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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. : Reply Brief

Utah Court of Appeals

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Kathryn Collard; Collard and Russell; Attorneys for Appellant.

P. Keith Nelson; Richards, Brandt, Miller and Nelson; David K. Watkiss; Tracy H. Fowler; E. Scott Savage; Attorneys for Respondents .

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BRIEF

UTAH
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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 corpora-
tion; and GERALD R. MORESS, M.D.,

Defendants-Respondents.

* * * * *

APPELLANT'S REPLY BRIEF

* * * *

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

* * * *

P. KEITH NELSON
RICHARDS, BRANDT, MILLER & NELSON
CSB Tower, Suite 700
50 South Main Street
Salt Lake City, Utah 84111

DAVID K. WATKISS
TRACY H. FOWLER
310 South Main Street, Suite 1200
Salt Lake City, UTah 84101

E. SCOTT SAVAGE
50 South Main Street
Salt Lake City, Utah 84144

ATTORNEYS FOR RESPONDENTS

KATHRYN COLLARD
COLLARD & RUSSELL
415 Judge Building
8 East 300 South
Salt Lake City, Utah 84111
Tel: (801) 534-1664

ATTORNEYS FOR APPELLANT

FILED

MAY 15 1987

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Plaintiff-Appellant,

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a division of CIBA-GEIGY
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corporation; ELI LILLY
& COMPANY, an Indiana corpora-
tion; and GERALD R. MORESS, M.D.,

*

Case No. 860409
B-13

*

*

*

Defendants-Respondents.

* * * * *

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P. KEITH NELSON
RICHARDS, BRANDT, MILLER & NELSON
CSB Tower, Suite 700
50 South Main Street
Salt Lake City, Utah 84111

KATHRYN COLLARD
COLLARD & RUSSELL
415 Judge Building
8 East 300 South
Salt Lake City, Utah 84111
Tel: (801) 534-1664

DAVID K. WATKISS
TRACY H. FOWLER
310 South Main Street, Suite 1200
Salt Lake City, UTah 84101

ATTORNEYS FOR APPELLANT

E. SCOTT SAVAGE
50 South Main Street
Salt Lake City, Utah 84144

ATTORNEYS FOR RESPONDENTS

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IN THE SUPREME COURT OF THE STATE OF UTAH

LARRY RAY REEVES, *

Plaintiff-Appellant, *

v. *

GEIGY PHARMACEUTICAL, INC., * Case No. 860409
a division of CIBA-GEIGY 13-B
CORPORATION, a New York *

Corporation; ELI LILLY & *
COMPANY, an Indiana corpora- *
tion;; and GERALD R. MORESS, *
M.D., *

Defendants-Respondents. *

APPELLANT'S REPLY BRIEF

Appellant Larry Ray Reeves, by and through counsel,
hereby submits the following Reply Brief in response to Respon-
dents' Brief On Appeal.

INTRODUCTION

The contrast between the "Statement of Facts" contained in
the Appellant Reeves' briefs and the brief of Respondents,
illuminates the genuinely disputed questions of fact which should
not have been resolved by the granting of Respondents' Motions For
Summary Judgment on all of Appellant Reeves' claims against them
by the lower court.

For example, Appellant Larry Reeves specifically contests
Respondents' assertion that there was no evidence before the lower
court to support Appellant Reeves' claim that the blistering skin

disease he suffered was caused by the drugs Tegretol and/or Pheno-barbital, manufactured and distributed to him by Respondents Moress, Geigy Pharmaceutical and Eli Lilly & Company. (Respondents' Br., para. 24, p.7, pp.8-11.)

Appellant Reeves also specifically opposes Respondents' assertion that there was no evidence before the lower court indicating a genuine factual dispute on the issues of whether Respondent Moress was liable to Appellant as a "merchant", on the basis of strict product liability in tort, or breach of express or implied warranties, or was liable to Appellant Reeves for "medical malpractice", including his failure to obtain the "informed consent" of Larry Reeves, or his parent, to his treatment with the drugs Tegretol and/or Phenobarbital, as required pursuant to state statute. (Respondents' Br., Paras. 19, 24, pp.6-7, 11)

Appellant Reeves will show that there were genuinely disputed material facts concerning each of the foregoing issues which rendered the grant of summary judgment thereon inappropriate, or that the evidence before the Court viewed in the light most favorable to Appellant Reeves as the party opposing summary judgment, did not entitle Respondents to such relief as a matter of law. Geneva Pipe Co. v. S & H Ins. Co., 714 P.2d 648 (Utah 1986).

