1978

Connie Lou Switzer et al v. Bryce C. Reynolds et al : Brief of Respondent

Utah Supreme Court

C. R. Henriksen; Joel H. Dembinsky; Attorneys for Appellants;
John H. Allen; Richard H. Moffat; Attorneys for Respondents;

IN THE SUPREME COURT OF THE STATE OF UTAH

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CONNIE LOU SWITZER, RAYMOND GORDON SWITZER, DONALD EUGENE SWITZER, RODNEY DEAN SWITZER, and THEREASE JO SWITZER, all minors, by and through their guardian ad litem, LOUELLA R. BOWLES,	:	
Plaintiffs-Appellants,	:	
- vs -	:	Civil No. 15712
BRYCE C. REYNOLDS, individually and formerly doing business as REYNOLDS SAND AND GRAVEL CO., CLARK EQUIPMENT CO., Construction Machinery Division, and FOULGER EQUIPMENT COMPANY,	:	
Defendants-Respondents.	:	

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BRIEF OF RESPONDENT CLARK EQUIPMENT COMPANY

Appeal from Judgment of Third Judicial District Court
in and for Salt Lake County, Utah
Honorable Peter F. Leary, Judge

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- vs -

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STATEMENT OF THE CASE

This is suit brought by the widow and five children of Gordon Switzer, pursuant to Section 78-11-7, Utah Code Annotated (1953, as amended), for the wrongful death of Gordon Switzer.

DISPOSITION IN LOWER COURT

The Appellants' statement as to the disposition in the lower court is correct.

RELIEF SOUGHT ON APPEAL

The Respondent seeks to have the judgment entered by the lower court against the Appellants sustained.

STATEMENT OF FACTS

The Respondent agrees with the Appellants' Statement of Facts, with the exception of the Appellants' statement that Jack Thompson saw the incident clearly and concluded that Gordon Switzer appeared to have no problem with the machine.

In addition to the facts set forth in the Appellants' Statement of Facts, the Court should be aware of the following dates:

1. Birth dates of the Switzer children:

A.	Connie Lou Switzer	October 25, 1956
B.	Raymond Gordon Switzer	October 25, 1957
C.	Donald Eugene Switzer	January 26, 1959
D.	Rodney Dean Switzer	October 29, 1960
E.	Therease Jo Switzer	May 22, 1963

2. Date of sale of the 175A front end loader by Clark: August 25, 1956.

3. Date of the accident resulting in the death of Gordon Switzer: June 24, 1963.

4. Date on which Appellants filed the Complaint in this action: October 23, 1974.

POINT I

THE BURDEN WAS ON THE APPELLANTS, IN OPPOSITION TO THE RESPONDENT REYNOLDS' MOTION FOR SUMMARY JUDGMENT, TO SET FORTH SPECIFIC FACTS ESTABLISHING A GENUINE ISSUE OF MATERIAL FACT AND FAILURE SO TO DO MADE SUMMARY JUDGMENT PROPER.

A. The Appellants were required by Rule 56(e) of the Utah Rules of Civil Procedure to establish a genuine issue of material fact.

The procedure to be followed by a party adverse to a Motion for Summary Judgment clearly is set forth in Rule 56(e), Utah Rules of Civil Procedure. That subdivision provides in its entirety:

> Supporting and opposing affidavit shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported, as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response by affidavits or as otherwise provided in this Rule must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), Utah Rules of Civil Procedure (emphasis added).

It has been the Respondents' contention throughout the proceedings in the lower court that the Appellants have no facts which support their allegations of negligence on the part of the Respondents. The Appellants have an abundence of

conclusions, but a dearth of facts supporting those conslusions. It was due to this scarcity of supporting facts that the Appellants were unable to meet the requirement of Subdivision (e) of Rule 56. That subdivision requires that a party opposing a motion for summary judgment establish specific facts showing a genuine issue for trial. The Appellants were required to establish those specific facts by affidavits, made upon personal knowledge, setting forth facts admissible in evidence.

