1979

Ned O. Gregerson v. James L. Jensen and Nedra Jensen : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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NED O. GREGERSON,	:	
	:	
Plaintiff/Appellant,	:	
	:	
vs.	:	Case No. 16339
	:	
JAMES L. JENSEN and	:	
NEDRA JENSEN, his wife,	:	
	:	
Defendants/Respondents.	:	

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RESPONDENTS' BRIEF

Respondents' Brief from Judgment of Sixth Judicial District Court for Sanpete County, State of Utah, The Honorable Don V. Tibbs, District Judge, Presiding.

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STATEMENT OF THE CASE

The lower court ruled that the Plaintiff/Appellant had not established prima facie case that a contract consisting between Plaintiff/Appellant and Defendants/Respondents and entered Judgment for no cause of action against the Plaintiff/Appellant seeks to have the lower court's Judgment affirmed.

STATEMENT OF FACTS

On or shortly before September 30, 1971, Plaintiff/Appellant Ned Gregerson approached Defendant/Respondant James Jensen to inquire into the purchase of some land held by Jensen in Gunnison, Utah. (Transcript of court proceedings hereinafter T) 11A:19-20. Gregerson was interested in establishing a dental practice in Gunnison, where he was reared. T 10:11,12, 25-30; 28:7-15.

Contact was first made at the service station that Jensen manages in Gunnison. T 11A:19-20; 44:25-26. At that time Gregerson and his father tried to talk Jensen into selling the land by telling Jensen that they would assist him to establish an Amway business which would allow him to retire in five years. T 45:1-7,19-24; 46:18-28.

Shortly thereafter, Jensen and Gregerson went out to examine the property in question. T 47:1. Jensen owned only

one piece of land in the area. (finding of fact no. 5) Jensen's home was located on the southern portion of the lot and the northern portion was being used as pasture. T 26:10-14; T 38:8-9. Jensen would only consider selling a piece of the pasture land, since his drain field and cesspool extended into that area. T 46:6-13; 47:2-4. Jensen indicated to Gregerson the piece of the pasture land he thought he would be willing to sell by kicking the dirt at a spot on the land that he presumed to be beyond the point of possible interference with his cesspool and drain fields. T 46:6-13.

Preliminary negotiations ensued at Jensen's home in which Gregerson agreed to pay $700 for property to the north of the area where Jensen kicked the dirt. T 48:11-19. Jensen was willing if Gregerson would establish his dental practice on the property, which would enhance the value of Jensen's land, (T 51:17-25) and if Jensen was able to get a partial release of the mortgage on the whole of his property. T 59:10-16; 30:2-5; 49:21-22. Gregerson at that time gave Jensen a check of $350 to hold the property, (T 17:23-30) which Jensen deposited in the bank. T 60:16-22. The check now appears with the following inscription in Gregerson's handwriting "1/2 payment on land as agreed other 1/2 payment when deed delivered." (Plaintiff Exhibit No. 1)

Gregerson, at the time of these preliminary negotiations was concerned about obtaining a legal description of the property. T 15:7-8. Jensen produced a tax notice which contained a legal description of the entire piece of property owned by Jensen, but no description existed of any divided portion of the entire piece. T 15:9-24; 4:23-27. See also, Designation of Record on Appeal No. 18.

Gregerson and his father took the tax notice and later went to measure the land along with a local builder, Don Anderson. T 38:14-22. Jensen was interested in verfying the description on the tax notice to insure that sufficient land was actually there to provide for a dental clinic. T 40:29-30; 41:14-26. However the depth of the lot to the point where Jensen had kicked the dirt was not described in the tax notice. See, Designation of Record on Appeal No. 18.

Shortly thereafter Gregerson returned to the army base in Texas where he was serving in the military. T 20:12-13, 24-25. Jensen understood that Gregerson was going to return to Gunnison in December of 1971, after he was discharged from the army, to complete negotiations and commence construction of a dental clinic on the property. T 49:12-15; 51:28-30. During the interim period, following preliminary negotiations, the bank

in Gunnison prepared a deed for conveyance of the property to Gregerson. T 50:17-29. However, Jensen, on the advise of the bank, did not execute the deed prior to Gregerson's return in December since no survey had been made of the property, T 52:21-31; 51:1-4, and the deed had been prepared at the request of someone other than Jensen. T 50:17-19. Jensen assumed that the deed was prepared at Gregerson's request. T 50:17-19.

