2001

American Aggregate Corporation v. Otto Buehner and Company : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

AMERICAN AGGREGATE CORPORATION, a corporation,
Plaintiff and Appellant,

vs.

OTTO BUEHNER & COMPANY, a corporation, and PAUL BUEHNER,
Defendants and Respondents,

vs.

D. W. BRIMHALL,
Additional Defendant on Counterclaim, and Cross-Complainant.

Case No. 13478

Reply Brief of Plaintiff-Appellant

APPEAL FROM PORTIONS OF THE JUDGMENT OF THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH
HONORABLE GORDON R. HALL
TRIAL JUDGE PRESIDING

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REPLY ARGUMENT

I.

SINCE NEITHER BRIMHALL NOR RESPONDENTS BUEHNER HAVE APPEALED OR CROSS-APPEALED FROM ANY PORTION OF THE JUDGMENT AS MODIFIED, AND BRIMHALL HAS NOT FILED ANY

BRIEF, DEFENDANTS-RESPONDENTS HAVE NO STANDING TO ARGUE THAT BRIMHALL HAD ANY GREATER RIGHT THAN TO BE PAID A FIXED FEE PER TON FOR MINING AND CRUSHING SERVICES.

Plaintiff has appealed from only paragraphs 1 and 6 of the judgment, which dismissed plaintiff's complaint with prejudice and which denied plaintiff interest and costs. No one has appealed from any portion of paragraphs 2 to 5 of the judgment, as modified by court order October 15, 1973. As specified by paragraphs 4 and 5 of the judgment as amended after hearing on motion:

> "4. By reason of the settlement agreement made between plaintiff AMERICAN AGGREGATE CORPORATION and D. W. BRIMHALL on July 9, 1970, D. W. BRIMHALL became entitled to $7.25 per ton *instead of $10.00 per ton for mining and crushing services* on all tonnage shipped to defendant OTTO BUEHNER & COMPANY totaling 5,172 tons, less a credit of $29,000.00 collected by D. W. BRIMHALL on the first 4,000 tons shipped to defendant OTTO BUEHNER & COMPANY in 1969 and 1970, leaving a balance of $8,497.00 payable to D. W. BRIMHALL computed at the rate of $7.25 per ton for the 1172 tons in excess of the first 4,000 tons, which amount shall be payable to him out of the money deposited or to be deposited in court by defendant OTTO BUEHNER & COMPANY.
>
> "5. Under said settlement agreement, as to

> said 5,172 tons, D. W. BRIMHALL was not entitled to $5,000.00 'move-in-costs' paid to him by OTTO BUEHNER & COMPANY, nor to make any other charge against plaintiff in excess of said $7.25 per ton." (R. 941, Ab. 143-144. Italics added).

As the judgment was originally prepared by counsel for defendants and signed before counsel for plaintiff had opportunity to file exceptions or objections, $37,149.00 was payable to Brimhall for crushing only (an excessive amount), and Brimhall was allowed to "retain as his separate property the $5,000.00 move-in-cost paid to him by OTTO BUEHNER & COMPANY." (R. 854, Ab. 142). The modification of the portion of the judgment as to Brimhall was made to conform to his own admissions made on deposition and at the trial that he was to be paid a fixed price of $10 per ton for mining and crushing services, and nothing in excess of that amount.

Inasmuch as neither Brimhall nor defendants-respondents have appealed from that portion of the judgment as modified, we believe they are precluded from collaterally assailing that portion of the judgment as modified. However, on pages 12 to 22 of their brief defendants-respondents argue their Point I:

> "The Court did not commit prejudicial error in finding that Brimhall was a 'joint venturer' with appellant and *as such was authorized to act as an agent* for appellant in entering into the purchase order agreement *for the sale of American Aggregate quartzite.*" (Italics added).

The statement itself impliedly acknowledges that the purchase order issued by Otto Buehner & Company to Brimhall *personally* with all sums payable *personally* to Brimhall, and nothing to plaintiff, was for aggregate owned by plaintiff-appellant American Aggregate Corporation.

