the previous Zions Litigation and because of concerns prompted thereby simply inquired of Anthony Middleton concerning the Middletons' feelings on further development. And there was no evidence presented that before

Anthony Middleton issued the threats Boyer asked for assurances the Middletons would not sue. Beyond that, the Middletons were not sued because they refused to give an assurance that they would not commence a lawsuit. They were sued because Anthony Middleton affirmatively threatened groundless litigation, thereby destroying the transaction with The Boyer Company.

3. The Middletons Are Jointly Liable for the Breach of the Covenant of Good Faith and Fair Dealing.

The Middletons represented by Moyle & Draper argue that even if the covenant of good faith and fair dealing was breached by Anthony Middleton, that such a breach would not impose joint liability on the remaining Middletons. They quote from 3A Corbin on Contracts, § 654A (1991 Pocket Part at 81), that the obligation of good faith is "constructive" rather than "implied" and cite § 205 of the Restatement (Second) of Contracts, that the covenant is imposed upon each party to the contract, to argue that unlike other breaches of contract, the breach of the obligation of good faith does not impose joint liability. This argument is a non sequitur. The authorities relied upon by the Middletons have absolutely nothing to do with this issue. In this regard, Cluff v. Culmer, 556 P.2d 498 (Utah 1976), cited by the Middletons, provides no support whatsoever. That case, although holding both sellers of real estate liable for an implied covenant against waste (without any reference to who actually committed it), contains no discussion at all of joint liability.

The Middletons have cited no cases for the proposition that the rules of joint liability for breach of contract are any different for the implied covenant of good faith and fair dealing than any other breach and Medical Leasing has, not surprisingly, been unable to find any such cases. The law imposes the obligation of good faith and fair dealing as part of the contract between the parties. The covenant has to do with how the parties perform their obligations under the contract. As will be demonstrated later [pp. 73 to 83], all of the Middletons, as the Landlord under the Amended Ground Lease, are jointly liable for the breach of that contract. It would be illogical to treat the breach of this covenant any different from other breaches of contract.

D. THE EVIDENCE WAS OVERWHELMING THAT THE MIDDLETONS' WRONGFUL THREATS OF LITIGATION DESTROYED THE TRANSACTION WITH THE BOYER COMPANY.

The Middletons once again raise the evidentiary argument, soundly rejected by both the jury and the court below, that there is no substantial evidence that Anthony Middleton's threats of litigation were the cause of The Boyer Company's refusal to go forward with the sublease of the Property. Rather, the Middletons posit, the real reason The Boyer Company refused to go forward was that it supposedly could not obtain financing for development without concessions from the Middletons which the Middletons were not required to give under their Amended Ground Lease with Medical Leasing. This question of causation was a question of fact for the

jury and the jury found from a preponderance of the evidence against the Middletons.

In reasserting this argument on appeal, the Middletons attempt to reduce the body of evidence to small selected bits of testimony, all removed from context, and for the most part immaterial to the point. At the same time, the Middletons ignore all the remaining testimony given at trial, failing once again to marshal the evidence and all reasonable inferences to be derived therefrom supporting the jury's verdict.

In order to recover damages from the Middletons, Medical Leasing was not required to prove beyond any doubt that it would have entered into a sublease with Boyer for development of the Property or that Anthony Middleton's wrongful threats of litigation were the sole proximate cause of Boyer's decision not to go forward with the project. Rather, Medical Leasing was only required to demonstrate that absent the wrongful threats there was a reasonable probability that a sublease would have been executed and that the wrongful threats were a substantial factor in Boyer's decision not to go forward with the project. Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 471 (Pa. 1979); Caruso v. Local Union No. 690, Etc., 653 P.2d 638, 643 (Wash. App. 1982); Prosser & Keeton on The Law of Torts, § 129 at 989 (5th Ed. 1984). As this Court remarked in Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 302 (Utah 1982):

The tort of intentional interference with prospective economic relations reaches beyond protection of an interest in an existing contract and protects a party's interest in prospective relationships of economic advantage not yet reduced to a formal contract (and perhaps not expected to be).

To illustrate the point, Anthony Middleton's testimony (which the Middletons understandably ignore), on its own, establishes causation. Anthony Middleton's diary [Plaintiff's Exhibit 37] demonstrated that when Boyer first told him about the proposed development, Anthony Middleton understood Boyer could develop the Property without subordination and was angry because "those birds will derive a very handsome income off the development without actually including the actual owners of the land at all." Moreover, Anthony Middleton's diary entry and testimony on these issues make no reference to Boyer or Medical Leasing requiring concessions from the Middletons. [Plaintiff's Exhibit 37; R. 4376]. The same evidence makes clear that Boyer still believed the deal was very alive at that time.

Anthony Middleton admitted that he told Boyer that there would be litigation if the Middletons were not compensated, probably at a meeting he had with Boyer on August 7 or 8, 1989, but certainly at a meeting held on September 26, 1989 with Boyer, Dr. Ring and Dr. Wong. [R. 4353-4354, 5606-5609]. Anthony Middleton further admitted that Boyer told him, both at the August and September meetings, that he was not interested in doing the development if the Middletons were going to sue. [R. 4353-4354, 4358-4361]. Tony Middleton's diary entry concerning the September 26, 1989 meeting [Plaintiff's Exhibit 37] states:

At any rate, we got the point made since then that the only thing we are interested in is increasing the income realized from the property in return for which the Middleton family will agree not to challenge the contract in court.

[R. 5618-5619]. As in previous meetings, that meeting involved no reference to concessions or to Boyer or Medical Leasing needing anything from the Middletons. In fact, the phrase "challenge the contract in court" presumes, as Anthony Middleton anticipated, that a contract would be entered into between The Boyer Company and Medical Leasing without the requirement of any consent by the Middletons. The only way Anthony Middleton could attempt to stop it was to threaten a groundless suit.

George Middleton admitted that Anthony told him that Boyer wanted to develop the Property but was afraid of protracted legal problems and therefore the project was on hold. [R. 4951-4952].

Drs. Ring and Wong both testified that Anthony Middleton threatened Boyer with litigation at meetings on September 26, 1989 and November 11, 1989 (when Boyer said he was in a "litigation box"), and that on more than one occasion Boyer said he was not interested in attempting to develop the Property with threats of litigation. [R. 4126-4138, 4144, 4147, 4182, 4890-4891, 4920, 4926]. Dr. Ring testified that at the September 26, 1989 meeting Boyer told Anthony Middleton that he had reviewed the Amended Ground Lease as modified by the Zions stipulation and told him that the documents seemed clear that the Middletons' consent to development was not required. Anthony replied, "Well, I don't think that makes any difference. If a stake goes in the ground, the Middletons will sue." Anthony reiterated two or three times that the Middletons had a philosophical right to more income and that if they didn't get it, they would sue. These threats were made even though there

was no request for concessions from the Middletons at the meeting. Dr. Ring testified that after the threats were made at that meeting that discussions continued thereafter, but the parties never went back to discussing the original deal again. After that, the focus related to the threats of litigation. [R. 4126-4133]. This testimony was not contradicted either by Anthony Middleton or Boyer.

Further, the Middletons' suggestion that it was the concerns expressed in Taylor's March 14, 1989 letter that prevented the deal from going forward is contrary to, inter alia, the specific testimony of Dr. Ring. Dr. Ring testified that at the July 25, 1989 meeting, attended both by Boyer and Taylor, they discussed the concerns of Taylor and Greg Bell about financing. The concerns set forth in Taylor's March 14, 1989 letter were being discussed when Boyer said that, "Those problems can be dealt with, don't pay any attention to his attorney, it was not a point of issue", "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" and "I came here to make a deal, I didn't come here to break one." Boyer said his major concern was he did not want to get in a litigation box the way Zions had gotten themselves into it. Boyer said if Zions could get financing so could The Boyer Company and that he had read Greg Bell's letter concerning financing, but did not agree with it. Boyer said, "The only thing that I can see that's going to stop this project at this point is this concern of --

my concern of the threat of litigation." Boyer never mentioned financing. [R. 4115-4121 and 4422-4424].

Boyer did not even recall reading Taylor's March 14 letter before it was sent. Boyer never allowed the deal to pivot on financing or Taylor's concerns. Dr. Ring made it perfectly clear at the July 25, 1989 meeting that no one, including Boyer, was to seek any concessions from the Middletons. [R. 4120-4122, 4529-4532, 4590, 4596-4598, 4640]. Anthony Middleton himself confirmed that Medical Leasing was not asking for any concessions. [R. 5592]. Parsons confirmed in detail Dr. Ring's testimony about the July 25, 1989 meeting and specifically concerning Boyer's statements. [R. 4530-4532].

In fact, Taylor had little to do with the transaction. He was not involved in any of the negotiations on the Development Agreement, did not look at any of the pleadings in the Zions litigation and drafted his March 14, 1989 letter based on an outdated version of the Amended Ground Lease. [R. 4507-4508, 5451-5456, 5485-5486]. Although the Middletons place great importance on the so-called "business hurdles" that Taylor articulated in his March 14, 1989 letter, Taylor himself could not and did not testify that those concerns ultimately killed the deal. Taylor admitted under cross-examination that he did not know why Boyer decided to pull out of the deal. [R. 5491-5502]. Furthermore, Dr. Ring testified that at the end of the July 25, 1989 meeting Boyer said that The Boyer Company needed nothing from the Middletons in order to develop the Property and that at the September 26, 1989 meeting Boyer indicated he was

not following Taylor's advice. Simply put, Taylor was out of the loop with respect to negotiations long before Anthony Middleton's threats torpedoed the deal. [R. 5486-5497].

