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Robert Flynn III; Pro Se.

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IN THE UTAH COURT OF APPEALS

TIRE KING, INC., a Utah corporation, Plaintiff-Appellee, v. ROBERT FLYNN III, Defendant-Appellant.	CASE NO. 20010172-CA Category 15

BRIEF OF APPELLEE

APPEAL FROM DENIAL OF MOTION FOR STAY AND MOTION FOR NEW TRIAL PURSUANT TO RULE 59(a)(1) AND (5), UTAH RULES OF CIVIL PROCEDURE, IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR CARBON COUNTY, THE HONORABLE BRYCE K. BRYNER, PRESIDING.

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FILED
JUN 25 2001
COURT OF APPEALS

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STATEMENT OF JURISDICTION

This being an appeal from an order denying a motion for a new trial and denial of a motion for continuance of the trial in the Seventh Judicial District Court, the Supreme Court is granted original appellate jurisdiction over this case by Section 78-2-2(j) U.C.A. (1953, as amended) subject to referral to the Court of Appeals.

STATEMENT OF THE ISSUES

FIRST ISSUE: Whether the Court's denial of Appellant's motion, made at the beginning of the trial, for a continuance of the trial to allow Appellant to subpoena a witness was a denial of Appellant's right of due process of law.

Standard of Appellate Review: The Trial Court's ruling is based upon the Court's discretion to grant or deny motions pursuant to Rule 4-105(3) of the Utah Rules of Judicial Administration. Any decision is at the discretion of the Trial Court, and the Appeals Court should not disturb the Trial Court's ruling without a showing of an abuse of discretion.

SECOND ISSUE: Whether Appellant's Motion for a new trial complied with the requirements of Rule 59(a), Utah Rules of Civil Procedure.

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Standard of Review: The Trial Court has no discretion to grant a new trial absent a showing of one of the grounds specified in Rule 59(a). Schindler v. Schindler, 776 P.2d 84 (Utah Ct App 1989). If a showing of one of the grounds specified in the Rule is made, the court still has broad discretion to grant or deny a motion for a new trial and the Appeals Court will not disturb the Trial Court's decision absent a showing of an abuse of discretion. Crookston v. Fire Ins. Exch., 817 P.2d 789 (Utah 1991).

THIRD ISSUE: Whether the damages awarded to the Plaintiff are beyond the ability of the Defendant to pay. Appellant stated that as one of his grounds for a motion for a new trial. The law suit did not seek damages, and the court did not award "damages", but awarded Appellee compensation for goods and services provided to Defendant. The court found that this issue was a restatement of Defendant's claim that he was denied his right to due process because the court refused to continue the trial.

Standard of Appellate Review: Pursuant to Rule 59(a)5, Appellant must show the Court awarded "damages", the damages were exclusive, and appear to have been given under the influence of passion or prejudice. The Trial Court's refusal to grant a new trial on this basis came from the Court's review of the facts and the Court's

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decision should not be set aside without a showing of an abuse of the Court's discretion. Schindler v. Schindler, 776 P.2d 84 (Utah Ct App 1989).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

Constitution of Utah, Article 1, Section 7. Due Process of Law.

No person shall be deprived of life, liberty or property, without due process of law.

Utah Rule of Civil Procedure 59(a) 1 through 7. also (b) and (c)

(a) *Grounds.* Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment;

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special

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verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) *Time for motion.* A motion for a new trial shall be served not later than 10 day after the entry of the judgment.

(c) *Affidavits; time for filing.* When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. ...

Utah Rule of Civil Procedure 45(a)(1)(C)

Subpoena.

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(a) *Form; issuance.*

(1) Every subpoena shall:

(C) command each person to whom it is directed to appear to give testimony at trial, or at hearing, or at deposition, or to produce or to permit inspection any copying of documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

Utah Rule of Civil Procedure 45(b)(1)(A)

(b) *Service; scope.*

(1) Generally.

(A) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made as provided in Rule 4(e) for the service of process and, if the person's appearance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States, or this state, or any officer or agency of either, fees and mileage need not be tendered. Prior notice of any commanded production or inspection of documents or tangible things or

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inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

Utah Code Annotated (1953) Section 78-24-5

Subpoena defined. The process by which the attendance of a witness is required is a subpoena. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents or other things under his control which he is bound by law to produce in evidence.

U.C.A. Section 78-24-6

Duty of witness served with subpoena. A witness served with a subpoena must attend at the time appointed with any papers under his control required by the subpoena, and answer all pertinent and legal questions; and, unless soon discharged, must remain until the testimony is closed.

Utah Rules of Judicial Administration, Rule 4-105(3)

Continuances in special circumstances.

(3) A motion to continue made on or within 10 days prior to the date of a hearing may be granted by the court upon a showing of good cause and upon such conditions as the court

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determines to be just, including but not limited to the payment of costs and attorney fees.

STATEMENT OF THE CASE

A. ***NATURE OF THE CASE.*** This is a civil action originally brought in the Seventh Judicial District Court for Carbon County, State of Utah. Plaintiff/Appellee, a Utah Corporation, filed an action for payment for goods and services provided to Defendant/Appellant, for the repair and re-building of Appellant's automobile. The court ruled in favor of Appellee, issued a Memorandum Decision and directed Appellee's attorney to prepare Findings of Fact and Conclusions of Law and an Order of Judgment.

B. COURSE OF PROCEEDINGS; In 1999, Appellant arranged with Appellee to repair and rebuild automobiles owned by Appellant. Appellant delivered his automobile to Appellee's place of business and discussed the work he required to be done by Appellee's employees. Appellant reached an agreement with Appellee's president, but thereafter, Appellant also gave additional instruction to Appellee's office manager and Appellee's mechanics for the performance of additional work. (para. 5, Verified Complaint and para. 1, Answer to Complaint).

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A few months later, when Appellee had completed most of the restoration, without Appellee's consent and during a day when Appellee was not open for business, Appellant went to Appellee's place of business and removed his automobile from the premises without Appellee's consent and without paying for the goods and services. (para. 7, Verified Complaint, uncontroverted by Answer to Complaint). Appellee requested payment and Appellant refused. Appellee filed suit in the Seventh Judicial District Court for Carbon County, State of Utah and served Appellant with a Complaint and Summons. Appellant answered the Complaint and Summons and filed various pleadings in an effort to get the matter dismissed. On February 17, 2000, Appellant obtained a subpoena form, filled it out and delivered it to the sheriff of Carbon County to be served upon the president of Appellee, Paul Pugliese. On February 18, 2000, the Carbon County Sheriff served Paul Pugliese with the subpoena. The subpoena did not state a specific place, day and time for appearance and in fact, was issued four months prior to June 26, 2000, the day the District Court judge issued a Notice of Trial Setting, for the trial to be held on September 7, 2000. (Ruling on Defendant's Motion for Stay of Order and Motion for New Trial, Feb. 6, 2000, page 2, 1st

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paragraph). Appellant also failed to include the witness fee required by the Rules of Civil Procedure.

Paul Pugliese did not appear for trial, and Appellant made a motion on the morning of trial for a continuance to subpoena Mr. Pugliese. The Court exercising its discretion, denied Appellant's motion and proceeded to trial. (Ruling on Motion, dated Feb. 6, 2000, para. 7). After the parties rested, the Court issued a Memorandum Decision on October 11, 2000 and also ordered a supplementary hearing for October 25, 2000. Appellant failed to appear at the October 25, 2000 hearing. (Amended Memorandum Decision, Oct. 25, 2000, page 1, 1st paragraph). The Court then entered an amended Memorandum Decision and ordered Appellee to draft Findings of Fact and Conclusions of Law and a Judgment and Order.

Appellant filed a Motion for Stay of the Order And For New Trial, Appellee filed an Objection to the motion for a new trial and Appellant filed a response to Appellee's objection. On February 6, 2001, Judge Bryce K. Bryner issued a ruling on Defendant's Motion for Stay of Order and Motion for New Trial. Judge Bryner found Appellant's claim was without merit because Defendant's motion for

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continuance was untimely. Appellant now appeals from Judge Bryner's ruling on his motion for a new trial.

RELEVANT FACTS

It is difficult, in some ways, to state all of the relevant facts to the court because neither party obtained a written transcript of the proceedings before the court. In stating the relevant facts, Appellee will refer the Court of Appeals to written pleadings, documents, written decisions of the court and facts referred to in Appellant's brief even though the facts covered in Appellant's brief do not refer to any record. The court accepted Appellant's brief, anyway, and Appellee is now obligated to respond to it.