On pages 14 to 19 of their brief, defendants-respondents quote some irrelevant conjectural testimony of Brimmhall, claiming that it "supports the trial court's finding of a joint venture." The "finding" was a conclusion unsupported by the evidence, and inconsistent with the judgment as modified. Defendants argue that such testimony (although inconsistent with Brimhall's admissions) shows that there was some "agreement" prepared by counsel for plaintiff, but not signed, which would have allowed Brimhall $10 per ton for crushing services alone, *plus "division of the profits."* The officers of plaintiff denied there ever was any such "agreement" oral or written, but only an oral agreement to pay Brimhall, the independent mining and crushing contractor a fixed fee of $10 per ton when the aggregate was sold and the money collected. Inasmuch as Brimhall testified that the going rate was only $7 per ton for those services the $10 per ton included not only a profit within the $7, but also an additional profit of $$3 per ton. Obviously, no lawyer representing plaintiff would have drawn any kind of "agreement" so one-sided in favor of Brimhall, to allow him to reap the normal profit within the going rate of $7 per ton, plus the $3 per ton extra profit, and then

also a "division of the profits" without even permitting American Aggregate Corporation as the owner to recover all of its costs and expenses. Brimhall's own admissions on deposition and on cross-examination, refuted such fantastic unconscionable claims.

"The rule is that the testimony of a witness is no stronger than where it is left on cross-examination." Oberg v. Sanders, 111 Utah 507, 518, 184 P. 2d 229. This applies not only to the admissions made by D. W. Brimhall, but also to those made by defendant Paul Buehner and other witnesses for defendants and for Brimhall. By self-serving declarations and hearsay, defendants attempted to make Brimhall an "agent" of plaintiff; but they want this Court to overlook the fact that *defendants induced* Brimmhall to sign acceptance of an outrageous purchase order (Exhibit 19-P) in the name of D. W. Brimhall personally for the sale of plaintiff's aggregate not only below plaintiff's costs at a figure dictated by defendants, but with all payments therefor solely to Brimhall, with nothing payable to plaintiff as owner. Brimhall was thereby acting adversely to plaintiff as owner of the materials.

The sworn admissions of Brimhall included: (a) As a licensed independent contractor, in 1967 Brimhall made an oral agreement with American Aggregate to move into plaintiff's quarry and mine and crush plaintiff's white quartz aggregate at his own convenience with his own equipment and employees at his own expense. (R. 209, 566-568, Ab. 27, 80). (b) He said

he was to receive $10 per ton when the material was sold. (R. 250, Ab. 33). That $10 included "whatever was necessary to get it into a finished product", including removing overburden, mining, crushing, moving equipment, wear on equipment, etc. (R. 214-216. Ab. 28). (c) The $10 per ton included his anticipated *profit* (R. 605-606, Ab. 86-87), for that type of operation was then generally contracted at the rate of $7 per ton. (d) He was to be paid the $10 per ton when American Aggregate sold the aggregate and collected the money. (R. 278-279, Ab. 36). (e) He never was paid anything in excess of $10 per ton (even when the sale price was the regular price of $35 per ton).

Defendants argue on page 12 that Don Reimann, (vice-president), prior to the time defendants issued the purchase order to Brimhall, Exhibit 19-P, told Buehner "to deal with Brimhall, work it out with Brimhall"; but Don Reimann testified that he told Buehner he could deal with Brimhall as to *sizes,* not as to prices. (R. 365-366, Ab. 48). No reasonable person could believe that when the Reimanns owned the aggregate which had been specified by the architects, and the samples from plaintiff's quarry had been approved by the architects, that plaintiff would consent to allow a competitor to dictate the price at which plaintiff would sell, or o delegate that function to the crushing contractor. It is undisputed that Paul Buehner asked plaintiff for quotations which recognized plaintiff's ownership. Plaintiff quoted $29.50 per ton delivered, for selected sizes.

Buehner admitted that he told Don Reimann that the quoted price was "too high." When Buehner represented that he could get the same material or similar material for $19.50 a ton from a man named Chidester, Don Reimann replied that "they couldn't get that material *unless they stole it from us.* It was specified on the job." Buehner then threatened to substitute other material if he could not get the plaintiff's aggregate at his own price, but Reimann said he had talked to the architect and that the architects would not allow any substitution. Plaintiff refused to lower the quotation. (R. 335-339, Ab. 42-43).