As the record discloses, the Respondent Reynolds' Motion for Summary Judgment was supported by the Affidavits of Bryce Reynolds and Richard Reynolds. Those Affidavits were made upon personal knowledge and contain evidence admissible at trial. That evidence established that the 175A tractor was not defective and that the Respondent Reynolds was not negligent. The Appellants did not submit any affidavit whatsoever to contradict those submitted by the Respondent Reynolds nor did the Appellants, in their Memorandum in Opposition to Reynolds' Motion for Summary Judgment and the September 4, 1977, Memorandum referred to therein, cite any "depositions, answers to interrrogatories, or further affidavits," as provided by Subdivision (e). The Appellants' Memorandum in Opposition to Respondent Reynolds' Motion for Summary Judgment contains nothing other than the Appellants' conclusions regarding the negligence of Reynolds and defects

in the 175A tractor. The Appellants completely failed to meet the burden placed upon them by Subdivision (e) of Rule 56. Now, on appeal, they wish, again, to ignore facts and argue conclusions. In no portion of Rule 56, the rule governing summary judgment actions, does it provide that a party opposing a motion for summary judgment may rely upon his conclusion as to the issues at hand. The purpose of the motion is to force a party to document facts which support his conclusion and his cause of action. When placed to this task, if a party connot document the supporting facts, then there is no need to take the matter to trial. When the Appellants were placed to this task, they responded with self-serving conclusions. These conclusions, like any theory, are worthless without supporting foundation.

The lower court, when reviewing the memoranda and supporting documents placed before it by the Respondent Reynolds, and those filed by the Appellants, made the same determination. The Respondent Reynolds could document that it was not negligent and that the 175A tractor was not defective. His documentation met the criteria of Subdivision (e) of Rule 56. The Appellants responded with no facts which contradicted the testimony supplied in the Respondent Reynolds' affidavits, thus leaving the court with no alternative but to grant summary judgment in the Respondent Reynolds' favor. The court was bound by the provisions of Subdivision (e) which

required that "If he [the opposing party] does not so respond, summary judgment, if appropriate, shall be entered against him." Rule 56, Subdivision (e), Utah Rules of Civil Procedure.

In addition to the direction given by Subdivision (e), the court was compelled, in an equitable manner, to enter summary judgment against the Appellants., The Respondents were being required to defend an action filed eleven years after the cause of action accrued. After commencing this action, the Appellants undertook extensive discovery of both Respondents, and, in the case of Clark, submitted, in the form of Interrogatories and Request for Production of Documents, 1,845 questions and 497 requests for production of documents. In response to this discovery Clark provided the Appellants with all the documents it had concerning the design and manufacture of the 175A tractor and attempted, to the best of its ability, to answer the 1,845 questions directed to it. It was not until this discovery was completed that the Respondents brought the motions now being reviewed by this Court. The Appellants had ample time within which to document specific facts upon which they would rely in establishing their causes of action. If such facts had existed, the Appellants would have found them. Instead, when the Respondents brought their Motions, the Appellants were unable to document these facts, as required by Subdivision (e) of Rule 56 and thereby failed in their opposition to the Motions.

CONCLUSION

The provisions of Rule 56(e), Utah Rules of Civil Procedure, are clear. The Appellants did not meet their burden of establishing, upon personal knowledge and in a form admissible at trial, the facts which would indicate a genuine issue of material fact existing in this matter. The lower court properly ruled that Reynolds is entitled to summary judgment on the issues of its alleged negligence and the alleged defective condition of the 175A tractor.

POINT II

THE APPELLANTS ARE BARRED FROM ASSERTING THE RESPONDENTS' FAILURE TO PLEAD THE SPECIFIC SECTION OF THE STATUTE OF LIMITATIONS BY THE APPELLANTS' FAILURE TO RAISE THIS ISSUE IN THE LOWER COURT

A. The Appellants' Failure to Raise in the Trial Court the Issue of Improper Pleading Prohibits Them from Raising It on Appeal. The Appellants take this appeal from the lower court's Order granting Reynolds' Motion for Summary Judgment and Clark's Motion for Dismissal. Both Respondents, in support of their respective Motions, filed supporting memoranda, in which they argued the effect of Section 78-12-28(2), Utah Code Annotated (1953, as amended). The Appellants, in opposition to these two Motions, filed two memoranda, in which they argued that the statute of limitations was not a bar. In neither of the two memoranda filed by the Appellants was the Respondents' failure to plead the specific statute ever

raised. Nor was this issue raised through any other pleading or motion placed before the lower court. The first time that the Respondents were confronted with Rule 9(h) was upon receipt of the Appellants' Brief.

