

1997

Hans Rosenwinkel v. John Bennett : Brief of Appellant

Utah Court of Appeals

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COURT OF APPEALS

IN THE COURT OF APPEALS OF THE STATE OF UTAH

HANS ROSENWINKEL,

Plaintiff/Appellant,

vs.

JOHN BENNETT,

Defendant/Appellee.

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BRIEF OF APPELLANT

Case No. 970521-CA
Priority 15

Appeal from a Judgment of the Third Judicial District Court,
in and for Salt Lake County, State of Utah, Judge Homer F. Wilkinson

ORAL ARGUMENT REQUESTED

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JURISDICTION

Jurisdiction is proper in this Court pursuant to Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue 1. Did the district court err by entering a judgment ordering relief which was not recommended at the hearing before the Commissioner and which does not accurately or fairly reflect the proceedings at the hearing before the Commissioner? The standard of review is correction of error. Carlie v. Morgan, 922 P.2d 1, 3 (Utah 1996) (questions of law are granted no particular deference but are reviewed for correctness). Appellant preserved his appeal by filing a Notice of Appeal within thirty days of the district court's judgment. R. at 63-65, 90-91.

Issue 2. Did the district court err in awarding attorney fees pursuant to Utah Code Ann. § 78-28-56 without making a finding that 1) Bennett prevailed; 2) Rosenwinkel's claim was without merit; and 3) Rosenwinkel did not act in good faith. The standard of review is correction of error. Strawberry Elec. Serv. Dist. v. Spanish Fork City, 918 P.2d 870, 875 (Utah 1996) (interpretation and application of statutes and constitutional provisions reviewed for correctness). Appellant preserved his appeal by filing a Notice of Appeal within thirty days of the district court's judgment. R. at 63-65, 90-91.

CONSTITUTIONAL PROVISIONS, STATUTES

The determinative and pertinent statutes involved in this appeal are included in the addendum to this brief.

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from a judgment entered on June 25, 1997 by Judge Homer F. Wilkinson, Third District Court, Salt Lake County, based upon the recommendation of Court Commissioner Thomas Arnett.

Course of Proceedings and Disposition

On February 7, 1997, Hans Rosenwinkel ("Rosenwinkel") filed a Verified Petition for Protective Order against his roommate John Bennett ("Bennett"). The district court issued an Ex Parte Protective Order against Bennett. On February 12, 1997, Bennett filed a Motion for Dissolution of Protective Order and a Verified Answer to Rosenwinkel's Verified Petition.

On February 24, 1997, due to a court clerical error, the hearing on Rosenwinkel's petition was heard at 8:30 a.m. instead of 9:30 a.m. as stated on Rosenwinkel's copy of the Ex Parte Order. The Commissioner, in the earlier hearing, had already granted Bennett's Motion for Dissolution and also granted Bennett's request for repayment of his share of the rent due to Rosenwinkel's apparent "default." Upon learning of the clerical error, the

Commissioner continued the hearing to March 10, 1997, and the Court re-issued an amended protective order against Bennett. At the hearing on March 10, 1997, the Commissioner ordered the Petition for Protective Order dismissed.

Bennett's counsel submitted a proposed order apparently relying wholly on the February 24, 1997, hearing and excluding any mention of the continued hearing on March 10, 1997. That proposed order was signed and entered by the Court on April 23, 1997. Rosenwinkel never received a copy of the proposed order.

On June 25, 1997, a judgment incorporating the terms of the April 23, 1997 order was filed. On July 23, 1997, Rosenwinkel filed this appeal and a Motion for Relief from the Judgment pursuant to Utah R. Civ. P. 60(b).

On September 18, 1997, this Court moved, sua sponte, for a summary disposition of the case. After both parties filed memoranda, this Court in an October 28, 1997 order denied the Sua Sponte Motion for Summary Disposition and asked for briefing on the merits of the appeal.

Statement of Facts

On February 4, 1997, Hans Rosenwinkel ("Rosenwinkel") was assaulted and threatened by his roommate, John Bennett ("Bennett"), who also threatened their other roommate, Dawn Numedahl. R. at 86. On February 7, 1997, Rosenwinkel and Numedahl went to the clerk's office of the Third District Court and explained what had happened. The

clerk gave them forms, which they completed, and an Ex Parte Protective Order was issued against John Bennett. A copy of the Ex Parte Protective Order was given to Hans Rosenwinkel. R. at 86-87; Affidavit of Hans Rosenwinkel, dated July 23, 1997, (“Rosenwinkel Aff.”) ¶ 2. A copy of Rosenwinkel’s Affidavit is attached to this Brief as Addendum 1. The last page of the Order set a hearing on the Order on Monday, February 24, 1997 at 9:30 a.m. R. 9-12. A copy of the Ex Parte Protective Order is attached to this Brief as Addendum 2.

The Ex Parte Protective Order was served on John Bennett on February 10, 1997. R. at 18-19. On February 12, 1997, counsel for Bennett filed a Verified Answer to the Verified Petition for Protective Order, a Motion for Dissolution of Protective Order and a Notice of Hearing, which were hand delivered to Rosenwinkel on February 12. In his Verified Answer, Bennett requested payment of rent lost after he was barred from the apartment and his security deposit and attorney fees pursuant to Utah Code Ann. § 78-27-56. R. at 23. The Notice of Hearing stated that Bennett would call his Motion for Dissolution of Protective Order for hearing on February 14, 1997, at 9:00 a.m. R. at 87; Rosenwinkel Aff. ¶ 4. Rosenwinkel appeared at Third District Court on February 14, 1997 at 9:00 a.m. and was informed that there was no hearing scheduled on his Petition for Protective Order or the Motion for Dissolution. R. at 87; Rosenwinkel Aff. ¶ 5.

On February 24, 1997, Bennett and his counsel appeared at 8:30 a.m. for the hearing on Rosenwinkel's Petition for Protective Order and Bennett's Motion for Dissolution of Protective Order. The Commissioner called the case, noted the absence of Rosenwinkel or any representative for Rosenwinkel and stated he would recommend granting Bennett's Motion for Dissolution of Protective Order. Counsel for Bennett directed the Commissioner's attention to Bennett's request for lost rent, and the Commissioner stated he would recommend granting Bennett's claim for rent for the period after Bennett had been barred from their shared apartment by the Ex Parte Protective Order. R. at 99 (pp. 3-4). The transcript of the tape recording of the February 24, 1997, hearing is found at Addendum 3.

On February 24, 1997, Rosenwinkel appeared at the Commissioner's courtroom at 9:10 a.m. for the hearing scheduled in the Ex Parte Protective Order for 9:30 a.m. The clerk informed Rosenwinkel that the matter had already been heard. Rosenwinkel showed the clerk his copy of the Ex Parte Protective Order, scheduling the hearing for 9:30 a.m. The clerk acknowledged to Rosenwinkel that the confusion about hearing time was due to an error in the court clerk's office. R. at 87. Rosenwinkel Aff. ¶ 6. The clerk then spoke with the Commissioner and as a result, the hearing on Rosenwinkel's Petition was continued to March 10, 1997. R. at 31. The Minute Order reflecting the 8:30 a.m. proceeding before the Commissioner, Rosenwinkel's appearance, the clerical mistake and the continuance of the hearing is found at Addendum 4.

