

1983

Marjorie J. Durand v. Cedar City Corporation, H. L. Bradley, Arthur O. Stewart And Grant Hinchcliff : Appellant's Brief

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IN THE SUPREME COURT
OF THE STATE OF UTAH

MARJORIE J. DURAND,

Plaintiff-Appellant,

vs.

CEDAR CITY CORPORATION,
H. L. BRANDLEY, ARTHUR O.
STEWART and GRANT HINCHCLIFF,

Defendants-Respondents,

Case No. 19033

APPELLANT'S BRIEF

PATRICK H. FENTON
Attorney for Appellant
154 North Main Street
Cedar City, UT 84720

ALLAN L. LARSON
Attorney for Respondent
10 Exchange Place
11th Floor
P. O. Box 3000
Salt Lake City, UT 84110

FILED

JUN 29 1903

Clerk, Supreme Court, Utah

IN THE SUPREME COURT
OF THE STATE OF UTAH

H. L. BRANDLEY,
Plaintiff-Appellant,
vs.
CEDAR CITY CORPORATION,
H. L. BRANDLEY, ARTHUR O.
STEWART and GRANT HINCHCLIFF,
Defendants-Respondents,

Case No. 19033

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Attorney for Respondent
10 Exchange Place
11th Floor
P. O. Box 3000
Salt Lake City, UT 84110

TABLE OF CONTENTS

	<u>Page</u>
STATE OF UTAH	1
COURT OF LOWER COURT	3
COURT OF APPEAL	3
COURT OF FACTS	3
DEFENSE	
POINT 1. THERE ARE ISSUES OF FACT TO BE DECIDED BY FACT FINDER	6
CONCLUSION	15

CASES CITED

<u>Brown Realty, Inc. v. Leah N. Abbott</u> , 562 P.2d, 238	11
<u>Harrows v. McGill</u> , 563 P.2d 189.	11
<u>Harrah v. Margetts</u> , 571 P.2d 1332.	11
<u>Harford v. Utah By Products Company</u> , 1 Utah 2nd 243, 263 P.2d, 287	14
<u>Hart v. Rabney</u> , 645 P.2d 613.	15
<u>Hess v. Mountain States Telephone and Telegraph</u> , 611 P.2d, 363	13
<u>Hess v. Prudential</u> , 558 P.2d 1337.	11
<u>Hess v. Hess</u> , 559 P.2d 964	11
<u>Hess v. Allison's</u> , 587 P.2d 130.	13
<u>Hess v. Klein</u> , 576 P.2d 1291	12

CODE CITED

Rule 106 of Civil Procedure	10
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TEXT_CITFD

Restatement of the Law of Torts, Second, § 417, 1965, 40 A.L.R.2d 1196.

IN THE SUPREME COURT
OF THE STATE OF UTAH

AND

at 014-Appellant,

CEDAR CITY CORPORATION,
vs. BRADLEY, ARTHUR O.
vs. GRANT HINCHCLIFF,
Defendants-Respondents.

Case No. 19022

APPELLANT'S BRIEF

STATEMENT OF THE CASE

Marjorie J. Durand, plaintiff and appellant, in the above-entitled matter, at all times material to this case and for a long period of time prior thereto, and up to and including the present time lived in a trailer known as trailer space number 24, at a recognized trailer park at 1027 North Main Street, Cedar City, Utah. She was at all times up to and including the 21st day of January, 1979, employed in a supervisory capacity of telephone operators in Cedar City, Iron County, State of Utah, by Mountain Bell and had been so for a considerable number of years. She lived at the trailer park under a rental agreement with the property owner. Mrs. Durand was in her own home, minding her own business, watching television the evening of the 21st day of January, 1979, when without warning a fusillade of fire arms broke out in the area and she was wounded. The damage that

the good lady is complaining of resulted from the wounding by the unprecedented fusillade of fire arms bullets erupting in true Wyatt Eyrup fashion in a heavily populated trailer park within the city limits of Cedar City, Utah. The fusillade of fire arms amounted to an expenditure of ammunition that made American expenditure of ammunition in World War II and Korea conservative; said fusillade of fire arms resulted from Cedar City police officers having violated their duty and letting known to makers go loose while under the influence of alcohol over the objections of the wife of one Neil Anderson who lived in a trailer near the plaintiff. When Neil Anderson started to return to the police station to get his brother, his wife telephone the police and they invaded the premises of Anderson. Although they had an opportunity to disarm him, they did not do so. The retreated and the fusillade of bullets went in all directions.

Thereafter, a complaint was filed against Cedar City and the officers involved alleging negligence, failure to perform their duty. But in the due course of events, defendants filed a motion for summary judgment, supported the same by affidavits and the plaintiff countered the same with affidavits. In 1982, hearing was had on defendants' motion for summary judgment and on the date of May 7, 1982, the Honorable J. Harlan Burns made an order overruling and denying defendants' motion for summary judgment and reserving to the defendants the right to renew said motion at the time of the pretrial and at the completion of discovery. Thereafter, at the pretrial on February 7, 1983,

of the affidavits and without additional information, the Court granted the motion for summary judgment in favor of the defendant. The appeal is from the order granting the summary judgment.

DISPOSITION IN THE LOWER COURT

As stated in the next preceding paragraph, on the 7th day of February, 1983, the Court saw fit to grant defendants' motion for summary judgment. It was formulated into a written order on the 1st day of February, 1983, and filed thereafter.

RELIEF SOUGHT ON APPEAL

The plaintiff and appellant, Marjorie J. Durand, seeks summary judgment granted by the Court reversed and this motion sent to the fact finder for proper disposition.

STATEMENT OF FACTS

As stated above, the plaintiff along prior to the occurrence complained of, had been employed in Cedar City, Iron County, State of Utah as a supervisor of telephone operators in Cedar City, Utah, by Mountain Bell. She had been steadily employed in this capacity for a number of years; for a considerable period of time prior to the matter complained of, she had lived in a trailer space #24 at 1027 North Main Street, Cedar City, Utah, in an organized trailer court. That one Neil Anderson lived in the adjoining trailer.

That prior to the 21st day of February, 1979 and the 21st day of February, 1979, Neil Anderson and his brother were employed as mechanics in an automotive repair institution in Cedar City, Iron County, State of Utah. That at times they

had been involved with intoxicant and had a prior history with the Cedar City police force of this jurisdiction and that each of them became belligerent and argumentative when confronted by police officers. On occasion, each had threatened to use arms in connection with what they termed "police harassment," and had on occasion prior to the 21st day of February, 1979, interfered with police officers in the due performance of their duty while the Anderson brothers were under the influence of alcohol. Neil Anderson's brother's name is Eugene Anderson. In the Anderson family there had been a prior history of shootings under these conditions; all of these items were well known to the Cedar City police officers.