Appellee is a Utah Corporation in good standing, with its principal place of business at Price, Carbon County, Utah (para 2, Verified Complaint dated February 7, 2000). Appellant is a resident of Carbon County, Utah (para 3, verified complaint). On May 26, 1999, Appellant signed a work order (Exhibit No. 1) that described repairs that were to be made by Appellee to Defendant's 1964 Chrysler (para 1 of Findings, Memorandum Decision dated October 11, 2000). On September 20, 2000, Appellee prepared an invoice detailing work performed on Appellant's Chrysler and other automobiles at Defendant's request. The total cost was $4,854.05

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and Defendant received a credit for $2,500.00 previously paid, leaving a balance of $2,354.05. Appellant subsequently removed his automobile from Appellee's premises without paying the bill even though he had authorized all of the work performed by Appellee (Findings, page 1, Memorandum Decision dated October 11, 2000). Appellee filed a complaint on February 7, 2000, seeking compensation for services and auto parts for automobiles owned by Defendant (Verified Complaint). On February 17, 2000 Appellant obtained a subpoena form, partially completed it, and had the Carbon County Sheriff serve it on Paul Pugliese, (Addendum, #1). The subpoena did not specify a place, date or time for the appearance of Paul Pugliese. It wasn't until four months later on June 26, 2000, that the District Court Judge selected the date of September 7, 2000 as the date for trial (Ruling on Defendant's Motion for Stay of Order and Motion for a New Trial, dated February 6, 2001, page 2, para. 1).

On September 7, 2000, when Appellee's attorney, together with his witnesses appeared for trial together with Appellant, the Court asked the parties if they were ready to begin the trial. Appellant informed the Court that he had subpoenaed Paul Pugliese and that Paul Pugliese was not present. He presented a copy of the

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Subpoena and Return to the court, the court heard argument from both Appellant and counsel for Appellee and denied Appellant's request for a continuance of the trial so that he could properly subpoena Paul Pugliese, the owner of the Plaintiff corporation (para 1, Appellee's Objection to Motion for Stay of Order and Motion for a New Trial, dated November 22, 2000, uncontroverted by Defendant). The court proceeded with the trial, and heard the sworn testimony of Appellee's witnesses, the sworn testimony of Appellant, received exhibits into evidence, heard arguments of counsel for Appellee and from Appellant, took the matter under advisement and issued a Memorandum Decision (Memorandum Decision, October 11, 2000, uncontroverted by Defendant). The court ordered a second hearing, scheduled for October 25, 2000. Counsel for Appellee and Appellee's office manager appeared on that date but Appellant did not appear (Amended Memorandum Decision, October 25, 2000). Appellant then filed his Motion for Stay and Motion for New Trial.

SUMMARY OF THE ARGUMENT

FIRST ISSUE: Appellant failed to issue a valid subpoena, completely failing to state the place, date and time for the appearance of Paul Pugliese, (see Subpoena, Addendum #1) and failing to pay the witness fee required by Rule 45(b)(1)(A), Utah Rules of Civil

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Procedure. The court, pursuant to the discretion given it by Rule 4-105(3) of the Utah Rules of Judicial Administration, denied Appellant's request for a continuance on the morning of trial so that he could subpoena Paul Pugliese. The court made its decision based on the facts that Appellant had from June 26 to September 7, 2000 to issue a subpoena that included the place, date and time. (Ruling on Motion for New Trial, dated Feb. 6, 2000, page 2, para. 1). Appellant could have also obtained a subpoena and served Paul Pugliese during the lunch break on the day of trial and could have subpoenaed Paul Pugliese to appear at the October 25, 2000 supplemental hearing. Because Appellee initiated this cause of action by filing a Verified Complaint, serving Appellant with a Complaint and Summons, the Appellant filing an Answer to the Complaint, the Appellant was afforded due process of law and the opportunity to defend himself. The court's denial of his request, on the morning of trial, for a continuance was not a denial of Appellant's right of due process of law.

SECOND ISSUE: Appellant's motion for a new trial, pursuant to Rule 59(a)(1), Utah Rules of Civil Procedure, did not comply with the requirements of that Rule. The only "irregularity" referred to by Appellant was Paul Pugliese's failure to appear on the Appellant's

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defective subpoena which did not specify the place, date and time of Mr. Pugliese's appearance and was not accompanied by a witness fee as required by Rule 54(b)(1)(A), Utah Rules of Civil Procedure.

Appellant's failure to follow the rules in serving a subpoena is not an "irregularity" within the meaning of Rule 59(a)(1), and none of the other grounds required for the granting of a new trial can be shown, either. The Trial Court has no discretion to grant a new trial absent a showing of one of the grounds specified in Rule 59(a). Appellant has failed to show grounds justifying the Court's granting of his motion.

THIRD ISSUE: This issue is included only because Appellant lists it as one of his reasons for his motion for a new trial and for his appeal. The court correctly determined that Appellant's principle argument was simply a restatement of his claim that the court's refusal to grant him a continuance on the morning of trial was a denial of his right to due process of law. Appellant was not denied due process of law. In fact Appellee's efforts to recover the money owed to it began by bringing the entire matter before a court in which Appellant could respond to Appellee's claims and exercise his rights to due process of law. The right to due process of law cannot be forced upon a person, and citizens can only be given the

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opportunity to have due process of law. Appellant was given the opportunity, chose to exercise his right without the assistance of competent legal counsel, but still had his day in court. While Mr. Pugliese did not appear and testify, Appellant appeared, was sworn and testified, and testified to the purported agreement between himself and Mr. Pugliese, Appellee's agent. If anything, Appellant was afforded the opportunity to present his uncontroverted side of the story without Mr. Pugliese present to rebut his statements.

DETAIL OF THE ARGUMENT

Appellant's brief includes many arguments, facts and issues, attempting to get this court to re-try the case. However, there are only two basic issues in this appeal which the court should address, (1) was the Trial Court's refusal to enforce Appellant's faulty subpoena or grant Appellant a continuance to subpoena Paul Pugliese a denial of due process, and (2) did the court abuse its discretion in denying Appellant a new trial pursuant to Rule 59(a)(1), Utah Rules of Civil Procedure.

The Request For a Continuance Issue: Section 78-24-5, Utah Code Annotated, 1953, defines what constitutes a subpoena. For a document to constitute a subpoena, it must (1) be a writ or order directed to a person, (2) requiring his attendance, (3) at a

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particular time and place to testify as a witness. Appellant obtained a subpoena form from the Seventh Judicial District Court, partially completed the form and had it served upon Paul Pugliese. However, the form failed to state the place Mr. Pugliese was to appear, and failed to state the date and the time of his appearance, and under the definition of a subpoena contained in the Utah Code, the document served on Mr. Pugliese was not a subpoena. Appellant, having chosen to represent himself, should not expect the District Court Judge to act as his legal counsel and a fortiori, should not expect counsel for Appellee to act as his legal counsel.

Appellant's purported subpoena failed to comply with the definition of a subpoena found in Section 78-24-5, Utah Rules of Civil Procedure and failed to comply with the requirements of Rule 45(a)(1)(C) because it failed to state the place of appearance, the date and the time. Additionally, Appellant failed to comply with Rule 45(b)(1)(A), because Appellant failed to provide a witness fee to Mr. Pugliese. Mr. Pugliese was not a party to this action, Tire King, Inc., a Utah corporation was the party.

After this counsel filed the Verified Complaint in behalf of Appellee, Appellant filed an Answer, that was in some ways, non-responsive to the Complaint. Shortly thereafter, Appellant filed a

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Memorandum in Support of Motion to Dismiss, without filing the Motion itself. Counsel for Appellee concluded that Appellant, representing himself, was unfamiliar with the rules of the court.

During that same time, Appellant served his faulty subpoena upon Paul Pugliese and in reviewing it, counsel for Appellee assumed that Appellant was using the document as a Request for Production of Documents. Shortly thereafter, Appellant delivered a request for discovery and counsel assumed Appellant served the subpoena form for discovery purposes, because it didn't otherwise make any sense.

When the parties appeared for court and Appellant raised the issue of his subpoena, in a conciliatory frame of mind, this counsel "apologized" to the court and explained that this counsel did not realize that Appellant intended for Mr. Pugliese to appear at trial, since the subpoena was issued many months before a trial date was even selected. Paul Pugliese did not appear for trial as a witness for the Plaintiff/Appellee because his presence at Appellee's place of business is essential to the proper operation of the business. Appellee's office manager was fully familiar with Appellee's dealings with Appellant, and was the keeper of the records pertaining to their transactions. Greg Franklin was the mechanic that provided

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much of the labor on Appellant's automobile and was with Appellant when decisions concerning the engine and transmission were made (para 5, Amended Memorandum Decision, October 25, 2000). They appeared at court and testified in behalf of Plaintiff.

