1982

Charles H. Stratford et al v. Earl P. Morgan et al : Brief of Defendants-Respondents

Utah Supreme Court

Spafford, Dibb, Duffin & Jensen; Thomas A. Duffin; Attorney for Respondents;
Armstrong, Rawlings & West; Attorney for Appellants;

IN THE SUPREME COURT OF THE STATE OF UTAH

CHARLES H. STRATFORD, and ROBERT L. HARRIS,	:	
Plaintiffs-Appellants,	:	
vs.	:	
EARL P. MORGAN, EARL D. MORGAN, GLORIA M. BROADBENT, EVELYN M. NEVILLE and ALICE M. TIMMERMAN,	:	Case No. 18306
Defendants-Respondents.	:	

BRIEF OF DEFENDANTS-RESPONDENTS

Reply to an Appeal from a judgment of
the Third District Court of Salt Lake County
Honorable Dean E. Conder, Judge

SPAFFORD, DIBB, DUFFIN & JENSEN
Thomas A. Duffin
311 South State Street,
Suite 380
Salt Lake City, Utah 84111
Attorney for Respondents

ARMSTRONG, RAWLINGS & WEST
David E. West
1300 Walker Building
Salt Lake City, Utah 84111
Attorney for Appellants

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TABLE OF CONTENTS

CASES CITED

TEXT CITED

NORTH ¼ COR. SEC. 8
T2S, R1E, S.L.B&M.
NOT FOUND

NORTH 53.2

Morgan Deed

GROUP OF 6 WILLOWS

N 50 W

20" WILLOW

95

5000.00
5000.00

127.20'

33.13'

S 70° W 112

PARCEL #1

Stratford Deed Descr.

742.29' RECORD
¼ SEC. LINE
S 0°10' W
A.R.P.
742.12 TO CLOSE

SOUTH 98.05

8" WILLOW

CREEK

N 48° E 129.77'

36" WILLOW

DEED DESCRIPTION

POB

96.79'

N 63°20' E

8" WILLOW

BIG COTTONWOOD

97

N 73°20' E

8' MULT. WILLOW

FENCE BEARS NORTH

6" WILLOW

PARCEL #2

S 26° W 224.40'

DISPUTED LAND

48" WILLOW

WILLOW

95

94

N 86° W 132.0'

2-24" WILLOWS

36" WILLOW

STRATFORD DEED DESCRIPTION

S 74° W 23.17' (M)
TO CLOSE.
26.40 (D)

36" WILLOW

14" WILLOW

14" WILLOW

20" WILLOW

14" WILLOW

WELL HEAD

30" WILLOW

8" WILLOW

8" WILLOW

10" WILLOW

12" WILLOW

Top Bank

12" WILLOW

10" WILLOW

30" CORKSCREW WILLOW

EAST 39.60'

14" TREE

NOT SET

SOUTH 742.12' TO ℄ Rd.
(732.60' 11.1 CHAINS D)

4300

36" WILLOW

27" Willow

24" Willow

6" PINE

10" WILLOW

6" WILLOW

3 PEACH

10 EVERGR.

4 PEACH

8" EVERGR.

4.77 ACRES

97

98

01

EXHIBIT "A"

EXHIBIT "B"

Description of Property in Plaintiffs'
Complaint for the purpose of Quieting Title

PARCEL 1

Beginning at a point which is North 53.21 feet and East 202.62 feet from the North quarter corner of Section 8, Township 2 South, Range 1 East, Salt Lake Base and Meridian, said point being in the center of Big Cottonwood Creek; thence South 25.97 feet; thence S 70° W 112.86 feet; thence N 58°40' E 124.16 feet to the point of beginning. Containing 0.032 Acre (1377 square feet).

PARCEL 2

Beginning at a point which is South 98.05 feet from the North quarter corner of Section 8 Township 2 South, Range 1 East, Salt Lake Base and Meridian, said point being in the center of Big Cottonwood Creek; thence N 48°05' E along the center of said creek a distance of 129.77 feet; thence S 26° W 224.40 feet; thence N 86° W 132.00 feet; thence S 74° W 23.18 feet; thence North 48.00 feet to the center of the beforementioned creek; thence N 73°20' E 72.31 feet; thence N 63°20' E 96.79 feet to the point of beginning. Containing 0.389 Acre (16,936 square feet)

IN THE SUPREME COURT OF THE STATE OF UTAH

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vs.	:	Case No. 18306
EARL P. MORGAN, EARL D. MORGAN, GLORIA M. BROADBENT, EVELYN M. NEVILLE and ALICE M. TIMMERMAN, Defendants-Respondents.	:	

RESPONDENTS' BRIEF ON APPEAL

STATEMENT OF THE KIND OF CASE

The defendants-respondents agree basically with the plaintiffs-appellants' statement of the kind of case.

