

2005

Lewiston State Bank v. Greenline Equipment : Brief of Appellee

Utah Court of Appeals

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LEWISTON STATE BANK, a Utah Bank)	BRIEF OF APPELLEE/ CROSS-APPELLANT
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 Plaintiff/Appellee/
Cross-Appellant

JAN 2

LEWISTON STATE BANK, a Utah Bank Corporation,)	BRIEF OF APPELLEE/ CROSS-APPELLANT
)	
Plaintiff/Appellee/Cross-Appellant,)	
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vs.)	
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GREENLINE EQUIPMENT, L.L.C., A Utah Limited Liability Company, JOHN DOES I-X AND JANE DOES I-X,)	
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Attorneys for Defendants/Appellant

Attorneys for Plaintiff/Appellee/
Cross-Appellant

LIST OF ALL PARTIES IN THE DISTRICT COURT

The following parties and attorneys appeared in the proceeding in the trial court:

1. Lewiston State Bank, a Utah banking corporation, Plaintiff/Appellee/Cross-Appellant, was represented by Brian G. Cannell of Hillyard, Anderson & Olsen, P.C.
2. Greenline Equipment, LLC, a Utah limited liability company, was represented by Dennis L. Mangrum and R. Collin Mangrum.
3. John Does I-X and Jane Does I-X were not identified or represented in the trial court proceedings.

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IN THE UTAH COURT OF APPEALS

LEWISTON STATE BANK, a Utah Bank)	BRIEF OF APPELLEE/
Corporation,)	CROSS-APPELLANT
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Plaintiff/Appellee/Cross-Appellant,)	
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vs.)	
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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.)	
)	

JURISDICTION

The Utah Supreme Court has original jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2(3)(j) and Rules 3 and 4 of the Utah Rules of Appellate Procedure. This matter was transferred to the Utah Court of Appeals pursuant to Utah Code Ann. § 78-2-2(4) and § 78-2a-3(2)(j).

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court properly granted summary judgment to Lewiston State Bank ruling that Greenline's security interest in the collateral at issue was junior to the priority secured position of Lewiston State Bank as a matter of law?
2. Whether Greenline should be precluded from raising policy justifications of fairness and efficiency in favor of extending purchase money priority status to its position with the

collateral for the first time on appeal when such issues were not properly presented first to the trial court?

3. Whether Greenline has failed to “marshal the evidence” supporting the trial court’s conclusion that its subsequent financing transaction was not a “refinance” as contemplated by Utah Code Ann. § 70A-9a-103(6)(c)?

4. Whether the trial court committed error by failing to award attorney fees and costs to Lewiston State Bank as an element of consequential damages resulting from Greenline’s conversion of the collateral as it was reasonably foreseeable that Lewiston State Bank would incur such fees and costs in being forced to enforce its priority lien rights to disgorge the sale proceeds from Greenline?

PRESERVATION OF ISSUES IN THE TRIAL COURT

The priority of Lewiston State Bank’s secured position in the collateral at issue and its entitlement to prejudgment interest, reasonable attorney fees and costs as consequential damages incurred while enforcing its lien rights were argued both by Memorandum and during the oral arguments at the hearings on summary judgment. Lewiston State Bank filed two separate motions for summary judgment and supported its legal positions by submitting various affidavit testimony and exhibits. *See TR at pgs. 59-68; 126; 187-211; 303-309; and 319.*

APPLICABLE STANDARD OF REVIEW

The Utah Supreme Court has set forth the standard of review of a summary judgment as follows:

Inasmuch as a challenge to summary judgment presents for review conclusions of law only, because, by definition, summary judgments do not resolve factual issues, this court reviews those conclusions for correctness, without according deference to the trial court’s

legal conclusions. *See Bonham v. Morgan*, 788 P.2d 497, 499 (Utah 1989)(citing *Madsen v. Borthick*, 769 P.2d 245 (Utah 1988)).

In reviewing the trial court's grant of summary judgment, this court views the facts in the light most favorable to the non-moving party. *See Schnuphase v. Storehouse Markets*, 918 P.2d 476, 477 (Utah 1996).