Perhaps the most telling indication of the insignificance of Taylor's input into the deal was offered by Greg Gardner when he was being questioned by Mr. Frankenburg about his review of Plaintiff's Ex. 33, the working draft of the sublease which he had discussed with Boyer. After testifying that he couldn't recall if he recommended that Boyer should sign the documents he was asked: "Q. Would it be fair to say that you relied upon The Boyer Company's attorney [Taylor] to make that determination, isn't it? A. For the boilerplate language, yes. For the business points, I would rely on myself and Roger [Boyer] for that." [R. 4791-4792]. Henry Schwendiman placed Taylor's input in the transaction in a similar perspective when Schwendiman testified that the documentation was maybe only 1/100th of a part of the issues that lenders look at when determining to finance a transaction and that a lender looks at the strength of the borrower and their track record, the other deals they have developed, the quality of past developments, the type of tenants they can attract, the location of the proposed project, the quality of construction, the parking situation and similar matters. [R. 5146-5147].

The evidence at trial, including Boyer's own testimony, demonstrated that throughout 1989 Boyer was proceeding in good faith towards an agreement for development of the Property. [R. 4871, 4885]. For example, in a June 27, 1989 telephone

conversation with John Parsons, long after Taylor's letter, Greg Gardner affirmed that Boyer most definitely remained interested in the Property and Boyer still intended to go forward with the project. [R. 4528]. Parsons testified in this regard:

Mr. Hunt: And then the next paragraph -- I guess you've asked him: "Do you want the deal?" and he says, "Yes, without a doubt?"

A. Well, before that, I told him that my clients wouldn't pay any money to Middletons and then I asked him, "Do you want to deal?" and he said, "Yes, without a doubt, this is the best available corner in town."

[R. 4583]. Parsons also testified that as of that time the deal was finished and moving forward except for Boyer's meeting with the Middletons to obtain comfort with respect to possible litigation from the Middletons. [R. 4535-4536].

It was not until September 26, 1989 when Anthony Middleton pressed home his threats of litigation that serious doubts were cast on the viability on the deal. Until that time, Medical Leasing had not reached any impasse with Boyer. [R. 4300]. The threats at the September 26th meeting derailed the negotiations. After that time, the discussions centered on the threats and different proposals to get around the threats. [R. 4132-4133].

The Middletons argue that the testimony of Parsons and Drs. Ring and Wong concerning Boyer's statements to them are "rank hearsay." This argument misses the point. To the extent that the testimony was hearsay, the court correctly found it admissible under well recognized exceptions, including Utah Rules of Evidence Rules 803(1) (present sense impression) and (3) (state of mind including, intent, plan and motive), as it was introduced to show Boyer's state of mind and his intent with respect to going forward

with the sublease.¹⁰ Consequently, Boyer's statements were perfectly admissible.

The Middletons argue that at trial Boyer testified he could not remember one way or the other the threats of litigation so that must prove the real reason that Boyer did not go forward with development of the project was the concerns expressed by Taylor in his March 14, 1989 letter. Again, the evidence was otherwise.

It is important to recognize at the outset that the jury was not bound to believe Boyer's testimony that he could not remember whether Anthony Middleton had threatened litigation. Boyer admitted that he and Anthony Middleton were long-time friends who were both involved as leaders of their stake in the L.D.S. church. Boyer was at best a reluctant witness with a convenient and almost total memory lapse concerning the transactions. Moreover, it is important that Boyer did not deny that threats of litigation had been made, but only said he could not remember one way or another whether there were threats. And, Boyer admitted that he may have told Anthony Middleton he was not interested in developing the Property if litigation would be involved and that threats of litigation would chill development of the Property. [R. 4863-4864]. Boyer clearly testified that if litigation had been

¹⁰ Even if the hearsay exception had not been available, the statements were necessary predicates to explain Anthony Middleton's threats in response to the statements, for which use the statements would not be offered for the truth of the matters stated and therefore would not be hearsay.

threatened he would not have been interested in proceeding with the project. [R. 4872-4873].¹¹

In addition, Boyer obviously understood at the November 11, 1989 meeting that if the deal went forward there would be litigation. [R. 5623-5627; Defendants' Exhibit 27]. There is no question but that Boyer knew he had been threatened by Anthony Middleton because his statements acknowledging that fact are reflected in the tape transcript of the November 11, 1989 meeting. [Defendants' Exhibit D-27]. In that respect, page 32 of Exhibit D-27 records the following conversation:

Mr. Boyer: We will litigate. We will be willing to litigate and prepared to litigate the status quo if we know we're going to be litigating anyway. We're now in a litigation box. We go forward we litigate, we go backward we litigate.

Mr. Ring: Is that your impression?

Mr. Boyer: I thought that's what both of you said. That's the implication. He said we would litigate if they don't participate, and you suggested that I think we have a binding agreement.

Mr. Ring: I think we do.

Mr. Boyer: What my point is, if we don't proceed I think the implication is we litigate. If we did proceed, the implication is we litigate.

Further, page 18 of Exhibit D-27 records the following exchange between Dr. Ring and Anthony Middleton in front of Boyer:

Dr. Ring: As a matter of fact, as you said right off the bat, you said it then and you said at every meeting we've had, is that if any development happens out there, we're going to sue.

¹¹ In that regard Boyer testified:
"Q. And if going forward with this development meant being involved, at all, in litigation with the Middletons, would it be your determination not to go forward?
A. That's correct, we would not regardless of our friendship.
Q. In other words, litigation itself would be threatening enough?
A. Yes." [R. 4872].

Anthony Middleton: No. That's only half of what I said. There would be -- very likely be -- a suit entered if zero participation on the part of the owners.

A transcript of a February 15, 1990 meeting also plainly evidences that Boyer was backing away from the sublease because of Anthony Middleton's threats. At the February 15, 1990 meeting at Boyer's office, shortly after Taylor's February 5, 1990 letter announcing Boyer had no further interest in pursuing the project, Boyer stated:

Well, we had, you know, Tony, he's called a couple of times. In fact, he called me I think it was last week and told me, I guess the essence of his comment was, I feel more strongly about the strength of my position, that almost is a direct quote, than I have ever before, after having gotten into this, which I honestly don't know how he could arrive at that conclusion, but that is his conclusion.

. . .

We had a discussion with Vic and he has suggested, and I don't know, it may have even been sent, but we are sending you a letter saying, look, this is a draft of it, saying, look, get your act together, when we can make a deal let's talk about a deal. In the meantime, we're kind of stepping back.

[Defendants' Exhibit 58 at 4].¹²

Although the Middletons now want to argue about whether Anthony Middleton's threats caused Boyer to walk from the transaction, the evidence was beyond question that was exactly the

¹² The Middletons point to Taylor's letter of February 5, 1990 in which Taylor notified Medical Leasing that Boyer was no longer interested in pursuing the project as proof that Boyer refused to go forward with the project because the concessions mentioned in Taylor's previous letter had not been obtained. At best, Taylor's letter was ambiguous in this regard. Interpreting the letter in the light most favorable to Medical Leasing, the letter totally supports Medical Leasing's theory that the Middletons' refusal to assure Boyer he would not be sued was what destroyed the deal. But, even if the letter is construed as meaning what the Middletons say it does, the jury was not bound to believe that the reasons asserted by Taylor in his letter were the real reasons for Boyer's decision not to go forward, especially when Taylor testified he didn't know why The Boyer Company pulled out. Obviously, as of February, 1990, Boyer was attempting to avoid any potential claim by Medical Leasing. Taylor's letter is also contradicted by the evidence of Boyer's own statement as to why Boyer did not proceed.

result Anthony Middleton intended unless Medical Leasing surrendered to his demands for more money. He knew from his earlier experience with the Zions litigation that by threatening litigation he could forestall development. [R. 4340-4341]. In fact, he wrote in his diary of his intention to forestall and, if necessary, to block development by litigation. [Plaintiff's Exhibit 37; R. 4344-4347]. Anthony Middleton even reminded Boyer that timing was critical in financing a commercial development and that outside of the appropriate time window it would become increasingly difficult for Boyer to get financing. [R. 5628]. Both Medical Leasing's and the Middletons' expert testimony confirmed the disastrous effect that threats of litigation would have on a proposed transaction. [R. 5099-5100, 5118-5119, 5325-5326]. In short, Anthony Middleton's threats had exactly the intended result.

The jury heard all the evidence and obviously refused to accept the Middletons' theory that the reason Boyer refused to go forward with the project related to concerns about financing expressed in Taylor's March 14, 1989 letter. The jury's reaction was not surprising in view of the overwhelming evidence that the only reason Boyer walked from the Property was because of Anthony Middleton's litigation threats.¹³ The Middletons were asking the jury to believe that despite the enormous work that Greg Gardner testified The Boyer Company had done with respect to the project over a period of over two years, including getting the Property

¹³ Of course, Medical Leasing's burden respecting causation was only to show that the threats were one of the proximate causes for the termination of the transaction.

rezoned, and despite the fact that discussions continued unabated for many months after Taylor's letter with little, if any, discussion concerning financing, and despite the fact that the discussions only turned sour after Anthony Middleton made his threats, that The Boyer Company walked from the sublease because of a perceived problem with financing without even attempting to present the project for financing to one single lender. The Middletons' arguments strained credulity and they can hardly complain that the jury did not agree.

The Middletons also assert in passing that their experts, Gary Banks and Gregory Bell, were of the opinion that the proposed project could not be financed by The Boyer Company without concessions from the Middletons. Again, the Middletons fail to marshal the evidence in this regard. As is set forth earlier in this brief (p. 24, ¶ 28), Medical Leasing's expert testified that in his opinion the project could be financed without any concessions. The jury obviously believed Medical Leasing's expert. The evidence fully supported, if not compelled, the jury verdict.

E. THE TRIAL COURT CORRECTLY AWARDED MEDICAL LEASING ATTORNEY'S FEES.

The Middletons contend that the trial court erred in awarding attorney's fees to Medical Leasing because the Middletons were not given a notice of default as supposedly required by paragraph 16 of the Amended Ground Lease, that attorney's fees

allegedly cannot be awarded for breach of the implied covenant of good faith and fair dealing, and because, so the argument goes, there was no finding that the Middletons breached the express terms of the Amended Ground Lease. These arguments should be rejected.