Appellant was not harmed by Paul Pugliese's non-appearance. As recorded in the Court's Memorandum Decision dated October 11, 2000, on the day of trial on September 7, 2000, Appellant was present and testified, the court received exhibits into evidence, heard arguments and took the matter under advisement. During the trial, to assist Appellant, the court greatly relaxed the rules for presenting evidence, and allowed the Defendant great latitude in presenting his evidence and arguments, including both when he presented his case and when he cross examined Plaintiff's witnesses. It is neither fair nor truthful for Defendant to now accuse the court of undermining Defendant's case (see para 5 of Appellee's Objection to Motion for Stay of Order and Motion for Trial dated November 22, 2000). In Appellee's Objection to Motion for Stay of Order and Motion for New Trial, Appellee correctly states the facts of what occurred relating to Appellant's purported subpoena, the court's conduct of the trial, and the discretion the court exercised in allowing Appellant's great latitude in presenting this case. The statements in

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Appellee's Objection to Appellant's Motion for Stay and Motion for New Trial were not rebutted or controverted by Appellant. The court, in its ruling on Defendant's Motion for Stay of Order and Motion for New Trial, incorporated the assertions of the facts in Appellee's Objection to Appellant's Motion for a New Trial, obviously finding them to be accurate. Dispositive of the issue of whether Appellant was afforded the opportunity to present his case is the fact that Appellant testified at great length about the agreement between himself and Appellant concerning the repair and restoration of his automobile and thoroughly cross-examined Appellee's witnesses. Without realizing it, it was to Appellant's advantage to be able to testify concerning the terms of the agreement in Paul Pugliese's absence because his testimony was not rebutted by Paul Pugliese.

Appellant was not denied due process of law, but was fully afforded his right to due process of law because, in Appellee's efforts to recover moneys owed, Appellee filed an action before the court, served Appellant notice of the legal action, participated in a trial with Appellant to which Appellant was given notice, and Appellant had an opportunity to be heard and to give evidence and present his defense. That is all that is required. Christiansen v. Harris, 163 P.2d 314 (1945). For Appellant to be afforded due

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process, neither the court nor opposing counsel is obligated to prepare Appellant for trial or to try his case for him. He only needs to be given the opportunity to appear and present his case.

The Denial of a New Trial Issue: Appellant brought his Motion for Stay of Order and Motion for New Trial pursuant to Rule 59(a)(1), Utah Rules of Civil Procedure. The substance of his grounds for the granting of a new trial was that Paul Pugliese's failure to appear pursuant to Appellant's purported subpoena and the court's refusal to grant Appellant a continuance on the morning of trial constituted an "irregularity". The "irregularity" in this matter occurred on February 17, 2000, when Appellant obtained a subpoena form from the District Court, partially completed it, completely failed to include the place, date and time for which Paul Pugliese was to appear and failed to attach the witness fee. Then, on the morning of trial, Appellant asked the court to delay the whole proceeding because he, alone, had failed to properly prepare his case.

There was no irregularity in the proceedings of the court within the meaning of Rule 59(a)(1) Utah Rules of Civil Procedure, and none of the other grounds stated in Rule 59 apply. The Trial Court has no discretion to grant a new trial absent a showing of at least one of the circumstances specified in Subsection (a). Schindler

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v. Schindler, 776 P.2d 84 (Utah Ct. App. 1989). Even if an irregularity does exist, the Trial Court has broad discretion to grant or deny a motion for a new trial. Crookston v. Fire Ins. Exch., 817 P.2d 789 (Utah 1991). A Trial Court's ruling on a motion for a new trial should not be disturbed on appeal except where there is a clear abuse of the court's discretion. Jensen v. Thomas, 570 P.2d 695 (Utah 1977). The District Court Judge, in his ruling on Defendant's motion from which Appellant brings this appeal fully explains the facts upon which he based his decision and adequately demonstrates that he did not abuse his discretion in denying Appellant's motion for a new trial.

In Appellant's Motion for Stay of Order and Motion for New Trial, Appellant, as additional grounds for his motion, also cited Rule 59(a)(5). In Appellee's Objection to Motion for Stay of Order and Motion for New Trial, Appellee responds to that argument in Appellant's Motion in paragraph 7 of Appellee's objection. Subparagraph 5 requires a showing of "excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice". The court did not award any damages in this case, but awarded the amount due to Plaintiff pursuant to an agreement between the parties and did not award more than Plaintiff

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asked for in the Complaint. Nothing was awarded to the Plaintiff/Appellant "under the influence of passion or prejudice". The court acted in a very reserved and calm manner, listened to all of the evidence including Defendant's evidence, allowed the Defendant great latitude in presenting his case and cross-examining Plaintiff's witnesses and took the matter under advisement before issuing his decision. Then, the court ordered a second hearing for October 25, 2000 to obtain additional information before rendering a final judgment. In that hearing, the only "irregularity" was Defendant's failure to appear at the hearing. (See para 7, Appellee's Objection to Motion for Stay of Order and Motion for New Trial). In Appellant's response to the Objection for Motion for Stay and Motion for Trial, under Objection (D), Appellant acknowledges that "the Plaintiff interpretation may be right".

CONCLUSION

Appellant failed to issue a subpoena as defined by Section 78-24-5, Utah Code Annotated, 1953, and his purported subpoena, issued four months before the trial date was even selected, failed to specify the place, date, and time of appearance of the witness, and failed to include a witness fee, both required by Rule 45 of Utah Rules of Civil Procedure. He was not entitled to a continuance of the

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trial, and the District Court Judge did not abuse his discretion when he denied Appellant's request for a continuance of the trial date on the morning of the trial. The Appellant was not denied his right to due process of law, because Appellee's efforts to collect the debt owed to it began with bringing the matter before a court of competent jurisdiction, serving Appellant with notice of the legal action, giving Appellant an opportunity to be heard, and to present his evidence. Although Paul Pugliese did not appear at trial, Appellant freely testified concerning the terms of the agreement between the parties, without his testimony being controverted by Paul Pugliese. The court heard the evidence of all the witnesses, and issued a Memorandum Decision, ruling in favor of the Plaintiffs for the amount prayed.

Appellant's Motion for Stay of Order and Motion for New Trial failed to comply with the requirements of Rule 59(a)(1) because the motion did not state an "irregularity" within the meaning of the rule or demonstrate an abuse of discretion. Under Rule 59(a)(5), Appellant's Motion for a New Trial was not supported with evidence because the court did not award damages and there was no showing that the award of the amount prayed for was excessive or due to passion or prejudice. The court does not have discretion to

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grant a new trial absent a showing by the Appellant that one of the grounds for the granting of a new trial exists. Appellant failed to do that. The court did not abuse its discretion in denying Appellant a new trial and the court's decision should not be disturbed by the Court of Appeals.

RESPECTFULLY SUBMITTED THIS 25 DAY OF JUNE, 2001.

Keith H. Chiara
Attorney for Tire King, Inc.
Plaintiff/Appellee

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ADDENDUM

1. Subpoena
2. Memorandum Decision, October 11, 2000
3. Amended Memorandum Decision, October 25, 2000
4. Motion for Stay of Order and Motion for New Trial
5. Objection to Motion for Stay and Motion for New Trial
6. Response to Objection
7. Ruling on Motion for Stay and Motion For New Trial
8. Memorandum in Support of Motion to Dismiss

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Name Bar Number
Robert Flynn
Address
1265 No carbonville rd
City, State ZIP
Price Ut. 84501
Telephone
Attorney for the defendant (Pro Per)

IN THE SEVENTH DISTRICT COURT, STATE OF UTAH
CARBON COUNTY

Tire king corp.,
Plaintiff,

v.

Robert Flynn,
Defendant.

SUBPOENA

Case No. 000700120

TO: PAUL PUGLIESE OWNER TIRE KING

YOU ARE COMMANDED:

[X] to appear in the seventh district Court at the place, date and time specified below to testify in the above case.

[ ] to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

[X] to produce or permit inspection and copying of the following documents or objects at the place, date and time specified below (list documents or objects):

1. Plaintiffs bill to defendant dated 9-20-99

2. Dates of payments of transmission to TRI, & [777 E Main, Price UT]

3. The original verified agreement of defendant with Tire King Inc (Complaint, item 5)

[ ] to permit inspection of the following premises at the date and time specified below.

