2016

Andrew L. Ellsworth, Et Al., Plaintiffs/Appellants, vs. Terry Huffstatler, Et Al., Defendants/ Appellees. Terry Huffstatler, Et Al., Petitioner/ Appellant, vs. Mark L. Ellsworth, Et Al., Respondents/ Appellees. Terry Huffstatler, as Trustee of the Barbara May Ellsworth Trust, Intervenor Plaintiff/ Appellee, vs. Mark L. Ellsworth, Co-Trustee of the Ellsworth Family Trust., Intervenor Defendant/ Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

ANDREW L. ELLSWORTH, *et al.*, Plaintiffs/Appellants, v. TERRY HUFFSTATLER, *et al.*, Defendants/Appellees.	
TERRY HUFFSTATLER, *et al.*, Petitioner/Appellant, v. MARK L. ELLSWORTH, *et al.*, Respondents/Appellees.	
TERRY HUFFSTATLER, as Trustee of the Barbara May Ellsworth Trust, Intervenor Plaintiff/Appellee, v. MARK L. ELLSWORTH, Co-Trustee of The Ellsworth Family Trust, Intervenor Defendant/Appellant.	Court of Appeals No. 20150478

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, HONORABLE DAVID MORTENSEN CIVIL NO. 130400498 AND CONSOLIDATED CASE NO. 133400333

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COMPLETE LIST OF ALL PARTIES

Pursuant to Rule 24(a)(1), Utah Rules Of Appellate Procedure, the following sets forth a complete list of all parties to the trial court proceeding:

Appellants

Andrew L. Ellsworth (Plaintiff)
Mark L. Ellsworth (Plaintiff, Respondent and Intervenor Defendant)
Michelle Thomas (Plaintiff)
Ken L. Ellsworth (Plaintiff)
Tami Jasper (Plaintiff and Respondent)
Tim Ellsworth (Plaintiff)
The Ellsworth Family Trust dated May 1, 1991 (Plaintiff, Petitioner and Defendant)

Appellees

Terry Huffstatler (Defendant, Petitioner, Intervenor Plaintiff)
Jim Huffstatler (Defendant)
Karl V. Baker (Defendant)
Keith A. Baker (Defendant)
The Ellsworth Family Trust dated May 1, 1991 (Plaintiff, Petitioner and Defendant)
The Estate of Barbara Mae Ellsworth (Defendant)
Barbara May Ellsworth (now deceased) (Defendant and Petitioner)
Barbara May Ellsworth Trust date March 19, 2013 (Intervenor Plaintiff)

In accordance with Rule 24(d) Terry Huffstatler will be referred to as "Terry"; Mark Ellsworth will be referred to as "Mark"; Michelle Thomas will be referred to as "Michelle"; The Ellsworth Family Trust, dated May 1, 1991 will be referred to as the "1991 Trust" or "EFT"; The Barbara May Ellsworth Trust, dated March 19, 2013 will be referred to as the "2013 Trust"; Barbara May Ellsworth will be referred to as "Barbara"; Elmer "Bud" Ellsworth will be referred to as "Elmer"; attorney Steve Skabelund (who represented Elmer and Barbara in connection with their estate planning) will be referred to as "Mr. Skabelund."

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ARGUMENT

On appeal, Appellants have argued that the trial court erred when it determined Barbara became the owner of the precious metals pursuant to Utah Code Ann. § 75-3-102. To meet the conditions of § 75-3-102, it must be shown that, "... the devisee ... possessed the property devised in accordance with the provisions of the will." The trial court ruled that the Elmer's will ("Will") unambiguously named Barbara as the devisee who should receive the precious metals. Appellants contend there is ambiguity in the provisions of the Will which make it puzzling to determine whether Barbara or the 1991 Trust was the devisee of the will. Whether an ambiguity exists is a question of law.

Additionally, Appellants have argued that the trial court erred when it determined Appellees rebutted the legal presumption that Barbara's creation of the 2013 Trust was unfair. The record in this case establishes that Barbara created the 2013 Trust because of information she obtained from her daughter Terry relating to a March 13, 2013 email, and the trial court determined that Terry had overreacted to that email.

