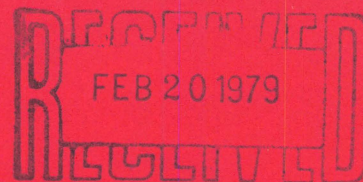


221 VA367

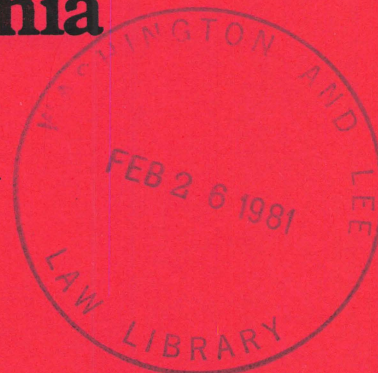
CLERK
SUPREME COURT OF VIRGINIA



RICHMOND, VIRGINIA

IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 781258



NEFF TRAILER SALES, INC.
Appellant

v.

CARROLL W. DELLINGER
Appellee

JOINT APPENDIX

William A. Julias, Esq.
Franklin R. Blatt, Esq.
Of Julias, Blatt & Blatt
9 North Court Square
Harrisonburg, Virginia 22801
Counsel for Appellant

David J. Hatmaker, Esq.
Of Hatmaker, Dinsmore & Stables
206 Virginia National Bank Bldg.
Harrisonburg, Virginia 22801
Counsel for Appellee

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RECEIVED

SEP 20 1977

NGHAM COUNTY
SHERIFF'S DEPT.

NOTICE OF MOTION
FOR JUDGMENT

Take notice that on the 3rd day of October, 1977, plaintiff will move this Court that judgment be entered for the sum of THREE THOUSAND SIX HUNDRED SIXTY SEVEN AND 62/100 DOLLARS (\$3,667.62), plus costs and interest from July 20, 1977 arising out of the following:

(1) On August 31, 1973 plaintiff and defendant entered into an employment agreement, a copy of which is attached hereto, marked Exhibit A, and is to be read as a part hereof.

(2) Plaintiff executed his duties as defendant's employee faithfully under the aforesaid agreement until July 20, 1977, at which time he was discharged by defendant without justification and in breach of the terms thereof.

(3) An itemization of the damages suffered by plaintiff as a direct and proximate result of defendant's breach of contract is attached hereto, marked Exhibit B, and is to be read as a part hereof.

CARROLL W. DELLINGER
By Counsel

HATMAKER, DINSMORE & STABLES
206 Virginia National Bank Building
Harrisonburg, VA 22801

By: [Signature]
David J. Hatmaker

Appeal perfected 1-17-78
[Signature]

Dismissed and
appeal noted this
9th day of Jan-
uary, 1978
[Signature]

JUDGE

001

2

August 31, 1973

This contract date, August 31, 1973, between Neff Mobile Homes, Inc., and Carroll W. Dellinger is as follows:

- (1.) Starting August 31, 1973, the salary of Carroll W. Dellinger is to be raised to \$230.00 each week.

This salary is to remain in effect until August, 1978, at which time, the salary will be discussed to coincide with the cost of living.

All transfer, fees and other benefits are to remain the same for this period of time.

Carroll Dellinger will perform his same duties and agrees to work for Neff Mobile Homes for this period of time.

Neff Mobile Homes agrees to pay the above salary for this period of time and is in no way liable to give any raises within this period of time.

Neff Mobile Homes - by [Signature]
Carroll W. Dellinger

Exhibit A

11/20/76
g
002

ITEMIZATION OF DAMAGES

(1)	Salary differential between employment agreement and present job	\$1,685.00
(2)	Commissions lost	1,481.00
(3)	Voluntary reduction in salary during 1975 which was to be repaid	925.00
(4)	Less: Amount previously remitted by check which Mr. Dellinger is now holding	<u>423.38</u>
	Total	\$3,667.62

Exhibit B

JAN 18 1978

VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY.

CARROLL W. DELLINGER

PLAINTIFF

V. On an appeal from a judgment of the Rockingham District Court

NEFF TRAILER SALES, INC. d/b/a Neff Mobile Homes & DEFENDANT
Neff Mobile Homes, Inc.

TO: William A. Julias, Attorney for Neff Trailer Sales, Inc.:

In Accordance with the provisions of Section 16.1-112 of the Code of Virginia of 1950, as amended, this is to notify you that the above case has been docketed in the Circuit Court of Rockingham County, plaintiff having paid the required writ tax and Clerk's fee.

Given under my hand this 18th day of January, 1978.

GEORGE W. KEMPER, CLERK

By: Michael Kemp, Deputy Clerk.

O R D E R

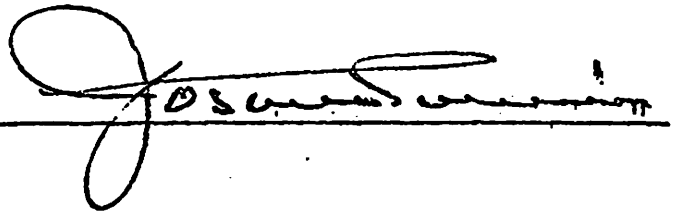
At a pretrial conference held on March 6, 1978, David J. Hatmaker, Esquire appeared for the plaintiff and William A. Julias, Esquire for the defendant.

The pleadings heretofore filed shall be considered to be the motion for judgment and the defendant shall file grounds of defense within 15 days.

This case is scheduled for pretrial conference on the 3rd of April, 1978, for which purpose the Clerk shall place it on the Motions docket for 15 minutes for the purpose of confirming the trial date and hearing on any motions which may be filed by March 25, 1978.

This case is reserved for trial on the 25th of April, 1978, until April 3, 1978, before a venire of 5 from a panel of 11 pursuant to Section 8.01-359 of the Code of Virginia.

ENTER: _____



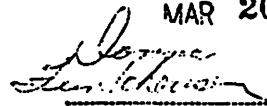
Recorded In
<i>Common Law</i>
Order Book <i>50</i> Page <i>45</i>
<i>3/6/78</i>

DEMURRER AND GROUNDS OF DEFENSE

Docket Number 5922

Filed in the Clerk's Office
Rockingham County, Va.

MAR 20 1978


Deputy Clerk

DEMURRER

Now comes the defendant, Neff Trailer Sales, Incorporated, by counsel, and says that the Motion for Judgment filed against it in the above styled action is insufficient in law and in support thereof sets forth the following:

(A) That the agreement purportedly entered into dated August 31, 1973, does not constitute an employment agreement whereby money damages and relief can be sought and obtained herein.

(B) Said agreement lacks a good and sufficient consideration.

(C) The language contained in said agreement is ambiguous and capable of more than one interpretation, thereby failing to fully set forth a mutual meeting of the minds between the parties.

(D) There is no assertion or allegation that corporate action was taken by the Board of Directors authorizing said agreement.

(E) There is no assertion that Donald B. Strickler, Vice-President of Neff Trailer Sales, Incorporated, did in fact have the authority and power to enter into an employment agreement which would be binding upon the defendant.

(F) There is no assertion that said agreement has at any time subsequent to August 31, 1973, been ratified or adopted by the President of the company, its Board of Directors, and/or any other officer or official thereof.

(G) There are no duties set out and described in said agreement.

(H) Plaintiff had the right to terminate his employment at will.

GROUND OF DEFENSE

For Answer to the Motion for Judgment, the defendant answers as follows:

(1) All allegations contained in plaintiff's Motion for Judgment are denied.

(2) It is denied that the plaintiff is entitled to the relief prayed for.

OTHER DEFENSES

Without admitting that an employment contract was entered into on August 31, 1973, defendant sets forth the following:

(A) Plaintiff contacted Donald B. Strickler, Vice-President of Neff Trailer Sales, Incorporated, in August, 1973, for purposes of seeking a pay raise and assured him that if given such a raise, under no conditions would he request a salary over

and above the sum of Two Hundred Thirty Dollars (\$230.00) each week for a period of five (5) years.

(B) That the last paragraph of said agreement clearly sets forth that Neff Trailer Sales, Incorporated, is in no way liable or responsible for giving any raises to the plaintiff for said period of time and clearly reflects what was in fact the intention of Donald B. Strickler, Vice-President, at the time the request of the plaintiff was made; namely, no further raises would be given plaintiff for a period of five (5) years if he continued to remain with the defendant company.

(C) Said memorandum of agreement was prepared by the plaintiff inasmuch as he was the requesting party for the raise at that time.

(D) Plaintiff had the right to terminate his employment at will to the prejudice of defendant.

(E) The said Donald B. Strickler, Vice-President, did in fact have the right to hire and fire certain employees, as well as give raises, but under no conditions was he ever given authority by the defendant company, either directly or indirectly, and/or otherwise, to enter into a binding employment contract with any employee thereof.

(F) There has never been an employment contract entered into by the management of Neff Trailer Sales, Incorporated, with any of its employees.

(G) The Board of Directors of Neff Trailer Sales, Incorporated, have never authorized or approved an employment contract with the plaintiff herein.

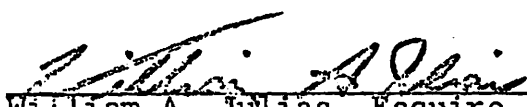
(H) During the period of the alleged agreement, management of the defendant company in fact reduced plaintiff's salary by ten per cent (10%) at which time no mention was ever

made by plaintiff to anyone regarding said agreement, all of which serves as an estoppel upon the plaintiff from asserting any rights thereunder.

(I) Without admitting any liability under said alleged employment contract, when actual knowledge first became known to Bill V. Neff, President of Neff Trailer Sales, Incorporated, in July, 1977, another position with the defendant company was offered to plaintiff at the same pay scale, but plaintiff refused to accept said position. Upon his refusal to accept said position, he was necessarily terminated because of his wilful refusal to work.

(J) Defendant reserves the right to rely upon any and all such other or additional defenses as may appear from the evidence developed during discovery proceedings or during trial of this action.

NEFF TRAILER SALES, INCORPORATED
By Counsel



William A. Julius, Esquire
Counsel for Defendant
Julias, Blatt & Blatt
9 North Court Square
Harrisonburg, Virginia 22801

CERTIFICATE

I hereby certify that I have this 20th day of March, 1978, mailed a true copy of the foregoing Demurrer and Grounds of Defense to David J. Hatmaker, Esquire, Hatmaker, Dinsmore & Stables, Attorneys at Law, 206 Virginia National Bank Building, Harrisonburg, Virginia, 22801, counsel of record for Plaintiff herein.

009



William A. Julius, Esquire

O R D E R

On the 3rd day of April, 1978, came the plaintiff by David J. Hatmaker, Esquire, his attorney, and came the defendant by William A. Julias, Esquire and Franklin Blatt, Esquire, their attorney.

Upon consideration of the demurrer to the motion for judgment, the demurrer is overruled to which action of the Court, the defendant excepted.

The grounds of demurrer are considered to be additional grounds of defense; if the defendant contends that it discharged the plaintiff with cause, it shall file a bill of particulars of the cause for discharging the plaintiff within 10 days.

If the plaintiff contends that the defendant gave him reasonable cause to terminate his employment by the defendant, he shall state the grounds thereof within 5 days from the date the defendant states the cause for discharging.

If the plaintiff files an amended motion for judgment within 5 days, the trial date of April 25, 1978, shall stand released.

Leave is granted to the plaintiff to file an amended motion for judgment joining Donald Strickler as a party defendant.

If the plaintiff does ^{not}/so file, the parties shall exchange draft instructions and file copies thereof with the presiding judge by April 17, 1978, and this case is scheduled for further pretrial conference on April 19, 1978, for which purpose the Clerk shall place it on the Motions docket for 20 minutes.

Recorded In <i>Common Law</i>
Order Book <i>30</i> Page <i>463</i>
<i>4/3/78</i>

ENTER: *L. J. Strickler*

BILL OF PARTICULARS

Docket No. 5922

Now comes the defendant, Neff Trailer Sales, Incorporated by counsel, and for its bill of particulars says as follows:

(1) That without admitting liability under any alleged employment contract and without waiving any of the defenses heretofore filed herein, asserts and alleges that another position of employment with the defendant was offered to the plaintiff at the same pay scale; but that plaintiff wilfully refused to accept the same, thereby giving to the defendant good and sufficient cause to discharge him from its employment.

(2) That the plaintiff was capable of performing the other means of employment offered him by the defendant.

(3) That there was no reason given to defendant by plaintiff as to why he could not accept other means of employment in the company at the same pay scale other than he stated that his lawyer told him he didn't have to perform any other job.

Filed in the Clerk's Office
Rockingham County, Va.

APR 11 1918


J. J. J. J.
J. J. J. J. Deputy Clerk

22

(4) That defendant includes in these particulars by reference paragraph numbered (I) of its Grounds of Defense heretofore filed herein.

Respectfully submitted,

NEFF TRAILER SALES, INCORPORATED
By Counsel



William A. Julias, Esquire
Counsel for Defendant
Julias, Blatt & Blatt
9 North Court Square
Harrisonburg, Virginia 22801

CERTIFICATE

I hereby certify that I have this 11th day of April, 1978, mailed and/or delivered a true copy of the foregoing Bill of Particulars to David J. Hatmaker, Esquire, Hatmaker, Dinsmore & Stables, Attorneys at Law, 206 Virginia National Bank Building, Harrisonburg, Virginia, 22801, Counsel of record for Plaintiff herein.



William A. Julias, Esquire

BILL OF PARTICULARS

Docket No. 5922

Now comes the Defendant, Neff Trailer Sales, Incorporated, by counsel, and for the further particulars requested of it by Plaintiff, sets forth the following:

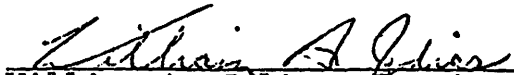
(1) That the position of employment offered by the Defendant to the Plaintiff was that of "Service Manager".

(2) That the duties and responsibilities of "Service Manager" were to supervise personnel in repair of used mobile homes, to supervise deliveries and setups, and to supervise miscellaneous service.

(3) That the salary offered to Plaintiff in capacity of "Service Manager" was Two Hundred Thirty Dollars (\$230.00) per week.


Respectfully submitted,

NEFF TRAILER SALES, INCORPORATED
By Counsel


William A. Julias, Esquire
Counsel for Defendant
Julias, Blatt & Blatt
9 North Court Square
Harrisonburg, Virginia 22801

Filed in the Clerk's Office
Rockingham County, Va.

APR 14 1978


Deputy Clerk

C E R T I F I C A T E

I hereby certify that I have this 14th day of April, 1978, mailed and/or delivered a true copy of the foregoing Bill of Particulars to David J. Hatmaker, Esquire, Hatmaker, Dinsmore & Stables, Attorneys at Law, 206 Virginia National Bank Building, Harrisonburg, Virginia, 22801, Counsel of record for Plaintiff herein.



William A. Julias, Esquire

BILL OF PARTICULARS
AS TO GROUNDS OF
TERMINATION OF EMPLOYMENT

Docket No. 5922

Comes now the plaintiff, by counsel, and states as follows:

(1) On July 20, 1977 defendant discharged plaintiff in violation of the contract of employment previously entered into. The reason for the discharge was that plaintiff refused to accept the position of "service manager" as described in defendant's Bill of Particulars.

(2) Plaintiff was originally employed as defendant's "credit manager" and performed these duties pursuant to the employment contract until his discharge.

(3) As credit manager, plaintiff was responsible for investigating the credit of defendant's customers, supervising the payment of installment notes given for the purchase of mobile homes from defendant, and working with banks to whom the notes had been discounted to enforce the collection of delinquencies. For this position plaintiff had acquired great expertise in credit management and collection and enforcement of delinquent notes, and worked closely with various bank collection departments.

Filed in the Clerk's Office
Rockingham County, Va.

APR 18 1978

015

Donna
Deputy Clerk
Deputy Clerk

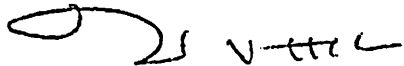
(4) Plaintiff knew he was unqualified for the position of "service manager" because he had had no experience or training in the maintenance, refurbishing, reconditioning and repair of mobile homes.

(5) Because plaintiff had been hired as credit manager, he was not required by law to accept employment in a capacity substantially different from credit manager. The law on this question has been briefed in plaintiff's Memorandum previously submitted, at page 8 thereof.

CARROLL W. DELLINGER
By Counsel

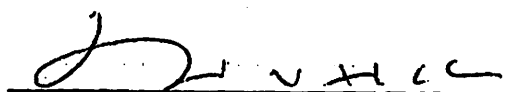
HATMAKER, DINSMORE & STABLES
206 Virginia National Bank Building
Harrisonburg, Virginia 22801
Counsel for Plaintiff

By



David J. Hatmaker

I hereby certify that a copy of the foregoing Bill of Particulars as to Grounds of Termination of Employment was mailed to William A. Julias, Esquire, Julias, Blatt & Blatt, 9 North Court Square, Harrisonburg, Virginia 22801, counsel of record for the defendant this 15th day of April, 1978.


Counsel for Plaintiff

MOTION

Comes now the plaintiff, by counsel, and moves the Court to direct defendant to state with preciseness the exact description of the job defendant allegedly offered plaintiff as alternative employment, as referred to in defendant's Bill of Particulars.

CARROLL W. DELLINGER
By Counsel

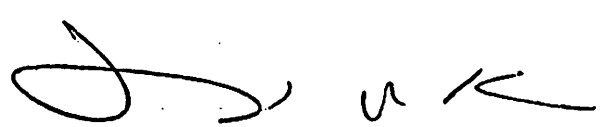
HATMAKER, DINSMORE & STABLES
206 Virginia National Bank Building
Harrisonburg, Virginia 22801
Counsel for Plaintiff

By


David J. Hatmaker

I hereby certify that a copy of the foregoing Motion was mailed to William A. Julias, Esquire, Julias, Blatt & Blatt, 9 North Court Square, Harrisonburg, Virginia 22801, counsel of record for the defendant, Neff Trailer Sales, Incorporated, this 13th day of April, 1978.

Filed in the Clerk's Office
Rockingham County Va.


Counsel for Plaintiff

APR 13 1978

 Deputy Clerk

O R D E R

At a pretrial conference held on April 19, 1978, David J. Hatmaker, Esquire appeared for the plaintiff and Steven Blatt, Esquire appeared for the defendant.

The parties proffered and exchanged drafts of instructions that they expect to offer at trial.

The issues are:

- (1) Whether Strickler had authority, actual or apparent, to execute the contract dated August 31, 1973; if so,
- (2) Which party, if either, breached the contract
- (3) If the defendant breached the contract, the amount of the plaintiff's damages.

This case is confirmed for trial before a venire of 5 from a panel of 11, pursuant to Section 8.01-359 of the Code of Virginia on the 25th of April, 1978, at 9:30 a. m.

ENTER: *Josue L. L...*

Recorded In
<i>Case No. 1978-19</i>
Order Book <i>30</i> Page <i>171</i>
<i>4/19/78</i>

Dellinger
V.
Neff

INSTRUCTION NO. 1

The Court instructs the jury that Carroll W. Dellinger and Neff Trailer Sales, Incorporated entered into a contract in which Neff agreed to pay Dellinger \$230.00 per week in salary from August 31, 1973 until August 1978, that all transfer fees and other benefits would remain the same for this period of time, and that Neff was in no way liable to give any raises within this period of time, in return for which Dellinger agreed to perform his same duties that he had performed prior to the execution of the contract and agreed to work for Neff until August 1978. If you find by a preponderance of the evidence that Neff unreasonably discharged Dellinger from his employment on July 20, 1977 then you shall find for the plaintiff, Carroll W. Dellinger and affix damages according to the instructions of this Court.

4/25/78
JCR

CARROLL W. DELLINGER

v.

NEFF TRAILER SALES, INCORPORATED

INSTRUCTION NO. 2

The Court instructs the jury that if you believe from the evidence that the plaintiff, Carroll W. Dellinger, ~~unreasonably~~ ~~willfully~~ refused to accept other employment offered to him by the defendant, Neff Trailer Sales, Incorporated, and at the same pay scale previously paid him, then his discharge from employment is justified and you shall return your verdict in favor of the defendant, Neff Trailer Sales, Incorporated.

4/25/78
J - R

Dellinger
v.
Neff

INSTRUCTION NO. 3

The Court instructs the jury that if an employee is engaged to fill a particular position, any material change in his duties ~~or significant reduction in rank~~ made by the employer without the consent of the employee constitutes a breach of his employment agreement by the employer.

4/28/78
J. R.

CARROLL W. DELLINGER

v.

NEFF TRAILER SALES, INCORPORATED

INSTRUCTION NO. 4

The Court instructs the jury that where the language of a written contract is ambiguous and capable of more than one (1) construction, then consideration can be given to the situation of the parties at the time, the subject matter of the contract, the acts of the parties thereunder, the purpose sought to be accomplished thereby, and generally the circumstances attending its execution.

4/25/78
S. R.

CARROLL W. DELLINGER

v.

NEFF TRAILER SALES, INCORPORATED

INSTRUCTION NO. 5

The Court instructs the jury that if there be any ambiguity in the meaning of the terms of the alleged agreement which is the subject of this law suit, then such terms are to be ~~construed~~ construed against the plaintiff, Carroll W. Dellinger, in arriving at the meaning which was intended between the parties.

4/25/78
JR

Dellinger
v.
Neff

INSTRUCTION NO. 6

The Court instructs the jury that in computing the damages, if any, suffered by Dellinger by Neff's breach ^{if any} of the employment agreement, you should consider the salary and benefits that Dellinger would have received from the date of the breach until the end of the contract period, including all fees, commissions and other benefits incidental thereto, plus all salary earned up until the date of the breach but not paid, less all salary and benefits that plaintiff earned as a result of having subsequently obtained employment elsewhere.

7/25/78

CARROLL W. DELLINGER

v.

NEFF TRAILER SALES, INCORPORATED

INSTRUCTION NO. 7

A verdict must not be based in whole or in part upon surmise, conjecture or sympathy for either of the parties, but must be based solely upon the evidence and the instructions of the Court.

4/25/58
J.R.

INSTRUCTION NO. 8

The jury are the sole judges of the weight of the evidence and of the credibility of the witnesses, and the jury has the right to discard or accept the testimony or any part thereof of any witness which the jury regards proper to discard or accept, when considered in connection with the whole evidence in the case, but the jury has no right arbitrarily to disregard the credible testimony of a witness. In determining the credibility of witnesses, the jury may take into consideration the demeanor of the witness on the witness stand; his apparent candor or fairness; his bias, if any; his intelligence; his interest, or lack of it, in the outcome of the case; his opportunity, or lack of it, for knowing the truth and for having observed the facts to which he testifies; any prior inconsistent statements by the witnesses if proven by the evidence; and from all these and taking into consideration all the facts and circumstances of the case, the jury are to determine the credibility of the witnesses and the preponderance of the evidence.

4/25/28
JCR

INSTRUCTION NO. B

The Court instructs the jury that in construing a contract regard should be had to the intention of the parties, and such intention should be given effect. In determining this intention, regard is to be given to the situation of the parties, the subject matter of the agreement, and the object which the parties intended to accomplish.

And the Court further tells you that unless you believe by a preponderance of the evidence that the parties mutually intended to accomplish the same result, then the plaintiff, Carroll W. Dellinger, has failed to meet the burden required of him hereunder, and you shall return a verdict for the defendant, Neff Trailer Sales, Incorporated.

Reversed
4/22/88
J. R.

INSTRUCTION NO. 73

Where an alleged contract leaves in doubt what in fact was intended to be agreed upon between the parties, and to that extent the Court tells you, that if you believe from the evidence in this case that Carroll W. Dellinger had one intention and meaning in mind at such time as he prepared and executed the written agreement, which is the subject of this suit, and that Donald B. Strickler in fact had a different intention, then such agreement is ambiguous and you shall return your verdict in favor of the defendant, Neff Trailer Sales, Incorporated.

*Referred
4/15/88
JVL*

INSTRUCTION NO. C

The Court instructs the jury that the burden of proof in this case is upon the plaintiff to prove by a preponderance of the evidence each and every element of a valid and binding contract. To that end the Court tells you that before you can return a verdict in favor of the plaintiff, Carroll W. Dellinger, you must believe by a preponderance of the evidence that at such time as the alleged contract was entered into by and between the parties that there was a good and valid consideration therefor, a mutual meeting of the minds regarding the terms thereof, and that the parties thereto were competent to enter into same.

And the Court further tells you that unless you believe by a preponderance of the evidence that the plaintiff has proved each and every one of the above elements, then you shall return your verdict in favor of the defendant, Neff Trailer Sales, Incorporated.

Referred
4/25/78
gch

INSTRUCTION NO. 7

The Court instructs the jury that before you can return a verdict in favor of the plaintiff, you must believe by a preponderance of the evidence that Donald B. Strickler had the authority, either express or implied, to enter into an employment contract on behalf of the defendant.

Referred
4/15/78
J. W.

INSTRUCTION NO. E

The Court instructs the jury that unless Donald B. Strickler has been authorized, either expressly or impliedly, then as an employee of Neff Trailer Sales, Incorporated, he has no authority to enter into a written employment agreement for a fixed period of time and for a stated sum of money.

And unless you believe from the evidence that Donald B. Strickler had authority, either express or implied, to enter into a written employment agreement which would be binding and controlling upon the defendant company, or unless the defendant, Neff Trailer Sales, Incorporated, had knowledge of such an employment arrangement and assented thereto, then the defendant, Neff Trailer Sales, Incorporated, is not responsible for the actions of Donald B. Strickler, and you should return your verdict in favor of the defendant, Neff Trailer Sales, Incorporated.

Reopened
4/25/78
JW

INSTRUCTION NO. DF

The Court instructs you if you believe from the evidence that at the time of the occasion involved herein Donald B. Strickler had temporarily departed from the ordinary course of business of the defendant, Neff Trailer Sales, Incorporated, and from the scope of his employment, and was engaged in an independent venture on his own, then the defendant, Neff Trailer Sales, Incorporated, is not responsible for his actions and you shall return your verdict in favor of the defendant, Neff Trailer Sales, Incorporated.

*Revised
4/25/78
JCR*

INSTRUCTION NO. 6

In order to recover in this case the burden is upon the plaintiff to prove by a preponderance of the evidence that Donald B. Strickler was an employee, servant and/or agent of the defendant, Neff Trailer Sales, Incorporated, and further that at the time he signed the agreement with the plaintiff, he was acting within the scope and authority of his employment. And the Court further tells you unless you believe that the plaintiff has proven these things by a preponderance of the evidence, then the defendant, Neff Trailer Sales, Incorporated, is not responsible for Donald B. Strickler's actions and you shall return your verdict in favor of the defendant, Neff Trailer Sales, Incorporated.

Revised
4/1-5/78
JLR

August 31, 1973

This contract date, August 31, 1973, between Neff Mobile Homes, Inc., and Carroll W. Dellinger is as follows:

- (1.) Starting August 31, 1973, the salary of Carroll W. Dellinger is to be raised to \$230.00 each week.

This salary is to remain in effect until August, 1978, at which time, the salary will be discussed to coincide with the cost of living.

All transfer fees and other benefits are to remain the same for this period of time.

Carroll Dellinger will perform his same duties and agrees to work for Neff Mobile Homes for this period of time.

Neff Mobile Homes agrees to pay the above salary for this period of time and is in no way liable to give any raises within this period of time.

Neff Mobile Homes - by [Signature]
Carroll W. Dellinger

PLAINTIFF'S EXHIBIT 1

STIPULATION

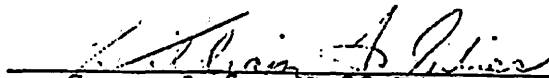
Docket No. C77-2679

Counsel stipulate that Carroll W. Dellinger's income from employment at Neff Trailer Sales, Incorporated for 1974, 1975, 1976 and 1977 was as follows:

<u>Year</u>	<u>Salary</u>	<u>Commissions</u>	<u>Total Earnings</u>
1974	\$11,960.00	\$1,070.02	\$13,030.02
1975	11,730.00	294.72	12,024.72
1976	11,546.00	1,962.05	13,508.05
1977	6,969.00	824.38	7,793.38



Counsel for Carroll W. Dellinger



Counsel for Neff Trailer Sales,
Incorporated

PLAINTIFF'S EXHIBIT 2

46

NEFF TRAILER SALES, INC.

P.O. BOX 1087
HARRISONBURG, VIRGINIA 22801

68-156
514

No 3256

TO ROCKINGHAM NATIONAL BANK
HARRISONBURG, VA.

DATE JUL 6 1973

PAY
TO
THE
ORDER OF

NEFF TRAILER SALES, INC. \$155.00 DOLLARS

NEFF TRAILER SALES, INC.

C. W. DELLINGER

AUTHORIZED SIGNATURE

⑆0514⑆0156⑆ ⑆6 391 236⑆

⑆0000015500⑆

47
DEFENDANT'S EXHIBIT

VERDICT FOR THE PLAINTIFF

We, the jury, on issue joined, find in favor of
the plaintiff, Carroll W. Dellinger and assess his damages at

\$ 3836.24.

April 25, 1978

James Edward Morris

Foreman
Forelady

GROUND IN SUPPORT OF MOTION TO
SET ASIDE JURY VERDICT
Docket No. 5922

Now comes the Defendant, Neff Trailer Sales, Incorporated, by counsel, and files this its Grounds in Support of its Oral Motion, made at the close of trial, to set aside the jury verdict, and in support thereof says as follows:

(1) That the jury was not properly instructed as to all matters of law and issues of fact in the case.

(2) That the jury was allowed to speculate as to Plaintiff's damages and did in fact return a verdict based upon speculation.

(3) That Plaintiff, Carroll W. Dellinger, was allowed to testify from certain heresay material and notes.

(4) That the Court improperly admitted certain evidence, over objection of Defendant's counsel, which allowed Plaintiff to establish his damages without direct testimony.

Respectfully submitted,


Filed in the Clerk's Office
Rockingham County, Va.

NEFF TRAILER SALES, INCORPORATED
By Counsel

MAY 1, 1978

George W. Lepp Clerk
By: Marlene Key, B.C.

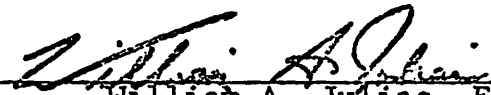
1/9



William A. Julias, Esquire
Counsel for Defendant
Julias, Blatt & Blatt
Attorneys at Law
9 North Court Square
Harrisonburg, Virginia 22801

CERTIFICATE

I hereby certify that I have this 1st day of May, 1978,
mailed a true copy of the foregoing Grounds In Support Of Motion To
Set Aside Jury Verdict to David J. Hatmaker, Esquire, Hatmaker,
Dinsmore & Stables, Virginia National Bank Building, Harrisonburg,
Virginia, 22801, counsel for Plaintiff, Carroll W. Dellinger.



William A. Julias, Esquire

MEMORANDUM IN SUPPORT OF MOTION
TO SET ASIDE JURY VERDICT
Docket No. 5922

Now comes the Defendant, Neff Trailer Sales, Incorporated, by counsel, and files this its Memorandum in support of its motion to set aside the jury verdict herein, and says as follows:

(1) THAT THE JURY WAS NOT PROPERLY INSTRUCTED AS TO ALL MATTERS OF LAW AND ISSUES OF FACT IN THE CASE.

(A) Defendant contends that there was a viable jury question, in the case at Bar, as to whether or not the Memorandum of Agreement as submitted by the Plaintiff was in fact an employment contract.

Defendant contends that there was a viable issue of fact as to whether or not the purported contract was an employment contract or just an agreement not to give wages. Plaintiff contends that in order to ascertain this fact, there is a question as to what was the intention of the parties. Plaintiff contends that there is doubt and ambiguity patent on the face of the alleged agreement, and in that case, it is necessary for a Court to follow the interpretation placed thereon by the parties themselves, see 4B, M.J., Contracts, §47, ~~see~~ cases cited in footnote 17. Additionally, Courts should adopt the construction placed on contracts

Rockingham County, Va.

MAY 10

JULIAS, BLATT
& BLATT
ATTORNEYS-AT-LAW
HARRISONBURG, VA.

by the parties, as evidenced by their actions, and there was ample evidence in the trial of this case to show that neither the Plaintiff nor the Defendant ever treated the said agreement as an employment contract. Therefore, the jury was not properly instructed since there was an issue of fact as to whether or not the agreement was in fact an employment contract.

(B) Defendant contends that there was a viable issue of fact as to whether or not Defendant's employee, Strickler, had the apparent authority to enter into an employment contract to bind Defendant.

Plaintiff contends that whether or not a contract made by an agent is within the apparent scope of the authority of the agent, where the evidence on the subject is conflicting, is a question of fact to be determined by the jury, under proper instructions from the Court, see generally Raven Red Ash Coal Corporation v. Herron, 114 Va. 103 (1912), Wright v. Shortridge, 194 Va. 346 (1952). Defendant contends that the evidence was in conflict since testimony was before the jury that apparently it was the knowledge of the people who worked for Defendant that Strickler did not have the authority to enter into written contracts such as what is purported to be the case by Plaintiff. Further, where a person deals with an agent, it is his duty to ascertain the extent of the agency. He deals with him at his own risk, and the law presumes him to know the extent of the agent's power, and if the agent exceeds his authority, the contract will not bind the principal, but will render the agent liable to the third party, see 1A, M.J., Agency, §24. Therefore, the issue of whether or not Strickler had the apparent authority to bind Defendant corporation, was an issue of fact which should have properly been submitted to the jury under proper instruction.

(2) THAT THE JURY WAS ALLOWED TO SPECULATE AS TO PLAINTIFF'S DAMAGES AND DID IN FACT RETURN A VERDICT BASED UPON SPECULATION.

Defendant contends that most of the damages claimed by Plaintiff were speculative, in that they could not properly be ascertained. For example, the jury was allowed to speculate as to Plaintiff's future commissions, and in fact, the figures Plaintiff used were based, in part, upon commissions had from the sale of mobile homes and not entirely on commissions earned by Plaintiff in the course of his duties in Defendant's Credit Department. Generally, it may be stated that damages which are in their nature uncertain, speculative, or contingent, cannot be recovered and damages which are wholly uncertain cannot be made certain by the adoption of some arbitrary standard of loss. The general principle that you cannot measure damages by mere speculation or conjecture is well settled by the authorities, see 5B, M.J., Damages, §13. Additionally, Plaintiff was allowed to offer his damages to the jury by means of the estimates of his counsel, and Defendant contends that the estimates of counsel tended to instill in the minds of the jurors impressions not founded on the evidence. Additionally, Defendant claims that verdicts should be based on deductions drawn by the jury from the evidence presented and not the mere adoption of calculations submitted by counsel, see generally 5B, M.J., Damages, §82. Therefore, Defendant claims that the jury had to speculate in returning its verdict for the Plaintiff and that such speculation renders the verdict improper.