That upon the evening of the 21st day of February, 1979, the defendant Grant Hinchcliff and another Cedar City police officer by the name of Bruce Marshall stopped a vehicle on north Main Street in Cedar City, Utah, because of the manner in which it was being driven. Eugene Anderson was driving the vehicle and Neil Anderson was riding as a passenger in said vehicle. Both of the brothers were taken into custody by the officers. The officers proceeded in the investigation of the driving while under the influence of alcohol instant; they took both of the Anderson brothers to the police station to apply a breathalyzer test to the driver, to-wit: Eugene Anderson. Neil Anderson was taken to the police office as part of this proceeding. While attempting to process the driving-while-under-the-influence charges against Eugene Anderson, there was interference by both brothers. The arresting officers called the wives of the two Anderson brothers

...at them. That Neil Anderson became bellicose, ...with the officers, threatened them with shooting, and ... The defendant Grant Hincheliff threatened ... Neil Anderson in jail on a charge of interfering ... in the performance of his duty.

... when the wives of the Anderson brothers arrived ... station and at the processing area, the defendant ... Hincheliff turned one Neil Anderson loose without filing ... against him, even though there had been threats of shooting ... even though he was interfering with police officers in process- ... a driving-while-under-the-influence charge in relation to ... Eugene Anderson. Officer Hincheliff asked Neil Anderson's wife ... take him home. Neil Anderson's wife asked the officers to ... lock him up because of the shape he was in. The officers refused.

Neil Anderson's wife took him home. On the way home ... and after arriving at home, Neil Anderson was bellicose and made ... threats concerning shooting and was going back to help his ... brother Eugene Anderson, the driver of the vehicle. The home of ... Anderson was in the trailer park occupied by the plaintiff ... many other people and was heavily saturated with people.

Neil Anderson made efforts to obtain a fire arm; his wife called ... for police assistance. At the time Neil Anderson's wife called ... for police assistance, Eugene Anderson and his wife were leaving ... police area, the processing of the charge of driving while ... under the influence having been completed and his wife having ... called for the appearance of said Eugene Anderson. The call ... Neil Anderson was responded by the defendants H. L. ... Arthur O. Stewart and Grant Hincheliff, functioning as

officers of the defendant Cedar City Corporation. At the time of responding to said call, the defendants H. L. Bradley and Arthur O. Stewart had actual knowledge of the present location of Neil Anderson in the police station through information obtained the same from Hincheliff. They also had actual knowledge that he had made prior threats against police officers while under the influence of alcohol. They had actual knowledge that he was under the influence of alcohol at the present time.

The officers approached the trailer of Neil Anderson; the defendant H. L. Bradley entered the trailer, saw Neil Anderson sitting down with a rifle crosswise across his knees, the bolt open, attempting to insert ammunition into same. This was from a distance of approximately four feet. The officers allowed Neil Anderson to load the gun and then they retreated as is shown by their affidavits, which are attached hereto as Exhibits "C", "D", and "E". After considerable altercation with Mr. Neil Anderson with him on the porch and two of the officers in protective positions, the shoot out commenced. Neil Anderson fired two or three shots, each of which were heard by the defendants Arthur O. Stewart and Grant Hincheliff, none of which could have been the shots that injured the plaintiff.

As a result of the shoot out, the plaintiff sitting in her own home, minding her own business, watching television was severely wounded. The damage she has complained of resulted therefrom. In addition, Neil Anderson was killed.

ARGUMENT

POINT I

THERE ARE ISSUES OF FACT TO BE DECIDED BY
FACT FINDER

to a fifty thousand-dollar question in an appeal of this
nature. The matter is not there are issues of fact still left to
be determined by the trial court. As often happens, when a judge
of a court of general jurisdiction makes conflicting decisions
on the same case, we are left with this dilemma. If one examines
pages "A" and "B" attached hereto and made a specific part
of his reference, based upon the same motion for summary
judgment after a substantial study period on the 7th day of
May, 1982, the Court on its own initiative and on an order
passed by the Court and not prepared by counsel, overruled and
granted a motion for summary judgment. However, the Court reserved
to the defendants the right to renew the motion at the time of
trial and the completion of the discovery. On the 7th day
of January, 1983, the Court made an absolute reverse decision
in the same situation without additional affidavits, without
additional information, simply by the matter being submitted to
the Court. This is not only hard to understand by plaintiff's
counsel, but is almost impossible for the plaintiff to understand.
There were issues of fact to be added or to be determined by
the order of the 7th of May, 1982, then why the
reverse decision on the 7th of January, 1983, which was incorporated
in a written decision, signed by the Court on the 1st day of
March, 1983? Both of these orders are marked as Exhibits "A"
and "B" and are attached hereto and incorporated as though set
out in the herein. While it is fine for the trial court to
take the attitude that it has a right to correct its previous
decision and it is certainly idealistic for an appellate court

to take the attitude that this kind of erroneous procedure should be upheld, endorsed, and continued, and unbalanced weights is nothing in addition that has been added to the responsibility of the parties to understand this type of reasoning. If there is sufficient evidence to justify a summary judgment as set forth in Exhibit "A", then it is impossible for parties to understand why there is sufficient evidence to justify a summary judgment as set forth in Exhibit "B" when nothing is added and included there. There is no question that there are myriads of cases in which this has happened and has been endorsed. At the same time, please explain it. When the trial court does not have additional information at the time of changing its opinion, and where the trial court fails to consider all information that is applicable, the reasoning behind this is even more fallacious. The Court disallowed two affidavits, one of Mr. Jensen and one of Patrick H. Fenton, counsel. The affidavit of Mr. Jensen did nothing but tell the caliber of the bullets that penetrated the plaintiff's trailer and the angle of penetration. The Court disallowed the same on the basis of qualification as an expert. Certainly the fact that the affidavit was made, raises the question as to what it says, and certainly, any trial court should not disqualify any affidavit of this nature without something that says otherwise which is not present. Regardless of the qualifications of Mr. Jensen, these are items that can still be proven and if necessary, additional or substitutional experts can be obtained. The real fallacious item is the disqualification of the affidavit of Patrick H. Fenton. This affidavit furnishes nothing and in the body of the affidavit, it so says. All it

...of the other affidavits, that the defendants
...Patrick H. Fenton. The affidavits of the three police
...for the accident and are responsible for the injury
...it was on its face only an attempt to digest
...of the three police officers' affidavits and
...into a form that could be readily absorbed by the
...of whether or not the affidavit of Patrick
...admitted, the contents of the three police officers'
...are still before the Court. The Court has the duty of
...what the affidavit of Patrick H. Fenton attempted to do.
...ignored these affidavits in its decision of January 7,
...Each of these affidavits are marked as Exhibits "C", "D",
...or "E", and is hereby incorporated as though set forth verbatim
...These affidavits are attached hereto. These affidavits
...show, by giving effect to the face of them, that it was
...possible for Mrs. Durand to have been hit by Anderson's bullets.
...only quarrel that the undersigned would have with said
...affidavits is that an actual measurement shows that the diagram,
...is the identical diagram attached to each of the officer's
...affidavits, is intentionally out of perspective. In all probability,
...of the diagram of the trailer court been drawn according to scale
...in proper perspective, it would have served the defendants'
...for summary judgment better than the distorted item that
...is included.