1. Notice of Default Was Not Required in Order for Medical Leasing to be Entitled to Attorney's Fees and, In Any Event, Notice Was Given.

Paragraph 16 of the Amended Ground Lease contained the following attorney's fees provision:

If Landlord or Tenant default hereunder or file suit against the other which is 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. [Emphasis added].

The Middletons' argument that in order to be entitled to attorney's fees under this provision Medical Leasing was required to give a written notice of default under paragraph 6 of the Amended Ground Lease cannot withstand analysis for at least three reasons.

First, as demonstrated earlier (pp. 41-43), and as the trial court ruled, paragraph 6 only required that a notice of default be given before the non-defaulting party could incur certain expenses in the performance of the lease or before the Middletons could terminate the lease. Paragraph 6 expressly did not limit any other remedies which the parties had.

Second, as earlier set forth (p. 44), notice of default was in fact given to the Middletons on December 8, 1989 when Medical Leasing's attorney, Mr. Parsons, sent to Richard P. Middleton on behalf of all the Middletons a copy of Parsons' previous November 17, 1989 default letter.

Third, Medical Leasing was entitled to recover attorney's fees under paragraph 16 whether or not the Middletons were technically in "default" under paragraph 6 because paragraph 16 allows attorney's fees to the prevailing party in any lawsuit "which is any way connected with this Lease." Indeed, the Middletons made this very argument below. They asserted that a party is entitled to attorney's fees under the Amended Ground Lease in two situations, that is if (1) the other party defaults; or (2) if the party prevails in a lawsuit which is in any way connected with the Lease. [See Williams & Hunt's Objection to Medical Leasing's Application for Attorney's Fees, and Moyle & Draper's Memorandum Opposing Plaintiff's Motion in Limine Re: Attorney's Fees, R. 1261-1264, 1268-1269]. The Middletons were correct in that regard.

2. The Middletons Did Breach the Express Terms of the Amended Ground Lease.

The Middletons, in ostrich-like fashion, erroneously argue that Medical Leasing never identified any breach by the Middletons of the express terms of the Lease and that, in any event, the jury never found a breach of the express provisions of the Lease.

To the contrary, the Middletons' wrongful threats of litigation made in order to derail the sublease with The Boyer Company constituted a breach of the express provisions of paragraph 8 of the Amended Ground Lease under which they agreed that the Property could be developed by an independent third party without their consent unless subordination was sought.

The claim for breach of the implied covenant of good faith and fair dealing was also grounded upon the provisions of paragraph 8. The Utah Court of Appeals made it clear in Ted R. Brown & Associates v. Carnes Corp., 753 P.2d 964, 970-71 (Utah App. 1988), that the covenant of good faith and fair dealing is not something floating around unconnected to the contract between the parties. The covenant in fact arises from the contractual obligations the parties have voluntarily undertaken:

In exercising its rights under this final modification of the parties' contract, Carne's implied duty of good faith did not require it to keep extending the deadline ad infinitum until the Church contract was awarded. '[W]here the parties have made an express contract, the court should not find a different one by implication concerning the same subject matter if the evidence does not justify [such] an inference' . . . In other words, such an inference or covenant relating to a specific contract right excludes the possibility of an implied covenant of a different or contradictory nature. . . .

It is fundamental that every contract imposes a duty on the parties to exercise their contractual rights and perform their contractual obligations reasonably and in good faith . . . Nonetheless, a court may not make a better contract for the parties than they have made for themselves; furthermore, a court may not enforce asserted rights not supported by the contract itself. . . .

[753 P.2d at 970] [Emphasis added]. See also St. Benedict's Dev. v. St. Benedict's Hospital, 811 P.2d 194 (Utah 1991).

Thus, the jury's finding of a breach of the implied covenant of good faith and fair dealing in this case could only have been premised on a finding that paragraph 8 of the Amended Ground Lease was expressly breached. [See Jury Instruction No. 24, R. 1541-1542]. Accordingly, the fact that special verdict question number 4 asked the jury whether the Middletons had breached the express terms of the Amended Ground Lease "and/or" the implied covenant of good faith is irrelevant.

The Middletons place great emphasis on McKenzie v. Kaiser-Aetna, 127 Cal.Rptr. 275 (Cal. App. 1976). McKenzie is not on point. In McKenzie, the attorney's fees provision in the contract only allowed attorney's fees "in any action brought to enforce the performance of this contract, or any of the terms, covenants or conditions thereof. . . ." The court thus observed that it was "necessary to determine whether all those causes of action were 'action[s] on [the] contract.'" The court concluded that an action for negligent misrepresentation is not an action on contract and that because the jury could have awarded its verdict on the basis of the negligent misrepresentation theory, fees could not be awarded.

In stark contrast, the attorney's fee provision in the present case allows fees in any suit which is "in any connected with this Lease." Both Medical Leasing's claims for express breach of contract and breach of the implied covenant of good faith and fair dealing were actions on the contract and "connected with" the Amended Ground Lease.

3. Medical Leasing Was Entitled to Attorney's Fees For Breach of the Implied Covenant of Good Faith and Fair Dealing.

The Middletons rely on this Court's decision in Cluff v. Culmer, 556 P.2d 498 (Utah 1976), in support of their argument that attorney's fees cannot be awarded for breach of the covenant of good faith. The Middletons' reliance is misplaced.

In Cluff, this Court upheld the trial court's refusal to allow attorney's fees, finding that an implied covenant arising from the landlord/tenant relationship (not the contract) that the tenant would not commit waste did not come within the scope of the attorney's fees provision because an action to recover damages for waste did not constitute an action to enforce the written contract. In other words, the implied covenant in Cluff did not arise from the language of the contract, but was grounded upon the existence of the landlord/tenant relationship. The three cases cited by the Cluff court, Forrester v. Cook, 292 P. 206 (Utah 1930), Leone v. Zuniga, 34 P.2d 699 (Utah 1934), and Jacobsen v. Swan, 278 P.2d 294 (Utah 1954), all involved contracts with a narrow attorney's fee provision that only allowed fees in suits to "enforce" the contract. In each case, the contract had already been forfeited and the court ruled the suit therefore was not to enforce the contract.

In the case at bar, the breach of the implied covenant of good faith and fair dealing by the Middletons was in fact based upon the language of the paragraph 8 of the Amended Ground Lease entitling Medical Leasing to sublease for development without

consent. The breach of the implied covenant of good faith and fair dealing constituted a breach of the lease. Moreover, the attorney's fee provision in the present case, which allows attorney's fees to the prevailing party in an action in any way connected with the lease, is much broader than the provision in Cluff, which only allowed fees incurred in the "enforcement of the contract." Courts have allowed attorney's fees for breach of implied contract or warranty in situations far less clearly within the language of the contract permitting fees. See, e.g., Cabal v. Donnelly, 714 P.2d 1071, 1073 (Or. App. 1986); Geraci v. Crown Chevrolet, Inc., 444 N.E.2d 1308, 1311 (Mass. App. 1983).

4. The Award of Attorney's Fees Was Not Defective Because Medical Leasing Did Not Set Out the Time and Fees Expended for Unsuccessful Claims and Claims For Which There Would Be No Entitlement to Attorney's Fees.

At trial, the parties stipulated to reserve the issue of attorney's fees until after the jury returned its verdict, at which time the parties would present their evidence of attorney's fees by way of affidavit. After the jury returned its verdict, Medical Leasing filed its affidavits concerning fees setting forth in substantial detail the services performed and the amount of fees incurred. Copies of the billings listing the services performed by date, the attorney performing the service and the time spent were attached. Medical Leasing asked for \$319,502.00 attorney's fees and approximately \$55,000.00 in other fees and costs (in

addition to taxable costs). The court cut this request by almost \$100,000.00 and awarded \$275,000.00 as reasonable attorneys fees.

The parties then entered into a stipulation by which the Middletons agreed to waive any claim or right to contest the court's determination that \$275,000.00 was a reasonable attorney's fee. The Middletons, however, reserved their right to claim that Medical Leasing failed to allocate time and fees expended for successful claims for which there allegedly was not an entitlement to attorney's fees, unsuccessful claims for which there would not be an entitled to attorney's fees had the claims been successful, and claims for which there is no entitlement to attorney's fees. [R. 2950-2952].

The Middletons claim in this regard that Medical Leasing was not entitled to an award of attorney's fees for its claims of interference with contract, interference with prospective economic relations or breach of the covenant of good faith and that all time associated with preparing the original complaint, which was later amended, and responding to a partially successful motion to dismiss must be disallowed. These contentions are without merit.

Of course, the point of beginning for an award of attorney's fees is the attorney's fee provision contained in the contract. As this Court said in Trayner v. Cushing, 688 P.2d 856, 858 (Utah 1984):

[A] party is entitled only to those fees attributable to the successful vindication of contractual rights within the terms of their agreement. [Emphasis added].

The attorney's fee provision in the present case, as previously noted, is extremely broad. That provision allowed fees

to the prevailing party in any suit having any connection with the Lease. All of Medical Leasing's claims, under the alternative theories, arose out of the same wrongful acts and sought to vindicate Medical Leasing's right under the Amended Ground Lease to sublease the Property for development.

In this regard, the fact that early on in the case Medical Leasing's separate claim for interference with contract was dismissed is irrelevant because Medical Leasing ultimately prevailed on its claims for breach of contract and interference with prospective economic relations, each of which theories were grounded upon the same wrongful conduct of the Middletons. Under the Middletons' argument, if suit were brought for breach of contract, unjust enrichment and quantum meruit alleging the failure of a defendant to pay amounts due under a contract and the plaintiff only obtained judgment for the full amount due on the breach of contract theory, the plaintiff would only be entitled to recover a portion of the fees incurred. Such a result would be incongruous. The important point in this case is that Medical Leasing recovered 100% of the damages it was seeking in the amount of \$2,582,780.00 plus accrued interest for the wrongful conduct of the Middletons. Medical Leasing was entitled to recover all of the attorney's fees incurred in obtaining that judgment.

