

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JACOB FREDERICK JOCHUM, and
JACOB F. JOCHUM, JR., d/b/a
JACK JOCHUM TRUCK SERVICE,

Plaintiffs-Appellants,

v.

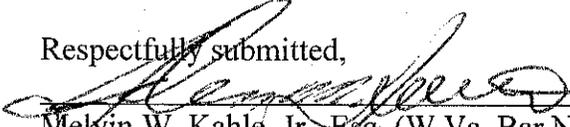
WASTE MANAGEMENT OF
WEST VIRGINIA, INC, ET AL.,

Defendants-Appellees,

Appeal No.: 34264
Hon. Martin J. Gaughan
Circuit Court of Ohio County, WV
Civil Action No.: 06-C-415

**APPELLATE BRIEF OF JACOB FREDERICK JOCHUM,
and JACOB F. JOCHUM, JR., d/b/a JACK JOCHUM TRUCK SERVICE**

Respectfully submitted,


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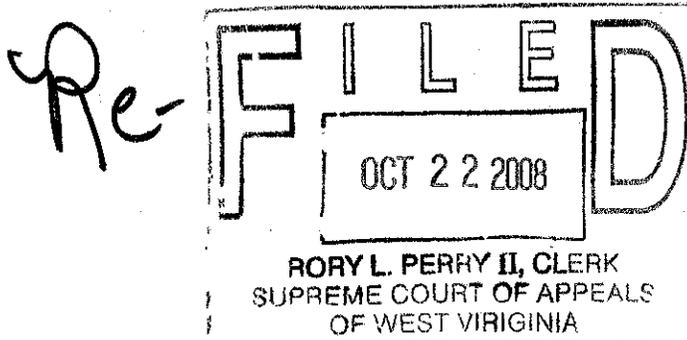


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THE KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Jacob Frederick Jochum and Jacob F. Jochum, Jr., d/b/a Jack Jochum Truck Service (the Jochums) filed suit against Waste Management for its breach of an Asset Purchase Agreement. Complaint, at Counts One and Two.

The circuit court granted summary judgment to Waste Management, holding that two conditions precedent to the Agreement were unfulfilled.

STATEMENT OF FACTS

The Jochums are a father and son team who do business as Jack Jochum Truck Service in the waste disposal industry. Their Public Service Commission Motor Carrier Certificates of Convenience and Necessity authorize them to provide waste disposal services in Wheeling, and Ohio and Marshall Counties, West Virginia. *See* Complaint and Waste Management's Answer (Answer), at ¶¶ 4-5, 14-16.

The Jochums retrieve, transport, and dispose residential, commercial, and industrial garbage. *See* EXHIBIT 1, pertinent portions of West Virginia Public Service Commission hearing transcript, at 43.

The business is over 50 years old. *Id.* at 16-17. The Jochums have invested significant manpower and resources by servicing clients, and maintaining and purchasing equipment and parts. *Id.* at 133-34. They often went "the extra mile" by putting lids back on garbage cans, occasionally providing trash containers, and performing other services. *Id.* at 48-50.

Due to Jack Jochum, Sr.'s health, the Jochums sought a purchaser for their business, beginning back in 2002-03. *See* Complaint, at ¶ 19. Even though there were 4 to 5 other interested businesses, they chose Waste Management. Hearing Transcript, at 54.

On March 8, 2004, the Jochums and Waste Management executed the Asset Purchase Agreement, which provided that Waste Management would pay the Jochums \$465,000.00 for their business and certificates. Complaint and Answer, at ¶ 20. Although it referenced only two of the certificates, the Jochums contributed a third as a measure of good will as a bonus. EXHIBIT 2, Jacob F. Jochum, Jr. Affidavit, with pertinent portions of Asset Purchase Agreement, at ¶¶ 3-4.

Due to delays caused by American Disposal Services, a competitor which opposed the Agreement, the PSC didn't approve the transfer until December, 2005. *See* EXHIBIT 3 at 1, 4, 13. ADS' petition to appeal was denied in June, 2006. Complaint & ADS Answer, at ¶ 40.