Paul Buehner used Brimhall to negotiate for him and to act as his tool or agent, as demonstrated by Paul Buehner's own admissions. Buehner testified (a) He asked Brifhall to talk to Don and Rich Reimann and see if they would lower the price. (R. 44-48, Ab. 6-7). (b) Buehner then told Brimhall he planned to take all sizes known as "crusher run." That representation was utterly false, as Buehner intended to take selected sizes. Buehner had Brimhall go back and forth to the officers of American Aggregate several times. (c) Buehner told Brimhall to tell Don Reimann that the price was too high, and that he had better lower the figure. (d) When Brimhall returned with a quotation from plaintiff of $25.50 for "crusher run", per ton, and stated it was the lowest price American Aggregate would take, Buehner said, *"No deal."* (R. 49-50, 140-142, Ab. 7, 19). Although Buehner said he did not know what the agreement was between American Ag-

gregate and Brimhall, he told Brimhall that if Brimhall did not sign with him he was going to have a substitution and give a purchase order to Chidester. Buehner offered $5,000.00 "move-in-cost" to sign a purchase order for $20.50 a ton, and Brimhall signed Exhibit 19-P soon afterwards, on October 17, 1969, with the understanding that the Buehners were going to take "crusher run". Exhibit 20-P stated that the purchase order was for "selected sizes," (not crusher run). (R. 222-225), 608-610, 632, Ab. 30, 88, 92). Obviously, neither Brimhall nor defendants sent American Aggregate Corporation a copy of such putative purchase order.

While defendants argue that plaintiff was bound by the acts of Brimhall, under a theory of a joint venture, the claim of joint venture contradicts the admissions of Brimhall that he was to be paid a fixed fee of $10 per ton, and the judgment as modified specifies that plaintiff is not liable for any additional charges than the $7.25 per ton agreed on in the settlement made July 9, 1970, when the figure was scaled down from $10 per ton. If Brimhall acted as "agent" for any one, it was for the benefit of the defendants to unjustly enrich defendants to the financial loss and detriment of plaintiff.

II.

THE BUEHNER DEFENSE OF "RELEASE" WAS SPURIOUS, SINCE PLAINTIFF NEVER EXECUTED ANY RELEASE, AND PAUL BUEHNER'S ADMISSIONS ON

DEPOSITION PLUS ADMISSIONS ON CROSS-EXAMINATION, PLUS DEFENDANTS' OWN DOCUMENT, EXHIBIT 40-P, DISCREDITED BUEHNER'S TESTIMONY BOTH AS TO "RATIFICATION" OF ANY $20.50 PER TON PRICE AND "RELEASE".

On pages 22 to 24 Respondents argue that Appellant "ratified" Exhibit 19-P (the purchase order issued by Otto Buehner & Company to D. W. Brimhall *personally*) as to $20.50 per ton for the aggregate. It is claimed that on May 29, 1970, Paul Buehner had a telephone conversation with Don Reimann. Buehner said he "refreshed his recollection" by referring to a diary, for May 29 and June 3, 1970. He testified that Don Reimann said "we would accept the price on the aggregate which has been discussed", and he "would like to have us help him with the use of our models and molds on the oxen (for two temples) at the reduced price." Buehner tied the said "agreement" as to the "aggregate" price to the "agreement" for the molds of the oxen. Such testimony was offered in support of the challenged defense of a purported "release" by plaintiff American Aggregate Corporation to Otto Buehner & Company.

Independent of the fact that a lot of self-serving entries are made in diaries, even by criminals, the defense was sham, as illustrated on cross-examination. The transaction relating to the molds for oxen for the Ogden and Provo Temples, was not negotiated with plaintiff at all, but with *Style-Crete, Inc.,* an entirely

separate corporation from American Aggregate. Exhibit P-40 dated March 18, 1971, was prepared by Otto Buehner & Company. It makes no reference whatsoever to the aggregate owned by American Aggregate Corporation. Paul Buehner's direct examination was destroyed on cross-examination.

On cross-examination Paul Buehner admitted that no purchase order ever was issued in the name of American Aggregate Corporation for any of the aggregate hauled away from plaintiff's leasehold in Box Elder County to the Otto Buehner & Company plant in Murray during 1969 and 1970. If there had been an "agreement" with plaintiff to "ratify" a price of $20.50 per ton, (which was below plaintiff's costs), Otto Buehner & Company certainly would not have neglected to issue a *purchase order* and have plaintiff sign it. Exhibit 40-P, instead of showing generosity on the part of Otto Buehner & Company to plaintiff it showed that Otto Buehner & Company was going to get the finished molds from ***Style-Crete, Inc.,*** (not from American Aggregate Corporation) which were worth thousands of dollars, according to the testimony.

