

1993

# Kenny Jim Shaw v. Layton Construction Company, Inc., Steel Deck Erectors, Inc. : Reply Brief

Utah Court of Appeals

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930475

IN THE UTAH COURT OF APPEALS

KENNY JIM SHAW,

Plaintiff/Appellant,

vs.

LAYTON CONSTRUCTION COMPANY,  
INC., a Utah corporation,  
STEEL DECK ERECTORS, INC.,  
a Utah corporation, and  
JOHN DOES A to Z,

Defendants/Appellees,

CASE NO. 930475-CA

LAYTON CONSTRUCTION COMPANY,  
INC.,

Third-party Plaintiff,

vs.


BILT-RITE CONCRETE, INC., a  
Nevada corporation; I.  
CHRISTENSEN INC., a Nevada  
corporation or partnership;  
HARV & HIGHAM MASONRY, a Utah  
corporation; and TECH STEEL,  
a Utah corporation,

Third-party Defendants.

REPLY BRIEF OF APPELLANT TO BRIEFS OF DEFENDANTS/APPELLEES  
STEEL DECK ERECTORS, INC. AND LAYTON CONSTRUCTION COMPANY, INC.

AN APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY, THE HONORABLE PAT B. BRIAN, JUDGE

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AN APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
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SUMMARY OF ARGUMENTS

- A. APPLICATION OF THE CHOICE OF LAW RULE OF LEX  
LOCI DELICTI IS INAPPROPRIATE IN WORKMENS  
COMPENSATION CASES
- B. LEGISLATURE INTENDED THAT UTAH'S WORKERS'  
COMPENSATION ACT HAVE EXTRATERRITORIAL EFFECT

WHERE A UTAH WORKER IS INJURED IN ANOTHER STATE

- C. APPLICATION OF "MOST SIGNIFICANT CONTACTS" AND/OR "INTEREST ANALYSIS" APPROACH IS INAPPROPRIATE IN WORKERS' COMPENSATION CASES
- D. UTAH CODE ANNOTATED §35-1-62 CONTEMPLATES AND PROVIDES REMEDY FOR INJURIES CAUSED BY NEGLIGENT THIRD PARTIES WHO DO NOT PROVIDE WORKERS' COMPENSATION INSURANCE
- E. IN WORKERS' COMPENSATION CONFLICT CASES, STATE OF NEVADA DOES NOT APPLY LEX LOCI DELICTI RULE

ARGUMENT

POINT I

APPLICATION OF THE CHOICE OF LAW RULE OF LEX LOCI DELICTI IS INAPPROPRIATE IN WORKMENS COMPENSATION CASES

One major issue in this case which both Defendants have failed to recognize and address is that the doctrine of Lex Loci Delicti is applied to determine which state's tort law should be applied, not which state's workers' compensation laws apply. A workers' compensation case such as the one now before this Court, presents an entirely different set of problems than does a traditional tort case where a resident of one state is injured in another. Consequently, such a case also presents different choice of law problems. The Defendants are asking this Court to apply a tort choice of law doctrine to determine which state's workers' compensation laws applies. Their logic is that if Nevada's workers' compensation laws are applied, then those statutes will bar any right by this Plaintiff to pursue a third party action.

As stated by the Connecticut Supreme Court in Simaitis v. Flood, 437 A.2d 828, 831 (Conn. 1980), "the place-of-injury rule



affords only an unsatisfactory resolution to the workers' compensation choice of laws problem."

The choice of law in workers' compensation cases is the law of the state which paid the workers' compensation benefits and where the employment relationship commenced. Id. at 833.

Defendant, Steel Deck, claims that Lex Loci Delicti needs to be applied, otherwise chaos will ensue with different outcomes in different states. Defendants fail to recognize that the application of Lex Loci Delicti will provide uncertainty and different results in any event. Under their theory, a Nevada resident, hired in Nevada by a Nevada employer who is injured in Utah would be allowed to seek recovery for his damages applying Utah's workers' compensation laws. A different result than the one they would like to have this Court impose on the Plaintiff and other Utah residents in his position who are injured in another state while temporarily working there for a Utah employer. Defendant, Steel Deck, claims that Lex Loci Delicti promotes stability in the law, predictability of results, justice among the parties and prevents the scourge of forum shopping.

