

1989

Kevin P. Gates v. Camille Henrie Gates : Brief of Respondent

Utah Court of Appeals

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890235

IN THE UTAH COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

KEVIN P. GATES, Plaintiff/ Appellant, v. CAMILLE HENRIE GATES, Defendant/Respondent.	BRIEF OF RESPONDENT Case No: 890235-CA Priority No: 14(b)
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Appeal From an Order in the Third Judicial District Court,
in and for Salt Lake County, State of Utah,
Honorable James S. Sawaya

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IN THE UTAH COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

KEVIN P. GATES, Plaintiff/ Appellant, v. CAMILLE HENRIE GATES, Defendant/Respondent.	BRIEF OF RESPONDENT Case No: 890235-CA Priority No: 14(b)
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JURISDICTION AND NATURE OF CASE

The Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. §78-2a-3, as an appeal from a final Order entered in a civil proceeding.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented by this Appeal include:

1. Did the Trial Court commit reversible error by entering an Order modifying the Decree of Divorce which had been entered in this matter based upon a finding that the Plaintiff did fail to disclose his true income to Defendant at the time the

parties entered into a Stipulation, and that the Defendant was not aware of Plaintiff's income when she agreed to accept \$250.00 per month as child support for the minor child of the parties.

STATEMENT OF THE CASE

A. COURSE OF THE PROCEEDINGS BELOW

1. A Decree of Divorce was entered in this matter on June 30, 1983.

2. A Modification Order was entered on April 11, 1986, directing the Plaintiff to pay the Defendant the sum of \$250.00 per month as and for child support for the minor child of the parties.

3. On April 19, 1988, the Defendant filed a Petition for Modification of Decree of Divorce alleging that the income of the Plaintiff has increased substantially since entry of the Modification Order and that he is better able to provide a greater sum as child support for the benefit of the minor child of the parties.

4. The matter was tried to the Court on February 14, 1989. On March 20, 1989, the Court entered an Order Modifying the Decree of Divorce to award the Defendant \$750.00 per month as child support and entering a Judgment in favor of the Defendant for \$2,000.00 in attorney's fees.

5. Plaintiff filed a Notice of Appeal from the Order Modifying the Decree of Divorce and Judgment on April 19, 1989.

6. Plaintiff filed a Brief in this matter on September 6, 1989. The Court entered an Order allowing the Defendant an extension of time until November 4, 1989, in which to file Respondent's Brief in this matter.

B. STATEMENT OF FACTS

1. The Decree of Divorce entered in this matter on June 30, 1983, directed the Plaintiff to pay \$175.00 per month as child support for the benefit of the minor child of the parties. [R 19]

2. On January 7, 1985, the Defendant filed a Motion to Modify the Decree of Divorce seeking an increase of child support. [R 22]

3. The Plaintiff filed a Counter-Request for Modification seeking a change in rights of visitation with the parties' minor child. [R 54]

4. The Petitions of each of the parties were argued to the Domestic Relations Commissioner of the Third District Court on June 20, 1985. The Commissioner entered a Recommendation that Defendant's Petition to increase child support should be denied because there was not a substantial change in circumstance since entry of the Decree of Divorce. [R 62]

5. The Defendant rejected the Recommendation of the Commissioner and a hearing was held before the Court on July 18,

1985. At that hearing before the Court evidence was presented that the Plaintiff's income before federal and state tax was \$2,213.00 per month. [R 66 and R 48] Plaintiff also presented evidence that his net income after tax and expenses was \$513.76 per month. [R 66 and R 49] Finally, Plaintiff presented evidence that his income after personal expenses was a negative figure of \$665.19. [R 66 and R 50]

6. Following the hearing the Court entered its Findings of Fact and Conclusions of Law on January 14, 1986, finding that the Plaintiff's gross income at the time of the divorce was \$2,213.12 per month and that his income at the time of the hearing was \$2,131.58 per month. [R 68] Based upon those findings the Court concluded that there had not been a material change of circumstance. [R 69]

7. The Court entered its Order on January 14, 1986, denying Defendant's Motion to modify the provisions in the Decree of Divorce with respect to increasing child support. [R 72] On April 11, 1986, a Stipulation for Modification was filed with the Clerk of the Court providing that the Plaintiff would pay the Defendant \$250.00 per month as child support and further providing that beginning with the month of September, 1987, child support would be increased to \$300.00 per month. [R 73 and R 74] The Stipulation of the parties also contained a provision stating:

The parties acknowledged that this Stipulation is based upon circumstances of each party as they presently exist . . . [R 75]

8. Pursuant to the terms of the Stipulation the Court entered a Modification Order on April 11, 1986, directing that child support would be increased to \$250.00 per month, that beginning with the month of September, 1987, child support would be increased to \$300.00 per month, and that the Order is based upon circumstances as they presently exist. [R 76 through 78]

9. The Plaintiff filed a Petition for Modification of Divorce Decree on May 18, 1987, seeking a change of custody of the parties' minor child. [R 79] On September 11, 1987, an Order was entered dismissing the Plaintiff's Petition for Modification. [R 98]

10. On August 19, 1988, the Defendant filed a Petition for Modification of Decree of Divorce which alleged a substantial change of circumstance since the entry of the Modification Order and prayed for an increase of child support, asked that the parties share equally in any and all uninsured medical expenses for the minor child and asking for an award of attorney's fees. [R 121 through 123]

11. The Plaintiff's Petition was tried before the Court on February 14, 1989. [R 154]

12. The Defendant testified at trial that the Plaintiff approached her in approximately August or September of 1985,

following the hearing which had taken place in July, 1985, and the Plaintiff told the Defendant that he knew she needed more money and that he would give her more money if she would give him the tax exemption for their minor child. [Trans. P.5, L.2 through P.6, L.19]

13. A verbal agreement setting out the parameters of the Stipulation which was entered by the Court on April 11, 1986, was reached by the parties some time during September or October, 1985. [Trans. P.11, L.5 through L.22] The Defendant commenced to pay the increased child support in October, 1985. [Trans. P.7, L.20 through P.9, L.18]

14. At the time the parties entered into the Stipulation to increase child support, the Defendant was not aware of the Plaintiff's income and believed that the Plaintiff's income was the same as he had represented to the Court during the proceedings in July, 1985. [Trans. P.17, L.6 though L.13] The Defendant provided no information regarding his income at the time the parties entered into the Stipulation either by a verbal affirmation or by providing any documentation of his income. [Trans. P.17, L.14 through P.18, L.9; Trans. P.26, L.10 through L.13]

15. At the time the parties entered into the Stipulation to modify the payment of child support in 1986, the Plaintiff was earning approximately \$9,000.00 per month as gross

income. The Plaintiff testified at trial that he told the Defendant he was making \$8-10,000.00 per month. [Trans. P.47, L.12 through L.23] The Plaintiff also testified that the discussions which resulted in the Stipulation to increase support in 1986, began in September, 1985, approximately one month after the parties had been in Court and the Defendant's Petition for Modification had been denied. [Trans. P.48, L.12 through L.18]

16. During the trial, the Court admitted Defendant's Exhibit "24", a copy of the Plaintiff's tax return for 1985. Plaintiff's 1985 tax return showed a monthly income of \$3,405.00 per month. [Trans. P.52, L.10 through P.53, L.3] The Court admitted the document to show the disparity between what Plaintiff claimed as income at the time of trial in July, 1985 and his actual income as shown on his 1985 tax return. [Trans. P.54, L.16 through L.22]

17. The Plaintiff admitted in cross-examination that the Findings of Fact and the Order entered in January, 1986, was not an accurate statement of the Plaintiff's income at that time. [Trans P.70, L.4 through L.7]

18. At the time of trial on Defendant's Petition for Modification, February 14, 1989, the Plaintiff's income was \$6,000.00 per month. [R 167]

19. The Plaintiff at no time disclosed his income to the Defendant when the parties entered into the Stipulation to

increase child support. [Trans. P.88, L.13 through P.89 L.7]

20. Counsel for the Defendant was never involved in negotiations which resulted in the increase in child support, no Petition was before the Court and no discovery was undertaken. Counsel for Defendant simply drafted an agreement which was forwarded to counsel for the Plaintiff and subsequently modified to include the provision that the Stipulation was based upon the circumstances as they presently existed. [Dep. of Glen M. Richman, February 7, 1989, admitted into evidence, Trans. P.29, L.12 through P.31, L.12]

21. At the conclusion of the trial, counsel for the Defendant made a motion pursuant to the Utah Rules of Civil Procedure, Rule 15(b), to modify the pleadings to conform to the evidence presented to the Court asking the Court to amend the existing Orders based upon misrepresentations to the Court, misrepresentations to the Defendant and material omissions of fact by the Plaintiff by causing the Defendant to enter into the Stipulation which became the Modification Order of April 11, 1986. [Trans. P.91, L.2 through L.13]

22. The Court entered its Findings of Fact that the Plaintiff's obligation to pay support for the minor child of the parties was modified by Order dated April 11, 1986, increasing the child support from \$175.00 per month to \$250.00 per month.