(3) THAT PLAINTIFF, CARROLL W. DELLINGER, WAS ALLOWED TO TESTIFY FROM CERTAIN HEARSAY MATERIAL AND NOTES.

Defendant contends that it was improper to allow the

Plaintiff to testify from the hearsay notes which he carried to the witness stand. There was no proper foundation laid by Plaintiff's counsel, which would either give rise to a present recollection refreshed or a past recollection recorded. Plaintiff testified that the notes he was carrying were not his and were furnished him by his counsel, and therefore, Defendant contends they were hearsay. In order to constitute present recollection refreshed, it would be necessary for Plaintiff to at least testify from his own knowledge after looking at the Memorandum which he held, and this he did not do. Therefore, he was allowed to read from the Memorandum and no foundation was laid to show that he was refreshing his own memory or testifying from his present memory. In order to constitute past recollection recorded, the material testified from must have been prepared by Plaintiff, or by someone under his direction, at or near the time of the incident complained of. There was no testimony or foundation laid as to any of the requisites of a past recollection recorded, and therefore, it was improper to allow Plaintiff to testify from the said Memorandum under this theory.

Defendant then contends that, as stated aforesaid, it was improper for Plaintiff to use the prepared notes and memorandums at all, in giving testimony in this trial.

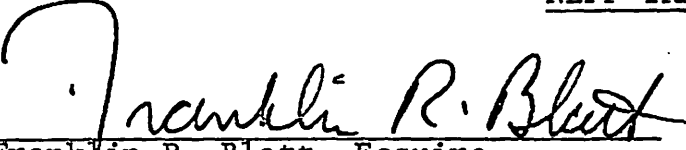
(4) THAT THE COURT IMPROPERLY ADMITTED CERTAIN EVIDENCE, OVER OBJECTION OF DEFENDANT'S COUNSEL, WHICH ALLOWED PLAINTIFF TO ESTABLISH HIS DAMAGES WITHOUT DIRECT TESTIMONY.

Defendant contends that it was improper for the Court to allow the introduction of the alleged stipulation of counsel as to some of Plaintiff's damages. Defendant contends that this action was a trial de novo, after having had an appeal from the District Court, and that any such stipulation entered in the District Court

was only for the purposes of District Court and not for the purposes of this action on trial de novo. From the face of the stipulation itself, it shows that it was only intended to be used in District Court, and in fact, neither Plaintiff or his counsel ever made a request for admissions, or otherwise, in this Court concerning said damages. Defendant contends that this action was improper and highly prejudiced his case and that there was no stipulation entered for Circuit Court.

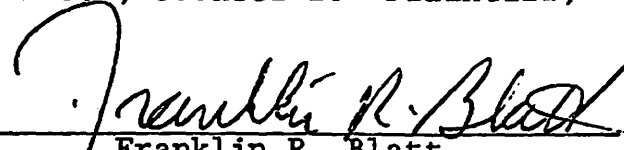
Respectfully submitted,

NEFF TRAILER SALES, INCORPORATED
By Counsel


Franklin R. Blatt, Esquire
Counsel for Defendant
Julias, Blatt & Blatt
9 North Court Square
Harrisonburg, Virginia 22801

CERTIFICATE

I hereby certify that I have this 10th day of May, 1978, mailed a true copy of the foregoing Memorandum to David J. Hatmaker Esquire, Hatmaker, Dinsmore & Stables, Virginia National Bank Building, Harrisonburg, Virginia, 22801, counsel for Plaintiff, Carroll W. Dellinger.


Franklin R. Blatt

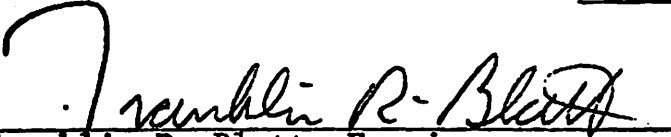
MOTION

Docket No. 5922

Now comes the Defendant, Neff Trailer Sales, Incorporated, pursuant to Rule 5:9(c) of the Rules of The Supreme Court of Virginia, and moves the Court to Order that the transcript of the action herein shall become a part of the record of this action.


Respectfully submitted,

NEFF TRAILER SALES, INCORPORATED
By Counsel


Franklin R. Blatt, Esquire
Counsel for Defendant
Julias, Blatt & Blatt
9 North Court Square
Harrisonburg, Virginia 22801

Filed in the Clerk's Office
Rockingham County, Va.

MAY 15 1978

 Deputy Clerk

CERTIFICATE

I hereby certify that I have this 15th day of May, 1978, mailed and/or delivered a true copy of the foregoing Motion to David J. Hatmaker, Esquire, Hatmaker, Dinsmore & Stables, Virginia National Bank Building, Harrisonburg, Virginia, 22801, counsel for Plaintiff, Carroll W. Dellinger.


Franklin R. Blatt

VIRGINIA: (IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY..

CARROLL W. DELLINGER,

Plaintiff

V.

NEFF TRAILER SALES, INCORPORATED,

Defendant

At Law
No. 5922

I, Debra S. Ours, a Court Reporter duly sworn to take the evidence and incidents of trial in the case of Carroll W. Dellinger v. Neff Trailer Sales, Incorporated, do hereby certify that the following is a true and accurate transcript of portions of the testimony which took place on the 25th day of April, 1978, in the Courtroom of the Circuit Court of Rockingham County, at Harrisonburg, Virginia, before the Honorable Joshua L. Robinson.

Given under my hand this 16th day of May, 1978.

Debra S. Ours

APPEARANCES:

FOR THE PLAINTIFF:

DAVID J. HATMAKER, ESQUIRE

FOR THE DEFENDANT:

WILLIAM A. JULIAS, ESQUIRE
FRANKLIN R. BLATT, ESQUIRE

Filed in the Clerk's Office
Rockingham County, Va.

MAY 17 1978

046

Court Reporting Service
32 GRAHAM STREET
HARRISONBURG, VIRGINIA 22801

WITNESS - CARROLL W. DELLINGER

Direct Examination by Mr. Hatmaker:

Q. Now, following your being fired from Neff's, did you go to work for another company?

A. Yes sir. Wetsel's Seed Company.

Q. When did you begin work with them?

A. August 15, 1977.

Q. And how much did that job pay?

A. \$201.95 a week, I believe it was.

Q. And I think you got a raise, isn't that correct?

A. Yes sir. The first week in April I got a raise to \$212.00 a week.

Q. That was the first week in April of this year?

A. Yes sir.

Q. Now, you say you were working for Neff's at \$230.00 a week, according to the contract. Is that right?

A. Yes, that's correct.

Q. So, we'll call this salary. (Counsel writes on board)

I think the jury ought to know that my handwriting is terrible, but I'm going to do the best I can here.

So, with Neff you were making \$230.00 a week?

A. Yes sir.

Q. Now, from the date you were fired, July 20, 1977, through

1. August 31, 1978, do you know how many weeks that is?

2. A. No sir, I've forgotten.

3. MR. HATMAKER: Do you want to count them, or will you
4. all accept that it is fifty-eight weeks?

5. MR. JULIAS: No, we don't accept any fifty-eight weeks,
6. because it's not.

7. MR. HATMAKER: Do you want to count them?

8. MR. JULIAS: I would assume that you've done it before
9. today, Mr. Hatmaker.

10. MR. HATMAKER: We have.

11. Q. Fifty-eight weeks . . .

12. MR. BLATT: Your Honor, I object at this point to Mr.
13. Dellinger testifying from any notes or typewritten mater-
14. ial. No proper foundation has been laid for him to use
15. that. There's no past recollection recorded or past re-
16. collection refreshed, and I don't even know who prepared
17. those notes.

18. COURT: Are you using notes to refresh your recollec-
19. tion?

20. A. Yes sir.

21. COURT: When did you prepare the notes?

22. A. Two days ago, I believe they were, sir.

23. COURT: Will the notes assist you in refreshing your
24. recollection?

1. A. Yes sir.

2. COURT: The objection is overruled.

3. MR. JULIAS: Can we ask one other question? Are they
4. your notes?

5. A. The notes here on top, yes sir, they are.

6. MR. JULIAS: And what's underneath?

7. A. It's a paper that Mr. Hatmaker gave me a couple of days
8. ago.

9. MR. JULIAS: All right, he prepared it then, not you?

10. A. He prepared the paper from my figures, yes sir.

11. MR. JULIAS: We object to the reference to that then,
12. Your Honor.

13. MR. HATMAKER: Your Honor, it doesn't matter who pre-
14. pared them.

15. COURT: Were the notes that Mr. Hatmaker prepared based
16. on information that you had given him?

17. A. Yes sir.

18. COURT: The objection is overruled.

19. * * * * *

20.

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1. VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY.

2. CARROLL W. DELLINGER,

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23.)
24.)
Plaintiff

V.

At Law No. 5922

NEFF TRAILER SALES, INCORPORATED

d/b/a NEFF MOBILE HOMES, and
NEFF MOBILE HOMES, INC.,

Defendant

I, Debra S. Ours, a Court Reporter duly sworn to
take the evidence and incidents of trial in the case of
Carroll W. Dellinger v. Neff Trailer Sales, Incorporated,
do hereby certify that the following is a true and accurate
transcript of the trial which took place on the 25th day of
April, 1978, in the Courtroom of the Circuit Court of Rock-
ingham County, at Harrisonburg, Virginia, before The Honor-
able Joshua L. Robinson.

Given under my hand this 30th day of May, 1978.

Debra S. Ours
Debra S. Ours

APPEARANCES:

FOR THE PLAINTIFF:

DAVID J. HATMAKER, ESQUIRE

FOR THE DEFENDANT:

WILLIAM A. JULIAS, ESQUIRE
FRANKLIN R. BLATT, ESQUIRE

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1. COURT: This 25th day of April, 1978 we have
2. case #5922, Carroll W. Dellinger v. Neff Trailer Sales. Mr.
3. Hatmaker is appearing for the plaintiff; Mr. Julias and Mr.
4. Franklin Blatt are appearing for the defendant. Is the
5. plaintiff ready?

6. MR. HATMAKER: Yes, Your Honor.

7. COURT: Is the defendant ready?

8. MR. JULIAS: Yes, Your Honor.

9. COURT: Call the jury.

10. (Prospective Jurors Called;
11. Selection of Jury Panel;
12. Opening Statements of Counsel)
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1. WITNESS - CARROLL W. DELLINGER

2. Direct Examination by Mr. Hatmaker:

3. Q. State your full name and your address, please, sir.

4. A. Carroll W. Dellinger; Route 3, Harrisonburg.

5. Q. How old are you, Mr. Dellinger?

6. A. Thirty-nine.

7. Q. Are you married?

8. A. Yes, I am.

9. Q. Do you have a family?

10. A. Yes sir, two children.

11. Q. How old are they?

12. MR. JULIAS: I object to that, Your Honor.

13. COURT: The objection is sustained.

14. Q. How long have you lived in Harrisonburg?

15. A. I've lived in the Harrisonburg area all my life, except
16. two and a half years I lived in Northern Virginia.

17. Q. Where are you employed now?

18. A. Wetsel's Seed Company.

19. Q. I believe you were formerly employed by Neff Trailer
20. Sales, is that correct?

21. A. Yes sir, I was.

22. Q. When did you go to work there?

23. A. It was in May of 1967, I believe.

24. Q. Prior to that time where had you worked?

1. A. I worked for American Finance Corporation in Northern
2. Virginia.
3. Q. How long did you work for them?
4. A. A total of five and a half years.
5. Q. And you say you went to work at Neff Trailer Sales in
6. May of 1967?
7. A. Yes sir.
8. Q. Who hired you?
9. A. Don Strickler.
10. Q. And who is Don Strickler?
11. A. He was Vice-President of Neff Trailer Sales and Personnel
12. Manager and overall manager.
13. Q. Now, at the time you were hired what job were you hired
14. to do?
15. A. Credit and collections.
16. Q. Tell me what kind of work that involved.
17. A. The credit end of it was investigation of credit applica-
18. tions for people that applied for credit. The collection
19. end of it was notes that had been discounted to certain
20. banks in this area and in other parts of the state that
21. had became past due within a certain period of time,
22. sixty, ninety days past due.
23. Q. Let's go into that in some detail. As I understand it,
24. credit and collection by its definition is really divided

1. into two different principal things that you do. First
2. of all, you investigate the credit of, is it potential
3. customers at Neff's?

4. A. Yes, that's right.

5. Q. The people who want to buy mobile homes?

6. A. Mobile homes, sometimes it's real estate, some of the
7. real estate, and rental on some of the mobile homes that
8. was in the parks.

9. Q. You talked about some notes that were discounted at the
10. local banks. Who would sign those notes and what were
11. they for?

12. A. These were loans that had been approved that was being
13. financed at the banks for mobile homes that was sold.
14. Mr. Neff signed some of them. At that time, Mr. Messick
15. was signing some of them, and Mr. Strickler was signing
16. some of them.

17. Q. These were notes that were originally made by whom?

18. A. Customers that applied for credit to buy mobile homes.

19. Q. People would buy mobile homes on credit and they would
20. sign a note, is that correct?

21. A. That's correct.

22. Q. And you say these notes were discounted at local banks?

23. A. Local banks and other banks throughout the State of
24. Virginia and West Virginia and clear into New Jersey.

1. Q. Well, what do you mean by discount? Tell the jury.
2. A. The banks would buy the paper from Neff Mobile Homes.
3. They would give us the money for the purchase of the
4. mobile home with recourse.
5. Q. Now, what does that mean?
6. A. That if the customer didn't pay it after it went so far
7. past due Neff Trailer Sales would repossess or pay the
8. loans off.
9. Q. And what was your job with respect to the notes that were
10. discounted to local banks? How did you enter into all
11. of this?
12. A. As far as the collection end of it?
13. Q. Yes.
14. A. The bank would notify us when an account would go so far
15. past due and ask us to collect it or pick it up, pick
16. the mobile home up.
17. Q. And therefore your job was what?
18. A. It was working collections and approving of credit.
19. Q. As far as working the collections is concerned, what
20. actually did you do?
21. A. I wrote the people letters, called them, sometimes went
22. on the road to investigate, right to the residence their-
23. selves.
24. Q. Did you actually participate in the repossession of mobile

1. homes?
2. A. Several of them I did, yes.
3. Q. But, is it correct to say that your principal work that
4. you did was with local banks?
5. A. Correct, with local banks, right.
6. Q. Was this office work or field work or what?
7. A. I would say it was ninety percent office work, ten per-
8. cent field work.
9. Q. You began working with Neff's in 1967. Is that the kind
10. of work you did from the time you went there?
11. A. From 1967 up until the time I left, yes sir, with the
12. exception of working some insurance accounts and doing
13. some titles and everything in advance to the credit end
14. of it.
15. Q. Now, in 1973 did you receive a job offer?
16. A. Yes sir, I did.
17. Q. From whom?
18. A. United Virginia Spotswood Bank.
19. Q. And what was the nature of that job offer?
20. A. Their credit collection manager, the same type work I was
21. doing.
22. Q. Well, what did you decide to do at that point?
23. A. I couldn't make up my mind. The bank had a good offer,
24. and I went to Mr. Strickler and told him that I had another

1. offer of a job, and if they would like for me to stay.
2. And he told me he didn't really know. So, I gave him a
3. proposal of a certain salary that I would consider staying
4. to work for Neff's for and told him that I'd like to have
5. it in writing, this contract in writing. And he agreed
6. to it.

7. Q. What did he say with respect to writing it up?

8. A. He told me to write it up and bring it to him and he would
9. sign it.

10. Q. Why did you go to Mr. Strickler?

11. A. As far as I was concerned, he was the man with the most
12. authority when Mr. Neff wasn't there.

13. Q. And who is Mr. Neff?

14. A. Mr. Bill Neff, President of the company.

15. Q. Now, was Mr. Neff away a good bit of the time?

16. A. Yes sir, he was.

17. Q. And who basically ran the business when Mr. Neff was away?

18. A. I would say Mr. Strickler.

19. Q. What was Mr. Strickler's title?

20. A. Vice-President.

21. Q. I believe you testified that he was the man that hired
22. you. Is that correct?

23. A. Yes sir. He called me when I worked in Northern Virginia
24. and asked me if I wanted to come to work for him.

1. Q. Did he hire any other employees that work for Neff?
2. A. Yes sir. He hired most of the office staff.
3. Q. Who did the firing?
4. A. Well, I would say Mr. Strickler and Mr. Neff both.
5. Q. Who negotiated salary and wages with respect to the
6. office staff people?
7. A. Mr. Strickler.
8. Q. Who was in charge of personnel relations and benefits
9. among the office people?
10. A. Mr. Strickler.
11. Q. Did you actually type up an agreement?
12. A. Yes sir. I typed the agreement up.
13. Q. I show you a piece of paper and ask you if you can iden-
14. tify that.
15. A. That's the contract I typed up in August of 1973, yes sir.
16. MR. HATMAKER: Your Honor, I'd like this marked as
17. Plaintiff's Exhibit #1.
18. COURT: It will be so marked.
19. Q. Now, I'd like for you to read that, if you would.
20. A. It's dated August 31st, 1973. It says, "This contract
21. date, August 31, 1973, between Neff Mobile Homes, Inc.,
22. and Carroll W. Dellinger is as follows: (1.) Starting
23. August 31, 1973, the salary of Carroll W. Dellinger is
24. to be raised to \$230.00 each week. This salary is to

1. remain in effect until August, 1978, at which time, the
2. salary will be discussed to coincide with the cost of
3. living. All transfer fees and other benefits are to
4. remain the same for this period of time. Carroll Dellinger
5. will perform his same duties and agrees to work for
6. Neff Mobile Homes for this period of time. Neff Mobile
7. Homes agrees to pay the above salary for this period of
8. time and is in no way liable to give any raises within
9. this period of time." Signed: "Neff Mobile Homes by
10. Donald B. Strickler," and myself.

11. Q. Now, did Donald Strickler sign this in your presence?

12. A. Yes sir, he did.

13. Q. Before we get into the contract itself, I want to talk
14. a little bit about Mr. Strickler. Now, you say he was
15. Vice-President of the corporation, is that correct?

16. A. Yes sir.

17. Q. How long had he worked for Neff's?

18. A. I'd say somewhere between fifteen and twenty years. I
19. don't know exactly when he started working there.

20. Q. How long had he been working there when you went to work
21. there?

22. A. I'd say approximately five years, maybe longer.

23. Q. Tell me as much as you can about the job that Mr. Strick-
24. ler was doing, the kind of work he was doing in August

1. of 1973. You told us some of it, but try to fill in as
2. much as you can.

3. A. He was over all of us in the collection department, which
4. consisted of two of us and the credit girl. He was over
5. all of the office itself, the employees, bookkeepers,
6. telephone operators. He was in charge of Spotswood Mo-
7. bile Homes, which is the mobile home park. He was over
8. all--kept up on the books and stuff at Ponda River Lodge
9. and Marina which is at Coles Point. And he done every-
10. thing, he was right underneath Mr. Neff. As a matter of
11. fact, they was in the same office.

12. Q. They shared an office?

13. A. Yes sir.

14. Q. Now, you've testified that Mr. Neff was away a good bit
15. of time, is that correct?

16. A. Yes sir.

17. Q. Who was the principal officer and manager of the enter-
18. prise when he was absent?

19. A. Mr. Strickler and J. C. Neff which, I believe, was the
20. secretary-treasurer.

21. Q. Now, at the time you and Mr. Strickler signed this writ-
22. ten agreement, had you ever seen any written employment
23. contract that Mr. Strickler had?

24. A. Yes sir, I did.

1. Q. Tell me the circumstances under which you saw the contract
2. and what you remember about it.

3. MR. JULIAS: Your Honor, please. I think if he's talk-
4. ing about any contract of employment and he's talking
5. about Vice-President Strickler, he has to lay the founda-
6. tion with the nature of the contract, with what company
7. it was, the parties involved, before it has any relevancy
8. in this proceeding.

9. COURT: It's not clear to me just what contract you're
10. referring to. Suppose I excuse the members of the jury
11. while I hear argument on this question of law. The jury
12. may leave the Courtroom.

13. (Out of Presence of Jury)

14. MR. HATMAKER: Your Honor, in discussions that lead up
15. to the signing of this contract that's in dispute today,
16. Mr. Dellinger and Mr. Strickler had talked about employ-
17. ment contracts, and Mr. Strickler showed Mr. Dellinger an
18. employment contract that he himself had with Neff.

19. COURT: This was Mr. . . .

20. MR. HATMAKER: Strickler.

21. COURT: Mr. Strickler's employment contract with Neff?

22. MR. HATMAKER: Yes. Well . . . yes sir. And it was
23. one of the things that kind of triggered the idea of a
24. written employment contract. And, of course, its rele-

1. vancy here is on the issue of apparent authority, as well
2. as express authority. But principally with apparent auth-
3. ority because it led Mr. Dellinger to believe that Mr.
4. Strickler was clothed with all sorts of authority with
5. respect to . . .

6. COURT: Is that contract available, have you requested
7. it?

8. MR. HATMAKER: We have not requested it.

9. COURT: Well, now, is this issue with respect to--you
10. take the position it's admissible with respect to Mr.
11. Strickler's apparent authority.

12. MR. HATMAKER: That's correct.

13. COURT: Are you gentlemen still seriously questioning
14. that?

15. MR. JULIAS: Yes sir.

16. COURT: Go ahead and pose your questions on that, Mr.
17. Hatmaker.

18. Q. Did Mr. Strickler show you an employment contract that
19. he had?

20. A. Yes sir, he did.

21. Q. What do you remember about it?

22. A. It was rather lengthy, I'd say three or four pages, and
23. it went into detail what his duties were as far as the
24. overseeing of Neff Trailer Sales, Spotswood Mobile Homes

1. and the other corporations. What his responsibility was,
2. that he would be in charge to oversee these jobs and
3. these things that had to be done.

4. Q. And did Mr. Strickler make any comment about the employ-
5. ment contract, if you recall?

6. A. He made something, but I can't remember what it was any-
7. more. I can't--it's been so long ago I don't remember
8. how the contract came up anymore. Other than it went
9. into detail how long he would work, his salary and so
10. forth, what he'd be making.

11. COURT: What, if anything, do you remember about the
12. contract with respect to the scope of Mr. Strickler's
13. duties?

14. A. If I remember correct, sir, it went into detail what each
15. individual job was he was to oversee and do.

16. COURT: What, specifically, did it say with respect to
17. his right to hire and fire employees and set their wage
18. rates?

19. A. I don't remember if that was in there or not, sir. The
20. only thing I can vaguely remember, it was back in 1972 or
21. the early part of 1973, was it went into the details of
22. his duties, what his performance would be, and who he was
23. responsible to.

24. COURT: What's the relevance of this, Mr. Hatmaker?

1. MR. HATMAKER: Let me ask another question.

2. Q. Did it set out his duties with respect to Neff Trailer
3. Sales, what he was supposed to do there?

4. A. Yes sir.

5. Q. And what was he supposed to do there?

6. A. Like I say, it's been so long. I know it said of oversee-
7. ing of the collection department, the office help. As
8. far as the book work and stuff, the auditing, the audit-
9. ing and running of the mobile home parks.

10. Q. Now, you say it had to do with the office help.

11. A. Yes sir.

12. Q. Is that the hiring and firing of office help?

13. A. It could have, I can't say for sure, but it could have.
14. Like I say, it was very lengthy, three or four pages.

15. COURT: Do you wish to make any further proffer, Mr.
16. Hatmaker?

17. MR. HATMAKER: No sir.

18. COURT: Do you wish to be heard any further?

19. MR. HATMAKER: No, Your Honor.

20. COURT: I mean, you concede the inadmissibility of that?

21. MR. HATMAKER: No sir, I don't. I think it is admissible.

22. COURT: For what purpose?

23. MR. HATMAKER: On the issue of apparent authority. It
24. gave Mr. Dellinger the impression, and I think he can tes-

1. tify to that, that Mr. Strickler was clothed with a great
2. deal of authority.

3. COURT: Is there any question about Mr. Strickler being
4. the general manager of that part of the operation?

5. MR. HATMAKER: Not in our mind, but they insist that
6. there is a question about it.

7. MR. JULIAS: We take the position that Strickler had
8. no authority whatsoever to enter into a written agreement
9. that was binding on the corporation.

10. COURT: The question was: Is there any question about
11. Mr. Strickler being the general manager of that part of
12. the operation?

13. MR. JULIAS: Yes sir. He was not the general manager,
14. as a matter of fact.

15. COURT: Then I'll permit you to inquire with respect
16. to what Mr. Strickler represented to this witness, with
17. respect to his authority in the operation of the enter-
18. prise.

19. MR. HATMAKER: All right, sir.

20. COURT: Does that clear everything up, gentlemen?

21. MR. HATMAKER: Well, as far as this employment contract
22. that Mr. Dellinger saw, where are we on that? Can I ask
23. the questions I asked awhile ago?

24. COURT: Yes, to the extent--for the limited purpose

1. of what Mr. Strickler held himself out to be.

2. MR. BLATT: I thought that Mr. Dellinger has already
3. answered that question for Mr. Hatmaker, that he didn't
4. remember anything being in the agreement that was shown
5. to him that would give Mr. Strickler any authority to
6. enter into contracts.

7. COURT: Well, that's an appropriate matter for cross
8. examination.

9. MR. JULIAS: If it please the Court. We don't feel
10. any reference should be made to that agreement for one
11. of several reasons. Well, many of several reasons. First
12. of all, Mr. Dellinger never read the agreement, so con-
13. sequently he doesn't know what the sum and substance of
14. it was. Secondly, he doesn't even know who the parties
15. were. Thirdly, as a matter of fact, and they do have the
16. responsibility to this Court because this case has been
17. tried previously in a Court not of record, and Mr. Dellinger-
18. er, as well as Mr. Hatmaker, both know that the undisput-
19. ed evidence disclosed it was a service agreement between
20. two separate businesses that had nothing to do with em-
21. ployment and was terminable at will.

22. COURT: Well, I don't know--we have to take the testi-
23. mony of the witness.

24. MR. JULIAS: Well, the witness can't testify to that

1. which he does not know. And just to simply say that he
2. saw some agreement and, not knowing what the contents
3. were, and presupposed evidence before the jury, we feel,
4. would do irreparable damage to the defendant's case.

5. COURT: What's your view on that, Mr. Hatmaker?

6. MR. HATMAKER: I expect it would do some damage to the
7. case, Your Honor. This whole thing has to do with what
8. Mr. Dellinger reasonably perceived Mr. Strickler's scope
9. of authority was. And I think that the evidence is ad-
10. missible on that point, and that's the only reason that
11. we're proffering it.

12. MR. BLATT: Your Honor, we still take the position that
13. the best evidence is the contract and not Dellinger's
14. recollection, and that it's hearsay as to Dellinger. And
15. furthermore, he has not laid the proper foundation of
16. the knowledge of the contract.

17. COURT: We'll receive it in evidence for the limited
18. purpose of what Mr. Strickler represented to the witness
19. with respect to the scope of his authority. Does that
20. clear everything up, gentlemen? Exception will be noted.
21. We'll take a five minute recess before the jury is called
22. back.

23. (Recess)

24. (Jury Returns)

1. Q. Mr. Dellinger, during the discussions that you had with
2. Mr. Strickler, Vice-President of Neff's, prior to your
3. signing this agreement that you have in your hand there,
4. did you have occasion to see an employment agreement . . .

5. MR. JULIAS: I object to the reference to an employment
6. agreement, Your Honor. I thought we resolved that earl-
7. ier.

8. MR. HATMAKER: We did.

9. COURT: Whether it's an employment agreement or not,
10. apparently is not relevant. So, you may just refer to
11. an agreement, Mr. Hatmaker.

12. Q. All right. An agreement then. Did you have occasion to
13. see an agreement that Mr. Strickler had entered into?

14. A. Yes, I did.

15. Q. Tell us what you remember about the agreement.

16. A. The agreement was lengthy, three or four pages. It
17. outlined Mr. Strickler's duties . . .

18. MR. JULIAS: I object to what the agreement outlined.
19. Only what Mr. Strickler represented to this plaintiff as
20. to what was the content.

21. MR. HATMAKER: Your Honor, he's entitled to testify
22. as to the impression that the agreement had on him.

23. MR. JULIAS: That's hearsay.

24. COURT: Just a minute, gentlemen. Ladies and gentlemen,

1. this evidence is received for the limited purpose of what
2. Mr. Strickler represented to the witness was the scope
3. of his authority with the defendant corporation. And you
4. should not consider this evidence to be relevant for any
5. other purpose. Objection is noted. You may proceed, Mr.
6. Hatmaker.

7. Q. Go ahead, tell us what you saw in the agreement.

8. A. It outlined Mr. Strickler's responsibilities to Neff
9. Trailer Sales, his work and what he was to oversee and
10. what type of work he was to do and his salary.

11. Q. Did Mr. Strickler make any comment about that or represen-
12. tation to you with respect to his authority?

13. A. He didn't make about his authority, but with what was writ-
14. ten in the agreement that I seen, as far as I was concern-
15. ed, he was the next man in line right after Mr. Neff.

16. Q. In the course of Mr. Strickler's work for Neff Trailer
17. Sales, did he have occasion to sign notes to the banks
18. himself?

19. A. Yes sir.

20. Q. Why did he do that?

21. A. He had the authority to do it when Mr. Neff wasn't present.

22. Q. And do you remember the amounts of any of these notes
23. or what range of amounts they were?

24. A. They ranged anything from ten thousand to twenty thousand,

1. twenty-five thousand dollars.
2. Q. How many times did he sign these notes?
3. A. I'd say at the time Mr. Neff would be gone a week, it
4. would average anywhere from ten to fifteen notes a week.
5. Q. Ten to fifteen notes a week?
6. A. Yes sir.
7. Q. Did Mr. Neff himself sign notes when he was there?
8. A. Yes sir.
9. Q. Now, I don't want to lead you but to save time, as I
10. understand it, these were the notes that customers had
11. signed when they bought trailers. Is that right?
12. A. Yes sir.
13. Q. And were being, the notes themselves, were being sold to
14. local banks?
15. A. Yes.
16. Q. And, of course, a corporate officer had to sign the
17. note to transfer it, is that right?
18. A. That's correct.
19. Q. You say Mr. Strickler had signed--how many did you say,
20. ten to fifteen of these notes a week?
21. A. I would say it averaged ten or fifteen a week.
22. Q. And the amounts ranged anywhere from ten thousand to
23. twenty-five or thirty thousand?
24. MR. BLATT: Your Honor, that's been asked and answered.

1. COURT: That's been covered.

2. Q. Now, let's get to the contract itself. This writing is
3. dated August 31, 1973.

4. A. Yes sir.

5. Q. Was that the date you all signed it?

6. A. Yes sir, it was.

7. Q. Now, who actually typed this up?

8. A. I typed it up myself, sir.

9. Q. Did you type it at home or . . .

10. A. No, at the office.

11. Q. At the office. And where was it signed?

12. A. It was signed in Mr. Strickler's office, main office.

13. Q. Tell us what you remember about the conversation that you
14. had when you took the agreement to him.

15. A. There wasn't much conversation to it. I just told him
16. here's the contract that you said you would sign after I
17. typed it up. And he signed it and I gave him a copy and
18. kept the original and left.

19. Q. Well, did you tell him why you wanted a written contract?

20. A. I told him that I wanted the contract that I wouldn't--
21. with the raise of \$230.00 that I would agree to work for
22. Neff Trailer Sales for a period of five years at that
23. salary.

24. Q. Did you tell him why you wanted a written contract?

1. A. No sir, I don't believe I did.

2. Q. Now, your salary was raised to \$230.00 a week. What had
3. you been making?

4. A. I think it was roughly around \$201.00 or \$212.00 every
5. week, I'm not sure. It figured out roughly a \$900.00 a
6. year increase.

7. Q. Now, there's a paragraph in here that I think you ought
8. to explain to the jury. It says, "All transfer fees and
9. other benefits are to remain the same for this period of
10. time." Now, what are transfer fees?

11. A. Transfer fees consist of when a customer had a mobile
12. home that they wanted somebody to assume the payments on
13. to keep from being repossessed or hurting their credit,
14. they would bring another party in. And I would take the
15. credit application and do the credit investigations and
16. transfer, get all the papers signed that was to be dis-
17. counted at the bank to do the transfer. And this fee was
18. usually charged, a \$100.00 transfer fee, which the company
19. got \$50.00 of, and myself and Mr. Taylor got the other
20. \$50.00.

21. Q. Now, who is Mr. Taylor?

22. A. He is the other boy working in the credit department with
23. me.

24. Q. And other benefits. What other benefits had you been get-

1. ting when this contract was entered into?
2. A. I got a percentage of all the bad debt collections I
3. collected on repossessions and judgments.
4. Q. Now, the next paragraph says, "Carroll Dellinger will per-
5. form his same duties . . ." What duties were you perform-
6. ing prior to the signing of this contract?
7. A. The same duties I was performing when I left, credit
8. collections and credit investigations, titles and insur-
9. ance, some discounting of notes at banks.
10. Q. Credit and collection work, is that correct?
11. A. Yes.
12. Q. Now, did you, in fact, continue working for Neff's after
13. this contract was signed?
14. A. Yes, I did.
15. Q. And what kind of work did you, in fact, do?
16. A. The same work, credit collection and insurance and titles
17. and transfers.
18. Q. And did you continue to receive transfer fees and other
19. benefits?
20. A. Yes sir.
21. Q. Now, I believe you were discharged from Neff Trailer Sales
22. employ, is that correct?
23. A. On July the 20th, 1977.
24. Q. Were you given a reason why you were fired?

1. A. The first reason I was given was they was cutting back on
2. work and on the operations. And Mr. Neff had told me I
3. had sixty to ninety days to find myself another job. And
4. something else came up and I went to him and told him
5. that I had the contract, that I would honor the contract,
6. I would work until August of 1978 under this contract.
7. That I would not work for Mr. Strickler or under his
8. authority, but I would work for him.
9. Q. I take it that you and Mr. Strickler had had some person-
10. ality differences, is that correct?
11. A. Yes sir, numerous times.
12. Q. Did Mr. Neff offer you another job?
13. A. After I showed him the contract he did, yes sir. He
14. offered me another job.
15. Q. He didn't offer you a job until you showed him the con-
16. tract?
17. A. No sir.
18. Q. What alternate or other job did he offer you?
19. A. A job in the service department overseeing the recondi-
20. tioning of used mobile homes.
21. Q. Can you explain to the jury in more detail what that job
22. would have been.
23. A. Repairing the plumbing; laying carpet; replacing tile,
24. paneling, light fixtures; anything to recondition a mobile

1. home for resale.