The Middletons would have this court invalidate the attorney's fee award on the basis that it must be reduced by the time associated with responding to a motion to dismiss, as a result of which Medical Leasing's claim for an injunction was dismissed. To the contrary, the claim for an injunction was simply part of the

claim upon which Medical Leasing ultimately prevailed -- that is that the Middletons' wrongful threats of litigation torpedoed the sublease with The Boyer Company. In any event, even if it were appropriate to reduce the fees by those incurred in connection with the injunction, the information provided to the court below was more than sufficient for the court to make that deduction. As demonstrated below, the amount of attorney's fees incurred in connection with the injunction could not have comprised more than approximately \$2,500.00. [R. 2696-2698].

Lastly, the Middletons object that Medical Leasing's claims for fees included \$25,000 for the cost of Medical Leasing's damage expert. The Middletons provide no support for the argument that this amount was included by the court in its award. Moreover, the Middletons ignore the fact that the court reduced Medical Leasing's claim for attorney's fees and for the expert fees and other costs from approximately \$375,000.00 to \$275,000.00, a reduction of approximately \$100,000.00, which was far more than the amount claimed for the damage expert. Beyond that, the Middletons did not reserve the right in the stipulation entered into between the parties to claim that the attorney's fee award was improper for supposedly including this item. Presumably, the court deducted this amount in awarding the fees. In any event, the Middletons cannot now object to the award on that basis.

In summary, the attorney's fee award by the trial court was reasonable, was fully supported by the evidence and the applicable law and should be upheld.

F. THE COURT CORRECTLY DETERMINED THAT THE MIDDLETONS WERE JOINTLY LIABLE FOR BREACH OF THE AMENDED GROUND LEASE.

1. As the Landlord Under the Amended Ground Lease, the Middletons Were Jointly Liable for Its Breach.

During trial Judge Rigtrup reserved the legal issue of whether all the Middletons were jointly liable for Anthony Middleton's breach of the Amended Ground Lease because they all signed the Amended Ground Lease as "Landlord." After extensive post-trial briefing and argument, Judge Rigtrup ruled that, in light of the jury's finding that the Amended Ground Lease was breached, all the Middletons were jointly liable because they had all undertaken the obligations as Landlord.

The Middletons attempt to convince this Court that because as tenants in common they only owned an undivided fractional part of the Property and because one co-tenant as a general principle cannot bind another co-tenant's interest in property, that there is no joint liability in this case for breach of the Amended Ground Lease. This argument misses the point. The trial court did not hold the Middletons' jointly liable because they were co-tenants, but because they had all executed the Amended Ground Lease as "Landlord" and had thus contractually undertaken joint obligations.

The Middletons also argue that a lease of land by two or more tenants in common is regarded as several leases by the tenants of their undivided interest. The only authority which the Middletons can find for this proposition are three treatises

written in 1886, 1887 and 1906, respectively, when Plessy v. Ferguson was still the law of the land. Although these cases are undoubtedly of historical legal interest, they fly in the face of modern authorities.

Under the modern view, leases are, of course, simply viewed as contracts that are governed by ordinary principles of contract law. See, e.g., LMV Leasing, Inc. v. Conlin, 805 P.2d 189, 193 (Utah App. 1991); Powell, The Law of Real Property, § 230[2] at 16B-7 (1991) (courts have adopted the view that leases should be construed like any other contract). When two or more persons agree to undertake performance of an obligation pursuant to a contract, the law presumes that the undertaking of that performance was joint and holds the parties jointly responsible for the performance of the undertaking. Turner v. Gunderson, 807 P.2d 370, 375 (Wash. App. 1991); Moore v. Seabaugh, 684 S.W.2d 492, 495 (Mo. App. 1984); Schneider v. Bytner, 481 N.Y.S.2d 777, 779 (A.D.3 Dept. 1984); Morgan v. Cincinnati Ins. Co., 307 N.W.2d 53, 54 (Mich. 1981). As is stated in Section 289(1) of the Restatement (Second) of Contracts:

[W]here two or more parties to a contract promise the same performance to the same promisee, each is bound to the whole performance thereof, whether his duty is joint, several, or joint and several.

For any breach of contract, there is only one cause of action against the joint obligors who are jointly liable for the damages suffered by the plaintiff. Turner v. Gunderson, 807 P.2d at 375 (citing Harrison v. Peuga, 480 P.2d 247 (Wash. App. 1971)).

The presumption of joint liability can only be overcome by showing from the language in the contract that the parties intended

their liability to be several. Donzella v. New York State Throughway Authority, 180 N.Y.S.2d 108, 110 (A.D. 3 Dept. 1958); Clayman v. Goodman Properties, Inc., 518 F.2d 1026, 1032 (D.C. Cir. 1973); Alexander v. Wheeler, 407 N.Y.S.2d 319, 320-21 (A.D. 4 Dept. 1978); Don L. Tullis & Associates, Inc. v. Gover, 577 S.W.2d 891, 900 (Mo. App. 1979); Anderson v. Barnes, 671 P.2d 1327, 1328 (Colo. App. 1983).

In the Amended Ground Lease in the present case, each of the Middletons signed personally and were denominated in the agreement in the singular as "Landlord" and there is no differentiation between them with respect to their rights and obligations. That designation makes clear that the agreement contemplated the Middletons would be treated as single obligor and therefore be jointly liable. Drawing that same conclusion from similar language, the court in Clayman v. Goodman Properties, Inc., supra, noted:

We have had occasion in the fairly recent past to point out that 'the general rule is that the obligation created by the promise of several persons is joint unless the contrary is made evident.' [Citations omitted]. The contract before us falls squarely within the ambit of that principle. Throughout the contract, Goodman Properties is referred to by the word "owner." Similarly, the Claymans and Hillman are invariably referred to collectively by the words "respective purchaser" or "purchaser" always in the singular. Nowhere does the contract distinguish the three in any way or separate the rights and obligations among them. On the contrary, the contract uniformly treats the three as a team, without so much as a whisper that they are to be differentiated in any ways or for any purpose.

[518 F.2d at 1032] [Emphasis added].

Similarly, in Huggins v. Bacon, 321 S.E.2d 353 (Ga. App. 1984), the court held that a real estate investor as a joint

obligor under a contract along with the contractor was liable for breach of an implied agreement to build a house in a fit and workmanlike manner. The court reasoned that even though the investor had not worked on the construction of the house, he was still jointly liable because he had signed the contract.

The Middletons argue that, in fact, the language of the Amended Ground Lease using the term "Landlord" in the singular supports the conclusion their liability is severable, relying upon F.D.I.C. v. Bismarck Inv. Corp., 547 P.2d 212 (Utah 1976). The Bismarck court, in clearly identified dicta, stated that, "[o]rdinarily, a promise by two or more in the singular number is prima facie several while a promise in the plural is prima facie joint." [547 P.2d at 214]. Justice Ellett gave no explanation for this statement. Although Justice Ellett's language is incomprehensible, the case cited by the court in support of that statement contains a correct statement of the law and clarifies what the Bismarck court meant. Bismarck cited Lovell v. Commonwealth Thread Co., 172 N.E. 76 (1930), which involved two separate promissors promising clearly different performances. The court held each promisor only to their respective promises. As to joint obligations generally, however, the Lovell court was in accord with the cases cited by Medical Leasing on this point:

Where two or more persons covenant with another by the words "we covenant" the words indicate a joint covenant, and are to be so considered, unless from the whole contract it should appear that such was not the understanding of the parties. If two covenant generally for themselves, without any words of severance, or that they, or any one of them, shall do such a thing, a joint charge is created.

[172 N.E. at 78].

The Middletons assert that the court must look to the underlying circumstances of the parties in interpreting the contract. Of course, in interpreting a contract, the court just looks at the four corners of the contract unless it is ambiguous. J.C. Realty, Inc. v. Willey, 758 P.2d 923 (Utah App. 1988). The language of the Amended Ground Lease is not ambiguous in this regard. But, even if the court were to look at the circumstances at the time of execution of the Amended Ground Lease, those circumstances point to joint liability. All of the Middletons owned undivided fractional interests in the Property. None of the Middletons could separately lease their fractional interest in the Property. All of the Middletons had to join together to do so.

Lithia Lumber Co. v. Lamb, 443 P.2d 647 (Or. 1968), cited by the Middletons, provides no support for their position. In Lithia, the court found that different defendants who signed completely separate contracts which expired at different times and dealt with separate subjects were not jointly and severally liable. Although the defendants had all signed a third contract to sell timber to the plaintiff, because the defendants independently owned different parcels of timber, the court found their liabilities were several. In the case at bar, of course, the Middletons did not own separate parcels of property; they each owned an undivided fractional part of the whole parcel and no one Middleton could have separately leased the Property.

The Middletons next say that the Amended Ground Lease was ambiguous as to whether the parties intended the Middletons' promises to be joint or several, necessitating consideration of

extrinsic evidence. The Middletons do not even bother to explain to the court the nature of the ambiguity they contend exists. The language of the Amended Ground Lease is, in fact, clear; the legal result of that language is that the Middletons are jointly liable.