The Appellants failure to raise, before the lower court, the issue of the Respondents' defective pleadings constitutes a waiver of that defense. Utah cases are clear on this point. In the case of Attorney General of Utah v. Pomerow, 93 Utah 426, 73 P.2d 1277, 1300 (1937) the Utah Supreme Court, when reviewing the Respondent's failure to plead, by section and subdivision number, the specific statute of limitation upon which he was relying, held that:

> The Appellant's next contention is that the statutes were not pleaded as required by law because the specific subsection of Section 104-2-26 was not set out, as required by Section 104-13-7. This question was raised for the first time in this Court. The motion to strike the amendment or to reply to the amendment did not mention it. We shall not, therefore, now consider it, except to say that the only part of Section 104-2-26 which could apply to the allegations of the Complaint is Subsection (1). No one could have been mislead as to what part of Section 104-2-26 the Respondents' relied upon.

Attorney General of Utah v. Pomerow, 73 P.2d at 1300.

The Appellants did not raise the defense of failure to correctly plead the statute of limitations until reaching this Court, nor were they mislead by the Respondents' failure to plead the specific section. The Appellants, in their

Brief, acknowledge that: "If any statute of limitation applies, it would be Section 78-12-28, Utah Code Annotated (1953, as amended)." Appellants' Brief at 9. With this admission, the Appellants have disspelled any doubt that may have lingered concerning whether or not they were mislead or prejudiced by the Respondents' failure to plead the specific section and subdivision. See also Dean Vincent, Inc. v. Chamberlain, 264 Or. 187, 504 P.2d 722, 724 (1972).

B. Application of the Doctrine of Equitable Estoppel or Estoppel in Pais.

The Appellants, in their argument for the application of the doctrine of equitable estoppel, attempt to create a novel extension of that doctrine. With the veil removed, the Appellants' theory is that if an opponent in a lawsuit fails to prove any defense he may have as quickly as possible, he may be estopped to prove that defense at any later time. In support of this theory, the Appellants cite three Utah cases which apply the doctrine of equitable estoppel in its more traditional role. In each one of three cases cited: Whitaker v. Salt Lake City Corp., 522 P.2d 1252, 1253 (Utah 1974); Rice v. Granite School District, 23 Utah 2d 22, 456 P.2d 159, 162-63 (1969); and Weir v. Bauer, 75 Utah 498, 286 P. 936, 946 (1930), the party sought to be estopped made representations upon which the Appellant relied in delaying the institution of suit upon his cause of action. In both Whitaker and Rice,

governmental officials represented to the Appellants that a settlement would be effected in the near future. Those Appellants, in reliance upon the representations of the officials, delayed giving the notices required under the Governmental Immunity Act and failed to file their Complaints within the statute of limitations provided by that act. This Court held that, as a result of representations made to the Appellants by the officials, the officials would be estopped from asserting the statute of limitations as a defense.

In Weir, a stockholder relied upon representations made by a corporation regarding payment by the corporation to the stockholder on debts owed to the stockholder. As a result of these representations, the stockholder did not initiate action on the overdue debts and the statute of limitations ran. When the stockholder commenced suit, the corporation raised the statute of limitations as a defense and this Court held, in that situation, that the corporation be estopped to assert that defense.

In the present matter, the Appellants can point to no representations made by either Respondents concerning whether or not the Respondents would assert the statute of limitations, nor did the Respondents act to delay the filing of Appellants' Complaint. The cases cited by the Appellants do not support their argument.

The Appellants' argument for equitable estoppel must fail. This Court continuously has held that an essential element of the doctrine of equitable estoppel is that of misrepresentation or concealment. See Rabarino v. Price, 123 Utah 559, 260 P.2d 570 (1953). The Appellants cannot point to any representations made by the Respondents to the effect that they would not act upon their affirmative defense of the statute of limitations. Such an inability on the part of the Appellants is fatal to their argument.

