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No. 67539-7-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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FINANCIAL PACIFIC LEASING, LLC,  
a Washington limited liability company,

Respondent

v.

LAW OFFICES OF DAVID A. SHARP, P.A., a Florida corporation,  
DAVID A. SHARP, individually, and MARIANNE SHARP,

Appellants,

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On Appeal from the Superior Court of King County  
The Honorable J. Wesley Saint Clair  
Cause No. 10-2-30494-1-KNT

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APPELLANT'S REPLY BRIEF

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**Table of Contents**

I. INTRODUCTION ..... 1

II. ARGUMENT..... 2

    A. Mr. Sharp did not accept the copier..... 2

    B. Financial Pacific’s attempt to disclaim RCW 62A.2A-515 and  
    adopting its own acceptance process is unenforceable. .... 4

    C. Mrs. Sharp did not guarantee the Lease..... 10

    D. Mr. Sharp did not misrepresent acceptance of the copier..... 10

III. SUMMARY ..... 15

Table of Authorities

**Cases**

*Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wash.2d 217,  
222, 797 P.2d 477 (1990)..... 8

*Cox v. Lewiston Grain Growers, Inc.*, 86 Wash.App. 357, 368, 936 P.2d  
1191 (1997)..... 8

*General Electric Capital Corp. v. National Tractor Trailer School, Inc.*,  
175 Misc.2d 20, 667 N.Y.S.2d 614 (N.Y.Sup.,1997)..... 5

*Info. Leasing Corp. v. GDR Investments, Inc.*, 152 Ohio App.3d 260, 265,  
787 N.E.2d 652, 656 (2003)..... 3

*Liebergesell v. Evans*, 93 Wash.2d 881, 613 P.2d 1170 (1980) ..... 11, 12

*Nelson v. McGoldrick* 127 Wash.2d 124, 131, 896 P.2d 1258,  
1262 (1995)..... 7

*Peter Pan Seafoods, Inc. v. Olympic Foundry Co.* 17 Wash.App. 761,  
770, 565 P.2d 819, 825 (1977)..... 12, 14

**Statutes**

RCW 19.36.010 ..... 10

RCW 62A.1-102 ..... 9

RCW 62A.1-204 ..... 4, 5, 6

RCW 62A.2A-108 ..... 7

RCW 62A.2A-407 ..... 3, 6

RCW 62A.2A-503..... 8

RCW 62A.2A-515 ..... 4, 5, 7, 8, 9

**Other Authorities**

Article 2A of the Uniform Commercial Code ..... 3

## I. INTRODUCTION

Financial Pacific Leasing, LLC (“Financial Pacific”), acknowledges, as it must, that Mr. Sharp did not receive the copier that was the subject of the finance lease (the “Lease”). Financial Pacific nevertheless contends that Mr. Sharp is liable for the lease payments because Mr. Sharp somehow accepted a copier that was never delivered to him. Financial Pacific Leasing contends that Mr. Sharp lied to Financial Pacific when Mr. Sharp stated that he had received the copier, that it was in good working order, and that Financial Pacific could pay the vendor. Mr. Sharp adamantly disputes that he made such statements. On April 22, 2010, Mr. Sharp specifically informed Financial Pacific that he believed that the copier was being delivered, not that it had been delivered. (CP 81) He did not state that he had received the copier, he did not say that the copier was in good working order, and he did not say that Financial Pacific could pay the vendor. In short, Mr. Sharp did not “accept” the copier as was required by the Lease.

Alternatively, Financial Pacific argues that Mr. Sharp unreasonably delayed notifying Financial Pacific that the copier had not been delivered. Again, the record does not support such a finding. Instead, the record demonstrates that Mr. Sharp made repeated attempts to contact

Gary Merrill, who was a sales representative with ImageSource and who had assisted Mr. Sharp with the purchase of the copier. (CP 81) The record also demonstrates that Mr. Sharp made repeated attempts to contact ImageSource. (CP 81) Unfortunately, those efforts were unsuccessful. Mr. Sharp also contacted Financial Pacific prior to the date on which the first lease payment was due. (CP 81-82). What the record fails to establish is when Mr. Sharp received contact information from Financial Pacific. There is no evidence that Mr. Sharp had information which would have enabled him to contact Financial Pacific sooner than the date on which he contacted them. Considering the facts as presented in this case, there was no delay in contacting Financial Pacific.