PLACE DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other person who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Rule 30(b)(6), Utah Rules of Civil Procedure.

Dennis Olson DATE: 2-17-00
CLERK OR ATTORNEY FOR PLAINTIFF/ DEFENDANT

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including communicative aids and services) during this proceeding should call 1-800-992-0172, at least THREE working days prior to the scheduled proceeding.

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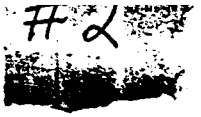

OCT 11 2000
SEVENTH DISTRICT COURTS

IN THE SEVENTH DISTRICT COURT IN AND FOR CARBON COUNTY, STATE OF UTAH

TIRE KING INC.,	)	**MEMORANDUM DECISION**
Plaintiff,	)	
VS.	)	
ROBERT FLYNN,.	)	Case No. 000700120
Defendant.	)	Judge Bryce K. Bryner

This matter came on regularly for trial on September 7, 2000. The court heard the sworn testimony of the parties and their witnesses, received exhibits into evidence, heard the arguments of counsel, took the matter under advisement, and now issues this memorandum decision.

Plaintiff seeks judgment against the defendant for $2,354.05 for parts, labor, and services provided to defendant's 1964 Chrysler and two other vehicles, together with accrued interest, attorney fees, and costs. The defendant contends that the defendant breached the agreement to repair the Chrysler by performing work that was not authorized.

From the evidence presented the court finds:

1. On May 26, 1999, the defendant signed a work order (Ex. #1) that described repairs that were to be made by plaintiff to defendant's 1964 Chrysler.

2. On September 20, 2000, plaintiff prepared an invoice detailing the work that was performed on the defendant's Chrysler as well as some work performed at defendant's request on a Blazer and a Buick. The total cost was $4854.05. The Defendant received a credit for $2,500 previously paid as a deposit, leaving a balance due of $2,354.05.

3. After plaintiff examined the Chrysler engine, it was determined that it should be taken to Clegg Automotive in Orem for engine work that is normally farmed out by plaintiff. The

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defendant personally transported the engine to Orem and thereby consented to the engine being removed from the car and the work by Clegg being performed. The plaintiff paid the bill to Clegg Automotive in the amount of $736.33, and charged the defendant for that expense and listed it on Ex. #2.

4. The defendant never complained to the plaintiff that the work being performed was not authorized.

5. After the engine was returned from Clegg Automotive for a second time and was reinstalled, the car was started but the transmission linkage would not operate properly and the transmission remained in reverse. Mr. Greg Franklin, a mechanic with plaintiff, testified that the defendant told him to remove the transmission. However, the defendant testified that he was not present when the transmission was removed and that he did not authorize the transmission to be removed from the car, and he contends he should not be charged $240 for its removal and installation. In any event, the transmission was then taken to TRI for repairs by the defendant and Mr. Franklin accompanied him.

The court finds that the defendant authorized the transmission to be removed. Moreover, on August 10, 1999, at the bottom of Ex #3, the defendant ratified the removal by the instruction he wrote directing the plaintiff to "include transmission work on my bill until all work is done. OK?" Ex.#3 was written by the defendant after the transmission had been removed from the car.

6. The court finds that on September 11, 1999, the defendant justifiably removed the Chrysler from the plaintiff's premises because it had not been worked on for about three weeks. The court finds however, that the removal of the car prevented the plaintiff from completing some minor repairs on the car, to wit: fine tuning the transmission and the engine, state inspection, and completing work on the brakes. The court finds that the total amount on Ex. 2 included the cost of performing that final work. Because it was not performed, the bill is to be

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reduced by the value of the work not completed. The court was not presented with any evidence from which it could determine the reasonable value of the work that has not yet been performed. For that reason, the court will conduct a hearing on October 25, 2000, at 1:30 p.m. for the purpose of taking testimony on the value of the work not completed.

The court declines to make an award of attorney fees in this case for the reason that the court finds the defense presented by the defendant was brought in good faith. The defendant presented eleven reasons why the plaintiff should not be awarded the relief requested in the complaint. The fact that the court has rejected those reasons does not mean the defense was not asserted in good faith.

Based on the foregoing, the court finds that the plaintiff should be awarded judgment in the amount of $2354.05, less the value of the work not completed.

Once the hearing is completed on October 25th, counsel for the plaintiff is directed to prepare appropriate Findings of Fact, Conclusions of Law, and a Judgment consistent with this memorandum decision.

DATED this 11th day of October, 2000.

Bryce K. Bryner, Judge

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CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 000700120 by the method and on the date specified.

METHOD	NAME
Mail	ROBERT FLYNN DEFENDANT 1265 North Carbonville Rd Price, UT 84501
Mail	KEITH CHIARA ATTORNEY P.O. BOX 955 PRICE UT 84501

Dated this 11th day of Oct, 2000.

Deputy Court Clerk

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#3

FILED
OCT 25
SEVENTH DISTRICT COURTS

IN THE SEVENTH DISTRICT COURT IN AND FOR
CARBON COUNTY, STATE OF UTAH

TIRE KING INC.,	)	**AMENDED MEMORANDUM DECISION**
Plaintiff,	)	
VS.	)	
ROBERT FLYNN,.	)	Case No. 000700120
Defendant.	)	Judge Bryce K. Bryner

This matter came on regularly for trial on September 7, 2000. The court heard the sworn testimony of the parties and their witnesses, received exhibits into evidence, heard the arguments of counsel, took the matter under advisement, and issued its *Memorandum Decision* on Oct. 11, 2000. In that decision, the court scheduled another hearing for October 25, 2000, at 1:30 p.m. for the purpose of considering a credit to be given the defendant which the court found to have not been completed, but for which the defendant was billed. The court conducted the hearing on the said date at which time the plaintiff and its attorney were present but the defendant did not appear.

Plaintiff seeks judgment against the defendant for $2,354.05 for parts, labor, and services provided to defendant's 1964 Chrysler and two other vehicles, together with accrued interest, attorney fees, and costs. The defendant contends that the defendant breached the agreement to repair the Chrysler by performing work that was not authorized.

From the evidence presented at the trial and the hearing on October 25, 2000, the court finds as follows:

1. On May 26, 1999, the defendant signed a work order (Ex. #1) that described repairs that were to be made by plaintiff to defendant's 1964 Chrysler.

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2. On September 20, 2000, plaintiff prepared an invoice detailing the work that was performed on the defendant's Chrysler as well as some work performed at defendant's request on a Blazer and a Buick. The total cost was $4854.05. The Defendant received a credit for $2,500 previously paid as a deposit, leaving a balance due of $2,354.05.

3. After plaintiff examined the Chrysler engine, it was determined that it should be taken to Clegg Automotive in Orem for engine work that is normally farmed out by plaintiff. The defendant personally transported the engine to Orem and thereby consented to the engine being removed from the car and the work by Clegg being performed. The plaintiff paid the bill to Clegg Automotive in the amount of $736.33, and charged the defendant for that expense and listed it on Ex. #2.

4. The defendant never complained to the plaintiff that the work being performed was not authorized.

5. After the engine was returned from Clegg Automotive for a second time and was reinstalled, the car was started but the transmission linkage would not operate properly and the transmission remained in reverse. Mr. Greg Franklin, a mechanic with plaintiff, testified that the defendant told him to remove the transmission. However, the defendant testified that he was not present when the transmission was removed and that he did not authorize the transmission to be removed from the car, and he contends he should not be charged $240 for its removal and installation. In any event, the transmission was then taken to TRI for repairs by the defendant and Mr. Franklin accompanied him.

The court finds that the defendant authorized the transmission to be removed. Moreover, on August 10, 1999, at the bottom of Ex #3, the defendant ratified the removal by the instruction he wrote directing the plaintiff to "include transmission work on my bill until all work is done. OK?" Ex.#3 was written by the defendant after the transmission had been removed from the car.

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6. The court finds that on September 11, 1999, the defendant justifiably removed the Chrysler from the plaintiff's premises because it had not been worked on for about three weeks. The court finds however, that the removal of the car prevented the plaintiff from completing some minor repairs on the car, to wit: fine tuning the transmission and the engine, state inspection, and completing work on the brakes. However, the court finds that the total amount on Ex. 2 did not include the cost of performing that final work.

The court declines to make an award of attorney fees in this case for the reason that the court finds the defense presented by the defendant was brought in good faith. The defendant presented eleven reasons why the plaintiff should not be awarded the relief requested in the complaint. The fact that the court has rejected those reasons does not mean the defense was not asserted in good faith.