DISPOSITION IN THE LOWER COURT

The respondents agree with the disposition of the lower court, but hold that in addition, the said appellants failed to meet the burden of proof and failed to establish any of the elements of boundary line by acquiescence as required under the guidelines of the previous decisions of the Utah Supreme Court.

RELIEF SOUGHT ON APPEAL

The defendants seek to affirm the judgment of the trial court.

STATEMENT OF FACTS

The statement of facts as presented by the appellants, needs further explanation. When L. H. Stratford and Ella Stratford purchased the property on March 10, 1951, only a small portion of their land was bounded by Big Cottonwood Creek. The drawing and layout, as set forth on Exhibit "A" of Respondents' brief, fairly illustrates and sets forth the area of dispute with particular attention from the common points of beginning of appellants' and respondents' land with the same north quarter corner, section 8, Township 2 South, Range 1 East, Salt Lake Base and Meridian. At the time of the purchase of the Stratford property in the spring of 1951, the evidence is clear there was no partial fence in existence along the south bank of Cottonwood Creek, but there was an interior fence approximately 150 feet south of Cottonwood stream on the south side of the creek and the said Morgans were using it in relationship to their farm for a long period of time prior to the purchase of the Stratfords. What the Stratfords did in 1951 was to remove the interior fence 150 feet South of Cottonwood Creek, which was in a state of disrepair and place a new fence along the south bank of Cottonwood Creek and the defendants' father, who had just lost his wife, and was in poor health, not being able to defend himself, did not bring an action for the removal of the Stratfords or their ejectment at that time.

From an examination of the record, pursuant to Exhibit 28, which is attached, the same north quarter corner of Section 8,

Township 2 South, Range 1 East, Salt Lake Base and Meridian was used to measure the boundary line between the plaintiffs' and defendants' land. It appears rather conclusively from the abstract, Exhibit 28, and from its examination that from the time of the patenting of the land to 1906 that Cottonwood Stream was wandering or meandering some period of time, and the parties at that time were attempting to measure their properties from the center of Big Cottonwood Creek. After 1906, no predecessor in title of either the plaintiffs or the defendants, ever again used the center of Big Cottonwood Creek for their metes and bounds description of the property. It might be well to point out that the parties did not use "Big Cottonwood Creek as a measuring device, but used metes and bounds and then described that as being in the center of Cottonwood Creek." But after 1906 none of the parties ever mentioned Big Cottonwood Creek in relationship to the surveys of their property. It appears that all of the parties were using metes and bounds after 1906 and each one was occupying their property by their metes and bounds description after that period of time.

On May 23, 1979, Charles Stratford had his property surveyed and the land set forth from the North quarter corner of Section 8, Township 2 South, Range 1 East, Salt Lake Base and Meridian which indicates that his property line was 150 feet South of Big Cottonwood Creek and that his predecessors' title, as they had conveyed it to him from 1874, had located their

boundary line approximately 150 feet south of Big Cottonwood Creek. In fact an examination of the record and the stipulations by opposing counsel during the trial were as follows:

1. That the said plaintiffs-appellants were not claiming any land by the doctrine of adverse possession. (R. 123) This was merely a confirmation of previous stipulations in court chambers prior to the commencement of the trial.

2. In the record, (R. 166) counsel for Stratfords, Mr. West, stated to the court:

> "MR. WEST: I would like to make a motion at this time to amend the complaint to conform with the evidence that has been presented in the case; and amend the complaint to add an additional cause of action based upon adverse possession. I think the evidence shows that there has been possession of this property since the year 1951. The evidence also shows that the tax notice has come out with the deed description on the tax notice; but the acreages as shown on those tax notices is in excess of what the deed description is, which to me indicates that there have been taxes paid on the entire parcel.
>
> THE COURT: Excuse me, Mr. West. Do I understand the tax notices do not include the disputed portion in their metes and bounds description?
>
> MR. WEST: That's correct."

