

1979

## Perry Messick v. Pho Trucking Service, Inc : Brief of Plaintiff-Appellant

Utah Supreme Court

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~~ORIGINAL~~

IN THE SUPREME COURT  
OF THE STATE OF UTAH  
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PERRY MESSICK, :  
Plaintiff-Appellant, :  
-v- :  
PHD TRUCKING SERVICE, INC., : Supreme Court No. 16605  
Defendant-Respondent. :

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BRIEF OF PLAINTIFF-APPELLANT  
-----

APPEAL FROM THE JUDGMENT OF THE  
FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY  
HONORABLE ALLEN B. SORENSEN, PRESIDING  
-----

JACKSON HOWARD, for:  
HOWARD, LEWIS & PETERSEN  
Attorneys for Plaintiff-Appellant  
120 East 300 North  
Provo, Utah 84601

ROBERT L. MOODY  
CHRISTENSEN, TAYLOR, & MOODY  
Attorney for Defendant-Respondent  
55 East Center Street  
Provo, Utah 84601

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Clerk, Supreme Court, Utah

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JACKSON HOWARD, for:  
HOWARD, LEWIS & PETERSEN  
Attorneys for Plaintiff-Appellant  
120 East 300 North  
Provo, Utah 84601

ROBERT L. MOODY  
CHRISTENSEN, TAYLOR & MOODY  
Attorney for Defendant-Respondent  
55 East Center Street  
Provo, Utah 84601

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IN THE SUPREME COURT OF THE STATE OF UTAH  
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PERRY MESSICK, :  
Plaintiff-Appellant, :  
-v- :  
PHD TRUCKING SERVICE, INC., : Supreme Court No. 16605  
Defendant-Respondent. :  
- - - - -

BRIEF OF PLAINTIFF-APPELLANT  
- - - - -

STATEMENT OF THE NATURE OF THE CASE

This is an action to compel the lessee to account for payments due to lessor under a truck leasing agreement and for judgment for the amount owing the lessor.

DISPOSITION IN THE LOWER COURT

The case was tried on April 19, 1979, before Judge Sorensen in the District Court of Utah County. The Court found that the parties had reached an accord and satisfaction on October 22, 1976, and entered judgment for the defendant.

RELIEF SOUGHT ON APPEAL

Plaintiff-appellant prays that this Court reverse the findings of the trial court and award judgment for the plaintiff in accordance with his proposed findings of fact. In the alternative, it is prayed that this Court will find that the disputed lease agreements are valid and enforceable against the defendant and remand the case for a new trial on the issue of damages.

## STATEMENT OF FACTS

The plaintiff, Perry Messick, was the owner of a 1963 Kenworth truck. He had bought this truck on December 7, 1973, from Verl Davies and Ray Hiatt for \$10,000. He paid \$2,000 down and gave a note for the balance to Davies and Hiatt. Davies and Hiatt are the owners and principal officers of PHD Trucking. (R.89, 183).

On January 1, 1974, the plaintiff entered into a lease agreement with the defendant, PHD Trucking. (R.95, 124) The terms of the lease were that PHD would pay to the plaintiff \$.32 per mile for the use of the truck and \$.10 per mile for the driver of the truck. (R.115, Ex. 3,4).

Over the next two years and three months, plaintiff's truck was driven on hauling assignments for the defendant. It was plaintiff's belief that the terms of the lease were in effect throughout this period. (R.124). The lease expired on July 1, 1974, and the parties signed another identical agreement on November 22, 1974. (R.126). In this four and one-half month interval, the defendant continued to use the plaintiff's truck and the parties understood that the terms of the lease governed their relationship. (R.206-207).

It was arranged between the parties that payments which became due to the plaintiff would be retained by the defendant and credited toward the amount that he owed to Mr. Davies and Mr. Hiatt on the truck. (R.93, 100).



In January of 1975, the plaintiff began inquiries as to how much he still owed on the truck. Mr. Davies told him that it was almost paid for. (R.126). In May of 1975, thinking that his truck had been paid off, the plaintiff ceased hauling for the defendant and leased his truck out to other companies. (R.126). Throughout this period and into the Fall of 1976, the plaintiff made numerous requests that the defendant account to him for the monies it had retained. (R.126, 128). The plaintiff received no accounting for the amount owing him under the lease. In early October, 1976, however, he was informed that he still owed \$9,800.00 on the truck. (R.130). Approximately one week later, the plaintiff offered to sell his truck back to Davies and Hiatt. On October 22, 1976, the plaintiff re-conveyed all of his interest in the truck for \$1,586.03. (R.130 Ex. 7).

