

1989

John Wagner Associates v. Hercules, Inc. : Response to Petition for Rehearing

Utah Court of Appeals

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James M. Elegante; Parsons, Behle & Latimer; Attorneys for Respondent.

Robert F. Babcock; Darrel J. Bostwick; Walstad & Babcock; Attorneys for Appellant.

Recommended Citation

Legal Brief, *John Wagner Associates v. Hercules, Inc.*, No. 890017 (Utah Court of Appeals, 1989).
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IN THE COURT OF APPEALS OF THE STATE OF UTAH

890017-CA

JOHN WAGNER ASSOCIATES,
d/b/a GRABBER UTAH,

Plaintiff-Appellant,

vs.

HERCULES, INC.,

Defendant-Respondent.

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CASE NO. 890017-CA

Category No. 14b

PLAINTIFF'S RESPONSE TO DEFENDANT'S PETITION FOR REHEARING

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH
Honorable Frank G. Noel, District Court Judge

Robert F. Babcock (0158)
Darrel J. Bostwick (4543)
WALSTAD & BABCOCK
254 West 400 South, #200
Salt Lake City, UT 84101
Telephone: (801) 531-7000

ATTORNEYS FOR APPELLANT

James M. Elegante
PARSONS, BEHLE & LATIMER
185 South State Street, Suite 700
P. O. Box 11898
Salt Lake City, Utah 84147-0898

ATTORNEYS FOR RESPONDENT

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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d/b/a GRABBER UTAH,

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ATTORNEYS FOR RESPONDENT

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PRELIMINARY STATEMENT

Pursuant to Rule 35 of the Utah Rules of Appellate Procedure and pursuant to a request of the Clerk of the Utah Court of Appeals, Mary T. Noonan, the Plaintiff, John Wagner Associates dba Grabber Utah, respectfully submits this Response to Defendant Hercules' Petition for Rehearing. In accordance with the instructions from the Clerk of the Utah Court of Appeals, the Plaintiff is responding only to Sections II.B. and II.D. of Hercules' Petition. The Clerk specifically instructed the Plaintiff not to address the arguments made by the Defendant in Sections II.A. and II.C. of Defendant's Petition for Rehearing.

ARGUMENT

The standard for reviewing Hercules' Petition for Rehearing is stated in Rule 35 of the Utah Rules of Appellate Procedure. The Rule states, in pertinent part, "The petition shall state with particularity the points of law or fact which the petitioner claims the court has overlooked or misapprehended" Section II.B. of Hercules' Petition, fails to set forth any law or facts which the Court overlooked or misapprehended. And, while Section II.D. of Hercules' Petition does state a valid point of law that the Court misapprehended, there is additional law upon which the Court may grant an award of attorneys' fees to the Plaintiff for Hercules' failure to obtain a payment bond, as set forth more fully below.

Although Section II.B. of Hercules' Petition fails to meet the standard for the Court's review, each of the two Sections of Hercules' Petition for which a response has been requested by the Court is addressed in the subsections below.

I. THE COURT CORRECTLY HELD THAT THE PURCHASE ORDER BETWEEN HERCULES AND MODULAIRE CONSTITUTED A CONTRACT FOR THE CONSTRUCTION OF THE MODULAR OFFICE UNITS.

In Section II.B. of the Petition, Hercules assails the Court's decision that, as a matter of law, the purchase order between Hercules and Modulaire for the procurement of the office buildings constituted a contract for the construction of those buildings. Hercules' attack on the Court's holding is twofold, neither of which warrants a rehearing or a change in the Court's Opinion of August 31, 1990.

First, Hercules claims that the Court was in error since the Plaintiff did not contract directly with Hercules. And second, Hercules criticizes the Court's reliance upon a factual stipulation concerning the contractual relationships on the project, which stipulation was entered voluntarily by Hercules at the trial of the case. The contentions asserted by Hercules with respect to the this issue are completely groundless. The Court has not overlooked or misapprehended any facts or law with respect to the Court's holding that the purchase order constituted a contract for the construction of the office buildings. Nevertheless, the Plaintiff addresses the two contentions of Hercules below.

