

1978

Robert ER. Anderson v. Dionne Bradley : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

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ROBERT E. ANDERSON,

Plaintiff and Appellant,

vs.

Case No. 15571

DIONNE BRADLEY,

Defendant and Respondent.

-----oooOooo-----

~~RESPONDENT~~ BRIEF OF RESPONDENT

-----oooOooo-----

Appeal from a Judgment of the District Court
of Salt Lake County
Honorable Stewart M. Hanson, Jr., Judge

-----oooOooo-----

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IN THE SUPREME COURT
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STATE OF UTAH

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ROBERT E. ANDERSON,

Plaintiff and Appellant,

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Case No. 15571

DIONNE BRADLEY,

Defendant and Respondent.

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REPLY BRIEF OF RESPONDENT

-----oooOooo-----

STATEMENT OF THE KIND OF CASE

This is an action for personal injury sustained by pedestrian in an auto/pedestrian accident.

DISPOSITION IN LOWER COURT

The case was tried before a jury which found plaintiff and defendant equally negligent, resulting in a verdict and judgment for the defendant.

RELIEF SOUGHT ON APPEAL

Defendant seeks affirmation of the lower court judgment and denial of Motion for New Trial.

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STATEMENT OF FACTS

On the evening of February 7, 1976, plaintiff was in the process of crossing Sunnyside Avenue at its intersection with Guardsman Way en route to the University of Utah and defendant was driving a 1971 Ford Matador automobile west on Sunnyside Avenue on her way to the Salt Lake City Public Library when they were involved in an auto/pedestrian accident.

Plaintiff was injured as a result of that collision; however, the question, nature or extent of his damages is not before this Court on appeal.

At trial, the case was submitted to the jury on a general verdict with special Interrogatories after all of the evidence was in. After some deliberation, the jury returned a verdict for defendant and judgment of no cause of action based upon its determination that plaintiff and defendant were equally negligent and responsible for the collision. This appeal results from that verdict and the lower court's denial of plaintiff's Motion for a New Trial.

ARGUMENT

THE JURY'S DETERMINATION THAT PLAINTIFF AND DEFENDANT WERE EQUALLY NEGLIGENT IS CONSISTENT BOTH WITH THE LAW AND WITH THE EVIDENCE PRODUCED AT TRIAL; AND THE LOWER COURT'S DENIAL OF PLAINTIFF'S MOTION FOR A NEW TRIAL WAS NOT AN ABUSE OF DISCRETION

A review of the evidence will show that reasonable men

could have come to the same conclusion as did the jury, to wit: that plaintiff and defendant were equally negligent and responsible for the accident. Certainly, it is the law in Utah that the verdict of a jury must not be set aside unless a reasonable man could not come to the same conclusion even when all of the evidence and inferences fairly derived therefrom are taken in a light most favorable to the prevailing party. See Porter v. Price, 11 Utah 2d 80, 355 P.2d 66 (1960). The verdict is protected by a bulwerk of rules best articulated in the auto/pedestrian case of Coombs v. Perry, 2 Utah 2d 381, 275 P.2d 680 (1954) as follows:

. . . First, by the general proposition that the judgment and proceedings in the lower court are presumptively correct with the burden upon defendant to show error. Second, where a trial judge has passed upon a question and a jury, presumably fair and impartial, has made a finding, while such is not controlling, it is at least entitled to some consideration and should not be wholly ignored in reviewing the situation and attempting to see, as objectively as possible, whether reasonable minds might so conclude. Third, that the court must review the evidence, together with every inference fairly arising therefrom, in the light most favorable to the plaintiff, and similarly, must consider any lack or failure of evidence in the same light, which we do in reviewing the facts here.

The most helpful expose¹ on the factors and elements to be considered in a case of this type on appeal is found in the case of Pollesche v. Transamerican Ins. Co., 27 Utah 2d 430, 497 P.2d 236

the fact to be such as will support the ruling which we are called upon to review; but if, after giving due consideration to the fact that the trial judge is better able to weigh conflicting evidence, the evidence be such nevertheless as to impel but one reasonable conclusion, and that as to the fact adverse to the ruling, it would be our duty as an appellate court to so declare, notwithstanding there might be some conflict in the evidence.