The plaintiff refused to accept the figures given to him concerning ton haulage payments and this lawsuit ensued. At trial, the defendant's employees, Mr. Davies and Mr. Hiatt, testified that they never intended to pay plaintiff under the terms of the lease. (R.115-116, 169). They claimed that the parties had agreed that payment would be made on a 'tonnage rate per trip' basis, and that the lease agreement was executed only to convince the Public Service Commission that the plaintiff was operating under defendant's Certificate of Convenience. (R.95-96, 186). This testimony was admitted over plaintiff's objection that it was parol evidence attempting to vary the terms of a writing. (R.205). The

defendant's accounting to the plaintiff used the tonnage per trip rate rather than the rate spelled out in the lease agreement. (Ex. 5 & 6). As a result of this, a much lower sum of money was credited to the plaintiff's account and the defendant's books showed that the truck had run a deficit. (R.101). The plaintiff is now seeking the difference between what he was actually paid and the amount that he should have been paid pursuant to the lease. The calculation of this amount is shown in Exhibit 30.

The Court entered judgment for the defendant on the ground that the parties had reached an accord and satisfaction on October 22, 1976, by the reconveyance of the plaintiff's truck to Mr. Davies and Mr. Hiatt. The plaintiff's motion for a new trial was denied and this appeal ensued.

#### ARGUMENT

##### POINT I

THE WRITTEN LEASE AGREEMENT CANNOT BE MODIFIED BY PAROL EVIDENCE.

The defendant drafted the leases in question (Exhibits 3 and 4) and persuaded the plaintiff to execute them by telling him that he could not lawfully drive for them without such a lease agreement. At trial, over plaintiff's objection (R.205), defendant introduced testimony that it did not intend to be bound by the terms of the lease which required it to pay plaintiff thirty-two cents (\$.32) per mile for the truck and ten cents (\$.10) per mile for the driver. (R.115-116, 169). Such testimony is inadmissible as parol evidence attempting to vary the plain, unambiguous

the parties. The Oregon Supreme Court announced this rule in Kergil v. Central Oregon Fir Supply Company, 323 P.2d 947 (Or., 1958), a case identical to the present action.

In Kergil, a truck owner executed a written agreement leasing his truck to the defendant for the purpose of hauling lumber. The defendant paid the plaintiff some money but it was less than the amount stated in the lease.

At trial the defendant admitted the execution of the lease but said that it was a pretend agreement entered only so that it could be filed with the Public Service Commission to receive a favorable tax treatment. The defendant said that the true agreement was that plaintiff would be paid a fixed amount per thousand board feet hauled.

The Court held that such testimony was inadmissible parol evidence attempting to vary the terms of a writing. It said:

Thus, the principal question is: Will the law permit consideration of oral evidence denying the validity of the written memorial of the parties when such oral evidence shows the written document was executed for the purpose of defrauding or misleading a third party?

The courts are not of a single mind upon this issue. We confess, the majority of jurisdictions at the present time, based upon pure logic, admit the evidence on the basis that such testimony is offered, not to vary the terms of the written instrument within the letter of the parole evidence rule, but only to show the parties never intended the written instrument to be a binding agreement.

The difficulty with this view is that it overlooks the moral aspects of the situation. It permits the law to be used to lend its aid to those who would mislead or defraud third parties without providing any restraining penalty upon their immoral actions. Of the majority view, the eminent Michigan law professor John E. Tracy, 33 Michigan Law Review

'A rule admitting such testimony encourages dishonest men in pursuing fraudulent practices. If such a man knows that he can, to his profit, with little risk to himself, deceive his neighbor by arranging to have exhibited to such neighbor a contract apparently binding but legally unenforceable, can it not be expected that he will do so? Also would it not be equally apparent to the layman that a dishonest man, faced with certain liability on a contract which he has signed, under such a rule could always create for himself a chance of avoiding such liability by inventing testimony to show that he signed the contract only for the purpose of deceiving someone not a party to the cause? For, under the rule as laid down by the authorities, against such testimony, if believed by the jury, the court is powerless to do justice, however preposterous the court may feel it to be.'

