

2001

Joseph Mecham v. Consolidated Oil &
Transportation, INC., A Colorado Corporation,
Chase Manhattan Bank, a New York Corporation :
Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOSEPH MECHAM

Plaintiff/Appellant,

vs.

**CONSOLIDATED OIL &
TRANSPORTATION, INC., A Colorado
Corporation, CHASE MANHATTEN
BANK, a New York Corporation,**

Defendant/Appellee.

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Priority No.: 15

Case Number: 20010041-CA

Dist. Ct. No: 960800543

BRIEF OF APPELLANT

**APPEAL FROM ORDER ENTERED IN THE EIGHTH DISTRICT COURT
UINTAH COUNTY, STATE OF UTAH
THE HONORABLE A. LYNN PAYNE**

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Utah Court of Appeals

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APPELLATE JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Annotated 78-2-2(4), whereby the Utah Supreme Court has transferred the case to the Utah Court of Appeals for disposition.

NATURE OF CASE

Defendants Chase Manhattan Bank, N.A. and Consolidated Oil & Transportation Company, Inc., were dismissed by the trial court on Summary Judgment and Lack of Jurisdiction respectively. The orders became final on December 15, 2000, when an order dismissing Appellant's claim with prejudice against all remaining parties was entered, by the Honorable A Lynn Payne, Eighth District Court in and for Uintah County, State of Utah.

Appellant filed a Notice of Appeal on January 11, 2001.

ISSUES FOR REVIEW AND STANDARD OF REVIEW

- 1. Did the trial court err in finding that there was no genuine issue of material fact as to whether Chase Manhattan Bank was a principal/agent of Landmark Petroleum/ Westcourt and that Chase Manhattan was entitled to judgment as a matter of law?**

Standard of Review: The Court reviews a dismissal on Summary Judgment for Correctness. Summary Judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. URCP Rule 56(c). As a question of law, entitlement to summary judgment is reviewed for correctness. *K & T, Inc. v. Koroulis*, 888 P.2d 623, 627 (Utah

1994). “ ‘We determine only whether the trial court erred in applying the governing law and whether the trial court correctly held that there were no disputed issues of material fact.’” *Id.* (quoting *Ferree v. State*, 784 P.2d 149, 151 (Utah 1989) (citation omitted)). *Clark v. Farmers Ins. Exchange*, 893 P.2d 598 (Utah App. 1995).

2. Did the trial court err in finding as a matter of law that Consolidated Oil and Transportation lacked minimum contacts with the State of Utah so as to preclude a finding of long arm jurisdiction?

Standard of Review: The court reviews jurisdictional decisions for correctness.

Where, as here, “a pretrial jurisdictional decision has been made on documentary evidence only, an appeal from that decision presents only legal questions that are reviewed for correctness.” *Arguello v. Industrial Woodworking Mach.*, 838 P.2d 1120, 1121 (Utah 1992) (citing *Anderson v. American Soc’y of Plastic & Reconstructive Surgeons*, 807 P.2d 825, 827 (Utah 1990), *Starways Inc. v. Curry*, 1999 WL 308573 (Utah 1999)).

3. Did the trial court err in finding as a matter of law that Consolidated Oil and Transportation, Inc. is not doing business within the State of Utah so as to preclude a finding of general jurisdiction?

Standard of Review: The court reviews jurisdictional decision for correctness.

Where, as here, “a pretrial jurisdictional decision has been made on documentary evidence only, an appeal from that decision presents only legal questions that are reviewed for correctness.” *Arguello v. Industrial Woodworking Mach.*, 838 P.2d

1120, 1121 (Utah 1992) (citing *Anderson v. American Soc'y of Plastic & Reconstructive Surgeons*, 807 P.2d 825, 827 (Utah 1990), *Starways Inc. v. Curry*, 1999 WL 308573 (Utah 1999)).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

URCP 56(c)

Utah Code Ann. 78-2-2(4)

FRCP Rule 12

STATEMENT OF FACTS

During the latter part of 1994 and early 1995, Appellant was employed by Adler Hot Oil Service (“**ADLER**”) as a hot oil truck driver. Adler was engaged in the business of contracting with other companies for the use of its hot oil trucks. In September, 1994, and again in February, 1995, Adler was contacted telephonically by Shirley Heber, a principle of Consolidated Oil and Transportation, Inc. (“**CTCI**”). Ms. Hebert contracted with Adler to perform a hot oil procedure on a storage tank at a refinery in Fruita, Colorado. (Heiner deposition, P. 25-26)

The hot oil procedure was completed in September, 1994, as contracted and invoices were sent by Adler, in Vernal, Utah, to CTCI. CTCI neglected to pay the invoices and Adler filed a complaint against CTCI in the District Court in Vernal, Utah. CTCI filed its answer, admitting jurisdiction.