The Court then found that there had been no material change in circumstance regarding Plaintiff's income. However, the Court found:

Number 3. The most reasonable and credible assessment of the testimony of the parties is that the Plaintiff did fail to disclose his true income to the Defendant at the time the parties entered into the Stipulation and that Defendant was not aware of Plaintiff's income when she agreed to accept \$250.00 per month as child support for the minor child of the parties.

Number 4. The Plaintiff's income at the time the parties entered into the agreement and his present income is in the amount of \$6,000.00 per month.

The Court then concluded that there had been no material change of circumstance but that Plaintiff's failure to disclose his true income was a material omission of fact. The Court then concluded that child support should be increased pursuant to the Uniform Child Support Guidelines which were applicable at the time of trial. [R 166 through 168]

23. The Court entered its Order modifying the Decree of Divorce directing the Plaintiff to pay to the Defendant the sum of \$750.00 per month as child support, directed the Plaintiff to maintain health insurance, awarding the Plaintiff the right to claim the minor child as a tax return and awarding the Defendant \$2,000.00 in attorney's fees. [R 170 through 171]

SUMMARY OF THE ARGUMENT

Under Utah Rules of Civil Procedure, 52(a), the Appellate Court should defer to the Trial Court's determination of the credibility witnesses. The Trial Court Judge was in the best position to observe the litigants in person and measure their credibility. Absent a showing of clear error, the Appellant must rely upon the credibility given to each of the witnesses by the Trial Court.

The Trial Court in measuring the credibility of the witnesses in this matter determine that the Plaintiff had failed to be honest in his negotiations to establish child support when the parties agreed to a Modification in April, 1986, that the Plaintiff had either misrepresented his income or failed to disclose his income and that such misrepresentations or omissions were material to the ability of the parties to reach a fair settlement. The Court allowed Modification of the Petition pursuant to Rule 15(b) of the Utah Rules of Civil Procedure, to allege fraud upon the Court by material omission and amended the Order of April 11, 1986, upon those grounds rather than upon a showing of a substantial change of material circumstance.

At the time the parties entered into the Stipulation and Modification Order of April 11, 1986, there was no action pending before the Court, no discovery was undertaken and counsel for the

Defendant was involved only for the purpose of drafting an agreement reached between the parties without the assistance of counsel. There was no bona fide representation of the Defendant by counsel for the purpose of determining Plaintiff's income.

The Court erred in awarding the Plaintiff the tax exemption for the minor child of the parties.

Plaintiff's Appeal in this matter is without merit and not brought in good faith. It is reasonable that the Defendant should be awarded such attorney's fees and costs as she may incur in defending this Appeal.

ARGUMENT

I.

THE TRIAL COURT'S CONTINUING EQUITABLE JURISDICTION
TO ADJUST THE RIGHTS OF THE PARTIES ENCOMPASSES THE
POWER TO AMEND THE DECREE BASED UPON TACIT FRAUD
RELATING TO MR. GATES' CHILD SUPPORT OBLIGATION.

The primary thrust of Mr. Gates' Argument on Appeal, is that he made a good deal for himself in 1986 by failing to disclose to his wife that he was making \$3,000.00 per month more than at the time they were before the Court in May, 1985, and the Court should enforce his tacit fraud upon his wife, child and the Court, because "there is no change in circumstances" from the time of entry of the Stipulation Order to the date of the hearing. Mr. Gates' position is no more than a tautological

argument with a false premise: "I made an agreement for a stated amount in 1986 based upon my income as it then existed. Since my income hasn't changed, my agreement is still good." The false premise is that equity will tolerate nondisclosure of the true facts upon which a rational decision should have been made, especially where the detriment flowing from the dishonesty directly deprives a person not a party to the "deal" from his statutory entitlement, i.e., Mr. Gates' child.