An Amended Ex Parte Protective Order was issued and served on Bennett that same day. R. at 32-38. On March 7, 1997, Bennett filed a Memorandum in Opposition to Permanent Protective Order, Bennett's Affidavit In Opposition to the Entry of Any Further Extension of Amended Ex Parte Protective Order and the affidavit of his attorney concerning attorney fees. R. at 41-55.

Rosenwinkel appeared at the hearing on March 10, 1997. Loren Martin, an attorney present in the courtroom to assist plaintiffs in hearings on protective orders, reviewed Rosenwinkel's papers and was present during the hearing. Bennett appeared and was represented by James Lowrie. After hearing from both Rosenwinkel and Lowrie, the Commissioner stated that he would recommend dismissing the matter and that the court would prepare its own order. No request for any reimbursement to Bennett for rent or attorney fees was made by Bennett or his counsel. R. at 100 (p. 5). A transcript of the March 10 hearing is found at Addendum 5. The Commissioner entered a Minute Order stating only that "[t]he Commissioner recommends that this matter be dismissed." A copy of the Minute Order entered at the March 10, 1997 hearing is found at Addendum 6.

Bennett's counsel submitted a proposed order on March 7, 1997, that the clerk's office returned to counsel on March 14, 1997 because it lacked a signature line for the Judge and it was not served on Rosenwinkel. The proposed order was resubmitted on March 14, 1997, with the required signature lines but still without proof of service on Rosenwinkel.

Memorandum Responding to Court's Sua Sponte Motion for Summary Disposition, October 10, 1997, at Exhibits J, K and L.

On April 21, 1997, Bennett's counsel resubmitted the Order reciting and relying upon the hearing before the Commissioner on February 24, 1997, and not mentioning or reflecting the continued hearing on March 10, 1997. That Order granted dissolution of the protective order and awarded Bennett: 1) immediate possession of his personal property, 2) the sum of \$633 for reimbursement of rent and security deposit and 3) \$1,750 in attorney fees. R. 58-60. A copy of the trial court's Order is found at Addendum 7.

The Order was entered by the Court on April 23, 1997. R. at 58-60. Although the certificate of service reflects that Rosenwinkel was served a copy of the Order by mail on April 14, 1997, Rosenwinkel did not receive it. R. at 88-89, Rosenwinkel Aff. ¶ 12.

On June 3, 1997, Bennett's counsel sent Rosenwinkel a proposed Judgment, again relying upon the hearing before the Commissioner on February 24, 1997 and not mentioning or reflecting the hearing on March 10, 1997, incorporating the terms of the April 23, 1997 Order. Rosenwinkel had moved from the address to which the proposed Judgment was sent and did not receive the proposed Judgment until June 14, 1997. R. at 88, Rosenwinkel Aff. ¶ 10.

The proposed Judgment was entered by the district court on June 25, 1997. R. at 63-65. A copy of the Judgment is found at Addendum 8.

SUMMARY OF THE ARGUMENT

The trial court's order and judgment awarding lost rent and security deposit and attorney fees to Bennett do not accurately represent the recommendations of the Commissioner at the initial hearing or continued hearing on March 10, 1997. At the March 10 hearing, Bennett's counsel specifically stated that no further relief of any sort was required in the case and that the matter should end. The Commissioner agreed that the matter should end, without any hint or indication that he would recommend an award of attorney fees or payment of lost rent to Bennett. The Commissioner further declared that the Court would enter its own order. Despite this, counsel for Bennett submitted, and the Court executed, an Order and Judgment in which attorney fees and lost rent were awarded to Bennett. Because the Judgment does not reflect the findings or recommendations made by the Commissioner at the March 10 hearing and is contrary to the Commissioner's minute order, it should be reversed. A judgment based on the award of lost rent, recommended by the Commissioner in Rosenwinkel's absence on February 24 and before the Commissioner learned that Rosenwinkel's absence was caused by an error in the clerk's office, would violate due process under both the Utah and U.S. Constitutions.

Additionally, attorney fees cannot be awarded to Bennett pursuant to Utah Code Ann. § 78-27-56 because the district court did not make specific findings that Bennett prevailed, that Rosenwinkel's claim was meritless and that the claim was asserted in bad faith.

Therefore, the district court's order and judgment awarding Bennett attorney fees cannot stand pursuant to Utah Code Ann. § 78-27-56 and should be reversed.

ARGUMENT

I. The Judgment Against Rosenwinkel Does Not Accurately Reflect the Proceedings in the District Court and Should be Reversed

In Gillmor v. Wright, 850 P.2d 431, 436 (Utah 1993), the Utah Supreme Court stated:

It has long been the law in this state that conclusions of law must be predicated upon and find support in the findings of fact and that the judgment or decree must follow the conclusions of law. When there is variance, the judgment must be corrected to conform with the findings of fact.

In the present case, neither the district court's judgment nor the order upon which the judgment is predicated, accurately represent what the Commissioner recommended at the hearing on March 10, 1997, and the Judgment must therefore be reversed.

In February 1997 Rosenwinkel and his roommate, Dawn Numedahl, went to the Third District Court Clerk's Office and informed the clerk that they had been threatened and assaulted by their roommate, John Bennett. The Clerk's Office apparently believed that this situation entitled Rosenwinkel to the protection of the Utah Cohabitant Abuse Act and issued an Ex Parte Protective Order. The clerk gave Rosenwinkel and Numedahl a copy of the Ex Parte Protective Order, which informed Rosenwinkel that a hearing had been set on the Order on February 24, 1997 at 9:30 a.m. R. at 16.

In reliance on the written instruction from the Clerk's Office, Rosenwinkel appeared in court on February 24, 1997, at 9:10 a.m. and was informed that defendant Bennett and his attorney had been in the courtroom an hour earlier and that the matter had been heard by the Commissioner in Rosenwinkel's absence. In that hearing, Bennett's counsel specifically asked that Rosenwinkel be ordered to pay Bennett the amount of the rent lost by Bennett when he was barred from the apartment. R. at 99 (p. 3). Rosenwinkel showed the courtroom clerk the Ex Parte Protective Order he had been given, setting the hearing at 9:30 a.m. The courtroom clerk acknowledged that there had been a scheduling error in the court clerk's office. When the error was brought to the Commissioner's attention, he continued the hearing to March 10, 1987.¹ R. at 31.

At the continued hearing on March 10, 1987, Bennett and his attorney and Rosenwinkel were all present. During the continued hearing, in contrast to his specific request for payment of lost rent to Bennett at the February 24 hearing, Bennett's counsel did not seek any payment of lost rent or attorney fees. In fact, at the March 10 hearing, counsel for Bennett disclaimed any interest in any relief except dissolution of the protective order. He argued that there was "no need for any further relief to issue from the Court," and that

¹ Two weeks earlier Rosenwinkel had been served with Bennett's Motion for Dissolution of Protective Order and a Notice of Hearing, informing him that a hearing on the Motion for Dissolution would be heard on February 14, 1997 at 9:00 a.m. Rosenwinkel appeared on February 14, 1997, and was informed that there was no hearing scheduled. R. at 87.

there was no showing of “any further necessity for court intervention of any sort.” R. at 100 (p. 5) (emphases added).

