

1988

# Gilbert R. Wilburn v. Interstate Electric, National Union Fire Insurance Company of Pittsburgh, Second Injury Fund, Utah State Industrial Commission : Brief in Opposition to Certiorari

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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GILBERT R. WILBURN,

Applicant/Appellant,

vs.

Certiorari Docket No. 880086

INTERSTATE ELECTRIC, NATIONAL  
UNION FIRE INSURANCE COMPANY OF  
PITTSBURGH, SECOND INJURY FUND  
and UTAH STATE INDUSTRIAL  
COMMISSION,

Priority No. 13

Defendants/Respondents.

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BRIEF OF DEFENDANTS/RESPONDENTS INTERSTATE  
ELECTRIC AND NATIONAL UNION FIRE INSURANCE COMPANY  
OF PITTSBURGH IN OPPOSITION TO APPLICANT/APPELLANT'S  
PETITION FOR WRIT OF CERTIORARI

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### ISSUES PRESENTED FOR REVIEW

I. Did the Utah Court of Appeals properly affirm the Industrial Commission's final decision by holding that:

A. Section 35-1-90 is no bar to the enforceability of the Settlement Agreement?

B. There was ample evidence to support the judge's finding that, as a matter of fact, "the agreement was validly executed by the parties as a settlement of a disputed claim, including for permanent total disability benefits." Wilburn v. Interstate Electric, 74 Utah Adv. Rep. 23, (Utah App. 1988); and

C. Maximum deference should be given "to the basic facts determined by the agency, which will be sustained if there is evidence of any substance that can be reasonably regarded as supporting the determination made? Id.

### DETERMINATIVE STATUTE, RULES AND CASE

The Statute, Rules and Case Authority relevant to a determinative resolution of the present case are: (1) Utah Code Ann. § 35-1-90 (1974); (2) Rules 42-43, Rules of Utah Supreme Court, 56 Utah Adv. Rep. 38 (1987); and (3) Wilburn v. Interstate Electric, 74 Utah Adv. Rep. 23, (Utah App. 1988).

## STATEMENT OF THE CASE

### A. Nature Of The Case:

This case arises out of applicant's alleged industrial accident and related claim for permanent total disability benefits, under the Utah Workers' Compensation Act.

### B. Course Of Proceedings And Disposition By The Court Of Appeals:

1. On February 13, 1986, Gilbert R. Wilburn ("Wilburn"), filed an application with the Industrial Commission seeking permanent total disability benefits from defendants. (R. 43.) Defendants answered the application asserting various defenses, including the fact that the claim was barred by a previously entered Settlement Agreement. (R. 44-45.)

2. On May 14, 1986, Administrative Law Judge Richard Sumsion reviewed Wilburn's application. (R. 49.) On May 28, 1986, Judge Sumsion issued Tentative Findings of Fact, Conclusions of Law and Order, finding Wilburn to be permanently and totally disabled. (R. 338-345.)

3. Pursuant to defendants' Motion for Review and Clarification (R. 357-371), Judge Sumsion issued Supplemental Findings of Fact, Conclusions of Law and Order, vacating his prior Interim Order of May 28, 1986, and ruling that the Compromise and Settlement Agreement ("Agreement") entered into between the parties and approved by the Commission on November 28, 1984,



was binding and precluded the applicant from asserting his claim for permanent total disability. (R. 372-376.)

4. Counsel for Wilburn obtained review of the Supplemental Order by the full Commission. (R. 377.) Memoranda discussing all of the issues raised in this appeal were then submitted to the Commission for review. (R. 380-406.) The Commission denied Wilburn's Motion for Review, with all three commissioners concurring. (R. 407.)

5. The Industrial Commission made the following significant factual determinations:

(a) Defendants, in good faith, asserted the defense that the alleged event did not constitute a compensable "accident." (R. 339.)

(b) Wilburn clearly contemplated asserting a claim for permanent total disability several months before he executed the Agreement. (R. 341.)

(c) The parties clearly understood that the trade-off contemplated by the Agreement included a relinquishment of Wilburn's claim for permanent total disability. (R. 341.)

