

2002

George Weinstein v. Ronald Popiel & Jamie Popiel : Brief of Appellee

Utah Court of Appeals

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THE UTAH COURT OF APPEALS

GEORGE WEINSTEIN,

Plaintiff/Appellant,

vs.

RONALD POPIEL & JAMIE POPIEL,

Defendants/Appellees

Case No. 20020486 CA

(ORAL ARGUMENT REQUESTED)

APPELLEES' BRIEF

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

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STATEMENT OF JURISDICTION

Appellee concedes that the jurisdictional statement set forth by Appellant Weinstein is correct. The Supreme Court has deferred jurisdiction to the Court of Appeals.

Throughout this brief the Appellant is referred to as the “neighbor” or “Weinstein” and the Appellants are referred to as the “property owners” or the “Popiels,” consistent with *Rule 24(b) of the Utah Rules of Appellate Procedure*.

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

It is difficult to identify the issues Weinstein raises on appeal because they are confusing.

ISSUE I(a). Weinstein urges that the district court erred in declining to grant his cross motion for summary judgment on the undisputed facts. He then revisits excerpts of selected facts which he believes to be favorable to him throughout his Statement of the Case, but fails to marshal the evidence.

Marshaling the evidence entails marshaling or listing all the evidence supporting the finding that is challenged. See *Tingey v. Christensen*, 373 Utah Adv. Rep. 10,11

(Utah 1999); *Benvenuto*. 372 Utah Adv. Rep. At 4; *State v. ex rel. T.J.*, 945 P.2d 158, 164 (Utah Ct. App. 1997); *In re Estate of Hamilton*, 869 P.2d 971, 977 (Utah Ct. App. 1994). Weinstein has not done so.

STANDARD: The standard of review is that a trial court's findings of fact are reviewed under a clearly erroneous standard. See *Young v. Young*, 979 P.2d 338, 342 (Utah 1999); *Pennington v. Allstate Ins. Co.*, 973 P.2d 932,937 (Utah 1998); *Grossen v. DeWitt*, 369 Utah Adv. Rep. 31,32 (Utah Ct. App. 1999).

The clearly erroneous standard has been applied to what a reasonable person would have done in specific circumstances. See *Aurora Credit Servs., Inc. v. Liberty West Dev., Inc.*, 970 P.2d 1273, 1279 (Utah 1998). The matter under review is a review of reasonableness. It has been applied to whether a breach of contract is material. See *Coalville City v. Lundgren*, 930 P.2d 1206, 1209 (Utah Ct. App. 1997). The matter under review is a review of contract provisions.

To successfully challenge findings of fact, an appellant must prove they are clearly erroneous, i.e. against the clear weight of the evidence.

ISSUE I(b). Weinstein then urges that the district court improperly interposed an implied covenant of "good faith and fair dealing" but fails to indicate whether this is an improper conclusion of law, which requires a different standard of review. One can only surmise that Weinstein suggests that the trial court misapplied a principle of law because he uses these words repeatedly.

STANDARD: The standard of review is again a clearly erroneous standard.

This Court has consistently held that a determination of the application of “good faith and fair dealing” is a matter for the trier of fact and is not a conclusion of law.

“Whether there has been a breach of good faith and fair dealing is a factual issue, generally inappropriate for decision as a matter of law.” Cook v. Zions First Nat’l Bank, 919 P.2d 56, 61 (Utah Ct. App. 1996)

See Mackey v. Cannon, 2000 UT App 36 (Utah Ct. App. 2000). Good faith and fair dealing are fact sensitive concepts, and whether there has been a breach of good faith and fair dealing is a factual issue, generally inappropriate as a matter of law. See Western Farm Credit Bank v. Pratt, 860 P.2d 376, 380 (Utah App. 1993), wherein the court states such determination is a “factual issue to be determined by [the factfinder] after consideration of all attendant circumstances and evidence.” American Concept Ins. Co. v. Lochhead, 751 P.2d 271,273 (Utah App. 1988); accord Commercial Security Bank v. Hodson, 15 Utah 2d 388, 393 P.2d 482 (1964)..