The Commissioner recommended dissolution of the protective order and made no recommendation awarding lost rent or attorney fees. In addition, the Commissioner instructed the parties that “the Court will enter it’s own order.” R. at 100 (p. 5).

On March 7, prior to the continued hearing, counsel for Bennett submitted a proposed order, dissolving the protective order, stating that Bennett’s Verified Answer was “approved” and awarding Bennett \$633 in lost rent and \$1,750 in attorney fees. The clerk’s office rejected Bennett’s proposed order for lack of proper signature lines and failure to serve it on Rosenwinkel.

Following the March 10 hearing and despite the Commissioner’s instruction, Bennett’s counsel resubmitted the proposed order on March 14, 1997. The required signature line had been added, but it still lacked proof of service. Counsel for Bennett submitted the same proposed order again on April 14, still referring only to the February 24 hearing and awarding Bennett \$633 for lost rent and security deposit and attorney fees in the amount of \$1750.

As is evident from the minute orders and transcripts of the hearings on February 24 and March 10, the Judgment, and the Order upon which it is premised, misrepresent the proceedings before the Commissioner. At the February 24 hearing, the Commissioner

properly continued the hearing to March 10 because Rosenwinkel, through no fault of his own, was not present at the hearing. Consequently, the only result from the February 24 hearing was a continuance of the hearing. Once Bennett's counsel learned that the hearing had been continued, it was clear that it could not be the basis for an award of lost rent that appears in the Order and Judgment drafted by Bennett's counsel. Nor could it be the basis for the award of attorney fees that appears in the Order and Judgment because that issue was never addressed by the Commissioner. Rather that hearing merely continued the status quo as demonstrated by the court's issuance of an Amended Ex Parte Protective Order until the date of the next hearing. R. at 35-38.

The continued hearing on March 10, at which the Commissioner did make his final recommendations, is not even mentioned in the Order or Judgment. At that hearing, the only relief recommended was dismissal of the matter. R. at 100 (p. 6); R. at 57.

The Commissioner's original recommendation to grant lost rent to Bennett at the February 24 hearing was not the Commissioner's final recommendation on the issue. R. at 57. To allow the Order and Judgment to stand would violate the fundamental fairness required by due process under both the Utah and U.S. Constitutions. Rosenwinkel would be burdened with a judgment against him of which he had no knowledge because he was absent, due to the court's clerical error, from the February 24 hearing. The issue of an award of lost rent was not raised at the March 10 hearing. Rosenwinkel had no notice of an award of lost

rent to Bennett until he received the Judgment in June. R. at 88. It would be particularly unfair to allow the Judgment to stand in this case because the issuance of ex parte protective orders under the Utah Cohabitant Abuse Act is formulated to accommodate non-attorneys. See Wells v. Children's Aid Soc'y of Utah, 681 P.2d 199, 204 (Utah 1984) (due process requires fairness).

Where, as here, the Judgment entered does not accurately reflect the proceedings and decision of the court, it must be reversed.

II. Attorney Fees to Bennett Were Improperly Included in the District Court's Judgment

Bennett's claim for attorney fees was not addressed at either the February 24 or March 10 hearing. The Commissioner never recommended an award of attorney fees. There is therefore no basis from either hearing for the award of attorney fees in the Judgment.

Bennett sought an award of attorney fees, and presumably included them in the Order and Judgment, based on Utah Code Ann. § 78-27-56 (1996), which provides, "In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith."

To award attorney fees under the plain language of Utah Code Ann. § 78-27-56,

the trial court must determine that three requirements are met:
(1) the party seeking fees prevailed; (2) the claim or defense

asserted by the opposing party was meritless; and (3) that claim or defense was asserted in bad faith.

Chipman v. Miller, 312 Utah Adv. Rep. 37, 38-39 (Utah Ct. App. 1997). Moreover, the trial court must make specific findings to support each of these elements. Id. at 39 (citing Watkiss & Campbell v. FOA & Son, 808 P.2d 1061, 1068 (Utah 1991). Absent specific findings, the basis of the award cannot be determined. Id.

In the present case, the Commissioner and district court failed to find any of the elements required for an award under Utah Code Ann. § 78-27-56. In Bennett's Memorandum Responding to this Court's Sua Sponte Motion for Summary Disposition, Bennett suggested that Commissioner Arnett's statement at the March 10 hearing that the Utah Cohabitant Abuse Act² did not include disputes between cotenants was a finding that Rosenwinkel's claim for a protective order was meritless.

However, the Utah Cohabitant Abuse Act specifically includes cotenants in its coverage. The Utah Cohabitant Abuse Act defines a cohabitant as "an emancipated person pursuant to Section 15-2-1 or a person who is 16 years of age or older who: . . . (e) resides or has resided in the same residence as the other party." Utah Code Ann. § 30-6-1(2)(e) (Supp. 1997). Moreover, the Act allows courts to issue protective orders to "[a]ny cohabitant or any child residing with a cohabitant who has been subjected to abuse or domestic violence,

² The Utah Cohabitant Abuse Act is found at Utah Code Ann. § 30-6-1 to 14 (Supp. 1997).

or to whom there is a substantial likelihood of immediate danger of abuse. . .” Utah Code Ann. § 30-6-2(1) (Supp. 1997). Both provisions apply to Rosenwinkel’s situation. Thus, the Commissioner’s statement cannot support a finding that Rosenwinkel’s claim was meritless.

Furthermore, there is no finding, nor could there be, that Rosenwinkel acted in bad faith. He accurately described his relationship to Bennett to the clerk and was instructed how to complete the petition for a protective order. The protective order issued. Rosenwinkel appeared in court on all three occasions he was instructed to do so, at the times stated. There is no finding of bad faith and no basis in the record for such a finding.


Finally, Bennett waived his claim for attorney fees. Although Bennett’s Verified Answer included a claim for relief of attorney fees, his counsel did not seek such an award at the February 24 hearing when he sought an award of lost rent. More importantly, at the March 10, 1997 hearing, Bennett’s counsel went further and stated specifically that, “I don’t think there is any showing that any further necessity for court intervention of any sort, even if there was at the beginning.” R. at 100 (p. 5).

Neither the Commissioner nor the district court made any findings whatsoever to support an award of attorney fees to Bennett. In the absence of such findings and given Bennett’s waiver of his request for such fees, an award of attorney fees under Utah Code Ann. § 78-27-56 cannot stand.

CONCLUSION

The nature of the proceedings before the Commissioner is not accurately or fairly represented in the Judgment or Order. The trial court made none of the specific findings of fact necessary to support an award of attorney fees pursuant to Utah Code Ann. § 78-27-56. Consequently, that portion of the Judgment entered on June 25, 1997, awarding Bennett lost rent and attorney fees should be reversed. Appellant requests an award of costs pursuant to Utah R. App. 34(a). Appellant further requests oral argument.

