1995

Thompson v. Community Nursing Servie : Brief of Appellee

Utah Court of Appeals

Theresa Thompson; Pro Se.
Micheal Patrick O\'Brien; Jones, Waldo, Holbrook & McDonough; Attorneys for Defendant/ Appellee.

IN THE SUPREME COURT OF THE STATE OF UTAH

THERESA F. THOMPSON, Plaintiff/Appellant, vs. COMMUNITY NURSING SERVICES, Defendant/Appellee.	:	**APPELLEE'S/DEFENDANT'S BRIEF** Case No. 950102 Priority No. 15

APPEAL FROM A SUMMARY JUDGMENT ENTERED IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, BY J. DENNIS FREDERICK, DISTRICT JUDGE

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MISCELLANEOUS

Appellee/Defendant Community Nursing Services ("CNS"), by and through its undersigned counsel of record, hereby files this Brief in opposition to the appeal filed by Plaintiff (hereafter "Plaintiff") in the above-captioned matter.

JURISDICTION

Assuming that Plaintiff timely filed a Notice of Appeal, an issue addressed in more detail below, this Court has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF ISSUES PRESENTED AND STANDARD FOR REVIEW

This appeal presents the following issues for resolution by this Court:

1. Whether the trial court erred in entering an Order and Judgment on December 23, 1994 dismissing Plaintiff's Complaints which sought to hold CNS liable in tort for absolutely privileged statements it made during the course of an EEOC investigation.[1]

2. Whether Plaintiff timely filed her notice of appeal.[2]

3. Whether Plaintiff should be held liable for costs on this appeal.

The first issue is a legal issue that this Court reviews for correctness without deference to the summary judgment ruling of the trial court. Salt Lake City Corp. v. Cahoon

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[1] By its own express terms, Plaintiff's Notice of Appeal is clearly limited to seeking review of the Order and Judgment dated December 23, 1994 (Addendum "E"). Thus, this Court has not been asked to determine whether the trial court acted properly in denying various post-judgment motions filed by Plaintiff. These post-judgment motions are discussed below in the section outlining the course of the proceedings before the trial court.

[2] This issue was first raised with this Court when CNS filed a Motion for Summary Disposition on March 3, 1995. The Court denied this Motion in an Order dated June 21, 1995. To the extent that this issue can still be raised during the course of the normal appeal processes, CNS does so here and presents its argument later in this brief. To the extent this issue has been finally resolved by the Order dated June 21, 1995, counsel for CNS apologizes in advance for presenting this argument again.

and Maxfield Irrigation Co., 879 P.2d 248, 251 (Utah 1994). The second and third issues relate to the appeal itself and were not part of the trial court proceedings.

NATURE OF THE CASE

In this lawsuit, Plaintiff seeks to impose liability on CNS for statements that are absolutely privileged because they were allegedly made during the course of a judicial or quasi-judicial proceeding, specifically an investigation by the United States Equal Employment Opportunity Commission ("EEOC") into an age discrimination charge Plaintiff filed. The EEOC ruled in favor of CNS on this charge. A true and correct copy of the EEOC's decision (which was also presented to the trial court below) is attached hereto as Addendum "A." Because the statements at issue are absolutely privileged, Plaintiff's claims are not actionable, were properly dismissed by the trial court. This Court should affirm that ruling.

COURSE OF PROCEEDINGS BELOW

After she was discharged by CNS for performance issues, Plaintiff filed an age discrimination charge with the EEOC. During the course of investigating this charge, the EEOC spoke to several current and former employees of CNS. On August 30, 1994, the EEOC issued a written Determination and Right to Sue letter stating there was no reasonable cause to conclude Plaintiff had been the victim of discrimination. The Right to Sue letter stated, "**Following this dismissal, the Charging Party may only pursue this matter by filing suit against the Respondent named in the charge within 90 days of the receipt of this letter.** Otherwise, the Charging Party's right to sue will be lost." (See Addendum "A") (emphasis in original).

Instead of filing such a discrimination lawsuit, however, on or about October 12, 1994, acting pro se, Plaintiff filed a lawsuit against CNS entitled: "Complaint for Financial Loss and Severe Emotional and Physical Stress for: Defamation of Personal and Professional Character." Record at 2-3 (Addendum "B"). The Complaint's prayer for relief stated, "Plaintiff prays judgment against Defendants for defamation of personal and professional character...." Record at 3. On or about October 19, 1994, Plaintiff filed an amendment to this Complaint stating, "Plaintiff charges Defendant with making defamatory remarks...." Record at 10-13 (Addendum "C"). On their face, both Complaints plainly sought to impose defamation liability on CNS for statements allegedly made during the EEOC investigation.

On November 1, 1994, CNS filed a Motion to Dismiss and/or for Summary Judgment. Record at 38-58. The basis for this Motion was that CNS was absolutely privileged from any alleged defamation liability for statements allegedly made during the course of the EEOC investigation. CNS presented a copy of the EEOC Determination (Addendum "A") to the trial court as an exhibit to its motion.

On or about November 7, 1994, Plaintiff filed a document opposing CNS' motion and entitled "Motion to Deny Dismissal and/or Summary Judgment Requested by Defendant and Grant Summary Judgment to Plaintiff." Record at 59-82. The trial court held a hearing on all these matters on December 12, 1994 and took them under advisement.

Later that same day, the trial court issued a minute entry treating CNS' motion as a request for summary judgment, granting summary judgment "for the reasons specified in the supporting memoranda" and requesting CNS' counsel to prepare an order and judgment. Record at 93 (Addendum "D"). On December 23, 1994, the court signed and entered an Order

and Judgment dismissing Plaintiff's Complaints because the statements allegedly made by CNS were absolutely privileged. Record at 119-21 (Addendum "E").

