

1978

# Ted R. Brown and Associates, Inc. v. Carnes Corporation and Long Deming Utah, Inc. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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TED R. BROWN AND ASSOCIATES, )  
INC., )  
Plaintiff-Appellant )  
-vs- ) Case No. 15928  
CARNES CORPORATION, a cor- )  
poration, and LONG DEMING )  
UTAH, INC., a corporation, )  
Defendant-Respondent. )

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BRIEF OF RESPONDENT

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Appeal from Judgement of Third Judicial Dis-  
trict Court in and for Salt Lake County,  
State of Utah, Honorable Gordon R. Hall and  
Honorable Peter F. Leary, District Judges.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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TED R. BROWN AND ASSOCIATES,	)	
INC.,	:	
	)	
Plaintiff-Appellant	:	
	)	
-vs-	:	Case No. 15928
	)	
CARNES CORPORATION, a cor-	:	
poration, and LONG DEMING	)	
UTAH, INC., a corporation,	:	
	)	
Defendant-Respondent.	:	
	)	

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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

Ted R. Brown and Associates, Inc., brought an action for the collection of a sales commission against Carnes Company<sup>1</sup> and Long Deming Utah, Inc. This is an appeal to review the decisions of the district court that Carnes Company is not subject to the jurisdiction of the Utah Courts.

Carnes Company is an unincorporated division of Wehr Corporation, a foreign corporation not qualified to do business in the State of Utah. Carnes Company has appeared

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1. See note 2 infra.

specially throughout all of the proceedings in this action, without entering a general appearance, and it does not enter a general appearance now.

#### DISPOSITION IN LOWER COURT

On October 18, 1974, and on March 5, 1975, the Third Judicial District Court in and for Salt Lake County, the Honorable Gordon R. Hall, granted the motion of Carnes Company to quash the service of summons made upon it.

On May 30, 1978, the Third Judicial District Court in and for Salt Lake County, the Honorable Peter F. Leary, once again granted the motion of Carnes Company to quash the service of summons made upon it.

#### RELIEF SOUGHT ON APPEAL

Carnes Company prays the orders be affirmed.

#### STATEMENT OF FACTS

Plaintiff Ted R. Brown and Associates, Inc., is a Utah corporation engaged in the business of distributing heating, ventilating and refrigeration equipment for manufacturers of those products. Defendant Carnes Corporation (herein "Carnes") is a division of Wehr Corporation, a



Wisconsin corporation not qualified to do business in the State of Utah.<sup>2</sup> Carnes is a manufacturer of ventilation equipment.

On approximately May 24, 1961, plaintiff entered into a contract with Carnes. (R. 144-154). Under the contract plaintiff agreed to act as an independent sales representative for Carnes' products in Utah and portions of Idaho and Wyoming. During the term of the sales agreement, plaintiff solicited orders for Carnes' equipment on a commission basis. Plaintiff also acted as a sales representative for several competitors of Carnes, and the Carnes product-line constituted only a small part of the plaintiff's business. (R. 136-137).

On approximately August 29, 1968, the sales agreement between plaintiff and Carnes was terminated. Defendant Long Deming Utah, Inc., entered into a sales agreement with Carnes on September 3, 1968, thereby becoming the plaintiff's successor as the sales representative of Carnes in Utah. (R. 175).

On October 23, 1973, plaintiff filed a complaint against Carnes and Long Deming Utah, Inc.,<sup>3</sup> in three counts:

- 
2. Carnes Corporation later became an unincorporated division of Wehr Corporation, and it is now known as Carnes Company.
  3. Long Deming Utah, Inc., is not a party to this appeal.

(1) that the plaintiff's relationship as sales representative was terminated after the plaintiff had obtained a tentative order for Carnes' equipment to be installed in the proposed office building of the L.D.S. Church, and before the construction contracts for the building were awarded; therefore, plaintiff was entitled to the commission on the equipment eventually ordered, notwithstanding the subsequent sales agreement between the defendants and the provisions of plaintiff's contract; (2) that if not entitled to the full commission, plaintiff was entitled to a portion of it; and (3) that the defendants had conspired to terminate the plaintiff's agreement with Carnes; therefore, plaintiff was entitled not only to the commission lost on the office building but to other unspecified lost commissions and punitive damages as well. (R. 160-163).

Plaintiff attempted to serve process on Carnes in Wisconsin under the Utah Long-Arm Statute (R. 158-159), and also attempted to serve Carnes in Utah by service on Lyn Felton. (R. 156). At the time of service on October 29, 1973, Mr. Felton was the vice-president of Long Deming, Utah, Inc. (R. 496-497).

On November 28, 1973, Carnes filed a motion pursuant to Rule 12(b)(2), (4), and (5), U.R.C.P., to quash the service and dismiss the complaint on the ground that the

court did not have jurisdiction over Carnes. (R. 139). Affidavits were filed by both the plaintiff and Carnes (R.133-134; 135-137), and on October 1, 1974, the motion was heard by the Honorable Gordon R. Hall. On October 18, 1974, he entered an order quashing service and dismissing plaintiff's complaint against Carnes, the court having no jurisdiction. (R. 121-122). Plaintiff then filed a motion for reconsideration or to vacate or, in the alternative, amend judgment. (R. 133-114).

On November 7, 1974, plaintiff filed a motion for the issuance of a writ of attachment. (R. 109). The motion was granted ex parte by the Honorable Stewart M. Hanson, Jr., on the same day, and a writ was thereafter issued and served. (R. 105-106). The order authorizing the writ was obtained without notice to Carnes' or its counsel, nor was Carnes' counsel given notice either before or after the actual issuance of the writ. Upon learning of the attachment, Carnes filed a motion for its release. (R. 102). At the time of the attachment proceedings, Judge Hall's order to quash service and dismiss the complaint against Carnes had been entered and was effective pending only the plaintiff's motion for reconsideration. The latter motion, dated October 25, 1974, was not noticed for hearing until Carnes' original notice of January 14, 1975. (R. 93).