In Moser v. Zions Co-op Merc. Inst., [114 Utah 58, 65, 197 P. 2d 136 (1948)], this court stated that if reasonable minds could have found as the jury did from the evidence before it, then this court cannot say that the trial court abused its discretion in denying the party's motion for new trial on the ground of insufficiency of the evidence to support the verdict. [Emphasis added.]

In short, this Court held that it was the province of the jury to weigh the conflicting evidence and the credibility of the witnesses and to determine the questions of fact including the ultimate facts of negligence and causation. In that case, upon examination of the evidence as disclosed by the record it was apparent that there was a substantial conflict of evidence as to the material issues of fact and the Court, accordingly, held that there was no abuse of discretion by the lower court in denying plaintiff's Motions.

The evidence in this case regarding negligence and causation was not so clear as to impel but one reasonable conclusion, and that as to a fact adverse to the lower court ruling. The following excerpts and summaries of the testimony of plaintiff, defendant,

Raymond W. Ward and Artie R. Banks, Jr., the four witnesses who testified about the circumstances of the auto/pedestrian accident, demonstrate a substantial conflict of evidence not only as to the material facts in general, but as to the ultimate facts of negligence and causation as well.

As a review of the record will show, there was substantial credible evidence justifying the jury's conclusion that plaintiff and defendant were equally negligent. With respect to the plaintiff's negligence, if the facts are that he sprinted out in front of defendant's automobile, out of a place of safety and into a place of danger, it was reasonable and prudent for the jury to conclude that he was negligent. Or, if plaintiff walked across the crosswalk on Sunnyside Avenue and said to himself, I'm in the crosswalk and everybody else in the world that may come along this street must watch out for me and for my safety and must not get me in a position of danger, then the jury was reasonable and prudent in concluding that plaintiff was negligent. Or, if plaintiff walked across that street and never looked east and never paid attention to traffic, then the jury was reasonable and prudent in finding him negligent. Any of the above findings of fact, or any combination thereof, would be sufficient to sustain the jury's verdict.

Looking specifically to the record, it shows that Officer Artie R. Banks, Jr. of the Salt Lake City Police Department investigated the accident. (R. T. 14) Although Officer Banks did not recall whether

he spoke with the plaintiff about the circumstances of the accident on the night of the accident or the following day (R. T. 20), he did recall that when he spoke with and questioned the plaintiff, he appeared to hear and understand the questions and his answers were responsive. (R. T. 21) Appellant's Brief would have us believe that when plaintiff spoke with Officer Banks he was under the influence of medication, in considerable pain, and in-and-out of consciousness, and that anything he might have said at that time is not to be believed. Thus, the obvious inference that plaintiff did not know what he was saying. However, plaintiff's answers to all of Officer Bank's questions were responsive, the obvious inference being that he understood the questions and gave the appropriate answers. When asked by Officer Banks "what happened" plaintiff responded that when he was halfway across the crosswalk he saw defendant's car approaching and "sprinted to try to get across the road." (R. T. 22) That statement was credible.

That is consistent with the testimony of Raymond W. Ward who was driving four to five car lengths behind the defendant (R. T. 3) at the time of the accident and who was able to see the plaintiff through the rear and front windows of defendant's automobile. (R. T. 3) He stated that plaintiff was traveling across the crosswalk at a "medium to a fast gate. He was walking along. He wasn't going slow." (R. T. 10) Dionne Bradley testified that she was traveling at a speed of approximately thirty (30) miles per hour (R. T. 31, 33, 171); that she was about

fifty (50) feet away from the plaintiff when she first saw him (R. T. 31); and that although she immediately swerved to the left she was unable to avoid the ensuing collision. (R. T. 32) Further, the evidence showed that when she first saw the plaintiff he was right in front of her (R. T. 31, 32) and that the right front of her car was the probable point of impact. (R. T. 33, 171) Defendant would have been traveling about forty-four (44) feet per second. If we are to believe defendant's testimony that plaintiff was in the middle of the defendant's lane, fifty (50) feet away when she first saw him, even if he had been sprinting he would have been unable to take more than a step or so, if that, before impact.