Appellant Reeves also disputes Respondents' mischaracterization of certain proceedings herein in relation to Appellant's

opposition to Respondents' Motions For Summary Judgment, including the following statements which appear in Respondents' "Statement of Facts":

12.Each defendant responded fully and completely to the discovery requests made by the plaintiff.

(Respondents' Br., p.5)

As Appellant has previously indicated, and, as the record reflects, Respondents' responses to discovery included numerous refusals and objections to the provision of documents and information which not only required Appellant's counsel to spend considerable time in attempting to ameliorate such objections, but also required Appellant to conduct discovery from independent sources, including the U.S. Food & Drug Administration, medical periodicals and medical experts, which discovery Appellant Reeves was pursuing at the time Respondents filed their Motions For Summary Judgment. (Appellant's Opening Br., "Statement of Facts", pp.4-6)

Appellant also disputes Respondents' statement that:

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

(Respondents' Br., p.6)

Appellant Reeves disputes this statement in that it seeks to create the false impression that Appellant was not engaged in further discovery, or that there was no further discovery to be done, at the time Respondents filed their Motions For Summary Judgment.

As Appellant Reeves indicated in his "Statement of Facts", Appellant was still pursuing discovery through sources independent of Respondents, and Appellant's counsel filed an Affidavit under Rule 56(f), U.R.C.P., verifying the need for further discovery to oppose Respondents' Motions for Summary Judgment and to prepare Appellant's case for trial, and anticipated that the lower court would permit further discovery given the complex nature of the case. (Appellant's Opening Br., "Statement of Facts", pp. 5-8)

Appellant Reeves also contests Respondents' statements that the hearing on their Motions for Summary Judgment was postponed until June 2, 1986, "pursuant to plaintiff's motion and affidavit" (Respondents' Br., "Statement of Facts", Nos. 22 and 23, p.7), in so far as Respondents suggest that the hearing was continued to provide Appellant Reeves the opportunity to file expert affidavits to oppose those filed by Respondents in support of their Motions for Summary Judgment.

As counsel's Affidavit shows, the hearing on Respondents' Motion For Summary Judgment was scheduled on a date when Appellant's counsel was previously scheduled to be present for hearings in other courts, and was simply postponed to a non-conflicting date. (Affidavit of Kathryn Collard, R. 189, paras. pp. 4-5)

ARGUMENT

POINT I. THE EVIDENCE BEFORE THE LOWER COURT PRESENTED A GENUINE FACTUAL DISPUTE CONCERNING THE CAUSE OF APPELLANT REEVES' INJURIES RENDERING SUMMARY JUDGMENT FOR RESPONDENTS ON THIS ISSUE IMPROPER.

Respondents' assertion that Appellant Reeves' claim that the drugs Tegretol and/or Phenobarbital caused his injuries "remained completely unsupported" "after two years of discovery" (Respondents' Br. 8), is incorrect, and blatantly ignores evidence of record in this action.

Contrary to Respondents' erroneous assertion that the depositions of Dr. Zone, Dr. Piepkorn and Dr. Warden "completely failed to substantiate" Appellant Reeves' claim that his blistering skin disease was caused by the drugs Tegretol and/or Phenobarbital, (Respondents' Br., p.8), the depositions of Dr. Glen Warden, Larry Reeves' treating physician, and Dr. Joseph J. Zone, a consulting physician, indicate that the medications Tegretol and/or Phenobarbital, manufactured and distributed to Larry Reeves by Respondents, were the most likely cause of his injuries.

In their depositions, Dr. Warden and Dr. Zone, while observing that the precise etiology (mechanism of action) of Larry Reeves' blistering skin disease is unknown, testified that this disease is known to be caused by medications, including prescription and non-prescription drugs.

For example, Dr. Glen Warden, Larry Reeves' treating physician, testified that his blistering skin disease

(It) has been related to medications, it's been related to viral injuries, it's been related to over-the-counter preparations; however the etiology remains unknown.

