

1979

Karl Winsness and Associates, A Partnership v. M.J.
Conoco Distributors, Inc., A Utah Corporation :
Defendant-Respondent's Petition For Rehearing
and Brief In Support thereof

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

KARL WINSNESS AND ASSOCIATES, :
A Partnership, :

Plaintiff- :
Appellant, :

vs. :

Case No. 15501

M. J. CONOCO DISTRIBUTORS, :
INC., A Utah Corporation, :

Defendant- :
Respondent. :

DEFENDANT-RESPONDENT'S PETITION
FOR REHEARING AND BRIEF IN SUPPORT THEREOF

Appeal from the Judgment of the Third Judicial District Court
In and for Tooele County, State of Utah,
Honorable Peter F. Leary, District Judge

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FILED

MAR 26 1979

Clerk, Supreme Court, Utah

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DEFENDANT-RESPONDENT'S PETITION
FOR REHEARING AND BRIEF IN SUPPORT THEREOF

PETITION FOR REHEARING

Comes now the Defendant, M. J. Conoco Distributors, Inc., acting by and through its attorneys Allen H. Tibbals and Michael Z. Hayes of the law firm of Tibbals and Staten, and under and pursuant to Rule 76(e)(1) Utah Rules of Civil Procedure, petitions this Court for a rehearing or a modification of the decision of this Court in the above captioned matter for the reason and upon the grounds that:

1. This Court failed to accord to the proceedings before this Court, due process in that:

a. The Court has rendered its decision acting on an erroneous fundamental premise which is not supported in the record or the briefs of either party, to-wit, that "The service station at issue in the litigation was owned by the Plaintiff-Appellant." (Opinion Justice Stewart dated March 6th, 1979, first sentence.) The opinion continues, "Plaintiff leased the station to Defendant. . ." This also is not a fact and cannot be supported from either the briefs or the record. These erroneous assumptions color the entire decision of the Court.

The fact as shown by the record and briefs of the parties show without contradiction that the station was built by Defendant-Respondent in 1972 and at all times was and now is owned by Defendant-Respondent M. J. Conoco. (R15,36,119,5, Respondent's Brief page 1,3) Under the assumption made by the Court, the capital at risk in the venture and the relationship between

the parties is entirely at variance from the actual facts with which the District Court dealt.

b. This Court acted peremptorily at the hearing before the Court, ordering the Defendant-Respondent to proceed first in the argument before the Court stating that it did so, as voiced by Chief Justice Crockett, who said in essence that this case was before the Court on appeal from a summary judgment based upon motion supported by affidavit which the Court did not favor and the Court believed therefore that this placed the weight of persuasion upon the Respondent to show cause why the Court should not reverse the decision of the lower court inasmuch as there appeared to be factual issues disputed. Even when Respondent brought to the attention of the Court that this was erroneous and that, in fact, the matter was before the Court on appeal from a directed verdict granted by the Court on motion of Defendant-Respondent after four full days of trial and one-half days of argument before the court sitting with a jury, and that the Court had granted the directed verdict because of the failure of the plaintiff to prove its case, the Supreme Court nevertheless compelled the Defendant-Respondent to go forward first with its argument and refused, at the close of argument, to allow the privilege usually accorded the Appellant of a rebuttal to the argument of the Respondent. We believe this to be a significant departure from established procedure having an impact on

the decision of the Court because the Court has incorporated into its opinion, unrefuted statements made in the oral argument by counsel for the Appellant which, had the Respondent been accorded its opportunity to respond to the Appellant, would have been properly refuted. By so altering its procedure and by failing to examine the record with sufficient care to ascertain even the fundamentals of the ownership of the property involved and the nature of the contract between the parties, the Defendant-Respondent has not had due process or a fair and impartial hearing before this Court which is the right of the Defendant-Respondent under the laws and the Constitution of this State and of the United States. As a result thereof, the Defendant-Respondent is confronted with a determination by this Court that the Appellant owns the service station and that the agreement between the parties is a lease thereof. This confronts the Defendant-Respondent with an unconsciounable burden on retrial and the peril that the unsupported and incorrect statement of this Court may be alleged to be Res Judicata and binding on parties to this litigation.

2. The decision of this Court ignores the established rule that it is the Plaintiff's burden to establish his primae facia case as to the existence of an actual breach of contract and damages resulting to the Plaintiff therefrom by credible evidence which would hold to the minimum, speculation by the jury

acting under accepted standards and the guidance of the Court's instructions.

