

1997

Mahlon Peck & Family, Inc., Plaintiffs/Appellants,
v. Lloyd R. Brooks, et. al., Defendants/Appellees :
Brief of Appellee

Utah Court of Appeals

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THE UTAH COURT OF APPEALS

MAHLON PECK & FAMILY, INC.,

Plaintiffs/Appellants,

Civil No. 960400145

v.

Appeal No. 970588-CA

LLOYD R. BROOKS, et. al.,

Priority No. 15

Defendants/Appellees.

BRIEF OF APPELLEES

APPEAL FROM A JUDGMENT UNDER UTAH CODE ANN. § 78-31a-16
CONFIRMING AN ARBITRATION AWARD,
FOURTH JUDICIAL DISTRICT COURT,
THE HONORABLE JUDGE HOWARD H. MAETANI PRESIDING

**UTAH COURT OF APPEALS
BRIEF**

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CASE NO. 970588

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TABLE OF CONTENTS

	<u>Page</u>
PARTIES	1
STATEMENT OF JURISDICTION	1
ISSUES FOR REVIEW	1
STANDARD OF REVIEW	1
DETERMINATIVE PROVISIONS ON APPEAL	2
STATEMENT OF THE CASE	3
A. <u>Nature of the Case, Proceedings and Disposition Below</u>	3
B. <u>Statement of Facts</u>	4
SUMMARY OF ARGUMENT	12
ARGUMENT	13
POINT I	
THE ARBITRATOR NEITHER MANIFESTLY DISREGARDED THE LAW NOR VIOLATED PUBLIC POLICY IN FINDING IN BROOKS' FAVOR	13
A. <u>The Arbitrator Did Not Manifestly Disregard the Law</u>	14
B. <u>The Arbitration Award Did Not Violate Public Policy</u>	15
POINT II	
IN ANY EVENT, PECK HAS WAIVED ANY RIGHT TO CHALLENGE THE ARBITRATION AWARD FOR MANIFEST DISREGARD OF THE LAW OR VIOLATION OF PUBLIC POLICY	16

POINT III

BROOKS SHOULD BE AWARDED THE COSTS AND ATTORNEY FEES INCURRED IN DEFENDING THIS APPEAL	19
CONCLUSION AND RELIEF REQUESTED	20

TABLE OF AUTHORITIES

Page

Cases

<i>Allred v. Educators Mutual Ins. Assoc.</i> , 909 P.2d 1263 (Utah 1996)	18
<i>Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.</i> , 925 P.2d 941 (Utah 1996)	1, 2, 13-17, 19, 20
<i>LeBaron & Assoc. v. Rebel Enterprises</i> , 823 P.2d 479 (Utah App. 1991)	18
<i>Robinson & Wells, P.C. v Warren</i> , 669 P.2d 844 (Utah 1983)	17
<i>Utah County v. Brown</i> , 672 P.2d 83 (Utah 1983)	18

Statutes

Utah Code Ann. § 78-31a-12	2, 16, 20
Utah Code Ann. § 78-31a-13	18
Utah Code Ann. § 78-31a-14	2, 12, 13, 16, 18
Utah Code Ann. § 78-31a-14(1)(c)	16
Utah Code Ann. § 78-31a-16	3, 13, 17, 19, 20

Rules and Regulations

Rule 33, Utah Rules of Appellate Procedure	13, 19
--	--------

PARTIES

Appellants are Mahlon Peck & Family, Inc. (“Peck”) and appellees are Lloyd R. Brooks, et al. (“Brooks”).

STATEMENT OF JURISDICTION

Brooks does not contest the Statement of Jurisdiction contained in the Brief of Appellants.

ISSUES FOR REVIEW

1) If this Court undertakes judicial review of the arbitration award at all, should it reverse the district court’s order confirming the award and dismissing Peck’s complaint when Peck fails to acknowledge or marshal the evidence supporting the award, when substantial, competent evidence supports the arbitrator’s factual findings, and when given those findings, there is no showing whatsoever the arbitrator did not correctly apply appropriate legal standards?

2) When Peck failed to challenge the arbitration award in the district court before or after Brooks moved to confirm the award, can or should this Court reverse the district court’s confirmation order?