...with a thorough examination of the laws of the State
...pertaining to this item, brings us to the question that
...other item at issue herewith is an interpretation of Rule

56 of the Utah Rules of Civil Procedure. The Rules of Civil Procedure were initially adopted in 1941. Before that time, we had a similar procedure, and in the final analysis, due to the 1951 adoption of the Rules of Civil Procedure and in sequence thereto, including the various changes that have happened therein, the primary question is whether or not there are still issues of fact to be determined. One cannot even read the pleadings of this matter without coming to the conclusion that there are issues of fact still to be determined. The affidavits of the officers conclusively prove that there are issues of fact to be determined, to-wit:

1. Why do officers turn loose drunks with a known propensity to shoot when they are in violation of law?
2. When officers have a chance to disarm a man with a known propensity to shoot while he was still loading a gun, why do they engage in a shoot out?
3. Are these items of such misconduct or negligence that they justify a recovery?

These questions have not been determined. Under these conditions, there can be no question but that there should be a chance for the finder of fact to hear the matter in connection with this.

As indicated before, the history of our law prior to the Rules of Civil Procedure, state that without question that all items of this nature should go to trial. Although there are legends that holds this interpretation of Rule 56, Utah Rules of Civil Procedure as being valid, one should consider the

In the case of Brown Realty, Inc. v. Leah N. Abbott, 562 P.2d, 1000, the court held that a commission due under a listing contract was not payable because the property was not sold. There is a further question regarding the effect of the withdrawal notice abrogated time features of the listing contract. The trial court allowed a summary judgment for the real estate dealer. The appellate court held that there were unanswered questions of fact and reversed the matter.

In the case of Pace v. Pace, 559 P2. 964, under a deed of foreclosure and a counterclaim, in which the counterclaim was for accord and satisfaction and partial payments on account of obligations of this nature, there was summary judgment for the mortgage holder. This was reversed upon the finding that there were material questions of fact to payment on account and that these precluded summary judgment.

In the case of Madsen v. Prudential, 558 P2d.1337, action by trustees against trustee for accounting of pledged funds, a summary judgment was awarded to the defendant. It was reversed and held that issues of facts as to the use of funds and whether an accounting was due and the accounting in detail.

In the case of Burrows v. McGill, 563 P2d.189, a former employee brought action for a share of pension funds. The defendant sought forfeiture of pension funds based upon alleged fraud. The employee found summary judgment for the defendant. The particular matter was affirmed on the basis that there were issues of fact still undecided.

In the case of Durham v. Margetts, 571 P2d. 1332, summary judgment was affirmed on the basis that there was not

damage to a pedestrian in an unnecessary shooting, and summary judgment was granted regarding a pedestrian. Summary judgment was granted regarding a pedestrian. The issue of fact remaining is the fact that such a shooting of fact that had not been decided as to whether or not there was damage to the pedestrian, and if so, how much.

In the case of Sandberg v. Klein, 576 P.2d 1291 (which is a Washington County, Utah case, involves a quiet title action and involves the question of whether or not options had been exercised. A counterclaim was filed, claiming the exercise of an option. Summary judgment gave the quiet title action precedence. This matter was reversed; issues of fact remained. It was stated that the only time it is proper to award summary judgment is when there are no issues of fact remaining.

From all of this it can be seen that one has to look at each individual case as to whether or not there are issues of fact remaining, and that precedence means very little except that when there are issues of fact remaining, that summary judgment should not be granted.

In the question at bar, the issues of fact that are remaining are as set forth above:

1. Are officers responsible when they turn loose known trouble makers that are drunk and damages result? Even though the officers created the damage in an unnecessary shooting?
2. Are officers responsible in an unnecessary shooting for the lead that is flying around a trailer court?

One must also remember that the defendants were officers in connection with this matter. One thing that certainly bothers

... whether or not these officers should be protected in such a matter and how far does an officer go in his duty if he turns a violation of law and turns loose a known offender in violation of law, is he responsible for it? If he goes in response to a call to a known offender and has the chance to disarm him and panics, and then a shoot out, to what extent is the officer and his department responsible? Knowing that courts and everyone is going to protect officers, how far does this protection go if this protection allow them to turn loose a machine gun and ramblade into a settled area, when they should back up and take the necessary steps to get the person causing the trouble out of the known area?

Some of the cases that hold that reasonable minds could believe that there could be damage by the act of the officers and the act of the party are as follows:

Rees v. Albertson's, 587 P.2d 130. In this item, a minor bought beer. There was then an automobile accident and a minor resulted. The insurance company of the named plaintiff paid \$61,742.50, and then asked for contribution from the defendant selling the beer to the minor and for anticipating that damage would result. The trial court allowed a motion for summary judgment for the defendant. It was reversed with the comment, "A reasonable mind could believe that in selling beer to a minor, a retailer reasonably should have foreseen the likelihood of the sale of beer being combined with an automobile and producing an accident. In addition, the case of Jensen v. Mountain States

Telephone and Telegraph, 611 P.2d 363, involved an emergency vehicle of the telephone company. Said vehicle was cutting in an intersection. Said telephone company was included in a tort suit inasmuch as a vehicle sneaking around the stopped telephone vehicle got involved in a collision. Summary judgment was granted to defendant the telephone company. This was reversed on the ground that reasonable minds should have anticipated that a motorist might try to go around the emergency vehicle while it was in the intersection and that an accident could result. This particular case cites Hillyard v. Utah By Products Company, as the basis for the summary judgment and as the basis for reversing the same. An examination of this case reveals that it is not a summary judgment case; it is found at 1 Utah 2nd 143, 263 P. 2d 287. It is a negligence case and is the basic case. It adopts the standard of negligence given in the restatement of law of torts as follows: "Restatement of the Law of Torts, Second Volume of Negligence, Section 447, page 1196,

"The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if

- (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or
- (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or
- (c) the intervening act is a normal response to a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

the case that should probably receive the greatest weight. See Jackson v. Dabney, 645 P.2d 613. This was a summary judgment against an attorney. Summary judgment was granted in favor of the attorney, it was reversed with the

2011

"It is a question for the jury to ascertain whether or not the attorney breached the required standard of conduct, and where reasonable minds could differ on whether defendant's conduct measures up to the required standard of care, there should be a trial. And this precluded summary judgment."