In the meantime, the Southern District federal court ruled in *Harper v. Public Service Commission of West Virginia*, 427 F. Supp.2d 707 (S.D. W.Va., 2006) that W.Va. Code § 24A-2-5 was unconstitutional as applied to the plaintiffs therein - the statute required waste disposal companies to obtain PSC certificates prior to providing services and/operating in West Virginia.

Waste Management terminated the Agreement per a condition precedent at Provision § 9(e). Complaint and Answer, at ¶ 36.

It reads:

All obligations of Buyer to close hereunder are subject to fulfillment by Seller or waiver by Buyer, prior to or on the date of Closing, of the following conditions:

...

(e) No law, rule, regulation, order, writ or judgment of any court, arbitrator or other agency of government or any agreement to which Buyer or an affiliate of Buyer is bound shall have prevented or prohibited or make less economic the consummation of the transactions contemplated hereby.

See Jacob Jochum, Jr. Affidavit and Agreement; Complaint and Answer, at ¶ 37.

Waste Management argued that *Harper* excused it from buying the Jochums' certificates and made the Agreement "less economic." Complaint and Answer, at ¶ 36.

The Jochums filed suit against Waste Management for breach of contract and detrimental reliance.

The circuit court granted summary judgment to Waste Management, holding that Provision §§ 9(d) and (e) were condition precedents that were unsatisfied. Provision § 9(d) required PSC approval to transfer the certificates

ASSIGNMENT OF ERROR

THE CIRCUIT COURT ERRED IN GRANTING THE DEFENDANT, WASTE MANAGEMENT'S MOTION FOR SUMMARY JUDGMENT ON THE JOCHUMS' BREACH OF CONTRACT AND DETRIMENTAL RELIANCE CLAIMS.

DISCUSSION OF LAW

I. STANDARD OF REVIEW

"A circuit court's entry of summary judgment is reviewed de novo." *Roberts v. W.Va. American Water*, Syl. Pt. 1, 221 W.Va. 373, 655 S.E.2d 119 (2007).

Rule 56(c), of the West Virginia Rules of Civil Procedure, reads:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The movant must show a clear right to judgment and that the non-movant cannot prevail under any circumstances. *Aetna Co. v. Federal Co.*, 148 W.Va. 160, 171, 133 S.E.2d 770 (1963).

The movant bears the burden of producing affirmative evidence showing the absence of a genuine issue of material fact; the burden then shifts to the non-movant to (1) rehabilitate the evidence attacked by the movant; or (2) produce additional evidence showing a genuine issue for trial. *Sells v. Thomas*, Syl. Pt. 3, 220 W.Va. 136, 640 S.E.2d 199 (2006)(per curiam).

The Court must weigh all inferences, doubts, and ambiguities for the non-movant. *Id.*; *Harris v. Jones*, 209 W.Va. 557, 561, 550 S.E.2d 93 (2001)(per curiam)(quoting *Aetna*); *Payne v. Weston*, 195 W.Va. 502, 509, 466 S.E.2d 161 (1995).

II THE COURT SHOULD REVERSE THE TRIAL COURT'S SUMMARY JUDGMENT RULING REGARDING PROVISION § 9(E) BECAUSE A GENUINE ISSUE OF MATERIAL FACT EXISTS WHETHER OR NOT IT WAS SATISFIED, VIOLATED OR EVEN APPLICABLE.

- (A) A genuine issue of material fact exists whether or not Provision § 9(e) was satisfied or violated because Waste Management intentionally chose to use the ambiguous terms "less economic" to bind the Jochums to the Agreement and prevent them from negotiating with Waste Management's competitors and, at the same time, maintain the option of voiding the contract if *Harper* was decided in its favor.**

Provision § 9(e) of the Agreement reads:

All obligations of Buyer to close hereunder are subject to fulfillment by Seller or waiver by Buyer, prior to or on the date of Closing, of the following conditions:

...

(e) No law, rule, regulation, order, writ or judgment of any court, arbitrator or other agency of government or any agreement to which Buyer or an affiliate of Buyer is bound shall have prevented or prohibited or make less economic the consummation of the transactions contemplated hereby.

Harper reads that "West Virginia Code § 24A-2-5 is invalid insofar as it requires solid waste haulers engaged in the interstate transportation of solid waste to obtain a certificate of convenience and necessity from the PSC prior to providing those services." 427 F. Supp.2d at 724.