The only other possible standard would be a mixed one of reviewing the “measure of discretion” given to the trial court. This standard is set forth in State v. Pena, 869 P.2d at 936-39. When a legal rule is to be applied to a given set of facts, or in other words when the trial court must determine “whether a given set of facts comes within the reach of a given rule of law,” the trial court is given a de facto grant of discretion. *Id.* At 936-37. Although legal questions are reviewed for correctness, appellate courts may still

grant a trial court discretion in its application of the law to a given fact situation. See *Jeffs v. Stubbs*, 970 P.2d at 1244. Because of the fact sensitive nature of the good faith requirement, this alternate standard does not apply.

ISSUE I(c). Weinstein then urges that the district court rewrote a contract between the parties to contain a term that “permission cannot be unreasonably withheld.” This issue appears to suggest that such determination is an abuse of discretion.

STANDARD: The standard of review is the abuse of discretion standard, which requires the appellate court to find that there is “no reasonable basis for the decision.” See *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 938 (Utah 1993). A trial judge’s determination will be reversed if the ruling “is so unreasonable that it can be classified as arbitrary and capricious or a clear abuse of discretion.” *Kunzler v. O’Dell*, 855 P.2d 270, 275 (Utah Ct. App. 1993); *Ames v. Maas*, 846 P.2d 468, 476 (Utah Ct. App. 1993).

ISSUE II(a). Weinstein next suggests that the district court failed to grant a mandatory injunction. This determination is clearly within the discretionary power of the trial court.

STANDARD: The standard of review is the abuse of discretion standard set forth above. This standard has specifically been applied to whether a trial court properly granted or denied injunctive relief. See *Aquagen Int’l, Inc. v. Calrae Trust*, 972 P.2d 411, 412 (Utah 1998); *Miller v. Martineau & Co.*, 372 Utah Adv. Rep. 34, 36 (Utah Ct.

App. 1999).

ISSUE II(b). Weinstein then complains that the trial court denied relief for a “lack of perceived damages.” This determination is one of discretion with the trial court.

STANDARD: The standard of review is the abuse of discretion standard set forth above and specifically applied to a denial of injunctive relief.

ISSUE III. Weinstein next complains that the trial court did not give him an opportunity to introduce evidence of actual damages. There is no reference whatsoever in the record to his ever attempting to do so, nor does he suggest that he attempted to introduce such evidence. This is not an issue for appeal.

ISSUE IV. Weinstein finally urges that the Appellate Court review the trial court’s failure to direct reimbursement of his legal fees and expenses. His argument, at Point III indicates that he finds it to be an abuse of discretion.

STANDARD: The standard of review is the abuse of discretion standard set forth above. With regard to this standard, the appellant must show the trial court exceeded the measure of discretion allotted by showing no reasonable basis for the decision.

PRESERVATION OF ISSUES

At no stage of the proceedings did Weinstein's trial counsel preserve any of the issues raised on appeal for the first time for appellate review. There were no objections to actions taken by the trial court. There were no requests to introduce evidence of damages. No post trial motions were filed. Appellant raises all issues for the first time on appeal. The rationale for preservation is that the trial court, in fairness, ought to have a chance to correct its own errors. See State v. Rudolph, 970 P.2d 1221, 1225-26, 1227 (Utah 1998); In re Estate of Morrison, 933 P.2d 1015, 1018 (Utah Ct. App.1997)

STATEMENT OF GROUNDS

Appellant Weinstein fails to set forth any grounds for the appeal. The only point he consistently returns to in his brief is that the CC&Rs require that he give his permission before the Popiels can build a fence on their property. He has repeatedly refused to give his permission. He states that it is his legal and absolute right to withhold it, even to the point of arbitrary refusal. The trial court respectfully disagrees.