In accepting Financial Pacific's arguments, and entering summary judgment, the Superior Court disregarded controlling authority and erred in finding the defendants liable on the Lease. This Court should remedy the Superior Court's errors by reversing the Court's order granting summary judgment and allow this matter to proceed to trial on the merits.

## **II. ARGUMENT**

### **A. Mr. Sharp did not accept the copier.**

The thrust of Financial Pacific's argument is that the lease was an enforceable contract and that Mr. Sharp breached the lease when he failed to make the required lease payments. The record does not support this

argument. RCW 62A.2A-407 provides that the lessee's obligation to make the lease payments is contingent upon the lessee's acceptance of the goods. In other words, the "hell or high water" provisions of a finance lease do not become operable and a lease does not become irrevocable until such time that the leased equipment has been accepted. Mr. Sharp did not become obligated to make the lease payments because he did not and could not accept a copier that was never delivered to him.

Section 3 of the Lease specifically states that "it is the intent of both parties to the Lease that it qualify as a statutory finance lease under Article 2A of the Uniform Commercial Code". Accordingly, the Lease is subject to the provisions of RCW 62A.2A-407. While Washington courts have yet to interpret RCW 62A.2A-407, courts from other jurisdictions which have considered this issue have uniformly held that acceptance cannot occur until the lessee has had a reasonable time to inspect the leased goods. *See generally Info. Leasing Corp. v. GDR Investments, Inc.*, 152 Ohio App.3d 260, 265, 787 N.E.2d 652, 656 (2003), holding that the requirement that the lessee be given a reasonable time cannot be circumvented.

Clearly, applying these standards, acceptance of the copier did not and could not occur because the copier was never delivered to Mr. Sharp's office. Mr. Sharp never had an opportunity to inspect the copier to

determine whether it was functioning properly, let alone a reasonable time to inspect the copier. This conclusion is supported by RCW 62A.2A-515, which similarly provides that acceptance does not occur until the lessee has had a reasonable time to inspect the goods.

**B. Financial Pacific's attempt to disclaim RCW 62A.2A-515 and adopting its own acceptance process is unenforceable.**

Financial Pacific contends that RCW 62A.2A-515 is not applicable because the parties altered the provisions of the UCC by agreement by agreeing on how Mr. Sharp was to accept the copier. Relying upon Section 6 of the Lease, Financial Pacific further contends that it effectively disclaimed all warranties including RCW 62A.2A-515. According to Financial Pacific, acceptance occurs under the Lease when a Financial Pacific representative completes the Verification Certificate. (CP 60-62).

Disregarding the fact that Mr. Sharp disputes that he informed the Financial Pacific representative that he had received the copier, that Mr. Sharp disputes that he ever stated that the copier was in good working order, and that Mr. Sharp disputes that he informed Financial Pacific that it could pay the vendor, the Verification Certificate, and Financial Pacific's acceptance procedure is void and unenforceable because it did not allow a reasonable time for inspection of the copier as required by RCW 62A.1-204.

RCW 62A.1-204(1) provides that “[w]henver this Title requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.” Washington’s Official Comment 1, RCW 62A.1-204, explains that in subsection (1) “provision is made for disregarding a clause which whether by inadvertence or overreaching fixes a time so unreasonable that it amounts to eliminating all remedy under the contract.” Financial Pacific’s acceptance procedure is overreaching.

The Lease does not establish a time within which the lessee must accept the leased equipment. Instead, Financial Pacific argues that Mr. Sharp accepted the copier in his telephone conversation with the Financial Pacific representative. (Res. Br. 18) According to the Verification Statement, the used copier was delivered the same day on which the telephone conversation occurred. (CP 62). Therefore, had the copier even been delivered, Mr. Sharp would have had less than one day within which to inspect the copier and determine that it was in good working order. This is not a reasonable time that is required by RCW 62A.2A-515 (1). *See generally, General Electric Capital Corp. v. National Tractor Trailer School, Inc.*, 175 Misc.2d 20, 667 N.Y.S.2d 614 (N.Y.Sup.,1997) holding that acceptance of copying machine, under equipment lease, did not occur at time of delivery even though lease so specified; agreement terms fixing

manifestly unreasonable time for complying with requirements under UCC were void, and providing for acceptance at delivery did not allow reasonable time for inspection of goods as required under the UCC.

