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IN THE SUPREME COURT OF THE STATE OF UTAH

GENERAL LEASING COMPANY, A Corporation,	:	
Plaintiff and Respondent,	:	
vs.	:	CASE NO. 18348
MANIVEST CORPORATION, A Corporation,	:	
Defendant and Appellant.	:	

BRIEF OF THE DEFENDANT AND APPELLANT MANIVEST CORPORATION

Appeal from the Third Judicial District Court of Salt Lake County, Honorable Homer F. Wilkinson, District Judge

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FILED

JUL - 9 1982

Clerk, Supreme Court, Utah

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CASES CITED

OTHER AUTHORITIES

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IN THE SUPREME COURT OF THE STATE OF UTAH

GENERAL LEASING COMPANY, A Corporation, Plaintiff and Respondent, vs. MANIVEST CORPORATION, A Corporation, Defendant and Appellant.	:	CASE NO. 17267

BRIEF OF APPELLANT

NATURE OF THE CASE

This case involves an action for alleged conversion on the part of Manivest Corporation, the Defendant. Manivest Corporation is the landlord of a parcel of land and the building thereon which was rented to a third party, Peck and Shaw Fine Cars, Inc.. Peck and Shaw in turn as a tenant leased certain air conditioning and heating equipment from the Plaintiff and installed the equipment in and on the building owned by the Defendant. Peck and Shaw defaulted on their lease with the Defendant and vacated the building. The air conditioning and heating improvements were left affixed as a part of the building when Peck and Shaw vacated the building. Plaintiff brings this action to recover the improvements alleging their nature as personal property. Defendant defends this action on the basis of the improvements as real property.

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DISPOSITION IN LOWER COURT

This appeal is taken from a granting of a judgment in favor of the Plaintiff, the Court deciding in the affirmative on the issue of the personal property nature of the air conditioning and the heating improvements. The trial was heard on Thursday, October 15, 1981 in the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, before the Honorable Homer F. Wilkinson, Judge presiding.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the lower Court's granting on a judgment in the amount of $18,000.00 in favor of the Plaintiff.

STATEMENT OF THE FACTS

In the late summer of 1977, Peck and Shaw Fine Cars, Inc. had its place of business at 5650 South 900 East in Murray, Utah. Peck and Shaw leased those premises from Manivest Corporation on a fifteen (15) year lease commencing in 1971. On October 3, 1977, six (6) years after the commencement of the lease, Peck and Shaw, desiring to upgrade the building's air conditioning and heating, leased from the Plaintiff new equipment (Record p. 66). The leased items consisted of eight (8) large commercial evaporative coolers, their supporting sleeve and duct work, and a heating CO-RAY-VAC system consisting of multiple burners hung along the ceiling and their supporting pump and exhaust systems (Record pp. 68, 201, 205, 228).

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At the time of the lease, General Leasing Company approached the landlord, the Defendant, Manivest Corporation, and requested that Manivest execute a landlord waiver. This waiver would have relinquished any future claim of right Manivest would have had over the leased property. However, Manivest refused to execute the waiver (Record pp. 171,172).

In late January, 1980, Peck and Shaw abandoned the premises at 5650 South 900 East, Murray, Utah forfeiting its leasehold with Manivest and also defaulting upon the lease payments due Plaintiff for the air conditioning and heating equipment installed in 1977. At the time of Peck and Shaw's default, there were approximately six (6) years left on the landlord-tenant lease between Defendant, Manivest Corporation, and Peck and Shaw.

After Manivest retook possession and control of the premises, Plaintiff, General Leasing Company, made demand upon the Defendant to return the leased equipment and the Defendant refused to do so (Record p. 163). The Defendant, Manivest Corporation, has refused to return the equipment on the basis that the heating and air conditioning equipment have become fixtures in the sense that they are integrally related to the value of the real estate. In addition, Plaintiff was well aware that respecting the leasing agreement with Peck and Shaw, Defendant had never executed a landlord waiver respecting the subject equipment (Record p. 189). Furthermore, at all times during the term of the leasing arrangement between Peck and Shaw and the Plaintiff, the lease could have been accelerated by Plaintiff, General

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Leasing, to recover the equipment had General Leasing deemed itself insecure (Record p. 189).