Appellant's Brief alleges at one point that there was no serious disagreement as to the cause or causes of the accident. That's not true. For example, contrary in some respects to what he told Officer Banks, plaintiff testified at the time of trial that he stopped at the corner of Greenwood Terrace and Sunnyside Avenue, waited for two eastbound automobiles to pass by, and then proceeded north across Sunnyside Avenue without looking to the east or west for vehicular traffic. (R. T. 40, 70, 122) After entering the crosswalk, plaintiff continued, he noticed a car westbound, but it seemed to be far enough away and moving slow enough that he could safely cross the street. (R. T. 40, 70) Further, plaintiff stated that from the time he first observed the automobile and continued to walk across the street, he did not again look to the east toward westbound traffic until just before impact. (R. T.

125, 126) Nor, was he aware of the sound of a car or its headlights until that time. (R. T. 125, 126) Plaintiff admitted that, at the time of trial, his recollection of what transpired after the collision was confused and that his recollection of events that occurred prior to impact were not "crystalline." (R. T. 126)

Mr. Ward's testimony also conflicted with that of other witnesses on several other questions of fact. For instance, he testified that the day of the accident was a clear day and that at the time of the accident it was still quite light. (R. T. 2) At one point he stated that he did not believe the defendant had her headlights on at the time of the accident (R. T. 4), and later added that he was certain he did not have his headlights on and equally certain that the defendant did not have her lights on. (R. T. 8-9) Further, he stated that none of the other automobiles on the road at the time had their headlights on. (R. T. 9)

While on cross-examination, Officer Banks stated that at the time he was dispatched to the accident, he was at or near the Salt Lake City limits on State Street. (R. T. 18) He testified that although it was still fairly light at the time he had his headlights on. (R. T. 18) Further, he testified that after arriving at the scene of the accident he investigated defendant's automobile and found her headlights to still be on. (R. T. 19)

Dionne Bradley, defendant, testified that at the time of

the accident it was dark and that her headlights were on low beam.

(R. T. 32, 170)

Again, Mr. Ward testified that although he observed the defendant for two (2) to three (3) seconds prior to the collision, he did not observe plaintiff look to the east, toward defendant's automobile.

(R. T. 10) In fact, he added later in his testimony that plaintiff did not seem to be aware of any vehicular traffic. (R. T. 11)

The jury was properly instructed on the law. The following Instructions, along with others not particularly germane to this appeal, were given to the jury:

INSTRUCTION NO. 8

As used in these instructions, "negligence" means the failure of a party to do what a reasonably prudent person would have done, or doing what a reasonably prudent person would not have done, under the circumstances of this situation, to protect oneself and others from the risk of harm. Negligence may consist of acting or of omitting to act. Negligence of plaintiff toward himself does not bar the plaintiff from recovery of damages unless his negligence is as great or greater than the negligence of the defendant against whom recovery is sought. If plaintiff's negligence is not as great as defendant's negligence, damages allowed will be diminished in the proportion to the amount of negligence attributable to the plaintiff.

INSTRUCTION NO. 9

In addition to this general definition of negligence, there are other rules of law, as well as statutes enacted by the legislature for safe

operation of vehicles on the highways. A person who fails to comply with such rules or statutes is negligent, as that term is used in the verdict and in the court's instructions.

INSTRUCTION NO. 10

You are instructed that it was the duty of each of the parties, defendant and plaintiff, to meet the standard of a reasonably prudent person under the circumstances of this case, to avoid risk of harm to himself and to the other party, and to observe and be aware of the condition of the highway, traffic thereon, and other existing conditions.

