1995

Norval R. Jones and Delores S. Jones v. Michael J. Arambel : Brief of Appellant

Utah Court of Appeals

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Gregory N. Skabelund; Attorney for Defendant/Appellant.

950751-CA

IN THE UTAH COURT OF APPEALS

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NORVAL R. JONES and DELORES S. JONES,	)	
Plaintiffs/Appellees,	)	
v.	)	Case No. 950751-CA
MICHAEL J. ARAMBEL,	)	Priority No 15
Defendant/Appellant.	)	

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BRIEF OF APPELLANT

THIS IS AN APPEAL OF A JUDGMENT AND DECREE
OF THE FIRST JUDICIAL DISTRICT COURT
FOR CACHE COUNTY, UTAH
THE HONORABLE BEN H. HADFIELD

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BRIEF OF APPELLANT

JURISDICTION OF COURT

Jurisdiction is conferred on the Utah Court of Appeals pursuant to the provisions of Section 78-2-2(3)(j) of Utah Code Annotated.

ISSUES PRESENTED FOR REVIEW, STANDARD OF REVIEW, AND CITATION OF RECORD

POINT I

WHETHER THE TRIAL COURT COMMITTED ERROR BY ENTERING FINDINGS OF FACT NOT SUPPORTED BY THE EVIDENCE.

The trial court erred in entering findings of fact not supported by the evidence. Reid v. Mutual of Omaha Insurance Co., 776 P.2d 896 (Utah 1989).

STANDARD OF REVIEW

The trial court's findings of fact are clearly erroneous if they are so lacking in support as to be against the clear weight of the evidence, Doelle v. Bradley, 784 P.2d 1176, 1178 (Utah 1989).

CITATION OF RECORD

Memorandum Decision dated February 22, 1995, ([1]Rec. 103-104); Findings of Fact & Conclusions of Law, ([1]Rec. 108-112); Judgment & Decree ([1]Rec. 113, 114); and Memorandum Decision dated July 5, 1994, ([1]Rec. 149, 150).

POINT II

WHETHER THE TRIAL COURT COMMITTED ERROR IN NOT FINDING THAT THE PLAINTIFFS/APPELLEES ELECTED TO ACCEPT DEFENDANT/APPELLANT'S SURRENDER OF THE PREMISES, TERMINATING THE LEASE AGREEMENT, AND THEREBY PLAINTIFFS/APPELLEES WERE NOT ENTITLED TO DAMAGES.

The trial court erred in not finding through the course of conduct of Plaintiffs/Appellees that Plaintiffs/Appellees elected to accept Defendant/Appellant's surrender of the premises, terminating the lease agreement, and thereby Plaintiffs/Appellees were not entitled to damages.

STANDARD OF REVIEW

See Point I above.

CITATION OF RECORD

See Point I above.

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[1]All references are of record; Rec. refers to record.

POINT III

WHETHER THE TRIAL COURT COMMITTED ERROR IN NOT FINDING THAT PLAINTIFFS/APPELLEES FAILED IN THEIR DUTY TO MITIGATE THEIR DAMAGES AFTER JULY 1992 BY SEEKING A NEW TENANT.

The trial court erred in not finding that Plaintiffs/Appellees failed in their duty to mitigate their damages by failing to make any effort to find a new tenant after July 1, 1992, Reid v. Mutual of Omaha Insurance Co. supra.

STANDARD OF REVIEW

The conclusions of law are challenged by Defendant/Appellant. Accordingly, the applicable standards of appellate review are for the correctness of the conclusions of the trial court and are given no special deference. Bountiful v. Riley, 784 P.2d 1174, 1175 (Utah 1989).

CITATION OF RECORD

See Point I above.

POINT IV

WHETHER THE TRIAL COURT COMMITTED ERROR IN AWARDING PLAINTIFFS/APPELLEES THEIR ATTORNEY'S FEES WHEN PLAINTIFFS/APPELLEES TERMINATED THE LEASE AGREEMENT, OR ALTERNATIVELY THE TRIAL COURT FOUND THAT PLAINTIFFS/APPELLEES WERE IN BREACH OF THEIR DUTY TO MITIGATE DAMAGES.

The trial court erred in awarding Plaintiffs/Appellees attorney's fees when Plaintiffs/Appellees terminated the lease agreement, or alternatively the trial court found that Plaintiffs/Appellees were in breach of their duty to mitigate damages as required by the lease agreement.

STANDARD OF REVIEW

See Point III above.

CITATION OF RECORD

See Point I above.

DETERMINATIVE STATUTES

78-36-12.6 Utah Code Annotated:

(1) "In the event of abandonment, the owner may retake the premises and attempt to rent them at the fair rental value, and the tenant who abandons the premises shall be liable:

> (b) for rent accrued during the period necessary to re-rent the premises at the fair rental value, plus the difference between the fair rental value and the rent agreed to in the prior rental agreement, plus a reasonable commission for the re-renting of the premises and costs, if any, necessary to restore the rental unit to its condition when rented by the tenant less normal wear and tear . . ."

STATEMENT OF CASE

A. Nature of Case:

The Complaint of Plaintiffs/Appellees' seeks recovery of rental payments under the terms of a lease agreement between Plaintiffs/Appellees and Defendant/Appellant. Defendant/Appellant asserts the defense that Plaintiffs/Appellees elected to terminate the lease agreement and are, therefore, not entitled to damages. The trial court found that Plaintiffs/Appellees were entitled to rent for the period from July 1, 1992, through June 30, 1993, in the amount of $19,200 with offset for the use by Plaintiffs/Appellees of the corral,

hay barn, and the sale of the home, for a total offset of $3,650 and total damages of $15,550 for that period of time. Thereafter, from July 1, 1993, to the end of the lease term, the trial court found that Plaintiffs/Appellees failed to mitigate their damages. The trial court thereby awarded Plaintiffs/Appellees the sum of $15,550 in damages and $5,980 attorney's fees and costs.

B. Course of Proceeding:

The Plaintiffs/Appellees filed a complaint for rental payments on the 12th day of February, 1993. Defendant/Appellant filed his answer on the 26th day of March, 1993. The trial court entered its Memorandum Decision on the 22nd day of February, 1995.

C. Disposition of the Court below:

The trial court entered its Findings of Fact & Conclusions of Law and Judgment & Decree on the 20th day of April, 1995. The trial court entered its Order Denying Defendant's Motion To Alter Or Amend Judgment on the 1st day of August, 1995. A Notice of Appeal was filed on the 29th day of August, 1995.

STATEMENT OF FACTS

Plaintiffs/Appellees and Defendant/Appellant entered into a lease agreement on the 21st day of August, 1989, for the lease of certain real property as follows ([1]Rec. 20-22, 248, 284; Plaintiffs' Exhibit #1):

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[1]All references are of record; Rec. refers to record.

Lot 1 and 2, Block 14, as platted on Plat "A" of NEWTON TOWNSITE SURVEY, and further described as being situated in Sections 18 & 19, Township 13, North Range 1 West of the Salt Lake Base and Meridian.

In accordance with the lease, the leased premises consisted of a milking parlor, milking equipment, two (2) hay sheds, milk cow lounging sheds, corrals, silo, commodity shed, and tenant house situated on said real property (T. 40-41, 44, 79, 100, 255-256; Plaintiffs' Exhibit #1). Said lease agreement further provided certain personal property including the following farm machinery:

a. (1) A26 International Tractor with Feed Wagon;

b. (1) Ford 545 Tractor with Scraper and Loader;

c. (1) Gehl Grain Chopper;

d. (1) Ford Tractor and Manure Box;

e. (1) Knight Manure Spreader.

(T. 41, 92, 256).

Paragraph 2 of the lease agreement provided for a term of the lease to include a period of five (5) years beginning September 1, 1989, and terminating at midnight on August 31, 1994 (T. 22, 29; Plaintiffs' Exhibit #1).

Paragraph 4 of the lease agreement provided as consideration, Defendant/Appellant agreed to pay the Plaintiffs/Appellees the sum of $1,600.00 per month beginning October 1, 1989, and including September 1, 1994 (T. 87; Plaintiffs' Exhibit #1).