LAW AND ANALYSIS

POINT I

THE COURT'S AWARD OF DAMAGES OF $18,000.00 ASSUMES THAT NONE OF THE LEASED EQUIPMENT HAD ASSUMED THE CHARACTER OF REAL PROPERTY, WHICH IS NOT SUPPORTED BY THE EVIDENCE AND IS AN INCORRECT APPLICATION OF LAW.

The question which must be asked in this law suit is how much was the Plaintiff damaged by the alleged conduct of Defendant. Assuming, for illustration, that in January of 1980 when Peck and Shaw left behind the leased air conditioning and heating equipment, that Defendant upon reassuming control of the building, acceded to Plaintiff's request and returned everything that Plaintiff had leased to Peck and Shaw in 1977. What would that used equipment have been worth? As to this issue, Plaintiff's expert witness testified as follows:

"Q Are you familiar with the value of used equipment in this community of this sort of heating and air conditioning equipment?

A Yes, I am.

Q And do you have an opinion of the value of the equipment involved in this case if it were taken away from the building and sold as of December 1980?

A Yes.

Q What would the value of that be taken away from the building?

A Oh, approximately, I'd say right in the ballpark of $18,000." (Record p. 209).

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Therefore, based upon this testimony, the entire value of all of Plaintiff's used equipment was Eighteen Thousand Dollars ($18,000.00) at the time Plaintiff demanded its return. The testimony of Defendant's expert witness amounts to even less. Defendant's expert testified that the used heating equipment, once returned to Plaintiff, was worth about Sixty Five Hundred Dollars ($6,500.00) (Record p. 233). Regarding the used cooling equipment, the expert gave no testimony on its value. Defendant's expert stated that eight (8) new detached swamp coolers were worth Ten Thousand, Four Hundred Dollars ($10,400.00) new (Record pp. 234, 235, 228). However, as to their used value, he stated as follows:

> " A On most air conditioning installations that involved the installation of real property, involved duct work and water lines and electrical lines, the value of the total job, the material represents probably a half or less of the value of the total job, so therefore the labor to install used equipment is as much or more as it is to install new equipment. When you look at the total savings on a total installed job, used equipment does not look very attractive. And if it's over a year old, for instance, you have lost a manufacturer's warranty on the equipment. Swamp coolers, air conditioners tend to go fast. They don't tend to hold up a long time. If I were a customer and as a customer advising a customer, I would be very reluctant to generally advise the installation of a used cooling system for those reasons in a building." (Record pp. 228,229).

Furthermore, regarding the duct work and support systems for the swamp coolers, Plaintiff's expert testified that such had no value in used equipment.

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"Q Now, why is there such a difference between the value of the property installed on the building and the value if you took it away and sold it?

A Well, the labor, you lose the installed money, obviously. You would lose quite a bit of materials.

Q What type of materials?

A Duct work, water lines, electrical.

Q These couldn't be used again?

A No. The application, the chances of the application being the same somewhere else on the equipment would be one in a million. It would just be worth less. Then half the time you mess it up trying to save it, anyway. It's just not worth the time to monkey with it." (Record p. 210).

Therefore, the most the used equipment could have possibly been worth to the Plaintiff is Eighteen Thousand Dollars ($18,000.00), and that is assuming the Court believed only Plaintiff's expert. Therefore, ipso facto, by granting judgment in favor of the Plaintiff in the amount of Eighteen Thousand Dollars ($18,000.00), the Court decided that all of the leased equipment should have been returned to the Plaintiff and that none of it had assumed the character of real property. Therefore, any part of the leased property shown as a clear matter to be real property, the value thereof should be subtracted directly from the $18,000.00 judgment.

