

1988

# Larry Ray Reeves v. Geigy Pharmaceutical, Inc., a division of Ciba-Geigy Corporation, a New York corporation; Eli Lilly and Company, an Indiana corporation and Gerald R. Moress, M.D. : Brief of Respondent

Utah Court of Appeals

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**BRIEF**

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CKET NO. **880287-CA** IN THE SUPREME COURT OF THE STATE OF UTAH

LARRY RAY REEVES, )  
 )  
Plaintiff-Appellant, )  
v. )  
 )  
GEIGY PHARMACEUTICAL, INC., )  
a division of CIBA-GEIGY )  
CORPORATION, a New York )  
corporation; ELI LILLY & )  
COMPANY, an Indiana corporation; )  
and GERALD R. MORESS, M.D., )  
 )  
Defendants-Respondents. )

**00 0207-CA**

Case No. 860409  
13-B

**RESPONDENTS' BRIEF**

Appeal From the Third Judicial District Court  
Of Salt Lake County, State of Utah  
The Honorable J. Dennis Frederick Presiding

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**FILED**

**APR 6 1987**

IN THE SUPREME COURT OF THE STATE OF UTAH

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LARRY RAY REEVES,

Plaintiff-Appellant,

v.

GEIGY PHARMACEUTICAL, INC.,  
a division of CIBA-GEIGY  
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corporation; ELI LILLY &  
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COMPANY, an Indiana corporation; )  
and GERALD R. MORESS, M.D., )  
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Defendants-Respondents. )

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Case No. 860409  
13-B

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RESPONDENTS' BRIEF

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STATEMENT OF ISSUES

Did the trial court properly grant summary judgment in favor of the respondents in view of the plaintiff's failure to file affidavits or produce other evidence demonstrating a genuine dispute as to any material fact?

APPLICABLE STATUTE

Rule 56(f) of the Utah Rules of Civil Procedure provides:

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

#### STATEMENT OF THE CASE

This was a products liability case coupled with a medical malpractice action in which it was alleged that the plaintiff sustained burns over approximately fifty-five percent of his body after using Phenobarbital manufactured by defendant Eli Lilly & Co., and Tegretol, manufactured by the defendant Geigy Pharmaceutical, both of which had been prescribed by the defendant Gerald R. Moress, M.D., as anti-convulsants. The plaintiff filed suit on February 8, 1984. After considerable discovery, the defendants filed motions for summary judgment on April 28, 1986. The motions were initially scheduled to be heard on May 19, 1986, but were postponed pursuant to a 56(f) motion and affidavit filed by the plaintiff. On June 2, 1986, Judge J. Dennis Frederick granted the defendant's motion for summary judgment when the plaintiff failed to file affidavits or point to any other evidence demonstrating any genuine dispute as to material fact. The plaintiff appeals Judge Frederick's decision.

#### STATEMENT OF FACTS

1. Plaintiff Larry Reeves was born December 5, 1961. In about 1974, while in sixth grade, he began experiencing epileptic seizures for which he was initially seen by Dr. Levere Poulson, who prescribed Phenobarbital. (Depo. of Mrs. Alma Look pp. 16-17.)

2. Dr. Poulson referred the plaintiff to Dr. Michael Goldstein, a neurosurgeon, who treated the plaintiff from 1975 to 1978. Dr. Goldstein monitored the convulsive disorder and prescribed Dilantin and Phenobarbital as corrective medication. (Id. at pp. 19-28.)

3. Plaintiff became dissatisfied with Dr. Goldstein and consulted with another neurologist, Dr. Fumisuke Matsuo, at the University of Utah Medical Center on December 15, 1978. Dr. Matsuo maintained plaintiff on anti-seizure medication, including Dilantin, Valproic Acid and Mesantoin. (Id. at pp. 29-32.)

4. Both Dr. Goldstein and Dr. Matsuo had difficulty in controlling the seizures. (Id. at p. 36.)

5. The plaintiff became dissatisfied with Dr. Fumisuke Matsuo and, on recommendation from Dr. Poulson, saw the defendant Dr. Moress, a neurologist, on August 2, 1980. (Id. at p. 48.)