In the meantime, Plaintiff filed a pleading dated December 20, 1994, asking the court to reverse its judgment and to add the following claims to the Complaints which had already been dismissed by the order contained in the minute entry:

- "Plaintiff charges Defendant with perjury under oath, violation of Utah Code Ann. sec. 76-8-504 and sec. 76-8-504." [written in hand above: "76-8-502"].
- "Plaintiff charges Defendant with communication fraud, violation of Utah Code, [sic] Ann. sec. 76-10-1801."
- "The defamation of the Plaintiff's character was committed by perjury under oath and was done for the purpose of obtaining a decision from the EEOC in their favor...."
- "Plaintiff charges Defendant with the tort of outrage...."

Record at 100-15 (emphasis in original). On or about December 22, 1994, CNS filed a memorandum in opposition to this Motion. Record at 116-17.

On or about December 30, 1994, Plaintiff filed another motion to "Reverse Judgment" and "Amend Complaint," replacing the previous motion seeking to add the same claims discussed above and asking for oral argument. Record at 126-31 (Addendum "F"). On or about January 5, 1995, the court denied the request for oral argument on this Motion and indicated it would rule on it when properly submitted for decision. Record at 132-33.

On or about January 9, 1995, Plaintiff filed a document entitled "Request for Decision." See Addendum "G."[3] Rather than merely submitting her motion for decision,

[3] Counsel for CNS could not locate any reference to this pleading in the record index prepared by the trial court.

however, for the first time, Plaintiff explained in detail that she was seeking to add not only the new claims outlined above, but also an age discrimination claim based on the original EEOC charge. CNS objected to the same and filed a memorandum in support of this objection. Record at 134-40.

The court denied Plaintiff's Motion in a minute entry dated January 12, 1995. Record at 141-42. On or about January 13, 1995, Plaintiff filed a reply to the objections filed by CNS, Record at 144-47, as well as her own objection to what she termed a "hasty decision" made by the court on the motion she herself had already submitted for decision on January 9, 1995. Record at 143.

Bending over backwards to be fair to Plaintiff, on January 18, 1995 the trial court issued a minute entry setting aside its previous minute entry of January 12, 1995 and indicating the matter would be ruled on when submitted for decision. Record at 150-51. On or about January 20, 1995, Plaintiff again submitted for decision her motion to "Reverse Judgment" and "Amended Complaint". Record at 152-53. In a minute entry dated January 26, 1995, the trial court denied Plaintiffs' Motion "for the reasons specified in Defendant's responding memorandum." Record at 154-55. The court signed an Order to the same effect on February 8, 1995. Record at 156-57 (Addendum "H").

On or about February 22, 1995, Plaintiff filed a Notice of Appeal from the final Judgment entered by the court on December 23, 1994. Record at 159-61 (Addendum "I"). This Notice was filed fully 61 days after the final Judgment appealed from was entered. In a Motion for Summary Disposition filed March 3, 1995, CNS sought dismissal of this matter on the merits and because Plaintiff's Notice of Appeal was filed two months after the entry of final

judgment and thus the appeal was not timely and this Court had no jurisdiction over the same. In an Order dated June 21, 1995, this Court denied this Motion and ordered the Parties to follow the normal appeal process.[4]

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[4] As noted above under the Statement of Issues section, to the extent this issue of timeliness can still be raised as part of this appeal, CNS now does so and provides the following brief statement of why it believes jurisdiction is lacking and why this appeal can and should be dismissed for this reason alone.

The failure to timely file a notice of appeal means that an appellate court has no jurisdiction over the appeal. Nelson v. Stoker, 669 P.2d 390, 392 (Utah 1983); Bowen v. Riverton City, 656 P. 2d 434, 436 (Utah 1982); Burgers v. Maiben, 652 P.2d 1320, 1321-22 (Utah 1982). As Plaintiff concedes in her Notice of Appeal and Docketing Statement here, the final judgment in this case was entered on December 23, 1995. Both the Notice of Appeal and Docketing Statement expressly indicate that it is this December 23, 1995 final judgment from which Plaintiff appeals.

Rule 4(a) of the Utah Rules of Appellate Procedure mandates that an appeal must be brought within thirty (30) days of "the date of entry of the judgment or order appealed from." Thus, Plaintiff's deadline to file an appeal from the final judgment was January 23, 1995. Plaintiff missed this deadline by a substantial amount of time; her Notice of Appeal was filed February 22, 1995, fully sixty-one (61) days after the entry of final judgment.

Rule 4(b) of the Utah Rules of Appellate Procedure allows the time to file a notice of appeal to be tolled only under specific, limited circumstances, namely the filing of a motion for judgment under Rule 50(b), to amend or make additional findings under Rule 52(b) or Rule 59, or for a new trial under Rule 59. None of those circumstances exists here.

Plaintiff filed post-judgment motions to "Reverse Judgment" and "Amend Complaint" and the memoranda in support of these motions consisted largely of pleas for reconsideration, re-argument of the issues previously resolved by the trial court and statements in support of her allegation that she should be able to assert criminal and other claims. None of these motions should serve to toll the time for filing a notice of appeal under Rule 4(b) of the Utah Rules of Appellate Procedure.

The Utah Rules of Appellate Procedure plainly do not allow the filing of a motion to amend a complaint to toll the time for filing a notice of appeal. Thus, the only question is whether Plaintiff's motion for reconsideration tolls this time period. It does not.

(continued...)

STATEMENT OF FACTS

Because CNS moved to dismiss this matter below, it properly assumed, for the purposes of that motion, only that the facts stated in the Complaints were true. CNS submitted only the EEOC Determination for consideration beyond the pleadings. Accordingly, there are no factual or background matters to discuss with this Court that have not already been addressed above.

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[4] (...continued)

None of the circumstances allowing tolling exist here. Rule 50(b) of the Utah Rules of Civil Procedure allows a party to seek a judgment notwithstanding a jury verdict. Plaintiff here made no such motion nor could she, as there was no jury verdict to seek to overturn.