DATED this 9th day of February, 1998.


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Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am a member of and/or employed by the law firm of WATKISS DUNNING & WATKISS, Broadway Centre, Suite 800, 111 East Broadway, Salt Lake City, Utah 84111-2304, and that in said capacity I caused to be served two (2) true and correct copies of the attached BRIEF OF APPELLANT upon the following by depositing properly addressed envelopes containing the same in the United States Mail, postage prepaid, this 9th day of February, 1998:

James S. Lowrie, Esq.
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101

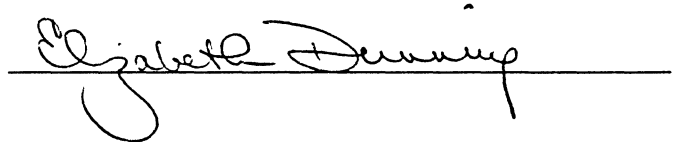


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2. Ex Parte Protective Order
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10. Attorney Fee Statute, Utah Code Ann. § 78-27-56 (1996)

Tab 1

97 JUL 23 PM 6:51

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Telephone: 801/530-1500

BY [Signature]
DEPUTY CLERK

Attorneys for Petitioner

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

HANS ROSENWINKEL,	:	
	:	
Petitioner,	:	AFFIDAVIT OF
	:	HANS ROSENWINKEL
-vs.-	:	
	:	
JOHN BENNETT,	:	Civil No. 970900972SA
	:	Judge Homer F. Wilkinson
Respondent.	:	Commissioner Thomas N. Arnett

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

HANS ROSENWINKEL, being first duly sworn, deposes and says as follows:

1. On February 4, 1997, I was assaulted and threatened by my roommate, John Bennett, who also threatened our roommate, Dawn Numedahl.

2. On February 7, 1997, Numedahl and I went to the clerk's office of the Third District Court and explained what had happened. I was given a form to fill out on which I described my relationship to John Bennett and Dawn Numedahl and what had occurred. An

Ex Parte Protective Order was issued against John Bennett. A copy of the Ex Parte Protective Order was given to me. The last page of the Order set a hearing on the Protective Order on Monday, February 24, 1997 at 9:30 a.m.

3. The Ex Parte Protective Order was served on John Bennett on February 10, 1997.

4. On February 12, 1997, counsel for John Bennett filed a Verified Answer to Verified Petition for Protective Order, Motion for Dissolution of Protective Order and Notice of Hearing, which was hand delivered to me on February 12. The Notice of Hearing stated that John Bennett would call his Motion for Dissolution of Protective Order for hearing on February 14, 1997, at 9:00 a.m.

5. I appeared at Third District Court on February 14, 1997 at 9:00 a.m. and was informed that there was no hearing scheduled on my Petition for Protective Order or the Motion for Dissolution of Protective Order.

6. I appeared at the Commissioner's courtroom on February 24, 1997, at 9:10 a.m. for the hearing scheduled in the Ex Parte Protective Order for 9:30 a.m. The clerk informed me that the matter had already been heard. I showed the clerk the Ex Parte Protective Order, scheduling the hearing for 9:30 a.m. The clerk acknowledged to me that the confusion about hearing time was due to an error in the court clerk's office.

7. The clerk spoke with the Commissioner and as a result, the hearing on my Petition and Bennett's Motion was continued to March 10, 1997.

8. On March 7, 1997, counsel for John Bennett filed a Memorandum in Opposition to Permanent Protective Order, Bennett's Affidavit In Opposition to the Entry of Any Further Extension of Amended Ex Parte Protective Order and attorney's fee affidavit.

9. I appeared at the hearing on March 10, 1997. An attorney named Loren Martin was present, reviewed my papers and was present during the hearing. John Bennett appeared with his attorney James Lowrie. After hearing from both me and Mr. Lowrie, the Commissioner dissolved the Protective Order. No request for any lost rent or other reimbursement to John Bennett or attorneys fees was made by John Bennett or his counsel.

10. On June 3, 1997, counsel for John Bennett sent me a Judgment, reciting and relying upon the hearing before the Commissioner on February 24, 1997, where through no fault of mine, I did not appear, and not mentioning or reflecting the hearing on March 10, 1997, at which I did appear. I had moved from the address to which the proposed Judgment was sent and did not receive the Judgment until approximately June 14, 1997.


11. Attached to the Judgment was an Order, also reciting and relying upon the hearing before the Commissioner on February 24, 1997 and not mentioning or reflecting the continued hearing on March 10, 1997, at which I appeared. That Order dissolved the protective order, awarded John Bennett immediate possession of his personal property and the sum of \$633 for reimbursement of rent and security deposit and \$1,750 in attorneys fees.

12. Although I have been shown a copy of the Order which reflects that a copy was served by mail on me on April 14, 1997, I did not receive a copy of the Order until I received

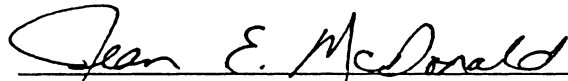
the Judgment.

13. After receiving the Judgment, I obtained the name of Elizabeth T. Dunning and consulted with her as soon as I could get an appointment on July 10, 1997.

FURTHER AFFIANT SAITH NAUGHT.

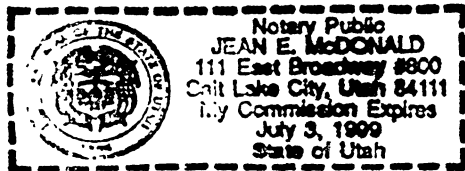

HANS ROSENWINKEL

SUBSCRIBED AND SWORN TO before me this 23 day of July, 1997.


NOTARY PUBLIC
Residing at Salt Lake City, Utah

My Commission Expires:

7-3-99



Tab 2

Hans Rosenwinkel
Petitioner's Name
8100 St.
Address (may be omitted for privacy)
SLC, UT 84103
City, State, ZIP
(801) 359-0536
Telephone (may be omitted)

FILED DISTRICT COURT
Third Judicial District
FEB - 7 1997
SALT LAKE COUNTY
By _____ Deputy Clerk

issued

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

Hans Rosenwinkel
Petitioner,
vs.
John Bennett
Respondent.

)
)
) EX PARTE
) PROTECTIVE ORDER
)
)
) Civil No. 970900972SA
)
) Judge JUDGE HOMER F. WILKINSON
) Comm. Shutt

The Court having found that Petitioner is a cohabitant of Respondent and having found that the Court has jurisdiction over this matter, and having reviewed Petitioner's Verified Petition for Protective Order, from which it appears that domestic violence or abuse has occurred, and pending further hearing in this matter,

IT IS HEREBY ORDERED:

(The Judge shall initial each section that is included in this Order.)

