

1987

# Mitchell D. Henderson v. For-Shor Company : Brief of Respondent

Utah Court of Appeals

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## Recommended Citation

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**BRIEF**

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DOCKET NO. **870502-CA**

IN THE SUPREME COURT OF THE STATE OF UTAH

MITCHELL D. HENDERSON,  
ILEEN BUTTARS, LAURENA B.  
HENDERSON, and DAVID HALE

BRIEF OF RESPONDENT/  
CROSS-APPELLANT

Plaintiffs/Respondents

vs.

FOR-SHOR COMPANY

Supreme Court No. 20626

Defendant/Appellant

**870502-CA**

BRIEF OF RESPONDENTS  
MITCHELL D. HENDERSON, ILEEN BUTTARS,  
LAURENA B. HENDERSON, and DAVID HALE

Appeal from the Judgment and Decision of the  
FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY, STATE OF UTAH  
The Honorable VeNoy Christoffersen, Presiding

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**FILED**

**SEP 12 1985**

Supreme Court Utah

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BRIEF OF RESPONDENTS &  
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Defendants/Appellant

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STATEMENT OF ISSUES PRESENTED ON APPEAL

A. ISSUES PRESENTED BY DEFENDANT/APPELLANT

Plaintiffs have no substantial disagreement with the issues presented by Defendant as appellant in its Brief except that in issues #3, #4, #5 and #6, Defendant asserts that "no evidence" supporting the court's decision was presented. Those are false conclusions or statements. Plaintiffs did present evidence supporting the court's decision.

B. ISSUES PRESENTED BY PLAINTIFFS/CROSS-APPELLANT ON CROSS-APPEAL

1. Intentional Infliction of Mental Distress. Did the Trial Court err in dismissing Plaintiff-Henderson's claim for intentional infliction of mental distress because the court found, as a matter of law, that he could make no

such claim because the property taken was not his property?

2. Costs and Attorney's Fees for Refusal to Admit.

Did the Trial Court err in refusing to order the Defendant to reimburse Plaintiff for professional witness fees and transportation costs and attorney's fees incurred as a result of Defendant's failure or refusal to admit that three documents were indential copies and what the Bankruptcy Court's Clerk general proceedings were?

3. Wrongful Interference With Favorable Business Relationships. Did the court err in failing to find that the Defendant interfered with favorable business relationships between Plaintiff, David Hale, and Mitchell Henderson and Ileen Buttars, and in failing to award damages incidental thereto?

STATEMENT OF THE CASE

Nature of the Case and Disposition in Court Below

Ileen Buttars, the mother of Plaintiff, Laurena Henderson, and grandmother of Plaintiff, Mitchell Henderson, brought an action against Defendant for taking and converting cement forming equipment she had purchased from her grandson, Mitchell. The forms were temporarily stored on the premises of her daughter, Laurena, who has sued Defendant for trespass when Defendant's employees came upon her property which was posted with no trespassing signs, drove across her back lawn leaving ruts. The grandson, Mitchell, who had become ill and financially distressed, after selling the forms to his grandmother, continued in charge of the forms trying to sell



them or rent them for her. The loss of the forms and attending circumstances caused Mitchell to suffer mental and emotional distress for which he sued Defendant. The would-be purchaser and lessor of the forms, David Hale, sued the Defendant for interfering with the impending lease and sale and the resultant losses suffered by him.

Defendant, a creditor of Mitchell, claimed it had a right to the cement forms in spite of the sale to the grandmother and in spite of a subsequent bankruptcy by Mitchell three years later and a year before the forms were taken.

The trial court found that the sale of the forms by Mitchell to his grandmother, Ileen Buttars, for approximately \$26,000.00 was valid, especially in light of the fact that Defendant, prior to the taking and prior to the date of Mitchell's bankruptcy filing, had taken a promissory note from Mitchell for approximately \$3,000.00 and converted it to a judgment. The trial court consequently awarded Ileen Buttars damages of \$5,725.35 for the value of the forms plus additional damages of \$7,500.00 suffered as a result of the taking which rendered the other half of the forms useless for re-sale or for renting for a period of three years. The court found that Mitchell Henderson had no claim for intentional infliction of mental distress because the forms were not his, and found no cause for action by David Hale for Defendant's interference with his purchase or rental of the forms and for putting him out of business. But because

it became clear at trial that Defendant had wrongfully overcharged Mr. Hale on his account, the court awarded him \$265.00. The court awarded Mrs. Henderson \$100.00 as a result of Defendant's trespassing.

Statement of Facts

In September, 1976, Mitch Henderson purchased a variety of For-Shor forms from the Defendant through either of two companies: Interstate Industries or Wallmaster, Inc. (Exhibit #18). These forms were in essence indential to the eight foot and four foot forms he subsequently leased in 1977 and then purchased from Defendant in August, 1978 (assuming that all forms were in new condition). First Security Bank took a security interest in the 1976 forms (Exhibit #1), which it subsequently released in August, 1978, when Ileen Buttars paid off \$30,884.18 in debts owed by Mitchell to the bank (Exhibits #7 and #8, and Ileen Buttars' testimony T.p.83 line 34).

In the spring of 1978, both Defendant and Defendant's counsel had demanded payment for the forms under rental, or Mitchell would be sued. In June, 1978, Defendant, without authority and on it's own iniative (Exhibits #17, and #4, printed matter) converted the leased forms to a purchase and charged Mitchell's account \$5,119.00 (Exhibit #4). Upon receiving a billing statement (Exhibit #3) reflecting the change from rent to purchase, Mitchell called Jim Snarr and told him he would be in their office in a month or so and pay off the forms (T.pp.19-20). The payoff figure was not

satisfactory so Mitchell negotiated with Jim Snarr for some additional credit on the purchase price since he had rented for about nine months and his account had been charged at the rate of 8 percent of the purchase price per month (equals 72 percent of the cash purchase price). Additional credit of \$2,180.00 was given (Exhibit #5 and #3). Mitchell then paid off the forms and gave additional monies to be applied to his account (T.pp.20, 23-24). Total amount paid was \$6,400.00 (Exhibit #6).

First Security Bank having received full payment on its loans (\$30,884.18) and For-Shor having received more than the cash purchase price on the forms converted from rent to purchase (purchase price charged was \$5,119.21 and cash paid was \$6,400.00). Mitchell felt free to convey the forms to his grandmother, Ileen Buttars, as per their agreement (Exhibit #2, T.p.25 line 7). Ileen Buttars purchased both the original For-Shor forms plus the ones which had been rented from For-Shor, in August, 1978, thinking they were all one set which had been held as security by First Security Bank. She knew nothing of the For-Shor Company until after For-Shor took some of the forms from Clarkston (T.p.81 line 21; p.85 line 2). Mitchell was instructed by his grandmother to find a buyer for all the mod-u-form panels and equipment if he could (T.p.84 line 18). He offered them for sale to a number of people but didn't find a buyer (T.p.32). He then decided to generate revenue from them by leasing them out and did so between April 13, 1981, and July 9, 1981 (T.p.34). Revenue for those three to four months

was approximately \$2,500.00 (Exhibit #9 and #10) (T.p.24 line 15). On July 9, 1981, Defendant came to Clarkston and took a little less than half of the set. This action prevented the sale of the entire set to David Hale referred to below. T.p.37 line 1-10.