Based on the foregoing, the court finds that the plaintiff should be awarded judgment in the amount of $2354.05, together with costs and pre-judgment and post-judgment interest as provided for by law.

Counsel for the plaintiff is directed to prepare appropriate Findings of Fact, Conclusions of Law, and a Judgment consistent with this *Amended Memorandum Decision.*

DATED this 25th day of October, 2000.

Bryce K. Bryner, Judge

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CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 000700120 by the method and on the date specified.

METHOD	NAME
Mail	ROBERT FLYNN DEFENDANT 1265 North Carbonville Rd Price, UT 84501
Mail	KEITH CHIARA ATTORNEY P.O. BOX 955 PRICE UT 84501

Dated this 25 day of October, 2000.

Lorene Brundage
Deputy Court Clerk

0 62

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#4

Robert Flynn
1265N.Carbonville Rd #92/#24
Price Utah 84501
Defendant(Pro Per)

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR CARBON COUNTY,
STATE OF UTAH

Tire King, Inc., Plaintiff, vs. Robert Flynn, Defendant.	MOTION FOR STAY OF ORDER AND MOTION FOR NEW TRIAL Civil 000700120 Judge: Bryce K. Bryner

The above case has come before the Courts and a Final Judgement is immanant;

Comes now the Defendant acting in his own behalf and asks the Court for a STAY and MOTION FOR NEW TRIAL; Pending any further rulings and appeals.

Under CIVIL Rule 59(1):

1. Defendant was not offered a fair trial because a Subpoena decision ruled on Defendant during trial did obstruct or other wise deny his right to his only named witness, the Plaintiff. Thus denial of some Due Process.

a. Under discretions therein time should have been offered as needed to obtain such witness or corrections of subpoena a harmless error but one denying Due Process.

b. This was unfair to the Defendant, undermines his ability to present an assertive defense against the unfounded dollars demanded by Plaintiffs and monies for work not done.

c. Opened the door to misrepresenting, in the Courts decision Memorandum, the Defendants very own words of his "Contention " ie the Defendant did not say " Plaintiff breached the agreement to repair the Chrysler by performing work that was not authorized "; The Defendant own ANSWER TO COMPLAINT says what the Defendant did say: [Dated Feb 11, 2000]

"Plaintiffs failed to provide all and adequate services to the defendant, misuses of the 2500.00 given, and forfeitures of all agreements for said goods and services." Testimony also underlines this point of view not the Court interpre -tations. The Court Memorandum appear to concur.

c.1 Whether such dollars is unauthorized is not known to the Defendant as no bills, documentations, or statements were

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CIVIL
Under Rule 59 (5):

2. The damages assessed to the Defendant are excessive beyond his ability to even pay.

a. Without the right to assertive defense and his only witness, Defendant could not rebut the excessive dollars that were claimed in the bill and adjudged agaist same.

b. While it was true that unauthorized work was done but not testified to by Plaintiff himself, dollars as to agreement and contracts were not legally proven by the Plaintiffs. [The actual Plaintiff was not in Court]

Defendant did have as the Court says written agreements [Exhibits: #1] but no credits against excessive charges for unauthorized dollars shown in [Exhibit #8] were even considered in the Courts decisions (2500.00 was the limit imposed in May 1999) These points are all provable only if the witness for the Defendant can be crossexamined. Monies for work not done is a different credit due Defendant. Dollars were not in any agreement (s) which Plaintiffs offered the court.

Consequently, although a subpoena was turned over to the Clerk of the Court, and even served and paid for by the Defendant it was never officially filed by the Court and dates never established, which rightly or wrongly did serve to deny the Defendant in the above case, his due process in full amounts as prescribed under the UTAH Constitution, Art. I Sec (7).

Dated this 17th day of November, 2000.

DEFENDANT Robert Elgin

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AFFADAVIT

I ROBERT I FLYNN do swear on this day, Nov 17, 2000 :

That in the above motions asked for that to the best of my ability turned over to the Court Clerk, on 02-17-00 forms For Subpoena for Plaintiff in the above entitled case acting on my own behalf.

AS far as I can say it was never officially filed on that day discovered Nov 2000, on inspecting record.

SIGNED Robert Flynn

2 ATTACHMENTS A. Receipt of service
B. Clerks Receipt

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ATTACHMENT AFFADAVIT

Carbon County Sheriff's Office
240 West Main Street
Price, Utah 84501
(435) 636-3251

***** C O U N T E R R E C E I P T *****

Receipt No - **2000014** Date - **02-17-00**

Amount Paid - **$7.00** pd for
Check No - **CASH**

Payment By - **FLYNN, ROBERT**

Description - **SUB**

Received By - **KOBE, DEBORAH A**

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Name Bar Number

Robert Flynn

Address

1265 No carbonville rd

City, State ZIP

Price Ut. 84501

Telephone

Attorney for the defendant (Pro Per)

IN THE SEVENTH DISTRICT COURT, STATE OF UTAH
CARBON COUNTY

Tire king corp., Plaintiff,	**SUBPOENA**
v.	
Robert Flynn, Defendant.	Case No. 000700120

TO: ~~PAUL PUGLIESE OWNER TIRE KING~~

YOU ARE COMMANDED:

[X] to appear in the seventh district Court at the place, date and time specified below to testify in the above case.

[ ] to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

[X] to produce or permit inspection and copying of the following documents or objects at the place, date and time specified below (list documents or objects):

~~1. Plaintiffs bill to defendant dated 9-20-99~~

~~2. Dates of payments of transmission to TRI,~~ ~~&[777 E Main, Price UT]~~

~~3. The original verified agreement of defendant with~~ Tire King Inc (Complaint, item 5)

[ ] to permit inspection of the following premises at the date and time specified below.

PLACE DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other person who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Rule 30(b)(6), Utah Rules of Civil Procedure.

Dennis Olson DATE: 2-17-00

CLERK OR ATTORNEY FOR PLAINTIFF/ DEFENDANT

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including communicative aids and services) during this proceeding should call 1-800-992-0172, at least THREE working days prior to the scheduled proceeding.

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CERTIFICATE OF MAILING

I, the undersigned, certify that on the 17th day of November, 2000, that I mailed a true and correct copy of Motion to Stay with Motion for New Trial, first class postage prepaid _ to:

CHIARA LAW OFFICES
KEITH CHIARA

98 NORTH 400 EAST
PRICE UTAH 84501

Robert Flynn
DEFENDANT(PRO PER)

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ORIGINAL

FILED
NOV 27
SEVENTH DISTRICT COURTS

Keith H. Chiara #0621
98 North 400 East
P. O. Box 955
Price, UT 84501
Telephone: (435) 637-7011
Facsimile: (435) 636-0138
Attorney for Rebel Bail Bonds

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR CARBON COUNTY, STATE OF UTAH

TIRE KING, INC., Plaintiff. Vs. **ROBERT FLYNN,** Defendant.	**OBJECTION TO MOTION FOR STAY OF ORDER AND MOTION FOR NEW TRIAL** Civil No. 000700120 Judge Bryce K. Bryner

COMES NOW Plaintiff, by and through its attorney of record, Keith H. Chiara, and objects to granting of Defendant's Motion for Stay of Order and his Motion for New Trial for the following reasons:

1. Defendant moves for a new trial pursuant to URCP 59(1). It is assumed he means URCP 59(a)(1). Defendant claims he was not given a fair trial because he subpoenaed Paul Pugliese and Paul Pugliese did not appear. He attaches a copy of the subpoena to his motion.

Defendant raised the issue of Paul Pugliese's failure to appear on Defendant's "subpoena" at the trial. A copy of the "subpoena" was produced and reviewed. The "subpoena" was incomplete in that it did not give a date for appearance and therefore was clearly deficient.

[redacted] 0 7

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2. The subpoena was dated 2-17-00. The trial in this case was not even selected by the Court until June 26, 2000, more than four (4) months after the date of the "subpoena".

Because no trial had been set and because the subpoena was not dated, Plaintiff treated the subpoena as a discovery tool, or a Subpoena Duces Tecum and provided Defendant with those items requested insofar as Plaintiff had them in its possession.

3. At trial, the Court determined that the Defendant's subpoena did not require Mr. Pugliese to appear on the date of trial. It is not the Court's responsibility to guide the Defendant through the trial or to act as Defendant's attorney to protect Defendant from his own failings.

