1981

Reuel S. Kohler and Dolores M. Kohler v. Town of Garden City, Utah, A Municipal Corporation and Birdie Properties, a Partnership v. Town of Garden City Utah A Municipal Corpoation, Mack J. Madsen, and Leola S. Madsen : Brief of Respondents Kohler

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

REUEL S. KOHLER, et al.,

Plaintiffs/Respondents,

vs.

GARDEN CITY,

Defendant/Appellant.

BIRDIE PROPERTIES,

Plaintiff/Respondent and Cross-Appellant,

vs.

GARDEN CITY, et al.,

Defendants/Appellants.

BRIEF OF RESPONDENTS KOHLER

Case No. 17346

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NATURE OF THE CASE

Plaintiffs/respondents Kohler (hereinafter sometimes the "Kohlers") brought this action to quiet title to certain property which they own in Garden City against adverse claims of defendant/appellant Garden City (hereinafter sometimes "Garden City") that a portion of the Kohlers' property had been impliedly dedicated as a public thoroughfare.

DISPOSITION IN THE LOWER COURT

The lower court quieted title in favor of the Kohlers and awarded them injunctive and monetary relief.

NATURE OF RELIEF SOUGHT ON APPEAL

The Kohlers seek affirmation of the lower court's judgment.

STATEMENT OF FACTS

The Kohlers agree that appellant is a duly incorporated town in the State of Utah. The balance of the statement of facts set forth by Garden City is argumentative and undocumented. The Kohlers submit that the record demonstrates the following.

In 1967, when the Kohlers purchased their property on the shore of Bear Lake in Garden City, they had no knowledge of any claimed "right-of-way." They did have notice of a foot-path overgrown with weeds which was occasionally used by a neighbor who was able to drive his jeep down the path for access to his property (Transcript, hereinafter "Tr." 46). This foot path, however, was located at all times south of the surveyed boundary of the Kohlers' property and did not encroach upon their property (Tr. 13, 14, 45). The record demonstrates that the Kohlers had no knowledge of a claim by Garden City to a right-of-way, at least not until 1972 when the City widened the foot path to the north causing it to cross and encroach upon the southern portion of the Kohler property (Tr. 56). The Kohlers were not informed of the extent of Garden City's claim until 1974 (Tr. 91). Contrary to appellant's assertion, nowhere does the record demonstrate that "its right-of-way" was "historically dedicated and established by the original plat

and survey" (Brief of Appellant Garden City [hereinafter "Br."], 3).

Finally, and contrary to Garden City's Statement of Facts, the Kohlers do indeed contest the existence and extent of public assess to Bear Lake from the end of First South in Garden City. This issue always has been and continues to be a major one in this lawsit. This entire case hinges upon whether the use of the path in question by the public has been sufficient to constitute an implied dedication under §27-12-89, Utah Code Ann. (1953) and, if so, the location and width of the highway so dedicated. The trial court found that proof of such use was lacking and granted Judgment in favor of the Kohlers (Memorandum Decision, p. 2).

ARGUMENT

I. GARDEN CITY FAILED TO MEET ITS BURDEN OF ESTABLISHING BY CLEAR AND CONVINCING PROOF THAT THE KOHLERS' LAND HAD BEEN DEDICATED AS A PUBLIC HIGHWAY.

The burden of a party who appeals the Judgment of a trial court and the duty of the reviewing court were described in the case of Charlton v. Hackett, 11 Utah 2d 389, 360 P.2d 176 (1961) as follows:

> In considering the attack on the findings and judgment of the trial court it is our duty to follow these cardinal rules of review: to indulge them a presumption of validity and correctness; to require the appellant to sustain the burden of showing error; to review the record in the light most favorable to them; and not to disturb them if they find substantial support in the evidence. 11 Utah 2d at 390.

See also R. C. Tolman Construction v. Myton Water Association, 56 P.2d 780 (Utah, 1977). If there is a reasonable basis in the evidence to support the trial court's findings, they should not be disturbed. Holman v. Sorenson, 556 P.2d 499 (Utah, 1976). Indeed the findings and Judgment of the trial court are entitled to a presumption of correctness and credibility; the appellant must clearly demonstrate that they are in error. First Security Bank of Utah, N.A. v. Wright, 521 P.2d 563 (Utah, 1974); Latimer v. Katz, 29 Utah 2d 280, 508 P.2d 542 (1973).