2. COURT: Are you referring to supervising such work or
3. actually doing it?

4. A. Yes sir, supervising it.

5. COURT: Supervising the work.

6. A. Yes sir.

7. Q. What was your understanding of the expertise that was
8. needed for that job?

9. A. I didn't feel I was qualified to do it because I had no
10. experience in that type work.

11. Q. By that type work, what do you mean, that type work?

12. A. Well, repair work, carpentry, plumbing, electrical work.

13. Q. You say you've never had any training in that?

14. A. No sir.

15. Q. What reason did you say Mr. Neff gave you for discharging
16. you?

17. A. He said he was cutting back on the operations and the
18. only reason they was keeping the other credit boy instead
19. of me was the other boy had an insurance license.

20. Q. Now, that was, I think, Mr. Taylor, is that right?

21. A. Yes.

22. Q. Now, as far as working with the local banks is concerned,
23. at the time of your discharge do you recall how many banks
24. you were working with and how many Mr. Taylor was working

1. with?

2. A. I had approximately eight. I think Mr. Taylor had four
3. or five.

4. Q. Now, did you receive any raises after this contract was
5. signed?

6. A. I received a raise in my ten percent benefits, I'd say
7. approximately six months before I was fired. When I went
8. to Mr. Neff after I found out the salary the other boy
9. was being paid for the same type work that he was doing.

10. Q. But what about the base salary, was that raised?

11. A. No sir. It was never raised, and it was never asked for
12. a raise.

13. Q. You never asked for a raise?

14. A. No sir.

15. Q. Now, following your being fired from Neff's did you go
16. to work for another company?

17. A. Yes sir. Wetsel's Seed Company.

18. Q. When did you begin work with them?

19. A. August 15, 1977.

20. Q. And how much did that job pay?

21. A. \$201.95 a week, I believe it was.

22. Q. And I think you got a raise, isn't that correct?

23. A. Yes sir. The first week in April I got a raise to
24. \$212.00 a week.

1. Q. That was the first week in April of this year?

2. A. Yes sir.

3. Q. Now, you say you were working for Neff's at \$230.00 a
4. week, according to the contract. Is that right?

5. A. Yes, that's correct.

6. Q. So, we'll call this salary. (Counsel writes on board)

7. I think the jury ought to know that my handwriting is
8. terrible, but I'm going to do the best I can here. So,
9. with Neff you were making \$230.00 a week?

10. A. Yes sir.

11. Q. Now, from the date you were fired, July 20, 1977, through
12. August 31, 1978, do you know how many weeks that is?

13. A. No sir, I've forgotten.

14. MR. HATMAKER: Do you want to count them, or will you
15. all accept that it is fifty-eight weeks?

16. MR. JULIAS: No, we don't accept any fifty-eight weeks,
17. because it's not.

18. MR. HATMAKER: Do you want to count them?

19. MR. JULIAS: I would assume that you've done it before
20. today, Mr. Hatmaker.

21. MR. HATMAKER: We have.

22. Q. Fifty-eight weeks . . .

23. MR. BLATT: Your Honor, I object at this point to Mr.
24. Dellinger testifying from any notes or typewritten mater-

1. ial. No proper foundation has been laid for him to use
2. that. There's no past recollection recorded or past re-
3. collection refreshed, and I don't even know who prepared
4. those notes.

5. COURT: Are you using notes to refresh your recollec-
6. tion?

7. A. Yes sir.

8. COURT: When did you prepare the notes?

9. A. Two days ago, I believe they were, sir.

10. COURT: Will the notes assist you in refreshing your
11. recollection?

12. A. Yes sir.

13. COURT: The objection is overruled.

14. MR. JULIAS: Can we ask one other question? Are they
15. your notes?

16. A. The notes here on top, yes sir, they are.

17. MR. JULIAS: And what's underneath?

18. A. It's a paper that Mr. Hatmaker gave me a couple of days
19. ago.

20. MR. JULIAS: All right, he prepared it then, not you?

21. A. He prepared the paper from my figures, yes sir.

22. MR. JULIAS: We object to the reference to that then,
23. Your Honor.

24. MR. HATMAKER: Your Honor, it doesn't matter who pre-

1. pared them.

2. COURT: Were the notes that Mr. Hatmaker prepared based
3. on information that you had given him?

4. A. Yes sir.

5. COURT: The objection is overruled.

6. Q. \$230.00 times 58 weeks is \$13,340.00. Is that correct?

7. A. Yes sir.

8. Q. Now, you worked for Wetsel's from August 15th, 1977, is
9. that right?

10. A. Yes sir.

11. Q. And you earned \$201.00, did you say?

12. A. \$201.90 a week, I believe it was, sir.

13. Q. \$201.90 a week.

14. A. Yes sir.

15. Q. For how many weeks?

16. A. Thirty-three weeks.

17. Q. That multiplies out to \$6,662.70, is that right?

18. A. Yes sir.

19. Q. Now, from the first week in April through the end of
20. August of 1978 is how many weeks?

21. A. It figures out to 21.4.

22. Q. 21.4 weeks. And do you anticipate making the same salary
23. that you're making now for that period of time?

24. A. Yes sir.

1. Q. And how much is that?

2. A. \$212.00 a week.

3. Q. \$212.00, okay. And if you multiply that out then you get

4. \$4,536.80. Is that correct?

5. A. Yes sir.

6. Q. Now, if we subtract, excuse me. First of all, if we add

7. up the salary that you've made from Wetsel's and that you

8. expect to make from Wetsel's, what do we get?

9. A. \$11,199.50.

10. Q. If we subtract that from what you would have made at

11. Neff's had you stayed there, what do we get?

12. A. \$2,140.50.

13. Q. All right, that's subtracting this figure from that

14. figure. You get what?

15. A. \$2,140.50.

16. Q. All right. We'll call that difference in base salary.

17. MR. HATMAKER: If Your Honor please. We have a stipu-

18. lation that's been previously entered into as to Mr. Del-

19. linger's salary and commissions for the years 1974 to . .

20. MR. JULIAS: We object to any stipulation, Your Honor.

21. There's been no stipulation before this Court as to any

22. damages.

23. COURT: Let me see the stipulation.

24. MR. HATMAKER: Right here it is, Your Honor. It's not

1. damages anyway. It's the amount of salary and commissions.

2. COURT: Well, this is a stipulation of what his salary
3. and commissions were for the years 1974, 1975, 1976, and
4. 1977.

5. MR. BLATT: They're not damages. They're not stipulated
6. as to damages.

7. COURT: Nobody has stipulated . . . have you proffered
8. any stipulation of damages, Mr. Hatmaker?

9. MR. HATMAKER: No, I haven't proffered any stipulation
10. of damages, Your Honor. We had stipulated these items
11. upon which we expect to . . .

12. COURT: As I understand it, it is stipulated that this
13. is what the parties agree Mr. Dellinger's salary and
14. commissions were for each of the years stated here. Do
15. you object to this being received in evidence?

16. MR. JULIAS: It has no relevance to this hearing.

17. COURT: The objection is overruled.

18. MR. JULIAS: Note our exception.

19. COURT: Received in evidence as Plaintiff's Exhibit #2.
20. Has Plaintiff's Exhibit #1 been received in evidence?

21. MR. HATMAKER: Yes sir.

22. COURT: Plaintiff's Exhibit #1 is received in evidence,
23. and this is Plaintiff's Exhibit #2 received in evidence.
24. That is signed by Mr. Julias or Mr. Blatt, I assume.

1. MR. JULIAS: If it please the Court. May I approach
2. the Bench?

3. COURT: Let me excuse the members of the jury so we can
4. take up this matter of law.

5. (Jury Leaves Courtroom)

6. MR. JULIAS: This is the first that I have heard about
7. the proffering of any stipulation by Mr. Hatmaker since
8. this matter's been pending before this Court. We've had
9. numerous pre-trial conferences in this matter and the case
10. has been pending for several months. Mr. Hatmaker has
11. filed voluminous requests and pleadings, all of which have
12. been answered. At no time has any stipulation been had.
13. That stipulation was signed as a matter of convenience
14. only in a Court not of record, and now we are here de novo
15. and we have not been requested to execute any stipulation
16. and we strongly object to any reference to it.

17. COURT: Let me see the stipulation. This came out of
18. the Court file, did it not?

19. MR. JULIAS: It came out of the County Court file.

20. COURT: So, it's in the file.

21. MR. JULIAS: But, it's never been proffered to this
22. Court for its consideration. As a matter of fact, it's
23. been entered over our objection.

24. COURT: Well, gentlemen, all I know is that it is a

1. stipulation and it is in the record.

2. MR. JULIAS: But, it's a de novo hearing, Your Honor.
3. If you want to go on that, it's in the record from the
4. previous hearing that there was a defendant's verdict.

5. MR. HATMAKER: Your Honor, I frankly have never heard
6. of any such thing as this. I think this is the kind of
7. thing they could have brought up at pre-trial. You men-
8. tioned the stipulation as having been in the record and
9. they didn't say a word about it.

10. MR. JULIAS: Mr. Hatmaker, we don't even concede that
11. a claim for commissions is justified.

12. COURT: Just a minute, gentlemen.

13. MR. JULIAS: As a matter of fact, it's been expressly
14. denied. As a matter of fact, Mr. Steven Blatt, who at-
15. tended the latest pre-trial conference in this matter
16. last Monday, was specifically instructed by me because of
17. my inability to be present, that under no conditions were
18. there any stipulations of damages or otherwise to be con-
19. ceded or admitted should the matter be brought to the at-
20. tention of the Court because up until now it's never been
21. brought to this Court's attention for the first time and
22. there's been numerous orders entered by the Court on every-
23. thing that's been brought up on each occasion.

24. COURT: Well, there's no question then that counsel

1. are in agreement that this stipulation that's marked
2. Plaintiff's Exhibit #2 was in the record that was trans-
3. mitted to this Court from the General District Court.
4. Now, the pre-trial order on the 6th of March, 1978, says,
5. "The pleadings heretofore filed shall be considered to be
6. the motion for judgment." And everything that was in
7. the record from the District Court was in this file.

8. MR. JULIAS: Has that been filed? Is it marked filed
9. and initialed by Judge Paul? The reason I raise the ques-
10. tion, Your Honor, is when the case was tried in the Dis-
11. trict Court we never even considered damages. It was
12. agreed between counsel that the only issue for the Court
13. was to determine the validity of the contract; and if
14. there was, in fact, a valid contract, then we would argue
15. damages. I don't even know how it got filed.

16. MR. BLATT: It's never been filed in the District Court.

17. COURT: Well, all we know is it is in the record that
18. was transmitted here from the District Court and all this
19. shows is what the salary and the commissions were for the
20. years 1974 through 1977.

21. MR. JULIAS: It's not filed, it's not marked filed.

22. COURT: You gentlemen have agreed that it was part of
23. the record that was sent here from the District Court.

24. MR. JULIAS: I'm sorry, I have not agreed to that, Your

1. Honor. And I don't think you're going to find anything in
2. in the record that's going to indicate that I have agreed
3. to it. I'm sorry to take issue with it and I hate to be-
4. labor the point, but I feel very strongly about it. Now,
5. Mr. Hatmaker has had ample opportunity to get his damages
6. in order. If he elects to undertake to do it today, then
7. I'm sorry, that's his fault, not ours.

8. COURT: This has been in the record, there's been no
9. question about . . .

10. MR. JULIAS: It's only been in the file. It hasn't
11. been in the record. When you say the Motion for Judgment
12. is a matter of record . . .

13. COURT: Is there any issue about these items, Mr. Julias?

14. MR. JULIAS: Yes sir, because we're contending that the
15. commissions that he's contending that was due and owing
16. in 1977 are speculation.

17. MR. HATMAKER: First of all, these numbers are based on
18. information that Neff's bookkeeper gave us, and Mr. Del-
19. linger can testify to that if he's required to. There's
20. nothing in here that is a conclusion. All of that data
21. is data that came from Neff Trailer Sales, and the reason
22. we entered into the stipulation in the District Court was
23. to save the time and trouble of the Neff bookkeeper com-
24. ing down and testifying.

1. COURT: I assume you wouldn't have signed this, Mr.
2. Julias, unless you had verified these figures were correct.

3. MR. JULIAS: Mr. Hatmaker asked me at the outset to sign
4. that, Your Honor, and I agreed to it. And then we decid-
5. ed, and it was no question about it, we never even got
6. into damages in the District Court. The subject was
7. never even brought up, because the only issue before
8. Judge Paul was to determine the validity of a contract.

9. MR. HATMAKER: We submitted the stipulation at the be-
10. ginning of the trial. For the convenience of the trial,
11. we determined that the issue of whether or not there was
12. a contract would be settled first, and if it were a con-
13. tract then the Judge would get into damages. That's why
14. he didn't actually take the piece of paper, hold it in
15. his hand and do things with it. But it was made a part
16. of the record, and as far as I'm concerned, it's still
17. in the record.

18. MR. JULIAS: That's exactly why it wasn't filed, be-
19. cause it was never an issue for the Court's consideration.

20. MR. HATMAKER: I've never heard that it wasn't filed
21. because, Your Honor, I had it made.

22. COURT: But it was in the record that was sent here
23. from the District Court. And I don't see that it makes
24. any difference, Mr. Julias, whether it was in this record

1. or whether Mr. Hatmaker retained it in his file. Here it
2. is, a stipulation, and it's signed by you as counsel for
3. Neff.

4. MR. JULIAS: Well, Your Honor, I think we are at least
5. afforded the opportunity and the courtesy of asking if
6. we agreed to a stipulation in this Court.

7. COURT: Well, here it is. It's signed as a stipulation.

8. MR. JULIAS: Well, you say that, Your Honor, but I don't
9. concede that because it has not been accepted as a filed
10. exhibit and I don't consider that a matter of record,
11. and I don't think the Court should undertake to do so.

12. COURT: The only question--is this your signature, Mr.
13. Julias? That's the only question that the Court will be
14. concerned with.

15. MR. JULIAS: Yes sir, that's my signature. But I do
16. not concede that that was ever filed as an exhibit.

17. COURT: All right. This is received in evidence as
18. Plaintiff's Exhibit #2. Let's go onto something else,
19. gentlemen, before we get involved in this issue. I no-
20. tice that in the bill of particulars there's an amount
21. of \$423.38 that is referred to as "less previously ten-
22. dered and held." What is the status of that?

23. MR. HATMAKER: That was a check that Neff paid Dellinger
24. for his accumulated vacation, which Mr. Dellinger took

1. and eventually did cash. And so, that is a setoff.
2. There is an additional setoff, Your Honor, and I realize
3. this isn't evidence and I'm sure Mr. Julias will object
4. to this even being in the Courtroom, but I'll be happy
5. at this point for the convenience of everybody in order
6. to try to save some time here to supply a statement of
7. the damages that we expect to prove and how we expect to
8. prove them today.

9. COURT: You've filed this, haven't you?

10. MR. HATMAKER: No, this is revised, I just drew this
11. up. And the reason I did was because I just found out
12. the other day that Mr. Dellinger had received a raise
13. from Wetsel's Seed which actually reduced his damages
14. a little bit. And also that Mr. Dellinger had collected
15. unemployment benefits totaling \$330.00, which I've also
16. included in the setoff down at the bottom of the page.

17. COURT: So, when you calculate your damages you will
18. give the defendant credit for that \$423.38?

19. MR. HATMAKER: That's right, and I have. It's the last
20. number on the page, \$3,836.24, is the damage we're ask-
21. ing. Now, Your Honor, we might as well get into this
22. now since the jury is out. I've had to make some projec-
23. tions here of the commissions that he would have earned
24. for the full year of 1977 and for the year 1978. And I

1. think I'm entitled to do that under the authority of
2. M & B Construction Company v. Mitchell, 213 Va. 755.
3. What I've done--or, maybe it would help if the Court just
4. read this first.

5. COURT: Well, I don't see any problem there. The stipu-
6. lation does not say the period of time in 1977 that he
7. worked. And you gentlemen can do it any way you wish
8. and argue about which way it should be done, which will
9. be questions for the jury.

10. MR. HATMAKER: That stipulation is as to dollars he
11. received from Neff's before he was fired. Now, what I
12. want to do is to project from that the commissions he
13. would have made for the remainder of that year plus the
14. commissions he would have made for 1978.

15. COURT: I don't see any problem there.

16. MR. HATMAKER: Your Honor, I don't either.

17. MR. BLATT: That's objectionable because any commissions
18. that he receives would be on the amount--directly in pro-
19. portion to the amount of work that he does, and we can't
20. tag a definite figure on that, a bottom-line figure. He
21. may do less work or perform less than what he had done
22. before. And it's entirely speculation to go as to what
23. his projected commissions would be.

24. COURT: Well, gentlemen, there's no problem here. The

1. evidence can be admitted before the jury and it's up to
2. the jury to make the appropriate projection. Now, so
3. long as the witnesses stay away from opinions and con-
4. clusions the evidence is admissible. But the opinion or
5. conclusion with respect to what the projected loss of
6. commission was is a matter for the jury to determine,
7. based on what he had received in the past.

8. MR. JULIAS: Your Honor, that's right. But, what we're
9. objecting to is for him to give testimony that \$1,497.01
10. was in fact lost.

11. MR. HATMAKER: No, I wouldn't testify to that.

12. MR. JULIAS: Well, this has indicated that you would.

13. MR. HATMAKER: Well, I wouldn't. If you'd listen to
14. what I was saying.

15. MR. JULIAS: I'm just reading what you gave me, Mr.
16. Hatmaker.

17. MR. HATMAKER: I understand you are. But you have not
18. read that, and you don't listen to what I'm saying and
19. you never have throughout this thing.

20. COURT: Now, it's not necessary to make that comment,
21. Mr. Hatmaker.

22. MR. HATMAKER: I'm sorry, Your Honor. I've made a pro-
23. jection for the entire year 1977, and I expect in argu-
24. ment to show how I get that figure, Your Honor. And I

1. believe the closing argument is the proper place to make
2. that projection.

3. MR. BLATT: Your Honor, that's a conclusion that Mr.
4. Hatmaker would be drawing from the evidence and not pro-
5. per. The jury can make its own conclusion.

6. COURT: Gentlemen, this is such a simple matter. Coun-
7. sel in closing argument can suggest to the jury what con-
8. clusions they may draw from the evidence.

9. MR. JULIAS: I agree to that, Your Honor. The only
10. thing that I'm disagreeing with is Mr. Hatmaker drawing
11. all these figures and putting all these figures up and
12. dividing them by four and to come down and suggest to the
13. jury that that is the figure.

14. COURT: He's merely advising you what his position is
15. going to be and is advising you that he has very gra-
16. ciously, based on additional evidence, reduced the amount
17. that he previously claimed. Now, do you want him to stick
18. to his former figure?

19. MR. JULIAS: I want to know if he's intending to offer
20. this as an exhibit.

21. COURT: I haven't seen any offering in evidence.

22. MR. BLATT: What I'm getting at, Your Honor, is if Mr.
23. Hatmaker wants to argue that to the jury, that's one
24. thing, but setting up here and calculating it and giving

1. it the force of evidence, in his opinion, as to what the
2. projections would be at this time is not relevant.

3. COURT: Gentlemen, this is such a simple, uncomplicated
4. matter. I just can't understand all the controversy
5. about it.

6. MR. HATMAKER: Your Honor, here's what I plan to do,
7. and we might as well get it straightened out right now,
8. as whether this is all right or not. I expect to show
9. the jury now what the figures on that stipulation are. I
10. expect to introduce evidence as to the number of pay per-
11. iods which he took a ten percent deduction in pay, and I
12. expect to introduce evidence that he expected to get that
13. money back, and I will do the multiplications. Now, as I
14. understand the law, any projections I make as to future
15. lost commissions based on the commissions that he actual-
16. ly had earned, and there is an element of speculation in-
17. volved in this, that is a proper subject for closing argu-
18. ment and I expect to make those projections then. Be-
19. cause they are, in my mind, conclusions that the jury can
20. draw. Now, I'm sure they're going to object to all this,
21. but we might as well clear the air now, as to whether this
22. procedure is acceptable to the Court. I can't conceive
23. that there would be any problem with it.

24. COURT: Well, I'll hear the objections when they're

1. made at the proper time. Since the jury is out we'll
2. take a three minute break.

3. (Recess)

4. (Jury Returns)

5. COURT: Proceed, Mr. Hatmaker.

6. MR. HATMAKER: If I could have that stipulation, I'd
7. like to put those numbers up on the board. For the
8. benefit of the jury, I want to state that these figures
9. have been stipulated by counsel for both sides as to what
10. the salary and commissions were actually earned by Car-
11. roll Dellinger during the time that he was an employee
12. at Neff's. And I'll put them down for years. I'll make
13. three columns, one for year, one for salary and one for
14. commissions. In 1974 the salary was \$11,960.00 and com-
15. missions earned was \$1,070.02. In 1975 the salary was
16. \$11,730.00 and commissions earned was \$294.72. In 1976
17. the salary was \$11,546.00 and commissions earned was
18. \$1,962.05. In 1977, and this is the year he was discharg-
19. ed, the salary was \$6,969.00 and commissions of \$824.38.

20. Q. Now, Mr. Dellinger, during the period of time that you
21. worked for Neff's, did you take a reduction in the sum
22. of \$230.00 a week.

23. A. Yes sir, I did.

24. Q. When was that and why? What happened?

1. A. It was in June of 1975. I had just come back off of
2. vacation and some of the other office personnel was talk-
3. ing to me about having to take a cut . . .

4. MR. BLATT: Objection, Your Honor, that's hearsay, what
5. the other office personnel would have been talking to him
6. about.

7. COURT: Do you want to omit the matter of the reduction
8. of salary?

9. MR. HATMAKER: No, Your Honor, I don't.

10. COURT: I'm asking the defendant whether they wish to
11. disregard the matter of reduction of salary.

12. MR. JULIAS: What do you mean, omit it?

13. MR. BLATT: No, Your Honor. I withdraw the objection.

14. COURT: You may proceed, Mr. Hatmaker.

15. A. They were talking about having to take a ten percent cut
16. in salary, this was right when I came back from vacation.
17. About a week later, Mr. Neff called me in the office and
18. said that the financial situation of Neff Trailer Sales
19. was down and he was asking everybody to take a ten per-
20. cent cut in salary.

21. Q. They were asking everybody to take one?

22. A. Yes sir. And I asked him for how long a period of time,
23. and he said until the corporation got back on its feet,
24. at that time that you'll get your ten percent back. And

1. I have never seen it.
2. Q. Well, now, what do you mean, "you'll get your ten percent
3. back." What was your understanding of that?
4. A. He told us that when the corporation got back on its feet
5. that we would get our ten percent back, plus the back ten
6. percent that was held out.
7. Q. For what period of time did you actually take a pay cut?
8. A. It was June of 1975, I believe. June of 1975 to May 2nd
9. of 1976.
10. Q. Do you remember how many pay periods that was?
11. A. It was twenty-four pay periods.
12. Q. Twenty-four pay periods?
13. A. Yes sir.
14. Q. Now, during that time, during the twenty-four pay periods
15. that you took the reduced salary, what was your check?
16. A. \$212.00 a week, I believe it was, sir.
17. Q. Is that correct? Are you sure?
18. A. It was \$414.00 for two weeks.
19. Q. You were paid every two weeks?
20. A. Yes sir.
21. Q. Twenty-four pay periods at \$414.00 per pay period. Is
22. that correct?
23. A. Yes sir.
24. Q. It multiplies out to \$9,936.00. Now, you had been making

1. \$230.00 a week or \$460.00 a pay period. Is that correct?
2. A. Yes sir.
3. Q. So, if you had not taken a ten percent deduction during
4. this time you would have made \$11,040.00. Is that cor-
5. rect?
6. A. Yes sir.
7. Q. And the difference between the two is \$1,104.00. Is that
8. right?
9. A. Yes sir.
10. Q. Now, why did you take the pay cut, you had a contract?
11. A. Because of the financial condition of the corporation.
12. Mr. Neff explained to me what the problem was and I took
13. the ten percent cut because I figured that I would get
14. the ten percent back eventually, after the corporation
15. got back on its feet.
16. Q. Did other employees take that same pay cut?
17. A. Yes sir.
18. Q. Did you ever get this money back?
19. A. No sir.
20. Q. Was your salary raised back up to \$230.00 a week, event-
21. ually?
22. A. Yes sir.
23. Q. Did you receive a check for vacation benefits from Neff
24. Trailer Sales after you were discharged?

1. A. I received a check for salary and some commissions I had
2. coming to me, plus the three or four days vacation I had.
3. Q. What was that check for, how much money?
4. A. \$423.38.
5. Q. So, you were then paid \$423.38. And did you receive any
6. other checks?
7. A. I received \$330.00 from unemployment.
8. Q. All right. \$330.00 from unemployment. And that was for
9. what period of time?
10. A. That was from the period of time I left Neff's until I
11. went to work at Wetsel's.
12. Q. What kind of job do you do at Wetsel's?
13. A. Credit collection manager and, well, mostly credit col-
14. lection. I approve all credit accounts, new accounts.
15. Q. You do the same kind of work you did for Neff's, is that
16. correct?
17. A. Yes sir.
18. MR. HATMAKER: No further questions.
19. COURT: The defendant may inquire.
- 20.
21. Cross Examination by Mr. Julias:
22. Q. Mr. Dellinger, you indicated in your testimony in chief
23. that you first went to work in 1967 and Don Strickler
24. was that person who hired you.

1. A. Yes sir.

2. Q. How many raises did you receive from May of 1967 until
3. you signed this alleged memorandum on August 31, 1973?

4. MR. HATMAKER: Objection, Your Honor. It's irrelevant.

5. COURT: Overruled.

6. A. I'd say approximately three.

7. Q. Had you ever made any requests for raises for which you'd
8. been denied?

9. A. No.

10. Q. Now, isn't it a fact that during your course of employment
11. with Neff's that you had from time to time sought employ-
12. ment elsewhere?

13. A. Yes, I would say that.

14. Q. And isn't it a fact, Mr. Dellinger, that instead of 1973
15. it was in 1971 when you talked with United Virginia Bank
16. about handling credit collections for them.

17. A. No. It was 1973.

18. Q. Are you absolutely certain of that?

19. A. Yes.

20. Q. Now, Mr. Hatmaker in his opening statement indicated that
21. it was because of the offer of United Virginia Bank that
22. this agreement was drafted. And you've indicated that
23. you drafted the agreement yourself, I believe.

24. A. That's right.

1. Q. And at the time you drafted that agreement and you pre-
2. sented it to Mr. Strickler you did not tell him it was
3. because of the United Virginia Bank that you wanted that
4. agreement, is it?
5. A. Not the day that I presented it to him. I discussed that
6. to him before it was drew up, several weeks before that.
7. Q. Now, Don Strickler occupied what title out at Neff's?
8. A. Vice-President.
9. Q. Were there other vice-presidents out there?
10. A. Yes, it was.
11. Q. How many? How many do you know of?
12. A. Well, it varied, sometimes four, sometimes five, some-
13. times three. It all depended on who left and who came.
14. Q. There were several vice-presidents?
15. A. Right.
16. Q. And was not Ivan Messick also employed at Neff Trailer
17. Sales at that time?
18. A. Yes, he was.
19. Q. And what was his title?
20. A. He was Vice-President.
21. Q. Was he also under the title of general manager, in charge
22. of operation?
23. A. No.
24. Q. He was not?

1. A. Not that I know of, no sir.
2. Q. How long did Mr. Messick work out there, to your knowledge?
3. A. I believe he was in business with Mr. Neff ever since he
4. was in the mobile home business.
5. Q. Isn't it a fact that Mr. Messick was the one that signed
6. and discounted the notes that Mr. Hatmaker has been re-
7. ferring to, that you've indicated that Don Strickler was
8. handling?
9. A. He signed some, yes sir.
10. Q. He signed some, far more than Mr. Strickler?
11. A. Yes.
12. Q. And as a practical matter, it was actually Ivan Messick
13. or Bill Neff who generally handled the paper work that
14. was financed and discounted through banks.
15. A. Yes, except when they was gone then Mr. Strickler done it.
16. Q. It was rare that Mr. Neff and Mr. Messick were gone at
17. the same time, is it not?
18. A. No, I wouldn't say it was rare, no.
19. Q. Now, when you say gone, you're talking about gone for
20. days at a time.
21. A. Two or three days, a week, yes.
22. Q. I don't believe there's any issue of the fact that you
23. did deal in collections and this was your principal forte,
24. insofar as handling repossessions and working collections

1. and the like. Now, do you know of any other employee that
2. ever had an employment contract with Neff Trailer Sales?

3. A. Mr. Strickler.

4. Q. We'll get to that in a minute. But, other than that, do
5. you know of any other employee that ever . . .

6. A. No.

7. Q. How many employees does Mr. Neff have?

8. A. Now I don't know.

9. Q. Well, how many did he have at the time you were there or
10. just up to the time of your termination?

11. A. Excluding shop, because I don't know how many ever worked
12. back there, I would say--including the sales force and
13. the office around twelve.

14. COURT: Mr. Julias, when you say how many employees did
15. Mr. Neff have, you mean Neff Trailer Sales, Incorporated.

16. MR. JULIAS: Neff Trailer Sales, yes sir. I'm sorry.

17. Q. The Neff Trailer Sales, Incorporated is what I'm refer-
18. ring to.

19. A. I'd say between ten and twelve.

20. Q. And to your knowledge none of those people, excluding Mr.
21. Strickler for the moment, had any employment agreement
22. that you're aware of?

23. A. Not that I know of.

24. Q. Now, the agreement that Mr. Hatmaker has alluded to and

1. that you've testified to, who was that agreement between?
2. A. Mr. Neff--Neff Trailer Sales and Don Strickler.
3. Q. And was it Don Strickler individually, or Don Strickler
4. as a business enterprise that he had that was completely
5. unrelated to Neff Trailer Sales?
6. A. I think at the time he was going under Harrisonburg
7. Collection Agency or something like that.
8. Q. So, he did in fact have a collection agency that was in-
9. dependent of Neff Trailer Sales, didn't he?
10. A. It could be considered independent, but he worked out of
11. Neff Trailer Sales' office.
12. Q. But it was Mr. Strickler's business, wasn't it?
13. A. Yes.
14. Q. And that agreement was between Don Strickler and his col-
15. lection agency and Neff Trailer Sales?
16. A. Yes sir.
17. Q. So, it was actually a service agreement to handle collec-
18. tions, wasn't it?
19. A. I don't know if it was a service agreement, but I knew it
20. was an agreement between Don Strickler and Mr. Neff.
21. Q. Do you know whether performance was required under that
22. agreement. In other words, was performance required while
23. he was working at Neff Trailer Sales or was it required
24. by working in an office that was maintained by that col-

1. lection agency?
2. A. While he was working for Neff Trailer Sales.
3. Q. Are you sure of that?
4. A. Yes, because his office was for the exception of a period
5. of about six months was at Neff Trailer Sales.
6. Q. Did he ever work that from his home?
7. A. Six months, about six months he did.
8. Q. Now, if you looked at that agreement, then you know that
9. that agreement was terminable at will too. Was it not?
10. A. I believe the clause in it was thirty days.
11. Q. Either party could terminate in thirty days?
12. A. Right.
13. Q. But, so far as you know it didn't have anything to do
14. with his employment status as vice-president or officer
15. of Neff Trailer Sales?
16. A. No.
17. Q. He never represented, other than that agreement that you
18. allude to, any other authority that he had to enter into
19. a written agreement with you, did he?
20. MR. HATMAKER: Objection, Your Honor. That calls for a
21. conclusion.
22. MR. JULIAS: I just asked if he ever represented him-
23. self as having that authority.
24. COURT: This has to do with what Strickler represented?

1. MR. JULIAS: Yes sir.

2. MR. HATMAKER: I'm sorry.

3. COURT: You may answer the question.

4. Q. I'll phrase the question again. Other than the agreement
5. that we just referred to that was between a collection
6. agency that Strickler had and Neff Trailer Sales, did
7. Strickler ever represent to you at any time, other than
8. what you've indicated there, that he had authority to
9. enter into an employment agreement, a written employment
10. agreement?

11. A. No. No, not a written employment agreement. It was
12. never brought up before.

13. Q. Who was the President of this corporation?

14. A. Bill V. Neff.

15. Q. Did Bill V. Neff ever fire employees out there, that you
16. are aware of, from the time you became employed there?

17. A. Yes, I would say he did.

18. Q. Did he ever fire any employees that Mr. Strickler had
19. hired, that you're aware of?

20. A. I would say yes. I don't know . . .

21. Q. In other words, as the President of the company he had
22. authority to run the company?

23. A. Yeah, sure, he had authority. That's right.

24. Q. Now, when this agreement that's been referred to was

1. drafted by you, you indicated you typed it yourself in
2. your office, and it was dated August 31, 1973.

3. A. Right.

4. Q. At the time you prepared this, is it not a fact that you
5. told Mr. Strickler that you would not seek anymore raises
6. for five years if he would agree to pay you \$230.00 per
7. week?

8. A. I told him what was in the contract. If the contract
9. stated that, I guess that's what I told him.

10. Q. Well, you read the contract. Why did you leave what date
11. in August this contract, if it was valid, was supposed to
12. terminate?

13. A. Because it was written on August the 31st, and the year
14. ended on, 'as far as I was concerned, the five years end-
15. ed on August 31st, 1978.

16. Q. And I believe the last paragraph, which was not read,
17. indicates that, "Neff Mobile Homes agrees to pay the
18. above salary for this period of time and is in no way
19. liable to give any raises within this period of time."

20. A. No, I read that paragraph.

21. Q. Did you read that?

22. A. Yes.

23. Q. Well, excuse me. Mr. Hatmaker was examining you on it,
24. I believe, he didn't cover that paragraph. Didn't that

1. paragraph in effect say what you had represented to Mr.
2. Strickler, that you agreed to stay there and not ask for
3. any raises for five years?

4. A. Yes.

5. Q. Now, there's nothing in this agreement to permit you from
6. leaving anytime you wanted to within that period of time,
7. is there?

8. A. As far as I was concerned it was. Because I agreed to
9. stay there and work for a certain salary for a five year
10. period.

