

2001

Marjorie J. Durand v. Cedar City Corporation : Brief of Appellant

Utah Supreme Court

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Allan L. Larson; Attorney for Respondent.

Patrick H. Fenton; Attorney for Appellant.

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BRIEF

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DOCKET NO. **19033**

IN THE SUPREME COURT

OF THE STATE OF UTAH

MARJORIE J. DURAND,

Plaintiff-Appellant,

vs.

CEDAR CITY CORPORATION,
H. L. BRADLEY, ARTHUR O.
STEWART and GRANT HINCHCLIFF,

Defendants-Respondents,

Case No. 19033

APPELLANT'S BRIEF

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Cedar City, UT 84720

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10 Exchange Place
11th Floor
P. O. Box 3000
Salt Lake City, UT 84110

FILED

OCT 13 1983

IN THE SUPREME COURT
OF THE STATE OF UTAH

MARJORIE J. DURAND,

Plaintiff-Appellant,

vs.

CEDAR CITY CORPORATION,
H. L. BRADLEY, ARTHUR O.
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IN THE SUPREME COURT
OF THE STATE OF UTAH

MARJORIE J. DURAND,
Plaintiff-Appellant,
vs.
CEDAR CITY CORPORATION,
H. L. BRADLEY, ARTHUR O.
STEWART and GRANT HINCHCLIFF,
Defendants-Respondents.

Case No. 19022

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This is an action brought by Marjorie J. Durand arising out of a shoot out on the 21st day of February, 1979, in a trailer court in the north part of Cedar City, Iron County, State of Utah. Mrs. Durand was an occupant of a trailer in the court.

One Neil Anderson, together with his brother, operated a motor vehicle repair shop on the north edge of Cedar City. Neil Anderson lived in the same trailer court as Mrs. Durand, only a few doors from Mrs. Durand's trailer. Exhibits "D" and "E" attached hereto give a relative location of these two trailers in the trailer court, although they are not drawn to scale.

Neil Anderson and his brother had a local reputation of indulging in alcohol in the later part of the day. On this particular evening, they became quite drunk and started up town.

They were picked up by police of Cedar City and taken to the police station. The brother of Neil Anderson was driving. While in all probability that had had drink for drink, the officers called Neil Anderson's wife to come and get him; the officers then processed the brother for driving while under the influence of alcohol. Mrs. Anderson took her husband home although he had a reputation of shooting it out with police officers, threatening police officers, and items of this nature. When he became belligerent and started back to town, making threats to go back to town to get his brother, Mrs. Anderson called the police. The police responded; the shoot out occurred; and as part of the shoot out, Mrs. Durand was injured.

Mrs. Durand signed a notice and the same was served upon Cedar City Corporation as a notice of claim within the statutory period. A complaint was filed, and a motion was made for the court to set a bond for bringing an action against officers of a city. In the due course of events, an order was filed requiring a \$300.00 bond. The bond was posted in cash as a \$600.00 property bond.

In the due course of events, the defendants filed a Motion for Summary Judgment, which was overruled and denied, on the 7th day of May, 1982, by the District Court of Iron County. See Exhibit "A" attached hereto. This reserved to the defendants the right to renew the motion at the time of pretrial. At the time of the pretrial, the motion was renewed. Without additional evidence or without additional affidavits, the court ruled that the summary judgment should be granted. This is the only item that the court decided. No other question was decided

by the court at that time; Exhibit "B", "Summary Judgment," dated the 1st day of February, 1983, is the result thereof. There is as part of the record on appeal, a short court proceeding of the 7th day of January, 1983, in which the argument was submitted. The court specifically refused to rule on any other point. See transcript of January 7, 1983, page 4, line 17-19, inclusive. This appeal is based on that specific ruling, and is an appeal from the order granting the motion for summary judgment.

DISPOSITION IN THE LOWER COURT

On January 7, 1983, the trial court saw fit to grant defendant's motion for summary judgment.

RELIEF SOUGHT ON APPEAL

The plaintiff and appellant, Marjorie J. Durand, seeks to have summary judgment granted by the court reversed and this situation sent to a fact finder for proper disposition and findings of fact on the matter.

STATEMENT OF FACTS

The plaintiff along prior to the occurrence complained of, had been employed in Cedar City, Iron County, State of Utah as a supervisor of telephone operators in Cedar City, Utah, by Mountain Bell. She had been steadily employed in this capacity for a number of years. For a considerable period prior to the time of the matter complained of, the plaintiff had lived in trailer space #24, at 1027 North Main Street, Cedar City, Utah, in an organized trailer court. Neil Anderson lived in a neighboring trailer.

Prior to the 21st day of February, 1979, Neil Anderson

and his brother were self-employed as mechanics in an automotive repair institution in Cedar City, Iron County, State of Utah. At times they had been involved with intoxicants and had prior histories with the Cedar City police force. The fact that each of them became bellicose and argumentative when interfered with was known by police officers. On occasion, each had threatened to use fire arms in connection with what they termed "police harassment;" they had on occasion prior to the 21st day of February, 1979, interfered with police officers in the due performance of their duty while the Anderson brothers were under the influence of alcohol. Neil Anderson's brother's name is Eugene Anderson. In the Anderson family there had been a prior history of shootings under these conditions. All of these items were well known to the Cedar City police officers.

Upon the evening of the 21st day of February, 1979, the defendant Grant Hinchcliff and another Cedar City police officer by the name of Bruce Marshall stopped a vehicle on north Main Street in Cedar City, Utah, because of the manner in which it was being driven. Eugene Anderson was driving the vehicle; Neil Anderson was riding as a passenger in said vehicle. Both Eugene Anderson and Neil Anderson were taken into custody by the officers. The officers then proceeded in the investigation of the driving while under the influence of alcohol incident. They took both of the Anderson brothers to the police station to apply a breathalyzer test to the driver, to-wit: Eugene Anderson. Neil Anderson was taken to the police office as part of this proceeding. While attempting to process the driving-while-under-the-influence charges against Eugene Anderson, there was interference

by both brothers. The arresting officers called the wives of the two Anderson brothers and requested them to come and help them. Neil Anderson became bellicose, interfered with the police officers, threatened them, and had to be restrained. The defendant Grant Hinchcliff threatened to put Neil Anderson in jail on a charge of "interfering with an officer in the performance of his duty."

When the wives of the Anderson brothers arrived at the police station, the defendant Grant Hinchcliff turned Neil Anderson over to his wife without filing charges against him, even though there had been threats of shooting and he had interfered with the police officers in processing the driving-while-uner-the-influence of alcohol charge in relation to Eugene Anderson. Officer Hinchcliff asked Neil Anderson's wife to take him home. Mrs. Anderson asked the officers to lock him up because of the shape he was in. The officers refused to do so.