(d) The Parties stipulated in the Agreement itself that there was a bona fide issue as to the compensability of the applicant's claim at the time of the Agreement. (R. 38.)

(e) The Agreement was approved by the Industrial Commission's legal counsel. (R. 40.)

(f) Settlement of industrial claims is usually a desirable objective from a policy standpoint. (R. 373.)

(g) Wilburn was advised to and did discuss his claim with an attorney prior to signing the Agreement. (R. 373.)

(h) Wilburn discussed the Agreement with the Commission's legal counsel who approved the settlement after discussing all of its ramifications with Wilburn. (R. 373.)

(i) Wilburn gave long and serious consideration to execution of the Agreement, which was not prepared on the spur of the moment and signed hastily. (R. 373.)

(j) Wilburn understood the possibility of losing medical benefits if he were to lose his claim on the issue of "no accident." (R. 373.)

(k) A settlement agreement such as that entered into by Wilburn is valid under Utah law when an issue concerning the compensability of the claim is at issue. (R. 372.)

(l) To invalidate Wilburn's Agreement would seriously undermine the entire settlement process, rendering such process so uncertain and unpredictable as to seldom be worthy of serious consideration. (R. 374.)

6. The Commission affirmed the Order of the Administrative Law Judge on September 9, 1986. On October 7, 1986, Wilburn filed a Petition for Writ of Review with this Court, which was remanded to the Utah Court of Appeals for disposition.

7. On review, the Utah Court of Appeals affirmed the Industrial Commission Order, holding that (1) Wilburn released his claim for permanent total disability benefits upon signing the Settlement Agreement; and (2) that Utah Code Ann. § 35-1-90 (1974) "is no bar to enforceability of the agreement." Wilburn v. Interstate Electric, 74 Utah Adv. Rep. 23, 25 (Utah App. 1988). The instant Petition for Writ of Certiorari followed.

C. Statement Of Facts:

1. On or about April 14, 1980, Wilburn, while working for Interstate Electric lifted a small portable generator from the floor to his workbench. This activity was neither unusual nor

unexpected, but rather, was a routine work function performed on a regular basis. (R. 84-85.)

2. Mr. Wilburn indicated that he did not feel pain in his back until five to ten minutes after the described lifting. (R. 350-351.)

3. Wilburn consulted Dr. Gene Smith the following day concerning low back pains. Dr. Smith examined Wilburn and released him to his regular work within a few days. Wilburn took three days off work, underwent physical therapy for two to three weeks and then continued to work for over a year without additional medical treatment. (R. 1, 59-60, 65, 297.)

4. On February 2, 1981, Dr. Wallace Hess examined Wilburn to determine a disability rating which was found to be a 5% permanent partial disability from the claimed work injury plus a 15% permanent partial disability due to a pre-existing low back condition. (R. 177-180.) Based upon this rating, Wilburn received permanent partial disability of 20% benefits, with the employer and the Second Injury Fund paying their pro-rata shares. (R. 102.)

5. After April, 1980, Wilburn did not receive any additional medical treatment for his low back injury until August 18, 1981, when he saw Dr. Gordon Affleck. Wilburn was laid off work on July 31, 1981. (R. 11, 65-66, 297.) Dr. Affleck placed Wilburn on temporary total disability which was

paid by the employer from August, 1981 until September 30, 1983. (R. 298-300.)

6. On June 20, 1983, Dr. Hess re-examined Wilburn, noting a degeneration of Wilburn's arthritic condition, especially as it affected his neck and ankles, a condition unrelated to the industrial injury. Dr. Hess determined that the permanent partial disability was a combined total of 36% with 10% assigned to the claimed industrial injury, 15% assigned to pre-existing arthritis in the low back, and 15% assigned to a non-industrial cervical spine condition. (R. 181-189.)

7. Sometime in late 1983, Wilburn consulted with Administrative Law Judge Jan Moffitt at the Industrial Commission, who advised him to make a claim for permanent total disability. She referred Mr. Wilburn to Attorney Robert Shaughnessy, with whom he then consulted. (R. 122-123, 322.)