Waste Management admitted that "**...the Harper decision was an anticipated difficulty, which resulted in the inclusion of Section 9(e) in the Agreement.**" Waste Management's Response to Petition for Appeal, at 12, (emphasis added, and in original). But Waste Management didn't draft¹ Provision § 9(e) to read that "No law, rule, regulation, order, writ or judgment of any court, arbitrator or other agency of government or any agreement to which Buyer or an affiliate of Buyer is bound shall have prevented or prohibited or *made the Jochums' PSC certificates unnecessary* for the consummation of the transactions contemplated hereby. Nor did it reference

¹ Waste Management prepared the agreement. Jacob Jochum, Jr. Affidavit, at ¶ 2.

Harper or even define “less economic”.

Since Waste Management anticipated *Harper*, it should have clearly stated that possibility in the Agreement so there would be no confusion. For example, to Jack Jochum, Jr., “make less economic the consummation of the transactions contemplated hereby,” would only apply if new laws, PSC regulations, or taxes increased Waste Management’s cost of continuing the Jochums’ business, resulting in less profit. Jacob Jochum, Jr. Affidavit, at ¶ 6. He “..did not understand nor intend the provision to mean that Waste Management could repudiate the agreement simply because it believes it no longer has to purchase certificates to operate waste disposal in West Virginia, or that it could use it to renege on the agreement without showing how it would lose money.” *Id.*

Instead, Waste Management intentionally chose to use the ambiguous terms “less economic” so that it could bind the Jochums to the Agreement and prevent them from negotiating with Waste Management’s competitors and, at the same time, maintain the option of voiding the contract if *Harper* was decided in its favor. Indeed, the Jochums began negotiations in 2002-03 to sell their business and had 4-5 other interested parties to whom they could have sold if not for the Agreement with Waste Management - they are left with Waste Management’s repudiation due to *Harper*.

Waste Managements’ actions violate West Virginia’s covenant of good faith and fair dealing, which required it to approach the contracting process with good faith and the intent to deal fairly. *Buckhannon-Upshur Cty. Airport v. R & R Coal*, 186 W. Va. 583, 590, 413 S.E.2d 404 (1991) (quoting *GUIN v. HA*, 591 P.2d 1281 (Alaska 1979)):

In every contract ... there is an implied covenant of good faith and fair dealing that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.

See also *Morton v. Amos-Lee Securities*, 195 W. Va. 691, 697 n.15, 466 S.E.2d 542 (1995)(the WV

Supreme Court did not foreclose the appellant from proceeding with a theory for breach of the covenant of good faith and fair dealing at the negotiation stage). “[N]either party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. . . .” *Caperton v. A. T. Massey Coal Co.*, Case No. 33350, __ W.Va. __, __ S.E.2d __, (4-3-2008) (Albright, Justice, and Cookman, Judge, sitting by special assignment, dissenting), at 42-43.

And covert, questionable and reprehensible actions are hardly conducive to “promoting trust in the contracting process or otherwise furthering commerce and business interests — nor [do they] foster trust in the judicial process.” *Caperton*, (Albright, Justice, and Cookman, Judge, sitting by special assignment, dissenting), at 44. They undermine the contracting process and impede economic growth.

Waste Management’s actions are also a perfect example of why ambiguous language in a contract must be strictly construed against the drafter. *See Combs v. McLynn*, 187 W.Va. 490, 493, 419 S.E.2d 903 (1992) (per curiam); *Nisbet v. Watson*, 162 W.Va. 522, 530, 251 S.E.2d 774 (1979). “The drafting party is more likely to perceive areas of ambiguity, or even to intentionally create ambiguity, intending to put forth a particular interpretation at a later date.” Cmt. to Restatement (Second) of Contracts § 206 (1979), quoted in *Walters v. National Properties, LLC*, 2005 WI 87, 282 Wis.2d 176, 184-85, 699 N.W.2d 71. Consequently, “In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.” Restatement (Second) of Contracts § 206 (1979), quoted in *Walters*.

