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Washington Court of Appeals Division III
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No. 23956-0-III

**COURT OF APPEALS, DIVISION III
IN AND FOR THE STATE OF WASHINGTON**

DAVID PITTS,

Appellant,

v.

GORDON H. CRAFTS and JAYMIE V. CRAFTS,

Respondents.

BRIEF OF APPELLANT

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A. Assignments of Error

Assignments of Error

1. The trial court erred in granting Plaintiffs' Motion for Summary Judgment on February 18, 2005.

2. The trial court erred in denying Defendant's Motion For Reconsideration of the court's original decision granting summary judgment, on March 11, 2005.

Issues Pertaining to Assignments of Error

"May an unsecured, nonpriority Chapter 7 bankruptcy creditor evade the effect of the federal statutory injunction against continuation of an action after discharge, simply by demanding specific performance of a penalty or forfeiture provision of a contract which is in default prior to bankruptcy, in lieu of monetary damages?" (Assignments of Error 1 and 2).

"Where a party has previously obtained a judgment for unlawful detainer and damages for breach of contract, including certain contractual penalties arising from the

breaching party's default, may that party's assignee file a second suit for enforcement of other penalty provisions of that same contract, arising out of the same default, notwithstanding the prohibition against claim-splitting?"

(Assignments of Error 1 and 2)

B. Statement of The Case

The underlying lawsuit concerns a 9.83-acre parcel of real property which lies adjacent to a larger 160-acre parcel which plaintiffs Crafts had purchased from Mr. Glen Cloninger (CP 119). Prior to the rulings that are at issue here, legal title to the smaller parcel of real property was held in the name of Betty J. Pitts, now deceased. *Id.* The 9.83-acre parcel was accordingly subject to distribution through decedent's probate estate, under the residuary clause of decedent's June 15, 1990 Last Will And Testament of Ms. Pitts (CP 153). In that residuary clause (identified as section "SEVENTH"), decedent stated, in pertinent part:

"I give, devise and bequeath the rest,
remainder and residue of my estate, of
whatsoever nature and wheresoever
situated, to my sons, DOUGLAS ALLEN

PITTS, LeROY JOSEPH PITTS, and
DAVID MICHAEL PITTS, and my
granddaughter, SHANDA FAWN PITTS,
to be divided equally between them.”

CP 153-154. Because the parcel is less than 10 acres, it is too small for a residence, which reduces its value. Moreover, as a practical matter, it cannot be physically subdivided, because the parcel is already smaller than the minimum amount of acreage for subdivision. CP 154.

The larger 160-acre parcel of property now owned by Crafts was at one time owned by Betty J. Pitts, and was described in section “FIFTH” of her 1990 Last Will And Testament as her “personal residence and ranch located at 14829 N. Burnett Road.” (CP 154) However, Ms. Pitts did not actually enter into a contract for the purchase of the 160 acres from John and Ruth Kennedy until August 1, 1990 (CP 28-37).

At the time Betty Pitts executed her June, 1990 Last Will And Testament, neither Ms. Pitts nor John and Ruth Kennedy held legal title to the 9.83-acre parcel in question. It was not until entry of a Judgment and Decree in Spokane County Superior Court on June 23, 1994 that title to the disputed parcel was confirmed in the Kennedys (CP 22-26); and per the terms of the Settlement Agreement which led to that Judgment

and Decree, Ms. Pitts was given the right to purchase the parcel in question from the Kennedys (CP 24-26). Kennedys executed a separate Quit Claim Deed to Betty J. Pitts for the disputed 9.83 acres on September 26, 1994 (CP 44). However, the only property mentioned in the Warranty Fulfillment Deed from Kennedys to Betty J. Pitts was the original 160 acres (CP 119).

Consistent with the foregoing, the 9.83-acre parcel in question was not part of the 160-acre parcel of property that was described in the deed from Betty Pitts to her son, defendant David Pitts, dated June 29, 1993 (CP 119, 124).