Under these circumstances, there can be no question that the case at bar should go to trial. That there are many questions concerning the conduct of the officers as to whether or not it is a proper standard under the circumstances, and there are many questions of this nature that a fact finder should find.

CONCLUSION

That the finding of the trial court in relation to summary judgment should be reversed and the matter set for trial.

DATED this 2nd day of June, 1983.

Respectfully submitted,



PATRICK H. FENTON
Attorney for Plaintiff-Appellant

FEDERAL DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF IRON, STATE OF UTAH


FD
MAY 11 1982
CLERK OF COURT
COUNTY OF IRON
SALT LAKE CITY
1000 WEST 100 SOUTH

GEORGE J. DURAND,)
Plaintiff,) ORDER OVERRULING AND
) DENYING DEFENDANTS'
) MOTION FOR SUMMARY JUDGMENT
)
CEDAR CITY CORPORATION et al.,) Civil No. 8503
Defendants.)

This matter having come before the Court on Defendants' Motion for Summary Judgment, and the Court having reviewed the affidavits in support of said Motion and the affidavits in opposition thereto, and the Court having reviewed the Memorandums of Points and Authorities, and good cause appearing therefor;

IT IS HEREBY ORDERED that said Motion for Summary Judgment be and the same hereby is OVERRULED and DENIED, reserving to the Defendants the right to renew said Motion at the time of pretrial and at the completion of discovery.

DATED this 7 day of May, 1982.


HARLAN BURRIS
District Judge

MAILING CERTIFICATE

I hereby certify that on this 10 day of May, 1982, I mailed a copy of the above ORDER to the following: PATRICK H. FENTON, ESQ., 13 West Hoover Avenue, Cedar City, Utah 84720; ROBERT BRAITHWAITE, ESQ., 110 North Main, Suite H, Cedar City, Utah 84720; and ALLAN L. LARSON, ESQ., 10 Exchange Place, 11th Floor, Salt Lake City, Utah 84110.



ALLAN L. LARSON
CHRISTENSEN & MARTINEAU
Attorneys for Defendants
100 George Place, Eleventh Floor
Salt Lake City, Utah 84110
Telephone: 521-9000

IN THE FIFTH JUDICIAL DISTRICT COURT OF IRON COUNTY
STATE OF UTAH

MARJORIE J. DURAND,

Plaintiff,

SUMMARY JUDGMENT

vs.

CEDAR CITY CORPORATION,
H. L. BRADLEY, ARTHUR O.
STEWART, and GRANT HINCHCLIFF,

Civil No. 8503

Defendants.

Defendants' Motions to Dismiss and for Summary Judgment coming on regularly for hearing on January 7, 1983, before The Honorable J. Harlan Burns, District Court Judge, and plaintiff being present in person and through her attorney, Patrick H. Fenton, and Allan L. Larson and Robert T. Braithwaite appearing on behalf of the defendants, and the Court having reviewed the pleadings, affidavits, depositions and memoranda of authorities, and defendants having objected to the affidavits of Patrick H. Fenton, Charlene Rowley, and Jay Jenson, and asking to strike same for insufficiency pursuant to Rule 56, Utah Rules of Civil Procedure, and the matter having been fully

by counsel, and submitted to the Court for decision, the Court being fully advised in the premises, and the Court accordingly finding that the affidavits of Patrick H. Fenton and Jay Jenson are legally insufficient to raise any material issue of fact, and striking same, and the Court further finding that there exists no issue of material fact relative to the occurrence which is the subject of plaintiff's Complaint, and the Court further finding that the defendants breached no duty to the plaintiff, and that defendants are not liable to the plaintiff for the injuries sustained as a result of the occurrence of February 21, 1979, and having concluded that defendants' motions should be granted, it is hereby

ORDERED, ADJUDGED AND DECREED that the affidavits of Patrick H. Fenton and Jay Jenson are stricken, and that defendants' Motions to Dismiss and for Summary Judgment should be, and the same hereby are, granted, and plaintiff's Complaint is hereby dismissed with prejudice and upon the merits, and Summary Judgment is hereby entered in favor of the defendants and against the plaintiff, no cause of action, defendants to recover costs.

Dated this 1st day of February, 1983.

BY THE COURT:

151

J. Harlan Burns
District Court Judge

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Margo D. Colegrove, being first duly sworn, deposes and says:

That she is employed in the law offices of Snow, Christensen
& Martineau, attorneys for _____ defendants _____
_____ herein;
that she served the attached NOTICE OF ENTRY OF JUDGMENT

(Case No. 8503) upon the parties listed below by placing
a true and correct copy thereof in an envelope addressed to:


Patrick H. Fenton, Esq.
Attorney for Plaintiff
154 North Main Street
Cedar City, UT 84720

Robert T. Braithwaite, Esq.
Cedar City Attorney
P. O. Box 249
Cedar City, UT 84720

and mailing the same, postage prepaid, on the 3rd day
of February, 1983.


Margo D. Colegrove

Subscribed and sworn to before me this 3rd day of February, 1983.


Allison McCandless
Notary Public
Residing in Salt Lake County, Utah

W. J. MARTINEAU
W. J. MARTINEAU & MARTINEAU
Attorneys
1100 East 1100 South, Eleventh Floor
Salt Lake City, Utah
801 841110

IN THE JUDICIAL DISTRICT COURT OF IRON COUNTY
STATE OF UTAH

MICHAEL J. DURAND,)

Plaintiff,)

vs.)

AFFIDAVIT

CEDAR CITY CORPORATION,)

Civil No. 8503

H. L. BRADLEY, ARTHUR O.)

STEWART, and GRANT)

HINCHCLIFF,)

Defendants.)

STATE OF UTAH)

)ss.

