

1979

Richard G. Foote et al v. Newton A. Taylor : Brief of Plaintiffs-Appellants

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

D. John Musselman; Attorney for Plaintiffs-Appellants;

Milton T. Harmon; Attorney for Defendants-Respondents;

Recommended Citation

Brief of Appellant, *Foote v. Taylor*, No. 16533 (Utah Supreme Court, 1979).

https://digitalcommons.law.byu.edu/uofu_sc2/1804

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE
STATE OF UTAH

RICHARD G. FOOTE, SHIRLEY :
P. FOOTE, and VENICE THEATRE :
CORPORATION, :

Plaintiffs and
Respondent, :

vs. : Case No. 16533

NEWTON A. TAYLOR, :

Defendant and
Appellant. :

BRIEF OF PLAINTIFFS-APPELLANTS

D. JOHN MUSSELMAN, for
MUSSELMAN, MADSEN & ZABRISKIE
1325 South 800 East
Suite #115
Orem, Utah 84057
Attorney for Plaintiffs-
Appellants

Milton T. Harmon
36 South Main Street
Nephi, Utah 84648
Attorney for Defendants-
Respondents

TABLE OF CONTENTS

	<u>PAGE</u>
NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	3
ARGUMENT ON APPEAL	
POINT I	
THE TRIAL COURT ERRED IN HOLDING THAT THE EARNEST MONEY RECEIPT AND OFFER TO PURCHASE FOR EQUIPMENT, AND THE LEASE AGREEMENT TO THE VENICE THEATRE AND PIZZA PARLOR, CON- STITUTED TWO SEPARATE AGREEMENTS WHICH WERE NOT MERGED.	6
POINT II	8
THE PLAINTIFF'S RIGHT OF RECOVERY AGAINST DEFENDANT IS LIMITED TO RETENTION OF THE DEFENDANT'S DOWNPAYMENT PURSUANT TO THE LIQUIDATED DAMAGES CLAUSE OF THIS AGREEMENT.	
POINT III	13
IN THE EVENT THIS COURT HOLDS AGAINST POINTS I AND II AS HEREIN STATED, THEN THE AWARD OF THE DOWNPAYMENT TO THE PLAINTIFF CANNOT BE UPHELD: SAID AWARD BEING CONTRARY TO LAW AND FACT.	
A. THE TRIAL COURT SPECIFICALLY RULED THAT THE PLAINTIFF FAILED TO CLEARLY SHOW WHAT DAMAGE WAS SUFFERED BY DEFENDANT'S RENOVATION OF THE PIZZA PARLOR; THEREFORE, THE AWARDED OF DEFENDANT'S \$1,000.00 DOWN- PAYMENT "FOR ANY SUCH DAMAGE" WAS CONTRARY TO LAW	13

TABLE OF CONTENTS

(CONT.)

PAGE

B. EVEN IF THERE IS SOME BASIS FOR
AWARDING DAMAGES AFTER HAVING RULED THEY WERE NOT
CLEARLY SHOWN, THE AWARD OF THE DOWNPAYMENT MUST
STILL BE REVERSED BECAUSE ANY DAMAGES FOUND WOULD
BE BASED ON MERE SPECULATION AND CONJECTURE.

15

CONCLUSION

18

TABLE OF AUTHORITIES

PAGE

CASES CITED

<u>Andreasen v. Hansen</u> , 8 Utah 2d 370, 335 P.2d 404 (1959) . .	11, 12
<u>Bullfrog Marina, Inc. v. Lentz</u> , 28 Utah 2d 261, 501 P.2d 266 (1972)	6, 7, 8
<u>Bunnel v. Bills</u> , 13 Utah 2d 83, 368 P.2d 597 (1962)	13
<u>Close v. Blumenthal</u> , 11 Utah 2d 51, 354 P.2d 856 (1960) . .	10, 11
<u>Dowding v. Land Funding Ltd.</u> , 555 P.2d 957 (Utah 1976) . .	9, 11
<u>First National Bank of Hutchenson v. Kaiser</u> , 222 Kan. 274, 564 P.2d 493 (1977).	6
<u>Harty v. Hoerner</u> , 170 Colo. 506, 463 P.2d 313 (1969). . . .	6
<u>Haspray v. Pasarelli</u> , 79 Nev. 203, 380 P.2d 919 (1963). . .	6
<u>Rollins v. Rayhill</u> , 200 Okl. 192, 191 P.2d 934 (1948) . . .	15