CTCI owned oil in a storage tank, at a refinery, in Fruita, Colorado, which was too thick to remove from the tank. CTCI contracted with Adler to use a hot oil truck to pump heated oil into the storage tank until the oil in the storage tank became hot enough to liquify so that it could be removed from the storage tank and sold as product. (Addendum “J” Heiner deposition p. 25-34) On or about February 27, 1995, the Appellant was injured when performing duties for Adler, required under the contract between Adler and CTCI. The Appellant was injured when a coupling came loose and Appellant was sprayed with hot oil, causing first degree burns over 50% of his body. (Addendum “I” Second Amended Complaint, paragraphs 10-22)

CTCI maintains a web site that solicits business in the State of Utah. The site provides detailed factual information about CTCI and requests that the Web site user contact CTCI.

In addition to the web site, CTCI communicates over the Web to residents of Utah through electronic communication. CTCI purchases products and arranges for shipping the products out of Utah (R. 668-679, P.9, ¶2, “CTCI’s Memorandum of Points and Authorities in Support of Motion To Dismiss”)

It is undisputed that Chase Manhattan Bank’s (“**Chase**”) involvement as a security holder of Landmark Petroleum, Inc., (“**Landmark**”) assets began as a lender, as evidenced by the 1992 Amended Restated Credit Agreement (“**Amended Credit Agreement**”) (Addendum “A”).

In 1994, the relationship between Chase and Landmark changed. Chase and Landmark agreed that the refinery should be closed. Chase and Landmark agreed that Defendant Westcourt Management, Inc., (“**Westcourt**”) would purchase some of the assets and maintain and sell the rest. In order to accomplish this, contracts were entered into between Chase, Landmark and Westcourt. (Addendum “B” Marketing Agreement) (Addendum “C”, Asset Purchase Agreement) (Addendum “D”, Consent and Agreement), (Addendum “E”, Management Agreement).

Richard Means, (“**Means**”) was an employee of the refinery, whose duties included maintaining the assets of the refinery on behalf of Westcourt and Chase. (Addendum “F”, Means depo. P. 42, lines 14-16) Because Westcourt wanted to avoid the expense of Means’ payroll, Chase paid Means’ wages. (Addendum “F” Means depo. P. 39, lines 8-9). As a result of Appellant’s injuries, Appellant filed an amended complaint naming, among other defendants, Chase Manhattan Bank, N.A. (“**CHASE**”) and Consolidated Oil & Gas, Inc., as parties. (Addendum “I” Second Amended Complaint) Appellant specifically alleged that Chase incurred liability as an owner/operator and/or employer of the refinery because it was involved in the day-to-day operations and control of the refinery. Both parties entered their appearances and discovery was conducted over the course of several years.

In or about October, 1999, the Appellant was made aware that Consolidated Oil & Gas, Inc., was the wrong defendant and moved the court to dismiss them. On or about November 11, 1999, the Appellant filed his motion and order to add (“**CTCI**”) and

CTCI was served. Appellant specifically alleged that CTCI incurred liability as a contractor of Adler Hot Oil Service by being involved in a refinery that worked with “ultra-hazardous” activities and because it instructed plaintiff to utilize inherently unsafe procedures.

On or about February 28, 2000, Chase brought a Motion for Summary Judgment claiming that it was nothing more than a lender and did not assume sufficient control of the operations of the refinery to become a principal with liability for the acts and transactions of the refinery. On or about July 11, 2000, the District court entered an order granting Chase’s Motion For Summary Judgment. (Addendum “G” and Addendum “K”)

On or about January 19, 2000, CTCI brought a Motion to Dismiss for Lack of Jurisdiction claiming that it was/is a Colorado Corporation and had no business dealings and/or minimum contacts with the State of Utah and did not transact any business in the State of Utah which would allow Utah to have personal or specific jurisdiction. On or about April 18, 2000, the District Court entered its order granting CTCI’s Motion To Dismiss For Lack Of Jurisdiction. (Addendum “H” and Addendum “L”)

SUMMARY OF ARGUMENT

1.