STANDARD OF REVIEW

“The standard for reviewing an arbitration award is highly deferential to the arbitrator.” *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941, 946 (Utah 1996). A reviewing court does not substitute its judgment for the arbitrator’s, and an

award is disturbed only if the proceeding was not “fair and honest” and did not respect the “substantial rights of the parties.” *Buzas Baseball, Inc.*, 925 P.2d at 947.

DETERMINATIVE PROVISIONS ON APPEAL

The following statutes are determinative:

- 1) Utah Code Ann. § 78-31a-12

Confirmation of award.

Upon motion to the court by any party to the arbitration proceeding for the confirmation of the award, and 20 days notice to all parties, the court shall confirm the award unless a motion is timely filed to vacate or modify the award.

- 2) Utah Code Ann. § 78-31a-14

Vacation of the award by the court.

(1) Upon motion to the court by any party to the arbitration proceeding for vacation of the award, the court shall vacate the award if it appears:

- (a) the award was procured by corruption, fraud, or other undue means;
- (b) an arbitrator, appointed as a neutral, showed partiality, or an arbitrator was guilty of misconduct that prejudiced the rights of any party;
- (c) the arbitrators exceeded their powers;
- (d) the arbitrators refused to postpone the hearing upon sufficient cause shown, refused to hear evidence material to the controversy, or otherwise conducted the hearing to the substantial prejudice of the rights of party; or

(e) there was no arbitration agreement between the parties to the arbitration proceeding.

(2) A motion to vacate an award shall be made to the court within 20 days after a copy of the award is served upon the moving party, or if predicated upon corruption, fraud, or other undue means, within 20 days after the grounds are known or should have been known.

3) Utah Code Ann. § 78-31a-16

Award as judgment.

An award which is confirmed, modified or corrected by the court shall be treated and enforced in all respects as a judgment. Costs incurred incident to any motion authorized by this chapter, including a reasonable attorney's fee, unless precluded by the arbitration agreement, may be awarded by the court.

STATEMENT OF THE CASE

A. Nature of the Case, Proceedings and Disposition Below.

After the sale in the early 1990s of an undeveloped parcel of real property situated in Utah County, Peck filed a Complaint in the district court against his real estate agent, Brooks. In a volatile market, Peck became unhappy with the price received for the parcel, and in ten causes of action complained of breach of fiduciary duty, negligent misrepresentation and other alleged errors or omissions. (R. 35).

After formal discovery but before trial, the parties agreed to submit Peck's claims to arbitration before Mr. Stephen B. Nebeker of the Intermountain ADR Group. Mr. Nebeker received pre-hearing submissions of argument and documentary evidence, then presided over two different hearings where the participants presented live and

deposition testimony of parties, lay and expert witnesses, and oral and written argument. Mr. Nebeker then found in Brooks' favor and against Peck on all Peck's claims. (Exhibit A to R. 140, Opinion dated April 7, 1997; copy of Opinion attached hereto as "Addendum A").

Brooks moved the district court to confirm Mr. Nebeker's award on May 14, 1997. (R. 140). Peck did not oppose the motion, nor did Peck ever request the district court to modify or vacate the award. The district court confirmed the award by order dated July 22, 1997. (R. 146).

B. Statement of Facts.

Peck wholly fails to marshal or even mention the evidence supporting the arbitrator's factual findings. Without fully describing all facts supporting the decision, the following are additional facts of record material to this Court's review:

1. Lloyd Brooks is a real estate agent associated with Century 21 Robinson & Wilson Realty who has many years experience working in the American Fork area. (Brooks Depo., pp. 5-6, §2 of Addendum at Tab 9).¹

2. In October 1990, a Mr. Carl Mellor ("Mellor") planned to move his family catering business and wanted to acquire commercial property for that purpose. (Brooks

¹Peck moved to supplement the record on appeal pursuant to Utah Rule of Appellate Procedure 11(h), and this Court granted the motion pursuant to an Order dated February 25, 1998. Peck submitted two "volumes" of addenda (labeled sections one and two) with his principal brief consisting of the materials he wished to be added to the record. When Brooks cites to portions of the supplemented record in this brief, he refers to the section of Peck's addenda as identification.