Rule 52(b) allows a party to move to amend a judgment and/or add additional findings. Plaintiff's motions did no such thing and rather simply sought for the trial court to completely change its mind and reverse its decision. Furthermore, there were no factual findings to amend, as the trial court ruled as a matter of law against Plaintiff's claims.

Finally, Rule 59 allows a party to seek a new trial. Plaintiff's motion could not possibly have been made pursuant to Rule 59 as there was no trial in the first place. Plaintiff's motion was, at best, not one for a new trial but one for a "new summary judgment" asking the court to change its mind. In Watkiss & Campbell v. Foa & Son, 808 P.2d 1061 (Utah 1991), because a motion captioned "motion for reconsideration" of a summary judgment ruling was essentially treated by the trial court as a motion for a new trial, the Court ruled that the time for filing a notice of appeal was tolled. Id. at 1064-65. Plaintiff's motion to "Reverse Judgment" here was not treated as a new trial motion, and in fact, the Order denying it specifically stated that the motion was treated as a motion for reconsideration. See Order dated February 8, 1995 (See Addendum "G"). If Plaintiff's motion to "Reverse Judgment" here tolls the appeal time, every motion for reconsideration, and every "hey-Judge-please-change-your-mind" motion must be held to do so. They will then be filed after every dispositive order in the trial courts, something at odds with the clear intent of the applicable rules that only certain post-judgment motions toll the time to file a notice of appeal.

Thus, there was no tolling under Rule 4(b) of Plaintiff's time to file a notice of appeal. Accordingly, Plaintiff's appeal is not timely and should be dismissed.

Plaintiff evidences a chronic inability to understand that CNS admitted the facts alleged in her Complaints solely for the purposes of its Motion to Dismiss, a point CNS expressly stated in its pleadings and in oral argument. (See, e.g., partial transcript of argument attached hereto as Addendum "J"). CNS has denied Plaintiff's allegations all along, but moved for dismissal because even if Plaintiff's allegations are true, she cannot prevail.[5]

SUMMARY OF ARGUMENT

Plaintiff seeks to impose liability on CNS for statements she alleges its witnesses made during an EEOC investigation. Because any such statements made during this quasi-judicial proceeding are absolutely privileged, Plaintiff's claims are not actionable.

ARGUMENT

I. THE TRIAL COURT PROPERLY PRECLUDED PLAINTIFF FROM SEEKING TO IMPOSE LIABILITY FOR STATEMENTS ALLEGEDLY MADE DURING A JUDICIAL OR QUASI-JUDICIAL PROCEEDING

The essence of Plaintiff's lawsuit against CNS, despite her numerous attempts to redefine it each time it was rejected by the trial court, has been to try to impose some type of tort liability on CNS for statements allegedly made about her during the course of responding to the discrimination charge she filed with the EEOC. This is obvious from a cursory review of her Complaint and Amended Complaints, as well as from the statement of issues on pp. 2-3 of

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[5] Plaintiff's endless harping on this point and unfounded accusations of criminal or unprofessional conduct related to the same are completely distorted, unfounded, inappropriate and should not be tolerated, even from a pro se litigant. Equally disturbing are Plaintiff's unprovoked attacks against Judge Frederick, who conducted himself with professionalism and dignity (and with great, if undeserved, patience toward Plaintiff) throughout this process. It certainly is Plaintiff's right to disagree with the results to date of this litigation. It is not her right, however, to litigate this appeal by way of insults and ugly, meritless accusations. She should be sanctioned for such conduct.

her Docketing Statement. Thus, no matter how she attempts to reframe her lawsuit (and she tried to do so quite often before the trial court), as a matter of law there is no basis for imposing any liability on CNS under these circumstances because these alleged statements are privileged.

It is well-established that there is an absolute privilege from liability for statements made during the course of judicial or quasi-judicial administrative proceedings. See Restatement (Second) of Torts, §§ 587-588 (1977) (hereafter cited as "Restatement");[6] Prosser and Keeton on Torts, § 114, pp. 816-819 (1984) (hereafter cited as "Prosser"). This privilege "is based upon the public interest in according to all men the utmost freedom of access to the courts of justice for the settlement of their private disputes." Restatement § 587, comment (a). The privilege applies to any sort of judicial or administrative proceeding, in any of the branches of government, where a type of judicial function is performed. Id. at § 585, comment (c); Prosser, at § 114, pp. 818-819.

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[6] Restatement Section 587 states:

> A party to a private litigation or a private prosecutor or defendant in a criminal prosecution is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding.

Restatement Section 588 states:

> A witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as a part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding.

Utah follows this rule of law. See Allen v. Ortez, 802 P.2d 1307 (Utah 1990). Utah has also codified an absolute privilege into its statutory law. See Utah Code Ann. §§ 45-2-3(2), 45-2-10(2)[7]

In Allen, the Utah Supreme Court relied on both the Restatement and Prosser as discussed above and stated:

> One of the absolute privileges is that granted to participants in judicial proceedings. The general rule is that judges, jurors, witnesses, litigants and counsel in judicial proceedings have an absolute privilege against defamation. [citations omitted] This privilege is premised on the assumption that the integrity of the judicial system requires that there be free and open expression by all participants and that this will only occur if they are not inhibited by the risk of subsequent defamation suits. [citations omitted].

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[7] Utah Code Ann. § 45-2-3(2) states:

> A privileged publication or broadcast which shall not be considered as libelous or slanderous per se, is one made:
>
> > (2) In any publication or broadcast of or any statement made in any legislative or judicial proceeding, or in any other official proceeding authorized by law.

Utah Code Ann. § 45-2-10(2) states:

> A privileged broadcast which shall not be considered as libelous, slanderous, or defamatory per se, is one made:
>
> > (2) In any broadcast of or any statement made in any legislative or judicial proceeding, or in any other official proceeding authorized by law.

Id. at 1311. Of course, an absolute privilege means there is no cause of action regardless of whether the statements at issue are true or false. See, e.g., Williams v. Standard Examiner Pub. Co., 27 P.2d 1, 13 (Utah 1933).