After four full days of trial devoted exclusively to the Plaintiff's presentation of his evidence and after the Plaintiff had rested, the trial judge recognized that there was not sufficient credible evidence to present to the jury as to either the breach of contract as claimed by the Plaintiff, nor as to any measurable damage resulting to the Plaintiff. The action of the lower court in giving the directed verdict was taken after prolonged argument by counsel and due deliberation by the Court. The serious deficiencies in the Plaintiff's case were carefully evaluated by the lower court and the Court's action is entitled to the respect long recognized as due the action of the lower court which has the opportunity to evaluate the testimony of the witnesses, their conduct on the stand, validity, the quality of the evidence presented and the nature of the presentation. The opinion of the Supreme Court ignores the existing standards by which the lower court acted and gives no new guidelines on which a retrial can be based.

Defendant-Respondent submits herewith its Brief in Support of the within Petition in accordance with the Rules of Civil Procedure in such cases made and provided.

BRIEF OF PETITIONER

Point I

BY FAILING TO EXAMINE THE RECORD BEFORE IT IN THE INSTANT CASE WITH SUFFICIENT CARE TO BE APPRISED OF THE FUNDAMENTAL FACTS UPON WHICH THIS LITIGATION IS BASED, THIS COURT HAS MADE AN ERRONEOUS FINDING CONCERNING THE OWNERSHIP OF THE SERVICE STATION AND THE NATURE OF THE AGREEMENT BETWEEN THE PARTIES WHICH, IF NOT CORRECTED, COULD BE CLAIMED TO HAVE MADE THESE MATTERS RES JUDICATA AT THE REHEARING OF THE CASE, THUS IMPOSING ON DEFENDANT AN UNFAIR AND UNCONSCIONABLE BURDEN AND DEPRIVING DEFENDANT-RESPONDENT OF A FAIR TRIAL AND DUE PROCESS.

The introductory statement of the Court's official opinion filed in this case March 6th, 1979, is as follows:

"The Plaintiff below and Appellant here (hereinafter or sometimes "Lessor") owns a gasoline service station on the interstate highway between Salt Lake and Wendover at an isolated location known as 'Delle' about 53 miles west of Salt Lake City. Plaintiff leased the station to Defendant. . . ."

This is not the fact. The record shows, (TR pp36&37, Exhibit 6) as do the briefs of the parties, that the service station, subject matter of the controversy and litigation, was built by the Defendant-Respondent, M. J. Conoco, at its expense, was owned by the Defendant Company at all times and is still owned by that Company.

The Court's decision erroneously states that the service station is owned by the Plaintiff-Appellant rather than the

Defendant-Respondent. This error is extremely prejudicial to the Defendant in that it is a judicial determination as to the ownership of the service station and could, therefore, be considered as Res Judicata at the retrial of the case. Defendant-Respondent respectfully submits that this fundamental error requires either that Defendant-Respondent be given the opportunity of a rehearing in the Supreme Court on this matter or, at least, that the opinion of the Court be amended to correct the mistatement of fact concerning the ownership of the service station and to show that the agreement of the parties was not a lease of the service station, but of the land on which the station was built by M. J. Conoco, Defendant-Respondent, and at all times the owner thereof.

It was always the risk capital of M. J. Conoco that was involved in the building and operation of the service station, not that of the Plaintiff-Appellant. The error in this fundamental concept colors the entire opinion of this Court and the failure to ascertain this fact from the record which is replete with reference to the fact that the station was built and owned by M. J. Conoco, is not due process and deprives the Defendant-Respondent of a fair and impartial evaluation of the facts in this case and the law which should be applied thereto. It prevents a fair review of the lower court's action, for that Court, at all times, recognized that ownership of the station was in Defendant-Respondent.

The law of property has long recognized that one's failure, if it can be found that there was such a failure, to operate or to employ his own property to the best advantage, constitutes a far different legal wrong than to fail to operate or to manage the property belonging to another properly and in accordance with contract. In fact, conduct in the handling, management and control of property entrusted to one by another, whether by lease or otherwise, may be a wrong when such treatment of one's own property would constitute no wrong whatever. Such is an important aspect of this case, for here the station had been built, the capital at risk and all of the responsibility therefore was that of the Defendant-Respondent, M. J. Conoco Distributors, Inc. It had built the station on land leased from the Appellant and fundamental to the concept of the relationship was that an equal or greater investment in a restaurant facility was to be made by the Plaintiff-Appellant to become a part of the total package which induced M. J. Conoco to make the investment for the service station. This reciprocal duty colored the entire transaction relating to the hours of operation, it being contemplated that the station and the restaurant together, in a 24-hour operation, would be an attractive thing at this location and would entice the public to patronize both the service station and the restaurant. Either alone had a much more hazardous and less likely chance of success and, in fact, were so isolated that

the singular operation of the service station alone, without the required restaurant facility, was an economic impossibility. These facts are clear from the reading of the record and were understood by the trial court at the time that he granted Defendant-Respondent's motion for a directed verdict.