11. Q. Well, what recourse would Neff Trailer Sales have if you
12. would elect to have left after two years?

13. A. The same recourse that I got, Court.

14. Q. You feel that this would have given him a cause of action
15. against you?

16. A. Yes sir.

17. Q. Is that just what your impression is?

18. A. That's my opinion.

19. Q. Now, if this were intended to be an employment agreement
20. and if you were so vital to the internal workings of Neff
21. Trailer Sales, why wasn't there a covenant or restriction
22. against you from going to work with any other company
23. performing the same duties in competition with Neff?

24. MR. HATMAKER: Objection, Your Honor. I think the ques-

1. tion calls for a conclusion.

2. COURT: It's argumentative. It calls for a conclusion
3. of law. The objection is sustained.

4. Q. Now, you prepared this agreement.

5. A. Yes sir. Mr. Strickler told me to write it up and he
6. would sign it.

7. Q. Who did you receive your pay checks from?

8. A. Neff Trailer Sales.

9. Q. Are you sure about that?

10. A. Yes.

11. Q. And Neff Trailer Sales is who you were working for, is
12. it not?

13. A. Yes.

14. Q. In reading this agreement, it appears to me that the
15. agreement is by and between Neff Mobile Homes, Inc. Who
16. is Neff Mobile Homes, Inc.?

17. A. They had changed. They felt that Neff Trailer Sales didn't
18. sound right to the public, to the public image, as far as
19. mobile homes, and mostly the majority of the stuff was
20. simply Neff Mobile Homes, Incorporated.

21. COURT: The Motion for Judgment is Neff Trailer Sales,
22. Incorporated, doing business as Neff Mobile Homes. And I
23. assume from that that Neff Mobile Homes is a trade name
24. of Neff Trailer Sales, Incorporated. Is there any issue

1. about that?

2. MR. JULIAS: I'm unaware of it.

3. MR. HATMAKER: As far as I'm concerned, it isn't. Your
4. Honor, it's a trade name.

5. COURT: There's been no issue raised about that.

6. MR. JULIAS: Well, it's a matter of proof on the com-
7. plainant. He prepared the agreement, he should certainly
8. know with whom he's employed.

9. COURT: Well, the motion for judgment alleges that Neff
10. Trailer Sales, Incorporated was doing business as Neff
11. Mobile Homes, a trade name. There's no denial in the
12. pleadings that they did business under that trade name.

13. MR. JULIAS: We're talking about the contract itself,
14. Your Honor. There's nothing of record that we're aware
15. of that there is any such organization as Neff Mobile
16. Homes, Inc. That's who the agreement is between.

17. COURT: Except the allegation in the Motion for Judg-
18. ment that, as far as the pleadings show, is undenied.

19. MR. JULIAS: Everything is denied in the Motion for
20. Judgment, Your Honor.

21. MR. HATMAKER: Your Honor, this was never made an issue
22. of in this case until now. As far as I'm concerned, the
23. matter is not in dispute.

24. MR. JULIAS: He said he worked for Neff Trailer Sales,

1. Incorporated.
2. COURT: All right. Go ahead.
3. Q. You did work for Neff Trailer Sales, Incorporated?
4. A. Yes.
5. Q. And you did draft this agreement?
6. A. Yes.
7. Q. And the agreement is by and between you and Neff Mobile
8. Homes, Inc.
9. A. Yes, it was signed by Mr. Strickler, Neff Mobile Homes,
10. Incorporated.
11. Q. It says "Neff Mobile Homes." It doesn't even say incor-
12. porated, the copy that I have. Is that what your copy
13. says?
14. A. Neff Mobile Homes, by Don Strickler, yes.
15. Q. Now, in June of 1976, Mr. Neff made it clear that he was
16. giving a ten percent cut for all employees across the
17. board, including himself, did he not, of Neff Trailer
18. Sales?
19. A. June of 1975.
20. Q. I'm sorry, 1975.
21. A. Yes sir.
22. Q. And, in fact, that plan was implemented, was it not?
23. A. As far as I know it was.
24. Q. And I believe Mr. Neff, as President of Neff Trailer

1. Sales, called you into his office personally to discuss
2. this with you, did he not?

3. A. Yes, because I was on vacation when the others was told.

4. Q. And he called each employee into the office personally
5. and so advised them.

6. A. I don't know about the other employees. I wasn't there
7. when it happened.

8. Q. And at that time he indicated that the company was having
9. financial hardships and that in reviewing the salary
10. scale of everyone that a ten percent across the board
11. pay cut was in order.

12. A. Yes. He asked everybody to take a ten percent cut.

13. Q. And I believe he further indicated that at the first time
14. that he could get the financial condition of the company
15. turned around he would reinstate the ten percent cut to
16. everybody.

17. A. Yes sir.

18. Q. And as a matter of fact, approximately eleven to twelve
19. months later the company did get turned around and every-
20. body's ten percent cut was reinstated, wasn't it?

21. A. Mine was. I can't testify for the other employees.

22. Q. Now, no representation was ever made to you that you were
23. going to get the ten percent reinstated plus the ten
24. percent that was cut out, was it?

1. A. Yes, it was.

2. Q. Is that the impression that you actually had?

3. A. Yes sir.

4. COURT: Is that claimed as a matter of damage, Mr.
5. Hatmaker?

6. MR. HATMAKER: Yes.

7. Q. Did you ever go back to Mr. Neff and ask him for that ten
8. percent?

9. A. No, I didn't.

10. Q. Did you ever go to Mr. Strickler and ask him for that ten
11. percent?

12. A. It wasn't no use, several other employees had already
13. done it.

14. Q. As a matter of fact, not one employee got that ten per-
15. cent, did they?

16. A. No sir.

17. Q. Now, when Mr. Neff gave that ten percent across the board
18. pay cut, even to himself, why didn't you allude or make
19. reference to this alleged employment contract? Say,
20. "Well, Mr. Neff, I have an employment contract."

21. A. Because I knew the financial situation of the corporation
22. and I knew everybody else was going to take it. I decid-
23. ed to take it with the understanding that I had, that I
24. would get it back when it was back on--and that's the

1. reason the contract wasn't brought up.

2. Q. So, we're now in June of 1975, this agreement purportedly
3. was in effect since August of 1973. And to your knowledge
4. Mr. Neff, as the President of the company, was still not
5. aware of it.

6. A. I don't know if he was aware of it or not. I can't testi-
7. fy to that. I knew it was a copy of it in my personnel
8. file.

9. Q. But, you don't know if he was aware of it. You had not
10. told him.

11. A. No sir.

12. Q. Isn't it a fact now, Mr. Dellinger, that in February of
13. 1976, you again went back to Mr. Neff and asked for a pay
14. raise?

15. A. I went to Mr. Neff and asked for a pay raise because the
16. boy that was doing the same type of job that I was doing
17. was making an excess amount over what I was making. And
18. I felt that I deserved a raise.

19. Q. Why didn't you go to Mr. Strickler?

20. A. Because me and Mr. Strickler was having conflicts on
21. certain things, and I knew it wasn't no use to talk to
22. him about it.

23. Q. In other words, he was being somewhat demanding on you
24. and you all were having some difficulties.

1. A. I would say, yes.
2. Q. And it's a fact, Mr. Neff did not agree to give you a
3. raise as such. Isn't that correct?
4. A. He said that they would take it into consideration, and
5. after thirty days we'd talk about it and come back and
6. they'd see.
7. Q. And then he did say, "Okay, Carroll, I'll raise your com-
8. missions on collections from ten to fifteen percent, that
9. way it can be your own ability to generate further income
10. if you want a raise." And that's what you all agreed to.
11. A. Yes sir.
12. Q. And that was done?
13. A. Right.
14. Q. And according to the figures that are put up on the board,
15. then in 1976 you did realize more commissions because you
16. were able to generate more work because it was on your
17. own ability to do it.
18. A. Yes. I believe it was April of 1976, I believe. I'm
19. not sure of the date.
20. Q. Now, at this time you still had not made any mention to
21. Mr. Neff of any alleged employment agreement, had you?
22. A. No sir.
23. Q. Is that why you didn't go to Mr. Strickler to seek a pay
24. raise?

1. A. No sir.

2. Q. Now, in July of 1977, I believe you and a gentleman by
3. the name of Robert Taylor were working credit collections
4. together.

5. A. Yes.

6. Q. And I believe Mr. Taylor was also a licensed insurance
7. agent, was he not?

8. A. Yes.

9. Q. And were you not called in by Mr. Neff once again, as the
10. President of the company, and advised that there was not
11. sufficient need to have two of you all in the same posi-
12. tion. And, consequently, he wanted to move you out be-
13. cause Taylor had an insurance license and he could serve
14. in a more dual capacity than you.

15. A. Yes.

16. Q. In other words, this was a further cutback on operations.
17. Was it at that time that you first made mention of an
18. employment agreement or was it later?

19. A. I don't know if it was that time. I'd say it was within
20. two weeks.

21. Q. Why didn't you make mention of it at that time, if that
22. was what your expertise and the only thing that you felt
23. that you could do?

24. A. Because Mr. Neff told me I had sixty or ninety days to

1. find myself another job.

2. Q. But after two weeks you went back and you told him you
3. had an employment agreement.

4. A. That's right. After me and Mr. Strickler had a falling
5. out again, right.

6. Q. And at that time, did you show Mr. Neff this agreement?

7. A. I did not have the agreement with me. He said he'd like
8. to see it. I went home, brought it back and made him a
9. copy and give it to him, yes sir.

10. Q. At that time when you told him you had the agreement and
11. he said to go back and get it, let him take a look at it . .

12. A. Yes sir.

13. Q. So far as you know that was the first knowledge he ever
14. had of any alleged agreement, wasn't it?

15. A. As far as I know. I don't know if he . . .

16. Q. Well, it was obvious from what he had requested of you,
17. wasn't it?

18. A. It was in the personnel file. It was available to him.

19. Q. Now, you told him, according to your testimony, if I
20. wrote it down here correctly, that you would work for
21. him but you would not work for Strickler?

22. A. That's right.

23. Q. Well, does that mean then if he would have left you in
24. credit and you would have had to work for Strickler that

1. you would have quit?
2. A. No. I'd have done my job.
3. Q. Well, why did you tell him you weren't going to work for
4. Strickler?
5. A. Because probably at the time I was mad, that's probably
6. the reason I told him that.
7. Q. Now, after you showed this agreement to Mr. Neff he
8. said, "All right, I'll put you over in another area and
9. give you the same pay," didn't he?
10. A. Yes sir.
11. Q. And that position was service manager, was it not?
12. A. No sir.
13. Q. Well, what do you say the position was?
14. A. Foreman, supervisor. Because there was somebody else in
15. the service . . .
16. Q. You were asked to simply supervise people below you in
17. the reservicing of trailers, were you not?
18. A. That's right.
19. Q. And Mr. Neff is the one that asked you to occupy that
20. status, was he not?
21. A. He was.
22. Q. Now, don't you feel Mr. Neff, if he or his corporation
23. was going to pay you a salary, was the best judge as to
24. whether you could do the job or not?

1. MR. HATMAKER: Objection.

2. COURT: Sustained.

3. Q. Well, why do you feel that you could not do the job if
4. all you had to do was supervise the work?

5. A. Because I was never trained in that type of work. How
6. could I supervise somebody when I didn't know what I was
7. doing?

8. Q. Well, you didn't have to pass on the work, did you? All
9. you had to do was see that the work was done.

10. A. It was never explained.

11. Q. Well, you never asked to have it explained to you, did
12. you?

13. A. No. Because when he offered me the job I just told him
14. I'd have to seek my attorney's advice as to whether to
15. take it or not.

16. Q. And, as a matter of fact, didn't you tell him that your
17. attorney said you didn't have to take it.

18. MR. HATMAKER: Objection.

19. COURT: Sustained.

20. MR. JULIAS: Well, if he, in fact, made that statement,
21. Your Honor, I think it's very relevant.

22. COURT: The objection is sustained.

23. Q. So, then according to your last answer then, you said
24. that you'd talk it over with your attorney to see whether

1. you had to take that job.

2. A. Yes.

3. Q. At which time he terminated you.

4. A. A day or so later, yes.

5. Q. And you got the check and so forth that Mr. Hatmaker referred to. Just to recapitulate, you asked for the raise in June of 1975--excuse me. You received a ten percent pay cut in June of 1975. You asked for a raise in February of 1976. And in July of 1977, just prior to your termination, is where you indicated your willingness that you would work for Mr. Neff himself, but not Don Strickler.

13. A. Right.

14. Q. And at all times, so far as you know, you were gainfully employed by Neff Trailer Sales, Incorporated.

16. A. Yes.

17. MR. JULIAS: I think that's all the questions I have for now.

19. COURT: Do you wish to re-direct the witness, Mr. Hatmaker?

22. Re-Direct Examination by Mr. Hatmaker:

23. Q. Let me clarify one thing. You said you had a conversation with Mr. Strickler a couple of weeks before you all

1. signed that agreement with respect to the job you'd been
2. offered at the Spotswood Bank?
3. A. Yes sir.
4. Q. And so, Mr. Strickler did know that you were thinking
5. about changing jobs when he signed that agreement, is
6. that correct?
7. A. Yes sir, he did.
8. Q. Now, you testified that to your knowledge no other em-
9. ployees had received written employment agreements ex-
10. cept Mr. Strickler. Do you know whether any other em-
11. ployees had asked for any such agreement?
12. A. No sir, I don't.
13. Q. When Strickler signed that agreement, did you believe
14. that he was acting on his own behalf?
15. A. No sir.
16. Q. Did you believe that he was acting on behalf of his own
17. private enterprise, his collection agency?
18. A. No sir.
19. Q. On whose behalf did you think he was acting?
20. A. Neff Trailer Sales.
21. Q. Now, was Neff Mobile Homes a trade name for Neff Trailer
22. Sales?
23. A. Yes sir.
24. Q. I believe the corporation did business as Neff Mobile

1. Homes, is that correct?

2. A. It did business as Neff Trailer Sales with the trade name
3. of Neff Mobile Homes, right.

4. Q. Did Bill Neff have access to the personnel files during
5. the period of time that this contract was in the file?

6. A. Yes sir.

7. Q. Did he go into them by any chance, that you know of?

8. A. I thought that he went through all the personnel files
9. when there was any major change made in the company's
10. policy.

11. Q. But he did have access to them?

12. A. Yes sir.

13. MR. HATMAKER: No further questions.

14. COURT: Re-cross?

15. MR. JULIAS: Yes sir.

16.

17. Re-Cross Examination by Mr. Julias:

18. Q. If your contract or alleged contract was in your person-
19. nel file when Mr. Neff asked you to get it, why didn't
20. you just ask him to remove it from your personnel file?

21. A. My copy was home. Mr. Strickler's and Neff Trailer Sales
22. copy was in the personnel file.

23. Q. That's my question. Why didn't you ask Mr. Neff just
24. to remove it right from his file, which was right there

1. in his office.

2. A. He asked to see a copy of mine. He didn't ask to see the
3. copy of the one at the trailer sales.

4. Q. Is there a difference between the two?

5. A. No.

6. Q. Well, why as a matter of principle, why didn't you say,
7. "Well, there's a copy in my personnel file."

8. A. I don't see why that is. He asked for a copy of mine
9. and I gave it to him.

10. Q. Do you know whether or not there is one in the personnel
11. file?

12. MR. HATMAKER: Objection, Your Honor. I think he's
13. answered.

14. COURT: I think you've pursued this just about as far
15. as you can go, Mr. Julias.

16. MR. JULIAS: All right.

17. COURT: Any further questions of this witness?

18. MR. HATMAKER: That's our case, Your Honor.

19. COURT: The Plaintiff rests. The Defendant may pro-
20. ceed.

21. MR. BLATT: Your Honor, we'd like to make a motion
22. out of the presence of the jury.

23. COURT: I'll excuse the members of the jury.

24. (Jury Leaves Courtroom)

1. MR. JULIAS: If it please the Court, we move to strike
2. the evidence. And on that basis, we would, among the many
3. grounds we wish to assign, assert and set forth that the
4. Plaintiff's case can rise no higher than its own evi-
5. dence, the doctrine of Massie v. Firmstone.

6. COURT: The Court is acquainted with the doctrine.

7. MR. JULIAS: Pardon me?

8. COURT: I say, the Court is acquainted with the doc-
9. trine.

10. MR. JULIAS: Yes sir. Now, first of all, I think it's
11. extremely relevant, Your Honor, that the Plaintiff in
12. fact drafted the agreement that's the subject of this
13. law suit.

14. COURT: The Court's aware of the principles of law
15. involved in it.

16. MR. JULIAS: It's to be construed against the Plain-
17. tiff if there's any ambiguity whatsoever. As a matter
18. of fact, we have a case to support that.

19. COURT: There's no question about that principle of
20. law, Mr. Julias. Let's get to the merits of the motion.

21. MR. JULIAS: Now, we feel that the suit is against
22. a corporation for which there is no such corporation--
23. against a company that has no liability because the
24. agreement is between Neff Mobile Homes, Inc. which

1. alludes to the fact that there is such a corporation,
2. and as a matter of fact, there is no such corporation.
3. There is no such trade name of record. And, consequent-
4. ly, to come in and say that Neff Trailer Sales, Incor-
5. porated is responsible for an act committed by an em-
6. ployee that apparently has no authority, other than the
7. one contract that he's referred to that obviously is not
8. an employment agreement. He otherwise didn't have any
9. idea whatsoever of another contract of employment be-
10. tween the trailer sales company and any other employee.
11. And, again, this goes to the doctrine your case cannot
12. rise higher . . .

13. COURT: I follow you.

14. MR. JULIAS: Third, we have the doctrine of estoppel.
15. The Plaintiff himself has indicated that he said, "I
16. won't ask for a raise for five years," and that was the
17. reason he drafted the agreement and took it back. And
18. he said there wasn't any question about that, that was
19. what he intended. Now, the agreement per se is full of
20. ambiguities. It doesn't spell out termination, it
21. doesn't spell out the exact duties. There is strong
22. question of the authority, either direct or ostensible,
23. of Strickler to bind the corporation among other things.
24. The agency relationship to that extent has not been

1. established. If it were to be established, other than
2. on supposition, then we feel that the Plaintiff has the
3. duty to call corporate officers of Neff's in here to
4. verify what their responsibilities were if such be the
5. case. They have failed to do so. We feel the estoppel
6. positions have to be asserted. Namely, his ten percent
7. pay cut. He never asserted the contract at that time.
8. He's asked for a pay raise during the terms of this al-
9. leged contract, which was not granted. He never made
10. mention of the fact that he had an alleged contract.
11. And thirdly, he indicated that he would work for Mr.
12. Neff but not work for Don Strickler, who was his immed-
13. iate boss. All of which we feel are an estoppel of
14. the Plaintiff asserting his rights.

15. COURT: Thank you, Mr. Julias. The motion is denied.
16. Exception is noted. Bring the jury in.

17. (Jury Returns)
18.
19.
20.
21.
22.
23.
24.

WITNESS - DONALD B. STRICKLER

Direct Examination by Mr. Blatt:

Q. Would you state your name, please.

A. Donald B. Strickler.

Q. And, sir, where do you live?

A. In Harrisonburg.

Q. Are you employed?

A. Yes sir.

Q. Where are you employed?

A. Neff Trailer Sales.

Q. And in what capacity are you employed with Neff Trailer Sales?

A. I'm personnel manager and I supervise the credit department and the mobile home park.

Q. What do your duties actually entail?

A. Mainly supervision of the credit department, credit department and the parks. And the hiring and supervising of personnel.

Q. When did you first go to work for Neff Trailer Sales?

A. I think it was sometime in 1961 or 1962.

Q. And so, you've been working there how long?

A. Approximately seventeen years.

Q. Are you acquainted with Carroll W. Dellinger?

A. Yes sir.

1. Q. How do you know him?
2. A. Well, I've known Carroll, I guess, since I was a boy.
3. Carroll grew up in the neighborhood I grew up in and then
4. Carroll came to work for me. I hired Carroll.
5. Q. Do you remember when you hired him?
6. A. I think it was 1967.
7. Q. And for what did you hire him?
8. A. To work in our credit department as a collector.
9. Q. Was he ever hired as a credit manager?
10. A. I don't think so, no sir.
11. Q. Now, do you remember the salary that you hired him at?
12. A. I think it was around \$150.00 a week was the beginning
13. salary.
14. Q. Are you absolutely positive of that?
15. A. No sir, unless I'd look at some records.
16. Q. Did you ever give Mr. Dellinger any raises?
17. A. I think I gave him a raise in 1970 and one in 1971, I
18. believe. And then one other one in 1973.
19. Q. Were these voluntary raises or were they requested by him?
20. A. The one was a voluntary raise, the first one. These last
21. two were requested by Mr. Dellinger.
22. Q. What reasons did he give you for the raise in 1971 and
23. the raise in 1973?
24. A. In 1971 he said he had a position offered to him with

1. one of the local banks at more money, and wanted a raise
2. at that time which I granted.

3. Q. Do you remember which bank that was?

4. A. I think he said it was Spotswood. I'm trying to think
5. if it was Harrisonburg Loan and Thrift or Spotswood. I
6. think it was Spotswood Bank.

7. Q. And that was in 1971?

8. A. Yes sir.

9. Q. What reason did he give you for the raise in 1973?

10. A. Well, he just said he needed that raise. He didn't
11. really give me any reason. He just said he needed the
12. raise to live on.

13. Q. Were there ever any discussions concerning any other
14. employment in 1973 or any other banks in 1973?

15. A. No sir.

16. MR. HATMAKER: I didn't understand your question.

17. COURT: Will you repeat the question, Mr. Blatt.

18. Q. Were there any discussions in 1973 about Mr. Dellinger
19. going to work for any other banks or any other firms?

20. MR. HATMAKER: I'm sorry, I misunderstood you.

21. A. Do you want me to answer you?

22. Q. I think Mr. Hatmaker understands.

23. COURT: He has answered.

24. Q. Now, let me ask you a question. Do you have an employ-

1. ment contract with Neff Trailer Sales yourself?
2. A. No sir.
3. Q. Do you have any type of written agreement with them?
4. A. Yes sir.
5. Q. What type of an agreement is that?
6. A. It's a service contract.
7. Q. Now, what do you mean by a service contract?
8. A. Well, it's a contract whereas I perform certain services
9. for Neff Trailer Sales at a certain fee.
10. Q. Does that in any way, shape or form have to do with your
11. supervising and managing any of the affairs out there?
12. A. The contract itself?
13. Q. Yes.
14. A. I would say yes.
15. Q. Does it have to do with a separate business had by you
16. in the collections?
17. A. Yes.
18. Q. So, in that respect, the contract is between a business
19. of yours and a business of Mr. Neff's.
20. A. Yes sir.
21. Q. How is that agreement terminable or that employment ter-
22. minable?
23. A. Do you mean how does the contract work?
24. Q. Yes. How can you terminate it?

1. A. Well, each party has thirty days to give each other writ-
2. ten notice to terminate it.
3. Q. In the time that you have been working at Neff Trailer
4. Sales, have you ever known any other employee or any em-
5. ployee to have a written employment contract?
6. A. No sir.
7. Q. Have you ever, yourself, known that any employee has
8. ever been offered that?
9. A. No sir.
10. Q. Let's go back to August the 31st of 1973. Mr. Strickler,
11. this is Plaintiff's Exhibit #1, do you recognize this?
12. A. Yes sir, I recognize it.
13. Q. Is that your signature right here?
14. A. Yes.
15. Q. I want you to hold onto that for a minute. How did that
16. document come into being?
17. A. Well, when Carroll asked me for this last raise . . .
18. Q. Now, when was that?
19. A. That was on August 31st evidently. That was the date
20. this agreement was dated.
21. Q. Of what year now?
22. A. Of 1973.
23. Q. Okay.
24. A. When he asked me for this raise he said he would work

1. for five years if I'd give him this raise without anymore
2. raises. I said, "Fine, draw up the agreement. We'll
3. sign it to that effect."
4. Q. Now, why did you even want an agreement like that?
5. A. Well, within a period of three years I'd given Carroll
6. almost five thousand dollars a year raises, including
7. this one. And I didn't want to keep going through this.
8. And this is the reason I said if I okayed this raise
9. there wasn't going to be any other raises given period.
10. Q. And who prepared that?
11. A. I asked Carroll to.
12. Q. What was your intention when you signed that thing?
13. A. That I would sign an agreement that I would pay him a
14. certain wage for the time he worked there and there
15. wouldn't be any further raises.
16. Q. Did you feel that he could quit at any time he wanted to?
17. A. Yes sir.
18. Q. Did you feel that you could fire him at any time you
19. wanted to?
20. A. Yes sir.
21. Q. Now, would you read the last paragraph of that agreement.
22. A. "Neff Mobile Homes agrees to pay the above salary for
23. this period of time and is in no way liable to give any
24. raises within this period of time."

1. Q. As far as you're concerned that's what you were agreeing
2. to?

3. A. Yes sir.

4. Q. Mr. Strickler, do you have the authority to execute writ-
5. ten contracts on behalf of Neff Trailer Sales?

6. A. No sir.

7. Q. For the sixteen years that you've been working there,
8. who is the person or persons that had that authority?

9. A. I would say Bill Neff.

10. Q. Did you intend this to be an employment agreement?

11. A. No sir.

12. Q. Now, Mr. Dellinger has indicated heretofore that he was
13. having some problems with you out there. Were you having
14. some problems with him?

15. A. Yes sir.

16. Q. For the benefit of the jury, since he didn't elaborate
17. on those problems, would you tell us what those problems
18. were.

19. A. Well, I'll just touch base on them. I didn't feel Car-
20. roll was working the accounts really the way they should
21. be worked. I did have a complaint, this was back in 1974,
22. at one period of time from his secretary. She called
23. me one day on the phone, she was about in tears, stating
24. that Carroll wasn't making his callbacks to his customers

1. and they were calling back and accusing her of not giving
2. him the messages. That was one part of it.

3. Q. What are callbacks to customers? I'm not sure I under-
4. stand.

5. A. Say for example, one of our customers called in to talk
6. about a problem for paying for their mobile home. If
7. Carroll was gone they'd call in and talk to his secretary
8. and she would take a message and a phone number for Car-
9. roll to call them back. Well, evidently, consequently,
10. he wasn't making these callbacks in time and they were
11. calling her back and giving her a fit about it.

12. MR. HATMAKER: If Your Honor, please. I've got to
13. interpose an objection here. It seems to me that unless
14. it goes to breach of contract, then all of this is ir-
15. relevant.

16. MR. BLATT: Well, an employee's duties and faithful
17. performance of their duties is always consideration for
18. termination. Mr. Dellinger has already indicated to the
19. jury that there were problems. I'm just trying to ex-
20. plain what the problems were.

21. COURT: Isn't there an allegation that he was discharged
22. for cause?

23. MR. JULIAS: Yes sir.

24. MR. HATMAKER: Your Honor, it's my understanding that

1. the allegation that he was discharged for cause was that
2. he wouldn't accept the alternative employment.

3. COURT: Have you alleged any other cause for his dis-
4. charge, Mr. Julias?

5. MR. JULIAS: We reserve the right to raise such defen-
6. ses as the evidence might develop. And I believe accord-
7. ing to Mr. Dellinger's own testimony, he indicated he
8. would not work for Mr. Strickler but he would work for
9. Mr. Neff.

10. COURT: Well, let's limit it to that.

11. Q. What other problems concerning you and Mr. Dellinger
12. were there out there, or in your supervising him?

13. A. Well, I had complaints from some of the employees that he
14. wasn't there. When I left or Mr. Neff left, he wasn't
15. there to take care of the people coming in, to contact
16. them about problems they had. And generally, I just
17. didn't feel that he was doing his work properly.

18. Q. What is the physical office arrangement? Do you and Mr.
19. Neff share an office out there?

20. A. Yes sir.

21. Q. Is that office divided by partition?

22. A. Yes sir.

23. Q. Where was Mr. Dellinger's office when he first started
24. working there?

1. A. It was in--separated over into the mobile home part.

2. Q. Was his office ever moved?

3. A. Yes sir.

4. Q. Where was it moved to?

5. A. Up to where our offices were.

6. Q. Why was that office moved?

7. A. So we could keep closer eye on him, see that he--maybe
8. we could help him improve his work.

9. Q. What was Mr. Dellinger's attitude on working his accounts?

10. A. I don't understand your question.

11. Q. Did Mr. Dellinger, from your estimation as his supervisor,
12. work his accounts in a proper manner?

13. A. I felt he wasn't, no. I didn't think he was working them
14. soon enough.

15. Q. Explain to us what problems you had when accounts get
16. delinquent.

17. MR. HATMAKER: Excuse me, Your Honor. Again, unless
18. this goes to breach of contract all of this is irrelevant.

19. COURT: You're getting outside of the scope of the
20. Plaintiff's evidence with respect to grounds of breach.

21. MR. BLATT: I'm getting into his specific duties on
22. what he did as credit manager. I want to get into some
23. of the business that he was supposed to do so as not to
24. cause loss to the company.

1. COURT: Well, that wasn't the question that you asked.
2. Repeat your question.
3. Q. Mr. Strickler, from your knowledge of the business, what
4. happens when bank notes are discounted or promissory
5. notes are discounted to a bank?
6. A. What happens?
7. Q. Yes. Who do the people make the payments to?
8. A. To the bank.
9. Q. And what happens if the people default in those payments?
10. A. Our credit department contacts them and tries to solve
11. their problem and helps them get their accounts up to
12. date.
13. Q. What happens if those payments are in default for three
14. payments or more?
15. A. We have to pay off the banks.
16. Q. Now, who is "we"?
17. A. Neff Trailer Sales.
18. Q. Has to pay those payments then, to the banks?
19. A. Yes sir.
20. Q. So, any time between one and two the bank kind of holds
21. those payments in default?
22. A. Yes.
23. Q. Did you have any problem with Mr. Dellinger in making
24. contact with delinquent accounts?

1. A. Yes sir.
2. Q. What type of problems would that be?
3. A. Well, I thought again, that he wasn't contacting--general-
4. ly our rule is to start working these accounts when they
5. become two payments past due, and that gave us a month
6. to work them before the third payment became past due.
7. Q. A month to work them then before the corporation would
8. have to make the payments?
9. A. I felt that he wasn't working them soon enough and they
10. weren't being worked properly.
11. Q. Did you have any discussions with him about this?
12. A. Yes.
13. Q. What were the discussions that you had?
14. A. About those same things.
15. Q. Did he ever make any statements to you about his perfor-
16. mance?
17. A. No.
18. Q. Did he ever give you any reason for not working them as
19. quickly as you wanted them worked?
20. A. No sir. In fact, I asked him one time what his reason
21. was.
22. Q. Did he have a reason?
23. A. I asked him if he was just tired of credit work. He said
24. no.

1. Q. Did Mr. Dellinger receive any money other than his base
2. salary?
3. A. Yes sir.
4. Q. How did he receive other monies?
5. A. Well, he was paid for working bad debt collections, he
6. was paid a percentage on that. He was also paid trans-
7. fer fees for transferring, doing paper work. When a
8. customer brought someone in to assume their payments on
9. their mobile homes he was paid for that also.
10. Q. Did he have any other ways of making money out there?
11. A. His salary.
12. Q. Did he ever participate in sales?
13. A. Yes sir, he did.
14. Q. When would he have participated in sales?
15. A. Well, when we have our annual sales he would work on the
16. sales and what he sold he would be paid for, what mobile
17. homes he sold.
18. Q. Did he ever work at any other time during the year on
19. sales?
20. A. Possibly once or twice he might have went out and sold
21. someone a mobile home.
22. Q. So, in any given year his annual salary or commissions
23. that he would have been paid would reflect some percent-
24. age of sales?

1. A. I would say so, yes.

2. Q. Now, after August the 31st of 1973, did Mr. Dellinger
3. ever ask for any other raise?

4. A. Yes sir.

5. Q. Do you remember when that was?

6. A. It was 1976, I believe.

7. Q. What were the reasons that he gave for wanting the other
8. raise?

9. MR. HATMAKER: Your Honor, I think that at this point
10. we ought to be very certain about why this evidence is
11. coming in. May I approach the Bench?

12. COURT: What's the relevance of this, Mr. Blatt?

13. MR. BLATT: Your Honor, Mr. Dellinger has already
14. testified as to the reasons that he asked for the raise.
15. And I'm asking Mr. Strickler what reasons were given to
16. him for the raise.

17. COURT: All right. That would seem to be admissible.
18. I'll overrule the objection. Limit the answer to the
19. specific question that's asked.

20. Q. In 1976 did Mr. Dellinger give a reason for wanting a
21. raise?

22. A. He didn't want, he demanded a raise.

23. Q. What was the reason that he demanded the raise?

24. A. Because one of the other men there, he felt, was making

1. more money than he was and that he should be paid equal.
2. Q. What was the reason that he thought he should be paid
3. equal? Did he give a reason for that?
4. A. Well, he felt--he had been there longer and he felt that
5. he should be making at least as much as this other man.
6. Q. Did he refer at anytime to the agreement of 1973?
7. A. No sir.
8. Q. Who did he make this request for a raise to?
9. A. To me.
10. Q. Did you know if he had any discussions with Mr. Neff
11. about it?
12. A. He did afterwards, we both did.
13. Q. Was he, in fact, raised?
14. A. His salary wasn't. His percentage on bad debt collect-
15. ions was raised.
16. Q. Now, was there ever a time during the last several years
17. of employment that it was necessary for certain employees
18. to take a pay reduction?
19. A. I believe it was in 1975.
20. Q. And what was that?
21. A. Well, it was an across the board reduction to all em-
22. ployees. Their pay was reduced ten percent.
23. Q. Including Mr. Neff?
24. A. I assume it was. I never seen Mr. Neff's check.

