

1991

Mark Plaskon v. Darwin S. Hayes, Beth Hayes, Duane H. Jenkins, Carma Jenkins, Double D Storage Garages : Petition for Writ of Certiorari

Utah Supreme Court

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James B. Hanks; Kipp and Christian; Attorneys for Petitioners.

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UTAH SUPREME COURT
BRIEF

IN THE UTAH SUPREME COURT

| | | |
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| MARK PLASKON, | : | |
| Respondent, | : | |
| vs. | : | Case No. 910563 |
| | : | Priority No. 16 |
| DARWIN S. HAYES, BETH HAYES, | : | |
| DUANE H. JENKINS, CARMA JENKINS, | : | |
| dba DOUBLE D STORAGE GARAGES, | : | |
| Petitioners. | : | |

PETITION FOR WRIT OF CERTIORARI

APPEAL FROM A DECISION RENDERED BY
THE HONORABLE DOUGLAS L. CORNABY,
JUDGE OF THE SECOND JUDICIAL DISTRICT COURT
FOR DAVIS COUNTY, STATE OF UTAH,
SITTING WITHOUT A JURY, DISMISSING PLAINTIFF'S CASE,
FOLLOWING A PARTIAL TRIAL HELD ON OCTOBER 4, 1990

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UTAH

IN THE UTAH SUPREME COURT

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| MARK PLASKON, | : | |
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QUESTIONS PRESENTED FOR REVIEW

In reversing the decision of the trial court, did the Court of Appeals correctly apply the following standards of review:

A. Does the evidence, viewed in a light most favorable to the judgment entered, preponderate against the ruling made by Judge Cornaby?

B. Did the trial court misapply principals of law in finding that no contract existed?

REFERENCE TO ORDER OF COURT OF APPEALS

This Petition concerns an Order of Reversal entered by the Utah Court of Appeals on the 22nd day of November, 1991. In their order, Justices Orme, Garff and Jackson ruled as follows: ". . .the trial court erred in finding that no contract existed between Plaintiffs and Defendants. Based on the court's further finding that the sale was not conducted pursuant to Utah Code Annotated §38-3-1, et seq. 1988, we reverse the judgment for Defendants and remand for a determination for the damages incurred by Plaintiff".

JURISDICTIONAL GROUNDS

Petitioners seek a review of an Order of Reversal entered by the Utah Court of Appeals on November 22, 1991. The Utah Supreme Court has jurisdiction to review the decision rendered by the Utah Court of Appeals pursuant to Rule 46(c) of the Utah Rules of Appellate Procedure.

CONTROLLING PROVISIONS OF CONSTITUTIONS, STATUTES, ORDINANCES AND REGULATIONS

There are no provisions of Constitutions, statutes, ordinances and regulations which are controlling in this case.

STATEMENT OF CASE

A. NATURE OF CASE, COURSE OF PROCEEDINGS AND DISPOSITION

The Plaintiff, Mark Plaskon (hereafter "Plaskon") filed this action on November 21, 1989 to recover the damages he claimed to have sustained as a result of the Defendants' alleged conversion of his personal property. In his Complaint, Plaskon alleged that the Defendants had wrongfully sold certain items of his property which had been stored in the Double D Storage Garage, a self-storage facility owned by the Defendants. Plaskon claimed that the Defendants had sold his property without giving him proper notice and without following proper procedures. The Defendants answered Plaskon's Complaint and argued that Plaskon had never entered into a contractual arrangement with them, had never contacted them, nor had he ever paid rent.

On October 4, 1990, the matter was tried without a jury before the Honorable Douglas L. Cornaby. Prior to the beginning of the trial, it was determined that the issue of Plaskon's standing to sue would be first determined, and the issue of damages, if necessary, would be reserved for further proceedings. After hearing the evidence presented by both parties, Judge Cornaby found that there was no contract between the parties. Judge Cornaby's decision was based on the following facts:

1. Plaskon had never entered into a rental contract, written or oral, with the Defendants.

2. Plaskon never paid the Defendants rent during the 13 month period in which his property was stored in the Defendants' facility.

3. Plaskon's claims, if any, were against his girlfriend, Paulette McFarland, who had moved his property into the storage facility.

As a result of finding a lack of privity of contract, Judge Cornaby ruled that Plaskon did not have standing to sue the Defendants and dismissed Plaskon's claims.