With respect to the first contention, Hercules attempts to mislead the Court by fabricating a statutory requirement that the Plaintiff must have contracted directly with Hercules in order for Utah Code Annotated §§ 14-2-1 et seq. to apply. On page 6 of the Petition, Hercules erroneously states that "Hercules, therefore, did not contract with Wagner for the construction of the units, as required by the Payment Bond Statute." While it is true that the Plaintiff did not contract with Hercules, no such statutory requirement exists in the Payment Bond Statute.

Utah Code Annotated § 14-2-1 (1953 as amended in 1985) states that:

The owner of any interest in land entering into a contract, involving \$2,000 or more, for the construction, addition to, alteration, or repair of any building, structure or improvement upon land shall, before any such work is commenced, obtain from the contractor a bond in the sum equal to the contract price, with good and sufficient sureties, conditioned upon the faithful performance of the contract and the prompt payment for material furnished, equipment and materials rented, and labor performed under the contract.

Emphasis added. Section 14-2-2 (1953 as amended in 1965) goes on to state, in pertinent part, that:

Any person subject to the provisions of this chapter, who shall fail to obtain such good and sufficient bond, or to exhibit the same, as required herein, shall be personally liable to all persons who have furnished materials or performed labor under the contract. . . .

Emphasis added.

From a reading of these Sections, it is clear that contract privity is not required for a person to make a claim under Utah Code Annotated §§ 14-2-1 et seq., either on a bond, if one is provided, or against the owner personally, if a bond is not provided. In fact, these statutes, and the personal liability of the property owner mandated therein, were created specifically to eliminate lack of privity defenses when an owner receives the benefit of labor or materials provided to improve the owner's property but fails to require a bond to assure payment thereof.

The Defendant also assails the Court's reliance upon the stipulation of the contractual chain for the procurement of the modular office complexes. However, Hercules fails to point out in its Petition that the Court did not rely solely on the stipulation to arrive at the legal conclusion that the purchase order constituted a

contract for the construction of the office buildings. The Court arrived at the same conclusion by analyzing the facts of the case and the provisions of the purchase order itself. The stipulation, combined with the facts of the case, present overwhelming proof that the purchase order between Hercules and Modulaire constituted a contract for the construction of the office buildings.

The stipulation, as well as the evidence submitted at the trial and the representations of the Defendant's own attorney at the oral argument before this Court, clearly establish the following:

1. Hercules entered into a purchase order with Modulaire for the procurement of approximately 25,000 square feet of office space which was to be constructed using modular units for the shell of two separate buildings, the construction of which extended to finishing, altering and improving the shells to specifications required by Hercules for completed office buildings.
2. Under the purchase order, Modulaire owed a duty to Hercules to provide the office buildings within a time certain and according to specifications which were issued, approved and/or required by Hercules.
3. In order to meet its obligations under the purchase order, Modulaire contracted with Space Building Systems for the construction of the interior of the office buildings.
4. In order for Space Building Systems to meet its obligations under its construction contract with Modulaire, and derivatively for Modulaire to meet its obligations to Hercules under the purchase order, Space Building Systems contracted with the Plaintiff to provide materials for the construction of the interior of the office buildings.
5. The materials supplied by the Plaintiff were in fact used in the construction of the office buildings.
6. Hercules did not require a payment bond from Modulaire to assure the payment of the labor and materials required to construct the office buildings as required by Utah Code Annotated §§ 14-2-1 et seq. (1953 as amended in 1985).

For the Defendant to argue that the purchase order between Modulaire and Hercules was not for the construction of the office buildings not only disregards the plain language of the statute but it

ignores the facts that the Court has already thoroughly reviewed in arriving at its decision. Further, Hercules has failed to identify even one fact or state one element of law which the Court has overlooked or misapprehended.

Hercules' contentions simply defy common sense. If the purchase order was not one for construction of the office buildings, how was Modulaire supposed to fulfill its contractual obligations to Hercules? Were the office complexes supposed to materialize out of thin air without any effort to purchase, assemble and erect the various materials and components into finished buildings? It defies logic for there to be any conclusion other than the purchase order was indeed a contract for the construction of the office buildings.

In its opinion, this Court properly drew from the stipulation and from the facts of the case to hold that, as a matter of law, the purchase order was for the construction of the office buildings. The fact that Hercules now wishes that it had not entered into the stipulation should be of no consequence to the Court. This is especially true since there is ample evidence in the record that the stipulation accurately reflects the contractual relationships among the contracting entities.

