

2000

# John B. Hawkins v. Tom Callahan : Brief of Appellant

Utah Supreme Court

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Shawn D. Turner; Attorney for Appellees.

Thor B. Roundy; Attorney for Appellants

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IN THE UTAH SUPREME COURT

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JOHN B. HAWKINS,	)	BRIEF OF THE APPELLANT
	)	
Plaintiff and Appellee,	)	Trial Court No. 980906136
	)	
v.	)	Appellate Court No.
	)	2000550
TOM CALLAHAN,	)	
	)	Subject to Assignment to
Defendant and Appellant	)	the Court of Appeals

---

Appeal from the Third District Court, Salt Lake County,  
Judge Hilder

Argument priority classification: 15

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Exhibit "A": Findings of Fact and Conclusions of Law,  
dated September 14, 1999.

Exhibit "B": Judgment, dated October 19, 1999.

Exhibit "C": Minute Entry, dated May 24, 2000

Exhibit "D": Order Establishing admissions, dated  
November 29, 1998

Exhibit "E": Plaintiff's trial exhibit no. 4, Payment  
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Exhibit "F": Plaintiff's trial exhibit no. 1, Lease

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## **TABLE OF AUTHORITIES**

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### RULES

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### Statutes

None.

### Other Authorities

None.

### **STATEMENT OF JURISDICTION**

The Supreme Court has jurisdiction in this matter pursuant to Section 78-2-2(3)(j), Utah Code Ann. (1953, as amended). The Utah Supreme Court may transfer this case to the Utah Court of Appeals.

### **STATEMENT OF THE ISSUES**

I. Whether or not the trial court erred in denying plaintiffs' Rule 59 motion to amend the judgment in question. [R:494-496] With respect to a Rule 59 motion, the standard for review is whether the trial court committed an abuse of discretion. Interstate Excavating, Inc. v. Agla Dev. Corp., 611 P.2d 369 (Utah 1980).

II. Whether or not the trial court erred in accepting evidence at trial contradicting the admissions established by the Order issued by the trial court, executed November 27, 1998. [R:505 pp. 3:17-4:4, 27:3-11, 163:12-25] With respect to an appeal which presents only questions of law, the trial court's rulings are accorded no deference and are reviewed for correctness. With regard to the trial court's amendments to admissions at the time of trial, the standard for review is error in

law, the trial court having no discretion to do so. Langeland v. Monarch Motors, Inc., 952 P.2d 1058 (Utah, 1998).

III. Whether or not the trial court erred in finding that the lease extension executed by plaintiff was fraudulently altered by defendant. [R:505 163:12-25] With respect to findings of fact, the Trial Court's findings will be upheld unless the evidence is so completely lacking or so slight and unconvincing as to make the verdict plainly unreasonable or unjust. Nelson v. Trujillo, 657 P.2d 730, 732 (Utah 1982).

#### **STATUTES, ORDINANCES AND RULES**

Utah Rules of Civil Procedure, Rule 36. (A copy of Rule 36 is attached as Addendum, Exhibit "D.")

Utah Rules of Civil Procedure, Rule 59. (A copy of Rule 59 is attached as Addendum, Exhibit "E.")

#### **STATEMENT OF THE CASE**

This is a landlord-tenant case. Plaintiff filed suit to evict Defendant and sought treble damages for unlawful detainer. Defendant counter-claimed for breach of contract, wrongful eviction and self-help eviction.

Pursuant to the motion of Defendant, the trial court executed an order on November 27, 1998, establishing several requests for admissions, as submitted by Defendant to Plaintiff. [R:122-128, 194-199] The case was tried before the trial court on March 22, 1999. [R: 505] The trial court received evidence contradicting the admissions during the course of trial. [R:505, pp. 3:17-4:4, 27:3-11, 163:12-25.] At the conclusion of trial, the trial court held that the lease extension which had been established by request for admission no. 18 and Exhibit "B" attached thereto, introduced into evidence as part of Plaintiff's Exhibit 4, was a document which had been altered by the Defendant subsequent to its execution by the Plaintiff. [R:505, p. 163:12-25] The trial court thereby rejected admission no. 18 from its Order dated November 27, 1998. [R:505, p. 163:12-25] The trial court held that there was no lease extension and that Defendant was therefore a month to month tenant under the lease admitted into evidence as Plaintiff's Exhibit no. 1. [R:505, p. 163:12-25] The Trial court found that Plaintiff had engaged in a self-help eviction. However,

since the Trial court had found that Defendant was a hold-over tenant, the Trial court only awarded damages for certain property which had been left outside during the course of the self-help eviction. [R:505, pp. 164:14-165:12]

The Trial court entered the findings of fact and conclusions of law on September 14, 1999. [R:422-427] The Trial court entered judgment on October 19, 1999. [R:466-468]

Plaintiff filed a motion to amend the judgment, pursuant to Utah Rules of Civil Procedure, Rule 59, on September 24, 1999 [R:428-445] (which motion was filed again post-judgment on October 27, 1999. [R:469-470]) The Trial court issued an order denying the Rule 59 motion dated May 24, 2000. [R:494-496] Notice of appeal was filed June 7, 2000. [R:497-498]

#### **STATEMENT OF FACTS**

The procedural facts and the disputed and undisputed material facts presented to the trial court, and which are relevant to this appeal, consisted of the following:

On November 27, 1998, the trial court signed an order, establishing 34 requested admissions in the case. [R:122-128, 194-199, 252.] Moments before trial began on March 22, 1999, on its own motion, the trial court announced to the parties that it would accept verbal testimony that the admissions were not true statements. [R:505, pp. 3:17-4:12]

Admission no. 18 consisted of the following: "Please admit that the document attached hereto as Exhibit "B" is a true and correct copy of an extension of the lease agreement between you and Tom Callahan." [R: 124, 196, 301 Plaintiff's Exhibit no. 4] Plaintiff testified at trial that he had signed the document in question. [R:505 p. 36:18-21, Plaintiff's Exhibit no. 4] However, he also testified that the document had been altered by the defendant. [R:505, pp. 36:24-37:5] The trial court concluded that the document was fraudulent and therefore justified setting aside the admission to make a finding that there was no lease extension. [R:505, p. 163:12-25]

On cross examination concerning the lease extension, the plaintiff was shown approximately seven green 3 x 5

cards containing his signature. [R:301 Plaintiff's Exhibit no. 4; 505, pp. 59:5-61:7] Most of the cards were receipts for rental payments. [R:301 Plaintiff's Exhibit no. 4] Plaintiff acknowledged that his signature appeared on each of the cards near the center of the card, just below the text. [R:301 Plaintiff's Exhibit no. 4; 505, pp. 59:11-61:7] One of the cards was the lease extension. Plaintiff's signature was squeezed into the very corner of the card, because the text left very little room for execution by plaintiff. [R:301 Plaintiff's Exhibit no. 4; 505, pp. 59:11-61:7] Plaintiff acknowledged that he had signed the card. [R:505, p. 36:18-21] However, plaintiff testified that the text had been added by defendant after the card was signed. [R:505, pp. 36:24-37:5] Plaintiff stated that he could offer no explanation for why he had signed the card squeezing his signature into the corner on that particular card. [R:505, pp. 60:9-61:7] There was no evidence or testimony that any alteration had been made to the text. Plaintiff's only testimony was his completely unbelievable conclusory statement that he had



signed a blank card in the very corner for no apparent reason. [R: pp. 60:9-61:7]

Defendant was prejudiced by the trial court's withdrawal of the admissions on its own motion at trial. The lease extension was the cornerstone of defendant's case. Defendant was afforded no opportunity to prepare for the unsolicited change in the trial court's order. Moreover, the finding of the trial court was unequivocally contradicted by the evidence.

#### **SUMMARY OF THE ARGUMENT**

According to Langeland v. Monarch Motors, Inc., 952 p.2d 1058 (Utah 1998), the trial court has limited or no discretion to set aside request for admissions, absent full compliance with Utah Rules of Civil Procedure, Rule 36(b). There are various reasons for the prohibition against setting aside requests for admissions, including without limitation prejudice to the opposing party.

In the present case, the trial court issued an Order establishing requests for admissions on November 27, 1998. The case proceeded to trial on March 22, 1999. Just moments before the trial began, the trial court

announced that it would accept evidence contradicting two extremely significant admissions. Admission no. 1 stated, "Please admit that the document attached as Exhibit 'A' is a true and correct copy of the lease agreement between you and Tom Callahan." [R:122-123, 194] The trial court stated that it would accept evidence from the Plaintiff that the lease had been fraudulently altered after it was executed by the Plaintiff. Admission no. 18 stated, "Please admit that the document attached hereto as Exhibit 'B' is a true and correct copy of an extension of a lease agreement between you and Tom Callahan." [R:124, 196] The trial court stated that it would accept evidence that the lease extension was a fraudulent document or had been altered by Mr. Callahan after it was signed by the Plaintiff. The entire case turned on the trial court's rejection of admission no. 18 during the course of trial.

According to the rule of law stated in Langeland, the trial court had no discretion to set aside the admission established by its November 27, 1998 Order during the course of the trial.

Even a cursory review of the evidence reveals that the lease extension was a true and correct copy. The Plaintiff testified at trial that he signed the document in question. The document in question was a very small 3 x 5 card completely filled with writing. The Plaintiff signed the 3 x 5 card in its lower right hand corner. The 3 x 5 card containing the lease extension was compared to five other 3 x 5 cards which Plaintiff testified that he had also signed. On each of those 3 x 5 cards, Plaintiff's signature appeared immediately below the text on the card leaving the bottom of the card blank. There was never any space left blank above the signature. If one were to conclude that the Plaintiff always signed his name directly beneath the text on the card, there is no way that the lease extension card in question could have been altered after it was executed by the Plaintiff. Plaintiff was given the opportunity to explain why he had signed the card in the lower right hand corner if some of the text had been missing. The Plaintiff stated that he had no explanation. The Plaintiff also acknowledged that his claim that the lease

extension had been altered after he signed it was inconsistent with his pattern of signing the other five 3 x 5 cards. In short, even if Rule 36(b) permitted the trial court to change the admissions on the spur of the moment during the course of trial, no reasonable person could have concluded that the lease extension was a forgery or had been altered Plaintiff signed it.

Because the Defendant is entitled to a finding that the lease extension was valid, Defendant should be the prevailing party on his counterclaim for breach of contract and wrongful eviction. As such, Mr. Callahan is entitle to damages measured by the difference in his lease with the Plaintiff and the new lease he obtained thereafter, damages associated with the time that he spent homeless as a result of Plaintiff's self-help eviction, including punitive damages, and the full award of his attorney's fees with regard to the issues as to which he prevailed, together with a reduction in the attorney's fees awarded to Plaintiff.

## ARGUMENT

### I. THE TRIAL COURT ERRED BY ALLOWING THE INTRODUCTION OF EVIDENCE AT TRIAL IN CONTRADICTION TO ADMISSIONS

Utah Rules of Civil Procedure ("URCP"), Rule 36(b) sets forth the procedure which a party must follow after failing to timely respond to requests for admissions. The leading case applying Rule 36(b) is Langeland v. Monarch Motors, Inc., 952 p.2d 1058 (Utah 1998). If the standard set forth in Langeland, discussed below, is not met, then the trial court has no discretion to set aside admissions already established. Id. at 1064.

Under the circumstances of the present case, the trial court's decision to accept testimony which contradicted the established admissions was an unequivocal breach of the rule of law established by Langeland. In the present case, the plaintiff failed to timely respond to requests for admissions. The defendant filed a motion requesting that the trial court issue an order establishing the admissions. The parties fully briefed the issue, although the plaintiff never filed a motion pursuant to Rule 36(b) to have the admissions set

aside. On November 27, 1998, the trial court signed an order establishing the thirty-four requested admissions in the case. In rendering its decision, the trial court stated to the parties that it recognized that it was without discretion to set aside the admissions, for the reasons set forth in Langeland. [R:252]

Notwithstanding the Order dated November 27, 1998, and the trial court's previous statements to the parties with regard to its lack of authority to set aside the admissions, when the parties appeared for trial, the trial court surprised the parties by stating that it was not comfortable with its Order issued four months earlier and that it would, therefore, be willing to accept testimony from plaintiff that some of the admissions were not correct. [R:505 pp. 3:17-4:12] It is apparent from the record that the trial court was prejudicially predisposed to change the admissions, and that the change was not based on any perceived credibility of Mr. Callahan. [See the statement of the Court before Mr. Callahan testified at R:505 pp. 3:17-4:12, 54:16-55:1]

In the present case, the standard set forth by the Utah Supreme Court prohibits withdrawal or amendment of the admissions or acceptance at trial of contradictory evidence.

The trial court issued an Order establishing the admissions. The trial court cannot amend the admissions, set them aside or change its order with respect thereto at the moment trial is set to begin.

Defendant was extremely prejudiced by the Trial court's amendment to the Admissions on its own initiative. In accordance with the standard set forth in Langeland v. Monarch, the Admissions could not have been amended even if Plaintiff were to meet his burden, discussed below, because of the prejudice that would result to Defendant. One of the purposes of the Requests for Admissions was to establish specific facts that would alleviate the need to call additional witnesses or to otherwise spend time in preparation as to documents that would be introduced at trial. Because the trial court failed to act until trial, Defendant had no chance to issue subpoenas to witnesses that were made unnecessary

as a result of the Admissions in this case. In fact, various witnesses were out of the state and because of the passage of time would likely have been unavailable to Defendant to testify at trial. These include at least two other roommates that were evicted by Plaintiff. The unavailability of witnesses does satisfy the requirements of Langeland v. Monarch requiring Defendant to show prejudice in order to prevent amendment to the Admissions. Because of the prejudice to Defendant "the Trial Court had no discretion" to amend the Admissions, particularly on the day of trial and without even the filing of an appropriate motion. Id. at 1064.

According to the Supreme Court in Langeland, because of the prejudice to Defendant "the Trial Court had no discretion" to set aside or alter the admissions or to receive contradictory evidence. Id. at 1064.

**II. PLAINTIFF FAILED TO FILE THE  
MOTION REQUIRED BY RULE 36(b).**

In accordance with the standard set forth in Langeland v. Monarch, Plaintiff was required to file a motion pursuant to Rule 36(b) in order to change the



effect of his failure to respond to the requests for admissions. Plaintiff failed to file a motion under Rule 36(b). Plaintiff failed to file any similar motion which might be construed as a motion under Rule 36(b). Therefore, all of the admissions must stand.

Even if plaintiff had filed the required motion, the motion would have been denied, as a matter of law. The standard set forth in Langeland v. Monarch provides that Plaintiff has the burden of establishing that amendment or withdrawal of the admissions would serve the presentation of the merits of the action. "Once these matters have been admitted against a party, something more than a bare denial is required to convince the Court that the admissions should be withdrawn or amended and that the merits of the matter should be argued in Court." Langeland, Supra, at 1062. In other words, Plaintiff must "introduce some evidence by affidavit or otherwise as specific facts indicating that the matters deemed admitted against it are in fact untrue." Id. Even if plaintiff had filed the appropriate motion, there was nothing in his testimony which would have met the

required standard. See Argument III, below. Likewise, at trial, Plaintiff offered nothing more than a bare denial of the admissions in question. He admitted that he had not maintained a copy of the documents in question. [The totality of the testimony concerning any alteration is found in the record at R:505 pp. 23-34, 55-61, 64-65, 86-94, 122-123.]

The results are not as harsh as they might seem. Most of the matters deemed admitted were established by the documents upon which they were based or were otherwise consistent with the Plaintiff's actual admissions. See Argument III, below. The Admissions established that the lease and the extension of the lease entitled Defendant Tom Callahan to occupy the premises in accordance with their terms until March 19, 1999. [R:122-128, 194-199.] The Admissions established that Tom Callahan was not in breach of the lease and that his eviction was wrongful. [R:122-128, 194-199.] The Admissions relieve the parties and the Trial court from dealing with the "he-said/she-said" type of oral evidence that was permitted at trial with regard to these issues.

**III. THE EVIDENCE WAS THAT THE LEASE EXTENSION CARD WAS  
NOT ALTERED BY MR. CALLAHAN.**

Even if the trial court had the discretion to alter the admissions at the time of trial, or based on testimony at trial, testimony did not justify any amendment to admission no. 18, nor did the evidence justify a finding that Exhibit "B" (Plaintiff's Exhibit "4") was anything other than an unaltered extension of the lease, as it purported to be on its face.

Except as to Plaintiff's Exhibit "4", because Plaintiff failed to file the required motion under Rule 36(b), Defendant will not go into great detail in this memorandum to show the inability of Plaintiff to meet such a burden as to the original Lease or the other admissions. The Lease is discussed very briefly under Argument IV. Nevertheless, the Court may be interested to note Plaintiff's testimony as to most or all of the most significant admission. For example, Plaintiff admitted that the signature on the document attached as Exhibit "A" was his signature. [R:301 Plaintiff's Exhibit 1; 505 p. 23:18-22] Plaintiff acknowledged that

he does not have his own copy of the lease. [R:505 pp. 24:1-2, 34:10-18, 64:12-65:2] Similarly, in response to Request for Admission No. 19, Plaintiff admitted that it was his signature on the document attached as Exhibit "B". [R:301 Plaintiff's Exhibit no. 4; 505 pp. 36:18-21.] It seems nonsense that Plaintiff wishes to deny that the extension is exactly what it purports to be. Other various admissions are simply admissions of facts set forth in other documents. These documents are virtually impossible for Plaintiff to controvert.