Paragraph 8 of the lease agreement provides:

"Subject only to the conditions provided in paragraph 10 herein, lessee shall not leave the leased premises unoccupied or vacated but shall continuously, during the entire term of this lease, conduct and carry on only that type of a business which on the leased premises is specifically set forth in paragraph 3 of the lease agreement." (Plaintiffs' Exhibit #1).

Paragraph 17 of the lease agreement provided:

"The lessee shall be in default of the lease upon the happening of one or more of the following events:

(a) failure to pay any installment of rent or any other sum to be paid by lessee hereinunder when due, or within ten (10) days thereafter;

(b) Upon default of the lessee, lessor may elect to terminate this lease or without terminating this lease lessor may take possession of the leased premises and relet the same or any part thereof for such term, or terms, and at such rental, or rentals, and upon such other terms and conditions as lessor, in the exercise of lessor's sole discretion may deem advisable, and shall have the right to make alterations and repairs to said leased premises. Upon each such reletting, lessee shall be immediately liable for, and shall pay to lessor any indebtedness due hereinunder the cost and expenses of such reletting, (including advertising costs), brokerage fees, reasonable attorney's fees incurred by lessor, the cost of alterations and repairs accrued by lessor, and the amount of any rent incurred under this lease for the period up to the time of the reletting and thereafter to the end of the term of the lease, less the rent actually received from reletting the leased premises. If the lessee has been credited with any rent to be received by such reletting, and such rents shall not be properly paid to lessor by the new lessee, such deficiency shall be calculated and paid monthly by lessee. . . ." (Plaintiffs' Exhibit #1).

Paragraph 19 of the lease agreement provided:

"should either of the parties default in any of the covenants or agreements contained herein, the defaulting party shall pay the costs and expenses, including reasonable attorney's fees that may arise or accrue from enforcing this agreement, or in obtaining possession of the leased premises, or in pursuing any remedy provided hereinunder, or in the laws

of the State of Utah which said remedy is pursued by filing a suit or otherwise." (Plaintiffs' Exhibit #1).

At trial, Plaintiff/Appellee Norval Jones testified that Defendant/Appellant left the premises in "approximately September 1991." (T. 88) By moving his dry cows and all personal equipment, including a John Deere tractor and truck, Plaintiff/Appellee Norval Jones testified that he let the premises remain idle, that he never thought Defendant/Appellant had left the premises and that he could have come back at any time (T. 88-89, 103, 140). Plaintiff/Appellee Norval Jones testified that he received rent from Defendant/Appellant through a milk assignment until it was completed and has not received any rent from July 1992 to date. Plaintiff/Appellee Norval Jones testified when he didn't receive rent from Defendant/Appellant in July 1992, he contacted Defendant/Appellant and Defendant/Appellant stated that if he had a problem with it to contact his attorney (T. 32-34, 104).

Plaintiff/Appellee Norval Jones testified that after Defendant/Appellant vacated the premises, Plaintiffs/Appellees then used the leased estate for their own benefit. Plaintiff/Appellee Norval Jones testified he placed twenty-six (26) head of cattle in the corrals and feed yards in October and November 1991, placed his hay into the hay sheds in September 1991, placed his own personal farm equipment into the commodity sheds, and used the leased farm machinery including the grain chopper, Ford tractor and manure box, and Knight spreader for his own use and benefit (T. 38-41, 97-100).

Defendant/Appellant testified that he never authorized Plaintiff/Appellee Norval Jones to use the leased facilities including placing hay in the barns and Herefords in the corrals (T. 271-272, 274, 276-277).

Plaintiff/Appellee Norval Jones testified that in August 1991, he was approached by Scott, Defendant/Appellant's ex-employee, who asked Plaintiff/Appellee Norval Jones if he could continue to occupy the tenant house (T. 45-47). Plaintiff/Appellee Norval Jones also testified that in March 1993, he began negotiating a sale of the tenant house (T. 56, 101-102), and on May 3, 1993, he sold the tenant house to Randy and Karen Jones for $45,000.00 (T. 100-101, 145). Plaintiff/Appellee Norval Jones then testified that he sold the tenant house because Defendant/Appellant had abandoned the tenant house but not the other leased property (T. 102, 145-146).

Plaintiff/Appellee Norval Jones also testified that on March 30, 1993, he traded in part of the leased equipment including the International Tractor and Ford 545 Tractor to Buttars Tractor (T. 105-106).

Plaintiff/Appellee Norval Jones received from Defendant/Appellant's counsel a letter dated October 8, 1992, which letter stated that Plaintiffs/Appellees had interfered with Defendant/Appellant's "right to use, enjoyment, and occupation of the family farm . . . . has elected to abandon the

premises and terminate the lease agreement." (T. 90-91; Defendant's Exhibit #21; [1]Rec. 146).

Plaintiff/Appellee Norval Jones further testified that he made no effort to release the premises to anyone else and did not relet to any person, or was not interested in leasing to them (T. 107-109). Then Plaintiff/Appellee Norval Jones testified that after Defendant/Appellant vacated the premises people wanted to rent the house but he "didn't want to fix the house up to be acceptable for renters." (T. 101) Plaintiff/Appellee Norval Jones further testified that three (3) different individuals contacted him about reletting the premises immediately after Defendant/Appellant left the premises in July 1992, including Goodrich, Traveller, and Todd Davis, but Plaintiff didn't want to relet the premises to these individuals (T. 107-109).

Todd Davis testified that he contacted Plaintiff/Appellee Norval Jones about reletting the premises from the Defendant/Appellant immediately after Defendant/Appellant vacated the premises (T. 240-243). Plaintiff/Appellee Norval Jones testified that he refused to relet the premises to any individual and made no effort to relet the premises (T.107-109).

At the conclusion of trial, the court determined to further study the issue of damages to the premises, as well as to reserve the issue of attorney's fees and

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Plaintiffs/Appellees' Counterclaim against the Defendant/Appellant (T. 288-289).

The trial court entered its Memorandum Decision on the 22nd day of February, 1995. In said Memorandum Decision, the trial court stated:

> "The court finds that the Defendant's failure to pay the $1,600.00 monthly rental costs is a breach of the lease and commenced in July 1992, thereafter, it became incumbent upon the Plaintiff to mitigate his damages. The court finds that the Plaintiff failed to take adequate steps to mitigate the damages after July 1, 1993." ([1]Rec. 103-104).

The Trial Court then went on to find damages in the total of $15,550.00 due on rental after total mitigation offset or the following:

> "Plaintiff's use of corral: $1,400.00; Plaintiff's use of the barn: $2,000.00; Plaintiff's sale of the home: $125.00; total mitigation offset: $3,650.00; total rent owing from Defendant to Plaintiff after mitigation offset: $15,550.00." ([1]Rec. 103-104).

In the trial court's second Memorandum Decision on July 5, 1995, the Plaintiffs/Appellees were awarded attorney's fees due to Defendant's breach of the contract. The trial court held that the failure to mitigate was not, in itself, a breach of contract, but rather was an occurrence which limited the amount of Plaintiffs/Appellees' recovery.

SUMMARY OF ARGUMENT

I. The trial court, in paragraph 9 of its Findings of Fact, made a specific finding that Plaintiffs/Appellees had a continuing expectation that

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Defendant/Appellant would return and use the leased premises and for that reason failed to relet the premises. Such a finding was clearly erroneous and not supported by the clear weight of the evidence. Under Rule 52(a) of the Utah Rules of Civil Procedure, it provides:

> "findings of fact, whether based upon oral documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses . . ."

A finding attacked as lacking adequate evidentiary support is deemed 'clearly erroneous' only if we conclude the finding is against the clear weight of the evidence, Reid v. Mutual of Omaha Insurance Co. supra.

II. Pursuant to the lease agreement, Plaintiffs/Appellees had two (2) alternative remedies against Defendant/Appellant which they could pursue in case of breach of the lease agreement: (1) terminate the lease agreement, or (2) take possession of the leased premises and relet the same. The clear weight of the evidence demonstrates that Plaintiffs/Appellees elected to accept Defendant/Appellant's surrender of the premises, terminating the lease agreement. Thereby, Plaintiffs/Appellees were not entitled to the damages they sought.

III. The trial court committed error in not finding that Plaintiffs/Appellees failed in their duty to mitigate their damages after July 1992 by seeking a new tenant.