The Appellant argues that pursuant to the terms of (Addendum “B”, “C”, “D” and “E”) and in practice, Chase stepped out of the role of a lender and became a principal in the day to day operations of the refinery. Appellant argues that in so doing, chase

assumed the role of manager and/or operator of the refinery and thus, was liable for the negligence of the refinery causing the accident involving the Appellant.

2 & 3

The Appellant argues that CTCI, by using a web site to transact business in Utah it is present in Utah for purposes of general jurisdiction. Appellant also argues that since CTCI engaged in the transaction of business in Utah, i.e., entering into the contract with Adler, and the fact that injuries to Appellant arose out the business activity, Utah has specific jurisdiction over CTCI.

ARGUMENT

1

Did the trial court err in finding that there was no genuine issue of material fact as to whether Chase Manhattan was a principal/agent of Landmark Petroleum and that Chase Manhattan was entitled to judgment as a matter of law?

A. A lender, which is a secured creditor may, by its acts, become a principal of the debtor.

The law is clear that a lender, which is a secured creditor, may, by its acts, become a principal of the debtor. This fundamental rule of law is set forth in the *American Law Restatement of Agency*, section 14(O) which states the following.

Security Holder Becoming a Principal

A creditor who assumes control of his debtor's business for the mutual benefit of himself and his debtor, may become a principal, with liability for the acts and transactions of the debtor in connection with the business.

There is no Utah case which applies this section of the restatement of agency. Other courts, however, have used the above cited law to find liability on the part of lending institutions. see, *Plymouth Rock Fuel Corp., v. Leucadia, Inc.*, 474 N.Y.S. 2d 79 (A.D. 2 Dept. 1984). In *Plymouth* the court held that due to the degree of control exercised by a second mortgagee over the mortgagor's operation, the mortgagor, who assigned to the second mortgages all of the rents and profits derived from the operation of the property became second mortgagee's agent. see also, *Save Way Oil Company, Inc. v. Mehlman*, 496 N.Y.S.2d 537 (A.D. 2 Dept. 1985). In *Save Way Oil Company*, the court found, in an action to recover damages for goods had and received against a bank, as a mortgagee, an issue of fact existed as to whether the conduct of opening a bank account as an "agency account" and the use of a checks drawn thereon for fuel oil payments, created the appearance of apparent authority in the management firm to incur expenditures for fuel oil for mortgaged premises on behalf of the bank.

B. Chase, by exercising control over the Landmark/Westcourt, beyond that of a reasonable debtor, became a principal of Landmark/Westcourt.

Chase's involvement with Landmark began as a lender as evidenced by the 1992 Amended Restated Credit Agreement. (Addendum "A") It is undisputed that as a part of the loan, Chase became a security holder of Landmark's assets.

In 1994, the relationship between Chase and Landmark changed. Chase and Landmark agreed that the refinery should be closed. Chase and Landmark agreed that

Defendant Westcourt would purchase some of the assets and manage and sell the rest. In order to accomplish this, contracts were entered into between Chase, Landmark and Westcourt. (Addendum “B”, “C”, “D” & “E”).

As a part of the agreements between Chase, Landmark and Westcourt, Chase exerted much more control and made virtually all of the decision regarding the refinery. [Addendum “B”].

The District Court made a finding that Chase did not have veto power over the sale of the assets of Landmark, but had power to agree or disagree. However, the plain language of the Marketing Agreement states that Westcourt was required to establish a bank account, with respect to which Chase would have the sole right to make withdrawals. (Addendum “B” ¶ 2.4(a)). All monies received from the sale of the assets were to go into said account. (Addendum “B” ¶ 2.4(a)) Westcourt was required to establish another account at Chase to which Chase had discretion to transfer money, upon request of Westcourt, for, among other things, maintenance of the assets. (Addendum “B” ¶ 2.4(b)). In order to receive money from Chase for daily expenses, Westcourt had to make a request in writing. (Addendum “B” 2.4(b)(ii)). If Chase and Westcourt disagreed on the amount to deducted for the monthly expenses, the matter was to be settled by their accounting firm. (Addendum “B” ¶ 2.5) The Appellant argues that if Chase had the power to approve or disapprove of the monthly expenses, it necessarily had control of the day to day operations.