STATEMENT OF THE CASE

The Popiels stand firmly on the facts of the case set forth by the district court in its ruling. Because Weinstein has failed to marshal the evidence, the appellate court must accept the facts as set forth by the trial court. Neighbor Weinstein argues with the findings of fact throughout his brief and attempts to repeatedly return to the record to selectively introduce facts favorable to him, not advising the appellate court that many of his selections were controverted, i.e. urging that another neighbor objected to the fence and that the property owners built their fence maliciously and with actual knowledge of a requirement to obtain his permission, which points of view the trial court specifically controverts. The appellate court should disregard pages 8-15 of appellant's brief for this reason and apply the trial court's findings of fact, which are as follow.

“The parties live in the Ranch Place subdivision. Their properties adjoin each other, in part. All properties and homeowners in Ranch Place are subject to Covenants, Conditions and Restrictions (“CC&Rs”) which were in place when both parties bought their respective properties, and at all times relevant to the dispute. Fencing of Ranch Place properties is subject to specific conditions in the CC&Rs. Until 2000, neither property was fenced. Many properties in Ranch Place are fenced and many of the existing fences exceed the four

foot height restriction. Few fences in the parties' immediate neighborhood are fenced, and before the Popiels fenced their property, approximately seven adjacent properties were unfenced and constituted de facto common ground between and around the houses. The Popiels' fence complies with neighborhood standards, was approved by the Homeowners' Association ("HOA"), but it exceeds the height restriction by approximately three to nine inches. The height is, however, consistent with the height of other fences in the subdivision.

The Popiels fenced their property for at least two reasons: to restrain and protect their surviving dog, after one dog was killed by an automobile, and to prevent Mr. Weinstein from using their property to run his dog. Popiels did not obtain Mr. Weinstein's permission before they erected a fence that ran just inside their property line, where it adjoins Mr. Weinstein's property. The CC&Rs require that such permission be obtained. Mr. Weinstein withheld his permission for at least two reasons: first, he relied on the use of Popiels' property to extend his relatively small backyard to provide exercise and play for his dog, and he also cherished the "common" ground which he believes benefitted not just him, but all adjoining property owners. Mr. Weinstein claims he would never have bought his property if he had believed his neighbors could erect an adjoining fence over his objections. Two other property adjoining property owners have given permission for the fence. There is a dispute whether Martins gave permission, but they have since sold their property, and they have never filed a formal complaint or joined this lawsuit. The Popiels did receive pre-approval for the fence from the HOA, but the approval letter failed to refer to the need to

obtain permission from neighbors, and Mr. Weinstein had no notice of the construction until after it was accomplished.

When Mr. Weinstein pursued his objection with the HOA, after construction was complete, the HOA agreed that the approval letter lacked reference to the need for permission, but the officers of the HOA indicated that they believed the approval requirement was a courtesy provision, and not an absolute requirement. Because Mr. Weinstein persevered with his objections, the HOA then conducted a variance procedure to determine if the Association members were willing to grant a variance for the lack of permission. At the time of the meeting, Mr. Weinstein had never objected to the excessive height of the fence, and the height was not at issue. At the HOA meeting, homeowners in attendance voted 64 to zero in favor of the variance. That is not the required absolute majority of all homeowners, but unrebutted evidence establishes that when proxies were counted, the vote exceeded fifty percent. Neither party presented evidence that proxies are not valid with respect to a variance vote.”

SUMMARY OF ARGUMENT

Weinstein states in his summary of his argument that the district court interjected an implied condition of fair dealings and good faith and accepted a disputed subjective excuse and argues that such actions were improper. Mr. Weinstein's arguments are incorrect and lack legal foundation.