And Professor Wigmore, 9 Wigmore on Evidence 16, §2406, states the following:

'When the document is to serve the purpose of a mere sham, this principle in strictness exonerates the makers. But a just policy would seem to concede this only when the pretense is a morally justifiable one (as, to calm a lunatic or to console a dying person). When it is morally beyond sanction, or aims at an evasion of the law or a deception of other persons, by intention of the parties, that intention will not be given effect. Hence if the validity of the instrument would give effect to such intention (as in usury), the instrument will not be enforced; but if the invalidity of the instrument would give effect to such intention, the instrument will be enforced.'

Other courts have adopted this rule which we believe is the one most in conformity with the dictates of justice. See Graham v. Savage, 110 Minn. 510, 126 N.W. 394; Higby v. Hooper, 124 Mont. 331, 221 P.2d 1043;

Supreme Lodge Knights of Phythias v. Dalzell, 205 Mo.App. 207, 223 S.W. 786; Gagnon v. Fleury, 117 Vt. 382, 92 A.2d 470; Town of Grand Isle v. Kinney, 70 Vt. 381, 41 A.130. See dissent in Hoss v. Purinton, 9 Cir., 229 F.2d 104.

Under the facts in this case, the trial court erred in admitting testimony of another and different oral contract from that expressed by the parties in their executed written leases.

Other cases in support of this rule are Bersani v. General Accident Fire & Life Assurance Corporation, 36 N.Y.2d 457, 369 N.Y.S.2d 108, 330 N.E.2d 68 (N.Y.1975); Schnabel v. Vaughn, 140 N.W.2d 168 (Ia. 1966); Meyer v. Weber, 109 S.W.2d 702 (Mo.1937).

The defendant should not be allowed to escape liability on contracts that it drafts by claiming that the true purpose of the contract was to defraud a government agency. Such a result would encourage the defendant to continue its illegal conduct. Indeed, the defendant has indicated that such conduct is already its standard operating procedure. (R.186). Without the parol evidence of the defendant accepted by the court, the proof offered by the plaintiff would have been undisputed and irrefutable.

#### POINT II

THE LEASE AGREEMENT CANNOT BE ALTERED  
BY THE DEFENDANT'S SUBJECTIVE INTENTIONS.

While the intent of the parties to a contract is determinative of its meaning, it is fundamental that only objective manifestations of intent will effect the interpretation.

The unspoken or subjective intents of the parties have no bearing on their agreement. This is stated in 17 Am.Jur.2d,

Contracts §245.

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It is not necessarily the real intent, but the expressed or apparent intent, which is sought. The court will not attempt to ascertain the actual mental processes of the parties in entering into the particular contract; rather the law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest.

In Clyde v. Eddington Canning Company, 10 Utah 2d 14, 347 P.2d 563 (1959), the defendant had signed an instrument in which he personally guaranteed payment for goods his corporation bought from the plaintiff. The defendant later sought to avoid personal liability by claiming that it was not his intention to be bound in his personal capacity. This court sustained a summary judgment for the plaintiff stating that "under the clear language of the writing we are not impressed with such contention, particularly since intentions cannot vary the terms of clear, concise, unambiguous language employed by him who says he did not intend what he said."

The objective manifestations made to plaintiff were that the plaintiff would receive thirty-two cents (\$.32) per mile for the lease of his truck and ten cents (\$.10) per mile for its driver. They were made when the defendant's employees approached plaintiff, told him that he needed a lease agreement to legally work for them and presented to him an agreement which they had prepared and which stated that he would receive the said amounts. At the time the agreement was executed, Mr. Davies and Mr. Hiatt did not tell

plaintiff that they intended the lease to be a sham. Mr. Hiatt stated that he relied on previous discussions with plaintiff to make their intention clear (R.168, line 3, page 170, line 18). It was certainly reasonable for the plaintiff to understand that the lease presented to him was meant to be valid and not an attempt to circumvent the law. It was the defendant's burden to make such an intention absolutely clear and in failing to do so it must be bound by the words it wrote as they would be reasonably understood.

