2000

Olaf Theodore Stevensen, Jr., and Barbara Ann Stevensen v. Nick N. Nikols, Dab Associates, a partnership, George Anagnostakis, George Bruce Breinholt and Welden L. Daines : Reply Brief of Appellants

Utah Supreme Court

Hardin A. Whitney; Wayne G. Petty; Moyle and Draper; Attorneys for Defendant-Respondent Nikols; F. Alan Fletcher; Parsons, Behle, and Latimer; Attorney for Defendant-Respondent DAB Associates.

James A. Arrowsmith; Watkins and Faber; Attorney for Plaintiffs-Appellants.

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

OLAF THEODORE STEVENSEN, JR., and BARBARA ANN STEVENSEN,

Plaintiffs-Appellants,

vs.

Case No. 14006

NICK N. NIKOLS, DAB ASSOCIATES, a partnership, GEORGE ANAGNOSTAKIS, GEORGE BRUCE BREINHOLT and WELDEN L. DAINES,

Defendants-Respondents.

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY, THE HONORABLE PETER F. LEARY, JUDGE.

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REPLY BRIEF OF APPELLANTS

A R G U M E N T

Appellants deem it necessary to reply to a number of matters improperly raised by Respondents' briefs.

POINT I.

RESPONDENTS' POINT I THAT THIS APPEAL WAS NOT TIMELY FILED HAS BEEN PREVIOUSLY ADJUDICATED BY THIS COURT AND IS RES JUDICATA.

Point I in Respondents' briefs attempts to raise a matter already heard and decided by this Court. Respondents made a motion to dismiss the appeal on the ground that it was not timely filed. This Court denied said motion. Rule 76(e) of the Utah Rules of Civil Procedure provides that

either party may petition this Court for rehearing within twenty days after the decision is filed. Respondents did not petition for rehearing as provided, and therefore the decision is res judicata.

In any case, because the appeal was not solely in unlawful detainer, the longer period in which an appeal may be taken is applicable. See Weyer v. Peterson, 16 Utah 2d 278, 399 P.2d 438 (1965).

POINT II.

RESPONDENTS ARE NOT ENTITLED ON APPEAL TO RAISE ISSUES WHICH ARE NOT DEFENSIVE UNLESS THEY HAVE CROSS-APPEALED OR FILED THE ALTERNATIVE STATEMENT OF POINTS.

Respondents' Points II, III and IV (b) are not properly raised and should not be considered by this Court, as Respondents failed to raise those points as required. Rule 74(b) provides that:

> . . . where any one or more parties have filed a Notice of Appeal as required by Rule 73, other parties may separately or together cross appeal from the order or judgment of the lower court without filing a Notice of Appeal; provided, however, such party or parties shall file a statement of the points on which he intends to rely on such cross appeal within the time and as required by subdivision (d) of Rule 75. (Emphasis added.)

Respondents did not cross appeal or file any statement of points. They cannot now properly allege that the

lower court erred in regard to any matter not relied on by Appellants. Respondents are not entitled to ask this Court to reverse the lower court on any of the items contained in their Points II, III and IV (b) because those points are taking issue with the lower court's decision and are not defensive.

POINT III.

UTAH LAW SPECIFICALLY PROVIDES THAT AN UNLAWFUL DETAINER OCCURS IF A DEFAULT IS NOT CURED AFTER NOTICE.

Section 78-36-3(5) Utah Code Annotated (1953) provides:

> § 78-36-3. A tenant of real property, for a term less than life, is guilty of an unlawful detainer:
>
> (5) When he continues in possession, in person or by subtenant, after a neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, . . . and after notice in writing requiring in the alternative the performance of such conditions or covenants or the surrender of the property, served upon him, and, if there is a subtenant in actual occupation of the premises, also upon such subtenant, shall remain uncomplied with . . . after service thereof. (Emphasis added.)