Depo., pp. 16-17). Mellor approached Brooks to inquire whether Brooks knew of any available commercial properties in the area. (Brooks Depo., p. 16).

3. Contrary to Peck's bald assertions on appeal, Mellor and Brooks were not close friends with a decades-long "ongoing relationship." (Brooks Depo., p. 14). Brooks testified:

Q: How long have you known Carl Mellor?

A: Well, I've known *of him* for probably 25 -- 30 years.

Q: And how long have you done business with Carl Mellor?

A: Oh, I'd have to guess. I sold him a piece of property probably 10 years ago.

. . .

Q: Do you have any contacts with Mr. Mellor besides business contacts?

A: Through the church, through the LDS Church.

Q: Any social contacts with Mr. Mellor?

A: No.

Q: Do you consider him a friend?

A: Well, I don't know how you're going to define a friend. I consider a lot of people friends; *socially, no*.

(Brooks Depo., pp. 14, 16) (emphasis added). Mellor confirmed he and Brooks were not friends:

Q: Are you social acquaintances [with Brooks] as well?

A: Well, I certainly don't ignore him when I see him. We're not, what you would say, close.

Q: Has he ever been to your house, for example, for dinner or you at his house?

A: No. One of the few that hasn't. In our catering business, we serve everybody as often as we can. I don't recall him ever accepting the invitation.

(Depo. of Carl Mellor, pp. 12-13; §2 of Addendum at Tab 10).

4. Brooks had heard Peck might be interested in selling an 8.5-acre piece of undeveloped farm land, and Brooks approached Peck to gauge his interest. (Brooks Depo., p. 17). Peck indicated he did want to sell the land. (Brooks Depo., p. 17; Depo. of Mahlon Peck, p. 16; §2 of Addenda at Tab 11).

5. Brooks performed some market research to gauge the value of the parcel, and then shared the research with Peck. Based in part on that research and Peck's own past experience, Peck decided to offer the land for sale at the price of \$16,000.00 per acre. (Brooks Depo., pp. 19, 24). Peck was "willing to sell it at that time at that price" so he could obtain money to pay off debt. (Peck Depo., p. 32).

6. Although Mellor did not want to pay more than \$15,000.00 per acre for the business property, he accepted Peck's offer of \$16,000.00 per acre, and the parties entered a standard form Earnest Money Sales Agreement on October 25, 1990, for Mellor to purchase the property for \$16,000 an acre and a total of \$136,000.00. (Mellor Depo., pp. 17, 20). The Earnest Money Sales Agreement also provided Peck could farm the portion

of the property Mellor was not using at a yearly rental rate of \$50.00 per acre. (Earnest Money Sales Agreement, pp. 2-3, §1 of Addenda at Tab 4).

7. Brooks was the seller's agent as contemplated by Paragraph 10 of the Earnest Money Sales Agreement, and Mellor understood Brooks to be representing Peck during the transaction:

Q: Did you expect him [Brooks] to protect your interests?

A: Not when he told me he was selling -- that he was representing the seller at the time.

. . .

Q: In this Peck transaction, do you feel like you got any special favors from Mr. Brooks?

A: No.

(Mellor Depo., pp. 48, 56).

8. Mellor paid Peck an earnest money deposit of \$500.00,² and they initially agreed on a closing date of May 31, 1991. (Earnest Money Sales Agreement, pp. 2-3). As this date approached, Mellor requested an extension of the closing date to September 31, 1991. Peck agreed to the proposal and Mellor paid Peck an additional \$2,000.00 as a down payment. (Brooks Depo., pp. 31-33; Addendum to Earnest Money Sales Agreement, §1 of Addendum at Tab 4).

²The amount of the earnest money deposit was roughly one percent of the total purchase price, which is Brooks' "standard recommendation" as a real estate agent for an earnest money deposit. (Brooks Depo., pp. 19-20).