Point II

THE TRIAL JUDGE CORRECTLY ACQUITTED HIS RESPONSIBILITY TO INTERPRET THE CONTRACT BETWEEN THE PARTIES REGARDING CONSTRUCTION OF A LAGOON. WITHOUT SHOWING ANY ERROR IN LAW OR ABUSE OF DISCRETION ON THE PART OF THE TRIAL COURT, THIS COURT HAS REVERSED THE TRIAL COURT RESULTING IN DEPRIVING THE DEFENDANT-RESPONDENT OF DUE PROCESS OF LAW.

The lower court recognized and applied the correct rule and measure of damages to the situation regarding the construction of the sewage lagoon as cited by this Court, namely:

"The measure of damages where there has been defective or incomplete performance of a construction contract is as set forth in the Restatement of Contracts, Section 346(1) 1932 as:

'. . . the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste; . . .'"

(Opinion of March 6, pg. 5) (Emphasis ours)

This point was raised in the Court below and Plaintiff refused to accept the Court's ruling. The Plaintiff insisted

that he was entitled to the monthly return he expected to receive on a restaurant facility which he, of his own volition, elected not to build. The argument on this point between court and counsel for Plaintiff is contained in the record. (Pgs. A-41 line 22 to A-45 line 25.)

Both the attorney for the Plaintiff-Appellant and the Judge recognized the facts testified to and even admitted by the Supreme Court in its decision that the lagoon could not be completed and made functional without the effluent from the restaurant. The lagoon could not be created or maintained without this effluent from an economic standpoint because the presence of water in the lagoon was essential to its maintenance. Water could only be made available by hauling it by truck. To haul water solely for the purpose of making the lagoon functional was economic waste. The lower court recognized this.

In view of the refusal of the Plaintiff-Appellant to abide by the decision of the Court and to make any effort to show damages as requested by the lower court, does this appellate Court have the right to ignore the situation and simply overlook the defiance of the Plaintiff-Appellant, and give him a further opportunity to again try to make his case, and still stay within the purview of due process. At some point the rights of the other litigant should be considered. We submit that by refusing to conform to the ruling of the Court and accept the measure of

damages which the lower court imposed correctly, according to the decision of the Supreme Court, the Plaintiff-Appellant is precluded from putting the Defendant-Respondent to the expense of a further trial on the same issues which were knowledgably and correctly ruled on by the lower court as shown by the record. Judge Leary correctly stated:

"And there isn't any reason in here that he couldn't have built a restaurant if he wanted to and he elected not to do so. And his reason for electing not to do so is that he claims that this man or the corporation breached the agreement and his damages that he is asking are based upon a decision that he made. It has nothing to do with what the Defendant may have done."

Obviously Judge Leary decided, after hearing all of the testimony at trial, that the contract required the Plaintiff to build his restaurant before he could complain that the sewage lagoons were not completed. It was Judge Leary's prerogative to weigh the testimony on this issue and make a decision which he did in fact do. The Defendant should not be compelled to retry this issue when Judge Leary has already made a judicial determination as to the construction of the contract which determination was not passed upon by the Appellate Court - simply ignored.

Point III

THE DECISION OF THE SUPREME COURT BY EXCUSING THE PLAINTIFF-APPELLANT FROM THE NECESSITY TO MAKE OUT A PRIMAIE FACIA CASE, THE STANDARD TO WHICH HE WAS HELD BY THE LOWER COURT IN ACCORDANCE WITH ESTABLISHED PRECEDENT, DEPRIVES THE DEFENDANT-RESPONDENT OF DUE PROCESS.

The burden of the Plaintiff in any action is to make a primaie facia case before he rests, which includes the necessary proofs from which, in a contract action, the breach of contract can be shown and the quantum of damages be reasonably determined. (Peoples Finance & Thrift Co. vs. Landis, 503 P2d 444, 28 U2d 392, also Koesling vs. Bosamalsis, 539 P2d 1043.)