OTHER AUTHORITY

22 Am. Jur. 2d <u>Damages</u> § 201 (1965).	13
78 Am. Jur. 2d <u>Waste</u> § 41 (1975).	13
82 A.L.R. 2d 1106, 1113 (1962).	16

IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD G. FOOTE, SHIRLEY :
P. FOOTE, and VENICE THEATRE :
CORPORATION, :

Plaintiffs and :
Respondents, :

vs. : Case No. 16533

NEWTON A. TAYLOR, :
Defendant and :
Appellant. :

BRIEF OF PLAINTIFF-APPELLANTS

NATURE OF THE CASE

This is an action for damages brought by Plaintiffs-Respondent's Richard G. Foote, his wife, Shirley P. Foote, for and in behalf of the Venice Theatre Corporation. Plaintiff-Respondents claim that the Defendant-Appellant, Newton Taylor breached a real property lease and personal property purchase agreement which caused substantial loss of rents and monthly payments. In addition, Plaintiff-Respondent' claim damages to the real property. Defendant-Appellant counter-claimed for damages alleging prior breach by Plaintiff-Respondents.

DISPOSITION IN THE LOWER COURT

The trial court, the Honorable David Sam, District Judge, presiding, held as follows: That the real property lease, and the personal property purchase were two separate agreements; that the Defendant-Appellant breached the contracts; that the Defendant-Appellants Motion to Strike damage allegations except for the claim for liquidated damages expressed in the personal property agreement, should be denied; that the Plaintiff-Respondent had been injured for loss of fair rental to building and equipment in the amount of \$2,052.16; that Plaintiff-Respondent "did not clearly show what damage was suffered" to the real property, but was none-the-less entitled to retain Defendant-Appellant's \$1,000.00 downpayment "for any such damage;" and that Plaintiff-Respondent was entitled to \$1,150.00 for Attorneys fees and court costs.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the lower court's decision that the real property lease and the personal property purchase were two separate agreements, and a reversal of the denial of Appellant's Motion for damages to be limited to the liquidated damages expressed in the personal property agreement.

In the event this Court does not reverse the trial judge's decision that there were two agreements, then Appellant seeks a ruling that the liquidated damages provision would still apply to the personal property agreement, and the total award should be reduced in accordance with that determination.

In the event this Court does not reverse the trial judge's decision that there were two agreements, then Appella: seeks a ruling that the liquidated damages provision would still apply to the personal property agreement, and the total award should be reduced in accordance with that determination.

In the event this Court does not grant any of the relief prayed for above, then Appellant seeks a reversal of the award of Appellant's downpayment.

STATEMENT OF FACTS

During the summer of 1978, Mr. Newton Taylor investigated the possibility of establishing an Italian Place Restaurant in Nephi, Utah. Pursuant to his investigation he entered into negotiations with Richard G. Foote as to the possibility of acquiring the Venice Theater and Venice Pizza Hut, which were both in the same building. Mr. Taylor made it known that he was not interested in the theater, but was willing to take it along with the restaurant if necessary. Mr. Foote made it clear that it was his position that they would both have to be taken together.

On or about the 7th day of August, 1978, the parties signed an Earnest Money Receipt and Offer to Purchase covering the personal property (restaurant and theater equipment) contained within the Venice Theater and Venice Pizza Hut. The signed document contained an additional typed-in-clause which stated: "This sale shall be accompanied by the attached Lease-Purchase Agreement on the building located at 86 South Main, Nephi, Utah.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
(Venice Theatre, pizza restaurant, office). Said lease agreement
Machine-generated OCR, may contain errors.

was signed on or about the 11th day of August, four days after the Earnest Money Document was signed. Uncontroverted testimony by both parties during the lower court trial indicated that although there were two documents, it was all part of the same agreement.