At the time the 160 acres was deeded by Ms. Pitts to David Pitts in 1993, Mr. Pitts was unaware of the provision relating to that same property in his mother's Will (CP 119). In June of 1999, when David Pitts attempted to sell the entire 170 acres to V. Ram Gopal, he learned that he did not have title to the 9.83 acres (CP 120). For that reason, the Statutory Warranty Deed from Mr. Pitts to Mr. Gopal only included the larger 160-acre parcel. *Id.* Unfortunately, this Statutory Warranty Deed was apparently delivered to Mr. Gopal before he executed a corresponding Deed of Trust to secure his obligation to pay the purchase price. *Id.* In August of 1999, after Mr. Pitts became aware of this

discrepancy, he confronted Mr. Gopal, who agreed to return to Mr. Pitts the sum of \$70,000.00, together with the 50 acres on which defendant was then living, in settlement of the dispute. *Id.*

Mr. Pitts received the \$70,000.00, and thought that the matter was settled, but neither the August 16, 1999 “Agreement of Understanding” with Mr. Gopal (CP 129-130), nor any Deed to Mr. Pitts for the 50 acres was ever recorded. CP 120. Instead, the title documents show that Mr. Gopal transferred the entire 160-acre parcel to Kenneth V. Lohmeyer in March of 2000 (CP 120, 132-34), and that Lohmeyer subsequently quit-claimed the property to Partners Development, L.L.C., in lieu of foreclosure, in January of 2001 (CP 120, 136-37). David Pitts was unaware of any of these transactions at the time (CP 120),

On or about November 30, 2001, Glen Cloninger acquired title to the 160 acres from Partners Development, L.L.C. through another foreclosure action (CP 58-59). Mr. Cloninger testified that the disputed parcel had been “mistakenly” omitted from the Deed of Trust (CP 59). At the time of the foreclosure action, David Pitts was still living on the 50-acre portion of the 160 acres that he believed belonged to him by reason of the August 16, 1999 “Agreement of Understanding” with Mr.

Gopal (CP 120). It was not until after the Cloninger foreclosure that defendant Pitts learned that Gopal had never recorded a Deed to the 50 acres as promised, and that Gopal had transferred the entire 160 acres to someone else. *Id.*

On March 14, 2002, threatened with eviction by Mr. Cloninger, defendant David M. Pitts signed a document entitled “Real Estate Lease With Purchase Option” relating to the 160-acre parcel (CP 120, 74-81). By its terms, this document contemplated contemporaneous execution and delivery of a Quit Claim Deed to the subject property, to be held in trust by Mr. Cloninger’s attorney (CP 77-78). The Quit Claim Deed in question was apparently to be forfeited to Mr. Cloninger only in the event defendant defaulted under the Lease and/or failed to exercise the purchase option provided in the “Real Estate Lease With Purchase Option” document. *Id.*

The Quit Claim Deed contemplated by the “Real Estate Lease With Purchase Option” was not executed contemporaneously with the latter document (CP 120). Subsequently, defendant David Pitts refused to execute and deliver a deed to the subject property, in part, because he believed that the property would be given to his brothers from his

mother's estate, and in part, because he felt that he had been forced to sign the Lease agreement under duress. *Id.*

On September 6, 2002, Glen A. Cloninger filed a lawsuit in Spokane County Superior Court against defendant David M. Pitts, seeking to remove Mr. Pitts from the 160 acres, and seeking damages for his breach of the "Real Estate Lease With Purchase Option." CP 121, 139-152. On September 30, 2002, Judgment was entered against Mr. Pitts, in the amount of \$3,248.41. *Id.*

The legal description contained in the on April 1, 2003 Statutory Warranty Deed granted by Glen A. Cloninger and Pamela M. Cloninger to plaintiffs Gordon H. Crafts and Jaymie V. Crafts, which included only the 160 acres, was identical to the legal description in the Trustee's Deed that was obtained by Mr. Cloninger on or about November 30, 2001. CP 72, 84. On September 24, 2003, Gordon and Jaymie Crafts received a separate "Assignment of Interest" from Mr. Cloninger, that specifically related only to the 9.83-acre parcel which is the subject of this action (CP 60, 86).

That same date, Crafts initiated the lawsuit in the case at bar, seeking to force defendant David Pitts to execute and deliver to plaintiffs a Quit Claim Deed to the 9.83-acre parcel, relying upon the March 14,

2001 “Real Estate Lease With Purchase Option.” The basis for the relief requested, as described in paragraph 2.7 of the Complaint, was the assertion that “Defendant David Pitts defaulted under the Agreement by failing to make required monthly payments and also failed to exercise the option to purchase.” CP 5.