The application of the workers' compensation choice of law rule advocated by this Plaintiff would provide the same "stability" which Steel Deck feels needs to be safeguarded.

The application of the workers' compensation laws of the state where the injured party was hired and where he receives his workers' compensation benefits provides a uniform application of the law. Granted, if an injured party is from a state which bars

third party actions and he is injured in another state which may grant such a right to its residents, he will be barred from pursuing his lawsuit. Such a result is no less predictable than the application of *Lex Loci Delicti*.

The rule advocated by the Plaintiff provides uniformity of justice among the parties and likewise prevents "the scourge of forum shopping" since the law to be applied, no matter where the action is initiated, is that of the state where the injured party is employed and received workers' compensation benefits.

In its brief, Steel Deck poses the question: "which law would apply if the injured party seeking to maintain a negligence action were not a resident of Utah?" (Steel Deck's Brief at 12). Although this issue is not now before this Court on appeal, the answer is quite simple. The workers' compensation law of the state where he or she was employed and received workers' compensation benefits would apply in determining whether he has the right to bring such an action.

If others were injured on the Nevada Project as a result of a third party's negligence, the right to pursue that action against that third-party will be determined by the workers' compensation laws of their state of employment and where they received their workers' compensation benefits. Under this scenario, if, for example, a California resident was injured on the Project due to Steel Deck's or Layton's negligence, he or she could commence an action in Utah or California, but the trial court should apply California's workers' compensation laws, which, by the way, allows

third-party actions as does Utah's.

The residents of the individual states should be able to rely on their home state's labor and industrial laws as they move across state lines for temporary work. Obviously, someone in this Plaintiff's position who was hired in Utah by a Utah employer should have a reasonable expectation that if he is injured while temporarily working in another state, that the employment and labor laws of the state of Utah, including the workers' compensation laws, would provide him with all of the relief afforded by that statute. This includes the right under Utah Code Annotated §35-1-62, 1953 as amended, to bring a negligence action against any third party who may have contributed to or caused the injuries to the injured worker.

## POINT II

### LEGISLATURE INTENDED THAT UTAH'S WORKERS' COMPENSATION ACT HAVE EXTRATERRITORIAL EFFECT WHERE A UTAH WORKER IS INJURED IN ANOTHER STATE

The main thrust of Plaintiff's argument is that in a workers' compensation conflict issue, the workers' compensation laws of the state where the injured worker was hired and received workers' compensation benefits should be applied in determining whether a third party action may be brought. Dueitt v. Williams, 764 F.2d 1180 (5th Cir. 1985), O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2nd Cir. 1978), certiorari denied, Gillespie v. Schwartz, 493 U.S. 1034, 99 S.Ct. 638, 58 L.Ed.2d 696, Gregory v. Garrett Corp., 578 F.Supp. 871 (D.C.N.Y. 1983), Fox v. Sharlow, 579 A.2d 603 (Conn. Suppr. 1990), Fagan v. John J. Casale, Inc., 16 Misc.2d 1046, 184

N.Y.S.2d 109 (1959).

Plaintiff was hired in Utah, his employer is a Utah corporation and he sought and received workers' compensation benefits in Utah. If this Court adopts this rule, then it is apparent as pointed out in Plaintiff's initial brief that he has a right under Utah Code Annotated §35-1-62 to seek recovery for his injuries from negligent third parties, including the appellees herein.

In his initial brief, Plaintiff argued that Utah's Workers' Compensation Act has extraterritorial effect and grants the right to bring a third party action even when the injuries occur outside of this state. In its brief, Defendants Steel Deck assails Plaintiff's argument with the absurd statement that Plaintiff cited "dubious" cases to support his position (Steel Deck's Brief at 14).

Plaintiff finds it curious that Defendant Steel Deck would characterize decisions of this and other courts on this issue as having dubious merit while at the same time failing to cite any cases whatsoever which support its position to the contrary. Instead, Defendant Steel Deck embarks on its own interpretation of Utah's workers' compensation statutes without providing any case law which supports that interpretation. Accordingly, Steel Deck's unsupported argument on this position should stand on its own.