Garden City has not alleged that the trial court's actions were arbitrary or an abuse of discretion. The only matter left for review is whether the trial court weighed the evidence under the appropriate legal standard. Once it is determined that the appropriate legal standards were applied, the Judgment must be affirmed. The evidence adduced at trial need be examined only so far as necessary to decide whether approporiate legal principals were applied.

The major issues raised by Garden City in its appeal, namely, whether a "right-of-way" was extinguished and the width of that right-of-way (Docketing Statement, Issues A and B; Br. Part II) beg the entire question on appeal. This case at the trial court turned on the question of whether or not such a right-of-way was ever in fact created. The questions of width and extinguish-

rent once a right-of-way is created were not addressed by the trial court nor need they be reached on appeal.*

Utah law is clear that property may be dedicated to public use as a highway in only one of two ways. Property can be dedicated expressly or dedication may be implied by public use. In this case, the City claims no record interest in the land. Thus, if there has been a dedication it must be implied under the standard articulated in §27-12-89, Utah Code Ann. (1953). That section provides:

> A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years. (emphasis added)

Earlier cases under this and the prior common law rule looked at the actual intent of the grantor in allowing public use of his property. See, e.g., Wilson v. Hull, et al., 24 P. 799 (1890); Whittaker v. Ferguson, 6 Utah 240, 51 P. 980 (1898); Shettler v. Lynch, 23 Utah 305, 64 P. 955 (1901). Later cases have looked at the question by more objective standards, but still focus on conduct from which the intent of the grantor in allowing a use of his property adverse to his interests may be implied.

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* The issues of the creation and width of a public thoroughfare were recognized and briefed by Garden City after trial (Defendant's Post-Trial Memorandum, pp. 2, 3). With regard to the width of the claimed right-of-way, it is interesting to note that Garden City's Counterclaim is silent on the subject of width. Although a 99 foot dedication had previously been claimed, at trial Garden City argued for a 66 foot roadway (Defendant's Post-Trial Memorandum, p. 3). On appeal, Garden City has elected to renew its claim to 99 feet (Br. 6, 15).

Because of the pre-eminence of private property rights, Utah case law clearly states that the burden of proof in is on the party asserting an implied public dedication. This Court, in Bonner v. Sudbury, 417 P.2d 646, 648 (1966), stated:

> In connection with this review we deem it appropriate to note our agreement that the dedication of one's property to a public use should not be regarded lightly and that certain principles should be adhered to. The presumption is in favor of the property owner; and the burden of establishing public use for the required period of time is on those claiming it. (emphasis added; footnote omitted)

In a subsequent case, the Supreme Court reversed a trial court determination of an implied dedication and stated:

> Irrespective of the departure from theory or proof, we think the burden of proving a real public use continuously for ten years was not met here in light of principles to the effect that dedication of rights to the public generally, must be displayed by clear and convincing evidence. This we say in view of the other principle that on review we canvass the facts in a light more favorable to the conclusion of the arbiter of the facts. These principles clash somewhat, but where individual property rights are at stake we must not treat such rights lightly. Petersen v. Combe, 438 P.2d 545, 546 (Utah, 1968). (emphasis added; footnotes omitted)

Thus, at trial Garden City was required to establish a dedication by clear and convincing evidence. The evidence adduced at trial indicates, and the trial court found, that Garden City failed to meet its burden.

The City demonstrated no evidence of use before the Kohlers' land was patented by the United States Government. The

evidence adduced at trial was predominantly by people who owned contiguous property and by their relatives and invitees. There was evidence that cattle were occasionally driven down the lane to pasture. Several individuals testified that as children they would visit their cousins and use the lane for access to the lake in the summer and for sledding in the winter. There was evidence of occasional use by automobiles, but this again was predominantly by adjacent land owners and their relatives and invitees. There was, in short, no evidence of continuous use of the lane by the public as a thoroughfare for a period of ten years. The City simply did not meet its burden of establishing an implied dedication. Indeed, the Court found that "if there was any public use to the lake in that area that it was a use that was occasional for pedestrian and cattle traffic" (Memorandum Decision, p. 2). This finding was neither arbitrary nor an abuse of discretion.