C. Conclusion.

The Appellants have waived, by their failure to raise the issue in the lower court, their right to use the Respondents' defective pleadings. The argument for the application of the doctrine of equitable estoppel, though novel, overlooks an essential element of that doctrine and, therefore, must fail.

POINT III

THE STATUTE OF LIMITATIONS PROVIDED IN SECTION 78-12-28(2), UTAH CODE ANNOTATED (1953, AS AMENDED) WILL RUN SO LONG AS A MEMBER OF THE CLASS ENTITLED TO SUE IS UNDER NO DISABILITY AND FAILS TO SUE WITHIN A TWO-YEAR PERIOD.

The Respondent Clark's argument on this point, simply stated is: whenever a class of persons is entitled to sue on one cause of action and any one person in that class has the statute of limitations run against him, then the cause of

action is lost for the entire class. This position is supported by the case of Louisville & N.R. Co. v. Sanders, 5 S.W. 562 (Ky. 1887). In the Sanders case, the minors of a decedent were estopped from bringing suit for wrongful death due to the fact that the statute of limitations had run against a member of the class entitled to sue. As in Utah, the Kentucky wrongful death statute provided for one cause of action only. That cause of action accrued to anyone of three persons: the widow, heirs of the decedent, or the personal representative of the decedent's estate. The Sanders court observed that:

> If there be one of these in being, with the right to sue, then does not the policy of the law and the comparison and consideration of all the statutory provisions upon the subject dictate that the action must be brought within the year from the accrual of such right, to avoid a bar as to all?

Sanders, supra, at 564.

Since neither the Utah wrongful death statute nor the statute of limitations applicable to that statute speak to this issue, the Court must look elsewhere for guidance. The Appellants cite numerous cases, including the recent decision of this Court in Scott v. School Board of Granite School District, 560 P.2d 746 (Utah 1977). However, in each case cited by the Appellants, an important element is missing. Not one of those cases contain the situation where one cause of action existed for a class of people and the statute of

limitations had run against a member of that class. In each case, only one person was entitled to sue on the cause of action. In the present matter, we have a class composed of the widow of the deceased and five children. There can be no doubt that the statute of limitations ran as against the widow, Louella R. Switzer Bowles, since she was under no disability for the two years immediately subsequent to the accrual of the cause of action. That she was entitled to bring the action as the survivor of the deceased is set forth in Section 78-11-7, Utah Code Annotated (1953, as amended), which provides, in pertinent part:

> When the death of a person not a minor is caused by the wrongful action or neglect of another, his heirs, or his personal representatives for the benefit of his heirs, may maintain an action for damages against the person causing the death . . .

Persuasive authority which would bring about the policy set forth in the Sanders case, if controlling in this case, is found in the Utah Products Liability Act, Section 78-15-3, Utah Code Annotated (1953, as amended) which provides, in its entirety:

> (1) No action shall be brought for the recovery of damages for personal injury, death or damage to property more than six years after the date of initial purchase for use or consumption or ten years after the date of manufacture, of a product, where the action is based upon, or arises out of any of the following:

(a) Breach of implied warranty;

(b) Defects in design, inspection, testing or manufacture;

(c) Failure to warn;

(d) Failure to properly instruct in the use of a product; or

(e) Any other alleged defect or failure of whatsoever kind or nature in relation to a product.

(2) The provisions of this section shall apply to all persons, regardless of minority or other legal disability, but shall not apply to any cause of action where the personal injury, death or damage to property occurs within two years after the effective date of this Act.

The purpose of this provision of the Utah Products Liability Act is to prevent suit such as the one presently before this Court. The Legislature has made a policy decision that it is unfair to require manufacturers to defend products liability actions filed a substantial number of years after the date the product was either manufactured or sold. This unfairness is evident in the present lawsuit in that both Respondents are required to defend allegations of negligence, breach of warranty, and strict liability arising out of an accident that occurred 15 years ago and relating to a machine manufactured 22 years ago. This unfairness is emphasized by the fact that Louella R. Switzer Bowles could have filed this action at any time after June 24, 1963. Instead, she waited 11 years to bring this action. If this Court applies the interpretation

propounded by the Appellants to the Wrongful Death Act and statute of limitations, the statute of limitations would not run on this action until May 23, 1983, which date would be two years and one day after the youngest of the Appellants, Therease Jo Switzer, born May 22, 1963, obtained her majority. This would be one month and two days short of being twenty years from the date of the accident and twenty-seven years and three months from the date of sale of the 175A tractor by Clark. To require a manufacturer, or any party, to defend an action at the expiration of such a substantial period of time is more than unfair: it approaches a violation of the due process and equal protection clause of the Fourteenth Amendment.

