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IN THE SUPREME COURT OF THE

STATE OF UTAH

DAVE WESTLEY, Plaintiff/Appellant, vs. FARMER'S INSURANCE EXCHANGE, dba FARMER'S INSURANCE GROUP, DEVEAUX CLARK and CLARK YOUNG, Defendants/Respondents.	:	BRIEF OF RESPONDENTS No. 18225

RESPONDENTS' BRIEF

On Appeal from the Third Judicial District Court
in and for Salt Lake County, State of Utah
The Honorable G. Hal Taylor

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FILED

JUL - 2 1982

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE

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DAVE WESTLEY, Plaintiff/Appellant, vs. FARMER'S INSURANCE EXCHANGE, dba FARMER'S INSURANCE GROUP, DEVEAUX CLARK and CLARK YOUNG, Defendants/Respondents.	:	BRIEF OF RESPONDENTS No. 18225

NATURE OF THE CASE

Plaintiff/Appellant (hereinafter plaintiff) originally filed a two-count complaint, the first count asserting breach of contract, the second count asserting defamation.

DISPOSITION IN LOWER COURT

The order appealed from granted Defendants/Respondents' (hereinafter defendants) motion for summary judgment as to the first count, denied defendants' motion for summary judgment as to the second count, and denied plaintiff's motion to amend. (R. 69-70) That order was entered after oral argument of the motions on December 7, 1981.

Trial having been set for January 13, 1982, a pre-trial settlement conference was held on January 6, 1982. At this conference plaintiff announced he would dismiss his second cause of action. The result was a further order disposing of the entire lawsuit. (R. 39)

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STATEMENT OF FACTS

Plaintiff's statement of facts is deemed by defendants to be inadequate for comprehension of the legal issues involved. There follows a complete recitation of the material uncontested facts supported by the record.

The facts set forth herein are primarily based upon the deposition testimony (and exhibits proffered during deposition) of the plaintiff himself.

In May, 1978, plaintiff agreed to become a selling agent for Farmers[1/] (Supp. R., Vol. II, Ex. D-6; see also Supp. R., Vol. I, Ex. D-2).[2/] That Agent Appointment Agreement executed by plaintiff called for the Companies to pay commissions upon business written by plaintiff and for plaintiff to sell insurance for the Companies. One of the important duties undertaken by Mr. Westley was "servicing all policyholders of the Companies in such a manner as to advance the interests of the policyholders, the Agent and the Companies." (Supp. R., Vol. I, Ex. D-2, para. B-2).

1/ "Farmers" as used herein collectively refers to Farmers Insurance Exchange, Truck Insurance Exchange, Fire Insurance Exchange, Mid-Century Insurance Company and Farmers New World Life Insurance Company. Defendants in this brief will also refer to this collective as "the Companies." Plaintiff has only sued Farmers Insurance Exchange even though his contract is with all five entities.

2/ All exhibit references are to documents made exhibits during the depositions of plaintiff.

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It has been Farmers' practice to assign to new agents existing policies of insurance that were written by persons no longer agents of Farmers, and for which Farmers paid the former agents contract value (See Supp. R., Vol. I, Ex. D-2). These policies of insurance are called 500 series policies. The practice is described in the Agents Guide (Supp. R., Vol. I, Ex. D-1). Less than full renewal commissions are paid the agent on 500 series policies. A purpose of Farmers assigning 500 series policies to new agents is to assist them in getting started (Supp. R., Vol. I, pp. 31-32). The stated policy of Farmers, as set out in Mr. Westley's Agents Guide (Supp. R., Vol. I, Ex. D-1), and of which he was aware (Supp. R., Vol. I, p. 36), is that:

> Assignment of 500 series policies to a particular agent is not a permanent assignment to that agent. It may be again reassigned to a different agent anytime conditions indicate reassignment is in the best interest of the policyholders and the companies.
>
> Reassignments or transfers of policies are primarily made to provide the finest service possible to the policyholders.3/ At the same time, we need to make the best use of policies in developing a full time Agency Force.