The Court, in the text of Footnote 4 on pages 6 and 7 of the August 31, 1990 Opinion, correctly states that even aside from stipulation entered voluntarily by Hercules, the evidence in the record leads to the conclusion that the purchase order constituted a contract for the construction of the office buildings. It is sound reasoning which led the Court to state generally:

If a lessee enters into an agreement to lease a building which is not currently on its land but will be constructed by the lessor, the lessee is necessarily

entering into a contract to construct the building upon its land or the land in which it has an interest.

Even more compelling are the facts of this case where the buildings were constructed by a contractor which is not the lessor.

Hercules has an interest in the land which predates the purchase order contract between Hercules and Modulaire for the procurement of the office buildings. Hercules entered into a purchase order for procurement of the office buildings upon the land in which it has an interest. In order for Modulaire to fulfil its obligations to Hercules under the purchase order, it had to construct the office buildings. Therefore, the purchase order is necessarily a contract for the construction of the office buildings. No other conclusion is possible under the facts of this case.

The facts of the case are largely undisputed and the Court cited some of those facts to show several indicators that the purchase order was a contract for the construction of the office buildings. In Footnote 4, pp. 6 and 7 of the August 31, 1990 Opinion, the Court stated:

Even absent the parties' stipulation, the leasing arrangement constitutes a contract for the construction of a building on its own merits. The purchase order by which Hercules leased the complexes from Modulaire states: "These complexes will be built to Hercules specification no. 9106." The purchase order also states "Installation to be complete as soon as possible. Hercules will be responsible for site preparation, sewer, water and electrical service hookups." The purchase order also provided for one time charges for "delivery, set-up and skirting" of the complexes which were to be billed separately from the monthly lease payments. The construction contract between Modulaire and SBS similarly refers to Hercules as the "Owner" and Modulaire as the "Contractor."

Emphasis in original.

While these are the facts that the Court cited, there are many

others in the record which further support the conclusion made by the Court.

II. WHILE UTAH CODE ANNOTATED § 14-2-3 (1953 AS ENACTED IN 1963) DOES NOT PROVIDE FOR ATTORNEYS' FEES IN AN ACTION FOR FAILURE TO OBTAIN A PAYMENT BOND, UTAH CODE ANNOTATED § 14-2-2(3) (1953 AS AMENDED IN 1989) APPLIES TO PENDING LITIGATION AND ENTITLES THE PLAINTIFF TO AN AWARD OF ATTORNEYS' FEES IN THIS ACTION FOR FAILURE TO OBTAIN A PAYMENT BOND.

Hercules correctly states the status of the law with respect to Utah Code Annotated § 14-2-3 (1953 as enacted in 1963). However, that does not mean that the Plaintiff is not entitled to an award of attorneys' fees.

In 1986, the Utah legislature amended § 14-2-3 and then repealed it in 1987. Then in 1989, the Utah legislature amended Utah Code Annotated § 14-2-2 to specifically include provisions for attorneys' fees in claims for failure to obtain a payment bond. Section 14-2-2(3) (1953 as amended in 1989) states:

(3) In an action for failure to obtain a bond, the court may award reasonable attorneys' fees to the prevailing party. These fees shall be taxed as costs in the action.

There is persuasive authority which leads to the conclusion that an award of attorneys' fees in this action is appropriate under § 14-2-2 (1953 as amended in 1989) even though the amendment was made during the pendency of this case.

The starting point in the analysis is to set forth the general rule. Generally, the substantive law which is in effect at the time a cause of action accrues is the law which should apply to any suit to enforce the cause of action. See, Carlucci v. Utah State Industrial Commission, 725 P.2d 1335 (Utah 1986). This general rule is well founded in common law (See, Farrel v. Pingree, 5 Utah 443, 16 P. 843 (1888) (predecessor statute was merely a statement of well-settled

rules of statutory construction)) and in statutory law (See, Utah Code Annotated § 68-3-3). See also, In re J.P., 648 P.2d 1364 (Utah 1982).

However, since the statute governing this general rule is merely a statement of well-settled rules of statutory construction, it is subject to the common law exceptions to such rule.