Mrs. Neil Anderson took her husband home. On the way home and after arriving at home, Neil Anderson was bellicose and made threats concerning shooting and stated he was going back to help his brother Eugene Anderson. The home of Neil Anderson was in the trailer park occupied by the plaintiff and many other people and was heavily saturated with occupants. Neil Anderson made efforts to obtain a fire arm; his wife called for police assistance. At the time Neil Anderson's wife called for police assistance, Eugene Anderson and his wife were leaving the police station, the processing of the charge on Mr. Eugene Anderson having been completed and his wife having posted bail for his appearance. The call of Mrs. Neil Anderson was responded to by defendants

H. L. Bradley, Arthur O. Stewart and Grant Hinchcliff, functioning as officers of the defendant Cedar City Corporation. At the time of responding to said call, the defendants Bradley and Stewart had actual knowledge of the previous conduct of Neil Anderson in the police station that night, having obtained the same from Officer Hinchcliff. Both Bradley and Stewart had actual knowledge that he had made prior threats against police officers while under the influence of alcohol. They also had actual knowledge that he was under the influence of alcohol on this particular evening.

The officers approached the trailer of Neil Anderson; the defendant H. L. Bradley entered the trailer, saw Neil Anderson sitting down with a rifle crosswise his knees, the bolt open, attempting to insert ammunition into the same. This was from a distance of approximately four feet. The officers allowed Neil Anderson to load the gun; the officers retreated as is shown by their affidavits, which are attached hereto as Exhibits "C", "D", and "E". After considerable altercation with Mr. Neil Anderson, with him on the porch and two of the officers in protective positions, the shoot out commenced. Neil Anderson fired two or three shots, each of which were heard by the defendants Arthur O. Stewart and Grant Hinchcliff, none of which could have been the shots that injured the plaintiff.

As a result of the shoot out, the plaintiff, sitting in her own home, minding her own business, watching television, was severely wounded. The damage she has complained of resulted therefrom. In addition, Neil Anderson was killed.

That within the statutory period as the statute was in existence at that time, Marjorie Durand filed a claim with Cedar City Corporation, which in the due course of events was denied. That at the time of filing the complaint in the above-entitled matter with the District Court of Iron County, Utah, the Court prescribed a bond to be filed by Marjorie Durand, which was filed.

ARGUMENT

POINT I

THERE ARE ISSUES OF FACT TO BE DECIDED BY A
FACT FINDER

Attached hereto are Exhibits "C", "D", and "E", which are the affidavits of the three police officers engaged in the shoot-out. In Exhibit "C", the affidavit of one Grant Hincheliff, in paragraph two, tells of stopping Eugene Anderson and Neil Anderson because the vehicle was being driven under the influence of alcohol. In paragraph three of this exhibit, it states:

"It was apparent that both Eugene and Neil Anderson were intoxicated. Eugene was informed by Officer Marshall that he was being placed under arrest for driving under the influence of alcohol. Both Andersons were taken to the Iron County Jail to process Eugene Anderson's arrest and make arrangements for both men to be transported home."

Paragraph four of said affidavit itemizes the interference of Neil Anderson with the breathalyzer tests being given to his brother Eugene Anderson. The following statement is made:

"Neil Anderson demonstrated wide emotional swings during this time but was controllable at all times and did not behave in a manner necessitating his incarceration for disorderly behavior or other similar charge."

This statement is made, although this sentence in paragraph four states: "This was necessary to prevent his interference with the breathalyzer tests." A previous statement shows that it was necessary for an officer to control Neil Anderson while his brother was given the breathalyzer test. Paragraph five relates to Neil Anderson's wife being called. An officer placed Neil Anderson in the passenger side of the car. The affidavit, marked as Exhibit "C" states that a call from Mrs. Anderson was received and she requested help, and that this officer together with one Sergeant Bradley went to the trailer. Thereafter, the shoot-out occurred.

Exhibits "D" and "E", which are the affidavits of Officers Bradley and Stewart show that at the time they responded to the call that they were aware of the prior arrest of the Anderson brothers and the fact that Neil Anderson was drunk, belligerent and making trouble.

Exhibit "F" shows the claim that was filed with Cedar City.

Exhibits "A" and "B" are the contrary findings pertaining to the summary judgment of the trial judge.

Exhibits "C", "D", and "E" and the accompanying diagrams show, by giving affect to the fact of them, that it was impossible for Mrs. Durand to have been hit by Neil Anderson's bullets. They show without question that while Hinchcliff participated in the earlier arrest for drunk driving and the earlier work in connection with Neil Anderson, that the other two officers were aware

of the drunk driving situation and the items that had preceded the shoot out.

The affidavit of Mrs. Durand shows that she is entirely without fault. She had no knowledge of what was going on. Under these conditions when we come to the question as to whether or not there are facts still to be decided by a fact-finder, we have to go a bit further and look at the results of this police work. Upon other considerations, the affidavits of the officers that are Exhibits "C", "D", and "E", raise the following questions:

1. Is there any justification for an officer to turn loose upon a town a known drunk with a known propensity to shoot when he has been in violation of the law; and what right does the officer have to let a drunk go home?

2. Did Mr. Bradley have a chance to disarm Mr. Neil Anderson, a man with a known propensity to shoot, while he was still holding a gun and while the firing mechanism was open to the knowledge of Mr. Bradley?

3. To what extent should officers be protected in this situation?

These are questions that have not been determined, and until they are determined, there is not a satisfactory solution of this particular case. It is improper to dispose of the same on a summary judgment basis.

While there is no question that we are into a situation where there is a conflict between the protection of an officer, we must ascertain at what point is the officer responsible for actions of this nature which result in damage to citizens that

are entirely without fault. There are two specific items of evidence in this matter that the court needs to determine, to-wit:

1. The actions of the defendant Hinchcliff in turning loose a person under the influence of alcohol.

2. The actions of all three officers in the shoot out, bearing in mind that the prior knowledge they had and the chance they had had to disarm Neil Anderson.

The Utah State Supreme Court has held for a long period of time that if there is any action of fact or any question of fact, that a summary judgment should not be allowed. This pertains not only to damage cases such as we are talking about, but the same applies to any other case.

Rule 56, Utah Rules of Civil Procedure, and the effect of same on cases, we have the following items that we should be concerned about, to-wit:

Bill Brown Realty, Inc. v. Leah N. Abbott, 562 P.2d, 238; Pace v. Pace, 559 P.2d, 964; Madsen v. Prudential, 558 P.2d, 1337. Burrows v. McGill, 563 P.2d, 189; Durham v. Margetts, 571 P.2d, 1332; Sandberg v. Klein, 576 P.2d 1291; and Rees v. Albertson's, Inc., 587 P.2d, 130. These particular cases are on myriad subjects. They hold that summary judgment should not be granted. The Rees v. Albertson's Inc., on page 133, contains the following statement:

"To be considered in connection with what has been said above are these principles: that the questions relating to negligence and proximate cause are generally for the fact-trier, court or jury, to determine. A party should not be deprived of the privilege

of having such an adjudication of his claims unless it appears that even upon the facts claimed by him he could not establish a basis for recovery. Moreover, when there is doubt about the matter, it should be resolved in favor of permitting the party to go to trial."