Defendant Layton makes the allegation that:

Although probably irrelevant, Plaintiff has gone so far as to misstate in his Statement of Facts that he filed this action for negligence pursuant to the provisions of Utah Code

Annotated §35-1-62 . . .to recover damages from negligent third parties including the defendants. (Layton's Brief at 9).

Layton was correct by stating that this issue is irrelevant. It is not an issue on appeal and Plaintiff's action is not defective simply because the statute was not cited in his Complaint. Furthermore, the trial court's Findings of Fact on Layton's own Motion to Dismiss states: "1. This is an action brought pursuant to Utah Code Annotated §35-1-62, 1953 as amended." (R. 321-329). Layton was given ample opportunity to object to the trial court's findings but failed to do so and it is absolutely inappropriate to now raise this issue on appeal.

Furthermore, Layton mischaracterizes Plaintiff's position regarding the application of §35-1-54 to this case. Plaintiff does not contend that §35-1-54 is a statutory exception to Lex Loci Delicti. Rather, Plaintiff's argument is that Lex Loci Delicti is not applicable and that §35-1-54, together with the cited authorities, support the proposition that Utah's Workmen's Compensation Act has extraterritorial effect and provides all benefits under the Act to Utah workers who are injured while temporarily working in another state. This includes the right under §35-1-62 to bring a third party action such as the one now before this Court.

### POINT III

#### APPLICATION OF "MOST SIGNIFICANT CONTACTS" AND/OR "INTEREST ANALYSIS" APPROACH IS INAPPROPRIATE IN WORKERS' COMPENSATION CASES

In their briefs, Defendants incorrectly characterize

Plaintiff's position as being one which advocates a combination of the "most significant contacts" and "interest analysis" tests applied in tort choice of law cases which have rejected the traditional Lex Loci Delicti doctrine.

Plaintiff is advocating the rule established by the authorities cited herein and in his initial brief that simply states that the workers' compensation law of the state where the injured party was hired and where he received his workers' compensation benefits should be applied in determining whether he can proceed with a third party negligence suit. The "most significant contacts" and "interest analysis" approaches deal strictly with common law tort actions and not workers' compensation cases.

Restatement "Second" Conflicts of Law §145 provides:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the most significant relationship to the occurrence and the parties under the principals stated in §6.  
(emphasis added)

The issue now before this Court is not one of tort law, but one of workers' compensation law. As stated in Hauch v. Connor, 453 A.2d 1207, 1211 (Md. 1983):

{M}any courts recognize that workman's compensation law conflict issues present distinct policy questions and should not be treated as tort or contract matters for choice of law purposes. We agree with this approach.  
(emphasis added)

Accordingly, the tort choice of law approaches addressed by Defendants should not be considered in the context of this, a

workers' compensation case, since there are several policy reasons which weigh against such an approach. Those policy considerations were addressed in this Plaintiff's initial Brief. However, Plaintiff, for the purpose of clarifying this issue, would like to reiterate that those policy reasons include:

1. Utah has an interest in protecting the rights of its residents who are hired in Utah by Utah employers.

2. Utah has a right to regulate and oversee contracts of employment which are executed in this state.

3. Utah has the right to protect the reasonable expectation of individuals hired in this state that they will be covered by and afforded the protection of Utah's workers' compensation laws, including the right under §35-1-62 to pursue legal action for the recovery of damages due to the negligence of a third party.

Assuming, for the purposes of argument, that the "most significant contacts" or "interest analysis" approaches are applied in this case, Plaintiff contends that the factors which are weighed would heavily favor the state of Utah and the application of its workers' compensation law. Under the "most significant contacts" analysis, Plaintiff concedes that the place of the injury and the place where the conduct causing the injury occurred are in Nevada. However, with respect to the second two factors, it is clear from the record that the domicile, residence, nationality, place of incorporation and place of business of the parties; and the place where the relationship between the parties is centered is clearly within the state of Utah. It is undisputed that the Plaintiff, at

the time of his injury was a resident of the state of Utah, his employer, Harv & Higham Masonry together with the two Defendants herein were Utah corporations with their principal places of business being in Salt Lake City, Utah. Furthermore, the relationship between all of the parties was clearly centered in Salt Lake City which was the location where the subcontracts between Layton, Steel Deck and Harv & Higham Masonry were executed. The Plaintiff was hired by his employer, Harv & Higham Masonry, in the state of Utah.