8. By report dated February 1, 1984, Dr. Affleck stated: "Mr. Wilburn is not capable of any significant employment, especially in the area that he has any training or capability in." (R. 248.) Thereafter, Wilburn contacted National Union Fire Insurance Company ("National Union"), the workers' compensation insurance carrier, claiming additional continuing disability compensation, and was then referred by the carrier to its attorney, Stuart L. Poelman, who met with Wilburn on February 24, 1984. (R. 31.)

9. While meeting with Wilburn, Mr. Poelman explained that the employer and its insurance carrier could raise several defenses to Wilburn's claim for Permanent disability, including a defense that the events of April 14, 1980, as described by Wilburn in his statement, did not constitute an industrial "accident" under the then existing legal interpretation of that concept. Wilburn understood from the discussion that if the employer and its insurance carrier were successful in asserting such defense, he would lose his claim for all additional compensation, including future medical expenses. On April 26, 1984, Wilburn talked again with Mr. Poelman, at which time Wilburn noted his assertion of a claim for permanent total disability and a discussion was had concerning the effect of defendants' "no accident" defense. Wilburn was told to seek the advice of other counsel. Wilburn suggested, and Mr. Poelman concurred, that Wilburn should confer with Judge Jan Moffitt or Judge Tim Allen at the Industrial Commission. Settlement alternatives were discussed, and Wilburn offered to settle for an additional 10% permanent partial disability. (R. 129-130, 322-323.) Thereafter, the parties reached a verbal agreement and Mr. Poelman prepared a Compromise and Settlement Agreement ("Agreement") which was sent to Wilburn on May 31, 1984. (R. 35, 115.)

10. In June, 1984, Wilburn consulted with Attorney Shaun Howell, legal counsel for the Industrial Commission, and asked

her for her advice concerning the Agreement. (R. 112, 117-119.) From that consultation, Wilburn understood the risk he might take by pursuing his claim to a hearing. (R. 117.) Attorney Howell met with Wilburn on various occasions: first when he brought in an application seeking a continuation of total disability benefits and indicated that he was going to make a claim for permanent total disability; second, when he delivered some medical records to Ms. Howell for her review; and finally when he brought in a copy of the written Settlement Agreement for review. (R. 134-138.)

11. Attorney Howell testified at the hearing before the Industrial Commission that during the discussions it was clear that Wilburn was asserting a claim for permanent total disability, that Wilburn knew of the defenses which had been explained to him by Mr. Poelman, and that Ms. Howell discussed those defenses with Mr. Wilburn, including the "no accident" defense which, if successful, would bar him from entitlement to future medical expenses. (R. 113-114, 141, 145.)

12. After considering the initial Agreement, Wilburn asked for payment of an additional \$1,590.00 for temporary total disability for the period of September 30, 1983 to November 22, 1983. Defendants agreed and the Agreement was then revised and sent to Wilburn for signature. Wilburn read the Agreement, asked Judge Moffitt about it, and signed it. (R. 115, 144.)

The Settlement Agreement was then sent to the Industrial Commission on November 1, 1984, and was approved by the Commission through its legal counsel, Shaun Howell, on November 28, 1984. (R. 36, 40.) Defendants made payment to Wilburn as specified by the Agreement. (R. 115-116.)

12. Wilburn entered into the Agreement when he was age 63 and had not worked for over three years. (R. 119.) Wilburn was then on total disability under Social Security and was claiming that he could not work. (R. 93, 119.) At the time the Agreement was entered, defendants understood that the Agreement compromised and settled Wilburn's claim for permanent total disability. (R. 151.)

#### SUMMARY OF ARGUMENT

Wilburn's Petition for Writ of Certiorari is ill founded for at least three significant reasons. First, review by writ of certiorari is not appropriate in the instant case because Wilburn fails to satisfy any justification that this court considers in granting such a writ. Second, Wilburn improperly urges this Court to reevaluate Industrial Commission factual determinations. Finally, Wilburn mistakes the standard of review applied in the Wilburn decision, confusing affirmance of the Commission's Order which was based on well supported factual determinations with a supposed interpretation of law.