COUNTY OF SALT LAKE)

GRANT HINCHCLIFF, being first duly sworn, upon oath,
deposes and says:

1. On or about February 21, 1979, I was employed as an officer of the Cedar City Police Department, having been a member of said department for about two years.
2. At approximately 11:20 p.m. on the evening of February 20, 1979, Officer Bruce Marshall, also of the Cedar City Police Department and I stopped a black Chevrolet driven by Eugene Anderson in the company of his brother Neil Anderson, because we suspected that the driver was operating the automobile under the influence of alcohol.
3. It was apparent that both Eugene and Neil Anderson were intoxicated. Eugene was informed by Officer Marshall that he was being placed under arrest for driving under the influence of alcohol. Both Andersons were taken to the Iron County Jail to process Eugene Anderson's arrest and make arrangements for him to be transported home.

4. I personally supervised Neil Anderson during the time the breathalyzer tests were being performed on his brother. It was necessary to prevent his interference with the breathalyzer tests. Neil Anderson demonstrated wide emotional range during this time but was controllable at all times and did not behave in a manner necessitating his incarceration for disorderly behavior or other similar charge. At no time did I believe that Neil Anderson's condition endangered the safety of others.

5. I thereafter contacted Neil Anderson's wife Charlene, explained the situation to her and asked for her assistance in transporting Neil home. Neil was released into his wife's custody. I personally placed Neil in the passenger side of his wife's vehicle at the jail and Neil indicated that he would go home and go to bed.

6. Shortly thereafter, while Eugene Anderson's bail was being arranged, Mrs. Neil Anderson telephoned the Cedar City Police Department offices and stated that Neil was causing a disturbance at the trailer park where he lived. Sergeant Harold Bradley, who took the call, indicated that Neil was threatening to kill people with his gun.

7. Sergeant Bradley, Officer Art Stewart and I responded to Mrs. Anderson's call. I traveled in my own patrol car, following Sergeant Bradley and Officer Stewart to Kelly's Trailer Court where Neil Anderson's trailer was located.

8. Neil Anderson's trailer was the second trailer from the south end, on the east side of the street. This trailer is depicted by a letter "A" on the attached diagram, which I drew on or about February 21, 1979, and hereby incorporate into this Affidavit. Sergeant Bradley parked his patrol car south of the Anderson trailer as shown by the "#4" on the diagram. I parked facing south, just to the north of the Anderson trailer as indicated by the "#1", and adjacent

...state pickup truck with the initials C.P.U. painted on
... This truck is indicated by a "#2" on the attached
... The white automobile driven by Charlene Anderson
... from the jail was parked in the driveway
... the Anderson trailer, and is shown on the dia-
...

... I exited my car, Sergeant Bradley and Officer
... proceeded toward the trailer's porch which was
... on the north side of the trailer. Sergeant Bradley,
... reaching the trailer door, apparently saw Neil Anderson
... approaching the door with a rifle in his hand. Sergeant
... shouted a warning about the gun then ran to the
... northwest corner of the trailer, taking cover in the position
... shown as "Bradley" on the attached diagram. The trailer
... door opened and Neil Anderson emerged carrying a short-
... barreled rifle.

10. Officer Stewart had no time to seek cover and was
... standing in the grassy area between the Anderson trailer and
... the white Chevrolet in the position marked "Stwt." when
... Anderson emerged from his trailer. Officer Stewart did not
... have his gun drawn and attempted to convince Anderson to put
... the rifle down. Anderson refused to do so and lowered the
... gun barrel so as to point it at Officer Stewart. My position
... is depicted on the attached diagram by "Hinch." Sergeant
... Bradley and I also admonished Anderson to discard his rifle.
... Both Sergeant Bradley and I at this time drew our own guns.

11. Anderson refused to put his rifle down. He continued
... to point the muzzle in the direction of Officer Stewart.
... Officer Stewart moved slowly back and forth to stay out of
... the rifle's line of fire, and continued talking to Anderson.
... Mrs. Anderson also emerged from the trailer three times and
... talked to Anderson, attempting to convince him to put his
... down. Anderson refused to listen. He indicated that he
... did not want his brother held in jail, but refused to accept
... assurances that Eugene's bail had been processed and
... he would return home soon.

10. Officer Stewart could reach cover, the rifle
pointed in the direction of Officer
11. in line with the trailer of Marjorie
12. west across the street from the Anderson
13. Mrs. Durand's trailer is indicated on the attached
14. by a "B". I saw Officer Stewart fall to the ground
15. I heard him to be shot. I fired three rounds at
16. Sergeant Bradley and Officer Stewart also returned
17. fire.

18. Anderson had apparently been struck by the return
19. fire and began to slump into a sitting position. As he did
20. his rifle discharged again, this time in my direction. I
21. fired three more shots at Anderson. I also heard other shots
22. fired and saw that Sergeant Bradley was also returning
23. Anderson's fire.

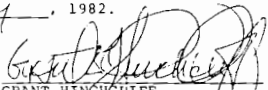
24. Anderson's wife then emerged from the trailer and
25. took the rifle from her husband. She asked for our help.
26. Sergeant Bradley and Officer Stewart approached Anderson first.
27. It was apparent that Anderson had been severely wounded and
28. was either dying or dead.

29. The accompanying diagram accurately depicts the
30. positions of all parties at the time the first shot was fired.
31. Sergeant Bradley, Officer Stewart and I were all facing east
32. southeast during the exchange of gunfire. Sergeant Bradley,
33. observed the direction of Anderson's first shot, was
34. informed about the occupants of the trailer immediately
35. across the street to the west of the Anderson trailer.

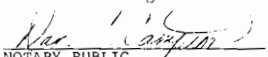
36. Sergeant Bradley proceeded to check said trailer and
37. that a woman, later identified as Marjorie Durand, had
38. in the lower leg. An ambulance was called for and
39. administered until the ambulance arrived.

... in a position to observe all of the parties
... exchange of gunfire. At no time did Sergeant
... Stewart or I fire our weapons in the
... Durand's trailer, which was behind us as
... person's fire. Only Anderson's shots could
... in Mrs. Durand's injury.

... this 7th day of JANUARY, 1982.

