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Arthur H. Nielsen; Clark R. Nielsen; Paul R. Frischknecht; Attorneys for Defendant-Appellant; Dan S. Bushnell; Attorneys for Plaintiff-Respondent;

Recommended Citation
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IN THE SUPREME COURT OF THE STATE OF UTAH

THE BOARD OF EDUCATION OF SOUTH SANPETE SCHOOL DISTRICT, Plaintiff-Respondent v. DON K. BARTON, et al., Defendant-Appellant.	Civil No. 15946

BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM THE SIXTH JUDICIAL DISTRICT COURT OF SANPETE COUNTY, HONORABLE DON V. TIBBS, JUDGE

Arthur H. Nielsen
Clark R. Nielsen
NIELSEN, HENRIOD, GOTTFREDSON & PECK
410 Newhouse Building
Salt Lake City, Utah 84111

Paul R. Frischknecht
50 No. Main
Manti, Utah 84642

Attorneys for Defendant-Appellant

Dan S. Bushnell
Bruce Findlay
KIRTON, McCONKIE, BOYER & BOYLE
330 South 300 East
Salt Lake City, Utah 84111

Attorneys for Plaintiff-Respondent

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410 Newhouse Building
Salt Lake City, Utah 84111

Paul R. Frischknecht
50 No. Main
Manti, Utah 84642

Attorneys for Defendant-Appellant

Dan S. Bushnell
Bruce Findlay
KIRTON, McCONKIE, BOYER & BOYLE
330 South 300 East
Salt Lake City, Utah 84111

Attorneys for Plaintiff-Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE BOARD OF EDUCATION OF SOUTH SANPETE SCHOOL DISTRICT,	)	
Plaintiff-Respondent	)	
vs.	)	Civil No. 15946
DON K. BARTON, et al.,	)	
Defendant-Appellant.	)	

BRIEF OF DEFENDANT-APPELLANT

NATURE OF THE CASE

This is a condemnation action brought by the Plaintiff-Respondent to obtain 24.49 acres of real property within the City of Manti and owned by Defendant-Appellant.

DISPOSITION OF CASE BY LOWER COURT

Following a jury trial in June 1978, the Defendant-Appellant was only awarded $1,633.00 per acre for the 24.49 acres of land condemned and given to the Plaintiff-Respondent.

RELIEF ON APPEAL

Appellants seek reversal of the jury award of value and a new trial due to prejudicial irregularities and errors by the Court during the trial.

STATEMENT OF FACTS

Appellant will refer to the Court Record and the trial transcript as "R," and "Tr." respectively.

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Plaintiff-Respondent is the Board of Education of the South Sanpete School District (R. at 55)(hereinafter sometimes referred to as the "Board" or "Respondent"). Defendant-Appellant (hereinafter sometimes referred to as "Barton" or "Appellant") is a resident of Manti in Sanpete County, State of Utah (Tr. at 172), and was, prior to this condemnation action, the fee owner of 24.49 acres located within Manti City in Sanpete County. (R. at 56)

On or about October 11, 1977, the Board by resolution authorized the acquisition of Barton's 24.49 acres for the construction of a high school in Manti City and negotiated with the Appellant for its purchase. (R. at 2, 55) When the parties failed to agree on a price for the land in question, Respondent filed this action on October 25, 1977, to condemn the property. (R. at 1)

On January 23, 1978, the lower court granted Respondent's Motion for Immediate Occupancy and Respondent filed a check with the Court Clerk in the amount of $36,735.00 representing 75% of Respondent's appraised value of $48,980.00 for the property. (R. at 16-17)

At the conclusion of the trial which lasted three days, the jury found the value of the condemned property to be only $40,000.00 (R. at 65), despite Respondent's claim in its Motion for Immediate Occupancy that the property was worth nearly $50,000.00. Judgment awarding that sum to the Appellant was entered June 12, 1978, and a final order of condemnation was entered on July 10, 1978. (R. at 77-79 and 82-83) Thereafter, this appeal was taken.

