

1977

# Keith E. Sohm v. Kendell D. Winegar : Brief of the Plaintiff

Utah Supreme Court

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Keith E. Sohn; Attorney for Plaintiff;

Roger F. Cutler; Attorney for Defendant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

KEITH E. SOHM,

Plaintiff-Appellant,

vs.

WENDELL D. WINEGAR, dba  
UTAH ELECTRIC & MOTOR COMPANY,

Defendant-Respondent.

CASE NO. 14654

BRIEF OF THE PLAINTIFF

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California Priester v. Citizens Nat. Trust & Saving Bk, 280 P 2d 835

Utah Petrie v. General Contracting Co., 17 U 2 408, 413 P 2d 600

Utah Bishop v. Parker, 103 Ut. 145, 134 P 2d 180

California Jones v. Martin, 256 P 2d 905

California Rader v. Thrasher, 368 P 2d 360

California Setzer v. Robinson, 368 P 2d 124

SERVICES CITED

7 Am Jur 2nd Attorney and Client §214 and §223

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IN THE SUPREME COURT OF THE STATE OF UTAH

KEITH E. SOHM,

Plaintiff-Appellant,

vs.

WENDELL D. WINEGAR, dba  
UTAH ELECTRIC & MOTOR COMPANY,

Defendant-Respondent.

CASE NO. 14654

STATEMENT OF THE CASE

The plaintiff in this action is an attorney duly licensed to practice law in the courts of this state. The defendant, Wendell D. Winegar, is an individual doing business as Utah Electric and Motor Co., a business which involves the sale and repair of electric motors and related supplies. The plaintiff has been performing legal services for defendant for about 20 years, during all of which time the parties were personal friends and they performed services for each other on a very informal basis (R.95). No formal written attorney retainer agreement was ever drawn up between the parties (R. 116) but traditionally throughout their association the plaintiff had charged and defendant had paid one-fourth of the recovery in collection cases except that it may have been one-half in small collections. (R. 60, 107). Plaintiff obtained a judgement for \$9,706 against All Grain for defendant and received attorneys based on one-fourth from February 24, 1973 until October 4, 1973 at about which time defendant by-passed the plaintiff, settled directly with All

on attorneys fees. Defendant also failed to pay attorney's fees on the Rothe Estate matter and a small balance due in the Flint and Walling Case.

After October, 1973 and throughout 1974 the defendant failed to respond to the billings of the plaintiff - he never refused to pay, he just wouldn't respond (Exhibit 14-P). The plaintiff claims the following amounts are reasonable and are due on the following accounts with defendant including interest to May 10, 1976, (Exhibit 1-P), to wit:

First Cause of Action - Taylor, All Grain and G.E. acct.	\$624.86
Second Cause of Action - Rothe Estate Account . . . . .	474.07
Third Cause of Action - Flint and Walling Account . . . . .	56.00
TOTAL DUE	\$1,154.93

#### DISPOSITION BY THE COURT

The lower court denied recovery by the plaintiff on any of the three causes of action finding that the plaintiff had received a reasonable fee for his services.

#### RELIEF SOUGHT BY APPEAL

The plaintiff seeks to have the order of the lower courts reversed, to find that there was, in fact, a fee arrangement of one-fourth of the recovery in effect between the parties and that for the sum of \$1,154.93 plus costs and interest, the plaintiff is entitled to judgement.

#### STATEMENT OF THE FACTS

First Cause of Action: The plaintiff, at the request of defendant and after preliminary demands filed an action in the Third Judicial District Court for Salt Lake County, known as Utah Electric and Motor Co. vs. Lawrence C. Taylor and All Grain Co., Civil No. 205125. After participating in some preliminary motions which were won by plaintiff for Utah Electric, the plaintiff moved for a Summary Judgement against All Grain Co. and the Judgement was granted December 21, 1972 in total amount of \$9,706.36 plus costs (R. 58, Ex. 2-P). Because the corporation refused to pay the judgement plaintiff proceeded to press for trial against Mr. Taylor

personally. When the trial date of February 27, 1973 drew near (Exhibit 17-P) plaintiff so advised Mr. Winegar by his notes of December 21, 1972 and February 16, 1973 (Exhibit 3-P) and urged Taylor and All Grain to Settle. Mr. Taylor and All Grain agreed to pay the judgement at the rate of \$1,000 per month (R. 58) so trial was deferred and All Grain started making payments February 24, 1973 on a total amount including interest of \$9,868.06. Plaintiff received the monthly payments, computed the interest, distributed the funds and sent a copy of his accounting to the defendant and the All Grain attorney each time payment was received (R. 58, 59) (Exhibit 2-P, p-4). Checks were received and disbursed (without showing cents) as follows:

