

1998

Vickie M. Nielsen v. The Estate of Mary Jane Hefferon : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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**UTAH COURT OF APPEALS
BRIEF**

**UTAH
DOCUMENT**

IN THE UTAH COURT OF APPEALS
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DOCKET NO. 981711

VICKIE M. NIELSEN,

Plaintiff/Appellant,

vs.

THE ESTATE OF MARY JANE HEFFERON,

Defendant/Appellee.

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Appeal No. 981711

Argument Priority 15

APPELLANT'S BRIEF

Appeal from a Decision of the
Third Judicial District Court,
Salt Lake County, Judge William A. Thorne

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FILED

Utah Court of Appeals

APR 07 1999

**Julia D'Alesandro
Clerk of the Court**

IN THE UTAH COURT OF APPEALS

VICKIE M. NIELSEN,

Plaintiff/Appellant,

vs.

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has appellate jurisdiction over this interlocutory appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1953, as amended).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. The trial court erred as a matter of law in dismissing Mrs. Nielsen's complaint on summary judgment where there were material issues of fact in dispute regarding (1) whether the adjuster for the insurer of Ms. Heffron (all collectively referred to herein as "Liberty Mutual") represented to Mrs. Nielsen or her counsel that the "personal injury" language in the release would not be binding on Mrs. Nielsen thereby precluding use of the release due to estoppel or fraud in the inducement; and (2) whether an employee or agent of Liberty Mutual physically altered the release, making it void and fraudulent.

Standard of review: Summary judgment is appropriate only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. A challenge to summary judgment involves only review of questions of law in which the appellate court reviews the questions for correctness, giving no deference to the trial court's conclusions. The appellate court addresses (1) whether the trial court erred in applying the governing law and (2) whether the trial court correctly held that there were no disputed issues of material fact. Glencore, Ltd. v. Ince, 343 Utah Adv. Rep. 10, 10 (Utah 1998).

This issue was preserved for review in Plaintiff's Memorandum in Support of Plaintiff's Objection to Defendant's Motion to Dismiss and Plaintiff's Motion for Leave to Amend Her Complaint and attachments thereto, R. 43 to 51, and in oral argument before the trial court, R. 123, T. 14-23.

2. The trial court abused its discretion in denying Mrs. Nielsen's motion for leave to

amend her complaint where (1) justice clearly required the granting of the motion, (2) there would be no prejudice to the defendants, and (3) the issues involved in the proposed amendment related directly to the validity of the release.

Standard of review: A ruling on a motion to amend is within the discretion of the trial court. Timm v. Dewsnup, 851 P.2d 1178, 1182 (Utah 1993). Where the trial court exercises its discretion, it may be reversed only for abuse of that discretion. State v. Harmon, 956 P.2d 262, 265 (Utah 1998).

This issue was preserved for review in Plaintiff's Memorandum in Support of Plaintiff's Objection to Defendant's Motion to Dismiss and Plaintiff's Motion for Leave to Amend Her Complaint and attachments thereto, R. 43 to 51.

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

There are no determinative constitutional or statutory provisions governing the resolution of these issues. Issue No. 2 is governed by Rule 15(a), Utah R. Civ. P. which provides that leave to amend "shall be freely given when justice so requires."

STATEMENT OF THE CASE

This is a personal injury action by Vickie M. Nielsen which arose as a result of an automobile accident on September 28, 1990. Negotiations with Liberty Mutual Insurance Company, the Defendant's insurer, began in February of 1991. On May 1, 1991, Liberty Mutual paid Mrs. Nielsen's husband for loss of his pickup truck in exchange for title to the vehicle. On or about June 6, 1991, David Gehris, adjuster for Liberty Mutual, negotiated a settlement for Mrs. Nielsen's separate property damage claim. He sent a release to be executed by Mrs. Nielsen and her counsel. Mr. Gehris advised Mrs. Nielsen's attorney that he knew the settlement was only with respect to Mrs. Nielsen's property damage claim and that they could ignore language

in the release regarding personal injury claims. Not wishing to rely solely on Mr. Gehris' oral representation, Mrs. Nielsen's counsel crossed out on the release the words "Personal Injuries existing or which may exist which are known or unknown to me at the present time" and "both to person." Both then executed the release.