Respondents failed to comply with the terms of the lease and refused to cure those defaults after notice. Under the above statute, plaintiffs are clearly entitled to possession. Respondents' citations of authority in Point VI of

their briefs are not applicable in light of the above statute.

DATED this 1st day October, 1975.

Respectfully submitted,

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Attorney for Plaintiffs-
Appellants

CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of Plaintiffs-Appellants Reply Brief to Hardin A. Whitney and Wayne G. Petty, of Moyle & Draper, 600 Deseret Building, Salt Lake City, Utah 84111, attorneys for Defendant-Respondent Nikols, and two copies to F. Alan Fletcher, of Parsons, Behle & Latimer, 79 South State Street, Salt Lake City, Utah 84111, attorneys for Defendant-Respondent DAB Associates, postage prepaid, this 1st day of October, 1975.

/s/ James A. Arrowsmith

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BRIEF OF PLAINTIFFS-APPELLANTS

STATEMENT OF THE KIND OF CASE

Appellants leased the dining room and kitchen facilities of the Salt Lake Athletic Club and Spa (formerly the Towne House) to Respondent Nick N. Nikols (hereinafter Nikols), who subleased the premises to Respondents DAB Associates, Anagnostakis (Aggie), Breinholt and Daines (hereinafter DAB or Aggie). Because of certain defaults under the lease, Appellants brought an unlawful detainer action. Respondents counterclaimed for breach of the covenant of quiet possession. DAB also sought reimbursement for charges by members of Appellants' club.

DISPOSITION IN THE LOWER COURT

The district court, the Honorable Peter F. Leary presiding, dismissed Appellant's Complaint and Respondents' Counterclaims, but awarded attorneys' fees to Respondents. The court also awarded DAB $613.01 for charges by Appellants' members.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the lower court's decision as to dismissal of their complaint, award of attorneys' fees to Respondents and award of $613.01 to DAB.

STATEMENT OF FACTS

The statement of facts has been divided into numbered paragraphs for more convenient reference.

1. Appellants own and operate the Salt Lake Athletic Club. (R. 83).

2. The Athletic Club had approximately 1500 members, with approximately 250 family memberships and approximately 100 memberships issued to minors (R. 84), and the dining room facilities were available to them. (Paragraph 8 of House Rules, Exhibit 19-P).

3. During the ten years when Appellants operated the dining room, they had a complete salad bar with twenty or more different items, and four to eight entrees

every day for lunch and at least six to eight entrees and the salad bar in the evening. (R. 92).

4. Appellants leased the Towne House Restaurant facilities to Nikols on or about December 1, 1971 (R. 242) for preparing and serving such food and beverages to club members as Appellants had previously supplied (R. 245). The lease provided that in the event there was not sufficient food and beverage business from Club members, Nikols was permitted to open the premises to the public. (R. 247-48).

5. Paragraph 5 of the Sublease between Appellants and Respondent Nikols provided that Nikols would have available and prepare and serve to Club members food and beverages in the types and qualities being served by Appellants and at the following times:

Lunch	Monday through Friday 11:30 a.m. to 2:30 a.m.
Dinner	Saturday 7:30 p.m. to 11:00 p.m.

Nikols was required to have sandwiches and drinks available Monday through Saturday from 6:00 p.m. to 10:00 p.m. (R. 246).

6. Nikols admitted that Appellants sought him because he was a master chef and because of his reputation as a good restauranteur (R. 180), and that he went into the Towne House to provide great and excellent quality of food and variety. (R. 181).

7. Nikols did not change the format when he took over (R. 92). He testified he had six or eight or more different entrees (R. 173, 174), and that he maintained the revolving salad bar, which had a great variety of salads, all during the period he ran the restaurant. (R. 180).

8. Nikols opened the premises to the public in the spring of 1973 (R. 164), but tried to give the best menu items possible to bring in the customers. (R. 174). When Nikols opened to the public, he advertised the excellent cuisine. (R. 172).