At trial several signature cards, signed by the Plaintiff each month, were introduced as exhibits. [R:301 Plaintiff's Exhibit no. 4] All of the signature cards were executed by Plaintiff directly beneath the text on the card. [R:301 Plaintiff's Exhibit no. 4; 505 pp. 34:20-37:5, 59:11-61:7] In each case the text on the card was in the center of the card and the signature of Plaintiff was also very near the center of the card. [R:301 Plaintiff's Exhibit no. 4; 505 pp. 59:11-61:7] In stark contrast, Exhibit "B" was executed by the Plaintiff on the very bottom of the card, indicating that it was

executed by the Plaintiff when the text of the card completely filled the remainder of the card. [R:301 Plaintiff's Exhibit no. 4; 505 pp. 59:11-61:7] There is no other possible explanation for execution by the Plaintiff on the lower part of the card. At trial, Plaintiff was invited to give an explanation for why his signature might be on the very bottom edge of the card. [R:505 pp. 60:9-61:7] Plaintiff had absolutely no explanation. [R:505 pp. 60:9-61:7] Plaintiff's testimony was essentially an admission that the text had, in fact, been there at the time that he executed the card.

Plaintiff also testified that the only time he spoke to Mr. Callahan about extending the Lease was in March 1998. The Lease Extension was signed January 20, 1998. Mr. Callahan would have had to have created the forgery two months before Plaintiff alleges that the subject even came up! [R:301 Plaintiff's Exhibit 4; 505 p. 37:6-16]

Based on that evidence, the only finding that the Trial court could reach is that Plaintiff executed the card when all of the text constituting the extension of

the lease was already on the card. As a matter of law, Mr. Callahan had the right to occupy the premises until March 15, 1999 as provided by Exhibit "B". Admission no. 19 established that Plaintiff executed the card. Plaintiff's testimony at trial was that it was, in fact, his signature on the card. [R:505 p. 59:11-61:7]

As discussed under heading no. IV, below, the trial court must conclude that defendant is the prevailing party on his counter-claim for wrongful eviction. It is extremely difficult to ascribe a just and equitable purpose to the trial court's action on its own motion to permit amendment to the Admissions, and more significantly, why the trial court would make a finding with regard to the lease extension which was contrary to the evidence. The decision must be the result of a predisposition to make such a decision, as discussed on page 12, above. The trial court's heart was in the right place. It felt remorse over the effect of all of the overwhelming admissions entered before trial. It wanted to even the playing field. However, in attempting to do so, it robbed Mr. Callahan of the justice to which he is

entitled. As discussed under heading no. V, Plaintiff is entitled to the full measure of his damages as the Admissions establish, including an appropriate award of attorney's fees based on defendant's success on his counter-claim for wrongful eviction.

**IV. THE EVIDENCE WAS THAT THE LEASE WAS  
NOT ALTERED BY MR. CALLAHAN.**

Even if the Trial court had the discretion to alter the Admissions at the time of trial, or based on testimony at trial, the testimony did not justify any amendment to admission no. 18, nor did the evidence justify a finding that Plaintiff's Exhibit "4" was anything other than an unaltered extension of the lease, as it purported to be on its face.

Likewise, admission nos. 1 and 2 established that Plaintiff executed the Lease. Plaintiff's testimony at trial was that it was, in fact, his signature on the Lease. [R:301 Plaintiff's Exhibit no. 1; 505 p. 23:18-22] The terms of the lease were further established by admissions no. 3, 4, 6, 8, 10, 11, 12, 14, 15 and 16. Although Plaintiff had a copy of leases signed by other

tenants, he had no other copy of the lease signed by Mr. Callahan. [R:505 pp. 64:12-65:2] He had nothing other than his bare denial upon which to dispute the terms of the Lease. Given Plaintiff's indisputably false testimony as to the lease extension, it is difficult to believe Plaintiff's representations as to the Lease were not also false.

As discussed under heading no. V, Plaintiff is entitled to the full measure of his damages as the admissions establish, including an appropriate award of attorney's fees based on defendant's success on his counter-claim for wrongful eviction.

**V. MR. CALLAHAN IS ENTITLED TO DAMAGES AND HIS COSTS AND ATTORNEY'S FEES.**

As discussed under heading III, above, Mr. Callahan is entitled to be treated as the prevailing party on his claim for wrongful eviction. The appropriate amount of his damages includes all of that evidence presented by Defendant at trial with regard to his expenses associated with being wrongfully evicted, the difference between his favorable lease rate with all of the amenities at the



premises owned by Plaintiff and the higher lease rate, taking into consideration the absence of amenities, at the places where he subsequently resided, including without limitation the time he spent living on the street or in a homeless shelter. [R:505, pp. 102:11-120:8]

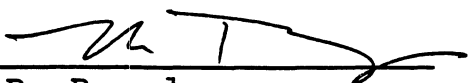
With regard to attorney's fees, the Trial court granted fees as to the issues on which the parties prevailed. [R:505, p. 165:17-21] The award of attorney fees should now be adjusted to correctly reflect that Mr. Callahan prevailed on his claim for wrongful eviction in breach of contract.

### **CONCLUSION**

In summary, Defendant Callahan requests that this Court reverse the decision of the trial court to accept evidence contradicting the admissions pursuant to the trial court Order of November 27, 1998, or alternatively that this Court find that the evidence presented at trial does not support the finding that there was an alteration by Defendant of the lease agreement or the lease extension. Defendant Callahan further requests that this Court hold on the basis of the lease extension that

Plaintiff breached the lease agreement between the parties and wrongfully evicted Defendant Callahan prior to the expiration of the lease extension. Defendant Callahan request that this Court direct the trial court to make appropriate findings based on the evidence presented at trial and include in Defendant's damages award the difference in value between the premises he rented from Plaintiff and the premises that were subsequently rented, general damages including pain and suffering associated with the days which Defendant Callahan spent homeless following the wrongful eviction, punitive damages, and an adjustment to the award of costs and attorney's fees to reflect the fact that Defendant Callahan prevailed at trial on all issues. Defendant Callahan requests an award of costs and fees incurred in connection with this appeal and requests leave of Court to present evidence as to the appropriate amount.

DATED this 15<sup>th</sup> day of October, 2000.

  
\_\_\_\_\_  
Thor B. Roundy  
Attorney for Appellant

CERTIFICATE OF SERVICE BY MAIL

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I, THOR B. ROUNDY, certify that on this 13<sup>th</sup> day of October, 2000, I served two copies of the attached BRIEF OF THE APPELLANT, Trial Court No. 980906136, Appellate Court No. 2000550, upon counsel for the appellee in this matter by mailing it to him by first class mail with sufficient postage prepaid to the following address:

Shawn D. Turner  
4516 South 700 East, Suite 100  
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Thor B. Roundy  
Attorney for Appellant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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JOHN HAWKINS,	:	FINDINGS OF FACT AND
	:	CONCLUSIONS OF LAW
Plaintiff,	:	
vs.	:	CASE NO. 980906136
TOM CALLAHAN,	:	
Defendant.	:	

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This matter came before the Court for trial on March 22, 1999. By way of the Court's prior ruling with respect to certain Requests for Admissions propounded by the defendant on the plaintiff, the Court held certain matters to be deemed admitted for purposes of trial.

Plaintiff was present and represented by counsel, Shawn D. Turner, and defendant was present and represented by counsel, Thor B. Roundy. The Court having reviewed the file, having listened to the witnesses and having taken evidence herein, hereby finds the following:

**FINDINGS OF FACT**

1. The Court finds Mr. Callahan to be a not credible witness.

EXHIBIT "A"

2. The Court finds that there was a written lease between the parties but also finds that Mr. Callahan altered the lease agreement after it was signed by the parties.

3. The Court finds that the card that allegedly extended the lease was not prepared and signed in the form presented at trial by Mr. Callahan.

4. The Court finds there was no extension of the lease past March 15, 1998.

5. The Court finds Mr. Callahan remained in occupancy after the lease terminated on March 15, 1998.

6. The Court finds that Mr. Callahan was given a valid notice on May 1, 1998 that the lease would terminate June 14, 1998.

7. The Court finds the notice was appropriate.

8. The Court finds the notices served on Mr. Callahan in June of 1998 failed to meet the notice requirements in that they were not served appropriately, there were errors in them and there were items in them that should not have been claimed.

9. The Court finds that Mr. Hawkins removed property of Mr. Callahan's, locked him out and changed the locks on the property without following any judicial process.

10. The Court finds that Mr. Hawkins' actions were not taken with a desire to do anything illegal or unfair.

11. The Court finds that the only item of damages proximately caused by the self-help eviction and proven by a preponderance of the evidence was the loss of some clothing with a value of \$195.

12. The Court finds that the other damages claimed by the defendant were either not proximately caused, would have otherwise been incurred, or were incurred through a failure to mitigate.

#### CONCLUSIONS OF LAW

1. The lease agreement between the plaintiff and defendant expired as of March 15, 1998.

2. Pursuant to the notice served on the defendant the defendant should have left the property no later than June 15, 1998.

3. The defendant unlawfully held over in the property until August 15, 1998.

4. Plaintiff is entitled to rents for that period of time in the amount of \$580.

5. Although the defendant was in unlawful detainer as the same is described in Utah Code Ann. § 78-36-3, the plaintiff's delivery of notice by sliding the same under the defendant's door does not comport with the notice requirements as set forth in Utah Code Ann. § 78-36-6. Furthermore, the notices contained errors and sought items that should not have been claimed.

6. The Court finds accordingly that plaintiff is not entitled to the trebled rents awardable under Utah Code Ann. § 78-36-10(3).

7. The Court finds that removing Mr. Callahan's property, locking the doors and changing the locks on August 16, 1998, constituted an improper self-help eviction.

8. The Court finds that the damages awardable to the defendant as a result of that action are \$195 for personal belongings which were left on the porch of the property and apparently taken by some other parties unknown.

9. Defendant is not entitled to punitive damages.

10. Both the amount awarded to plaintiff and the amount awarded to the defendant shall accrue interest at the stated legal rate for prejudgment interest until such time as judgment is entered. Thereafter, the amount shall be offset and the remaining balance owing to the plaintiff shall accrue interest at the statutory legal rate for judgments.

11. The Court finds that the respective parties may be entitled to attorney's fees, but such fees are awardable only on the issues on which they prevailed and the Court reserves the right to deny all fees that the Court finds are not or can not be appropriately segregated. The Court will determine the issue of

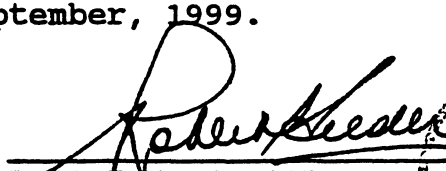
attorney's fees based on supplemental Affidavits and Memoranda to be submitted by the parties.

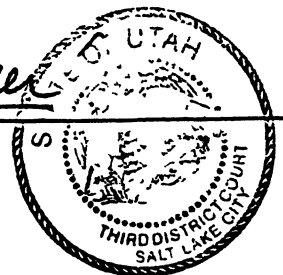
**JUDGMENT**

The Court enters a judgment against defendant in favor of plaintiff in the amount of \$580, together with attorney's fees to be determined hereafter, to be offset by the following award to the defendant, together with costs and attorney's fees to be determined hereafter.

The Court enters judgment against plaintiff and in favor of defendant in the amount of \$195, together with costs and attorney's fees to be determined hereafter, to be offset by the foregoing award to the plaintiff.

Dated this 14<sup>th</sup> day of September, 1999.

  
ROBERT K. HILDER  
DISTRICT COURT JUDGE





MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Findings of Fact and Conclusions of Law, to the following, this\_\_\_\_\_ day of September, 1999:

Shawn D. Turner  
Attorney for Plaintiff  
4516 South 700 East, Suite 100  
Salt Lake City, Utah 84107

Thor B. Roundy  
Attorney for Defendant  
275 E. South Temple, Suite 150  
Salt Lake City, Utah 84111

---

SHAWN D. TURNER (5813)  
LARSON, TURNER, FAIRBANKS & DALBY  
4516 South 700 East, Suite 100  
Salt Lake City, Utah 84107  
(801) 263-2900

**FILED DISTRICT COURT**  
**Third Judicial District**

OCT 21 1999

By

SALT LAKE COUNTY

Deputy Clerk

**IMAGED**

IN THE THIRD DISTRICT COURT STATE OF UTAH  
SALT LAKE COUNTY, SALT LAKE CITY DEPARTMENT

---

JOHN HAWKINS,	:	JUDGMENT
Plaintiff,	:	
	:	ENTERED IN REGISTRY
vs.	:	OF JUDGMENTS
	:	DATE 10/22/99
TOM CALLAHAN,	:	Civil No. 980906136
Defendant	:	Judge Hilder

---

On or about September 14, 1999 this Court entered its findings of fact and conclusions of law and a minute entry in the above entitled case. Based thereon it is the judgment of the Court that Plaintiff is awarded judgment against the Defendant in the amount of \$580.00 comprised of two periods of unpaid rent of \$290.00 each. Said amounts shall bear interest at the statutory prejudgment interest rate from the date due until such time as this judgment is entered. Two Hundred Ninety Dollars shall bear interest from June 15, 1998 and the remaining two hundred ninety dollars shall bear interest from July 15, 1998. Plaintiff is further awarded attorneys fees and costs in this matter in the amount of \$1,330.75.

The Defendant in this matter is awarded damages in the amount of \$195.00 on his counterclaim. Said amount is to bear interest at the prejudgment interest rate from August 16, 1998 until the date

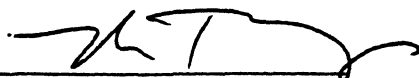
EXHIBIT "B"

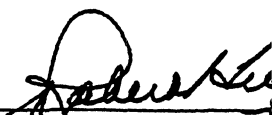
of the entry of this judgment. Defendant is also awarded attorneys fees and costs in the amount of \$941.00.

The amounts owing to the Defendant are to be offset against those amounts owing to the Plaintiff.

The net amount due to the Plaintiff shall hereafter bear interest at the statutory rate for judgments.

DATED this 19<sup>th</sup> day of October, 1999.

  
Approved as to Form  
Thor B. Roundy

  
Judge Hilder



IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

JOHN HAWKINS,

Plaintiff,

vs.

TOM CALLAHAN,

Defendant.

MINUTE ENTRY

AND ORDER

Civil No. 980906136

Judge Robert K. Hilder

---

This matter is before the court for decision of defendant's Rule 59, Utah Rules of Civil Procedure, Motion to Amend Findings of Fact, Conclusions of Law, and Judgment. As a preliminary matter, the court notes that the matter was submitted for decision in November, 1999, and then re-submitted on May 4, 2000. This court was completely unaware of the Motion prior to the second Notice to Submit. The case was apparently referred to Judge Thorne, who took over this court's civil matters following the creation of divisions in 1999. Judge Thorne had a law clerk review the matter, but at some point he apparently either realized that this court had agreed to retain jurisdiction, or alternatively, he felt that the Motion to Amend could be better decided by the judge who tried the case. In any event, the matter was referred to this court only within the last two weeks, and the court apologizes to both counsel and the parties for the delayed decision.

The court has carefully considered the motion and the response. With respect to the Requests for Admissions, that issue was squarely before the court on the day of trial, and the court DENIES defendant's Motion to Amend. The court recalls, and review of the videotape confirms, that at the outset of trial, the court indicated, admittedly on its own motion (and alerted to the possibility by plaintiff's Trial Brief), that it would revisit the Requests for Admissions, particularly the one regarding the purported lease extension, if it appeared that the extension was the result of fraud or forgery. That is exactly what the court found.

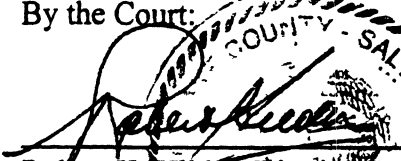
Langeland v. Monarch Motors, Inc., 952 P.2d 1058 (Utah 1998), notwithstanding, this court does not believe that Rule 36, URCP, robs this court of its inherent power to prevent injustice, and particularly the power to prevent the use of a court rule, or litigation device, to perpetrate a fraud on the court or on a party. The court explicitly found that defendant was not credible on the issue of the lease extension. The court is aware that defendant believes the evidence does not support this finding, but as fact finder the court was unequivocally persuaded that the "extension" was bogus, and any dispute with that finding is a matter for appeal.

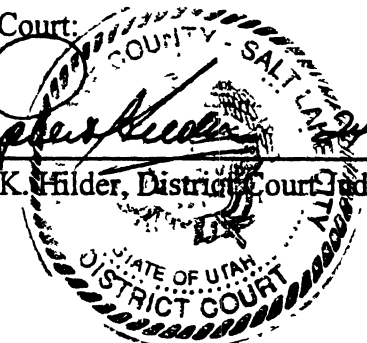
With respect to the \$150.00 refundable deposit, the court believes that defendant's Motion has merit. The deposit was established by the admissions and no contrary finding exists. Accordingly, the Motion is GRANTED on this issue and counsel for defendant is directed to prepare an amended Judgment reflecting a credit to defendant in the amount of \$150.00, plus post-judgment interest from the date of the original judgment.

The remaining issues are without merit, and the Motion to Amend is DENIED with the exception of the amendment reflecting the \$150.00 credit.

This signed Minute Entry shall be the Order of the court, and no further order is required.