Since Waste Management intentionally chose the ambiguous terms, “less economic,” and chose not to define them, they must be construed against it; the trial court’s ruling should be reversed, and the matter remanded for trial. *See Ohio Valley Contractors v. Board of Educ.*, Syl. Pt. 1, 182 W.Va. 741, 391 S.E.2d 891 (1990)(per curiam)(“Where a contract is ambiguous then issues of fact arise and summary judgment is ordinarily not proper.”); *Estate of Tawney v. Columbia Natural Resources*, Syl. Pt. 8, 219 W.Va. 266, 633 S.E.2d 22 (2006)(“Uncertainties in an intricate and involved contract should be resolved against the party who prepared it.”)²; *see also Harvey Concrete v. Agro Const. & Supply*, 189 Ariz. 178, 183, 939 P.2d 811 (App. 1997); *Lapping v. HM Health Ser.*, No. 2004-T-0011, 2005-Ohio-699 (11th Dist. Ct. App. Feb. 22, 2005), at ¶¶ 10, 25; and *Castroville Arpt. v. Castroville*, 974 S.W.2d 207, 210-11 (Tex. App. -San Antonio 1998), regarding triable issues involving conditions precedent. Otherwise, Waste Management, will continue to benefit from its breach of the covenant of good faith and fair dealing, and this Court’s ruling will encourage similar conduct among future contracting parties.

(B) A genuine issue of material fact exists whether or not Provision § 9(e) was satisfied or violated because Harper did not make the Agreement less profitable.

“Less economic” must be construed with sound waste management business practice. *See e.g. Columbia Gas v. E. I. Du Pont*, Syl. Pt. 3, 159 W. Va. 1, 217 S.E.2d 919 (1975)(“Where found to be ambiguous, a contract between businessmen should be construed in accordance with sound business practices.”).

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Although the Agreement provides for construction of ambiguities as if drafted jointly, it also reads that it “...**shall** be governed and interpreted in accordance with the laws of the State of West Virginia.” Agreement, at ¶¶ 32, 33 (emphasis added). And any doubt at the summary judgment stage should be weighed in favor of the Jochums.

The proper interpretation of “less economic” is less profitable, not that a better deal may be struck elsewhere if the Jochums’ certificates need not be purchased in light of *Harper*. Waste Management admitted as much by focusing on profitability in its argument that *Harper* supports repudiation because it “...made the entire area subject to [the Jochums’] Certificates **less profitable.**” Summary Judgment Reply, at 5 (emphasis added).

Except for its admission, Waste Management’s argument is otherwise wrong and factually untrue: the subject area became more profitable after *Harper*.

The profitability of the entire area subject to the Jochums’ certificates depends on the Jochums’ customer base, not the certificates, which weren’t even assigned a value in the Agreement. See Jacob Jochum, Jr. Affidavit, at ¶ 3.

The Jochums spent decades in establishing good will and business relationships. As of March, 2006, they had over 100 commercial and 600 residential customers. EXHIBIT 4, Evelyn Jochum Affidavit. In addition to tangible items, such as trucks and waste containers, Waste Management was to receive the right to service these customers. Jacob Jochum Affidavit, at ¶ 3. The plaintiff’s expert, Richard Sterner, anticipated that if the Agreement had proceeded, the customers would have remained with Waste Management. EXHIBIT 5, Richard Sterner Affidavit, without attachments, at ¶ 5(A)

Harper did not cause any decrease in the Jochums’ profits. As a matter of fact, the average gross revenue after *Harper* increased compared to that before, and the Jochums’ profits didn’t decline. See Evelyn Jochum Affidavit. Their gross revenues increased from \$16,300.00 in March, 2006 and \$16,301.61 in January, 2007, to \$17,616.84 in June, 2007. See *Id.* Their present monthly revenues are still approximately \$17,000.00. The Jochums’ revenues are anticipated to continue to

be unimpaired in the future by *Harper*. Sterner Affidavit, at ¶ 5(C).³

Without these customers, Waste Management would incur tremendous expense, and utilize vast amounts of manpower and resources in establishing its own customer base. *Id.*, at ¶ 5(A). And no profits would be made without customers. Customers are a core feature of the transaction and because of them, the Agreement is not less profitable and Provision § 9(e) is satisfied and not violated. *See* Sterner Affidavit, at ¶ 5.