	<u>Payment</u>	<u>To Keith</u>	<u>To Wen</u>	<u>Interest</u>	<u>Principal</u>	<u>Balance</u>
2-24-73	\$1,000	\$1,000		\$130	\$870	\$9,868
3-24-73	1,000		1,000	51	942	8,868
4-26-73	1,000		1,000	52	947	7,925
6-20-73	2,000	250	1,750	93	1,906	6,978
8-15-73	1,000	250	750	50	949	4,121
9-06-73	1,000		1,000	20	979	3,142
10-4-73	1,000	500	500	21	979	2,163
	\$8,000	\$2,000	\$6,000		BALANCE DUE	\$2,163

The defendant acknowledged in this answer (Exhibit 2-P p. 3,4, & 5) that he received \$6,000 and plaintiff received \$2,000 up to October 4, 1973 and thereafter defendant received \$1,958 (R. 10).

No changes were assessed by plaintiff for collecting, accounting and mailing services. Up to October, 1973 plaintiff had received one-fourth of each \$1,000 payment. The first \$1,000 was held out by plaintiff and plaintiff held out \$500 from the last payment. The defendant paid \$250 in June and \$250 in August in response to billings.

The defendant gave his permission for plaintiff to keep the first check (R. 101) (Exhibit 2-P). The defendant was anxious to get the rest of his money and began calling All Grain and making demands and finally without consulting plaintiff arranged a settlement of \$1,958, by passed the plaintiff

and collected the \$1,958 directly from the All Grain people on about October 18, 1973 (R. 10, 59, 60). The first time plaintiff knew of the settlement was when All Grain attorney asked for a satisfaction of judgement (R. 60 Ex. 2-P p. 2). Plaintiff repeatedly billed defendant for one-fourth of \$1,958 or \$489.50 (Ex. 2-P, 3-P and 4-P). In one instance April 17, 1974 plaintiff billed defendant for one-third (Ex. 3-P p. 5) but corrected it later. By letter of August 9, 1974 (Ex. 2-P p. 8) Winegar's secretary wrote obviously objecting to the one-third but no objection was ever made to the billing for one-fourth until an answer was filed to this complaint.

The defendant refused to answer plaintiff's billing, telephone calls and even evaded plaintiff when he came to his office but the defendant never once objected to plaintiff's bills and never paid it (R. 60, 62, 63). Plaintiff is now claiming one-fourth of \$2,163.00 (Ex 1-P) since defendant refused to pay the lesser amount and since he by-passed his attorney in settling and did so without plaintiff's permission.

The Second Cause of Action involves the bill of the plaintiff in the matter of the Rothe Estate. On or about February 19, 1975, plaintiff received an offer to settle defendant's claim against the Kurt P. Rothe estate in Wasatch County which claim plaintiff had filed and handled for the defendant some 13 years before. After interviews, research and preparation and two or three appearances arguing motions in the Wasatch County Probate Court, no recovery was made. The Court appearances and negotiations covered a period between October 29, 1962 and July 27, 1964. The Court appearances were October 29, 1962, December 13, 1962 and July 27, 1964 (Ex. 4-P). The plaintiff received about \$50.00 for his services (R. 81). By notice (Ex. 5-P) plaintiff was advised the Estate would settle for \$1,780.57. Plaintiff personally advised the defendant who accepted the settlement offer. The acceptance was relayed to the Estate's attorney. The check for \$1,780.57 was sent to



plaintiff April 17, 1975 made out to Wendell D. Winegar (Ex. 4-P). Because of the difficulty in getting his fees in the All Grain case, plaintiff added his name to the check and left it with defendant rather than holding it until defendant signed it. The \$1,780.57 represented an unexpected windfall since both plaintiff and defendant had written the debt off years before (R. 86). Plaintiff billed defendant for his usual one-fourth fee by his bill of April 28, 1975 (Ex. 4-P). Defendant ignored the bill, failed to pay it but did not object to it at anytime.