Equally important is the fact that the lane was at all times located to the south of the Kohler property. The only survey in the record, that of Robert Wilson, a licensed surveyor of eminent qualifications, demonstrates that the road or "foot path" was located to the south of the southern boundary of the Kohler property when he surveyed it in 1967 (Tr. 7, 8, 13, 14). The lane about which he and other witnesses testified was narrow. The area around the lane was swampy and divided from the pasture to the north by livestock fences. Even if the evidence could establish an implied dedication by the property owner over whose land the lane

ran, that dedication could not operate to dedicate any part of the Kohler land over which the land did not run. It is axiomatic that a property owner cannot dedicate by implication that which he could not dedicate expressly. Indeed, the court found:

> That any such use in any event was located to the south of the southern boundary of the Kohler property and no demonstrated use has been shown to the satisfaction of the Court of property belonging to the Kohlers until the encoachment by the City in 1972. (Memorandum Decision, p. 2)

If the City desires to take land to the north of Kohlers' boundary line--land over which no public use occurred prior to 1972--they must accord due process of law, condemn the land and compensate its owners.

The Utah Supreme Court case which is most instructive here is Petersen v. Combe, supra. As set forth above, this case provides the standard of clear and convincing evidence by which a dedication must be demonstrated. Petersen involved the alleged implied dedication of a dead end road, the property on either side of which was owned by various individuals. The Court stated that these individuals, by virtue of their land ownership, were entitled to use the road and that "they or their personal visitors cannot be numbered in the class of members of the general public using such road in a fashion that might ripen into a dedication of a road under the statute." 438 P.2d at 545. The Court further noted that the road was used by various agencies of government for access to the land at the end of the dead end road and that Weber County

equipment graded and maintained the road off and on during the period in question. The Court posed this question:

> Was there sufficient evidence by competent testimony, by witnesses who were not self-serving, to show by clear and convincing evidence, that the public generally,--not just a few having their own special and private interests in the road, had used the road continuously for ten years? Id. at 546, 547.

The Court then answered the question in light of the facts adduced at trial in the negative.

The facts in Petersen present some helpful parallels to the situation here. Both cases involved evidence of use predominantly by adjacent land owners and their relatives and invitees. In both cases municipal funds were apparently used for some maintenance of the roads in question. Petersen, like the instant case, involved a dead end road--it was not a thoroughfare as required by the statute. The term "thoroughfare" is defined in Black's Law Dictionary, Revised 4th Edition, 1968 at page 1651, as:

> A street or passage through which one can fare (travel;) that is, a street or highway affording an unobstructed exit at each end into another street or public passage. (emphasis in original; citing inter alia Morris v. Blunt, 161 P. 1127 (Utah, 1916).

The lane in question here is not a "thoroughfare." It does not allow an unobstructed exit at each end; it does not provide transit between two other lanes or public ways; it does not even connect a public highway with any land or facility owned by Garden City. The fact that there is no public facility, no beach and no boat ramp, means that for the public to use Bear Lake from the right-of-way

claimed by Garden City, the public must trespass on private property to turn vehicles around, to launch boats, to water stock, or even swim from the beach. The 66-foot access claimed by the City at trial (Post-Trial Memorandum, p. 3) and the 99-foot easement claimed on appeal (Br. 6) are still insufficient for these uses without the use of private lands not yet claimed by the City.

The three cases cited by appellant in support of its assertion that an implied dedication occurred provide no nourishment for their argument. In all three cases, Shettler v. Lynch, 23 Utah 305, 64 P.2d 955 (1901), Wilson v. Hull, 7 Utah 90, 24 P. 799 (1891) and Whittaker v. Ferguson, 6 Utah 240, 51 P. 980 (1898) an "animus dedicandi" or intention to dedicate was found in the land owner because of extensive and continuous public use of his land. The following distinguishing language from the court in those cases is instructive:

> . . . if the land of which that covered by the road is a part is unenclosed, and not appropriated to any special use by the owner, the fact that the public travels over it occasionally, as the custom may be to cross vacant and unoccupied lands without objection from the owner, does not authorize any infererence of an intention to dedicate. Under such circumstances the mere failure to manifest an objection does not authorize an inference that the mind of the owner consents. The inference in that case is that the proprietor did not understand that the land was being appropriated for the permanent use of the public as a highway. Wilson v. Hull, 24 P. at 800.