The pleaded defenses of "release" and "ratification" were spurious. The proffered testimony in support thereof, was destroyed on cross-examination.

Paul Buehner did not offer any testimony to contradict the following testimony of Richard C. Reimann, president of plaintiff corporation: Buehner called Reimann about a month after the meeting of May 1, 1970, and asked for a quotation several hundreds tons of

aggregate for the B.Y.U. job, and Reimann quoted the regular price of $35 per ton. (R. 459-460, Ab. 63). About the same time, Marv Allred, plant superintendent for Otto Buehner & Company, called Don R. Reimann for a quotation and also was quoted $35 per ton. That testimony was not rebutted. No purchase order was issued, but plaintiff subsequently discovered that its aggregate continued to be hauled away. Plaintiff was frustrated in its attempts to get any weigh tickets or accounting from either Otto Buehner & Company or its contract-carriers Clark Tank Lines and Christensen Feed & Seed.

III.

DEFENDANTS-RESPONDENTS POINT TO NEITHER PROOF NOR ADMISSIONS OF ANY "RATIFICATION" BY PLAINTIFF-APPELLANT OF THE BRIMHALL PURCHASE ORDER, NOR TO ANY POSSIBLE "PROOF" THAT PLAINTIFF MADE ANY "PROFIT" IN THE TRANSACTION.

On page 24 it is argued that there was a "ratification" of the Brimhall purchase order (Exhibit 19-P). However, respondents cite no evidence to support such contention. They make the unwarranted contention that counsel for appellant "argues" that "such ratification by his clients was illegal because it violated the Unfair Practices Act." That is a misquotation. There never was any admission of "ratification." Appellant contended that even *if* there had been an attempted rati-

fication, which there was not, it would have been against public policy and void under the Unfair Pratices Act, Secs. 13-5-3, 5, 6, 7, 8, 13, 15 and 17, U.C.A. 1953, because the Brimhall sale of plaintiff's materials was below plaintiff's costs. Plaintiff also contended that it would have been illegal under the statute prohibiting price-fixing, restraint of trade and monopoly, Secs. 50-1-1, 2, 3, 6 and 10, U.C.A. 1953. Buehner admitted that plaintiff was a competitor of Otto Buehner & Company in the aggregate business.

There is no basis for the argument on pages 24 and 25 of the Brief of Defendants-Respondents that plaintiff-appellant made any "profit" from either crushing or hauling. Plaintiff admittedly hauled only 259 tons to defendant Buehner company plant, at the request of defendant corporation. As to the 4,000 tons of plaintiff's aggregate wrongfully sold under the Brimhall purchase order, Otto Buehner contracted the hauling thereof to Clark Tank Lines for $7.55 per ton, Exhibit 5-D. Plaintiff had nothing to do with Clark Tank Lines, and did not see such Exhibit 5-D until the time of trial. Plaintiff could not possibly have profited from that hauling which was under the control and management of Otto Buehner & Company and its contract carrier and subcontractor Christensen Feed & Seed.

On pages 10 and 11 a small portion of the testimony of Gaylen Christensen is quoted to the effect that Don Reimann did not tell that subcontractor of Clark Tank Lines not to deliver any more aggregate, but

told the witness to continue hauling. Such quoted testimony was not merely contradicted by Don Reimann, but even destroyed on cross-examination of Christensen and of his employee which showed that Don Reimann called to find out how much tonnage had been hauled from the quarry which had gone over the Christensen Feed & Seed scales; and that false information was given to Reimann as to the quantities. Clark Tank Lines had been told to stop hauling from plaintiff's quarry as early as February 1970. Both Clark Tank Lines as Buehner's contract carrier and Christensen as subcontractor, when they ultimately furnished information, gave false and misleading information showing lesser amounts than actually hauled, as illustrated by Exhibits 7-P, 21-P and 28-P. Except for an understatement of tonnage on June 16, 1970, Exhibit 25-P, defendants gave plaintiff no information directly at all until shortly prior to filing suit in 1971. Defendants withheld weigh tickets and an accounting, which had been promised in the conference of May 1, 1970. Defendants hindered and delayed plaintiff and counsel in getting accurate information as to tonnage of plaintiff's materials hauled away, and some of that information was not obtained until the time of trial.

