

1986

Harlen W. Brown v. Harry Heathman, Inc., Harry  
Heathman doing business as Heathman  
Investment Company and Heathman Properties :  
Brief of Appellant

Utah Supreme Court

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 860154-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

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HARLEN W. BROWN, )

Plaintiff and Appellant, )

vs. )

CASE NO. 20885

HARRY HEATHMAN, INC., HARRY )  
HEATHMAN doing business as )  
Heathman Investment Company and )  
Heathman Properties, )

Defendants and Respondents, )

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BRIEF OF APPELLANT

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APPEAL FROM THE JUDGMENT OF THE  
FOURTH JUDICIAL DISTRICT COURT OF UTAH, IN AND FOR UTAH COUNTY  
HONORABLE J. ROBERT BULLOCK, JUDGE

---

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**FILED**

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Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

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HARLEN W. BROWN,	)	
Plaintiff and Appellant,	)	
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HEATHMAN doing business as	)	
Heathman Investment Company and	)	
Heathman Properties,	)	
Defendants and Respondents,	)	

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BRIEF OF APPELLANT  
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STATEMENT OF ISSUES PRESENTED ON APPEAL

Plaintiff/Appellant herewith submits to this Court the following issues for disposition upon this appeal:

1. Whether the District Court Judge's findings were in accordance with the evidence. The findings were:

A. That Defendants did not knowingly make false statements to Plaintiff regarding the character of the automobile purchased and did not act fraudulently to induce Plaintiff to purchase the automobile;

B. That Defendants did not act with scienter;



C. That Defendants did not commit actual acts of fraud or any deceptive act or practice which would support rescission of the purchase and sale contract.

2. Whether the District Court Judge failed to make findings on whether the Defendants breached the purchase and sale contract.

3. Whether the District Court Judge committed error in failing to award Plaintiff the value of the trade-in vehicle which was retained by Defendants, or some portion of the value;

4. Whether the District Court Judge committed error at trial, over the objections of Plaintiff's counsel, in permitting counsel for the Defendants to read into evidence portions of the transcript of the deposition of Robert H. Posey.

#### STATEMENT OF THE CASE

Plaintiff instituted this action against Defendants on October 22, 1979. Plaintiff alleged that Defendants had made material misrepresentations of fact to Plaintiff and that Plaintiff had justifiably relied upon the misrepresentations in entering into a contract with Defendants. Plaintiff further alleged that Defendants failed to perform the terms of the contract. The contract concerned Plaintiff's purchase of a 1979 Buick Regal automobile from Defendants, and the trade-in by Plaintiff of a 1978 Chevrolet truck. Defendants filed a counterclaim against Plaintiff.

#### DISPOSITION IN THE LOWER COURT

The case was tried without a jury before Judge J. Robert Bullock on May 13, 1985. On August 13, 1985, the Judge ruled that Defendants' counterclaim was dismissed for failure to prosecute and that Plaintiff's complaint was dismissed for no cause of action.

#### RELIEF SOUGHT ON APPEAL

Appellant seeks to have the judgment of the trial court reversed and judgment entered in his favor on the issues of fraud, breach of contract, and unjust enrichment.

#### STATEMENT OF FACTS

On September 21, 1979, Plaintiff negotiated with Defendants for the purchase of a new car. Defendants represented, in writing and orally, that a 1979 Buick Regal automobile was new. Plaintiff executed Defendants' VEHICLE BUYER'S ORDER and a CONSUMER CREDIT CONTRACT, both of which indicated in writing that the car was a new vehicle. Defendants' charged Plaintiff the new-car sticker price for the automobile. As a down payment, Plaintiff traded in his 1978 Chevrolet truck which, at the time, was only a year old.

The day after Plaintiff had taken delivery of the car, he discovered that the car was used and had in excess of 11,000 miles

on it. Plaintiff endeavored to return the vehicle. Defendants' indicated that they would "make it right" with him, although they took no action to do so. Plaintiff refused to pay the balance owed on the car and Defendants' repossessed it.

Upon Defendants' repossession of the Buick, they also refused to return Plaintiff's trade-in vehicle, or to refund the value thereof (\$4,473.64) or any portion of the value. Consequently, Plaintiff was without both the vehicle he had purchased as a "new" vehicle and the vehicle he had traded in.

#### SUMMARY OF ARGUMENT

The District Court committed error in the following respects:

First, it ruled that Plaintiff failed to establish a cause of action for fraud against the Defendants. To the contrary, Plaintiff's evidence showed that Defendants knowingly or recklessly made oral and written misrepresentations of fact for the purpose of inducing Plaintiff to rely thereon. Plaintiff reasonably relied on Defendant's misrepresentations and was damaged as a result.

The District Court's ruling is in part based on deposition testimony which was erroneously admitted into evidence in the absence of an adequate showing of witness unavailability, as required by the Utah Rules of Evidence and Utah case law.

Second, it failed to make any finding concerning Plaintiff's cause of action for breach of contract, as required by the Utah Rules of Civil Procedure and Utah case law.

Third, it failed to make any finding concerning the unjust enrichment of Defendants concerning their repossession of the vehicle purchased by Plaintiff.

Based upon these errors, the District Court's ruling in the case should be reversed.

#### ARGUMENT

##### POINT I

THE DISTRICT COURT'S FINDING THAT HARRY HEATHMAN, INC. IS NOT LIABLE FOR FRAUD IS NOT IN ACCORD WITH THE EVIDENCE.

All of the elements of fraud were substantiated with evidence offered by Mr. Brown at trial. Defendants did not appear in person although their attorney attended the trial. They did not call any witnesses. They offered only the deposition testimony of one Robert Posey, Heathman's salesman, and the testimony was admitted into evidence over the strong objection of Plaintiff's counsel.

A. REQUISITE ELEMENTS OF FRAUD

In Utah a finding of fraud requires:

. . . a showing of a false representation of an existing material fact, made knowingly or recklessly for the purpose of inducing reliance thereon upon which plaintiff reasonably relies to his detriment. Sugarhouse Finance Company v. Anderson, Utah, 610 P.2d 1369, 1373 (1980).

Similarly, the elements of a cause of action for fraud are outlined in Taylor v. Gasor, Inc., Utah, 607 P.2d 292, 294 (1980) as follows:

A finding of fraud must be based on the existence of all the essential elements, i.e., the making of a false representation concerning a presently existing material fact which the representator either knew to be false or made recklessly without sufficient knowledge, or the omission of a material fact when there is a duty to disclose, for the purpose of inducing action on the part of the other party, with actual, justifiable reliance resulting in damage to that party.

See also Horton v. Horton, Utah 695 P.2d 102 (1984) and Dugan v. Jones, Utah, 615 P.2d 1239 (1980).