In 1978-1979, Mitchell still owed an account balance to Defendant of about \$1,600.00 -- \$3,500.00 (Exhibit #3) (T.p.25). When he was unable to pay the account off, Defendant sued him, not bothering to amend the complaint which had been prepared in early 1978 when Mitchell was still renting the forms (T.p.162) (Exhibit #24). In response to the summons, Mitchell came to Defendant's office, arranged to pay the balance of this account by signing a promissory note on September 6, 1979, (Exhibit #37) (T.p.26-27). He made two payments on that note and then bad health prevented him from working further and making additional payments. Defendant then amended the complaint to sue on the note in December, 1979, (Exhibit #24) and took a default judgment on February 13, 1980, (Exhibit #24). Bad health continued for Mitchell and he filed for bankruptcy on July 16, 1980, (Exhibit #25) and received a discharge on September 18, 1980 (Exhibit #16). According to Bankruptcy Court Clerk, Mary Beth Simpson, the Bankruptcy Court mailed two documents on two different occasions to Defendant notifying it of Plaintiffs' filing and subsequent discharge (Notice of First Meeting of Creditors and Notice of Discharge) (T.p.28 line 3-13). A copy of the first notice (Notice of First Meeting of Creditors) identical to other photocopies of the

same copy generation mailed to other of Mitchell's creditors listed on the creditor's matrix (Exhibit #25) was found in Defendant's file containing some of its collection efforts (Douglas Caywood's testimony; T.p.113 line 18--p.114, line 15; Exhibit #19). Defendant did not explain with certainty as to how the notice got into the file. It was folded in fours and copied on both sides as is the custom in mailings from the Bankruptcy Court (T.p.227 line 11-24; T.p.344 line 7--p.345 line 2).

After judgment was taken against Mitchell, Defendant made one attempt to serve him with a supplemental order in 1980. There was evidence that indicated the Defendant made no effort to collect on its judgment after the mailing of the Notice of First Meeting of Creditors in July, 1980, until July, 1981, a full year after the discharge. Testimony from James Snarr and Mitchell Henderson indicated that although Mitchell moved several times between 1977 and 1981, all billing statements and correspondence sent by Defendant to Mitchell were never returned to the sender, but were received by Mitchell (T.pp.351-352, 424).

The facts also reveal that when Mitchell signed Defendant's Account Agreement in 1976, Defendant made no attempt to explain its meaning or even give him time to read it, (T.p.497) which incidentally Mitchell could not do at that time (T.p.495). There is no other document before the Court signed by Mitchell specifically identifying the forms in

question as being leased and what the terms of the lease were.

In early July, 1981, David Hale, who had been leasing some cement forming equipment from Defendant, came to Defendant's business to purchase some ties for two jobs he had lined up in Tremonton. In his conversation with Dan Sharp, he mentioned he was going to buy Mitchell's set and use them on the two jobs in Tremonton (T.p.313). Dan Sharp then remembered Mitchell still owed his company some money (T.pp.292-293). He reviewed the account and the file with Jim Snarr, copied an invoice indicating what items of equipment he had originally leased and subsequently converted to purchase in 1978 (Plaintiffs' Exhibit #4) and took a copy of it to Clarkston and took most of those items back (Defendant's Exhibit #27). Defendant never gave anyone notice of its taking until the Sheriff's Office confronted it several months later. The effect of taking a half set of forms was to stop the lease and sale to David Hale T.p.311.

As a result of the taking, David Hale had insufficient forms to do his Tremonton job and naturally went to Defendant with whom he was doing business and told Dan Sharp that someone had stolen his forms, and to keep his eyes open for them (T.pp.311, 313-314). Dan told him he would watch for them. He then leased some forms to Dave Hale mainly to replace the ones stolen (T.p.397 line 20--p.398 line 8). The extra effort to get an entire set together (partially from Salt Lake and partially from Clarkston) forced David Hale to rent trucks, cancel his plans to buy the Henderson

and other equipment, (T.p.396-398) and to expend approximately \$1,500.00--\$2,000.00 in extra time, wages, rent and other expenses to get the jobs done (T.pp.315-319; Exhibit #30, #31, #32 and #34). Not having his own truck or trailer prevented him from immediately loading the forms when stripping the foundation. Instead he had to stack them on the ground and then handle them again after renting a truck to haul some here and some there (T.pp.329-330). These were the factors contributing to the \$2,000.00 loss (Exhibits #30, #31, #32, #33 and #34 all evidence this loss).

Not only did David Hale suffer the \$2,000.00 loss, but he also lost an opportunity to go into business (T.pp.332-334; T.p.398 line 1-2). He had made application to a leasing company for financing (using the forms as collateral) (T.p.339 line 12--p.400) and could have used his mother's house as collateral as well, had the lender requested it (T.pp.419-422). He had lined up a truck and trailer he could have used for 90 days with option to buy and had good possibilities for additional jobs in the Tremonton area from people who had inspected his work (T.pp.390, 413 line 20--p.414). He had also submitted a bid to people in Wyoming for whom he had done work that spring and who wanted him to do more (Plaintiffs' Exhibit #35). He had to withdraw that bid when he realized he'd have to commercially lease forms to replace the ones taken (T.pp.390, 397 line 22).

Mr. Hale is a experienced formsetter and had set one

house foundation per day on other jobs before (T.pp.395-397). Considering the economy, he felt he could easily do one to two per week (T.p.387). He calculated that his profit would be somewhere areound \$150.00 per average home foundation per week (T.pp.386-388; T.p.415 line 24-p.417).

After reviewing Defendant's charges to Mr. Hale's account while he and Defendant were doing business in preparation for trial, it was discovered that Defendant charged him \$265.00 for returning dirty forms when in fact they were dirty when he checked them out (Exhibit #39) (T.pp.434-436).

Robert Mortensen, a very well respected general building and cement contractor testified that for someone to take a substantial portion of a "set" of foundation forms would stop any cement forming business in its tracks (T.p.379 line 8-18). He also testified that he rented out cement forms at the rate of \$1.00 per form per pour (T.p.381). He testified he had no trouble finding work for his two sets of forms, but that business was competitive (T.p.381). He thought that Hale could probably find houses to do (T.p.380 line 22--p.381 line 2). When Hale went to Defendant's place to rent forms to replace the ones stolen, he found it to be very busy. T.p.326. No other forms were available in Cache Valley. T.p.398.

In trying to recall the retaking incident, Dan Sharp, who is no longer employed by Defendant, remembered going through an open field along a little road lined with weeds.



He recalled that the forms taken were not in the best condition and denied that the property was posted with "no trespassing" signs. Mrs. Laurena Henderson and Mitchell, her son, testified that her property was posted with several no trespassing signs, (Exhibit #11; T.pp.94, 97 line 21--99) that there were sheds and grainries around and that the little drive that led to the forms was graveled and free of weeds and that her back lawn went right back to the driveway. She said that the people who took the forms traveled right past several signs on their way in (Exhibit #11) and then on their way out traveled diagonally through her back lawn and through a spot of newly planted grass leaving ruts or tire depressions in the lawn and soil (T.p.100; Exhibit #11).

When For-Shor got the forms it reconditioned them and put them in their rental pool which earns 8 percent of their list price per month (T.p.436 line 14--p.437 line 3). The list price has escalated from 1978, when they were converted to purchase, to February, 1984, where they were priced at 7 percent to 9 percent over the prices listed in Defendant's Exhibit #27 and page three of Exhibit #28 (T.pp.437-438).