Applying this to the case at bar, we come to the conclusion that the only possibility of having a summary judgment of no cause of action is, that even if the facts as claimed by Mrs. Durand are true, that there can be no recovery should there be a summary judgment.

We have found in negligence cases and guest cases that a person should be responsible when he consciously chooses a course of action that places others in danger. This may be done by inattentive driving and oftentimes this has been called conduct evidencing a wreckless disregard for the safety of others. This has been applied in automobile cases. State v. Berchtold, 11 Utah 2d, 208, 357 P.2d 183; and State v. Selman, 18 Utah 2d, 199, 417 P.2d 975. Applying this to the case at bar, when an officer turns loose a person under the influence of liquor, knowing that he has a propensity for troubles, do we free the officer from the trouble that results and do we do so by summary judgment without evidence? There seems to be no question that there should be a finding of fact as to whether or not the defendants were guilty of negligence.

POINT II

THAT THE DEFENDANTS HAD A DUTY TO PROTECT THE PLAINTIFF FROM HARM

To answer this question, one must take a look at what is the duty of a police officer and of a city that hires police officers to its citizens.

There can be no question that the primary duty of police officers is to protect the health, lives, and morals of the people in the area that they are responsible for. This is found in Corpus Juris Secundum on "Police," Volume 72, page 207 in general praseology. There are many definitions of the word "police" and of the word "police regulation." Volume 72, page 206-207, gives us three classifications, to-wit:

1. Measures which are adopted to keep order, the laws and ordinances on cleanliness, health, and so on in effect.

2. To procure to the authorities the means of detecting the smallest attempts to commit crime, in order that the guilty may be arrested before their plans are carried into execution and delivered to the justice of the country.

3. The third phase is the comprehension itself of the laws and the measure which require the citizens to exercise their rights.

These duties were owed to Mrs. Durand as well as to every other citizen in the area.

A city is to set up a police force as delegated to cities and towns by virtue of Article 11, Section 5, of the Utah Consitution.

There can be no question that the first duty of any officer is to prevent the violation of law. Under these conditions when they picked up Neil Anderson, as long as he was under the influence of liquor, they should have arrested him and gone forward with the prosecution for public intoxication under the provisions of Title 32-7-13, Utah Code Annotated, 1953,

as amended, and under an appropriate Cedar City ordinance. However, when officers make themselves judges and juries and find a person that should not be confined and turn him loose, in a known inebriated condition, the officers that turned him loose should be held accountable for his conduct. And those that create damage, knowing he has been turned loose, should also be held accountable.

Certainly the duty owed to Mrs. Durand by the officers was the same duty as owed to everyone else in the area by the officers and by the city.

POINT III

THE PLAINTIFF'S CLAIM IS NOT BARRED BY THE GOVERNMENTAL IMMUNITY ACT

In all probability, items of this nature are the very reason for the label of governmental immunities. In our legal system, there are always abuses that bring everything to a head. This gives rise to two questions: First, whether or not there can be any recovery whatsoever on an action of this nature under the Governmental Immunity Act; and second, whether or not the Governmental Immunity Act has been complied with.

Pertaining to the first part of this question, Section 63-30-10, Utah Code Annotated, 1953, as amended, had an amendment in 1983. Prior to that time, the last amendment was in 1975. At the beginning of the section as established in 1975, set forth in the 1978 revision of Volume 7 A, Utah Code Annotated, 1953, it states as follows:

"Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of his employment except if the injury

After the 1978 revision, there are eleven exceptions. The format in the 1983 revision is different; there are some additional exceptions. The contents and the meaning of same are quite similar. For purposes of this discussion, we probably should consider the 1975 revision as set forth in the 1978 volume of 7 A, Utah Code Annotated. Very probably this is the law that was in effect in 1979, at the time that this act took place rather than the present law. The only item of exception that we should be concerned about is the first one. It reads, to-wit:

"arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused."

This again brings us squarely to the question of what is an officer's duty when he takes into custody a known drunk that is drunk and he has been taken into custody as a drunk. It again brings us to Officer Hinchcliff's affidavit which is attached hereto as Exhibit "C". Paragraph three thereof, which is quoted as follows: "It was apparent that both Eugene and Neil Anderson were intoxicated." It is not a discretionary function to prosecute a person for drunkenness or for being intoxicated. It is a matter of duty. The effect of the summary judgment is to say that the officer has discretion. The same is true pertaining to whether or not Officer Bradley acted properly in backing out of the trailer instead of disarming Neil Anderson when he had a chance to do so. These are discretionary duties of the police officer. The finding of the summary judgment claims otherwise.

If we have given the officer discretion as to whether or not he can arrest a person that is intoxicated, then we must also give him discretion as to whether or not he must arrest a bank robber. Under these conditions, neither of these functions can be termed to come under the first exception to the waiver of immunity for the act of an officer or by a negligent act or omission of an employee committed within the scope of his employment.

The other question, of course, goes to Section 63-30-13 to 63-30-19, Utah Code Annotated, 1953, as amended. Section 63-30-19 has not been changed. Section 63-30-13 at the time of the acts complained of, required a notice of claim within three months. The 1983 Legislature has changed that to one year. The plaintiff contends that the notice was given while under the three-month time limitation and that the bond was posted. The defendants raised these items by motion, but they were not decided by the court. The court in its decision on the 7th day of January, 1983, as stated above, specifically decided no question except granting the summary judgment. The Court did not give the reason therefore on any basis pertaining to the Governmental Immunity Act. Certainly there is a conflict on this, and certainly it is an item that should go to proof.

A very interesting case that may have some merit in relation to this question and to the summary judgment question is the case of Schmitt v. Billings, 560 P.2d 516. The very nill of that case is in the procedural questions that

are not applicable here. It was remanded for further proceedings, with findings that there were items of controversy to be decided by the court, with further comments that appear to be dicta to the effect that Section 10 of Title 63-30-10, does not appear that the three individuals from tortious acts. The questions in this case appear to be decided on procedural situations and not on merit.

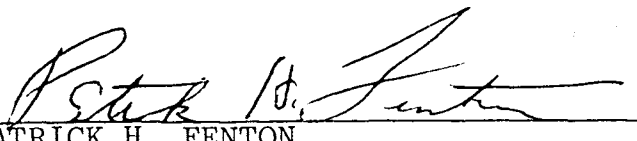
Under these conditions, it is believed by the undersigned that it is as a matter of law, the Governmental Immunity Act does not prevent a defense for any defendant, with the possible exception that Title 63-30-20, if at the time of the trial be applicable in such a fashion that it may limit recovery from all defendants. Under these circumstances, there can be no question that the case at bar should go to trial, and the questions concerning the conduct of the officers as to whether or not it is a proper standard under the circumstances should be submitted to a fact-finder and whether damages should be assessed against the defendants.

CONCLUSION

The finding of the trial court in relation to summary judgment should be reversed and the matter set for trial.

DATED this 11th day of October, 1983.