6. Dr. Moress began managing the seizure disorder and saw plaintiff intermittently during the year 1980, with visits on August 29, 1980, October 28, 1980, December 8, 1980, and then into 1981, with visits on January 6, 1981, and September 4, 1981, with a final visit on September 9, 1981. During this time frame, Dr. Moress prescribed Dilantin, Phenobarbital, Mesantoin and Tegretol. As of the last visit, plaintiff was taking both Tegretol and Phenobarbital. (Id. at pp. 40-79.)



7. On October 31, 1981, at approximately 7:30 a.m., the plaintiff noted that the top layer of his skin began peeling off after taking a shower. He was admitted into the University Medical Center where he was treated by Dr. Glen Warden. Approximately fifty-five percent of the plaintiff's superficial skin peeled off. Seven days after admission, an additional ten percent of his skin peeled off. (Warden Depo. pp. 5-10.) (R. at 212)

8. The plaintiff was initially diagnosed as suffering from Toxic Epidermal Necrolysis (TEN), which is a dermatological disorder which results in loss of skin at various degrees. The etiology is unknown. (Warden Depo. pp. 12-13.) (R. at 212)

9. The burns plaintiff suffered were full thickness, meaning that they were third degree, extending entirely through the skin. (Warden Depo. p. 21.) (R. at 212)

10. Plaintiff was treated for his burns at the University Medical Center until November 25, 1981. Thereafter, he had several additional admissions for the purpose of treating the burns and receiving skin grafts. Plaintiff has reached maximum improvement with respect to the burn injury. (Warden Depo. pp. 59-65.) (R. at 212)

11. On February 8, 1984, the plaintiff filed suit against the defendants Geigy Pharmaceutical, Ciba-Geigy Corporation ("Geigy"), Eli Lilly & Co. ("Lilly"), and Dr. Moress. Defendant Geigy manufactured Tegretol, defendant Lilly manufactured Phenobarbital, and defendant

Moress prescribed Tegretol and Phenobarbital to the plaintiff. The plaintiff alleged that the Tegretol and the Phenobarbital caused the burns on the plaintiff's body. (R. at 2)

12. **Thereafter**, the parties engaged in discovery. The plaintiff sent interrogatories to defendants Moress, Lilly and Geigy. Plaintiff also requested production of documents from the defendants Lilly and Geigy. Each defendant responded fully and completely to the discovery requests made by the plaintiff. (See, e.g. R. at 58, 98, 116, 129, 132, 134)

13. In addition to discovery requests, five depositions were taken. On August 22, 1984, plaintiff deposed the attending physician, Glen Warden, M.D. (R. at 212)

14. On December 18, 1984, defendants deposed Michael W. Piepkorn, M.D. Dr. Piepkorn had performed tests on the plaintiff, including a skin biopsy on November 2, 1981. (R. at 212)

15. On December 19, 1984, defendants deposed Dr. John Zone. Dr. Zone also treated the plaintiff and performed pathology tests on him. (R. at 211)

16. On December 17 and 18, 1984, the defendants deposed Mrs. Alma Lamar Cook, the plaintiff's mother. Defendants also deposed the plaintiff. Based upon this thorough discovery, the defendants filed motions for summary judgment in April 1986, over two years after the Complaint had been filed. (R. at 175, 183)

17. At the time the defendants filed their motions for summary judgment, the plaintiff had no outstanding discovery demands.