(Warden Depo., pp.12-13) (Emphasis supplied)

Dr. Warden also testified in his deposition that because of the known association between certain medications and the type of blistering skin disease suffered by Larry Reeves, he ordered Larry Reeves' medication with Tegretol and Phenobarbital to be discontinued, suggesting that Dr. Warden believed these drugs to be the cause of Larry Reeves' injury:

Q. What was the purpose of the consultation with neurology?

A. The patient has had a seizure disorder for many years and has been given a difficult--and continues to be difficult to control in his seizures; and because the patient was on seizure medication and they have been described to be an association with this disease, then we needed consultation from neurology to alter his medication for his seizure disorder. We did not want to continue him on the same medication.

(Warden Depo., p.26) (Emphasis supplied)

Dr. Warden further testified in his deposition that he had written a report on April 5, 1982, in which he stated that the etiology of Appellant Reeves' injuries "is probably due to Tegretol or phenobarbital." (Warden Depo., p.47)

Dr. Zone, a consulting physician on Larry Reeves' case, testified in his deposition that blistering skin disease of the type suffered by Larry Reeves is associated with the administration of medications and other substances.

Reading from his initial diagnosis of Larry Reeves on November 2, 1981, Dr. Zone testified as follows

Q: When you saw Larry the first time on November 2, you made an assessment.

A: Yes.

Q: What does an assessment mean?

A: That means my opinion of the diagnosis at that point.

Q: And why don't you just read that whole thing into the record, if you would, please, kind of slowly.

A: "Toxic epidermal necrolysis is most likely diagnosis given the patient's medication. This has occurred with virtually any drug, virus infection, lymphomas and immunization. The shower history seems inadequate to cause a thermal injury. The patient is old for staphylococcal scalded skin syndrome and this is usually more painful, shortlived and more superficial involvement. The lack of mucosal involvement and the presence of dermal injury are unusual for TEN but not unheard of."

(Zone Depo., pp.18-19) (Emphasis supplied)

Dr. Zone further testified that a history of drug exposure is a common clinical feature of toxic epidermal necrolysis (TEN), the diagnosis Dr. Zone gave to Larry Reeves' blistering skin disease:

Q: Well typically, I'm just asking for the clinical features of TEN, how is it first manifest, how does it progress?

A: Basically what I said. Usually we get a history of either a viral illness, some type of new drug exposure, or repeat drug exposure, then it starts in small areas of blisters.

(Zone Depo., p.20, lines 19-25) (Emphasis supplied)

Dr. Zone further testified in his deposition, he could not rule out the possibility in Larry Reeves' case, that a dramatic increase in the dosage of not only one medication, but two medications that he was taking, could have precipitated "this kind of immune reaction." (Zone Depo., pp.47-48)

Dr. Piepkorn, a physician whose only involvement with Larry Reeves, was that he performed a histological examination of a section of tissue from his body, testified that the tissue he examined showed extensive damage to the dermis, the layer of skin below the epidermis, as well as damage to the epidermis. (Piepkorn Depo., pp.6-7,15)

Dr. Piepkorn disagreed with Dr. Zone that damage to the dermis layer of the skin was consistent with a diagnosis of Toxic Epidermal Necrolysis (Zone Depo., p.19), because of Dr. Piepkorn's view that, by definition, damage to the dermis places the injury outside the diagnosis of toxic epidermal necrolysis, which is typically concerned with damage to the epidermal layer of the skin. (Piepkorn Depo., pp.16, 22)

Dr. Piepkorn testified that he wasn't aware of any drug induced cases of blistering skin disease similar to

that suffered by Larry Reeves which resulted in damage to the dermis layer of the skin, but stated that he has only personally seen two clinical cases of Toxic Epidermal Necrolysis. (Piepkorn Depo., pp.18, 22-23)

By contrast, Dr. Zone testified that he had seen three or four cases which he had diagnosed as Toxic Epidermal Necrolysis involving extensive damage to the dermis as occurred in the case of Larry Reeves at the University Medical Center during the past six years. Dr. Zone stated that as far as he knew, none of these cases were reported in the medical literature. (Zone Depo., p.29)

Respondents also falsely represent that the Affidavit of Dr. Joel A. Thompson "fully refuted the plaintiff's allegation that Tegretol and Phenobarbital somehow caused his skin disorder...", (Respondents' Br., 9). However, Dr. Thompson's Affidavit contains no opinion regarding the cause of Larry Reeves' injuries, only the statement that Dr. Thompson is not aware of any test that would have predicted a "cutaneous reaction to Tegretol." (Affidavit of Joel A. Thompson, M.D., para. 7, R. 162-164).