In Reid v. Mutual of Omaha Insurance Co. supra, the Utah Supreme Court held:

> "a landlord who seeks to hold a breaching tenant liable for unpaid rentals has an obligation to commercially make reasonable steps to mitigate its losses, which ordinarily means the landlord must seek to relet the premises."

IV. The trial court committed error in awarding Plaintiffs/Appellees attorney's fees when Plaintiffs/Appellees elected to terminate the lease agreement. Alternatively, Plaintiffs/Appellees were not entitled to attorney's fees pursuant to the lease agreement in that Defendant/Appellant successfully defended Plaintiffs/Appellees' claim for rentals by Plaintiffs/Appellees' failure to mitigate damages.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED ERROR BY ENTERING FINDINGS OF FACT NOT SUPPORTED BY THE EVIDENCE.

Rule 52(a) provides:

> "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

This clearly erroneous standard applies where the case is characterized as one in equity or in law. Barker v. Francis, 741 P.2d 548, 551 (Utah Ct. App. 1987).

> "A finding attacked as lacking adequate evidentiary support is deemed clearly erroneous only if [the court] concludes that the finding is against the clear weight of the evidence." In re Estate of Bartell, 776 P.2d 885 (Utah 1989); State v. Walker, 743 P.2d 191, 192-193 (Utah 1987); and Reid v. Mutual of Omaha Insurance Co., supra.

Paragraph 9 of the findings of fact stated Plaintiffs/Appellees:

> "had a continuing expectation that Defendant would return to the leased premises."

However, the clear weight of the testimony shows the contrary. The trial court's Memorandum Decision provided:

> "The court finds that Defendant's failure to pay the $1,600 monthly rental cost due to breach of the lease commenced in July 1992. Thereafter, it became incumbent upon the Plaintiff to mitigate his damages. The court finds that the Plaintiff failed to take adequate steps to mitigate his damages after July 1993."

The trial court did not state in its Memorandum Decision that Plaintiffs/Appellees had an expectation that Defendant/Appellant would return to the leased premises. The court stated that after July 1992, it became incumbent upon Plaintiffs/Appellees to mitigate their damages.

The clear weight of the evidence demonstrates that after Defendant/Appellant abandoned the premises in September 1991, Plaintiffs/Appellees did not have an expectation that Defendant/Appellant would return: (1) Defendant/Appellant stopped paying rent in July 1992; (2) Plaintiff/Appellee Norval Jones acknowledged that Defendant/Appellant abandoned the premises in September 1991; (3) Plaintiff/Appellee Norval Jones testified that he placed twenty-six (26) head of cattle in the corrals and the feed

yards in October 1991; (4) Plaintiff/Appellee Norval Jones placed hay into the hay sheds in September 1991, and placed his own personal farm equipment into the commodities sheds; (5) Plaintiff/Appellee Norval Jones used the machinery, including the grain chopper, Ford tractor and manure box, and Knight spreader for his own use and benefit; and (6) Defendant/Appellant's letter dated October 8, 1992, stated that Defendant/Appellant had elected to abandon the premises and terminate the lease agreement.

The weight of the evidence shows that the trial court did not characterize its findings in its memorandum decision as one of expectation by Plaintiffs/Appellees that Defendant/Appellant would return to the leased premises. The clear weight of the evidence demonstrates that Plaintiffs/Appellees acknowledged Defendant/Appellant had abandoned the premises prior to July 1992 and communicated to Plaintiffs/Appellees that he intended not to return.

POINT II

THE TRIAL COURT COMMITTED ERROR IN NOT FINDING THAT THE PLAINTIFFS/APPELLEES ELECTED TO ACCEPT DEFENDANT/APPELLANT'S SURRENDER OF THE PREMISES, TERMINATING THE LEASE AGREEMENT, AND THEREBY WERE NOT ENTITLED TO DAMAGES.

In Farmers & Merch. Bank v. Universal C.I.T. Credit Co., 4 Utah 2d 155, 289 P.2d 1045 (1955), the Utah Supreme Court made the following statement:

> "The doctrine of election of remedies applies as a bar only where the two actions are inconsistent, generally based upon incompatible facts; the doctrine does not operate as an estoppel where the two or more remedies

are given to redress the same wrong and are consistent. Where the remedies afforded are inconsistent, it is the election of one that bars the other; but where they are consistent, it is the satisfaction that operates as a bar." (Id. at 1049.)

In Cook v. Covey-Ballard Motor Co., 69 Utah 161, 253 p. 196 (1927), the Utah Supreme Court stated:

> "It is well settled that one who is induced to make a sale or trade by the deceit of a vendee has the choice of two remedies upon his discovery of the fraud; he may affirm the contract and sue for his damages, or he may rescind it and sue for the property he has sold or what he has paid out on the contract. The former remedy counts upon the affirmance or validity of the transaction, the latter repudiates the transaction and counts upon its invalidity. The two remedies are inconsistent, and the choice of one rejects the other, because the sale cannot be valid and void at the same time . . . [citation omitted] . . . There thus were open to him at that time two coexisting remedies, which were alternative and inconsistent with each other, and, when the plaintiff elected the one as he did, the other was no longer available. (Id. at 199.)
> . . .
>
> The doctrine of an election rests upon the principle that one may not take contrary positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves a negation or repudiation of the other, the deliberate and settled choice of one, with knowledge or means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again . . ." (Id. at 200.)

In Royal Resources, Inc. v. Gibralter Financial. Co., 603 P.2d 793 (Utah 1979), the Utah Supreme Court stated:

> "The doctrine of election of remedies is a technical rule of procedure and its purpose is not to prevent recourse to any remedy, but to prevent double redress for a single wrong. Said doctrine presupposes a choice between inconsistent remedies, a knowledgeable selection of one thereof, free of fraud or imposition, and a resort to the chosen remedy evincing a purpose to forego all others." (Id. at 796.)

In Costello v. Kasteler, 7 Utah 2d 310, 324 P.2d 772 (1958), the Utah Supreme Court recognized the principle that a party cannot have a judgment against an agent and an undisclosed principal and that the party seeking such judgment must elect to hold one or the other.

In the case at hand, the lease agreement contained the provisions governing the Plaintiffs/Appellees' rights in the event of default of the Defendant/Appellant. Paragraph 17(b) provided that:

> "Upon default of the lessee, lessor may elect to terminate this lease or without terminating this lease lessor may take possession of the leased premises and relet the same or any part thereof for such term, or terms, and at such rental, or rentals, and upon such other terms and conditions as lessor, in the exercise of lessor's sole discretion may deem advisable, and shall have the right to make alterations and repairs to said leased premises. Upon each such reletting, lessee shall be immediately liable for, and shall pay to lessor any indebtedness due hereinunder the cost and expenses of such reletting, (including advertising costs), brokerage fees, reasonable attorney's fees incurred by lessor, the cost of alterations and repairs accrued by lessor, and the amount of any rent incurred under this lease for the period up to the time of the reletting and thereafter to the end of the term of the lease, less the rent actually received from reletting the leased premises. If the lessee has been credited with any rent to be received by such reletting, and such rents shall not be properly paid to lessor by the new lessee, such deficiency shall be calculated and paid monthly by lessee. . . ." (Plaintiffs' Exhibit #1).

As the foregoing provision in the lease clearly indicated, Plaintiffs/Appellants had two (2) alternative remedies which they could have pursued which were mutually exclusive, and the choice of one of which precluded the choice of the other as follows:

1. Terminate the lease.

2. Take possession of the leased premises and relet the same, or any part thereof, for the term or terms, and at such rental or rentals, and under such terms and conditions as may be deemed advisable, and upon such, lessee shall be immediately liable for all indebtedness due under the lease agreement, the costs and expenses of such reletting, reasonable attorney's fees, the cost of alterations and repairs, and the amount of rent incurred under the lease from the period up to the time of the reletting.

3. According to the terms of the lease agreement, the trial court should have determined that Plaintiffs/Appellees' conduct amounted to termination of the lease agreement.

Alternative No. 2 was not available to Plaintiffs/Appellees because Plaintiffs/Appellees did not introduce any evidence that they relet the premises, or any part thereof, or made alterations or repairs to the leased premises.