The court then went on to say, in the record on page 174:

> "THE COURT: Well, Mr. West, first to your motion to include adverse possession I am going to deny that because I specifically asked whether you were asserting adverse possession and you indicated you were not.
>
> "Secondly, I think that with the description on the tax notice it wouldn't be sufficient to constitute adverse possession without describing the property in question. It leaves it too ambiguous as to whether the other portion of the acreage is.

The court then ruled in effect that boundary line by acquiescence had not been established by the plaintiffs because the boundary line, by their own evidence, was not in doubt, had never been in dispute and there was no conflict in reference to the same.

ARGUMENT

POINT I

PLAINTIFFS DID NOT ESTABLISH A PRIMA FACIE CASE OF BOUNDARY LINE BY ACQUIESCENCE AND THE COURT PROPERLY DISMISSED PLAINTIFFS' COMPLAINT

We do not dispute the basic facts as set forth in Baum vs. Defa, 525 P.2d 725, (Utah 1974), Fuoco vs. Williams, 421 P.2d 944, (Utah 1966), which states as follows:

> "In former opinions this court has required four prerequesites to establish a presumption of boundary by acquiescence. They are: (1) occupation up to a visible line marked by monuments, fences or buildings, (2) mutual acquiescence in the line as the boundary, (3) for a long period of years, (4) by adjoining landowners."

The first case to deal with this problem is Brown v. Milliner, 232 P.2d 202 (Utah 1951), where the court stated as follows:

> "A review of the Utah cases involving boundary disputes reveals that it has long been recognized in this state that when the location of the true boundary between two adjoining tracts of land is unknown, uncertain or in dispute, the owners thereof may, by parol agreement, establish the boundary line and thereby irrevocably bind themselves and their grantees. . . . In the latter case this court pointed out that when the location of the true boundary is known to the adjoining owners any parol agreement between them establishing the boundary elsewhere would be an attempt to transfer an interest realty without complying with the statute of frauds.

But, we stated, if the location of the true boundary is not known to the adjoining owners, a parol agreement between them fixing its location is not regarded as transferring an interest in land but merely determining the location of existing estates. (emphasis added)

"We have further held in this state that in the absence of evidence that the owners of adjoining property or their predecessors in interest ever expressly agreed as to the location of the boundary between them, if they have occupied their respective premises up to an open boundary line visibly marked by monuments, fences or buildings for a long period of time and mutually recognized it as the dividing line between them, the law will imply an agreement fixing the boundary as located, if it can do so consistently with the facts appearing, and will not permit the parties nor their grantees to depart from such line."

The final later pronouncement of this court is in the case of John Joseph Madsen vs. Darrell L. Clegg, 639 P.2d 726, Utah (1981), with facts identically the same as in this case. The Supreme Court stated:

> "The doctrine of boundary by acquiescence has long been recognized, and when the location of the true boundary between adjoining tracts of land is unknown, uncertain or in dispute, the owners thereof may, by parol agreement, establish the boundary line and thereby irrevocably bind themselves and their grantees. However, when the true boundary is known, any parol agreement of the owners establishing the boundary elsewhere is void and unenforceable by virtue of the statute of frauds, which requires a conveyance of real property to be in writing.
>
> "This court has determined that in the absence of an express agreement as to the location of the boundary between adjoining owners, the law will imply an agreement fixing the boundary as located, if it can do so consistently with the facts appearing. However, when the evidence fails to support any implication

that a fence has been erected by adjoining owners pursuant to an agreement between them as to the location of the boundary between them, the doctrine of boundary by acquiescence has no application. In an earlier case, this court cautioned:

> "'We do not wish to be understood as holding that the parties may not claim to the true boundary, where an assumed or agreed boundary is located through mistake or inadvertance, or where it is clear that the line as located was not intended as a boundary, and where a boundary so located has not been acquiesced in for a long term of years by the parties in interest. [emphasis added.]'
>
> In the instant case, plaintiff showed that no uncertainty or dispute existed concerning the location of boundary line at the time the 1904 fence was constructed. The 1904 deeds to plaintiff's and defendant's predecessors unmistakably define a boundary which takes a substantial job northward at its eastern end. Defendant has raised no question concerning the validity of these deeds; nor has he shown any subsequent conveyance by plaintiff or his father which might cast doubt on plaintiff's present title. The trial court did not include in its findings any indication that the boundary was disputed when plaintiff's father built the fence or that the fence was intended originally as a boundary line. In the absence of any initial uncertainty concerning the ownership of the property in question, the doctrine of boundary by acquiescence has no application."