A. Principles of Review of Modification Proceedings.

The basic principles upon which an Appellate Court reviews a Trial Court's divorce modification proceedings are well defined in the case of Christensen v. Christensen, 628 P.2d, 1297, 1299 (Utah 1981):

"The modification of Divorce Decrees is a matter of equity, and it is the duty and prerogative of this Court to review both the facts and the law. (Citations omitted) However, it is likewise true that on review this Court will accord considerable deference to the judgment of the Trial Court due to its advantage position and will not disturb the action of that Court unless the evidence clearly preponderates to the contrary, or the Trial Court abuses its discretion or misapplies principles of law." (Citations omitted)

Further, an Appellate Court may affirm a Trial Court's decision on proper grounds even though different than those relied upon by the Trial Court. Branch v. Western Petroleum, Inc., 657 P.2d, 267, 276 (Utah 1982)

B. Utah Legal Principles Regarding Child Support Obligations. The Utah Legislature, and Courts of the State of Utah, have considered as primary the parental obligation of support when addressing divorcing parties and their children's rights.

"The Utah Legislature has clearly stated the public policy of the State of Utah is that 'Children shall be maintained from the resources of responsible parents, thereby relieving or avoiding, at least in part, the burden of [support] often borne by the general citizenry through welfare programs.' Citing, Utah Code Ann. §78-45-b-1.1 (1987); Peterson v. Peterson, 74 Utah Adv. Rep. 26, 28 (1988).

As stated in Martinez v. Martinez, 748 P.2d, 593, 595,

(Utah App. 1988):

"Utah Code Ann. § 78-45-3, -4 (1987) established the obligation of both parents to support their children and '[a] child's right to that support is paramount.' Citing, Woodward v. Woodward, 709 P.2d, 393, 394 (Utah 1985) 'The Utah Supreme Court continued, 'the Trial Court may fashion such equitable Orders in relation to the children and their support as is reasonable and necessary, considering not only the needs of the children, but also the ability of the parent to pay.'

In Race v. Race, 740 P.2d, 253, 255 (Utah 1988) the Court again underscored the importance of the child's rights when it stated:

"Although the awarding of visitation and child support is within the Court's discretion, the Court must consider the child's paramount right to and need for his parents support. (Citation omitted) The Court-Ordered child support is an obligation imposed for the benefit of the children, not the divorcing spouse."

Finally, the Utah Supreme in Lord v. Shaw, 682, P.2d, 853, (Utah 1984), the broad equitable power of a Trial court relating to child support stated:

"In matters concerning the custody and support of children, because of their highly equitable nature, it is appropriate for the Trial Court to take into consideration the entire circumstances in making any order of enforcement of the decree, by contempt or otherwise having in mind his equitable powers, to make any adjustments he may think fair and justified." Lord v. Shaw, at 856.

C. The Court's Increase in Child Support is an Appropriate Exercise of its Equitable Powers. The Court increase of Mr. Gates' child support obligation was a wise and appropriate use of the broad equitable discretion vested in Trial Courts to insure the welfare of children based upon their parents' ability to care for them. The Trial Court chose not to tolerate Mr. Gates' active omission when seeking and receiving a Court-Ordered increase of child support based upon nondisclosure of his true income. Mrs. Gates believes, and after a review of the record it is clearly appropriate, that the Court should have

increased the child support and made it retroactive to January, 1986 when Mr. Gates began making \$6,000.00 per month. As stated in Race v. Race, supra, child support is an obligation imposed for the benefit of the child not the divorcing spouse. In this instance, the child has been deprived of three years of increased child support benefits to which the child was entitled. We believe it is appropriate that this Court consider that issue on appeal, i.e., making the increased child support retroactive to 1986 for the benefit of Mr. Gates' child.

The Argument made on appeal by Mr. Gates is similar to the argument rejected by the Court in Druce v. Druce, 738, P.2d, 633 (Utah 1987). In Druce, the District Court entered a Temporary Order of Child Support prior to the final Decree. At the time of the final Decree, Mr. Druce was in arrears \$1,200.00 on the Temporary Order. However, the final Decree did not require that Mr. Druce pay the amounts that were delinquent at the time of entry of the final Order. Subsequently, Mrs. Druce obtained a Judgment for the delinquent child support payments which had accrued to the date of entry of the final Divorce Decree. Mr. Druce appealed, asserting that the Temporary Support Order had merged into the final Decree and since the final Decree was silent on the delinquent temporary support payments the doctrine of res judicata precluded Plaintiff from seeking unpaid amounts.