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ARGUMENT

POINT I

THE JURY VERDICT SHOULD BE REVERSED DUE TO PREJUDICIAL ERROR IN THE LOWER COURT.

A. The trial court erred in permitting Respondent to introduce testimony surrounding the sale of land to the L.D.S. Church after determining that such transaction was not relevant.

Appellant Barton called as an expert witness Mr. Marcellus Palmer, a licensed real estate appraiser. (Tr. at 36) Mr. Palmer testified that in his expert opinion this Barton property in Manti City was worth $6,600.00 per acre. Including the agricultural building improvements, the property has a fair market value of $166,084.00. (Tr. at 102, 109) Mr. Palmer's opinion was based on six comparable transactions within the Manti City area.

In addition to these comparables and also as a basis for his expert opinion, Mr. Palmer attempted to show the comparability of a sale of land from Grant Cox to the local L.D.S. Church. (Tr. at 100-101) Mr. Palmer testified that the Church paid $10,000.00 for one acre of land located near the Defendant's property. (Tr. at 100) Upon the objection of Respondent, the Court precluded the witness or counsel from presenting testimony as to the comparability of this sale. (Tr. at 100-102) Yet the Court permitted cross examination of Mr. Palmer by Respondent's counsel regarding this sale. When Appellant thereafter attempted to cross examine the Board's appraiser regarding this transaction, Appellant was precluded by the Court:

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THE COURT: Now, I've heard enough of that. Now, let's go onto something else. I think I've heard enough about this, so let's go onto something else now. The record should indicate that this sale is not relevant in these proceedings, so let's go onto another question. (Tr. at 270)

The following day when Court and counsel met in chambers, the Board requested permission to call a Mr. Wilbur Cox who was the L.D.S. stake president and had dealt with Grant Cox, the seller, regarding the Church transaction. (Tr. at 282) Appellant objected since Mr. Cox was not listed by counsel as a witness on the witness lists exchanged five days prior to trial. Other witnesses that Appellant had tried to call had been excluded for that reason. (See Tr. 152.) Also, Plaintiff's only "rebuttal witness," Mr. Grant Cox, the seller of the land to the Church, was in Salt Lake City and not available to testify on that day. (Tr. at 282-283) In the alternative, Plaintiff's counsel requested a continuance in order that the testimony of Grant Cox might also be made available to the jury. (Tr. at 283)

The Court noted Plaintiff's objections but denied them both. Completely contrary to his previous ruling that the sale was "not relevant," the Court allowed Wilbur Cox to testify and stated:

THE COURT: Your objection's noted and the motion to reopen the record for this purpose is allowed. The record should further indicate that the Court has had personal knowledge of this sale and is of the opinion that it would not be proper to leave the jury with this set of facts at this time and that to refuse to allow a clearing up of the record as to that comparable sale would be reversible error and the Court is of the opinion that it would be proper and fair to allow the evidence and it would be improper not to allow it. (Tr. at 283)

Thus, after determining that such transaction was not relevant, the trial court, over objection by Plaintiff's counsel,

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allowed the testimony of Wilbur Cox. (Tr. at 282-285)

After emphasizing his prominent community and religious position as the local stake president, Mr. Wilbur Cox was permitted to give hearsay testimony that the seller, Grant Cox, had certain religious and tax motives for selling the property to the L.D.S. stake, without even requiring that Mr. Grant Cox testify as to his motives. (Tr. at 286-297)

Plaintiff submits that the effect of the above chain of events at trial had a prejudicial impact on the jury. The Court, during Appellant's presentation of witnesses, ruled in front of the jury that the sale to the "Church" was "not relevant in these proceedings" and cut off Appellant's right to go into the matter further. (Tr. at 270) Later, because of his "personal knowledge" of the sale, the Court permitted Respondent to present the authoritative testimony of the local ecclesiastical leader, a "surprise" witness, who testified as to the intent and motives of another without allowing Appellant the opportunity to rebut the same.