Waste Management hasn't submitted any factual evidence to the contrary aside from an unsupported affidavit⁴ which provides without support that *Harper* made the agreement less economic, but without stating why, how, to what extent, or a factual basis. It is speculation and cannot be used to overcome the plaintiff's expert's (Sterner's) affidavit, which is rationally based on the facts. *Cf. Barbina v. Curry*, 221 W.Va. 41, 650 S.E.2d 140 (2007) ("We have made clear that unsupported speculation is not sufficient to defeat a summary judgment motion").

And aside from unsupported reference to competition, Waste Management doesn't have any "facts and/or evidence" supporting its position. *See* Waste Management's discovery responses, at

³ Potential reasons why the Jochums' revenues have increased despite *Harper* include:

- (A) waste-disposal companies that try to establish customer bases in West Virginia as a result of *Harper* will probably spend large amounts of time and resources, and decrease the risk of competition for the Jochums. *See* Sterner Affidavit, at ¶ 5(B).
- (B) pre-*Harper* competition in Ohio and Marshall Counties was substantial and any new competition would probably be minimal. ADS, for example, has \$1 to \$3 million invested in garbage disposal services in these counties. *See* Complaint and ADS Answer, at ¶¶ 26.

⁴ Waste Management's affidavit was not from an expert. *See* EXHIBIT 6, Waste Management's discovery responses, at p. 6.

p. 2-3. It hasn't shown any decrease in profits and doesn't have an expert to do so. *Id.* Nor can it reasonably dispute and undermine the facts submitted by the plaintiffs.

Harper does not allow repudiation. Sterner Affidavit, at ¶ 5.

(C) A genuine issue of material fact exists whether or not Provision § 9(e) applies regardless of whether or not it was satisfied or violated because the covenant of good faith and fair dealing required that Waste Management comply with the Agreement.

The parties executed the Agreement in March, 2004. Although Waste Management admitted that its anticipation of *Harper* resulted in Provision § 9(e)'s language, it wasn't until December 13, 2004 that Waste Management first notified the Jochums of pending litigation that could affect the Agreement. *See* Summary Judgment Reply, at 2; Hearing Transcript, at 71.

As discussed *supra*, Waste Management was required by the covenant of good faith and fair dealing to approach the contracting process with good faith and the intent to deal fairly.

The Covenant required Waste Management to notify the Jochums at the time of, if not prior to, the execution of the Agreement, rather than to wait 9 months. Waste Management's delay destroyed the potential for the Jochums to sell their business to at least 4 other potential buyers. *See* facts, *supra*.

Waste Management shouldn't be allowed to benefit from its delay to the detriment of the Jochums, and regardless of whether or not Waste Management stands to profit by the Agreement, the covenant requires it to consummate the transaction. *See e.g. Babcock Co. v. Brackens Co.*, 128 W. Va. 676, 681-82, 37 S.E.2d 619 (1946), reading:

If a party to a contract could be relieved from performance on the ground that no profit would accrue from its performance, the stability and binding force of most, if not all, contracts would be destroyed. It is of frequent occurrence in the business world that a party to a

contract finds that its performance is onerous and unprofitable; nevertheless, good faith and fair dealing call for performance.⁵

III. THE COURT SHOULD REVERSE THE TRIAL COURT'S SUMMARY JUDGMENT RULING REGARDING PROVISION § 9(D) BECAUSE A GENUINE ISSUE OF MATERIAL FACT EXISTS WHETHER OR NOT IT WAS SATISFIED OR VIOLATED.

The Court also ruled that “When the *Harper* ruling was decided on April 11, 2006, the issue of whether the Certificates transfer would gain governmental approval was still undecided, thus failing to satisfy the condition set forth in Section 9(d) of the Agreement.”

Provision § 9(d) reads:

All obligations of Buyer to close hereunder are subject to fulfillment by Seller or waiver by Buyer, prior to or on the date of Closing, of the

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See also Solondz v. Kornmehl, 317 N.J. Super. 16, 21, 721 A.2d 16 (1998), in which the court agreed with an inferior court’s “refus[al] to rewrite the contract or to give plaintiff a better deal than that for which he expressly bargained.” “[A]lthough a party to a contract believes he might have made a better deal after he agreed to the original contract, he is nonetheless bound by the terms of that primary agreement.” *Muhammad v. Strassburger*, 526 Pa. 541, 548, 587 A.2d 1346 (1991). “If every contract could be declared void because of a showing by an individual, a group of individuals, or even a significant portion of individuals that they could save money by breaking it, chaos would result.” *Upper Mo. G & T Co-op v. McCone Elec. Co-op.*, 160 Mont. 498, 504, 503 P.2d 1001(1972). And finally in *Ga. Magnetic v. Greene County*, 219 Ga. App. 502, 506, 466 S.E.2d 41 (1995), the Court determined that:

...even if in the interest of providing better patient care, the hospital authority was not justified in terminating the contracts purely because, in its judgment, the contracts proved to be financially detrimental or because it was able to strike a better deal with someone else. “If a firm contract can be terminated on such a basis with impunity then indeed is the basis of our industry and commerce on shifting sands. Perhaps the [hospital authority] here . . . made a bad bargain — one that was uneconomic for it. But such is the tuition in the school of hard knocks where lessons are learned that will be of incalculable value in determining the course of future policies and operations.

following conditions:

(d) Seller and Buyer shall have received all necessary governmental consents, including the approval of the West Virginia Public Service Commission and the consents to the assignment of Seller's customers including any municipal contract that may exist.

Due to delay caused by ADS, the Public Service Commission finally approved the transfer of the Jochums' certificates to Waste Management in December, 2005. EXHIBIT 3. In June, 2006, this Court refused ADS's petition for appeal of the decision.

Provision § 9(d) was satisfied in December, 2005 notwithstanding ADS's petition for appeal. Appellate Rule 6 provides that "Any person desiring to present a petition for an appeal may make application for a stay of proceedings to the circuit court in which the judgment or order desired to be appealed was entered." Waste Management never moved the PSC to stay the effects of the order. Nor did ADS. *See* ADS's response to petition. And ADS characterizes the absence of stay as determinative of the fact that governmental approval for the transfer occurred in December, 2005:

As set forth in the Commission Order entered on December 11, 2006..., the Public Service Commission granted its approval to the transfer of the certificates by Commission Order dated December 28, 2005. (See Findings of Fact number 17). Although ADS did, on February 27, 2006, file a petition to this Honorable Court regarding the Public Service Commission's Order of December 28, 2005, it did not ask for a stay of that Order pursuant to West Virginia Code § 24-5-1.

Even if approval was met in June, and not before, Waste Management cannot use Provision § 9(d) as a basis for repudiation - the Jochums were required to obtain approval before Closing, not before Waste Management's repudiation under Provision § 9(e). Moreover, the Jochums are entitled to jury determination of whether or not the delay in approval was reasonable. *Cf. Heartland, LLC v. McIntosh Racing Stable, LLC*, 219 W.Va. 140, 150, 632 S.E.2d 296 (2006) ("it is generally held that when a condition to be performed is not limited by an agreement, the condition must be

performed or abandoned within a reasonable time ”).

RELIEF REQUESTED

WHEREFORE, the plaintiffs, Jacob Frederick Jochum, Jacob F. Jochum, Jr., d/b/a Jacob Jochum Truck Service, pray that the October 1, 2007 Order and January 4, 2008 substitute Order be reversed and remanded.

Respectfully submitted,

Jacob Frederick Jochum, Jacob F. Jochum, Jr., d/b/a Jacob
Jochum Truck Service,
Appellants


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RECORD ON PETITION

Per Appellate Rule 4A(c), the appellants have designated the entire record for review.

Respectfully submitted,

Jacob Frederick Jochum, Jacob F. Jochum, Jr., d/b/a Jacob
Jochum Truck Service,
Appellants


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COUNSEL FOR THE PETITIONERS

APPELLATE RULE 4A(c) CERTIFICATION

I, the undersigned counsel, hereby certify that the facts alleged are faithfully represented and that they are accurately presented to the best of my ability.

Respectfully submitted,

Jacob Frederick Jochum, Jacob F. Jochum, Jr., d/b/a Jacob Jochum Truck Service,
Appellants


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CERTIFICATE OF SERVICE

I, the undersigned counsel, caused the foregoing **APPELLATE BRIEF** to be served on the defendants on this 20th day of October, 2008, at the law offices of their attorneys, as follows:

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Of Counsel

EXHIBITS
ON
FILE IN THE
CLERK'S OFFICE