By the Court:

  
Robert K. Hilder, District Court Judge



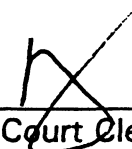
## CERTIFICATE OF MAILING

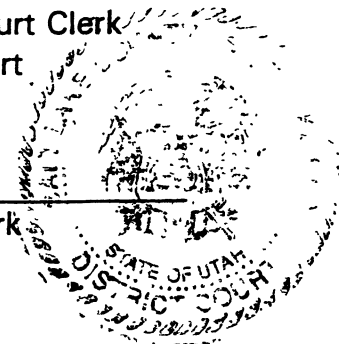
I certify that I mailed a true and correct copy of the above ruling on 26th day of May, 2000 to:

Thor B. Roundy  
275 East South Temple  
Suite 150  
Salt Lake City, Utah 84111

Shawn D. Turner  
4516 South 700 East  
Suite 100  
Salt Lake City, Utah 84107

Craig Ludwig, Court Clerk  
Third District Court

  
Deputy Court Clerk



Thor B. Roundy (Bar No. 6435)  
Counsel for Plaintiffs  
275 East South Temple, Suite 150  
Salt Lake City, Utah 84111  
Telephone (801) 364-3229  
Facsimile (801) 364-4721

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IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

John B. Hawkins	:	<b>ORDER</b>
	:	
Plaintiff,	:	
	:	Civil No. 980906136
v.	:	
	:	Judge Robert K. Hilder
Tom Callahan	:	
	:	
Defendant.	:	

---

**ORDER**

Based on the Motion for Order Establishing Admissions submitted by Defendant Tom Callahan, dated October 5, 1998, good cause appearing, is hereby ordered, judged and decreed as follows:

1. Defendant's Motion is granted;
2. The following Admissions are now deemed established:

REQUEST NO. 1. Please admit that the document attached hereto as Exhibit "A" is a true and correct copy of the lease agreement between you and Tom Callahan.

REQUEST NO. 2. Please admit that the signature on the document attached hereto as Exhibit "A" is your signature.

REQUEST NO. 3. Please admit that the lease agreement between you and Tom Callahan provides that the prevailing party in this litigation shall receive an award of costs and attorney's fees incurred.

REQUEST NO. 4. Please admit that the lease agreement between you and Tom Callahan requires you to provide heating.

REQUEST NO. 5. Please admit that the gas for heating was turned off as a result of your failure to pay the gas bill during the period of time that Tom Callahan occupied the premises.

REQUEST NO. 6. Please admit that the lease agreement between you and Tom Callahan requires you to provide a washer and dryer.

REQUEST NO. 7. Please admit that during the time that Tom Callahan occupied the premises you removed the washer and dryer.

REQUEST NO. 8. Please admit that the lease agreement between you and Tom Callahan requires you to provide cable television service.

REQUEST NO. 9. Please admit that during the time that Tom Callahan occupied the premises you discontinued the cable television service.

REQUEST NO. 10. Please admit that the lease agreement between you and Tom Callahan requires you to provide telephone service.

REQUEST NO. 11. Please admit that during the time that Tom Callahan occupied the premises you discontinued the telephone service.



REQUEST NO. 12. Please admit that you never provided Tom Callahan with a copy of any written set of rules that he was required to follow as a term of the lease.

REQUEST NO. 13. Please admit that you never provided tenants other than Tom Callahan with a copy of any written set of rules that they were required to follow as a term of their leases.

REQUEST NO. 14. Please admit that the lease agreement between you and Tom Callahan calls for a deposit of \$200.00.

REQUEST NO. 15. Please admit that the lease agreement between you and Tom Callahan provides that \$50.00 of the rental deposit is non-refundable.

REQUEST NO. 16. Please admit that the lease agreement between you and Tom Callahan provides that \$150.00 of the deposit is refundable.

REQUEST NO. 17. Please admit that Tom Callahan provided you with a \$200.00 deposit under the lease.

REQUEST NO. 18. Please admit that the document attached hereto as Exhibit "B" is a true and correct copy of an extension of the lease agreement between you and Tom Callahan.

REQUEST NO. 19. Please admit that the signature on the document attached hereto as Exhibit "B" is your signature.

REQUEST NO. 20. Please admit that the document attached hereto as Exhibit "C" is a true and correct copy of an affidavit executed by Dan Rohrberg, dated August 3, 1998.

REQUEST NO. 21. Please admit that the documents attached hereto as Exhibit "D" are each documents bearing your signature.

REQUEST NO. 22. Please admit that the washing machine at the premises overflowed.

REQUEST NO. 23. Please admit that the water from the washing-machine that overflowed at the premises caused water to go into the room occupied by Tom Callahan.

REQUEST NO. 24. Please admit that the carpet in the room of Tom Callahan was damaged by water from the washing-machine overflowing.

REQUEST NO. 25. Please admit that the mattress of Tom Callahan was damaged by water from the washing-machine overflowing.

REQUEST NO. 26. Please admit that boxes containing possessions of Tom Callahan were damaged by water from the washing-machine overflowing.

REQUEST NO. 27. Please admit that with respect to the water damage to the apartment that you received an insurance settlement check compensating you for said damage.

REQUEST NO. 28. Please admit that you have property insurance covering the property in question.

REQUEST NO. 29. Please admit that Tom Callahan did not smoke inside the premises.

REQUEST NO. 30. Please admit that tenants other than Tom Callahan have smoked inside the premises.

REQUEST NO. 31. Please admit that in general Tom Callahan was a clean tenant during the period of time that he occupied the subject premises.

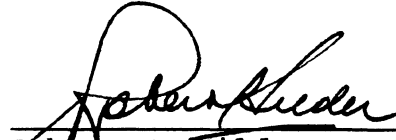
REQUEST NO. 32. Please admit that you are terminating the leases of all tenants of the subject property at the present time.

REQUEST NO. 33. Please admit that the reason that you are terminating all the leases of all the tenants of the subject property at this time is because you intend to sell the subject property.

REQUEST NO. 34. Please admit that on or about June 14, 1998, Tom Callahan tendered to you as payment of rent the cashier's check, a copy of which is attached hereto as Exhibit "E."

DATED this 27<sup>th</sup> day of November, 1998.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Robert K. Hilder", is written over a horizontal line.

Robert K. Hilder  
Third District Judge

Certificate of Service

I hereby certify that I caused to be mailed a true and correct copy of the foregoing Order, by United States mail, postage prepaid, this 13<sup>th</sup> day of November, 1998, to the following:

Shawn D. Turner  
Larson, Kirkham & Turner  
4516 South 700 East, Suite 100  
Salt Lake City, Utah 84107

A handwritten signature in dark ink, appearing to read "Shawn D. Turner", is written over a horizontal line.

RECEIVED FROM 1000 101-1000 referred to as resident, the sum of \$ \$2 1.00 lease accepted-6-21-97 DOLLARS evidenced by ☒ Cash, ☐ Check, ☐ Other, as a deposit which, upon acceptance of this rental agreement, shall belong to the Lessor of the premises, hereinafter referred to as Owner, and shall be applied as follows:

Monthly Rental Amount \$ \$290.00 cash accepted-6-21-97  
Rent for the period from: July 15 to Aug 15  
(Pro-Rate to End of Month)

RECEIVED 30 PAYABLE PRIOR TO OCCUPANCY  
\$ 490.00 \$ 490.00 cash (received) 6-21-97

Last 1 month's rent  
☒ Cash \$ 150.00 ☒ Refundable ☐ Not Refundable  
Security Deposit: 50.00  
☒ Cash \$ 50.00 ☐ Refundable ☒ Not Refundable  
Other 200.00  
TOTAL 200.00 Refundable

If this agreement is not accepted by the Owner or his agent, within 6-21-97 days, the total deposit received shall be refunded. Resident agrees to rent from the Owner the premises situated in the City of Salt Lake

Consisting of 91 Ut 1000 101-1000 Apt. No. Brownment Large  
consisting of Bedroom, Kitchen, Living room, washroom, bathroom, phone, cable TV, ref, A/C, etc. Room

1. TERM: The term shall begin on July 15, 97 and continue (Check one of the two following alternatives)

☒ on lease basis until July 15, 98

OR  
☐ on a month-to-month basis until tenant shall terminate by giving owner 30 days notice prior to the end of rental period.

2. RENT: Rent shall be \$ 290.00 per month payable in advance upon the 15 day of each calendar month to Owner or his authorized agent, at the following address 614 K Street. If rent is not paid within five (5) days after due date, Resident agrees to pay a late charge of \$15.00. Resident agrees to further pay \$8.00 for a dishonored bank check. If check is dishonored, Tenant agrees to make all future payments with Cash or Cashier's Check. Tenant agrees further to pay 2% per month on delinquent amount.

3. MULTIPLE OCCUPANCY: It is expressly understood that this agreement is between the Owner and all signatories, jointly and severally. In the event of default by any one signatory each and every remaining signatory shall be responsible for timely payment of rent and all other provisions of this agreement.

4. UTILITIES: Resident shall be responsible for the following utilities and expenses: all utility, including water, sewer, phone, cable, etc.  
☐ Water, ☐ Sewer, ☐ Gas, ☒ Electricity, ☐ Other

5. USE: The premises shall be used as a residence by the undersigned adult; and no children and for no other purpose without the prior written consent of the Owner. Occupancy by guests staying over 5 days will be considered to be in violation of this provision unless prior written consent is given by the Owner.

6. PETS: No pets shall be brought on the premises, even temporarily, without the prior written consent of the Owner. The unauthorized presence of a pet will subject the resident to penalties, damages, deductions and termination.

7. HOUSE RULES: If the premises are a portion of a building containing more than one unit, resident agrees to abide by all house rules which are attached and are hereby made a part of this agreement, whether attached before or after the execution hereof, including but not limited to rules with respect to noise, odors, disposal of refuse, pets, parking, and use of common areas. Resident shall not have a waterbed on the premises without prior written consent of the Owner.

8. ORDINANCES AND STATUTES: Resident shall comply with all laws, health codes, and regulations of all municipal, state and federal authorities.

9. ASSIGNMENT AND SUBLETTING: Resident shall not assign this agreement or sublet any portion of the premises without prior written consent of the Owner. Resident only - no subletting or rooming;

10. MAINTENANCE, REPAIRS OR ALTERATIONS: Resident accepts the premises as being in good order and repair, unless otherwise indicated. Resident shall at his own expense, maintain the premises in a clean and sanitary manner, including all equipment, appliances, furniture and furnishings therein and shall surrender the same, at termination, in as good condition as received, normal wear and tear excepted. Resident shall be responsible for all repairs required for damages caused by his negligence and that of his family or invitees or guests. Resident shall not paint, or otherwise redecorate or make alterations to the premises without the prior written consent of the Owner. Resident shall irrigate and maintain any surrounding grounds, including lawns and shrubbery, and keep the same clear of rubbish, weeds or snow on walkways, if such are a part of the premises and are not to be used for the use of the resident. Resident will not remove Owner's fixtures, furniture and/or furnishings from the apartment, for any purpose. When Resident moves in, Owner shall furnish light bulbs of prescribed wattage for apartments' sockets, thereafter, light bulbs will be replaced at Resident's expense. If smoke detectors are present, Resident agrees to notify owner of any malfunction or worn out batteries.

11. ENTRY AND INSPECTION: Resident shall permit Owner or Owner's agents to enter the premises at reasonable times and upon reasonable notice for the purpose of inspecting the premises or showing the same to prospective Residents or purchasers or for making necessary repairs.

12. POSSESSION: If Owner is unable to deliver possession of the premises as agreed, Owner shall not be liable for any damage caused. Resident shall not be liable for any rent until possession is delivered. Resident may terminate this agreement if possession is not delivered as agreed above.

13. SECURITY DEPOSIT: The security deposit set forth above shall secure the performance of resident's obligations. Owner may apply all or portions of said deposit on account for resident's obligations:

- Accrued Rent. Example: For lost rent until owner re-rents, if Resident moves out before lease term expires.
- Cleaning of the unit
- Damages over and above normal wear and tear
- Other costs provided for in this agreement

tenancy or within 15 days of receipt of Resident's new address, whichever is later.

15. ATTORNEY'S FEES: If legal action is taken by either party to enforce this agreement, or to enforce any rights arising out of the breach of this agreement, the prevailing party shall be entitled to all costs incurred in connection with such action including a reasonable attorney's fee.

16. WAIVER: No failure of Owner to enforce any part of this agreement shall be deemed as a waiver, nor shall acceptance of a partial payment of rent be deemed a waiver of Owner's right to full amount.

17. NOTICES: All notices shall be given in accordance with state laws. Where requirements are not spelled out by statute, notice may be given by mailing the same, postage prepaid, to resident at the premises or to Owner at the address shown below or such other places as may be designated.

18. HOLD OVER: Any holding over after expiration of lease term with the consent of the Owner, shall be construed as month-to-month tenancy in accordance with the terms of this agreement.

19. REIMBURSEMENT BY RESIDENT: Resident agrees to reimburse Owner promptly for the replacement cost of loss, property damage, or cost of repairs or service (including plumbing trouble) caused by negligence or improper use by resident, his agents, family or guests. Resident shall be responsible for damage from windows or doors left open. Such reimbursement is when Owner makes demand. Owner's failure to demand damage reimbursements, late-payment charges, returned check charge or other sums due by Resident shall not be deemed a waiver and Owner may demand same at any time including after move-out.

20. OWNER SHALL NOT BE LIABLE: Owner shall not be liable for any damages or losses to person or property caused by other residents or other persons. Owner shall not be liable for personal injury or damage or loss of Resident's personal property (furniture, jewelry, clothing, etc.) from theft, vandalism, fire, water, rain, hail, smoke, explosions, sonic booms or other cause, whatsoever, unless the same is due to the negligence of Owner. Owner strongly recommends that Resident secure insurance to protect himself against the above occurrences. If any of Owner's employees are requested to render any services such as moving automobiles, handling of furniture, cleaning, delivering packages, or any other service not contemplated in this contract, such employee shall be deemed the agent of Resident regardless of whether payment is arranged for such services and Resident agrees to hold Owner harmless from all liability in connection with such services.

21. REPAIRS AND MALFUNCTIONS: RESIDENT AGREES TO REQUEST ALL REPAIRS AND SERVICES IN WRITING TO MANAGER except in extreme emergency when telephone calls will be accepted. In case of malfunction of equipment, utilities or damage by fire, water, or other cause, Resident shall notify Manager immediately, and Owner shall act with diligence in making repairs and RENT SHALL NOT ABATE DURING SUCH PERIOD. If the damaged premises are unfit for occupancy and Owner decides not to repair the building, Owner may terminate his contract by giving written notice to Resident. If so terminated, rent will be prorated and the balance refunded along with the deposit(s) less lawful deductions.

22. DEFAULT BY OWNER: Owner agrees to (a) keep all areas of the apartment complex in a reasonably clean condition; (b) properly maintain hot water heating and/or air conditioning equipment, if provided; (c) abide by applicable state and local laws regarding repairs; (d) make reasonable repairs, subject to Resident's obligation to pay for damages caused by Resident, his family or guests.

23. DEFAULT BY RESIDENT: If Resident fails to pay rent or other lawful charges when due, or to reimburse Owner for damages, repairs or plumbing service costs when due or his family, guests or other occupants violate this contract or Owner's rules and regulations or applicable state or local laws or if Resident abandons the apartment or if Resident or his family or other occupants threaten or assault or use abusive or offensive language against any agent or employee or representative of Owner, the Owner may terminate Resident's right to occupancy by giving Resident notice.

24. ESCALATION CLAUSE: Due to increase in Utilities, Taxes, Insurance, and other operating expenses, Owner may increase the monthly rental in a lease upon 30 days written notice to resident. In no event may the rent be increased more than 10% during the initial term of the lease.

25. ABANDONMENT: Abandonment shall have occurred if, (1) without notifying the Owner, Resident is absent from the premises for 15 days while rent is due and Resident's possessions remain in the apartment, or (2) without notifying the Owner, Resident is absent for 15 days while rent is due and Resident's possessions have been removed from the apartment. If Resident abandons apartment, Owner may re-take apartment and attempt to rent it at fair market value. Resident shall be liable for the entire rent due for the remainder of the term, or the cost of re-renting the apartment, including rent lost, the cost of restoring the apartment to the condition at the time it was rented, and reasonable fees for re-renting the apartment. If Resident has left personal property in the apartment, Owner may remove and store it and attempt to give Resident notice of this action. Resident may obtain property by paying moving and storage costs. If Resident fails to claim property within 30 days of notice, Owner may make reasonable effort to sell the property at its fair market value and apply the proceeds toward any amount the Resident may owe. Any money remaining after such action shall be disposed of in accordance with UCA-78-44-11.

26. TIME: Time is of the essence for this agreement.

27. INVENTORY: The following furnishings and inventory are part of this agreement:

*Refrigerator, stove, range, stove, phone, cable TV, etc., with a license for it. In the event of a fire, the license shall be transferred to the new owner. The license shall be transferred to the new owner. The license shall be transferred to the new owner.*

28. ADDITIONAL TERMS AND CONDITIONS: *No conditions, lease, occupancy, etc. 21-77*

29. ENTIRE AGREEMENT: The foregoing constitutes the entire agreement made between the parties and may be modified only by a writing signed by both parties. The following exhibits, if any, have been made a part of this agreement:

☒ Application to Rent ☒ Inspection List ☐ Pet Lease ☐ Waterbed Agreement ☒ Other *see conditions*

The undersigned Owner accepts this agreement:

The undersigned Resident acknowledges receipt of a copy

*John H. Smith*  
Owner  
or Agent  
6100 F. Smith Rd.  
571 7100  
Phone

*John H. Smith*  
Resident  
6100 F. Smith Rd.  
571 7100  
Social Security No. *123-45-6789*  
in person *12/1/77*  
in person *12/1/77*  
in person *12/1/77*

To John Hawkins  
From Tom Callahan  
Rent \$290.<sup>00</sup> per mo. Paid for Jan. 15, 98  
through Feb. 15, 98.

And an Extension of rental Per Contract  
from Mar. 15, 98 through Mar. 15, 1999  
as of today Jan. - 20 - , 1998  
Tom Callahan John Hawkins  
Tom Callahan John Hawkins

(The first week Tom got here)  
→ John tried to remove the washer and dryer on the contention that they were his and he could do what he wanted to with them. Tom told him that the contract stipulated that he could not remove the washer and Dryer. John left the washer and dryer and didn't even ask to see the contract.