On or about November 20, 1990, Plaskon filed a Notice of Appeal. In his appeal, Plaskon complained that the trial court had ignored evidence which supported the existence of a contract between himself and the Defendants. On motion by the Court of Appeals, the case was submitted for an expedited decision pursuant to Rule 31 of the Appellate Rules and the case was heard on November 21, 1991. On November 22, 1991, the Court of Appeals reversed the trial court's ruling and found that the lower court erred "in finding that no contract existed between Plaintiff and Defendants". Based on the court's further finding that the Defendants' sale of Plaskon's property was not conducted pursuant to Utah Code Annotated §38-3-1, et seq. 1988, the Court of Appeals reversed the judgment and remanded for a determination of the damages incurred by Plaintiff.

B. STATEMENT OF FACTS

1. The Defendants are the owners of the Double D Storage Garages (self storage facility) which are located in Bountiful, Utah. (Transcript, p 67)

2. During the period from August 1, 1986 through July 11, 1987, Plaskon resided with his girlfriend, Paulette McFarland, in Bountiful, Utah. (Transcript pp 28, 32)

3. On July 11, 1987, Ms. McFarland contacted the Defendant, Carma Jenkins, concerning the rental of storage space in the Double D storage facility. Ms. McFarland indicated that she was having problems with her boyfriend, Mr. Plaskon, and wanted to move him out of her home. She contacted Double D while Plaskon was out of town and without Plaskon's prior knowledge. (Transcript pp 67-70)

4. Ms. McFarland agreed to rent space 108 in the storage facility and signed a rental agreement. The rental agreement provided for a rent of \$40 per month and a \$2 key deposit. (Defendant's Exhibit #1, Transcript pp 33-35)

5. Ms. McFarland further indicated that she was only renting the facility for one month and that Plaskon would need to make arrangements with Double D if he wanted to keep his things stored for a longer period. In accordance with her statement, Ms. McFarland signed another document bearing Mr. Plaskon's name which stated:

I, Mark J. Plaskon, agree to rent storage unit 108 for a period of one month for a total amount of \$40 plus \$2 key deposit.

The \$2 key deposit will be returned upon receipt of key and notification that tenant has vacated unit.

Ms. McFarland signed this document in Mr. Plaskon's name and later gave him a copy. (Transcript pp 33-35, 38, 67-70; Plaintiff's Exhibit #2)

6. After Ms. McFarland had rented space 108, she proceeded to move several duck decoys, which belonged to Plaskon, into the storage unit. (Transcript pp 45, 47)

7. Mr. Plaskon's property stayed in the storage facility until August of 1988. The Defendants testified that during this time, Mr. Plaskon did not contact them for any reason nor did he pay any rent. During this same period of time, the Defendants attempted to locate Mr. Plaskon to determine what he desired to do with his property. They were unsuccessful in their efforts. (Transcript pp 73-76, 86-87, 90, 93-94, 96)

8. In August of 1988, and after having failed to receive any rental payments or direction from Mr. Plaskon as to what should be done with the property, the Defendants sold the duck decoys contained in the storage facility. The decoys were sold for the amount of \$575. The rent owing at that time was approximately \$610. (Transcript pp 72-79, 96, 104)

9. In November of 1988, Plaskon went to the storage facility and found that his decoys were gone. He confronted the Defendants and was told that the decoys had been sold to cover past due rent. This suit then followed. (Transcript pp 93-94)

ARGUMENT

I. THE COURT OF APPEALS FAILED TO APPLY THE PROPER STANDARD OF REVIEW

Although the Court of Appeals did not issue a written opinion, its order reversing the trial court is inconsistent with the great weight of evidence and is contrary to the presumptions which favor upholding judgments rendered by the trial court. Pursuant to Utah law, the Court of Appeals is obligated to affirm the trial court's findings and conclusions "unless there is no reasonable basis in the record to support them. Further, the evidence and all inferences that fairly and reasonably might be drawn therefrom must be viewed in a light most favorable to the judgment entered." Nielsen v. Chin-hsien Wang, 613 P.2d 512 (Utah 1980). The rulings of the trial Court should not be disturbed unless the evidence clearly preponderates to the contrary, or the trial Court abuses its discretion or misapplies principals of law. Christensen v. Christensen, 628 P.2d 1297 (Utah 1981).