B. HARRY HEATHMAN, INC. MADE FALSE REPRESENTATIONS TO HARLEN BROWN CONCERNING A PRESENTLY EXISTING MATERIAL FACT

A cause of action for fraud involves a misrepresentation of an existing material fact. Sugarhouse Finance Company v. Anderson 610 P.2d at 1373; Taylor v. Gasor, Inc., 607 P.2d at 294.

Harry Heathman, Inc. made oral and written representations to Harlen Brown that the 1979 Buick Regal they offered to sell him was "new." The oral representations were made on September 12, 1979 by Robert H. Posey, the authorized agent of the Defendant who was

negotiating the sale on Defendant's behalf. (Record at 7). Defendant made two separate written representations that the 1979 Buick Regal was a new vehicle. The Vehicle Buyer's Order (Plaintiff's Exhibit No. 1 at trial) and Consumer Credit Contract (Plaintiff's Exhibit No. 2 at trial), prepared and completed by Heathman's representative, both indicate that the 1979 Buick Regal was new. Both forms contained boxes which could be checked to indicate that the car was either "NEW" or "USED." On both forms, Heathman's representative checked the boxes indicating that the 1979 Buick Regal was "NEW."

In determining whether or not a fact is material, the Supreme Court of Kansas in Timi v. Prescott State Bank, 553 P.2d 315, 325, 220 Kan. 377 (1976) stated as follows:

A fact is material if it is one to which a reasonable person would attach importance in determining his choice of action in the transaction involved. (Citations omitted).

The fact that a car is new or used is indeed a fact to which reasonable people would attach importance in considering a purchase. It is often the first factor a buyer would consider.

The oral and written representations made by Harry Heathman, Inc. to Harlen Brown concern the existence of a material fact; i.e., the new or used status of an automobile. The representation is not in the nature of a promise of future action, judgment, intention, prediction or conjecture which would work to defeat a cause of

action for fraud. The statement made concerned one of the most essential elements of the sales transaction.

In Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates, Inc., 427 P.2d 805, 808, 59 Cal.Rptr. 141 (1967), the Court cited the well-settled rule that the misrepresentation of even a single material fact upon which plaintiff had a right to, and did, rely will support a judgment for fraud. See also Callahan v. Wolfe, 400 P.2d 938, 944 (Idaho, 1965).

C. THE DEFENDANT EITHER KNEW THAT SUCH REPRESENTATIONS WERE FALSE OR MADE THEM IN RECKLESS DISREGARD AS TO THEIR TRUTH OR FALSITY.

Scienter is a requisite element in a cause of action for fraud. Sugarhouse Finance Company v. Anderson, 610 P.2d at 1373; Taylor v. Gasor, 607 P.2d at 294.

Harry Heathman Inc. knew that the 1979 Buick Regal which it sold to Harlen Brown was a used vehicle. The evidence showed that Heathman had loaned/leased the car to the BYU athletic department and that it had been driven by the BYU athletic director. (Record at 27). Therefore, Heathman's oral and written representations to Harlen Brown stating that the vehicle was new were false and Heathman Inc. knew the same.

In Town & Country Chrysler Plymouth v. Porter, 464 P.2d 815, 11 Ariz.App. 369 (1970), the Court of Appeals of Arizona affirmed

the trial court judgment of an automobile buyer in his cause of action for fraud against the dealer. The Plaintiff bought a car with an odometer reading of 2,000 miles. It was determined that the mileage was actually 7,000 miles. The Court found that knowledge of the falsity of the representation could properly be imputed to the dealer, making proof of actual knowledge unnecessary.

In a similar case in Colorado, Karan v. Bob Post, Inc., 521 P.2d 1276 (Colo.App. 1974), it was undisputed that the salesman made a false representation regarding the mileage of the automobile. The court rejected his lack of knowledge as a defense to fraud. Citing Stimson v. Helps, 9 Colo. 33, 10 P. 290, the Court stated:

' . . . He who makes a representation as to his own knowledge, not knowing whether it be true or false, and it is in fact untrue, is guilty of fraud as much as if he knew it to be untrue. In such a case he acts to his own knowledge falsely, and the law imputes a fraudulent intent.' (Emphasis in original).

In Dugan v. Jones, 615 P.2d at 1246 this Court held that circumstances impose upon a real estate vendor a "special duty to know the truth of his representations." The Court continued, at p. 1246, as follows:

Where the nature of the situation is such [that] the vendor is presumed to know the facts to which his representation relates, a misrepresentation is fraudulent even though not made knowingly, willfully or with actual intent to deceive.

An automobile dealer and its agents occupy a position similar to that of vendors of real estate. Both have knowledge, or



access to knowledge, which is not readily ascertainable or accessible to the buyer of a car or land. The circumstances impose a special duty upon a dealership to know the truth of its representations, and, in addition, the dealer is presumed to know the facts to which its representations relate. The agent for Harry Heathman, Inc. made material misrepresentations to Harlen Brown. Those misrepresentations, if made knowingly or in reckless disregard for their truth or falsity, were fraudulent. Because of the special duty of Harry Heathman, Inc. to know the truth of its representations, and because of the legitimate presumption that Harry Heathman, Inc. knew the facts on which its representations were based, the misrepresentations by Harry Heathman, Inc. were fraudulent.

D. THE REPRESENTATIONS MADE BY DEFENDANT WERE MADE FOR THE PURPOSE OF INDUCING RELIANCE ON THE PART OF PLAINTIFF, AND PLAINTIFF DID IN FACT REASONABLY RELY ON THE REPRESENTATIONS.

In order to prove fraud, the material misrepresentations must have been made for the purpose of inducing reliance on the part of the other party and must have induced actual and justifiable reliance. Sugarhouse Finance Company v. Anderson, 610 P.2d at 1373; Taylor v. Gasor, 607 P.2d at 294.

The oral and written representations by Harry Heathman, Inc. to Harlen Brown that the 1979 Buick Regal was a new vehicle may only be construed as having been made for the purpose of inducing reliance by Harlen Brown. Harlen Brown entered the Defendant's showroom intending to buy a new car. (Record at 27). The Defendant's agent knew of Harlen Brown's intent. Harry Heathman, Inc. represented orally and in writing that the car being considered by Harlen Brown was a new one and thereby met Plaintiff's requirements. The representations could have been made to serve no purpose other than inducing Mr. Brown to purchase the automobile.

In Town & Country Chrysler Plymouth v. Porter, 464 P.2d at 817, after refusing to set aside the Plaintiff's verdict for fraud against the Defendant dealer, the Court stated:

. . . The Plaintiff certainly had a right to rely on the mileage representation, (citation omitted), and where, as here, the representor has a motive of monetary gain, the jury would be justified in finding an intent that the purchaser rely upon the representation. (citations omitted). Furthermore, if the jury found that the mileage representation was intended to cause the Plaintiff to act in reliance thereon, it could infer the requisite intent to deceive.