The Court's comments, both in the presence of the jury and in chambers, illustrate an abuse of discretion which resulted in substantial prejudice to the Appellant. Not only was Appellant unable to go into the matter fully during his case in chief, but was also later prohibited from rebutting the testimony of Mr. Wilbur Cox when the Court reopened the issue because of its "personal knowledge" of the sale.

The whole chain of events prevented Appellant from getting out all the facts. It not only unfairly allowed the Respondent

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to "correct" the record, but resulted in prejudicing the jury against Appellant and his claims and "colored" the jury's view towards the entire matter.

B. <u>The trial court erred in refusing to allow testimony of Dee Ogden, the Board's appraiser, as to the nature of his employment.</u>

The trial court, by limiting the scope of examination, precluded Appellant from introducing the expert testimony of Mr. Dee Ogden, a real estate appraiser who had made an appraisal of the property for the School Board. (Tr. at 278)

In its case in chief, the Board presented the testimony of two appraisers. (Tr. at 188, 248) Mr. Gregory E. Austin testified that, in his opinion, the subject land was worth only $1,000.00 per acre or $27,500.00 with improvements; and Mr. Joseph Dan Cloward testified that, in his opinion, the land was only worth $1,250.00 per acre or $30,612.50. (Tr. at 206, 252-253)

Appellant thereafter determined to call Mr. Dee Ogden, who had made an appraisal of the property for the Board, as a rebuttal witness. (Tr. at 278) Mr. Ogden had obviously not been called by the Respondent School Board because his opinion as to the value of the property was far greater than that of either Mr. Austin or Mr. Cloward. (Tr. at 278) Upon the objection by the Board to testimony of Mr. Ogden, Appellant made a proffer of proof that Mr. Ogden, if called as a witness for Appellant landowner, would testify that he had been hired and paid by the Respondent to appraise the subject property. (Tr. at 278) The Court sustained the objection of Respondent to that testimony and ruled that Mr.

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Ogden could not testify as to the fact that he had been retained by the School Board and paid a fee to appraise the property. (Tr. at 278)

Although the Court ruled that Mr. Ogden could give an appraisal on the value of the property, the Court's ruling in effect stripped the Appellant from the real value of Mr. Ogden's testimony which may have partially offset the aura of "impartiality" of the Board in dealing with Appellant. It is obvious that Mr. Ogden's appraisal was higher than Respondent's other two appraisers because he wasn't called by Respondent to testify and because Appellant wanted to put him on the stand. Since Appellant's only appraiser had valued the property approximately six times higher than the two appraisers called by the Respondent, it would only have been fair to permit Mr. Ogden, who would have given an "in-between" appraisal, to testify for whom he had done the appraisal.

The jurors had a right to consider as evidence the fact that the Respondent School Board had hired an appraiser and decided not to use him as a witness at the trial because his appraisal was more than the Board's other appraisers. Evidence as to the nature of employment of an expert witness is probative in weighing his testimony, particularly where the "credibility" of the evidence appeared to be a major issue at the trial. Failure to allow such testimony was reversible error and prohibited this jury from considering all relevant facts in the case.

C. <u>The lower court erred in refusing to allow testimony of Morgan Dyreng.</u>

Another instance during the trial where prejudicial error

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occurred was the Court's refusal to allow the testimony of Mr. Morgan Dyreng. Mr. Dyreng was the owner-seller of an entire city block, consisting of five acres, located within Manti City which was sold to the Respondent School Board in December of 1977. (Tr. at 74) The purchase price paid by the School Board was $7,000.00 per acre. (Tr. at 178)

When Appellant's appraiser began to testify concerning that purchase of the five acres as a "comparable sale" which had been considered by him in his appraisal, the School Board objected on the basis of the competency of that sale as evidence and requested permission to call a witness in support of the contention that the sale was not "voluntary." The jury was excused and the School Board then called its own Superintendent, Mr. Ronald E. Everett, who testified that he had mentioned to the seller (Mr. Dyreng) the possibility of a condemnation suit during the negotiations. (Tr. at 75)

In rebuttal to Mr. Everett's testimony, Appellant wanted to call Mr. Dyreng himself to testify that the five-acre sale for $7,000.00 an acre was not "under threat of condemnation" but was, in fact, an arm's length transaction and sold for a fair price. (Tr. at 81) Appellant further argued that the School Board had not met its burden of showing that the sale was as a result of condemnation pressure and thereby not relevant herein. (Tr. at 83)

Appellant's position was and now is that simply having the power to condemn does not mean that every sale to an entity with power of eminent domain is "under the threat of condemnation."