In Shettler v. Lynch, like the current case, the Judge had to resolve some conflicts in the evidence. The Supreme Court stated, in upholding his ruling:

> It is true, there is some conflict in the evidence relating to the dedication by the owner of the land and the acceptance by the public, and the findings of fact hereinbefore referred to are thus based upon conflicting evidence, but there appears to be a decided preponderance of proof in support of them, and therefore this court will not disturb them. Likewise as to the other findings, and the conclusions of law of which the appellants complain. In such a case the findings of the trial court will not be disturbed unless they are so manifestly erroneous as to demonstrate some oversight or mistake. 64 P. at 956.

The case most stressed in Garden City's Brief is that of Hunsaker v. State of Utah, 29 Utah 2d 322, 509 P.2d 352 (1973). This case is clearly distinguishable from the present case. In Hunsaker, the existence of a highway easement across the northern portion of plaintiff's land was admitted by all parties. The only question was whether that easement was one or two rods wide. The trial court held that the highway is presumed to be of the statutory width and that the evidence was not sufficient to rebut that presumption. In the instant case, no continuous public use of the land now owned by the Kohlers was shown. Even if a dedication of a right-of-way by the land owner to the south is shown, a fortiori the entire width of that dedication must have been of his land--the only land which he could dedicate.

More helpful is the case of Bozo v. Ogden City, 285 P. 1033 (Utah, 1930). It might be said that Bozo is the Hunsaker case without the existing right-of-way. In Bozo, plaintiffs sued to quiet title to the north 49 1/2 feet of their property which the City claimed was part of a public street known as 20th Street. The

trial court found the plaintiffs were owners in fee simple of the entire tract, including the north 49 1/2 feet, and that the strip of land in dispute had never been opened to the public or used by the public for travel, even though a dedication of another 49 1/2 feet north of plaintiffs' property line had been dedicated as a street. The streets both west and east of 20th Street were 99 feet in width. In light of this evidence, the Utah Supreme Court affirmed the trial court and held that "[t]here was no dedication by opening and user" of plaintiffs' property. 285 P. at 1034. In the instant case, the evidence demonstrated and the trial court found insufficient public use to imply a dedication. Even if such user had been found, the evidence demonstrates that it was of the land to the south of Kohlers' property. As in Bozo, a dedication of the south 49 1/2 feet does not necessitate a dedication of the north 49 1/2 feet.

Garden City also cites the case of Jeremy v. Bertagnole, et al., 101 Utah 1, 116 P.2d 420 (1941). This case involved East Canyon Road, a 25 mile road from Old Highway 40 (now I-80) to the towns of Morgan and Hennifer. The Supreme Court affirmed the trial court's ruling of an implied dedication, citing findings of the court that the road was

> a well traveled, worked, and defined public road . . . that it [was] and had been for 60 years continuously used by ranchmen, stockmen, owners of land contiguous and adjacent thereto and by the public generally for all necessary and convenient purposes. . . . 101 Utah at 3, 4 (emphasis added).

The court cited further findings by the trial court that the use of the road had been "as general and extensive as though it had been formally laid out as a public highway by public authority." 101 Utah at 4. The Jeremy case is clearly different from the instant case. Jeremy involved a long road connecting a highway with two towns; the instant case involves a dead end lane a couple of hundred yards long used predominantly by contiguous property owners, relatives, invitees and occasional neighbors. The evidence in Jeremy demonstrated a continuous commercial use; the evidence in the present case demonstrates a sporadic use in terms both of frequency and purpose. In short, though Jeremy is an instructive case and one that is often cited by the Utah courts, it is a far different case than the one at bar.

Appellant also cites the case of Boyer v. Clark, 7 Utah 2d 395, 326 P.2d 107 (1958). Boyer involved "Middle Canyon Road" which connected Highway 133 with a town called "Grass Creek." The evidence in that case demonstrated a "continuous and uninterrupted use of Middle Canyon Road" for the hauling of coal from mines, for the driving of cattle and sheep, and for other uses for a period exceeding 50 years. 7 Utah 2d at 397. The court noted that the public used the road for these purposes in travelling from Grass Creek and various other points to and from Highway 133. Again, a thoroughfare described in Boyer v. Clark is a completely different creature than the dead end lane leading from the end of First South in Garden City east to Bear Lake.

The final case cited by appellant on this point, Deseret Livestock Co. v. Sharp, 123 Utah 353, 259 P.2d 607 (1953) adds nothing to appellant's argument. As indicated above, the authorities cited by Garden City on the question of extinguishment of public rights to an established highway are inapposite to this discussion. Because no public thoroughfare was found to exist, the question of extinguishment is moot.