As to this situation, the leased articles should be broken down into their major categories to determine what portions of the leased equipment are, as a matter of law, too closely related to the real estate so as to become "fixtures".

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POINT II

ANALYSIS OF EACH MAJOR CATEGORY OF THE LEASED EQUIPMENT ACCORDING TO UTAH LAW INDICATES TRIAL COURT DID NOT CORRECTLY APPLY THE LAW OF FIXTURES.

Utah's law concerning an item as a fixture is well laid out in State Road Commission v. Papanikolas, 19 Utah 2d 153, 427 P.2d 749 (1967). The three way test applied is stated by the Court as follows:

> "[1] In determining whether or not an item is a fixture, the courts usually apply the general three-way test, viz., (1) manner in which the item is attached or annexed to realty; (2) whether the item is adaptable to the particular use of the realty; and (3) the intention of the annexor to make an item a permanent part of the realty."

(1) THE MANNER IN WHICH THE ITEM IS ATTACHED OR ANNEXED TO THE REALTY.

The air conditioning system consisted of three (3) component parts:

1) The bottom discharge coolers on the roof;

2) The side discharge units for cooling individual areas; and

3) The exhaust fan system. (Record pp. 199-201).

These components were attached differently to the building in question.

The bottom discharge coolers were situated resting on the roof. In comparison to the average sized residential swamp cooler, these were huge. According to Plaintiff's expert, they were up to six (6) times the capacity of residential coolers. [illegible] They were also extremely heavy.

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In fact, they would require the use of a crane for their removal, in conjuction with two (2) men (Record p. 200).

The side discharge units were fastened to the side of the building with several screws, and were often resting on the other previously installed equipment (Record p. 200, 197). These units would also require crane assistance for removal from the real property (Record p. 200).

The exhaust fan system is removable only with considerable difficulty (Record p. 201). This is due to the fact that the exhaust system is actually part of the roof. Removing the exhaust fan system is to remove the roof's flashing thereby leaving a gaping hole where removed (Record p. 201).

Regarding the heating system, it was comprised of burners hung to beams in the building. The burners by-product is carbon monoxide which is sucked away by exhaust pumps (Record p. 202). The exhaust exits through roof flashings which if removed would also leave holes in the roof. Furthermore, along the string of burners, eight to ten inch square holes were left in the walls to accomodate the passage of the system (Record p. 204).

From the foregoing, it clearly appears that the attachment element is significant in each of the distinct categories of the equipment. Furthermore, it is clear that removal of the equipment would cause material injury to the building. Hence, attachment in the purely physical sense is sufficient. However, the systems ought not only be analyzed as how one thing is

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attached to another, but also the attachment issue pertains to the system as a whole. For instance, each evaporative cooler required its own independant duct work, its own hole, and its own sleeve (Record p. 228). The duct work was worked into the building such that to remove the duct work would have materially damaged the structure proper. The situation at bar is similar to the fact situation in the case of State Automobile Mutual Insurance Company vs. E. T. Trautwein, a 1967 Kentucky case. The Trautwein case deals with air conditioners mounted in wall openings to cool an apartment building. The opinion stated as follows:

> "According to this testimony, an opening in the wall of each apartment was provided for permanent attachment of a sleeve and an air conditioner was placed in this sleeve and fastened by screws and a rubber seal. The air conditioners were intended to remain permanently fixed in place. They could not be removed without considerable force and probable damage to the sleeves and the sleeves could not be removed without serious damage to the wall. These air conditioners were fixtures and part of the building insured by the appellant." 414 S.W. 2d 586 at 588 and 589, (Ken. 1967)

An air conditioning system is, after all, a system. This idea of an air conditioning continuum was not lost on the Kentucky Court. The Court clearly looked at the removal of the air conditioners as damaging the sleeves which in turn damage the duct work. Damaging duct work is clearly causing material injury to fixtures in the sense of a building's nature as real property. The attachment of integral components to one another constitutes an entire system that begins with the roof mounted [illegible] the air outlets within the building. If

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It flies in the face of reason to say that the eight machines on top of the roof could be disconnected and removed without any damage to the value of the system or the value of the realty.