INSTRUCTION NO. 11

A driver of a motor vehicle has a duty not to drive the vehicle on a highway at a speed greater than is reasonable and prudent under the conditions, and having regard to the actual and potential hazards then existing, and speed is to be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway, in compliance with legal requirements and the duty of all persons to use due care. The statutes also require that the driver of a vehicle shall, consistent with the foregoing, drive at an appropriate reduced speed when approaching and crossing an intersection, or when special hazards exist with respect to pedestrians or other traffic, or by reason of weather or highway conditions.

INSTRUCTION NO. 12

A driver of a motor vehicle is required to yield the right-of-way, slowing down or stopping if necessary to so yield, to a pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling, or when the pedestrian is approaching so closely from the opposite

half of the roadway as to be in danger.

The person having the right-of-way may assume that the other will yield. Failure of defendant to so yield the right-of-way to plaintiff would constitute negligence on defendant's part, if you so find.

INSTRUCTION NO. 13

It is the duty of every operator of a motor vehicle to exercise ordinary care and keep a careful lookout ahead and about him. The exercise of ordinary care requires him to make observations at a point or points where his observations will be efficient for protection from injury to persons or property, requires the seasonable and effective use of a driver's sense of sight to observe timely, not only the presence, location and movement of other users of the highway, pedestrians as well as vehicles, but traffic signs and signals, obstructions to vision, and everything else which might warn him of possible danger.

INSTRUCTION NO. 14

You are instructed that every motor vehicle operator or pedestrian has the right to assume and act upon the assumption that every other motor vehicle operator or pedestrian will observe the rules of the road and will not otherwise negligently expose himself to or put others in danger; and he may continue in that assumption until it becomes apparent, or in the exercise of ordinary care ought to be apparent, to him that some other motor vehicle operator or pedestrian is, by wrongful conduct, creating danger, or is not aware of, or cannot avoid that danger. In such a situation, every motor vehicle operator or pedestrian must, in order to be free from negligence, make all reasonable efforts to avoid collision or injury, even though the other motor vehicle operator or pedestrian is in the wrong in his course of conduct.

With respect to plaintiff's duties and responsibilities as a pedestrian, the court instructed the jury as follows:

INSTRUCTION NO. 15

In arriving at a verdict in this case, it is also necessary for you to determine whether the plaintiff, Robert E. Anderson, at and immediately prior to the time of the accident, was negligent with respect to caring for his own safety.

The terms "negligence" I have previously defined for you, and this definition you will bear in mind, together with the following instructions, in determining your answer to this question.

Every person in all situations has a duty to exercise ordinary care for his own safety. This does not mean that he is required at all hazards to avoid injury. His duty, rather, is that of taking such precaution to avoid injury as would be taken by an ordinarily prudent man in situations the same as or similar to that of the plaintiff at and immediately prior to the time of the accident.

To be free of negligence, one must use ordinary care in the exercise of his intelligence and of his facilities of sight and hearing, to the end that he may become aware of the existence of danger to him. The failure to use such intelligence and faculties, thereby failing to discover danger, is negligence, as I have before defined that term for you.

It is likewise the duty of everyone to recognize and appreciate all dangers which are open and obvious to him, or which would have been appreciated at the time by a reasonably prudent person who is in the exercise of ordinary care.

INSTRUCTION NO. 16

Before attempting to cross a street that is being used for the traffic of motor vehicles, it is a pedestrian's duty to make reasonable observations to learn the traffic conditions confronting him; to look to that vicinity from which, were a vehicle approaching, it would immediately endanger his passage; and to make the determination which a reasonably prudent person would make under the same circumstances as to whether it is reasonably safe to attempt the crossing. What observations he should make, and what he should do for his own safety, while crossing the street are matters which the law does not attempt to regulate in detail and for all occasions, except in this respect: It places upon him the continuing duty to exercise the care a reasonably prudent person would observe to avoid an accident.