18. The defendants' motion for summary judgment was supported by the affidavits of Dr. Joel A. Thompson and Dr. Leonard J. Swinyer. (R. at 158, 162)

19. Dr. Thompson, through his affidavit, testified that he was familiar with the standard of care required by physicians and hospitals in Salt Lake City, Utah, during the time frame the plaintiff was treated. Dr. Thompson testified that "the choice of medications prescribed by Dr. Moress and the dosages were appropriate for the type of seizure condition that Mr. Reeves had, and appropriate based upon his past history and unresponsiveness to prior medication use." Dr. Thompson further stated that Dr. Moress had complied with the degree of care, skill and treatment ordinarily possessed and provided by other neurologists in good standing in Salt Lake City, Utah, and that the allegations that Dr. Moress was negligent and had committed malpractice in the treatment of the plaintiff's seizure condition were not supported by the record. (R. at 162-165)

20. Dr. Swinyer testified that the Tegretol and the Phenobarbital prescribed for the plaintiff by Dr. Moress "were not the cause of Mr. Reeves' skin disorder." (R. at 158-161)

21. Defendants' motions for summary judgment were initially scheduled to be heard on May 19, 1986. Notice of the

hearing date was sent to the plaintiff on April 28 and April 30, 1986. (R. at 178-182)

22. In response to the summary judgment motions, affidavits and notices of hearing, the plaintiff, on May 6, 1986, moved pursuant to U.R.C.P. 56(f) for an Order extending the time of discovery and for postponing the summary judgment hearing. In support of the motion, plaintiff's attorney filed an affidavit that she had not had adequate time to conduct sufficient discovery. (R. at 186-190)

23. Pursuant to the plaintiff's motion and affidavit, the hearing was postponed until June 2, 1986. The plaintiff prepared and signed the Amended Notice of Hearing. (R. at 191)

24. Nevertheless, at the hearing before Judge **Fredericks** on June 2, 1986, the plaintiff failed to produce any affidavits controverting those filed by the defendants and failed to produce any evidence of any genuine dispute as to any material fact. The plaintiff failed to provide any affidavit, statement or other evidence indicating that Phenobarbital and Tegretol caused the plaintiff's skin disorder, or that defendant Moress acted negligently by prescribing the drugs. Accordingly, the court reviewed the affidavits of Dr. Thompson and Dr. Swinyer, and the depositions of Dr. Warden, Dr. Zone, Dr. Piepkorn, the plaintiff, and the plaintiff's mother, and finding no disputed facts, granted the defendants' motions for summary judgment. (R. at 196-198)

### SUMMARY OF ARGUMENT

The trial court properly granted the defendants' motions for summary judgment based upon the failure of the plaintiff to produce any affidavit or other evidence sufficient to establish a genuine dispute as to any material fact. The plaintiff had ample time to pursue discovery. There were no outstanding discovery requests or scheduled depositions when the defendants filed their motions for summary judgment over two years after the Complaint was filed. Plaintiff could not dispute the defendants' clear evidence that Phenobarbital and Tegretol did not injure the plaintiff, and that Dr. Moress had not breached any standard of care by prescribing those drugs to the plaintiff.

### ARGUMENT

#### POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS.

In his February 8, 1984 Complaint, the plaintiff claimed that in October, 1981, Tegretol and Phenobarbital combined to cause his skin disorder. After two years of discovery by interrogatories, requests for production of documents and five depositions, this allegation remained completely unsupported. The depositions of Dr. Zone, Dr. Piepkorn and Dr. Warden completely failed to substantiate plaintiff's claim. The plaintiff's primary treating physician, Dr. Warden, affirmed that the etiology of plaintiff's skin

problems was unknown. (Ward Depo. pp. 12-13. R. at 212.) Dr. Michael W. Piepkorn, a nationally known and respected board certified general pathologist, dermatologist and skin pathologist at the University of Utah Medical Center, performed a skin biopsy on tissue taken from the burn site of plaintiff's skin disorders. His histological examination showed that the skin and tissue loss were not caused by drugs. (Piepkorn Depo. pp. 28-29. R. at 210.)

Dr. John Zone, a respected dermatologist at the University of Utah with special training in immunopathology, also tested specimens obtained from the plaintiff. Dr. Zone concluded that the plaintiff's drug history did not fit the classic pattern for causing skin disorders and that the cause of plaintiff's problem was simply unknown. (Zone Depo. at pp. 28, 56-57. R. at 211.)