On March 18, 2004, defendant David Pitts filed for protection under Chapter 7 of the Bankruptcy Code; and in that bankruptcy filing, defendant listed both Glen Cloninger and Gordon and Jaymie Crafts among the creditors holding unsecured nonpriority claims, identifying this claim as a pending lawsuit (CP 121). Mr. Pitts did not include the parcel of property in question as an asset of the bankruptcy estate because he believed at the time that his siblings would receive the property – title to which was at that time held in the name of Betty J. Pitts – from his mother’s probate estate (CP 121), which had been pending in Spokane County Superior Court since November of 1999 (CP 153). Mr. Pitts received his Chapter 7 Discharge on June 18, 2004 (CP 121).

On February 18, 2005, the trial court granted the Motion for Summary Judgment file by Mr. and Mrs. Crafts, and ordered David Pitts to execute a Quit Claim Deed for the disputed property.

CP 189-191. On March 11, 2005, the trial court denied Mr. Pitts' Motion For Reconsideration of the court's original decision granting summary judgment. CP 207-208. On March 21, 2005, Mr. Pitts filed his Notice of Appeal of the foregoing rulings. CP 209-216.

C. Argument

I. THE STANDARD OF REVIEW OF THE LOWER COURT'S RULINGS IS *DE NOVO*.

An appellate court reviews a lower court ruling granting summary judgment on a de novo basis. *Int'l Bhd. of Elec. Workers, Local Union No. 46 v. Trig Elec. Constr. Co.*, 142 Wn.2d 431, 434-35, 13 P.3d 622 (2000), *cert denied*, 532 U.S. 1002 (2001). In doing so, the appellate court views the facts in the light most favorable to the nonmoving party. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Summary judgment is proper only where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c).

**II. THE TRIAL COURT'S SPECIFIC ENFORCEMENT
OF A PENALTY PROVISION OF A CONTRACT IN
DEFAULT PRIOR TO BANKRUPTCY VIOLATED
THE CHAPTER 7 STATUTORY PROHIBITION
AGAINST POST-DISCHARGE ACTIONS BY
CREDITORS.**

**1. A Discharge Under Chapter 7 Operates As An
Injunction Which Prohibits The Continuation
Of An Action Or An Act To Collect, Recover Or
Offset A Debt.**

As noted above, David Pitts received his Chapter 7 discharge on June 18, 2004. 11 U.S.C. §524 provides, in pertinent part:

§ 524. Effect of discharge

(a) A discharge in a case under this title [11 USCS §§ 101 seq.]-

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title [11 USCS § 727, 944, 1141, 1228, or 1328], whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived;

11 U.S.C. §101(12) defines a “debt” as any liability on a claim. 11

U.S.C. §101(5) defines a “claim” as any:

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

Crafts have contended that their cause of action for specific performance is not a “claim” under 11 U.S.C. §101(5), and therefore not a “debt” under §101(12) or §524. However, as will be demonstrated, this contention is inconsistent with both the letter and purpose of the Bankruptcy Code.

2. Crafts' Action For Enforcement of A Forfeiture
/ Penalty Provision of A Prepetition Contract,
Constitutes A "Claim" And Therefore A "Debt"
Which Was Discharged In David Pitts'
Bankruptcy.

The March 14, 2001 "Real Estate Lease With Purchase Option" (hereinafter, "Lease") was not a contract for purchase of the disputed 9.83-acre parcel of land. Instead, it was an agreement for a six-month lease of the separate 160 acres of property, together with an option to purchase that larger parcel of property.

The payments required under the Lease were \$1,000.00 per month (CP 74), and time was "of the essence in the performance of all of the provisions" of the agreement (CP 76). In the event Lessee David Pitts failed to make a monthly payment by the 15th of the month, he became obligated to pay a "late charge," in the amount of \$500.00 (CP 74). In addition to this fairly Draconian penalty, the Lease provided that a default would authorize release of the Quit Claim Deed from Lessor's counsel to the Lessor (CP 77-78). Finally, the Lease provides, "

“In the event of a default in the payment of rent which continues for more than seven days after written notice of termination given by Lessor to Lessee, Lessor may, at his option and without prejudice to the exercise of any other remedies which may [sic] available to him, treat the lease as terminated and all rights hereunder forfeited by Lessee.”