DETERMINATIVE PROVISIONS

Utah Code Ann. § 70A-9a-103(6)(c) provides as follows:

(6) In a transaction other than a consumer-goods transaction, a purchase money security interest does not lose its status as such, even if:

(c) the purchase-money obligation has been renewed, refinanced, consolidated, or restructured.

STATEMENT OF THE CASE

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

The trial court ruled that because Greenline was not an “original creditor,” had never entered into an assignment agreement with New Holland (the PMSI holder), and there was no clear evidence of any intent to transfer the original PMSI status held by New Holland 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.* Greenline is challenging these rulings on appeal.

The trial court awarded damages against Greenline in the amount of \$78,000.00 with interest at 10% per annum pursuant to Utah Code Ann. § 15-1-1(2)(2005), but refused to award

attorney fees and costs to Lewiston State Bank. *See Memorandum Decision dated June 29, 2005, TR at pg. 327, Appellant's Addendum, pg. 20.* Lewiston State Bank is challenging the trial court's ruling on attorney fees and costs on cross-appeal.

This appeal is from an Order Granting Summary Judgment to Plaintiff by the Honorable Gordon J. Low, District Court Judge, dated on or about March 16, 2005, and underlying Memorandum Decision dated February 25, 2005. This cross-appeal is from an Order Granting Summary Judgment to Plaintiff Re: Damages by the Honorable Gordon J. Low, District Court Judge, dated on or about July 28, 2005, and underlying Memorandum Decision dated June 29, 2005.

STATEMENT OF ADDITIONAL RELEVANT FACTS

The following facts provide a summary background for the relief sought by Lewiston State Bank as the Appellee/Cross-Appellant on appeal:

1. Greenline knew of Lewiston State Bank's priority claims as early as March 25, 2002, when "Mr. Jay Pickrell and Mr. Mike Phillips, representatives of Defendant Greenline, contacted Plaintiff to determine whether Plaintiff was willing to give up its priority secured position in the Collateral and Plaintiff responded that it was going to retain its secured positions." *See Affidavit of Anthony Jon Hall, para. 15, filed in support of Plaintiff's original Motion for Summary Judgment, TR at pg. 61.*

2. "That on or about April 17, 2003, Mr. Ronald E. Mumford sent a demand letter to Defendant Greenline regarding the combines, again placing said Defendant on notice of its superior lien position regarding the combines as being part of the Collateral, and made demand for payment or to make such Collateral available for repossession and sale by Plaintiff." A copy of

this letter is attached to Plaintiff's Complaint as Exhibit "H" and is incorporated by this reference.

See Affidavit of Anthony Jon Hall, para. 14, filed in support of Plaintiff's original Motion for Summary Judgment, TR at pg. 61.

3. That despite the verbal and written demands upon Greenline, the sale of the collateral to third parties was only finally disclosed in the Second Affidavit of Jay Pickrell, which is the only notice Lewiston State Bank has received regarding the status and whereabouts of the collateral and ultimate sale, which occurred without notice to Lewiston State Bank despite various requests for such information. *See Affidavit of Ronald E. Mumford, para. 12, filed in support of Plaintiff's original Motion for Summary Judgment, TR at pg. 199.*

SUMMARY OF ARGUMENTS

1. Utah Code Ann. § 70A-9a-103(6)(c) does not provide Greenline (a third party creditor and not an original creditor or an assignee of the original creditor) with a purchase money security interest ("PMSI") when it paid off the original creditor and extinguished the existing PMSI and failed to take an assignment of the original creditor's interest in the collateral at issue.

2. Greenline should not be allowed to argue for the first time on appeal whether the trial court should have relied on policy justifications of fairness and equity to extend purchase money priority status to its position with the collateral for the first time on appeal when such issues were not presented first to the trial court. Greenline failed to preserve this issue on appeal.

3. Greenline has failed to "marshal the evidence" supporting the trial court's conclusion that its subsequent financing transaction was not a "refinance" that was entitled to

purchase money priority under Utah Code Ann. § 70A-9a-103(6)(c), which necessarily includes the “extremely fact-sensitive” application of the legal standard contained therein.