The Utah Supreme Court in Allen outlined three elements necessary to any successful claim of absolute privilege:

> First, the statement must have been made during or in the course of a judicial proceeding. [footnote omitted]. Second, the statement must have some reference to the subject matter of the proceeding. [citation omitted]. Finally, the one claiming the privilege must have been acting in the capacity of a judge, juror, witness, litigant or counsel in the proceedings at the time of the alleged defamation.

802 P.2d at 1312-13. As the trial court properly found here, all three of these criteria are satisfied in the case at hand.

First, on its face, Plaintiff's initial Complaints plainly allege that the statements at issue were made during the course of the EEOC proceedings and thus this fact is not disputed. See Record at 2-3, 10-13 (Addenda "B" and "C").

Second, the matters at issue go to why Plaintiff was terminated from her employment with CNS and whether these were the true reasons or a pretext for alleged discrimination, essential inquiries in any EEOC investigation. See e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Branson v. Price River Coal Co., 627 F. Supp. 1324 (D. Utah 1986) aff'd 853 F.2d 768 (10th Cir. 1988). Thus, the alleged statements at issue clearly had some reference to the EEOC proceedings.

Finally, it is not disputed that Plaintiff's initial Complaint attributes the statements to CNS, which was clearly a litigant in the EEOC matter. See Record at 2-3, 10-13 (Addenda

"B" and "C"). Moreover, the persons who presented evidence on behalf of CNS were witnesses. Thus, the absolute privilege as outlined in Allen applies here.

The same result has been reached in very similar cases involving EEOC proceedings. See Thomas v. Petrulis, 465 N.E.2d 1059 (Ill. Ct. App. 1984); Hurst v. Farmer, 697 P.2d 280 (Wash. Ct. App. 1985), review denied 103 Wash. 1038 (1985).

In the Thomas case, the plaintiff filed a libel action claiming he was defamed by statements made by the defendant in a charge of discrimination the defendant had filed with the EEOC. The court dismissed the defamation claim, holding that the EEOC was a quasi-judicial body and that statements made during the course of such proceedings before the EEOC were absolutely privileged. 465 N.E. 2d at 1061-64. Clearly this is a correct decision, as the EEOC possesses all the necessary characteristics to be classified as a quasi-judicial entity. Id.

In the Hurst case, virtually identical to the case at hand, the plaintiff claimed he was defamed by documents and statements provided by his former employer to the EEOC during the course of the EEOC's investigation of the plaintiff's discrimination charge. The court concluded that such statements were absolutely privileged and could not support a defamation action. 697 P.2d at 282.

Other courts have reached the same conclusion when plaintiffs have used other tort theories besides defamation, such as the tort of outrage, to try to impose liability for statements made during the course of a judicial or quasi-judicial proceeding. See Correllas v. Viveiros, 572 N.E.2d 7, 8 (Mass. 1991) (affirming summary judgment in favor of defendant because statements made in judicial proceeding were absolutely privileged and thus could not support

either a defamation claim or a claim for intentional infliction of emotional distress); Doe v. Blake, 809 F. Supp. 1020, 1027-28 (D. Conn. 1992) (same).[8]

The same public policy reasons that support the absolute privilege as applied to a defamation claim must preclude an "outrage" or similar tort or other claims that make the same basic assertions based on privileged statements. To do otherwise would circumvent and abrogate the absolute privilege that is necessary for judicial and quasi-judicial proceedings to be conducted with the free and open expression required for resolution. Parties to litigation must be able to give information uninhibited by the threat of lawsuits based on the information they presented in the proceeding.[9]

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[8] This point is probably irrelevant to this appeal as the trial court's denial of Plaintiff's post-judgment efforts to amend her Complaints to assert the tort of outrage is not even before this Court as part of this appeal. Plaintiff's Notice of Appeal expressly states that the Judgment she appeals from is the December 23, 1994 Order and Judgment which dismissed Plaintiff's first two Complaints that contained no reference to the tort of outrage. The court ruled on the post-judgment motions later.

The same is true regarding Plaintiff's apparent effort (dated January 9, 1995) to assert an age discrimination claim, a request made (in a notice to submit) over two weeks after the entry of the December 23, 1994 Order and Judgment appealed from. Even if this issue is somehow properly before this Court, however, Plaintiff's claim would fail. The right to sue letter issued to Plaintiff on August 30, 1994 expressly required her to sue within 90 days or lose her right to sue altogether. Thus to be timely, Plaintiff's claim for discrimination should have been filed no later than December 1, 1994. Plaintiff clearly missed this filing deadline and thus is precluded from pursuing this claim. See 42 U.S.C. § 2000e-5(f)(1) (". . . within ninety days after the giving of such [right to sue] notice a civil action may be brought. . . ."; Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151-52 (1984) (also concluding at n. 3 that relation back provision of Rule 15(c) does not apply in circumstances of that case); Cottrell v. Newspaper Agency Corp., 590 F.2d 836, 837, 839 (10th Cir. 1979) (claim brought beyond 90 days barred); Flaherty v. Illinois Department of Corrections, _____ F. Supp. _____, 1995 U.S. Dist. Lexis 6336, *4 (N.D. Ill. 1995) ("pro se litigants must abide by the filing requirements imposed by Congress").

[9] Moreover, the conduct alleged by Plaintiff is insufficient as a matter of law to support (continued...)

Accordingly, the trial court acted properly in not allowing Plaintiff to attempt to impose tort liability on CNS for statements allegedly made by CNS to the EEOC investigator deciding how to rule on Plaintiff's charges. This Court should affirm that decision made by the trial court in this case.

II. CNS SHOULD BE AWARDED APPROPRIATE COSTS AND DAMAGES BECAUSE THIS APPEAL IS FRIVOLOUS

For the reasons outlined above, this appeal is frivolous and completely without merit. Plaintiff has also conducted this appeal in an ugly and insulting manner that should not be tolerated even from a pro se litigant. Therefore, CNS respectfully requests that it be awarded costs and damages under Rules 33 and 34 of the Utah Rules of Appellate Procedure.