CP 74 [emphasis supplied]. Other remedies that would have been available to the Lessor upon defendant Lessee’s failure to timely pay rent would of course have included a cause of action to recover unpaid rent, together with any late charges or other charges authorized under the Lease. In point of fact, Mr. Cloninger pursued those remedies in a separate lawsuit, and obtained a Judgment thereon in the amount of \$3,248.41 against David Pitts, on September 30, 2002 (CP 121).

As noted previously, the basis for specific enforcement of the penalty clause relating to forfeiture of Mr. Pitts’ interest in the 9.83-acre parcel was the assertion in Paragraph 2.7 of Crafts’ Complaint that

“Defendant David Pitts defaulted under the Agreement by failing to make required monthly payments and also failed to exercise the option to purchase.”

CP 5. Although Crafts did not specifically request monetary damages in their Complaint, their Prayer For Relief did include a request for judgment “Awarding plaintiffs any further or additional relief which the court finds equitable, appropriate or just.” *Id.*

Under federal bankruptcy law, a “claim” is not limited to a demand for payment of money damages. As noted above, it also includes a right to an equity remedy for breach of performance if the breach gives rise to an alternative right to payment of money damages.

In other words,

The question to be dealt with is whether, as a matter of state law, the non-breaching party to the contract has a right to obtain a money judgment, even though he also has a right to obtain an equitable judgment. If so, the remedy becomes a contingent claim and can be discharged in the bankruptcy. [emphasis supplied]

In Re Aslan, 65 B.R. 826, 831 (1986).

Under Washington law, the decision to grant specific performance of a contract provision is neither automatic nor inevitable.

On the contrary, the Washington Supreme Court has stated,

“Whether the performance of a contract will be specifically enforced by the court depends upon the circumstances of the particular case. And the granting

or refusing of the remedy has been said to be a matter resting within the sound and legal discretion of the court.”

Winckler v. Strickler, 79 Wash. 635, 639, 127 Pac. 206 (1912), quoting *Bower v. Bagley*, 9 Wash. 642, 38 Pac. 164 (1894).

More importantly, the *Winckler* court also held that “...it is for the sound and legal discretion of the court to determine whether specific performance will be decreed or damages awarded.” 79 Wash. at 639. More recently, our Supreme Court has held that, even where the only remedy expressly requested by a plaintiff is equitable relief, the trial court has the right to award whatever relief the facts warrant, including but not limited to monetary damages. *Zastrow v. W. G. Platts, Inc.*, 57 Wn.2d 347, 350, 357 P.2d 162 (1960), *opinion amended on denial of rehearing*, 360 P.2d 354. In so holding, the Court observed that the prayer for relief had requested not only specific performance, but also, “such other and further relief as to the court seems meet and proper,” much like the prayer for relief in the case at bar. *Id.*

In pursuing their motion for summary judgment, Crafts did not deny that the property interest in question had some value, although its precise value had not yet been determined (in part, because of the uncertainty whether Mr. Pitts’s interest in the disputed parcel was merely

an undivided 25%, along with two siblings and a niece). Clearly, had the provision in the Lease Agreement provided for only a forfeiture of a sum of money upon a default, or had the Crafts expressly requested damages in the amount of the value of the parcel in question, the post-bankruptcy collection of that forfeiture would have been prohibited by 11 U.S.C. §524.¹

Because the Crafts (prior to the filing of the bankruptcy petition) had the alternative of seeking damages against David Pitts for his refusal to honor the terms of the penalty provisions of the Lease agreement, the mere fact that Crafts elected to seek specific enforcement of the penalty in lieu of monetary damages should not logically empower them to circumvent the broad prohibition of 11 U.S.C. §524 against continuation of an action to collect, recover or offset a debt. If that were not the case, then the exception to the general prohibition would be so broad as to render the prohibition itself a virtual nullity.