On March 5, 1975, Judge Hall, after argument, reconsidered his earlier order and, although declining to amend his determination that jurisdiction had not been obtained over Carnes, he ruled that the complaint itself should remain in good standing in the event jurisdiction could be obtained later. (R. 74-75). Plaintiff filed a notice of intent to appeal.

In an order dated March 28, 1975, Judge Hanson released the attachment on the basis of Carnes' motion. (R. 65-66). In his order, however, Judge Hanson included a paragraph which noted that the filing of the motion for the release of the attachment constituted a general appearance by Carnes. The question of whether Carnes had been properly served either by the service on a local party or under the long-arm statute was argued but not ruled upon because the court had already determined a general appearance had been made.

Carnes then filed a petition for interlocutory appeal with this Court on the ground that Judge Hanson had erred in holding Carnes had appeared generally. (R. 3-7). Plaintiff also sought interlocutory appeal on the issue of long-arm jurisdiction. On March 16, 1976, this Court reversed Judge Hanson and held that Carnes had not in fact

entered a general appearance in this lawsuit. See Ted R. Brown and Associates, Inc. v. Carnes Corp., 547 P.2d 206 (Utah 1976). No action was taken on the plaintiff's request for interlocutory appeal.

Despite Judge Hall's ruling that the long-arm statute did not apply and this Court's refusal to review that ruling, plaintiff persisted in its attempts to relitigate the issue. On February 10, 1977, plaintiff filed a Motion for Order Declaring Service of Summons on Carnes Corporation Sufficient, Directing Carnes to Respond or Be Found in Default. (R. 197-199). Paragraph 5 of that motion provided:

5. By virtue of discovery procedures carried out by the Plaintiff, information has now been obtained and is set forth in the Stipulation duly signed by ROBERT D. MERRILL, Attorney for LONG DEMING UTAH, INC., which sets forth information sufficient to show that CARNES CORPORATION did in fact do business within the State of Utah within the statutory definition of the Long Arm Statute 78-27-23 U.C.A. 1953, as amended and is thereby subject to service under said statute as doing business within the state of Utah as defined by Statute as interpreted by the Supreme Court of the State of Utah.

Plaintiff's motion was heard on February 17, 1977, by the Honorable Hal S. Taylor. He entered an order on March 3, 1977, denying plaintiff's motion. (R. 222-223).

In March, 1977, plaintiff again attempted to serve Carnes in Wisconsin under the Utah Long-Arm Statute (R. 234-235) and also attempted to serve Carnes in Utah by service on Richard Barrett McDowell. (R. 229-230). At the time of service on March 15, 1977, Mr. McDowell was the vice-president of Utemp, Inc. (R. 599-600). Utemp was a Utah corporation which conducted portions of its business activities through its unincorporated division known as Utah Air Sales. Long Deming Utah, Inc.'s status as a sales representative of Carnes was terminated on September 15, 1975, and Utah Air Sales had succeeded to that position. (R. 251).

On April 6, 1977, Carnes again filed a motion to dismiss pursuant to Rule 12(b)(2), (3), (4) and (5), U.R.C.P., on the ground that the court did not have jurisdiction over Carnes. (R. 232). The motion to dismiss was based on two considerations: (1) that the complaint served in Utah on Mr. McDowell was insufficient as service of process on Carnes under Rule 4(e)(4), U.R.C.P.; and (2) that the issues of whether Carnes was doing business in the State of Utah and whether the Utah courts thereby acquired jurisdiction over Carnes pursuant to the long-arm statute, had already been determined adversely to plaintiff on three separate occasions and they should not be litigated again.

On April 21, 1977, plaintiff filed a motion for an order designating a special hearing on Carnes' motion to dismiss. (R. 237-238). The special hearing would, according to the plaintiff, enable it to present witnesses, introduce documents and evidence, and present extensive argument, all designed to demonstrate that the state courts had jurisdiction over Carnes. The hearing was opposed by Carnes on the elementary ground there were no issues concerning service of process and jurisdiction which remained to be decided. (R. 269).

On August 23, 1977, the plaintiff's motion for a special evidentiary hearing and Carnes' motion to dismiss were heard by the Honorable David B. Dee. On November 13, 1977, Judge Dee issued a memorandum decision in which he denied Carnes' motion to dismiss. He granted, instead, the plaintiff's motion for a special hearing, authorizing the introduction into evidence of all facts concerning Carnes' activities in the state in order to determine whether it was doing business here and had thereby subjected itself to the jurisdiction of the state courts. (R. 306-307).

On December 16, 1977, Carnes filed a petition for interlocutory appeal to this Court from Judge Dee's order. The petition was denied on January 9, 1978. (R. 320).

The evidentiary hearing granted to the plaintiff by Judge Dee was held on January 11-12, 1978, before the Honorable Peter F. Leary. On the basis of that hearing Judge Leary granted Carnes' motion to dismiss. He specifically held that service of process on Mr. Felton and on Mr. McDowell was not service on Carnes, and that no evidence supporting the applicability of the long-arm statute was presented that was not available to the plaintiff when the jurisdiction issue was originally raised and litigated in 1974 before Judge Hall. (R. 322-326, 350-356).

This appeal followed.

## ARGUMENT

### Introduction

This appeal is not concerned with the merits of the plaintiff's claims, but only with the question of personal jurisdiction over Carnes. Plaintiff has argued its position four times and on each occasion Carnes has prevailed. Now, for the fifth time, plaintiff seeks another opportunity to articulate the same issue. Its attempts to litigate the issue repeatedly, each time piecing-in slightly more evidence until its position, hopefully, meets with success, cannot be countenanced. Plaintiff had its day in



court. It cannot now be heard to say after losing that it should be given further opportunity to develop its case.

Carnes contends the orders dismissing it from this action, based on the state courts' lack of jurisdiction over it, should be affirmed. This must be the result in view of the substantial evidence previously presented to the trial courts.