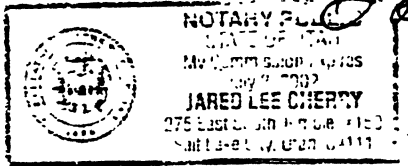
After the first flood John offered to pay for the damage to Tom's food, bed, boxes, damage, etc. when he got his insurance check. John asked Tom to remove the carpet in the hallway. My understanding was that John was to help Tom move his things upstairs & remove & replace the rug with his insurance check. The flood was not Tom's fault. John did give Tom \$50<sup>00</sup> for food but didn't pay Tom ~~for~~ for his property damage or labor. The entire bed, mattress, box springs and wood were soaked.

Hank smoked everywhere was extremely dirty and sub-rented to homeless people. We complained to John without results - This was all 3 of the other four tenants my understanding was 1 person per ~~at~~ room, renter only. This went on for about 5-6 months.

John turned off the heat in winter when it was still cold and that really sucked. 125



Tom wanted to work with John about moving out but John became irate and refused. It seems to me that John has practiced self-help since that time to try and make Tom's life miserable. Like the flood that occurred when John and NANCY said the washing machine ran over while they were there to work on the house. The machine was still set at second rinse but still had soap & soap residue in it at the bottom. Normally at the end of first rinse the water is clear. There seemed to be no way the flood could have been caused by the washing machine. There was no longer a rug in the hallway because Tom removed it. Therefore all of the waste water allegedly ~~should~~ from the washing machine should have easily gone straight into the sump and not caused a flood at all. I thought that a garden hose was the real culprit. It soaked my room & Tom's but not Tom's closet.



My Commission Expires: July 2, 2002

Reading at Notary Public

Don Rohberg 8-3-98

Notary Public: Subscribed and sworn to before me

*Jared Lee Cherry*

date August 3, 1998

E.L.C. "1"

Tom Callahan is a clean quiet  
tenant and pays his rent on time.  
He has rented from me for one year and  
a half, and I have not had any problems.  
If you need a reference call me.

thanks

John Hawkins

OFFICIAL CHECK

61-105775739

ZIONS BANK

Zions First National Bank  
Salt Lake City, Utah 84101

Date JUNE 13, 1998

Amount

290.00\*\*\*

PAY

THE SUM 290 DOLLS 00 CTS

To The Order Of \*\*\*JOHN HAWKINS\*\*\*

Drawer: Zions First National Bank

FOR RENT PAID IN FULL PER CONTRACT  
FROM JUNE 15th THROUGH JULY 15th

RE: TOM CALLAHAN

Issued By Integrated Payment Systems Inc., Englewood, Colorado  
6 CUBank (New York State), Buffalo, N Y

*Melissa Puente*  
Authorized Signature

⑆022000868⑆68⑈099155 105775739

THE VARIABLE TONE BACKGROUND AREA OF THIS DOCUMENT CHANGES COLOR GRADUALLY AND SMOOTHLY FROM DARKER TONES AT BOTH TOP AND BOTTOM TO THE LIGHTEST TONE IN THE

PAYEE: DETACH THIS STATEMENT BEFORE DEPOSITING CHECK

DESCRIPTION

61-105775739



To John Hawkins  
For rent paid in full  
per contract.  
from June 15, 1998  
through July 15, 1998

THIRD DISTRICT COURT - SLC COURT  
SALT LAKE COUNTY, STATE OF UTAH

---

JOHN B HAWKINS,	:	
Plaintiff,	:	MINUTE ENTRY
	:	
	:	
vs.	:	Case No: 980906136
	:	
TOM CALLAHAN,	:	Judge: ROBERT HILDER
Defendant.	:	Date: 11/27/98

---

Clerk: rhilder

After reviewing the supplemental memoranda filed by the parties, the court Determines that Langeland v. Monarch Motors, Inc., 952 P.2d 1058 (Utah 1998) is the controlling authority and Defendant's Motion to Deem Requests Admitted must be GRANTED. Plaintiff never filed an appropriate response, neither did he move to amend his answers after he became aware that there were pending and unanswered Requests for Admission. Pursuant to this Ruling, the court has this day signed the Order proposed by defendant on November 13, 1998. No further Order shall be required.

To - Tom C. Rent paid

for Oct 15 - Nov 15 97

I John Hawkes

Rec'd \$200.00

on Oct 18 97

PLAINTIFF'S  
EXHIBIT

7

Paid To John Hawkins  
(I. Tom Callahan) \$290.<sup>00</sup> rent per cont.

Nov 15, 1997

for rent Nov 15, 97 through Dec 15, 97

John Hawkins

To John Hawkins

\$1290.<sup>00</sup> Paid Rent in full  
Dec. 15, 97 through  
Jan 15, 98 per rent.

Tom Callahan

12-16-97

John Hawkins

To John Hawkins

From Tom Callahan  
Rent \$290.<sup>00</sup> per mo. Paid for Jan. 15, 98  
through Feb. 15, 98.

And an Extension of rental Per Contract  
from Mar. 15, 98 through Mar. 15, 1999  
as of today Jan. 20, 1998

Tom Callahan

Tom Callahan

John Hawkins

John Hawkins



To Tom Callahan

Rent Paid in full for (\$290.00)  
Feb. 15 through Mar. 15, 98

John Huntley

March 15 to May 15 & through May

Per agreement (rent only - one person per cabin) 15.98

290.00 Paid in Full.

John Hawkins

John Hawkins

To John Hawkins

For rent paid in full  
per contract.

from May 15, 1998

through June 15, 1998

about 1:55 pm May 13, 1998

John Hawkins

To John Hawkins

For rent paid in full  
per contract.

From June 15, 1998  
through July 15, 1998

RECEIVED FROM 1000 W. 11th St. Apt. 114 referred to as resident, the sum of \$ \$290.00 lease accepted - 6-21-97 DOLLARS evidenced by ☒ Cash, ☐ Check ☐ Other as a deposit which, upon acceptance of this rental agreement, shall belong to the Lessor of the premises, hereinafter referred to as Owner, and shall be applied as follows:

Monthly Rental Amount \$ \$290.00 cash accepted - 6-21-97

Rent for the period from July 15 to Mar 15 (Pro-Rate to End of Month)

Last 1 month's rent

Security Deposit \$150.00 ☒ Refundable ☐ Not Refundable

Other \$50.00 ☐ Refundable ☒ Not Refundable

TOTAL \$200.00 refundable

RECEIVED 490.00 PAYABLE PRIOR TO OCCUPANCY 490.00 (have received) 6-21-97

If this agreement is not accepted by the Owner or his agent, within 6-21-97 days, the total deposit received shall be refunded. Resident agrees to rent from the Owner the premises situated in the City of Salt Lake

consisting of 91 Ut located at 1000 W. 11th St. Apt. No. Base ment Large Room

TERM: The term shall begin on July 15 97 and continue (Check one of the two following alternatives)

☐ on lease basis until May 15 98

☒ on a month-to-month basis until tenant shall terminate by giving owner 30 days notice prior to the end of rental period.

2. RENT: Rent shall be \$ \$290.00 per month payable in advance upon the 15 day of each calendar month to Owner or his authorized agent, at the following address 614 W. R. Smith Ave. If rent is not paid within five (5) days after due date, Resident agrees to pay a late charge of \$15.00. Resident agrees to further pay \$8.00 for a dishonored bank check. If check is dishonored, Tenant agrees to make all future payments with Cash or Cashier's Check. Tenant agrees further to pay 2% per month on delinquent amount.

3. MULTIPLE OCCUPANCY: It is expressly understood that this agreement is between the Owner and all signatories, jointly and severally. In the event of default by any one signatory each and every remaining signatory shall be responsible for timely payment of rent and all other provisions of this agreement.

4. UTILITIES: Resident shall be responsible for the following utilities and equipment: ☐ Water, ☐ Sewer, ☐ Gas, ☒ Electricity, ☐ Other all utility included Washer-Dryer, phone cables all included

6. PETS: No pets shall be brought on the premises even temporarily, without the prior written consent of the Owner. The unauthorized presence of a pet will subject the resident to penalties, damages, deductions and termination.

7. HOUSE RULES: If the premises are a portion of a building containing more than one unit, resident agrees to abide by all house rules which are attached and are hereby made a part of this agreement, whether affected before or after the execution hereof, including but not limited to rules with respect to noise, odors, disposal of refuse, pets, parking, and use of common areas. Resident shall not have a waterbed on the premises without prior written consent of the Owner.

8. ORDINANCES AND STATUTES: Resident shall comply with all laws, health codes, and regulations of all municipal, state and federal authorities.

9. ASSIGNMENT AND SUBLETTING: Resident shall not assign this agreement or sublet any portion of the premises without prior written consent of the Owner Regular only - one person per room;

10. MAINTENANCE, REPAIRS OR ALTERATIONS: Resident accepts the premises as being in good order and repair, unless otherwise indicated. Resident shall at his own expense, maintain the premises in a clean and sanitary manner, including all equipment, appliances, furniture and furnishings therein, and shall surrender the same, at termination, in as good condition as received, normal wear and tear excepted. Resident shall be responsible for all repairs required for damages caused by his negligence and that of his family or invitees or guests. Resident shall not paint, or otherwise redecorate or make alterations to the premises without the prior written consent of the Owner. Resident shall irrigate and maintain any surrounding grounds, including lawns and shrubbery, and keep the same clear of rubbish, weeds or snow on walkways, if such are a part of the premises and are for the use of the resident. Resident will not remove Owner's fixtures, furniture and/or furnishings from the apartment, for any purpose. When Resident moves in, Owner shall furnish light bulbs of prescribed wattage for apartments' sockets, thereafter, light bulbs will be replaced at Resident's expense. If smoke detectors are present, Resident agrees to notify owner of any malfunction or worn out batteries.

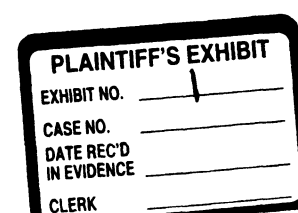
11. ENTRY AND INSPECTION: Resident shall permit Owner or Owner's agents to enter the premises at reasonable times and upon reasonable notice for the purpose of inspecting the premises or showing the same to prospective Residents or purchasers or for making necessary repairs.

12. POSSESSION: If Owner is unable to deliver possession of the premises as agreed, Owner shall not be liable for any damage caused. Resident shall not be liable for any rent until possession is delivered. Resident may terminate this agreement if possession is not delivered as agreed above.

13. SECURITY DEPOSIT: The security deposit set forth above shall secure the performance of resident's obligations. Owner may apply all or portions of said deposit on account for resident's obligations:

- (a) Accrued Rent. Example: For lost rent until owner re-rents, if Resident moves out before lease term expires.
- (b) Cleaning of the unit
- (c) Damages over and above normal wear and tear
- (d) Other costs provided for in this agreement

RESIDENT SHALL NOT HAVE THE RIGHT TO APPLY SECURITY DEPOSIT IN PAYMENT OF LAST MONTH'S RENT.



14 DEPOSIT REFUNDS Any refundable deposits shall be delivered or mailed to the Resident within 30 days of termination of tenancy or within 15 days of receipt of resident's new mailing address whichever is later

15 ATTORNEY'S FEES If legal action is taken by either party to enforce this agreement or to enforce any rights arising out of the breach of this agreement the prevailing party shall be entitled to all costs incurred in connection with such action including a reasonable attorney's fee

16 WAIVER No failure of Owner to enforce any part of this agreement shall be deemed as a waiver nor shall acceptance of a partial payment of rent be deemed a waiver of Owner's right to full amount

17 NOTICES All notices shall be given in accordance with state laws Where requirements are not spelled out by law notice may be given by mailing the same postage prepaid to resident at the premises or to Owner at the address shown below or such other places as may be designated

18 HOLD OVER Any holding over after expiration of lease term with the consent of the Owner shall be construed as month to month tenancy in accordance with the terms of this agreement

19 REIMBURSEMENT BY RESIDENT Resident agrees to reimburse Owner promptly for the replacement cost of loss of property damage or cost of repairs or service (including plumbing trouble) caused by negligence or improper use by resident his agents family or guests Resident shall be responsible for damage from windows or doors left open Such reimbursement is when owner makes demand Owner's failure to demand damage reimbursements late payment charges returned check charge or other sums due by Resident shall not be deemed a waiver and owner may demand same at any time including after move-out

20 OWNER SHALL NOT BE LIABLE Owner shall not be liable for any damages or losses to person or property caused by other residents or other persons Owner shall not be liable for personal injury or damage or loss of Resident's personal property (furniture jewelry clothing etc.) from theft vandalism fire water rain hail smoke, explosions, sonic booms or other causes whatsoever unless the same is due to the negligence of Owner Owner strongly recommends that Resident secure insurance to protect himself against the above occurrences If any of Owner's employees are requested to render any services such as moving automobiles handling of furniture cleaning delivering packages or any other service not contemplated in this contract such employee shall be deemed the agent of Resident regardless of whether payment is arranged for such services and Resident agrees to hold Owner harmless from all liability in connection with such services

21 REPAIRS AND MALFUNCTIONS RESIDENT AGREES TO REQUEST ALL REPAIRS AND SERVICES IN WRITING TO MANAGER except in extreme emergency when telephone calls will be accepted In case of malfunction of equipment utilities or damage by fire water or other cause Resident shall notify Manager immediately, and Owner shall act with diligence in making repairs and RENT SHALL NOT ABATE DURING SUCH PERIOD If the damaged premises are unfit for occupancy and Owner decides not to repair the building Owner may terminate his contract by giving written notice to Resident if it is so terminated rent will be prorated and the balance refunded along with the deposit(s) less lawful deductions

22 DEFAULT BY OWNER Owner agrees to (a) keep all areas of the apartment complex in a reasonably clean condition (b) properly maintain hot water heating and/or air conditioning equipment if provided, (c) abide by applicable state and local laws regarding repairs (d) make reasonable repairs subject to Resident's obligation to pay for damages caused by Resident his family or guests

23 DEFAULT BY RESIDENT If Resident fails to pay rent or other lawful charges when due or to reimburse Owner for damages repairs or plumbing service costs when due or his family guests or other occupants violate this contract or Owner's rules and regulations or applicable state or local laws or if Resident abandons the apartment or if Resident or other occupants threaten or assault or use abusive or offensive language against any agent or employee or representative of Owner the Owner may terminate Resident's right to occupancy by giving Resident notice

24 ESCALATION CLAUSE Due to increase in Utilities Taxes Insurance and other operating expenses, Owner may increase the monthly rental in a lease upon 30 days written notice to resident In no event may the rent be increased more than 1% during the initial term of the lease

25 ABANDONMENT Abandonment shall have occurred if (1) without notifying the Owner, Resident is absent from the premises for 15 days while rent is due and Resident's possessions remain in the apartment or (2) without notifying the Owner Resident is absent for 30 days while rent is due and Resident's possessions have been removed from the apartment If Resident abandons apartment Owner may re-take apartment and attempt to rent it at fair market value Resident shall be liable for the rent due for the remainder of the term or the cost of re-renting the apartment including rent lost, the cost of restoring the apartment to the condition at the time it was rented and reasonable fees for re-renting the apartment If Resident has left personal property in the apartment Owner may remove and store it and attempt to give Resident notice of this action Resident may obtain property by paying moving and storage costs If Resident fails to claim property within 30 days of notice Owner may make reasonable effort to sell the property at its fair market value and apply the proceeds toward any amount the Resident may owe A money remaining after such action shall be disposed of in accordance with UCA-78-44-11

26 TIME Time is of the essence for this agreement

27 INVENTORY The following furnishings and inventory are part of this agreement

*Washer, dryer, rug, stove, phone, cable TV, etc., will always be at 61 W. Russell Ave. and kept in working condition will be fixed within 3 days if they break down and utilities included*

28 ADDITIONAL TERMS AND CONDITIONS *No conditions lease accepted 6-28-92 to 2 (1c) may move in the weekend before the contract without charge*

29 ENTIRE AGREEMENT The foregoing constitutes the entire agreement made between the parties and may be modified only by a writing signed by both parties The following exhibits if any, have been made a part of this agreement

☒ Application to Rent ☒ Inspection List ☐ Pet Lease ☐ Waterbed Agreement ☒ Other *how to be a good tenant*  
(accepted) (My list) (Tom's list)  
Date = June 21 1992

The undersigned Owner accepts this agreement

The undersigned Resident acknowledges receipt of a copy of this agreement

*John Furkhis*  
Owner  
or Agent  
61 W Russell Ave  
Address  
571 7100  
Phone

*Tom LaLaba*  
Resident  
443-441298  
Social Security N  
15-000000  
Reside

1 SALT LAKE CITY, UTAH; MONDAY, MARCH 22, 1999, 1:55 P.M.

2 -ooo0ooo-

3 THE COURT: Okay. We're on the record. And sorry  
4 to have kept you, counsel. It's Case No. 980906136, John B.  
5 Hawkins versus Tom Callahan. Would counsel please state  
6 appearances.

7 MR. TURNER: Shawn Turner on behalf of the  
8 plaintiff, Mr. Hawkins, Your Honor.

9 MR. ROUNDY: Thor Roundy on behalf of the  
10 defendant, Tom Callahan.

11 THE COURT: Okay. And I note both parties are  
12 also present.

13 Counsel, I've read your trial briefs and I  
14 appreciate you both giving me courtesy copies and I  
15 appreciate the effort you took to prepare those. That's  
16 always helpful.

17 We do have the issue of the request for admissions  
18 that have been deemed admitted, and I think that is  
19 basically the rule and the law of the case. However, there  
20 are some admissions, as I read them, that give me some  
21 trouble. I don't know how critical, for example, the lease  
22 extension is to anyone's case. And although that appears to  
23 have been deemed admitted, I think, counsel, if there's  
24 anything that, I guess in this case, that plaintiff fees  
25 that I have deemed admitted but that results from fraud or a

1   forgery, I think I may take proof on that. Because that, to  
2   me, would not be something that perhaps should be included.  
3   I don't know if it was, but I see the allegation that it  
4   was.