9. There was no cover charge while the restaurant was private. (R. 167). After the restaurant was opened to the public, on most Fridays and Saturdays when Nikols had a local band, he did not charge a cover charge. (R. 178). Most of the time there was no cover charge on weeknights. (R. 175).

10. On or about January 7, 1974, Nikols subleased the restaurant to DAB (R. 254), who operate Aggie's Club and Restaurant on the premises. (R. 9).

11. Nikols testified that Aggie was required to maintain excellent food and service. (R. 184).

12. Nikols testified that Aggie worked as a manager, but did not have any knowledge as a restauranteur. (R. 183).

13. In his operation, Aggie charges a $5.00

door charge or "package". (R. 17). The package includes the patrons' cover charge, floor show, dancing, all the patrons' beer, and all their drink mix. (R. 20, 220).

14. Under Aggie's operation, on Wednesday evenings, the only food available was a roast beef dinner for $1.00 in addition to the $5.00 door charge. On Thursday evenings, only a spaghetti dinner was available for $1.00 in addition to the $5.00 door charge. (R. 17-18, 222).

15. Aggie discontinued the salad bar on July 15, 1974. (R. 221).

16. Aggie operates under a Class "C" Beer License, (Exhibit 12-P), and does not allow minors on the premises. (R. 33). Aggie also has a cabaret license. (R. 33) (Exhibit 10-P).

17. For the period August 1, 1974 through November 12, 1974, Aggie's package sales exceeded total food sales by more than four times. Package sales exceeded dinner sales by eight times. On a number of Tuesday evenings when Aggie's was open, there were no dinner sales, but there were hundreds of dollars in package sales. (Exhibit 7-P).

18. The figures shown for package sales in Exhibit 7-P do not include food, except for Wednesday and Thursday nights, when for an additional $1.00 a roast beef dinner or a spaghetti dinner was available. (R 20-21).

Aggie testified that on Wednesdays and Thursdays, a lot of his customers don't eat. (R. 17).

19. Mr. Rinehart Peshell testified that on October 29, 1974 (a Tuesday evening) he arrived at Aggie's Club at approximately 10:30 p.m. (R. 111), that he observed no one eating (R. 112), and that he only observed mixers being brought by girls and drinks brought in by patrons. (R. 112). Aggie's records show no dinner sales that evening. (Exhibit 7-P).

20. Lorraine Heugly testified she visited Aggie's Club with her husband on October 29, 1974 (R. 138). They arrived at approximately a quarter to nine. There was no linen or silverware on the table. No one offered them a menu, and she did not observe anyone eating that evening. (R. 139). Neither Mrs. Heugly nor her husband asked for a menu (R. 141-142). She didn't intend to eat when she went there. She didn't know it was a place to eat. She thought it was a club. (R. 142).

21. Mrs. Heugly also attended Aggie's Club on October 31, 1974. She was not given a menu, she observed no one eating, and to her knowledge none of the tables were set up with silverware or napkins. She didn't expect there would be anything to eat. (R. 142).

22. Aggie testified he employed an entertainment group called "Promises"(R. 25, 37) who put on a floor show called "Rip Rock and the Stick Shifts", in which they used the words "ass", "shit", (R. 44, 45) and "horny" (R. 48) in

their act since August 1, 1974.

23. Appellant testified that he had witnessed Aggie's floor show in August and that he had heard one of Aggie's entertainers state, "If I have offended anybody, fuck you." (R. 94-96).

24. Mr. Peshell testified that he witnessed the floor show of Rip Rock and the Stick Shifts on the night of October 29, 1974. Two of the entertainers carried on a conversation concerning their sexual prowess, using some female patrons as an example, one claiming the other entertainer's organs were small and that he knew the lady's vagina was large because he had engaged in sex with her. There was a slide show in which one slide showed a lady with bared breasts. The group presented a further routine of two young men riding in a car, discussing their desire for intercourse, crabs, itching and their sexual organs. After drinking beer, one indicated he needed to relieve himself, and proceeded to act out urinating. (R. 113-115).