The Brief of Appellees makes several arguments opposing Appellant's position. Appellants respond to Appellees' specific arguments below[1]:

I. Appellees assert. "*Elmer Ellsworth's Will is not ambiguous and does not support the alternate interpretation that Appellants seek to apply.*"

This Court can review the Will and reach its own legal conclusions regarding it without deference to the trial court. Appellants contend the trial court could not determine

[1] For convenience, Appellants have adopted the outline format contained in Appellees' Brief and have restated the specific headings used by Appellees.

the devisee from a simple reading of the Will because of the existence of ambiguity. Appellants have offered a reasonable interpretation of the Will which differs from the conclusion reached by the trial court. Where the Will does not clearly name a devisee, the trial court erred in concluding Barbara was the Will's devisee. As a result, the trial court erred in applying § 75-3-102 and determining Barbara was the proper owner of the precious metals.

A. Appellees assert, "The terms of Elmer's Will and EFT are not ambiguous."

As a threshold issue, Appellants have not alleged on appeal that the 1991 Trust is ambiguous. The trial court appears to have relied on the terms of the Will in reaching its decision regarding the application of § 75-3-102. It is the Will Appellants claim is ambiguous. The language of the 1991 Trust is not at issue on appeal.

In their brief, Appellees seek to have this Court focus on the statement, "If my spouse survives me, I give to her all items of Personal Property." Significantly, the parenthetical "as hereinafter defined" is largely ignored. This statement, when standing alone without the parenthetical, does not seem to be complete. A complete statement would be something similar to, "If my spouse survives me, I give to her all *of my* items of Personal Property." Another possible complete statement might be, "If my spouse survives me, I give to her all items of Personal Property *that are contained in my safe*." The standalone statement which Appellees emphasize, however, does not clearly indicate what personal property is being devised because the sentence is not complete without the parenthetical.

The trial court reached its conclusions by making an assumption about what Elmer intended. In its summary judgment ruling, the trial court stated:

> Even though Elmer does not define the words "Personal Property," the term is susceptible to construing it by its plain meaning. As a result, it can be *assumed* that Elmer's intent concerning the distribution of his personal property is the same as the conclusion a plain meaning of the Will communicates.
>
> (R. 1069-1070) (Emphasis added.)

If the trial court is "assuming" what Elmer's intent was, then by definition the trial court could not have been relying on the plain meaning of the Will when reaching its conclusions. Simply stated, if the trial court could have determined Elmer's intent from the plain meaning of the Will, an assumption would not be required.

As has been stated before, the Paragraph Fourth of the Will expressly states (in relevant part):

> If my spouse survives me, I give to her all items of Personal Property (as hereinafter defined). If my spouse does not survive me, I give those items of Personal Property (but not money, notes, documents of title, stock certificates or business property) to the individuals named in my Memorandum of Disposition of Personal Property.
>
> (Trial Exhibit 1 at page 10)

The trial court construed this provision as follows, "A plain reading of the Will explains that Barbara is to receive Elmer's personal property which was not transferred to someone else or to the family trust." (R. 1070) Essentially, the trial court is stating that because the precious metals were not transferred to the 1991 Trust, and because the Memorandum of Disposition of Personal Property was not completed, Barbara gets everything by default.

Appellees interpret Paragraph Fourth of the Will as follows:

> Elmer's Will clearly states: "[i]f my spouse survives me, I give to her all items of Personal Property." This statement is unequivocal—upon Elmer Ellsworth's death, Barbara Ellsworth was to receive ***all*** of Elmer Ellsworth's personal property. The only exception to this requirement is if the personal property were listed on a Memorandum of Disposition of Personal Property and that Memorandum included Elmer's signature and the identity of the intended recipient of the specified personal property. No such Memorandum exists.
>
> (Brief of Appellees at pages 11-12)

Under these interpretations of the Will, the personal property either goes to Barbara or to the intended recipient named in the Memorandum. There is no other possible distribution of the personal property under these readings. These interpretations are problematic, however, when viewed against that plain language of Paragraph Fifth of the Will. Paragraph Fifth provides in relevant part:

> "My residuary estate" means all my interest in real and personal property, whether community or separate and wherever situated, which I may own at my death (excluding property over which I may have a power of appointment) and which I have not disposed of by the preceding provisions of this will.
>
> I give my residuary estate to the Trustee then actin under that certain Trust Agreement named The ELLSWORTH FAMILY TRUST created on the 1st day of May, 1991, to be aggregated with (and held, administered, and distributed as an integral part of said Trust Estate in the manner and subject to the terms and provisions provided for in the Trust Agreement, including any amendments thereto made during my lifetime. ..."