## ARGUMENT

### POINT I

#### WILBURN'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

In his Petition, Wilburn seeks review of various Industrial Commission factual determinations, including whether (1) defendants raised the "no accident" defense in good faith; (2) it was arbitrary or capricious to uphold the parties' Settlement Agreement; and (3) the Parol Evidence Rule was properly applied. Rule 43 of the Rules of the Utah Supreme Court requires that there be some "special and important reasons" for granting a petition for writ of certiorari.<sup>1</sup> As set forth in detail below, re-evaluation of factual determinations is not considered sufficient justification for granting such a writ.

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<sup>1</sup>The pertinent portion of Rule 43, Rules of the Utah Supreme Court, provides that:

Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following . . . indicate the character of reasons that will be considered: . . . (2) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of this Court; . . . (4) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by this Court. (Emphasis added.) Review of Judgments, Orders, and Decrees of Court of Appeals, 56 Utah Adv. Rep. 38-39. (May 4, 1987).



In interpreting the strict standard for granting a petition for writ of certiorari, this Court noted that even where some special and important reason has been demonstrated, "certiorari is [still] a discretionary writ." Boggess v. Morris, 635 P.2d 39, 42 (Utah 1981). Indeed, "discretion must be used sparingly so as not to undermine . . . limits on the time and manner of appellate review." Boggess, 635 P.2d at 42.

The function of the Supreme Court in this posture is to review Court of Appeals decisions only where substantial issues of law exist or serious error has occurred. See Mast v. Standard Oil Co. of California, 140 Ariz. 1, 680 P.2d 137, 138 (1984). Faced with a similar Petition for Writ of Certiorari, the Oregon Supreme Court stated that:

[t]he function of this Supreme Court is no longer to afford every losing litigant a forum to review errors said to have been committed at trial or in an administrative hearing. That function is now placed in the Court of Appeals. Similarly, a party asserting that the Court of Appeals, in turn, has erred cannot for that reason alone expect further review in this Court. The process must stop somewhere, and for most purposes this is at the first level of appeal.

1000 Friends of Oregon v. Board of County Commissioners, Etc., 584 P.2d 1371, 1372 (Or. 1978).

Much like this Court, Oregon requires a petitioner to "present concrete reasons why the importance of an issue transcends the importance of the case to the litigants." Id.

at 1373. Wilburn's petition in the instant case does not encompass any legal issue which might "transcend the importance of the case to the litigants", nor does it present any "special and important reasons" for further review<sup>2</sup>. See also n.1, supra. The issues arising out of the instant case are better characterized as factual issues not likely to be repeated, and which are susceptible to clarification and amendment in the Industrial Commission. See 1000 Friends, 584 P.2d at 1373 and Wilburn, 74 Utah Adv. Rep. at 25-26.

- A. Utah Code Ann. § 35-1-90 (1974) Is No Bar To Enforceability Of The Settlement Agreement Because Sufficient Evidence Supports The Commission's Finding That The Parties Had A Good Faith Dispute As To The Compensability Of Wilburn's Claim.

The Utah Court of Appeals held that Utah Code Ann. § 35-1-90 "is no bar to enforceability of the agreement." Wilburn, 74 Utah Adv. Rep. at 25. In holding the Agreement to be enforceable, the Court of Appeals emphasized that any "compassion for the Applicant does not justify the erosion of a principle and policy pertaining to compensation agreements generally." Id.

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<sup>2</sup> Wilburn does not contend that this petition is based on any of the character of reasons considered under Rule 43, Utah Supreme Court Rules except for the allegation that it was arbitrary and capricious to uphold the Settlement Agreement. Under such circumstances, the Oregon Supreme Court counseled that "it would be the better part of wisdom to abandon the petition for review." 1000 Friends, 584 P.2d at 1373.

In this regard, the Court of Appeals concluded that:

[W]e agree with the Administrative Law Judge that this determination [a subsequent finding of compensability] cannot "supplant the judgment of those who earlier, in good faith, viewed this claim as one of doubtful compensability." Since there is sufficient evidence to support the Judge's finding that the parties had a good faith dispute as to the compensability of the claim, we defer to that determination.