Again, the case most helpful and instructive here is that of Petersen v. Combe, supra. The learning of that case compels an affirmation of Judge Christofferson's ruling.

II. EXHIBIT 59, A MAP OFFERED BY GARDEN CITY WAS PROPERLY EXCLUDED.

Garden City objects to the exclusion by the trial court of its offerred Exhibit 59, a map of Garden City. Contrary to Garden City's statement, there is no evidence that the map was prepared "at the behest of the town fathers" of Garden City (Br. 4), or that it "showed the intent of the town fathers . . . and the actions and reliance of the community" (Br. 6). The map was excluded for lack of foundation (Tr. 259, 260). Indeed, Mr. Low, counsel for Garden City, admitted that there was no foundation as to who originated the map, whether it had any official standing, whether it was a public record, or whether it was made pursuant to deed descriptions (Tr. 260, 261).

In spite of this clear ruling, Garden City argues that the document should have been admitted under an exception to the

hearsay rule--Rule 63(27) of the Utah Rules of Evidence. This assertion ignores the fact that hearsay was not an objection raised at trial nor was it the basis for the Judge's ruling.

Alternatively, Garden City argues that the document should have been admitted under Rule 67 of the Utah Rules of Evidence. Under this rule, an "ancient writing" may be authenticated and received into evidence

> if the judge finds that a ruling (a) is at least 30 years old at the time it is offered, and (b) is in such condition as to create no suspicion concerning its authenticity, and (c) at the time of its discovery was in a place in which such a document, if authentic, would likely be found, it is sufficiently authenticated.

Although there was testimony that the document is in excess of 30 years old, there was no evidence or finding by the court as to where the document was discovered and the fact that it had been "all over the country" makes it inherently suspicious (Tr. 256).

The real difficulty with Garden City's assertion that the map should have been admitted as an ancient document is the fact that it was never offered as such. The document was excluded for lack of foundation and no alternative ground for admission was proferred. In his treatise on evidence, Professor McCormick has stated:

> If counsel specifies a purpose for which the proposed evidence is inadmissible and the judge excludes, counsel cannot complain of the ruling on appeal though it could have been rightly admitted for another purpose. McCormick on Evidence, West Publishing Company, 1972, p. 112.

If counsel had an alternative basis for admission of his proposed exhibit, yet did not allow the judge to consider that ground, he cannot be heard now to complain of error in exclusion of the document.

The authorities cited by Garden City in support of its argument on this point do not support its position. The first, 80 A.L.R.2d 915, treats only the competency as evidence of receipts of a third person given for money payment. 80 A.L.R.2d at 917. The second, 46 A.L.R.2d 1318 (erroneously cited in Garden City's Brief as 46A A.L.R.2d 31318) states point-blank: "An ancient map made under the direction of a private person, or one for which no official authorization or recognition appears, is inadmissible in evidence." 46 A.L.R.2d at 1333 (emphasis added). A more succinct exposition of the Kohlers' position on this document could hardly be found.

Utah case law is clear that there is a presumption in favor of the rulings of the trial court, including all aspects of the proceedings. This Court has noted such a presumption and stated:

> Upon appeal, appellant has the burden of showing that there was substantial and prejudicial error which had the effect of depriving him of the opportunity of a full and fair presentation and consideration of the disputed issues. Redevelopment Agency of Salt Lake City v. Barrutia, 526 P.2d 47, 51 (Utah, 1974).

Thus, Garden City must demonstrate not only that the trial court erred, but that such error was substantial and prejudicial. Indeed

this court has stated that "on appeal, the burden is on the appellant to convince us that the trial court committed error and not that the appellant should have won the case." Brigham v. Moon Lake Electric Association, 24 Utah 2d 292, 297, 470 P.2d 393 (1970). Judge Christofferson's ruling cannot be reversed for error in the exclusion of evidence unless that error was prejudicial (Rule 5, Utah Rules of Evidence; Rule 61, Utah Rules of Civil Procedure; Downey State Bank v. Major-Blakeney Corp., 578 P.2d 1286 (Utah, 1978).

An examination of the record in this case demonstrates that exclusion of the map, even if error, was harmless to Garden City's case. The map was not offered to set a new factual base or to demonstrate facts that otherwise would not have been in evidence. Rather, Mr. Low, Garden City's attorney, offered the map "to correspond and corroborate [LaVon Sprouse's] testimony" (Tr. 261). The court states in its Memorandum Decision that the testimony of the witnesses was considered in arriving at its conclusion. Nowhere in the record is it indicated that the admission of one more map would have made any difference. Finally, even if the map did demonstrate the "intent of the town fathers" as argued by Garden City, that intent is irrelevant as the cases cited herein and in appellant's Brief amply demonstrate that it is the land owners' intent, either express or implied, from which a dedication must be found.