4. The trial court should have awarded Lewiston State Bank its reasonable attorney fees and costs incurred against Greenline as consequential damages resulting from its conversion of the collateral and sales proceeds as it was reasonably foreseeable that Lewiston State Bank would incur such attorney fees and costs in being forced to enforce its priority lien rights to disgorge the sale proceeds from Greenline and as Lewiston State Bank gave notice it would do so. Lewiston State Bank should likewise be awarded its attorney’s fees and costs incurred on appeal as a measure of consequential damages against Greenline.

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT UTAH CODE ANN. §70A-9a-103(6)(c) DOES NOT PROVIDE A PURCHASE MONEY SECURITY INTEREST (“PMSI”) TO A THIRD PARTY CREDITOR ABSENT AN ASSIGNMENT OF THE ORIGINAL CREDITOR’S INTEREST.

In the Brief of Appellant, Greenline asserts that the issue of whether Utah Code Ann. § 70A-9a-103(6)(c) provides purchase money security priority to a third party creditor who “refinances” a purchase money security interest without taking an assignment of the original creditor’s interest presents an issue of first impression of law in the State of Utah. As indicated below, however, there are no cases or statutory authority cited by Appellant throughout the entire United States that supports Greenline’s position.

As it did during the trial court proceedings, Greenline continues to erroneously rely upon a series of cases rejecting the “transformation theory” and confirming the “dual status theory” in support of its position that the New Holland (original creditor) priority purchase money security

interest (“PMSI”) established on March 5, 1998, somehow survived the admitted purchase of the equipment by Greenline and pay off of the original New Holland debt with subsequent financing by John Deere Credit. Each of the cases cited by Greenline in the Brief of Appellant either includes a “refinance” by the original creditor holding a PMSI or a “refinance” by a subsequent creditor holding a perfected assignment of the PMSI from the original creditor to maintain its priority. Greenline is **NOT** an original creditor holding a PMSI and is **NOT** a subsequent creditor holding a perfected assignment of a PMSI from an original creditor.

In the Tenth Circuit case *In re Billings v. Avco Colorado Industrial Bank*, 838 F.2d 405 (10th Cir. 1988), the debtor (not an intervening secured party) attempted to invalidate the creditor’s PMSI despite the fact that such creditor provided “refinancing of a purchase money loan, by which the old note and security agreement were cancelled and replaced by a new note and security agreement” upon the same collateral and “the back of the loan application stated that creditor would retain the purchase money interest.” *See In re Billings at 406.*

In re Billings is easily distinguished as Greenline is not the original creditor that established a PMSI and never received an assignment of the New Holland PMSI nor perfected the same. Further, there are no documents which support the parties’ intent to retain the New Holland PMSI status such as the loan application cited in *Billings*. *Id.*

In the United States Bankruptcy Court case *In re Krueger*, 172 B.R. 572, 574 (N.D. Ohio 1994), the debtor attempted to invalidate the secured position of the original creditor holding the PMSI which refinanced the debt. The Court found that “there was no evidence that refinancing represented payment, satisfaction or discharge of loan...and refinancing was specifically contemplated creditor’s retention of the security interest.”

The facts of *In re Krueger* are distinguishable from the present matter as Greenline has admitted in its pleadings and affidavits that it purchased the two combines from the Pali Brothers for the delinquent outstanding balance owed to New Holland, which clearly satisfied and discharged the original New Holland debt. *See payoff documents, Appellant's Addendum, pgs. 45-46.* As stated previously, Greenline is not the original creditor that established a PMSI, never received an assignment of the New Holland PMSI nor perfected the same, and there are no documents which support the parties' intent to retain the New Holland PMSI status.