In the present case, the Court of Appeals either ignored or misapplied the above standards in reaching its conclusion. Not only was the trial court's decision supported by substantial evidence, it was also well grounded in the law. For the following reasons, the Defendant's Petition for Writ of Certiorari should be granted to insure that the proper standards of review have been utilized in reviewing the decision of Judge Cornaby.

A. THE RULING OF THE TRIAL COURT IS SUPPORTED BY
SUBSTANTIAL EVIDENCE.

In the present case, the great weight of evidence supports Judge Cornaby's dismissal of Plaskon's lawsuit. His conclusion was reasonably based on the following factors:

1. Plaskon did not enter into a Rental Agreement with the Defendants. The record is very clear that Mark Plaskon did not enter into a written or oral contract with the Defendants. He was not present when Paulette McFarland signed the Rental Contract with the Defendants nor was there any evidence that he asked her to do so on his behalf. In fact, none of the Defendants could recall talking to Plaskon prior to the sale of his property. (Transcript pp 75, 86-87, 93)

Although Mr. Plaskon testified that he contacted the Defendants in May of 1988 and indicated he would pay any rent owing in the fall of 1988 (Transcript p 19), Judge Cornaby was not convinced. In ruling on the matter, Judge Cornaby stated:

...We know that when they sent this notice out, that's listed as Plaintiff's Exhibit 1, showing the \$535 with past due rental, even then there's the attempt to try to get him to put his things in a smaller unit. With that note that was made there by Mr. Hayes. "We do have a smaller unit if you still want one. We need to hear from". and at least on the part that I have, it doesn't show -- I think it must say "we need to hear from you". And that's in -- and that's on May 23.

Now, I don't think they heard from him on that. I don't believe they heard from him on that. I heard him tell about a conversation in which he claimed took place. Obviously, he gave enough of a conversation that he got his address. But I do not believe that he contacted him and made arrangements until that fall without payment.

From the way they've testified they do business, I don't believe they would have let the thing go for, what?

We're basically talking about 14 months without any rent and just say "well, sure. Contact us when you get around to it, to having some money." They testified that's not the way they do business.

...Had we gone past the date in November -- and, of course, we go to November of 1988 when we hear of this irate phone call, we then, of course, have gone almost 18 months with no contact and still no payment, no expectation. (Transcript pp 119, 120-122) (emphasis added)

Also enlightening is the testimony of Paulette McFarland. Ms. McFarland indicated that she was renting the facility for a one-month period, and that Mr. Plaskon would have to make arrangements if he wanted to store his property in the facility for a longer period. Ms. McFarland testified as follows:

Q: Let me show you what has been marked actually as Defendants' Exhibit #1, it's a copy of it, and ask you if you recognize it.

A: I do.

Q: What is it?

A: It's a lease agreement

Q: Ok. Between Double D Storage Unit and showing who was the tenant?

A: I have signed my name to that.

Q: Is this one of the documents that you signed when you met with him on or about the 11th of July?

A: Yes.

Q: Alright. Did you tell them at that time whose property was in the unit?

A: Yes, I did.

Q: And who did you tell them --

A: I told them it belonged to Mark Plaskon and that I would pay the first month's rent and I would give him the key and he would be obligated to do with it as he chose.

If he wanted to keep it, fine. If he didn't, that was fine, to.

* * *

Q: Was there any indication that that would not be an acceptable arrangement with the Double D people, the one that you described?

A: No; because they didn't really know whether he would want that further than one month or was that was to be discussed with him. (Transcript pp 33-35, 7)

As can be seen, the only contract concerning the rental of space 108 was between the Defendants and Paulette McFarland. The contract was for a period of one month. Any further arrangements were to be worked out between the Defendants and Mr. Plaskon. As set forth above, Plaskon failed to contact the Defendants and no such arrangements were made.

2. Plaskon did not pay rent.

During the year that Plaskon's property sat in the Double D Storage facility, he did not pay any rent. Mr. Plaskon's testimony is very clear in this respect:

Q: Ok, Mr. Plaskon, during the time that your property was in the storage facility, did you ever pay rent?