9. After the extension, Brooks continued to list Peck's property with the Multiple Listing Service (MLS) in order to field any "backup offer[s] in case for any reason the first offer falls through." (Brooks Depo., p. 36; MLS §1 of Addendum at Tab 4). Although other parties inquired about Peck's property in response to the MLS, no offers were made on the property. (Brooks Depo., pp. 37-38).

10. Some time later, Peck himself requested another six-month extension to March 31, 1992, to work out tax and title issues. (Brooks Depo., p. 40; Mellor Depo., p. 23; Second Addendum to Earnest Money Sales Agreement, §1 of Addendum at Tab 4). Mellor paid Peck another \$500.00 in connection with the second extension as a down payment, bringing the total amount he paid to Peck before closing to \$3,000.00. (Brooks Depo., p. 40; Second Addendum to Earnest Money Sales Agreement, § 1 of Addendum at Tab 4). Brooks placed another listing of Peck's property in the MLS for September 1991 through March 30, 1992. (MLS §1 of Addendum at Tab 4).

11. Peck and Mellor closed at the original purchase price of \$136,000.00, or \$16,000.00 per acre, in March 1992. (Escrow Settlement Statement, §1 of Addendum at Tab 4). Peck later became disenchanted with the sale when his son Wayne discovered Mellor was listing the parcel (as developed property) for a much higher price, and Wayne told Peck he could have sold the property for more than \$16,000.00 per acre. (Peck Depo., pp. 16-17).

12. Peck filed a Verified Complaint in March 1994. (R. 35). After formal discovery, the parties arbitrated the matter before Mr. Stephen Nebeker in early 1997. One of the critical factual issues was the amount the property was actually worth before and during the time the sale was pending so the arbitrator could determine whether Brooks breached some duty to assist Peck in correctly valuing the property for the sale. (Defendants' Objection to Additional Argument or Submissions, and Closing Argument, §1 of Addendum at Tab 7;).

13. Each party presented testimony from an expert appraiser as to the fair market value of the property during the relevant period. Peck's appraiser, Don Gurney, opined the property was worth \$22,000.00 per acre in May 1991 at the time of the first extension, and \$23,000.00 per acre in March 1992 at the time of the closing. (Cover page of Appraisal Report of Don Gurney, §2 of Addendum at Tab 13).

14. Gurney based these estimates on selling prices of other, purportedly comparable parcels of property in the area, but Gurney's estimates were vulnerable because he failed to account for the differences between the other parcels and Peck's parcel, and adjust the market value accordingly. (Defendants' Objection to Additional Argument or Submissions, and Closing Argument, p. 7, §1 of Addendum at Tab 7).

15. For example, in reaching his estimate of fair market value, the comparables Gurney used were for improved parcels with curbs, gutters, utilities etc., installed or nearly available. Gurney did not account or adjust for the fact that Peck's property was

unimproved at the time Mellor purchased it. (Appraisal Report of Don Gurney, pp. 18-19, § 2 of Addendum at Tab 13).

16. Gurney simply ignored that a piece of property is worth more to a potential buyer improved than unimproved; the actual buyer, Mellor, testified as follows:

Q: [By Mr. Keller] Now, one of the claims that the Pecks are making in this lawsuit is that [Mr. Brooks] should have got a higher price than \$16,000.00 an acre for that property. In fact, they're saying he should have got \$22,000.00 an acre.

A: [Mr. Mellor] \$22,000.00?

Q: Would you have paid \$22,000.00 an acre?

A: No, no way.

Q: Why is that?

. . .

A: Because for business development . . . I think my son, who is an engineer, figured that it would take, you know, as much as the property is worth to get the sewer functioning underneath the railroad tracks on State Street, and the fact that the railroad tracks prevented the lower part of the property from being highly valuable for commercial development. At that time, the trains were going through there on a daily basis, and we had no idea it would be different. And then the drainage problems with the railroad tracks at that point, you had to take water uphill to get it away from there.

(Mellor Depo., pp. 57-58).