III. THE TRIAL COURT PROPERLY AWARDED INJUNCTIVE AND MONETARY RELIEF.

Garden City noted at trial that the court had granted t Kohlers' Motion to File a Supplemental Complaint. This Complaint set forth additional items of damage occuring after the original Complaint had been filed. Garden City then indicated that it wou request an opportunity to rebut the evidence relative to these ne elements of damage. The court replied "We'll make that determination, of course, when you see what the evidence is as to damages, and if you need additional time, we'll grant it." The Judge then indicated that Garden City would "have the opportunity after hearing the testimony, if they feel they need the time to rebut it" (Tr. 4, emphasis added). The elements of damage presented by the Kohlers at trial were only those claimed in the original Complaint and did not reflect the additional bases for damages claimed in th Supplemental Complaint. Garden City offered no evidence on the question of damages nor did it take exception to or object to the proof offered by the Kohlers. Garden City did not request additional time or an opportunity to rebut the evidence introduced by the Kohlers. Such an opportunity was available at the time the briefing schedule was discussed at the end of the trial (Tr. 264-267).

It has never been the understanding of counsel for plaintiffs that a subsequent hearing would be held to determine the issue of damages. Such additional time was to be available to

Garden City only if they felt surprised by proof of damages under the new claims made in the Supplemental Complaint filed on the eve of trial. This apparently was also the understanding of the Court as it proceeded to award Kohlers injunctive and monetary relief in the Memorandum Decision of June 30, 1980. Not only did Garden City fail to request an opportunity to rebut the evidence on damages, at no time did it seek relief from or an amendment of the Judgment as it might have under Rules 59 and 60 of the Utah Rules of Civil Procedure.

The two cases cited by Garden City, Bobo v. Bigbee, 548 P.2d 224 (Okla. 1976) and Hurley v. Hurley, 127 P.2d 147 (Okla. 1942) are again not helpful on the point pressed by Garden City. In Bobo a motion for a new trial was filed between the time of trial and the entry of Judgment. No such motion was filed by Garden City in the instant case. In Hurley, the order at issue on appeal did not purport to be a final judgment and expressly left open and reserved for further consideration and decision the right complained of. In the instant case, Judge Christofferson's decision and subsequent Judgment determined the rights to the parties on both sides of the lawsuit and resolved all issues raised by the pleadings. The resolution of the damage question in this case is thus not one about which Garden City may claim error. Indeed, Garden City has candidly acknowledged that this issue, if the only one presented, would not be pursued on appeal (Response to Motion for Summary Disposition, p. 3).

CONCLUSION

It was demonstrated at trial that insufficient continuc public use of the lane in question had occurred to imply a dedica- tion under §27-12-89, Utah Code Ann. (1953). Likewise, it was demonstrated that the lane in question, prior to 1972, lay to the south of the south boundary of Kohlers' property. The Memorandur Decision entered by the Court found in favor of the Kohlers on bo points. The rulings on both points are reasonable and find substa tial support in the evidence.

Garden City has not demonstrated that Judge Christoffers was arbitrary or that he abused his discretion. Likewise, they have demonstrated no error which would act to their substantial prejudice. On the basis of the record in this case and the argu- ments made above, it is respectfully submitted that the Judgment the trial court awarding injunctive and monetary relief to the Kohlers must be affirmed.

RESPECTFULLY SUBMITTED this 16th day of January, 1981.

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CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed two true and correct copies of the foregoing Brief of Respondents Kohler in Case No. 17346, postage prepaid, this 16th day of January, 1981, to Gordon J. Low and Herm Olsen of Hillard, Low & Anderson, Attorneys for Defendant/Appellant Garden City, at 175 East 100 North, Logan, Utah, 84321; and one true and correct copy to James C. Jenkins, Attorney for Defendants/Respondents Madsen, at 21 West Center Street, Logan, Utah, 84321; and to David Lloyd, Attorney for Plaintiff/Respondent and Cross-Appellant Birdie Properties, at 1407 West North Temple, Suite 338, Salt Lake City, Utah, 84116.

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