5               So I'm going to give you a little bit of leeway  
6   there, Mr. Turner, to point out things that you think are  
7   not -- is not correct but that are deliberately not correct  
8   or result from some wrongdoing, because I think there's some  
9   area there where the Court does need to invoke its  
10   discretion. Again, there may not be any such thing in fact,  
11   but if you raise it, if that's the purpose, alert the Court  
12   to that.

13              I'm not quite sure how you want to proceed, given  
14   the status of the case, but is the plaintiff ready to go  
15   forward at this time? How would you like to proceed,  
16   Counsel?

17              MR. TURNER: Your Honor, what we propose to do is  
18   to start by calling a witness in a little bit of out of  
19   order. I have a realtor here, Ms. Kay Lee, who is going to  
20   describe the condition of the property when she viewed it.  
21   And we'd like to call her first so that she might be able to  
22   leave. And then after that, we will start with Mr. Hawkins  
23   and present --

24              THE COURT: That's fine. It's your case. You go  
25   ahead and call your first witness. Now, you may either make



1           A.    I was in the -- there's two rooms in the basement.  
2   There's a large room.  I was in that room, and it's on the--  
3   the north -- northern end of the home.

4           Q.    And after you moved out, did you subsequently rent  
5   that room to someone?

6           A.    Yes, I did.

7           Q.    And who was that?

8           A.    It was Tom Callahan.

9           Q.    So he moved into the room that you'd lived in  
10   prior?

11          A.    Yes, that's correct.

12          Q.    During that period that you lived in the home, had  
13   there been any problem, ever, with flooding in the basement?

14          A.    No, there -- there hadn't been.

15          Q.    Any damage to anything in the room that you'd been  
16   living in from water?

17          A.    No.

18          Q.    Mr. Hawkins, I'd like to show you what's been  
19   marked as Plaintiff's Exhibit No. 1.  Can you tell me what  
20   that is?

21          A.    Yes.  This is the agreement that Tom Callahan and  
22   I signed and went through on -- it was June of '97.

23          Q.    Okay.  And where did this -- this is a photocopy;  
24   is that correct?

25          A.    Yes.

1 Q. Do you have the original of this document?

2 A. No, I do not.

3 Q. And why not?

4 A. Because the day that we signed it, Tom took it  
5 with him when he left the home, after we got done signing  
6 it.

7 Q. Did you ever ask him for the original back, or a  
8 copy?

9 A. Yes, I did. After he moved in, I think it was a  
10 couple of weeks, I went to the home and talked with him and  
11 I asked for the deposit, which wasn't received at that time,  
12 and also lease agreement, for a copy of it.

13 Q. And what was his response?

14 A. He said he was busy at that time and he didn't  
15 want to talk about it, and went in his room and shut the  
16 door.

17 Q. Did you ever ask him for a copy again?

18 A. I think I asked him again for the deposit and a  
19 copy of the lease agreement. It was that next month when I  
20 came to get rent.

21 Q. And what was his response?

22 A. He said at that time he couldn't pay the deposit  
23 because of his previous landlord didn't refund his deposit  
24 and that he gave me \$50 of the non-refundable part. And he  
25 also said he -- he wouldn't give me a copy of the lease

1 agreement.

2 Q. Okay. Now, looking at the document marked as  
3 Plaintiff's Exhibit No. 1, and looking at the front page --  
4 and I believe it's a two-page document; is that correct?

5 A. Yes, it is.

6 Q. Okay. Looking at the front page of that document,  
7 can you tell me, looking at that, what of the writing on  
8 there is in your handwriting?

9 A. The writing that would be mine would be the "Salt  
10 Lake, 61 West Russett," and the "July 15th, '97," my  
11 initials "March 15th, '98," and --

12 THE COURT: Could you back up? Where is the "Salt  
13 Lake"?

14 THE WITNESS: That's -- "Salt Lake" is --

15 THE COURT: Oh, on the second sentence of the  
16 paragraph?

17 THE WITNESS: Yeah. "The resident agrees to rent."

18 THE COURT: Okay. That's your writing? And would  
19 you continue? I'm sorry to interrupt.

20 THE WITNESS: Okay. And, again, "Term." It says  
21 "The term shall begin July 15th, '97 on lease, based until"  
22 those are my initials and that's "March 15th, '98," that is  
23 my handwriting. And then I scratched that off and put  
24 "lease" and the "X." And then other than that, it's my name  
25 on the back page here.

1 Q. (By Mr. Turner) Okay. Let's just stay on the  
2 front page.

3 A. Oh, okay.

4 Q. Anything else on the front page?

5 A. I think that's it.

6 Q. Okay. So when we look at the -- at the top of the  
7 lease where it talks about monthly rental amount and it  
8 says, "\$290 cash accepted 6-21-97," is that your  
9 handwriting?

10 A. No, that's not my handwriting.

11 Q. Okay. And when we look at -- off to the right of  
12 that where it says, "Received \$490 cash" and "Payable prior  
13 to occupancy, \$490 cash," is that your handwriting?

14 A. That is not my handwriting.

15 Q. Where it says "Have received, 6-21-97," is that  
16 your writing?

17 A. Over here to the right?

18 Q. To the right of those two numbers.

19 A. That is not my handwriting.

20 Q. Did you in fact receive \$490 cash on 6-21-97?

21 A. I did not. I only received \$290 on that day, and  
22 it was cash.

23 Q. And the rest would have been the deposit, correct?

24 A. Yes.

25 Q. Was that information filled in at the time you

1 signed this document?

2 A. No, it was not.

3 MR. ROUNDY: Your Honor, I'm going to object.  
4 This is testimony contrary to the admissions in this case.

5 THE COURT: I agree. I understand. I'm going to  
6 allow any testimony that may go to forgery or fraud. So I  
7 will allow it. Your objection is always standing on that,  
8 if you'd like. Okay?

9 MR. ROUNDY: Okay. I'll just let a continuing  
10 objection stand as to that.

11 THE COURT: That will be fine.

12 MR. ROUNDY: Thank you, Your Honor.

13 Q. (By Mr. Turner) Okay. Looking again -- still on  
14 the first page, it's got -- after the address 61 West  
15 Russett, it says apartment number, it appears to say  
16 "Basement large consisting of," and there's a whole list of  
17 items, including cable TV.

18 A. Yes, I see that. That is not my handwriting.

19 Q. Was that filled in at the time that you signed  
20 this document?

21 A. It was not. It was not there.

22 Q. Have you ever had cable TV at that particular  
23 residence?

24 A. I have not.

25 Q. In your name?

1           A.    I have not had a bill that came to that address in  
2 my name.

3           Q.    That includes the time that you lived there,  
4 correct?

5           A.    That is correct. For the three and a half years,  
6 I have not had a bill.

7           Q.    Can you recall at this time, looking at the front  
8 of that document, any other items that would have been  
9 actually filled in at the time that you signed the  
10 agreement?

11          A.    On the rent, No. 2? This was filled in \$290, 15th  
12 day of the month, 61 Russett Avenue. I think Tom filled  
13 that in when -- when we were together, because that needed  
14 to be clear when rent was due. And then we agreed on all  
15 utilities as being water, gas, you know, sewer, telephone  
16 and then electric.

17          Q.    Okay.

18          A.    And other than that -- and I -- and this \$290 cash  
19 accepted 6-21-97, July 15th to March 15th, that was filled  
20 in by Tom as well the day that we signed the contract.

21          Q.    Okay. Part No. 4 dealing with the utilities  
22 discusses a washer and a dryer. Was it -- was that part of  
23 the lease agreement you'd entered into?

24          A.    No, it was not.

25          Q.    And what had you told Tom with respect to the

1 washer and dryer at the time that he was negotiating the  
2 lease with you?

3 A. He said he needed them. But I was planning on  
4 taking them with me when I moved out to my girlfriend's  
5 house.

6 Q. And did you tell him that?

7 A. Yes, I did.

8 Q. And what was his response?

9 A. He said he needed them. And I said that we might  
10 be able to work something out. But we didn't work something  
11 out at the time of the agreement.

12 Q. And then did you leave the washer and the dryer at  
13 the premises?

14 A. I did when I left, yes, I did.

15 Q. And why was that?

16 A. Because I -- they are heavy and I couldn't, you  
17 know, remove them myself.

18 Q. At the time that you were negotiating this initial  
19 lease with Mr. Callahan, was there a standard length of time  
20 that you did these leases for?

21 A. Oh, yes. It was -- I only rented month-to-month.  
22 It was a month-to-month basis for my tenants.

23 Q. Okay. And why -- this one was different. Why?

24 A. Because when Tom came to me, he said he needed to  
25 move out of the place he was in. And to begin with, he

1 wanted a two-year lease. And he said, "Well, I would prefer  
2 a one-year lease," and I decided on an eight-month lease  
3 because March 15th, you know, was the last month that school  
4 would be in. And that's when I was planning to sell my  
5 property. So I decided that eight months would be the  
6 longest, you know, lease period that I could, you know, do.

7 Q. And did you tell Mr. Callahan that's why you would  
8 only give him an eight-month lease?

9 A. Yes, it was.

10 Q. And what did he have to respond to that?

11 A. He agreed on it.

12 Q. Okay. Let's look at page 2 of this agreement.  
13 Now, looking through that, can you tell me, on that page,  
14 what handwriting, if any, is yours.

15 A. My handwriting is my name, the address and the  
16 telephone number. And the date, June 21st, '97, that's my  
17 handwriting as well.

18 Q. Okay. And that's -- that's the date above Tom  
19 Callahan's signature, right?

20 A. Yes. That's correct.

21 Q. The rest of that writing, how much of that was  
22 written at the time that you saw the lease?

23 A. Well, there wasn't any writing here at that time.

24 Q. So that --

25 A. When I signed it.



1 Q. That whole portion under No. 27 was -- was just  
2 blank lines?

3 A. Yes. That's correct.

4 Q. The same with No. 28?

5 A. Yes. That's correct.

6 Q. Mr. Hawkins, I'd like to show you what's been  
7 marked as Plaintiff's Exhibits No. 2 and 3. Can you tell me  
8 what those are?

9 A. No. 2 --

10 Q. First, No. 2. yeah.

11 A. -- exhibit would be Matt Abram, and this would be  
12 rental agreement that we signed, you know, to -- just for  
13 our rental agreement for him and I.

14 Q. Okay. And No. 3?

15 A. No. 3 would be Royal Kay. And it would be the  
16 agreement that I entered with Royal Kay.

17 Q. Okay. Now, are these true and correct copies of  
18 the leases you entered into with both these individuals?

19 A. Yes, they are.

20 Q. And are these copies of records that you would  
21 have kept as a landlord in the course of your business?

22 A. Actually, they're copies of the agreements that I  
23 had to go back to Matt and Royal to get because I couldn't  
24 find any of my previous files.

25 Q. Okay. So these are copies, not originals,

1 correct?

2 A. Oh, that -- yes, that's correct.

3 Q. And -- but they are copies of documents that you  
4 originally -- that you had the originals of in your  
5 possession at one time, correct?

6 A. Yes, that's correct.

7 Q. And you kept those originals at part of the --  
8 your business records.

9 A. Yes, that's correct.

10 MR. TURNER: Your Honor, I'd move for the  
11 admission of Plaintiff's Exhibits 1, 2 and 3.

12 THE COURT: Any objection, Mr. Roundy?

13 MR. ROUNDY: I'd object on the grounds of  
14 relevance and hearsay.

15 THE COURT: I'll overrule those objections.  
16 They're both received -- all three received.

17 Q. (By Mr. Turner) Now, looking at these two  
18 documents, were they off the same form agreement that you  
19 entered into with Mr. Callahan?

20 A. The same form? Yes, they were photocopies of an  
21 original that I had.

22 Q. Okay. And in both these cases, as you've  
23 testified previously, these were month-to-month, correct?

24 A. Yes, that's correct.

25 Q. And on -- were there any terms other than the

1 length of contract that you offered to Mr. Callahan that you  
2 think would have been different on the original lease that  
3 you signed with Mr. Callahan as opposed to these two leases?

4 A. I don't think I understand your question.

5 Q. That's good, because it was pretty confusing.

6 Looking at Exhibits 2 and 3, those are copies of  
7 the terms of the lease for those two individuals, correct?

8 A. Yes, that's correct.

9 Q. And No. 1 started out to be, at least, the  
10 agreement you had with Mr. Callahan, correct?

11 A. Yes, that's correct.

12 Q. Okay. Now, when I look at Exhibits 2 and 3, it  
13 appears that -- that they require monthly rental payments  
14 and delineate the utilities that are going to be provided,  
15 talk about the deposit that was required, and the rent.  
16 Now, the same thing would have been on the original with  
17 Mr. Callahan?

18 A. Yes, that's correct.

19 Q. Were you offering Mr. Callahan any other terms,  
20 other than a fixed lease, that were different from the terms  
21 that you were offering to Royal and Matt?

22 A. No. They would have been the same terms.

23 Q. The only possible difference might have been some  
24 difference in the amount of rent?

25 A. Yes, that's correct.

1           Q.    Mr. Hawkins, I'd like to show you what's been  
2 marked as Plaintiff's Exhibit No. 4. I guess I ought to  
3 move them here so we don't get them mixed up.

4           THE COURT: Before you go into that line, I'd just  
5 like to ask Mr. Hawkins, the Exhibit 1 you've been referring  
6 to, the lease with Mr. Callahan, where did you get that  
7 copy?

8           THE WITNESS: I got this copy from a rental book.  
9 It was a book --

10          THE COURT: No. I mean the filled out one, not  
11 your form. As you have it in front of you as Exhibit 1 with  
12 all the different conditions on it, where did you get a copy  
13 of that?

14          THE WITNESS: Oh. I received this copy from my  
15 attorney.

16          THE COURT: Okay. You didn't have it until after  
17 this lawsuit was instituted then?

18          THE WITNESS: That's correct.

19          THE COURT: Very well.

20          Q.    (By Mr. Turner) Okay. Mr. Hawkins, I'd like to  
21 show you what's been marked as Plaintiff's Exhibit No. 4.  
22 And I represent to you that this is a series of eight pages.  
23 Is that what you've got on yours?

24          A.    Yes, that's correct.

25          Q.    And these are photocopies of some three-by-five

1 cards that were made at Mr. Callahan's deposition. Did you  
2 ever see the three-by-five card originals for these  
3 particular documents?

4 A. The only time I saw the originals is when I signed  
5 them.

6 Q. Okay. And so the original of these items, how  
7 were they presented to you?

8 A. They were given me to sign for receipt for rent.

9 Q. And who gave them to you?

10 A. Tom Callahan gave them to me.

11 Q. Okay. And starting with the one -- if you look  
12 through them, I think you'll find that I've put them in  
13 chronological order. Would you check and see if that  
14 appears to be accurate to you.

15 A. Yes, they seem to be in order.

16 Q. Okay. Looking at the very first one, is that --  
17 is that or any part of it in your handwriting?

18 A. The one, two, three, last four lines, that's all  
19 my handwriting.

20 Q. Okay. So you wrote in all of the -- for October  
21 15 to November 15, et cetera, right?

22 A. Yes, that's correct.

23 Q. Okay. And did Tom tell you why he was giving the  
24 card to you to sign?

25 A. Just for receipt, for his record.

1 Q. Okay. And the lease with Tom started in June of  
2 '97; is that correct?

3 A. Yes, that's correct.

4 Q. Do you recall if he gave you a card before this  
5 one in October?

6 A. I don't -- I can't recall if he did or not.

7 Q. Okay. Now, at least starting with October, each  
8 month he would give you a card to sign that he'd paid his  
9 rent, correct?

10 A. Yes, that -- that's correct.

11 Q. And when we go to the next month, when you scroll  
12 through there, how much of that is in your handwriting  
13 versus Mr. Callahan's?

14 A. Just my name at the bottom there.

15 Q. Okay. So he'd filled in the whole top portion at  
16 that time, right?

17 A. That's correct.

18 Q. Now, when we skip to the fourth document in that  
19 set, which is the one, I think, that we need to focus on,  
20 how much of that particular document is in your handwriting?

21 A. Just my signature.

22 Q. Okay. What about the name above your signature?

23 A. That is not my handwriting.

24 Q. At the time that you were presented this card, did  
25 it have all of this writing on it?

1           A.    No, it did not.

2           Q.    What would have been on it at the time you signed  
3 it?

4           A.    I just think the top here for the receiving of the  
5 rent from January 15th through the February 15th, '98.

6           Q.    Okay. And did you ever discuss, around that  
7 particular time that this card was given to you, did you  
8 discuss giving Mr. Callahan an extension of his lease  
9 agreement?

10          A.    Not around that time.

11          Q.    Okay. When was it that you first had a discussion  
12 with Mr. Callahan regarding an extension of the lease  
13 agreement?

14          A.    It would have been around -- I think it was March.

15          Q.    Of 1998?

16          A.    Yes.

17          Q.    And what was the substance of that conversation?

18          A.    That he wanted to extend his lease another two  
19 years.

20          Q.    What did you tell him?

21          A.    I said no, I could not do that.

22          Q.    And did you give him a reason?

23          A.    Yes. I told him that it was to sell my property.

24          Q.    Did you tell him when you planned on selling the  
25 property?

1 I am taking 8 through 10 under advisement subject to further  
2 relevance.

3 MR. TURNER: Is that 8 through 11, Your Honor?

4 THE COURT: 6 and 7 are received. 8, 9, 10 and 11  
5 are under advisement.

6 Q. (By Mr. Turner) I have no further questions for  
7 this witness at this time, Your Honor.

8 THE COURT: Mr. Roundy, would you like to cross or  
9 would you like a five-minute break first? Whatever you  
10 wish.