17. Opposing Gurney's testimony, both Brooks and Kent Carpenter, Brooks' appraiser, testified that potential buyers would consider the three "comparable" properties Gurney used in arriving at Gurney's estimate of the fair market value of Peck's property

to be actually superior to Peck's property. Two of the three parcels were better suited for high volume retail development, and in each case the sellers of the "comparables" either provided improvements such as utilities, water and sewer, or the improvements could be provided inexpensively. (Defendants' Objection to Additional Argument or Submissions, and Closing Argument, pp. 8-9, § 1 of Addendum at Tab 7).

18. Carpenter estimated and testified that the fair market value of the property in May 1991 was \$14,700.00 per acre and \$16,000.00 per acre in March 1992. (Appraisal Report of Kent Carpenter, §2 of Addendum at Tab 12). Carpenter also employed the "sales comparison approach" in reaching these values, but Carpenter appropriately adjusted sales prices of the comparable properties to reflect the differences between the comparables and the subject property:

Two of the comparables (C-1 and C-2 at \$25,000 and \$20,000/acre) were representative of freeway commercial land prices for parcels with excellent access and exposure. Additionally, these sites had utility available and an accessibility that was much superior to the subject property. Commercial land sale number 3 also reflected a similar price per acre (\$25,000) due in part to its good access/exposure and seller installation of utilities, characteristics which are considered superior to those possessed by the subject property. The price paid for this [comparable] property in its original purchase (\$8,986/acre) sheds some light on the upside potential for a small parcel sell off, that has good development potential and utilities installed [unlike the subject parcel].

(Appraisal Report of Kent Carpenter, p. 73).

18. After hearing all testimony, the arbitrator found in Brooks' favor and against Peck on all issues, expressly noting in pertinent part as follows:

. . . It is my opinion that the appraisal report given by Kent Carpenter more accurately reflects the fair-market value of the property at the time of the sale from the Peck Family to Mellors. I find that, based upon the deposition testimony of Mr. Mellor and the testimony of Mr. Brooks, Mr. Brooks was representing the seller [Peck] and did not violate his fiduciary duty to the Pecks.

(Exhibit A to R. 140, Addendum A).

19. This appeal ensued after Brooks moved the district court to confirm the arbitration award and the district court did so, dismissing Peck's complaint on the merits, and without Peck petitioning the trial court to modify or vacate the arbitration award.

SUMMARY OF ARGUMENT

POINT I: Even if this Court determines it may or should review the arbitration award on the statutory grounds Peck raises, manifest disregard of the law or violation of public policy, the award cannot be disturbed on either ground. The arbitrator found as a factual matter Brooks correctly valued the land and breached no fiduciary duty. Peck fails to provide any basis for this Court to disregard the arbitrator's factual findings. Peck's claims of manifest disregard of the law and violation of public policy are thinly veiled attempts to question the arbitrator's judgment and unnecessarily increase the length and cost of an already lengthy, costly and factually unsupported litigation.

POINT II: Peck's failure to petition the trial court to vacate the arbitration award within twenty days after Brooks moved for confirmation of the award precludes him from challenging the award on appeal for manifest disregard of the law or violation of public policy. Utah Code Ann. § 78-31a-14 provides that a party to an arbitration can move the trial

court to vacate an award upon several enumerated grounds. Utah courts have held that parties who do not contest the arbitration award at the trial court level pursuant to § 78-31a-14 cannot seek appellate relief to vacate the award on any of the grounds in this statute.

POINT III: Brooks should be awarded attorney fees and costs incurred in defending this appeal either under Utah Rule of Appellate Procedure 33 governing frivolous appeals or under the Utah Supreme Court's ruling in *Buzas Baseball, Inc., supra*, regarding Utah Code Ann. § 78-31a-16.

ARGUMENT

POINT I

THE ARBITRATOR NEITHER MANIFESTLY DIS-REGARDED THE LAW NOR VIOLATED PUBLIC POLICY IN FINDING IN BROOKS' FAVOR.

