

2001

Maurice W. Smith and Anita L. Smith v. Mrs. Beth Pearmain, Barry D. Johnson, and Heartland Realtors : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

SEP 16 1976

MAURICE W. SMITH and ANITA L.
SMITH, his wife,

Plaintiffs-Respondents,

v.

MRS. BETH PEARMAIN, BARRY D.
JOHNSON, and HEARTLAND REALTORS,
a Utah corporation,

Defendant-Appellant.

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

Case No. 14163

APPELLANT'S BRIEF

Appeal from the Third Judicial District
Court of Salt Lake County, State of Utah,
Honorable Maurice Harding, Judge

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Clerk, Supreme Court, Utah

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a Utah corporation,

Defendant-Appellant.

Case No. 14163

APPELLANT'S BRIEF

NATURE OF THE CASE

Based on a claim of fraudulent misrepresentation, plaintiffs sued defendant for rescission of their contract for the purchase of certain real property and for damages. Defendant counterclaimed for damages resulting from plaintiffs' failure to perform their obligations under an assignment of contract and requested the court to foreclose plaintiffs' interest in said contract and the property described therein. Defendants Barry D. Johnson and Heartland Realtors, a Utah corporation, were dismissed on their own motions by the lower court. All references herein to defendant and appellant apply to the sole defendant remaining in the case, Beth Pearmain.

DISPOSITION IN THE LOWER COURT

The lower court granted rescission of the contract and entered judgment in favor of plaintiffs in the total sum of \$13,058.76 and judgment of no cause of action with respect

to defendant's counterclaim.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks to have the decision of the lower court reversed and judgment entered in favor of defendant and further relief as appears equitable to the Court.

STATEMENT OF FACTS

The property which is the subject of the present dispute is located at 1131 Wilson Avenue in Salt Lake City. (R.22)

In the year 1930 the owner of the property, a Mr. N. P. Nielson, petitioned the City Board of Adjustment for a variance from the terms of the zoning ordinance so as to permit the erection of a brick radio parts building at the rear of the lot, replacing an old frame barn and chicken coop then being used to produce radio parts, in a section of the city zoned as residential "A" which did not permit shops. (Exhibit 34-D; R.104-105)

In approving Mr. Nielson's petition, the Board of Adjustment found that an "unnecessary" hardship would be suffered by the petitioner if restrained from building as contemplated and that the "spirit of the ordinance" would be upheld and substantial justice done by granting the variance, providing the building was restricted to one story and basement occupying 24 X 30 feet as indicated in the plan filed with the petition. The Board specifically ruled as follows:

"IT IS THEREFORE ORDERED that the petition be granted; that the order and decision of the Chief Building Inspector be reversed and that said officer is hereby

directed to issue permit in accordance with the order and decision of this Board, building to be not more [than] 24 X 30 feet and restricted to 1 story and basement in height." (Exhibit 34-D) (Emphasis added)

No other restrictions were placed on the use of the property in addition to those stated above. (Exhibit 34-D)

At the time his petition was granted, Mr. Nielson was not living on the property. (Exhibit 34-D; R.95) There was, however, a residence on the front part of the lot which was apparently being rented out. (Exhibit 34-D)

In 1942 a Mr. Roestenburg, who had purchased the property, petitioned the City for a variance from the zoning ordinance for the privilege of building an addition to an accessory building, including a double garage with office and filing cabinets in the upstairs, which would be 16 1/2 feet or 1 1/2 feet higher than previously allowed by the Board. (Exhibit 35-D) At that time Mr. Roestenburg was using the already existent shop to produce tools of war. (Exhibit 35-D) The Board granted Mr. Roestenburg's petition in accordance with the plan submitted, as an extension of the former variance granted under Case No. 230. (Exhibit 35-D) The Board noted in its decision that the petitioner would suffer unnecessary hardship from a denial of the variance and that the spirit of the zoning ordinance would be best upheld and substantial justice done by granting the variance as an extension of the former variance. (Exhibit 35-D) The specific order of the Board is as follows:

"IT IS THEREFORE ORDERED that the variance be granted in accordance with the plan submitted and as an extension of former variance granted under Case No. 230; that the order and decision of the Chief Building Inspector be and the same is hereby reversed and said officer is hereby directed to issue permit in accordance with the order and decision of this Board providing permit is applied for within six months after the signing of this order." (Exhibit 35-D)

Again, no other restrictions or conditions were placed on the use of the property except those clearly stated above.