(2) WERE THE ITEMS ADAPTABLE TO THE PARTICULAR USE OF THE REALTY?

Peck and Shaw sold cars. In that business, one cannot expect customers to linger without adequate heating and air conditioning equipment. In car showrooms heating and air conditioning are not only adaptable but absolutely essential. The Supreme Court of Ohio, in the case of Holland Furnace Company vs. Trumble Savings and Loan Company, stated as follows:

> "A fixture may be defined as an item of property which was a chattel, but which has been so affixed to realty for a combined functional use that it has become part and parcel of the realty. The combined functional use must be of such a character as to indicate to all persons dealing with the realty that the intention and purpose of the owner of the chattel to make the combination a permanent attribute of the realty so as to pass in ownership with it." 19 NE2d 273, Ohio (1939)

The Court continued by referring to a disputed furnance and stated:

> "When installed it certainly became an integral and necessary part of the whole premises and ordinarily it would not be taken out or dismantled until it was worn out by use...The adaptation of the chattel to the permanent use and enjoyment of the freehold; the lack of utility of the premises if it were severed; and the necessity of replacing it with another or similar kind if it were removed all indicate that the second test of a fixture, it is satisfied in the case of this furnace." Id at 275

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(3) THE INTENTION OF THE ANNEXOR TO MAKE AN ITEM A PERMANENT PART OF THE REALTY.

The intent of the annexor (Peck and Shaw) can be gleened from a number of sources and the surrounding circumstances should be considered.

> " However, the intention to annex may be and often is inferred from the circumstances surrounding the annexation, adaption and usage of the article." Stockton vs. Tester, 273 SW2d 783 at 787. Mo. (1954).

The following circumstances are persuasive. The air conditioning units were installed in October of 1977. By its own terms, the lease would have run, barring the default of Peck and Shaw, for approximately another nine (9) years before the lease would have been subject to renegotiation by Manivest. It can hardly be doubted that Peck and Shaw, given the expense and adequacy of the new system, wanted to use it for at least the remaining nine years of its lease and perhaps longer if a new lease could be renegotiated. It is clear that Peck and Shaw must have desired to use both systems during the entire tenancy of the leasehold and to maintain it as a permanent accession thereto. It is clear from the acts of Peck and Shaw when the equipment was installed, as annexor they intended the equipment to remain in place on a permanent basis. For instance, roofs are expensive to maintain and repair yet large holes were cut in the roof and the walls to accomodate the systems. It is obvious that Peck and Shaw did not have in mind only a short term and detachable usage for the equipment. The

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units were intended to remain in place until obsolescent so as to justify the initial installation expense of retrofitting the building. In a Massachusettes case entitled General Heat and Appliance vs. Goodwin, the Court stated:

> "The central heating plant of a dwelling house is not a piece of furniture. Successive tenants do not bring it with them when they become occupants, nor take it away with them when they cease to occupy the building. It remains, and in the ordinary course of events, performs its function of heating until it wears out or is otherwise rendered insufficient or useless. It relates to the building itself. Its presence has a distinct relation to the value of the premises for the purpose of sale or mortgage." 54 NE 2d 676 at 679 (Massachusettes, 1944).

Heating and cooling equipment in and of themselves manifest an intent of permanency.

Furthermore, the evidence adduced at trial showed the Defendant required of its tenant that the air conditioning and heating system be maintained by the tenant. To this effect, witness Dobson stated as follows:

> "A I said that we would not sign a waiver, we would take it for consideration, but I did not think we would sign the waiver.
>
> Q For what reason.
>
> A Because our tenant had a responsibility to maintain the equipment that was in the facility, and it was his responsibility to do so. I didn't feel that we would sign it on that basis." (Record p.218).

From the preceding example, the annexor, Peck and Shaw, was of the intention to have the equipment remain on the premises as a permanent accession to the leasehold.