The Financial Pacific lease, which denies a lessee a reasonable time to inspect the leased equipment, is therefore overreaching because it eliminates all remedies under a finance lease. This is due to the draconian “hell or high water” provisions of a finance lease. Once accepted, the lease contract becomes irrevocable. RCW 62A.2A-407(1). The only remedy available to a lessee in a finance lease is to refuse acceptance of the leased equipment and therefore avoid its irrevocable obligations. Any provision in a finance lease that unreasonably restricts or otherwise denies a lessee a reasonable time to inspect the leased equipment should be disregarded by RCW 62A.1-204, because it eliminates one of the very few rights that a lessee may have under the finance lease.

Financial Pacific’s acceptance process should also be disregarded because it is substantively unconscionable. Any clause in a finance lease that unreasonably restricts or otherwise denies a lessee a reasonable time to inspect the leased equipment is unconscionable and unenforceable

pursuant to RCW 62A.2A-108(1).<sup>1</sup> A clause is substantively unconscionable if it is one sided or overly harsh. *See generally Nelson v. McGoldrick* 127 Wash.2d 124, 131, 896 P.2d 1258, 1262 (1995). In this case, Financial Pacific's disclaimer of RCW 62A.2A-515 coupled with its acceptance process is unconscionable. Financial Pacific's acceptance process is unconscionable because it is one sided and overly harsh because it deprives a finance lessee the meaningful opportunity of inspecting the leased equipment and thereby deprives the lessee an opportunity to decide whether to accept the equipment. By disclaiming RCW 62A.2A-515, and then imposing unreasonable restrictions on a lessee's opportunity to inspect the leased equipment and thereby make an informed decision as to whether to accept the leased equipment, Financial Pacific is attempting to deny a lessee any and all rights under Washington's Uniform Commercial Code. That is the very nature of an unconscionable clause.

Furthermore, even when conscionable, an exclusionary clause may be unenforceable if the limited or exclusive remedy fails of its essential

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<sup>1</sup> West's RCW 62A.2A-108 provides:

(1) If the court as a matter of law finds a lease contract or any clause of a lease contract to have been unconscionable at the time it was made the court may refuse to enforce the lease contract, or it may enforce the remainder of the lease contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

purpose. RCW 62A.2A-503(2)<sup>2</sup>; *see also Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wash.2d 217, 222, 797 P.2d 477 (1990); *Cox v. Lewiston Grain Growers, Inc.*, 86 Wash.App. 357, 368, 936 P.2d 1191 (1997). 1. A limited or exclusive remedy fails of its essential purpose if it deprives a party of the substantive value of its bargain. *Cox*, 86 Wash.App. at 370, 936 P.2d 1191. For example, in *Cox*, the limited remedy of a refund failed of its essential purpose when, due to a latent defect, the seeds purchased did not produce an adequate crop; because the plaintiff could not have discovered the problem until after planting the seeds and waiting some period of time, a refund of the purchase price did not offer a sufficient remedy. *Id.*

As previously explained, Financial Pacific is attempting to deny Mr. Sharp one of the few rights that is afforded a finance lessee, namely refusing acceptance of the leased equipment. Financial Pacific argues that the Lease effectively disclaimed RCW 62A.2A-515, and therefore the case law which uniformly holds that acceptance cannot occur until the lessee has had a reasonable time to inspect the leased goods is not applicable. In

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<sup>2</sup> RCW 62A.2A-503(2) provides:

Resort to a remedy provided under this Article or in the lease agreement is optional unless the remedy is expressly agreed to be exclusive. If circumstances cause an exclusive or limited remedy to fail of its essential purpose, or provision for an exclusive remedy is unconscionable, remedy may be had as provided in this Article.

its place, Financial Pacific argues that acceptance of the leased equipment is governed by the Verification Statement. The Verification Statement and the acceptance process employed by Financial Pacific, however, deny a lessee any meaningful opportunity to inspect the leased equipment to determine whether to accept the leased equipment. The denial of a meaningful opportunity to inspect the leased equipment and therefore the exercise its right to not accept the equipment deprives the lessee of a substantive value. The Verification Statement and the acceptance process employed by Financial Pacific are unenforceable. Mr. Sharp should be permitted an opportunity to reasonably inspect the copier as required by RCW 62A.2A-515.