The Plaintiff in four days of trial did neither. He presented some evidence that the service station in question was not open at a few given times. The duration or frequency of closure was not given in any manner, though it could have been had the Complaint been legitimate for the Plaintiff had employees in the area who could have kept track of the hours of closure if it was significant to do so. Under the status of the limited testimony available on closure of the station, how could the jury be instructed to determine the amount of time closed? Should the jury be allowed to go to the jury room, where they are not going to receive any further enlightenment than had been presented, and decide that the station was closed one day a week, two days a week, one hour a month, three hours, or whatever? There is

not one word of guidance from which the jury could logically make a finding as to the amount of time lost in the three year period of time involved in the litigation. It would be outright speculation with no guidance of any kind.

Secondly, there was absolutely no credible evidence to show that if the station was closed it affected the quantity of gasoline which would have been sold. No gallonage had been guaranteed. The Court was well aware that the Plaintiff was receiving a substantial land rental every month in excess of the reasonable value of this isolated land and that it had been paid without fail. Plaintiff relied on the testimony of a so called "expert" who admitted he had no actual knowledge of the operating conditions at the station, had never worked there, did not know anything about the traffic pattern except from a study which he misread and for which, (though admittedly the error was significant and plaintiff's counsel knew of the error) no effort was made to either offer corrective testimony or to rehabilitate the evidence. Despite this, the opinion of the Supreme Court is stated to be that the lower court should have allowed the jury to speculate as to the loss of gallonage sales. To do so is an abuse of due process and flies in the face of every case this Court has heretofore decided on the issue. The Court refers to the FEDECO case (23 U2d 306, 462 P2d 706 [1969]) as supporting the statement that "some degree of uncertainty is inevitable in

the damage determinations of the type involved in this suit." To be sure this is true, but since the writer tried and was attorney of record in the Fedeco case and is therefore thoroughly familiar with that case on both the original trial, the appeal and the retrial, the degree of uncertainty there was in no way comparable to this case and the case cannot stand for support of the *prima facie* case presented by the Plaintiff in the instant case. There was absolutely no uncertainty as to the breach of contract in the Fedeco case. The contract called for the delivery of a certain amount of leased space. The amount actually made available was known. The breach was clear and specific. There were issues as to whether the change had been consented to by the Plaintiff, but the claimed breach was not uncertain in any particular. The measure of the damages was the loss in sales resulting from the lack of space. Contrary to the situation in this case where absolutely no reliable evidence as to the gallonage which should have been sold or might have been sold in the subject station was offered, in the Fedeco case there was an actual traffic count of the number of people entering the building. There were comparative sales figures covering adjoining space during the exact time in question, there were figures showing the rate of increase in business of the other businesses in the same building during the same time. There were valid comparative studies showing the relationship

in sales volume between the type of merchandise offered by the plaintiff in that case and similar merchandise offered in adjoining space. The only speculation the jury was required to make in the Fedeco case was whether other factors regarding management policies of the particular plaintiff would make these figures which were offered inapplicable. Contrast that with the present case. No hours of failure of operation of the station has been shown. No sales figures of the station in question or any station in the vicinity during the period in question have been shown or offered. The only gallonage figures have been figures based on an Exhibit which covers a period more than two years prior to the questioned period, taken under circumstances that were admittedly totally different than the existing circumstances at the time of the alleged breach. There is no guidance from which the jury can make any computation. It is straight speculation. In the Fedeco case, the jury had a definite formula to apply to ascertain what might have been done without the breach. The only thing that could not be made relatively certain was the impact of the plaintiff's merchandising policies on these figures. A vastly different situation than confronted the lower court in this case. The lower court has correctly exercised its prerogative to take the case from the jury because the Plaintiff failed in four days of trial to make out the essentials of a prima facie case. The decision of the Supreme Court

points out no error of the lower court in making its ruling. It gives no guidelines or standards by which the Court can guide the jury in a retrial of the case. To impose on the Defendant-Respondent for a retrial under such circumstances is not due process and it is not justice. It simply gives the Plaintiff-Appellant another swing at the same ball which it missed the first time. Up to this case it has not been considered due process to give the Plaintiff three strikes before declaring him out. To rely on the "common sense of the jury" to make up for the imprecise proof of breach and of damages, as the opinion of this Court does (Opinion Pg. 4, last paragraph) in an area of life in which the average juror has no experience, namely service station operation at an isolated outpost, licenses abuse of the jury function.