Further, the affidavits of Dr. Thompson and Dr. Swinyer fully refuted the plaintiff's allegation that Tegretol and Phenobarbital somehow caused his skin disorder and that Dr. Moress committed malpractice by prescribing the drugs. Dr. Swinyer testified that Phenobarbital and Tegretol did not cause the plaintiff's skin disorders. Dr. Thompson agreed that Dr. Moress acted properly by prescribing Phenobarbital and Tegretol to the plaintiff. According to all of the medical experts in this case, Phenobarbital and Tegretol were not connected to the injuries sustained by the plaintiff.

In Utah it is the plaintiff's burden to establish by expert medical testimony the physician's standard of care and

that his behavior failed to conform to the proper standard. In Nixdorf v. Hicken, 612 P.2d 348, 352 (Utah 1980), the Supreme Court stated that a plaintiff must introduce expert testimony to establish the proper standard of care:

In a majority of malpractice cases, the plaintiff must introduce expert testimony to establish this standard of care. Expert testimony is required because the nature of the profession removes the particularities of its practice from the knowledge and understanding of the average citizen.

The Utah Supreme Court recently reaffirmed plaintiff's obligations in medical malpractice actions in Jennings v. Stoker, 652 P.2d 912, 914 (Utah 1982), stating:

Absent a situation where the propriety of the treatment received is within the common law and experience of a layman, the plaintiff in a medical malpractice case must prove the standard of care by expert medical testimony.

Expert testimony is also required to causally connect Pheno-barbital and Tegretol to plaintiff's injuries. The only exception to the expert witness rule occurs in situations where the treatment is within a layman's knowledge and experience. This exception has been applied by the Utah Supreme Court in situations where a physician loses a surgical instrument during an operation or performs an operation on the wrong part of the body. In such instances, "it would seem as a matter of common sense that scientific opinion would throw little light on the subject." Frederickson v. Maw, 227 P.2d 772, 773 (Utah 1951).

The instant case is not one which can be determined simply by the common sense of a layman. Whether the drugs

caused plaintiff's injury required expert opinion. Therefore, the plaintiff had the duty to present some evidence to dispute the affidavit and deposition testimony of the defendants. The plaintiff produced no evidence that Dr. Moress departed from a proper standard of care or that Phenobarbital and Tegretol caused the plaintiff's injury. On the other hand, Dr. Swinyer and Dr. Thompson, through their affidavits, established that the care and treatment given the plaintiff complied with acceptable medical standards and that the Phenobarbital and Tegretol were not linked to plaintiff's burns. Therefore, the defendants were entitled to summary judgment as a matter of law, and the trial court did not abuse its discretion in granting the defendant's motions.

## POINT II

### THE TRIAL COURT PROPERLY REJECTED PLAINTIFF'S RULE 56(f) AFFIDAVIT AND MOTION.

Despite the postponement of the summary judgment hearing until June 2, 1986, the plaintiff did not produce a single affidavit contradicting Dr. Swinyer or Dr. Thompson, and could not point to any evidence supporting his claim that some defect in Phenobarbital and Tegretol caused his injury. On May 6, 1986, the plaintiff's counsel had filed a Rule 56(f) affidavit stating she had not had "adequate time and do not now have time to conduct sufficient discovery regarding the facts of this case. . . ." (R. at 186-190) The trial court properly rejected plaintiff's Rule 56(f) motion and affidavit.



Rule 56(f) grants a trial court discretion to make any just order where a non-moving party fails to respond by contradicting affidavits to a summary judgment motion.