Used forms today are worth at least as much as new ones a few years ago. T.pp. 234-235. All of the forms can be put in new condition by merely sandblasting the frames, repainting them and by putting new plywood in the frames (T.pp.358-359). Mr. Snarr inspected the remainder of the

forms at Laurena Henderson's place in Clarkston in late 1983 and stated in Court that those particular forms had a value of 76 percent of new (T.p.437 line 4). However, he had no way to distinguish between the forms bought by Mitchell initially and those later leased and then converted to purchase. T.p.221 line 25--p.222 line 6. He calculated the value by figuring what it would cost to recondition them and thereby put them in new condition (T.p.438 line 21--p.439; T.pp.440-441). New prices as of February, 1984, for the items Defendant admits it took would be:

	<u>1982 Price</u>	<u>1984 Price</u>	<u>Totals</u>
55 2'x8' panels	96.00 x 8% =	103.68	5,702.40
24 2'x8' panels	53.00 x 8% =	57.24	1,373.76
2 8'x6' inside corners	65.00 x 8% =	68.04	136.08
2 4'x6' inside corners	32.00 x 8% =	34.56	69.12
900 wedge bolts	.28 x ?	.28	<u>252.00</u>
			7,533.36
	Deduct 24% for used		<u>.76</u>
			5,725.35

(Exhibit #26 and #28; T.p.440-441.)

Mitchell and David Hale both testified that the forms taken were mostly reconditioned because they had been preparing them for Hale's Tremonton jobs, the owner or contractor for which was very fussy (T.p.310). They both said the forms were in excellent condition (T.pp.357-359 line 17; T.p.438 line 21-p.439 line 7). Thus, the figures set forth above are the minimum.

Mrs. Buttars, although generating about \$2,500.00 in revenue for the first half of 1981, (T.p.31 line 23; Exhibit #9 and #10; T.p.34 line 12-29) could generate no further business when people learned she had only about a half set (T.pp.37-40 line 18; T.p.104 line 1-20; T.p.381 line 9-14). She has been without the forms or without compensation therefor for over three years (July 1981, when ½ of forms were taken, to date of trial, July 31, 1984).

Prior to trial and after discovering what was thought to be the original notice of Mitchell Henderson's bankruptcy in Defendant's collection files, Plaintiff's counsel obtained notices which had been mailed to two of Henderson's creditors and had those notices compared to the notice found in Defendant's file (R.p. 226-229). This comparison was done by a documents expert, Mr. Douglas A. Caywood, of Colorado. All three documents along with Mr. Caywood's written analysis were offered to Defendant's counsel at the time Plaintiff's counsel requested that Defendant admit that all three copies were from the same copy machine produced at the same time (R.p. 226). The request was made so that Plaintiffs would not be required to have the expert travel to Utah to establish that fact. Defendant refused to admit, (R.p. 240) so Plaintiff produced the witness to prove the point, but the court refused to order the Defendant to pay any costs incurred as a result of Defendant's failure to admit. Plaintiff's intent was to prove that Defendant had actual notice of Defendant's bankruptcy as an element of Plaintiff's claim

for punitive damages as well as to rebutt some of Defendant's other claims.

#### SUMMARY OF ARGUMENTS

##### A. Response to Appellant's summaries

1. Right To Repossess. Defendant can have no right to repossess because Mitchell's response to Defendant's demands for payment for the forms in 1978 was to pay off the forms (\$5,119.21) with a \$6,400.00 check with the balance being applied to his account. This together with his grandmother's payment of approximately \$26,000.00 to his lender gave him unquestionable freedom to transfer title to his grandmother, which he did three years before the claimed repossession. Also, Defendant's taking a promissory note from Plaintiff and the subsequent reduction of that note to a judgment leaves Defendant with no other remedies or claims against the property. The theory of fraud allegedly committed by Mitchell which allegedly motivated Defendant to take the promissory note is in conflict with testimony and other evidence introduced at trial and upon which the trial court based its decision and has insufficient basis for reversing the trial court's decision.

2. Sale of the Forms to Ileen Buttars as "Bona fide Purchaser". Mrs. Buttars knew that Mitchell had some Mod-u-forms and that he was willing to sell them all to her for \$26,000.00 if she would pay off his lender, First Security Bank, which she did. She knew nothing of any For-Shor claim to the forms and Defendant did nothing by way of public

filings or otherwise to place her on notice. The court, in light of Plaintiff Henderson's and Buttar's testimony and the written bill of sale, (Exhibit #2) found specifically against Defendant's claims that there was no sale.

3. Damages Awarded to Plaintiff Hale. During the course of the trial it was discovered and clearly established that in its business dealings with Plaintiff-Hale when he went to Defendant to rent forms to replace the ones stolen, that Defendant had overcharged him. This was freely admitted by Defendant and so Hale was awarded judgment of \$265.00 to correct the overcharge as viewed by the court. Rule 54(c)(1) of the Utah Rules of Civil Procedure allows a judge to grant the relief dictated by the evidence even though not pleaded.

4. Damages for Loss of Rental. Plaintiffs did offer evidence to establish loss of rentals. The evidence came both from Plaintiffs and from Defendant's manager who admitted that the forms taken went into its rental pool from which Defendant rents the forms at 8 percent of their new value per month or 96 percent per annum! Judgment for Plaintiff was for \$2,500.00 per year for three years.

5. Value of Forms. Plaintiff's offered evidence of value of the forms taken in several ways: What a prospective purchaser was willing to pay, what had been paid for the forms originally, current new prices, cost to restore the forms to new condition, and the value of used forms generally. Much of the testimony came from Defendant's employees.

6. Damages for Trespass. Plaintiff, Laurena Henderson, discribed the damage of truck tire ruts through a new part of her back lawn and the court awarded \$100.00. Defendant's objection to that award is without merit.

## ARGUMENTS

### I

THE EVIDENCE SUPPORTS THE COURT'S DECISION  
THAT MITCHELL HENDERSON PAID FOR THE FORMS  
IN FULL WITH CASH AND A PROMISSORY NOTE,  
AND THAT HE MADE NO MISREPRESENTATIONS  
WHICH WOULD VOID THE PROMISSORY NOTE.

1. In arguing that Mitchell induced For-Shor to take a promissory note, Defendant now attempts to hang its entire case on the testimony of its own attorney who was going to conduct the trial and not even testify! R.pp. 191-192. Counsel disqualified himself only at the request of Plaintiffs because Plaintiffs intended to call him, not because Defendant saw that Attorney Burnett's testimony would be the backbone of their defense. During discovery when Plaintiffs tried to get Defendant to divulge information regarding sales and rental prices for the equipment in question, Attorney Duane Burnett himself responded in writing stating that such facts were irrelevant because all charges for such things by Defendant against Plaintiff "...were reduced to a note and agreement, thereby rendering the same moot." R.p. 78. Clearly in September, 1982, and not long before the

scheduled trial date, Attorney Burnett was claiming the note was good and valid. Later, the defense realized that any claims it wanted to make on repossessing the equipment should have been made before its claims were merged into a promissory note and a judgment. It could not split its cause of action. Raymer vs. Hi-Line Transport, Inc. 15 Ut. 2d 427 (1964), Caste v. Arkansas Louisiana Gas Co. 597 F2d 1323 (Okla. 1979). Having realized that, Defendant then sought and found an excuse for doing so: According to Attorney Burnett, Mitchell told him that the forms were stolen, so Defendant had to settle for a promissory note. Mitchell emphatically denied this. (Tpp 523-524 line 14, p.526 line 16.) Furthermore, immediately after signing the note, he requested and got permission to return some of the forms Defendant claims were stolen! (T.p. 371.) Why would a person lie and say the forms were stolen and sign a promissory note for the balance owing on the goods and then a couple days later return some of those reportedly "stolen" forms to the same creditor for credit?! The answer is that Mitchell Henderson never told Attorney Burnett that the forms had been stolen. (T.p. 371 line 4--p.472 line 3; Exhibit #37 3rd page.)