Respectfully submitted,



PATRICK H. FENTON

Attorney for Appellant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF IRON, STATE OF UTAH


FILED
MAY 11 1982
CLERK OF DISTRICT COURT
COUNTY OF IRON
JAMES H. HARRIS

MARJORIE J. DURAND,)
Plaintiff,) ORDER OVERRULING AND
vs.) DENYING DEFENDANTS'
CEDAR CITY CORPORATION et al.,) MOTION FOR SUMMARY JUDGMENT
Defendants.) Civil No. 8503

This matter having come before the Court on Defendants' Motion for Summary Judgment, and the Court having reviewed the affidavits in support of said Motion and the affidavits in opposition thereto, and the Court having reviewed the Memorandums of Points and Authorities, and good cause appearing therefor;

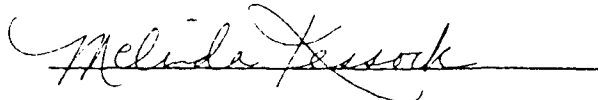
IT IS HEREBY ORDERED that said Motion for Summary Judgment be and the same hereby is OVERRULED and DENIED, reserving to the Defendants the right to renew said Motion at the time of pretrial and at the completion of discovery.

DATED this 7 day of May, 1982.


J. HARLAN BURRIS
District Judge

MAILING CERTIFICATE

I hereby certify that on this 10 day of May, 1982, I mailed a copy of the above ORDER to the following: PATRICK H. FENTON, ESQ., 13 West Hoover Avenue, Cedar City, Utah 84720; ROBERT BRAITHWAITE, ESQ., 110 North Main, Suite H, Cedar City, Utah 84720; and ALLAN L. LARSON, ESQ., 10 Exchange Place, 11th Floor, Salt Lake City, Utah 84110.



7

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10 Exchange Place, Eleventh Floor
P. O. Box 3000
Salt Lake City, Utah 84110
Telephone: 521-9000

IN THE FIFTH JUDICIAL DISTRICT COURT OF IRON COUNTY

STATE OF UTAH

MARJORIE J. DURAND,

Plaintiff,

SUMMARY JUDGMENT

vs.

CEDAR CITY CORPORATION,
H. L. BRADLEY, ARTHUR O.
STEWART, and GRANT HINCHCLIFF,

Civil No. 8503

Defendants.

Defendants' Motions to Dismiss and for Summary Judgment coming on regularly for hearing on January 7, 1983, before The Honorable J. Harlan Burns, District Court Judge, and plaintiff being present in person and through her attorney, Patrick H. Fenton, and Allan L. Larson and Robert T. Braithwaite appearing on behalf of the defendants, and the Court having reviewed the pleadings, affidavits, depositions and memoranda of authorities, and defendants having objected to the affidavits of Patrick H. Fenton, Charlene Rowley, and Jay Jenson, and moving to strike same for insufficiency pursuant to Rule 56, Utah Rules of Civil Procedure, and the matter having been fully

argued by counsel, and submitted to the Court for decision, and the Court being fully advised in the premises, and the Court accordingly finding that the affidavits of Patrick H. Fenton and Jay Jenson are legally insufficient to raise any material issue of fact, and striking same, and the Court further finding that there exists no issue of material fact relative to the occurrence which is the subject of plaintiff's Complaint, and the Court further finding that the defendants breached no duty to the plaintiff, and that defendants are not liable to the plaintiff for the injuries sustained as a result of the occurrence of February 21, 1979, and having concluded that defendants' motions should be granted, it is hereby

ORDERED, ADJUDGED AND DECREED that the affidavits of Patrick H. Fenton and Jay Jenson are stricken, and that defendants' Motions to Dismiss and for Summary Judgment should be, and the same hereby are, granted, and plaintiff's Complaint is hereby dismissed with prejudice and upon the merits, and Summary Judgment is hereby entered in favor of the defendants and against the plaintiff, no cause of action, defendants to recover costs.

Dated this 1st day of February, 1983.

BY THE COURT:

151

J. Harlan Burns
District Court Judge

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Margo D. Colegrove, being first duly sworn, deposes and says:

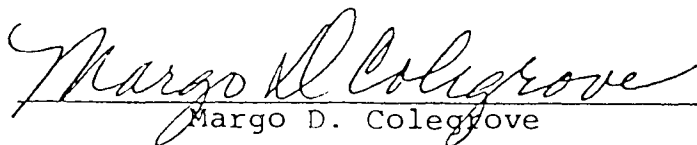
That she is employed in the law offices of Snow, Christensen
& Martineau, attorneys for _____ defendants
_____ herein;
that she served the attached NOTICE OF ENTRY OF JUDGMENT

(Case No. 8503) upon the parties listed below by placing
a true and correct copy thereof in an envelope addressed to:

Patrick H. Fenton, Esq.
Attorney for Plaintiff
154 North Main Street
Cedar City, UT 84720

Robert T. Braithwaite, Esq.
Cedar City Attorney
P. O. Box 249
Cedar City, UT 84720

and mailing the same, postage prepaid, on the 3rd day
of February, 1983.


Margo D. Colegrove

Subscribed and sworn to before me this 3rd day of February, 1983.


Alison McCandless

ALLAN L. LARSON
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendants
10 Exchange Place, Eleventh Floor
Post Office Box 3000
Salt Lake City, UT 84110
Telephone: 521-9000

IN THE FIFTH JUDICIAL DISTRICT COURT OF IRON COUNTY

STATE OF UTAH

MARJORIE J. DURAND,)
Plaintiff,)

vs.)

AFFIDAVIT

CEDAR CITY CORPORATION,)
H. L. BRADLEY, ARTHUR O.)
STEWART, and GRANT)
HINCHCLIFF,)
Defendants.)

Civil No. 8503

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

GRANT HINCHCLIFF, being first duly sworn, upon oath,
deposes and says:

1. On or about February 21, 1979, I was employed as an officer of the Cedar City Police Department, having been a member of said department for about two years.

2. At approximately 11:20 p.m. on the evening of February 20, 1979, Officer Bruce Marshall, also of the Cedar City Police Department and I stopped a black Chevrolet driven by Eugene Anderson in the company of his brother Neil Anderson, because we suspected that the driver was operating the automobile under the influence of alcohol.

3. It was apparent that both Eugene and Neil Anderson were intoxicated. Eugene was informed by Officer Marshall that he was being placed under arrest for driving under the influence of alcohol. Both Andersons were taken to the Iron County Jail to process Eugene Anderson's arrest and make arrangements for both men to be transported home.

4. I personally supervised Neil Anderson during the time that the breathalyzer tests were being performed on his brother Eugene. This was necessary to prevent his interference with the breathalyzer tests. Neil Anderson demonstrated wide emotional swings during this time but was controllable at all times and did not behave in a manner necessitating his incarceration for disorderly behavior or other similar charge. At no time did I believe that Neil Anderson's condition endangered the safety of others.