(Supp. R., Vol. I, Ex. D-1, emphasis supplied)

Pursuant to this written policy of Farmers, a group of 500 series policies were assigned to plaintiff. (Supp. R., Vol. I, p. 36) After Mr. Westley had been an agent for a little more than a

---

3/ Policyholders are in need of the services of their agent for claims, "problems with a premium," revision of terms of coverage, as well as other matters (Supp. R., Vol. III, p. 25).

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year, Farmers, upon the recommendation of the district manager, Mr. Clark (R. 49-50), took away from plaintiff the 500 series policies that had been assigned to him. (Supp. R., Vol I, p. 31) The consequence of this action is that Mr. Westley lost about $200 a month in renewal commissions from those 500 series policies (Supp. R., Vol. III, Ex. D-18; R. 45). It is this conduct which plaintiff, in Count I, characterized as a breach of contract by Farmers and Mr. Clark. (R. 5) Despite that characterization Mr. Westley, in sworn testimony, acknowledged Farmers right to withdraw the policies. "However, I also knew that if the company wanted I suppose they could take them back for just about any reason." (Supp. R., Vol. I, p. 35)

Plaintiff was engaged in other employment while an agent for Farmers. In the spring of 1979 plaintiff entered partnership with a Joseph Boberg as a private investigator (Supp. R., Vol. III, p. 9). By his own admission only about 75% of plaintiff's time was devoted to Farmers (Supp. R., Vol. III, p. 23), the balance of his time was as an investigator (Supp. R., Vol. II, p. 33; Supp. R., Vol. I, p. 25). The plaintiff's 1979 tax return more than bears out his testimony. It shows $9,711 gross income earned from his insurance business and $1,956 net income from his detective work (Supp. R., Vol. III, Ex. D-16). Mr. Westley admits he was informed that Farmers disapproved of part time status (Supp. R., Vol. II, p. 30).

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In September, 1979, Mr. Westley moved to an address on Fourth South in downtown Salt Lake City. His office was located on the third floor, a location Farmers' district manager objected to (Supp. R., Vol. I, p. 20). His telephone was answered "law office" (since he was sharing a suite with some lawyers) and it was only months later that that situation was changed. The change was to the telephone being answered "Boberg Westley" (Supp. R., Vol. I, pp. 29-30). Mr. Westley was requested to remedy these deficiencies (R. 49-50).

His failure to do so and his part time status caused Farmers to withdraw the 500 policies and reassign them (R. 49-50).

ARGUMENT

I. APPELLANT IMPERMISSIBLY BASED HIS ARGUMENT ON MATERIAL WHICH DOES NOT APPEAR IN THE RECORD.

In his brief, plaintiff states that "[n]o record of the hearing exists, in that the Court below did not have a shorthand reporter present during argument; but during argument, the following issues of fact, which could not be summarily disposed of, were cited to the Law and Motion Judge." (Appellant's Brief at 4.) Plaintiff rests his entire argument for reversal of the summary judgment upon these "issues of fact."

In Powers v. Gene's Building Materials, Inc., 567 P.2d 174 (Utah, 1977), Appellant based his entire appeal on an assignment of error which he admitted was not suggested by the record. The Court ruled that in the absence of a record, the "court has nothing before it to review in respect to such assignment of error." Id. at 175-76.

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This is precisely the situation which now confronts the Court. Plaintiff has appealed an issue which he acknowledges does not appear on the record. All plaintiff had to do in order to create an issue of fact for the record was to present one counter-affidavit. Holbrook Company v. Adams, 542 P.2d 191, 193 (Utah, 1975). Plaintiff failed even to do this. If plaintiff is permitted to appeal this question, the requirement that there be a record on appeal will be meaningless in Utah. Consequently, the trial court's judgment should be affirmed.