On December 15, 1992, Mrs. Nielsen's counsel contacted Mr. Gehris concerning Mrs. Nielsen's back injury resulting from the accident and discussed her pending surgery. On August 24, 1993, Mrs. Nielsen's counsel again contracted Mr. Gehris regarding the expenses for the surgery. On September 21, 1993, Mrs. Nielsen's attorney received a letter from Mr. Gehris requesting that he be contacted regarding the personal injury claim. On October 5, 1993 Mrs. Nielsen's counsel sent a medical records package to Mr. Gehris and requested that he respond concerning an independent medical examination. Litigation was timely commenced on September 20, 1994.

Mrs. Nielsen's counsel subsequently corresponded with Liberty Mutual personnel regarding the personal injury claim and both parties engaged in discovery. Not until Liberty Mutual filed its motion to dismiss on or about October 28, 1997, three years after commencement of the action, did Liberty Mutual produce the release and assert that the release precluded Mrs. Nielsen's personal injury claims.

Liberty Mutual submitted with its motion an affidavit of Mr. Gehris. Mrs. Nielsen responded with documentary evidence, her own affidavit and an affidavit of her attorney.¹ She also filed a motion for leave to amend her complaint to allege fraud and alteration of the release.

The trial court ruled that the Best Evidence Rule governed the issue and interpreted the

¹The motion is, therefore, properly treated as a motion for summary judgment under Rule 56, Utah R. Civ. P. See Rule 12(b), Utah R. Civ. P.

release without resort to extrinsic evidence. It ordered Mrs. Nielsen's claims dismissed with prejudice. Without entertaining oral argument on Mrs. Nielsen's motion for leave to amend and without making any findings as to that motion, the trial court denied her motion.

This appeal has been brought to challenge the trial court's dismissal of Mrs. Nielsen's claims and its denial of her motion to amend.

STATEMENT OF FACTS

1. On September 23, 1990, Vickie Nielsen was injured in a traffic accident involving a vehicle operated by Mary Jane Hefferon. R. 2.

2. Subsequent to the accident, Mrs. Nielsen obtained counsel who negotiated a settlement with Liberty Mutual Insurance Company, insurer of the vehicle operated by Mary Jane Hefferon. R. 44.

3. In May of 1991, Liberty Mutual settled the claim of Mrs. Nielsen's husband for loss of his pickup truck. R. 44.

4. Subsequent to the May 1991 settlement, Mrs. Nielsen negotiated and settled her separate claim for property damage. R. 45.

5. Liberty Mutual's claims adjuster, David Gehris, sent Mrs. Nielsen a release form to execute prior to receipt of the property damage amount. The adjuster represented to Mrs. Nielsen's counsel that the settlement was solely for the property damage and that Mrs. Nielsen could "ignore" the language regarding personal injury. R. 45.

6. Mrs. Nielsen did not trust the insurance company or Mr. Gehris. As a result, her counsel crossed out the words "Personal injuries existing or which may exist which are known or unknown to me at the present time" and "both to person." R. 45.

7. Mrs. Nielsen executed the release agreement with the personal injury language struck

out. R. 45.

8. Both Mrs. Nielsen and Mr. Gehris understood that Mrs. Nielsen would be asserting a claim for personal injuries after she underwent the necessary extensive medical treatment. R. 46.

9. From December 1992 through September of 1994, Mrs. Nielsen's counsel contacted and corresponded with Mr. Gehris concerning Mrs. Nielsen's personal injury claims. R. 46 to 47.

10. Mrs. Nielsen commenced this action on September 20, 1994. R. 1.

11. After commencement of the action, Mrs. Nielsen cooperated with Liberty Mutual in the evaluation of her personal injury claims. R. 46 to 47.

12. Both parties engaged in extensive discovery. At no time during discovery did Liberty Mutual produce the release nor assert reliance on the release as an affirmative defense.