5. I thereafter contacted Neil Anderson's wife Charlene, explained the situation to her and asked for her assistance in transporting Neil home. Neil was released into his wife's custody. I personally placed Neil in the passenger side of his wife's vehicle at the jail and Neil indicated that he would go home and go to bed.

6. Shortly thereafter, while Eugene Anderson's bail was being arranged, Mrs. Neil Anderson telephoned the Cedar City Police Department offices and stated that Neil was causing a disturbance at the trailer park where he lived. Sergeant Harold Bradley, who took the call, indicated that Neil was threatening to kill people with his gun.

7. Sergeant Bradley, Officer Art Stewart and I responded to Mrs. Anderson's call. I traveled in my own patrol car, following Sergeant Bradley and Officer Stewart to Kelly's Trailer Court where Neil Anderson's trailer was located.

8. Neil Anderson's trailer was the second trailer from the south end, on the east side of the street. This trailer is depicted by a letter "A" on the attached diagram, which I drew on or about February 21, 1979, and hereby incorporate into this Affidavit. Sergeant Bradley parked his patrol car just south of the Anderson trailer as shown by the "#4" on the diagram. I parked facing south, just to the north of the Anderson trailer as indicated by the "#1", and adjacent

to a white pickup truck with the initials C.P.U. painted on the door. This truck is indicated by a "#2" on the attached diagram. The white automobile driven by Charlene Anderson to take Neil home from the jail was parked in the driveway parallel to the Anderson trailer, and is shown on the diagram by a "#3".

9. As I exited my car, Sergeant Bradley and Officer Stewart proceeded toward the trailer's porch which was located on the north side of the trailer. Sergeant Bradley, upon reaching the trailer door, apparently saw Neil Anderson approaching the door with a rifle in his hand. Sergeant Bradley shouted a warning about the gun then ran to the northwest corner of the trailer, taking cover in the position shown as "Bradley" on the attached diagram. The trailer door opened and Neil Anderson emerged carrying a short-barreled rifle.

10. Officer Stewart had no time to seek cover and was standing in the grassy area between the Anderson trailer and the white Chevrolet in the position marked "Stwt." when Anderson emerged from his trailer. Officer Stewart did not have his gun drawn and attempted to convince Anderson to put the rifle down. Anderson refused to do so and lowered the gun barrel so as to point it at Officer Stewart. My position is depicted on the attached diagram by "Hinch." Sergeant Bradley and I also admonished Anderson to discard his rifle. Both Sergeant Bradley and I at this time drew our own guns.

11. Anderson refused to put his rifle down. He continued to point the muzzle in the direction of Officer Stewart. Officer Stewart moved slowly back and forth to stay out of the rifle's line of fire, and continued talking to Anderson. Mrs. Anderson also emerged from the trailer three times and talked to Anderson, attempting to convince him to put his gun down. Anderson refused to listen. He indicated that he did not want his brother held in jail, but refused to accept our assurances that Eugene's bail had been processed and Eugene would return home soon.

12. Before Officer Stewart could reach cover, the rifle discharged, while pointing in the direction of Officer Stewart and directly in line with the trailer of Marjorie Durand, which was due west across the street from the Anderson trailer. Mrs. Durand's trailer is indicated on the attached diagram by a "B". I saw Officer Stewart fall to the ground and believed him to be shot. I fired three rounds at Anderson. Sergeant Bradley and Officer Stewart also returned Anderson's fire.

13. Anderson had apparently been struck by the return fire and began to slump into a sitting position. As he did so his rifle discharged again, this time in my direction. I fired three more shots at Anderson. I also heard other shots being fired and saw that Sergeant Bradley was also returning Anderson's fire.

14. Anderson's wife then emerged from the trailer and took the rifle from her husband. She asked for our help. Sergeant Bradley and Officer Stewart approached Anderson first. It was apparent that Anderson had been severely wounded and was either dying or dead.

15. The accompanying diagram accurately depicts the positions of all parties at the time the first shot was fired. Sergeant Bradley, Officer Stewart and I were all facing east to southeast during the exchange of gunfire. Sergeant Bradley, having observed the direction of Anderson's first shot, was concerned about the occupants of the trailer immediately across the street to the west of the Anderson trailer.

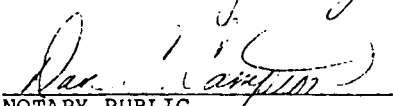
16. Sergeant Bradley proceeded to check said trailer and found that a woman, later identified as Marjorie Durand, had been shot in the lower leg. An ambulance was called for and first aid was administered until the ambulance arrived.

17. I was in a position to observe all of the parties engaged in the exchange of gunfire. At no time did Sergeant Bradley, Officer Stewart or I fire our weapons in the direction of Mrs. Durand's trailer, which was behind us as we returned Anderson's fire. Only Anderson's shots could have resulted in Mrs. Durand's injury.

Dated this 7th day of JANUARY, 1982.


GRANT HINCHCLIFF

SUBSCRIBED AND SWORN to before me this 7th day of JANUARY, 1982.

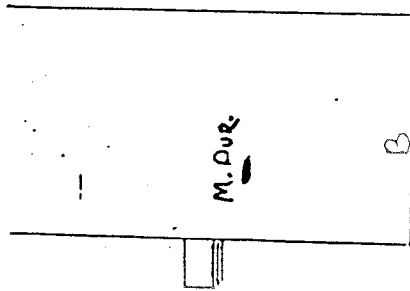
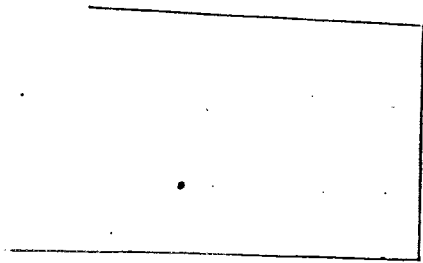

NOTARY PUBLIC

Residing in Salt Lake County, Utah

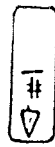
My Commission Expires:

1-11-87

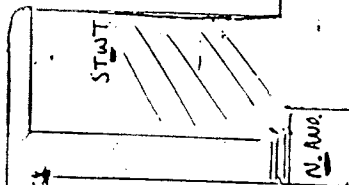
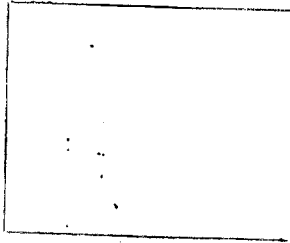
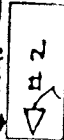
1045 NORTH



POSITIONS OF PARTIES
WHEN
FIRST SHOT WAS FIRED

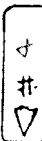


HINCH.