II. THE LOWER COURT CORRECTLY RULED THAT THE UNCONTESTED EVIDENCE DOES NOT ESTABLISH A CAUSE OF ACTION FOR BREACH OF CONTRACT

As noted above the evidentiary record upon which the matter was decided below consisted almost entirely of the deposition testimony of plaintiff himself. It is plaintiff's own testimony that required summary judgment and requires affirmance in this Court.

A. There Is No Contract Respecting The 500 Series Policies.

The relationship between Farmers and Westley was established and defined by the Agent Appointment Agreement. (Supp. R., Vol. I, Ex. 2) An examination of the Agent Appointment Agreement reveals that it is intended to be a fully integrated contract. The introductory language refers to "the following mutually agreed upon terms and conditions" which is language consistent with integration.

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The terms and conditions are themselves clear and inclusive. In Clause A the Companies' obligations are set forth. They are: (1) to pay new business and service commissions in accordance with schedules as may be established by the Companies; (2) to provide for and pay a portion of group insurance benefits; (3) to provide manuals and forms; (4) to provide advertising assistance; and (5) to make available education and sales training programs.

Mr. Westley, in turn, agreed in Clause B: (1) to sell insurance for the Companies on an exclusive basis; (2) to provide facilities for and to furnish service to all Farmer's policyholders; (3) to permit audits; and (4) to provide a fidelity bond. Additional clauses spell out in detail the rights of termination (Clause C), the agent's right to a review board hearing if he is terminated (Clause D), the right to renewal commissions on life insurance in the event of termination (Clause E), the right of the agent to assign his interest to a family member (Clause F), the right to receive compensation, called contract value, in the event of termination (Clause G), the agent's obligations upon termination (Clause H), the nature of the relationship (Clause I), and the provision that this "Agreement shall take the place of any previous . . . Agreement" and that "No change, alteration, or modification of this Agreement may be made unless it is in writing and signed by the Agent and . . . the Companies" (Clause J).

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This integrated contract contained no promise that Farmers would assign to Mr. Westley any 500 series policies. In urging that such a promise was made Appellant must go outside the integrated contract, to parol evidence.

(1) The Agent Appointment Agreement is an Integrated Contract and as Such Cannot be Varied by Extrinsic Evidence.

Its scope, its detail, its inclusiveness, all lead to the conclusion that the Agreement was intended to be an integrated contract. Restatement of Contracts, § 228 (1932). National Surety Corp. v. Christiansen Bros., 29 Utah 2d 460, 511 P.2d 731, 733 (1973).

It is a long-standing and well recognized rule that integrated contracts cannot be varied by extrinsic evidence. Restatement of Contracts, § 237 (1932). This rule is well established in Utah:

> The rules of evidence are familiar and not disputed by the respondent that extrinsic evidence is not admissible either to contradict or subtract from, add to or vary, the terms of a written instrument, and that, in the absence of accident, fraud, or mistake of fact, the execution of a contract in writing is deemed to supersede all of the stipulations concerning its terms or subject-matter which preceded or accompanied its execution.

Last Chance Ranch Co. v. Erickson, 82 Utah 475, 25 P.2d 952, 956 (1933). See also, Starley v. Deseret Foods Corp., 93 Utah 577, 74 P.2d 1221 (1938); J. Henry Jones Co. v. Smith, 27 Utah 2d 225, 494 P.2d 526 (1972).

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Looking only at the integrated contract, there is nothing that requires Farmers to assign 500 series policies to Mr. Westley and nothing that prohibits Farmers, having once assigned them, from withdrawing them at its own will and discretion.

(2) The Agent Appointment Agreement Has Not Been Modified to Provide for 500 Series Policy Assignments.

Clause J of the Agent Appointment Agreement provides the exclusive method of amendment; that is a writing signed by the Agent and the Companies. (Supp. R., Vol. I, Ex. D-2) Mr. Westley can point to no document signed by both him and Farmers that provides for the assignment of 500 series policies. The best he can produce is a unilateral declaration by Farmers (the Agents Guide, Supp. R., Vol. I, Ex. D-1) of its continued intent to use 500 series policies as an agency building tool. That declaration by Farmers is not a modification of the contract with Mr. Westley because it fails to meet the prerequisites imposed by Clause J.