13. In August of 1997, Liberty Mutual "found" the release. R. 34.

14. On October 28, 1997, Liberty Mutual filed (1) a motion for leave to amend its answer to assert the release as an affirmative defense, and (2) a motion to dismiss. R. 38.

15. On November 13, 1997, Mrs. Nielsen filed an objection to Liberty Mutual's motions and a motion for leave to amend her complaint to assert her claims of fraud and bad faith of the release and her defenses to the release. R. 40.

16. With her memoranda, Mrs. Nielsen filed her affidavit and an affidavit of her counsel raising material factual issues about the validity and enforceability of the release. R. 52 to 82.

17. The trial court conducted a hearing on the motions on February 26, 1998. R. 123 (see transcript).

18. At the hearing, Mrs. Nielsen's counsel inspected the release and acknowledged the validity of the signatures. R. 113.

19. The trial court then relied on the best evidence rule to hold that the scope of the agreement must be determined from the face of the release. R. 113. Finding no ambiguity in the language of the release, the court refused to consider parol evidence and held that the release precluded Mrs. Nielsen's claims. R. 114.

20. At no time did the trial court evaluate Mrs. Nielsen's claims of fraud, alteration, or fraud in the inducement.

21. Without discussion or analysis, the trial court denied Mrs. Nielsen's motion to amend her complaint. R. 114.

22. The trial court dismissed Mrs. Nielsen's claims with prejudice. R. 114.

SUMMARY OF ARGUMENT

Summary judgment is appropriate only where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Factual issues which are material are those which affect the final determination of legal issues under the appropriate governing law. In the present case, the legal issue is whether the release produced by Liberty Mutual is valid and bars Mrs. Nielsen's personal injury claims.

A release, like any other agreement, is construed according to its terms from the face of the agreement except in cases where facts exist which would invalidate the agreement. A release which limits or waives liability is unenforceable if procured by fraud or entered into on reasonable reliance upon the positive assertions made by another. In addition, a contract which has been altered is invalid. Where the question of alteration has been raised, the issue is a fact question which must be presented to the trier of fact and may not be disposed of by summary judgment. Where a document has been submitted which appears regular on its face, the trial court or finder of fact may not presume the document to be valid in the face of an assertion that

the document was altered or that the agreement was fraudulently induced.

Mrs. Nielsen did not allege fraud in her earlier pleadings because there was no indication that Liberty Mutual was going to assert the release as a defense to her claims. Only when the release was later found and Liberty Mutual asserted it as an affirmative defense, did Mrs. Nielsen have to evaluate the fraud issues. She did so timely through her objection to Liberty Mutual's motion to dismiss and by motion to the court for leave to amend her complaint.

The trial court's dismissal in the face of disputed issues of material fact was erroneous as a matter of law. In addition, its denial of Mrs. Nielsen's motion to amend was an abuse of discretion which resulted in prejudice and substantial injustice to Mrs. Nielsen. This Court should, therefore, reverse and remand to the trial court.

ARGUMENT

POINT I

THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT WHERE THERE WERE DISPUTED FACTS AS TO THE VALIDITY OF THE RELEASE.

It is well-established law that a trial court may properly grant summary judgment only in the absence of genuine issues of material fact where the moving party is entitled to judgment on the undisputed facts as a matter of law. *E.g.*, Glencore, Ltd. v. Ince, 343 Utah Adv. Rep. 10, 10 (Utah 1998). This Court has stated in the context of a summary judgment motion that an issue of fact "must be material to the applicable rule of law." Norton v. Blackham, 669 P.2d 857, 859 (Utah 1983). It has not defined "materiality" in the summary judgment context. It has, however, indicated in a criminal matter that the measure of materiality is the effect of a fact on the outcome of a trial. State v. Schreuder, 712 P.2d 264, 275 (Utah 1985) ("Testimony is material . .