This Court should consider the conclusion reached by the court in Sanders:

> When the administrator qualified, there was a person in esse who had the right to sue for and recover and receive entire damages, leaving no longer in existence a cause of action. The statute then began to run, not only against him, but against the cause of action. The statutory saving on behalf of the infant is only intended to apply when there is no one in being who has the power to sue. Unless this construction be given to it, the Statute of Limitations is not one of repose, as the cause of action may be kept alive for over twenty years, although there is one in being during the entire time who has the right to sue.

Sanders, supra, at 565 (emphasis added).

CONCLUSION

The Respondent submits that when considering the interest

of all parties and the policy adopted by the Utah Legislature in the Utah Products Liability Act, this Court should hold that the statute of limitations ran against the Appellants' cause of action when Louella R. Switze Bowles failed to institute suit on the wrongful death action prior to June 24, 1965.

POINT IV

THE TRIAL COURT IS VESTED WITH THE DISCRETIONARY POWER TO PLACE, AS A CONDITION OF THE TAKING OF A DEPOSITION, THAT THE PARTY NOTICING THE DEPOSITION PAY THE OPPOSING PARTY'S COSTS OF ATTENDING THE DEPOSITION.

A. Conditions Placed upon Discovery. Under the Amended Protective Order dated June 29, 1977, the trial court ordered, inter alia, that the Appellants, as a condition placed upon the taking of the depositions of Walter L. Black and M. L. Conrad, pay to Clark, the costs incurred by its counsel in attending the depositions in Benton Harbor, Michigan. These costs would include attorney's fees at the rate of $70.00 per hour. The Order further provided that all costs incurred in the inspection of the Respondent's microfilm records at Benton Harbor were to be borne by the Appellants.

Rule 26(c), Utah Rules of Civil Procedure, provides the trial court with the authority to make an order limiting discovery, such as the Order outlined above. That rule provides, in pertinent part, that:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the Court in which the action is pending . . . may make any order which justice requires to protect a party or persons from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place . . .

Rule 26(c), Utah Rules of Civil Procedure.

It is well recognized in jurisdictions following the Federal Rules of Civil Procedure, from which Rule 26(c) was adopted, that the trial court, in making a protective order under Rule 26(c), is vested with wide discretion. See Banta v. Superior Court, 112 Ariz. 544, 544 P.2d 653, 654 (1976); Commercial Union Ins. Co. v. City of Wichita, 217 Kan. 44, 536 P.2d 54, 64 (1975). The Appellants argue that the trial court abused this discretion since, in their opinion, the order effectively denied them discovery of microfilm records maintained by the Respondent Clark in Benton Harbor. See Appellants' Brief at 22. Due to the fact that the Appellants are unwilling to pay the costs which would be incurred in retrieving and reviewing the microfilm records, it would apear that the Order does prevent discovery of those records. However, the decision of whether or not to pay for the retrieval and review is that of the Appellants.

The Appellants cannot argue, successfully, that a trial judge cannot order a party seeking an out of state deposition to pay the travel costs and attorney's fees incurred by the opposing party. See Gibson v. Inter'l Freighting Corp., 173 F.2d 591 (3rd Cir.) cert. den. 338 U.S. 832 reh. den. 338 U.S. 882 (1949); North Atlantic & Gulf S.S. Co. v. United States, 209 F.2d 487 (2d Cir. 1954). In the Gibson case, the District Court for the Eastern District of Pennsylvania, held that a party wishing to take an out of state deposition of a witness for use at trial would be required to pay the costs incurred by the opposing party in attending that deposition. Those costs would include the attorney's fees incurred by the opposing party. See Gibson, supra; see also Annot. 70 A.L.R. 2d 685, 758-64 (1960); see generally Moore v. George A. Hormel Co., 4 F.R.D. 15 (S.D.N.Y. 1952); 4 Moore's Federal Practice, Paragraph 26.77 (1976).