Peck pays lip service to appropriate standards of review and claims he is not challenging “the factual findings of the arbitrator,” but then devotes his brief to doing just that. Peck’s “Statement of the Case” on pages 5-6 of his brief is a recitation of the evidence he faults the arbitrator for ignoring in ruling in Brooks’ favor. Peck attempts to attack the arbitrator’s factual finding that the opinions of Brooks’ expert appraiser more accurately reflected the fair market value of the subject property than the opinions of Peck’s appraiser. (Brief of Appellant, pp. 31-33). Finally, Peck recounts the evidence presented at the arbitration supporting his position in his “Statement of Facts,” often

without any record citation and often inaccurately, without mentioning any of the abundant evidence Mr. Nebeker relied upon in reaching his decision of “no cause of action.”³ (Brief of Appellant, pp. 7-12). Peck’s supposed challenges on the grounds of manifest disregard of the law and violation of public policy amount to an improper attempt to challenge the factual findings implicit in the arbitrator’s decision.

A. The Arbitrator Did Not Manifestly Disregard the Law.

“Manifest disregard of the law” is not necessarily a ground upon which an arbitration award can be vacated. *Buzas Baseball, Inc.*, 925 P.2d at 951 n.8 (“However, we reserve the issue of whether this ground is recognized in Utah”). In any event it is narrowly construed; “‘manifest disregard’ is much more than mere error in the law.” *Id.* at 951. The arbitrator must make such a fundamental legal error that it would be obvious to the average arbitrator. *Id.* at 951. Moreover, the arbitrator must recognize a “clearly governing legal principle” but decide to ignore it. *Id.* at 951.

Under these standards Peck’s argument borders on frivolity. Implicit in Mr. Nebeker’s decision of “no cause of action” is a determination that upon the facts presented at the arbitration hearing, Brooks did not breach his duties to Peck. Mr. Nebeker expressly stated in his findings “that the appraisal report given by Kent Carpenter more accurately reflects the fair-market value of the property at the time of the

³To present a more accurate picture of the arbitration proceeding, Brooks has marshaled some of the evidence supporting of the arbitrator’s decision in his Statement of Facts above.

sale from the Peck Family to Mellors [and] . . . Mr. Brooks was representing the seller [Peck] and did not violate his fiduciary duty to the Pecks.”

Peck attempts to attack these factual findings by a one-sided recitation of the facts. He wholly fails to identify or even discuss clearly governing legal principles that would be applicable to facts taken in a light favorable to Brooks, or show how the arbitrator ignored such principles. Given the facts found by the arbitrator favorable to Brooks on valuation of the land and relationship with Mellor, Peck cannot and does not point to a single legal principle Mr. Nebeker misapplied or ignored.

B. The Arbitration Award Did Not Violate Public Policy.

An arbitration award may be vacated for violating public policy only when the court finds “a well-defined and dominant policy against the described conduct after a review of the relevant laws and legal precedents.” *Buzas Baseball, Inc.*, 925 P.2d at 951 (citations omitted). Peck identifies the “well-defined public policy” purportedly violated as the policy “that a real estate agent has a fiduciary duty to his principal and that he should honor that duty . . .” (Brief of Appellant, p. 20).

As with Peck’s argument about manifest disregard of some legal principle, Peck’s second point is simply an attack on well-supported factual findings based upon only a partial description of the facts. Mr. Nebeker found as a factual matter that “that the appraisal report given by Kent Carpenter more accurately reflects the fair-market value of the property at the time of the sale from the Peck Family to Mellors [and] . . .

Mr. Brooks was representing the seller [Peck] and did not violate his fiduciary duty to the Pecks.” No public policy is violated if an agent unfairly accused of breaching his fiduciary duty is ultimately adjudged by an arbitrator to have complied with this duty.

This Court should affirm the trial court’s confirmation of the arbitration award because Peck is essentially asking for a *de novo* review of Mr. Nebeker’s decision. A reviewing court cannot substitute its judgment for that of the arbitrator. *Id.* at 949.

POINT II

IN ANY EVENT, PECK HAS WAIVED ANY RIGHT TO CHALLENGE THE ARBITRATION AWARD FOR MANIFEST DISREGARD OF THE LAW OR VIOLATION OF PUBLIC POLICY.

After Mr. Nebeker issued the arbitration award, Brooks moved the trial court for confirmation of the arbitration award pursuant to Utah Code Ann. § 78-31a-12. Peck had twenty days thereafter to request that the trial court vacate the award upon any of the five grounds listed in Utah Code Ann. § 78-31a-14, including that “the arbitrators exceeded their powers.” Utah Code Ann. § 78-31a-14(1)(c).