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[9] (...continued)
any outrage tort cause of action. A similar situation arose in Hurst v. Farmer, 697 P.2d 280 (Wash. Ct. App. 1985). In that case, the court held that statements made by the representatives of an employer during an EEOC proceeding were absolutely privileged. Id. at 282. The plaintiff in Hurst also alleged the tort of outrage. Id. The court rejected the claim as a matter of law, stating:

> Altier's [the employer representative] conduct, as a matter of law, was not so "extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community."
>
> ***
>
> It should be noted that the employer was required by the Equal Employment Opportunity Act to investigate the complaints against Hurst and the action taken was well within the spirit of that Act.

Id. (citation omitted); see also Howcroft v. Mountain States Tel. & Tel., 712 F. Supp. 1514, 1521-22 (D. Utah 1989) (mere termination does not constitute outrageous conduct to support tort); Larson v. Sysco Corp., 767 P.2d 557, 561 (Utah 1989) (same).

As in Hurst, here CNS was required to investigate and respond to the allegations and charge filed by Plaintiff and it did so well within in the spirit of the law. Thus, CNS' actions are privileged and do not support any claim of the tort of outrage.

CONCLUSIONS

Because CNS's statements were allegedly made during the course of and plainly relevant to the EEOC proceeding initiated by Plaintiff, and thus are absolutely privileged, Plaintiff's claim in this case fails, the trial court acted properly in dismissing it and there is no substantial basis for any review of that decision. Accordingly, CNS respectfully requests this Court to affirm the decision of the trial court, dismiss Plaintiff's appeal, and award appropriate costs and damages.

DATED this 21ST day of July, 1995.

JONES, WALDO, HOLBROOK & McDONOUGH

By Michael Patrick O'Brien

Michael Patrick O'Brien
Attorneys for Defendant/Appellee Community Nursing Services

CERTIFICATE OF SERVICE

I hereby certify that on the 21ST day of July, 1995 I caused to be mailed, postage prepaid, two true and correct copies of the foregoing APPELLEE'S/DEFENDANT'S BRIEF, to the following:

Theresa F. Thompson
Plaintiff Pro Se
Box 786
Park Valley, Utah 84329

Michael Patrick O'Brien

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Phoenix District Office

Phoenix District Office
4520 N. Central Avenue, Suite 300
Phoenix, AZ 85012-1848
(602) 640-5000

Charge No. 35C-94-0115

Theresa F. Thompson
P. O. Box 786
Park Valley, UT 84329

Charging Party

Community Nursing Services
3050 South Main Street
Salt Lake City, UT 84114

Respondent

D E T E R M I N A T I O N

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the above cited charge.

All requirements for coverage have been met. Charging Party alleged that she was discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, in that she was harassed by being issued written warnings and terminated from her position as PRN due to her age, 53, and in retaliation for complaining about harassment.

Examination of the evidence indicates Charging Party was terminated from the position of PRN because of unsatisfactory job performance. Records show that Charging Party was issued numerous written and verbal warnings regarding her job performance, including two written warnings issued prior to her complaint of harassment. The evidence shows that persons over the age of 40 continue to be employed and employees under the age of 40 have been terminated. Further evidence reveals that Charging Party was hired at the age of 52 and terminated at 53. There was no evidence to indicate that age was a factor in the decision to terminate Charging Party. Additionally, while Charging Party alleges discrimination under Title VII of the Civil Rights Act of 1964, as amended, the investigation did not substantiate any violation under this Act. Based on this analysis, I have determined that the evidence obtained during the investigation does not establish a violation of the statute(s).

This determination and dismissal concludes the processing of this charge. This letter will be the only notice of dismissal and the only notice of the Charging Party's right to sue sent by the Commission. **Following this dismissal, the Charging Party may only pursue this matter by filing suit against the Respondent named in the charge within 90 days of receipt of this letter.** Otherwise, the Charging Party's right to sue will be lost.

If the charge was filed within 300 days of the alleged discrimination, Charging Party may sue under the ADEA for recovery of backpay, an equal amount as liquidated damages, appropriate make-whole or injunctive relief, and attorneys' fees and court costs.

AUG 30 1994
Date

Charles D. Burtner
District Director

THERESA F. THOMPSON
PLAINTIFF REPRESENTING SELF
BOX 786
PARK VALLEY, UTAH 84329
NO PHONE

EXHIBIT "B"

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

THERESA F. THOMPSON, Plaintiff, vs. COMMUNITY NURSING SERVICE/HOSPICE Defendant.	COMPLAINT FOR FINANCIAL LOSS AND SEVERE EMOTIONAL AND PHYSICAL STRESS FOR: DEFAMATION OF PERSONAL AND PROFESSIONAL CHARACTER Case No. 940906495CV Judge J. Dennis Frederick

COMES NOW, Plaintiff, Theresa F. Thompson, as and for a FIRST CAUSE OF ACTION against the Defendants for DEFAMATION OF PERSONAL AND PROFESSIONAL CHARACTER, and alleges:

1. Plaintiff, Theresa F. Thompson, lives and resides at 62,335 West Dove Creek Road, Park Valley, Box Elder County, Utah.

2. Defendant, Community Nursing Service/Hospice, a Home Health Agency, is licensed by theState of Utah--having its principal place of operations in Salt Lake County with main office at 2970 South Main, South Salt Lake City, Utah 84115.

3. The events described herein originated in Salt Lake County.

4. The matter in controversy exceeds, exclusive of interest and costs the sum of ten thousand dollars.

5. Plaintiff was employed by Defendant from January 2, 1991 until on or about March 22, 1993 as a visiting Registered Nurse.