In the instant case, the element of reliance is unequivocal. Mr. Brown purchased the 1979 Buick Regal based on Harry Heathman, Inc.'s oral and written representations that the automobile was new. Mr. Brown testified at the trial of this case that he would not have

purchased the automobile had he known it was a used vehicle.  
(Record at 24, 25).

Mr. Brown's reliance on Harry Heathman, Inc.'s representations that the 1979 Buick Regal was a new car was undoubtedly reasonable. A prospective purchaser entering an automobile dealership is certainly entitled to rely on the dealer's representations of the specifications of the automobile being purchased. The dealer is in a superior position to know the facts regarding the automobile. The purchaser has no independent source of knowledge regarding the automobile. The buyer, therefore, frequently has no alternative but to rely on the representations made by the dealer.

In Cheever v. Schramm, Utah, 577 P.2d 951, 954 (1978), this Court held that:

Although it is correct that a party is not required to independently ascertain the truth of every representation made in a transaction such as this one, one claiming fraud must show he acted reasonably under the circumstances . . . . In determining [reasonableness], factors such as the respective age, intelligence, experience, mental condition, and knowledge of each party should be considered, along with their access to information, and the materiality of the representations.

An automobile dealership unquestionably possesses more experience in auto sales, greater knowledge relating to the specific automobile involved, and superior access to information than does a consumer buyer. Mr. Brown is a truck driver (Record at 23) and

testified that he was tired when he entered the dealership as he had just returned from a delivery "run." (Record at 7). The relative position of the parties in the instant case and consideration of the circumstances requires a finding that Harlen Brown reasonably relied on the material misrepresentations of fact made by Harry Heathman, Inc.

This Court, in Dugan v. Jones, 615 P.2d at 1247 held:

. . . a vendee of real property, in the absence of facts putting him on notice, has no duty to investigate to determine whether the vendor has misrepresented the area conveyed. Neither is a vendee estopped from recovering for misrepresentation of the area of the land conveyed merely because he viewed or inspected the premises, so long as he did not endeavor to determine independently the exact quantity of land. Nor is a vendee estopped from recovering in an action for deceit because he had the opportunity to inspect or otherwise check the property prior to purchase.

In the instant case, therefore, Harlen Brown is not precluded from recovery by any contention that he was deficient in failing to make an independent determination of the mileage registered on the automobile. To the contrary, Mr. Brown acted reasonably in relying on the Defendant's representations that the car was "new."

E. HARLEN BROWN SUSTAINED DAMAGE AS A RESULT OF DEFENDANT'S FRAUDULENT CONDUCT

It is essential that Plaintiff have sustained damages in a cause of action for fraud. Dilworth v. Lauritzen, Utah, 424 P.2d

136, 138 (1967); Child v. Hayward, Utah 400 P.2d 758, 759 (1965).

Harlen Brown entered into a written agreement to purchase the "new" 1979 Buick Regal for \$ 9,123.64. Mr. Brown traded in his 1978 Chevrolet truck as a down payment in the amount of \$ 4,473.64. (Plaintiff's Exhibits No. 1 & 2 at trial). When he discovered that the Buick was not new, Mr. Brown attempted to rescind the contract buy returning the car to Harry Heathman, Inc. and obtaining the return of his truck. (Record at 19, 22 & 23). Harry Heathman, Inc. would not cooperate. Mr. Brown did not make payments on the Buick and Harry Heathman, Inc. repossessed it. (Record at 20,21). Mr. Brown traded in his truck, which he owned free and clear, on a used car which he was told was "new" and which was repossessed, and was left by Harry Heathman, Inc. without either vehicle. The substantial damage to Mr. Brown is obvious.

Utah law requires that trial court findings be "supported by substantial evidence." Hidden Meadows Development Company v. Mills Utah, 590 P.2d 1244, 1250 (1979).

The trial court's findings in the instant case that Defendant had not committed fraud against the Plaintiff is not supported by "substantial" evidence. Rather, the ruling is against the clear weight of the evidence supporting fraud. The judgment of the trial court, therefore, must be reversed.

F. THE PLAINTIFF'S EVIDENCE WAS SUBSTANTIALLY UNCHALLENGED BY THE DEFENDANT. THE ONLY ATTEMPT BY DEFENDANT'S COUNSEL TO CHALLENGE PLAINTIFF'S EVIDENCE WAS THROUGH THE OFFER OF THE DEPOSITION OF ONE ROBERT H. POSEY AS EVIDENCE. THE TRIAL COURT'S ADMISSION INTO EVIDENCE OF PORTIONS OF THE DEPOSITION WAS ERROR IN THE ABSENCE OF THE REQUISITE SHOWING OF LEGAL UNAVAILABILITY OF POSEY AS A WITNESS.

Rule 804(a) of the Utah Rules of Evidence sets forth the conditions upon which out-of-court deposition testimony (hearsay) is admissible as substantive evidence at trial. The rule states:

"Unavailability as a witness" includes situations in which the declarant

- (1) is exempted by . . . privilege; or
- (2) persists in refusing to testify . . .; or
- (3) testifies to a lack of memory . . .; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

In Madrid v. Scholes, 546 P.2d 863 (N.M.App. 1976), the defendant's attorney sought to introduce previous testimony of two witnesses who were not present at the trial. On their absence, the defendant's attorney commented, "Subpoenas were sent, I don't have a return by these - - -." The trial court admitted the former testimony. Concerning part (5) of the Rule, the Court of Appeals of New Mexico reversed the trial court's admission of former testimony

into evidence and recited the requirement of Rule 804(a)(5) that the party show "that he was unable to procure the attendance of the witness by process or other reasonable means," (p. 865). The Court of Appeals held that the defendant did not comply with the Rule.

In the present case, counsel for Heathman, Inc. offered as evidence portions of the deposition of Robert H. Posey. (Record at 34). Said counsel did not call any witnesses or attempt to put on any other evidence. Upon the objection of Brown's counsel, the court inquired into the availability of Mr. Posey. Heathman's counsel replied,

"He is [unavailable], your Honor. We have been unable to locate him. Mr. Heathman does not know where he's at. Mr. Heathman doesn't have any employee around anymore except for Walt Farmer. Mr. Farmer does not know where Mr. Posey is, either. . . no service of a subpoena has been attempted because we didn't even have an address for him to even try that." (Record at 34, 35).

Plaintiff's counsel objected on the ground that the proffer by Defendant's counsel did not satisfy the requisite showing that attendance of the witness had been attempted "by process or other reasonable means". Judge Bullock noted that Heathman's attorney had orally represented that the witness was unavailable, and asked Brown's attorney if more than that was required. (Record at 35). Plaintiff's attorney responded in the affirmative and reserved his right to further objection. (Record at 35). Later, Plaintiff's attorney renewed his objection to the admission of the Posey

deposition on the ground that there had been inadequate proof of legal unavailability of the witness. (Record at 48). Judge Bullock overruled the objection and ruled that Defendant's attorney had met the required showing of unavailability under Rule 804. (Record at 48 & 51). He stated that Rule 804 did not require the

issuance of a summons [sic], when the proponent of the defendant [sic] doesn't know where the summons [sic] can be served or has made some reasonable effort, which he says he has, to ascertain the whereabouts of the deposer [sic]. (Record at 51).