Defendant tried to add credibility to Attorney Burnett's claims that Mitchell had represented that the forms were stolen based on a representation made in his bankruptcy statement of Affairs. It refers to Question 14 of Exhibit #29, but is probably referring to the answer to Question 18

of Exhibit #29 wherein Mitchell disclosed that some "equipment" had been stolen in July, 1979. Mitchell reported that there was vandalism or theft of a variety of equipment on three occasions (T.p.523 line 22) including outside and inside corners, but that none of the forms purchased from Defendant in 1978 were affected. (T.p.524 line 19, p.526)

It should be clear based on the above referenced exhibits and testimony that Defendant has no basis for asking this Court to reverse the trial Court's decision regarding Defendant's belated claim or defense of fraud or intentional misrepresentation.

## II

THERE WAS A BONA FIDE SALE OF THE FORMS  
FROM HENDERSON TO BUTTARS. DEFENDANT  
CAN CLAIM NO SECURITY INTEREST BECAUSE  
IT PRODUCED NO SIGNED WRITTEN AGREEMENT  
NOR CAN IT IDENTIFY THE SECURITY.

Defendant claims there is a distinction between the For-Shor forms purchased through Interstate Industries in 1976 and the forms converted from lease to purchase in July and August, 1978. It is true there were two purchases of similar forms at two different times and Defendant has not ever attempted to show the trial court or this court that it could distinguish between the forms purchased on the two different dates. Of course, depending on use and abuse of each individual form, their condition may vary greatly



and they are not fungible goods as claimed by Defendant. Because Defendant has never provided as means of proving which forms are which, it cannot prevail on its attempted re-possession.

It is true that Mrs. Buttars thought all the For-Shor forms were secured at First Security when she paid off Mitchell's loans there, but she also knew that her agreement with Mitchell was to buy his Mod-u-forms (For-Shor type). They were listed on the Bill of Sale. Exhibit #2; T.p. 65-66. T.pp. 81-90. Her payment of approximately 30,000 on Mitchell's loans (Exhibit #1, #7, and #8) certainly is evidence of giving value. Mrs. Buttars certainly had no actual (T.p.85) or constructive notice of any claim of ownership of the forms being made by Defendant (T.pp.220-221). Mr. Henderson paid \$6,400.00 for the forms and on his account as insisted by Defendant before he could obtain any more credit from the Defendant. (T.pp.19-25; T.p. 363 line 20-p.264 line 25.)

The list of facts recited by Defendant on page 24 of its brief are mostly either disputed or completely untrue. For example, Defendant's "fact" #7 states Mrs. Buttars "...did not ever manage the use of the forms." Mrs. Buttars gave Mitchell instructions to either rent or sell the forms and to keep the rental money to help him get on his feet (T.p.84 line 15-25). It seems as if Mrs. Buttars was completely in charge of the forms but was intent on helping her grandson with his difficulties. Just because she was

generous to her grandson does not mean she claimed no right or control over the property. Compare T.p.84 line 23-25 again with fact #9 as claimed by Defendant on p.24 of its Brief.

Mitchell Henderson and Defendant settled up on the purchase of the forms when he paid the \$6,400. The testimony and evidence supports that conclusion. Merely because the agreement was made orally between him and Mr. Snarr does not mean it should be ignored because two years earlier Snarr had Mitchell sign an account agreement. Defendant continues to ignore the testimony which indicates that the parties agreed to apply the \$6,400.00 to the purchase of the forms. The account agreement was not given to Mitchell and was only in Defendant's possession. (T.p.368 line 7-19.)

Defendant attempts to prove with exhibits and the testimony of his own witnesses that his position is the correct one, and at the same time ignores the testimony and exhibits of Plaintiffs' which call for a different conclusion. The trial court heard and received the evidence and arguments regarding these conflicts and found in favor of the Plaintiffs, Mrs. Buttars, etc. It is of no assistance to this Court for the Defendant to ignore Plaintiffs' evidence in arguing its points on appeal when in fact the trial court has found against it. Its only purpose seems to be to further delay payment of the judgment which delays prevent Mrs. Buttars from paying off at least part of the loan on her farm.

Defendant attempts to excuse its inability to distinguish the forms sold in 1976 from the forms sold in 1978 saying they were identical so it made no difference. In other words they were fungible goods. The trouble with that argument is that they were only fungible so long as both groups of forms were new. Anyone knows that once one begins using equipment, it receives varying amounts of use, abuse and maintenance. Therefore it became critical for the creditor and debtor to distinguish which forms were which. Defendant made no provision for doing so.

### III

THE COURT CAN AWARD DAMAGES TO A PARTY FOR  
ITEMS WHICH WERE NOT PLED BY THAT PARTY  
OR RAISED BY THAT PARTY PRIOR TO TRIAL.  
OTHERWISE RULE 54 (c)(1) OF THE UTAH RULES  
OF CIVIL PROCEEDURE HAS NO MEANING.

It became very clear to the court from the Exhibits presented (Exhibit #39) and from Defendant's testimony that Plaintiff Hale had been overcharged. This was established during the course of trial. (T.pp.433-436.) After this fact came to light, Defendant testified that Hale owed a balance of about \$237.00 (T.p.444 line 5) but that it had been written off as a bad debt (T.p.444 line 24-25). An attempt to prove the claim with documentary evidence from David Hale's business transactions, billings, and the

Plaintiff's aging reports failed to verify the claim. (T.pp.444-448.) Considering the fact that the court heard and received all the evidence related to the matter and found that David Hale was overcharged \$265.00 (Record p.382), one must assume that the court did not give much weight or credit to Defendant's belated claim that Plaintiff Hale still owed Defendant some money on an old bad debt. The trial judge's assessment of the evidence and the credibility of the witnesses should not be overturned.

#### IV

THE COURT'S DECISION REGARDING LOSS OF PROFITS AND RENTALS IS SUPPORTED BY THE EVIDENCE AND SHOULD BE AFFIRMED.

Mrs. Buttars' claim for damages in her complaint was that Defendant's wrongful taking of approximately a half set of forms rendered the other half useless. (Record p.5 para#3). The evidence supports such a claim. Robert Mortensen, a respected building contractor familiar with and active in the cement forming business testified that to lose approximately a half set of forms would stop a cement former's business in its tracks (T.p.379 line 13). See also T.pp.42 line 12-p.44 line 5, and T.p.26 line 14 where Defendant admitted that a cement former could not operate with just a half set. Both Mitchell and his mother, Laurena, testified that they received no rental income after the forms were taken except from David Hale who had tried to lease the

full set for a couple of jobs before half of them were taken. (T.pp.37-40, p.80). Also T.pp.103 line 19-p.104 line 21.

Defendant claims that the testimony was insufficient to justify the court's award of damages and argued in its Brief that a short three months' period was insufficient to establish rental potential. However, Defendant is reluctant to say that no attempt was made to rent the forms prior to the spring of 1981, which was the year they were taken. T.pp.31 line 16-p.34. When the forms were offered for rent there were plenty of takers as long as a full set was available. Additional proof that the forms were in demand was that all forms in Cache Valley were being used during that summer and that is why David Hale had to rent forms from Defendant in Salt Lake City.

Defendant argues that Plaintiff could have combined the ½ set of Mod-u-forms with his wallmaster forms and continued some sort of rental business (Defendant's Brief p.32) but it fails to point out that the Wallmasters were a new design idea that did not work and that they turned out to be junk. (T.p.69 line 8-23; T.pp.78-79.)

Defendant has referred to some of the exhibits on damages which support the court decision. In addition the trial judge used the shortest season possible when calculating the losses sustained by Mrs. Buttars by not having a full set to rent. The trial court used a six month period when the average season is more like eight to ten months.

(T.pp.39-40; T.p.381 line 10-12.)