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POINT III

IN THE CASE AT BAR THE LANDLORD SHOULD RETAIN THOSE ITEMS DEEMED FIXTURES AS AGAINST THE PLAINTIFF.

Regarding the leased equipment in questions, title never passed from the lessor to the lessee. The Plaintiff did retain title. However, the Plaintiff was well aware that the equipment was likely to assume the character and posture of fixtures for which the landlord may have an interest. Were this not so, Plaintiff would have had no reason to request Defendant to execute a landlord waiver (Record p. 111). In light of this fact, the rule is stated as follows:

> " There is authority that where the conditional seller or chattel mortgagee knows at the time of the sale or mortgage that the object upon which he depends for security is intended for permanent incorporation in and affixation to realty not owned by his buyer or mortgagor, his rights will ordinarily be held subservient to those of the owner of the realty." 35 AM JUR 2d §70 Fixtures

The record is clear that the Plaintiff was well aware of the "to be installed" nature of the equipment. If fact, Plaintiff's employee and district manager, Victoria Schoenfeld, stated as follows:

> "Q Is there any particualar custom in the trade of General Leasing obtaining landlord's waivers before installation of equipment?
>
> A Well, as general practice we usually do obtain waivers, but it depends sometimes on each individual case exactly how we go about to get one, and when and how.
>
> Q Are you saying then that sometimes you don't obtain waivers, but go ahead and install

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A Well, I guess about the last year it's been mandatory. Now we do it as a regular practice. We did before, but we sometimes made exceptions, due to a person's reputation or credit file. We would sometimes perhaps not be as aggressive all the way through it.

Q Did you attempt to get a waiver from Manivest in this case?

A Yes, sir, we did.

Q About when, do you recall?

A At the inception of the lease.

Q Before installation?

A Well, we told Mr. Peck that we would not give him the money unless we had a waiver, because this was going to be installed, and when the equipment is installed we get a little nervous and make sure they know when it is going in that we have to have this document."

(Record p. 170). (emphasis ours)

From this and from the nature of the property itself, it is clear that Plaintiff knew of the intended use of the equipment. Furthermore, the record gives no indication that Defendant was given any notice by the Plaintiff that the equipment was going to be installed. The record seems to indicate the equipment was installed first--then when the lease began, Manivest was approached for a landlord waiver (Record p. 170).

" Where personality, such as machinery, is to the seller's knowledge sold to be attached to the realty of a third person other than the buyer and used for a particular purpose, in order to bind such third person by a contract of conditional sale between the buyer and seller, such as one reserving title in the seller until full payment, such third person must have the actual notice of the reserved title, and its rights are not affected by the contract for payment between the buyer and seller without such notice." Allis-Chalmers Co. v. Ci. of Atlantic, 144 NW 346 (see

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Common sense also plays a role in the determination of fixture cases. When items of personal property become too related to the value of the building that removal constitutes material injury, they are and should be fixtures. Regarding the damage which would occur to the building should the heating equipment and air conditioners be removed, one must reason as did a New Yersey Court in the case of Lumpkin vs. Holland Furnace Company:

> "A heating plant in a dwelling house in this climate is as essential as doors and windows. While the latter may be removed from their hinges without doing material injury to the remainder of the building, in a purely physical sense, yet depriving a dwelling of all means of excluding cold on the one hand and providing warmth on the other, cannot be contemplated without recognizing material injury as a result." 178 A 788 at 789-790 New Jersey (1935).

Material injury to the freehold is and must be an overiding concern--even though the subject property is leased and title thereto is in the hands of another. This is the conclusion of a growing number of Courts in various jurisdictions.

> " Another point raised by the appellant's is that the testimony of Robert L. Tester, one of the defendants, regarding the agreement with the tenant that certain property should remain with the building, was so contradictory that it had no probative value.
>
> We think the testimony of Tester in respect to such claimed agreement was not and is not the determining factor on the question as to whether the articles had been annexed to and become a part of the freehold. The elements in making such determination are usually said to be those of Annexation, Adaption and Intent.