25. On November 13, 1974, Mr. Peshell again visited Aggie's Club (R. 115). One of the entertainers acted as if he opened a can of beer using his sexual organ. The entertainers also acted out urinating on some of the patrons. (R. 118). Aggie was there on both occasions. (R. 119).

26. Ken Rasmussen, a member of the Towne House Athletic Club, testified that his children used to visit

the restaurant first when Appellant and then when Nikols ran the restaurant, but they ceased when Aggie took over. (R. 106-107). He would no longer let them go because of the type of operation. (R. 107).

27. David R. Davidson, Jr., a member of the Towne House, testified he had two minor daughters who patronized the restaurant prior to the time it became Aggie's when Appellants and Nikols operated it, and that they have not gone to it since it became Aggie's Club and Restaurant because a sign says "No Minors Allowed". (R. 108-109).

28. Aggie had charges of approximately $613.01 from Towne House members. (R. 198-199).

20. Aggie testified that Appellant never asked him to carry any charges for him (R. 198, 201) and that Appellants refused to back up charges by members so that Aggie's would extend them credit. (R. 211).

30. Appellant's bookkeeper received Aggie's bill for charges and went over it with him. (R. 201). There was no evidence she agreed the bill was owed or had authority to so agree.

31. Aggie testified he assumed Appellant would pay the charges when he sent him the statement. (R. 200).

32. Paragraph 16 of the Sublease dated December 1, 1971 between Appellants and Respondent Nikols, provides in part:

> Sublessor and Sublessee agree that if either defaults in any of the conditions and terms of this lease, the defaulting party shall pay all costs and expenses, including attorney fees, which may arise or accrue from enforcing this lease or in obtaining possession of the premises or in pursuing any remedy provided by the laws of the State of Utah whether by filing suit or otherwise. (R. 251).

ARGUMENT

POINT I

WHEN THE TRIAL COURT SPECIFICALLY FOUND THAT APPELLANTS HAD NOT BREACHED THE NIKOLS SUBLEASE, IT WAS IMPROPER FOR THE COURT TO AWARD ATTORNEYS' FEES TO RESPONDENTS.

Nikols counterclaimed against Appellants for breach of the covenant of quiet possession in Paragraph 11 of the Sublease between Appellants and Nikols, and claimed attorneys' fees. The court's award of attorneys' fees was clearly improper. The Sublease between Nikols and the Appellants provides that in the event of default, the defaulting party would pay attorneys' fees. There is no other provision for attorneys' fees. The court specifically determined that Nikols had no cause of action against Appellants. In spite of the fact that the court dismissed all counts of Nikols' claims as to alleged breach of the Sublease by Appellants (R. 348), the court awarded Nikols

attorneys' fees in the amount of $3,665.63. Because the court dismissed Nikols' claims, there was no basis on which to award attorneys' fees.

The court again erred in awarding attorneys' fees to DAB, who had counterclaimed against Appellants for breach of the covenant of quiet possession contained in the Sublease Agreement between DAB and Nikols, and sought general damages in the amount of $4,500. The court dismissed DAB's claim, no cause of action, (R. 348), but awarded DAB attorneys' fees in the amount of $3,175.00. Because the court dismissed DAB's counterclaim no attorneys' fees should have been awarded. Such award would be improper under both the Stevensen-Nikols Sublease and the Nikols-DAB Sublease Agreement.

In addition, the award of attorneys' fees to DAB was improper for another reason. Paragraph 16 of the Sublease Agreement between Nikols and DAB, under which the court awarded attorneys' fees to DAB, is binding only upon Nikols and DAB. Appellants were not ever parties to that agreement. Respondent Nikols could not bind Appellants to an agreement to pay attorneys' fees to his sublessees.