From the application of the Madsen v. Clegg, supra, above, the following identical facts and circumstances are very apparent in this case as to the plaintiffs and defendants:

1. There is no question as to the validity of any deeds of the plaintiff or the defendants or their predecessors in title.

2. There was no question as to validity of the survey or surveys or the metes and bounds descriptions of the respective plaintiffs' and defendants' land from the north quarter corner,

Section 8, Township 2 South, Range 1 East, Salt Lake Base and Meridian. Counsel for plaintiffs stipulated in open court (R. 169):

> "THE COURT: Well, let me ask you this, sir; and it may be it's in evidence, I don't know. If you look at the Morgan description on the south side of the Morgan description and the north part of the Stratford descriptions, metes and bounds descriptions on the respective deeds, do they coincide?
>
> "MR. WEST: It's my understanding that the descriptions do in fact coincide."

3. There is no evidence of any agreement between the Stratfords and the Morgans, Mrs. L. H. Stratford, plaintiff, as grantee in the original deed, never did claim any such agreement and neither did her son.

4. There are no subsequent conveyances by either the Morgans or the Stratfords, which might cast doubt on the plaintiffs' present title.

5. There is no evidence that the plaintiffs' father ever built the fence with the intention that it be a boundary line, or the defendants' father ever agreed that it was to be the boundary line.

6. There was no evidence in the record that the ownership of either the plaintiffs' property or the defendants' property or any of their predecessors in title as to ownership was ever in doubt, uncertain or in dispute.

7. There is no evidence of any payment of taxes by the plaintiffs and as the court pointed out, the description on the

tax notice would not be sufficient to constitute adverse possession without describing the property in question (R. 174).

8. Prior to the purchase of the property by the Stratfords in 1951, the Morgans had used it as a pasture and planted it to grass and other forage crops for their cattle (R.159). From summary of all of the cases that have been decided by the Supreme Court in this area, which are as follows:

Baum v. Defa, 525 P.2d 725, (Utah 1974)
Wright v. Clissold, 521 P.2d 1224 (Utah, 1974)
Fuoco v. Williams, 421 P.2d 944 (Utah, 1966)
Motzkus v. Carroll, 322 P.2d 391 (Utah 1958)
Anderson v. Osguthorpe, 504 P.2d 1000 (Utah, 1972)
Holmes v. Judge 87P. 809 (1906)
Peterson v. Johnson, 34 P.2d 697 (Utah 1934)

Can be summarized as to certain basic facts in reference to the application of Boundary Line by Acquiescence, that where the true boundary line is known, any parole agreement establishing the boundary elsewhere is void and unenforceable by the statute of frauds which requires the conveyance of real property to be in writing, see also Madsen v. Clegg, supra.

9. That from a long period of time of usage, the court will imply an agreement between the owners, but where the evidence fails to support any implication that the fence has been erected by joining landowners pursuant to an agreement, the doctrine of Boundary Line by Acquiescence has no application. In this case the trial court by stipulation between counsel and opponents, determined that the boundary line between the parties was not in dispute. There was no agreement between the property owners as to the

location of a boundary line and there was no evidence to support an implication that the fence had been erected by the adjoining landowners pursuant to agreement. Therefore, based upon the evidence introduced by the plaintiff himself in support of his Complaint to quiet title, it utterly failed from the facts of his own presentation. There was no need for the defendants to proceed because it would have only corroborated the plaintiffs' own testimony and his own witnesses as to the facts and circumstances, as to the conclusion there was basically no dispute as to the boundary line.

POINT II

THE TRIAL COURT DID NOT ERROR IN SUSTAINING AN OBJECTION TO THE PLAINTIFFS' PROFERRED EVIDENCE.