11 MR. ROUNDY: I'm sorry?

12 THE COURT: Would you like a five-minute break or  
13 would you like to cross immediately?

14 MR. ROUNDY: I'd rather cross immediately.

15 THE COURT: Go ahead.

16 MR. ROUNDY: At this point, Your Honor, perhaps I  
17 could ask you to also make a ruling on this issue of forgery  
18 of the documents. There hasn't been any evidence, I think,  
19 strong enough to meet plaintiff's burden of proving any of  
20 those documents are forged.

21 THE COURT: I don't think it's an appropriate time  
22 to make that ruling. If I made it now, I'd probably be --  
23 the only evidence is that he said he didn't do it. And so I  
24 would be ruling, very frankly, that Exhibit 1 was altered  
25 and that the card was altered. I don't think I've heard



1 enough.

2 MR. ROUNDY: Okay.

3 CROSS-EXAMINATION

4 BY MR. ROUNDY:

5 Q. Let's take a look at Exhibit No. 1. Now, you  
6 indicated that parts of this were filled out by Tom and that  
7 parts of -- certain parts were filled out before you signed  
8 this lease agreement and certain parts were filled out after  
9 you signed the lease agreement. Is that your testimony?

10 A. That's correct.

11 Q. Okay. You gave us copies of some other leases --  
12 or at least we reviewed Exhibits 2 and 3, which are copies  
13 of other leases. With regard to those, you did all the  
14 filling-out on those, you testified; is that right?

15 A. On Exhibit 3?

16 Q. Yes.

17 A. This is all my handwriting except Royal M. Kay.  
18 And on Exhibit 2, the top part Matt filled in.

19 Q. Okay.

20 A. That is Matt's handwriting. And then the \$200  
21 deposit paid on the right there, received, that is my  
22 handwriting. And then the scribble mark up here, that's  
23 Matt's handwriting. He was trying to figure out what he was  
24 going to pay. And then on 2, "Rent," that is Matt's  
25 handwriting. And then on 4, that is my handwriting. And

1 then on the last page, that's my handwriting, "John  
2 Hawkins," and my address.

3 Q. Okay. Now, let's look at 3 quickly. When you  
4 said -- when you referred to Mr. Kay's name, I see two  
5 places where that appears, one at the top of the agreement  
6 and one his signature on the second page.

7 Were you referring to the signature on the second  
8 page or were you referring to both instances?

9 A. I was referring to both instances.

10 Q. Okay.

11 A. This top is not my handwriting in the --

12 Q. And that's his handwriting.

13 A. That is correct.

14 Q. Where "month-to-month" is written, you wrote that;  
15 is that correct? On the first page?

16 A. Oh, yes. Up here, "September 1996, month-to-  
17 month"?

18 Q. Okay.

19 A. That's correct, yes.

20 Q. All right. And on the contract identified as  
21 Plaintiff's Exhibit No. 2, you also wrote "month-to-month"  
22 on that one; is that right?

23 A. Exhibit No. 2?

24 Q. Uh-huh.

25 A. No. That is not my handwriting.

1 Q. Okay. Who wrote "month-to-month" on that one?

2 A. That would have been Matt.

3 Q. Okay. And then on Plaintiff's Exhibit No. 1, it  
4 doesn't say month-to-month, does it?

5 A. No, it does not.

6 Q. Okay. Did you have any problem with Tom filling  
7 out some of the provisions of this lease before it was  
8 signed?

9 A. No, I didn't.

10 Q. Okay. Let's look back at Exhibit No. 2 again.  
11 Under Item No. 4, it refers to utilities and each of the  
12 utilities is marked indicating that the tenant would be  
13 responsible for those utilities; is that correct?

14 A. That the tenant will be responsible?

15 Q. Yes.

16 A. No, that's not correct. I was responsible for the  
17 utilities.

18 Q. Doesn't it say "Resident shall be responsible for  
19 the following utilities"? And they're all checked?

20 A. Yes, that's correct.

21 Q. Isn't the tenant the resident?

22 A. That's correct.

23 Q. And the same thing on Plaintiff's Exhibit No. 3,  
24 are each of those marked as the resident's responsibility as  
25 well?

1           A.    That's correct.

2           Q.    Okay.  Now, let's look at Exhibit No. 1.  None of  
3 the utilities are marked in that case, are they?

4           A.    No, they're not.

5           Q.    So it's true that you were responsible for  
6 utilities in that case; is that correct?

7           A.    That's correct.

8           Q.    But it wouldn't be unusual for you to have reached  
9 that agreement before you signed this contract, would it?

10          A.    Reached?

11          Q.    That's what you did with -- with the other  
12 tenants.  You decided who was going to be responsible for  
13 utilities and those parts of the contract were filled out?

14          A.    Well, it was decided when I put the ad in the  
15 paper, because it said -- you know, it had a rent amount  
16 plus utilities.

17          Q.    I'm going to have to interrupt you because that  
18 portion of your testimony has been disallowed in the past,  
19 so I'm going to ask -- move the Court right now to strike  
20 that testimony again.

21                THE COURT:  Grant that motion.

22          Q.    (By Mr. Roundy)  What I'm asking you is that --

23                MR. TURNER:  Your Honor, I'd like to object.  If  
24 Counsel's going to ask questions that cause him to respond  
25 in certain fashions and then strike the testimony, that's --

1 THE COURT: Well, the question was whether it's a  
2 responsive answer, and I think the motion was appropriate.

3 Continue, Mr. Roundy.

4 MR. ROUNDY: Thank you, Your Honor.

5 Q. I'd like to have you refer now to Exhibit No. 4.  
6 Now, this consists of eight cards that were referred to that  
7 you either filled out or signed.

8 A. That's correct.

9 Q. The first one doesn't have your signature on it,  
10 so we'll skip that one.

11 I'd like you to look at the next one and notice  
12 where your signature is placed on that. It's right after  
13 the words are written "For rent, November 15, '97 through  
14 December 16, '97."

15 I'd like to have you look at the next one after  
16 that and notice where your signature is placed. It's right  
17 after the words "12-16-97."

18 I'd like you to look at the fourth card, and this  
19 is the one that involved the extension of the lease, and  
20 notice where your signature is placed on that one, at the  
21 bottom of the card after the various things that -- that  
22 have been written in there.

23 I'd like you to look at the next card and see  
24 where your signature is placed, just below the statement  
25 "Rent paid in full for \$190, February 15 through March 15,

1 '98."

2 I'd like you to look at the next card and notice  
3 where a signature is placed right underneath your name.

4 I'd like you to look at the next card and notice  
5 where your signature is placed with reference to the time  
6 that the payment was made in that instance. And, of course,  
7 there's not anything -- your signature is not on the file  
8 card.

9 Now, I'd like to ask you: Do you think that  
10 there's a reason with respect to the fourth card, which is  
11 the one that includes the reference to the extension of the  
12 lease contract, is there any reason you can give me why you  
13 would have put your signature at the very bottom right-hand  
14 corner of that card instead of right up under the statement  
15 "From Tom Callahan, rent, \$290 per month, paid for January  
16 15, '98 through February 15, '98"? Is there any reason you  
17 would have put it in the bottom right-hand corner instead of  
18 underneath that sentence at the time you signed the card?

19 A. No.

20 Q. Don't you think it's a little bit unusual or it  
21 would be a little unusual for you to have signed this card  
22 in the bottom right-hand corner and left a big blank space  
23 like that?

24 MR. TURNER: Objection. Argumentative.

25 THE COURT: Objection what?

1 MR. TURNER: Argumentative, Your Honor.

2 THE COURT: I'll allow the question.

3 Q. (By Mr. Roundy) Don't you think it would be  
4 unusual if you'd signed it in the bottom right-hand corner  
5 and left all that space on this card?

6 A. In looking at the pattern, yes, that's -- that  
7 would be true.

8 Q. Okay. Thank you.

9 Will that change your testimony about what was on  
10 that card when you signed it?

11 A. What do you mean?

12 Q. That maybe after considering that question, is it  
13 possible that you signed that card when those words were  
14 written on the card?

15 A. No.

16 Q. I'd like to ask you about the occasions upon which  
17 you claim that there was some verbal altercations with Tom.

18 You have indicated that the first instance, you  
19 were painting Henry Bowman's room and you were pulling out a  
20 phone line and Tom came up yelling that his phone wasn't  
21 working; is that right?

22 A. Yes. After, probably, five or six minutes of  
23 yelling and screaming, I calmed him down and understood  
24 that, yes. That's correct.

25 Q. What did he say to you?

1 threaten you with any kind of physical harm?

2 A. No.

3 Q. Okay. Thank you.

4 I'd like you to refer to Plaintiff's Exhibit No.

5 5. Is it your testimony that this document was provided on  
6 or about May 1st, 1998 to tenants?

7 A. That's correct. Yes.

8 Q. And I wonder if you could tell me why, at this  
9 time, you didn't say anything about Tom's deposit, put any  
10 kind of notice in writing concerning Tom's deposit?

11 A. I guess I didn't think that I needed to.

12 Q. Okay. And was there any reason why you didn't  
13 request a copy of the contract which you purportedly didn't  
14 have on this date or any date prior to this?

15 MR. TURNER: Objection, Your Honor. Misstates the  
16 witness's testimony on direct examination. He already  
17 testified he'd asked for a copy of the contract on at least  
18 two occasions.

19 THE COURT: He testified what? I'm sorry.

20 MR. TURNER: That he had asked for a copy of the  
21 contract on at least two occasions.

22 THE COURT: Okay.

23 Q. (By Mr. Roundy) And my question now is: Is there  
24 any reason you didn't ask for that deposit or for the copy  
25 of the contract in writing?



1           A.    No, there isn't any reason.

2           Q.    Any time before May 1st.   Okay.

3                   Let's refer to Plaintiff's Exhibit 6, the three-  
4 day notice to pay rent or vacate.  Is it your testimony that  
5 this \$150 that's referred to in Plaintiff's Exhibit No. 6 is  
6 simply this refundable security deposit, also by the  
7 contract?

8           A.    That's correct, yes.

9           Q.    Okay.  What is the \$35 eviction notice fee?

10          A.    That's for the time that it took me to go back to  
11 the house and prepare it and come back.

12          Q.    How much time did that take you?

13          A.    Oh, I think it's about 45 minutes.

14          Q.    All right.  So you wanted Tom to pay you for  
15 spending 45 minutes of your time to basically do the  
16 handwriting on this document and deliver it to him?

17          A.    That's correct.

18          Q.    Is there any provision in the contract that says  
19 that you have the right to charge him \$35 or charge him for  
20 your time if you give a notice of eviction?

21          A.    I don't think so.

22          Q.    Okay.  So, in fact, if you didn't have the right  
23 to charge him that \$35 by giving him this three-day notice,  
24 pay \$185 or quit, you would have been trying to overcharge  
25 him, wouldn't you?

1 this witness.

2 THE COURT: You may step down then.

3 May the witness be excused?

4 MR. ROUNDY: No objection.

5 THE COURT: You're free to leave, if you wish,

6 Ms. Travino. It's your choice.

7 Another witness?

8 MR. TURNER: No. Plaintiff will rest, Your Honor.

9 THE COURT: Very well. Defense ready to proceed?

10 MR. ROUNDY: Yeah, I think we might as well.

11 THE COURT: Okay.

12 MR. ROUNDY: Defense will call Tom Callahan to the

13 stand. Well, let's see, one procedural matter before that,

14 Your Honor, if I may move to have admitted into evidence at

15 this time the request for admissions and attached documents.

16 THE COURT: I'll allow them to be received.

17 I'm reserving the issue of revisiting any admitted fact that

18 may in fact involve fraud or forgery or any like conduct.

19 So, I mean, while they're admitted, you can refer to them

20 and use them. I'm not making them conclusive at this point.

21 MR. TURNER: Your Honor, I want to make an

22 objection.

23 THE COURT: Uh-huh.

24 MR. TURNER: First of all, simply because

25 something has been admitted in a request for admission does

1 not make the particular document or item admissible for  
2 purposes of fraud.

3 THE COURT: Not as an exhibit.

4 MR. TURNER: Right.

5 THE COURT: I agree with you on that.

6 MR. TURNER: And that's -- that's -- I also --

7 THE COURT: I just -- for use in the trial, you  
8 can do it. But I agree, it shouldn't -- and that's a little  
9 different; we don't have a jury. But I review it anyway.  
10 We wouldn't give it to a jury and give added weight to the  
11 testimony.

12 MR. TURNER: Correct.

13 THE COURT: But --

14 MR. TURNER: For example, Your Honor, one specific  
15 example, if I may.

16 THE COURT: Yes.

17 MR. TURNER: One of the requests for admissions is  
18 "Admit that this is a true and correct affidavit of Dan  
19 Warburg." Okay?

20 THE COURT: Uh-huh.

21 MR. TURNER: And, obviously, Dan Warburg is not  
22 here. So even if that particular request for admission has  
23 to be admitted, the fact that it's a true and correct  
24 affidavit does not make it admissible.

25 THE COURT: No. It may still not be admissible as

1 hearsay, for example, I agree.

2 MR. TURNER: Exactly, Your Honor.

3 THE COURT: But for the purposes of discussing and  
4 talking about them, but there are limitations. I think  
5 Mr. Roundy understands that.

6 MR. ROUNDY: Okay.

7 THE COURT: And he'll have to use them  
8 specifically.

9 MR. ROUNDY: Right. What I want to make sure  
10 we're clear on is that, you know, if we get to some appeal  
11 level or something like that and there's not an objection  
12 that we never got these read into evidence at the trial --

13 THE COURT: Yeah. And I think, essentially, that  
14 they're being -- they're published because they've been  
15 used, the Court has made a ruling that they're being  
16 admitted. I have somewhat modified that. Not necessarily,  
17 but I've opened the door to that, depending on testimony  
18 today. But I also agree that, for example, by merely having  
19 an attached document that it may be a true and correct copy  
20 doesn't make it either relevant or otherwise admissible,  
21 depending on other factors. Okay?

22 MR. ROUNDY: Yes.

23 THE COURT: Okay. So, for example, if you refer  
24 to the Warburg affidavit, you'll have to really face a  
25 hurdle.

1 MR. ROUNDY: Very well. Thanks, Your Honor.

2 All right. Plaintiff calls Tom Callahan to the  
3 stand.

4 THE COURT: Good. Mr. Callahan, step up and be  
5 sworn.

6 TOM CALLAHAN,  
7 defendant herein, called to testify by  
8 the plaintiff and being first duly sworn,  
9 was examined and testified on his oath as  
10 follows:

11 DIRECT EXAMINATION

12 BY MR. ROUNDY:

13 Q. Tom would you please state your name for the  
14 record.

15 A. Thomas Covey Callahan.

16 Q. Thank you. And are you the defendant that we're  
17 here for trial today?

18 A. Yes, sir.

19 Q. Tom, there's some documents that are there in  
20 front of you, and I believe that should be all the  
21 plaintiff's exhibits. Let me ask you if you can please find  
22 Plaintiff's Exhibit No. 1.

23 A. I have a 1 and a 3. You're talking about No. 1  
24 specifically, right?

25 Q. Yeah. I'm talking about Plaintiff's Exhibit No.

1 1. It's a two-page document. And just to help you find it,  
2 it should be a copy of your legal contract.

3 THE COURT: The lease with your name on the top of  
4 it. That one.

5 MR. ROUNDY: There's another page that goes with  
6 that so, if you can find that, it goes together.

7 THE WITNESS: Looks like it might be it.

8 MR. ROUNDY: Okay.

9 Q. Tom, do you recognize this document?

10 A. Yes, sir.

11 Q. Would you tell me what it is, please?

12 A. This is a lease contract agreement between John  
13 Hawkins and myself.

14 Q. Okay. And what was the date that this contract  
15 was signed?

16 A. According to this, we have a contract -- it was 6-  
17 21-97.

18 Q. Okay. Has anything on this document been changed  
19 since 6-21-97?

20 A. The only thing that we did, and it was because of  
21 some problems with the other tenant, underlined "No pets,"  
22 which was basically understood but just so that he would see  
23 that it was --

24 THE COURT: I'm sorry, where is that underlined --

25 THE WITNESS: It's on No. 6.

1 THE COURT: No. 6. Oh, okay. You're saying that  
2 happened after it was signed?

3 THE WITNESS: Yes, sir.

4 THE COURT: Okay. Continue.

5 THE WITNESS: And then underlined "written  
6 consent, renter only, one person per room," and that refers  
7 to also part of the yellow square documents.

8 And then on No. 7, wrote in there "no controls."  
9 I read that part of it and then I told John that I would go  
10 with whatever the majority went with and took it out. But  
11 it says -- it either says "no controls" or "no  
12 restrictions."

13 Q. (By Mr. Roundy) Okay. Do you remember what it  
14 said?

15 A. It would say -- to the best of my knowledge, it  
16 says no controls or no restrictions.

17 Q. Okay. Now, is it your testimony that that was  
18 changed after this document was signed on June 21, '97?

19 A. Yes, sir.

20 Q. Okay. Is there anything else on the -- on this  
21 Plaintiff's Exhibit No. 1 that's been changed after 6-21-97?

22 A. Not to my knowledge. Everything on there was  
23 basically a reasonable request, and on the washer, dryer, et  
24 cetera, et cetera, et cetera, that's just all part of it.  
25 Yes, sir.

1 Q. Okay. Now, let me get a little bit more specific.  
2 I've asked you if it was changed after 6-21-97. I want to  
3 be more specific. Was it changed on 6-21-97 but after John  
4 Hawkins signed this contract? Other than the things you've  
5 already mentioned, was there anything changed on this  
6 contract after John Hawkins signed it on 6-21-97?