I. THE APPEAL IS PREMATURE SINCE  
THE DISTRICT COURT'S ORDERS ARE  
NOT FINAL AND IMMEDIATELY APPEALABLE.

There is, at the outset, a genuine question of this Court's jurisdiction to hear the appeal. The Court's authority to review the decisions of the district courts is specifically limited by law to final orders and judgments. See, e.g., Utah Const. Art. VIII, §9; §78-4-17 Utah Code Ann. (1953); Rule 72(a), U.R.C.P. The two orders appealed by the plaintiff are not final and, therefore, they are not now appealable to this Court. The appeal is premature.

Where, as here, several defendants are charged with concerted wrongdoing,<sup>4</sup> an order dismissing one of them from the action for lack of personal jurisdiction is not

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4. Both the complaint and amended complaint allege that Carnes and Long Deming Utah, Inc., conspired to terminate the plaintiff's sales representative contract. The prayer for that claim seeks relief from the defendants jointly. (R. 160-163; 337-341).

immediately appealable as a final decision. Rule 54(b) of the Utah Rules of Civil Procedure governs the entry of a judgment in actions with multiple parties; it provides:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Under the rule, then, an order or other form of decision, however designated, is not final if it adjudicates any of the rights and liabilities of fewer than all of the parties in the action. The order may become final and immediately appealable only after the district court has completed two tasks: (1) it must make an express determination that there is no just reason for a delay in the entry of the judgment; and (2) it must expressly direct the entry of the judgment.

The objective of the rule is to prevent the unnecessary expense and delay of piecemeal appeals by requiring the parties to present the whole cause for review in a single appeal.

There are no Utah cases which have addressed this precise issue under Rule 54(b) of the Utah procedural rules.<sup>5</sup> There is, however, persuasive authority from other jurisdictions which indicates that the dismissal of fewer than all parties for lack of personal jurisdiction falls squarely within the ambit of the rule. For example, decisions interpreting Rule 54(b) of the Federal Rules of Civil Procedure,

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5. Rule 54(b) has been addressed by this Court in only one reported decision, that of M & S Construction and Engineering Co. v. Clearfield State Bank, 24 Utah 2d 139, 467 P.2d 410 (1970). That opinion dealt with the issue of multiple claims under the rule rather than the issue of multiple parties, as here. The plaintiff's complaint had been dismissed with prejudice by the district court, and one of the two defendants had been granted judgment on its counterclaim against the plaintiff and it also had been granted judgment on its cross-claim against the other defendant. The Supreme Court reversed the dismissal of the complaint but it refused to disturb the defendant's judgments on its counterclaim and cross-claim. In light of the reversal and remand for trial, less than all of the claims presented in the action had been adjudicated; there had been no express determination by the district court as required in Rule 54(b); and, therefore, the defendant's judgments were not final, were subject to revision, and could not then be reviewed by the Supreme Court.

The opinion is important here for its unequivocal recognition of the necessity for the district court's "certification" under Rule 54(b) in actions of multiple claims and/or parties. Without certification, the order is not final and immediately appealable.

which is virtually identical to the Utah rule,<sup>6</sup> hold that in these circumstances such jurisdictional orders are not final and not appealable without the district court's certification. See, e.g., Bernardi Bros., Inc. v. Pride Manufacturing, Inc., 427 F.2d 297 (3rd Cir. 1970) (where district court entered its certificate, the appeal was valid from an order dismissing the corporate defendant for lack of jurisdiction and the action remained pending for another defendant); Farrell v. Piedmont Aviation, Inc., 411 F.2d 812 (2nd

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6. The Utah rule contains two minor changes of phraseology, including a substitution of "and/or" for "or" after "third-party claim," and an insertion of "by the court" after "express determination," both in the first sentence. The federal rule provides:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Cir. 1969) (in wrongful death action, district court dismissed non-resident defendants for lack of jurisdiction and entered a 54(b) certificate from which valid appeal was taken); United States Fidelity & Guaranty Co. v. American State Bank, 372 F.2d 449 (10th Cir. 1967) (where the district court executed its certificate under Rule 54(b), the appeal was valid from an order of the trial court vacating its previous order allowing the filing of the third-party complaint, quashing the service, and dismissing them from the action); see generally 6 J. Moore, Moore's Federal Practice ¶54.27[6] at 343-344 (2d ed. 1978).

It is readily apparent from a review of the record that neither Judge Hall nor Judge Leary was requested by plaintiff to enter the necessary two-prong determination under Rule 54(b). The orders are, therefore, not appealable.

II. JUDGE LEARY PROPERLY DETERMINED  
AFTER A HEARING THAT JUDGE HALL'S  
DETERMINATION WAS CORRECT.

In his order of May 30, 1978, Judge Leary granted Carnes' motion to dismiss, thereby quashing service of process upon it. (R. 355). In addition, he specifically held as follows:

Substantially all of the evidence presented before this Court was peculiarly within the knowledge of Plaintiff, was obtainable by interrogation of the witnesses Young and Tregeagle, or by discovery prior to the hearing before Judge Hall on or about October 1, 1974. (R. 355).

He explained the latter holding more thoroughly in his memorandum decision. (R. 324-325). He noted that the plaintiff had both a right and an opportunity to present evidence in opposition to Carnes' motion to dismiss before Judge Hall on October 1, 1974; that the plaintiff had ample time between the filing of the complaint (October 26, 1973) and the hearing before Judge Hall (October 1, 1974) in which to conduct discovery related to the applicability of the long-arm statute to Carnes and related to any agency relationship between Carnes and Long Deming Utah, Inc., for purposes of service under Rule 4(e); and that plaintiff did not commence discovery until January 8, 1975. He concluded, therefore, that since substantially all of the evidence presented to him could have been presented timely to Judge Hall, he would not overrule Judge Hall's prior decision of dismissal.