Since the trial court concluded that Plaintiffs/Appellees elected to take possession of the leased premises and relet the same under Paragraph 17(b), the trial court was obligated to restrict the difference between the contract rate and the reletting of the premises, or any part thereof.

It was reversible error for the trial court to conclude that Plaintiffs/Appellees elected to take possession of the leased premises and relet the same. Plaintiffs/Appellees acknowledged that they made no effort

whatsoever to relet the premises. Therefore, Plaintiffs/Appellees clearly elected to terminate the lease agreement in accordance with paragraph 17(a) of the lease agreement. The trial court's Judgment must therefore be reversed.

POINT III

THE TRIAL COURT COMMITTED ERROR IN NOT FINDING THAT PLAINTIFFS/APPELLEES ELECTED TO ACCEPT DEFENDANT/APPELLANT'S SURRENDER OF THE PREMISES, TERMINATING THE LEASE AGREEMENT AND THEREBY PLAINTIFFS/APPELLEES WERE NOT ENTITLED TO DAMAGES

In Willis v. Kronendonk, 58 Utah 592, 200 P. 1025 (1921), the Utah Supreme Court stated:

> "It has so frequently been held by the courts aforesaid that in case a tenant surrenders the premises to his landlord before the end of the term, and before any of the rent is due and payable, the tenant is released or discharged from the payment of all rent, and that the landlord is without a remedy, that the rule has practically become elementary. The doctrine is likewise stated by all the text-writers on Landlord and Tenant." (Id. at 1027-1028)
>
> ". . . the courts are all agreed that, where there is a surrender by a tenant and an acceptance by the landlord, as in the case at bar, no action can be maintained by the landlord after such surrender for any rent not due and payable at or before the surrender went into effect, that in case of surrender the landlord can only maintain an action for the rent that was due and payable at the time of the surrender, and that in case of surrender before the rent is payable there can be no apportionment of the rent. So far as the writer is advised there are no decisions to the contrary. None have been cited, and the writer, after making diligent search, has not found any." (Id. at 1029.)
>
> "Assuming, however, that there had been merely an abandonment of the premises by the defendant, then the result, in view of the undisputed facts, would still have to be the same. As pointed out in the case cited from California, where a tenant abandons the premises, and the landlord unconditionally goes into possession thereof and treats them as though

the tenancy had expired, it amounts to a surrender, and the landlord cannot thereafter recover any rent, nor sue for damages. If he desires to reserve that right, he must recognize the tenant's rights in the premises for the unexpired term, and sue him for damages upon his breach of covenant to pay rent. This, however, is elementary doctrine." (Id. at 1030.)

The Utah Supreme Court followed the same ruling in the later case of Belanger v. Rice, 2 Utah 2d 250, 272 P.2d 173 (1954). In that case, the Court stated:

"A surrender may take place where there is an express agreement of the parties or by operation of law. There is no evidence of an express agreement, and hence we must examine those elements which might give rise to a surrender by operation of law. As stated in 32 Am. Jur., Landlord and Tenant, Sec. 905:

> "A surrender of a lease by operation of law results from acts which imply mutual consent independent of the expressed intention of the parties that their acts shall have that effect; it is by way of estoppel. However, the intention of the landlord to accept the tenant's surrender of the premises is important on the question of surrender by operation of law, and a surrender will not be implied against the intent of the parties, as manifested by their act." (Id. at 174.)

"It is fundamental that where a tenant surrenders and the landlord accepts the premises during the term of the lease, the landlord cannot recover rent not due and payable at the time of the surrender." (Id. at 175.)

In John C. Cutler Association v. De Jay Stores, 3 Utah 2d 107, 279 P.2d 700 (1955), the question of whether or not the acts of the parties demonstrated a surrender and acceptance of the surrender by the Landlord was reviewed. The Supreme Court stated:

"It is only when he [the landlord] exercises dominion over the premises beyond those purposes and inconsistent with the rights of a tenant whom

he seeks to hold for the rental of the premises, that a finding of surrender is justified." (Id. at 702.)

The Court then indicated that there was a conflict of authorities as to "the rule of law to be applied in determining whether a reletting will terminate the obligations of a lease." After reviewing the three schools of thought on the subject, the Utah Supreme Court adopted the following rule:

> "We believe that the third rule referred to by the Connecticut court, suggesting that there is no arbitrary standard to be invariably applied, best lends itself in doing justice in such controversies, and therefore aline ourselves with it.
>
> The question of surrender, being generally one of fact as to what was the intention of the parties, is to be determined from all attendant
>
> circumstances including the conduct and expressions of the parties." (Id. at 703.)

The Supreme Court then indicated that when the lessor leased the property to another tenant, and such action constituted an exercise of dominion over the property to the exclusion of the tenant, that such act terminated the lease agreement as well as any obligation to pay rent thereafter on the lease agreement.

In Frisco Joes, Inc. v. Peay, 558 P.2d 1327 (Utah 1977), the Utah Supreme Court stated:

> "As a general proposition, where a tenant offers to surrender a lease and the landlord agrees to accept the surrender, that extinguishes any liability for rent after such surrender. But it does not extinguish rights which have accrued beforehand." (Id. at 1330.)

In Frisco Joes, the Utah Supreme Court modified the judgment of the trial court and held that any award for rent accruing after the surrender of the lease and acceptance by the landlord "never did become due. It is therefore necessary to reduce the judgment by that amount." (Id. at 1330.)

At common law, the critical issue in applying the doctrine of surrender and acceptance is to determine whether the landlord intended to accept the surrender. This intention may be expressed or implied. See Frisco Joes supra, Mariani Air Products Co. v. Gill's Tire Mkt., 29 Utah 2d 291, 293, 508 P.2d 808, 810 (Utah 1973); Belanger v. Rice, supra; and Reid v. Mutual of Omaha Insurance Co., supra.

In the facts of the case at hand, there is no dispute in the evidence, nor any evidence offered, to disprove the following propositions which were clearly demonstrated by Defendant/Appellant to show that Plaintiffs/Appellees, by their acts, accepted the surrender of the subject premises:

1. The Defendant/Appellant unequivocally surrendered the premises to the Plaintiffs/Appellees as evidenced by abandonment of the premises in September 1991; Defendant/Appellant's failure to pay rent in July 1992; notified Plaintiffs/Appellees in a letter dated October 8, 1992, of Defendant/Appellant's intent to abandon the premises and terminate the lease agreement.

2. The Plaintiffs/Appellees exercised immediate and absolute dominion and control over the premises.

3. Plaintiff/Appellee Norval Jones testified that after Defendant/Appellant vacated the premises, Plaintiff/Appellee Norval Jones placed twenty-six (26) head of cattle in the corrals and feed yards, placed hay into the shed, placed his own personal farm equipment into the commodity sheds, and used the farm machinery, including the grain chopper, Ford tractor and manure box, and Knight spreader for his own use and benefit.

4. Plaintiff/Appellee Norval Jones sold the tenant house to Randy and Karen Jones.

5. From and after Defendant/Appellant's surrender of the possession of the premises, Defendant/Appellant never attempted to retake possession, dominion or control over the premises surrendered.

6. Plaintiffs/Appellees made no effort whatsoever to relet the premises, and Plaintiff/Appellee Norval Jones acknowledged that he made no effort to release the premises to anyone else, and that he didn't want to release the premises to anyone else although he was contacted by three (3) parties who were interested in leasing the premises immediately after Defendant/Appellant vacated the premises. Plaintiffs/Appellees never introduced any evidence to demonstrate an election of the remedy, but the evidence demonstrated that Plaintiffs/Appellees' conduct, as a matter of law, constituted an election to terminate the lease agreement.

Since the conduct of Plaintiffs/Appellees clearly amounted to an election to terminate the lease agreement, the trial court was obliged to make a specific finding on this issue and was compelled, in accordance with the terms of the lease agreement and the conduct of the landlord, to conclude an election to terminate the lease agreement as a matter of law.

The findings of the trial court that Plaintiffs/Appellees elected a remedy other than by the conduct of termination of the lease agreement is unsubstantiated by the assessment of the facts, even those construed most favorably to the ruling of the trial court.