1. Q. Did Mr. Dellinger receive a ten percent pay cut?
2. A. I assume he did, yes sir.
3. Q. Were you present when those discussions were had?
4. A. No sir.
5. Q. You had signed that agreement in 1973 though, hadn't you?
6. A. Yes sir.
7. Q. Did Mr. Dellinger ever complain to you that his pay was
8. being cut ten percent in violation of that agreement?
9. A. No sir.
10. Q. Did he ever mention the agreement to you when the ten
11. percent pay cut took place?
12. A. No sir.
13. Q. Was there a time later in the company when salaries were
14. then raised back ten percent?
15. A. I think it was about a year after that, approximately a
16. year.
17. Q. Was anyone ever paid back, to the best of your knowledge,
18. anyone in the company ever reimbursed that ten percent
19. during that period of time?
20. A. Not that I know of.
21. Q. What was your understanding about that ten percent pay
22. cut of whether or not it would be reimbursed?
23. A. I wasn't in on the discussion. I don't know. I just
24. know that there would be a ten percent cut. I wasn't in

1. on the discussion when he met with these people.
2. Q. Now, who did Mr. Dellinger work for?
3. A. He worked under me.
4. Q. But for who?
5. A. Neff Trailer Sales.
6. Q. Neff Trailer Sales, Incorporated?
7. A. Yes.
8. Q. Is there a business of Neff Mobile Homes, Incorporated?
9. A. There's no corporation by that name, no.
10. Q. No business enterprise of Neff Mobile Homes, Incorporated?
11. A. (Indicates no).
12. COURT: The record may show a negative response.
13. Q. Did you ever know of any trade names, legal trade name
14. of Neff Mobile Homes, Incorporated?
15. A. No. Neff Mobile Homes is a trade name, I believe.
16. Q. So, as far as Neff Mobile Homes, Incorporated, you've
17. never heard of that?
18. A. Neff Mobile Homes, Incorporated, no.
19. Q. Have you ever had to sign notes or discount negotiable
20. instruments at banks on behalf of Neff Trailer Sales?
21. A. I've had to reassign them, yes sir.
22. Q. You've had to reassign them?
23. A. Yes sir.
24. Q. At the outset insofar as binding the corporation, did

1. you ever sign the notes on behalf of Neff Trailer Sales,
2. Incorporated?
3. A. I don't understand your question.
4. Q. Have you ever initially endorsed notes for Neff Trailer
5. Sales, Incorporated?
6. A. Do you mean personally?
7. Q. Yes. For the corporation.
8. A. Yes sir, I have.
9. Q. Has this been on a regular basis?
10. A. No sir, I wouldn't say so.
11. Q. Who is Ivan Messick?
12. A. He was vice-president and general manager of Neff Trailer
13. Sales.
14. Q. Who had the authority to sign the checks for Neff Trailer
15. Sales, Incorporated?
16. A. I think at that time Ivan did and I did too. Ivan Mes-
17. sick and myself.
18. Q. Now, what exactly did Ivan Messick do out there at Neff
19. Trailer Sales.
20. A. He was general manager. He ran the trailer sales. He
21. managed the trailer sales operation.
22. Q. Would he be the one who would take over when Mr. Neff
23. was gone?
24. A. Yes sir.

1. Q. Was there ever great periods of time or periods of time
2. when they would both be absent at the same time?

3. A. Both of them never were absent at the same time.

4. Q. You're positive of that now.

5. A. I would say so.

6. Q. I'm going to show you what appears to be checks. At this
7. point I'll just give you one representative check at this
8. time and ask you what that appears to be.

9. A. It's a check to Mr. Dellinger.

10. Q. On what account?

11. A. It's on Rockingham National Bank. I believe it's a pay-
12. roll account, I'm not certain of that.

13. Q. What is written right up here at the top?

14. A. Neff Trailer Sales, Incorporated.

15. Q. Who signed it?

16. A. Ivan Messick.

17. MR. HATMAKER: Your Honor, I object to this. I don't
18. understand the relevance of it except possibly to show
19. that Ivan Messick was also a corporate officer and had
20. the authority to sign pay checks. It doesn't go to the
21. authority of Strickler.

22. MR. BLATT: I'm not talking about his authority. We
23. could introduce them all to show who was paying this
24. man's salary.

1. COURT: Do you want to examine them all and see if
2. they're the same, Mr. Hatmaker?

3. MR. HATMAKER: Your Honor, I'd like to see what they
4. are.

5. COURT: All right. I will receive this in evidence as
6. Defendant's Exhibit #1.

7. MR. BLATT: We'd like these others marked or proffer
8. them for identification. There's no need to introduce
9. them all so long as Mr. Hatmaker agrees that's a repre-
10. sentative check.

11. COURT: You can examine them during the lunch hour,
12. Mr. Hatmaker, and if there are any differences we can
13. supplement the record. You may proceed with your exam-
14. ination, Mr. Blatt.

15. Q. Now, Mr. Dellinger . . .

16. A. I'm Mr. Strickler.

17. Q. Excuse me. In concerning Mr. Dellinger, do you know when
18. he left the employment?

19. A. July of 1977, I don't know what the exact date was.

20. Q. Were you present when there were any discussions about
21. him leaving?

22. A. I think I was there on one discussion Mr. Neff had with
23. him.

24. Q. Did Mr. Dellinger ever discuss with you his reasons for

1. leaving?
2. A. No sir.
3. Q. Did Mr. Dellinger ever discuss with you his alleged agree-
4. ment of 1973?
5. A. No sir.
6. Q. Did Mr. Neff ever discuss that with you?
7. A. Yes sir.
8. Q. Under what circumstances?
9. A. Sometime in July, it was after Mr. Neff had the first
10. talk with him, he asked me if I had ever given Carroll
11. an employment contract. I said, "No sir." He said,
12. "Well, he says you did." I said, "Well, I never have
13. given him a contract. We have an agreement on salary."
14. So, then Mr. Neff showed me a copy of this agreement.
15. Q. You didn't deny executing that, did you?
16. A. No, I don't deny it.
17. Q. Now, what did you tell Mr. Neff it was for only?
18. A. It stated what I would pay Carroll in salary, with the
19. understanding there would be no further raise.
20. Q. Let me ask you a question now. In 1977 do you know
21. whether or not Mr. Neff was aware of the existence of
22. this agreement?
23. A. No sir.
24. Q. Had you ever shown it to him prior to the time he called

1. you in?

2. A. No sir.

3. Q. Do you know whether or not the board of directors had
4. ever ratified this agreement?

5. A. No sir.

6. Q. Let me ask you a question now. Have you ever told any-
7. body about this agreement?

8. A. No sir.

9. Q. It was just between you and Mr. Dellinger?

10. A. Yes sir.

11. MR. BLATT: That's all. Answer Mr. Hatmaker's ques-
12. tions.

13. COURT: At this time we'll reserve the cross examina-
14. tion of this witness until after lunch. We'll at this
15. time recess for lunch until 1:30.

16. (Luncheon Recess)

17. COURT: The witness has resumed the stand. Mr. Hat-
18. maker, you may inquire.

19.

20. Cross Examination by Mr. Hatmaker:

21. Q. Now, Mr. Strickler, that is your signature on that, is
22. that correct? (Counsel shows agreement to witness.)

23. A. Yes sir, that's my signature.

24. Q. Now, are you telling us that when you signed your name to

1. this piece of paper you were doing so without authority?
2. A. No sir, not this piece of paper.
3. Q. Well, what are you telling us?
4. A. I signed this as an agreement.
5. Q. Yeah, I know it is. But, what are you telling us? Are
6. you telling us that you had the authority of Neff Trailer
7. Sales to sign that agreement or not?
8. A. I would say so, yes.
9. Q. Now, you were Vice-President of the corporation at that
10. time, is that correct?
11. A. I was.
12. Q. How long had you been employed by Neff's?
13. A. At this time or altogether?
14. Q. At that time.
15. A. 1973--I'd say approximately eleven or twelve years.
16. Q. Did you tell Carroll Dellinger to prepare this agreement?
17. A. Yes sir.
18. Q. And that you would sign it, is that correct?
19. A. Yes.
20. Q. And you were signing it on behalf of Neff Trailer Sales.
21. A. Neff Mobile Homes or Neff Trailer Sales, yes.
22. Q. Well, is there any difference? They're the same thing,
23. aren't they?
24. A. I guess basically they're the same.

1. Q. That's what I thought. Now, did you read the contract
2. before you signed it?

3. A. Yes sir.

4. Q. It says, "Starting August 31, 1973, the salary of Car-
5. roll W. Dellinger is to be raised to \$230.00 each week."
6. Did you understand that when you signed it?

7. A. Yes sir.

8. Q. Do you want to tell me what that meant to you at the
9. time?

10. A. That meant I would pay him \$230.00 a week starting
11. August 31st, as it says.

12. Q. And it says, "This salary is to remain in effect until
13. August, 1978, at which time, the salary will be discussed
14. to coincide with the cost of living." What does that
15. mean to you?

16. A. Just what it says.

17. Q. It meant what it says, right?

18. A. Right.

19. Q. No more or no less, is that right? Is that right?

20. A. Yes.

21. Q. Now, the next paragraph says, "All transfer fees." Did
22. you know what a transfer fee was? Do you understand what
23. that means?

24. A. Yes sir, I knew what a transfer fee was.

1. Q. What was it?
2. A. Just what he got paid for transferring papers among
3. customers.
4. Q. Just what he testified to, isn't it?
5. A. I don't know what he testified to.
6. Q. You didn't hear it?
7. A. No.
8. Q. Oh, that's right, you were out of the room. "And other
9. benefits." Do you know what those other benefits were?
10. A. That would have been, I assume, his percentage on his
11. bad debt collections.
12. Q. "Are to remain the same for this period of time." Do
13. you understand what that means?
14. A. Yes.
15. Q. You understood it at the time, didn't you?
16. A. Yes.
17. Q. "Carroll Dellinger will perform his same duties." What
18. were his same duties? What were the duties he had been
19. performing?
20. A. He was working in credit work, credit collections, and
21. basic credit work.
22. Q. What was his job then?
23. A. He was working, doing some accounts, telephoning and
24. contacting delinquent accounts to work out problems that

1. customers had on their payments.
2. Q. Now, didn't his job consist also of checking people's
3. credit rating when they signed up to buy a mobile home?
4. A. He had a secretary that done that stuff.
5. Q. But he supervised the doing of it, didn't he?
6. A. He overseen it, then I overseen that, right.
7. Q. He was in charge of enforcing delinquent accounts,
8. wasn't he?
9. A. I don't know what you mean by enforcing.
10. Q. Well, collecting them on behalf of Neff.
11. A. Yes sir.
12. Q. These were accounts that people had defaulted on, right?
13. A. Yes.
14. Q. People who bought mobile homes defaulted on their notes,
15. is that right?
16. A. Yes.
17. Q. And that was what was meant by "performing his same
18. duties," is that correct?
19. A. Yes sir, I assumed so.
20. Q. Did it mean any more than that?
21. A. No.
22. Q. Did it mean any less than that?
23. A. No.
24. Q. "Agrees to work for Neff Mobile Homes for this period of

1. time." What do you mean, "this period of time." What's
2. that mean?

3. A. I didn't mean anything. Carroll Dellinger agreed to work
4. for Neff Mobile Homes. He made this statement, I haven't.

5. Q. Well, I'm reading from the contract. It says, "for this
6. period of time." Can you tell us what that meant? What
7. is "this period of time."?

8. A. Well, Mr. Dellinger is saying he will work for five years.

9. Q. I'm not asking you what Mr. Dellinger said. I'm asking
10. you what you understood these words to mean on the con-
11. tract.

12. A. Just what I said just a minute ago. Mr. Dellinger agreed
13. to work for five years for Neff Mobile Homes, that's what
14. it says.

15. Q. Did you understand "this period of time" to mean from
16. August 31, 1973 through August of 1978?

17. A. Well, I certainly did since he put the statement in
18. there. He agreed to it, I didn't.

19. Q. Well, now, you didn't agree to this?

20. A. I didn't make the statement Neff Trailer Sales was em-
21. ploying him for five years. He made the statement he
22. was going to work for five years.

23. Q. Are you telling us that this agreement said that he's
24. going to work for Neff's for five years, but Neff isn't

1. employing him? Is that what you're saying?
2. A. That's not what I said. I said he agreed to work for
3. five years without any salary increase, he agreed to work
4. for that. I didn't agree to employ him for five years.
5. He agreed to work for five years with no further increas-
6. es in salary. That's what I said.
7. Q. But you're saying Neff didn't agree to hire him for five
8. years.
9. A. No, I didn't agree to hire him for five years. He agreed
10. to work for five years.
11. Q. All right. What about the next paragraph? It says,
12. "Neff Mobile Homes agrees to pay the above salary for this
13. period of time." What is the above salary?
14. A. It's \$230.00 a week.
15. Q. What is "this period of time?"
16. A. The time that Mr. Dellinger worked there, that he agreed
17. to work for.
18. Q. Which was?
19. A. I would have had to agree to pay him. He wouldn't have
20. worked for anything.
21. Q. Which was, what period of time was it?
22. A. He agreed to work for five years.
23. Q. Beginning when?
24. A. Starting August 31st, 1973. But I didn't agree to it.

1. Q. You didn't agree to that?
2. A. No. He agreed to work, I didn't agree to employ him. He
3. agreed to work for five years.
4. Q. When you say "I" you're talking about Neff Trailer Sales?
5. A. I'm talking about Neff Trailer Sales.
6. Q. It says, "Neff Trailer Sales agrees to pay the above
7. salary for this period of time."
8. A. Sure.
9. Q. It says that, doesn't it?
10. A. Sure, it says that.
11. Q. But, you're telling us that that doesn't mean that Neff
12. is going to employ him for that period of time?
13. A. I would think not. I had to agree to pay him if he was
14. going to work there for five years, wasn't I? If he
15. agreed to work for five years I had to pay him while he
16. worked there. He's not going to work there for nothing.
17. Q. Well, I'm asking you what your interpretation of this is.
18. A. I just told you.
19. Q. It says, "Neff Trailer Sales agrees to pay . . ."
20. MR. JULIAS: Your Honor, I think--excuse me, Mr. Hat-
21. maker--I think the witness has attempted to answer this.
22. And I think Mr. Hatmaker is going over and over the same
23. question and I think this is up to the jury to give what-
24. ever consideration they wish to the attention of the

1. parties.

2. COURT: He's entitled to inquire. The objection is
3. overruled.

4. Q. And it says, "Is in no way liable to give any raises
5. within this period of time." Do you understand what that
6. meant?

7. A. Yes sir.

8. Q. What did it mean?

9. A. It meant that he wouldn't get a raise for five years and
10. he agreed to that.

11. Q. No. Does it mean that, or does it mean that you all
12. didn't have to give him any raises for five years.

13. A. It meant that we were in no way liable to give any raises
14. and he wouldn't ask for a raise during this period of
15. time. Just what it says.

16. Q. Now, where does it say that he agreed not to ask for a
17. raise?

18. A. I guess he agreed to it when he signed it.

19. Q. Where is it here, is it here?

20. A. No.

21. Q. Well, this is the agreement that you all came to, isn't
22. it?

23. A. Yes.

24. Q. And so, it's not in there, is it?

1. A. No.

2. Q. The statement, "Is in no way liable to give any raises
3. within this period of time," wouldn't you think that that
4. would mean that Neff wouldn't have to give him any raises
5. if they didn't want to within that period of time?

6. A. I would assume so, yes. That's the reason it was put in
7. there.

8. Q. Now, you read all this contract before you signed it,
9. didn't you?

10. A. Yes sir.

11. Q. Did you have any misunderstanding in your own mind at
12. the time you signed it as to what any of these words
13. meant, or these terms?

14. A. Deed, I didn't.

15. Q. You said on direct examination that this was an agreement
16. but not a contract.

17. A. Yes.

18. Q. Is that right?

19. A. Right.

20. Q. What would you concede to be the difference?

21. A. Well, a contract would certainly have a termination
22. clause and would have a lot more outline than what this
23. agreement has. Do you want me to go further?

24. Q. No. Did Dellinger work as credit manager until he was

1. discharged?

2. A. He worked in the credit department basically, I assume
3. as credit manager. I don't know whether his official
4. title was ever that, but basically this is what he did,
5. yes.

6. Q. You testified that he asked you for a raise in 1976, is
7. that right?

8. A. Yes sir.

9. Q. Now, you testified that he didn't mention the agreement.
10. Did you mention it?

11. A. No sir.

12. Q. Did you bring it to his attention that he signed an agree-
13. ment?

14. A. No sir.

15. Q. You didn't say to him, "Well, now, you promised us that
16. you wouldn't seek a pay raise." You didn't say that, did
17. you?

18. A. No.

19. Q. Now, as a matter of fact, Dellinger did work and was paid
20. \$230.00 a week for work as credit manager. He was paid
21. until he was discharged on July the 20th, is that right?

22. A. I assume so, yes.

23. Q. You were in a position to know, weren't you?

24. A. I don't know. I never seen his pay check.

1. Q. Did you hire him in the first place?
2. A. Sure, I hired him. I testified to that.
3. Q. You hired all the employees in the office, didn't you?
4. A. No sir. I don't think I hired them all.
5. Q. You hired most of them, didn't you?
6. A. I hired most of them.
7. Q. Did you ever fire anybody out there?
8. A. Yes sir.
9. Q. You were the person people came to see out there for pay
10. raises, weren't you?
11. A. Yes sir, I would say in certain departments.
12. Q. Dellinger came to you for pay raises, didn't he?
13. A. Yes sir.
14. Q. You were an employee of Neff Trailer Sales, is that
15. correct?
16. A. Yes sir.
17. Q. Did anybody ever tell you after this contract was signed
18. that you didn't have the authority to sign it?
19. A. No sir.
20. Q. Nobody ever brought that to your attention?
21. A. No.
22. Q. Bill Neff never did, never said that to you?
23. A. (Indicates no.)
24. Q. He never chewed you out about it?

1. A. No sir.

2. Q. Now, during the period of time right around August of
3. 1973, Bill Neff was away from this business quite a bit,
4. wasn't he?

5. A. I don't know what--it depends on what you term quite a bit.

6. Q. Well, on the average how many days a week did he spend
7. in the office?

8. A. I don't have any idea. You're asking me to remember in
9. 1973 every day the man was there for a year--let's see,
10. five years ago.

11. Q. If you can't remember you can't remember.

12. A. I can't remember, to give you a truthful answer.

13. Q. Okay. He went on fishing trips with Ivan Messick some,
14. didn't he?

15. A. He went on fishing trips with himself. I don't know
16. whether Ivan went along or not.

17. Q. Now, you testified that you ran into a problem with
18. Carroll over the performance of his job and this was in
19. 1976, wasn't it?

20. A. I had problems over a period of four or five years, six
21. years.

22. Q. Was it 1974, what year was it?

23. A. I had problems in 1974, 1975, 1976.

24. Q. You had all these problems all this time. Is this the

1. reason he was fired?
2. A. That wasn't the reason he was given that he was fired, no.
3. Q. He wasn't given that reason, was he?
4. A. No.
5. Q. Was he fired because he was incompetent?
6. A. No sir.
7. Q. As far as you know, what was the reason that Carroll was
8. fired?
9. A. Per reduction of the operation.
10. Q. They were cutting back?
11. A. Yes.
12. Q. And didn't they have another fellow on the staff who
13. could do the job?
14. A. Yes sir.
15. Q. What was his name?
16. A. Robert Taylor.
17. Q. And didn't he also have his insurance license?
18. A. Yes.
19. Q. And was that the reason that he was kept and Carroll was
20. let go?
21. A. That wasn't the whole reason, no sir.
22. Q. Well, that was a good bit of it, wasn't it?
23. A. I don't know. I never made that decision.
24. Q. Who did?

1. A. Bill Neff.

2. MR. HATMAKER: I don't have any further questions.

3. COURT: Re-Direct?

4.

5. Re-Direct Examination by Mr. Blatt:

6. Q. Mr. Strickler, now you testified in response to some
7. questions by Mr. Hatmaker that you thought you had the
8. authority to sign that piece of paper right there that's
9. been introduced as Exhibit #1. Is that correct?

10. A. Yes sir.

11. Q. And you testified--did you not testify in response to
12. direct examination by me that you did not have the auth-
13. ority to sign employment contracts. Is that correct?

14. A. No sir.

15. Q. You did not have that authority?

16. A. No sir.

17. Q. Now then, once again, what is this that you signed?

18. A. It's a wage agreement.

19. Q. Now, Mr. Hatmaker has used the terms that it's already
20. been testified to that Mr. Dellinger wrote up himself.

21. A. Yes sir.

22. Q. And has asked you to point out specifically where the
23. words are on this agreement that Dellinger won't ask for
24. anymore raises, hasn't he?

1. A. Yes sir.

2. Q. Why was this agreement tendered to you by Dellinger in
3. the first place?

4. A. Because I wanted it because of the three raises I'd given
5. him, I wanted to eliminate going through having to give
6. more raises in years to come.

7. Q. And this is what he wrote up and gave to you for your
8. understanding?

9. A. Yes sir. That's what it says.

10. Q. Is that what you take the words to mean, "Would in no
11. way be liable to give any raises"?

12. A. Yes sir. Why was it in there if it wasn't.

13. Q. Are you telling the Court and the jury then that that
14. was the intention of both you and Mr. Dellinger at that
15. time?

16. A. That was the intention.

17. Q. Well, Mr. Hatmaker has asked you why you didn't consider
18. this a contract. And you said because . . . well, exact-
19. ly what did you say? I'm not sure I caught that.

20. A. If I would have considered it a contract, it would have
21. been more terms and limitations and an agreement as to
22. what Mr. Dellinger's duties was, it would have had a ter-
23. mination clause. I have a contract of this nature other-
24. wise with Neff Trailer Sales. If I would have consider-

1. ed it a contract, it would have been worded a lot better
2. than that thing's worded.

3. Q. Is that then the only capacity you signed it, as a wage
4. agreement?

5. A. Yes sir.

6. Q. Now, you testified in response to Mr. Hatmaker that no-
7. body, Mr. Neff or nobody ever brought this up to you
8. about signing this thing. Did they ever know about it?

9. A. Not that I know of. The only people I knew that knew
10. about it, I assumed, was Mr. Dellinger and myself. I
11. didn't tell anybody about it.

12. Q. You didn't have any misunderstanding as to why you were
13. signing this thing, did you?

14. A. No.

15. Q. Let me ask you one question. Since you've been employed
16. with Neff Trailer Sales, how many promissory notes have
17. you signed for banks on behalf of the corporation, dis-
18. counted notes?

19. A. You mean in the whole seventeen years?

20. Q. Yes.

21. A. It would just be conjecture, it's not that many. I'd
22. say it wouldn't be over fifty or seventy-five during the
23. seventeen years, to my knowledge.

24. Q. Do you have any idea how many go through in the normal

1. course of business out there?

2. A. How many total notes go through? I would say on an aver-
3. age probably forty or fifty a month, somewhere along in
4. there.

5. Q. And that would be over a sixteen year period that you
6. were there?

7. A. Yes.

8. MR. BLATT: That's all, thank you.

9. COURT: Re-cross.

10.

11. Re-Cross Examination by Mr. Hatmaker:

12. Q. These notes that you've signed for the banks, what
13. amounts were they, what range were they?

14. A. I don't know. Unless you can tell me a certain note I
15. don't know. Do you want an average, is that what you're
16. asking?

17. Q. Yes.

18. A. I imagine it would probably average seven thousand,
19. seventy-five hundred dollars.

20. Q. Now, that's principal. What about interest?

21. A. Well, I'm talking about gross note.

22. Q. What's the biggest one that you can remember or what's
23. the highest amount that you can remember?

24. A. Well, this would have been most recent because the price

1. of mobile homes, they've gone up along with the cost.
2. I would say recently maybe seventeen thousand dollars
3. gross note.
4. Q. And when you sign these you're not binding yourself
5. personally, are you?
6. A. No sir.
7. Q. You're binding the corporation to pay, aren't you?
8. A. Yes sir.
9. Q. If the maker of the note, the person who bought the mo-
10. bile home, doesn't pay, then your corporation, Neff
11. Trailer Sales, has to pay, right?
12. A. Yes sir.
13. Q. And you do this just in the ordinary course of business.
14. A. No sir, very rarely I do it.
15. Q. But when you did it it was in the course of the mobile
16. home business, wasn't it?
17. A. Yes sir.
18. Q. Now, I take it from your answer that when you think of a
19. contract you think of some fancy document that's drawn
20. up by a lawyer and has a whole lot of clauses in it,
21. don't you?
22. A. No sir.
23. Q. You don't?
24. A. No sir.

1. Q. Well, you said you didn't think much of this.
2. A. I didn't. I haven't testified that I did.
3. Q. Well now, according to my copy this thing starts out--
4. whatever this is--it says, "This contract."
5. A. I didn't word it.
6. Q. You signed it.
7. A. I signed it, but I didn't word it.
8. Q. Did you read it?
9. A. Yeah, I read it.
10. MR. JULIAS: Your Honor, I think we're going back over
11. the same testimony.
12. COURT: This is responsive to the re-direct examination.
13. MR. JULIAS: Go ahead.
14. Q. Did you think about what the word contract meant?
15. A. No sir.
16. Q. You didn't think about that at all?
17. A. No. It says, "contract date," it doesn't say contract.
18. Q. It says, "This contract date, August 31, 1973." Doesn't
19. it?
20. A. Yes.
21. Q. It didn't raise any questions in your mind then as to
22. whether or not this was a contract, did it?
23. A. No. It was an agreement.
24. Q. It was an agreement. Fine.

1. MR. HATMAKER: No further questions.

2. COURT: Re-direct?

3.

4. Re-Direct Examination by Mr. Blatt:

5. Q. Let's lay the issue to rest. If it was an agreement or
6. if it was a contract, what was it an agreement or a con-
7. tract for?

8. A. Wages.

9. Q. Only?

10. A. Right.

11. MR. BLATT: Thank you.

12. COURT: Mr. Blatt, we might straighten it out at this
13. time. Legally, what is the difference between an agree-
14. ment and a contract?

15. MR. BLATT: It depends. A contract would have certain
16. formal requisites, I believe. That would be proper to
17. instruct the jury at at a proper time through proper
18. jury instructions.

19. COURT: Can there be an agreement without a contract?

20. MR. BLATT: I think there could be an agreement without
21. a contract if there was no consideration.

22. COURT: Then it wouldn't be a contract, would it?

23. MR. BLATT: That would be correct.

24. COURT: And it wouldn't be an agreement, would it?

1. MR. BLATT: Well, it depends. It could be an agreement
2. without being a contract.

3. COURT: It would be an unenforceable agreement or an
4. unenforceable contract.

5. MR. BLATT: If any agreement did not meet any of the
6. requisites, formal requisites for being a contract, it
7. would not be a contract or be an enforceable contract,
8. but it still could be an agreement.

9. COURT: It wouldn't be a contract and it wouldn't be an
10. agreement, would it?

11. MR. BLATT: That's why we have laws and judges and
12. books and juries.

13. COURT: Call your next witness.

14. MR. JULIAS: Mr. Neff.

15.

16. WITNESS - BILL NEFF

17. Direct Examination by Mr. Julias:

18. Q. State your name, please, sir.

19. A. Bill Neff.

20. Q. Where do you live, Mr. Neff?

21. A. Route 6, Harrisonburg.

22. Q. And what's your business? Well, what's the business
23. that is the subject of this suit? I'm not going to go
24. into all your areas of businesses.

1. A. This is the trailer sales business.
2. Q. And how long has Neff Trailer Sales, Incorporated, as
3. such, been in the trailer business?
4. A. This is the twenty-fifth anniversary, this year.
5. Q. And what position do you occupy with that company?
6. A. President.
7. Q. And how long have you been the President of the company?
8. A. For twenty-five years.
9. Q. Now, Mr. Neff, does Don Strickler work for you?
10. A. Yes sir.
11. Q. How long has he worked for you?
12. A. Oh, probably--I didn't realize how long it was frankly,
13. until I heard the testimony, I know it's been a good
14. while. I'd say seventeen, eighteen years.
15. Q. And what capacity does he occupy with Neff Trailer Sales
16. at this time?
17. A. He works as the, he is one of the vice-presidents within
18. the company at the present time and has been for some
19. time. He works in the capacity of just generally advis-
20. ing me of any irregularities or anything like this. He
21. is also credit manager and is in charge of credits. He's
22. in charge of personnel and does have the right to hire
23. and to fire and this type of thing.
24. Q. Do you have more than one vice-president?

1. A. Oh, yes sir.

2. Q. Now, in 1973 did Mr. Strickler occupy the status of
3. vice-president and have the right to hire and fire peo-
4. ple?

5. A. Yes, the same as now.

6. Q. Did you in 1973 have the right to hire and fire people
7. for Neff Trailer Sales?

8. A. Yes sir.

9. Q. Do you still have the right to hire and fire people?

10. A. Yes sir.

11. Q. Now, in 1973 had you cloaked Mr. Strickler, or for all
12. that matter, any other vice-president of your company,
13. with authority to enter into an employment contract with
14. any employee?

15. MR. HATMAKER: Objection. I object to the form of the
16. question, Your Honor.

17. COURT: The objection is sustained.

18. Q. What authority, if any, did any officer of your company
19. have to enter into an employment contract with any em-
20. ployee of Neff Trailer Sales?

21. A. There was none then and never has been.

22. Q. As a matter of fact, does Neff Trailer Sales, Incorporat-
23. ed have any employment contract with any executive offic-
24. er and/or other employee of Neff Trailer Sales?

1. A. No sir. Now or never has.
2. Q. If there would be such an employment contract, who would
3. be the one person who would have the authority to enter
4. into it?
5. A. That would be myself.
6. Q. And what is the reason that you have not or your company
7. has not granted authority to someone to enter into an
8. employment contract?
9. A. Well, this certainly puts a big liability in front of the
10. company, as far as anyone entering into an employment
11. contract. If you enter into an employment contract as
12. implied here for five years, you're talking about a fifty
13. or sixty thousand dollar liability. I don't think that
14. I would ever enter into it like this. I never have in
15. the past. There has been as many as sixty employees
16. there at one time. We've been there twenty-five years,
17. no one else has had any employment contract and no one
18. else has today. In my opinion, I don't think it is.
19. Q. So, in other words, you're saying that it would be a
20. liability of some sixty thousand dollars to the company
21. and you have no one authorized to enter into such agree-
22. ment.
23. A. That's right.
24. Q. Is your brother an officer and director of your company?

1. A. Yes.

2. Q. Does he have any such authority to enter into a . . .

3. A. Absolutely not.

4. Q. Now, Mr. Neff, in 1973, at the time that agreement was
5. entered into, were you aware of it?

6. A. No sir.

7. Q. And when did you first become aware of this agreement?

8. A. I became aware of this agreement when I spoke with Car-
9. roll about the cutback that I was going to do within the
10. operation.

11. Q. Do you remember when that was?

12. A. You know, these dates are rough, you know, you can roll
13. it back. It would have been probably three weeks prior
14. to him leaving the employment. I don't even know what
15. the dates were.

16. Q. July, 1977. He's testified he terminated on July 20th.

17. A. Okay. So, it would have been sometime, probably in June.
18. And as a friend of Carroll's, we had worked together for
19. twelve years, I've known him for fifteen years. And in
20. wanting to cut back the operation I called Carroll in, in
21. my office. I did this rather than having Don or anyone
22. else, just for the reason I'm telling you, this is the
23. main reason. And I said, "Carroll, you know we're cut-
24. ting back the operation, I want to cut back in size.

1. So, I would like for you to find another job. Now, you
2. don't have to be in no hurry, take sixty days, ninety
3. days, or if you need longer, you know, this is okay."
4. And these are the exact terms and expressions that was
5. used with him.

6. Q. What reply did he make to you at that time?

7. A. So, Carroll says, okay, you know. So, that was the end
8. of that. We went back to a very friendly state of mind.
9. So, then several days later--or it might have been pro-
10. bably a week later, I would say--Carroll walked into my
11. office and said, "You know I have an employment contract."
12. I said, "What do you mean you have an employment con-
13. tract?" He said, "Well, I have an employment contract
14. for five years of which I've only used up three," or
15. something like that. And I said, "Well, Carroll, you
16. know, I don't know anything about it. I don't know what
17. you're talking about." So, I said, "Well, let me see a
18. copy of it." So, he said, "All right." So, a couple of
19. days later he brings it in and he shows it to me.

20. Q. Is that the agreement that was referred to?

21. A. That's the same agreement that you're speaking of here.
22. So, I looked at it and I, in my layman type way, not
23. being an attorney or judge, I didn't know whether it was
24. a contract or not. In my opinion, it certainly was not.

1. But rather than cause any waves about it and in trying
2. to keep--when I use the word waves, I mean like we're
3. here today, you know. I said, "Carroll, I'll give you
4. another job. It's not enough work to do for two people
5. anymore in the department. So, if you think that you
6. have a contract, rather than to cause any waves, I'll
7. give you another job," which was clerical work that the
8. man was capable of doing. I was paying his salary, if
9. he wasn't capable of doing it as testified here, it was
10. my money. So, I felt he was capable of doing the job.
11. I asked him to take the job, which was managing and super-
12. vising people. It was not out doing plumbing work or
13. driving nails or anything else. Carroll says to me, "Is
14. it the same hours?" I said, "Yes." He said, "Is it the
15. same pay?" I said, "Yes." So, he says, "Let me think
16. about it." So, several days later he walks into my of-
17. fice. He says, "Bill, I have talked to my attorney and
18. my attorney advises me not to take that job." Well, this
19. made me upset. I said at this point, "Carroll, the
20. best thing for you to do is go to work for your attorney.
21. Go downstairs and get your pay check." Those are my
22. exact words. And that's what he did. We're sitting
23. here today.
24. Q. So, the first time that you were ever aware of any memo-

1. random of agreement was then in July, 1977?

2. A. Yes.

3. Q. Now, during February of 1976, did Carroll Dellinger ap-
4. proach you about any pay raises?

5. A. Carroll and Donnie approached me, both, about a pay
6. raise. And I said--we discussed it some. I think what
7. one of the problems was, it had to do with the commis-
8. sions or something. So, I said, "Well, I want you to
9. run . . ." I believe he was contending he wasn't getting
10. enough, making enough money commission-wise or something,
11. because the salesmen had been doing the transfers or
12. something along this line. So, I said, "Well, Donnie,
13. you get me a record. Dig up how much money Carroll has
14. made over the past year and what-not, from his commis-
15. sions." So, he did this. And when he came back to me
16. several days later, again both of them, it was found that
17. Carroll had made more money on these commissions than
18. what he thought he had, but it still wasn't enough that
19. he felt comfortable or he felt satisfied. So, I said,
20. well, you know, instead of giving Carroll an increase,
21. instead of giving you an increase in salary, I'll just
22. give you an increase in the percentage of your commission.
23. Which meant, of course, that the more he produced toward
24. collecting bad debts and this type thing, the more money

1. he would make. If he worked harder, then he would make
2. this much more money. So, he could increase his own
3. salary if he worked harder. So, this is what we put into
4. effect, I changed the percentage on the commissions of
5. the things he was getting money for.