INSTRUCTION NO. 17

In determining whether the plaintiff was negligent with regard to his own safety, you may take into account the fact that a pedestrian crossing a busy street must be constantly vigilant for his safety with respect to all of the conditions around him, and that even if a car is seen approaching, unless it is so positioned as to constitute an immediate hazard to him, he is not necessarily obliged to focus full and undivided attention on that particular car and so calculate his entire conduct as to avoid being struck by it. He need not anticipate that the driver will speed, fail to observe, fail to control her car, fail to afford him the right-of-way, or otherwise be negligent unless, in the exercise of ordinary care, he observes or should have observed something to warn him of such improper conduct.

It seems clear, based upon the record, that reasonable minds could have found as the jury did from the evidence and law

before it, to wit: that the parties were equally negligent and responsible for the accident. Nonetheless, even though the lower court satisfied the demands of Utah law plaintiff would have the decision overturned on the basis of Wisconsin law.

Plaintiff would have this Court adopt Wisconsin's scope of review on motions for new trials in comparative negligence type cases.

Rule 59(a), Utah Rules of Civil Procedure, sets forth the grounds upon which a motion for a new trial may be granted in this state:

Rule 59. New Trials; Amendments of Judgment

(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following cases; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one

of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

[Emphasis added.]

According to Section 270.49(1) W.S.A., a new trial may be ordered on any of four grounds in Wisconsin: (1) Errors in the trial; (2) verdict contrary to law or evidence; (3) excessive or inadequate damages; and/or (4) in the interest of justice. See, Tuschel v. Haasch, 174 N.W.2d 479 (Wis. 1970)

Appellant's Brief cites several Wisconsin Supreme Court cases, in which new trials were granted in comparative negligence cases, in support of the general proposition that a new trial should be granted if the percentage distribution of negligence is clearly against the great weight and preponderance of the evidence and is contrary to the interest of justice. In Loomans v. Milwaukee Mutual Ins. Co., 38 Wis.2d 456, 153 N.W.2d 318 (1968) an action arose out of a rear end

collision. The jury apportioned sixty percent (60%) of the cause of negligence to the plaintiff and forty percent (40%) to the defendant. The trial court granted a motion for a new trial, but failed to follow the proper procedure. On review, the Wisconsin Supreme Court exercised its discretionary power to grant a new trial. That decision, however, was based upon the Wisconsin "interest of justice" clause not found in Utah law and was further granted for the reasons that (1) there was no evidence to justify the apportionment of the causal negligence and (2) the jury granted no damages although the testimony of personal injuries was uncontroverted. In the case sub judice there was some substantial evidence to justify the apportionment of the causal negligence and the jury never did reach the question of damages.

In the case of Korleski v. Lane, 10 Wis. 2d 163, 102 N. W. 2d 234 (1960) the Wisconsin Supreme Court is careful to note that they were not prepared to say as a matter of law that the causal negligence of plaintiff did not equal the causal negligence of defendant; however, the court did exercise its discretion under the "interest of justice" provision to grant a new trial.

As stated in the case of Pollesche v. Transamerican Ins. Co., supra, in Utah if, upon examination of the evidence as disclosed by the record, it is apparent that there is a substantial conflict of evidence as to the material issues of fact in the case relative to which the insufficiency of evidence is alleged and if reasonable men could

have found as the jury did, then the Utah Supreme Court will not interfere with the lower court's affirmation of the jury's verdict. As stated in the case of Spath v. Sereda, 41 Wis.2d 448, 164 N.W.2d 246 (1969) a new trial may be granted in the interest of justice in Wisconsin when jury findings are contrary to the great weight of the evidence even though they are supported by credible evidence. In Wisconsin, this is the rule whether applies to the question of damages, negligence, causation or comparison of negligence. See, Brunke v. Popp, 21 Wis.2d 458, 124 N.W.2d 642 (1963); and Pingel v. Thielman, 20 Wis.2d 246, 121 N.W.2d 749 (1963). The standards for review in the two states are distinct.