Financial Pacific's reliance upon RCW 62A.1-102(3) is therefore misplaced. RCW 62A.1-102(3)<sup>3</sup> only allows the parties to vary the provisions of the UCC by agreement if such terms are not manifestly unreasonable. The Verification Statement and the acceptance process

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<sup>3</sup> RCW 62A.1-102(3) provides:

The effect of provisions of this Title may be varied by agreement, except as otherwise provided in this Title and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Title may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

employed by Financial Pacific, which deny a lessee a reasonable opportunity to inspect the leased equipment, are manifestly unreasonable.

**C. Mrs. Sharp did not guarantee the Lease.**

The record fails to establish that Mrs. Sharp signed the guaranty and guaranteed the lease payments. Both Mr. and Mrs. Sharp deny that Mrs. Sharp signed the guaranty. (CP 77, 82). Even Financial Pacific acknowledges that it is unclear how it obtain the purported guarantee from Mrs. Sharp. (CP 81). The statute of frauds provides that, “every special promise to answer for the debt, default, or misdoings of another person” must be in writing or else it is void. RCW 19.36.010. Mrs. Sharp denies that she signed a guaranty of the Financial Pacific obligation. The Superior Court’s decision entering summary judgment against Mrs. Sharp should be reversed.

**D. Mr. Sharp did not misrepresent acceptance of the copier.**

Financial Pacific argues that Mr. Sharp is not an innocent party and that he acted in bad faith and took affirmative steps to deceive Financial Pacific. The record does not support this argument. Mr. Sharp states in his declaration:

Mr. Merrill called me on or about April 22, 2010, and informed me that the copier would be delivered to my office later that day. On that same day, I received a call

from someone claiming to be a representative of Financial Pacific Leasing. I do not recall the person's name. Coincidentally, a truck was delivering a large box to the building where my office is located. I believed at that time that my copier was being delivered to my office. The individual from Financial Pacific Leasing inquired whether the copier had been delivered. I explained to this person that it was just being delivered. (CP 81).

There is no evidence that Mr. Sharp acted in bad faith. Mr. Sharp did not state that the copier had been delivered only that it was being delivered. He did not state that it was operating. Conversely, the record establishes that Mr. Sharp acted in good faith and complied with the terms of the Lease. He made the initial lease payment of \$1,720.20 on April 8, 2010. (CP 81, 88) It should be noted that Mr. Sharp is out this payment. When the copier was never delivered to Mr. Sharp, he immediately contacted Gary Merrill and ImageSource to locate the copier and determine why it had not been delivered. (CP 81) The first lease payment was not due to be paid to Financial Pacific until June 1, 2010. Prior to that date, Mr. Sharp informed Financial Pacific that the copier had not been delivered and requested that the Lease be cancelled. This is not evidence of bad faith.

In that regard, Financial Pacific's reliance upon *Liebergessell v. Evans*, 93 Wash.2d 881, 613 P.2d 1170 (1980) is misplaced. The *Liebergessell* decision involved an egregious set of facts in which a

businessman induced a widowed school teacher to lend him money at a 20 percent interest rate, even though he knew that interest rates over 12 percent were illegal. *Id* at 884–85. The lender, in contrast, had no business expertise, considered the borrower a friend, and relied on him for financial advice. *Id*. But when the lender attempted to collect the unpaid interest, the borrower raised usury as an affirmative defense. The court had little difficulty in denying the defense of usury, in part finding that there was a fiduciary relationship between the parties. *Id.* at 891. Reversing the trial court’s summary judgment decision and remanding the case for trial, the court held that defendant may have breached his contractual duty to deal in good faith by failing to inform the plaintiff that the interest rates were illegal and unenforceable. *Id. at 891-892*. In the present case, there is no evidence of a fiduciary duty. Similarly, there is no evidence that Mr. Sharp concealed information from Financial Pacific.