Under the "most significant contacts" analysis, there are two factors which favor the state of Nevada and two factors which favor the state of Utah. Under this analysis, the Court is then faced with the dilemma of which factor should be afforded the most weight and consideration in determining which state's workers' compensation law should be applied. "The mere counting of contacts should not be determinative of the law to be applied, but it is rather the relevancy of the contact in the terms of policy considerations important to the forum, vis-a-vis, other contact states." 15A C.J.S. Conflict of Laws §8(4), citing Wilcox v. Wilcox, 133 N.W.2d 408. Plaintiff has previously addressed and pointed out the policy considerations which he feels give the state of Utah a greater interest in the application of its workers' compensation laws. As stated in Wilson v. Faull, 141 A.2d 768, 774 (N.J. 1958), the forum state in a workers' compensation case has a sufficient interest in the work injury to justify the application of its own law. Further, the Court in Wilson held that the fact



that an employment contract is made within a state is deemed a sufficient interest to satisfy the full faith and credit clause of the United States Constitution. Id. at 775.

Once again, Plaintiff submits that while although the injury and the conduct giving rise to the injury occurred in Nevada, there are several other factors in this particular case which need to be seriously considered by this Court in determining that Utah has sufficient interests and contacts to apply its own workers' compensation law.

Defendant, Steel Deck, in its brief, seems to be making the argument that it would unreasonable for other subcontractors such as Bilt-Rite and I. Christensen to expect to be brought before a Utah court in a personal injury case where an allegation of negligence on their part is made. One only need to examine the facts of this case which clearly demonstrate that these subcontractors executed a subcontract in Salt Lake City, Utah with Layton Construction Company, Inc. which is a Utah corporation. It is reasonably foreseeable that whenever a party executes such a contract in the state of Utah, he or it may be brought before the courts of this state to answer for its conduct or misconduct during the performance of its obligations under that contract. Defendants, time and time again make the inference that the state of Nevada is a potential Defendant in this case. Plaintiff feels that this is a ludicrous argument since there has been no indication whatsoever that the state of Nevada was negligent in any way in contributing to Plaintiff's injuries. Notwithstanding this

argument, the state of Nevada, likewise, hired as its general contractor, a Utah corporation and it would not be unreasonable to expect the state of Nevada to have to answer for its performance under the terms of the contract. However, the issue of jurisdiction over a dispute between two states is not now before this Court and is not now subject to review.

Defendant, Steel Deck, also argues that Nevada's relation to the parties is equal to or greater than Utah's relation. Once again, Plaintiff contends that this argument is without any foundation whatsoever. The Appellees in this case are both Utah corporations, hired Utah residents as employees, and executed and entered into employment contracts and subcontracts in the state of Utah. Obviously, the state of Utah has a very close relationship to the parties herein and has a legitimate interest in overseeing those relationships, especially where a Utah resident is injured while performing his services under the terms of a contract of employment which was entered into in this state and where the injured party received workers' compensation benefits under Utah law and subject to the jurisdiction of the Utah Industrial Commission.

POINT IV

UTAH CODE ANNOTATED §35-1-62 CONTEMPLATES  
AND PROVIDES REMEDY FOR INJURIES CAUSED BY  
NEGLIGENT THIRD PARTIES WHO DO NOT PROVIDE  
WORKERS' COMPENSATION INSURANCE

In its brief, Defendant, Steel Deck, makes the argument that this Plaintiff's workers' compensation benefits are adequate and sufficient to meet his needs. It states that an injured employee

cannot choose to seek more money by initiating lawsuits. (Steel Deck's Brief at 22). Such an argument clearly runs contrary to the intention of the Utah Legislature to provide various remedies to workers who are injured while working within the course and scope of their employment. Under the Act, the Plaintiff's employer's obligation has been met due to the fact that it has fulfilled its legal requirement of providing the Plaintiff with workers' compensation insurance. The Plaintiff has been compensated under the policy of insurance and the employer's obligation thereunder has been discharged.