Peck failed to do so, and his excuse is that “none of the statutory grounds specifically set forth in the *Utah Arbitration Act* for a trial court to modify or vacate the arbitration award directly apply in the instant case” (Brief of Appellant, p. 7). However, he challenges the award for manifest disregard of the law, which he concedes

is a “judicially created doctrine stemming from the exceeding authority statutory ground.” *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941, 950-51 (Utah 1996).

The Utah Supreme Court has determined on two separate occasions that failure to contest an arbitration award at the trial level precludes appellate review of the award. In *Robinson & Wells, P.C. v Warren*, 669 P.2d 844 (Utah 1983), the losing party in an arbitration proceeding requested that the trial court vacate the award but filed its motion after the time provided under statute.⁴ The trial court denied the motion. Observing that an untimely motion to vacate an arbitration award “has been held to constitute a waiver of the right to challenge the award,” the Utah Supreme Court refused to vacate the award and explained that

[o]rdinarily a court has no authority to review the action of arbitrators to correct errors or to substitute its conclusion for that of the arbitrators acting honestly and within the scope of their authority. The statute [Utah Code Ann. § 78-31-16] has provided a method by which an award thus made may be given legal sanction and reduced to judgment by summary proceedings in the nature of a motion filed by the court. The statute has also designated the grounds by which the award may be vacated or set aside, and it is generally held that *no other grounds than those specified can be taken advantage of in such proceeding*.

Robinson & Wells, P.C., 669 P.2d at 846-48 (emphasis added).

⁴This case was decided under the former Utah Arbitration Act, Utah Code Ann. §§ 78-31-1 to -22. The former Act was the same as the current Act in all respects material to this appeal, with the exception that a party seeking to vacate an award had three months after the arbitration award was delivered to the parties under § 78-31-18 to petition to vacate rather than twenty days after service of the award as currently provided under § 78-31a-14.

Similarly, in *Allred v. Educators Mutual Ins. Assoc.*, 909 P.2d 1263 (Utah 1996), the appellant sought review of an arbitration award dismissing his claim for breach of contract without first having moved the trial court to vacate or modify the award pursuant to Utah Code Ann. § 78-31a-13 or -14. The court described these statutes as “procedural safeguards” designed to protect against unjust arbitration awards. *Allred*, 909 P.2d at 1266. It affirmed the trial court’s order confirming the award because

failure to timely file a motion to either modify or vacate the award forecloses a comprehensive review on the merits of the arbitration process Having ignored the procedural guidelines established for review of arbitration awards, Allred has also failed to identify any statutorily recognized grounds for vacating the award.

Id. at 1267.

Just as in other civil proceedings, an issue not raised before the trial court cannot be raised for the first time on appeal because the district court judge should have an opportunity to consider and rule on that issue. See *LeBaron & Assoc. v. Rebel Enterprises*, 823 P.2d 479, 482-83 (Utah App. 1991) (“To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue’s merits.”); *Utah County v. Brown*, 672 P.2d 83, 85 (Utah 1983) (purpose of rule that party must raise issue before trial court is to allow trial court to correct any error). To conserve judicial resources, the Utah legislature contemplates in § 78-31a-14 that the trial court is the first avenue of judicial review of an arbitration award.

Peck's attempt to bypass the process should not be entertained by this Court. Brooks requests that this Court affirm the trial court's confirmation of the arbitration award because Peck did not seek to modify or vacate the award below.

POINT III

BROOKS SHOULD BE AWARDED THE COSTS AND ATTORNEY FEES INCURRED IN DEFENDING THIS APPEAL.

Brooks requests that attorney fees and costs be awarded pursuant to Utah Rule of Appellate Procedure 33. Brooks alerted Peck by letter dated August 20, 1997, that he could not seek to vacate the arbitration award on appeal because he did not move to vacate the award at the trial court level. (Exhibit C to Brooks' Memorandum in Support of Motion for Summary Disposition of Costs and Fees Incurred). Despite this warning, Peck forged ahead with his appeal, at considerable cost to Brooks, and, as set forth above, has himself "manifestly disregarded" applicable legal standards. Under the rules of appellate procedure, Brooks should be compensated for defending this appeal.