6. Because of harassment by a supervisor, Plaintiff tried five times during 1991 to change employers but without sucess.

7. Plaintiff's employment was terminated by Defendant in March, 1993.

8. Plaintiff filed discrimination charges with the Equal Employment Opportunity Commission in Phoenix, Arizona.

9. On or around the 15th of August, 1994, Sharon Hencky, investigator for the EEOC, contacted the Plaintiff to respond to Defendant's charges of: 1) treating client in an uncaring, dangerous manner; 2) filthy, unkemp appearance; 3) insubordination; 4) substandard performance; 5) poor interpersonal relationships.

10. Since Plaintiff had not heard these charges or the half truths and outright lies that had been used to support these charges before, Plaintiff was thrown into severe emotional stress that contributed to an acute episode of diverticulitis that landed Plaintiff in Logan Hospital for nine days.

WHEREFORE, Plaintiff prays judgment against Defendants for defamation of personal and professional character leading to: 1) loss of employment; 2) loss of professional reputation; 3) loss of personal reputation, 4) severe physical and emotional stress; the sum of $ 3,000,000 (three million dollars).

Theresa F. Thompson

Plaintiff representing self

Plaintiff's Name and Address

Theresa F. Thompson
Box 786
Park Valley, Utah 84329

OCT-21-1994 14:56

EXHIBIT "C"

THERESA F. THOMPSON
PLAINTIFF REPRESENTING SELF
BOX 786
PARK VALLEY, UTAH 84329
NO PHONE

IN THE THIRD JUDICIAL COURT OF SALT LAKE COUNTY

STATE OF UTAH

THERESA F. THOMPSON, Plaintiff, COMMUNITY NURSING SERVICE/HOSPICE Defendant.	AMENDMENT TO COMPLAINT Civil No. 940906495 CV Judge J. Dennis Frederick

COMES NOW, Plaintiff, Theresa F. Thompson to amend the Complaint by adding the following:

11) Plaintiff charges Defendant with making defamatory remarks in writing and verbally about Plaintiff's appearance, compassion towards other people, ability to cooperate with others, professional performance, ability to relate to other people, intellect and education.

WHEREFORE, Plaintiff prays judgment against Defendant for:

1) an additional $ 2,000,000 (two million dollars) for a total of $ 5,000,000 (five million dollars)

2) all court and lawyer fees.

Theresa F. Thompson 10/19/94

Theresa F. Thompson
Plaintiff representing self

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Amendment to Complaint by certified mail prepaid to:

COMMUNITY NURSING SERVICE/HOSPICE
2970 South Main
Salt Lake City, Ut. 84115

DATED this 19 day of October 1994.

Theresa F. Thompson

Theresa F. Thompson

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

	:	MINUTE ENTRY
THOMPSON, THERESA F	:	
PLAINTIFF	:	CASE NUMBER 940906495 CV
	:	DATE 12/12/94
VS	:	HONORABLE J. DENNIS FREDERICK
	:	COURT REPORTER
COMMUNITY NURSING SERVICE	:	COURT CLERK CLB
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY.
D. ATTY.

PURSUANT TO THE HEARING HELD DECEMBER 12, 1994, THE COURT RULES AS FOLLOWS:

1. DEFENDANT'S MOTION HEREIN TREATED AS SUMMARY JUDGMENT AS MATTERS OUTSIDE THE PLEADINGS ARE CONSIDERED IS GRANTED FOR THE REASONS SPECIFIED IN THE SUPPORTING MEMORANDA.
2. COUNSEL FOR MOVANT TO PREPARE THE APPROPRIATE ORDER AND JUDGMENT.

Case No: 940906495 CV

Certificate of Mailing

I certify that on the 12th day of Dec., 1994, I sent by first class mail a true and correct copy of the attached document to the following:

THERESA F THOMPSON
Plaintiff
BOX 786
PARK VALLEY UT 84329

MICHAEL PATRICK OBRIEN
Atty for Defendant
1500 FIRST INTERSTATE PLAZA
170 SO MAIN, P.O. BOX 45444
SALT LAKE CITY UT 84145-0444

District Court Clerk

By: C. Beverly
Deputy Clerk

EXHIBIT E

Michael Patrick O'Brien (USB #4894)
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Defendant
1500 First Interstate Plaza
170 South Main Street
Post Office Box 45444
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200

C. Beverley

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

THERESA F. THOMPSON, Plaintiff, vs. COMMUNITY NURSING SERVICE & HOSPICE, Defendant.	:	**ORDER AND JUDGMENT** Civil No. 940906495CV (Judge J. Dennis Frederick)

On December 12, 1994, the court held a hearing on Defendant's Motion to Dismiss the above-captioned matter. Plaintiff appeared in person and represented herself. Defendant Community Nursing Service & Hospice was represented by its counsel of record, Michael Patrick O'Brien of Jones, Waldo, Holbrook & McDonough. The court, having reviewed the written submissions of the parties, heard oral argument and issued a minute entry granting Defendant's Motion, and for good cause shown;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

A. Defendant's Motion shall be treated as a Motion for Summary Judgment.

B. Based on the allegations in the Complaints and other submissions, the court concludes that the statements alleged by the Plaintiff's Complaint and Amended Complaints to create defamation liability are absolutely privileged statements because they: were made during the course or judicial or quasi-judicial proceedings before the United States Equal Employment Opportunity Commission ("EEOC"), bore some reference to such EEOC proceedings, and were made by parties, witnesses and/or litigants in such proceedings.

C. Summary judgment is granted to Defendant on Plaintiff's Complaint and all Amended Complaints, which are hereby dismissed with prejudice.

DATED this 13th day of December, 1994.