GRACE

A



ROUGH SKETCH
NOT TO SCALE
BY G. HINCHCLIFF
2-21-79

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

MARGO D. COLEGROVE, being duly sworn, says:


That she is employed in the offices of Snow, Christensen
& Martineau, Attorneys for defendants

_____ herein;
that she served the attached AFFIDAVIT of Grant Hinchcliff
_____ (Case Number 8503)
upon _____ plaintiff _____ by
placing a true and correct copy thereof in an envelope and
addressing it to:


Patrick H. Fenton, Esq.
Attorney for Plaintiff
13 West Hoover Avenue
Cedar City, Utah 84720

Robert T. Braithwaite, Esq.
Cedar City Attorney
P. O. Box 249
Cedar City, Utah 84720

and mailing the same, postage pre-paid, on the 18th day of
January, 1982.


Margo D. Colegrove

SUBSCRIBED AND SWORN TO before me this 18th day of January,
1982.


Notary Public
Residing in the State of Utah

ALLAN L. LARSON
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendants
10 Exchange Place, Eleventh Floor
Post Office Box 3000
Salt Lake City, UT 84110
Telephone: 521-9000

IN THE FIFTH JUDICIAL DISTRICT COURT OF IRON COUNTY

STATE OF UTAH

MARJORIE J. DURAND,)

Plaintiff,)

vs.)

AFFIDAVIT

Civil No. 8503

CEDAR CITY CORPORATION,)

H. L. BRADLEY, ARTHUR)

O. STEWART and GRANT)

HINCHCLIFF,)

Defendants.)

STATE OF UTAH)

) ss.

IRON COUNTY)

HAROLD L. BRADLEY, being first duly sworn upon oath, deposes
and says:

1. On or about February 21, 1979, I was employed as a
sergeant in the Cedar City Police Department, Iron County, Utah
having been a member of said department for approximately 11
years.

2. Shortly after midnight, on February 21, 1979, I received
a phone call at the offices of the Cedar City Police Department
from Mrs. Neil Anderson. Mrs. Anderson indicated that her
husband was causing a disturbance at the trailer park where he
resided, in that he was threatening to get his gun and start
killing people.

3. In response to Mrs. Anderson's call I took officer Art
Stewart of the Cedar City Police Department with me in my patrol
car and proceeded to the Anderson trailer which was located at
Kelly's Trailer Park, Officer Grant Hinchcliff, also of the
Cedar City Police Department followed in his own patrol car.
I parked my car slightly south of the west end of the Anderson
trailer, which was located on the east side of the street. On

the diagram attached hereto and hereby incorporated into this Affidavit, the Anderson trailer is indicated by a "A" and my car is indicated by a "#4". Officer Hinchcliff parked his car slightly north of the Anderson trailer, as shown by a "#1" on the attached diagram.

4. Officer Hinchcliff remained by his patrol car in the position designated by "Hinch" on the diagram, while Officer Stewart and I approached the steps located on the north side of the Anderson trailer. Through the windows on the west end of the trailer, I saw an individual appearing to be Neil Anderson, who was personally known to me.

5. Upon reaching the front door of the trailer, I could see Neil Anderson through the window of the door, approaching the door with a rifle in his hands. I shouted a warning to Officers Stewart and Hinchcliff about the rifle and immediately stepped back to the northwest corner of the trailer to find some protection. My position at that time is shown on the attached diagram as "Bradley".

6. Anderson had the apparently loaded rifle in his possession from the moment that I recognized him in the trailer. At no time did I or officer Stewart have an opportunity to disarm Anderson before he emerged from the trailer with the weapon.

7. Neil Anderson stepped onto the trailer's porch with the rifle in his hands. Officer Hinchcliff and I had at this time drawn our guns, Officer Stewart had been unable to find cover before Anderson emerged from his trailer and was standing without a drawn weapon on the grass between the trailer and a white Chevrolet designated as "#3" on the attached diagram. Officer Stewart's approximate location at this time is shown by the letters "Stwt" on the attached diagram.

8. Officer Stewart, Officer Hinchcliff and I all repeatedly asked Anderson to put down his gun. Anderson stated that he wanted his brother Eugene released from jail. Eugene Anderson had been arrested earlier in the evening for driving under

influence of alcohol. Neil Anderson was told that his brother's bail had been arranged and that he would be home shortly. Anderson did not respond to this information and continued to point his rifle in the direction of Officer Stewart and Anderson threatened to kill Stewart even if we were successful in shooting Anderson.

9. I observed Anderson release what appeared to be a safety mechanism on his rifle and Anderson continued to follow Officer Stewart's movements with the rifle. During this conversation, Stewart had slowly yet constantly moved and tried to avoid the muzzle of Anderson's rifle.

10. At about the time Officer Stewart reached the northwest corner of the grassy area between the trailer and the white Chevrolet, Anderson's gun discharged while pointing west toward Officer Stewart. I saw Officer Stewart fall to the ground and believed that Stewart had been shot. I fired five shots at Anderson in rapid succession.

11. As Anderson, who had apparently been shot, slid into a sitting position against the trailer, he fired another shot in the direction of Officers Hinchcliff and Stewart, apparently striking the white Chevrolet, "#3" on the attached diagram. I fired another shot at Anderson and further return fire also came from Officer Hinchcliff. Mrs. Anderson then emerged from the trailer and took the rifle from Mr. Anderson's hands and asked for our assistance.

12. I then checked Anderson's condition and it appeared that he was mortally wounded. I then recalled that the first shot fired by Anderson had been aimed directly west from the Anderson porch and realized that the bullet must have entered the trailer that was on the west side of the street across from the Anderson trailer. This trailer is indicated by a "B" on the attached diagram.

13. I went to the trailer on the west side of the street to check on the safety of its occupants. Through the window of the trailer I could see a woman lying on the floor, talking on the telephone, and bleeding from a wound in her right lower leg. Her position is shown by "M. Dur." on the attached diagram. At the urging of myself and Officer Stewart, the woman managed to crawl to the door and open it. Officer Stewart and I continued to administer first aid to the woman until an ambulance arrived. The woman was subsequently identified as Mrs. Marjorie Durand.

14. I was in a position to observe the actions of all the parties involved in the exchange of gunfire. None of the responding officers, including myself, at any time discharged our guns in the direction of Mrs. Durand's trailer, which was behind our backs as we returned Anderson's fire. I carefully observed the direction of Anderson's first shot and this led to my discovery of Mrs. Durand in her injured condition. I believe and therefore state that only Anderson's original shot could have been responsible for the wounding of Mrs. Durand.

Dated this 14 day of Dec, 1981.


HAROLD L. BRADLEY

SUBSCRIBED AND SWORN to before me on this 14 day of

Dec, 1981.