The District Court also found that while Chase did exercise some control over the assets of Westcourt, it did so as a lender, to protect them. (Addendum "G") It is true that Chase was interested in protecting the assets of Westcourt because of its interest in the assets. However, Chase stepped beyond what an ordinary lender would have done to protect the assets. Pursuant to agreement with Chase, Westcourt could not complete any sale of any Landmark asset greater than \$250,000.00 without first informing Chase of the terms of the sale and allowing Chase the right to object. If Chase objected, then Westcourt/Landmark could not proceed with the sale. (Addendum "B" Page 3, ¶ 2.3(a)-(c)).

Westcourt was required by Chase to have monthly meetings with Chase and Landmark to discuss projected expenses. Thereafter, Chase would disburse from Landmark's bank account to Westcourt's bank account in the amount of the projected monthly expense. Chase, however, kept its right to object to any sale expenses exceeding \$2,500.00. Chase did not require Landmark's consent to exercise this veto power of sales expenses. (Addendum "B" Page 5, ¶ (iii), page 6, ¶ (ii))

Chase required Westcourt to provide it a written breakdown of all monthly sales expenses. (Ex 10, page 8, paragraph 3.2(a))

Chase retained the right to fire Westcourt as the party marketing Landmark asset. Specifically, Chase had the right to terminate the Marketing agreement with Westcourt, thereby removing Westcourt as the sales agent of Landmark's assets. (Addendum "B" page 12, ¶ 6.2)

Another indication of the very tight control that Chase maintained over Westcourt and Landmark is exhibited by the fact that Chase became a shareholder of Landmark.(Addendum “F” Means Depo. Pages 16 &41)

It is also significant that Chase was paying the plant manger, Richard Means’ wages. Richard Means’ duties at the refinery included maintaining the assets of the refinery on behalf of Westcourt and Chase. [Addendum “F” Mean deposition, p. 42, line 14-16]. Westcourt wished to avoid keeping Mr. Means as a manager of the refinery because of the added expense. However, Chase agreed to put Mr. Means on the Westcourt payroll. (Addendum “F” Means deposition, p.39, lines 8-9,

“An agency relationship is a fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act.” See *Continental Bank & Trust Co. v. Taylor*, 384 P.2d 796 (Utah 1963) quoting *American Law Institute Restatement of Agency 2d*, Section 1.

It was Chase’s decision to keep Mr. Means’ working at the refinery. Chase was paying for his wages by reimbursing Westcourt. Mr. Means’ duties were performed on behalf of Chase. Chase controlled his employment. It had the total discretion to sign checks from Landmark’s account to reimburse Westcourt. Mr. Means could not work at the refinery without the consent and control of Chase. Certainly, Mr. Means was an agent of Chase and Chase should be liable for his negligent acts at the refinery.

Chase had complete control over the refinery subsequent to 1994. Chase could terminate Westcourt and/or Richard Means. Chase was the only party that could sign on Landmark's bank account and had complete discretion on funds. The facts clearly support a finding that Chase was the principal of Landmark and that Richard Means was an agent of Chase.

2

Did the trial court err in finding as a matter of law that Consolidated Oil and Transportation lacked minimum contacts within the State of Utah so as to preclude a finding of long arm jurisdiction?

Through its business contact with Utah, with regard to both the subject transaction and by advertising and doing business in Utah, there were sufficient contacts for Utah to have jurisdiction over CTCL.