6. Q. So, his commission prior to that time had been what?

7. A. Ten percent.

8. Q. And following that it was raised to what?

9. A. Fifteen.

10. Q. And according to this memorandum, it says, "All transfer
11. fees and other benefits are to remain the same for this
12. period of time." So there was an increase over and
13. above what . . .

14. A. There's no question about it. But, you must remember,
15. at that point I knew nothing about it.

16. Q. I understand that you weren't aware of this. But, it was
17. a material deviation from what it says here.

18. A. There's no question about it.

19. Q. Now, in 1975, in June of 1975, Mr. Neff, did you take a
20. look at the overall picture of the financial condition
21. of your company at that time, after which you made the
22. decision on behalf of your company to make a cutback in
23. income to your employees?

24. A. Yes, that's correct.

1. Q. Would you kindly explain the circumstances of that for
2. the benefit of the Court and the jury.

3. A. Well, what had taken place in getting my operating state-
4. ments--and this is contrary maybe to what most people
5. think throughout the community, but in getting my operat-
6. ing statements for Neff Trailer Sales for--I had not been
7. real active in Neff Trailer Sales. I had not been out
8. of town as implied here, but I had not been real active
9. in the management, in the lower management of Neff Trail-
10. er Sales. I hadn't been out of town for any length of
11. time as has been implied here. But I had been more ac-
12. tive in real estate and construction development and this
13. type thing, as you can see out here, and had not been
14. spending a lot of time with Neff Trailer Sales. As a re-
15. sult of this, for a period of two years, one year Neff
16. Trailer Sales lost a hundred a fifty thousand dollars and
17. the next year it lost about two hundred thousand dollars.
18. So, you know, no corporation, no company or no individual
19. can stand but so much of this. So, I said, you know, it's
20. time that I really get myself back in here and really
21. watch this thing myself. Now, I was probably in and out
22. of the office just about every day of the week because
23. I was operating from that office. So, I was there if
24. anything came up if anybody really needed anything. But,

1. in order to try to change the thing back to a profit-
2. making corporation, from a loss situation into a profit-
3. making thing, I had to become more active in the corpora-
4. tion. Well, I had to dig into it and see what was wrong.
5. One of the things I found wrong right initially to start
6. with, one way to correct it was that in my personal opin-
7. ion and based on the fact that a person can do this job
8. or another person can do this job, the ability of each
9. individual person there, they were being over paid about
10. twenty percent in my personal opinion, over and above
11. what the average person was doing for a like nature and
12. kind of work. So, the first thing that I saw that would
13. take place, that could take place to turn this corpora-
14. tion from a losing situation back to a profit-making
15. thing, was to reduce salary. Now, everyone took a ten
16. percent salary cut across the board. I know it's been
17. mentioned here several times that I took it also, I
18. certainly did. I don't think it would have been fair
19. to employees for me to tell them that I expected them to
20. take a ten percent cut in salary and me remain. So, I
21. certainly did take the ten percent cut in salary.

22. Q. Did you talk to the employees about this?

23. A. Well, I talked to the employees that--I didn't talk to
24. each individual employee. I talked to the department

1. heads basically. I did talk to the employees that I felt
2. to be in a higher pay scale within the company, people
3. that I thought that I owed it to to talk to. So, I did
4. talk with Carroll.

5. Q. Did you talk to him privately or with other people around,
6. or do you recall?

7. A. I believe I talked to him privately.

8. Q. Do you recall what the upshot of that conversation was?

9. A. He understood, you know, because I explained it just as
10. I explained it to the jury.

11. Q. Did you make any representations to him that he would be
12. paid the ten percent that you were cutting him?

13. A. You know, in all sincerity, you know, I've listened to
14. this testimony two times now, and in all sincerity it was
15. not my intent to do this. It was my intent--and this is
16. what I told all employees, that the corporation was
17. losing money, it's lost money for two years. As soon
18. as I can get the situation turned around I will give your
19. ten percent back. Now, I've thought about this several
20. times. That phase of the whole thing is the only thing
21. that makes any sense to me at all, it could have been
22. a misunderstanding. Because when I said I will give the
23. ten percent back, I meant that I would give the same sal-
24. ary back to what it was to start with. Now, I can see where

1. there would have been a possibility that someone could
2. have misunderstood. Well, he's going to give me the ten
3. percent back, then he's going to give me the ten percent
4. back he took from me. This was not my intent. I can
5. understand that possibly Mr. Dellinger misunderstood me.
6. This is the only thing that--the only way I can honestly
7. and very truthfully answer your question. It wasn't the
8. intent.

9. Q. How long did the ten percent pay cut across the board for
10. your employees remain in effect?

11. A. It was about a year, maybe eleven months. I got the sit-
12. uation turned around and the company started making a
13. profit in about eleven months.

14. Q. And at that time, did you reinstill the ten percent cut?

15. A. Everybody's salary went right back to where it was before.

16. Q. Were there any employees for Neff Trailer Sales that were
17. reinstated to the ten percent that they had been cut and
18. then given all the back pay as well?

19. A. No, including myself.

20. Q. At the time you discussed this with Mr. Dellinger, both
21. in June of 1975 when you made the cutbacks as well as
22. the time when the salary was reinstated some eleven or
23. twelve months later, was any conversation had by and be-
24. tween you and Mr. Dellinger regarding any alleged employ-

1. ment agreement?

2. A. No.

3. Q. Now, in 1973, the date of that agreement, did you have a
4. fellow working for you by the name of Ivan Messick?

5. A. Yes.

6. Q. What was Ivan Messick's capacity with your company?

7. A. Ivan was a vice-president and was the general manager of
8. Neff Trailer Sales. And it was plain knowledge to anyone
9. in the world.

10. Q. So, he was the one that was directly under you at Neff
11. Trailer Sales?

12. A. That's correct.

13. Q. Was he even over Don Strickler?

14. A. Well, as far as Neff Trailer Sales was concerned, yes.
15. But you must remember that Don did not just work for Neff
16. Trailer Sales. In the other companies that I had, Don
17. was involved with these. And Don was kind of a liaison
18. between all management and myself. Now, Don was more
19. active in Neff Trailer Sales than others. But if any-
20. thing was wrong or anything waving a flag, rather than
21. me having to dig in the books and watch for all this,
22. you know, this was Don's job to do. If there was any
23. irregularities in any of the companies, this was his job
24. to do. But, as far as being over Ivan in the trailer

1. sales, no.

2. Q. So, Ivan was the general manager?

3. A. Yes, totally. He signed all the documents and everything
4. else. It would be damn rare if Donnie ever signed any
5. documents.

6. Q. Now, we have several checks here that were drawn on Neff
7. Trailer Sales in 1973, July and August and September.
8. Whose signature is that on those checks?

9. A. It's Ivan Messick's.

10. Q. In other words, he paid the payroll.

11. A. Yes. He even signed my check.

12. Q. Did Ivan Messick have any authority to enter into an
13. employment contract?

14. A. No sir.

15. Q. Now, going back to the time when you and Carroll Delling-
16. er were having your final conversations prior to his
17. termination of employment with Neff Trailer Sales, he
18. indicated in his direct examination this morning that
19. he had told you that he would work for you but not for
20. Strickler. Did you hear that testimony?

21. A. (Indicates yes.)

22. Q. Can you further amplify about that.

23. A. Well, I just know that Donnie and Carroll just were not
24. getting along. This was common knowledge to myself that

1. they would clash back and forth quite frequently over
2. different things. Donnie contended Carroll was not doing
3. correctly, Carroll contended he was doing correctly, there
4. was some friction here. So, me and Carroll, me being the
5. type person I am, which is a very, very easy person with
6. employees; I was much easier, of course, to talk with
7. than what Don was--and no disrespect certainly to Don,
8. because he was doing his job as he saw it. That's about
9. the extent I know, and I tried to be the mediator be-
10. tween the two of them at all times, as I am with all
11. employees and all management at the company.

12. Q. So then, no discussion was had that if he wanted--if you
13. were going to consider that as an employment contract,
14. that he would have to work for Donnie Strickler then?

15. A. No.

16. Q. And did he make any suggestions along those lines?

17. A. No.

18. Q. Who executes contracts on behalf of Neff Trailer Sales,
19. Incorporated?

20. A. Well, at the time in question here, Ivan Messick was
21. executing all of the contracts. I say all of them, he
22. would have had to have been executing certainly ninety-
23. nine percent of them.

24. Q. Now, those are the trailer contracts and notes.

1. A. Which is what you're talking about.
2. Q. Right. Did Don Strickler execute in favor of lending
3. institutions notes and discount notes on behalf of Neff
4. Trailer Sales with any regularity?
5. A. No. Very, very, very rare. I would say probably the
6. only contract--and this may be the reason Carroll thought
7. to some degree he did execute quite a bit--would be trans-
8. fers or something like this that had no reason to neces-
9. sarily go through the sales department because there was
10. no money involved, as a rule there was no cost much in-
11. volved.
12. Q. Other than contracts in the ordinary course of Neff Trail-
13. er Sales and the discounting of paper and notes, do any
14. other employees, other than yourself as the President of
15. the company, have authority to enter into binding, writ-
16. ten contracts on behalf of Neff Trailer Sales?
17. A. No. No, don't have and they never have done it either.
18. Q. And who is the only one that does have that authority?
19. A. That's myself.
20. Q. And that was true in August of 1973 as well?
21. A. Yes.
22. Q. And generally, at such a time as when you entered into
23. any sophisticated agreements, did you have a lawyer or
24. lawyers that would prepare these documents upon request?

1. A. Usually.

2. MR. JULIAS: I think that's all. Answer any questions
3. Mr. Hatmaker might wish to ask you.

4. COURT: Mr. Hatmaker.

5.

6. Cross Examination by Mr. Hatmaker:

7. Q. Well now, Donald Strickler was vice-president of your
8. corporation in 1973, was he not?

9. A. He was one of the vice-presidents.

10. Q. All right. He was a vice-president, right?

11. A. Yes.

12. Q. Was he a stockholder?

13. A. No.

14. Q. Was he on the board of directors?

15. A. Yes, I think he was.

16. Q. Now, he was in charge of hiring and firing people in the
17. office, was he not?

18. A. That was one of his responsibilities, that wasn't his--
19. he wasn't the only one that could do that.

20. Q. But he did . . .

21. A. I think something maybe ought to be clarified.

22. Q. Okay. Fine.

23. A. Ivan did it, I did it. No, he wasn't the only one.

24. Q. But he had the authority to hire and fire, didn't he?

1. A. Yes.
2. Q. And the authority to grant raises?
3. A. Under normal circumstances.
4. Q. And to set commission percentages and all that sort of
5. thing?
6. A. Not with the sales force, no.
7. Q. But with the office people, with the credit people.
8. A. You know, it's hard to answer some of your questions, Mr.
9. Hatmaker, because in some cases it's yes and some it's
10. no. When I keep saying under some circumstances, you
11. know, to a certain degree he could do this.
12. Q. Well, he had the authority to set the commissions that
13. Bob Taylor and Carroll Dellinger were to get, right?
14. A. Well, he set those. Now, he talked with me about them.
15. Q. But he set them, didn't he?
16. A. Well, but he didn't have the authority to do it on his
17. own, Mr. Hatmaker. I'm trying to answer your questions,
18. but you . . .
19. Q. He didn't have the authority to set commissions?
20. A. Not on his own, but to some degree, yes.
21. Q. You're aware that he did that though, aren't you?
22. A. Well, you're also aware that he--when the one was increas-
23. ed from ten percent to fifteen percent, he did not do
24. that one on his own. He came to me, him and Carroll,

1. and talked to me. So, together we set the commission.

2. So, to answer your question, sometimes yes and sometimes

3. no.

4. Q. He did have the authority to discount notes, is that

5. correct?

6. A. He had the authority, but really I don't think--he did

7. them so infrequently, I don't think he had the knowledge.

8. Q. Well, he could sign his name.

9. A. Oh, that's quite true.

10. Q. Did you ever chastise him for having signed this employ-

11. ment contract with Carroll Dellinger?

12. MR. JULIAS: I object to that, Your Honor. It's imma-

13. terial.

14. COURT: Overruled.

15. MR. JULIAS: Note an exception to it.

16. A. Now, what was your question?

17. Q. Did you ever chastise Donald Strickler for entering into

18. this agreement with Carroll Dellinger?

19. A. I believe I would have to answer that no.

20. Q. Now, what is the reason that you fired Carroll Dellinger?

21. A. I explained the reason I fired Carroll Dellinger. Would

22. you like for me to go over it one more time.

23. Q. I just wish you would give it to me in summary form, if

24. you could. Did you fire him because he was incompetent?

1. A. No.

2. Q. Did you fire him because you were cutting back?

3. A. No.

4. Q. You didn't fire him because you were cutting back?

5. A. I fired him--if you want me to answer the question in-
6. stead of going through all of it, I'll answer the ques-
7. tion. I fired him because his attorney told him not to
8. take another job, that's the reason he was fired. I
9. told you that awhile ago. His attorney advised him he
10. could not take the other job. I said, "Well, then go
11. to work for your attorney."

12. Q. Wait a minute now. You don't know what his attorney
13. advised him, do you?

14. A. I know that he told me his attorney advised him not to
15. take the other job. This is what he told me. And I said,
16. "Go to work for your attorney." Now, that's the basis
17. of which he got fired.

18. Q. You fired him basically because he sought an attorney's
19. advice, isn't that correct?

20. A. That is not correct.

21. MR. HATMAKER: No further questions.

22.

23.

24.

1. Re-Direct Examination by Mr. Julias:

2. Q. In response to the question that Mr. Hatmaker asked you,
3. did you ever chastise Donnie Strickler because of that
4. agreement, by the same token, did you ever consent to the
5. terms of that agreement as an employment agreement?

6. A. No.

7. Q. Now, one other question that I overlooked asking you in
8. my direct examination. Mr. Strickler was asked some ques-
9. tions and Mr. Dellinger has raised some questions regard-
10. ing an agreement that he saw that was discussed regarding
11. an agreement between you and Don Strickler, which Mr.
12. Strickler has referred to as a service agreement. Could
13. you explain that for the benefit of the jury, please.

14. A. Well, what this agreement--this certainly has not been
15. explained properly. This agreement took place when Don
16. Strickler left the employment of Neff Trailer Sales, this
17. probably would have been seven or eight years ago, maybe
18. ten years ago, set up an agency known as Harrisonburg
19. Collection Agency. He was operating from his home. So,
20. at that time I entered into an agreement with another
21. place of business, not an individual, but a business
22. place for him to do credit and collections and work for
23. "x" number of dollars and to do "x" number of things.
24. But this was not with an individual. It was with, as far

1. as that, with another place of business. And I did it
2. myself, it certainly wasn't anyone else in that company.
3. And it could have been terminated within thirty days by
4. either party. It wasn't a five year thing that the com-
5. pany was liable for sixty grand.

6. Q. So, it was a business agreement that was terminable at
7. thirty days notice by either party.

8. A. Between two places of business, not one place of business
9. and one individual.

10. Q. It had nothing to do with employment, his guaranteed em-
11. ployment or anything like that.

12. A. No.

13. MR. JULIAS: I think that's all.

14. COURT: Re-cross?

15.

16. Re-Cross Examination by Mr. Hatmaker:

17. Q. You've testified that you offered Mr. Dellinger a job
18. as--what was it? Supervisor of the renovation of mobile
19. homes, wasn't it?

20. A. This was a part. This would have been a part of it.

21. Q. Well, that's what it was in fact, wasn't it?

22. A. Well, it would have been supervising of men that were
23. repairing mobile homes and probably some deliveries, set-
24. ups and services. It was strictly supervision, paper

1. work and clerical work, which was basically all he was
2. doing anyway. If collections isn't clerical work I don't
3. know what it is.

4. Q. But it was supervision of men who were doing mechanical
5. work, isn't that correct? Wasn't it supervision of
6. plumbers and electricians and carpenters who were reno-
7. vating mobile homes?

8. A. To some degree, I guess it . . .

9. Q. Well, wasn't that all it was? I mean, wasn't that it?

10. A. Not necessarily.

11. Q. Granted that there might be some record keeping involved
12. in it, wasn't the essence of the job to supervise the men
13. who did the renovation?

14. A. The only degree of supervision--it wouldn't have been
15. supervision of the product. See, there's a difference
16. between supervision, seeing that the product is done cor-
17. rectly, seeing that the men are at work on time, you know.
18. It's hard for me to answer your questions, because . . .

19. Q. Mr. Neff, that's a very simple question. I think you
20. ought to go ahead and answer it straightforwardly.

21. A. Okay. I'll answer it as far as . . .

22. MR. JULIAS: I object to counsel's remark to the wit-
23. ness, Your Honor. I don't think that remark was called
24. for.

1. COURT: Yes. Rephrase your question, Mr. Hatmaker.

2. Q. Didn't you offer Carroll Dellinger a job in which his
3. main task was to supervise the men who did the mechanical
4. work in the renovation of mobile homes?

5. A. His job would have been to supervise the men to see that
6. they were inside the mobile home working. As far as him
7. seeing that it was done, as far as going in and saying I
8. know this piece of pipe fits, the answer to your question
9. is no. The men knew how to do the work.

10. Q. He was responsible for getting the work done, is that
11. correct?

12. A. And seeing that the men were there on time, that they
13. worked while they were there, and this type thing, yes.

14. Q. He was responsible for getting the renovating done.

15. MR. JULIAS: I object to that, Your Honor. Mr. Hat-
16. maker is trying to put words in Mr. Neff's mouth. He's
17. answered the question. It's not responsive to what Mr.
18. Hatmaker wants him to answer and obviously counsel is
19. taking issue with the witness.

20. COURT: He's entitled to seek clarification from the
21. witness. The objection is overruled.

22. Q. He was in charge of the men who were making the renova-
23. tions, right?

24. A. That's correct.

1. Q. So, he would have been.

2. A. Yes.

3. Q. It would have been his duty to be sure that that work was
4. done properly, is that correct?

5. A. That would certainly have been one of his things to some
6. degree. If that's what you want.

7. MR. HATMAKER: No further questions.

8. COURT: Re-direct?

9. MR. JULIAS: That's all.

10. COURT: Call your next witness.

11. MR. BLATT: LeRay Comer.

12. COURT: We'll take a five minute recess.

13. (Recess)

14.

15. WITNESS - LERAY M. COMER

16. Direct Examination by Mr. Blatt:

17. Q. Sir, would you state your name, please.

18. A. LeRay M. Comer.

19. Q. And, sir, where do you live?

20. A. Shenandoah, Virginia.

21. Q. Are you employed?

22. A. Neff Mobile Homes.

23. Q. How long have you been employed at Neff Mobile Homes?

24. A. Fifteen years.

1. Q. What do you do out at Neff Mobile Homes?

2. A. I'm a service manager.

3. Q. Now, let me ask you a couple of questions. Do you have
4. a written employment contract?

5. A. No sir.

6. Q. Do you know of anybody at Neff Mobile Homes that has such
7. a contract?

8. A. No sir.

9. MR. HATMAKER: Objection. I think it's irrelevant,
10. Your Honor.

11. COURT: Well, it's in evidence so far and it's undis-
12.puted, so if the matter is covered, go ahead.

13. Q. Now, what are some of your duties right now, in relation
14. to your employment? What do you do out there?

15. A. Right now?

16. Q. Yes.

17. A. I manage the service department, the delivery department.
18. I manage part of the construction operation and I manage
19. the furniture store.

20. Q. In relation to the construction operation, do you ever
21. have the occasion to deal with contracts?

22. A. Yes sir.

23. Q. And who has the authority to sign those contracts on
24. behalf of your employer?

1. A. Mr. Neff.
2. Q. Do you know of anyone else that has that authority?
3. A. No sir.
4. Q. During the fifteen years that you've been there, has it
5. ever been your understanding that anyone would have the
6. authority to sign the contracts on behalf of Neff Mobile
7. Homes or Neff Trailer Sales, Incorporated, other than Mr.
8. Neff?
9. A. No sir.
10. Q. Now, sir, do you remember a time a few years ago when
11. your salary was cut ten percent?
12. A. Yes sir.
13. Q. What were the circumstances that were given to you of why
14. your salary was cut?
15. A. Because of the slack in business and the loss the company
16. was taking, that we needed to take a ten percent deduct-
17. ion.
18. Q. Sir, was your salary ever raised back up to that ten per-
19. cent?
20. A. Yes sir.
21. Q. Were you ever paid the ten percent back that had been
22. cut out for some period of eleven months?
23. A. We were paid a portion of it.
24. Q. Was it ever indicated to you that it would ever be paid

1. back?
2. A. No sir, not at the time it was cut.
3. Q. And who talked with you about that?
4. A. Who talked to me about it?
5. Q. Who told you it was going to be cut?
6. A. Mr. Neff.
7. Q. Were you promised it would be paid back?
8. A. No sir.
9. Q. Who's Ivan Messick?
10. A. Ivan Messick was vice-president of Neff Mobile Homes,
11. and general manager.
12. Q. When Mr. Messick was working was there anybody else that
13. had general manager authority?
14. A. No sir.
15. Q. Do you remember during the time that Mr. Messick was
16. working whether there were periods of time that both he
17. and Mr. Neff were out of town together?
18. A. Not that I remember.
19. Q. Would it be that one was there when the other one wasn't?
20. A. Yes sir.
21. MR. BLATT: That's all. Thank you. Answer Mr. Hat-
22. maker's questions.
- 23.
- 24.

1. Cross Examination by Mr. Hatmaker:
2. Q. Mr. Comer, what's your title now, with Neff's?
3. A. Now?
4. Q. Yes.
5. A. Service manager.
6. Q. Are you also vice-president now?
7. A. No sir.
8. Q. Where is your office?
9. A. It's in with Mr. Neff's office.
10. Q. Right in there, in the same room?
11. A. Yes sir.
12. Q. Are you a director of the corporation?
13. A. Yes sir.
14. Q. You're not an officer, you say.
15. A. No sir.
16. Q. And you say you got part of your money back.
17. A. Yes sir.
18. Q. How much of it did you get back?
19. A. I'm not sure whether it was one month or two months.
20. MR. HATMAKER: I don't have any further questions.
21. COURT: Re-direct.
22. MR. BLATT: I don't have any further questions.
23. COURT: Call your next witness.
24. MR. BLATT: Gene Combs.

1. WITNESS - GENE COMBS

2. Direct Examination by Mr. Blatt:

3. Q. Would you state your name, please.

4. A. Gene Combs.

5. Q. Where do you live?

6. A. Harrisonburg, Virginia.

7. Q. Are you employed?

8. A. Yes.

9. Q. Where do you work?

10. A. Neff Mobile Homes.

11. Q. How long have you worked for Neff Mobile Homes?

12. A. About fifteen years.

13. Q. Now, what exactly is Neff Mobile Homes?

14. A. Retail sale of mobile homes. They have mobile home parks,
15. they rent spaces.

16. Q. But is Neff Mobile Homes the mobile home park?

17. A. No. The mobile home park is Spotswood Mobile Home Es-
18. tates, Incorporated. It's a wholly owned subsidiary of
19. Neff Trailer Sales.

20. Q. How long have you worked then for the Neff organization?

21. A. A total of fifteen years with Neff Trailer Sales organi-
22. zation. Seven with Spotswood Mobile Home Estates.

23. Q. Do you have a written employment contract?

24. A. No.

1. Q. Do you know of anybody out there who does?

2. A. No.

3. Q. During the time that you have worked there for fifteen
4. years or so, who in it, of your understanding, has the
5. authority to sign contracts on behalf of the Neff organ-
6. ization?

7. A. Bill Neff.

8. Q. Is it your understanding that anyone else has that
9. authority?

10. A. Not that I'm aware of.

11. MR. BLATT: That's all.

12. COURT: Do you wish to inquire, Mr. Hatmaker?

13. MR. HATMAKER: No questions.

14. COURT: Call your next witness.

15. MR. JULIAS: That's the defendant's case, Your Honor.

16. COURT: The defendant rests. Does the plaintiff wish
17. to introduce any evidence on rebuttal?

18. MR. HATMAKER: Yes sir. I'd like to call Nelson
19. Simmons.

20.

21. WITNESS - NELSON SIMMONS

22. Direct Examination by Mr. Hatmaker:

23. Q. State your name, please, sir.

24. A. Nelson Simmons.

1. Q. Where do you live?
2. A. Route 5, Harrisonburg.
3. Q. What's your occupation?
4. A. Self-employed.
5. Q. What do you do?
6. A. Mobile home repairs.
7. Q. Are you a former employee of Neff Mobile Homes?
8. A. Yes sir.
9. Q. When were you employed there?
10. A. A total, I guess, of ten years.
11. Q. Beginning when and ending when?
12. A. I don't know the exact date, I've been gone from out
13. there a little over a year.
14. Q. So, you went to work then around 1967, somewhere around
15. in there?
16. A. Yes.
17. Q. You were working during the recession, were you not?
18. A. Right.
19. Q. Were you asked to take a ten percent pay cut during the
20. recession?
21. A. Yes sir.
22. Q. Who asked you to take it?
23. A. Well, Mr. Comer.
24. Q. He's the Comer that testified here awhile ago?

1. A. Yes.

2. Q. What's his title?

3. A. He was service manager.

4. Q. Did he talk to you privately about this?

5. A. Yes.

6. Q. What did he tell you about it?

7. A. Well, we'd just have to take a ten percent cut in pay, of
8. course, if we didn't take the ten percent we'd just have
9. to quit.

10. Q. You either took a ten percent reduction or you were out
11. of a job.

12. A. Find another job.

13. Q. Find another job, okay. Did he say anything to you about
14. whether or not the pay cut would be restored?

15. MR. JULIAS: I object to that, Your Honor. It's hear-
16. say.

17. COURT: Overruled.

18. A. No, he didn't.

19. Q. What was your understanding with respect to the restora-
20. tion of your pay cut?

21. A. Well, the only thing he told me was when things picked up
22. we'd get our ten percent back, reinstated.

23. Q. What did you take that to mean?

24. A. That, well, when things picked up we'd get our ten per-

1. cent back.

2. Q. Did you understand that he would have your former level
3. of pay restored to you?

4. A. Not by Mr. Comer, no.

5. Q. What was your understanding as an employee from whatever
6. source you had?

7. A. Well, the rumor--after that, the rumor went around that
8. we would get our ten percent back, what they had taken
9. off of us.

10. Q. Would you get the ten percent paid back to you that . . .

11. MR. BLATT: Your Honor, I object to the leading ques-
12. tion.

13. COURT: Sustained.

14. Q. Did you have any further understanding with respect to
15. the ten percent that you lost during the recession?

16. A. No, just hearsay that I would get it back, that's all.

17. Q. That you what?

18. A. That we would get it back.

19. Q. That you would get it back?

20. A. Yes, what they had held off of us.

21. MR. HATMAKER: No further questions.

22. COURT: Do you wish to inquire, Mr. Julias?

23. MR. JULIAS: Yes sir.

24.

1. Cross Examination by Mr. Julias:

2. Q. Mr. Simmons, LeRay Comer is the man that was designated
3. by the company to tell you that you would have to take
4. a ten percent cut.

5. A. Right.

6. Q. And if I understood your testimony correctly, you stated
7. that he did not say that you were going to get that ten
8. percent back at any time, but sometime later when the
9. company got turned around you would get the ten percent
10. cut restored.

11. A. Right.

12. Q. So, you never did hear it officially from any company
13. representative that you were going to get all the back
14. pay that you lost?

15. A. No, not from . . .

16. Q. You got it from no official sources.

17. A. No.

18. MR. JULIAS: That's all.

19. COURT: Re-direct.

20. MR. HATMAKER: Nothing further.

21. COURT: Call your next witness.

22. MR. HATMAKER: I recall Mr. Dellinger.

23.

24.

1. WITNESS - CARROLL W. DELLINGER

2. Direct Examination by Mr. Hatmaker:

3. Q. Mr. Dellinger, what was your understanding with respect
4. to the ten percent pay cut?

5. MR. BLATT: Your Honor, I object. That's been covered
6. on direct examination. It's been asked and answered and
7. been gone over several times.

8. MR. JULIAS: He can't call the plaintiff back just to
9. bolster up the plaintiff's testimony again. He went into
10. that in direct examination, Your Honor.

11. MR. BLATT: It's self-serving at this point.

12. COURT: It was not covered on direct, Mr. Hatmaker?

13. MR. HATMAKER: I simply wanted to bring it out again
14. just in case there was any doubt in anybody's mind about
15. it.

16. COURT: Well, if it's covered on direct it's not neces-
17. sary to repeat it.

18. MR. HATMAKER: Fine.

19. Q. Now, did you have a discussion with Bill Neff about the
20. kind of work that you were being offered as a substitute
21. job?

22. A. Yes.

23. MR. JULIAS: The same objection, Your Honor.

24. Q. Prior to July of 1977.

1. COURT: Overruled.

2. A. Yes sir.

3. Q. And I want you to tell us the substance of that conversa-
4. tion.

5. A. I was sitting at my desk one day after this employment
6. contract issue came up and he come by the desk and said,
7. "Come on, ride along up to the construction site, I want
8. to talk to you about this job I have at the shop." So,
9. we went in his truck up to the construction site where
10. they're building the shopping center. And he told me
11. that he wanted me to go back to the service department
12. and take five employees and to supervise the recondition-
13. ing of mobile homes. At no time was any paper work or
14. delivery of mobile homes discussed. He just said the
15. supervision of reconditioning mobile homes.

16. Q. What did you take that to mean?

17. A. I took it to mean that I was to supervise the repairs,
18. plumbing, carpentry work, whatever had to be done to a
19. used mobile home to get it ready for redelivery.

20. Q. Did he say anything about how he wanted the work done?

21. A. To his satisfaction.

22. Q. What were his exact words?

23. A. He wanted me to supervise the men to make sure the work
24. was done correctly.

1. Q. Had you ever done any work like that before?

2. A. No sir.

3. MR. JULIAS: Your Honor, all of this has been covered
4. in his direct examination. I hate to belabor the point
5. and continue objecting, but . . .

6. COURT: Yes, limit this to what was not covered in
7. direct, Mr. Hatmaker.

8. MR. HATMAKER: All right. I think I've covered it all.
9. That's all, thank you.

10. COURT: Do you wish to inquire, Mr. Julias?

11.

12. Cross Examination by Mr. Julias:

13. Q. Mr. Dellinger, you testified this morning in response to
14. a question that was asked you, didn't you testify you
15. didn't inquire as to what the duties entailed in the job
16. as service manager or in charge of the maintenance and
17. renovation and rehabilitation of trailers?

18. A. I didn't inquire into it. Mr. Neff told me what they
19. would be.

20. Q. And Neff never told you, Mr. Neff never told you that
21. you'd be responsible for the actual inspection and the
22. performance of the job, you just had to supervise it and
23. oversee that it was done.

24. A. He said to supervise and oversee that it was done correct-

1. ly, yes sir.

2. MR. JULIAS: That's all.

3. MR. HATMAKER: No further questions.

4. COURT: Call your next witness.

5. MR. HATMAKER: That's all.

6. COURT: Any surrebuttal by the defendant?

7. MR. BLATT: None.

8. COURT: Ladies and gentlemen of the jury, that com-
9. pletes the evidence you'll hear in this case. Before
10. you hear the argument of counsel and begin your delibera-
11. tions, it's my responsibility to prepare the instructions
12. of law to be given to you.

13. (Recess)

14.

15.

16.

17.

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23.

24.

(In Chambers)

MR. BLATT: Your Honor, we would again move to strike the Plaintiff's case and the Plaintiff's allegations as to damages. We renew our motions, the very same motions, for our motion to strike as per the Plaintiff's case.

I think the evidence now before the Court is that in ascertaining the damages, that commissions has definitely got to be struck from the jury because there's now contradicted testimony before the Court that over and above his commissions for working bad debts, that he would go out and get commissions for a job that he wasn't hired for, which was sales during a promotional era, weeks, and also sales on the weekend. And there's no way that the jury can segregate these out, what the amount was for sales as opposed to what the amount was for his alleged duties or commission for bad debts and transfer fees. So that would be nothing but pure speculation.

COURT: Anything further?

MR. BLATT: No.

COURT: Motion denied. Do you have any motions, Mr. Hatmaker?

MR. HATMAKER: Yes sir, Your Honor, I do. Your Honor, I move for summary judgment as to all of the allegations here, the contract, the agency question, everything except damages.

1. I think damages is the only thing that ought to go to the
2. jury.

3. As to the agency, first of all, I think the evidence
4. is overwhelming that Strickler had both actual and apparent
5. authority to execute this employment contract. He did the
6. hiring and firing out there for the office employees. He was
7. a vice-president of the corporation. He was a trusted em-
8. ployee under Bill Neff. He had wide authority. The corpora-
9. tion repeatedly held him out as having all sorts of authority.

10. COURT: I've heard enough on that. Go to something
11. else.

12. MR. HATMAKER: I think that the contract is clear and
13. unambiguous on its face. The only possible jury questions
14. on the contract itself would be as to the meaning of several
15. of the terms and they're really uncontradicted. The writing
16. itself recites all of the terms necessary for a contract, all
17. of the elements of a contract. It shows offer and acceptance
18. and consideration and it shows part performance. In fact, it
19. shows complete performance on the part of Dellinger. It's
20. clear and unequivocal, there's plenty of consideration
21. flowing in both directions here. The only places that rea-
22. sonable men could possibly need any interpretation as to what
23. the words mean are transfer fees and other benefits. The
24. testimony is uncontradicted as to what they mean.

1. COURT: I've heard enough on that. Go on to some-
2. thing else.

3. MR. HATMAKER: That's it. I think we're entitled--I
4. don't think there's any ambiguity in the contract to be con-
5. strued. And, as the Court well knows, it's the duty of the
6. Court to construe any ambiguities in the contract.

7. COURT: Mr. Julias. Mr. Blatt.

8. MR. BLATT: Your Honor, I believe that the Plaintiff
9. is not entitled to summary judgment. It is always proper
10. when there are ambiguous terms on the face of any agreement
11. to allow testimony and parole evidence to ascertain what the
12. intent of the parties were. Intent can be the reason that
13. they entered into it, plus intent is also proper to show
14. in their subsequent actions on how they treat the agree-
15. ment. I think that Mr. Strickler's and Mr. Dellinger's in-
16. tent is now before the jury. I think that the way Mr. Del-
17. linger treated this agreement is a material fact in issue as
18. to whether or not he treated it as an agreement for wages
19. or as a binding employment contract. I think this is a ques-
20. tion of fact at this point that will need to be determined
21. by the jury in giving weight as to whether or not that is a
22. contract for employment or an agreement by the parties as to
23. wages.