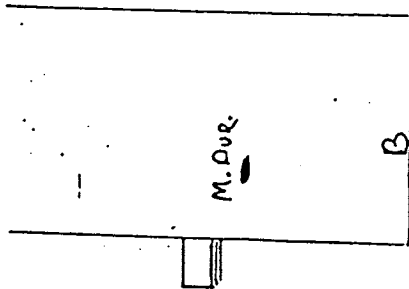
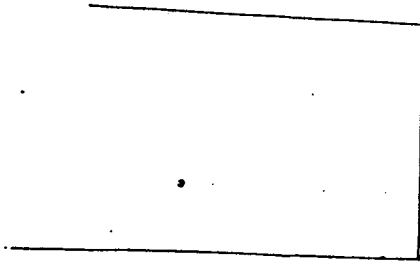

NOTARY PUBLIC

Residing in Iron County, Utah

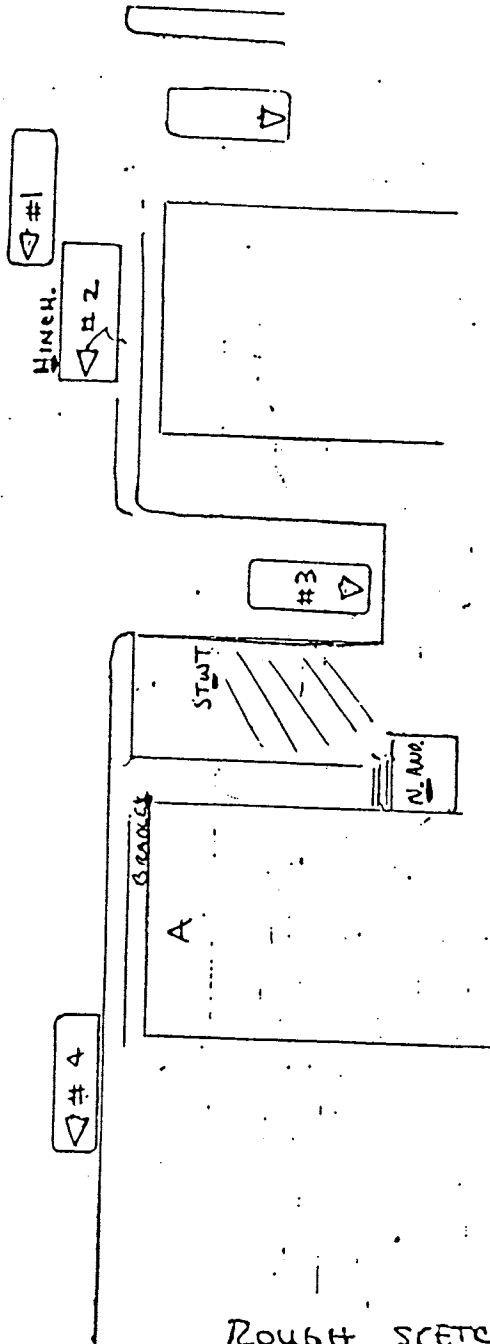
My Commission Expires:

Jan 16, 1985

1045 NORTH



POSITIONS OF PARTIES
WHEN
FIRST SHOT WAS FIRED



ROUGH SKETCH
NOT TO SCALE
BY G. HINCHCLIFF
2-21-79

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

MARGO D. COLEGROVE, being duly sworn, says:

That she is employed in the offices of Snow, Christensen
& Martineau, Attorneys for defendants

_____ herein;

that she served the attached AFFIDAVIT of Harold L. Bradley

_____ (Case Number 8503)

upon _____ plaintiff _____ by

placing a true and correct copy thereof in an envelope and
addressing it to:

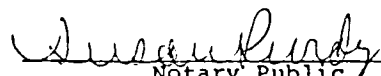
Patrick H. Fenton, Esq.
Attorney for Plaintiff
13 West Hoover Avenue
Cedar City, Utah 84720

Robert T. Braithwaite, Esq.
Cedar City Attorney
P. O. Box 249
Cedar City, Utah 84720

and mailing the same, postage pre-paid, on the 18th day of
January, 1982.


Margo D. Colegrove

SUBSCRIBED AND SWORN TO before me this 18th day of January,
1982.


Notary Public
Residing in the State of Utah

ALLAN L. LARSON
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendants
10 Exchange Place, Eleventh Floor
Post Office Box 3000
Salt Lake City, UT 84110
Telephone: 521-9000

IN THE FIFTH JUDICIAL DISTRICT COURT OF IRON COUNTY
STATE OF UTAH

MARJORIE J. DURAND,
Plaintiff,

vs.

AFFIDAVIT

CEDAR CITY CORPORATION,
H. L. BRADLEY, ARTHUR
O. STEWART and GRANT
HINCHCLIFF,

Civil No. 8503

Defendants.

STATE OF UTAH)
) ss.
IRON COUNTY)

ARTHUR O. STEWART, being first duly sworn upon oath
deposes and says:

1. On or about February 21, 1979, I was employed as an
officer of the Cedar City Police Department, Iron County, Utah
having been a member of said department for approximately
four years.

2. At approximately midnight on the evening of February
20, 1979, I was with Sergeant Harold Bradley of the Cedar
City Police Department at the department's offices when
Sergeant Bradley received a call from Mrs. Neil Anderson
indicating that her husband was causing a disturbance at the
trailer park where they lived.

3. In response to said call I accompanied Sergeant
Bradley in the latter's car to Kelly's Trailer Park, with
Officer Grant Hinchcliff following in his patrol car. The
Anderson trailer was located on the east side of the street,

in the position designated by the letter "A" on the attached diagram, which I hereby incorporate into this Affidavit. Sergeant Bradley and I parked slightly south of the west end of the Anderson trailer in the position shown by the "#4" on the diagram. Officer Hinchcliff parked further north, as shown by the "#1" on the attached diagram.

4. Sergeant Bradley and I approached the trailer while Officer Hinchcliff remained near his car in the position designated "HINCH" on the diagram. Through the trailer's windows I observed a man who appeared to be Neil Anderson standing in the kitchen area of the trailer, working with his hands on an unidentifiable object that was lying on a counter top.

5. Sergeant Bradley and I started up the trailer's stairs, which were located on the north side of the trailer. Neil Anderson approached the trailer door with a rifle in his hands. Sergeant Bradley yelled "He's got a gun" following which Bradley retreated and took cover behind the northwest corner of the trailer in the location marked "Bradley" on the diagram.

6. At no time did I or the other police officers responding to Mrs. Anderson's call have an opportunity to take the rifle from Neil Anderson's possession before he emerged from the trailer brandishing it in a menacing fashion.

7. I started to retreat towards the street but Neil Anderson had stepped onto the porch, gun in hand, while I was still on the grass between the trailer and a white Chevrolet parked parallel to the trailer. On the attached diagram, I was approximately at the position indicated by the letters "Stwt" and the white Chevrolet is designated as "#3".

8. Sergeant Bradley, Officer Hinchcliff and I all attempted at this time to persuade Anderson to put his gun down. Mrs. Anderson also repeatedly emerged from the trailer and attempted to persuade her husband to put down his rifle. I

did not have my gun drawn at this time, although Officer Hinchcliff and Sergeant Bradley did. Anderson repeatedly stated that he wanted his brother Eugene released from jail. Eugene Anderson had been arrested for driving under the influence of alcohol earlier in the evening while in the company of Neil. Yet Neil did not respond to our assurances that Eugene's bail was being processed and that his brother would return home soon.