A. For purposes of CTCL's Motion to Dismiss, Appellant need only a prime facie showing of jurisdiction.

There are three avenues available in which to determine jurisdiction. The Court may determine jurisdiction on affidavits alone, permit discovery or hold an evidentiary hearing. Appellee has submitted the issue of jurisdiction to the District Court by affidavit. The Utah Supreme court dealt with such a case in *Anderson v. American Society of Plastic and Reconstructive Surgeons*, 807 P.2d 825 (Utah 1990). In *Anderson*, the Court adopted rule 12 of the Federal Rules of Civil Procedure for use by Utah State Courts and stated the following:

The approach taken by the federal courts is motivated by concern for flexibility, judicial economy, and preservation of substantial rights. In the federal court's discretion, under rule 12 it may determine jurisdiction on affidavits alone, permit discovery, or hold an evidentiary hearing. If it proceeds on documentary evidence alone (i.e., the first two methods), the Appellant is only required to make a prima facie showing of personal jurisdiction. The Appellant's factual allegations are accepted as true unless specifically controverted by the defendant's affidavits or by depositions, but any disputes in the documentary evidence are resolved in the Appellant's favor. The trial court must not weigh the evidence unless a hearing is held.

Appellant, therefore, needed to only make a prima facie showing of jurisdiction.

Such a burden is defined as "relatively slight". See, *Pruco Fleet Services, Inc. v. Towers*, 39 F.Supp.2d 1320 (D.Utah 1999) footnote 4.

B. CTCI is using its web site to transact business in the State of Utah and is therefore present in Utah for purposes of general jurisdiction.

The Internet has provided for a new area of law in dealing with jurisdiction. The law applying personal jurisdiction standards to the Internet is set forth in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp 1119 (W.D.Pa. 1997). This law was adopted by Utah courts in *Patriot Systems, Inc. v. C-Cubed Corp.*, 21 F.Supp. 2d 1318 (D. Utah 1998) and again in *PurCo Fleet Services, Inc. v. Towers*, 38 F.Supp. 2d 1320 (D.Utah 1999). Specifically, Judge David Sam, in the *Patriot* case, p.1324, quoted the following language from the *Zippo* case.

...However, current case law reveals three general categories along a "sliding scale" for evaluating jurisdiction. *Id.* First, personal jurisdiction is established when "a defendant clearly does business over the Internet", such as entering into contracts which require the "knowing and repeated transmission of computer files over the Internet." *Id.* (quoting *Zippo*, 952 F.Supp. at 1123-24). Second, exercising personal jurisdiction is not

appropriate when the Internet use involves “[a] passive Web site that does little more than make information available to those who are interested in it” *Id.* (quoting, *Zippo*, 952 F.Supp. at 1123-24). Under these circumstances, “a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions.” *Id.* (quoting, *Zippo*, 952 F.Supp. at 1123-24). Third, a middle category encompasses “interactive Web sites where a user can exchange information with the host computer.” *Id.* (quoting, *Zippo*, 952 F.Supp. at 1123-24). Whether the exercise of jurisdiction is appropriate depends upon the “level of interactivity and commercial nature of the exchange of information that occurs on the Web site.” *Id.* (quoting, *Zippo*, 952 F.Supp. at 1123-24).

Clearly, CTCI’s actions place them in the first category. CTCI has posted a lengthy and detailed Web site that is more than a passive advertisement. CTCI provides seven pages of facts regarding its company and requests that a Utah visitor of the Web site contact them. (See Plaintiff’s Memorandum In Opposition to Motion to Dismiss, R. 817-858). In addition, CTCI admits in its Memorandum in Support of Motion to Dismiss for Lack of Jurisdiction that it is engaged in spot transactions with Utah companies and uses electronic communications through the Web to transact business in the State of Utah. (See Defendant’s Memorandum In Support of Motion To Dismiss, R.668-679).

CTCI, through its use of the Web, is present in Utah and the Eighth District Court has general jurisdiction over this defendant.

3

The Eight District Court has specific jurisdiction over CTCI since CTCI has engaged in the transaction of business within this state and the injuries to Appellant arose out of the business activity.

The Federal District Court of Utah in *Nova Mud Corp. v. Fletcher*, 648 F.Supp. 1123 (D.Utah 1986) explained the analysis to be used in determining whether specific jurisdiction should be exercised.

In *Fletcher*, an oral contract was entered into between Appellant and defendant in which Appellant agreed to supply drilling mud to the defendant in Nevada. The contract was entered into over the telephone. Defendant had no other contract with Utah. The Utah court found jurisdiction to exist by applying a three step analysis.