The Earnest Money Receipt and Offer to Purchase included provisions for downpayment, monthly payments, and other related terms. Mr. Taylor was required to make a \$1,000.00 downpayment and additional monthly payments of \$304.29 per month. The contract provided that, "In the event the purchaser fails to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid hereon, shall, at the option of the Seller, be retained as liquidated damages."

The document containing the lease on the real property also included payment provisions and other related terms. By the terms of the lease, Mr. Taylor was to pay Mr. Foote \$240.00 per month for the lease of the building. It should be noted that the lease also contained an option to buy which could be exercised by Mr. Taylor, and provided that all lease payments made prior to the exercise of the option would apply to the purchase, if the option were exercised.

At the time of the signing of the above-mentioned documents it was orally agreed upon by the parties that the roof over the restaurant was in need of repair, and that said repair should be the financial responsibility of Mr. Foote. Apparently, there was some misunderstanding between the parties as to whether Mr. Taylor

would have the roof repaired and take the cost thereof out of the rent payments, or Mr. Foote would arrange to have the roof repaired on his own. This misunderstanding resulted in no action being taken to repair the roof until sometime near the end of October.

During this period of time from August until late October, Mr. Taylor operated the theater, but was unable to open the restaurant. He had started renovation of the restaurant kitchen and had obtained a franchise for an Italian Place Restaurant. As part of his franchise package, he was to receive restaurant kitchen equipment. However, Mr. Taylor could not take delivery of the equipment while the kitchen roof still leaked. Therefore, the restaurant could not be opened as long as the roof leaked over the kitchen area.

In October of 1978, there were several communications between Mr. Taylor and Mr. Foote concerning the roof repair. Some of the communications were made in person and some through counsel of both parties. Mr. Taylor refused to make any rent or purchase payments until the roof was repaired. Mr. Foote refused to have the roof repaired until the payments were made. Sometime during these communications Mr. Taylor made it clear that if the roof was not repaired by October 31, 1978, he would consider the contract null and void. On October 31, 1978, Mr. Taylor entered the kitchen of the restaurant and could still see light through the roof, he immediately vacated the premises.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN HOLDING THAT THE EARNEST MONEY RECEIPT AND OFFER TO PURCHASE FOR EQUIPMENT, AND THE LEASE AGREEMENT TO THE VENICE THEATRE AND PIZZA PARLOR, CONSTITUTED TWO SEPARATE AGREEMENTS WHICH WERE NOT MERGED.

It is practically a universal rule of law that where two or more writings are executed at or near the same time, in the course of the same transaction and concerning the same subject matter, they should be read together. First National Bank of Hutchenson vs. Kaiser, 222 Kan. 274, 564 P. 2d 493 (1977). The Colorado Supreme Court in interpreting this rule has gone so far as to say that not only should each agreement be construed in light of the other, but that a fundamental principle of construction requires that they be treated "as one and the same instrument," Harty v. Hoerner, 170 Colo. 506, 463 P.2d 313 (1969) (emphasis added). The rule has been held to apply even when the writings do not expressly refer to each other. Haspray v. Pasarelli, 79 Nev. 203, 380 P.2d 919 (1963).

The validity of this rule in Utah was recently affirmed by this Court in Bullfrog Marina, Inc. vs. Lentz, 28 Utah 2d 261, 501 P.2d 266 (1972). The facts of that case are remarkably analogous to the facts of the case at bar. The Plaintiff, Bullfrog Marina, Inc. had negotiated with the Defendant, Lentz to operate a houseboat business at Lake Powell. In order to

avoid certain restrictions governing the Plaintiff's concessions, the parties entered into two agreements, one styled after an employment contract wherein the Plaintiff employed the Defendant to operate a houseboat rental service; the other designated a lease whereby the Plaintiff leased three houseboats from the Defendant. Both contracts were to become effective on the same date and were to run for the same term of two years.

At trial, the trial Court found that the Defendant would not have leased the boats to the Plaintiff unless he could operate the houseboat rental service, and due to the relationship between the lease and the employment contract, the trial judge held that the two writings should be considered as one agreement. In affirming the decision of the trial Court, this Court stated,

.... here two or more instruments are executed by the same parties contemporaneously, or at different times in the course of the same transaction, and concern the same subject matter, they will be read and construed together so far as determining the respective rights and interests of the parties, although they do not in terms refer to each other. 501 P.2d at 271

The facts of the instant case are much more compelling than those in Bullfrog Marina, supra. At trial both the Plaintiff and the Defendant testified that the two writings constituted "one transaction, one agreement, and two documents put together represent[ing] the total agreement." (T @ 42,45,70).