However, pursuant to Utah Code Annotated §35-1-62, the Plaintiff is afforded the right to pursue a third party action against negligent tortfeasors who contributed to or caused his injuries and who did not provide his workers' compensation insurance. Pate v. Marathon Steel Company, 777 P.2d 428 (Utah 1989), and Bosch v. Busch Development, Inc., 777 P.2d 431 (Utah, 1989).

Defendant, Steel Deck, seems to be arguing that since Plaintiff has recovered benefits from the workers' compensation insurance carrier, all of this state's interests in the case are satisfied and that his statutory right to pursue a negligence action and this state's interest in providing and preserving that right are somehow unimportant. To deprive the Plaintiff of this right would have a significant impact on the Plaintiff and others in his position. Plaintiff's recovery of workers' compensation benefits is really insignificant in comparison with the substantial

damages which he has sustained. Granted, the Plaintiff will be provided with medical coverage for his injuries for the duration of his life. However, the other elements of damages involved in this case have not been clearly disposed of or taken care of by his recovery of workers' compensation benefits. It is obvious that these factors were taken into consideration by the Utah Legislature when it enacted §35-1-62 in allowing an injured worker to seek the recovery of additional damages from negligent third parties instead of enacting a statute similar to that of Nevada which bars any such claims and provides that workers' compensation is the sole and exclusive remedy. Obviously, the Utah Legislature felt that it was important to provide this remedy in an effort to provide an optimum recovery for injured workers who are hired in this state.

For the various policy reasons discussed in this Plaintiff's initial brief and those reasons stated herein, it is clear and obvious that the state of Utah has greater interests in applying its own workers' compensation laws and that the contacts with the state of Utah are significant enough to apply its workers' compensation law should this Court adopt this analysis. However, Plaintiff would like to reiterate his position and argument that the appropriate rule to be applied in this and other cases of its kind is the law of the state where the injured employee was hired and which paid the injured employee's workers' compensation benefits. As in this case, if those workers' compensation laws provide a remedy to pursue a third party negligence claim, then that right should be granted to the employee who has received

benefits under those laws.

POINT V

IN WORKERS' COMPENSATION CONFLICT CASES, STATE  
OF NEVADA DOES NOT APPLY LEX LOCI DELICTI RULE  
WHICH IS ADVOCATED BY DEFENDANTS

In its brief, Layton cites the case of Tab Construction Co. v. Eighth Judicial District Court, 83 Nev. 364, 432 P.2d 90 (1967) in support of its position that Nevada's interests in this case are somehow more compelling than those of Utah. It is interesting to note that in Tab, the Nevada Supreme Court, in discussing a workers' compensation conflict issue makes no mention of the Lex Loci Delicti rule which is advocated by the Defendants herein and cites various issues which need to be considered by the trial court in determining which state's workers' compensation law should be applied. In its brief, Layton has failed to list all of the factors listed by the Nevada Supreme Court. Those factors in their entirety which are cited by the Court included: Nevada was the forum state, the general contractor was a Nevada resident, Nevada was the place of the injury, the place where the employment relationship existed, the place where the general contractor's business was localized, and the place where the employees worked. Id. at 91.

If Layton wishes to rely on Tab in support of its argument, then it is clear that Utah's "interests" and "contacts" in this case are more substantial than Nevada's. Granted, Nevada was where Mr. Shaw was working when he was injured. However, Utah is the forum state, Layton, which is the general contractor, is a Utah

resident and its business is localized in Salt Lake City, Utah. Furthermore, the place of Plaintiff's employment was Utah. He was hired by Harv & Higham Masonry which is a Utah corporation and he performed several jobs for his employer in Utah prior to working on the Nevada project. Of further significance, and as has been stated earlier, the subcontracts between Layton and Plaintiff's employer and Defendant Steel Deck were executed in Salt Lake City, Utah.

Layton concedes that it is not a Nevada resident but argues that the fact that the state of Nevada is owner of the Project should somehow make a difference. The Nevada Supreme Court in Tab did not list the ownership of a project as a determining factor. Furthermore, the state of Nevada is not a party to the action and Plaintiff has no intention of naming it as a party.