. if there is a reasonable probability that its presence would affect the outcome of the trial.”) The U.S. Supreme Court has defined the terms “material” and “genuine” for summary judgment purposes. A “material” fact is one “that might affect the outcome of the suit under governing law,” and a “genuine” issue is one for which “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Many states have similarly defined a fact as being material for summary judgment purposes if it can affect the determination of the legal issues, *i.e.*, the outcome of the case.²

The legal issue before the trial court on summary judgment was whether the release signed by Mrs. Nielsen, which contained language releasing liability for personal injury, was valid and enforceable. The trial court relied on the “best evidence rule” to the exclusion of parol evidence to conclude that the release was valid and enforceable.

This Court has recognized that parol evidence is properly received where an agreement may be invalid for fraud or other causes.

This court has held that as a principle of contract interpretation, the parol evidence rule has only a narrow application. Simply stated, the rule operates, in the absence of invalidating causes such as fraud or illegality, to exclude evidence of prior or contemporaneous conversations, representations, or statements offered for the purpose of varying or adding to the terms of an integrated contract.

Ward v. Intermountain Farmers Ass’n, 907 P.2d 264, 268 (Utah 1995) (citations omitted, emphasis added). *See also* State Bank of Lehi v. Woolsey, 565 P.2d 413, 418 (Utah 1977) (presumption that writing is integrated is appropriate “in the absence of invalidating causes such

²*E.g.*, Beck v. Haines Terminal & Highway Co., 843 P.2d 1229 (Alaska 1992); Peterson v. Halsted, 829 P.2d 373, 375 (Colo. 1992); Drake v. Drake, 586 P.2d 742, 743 (Okla. 1978); Clements v. Travelers Indem. Co., 850 P.2d 1298, 1301 (Wash. 1993); Mize v. North Big Horn Hosp. Dist., 931 P.2d 229, 232 (Wyo. 1997).

as fraud or illegality”); Lamb v. Bangart, 525 P.2d 602, 607 (Utah 1974) (“unless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties”).

The Restatement (Second) of Contracts addresses the issue of when parol evidence may be admissible in the evaluation of a facially complete agreement.

Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish

- (a) that the writing is not an integrated agreement;
- (b) that the integrated agreement, if any, is completely or partially integrated;
- (c) the meaning of the writing, whether or not integrated;
- (d) illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause;
- (e) ground for granting or denying rescission, reformation, specific performance, or other remedy.

Restatement (Second) of Contracts § 214 (1981). Two of the Restatement comments are relevant to the present issue.

What appears to be a complete and binding integrated agreement may be a forgery, a joke, a sham, or an agreement without consideration, or it may be voidable for fraud, duress, mistake, or the like, or it may be illegal. Such invalidating causes need not and commonly do not appear on the face of the writing.

Restatement (Second) of Contracts § 214 comment c.

A contract which is fully enforceable in an action for damages may be subject to equitable remedies such as rescission or reformation by reason of fraud, mistake or the like. . . . Evidence of the circumstances in which the contract was made may be relevant to such remedial issues . . .

Restatement (Second) of Contracts § 214 comment d.

Under Utah law, an agreement which limits liability, such as the release at issue here, is unenforceable if it is procured by fraud. Otsuka Electronics (USA, Inc.) v. Imaging Specialists, Inc., 937 P.2d 1274, 1280 (Utah App. 1997) (citing Lamb v. Bangart, 525 P.2d 602, 608 (Utah

1974)). *See also* Despain v. Despain, 855 P.2d 254, 257 (Utah App. 1993) (citing Dugan v. Jones, 615 P.2d 1239, 1247 (Utah 1980), “A person may rely upon positive assertions made by another, and fraud in the inducement may allow the injured party to avoid the contract.”)

It is also Utah law that a challenge to the validity of a document based on alteration is a fact question which must go to the finder of fact. “[T]he question of [a document’s] validity is a matter to be determined by the trier of fact, and the mere fact that a judge allows a document to be received in evidence does not mean that the jury or the court, if there is no jury, must accept the document as genuine.” Hartman v. Young, 551 P.2d 229, 231 (Utah 1976). *See also* Zions First Nat. Bank v. Rocky Mountain Irr., Inc., 795 P.2d 658, 663 (Utah 1990) (“The trial court should have allowed the jury to decide the material, fraudulent alteration issue.”) Parol evidence is admissible in evaluating the alteration issue.