Gregerson, subsequently decided to establish his dental clinic in Cedar City rather than Gunnison. T 22:18-19; 23:1-5. Jensen offered to give Gregerson his money back, but Gregerson wanted the money plus interest, and refused Jensen's offer. T 51:10-12.

Gregerson commenced a suit for specific performance of a land sales contract, which was tried September 27, 1978. The court, after hearing Gregerson's argument, dismissed the claim on the basis that there was no description of the land which the court could specifically enforce. T 74:14-21; 76:7-12. However, the court did order Jensen to return the $350 deposit with interest.

Gregerson moved for a new trial on the basis that Jensen allegedly failed to reply completely to Interrogatory No. 14 which asked the following:

> "INTERROGATORY NO. 14: Please state whether or not any other written documents exist concerning the property described in Interrogatory No. 2 between Plaintiff and Defendants which were written or prepared on or about September 30th, 1971. If the answer to this is in the affirmative, please attach a copy of said instrument."

Jensen's response did not recognize the existence of the unsigned deed prepared by the bank.

> "INTERROGATORY NO. 14: ANSWER: In answer to Interrogatory No. 14, there are not any documents that exist regarding the sale of said property." (Designation of Record on Appeal No. 8).

The trial court denied the motion on the following basis:

> "That the existance of an unsigned document not prepared by the Defendant would still not make a prima facie case for Plaintiff." (Court Order dated January 1st, 1979; Designation of Record on Appeal No. 24).

ARGUMENT

POINT I

THE COURT BELOW PROPERLY DECIDED THAT THE CANCELLED CHECK BEARING NO DESCRIPTION OF THE LAND TO BE CONVEYED IS NOT A SUFFICIENT MEMORANDUM TO SATISFY THE REQUIREMENTS OF THE STATUTE OF FRAUDS.

Utah Supreme Court decisions dated from 1915 have consistently held that no memorandum is sufficient to satisfy the Statute

of Frauds unless it contains all of the essential terms of the alleged agreement. The cases make it clear that a description of the property to be conveyed is one of the essential terms required.

In Adams v. Manning, 46 Utah 82, 148 P 465 (1915) the plaintiff, M. Louisa Adams, as executrix of the estate of D.C. Adams, sued to enjoin the continued trespass of the defendant, Manning, on lands which had been owed by the decedant. At trial Manning produced a receipt which he claimed to have received from the decedant. The receipt read as follows:

> "October 19, 1907. Received of H.W. Manning thirty dollars ($30) as part payment of thirty acres of land. Price to be $100 for said land. D.C. Adams

In reversing the decision of the district court the Utah Supreme Court held that

> [u]nder all the authorities, the memorandum here in question is insufficient to take the alleged sale out of the statute of frauds for the reason that there is no sufficient or any description of the land alleged to be sold. 148 P at 466.

The memorandum in the Adams case is, if anything, more descriptive of the land in question than is the check in the instant case. Although the receipt offered in evidence by Manning did not fully describe the land he occupied, it did

state that thirty acres were involved. The check in the present case makes no mention of either the quantity or the location of the land alleged to have been sold.

In more recent cases the Utah Supreme Court has emphasized by repetition that a memorandum must include all the essential terms of the alleged contract.

The court held in Collete v. Goodrich, 119 Utah 662, 231 P2d 730, 732 (1951) that "the written memorandum which is relied on to satisfy the statute of frauds must contain all the essential terms and provisions of the contract... The memorandum must show what the contract was, and not merely note the fact that some contract was made." Again in Eckard v. Smith, 527 P2d 660, 662 (Utah 1974) the Utah Supreme Court held that

> Specific performance cannot be granted unless the terms are clear, and that clarity must be found from the language used in the document.

In Birdzell v. Utah Oil Refining Co., 121 Utah 412, 242 P2d 578, 580 (1952), a case dealing with a lease agreement, the same court decided that "[i]t is fundamental that the memorandum which is relied on to satisfy the statute of frauds must contain all the essential terms and provisions of the contract."