He cannot have it both ways. On the one hand he would like to argue that the CC&Rs constitute an absolute, unambiguous contract between the parties, which the court must enforce with strict rigidity. On the other hand, if one accepts that the court must consider the CC&Rs to be a contract, then one cannot disregard the well established application of the mandatory implied covenant of good faith and fair dealing, which adheres to all contracts in the State of Utah. The trial court did not "interject" anything improperly and is not rewriting the terms of the contract, as neighbor Weinstein repeatedly complains.

The property owners stand firmly behind the long line of precedent in this jurisdiction, which abhors discretionary capriciousness and looks to the common good and purpose, course of dealings and conduct of the parties and reasonable expectations.

These principles control and guide our courts and are set forth with their corresponding authority in the property owners' Argument. Neighbor Weinstein ignores Utah's adherence to consideration of the common good and would have the court apply the contextual extracts of law from the multiple cases he cites from foreign jurisdictions, such as New York, New Jersey, Texas, Colorado, Oklahoma and other states. Weinstein relies further on employing unsavory language in his challenge to the trial court's ruling; accusing the court of "arriving at the popular position," depicting him as a villain, focusing on the "abortive variance vote" of the Home Owners Association and overlooking the "false publicity" mis-characterizing him..

ARGUMENT

Where expressly stated, restrictive covenants are not favored in the law and are strictly construed in favor of the free and unrestricted use of property. Robbins v. Finaly, 645 P.2d 623, 627 (Utah 1982); Parrish v. Richards, 8 Utah 2d 419, 421, 336 P.2d 122, 123 (1959); Freeman v. Gee, 18 Utah 2d 339, 345, 423 P.2d 155, 159 (1967). Generally, express restrictive covenants are upheld only "where they are necessary for the protection of the business for the benefit of which the covenant was made and no greater restraint is imposed than is reasonably necessary to secure such protection. Allen v. Rose Park Pharmacy, 120 Utah 608, 614, 237 P.2d 823, 826 (1951).

Neighbor Weinstein uses language in his brief which suggests that he, himself, bargained with property owners Popiel to create the provisions of the CC&Rs. He suggests that he is being deprived of the benefit of the bargain, if he cannot now exercise his absolute unequivocal contract right to withhold his permission for the property owners to have their rather innocuous split rail fence in their back yard. [The fence is of the type which has three split log rails, each approximately 9' long; held up by vertical posts at each end.]

The trial court in the instant case did not abuse its discretion in finding that Weinstein unreasonably withheld his permission for the Popiels to build their fence. The Utah Supreme Court set forth controlling principles in Peirce v. Peirce, 2000 UT 7 (Utah 2000) when it stated that “we interpret the terms of a contract in light of the reasonable expectations of the parties, looking to the agreement as a whole and to the circumstances, nature and purpose of the contract.” See Utah State Med. Ass’n v. Utah State Employees Credit Union, 655 P.2d 643, 646 (Utah 1982); Nixon v. Nixon, Inc. v. John New & Assocs., Inc., 641 P. 2d 144, 146 (Utah 1982); adding that “where there is doubt about the interpretation of a contract, a fair and equitable result will be preferred over a harsh and unreasonable one. And an interpretation that will produce an inequitable result will be adopted only where the contract so expressly and unequivocally so provides that there is no other reasonable interpretation to be given it.”

BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

It is well established and longstanding law in the State of Utah that every contract is subject to an implied covenant of good faith and fair dealing.

“A covenant of good faith and fair dealing inheres in most, if not all, contractual relationships.” St. Benedict’s Dev. V. St. Benedict’s Hosp., 811 P.2d 194, 199-200 (Utah 1991).

The trial court did not interject an implied condition. “Every contract is subject to an implied covenant of good faith.” Iadanza v. Mather, 820 F. Supp. 1371 (10th Cir. 1993). Weinstein did not obtain a transcript of the Summary Judgment hearing for the record on appeal, as requested by Appellee’s motion, because it was in that hearing the argument was advanced with regard to the covenant of good faith and fair dealing. It was not interjected after the hearing and it cannot be so argued in the absence of any record.. Nor can there be any argument that there was no basis in fact for the trial court’s ruling, reviewing the court’s own findings of fact, which stand as written.