There are several exceptions to the general rule upon which Utah and other courts have applied intervening statutory amendments to pending litigation. These are: (1) when the statutory amendment affects only procedural law rather than substantive rights (State Department of Social Services v. Higgs, 656 P.2d 998 (Utah 1982) and Pilcher v. State Department of Social Services, 663 P.2d 450 (Utah 1983)); (2) when the amendment is remedial (Marshall v. Industrial Commission, 704 P.2d 581 (Utah 1985)); (3) when the amendment is meant to clarify and amplify existing law (State Department of Social Services v. Higgs, 656 P.2d 998 (Utah 1982) and Okland Construction Co. v. Industrial Commission, 520 P.2d 208 (Utah 1974)); (4) when the amendment does not enlarge, eliminate or destroy vested or contractual rights (State Department of Social Services v. Higgs, 656 P.2d 998 (Utah 1982) and Marshall v. Industrial Commission, 704 P.2d 581 (Utah 1985)); and (5) when the statutory amendment specifically states that it is to apply retroactively (Utah Code Annotated § 68-3-3).

The exceptions to the general rule are as well-settled as the general rule. The Utah Supreme Court stated that "Even in states where the state constitution prohibits retroactive application of statutes, an exception is made for remedial procedural statutes." Pilcher v. State, Department of Social Services, 663 P.2d 450, 455 (Utah 1983). The Utah cases cited above have applied statutory amendments retroactively, or have at least recognized that such

application is appropriate. This is so regardless of the general rule stated in Utah Code Annotated § 68-3-3. There can be no question that the common law exceptions to the general rule which are noted above apply to Utah Code Annotated § 68-3-3.

The Utah Supreme Court stated:

A contrary rule applies, however, where a statute changes only procedural law by providing a different mode or form of procedure for enforcing substantive rights. Such remedial statutes are generally applied retrospectively to accrued or pending actions to further the Legislature's remedial purpose.

Pilcher, 663 P.2d at 455. The Utah Supreme Court also stated:

[P]rocedural statutes enacted subsequent to the initiation of a suit which do not enlarge, eliminate, or destroy vested or contractual rights apply not only to future actions, but also to accrued and pending actions as well.

State v. Higgs, 656 P.2d 998, 1000 (Utah 1982).

This Court must determine whether the intervening amendment of Utah Code Annotated § 14-2-2 to allow a discretionary award of attorneys' fees fits into one of the common law exceptions to the general rule and, therefore, should be applied to this case to allow the Plaintiff to recover attorneys' fees under Utah Code Annotated § 14-2-2 (1953 as amended in 1989). The Court must determine whether the intervening amendment of § 14-2-2 (1953 as amended in 1989) does not "enlarge, eliminate, or destroy vested or contractual rights" of the parties hereto. If it does not, Utah Code Annotated § 14-2-2 (1953 as amended in 1989) should be applied to this case and the Plaintiff should be awarded its reasonable attorneys' fees as costs. Such an award is in the discretion of the Court.

To the best of the Plaintiff's knowledge, the Utah appellate courts, have never addressed the issue of whether an intervening

statutory amendment authorizing an award of attorneys' fees fits into one of the stated exceptions. The Plaintiff is also unaware of any Utah trial court decisions regarding this issue. However, there are other states' appellate courts which have directly addressed the issue.

The Washington Court of Appeals held that an intervening statutory amendment authorizing attorneys' fees was procedural or remedial in nature. That Court stated:

Statutes generally operate prospectively unless remedial in nature. A statute is remedial when it relates to practice, procedure or remedies and does not affect substantive or vested rights. We deem attorney's fees to be remedial in nature and therefore give the statute retroactive effect.

Camer v. Seattle School District No. 1, 52 Wash.App. 531, 762 P.2d 356 (1988) (citations omitted) (emphasis added). See also, Bradfute v. Renton School District No. 403, 19 Wash.App. 638, 577 P.2d 157, 159 n.1 (1978).