In addition, the Defendant testified that his main interest and concern was in the case of the restaurant facilities and that the offer to purchase the theatre equipment was due to his perception of the lease of the restaurant and the purchase of the equipment as a "package deal", (T @105).

Indeed, the very documents themselves indicate that intention; one clause of the purchase agreement provides that "sale contingent upon buyer.... approving lease agreement attached to contract."

In the Bullfrog Marina case, this Court characterized the question of the integration of a single document as a factual one. 501 P.2d at 270. In the present case, not only was there no evidence that the two documents constituted separate agreements, there was an abundance of uncontroverted testimony that the two writings together constituted the terms of the agreement between the parties. The holding of the trial judge that the two agreements were separate and not merged was contrary both to the law of this state, and to the uncontroverted evidence produced at trial, and should be reversed.

POINT II.

THE PLAINTIFF'S RIGHT OF RECOVERY AGAINST DEFENDANT IS LIMITED TO RETENTION OF THE DEFENDANT'S DOWN-PAYMENT PURSUANT TO THE LIQUIDATED DAMAGES CLAUSE OF THIS AGREEMENT.

Damages:

(continued on page 9)

It is the well-settled law of this State that when a contract for sale contains a liquidated damages clause, exercisable at the option of the seller, any retention of past payments constitutes a binding election by the Seller to rely on the liquidated damages clause as his sole remedy. Dowding v. Land Funding Ltd., 555 P.2d 957 (Utah 1976) and cases cited therein.

In this regard, counsel for the Defendant made a timely motion to strike the damages alleged in the complaint, (T at 101) which motion was subsequently denied. In ruling on the motion, the trial judge distinguished the cases presented to him on the basis that those cases dealt with contracts which were disaffirmed at their relative inception, whereas the contract at issue in this case had undergone partial performance. This distinction, however, runs counter to both the express terms of the agreement and the underlying purposes of the law.

The portion of the contract relevant here, is found in the document entitled "Earnest Money Receipt and Offer to Purchase", and provides:

In the event the purchaser fails to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid herein shall, at the option of the Seller, be retained as liquidated and agreed damages.

This clause was further explained in a subsequent provision

which states that "\$1,000.00 is non-refundable if buyer is unable to perform on contract...." (emphasis added).

These two provisions make it clear that the breach which triggers the liquidated damages clause is not a repudiation of the contract before any execution thereof but any failure to complete the purchase "as herein provided!" Therefore, the rule established by the cases cited supra should also apply in the present case.

In addition, to hold as the trial court did contravenes the policy which forms the basis of the law. In Close vs. Blumenthal, 11 Utah 2d 51, 354 P.2d 856 (1960) the Court noted that the option of retaining liquidated damages was for the sole benefit of the seller and that the seller will always choose the option to his advantage and to the disadvantage of the buyer.

"Under those circumstances the clause should be strictly applied against the seller and he should be held to meet its requirements with exactness." 354 P.2d at 857.

In line with this strict application, the Court states that: "where there was an option to be exercised regarding the forfeiture of the deposit as liquidated damages, the fact that the money was kept was incontrovertible evidence that the Seller had exercised the option to keep it...." [emphasis added] That a contract is breached after partial execution doe

not change the underlying policies. The seller still has the option to elect to retain liquidated damages. According to the terms of the contract, these liquidated damages can include not only the deposit but all payments received up to the time of the breach. The possibility of overreacting by a Seller still exists. That the parties began performance on the contract should not be sufficient to justify the rejection of the rule enunciated in Andreasen vs. Hansen, 8 Utah 2d. 370, 335 P.2d 404 (1959) and recently affirmed in Dowding v. Land Funding Ltd., supra., that a binding election has been made when a party to a breached contract retains monies and makes no offer to return them.

In the present case, the Plaintiff himself testified that he did not return any monies paid to him under the contract, nor did he make any offer to return them. (T at 46).