7 A. No.

8 Q. Okay.

9 A. Except for those things, no, sir.

10 Q. All right. So up in the top paragraph when it  
11 says -- where it says "\$290, lease accepted 6-21-97," that  
12 appeared on this contract when John Hawkins signed it; is  
13 that correct?

14 A. Yes, sir.

15 Q. And below that there's "\$290 cash accepted 6-21-  
16 97"; is that correct?

17 A. Yes, sir.

18 Q. And then "Received \$490 cash and payable prior to  
19 occupancy, \$490 cash now received 6-21-97." Were they on  
20 it?

21 A. Yes.

22 Q. When John Hawkins signed it?

23 A. Yes, sir.

24 Q. All right. How about the references to the  
25 deposit, "Cash, \$150" the check mark, "Cash, \$50," looks



1 like a check mark by cash and an "X" in "Non-refundable" and  
2 then "Cash, \$200 refundable." Were those there --

3 A. Yes, sir.

4 Q. -- at the time that John Hopkins signed it?

5 I need your answer after my question's done,  
6 please.

7 A. I'm sorry. Yes, sir.

8 Q. Okay. Now, there's a reference up above paragraph  
9 No. 1 there, and it has some words in it. And I wonder if  
10 you can read those. And maybe I should give you this  
11 original copy.

12 MR. ROUNDY: Your Honor, if I can approach the  
13 witness.

14 THE COURT: You may.

15 Q. (By Mr. Roundy) Let me give you that original  
16 copy and ask you if you'd please read those words, beginning  
17 with --

18 A. Exactly which ones -- you say the first  
19 paragraphs?

20 Q. Above the first paragraph, it says "Consisting of"  
21 and then there's handwritten words, "bathroom, kitchen,  
22 living room."

23 Q. Okay. It says -- looks like it says "bathroom,  
24 kitchen, living room, washer, dryer, phone, cable TV,  
25 refrigerator, microwave and all" -- it says "all included,

1 et cetera, room," and I'm not sure if something came through  
2 right there. And then it says "No restrictions or  
3 conditions, et cetera."

4 Q. All right. Does that word, "room," go with the  
5 line above, "Apartment number, basement, large room"?

6 A. Rooms --

7 Q. I'm just wondering if that's a reference to the  
8 room that you were renting or it's something that said  
9 "consisting of."

10 A. Basically the -- well, the living room was part of  
11 the arrangement, yes, sir, and the kitchen. And the  
12 bathrooms.

13 Q. Okay. What was the size of the apartment in the  
14 basement that you were renting?

15 A. Oh, just guessing, I would say 20-by-10 or 20-by-  
16 12, with the closet space.

17 Q. Okay.

18 A. It had a kind of a shelf space next to the outside  
19 window.

20 Q. Okay. Was there cable TV at the premises when you  
21 lived there?

22 A. He told me there was when I was upstairs and he  
23 was showing me the living room. There was a large TV. I'm  
24 presuming it looked like about a 31-inch TV. And it was  
25 gone, and I was told that was -- the cable TV was part of

1 the arrangement and also that that TV there was mine to use.

2 Q. Okay. Let's go down to paragraph No. 4. Well,  
3 let's see. I don't know if I asked you. We just read those  
4 provisions, "bathroom, kitchen, living room" and so forth.  
5 Were those there when John Hawkins signed this agreement?

6 A. Yes, sir.

7 Q. Okay. Let's go down to paragraph No. 4. Would  
8 you read the handwritten portions near Paragraph No. 4 there  
9 for us?

10 A. "All utilities included, and washer, dryer, phone,  
11 cable TV, all included, and refrigerator, stove, access to  
12 upstairs bathroom and et cetera."

13 Q. Okay. Was that written in when John Hawkins  
14 signed this agreement?

15 A. Yes, sir.

16 Q. Okay. Would you turn to the second page under  
17 item No. 27, Inventory, and would you read the handwriting  
18 under item No. 27 for us?

19 A. Looks like "Washer, dryer, refrigerator, stove,  
20 phone, cable TV, et cetera will always be at 61 Russett  
21 Avenue, keep in working condition and will be fixed in three  
22 days if they break, and all utilities included." That's on  
23 27.

24 Q. Okay. And why don't you read 28 then?

25 A. "No condition lease accepted 6-21-97." And then

1 under that, "And I, T.C." -- that's me.

2 Q. Okay.

3 A. -- "may move in weekend before contract without  
4 charge. I'm going to change lock and not make sub-key."

5 Q. Okay. Did you ever change the lock?

6 A. I took the lock off. Partly because there were so  
7 many residents, I thought it was -- John had told me he  
8 thought he had only his key, but he wasn't sure.

9 Q. Okay. When did that transpire?

10 A. When did I remove the lock?

11 Q. Yeah. You can tell me in general terms.

12 A. I think shortly after I moved in.

13 Q. Within the first couple of months?

14 A. Oh, easily.

15 Q. Okay. Did this issue ever come up, "Tom Callahan  
16 may move into -- move in the weekend before the contract  
17 without charge"? Did he ever try to charge you after you  
18 moved in at some point for that weekend?

19 MR. TURNER: Objection. Relevance, Your Honor.

20 THE WITNESS: No, sir.

21 THE COURT: What?

22 MR. TURNER: Objection. Relevance, Your Honor.

23 That's --

24 THE COURT: What's the relevance, Mr. Roundy?

25 MR. ROUNDY: Well, Your Honor, they're alleging

1 that these provisions were not in the contract at the time  
2 John Hawkins signed it. And what I'm trying to point out by  
3 putting this evidence in is that there's no reason for Tom  
4 Callahan to have added any of these things relating to  
5 making changes to this document, if this is something that  
6 never became an issue with this contract.

7 It was, in all likelihood, there --

8 THE COURT: Overruled. Ask your question.

9 MR. ROUNDY: Okay.

10 Q. Tom, would you go ahead and answer the question.  
11 Or I can repeat it, if that's helpful.

12 A. If you would, please, sir.

13 Q. Okay. I was wondering if John Hawkins ever tried  
14 to charge you for moving in early.

15 A. No.

16 Q. Under the contract. So that never became an issue  
17 after the contract was signed?

18 A. No, sir.

19 Q. Okay. Were those provisions of paragraph 27 and  
20 28, did they appear in the contract at the time John Hawkins  
21 signed it?

22 A. Provisions 27 and 28?

23 Q. Yes. The handwritten portions.

24 A. They were all there when we signed the contract,  
25 yes, sir.

1 Q. Okay.

2 Tom, I'd like you to look at Exhibit No. 4 now,  
3 and that's eight different documents and they all are  
4 these -- are photocopies of these green cards.

5 A. No. 4?

6 Q. -- or the yellow cards. There's eight of them,  
7 the photocopies of the cards filled out or signed by John  
8 Hawkins.

9 THE COURT: You said eight?

10 MR. ROUNDY: There's eight of them.

11 THE WITNESS: One, two, three, four, five, six.  
12 I've got two papers.

13 THE COURT: They're not stapled together in your  
14 set?

15 MR. TURNER: They're not stapled, no.

16 THE COURT: Okay. Then maybe they're missing.

17 THE WITNESS: Here's, looks like, two more.

18 MR. ROUNDY: Okay.

19 THE WITNESS: They're not in any specific order.  
20 Go ahead.

21 Q. (By Mr. Roundy) All right. Would you just review  
22 those, look at each one of them?

23 A. The one that has four on it says "To Tom Callahan,  
24 rent --

25 Q. Tom, I don't want you to answer any questions

1 right now.

2 A. Oh, okay.

3 Q. I want you to look at each of them.

4 A. Okay.

5 Q. Then I'll ask you some questions. And if you need  
6 to look at them again, you may.

7 A. Okay.

8 Q. Tom, do you recognize these documents?

9 A. Yes. They're the three-by-five, approximately,  
10 yellow cards that I gave to him to sign.

11 Q. Okay. Now, the first card isn't signed by him,  
12 but I'm not too worried about that one. There's also a  
13 card --

14 A. You're talking about the one with the No. 4 on it?

15 Q. Yeah. The one with No. 4 on it.

16 A. He's got his name up there, R. John Hawkins.

17 Q. Okay. Well, I don't want to -- I don't want to  
18 worry about that one. I don't want to worry about the last  
19 one which refers to the rent from June 15th, '98 to July 15,  
20 '98. But I do want to ask you about these other cards  
21 because they all have John's signature on it.

22 A. Okay.

23 Q. Were any of these cards changed at the time that  
24 John signed them?

25 A. No, sir.

1           Q.    Okay.  Let's look specifically at the one that  
2 purports to extend the rental contract.  And that one's  
3 signed by you and by John.

4           A.    Yes, sir.  Oh, printed in and signed.

5           Q.    I want to ask you the same thing, because this is  
6 particularly important.  Was this document changed after  
7 John signed it?

8           A.    No, sir.  Very definitely not.

9           Q.    Okay.

10           MR. ROUNDY:  Your Honor, I have originals of all  
11 these cards, if the Court would prefer that we introduce the  
12 originals into evidence.

13           THE COURT:  I'm okay with the copies, unless  
14 Counsel believes I need an original to see any differences  
15 in writing or anything.

16           MR. TURNER:  I don't believe so, Your Honor.  But  
17 I'm happy with either way.  It doesn't matter to me.

18           THE COURT:  Okay.  We're okay with copies then.

19           MR. ROUNDY:  Would the Court prefer to have the  
20 original of the lease agreement or is the Court okay with a  
21 copy?

22           THE COURT:  Same thing.  If you -- I'm satisfied.  
23 I think it's pretty easy to read.  I have no problem.  
24 Again, if you think there's things in ink colors or  
25 something that would make a difference.



1           A.    And it said by order of the court.

2           Q.    Okay.  Now, I'm not -- we've talked about the  
3 order of restitution and the notice that was left by the  
4 constable.  What I'm concerned about is that you returned to  
5 the premises Sunday evening and the doors were locked.

6           MR. TURNER:  Objection, Your Honor.  What Counsel  
7 just finished up with is "That's what I want you to testify  
8 to."  Counsel is testifying instead of --

9           THE COURT:  Well, okay.  Ask the proper direct  
10 questions.

11          Q.    (By Mr. Roundy)  Tom, I want you to tell me about  
12 what happened on -- not before, when there were things  
13 posted on the door, but I want you to tell me about what  
14 happened on Sunday, August 16, 1998.

15          A.    I was told that I had to leave by 5:00.  I got  
16 some things ready real quickly.  And I think I went to went  
17 and make a phone call.  I believe it was to my lawyer.  And  
18 when I came back, it was -- it was before 5:00,  
19 approximately ten minutes, the door was locked.

20          Q.    Okay.  So it's your testimony that you made an  
21 effort to return to the premises, at which time the door was  
22 locked.

23          A.    Yes, sir.

24          Q.    Now, why didn't you use your key and try to get  
25 in?

1           A.    I tried to, and the lock had been changed.

2           Q.    Okay.  Where did you stay Sunday evening?

3           A.    The --

4           MR. TURNER:  Objection.  Relevancy, Your Honor.

5           THE WITNESS:  The --

6           THE COURT:  Well, are you going to his damages on  
7 the counterclaim?

8           MR. TURNER:  I don't think they're going to claim  
9 that he incurred any expenses that evening.

10          THE COURT:  Well, that's what I'm going to ask.  
11 What is the purpose?

12          MR. ROUNDY:  Yes.  This has to do with the  
13 counterclaim, the wrongful eviction and --

14          THE COURT:  Where he stayed, though, what's the  
15 relevance?  Does that go to damages or just to show that  
16 he's out?

17          MR. ROUNDY:  That will go to damages.

18          THE COURT:  I'll allow the question.

19          Q.    (By Mr. Roundy)  Where did you stay, Tom?

20          A.    The first night, a neighbor, if I were facing  
21 north, the neighbor to the left, allowed me to stay under  
22 one of her trees.  First night.

23          Q.    Okay.  Where did you stay the second night?

24          A.    The second night, because it was pouring down rain  
25 and, like I say, he felt sorry for me and allowed me to stay

1 in the garage out of the rain. The neighbors to the right,  
2 if you were facing north.

3 Q. All right. Where did you stay subsequent to that?

4 A. Not to bother them or cause them any kind of  
5 problems, I slept on -- hid out on some grass, and then  
6 another place I hit another night was between a couple cars  
7 on gravel pavement. And exactly was I out there four or  
8 five days. I'm not positive.

9 Q. Okay.

10 MR. ROUNDY: If I could approach the bench on  
11 another exhibit, Your Honor.

12 THE COURT: Beg your pardon?

13 MR. ROUNDY: If I can approach the bench on  
14 another exhibit.

15 Q. Tom, I'm going to show you this envelope with some  
16 papers and ask you if you recognize these documents.

17 A. Yes. There was a person on that told me to see if  
18 I could get into the Rescue Mission.

19 Q. Okay. Is that a homeless shelter of some type?

20 A. It's a -- it's a kind of like a church, homeless-  
21 type thing, yes.

22 Q. Okay. And looking at that document, can you tell  
23 me the first night that you stayed there or kept your things  
24 there?

25 A. According to this, it was 8-20-98.

1 Q. Okay. According to your recollection, when did  
2 you stay at the Rescue Mission?

3 A. The best of my recollection, I was allowed to  
4 store what things I did have there the first night, and then  
5 I stayed the rest of the nights at the places on there.

6 Q. So you stayed there five nights -- or you stayed  
7 there four nights, total?

8 A. There'd be one, two, three, four -- four at least.

9 Q. Okay. That would take us up till, approximately,  
10 August 26th. Where did you stay on August 26th and  
11 subsequent to that?

12 A. I think -- August 26th -- best of my knowledge, I  
13 think I was trying to get moved into Parkside apartments.

14 Q. Okay. Is that the next place that you had a more  
15 permanent residence --

16 A. Yes.

17 Q. -- at those apartments?

18 A. Yes, sir.

19 Q. Okay. Did you enter into a -- I'm getting ahead  
20 of myself.

21 Did you enter into a rental agreement with the  
22 Parkside apartments?

23 A. Yes.

24 Q. What was the amount of the rent at the Parkside  
25 apartments?

1           A.    My part was \$262.50, I believe it was, and we had  
2 to pay utilities, which were high.

3           Q.    But your base rent was \$262.50?

4           A.    Plus utilities.

5           Q.    Utilities --

6           A.    Plus we had to put up, I think it was, \$500, and  
7 my part of that would have been \$250.

8           Q.    Okay. And that was a deposit?

9           A.    Yes, sir.

10          Q.    Okay. What I'm concerned with here is making a  
11 comparison between your rent -- your rental arrangement with  
12 John Hawkins and your rental arrangement with Parkside  
13 apartments.

14               MR. TURNER: Objection, Your Honor. This isn't  
15 questions, this is Counsel trying to lead testimony again.

16               MR. ROUNDY: I'm just setting up --

17               THE COURT: I understand. I understand what  
18 you're trying to do and I think that's fair enough. What  
19 you need to do is do it with more direct questions to the  
20 point.

21               MR. ROUNDY: Okay. Very well.

22               THE WITNESS: I could probably answer it.

23          Q.    What was the -- well, it wasn't a question.

24               What was the size -- what were the dimensions of  
25 the unit that you occupied at Parkside apartments?

1           A.    The room, I think, was about a 11-by-12,  
2 approximately.

3           Q.    Okay.  So that's about ten feet shorter than the  
4 place with John Hawkins?

5           A.    Well, it was smaller than that one, yes, sir.

6           Q.    And did they have cable TV at the Parkside  
7 apartments?

8           A.    No, sir.

9           Q.    Did they have a washer and dryer?

10          A.    No, sir.

11          Q.    Did they have a telephone?

12          A.    No, sir.

13          Q.    How much did you pay for utilities, in an average  
14 month, at the Parkside apartments?

15          A.    I think both of them came to, approximately, I  
16 think it was around \$50 or \$60, approximately.  I'm just  
17 guessing.  But I'd say around fifty.

18          Q.    Okay.  And when you say both of them, what  
19 utilities are you referring to?

20          A.    Gas and electricity.

21          Q.    I'm sorry?

22          A.    Gas and electricity.

23          Q.    Okay.  Thanks.

24                Did you ever have your own telephone installed?

25          A.    No, sir.

1 Q. Did you ever purchase a washer and dryer?

2 A. No, sir.

3 Q. Did you ever obtain cable TV?

4 A. No, sir.

5 Q. Did you do your laundry outside of the apartment  
6 somewhere?

7 A. Yes, sir. I had to take it to a laundromat.

8 Q. Okay. And what --

9 A. And I could only carry one arm at a time.

10 MR. TURNER: Objection, Your Honor.

11 Nonresponsive.

12 THE COURT: Sustained as to that part of the  
13 answer.

14 MR. ROUNDY: Okay.

15 Q. How much did you pay in an average month for  
16 cleaning your clothes?

17 A. I'd have to --

18 Q. While you were at Parkside apartments?

19 A. -- figure it up. Twice -- twice a week, because I  
20 have to go twice because I can only carry one hand.

21 Q. Actually, let me just stop you there for a minute.  
22 I have a piece of paper here that might help to refresh your  
23 recollection. It's not going to be admitted as an exhibit,  
24 but it's --

25 MR. TURNER: Then I'm going to object to its use,

1 Your Honor, particularly because this particular type of  
2 document was requested at the time that Mr. Callahan's  
3 deposition was taken and was not presented. And, therefore,  
4 I don't believe that it would be admissible, and for him to  
5 be using it --

6 THE COURT: Is this a document that was prepared  
7 after the deposition or during or --

8 THE WITNESS: No, sir.

9 MR. ROUNDY: I couldn't say for sure when the  
10 document was prepared, but I can say that all responsive  
11 documents that we had at the time of the deposition were  
12 provided.