The Third Cause of Action involves the bill of the plaintiff for \$50.00 in the Flint and Walling Case where defendant was sued as a defendant so charges were based on an hourly rate. The last check received by the plaintiff from the defendant for services in this case was for \$455.00 (Ex. 6-P and 11-D) which paid plaintiff up to the time a settlement was entered into on the case on about May 10, 1973. The additional \$50 charge resulted from further negotiations and letters with Flint and Walling when defendant failed to make payments to Flint and Walling as agreed. The \$50 represents a very conservative two hours even though prior billing had been billed \$35 an hour (Exhibit 6-P). The last services were performed in July and August 1974 (R. 65, 66 Exhibit 6-P).

#### ARGUMENT

#### POINT I

THE LOWER COURT ERRORED IN NOT ALLOWING PLAINTIFF ATTORNEY'S FEES ON THE FIRST CAUSE OF ACTION. THE EVIDENCE CLEARLY ESTABLISHES THAT PLAINTIFF WAS ENTITLED TO ATTORNEY'S FEES IN THE AMOUNT OF ONE-FOURTH OF THE TOTAL RECOVERED FROM THE JUDGEMENT OBTAINED BY PLAINTIFF FOR DEFENDANT AGAINST ALL GRAIN COMPANY.

As evidence that plaintiff is entitled to attorney's fee of one-fourth of the amount of the judgement the plaintiff claims as follows:

1. The plaintiff performed services for the defendant for many

years without a written agreement. The fee arrangement had always been

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one-fourth of recovery in collection cases (R. 62, 64). (Many attorneys, of course, charge one-third or more).

2. In plaintiff's letter of August 21, 1972 he offered to work for an hourly fee or for a fee of one-third and asked defendant to respond but no answer was received (R. 61, Ex. 3-P p. 1). Plaintiff's next letter dated December 21, 1972 stated, "I will pursue the matter on a contingent basis with a minimum as suggested in one of my previous letters" (R. 61, Ex. 3-P p. 2). On February 16, 1973, plaintiff advised defendant, "I will figure attorney's fees on a contingent basis in the Taylor matter." (Ex 8-d). NO OBJECTION WAS MADE BY DEFENDANT TO THESE CONTINGENT FEE

PROPOSALS. Based on these pre-recovery proposals plaintiff could have charged a one-third fee but decided one-fourth was adequate. It is obvious that defendant never responded or plaintiff would not have kept sending notes.

3. Plaintiff commenced collection of the judgement on February 24, 1973 and continued to collect for defendant at the rate of \$1,000 per month through October 4, 1973 withholding his one-fourth fee in some cases but remitting the check and billing in other cases (Ex. 2-P) (Ex. 3-P p. 4). The defendant paid one \$250 bill in June and another one-fourth fee with his check No. 1151 dated August 15, 1973 (Ex. 13-D) showing his agreement to the one-fourth fee terms. After plaintiff collected his \$250 fee from February through October WITHOUT AN OBJECTION FROM THE DEFENDANT. In fact, defendant never objected to the fee arrangement until he answered the complaint in June, 1975.

4. Defendant acknowledged the one-fourth fee arrangement when he stated in his answer to the Complaint: "4. Pursuant to the arrangement for payment, the plaintiff received a check on or about February 24, 1973, and deducted from the \$1,000 received \$250.00." (R. 10).

he improperly settled directly with the All Grain people, by-passed plaintiff (his attorney) collected the last payment and conveniently forgot his attorney (R. 59).

6. On two instances, November, 1973 and April, 1974, the plaintiff by error, billed the defendant for one-third (Ex. 3-P, 9-D, 10-D). The defendant's office girl answered one of these billings by letter of August 9, 1974 "per All Grain Matter. Your amount is incorrect" (Ex. 2-P p. 3) but never objected to the billings for one-fourth fee (R. 62). This office letter was the closest defendant ever came to objecting to anything. Defendant could not have been very angry at plaintiff as of August 9, 1974 because he requested further services.