This court has frequently stated that attorneys' fees are not recoverable unless provided for by the contract or authorized by statute. See Pacific Coast Title Insurance

Co. v. Hartford Accident & Indemnity Co., 7 Ut. 2d 377, 325 P.2d 906 (1958). In the instant case, we have neither. Because Nikols was not entitled to be awarded attorneys' fees under his Agreement with Appellants, and because DAB had no agreement with Appellants, the trial court was absolutely wrong in awarding attorneys' fees to Respondents.

POINT II

WHERE THE EVIDENCE WAS CONCLUSIVE THAT RESPONDENTS DAB HAD CHANGED THE OPERATION OF THE RESTAURANT, THE TRIAL COURT SHOULD HAVE FOUND AS A MATTER OF LAW THAT RESPONDENTS HAD BREACHED THE LEASE.

Under paragraph 4 of the Sublease with Appellants, Nikols assumed the operation of preparing and serving such food and beverages as Appellants had previously supplied to members of the Club in the main dining room and kitchen area. Nikols was required to have available and serve to Club members food and beverages in the types and qualities then served by Appellants and to serve lunch Monday through Friday, 11:30 a.m. to 2:30 p.m., dinner on Saturday from 7:30 p.m. to 11:00 p.m., and to have sandwiches and drinks available Monday through Saturday from 6:00 p.m. to 10:00 p.m. Nikols could offer additional service if he so determined. In the event there was not sufficient business from Club members to make the business profitable, then under paragraph 9 of the Sublease, Nikols

was permitted to open the premises to the public and make it a public restaurant. (See Statement of Facts 4 and 5).

The evidence was clear and uncontradicted that during the ten years Appellants operated the dining room facilities at The Towne House Athletic Club, they had maintained a revolving salad bar with twenty entrees, plus a menu with four to eight entrees at lunch and six to eight entrees for dinner. Appellants sought out Nikols because of his reputation as a master chef and fine restauranteur. When Nikols subleased the restaurant from Appellants, he maintained the salad bar and offered six to eight or more entrees off the menu. Members took their minor children to the restaurant. A cover charge was imposed only on a few occasions while the restaurant was private. When Nikols opened the restaurant to the public, he advertised the excellent cuisine. He only charged a cover charge when there was expensive entertainment. On weeknights he tried not to charge a cover charge, and on most weekends he did not. (See Statement of Facts 3, 6 through 9, 26 and 27).

Aggie drastically changed the operation of the restaurant. He discontinued the salad bar. He obtained a Class "C" Beer License and thereafter prohibited minors from using the restaurant facilities. He instituted a

package deal of $5.00 per person, which covered entrance, entertainment and all of each patron's beer and drink mix. His business records show that the great bulk of his income came from his package and not from food sales. For the period of August 1, 1974 through November 12, 1974, package sales exceeded total food sales by over four times. For that period, package sales exceeded the evening dinner sales by eight times. In fact, Aggie's business records show that on a number of evenings, there were no food sales at all. Witnesses testified that on the night of Tuesday, October 29, 1974, they observed no one eating, no tables were set up, and they were not offered menus. One witness testified she did not know she could get food there because she thought it was a club. Further, Aggie brought in a group of entertainers whose show included reference to sexual intercourse, sex organs, urination and similar material. (See Statement of Facts 13 through 25).

These facts clearly establish that Aggie's operation differed substantially from the way in which Appellants and Respondent Nikols operated the restaurant. Aggie's operation resembles a bar rather than a restaurant.

Appellants could find no Utah cases where a court has construed the meaning of "public restaurant". Most cases from other jurisdictions involving a judicial inter-

pretation of this term have concerned liquor control, zoning or civil rights statutes.

Aggie's operation was not open to the public. Aggie's obtained a Class "C" Beer License. Section 19-3-9 of the Salt Lake City Ordinances provides:

> Unlawful to Permit Minors in Certain Establishments. It shall be unlawful for any licensee of a Class "C", or Class "D", license for the sale of beer, or any operator, agent or employee of such licensee to permit any person under the age of twenty-one years to remain in or about such licensed premises.