Affirming the lower court's judgment, the Utah Supreme Court stated:

"We recognize that a few jurisdictions have adopted the Rule advocated by the Defendant. (Citations omitted) However, we disagree with those decisions. A rule that denies recovery of accrued unpaid obligations under a Temporary Order, unless they are expressly observed by the final Order are 'entirely senseless . . . [because] it awards the recalcitrant husband for non-compliance with the Court's Order by excusing him from payment of arrears.' H. Clark, Law of Domestic Relations, Section 14.2, at 428 (1968)." Druce v. Druce at 634.

This Court may also uphold the Lower Court's decision based upon a reformation of contract theory. Paragraph 6 (R.75) of the Stipulation Modifying the Decree of Divorce entered into April 10, 1986, states:

"The parties acknowledge that this Stipulation is based upon circumstances of each party as they presently exist and, subject to the Court's approval, the Divorce Decree and subsequent Orders may be modified upon this Stipulation and subject to its terms being incorporated therein."

It is clear that both parties intended the Stipulation to reflect their current circumstances. Mrs. Gates believed that Mr. Gates' income was not greater than at the time of the May, 1985 hearing, which she believed to be \$2,300.00, rather than \$6,000.00, per month. Recently, the Utah Supreme Court has held

that a unilateral mistake may be a basis for reformation to conform the agreement to what both parties intended. Guardian State Bank v. Stangl, 113 Utah Adv. Rep. 9 (1989). The equitable remedy of reformation would be an appropriate remedy to benefit Mr. Gates' child who has been deprived of his father's increased bounty the last three years by his father's unconscionable bargaining.

The Court's equitable powers were exercised in favor of a reasonable and just decision which takes into consideration Mr. Gates' current income and reflects the appropriate amount under the Child Support Guidelines which he should be paying.

II

THE TRIAL COURT'S ASSESSMENT WHEN JUDGING CREDIBILITY OF THE PARTIES SHOULD NOT BE DISTURBED ON APPEAL.

Mr. Gates erroneously claims that there were no misrepresentations which would act as a basis for modification. In reply to this erroneous statement, the legal principle is that the Trial Court sat through a one-day trial listening to the testimony, receiving exhibits and examining the facts. As recently stated by this Court:

"Under Utah Rules of Civil Procedure 52(a), we defer to the Trial Court's determination of the credibility of witnesses. We see no reason in the record to disagree with the Judgment of the Trial Court Judge, who was in the arena and observed the combatants in

person." Johnson v. Johnson, Utah Adv. Rep.
22, 24 (Utah Ct. App. 1989)

The following evidence was received during the hearing:

a) Mrs. Gates, at the time of entering into the Stipulation to increase child support, believed that Mr. Gates' income was the same as he had represented to the Court in July, 1985. [Trans. P.17, L.6 through L.13]

b) Mr. Gates provided no information to Mrs. Gates regarding his income either verbally or by documentation when they entered into the Stipulation. [Trans. P.17, L.14 through P.18, L.9]

c) Mr. Gates testified that the discussions which resulted in the Stipulation to increase child support in 1986 began in September, 1985, approximately one month after the parties had been in Court on Mrs. Gates' Petition to Modify. [Trans. P.48, L.12 through L.18]

d) Mr. Gates testified at the time of trial that he was making approximately \$8-10,000.00 per month and that he allegedly told Mrs. Gates the figure. [Trans. P.47, L.12 through L.23]

e) The Court admitted Mr. Gates' tax returns for 1985 showing that he had a monthly income of \$3,405.00 per month, showing that he earned \$1,200.00 per month more than what he claimed in the July, 1985 hearing. [Trans. P.52, L.10 through P.53, L.3]

f) Mr. Gates admitted in cross-examination that the Findings of Fact and Order entered January, 1986, was not an accurate statement of his income at the time. [Trans. P.70, L.4 through L.7]

g) Counsel for Mrs. Gates was never involved in negotiations which resulted in the increase in child support; counsel for Mr. Gates simply drafted an agreement which was forwarded to counsel for Mrs. Gates and subsequently modified to include the provision that the Stipulation was based upon circumstances as they presently existed. [Dep. of Glen M. Richman, Feb. 7, 1989, Trans. P.29, L.12 through P.31, L.12]

There is substantial evidence in the record to support the Trial Court's conclusion that Mr. Gates was lying and that Mrs. Gates was duped into an agreement which did not take into consideration the true facts as they then existed.