The Supreme Court of California also held that an intervening statutory amendment authorizing attorneys' fees would apply to cases pending on appeal. In Woodland Hills v. City Counsel of Los Angeles, 154 Cal.Rptr. 503, 593 P.2d 200, 206 (1979) stated:

The section provides explicit statutory authorization for a "private attorney general" attorney fee award. . . . Although section 1021.5 was not on the books at the time the trial court denied plaintiffs' motion for attorney fees, the governing authorities establish that the new statute nonetheless applies to this proceeding, which was pending on appeal at the time the legislative enactment became effective.

Emphasis added. The California Court went on to cite substantial Federal case authority for the proposition that intervening statutory amendments authorizing awards of attorneys' fees apply to cases pending on appeal at the time of the effective date of the amendment.

See, e.g., Bradley v. Richmond School Board, 416 U.S. 696 (1974); Gore v. Turner, 563 F.2d 159 (5th Cir. 1977); Alphin v. Henson, 552 F.2d 1033 (4th Cir. 1977); and Torres v. Sachs, 538 F.2d 10 (2nd Cir. 1976).

Other state courts have held that where a statutory amendment grants the court authority to award discretionary attorneys' fees, as opposed to a mandatory award of attorneys' fees, such amendments would be applied to pending actions. Utah Code Annotated § 14-2-2 (1953 as amended in 1989) grants such discretionary authority to the courts to award attorneys' fees and tax them as costs in the action.

In Circle K Corporation v. Rosenthal, 118 Ariz. 63, 574 P.2d 856 (1978), the Arizona Court of Appeals held that a permissive statutory amendment which became effective during the pendency of the appeal was to be applied to the case on appeal.

The Idaho Supreme Court has also applied an intervening statutory amendment allowing an award of attorneys' fees to a pending case. In Jensen v. Shank, 99 Idaho 565, 585 P.2d 1276, 1277-1278 (1978), the Court stated:

The application of I.C. § 12-121 to a claim for relief which arose prior to the enactment of that section but tried after the section became law is not an improper retroactive application of that section since we view its provision as remedial and procedural and not as affecting the substantive claim for relief.

Emphasis added. See also, Ericksen v. Blue Cross of Idaho, 116 Idaho 693, 778 P.2d 815 (Idaho App. 1989) (attorneys' fees amendment applied retroactively since either party could recover attorneys' fees if it were the successful party).

Another Idaho case further emphasizes the point. In Meyers v. Vermaas, 114 Idaho 85, 753 P.2d 296, 298 (Idaho App. 1988), while the

Court declined to allow and award of attorneys' fees because it required a mandatory award rather than a discretionary award, the Court stated:

Statutes which do not "create, enlarge, diminish or destroy contractual or vested rights" are deemed to be remedial or procedural, as opposed to substantive. . .

When this classification scheme is applied to statutes authorizing discretionary awards of attorney fees, such statutes generally are held to be remedial or procedural. Consequently, they are given retroactive effect. Presumably, any amendment to such statutes would receive retrospective effect.

Emphasis in original. Citations omitted.

These cases are helpful and persuasive in deciding the case at bar. Utah Code Annotated § 14-2-2 (1953 as amended in 1989) states that "the court may award reasonable attorneys' fees to the prevailing party." This grant of discretionary authority does not enlarge, create or diminish vested or contractual rights of the parties. The ability of the prevailing party to recover reasonable attorneys' fees does not affect the substantive rights of the parties. The cause of action upon which the Plaintiff seeks recovery remains the same and Hercules is still liable for failure to obtain a payment bond.

Section 14-2-2 (1953 as amended in 1989) further states that "These fees shall be taxed as costs in the action." Thus, the award of attorneys' fees under this Section is not substantive right of the parties but rather an extension of the Court's undisputed authority to procedurally award "costs" in an action or appeal.

From the discussion above, it is clear that the amendment of Utah Code Annotated § 14-2-2 (1953 as amended in 1989) to allow the discretionary award of attorneys' fees is a procedural provision which is remedial in nature and should be applied to this case to grant the

Plaintiff an award of its reasonable attorneys' fees herein.¹

CONCLUSION

It is clear that the Court did not overlook or misapprehend any facts or law with regard to the issue of whether the purchase order between Modulaire and Hercules for the procurement of the office buildings constituted a contract for the construction of the buildings. The Court's decision on this issue was based upon two rationales.