### POINT III

THE CREATOR OF AN ILLEGAL CONTRACT SHOULD NOT BE ALLOWED TO ENFORCE IT OR TO PROFIT FROM ITS TERMS.

The defendant asserts that the true contract between the parties was a tonnage per trip rate of payment. Such a contract is illegal because plaintiff cannot operate under defendant's Certificate of Convenience under any method of payment except leasing. Thus if defendant argues that the leases are a sham he is also arguing that the "true" contract is illegal.

Generally, the court will extend no relief to the parties of an illegal contract, however, when the parties are not in pari delicto the courts will give relief to the innocent or less guilty party by either enforcing the contract or by giving the value of any services rendered. The law is stated in "Contracts," 17 Am.Jur.2d §227, 607:

Where the one party is the principal offender and the other criminal only from a constrained acquiescence in the illegal conduct, in such cases there is no parity of delictum at all between the parties, and the one protected by law or acting under compulsion may at any time, resort to the law to recover.

The case law in Utah and other states is in accord.  
In Gorringe vs. Read, 23 Utah 120, 63 P. 902 (1901) this  
court stated:

It is no doubt true, as a general proposition that a court of equity. . . will not interpose to aid parties who are concerned in unlawful transactions or agreements; but where public policy requires relief to be given, and when the parties, though in delicto, are not in pari delicto, - as when, at the time of the transaction, the complainant was under undue influence, hardship, or oppression, or great inequality of condition or age existed, and acted involuntarily, - the maximum does not apply. The reason is that in such cases the public interests and justice require relief to be given, even though the complaint be by one who is particeps criminis.

The Oregon Supreme Court rendered a similar holding in  
Oregon & Western Colonization Company v. Johnson, 102 P.2d  
928 (Oregon 1940). It said:

Where the parties to an illegal bargain though both blameworthy, are not in pari delicto, and one of them has not been guilty of serious moral turpitude, he can repudiate the bargain and if he has rendered any performance thereunder recover it or its value.

Finally, in Redke v. Silver Trust, 98 Cal.Rptr.293, 490  
P.2d 805 (1971), the California Supreme Court stated that:

A bargain may be illegal by reason of the wrongful purpose of one or both of the parties making it. This is true even though the performances bargained for are not in themselves illegal and even though



in the absence of the illegal purpose the bargain would be valid and enforceable. The party that makes such a bargain in furtherance of his wrongful purpose cannot enforce it, even though it is enforceable against him by the other party if the latter is innocent of such a purpose. (Emphasis in original).

The plaintiff is not in pari delicto in regards to the illegal tonnage contract. He understood that he was operating legally under valid leases, (R.124). He was unaware that PHD was paying him under an illegal contract. (R.125, 131). The defendant should be estopped from asserting such an illegal contract and should be required to pay the plaintiff the amount manifested in the leases, such sum being the reasonable value of plaintiffs services.

Even if the parties were in pari delicto, public policy dictates that the defendant should be required to live up to rates promised in the leases. Otherwise the defendant will profit from his illegal scheme and will have incentive to repeat it. In Local Federal Savings and Loan Association v. Sheets, 130 P.2d 825 (Okla. 1942) the Court said that "when public policy demands the granting of relief, the same will be afforded regardless of the illegality of the transaction with which it is connected."

#### POINT IV

THE DECISION OF THE TRIAL COURT WAS NOT  
SUPPORTED BY THE FACTS OR THE LAW.

A. Standard of Review. This is an action for an accounting in equity. The nature of an equitable accounting stated in Accounts and Accounting, 1 Am.Jur.2d §52, page

Courts of equity have jurisdiction to state and settle accounts, or to compel an accounting, where a fiduciary relationship exists between the parties and duty rests upon the defendant to render an account. This right exists not only in the case where those relationships which are traditionally regarded as those of trust and confidence, but also in those informal relations which exist whenever one person trusts in and relies upon another. The relationship between an employer and employee, between parties to a business agreement, and between an officer of a school board and school district, have all been held to involve such confidence and trust as to entitle one of the parties to an accounting in equity. (Emphasis added).

The plaintiff had entrusted the defendant with much of the money that his truck had earned so that it could be applied to the debt that he owed for the purchase of the truck. This suit is to determine how much the defendant was obligated to credit to the plaintiff's account. As such, it comes under the above description of an equitable accounting.