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(Tr. at 83-84) The School Board urged that it was "the power to condemn" (Tr. at 83) which colors the sale and makes it involuntary and hence not relevant in the case. (Tr. at 83)

Prior decisions of this Court establish that Appellant was correct. The mere fact that an entity has the power of eminent domain does not exclude any sale to such entity as a "comparable sale" on the basis that it is a forced sale. For example, in Salt Lake City v. Lewis, 30 Utah 2d 462, 519 P.2d 1344 (1974), this Court held that evidence of a sale to Utah Power and Light Company was permissible as a comparable sale even though the utility had the power of eminent domain. The Court observed that such a sale does not prohibit the circumstance as being one from a willing buyer to a willing seller. 519 P.2d at 1345.

Nevertheless, the trial judge herein denied Appellant's request to call Mr. Dyreng to the stand to explain that the sale was not "under threat of condemnation." The Court said:

> THE COURT: I've heard enough. It's the Court's opinion that the sale would be in contemplation of condemnation. The Court will not allow the testimony regarding the sale.
>
> MR. BUSHNELL: I have something else I'd like to take up outside the jury.
>
> THE COURT: I'm going to take the next step, while I have it in my mind and in view of that, it is the order of the Court that no one present in this Court shall make any further statements in the presence of the jury or in response to this trial concerning this sale. (Tr. at 85)

Thus, the result of that decision was to preclude Appellant from using that sale as a "comparable" or even to show by testimony of the owner-seller of the five-acre tract that it was a voluntary sale and thus a "comparable sale" for Mr. Palmer to consider.

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Mr. Palmer was precluded from saying any more on the subject of that sale. The jury was prohibited from considering the fact that such similar property to Appellant's land had been purchased for $7,000.00 an acre. Certainly such evidence concerning a tract comprising several acres should have been presented to the jury which finally awarded Appellant approximately $1,500.00 per acre.

Although such error was prejudicial in and of itself, the prejudice was further compounded later in the trial by two separate events.

First, Respondent's counsel was later permitted to question the Appellant himself on cross examination about the sale of the five acres to the School District. (Tr. at 178-180) For example, the Court allowed the Board's attorney to ask the following questions:

> Q: Would it surprise you to know that the appraisal for that land, for the land itself, was within five hundred dollars an acre of the same appraisal for your land?
>
> A: I've been told that and it really bothered me.
>
> Q: Would it surprise you?
>
> A: It would really surprise me.
>
> Q: Do you know that I have shown that appraisal to one of the counsel for this side of the table to demonstrate that and I would be happy to show it to you? The point simply is that for the land itself it was appraised at or near the same figure as your land was appraised; isn't that true?
>
> A: I don't know because I haven't seen it. (Tr. at 179)

Thus, in effect, the Court allowed the Respondent to get into evidence the fact that its appraisal of the five-acre sale was close to its appraisal of the Appellant's property. This

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was done despite the Court's earlier ruling and despite the fact that Appellant had been prohibited from putting in testimony as to the sales price of that land at $7,000.00 per acre.