Moreover, the only extrinsic evidence to which the Middletons point to support their position is that the Middletons had separate counsel in the Zions Litigation and that before the September 26, 1989 meeting Dr. Wong made an effort to inform Richard G. Middleton of the meeting, to which Mr. Middleton replied that he knew of the discussions but that Anthony Middleton only represented one-third of the family. The fact that the Middletons had been represented by different counsel in litigation is, of course, unremarkable and largely irrelevant. Parties jointly bound on contracts are commonly represented by separate counsel because, even though they are jointly bound on the contract, the obligors may have claims for indemnity against each other or have other conflicting interests. The fact that Dr. Wong was told on one occasion respecting a single meeting in 1989 that Anthony Middleton did not speak for all of the Middletons was relevant to the issue of agency, but it has nothing to do with the legal obligation of the Middletons as "Landlord" under the Amended Ground Lease which they had executed years before, nor to their intent at the time they signed the lease.

However, the extrinsic evidence, even if considered, supports joint liability. Anthony Middleton was the only Middleton who took part in the communications and meetings which are the subject of this action concerning The Boyer Company sublease.

Anthony Middleton testified that he kept the family informed of what he was doing, including specifically informing George and Richard G. of the position that he was taking that the Middleton family was entitled to compensation. At no time did any of the Middletons disavow Anthony Middleton's conduct even after December 8, 1989 when Mr. Parsons sent to Richard G. Middleton a copy of the November 17, 1989 letter demanding that the Middletons withdraw their threats of litigation.¹⁴ Finally, each month a single rent payment was faithfully made by Medical Leasing and sent to Richard P. Middleton who distributed the payment among all the Middletons.

There are compelling policy reasons for the universal rule holding obligors under a contract -- including this contract -- jointly liable. A rule which allows one joint obligor to destroy the obligee's benefits under a contract, but at the same time requires the obligee's full performance to the other joint obligors would set commercial transactions, large and small, on their heads. For example, if the Middletons' position is correct, then one Middleton could prevent Medical Leasing from using the Property, but the other Middletons could still demand payment of their share of the rent. That is exactly the type of absurd result which the joint obligor rule avoids. Add to that the Middletons' notion that the burden is on the obligee to discover which of the joint obligors breached and that the obligee's remedy is limited only to that person, and contract law would be turned on its head.

¹⁴ The Middletons in fact argue that: "Even Anthony's actions were consistent with the parties' expectations." [Moyle & Draper Brief, p. 25]. The malicious threats were not remotely consistent with Medical Leasing's expectations, but if they were consistent with the Middletons', the Middletons have little reason to be upset when the activity they "expected" resulted in their jointly liability.

Clearly, the rule recognizes that one must choose his other joint obligors carefully and that if one obligor breaches the contract, then the other joint obligors, who are in the best position to prevent or cure the breach, are the ones who bear the risk of the breach, rather than placing the risk of the breach on the obligee. The other obligors are therefore given a strong incentive to see that all of the obligors comply with their obligations and to take appropriate remedial action if those obligations are not being honored. For example, in the present case, this whole litigation could have been avoided if the other Middletons would simply have rejected Anthony Middleton's conduct and announced that the Middletons would honor their contractual obligations.

2. Whether Or Not All of the Middletons Would Have Had to Join in Litigation on the Amended Ground Lease is Irrelevant.

The Middletons attempt to convince the court that they could not possibly be jointly liable for Anthony Middleton's wrongful threats of litigation because, so the Middletons argue, all of them would have had to join together in a lawsuit against Medical Leasing on the lease to make good on the threat. This argument is simply wrong.

In the first place, the Middletons miscite R. Powell and P. Rohan, Law of Real Property, § 606[1] (1991), for the proposition that any action on the lease would have to be joined in by all of the Middletons. Powell only states that in actions against lessees to recover rent, the joinder of all co-tenants is

usually required. A lawsuit by Anthony Middleton to prevent development of the Property would not have been one to recover rent.

More importantly, whether or not all of the Middletons would have had to join in a lawsuit against Medical Leasing with respect to Medical Leasing's right to sublease the Property to The Boyer Company for development is beside the point. The wrong complained of in this lawsuit was not the filing of groundless litigation, but the threat to do so. Those threats were made by the Landlord under the Amended Ground Lease and the Landlord is liable for the threats. And, none of the Middletons ever disavowed the threats.

3. Medical Leasing Pled Joint Liability.

Finally, the Middletons contend that Judge Rigtrup erred in finding all of them jointly liable as the Landlord under the Amended Ground Lease because Medical Leasing supposedly failed to plead joint liability on any theory other than agency. This contention was properly rejected by the trial court.

The Amended Complaint unquestionably alleged that all of the Middletons breached the Amended Ground Lease and were liable for that breach. Paragraph 1 of the Amended Complaint stated that the, "action arises out of Defendants' course of conduct which constitutes a breach of contract . . ." [R. 319]. In paragraph 4, Medical Leasing alleged that, ". . . the Defendants are the 'Landlord' and Medical Leasing is the 'Tenant' under the 1980

Amended Ground Lease." Paragraph 14 recited that, the "Defendants are collectively referred to in this Complaint as 'Defendants', the 'Middletons' or the 'Landlord' under the 1980 Amended Ground Lease." Paragraph 51 of the Amended Complaint alleged that all of the Middletons breached the Amended Ground Lease by seeking to preclude Medical Leasing from subleasing by improper threats of litigation. Medical Leasing went on to seek recovery of damages for breach of the Amended Ground Lease from all of the Middletons. After thoroughly reviewing the allegations of the Amended Complaint, Judge Rigtrup concluded that the pleading was, in fact, sufficient notice of Medical Leasing's claim that the Middletons were jointly liable. [R. 5958-5960].

The Middletons' position apparently is that Medical Leasing was obligated to expressly allege in the Amended Complaint the legal theory that because each of the Middletons executed the Amended Ground Lease as the "Landlord" that they were jointly liable. To the contrary, Medical Leasing was only required under Rule 8 of the Utah Rules of Civil Procedure to allege a short and plain statement of the facts upon which its claim was based. Medical Leasing undisputedly did so. Medical Leasing had no obligation to plead the legal conclusion that all of the Middletons were liable because they signed the Amended Ground Lease. In fact, pleading legal conclusions or arguments, although not fatal, is actually considered a pleading defect. See, e.g., Bond v. Dunmire, 473 N.E.2d 78 (Ill. App. 1984) (allegations of legal conclusions constitute merely formal defects in complaint, not defects of substance); Aster v. Arthur Murray, Inc., 220 N.Y.S.2d 34 (N.Y.

1961) (legal conclusions are improper in pleading and party should not be required to answer them); Reinert v. Carver, 41 So.2d 449 (Fla. 1949).

The Middletons miscite New Jersey Office Supply, Inc. v. Feldman, 1990 LW 74477 (U.S.D.C.N.J. 1990), and Sharkey v. Lathram, 156 N.E.2d 502 (Ohio 1959), for the proposition that joint liability should be separately pleaded. These cases only stand for the proposition that a plaintiff must plead sufficient facts to show joint liability, a standard clearly met by Medical Leasing in the case at bar.

The Middletons' claim of surprise strains credulity. The essential facts underlying the joint obligation of the Middletons as Landlord under the Amended Ground Lease were clearly alleged. The Middletons had sufficient notice to allow them to prepare their defense. It was their responsibility to conduct appropriate legal research and discovery to meet the legal issues raised by the facts alleged in the pleadings. The Middletons cannot blame the trial court or Medical Leasing if they failed to do so.¹⁵

G. THE JURY'S AWARD OF LOST PROFITS TO BE SUFFERED BY MEDICAL LEASING DURING THE REMAINING TERM OF THE AMENDED GROUND LEASE WAS ENTIRELY PROPER.

The jury awarded Medical Leasing compensatory damages in

¹⁵ In this regard, although the Middletons point to jury instruction number 14 concerning the claims of the parties as supposedly showing that the joint liability issue was never raised and that only agency had been raised as a ground for joint liability, the instruction shows just the contrary:

"Medical Leasing claims that all actions of Anthony Middleton referred to in the previous paragraph are attributed to each and every other Defendant by the rules of the law, including the rules of agency."

the sum of \$2,582,780.00, representing the profits Medical Leasing lost as a proximate result of the destruction of the proposed sublease with The Boyer Company. This amount was the present value of the rent which The Boyer Company would have paid Medical Leasing under the proposed sublease.

The Middletons now argue that the jury's award of damages to Medical Leasing for loss of profits during the remaining term of the Amended Ground Lease was improper because Medical Leasing supposedly failed to mitigate its damages, because the case of Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896 (Utah 1989), allegedly prohibits a jury from awarding future lost profits and because there was not sufficient evidence of the amount of lost profits. These arguments are without support in the evidence or under the applicable law.

1. The Middletons Failed to Meet Their Burden of Proving that Medical Leasing Did Not Take Reasonable Action to Mitigate its Damages.

The Middletons pled mitigation as an affirmative defense in this action. The Middletons, of course, had the burden of proving by competent evidence that Medical Leasing could have mitigated its damages by reasonable effort and expense. Pratt v. Board of Education, 564 P.2d 294, 298 (Utah 1977); John Call Engineering v. Manti City, 795 P.2d 678, 680 (Utah App. 1990); A. Corbin, Corbin on Contracts, § 1039 (1964). This burden required the Middletons to prove what Medical Leasing could have done to

mitigate its damages and how much of the losses could have been avoided through such efforts.

The Middletons did not even attempt at trial to meet their burden of proving a failure to mitigate. One searches the record in vain for any mention by the Middletons of the mitigation issue or any attempt to present evidence thereon. The Middletons put on not one word of testimony concerning what Medical Leasing could have done with the Property or how much loss could have been avoided.¹⁶ In fact, the Middletons vehemently argued at trial that Medical Leasing was not damaged by the threats of litigation because the Property could not be commercially developed without the Middletons granting concessions they were not obligated to grant under the Amended Ground Lease. In other words, Medical Leasing could not possibly have done anything to mitigate. The Middletons' belated cry of failure to mitigate is inherently inconsistent with the position they took at trial.