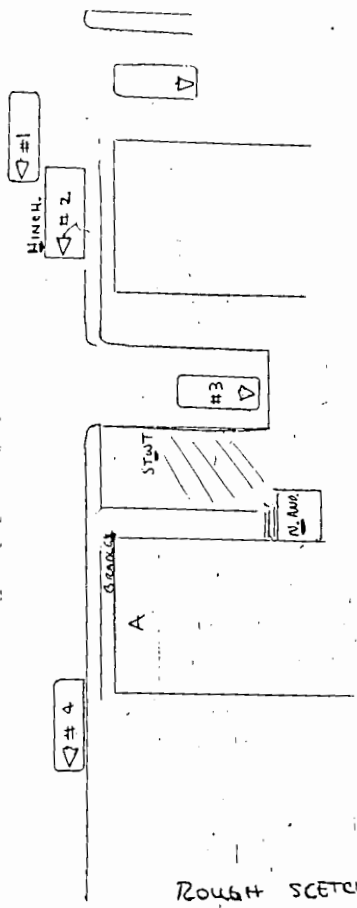
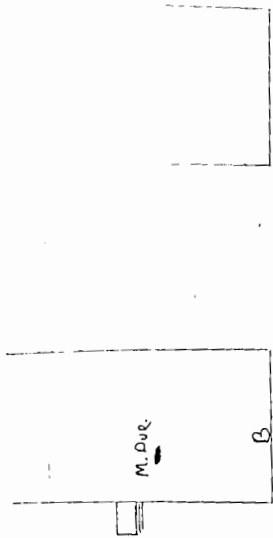

GRANT HINCHCLIFF

... AND SWORN to before me this 7th day of January,
1982.


NOTARY PUBLIC
Residing in Salt Lake County, Utah

... Commission Expires:
1/31/84

POSITIONS OF PARTIES
WHEN
FIRST SHOT WAS FIRED



ROUGH SKETCH
NOT TO SCALE
By. G. HINCHLIEF
2-21-79



STATE OF UTAH)
COUNTY OF GARFIELD) ss.
MARGO D. COLEGGIOVE)

MARGO D. COLEGGIOVE, being duly sworn, says:
I am employed in the offices of Snow, Christensen
& Johnson, Attorneys for defendants

_____ herein;
I have served the attached AFFIDAVIT of Grant Hinchcliff
_____ (Case Number 8503)
_____ plaintiff _____ by
placing a true and correct copy thereof in an envelope and
addressing it to:

Patrick H. Fenton, Esq.
Attorney for Plaintiff
13 West Hoover Avenue
Cedar City, Utah 84720

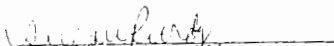
Robert T. Braithwaite, Esq.
Cedar City Attorney
P. O. Box 249
Cedar City, Utah 84720

and mailing the same, postage pre-paid, on the 18th day of
January, 1982.


Margo D. Coleggiove

TESTIFIED AND SWORN TO before me this 18th day of January,

1982


Notary Public
Residing in the State of Utah

W. L. MOORE
W. L. MOORE & MARTINEAU
Attorneys for Defendants
1111 North Main Street, Eleventh Floor
Salt Lake City, Utah 84110
Telephone: 531-9900

IN THE FIFTH JUDICIAL DISTRICT COURT OF IRON COUNTY
STATE OF UTAH

MARJORIE J. DURAND,)

Plaintiff,)

vs.)

CEDAR CITY CORPORATION,)

H. L. BRADLEY, ARTHUR)

O. STEWART and GRANT)

HINCHCLIFF,)

Defendants.)

AFFIDAVIT

Civil No. 8503

STATE OF UTAH)

)ss.

IRON COUNTY)

HAROLD L. BRADLEY, being first duly sworn upon oath, deposes and says:

1. On or about February 21, 1979, I was employed as a sergeant in the Cedar City Police Department, Iron County, Utah having been a member of said department for approximately 11 years.
2. Shortly after midnight, on February 21, 1979, I received a phone call at the offices of the Cedar City Police Department from Mrs. Neil Anderson. Mrs. Anderson indicated that her husband was causing a disturbance at the trailer park where he resided, in that he was threatening to get his gun and start killing people.
3. In response to Mrs. Anderson's call I took officer Art Stewart of the Cedar City Police Department with me in my patrol car. We proceeded to the Anderson trailer which was located at Miller's Trailer Park. Officer Grant Hinchcliff, also of the Cedar City Police Department followed in his own patrol car. I parked my car slightly south of the west end of the Anderson trailer, which was located on the east side of the street. On

attached hereto and hereby incorporated into this report. The Anderson trailer is indicated by a "A" and the Chevrolet designated by a "#4". Officer Hinchcliff parked his patrol car to the north of the Anderson trailer, as shown by a "#1" on the attached diagram.

4. Officer Hinchcliff remained by his patrol car in the location designated by "Hinch" on the diagram, while Officer Stewart and I approached the steps located on the north side of the Anderson trailer. Through the windows on the west end of the trailer, I saw an individual appearing to be Neil Anderson, who was personally known to me.

5. Upon reaching the front door of the trailer, I could see Neil Anderson through the window of the door, approaching the door with a rifle in his hands. I shouted a warning to Officers Stewart and Hinchcliff about the rifle and immediately stepped back to the northwest corner of the trailer to find some protection. My position at that time is shown on the attached diagram as "Bradley".

6. Anderson had the apparently loaded rifle in his possession from the moment that I recognized him in the trailer. At no time did I or officer Stewart have an opportunity to disarm Anderson before he emerged from the trailer with the weapon.

7. Neil Anderson stepped onto the trailer's porch with the rifle in his hands. Officer Hinchcliff and I had at this time drawn our guns, Officer Stewart had been unable to find them before Anderson emerged from his trailer and was standing without a drawn weapon on the grass between the trailer and the white Chevrolet designated as "#3" on the attached diagram. Officer Stewart's approximate location at this time is shown by the letters "Stwt" on the attached diagram.

8. Officer Stewart, Officer Hinchcliff and I all repeatedly demanded that Anderson put down his gun. Anderson stated that he had a brother Eugene released from jail. Eugene Anderson had been arrested earlier in the evening for driving under

9. I saw alcohol. Neil Anderson was told that his rifle had been arranged and that he would be home. Anderson did not respond to this information and pointed his rifle in the direction of Officer Stewart. Anderson threatened to kill Stewart even if we were successful in shooting Anderson.

10. I observed Anderson release what appeared to be a safety mechanism on his rifle and Anderson continued to follow Officer Stewart's movements with the rifle. During this conversation, Stewart had slowly yet constantly moved and tried to avoid the muzzle of Anderson's rifle.

11. At about the time Officer Stewart reached the northwest corner of the grassy area between the trailer and the white Chevrolet, Anderson's gun discharged while pointing west toward Officer Stewart. I saw Officer Stewart fall to the ground and believed that Stewart had been shot. I fired five shots at Anderson in rapid succession.

12. As Anderson, who had apparently been shot, slid into a sitting position against the trailer, he fired another shot in the direction of Officers Hinchcliff and Stewart, apparently striking the white Chevrolet, "#3" on the attached diagram. I fired another shot at Anderson and further return fire also came from Officer Hinchcliff. Mrs. Anderson then emerged from the trailer and took the rifle from Mr. Anderson's hands and asked for our assistance.