The record supports Judge Leary's reasoning. In the hearing of October 1, 1974, before Judge Hall, the plaintiff did not attempt to present substantial evidence concerning Carnes' business activities in Utah. It offered only a

single, conclusionary affidavit from its corporate president. (R. 133-134). This point is even more significant given the two additional considerations that the plaintiff took it upon itself to notice-up the Carnes' motion for a hearing, and that the hearing date was at least ten (10) months subsequent to the date on which the motion was originally filed with the court by Carnes. During this time span the plaintiff could have conducted discovery related to the jurisdictional issues. Although plaintiff had the opportunity to submit any interrogatories, depose any witnesses or parties, file requests for admission or seek the production of any documents that would support its case, it elected to notice Carnes' motion for hearing before the court on the strength of its president's affidavit only. Plaintiff had its day in court and, as Judge Leary concluded, it cannot now be heard to say after losing that it should be given further opportunity to develop its case. The issues of whether Carnes was doing business in the State of Utah and whether the state courts thereby acquired jurisdiction over Carnes, were already submitted to the court and the issues decided.

The plaintiff's criticism of Judge Leary's conclusion is two-fold. First,<sup>7</sup> it concedes that evidence could

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7. Appellant's Brief at 48-49.

have been presented to Judge Hall but only in the form of affidavits. And, it suggests that if more formal and extensive evidence should have been presented, there is nothing in the record which indicates the plaintiff failed to request such a hearing before Judge Hall. Carnes' response to the argument is brief. Plaintiff bears the responsibility of preparing its own case. It alone must decide what evidence to offer, when to do so and in what manner. If it considered affidavits inadequate, it should have pursued alternate tactics. If it deemed a formal evidentiary hearing to be crucial it should have demanded it in a manner designed to protect its record.

Second,<sup>8</sup> plaintiff contends the issue of overruling Judge Hall's determination was never presented to Judge Leary. In fact, quite the opposite is true. During the evidentiary hearing before Judge Leary, counsel for Carnes repeatedly objected to matters on the basis they had already been presented to Judge Hall and decided. (See, e.g., R. 422; 497; 514-515).

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8. Appellant's Brief at 50-51.



III. CARNES IS NOT SUBJECT TO THE  
JURISDICTION OF THE UTAH COURTS  
UNDER THE LONG-ARM STATUTE.

Plaintiff insists Carnes has actively transacted business in Utah within the meaning of the Utah Long-Arm Statute and is, therefore, subject to the jurisdiction of the local courts. Whatever the conceptual simplicity of plaintiff's argument in its brief, it wholly ignores both the facts of this case and the controlling legal principles.

In several paragraphs<sup>9</sup> plaintiff belittles Carnes' legal argument to Judge Hall that the plaintiff's claims did not arise within the coverage of the long-arm statute. To the contrary, that argument is correct. It is important to remember that the complaint served on Carnes in Wisconsin in 1977 was identical in language to the one originally filed by the plaintiff in 1973. Neither made an allegation of specific types of conduct which should render Carnes subject to the jurisdiction of the Utah courts. Rather, they merely recited that jurisdiction was based on a single subparagraph of the long-arm statute, §78-27-24(2), and on related but unspecified provisions of the Utah Code. That provisions provides as follows:

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9. Appellant's Brief at 38, 45-46.

Any person, notwithstanding Section 16-10-102, whether or not a citizen or resident of this state, who in person or through an agent, does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:

\* \* \*

(2) Contracting to supply services or goods in this state;

\* \* \*

On the basis of this jurisdictional allegation Carnes moved to dismiss this action on November 28, 1973. It set forth several arguments in its supporting memorandum. (R. 125-132). First, it contended that the long-arm statute provision relied on by the plaintiff was inapplicable to the plaintiff's claims. It is critical to observe that §78-27-26 Utah Code Ann. (1953) permits only those claims arising from acts specifically enumerated in §78-27-24 to be asserted against a defendant over whom jurisdiction is based on the long-arm statute. The plaintiff's claims did not arise from Carnes' contractual agreement to supply equipment to third parties in the State of Utah. There have been no claims covering that equipment, either the manner in which

it was supplied or its quality. Indeed not. This cause of action arose, as stated in the complaint, solely from an alleged breach and wrongful termination of the plaintiff's sales representative agreement with Carnes. The equipment supplied by Carnes to the church office building has nothing to do with the plaintiff's claim for breach of contract, other than to establish a measure of damages for the lost sales commissions. Subsection (2) of §78-27-24 cannot, therefore, support a claim of jurisdiction over Carnes.

Plaintiff subsequently amended the complaint in January, 1978, in order to plead jurisdiction on the specific basis of the entire Utah Long-Arm Statute and those provisions in §§78-27-20, to 28 Utah Code Ann. (1953), and also on the general basis of a repetitive, blanket statement that Carnes had done business within the State of Utah. Attention is, therefore, directed to the entire Utah Long-Arm Statute.

The Utah Supreme Court first interpreted the long-arm statute in Hill v. Zale Corp., 25 Utah 2d 357, 482 P.2d 332 (1971). There, an employee commenced an action in the Utah state courts against his former employer, a Texas corporation. The defendant was a parent corporation of

numerous wholly-owned subsidiary corporations operating as retail outlets throughout the United States, including Utah. The plaintiff had been employed for nine and one-half years in several of the defendant's subsidiaries. Plaintiff brought suit in Utah for wages and fringe benefits he claimed due for services rendered to one of the defendant's subsidiaries in another state. Service of process was made upon the assistant vice-president and regional manager of the defendant, whose office was in Utah.

The district court granted the defendant's motion to dismiss the action on the ground that the defendant was a foreign corporation not subject to service of process within the State of Utah. This Court reversed an appeal, holding that the defendant corporation had, in a continuous and regular manner over a period of years, maintained such contacts and carried on such activities within the state of Utah that it should be subject to the jurisdiction of its courts. The Court noted that the officers and directors of the defendant were practically identical with those of its Utah subsidiaries; that the defendant had engaged in advertising and other promotional activity in Utah; that in its promotional activity the defendant gave no indication the local subsidiaries were separate corporate entities from the

parent; and that the defendant exercised extensive control over the business operations of its local subsidiaries, including control of security, auditing, receipts, disbursements, and employee wages and incentive awards.