In the United States Bankruptcy Court case *In re Short*, 170 B.R. 128 (S.D.Ill. 1994), the debtor attempted to invalidate the secured position of the original creditor holding the PMSI which refinanced the debt. The Court found that the security interest survived due to the intent of the parties with a finding under Illinois law that a financing agency obtains a purchase money security interest when it advances money and takes back an assignment. This cited case also refers to the "transformation rule" and "dual status rule" which do not have any application to the present matter as Greenline is not the original creditor that established a PMSI, never received an assignment of the New Holland PMSI nor perfected the same, and there are no documents which support the intent of the parties to retain the New Holland PMSI status.

In the United States Bankruptcy Court case *In re Hill*, 226 B.R. 284 (10th Cir. 1998), the debtor again attempted to invalidate the secured position of the subsequent creditor holding a perfected assignment of the PMSI that had refinanced the debt. This case is distinguishable as Greenline never received an assignment of the New Holland PMSI nor perfected the same.

The case *In re Schwartz*, 52 B.R. 314, 315 (E.D.Pa. 1985) clearly establishes that an "assignee" of the PMSI may later refinance the debt and maintain its PMSI status. Again, this case

is distinguishable as Greenline never received an assignment of the New Holland PMSI necessary to preserve the PMSI status.

These cases are all clearly distinguishable from the present matter where there was no “refinance” by the original creditor holding a PMSI nor an assignment of a PMSI to any subsequent creditor. Without an assignment of the New Holland PMSI to Greenline, such PMSI was extinguished by Greenline’s subsequent admitted purchase and pay-off of the original debt. Greenline has failed to meet its burden of proving that it holds a PMSI under Utah Code Ann. § 70A-9a-103(7).

Greenline further errantly relies on the OFFICIAL COMMENT to the Uniform Commercial Code § 9-103 citing circumstances of a debt being “renewed, refinanced, and restructured” as if it is applicable to its purchase of the collateral from the Pali Brothers and subsequent financing through John Deere Credit. While rejecting the “transformation rule,” the OFFICIAL COMMENT in paragraph 7 gives the specific example of the debt being refinanced by the “original lender.” Greenline and/or John Deere Credit are not the “original lender” in the transaction at issue, so the reference to the OFFICIAL COMMENT has no application to Greenline’s priority claims.

It should be further noted here that the subsequent financing transaction that Greenline claims was a “refinance” was extended to Eli M. Pali and Bart P. Pali individually and was **NOT** extended to Pali Brothers as was the original debt to New Holland, resulting in a new creditor and new debtors, which begs the question whether the transaction at issue can be properly considered a “refinance” in the first place. *See UCC filing detail and Security Agreement, Appellant’s Addendum, pgs. 34, 43, 47-51.*

There is no question that if New Holland as the original creditor had refinanced the debt with new loan documents that referred to the parties' intentions to maintain its original PMSI status, or had assigned its interest in the collateral to Greenline, Lewiston State Bank's security interest would be subordinate thereto. The evidence is clear, however, that such never occurred in this matter and that New Holland never assigned its PMSI status. New Holland was merely paid the debt it was owed, which extinguished the debt and the PMSI. Greenline has significantly confused this issue by characterizing its subsequent purchase and new financing through John Deere Credit as a "refinance."

Accordingly, 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 creditor and PMSI holder), and there was no clear evidence of any intent to transfer the original PMSI status held by New Holland 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. 8.*

II. GREENLINE FAILED TO PRESERVE ITS CLAIMS THAT THE TRIAL COURT SHOULD HAVE RELIED ON POLICY JUSTIFICATIONS OF FAIRNESS AND EQUITY.

Greenline's Brief of Appellant fails to adequately cite the trial record as required by Rule 24(e) of the Utah Rules of Appellate Procedure, making it difficult to determine where Greenline preserved the issues it argues on appeal. An issue is preserved for appeal when a party timely brings the issue to the attention of the trial court, thus providing the court with an opportunity to rule on the merits. The Court of Appeals cannot consider issues raised for the first time on

appeal absent plain error or exceptional circumstances. *See York v. Shulsen*, 875 P.2d 590, 594 (Utah Ct. App. 1994).