After making this abstract statement of law the Birdzell decision listed the essential provisions of a lease agreement: "First, a definite agreement as to the extent and boundaries of the property to be leased..." 242 P2d at 580. If a memorandum of a lease contract must contain the "extent and boundaries of the property," surely a land sale contract would be subject to the same requirement.

In Zion's Properties, Inc. v. Holt, 538 P2d 1319 (Utah 1975) the Utah Supreme Court considered the question of whether an endorsed check was a sufficient memorandum to comply with the Statutes of Frauds.

After signing a valid written contract in January, 1973 for the sale of realty the parties allegedly modified the written contract by oral agreement. The Plaintiff presented an endorsed and cancelled check which bore the handwritten notation "as per agreement of 12-8-73" as proof of the modification. In holding the memorandum to be inadequate the Utah Supreme Court said that

> any such modifying agreement must be sufficiently certain and unequivocal in its terms that the parties will understand what it is and what is to be done under it. Neither the check nor the quoted notation thereon make any such recitals and they do not meet the requirement. 538 P2d at 1322.

Dictum in the decision of the Utah Supreme Court in Adams v. Manning, 46 Utah 82 148 P 465, 467 (1915) is a further illustration of the principle that a cancelled check which contains no description of the land in question does not constitute a sufficient memorandum to satisfy the Statute of Frauds. After concluding that the receipt signed by Adams was not an adequate memorandum because there was "no sufficient or any description of the land alleged to have been sold," the court made the following statement:

> If it can be said that a contract of sale is established in this case, we may meet tomorrow with a case where the alleged purchases issued and delivered to the alleged vendor a check on which the former wrote the words "part payment of ten acres of land," and in view that the alleged vendor has endorsed the check and received the money and then has died, the alleged purchases produces the check and endorsement, and in connection therewith claims he took possession, constructive or otherwise, of the land alleged to have been sold, and asks and is given specific performance if he will pay the remainder of the purchase price whatever it may be. What becomes of the Statute of Frauds under such circumstances.

POINT II

THE COURT PROPERLY RULED THAT AN UNSIGNED DEED WHICH WAS NOT IN EXISTENCE WHEN THE ALLEGED LEGAL MEMORANDUM WAS FORMED, WAS NOT REFERRED TO IN THE MEMORANDUM, AND WAS NOT PREPARED BY THE DEFENDANT, WOULD NOT ESTABLISH A PRIMA FACIE CASE FOR THE PLAINTIFF.

Modern jurisdictions are divided on the question of whether an unsigned writing not referred to in the memorandum may be used to supplement the memorandum. Some jurisdiction absolutely refused to allow an unsigned writing to augment a signed memorandum unless the signed statement makes an express reference to the supplementary document. See for example Irvine v. Haniotis, 208 Okla 1, 252 P2d 470, 472 (1953). These jurisdictions will not admit parol evidence to show a link between the signed and the unsigned papers. Other jurisdictions allow two writings to unitedly form the memorandum which satisfies the statute. See for example Grant v. Avvil, 39 Wash 2d 722, 238 P2d 393, 395 (1952). These jurisdictions of the second class require that either parol evidence or an express reference establish that the two documents constitute one memorandum.

> Even where a signed paper contains an internal reference to an unsigned one, almost always some parol testimony is necessary to aid in the identification. There is ample authority holding that it is admissible for this purpose. The words of reference need not be sufficient in themselves; they are required only to the extent that they are necessary to prevent successful fraud and perjury. In a case where the court is convinced that there is no serious danger of such fraud and perjury, the words of reference may be wholly dispensed with without violating either the words or the spirit

> of the statue. . . If from the documents and the supplementary parol evidence the court is not convinced that no fraud is being perpetrated, it may properly refuse enforcement and throw the burden of this result upon the statute of frauds. 2 Corbin on Contracts § 515 (1963)

Regardless of which approach the court chooses to follow, the deed in question is not sufficient to satisfy the Statutes of Frauds. Obviously the first alternative bars any use of the unsigned memorandum to show that a contract existed. Moreover, even if the court adopts the second position, the deed is inadequate because there has been no showing that any parol evidence exists to prove that the two documents from one memorandum. Both Gregerson and Jensen have denied under oath that they had anything to do with preparing the deed. T 50:17-29, 30:19-29. Furthermore, Gregerson has not provided any evidence from any source either at trial or in his motion for a new trial that would prove that either party intended that the deed memorialize a contract between the parties.