In the present matter, the trial court was confronted with a situation wherein the Appellants wished to depose two expert witnesses employed by the Respondant Clark and residing in Benton Harbor, Michigan. These depositions were entirely for the benefit of the Appellants and not sought by the Respondant Clark. In this respect, the present case is identical to the Gibson case, cited above. In addition to the fact that the depositions were solely beneficial to the Appellants, the court was advised of the fact that the Appell-

ants had submitted Interrogatories and Request for Production upon the Respondant Clark, totaling 1845 individual questions with an additional 497 requested documents. In response to these Interrogatories and Requests for Production, the Respondant Clark supplied, to the best of its ability, all of the information requested.

In spite of the vast discovery previously completed by them, the Appellants sought to discover microfilm records which, in their own words, would take: "A considerable period of time, perhaps a week or more . . . ." Appellants' Brief at 22. The Respondent Clark was not required, as the Appellants suggested, to undertake the retrieval and review of the microfilm records at its own expense. See Celanese Corp. V. E. I. duPont deNemours & Co., 16 F.R. Serv. 2d 1531 (D. Del. 1973) (parties seeking broad discovery of documents were ordered to bear costs of producing them.)

When viewed in light of the past discovery undertaken by the Appellants and the burden and expense that would have been placed upon the Respondent Clark if Clark were required to pay the cost of its counsel attending the depositions and reviewing the microfilm records and, further, the costs of retrieving the microfilm records, the court properly decided that if such discovery was to be undertaken by the Appellants, that justice required that the Appellants pay for such discovery.

B. Appellants' Requests for Costs and Attorney's Fees on Motion to Compel Discovery.

The Appellants' final argument under this point is that this Court should award them the attorney's fees and costs they incurred in various motions wherein they undertook to compel the Respondent Clark to respond to certain discovery. The Appellants freely admit in their Brief that they requested that these costs be awarded and, as of this time, the trial court has yet to rule on these requests. See Appellants' Brief at 23. A primary rule of appellate practice is that the appellate court will not review a matter pending before a lower court until the lower court has entered a final order or judgment. See Rule 72(a), Utah Rules of Civil Procedure. The lower court has not decided the Appellants' request for costs and attorney's fees, made concurrent with their Motion to Compel and, therefore, this question is not properly before this Court.

C. Conclusion..

The trial court acted properly and within the bounds of its discretion when ordering the Appellants to pay the costs to be incurred by the Respondent Clark in having its counsel attend out of state depositions and, further, the costs to be incurred in retrieving and reviewing the micro-film records.

CONCLUSION TO RESPONDENT'S BRIEF

The Appellants challenge the lower courts decision on two

grounds. The first being that summary judgment was not proper due to the fact that a genuine issue of fact existed under their theories of negligence and for breach of warranty. The Appellants failed to properly set forth any facts which would have supported those theories. The only facts before the lower court indicated no negligence nor a breach of warranty. For this reason the Appellants appeal must fail.

Secondly, the Appellants contend that the statute of limitations does not bar their action. There is no Utah authority directly on point. However, the policy which should be applied in determining this issue can be found in the Utah Products Liability Act. If the legislative policy announced in that act is applied in this instance, the Appellants' cause of action must fail.

The Respondent Clark respectfully submits that the judgment and orders of the lower court be sustained.

Respectfully Submitted,

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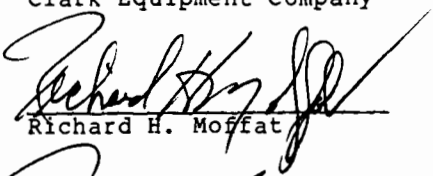

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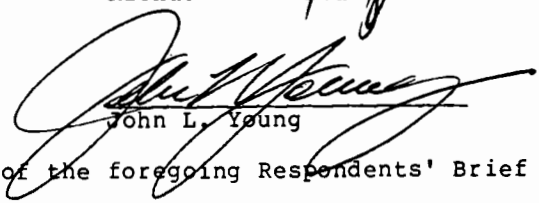

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