7. When defendant continued to ignore plaintiff for over a year, plaintiff did everything possible, phoning, writing and even going to defendant's place of business trying to collect or get some explanation from Mr. Winegar but Winegar refused to answer calls and even had his office lie for him (R. 62, 63). Even after his office's letter of August 9, 1974 (Ex. 2-P) saying Winegar wanted to discuss with me the defendant refused to contact me or answer my calls. Plaintiff's frustration is shown by his letter of May 12, 1975 demanding some kind of response from defendant to no avail (Ex. 14-P). OBVIOUSLY UP TO MAY 12, 1975 DEFENDANT STILL HAD NOT OBJECTED TO THE ONE-FOURTH FEE, it wasn't until after that last desperate letter went unanswered that an action was filed by the plaintiff.

On cross examination defendant stated:

Mr. Sohm: Q. "And you never did object to the fee I had put on those bills of one-fourth, did you?"

Mr. Winegar: A. "I don't believe that is a fair question."

OBVIOUSLY THERE WAS AN AGREEMENT OR, AT LEAST, DEFENDANT IS ESTOPPED FROM DENYING HE WAS OBLIGATED TO PAY ATTORNEY'S FEES BASED ON ONE-FOURTH OF THE JUDGMENT. The defendant's gripe seems to be that he did

not get good collection service (R. 10) but by that time the fee was already earned and often attorney's charge extra for collecting which plaintiff did not expect to do. Anyhow, plaintiff could never understand defendants impatience since checks came in regularly February, March, April etc.

## POINT II

PLAINTIFF SHOULD HAVE ATTORNEY'S FEE BASED ON THE BALANCE DUE - ONE-FOURTH OF \$2,163.00 OR \$540.80 AND NOT ON THE AMOUNT OF \$1,958.00 RECEIVED BY DEFENDANT SINCE IT WAS AN IMPROPER SETTLEMENT AND PLAINTIFF RECEIVED ONLY ~~NOT~~ \$2,500 AS LATER CLAIMED BY DEFENDANT.

Plaintiff had collected regularly and reasonably on schedule and a balance of \$2,163 was due from All Grain to plaintiff and defendant (Ex. 2-P p. 5) when defendant improperly and without permission of plaintiff settled for \$1,958 and collected that sum directly from All Grain with intent of beating plaintiff out of his fees.

The defendant admitted plaintiff had received only \$2,000 in his answer (R. 10) but at trial to the complete surprise of plaintiff came up for the first time with a claim he had paid plaintiff \$2,500 and offered Exhibit 13-D which plaintiff objected to (R. 9) and testified he had not received \$1,000 on August 9th. The August 9th entry has been obviously erased and changed, the last total entry in that column has also been erased The proper entry on the August 9th line should be \$250 or possible \$500, not \$1,000. The August 9th entry is obviously the check No. 1151 dated August 15, 1973 at the bottom of Exhibit 13-D (R. 91). This was the only payment made by defendant to plaintiff and was made in response to plaintiff bill June 20, 1973 (Ex. 3-P p. 4). No checks were produced and a so-called check 1395 dated 12-9-73 for \$200 was denied, and obviously has nothing to do with this proceeding. A \$100 payment received by plaintiff shown in

Exhibit 7-D was applied to services in the General Electric matter referred

in the record p. 77 and p. 117. That \$100 was the only fee received in the G. E. matter.

### POINT III

THE LOWER COURT ERRORED IN NOT ALLOWING PLAINTIFF ATTORNEYS FEES ON THE SECOND CAUSE OF ACTION. THE EVIDENCE CLEARLY SHOWS PLAINTIFF IS ENTITLED TO ONE-FOURTH OF THE SUM OF \$1,780.57 (\$445.14) FOR ATTORNEY'S FEES IN ROTHE ESTATE COLLECTION.