Based upon review of the trial record, it appears that Greenline failed to present the policy justification arguments to the trial court. *See Brief of Appellant*, pg. 31 – 39. Greenline should not be allowed to argue for the first time on appeal that the trial court should have relied on policy justifications of fairness and equity to extend purchase money priority status to its position with the collateral when such issues were not presented first to the trial court. Greenline failed to preserve these issues on appeal and is now precluded from making such arguments. *Id.*

Furthermore, to the extent that public policy considerations are properly before this Court, if the Utah Court of Appeals were to adopt Greenline's position it would reverse a significant component of the UCC's "first to file" rules that provide certainty as to the priority rights of intervening lien holders in the credit industry and would likewise nullify the UCC's "assignment" provisions altogether. The technical rules of the UCC must be followed just as the strict provisions of the Utah real property recording statute. The credit industry demands reliance upon the provisions of the UCC, otherwise chaos in the banking and lending industry would result where any unrelated third-party could supersede a bona-fide secured priority interest by paying minimal value and ignoring the assignment and filing requirements of the UCC. A lender could never rely on the UCC filings to determine lien priority prior to extending a loan. There has been absolutely no evidence submitted by Greenline that its position and chaotic result is supported by the legislative intent when Utah Code Ann. § 70A-9a-103(6)(c) was adopted.

III. GREENLINE FAILED TO “MARSHAL THE EVIDENCE” SUPPORTING THE TRIAL COURT’S DETERMINATION THAT ITS FINANCING TRANSACTION WAS NOT A “REFINANCE” ENTITLED TO PURCHASE MONEY PRIORITY UNDER UTAH CODE ANN. § 70A-9a-103(6)(c).

Greenline has failed to “marshal the evidence” supporting the trial court’s conclusion that its subsequent financing transaction was not a “refinance” entitled to purchase money priority under Utah Code Ann. § 70A-9a-103(6)(c). Such finding by the trial court and application of the legal standard at issue was “extremely fact-sensitive” as evidenced by the trial court’s Memorandum Decision dated February 25, 2005. *See Memorandum Decision dated February 25, 2005, TR at pg. 289, Appellant’s Addendum, pg. 11.*

If a determination of correctness of a trial court’s application of a legal standard in extremely fact sensitive, the appellant has a duty to marshal the evidence. *See Chen v. Stewart*, 100 P.3d 1177 (Utah 2004). In order to properly discharge the duty of marshaling the evidence, the appellant must present, in comprehensive and fastidious order, every piece of competent evidence which supports the findings that the appellant resists. *See Moon v. Moon*, 973 P.2d 431 (Utah Ct. App. 1999). When an appellant fails to marshal the evidence, the appeal fails and must be rejected. *See Child v. Gonda*, 972 P.2d 425, 434 (Utah 1998).

Greenline failed to marshal the evidence in the Brief of Appellant and failed to cite in comprehensive fashion the evidence that support’s the trial court’s determination that Greenline was not entitled to purchase money priority under Utah Code Ann. § 70A-9a-103(6)(c), such as the absence of assignment documents between New Holland and Greenline and the absence of any reference in Greenline’s financing documents evidencing the intent of the parties to maintain the PMSI. *See Memorandum Decision dated February 25, 2005, TR at pg 289, Appellant’s*

Addendum, pg. 15. Absent meeting its obligations to marshal the evidence, Greenline's appeal must be rejected. *See Child v. Gonda*, 972 P.2d 425, 434 (Utah 1998).

IV. THE TRIAL COURT COMMITTED ERROR BY FAILING TO RULE THAT LEWISTON STATE BANK WAS ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS AGAINST GREENLINE AS CONSEQUENTIAL DAMAGES.

In its Memorandum in Support of Plaintiff's Motion for Summary Judgment Re: Damages, Lewiston State Bank asserted two arguments for an award of attorney's fees and costs against Greenline. The first argument asserted that the claim for reasonable attorney fees and costs was supported by Greenline's continuing bad faith defense in this matter pursuant to Utah Code Ann. § 78-27-56 having knowingly converted the collateral and/or sales proceeds after receiving notice of Plaintiff's priority lien status. *See Memorandum in Support, TR at pg. 305*. This claim was clearly rejected by the trial court as there was insufficient evidence. *See Memorandum Decision dated June 29, 2005, TR at pg. 327, Appellant's Addendum, pg. 20*. Lewiston State Bank also asserted a second argument for an award of attorney fees and costs arguing that "Plaintiff's claim for 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*.

