

2005

# Lewiston State Bank v. Greenline Equipment, L.L.C. : Reply Brief

Utah Court of Appeals

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Cross-Appellant.

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LEWISTON STATE BANK, a Utah Bank	)	<b>REPLY BRIEF OF APPELLEE/ CROSS-APPELLANT</b>
Corporation,	)	
	)	
Plaintiff/Appellee/Cross-Appellant,	)	
	)	
vs.	)	
	)	
GREENLINE EQUIPMENT, L.L.C.,	)	
A Utah Limited Liability Company,	)	
JOHN DOES I-X AND JANE DOES I-X,	)	
	)	Appeal Case No. 20050689-SC
Defendants/Appellant.	)	
	)	

Appeal from a Final Summary Judgment of the  
First Judicial District Court  
Cache County, Utah  
The Honorable Judge Gordon J. Low Presiding  
(Trial Court Case No. 030101919)

Attorneys for Defendants/Appellant

Attorneys for Plaintiff/Appellee/  
Cross-Appellant

FILED  
UTAH APPELLATE COURT  
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**IN THE UTAH COURT OF APPEALS**

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LEWISTON STATE BANK, a Utah Bank Corporation,	)	<b>REPLY BRIEF OF APPELLEE/ CROSS-APPELLANT</b>
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Plaintiff/Appellee/Cross-Appellant,	)	
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**ARGUMENT**

**I. THE TRIAL COURT CORRECTLY RULED THAT LEWISTON STATE BANK’S PERFECTED SECURITY INTEREST IN THE COLLATERAL WAS SUPERIOR TO GREENLINE’S INTEREST, BUT SHOULD HAVE ALSO AWARDED ATTORNEY FEES AND COSTS.**

This case was originally brought by Lewiston State Bank seeking disgorgement of the sale proceeds wrongfully obtained, converted and retained by Greenline, and for reimbursement of all collection costs, including reasonable attorney fees, incurred by Lewiston State Bank while enforcing its priority lien rights in the collateral at issue.

The trial court appropriately ruled that because Greenline was not an “original creditor,” had never entered into an assignment agreement with New Holland (the

original Purchase Money Security Interest (PMSI) holder which, upon being paid off by Greenline, was asked to provide a lien release or Termination Statement to terminate the security interest), and there was no clear evidence of any intent to transfer the original PMSI status held by New Holland (the original creditor) to Greenline, the security interest obtained by Greenline was junior to the priority position of Lewiston State Bank. *See Memorandum Decision dated February 25, 2005, TR at pg. 289, Appellant's Addendum, pg. 11; See Affidavit of Melissa Braegger, para. 6, TR at pg. 236, Appellant's Addendum, pgs. 77-79; See Lien Release Request Letter, Appellant's Addendum, pg. 79.*

Greenline asserts that the enactment of Utah Code Ann. § 70A-9a-103(6)(c) resulted in a codification of the dual-status cases it has cited in support of its position on appeal. All of the cases cited by Greenline in support of its interpretation of the “refinance” provisions, however, involve either an **original creditor** or a **third-party assignee** that “refinances” an existing debt. If the enactment of the statute is indeed a codification of these cases, then it necessarily follows that a creditor asserting a priority position in a “refinance” transaction must either be the original creditor or an assignee of the original creditor, as was the case in each of these cases. The courts in these cases did not extend priority to a third-party creditor such as Greenline, who pays off and extinguishes an existing debt, nor did they involve the claimed continuation of a security interest for which a claimed “refinancer” had requested or obtained a lien release or Termination Statement, as is the situation in this case. *See Affidavit of Melissa Braegger,*

*para. 6, TR at pg. 236, Appellant's Addendum, pgs. 77-79; See Lien Release Request Letter, Appellant's Addendum, pg. 79.*

Greenline has failed to provide any cogent legal argument that the statutory changes were intended to override the well established rules regarding perfection of a security interest, and the continuation of the priority thereof by assignment, as set forth under the common law and the UCC provisions. Similarly, Greenline has not asserted or shown the existence of any evidence of intent, on the part of New Holland, as the original PMSI holder, to accomplish the assignment and transfer of such interest and its priority to Greenline. Instead, Greenline acknowledges its "pay off" of the New Holland PMSI notes and its request that New Holland provide Greenline with a "lien release" for the PMSI security interest, rather than an assignment of it. *See Affidavit of Melissa Braegger, para. 6, TR at pg. 236, Appellant's Addendum, pgs. 77-79; See Lien Release Request Letter, Appellant's Addendum, pg. 79.*

For all the reasons set forth in the Briefs of Appellee/Cross-Appellant, and in the trial court's Memorandum Decisions, the trial court ruled appropriately in the instant matter that Utah Code Ann. § 70A-9a-103(6)(c) does not provide a purchase money security interest ("PMSI") to Greenline. This is so because Greenline is a third-party creditor who paid off and extinguished the original debt to New Holland, requesting the release and termination of such interest, rather than obtaining an assignment of the original creditor's interest in the collateral.