There are no Utah cases that consider the question of whether an unsigned writing may supplement a signed memorandum and remedy its defects. However, both the Restatement of Contracts and Williston on Contracts recognize that under extraordinary circumstances such a supplement will be allowed.

Nevertheless, neither of these authorities on contract law would allow an unsigned memorandum to satisfy the Statute of Frauds in the present case.

4 Williston on Contracts §§ 582, 583 (3rd ed 1961) report cases that illustrate the liberal doctrine which would allow an unsigned document to supplement a signed memorandum.

Williston criticizes the decisions that have accepted the liberal doctrine because it nullifies any protection which the Statute of Frauds provides:

> It seems difficult to justify this extension of the doctrine in regard to several documents. There is no difficulty in making out a written memorandum that evidently relates to the same transaction, but the memorandum is not signed by the party to be charged. A simple illustration will indicate this. A writes a letter to B, saying: "I will sell you the property of which we spoke yesterday for $5,000 cash." B replies: "I understand that you will sell me the following described property of which we spoke yesterday (describing the property) at $5,000 cash. I hereby accept your proposition." According to the doctrine here criticized B's reply could be read with A's letter to charge A; they evidently refer to the same transaction, and the description of the property contained in B's letter could be incorporated in A's writing. But it is obvious that A has never authenticated the description by his signature, and to allow the description written by B to be used by B in enforcing the contract against A, is nothing other than to allow B to write an essential term of the memorandum himself and charge A with it as written. This criticism has particular relevance to the instant case.

If Utah law enforced the claims of every purchaser of land who had first made partial payment by cancelled check and who then relied on a separate deed for the description of the land - a deed that was not signed by the grantor, which did not exist when the check was delivered, and which was not referred to by the check - the opportunity to create a bargain would attract innumerable composers of false deeds and allow the almost total emasculation of the Statute of Frauds.

Section 208, comment d, of the Restatement (second) of Contracts reads as follows:

> d. Reference to future writings. Ordinarily a signature does not authenticate a document not in existence at the time the signature is made. But when several documents are executed by different parties in a single transaction, the signature of one may have reference to a subsequent signature of another. In some such cases the earlier signature may be adopted with reference to a document prepared later, whether signed by anyone or not. In other cases the reference is to an event of independent significance, or to the exercise of a power granted by the signer. Thus a signed offer authenticates the acceptance invited by it.
>
> Illustrations:
>
> 6. A and B enter into a contract within the Statute and sign a memorandum, otherwise sufficient, stating that the price to be paid shall be the same as the price agreed upon by C and D in a similar contract expected to be made on the following day. The memorandum is sufficient if it accurately states

the entire agreement between A and B. The contract made between C and D is an event of independent significance, and may be referred to for the price whether or not there is a memorandum signed by C or D.

7. A and B enter into an oral contract for the purchase and sale of a tract of land and sign a memorandum, otherwise sufficient, stating that the contract is "contingent upon A's ability to arrange $7,000 purchase money mortgage." A subsequently applies in writing to a financial institution for such a mortgage loan on specific terms as to duration, interest rate and payment. The mortgage loan application may be read with the memorandum to satisfy the Statute against either party.

In the present case if the warranty deed were executed the parties to the conveyance would be the same persons that had signed and endorsed the check. Moreover, the drafting of the deed is not an event of independent significance. Therefore, since the deed does not fall under either of the exceptions of commend d, the general rule bars the deed because it is a document that was not in existence at the time that the check was signed.

Appellant relies on Jacobson v. Cox, 202 P2d 714 (Utah 1949) and Stauffer v. Call (Supreme Court of the State of Utah, filed January 9th, 1979, Case No. 15468) to show that the court in the instant case ought to arrive at an appropriate description of the land for the parties in dispute.

However, in the Jacobson case the land in question was described in the original contract by reference to natural boundaries and fences such that misdescription in the record could be easily remedied. The court therefore decided that the case should be taken out of the Statutes of Frauds based on the following standard:

> A Description is sufficient if when read in the light of the circumstances of possession, ownership, situation of the parties, and their relation to each other and to the property, as they were when the negotiations took place and the writing was made, it identifies the property. A description is sufficient, although vague in respect of the boundaries, if it identifies a specific tract of land when applied to the facts on the surface of the earth, as where a surveyor, with the contract in his hands and with the aid of no other means than those provided, could go to the place stated therein and accurately located the land. American Jurisprudence Section 348, Volume 49, Statutes of Frauds, in dealing with the subject of uncertainty in deeds states.