Moreover, in the Wisconsin cases of Loomans v. Milwaukee Mutual Ins. Co., supra, Spath v. Sereda, supra, DeGroff v. Schmude, 38 N.W.2d 730 (Wis. 1974), and Markey v. Hauck, 73 Wis.2d 165, 242 N.W.2d 914 (1976) the Wisconsin Supreme Court simply affirmed the lower court's grant of a new trial. As stated in each of the above-mentioned cases, the reviewing court would not reverse a decision granting a new trial in the interest of justice absent a showing of clear abuse of discretion or an erroneous application of the law. In short, the superior court affirmed the lower court's ruling. The argument that this Court adopt a de jure or de facto "interest of justice" provision is a matter more appropriate for the legislature than the judiciary.

Many of the philosophical arguments and pleas made in Appellant's Brief are persuasive. It seems to underline and emphasize the apparent weakness and injustice of a non pure-comparative negligence statute. Maybe Utah ought to adopt a pure comparative negligence policy; nevertheless, as noted by the Wisconsin Supreme Court in the case of Vincent v. Pabst Brewing Co., 47 Wis. 2d 120, 177 N. W. 2d 513 (1970) the state Supreme Court has authority to change the common law while the legislature is the best body equipped to adopt change from existing comparative negligence doctrine to a pure comparative negligence doctrine.

It is also alleged that defense counsel's "shackled" remarks prejudiced the jury. It is alleged that defense counsel stated that defendant should not be "shackled" with a judgment. The record will show that defense counsel in his closing arguments stated only that the defendant should not be shackled with all of the responsibility for the accident as far as the negligence is concerned. (R. T. 212)

CONCLUSION

Under our judicial system, the people are the repository of the power from which the law is derived. In short, the law is the expression of the will of the people. The functioning of a cross section of the citizenry as a jury is the method by which the people express this will in the application of law to controversies which arise under it. Our democratic system, our constitutional and our statutory provisions

assure trial by jury to citizens of this state.

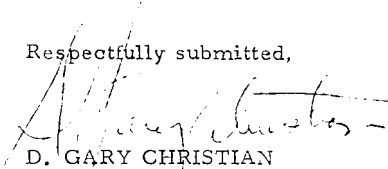
Courts, as final arbiters of law, could assume arbitrary, capricious and dangerous powers by presuming to determine questions of fact which litigants have a right to have passed upon by juries. One of the advantages of the jury system is to safeguard against such arbitrary and capricious power in the courts. To the credit of the courts of this country, they have been extremely reluctant to infringe upon this right, and by leaving it unimpaired have kept the administration of justice close to the people. Certainly, the rights of litigants should not be surrendered to the arbitrary and capricious will of juries without regard to whether there is a violation of legal rights as a basis for recovery. Courts do have supervisory duties and responsibilities and control over the action of juries which also is essential to the proper administration of justice. Nevertheless, it is important the courts remain cognizant of the vital importance of the privilege of trial by jury in our system of justice. Clearly, unless the question of comparative negligence is free from doubt, the court cannot pass upon it as a question of law. If the court is in doubt whether reasonable men might arrive at different conclusions then that very doubt determines the question to be one of fact for the jury and not one of law for the court.


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Based upon the foregoing, respondent respectfully requests
that this Court affirm the lower court's decision.

Respectfully submitted,


D. GARY CHRISTIAN

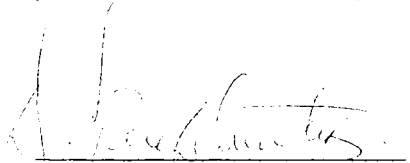

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MAILING CERTIFICATE

I hereby certify that I mailed three (3) copies of Reply Brief of Respondent to Bryce E. Roe and Judith A. Boulden of Roe and Fowler, attorneys for plaintiff and appellant, Robert E. Anderson, 340 East Fourth South, Salt Lake City, Utah 84111, this 19th day of June, 1978.

A handwritten signature in dark ink, appearing to read "D. Gary Christian", is written over a horizontal line.

D. GARY CHRISTIAN
Attorney for Defendant and
Respondent, Dionne Bradley