

2002

# George Weinstein v. Ronald Popiel and Jamie Popiel : Reply Brief

Utah Court of Appeals

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Thomas Howard; Attorney of Appellee.

George Weinstein; Appellant Pro Se.

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## Recommended Citation

Reply Brief, *Weinstein v. Popiel*, No. 20020486 (Utah Court of Appeals, 2002).

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THE UTAH COURT OF APPEALS

|                                 |   |                      |
|---------------------------------|---|----------------------|
| George Weinstein,               | ) |                      |
|                                 | ) |                      |
| Plaintiff/Appellant,            | ) |                      |
|                                 | ) |                      |
| vs.                             | ) | Case No. 20020486-CA |
|                                 | ) |                      |
| Ronald Popiel and Jamie Popiel, | ) |                      |
|                                 | ) |                      |
| Defendants/Appellees            | ) |                      |

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APPELLANT'S REPLY BRIEF

Appeal from the Third District Court, Summit County, Judge Robert K. Hilder

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THE UTAH COURT OF APPEALS

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Appellees commence their brief by stating (p.6) that they have difficulty in identifying the issues raised on appeal “...because they are confusing.” This is surprising as each point is specifically identified, with substantiating authorities. Such an approach sets the tone for the remainder of Appellees’ brief.

Appellees attempt to create confusion where none exists. They do not question or refute any statement of fact set forth by Appellant, which Appellant supported with specific record references. Appellees do not set forth a counterstatement of facts merely citing verbatim the decision of the lower court in lieu thereof, sans any references to the record to support them. As pointed out in Appellant’s brief, several of the facts referred to therein were contrary to the record or unfounded suppositions of the lower court on which it based its conclusions.

No matter how imaginative Appellees are in trying to muddy the waters, the issue herein is not the reasonableness of any fact finding. The appeal deals exclusively with issues of law in keeping with the original contentions of both parties when cross moving for summary judgment. It solely involves legal issues to be reviewed for correctness.

Appellees state “the breach of good faith and fair dealings” is a factual issue. They ignore the authoritative treatises and multiple appellate decisions of Points IA, 1B and IC of Appellant’s brief, holding the court cannot modify unambiguous

contractual provisions, disregard its express conditions or insert terms that it believes to be fair.

Appellees likewise distort Appellant's position in Points II A and II B. Although injunctive relief often is considered discretionary, the authorities cited by Appellant establish, where restrictive covenants are breached, it is the only appropriate and adequate remedy, so as to restore the status quo. This is particularly apt when the violative act was knowingly done and CC&R (10.2) expressly provides for it.

Appellees are correct in stating the failure to award counsel fees is ordinarily considered to be within the discretion of the lower court. However, as Appellants addressed in Point III, had the court below applied the controlling law, the failure to grant reasonable attorney's fees would have exceeded allowable parameters. This is buttressed by the fact that Appellees erected the fence surreptitiously during the few days Appellant was out of town and legal fees and costs are provided for in CC&R (10.2 (a)). By declining to grant reimbursement of Appellant's substantial fees, Appellant has been further penalized although he is the wronged party.

Appellees argue, and set forth case law, unrelated to the issues before this court. Rather than respond to points and authorities set forth in Appellant's brief, Appellees use phrases like "unreasonably withheld his permission", "abuses discretion", "where there is doubt about interpretation of a contract" which are not

present on this appeal and then cite cases related to such inapplicable premises. Interestingly, however, in one instance they cite *Nixon vs. Nixon* (bottom of page 17) holding that “...where the contract so expressly and unequivocally so provides...” it will be enforced even if the result appears to be harsh and unreasonable. Even so, Appellant does not acknowledged it is harsh and unreasonable to enforce a requirement of prior consent when the formidable barrier ran along Appellant’s rear property line and closed off its only remaining unobstructed side.

The lower court sustained plaintiff’s position that prior consent was a requirement and not a just a courtesy but Appellees nevertheless continue to argue this without any new foundation or cross-appeal. Likewise, they again urge, without further facts or law, that the variance vote should be given some consideration, although it was specified, and the lower court confirmed, that such procedure relates solely to issues of “design”.

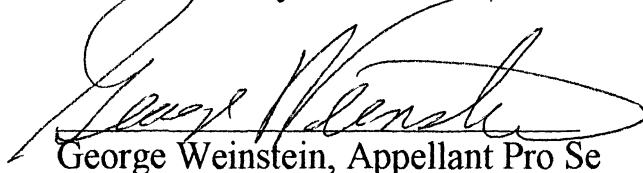
Appellees state on page 19 that a party should “not render it difficult or impossible for the other to continue performance and then take advantage of the non performance he has caused”. Nothing identified by Appellees or appearing in the record, demonstrates what Appellant improperly did to prevent any performance. Appellant and Martins just chose not to consent to the fence which they had the right to do, had their consents been requested.

Appellees claim they are ignorant of any case law which grants a party the absolute right to enforce a clear provision of a contract, notwithstanding all the authorities cited in Appellant's brief in Points 1 A, B and C.

Appellees make an argument of "justified expectations and common purposes" notwithstanding prior permission (7.5), and the violation being deemed a nuisance subject to abatement (10.1), are patently clear in the duly adopted Ranch Place CC&Rs. Should Appellees' position be upheld, express terms of any CC&Rs, as well as a variety of other contracts would mean little until each was passed upon, in every case, by a court. If the intent was to make the consent requirement subject to "reasonableness" it would have been so stated.

Appellees' brief is a broad shotgun presentation quoting general principles out of context, not directed to the issues of this appeal. They have not rebutted the material facts or case law set forth in Appellant's brief. It is therefore respectfully suggested that the need for oral argument has not been demonstrated.

**RESPECTFULLY SUBMITTED** this 25<sup>th</sup> day of March 2003.

  
George Weinstein, Appellant Pro Se

#### CERTIFICATE OF SERVICE

I hereby certify that on the 27<sup>th</sup> day of March 2003, I did personally hand deliver two true and exact copies of the foregoing Appellant's Reply Brief to Thomas Howard, Esq., Attorney for Appellees, at 1725 Sidewinder Drive, Park City, Utah 84060.