Wilburn attempts to persuade this Court that application of an objective standard of review to the facts of the instant case would result in a finding that assertion of a "no accident" defense was not in good faith. However, Wilburn ignores two important facts: First, this Court, and the Court of Appeals are restricted in their review of Industrial Commission factual conclusions. McKay Dee Hospital v. Industrial Commission, 598 P.2d 375, 376 (Utah 1979). Second, this Court "give[s] maximum deference to the basic facts determined by the agency, which will be sustained if there is evidence of any substance that can be reasonably regarded as supporting the determination made." Wilson v. Industrial Commission, 735 P.2d 403, 405 (Utah App. 1987) (citing Allen & Assoc. v. Industrial Commission, 732 P.2d 508, 508-09 (Utah 1987)).

In the instant case the Court of Appeals properly gave deference to the Industrial Commission's factual determinations. Moreover, the Industrial Commission's approval of the Settlement Agreement was not arbitrary or capricious, especially where:

Interstate's argument about the "compensability" of Wilburn's claim was not altogether implausible given the state of flux surrounding the definition of "accident" at the time plaintiff's claim was filed. (Citations omitted.)

Wilburn, 74 Utah Adv. Rep. at 25.

B. The Court Of Appeals Did Not Decide An Important Question Of State Law, As Yet Undecided By This Court Or In Conflict With A Decision Of This Court.

The Court of Appeals' decision is consistent with this Court's holdings in Brigham Young University v. Industrial Commission, 74 Utah 349, 279 P. 889 (1929); and Barber Asphalt Corp. v. Industrial Commission, 103 Utah 371, 135 P.2d 266 (1943) (holding that settlements are appropriate when the compensable nature of the worker's injury is disputed and the worker's right to recover is doubtful).

Petitioner mischaracterizes the Court of Appeals' declaration that "it would have no difficulty in finding the applicant's claim compensable." The issue is not whether the judge or Court of Appeals believed the applicant had suffered a compensable accident. The real issue is "a matter of what the parties believed and acted upon . . ." Id.

Accordingly, the Court of Appeals only reviewed the propriety of the Industrial Commission's factual determination that:

The applicant clearly contemplated asserting a claim for permanent total disability several months

before he executed the Compromise and Settlement Agreement. There is no evidence of a "subsequent change of condition or a new development not contemplated at the time of the release or settlement agreement." The stated basis for executing the agreement was to avoid the necessity of further litigating the "no accident" issue and, in doing so, assuring the applicant of a continuation of his medical benefits and some additional compensation. There is no express provision that the agreement was a tradeoff with respect to the applicant's potential claim for permanent total disability, even though this clearly was the understanding of the parties.

In Wilburn's case, he was advised to and did discuss his claim with an attorney, but at the time he signed the Compromise and Settlement Agreement, he was not represented by counsel. He did, however, discuss the Compromise and Settlement Agreement with the Commission's Legal Counsel, who approved the Settlement after discussing all of its ramifications with the Applicant. Based upon the testimony of the Commission's former legal counsel who approved this particular Agreement, and based upon the Applicant's own testimony, there can be little doubt that the Applicant gave long and serious consideration to the execution of the Agreement. This was not an Agreement that was prepared on the spur of the moment and signed hastily. It was, in fact, prepared weeks, if not months, before it was actually executed. By his own admission, the Applicant, at the time the Agreement was signed, was extremely concerned about ensuring a continuation of his medical benefits which were assured if he agreed to the terms of the Compromise and Settlement Agreement. If not, there is no doubt that the Applicant understood the possibility of losing that benefit if he were to lose his claim on the issue of "no accident." (Emphasis added.)

(R. 373.)

Based on these factual determinations, the Court of Appeals properly concluded that the Commission's findings were consistent with existing Utah law and should not be displaced.

## POINT II

A WRIT OF CERTIORARI WILL NOT BE GRANTED FOR  
AN APPEAL WHICH IS BASED ON A FACTUAL  
DISPUTE.

One of the central functions of the writ of certiorari is "to determine whether the inferior court exceeded its jurisdiction." State v. McAllister, 708 P.2d 239 (Mont. 1985). The writ of certiorari must be preserved for issues of such great legal importance that review is necessary. The Industrial Commission's sufficiently supported factual determinations are not proper subjects of further appellate review because:

The reviewing court's inquiry is whether the Commission's findings are "arbitrary and capricious" or "wholly without cause" or contrary to the "one [inevitable] conclusion from the evidence" or without "any substantial evidence" to support them. Only then should the Commission's findings be displaced.