The Affidavit of Respondents' expert, Dr. Leonard Swinyer, (R. 158-160) indicates that Dr. Swinyer is a physician specializing in dermatology, but does not indicate that he possesses any experience or expertise in the diagnosis of blistering skin diseases.

Dr. Swinyer states that he disagrees with the diagnosis of Larry Reeves' blistering skin disease as Toxic Epidermal Necrolysis made by his treating physicians, Dr. Warden and Dr. Zone, although his Affidavit does not indicate that he was provided or reviewed the depositions of Dr. Zone and Dr. Warden in forming this opinion. (R. 158-160)

Dr. Swinyer does testify in his Affidavit that, in his opinion, "the medications given to Mr. Reeves by Dr. Moress were not the cause of Mr. Reeves' skin disorder, whatever the disorders are diagnosed to be." (R. 160) However, this opinion is not expressed "to a reasonable medical certainty." (R. 160, para. 8)

Thus, an objective analysis of the medical testimony before the lower court indicates, at most, that Larry Reeves' treating physicians and one of Respondents' medical experts disagreed as to whether Larry Reeves' blistering skin disease, whatever the proper technical diagnosis, was caused by Tegretol and/or Phenobarbital.

Under these circumstances, Appellant Larry Reeves was entitled to have the disputed facts and expert medical opinions concerning the cause of his blistering skin disease submitted to the jury, even in the absence of any Affidavits filed by Appellant Reeves in opposition to the lone Affidavit of Dr. Swinyer, since

the sworn deposition testimony of Drs. Warden and Zone compels the conclusion that there was considerable evidence to support Appellant Reeves' claim that his injuries were caused by the drugs Tegretol and/or Phenobarbital.

POINT II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR RESPONDENT DR. MORESS ON APPELLANT REEVES' CLAIMS AGAINST HIM AS A "MERCHANT", BASED ON STRICT PRODUCTS LIABILITY IN TORT AND BREACH OF EXPRESS AND IMPLIED WARRANTIES.

Respondent Dr. Moress premised his Motion for Summary Judgment on the contentions that Appellant Reeves' case against him was a "medical malpractice action" and that in such action "it is plaintiff's burden to establish, by expert medical testimony, both the defendant/physician's standard of care, and that his care failed to conform to this standard." (R. 175-176; 169-171)

Respondent Moress' assertion that this action involves only causes of action for "medical malpractice" against him, blindly ignores the First, Second, Third and Fourth Causes of Action alleged in Appellant's Complaint. (R. 3-12)

In the First Cause of Action in his Complaint, Appellant Reeves seeks to impose liability against Dr. Moress as a "merchant" of the drugs Tegretol and/or Phenobarbital, under a theory of strict products liability in tort. (R. 3-8)

In his Second, Third And Forth Causes of Action, Appellant Reeves seeks to impose liability against Dr. Moress as a

"merchant", for breach of implied and/or express warranties.
(R. 8-12)

In his Fifth, Sixth and Seventh Causes of Action, Appellant Reeves seeks to impose liability against Respondent Dr. Moress as a "physician" for "medical malpractice", including Dr. Moress' failure to obtain Appellant Reeves' "informed consent" to be administered the drugs Tegretol and Phenobarbital for the treatment of his seizure disorder. (R. 12-20)

Respondent Moress presented no evidence in the lower court to support the granting of summary judgment in his favor on Appellant Reeves' First through Fourth Causes of Action against him as a "merchant." Rather, the Memorandum and Affidavits supporting Respondent Moress' Motion For Summary Judgment focused solely on Appellant Reeves' "medical malpractice" claims against him. (R. 158-177)

The evidence before the lower court was undisputed that Respondent Dr. Moress acted as a "merchant" in respect to the selection, sale and distribution of Tegretol and Phenobarbital to Appellant Larry Reeves. Appellant's mother, Mrs. Alma Cook, testified that Dr. Moress prescribed and provided these drugs to Larry Reeves for the treatment of his seizure disorder. (Alma Cook Depo., pp. 58-59)

Respondent Moress presented no evidence to the lower court to suggest that he did not select, sell and distribute Tegretol

and Phenobarbital to Appellant Larry Reeves, or to show that he was not negligent in the marketing, distribution and promotion of the drugs Tegretol and Phenobarbital to Appellant Larry Reeves as a "merchant."