Not only did the Middletons entirely fail to carry their burden on the mitigation issue, the expert testimony on damages from both sides demonstrated that Medical Leasing could have done nothing to mitigate its damages. Medical Leasing's financing expert, Henry Schwendiman, testified that because of the state of the commercial lending industry and the economy

¹⁶ Dr. Ring testified that prior to trial Medical Leasing had not attempted to sublease the property to anyone else because it could not do so in good faith without disclosing Anthony Middleton's threats of litigation. [R. 5046-5047]. Medical Leasing was not required to cave in to Anthony Middleton's coercive demands and threats of litigation in order to mitigate damages. Hector, Inc. v. United Savings & Loan Association, 741 P.2d 542 (Utah 1987). Further, the evidence was undisputed that the threats had been issued by Anthony Middleton, and had never been withdrawn. In fact, Anthony Middleton testified that his position at trial was the same as when he talked to Boyer, Medical Leasing and his diary in the events leading up to the suit.

relating to commercial office space there was only a remote chance that a developer could obtain financing for development within the ten years following trial. [R. 5100-5101, 5124-5127, 5136-5145]. Mr. Schwendiman testified that at the end of ten years, even if a developer were then still interested in the Property, the remaining term of the Amended Ground Lease would be of an insufficient length of time to amortize that developer's loan so the developer could realize an adequate return on his original investment. Mr. Schwendiman testified that as the amortization of a loan is shortened, the monthly payment stays the same, but the loan amount gets smaller. Thus, the developer is required to invest more of his own money and borrow less. The rents and net income stay the same and the developer gets a smaller return on his investment. [R. 5123-5145].

Medical Leasing presented the jury with three alternatives for calculating damages. [Plaintiff's Exhibit 47; R. 5210-5218]. One alternative assumed Medical Leasing would be able to secure a sublease within five years, a second alternative assumed ten years. However, because the jury believed Medical Leasing's evidence that the lack of feasibility of financing any kind of development after the withdrawal of The Boyer Company precluded mitigation through a future sublease, it awarded damages according to the third alternative which was that Medical Leasing would be unable to sublease the Property for the remainder of the Amended Ground Lease term.

Not only did the Middletons not contravene Mr. Schwendiman's testimony on this point, but their own experts' testimony supported that conclusion. The Middletons' experts testified that Plaintiff could not sublease the Property for development back in 1989-1990, at the time of trial or in the future. The jury rejected the conclusion about 1989-1990, accepting Anthony Middleton's appraisal of Boyer as a world-class developer and concluding with Boyer that The Boyer Company could have done the project. As to "now" or the "future," the experts on both sides all agreed the chances were slim to none. [R. 5399-5404, 5348-5359]. The transaction with The Boyer Company was a one-time opportunity that the Middletons destroyed. They must pay for the entire loss caused by their actions.

The court properly instructed the jury on mitigation [Jury Instruction No. 30, R. 1548] and, in awarding Medical Leasing prospective damages, the jury obviously believed Medical Leasing's evidence that it could not mitigate its damages because the Middletons' breach left Medical Leasing with undeveloped Property that could not produce rent for Medical Leasing in the future. The Middletons did nothing to meet even their burden of production with respect to mitigation. There simply is no basis for disturbing the jury's determination.

2. The Reid Case is Not Applicable to the Case at Bar.

The Middletons misread and misapply the case of Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896 (Utah 1989), in attempting to avoid the jury's award of future lost profits by arguing that damages could only be awarded through the date of trial. The holding in Reid is confined to a narrow factual circumstance not present in the case at bar.

In Reid, a tenant defaulted in payment of rent and abandoned the premises. The landlord sought to recover rental due through the entire remaining term of the lease. Although this Court recognized that a commercial lease is a contract governed by principles of contract law and that the "concept of mitigation of damages is grounded in traditional contract law principles . . . " [776 P.2d at 904 n.8], the court carved out a narrow exception to the general rule on mitigation by imposing upon a landlord suing a tenant for unpaid rent a continuing duty to mitigate damages by making reasonable efforts to relet the premises throughout the remainder of the lease term. Thus, the court held that in a suit by a landlord against a tenant for unpaid rent, the landlord is only entitled to recover rent due through the date of trial and must thereafter collect future rent in supplemental proceedings.

Reid did not purport to change the general rule that the breaching party must plead and prove mitigation as an affirmative defense or that damages for future lost profits can properly be awarded. Insofar as Medical Leasing has been able

to ascertain, there is not one case in all of American jurisprudence which has applied the rule of the Reid case to anything but a suit by a landlord for unpaid rents.

Of course, the case at bar does not involve a claim by a landlord against a tenant for unpaid rents. Rather, this is a suit by the tenant against the landlord for breach of the express provisions of the lease, the covenant of good faith and fair dealing implied in the lease, and for the tort of intentional interference with prospective economic relations, causing Medical Leasing a substantial loss of future profits that could have been realized through a sublease with The Boyer Company. The fact that Medical Leasing's lost profits claim is measured by the rent it would have received from The Boyer Company over the remaining term of the lease does not somehow transform this into a suit by a landlord against a tenant for unpaid rents.

Utah courts, consistent with the courts throughout the nation, embrace the principle that leases are contracts which are governed by ordinary contract principles. See, e.g., LMV Leasing, Inc. v. Conlin, 805 P.2d 189, 193 (Utah App. 1991); see also Powell, Law of Real Property, § 230[2] at 16B-7 (1991). It is, of course, a well established principle of contract law that a party is entitled to recover all foreseeable damages proximately caused by a defendant's breach, including damages for losses reasonably certain to occur in the future, and is not limited to damages occurring to the date of trial.

This Court's decision in Penelko, Inc. v. John Price Associates, Inc., 642 P.2d 1229 (Utah 1982), is directly on point. In Penelko, the landlord constructed a 35-foot driveway between the tenant's theater and an adjacent restaurant which had the effect of eliminating approximately fifty parking spaces which had been available for the tenant's customers. The tenant sued the landlord for breach of the lease and for tortious interference with the tenant's business. The jury entered a verdict in favor of the tenant and against the landlord in the amount of \$65,000.00, representing the amount of future lost profits resulting from the landlord's wrongful conduct.

The landlord contended that it was improper for the trial court to have allowed the jury to speculate as to future lost profit. The Penelko court rejected this argument and held that the lost profits had been properly awarded, observing:

The crucial question in awarding future damages involving a breach of the lease which affects the long-term value of the lease or the lessee's profit making potential is whether such damages can be ascertained with reasonable certainty. [Citations omitted] The record shows that plaintiff's expert accountant prepared exhibits and testified as to the profits which could have reasonably been anticipated for future operations based on the plaintiff's past operations. . . . The jury found on the basis of evidence presented at trial that Price was guilty of certain continuing lease violations. This fact distinguishes this case from Guntert v. City of Stockton . . . cited by Price, wherein it was held that where there is only a partial breach of contract the injured party may recover damages only to the time of trial and may not recover future damages.

[642 P.2d at 1235].

As recognized in Penelko, any notion of an ongoing duty to mitigate contract damages after trial is entirely at odds with the

well-settled principle that a total breach of a contract gives rise to one action that must resolve all of the plaintiff's claims for present and prospective damages and all of the defendant's mitigation defense. Thus, in Reichert v. General Ins. Co. of America, 442 P.2d 377 (Cal. 1968), the court stated:

[A]n entire claim arising either upon a contract or from a wrong cannot be divided and made the subject of several suits. In such a case it is no warrant for a second action that the party may not be able to actually prove in the first action all the items of the demand, or that all damages may not then have been actually suffered. He is bound to prove in the first action, not only such damage as has been actually suffered, but also such prospective damage by reason of the breach as he may be legally entitled to, for the judgment he recovers in such action will be a conclusive adjudication as to the total damage on account of the breach.

[Id. at 382].

The obligation of a tenant to mitigate prospective economic loss in the face of interference by the landlord with the business contemplated by the tenant's lease is entirely inconsistent with the Utah Supreme Court's holding in Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982). In Leigh Furniture, the Supreme Court specifically held that the jury could determine the tenant's prospective loss of business based on evidence at the time of trial of the landlord's interference with the tenant's business. In that case, the Supreme Court permitted the jury to assess prospective economic loss with respect to unidentified customers on the basis of projections concerning the effect of the landlord's interference on such unidentified persons.

In this case, the customer and the business prospects were concrete and specific and the effect on the subject transaction,

as demonstrated to the jury, and the amount of damages accruing from the interference could be specifically and mathematically calculated. That specific mathematical calculation made by Medical Leasing's accounting expert, Merrill Norman, was embraced by the jury on the grounds that the lease opportunity had been destroyed and would not in all probability reappear during a period of time that the lease term would sustain a viable business enterprise. The Middletons elected not to counter that evidence, but to rely solely upon their strategic decision to resist liability and avoid the issue of prospective damage.

Numerous other authorities recognize the right of a tenant to recover future damages from a breaching landlord. See, e.g., Noble v. Tweedy, 203 P.2d 778 (Cal. App. 1949); Sagebrush Development, Inc. v. Moehrke, 604 P.2d 198, 204 (Wyo. 1979); Restatement (Second) of Property, §§ 7.1 and 10.2 (1977).

Even if, contrary to what is argued above, Reid could be applied to something other than an action by a landlord for rent, it would be inapplicable to the present case.

First, Reid and the cases it followed, respecting the same narrow context, all involved situations where the tenant had abandoned the property. The landlord was then left with the property and no hindrance to reletting it immediately. In this case, of course, Anthony Middleton actively sought to prevent Medical Leasing from developing the Property and was successful in doing so. In point of fact, Tony Middleton repeated and reasserted this "philosophical position" that his family had the right to

interfere and his prediction they would do so. Those threats have never been withdrawn. The Property could not be relet.