BY THE COURT

By _____
The Honorable J. Dennis Frederick
Third District Court Judge

PLAINTIFF REPRESENTING SELF
BOX 786
PARK VALLEY, UTAH 84329
NO PHONE

EXHIBIT "F"

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

THERESA F. THOMPSON, Plaintiff, vs. COMMUNITY NURSING SERVICE/HOSPICE, Defendant.	MOTION: 1) REVERSE JUDGMENT 2) AMEND COMPLAINT 3) REQUEST HEARING FOR ORAL ARGUMENT Civil No. 940906495 CV Judge J. Dennis Frederick

Pursuant to Rules 52(b), 59, 60(b), and 61 of the Utah Rules of Civil Procedure, Plaintiff Theresa F. Thompson respectfully requests the Court:

1. To reverse the judgment in favor of the Plaintiff.

2. To correctly name and charge elements in the Original Complaint.

12) Plaintiff charges Defendant with providing false testamony in an official proceeding, violation of Utah Codes Ann. sec. 76-8-502, 76-8-503, and sec. 76-8-504. (See paragraph 10 of original complaint.)

13) Plaintiff charges Defendant with communication fraud, violation of Utah Code, Ann. sec. 76-10-1801.

15) Plaintiff charges Defendant with Tort of Outrage. The Original Complaint reads: Complaint for Financial Loss and Severe Emotional and Physical Stress for: Defamation of Personal and Professional Chararacter. In addition to the original $3,000,000 requested, the Plaintiff asks an additional $1,000,000

per day of hospital stay of nine days. ($9,000,000)

The basis of this Motion is that the original Complaint (which is not a charge of Defamation) was not addressed by the Defendant and justice has not yet been served.

Plaintiff respectfully requests that the Court grant her Motion.

DATED this 30 day of Dec, 1994.

Theresa F. Thompson
Theresa F. Thompson
Plaintiff representing self.

I hereby certify that I mailed a true and exact copy of the foregoing Motion and Memorandum in Support of Motion to: Michael Patrick O'Brien
1500 First Interstate Plaza
170 South Main Street
Post Office Box 45444
Salt Lake City, Utah 84145

Theresa F. Thompson 12/30/94
Theresa F. Thompson

Theresa F. Thompson
Box 786
Park Valley, Utah 84329

This Motion and Supporting Memorandum replaces and voids the Motion and Supporting Memorandum filed on or about December 20, 1994.

Theresa F. Thompson 12/30/94

PLAINTIFF REPRESENTING SELF
BOX 786
PARK VALLEY, UTAH 84329
NO PHONE

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

THERESA F. THOMPSON Plaintiff, vs. COMMUNITY NURSING SERVICE/HOSPICE, Defendant.	REQUEST FOR DECISION Civil No. 940906495 CV Judge J. Dennis Frederick

Plaintiff requests that the Court rule on the following matters and in the following ways pursuant to Rule 4-501 C.J.A. :

1. Tort of Outrage--Misunderstandings concerning the charge are based on Plaintiff's use of the term 'defamation'. Paragraph 10 of Original Complaint (enclosed) describes false testamony about Plaintiff's character and events but was defined by Plaintiff as 'defamation'. Because the Charge: 1) does not attempt to create a defamation liability; 2) is for extreme mental and emotional harm created by the 'defamation' (false testamony)--the specific statements made by Defendant are irrelevant (any false testamony would have created the same stressful situation described in the Memorandum (enclosed); 3) and is based on the fact that Defendant dared present false testamony to a Federal Commission creating the stress leading to the harm described in Memorandum, the Plaintiff requests a decision in her favor on the Tort of Outrage.

2. Decision on absolute privilege because it is in the court's power to decide to grant or deny a claim to absolute privilege, Plaintiff requests a decision against the Defendant's claim for absolute privilege based on the arguments in the Memorandum and a judgment in the Defamation charge in favor of the Plaintiff that justice may be served.

3. Violation of Utah Codes Ann. sec. 76-8-502, 76-8-503, and sec. 76-8-504 and 76-10-1801: that Defendant be charged with these violations.

4. Discrimination and Harrassment by Defendant towards the Plaintiff during her two years of employment by Defendant. This is the original charge placed before the EEOC. Plaintiff charges the Defendant's with this charge now and asks relief in the amount of $2,000,000 (two million dollars) Plaintiff argues that if the Plaintiff needed to use false testamony to get a decision in their favor by the EEOC, then the truth would have given a decision in favor of the Plaintiff (Charging Party).(This Motion would have been requested during an oral argument if a hearing had been granted. Plaintiff has been advised to place everything before the Court.)

Plaintiff respectfully requests a decision from the Court on each of these matters.

DATED this 9 day of Jan., 1995.

Enclosed are: original complaint and Amendment, return memorandum

Theresa F. Thompson
Plaintiff representing self

I hereby certify that I mailed a true and exact copy of the foregoing Request for Decision and Original Complaint and Amendment and motions and memorandum to: Michael Patrick O'Brien
1500 First Interstate Plaza
170 South Main Street
Post Office Box 45444
Salt Lake City, Utah 84145

Theresa F. Thompson

EXHIBIT 11

Michael Patrick O'Brien (USB #4894)
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Defendant
1500 First Interstate Plaza
170 South Main Street
Post Office Box 45444
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

THERESA F. THOMPSON, Plaintiff, vs. COMMUNITY NURSING SERVICE & HOSPICE, Defendant.	:	**ORDER** Civil No. 940906495CV (Judge J. Dennis Frederick)

On December 12, 1994, the court issued a minute entry granting summary judgment to Defendant in the above-captioned matter. On December 23, 1994, the court entered Final Judgment in favor of Defendant. After the court granted summary judgment, Plaintiff filed various motions which appear to be motions for reconsideration and/or motions to amend her dismissed complaint. Defendant has opposed all such motions. The court, having reviewed all the written submissions of the parties and being fully informed about the

same and for good cause shown and having issued a minute entry on January 26, 1995 denying Plaintiff's Motions;

IT IS HEREBY ORDERED THAT Plaintiff's motions are denied. The basis for this denial are the reasons specified by Defendant in the various pleadings it has filed in opposition to such motions.

DATED this 1st day of February, 1995.