This court should now hold that trial court erred in granting plaintiffs' motion for summary judgment, in that the continued

¹ Not surprisingly, counsel for Crafts did not bring to the attention of the trial court any case in which a bankruptcy court has held that an unsecured creditor's post-bankruptcy enforcement of any penalty or forfeiture provision of a contract in which the default occurred prior to bankruptcy would ever be permitted, nor are counsel for the appellant aware of any such holding.

prosecution of plaintiff's prepetition lawsuit was in clear violation of the injunction granted upon discharge by 11 U.S.C. §524. This matter should be remanded to the lower court for ultimate dismissal of the Superior Court action, consistent with that holding.

III. THE PENDING LAWSUIT FOR SPECIFIC ENFORCEMENT OF A CONTRACT PENALTY PROVISION VIOLATED THE PROHIBITION AGAINST CLAIM-SPLITTING.

1. The Practice of Filing Two Separate Lawsuits Based On the Same Event Is Prohibited Under Washington Law.

Washington courts have long recognized and enforced a rule precluding claim splitting, or the practice of filing two separate lawsuits based on the same event. *Landry v. Luscher*, 95 Wash. App. 779, 780 (1999) (*citation omitted*). The rule acts to prevent a claimant from splitting a single cause of action or claim and pursuing the split claim in successive suits, thus preventing duplicitous suits and situations in which a defendant would be forced to incur the cost and effort of defending

multiple suits. *Id* at 782 (*citation omitted*). The rule is “in accord with the general rule that if an action is brought for part of a claim, a judgment obtained in the action precludes the plaintiff from bringing a second action for the residue of the claim.” *Id*.

The prohibition against claim splitting is also tied to the concept of *res judicata*, which, if its elements are satisfied, will act to extinguish a subsequent claim by a plaintiff even if such plaintiff is prepared “(1) to present evidence, grounds or theories of the case not presented in the first action, or (2) to seek remedies or forms of relief not demanded in the first.” *Landry* at 783 (*citing* Restatement (Second) of Judgments §25 (1982)).

2. **Crafts Were Not Precluded From Seeking Enforcement of the Contractual Penalty Provision In Question In the Context of Their Prior Suit For Unlawful Detainer.**

In the case at bar, Mr. and Mrs. Crafts, whose rights were derived from -- and therefore limited by -- the rights of their predecessor and assignor, Glen A. Cloninger, sought specific enforcement of one of the penalty clauses contained in the March 14, 2001 “Real Estate Lease With

Purchase Option,” notwithstanding the fact that Mr. Cloninger had previously filed suit against David Pitts for breach of that same agreement in a previous Superior Court lawsuit, on September 6, 2002. CP 121, 139-152. Citing two decisions of the Court of Appeals in *Lees v. Wardall*, 16 Wn.App. 233, to 37, 554 P.2d 1076 (1976) and in *Kessler v. Nielsen*, 3 Wn.App. 120, 123, 472 P.2d 616 (1970) Crafts argued below – and the trial court apparently accepted this argument – that the rule prohibiting claim-splitting did not apply, because the original action was for unlawful detainer, and the current cause of action for enforcement of a default penalty would have been precluded by statute.

This contention by Crafts was neither an accurate statement of the law, nor was it an accurate description of what actually occurred in the earlier lawsuit. Addressing first the statement of the law, the remedies available under Washington’s unlawful detainer statute are not strictly limited to recovery of possession of the property. On the contrary, where an alleged unlawful detainer exists after default in the payment of rent, the court or jury under Washington’s unlawful detainer statute is directed to “assess the damages arising out of the tenancy” and “find the amount of any rent due,” after which

“... judgment shall be rendered against the defendant guilty of the forcible entry, forcible detainer or unlawful detainer for the amount of damages thus assessed and for the rent, if any, found due, and the court may award statutory costs and reasonable attorney’s fees.”

RCW 59.18.410.

The cases cited by Crafts in their argument before the trial court are not in any way inconsistent with the foregoing, nor do they have anything in common with the facts of the case at bar. In *Lees v.*

Wardall, supra, the pertinent issue before the Court was as follows:

"ISSUE TWO. Can parties who do not seek to recover possession of property bring a statutory forcible entry action?"

16 Wn.App. at 234. The answer to that issue was given by the Court on the following page of the opinion:

"CONCLUSION. A forcible entry action is a summary statutory proceeding in derogation of the common law. It cannot be brought unaccompanied by a claim to recover possession of real property."