Application of this standard to the contract at hand clearly shows that the description did not take it out of the Statute of Frauds. The only description on the contract was "land as agreed". Could anyone accurately locate the land based on the contractual description, as the standard requires? Moreover, if the land were described in the contract it would have to be described with reference to the unmarked spot where respondant kicked the dirt some eight years ago.

Appellant, Gregerson, also relies heavily on the case Stauffer v. Call (Supreme Court of the State of Utah, filed January 9th, 1979, Case No. 15468) to establish that the warranty deed in the present case satisfies the Statutes of Frauds. The Stauffer case is irrelevant for that purpose. Specific performance was decreed in the Stauffer case because the Plaintiff's part performance (possession and improvement) took the case out of the Statute of Frauds. The court made no holding that the statute was satisfied.

> "They [plaintiffs] made as sellers concede, substantial improvements to the two houses in which they lived .... The taking of possession and the payment of $6,400 towards the full price takes the matter out of the statute of frauds."

POINT III

THE TRIAL COURT CORRECTLY HELD THAT THE PLAINTIFF'S ALLEGED ACTS OF PART PERFORMANCE WERE INSUFFICIENT TO REMOVE THE ALLEGED CONTRACT FROM THE STATUTE OF FRAUDS.

In the case of Boland v. Nihlros, 77 Utah 205, 293 P. 7,10 (1930) the Utah Supreme Court enunciated the elements of a prima facie case of part performance as follows:

> The law is well settled in the state that, before a court can decree specific performance of an oral gift of land, it must appear by evidence that is clear, convincing, and unequivocal:

> (1) That there was a parol grant or gift by a contract or agreement which must be complete and certain in its terms;
> (2) possession taken and improvement, made by the donee pursuant to and in reliance on such oral gift;
> (3) that the improvements so made are substantial...
> (4) strong equities in favor of the donee, so strong that it would amount to a fraud upon him to allow the statute to be interpreted to defeat his claim.
> 293 P. at 10

Although the concise Boland summary came from a case which involved an oral gift of land rather than an oral contract, holdings from other Utah Supreme Court decisions (presented below) combined with the language of element number one of the Boland test above (parol grant or gift by a contract or agreement) conclusively show that the same four requirements apply to oral contracts as well.

The recent Supreme Court opinion in the case of Holmgren Brothers, Inc. v. Ballard, 534 P2d 611 (Utah 1975) reiterates the first requirements of the Boland test; that the terms of the oral contract must be complete and certain. The court held that "the oral contract and its terms must be clear, definite, mutually understood, and established by clear, unequivocal and definite testimony, or other evidence of the same quality." 534 P2d at 614. See also Campbell v. Nelson, 101 Utah 523, 125 P2d 413 (1942).

Other Utah Supreme Court decisions have held that the Plaintiff who seeks specific performance of an oral contract must "establish the terms thereof with a greater degree of certainty than is required in an action at law." Clark v. Clark, 74 Utah 290, 279 P 504 (1929). See also Christensen v. Christensen, 9 Utah 2d 102, 339 P2d 101 (1959). Since legal enforcement of an oral contract for the sale of realty is not available in Utah. Baugh v. Darley, 112 Utah 1, 184 P2d 335 (1957); McKinnon v. Corporation, Etc., Latter-day Saints, 529 P2d 434 (Utah 1974), plaintiffs must establish the oral contracts with the "greater clarity" which the Clark and Christensen cases require in order to qualify for any judical remedy.

In Ravarino v. Price, 123 Utah 559, 260 P2d 570 (1953) Chief Justice Wolfe explained the requirements of possession and the substantial improvements as follows:

> Some jurisdictions hold that possession is an indispensible element, ... while others indicate the possession is only ordinarily necessary.... We do not pass on this point. However, assuming acts in the nature of general improvements are sufficient without the element of possession, when it is lacking this court must be convinced that no reasonable doubt exists as to whether or not the acts of improvement are explainable on some basis other than the hypothesis of an oral contract. 260 P2d at 580.