The Judge ruled that the deposition testimony was admissible under Rule 804(b). (Record at 51). Rule 804(b) presupposes a determination of declarant unavailability as defined in Rule 804(a). The Judge's reliance upon 804(b) was, therefore, inappropriate.

In Madrid, the Defendant's attorney attempted service of subpoenas on the absent witnesses which the Court held to be an inadequate attempt to secure their attendance. In the instant case, Defendant's attorney did not even attempt service of a subpoena to procure the attendance of Mr. Posey.

The only evidence of declarant unavailability in this case was the oral conclusion by Defendant's attorney that the witness was "unavailable." (Record at 34 & 35). Under the clear language of Rule 804(a), and the guidance of Madrid, that is a wholly insufficient showing of declarant unavailability. Therefore, the District Court's admission into evidence of the deposition of Robert H. Posey was error.



## POINT II

THE DISTRICT COURT'S FAILURE TO MAKE A FINDING ON THE PLAINTIFF'S CAUSE OF ACTION FOR BREACH OF CONTRACT IS REVERSIBLE ERROR.

Rule 52(a) of the Utah Rules of Civil Procedure provides in pertinent part:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, . . .

This Court unequivocally restated this principle in, and remanded for more definite findings, the case of Silliman v. Powell, Utah, 642 P.2d 388, 391 (1982) as follows:

As the determiner of fact, the trial court is required to make findings on all material issues.

The Court likewise remanded for more definite findings the case of Rucker v. Dalton, Utah, 598 P.2d 1336, 1338 (1979) and explained its reasons for the requirement as follows:

The importance of complete, accurate and consistent findings of fact in a case tried by a judge is essential to the resolution of dispute under the proper rule of law. To that end, findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.

In Romrell v. Zions First National Bank, Utah, 611 P.2d 392, 394-95 (1980), this Court quoted Rule 52(a), U.R.C.P., and continued:

This requirement is mandatory and may not be waived. . . . Failure of the trial court to make findings on all material issues is reversible error.

See also Boyer v. Lignell, Utah, 567 P.2d 1112, 1113 (1977).

The Plaintiff pled (Plaintiff's Amended Complaint, paragraphs 3, 4, 6, 13, & 14) and argued (Record at 71, 72, 73 & 78) a cause of action for breach of contract. The Findings of Fact and Conclusions of Law entered by the Honorable J. Robert Bullock state only that Plaintiff failed to establish a cause of action for fraud, and indeed fail to even mention a contract cause of action. The absence of a finding on Plaintiff's cause of action for breach of contract and the strong statements of this Court requiring findings on all issues mandate the reversal of the lower court decision on this issue.

### POINT III

DEFENDANT'S REPOSSESSION OF THE 1979 BUICK REGAL AND RETENTION OF THE 1978 CHEVROLET TRUCK CONSTITUTE UNJUST ENRICHMENT.

An established maxim of equity jurisprudence is that of unjust enrichment. On this topic 30 C.J.S. Equity Sec. 89 states in part:

One must not enrich himself at the expense of another; and equity seeks to prevent unjust enrichment, and will not permit one to enrich himself unjustly at the expense of another.

The Fifth Circuit Court of Appeals in Texas Co. v. Miller, 165 F.2d 111, 114-15 (5th Cir. 1947), states as follows:

. . . Equity does not look with favor on the unjust enrichment of one person at the expense of another and will generally exercise its offices either by applying the principle of subrogation or by declaring the existence of a constructive trust or of an equitable lien in prevention thereof.

In E.L. Bruce Co. v. Bradley Lumber Co. of Arkansas, 79 F.Supp. 176, 189 (D.C.W.D. Ark. 1948), the Court repeated the familiar principle as follows:

. . . equity will not permit one to unjustly enrich himself at the expense of another. . . .

After Harlen Brown rescinded his contract to purchase the 1979 Buick Regal, Harry Heathman, Inc. repossessed the Regal. (Record at 20, 21). Heathman, Inc. refused Brown's requests to return his trade-in vehicle, the 1978 Chevrolet truck. (Record at 19, 22, & 23). As a result, Heathman, Inc. possessed the 1979 Buick Regal or proceeds from its subsequent re-sale, and the 1978 Chevrolet truck or proceeds from its subsequent re-sale. Such retention of both vehicles constitutes unjust enrichment by Heathman, Inc.

#### CONCLUSION

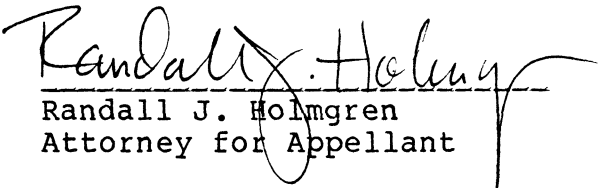
The District Court erred in its ruling that Plaintiff had not established a cause of action for fraud and erred in failing to make a ruling on Plaintiff's cause of action for breach of contract

and unjust enrichment. The judgment of the lower court must,  
therefore, be reversed.

DATED this 6th day of November, 1985.

Respectfully submitted,

SHIELDS, SHIELDS & HOLMGREN

  
\_\_\_\_\_  
Randall J. Holmgren  
Attorney for Appellant

## **ADDENDUM**

GARY L. CHRYSTLER,  
Attorney for Defendants  
42 North University Ave.  
Suite 4, P.O. Box 1045  
Provo, Utah 84603  
Telephone: 375-3121

IN THE FOURTH JUDICIAL DISTRICT COURT UTAH COUNTY

STATE OF UTAH

---0000000---

HARLEN W. BROWN,	:	
	:	
Plaintiff,	:	FINDINGS OF FACT AND
	:	CONCLUSIONS OF LAW
-vs-	:	
	:	Civil No. 52,832
HARRY HEATHMAN, INC.; HARRY	:	
HEATHMAN d/b/a HEATHMAN INVESTMENT	:	
COMPANY; and HEATHMAN PROPERTIES,	:	
	:	
Defendants.	:	

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This matter came on regularly for trial on the 13th day of May, 1985. Plaintiff was represented by Randall J. Holmgren and Defendants were represented by Gary L. Chrystler. As a preliminary matter, Defendant, Harry Heathman Inc., indicated, by and through counsel, that it would not prosecute its Counterclaim and the same was dismissed. Plaintiff was sworn and testified concerning the allegations in his Complaint and in support of his cause of action against the Defendants. At the request of Plaintiff's counsel, portions of the Deposition of Robert H. Posey, salesman for Harry Heathman Inc., were published and admitted into evidence. At the conclusion of evidence the matter was taken under advisement by the Court. Having reviewed the testimony and evidence submitted and heard the arguments and being fully advised in the premises, the Court now makes and enters its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Defendants' Counterclaim is dismissed for failure to prosecute.