[I]f the genuineness or authenticity of a material expression is in question, the parol evidence rule does not come into play; otherwise, it would be a means of destroying all defenses of a forgery victim and making a false document genuine, simply by silencing the person who most clearly knows of its falsity.

Tates, Inc. v. Salisbury, 795 P.2d 1140, 1141 (Utah App. 1990). The existence of this fact question as to the alteration of the release, on which parol evidence is properly admissible, clearly precludes summary judgment on the validity of the document.

After it became apparent that Liberty Mutual intended to rely on its newly located release, Mrs. Nielsen discovered that the release did not reflect changes she made at the time she signed it. She subsequently filed a motion to amend her complaint to allege fraudulent alteration of the release.

In addition, in response to Liberty Mutual’s motion to dismiss, Mrs. Nielsen submitted her affidavit and that of her counsel which clearly raise issues of fact material to the validity and

enforceability of the release. Mrs. Nielsen's affidavit stated, in part:

6. Under no condition did I settle my personal injury claim in June of 1991 knowing the extent of my injuries. I told my attorney that I did not trust insurance companies and I would not sign the release unless we modified the document.

7. When the Release and Settlement agreement was signed on June 6, 1991 in my attorney's office, I specifically asked him to cross out the words "Personal Injuries existing or which may exist which are known or unknown to me at the present time" and "both to person."

8. The agreement that the Defendants have submitted is not a true nor a correct copy of the original that was signed by me and sent to the insurance company by my attorney.

Affidavit of Vickie M. Nielsen, R. 53. The affidavit of Mrs. Nielsen's attorney also establishes fact questions about the intent of the parties in executing the release and raises questions about whether the release had been altered. Affidavit of Paul M. Halliday, Jr. R. 56.

Mrs. Nielsen raised factual issues about the circumstances surrounding her execution of the release which would preclude the written agreement from being an integration or a statement of her intent. She also raised factual issues about the facial validity of the release, in particular whether it had been altered after she signed it. The trial court's grant of summary judgment in reliance on the best evidence rule despite the existence of these material issues of fact was erroneous as a matter of law. This Court should, therefore, reverse the summary judgment and remand to the trial court for further proceedings.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MRS. NIELSEN LEAVE TO AMEND HER COMPLAINT.

The decision of whether to grant leave to amend a complaint is within the discretion of

the trial court. *E.g.*, Timm v. Dewsnup, 851 P.2d 1178, 1182 (Utah 1993). Rule 15(a), Utah R. Civ. P. provides that “leave [to amend] shall be freely given when justice so requires.” This Court has interpreted this provision liberally to “afford parties ‘the privilege of presenting whatever legitimate contentions they have pertaining to their dispute.’” Wilcox v. Geneva Rock Corp., 911 P.2d 367, 369 (Utah 1996) (citation omitted). A denial of a motion to amend is an abuse of discretion if it results in prejudice to the moving party. Slattery v. Covey & Co., Inc., 857 P.2d 243, 248 (Utah App. 1993) (citation omitted). There are three considerations which the appellate court views in evaluating on a trial court’s ruling on a motion to amend: “(1) the timeliness of the motion; (2) the moving party’s reason for the delay; and (3) the resulting prejudice to the responding party.” Swift Stop, Inc. v. Wight, 845 P.2d 250, 258 (Utah App. 1992) (citing Westley v. Farmer’s Ins. Exchange, 663 P.2d 93, 94 (Utah 1983)). A motion to amend made well into the discovery process “should be allowed if there is reasonable explanation for the delay in discovering the facts and the amendment is not unduly prejudicial to the opposing party.” Chadwick v. Nielsen, 763 P.2d 817, 820 (Utah App. 1988) (citing Girard v. Appleby, 660 P.2d 245, 248 (Utah 1983)).