A: No, I had not. (emphasis added) (Transcript p 29)

The absence of any contract between the parties and Plaskon's failure to pay rent provide ample support for Judge Cornaby's ruling. Such a result is made even more compelling when the above facts are viewed in a light most favorable to the judgment entered. Accordingly, this Court should affirm the findings and conclusions of Judge Cornaby because they are well grounded in fact and supported by the evidence.

B. THE TRIAL COURT'S RULING IS WELL GROUNDED IN LAW

By definition, a binding contract requires the mutual assent of the parties, a meeting of the minds, the payment of consideration and an agreement as to the essential terms and conditions. Copper State Leasing Company v. Blacker Appliance and Furniture Company, 770 P.2d 88 (Utah 1988); B&R Supply Company v. Bringham, 503 P.2d 1216, 28 Ut. 2d 442, (Utah 1972); Phillips v. Johnson, 514 P.2d 1337, 266 Or. 544 (Or. 1973). The burden of proving the existence of a contract is on the party seeking enforcement. O. B. Oberhansly v. Earl, 572 P.2d 1384 (Utah 1977).

In the instant case, Plaskon has altogether failed to show the existence of a binding contract. As set forth earlier in this brief, Plaskon never signed a written contract with the Defendants, never entered into an oral contract, never negotiated terms such as rental amount, lease period or the like, and didn't even talk to the Defendants until November of 1988, some 16 months after his possessions were moved to the storage facility. In addition, Plaskon failed to pay any rent during the entire time that his property was stored in the facility. Plaskon's only real contact was with Paulette McFarland, not the Defendants.

Plaskon has also failed to prove the existence of an implied contract. As defined by the Utah Court of Appeals in Davies v. Olsen, 746 P.2d 264 (Utah 1987), an implied contract must contain the following elements:

1. A request that work or services be performed;

2. The person providing the services must expect to be compensated for the same;

3. The person receiving the services knew or should have known that the providing party expected compensation.

In the instant case, the evidence is uncontroverted that it was Paulette McFarland, not Plaskon, who requested that Plaskon's property be stored. Plaskon did not sign a lease agreement nor did he ever contact the Defendants for the purpose of entering into a rental arrangement. In addition, there was never any discussion between the parties respecting terms. Based on the evidence, Judge Cornaby was correct is stating:

It's interesting to the Court to note as I listen to the testimony that the Plaintiff never made contact with the Defendants to establish a contract. He never pays any rent to them. ...

So what the Court is saying is it appears to the Court the Plaintiff never did sign -- never did sign a contract with them. Plaintiff never did have a contract with them. And even though we've talked about an agency relationship, Paulette McFarland had no authority to be an agent for him. And even though we've talked about ratification of Paulette's agreement, nothing's indicated that Mr. Plaskon ratified that agreement. Had we gone past the date of November -- and, of course, we go to November of 1988 when we hear of this irate phone call, we then, of course, have gone almost 18 months with no contact and still no payment, no expectation.

I think what all this indicates is that the only contract that the Defendants had was with Paulette McFarland. And there's no right to assume under the set of circumstances presented to the Court that the Defendants -- or the Plaintiff had ratified the contract. He had never paid a dime. He had never contacted them except to provide that one address. (Transcript pp 117, 121-122) (emphasis added)

Plaskon's argument that Defendants' counsel in his closing argument, agreed to the existence of a contract, is also without

basis. Any such statements by counsel are not binding on the Court because "the trier of fact, rather than counsel by agreement, determines what facts have been established by the evidence". Hering v. State Department of Motor Vehicles, 534 P.2d 143 (Wash. App. Div. 1 1975).

CONCLUSION

The trial Court properly exercised its discretion in dismissing Plaskon's complaint. The fact that Plaskon failed to contact the Defendants, failed to pay rent, and never entered into a rental arrangement with the Defendants provides ample evidence to support Judge Cornaby's conclusions, especially when viewed in a light most favorable to the judgment entered. Judge Cornaby's ruling is also legally correct because there is no evidence to support an express or implied contract. Accordingly, the Defendant's Petition for Writ Certiorari should be granted so that the matter can receive a full review.

DATED this 23 day of December, 1991.

KIPP & CHRISTIAN, P.C.