III

THE TRIAL COURT ERRORED IN AWARDING MR. GATES THE TAX EXEMPTION FOR THE PARTIES' MINOR CHILD.

Paragraph 3 of the Court's Order Modifying Decree of Divorce and Judgment grants Mr. Gates, the noncustodial parent, the tax exemption for the parties' minor child. The Trial Court's award of the tax exemption to Mr. Gates violates the Supremacy Clause of the U.S. Constitution in light of the 1982 Tax Reform Act and its effect on 26 UCS, Section 152(e)(1988).

The Trial Court's award of the tax exemption to Mr. Gates is contrary to Federal law and Utah's interpretation of the general requirement imposed by Section 152(e) of the Internal Revenue Service Code. (See Martinez v. Martinez, 754 P.2d, 69, 72 (Utah App. 1988) and Fulmer v. Fulmer, 761 P.2d, 942, 950 (Utah App. 1988))

The Trial Court was without jurisdiction to enter an Order contrary to the plain provisions of Internal Revenue Service Code. While the issue was not appealed, it is appropriate for this Court's remedial power to address the error.

IV

THE COURT SHOULD AWARD MRS. GATES COSTS REASONABLE
ATTORNEY'S FEES FOR DEFENDING THIS APPEAL.

Under Rule 33(a) and 40(a) of the Rule of the Utah Court of Appeals, this Court has the power to award costs and attorney's fees to Mrs. Gates for defending a "frivolous" appeal. Porco v. Porco, 752, P.2d, 365 (Utah App. 1988) The basis for the award is the clear deception which Mr. Gates foisted on Mrs. Gates and the Trial Court and, despite the Court's unequivocal ruling on the point. Mr. Gates continued misuse of the Utah Court system should not be tolerated by this Court. Mrs. Gates was required to expend considerable monies in proving Mr. Gates had failed to be honest. Mrs. Gates is again in the position of spending significant sums on attorney's fees to prove the same

point. Under these circumstances, this Court should award costs and attorney's fees to Mrs. Gates.

CONCLUSION

Mr. Gates' attempt to hide behind legal principles which protect legitimate interests of divorcing parties while approaching the matter with clearly "unclean hands" should to be condoned by this, or any other Court. The Trial Court saw through the veil of deceit which Mr. Gates actively wove around his wife, disenfranchising their child from the benefits of increased child support from 1986 through 1989. While Mr. Gates' omissions when entering into the Stipulation with his wife in 1986 may not fit into any clear-cut, square-pegged legal theory upon which redress is available, the Court's exercise of its broad equitable powers increasing the child support to a legal which is commensurate with Mr. Gates' current income, produces the most equitable result when considering the primacy of Mr. Gates' support obligation to his child.

DATED this 8th day of November, 1989.

LITTLEFIELD & PETERSON

By: 

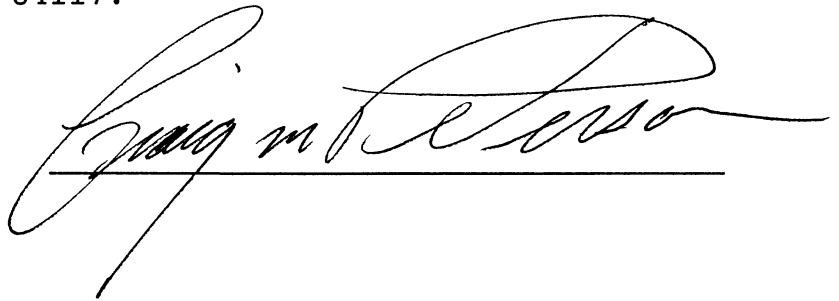
E. PAUL WOOD

Attorneys for Respondent

39669 39673

CERTIFICATE OF MAILING

I hereby certify that on this 6th day of November, 1989, I caused four true and correct copies of the foregoing BRIEF OF RESPONDENT to be served upon John S. Adams and Robert M. Taylor, TAYLOR, ENNENGA, ADAMS & LOWE, 5525 South 900 East, Suite 200, Salt Lake City, Utah 84117.



A handwritten signature in cursive script, reading "Craig M. Peterson", is written over a horizontal line.