The trial court utterly failed to consider this second 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. Both the *Heslop* and *Canyon Country Store* cases support the proposition that attorneys fees may be awarded as consequential damages where there is no other contract or statutory basis so long as such damages are reasonably foreseeable.

In the present action, Greenline knew of Lewiston State Bank's priority claims as early as March 25, 2002, when "Mr. Jay Pickrell and Mr. Mike Phillips, representatives of Defendant Greenline, contacted Plaintiff to determine whether Plaintiff was willing to give up its priority secured position in the Collateral and Plaintiff responded that it was going to retain its secured positions." *See Affidavit of Anthony Jon Hall*, para. 15, filed in support of Plaintiff's original Motion for Summary Judgment, TR at pg. 61.

Further, "That on or about April 17, 2003, Mr. Ronald E. Mumford sent a demand letter to Defendant Greenline regarding the combines, again placing said Defendant on notice of its superior lien position regarding the combines as being part of the Collateral, and made demand for payment or to make such Collateral available for repossession and sale by Plaintiff." A copy of this letter is attached to Plaintiff's Complaint as Exhibit "H" and is incorporated by this reference. *See Affidavit of Anthony Jon Hall*, para. 14, filed in support of Plaintiff's original Motion for Summary Judgment, TR at pg. 61.

That despite the verbal and written demands upon Greenline, the sale of the collateral to third parties was only finally disclosed in the Second Affidavit of Jay Pickrell, which is the only notice Lewiston State Bank has received regarding the status and whereabouts of the collateral and ultimate sale, which occurred without notice to Lewiston State Bank despite various requests for such information. *See Affidavit of Ronald E. Mumford*, para. 12, filed in support of Plaintiff's original Motion for Summary Judgment, TR at pg. 199.

Despite having actual notice of Lewiston State Bank's interest in the collateral at issue, Greenline failed to disclose the whereabouts of the collateral and sold such collateral without the consent of Lewiston State Bank. Greenline's conversion of the collateral was intentional and it was reasonably foreseeable that Lewiston State Bank would incur such attorney fees and costs in being forced to enforce its priority lien rights to disgorge the sale proceeds from Greenline, as Lewiston State Bank gave notice it would do so.

Additionally, the third party tort rule confirmed in *South Sanpitch Company v. Pack*, 765 P.2d 1279, 1282 (Utah Ct. App. 1988) has similar application to this case. The present action is a tort action involving the conversion of the collateral and sales proceeds by Greenline and its financing transaction with Eli M. Pali and Bart P. Pali and ultimate sale of the collateral. The "natural consequence" of Greenline's actions in failing to turn over the collateral or sales proceeds when requested was this litigation brought by Lewiston State Bank for conversion and disgorgement.

Based upon the forgoing, the trial court committed error and should have awarded to Lewiston State Bank its reasonable attorney fees and costs incurred against Greenline. *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 should likewise be awarded its attorney fees and costs on appeal.

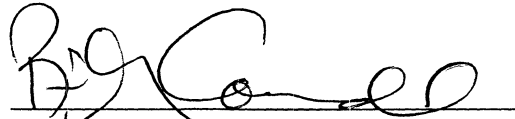
CONCLUSION

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.

DATED this 20 day of January, 2006.

HILLYARD, ANDERSON & OLSEN, P.C.



BRIAN G. CANNELL

Attorney for Appellee/Cross-Appellant

(original signature)

CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing BRIEF OF APPELLEE/CROSS-APPELLANT were mailed, postpaid, to the following this 20 day of January, 2006:

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(original signature)

ADDENDUM

No addendum is necessary pursuant to Rule 24(a)(11) and Rule 24(b)(2) of the Utah Rules of Appellate Procedure.