After the Court allowed Respondent to "reopen up" the issue, Appellant's attorney was later censured in front of the jury for trying to go into the same subject with Mr. Austin, one of the School District's appraisers. (Tr. at 210-211)

The second resulting prejudice was the position in which Mr. Palmer (Appellant's only expert witness) was left in the eyes of the jury. Without being able to testify as to the five-acre "comparable sale," he was left mainly with small acre-or-less comparables. The substantial prejudice occurred when the School District's appraiser belittled Mr. Palmer for relying on sales of very small tracts as comparables. For example, Mr. Austin testified in response to Appellant's question of comparability of two other sales with smaller sizes:

> A. Well, that's just about everything, Brother. That's everything. There ain't no comparable. How can you compare one acre with twenty five acres? There's no way. No way in this world. I would get kicked out of the Institute for doing a thing like that, absolutely lose my designation. (Tr. at 231-232)

Such prejudicial comments resulted from the Court's ruling that Mr. Palmer's larger "comparable sale" was not to be considered and obviously created the impression with the jury that sales involving only small tracts of land had been used as comparables by Mr. Palmer.

Thus, the improper ruling of the trial court served to compound the prejudicial effects of the error of the trial court

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in refusing to allow Mr. Dyreng to testify concerning his $7,000.00 per acre sale to the School District:

1. The jury was precluded from considering it as a comparable sale;

2. The School Board was later permitted indirectly to get in evidence before the jury of a purported appraisal of property for a substantially lesser amount than what the property was actually sold for; and

3. Appellant's appraiser was put in a bad light as it looked as if he relied mainly, if not exclusively, on sales involving smaller tracts as his only comparable sales.

The jury could not help but be substantially influenced by such error, as the final verdict herein illustrates.

POINT II

CUMULATIVE EFFECT OF THE ERRONEOUS RULINGS IN THE LOWER COURT.

A trial court has considerable latitude in a condemnation case in deciding whether to admit certain evidence and testimony. State of Utah By and Through its Road Commission v. Wood, 22 Utah 2d 317, 452 P.2d 872, 874 (1969). However, despite the amount of discretion given to the trial judge to control the trial, that discretion is not limitless.

Although harmless and minor errors are bound to occur in some trials, when an error occurs which provides "at least some likelihood of a different result in its absence," the Supreme Court is justified in reversing the verdict. Harris v. Harris, 14 Utah 2d 96, 377 P.2d 1007, 1009 n.2 (1963). See, also, Salt

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Lake County v. Kazura, 22 Utah 2d 313, 452 P.2d 869, 871 (1969); Wardell v. Jerman, 18 Utah 2d 359, 423 P.2d 485, 487 (1967); Paull v. Zions First National Bank, 18 Utah 2d 183, 417 P.2d 759, 961, n.5 (1966); Eager v. Willis, 17 Utah 2d 314, 410 P.2d 1003, 1005 (1966); and Hales v. Peterson, 11 Utah 2d 411, 360 P.2d 822 (1961).

Furthermore, when a case is tried to a jury, the rulings on evidence need to be scrutinized on appeal more critically than in a trial to the judge only. Arnovitz v. Tella, 27 Utah 2d 261, 495 P.2d 310, 311-12 (1972); In Re Baxter's Estate, 16 Utah 2d 284, 288, 399 P.2d 442 (1965).

Appellant submits that rulings of Court during the trial, as discussed herein, were so substantial and prejudicial that Appellant was deprived of the opportunity of "a full and fair consideration" of the disputed issue and fair consideration of the disputed issues. See Redevelopment Agency of Salt Lake City v. Barrutia, 526 P.2d 47, 51 (Utah 1974). See, also, Redevelopment Agency of Salt Lake City v. Mitsui Investment, Inc., 522 P.2d 1370, 1374 (Utah 1974).

The Supreme Court, in giving a trial judge latitude in deciding what evidence to exclude, has used the standard of "reasonable comparability" in the area of condemnation cases. State By and Through Its Road Commission v. Wood, supra, at 874. In Wood, the court observed that all parcels of property are not alike and cannot be identical. Thus, if another sale of land can be said to have any "probative value" on the price of the subject property, it should be admitted. The fact that there

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are some differences between the comparable sale and the subject sale goes to the weight of the evidence and not to its competency. 452 P.2d at 874. Yet the trial court precluded Appellant on more than one instance of presenting testimony of the comparability of different sales of land.