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> As between landlord and tenant and where the rights of third parties do not intervene, the intent is of paramount importance. But as between the owner of the building and creditors of the lessee it is of only coincidental importance and the question must be determined with more emphasis on the character of annexation and the uses to which the property is put. Stockton v. Tester, 273 SW2d 783 at 786,787 Mo. (1954).

Furthermore, in this case the lease had already been terminated with Peck and Shaw and Manivest had retaken control. In that regard, Plaintiff's right to retake the equipment had also been lost.

> "It is evident that there are circumstances under which the rights of the landlord will prevail as against a conditional seller or chattel mortgagee, principally where removal of the disputed object would result in material injury to the freehold, but also where the chattel was mortgaged after its annexation to the realty. It would also appear to be the rule that if the tenant, by reason either of nonpayment of rent or termination of the tenancy, or for other causes, loses the right to remove the fixtures in question, such right will also be lost to his conditional seller or chattel mortgagee." 35 AM JUR 2d Fixtures § 69.

In this wise, since the Plaintiff proceeded ahead without timely prior notice to Defendant and installed equipment on a long term lease with Peck and Shaw --their right to the equipment after the Peck and Shaw abandonment-- is no better than Peck and Shaw's would have been after abandonment. This point is well settled.

> " Respondent asserts, and we think correctly, that the chattel mortgagee can get no greater rights than those possessed by the tenant-mortgagor. The rule was well expressed in Donahue v. Hardman Estate, 91 Wash. 125, 157 P. 478, at page 480, 'A mortgagee from a tenant

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> has no greater right to remove trade fixtures from the premises after the tenant has surrendered possession to the landlord than the tenant himself would have. Whatever right or title the mortgagee from the tenant may have cannot rise higher than its source, and is measured by what the rights of the tenant would be at the time the mortgagee asserts his claim.' To the same effect are: Couch v. Scandinavian-American Bank, 103 Or.48, 197 P. 284,... (other remaining cites deleted).
>
> Appellants assert that the rule in California is otherwise and that the lien of a chattel mortage is superior to the landowner's title even though the tenant-mortgagor may have forfeited his right of removal by failure to exercise it within a reasonable time. They rely however on cases where the lien attached before the article was affixed to the realty. The distinction is clearly pointed out in Martyn v. Hamilton, 62 N.D. 445, 244 N.W. 15, 17: 'A mortgage taken with knowledge of the landlord's rights and that the machinery involved is a fixture is entirely different from a case where the landlord permitted mortgaged machinery to be affixed to his building.'" United Pacific Insurance Co. v. Cann, 276 P.2d 858 at 861, Cal. (1954). See also Glaser v. North, 201 Or 118, 266 P.2d 680.

Since Plaintiff was asleep at the switch when it could have accelerated its lease with the lessee, and allowed the Peck and Shaw abandonment without procuring their property, they find themselves in the difficult position of trying to assert a right they do not have.

CONCLUSION

The parties' actions and the legal consequences indicate that General Leasing Company has no cause of action. The record indicates the following: (1) General Leasing Company allowed a permanently installed air conditioning system and heating system

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be installed without notice to or waiver from the Defendant, Manivest Corporation; (2) the air conditioning and heating system together with its duct work constituted an entire system which should not be broken up due to the continuum nature of the fixtures; and (3) the property was sufficiently attached, intended, and adapted as fixture. Furthermore, none of the subject equipment can be removed without material injury to the realty.

Therefore, the judgment as entered should be vacated and Plaintiff's claims as to the subject equipment should be found lacking as a matter of law.

DATED this 9th day of July, 1982.

MORGAN, SCALLEY & DAVIS

J. BRUCE READING
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that I mailed 2 true and exact copies of the foregoing, Brief of Appellant, to Mr. Thomas L. Kay, RAY, QUINNEY & NEBEKER, Attorneys for Plaintiff-Respondent, at 400 Deseret Building, Salt Lake City, Utah 84111 on this 9th day of July, 1982.

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