24. COURT: Anything further?

1. MR. JULIAS: No. Just that that theory is, where the
2. ambiguity is, there are two cases that back it up. One is
3. Russell Co. v. Carroll, and there's other Virginia cases if
4. you want us to cite them. We've got a whole series of cases.

5. COURT: With respect to the issue of apparent author-
6. ity, the evidence is that people use the name Neff Trailer
7. Sales-Neff Mobile Homes interchangeably, one meant the same
8. thing as the other. The evidence is that Strickler was the
9. vice-president of the corporation. Even Mr. Neff testified
10. that he had the authority to hire and fire employees, give
11. them raises and cut their pay. So, the Plaintiff's motion is
12. sustained with respect to Mr. Strickler's apparent authority.

13. Next, with respect to the contract, parole evidence
14. is admissible to explain the terms of the contract only if
15. the contract is ambiguous. With respect to the duties to be
16. performed and the transfer fees and other benefits, the con-
17. tract is ambiguous and parole evidence is admissible to ex-
18. plain those terms of the contract. However, with respect to
19. the salary scale and with respect to the terms of the contract,
20. the contract is unambiguous. It says, "Dellinger will per-
21. form his same duties and agrees to work for Neff Mobile Homes
22. for this period of time," referring to the five years. And
23. the next paragraph, "Neff Mobile Homes agrees to pay the
24. above salary for this period of time." So, to the extent

1. that that is taken care of, that is covered by the Plaintiff's
2. motion. The Plaintiff's motion is sustained.

3. The issues are whether the Plaintiff was justified in
4. not accepting the other employment and the issue is whether
5. the other employment that was offered to the Plaintiff by
6. the Defendant was reasonable. And so, the issue is whether
7. the Plaintiff's refusal to take this other job was an unrea-
8. sonable refusal. If he refused unreasonably he breached, if
9. the Defendant did not offer other employment reasonably with-
10. in the contemplation of the parties then the Defendant breach-
11. ed.

12. MR. HATMAKER: Your Honor, I'd like to object to that
13. ruling. I think the A.L.R. 3d annotation is clear, that the
14. only jury issue is whether or not the work offered was sub-
15. stantially different from the work which he had done.

16. COURT: Well, that is in the context of the reason-
17. ableness of the refusal, and I assume that you will have in-
18. structions on that.

19. MR. HATMAKER: My point is that if the evidence is
20. uncontradicted that the work was different, then it becomes
21. an issue for the Court, not the jury, to determine whether
22. or not the refusal to accept it was justified.

23. COURT: Well, in my view, whether the work was so
24. substantially the same, or so substantially different, that

1. one or the other parties was unreasonable in offering or re-
2. fusing the employment is an issue for the jury. And, of
3. course, damages are an issue for the jury.

4. MR. JULIAS: Judge, how do you get around the propo-
5. sition that Dellinger, by his own testimony, says he would
6. not work for Strickler? I mean, it's his testimony. He
7. didn't deny it, he was the one who testified to it. That's
8. a breach within itself because that carries the connotation
9. all the way through it that he's not going to work in credit
10. and in collections and that's all he was in charge of.

11. COURT: But the only issue raised by the pleadings
12. was whether the other job was substantially, so substantial-
13. ly dissimilar to be unreasonable.

14. MR. BLATT: Your Honor, is the Court ruling that, as
15. a matter of law, and construing this agreement as an em-
16. ployment contract?

17. COURT: There's no question about that, it's a con-
18. tract. I still don't see the difference between a contract
19. and an agreement. I understand your examining the witness
20. on it.

21. MR. BLATT: Your Honor, at this point we wish to state
22. for the record our objection to that finding. I think that
23. in citing Michie's Jurisprudence and the line of cases that
24. they cite at Section 45, Contracts and Intentions of Parties,

1. in construing a contract we have to look at this whole thing,
2. the four corners and the face of it. We can't blue pencil
3. out the last paragraph, which one of the signers to the con-
4. tract indicated that that was the intent and the scope of it.
5. And the law is that the cardinal rule in construction of con-
6. tracts is that the intention of the parties governs, and I
7. think it's a fact question for the jury as to what the in-
8. tentions of the parties were in that agreement.

9. COURT: Well, nobody who is competent can come into
10. Court and say that I did not intend to sign what the written
11. agreement says that I signed.

12. MR. BLATT: I think it's a fact question as to what
13. the written agreement is, whether it's an employment con-
14. tract or whether it is a thing for wages. And it's obvious
15. from the conduct of the Plaintiff that he never intended . . .

16. COURT: We've covered that.

17. MR. JULIAS: I hate to belabor the point, but we're
18. not communicating about something here and it bothers me a
19. little bit because I think it's most serious. Because the
20. Court's ruling is in effect saying that any officer of Neff
21. Trailer Sales can sign a million dollar contract and bind
22. that corporation. And I don't think the Court has the intent
23. whatsoever to infer that.

24. COURT: Well, if he has appointed authority to do it

1. he certainly can.

2. MR. JULIAS: Well, Your Honor, how do you get around
3. the proposition that's set forth in High Knob, Inc. v. Allen,
4. 205 Va., where the Court states, "We have repeatedly said
5. that in construing a contract, 'Regard should be had to the
6. intention of the parties, and such intention should be given
7. effect. To arrive at this intention, regard is to be had to
8. the situation of the parties, the subject matter of the agree-
9. ment, the object which the parties intended to accomplish. A
10. construction should be avoided if it can be done consistently
11. with the tenor of the agreement, which would be unreasonable
12. or unequal, and that construction which is most obviously
13. just is to be favored as most in accordance with the presumed
14. intention of the parties.'" And with that they cite a throng
15. of cases.

16. COURT: It has to be consistent with the tenor of the
17. agreement.

18. MR. BLATT: And the intent of the parties.

19. MR. JULIAS: And the intent of the parties. Now, you
20. have Don Strickler who's testified that he had one completely
21. different version than Carroll Dellinger. As a matter of
22. fact, Carroll Dellinger on cross examination didn't disagree
23. when I posed that very question to him. He said in answer
24. to my question, he said, "Yes, that's what it says. I'll work

1. without any raises for five years." And it just seems to me
2. that the case law is there. And in this case, it was held
3. error for the Court not to strike the evidence where there
4. was an ambiguity in the agreement.

5. COURT: I can't see any ambiguity in the agreement.
6. There was an employment contract for five years.

7. MR. JULIAS: I conceivably would agree with the Court
8. had the Defendant prepared it. But where the Plaintiff pre-
9. pared it, this case, Russell Co. v. Carroll, at 194 Va., says
10. it's to be construed against the Plaintiff.

11. MR. HATMAKER: That's only if there's an ambiguity.

12. COURT: Gentlemen, let's take up instructions. We're
13. wasting a lot of time here.

14. MR. JULIAS: I don't think we have instructions to
15. cover those items that the Court has ruled on.

16. COURT: Do you have any instructions, Mr. Hatmaker?

17. MR. HATMAKER: Your Honor, I have some and I hope
18. that they are apropos at this point.

19. MR. JULIAS: What are the issues again, Judge?
20. Whether the Plaintiff was justified in refusing other employ-
21. ment?

22. COURT: Whether the Plaintiff was justified in not
23. accepting the other employment that was offered.

24. MR. BLATT: Will we be precluded from arguing to the

1. jury the intention of the parties when they executed this
2. agreement?

3. COURT: I can't see any issue on that. Let's see the
4. instructions.

5. MR. JULIAS: Well then, the Court's in effect ruling
6. as a matter of law that there's an issue of damages.

7. COURT: No.

8. MR. JULIAS: That's what it sounds like.

9. COURT: If the jury finds that the other job that
10. Mr. Neff offered him was reasonable and he was unjustified
11. in refusing it, then the defendant is entitled to a verdict.

12. MR. JULIAS: We want to note exceptions to all the
13. Court's rulings as being totally inconsistent with the law
14. of Virginia.

15. MR. HATMAKER: There is one, Your Honor, that I pre-
16. pared. Now this is a finding instruction and it needs to be
17. modified. That was the original finding instruction.

18. MR. JULIAS: What instruction are you offering?

19. MR. HATMAKER: I didn't number them. First of all,
20. the finding instruction, Your Honor . . .

21. COURT: These instructions cover the issues, don't
22. they?

23. MR. HATMAKER: Well, not quite, Your Honor. I think
24. we'd be giving something away right now if we'd ask the Court

1. to accept those. I'm not tendering these as they are typed,
2. I'm simply saying that they bear on the issues. I think they
3. need to be revised.

4. COURT: Do you want to take a five minute break and
5. work out the instructions you want to offer the Court?

6. MR. HATMAKER: I would, yes sir.

7. COURT: Okay, we'll take a five minute break and you
8. gentlemen can work out the instructions you want to offer.

9. (Recess)

10. COURT: Gentlemen, Instruction #1 offered by the
11. Plaintiff. Do you want to be heard on that?

12. MR. BLATT: We object. It's not an adequate state-
13. ment of the case. It does not take into account the ambi-
14. guities. We object to a finding instruction that there was
15. a contract between the parties on the grounds heretofore
16. stated. It's not an adequate statement of the law and not
17. an adequate statement of the case.

18. MR. JULIAS: On top of that it's confusing, Your
19. Honor, because the instruction encompasses certain parts of
20. the Court's ruling in one fashion and certain parts of the
21. Court's ruling in another fashion, all of which would serve
22. to be an invasion of the province of the jury in determining
23. what is in fact a proper issue for its consideration based
24. on the evidence of the case.

1. COURT: Objection overruled. Exception is noted.
2. Next is Instruction #2. It's a finding instruction offered
3. by the Defendant. If you find that Dellinger unreasonably
4. refused to accept other employment, you find for the Defendant.
5. That's granted as Instruction #2.

6. MR. HATMAKER: Over my objection, Your Honor. I be-
7. lieve that's contrary to the law. I think the only factual
8. question is whether or not the employment was substantially
9. different from the employment that he had before. If that
10. is so, then I think the law is clearly that the Court must
11. rule as a matter of law that the discharge is unjustified.

12. COURT: It's the view of the Court then, whether the
13. discharge was justified is a question for the jury. And un-
14. reasonable refusal is defined in another instruction. In-
15. struction #3.

16. MR. JULIAS: We object to that, Your Honor, on the
17. grounds that we don't feel that it's a proper definition of
18. the law based on the evidence of the case. And we further
19. feel that there is nothing before the Court to indicate sig-
20. nificant reduction in rank. And we feel that that would
21. have nothing to do--would have a tendency to be confusing.

22. MR. BLATT: It's prejudicial to the jury. There's
23. been no testimony whatsoever as to rank.

24. MR. JULIAS: Lesser salary or . . .

1. COURT: Do you want to strike . . .

2. MR. HATMAKER: I'll strike that.

3. COURT: All right. We'll strike the "significant
4. reduction in rank."

5. MR. JULIAS: We feel it's not an adequate statement
6. of the law and the fact that the consent of the employee
7. would be immaterial in this particular incidence.

8. COURT: Now, the contract may be ambiguous with re-
9. spect to what the duties are and what the commissions and
10. other benefits are. And I will then grant Instruction #4
11. that is offered by the Defendant.

12. MR. HATMAKER: I'm not sure which one that is.

13. COURT: Acts of the parties are admissible to show
14. their intent.

15. Instruction #5 is tendered by the Defendant, that if
16. there be ambiguity, then the terms are to be construed. I
17. have stricken the words offered by the defendant, "most
18. strongly."

19. MR. JULIAS: We'd like to have those words put back
20. in there under the grounds that in the case of Russell Co. v.
21. Carroll, that that was the wording of the Court.

22. COURT: Do you want to put "most strongly" back in
23. there, Mr. Hatmaker?

24. MR. HATMAKER: No sir. I object to the instruction.

1. I object to the previous one too.

2. MR. BLATT: We cite as further authority for that in-
3. struction, Volume 4B, Michie's Jurisprudence on contracts,
4. Section 44.

5. COURT: "Most strongly" is argumentative and not a
6. matter for the jury.

7. MR. JULIAS: Well, here it says it's a matter of law,
8. Your Honor.

9. MR. BLATT: Right here it's used in the text to the
10. jury. "Therefore to be considered most strongly against
11. such parties."

12. COURT: Instruction #6. "In computing the damages,
13. if any, suffered by Neff's breach." I have inserted there,
14. "if any".

15. MR. HATMAKER: No objection to that. Your Honor,
16. could I record my objections to #4 and #5 for the record?

17. COURT: I thought you'd done it.

18. MR. HATMAKER: I wasn't sure frankly, the way we've
19. shuffled them through here. Instruction #4 I object to as
20. being argumentative and an abstract instruction. It invades
21. the province of the Court.. And, frankly, it's also vague.

22. Instruction #5, I object because there is no ambi-
23. guity in any of the terms of the contract. The evidence is
24. undisputed as to what the terms in the contract all mean.

1. And I think in a case like that, when there is no dispute as
2. to what the terms mean, then it's the province of the Court
3. to construe the contract and not the jury.

4. COURT: It's the view of the Court that transfer fees
5. and other benefits and same dues are ambiguous and for that
6. reason parole evidence is admissible.

7. MR. HATMAKER: Your Honor, even though they're ambig-
8. uous, if there's no dispute as to what they mean, it's still
9. in the province of the Court to decide.

10. COURT: Well, the jury could draw different inferences
11. from it. That's #5. Instruction #6.

12. MR. JULIAS: We'd like to note our objection to #6,
13. Your Honor. We'd like to note our objection to #6 on the
14. grounds that it again refers to an employment contract that
15. we take issue with. And that the matters for the jury's
16. consideration as set forth in that instruction are not in
17. accordance with the evidence and, again, have the tendency
18. to be confusing and further direct a verdict in favor of
19. the Plaintiff. All of this is contrary and to the prejudice
20. of the defendant.

21. COURT: Exception is noted.

22. Instruction #7 is a sympathy instruction offered by
23. both parties?

24. MR. HATMAKER: Yes sir.

1. COURT: Instruction #8, credibility of witnesses is
2. offered by both parties?

3. MR. HATMAKER: Yes sir. I didn't type it but I'll
4. go along with it.

5. COURT: The Court has marked instructions by the de-
6. fendant, marked A, B, C, D, E, F, and G refused. And counsel
7. have leave to enlarge the record when the jury retires.

8. Are you ready, gentlemen?

9. MR. BLATT: Your Honor, I would have a further motion,
10. I'll probably make it later, about withdrawing some exhibits
11. that we've filed with leave to make copies of the checks.

12. MR. JULIAS: We'd like to put those checks back in
13. their original files.

14. COURT: Only one has been marked.

15. MR. JULIAS: The whole stack is over there.

16. COURT: Well, the rest of them have not been received
17. in evidence.

18. MR. BLATT: We can take that up when the jury goes
19. out.

20. MR. HATMAKER: I have no objection to them copying
21. them.

22. MR. JULIAS: We want the originals back.

23. COURT: None of them have been offered in evidence
24. except the one, and just put in the final order the defendant

1. is given leave to withdraw exhibit number such and such and
2. substitute a copy.

3. (Objections to Instructions Dictated to Reporter)

4. MR. BLATT: We amplify our reasons for offering In-
5. structions A through G on the grounds that there were ques-
6. tions of fact purported to the jury as to whether or not there
7. was a contract entered into by the parties; that their in-
8. tention was the major thing that should be controlling since
9. there was ambiguity in the written document as prepared by
10. the Plaintiff which should have been in terms of construc-
11. tion construed most strongly against the Plaintiff.

12. Additionally, there was a question of fact as to
13. whether or not Strickler had the apparent authority or
14. actual authority to enter into any type of contract, much
15. less an employment contract, on behalf of the corporation.
16. To my recollection, Dellinger did not testify that he thought
17. Strickler specifically had this type of authority. But in
18. any event, the defendant did offer other witnesses who had
19. been with the company longer than Dellinger and in different
20. capacities than Dellinger who testified that it was common
21. knowledge and it was their impression that the only person
22. that had authority to enter into any type of contract, much
23. less an employment contract, would have been Bill Neff, the
24. President of the corporation. And that there was an individ-

1. ual named Ivan Messick who was in a higher supervisory posi-
2. tion than Strickler at that time. And, if anyone would have
3. had ostensible authority or apparent authority, then it would
4. follow that it would have been this man, the man, Ivan Mes-
5. sick, who signed payroll checks, et cetera.

6. The instructions as refused by the Court, A through
7. G, do cover these points of law which the Defendant contends
8. were proper questions of fact for the jury and not proper
9. questions of law, since fairminded men could have differed
10. on the net result of either of these propositions; and all
11. propositions contained under A through G, it is error not
12. to instruct the jury or to take away these disputed points
13. from the jury.

14. The only other thing the Defendant wishes to add as
15. far as the instructions is the Defendant feels that all in-
16. structions tendered by the Defendant are proper statements
17. of the law and amply supported by the evidence.

18. MR. HATMAKER: I've got two instructions that were
19. tendered that I want to object to. The first says, "The
20. Court instructs the jury that it is undisputed that the
21. duties of the service manager offered by Neff to Dellinger
22. as alternative employment were substantially different from
23. the duties Dellinger had previously performed as credit
24. manager; and that Dellinger was not bound to accept the job

1. as service manager in order to fulfill his obligations under
2. the original employment agreement, if any agreement there
3. was." The basis for the objection to that instruction is
4. that there's no dispute in the evidence, at least any differ-
5. ence that reasonable men could consider in dispute, as to the
6. fact that Dellinger was originally employed as a credit man-
7. ager, an employee, an office employee having to do with cred-
8. it work. And this work was much, much different, substan-
9. tially different from the job he was asked to perform by his
10. employer. That is, the supervision of the renovation of mo-
11. bile homes that had been brought in upon repossession. There
12. should be no serious disagreement that those jobs are sub-
13. stantially different.

14. The second instruction that was not given to which an
15. objection was lodged says, "The Court instructs the jury that
16. if you find that Dellinger and Neff entered into an employ-
17. ment agreement, as further described in another instruction,
18. and thereafter if you further find that Neff discharged
19. Dellinger because Dellinger would not accept a position of
20. employment requested by Neff which was substantially differ-
21. ent from the duties incident to Dellinger's position under
22. his employment contract, even though the salary for the two
23. positions was the same, then Neff was in breach of said con-
24. tract and you shall find your verdict for Dellinger and

1. affix damages accordingly." The basis for an objection was
2. that although the Court held as a matter of law that there
3. was an agreement and that the terms were set out in the writ-
4. ing of August 31, 1973, the Court should have held as a
5. matter of law that Neff did discharge Dellinger because Del-
6. linger would not accept a position of employment requested
7. by Neff substantially different from the duties incident to
8. his position as credit manager under his employment contract.
9. Further, that the construction of the terms of his same dut-
10. ies in the employment contract, the only reasonable construc-
11. tion on that term was the credit work that he had performed,
12. reasonable men could not disagree on that, and therefore the
13. Court should have ruled as a matter of law that that's what
14. those words meant. Since the duties were different in the
15. two jobs, as I've said in objecting to the prior instruction,
16. in this instruction, at least the language in it with refer-
17. ence to the idea that Neff had a duty as a matter of law not
18. to require Dellinger to accept a different position, that's
19. the position that should have been given in the instruction.

20. (Instructions Read to Jury)
21.
22.
23.
24.

1. COURT: Mr. Hatmaker, you may open for the plaintiff.

2. MR. HATMAKER: Thank you, Your Honor. If it please
3. the Court. Ladies and gentlemen of the jury, we've finally,
4. after a long hard struggle, we've gotten through the evidence
5. in this case and now it's time for closing arguments. You'll
6. be pleased to know that the Judge has set a time limit for
7. the lawyers arguments so we can't go on forever. And there's
8. still quite a bit to talk about.

9. From the instructions you have been told that the
10. issues that you all have to decide are basically three.
11. First of all, you have to decide the meaning of particular
12. words and phrases in the contract that the Judge has told
13. you formed the agreement between the parties. Whether or
14. not there was a contract is undisputed at this point. All
15. you have to do with respect to that contract is to decide
16. in your mind what these particular words meant.

17. The second thing you have to do is to determine
18. whether or not Carroll Dellinger's refusal to accept another
19. job that Bill Neff tendered him was justified, whether that
20. refusal was justified under the circumstances and, conse-
21. quently, that Neff breached the contract of employment.

22. Thirdly, you have to consider the damages that
23. Dellinger has suffered as a result of Neff's breach of con-
24. tract, which we contend took place.

1. All right, now, let's take them in order. The words
2. and phrases that you have to decide what means are the words
3. "all transfer fees" and "other benefits" and "same duties."

4. Now, let me read the contract. It says, "All trans-
5. fer fees and other benefits are to remain the same for this
6. period of time." Now, what does transfer fees mean? It's
7. undisputed in the testimony that the transfer fees referred
8. to in the contract mean transfer fees that Dellinger got when
9. title of a mobile home was transferred from one person to
10. another. There was some paper work involved in it and Neff's
11. charged a fee for making the transfer of title and preparing
12. all of those papers. And Dellinger was entitled to--I think
13. they charged \$100.00 and Dellinger was entitled to \$50.00 of
14. it as extra compensation. Now, that's from Dellinger's testi-
15. mony and it's also from everybody else's testimony. That's
16. not really in dispute, but it is a question of fact that you
17. all have to decide.

18. All right, other benefits. Other benefits, it's un-
19. disputed that other benefits have to do with the commissions
20. on the repossession and resale of mobile homes. In that kind
21. of business there were quite a few repossessions and there
22. was a lot of work, a lot of paper work involved in reposses-
23. sion and resale apart from any transfer fees. Those benefits
24. there were certain commissions in there that Dellinger was

1. entitled to that he had been getting before this written con-
2. tract was signed and that he continued to get. Now, the evi-
3. dence, it really is undisputed as to that too. But, again,
4. that's an issue of fact that you all have to decide.

5. Now, the third phrase that you all have to decide is
6. the meaning of the words "same duties." Well, now, that's
7. not really in controversy either. We really haven't argued
8. about what those words mean. Dellinger went to work doing
9. credit work in the office. His duties were as of the time
10. that this contract was signed, his duties were to investi-
11. gate people for their credit status and also to handle notes
12. that people signed for the purchase of mobile homes, process
13. these notes with the banks and that involved discounting them
14. to the banks. And, when people defaulted on these notes as
15. they sometimes did, it was his duty to try to collect these
16. notes from the people who were in default. This was office
17. work and it was work of a specialized nature. It was work
18. that he'd been trained to do because he had formerly been
19. an American Finance Company manager, and he knew the credit
20. business. It's a very highly technical business, it involves
21. working with banks and that kind of situation. As I say, it's
22. special. Now, those were the duties that he had done before
23. this contract was signed, those were the duties that he con-
24. tinued to do. And, there really isn't any controversy as to

1. what those words mean either. Except in the context of this
2. alternative employment that Neff said he'd offer Dellinger.

3. Now, I want you all to look at this very carefully
4. because you have to decide whether that refusal of Dellinger
5. to accept this alternative employment was reasonable. I want
6. to read an instruction to you which I think is very material
7. here, and this is an instruction that the Court has already
8. instructed you on. "The Court instructs the jury that if an
9. employee is engaged to fill a particular position, any mater-
10. ial change in his duties made by the employer without the
11. consent of the employee constitutes a breach of his employment
12. agreement by the employer." Now, this tells you that if
13. Neff--first of all, if Dellinger was engaged to fulfill a
14. particular position, and I think it's really undisputed that
15. he was. He was engaged under this contract to do the same
16. duties that he had been doing, and the same duties that he
17. had been doing were those of a credit manager. Then any
18. material change in those duties made by Neff without the
19. consent of Dellinger constituted a breach of the contract
20. by Neff.

21. Now, what was the alternative employment that Dellinger-
22. er was asked to take? It was a supervisory position in the
23. renovation of mobile homes. Mobile Homes would be brought in
24. in a state of some disrepair; mobile homes that were repos-

1. sessed, were beat up, electrical and plumbing systems wouldn't
2. be working on them, that sort of thing. And somebody had to
3. repair them and repaint them occasionally and all that sort
4. of thing, do a lot of carpentry work, electrical and plumbing
5. work to get them refurbished and ready for resale. Now, the
6. work that Dellinger was asked to do was to supervise all of
7. this. Well, now, this is an entirely different kind of work
8. than he had contracted to do. He had an agreement that said
9. he would perform his same duties and those duties were credit
10. duties. And now, Neff was turning around and asking him to
11. go in the shop and manage the shop people, mechanics and car-
12. penters. There's nothing wrong with it, it's a good job, but
13. Dellinger wasn't qualified for it and he knew it. He had no
14. previous training for this job at all. And, Neff told him
15. that he wanted the job done properly, and he expected him to
16. have the job done properly. Now, this required an amount of
17. expertise that Dellinger realized that he simply wasn't qual-
18. ified for. So, he refused it and he was justified in refus-
19. ing it for that particular reason. He had been engaged to
20. fill a particular job and this was an entirely different job,
21. entirely different. It involved knowledge of things that he
22. didn't know anything about. And so, when he told Neff that
23. he wouldn't take that job Mr. Neff fired him. That's all
24. there was to it.

1. Now, we've got to talk about damages here a little
2. bit. Now, the damages basically consist of three different
3. kinds of items: One is the base salary, two are the commis-
4. sions and transfer fees and all that sort of thing, and
5. three was that ten percent pay cut that Dellinger testified
6. that he expected to have reinstated to him. Not only to bring
7. him back up to where he was, bring him up from \$207.00 a week
8. up to \$230.00, but he expected to get back the ten percent
9. that they had taken out of his pay. Those are the three
10. items of damages. Now, we're going to subtract from these
11. three items of damages certain money that Dellinger has re-
12. ceived since he was fired, because we have to, first of all,
13. and it's the honest thing to do. (Mr. Hatmaker standing in
14. front of board writing.) For example, with regard to the
15. salary, fifty-eight weeks from July the 20th, 1977 until the
16. end of August, 1978 when the contract expired times \$230.00
17. yields \$13,340.00. Now, he earned these amounts per week at
18. Wetsel's Seed Company where he went to work afterwards.
19. \$201.90 for thirty-three weeks, and that's that amount, and
20. \$212.00 a week times twenty-one and a fraction weeks is that
21. amount, and we add those up and we get \$11,199.50. And so,
22. how much was Dellinger really damaged by the fact that he
23. got fired? He was damaged the difference between what he
24. made from Wetsel's and what he would have made with Neff's,

1. and that's all we're asking for in that area and that is
2. \$2,140.50. Now, that takes care of the first item that we
3. talked about.

4. Now, with respect to the second item of damages,
5. we're going to get into making some projections here. The
6. projections that I'm going to make are my idea of what the
7. damages are to be. I frankly think they're conservative,
8. I'm not trying to put anything over on you all, but you can
9. follow this for yourselves and see what they would have come
10. out to. Now, Dellinger was deprived of commissions he other-
11. wise would have received. He had received these amounts
12. actually for these years. And you'll notice that this amount
13. is relatively small. Of course, this amount accounts for the
14. depression or the recession, the amount represents only part
15. of the year. Now, if we add up--excuse me. If we take the
16. amount that he earned for 1977, for the period January 1
17. through July 20, if we take that amount and we extend that
18. throughout the rest of 1977 by a mathematical calculation--
19. that's two hundred and one days to July 20th, divide \$824.38
20. by two hundred and one days, multiply it by three hundred
21. sixty-five days for the entire year, we get the figure of
22. \$1,497.01. So, that is a projection of the entire year from
23. what he actually made for the part of the year that he actu-
24. ally worked there. Now, let's take an average of these four

1. years as we have extended this year out through the entire
2. year. So, instead of this figure we'll use this figure which
3. represents the entire year 1977, and we'll add these up and
4. we get \$4,823.80, and if we divide by four we get \$1,205.95.
5. Now, that is an average year's commissions. That's not any
6. particular year's commissions, that's an average. Now, we're
7. going to do one more operation with that figure. Remember
8. that Dellinger should have worked for Neff through August of
9. 1978. He was discharged on July 20th, 1977, so that's a
10. little bit more than a year. If you work it out on a calcu-
11. lator it's 1.11538 years if you make a decimal out of it.
12. So, what I do now is take this \$1,205.95 and multiply that
13. by 1.11538 years I get \$1,345.12. And that is the amount
14. that we're claiming is due to him for lost commissions. Com-
15. missions that he should have gotten that he actually did not
16. get because Neff fired him.

17. Now, the third item of damages is the ten percent pay
18. cut. Dellinger testified that he agreed to a ten percent pay
19. cut, which he didn't have to do under this contract. He had
20. a contract of \$230.00 a week and he agreed to take a ten per-
21. cent pay cut during the recession to help out the company
22. because the company was in trouble. He didn't have to do it
23. but he did. He expected it back, he expected that to be
24. restored to him, that money to be paid back, not just to be

1. raised back up to his prior level of \$230.00 a week but he
2. expected Neff to give him, eventually pay him the money that
3. he should have been paid. And this is the difference. I've
4. already gone through those calculations. I won't bore you
5. with that again, but that comes out to \$1,104.00, that's the
6. difference. And that's what we're asking for in that item of
7. damages.

8. Now, if you take the three items of damages that we've
9. talked about, the base salary of \$2,350.58, and the commis-
10. sions of \$1,345.12, and the pay cut of \$1,104.00--I apolo-
11. gize, I've been doing this all day. I know I should not
12. apologize as a lawyer, but I do apologize for my handwriting
13. because I just can't write very well on this kind of board
14. and I don't have a very good handwriting anyway actually.
15. But, anyway, a total of \$4,799.70. Now, from that we're go-
16. ing to subtract--excuse me, I've got the wrong piece of paper.
17. I think I put a total down wrong. This should not be \$2,350.58,
18. but it should be \$2,140.50 which is the total that we had over
19. here. I was using a piece of paper that I had had before
20. accounting for a raise he got with Wetsel's Seed which start-
21. ed this month. I apologize to you all for confusing you on
22. that. But, he did get a raise and so that reduces his dam-
23. ages actually. So, a base salary difference of \$2,140.50,
24. commissions of \$1,345.00, pay cut of \$1,104.00, total of--

1. and I'll change that--\$4,589.62 less what he had previously
2. been paid, \$423.38, by Neff for severance pay. And he's
3. been paid \$330.00 from the unemployment. So, we've got to
4. subtract that, \$753.38, and the difference is \$3,836.24, and
5. that's what we're claiming as his damages.

6. Now you can see that we tried to be fair about it,
7. we're not trying to claim anymore than we're entitled to.
8. We've taken into consideration the pay cut he's getting from
9. Wetsel's and the pay raise and everything else. All we're
10. interested in is what's coming to us. So, you'll be asked
11. to decide these issues.

12. And on behalf of Mr. Dellinger, I think it's clear
13. that he was justified in refusing that employment for which
14. he was not qualified. He would have taken a lot of grief
15. and a lot of pain if he had messed up on that job knowing
16. he wasn't qualified, and he probably would have gotten fired
17. anyway. He certainly felt that he should not take the job
18. if he wasn't qualified for it. And since Neff breached the
19. contract, then Neff ought to have to pay it. And that's all
20. we're asking. Thank you.

21. MR. JULIAS: May I approach the bench for a moment,
22. Your Honor?

23. (At the Bench)

24. MR. JULIAS: According to my calculations counsel

1. took all of his time. Does that eliminate his opportunity
2. for rebuttal?

3. COURT: Apparently he did.

4. MR. HATMAKER: Is this about the time?

5. COURT: He pointed out that you used all your time.

6. MR. HATMAKER: I'm sorry, Your Honor, a whole lot
7. of it was involved in setting this thing up again.

8. MR. JULIAS: No, it began at the time after you
9. started.

10. COURT: I'll extend the time three minutes to a side.
11. That will give Mr. Hatmaker three minutes.

12. MR. JULIAS: I was hoping that I wouldn't take all
13. my time, that we would not need any rebuttal.

14. COURT: Well, I think that would be fair. I'll ex-
15. tend the time to both sides for three minutes.

16. (Closing Argument by Mr. Julias)

17.

18.

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1. COURT: I'll extend you three minutes, Mr. Hatmaker.

2. MR. HATMAKER: Thank you, Your Honor. Ladies and
3. gentlemen of the jury, in three minutes I'm going to have to
4. summarize this, and I think I can do it. I don't think you
5. want this to last much longer than that. Also, I'm going to
6. have to clarify some things Mr. Julias said.

7. First of all, he brought up the fact that Dellinger
8. did not raise any question about the contract when the ten
9. percent pay reduction went into effect. There were two
10. reasons for that. The first one was that the company was
11. in trouble, and that a faithful employee was at least moral-
12. ly bound, I think, to help out during that recession. You
13. all remember how that recession was, it was a tough one.
14. And, secondly and most compelling, he expected to be repaid.
15. So, why should he object to it.

16. Now, Mr. Julias has talked to you at some length
17. about certain alleged ambiguities and all this, and frankly,
18. there aren't any and I don't know why all that was mentioned.

19. But, in case you've become confused, you're only
20. asked to interpret the meaning of a couple of different
21. phrases in this contract and we've told you what the evidence
22. is that they are. The principal among them is the job that
23. Dellinger was hired to do. He was hired for credit work. He
24. was hired in the office, it was an office job. And we have

1. to compare that with the kind of job he was offered, which
2. was an entirely different job. It was a job to supervise
3. fellows in the shop. Now, there's nothing the matter with
4. that kind of job, and I don't want you to think that Carroll
5. Dellinger believes that there is. There's nothing the matter
6. with that kind of work at all if you're qualified for it.
7. But for the same reason I wouldn't attempt to do my own elec-
8. trical work around the house, or my own plumbing or my own
9. carpentry--well, I've tried that and it didn't work--Carroll
10. Dellinger refused to do that job because he didn't know how
11. to do it and he was afraid he might do it wrong. And he
12. cannot be blamed for that. Because if he had taken that job,
13. you can imagine out there in that setting with Bill Neff
14. hovering over him, you can imagine that the first time there
15. was any kind of mistake made among any of the men that he was
16. supposed to be supervising, Carroll Dellinger would have
17. gotten the ax for it because he was in disfavor with Neff's
18. principal man, Strickler, anyway. Dellinger would have got-
19. ten the ax and he wouldn't have been able to defend himself
20. at that point because he would have accepted that employment,
21. you see, and all the grief that went with it. So, he was
22. between a rock and a hard place.