Respondent Moress' liability to Appellant Larry Reeves on his First through Fourth Causes of Action relating to products liability and breach of warranty, must be determined on standards applicable to "merchants", and not on the basis of "medical malpractice" standards strictly applicable to physicians. The Affidavit of Respondents' expert, Joel A. Thompson, M.D., relates solely to his opinions concerning Appellant Reeves' "medical malpractice" claims against Respondent Moress, and contains no facts, opinions, or the basis for the expression of any expert opinion by Dr. Thompson regarding the liability of Dr. Moress on Larry Reeves' claims against him as a "merchant", alleged in the First through Fourth Causes of Action in Appellant's Complaint.

Based upon the foregoing, the lower court clearly abused its discretion in granting Respondent Moress summary judgment on Appellant Reeves' First through Fourth Causes of Action based on strict products liability and breach of express or implied warranties, and not "medical malpractice."

POINT III. THE EVIDENCE BEFORE THE LOWER COURT PRESENTED A GENUINE FACTUAL DISPUTE ON THE ISSUE OF WHETHER RESPONDENT MORESS HAD OBTAINED THE "INFORMED CONSENT" OF APPELLANT REEVES OR HIS PARENT TO HIS TREATMENT WITH THE DRUGS TEGRETOL AND/OR PHENOBARBITAL WHICH RENDERED SUMMARY JUDGMENT FOR RESPONDENT MORESS ON THIS ISSUE IMPROPER.

In the Fifth and Sixth Causes of Action set forth in his Complaint, Appellant Larry Reeves seeks damages against Respondent Dr. Moress for failing to obtain his informed consent to treatment with Tegretol and/or Phenobarbital, as required pursuant to Utah Code Annotated, Sec. 78-14-5, as amended (1976). R. 12-16.

Appellant Reeves' mother, Alma Cook, testified in her deposition that at the time Respondent Moress prescribed Tegretol and Phenobarbital for the treatment of Larry Reeves' seizure disorder, he never discussed these drugs or their side effects with them, and that he never provided them with any literature that explained the potential side effects of these drugs. (Depo. of Alma Cook, pp. 59-60)

Respondent Moress presented no documents, testimony or affidavit in the lower court to contradict Mrs. Cook's testimony, and there is no record or document that shows that Dr. Moress ever did discuss any of the potentially severe and substantial side-effects of Tegretol and/or Phenobarbital, including the blistering skin disease actually suffered by Larry Reeves,

with Appellant Reeves or his mother.

The Affidavit of Respondents' expert, Joel A. Thompson, M.D., does not address the issue of "informed consent" and contains no statement or opinion that Dr. Moress' failure to inform Larry Reeves and his mother of the potential severe and substantial side-effects of Tegretol and/or Phenobarbital did not constitute "malpractice", or the basis for any such opinion. There is no indication in Dr. Thompson's Affidavit that he even knew that Respondent Moress had not warned Appellant Reeves or his mother of the serious and substantial side-effects of the drugs in question.

In addition, none of the opinions rendered by Dr. Thompson in his Affidavit are expressed in terms of "a reasonable medical certainty." (R. 162-164)

In order to be entitled to summary judgment on the "informed consent" causes of action against him, Respondent Moress had the obligation to present expert medical testimony that he had no obligation to warn Larry Reeves or his mother of the side-effects of Tegretol and/or Phenobarbital, either because the risk of the side-effects experienced by Appellant Reeves were not "serious" or "substantial." Nixdorf v. Hicken, 612 P.2d 348, 352 (Utah 1980); Jennings v. Stoker, 652 P.2d 912, 914 (Utah 1982).

Respondents at least recognize the "burden" of a plaintiff to produce expert medical testimony regarding issues where the physician's compliance with the standard of care is in question. (Respondents' Br., p. 10)

Having failed to adduce any expert medical testimony on the issue of "informed consent", Respondent Moress was not entitled to summary judgment on Appellant Reeves' Fifth and Sixth Causes of Action against him, and it was error for the lower court to grant it.