This court is not bound by the findings of fact of the trial court in equity cases. Rather, it must conduct an independent evaluation of the evidence in the record. This was stated in First Security Bank of Utah v. Demiriz, 10 Utah 2d 405, 354 P.2d 97 (1960).

It is our prerogative and duty under the constitution to review the evidence in equity cases and to modify or make new findings if the record compels it.

B. The Evidence Compels a Reversal of the Trial Court's Decision. The findings of fact made by the trial court had no basis in the record. It found in Finding of Fact #11 (R.46, 32) that the parties had entered a settlement agreement

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which constituted an accord and satisfaction on September 22, 1976, and that such settlement agreement was shown by Exhibit 7. An examination of this exhibit gives no indication that the parties intended it to settle all of their claims against each other. It is merely a document in which the plaintiff conveyed the ownership of his truck back to Mr. Davies and Mr. Hiatt in exchange for \$1,526.03. The plaintiff released nothing other than the ownership in his truck. In support of this, Mr. Davies stated (R.185) that at the time Exhibit 7 was executed, there was no discussion between the parties regarding any other monies owed to the plaintiff by the defendant. As further evidence of the casual treatment of the testimony and exhibits, the Court found that the Exhibit had been executed on September 22, when the evidence demonstrated it had actually been executed on October 22. (R.102, Ex.7).

In Court Finding 7, (R.32) the Court found that neither of the parties kept a record of the mileage driven by the plaintiff for the defendant. This is plainly incorrect. Exhibit 29 shows that the plaintiff did keep mileage records. The defendant did not keep such records but made an estimate of mileage in preparation of trial and offered an exhibit based upon a reconstruction of its haulage records. (R.202-203, 212-213, Ex.16). Further, Court Finding 8, based upon the defendant's reconstructed mileage records found that plaintiff had driven 105,474 miles for the defendant. This contradicts the finding that no mileage records had been

In Finding 4, the Court found that the parties had executed the leases in question. In Finding 5, it found that the leases were merely used to meet the Public Service Commission requirements. The Court erred as a matter of law in failing to enforce the terms of those agreements. There was no lawful evidence upon which the court could base Finding 5. The testimony of the defendant that it did not intend the leases to be valid was inadmissible as parol evidence (See discussion in Point I).

Even if defendant's testimony was lawfully admitted, the court was obligated to find for the plaintiff. When a court is confronted with two possible constructions of a contract, one of them rendering the contract legal and one of them rendering the contract illegal, it is the duty of the court to choose the lawful of the two possible constructions. This was stated by this court in Schofield v. Zions Co-op. Mercantile Institution, 39 P.2d 342 (Utah 1934).

A construction giving an instrument a legal effect to accomplish its purpose will be adopted when it can reasonably be done, and between two possible constructions that will be adopted which establishes a valid contract.

This rule was also followed by the California Supreme Court in Redke v. Silver Trust, supra.

As a general rule, if a contract can be performed legally, a court will presume that the parties intended a lawful mode of performance.

The defendant's construction of the leases is that they were a sham and the plaintiff's construction is that they were valid and enforceable. Under the above rule, the court required to choose the plaintiff's construction.

C. There was not and could not be an accord and satisfaction on October 22, 1976. Supplementing the argument made under B above, there cannot be an accord because there is no evidence that anyone intended the settlement of October 22, 1976 (Ex. 7) to apply to anything other than the truck. An accord is reached only when a clear unambiguous offer of compromise is accepted by the creditor. The general view of the law is stated in 1 AmJur.2d, Accord and Satisfaction §14,312.

To constitute an accord and satisfaction in law dependent upon the offer of the payment of money, the offer of money must be made in full satisfaction of the demand or claim of the creditor and be accompanied by such acts or declarations as amount to a condition that if the money is accepted, it is to be in full satisfaction, and it must be of such a character that the creditor is bound so to understand the offer. The debtor is not required to use any set language in making his offer of full settlement, as long as he makes it clear that acceptance of what he tenders must be in full satisfaction. (Emphasis added).

In Coover v. G&J Electric, Inc., 285 Or. 247, 590 P.2 720 (1979), the Oregon Supreme Court held that no accord is reached unless "such intention shall be made known to the creditor in some unmistakable manner."