**received**  
8-6-85

2. Plaintiff, Harlen W. Brown, is a resident of Glenrock, Wyoming.

3. Harry Heathman Inc., is a Utah Corporation licensed to do business in the state of Utah.

4. Harry Heathman is a resident of the state of Utah.

5. On or about September 12, 1979, Harlen W. Brown was the owner of a 1978 Chevrolet automobile.

6. On or about September 12, 1979, Harry Heathman Inc., sold Plaintiff a 1979 Buick Regal automobile for the total sum of \$12,175.72.

7. Plaintiff traded in his 1978 Chevrolet automobile and received a credit as a down payment therefor in the sum of \$4,473.64.

8. The balance of the contract purchase price of \$5,915.44 was financed over a period of 48 months at an annual interest rate of 13.30 percent.

9. Pursuant to the parties' agreement, on September 12, 1979, Plaintiff executed a Vehicle Buyer's Order which indicated that the vehicle purchased by him was a new 1979 Buick Regal and that it had an outgoing odometer reading of 11,946 miles.

10. Also on September 12, 1979, to facilitate financing, Plaintiff executed a Conditional Sales Contract and Security Agreement which indicated the vehicle he was purchasing from Harry Heathman Inc., was a new 1979 Buick Regal automobile.

11. After purchase of the 1979 Buick Regal, Plaintiff brought suit against Defendants for rescission of the purchase contract claiming Defendants had fraudulently induced the purchase by knowingly and falsely misrepresenting the fact that the 1979 Buick Regal had been a driver's training car.

12. Plaintiff failed to meet his burden of proof regarding allegations of fraud in that Plaintiff failed to convince the Court that Defendant, Harry

Heathman Inc., or any of its employees or authorized agents knowingly made false statements to Plaintiff regarding the character of the automobile purchased nor did Defendant, Harry Heathman Inc., or any of its authorized agents or employees by their acts fraudulently induce Plaintiff into purchasing the 1979 Buick Regal.

13. Plaintiff also failed to meet his burden of proof regarding establishing by clear and convincing evidence that Defendant, Harry Heathman Inc., or any of its authorized agents or employees acted with scienter in this matter.

14. Plaintiff, Harlen W. Brown, has therefore, failed to establish his cause of action by failing to convince the Court by clear and convincing evidence that the Defendant, Harry Heathman Inc., or any of its authorized agents or employees committed actual acts of fraud in this transaction nor did Harry Heathman Inc. or any of its authorized employees or agents commit any deceptive act or practice which would support rescission of the parties purchase and sale contract.

#### CONCLUSIONS OF LAW

1. The Counterclaim of the Defendants is hereby dismissed for failure to prosecute.

2. Plaintiff's Complaint is hereby dismissed for no cause of action against all Defendants.

3. No costs are awarded either party.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1985.

BY THE COURT:

---

J. ROBERT BULLOCK  
DISTRICT COURT JUDGE



HARRY HEATHMAN, INC.  
175 North 100 West PROVO UTAH 84601 Telephone 373-9500  
CHEVROLET BUICK OPEL LUV

VEHICLE BUYER'S ORDER

DATE OF ORDER 9-12-77  
BUYER HARRY HEATHMAN  
ADDRESS 124 N. 130 E.  
CITY RICH COUNTY  
STATE AND ZIP CODE 84005 PHONE 2-1-5108  
I hereby order from you, subject to all terms conditions and agreements contained herein, and the ADDITIONAL CONDITIONS printed on the reverse side hereof the following  
☒ NEW ☐ USED VEHICLE  
YEAR 7 MAKE BUICK MODEL REGAL  
TYPE COLOR SLATE SERIAL NO. 440  
STOCK NO. 271 TO BE DELIVERED ON OR ABOUT  
Cash Selling Price \$412.00

Optional Equipment or Services	Total Installed Price \$
1. Radio	\$ 65.00
2. Air Conditioning	\$ 50.00
3. Power Windows	\$ 13.00
4. Power Locks	\$
5. Power Mirrors	\$
6. Power Seats	\$
7. Power Steering	\$
8. Power Brakes	\$
9. Power Doors	\$
10. Power Windows	\$
11. Power Locks	\$
12. Power Mirrors	\$
13. Power Seats	\$
14. Power Steering	\$
15. Power Brakes	\$
16. Power Doors	\$
17. Power Windows	\$
18. Power Locks	\$
19. Power Mirrors	\$
20. Power Seats	\$
21. Power Steering	\$
22. Power Brakes	\$
23. Power Doors	\$
24. Power Windows	\$
25. Power Locks	\$
26. Power Mirrors	\$
27. Power Seats	\$
28. Power Steering	\$
29. Power Brakes	\$
30. Power Doors	\$
31. Power Windows	\$
32. Power Locks	\$
33. Power Mirrors	\$
34. Power Seats	\$
35. Power Steering	\$
36. Power Brakes	\$
37. Power Doors	\$
38. Power Windows	\$
39. Power Locks	\$
40. Power Mirrors	\$
41. Power Seats	\$
42. Power Steering	\$
43. Power Brakes	\$
44. Power Doors	\$
45. Power Windows	\$
46. Power Locks	\$
47. Power Mirrors	\$
48. Power Seats	\$
49. Power Steering	\$
50. Power Brakes	\$
51. Power Doors	\$
52. Power Windows	\$
53. Power Locks	\$
54. Power Mirrors	\$
55. Power Seats	\$
56. Power Steering	\$
57. Power Brakes	\$
58. Power Doors	\$
59. Power Windows	\$
60. Power Locks	\$
61. Power Mirrors	\$
62. Power Seats	\$
63. Power Steering	\$
64. Power Brakes	\$
65. Power Doors	\$
66. Power Windows	\$
67. Power Locks	\$
68. Power Mirrors	\$
69. Power Seats	\$
70. Power Steering	\$
71. Power Brakes	\$
72. Power Doors	\$
73. Power Windows	\$
74. Power Locks	\$
75. Power Mirrors	\$
76. Power Seats	\$
77. Power Steering	\$
78. Power Brakes	\$
79. Power Doors	\$
80. Power Windows	\$
81. Power Locks	\$
82. Power Mirrors	\$
83. Power Seats	\$
84. Power Steering	\$
85. Power Brakes	\$
86. Power Doors	\$
87. Power Windows	\$
88. Power Locks	\$
89. Power Mirrors	\$
90. Power Seats	\$
91. Power Steering	\$
92. Power Brakes	\$
93. Power Doors	\$
94. Power Windows	\$
95. Power Locks	\$
96. Power Mirrors	\$
97. Power Seats	\$
98. Power Steering	\$
99. Power Brakes	\$
100. Power Doors	\$