(Exhibit 35-D) The Board's order states nothing with respect to occupancy of the residence, operation of the shop or number of employees permitted. (Exhibit 35-D)

When Mrs. Pearmain, Defendant and Appellant herein, moved into the neighborhood at 1137 Wilson Avenue in 1950, Mr. Roestenburg was on a mission and his shop was being rented out to a heating or sheet metal company. (R.111) The residence was being occupied by two separate parties as a duplex (R.109) pursuant to R-2 zoning which permitted two-family dwellings. (Exhibit 35-D; R.29)

About three months after Mrs. Pearmain moved into number 1137 Wilson Avenue, Mr. Roestenburg returned from his mission and resumed using the rear facilities of his property as a machine shop (R.111); however, he operated the shop as an absentee owner and continued to rent out the duplex for approximately 21 years. (R.233) The testimony below established that the residence had always been used as a duplex during the entire 25-year period Mrs. Pearmain had lived in the neighborhood and that it has been occupied

by many people during that period. (R.17)

Mrs. Pearmain purchased the property at 1131 Wilson Avenue from Mr. and Mrs. Roestenburg in August, 1971, on a uniform real estate contract. (R.226; R.176) That contract provided that Mr. Roestenburg could continue to use the machine shop at the rear of the property so long as he was capable of doing so. (R.176) He continued to use the shop and garage pursuant to the contract provision until his death, at which time Mrs. Pearmain rented out the garage at \$50.00 a month to her sons for the purpose of storing two dragster racing cars (R.20,28); and the machine shop was rented out to an ornamental light company (R.226) which assembled, painted and stored ornamental light fixtures. (R.62,63)

In December, 1972, Mrs. Pearmain, being a widow and desiring to dispose of the property at 1131 Wilson (R.26), listed it for sale through Heartland Realty (Exhibit 11-D; 12-P) with Mr. Barry Johnson as listing salesman. (Exhibit 12-P) The property was advertised in the Deseret News under the rental income column as "Duplex with Shops near Westminster College." (Exhibit 11-D)

Mr. Smith, Plaintiff and Respondent herein, a resident of California, saw the ad in the News and called Mr. Johnson to inquire. (R.22-23) According to Mr. Smith's testimony, he was informed by Mr. Johnson that the shops were being utilized under a 1945 non-conforming use permit which would

be invalid if the property were vacant for a year and a day and that it was zoned R-2 which permitted a duplex. (R.25) He also testified that Mr. Johnson told him that the shops could be utilized for light manufacturing and that there were a variety of businesses that would be interested in utilizing such a facility. (R.25)

On April 7, 1973, Mr. Smith personally inspected the property (R.27), including the basement, the machine shop and one of the apartments. (R.28) There were three or four individuals working in the machine shop, painting and storing ornamental light standards, on the day of inspection. (R.62-63)

Subsequent to his inspection, Mr. Smith entered into a contract with Mrs. Pearmain for the purchase of the property and took possession on June 1, 1973. (Exhibits 2-P, 4-P, 5-P, 6-P)

In the early part of February, 1974, Mrs. Pearmain received a letter from Smiths' attorney, advising her that Smith intended to rescind the contract for the reason that, since his purchase, the City had ordered him to vacate the rear building and to cease from manufacturing activities on the property for the reason that such activities were illegal. (Exhibit 14-P)

The record fails to disclose how the question of the property's use came before the City. There is some evidence that it may have been the result of a complaint from the

neighbors in protest to the building of a boat in the driveway by one of the tenants. (Exhibit 10-P)

On the other hand, the matter may have come before the City in the form of an application of some sort initiated by Mr. Smith. Although no such application is a part of the record, some reference to an application is made in the City's findings. (Exhibit 10-P)

There is no evidence in the record of any official written communication from the City until August 15, 1973. (Exhibit 35-D) That communication is in the form of a letter (Exhibit 20-P; 35-D) from the City Planning Director to Mr. Smith in apparent response to an earlier letter from Mr. Smith dated July 23, 1973, wherein Mr. Smith had inquired about the permissible uses of the property. (Exhibit 21-P) The City Planning Director advised as follows:

"In answering your questions, it is our opinion that the tenant for the commercial building would have to live in the residential building in front and that the building in the rear would be limited to a one-man machine shop with no welding or repair work of any type.