This case, then, falls squarely under the rationale of Andreasen, and Close, and the trial judge erred in denying the motion to strike damages.

In the event this court holds that the two documents involved here are two separate and distinct agreements, it should be noted that the \$1,000.00 down-payment and the liquidated damages provision run to the agreement to purchase the equipment and not to the lease of the property. For this reason, any damages arising out of the breach of contract to purchase the equipment must be limited to the \$1,000.00 deposit made on that contract.

In addition, if the documents are separate and distinct, it would be error for the trial judge to apply the \$1,000.00 retained on the purchase of the equipment, as compensation for damage to the real property. The deposit would have no relationship to the lease agreement.

Attorneys Fees:

In Andreassen v. Hansen, supra., a case where liquidated damages was held to be the only available remedy, this Court stated that "the award of attorneys fees is conditioned upon the necessity for incurring them and upon the Plaintiff's being justified in their demands." 335 P.2nd at 407. In that case, the Court reversed the award of attorney's fees based on the reasoning that as recovery of liquidated damages did not justify the retention of an attorney or pursual of a lawsuit, no compensation could be awarded for those expenses. The same reasoning should apply in the instant case. As the Plaintiff's sole remedy was the retention of liquidated damages, the attorney's fees incurred in this case are unjustified and therefore, the award of attorney's fees should be reversed.

Again, in the event that this Court should find the two documents constitute two separate agreements, the above reasoning should nonetheless apply to that agreement entitled "Earnest Money Receipt and Offer to Purchase" and the award of attorney's fees should be reduced by that amount

incurred by the attorney in the enforcement of that agreement.

POINT III

IN THE EVENT THIS COURT HOLDS AGAINST POINTS I AND II AS HEREIN STATED, THEN THE AWARD OF THE DOWNPAYMENT TO THE PLAINTIFF CANNOT BE UPHELD: SAID AWARD BEING CONTRARY TO LAW AND FACT.

A. THE TRIAL COURT SPECIFICALLY RULED THAT THE PLAINTIFF FAILED TO CLEARLY SHOW WHAT DAMAGE WAS SUFFERED BY DEFENDANT'S RENOVATION OF THE PIZZA PARLOR; THEREFORE, THE AWARDED OF DEFENDANT'S \$1,000.00 DOWN-PAYMENT "FOR ANY SUCH DAMAGE" WAS CONTRARY TO LAW.

In all civil suits the burden is on the party seeking relief to show by a preponderance of the evidence any damages sought. In actions by a landlord against a lessee for recovery of waste or damage to property, the damages and amount thereof must be shown with reasonable certainty.

The burden is on the Plaintiff in an action for waste to show that waste has been committed to his injury, and to show with reasonable certainty the particular act or acts of waste, as well as the amount of damage, if any, to the freehold. 78 Am. Jur. 2d Waste § 41 (1975), emphasis added.

To warrant a recovery based on the value of property injured or destroyed, there must be proof of its value or evidence of such facts as will warrant a determination of its value with reasonable certainty. 22 Am Jur. 2d. Damages § 201 (1965), emphasis added.

In this action, the Plaintiff did not show the amount or

extent of damage with reasonable certainty and the lower Court so held. In the DECISION the lower court specifically stated: "Plaintiff's claim for rennovation or repair of work started by the Defendant in the Pizza Parlor did not clearly show what damage was suffered."

In the CONCLUSIONS OF LAW, it was stated: "the Plaintiff's claim for rennovation or repair of work started by the Defendant in the pizza parlor did not clearly show the extent of damage suffered." If the Plaintiff "did not clearly show what damage was suffered," then he obviously failed to show with "reasonable certainty" the damage suffered, and should have been precluded from recovery.

However, after finding that the Plaintiff had not shown what damage was suffered, the court awarded Plaintiff the \$1,000.00 downpayment made by the Defendant "for any such damage". Again, the words "any such damage" implying that the damages had not been shown with reasonable certainty.

This award of the downpayment was completely unjustified and contrary to law. After having held that the Plaintiff had failed to clearly show what damage was suffered, an award by the Court would necessarily be arbitrary and based solely upon the whims of the trial judge. It is this type of award that the rule requiring "reasonable certainty" is designed to prevent. It has become well recognized that render-

ing judgment for substantial damages without proof of the damages actually suffered is reversible error. See, Rollins vs. Rayhill, 200 Okl.192, 191 P. 2d 934 (1948). Therefore, the award of the \$1,000.00 downpayment to the Plaintiff should be reversed on this basis alone.