Based upon its ruling, the trial court appropriately awarded damages to Lewiston State Bank against Greenline in the amount of \$78,000.00 (the net sales proceeds of this collateral) with interest at 10% per annum, but erroneously refused to award attorney fees and collection costs to Lewiston State Bank. *See Memorandum Decision dated June 29, 2005, TR at pg. 327, Appellant's Addendum, pg. 20.*

As set forth previously in its Brief of Appellee/Cross-Appellant and before the trial court in its Memorandum in Support of Plaintiff's Motion for Summary Judgment Re: Damages, Lewiston State Bank asserts that "reimbursement of attorney fees and costs is also supported as an element of consequential damages for Defendant's conversion as it was reasonably foreseeable that Plaintiff would incur such fees and costs in being forced to enforce its priority lien rights to disgorge the sale proceeds from Defendant. *See Heslop v. Bank of Utah*, 839 P.2d 828 (Utah 1992); *See also Canyon Country Store v. Bracey*, 781 P.2d 414 (Utah 1989)." *See Memorandum in Support, TR at pg. 305.*

Lewiston State Bank was entitled to a ruling from the trial court as to whether its claims were valid under the *Heslop* and *Canyon Country Store* cases; however, the trial court utterly failed to consider this argument for attorney fees and costs in its Memorandum Decision. *See Memorandum Decision dated June 29, 2005, TR at pg. 327, Appellant's Addendum, pg. 20.* Greenline also never responded or objected to Lewiston State Bank's claim for attorney fees and costs under an analysis of either the *Heslop* or

*Canyon Country Store* cases before the trial court, and raises its objections now for the first time on appeal.

The sequence of events in this matter is critical to Lewiston State Bank's claim for an award of attorney fees and costs. The events have been outlined and briefed previously by the parties in support of their respective summary judgment pleadings submitted to the trial court and their respective briefs on appeal. However, the following brief summary herein should prove helpful to the Court's disposition of Greenline's contentions, as well as in giving proper consideration to the Bank's claimed entitlement to attorney fees and costs.

1. February 22, 2000...Pali Brothers Farms, a Utah "DBA," for value received, executed a promissory note and security agreement in favor of Lewiston State Bank describing the collateral at issue herein (Loan 1 - \$300,750.00). *See Affidavit of Anthony Jon Hall, para. 3, TR at pg. 61.* Such collateral had also been the subject of two UCC Financing Statements filed by New Holland in March and November of 1998, which are the PMSI interests.

2. February 25, 2000...Lewiston State Bank files/records the UCC Financing Statement covering the collateral. *See Affidavit of Anthony Jon Hall, para. 5, TR at pg. 62.*

3. February 26, 2001...Pali Brothers Farms, a Utah "DBA," for value received, executed a promissory note and security agreement in favor of Lewiston State Bank, also secured by the collateral (Loan 2 - \$275,687.50). *See Affidavit of Anthony Jon Hall, para.*

6, *TR at pgs. 62-63.*

4. May 8, 2001...Lewiston State Bank files/records the second UCC Financing Statement covering the collateral. *See Affidavit of Anthony Jon Hall, para. 8, TR at pg. 63.*

5. January 14, 2002...Greenline sends the pay-off to New Holland, extinguishing the PMSI debt, and requesting a “lien release” from New Holland with respect to such security interests. *See Affidavit of Melissa Braegger, para. 6, TR at pg. 236, Appellant’s Addendum, pgs. 77-79; See Lien Release Request Letter, Appellant’s Addendum, pg. 79.*

6. February 21, 2002...Eli M. Pali and Bart Pali (***NOT Pali Brothers Farms***) sign a Security Agreement regarding the collateral, naming John Deere & Company as the Secured Party therein. *See Appellant’s Addendum, pgs. 47-51.*

7. March 6, 2002...John Deere & Company files/records a UCC Financing Statement covering the collateral. *See Affidavit of Anthony Jon Hall, para. 9, TR at pgs. 63-64.*

8. March 25, 2002...Greenline contacts Lewiston State Bank requesting a release and/or subordination of the Bank’s interest in the collateral, which is declined as the Pali Brothers have been struggling to make payments on Loan 1 and Loan 2 to Lewiston State Bank. *See Affidavit of Anthony Jon Hall, para. 15, TR at pg. 65.*

9. **April 29, 2002...Greenline sells additional equipment to the Pali Brothers increasing their debt by an additional \$451,350.00. *See Appellant’s***

***Addendum, pgs. 35-41.***

10. Pali Brothers Farms subsequently default on their payments to Lewiston State Bank on both Loan 1 and Loan 2 and remain in default on both loans to this date. *See Affidavit of Anthony Jon Hall, para.10, TR at pg. 64.*

11. March 24, 2003... US Auction conducted an auction in Honeyville, Utah, in which the two combines and related equipment accessories at issue herein were a part of the collateral to be auctioned, but were instead pulled from the auction by John Deere Credit. *See Affidavit of Anthony Jon Hall, para. 11, TR at pg. 64.*

12. April 3, 2003...Lewiston State Bank sends a demand letter to John Deere Credit regarding the two combines and placed John Deere Credit on notice of the Bank's superior lien position regarding the combines as part of the Bank's collateral. *See Affidavit of Anthony Jon Hall, para.12, TR at pgs. 63-64.*