"I would assume that the Board of Adjustment would have jurisdiction in this matter and could elaborate on this use provided there were no additional employees involved.

* * *

"If there is any other information we can provide, please contact us." (Exhibit 20-P) (Emphasis added)

The next official written communication from the City

which is a matter of record is a letter from the Board of Adjustment to Mr. Smith, dated December 17, 1973, advising him of the Board's decision that the use of the property is illegal and must be vacated. (Exhibit 10-P) Attached to the letter are the findings and order of the Board wherein the Board ordered as follows:

"IT IS THEREFORE ORDERED that the Board sustain the administrative decision that this is an illegal use and that the property be vacated; that the Board feels the intent was for a family-operated business and the use now has changed and is, therefore, in violation and in any event the present usage of the property is a substantial enlargement from the original variance and no parking facilities have been provided and such a change of use is beyond the original variance."

There is no evidence in the record of any written decision from the Planning Director or the Chief Building Inspector or any other City official prior to the decision of the Board of Adjustment which is marked Exhibit 10-P.

No reference was made in the letter marked Exhibit 20-P to any decision on the part of the Director or the Board ordering that the property be vacated or that the use be changed.

Without appealing from the decision of the Board, Smiths, Plaintiffs and Respondents herein, commenced this action in February of 1974 wherein they alleged that defendant and defendant's agent made certain false and misleading statements which induced them to enter into a contract for the purchase of said property. Plaintiffs

sought for rescission of said contract and damages. The lower court ruled in their favor and hence this appeal.

ARGUMENT

POINT I

AS A MATTER OF LAW, IT WAS ERROR FOR THE COURT BELOW TO FIND THAT DEFENDANT MADE FALSE REPRESENTATIONS, SUCH THAT WOULD ENTITLE PLAINTIFFS TO RESCIND THEIR CONTRACT.

A. Essential Elements of Fraud Action.

This Court in the case of Pace v. Parrish, 122 Utah 141, 247 P.2d 273 (1952), held that a plaintiff has the burden of proving by clear and convincing evidence all of the following essential elements in order to recover on the basis of fraudulent misrepresentations:

"These are: (1) That a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage."

Plaintiffs have failed to establish by clear and convincing evidence all of the above listed elements and it was therefore error for the court to allow rescission.

Specifically, one of the questions presented to the court on appeal is whether defendant made a representation concerning a presently existing material fact which was false. Defendant submits that this question must be

answered in the negative for the following reasons:

1. According to Mr. Smith's testimony, Mr. Johnson, the salesman, made the statement to him that the machine shop and garage were being utilized under a 1945 non-conforming use permit. (Exhibit 11-D; R.25)

2. Assuming such statement was in fact made by Mr. Johnson, plaintiffs have failed to prove by clear and convincing evidence that it was false at the time it was made.

3. Plaintiffs base their entire case on the faulty reasoning that, because the Board of Adjustment ultimately decided that the present use was illegal, the prior statements of Mr. Johnson were false.

4. The better reasoned authority is that a subsequent legal decision adverse to a statement or representation previously expressed as to the law cannot establish prior fraud. 37 AM. JUR. 2d, Fraud and Deceit, §73, p.116 (2d ed. 1968) 37 AM. JUR. 2d, Fraud and Deceit, §184 (2d ed. 1968) further states the law as follows:

"Except where it may be regarded as continuing in character, the truth or falsity of a representation is generally to be determined as of the time it was made, and subsequent changes do not affect the liability of the person who made it."