There is absolutely no evidence which shows that defendant clearly offered the \$1,586.03 payment in satisfaction of all claims and that plaintiff understood this and accepted such offer. As was stated in Part B above, Mr. Davies, the only witness for the defendant, testified that no other debts were discussed at the time of the transaction. (R.185).

Further, at the time Exhibit 7 was executed, the plaintiff was making no demand for payments under the lease. He entered the transaction with Hiatt and Davies, not PHD Trucking, seeking only to sell an apparently unprofitable truck. Any money he received was consideration for the truck only, not for the compromise of any claims against the defendant.

Finally, the defendant cannot claim accord and satisfaction under Exhibit 7 because it was not a party to that agreement. The exhibit shows that plaintiff conveyed his truck to Verl Davies and Ray Hiatt in their individual capacities. PHD Trucking Services Inc. was not mentioned and there is no indication in the document or other evidence that Davies and Hiatt were acting as representatives of the corporation or that they were treating the corporation as an alter ego.

Thus, there is no evidence whatsoever of an accord and satisfaction and this Court is obligated to reverse the findings of the court below.

#### POINT V

THE PLAINTIFF-APPELLANT IS ENTITLED TO JUDGMENT AGAINST THE DEFENDANT-RESPONDENT IN THE AMOUNT OF \$12,833.75.

The evidence clearly demonstrates that the defendant is indebted to the plaintiff in the amount of \$12,833.75. The plaintiff submitted proposed findings, conclusions and judgment accordingly. (R.33-37)

The frailty of the defendant's suggested arithmetic is reflected in its handling of charges to the plaintiff's

account. On its accounting it charged the plaintiff with \$2,226.66 in diesel repairs that were never made and explained such peculiar accounting by saying that these charges were really payroll charges to one of its drivers. (R.176-178, 138; Ex. 25, 23, 24).

Defendant, when it acted as broker for plaintiff's truck, also failed to give plaintiff full credit for amounts it received on plaintiff's behalf for hauling done for another company, Clark Tank Lines. The amount of this shortage was \$646.94. (R.127, 156; Ex. 25, 29).

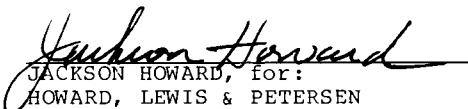
The amount of defendant's indebtedness to plaintiff is calculated in Exhibit 30. (Line 5 of exhibit 30 is arithmetically incorrect and should read \$12,833.75). The mileage figure of 109,409 was calculated in Exhibit 29 which is a compilation of plaintiff's records from the period he drove for defendant. This figure should be taken as correct in view of the fact that defendant admitted that it kept no mileage records of its own. (R.212-213). The expense figure in Exhibit 30 was calculated by the defendant in Exhibit 18.

When the defendant's parol evidence is excluded the evidence of the defendant's indebtedness according to plaintiff's calculation is overwhelming. Since this is an equity case this Court is empowered to examine the facts to determine the amount of the indebtedness. An examination of the testimony and exhibits will show that the sum sought by plaintiff is supported by reliable, clear and convincing evidence.

### CONCLUSION

The parties entered into a valid agreement and the plaintiff is now seeking to enforce that agreement and require the defendant to account to him for monies due. The defendant should be estopped from pleading its fraudulent scheme in order to avoid its obligations, under considerations of public policy, equity, and the parol evidence rule. It is requested that this Court reverse the findings of the trial court and adopt the proposed findings of the plaintiff. In the alternative the plaintiff asks that this Court declare the lease agreements to be enforceable and remand the case for a new trial on the issue of damages.

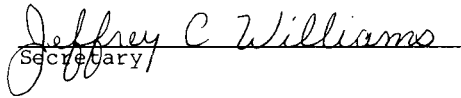
Respectfully submitted this 22<sup>nd</sup> day of October, 1979.

  
JACKSON HOWARD, for:  
HOWARD, LEWIS & PETERSEN  
Attorneys for Plaintiff-Appellants



MAILING CERTIFICATE

MAILED two copies of the foregoing Brief of Plaintiff-Appellant to Mr. Robert L. Moody, CHRISTENSEN, TAYLOR, & MOODY, Attorneys for Defendant-Respondent, 55 East Center Street, Provo, Utah 84601, postage pre-paid this 22nd day of October, 1979.

  
Secretary