JAMES B. HANKS
Attorney for Petitioners

APPENDIX

- A. ORDER OF REVERSAL**
- B. FINDINGS OF FACT AND CONCLUSIONS OF LAW**
- C. ORDER OF DISMISSAL**

FILED

NOV 22 1991

Mary Thomas
Vivian T. Thomas
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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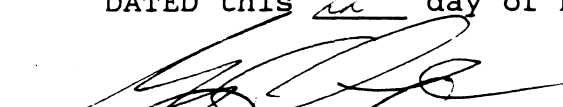
| | | |
|--------------------------|---|--------------------|
| Mark Plaskon, |) | ORDER OF REVERSAL |
| |) | |
| Plaintiff and Appellant, |) | |
| |) | Case No. 910124-CA |
| v. |) | |
| |) | |
| Darwin S. Hayes, et al., |) | |
| |) | |
| Defendant and Appellee. |) | |

Before Judges Orme, Garff, and Jackson (Rule 31).

This matter is before the court pursuant to Utah R. App. P. 31.

We determine that the trial court erred in finding that no contract existed between plaintiff and defendants. Based on the court's further finding that the sale was not conducted pursuant to Utah Code Ann. § 38-3-1, et seq. (1988), we reverse the judgment for defendants and remand for a determination of the damages incurred by plaintiff.


DATED this 22nd day of November, 1991.



Gregory K. Orme, Judge



Reginal W. Garff, Judge



Norman H. Jackson, Judge

NOV 25 '91 REC

CERTIFICATE OF MAILING

I hereby certify that on the 22nd day of November, 1991, a true and correct copy of the foregoing ORDER OF REVERSAL was deposited in the United States mail to the parties listed below:

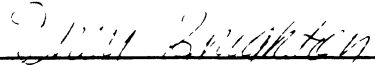
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Honorable Douglas Cornaby
Second District Court Judge
City and County Building
Farmington, UT 84025

Dated this 22nd day of November, 1991.

By


Deputy Clerk

FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH

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Telephone: (801) 521-3773

Attorney for Defendants

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR DAVIS COUNTY, STATE OF UTAH

| | | |
|------------------------------|---|----------------------|
| MARK PLASKON, | : | |
| | : | |
| Plaintiff, | : | FINDINGS OF FACT AND |
| | : | CONCLUSIONS OF LAW |
| vs. | : | |
| | : | |
| DARWIN S. HAYES, BETH HAYES, | : | |
| DUANE H. JENKINS, CARMA | : | Case No. 890746591CV |
| JENKINS, dba DOUBLE D | : | |
| STORAGE GARAGES, | : | |
| | : | |
| Defendants. | : | |

This matter came before the court for trial on Thursday, October 4, 1990. The defendants were represented by James B. Hanks of Kipp and Christian, P.C. The plaintiff was represented by John T. Caine. The court, having considered the evidence presented and being fully informed in the premises, now makes the following:

FILMED

FINDINGS OF FACT

1. The defendants are the owners of the Double D Storage Garages located in Davis County, State of Utah.

2. On July 11, 1987, Paulette McFarland signed a rental contract with the defendants for the rental of Unit 108 of the Double D Storage Garages. At the time the document was signed, she made the defendants aware that the property to be stored therein belonged to Mark Plaskon. She further stated that she would only be responsible for the first month's rent (\$40.00) and what happened thereafter would be between the defendants and Mr. Plaskon. All parties understood that.

3. Plaintiff's Exhibit "2" was signed by Paulette McFarland, not Mark Plaskon.

4. The defendants expected the plaintiff to show up after the first month and begin paying monthly rent or move his things out. The plaintiff did not do so. His property remained in Unit 108 until November, 1988 when he bought a home and moved in with Paulette McFarland. At this time, much of his furniture and clothing had been moved out of the storage shed, leaving only various duck decoys.

5. The plaintiff never contacted the defendants to establish a rental contract concerning Unit 108.

6. The plaintiff was sent notices of Past-Due rent on a regular basis but never made any response.

7. The defendants sent plaintiff a Notice of Sale of the contents of Unit 108 to 111 Wicker Lane, Bountiful, Utah. The notice should have been addressed to 14 Acorn Drive in North Salt Lake because an earlier notice was sent to this address (Notice of May 23, 1988) and it did reach him.

8. The defendants checked Unit 108 from time-to-time. When they checked with the plaintiff's former employer and learned that he was no longer employed, they checked the unit and found that the furniture had been moved out and nothing but decoys remained.