- gls ✓ 1. The Respondent is restrained from attempting, committing, or threatening to commit domestic violence or abuse against Petitioner.
- gls ✓ 2. The Respondent is restrained from attempting, committing, or threatening to commit domestic violence or abuse against the following minor children and members of Petitioner's family: Hans Rosenwinkel / Dawn Numedahl

3. The Respondent is prohibited from directly or indirectly contacting, harassing, telephoning, or otherwise communicating with the Petitioner.

4. The Respondent is ordered excluded and shall stay away from Petitioner's residence and its premises located at:

8100 St. SLC, UT 84103

and Respondent is prohibited from terminating or interfering with the utility services to the residence.

5. The Respondent is ordered to stay away from the school, place of employment, and/or other places, and their premises, frequented by Petitioner, the minor children and the designated household and family members. These places are identified by the following addresses:

C.Tanner (O). 1930 S. State St. SLC, UT (Hans Rosenwinkel)

Starbucks Coffee - Foothill Village (Dawn Wundt)

~~Deer Valley Resort - Snowflake Lodge (Dawn Wundt)~~

6. The Court having found that Respondent's use or possession of a weapon may pose a serious threat of harm to Petitioner, the Respondent is prohibited from purchasing, using, or possessing a firearm or any of the following weapons:

Knives / baseball bats / clubs

7. The Petitioner is awarded temporary possession of the following residence, automobile and/or other essential personal property:

Residence + personal belongings

8. The Petitioner is granted temporary custody of the following minor child/ren:

____ 9. The Respondent shall have visitation as follows:

____ 10. The Respondent is restrained from removing the parties' minor children from the state of Utah.

610 ✓ ____ 11. An officer from the following law enforcement agency: SUCPD
____ shall accompany Petitioner to ensure that Petitioner obtains custody of the children and/or that the Petitioner safely regains possession of the awarded property.

44 ✓ ____ 12. An officer from the same law enforcement agency shall facilitate Respondent's removal of Respondent's essential personal belongings from the parties' residence. The law enforcement officer shall contact Petitioner to make these arrangements. Respondent may not contact the Petitioner or enter the residence to obtain any items.

612 ✓ ____ 13. Law enforcement agencies with jurisdiction over the protected locations shall have authority to compel Respondent's compliance with this Order, including the authority to forcibly evict and restrain Respondent from the protected areas.

____ 14. The Respondent and the Petitioner are ordered to bring proof of current income to the hearing. The proof should include year-to-date pay stubs or employer statements, and complete tax returns for the most recent year.

____ 15. Other: _____

16. Unless otherwise modified by the Court, this Order is effective from the date and time served on Respondent, until, after further hearing in this matter, the Respondent is served with a Protective Order or a Protective Order is denied.

17. The Respondent is ordered to appear at a hearing on:

Date: Mon. Feb. 24, 1997

Time: 9:30

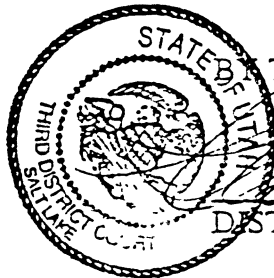
Room: 340

Address: 451 South 200 East, Salt Lake City, Utah 84111

Comm Name: Arnett

RESPONDENT'S VIOLATION OF PROVISIONS 1 - 7 OF THIS ORDER WILL CONSTITUTE A CLASS A MISDEMEANOR. EITHER PARTY MAY BE HELD IN CONTEMPT FOR IGNORING OR ALTERING THE TERMS OF THIS ORDER

DATED: Feb 7, 1997 TIME: 11:50 A.M.



THE COURT:

DISTRICT COURT JUDGE

Serve Respondent at:

Tab 3

7090912
ORIGINAL

IN THE THIRD DISTRICT COURT

FILED DISTRICT COURT
Third Judicial District

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SALT LAKE COUNTY

By R. Shupe
O. 970900972 SA Deputy Clerk

Civil No. 970900972 SA
Court of Appeals:
970521-CA

REPORTER'S TRANSCRIPT OF PROCEEDING

SALT LAKE CITY, UTAH

FEBRUARY 24, 1997

970521-CA

CAPITOL REPORTERS

A PROFESSIONAL COURT REPORTING COMPANY

175 South Main, Suite 510
Salt Lake City, Utah 84111-1969
TELEPHONE (801) 363-7939
TOLL FREE 800-663-7939
FAX (801) 363-8416

FILE NO.

A P P E A R A N C E S

For the Respondent:

James Lowrie
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main, Suite 1500
Salt Lake City, Utah 84101
(801) 521-3200

P R O C E E D I N G S

THE COURT: No. 8 is Rosenwinkel versus Bennett.

MR. LOWRIE: Jim Lowrie for the respondent, Your Honor.

THE COURT: For the record, let me ask if Hans Rosenwinkel or anyone on his behalf is present in the courtroom. The record should reflect that no one has responded.

Mr. Lowrie, you have a motion to dissolve the protective order pending; is that correct?

MR. LOWRIE: Yes, it is, Your Honor.

THE COURT: And I've reviewed that and believe it's well taken and I'll recommend your motion be granted.

MR. LOWRIE: Your Honor, if I could address the status of this. Mr. Bennett is out of the house and I think in this situation the premises should go to the petitioner with the caveat that he assume the responsibility for the lease and charged a refund of Mr. Bennett's share of the rental of the apartment.

THE COURT: Very well. Based upon the

1 fact that that was part of your motion, I believe
2 that would be appropriate to include in the order
3 dissolving.

4 MR. LOWRIE: Thank you.

5 THE COURT: Very well.

6 (Adjourned.)
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REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

I, VICKIE GODFREY, a notary public, in
and for the State of Utah, do hereby certify:

That the foregoing proceedings were transcribed under my direction from the Electronic Tape Recording made of these proceedings.

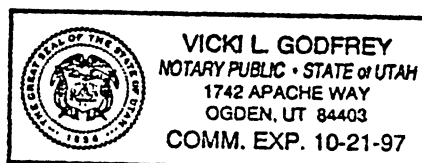
That this transcript is full, true and correct and contains all of the evidence, all of the objections of counsel and rulings of the court and all matters to which the same relate which were audible through said tape recording.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the outcome thereof.

That certain parties were not identified in the record and therefore the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 3rd day
of October, 1997.

Vickie Godfrey
VICKIE GODFREY, RPR, CSR



Tab 4

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

ROSENWINKEL, HANS	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 970900972 SA
	:	DATE 02/24/97
VS	:	HONORABLE THOMAS N. ARNETT
	:	COURT REPORTER 1-27:88-28:30 & 2-
BENNETT, JOHN	:	COURT CLERK KAD
DEFENDANT	:	

TYPE OF HEARING: SPOUSE ABUSE
PRESENT: PLAINTIFF DEFENDANT

P. ATTY. ROSENWINKEL, HANS
D. ATTY. LOWRIE, JAMES S

THIS MATTER WAS SCHEDULED ON THE 8:30 CALENDAR. RESPONDENT APPEARED FOR THE 8:30 CALENDAR, BUT THE PETITIONER DID NOT. THE COMMISSIONER THEN RECOMMENDED THAT THE RESPONDENT'S MOTION TO DISOLVED THE EX PARTE PROTECTIVE ORDER AND OTHER MOTIONS BE GRANTED. THE PETITIONER APPEARED FOR THE 9:30 CALENDAR WITH A COPY OF THE EX PARTE PROTECTIVE ORDER WHICH INDICATES A HEARING TIME OF 9:30. THE COMMISSIONER AT THAT TIME CONTINUED THIS MATTER TO MARCH 10, 1997 AT 9:30 A.M.