In connection with Defendant's claim that damages for loss of rental was too speculative, the court should remember that Defendant testified that as soon as it had gained possession of the half set, they were put on its rental pool and leased out along with other forms at the rate of 8% of new value per month or 96% of new value per year! T.pp.230-231; T.p.436 line 24-p.437 line 3. Mr. Mortensen testified that he rented his forms at \$1.00 per form per job. T.p.381. He'd therefore rent a full set of 180 forms for \$180.00 to pour the foundation on an average house (T.p.382). If we merely accept Defendant's claim as to how many forms were taken, one would count 83 forms (Exhibit #27). That excludes the other equipment it took which were wedge bolts.

In summary, there were several witnesses who testified regarding the rental value and demand for the forms in 1981. It appears that the trial judge in light of all the evidence took a conservative approach (six month period) and awarded a mere \$2,500.00 per year, which is certainly supported by evidence given from a variety of witnesses including the Defendant. He could have awarded much more.

#### V

#### THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING ON VALUE OF THE FORMS TAKEN.

In Defendant's Brief P.37, Defendant makes a bold statement:

The transcript of the trial is entirely void of evidence or testimony to establish the value of the forms...

If the above statement were true the trial court judge would not be a judge. Following are some of the references to value which the trial court could have considered:

1. The purchase price of the forms in August, 1978. Exhibit #4 gives the individual price for each form as well as the total purchase price of \$5,119.21. The forms were purchased and then three years later in July, 1981, they were taken. This was after prices on identical forms had risen substantially. (T.p.234 line 8-p.235 line 3) For example, new 2'x8' panels cost \$72.00 each in May, 1978 (Exhibit #4). In 1982, their cost had risen to \$88.32 (Exhibit #26 & #27 first line). In 1983 their price had risen to \$96.00 per panel and in early 1984 prices rose again to \$106.00 per panel. (T.pp.437-439 line 17)

The court can observe from reviewing the charges against Mitchell's account (Exhibit #3) and the charges on Exhibit #4 that even though Mitchell had incurred rent on forms for nine months since they were first rented in September, 1977, and even though they were probably used when he first began renting (T.p.230), he was charged full new price when Defendant unilaterally charged his account with their purchase. Certainly the account agreement gives Defendant no authority to do that. Exhibit #17. This, nevertheless gave the court some idea of their value as of that date and that was in a used condition. Admittedly Defendant gave Mitchell some

credit on the purchase price for the rent paid or charged to his account.

Mitchel and David Hale had taken some of the best forms and were cleaning and oiling them in preparation for the two jobs that Hale had contracted for in Tremonton just before they were taken. (T.p.310; T.p.347 line 14) The point is that the forms taken were in better condition than those that remained and which Jim Snarr looked at in 1983 in order to estimate the value of the forms taken.

Each time someone rents forms from For-Shor they use a printed form which lists the current new value of that item. Exhibit #27 and 3rd and 4th pages of Exhibit #39. The lessor of the equipment would then multiply the total value by 8 percent and that would be the monthly rent.

It can be seen by careful examination of the Exhibits and by Defendant's own admissions and by virtue of Defendant's manner of charging rent, the value of used forms in good condition was established. See also Exhibit #28 which is a list of some of the equipment taken, which reflects the new value as of 1982. On the third page of Defendant's Exhibit #28, the admitted new price of the forms back in 1982 was \$8,378.50. The Exhibit then asserts in behalf of Defendant that the price should be discounted 30% to cover the cost of restoring the forms to new condition. (Bottom of page 3.) Of course the controversy was not resolved in 1982 and Mrs. Buttars continued to be deprived of her  $\frac{1}{2}$  set of forms or their equivalent value for two more years until the date of trial. This of course continued to hurt her ability to sell



or rent a complete set, and such will be the case for a couple more years when this appeal is finally decided.

Based upon the Exhibits and testimony of both Plaintiffs and Defendant there is ample evidence that the equipment was worth \$5,725.35 at the time of the taking.

## VI

THE EVIDENCE SUPPORTS THE COURT'S FINDING  
OF \$100.00 DAMAGES FOR THE TRESPASS ON  
LAURENA HENDERSON'S BACK YARD.

The record (T.pp.97-100) and the exhibits (Exhibit #11) amply support the Court's finding that Defendant committed trespass (there being approximately six no trespassing signs in the immediate area). The record also supports the award of \$100.00 damages since Defendant's employees traveled approximately 90 feet (T.p.100 line 16) across Laurena's back lawn part of which was new grass. T.p.106. The heavy truck made ruts or tire impressions in the grass. T.p.101.

### RESPONDENT'S CONCLUSIONS

Defendant claims a right to repossess the equipment originally leased then sold to Mitchell. It produces no signed written lease agreement or even a means of identifying its claimed forms. Nor can it overcome the presumption in favor of upholding the trial court's decision when there is evidence to support it.

The essence of Defendant's arguments are the same as those made to the trial court before its decision. (Compare

Defnendat's Trial Brief, Record p.350.) Such arguments are of little use or value after the trial court makes its decision. Defendant must show that there was no basis for the court's decision when considering all the evidence, not just Defendant's evidence and views.

The trial courts decision on all of the above issues should be affirmed and this court should award Plaintiff's its costs on appeal and attorney's fees if it finds the appeal to be frivolous.

#### SUMMARIES OF PLAINTIFF'S ARGUMENTS IN THEIR CROSS-APPEAL

##### 1. Intentional Infliction of Emotional Distress.

There is no basis in the law for dismissal of a claim for intentional infliction of emotional distress merely because the person suffering the distress did not own the property taken, the loss of which was the major or primary cause for the emotional distress. The issue is whether Defendant intended to cause Mitchell Henderson emotional distress by taking the forms, and did he suffer the emotional distress claimed?

2. Plaintiff's Failure to Admit. The trial Court abused its discretion in failing to award attorney's fees and other expenses caused by Plaintiff's failure to admit that three documents were identical when the expert witness at trial clearly testified that all the documents were identical copies and no evidence was presented to the contrary. Expenses and fees should also be awarded for requiring Plaintiffs to call the U.S. Bankruptcy Court Clerk

to testify regarding it's general practices.

3. Interference with Favorable Business Relationships.

The Trial Court erred in failing to find that Defendant had wrongfully interfered with favorable business relationships between Plaintiffs Hale and Ileen Buttars, and in awarding damages therefor. The evidence was clear and undisputed that David Hale had agreed to lease and then to purchase the full set of forms. He had informed Defendant of this and Defendant then used the information to secretly convert the forms to its own use and thereby kill the deal. The impact of that action cost David Hale substantial monies and prevented him from carrying on further business.

ARGUMENTS

I

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF,  
MITCHELL HENDERSON'S CLAIM FOR INTENTIONAL  
INFLECTION OF MENTAL DISTRESS.