B. EVEN IF THERE IS SOME BASIS FOR AWARDING DAMAGES AFTER HAVING RULED THEY WERE NOT CLEARLY SHOWN, THE AWARD OF THE DOWNPAYMENT MUST STILL BE REVERSED BECAUSE ANY DAMAGES FOUND WOULD BE BASED ON MERE SPECULATION AND CONJECTURE.

In Bunnell vs. Bills, 13 Utah 2d 83, 368 P.2d 597, 602 (1962), this Court held that "damages cannot be found from mere speculative and conjectural evidence." In this case, the evidence concerning damages to the restaurant kitchen was completely speculative.

The only testimony that was given during the trial to establish the amount of damages to the kitchen was given by the Plaintiff, Mr. Foote, and he admitted on cross examination that he was guessing as to damages. His testimony was as follows:

(T. at 27, and 58)

DIRECT EXAMINATION

Q: ... do you have a judgment as to what the approximate cost will be to repair the kitchen?

A: Well, I am just hoping that that figure would come in around \$1,500.00.

CROSS EXAMINATION

Q: When you are saying that you are hoping that the repair figure in the kitchen would be around

\$1,500.00, I take it what you are telling us is that it might be more than that and it might be less, and that is a guess that you have given?

A. Yes.

No testimony was given as to specifically what the hoped for figure of \$1,500.00 was to cover. It is not clear from the record whether the money would be used to finish the remodeling that the Defendant had started, to rebuild the kitchen to the condition it was before the lease, or to construct a kitchen that would incorporate aspects of both (See T. at 26, 27)

If the kitchen was to be finished in accordance with what the Defendant had started, or if it were to be completed incorporating aspects of both, then the remodeling that the Defendant had commenced could not reasonably be considered to be damaging at all. In addition, there was no testimony to indicate that even if the kitchen was going to be rebuilt to the condition it was before the lease, that the expenses the \$1,500.00 would cover would be only those that were necessary, and not those that could be considered extravagant expenses. Yet, the law is well established that:

Damages recoverable by a landlord as the cost of restoration in an action for waste are generally limited to the reasonable expenses of restoring the property to its former condition, and they do not necessarily cover all that the lessor chose to spend or was obliged to spend under the circumstances. Annot., 82 A.L.R.2d 1106, 1113 (1962).

Without evidence beyond a mere guess, and without evidence to indicate how the guessed at amount of money was to be used, the award of the downpayment to the Plaintiff was based purely on speculation. This is evidenced by the fact that the trial court did not determine the amount of damage, did not award the \$1,500.00 prayed for, but simply awarded the downpayment.

There was absolutely no evidence presented at trial that would justify the awarding of the \$1,000.00 downpayment, as opposed to an award of \$900.00, \$800.00, \$700.00, or any other amount lower than the \$1,500.00 prayed for. If there was evidence of damages at all (which there was not), it would be for the \$1,500.00 that was prayed for, and not for the arbitrary amount of the downpayment.

The above mentioned facts and testimony, coupled with the decision of the trial court, indicate that the lower court arrived at the arbitrary amount of the downpayment merely because it was convenient. Since the purpose of damages is to award just compensation, they should not be determined solely on the basis of judicial convenience. This amounts to the worst kind of speculation; i.e., awards not based on the evidence presented, but on the desire of the trial court not to have to deal with the evidence presented. Therefore, the award of the \$1,000.00 downpayment to the Plaintiff should be reversed.

CONCLUSION

The Defendant-Appellant contends that his Points on Appeal are well taken, and the requested relief should be granted on the merits of the case.

Respectfully submitted,

D. John Musselman

D. JOHN MUSSELMAN
Attorney for Appellants

Mailing Certification:

MAILED a copy of the foregoing Brief to Milton T. Harmon, Attorney for Respondent, 36 South Main Street, Nephi, Utah 84648, this 21st day of May, 1980.

Garret M Kennedy
Secretary