Paragraph Fifth clearly contemplates the existence of a possible residuary estate of personal property that could be transferred to the 1991 Trust after application of Paragraph Fourth. This directly contradicts the Appellees and the trial court's interpretation of the Will that all personal property either goes to Barbara or some person named on the Memorandum of Disposition. The very existence of Paragraph Fifth is evidence that Elmer

intended the personal property could pass to the 1991 Trust. In fact, Paragraph Fifth would have no meaning under the trial court and Appellees' interpretation of the Will.

Under Appellants' interpretation of the Will, all of these provisions make sense and fit together. Appellants contend the Will should be read as follows: (1) If Barbara survives Elmer, then Elmer devises to Barbara all items of "Personal Property" which are specifically defined by Elmer: (2) Since no items of "Personal Property" were ever defined by Elmer, he must have intended that no specific items of "Personal Property" would pass directly to Barbara; and (3) Since no items of Personal Property passed directly to Barbara, the non-defined personal property would pass to the 1991 Trust pursuant to Paragraph Fifth[2] of the Will.

At bottom, there is an ambiguity as to whether Elmer intended to devise all, some or none of his personal property to Barbara via his Will. Where there is a question as to the proper devisee, the application of § 75-3-102 by the trial court was error.

i. Appellees assert, *"The term Personal Property is easily defined."*

Appellees make the general statement that the term "personal property" is easily defined. Appellants do not necessarily disagree with this statement if the common definition of the term is intended to be used. The fact remains, however, if Elmer intended to use the common definition of "personal property" there would be no need to define that term in the Will. The only reason to include a definition of "Personal Property" would be to provide a definition which was different from the common definition.

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[2] As it turned out, Barbara survived Elmer. Had Barbara not survived Elmer, and because Elmer did not complete the Memorandum of Distribution of Personal Property, all Personal Property would have transferred to the 1991 Trust pursuant to Paragraph Fifth.

Appellees fail to explain why the parenthetical "as hereinafter defined" is present if there was some meaning to be ascribed to it. The trial court found, "Elmer's will leaves the reader anticipating a list of personal property that will specifically be transfer [sic] to Barbara upon Elmer's death." (R. 1069-1070) Thus, even the trial court was questioning what Elmer intended to transfer to Barbara.

In this case, the common meaning of "personal property" cannot properly be used to construe the Will. Given the "as hereinafter defined" language which is expressly contained in the Will, it can reasonably be interpreted that "Personal Property" as used in the Will has a different meaning than its common definition because the Will indicates that the term will be defined in the document. In fact, it is at least as reasonable to assume Elmer intended a limited definition of "Personal Property" as it is to assume that he intended the common definition. The term "personal property" as that term is used in the Will cannot easily be defined because it is not clear what Elmer intended. As was stated in Appellant's opening brief, "A contract is 'ambiguous if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies.'" *Daines v. Vincent,* 2008 UT 51, 25; 190 P.3d 1269 (Utah 2008). It is uncertain what meaning Elmer attributed to the term "Personal Property" because the anticipated definition is not included in the document. Consequently, an ambiguity exists.

ii. Appellees assert, *"Appellants' proffered definition is untenable in the context of the provisions of the Will and EFT*

Appellees argue, "Appellants would have this Court endow a parenthetical with a meaning that it was never intended to have. ..." (Brief of Appellees at page 16) Of course,

in making this statement Appellees are resulting to speculation regarding what the parenthetical was intended to mean. The real question is, "Can the Will reasonably be interpreted to have more than one meaning?" While it is possible some sort of scrivener's error (a term used by Appellees) occurred, the fact remains that the lack of a definition for the term "Personal Property" creates an ambiguity in the context of this case. Appellants have already provided a reasonable interpretation which differs from the conclusions reached by the trial court. Appellants interpretation is just as reasonable as the conclusion reached by the trial court because the ambiguity exists.