(3) Farmers' Agents Guide Is Not a Separate Contract.

As already mentioned, the integrated Agent Appointment Agreement required modifications of its terms to be in writing signed by both the Agent and Farmers. Because the Agents Guide (Supp. R., Vol. I, Ex. D-1) is not signed by either party it clearly is not an amendment to the Agent Appointment Agreement. Nor is it a separate agreement. To be given the dignity of a separate agreement all the substantive rules relating to the formation of a contract would have to be met.

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First, there was no offer in the sense that Farmers ever gave Mr. Westley the opportunity to either accept or reject the policy stated in the Agents Guide. Corbin on Contracts. (1963) § 11, at 25. Rather, Farmers unilaterally announced through its Agents Guide that it would conduct its business in the way described. There is no suggestion that Farmers, by publishing its Agents Guide, intended to give Westley or any other agent the power to create a contract.

Second, in order for there to be a contract the terms must be definite enough to put the parties on notice of their respective obligations. Valcarce v. Bitters, 12 Utah 2d 61, 362 P.2d 427 (1961); Efco Distr. Inc. v. Perrin, 17 Utah 2d 375, 412 P.2d 615 (1966). See also, 17 C.J.S. Contracts (1963) § 36(2). The Agents Guide lacks such definiteness in material respects. From the Agents Guide no number of policies to be assigned can be discerned or reasonably implied. Neither can it be discerned or implied for how long a term the assignment will last. The vagueness of these important points makes the Agents Guide not a contract, but a statement of Farmers' discretion.

Finally, no consideration has been shown. Nothing is asked of the agent in exchange for the assignment of the 500 series policies. The Agents Guide only expresses an expectation that the Agent will serve the policyholders of the 500 series policies transferred to him. This represents no fresh consideration since the Agent Appointment Agreement (Supp. R., Vol. I, Ex. D-2) already

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imposed upon the agent, in Clause B, the duty of "servicing all policyholders of the Companies in such a manner as to advance the interests of the policyholders, the Agent and the Companies." Because there was no consideration there can be no contract. Manwill v. Oyler, 11 Utah 2d 433, 361 P.2d 177, 178 (1961).

There being no contract respecting the 500 series policies; therefore there can be no breach. Hence, the trial court was correct in dismissing Count I.

B. Even If The Policy Is Deemed A Contract There Has Been No Breach.

As set forth above, defendants urge that the practice of Farmers respecting the 500 series policies is not a contract between Farmers and Mr. Westley. However, if the Court rules that the practice is a contract there has been no breach of that contract.

(1) Farmers Did Not Promise to Let Agents Retain 500 Series Policies.

If there is any contract between Farmers and Mr. Westley it is stated in the writing respecting these 500 series policies. That writing is the Agents Guide (Supp. R., Vol. I Ex. D-1). In this document, it is stated that assignments of 500 series policies are intended primarily to provide service to policyholders. It is also stated that the agent to whom such policies are assigned will be paid a partial commission on renewals of such policies.

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At most, assuming for now that there is a contract concerning the 500 series policies, the contract is simply Farmers' promise to pay partial commissions so long as the policies are assigned to the agent, and the agent's promise to service the policyholders so long as the policies are assigned to him. There is neither an express or implied promise to allow the agent to retain any such policies for any period of time. (Except in the situation where the agent writes a certain amount of additional insurance for a particular policyholder, resulting in a transfer of that business to the agent's own number. No issue is raised concerning this exception.)

Not only is there no promise, but the Agents Guide expressly negates any promise. The Agents Guide expressly says "[t]he assignment . . . is not a permanent assignment." Since there was no promise vesting the 500 series policies in Mr. Westley the withdrawal of those policies cannot be a breach. Hence, the trial court properly dismissed Count I.

(2) Farmers' Withdrawal of the 500 Series Policies Was in its Own and the Policyholders' Best Interests and, Hence, Justified.