Rule 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or it may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

In every case where a party files a 56(f) affidavit, the trial court has broad discretion to determine the proper course of action. The courts review the "reasons stated" by the attorney or party for failure to present contradicting affidavits and determine whether the circumstances justify an extension of time to extend discovery and continue the summary judgment hearing. The 56(f) affidavit "directly and forthrightly invokes the trial court's discretion," Strand v. Associated Students of the University of Utah, 561 P.2d 191, 194 (Utah 1977) (quoting Moore's Federal Practice, 2d Ed., §56-24 pages 56-14-24 to 15-14-26), which will only be disturbed on appeal if the final decision reflects an abuse of that discretion. Id. Where the 56(f) affidavit results from dilatory discovery practices, lacks merit, or presents inadequate reasons for failure to produce contradicting affidavits, the trial court may properly grant summary judgment. Cox v. Winters, 678 P.2d 311, 312-313 (Utah 1984). Further, Rule 56(f) should not be applied to postpone

summary judgment where there is no reason to believe that the discovery would lead to the denial of the motion, (see generally, Wright & Miller, Federal Practice & Procedure, §27-40 through §28-41, 2d Ed., 1983, construing the identical federal role), or where there has been sufficient "time to utilize discovery proceedings prior to the hearing or summary judgment." Cox v. Winters, 678 P.2d at 313.

Likewise, in Rule 56(f) cases where substantial discovery has been completed and the facts elicited by the discovery do not, in any way, support the plaintiff's claims, a court's decision to grant summary judgment motion is justified. Burlington Coat Factory Warehouse, Corp. v. Espirit De Corp., 597 F.Supp 1199 (D.C.N.Y. 1984), affirmed in part, reversed on other grounds in part, 769 F.2d 919 (2d Cir. 1985). The Burington trial court explained:

A granting of a continuance under Rule 56(f) has been considered to be inappropriate in cases in which substantial discovery has been conducted, and plaintiff's action appears groundless.

Id. at 1202.

The courts have repeatedly emphasized that a dilatory plaintiff cannot rely on Rule 56(f). In Paul Kadair, Inc. v. Sony Corp. of America, 694 F.2d 1017 (5th Cir. 1983), the district court, in construing the identical federal rule, denied the plaintiff's Rule 56(f) request to postpone summary judgment and continue discovery, finding the plaintiff's failure to pursue discovery for over a year prior to the hearing dilatory. The Fifth Circuit affirmed, holding that the

plaintiff's one-year delay was a substantial factor supporting the trial court's discretion. The Court explained that where a plaintiff fails to produce specific facts after adequate discovery to support its allegations a trial court may properly refuse to permit discovery. Something more than a "fanciful allegation is required to justify denying a motion for summary judgment when the moving party has met its burden of demonstrating the absence of any genuine issue of material fact." Id. at 1030, quoting Contemporary Mission, Inc. v. United States Postal Service, 648 F.2d 97, 107 (2nd Cir. 1981).

The courts have also delineated factors to aid in determining whether a party is dilatory in order to assess a Rule 56(f) motion. Relevant factors include: 1) the length of the pendency of the case prior to the Rule 56(f) request; 2) whether and when the plaintiff could have anticipated the need for the requested discovery; 3) plaintiff's previous efforts, if any, to obtain the needed information; 4) the degree or nature of discovery already undertaken; 5) any limitations placed upon discovery previously by the trial court; 6) any prior solicitations of or provisions for discovery by the trial court; 7) any warning to plaintiff that, absent a speedy request, discovery might be denied and his claim dismissed; and, 8) whether the requested information was inaccessible to the plaintiff, e.g., as when within defendant's exclusive control, or whether alternative, accessible sources existed but were foregone. Kadair v. Sony, 694 F.2d at 1031.

In the instant case, the trial court properly rejected the plaintiff's 56(f) affidavit. The affidavit lacked merit, presented inadequate reasons to continue discovery, and resulted from dilatory discovery.

First, the plaintiff's 56(f) affidavit lacked merit and presented inadequate reasons to continue discovery. The affidavit did not explain or justify the plaintiff's inability to dispute defendants' affidavits and evidence. The affidavit merely stated that the plaintiff's attorney did "not have adequate time and do not now have time to conduct sufficient discovery regarding the facts of this case . . ." R. at 189. The affidavit offered no explanation why plaintiff had not pursued discovery against any of the defendants for over a year prior to the defendants' filing for summary judgment. Plaintiff's last discovery request to the defendants was filed on January 30, 1985. Fifteen months later, the plaintiff's attorney filed an affidavit that she had not had sufficient time to complete discovery. The affidavit failed to provide any reason for the 15-month delay and was properly rejected by the trial court.