Financial Pacific’s reliance upon *Peter Pan Seafoods, Inc. v. Olympic Foundry Co.* 17 Wash.App. 761, 770, 565 P.2d 819, 825 (1977), which held that a delay of nearly 6 months by the buyer in informing the seller of his intended revocation is insufficient compliance with the good faith obligation imposed by the UCC, is also misplaced. There is no evidence that Mr. Sharp unreasonably delayed informing Financial Pacific that the copier had not been delivered. When the copier was never

delivered to Mr. Sharp, he immediately contacted Gary Merrill and ImageSource to locate the copier and determine why it had not been delivered. (CP 81) When those efforts were unsuccessful, Mr. Sharp contacted Financial Pacific prior to the date on which the first lease payment was due. (CP81-82)

Financial Pacific contends that Mr. Sharp should have contacted them sooner and informed them that the copier had not been delivered. The record does not reflect, however, when Mr. Sharp received Financial Pacific's contact information. The Lease was originated by Direct Credit Funding. Direct Credit Funding subsequently assigned the Lease to Financial Pacific on April 22, 2010. (CP14). The Lease does not contain contact information for Financial Pacific. According to the Verification Statement, which is also dated April 22, 2010, Financial Pacific would send billing invoices to Mr. Sharp approximately 17 days prior to the due date of a monthly payment. The Verification Statement further provides that the first lease payment was not due until June 1, 2010. There is nothing in the record to suggest when Mr. Sharp received any statements from Financial Pacific, including the billing statement for the June 1<sup>st</sup> payment.

The record also does not reflect when the Verification Statement was sent to Mr. Sharp. According to the Delivery and Acceptance Provisions

in the Lease, Financial Pacific was obligated to forward the Verification Statement to Mr. Sharp. Again, the record does not reflect when and if this occurred.

Finally, it is important to note that Cindy Grover, the Financial Pacific representative who spoke with Mr. Sharp, did not testify that she provided Mr. Sharp with Financial Pacific' contact information. (CR 59-60). She provides no evidence concerning when Mr. Sharp received Financial Pacific's contact information. There is no evidence that Mr. Sharp unreasonably delayed informing Financial Pacific that the copier had not been delivered.

It is incongruous therefore to compare this case to the facts in the *Peter Pan Seafoods* decision. The record does not reflect that Mr. Sharp unreasonably delayed informing Financial Pacific that the copier had not been delivered. Given the circumstances of this case, Mr. Sharp acted reasonably.

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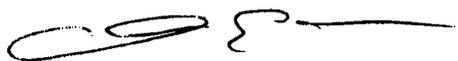
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### III. SUMMARY

For the reasons stated above, the defendants respectfully submit that the Court of Appeals must reverse the judgment and orders of the Superior Court and remand this case for trial on the merits.

DATED this 29<sup>th</sup> day of December, 2011.



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Christopher E. Allen, WSBA #20877  
Morton & McGoldrick, P.S.  
Attorneys for Defendants

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IN THE COURT OF APPEALS OF THE STATE  
OF WASHINGTON DIVISION I

LAW OFFICES OF DAVID A. SHARP,  
P.A., a Florida corporation, DAVID A.  
SHARP, individually, and MARIANNE  
SHARP,

Appellants,

v.

FINANCIAL PACIFIC LEASING, LLC, a  
Washington limited liability company,

Respondent.

NO. 67539-7-I

CERTIFICATE OF SERVICE

Loraine D. Taylor, under penalty of perjury under the laws of the State of Washington  
declares as follows:

I am an individual of at least 18 years of age, a resident of Pierce County, Washington,  
and not a party to this action. On December 30, 2011, I did cause to be served by ABC Legal  
Services for hand-delivery on December 30, 2011 a true and correct copy of Appellant's Reply

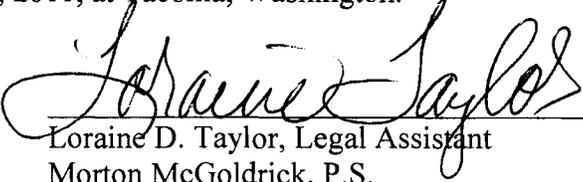
Brief on:

Brian L. Green  
McGavick Graves  
1102 Broadway, Suite 500  
Tacoma, WA 98402

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Signed this 30<sup>th</sup> day of December, 2011, at Tacoma, Washington.

  
Loraine D. Taylor, Legal Assistant  
Morton McGoldrick, P.S.

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