4. In Defendant's Motion, under Ia, Defendant apparently suggests that, during the trial, when he was informed that he had not properly served Paul Pugliese with a subpoena, the Court should have recessed and allowed him time to subpoena Paul Pugliese. Plaintiff's complaint was filed on February 7, 2000. Between that date and the date of trial, on September 7, 2000, Defendant filed several different motions and other documents requiring Plaintiff to respond in writing to preserve its claims against Defendant. Defendant had plenty of time to seek the advice of legal counsel, do research in the Utah Rules of Civil Procedure, or any other thing he needed to do in preparation for trial. He had no right, at the time of trial, to expect the Court to recess the trial, or continue the proceedings until he had properly subpoenaed Paul Pugliese. He requested the Court allow him to do that, and the Court declined. He is not now entitled to a whole new trial because he alone failed to properly follow the rules of Court. He claims that he is being denied his right to due process. However, he is only looking at one side of the issue. If the Court were to grant his motion for a new trial at this time, solely because of the Defendant's own

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failures, the Court would be denying Plaintiff due process. Certainly Plaintiff is as entitled to due process of law as is the Defendant.

5. Under Defendant's paragraph 1b, Defendant again claims that the actions of the Court were unfair to the Defendant, claiming that the Court's ruling undermines the Defendant's ability to present an assertive defense. The Court did no such thing. The Defendant was free to obtain competent legal counsel, and he was free to properly prepare. The Defendant alone undermined his own ability to present his defense. Interestingly, the Court greatly relaxed the rules for presenting evidence, and allowed the Defendant extremely great latitude in presenting his evidence and arguments, including when he presented his evidence and when he cross examined Plaintiff's witnesses. For Defendant to now accuse the Court of undermining Defendant's case is very unfair to the Court, and is not truthful.

6. In Defendant's paragraph 1c, it appears as though Defendant's objection to the Court's decision is merely that the Defendant views the evidence differently than the Court views it. The Court is entitled to view the evidence differently from what the Defendant claims the evidence to be, based upon all of the evidence presented before the Court, including evidence presented by the Plaintiff. Simply because the Court does not accept the Defendant's representations as to what the evidence is, does not mean that the Court is wrong and the Defendant is right, and the Defendant is entitled to have a whole new trial to repeat the same evidence the Court did not believe during the previous trial. In paragraph 1c, the Defendant appears to merely be rearguing the same things that he argued to the Court during the trial. Having presented his evidence and

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made his arguments once, if the Court does not accept his position, that does not mean that he is entitled to a new trial under URCP 59.

7. Under paragraph 2 of Defendant's Motion, the Defendant claims he is seeking a new trial based upon URCP 59(a)(5). In this assertion however, Defendant apparently did not read the grounds for a new trial that are provided for under Rule 59(a)(5), because the Court did not award damages in this case, but awarded the amount due to Plaintiff pursuant to an agreement between the parties for the Plaintiff to provide parts, labor and services and for Defendant to pay for the parts, labor and services. No damages were awarded. Certainly, nothing was awarded to the Plaintiff "under the influence of passion or prejudice". If anything, the District Court Judge acted in a very reserved and calm manner, carefully listened to all of the evidence, allowed the Defendant great latitude in presenting his case and cross examining the Plaintiff's witnesses, took the matter under advisement, issued a Memorandum Decision, set a second hearing for October 25, 2000, issued an Amended Memorandum Decision, and ordered judgment in behalf of the Plaintiff based upon the evidence presented at the trial and subsequent hearing. Interestingly, although the Defendant was fully informed of the hearing date for the second hearing, Defendant failed to appear.

8. As with Defendant's paragraph 1, Defendant's paragraph 2 is more re-argument of his case than statement of legitimate grounds for granting his motion. All of the things that he states in his paragraph 2 were argued by him before the Court in the September trial and he had the opportunity to present any other arguments in the October 26th hearing. Defendant was not denied due process, nor was he treated unfairly, nor did the Court makes its decision based upon

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the influence of passion or prejudice. Defendant has filed this motion simply because he does not want to pay a legitimate debt that he owes to the Plaintiff. For that reason his motion should be denied and he should be required to pay Plaintiff's attorneys fees for having to respond to these motions for a stay of the order and for a new trial.

PLAINTIFF PRAYS FOR AN ORDER OF THE COURT DENYING DEFENDANT'S MOTION FOR A NEW TRIAL AND FOR SETTING ASIDE THE JUDGMENT, SO PLAINTIFF CAN PROCEED, IN ACCORDANCE WITH LAW, TO RECOVER THE DEBT OWED BY DEFENDANT TO THE PLAINTIFF.

DATED this 22 day of November, 2000.

Keith H. Chiara

Keith H. Chiara
Attorney for Plaintiff

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CERTIFICATE OF MAILING

On the 22nd day of November, 2000, I personally mailed a true and correct copy of the foregoing Objection to Motion for Stay of Order and Motion for New Trial, postage prepaid to the following address:

Robert Flynn
1265 No. Carbonville Rd.
#92/#24
Price, Utah 84501

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Robert Flynn
1265N Carbonville RD. #92/24
Price UT. 84501
DEFENDANT, PRC PER

FILED
DEC - 4
SEVENTH DISTRICT COURTS

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR CARBON COUNTY,
STATE OF UTAH

TIRE KING INC., Plaintiff, VS. ROBERT FLYNN, Defendant.	RESPONSE TO THE OBJECTION FOR MOTION FOR STAY AND MOTION FOR NEW TRIAL. CIVIL: 000700120 JUDGE: BRYCE K. BRYNER

Comes now the Defendant and RESPONDS to the Objection for Motions for the following:

OBJECTION(A) DUE PROCESS DEFINITIONS
RESPONSE TO PLAINTIFF PARAGRAPHS #1-#4

Plaintiff arguements did mischaracterize Defendants Motion paragraphs wording in #1a-#1c by confusing differing definitions of Due Process; Defendant was asking for relief because of the bias and obstruction of Due Process caused by the administrative discretion within Due Process not necessarily the substantive parts of Due Process; For example. Under URCP 59a(1) relief is sought under "abuse of discretion" by the Court. This can stem from deeper rules such as the Canon 3 (Canon 3B(5)) wherein a judge shall(must) perform duties without bias or prejudice. Certainly the Courts are vitally interested in making available all relevant testimony; Mr Paul Pugliese was a witness to all the events in the scope of the Defendant's Contention ie breach of Contract, and their withdrawal as of Sept. 11 1999, to prevent Plaintiff's further demands steming from them.

The standards of fairness, one for the Plaintiffs', even let them take Court time to obtain yet another witness, should be the same for all. These seem to be a biasing of fairness in the administering the Process, of Due Process. The Defendant objected to his not having a witness but was overruled by the Judge.

OBJECTION(B) DID COURT OBSTRUCT DUE PROCESS BY OMISSION?
RESPONSE TO PLAINTIFF PARAGRAPH #5

Defendant clearly sees that 1.omissive acts from the Court Clerk not filing Defendant's Subpoena for the Record does deny the chance of any overview of the record by the Judge, and thus any memorandum to correct prior to court, and 2.Optional time for any remedy to the error on the subpoena, prevents or complicates the Defendants position and maybe then compromises his plans for presenting his evidence; They could have been deliberate, or not and obstructive, or not. The outcome then is biased before trial.

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OBJECTION(C): THE DEFENDANT CONTENTION
RESPONSES TO PLAINTIFF PARAGRAPH #6

The Defendant clearly stated his position in his Motion, paragraph #1c that he was NOT refering to the "evidence" as it pertains to the ideas of "contention", but instead to the words only in the ANSWER TO COMPLAINT. Court had no right to argue backwards from Plaintiff's arguements on "unapproved" issues, to Defendant's contention, on Breach of Contract for failure to deliver under the agreements. Two separate ideas. In fact the substituting of Plaintiff's contention into Defendants is highly irregular and should not be permitted. This is a bias to do this.

Contention is what is to be proved, not anything else.

The Courts Memorandum of Decision should accurately start off at where the Defendant started and analyze his arguement against the Plaintiff's, not just substitute one for the other ~~inaccurately~~. Of course the Defendants witness and assertive defense was blocked by the unfair ruling to permit Defendant's Subpoena.

OBJECTION(D): URCP 59a(5) DAMAGES
RESPONSE TO PLAINTIFF POINTS

The Plaintiff interpretation may be right.

Defendant read the rule using "generic" meanings of "damages" ie "costs/expenses".

If this be wrong the Defendant respectfully asks the Court to delete from his Motion For Stay and New Trial, paragraphs that pertain to justifications under URCP 59a(5), and leave intact those pertaining ot URCP 59a(1).