B. Appellees assert, *"Had EFT owned the precious metals, Barbara's gift of the junk silver would have violated EFT's terms; Appellants' acceptance of the junk silver confirms that the precious metals were never part of the EFT's trust estate.*

Here, Appellees argue that Appellants acceptance of "junk silver" many years after Elmer died is somehow relevant to whether the language in the Will is ambiguous. Interestingly, this section of Appellees' Brief is attempting to use parol evidence to support Appellees' interpretation of the Will.

Because the trial court ruled the Will was unambiguous, there was no parol evidence which was received by the trial court regarding interpretation of the Will. While there are valid reasons why Appellants accepted the junk silver from Barbara which have nothing to do with Appellants' understanding regarding who owned the junk silver, those reasons were never presented to the trial court because it ruled the precious metals belonged to Barbara. Litigation regarding the precious metals stopped when the trial court issued its

summary judgment ruling. In fact, in its ruling on the summary judgment motion the trial court stated:

> The alleged facts indicate that, at some point before litigation, the precious metals may have been treated as if they had been transferred to the EFT. However, as stated before, transfer of property into a trust must be done in a specific way none of which include solely treating property as if it is part of a trust.
>
> (R. 1069 at footnote 5)

Appellees are essentially alleging facts regarding Appellants' understanding of the ownership of the precious metals which are not part of the record. Appellants acceptance of junk silver in 2013 does not by default establish a concession by Appellants that Barbara owned those precious metals or that the Will is unambiguous. Appellants were not able to present parol evidence because of the trial court's ruling on summary judgment.

By resorting to arguing parol evidence, however, Appellees themselves have established that parol evidence is needed to determine Elmer's intent because a simple reading of the Will does not provide enough information. Appellants believe they should be entitled to present parol evidence in the same manner Appellees have. That is one reason this appeal has been filed.

C. *Appellees assert, "The trial court correctly applied the statutory language of U.C.A. § 75-3-102 and utilized Elmer's Will as evidence that Barbara was the rightful owner of the precious metals after Elmer's death.*

Appellees argue that the trial court's application of § 75-3-102 was proper. Appellees position can only be supported if there is no ambiguity in the proper devisee of Elmer's Will. As has been established above, there is ambiguity in the Will which precludes proper allocation of the statutory provision.

Appellees also argue that Appellants never introduced any admissible evidence for the trial court to consider. Obviously, since the trial court ruled the Will was unambiguous there was not an opportunity for Appellants to present parol evidence to the trial court.

If this Court determines there is ambiguity in Elmer's Will regarding the devisee of that Will, then application of § 75-3-102 was improper. There first must be a finding and conclusion regarding the actual devisee of the Will based on appropriate evidence. A proper finding has not yet been made because the trial court has not heard the evidence necessary to make that finding.

II. Appellees assert, "*The evidence presented at trial overcame the presumption of undue influence.*"

At trial, Appellants asserted a claim that Barbara was unduly influenced to create the 2013 Trust. In Utah, undue influence is *presumed* when a "confidential relationship" exists between the trust or will creator and the beneficiary of the will or trust. *Estate of Ioupe v. Carter*, 878 P.2d 1168 (Utah App. 1994). The trial court expressly found a confidential relationship existed between Barbara and Terry. (R. 1659) When a confidential relationship exists, a presumption of unfairness arises which must be overcome by countervailing evidence, and the burden shifts to the defendant to prove absence of unfairness by a preponderance of the evidence. *Robertson v. Campbell*, 674 P.2d 1226 (Utah 1983). Also, when a confidential relationship exists, and a transaction occurs that benefits the one in whom the confidence is placed, a presumption arises that the transaction is unfair. *See, e.g. Bradbury v. Rasmussen*, 16 Utah.2d 378, 383, 401 P.2d 710, 713 (1965). The finding of a confidential relationship shifts to the benefitting party the burden to

persuade the court that there was no fraud or undue influence exercised toward the other. *In re Swan's Estate*, 4 Utah.2d 277, 293, 293 P.2d 682, 693 (1956).