23. And so, he elected to stand on the contract that he
24. knew he had executed and that said that he was hired to do

1. specific work. And he had a right to stand on that. And why
2. did he have a right to stand on it? Because the Court has
3. told you so. In Instruction #3--and this is where this whole
4. thing is going to turn--it says that "if an employee is en-
5. gaged to fill a particular position"--Carroll Dellinger was--
6. "any material change in his duties made by the employer"--
7. like that other job he was offered--"without the consent of
8. the employee"--and Dellinger did not consent--"constitutes
9. a breach of his employment contract by the employer."--Neff.
10. That means that Neff is guilty of a breach of contract. Now,
11. that's what the law of this case is and it comes down to
12. that.

13. Now, the sum of \$3,836.24 is not a lot of money by
14. Bill Neff's standards.

15. MR. JULIAS: I object to that, Your Honor, that's
16. uncalled for.

17. COURT: The objection is sustained. The jury will
18. disregard the last statement of counsel.

19. MR. JULIAS: In fact, counsel has exceeded his time
20. already.

21. COURT: Your time has expired, Mr. Hatmaker.

22. MR. HATMAKER: Thank you, Your Honor. I submit to
23. you that this is a significant sum of money to Carroll
24. Dellinger. We ask you to give us a verdict for that amount.

1. Thank you.

2. (Jury Retires to Consider Verdict at 4:20 P.M.)

3. (In Chambers)

4. COURT: All right, gentlemen, it's ten minutes to five,
5. and about five or ten minutes ago the bailiff told me that a
6. member of the jury had a question, and I suggested to him
7. that the member of the jury reduce the question to writing
8. and here is the question. "What was the total amount of
9. damages the Plaintiff requested from the defendant? \$_____.

10. Question: What was the exact figures of the difference in
11. base salary, 'transfer of fees and other benefits' (i.e.,
12. commissions), and the difference of the 10% salary reduction
13. during the recession? Difference in base salary, \$_____;
14. Commissions, \$_____; 10% salary reduction due to recession,
15. \$_____. Question: Is the jury allowed to vary the amount
16. of damages claimed by the Plaintiff or are we instructed by
17. Instruction #6 to accept the total amount with no change?"

18. MR. BLATT: I think it's up to the jury to assess
19. the damages.

20. MR. JULIAS: It's up to them to assess the damages.
21. I don't think we can spell it out for them.

22. MR. HATMAKER: Well, I think they're supposed to give
23. me everything I asked for.

24. MR. JULIAS: Yeah, wonderful.

1. MR. HATMAKER: First of all, Your Honor, I think
2. that it's quite proper to tell the jury--to give the jury
3. the numbers that I've put up there cautioning them that
4. some of the numbers are based on my projections. I think
5. it's basically a question of their not being able to remember
6. what all the figures were. And I don't think that justice
7. is advanced by their having to rely on their memories.

8. MR. BLATT: I think to tell them specific figures
9. overemphasizes it to the jury. It's what their recollection
10. of the evidence is, not what we tell them we think the evi-
11. dence is.

12. MR. HATMAKER: Well, if they had any other reserva-
13. tions they probably would have written them down.

14. MR. JULIAS: But, Judge, here's the problem that we
15. have. To answer those questions you're accepting Mr. Hat-
16. maker's testimony. Dellinger never testified to all those
17. things. He got up there and those were his calculations
18. and projections which were nothing more than argumentative.
19. We can't use that, accept that as evidence. That's what
20. they're asking.

21. MR. BLATT: The Court said, when we objected to that,
22. that they weren't evidence, but they were a proffer and we
23. could argue them to the jury.

24. MR. HATMAKER: I'm entitled to draw reasonable infer-

1. ences and so are they, from the figures that were actually
2. entered into evidence and that's all I've done.

3. MR. JULIAS: I don't care if the jury draws them, I
4. just don't want you drawing them for them.

5. MR. BLATT: Some of those things then were not enter-
6. ed into evidence but were your figures that you drew on your
7. assumptions.

8. MR. JULIAS: That's right.

9. MR. HATMAKER: Well, I think what the projection--I
10. entered at least everything else into evidence, number of
11. weeks and all that sort of thing.

12. COURT: Didn't you file an amended motion for judg-
13. ment, Mr. Hatmaker?

14. MR. HATMAKER: Your Honor, the latest thing I have
15. with respect to a statement of damages . . .

16. MR. JULIAS: I've never heard of a jury coming back
17. and asking questions. That's, in effect, asking the Court
18. to assess the damages. And, again, this goes to the area of
19. speculation and conjecture which the Court has told them
20. that they cannot go to.

21. MR. HATMAKER: Your Honor, this is exactly what I
22. showed to the jury.

23. MR. JULIAS: I hope you didn't show that to the jury.

24. MR. HATMAKER: Now, I mean, that I . . .

1. COURT: That's your own figures. I want the amended
2. motion for judgment.

3. MR. HATMAKER: All right.

4. MR. JULIAS: I don't think he ever filed an amended
5. motion for judgment. I don't have a copy if he did.

6. COURT: Well, Bill of Particulars then.

7. MR. JULIAS: I don't know that he ever filed a Bill
8. of Particulars on it.

9. MR. HATMAKER: All right . . .

10. COURT: Here we are.

11. MR. BLATT: Well, now, that's incorrect.

12. MR. JULIAS: But that's totally incorrect, you see.
13. That was from back in the District Court.

14. COURT: Well, this is the amended Motion for Judg-
15. ment.

16. MR. JULIAS: No, it's not, Judge.

17. MR. BLATT: That's in the District Court.

18. MR. JULIAS: That was nothing but a motion to set
19. forth damages in the District Court.

20. MR. BLATT: And those figures, Mr. Hatmaker's conceded
21. today, some of them are incorrect.

22. MR. JULIAS: As a matter of fact, there's six hun-
23. dred dollars difference on that.

24. COURT: Well, gentlemen, this motion for leave to

1. amend the Motion for Judgment has been considered to be an
2. amended Motion for Judgment. The jury is entitled to be told
3. the amount the Plaintiff has claimed in his pleadings.

4. MR. JULIAS: But we cannot exceed his testimony, that
5. was the amount of his testimony.

6. MR. HATMAKER: I frankly would rather have them to
7. have these, the figures they asked for, than to give them
8. that.

9. COURT: I know you would.

10. MR. JULIAS: Yeah, who wouldn't.

11. COURT: But the only thing I can tell them is what's
12. in the pleadings. We can't tell them what was in the argu-
13. ment of counsel.

14. MR. BLATT: The pleadings are now at variance with
15. the proof.

16. MR. JULIAS: Which, again, goes to the case can't
17. rise any higher than its own evidence.

18. MR. HATMAKER: I'm not trying to make it rise any
19. higher, I'm trying to make it rise lower.

20. MR. JULIAS: Mr. Hatmaker, what you want you can't
21. do as a matter of law. Now, you know you can't do it.

22. MR. HATMAKER: I'm going to let them give me \$4,376.00.

23. MR. JULIAS: Yeah, let them make you a millionaire if
24. they want.

1. COURT: All right, I think we can do this. I could
2. tell them that the most damages that the Plaintiff--in the
3. light most favorable to the Plaintiff, and the amount the
4. Plaintiff claimed is \$3,836.24.

5. MR. JULIAS: That's assuming that they're satisfied
6. by a preponderance of the evidence to each and every one of
7. the areas of consideration that Mr. Hatmaker argued to.

8. COURT: They only asked for the amount that the
9. Plaintiff requested.

10. MR. JULIAS: But that comprises three different com-
11. pilations and one of which was nothing more than pure specu-
12. lation.

13. COURT: The next question is, they ask for the com-
14. putations.

15. MR. JULIAS: They're not entitled to that.

16. COURT: The simplest way to handle it--and the whole
17. problem arose because the jury was not taking notes, and I
18. never suggest to the jury that they take notes. The easiest
19. way to handle it would be to allot five minutes to counsel
20. for further argument. Would you object to that?

21. MR. JULIAS: Yes sir, we do object to it, yes sir.

22. MR. BLATT: It's my understanding that it's not pro-
23. per for the jury to take notes in any event.

24. COURT: Well, there's a difference of opinion on that.

1. MR. JULIAS: Those are areas that we've argued. It's
2. now for their consideration. And if they can't remember the
3. way he tried to convince them, then he's fallen down on his
4. necessary burden of proof, Judge.

5. COURT: Well, I'll tell them that in answering their
6. third question. I'll simply tell them I can't answer their
7. first question, they'll just have to depend on their recol-
8. lection of the evidence.

9. MR. JULIAS: And be satisfied by a preponderance of
10. the evidence as to the verdict that they return in support of
11. it.

12. MR. HATMAKER: Your Honor, I would move that the
13. motion for judgment be amended to reflect damages of \$3,836.24.

14. MR. JULIAS: Your Honor, we object to that because
15. that testimony has never been introduced to this Court. That
16. computation was nothing more than a matter of argument and
17. suggestion by counsel for Mr. Dellinger, and there's no tes-
18. timony to support the figure on the computations down here
19. on the commissions of \$1,345.12. And to give the jury that
20. figure, we feel, would be invading the province of the jury
21. for their consideration as to whether it's proper.

22. MR. BLATT: I want to make another motion. While
23. it's proper at courses of a trial to move to amend pleadings,
24. et cetera, to conform to the proof, Mr. Hatmaker's computa-

1. tions were not proof but were only ruled as argument of coun-
2. sel. The matter has been joined and set for the jury's con-
3. sideration. It's not proper to amend anything now to relate
4. back.

5. MR. JULIAS: Moreover, counsel had opportunity to ask
6. the Plaintiff on the witness stand how he would compute his
7. losses and never undertook to ask the question.

8. COURT: The Plaintiff's original Motion for Judgment
9. was for a greater amount, and he concedes that he has not
10. proved the greater amount and he is now asking to amend the
11. Motion for Judgment. The motion to amend is sustained, ob-
12. jection is noted.

13. (In Open Court - Jury Present)

14. COURT: I think I understand your questions. To this
15. extent I sympathize with you, you did not take notes, you
16. were not encouraged to take notes. Taking notes is something
17. that the Court neither encourages nor discourages. But I
18. can understand your difficulty when you did not take notes
19. in this case.

20. For your simplicity I have numbered these questions
21. one, two and three. The first question is that I can tell
22. you this, that the amount that the Plaintiff claims is
23. \$3,836.24. Now, that is what the Plaintiff claims. Whether
24. the Plaintiff has proved recovery of that amount, or any part

1. of that amount, if you find for the Plaintiff is a matter for
2. you to determine.

3. Your second question requesting exact figures is some-
4. thing that I regret I cannot give you any further information
5. on. You will have to depend upon your recollection of the
6. evidence and the argument of counsel.

7. The third question: "Is the jury allowed to vary the
8. amount of damages claimed by the Plaintiff or are we instruct-
9. ed by Instruction #6 to accept the total amount with no
10. change?" Well, you asked two questions there and I was about
11. to say no. The answer to the last part of it is no. You
12. are allowed to vary the amount claimed and if you find in
13. favor of the Plaintiff to award such damages as you think the
14. Plaintiff has proved by a preponderance of the evidence. Does
15. that answer your questions?

16. JURORS: (Affirmative reply)

17. COURT: All right, the jury may again retire to con-
18. sider its verdict.

19. (Jury Retires for Further Deliberation)

20. COURT: Have you reached a verdict?

21. FOREMAN: We have.

22. COURT: The Clerk will read the verdict.

23. CLERK: "We the jury, on the issue joined, find in
24. favor of the Plaintiff, Carroll W. Dellinger, and assess his

1. damages at \$3,836.24. Signed: James Edward Morris, Foreman.
2. April 25, 1978."

3. COURT: So say you all, ladies and gentlemen?

4. JURORS: (Affirmative reply)

5. COURT: The verdict appears to be in proper form.

6. Would counsel care to examine the verdict before the jury is
7. discharged?

8. MR. JULIAS: No.

9. MR. HATMAKER: No.

10. COURT: Ladies and gentlemen, on behalf of the Common-
11. wealth I thank you for your valuable public service. I can
12. now excuse you, discharge you from this case, and I'll excuse
13. you at this time and ask you to return for further service
14. tomorrow morning at 9:30. Thank you very much.

15. (Jury Excused from Further Attendance)

16. MR. HATMAKER: Your Honor, we move that judgment be
17. entered on the amount of the verdict and execution be given
18. on the judgment.

19. COURT: Mr. Julias.

20. MR. JULIAS: If it please the Court. We move to set
21. the verdict aside as being contrary to the law and the evi-
22. dence and for all the arguments that heretofore have been
23. advanced. And principally, because we felt that the case was
24. not properly submitted to the jury, that there were many

1. areas of fact for the jury's consideration that the Court
2. improperly took from the jury's consideration in telling them
3. as a matter of law they could construe the agreement as
4. a contract and only to consider whether or not the method of
5. employment offered by Neff Trailer Sales was materially dif-
6. ferent from that which Dellinger had heretofore been employed.
7. Then to further support the setting aside of the damages, it's
8. rather obvious, and the Court virtually can take judicial
9. notice of the fact, that the verdict was speculative in that
10. they accepted Mr. Hatmaker's computation on commissions of
11. \$1,345.12 when, in fact, there is no evidence before this
12. Court that that, in fact, is a correct figure. There's no
13. evidence that's been proffered by the Plaintiff, or any wit-
14. ness on his behalf or any representative on behalf of the
15. Plaintiff, showing intelligent computation or as to how these
16. figures were reached. The only computations that we have are
17. those that Mr. Hatmaker suggested in argument to the jury and
18. submitted in the figures that the Court indicated that were
19. in the pleadings. And there is no evidence whatsoever to
20. support it. As a matter of fact, to do so would be specula-
21. tion, and I just don't feel the Court would tell the jury
22. that they may go back and speculate on commissions when there
23. is no evidence to support it. We feel that to do so would
24. be error.

1. And, in addition, with respect to the \$1,104.00, we
2. feel that that matter was not properly instructed to the jury,
3. that that was a voluntary pay cut that Dellinger voluntarily
4. accepted. He never made issue of the alleged employment
5. agreement at that time and that he was, as a matter of law,
6. estopped from asserting that as an element of damages in this
7. proceeding. And that, again, is \$1,104.00. Those two items
8. alone total \$2,449.12, which is virtually two-thirds of the
9. amount of the award that was returned. And we respectfully
10. ask the Court to set aside the verdict.

11. COURT: First, the record may show that the jury re-
12. turned with its verdict within five or ten minutes of the
13. time they retired after the Court undertook to answer two of
14. its inquiries and advised them that the Court could not ans-
15. wer the second inquiry. The verdict will be recorded. The
16. Defendant is given leave to file grounds in support of its
17. motion within five days.

18. MR. JULIAS: Your Honor, could we have longer than
19. that? I have a trip planned. I'm going out of town on
20. Thursday morning and I'll be gone until Monday.

21. MR. BLATT: Your Honor, I'm going to have to pre-
22. pare for a case . . .

23. MR. JULIAS: I've been out of town on a business mat-
24. ter. I just got home last night and I won't be back in my

1. office until next week.

2. COURT: Well, I think that the Court has given mature
3. consideration to all of the matters that you've raised today,
4. both during the trial and at pre-trial conference, and I cer-
5. tainly don't want to cut you gentlemen off. Let the Defen-
6. dant file grounds of its motion within five days and a memo-
7. randum in support of the motion by the 10th of May, and put
8. the case on the motions docket for argument on the motion to
9. set aside the verdict on the 15th of May. Mr. Hatmaker, if
10. you wish leave to file a reply memorandum, then take the case
11. off the motions docket on the 15th of May and we'll put it on
12. the motions docket for the 5th of June. If you won't ask
13. leave to file a reply memorandum, we'll hear argument on the
14. motion on the 15th of May.

15. MR. HATMAKER: Your Honor, I may be able to write a
16. reply memorandum so that that can be heard on the 15th of
17. May if that's all right.

18. COURT: That's up to you.

19. MR. HATMAKER: Okay, just as long as I have that
20. option. I'd like to preserve it.

21. COURT: If you want leave to file a reply memorandum,
22. we'll simply extend the argument to a subsequent motions
23. day. The verdict will be recorded. Thank you, gentlemen.

24. (End of Trial)

1. VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY.

2. CARROLL W. DELLINGER,

3.)
4.)
5. Plaintiff)

6. V.)

At Law No. 5922

7. NEFF TRAILER SALES, INCORPORATED)

8. d/b/a NEFF MOBILE HOMES, and)

9. NEFF MOBILE HOMES, INC.,)

10.)
11. Defendant)

12. I, Debra S. Ours, a Court Reporter, do hereby certify
13. that the following is a true and accurate transcript of the
14. hearing on the motion to set aside the verdict in the above-
15. styled case which took place on the 15th day of May, 1978,
16. in the Chambers of the Circuit Court of Rockingham County,
17. at Harrisonburg, Virginia, before The Honorable Joshua L.
18. Robinson.

19. Given under my hand this 30th day of May, 1978.

20. Debra S. Ours
21. Debra S. Ours

22. APPEARANCES:

23. FOR THE PLAINTIFF: DAVID J. HATMAKER, ESQUIRE

24. FOR THE DEFENDANT: FRANKLIN R. BLATT, ESQUIRE

1. (May 15, 1978)

2. (In Chambers)

3. COURT: In the case of Dellinger v. Neff, this is on
4. a motion to set aside the verdict. I have not seen the motion.
5. I see the defendant has filed a memorandum, and I was not sent
6. a copy of it so I have not seen that. Let me take a few min-
7. utes to look at it. (Court examines defendant's memorandum).
8. The first grounds of the motion is that the jury was not pro-
9. perly instructed. Do you contend that any of the instruc-
10. tions, Mr. Blatt, were not correct statements of the law?

11. MR. BLATT: We had stated our grounds to the objec-
12. tions to the instructions as given at the time of the trial.
13. Now, these instructions were given based on the issues that
14. the Court had limited us to.

15. COURT: Do you contend that any of the instructions
16. were incorrect statements of the law?

17. MR. BLATT: I believe that Instruction #5, where the
18. Court struck out "most strongly," that should have been in
19. there. That language, "most strongly construed against the
20. Plaintiff," that was a proper statement of the law.

21. COURT: Okay. Now, you allege that there was an
22. issue of fact as to whether the memorandum of agreement was
23. a contract.

24. MR. BLATT: A contract for--an employment contract.

1. We allege it was an issue of fact as to that.

2. COURT: Let me find it. Gentlemen, this was received
3. in evidence, I don't see that it's marked.

4. MR. HATMAKER: It was filed as part of the Court
5. papers.

6. COURT: It was filed in evidence and it probably
7. should be marked. Wasn't it marked as an exhibit?

8. MR. HATMAKER: Was it not marked as an exhibit of
9. the . . .

10. MR. BLATT: I don't know whether that copy was mark-
11. ed or not. There may be another copy in the Court's file.
12. It was my impression that there was a photocopy that was
13. filed in evidence, but that's the original there.

14. COURT: Well, I was sure this was received in evi-
15. dence.

16. MR. HATMAKER: The jury had a copy of it, didn't
17. they?

18. MR. BLATT: Yes. I didn't think they had the orig-
19. inal. I know that it was before the jury, that that docu-
20. ment was before the jury, in either the form of a photocopy
21. or in its original form.

22. MR. HATMAKER: I think we took that out of the Court
23. papers and entered it as an exhibit, as I recall.

24. MR. BLATT: This may suffice. Is that one marked,

1. Your Honor?

2. COURT: Yes.

3. MR. BLATT: Okay. That's a photocopy. I thought
4. that was marked.

5. COURT: This photocopy is marked Exhibit A with the
6. pleadings and it was received in evidence.

7. MR. HATMAKER: Yes, it was.

8. COURT: I'll just initial it and put it with the
9. Court papers.

10. MR. BLATT: That's fine.

11. COURT: And you say this was not a contract of employ-
12. ment?

13. MR. BLATT: That's our contention.

14. COURT: Next, the jury was allowed to speculate.

15. MR. BLATT: Well, also, there's a subsection B under
16. the instructions that there was an issue as to the apparent
17. or ostensible authority that should have been submitted to the
18. jury.

19. COURT: Okay. Then speculation as to damages?

20. MR. BLATT: Yes.

21. COURT: Then testified from hearsay materials and
22. notes. Do you have a transcript of that?

23. MR. BLATT: No, I don't. The transcript is in the
24. process of being printed.

1. COURT: I don't remember any objection on the ground
2. of . . .

3. MR. BLATT: I made the objection myself, and His
4. Honor then asked the Plaintiff whether or not the information
5. he was using was his information given his attorney. It's
6. my best recollection of the testimony that the Plaintiff said
7. in fact, yes, he thought they were but he did not prepare the
8. figures and the computations that his counsel was using. And
9. I made the objection on the ground that there was no founda-
10. tion laid and it was overruled.

11. MR. HATMAKER: Well, let me clarify this.

12. COURT: We'd have to have the transcript to . . .

13. MR. HATMAKER: The material that he testified to, the
14. ultimate facts on the issue of damages that he testified to,
15. he testified to from his own recollection. That is, the
16. amount of money that he had made both at Neff's and at Wet-
17. sel's, the number of weeks that he--well, the date of his dis-
18. charge from Neff's and when he began his employment at Wet-
19. sel's. And there was some other testimony about the amount
20. of money that he had--his salary being reduced and the length
21. of time it had been reduced.

22. COURT: Well, I'll be glad to consider that when I
23. see the transcript. But, as I recall, when he was testifying
24. he had some notes in his hand. I believe, Mr. Blatt, you

1. objected to his reading from his notes. I think there was
2. then inquiry with respect to when he prepared the notes and
3. whether the notes would help him in refreshing his recollec-
4. tion. And he was not permitted to testify as to conclusions
5. in the notes and hearsay in the notes. I have some recollec-
6. tion of some computations. And if I remember correctly, he
7. was not permitted to testify with respect to the computa-
8. tions.

9. MR. BLATT: My recollection is somewhat different
10. in that the Plaintiff did not prepare those notes. He testi-
11. fied his counsel had prepared them for him.

12. COURT: And he was not permitted to testify with
13. respect to what his counsel had prepared.

14. MR. BLATT: But his counsel had prepared the whole
15. thing. Nothing was in the Plaintiff's handwriting and noth-
16. ing was prepared so closely in time that would have allowed
17. this to come under the exception of past recollection record-
18. ed. Now, there was no proper foundation laid as to whether
19. or not he could remember these items. And, in fact, for
20. that reason it could not come under the exception of pres-
21. ent recollection refreshed. I think it might be more proper
22. for the Court to consider this maybe when the transcript of
23. that portion is prepared.

24. COURT: Well, that couldn't be more than a couple of

1. pages of the transcript.

2. MR. BLATT: No.

3. MR. HATMAKER: Let me make a point here, Your Honor.

4. First of all, when a witness fails to be able to recollect,

5. first of all there has to be some indication that he fails

6. to recollect from his own power of recollection. Then the

7. Court makes the determination as to whether or not any foun-

8. dation ought to be laid for refreshment of recollection which

9. can be done through memoranda which do not have to be made

10. contemporaneously with the transaction and which do not have

11. to be prepared by anybody in particular, if he can then tes-

12. tify as to his own recollection. If he cannot then you get

13. into past recollection recalled. If he has a memoranda which

14. was made contemporaneously he can use that. But I don't think

15. we ever got to the point where it was established that he

16. failed to be able to recollect of his own independent recol-

17. lection.

18. COURT: If I remember correctly, the rulings were

19. that if he prepared the notes and they assisted him in re-

20. freshing his recollection he could refer to them and cross

21. examining counsel had the right to examine them.

22. MR. BLATT: I think a transcript will be most help-

23. ful because he testified contrary to that, or it's my recol-

24. lection he testified contrary to that, and did, in fact,

1. testify--or he was never asked the question whether he could
2. or could not remember.

3. MR. HATMAKER: I might say that I read a little bit
4. of Professor McCormick on this this morning in preparing for
5. this thing. He says there are basically two ways to take
6. care of this problem. One, obviously in the Court's discre-
7. tion, as to whether or not the witness is able to recall and
8. what aids can be used and, two, cross examination. And it
9. seems to me that cross examination was proper to determine
10. whether or not he had any independent recollection. And I
11. think you did cross examine him on that point.

12. COURT: Do you have anything further, Mr. Blatt?

13. MR. BLATT: On the hearsay?

14. COURT: No, on that issue.

15. MR. BLATT: That's the hearsay issue.

16. COURT: Now, the last issue is . . .

17. MR. BLATT: The last issue had to do with the stipu-
18. lation. It's the contention that's in the motion, that the
19. only purpose that it was entered into--it was not a part of
20. the trial in the lower court, but it was a stipulation at
21. the lower court and not for the purposes of trial, the
22. trial would be de novo. And I think that it was indicated
23. on the record at the argument at that time that, in fact,
24. the lower Court had not even addressed that issue itself;

1. and that, in fact, it was our contention that that memorandum
2. had not been filed, or that stipulation had not been filed
3. in the lower court.

4. COURT: Mr. Hatmaker.

5. MR. HATMAKER: Well, the stipulation was made a part
6. of the pleadings in the Circuit Court case and counsel had
7. ample opportunity if they felt there was any defect in the
8. pleadings or any question as to whether that stipulation was
9. in fact still relevant, they could have raised it in pre-
10. trial. I think the purpose of stipulations, as well as other
11. discovery in pre-trial, is to simplify the issues and get
12. through the litigation, not complicate it.

13. COURT: All right, thank you, gentlemen. First, with
14. respect to ground one, contending that the agreement that was
15. received in evidence was not a contract, I don't see how
16. there could be any possible construction of this agreement
17. other than it was a contract. It says the salary is to re-
18. main in effect until August, 1978. And there just could not
19. be any reasonable construction of that except that the Plain-
20. tiff was employed at a salary rate of \$230.00 a week until
21. August, 1978.

22. Secondly, I don't see how there could be an issue of
23. fact as to whether Mr. Strickler had apparent authority.
24. First, it was in evidence that the defendant operated under

1. various names including Neff Trailer Sales, and that Mr.
2. Strickler was the general manager. He hired the Plaintiff
3. and he set the wage rates of the other employees. So, I
4. don't see how there could be any issue of fact as to whether
5. Strickler had apparent authority and it was not necessary to
6. go into whether he had actual authority. For all practical
7. purposes, he was the boss there, he hired people and he set
8. their salary. The damages were within the limit that the
9. plaintiff proved and the reasonable inferences that could be
10. drawn therefrom.

11. Going to the stipulation now, this was a stipulation
12. that was signed by counsel, it was in the record. If it
13. was not to be stipulated in the trial, the Plaintiff certain-
14. ly would have been surprised thereby, and the Defendant has
15. not proffered any evidence to indicate that the facts were
16. not actually as stated in the stipulation.

17. That leaves the remaining issue of permitting the
18. Plaintiff to testify from his notes. From my recollection
19. of it there was some inquiry as to whether the notes would
20. refresh his recollection, and objection was sustained as to
21. any conclusions or arithmetic that were arrived at from
22. the notes that he used. But I want to be completely satis-
23. fied on that, and I will give the Defendant leave to file
24. the transcript of that part of the testimony with me within

1. five days from today.

2. In all other respects, the motion to set aside the
3. verdict will be overruled. I'll ask Mr. Hatmaker to submit
4. an order granting judgment on the verdict with interest from
5. the day of trial. You can mail it to me and serve a copy of
6. it on Mr. Blatt. You can note your objections to the order
7. at the time you submit the transcript. And if I need to
8. hear any further argument on it, I'll notify you gentlemen
9. after I've seen the transcript.

10. MR. BLATT: While we're here, Judge, it might be
11. proper if we would move the Court to make the transcript
12. part of the record so that we wouldn't have to come back
13. before the Court and ask that. And it might be entered in
14. the final order that Mr. Hatmaker would draft.

15. COURT: The order can include a provision making the
16. transcript part of the record and the Court's oral opinion
17. today to be transcribed and made part of the record.

18. MR. BLATT: Now, is it my understanding that final
19. judgment will be entered before we hear the argument on the
20. hearsay?

21. COURT: I've heard the argument on it, I want to
22. see the transcript. When I've seen the transcript, I will
23. either sign the order Mr. Hatmaker presents, unless there's
24. something in the form of the order on which you want to be

1. heard, or I'll set the matter for further argument.

2. MR. BLATT: I think maybe in that case--well, we can
3. take that up, if there are further matters we can take that
4. up then on the next motions day possibly.

5. MR. HATMAKER: Further objections?

6. MR. BLATT: No, not any further objections. I assume
7. all our objections are either in the record or in the memo-
8. randa. But, at this point, it's my understanding that the
9. transcript of the hearing is made a part of the record when
10. filed, all portions of it.

11. COURT: Mr. Hatmaker will put that in the order. Why
12. don't you give Mr. Hatmaker whatever else you want in the
13. order so he can put it in the order and it will be there when
14. he serves it on you.

15. MR. BLATT: Well, the only other thing would be that
16. if the Court would overrule after looking at the portion of
17. the transcript, then whether or not the defendant wishes to
18. appeal, the Court would then have to set an appeal bond, an
19. appropriate appeal bond.

20. COURT: Give those provisions to Mr. Hatmaker and
21. I'm sure he'll be delighted to put them in the order.

22. (End of Hearing)

23.

24.

JUDGMENT ORDER

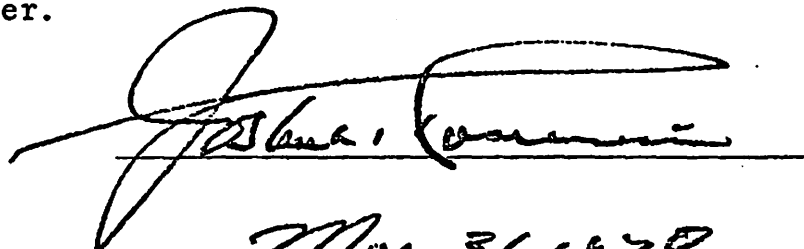
Docket No. 5922

This day came again the parties, by counsel, and the motion of the plaintiff to set aside the verdict of the jury and grant a new trial on the grounds heretofore assigned in writing, and filed with the papers in this action was argued by counsel.

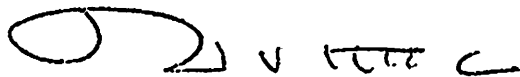
UPON CONSIDERATION WHEREOF, the Court having maturely considered said motion and all the grounds thereof, and the authorities submitted in support thereof, and the Court being of the opinion that said motion should be overruled, it is ADJUDGED and ORDERED that said motion be, and the same hereby is, overruled. Therefore, pursuant to the verdict of the jury, the Court doth ADJUDGE and ORDER that the plaintiff, Carroll W. Dellinger recover of the defendant, Neff Trailer Sales, Incorporated, the sum of Three Thousand, Eight Hundred Thirty-six Dollars and Twenty-four Cents (\$3,836.24) in accordance with the jury's verdict with lawful interest thereon from the 25th day of April, 1978, and costs in his behalf expended.

And plaintiff, by counsel, having indicated his intention to take an appeal from this judgment and having moved for a suspension of execution of this judgment pending action thereon by the Supreme Court, it is further ORDERED that execution

of this judgment be and it is hereby suspended for thirty (30) days from the date of this Order and thereafter so long as the matter is under consideration by the Supreme Court, provided that within said period of thirty (30) days defendant files with the Clerk of this Court an appeal bond in the penalty of Five Thousand Dollars (\$5,000.00), with surety to be approved by this Court, conditioned according to law; and it is further ORDERED that the transcript of testimony taken at the trial before this Court in this matter on April 25, 1978 and the oral opinion rendered by the Court at a hearing on the motion to set aside the verdict held on May 15, 1978, be made a part of the record in this case, provided that said transcript be filed in the office of the Clerk of this Court within sixty (60) days from the date of this Order.

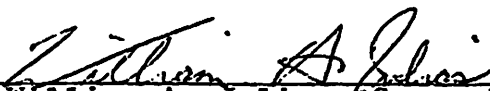

DATE: May 31, 1978

I ASK FOR THIS:



David J. Hatmaker, Counsel for
Carroll W. Dellinger

SEEN AND OBJECTED TO:



William A. Julias, Counsel for
Neff Trailer Sales, Incorporated

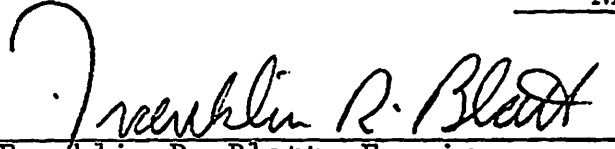
Recorded In
<u>Carroll W. Dellinger</u>
Order Book <u>50</u> Page <u>574</u>
<u>5/31/78</u>

NOTICE OF APPEAL
Docket No. 5922

TO: GEORGE W. KEMPER, CLERK, CIRCUIT COURT OF ROCKINGHAM COUNTY,
VIRGINIA:

Notice is hereby given that Neff Trailer Sales, Incorporated,
Defendant, hereby appeals to the Supreme Court of Virginia from
the final judgment entered in this action on May 31, 1978, and
will apply for a Writ of Error and Supersedeas. A transcript of
testimony, and other incidents of the case, will be filed hereafter.

NEFF TRAILER SALES, INCORPORATED
By Counsel



Franklin R. Blatt, Esquire
Counsel for Defendant
Julias, Blatt & Blatt
9 North Court Square
Harrisonburg, Virginia 22801

CERTIFICATE

I hereby certify that a true copy of the foregoing Notice
of Appeal was mailed and/or delivered to David J. Hatmaker, Esquire,
Hatmaker, Dinsmore & Stables, Virginia National Bank Building,
Harrisonburg, Virginia, 22801, counsel for Plaintiff, Carroll W.
Dellinger, this 3th day of June, 1978.

Filed in the Clerk's Office
Rockingham County, Va.


Franklin R. Blatt

JULIAS, BLATT
& BLATT
ATTORNEYS-AT-LAW
HARRISONBURG, VA.
RB/tjp
+ 2
6/15/78
3396

JUN 8 1978

 Deputy Clerk

ASSIGNMENTS OF ERROR

(1) That the Court erred when it ruled that the Memorandum dated August 31, 1973, constituted an employment contract between the appellant and the appellee, and thereafter failed to submit this issue of fact, under proper instructions to the jury for a determination.

(2) That the Court erred in allowing appellee to offer speculative evidence as to this alleged damages.

(3) That the Court erred in ruling appellant's employee, Donald Strickler, was an agent with the authority to bind appellant in an employment contract, and thereafter failed to submit this issue of fact to the jury under proper instruction.

(4) That the Court erred in allowing the appellee to testify from hearsay notes and material.