It is a well-settled principle of law that "losses are not regarded as avoidable if the defendant himself prevents the plaintiff from taking the steps necessary to avoid them," and the interfering party is precluded from asserting mitigation as an affirmative defense. Home Life Ins. Co. v. Clay, 773 P.2d 666, 674 (Kan. App. 1989); A. Corbin, Corbin on Contracts, § 1039 at 250-51 (1964). Similarly, when both parties to a contract are in equal positions to mitigate damages caused by one party's breach, the breaching party may not assert mitigation as an affirmative defense. Alexander v. Brown, 646 P.2d 692, 695 (Utah 1982); Angelos v. First Interstate Bank of Utah, 671 P.2d 772, 777-78 (Utah 1983).

Second, and even more importantly, Reid is not applicable because, as previously demonstrated, the undisputed evidence, including the evidence put forth by the Middletons, proved that Medical Leasing could not sublease the Property for development in the future.

3. The Jury Verdict Does Not Allow Medical Leasing a Double Recovery.

The Middletons repeat their argument in the court below that allowing Medical Leasing to recover damages for the remaining term of the Amended Ground Lease may result in a double recovery because Medical Leasing has the potential opportunity to sublease

the Property in the future. This argument ignores the evidence at trial and the jury's determination.

The undisputed evidence at the trial was that 1989 was right at the peak of a boom period for commercial real estate when financing was relatively easy to obtain [R. 5119-5122]. Mr. Schwendiman testified that the financing market started tightening by the spring of 1990 and became enormously restrictive by the winter of 1991 because of the savings and loan crisis and pressure from rating agencies and regulators on insurance companies to reduce the amount of their portfolios invested in mortgages. [Id.] Mr. Schwendiman testified that although financing developments on unsubordinated ground leases was very feasible during the time The Boyer Company was intending to develop the Property, thereafter such financing would be rejected for more conventional arrangements, especially in light of the substantially shrinking field of lenders. [R. 5100-5101, 5119-5122]. As previously stated, Mr. Schwendiman further opined that it would be five to seven years before financing was even remotely feasible and ten years before it would be likely that financing could be obtained for the development proposed by Boyer, at which time the project would no longer be feasible. Such a diminution of the remaining term of the Amended Ground Lease, even if a developer were still interested in the Property at that time, would leave an insufficient length of time to amortize that developer's loan so

the developer could realize an adequate return on his original investment.¹⁷ [R. 5145].

Although the Middletons now scream "double recovery," the Middletons presented not one word of testimony, in any way, to contradict that of Mr. Schwendiman concerning future development of the Property and there is no evidence in the record that the Property can be developed on a sublease during the remaining term of the Amended Ground Lease.

In fact, as already demonstrated, the Middletons, in an unsuccessful effort to try to prove that The Boyer Company would not have been able to finance the proposed development, called experts to testify that in view of the provisions of the Amended Ground Lease between Medical Leasing and the Middletons, Medical Leasing would never be able to sublease the Property because any prospective sublessee would not be able to obtain financing. Accordingly, although the jury rejected the argument that The Boyer Company could not finance the project at the time the threats were made, the evidence offered by the Middletons corroborated Medical Leasing's damage evidence as it applied to future periods. The Middletons' new unsupported contention that Medical Leasing may be able to make some productive use of the Property during the remaining term of the lease is pure speculation, is outside the record of this case and contrary to their own evidence.¹⁸

¹⁷ Consistent with the testimony of all experts at trial, no development would occur without complete and permanent withdrawal of any threats by the Landlord of the groundless litigation, something that was never accomplished, even at trial.

¹⁸ The closest the Middletons can come in their briefs to showing the Property can be developed is to throw out the obviously improper observation, de hors the record, that one of their attorneys supposedly saw a Christmas tree lot operating on the Property in December, 1992, after this appeal was filed.

Whether the Property can be developed during the remaining term of the ground lease was a determination the jury was required to make based upon the evidence. The issue is no different in principle from any other suit for future lost profits. In any such case, a jury is required to make a reasoned judgment in a necessarily uncertain area based upon reasonable estimates, opinions and projections. Medical Leasing presented the jury with three possible alternatives with respect to future development of the Property. The jury obviously believed the competent evidence that Medical Leasing would be unable to develop the Property under the sublease for the remainder of the lease term. There simply is no basis for overturning that decision.

The Middletons either had no rebuttal evidence on future development or made a calculated decision at trial not to attempt to challenge Medical Leasing's evidence that future development of the Property was not feasible.¹⁹ Having lost the case, the Middletons are simply scrambling to attempt to avoid the consequences of their decision or inability to put on any evidence on this issue. There is no evidence to support the Middletons' new position and it should be rejected.

In this regard, to eliminate any possibility of double recovery, Judge Rigtrup included in the judgment a provision which allows the Middletons to seek out future development for the Property and to ask the court for credit against the judgment for a share of profits, if any are even realized, from any such

¹⁹ If the Middletons had introduced evidence that Medical Leasing could sublease the Property for development in the future, it would have run counter to their evidence that no one, not even The Boyer Company, could have financed the proposed project, at a time when financing was relatively easy.

development. Although Medical Leasing does not believe that Judge Rigrup technically had the authority to include this provision in the judgment, Medical Leasing did not resist it nor has Medical Leasing appealed with respect thereto.

4. Medical Leasing's Damage Theory Was Fully Supported By the Evidence.

Finally, the Middletons contend that Medical Leasing's damage theory is fatally flawed because it was based upon the assumption that Medical Leasing would have received from Boyer the monthly rents provided in the first draft of the sublease Medical Leasing prepared and delivered to Boyer on February 3, 1989. The argument is that there was no basis for such an assumption because Boyer supposedly testified that after the Development Agreement expired on January 31, 1989 the parties talked about different terms for the agreement. Once again, this argument is not faithful to the record.

The Development Agreement, executed by The Boyer Company and Medical Leasing on June 14, 1988, expressly set forth the rental which Boyer would pay for the Property. There was no evidence below that after the Development Agreement expired and the parties continued their discussions towards execution of a sublease that the parties ever discussed lowering that rent or that Boyer ever objected to the amount of rent set forth in the draft of the sublease. The drafts of the sublease carried the same rental rate and that aspect was never a topic of discussion

or controversy. Although Boyer testified that at some unspecified time after February, 1989 the parties talked about "some scenarios that would have allowed the rent to change," [R. 4852] Boyer did not come close to testifying that there was any discussion prior to the litigation threats concerning changing the amount of rent.²⁰ Dr. Wong testified no one ever suggested to Medical Leasing the business terms of the transaction had to change. [R. 4885-4886]. In fact, Greg Gardner, the project manager for The Boyer Company, testified there was no discussion concerning changing the rent:

Q. Isn't it a fact that the only change that was talked about with respect to the rental provisions during the year, 1989, was the possible six-months' slippage in the lease dates? In other words, a six-month slippage from when The Boyer Company would have to start paying rent to Medical Leasing?

Mr. Frankenburg: Objection, he's leading.

The Court: Sustained.

Mr. Gurmankin: Let me ask it this way: Do you recall any demands proposed by The Boyer Company with respect to the rent other than some talk of slipping the lease dates back six months?

A. No.

[R. 4829].

In Penelko, Inc. v. John Price Associates, Inc., supra, the Utah Supreme Court recognized that a party is entitled to recover damages for lost profits if the jury is provided with a sufficient basis for estimating damages with reasonable certainty. In this

²⁰ It is interesting to note in this regard that not even Taylor expressed any concerns about the amount of rent in his March 14, 1989 letter.

regard, the court noted that although a jury is not allowed to speculate freely as to the amount of damages or lost profits:

The evidence, however, will be deemed sufficient to establish a basis for an award of damages for lost profits where the plaintiff has provided the best evidence available to him under the circumstances.

[642 P.2d at 1233]. See also Gould v. Mountain States Telephone & Telegraph Co., 309 P.2d 802, 805-06 (Utah 1957); GHK Associates v. Mayer Group, Inc., 274 Cal.Rptr. 168, 179 (Cal. App. 1990); Flagg v. Andrew Williams Stores, 273 P.2d 294 (Cal. App. 1954).

Medical Leasing provided the best evidence available concerning the amount of damages it suffered; that evidence was fully sufficient to support the jury's verdict.

H. THE JURY VERDICT THAT ANTHONY MIDDLETON TORTIOUSLY INTERFERED WITH MEDICAL LEASING'S PROSPECTIVE RELATIONSHIP WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The jury determined that Anthony Middleton willfully and maliciously interfered with Medical Leasing's prospective business relationship with The Boyer Company, with the dominant purpose to harm and/or immediately injure Medical Leasing, and awarded Medical Leasing compensatory and punitive damages. Anthony Middleton now claims that there is not sufficient evidence to support that finding and that he was privileged to interfere with the relationship. One more time, the Middletons fail to marshal the evidence supporting the jury's verdict.

1. Improper Purpose and Improper Means.

In Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 304 (Utah 1982), this court set forth the elements which a plaintiff must prove in order to recover for intentional interference with prospective economic relations, that is that the defendant intentionally interfered with the plaintiff's existing or potential economic relations for an improper purpose or by improper means causing injury to the plaintiff. See also St. Benedict's Dev. v. St. Benedict's Hospital, 811 P.2d 194, 197 (Utah 1991). It is respectfully submitted that in the present case, both of the alternative improper purpose or improper means requirements were met.