Point IV

THE OPINION OF THIS COURT ADMITS THAT THE LOWER COURT MAY HAVE ERRED ON THE GROUNDS ON WHICH IT EXCLUDED EXHIBIT 35, A GALLONAGE TABLE, BUT CONTINUES TO RULE THAT THE EXHIBIT IS RELEVANT AND ADMISSIBLE. THE DEFENDANT-RESPONDENT ATTACKED THE FOUNDATION OF THE EXHIBIT ON OTHER GROUNDS WHICH STILL EXIST, AND WHICH MAKE THE EXHIBIT INADMISSIBLE, AND THE STATEMENTS MADE IN ORAL ARGUMENT WHICH RESPONDENT HAD NO OPPORTUNITY TO REFUTE AND UPON WHICH THE SUPREME COURT APPARENTLY RELIED IN RULING THE EXHIBIT ADMISSIBLE ARE NOT CORRECT. THE LANGUAGE OF THE COURT OPINION, IF ALLOWED TO STAND, WILL MEAN THE DEFENDANT-RESPONDENT IS CONFRONTED ON RETRIAL WITH AN EXHIBIT WHICH THIS COURT HAS STATED IS ADMISSIBLE WITHOUT EVER HAVING BEEN CORRECTLY OR PROPERLY ADVISED AS TO THE FOUNDATIONAL DEFECTS.

Plaintiff-Appellant had the opportunity at trial to establish relevancy of Exhibit 35 which he could not do. The facts are uncontested that Exhibit 35 represents gasoline sold at a different service station for the first six months of 1972. Under any standard heretofore recognized by this Court, this Exhibit is not admissible. We submit that to deprive the Defendant-Respondent of his right to object on that basis, deprives Defendant-Respondent of due process. The decision of this Court gives no guidelines as to what use can be made of Exhibit 35 at the retrial of this matter. As mentioned in the Court's decision, the Appellant does not argue about the inadmissibility of gallonage reports from other service stations, yet as the decision now stands, a new jury would be allowed to use an Exhibit that represents gallonage sold at a different service station under totally different circumstances, for over half the period covered by the Exhibit, which was more than two years prior to the period in question in the instant litigation. This Court has never heretofore allowed a jury to speculate as to damages through the use of figures representing sales at a different location under different circumstances occurring more than two years prior to the questioned period. Petitioner respectfully submits that Exhibit 35 is simply not capable of being applied to the factual situation in this case. The fact that the Court gave as its reason for excluding the Exhibit,

a reason other than foundational, should not deprive the Defendant-Respondent of the right to challenge the Exhibit on foundational grounds as was done (R135, L-3-13) and to have the Court rule thereon. The decision of the Appellate Court recites:

"The sales data of the Delle station for 1972, the last year the station was concededly in nearly continuous operation." (Opinion Pg. 3 1st paragraph)

These factual assumptions by the Court are not true as an examination of the Record shows. The lower court was aware of these deficiencies in the Exhibit as the testimony showing the deficiencies was given before that court.

Again, in this instance it was within Judge Leary's clearly defined prerogatives, as outlined by the Utah Rules of Evidence, to exclude this Exhibit when it was shown to him to in fact represent gallonage sold at a different service station and under very different circumstances.

Point V

THE CHANGE OF ESTABLISHED PROCEDURES BY THIS COURT WITHOUT NOTICE TO THE PARTIES AND WITHOUT ADEQUATE OPPORTUNITY TO PREPARE AND MEET THE CHALLENGE, CONSTITUTED AN ABUSE OF DUE PROCESS.

In this case, on the date of oral argument, when the case was called before the Court by the Chief Justice, and counsel for the Plaintiff-Appellant announced that he would

require in the presentation of his argument to the court a full 20 minutes, the maximum allowed by the Court for oral argument, the comments of the Chief Justice then made clear that this Court did not accord to this litigation much significance and felt that the matter did not merit that much time of the Court. Subsequently, when the argument was actually called for, the Chief Justice announced that, in the Court's opinion, the usual procedures of the Court should be reversed and in place of the Plaintiff-Appellant presenting his argument first and the Respondent being allowed to answer the same, by reason of the fact that this case was before the Court on a Summary Judgment granted on Motion and Affidavit, the weight of persuasion lay with the Defendant-Respondent for it appeared to the Court that there were factual issues which should have been determined on trial and that therefore, the Court wished the Defendant-Respondent to show to the Court for what reason the Court should not reverse the action of the lower court. As promptly as could be, counsel for the Defendant-Respondent advised the Court of its primary error, namely that this case was not before the Court on a Summary Judgment supported by Affidavit and based upon Motion, but was there after a week's full trial before court and jury wherein the Plaintiff had been unable to prove its case and the court had therefore entered a directed verdict because there was not sufficient proof to submit to the jury. Despite being noti-

fied and advised of its error, the Court nevertheless persisted in requiring the Defendant-Respondent to proceed with the oral argument.