POINT IV

UNDER REID V. MUTUAL OF OMAHA INSURANCE CO., THE UTAH SUPREME COURT HAS HELD THAT A LANDLORD WHO SEEKS TO HOLD A BREACHING TENANT LIABLE FOR UNPAID RENTALS HAS AN OBLIGATION TO COMMERCIALLY MAKE REASONABLE STEPS TO MITIGATE ITS LOSSES, WHICH ORDINARILY MEANS A LANDLORD MUST SEEK TO RELET THE PREMISES.

The trial court entered its Memorandum Decision on the 22nd day of February, 1995. In said Memorandum Decision, the trial court stated:

> "The court finds that Defendant's failure to pay the $1,600 a month rental cost is a breach of the lease and commenced in July of 1992. Thereafter, it became incumbent upon the Plaintiff to mitigate his damages. The court finds that the Plaintiff failed to take adequate steps to mitigate the damages after July 1, 1993."

The court then went on to find damages in the total of $15,000 due on rental after total mitigation offset, or the following: Plaintiff's use of the corral - $1,400; Plaintiff's use of the barn - $2,000; Plaintiff's sale of the home - $125;

total mitigation offset - $3,650; total rent owing from the Defendant to the Plaintiff after mitigation offset - $15,550.

The Findings of Fact & Conclusions of Law provided:

> "the court finds that the Plaintiffs had a continuing expectation that the Defendant would return to and use the leased premises and for this reason failed to relet the premises and thereby mitigate their damages. The court finds that this expectation on the Plaintiffs' part was reasonable but for the period exceeding one year from the date of the initial breach. Thereafter, the court finds that it would have been reasonable for the Plaintiffs to seek other renters or to find alternative ways to mitigate their damages."

In the case of Reid v. Mutual of Omaha Insurance Co., 776 P.2d 896, 906, the Utah Supreme Court stated:

> "We hold that the landlord who seeks to hold a breaching tenant liable for unpaid rents has an obligation to commercially make reasonable steps to mitigate his losses, which ordinarily means a landlord must seek to relet the premises."

Pursuant to 78-36-12.6 Utah Code Annotated, the Utah State Legislature has imposed upon a commercial landlord a duty in the case of rental default to use its best efforts to relet the premises. It provides:

> (1) "In the event of abandonment, the owner may retake the premises and attempt to rent them at the fair rental value, and the tenant who abandons the premises shall be liable:
>
> > (b) for rent accrued during the period necessary to re-rent the premises at the fair rental value, plus the difference between the fair rental value and the rent agreed to in the prior rental agreement, plus a reasonable commission for the re-renting of the premises and costs, if any, necessary to restore the rental unit to its condition when rented by the tenant less normal wear and tear . . ."

The Utah Supreme Court, in Olympus Hills Shopping Center, Ltd. v. Landes, 821 P.2d 451 (Utah 1991), held that it is a landlord's duty to mitigate damages to use "best efforts" to relet the premises.

In Reid v. Mutual of Omaha Insurance Co. supra, the Utah Supreme Court defined the duty imposed upon the landlord. It provided:

> "the landlord . . . has the burden of proving both the amount of damages and the fact that it took appropriate mitigation efforts. Assume the landlord carries this burden, a judgment and damage award on the whole cause arising out of the breach can therefore be rendered. . ." (Id. at 906).
>
> "Another point warranting clarification is the affirmative nature of the mitigation. Some courts impose a mitigation requirement due not requiring landlords to show active efforts to relet; instead, the landlord can carry its proof of mitigation burden simply by showing that it was passively receptive to opportunities to relet the premises [citations omitted]. We conclude that this minimal showing does not show the policies that underlie the adoption of the mitigation requirements. We prefer to follow these courts that have required that a landlord take positive steps reasonably calculated to effect a reletting of the premises." (Id. at 906).
>
> "Only by following such a course can we insure that serious efforts are made to redeploy the rental property in a productive fashion by those who are best able to accomplish that, and who are also best able to prove that the required mitigation efforts have been carried out." (Id. at 906).
>
> "A further word about the standard by which the landlord's efforts to mitigate are measured: the standard is one of objective commercial reasonableness [citation omitted]. A landlord is obligated to take such steps as would be expected of a reasonable landlord lending out the similar property in the same market conditions." (Id. at 906-907).

The trial court found that Defendant/Appellant's failure to pay $1,600 monthly rental was a breach of the lease and commenced in July 1992.

Thereafter, the trial court then found it incumbent upon the Plaintiffs/Appellees to mitigate their damages. In conflict of the Memorandum Decision, the Findings of Fact & Conclusions of Law provided that Plaintiffs/Appellees had a continuing expectation that the Defendant/Appellant would return and use the premises, and for that reason failed to relet the premises and thereby mitigated their damages. The trial court found that the Plaintiffs/Appellees failed to take adequate steps to mitigate damages after July 1, 1993.

Plaintiff/Appellee Norval Jones testified that after Defendant/Appellant vacated the premises, people wanted to rent the house, which was part of the leased premises, but he didn't want to fix the house up to make it acceptable for renters. Plaintiff/Appellee Norval Jones further testified that three (3) different individuals contacted him about releasing the premises after Defendant/Appellant abandoned the premises, including Goodrich in September 1992, and Todd Davis in October/November 1992. But, Plaintiff/Appellee Norval Jones didn't want to relet the premises to those individuals. Plaintiff/Appellee Norval Jones further testified that he made no effort to release the premises to anyone else and did not release the premises to any person, or was not interested in leasing to them. Todd Davis testified that he contacted Plaintiff/Appellee Norval Jones about releasing the premises from Plaintiff/Appellee immediately after Defendant/Appellant vacated the premises.

However, Plaintiff/Appellee Norval Jones testified that he refused to relet the premises to any individual and made no effort to relet the premises.

It was reversible error, from clear weight of the evidence, for the trial court to conclude that Plaintiffs/Appellees' didn't have a duty to mitigate damages after Defendant/Appellant abandoned the leased premises after September 1991, and breached the lease for failure to pay rent in July 1992. It was error for the trial court to award one (1) additional year of rental from July 1992 to July 1993.

POINT V

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN AWARDING PLAINTIFFS/APPELLEES ATTORNEY'S FEES.

Under the terms and conditions of the lease agreement, upon default the lessor could:

> "Elect to terminate this lease agreement, or without terminating the lease agreement, take possession of the leased premises and relet the same or any part thereof."

A. THE LEASE AGREEMENT WAS TERMINATED, AND, THEREFORE, NEITHER PARTY IS ENTITLED TO ATTORNEY'S FEES.

Under paragraph 17(b) of the lease agreement it provides:

> "Upon default of the lessee, lessor may elect to terminate this lease or without terminating this lease lessor may take possession of the leased premises and relet the same or any part thereof for such term, or terms, and at such rental, or rentals, and upon such other terms and conditions as lessor, in the exercise of lessor's sole discretion may deem advisable, and shall have the right to make alterations and repairs to said leased premises. Upon each such reletting, lessee shall be immediately liable for, and shall pay to lessor any indebtedness due hereinunder the cost

> and expenses of such reletting, (including advertising costs), brokerage fees, reasonable attorney's fees incurred by lessor, the cost of alterations and repairs accrued by lessor, and the amount of any rent incurred under this lease for the period up to the time of the reletting and thereafter to the end of the term of the lease, less the rent actually received from reletting the leased premises. If the lessee has been credited with any rent to be received by such reletting, and such rents shall not be properly paid to lessor by the new lessee, such deficiency shall be calculated and paid monthly by lessee. . . ." (Plaintiffs' Exhibit #1).

Since Plaintiffs/Appellees, through their course of conduct, terminated the lease agreement, neither party is entitled to attorney's fees pursuant to the lease agreement because the lease agreement was terminated.

B. PLAINTIFFS/APPELLEES ARE NOT ENTITLED TO ATTORNEY'S FEES IN THAT DEFENDANT/APPELLANT SUCCESSFULLY DEFENDED PLAINTIFFS/APPELLEES' CLAIM FOR RENTAL BASED UPON PLAINTIFFS/APPELLEES' FAILURE TO MITIGATE DAMAGES.