In reaching its decision the Court analyzed the provisions of the Utah long-arm statute, and it expressed the appropriate judicial inquiry in the following manner:

It is appreciated that the language [of the long-arm statute] just quoted is necessarily a broad-sounding generality; and that it must be so interpreted and applied as to conform with basic concepts of fairness and due process of law. This mandates that a foreign corporation should not be subjected to undue difficulties from lawsuits merely because its products are distributed in this State, or may be purchased and sold by others therein....

\* \* \*

When the problem [of acquiring jurisdiction over a foreign corporation] arises, its solution depends on whether it can fairly be said that the corporation is doing business within the State in a real and substantial sense. This involves the analysis of a number of factors, none of which is alone the sine qua non to establish a business presence in the State, but from a consideration of the total picture as to the existence or absence of them the answer to that critical question is to be found:

1. Whether there are local offices, stores or outlets;
2. The presence of personnel, how hired, fired and paid; the degree of control and the nature of their duties;

3. The manner of holding out to the public by way of advertising, telephone listings, catalogs, etc.;

4. The presence of its property, real or personal, or interest therein, including inventories, bank accounts, etc.;

5. Whether the activities are sporadic or transitory as compared to continuous and systematic;

6. The extent to which the alleged facts of the asserted claim arose from activities within the state;

7. The relative hardship or convenience to the parties in being required to litigate the controversy in the state or elsewhere.

482 P.2d at 333-334. (citations omitted.)

After the Hill decision the Court consistently applied the enumerated criteria to determine whether the activities of a foreign corporation in this state should subject it to the jurisdiction of the local courts. See, e.g., Transwestern General Agency v. Morgan, 526 P.2d 1186 (Utah 1974); Mack Financial Corp. v. Nevada Motor Rentals, Inc., 529 P.2d 429 (Utah 1974); Kocha v. Gibson Products Co., 535 P.2d 680 (Utah 1975). And eventually, the Court's analysis and approach to the long-arm statute as announced in Hill was expressly reaffirmed in its decision of Union Ski Co. v. Union Plastics Corp., 548 P.2d 1257 (Utah 1976). There, a Utah corporation sued a California corporation for

breach of a contract. The contract at issue was an exclusive distributorship agreement under which the defendant had agreed to manufacture ski boots in California and supply them to the plaintiff for distribution and sale in Utah and elsewhere. During the course of dealings between the parties, the defendant's agents made at least four business trips to Utah to negotiate the terms of the contract, inspect the plaintiff's facilities and operations, engage local boot designers, and participate in meetings to plan the sale and promotion of the boots. The plaintiff made an advance payment and secured a substantial order for the boots. The defendant never supplied any boots to the plaintiff.

The district court granted the defendant's motion to dismiss for lack of personal jurisdiction under the long-arm statute. The Supreme Court affirmed that decision on appeal. It referred to the Hill criteria and noted that the California corporation had no local office, store, property, inventory, telephone listing or bank account and had done no local advertising. The Court also noted that other elements of the arrangement had occurred outside Utah: California was where the contract had been executed and allegedly breached, where the boots were to be manufactured, and where the payments were to be made; all shipments were to be

delivered F.O.B. the defendant's factory in California; and California law would govern the contractual arrangement.

After Union Ski, the Hill criteria provided the focal point of analysis in still other, subsequent cases. See, e.g., White v. Arthur Murray, Inc., 549 P.2d 439 (Utah 1976); Cate Rental Co., Inc., v. Whalen & Co., 549 P.2d 707 (Utah 1976); Chevron Chemical Co. v. Mecham, 550 P.2d 182 (Utah 1976); Packaging Corp. of America v. Morris, 561 P.2d 680 (Utah 1977).

Finally, in its opinion of Abbott G.M. Diesel, Inc. v. Piper Aircraft, 578 P.2d 850 (Utah 1978), the Court re-evaluated the method of jurisdictional analysis it had expressed earlier in Hill. The Court noted a distinction between the "doing business" and the "minimum contact" tests. The doing business concept allows "general" personal jurisdiction (i.e., on claims which are either related or unrelated to forum activity) over a defendant which has substantial and continuous local activity. The minimum contact test under the long-arm statute is different, however. According to the Court, it permits only the exercise of "specific" or limited personal jurisdiction: where a foreign defendant has isolated, minimum contacts with the forum through its transaction of business there, personal



jurisdiction may be asserted only on claims arising out of the defendant's forum activity. Obviously, then, the minimum contact test is based on a measurement of the quality and nature of the defendant's activities within the forum. For that reason the Court suggested that the district court conduct a hearing to resolve any conflicts of facts stated in the competing jurisdictional arguments of the parties. The hearing should be governed by inquiries into and an assessment of the defendant's forum activity, including:

1. the nature and quality of the defendant's acts;
2. whether the defendant engaged in purposeful --rather than unintentional -- acts in order to avail itself of the privilege and protections here; and the substance -- not just form -- of the defendant's business relationship and acts should be ascertained; and,
3. any other relevant matters bearing on "notions of fair play and substantial justice." 578 P.2d at 854.