In the argument made by the Plaintiff-Appellant, an attorney who was not party to the action in the lower court and who therefore spoke only from his understanding of the record and not from knowledge of what had transpired in the lower court, was permitted to make statements which were incorrect and which, had the Defendant-Respondent been allowed its ordinary position, would have been refuted in the argument of the Defendant-Respondent. When Defendant-Respondent, through its counsel, asked whether or not he was to be accorded some time in rebuttal as would be the case having assumed the argument position of the Appellant, the Court denied this privilege stating through the Chief Justice that the Court was going to adjourn for lunch and that unless there was something of critical importance that could be presented in one minute, there was nothing more that the Court desired to hear. This unusual procedure, contrary to the established procedures of the Supreme Court of the State of Utah for generations, fails to accord with the standards of due process recognized by the Constitution of the State of Utah and the Constitution of the United States. While the irregularity in procedure could perhaps be overlooked under normal circumstances, the fact that the Court was misled

by statements made by the counsel for the Plaintiff-Appellant which found their way into the Court's opinion in deciding the case and which are refuted by the record, lend significance and importance to the irregularity of the procedure.

CONCLUSION

Counsel for Defendant-Respondent feels compelled by duty and responsibility to the client, as well as by his obligation to this Court as a member of the bar of this Court, to attempt by this petition and supporting brief to bring to the Court's attention significant discrepancies between the facts related in the Court's decision, as the basis upon which it decided the case, and the actual uncontested and admitted facts as shown by the Record and briefs on file in the action. These fundamental errors have manifestly influenced not only the outcome of this case on appeal, but unchallenged and uncontested, they constitute a threat to the ability of the Defendant-Respondent to have fair and impartial treatment on a retrial of the case. These erroneous statements pose the hazard that they may be claimed to be binding, factual determinations by this Court and Res Judicata.

We respectfully submit to the Court that any litigant is entitled to have the Appellate Court evaluate the case starting from the same basic premise and admitted factual situations as the lower court had before it in taking whatever action the lower court took - particularly when the fact is as fundamental as the ownership of the property involved.

We believe that even in the unlikely event that this Court should be of the opinion that these factual errors could not change the Court's ultimate opinion, the Petitioner is entitled to have the decision of the Court corrected so that it contains a true and accurate statement of the admitted facts and on retrial, the Defendant-Respondent is not handicapped by being confronted with the necessity to try and overcome the impression created on the trial court by the errors in the decision sending the case back for retrial. We also believe that the Court should correct the decision wherein it would deprive the Defendant and Respondent on retrial of the right to challenge the Plaintiff-Appellant's proposed gallonage Exhibit for foundational defects. As pointed out, the language of the decision would seem to make this Exhibit admissible when the fact that foundational facts essential to this admission have never been ruled on by the lower court.

We humbly, sincerely, and respectfully beseech this Court to take cognizance of the plight of the Defendant-Respondent and accord to this litigant fair and just relief from the unequal and improper burden imposed by the Court's decision.

Respectfully submitted,

TIBBALS AND STATEN


ALLEN H. TIBBALS


MICHAEL Z. HAYES

MAILING CERTIFICATE

I hereby certify that I mailed 2 true and correct copies of the foregoing PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF to Craig Stephens Cook, Esq., Attorney for Plaintiff-Appellant, 3645 East 3100 South, Salt Lake City, Utah 84109, this ____ day of March, 1979, postage prepaid.

CERTIFICATE OF DELIVERY

I hereby certify that I delivered 2 true and correct copies of the foregoing PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF to THOMAS A. DUFFIN, Attorney for Plaintiff-Appellant, Suite 510, Ten Broadway Building, Salt Lake City, Utah, this ____ day of March, 1979.

Received two copies of the foregoing Petition this ____ day of March, 1979.

THOMAS A. DUFFIN