9. During the conversation with Neil Anderson, I moved slowly north and south across the lawn backing towards the street, trying to avoid the muzzle of the gun that Anderson continued to point in my direction. At one point Anderson indicated that even if the other officers were successful in shooting him, he intended to kill me with the rifle which he described as a .350 Magnum.

10. As I neared the corner of the lawn and sidewalk by the right rear corner of the white Chevrolet parked in the driveway, Anderson turned to look at Sergeant Bradley as Bradley said something to him. As I took a step to the left, Anderson's gun discharged and the bullet passed me to the right, heading directly west towards the trailer of Marjorie Durand, which is marked by a "B" on the attached diagram.

11. When Anderson's gun discharged I dove behind the white Chevrolet, moved to a more protected position on the north side of the car, stood, and fired four rounds at Anderson. Sergeant Bradley and Officer Hinchcliff were also returning Anderson's fire, from their positions indicated as "Bradley" and "Hinch" on the diagram.

12. As Anderson began to slump into a sitting position, his rifle discharged again, the bullet striking the white automobile behind which I was ^{kneeling} ~~standing~~. Sergeant Bradley and Officer Hinchcliff again returned fire, from their same positions.

13. Mrs. Anderson then emerged from the trailer and took the rifle from Anderson's hands. I approached Anderson and checked and found that he had no pulse. Sergeant Bradley used his radio to contact an ambulance.

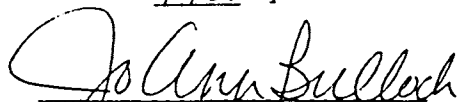
14. Shortly thereafter I saw Sergeant Bradley pounding on the door of the trailer directly west across the street from the Anderson trailer. This was the direction which Anderson's initial shot had traveled. I heard Sergeant Bradley ask the trailer's occupant to open the door if that were possible. The trailer's occupant managed to open the door and I followed Sergeant Bradley into the trailer and observed that a woman later identified as Marjorie Durand had been struck in the right lower leg by a bullet. I stayed with Mrs. Durand and administered first aid until an ambulance arrived.

15. I was in a position to observe the direction of the shots fired by Sergeant Bradley, myself and Neil Anderson. I was narrowly missed by Anderson's original shot, which was aimed directly at the Durand trailer across the street. As the Durand trailer was behind the backs of all three responding police officers, I believe and therefore state that it is not possible that Mrs. Durand was struck by a police bullet and only Anderson's original shot could have resulted in the injury to Mrs. Durand.

Dated this 14 day of Dec, 1981.

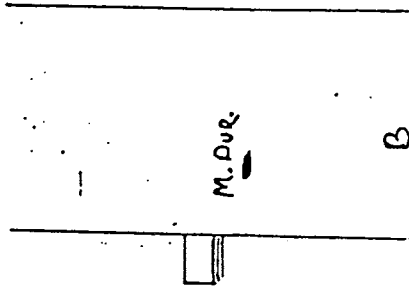
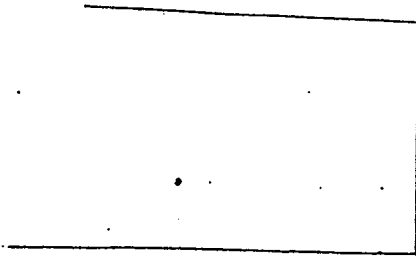

ARTHUR O. STEWART

SUBSCRIBED AND SWORN to before me on this 14th day of
December, 1981.


NOTARY PUBLIC
Residing in Iron County, Utah

My Commission Expires:
12-1-83

1045 NORTH



POSITIONS OF PARTIES
WHEN
FIRST SHOT WAS FIRED

#1

HINCH.

#2

#3

STWT

N. DUE

GRADUATE

A

#4

ROUGH SKETCH
NOT TO SCALE
BY G. HINCHCLIFF
2-21-79

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

MARGO D. COLEGROVE, being duly sworn, says:

That she is employed in the offices of Snow, Christensen
& Martineau, Attorneys for defendants

_____ herein;

that she served the attached AFFIDAVIT of Arthur O. Stewart

_____ (Case Number 8503)

upon _____ plaintiff _____ by

placing a true and correct copy thereof in an envelope and
addressing it to:

Patrick H. Fenton, Esq.
Attorney for Plaintiff
13 West Hoover Avenue
Cedar City, Utah 84720

Robert T. Braithwaite, Esq.
Cedar City Attorney
P. O. Box 249
Cedar City, Utah 84720

and mailing the same, postage pre-paid, on the 18th day of
January, 1982.


Margo D. Colegrove

SUBSCRIBED AND SWORN TO before me this 18th day of January,
1982.



Notary Public
Residing in the State of Utah

Exhibit "F"

NOTICE OF CLAIM

TO CEDAR CITY CORPORATION, Cedar City, Utah:

You are hereby advised that I was injured by flying bullets on or about the 21st day of February of 1979 in my home at 1027 North Main Street, Trailer Space Number 24, arising out of a bullet exchange between Cedar City Police and a gentleman by the name of Anderson, who lived adjacent in this heavily populated area of Cedar City, Utah.

You are hereby advised that I have a tremendous hospital bill and various other things arising out of being hit in both legs, that I have lost two toes and have cut nerves, cut ligaments, torn tendons, muscle damage and various other things, and I am advised that I will need nerve surgery and therapy for nerves before I am through.

In addition to the physical injury and the pain and suffering, my trailer has been damaged and the interior of the trailer is no longer fit for human habitation.

In addition you are advised I am being damaged by loss of earning capacity and loss of income.

While I have no idea what the final bill is going to be, it now appears that it will not be under \$100,000.00, and may go much higher, even as much as one-half million dollars, depending of course upon the time I am out of work, the surgery, the hospitalization and items of this nature.

I was hospitalized in Cedar City, Utah by orders of Cedar City policemen and have a tremendous hospital bill as a result thereof. In addition to this it is my considered opinion that Cedar City officers were negligent in this matter from the standpoint of allowing a person under the influence of alcohol and worked up to

go home after arresting his brother for driving under the influence of alcohol and that they are again negligent in answering the call in the manner in which the shootout was provoked and brought about and the further item that having actual knowledge that a person under the influence of liquor was making threats with a gun toward them, Cedar City's police force caused a shootout in a heavily populated area instead of taking it out into some area that was not heavily populated.

DATED this 6 day of MARCH, 1979.

Marjorie J. Durand
MARJORIE J. DURAND

STATE OF UTAH)
 : ss.
County of Iron)

On the 6 day of MARCH, 1979, personally appeared before me MARJORIE J. DURAND, the signer of the foregoing instrument, who duly acknowledged to me that she executed the same.

Reah N. [Signature]
NOTARY PUBLIC
Residing at Cedar City, Utah

My Commission Expires:

7/1/1980

MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing, postage prepaid, to Allan L. Larson, SNOW, CHRISTENSEN & MARTINEAU, Attorneys for Defendants-Respondents, 10 Exchange Place, Eleventh Floor, P. O. Box 3000, Salt Lake City, UT 84110, this 11th day of October, 1983.