First, the requirement that a defendant act with an improper purpose is satisfied by showing that a defendant's predominant purpose was to injure the plaintiff. Leigh Furniture, 657 P.2d at 307. Although it is true, as Anthony Middleton argues, that there is evidence that one of his purposes was to obtain economic gain, that is not sufficient to constitute a defense to a claim of improper purpose under Leigh Furniture. In the first place, there is substantial evidence that while Anthony Middleton's interest was to obtain additional consideration, whether or not he got it, his first and primary goal was to make sure "those birds", as he referred to Medical Leasing in his diary, did not obtain a "handsome income" from the Property. In that regard, he issued the threats of litigation knowing (as Boyer had told him) that such threats would drive The Boyer Company off the project. Clearly,

he understood his actions had the substantial prospect of destroying The Boyer Company deal for all parties. It is also important to note that he acknowledged to Boyer the narrow window of opportunity for the development, which was closing, and that litigation would cause it to be lost. [R. 5628]. Anthony Middleton attentively monitored the death of Medical Leasing's transaction with The Boyer Company and, nevertheless persisted in his groundless threats. Even after he knew the Medical Leasing deal was destroyed, Anthony Middleton nevertheless refused to withdraw those threats. Thus, even though he knew he wasn't going to obtain any benefit, he acted to insure that Medical Leasing would not either. That evidence was consistent with the jury's finding that his dominant purpose was to injure Medical Leasing in accordance with the instruction regarding "improper purpose" [Jury Instruction No. 18, R. 1535] given by the court.

Furthermore, the clear evidence was that Anthony Middleton acted intentionally to interfere with Medical Leasing's contract in order to obtain an economic advantage to which he knew he was not entitled. In his diary note of August 6, 1989, Anthony Middleton recognized that the Middletons were not entitled to any compensation and that their consent was not necessary unless subordination was sought. When Anthony Middleton later made his litigation threats, he didn't even attempt to rely on any provision of the contract; he simply stated it was his "philosophical" belief that the Middletons were entitled to more money and that was enough. Anthony Middleton's threats which were intended to block development of the Property unless his demands were met constituted

nothing less than extortion. Whether or not an extortionist has monetary gain as a predominant goal, that certainly cannot be said to be a "proper purpose."

But whether or not the improper purpose prong of the Leigh Furniture test was met, the alternative improper means requirement was clearly satisfied. The improper means requirement is met by a showing of such things as threats, intimidation, deceit or misrepresentation, unfounded litigation, or violations of "an established standard of a trade or profession." Leigh Furniture, 657 P.2d at 308; St. Benedict's Dev., 811 P.2d at 198. For example, in Leigh Furniture, this court found that the defendant's actions in forcing defendant to defend two groundless lawsuits constituted improper means. The court also opined that although a deliberate breach of contract is not by itself an "improper means" that where a deliberate breach of contract is coupled with an immediate purpose to inflict injury, even though that purpose does not predominate over a legitimate economic end, the combination is sufficient to constitute an improper means. As demonstrated above, in the case at bar, the evidence persuasively demonstrated that the threats of groundless litigation were intended to and did destroy the proposed sublease with The Boyer Company.

Anthony Middleton does not seriously argue that the threats were not made, but instead urges this court to adopt a rule that threats of litigation, regardless of how groundless and malicious, and despite the fact that they are issued with predominant purpose to injure and/or cause immediate harm, can never be sufficient for

an interference with prospective business relationship claim. The Middletons contend that only actual litigation which is terminated favorably and is determined to have been malicious should be a sufficient basis for such a claim. In this regard, Anthony Middleton urges the Court that it would be "repugnant to public policy to discourage potential litigants from stating their positions and alleged rights before resorting to the courts." [Williams & Hunt Brief, p. 46].

The argument that no limitation should be placed upon malicious threats of groundless litigation that can be thrown around in order to gain advantage in negotiations is fatuous. There is just no reasoned basis for arguing that it is against public policy to discourage people from destroying the business expectancies of others in order to obtain personal advantage by making malicious threats of litigation which are not only groundless, but known to be groundless. As was graphically demonstrated at trial, the issuance of a threat of litigation by a Landlord in the context of development and financing is an act that can itself destroy a business transaction. As Henry Schwendiman testified in the present case, the threat of litigation has an extremely chilling effect on real estate development and is one of the worst things with which a developer can be confronted. To allow individuals to maliciously threaten groundless litigation with impunity invites and encourages exactly the type of malicious "I have nothing to lose" attitude exhibited by Anthony Middleton in this case.

The damage inflicted by Anthony Middleton was complete when he made his threats. He did not have to follow through on those threats by actually filing suit. Thus, Medical Leasing had no opportunity to obtain a favorable ruling terminating the threatened litigation. That does not mean that Anthony Middleton's right to resort to the courts was unprotected. The protection, of course, which Anthony Middleton was given in this case is that he was only held liable for intentional interference with prospective business relationships after it was first determined that he intentionally and maliciously made threats of groundless litigation which he knew were groundless for the purpose of sabotaging the transaction unless his demands were met.

Pacific Gas & Electric Co. v. Bear Stearns & Co., 791 P.2d 587 (Cal. 1990), relied upon so heavily by the Middletons, is clearly distinguishable from the case at bar because in Pacific Gas the issue before the court was whether liability could be imposed for inducing "a potentially meritorious lawsuit." In the present case, the litigation threatened by Anthony Middleton was not "potentially meritorious"; it was known by him to be groundless. In addition, in Pacific Gas, the lawsuit which was induced by the defendant had actually been filed and was still pending.

The other case cited by the Middletons, Blake v. Levy, 464 A.2d 52 (Conn. 1983), is likewise distinguishable. In Blake, the prior litigation had been terminated in a good faith negotiated settlement. The court held that because it is the policy of the law to favor settlements, a party to a settlement ought not to be able to turn around and sue the other party either for malicious

prosecution or interference with prospective business relationships for bringing the lawsuit that was settled.

Other courts have held that a party seeking recovery from interference with prospective business relationships on the basis of prior unfounded litigation is not required to allege favorable termination of that litigation. See, e.g., Erlandson v. Pullen, 608 P.2d 1169, 1172 (Or. App. 1980); Herbert Products, Inc. v. Oxy-Dry Sprayer Corp., 145 N.Y.S.2d 168 (N.Y. 1955). The view adopted by these cases is even more compelling when it is the wrongful threat of litigation which inflicted the damage and constitutes the gravamen of the claim.

2. Privilege.

Finally, Anthony Middleton insists that he was privileged to interfere with Medical Leasing's business relationship, relying upon Bunnell v. Bills, 368 P.2d 597 (Utah 1962). This contention is frivolous. This court in Bunnell recognized that where a person has a legal right to perform an act he is not liable because that act induces a breach of contract and cited Prosser for the proposition that if a defendant has a present economic interest to protect, he is privileged to prevent performance which threatens that interest. It is pure fantasy to argue that Anthony Middleton had a legitimate economic interest to protect in the case at bar. If anything was made clear to the jury by the evidence, including Anthony Middleton's own testimony, it was that Medical Leasing had every right to do what it was doing and that the Middletons had no

right to interfere. In fact, Anthony Middleton had no economic interest in the development of the Property by The Boyer Company and the development of the Property by The Boyer Company did not threaten, in any respect, the only economic interest which he had - the right to be paid the rent specified in the Amended Ground Lease with Medical Leasing. See Bank of Utah v. Commercial Security Bank, 369 F.2d 19, 28-29 (10th Cir. 1966).

Bergfeld v. Stork, 288 N.E.2d 15 (Ill. App. 1972), relied upon by the Middletons, is also not close to the point. In that case, the plaintiffs leased certain premises from the defendant upon which they operated a business. They agreed to sell that business to a Mr. Steik. At a time shortly before their lease term was expiring, Steik, seeking suitable quarters for the business, then entered into a new agreement to lease the premises from the defendant, but the defendant attempted to renege on the new lease agreement which was independent of plaintiff's and agreed to lease the same property to another company. Because of the attempted revocation by defendant, Steik cancelled his contract with plaintiffs and refused to complete it. The court simply found no allegations that defendant intentionally interfered with the contract between plaintiffs and Steik or that defendant acted maliciously against plaintiffs. The court noted that the defendant's interest in the new lease agreement with Steik was for his own benefit and his attempt to revoke it to enter into a more profitable lease at a higher rent was not inconsistent with a good faith purpose and that the attempted revocation did not cancel the lease between defendant and Steik nor did it cancel the contract

between plaintiffs and Steik. The two elements found absent in Bergfeld, viz, intentional interference and malice, were specifically found present by the jury in this case.

Finally, Anthony Middleton's conduct could not have been privileged in any case because, as the jury found, that conduct the was willful and malicious.

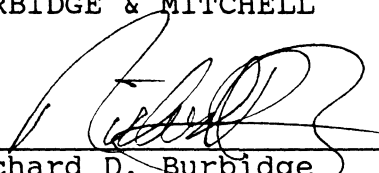
For all of the reasons stated above, there is no basis for overturning the jury's decision that Anthony Middleton interfered with Medical Leasing's prospective business relationship.


CONCLUSION


For all the reasons set forth above, it is respectfully submitted that the Judgment should be affirmed in all respects.

DATED this 5th day of March, 1993.

BURBIDGE & MITCHELL


Richard D. Burbidge


Stephen B. Mitchell


Jay D. Gurmankin

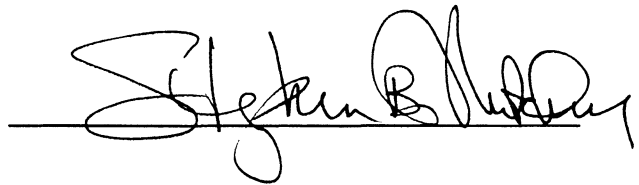
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed four
(4) copies of the within Brief to the following parties by
depositing the same in U.S. mails, postage prepaid, this 5th
day of March, 1993:

George A. Hunt, Esq.
Kurt M. Frankenburg, Esq.
WILLIAMS & HUNT
257 East 200 South, Suite 500
P.O. Box 45678
Salt Lake City, Utah 84145-5678

Joseph J. Palmer, Esq.
MOYLE & DRAPER
600 Deseret Plaza
No. 15 East First South
Salt Lake City, Utah 84111-1915

A handwritten signature in black ink, appearing to read "Stephen B. Draper", is written over a horizontal line.