The property taken by Defendant was owned by Ileen Buttars by virtue of a sale which took place three years earlier. However, Defendant did not know that at the time it re-posessed. It thought the property was still owned by Mitchell. T.pp.292-293. In fact David Hale was unaware that Mitchell was merely selling the forms for his grandmother until immediately after July 9, 1981, when they were taken. T.p.312 line 16--p.313 line 1. Thus, the action which Defendant took with respect to the forms was taken

with the thought in mind that the forms belonged to Mitchell. T.p.235. The forms were taken just a day or two before they were to be used on a job in Tremonton and Defendant knew this. Furthermore, Defendant then leased some of its own forms to David Hale to fill the void left with half the forms turned up missing. No effort was ever made by Defendant to account to Mitchell for the value of the forms after they were taken. T.pp.226 line 24-227. When the decision was made to take the forms Defendant knew it had taken a promissory note for the account and that the note had been reduced to a money judgment T.p.235. Yet Defendant went ahead with the taking and said nothing to Mitchell. The impact that the taking had on Mitchell was dramatic. Knowing his grandmother had done him a big favor by borrowing against her farm and then purchasing the equipment and knowing that she had great trust in him (T.p.84 line 15-p.85 line 1; T.p.87 line 20) Mitchell began worrying about what the loss would do to his grandmother's ability to pay off her farm loan. Later when the Sheriff's Department inferred he may have sold the forms, he became worried about how he would be able to clear his own name and reputation. T.p.45 line 1-25; T.o.53 line 1-20. As a result he suffered from headaches, sick stomach and other stress-type illnesses such as ulcers. T.p.103. All the distress was caused by the taking of the forms and Defendant was not about to reveal the fact that it had taken them or to even attempt to reconcile their taking with any claimed unpaid bill. They

simply stole the forms and then let Mitchell and everyone else stew and worry while they smiled about getting rid of the form rental competition, and having done more rental business with David Hale as a result of their theft. A nice way to get ahead fast if you don't get caught. The simple fact that Mitchell Henderson did not own the forms but only felt responsible for them is not sufficient legal grounds to dismiss his claim in light of the fact that Defendant thought he was the owner and they knew he had made arrangements to rent and to sell them to David Hale. T.p.292, 313 line 14. They most certainly would have known that the sudden disappearance of a half set of forms would cause someone great concern and distress.

## II

THE COURT ERRED IN NOT AWARDING PLAINTIFFS' COSTS AND FEES INCURRED IN PROVING THAT THE THREE BANKRUPTCY DOCUMENTS WERE IDENTICAL COPIES AND THE BANKRUPTCY COURT'S GENERAL PRACTICES.

After the one bankruptcy notice was discovered in Defendant's files, Plaintiffs acquired two similar notices of bankruptcy sent to other creditors of Mitchell and had them analyzed by an expert. R.p.228-229. The three copies and the expert's analysis were all made available to Defendant and Defendant was requested to admit that all three

copies were identical. Rec.p.226. Defendant refused (Rec.p.240-241) so Plaintiff was required to bring in the expert from Colorado to testify. T.p.109-126. The testimony was undisputed and Defendant offered no evidence which was contrary to that of the expert. The purpose for proving that Defendant had received the notice was to prove that Defendant was acting in disregard of the law when it tried to take back the forms when it knew its account had been extinguished by the bankruptcy filing a year earlier. Plaintiffs were trying to prove bad motive and willfull misconduct in order to support their claim for punitive damages in addition to the damages for interference with favorable business relations and intentional infliction of mental distress.

Plaintiff also asked Defendant to admit what the bankruptcy court clerk's practice was with respect to making copies (T.p.226-227) and again Defendant refused (R.p.241) and Plaintiff was required to call the clerk of the bankruptcy court as a witness to prove the general practice. T.p.276-277, 279 line 3-8.

The court in its Memorandum Decision said that a copy of the bankruptcy notice "...turns up in their file..." (R.p.381). Plaintiffs' counsel then proposed findings asserting that the three copies were identical. Defendant objected (R.p.391-392) and the court would not make a specific finding on the point other than to say that "...Defendant had a copy of the Bankruptcy notice in its file."

R.p.406. Thus, the court refused to hold that the three copies were identical in the face of uncontroverted evidence coming from unimpeached witnesses: Norman Erickson, Budge Clinic creditor (T.pp.127-131); Carol Hansen, Credit Bureau Employee (T.pp.132-136); and Douglas A. Caywood, the documents expert (T.pp109-126). Rule 52 of the Utah Rules of Civil Proceedure requires a court to make finding on the relevant issues in the case and not to make them in opposition to the great weight of the evidence. Boyer Co. v. Lignell (Ut. 1977) 567p.2d 1112. In this case no real evidence was introduced to controvert the facts established by Caywood, yet the court seemed hesitant to find as the evidence dictated. R.p.406-407; (Finding no. 14) R.p.391-392; R.p.385.

If Rule 36 of the Utah Rules of Civil Proceedure dealing with requests for admissions is to serve its purpose of narrowing the issues and reducing or minimizing the costs of litigation, the court must enforce Rule 37 relating to assessing costs and fees which could otherwise have been avioded had the party admitted the requested fact. It is not justice to allow Defendant to cause the Plaintiffs as much expense as possible in bringing their claims to court.

### III

THE TRIAL COURT ERRED IN FAILING TO FIND  
THAT DEFENDANT INTERFERED WITH FAVORABLE  
BUSINESS RELATIONSHIPS BETWEEN PLAINTIFF  
HALES AND MRS. BUTTARS WHEN THE AGREEMENTS

TO LEASE AND TO SELL THE CEMENT FORMING  
EQUIPMENT WERE RENDERED IMPOSSIBLE TO  
PERFORM BY DEFENDANT'S CONVERSION OF HALF  
OF THAT EQUIPMENT.

David Hale had agreed to rent and to purchase the entire set of forms. T.pp.35 line 6-p.37 line 10; T.p.311; T.p.292 line 12. The Defendant found out about it, (T.p.292 line 12; T.p.311 line 24-p.312 line 3; T.p.313 line 2-15) and decided to take them. T.p.292 line 23-p.293. Just before the taking, Defendant knew that David Hale was going to use the forms on a job, and that up until then Hale had been renting forms from Defendant. T.p.292 line 12. After the forms were taken, Hale returned to Defendant to rent forms to replace the forms that had been stolen (T.p.313 line 15-p.315 line 2). Defendant gladly rented forms to Hale from their rental pool at the rate of 8% of new value per month. (Exhibit #39, 2nd, 3rd, and 4th pages.) Of course, the effect of the taking was to prevent the sale of the entire set to Hale (T.p.311). Plaintiff Buttars not only lost the sale but also the rent of a half set for about a month, and Defendant took the business instead. T.p.325 line 9-p.326 line 17.

The taking caused David Hale to withdraw his bid on one job in Jackson, Wyoming (T.p.331-332; Exhibit #35) and to go through a much more expensive procedure in doing his Tremonton jobs, by renting and returning forms from and to Defendant, traveling all the extra mileage and renting



trucks, etc. T.pp.315-330. He also lost other business. T.p.390.

In Utah we recognize the tort of wrongful interference with favorable contractual relations. Bunnell v. Bills, 13 Ut.2d 83, 368 P.2d 597 (1962), Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293 (Ut. 1982).

In the Bunnell case Plaintiff made no showing of an actionable interference with favorable contractual relations. In the Leigh case this court indicated that wrongful interference with advantageous economic relations included not only interference with contractual relations, but also other favorable business relationships.

"However, the right of action for interference with a specific contract is but one instance, rather than the total class, of protections against wrongful interference with advantageous economic relations." 657 P.2d 293, 301.

The court went on to sustain the jury's verdict and to indicate that Defendant had wrongfully interfered with prospective economic relations.

In this case before the Court there is substantial evidence of the favorable business relationships between David Hale and Mitchell Henderson and that the parties' continuation of that relationship was terminated because Defendant stole half the equipment. T.p.397 line 12--p.398 line 17; T.p.415 line 11--22.

In the Leigh case Plaintiff did not produce evidence of a contract or an agreement which was wrongfully interfered with so this Court was looking for evidence of other bus-

iness relationships which would support a verdict in favor of Isom. This Court recited its rule as follows:

"We recognize a common-law cause of action for intentional interference with prospective economic relations, and adopt the Oregon definition of this tort. Under this definition, in order to recover damages, the Plaintiff must prove (1) that the Defendant intentionally interfered with the Plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the Plaintiff. 657 P.2d 293,304.