Total for optional equipment and/or services \$ 25.00  
Sub Total \$ 437.64  
Less allowance for my 1978 (Make) (Model) (Line of Subject) (Body Style) (Serial No.)  
With equipment as appraised (Deduct from Sub Total) \$ 1.00  
AMOUNT SUBJECT TO SALES TAX \$ 436.64  
Sales Tax \$ 23.75  
License and Transfer of Title \$ 8.50  
Total Cash Selling Price \$ 447.64  
TRADE IN ALLOWANCE \$ 447.64  
Less Balance Owing to  
of \$  
Net Allowance (Which allowance I guarantee free from all encumbrances) \$ 447.64  
Deposit Herewith \$  
Cash Due on Delivery \$  
Total Down Payment \$ 447.64  
Unpaid Cash Price Balance \$ 515.40  
Total Insurance Premium WARRR \$ 38.00  
Property Tax on Trade-in

Additional Information on 88-100-1946 TRADE 13,605  
CUSTOMER TO FURNISH OWN COLLISION AND LIABILITY INSURANCE AND ACCEPTS FULL FINANCIAL RESPONSIBILITY FOR DAMAGE DUE TO COLLISION  
NOTICE TO CUSTOMER: I HAVE BEEN MADE NO PROMISES BY HARRY HEATHMAN, INC. REPRESENTATIVES NOT LISTED IN THIS CONTRACT OTHER THAN REPAIR ORDER AS TO ACCESSORIES, FREE WORK, OR ANY ITEM NOT LISTED ON THIS CONTRACT WARRANTIES TYPE NO I HAVE READ AND UNDERSTAND THIS CONTRACT FULLY  
BUYER'S SIGNATURE X  
MANAGER DISCLOSING THIS CONTRACT X

Salesman JASEY  
APPROVED BY  
THIS ORDER IS NOT VALID UNLESS SIGNED AS ACCEPTED HERE BY SALESMAN OR OFFICER OF THE COMPANY

NOTICE TO THE BUYER Do not sign this order before you read it or if it contains any blank spaces in the CREDIT SALE DISCLOSURE STATEMENT portion hereof if credit is extended You are entitled to an exact copy of the order you sign  
BUYER ACKNOWLEDGES he has read and received a complete copy of this order comprising the entire agreement affecting this purchase

A Buyer Signs X B Co Buyer Signs X

CREDIT SALE—DISCLOSURE STATEMENT

1 Cash Price  
2 Downpayment Consisting of  
A Cash Downpayment \$  
B Trade-in  
C Total Downpayment (2A & B)  
3 Unpaid Balance of Cash Price (1-2C)  
4 Other Charges Consisting of  
\*A Optional Physical Damage Insurance \$  
\*\*B Optional Credit Life Insurance \$  
\*\*C Optional Disability Ins. \$  
D Sales Tax \$  
E License Transfer of Title \$  
F Total Other Charges (4A + 4B + 4C)  
5 Unpaid Balance (Amount Financed) (3 + 4F)  
6. FINANCE CHARGE  
- Deferred Payment Price (1 + 4F + 6)  
7 Total of Payments (3 + 6)  
9. ANNUAL PERCENTAGE RATE %

10 Finance charges to begin accrue on  
11 TOTAL OF PAYMENTS shall be repaid to SELLER in consecutive installments of \$ each on the day of each month beginning 19 , PLUS \$ on 19 X , and \$ . on 19 X  
If any installment is more than twice the amount of an otherwise regular scheduled equal payment it is a BALLOON PAYMENT which may be refinanced without penalty. Identify each "BALLOON PAYMENT" at "X" above.

12 If any installment is in default more than 10 days, default charges shall be payable in the amount of 5% of the delinquent installment or \$5, whichever is less, or at seller's election, an amount equal to the annual percentage rate stated above times the unpaid amount of the installment from the date of the installment until paid in full, counting each day as 1/30th of a month

14 If this contract is prepaid, a refund credit computed in accordance with the rule of 78s will be made to Buyer, subject to retention by Seller of a minimum finance charge of \$5 if the amount financed does not exceed \$75, or \$750 if amount financed exceeds \$75. No rebate will be made if the amount thereof is less than \$1

4A PHYSICAL DAMAGE INSURANCE against accidental damage to the Property for a term of months as checked ☐ Comprehensive Coverage  
☐ Fire Theft and Additional Coverage  
☐ \$ Deductible Collision  
☐ Towing and Labor Insurance settlement will be based upon actual cash value of Property at time of loss not exceeding limits of liability set forth in policy, and payable to Buyer, Seller or Assignee of Seller, as interests may appear

BUYER MAY CHOOSE THE PERSON THROUGH WHICH THE INSURANCE IS TO BE OBTAINED

\*\*4B & C CREDIT LIFE AND/OR DISABILITY INSURANCE according to terms and conditions set forth in policy or certificate if insurance issued by NAME INSURER

HOME OFFICE ADDRESS

IF CHARGE FOR CREDIT LIFE AND/OR DISABILITY INSURANCE IS TO BE INCLUDED IN ORDER, INSERT CHARGE IN LINE 4B & C AND HAVE BUYER AND CO-BUYER SIGN THIS STATEMENT BEFORE SIGNING ORDER BELOW

BUYER IS NOT REQUIRED TO OBTAIN CREDIT LIFE AND/OR DISABILITY INSURANCE COVERAGE.

The undersigned hereby affirm(s) that the charge for credit life and/or disability insurance shown in item 4B & C of this Disclosure Statement has been disclosed in writing to the undersigned prior to execution by the undersigned of this statement and that after such disclosure the undersigned specifically affirm(s) that the undersigned desires to obtain the insurance for which an amount is included above

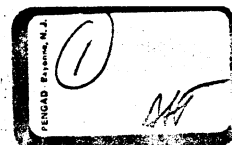
BUYER'S DATE  
SIGNATURE X  
CO-BUYER'S DATE  
SIGNATURE X

## CONDITIONS

### IT IS FURTHER UNDERSTOOD AND AGREED:

The order on the reverse side hereof is subject to the following terms and conditions which have been mutually agreed upon:

1. The manufacturer has reserved the right to change the list price of new motor vehicles without notice and in the event that the list price of the new vehicle ordered hereunder is so changed, the cash delivered price, which is based on list price effective on the day of delivery, will govern in this transaction. But if such cash delivered price is increased the buyer may, if dissatisfied with such increased price, cancel this order, in which event if a used vehicle has been traded in as a part of the consideration herein, such used vehicle shall be returned to the buyer upon the payment of a reasonable charge for storage and repairs (if any) or, if the used vehicle has been previously sold by the dealer, the amount received therefor, less a selling commission of 15% and any expense incurred in storing, insuring, conditioning or advertising said vehicle for sale, shall be returned to the buyer.
2. The buyer agrees to deliver the original bill of sale and the title to any used vehicle traded herein along with the delivery of such vehicle in the same condition and containing the same equipment as when appraised reasonable wear and tear excepted, and the buyer warrants such used vehicle to be his property free and clear of all lien and encumbrances except as otherwise noted herein.
3. Upon the failure or refusal of the buyer to complete said purchase for any reason other than cancellation on account of increase in price, the cash deposit may be retained as liquidated damages, or in the event a used vehicle has been taken in trade, the buyer hereby authorizes dealer to sell said used vehicle, and the dealer shall be entitled to reimburse himself out of the proceeds of such sale, for the expenses specified in paragraph 1 above and also for his expenses and losses incurred or suffered as the result of buyer's failure to complete said purchase.
4. The manufacturer has the right to make any changes in the model or design of any accessories and part of any new motor vehicle at any time without creating any obligation on the part of either the Dealer or the Manufacturer, to make corresponding changes in the vehicle covered by this order either before or subsequent to the delivery of such vehicle to the buyer.
5. Dealer shall not be liable for delays caused by the manufacturer, accidents, sureties, fires, or other causes beyond the control of the dealer.
6. NO WARRANTIES ARE MADE OR WILL BE DEEMED TO HAVE BEEN MADE BY EITHER THE DEALER OR THE MANUFACTURER OF THE NEW MOTOR VEHICLE OR MOTOR VEHICLE CHASSIS FURNISHED HEREUNDER, EXCEPTING ONLY THE CURRENT PRINTED WARRANTY APPLICABLE TO SUCH VEHICLE OR VEHICLE CHASSIS, WHICH WARRANTY IS INCORPORATED HEREIN AND MADE A PART HEREOF AND A COPY OF WHICH WILL BE DELIVERED TO BUYER AT THE TIME OF DELIVERY OF THE NEW MOTOR VEHICLE OR MOTOR VEHICLE CHASSIS, SUCH WARRANTY SHALL BE EXPRESSLY IN LIEU OF ANY OTHER WARRANTY, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND THE REMEDIES SET FORTH IN SUCH WARRANTY WILL BE THE ONLY REMEDIES AVAILABLE TO ANY PERSON WITH RESPECT TO SUCH NEW MOTOR VEHICLE OR MOTOR VEHICLE CHASSIS.  
  
NO WARRANTIES, EXPRESS OR IMPLIED, ARE MADE BY THE DEALER WITH RESPECT TO USED MOTOR VEHICLES OR MOTOR VEHICLE CHASSIS FURNISHED HEREUNDER EXCEPT AS MAY BE EXPRESSED IN WRITING BY THE DEALER FOR SUCH USED MOTOR VEHICLE OR MOTOR CHASSIS, WHICH WARRANTY, IF SO EXPRESSED IN WRITING, IS INCORPORATED HEREIN AND MADE A PART HEREOF.
7. In case the vehicle covered by this order is a used vehicle, no warranty or representation is made as to the extent such vehicle has been used, regardless of the mileage shown on the speedometer of said used vehicle.
8. In the event that the transaction referred to in this order is not a cash transaction, the buyer herein, before or at the time of delivery of the vehicle ordered, and in accordance with the terms and conditions of payments indicated on the front of this order, will execute a conditional sales contract, or such other form of security agreement as may be required to complete this transaction upon a time credit price basis.
9. In the event that it becomes necessary for Dealer to enforce any of the terms and conditions of this order, buyer agrees to pay reasonable attorney's fees and court costs.
10. This order is Non-Transferable. 534-2100
11. This order is subject to credit approval by a financing institution, and in the event it is unacceptable to the financing institution, buyer will return vehicle covered by this order immediately to Dealer if delivery has been made.
12. LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND DAMAGE CAUSED TO OTHERS IS NOT INCLUDED IN THIS AGREEMENT.
13. BUYER REPRESENTS he is 18 years of age or older, and no credit has been extended except as appears on the reverse side.
14. This order constitutes the entire terms and agreements between the parties hereto in reference to the vehicle ordered hereunder.



General Motors Acceptance Corporation at: PO B 25873, SALT LAKE CITY, UTAH 84111

Address

is a creditor in this credit sale transaction solely for the disclosure purposes of the Consumer Credit Protection Act.

Buyer (and Co Buyer)—Name and Address (Include—County and Zip Code) <b>HARLEN W BROWN</b> <b>124 N 130 E</b> <b>OREM, UT 84057</b>	Seller—Name and Address <b>HARRY BEATHMAN, INC.</b> <b>175 NORTH 100 WEST</b> <b>PROVO, UTAH 84601</b>
---	---

The seller hereby sells, and the buyer (meaning all undersigned buyers, jointly and severally) hereby purchases, subject to the terms set forth below and upon the reverse side hereof, the following property, delivery and acceptance of which in good order are hereby acknowledged by buyer, viz.:

New or Used	Year Model	No. Cyl.	Make Trade Name	Body Type — If Truck, Give GVW	Model No. or Series	Vehicle Identification No.
NEW	1979	8	BUICK	2DR 0	REGAL	4M47W9Z126640

If truck—Describe bodies and major items of equipment sold—

Buyer represents that the purchase of said property is primarily for personal, family or household ☒ agricultural ☐ business (other than agricultural) ☐ use (check one).1. CASH PRICE (including any accessories, services and taxes imposed on the cash sale) \$ 3,373.64 + SALES TAX 232. = \$ 3,606.39 (1)2. TOTAL DOWNPAYMENT—Trade-in 1978 CHEV \$ 4,473.64 \$ NONE \$ 4,473.64 plus \$ NONE = \$ 4,473.64 (2)  
Make, Model, Year Gross Trade-in Allowance (Payoff—made by seller) Trade-in (Net) Cash Downpayment3. UNPAID BALANCE OF CASH PRICE (Difference between Items 1 and 2) \$ 5,132.75 (3)

## 4. OTHER CHARGES

\*A. Cost of Required Physical Damage Insurance \$ NONE (4A)\*\*B. Cost of Optional Mechanical Breakdown Insurance \$ NONE (4B)

BUYER MAY CHOOSE THE PERSON THROUGH WHICH THE INSURANCE IN A AND B IS TO BE OBTAINED.

C. Cost of Creditor Insurance for the term hereof.

COVERAGE OF THE BUYER BY ANY SUCH INSURANCE IS NOT REQUIRED BY SELLER.

CHECK CREDITOR \*\*\* ☒ SINGLE \$ 200.25 (4C)INSURANCE DESIRED ☒ Disability (Accident and Health) \$ 231.19 (4C)☐ Other (describe) \$ NONE (4C)

BUYER'S APPROVAL: I DESIRE TO OBTAIN THE CREDITOR INSURANCE CHECKED ABOVE FOR THE BUYER PROPOSED FOR INSURANCE.