Kaiser Steel Corp. v. Monfredi, 631 P.2d 888, 890 (Utah 1981).

In the instant case, the Court of Appeals determined that "[a]lthough the evidence was in conflict, ample evidence supports the judge's findings . . ." Under these circumstances, further review would only be duplicative, and unnecessary.

The major contentions in Wilburn's petition are that, as a factual matter: (1) the compensability of Wilburn's claim was not disputed; (2) he did not settle his claims for permanent total disability benefits; and (2) the Commission and Court of Appeals misapplied the parol evidence rule. In making

these arguments, Wilburn ignores the function of this Court when reviewing Industrial Commission factual determinations.

This Court has consistently held that deference must be given to fact finders especially where, as here, the Legislature has comprehensively delegated responsibility over a particular subject to a specialized administrative agency. Utah Code Ann. § 35-1-16 (1987). See, e.g., Department of Administrative Services v. Public Serv. Commission, 658 P.2d 601, 608-10 (Utah 1983); Central Bank & Trust Co. v. Brimhall, 28 Utah 2d 14, 16, 497 P.2d 638, 641 (1972).

Wilburn's argument that Section 35-1-90 makes the Settlement Agreement invalid is misplaced for two reasons. First, Wilburn must acknowledge that settlements are appropriate when compensability is disputed. See Brigham Young, supra. Second, the Commission concluded, as a factual matter, that "Interstate's argument about the 'compensability of Wilburn's claim was not altogether implausible . . . ' since there is sufficient evidence to support the judge's finding that the parties had a good faith dispute." Wilburn, 74 Utah Adv. Rep. at 25, n.3 (R. 38.) Because this Court gives deference to the Commission's factual findings, no additional review is necessary. Review of Wilburn's claim that he did not intend to settle his claim for permanent total disability is not necessary for the same reason. (R. 341.)

Wilburn's claim that the Commission and Court of Appeals improperly applied the parol evidence rule is likewise flawed for two reasons. First, although interpretation of contract is generally a question of law, where as here, the contract is ambiguous, "the process of resolving ambiguities . . . require[s] the consideration of evidence, and conflicts in evidence will need to be resolved by the trier of fact." Morris v. Mountain States Telephone and Telegraph Co. 658 P.2d 1199, 1201 (Utah 1983). See also Overson v. U.S.F.&G., 587 P.2d 149, 151 (Utah 1978). Second, because conflicting evidence was introduced to clarify contractual ambiguities, the Commission interpreted the contract, through a factual inquiry and determination. On review, the Court of Appeals concluded that "[a]llthough the evidence was in conflict, ample evidence supports the judge's findings. . . ." Wilburn, 74 Utah Adv. Rep. at 24. Once again the Court of Appeals properly deferred to the Commission's factual determinations.

#### CONCLUSION

The determination of whether the Industrial Commission properly approved Wilburn's Settlement Agreement is a factual matter which must be ultimately decided by the Industrial Commission. Because each case is unique, the Industrial Commission must exercise its discretion in making such

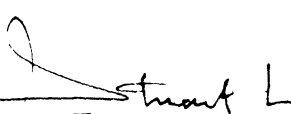



factually governed decisions. In the instant case, the Utah Court of Appeals and the Industrial Commission based their decisions that "the agreement was a validly executed settlement of a disputed claim" on ample supporting evidence.

Thus, the petition fails to demonstrate any legal decision by the Court of Appeals which either creates new law, conflicts with current law, or otherwise necessitates a decision by this Court. For these reasons, Wilburn's petition should be denied.

DATED this 18th day of April, 1988.

SNOW, CHRISTENSEN & MARTINEAU

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SCMLRL124

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April, 1988, I caused four true and correct copies of the foregoing Brief of Defendants/Respondents Interstate Electric and National Union Fire Insurance Company to be mailed first class, postage prepaid, to the following parties of record:

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