Tab 5

970900972
ORIGINAL

IN THE THIRD DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

FILED DISTRICT COURT
Third Judicial District

* * *

ROSENWINKEL,

)

OCT 21 1997

)

Petitioner,

)

SALT LAKE COUNTY

)

By K. Shupe Deputy Clerk

- v -

)

Civil No. 970900972SA

)

Court of Appeals:

BENNETT,

)

970521-CA

)

Respondent.

)

)

REPORTER'S TRANSCRIPT OF PROCEEDING

BEFORE THE HONORABLE COMMISSIONER THOMAS N. ARNETT

SALT LAKE CITY, UTAH

MARCH 10, 1997

970521-CA

CAPITOL REPORTERS

A PROFESSIONAL COURT REPORTING COMPANY

175 South Main, Suite 510
Salt Lake City, Utah 84111-1969
TELEPHONE (801) 363-7939
TOLL FREE 800-663-7939
FAX (801) 363-8416

FILE NO.

OCT 23 1997

COPIES AVAILABLE

100

A P P E A R A N C E S

For the Petitioner:

Loren D. Martin
ATTORNEY AT LAW
139 East South Temple, Suite 400
Salt Lake City, Utah 84111
(801) 538-0066

For the Respondent:

James Lowrie
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main, Suite 1500
Salt Lake City, Utah 84101
(801) 521-3200

P R O C E E D I N G S

THE COURT: Let's go on to No. 3, Rosenwinkel versus Bennett. Mr. Rosenwinkel, this matter was scheduled on the 24th of February. Mr. Lowrie and Mr. Bennett were here and you were not. Where were you?

MR. ROSENWINKEL: According to our paperwork, we were supposed to be here at 9:30 and then they rescheduled it for us today. There was a miscommunication with the Court people regarding the paperwork.

THE COURT: Very well. Mr. Martin, are you going to be involved in this case?

MR. MARTIN: If I could, I might be able to save you a little bit time in this. The involvement of these three were residing in the same house.

THE COURT: I'm aware of that. I've reviewed the file.

MR. MARTIN: And maybe there's some question -- I'd just advise (Inaudible) the protective order but I'll have some concrete (Inaudible).

THE COURT: Very well. Mr.

1 Rosenwinkel, I've been indicating to Mr. Martin I
2 have read the Court's file and am aware of your
3 allegations in this matter. Is there anything that
4 you wish to state for the record at this time?

5 MR. ROSENWINKEL: Basically, John
6 Bennett refuses to take his name off our lease.
7 He's admitted to having a hot temper so we better
8 be willing to stick up to him when he blows up
9 because nothings going to stand in his way. He
10 frightens both of us and we feel we shouldn't have
11 to deal with that way in this situation.

12 THE COURT: Thank you, Mr. Rosenwinkel.
13 Mr. Lowrie?

14 MR. LOWRIE: Yes, Your Honor. I think
15 this is -- it's unfortunate that this situation is
16 before you. The petition, as I read it, does not
17 comply with the statute in terms of there being a
18 kind of conduct that gives rise to a protective
19 order. We don't make anything out of that at this
20 point, but I think it's time for this proceeding to
21 end. You have before you the affidavit of Mr.
22 Bennett, I hope.

23 THE COURT: I do.

24 MR. LOWRIE: This reflects under oath
25 his version of what happened. Mr. Rosenwinkel did

1 not contest this when he spoke this morning and I
2 think that that clearly shows that there is no need
3 for any further relief to issue from the Court. And
4 as a consequence, the fact is that this matter
5 should be ended I don't think there is any showing
6 that any further necessity for court intervention
7 of any sort, even if there was at the beginning.

8 THE COURT: Thank you, Mr. Lowrie.

9 Mr. Rosenwinkel, anything further?

10 MR. ROSENWINKEL: No.

11 THE COURT: Very well. Let me indicate
12 as follows: The Utah Legislature adopted the Utah
13 Cohabitant Abuse Act to deal the enormous and
14 critical problem of domestic violence in the State
15 of Utah. I just returned from a week-long
16 conference out of state dealing with the issue of
17 domestic violence. That conference indicated that
18 even though all 50 states have adopted some similar
19 statutes, that the problem continues to grow, that
20 we continue to have victims who are battered and
21 abused as a result of domestic violence.

22 This Act was not adopted to deal with
23 the problems of two tenants in a landlord/tenant
24 type of situation. This case is not the kind of
25 case where this Act was intended and I agree with

1 Mr. Lowrie, that it's time for this to end. My
2 recommendation will be today that this matter be
3 dismissed.

4 The Court will enter it's own order.
5 You're free to go.

6 MR. LOWRIE: Thank you, Your Honor.

7 THE COURT: Thank you.

8 (Adjourned.)
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REPORTER'S CERTIFICATE

STATE OF UTAH)
COUNTY OF SALT LAKE) ss

I, VICKIE GODFREY, a notary public, in
and for the State of Utah, do hereby certify:

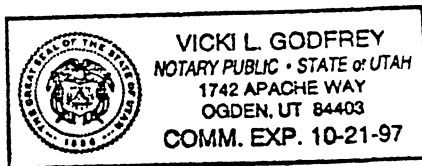
That the foregoing proceedings were
transcribed under my direction from the Electronic
Tape Recording made of these proceedings.

That this transcript is full, true and
correct and contains all of the evidence, all of
the objections of counsel and rulings of the court
and all matters to which the same relate which were
audible through said tape recording.

I further certify that I am not of kin
or otherwise associated with any of the parties to
said cause of action and that I am not interested
in the outcome thereof.

That certain parties were not
identified in the record and therefore the name
associated with the statement may not be the
correct name as to the speaker.

WITNESS MY HAND AND SEAL this October
day of 3rd, 1997.



Vicki L. Godfrey
VICKIE GODFREY, RPR, CSR

Tab 6

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

ROSENWINKEL, HANS	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 970900972 SA
	:	DATE 03/10/97
VS	:	HONORABLE THOMAS N. ARNETT
	:	COURT REPORTER TAPE 1-19:45-21:10
BENNETT, JOHN	:	COURT CLERK KAD
DEFENDANT	:	

TYPE OF HEARING: SPOUSE ABUSE
PRESENT: PLAINTIFF DEFENDANT

P. ATTY. MARTIN, LOREN
D. ATTY. LOWRIE, JAMES S

COMMISSIONER RECOMMENDS THIS MATTER BE DISMISSED.