13 THE COURT: Is it his recapitulation of what he's  
14 spent or --

15 MR. ROUNDY: Yeah. These are his notes that --  
16 where he was trying to figure out his damages and things.  
17 And he was asked about that during his deposition.

18 THE COURT: I'm going to allow it to be used to  
19 refresh recollection.

20 MR. ROUNDY: If I could approach the witness, Your  
21 Honor.

22 THE COURT: You may.

23 You may look at it, sir, and see if it refreshes  
24 your recollection. You may not give your answer by reading  
25 from it. So just have a look and then put it aside, if you



1 believe it helps.

2 THE WITNESS: This actually refers to the glasses,  
3 I think.

4 THE COURT: To the what? I'm sorry? Oh, your  
5 eyeglasses.

6 MR. ROUNDY: If I may, Your Honor, maybe I can --

7 THE WITNESS: But it is my handwriting.

8 MR. ROUNDY: Well, okay. I saw something on there  
9 about wash. Why don't you take a look at it and see if that  
10 helps you and then --

11 THE WITNESS: Okay. Down -- down toward the  
12 bottom --

13 Q. (By Mr. Roundy) Now, don't read from it. Just  
14 look at it --

15 A. Okay.

16 Q. -- and put it aside. Now, if you'll tell us  
17 about --

18 A. Okay. The dryer would be for each load, because  
19 you can't just toss them all together, would be 75 cents.  
20 It takes that to go 30 minutes. And I think the washers at  
21 that particular laundry was \$1.25 for the laundry.

22 Now, I bought the soap down there, which would be  
23 50 cents for each load, and I did anywhere from two to three  
24 loads. And the soap would be 50 cents and Downey would be  
25 50 cents, and -- now, I think -- on the softener, I think I

1 took -- might have taken my own static cling with me. But  
2 with each load, that would be \$1.75, if it were three loads.  
3 And if it were three loads, it would be 75 cents to dry  
4 them.

5 Q. Okay. When you say "I usually did three loads,"  
6 are you referring to three loads a week or --

7 A. Three loads of clothes. Now, that's segregating  
8 my clothes so that I don't put wash and wear with the Levi's  
9 and the colors with the whites.

10 Q. Okay. I just want to know how many times you went  
11 to do laundry.

12 A. Twice a week.

13 Q. Okay. And three loads twice a week?

14 A. Two to three, yes, sir. I'd say approximately --  
15 I'd say five loads a week.

16 Q. Okay. During the time that you were living in  
17 your neighbors' back yard or in the homeless shelter, before  
18 you moved into the Parkside apartments, was any of your  
19 property damaged while you were living on the street?

20 A. My neighbors told me that they saw some kids  
21 taking some of the wet clothes.

22 MR. TURNER: Objection. Hearsay, Your Honor.

23 THE COURT: Sustained.

24 THE WITNESS: That's all I know.

25 MR. ROUNDY: Okay.

1           Q.    We'll come to the clothes in a minute.  What I'm  
2 asking you about is if any of your property was damaged  
3 while you were homeless.

4                    Maybe you should refer to your piece of paper to  
5 refresh your recollection.

6           A.    This one?

7           Q.    Uh-huh.

8           A.    Yes.  My glasses.  I -- one night, I rolled over  
9 on top of my glasses.

10          Q.    Okay.  Why don't you tell us how that occurred?

11          A.    Well, I was sleeping on a gravel pavement between  
12 two cars and I guess, just because of the roughness of it, I  
13 rolled over on them.

14          Q.    What would you say was the amount or dollar value  
15 for damages for your glasses would be?

16          A.    Those particular ones I -- now, they cost me when  
17 I first got them -- my understanding, I priced at two  
18 different places, and I think it came to approximately --  
19 because of my age --

20          Q.    Uh-huh.

21          A.    -- they said I had some kind of scale-down because  
22 of my age.  I could get them for, I think it was, three  
23 seventy-five to three ninety-five.

24          Q.    Okay.  Why so expensive for these glasses?

25          A.    Because they're protection glasses so that when --

1 the equipment that I used to work on, if something had  
2 happened and it hit you in the face, it wouldn't bust your  
3 eye out, the glass wouldn't fly.

4 Q. Did you use these glasses not just at work but in  
5 everyday activity as well?

6 A. I actually wore them all the time.

7 Q. Okay. Did you have another pair of glasses that  
8 you used at that time?

9 A. No, sir.

10 Q. What about the glasses that you're wearing now?

11 A. I purchased them, but they're not protection  
12 glasses.

13 Q. Okay. How much did you pay for the glasses you're  
14 wearing now?

15 A. I believe I got two pairs. Because they're  
16 bifocals, I had to pay more. I believe it was \$143.

17 Q. For both pair?

18 A. Yes, sir.

19 Q. Okay. All right. When you were locked out of the  
20 apartment on Sunday, August 16th, was any of your property  
21 left outside?

22 A. There were some clothes that I had in the bathtub  
23 that they took out and put on -- in a plastic bag on the  
24 front porch.

25 Q. Okay. Did you see them that night? Did you

1 retrieve them Sunday night?

2 A. No, sir.

3 Q. Did you retrieve them later?

4 A. Not those clothes. Now, I was able -- whatever  
5 clothes were left --

6 Q. Uh-huh.

7 A. -- I retrieved when I moved.

8 Q. Okay. Do you know what clothes were lost?

9 A. I believe it was -- I had four almost new Levi's.  
10 That's the shrink-to-wear.

11 Q. Okay. What were the values of those Levi's?

12 A. Approximately \$30 apiece. Actually, a little more  
13 if you start putting tax on it. And I had -- I think it was  
14 four to three -- I wrote this down before and gave it to my  
15 counselor, but I think it was three to four long (inaudible)  
16 and I think it was three to four short (inaudible). They  
17 all sell for about, I think it's \$9.50 apiece for those  
18 socks.

19 And I think I was missing -- yeah, I'm missing  
20 four almost new black underwear, Jockey.

21 Q. Okay. What's the value of those?

22 A. They -- they're \$6 apiece, but I did purchase four  
23 recently to replace those at \$4.50, I think it was, apiece,  
24 plus tax.

25 THE COURT: How many pair of those?

1           THE WITNESS: There were four. They were on sale  
2 and so I purchased them on sale.

3           Q. (By Mr. Roundy) Now, tell me about the move from  
4 John Hawkins' place, when you were able to retrieve your  
5 property and where you took it.

6           A. How I did it?

7           Q. Uh-huh.

8           A. I met a person, I believe it was, at the Maverick  
9 store not too far from there.

10          Q. Uh-huh.

11          A. I call it around the corner. It's actually what I  
12 call two short blocks, was my block length. And I told him  
13 my situation, et cetera, et cetera, and he said he thought  
14 he might be able to help me. And -- and he said but it  
15 might cost me, et cetera, et cetera. And I said, "Well,  
16 I've got to move."

17                 And it actually took us approximately three -- not  
18 three full days, but it was -- it encompassed a portion of  
19 three days. Now, exact -- he just -- he actually cut down  
20 on the price, but he rounded it off.

21           MR. ROUNDY: If I could approach the bench.

22           THE COURT: You may.

23           MR. ROUNDY: I have another exhibit.

24           Q. Tom, I'm going to ask you to look at what's been  
25 marked as Defendant's Exhibit No. 3 and ask you if you

1 recognize that.

2 A. It looks like the document that Jeff Hillard gave  
3 me that I -- for services.

4 Q. And does that accurately present the amount of  
5 money that he charged you to help you move?

6 A. Yes, sir.

7 Q. What is that amount?

8 A. \$500.

9 Q. I'd move for admission of Exhibit No. 3 into  
10 evidence, Your Honor.

11 MR. TURNER: I'm going to object, Your Honor, on  
12 the basis that that document is hearsay and there is no  
13 exception to this particular --

14 THE COURT: It is what?

15 MR. TURNER: It's hearsay and there is no  
16 particular exception that applies to it.

17 THE COURT: Mr. Callahan's testified that it's a  
18 receipt that he received for payment that he made.

19 MR. TURNER: Well, he --

20 THE COURT: I'm not going to receive the exhibit.  
21 He can testify as to what he paid for.

22 MR. ROUNDY: Very well.

23 Q. All right, Tom. Where did you take your property?

24 A. I took it over to Parkside apartments.

25 Q. Okay.

1           A.    And some to storage.

2           Q.    Okay.  Why didn't you take it all to the Parkside  
3 apartments?

4           A.    Well, I was kind of in a hurry, and so I took some  
5 to storage and some to Parkside apartments.

6           Q.    Okay.  Did you eventually move it from storage to  
7 Parkside apartments, the rest of it?

8           A.    I think I crowded it in.  I -- I -- I had the  
9 storage, I believe it was, for -- it was either three or  
10 four months.  And since they were going to make condominiums  
11 out of it, I wanted to try to get things sorted, so I  
12 brought them back over to the apartment.

13          Q.    Okay.  How much did the storage cost you?

14          A.    I believe it was \$40 a month.

15          Q.    Okay.  Do you still live at the Parkside  
16 apartments?

17          A.    No, sir.

18          Q.    When did you move out of the Parkside apartments?

19          A.    Just recently.  It would have been just after, I  
20 think, the first of this month.  Actually, I was going to  
21 move before, but I was unable to get in -- move into the  
22 place.

23          Q.    So you have moved a second time?

24          A.    Yes, sir.

25          Q.    In early March '99; is that right?



1           A.    Yes, sir.

2           Q.    And did you incur any additional moving expenses  
3 at that time?

4           A.    I incurred an expense with U-Haul and I had to pay  
5 a couple of other people to help me move. And I had to  
6 store some things, because the place where I'm going would  
7 not take it on. I stored a place for \$45, and I believe I  
8 paid the gentlemen \$40 apiece, and I believe the U-Haul,  
9 just guessing at it, was approximately a hundred and twenty,  
10 or so, dollars.

11          Q.    Okay. Other than the expenses that we've talked  
12 about now, in relation to either the first or the second  
13 move, can you think of any other moving expenses that you  
14 had?

15          A.    I'm not sure.

16          Q.    Okay. While you were moving your property the  
17 first time, was there anything that was broken in the move?

18          A.    The microwave was dropped.

19          Q.    What were your damages from that?

20          A.    I'm not really positive. I paid sixty-five for  
21 it, but I was able to -- I think the guy just charged me a  
22 minimum of \$15 to fix it.

23          Q.    Okay.

24          A.    And that included the fuse.

25          Q.    Okay. Tom, did you suffer any mental anguish or

1 suffering, things of that nature, at the time you were  
2 locked out of the apartment or had to live on the street  
3 before you reached your new apartment?

4 MR. TURNER: Objection, Your Honor.

5 THE WITNESS: Yes.

6 MR. TURNER: Any proof of mental damages of that  
7 sort, under Utah law, would require the testimony of an  
8 expert. I certainly don't see any experts here to testify  
9 on that subject today.

10 MR. ROUNDY: I believe that the case law I  
11 submitted in the -- our trial brief indicates otherwise.  
12 That, in cases of intentional infliction of emotional  
13 distress causes of action, that might be the case. But in a  
14 wrongful eviction action, the court -- Supreme Court stated  
15 that mental anguish and suffering are an appropriate measure  
16 of damages and that there's no requirement for medical  
17 treatment and that type of thing.

18 THE COURT: Well, you submitted case law that  
19 damages may be appropriate. I didn't see the case. Does it  
20 say how the proof has to be presented?

21 MR. ROUNDY: There's no -- there's no restriction  
22 on that, in these circumstances, for how the proof's  
23 presented.

24 THE COURT: I'll allow the question.

25 Q. (By Mr. Roundy) Tom, I think I heard your answer,

1 but would you say again whether you suffered any mental  
2 anguish or --

3 A. It's --

4 Q. -- pain at the time?

5 A. -- it's been extremely stressful. And I've also--  
6 my stomach, I'm having to constantly take Tums and drink  
7 buttermilk to relieve the, you know, pressure there. And,  
8 to be honest, I feel like I've been terrorized.

9 MR. ROUNDY: Okay. That's all for this witness,  
10 Your Honor.

11 THE COURT: Cross-examine.

12 CROSS-EXAMINATION

13 BY MR. TURNER:

14 Q. Mr. Callahan, turning back to Exhibit 1 and 2, the  
15 lease agreement between you and Mr. Hawkins.

16 A. Yes, sir.

17 Q. You had the original, correct?

18 A. I beg your pardon?

19 Q. You had the original?

20 A. Yes, sir.

21 Q. And you've had that in your possession since it  
22 was signed?

23 A. Yes, sir.

24 Q. And did Mr. Hawkins ever ask you for a copy of  
25 that?

1           THE WITNESS: When, earlier, he was talking about  
2 it, and I told him it would take me some time to check it  
3 out, there was two places, and but one place they had --  
4 they wanted to -- they actually wanted too much, I thought.  
5 They had said one thing and then they raised the price up.

6           And the other place that the lady and I had agreed  
7 upon, before I signed, her husband died. And, evidently,  
8 she -- he had done all the bookwork. And so she was kind  
9 of -- she wanted a month-to-month and I told her I needed a  
10 long-term.

11          Q.    (By Mr. Turner) Okay. So you had an offer for a  
12 month-to-month lease but not a long-term, and so you didn't  
13 take it; is that accurate?

14          A.    Yes, sir.

15          Q.    Okay. And you said this happened some time before  
16 the 16th. Can you tell us approximately when that took  
17 place?

18          A.    That took place back in, I think it was, June  
19 somewhere. I told him I'd try to work with him, but he --  
20 he became, actually, hostile about it.

21          Q.    Okay. So that's June of 1998?

22          A.    I could only presume so. I'd have to refer to  
23 some of Dan's notes and things.

24          Q.    Okay. So prior to June of 1998, had you ever had  
25 a discussion with Mr. Hawkins as to his desire for you to

1 leave the property?

2 A. The only time we talked is when we had the  
3 extension, and he said that the reason he wouldn't give it  
4 to me to June the next year was because that March, which I  
5 believe would be '99, that he may go to another school. And  
6 so the agreement would be to March '99.

7 Q. At the time that you originally signed Exhibit 1,  
8 which is the lease, what sort of lease period did you ask  
9 for?

10 A. I beg your pardon?

11 Q. At the time that you signed the lease, which you  
12 signed, which is Exhibit No. 1, what sort of lease period  
13 did you ask Mr. Hawkins to give you?

14 A. Well, at the time, I wanted, actually, two years.

15 Q. And what did he tell you?

16 A. He told me he -- he might have to move back in.  
17 So just in case, he'd make it to March 15th.

18 Q. Did he talk to you at that time about going back  
19 to school?

20 A. I -- sir, whether he worked or went to school, I  
21 don't know. I can only presume -- I understood that he was  
22 working and going to school at the same time. I don't know.

23 Q. Okay. Now, on that Sunday, August 16th, when you  
24 moved out of the property, you came back -- you testified  
25 you came back and found the locks had been changed, correct?

1 what you picked up is marked. You've still got one that's  
2 marked.

3 Yeah. That's it.

4 JOHN HAWKINS,  
5 recalled to testify by the defendant,  
6 being previously sworn, was examined  
7 and testified further on his oath as  
8 follows:

9 DIRECT EXAMINATION

10 BY MR. ROUNDY:

11 Q. John, why don't we have you give us your version  
12 of what happened on August 16, 1998. Let me be more  
13 specific.

14 Were the locks on the premises actually changed  
15 while Tom was gone before 5:00 on that evening?

16 A. By myself? No.

17 Q. Okay. Were they changed by someone else?

18 A. Yes, they were changed.

19 Q. Okay. Who were they changed by?

20 A. They were changed by my brother.

21 Q. Okay. Do you know the time that he changed the  
22 locks?

23 A. It would have been after 3:30, because I left for  
24 work at 3:30.

25 Q. Okay. John, we've heard some testimony about a

1 bag of clothes that was left outside. Was that -- did you  
2 take some of Tom's clothes out of the bathtub and put in  
3 that bag and put them outside?

4 A. Yes, I did.

5 Q. What was the date that that occurred?

6 A. That happened on that same day.

7 Q. Okay. Do you know what happened to those clothes  
8 afterwards?

9 A. They were on the porch when I left.

10 Q. Front porch or back porch?

11 A. The front porch.

12 Q. Okay. Did you see them again after that?

13 A. Yes. I saw them, I think it was, that Wednesday  
14 when the constable came over.

15 Q. Okay. Had they been disturbed at all on that  
16 Wednesday when the constable came over?

17 A. Not that I noticed. But they were put back in the  
18 house on that same day when the constable came.

19 Q. Okay. All right. Excuse me.

20 John, what's your amount of annual income?

21 MR. TURNER: Objection, Your Honor. Relevance.

22 THE COURT: What's the relevance, Counsel?

23 MR. ROUNDY: We're asking the Court to award  
24 punitive damages relative to the self-help eviction.

25 THE COURT: Well, you can get into that issue if I

Rule 36. Request for admission.

(a) Request for admission.

(1) A party may serve upon any other party a written request for the admission, for purpose of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. The request for admission shall contain a notice advising the party to whom the request is made that, pursuant to Rule 36, the matters shall be deemed admitted unless said request is responded to within 30 days after service of the request or within such shorter or longer time as the court may allow. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).

(2) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

(3) The party who has requested the admissions may move to determine the



sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may

order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subverted thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

Advisory Committee Note. For a complete explanation of the 1999 amendments to this rule and the interrelationship of these amendments with the other discovery changes, see the advisory committee note appended to Rule 26. The Supreme Court order approving the amendments directed that the new procedures be applicable only to cases filed on or after November 1, 1999.

Rule 59. New trials; amendments of judgment.

(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) Time for motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Affidavits; time for filing. When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served

with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On initiative of court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.