09/12/79

(Date)

Signature

(Buyer's Signature)

(Co-Buyer's Signature)

D. Official Fees (Describe) SAFETY INS. 5.25 DOC. FEE 7.50 \$ 12.75 (4D)E. License and/or Registration Fees (Itemize) \$ 7.50 (4E)F. Certificate of Title Fee \$ 30 (4F)G. Other (Describe) MIC SERVICE CONTRACT 36/50,000 \$ 290.00 (4G)5. UNPAID BALANCE—AMOUNT FINANCED (Sum of Items 3 and 4) \$ 5,215.64 (5)6. FINANCE CHARGE \$ 1,786.64 (6)7. TOTAL OF PAYMENTS (Sum of Items 5 and 6) \$ 7,002.08 (7)8. DEFERRED PAYMENT PRICE (Sum of Items 1, 4 and 6) \$ 12,175.79 (8)9. ANNUAL PERCENTAGE RATE 13.30 % (9)10. PAYMENT SCHEDULE: The Total of Payments (Item 7) is payable at seller's office designated below or at such office of any assignee as may be hereafter designated in 48 installments of \$ 160.46 each, commencing 10/27/79, to, and on the same day of each successive month thereafter or as indicated in space below.

Any instalment which is more than twice the amount of an otherwise regularly scheduled equal instalment is a BALLOON PAYMENT. Until the property described in this contract is to be used primarily for agricultural or leasing purposes, buyer has the right to prepay the amount of any balloon payment at the time it is due without penalty and under terms which shall be no less favorable to the buyer than the terms of the original sale. These provisions do not apply to the extent that the Payment Schedule is adjusted to the seasonal or irregular income of the buyer.

11. DEFAULT CHARGE IN EVENT OF LATE PAYMENT If any instalment is not paid within 10 days after it is due, buyer agrees to pay a delinquency charge equal to 5% of the unpaid instalment not to exceed \$3 if property hereunder is purchased primarily for personal, family, household or agricultural use.

12. DESCRIPTION OF SECURITY INTEREST Seller retains a security interest under the Uniform Commercial Code in the property described above and any proceeds to secure payment and performance of buyer's obligation hereunder, including any additional indebtedness incurred as provided herein and under any extensions or renewals hereof.

13. PREPAYMENT REBATE Upon prepayment in full buyer is entitled to a rebate of the Finance Charge (Item 6) computed in accordance with the Rule of 78 if the obligation hereunder is originally payable in 61 instalments or less, otherwise in accordance with the actuarial method. A minimum charge will be retained on the amount of the rebate as follows: \$5 if the Amount Financed does not exceed \$75 \$7.50 when the Amount Financed exceeds \$75 No rebate under \$1 will be paid.

## \*Required Physical Damage Insurance

Insurance Company \_\_\_\_\_ Term: \_\_\_\_\_ months

☐ \$ \_\_\_\_\_ Deductible Collision—and also select one of the following:☐ Full Comprehensive including—Fire Theft and Combined Additional Coverage☐ \$ \_\_\_\_\_ Deductible Comprehensive including—Fire-Theft and Combined Additional Coverage☐ Fire-Theft and Combined Additional CoverageOptional if desired—Towing and Labor costs ☐ Rental Reimbursement ☐

The insurance, if any, referred to in this contract does not include coverage for bodily injury and property damage caused to others.

## \*\*Optional Mechanical Breakdown Insurance

Insurance Company MICSALT LAKE CITY, UTAHTerm ☐ 36 months or 36,000 miles whichever occurs firstTerm ☒ MIC 36/50000☒ \$25 Deductible ☐ \$50 Deductible ☐ \_\_\_\_\_ Deductible

According to terms and conditions set forth in policy certificate of insurance issued by the insurer as checked below and in "Notice of Proposed Creditor Insurance on Life of Buyer" contained on reverse of buyer's copy of contract.

Buyer Proposed For Life Insurance: ☒ The person whose name appears on line A below (co-buyer, if any, on line B, when buyer is a corporation or partnership).☐ The Prudential Insurance Company of America, Newark, New Jersey, under its Group Policy No. GL-380. The insurance under said group policy does not cover: (1) the Buyer Proposed for Life Insurance if age 65 or older at the date of this contract or (2) the Buyer Proposed for Life Insurance if age 65 or older at the date of this contract and the maximum aggregate amount of insurance for this and any other contract of the buyer is \$15,000.

BUYER'S AGE STATEMENT AND HEALTH DECLARATION (Applicable Where a Charge Has Been Authorized in 4C Above and Insurance Under Prudential Group Policy GL-380 is Proposed).

Age last birthday of Buyer Proposed for Life Insurance? ☐ Under 65

I, the Buyer Proposed for Life Insurance, understand that the insurance is only available to a buyer who makes the following declarations to induce Prudential to effect such insurance: I do hereby declare that within the past three months (1) I have not consulted or been under the care of a doctor or other practitioner for cancer, and (2) I have not been confined in a hospital or other institution because of any condition of the heart, brain, liver, kidneys or lungs. I hereby authorize any physician or hospital to disclose to Prudential any information concerning my medical history prior to the date of this contract.

Signature

(Signature of Buyer Proposed for Life Insurance)

## AMERICAN BANKERS LIFE

ASSURANCE CO. OF FLORIDA  
MIAMI, FLORIDA

(Home Office Address)

Under policy of above designated insurer, maximum amount

of insurance under this contract is \$ 7,702.08

and maximum aggregate amount of insurance under this and

any other instalment contract of the buyer is \$ 15,000

## **RULE 52**

### **FINDINGS BY THE COURT**

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

RULE 804  
HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

**(a) Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
- (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of his statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

**(b) Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a civil or criminal action or proceeding, a statement made by a declarant while believing that his death was imminent, if the judge finds it was made in good faith.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

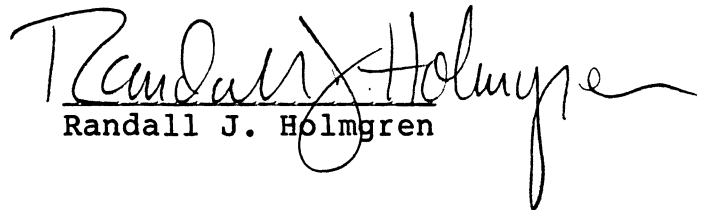
(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

CERTIFICATE OF MAILING

I hereby certify that I personally mailed four (4) true and correct copies of the foregoing BRIEF OF APPELLANT to the following, postage prepaid, this 6th day of November, 1985.

Harry Heathman  
Pro Se for Defendants/Respondents  
Shaw Island, WA 98286

Certified Mail -- # P 001 856 667

  
Randall J. Holmgren