Defendant/Appellant successfully defended Plaintiffs/Appellees' claim for rental for the entire length of the lease term. The court only awarded the Plaintiffs/Appellees one (1) year's rental because Plaintiff/Appellee Norval Jones breached his duty to mitigate his damages. The trial court additionally only awarded partial damages to the premises.

Plaintiffs/Appellees were in breach of the lease agreement by violating Utah law in failure to mitigate their damages. Plaintiffs/Appellees did not elect to terminate the lease agreement and elected not to take possession of the leased premises. In accordance with paragraph 19 of the lease agreement:

> "should either of the parties default in any of the covenants or agreements contained herein, the defaulting parties shall pay the costs and expenses, including reasonable attorney's fees that may arise or accrue from enforcing this agreement, or in obtaining possession of the leased premises, or in pursuing any remedy provided hereinunder or in the laws of the State of Utah which said remedy is pursued by filing a suit or otherwise."

Clearly, through the trial court's own Memorandum Decision, Plaintiffs/Appellees have violated the lease agreement by not electing to relet the premises and failure to mitigate damages all in violation of the lease agreement and violation of Utah law. To award Plaintiffs/Appellees all of their attorney's fees is contrary to the lease agreement and in violation of Utah law and Reid v. Mutual of Omaha Insurance Co. supra.

It was reversible error to award Plaintiffs/Appellees their attorney's fees when the lease was terminated. Alternatively, it was error to provide Plaintiffs/Appellees their attorney's fees when Plaintiffs/Appellees clearly failed to mitigate their damages in violation of paragraph 19 of said lease agreement.

CONCLUSION AND REQUEST FOR RELIEF

The trial court committed error by allowing findings of fact not supported by the evidence, particularly, that for the first year that Plaintiffs/Appellees had a reasonable expectation that Defendant/Appellant would return to the leased premises.

The trial court committed further error by not finding that Plaintiffs/Appellees elected to accept Defendant/Appellant's surrender, thereby

terminating the lease agreement and preventing Plaintiffs/Appellees from claims of damages.

Alternatively, the trial court committed error by concluding that Plaintiffs/Appellees did not have a duty to find a new tenant until after July 1, 1993.

Finally, the trial court committed error in awarding Plaintiffs/Appellees their attorney's fees providing that this court determines that Plaintiffs/Appellees elected to terminate the lease agreement.

Alternatively, Plaintiffs/Appellees are not entitled to attorney's fees in that Defendant/Appellant successfully defended Plaintiffs/Appellees' claim for rental based upon their failure to mitigate damages.

The decision of the trial court should be reversed and either: (1) the case should be remanded with instructions; or (2) the judgment award Plaintiffs/Appellees should be reduced to the amount of property damages to the premises in the sum of $5,980; (3) alternatively, find that Plaintiffs/Appellees had elected to terminate the lease agreement; (4) neither party should be awarded attorney's fees.

DATED this 3 day of June, 1996.

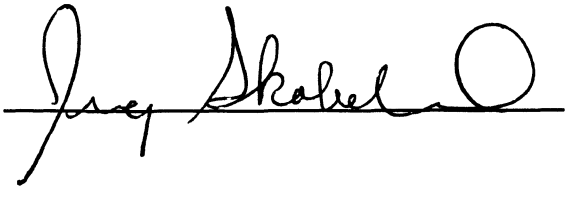
Gregory Skabelund
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed true and correct copies of the BRIEF OF APPELLANT in the United States mail, postage prepaid, to the following:

L. BRENT HOGGAN
Olson & Hoggan
88 West Center
PO Box 525
Logan, UT 84323-0525

DATED this 3 day of June, 1996.



ADDENDUM

MEMORANDUM DECISION - DATED FEBRUARY 22, 1995

FINDINGS OF FACT & CONCLUSIONS OF LAW

JUDGMENT & DECREE

SECOND MEMORANDUM DECISION - DATED JULY 5, 1995

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT - DATED APRIL 21, 1995

NOTICE OF APPEAL

IN THE FIRST JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF CACHE, STATE OF UTAH

NORVAL R. JONES and DELORES S. JONES	MEMORANDUM DECISION
PLAINTIFFS,	CIVIL NO. 930000077
vs.	HONORABLE BEN H. HADFIELD
MICHAEL J. ARAMBEL,	
DEFENDANT.	

This matter was tried to the Court on July 7, 1994. At the conclusion of the trial the Court announced partial findings and decision and directed Counsel to conduct further research and submit written memoranda of points and authorities. Plaintiff's Memorandum was submitted October 18, 1994. Defendant's Memorandum was submitted January 3, 1995. Both memoranda were substantially beyond the deadlines set by the Court. The Court will accept both memoranda and has reviewed the same, but notes that the passage of time compounds the difficulty in making a precise calculation concerning the issues.

As previously indicated, the Court finds that the August 21, 1989 Lease is valid and enforceable and was never modified by the parties. The Court further finds that paragraph 17 of the Lease empowers the Plaintiff to relet the premises if the Defendant is in default. Plaintiff testified he referred several inquiries concerning the property to the Defendant. Defendant testified that in November 1991, Plaintiff stated that because of difficulties and damages, he would "never relet the place again." The Court finds that Defendant's failure to pay the $1600.00 monthly rental constituted a breach of the Lease and commenced in July 1992. Thereafter, it became incumbent upon the Plaintiff to mitigate his damages. The Court finds that the Plaintiff failed to take adequate steps to mitigate damages after July 1,

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Feb 24, 1995

1993. The Court will allow the rent to accrue for the one year period for the initial breach and finds that such a period of time would have been reasonable for the Plaintiff to seek other renters or find alternate ways of mitigating damages. Therefore, the Court finds that rent is due and owing for the period of July 1, 1992 through June 30, 1993 in the amount of $19,200.00.

During the period of July 1992 through June 30, 1993, the Plaintiff did take certain measures to mitigate damages and these shall be allowed as offsets as follows:

Plaintiff's use of the coral	$ 1,400.00
Plaintiff's use of hay barn	2,000.00
Plaintiff's sale of home in May 1993	225.00
Total Mitigation Offset:	**$ 3,650.00**
Total rent owing from Defendant to Plaintiff after mitigation offset	$15,550.00

The Court has reviewed the property damage claims of Plaintiff including the exhibits. During the term of the Lease, the facilities were already rather old and equipment "well worn". On the other hand, the exhibits leave little doubt that significant damage occurred during the period of Defendant's occupancy. Many of the damages claimed by Plaintiff would leave the Plaintiff with new equipment, whereas, the equipment at the commencement of the Lease was far from new.

After reviewing the exhibits and evidence, the Court awards property damages in favor of the Plaintiff and against Defendant in the amount of $5,980.00.

The Defendant having breached the Lease, Plaintiff is entitled to recover attorneys fees incurred herein. Judgment is awarded against Defendants in the amount of $5,305.23 for attorneys fees, and costs, together with such reasonable fees and costs as are hereafter documented from the date of trial until the Judgment is ultimately satisfied.

Counsel for the Plaintiff is directed to prepare comprehensive Findings and Conclusions as well as a Judgment in accordance with this decision.

DATED this 22 day of February, 1995.

BY THE COURT:

STATE OF UTAH
FIRST DISTRICT COURT
BRIGHAM CITY

BEN H. HADFIELD
DISTRICT JUDGE

CERTIFICATE OF MAILING

I certify that on the 22nd day of February, 1995, I sent by first class mail a true and correct copy of the attached document to the following:

Gregory Skabelund
2176 North Main
Logan, UT 84341

L. Brent Hoggan
OLSON & HOGGAN
88 West Center
P. O. Box 525
Logan, UT 84323-0525

District Court Clerk

By: Kathi Johnston
Kathi Johnston,
Deputy Clerk

INC

L. Brent Hoggan (#1512)
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

NORVAL R. JONES and DELORES S. JONES, Plaintiff, vs. MICHAEL J. ARAMBEL, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. 930000077 CV

This matter came on for trial pursuant to notice at 9:00 o'clock a.m. July 7, 1994 in the Courtroom in the Hall of Justice, Logan, Cache County, Utah, the Honorable Ben H. Hadfield presiding. The Plaintiffs were present in person and were represented by their attorneys, Olson & Hoggan, P.C., L. Brent Hoggan. The Defendant was present in person and was represented by his attorney, Gregory Skabelund. Witnesses were sworn and testified, documentary evidence was presented, the case was argued and briefed to the Court and the Court having heard the evidence, having examined the Memorandum of the parties and being fully advised in the premises, now makes and enters the following:

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FINDINGS OF FACT:

1. Under date of July 21, 1989 the Plaintiffs as Lessor entered into a written Lease with the Defendant as Lessee covering

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April 14, 1995

premises consisting of land, a milking parlor, milking equipment, two (2) hay sheds, milk cow lounging sheds, corrals, a silo, a commodity shed, a tenant house and various items of farm machinery and equipment. Said property will be referred to hereinafter as the Leased Premises.