5. Furthermore, representations or statements concerning domestic law are not ordinarily regarded as representations of fact, but rather expressions of opinion

on which no action in fraud will lie, even though they are false. 37 AM. JUR. 2d, Fraud and Deceit, §73, p.113 (2d ed. 1968) Accord, Adamson v. Brockbank, 112 Utah 52, 185 P.2d 264 (1947); Ackerman v. Bramwell Investment Company, 86 Utah 52, 12 P.2d 623 (1932). See, also, 37 AM. JUR. 2d, Fraud and Deceit, §§45,73 (2d ed. 1968), for proposition that the above rule extends to representations as to what the law requires to be done, and representations as to what the law will not permit to be done, especially when the representations are made by the avowed agent of the adverse interest, or when there is no confidential relationship between the parties. See 37 AM. JUR. 2d, supra, §74: The principal of non-responsibility for misrepresentations of law has been applied to false representation by a vendor of land as to a matter of law relating to his rights in and to the land.

B. Application of Law to Facts.

Mr. Johnson's alleged statement that the shop was being operated under a 1945 non-conforming use permit is an entirely reasonable and valid opinion and interpretation of the use that was originally granted in 1930 and later enlarged in 1942.

The original variance was granted for the erection of a radio parts building. It was later expanded in 1942 to permit the construction of an addition to the shop. At that time the premises were being used to manufacture

tools for war.

It is interesting to note that both in 1930 and 1942 the respective owners were petitioning the City for approval to construct a new building or addition to an already existing building. It is apparent from examining the file on each case (Exhibits 34-D and 35-D) that the owner was already using the premises to manufacture, in one case radio parts, and in the other case tools of war prior to the filing of their respective petitions.

In both of these instances the Board had adopted a very liberal approach and interpretation of the zoning ordinance and variance, finding in each case that "the spirit of the ordinance will be upheld and substantial justice done" by granting, extending and expanding the variance.

The testimony is to the effect that in the last 25 years the same shop and premises has been used as a machine shop for some type of manufacturing. (R.21,111) It is possible that Mr. Rosenberg ceased manufacturing tools of war some time subsequent to 1945; however, the testimony offered at trial established that he continued to use the shop as a machine shop. (R.21,111) In his absence the shop was utilized by a heating or sheet metal company. (R.111)

The Board of Adjustment in 1973 stated its opinion that the previous Board "assumed it would be a family-

operated business when they granted the variance." The Board takes great liberty by stating such an opinion. Not only was the first variance in 1930 granted to an absentee owner (one who did not occupy the residence on the front of the lot), but there is no evidence, whatsoever, that any "family-operated" business was involved. (Exhibit 34-D)

The court below acknowledged that there was no limitation in the 1930 decision with respect to ownership or occupancy of the house along with the new structure. (R.116)

Neither is there any evidence in 1942 of a "family-operated" business. In that case the Board took note of the fact that a variance had been granted in 1930; that the petitioner had now increased the business and was making tools of war industry; that a Mr. Beatty, father-in-law, who was owner of adjacent property, had deeded 4 1/2 feet to petitioner in order that he might build a double garage 20 X 20 feet with office and filing cabinet space upstairs and that this would be an extension of the old variance. Now it is certainly far fetched for the Board to conclude that a "family business" was being conducted, merely by virtue of the fact that the father-in-law had deeded some property to the petitioner.

No mention was made, in either the 1930 or 1942 Board rulings, of any limitations or restrictions on number of employees, parking facilities, "family" involvement or

occupation of the residence. When the Board, in 1973, enumerated such restrictions, it did so wholly without foundation or legal basis. The court below acknowledged that the Board was imposing new restrictions. (R.97)

Plaintiffs' attorney correctly argued before the Board of Adjustment in December, 1973, that "the current uses of the property are a logical extension of the variances granted and do not exceed the variance approved in 1942 wherein the property was used as a machine shop for the making of tools." (Exhibit 10-P) He further argued, and correctly so, that "there was no difference between the running of the machine shop and the light manufacturing and 'working on an antique car.'"

When Mr. Smith inspected the property in April, prior to purchasing, he observed that the shop was being utilized by a company which was assembling, painting and storing light fixtures. The attached garage was occupied for storage purposes by two dragster automobiles. He observed three or four individuals working in the machine shop. (R.62-63) That was the sum total of the "business" or shop portion of the property.