SUMMARY OF DEFENDANTS RESPONSE
Plaintiff is refusing to allow his client, Mr. Paul Pugliese, to testify as Defendant's witness even though the Court knows this denies Defendant's Due Process. A Problem that must be rectified by this Court because there was an administrative bias to fairness, and omissions of the court that were discretion -al on the part of the court. The Defendant had done all he knew or could given the situation. Supression of evidence is not correct, and would be grounds for a new trial.

Dated This 4th Day of December, 2000.

DEFENDANT: Robert Flynn

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CERTIFICATE OF MAILING

I the undersigned, certify that on the 4th day of December, 2000, that I mailed a true and correct copy of The Response to Objections To Motions to Stay and Motion For New Trial, first class postage prepaid, to:

CHIARA LAW OFFICES
KEITH CHIARA

98 NORTH 400 EAST
price Utah 84501

Robert Flynn
DEFENDANT, PRO PER

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#1

FILED
FEB - 8 2001
SEVENTH DISTRICT
COURT/CARBON

IN THE SEVENTH DISTRICT COURT IN AND FOR
CARBON COUNTY, STATE OF UTAH

TIRE KING INC.,	)	**RULING ON DEFENDANT'S MOTION FOR STAY OF ORDER AND MOTION FOR NEW TRIAL**
Plaintiff,	)	
VS.	)	
ROBERT FLYNN,.	)	Case No. 000700120
Defendant.	)	Judge Bryce K. Bryner

Trial in this matter was held on September 7, 2000. The court took the case under advisement and issued its *Amended Memorandum Decision* on October 25, 2000. The plaintiff prepared proposed *Findings of Fact and Conclusions of Law* and a proposed *Judgment and Order* and mailed copies to the defendant. The defendant timely filed a pro se *Motion for Stay of Order and Motion for New Trial*, to which the plaintiff filed an *Objection* and the defendant filed a *Response*. A Notice to Submit for Decision has been filed and the court now issues this ruling.

The defendant's motion claims:

1. That he was denied a fair trial because the court refused on the day of trial to continue the trial to allow the defendant to subpoena a witness, thereby denying him his right to due process.

2. That the damages awarded to the plaintiff are beyond the ability of the defendant to pay.

I. Was the Defendant Denied a Fair Trial and Due Process?

Under Rule 59 (a) (1) URCP, a new trial may be ordered if either party was prevented from having a fair trial by an irregularity in the proceedings of the court or an abuse of discretion by the court. The defendant claims that the court abused its discretion by refusing to allow the

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defendant a continuance to subpoena a witness, Mr. Paul Pugliese.

The court finds that the claim is without merit because the defendant's motion for a continuance was untimely. The defendant made the motion during the second day of trial on September 7, 2000. The defendant had previously served a subpoena on Mr. Pugliese on February 18, 2000, which was four months before the case was set for trial pursuant to a Ruling dated June 26, 2000. The defective subpoena therefore could not and did not specify a date and time for Mr. Pugliese to appear. The court finds that there was adequate time between the date of setting the trial (June 26, 2000) and the date of the trial (September 7, 2000) to issue a new subpoena with the proper date and time inserted. The defendant has presented no valid reason why a new subpoena could not have been timely served to obtain the presence of Mr. Pugliese. To have granted a continuance at that stage of the proceedings would have prejudiced the plaintiff by causing him to incur additional delay and would have caused him to incur additional attorney fees. The court therefore finds that the refusal of the court to grant a continuance was neither an irregularity in the proceedings nor was it an abuse of discretion that prevented the defendant from having a fair trial nor did it deprive him of due process of law.

II. Defendant's Allegation That the Damages are Beyond his Ability to Pay

The defendant alleges that "[T]he damages assessed to the Defendant are excessive beyond his ability to even pay." In support thereof he claims; (1) that he could not rebut the amount of the bill because he was deprived of the right to examine Mr. Paul Pugliese as a result of the court not allowing a continuance; and (2) unauthorized work was performed on defendant's automobile but could not be proved without the testimony of Mr. Pugliese.

The court finds that this argument is essentially the same argument presented in the defendant's first claim, i.e., that the defendant was deprived of the right to examine a witness

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when the court refused to grant a continuance. For the reasons set forth in Section I above, the court finds that the defendant's claim is without merit.

Based on the foregoing, the court finds that there was no irregularity in the proceedings of the court which prevented the defendant from having a fair trial. Accordingly, the motion for a stay of proceedings and the motion for a new trial are denied.

DATED this 6th day of February, 2001.

Bryce K. Bryner
District Judge

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CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 000700120 by the method and on the date specified.

METHOD	NAME
Mail	ROBERT FLYNN DEFENDANT 1265 North Carbonville Rd #92/24 Price, UT 84501
Mail	KEITH CHIARA ATTORNEY P.O. BOX 955 PRICE UT 84501

Dated this 8th day of July, 2001.

L Rasmussen
Deputy Court Clerk

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#8

ROBERT I FLYNN
DEFENDANT, (PRO PER)
1265 No Carbonville RD
#92 Price UT 84501

Hand Delivered
2/23/2000

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR CARBON COUNTY, STATE OF UTAH

Tire King Inc. Plaintiff, vs. Robert Flynn Defendant.	MEMORANDUM IN SUPPORT OF DEFENDANT, ROBERT FLYNN"S MOTION TO DISMISS Civil No. 000700120

Defendant Robert Flynn submits the following recent facts in support of a motion to dismiss.

STATEMENT OF FACTS

1. Plaintiff Tire King had no written agreement with Defendant Robert Flynn in the form of and in the totals (and contents) as submitted to Defendant and dated Sept. 20 1999.

2. Affidavit of complaint to Defendant on above case 000700120 items # 4-8 are singly and solely based on this submitted agreement. (Defendant's Exhibit B)

3. Defendant had work done from June 20 1999 to August 1999 before the September dated document submitted. No signature is on the submitted agreement submitted purporting to be Defendants agreement in June 1999.

4. Exhibit C for Defendant shows when Defendant left Tire King.

5. Plaintiffs would not negotiate in good faith this agreements validity with Defendant and in the complaint are acting in bad faith to this court.

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DEFENDANTS ARGUEMENT

1 Certain facts came to light on or about February to Defendant February 15 2000 which defined the specific dates for when one of the "agreements" [$767.23] totals, the transmissions repair at TRI, which showed this date to be October 1 1999 which is after the dated "agreement" submitted to Defendant purporting to be the original agreement.

2 Attached is Defendants (Exhibit D) signed by the TRI manager showing he agreed with the statements typed therein as to 1. dates, 2 separated agreement of Defendant to pay the monies to TRI later, not to Plaintiff, at any time from June through August 1999.

3 Thus the contents in the complaint affidavit as submitted to Seventh District Court of Utah is invalid as to its specific money relative to this one item, its dates, and its relavance to the purported agreement Defendant actually made with Tire King on or about June 20 1999.

THUS
The Plaintiffs knowing these facts, did not disclose the nature of the facts and deliberately hid the facts from affidavit of complaint. (allow its submission.)

A Copy of the letter from Defendant to Plaintiff (and his attorney) attempted on September 27 1999 to act in good faith to this Court, disclosing the facts to the Plaintiffs but was in writing told not to communicate.
(EXHIBIT E of Defendant).

The defendant swears this is not representative of any document he had ever seen before and then could not be legally his document, and asks the Seventh District Court to DISMISS because of the bad faiths of Plaintiffs relative to their complaint's forms and contents.