The policy in condemnation cases is to permit all relevant evidence to establish the true fair market value of the condemnee's land. See Weber County Water Conservancy District v. Ward, 10 Utah 2d 29, 347 P.2d 862 (1959). Therein the court indicated that adequate opportunity should be given the landowner to make certain he receives the fair market value of his land inasmuch as he is being forced by the State's police power to forfeit his property. This Court stated that it was error for the lower court to refuse to allow the landowner to testify as to the price he paid for the land 6 1/2 years earlier. The Court held that any probative information should be admitted. Differences in comparability, if any, go to the weight of the evidence rather than its admissibility:

> "Such sales, [of the same property] when made under normal and fair conditions, are necessarily a better test of the market value than speculative opinions of witnesses; for truly, here is where money talks." 347 P.2d at 864.

Although we are not concerned here with the admissibility of the original purchase price of the subject property, the analogous policy argument remains--evidence of prior sales should be allowed with appropriate explanations to the jury inasmuch as they are "a better test of the market value than speculative opinions of witnesses." While Appellant was prevented from giving a full

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and fair presentation of his evidence as to certain sales, Respondent was permitted at length to dispute the applicability of such sales.

Weber County v. Ward, supra, also discussed the importance of cross examination of witnesses. Therein, the condemnee was effectively denied the opportunity to cross examine an adverse witness because of the witness' noncommital, irresponsive answers. The court observed:

> "The purpose of cross-examination is to give adversary counsel the opportunity not only to inquire into uncertainties relating to the testimony in chief, but to test its credibility. Whatever may tend to explain, modify, or contradict the direct evidence should be allowed. Even though it is generally said that the trial judge has discretion to control cross-examination within reasonable limitations, he should not so restrict it as to prevent inquiry into matters having a direct bearing upon vital issues as was done here." 347 P.2d at 865.

In the instant case, failure to allow Mr. Dyreng and Mr. Grant Cox to testify in effect reduced the credibility of Appellant's other witnesses and testimony. Yet Respondent was allowed to produce his own testimony regarding these sales and Appellant was restricted in his cross examination. Yet another illustration of this occurred when Appellant sought to call a witness during his case. Appellant called Mr. Richard McFarlane to testify. (Tr. at 152) The School Board objected because Mr. McFarlane was not listed on the pretrial witness list exchanged by counsel. Despite Appellant's arguments that he had just learned of Mr. McFarlane and that neither he nor his testimony would be a "surprise" to the Board (Tr. at 152), the Court refused to let him testify (Tr. at 153), which again prohibited the Appellant from putting all the relevant facts before the jury.

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CONCLUSION

Appellant urges this Court to reverse the verdict and grant Appellant a new trial. Reversible and prejudicial error occurred on several occasions during the trial, coloring the jury's findings, prohibiting them from considering relevant and probative evidence and alienating them from the Appellant in the case. The cumulative effect of the errors resulted in substantial prejudice to the outcome of the case and in an unfortunate miscarriage of justice. Such prejudice should not be lightly rejected and passed over as harmless error as the verdict indicates that the jury was affected by the errors.

Appellant respectfully requests this Court to grant a new trial.

Respectfully submitted this 9th day of March, 1979.

Arthur H. Nielsen
Clark R. Nielsen
NIELSEN, HENRIOD, GOTTFREDSON & PECK
Attorneys for Defendant
410 Newhouse Building
Salt Lake City, Utah 84111

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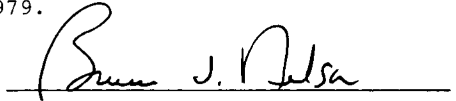
CERTIFICATE OF SERVICE

SERVED the foregoing Brief of Defendant-Appellant by hand delivering two copies thereof to Dan S. Bushnell and Bruce Findlay, Kirton, McConkie, Boyer and Boyle, Attorneys for Plaintiff-Respondent, at 330 South 300 East, Salt Lake City, Utah, this 9th day of March, 1979.



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