The trial court indicated that Barbara's decision to create the 2013 Trust resulted from an email Mark sent to Terry on March 13, 2013. (R. 1678 at ¶ 17) The trial judge determined that Terry considered the email to contain a "threat" and "demand" that Barbara resign as Trustee. (R. 1677 at ¶ 18) Further, the trial court expressly found that Terry overreacted to that email. (R. 1651) Additionally, Mark's email was never shown to Barbara. (R. 1912 at page 49) Rather, Terry explained its contents to Barbara. *Id.*

The evidence at trial established that Barbara was relying on what Terry told her, and not the March 13, 2013 email itself. Thus, to rebut the presumption of unfairness, there must be some evidential showing that Barbara was not acting on Terry's overreaction to the email. Because that evidence does not exist in the record, the only conclusion that can be reached is Barbara was acting on Terry's overreaction. Accordingly, the estate planning changes were fundamentally unfair because Barbara was unduly influenced by Terry's overreaction.

A. Appellees assert, *"Appellants have failed to marshal the evidence."*

Appellees allege Appellants have failed to marshal the evidence which supports the trial court's factual findings. Appellant's position, however, is that the legal presumption of unfairness was not rebutted because Appellees failed to show that Barbara's actions and motivations in creating the 2013 Trust were based on accurate information provided from Terry. Under the facts presented at trial, Barbara may have had reasons to create the 2013 Trust, but based on the evidence presented at trial, those reasons were triggered by the

March 13, 2013 email and Terry's overreaction to it. The facts establish this email was never shown to Barbara and Terry overreacted to that email. Appellants have marshaled these facts. The events with Barbara that transpired subsequent to this time were, based on the evidence in the record, tainted by Terry's overreaction.

Appellees state that Appellants failed to marshal evidence supporting the trial courts finding that undue influence did not occur. Specifically, Appellees state:

> The trial court ultimately found that the evidence presented at trial "preponderates against a finding of unfairness" and that the Barbara May Ellsworth Trust was "not the result of undue influence." (R. at 1657.) To support these ultimate findings, the trial court, among many other things, found that the Barbara May Ellsworth Trust was prepared with the assistance of counsel, that the new estate plan reflected Barbara's own wishes, and that Barbara had her own motivations to seek to create a new estate plan. Furthermore, the trial court found that Barbara understood "that she owned the [marital home] and that she wanted to sell that residence to a particular family," that she knew "what her property [was] and" was able to "formulate a plan for its disposition." (R. at 1661.) The trial court specifically referenced both Mr. Skabelund's belief that Barbara did not lack testamentary capacity and Dr. Curzon's medical determination that Barbara "was able to generally understand what was going on and make decisions concerning her assets." (R. at 1660-61.)

Notably, Appellants are not contesting these findings on appeal. Rather, Appellants contend each of these facts came into existence because Barbara was unduly influenced by Terry's overreaction to the March 13, 2013 email. Pursuant to Utah law, once the trial court determined a confidential relationship existed, the burden then shifted to Appellees to prove absence of unfairness by a preponderance of the evidence. The trial court found Terry overreacted to the email. It is undisputed that Terry did not show the email to Barbara.

Given these facts, to meet their burden to prove absence of unfairness, Appellees must point to evidence in the record showing that Barbara was not acting on Terry's

overreaction to the email. Because that evidence does not exist in the record, the only conclusion that can be reached is Barbara was acting on Terry's overreaction. Accordingly, the estate planning changes were fundamentally unfair because Barbara was unduly influenced by Terry's overreaction.

B. Appellees assert, *"There is no burden upon Appellees to prove any other facts related to Barbara's understanding of Mark Ellsworth's March 13, 2013 email.*

Appellees contend they had no burden to establish Barbara's understanding of the March 13, 2013 email. Appellees' burden at trial is clearly established by Utah law. The trial court found a confidential relationship existed between Barbara and Terry. Where a confidential relationship exists, a presumption of unfairness arises which must be overcome by countervailing evidence, and the burden shifts to the defendant to prove absence of unfairness by a preponderance of the evidence. *Robertson v. Campbell*, 674 P.2d 1226 (Utah 1983). Moreover, when a confidential relationship exists, and a transaction occurs that benefits the one in whom the confidence is placed, a presumption arises that the transaction is unfair. *See, e.g. Bradbury v. Rasmussen*, 16 Utah.2d 378, 383, 401 P.2d 710, 713 (1965). This shifts to the benefitting party the burden to persuade the court that there was no fraud or undue influence exercised toward the other. *In re Swan's Estate*, 4 Utah.2d 277, 293, 293 P.2d 682, 693 (1956).