Irrespective of the standard used -- the doing business concept and its enumerated criteria as analyzed in Hill, or the minimum contact test with its attendant eviden-

tiary hearing by the trial court as discussed in Abbott -- Carnes has not subjected itself to the jurisdiction of the Utah courts. Consider, first, the following description of Carnes' business operations:

Carnes is an unincorporated subdivison of Wehr Corporation, a Wisconsin corporation engaged in the manufacture of heating, ventilating and refrigeration equipment. Its office and factory are located in Wisconsin, as are its records and principal officers. Carnes has never qualified to do business in the State of Utah and it does not carry-on business in Utah. It has no local offices, manufacturing facilities, warehouses, stores or outlets in Utah; it has no affiliated company in Utah; it has no agents or personnel residing in Utah nor do any personnel regularly visit Utah. Carnes does not own real property in Utah; it does not have personal property, including inventories, in Utah. Carnes has not engaged in any advertising directed specifically at potential customers in the State of Utah,<sup>10</sup> and it does not maintain a

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10. Other than by including a copy of Utah Air Sales' card in the Carnes Company catalog.

telephone listing in the state. Carnes has no bank accounts or investments in Utah. Carnes products are sold in Utah only by independent sales representatives, but Carnes has no pecuniary interest in or supervisory control over them.<sup>11</sup> (R. 135-138; 239-246; 251-254; 482-486; 517-521; 612-161; 645-653).

The foregoing facts were presented to the district court in four separate proceedings. On each occasion the issues of whether Carnes was doing business in the State of Utah and whether the local courts had acquired jurisdiction over it pursuant to the long-arm statute, were determined adversely to plaintiff:

On November 28, 1973, Carnes filed a motion to quash the service and dismiss the complaint, pursuant to Rule 12(b)(2), (4), (5), U.R.C.P. On October 18, 1974, Judge Hall granted the motion, ruling that the court did not have jurisdiction over Carnes.

On October 25, 1974, plaintiff filed a motion for reconsideration of the judgment and the issue of jurisdiction was before the court a second time. On March 5, 1975, Judge Hall expressly declined to change his prior ruling that long-arm jurisdiction over Carnes had not been obtained.

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11. The business operations of the sales representatives and their relationship to Carnes are described in Argument IV of this brief.

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The issue was considered for a third time when, on February 10, 1977, plaintiff filed a motion for an order declaring that service of summons had been made on Carnes. On March 3, 1977, Judge Taylor denied the motion, thereby rejecting the plaintiff's jurisdictional issue again.

And, on January 11-12, 1978, the plaintiff received a special hearing before Judge Leary in which to argue the question of jurisdiction for the fourth time. The hearing was conducted in strict accordance with this Court's instructions in Abbott. All parties were afforded an opportunity to present witnesses, to introduce documents and evidence, and to give extensive argument, all designed to determine the existence of jurisdiction over Carnes under the long-arm statute. On the basis of that plenary hearing and a thorough review of the pleadings, affidavits, and answers to interrogatories, Judge Leary again held that Carnes was not subject to local jurisdiction under the long-arm statute.

It is important to remember that the plaintiff bears the burden of proving the jurisdictional allegations in its complaint. See Union Ski Co. v. Union Plastics Corp., supra. Even a cursory review of the record demonstrates the plaintiff has not been denied an opportunity to present all of the evidence it could marshal concerning Carnes' busi-

ness activities in Utah, and thereby satisfy its evidentiary burden. Resolution of the question is dependent upon the trial court's determination of the factual matters and, unfortunately for plaintiff, it simply has not convinced any trier-of-fact of the correctness of its argument. See Dunham-Bush, Inc. v. Bill Hartmann Plumbing & Heating, Inc., 30 Utah 2d 177, 515 P.2d 92, 94 (1973). Now, this Court should accord to the three trial court judges who have heard this case the prerogative of weighing the evidence and of drawing inferences from it, and upon that basis determining the facts. See Union Ski Co. v. Union Plastics Corp., supra. The orders of dismissal granted by Judge Hall and Judge Leary should be affirmed.

IV. SERVICE OF PROCESS ON OFFICERS OF  
LONG DEMING UTAH, INC., AND UTEMP-  
UTAH AIR SALES, WAS NOT SERVICE ON  
CARNES UNDER RULE 4(e) (4), U.R.C.P.

Plaintiff filed its complaint against Carnes on October 23, 1973. It attempted to serve process on Carnes in Wisconsin under the Utah Long-Arm Statute, and it attempted to serve Carnes in Utah by service on Lyn Felton. At the time of service on October 29, 1973, Mr. Felton was the vice-president of Long Deming Utah, Inc., the indepen-

dent sales representative for Carnes in Utah. On November 28, 1973, Carnes filed a motion pursuant to Rule 12(b)(2), (4), and (5), U.R.C.P., to quash the service and dismiss the complaint on the ground that the court did not have jurisdiction over Carnes. The motion was granted by Judge Hall on October 18, 1974. On March 5, 1975, he reconsidered his order but declined to amend his determination that jurisdiction had not been obtained over Carnes.

In March, 1977, plaintiff again attempted to serve Carnes in Wisconsin under the Utah Long-Arm Statute, and it renewed its prior efforts to serve Carnes in Utah, this time by service on Richard Barrett McDowell. At the time of service, Mr. McDowell was the vice-president of Utemp, Inc. Utemp was a Utah corporation which conducted portions of its business activities through its unincorporated division known as Utah Air Sales. Utah Air Sales had succeeded Long Deming Utah, Inc., as the independent sales representative for Carnes in Utah. On April 6, 1977, Carnes filed a motion to dismiss pursuant to Rule 12(b)(2), (3), (4) and (5), U.R.C.P., again contending the court did not have jurisdiction over Carnes. The motion to dismiss was based in part on the consideration that the complaint served in Utah on Mr. McDowell was insufficient as service of process on Carnes. The motion to dismiss was granted by Judge Leary on May 30, 1978.

Plaintiff challenges both orders of dismissal, contending that service of process on either Long Deming or Utah Air Sales was sufficient service on Carnes under Rule 4(e)(4), U.R.C.P. It reasons that Long Deming and Utah Air Sales were independent sales representatives for Carnes; that their activities in Utah were on Carnes' behalf and constitute doing business in the state by Carnes; and, therefore, that service of process on them was tantamount to service on Carnes. The plaintiff's argument is incorrect.