The court went on to explain what would be interference for an improper purpose or by improper means. The purposes for which the forms were taken was, according to Defendant to regain possession of its property. The effect of the taking was to put Ileen Buttars out of the form renting business and to take some of that business (David Hale's) and shift it to Defendant. It is difficult to determine which purpose was the primary purpose but both purposes are clearly economical. It would be reasonable to assume that the purpose giving Defendant the greatest economical advantage would be the primary purpose. Here, putting Plaintiffs out of the form renting business and to thwart the sale to Hale would appear to be to Defendant's best advantage in the long run, because Hale was one of Defendant's customers, and Defendant would have another half set of forms to rent out. Such a purpose is not and should not be labeled proper.

This court in the Leigh case stated that if the purpose

were acceptable, but the means utilized were improper Defendant would still be held liable. Were the means justified in this case? The means utilized were to convert Mrs. Buttars' forms and never tell anyone about it until months later after the Sheriff's criminal investigation located them.

In explaining what are "improper means" this Court stated:

"The alternative requirement of improper means is satisfied where the means used to interfere with a party's economic relations are contrary to law, such as violations of statutes, regulations or recognized common-law rules. Such acts are illegal or tortious in themselves and hence are clearly "improper" means of interference." 657 P.2d 293, 308.

The trial court found that Defendant had taken forms which belonged to Mrs. Buttars:

"The court therefore, holds that the repossession of the forms were wrongful and that they belonged to Mrs. Buttars." Record P.382.

Clearly, then the favorable business relationships existed and were terminated when half the forms were taken. Mrs. Buttars lost her rent and her sale, Mr. Hale lost his opportunity to do a number of jobs and to go into business for himself. The record clearly supports a finding of damages resulting to Hale, but the court spent no time in assessing the damage because it felt Mr. Hale had no cause of action against Defendant For-Shor but should have proceeded against Plaintiff, Mitchell Henderson:

"Therefore the damage for wrongful repossession occurred to Mrs. Buttars and not Mr. Henderson or Mr. Hale. If Mr. Hale was damaged, it was between he and Mr. Henderson." Record p.382.

The above portion of the court's decision is that portion which Plaintiff contends is not supported by the facts and the law and should be reversed. It is true that perhaps David Hale could have sued Mrs. Buttars and Mitchell Henderson for breach of contract, but because the forms were stolen, impossibility of performance would likely have been a defense. Even if such a cause of action existed this did not limit David Hale's right to pursue his claim against Defendant who knowingly broke up the business relationships for its own economic gain by converting property it had long since sold.

#### CONCLUSION

1. The Supreme Court should reverse the trial court's holding as a matter of law that Mitchell had no cause of action for intentional infliction of mental distress, and instruct the trial court to then consider the issue of liability and damages based on the evidence presented.

2. The Supreme Court should instruct the trial court to enter a finding that the three copies of the Notice of First Meeting of Creditors were identical and to assess costs and attorney's fees against Defendant in accordance with the record. Record pp.400-402.

3. This court should reverse the trial court's holding wherein it held that the facts do no support a cause of action for wrongful interference with favorable business relationships between Plaintiffs by Defendant. The trial court should then be instructed to assess damages in accordance with the evidence on record.

Respectfully submitted this 10th day of September, 1985.

ZOLLINGER & ATWOOD



J. Blaine Zollinger

ADDENDUM

Attached hereto for the Court's consideration are copies of the following document and excerpts from the District Court record and transcript:

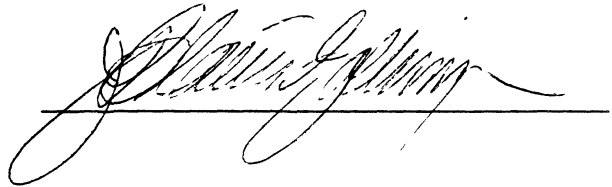
Memorandum Decision

- Trial Exhibit No. 2 - - Bill of Sale, Henderson to Buttars.
- Trial Exhibit No. 6 - - Henderson \$6,400.00 check with check stub.
- Trial Exhibit No. 11 - - Laurena Henderson's map showing no trespassing sign locations and Defendant's direction of travel.
- Trial Exhibit No. 27 - - Defendant's form rental sheet.
- Trial Exhibit No. 28 - - Defendant's accounting sheet-value of forms.

CERTIFICATE OF SERVICE

I hereby certify that four (4) copies of Respondent's Brief were served on Defendant/Appellant's Counsel, James C. Jenkins at 67 East 100 North, P.O. Box 3700, Logan, Utah 84321.

DATED this 10 day of September, 1985.

A handwritten signature in cursive script, appearing to read "James C. Jenkins", is written over a horizontal line.

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE  
STATE OF UTAH

-----  
MITCHELL D. HENDERSON, ILEEN )  
BUTTARS, LAURENA B. HENDERSON, )  
DAVID HALE, )

Plaintiffs  
vs.

FOR-SHORE COMPANY,

Defendants

) MEMORANDUM DECISION

) Civil No. 20456

-----  
This matter was heard before the Court in a split trial  
secession on August 1 and 2, 1984 and again on September 17, 1984.  
Briefs have been submitted after trial by both parties.

Based on the memorandum and testimony given at the trial,  
the Court now enters this memorandum decision.

The Court finds that the repossession of the forms by For-  
Shore Company was not a legal repossession. They had no right  
to repossess the forms. The forms had been purchased by Mr.  
Henderson, the last payment being in the form of a promissory note  
accepted by the defendant, For-Shore Company and later reduced to  
judgment by them. The judgment may be valid, but there was some  
question on that because of the bankruptcy proceedings, although  
defendant claims they did not receive notice, a copy of the notice  
turns up in their file. Testimony of the plaintiffs is also that  
the forms were sold to the plaintiff's mother, who is one of the  
plaintiffs in this action, Ileen Buttars. It is obvious consideration  
was given since she paid off Mitchells Security Bank loan, some  
\$25,000.00. Defendants may surmise this was only a loan and there was  
no intention to transfer title to Mrs. Buttars by Mr. Henderson, her



son, but no evidence was offered to rebut this.

Therefore, the damage for the wrongful repossession occurred to Mrs. Buttars and not Mr. Henderson, or Mr. Hale. If Mr. Hale was damaged, it was between he and Mr. Henderson, except that Mr. Hale should receive and the Court does give judgment to Mr. Hale for the \$265.00 overcharge by For-Shore to him on rental. The Court awards no damages to Mr. Henderson since they were not his forms. The Court feels that, although the defendants were a bit tricky in learning about the forms and then failing to inform Mr. Hale that they were the ones who took the forms after he told them they were stolen. It does not meet the criteria of punitive damages as set forth in Leigh Furniture and Carpet Company v. Isom, 657 P.2nd 293.

The Court therefore, holds that the repossession of the forms was wrongful and that they belong to Mrs. Buttars. Damages are awarded for the value of the forms taken in the amount of \$5,725.35. And, since the defendant has used the forms for three years and generated revenue from them, Mrs. Buttars has been deprived during that time of their use. A full set being of the rental value of about \$5,000.00 per year, but there being only taken a half set the Court will award \$2,500.00 damages per year for the three years or \$7,500.00.

In addition the Court will award \$100.00 damages for the trespass which occurred in taking the forms.

This being a total judgment to Mrs. Buttars in the amount of \$13,325.35 and the judgment to Mr. Hale for \$265.00. Counsel for plaintiff to prepare the appropriate findings and judgment.

Dated this 17th day of December, 1984.