The court determined that Defendant Fletcher had transacted business in Utah. The court determined that a defendant need not be physically present in the State of Utah to be transacting business in Utah. The act of Defendant Fletcher in engaging in a telephone call to enter into an oral contract satisfied the requirement of showing that Defendant was transacting business in the State of Utah.

The court's second part of its analysis found that the Appellant's claim arose out of its activity within the State of Utah. In finding that the claim arose out of the activity within Utah, the court stated the following:

The second step in a jurisdictional analysis is to determine whether Nova Mud's claim *arises out of* Fletcher's activity within Utah. *Hanson v. Denckla*, 357 U.S. 235, 251, 78 S.Ct. 1228, 1238, 2 L.Ed. 1283 (1958). . . In this case both Nova Mud's claim for breach of contract and claim for common law fraud directly relate to Fletcher's activity of calling and requesting services from a Utah corporation. The *Hanson* test is clearly met.

Id. At 1126.

The court's third test of the jurisdictional analysis deals with the issue of fundamental fairness and the notions of fair play and substantial justice. The court found that it was fundamentally fair to assert jurisdiction over Defendant Fletcher. The court concluded that by personally contracting with a Utah corporation, Defendant Fletcher was on notice and that it was foreseeable that litigation relating to that contract could be brought in Utah. Fletcher should also have been aware that the contract would have a significant impact in the State of Utah.

Applying the analysis used in the *Nova Mud* case to this case, jurisdiction should be found to exist. When CTCI telephoned Adler and entered into an oral contract to perform work in the State of Colorado, CTCI was transacting business in the State of Utah. This is especially exhibited by the fact that after performing the services that CTCI requested, Adler filed suit against CTCI for payment, in the Eighth District Court, State of Utah and CTCI entered an appearance, agreeing to submit to Utah jurisdiction.

The second *Nova Mud* factor is present because the Appellant was injured when he was performing the contract between Adler and CTCI. Thus, the injury arose out of the contract. Finally, the third factor is present because it is fundamentally fair for this Court to exercise jurisdiction over CTCI. It was foreseeable to CTCI that litigation arising out of the contract could commence and that the contract would have a significant impact in the State of Utah. The injuries that Appellant sustained through performing the contract impacted his life forever.

CONCLUSION

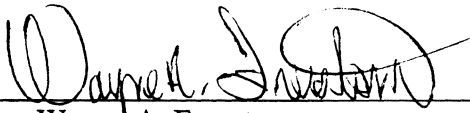
Chase stepped beyond that of an ordinary lender protecting its interests and thus, became a principal of the debtor, Landmark/Westcourt. By exercising much more control of the assets and day-to-day operations of Landmark/Westcourt than an ordinary lender would normally exert, Chase became a manager/owner of the refinery and should therefore be liable for injuries caused the Appellant, due to the negligence of its employees.

CTCI is and was present in the State of Utah through its Web site. The Web site and the electronic communications made by CTCI constitute continual and substantial activity within the State of Utah to find general jurisdiction exists. General jurisdiction exists and Appellant's claim need not be related to CTCI's contacts with Utah for the lawsuit to proceed.

Alternatively, CTCI has already been brought into Utah Courts by Adler in a previous lawsuit and CTCI admitted jurisdiction. To argue that there is not jurisdiction now is to argue against jurisdiction that has already been admitted in the Adler case because the same analysis applies. The only difference is that now the Appellant of the current lawsuit is the employee of Adler and not Adler itself. The same contract is present and the same contacts between the parties are present.

DATED this 21 day of May, 2001.

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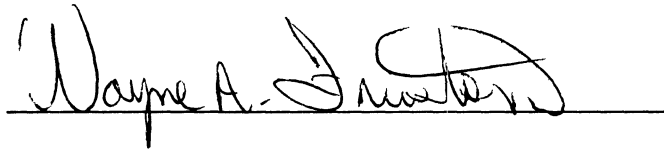
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CERTIFICATE OF MAILING

I hereby certify that on this 21 day of April, 2001, I caused to be mailed, First-Class Mail, postage pre-paid and true and correct copy of the foregoing Appellant's Brief to the following:

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ADDENDUM

INCLUDED IN SEPARATE BINDING