9. The documents set forth as plaintiff's Exhibit "1" were sent to the plaintiff with the notation "we do have a smaller unit if you still want one. We need to hear from you." This notice was sent on May 23, 1988. The plaintiff did not respond.

10. The court is aware of a conversation which the plaintiff claimed took place in which he made arrangements to pay the balance of rents due in the fall of 1988. The court does not believe that such an arrangement was made because of the way the defendants conducted their business. The court does not believe that the defendants

would let things go for approximately 14 months without any rent and just say " Well, sure. Contact us when you get around to it, to having some money." They testified that's not the way they do business.

11. The plaintiff never did sign a contract with the defendants or enter into an oral or written agreement with them. The plaintiff did not pay the defendants any amounts for rent.

CONCLUSIONS OF LAW

1. The plaintiff did not have a rental contract for the storage of his personal property with the defendants.

2. Section 38-3-1 of Utah Code Annotated sets forth the procedure for executing on a lien concerning property held in a self-service storage facility.

3. Because of a nonpayment of rent, the defendants had a lien on the contents of Unit 108 in the Double-D Storage Garage.

4. When the defendants disposed of the property contained in Unit 108 of the Double D Storage facility, they did not follow the procedures set forth in the above-named statute.


5. Paulette McFarland was not an agent of the

plaintiff nor were Ms. McFarland's rental agreements with the defendants ratified by the plaintiff. The defendants had a contract with Paulette McFarland, not the plaintiff. Any complaint that the plaintiff has is with Paulette McFarland.

6. There is no privity of contract between the plaintiff and the defendants.

DATED this 31 day of October, 1990.

BY THE COURT:


HONORABLE DOUGLAS L. CORNABY

CERTIFICATE OF MAILING

MAILED, first-class, postage prepaid on the 19
day of October, 1990, a true and correct copy of the
foregoing Findings of Fact and Conclusions of Law, to the
following:

John T. Caine
RICHARDS, CAINE & ALLEN
2568 Washington Boulevard
Ogden, Utah 84401

Kinden R. Blumley

FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH

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CLERK, 2ND DIST. COURT

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Attorney for Defendants

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR DAVIS COUNTY, STATE OF UTAH

| | | |
|------------------------------|---|----------------------|
| MARK PLASKON, | : | |
| | : | |
| Plaintiff, | : | |
| | : | ORDER OF DISMISSAL |
| vs. | : | |
| | : | |
| DARWIN S. HAYES, BETH HAYES, | : | |
| DUANE H. JENKINS, CARMA | : | Case No. 890746591CV |
| JENKINS, dba DOUBLE D | : | |
| STORAGE GARAGES, | : | |
| | : | |
| Defendants. | : | |

This matter came before the court for trial on the 4th day of October, 1990. The plaintiff was represented by John T. Caine. The defendants were represented by James B. Hanks of Kipp and Christian, P.C. The court, having heard the evidence produced at trial and being fully informed in the premises:

ORDERS, ADJUDGES AND DECREES:

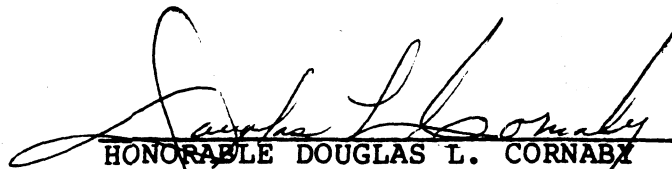
Plaintiff's complaint against the defendants is hereby dismissed because of a lack of contractual privity

FILMED

between the parties.

DATED this 31 day of October, 1990.

BY THE COURT:


HONORABLE DOUGLAS L. CORNABY

CERTIFICATE OF MAILING

MAILED, first-class, postage prepaid on the 19
day of October, 1990, a true and correct copy of the
foregoing Order, to the following:

John T. Caine
RICHARDS, CAINE & ALLEN
2568 Washington Boulevard
Ogden, Utah 84401

Kinden R. Blingley

CERTIFICATE OF MAILING

I HEREBY CERTIFY that four true and correct copies of the foregoing Petition Writ of Certiorari were mailed, first-class, postage prepaid on the 23 day of December, 1991, to the following:

John T. Caine
RICHARDS, CAINE & ALLEN
2568 Washington Boulevard
Ogden, Utah 84401

Kirsten R. Blingard