Tab 7

James S. Lowrie (USB 2007)
Lewis M. Francis (USB 6545)
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Respondent
1500 First Interstate Plaza
170 South Main Street
Post Office Box 45444
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200

FILED DISTRICT COURT
Third Judicial District

APR 23 1997

SALT LAKE COUNTY
By [Signature]

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

HANS ROSENWINKEL,

Petitioner,

vs.

JOHN BENNETT,

Respondent.

ORDER

Civil No. 970900972SA

Judge Homer F. Wilkinson

Commissioner Thomas N. Arnett

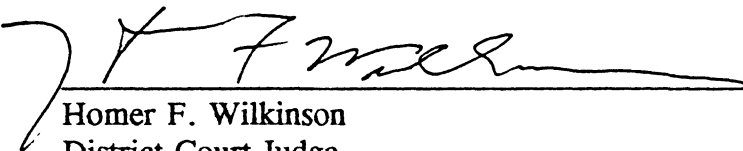
2214874
4-25-97
8:16 am

The Motion for Dissolution of Protective Order and Answer of John Bennett came on to be heard on the 24th day of February, 1997 at 8:30 a.m. The respondent, John Bennett, appeared in person and through his counsel James S. Lowrie. The petitioner did not appear. The Motion for Dissolution of Protective Order was granted and the Verified Answer to the Verified Petition for Protective Order was approved. Now therefore, it is hereby ordered as follows:


1. The Protective Order issued by the Court on February 7, 1997 is hereby dissolved.
2. The respondent is awarded immediate possession of his personal property.
3. The respondent is awarded the sum of \$633 for the deprivation of his living premises and the restoration of his share of the cleaning and security deposit the parties had on file to secure the premises.
4. The respondent is awarded his attorney's fees in the amount of \$1,750.

BY THE COURT:

DATED this 23 day of April, 1997.


Homer F. Wilkinson
District Court Judge

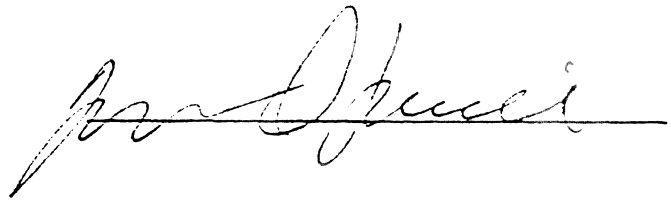
DATED this 21 day of April, 1997.


Thomas N. Arnett
District Court Commissioner

CERTIFICATE OF SERVICE

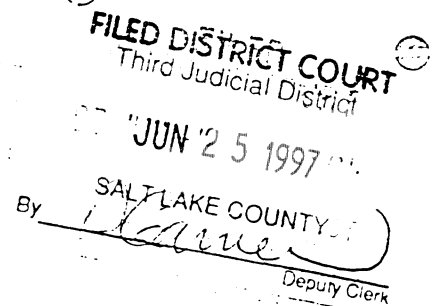
I, the undersigned, hereby certify that on the 14th day of April, 1997, I caused a true and correct copy of the foregoing Order to be mailed, via first class mail, postage prepaid, to the following:

Hans Rosenwinkel
81 "O" Street
Salt Lake City, Utah 84103

A handwritten signature in cursive script, appearing to read "Hans Rosenwinkel", is written over a horizontal line.

Tab 8

10-19
James S. Lowrie (USB 2007)
Lewis M. Francis (USB 6545)
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Respondent
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
SALT LAKE COUNTY, STATE OF UTAH

HANS ROSENWINKEL,

Petitioner,

vs.

JOHN BENNETT,

Respondent.

JUDGMENT

2214874

Civil No. 970900972SA

Judge Homer F. Wilkinson

Commissioner Thomas N. Arnett

The Motion for Dissolution of Protective Order and Answer of respondent John Bennett came on for hearing the 24th day of February, 1997. The Court entered its Order in favor of respondent on April 23, 1997, a copy of which is attached hereto. Based on the Court's Order,

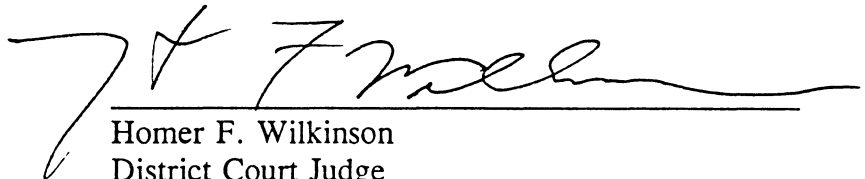
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment should be and is hereby entered in favor of respondent, John Bennett, and against petitioner, Hans Rosenwinkel, in the amount of \$2383.00, plus interest thereon at the postjudgment rate of

7.61 percent (7.61%) per annum, accruing from April 23, 1997 until completely satisfied.

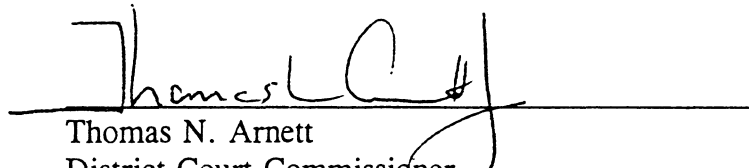
Said judgment shall also be supplemented by respondent's after-accruing collection costs, including attorneys' fees, as may be established by subsequent affidavit.

DATED this 25 day of ~~May~~^{June}, 1997.

BY THE COURT:


Homer F. Wilkinson
District Court Judge

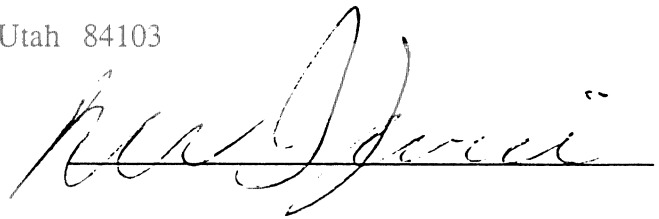
DATED this 20 day of ~~May~~^{June}, 1997.


Thomas N. Arnett
District Court Commissioner

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 21st day of June, 1997, I caused a true and correct copy of the foregoing JUDGMENT to be mailed, via first class mail, postage prepaid, to the following:

Hans Rosenwinkel
81 "O" Street
Salt Lake City, Utah 84103

A handwritten signature in cursive script, appearing to read "Hans Rosenwinkel", is written over a horizontal line.

Tab 9

30-6-1. Definitions.