First, the stipulation regarding the contractual relationships among Hercules, Modulaire, Space Building Systems and the Plaintiff was enough to resolve the issue by itself. Second, the Court looked to the undisputed facts of the case and the language of the purchase order to independently arrive at the conclusion that the purchase order constituted a contract for the construction of the office buildings.

Hercules complains of only the Court's usage of the stipulation but says nothing about the facts cited by the Court or about the necessary inferences drawn from those facts (as stated by the Court in the second and third paragraphs of Footnote 4 on p. 7 of the Opinion).

¹ Although the Court's ruling to reinstate the Plaintiff's mechanic's lien foreclosure cause of action opens the door for recover of attorneys' fees under Utah Code Annotated § 38-1-18, such an award may only be recoverable from the amounts generated from a foreclosure sale, if the mechanic's lien is ultimately ordered to be foreclosed. At this juncture, the only sure method for the Plaintiff to recover its attorneys' fees from Hercules is to hold Hercules liable for such fees under Utah Code Annotated § 14-2-2 (1953 as amended in 1989). As the Court appropriately noted in its opinion of August 31, 1990 at page 5, Hercules had its remedy in its own hands (quoting language from Rio Grande Lumber Co. v. Darke, 50 Utah 114, 122, 127, 167 P.2d 241, 244, 246 (1917)). If Hercules had done what the law requires and obtained a payment bond from Modulaire, Hercules would have no liability under Utah Code Annotated § 14-2-1 et seq. and the Plaintiff likely would have been paid, including its attorneys' fees if it had to sue on the bond.

Hercules fails to state any facts which the Court overlooked or misapprehended. Further, Hercules does not cite any statutory or case authority which the Court overlooked or misapprehended. Even if the Court were to disregard the stipulation, the facts mandate the same conclusion.

Hercules does attempt to mislead the Court into believing that the Plaintiff must have privity of contract with Hercules for Utah Code Annotated §§ 14-2-1 et seq. to apply. Such is not the case. While Hercules may have "always maintained that it is nothing more than a lessee of the mobile trailers" (Petition for Rehearing at p. 7), that does not change the fact that the stipulation, the facts presented at the trial and the language of the purchase order all dictate that Hercules did in fact contract for the construction of the office buildings. As the Court correctly stated, "Inherent in such a lease is a contract for the construction of the building itself or else the lease agreement would be void and of no effect." Opinion at p. 7, Footnote 4.

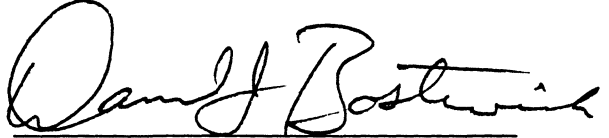
Further, the award of attorneys fees is within the discretion of the Court, albeit under Utah Code Annotated §14-2-2 (1953 as amended in 1989) rather than under Utah Code Annotated § 14-2-3. The amendment to § 14-2-2 granting the Court power to award the prevailing party a discretionary award of attorneys' fees is a procedural and remedial amendment which may be applied to accrued and pending actions, even actions pending on appeal.

For the reasons stated herein, the Plaintiff respectfully requests that the Court deny Hercules' Petition for Rehearing on all issues except for a statement by the Court clarifying that the Plaintiff is entitled to its reasonable attorneys' fees from Hercules

pursuant to Utah Code Annotated § 14-2-2 (1953 as amended in 1989) rather than under Utah Code Annotated § 14-2-3 as stated in the Opinion of August 31, 1990.

RESPECTFULLY SUBMITTED this 22nd day of October, 1990.

WALSTAD & BABCOCK

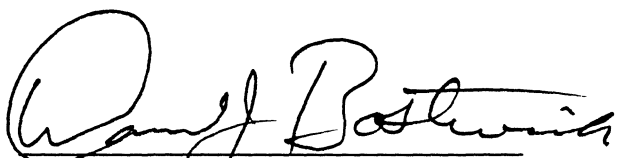
By: 
Darrel J. Bostwick
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 1990, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing to the following:

James M. Elegante
PARSONS, BEHLE & LATIMER
185 South State Street, Suite 700
P.O. Box 11898
Salt Lake City, Utah 84147-0898

WALSTAD & BABCOCK

By: 
Darrel J. Bostwick
Attorneys for Plaintiff

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