BY THE COURT:

This agreement made this day - 9/15/78 between Mitchell Henderson,  
party of the first part

and Eileen Butters, Clarkston, Utah  
party of the second part  
Witnesseth.:

That the party of the first part agrees to sell to the party of the  
second part the described equipment appearing on a separate sheet, affixed  
to page one, for the sum of *Twenty Six Thousand Two Hundred Sixty and 9/100*  
\$ 26,260.91.

This transaction is in consideration of a loan in favor of the  
party of the first part, wherein the party of the second part will retain  
and assume ownership of the described equipment.

Signed

*Mitchell Henderson*  
*Eileen Butters*

Signed in the presence of

*Michael J Henderson* 9/15/78  
*Sandra B Henderson* - 9/15/78



Mitchell Henderson  
Contractor  
Logan Utah.

Description			Unit Price	Amount
155-	2' by 8'	panels	\$76.00 each	\$11,780.00
80-	2' by 4'	panels	\$43.40 each	3,470.00
10-	20" by 4'	panels	\$50.00 each	500.00
8-	18" by 4'	panels	\$45.00 each	360.00
10-	16" by 4'	panels	\$40.00 each	400.00
20-	15" by 4'	panels	\$53.00 each	1,060.00
30-	14" by 4'	panels	\$43.00 each	1,290.00
22-	12" by 4'	panels	\$38.00 each	836.00
8-	10" by 4'	panels	\$39.00 each	312.00
8-	8" by 4'	panels	\$35.00 each	280.00
15-	6" by 4'	panels	\$20.00 each	400.00
8-	4" by 4'	panels	\$20.00 each	240.00
30-	2" by 4'	panels	\$12.00 each	360.00
45-	1" by 4'	panels	\$10.00 each	450.00
17-	8' by 6"	I.S.C.	\$17.00 each	289.00
26-	4' by 6"	I.S.C.	\$9.00 each	234.00
26-	8'	O.S.C.	\$4.00 each	1,404.00
20-	4'	O.S.C.	\$30.50 each	610.00
5000	Wedge Bolts		\$ .20 each	1,000.00
250-	2 by 4 Walers		\$ .25 each	62.50
255-	Z, Walers		\$ .36 each	94.80
162-	Long Wedge Bolts		\$ .47 each	76.61

\$ 26,260.59

Tax

No 914

MITCHELL D. HENDERSON  
CONCRETE FORMING

PAYROLL CHECK

DATE Aug 2 1978  
TO Per Sher  
REMARKS pay of bonus  
BAL BRO T FOR D 10742.04  
AMT DEPOSITED  
TOTAL 10742.04  
AMT THIS CHECK 6400.00  
BAL CAR D FOR D 4342.04

EMP NAME	
PERIOD ENDING	
EARNINGS	
TOTAL	
FICA	
FED WITH TAX	
STATE WITH TAX	
DEDUCTIONS	
TOTAL DEDUCTIONS	
AMOUNT OF CHECK	

STATEMENT OF WAGES AND DEDUCTIONS FOR EMPLOYEE'S RECORD.  
DETACH BEFORE CASHING

MITCHELL D. HENDERSON  
CONCRETE FORMING  
BOX 48 563-6520  
CLARKSTON, UTAH, 84305

97-21 97-21

Pay to the order of Per Sher \$ 6400.00

Six Thousand Four Hundred dollars and no/100 Dollars

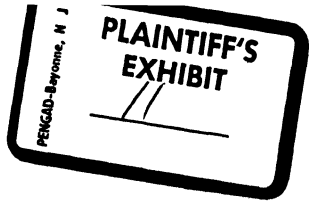
FIRST SECURITY BANK OF UTAH  
NATIONAL ASSOCIATION  
SMITHFIELD, UTAH 84335

PT 1243 0094 43 00129 22 0914 000006400000

PLAINTIFF'S EXHIBIT 6

914 97-94/1243

Mitchell D. Henderson



with

Pyramith Road

Clarkston Town

400 Road

Location of Real Property owned by Laurin E. Henderson

Laurin E. Henderson 6/15/62

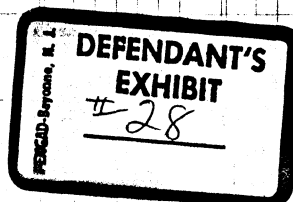
venton Road

Property line  
front Drive  
Home  
on all building  
I see pas sign  
on all building  
forms stored  
quant hut  
I see pas sign  
on all building  
on all building  
on all building

Nos



1	2	3	4	5	6	7	8
ITEM	Qty	Purchase Price	EXTENSION		NEW Price 1992	Extension	
(Enrollers 31828, 3115)							
1 24" x 8' P	75	6072	455400		8832	662400	
2 24" x 4' P	50	3238	161900		4876	243800	
3 8' OC	12	1540	18552		1748	20976	
4 1" x 4' F	10	653	6530		920	9200	
5 2" x 4' F	10	805	8050		1288	12880	
6 8" x 4' F	8	1960	15680		3680	29440	
7 10" x 4' F	8	2378	19024		3864	30912	
8 12" x 4' F	21	2567	53907		3864	81144	
9 14" x 4' F	14	2677	42832		4324	60536	
10 15" x 4' F	14	3284	52444		4600	73600	
11 16" x 4' F	8	2797	22376		4600	36800	
12 4' IC	14	2093	29302		2944	41216	
13 8' IC	3	3864	11592		5796	17388	
14 4" x 4' F	8	1822	14576		2944	23552	
15 18" x 4' F	7	2907	20349		4600	32200	
						13,846.92	
16 Inv #3004							
17							
18							
19 20" x 4' F	8	3050	24400		4876	39008	
20 6" x 4' F	12	2010	24120		2944	35328	
21 UNALER TISS	150	.161	2415		.130	4500	
22 WEDGE BOLTS	3000	.161	48300		.260	78000	
23 Z UNALERS	150	.58	8700		.860	12900	
24							
25 TOTAL			10,404.49			15,544.28	35% n
26							
27							
28							
29 TOTAL Pg 1		10,404.49				15544.28	
30 TOTAL Pg 2		80572				35% up	
31 TOTAL		11,210.21				17246.47	
32							
33							
34							
35							
36							
37							
38							
39							
40							



For detail see Appendix for summary of items

ITEM	Qty	PRICE	Extension
(Inv 3507)			



# KENTAL EQUIPMENT COMPARISON

1	2	3	4	5	6	7	8
ITEM	Qty	1978 PRICE	EXTENSION		NEW PRICE	EXTENSION	
1 24"x8" P	55	54.72	3009.60		96.00	5280.00	
2 6" I C x 8'	2	3.914	7.828		63.00	126.00	
3 24"x4" P	50	30.93	1546.50		53.00	2650.00	
4 6" I C x 4'	4	20.90	83.60		32.00	128.00	
5 W3013 Bolts	500	.16	80.00		.28	140.00	
6 2x4 WALSHEES	50	.167	8.35		.33	16.50	
7 2 WALSHEES	50	.53	26.50		.94	47.00	
8 (S/B 4875.44)			4832.83			8387.50	
9 (DO TO REMOVAL)							
10							
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NEW PRICE FORMS OWNED BY M. HENDERSON  
(PURCHASED FROM INTERSTATE INDUSTRIES)

1554428

NEW PRICE FORMS OWNED BY M. HENDERSON  
(PURCHASED FROM FAN-STAR G)

129162

NEW PRICE FORMS RENTED TO M. HENDERSON  
(NOT RETURNED) PICKED UP

838750

251223.40

ASSUME FORMS WERE USED - plywood in case RECOVERED  
WAS IN NEED OF REPAIRING. LESS 30% OF NEW PRICE  
RESTORE IN NEW CONDITION.

VALUE USED

1765638