Not even plaintiff urges that Farmers had no right to withdraw the 500 series policies. "However, I also knew that if the company wanted I suppose they could take them back for just about any reason." (Supp. R., Vol. I, p. 35) Given that concession, plaintiff must concede that if Farmers had <u>any</u> rational reason for withdrawing the policies no breach has been shown.

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The purpose of temporarily assigning 500 series policies to agents is to serve the "best interest of the policyholders and the Companies." (Supp. R., Vol. I, Ex. D-1)

It is clearly in the best interest of policyholders that the agent assigned to them be available on a full-time basis. Policyholders are in need of the services of their agent for claims, "problems with a premium," revision of terms of coverage, as well as other matters (Supp. R., Vol. III, p. 25). Obviously the more time an agent devotes to the business the better served are the policyholders. Thus, it is in the interests of the policyholders that agents be full-time agents, freely available during all reasonable business hours. If Farmers' policyholders are well served by their agent, they are more likely to renew their insurance with Farmers. It is precisely for this reason that it is in Farmers' best interest that agents be full-time. Full-time agents also will sell more insurance than part-time agents, and for this reason also it is in Farmer's interest that its agents be full-time.

The Agents Guide (Supp. R., Vol. I, Ex. D-1) expressly recognized this interest:

> Reassignments or transfers of policies are primarily made to provide the finest service possible to the policyholder. At the same time, we need to make the best use of policies in developing a full time producing Agency Force. (Emphasis supplied)

The evidence is uncontradicted that plaintiff was engaged in other employment while an agent for Farmers. In the spring of 1979 plaintiff entered partnership with one Joseph Boberg as a

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private investigator (Supp. R., Vol. III, p. 9). By his own admision only about 75% of plaintiff's time was devoted to Farmers (Supp. R., Vol. III, p. 23), the balance of his time was as an investigator (Supp. R., Vol. II, p. 33; Supp. R., Vol. I, p. 25). The plaintiff's 1979 tax return more than bears out his testimony. It shows $9,711 gross income earned from his insurance business and $1,956 net income from his detective work (Supp. R., Vol. III, Ex. D-16).

Mr. Westley admits he was informed that Farmers disapproved of part time status (Supp. R., Vol. II, p. 30). The 500 series policies were withdrawn, in part, because the District Manager believed Mr. Westley was not devoting full time to Farmers' business (R. 49-50). The District Manager's conduct was justified because Farmers had a legitimate interest in encouraging full-time agents, and, conversely, discouraging part-time agents. For this reason alone there can be no breach of contract.

In September, 1979, Mr. Westley moved to an address on Fourth South in downtown Salt Lake City. His office was located on the third floor, a location the district manager objected to (Supp. R., Vol. I, p. 20). His telephone was answered "law office" (since he was sharing a suite with some lawyers) and it was only months later that that situation was changed. The change was to the telephone being answered "Boberg Westley" (Supp. R., Vol. I, pp. 29-30).

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It is quite apparent that it is in Farmers' interest that its agents be visible and easily accessible. Taking a walk-up office in a downtown business section with a telephone answering service that doesn't identify the agent as a Farmers agent is a disservice to Farmers. To fail to correct the situation, to remain obdurately invisible and inaccessible, warrants the conclusion that the best interests of Farmers and its policyholders would be served by reassigning the 500 series policies. Moreover, Mr. Westley's officing arrangement itself constituted a breach of the Agent Appointment Agreement. That agreement, paragraph B(2), required Mr. Westley "to provide facilities necessary to furnish insurance services to all policyholders of the Companies." An agent whose phone is answered "law office" is not in a position to furnish insurance services.

The Agents Guide (Supp. R., Vol. I, Ex. D-1) is quite clear that the interests of Farmers and its policyholders are paramount. Farmers' action was taken to protect those interests. Such conduct is expressly justified and cannot be deemed a breach of contract.