2. The term of the Lease was for five (5) years beginning **September 1, 1989 and terminating at midnight on August 31, 1994.**

3. By the terms of the Lease, the Defendant agreed to pay Plaintiff monthly rental of $1,600.00 each month beginning October 1, 1989 and continuing on the 1st day of each month thereafter through and including September 1, 1994.

4. Under the terms of the Lease, on any payment which was due which was not made on the due date or within five (5) days **thereafter, Lessee agreed to pay a late charge of five percent (5%)** of the unpaid amount of such installment.

5. Under the terms of the Lease, the Defendant agreed to care for and maintain the improvements constituting part of the Leased Premises and all equipment constituting a part of the Leased Premises in their condition as at the beginning of the Lease, reasonable wear and tear accepted. Defendant further covenanted under the terms of the Lease to promptly repair in a workmanlike manner all damage to improvements and all equipment constituting a part of the Lease Premises at Defendant's sole cost and expense.

6. The Court finds that the Lease is valid and enforceable and was never terminated or modified by the parties either specifically or by a course of dealing between Plaintiffs and Defendant.

7. The Defendant defaulted in the Lease by, among other things, failing to pay monthly rental payments thereon after July 1, 1992 and by failure to keep the improvements on the Leased Premises in good order and by failure to care for and maintain the improvements on the premises and by abandoning the Leased Premises at or about the time Defendant ceased paying rental payments on the Lease.

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8. The Plaintiffs, with the express consent of Defendant, used one (1) of the corrals and the hay barn on the Leased Premise subsequent to Defendant's vacating the same and sold the tenant house. The reasonable rental for the corral used by the Plaintiffs was $1,400.00, the reasonable value of the use of the hay barn by the Plaintiffs was $2,000.00 and interest earned by Plaintiffs on the proceeds from the sale of the tenant house from the time sold to the termination of the Lease is $225.00, making a total offset to which Defendant would be entitled for sums owing by Defendant to Plaintiffs under the Lease is $3,650.00.

9. The Court finds that Plaintiffs had a continuing expectation that Defendant would return to and use the Leased Premises and for this reason failed to relet the premises and thereby mitigate their damages. The Court finds that this expectation on the Plaintiffs' part was reasonable but not for a period exceeding one (1) year from the date of the initial breach. Thereafter, the Court finds that it would have been reasonable for Plaintiffs to seek other renters or to find alternate ways of mitigating their damages.

10. Based upon the foregoing findings of the Court, the Court determines that the rentals due under the Lease for a period of one (1) year after Defendant stopped making rental payments is the sum of $19,200.00 plus interest at ten percent (10%) from the date due until paid and late charges. Interest accrued to April 1, 1995 totals $4,239.94 and late charges total $960.00.

11. The Court finds that notwithstanding Plaintiffs' claim that the damages to the Leased Premises caused by or as a result of the Defendant's unreasonable use of the same totaled $8,263.00, the actual sum of the claims were for replacement costs of old equipment and that under the circumstances, reasonable compensation for improvements damaged by the Defendant on the Leased Premises is $5,980.00 plus interest thereon from July 1, 1992 at the rate of ten percent (10%) per annum Interest accrued to April 1, 1995 is $1,644.49.

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12. The Court finds that the Lease provides for the recovery of attorney's fees in the event of a default. The Court further finds that the Plaintiffs are the prevailing party in this action and determines that a reasonable attorney's fee for the period through the trial of this case is $5,305.23.

13. The Court further finds that Plaintiffs are entitled to their costs upon filing an appropriate cost bond and, further, are entitled reasonable fees and costs hereafter incurred and documented until ultimate satisfaction of this Court's judgment.

Based upon the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW:

1. That Judgment should enter in favor of Plaintiffs and against Defendant for rentals due and unpaid in the amount of $19,200.00 plus late charges of $960.00 and interest to April 1, 1995 in the amount of $4,239.94 or a total of $24,299.94 less mitigation of $3,650.00 for Plaintiffs' use of the corral barn and for the sale of the tenant house for a net amount of lease payments, interest and late charges of $20,749.94.

2. Judgment should enter against Defendant for damages to the Leased Premises in the amount of $5,980.00 plus interest thereon to April 1, 1995 in the amount of $1,644.49.

3. Judgment should be in favor of Plaintiffs and against Defendant for $5,305.23 in attorney's fees through the trial of this case plus their costs and that judgment should provide that Plaintiffs are entitled to Judgment for such further costs and attorney's fees as Plaintiffs may incur from and after the date of Trial and until said Judgment is satisfied.

Let Judgment enter accordingly.

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DATED this 14 day of April, 1995.

Ron H. Hadfield
District Court Judge

MAILING CERTIFICATE

I hereby certify that I mailed an exact copy of the foregoing Findings Of Fact And Conclusions Of Law, to Defendant's Attorney, Gregory Skabelund, at 2176 North Main, Logan, Utah 84321, postage prepaid in Logan, Utah, this 29th day of March, 1995.

L. Brent Hoggan

LBH/jones.fof
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

NORVAL R. JONES and DELORES S. JONES, Plaintiff, vs. MICHAEL J. ARAMBEL, Defendant.	JUDGMENT AND DECREE Case No. 930000077 CV

This matter came on for trial pursuant to notice at 9:00 o'clock a.m. July 7, 1994 in the Courtroom in the Hall of Justice, Logan, Cache County, Utah, the Honorable Ben H. Hadfield presiding. The Plaintiffs were present in person and were represented by their attorneys, Olson & Hoggan, P.C., L. Brent Hoggan. The Defendant was present in person and was represented by his attorney, Gregory Skabelund. Witnesses were sworn and testified, documentary evidence was presented, the case was argued and briefed to the Court and the Court having heard the evidence, having examined the Memorandum of the parties and being fully advised in the premises, and having made and entered its Findings of Fact and Conclusions of Law, now makes and enters the following:

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JUDGMENT AND DECREE

It is hereby ORDERED, ADJUDGED AND DECREED as follows:

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April 14, 199

1. That Judgment be and is hereby entered in favor of Plaintiffs and against Defendant for rentals due and unpaid in the amount of $19,200.00 plus late charges of $960.00 and interest to April 1, 1995 in the amount of $4,239.94 or a total of $24,299.94 less mitigation of $3,650.00 for Plaintiffs' use of the corral barn and for the sale of the tenant house for a net amount of lease payments, interest and late charges of $20,749.94.

2. Judgment is hereby entered in favor of Plaintiffs and against Defendant for damages to the Leased Premises in the amount of $5,980.00 plus interest thereon to April 1, 1995 in the amount of $1,644.49.

3. Judgment is entered in favor of Plaintiffs and against Defendant for $5,305.23 in attorney's fees through the trial of this case plus their costs plus such further costs and attorney's fees as Plaintiffs may incur from and after the date of Trial and until said Judgment is satisfied.

Let Judgment enter accordingly.

DATED this 14 day of April, 1995.

Ben H. Hadfield
District Court Judge

MAILING CERTIFICATE

I hereby certify that I mailed an exact copy of the foregoing Judgment and Decree, to Defendant's Attorney, Gregory Skabelund, at 2176 North Main, Logan, Utah 84321, postage prepaid in Logan, Utah, this 29th day of March, 1995.