16 Wn.App. at 235. In that case, the tenants had moved out of the property in question, and after moving out, they had filed a forcible entry action against the landlord, without seeking to recover possession

of the leased premises. The appellate court did not hold that the tenants would have been precluded from seeking other damages, if they had also sought to recover possession of the premises. It merely upheld the decision of the trial court to the effect that a request for possession was an essential element of a forcible entry cause of action, and without that element, the trial court lacked jurisdiction over the tenants' forcible entry claim.

In, *Kessler v. Nielsen, supra*, the issue before the Court of Appeals was whether an unlawful detainer action became moot where the right to possession of the premises was resolved after suit was filed, but before judgment was rendered. The Kessler court held that, where the plaintiff is no longer in a position to litigate the right of possession, no recovery may be had for the "statutory incidents" that could normally be pursued in an unlawful detainer action. 3 Wn.App. at 127. The appellate court did not hold that the plaintiff would have been precluded from seeking other damages, if litigation of the right of possession issue had not become moot.

In the case at bar, there was no suggestion that Mr. Cloninger ever abandoned his demand for possession of the leased premises in the first lawsuit, nor was there any indication that Mr. Cloninger's demand

became moot prior to entry of Judgment against David Pitts in September of 2002. Indeed, if the demand for possession had become moot, then Mr. Cloninger would have had no basis upon which to recover the rent, double damages and late fees that he had also demanded in his Complaint. See *Kessler v. Nielsen, supra*.

In fact, the uncontroverted evidence before the trial court in the case at bar established that Mr. Cloninger, the plaintiff in Spokane County Superior Court Cause No. 02-205454-9, asserted in his Complaint For Unlawful Detainer that he was entitled to recover not only possession of the premises, but also, unpaid rent in the amount of \$1,000.00, a \$500.00 penalty to which he was contractually entitled as a "late charge" by reason of defendant's failure to timely pay rent, and double damages. CP 121, 142-144. Consistent with these claims, Mr. Cloninger was indeed awarded judgment against defendant David M. Pitts, on September 30, 2002, in the sum of \$3,248.41. CP 121.

As mentioned previously, the prohibition against claim splitting and principles of *res judicata* will operate to extinguish a second lawsuit by a plaintiff even if such plaintiff is prepared "...to seek remedies or forms of relief not demanded in the first." *Landry v. Luscher, supra*, at 783 (citing Restatement (Second) of Judgments §25 (1982)).

Mr. and Mrs. Crafts cannot avoid this result by characterizing their current lawsuit as a separate claim in equity. Just as their predecessor sought enforcement of the draconian Lease penalty provision which provided for a \$500 "late fee" upon a relatively minor default in the terms of the Lease, so too, could their predecessor have sought enforcement of the penalty provision that is at issue in this subsequent lawsuit. By failing to do so, Mr. Cloninger subjected himself and his successors in interest to application of the doctrine against claim-splitting.

This court should now hold that trial court erred in granting plaintiffs' motion for summary judgment, in that separate prosecution of the claim for specific performance of one contractual penalty provision was in clear violation of the prohibition against claim-splitting, given the previous prosecution of other claims, arising from the same contract. This matter should be remanded to the lower court for ultimate dismissal of the Superior Court action, consistent with that holding.

D. Conclusion

To the extent that there exist any uncertainties regarding factual issues, all such uncertainties must be resolved in favor of Mr. Pitts, the

appellant herein, who was the non-moving party below. In any event, for the reasons stated in Section C, the rulings of the trial court granting Crafts' motion for summary judgment, and denying David Pitts' motion for reconsideration should be reversed, and this matter should be remanded to the trial court with direction to dismiss the underlying lawsuit.

RESPECTFULLY SUBMITTED, this 6th day of June, 2005.

RANDALL & DANSKIN, P.S.

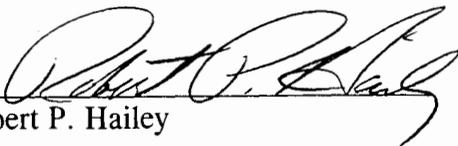
By: 
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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing document on the 6th day of June, 2005, addressed to the following:

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