As used in this chapter:

- (1) "Abuse" means attempting to cause, or intentionally or knowingly causing to an adult or minor physical harm or intentionally placing another in fear of imminent physical harm.
- (2) "Cohabitant" means an emancipated person pursuant to Section 15-2-1 or a person who is 16 years of age or older who:
 - (a) is or was a spouse of the other party;
 - (b) is or was living as if a spouse of the other party;
 - (c) is related by blood or marriage to the other party;
 - (d) has one or more children in common with the other party; or
 - (e) resides or has resided in the same residence as the other party.
- (3) Notwithstanding Subsection (2), "cohabitant" does not include:
 - (a) the relationship of natural parent, adoptive parent, or step-parent to a minor; or
 - (b) the relationship between natural, adoptive, step, or foster siblings who are under 18 years of age.
- (4) "Court clerk" means a district court clerk or juvenile court clerk.
- (5) "Department" means the Department of Human Services.
- (6) "Domestic violence" means the same as that term is defined in Section 77-36-1.
- (7) "Ex parte protective order" means an order issued without notice to the defendant in accordance with this chapter.
- (8) "Foreign protective order" means a protective order issued by another state, territory, or possession of the United States, tribal lands of the United States, the Commonwealth of Puerto Rico, or the District of Columbia shall be given full faith and credit in Utah, if the protective order is similar to a protective order issued in compliance with Title 30, Chapter 6, Cohabitant Abuse Act, or Title 77, Chapter 36, Cohabitant Abuse Procedures Act, and includes the following requirements:
 - (a) the requirements of due process were met by the issuing court, including subject matter and personal jurisdiction;
 - (b) the respondent received reasonable notice; and
 - (c) the respondent had an opportunity for a hearing regarding the protective order.
- (9) "Law enforcement unit" or "law enforcement agency" means any public agency having general police power and charged with making arrests in connection with enforcement of the criminal statutes and ordinances of this state or any political subdivision.
- (10) "Peace officer" means those persons specified in Section 77-1a-1.
- (11) "Protective order" means a restraining order issued pursuant to this chapter subsequent to a hearing on the petition, of which the petitioner has given notice in accordance with this chapter.

History: C. 1953, 30-6-1, enacted by L. 1979, ch. 111, § 1; 1989, ch. 32, § 1; 1990, ch. 183, § 15; 1991, ch. 180, § 2; 1993, ch. 137, § 3; 1995, ch. 300, § 2; 1996, ch. 244, § 2; 1997, ch. 303, § 1.

Amendment Notes. — The 1995 amendment, effective July 1, 1995, added Subsection (6), redesignating former Subsection (6) as Subsection (7), and deleted former Subsection (7), defining "good cause."

The 1996 amendment, effective April 29,

1996, added Subsection (8) and redesignated the other subsections accordingly; in Subsection (9) added "or 'law enforcement agency'"; and in Subsection (11) substituted "petition" for "plaintiff's complaint" and "petitioner" for "plaintiff."

The 1997 amendment, effective May 5, 1997, divided Subsection (3) into introductory language and Subsection (3)(a), added Subsection (3)(b), and made related changes.

COLLATERAL REFERENCES

A.L.R. — Admissibility of evidence of prior physical acts of spousal abuse committed by defendant accused of murdering spouse or former spouse, 24 A.L.R.5th 465.

30-6-2. Abuse or danger of abuse — Protective orders.

(1) Any cohabitant or any child residing with a cohabitant who has been subjected to abuse or domestic violence, or to whom there is a substantial likelihood of immediate danger of abuse or domestic violence, may seek an ex parte protective order or a protective order in accordance with this chapter, whether or not that person has left the residence or the premises in an effort to avoid further abuse.

(2) (a) A petition for a protective order may be filed under this chapter regardless of whether an action for divorce between the parties is pending.

(b) If a complaint for divorce has already been filed in district court, a petition under this chapter may be filed as part of the divorce proceedings.

(3) A cohabitant, the department, or any person or institution interested in a minor may seek a protective order on behalf of the minor under the circumstances described in Subsection (1), regardless of whether the minor could have filed a petition on his own behalf. If a cohabitant intends to seek a protective order on his own behalf and on behalf of a minor, a single petition may be filed.

(4) The court shall appoint a guardian ad litem to represent the minor if the court considers the appointment necessary for the welfare of the minor.

(5) The county attorney or district attorney, if appropriate, shall represent the department where the department appears as a petitioner.

(6) A petition seeking a protective order may not be withdrawn without approval of the court.

History: C. 1953, 30-6-2, enacted by L. 1979, ch. 111, § 2; 1989, ch. 32, § 2; 1992, ch. 248, § 1; 1993, ch. 137, § 4; 1995, ch. 300, § 3; 1996, ch. 244, § 3.

Amendment Notes. — The 1995 amendment, effective July 1, 1995, inserted references to domestic violence in Subsection (1); substituted references to seeking a protective order or ex parte protective order for references to filing a complaint or a verified complaint in Subsection (1) and in two places in Subsection (3); substituted references to a petition seeking a

protective order for references to a complaint in Subsections (2)(a), (3), and (6); and made stylistic changes.

The 1996 amendment, effective April 29, 1996, in Subsection (1) added "or the premises"; in Subsections (2)(b) and (3) substituted "petition" for "complaint"; and in Subsection (2)(b) substituted "complaint" for "petition" and "part of the divorce proceedings" for "part of the initial divorce complaint or subsequent proceedings."

30-6-3. Venue of action.

(1) The district court has jurisdiction of any action brought under this chapter. The juvenile court has concurrent jurisdiction of an action brought under this chapter if a protective order is sought on behalf of a minor unless the petition is filed by a natural parent, adoptive parent, or step-parent of the minor against a natural parent, adoptive parent, or step-parent of the minor.

(2) An action brought pursuant to this chapter shall be filed in the county where either party resides or in which the action complained of took place.

History: C. 1953, 30-6-3, enacted by L. 1979, ch. 111, § 3; 1993, ch. 137, § 5; 1995, ch. 300, § 4.

Amendment Notes. — The 1995 amend-

ment, effective July 1, 1995, in Subsection (1), substituted "a protective order is sought" for "the complaint is filed" and "petition" for "complaint" and made a stylistic change.

Tab 10

nance of a ski run that was alleged to create a hazard to skiers. *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991).

— **Supervision of employees.**

Evidence raised a genuine issue of material

fact, precluding summary judgment, as to whether a ski area operator was negligent in not supervising its employees in regard to the practice of reckless skiing. *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991).

COLLATERAL REFERENCES

Utah Law Review. — Utah's Inherent Risks of Skiing Act: Avalanche from Capitol Hill, 1980 Utah L. Rev. 355.

78-27-54. Inherent risks of skiing — Trail boards listing inherent risks and limitations on liability.

Ski area operators shall post trail boards at one or more prominent locations within each ski area which shall include a list of the inherent risks of skiing, and the limitations on liability of ski area operators, as defined in this act.

History: L. 1979, ch. 166, § 4.

Meaning of "this act." — See note following same catchline in notes to § 78-27-51.

78-27-55. Repealed.

Repeals. — Section 78-27-55 (L. 1979, ch. 166, § 5), relating to notice requirements in case of injury arising from the inherent risks of

skiing and the statute of limitations on such action, was repealed by Laws 1980, ch. 43, § 1.

78-27-56. Attorney's fees — Award where action or defense in bad faith — Exceptions.

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

History: L. 1981, ch. 13, § 1; 1988, ch. 92, § 1.

NOTES TO DECISIONS

ANALYSIS

Appeal.

— Frivolous appeal.

Breach of covenant of good faith by insurer.

Discretion of court.

Essential elements.

Findings.

Hearing.

Paralegal services.

State of mind.

"Without merit" and "good faith."