L. Brent Hoggan

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

NORVAL R. JONES and DELORES S. JONES, Plaintiff, vs. MICHAEL J. ARAMBEL, Defendant.	JUDGMENT AND DECREE Case No. 930000077 CV

This matter came on for trial pursuant to notice at 9:00 o'clock a.m. July 7, 1994 in the Courtroom in the Hall of Justice, Logan, Cache County, Utah, the Honorable Ben H. Hadfield presiding. The Plaintiffs were present in person and were represented by their attorneys, Olson & Hoggan, P.C., L. Brent Hoggan. The Defendant was present in person and was represented by his attorney, Gregory Skabelund. Witnesses were sworn and testified, documentary evidence was presented, the case was argued and briefed to the Court and the Court having heard the evidence, having examined the Memorandum of the parties and being fully advised in the premises, and having made and entered its Findings of Fact and Conclusions of Law, now makes and enters the following:

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O BOX 525
UTAH 84323-0525
)11 752 1551

ONTON OFFICE
'3 EAST MAIN
O BOX 115
ITON UTAH 84337
)11 257 3885

JUDGMENT AND DECREE

It is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. That Judgment be and is hereby entered in favor of Plaintiffs and against Defendant for rentals due and unpaid in the amount of $19,200.00 plus late charges of $960.00 and interest to April 1, 1995 in the amount of $4,239.94 or a total of $24,299.94 less mitigation of $3,650.00 for Plaintiffs' use of the corral barn and for the sale of the tenant house for a net amount of lease payments, interest and late charges of $20,749.94.

2. Judgment is hereby entered in favor of Plaintiffs and against Defendant for damages to the Leased Premises in the amount of $5,980.00 plus interest thereon to April 1, 1995 in the amount of $1,644.49.

3. Judgment is entered in favor of Plaintiffs and against Defendant for $5,305.23 in attorney's fees through the trial of this case plus their costs plus such further costs and attorney's fees as Plaintiffs may incur from and after the date of Trial and until said Judgment is satisfied.

Let Judgment enter accordingly.

DATED this 14 day of April, 1995.

/S/ BEN H. HADFIELD
Ben H. Hadfield
District Court Judge

MAILING CERTIFICATE

I hereby certify that I mailed an exact copy of the foregoing Judgment and Decree, to Defendant's Attorney, Gregory Skabelund, at 2176 North Main, Logan, Utah 84321, postage prepaid in Logan, Utah, this 29th day of March, 1995.

/S/
L. Brent Hoggan

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IN THE FIRST JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF CACHE, STATE OF UTAH

NORVAL R. JONES and DELORES S. JONES	)	MEMORANDUM DECISION
PLAINTIFFS,	)	CIVIL NO. 930000077
vs.	)	HONORABLE BEN H. HADFIELD
MICHAEL J. ARAMBEL,	)	
DEFENDANT.	)	

This matter comes before the Court pursuant to Defendant's Motion To Alter Or Amend Judgment. The Court has reviewed the Motion, accompanying memorandum, Plaintiff's reply memorandum and Defendant's response.

Defendant's first argument is that Plaintiff failed to mitigate damages and therefore should be awarded no damages. Defendant's argument seems to totally overlook the consequences of Defendant's undisputed breach. A duty to mitigate only arises if a breach occurs. In the typical occurrence, a lessee defaults in rent, a lessor makes efforts to obtain an alternate lessee, and within a reasonable period of time, that alternate lessee is making the rental payments or a portion thereof, thereby mitigating the damages. The Court held in this case, that reasonable mitigation efforts by Plaintiffs should have produced an alternate lessee within one year from the breach. The breach occurred July 1, 1992 when Defendant failed to pay the rent owing.

The Court stands by its original decision concerning the mitigation issue. The Judgment as prepared and entered was, in the Court's view, the correct amount.

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July 7, 1995

Defendant's second point of alleged error claims it was improper to award "post-judgment interest". The argument following this assertion addresses the issue of "pre-judgment interest". Presumably, Defendant's argument is directed to the issue of pre-judgment interest. UCA 15-1-1 (2) provides an interest rate of 10% in circumstances such as the present. Plaintiff was entitled to interest at this rate from the date each amount became due and certain. The general prayer for relief in the Complaint is sufficient to cover the issue of statutory interest.

The third error alleged by Defendant is that Plaintiffs were not entitled to recover their attorneys fees because Plaintiffs had failed to mitigate damages. This argument confuses two separate and distinct issues. The Plaintiffs were awarded attorneys fees due to the Defendant's breach of the Contract. The Plaintiffs failure to mitigate was not, in itself, a breach of the Contract, but rather was an occurrence which limited the amount of Plaintiffs' recovery. The award of attorneys fees and costs is affirmed.

Defendants' Motion To Alter Or Amend Judgment is denied in its entirety. Counsel for Plaintiffs is directed to prepare an Order in conformance herewith.

DATED this 5 day of ~~June~~ July, 1995.

BY THE COURT:

STATE OF UTAH
FIRST DISTRICT COURT
BRIGHAM CITY

Ben H. Hadfield

BEN H. HADFIELD
DISTRICT JUDGE

CERTIFICATE OF MAILING

I certify that on the 6th day of July, 1995, I sent by first class mail a true and correct copy of the attached document to the following:

Brent Hoggan
Olson and Hoggan
88 West Center Street
P. O. Box 525
Logan, UT 84323-0525

Gregory Skabelund
2176 North Main
Logan, UT 84321

District Court Clerk

By: Kathi Johnston
Kathi Johnston,
Deputy Clerk

L. Brent Hoggan (#1512)
OLSON & HOGGAN, P.C.
88 West Center
P.O. Box 525
Logan, Utah 84323-0525
Telephone (801) 752-1551

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

NORVAL R. JONES and DELORES S. JONES, Plaintiffs, vs. MICHAEL J. ARAMBEL, Defendant.	ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT Civil No. 930000077 CV

In this matter the Court made and entered Findings of Fact and Conclusions of Law and a Judgment and Decree on April 14, 1995. On April 24, 1995 the Defendant made a Motion to Alter or Amend the Judgment of the Court entered on April 14, 1995 and, in support of said Motion filed a Memorandum to which counsel for the Plaintiff made a reply and Defendant made response. On the same date as his Motion to Alter or Amend the Judgment Defendant requested a hearing on his Motion. The matter having been fully briefed to the Court, the Court having read and considered the Memoranda of the parties and being fully advised in the premises and having on July 5, 1995 entered a Memorandum Decision in writing and the Court having found and hereby does find that the issues raised by Defendant in his Motion to Alter or Amend Judgment are framed and argued in the Memoranda of the parties and the disposition of Defendant's Motion will not dispose of the issues in the case on the merits with prejudice,

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(801) 257 3885

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NOW THEREFORE, it is hereby ordered, adjudged and decreed as follows:

1. That Defendant's request for a hearing on his Motion to Alter or Amend Judgment be and the same is hereby denied.

2. For the reasons and on the grounds stated by the Court in its Memorandum Decision of July 5, 1995, Defendant's Motion to Alter or Amend Judgment is hereby denied.

DATED this 19th day of July, 1995.

STATE OF UTAH
FIRST DISTRICT COURT
CACHE COUNTY

Ben H. Hadfield
District Court Judge

MAILING CERTIFICATE

I hereby certify that I mailed an exact copy of the foregoing Order Denying Motion to Alter or Amend Judgment to Defendant's Attorney, Gregory Skabelund, at 2176 North Main, Logan, Utah 84321, postage prepaid in Logan, Utah, this 19th day of July, 1995.

Secretary

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(801) 752-9437

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY

STATE OF UTAH

NORVAL R JONES and
DELORES S JONES,

Plaintiff/Appellee,

v.

MICHAEL J ARAMBEL,

Defendant/Appellant.

NOTICE OF APPEAL

Civil No. 930000169

Judge Ben H Hadfield

Notice is hereby given that Defendant/Appellant, Michael J. Arambel, by and through his counsel, Gregory Skabelund, appeals to the Utah Supreme Court the final order of the Honorable Ben H. Hadfield entered in this matter on August 1, 1995. The appeal is taken from the entire judgment.

DATED this 29 day of August, 1995.

GREGORY SKABELUND
ATTORNEY FOR DEFENDANT/APPELLANT

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing NOTICE OF APPEAL in the United States mail, postage prepaid, to the following:

L. Brent Hoggan
OLSON & HOGGAN
88 West Center
P.O. Box 525
Logan, UT 84323-0525

DATED this 29 day of August, 1995.