It is uncontested that Barbara's creation of the 2013 Trust benefitted Terry. As a confidential relationship existed between Barbara and Terry a presumption arises that the transaction (creation of the 2013 Trust) was unfair. It then became Appellees' burden to establish the transaction was fair.

As is stated above, the trial court found that Terry overreacted to this email. Barbara's subsequent actions were based on what Terry told Barbara about this email (because Terry testified she did not show it to Barbara). It was Appellees burden to show the creation of the 2013 Trust was fair. Where the evidence in the record shows that Barbara only had information from Terry regarding the March 13, 2013 email, and where Terry overreacted, Appellees have a duty to show Barbara was acting independently of Terry to establish creation of the 2013 Trust was fair.[3] There is no such evidence in the record.[4]

CONCLUSION

Appellants request that this Court reverse the trial court's summary judgment determination that the Precious Metals were properly Barbara's pursuant to § 75-3-102. There is ambiguity as to who is the property devisee under the terms of the Will. Because of that lack of clarity, it cannot properly be concluded that Barbara was the devisee of the Precious Metals. If Barbara was not devisee of the Precious Metals, then the Court improperly relied on § 75-2-102 in concluding that Barbara was the owner of the Precious Metals.

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[3] Appellees argue that Appellants assume Barbara could not think for herself. There is no evidence in the record, however, that Barbara did anything but rely on information she received from Terry regarding the March 13, 2013 email.

[4] Appellees reference testimony of Mr. Skabelund arguing that he thought the March 13, 2013 email was a threat. (Brief of Appellees at page 22.) It appears that in this testimony Mr. Skabelund was referring to emails that were sent subsequent to March 13, 2013 by Michelle Thomas. The trial court referred to these emails in its Findings and Conclusions. (R. 1673 at ¶ 34) Mr. Skabelund's testimony also makes clear that he thought Barbara "always liked Mark," (R. 1912 at page 186 line 23)

Additionally, the trial court erred when it determined Appellees rebutted the presumption of unfairness of Barbara creating the 2013 Trust. While the evidence at trial established Barbara created the 2013 Trust because she was angry at one or more of the Ellsworth children, the evidence and findings of the trial court also establishes that Barbara was only acting on information she received from Terry. The trial court found Terry had overreacted. Where Barbara did not see the actual email, but only received Terry's understanding that it contained a "threat" and a "demand," the record can only support a finding that Barbara acted on Terry's overreaction and not on independent review of the email itself. Consequently, Appellees did not meet their burden to show fairness.

Appellants respectfully respect that the Court reverse the summary judgment decision and remand this matter for further proceeding to determine Elmer's intent regarding the beneficiary of his Will. Additionally, Appellants request that this Court reverse the trial court's determination that Appellees appropriately rebutted the presumption of unfairness and direct the trial court to enter a finding that the presumption of undue influence was not rebutted by the Appellees.

RESPECTFULLY SUBMITTED this 4th day of January, 2016.

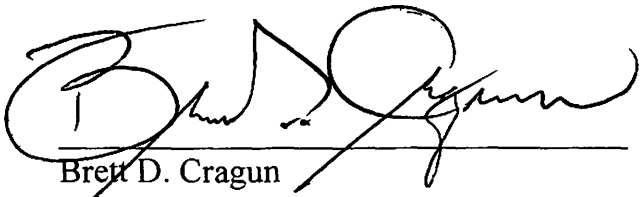
Brett D. Cragun
Attorney for Appellants

CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

1. This reply brief complies with the type-volume limitation of Utah R. App. P. 24(f) (1) because this brief contains no more than 4,067 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in font size 13 and Times New Roman type font.

DATED this 4th day of January, 2016.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of foregoing Brief Of Appellant was served upon the following individuals, by email and by first class mail, postage prepaid, at the addresses shown below this 4th day of January, 2016.

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