Mrs. Nielsen commenced this action on September 20, 1994. The parties engaged in extensive discovery. At no time did Liberty Mutual produce the release. In August of 1997, Liberty Mutual “found” the release and subsequently filed a motion for leave to amend its answer and a motion to dismiss based upon the release (October 28, 1997). Based upon the recollection of Mrs. Nielsen and her attorney that the personal injury provisions had been lined out, Mrs. Nielsen made her motion to the court on November 13, 1997, for leave to amend her complaint to raise the issue of fraudulent alteration of the release.

At no time prior to the hearing before the trial court on February 26, 1998 was Mrs.

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CLERK OF DISTRICT COURT
THIRD JUDICIAL DISTRICT

JUL 25 1998

By _____

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

VICKIE M. NIELSEN,

Plaintiff,

vs.

THE ESTATE OF MARY JANE
HEFFERON,

Defendant.

ORDER OF DISMISSAL

Civil No. 940905959 PI

Judge William A. Thorne

This matter came on for hearing on February 26, 1998 pursuant to the *Motion to Dismiss* filed by Defendant, the Estate of Mary Jane Hefferon, and the *Motion to Amend Complaint* filed by Plaintiff. At that hearing, Plaintiff was present and represented by Paul M. Halliday, Jr., of and for the law firm of Halliday & Watkins, and Defendant was represented by Lynn S. Davies and Kent W. Hansen, of and for the law firm of Richards, Brandt, Miller & Nelson.

Having reviewed the papers and pleadings on file herein, including the motions and memoranda filed in support of and in opposition to the present motions, and good cause

appearing therefore, the Court enters the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. At the hearing held in this matter, Defendant's counsel produced an original *Release and Settlement of Claim* (the "**Original Release**"). Exhibit "A" attached to Defendant's *Memorandum in Support of Motion to Dismiss* appears to the Court to be a duplicate of the Original Release.

2. At that hearing, after having inspected the Original Release and conferred with Plaintiff, Plaintiff's counsel acknowledged that the signatures on the Original Release are the signatures of Plaintiff and her counsel.

3. Also at that hearing, Plaintiff's counsel stated that there was only one original of the *Release and Settlement of Claim*.

CONCLUSIONS OF LAW

1. Under the Best Evidence Rule, set forth at Rules 1002-1004, Utah Rules of Evidence, where the Original Release is available and before the Court, Plaintiff's counsel having acknowledged that the Original Release bears the signatures of Plaintiff and her counsel, the content and scope of the parties' agreement must be determined from the Original Release.

2. After having considered all of the evidence presented by Plaintiff, the Court finds that there is no ambiguity with regard to the language of the Original Release. Accordingly, the

parties' intent must be ascertained solely from the language of this contract, without resort to parole evidence.

3. The Original Release clearly encompasses Plaintiff's claims for personal injuries arising from the accident that is the subject of this accident, which are the same claims asserted in this action.

ORDER

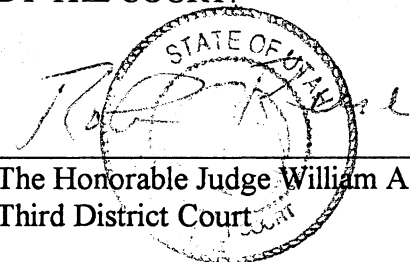
Based upon the foregoing it is hereby

ORDERED, ADJUDGED AND DECREED that Plaintiff's claim is dismissed with prejudice; and it is further

ORDERED, ADJUDGED AND DECREED that Plaintiff's *Motion to Amend* her Complaint is denied.

DATED this 25 day of June, 1998.

BY THE COURT:


for The Honorable Judge William A. Thorne
Third District Court

Approved as to Form:

HALLIDAY & WATKINS

Paul M. Halliday, Jr.
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on this 3rd day of March, 1998, to the following:

Paul M. Halliday, Jr.
Paul M. Halliday
HALLIDAY & WATKINS
376 East 400 South, Suite 300
Salt Lake City, Utah 84111

Pat Moeller

8871-363: 188026