The Title Opinion. During the course of the trial, the defendant attempted to introduce a title opinion in 1951, by Stephens, Brayton & Lowe concerning some early conveyances which tied the north boundary of the property to Big Cottonwood Creek. Of course, this was merely an attorney's opinion, which in no way could be binding upon the defendants and was not in any way offered as an exception to the hearsay rule and was clearly within Rule 63, Utah Rules of Evidence, which states as follows:

> "Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible, except:"

Also the letter states: "Most of the early conveyances tie the North boundary to the center of Cottonwood Creek." It goes on to say:

"The last deed referring to the Cottonwood Creek as a boundary is dated in 1906."

The problem here is that somehow the plaintiffs are claiming the center of Big Cottonwood Creek is the boundary line, by the Stephens, Brayton & Lowe attorneys' opinion, but his boundary line by acquiescence is a fence on the south side of Big Cottonwood Creek. This is confusing and is a claim for two different boundary lines.

Again, it cannot be stressed too clearly that an examination of the plaintiffs' abstract (Ex. 28) on page 11 of Orson Sanders to Asa D. Reynolds, on November 12, 1906, which is the last time Cottonwood Creek was ever mentioned, does not mention the boundary line as being Cottonwood Creek, but gives metes and bounds and then mentions one of the calls as being in the "center of Big Cottonwood Creek." Again, not to be too repetitious, Big Cottonwood Creek was never used as a boundary line as such, but was mentioned in some of the calls as being the location line of the metes and bounds descriptions.

Also, at best there is no evidence that Mr. Morgan ever had any knowledge as to the same, that this was brought to his attention, or that any claim was ever made or that this was an area of dispute and the whole opinion is based mostly on "You state that the Creek bed has changed" which is merely a self-serving statement by L. H. Stratford, which has no application in this case and was without foundation.

Correspondence with Salt Lake County. Again, the correspondence with Salt Lake County was clearly within Rule 63, Rules of Evidence, and was hearsay, self-serving, and

immaterial. There is no evidence that Salt Lake County ever examined the title of the plaintiffs or defendants and that what Salt Lake County's letter may have been on is other people's property two miles up the stream or two miles down the stream or what others may have used, and based upon that without any further evidence or foundation, the court very properly, on the basis of (1) lack of foundation, (2) hearsay, and (3) self-serving.

The plaintiffs cite the case of Durfey v. Board of Education of Wayne County, 604 P.2d 480 (Utah 1979) and Webb v. Webb, 253 P.2d 372 (Utah 1949) and 29 Am Jur 2d, §497. These cases we state may very well be pertinent to show the mental state of mind of a person, but there is no evidence here from any assertions what the state of mind of L. H. Stratford was other than deciding to appropriate defendants' land on his own, without any basis of misunderstanding, or confusion in either his abstract, his title, or his deeded conveyances.

Testimony from Mrs. Stratford. Again, the objection as to Ella Stratford's testimony, what she understood the boundary line to be, at Big Cottonwood Creek, is hearsay, immaterial, without foundation and a conclusion. Without any of the basic approaches of the introduction of the testimony, the court very properly did not allow the evidence in on the basis as to plaintiffs as they proposed their questions and as it related to the testimony of this witness.

POINT III

THE FORM OF THE JUDGMENT OF DISMISSAL WAS PROPER.

The Judgment of the court decreed that the plaintiffs had no fee simple title in certain property described by metes and bounds as set forth in the "plaintiffs' complaint". (Exhibit B) An analysis of the plaintiffs' complaint (R. 2) requests the court to quiet title in Charles H. Stratford and Robert L. Harris because they were fee title owners to Parcels 1 and Parcel 2. The Complaint then states in paragraph 2, (R. 2) that the defendants claim an interest. Paragraph 3 (R. 3) states that they are claiming title by virtue of acquiescence in the fence and stream and boundary line.

It, therefore, appears that the basic allegations of the plaintiffs' Complaint claims that they were the fee title owners in Parcel 1 and Parcel 2 and by their own evidence they failed to establish that they had any fee title or record title to Parcels 1 and 2. The map of the property of which they seek to quiet title is set forth as an exhibit to this Complaint, see illustration, Exhibit "A", Description Exhibit "B".

The plaintiffs now claim that the decree caused a portion of the property occupied by the plaintiffs to be transferred to the defendants because defendants had no interest in the property. This is merely a conclusion on their part. They fail to realize that in bringing a quiet title action that they must rely on the strength of their title and not because of any weakness alleged in

the defendants. The pronouncement of this court in Olsen v. Park Daughters Investment Company, 511 P.2d 145 (Utah 1973) states the general law very clearly in this matter.