In view of the liberal interpretations previously made by the Board with respect to this property, the 1973 Board's conclusion that the present uses were contrary to the spirit and intent of the Zoning Ordinance was not only without legal basis but totally inconsistent with the prior rulings.

Mr. Johnson's statement and interpretation with regard to the uses allowed under the variance has more legal basis, is more logical and reasonable than the Board's subsequent decision.

Plaintiffs' argument in the court below that defendant misrepresented by stating that R-2 zoning permitted duplexes is likewise without merit. The letter from the City Planning Director states that the Residential "R-2" district zoning classification permits two-family dwellings. (Exhibit 20-P) The testimony below disclosed that the residence had been a duplex for at least 25 years and probably longer. (R.93) Apparently no permit had been obtained at the time the residence was converted to a duplex; however, that does not make it illegal. The court below stated defendant's position well when it said:

The Court:

"If the zoning ordinance permits duplexes in that area, how can the City complain they have a duplex there?" (R.93)

* * *

"I suppose all the City could do if it could do anything would be to complain about no building permit having been issued and that would be a personal matter and the statute of limitations would have barred that by now." (R.94)

The following exchange between counsel and court further disposed of the matter of the duplex:

Mr. Nielsen:

"And, in any event, if the Court please, . . . that

building permit could be taken out any time by anybody if it is a matter of a permit." (R.94)

The Court:

"I don't think it is too late. I don't think they have to get a permit in that late of the day. It may be unlawful to make certain changes in the building without a permit, and they may make it a misdemeanor." (R.94)

Mr. Dodd:

"They may turn out our tenants. . . ."

The Court:

"I think they have no right to do that."

Mr. Dodd:

"They did, though."

The Court:

"Did they do it?"

Mr. Nielsen:

"No, there is no testimony they did."

The Court:

"They ordered you to turn them out, didn't they?"

Mr. Dodd:

"Yes."

The Court:

"You didn't have to do it. Knowing you as well as I do, I don't think you would do it just because somebody tells you to." (R.94)

The court below admitted that it would like to be able to reverse the decision of the Board of Adjustment. (R.118) The court was not being asked to reverse the Board's decision,

however. It was the court's duty merely to decide whether the statements made by defendant were false at the time they were made. In view of the foregoing arguments, defendant submits that the court should have come to the opposite conclusion.

C. Variance Runs with the Land.

It appears to have been undisputed below that a variance runs with the land. (R.119,126) The law is well stated in 58 AM. JUR., Zoning, §215:

"The right to make a non-conforming use of zoned premises, under a grant of a variation for such purpose, has been held not to be a mere personal license or permit to the applicant or his assigns, but to attach to the premises and to be available to a subsequent purchaser thereof."

In accord are 168 ALR 122; Cohn v. County Board of Supervisors, 135 Cal.2d 180, 286 P.2d 836 (1955); State v. Konopka, 119 Ohio App. 513, 200 N.E.2d 695 (1963).

Plaintiffs were entitled to the benefits which had been established by the variance granted in 1930 as expanded in 1942, and any representation to that effect was reasonable and true.

POINT II

PLAINTIFFS WERE ON NOTICE THAT THE SHOPS WERE BEING UTILIZED PURSUANT TO VARIANCE AND NON-CONFORMING USE PERMIT AND CONSEQUENTLY HAD A DUTY TO INQUIRE AS TO THE USE PRIOR TO PURCHASE.

Mr. Smith testified that he was advised by Mr. Johnson

that the shops were being operated pursuant to a 1945 non-conforming use permit which would be invalid if the property was left vacant for one year and one day. (Exhibit 11-D; R.25)

He also testified that he holds a masters degree in public administration (R.42); that he has been employed since 1966 primarily as an assistant to city managers (R.42) in Berkeley, El Cerrito, San Gabriel, Lindsay and Riverside, all in California (R.42); that he was familiar with city planning and the layout of a city (R.43); that he was aware that cities had zoning rules and regulations (R.43); that he was aware that certain sections of the city were zoned for residential purposes as compared to commercial and other purposes (R.44); that he was aware that if a particular area was zoned for one use, it couldn't be used for another purpose unless there was some kind of a variance granted (R.44); that he was entirely familiar with the terms "variance" and "non-conforming use" at the time he talked to Mr. Johnson on the phone (R.44) and that he knew that if a person was using the property zoned for one use inconsistent with that zoning regulation, it would have to be pursuant to some variance or non-conforming use. (R.44)

In spite of his familiarity with zoning, variances and non-conforming use, Mr. Smith chose to ignore the public records which were available to him, as well as to Mr. Johnson.