Dated this 22nd day of February, 2000

ROBERT FLYNN(PRO PER)

Robert Flynn

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THE KING
535 EAST MAIN
PRICE, UTAH 84501
(801) 637-8473

NAME Robert Flunn
ADDRESS 1265 North Carbonville Rd#5
CITY Price STATE Ut ZIP CODE 84501
PHONE CONTACT HOME PHONE

CAR AMERICA

SERVICE REQUESTED Deposit $ 2500.00 Balance $2354.05
Car was removed before Bill was paid Removed by Robert

VISUAL INSPECTION ONLY

BRAKE SYSTEM

Position	Drum	Rotor	Mfg Spec	Actual	Acceptable	Recommend	Position	Drum	Rotor	Mfg Spec	Actual	Acceptable	Recommend
RF							RR						
LF							LR						

Front	Estimated Per Cent Worn	Acceptable	Recommend	Rear	Estimated Per Cent Worn	Acceptable	Recommend
Pads/Linings	%			Pads/Linings	%		
Caliper/Cyl.				Caliper/Cyl.			
Hardware				Hardware			
Bearing/Seal				Bearing/Seal			
Brake Hose(s)				Brake Hose(s)			

STEERING SYSTEM

CONVENTIONAL SUSPENSION Part	Acceptable	Recommend	MACPHERSON SUSPENSION	Acceptable	Recommend
Pitman Arm			Strut Assembly		
Idler Arm			Bearing Repack		
Tie Rod End R Outer			Rack & Pinion Assembly		
Tie Rod End R Inner			Rack & Pinion Mounting Bushings		
Tie Rod End L Outer			Tie Rod End R Outer		
Tie Rod End L Inner			Tie Rod End R Inner		
Tie Rod Sleeve R L			Tie Rod End L Outer		
Center Link			Tie Rod End L Inner		
Shocks			Bellows Boot R L		
Bearing Repack			Alignment Check		
Alignment Check			Shocks		

DRIVE SYSTEM

Front Wheel Drive	Acceptable	Recommend	Rear Wheel Drive	Acceptable	Recommend
C.V. Joint Inner R L			Front U-Joint		
C.V. Joint Outer R L			Rear U-Joint		
C.V. Boot Inner R L			Transmission Mount		
C.V. Boot Outer R L					

TIRES

Tire Size _____ Speed Rating _____
Less than 2/32 Tread Depth is Illegal in Many States

Wheel Position On Car	Air Pressure	Visible Damage	Acceptable Tire Tread Depth in 32nds of an inch	Recommend Trade In	Recommend Replace
RF			12 - 11 - 10 - 9 - 8 - 7 - 6	5 - 4 - 3	2 - 1
LF			12 - 11 - 10 - 9 - 8 - 7 - 6	5 - 4 - 3	2 - 1
RR			12 - 11 - 10 - 9 - 8 - 7 - 6	5 - 4 - 3	2 - 1
LR			12 - 11 - 10 - 9 - 8 - 7 - 6	5 - 4 - 3	2 - 1

QTY	UNIT PRICE	PARTS DESCRIPTION	
	Blazer	Labor on Blazer	
	Buick	Windshield + State Inspection	134.42
5		G 78-14 Classic White Walls @ 88.00	440.00
		Check to Clean Electronics	136.33
		Tranny from Transmission Rebuilders	
		Heads Cleaned 2 Resurface	295.06
15 hr		Labor to Remove Windshield Engine	
11.2 hrs	25.00	Labor to Clean Throttle Body Block	489.00
		Valley Pan Set	168.09
		Trans Fluid Oil Filter	
5 Labor hrs		Labor to R+R Cylinder Head/Remove Starter	
5 Hours		Labor to Remove Head Replace Tranny	
		Starter Exchanged	
		V-Belt P.V.C. Air Filter, Fuel Filter	
		Upper & Lower Rad Hose, Cap, Rotor, Plugs	20.88
		Plug Wires, Fuel Pump & Water Pump	
		Intake Man Gasket Set Thermostat w/Gasket	32.33
		Tax	450.82
			456.86
		PARTS	
		LABOR	
		TAX	
		TOTAL	4854.05

YOU ARE ENTITLED BY LAW TO THE RETURN OF ALL PARTS REPLACED EXCEPT THOSE WHICH ARE TOO HEAVY OR LARGE, AND THOSE REQUIRED TO BE SENT BACK TO THE MANUFACTURER OR DISTRIBUTOR BECAUSE OF WARRANTY WORK OR AN EXCHANGE AGREEMENT. YOU ARE ENTITLED TO INSPECT THE PARTS WHICH CANNOT BE RETURNED TO YOU.

REPAIRS MADE BY (NAME)

X

THE INDEPENDENT DEALER NAMED ABOVE IS AUTHORIZED BY ME TO PERFORM THE DESCRIBED SERVICES AND REPAIRS INCLUDING REPLACEMENT OF NECESSARY PARTS. DEALER OR HIS EMPLOYEES MAY OPERATE VEHICLE FOR INSPECTION, TESTING OR DELIVERY AT MY RISK. WORK MAY BE SUBCONTRACTED AS NECESSARY AND AS EXPLAINED TO ME. IT IS UNDERSTOOD THAT THE FINAL INVOICED PRICE ON ESTIMATES EXCEEDING $20.00 WILL NOT EXCEED THE ESTIMATE BY $10.00 OR 10% WHICHEVER IS LESS, WITHOUT MY APPROVAL IN THE EVENT I DO NOT AUTHORIZE COMPLETION OF A JOB OR SERVICE ONCE WORK HAS COMMENCED. A CHARGE MAY BE IMPOSED FOR DISASSEMBLY, REASSEMBLY OR PARTIALLY COMPLETED WORK.

CUSTOMER

X

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– HELPER TOWING –

– 24 HOUR TOWING –

159 North Main • Helper, Utah 84526

Telephone (435) 472-5534

All Accounts Due and Payable Immediately. If collection is made by suit or otherwise, I agree to pay interest until paid, also collection costs, including attorney's fee. Not responsible for any damages or loses of any type or nature, while towing, hooking up or while unit is being stored.

MAKE	YEAR	MODEL	LICENSE NO. & STATE	COLOR
Chev	64	300		

NAME OF INSURANCE CO. | POLICY NO.

Robert Flynn — Sept-11/99

NAME — DATE

ADDRESS

CITY — STATE — ZIP CODE

	Miles Towing@	75.00
	Hook-up Fee	
	Dolly Fee	
	Hrs. Labor@	
	Storage@	
	TOTAL	75.00

P.D Receipt
Duplicate
Exhibit C
Defendant Robert
Flynn

All Bills Due & Payable Immediately

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EXHIBIT D
DEFENDANT
ROBERT FLYNN

FEBRUARY 15 2000
TRI PRICE UT.
DAVE JOHNSON;

Dave;

I need the following written statements of fact only pertaining to the state of work on my 64 chrys. at Tire King which your company did the rebuild of trans in Aug 99. If I can get this in a brief writen form signed by you then I wont need to bring anyone into court to tell the facts to the court. The note will work..

10/1

NEED
1. Dateand payment $$ Tire king made to you on car
2. The date and fact of transmission when Rick looked at it to see if he could fix it there. Beginning of Sept.
3. The statement of fact that you and I spoke on the phone to get money paid, and that I said at least in sum and substance that I did not want to pay for the trans work at that time .

8/13

Robert Flynn ph 637-2755

David A Johnson
Manager
Transmission Rebuild Inc.

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DEFENDANT
ROBERT FLYNN

SEPT 29 199[illegible]
FOR: ROBERT FLYNN

TO: LAW OFFICES [illegible]
K. CHIARA

RE: CHARGES OF ILLEGALITY
TIRE KING BILLS

Dear K. Chiara

As far as I knew or know I made NO legal arrangements with TIRE KING CO. at any time to allow accruing (OWED) CHARGES to be put on my CHRYSLER 300 auto. In fact I had with TK (PAUL) an informal, friendship based, personal arrangements to leave my car at my request at his place, do work on a PAY AS YOU GO BASIS for whichIe was paid up front as required by TK for any and all of his expenses. Work was to be then completed by TK. The car was NOT to be encumbered in the process.

TK failed to live up to its arrangements as per above, yet I was paid up (2500.00$$) at the time I elected under our arrangement to leave TK and finish up the work he did not complete, at home. [There was 3000.00(agreed, less 140.00adv., less 0300.00$ held = 2560.00 left)]
Paul was obligated under this verbal agreement to inform me of any extra ordinary expenses incurred, at which time I would re-imbuse him the $$. At the time I elected to take my car home

1. He had not spoken to me of anything as such owed
2. He had not completed his agreed work
3. He had NO BILL from which to judge anything or hold my vehicle for a bill not paid kind of arrangement.
4. The bill you sent me was done after the fact(of my knowledge)

I do not think it would be illegal under our special arrangements to do what I did.

The bill you sent me has invalid items on it I do not owe for various reasons you are not aware of; I have done nothing improper, or that a prudent person would not do when confronted with a three month delay of work by TK, incomplete and faulty; I agree to certain items on the bill, and disagree with others, and this is Pauls fault for not being accurate in own assessments of needed work; He is not telling the truth in his bill and so it would be best decided before a judge, where he has to tell the truth. 4800.00$ to rebuild an engine and transmission, and partly install these is not an accurate cost.

Our informal arrangements agreed to at most 3100.00$ total (Bill#)
but some of this was lost by Pauls own careless methods.

Sincerely Robert I Flynn. Robert Flynn

CC Tire King Headquarters.

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