It is significant that Aggie's chose to obtain and operate under a Class "C" permit. The traditional restaurant beer license, a Class "B" permit, requires that sixty percent (60%) of the restaurant's revenue be derived from the sale of food. (Section 19-1-11, Salt Lake City Ordinances). As can be seen from Exhibit 7-P, Aggie's Club could not meet this requirement. By obtaining the Class "C" permit, Aggie excluded all minors as well as all minor members of The Towne House Club who formerly had full rights to use the facilities.

Black's Law Dictionary defines "public" as being "open to all". Where Aggie's operation denied admission to a significant portion of the public, all minor members of the Athletic Club, and all minor children of members, the Court should have found as a matter of law that Aggie

was not operating a public restaurant within the terms of the Sublease.

Moreover, Aggie's Club does not meet any definition of restaurant used by Salt Lake City. Section 51-2-42A (1972) of the Salt Lake City Zoning Ordinance provides:

> RESTAURANT. "Restaurant" shall mean a building within which there is served a variety of hot food for consumption on the premises and where more than sixty (60%) percent of the gross volume is derived from the sale of foods served for consumption on the premises.

For purposes of obtaining a Class "B" Beer License, Section 19-1-11 (1974) of the Salt Lake City Ordinances states "restaurant"

> . . . shall mean premises where a variety of hot food is served for consumption on the premises and where more than sixty percent of the gross volume of business is derived from the sale of food served for consumption on the premises.

A very high percentage of Aggie's revenue comes from his package sales, which includes the cover charge, beer and mixers. Less than one-fourth of Aggie's total revenue comes from food sales. Clearly Aggie's does not meet the sixty percent requirement of the ordinances. In addition, both ordinances require that a variety of hot food be served. Aggie's own testimony was that on Wednesdays and Thursdays only one item was available.

The business license definition of restaurant is

broad. Section 20-14-1 (1971) of the Salt Lake City Ordinances states:

> "Restaurant" as used in this chapter shall be defined to be any place where food or drink is prepared, served or offered for sale or sold for human consumption on or off the premises.

The obvious intent of the city is to regulate all businesses, and, therefore, the definition of restaurant must necessarily be broad enough to cover all establishments where any food at all is served. It is therefore more appropriate to refer to other ordinances, such as zoning and liquor control, as well as cases, to determine the ordinary definition of a restaurant.

In Leograndis v. Liquor Control Commission, 149 Conn. 507, 182 A.2d 9 (Sup. Ct. Err. 1962), the liquor control commission had suspended a restaurant liquor permit, and the lower court had dismissed an appeal from the suspension. The plaintiff had liquor sales for undisclosed periods of $47,989.45 as against food sales of $2,074.65. The plaintiff admitted he did little or no noon hour business and very little, if any, supper business. Most of his business was done on Friday and Saturday nights, when he provided a band and floor show. The defendant relied on Section 30-1(17) of the general statutes, which defined restaurant as follows:

> (17) "Restaurant" means space, in a suitable and permanent building, kept, used, maintained, advertised and held out to the public to be a place where hot meals are regularly served, . . .

The court, in construing this statute stated:

> The mere possession of a supply of food sufficient to offer a limited number and variety of meals would not make the premises a restaurant under Section 30-1(17) if there were so few food patrons or their demands for food were so insignificant that the service of hot meals was not a regular part of the permitee's business. 182 A.2d at 11.

The court concluded that the commission had committed no error in arriving at its decision.

Fulford v. Board of Zoning Adjustment of City of Dothan, 256 Ala. 336, 54 A.2d 580 (1951) arose from a proceeding before the Board of Zoning Adjustment for permission to sell beer in a restaurant. The Board denied permission, and the petitioners appealed to the circuit court, which affirmed the Board's action. The Supreme Court of Alabama held that the sale of beer in the restaurant would have been an unauthorized extension of the nonconforming business under the zoning ordinances. In its analysis, the court cited with approval the following language:

> "A restaurant is defined by Webster to be an eating house and such it has always been construed under the law and not where intoxicants are dispensed under the guise of running a restaurant, a restaurant keeper in contemplation of law is not a saloon keeper" . . . "A restaurant does

> not necessarily mean a beer and wine restaurant, and a written lease of premises for use as a restaurant did not obligate landlord to assent to application for a beer and wine license." (citations omitted).