In view of the facts previously stated, however, it is likely, had Mr. Smith examined the public record prior to purchase, that he would have concluded, just as he ultimately argued before the Board, that the present use of the property was consistent with the variance(s) previously granted.

This case is a good illustration of the policy of the law and reasons behind the principles of law previously stated, that representations as to what the law will or will not permit, relating to rights in and to land, are expressions of opinion, and even if they prove adverse to a subsequent legal decision, will not establish prior fraud or form the basis of recovery for false representation.

There is no testimony that Mr. Smith at any time asked Mr. Johnson for a copy of the variance or the City's decisions granting variance or that he asked Mr. Johnson to explain the terms of the same.

If anything is to be implied from Johnson's statements, it would be that they were legal conclusions or legal opinions such that would put Smith on notice, particularly with his background in city administration, to determine the legal significance of the non-conforming use himself.

In the case of Pace v. Farrish, 122 Utah 141, 247 P.2d 273 (1952), this Court held that as to those things which the vendee could find out for himself with reasonable inquiry, he could not rely upon the representations of the

vendor while there was nothing in the representations of the vendor which precluded him from doing it.

The reasons generally advanced as the basis of the rule that fraud cannot be predicated upon misrepresentations as to matters of law are that everyone is presumed to know the law, both civil and criminal, and is bound to take notice of it, and therefore cannot, in legal contemplation, be deceived by such representations. 37 AM. JUR. 2d, supra, §73. One has no right to rely on such representations or opinions, and should not be permitted to say that he was misled by them.

In Scott v. Wilson, 15 Ill. App. 2d 456, 146 N.E.2d 397 (1957), the court held that:

"Even if the fact that a basement apartment in a building was occupied by tenants and that rent was being collected from it when the purchasers made an inspection prior to purchasing the building constituted a representation by conduct that such occupation was not in violation of a city zoning ordinance, such representation would not entitle the purchasers to rescission of the contract after they were required to cease renting such basement apartment because occupancy thereof was in violation of the city zoning ordinance, since such representation was a representation of law, and not of fact, and was the type of representation concerning which both parties had equal opportunity to inform themselves.

POINT III

BY TAKING AFFIRMATIVE ACTION TO BRING THE QUESTION OF USE BEFORE THE BOARD OF ADJUSTMENT AND BY FAILING TO APPEAL THE DECISION OF THE BOARD, PLAINTIFFS RATIFIED ANY POSSIBLE WRONG AND WAIVED ANY RIGHT THEY MAY HAVE HAD TO RESCISSION AND DAMAGES.

In the court below plaintiffs' attorney posed the question, "How far does a man have to go to pull himself out of a situation. . . ." (R.90) The court responded by saying:

"I would suspect that you would have to go farther than just the Board of Adjustment. I think you would have to go to court and get a decree of the court."

Plaintiffs' counsel stated that they "appealed to the Board of Adjustment to see if the existing uses at the time of the sale were permitted under the variance." (R.135)

The time for rescission, if indeed plaintiffs were entitled to that remedy, would have been in the first instance after discovering the alleged wrong. Once plaintiffs undertook affirmative action before the Board, however, they were bound to exhaust their remedies by appeal before they could be entitled to rescind, particularly where the facts of the case disclose that the Board's decision was tenuous and on weak legal footings.

CONCLUSION

For the foregoing reasons, Defendant and Appellant respectfully submits that the decision of the lower court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellant's Brief was served on counsel for the Respondent, Graham Dodd, 336 South Third East, Salt Lake City, Utah 84111, by delivering a copy thereof on this 3rd day of October, 1975.

/s/ _____