The argument utterly ignores strict compliance with the local procedural rule governing service. In order to serve process upon a corporation within the State of Utah, a plaintiff must comply with the requirements of Rule 4(e)(4), U.R.C.P. The rule provides:

(e) Personal service within the state shall be as follows:

(4) Upon any corporation, not herein otherwise provided for, upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy thereof to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. If no such officer or agent can be found in the county in which the action is brought, then upon any such officer or agent, or any clerk, cashier, managing agent, chief

clerk, or other agent having the management, direction or control of any property of such corporation, partnership or other unincorporated association within the state. If no such officer or agent can be found in the state, and the defendant has, or advertises or holds itself out as having, an office or place of business in this state, or does business in this state, then upon the person doing such business or in charge of such office or place of business.

The statute recognizes personal service upon a corporation only when it is made upon one of the enumerated individuals. For instance, the rule provides that service may be made upon an officer; a general agent; an agent specifically authorized to receive service of process; an agent having the management, direction or control of any corporate property within the state; or a person doing business or in charge of a business office, when a defendant has advertised or held itself out as doing business or having an office in the state.

There is no evidence in the record to indicate that either Long Deming or Utah Air Sales falls within any of the foregoing five categories. (R. 517-518; 614-615). Neither was, for example, an officer of Carnes or Wehr Corporation. Neither was a managing or general agent of either business entity. Neither has ever been appointed by Carnes or Wehr Corporation to act as their agent to receive service



of process in the state of Utah and, moreover, neither has ever received such authority by the laws of this state.

In fact, Long Deming and Utah Air Sales bear absolutely no relationship to Carnes which would substantiate service of process on them. They are independently owned and operated business entities which act as local sales representatives for various and differing manufacturers of mechanical equipment. (R. 482). In that connection, each has operated as the exclusive sales representative for Carnes in Utah on separate occasions; Long Deming's representation extended from September 3, 1968, to September 15, 1975, and Utah Air Sales immediately succeeded to that position. Carnes' business dealings with Long Deming and with Utah Air Sales were similar, and they were typical of dealings between Long Deming, Utah Air Sales and other manufacturers. (R. 482). Both Long Deming and Utah Air Sales operated as a sales representative for various mechanical equipment manufacturers, merely offering for sale the Carnes' brand of equipment along with other competing lines. (R. 482). Neither was an agent, servant or employee of Carnes but merely a sales representative by contractual agreement. (R. 517-518; 614-615). Pursuant to the terms of that agreement, each was able to develop the sale of Carnes products in any

manner which it deemed advisable, without any control or direction from Carnes. For example, each could determine which potential customers to contact and what time to devote to customer solicitation. Each had its own employees; controlled the hours they work, the pay they receive, and the basis on which they are paid -- all without direction from Carnes. Each received a commission on sales of Carnes' equipment in Utah; no other remuneration was extended by Carnes and each paid its own expenses without reimbursement from Carnes. No specific employees were assigned solely to sales of Carnes' equipment. (R. 494). Each solicited and received orders in accordance with price schedules and terms established by Carnes. Neither had authority to bind or commit Carnes; the acceptance or rejection of orders was wholly within the discretion of Carnes, and any acceptance or rejection was made by Carnes in Wisconsin. (R. 492.) Orders accepted by Carnes constituted agreements between it and the customers. Deliveries were as agreed between them and collections were the responsibility of Carnes, unless guaranteed by the sales representative, which was an unusual circumstance. Invoicing was direct from Carnes to the customer, and the customer paid Carnes directly. Carnes' final agreements with its customers were typically in the form of invoices

subject to terms, conditions and warranty. (R. 135-138; 239-246; 251-254; 482-486; 517-521; 612-616; 645-653).

In addition to the preceding format, Long Deming Utah, Inc., and Utah Air Sales each made purchases from Carnes for its own account, including products they held in inventory and then resold to customers, and also products for particular projects which they resold to their customers. Such purchases were F.O.B. Wisconsin and Carnes retained no interest in them, other than security, after they were purchased. Each was free to represent other manufacturers in a capacity similar to that with Carnes and, in fact, each did represent other competing manufacturers. The volume of business from Carnes' products was less than half of the total dollar volume for each. (R. 135-138; 239-246; 251-254; 482-486; 517-521; 612-616; 645-653).

The foregoing items are important for two reasons. First, they vividly indicate that the activities of Long Deming and Utah Air Sales in Utah were not on Carnes' behalf and did not constitute doing business in the state by Carnes. Therefore, Carnes cannot be served by serving either of them. See, e.g., Western Gas Appliances, Inc., v. Sevel, Inc., 123 Utah 229, 257 P.2d 950 (1953). After reviewing all of the evidence, Judge Leary reached this precise conclusion. In

his order of May 30, 1978, he made the following two determinations:

\* \* \*

Service of process upon Richard B. McDowell, an officer of an independent sales representative of Defendant Carnes Company, was not service of process upon Defendant Carnes Company within the meaning of Rule 4, Utah Rules of Civil Procedure.

Service of process upon Lyn Felton, an officer of an independent sales representative of Defendant Carnes Company, was not service of process upon Defendant Carnes Company within the meaning of Rule 4, Utah Rules of Civil Procedure.

\* \* \*

Second, they pinpoint a dangerous flaw in the plaintiff's argument. Observe that Long Deming Utah, Inc., and Utah Air Sales have done nothing beyond those activities and responsibilities normally assumed by a manufacturers' sales representative. Nevertheless, the plaintiff vehemently suggests that a foreign corporation is automatically subject to local jurisdiction whenever business is conducted in this manner by its local independent sales representative. Imagine the effect of such a standard on the nation's manufacturers:

If activity by a distributor over whom there is no control other than a mutual right to discontinue the distributorship is to be regarded as on behalf of the defendant, state lines will essentially cease to exist for every manufacturer whose goods move in interstate commerce. Venus Wheat Wafers, Inc., v. Venus Foods, Inc., 174 F. Supp. 633, 636 (D. Mass. 1959).