POINT IV. THE LOWER COURT ABUSED ITS DISCRETION IN GRANTING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT WITHOUT AFFORDING APPELLANT REEVES THE OPPORTUNITY FOR FURTHER DISCOVERY AS REQUESTED IN COUNSEL'S AFFIDAVIT FILED PURSUANT TO RULE 56(f), U.R.C.P.

Respondents wrongly contend that the hearing on their Motions for Summary Judgment was postponed until June 2, 1986, to provide Appellant Reeves with the opportunity to file Affidavits in opposition to those submitted by Respondents' experts. (Respondents' Br., p.11)

The hearing was postponed only because Appellant's counsel was already scheduled for hearings on May 19, 1986, the date originally assigned for hearing of Respondents' Motions. R. 189, paras. 4-5.

Appellant Reeves's Motion for Further Discovery and Affidavit pursuant to Rule 56(f) filed on May 6, 1986, gave express notice to Respondents and the lower Court that Appellant

Reeves would not be able to file affidavits to counter those of Respondents' experts without the opportunity for additional discovery. Appellant's Motion For Further Discovery was also scheduled for hearing on the same date as Respondents' Motions For Summary Judgment. (R. 188-191)

Respondents' alternative arguments to the effect that Appellant Reeves had done enough discovery, or that no further discovery was required, or that Appellant's counsel was dilatory in completing discovery, are without merit for the reasons reviewed in Appellant's Opening Br., pp. 2-8; 9-14, and did not justify the lower court in granting Respondents' Motions For Summary Judgment without permitting Appellant Reeves a reasonable opportunity to conduct further discovery.

CONCLUSION

The lower court abused its discretion in granting Respondents' Motions For Summary Judgment on all of Appellant Larry Reeves's claims against them, for the reasons that the evidence before the lower court did not entitle Respondents to summary judgments, or presented disputed issues of fact which should have been submitted to a jury, and because the lower court should have permitted Appellant Reeves the opportunity for additional discovery based upon the Affidavit of his counsel pursuant to Rule 56(f), U.R.C.P., prior to forever foreclosing Appellant Reeves the right to redress his substantial claims against

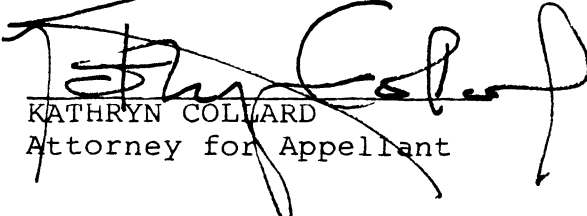
Respondents.

Based upon the foregoing, Appellant Larry Ray Reeves respectfully requests this Court to reverse the lower court's grant of summary judgments for Respondents and permit this action to proceed to a trial on the merits.

DATED and respectfully submitted this 15th day of May, 1987.

COLLARD & RUSSELL

By:


KATHRYN COLLARD
Attorney for Appellant

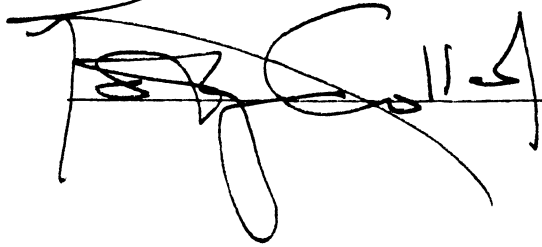
MAILING CERTIFICATE

I hereby certify that on this 15th day of May, 1987,
I mailed four (4) true and correct copies of the foregoing
Appellant's Reply Brief to counsel of record for Respondents at
the following addresses:

D. KEITH NELSON
BRUCE R. GARNER
RICHARDS, BRANDT, MILLER & NELSON
CSB Tower, Suite 700
50 South Main Street
Salt Lake City, Utah 84114

DAVID K. WATKISS
KEVIN L. MCCLOSKEY
WATKISS & CAMPBELL
310 South Main Street, Suite 1200
Salt Lake City, Utah 84144

E. SCOTT SAVAGE
JEFFREY E. NELSON
VANCOTT, BAGLEY, CORNWALL
& McCARTHY
50 South Main Street
Salt Lake City, Utah 84144

A handwritten signature in black ink, appearing to read "Jeffrey E. Nelson", written over a horizontal line.