Typical of misstatements of the evidence, on page 2 of their brief respondents contradict the admissions made by Brimhall, by representing that Brimhall and plaintiff American Aggregate Corporation "had a *joint interest* in crushed white quartzite *which had remained substantially unsold* for three or four years."

Brimhall admitted that he had only a right to collect $10 per ton for mining and crushing under an oral agreement made in 1967. Only two years later, on October 17, 1969, he signed Exhibit 19-P at the request of Paul Buehner. There were sales of said aggregate in 1967 and 1968, including sales to Otto Buehner & Company at $35 per ton (Exhibit 4-P). Brimhall admitted receiving payments in 1967 and 1968, never in excess of $10 per ton. Defendants objected to Exhibits 31-P and 51-P showing payment to Brimhall January 31, 1968, and the trial court sustained objection on the ground that such exhibits did not relate to any issue in this case. After having such evidence excluded, respondents resort to misleading generalities, such as the unfounded contention on page 30 that "there were approximately 5000 tons of crushed material which neither Appellant nor Brimhall had been able to sell for three or four years."

Independent of such exaggeration and unfounded argument, Brimhall never attempted to make any sale until Paul Buehner induced him to sign purchase order 19-P in his own name for the sale of plaintiff's materials. Apparently, the respondents want to create the impression that so much time had elapsed since a sale had been made, that Brimhall was justified in some manner in accepting $5,000 "move-in-cost" from Otto Buehner & Company as an inducement to sell in his own name with all proceeds payable to himself, plaintiff's aggregate not only below the lowest price plaintiff said he could sell without "going in the red", but

below plaintiff's costs. Brimhall not only admitted he had no authority to sell, but in March 1970 when Paul Buehner asked him for a price on 700 additional tons for *another job*, Brimhall stated that he had exceeded his authority and that the Buehners had to deal with American Aggregate Corporation. (R. 233-234, Ab. 31-32).

By amended counterclaim defendants pretended that they had obtained too much aggregate. They sought to charge plaintiff with the fictitious claim for damages for defendants' own wrongful acts in inducing Brimhall to sign Exhibit 19-P. Although Otto Buehner & Company had contracted with Clark Tank Lines to haul plaintiff's materials out of plaintiff's quarry to complete the process of converting plaintiff's goods to the use and benefit and unjust enrichment of plaintiff's competitor Otto Buehner & Company, defendants attempted to make plaintiff responsible therefor. Plaintiff had refused to sign or endorse said putative Brimhall purchase order when its officers saw it about May 1, 1970, and had refused to ratify it. At the trial, defendants contended in defiance of the Statute of Frauds and in violation of the Parol Evidence Rule that Exhibit 19-P should be construed not only as a document binding on the plaintiff as the victim of fraud and illegal price-fixing, to enable defendant Otto Buehner & Company to have aggregate at $20.50 per ton for the church office building job, but in addition that such document should be construed (or amended in effect) so that instead of relating exclusively to the church

office building project, referred to in Exhibit 19-P, it would extend to any an every other job to enable Otto Buehner & Company to take any quantity of plaintiff's aggregate at defendant's dictated below-cost-price of $20.50 per ton.

Knowing that plaintiff refused to sign or endorse Exhibit 19-P, on page 25 of their brief respondents make the unwarranted argument that appellant

> "is trying to convince this court that a seller can enter into a contract below cost and after delivering the full amount of the product, repudiate its agreement and recover on the theory that its violation of the law excuses its performance."

Plaintiff-appellant did not execute any contract with defendants Buehner, so plaintiff did not repudiate any "contract." Plaintiff quoted prices for its material as it had the legal right to do, and refused to lower its prices to a below-cost figure demanded by its competitor. Defendants well-knew they had to obtain those materials from plaintiff's quarry to comply with the contract Otto Buehner & Company had made with the general contractor and with the Church as owner. Otto Buehner & Company was quoted the price of $29.50 per ton for aggregate of selected sizes for a quantity of 4,000 tons, and it had that figure in submitting its bid.