Appellant's evidence as to the operation of Aggie's Club was clear and unrebutted. Aggie's is not operated as a public restaurant, as such term has been defined by Salt Lake City and has been construed by the Courts. The bulk of Aggie's revenue comes from his package sales. Food constitutes a small part of his total business.

In addition, if there was any doubt as to what the term "public restaurant" means, the court should have considered the construction placed upon the term by the parties themselves. When Appellants operated the restaurant, they provided a variety of entrees and the salad bar to members. Nikols entered in to provide excellent food and service to Athletic Club members, and he continued this operation when he opened to the public. That is the best evidence of what the parties contemplated when they used the term "public restaurant". Aggie's operation differs substantially from prior operation by Appellants and Nikols.

Under the Sublease, Nikols was permitted to offer additional service, but he was not permitted to

either change the operation or curtail it. The evidence was clear as to Aggie's operation. Respondents presented no contradictory evidence except their own self-serving statements, which were contradicted by Aggie's own business records.

Aggie's operation clearly fails to meet the standards of a restaurant for liquor and zoning purposes, and it does not meet the criteria established by other courts which have construed similar liquor and zoning laws. The trial court should have found as a matter of law that Respondents were not operating the premises as a public restaurant.

POINT III

THE COURT ERRED IN AWARDING $613.01 TO RESPONDENTS FOR CHARGES MADE BY MEMBERS OF THE SALT LAKE ATHLETIC CLUB.

The evidence was clear that there was no agreement for Appellants to pay DAB for charges made by members of the Athletic Club at Aggie's Club & Restaurant. Aggie testified that Appellants never asked him to carry any charges for him. Aggie later testified that Appellants refused to back up the charges by Athletic Club members so that Aggie would extend them credit. Aggie sent a statement to Appellants for charges by Athletic Club members. Appellant's bookkeeper acknowledged receipt of Aggie's bill

and went over it with him, but there is no evidence that she agreed the bill was owed or that she had authority to so agree. (See Statement of Facts 28 through 31).

There was no evidence that Appellants and DAB ever reached any understanding or agreement concerning payment or guaranty of the charges. On the contrary, Aggie testified Appellants refused to guaranty charges by members. Moreover, under no principle of contract law could appellants be bound by an agreement or arrangement between Aggie and persons who are also members of the Salt Lake Athletic Club. The trial court erred in awarding the amount of such charges to DAB.

CONCLUSION

Appellants respectfully request this court to reverse the trial court's decision with regard to Appellants' complaint and to award judgment to Appellants, terminating Respondents' possession of the premises, to reverse the trial court's award of attorneys' fees to Respondent Nikols and Respondents DAB, and to reverse the trial court's award of $613.01 to Respondents DAB under Count IV of their counterclaim. Appellants also request that this court assess damages against all Respondents for

their unlawful detainer of the premises from and after September 12, 1974, at the rate of $3,000 per month. (R. 294).

DATED this 26th day of June, 1975.

Respectfully submitted,

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Attorney for Plaintiffs-Appellants

CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of Plaintiffs-Appellants Brief to Hardin A. Whitney and Wayne G. Petty, Moyle & Draper, 600 Deseret Building, Salt Lake City, Utah 84111, attorneys for Defendant-Respondent Nikols, and two copies to F. Alan Fletcher, Parsons, Behle & Latimer, 79 South State Street, Salt Lake City, Utah 84111, Attorney for Defendant-Respondent DAB Associates, postage prepaid, this 26th day of June, 1975.