About 13 years ago plaintiff represented defendant in filing a claim against the Estate of Kurt P. Rothe in Wasatch County. (R. 63, Ex. 2-P and 4-P). The plaintiff made at least two or three appearances in Heber City on the matter over a couple of years period (Ex. 4-P). Both plaintiff and defendant had given up and written the claim off. In February 1975 plaintiff received a notice (Ex. 5-P) offering defendant 80% or \$1,780.57 to settle his claims. Plaintiff contacted defendant and defendant agreed to the settlement (R. 64). Attorney's fees were not discussed but plaintiff received the checks (Ex. 4-P) added his name to it because of his difficulty recovering other fees and delivered the check to defendant and billed the defendant for \$445.14 (R. 64, Ex. 4-P). The plaintiff is entitled to attorney's fees based on one-fourth of the recovery because of the past practices between the parties of using one-fourth as the attorney's fee in collection matters as observed by the court, "He is going on the basis, I assume, that his regular fee had been one-fourth of what he collected, on this basis." (R. 63). In past practices charges were based on one-fourth of the recovery as attorneys fees (R. 60). It was also the fee that had applied in the All Grain case without objection (R. 62) as discussed above. The defendant was billed April 28, 1975 for the sum of \$445.14 (Ex. 4-P) right after the check for \$1,780.57 was delivered by plaintiff to defendant. No payment was made by defendant and no objection was ever received to the billing charge of one-fourth of the recovery despite

repeated demands by plaintiff. That no objections were received to the billing is shown by the desperation letter of plaintiff dated May 12, 1975 (Ex. 14-P).

#### POINT IV

THE COURT ERRORED IN NOT ALLOWING PLAINTIFF ATTORNEY'S FEE OF \$50.00 IN THE THIRD CAUSE OF ACTION IN THE FLINT AND WALLING MATTER. THE UNDISPUTED EVIDENCE CLEARLY SHOWS THE PLAINTIFF PERFORMED ADDITIONAL SERVICES FOR DEFENDANT FOR OVER TWO HOURS REASONABLY WORTH \$50.00.

The plaintiff was paid a check for \$455.00 for his services as shown on the page of Exhibit 6-P and page two of that exhibit shows two hours additional services billed as \$50 (Ex. 4-P) which was never paid (R. 65). The services were made necessary when defendant failed to pay Flint and Walling as agreed. Winegar was trying to stall for time and asked me to try to stall them off (R. 67, 68). I wrote to defendant August 7, 1974 enclosing a statement and an affidavit regarding default in the Flint and Walling Matter (Ex. 2-P p. 8). Defendant's office girl wrote back August 9, 1974 stating:

"With regard to the letter from Mr. Greenwood informing us that arrangements are to be made to pay the amount due, would you kindly inform him of the following: We do expect payment in the next two weeks from two or three large contracts for which we have received materials to complete, and we would offer \$5,500.00 by the 24th of August, approximately, with the balance in three payments within ninety days. If this does not satisfy the plaintiff, then we would ask your indulgence in defending us to this end, as we can only perform to this extent".

Obviously considerable extra services were performed and requested by defendant after the payment of \$455.00 on June 22, 1973. The \$50 fee was properly charged, well earned, never paid and never objected to.

The defendant stated several times that he was able to and would pay reasonable fees. (R. 94, 105) and did not contest the additional Flint and Walling bill (R. 104, 105).

#### POINT V

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A CONTINGENT FEE OF ONE-FOURTH IS AN ACCEPTABLE FEE AND IS REASONABLE.

Contingent fee arrangements have long been an accepted and are a very common method of applying attorney's fee. In 4A Pacific Digest 2nd Sections 147, 148 (1) 148 (2) and 148 (3) several pages refer to contingent fees and none of the many citations appeared critical of the contingent fee but discussed various problems connected with its application.

A contingent fee contract was upheld in the following California case when the court had to consider the circumstances surrounding the matter to determine the parties intent. *Houge v. Ford*, 285 P 2d 257.

"Contingent fee contract between attorney and client, when explained by reference to circumstances under which it was made and matter to which it relates, left no doubt as to its meaning, and statute providing that any possible doubts as to meaning of contract should be resolved against person preparing it was not applicable."