Contrary to the argument of respondents, plaintiff corporation only delivered 259 tons (at the request of defendant's agents) out of a total of 5,172 tons. Except for the 259 tons delivered by plaintiff for various jobs, the defendant Otto Buehner & Company helped itself

to plaintiff's aggregate by contracting the hauling of 4,000 tons to Clark Tank Lines, Exhibit 5-D. Plaintiff never repudiated any agreement because the Buehners refused to make an agreement with plaintiff. They were determined to circumvent the plaintiff by their price-fixing scheme by giving a purchase order to Brimhall, which he subsequently admitted he had no authority to sign. Defendants made Brimhall their agent and tool in a price-fixing scheme, to defraud plaintiff. When officers of Otto Buehner & Company asked plaintiff for quotations on other jobs and were given quotations of $35 per ton because of the size of the order did not warrant a lower quotation, the Buehners did not issue a purchase order to plaintiff. They knew they could not get plaintiff to sign a purchase order at their dictated below-cost prices, so Otto Buehner & Company continued to haul away plaintiff's materials behind the backs of plaintiff's officers.

Respondents' argument that the Unfair Practices Act and the statute against price-fixing are "not applicable to a seller who repudiates his own contract", is not in point since plaintiff never made a contract with defendants. Over objections of counsel for plaintiff, overruled by the trial court, defendants were permitted to introduce all kinds of incompetent evidence which was objectionable both under the Statute of Frauds Sec. 25-5-4 (1), U.C.A. 1953, and under the Parol Evidence Rule.

The trial court was led into prejudicial error of making in effect a contract between plaintiff and Otto

Buehner & Company to which plaintiff never assented, and to which plaintiff refused to assent because it imposed on plaintiff an obligation contrary to law to allow its competitor to take plaintiff's aggregate not only below plaintiff's quoted prices, but at defendants' dictated prices below plaintiff's costs to plaintiff's damage and detriment and for the unjust enrichment of plaintiff. The trial court by implication allowed Otto Buehner & Company to have aggregate at defendants' dictated price of $20.50 per ton, not only for the church office building job, but for other jobs not even referred to in Exhibit 19-P.

The respondents who were the beneficiaries of such illegal price-fixing and unfair trade practices now have the audacity to ask this Honorable Court to affirm such judgment in disregard of the plain interdiction of the statutes, and in disregard of the constitutional rights of plaintiff.

The unconscionable attitude of defendants was manifested when Otto Buehner & Company in December 1969 refused to talk to plaintiff's officers, but told them to get in touch with Brimhall, apparently knowing he was leaving town. Then when no purchase order was issued to plaintiff and in February 1970 when plaintiff's officer asked the Buehner office manager when plaintiff was going to be paid for its aggregate taken by the Buehner company, plaintiff received the curt reply, "You are not going to be paid." Otto Buehner & Company wrote Exhibit 19-P so that all money would be paid solely to Brifhall. Brimhall collected all

the money in his own name until June 29, 1970. None of defendants' arguments can erase their unconscionable misconduct.

IV.

THE UNITED STATES DISTRICT COURT HAS NO JUDICIAL POWER TO OVERRULE THE DECISIONS OF THE SUPREME COURT OF UTAH, NOR TO ISSUE SOME INTERPRETATION OF A UTAH STATUTE BINDING THIS COURT.

On pages 25 to 28 of their brief, respondents cite and quote from a memorandum decision on the liability phase of a case in the United States District Court. No judgment has been entered. There has merely been a determination of liability under Federal statutes affecting interstate commerce. It is immaterial whether the Utah statutes are inapplicable in a Federal court case involving price-fixing and monopoly or other unfair practices in interstate commerce. The case before this Court involves State statutes and intrastate commerce.

With all due respect to the United States District Court ,it has no power to overrule the decisions of the Supreme Court of Utah relating to State statutes, nor to issue any interpretation of a Utah statute which would be binding on this Court.

Respondents apparently confused the trial court in arguments which impugned directly or indirectly the constitutionality of the Unfair Practices Act and the

Utah statute against price-fixing combinations in restraint of trade. However, it appears that whatever claims respondents made in the lower court, they have abandoned such argument and are not now challenging the constitutionality of either set of statutes. Consequently, there is no need to defend the constitutionality of either statute. Respondents are saying that those statutes are not applicable in this case and misstate the facts in an argument designed to make those statutes inapplicable. Respondents are indeed desperate for argument when they have to look for some memorandum in a Federal case in which there is no judgment entered, in an attempt to tell this Court that it ought to follow the decision of the lower Federal court.

CONCLUSION

Appellant respectfully submits that respondents have not met any issue squarely, but have misstated the evidence and omitted reference to all of respondents' as well as Brimhall's admissions, and that plaintiff-appellant should have the relief as requested in the Brief of Plaintiff-Appellant.

Respectfully submitted,

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