> "In analyzing the plaintiffs' attack upon the findings and judgment it is appropriate to have in mind these basic propositions: In order for them to prevail, plaintiffs had the burden of proof to establish their case, and to persuade the trial court; and particularly in this action to quiet title, this had to be done on the strength of their own title and not because of any weakness in that of the defendants."
>
> Babcock v. Dangerfield, 98 Utah 10, 94 P.2d 862 (1939);
> Mercur Coalition Mining Company v. Cannon, 112 Utah 13, 184 P.2d 341 (1947);
> Smith v. DeNiro, 26 Utah 2d 153, 486 P.2d 1036 (1971)

The said defendants failed to prove that they had any record title and failed to prove that they had title by boundary line by acquiescence or any other title upon which to base their quiet title action. Therefore, the trial court's determination of the form of the judgment is proper and is proper under the existing law.

POINT IV

THE TRIAL COURT PROPERLY DENIED PLAINTIFFS' MOTION TO AMEND THE PLEADINGS TO CONFORM WITH THE EVIDENCE.

The plaintiffs' allegations of error in Point IV are very confusing and hard to comprehend under existing principles of law. They don't claim mistake, they don't claim inadvertance, they don't claim surprise, they don't claim improper conduct on the part of the judge. They are somehow claiming that they misread the existing case law as to boundary line by acquiescence

and, therefore, based upon misunderstanding of the law of boundary line by acquiescence they now want to proceed on a new theory, having stated expressly to the court that that was not the basis upon which they were proceeding, either by their complaint or by their action on the day of the trial.

Upon reading the complaint (R. 2) they commenced an action to quiet title alleging they were the fee simple title owners of the disputed land, which they were plainly not. They did not claim that they had paid taxes, which would have been required by adverse possession, or any other basis upon the land which they were entitled to.

On page 123 of the record, the court plainly stated as follows:

> "THE COURT: I understand you are not claiming adverse possession, only claiming boundary by acquiescence?
>
> MR. WEST: Claiming boundary by acquiescence. And I would offer plaintiffs' Exhibit 31."

It is not until the conclusion of the case that after everything had taken place that the plaintiff then made a motion to amend the complaint for adverse possession.

The court stated to Mr. West on page 174 of the record:

> "THE COURT: Well, Mr. West, first to your motion to include adverse possession I am going to deny that because I specifically asked whether you were asserting adverse possession and you indicated you were not.
>
> "Secondly, I think that with the description on the tax notice it wouldn't be sufficient to con-

> stitute adverse possession without describing the property in question. It leaves it too ambiguous as to whether the other portion of the acreage is."

There is no evidence that the plaintiffs ever paid any taxes on parcels 1 and 2 of which they requested the above entitled court to quiet title in their names and an examination of the tax notice very amply rules this.

It is very elementary, although the said plaintiffs place some emphasis that the amount of land as shown on their tax title is greater than the amount as it is described in their deed, it is very clear that the land which they are claiming, now by adverse possession, does not include the land which they seek to quiet title on, parcels 1 and 2, but is included within the deeded description of the defendants, for which they had been paying taxes.

It is now argued, by the plaintiffs, that although it was not offered in evidence, somehow if the amount of land described by Salt Lake County Assessor's office, is greater than the actual amount of land, as set forth in their deed, that this extends over into defendants' land for which they have no title and for which they have paid no taxes. It is elementary that their tax notices coincide exactly with their legal description. They were paying taxes on no more or on no greater parcel of land than by their deeded tax description. The probable reason of the difference in their tax notice by quantity than their deeded description is probably based upon the fact that the original deed was from the

center of 4800 South. It could also be a computer or surveyor mistake in computation in the office of the county assessor of Salt Lake County. There are more than a thousands reasons that might explain this particular discrepancy. It is again merely a question of speculation.

CONCLUSION

Based upon the arguments and the authorities as cited herein, it is respectfully urged that the judgment of the trial court be affirmed. It is also urged that the rulings on evidence were true, correct and proper and should also be affirmed by this court.

Respectfully submitted,

THOMAS A. DUFFIN
SPAFFORD, DIBB, DUFFIN & JENSEN
311 South State, Suite 380
Salt Lake City, Utah 84111