C. There Can Be No Cause Of Action Against The Defendant Clark For Breach Of Contract.

There is no doubt that plaintiff's Agent Appointment Agreement was a contract between him and the Companies, the insurance entities collectively called Farmers. Mr. Clark is not a party to that contract. Nor is he a party to any contract that may have been created by Farmers' publication of its Agency Guide. Mr.

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Clark is only an agent, a disclosed agent, for Farmers. As such, no contractual duty was owed by Clark to Westley. Restatement (Second) of Agency, § 320 (1958). 3 C.J.S., Agency, § 361, at 173, § 365 at 180 (1973). Hence, the trial court properly dismissed Count I as to Mr. Clark.

III. THE TRIAL COURT'S DENIAL OF PLAINTIFF'S MOTION FOR LEAVE TO AMEND WAS A VALID EXERCISE OF DISCRETION.

The trial court's denial of plaintiff's motion for leave to amend was a valid exercise of discretion. Rule 15 of the Utah Rules of Civil Procedure provides that after responsive pleadings have been filed, a party may amend his pleadings only by leave of the court and that leave shall be granted as justice requires. In Dupler v. Yates, 10 Utah 324, 351 P.2d 624, 637 (1960), this Court explained that "[t]he permitting of amendments to pleadings rests in the sound discretion of the trial court." When a matter is left to the discretion of the trial court, the function of a reviewing court is to prevent abuse of discretion not to substitute its judgment for the judgment of the trial court. Book v. Book, 59 Wyo. 423, 141 P.2d 546, 550 (1943); Kingsbury v. Brown, 60 Idaho 464, 92 P.2d 1053, 1057 (1939). Where good reasons for the trial court's decision exist, there cannot be abuse of discretion. Here, there were several good reasons for the trial court's decision.

First, permitting plaintiff's amendment would have caused undue delay. The delay would have been undue because it could easily have been prevented. Plaintiff's motion was presented on the

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eve of trial as the time for discovery, as per Rule 10 of the Third District Rules of Practice, was coming to a close. Plaintiff's complaint was filed on April 23, 1980. The substance of the amendment was known no later than November 24, 1980 when plaintiff discussed it in his deposition. (Supp. R., Vol. III, p. 36.) The amendment was not proposed for a full year later in November 23, 1981, by which time defendant had prepared his motion for summary judgment. Plaintiff had more than ample opportunity to amend his complaint during the preceding year. He had already asked for and received one six-month continuance (R. 47A). Instead, plaintiff waited until defendant's motion for summary judgment was to be heard and until trial was little more than one month away before moving for leave to amend and for a second continuance. Earlier action was feasible and would have prevented the delay.

Second, the proposed amendment alleges malicious conduct. The record is void of evidence of malicious conduct on the part of defendants. Plaintiff's brief fails to point out any portion of the record which even suggests that the defendants had a malicious intent. Permitting this amendment would be a waste of valuable judicial time and would not further justice.

In this case, considerations of undue delay and waste of time outweighed any small purpose which would be served by admitting the amendment. While other minds might have decided this question differently, the trial court's decision is grounded on the idea that there must be an end to litigation. Judicial resources are limited

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and there was no substantial justification in continuing this trial to hear this amendment after plaintiff had so long failed to bring it before the court. There was no abuse of discretion and the trial court's decision should be affirmed.

CONCLUSION

The trial court correctly decided plaintiff's Motion for Summary Judgment and did not abuse its discretion in not granting defendant leave to amend. Defendants urge this Court to affirm the trial court in all respects.

DATED this 2nd day of July, 1982.

RESPECTFULLY SUBMITTED:

Warren Patten
of Fabian & Clendenin, a
Professional Corporation,
Attorneys for Defendants/Respondents

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I caused to be mailed a true and correct copy of the foregoing Brief of Respondent by U. S. Mail, postage prepaid, this 2nd day of July, 1982, addressed to:

Lambertus Jansen, Esq.
525 South Third East
Salt Lake City, Utah 84111
Attorney for Plaintiff

Cathy Coleman

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