*Priester v. Citizens Nat. Trust & Saving Bank* 280 P 2d 835:

"Contract between attorney and client for the rendition of services construed as a whole, manifested the intent that one-fourth interest in all the properties described which were all the properties belonging to plaintiff would be the fee of the attorney if he were successful in defending plaintiff in an action brought against him by his mother to recover an apartment house."

The Utah Case, *Petrie v. General Contracting Co.*, 17 U 2 408, 413 P 2d 600, involved a client's action against an attorney who claimed a one-third interest in mining claims. The Supreme Court upheld the lower court in finding the client and attorney intended that the attorney was to receive a contingent fee of one-third of whatever was obtained from defendant. The court further held that:

"There is no question about the validity of a contract for an attorney's fee contingent upon recovery, which may be a share of it; nor that the same rules apply to it as to other contracts. Both the amount and the means of payment, whether in money or property, depend upon the agreement between the parties. In the event of uncertainty or ambiguity as to their intent, it may be divined from their conduct and the surrounding circumstances."



surrounding circumstances and conduct of the parties. Obviously in our case judging from past practices and the fact that attorney's fees were received based on twenty five percent over a nine month period without objection shows an agreement of the defendant to the one-fourth fee as well as an agreement on the reasonableness. If the courts found one-third reasonable in the above case certainly the arrangement between plaintiff and defendant for one-fourth was reasonable. The court goes on to observe that a client has a duty to be honest with his attorney as well as the lawyer to his client:

"In the circumstances here shown the fact that Mr. Tuft was plaintiff's attorney in the prior action gives him no less rights than any other associate would have had who had been assigned one-third of "whatever was obtained from the defendant." We are constantly hearing talk about the obligations of lawyers to be honest with their clients, which is correct and salutary. But it is also true that a client has a duty to be honest with his lawyer and that the latter's rights are equally entitled to be safeguarded by the courts."

"We are in accord with the view of the trial court that the reasonable deduction from the facts shown is that the parties intended that Mr. Tuft was to receive a contingent fee of one-third of whatever was obtained from the defendant, whether money or property. . . .".

Section 78-51-41, Utah Code Annotated 1953, states:

"The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgement in his client's favor and to the proceeds thereof in whosoever hands they may come, and cannot be affected by any settlement between the parties before or after judgement".

In the Utah Case, Bishop v. Parker, 103 Ut. 145, 134 P 2d 180, the Court held that compensation is governed by agreement, express or implied and is not restrained by law.

The Jones v. Martin California Case, 256 P 2d 905 held that  
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a contingent fee agreement vests attorney with an equitable interest in the



clients cause of action and a trust is created in the recovery for benefit of the attorney and that:

"neither client nor opposite party, if latter has knowledge of attorney's rights, can so compromise litigated subject matter as to defeat attorney's rights."

In Rader v. Thrasher, California, 368 P2d 360 the Court held a contingent fee contract may properly provide for larger compensation than would otherwise be reasonable.

A 1962 California case Setzer v. Robinson, 368 P2d 124, held as follows:

"Contingent fee agreement was not unconscionable where it provided for fee of one-third of recovery, with retainer paid at outset credited upon such one-third, even though defendant in case for which attorney was retained defaulted, in view of fact that parties could not tell in advance that default would occur and services might have included contested trial and possible appeal."

"Reasonableness of contingent fee is to be judged not by hindsight but by situation as it appeared to parties at time contract was entered into".

7 Am Jur 2nd § 214 states:

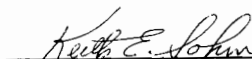
"Contingent fee contracts between attorney and client are recognized as valid unless obtained by fraud, mistake, undue influence, or suppression of facts on the part of the attorney, or unless the contract is contrary to public policy".

"§ 223 - The client cannot by settling, compromising, or dismissing a pending suit or action, without consent or over the objection of his attorney, deprive the attorney of compensation which the client agreed to pay."

WHEREFORE, plaintiff prays the lower court be reversed and Judgement be allowed for the plaintiff against the defendant.


Dated this 3rd day of January, 1977.

Respectfully Submitted



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Mailed a copy to counsel for defendant, Roger F. Cutler,  
602 East Third South, Salt Lake City, Utah this 4th day of January, 1977.

  
\_\_\_\_\_  
Keith E. Sohmn