13. I then checked Anderson's condition and it appeared that he was mortally wounded. I then recalled that the first shot fired by Anderson had been aimed directly west from the Anderson porch and realized that the bullet must have entered the trailer that was on the west side of the street across from the Anderson trailer. This trailer is indicated by a "B" on the attached diagram.

I went to the trailer on the west side of the street
the safety of its occupants. Through the window
I could see a woman lying on the floor,
telephone, and bleeding from a wound in her
Her position is shown by "M. Dur." on
gram. At the urging of myself and Officer
the woman managed to crawl to the door and open it.
Officer Stewart and I continued to administer first aid to
the woman until an ambulance arrived. The woman was subse-
quently identified as Mrs. Marjorie Durand.

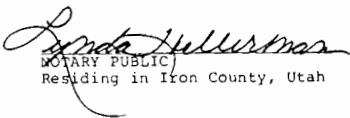
14. I was in a position to observe the actions of all
the parties involved in the exchange of gunfire. None of the
responding officers, including myself, at any time discharged
our guns in the direction of Mrs. Durand's trailer, which
was behind our backs as we returned Anderson's fire. I care-
fully observed the direction of Anderson's first shot and
this led to my discovery of Mrs. Durand in her injured con-
dition. I believe and therefore state that only Anderson's
original shot could have been responsible for the wounding of
Mrs. Durand.

Dated this 14 day of Dec, 1981.


HAROLD L. BRADLEY

SUBSCRIBED AND SWORN to before me on this 14 day of

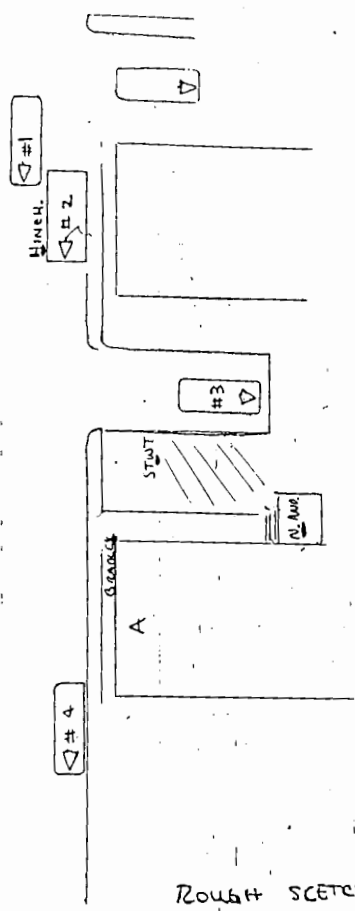
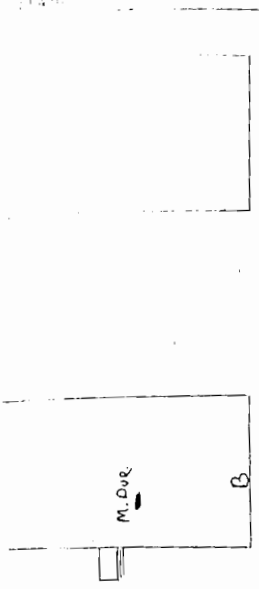
 1981.


NOTARY PUBLIC
Residing in Iron County, Utah

Commission Expires:

Jan 16, 1985

POSITIONS OF PARTIES
 WHEN
 FIRST SHOT WAS FIRED



ROUGH SKETCH
 NOT TO SCALE
 BY G. WINCHELUP
 2-21-79



STATE OF UTAH)
) : ss.
COUNTY OF KANE)

MARGO D. COLEGROVE, being duly sworn, says:

that she is employed in the offices of Snow, Christensen
& Martineau, Attorneys for defendants

_____ herein;
that she served the attached AFFIDAVIT of Harold L. Bradley
_____ (Case Number 8503)
upon _____ plaintiff _____ by
placing a true and correct copy thereof in an envelope and
addressing it to:

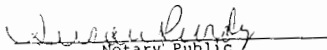
Patrick H. Fenton, Esq.
Attorney for Plaintiff
13 West Hoover Avenue
Cedar City, Utah 84720

Robert T. Braithwaite, Esq.
Cedar City Attorney
P. O. Box 249
Cedar City, Utah 84720

and mailing the same, postage pre-paid, on the 18th day of
January, 1982.


Margo D. Colegrove

DESCRIBED AND SWORN TO before me this 18th day of January,
1982.


Notary Public
Residing in the State of Utah

WILLIAM
WILLIAMSON & MARTINEAU
Attorneys
1100 East 11th Street, Eleventh Floor
Salt Lake City, Utah 84110
Telephone 533-0000

IN THE DISTRICT JUDICIAL DISTRICT COURT OF IRON COUNTY
STATE OF UTAH

MARGIE J. BRAND,
Plaintiff,

AFFIDAVIT

CEAR CITY CORPORATION,
H. L. BRADLEY, ARTHUR
O. STEWART and GRANT
HINCHELIFF,
Defendants.

Civil No. 8503

STATE OF UTAH)
)ss.
IRON COUNTY)

ARTHUR O. STEWART, being first duly sworn upon oath
deposes and says:

1. On or about February 21, 1979, I was employed as an
officer of the Cedar City Police Department, Iron County, Utah
having been a member of said department for approximately
four years.

2. At approximately midnight on the evening of February
20, 1979, I was with Sergeant Harold Bradley of the Cedar
City Police Department at the department's offices when
Sergeant Bradley received a call from Mrs. Neil Anderson
alleging that her husband was causing a disturbance at the
trailer park where they lived.

3. In response to said call I accompanied Sergeant
Bradley in the latter's car to Kelly's Trailer Park, with
Sergeant Grant Hincheliff following in his patrol car. The
trailer in question was located on the east side of the street,

... designated by the letter "A" on the attached diagram, which I hereby incorporate into this Affidavit.

Sergeant Bradley and I parked slightly south of the west end of the trailer in the position shown by the "#4" on the attached diagram. Officer Hinchcliff parked further north, as shown by the "#1" on the attached diagram.

4. Sergeant Bradley and I approached the trailer while Officer Hinchcliff remained near his car in the position designated "HINCH" on the diagram. Through the trailer's windows I observed a man who appeared to be Neil Anderson working in the kitchen area of the trailer, working with his hands on an unidentifiable object that was lying on a counter top.

5. Sergeant Bradley and I started up the trailer's stairs, which were located on the north side of the trailer. Neil Anderson approached the trailer door with a rifle in his hands. Sergeant Bradley yelled "He's got a gun" following which Bradley retreated and took cover behind the northwest corner of the trailer in the location marked "Bradley" on the diagram.