One year after Ravarino the Utah Supreme Court made it clear that possession and improvements are part of a prima facie case of part performance in Utah. The opinion of the Court in Roth v. Roth, 2 Utah 2d 40, 269 P2d 278, 281 held that "acts of part performance must be exclusively referable to the contract in that the possession of the party seeking specific performance and the improvements made by him must be reasonably explicable only on the postulate that a contract exists..."

The record of the instant case contains no evidence that appellant ever took possession of the Jensen land or that he made any improvements on the land whatsoever.

The Utah Supreme Court opinion in Madsonia Realty Co. v. Zion's Savings Bank & Trust Co., 123 Utah 327, 259 P2d 595 (1953) reiterated the fourth requirement listed in Boland; that the equities of the alleged parol contract so favor the promisee that he would be defrauded if the Statute of Frauds barred his claim. The court concluded that

> part performance which will avoid the statute of frauds may consist of any act which puts the party performing in such a position that non-performance by the other would constitute fraud. 259 P2d at 602.

More recent Supreme Court decisions have held that the mere refusal of alleged promise to perform an alleged oral contract

cannot constitute the fraud which is necessary. In Easton v. Wycoff, 4 Utah 2d 386, 295 P2d 332, 335 (1956) the Court decided that

> A mere refusal to perform an oral agreement within the Statute, however is not such fraud as will justify a court in disregarding the Statute even though it results in hardship to the plaintiff... And that mere loss of a good bargain is not enough to estop defendant from setting up the statute of frauds as a defense to an action on a contract.

The same court's opinion is McKinnon v. Corporation, Etc. Latter-day Saints, 529 P2d 434, (Utah 1974) held that

> Fraud, generally cannot be predicated upon the failure to perform a promise or contract which is unforceable under the statute of frauds, for the promisor has not, in a legal sense, made a contract; and therefore, he has the right, both in law and in equity to refuse to perform.

Since the trial court in the present case has already held that the appellant will receive a repayment of his down payment with interest, there is no loss which he will suffer other than the loss of his bargain.

The decision of Hogan v. Swayze, 65 Utah 435, 237 P 1097, 1103 (1925) is one illustration of facts which state a prima facie case for part performance of an oral contract. In that case the Utah Supreme Court held that

> The written contract, as modified by the oral agreement, is definite, certain, and specific in all its

terms. It constitutes a valid contract for the purchase of the east half of the land in question. Plaintiff paid the full purchase price, and with the knowledge and consent of the vendors, entered into possession and made valuable improvements thereon.

The facts of the instant case differs from those in Hogan and fall short of the requirements of Boland in that

(1) The parol agreement is not clear.
(2) Appellant did not take possession of the land in question at any time.
(3) Appellant made no improvements on the land.
(4) Appellant will not be the victim of any fraud if the contract is not enforced.

CONCLUSION

In Del Porto v. Nicolo, 495 P2d 811 (Utah 1972), the Utah Supreme Court defined the appellant's burden:

> [d]ue to the advantaged position of the trial court, in close proximity to the parties and the witnesses, there is indulged a presumption of correctness of his findings and judgment, with the burden upon the appellant to show they were in error; and where the evidence is in conflict, we do not upset his findings merely because we may have reviewed the matter differently, but do so only if evidence clearly preponderates against them. 495 P2d at 812.

Gregerson failed to meet the burden for the following reasons:

1. Under well established Utah law a cancelled check which contains no description of the land involved cannot constitute a sufficient memorandum of a land sales contract to satisfy the Statute of Frauds.

2. The existence of an unsigned deed not prepared by the defendant, not referred to in the alleged memorandum, and not in existence when the contract was allegedly entered, could have no bearing on the outcome of this case.

3. Without taking possession of the land or making any improvements on it, partial payment under an alleged land sales contract does not constitute partial performance sufficient to remove the alleged agreement from the Statute of Frauds.

Therefore, the trial court appropriately dismissed the plaintiff's cause of action and denied the motion for a new trial.

DATED this 26 day of September, 1979.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that one copy of the foregoing Brief has been mailed to:

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by depositing said copy in the U.S. Mails, postage prepaid thereon, this 26 day of September, 1979.

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