Indeed, consider whether it would render illusory the constitutional standard of due process in all questions of personal jurisdiction over foreign corporations. Also, consider whether such service would assure that service upon a sales representative would be effectively communicated to the manufacturer itself.

Carnes contends the orders of dismissal granted by Judge Hall and Judge Leary should be affirmed.

V. THE DECISIONS OF JUDGE HALL AND  
JUDGE LEARY WERE PROPER.

In the third point of its appeal brief the plaintiff is content to review and to comment upon the procedural history of this case once more. Carnes has no serious dispute with most of what is said, so it will limit its reply to the following brief comments.

The plaintiff criticizes Judge Hall for failing to explain his rulings.<sup>12</sup> The elementary response to the allegation is that findings by the court were not required. Rule 52(a) of the Utah Rules of Civil Procedure provides, in part:

...Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b). (emphasis added.)

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12. Appellant's Brief at 39, 40.

Moreover, this Court has indicated that if the issues material to a ruling on the question of a court's jurisdiction can be identified, it is not necessary for the court to have made written findings enumerating them. This principle is aptly demonstrated in the opinion of McCarthy v. State, 1 Utah 2d 205, 265 P.2d 387 (1953). In that case, plaintiff undertook to do work upon a monument at the mouth of Emigration Canyon. The other contracting party was the "This Is the Place Monument Commission", a committee of citizens appointed by the Governor of Utah to plan, raise funds for, and erect such a monument. Their appointment was made pursuant to a recommendation by joint resolution of the state legislature, although the legal status of the commission and its relationship to the state in carrying out the directives of the legislature and the governor were not clearly defined. The commission received and expended appropriations from the state legislature and proceeded to have the monument erected.

A dispute developed over the construction work done by the plaintiff and his entitlement to payment. For that reason he started an action in the United States District Court for the District of Utah against the monument commission, characterizing it as a voluntary association,

and also against its members individually. The commission members claimed that neither the association nor its individual members were responsible under the contract since they were simply acting for the State of Utah, which was the real party in interest. The federal court sustained their contention and held, for that reason, that it had no jurisdiction of the plaintiff's action against the State of Utah. The action was dismissed.

Approximately nine months later plaintiff instituted another suit against the State of Utah, the monument commission, its executive secretary, and the members individually in the Third District Court of the State of Utah. The action was eventually dismissed against the individual defendants on the ground that the federal court had already made a final determination they were not the real parties in interest and were not personally responsible. Plaintiff appealed the dismissal to the Utah Supreme Court. En route to affirming the lower court's dismissal of the action, this Court provided the following language:

Plaintiff contends that inasmuch as the Federal Court dismissed the case for lack of jurisdiction, the rule of *res judicata* is not applicable. He cites Hutton v. Dodge wherein we announced the general rule that a judgment becomes *res judicata* only when the court has acquired jurisdiction over the subject matter and the parties. This rule is grounded upon the sound principle that litigants

are entitled to have an adjudication upon the merits. It must be conceded that in most instances, if a tribunal has no jurisdiction, there is no trial on the merits. However, it is not open to question that a judgment of dismissal for want of jurisdiction is conclusive as to the matters upon which the ruling was necessarily based. In *American Surety Co. v. Baldwin*, Mr. Justice Brandeis stated: 'The principles of res judicata apply to questions of jurisdiction as well as to other issues.' No reason is apparent why the rule should be less applicable to a decision denying jurisdiction than to one sustaining it.

In the instant case, the conclusion that the Federal Court lacks jurisdiction was necessarily based upon a determination of the critical issue, i.e., that the individual defendants were not personally responsible under the contract. The other jurisdictional facts were present: The amount exceeded \$3,000; there was diversity of citizenship between [the parties]. The question whether the latter were responsible under the contract and therefore proper parties defendant was the one which was tried, argued and submitted to the Federal Court. The only logical deduction that can be drawn is that such was the ground for its order of dismissal. And this is true notwithstanding the fact that the court made no such written finding. The issue having been squarely presented and determined, it is res judicata as between these parties. 265 P.2d at 387. (citations omitted).

The McCarthy opinion indicates that if the issues material to a ruling on the question of the court's jurisdiction can be identified, it is not necessary for the court to have made written findings enumerating them. Here, there were two principal issues material to the prior rulings on



jurisdiction made by Judge Hall. In considering whether Carnes fell within the parameters of the long-arm statute, he had to consider whether the plaintiff's claim rose from contracting to supply services or goods in Utah, and whether the minimum contacts of Carnes with this state satisfied the constitutional standards for due process. These issues were tried, argued and submitted to Judge Hall and he determined them by finding no jurisdiction over Carnes.

Plaintiff also suggests<sup>13</sup> that by denying Carnes' petition for interlocutory appeal, this Court impliedly expressed its disapproval of Judge Hall's decision to quash the service of summons upon Carnes and dismiss it from the action. To make such a suggestion in the absence of an opinion from the Court is to succumb to conjecture.

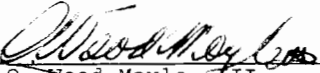
#### CONCLUSION

Based on the foregoing, Carnes Company prays the orders of dismissal be affirmed.

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13. Appellant's Brief at 45.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of March, 1979,

  
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O. Wood Moyle, III  
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Reid E. Lewis

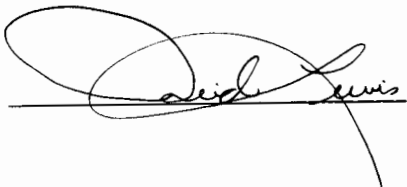
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CERTIFICATE OF SERVICE

This is to certify that on the 29<sup>TH</sup> day of March, 1979, I served the foregoing Brief of Respondent, by mailing a copy thereof, with postage prepaid thereon, to counsel of record as follows:

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A handwritten signature in dark ink, appearing to read "David Lewis", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the beginning and a long, sweeping tail that extends below the line.