6. At no time did I or the other police officers responding to Mrs. Anderson's call have an opportunity to take the rifle from Neil Anderson's possession before he emerged from the trailer brandishing it in a menacing fashion.

7. I started to retreat towards the street but Neil Anderson had stepped onto the porch, gun in hand, while I was still on the grass between the trailer and a white Chevrolet parked parallel to the trailer. On the attached diagram, I was approximately at the position indicated by the letters "Stet" and the white Chevrolet is designated as "#3".

8. Sergeant Bradley, Officer Hinchcliff and I all attempted at this time to persuade Anderson to put his gun down. Mrs. Anderson also repeatedly emerged from the trailer and attempted to persuade her husband to put down his rifle. I

9. I kept my gun drawn at this time, although Officer [redacted] and Sergeant Bradley did. Anderson repeatedly stated that he wanted his brother Eugene released from jail. Eugene Anderson had been arrested for driving under the influence of alcohol earlier in the evening while in the company of Neil. Yet Neil did not respond to our assurances that Eugene's bail was being processed and that his brother would return home soon.

9. During the conversation with Neil Anderson, I moved slowly north and south across the lawn backing towards the street, trying to avoid the muzzle of the gun that Anderson continued to point in my direction. At one point Anderson indicated that even if the other officers were successful in shooting him, he intended to kill me with the rifle which he described as a .350 Magnum.

10. As I neared the corner of the lawn and sidewalk by the right rear corner of the white Chevrolet parked in the driveway, Anderson turned to look at Sergeant Bradley as Bradley said something to him. As I took a step to the left, Anderson's gun discharged and the bullet passed me to the right, heading directly west towards the trailer of Marjorie Durand, which is marked by a "B" on the attached diagram.

11. When Anderson's gun discharged I dove behind the white Chevrolet, moved to a more protected position on the north side of the car, stood, and fired four rounds at Anderson. Sergeant Bradley and Officer Hinchcliff were also returning Anderson's fire, from their positions indicated as "Bradley" and "Hinch" on the diagram.

12. As Anderson began to slump into a sitting position, his rifle discharged again, the bullet striking the white automobile behind which I was ^{kneeling} standing. Sergeant Bradley and Officer Hinchcliff again returned fire, from their same positions.

13. Mr. Anderson then emerged from the trailer and took the rifle from Anderson's hands. I approached Anderson and checked and found that he had no pulse. Sergeant Bradley used his radio to contact an ambulance.

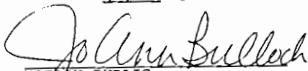
14. Shortly thereafter I saw Sergeant Bradley pounding on the door of the trailer directly west across the street from the Anderson trailer. This was the direction which Anderson's original shot had traveled. I heard Sergeant Bradley urge the trailer's occupant to open the door if that was possible. The trailer's occupant managed to open the door and I followed Sergeant Bradley into the trailer and observed that a woman later identified as Marjorie Durand had been struck in the right lower leg by a bullet. I stayed with Mrs. Durand and administered first aid until an ambulance arrived.

15. I was in a position to observe the direction of the shots fired by Sergeant Bradley, myself and Neil Anderson. I was narrowly missed by Anderson's original shot, which was aimed directly at the Durand trailer across the street. As the Durand trailer was behind the backs of all three responding police officers, I believe and therefore state that it is not possible that Mrs. Durand was struck by a police bullet and only Anderson's original shot could have resulted in the injury to Mrs. Durand.

Dated this 14 day of Dec, 1981.

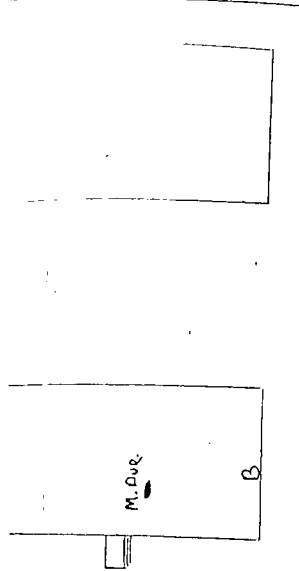

ARTHUR O. STEWART

SUBSCRIBED AND SWORN to before me on this 14th day of
December, 1981.

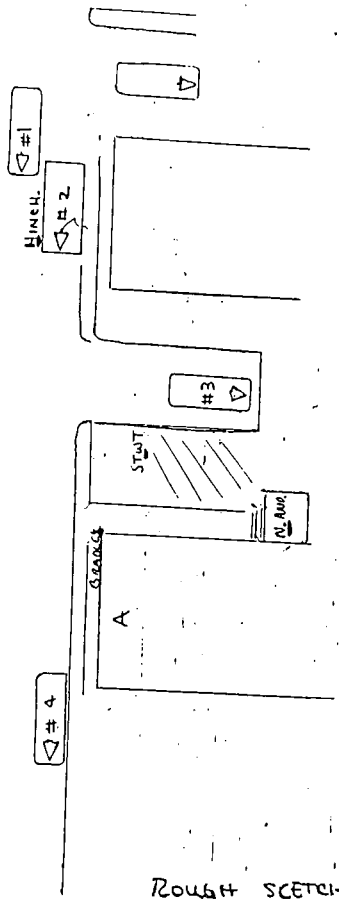

NOTARY PUBLIC
Residing in Iron County, Utah

My Commission Expires:
12-1-83

245 NORTH



POSITIONS OF PARTIES
WHEN
FIRST SHOT WAS FIRED



ROUGH SKETCH
NOT TO SCALE
BY G. HINCHLIFF
2-21-79



COUNTY OF UTAH)
) ss.
Cedar Valley LAKE)

MARGO D. COLEGROVE, being duly sworn, says:

that she is employed in the offices of Snow, Christensen
& Martineau, Attorneys for defendants

_____ herein;

that she served the attached AFFIDAVIT of Arthur O. Stewart

(Case Number 8503)

upon _____ plaintiff by

placing a true and correct copy thereof in an envelope and

addressing it to:

Patrick H. Fenton, Esq.
Attorney for Plaintiff
13 West Hoover Avenue
Cedar City, Utah 84720

Robert T. Braithwaite, Esq.
Cedar City Attorney
P. O. Box 249
Cedar City, Utah 84720

and mailing the same, postage pre-paid, on the 18th day of
January, 1982.

Margo D. Colegrove
Margo D. Colegrove

DECEASED AND SWORN TO before me this 18th day of January,

1982.

William J. Finley
Notary Public
Residing in the State of Utah