As an alternative ground for awarding attorney fees and costs, Utah Code Ann. § 78-31a-16 provides that attorney fees and costs incurred "incident to any motion" authorized by the Utah Arbitration Act may be awarded by the court. In *Buzas Baseball, Inc.*, the Utah Supreme Court construed the "incident to any motion" phrase in the statute to apply to an appeal to correct the trial court's error in granting a motion to vacate. *Id.* at 954. The court suggested that an award of attorney fees and costs to the prevailing party in an appeal involving the Utah Arbitration Act is almost always justified:

Looking to the actual operation of our statute [§ 78-31a-16], it is difficult to conceive of an award of attorney fees to a prevailing party which would run afoul of our policies. The only such situation we can imagine would be one where a trial court awarded attorney fees to a party who did not prevail in the litigation or who challenged an award and prevailed only as to some very minor point but lost as to all minor points. Such an award of attorney fees would arguably defeat the purposes behind the Utah Arbitration Act because it would not further the goal of discouraging unnecessary relitigation of arbitration awards.

Id. at 953.

In this case, Brooks is entitled to attorney fees and costs on appeal under Utah Code Ann. § 78-31a-16. This appeal is incident to his motion to confirm the arbitration award (a motion authorized by Utah Code Ann. § 78-31a-12) because it seeks a reversal of the trial court's order granting that motion.

CONCLUSION AND RELIEF REQUESTED

Peck has not presented any reason to disturb the arbitrator's award. Brooks requests that this Court affirm the district court's confirmation of the arbitration award, and award him reasonable attorney fees and costs incurred in defending this appeal.

DATED this 14th day of May, 1998.

SNOW, CHRISTENSEN & MARTINEAU

By Jul P. Blanch
Robert C. Keller
Julianne P. Blanch
Attorneys for Appellee Brooks, et al.

ADDENDUM A:

ARBITRATOR OPINION DATED APRIL 9, 1997

Connie D. Roth
President & Founder
Steven R. Hansen
Executive Director

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INTERMOUNTAIN ADR GROUP

MAHLON PECK & FAMILY, INC.

Plaintiff,

OPINION

v.

Case No. 940400145

LLOYD R. BROOKS, et al.,

Defendants.

I, Stephen B. Nebaker, arbitrator in the above-entitled matter, having reviewed the briefs, including closing arguments submitted by the plaintiffs and the defendants, the case law, the appraisal reports submitted by Kent Carpenter and Don R. Gurney, and the deposition testimony submitted by Mahlon Peck, Lloyd Brooks and Carl Mellor, make the following determination:

I find the issues in favor of the defendants and against the plaintiffs no cause of action and deny plaintiffs' claims in their entirety. It is my opinion that the appraisal report given by Kent Carpenter more accurately reflects the fair-market value of the property at the time of the sale from the Peck Family to Mellors. I find that, based upon the deposition testimony of Mr. Mellor and the testimony of Mr. Brooks, Mr. Brooks was representing the seller and did not violate his fiduciary duty to the Pecks.

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P.02

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It is further my opinion that each party should bear
their own costs and attorneys' fees incurred in this matter.

DATED this 9th day of April, 1997.

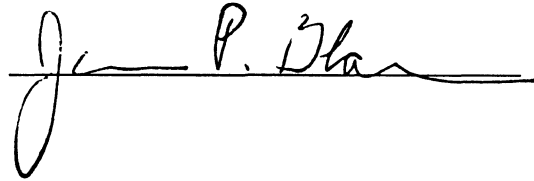

Stephen B. Nebeker
Arbitrator

0723311/dm

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the foregoing were mailed, first class, postage prepaid to following:

Gordon W. Duval
Christine M. Petersen
Duval Hansen Witt & Morley
110 South Main Street
Pleasant Grove, Utah 84062

A handwritten signature in black ink, appearing to read "J. P. Duval", is written over a horizontal line.