Layton argues that since Plaintiff "chose" to work for his employer in Nevada and joined a union there, then he has availed himself of Nevada's "benefits". The state of Nevada has bestowed no benefits whatsoever on the Plaintiff. The only reason Plaintiff was paid more was due to the fact that he received a per diem living allowance while he was temporarily living in Nevada while he worked on the Project. This is a common benefit provided to construction workers who are temporarily assigned to jobs away from their place of residence and was a benefit given to Mr. Shaw by his Utah employer, and was not a benefit which came from the State of Nevada.

Plaintiff did not receive any benefits, including workers'

compensation benefits from Nevada. And now, Defendants are arguing that Nevada's workers' compensation laws should be applied in depriving Plaintiff of his right to recover for his injuries caused by negligent tortfeasors. Such a negative and oppressive outcome for the Plaintiff is anything but a benefit.

One final distinction in the Tab case which needs to be pointed out, is the fact that in Tab the lawsuit was filed in Nevada against the general contractor which was a Nevada resident. As stated by the Nevada Supreme Court in Tab:

Significant is the fact that it is the state of the forum. If the forum state is concerned, it will not favor the application of a rule repugnant to its own policies, and the law of the forum will presumptively apply, unless it becomes clear that non-forum incidents are of greater significance. Id. at 91.

Utah, as the forum state, has established, as its policy, the right of injured workers to seek recovery from negligent third parties pursuant to §35-1-62. The application of Nevada's workers' compensation laws, which prohibits such actions is so clearly repugnant to that policy, that no elaboration is needed.

The factors which favor the application of Utah's workers' compensation laws have been dealt with in great detail in Plaintiff's initial brief as well as this Reply Brief. Taking into consideration all of the factors which the Nevada Supreme Court deems to be important and of significance, it is clear that the workers' compensation laws of Utah would be applied, especially in light of the importance which the state of Nevada places on the interests of the forum state and not necessarily those interests of

the state where the injury occurred.

CONCLUSION

As set forth in Plaintiff's initial brief and as set forth hereinabove, the prevailing authority states that the application of the rule of Lex Loci Delicti in workers' compensation case, is inappropriate due to various policy reasons. The current trend throughout the country applies a different choice of law standard in cases of this type wherein the law of the state where the injured party resides, where he was employed, and where he received his workers' compensation benefits is applied in determining his right to bring a third party action, not the workers' compensation laws of the state where he was injured.

The application of the rule advocated by this Plaintiff affords the same, and in some cases better, stability in the application of law and prevents the "scourge of forum shopping" which seems to be of concern to the Defendants herein.

Furthermore, Utah's Workmen's Compensation Act was and is intended by the Legislature and, according to decisions of this Court, to have extraterritorial effect and the benefits provided by the Act, including the right to bring a third party tort action, are conferred upon Utah residents who are injured while temporarily working in another state for a Utah employer.


The prevailing rule being adopted by numerous jurisdictions is not the "most significant contacts" or the "interest analysis" approaches which are advocated by the Defendants. However, even under these theories, it is clear that Utah's interests and



contacts with the parties and the events are so significant that there is no reason why Utah's workers' compensation laws should not be applied. Furthermore, as enunciated by the Nevada Supreme Court in the Tab Construction case, the fact that Utah is the forum state together with the other elements involving the residence of the Plaintiff and the Defendants in Utah is of such profound significance that Utah's laws should be applied.

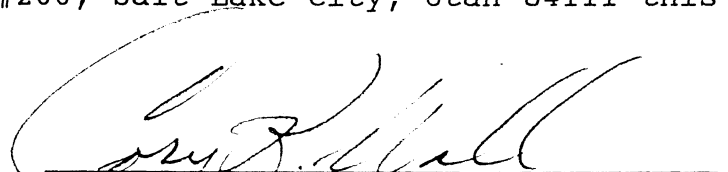
Based upon the foregoing, Plaintiff respectfully requests that the Orders of the Trial Court granting Summary Judgment and Dismissal be reversed and that this matter be remanded to the Trial Court for further proceedings.

RESPECTFULLY SUBMITTED:

  
CORY R. WALL  
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Reply Brief was hand delivered to Lee C. Henning, 175 South West Temple, #510, Salt Lake City, Utah 84101 and Steven B. Smith, 261 East 300 South, #200, Salt Lake City, Utah 84111 this 2<sup>nd</sup> day of November, 1993.

  
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