BY THE COURT

By _____
The Honorable J. Dennis Frederick
Third District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January, 1995, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing Order to the following:

Theresa F. Thompson
Plaintiff Pro Se
Box 786
Park Valley, Utah 84329

Michael Patrick O'Brien

EXHIBIT A

THERESA F. THOMPSON
PLAINTIFF/APPELLANT REPRESENTING SELF
BOX 786
PARK VALLEY, UTAH 84329
NO PHONE

FROM THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

THERESA F. THOMPSON, Plaintiff and Appellant, vs. COMMUNITY NURSING SERVICE/HOSPICE, Defendant and Appellee.	NOTICE OF APPEAL Civil No. 940906495 CV

Notice is hereby given that Plaintiff and Appellant, Theresa F. Thompson, appeals to the Utah Supreme Court the final judgment of the Honorable J. Dennis Frederick entered in this matter on December 23, 1994.

The appeal is taken from the entire judgment.

DATED this 22 day of February, 1995.

Theresa F. Thompson

Theresa F. Thompson

Affidavit of Impecuniosity

Theresa F. Thompson
Box 786
Park Valley, Utah 84329
No phone

I, Theresa F. Thompson, do solemnly affirm that owing to my poverty I am unable to bear the expenses of the appeal which I am about to take and that I believe I am entitled to the relief sought by such appeal.

Date: 2/7/95

Theresa F. Thompson
Affiant

State of Utah
County of Weber

Subscribed and sworn to before me on Feb 7, 1995.
date

Glenda J. Lee
signature
Notary Public

Name and Title of Officer Authorized to Administer Oath

NOTARY PUBLIC
GLENDA J. LEE
1344 West 4675 South
Riverdale, Utah 84405
My Commission Expires
January 28, 1998
STATE OF UTAH

References:
Sections 21-7-3 and 21-7-4, Utah Code Ann. 1953, as amended
Utah R. App. P. 6

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH

EXHIBIT "J"

THERESA F. THOMPSON,

Plaintiff,

vs.

COMMUNITY NURSING SERVICE,

Defendant.

Case No. CIV 940906495 CV

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS (MICHAEL O'BRIEN'S ARGUMENTS ONLY)

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE J. DENNIS FREDERICK

on Monday, December 12, 1994

APPEARANCES:

For the Plaintiff: THERESA F. THOMPSON
Pro Se

For the Defendant: MICHAEL PATRICK O'BRIEN
Attorney at Law
170 South Main Street #1500
Salt Lake City, Utah 84101
521-3200

ANNA M. BENNETT, CSR
License No. 22-106796-7801
240 East 400 South
Salt Lake City, Utah 84111
535-5203

* * *

MR. O'BRIEN: Your Honor, I don't want to take a lot of time because our position is stated in the Memorandum, but essentially, the background on this is that Ms. Thompson was employed by Community Nursing Service, and at one point was discharged. Subsequent to that she filed a charge claiming age discrimination, and that matter was pending before the Equal Employment Opportunity Commission. That charge was investigated by the EEOC and one employee and one former employee of Communit Nursing Service were interviewed by the investigator.

Subsequent to that time, a ruling was issued by the EEOC which is attached to the Memorandum. The ruling concluded there was no reasonable cause to believe that age discrimination led to Ms. Thompson's discharge.

After that ruling, Community Nursing was served with this lawsuit which alleges that during the course of the EEOC proceedings, Ms. Thompson was defamed by statements made about her.

This is a motion to dismiss. For purposes, of course, of this motion, we assume that the facts and the statements in the Complaint are true. Notwithstanding that, your Honor, we believe that they should be dismissed because they do seek to impose defamation liability for statements made during the course of a quasi-judicial

proceeding which is absolutely privileged.

There are basically three points that need to be met to establish this privilege and that's found in the Allen v. Ortez case cited in our materials. The first is that -- let me just quote for the Court. The statement must have been made during the course of the judicial proceeding.

There's no Utah case law that addresses the issue of a quasi-judicial proceeding like the EEOC, but we have attached to our Memorandum two cases, one from Washington and one from Illinois that conclude the EEOC is a quasi-judicial proceeding that qualifies for the privilege, and there are various substantial other authorities that indicate quasi-judicial proceedings qualify for the privilege.

So we would submit, your Honor, the first prong of the Allen test is met. Second, the statement must have some reference to the subject matter of the proceeding.

Now, the issue before the EEOC was whether or not Ms. Thompson was discharged for legitimate reasons, or for inappropriate reasons related to her age. Therefore, there was some need to respond to the investigator's questions about the reasons for the discharge, the disciplinary history, the perceptions of the client toward the individual. All of Ms. Thompson's statements that she alleges are

defamatory relate to those sorts of issues and therefore, they have some reference to the quasi-judicial proceeding that was involved, and finally, the third prong, your Honor, the privilege must have been made -- excuse me. The statement must have been made by someone acting in the litigation, the judge, the juror, litigant or witness, and there's no dispute here, I believe Ms. Thompson concedes, that that prong is satisfied in this case.

Based on those three prongs and them being met in this case in the face of the pleading, your Honor, we'd ask that the lawsuit be dismissed. Thank you.

* * *

THE COURT: Anything further, Mr. O'Brien?

MR. O'BRIEN: No, your Honor, except I did neglect to mention -- I apologize -- that the Complaint was amended to assert two claims under the criminal code and we would include that in our motion to dismiss, and then there was a motion for protective order pending, but we don't need to address that until the Court rules on the motion to dismiss.

* * *

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

I, ANNA M. BENNETT, do hereby certify:

That I am a Certified Shorthand Reporter, License No. 22-106796-7801, and one of the official court reporters of the state of Utah; that on the 12th day of Decembmer, 1994, I attended the within matter and reported in short-hand the proceedings had thereat; that later I caused my said shorthand proceedings to be transcribed into typewriting, and the foregoing pages, numbered from 2 to 4, inclusive, constitute a full, true and correct account of certain excerpted portions of the same, to the best of my ability.

DATED AT SALT LAKE CITY, UTAH, this 1st day of February, 1995.

Anna M Bennett CSR

ANNA M. BENNETT, CSR