Next, the plaintiff's Rule 56(f) motion resulted from dilatory practices and does not meet the standard in Cox v. Winters, 678 P.2d at 312-313. The factors delineated in Kadair v. Sony, 694 F.2d at 1031 also weigh heavily against the defendant. First, this case was over two years' old when defendants filed their motions for summary judgment. As noted, the plaintiff's last discovery requests to the

defendants were filed on January 30, 1985, 15 months prior to the summary judgment hearing.

Second, the plaintiff should have anticipated the need for the requested discovery. At the outset of the case, it was apparent that expert medical testimony would be required against Dr. Moress and to link Phenobarbital and Tegretol to the plaintiff's skin disorders. Despite the clearly anticipated need for such evidence, the plaintiff did not obtain expert testimony and could not point to any evidence contradicting the defendants' affidavits. Moreover, under Rule 11 of the Utah Rules of Civil Procedure, a party is required to investigate the factual and legal basis for suit prior to filing a complaint in order to ensure that the allegations are well grounded in fact and legally warranted. The rule properly requires consultation with experts prior to filing the complaint to confirm the factual basis asserted for liability. In the instant case, the plaintiff did not consult any expert willing to support the allegations in the complaint or contradict Dr. Thompson or Dr. Swinyer.

Third, significant and substantial discovery has already been completed. The plaintiff's brief concedes that plaintiff received thousands of pages of documents during discovery and that five individuals were deposed. Nevertheless, there is not any evidence to support plaintiff's allegations and no showing that further discovery would have been anything but cumulative and wasteful. Finally, no prior limitation was placed upon the plaintiff's discovery efforts by

the trial court. The plaintiff was given ample time and latitude to prepare his case.

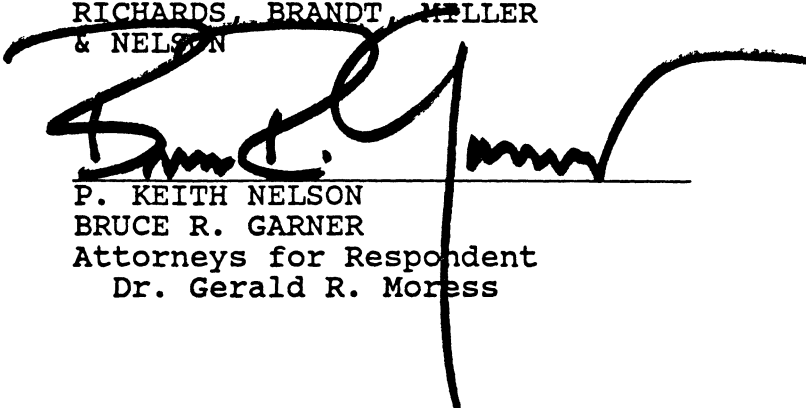
Plaintiff had more than sufficient "time to utilize discovery proceedings prior to the hearing for summary judgment," Cox v. Winters, 678 P.2d at 313 and yet failed to produce any evidence supporting his complaint. Substantial discovery has been completed, and there is no evidence contraverting the defendant's evidence. Summary judgment was justified and the trial court properly denied the Rule 56(f) motion.

#### CONCLUSION

For the foregoing reasons, the defendants request this Court to affirm the trial court's order of summary judgment dismissing the plaintiff with prejudice and on the merits.


DATED this 6<sup>th</sup> day of April, 1987.

RICHARDS, BRANDT, MELLER  
& NELSON



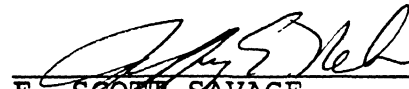
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MAILING CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first class, postage prepaid on this 6<sup>th</sup> day of April, 1987, to the following counsel of record:

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