13. April 16, 2003...Mr. Randy Church, a representative of John Deere Credit contacted Lewiston State Bank regarding the Bank's priority secured position in the collateral, and acknowledged that Lewiston State Bank's priority secured position was superior to that of John Deere Credit. However, Mr. Randy Church further informed Lewiston State Bank that John Deere Credit would assign its interest in the collateral to Greenline. *See Affidavit of Anthony Jon Hall, para. 13, TR at pg. 65.*

14. April 17, 2003...Mr. Ronald E. Mumford, Esq. sends a demand letter on behalf of the Bank to Greenline regarding the combines, again placing Greenline on notice

of the Bank's superior lien position regarding the combines as part of the Bank's collateral, and demanding payment, or to make such collateral available for repossession and sale by the Bank. *See Affidavit of Anthony Jon Hall, para. 14, TR at pg. 65.*

15. August 4, 2004...Greenline, only after the litigation had been initiated, finally discloses the whereabouts of the collateral which it had sold to a third-party, without notice to the Bank, as described in the Second Affidavit of Jay Pickrel, despite Lewiston State Bank's numerous prior requests, and the Bank's recorded interest in the collateral. *See Second Affidavit of Jay Pickrel, TR at pg. 139, Appellant's Addendum, pgs. 58-62.*

The forgoing timeline is important because it establishes that Greenline was clearly on notice of Lewiston State Bank's interest in the collateral, yet consciously chose to act contrary to and in violation of Lewiston State Bank's first place perfected security interest, as the trial court properly determined. Greenline chose to ignore Lewiston State Bank's written notice and recorded interest in the collateral, and further failed to act in a commercially reasonable manner, as required by Article 9 of the UCC, when it sold the collateral without notice to the Bank, so as to preclude the Bank's timely intervention.

Accordingly, the trial court correctly ruled that "whatever Defendant did with respect to the collateral, it did so in violation of the Plaintiff's first place perfected security interest." *See Order Granting Summary Judgment to Plaintiff, TR at pg. 300, Appellant's Addendum, pg. 19.* Greenline's actions while on notice of Lewiston State Bank's interest in the collateral necessarily makes the imposition of attorney fees and

costs “foreseeable” and appropriate under the reasoning of the *Heslop* and *Canyon Country Store* cases.

Additionally, the third party tort rule confirmed in *South Sanpitch Company v. Pack*, 765 P.2d 1279, 1282 (Utah Ct. App. 1988), allowing the award of attorney fees and costs as a foreseeable and natural consequence of a defendant’s tortious activity, has similar application to this case. Greenline failed to assert any contrary legal argument regarding the application of this case in its Reply Brief. The present action is a tort action involving the conversion of the collateral and sales proceeds by Greenline. This litigation, which has resulted in significant attorney fees and costs to Lewiston State Bank, was the “natural consequence” of Greenline’s tortious actions in failing to turn over the collateral as requested, and instead converting the collateral by sale and retention of the sale proceeds, knowing of the Bank’s prior perfected position.

Based upon the forgoing, the trial court committed error and should have considered these arguments and should have awarded reasonable attorney fees and collection costs to Lewiston State Bank. *See Heslop v. Bank of Utah*, 839 P.2d 828 (Utah 1992); *See also Canyon Country Store v. Bracey*, 781 P.2d 414 (Utah 1989); *See also South Sanpitch Company v. Pack*, 765 P.2d 1279, 1282 (Utah Ct. App. 1988). On that same basis, Lewiston State Bank respectfully requests an award of its attorney fees and costs on appeal.

## **CONCLUSION**

For the reasons heretofore stated, the trial court's judgment should be affirmed as to its determination that Greenline was not entitled to purchase money priority status under Utah Code Ann. § 70A-9a-103(6)(c), and confirming the monetary award of damages plus interest against Greenline. The trial court's judgment regarding its decision not to award of attorney fees and costs to Lewiston State Bank at trial should be reversed as it should be awarded its attorney fees and costs at trial and as incurred on appeal or, in the alternative, the issue of attorney fees and costs should be remanded to the trial court for full consideration of the arguments set forth herein.

**DATED** this 10 day of March, 2006.

HILLYARD, ANDERSON & OLSEN, P.C.

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BRIAN G. CANNELL

Attorney for Appellee/Cross-Appellant

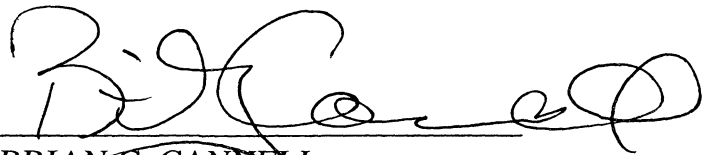
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## CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing REPLY  
BRIEF OF APPELLEE/CROSS-APPELLANT were mailed, postpaid, to the following  
this 10 day of March, 2006:

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A handwritten signature in black ink, appearing to read "B. G. Cannell", written over a horizontal line.

BRIAN G. CANNELL  
Attorney at Law

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(original signature)