It is well established that an element of reasonableness must attach to the language of the CC&Rs.

“The purpose, intentions, and expectations of the parties should be determined by considering the contract language and the course of dealings and conduct of the parties.” Ibid. St. Benedicts 811 P.2d. 194, 199-200 (Utah 1991).

The CC&Rs provide that actions such as building a fence are to be evaluated, approved and overseen by the Homeowners Association (“HOA”). The property owners complied with this provision. The trial court found in its findings that “*the officers of the HOA indicated that they believed the approval requirement was a courtesy provision and not an absolute requirement.*” The HOA was convinced that the neighbor had no legitimate reason for withholding his approval, such as fence color or type and that the only reason for refusing to give permission was that he could no longer run his dog across their property (R-0231, 0246). The HOA believed that the purpose of an objection was to call to the committee’s attention a legitimate problem to be considered by them in granting an approval. Weinstein’s refusal to grant permission did not further the common good or purpose of the restrictive covenants.

The parties to a contract are deemed to intend that the terms of a contract should be construed in a manner which assumes the parties intended that the duties and rights created by the contract should be performed and exercised in good faith. This means that “one party may not render it difficult or impossible for the other to continue performance and then take advantage of the non-performance he has caused. Zion’s Properties, Inc. v. Holt, 538 P.2d 1319, 1321 (Utah 1975). See also Olympus Hills Shopping Ctr., Ltd. v. Smith’s Food and Drug Ctrs, Inc., 889 P.2d 445, 450 (Utah Ct. App. 1994).

There is no case law known to the Appellees which grants one party an absolute and unreasonable right to exercise a discretionary withholding of approval over the other.

“To comply with his obligation to perform a contract in good faith, a party’s actions must be consistent with the agreed common purpose and the justified expectations of the other party.” St. Benedict’s Dev. Co. v. St. Benedict’s Hosp., 811 P.2d 194, 199-200 (Utah 1991)

“When a party has been granted discretion under a contract, that discretion may not be exercised capriciously or in bad faith.” Ibid., Olympus Hills, 889 P.2d 445, 456 (Utah App. 1994). The 10th Circuit Court of Appeals has observed that “the purpose of the good faith doctrine in contract law is to protect the reasonable expectations of the parties by ‘implying terms in the agreement.’” Big Horn Coal Co. v. Commonwealth Edison Co., 852 F.2d 1259, 1267 (10th Cir. 1988). Where an express term establishes a right or power to be exercised in the sole discretion of one party, in Utah that right or power must be exercised consistent with the covenant of good faith. A.I. Transp. v. Imperial Premium Fin., 862 F. Supp. 345 (10th Cir. 1988).

Neighbor Weinstein has adamantly announced even after-the-fact that “he wouldn’t have approved [the fence] if asked” (R-0224) and that he “won’t give permission because they never asked me” (R-0230). The Association believed that he would not give his permission was because he used to run his dog on their property (R-0231).

“An examination of express contract terms alone is insufficient to determine whether there has been a breach of the implied covenant of good faith and fair dealing. To comply with his obligation to perform a contract in good faith, **a party’s actions must be consistent with the agreed common purpose and the justified expectations of the other party.** The purpose, intentions, and expectations of the parties should be determined by considering **the contract language and the course of dealings between and conduct of the parties.**”

Ibid., St Benedicts, 811 P.2d 194, 200 (Utah 1991) (emphasis added).

Thus it is the parties’ agreed common purpose and justified expectations that are critical in determining whether the implied covenant of good faith and fair dealing has been breached. A party’s expectations can be justified only when grounded in the language of the contract, the course of dealing between the parties, and/or the parties’ conduct. In the instant case particularly, one must consider the role of the Homeowners Association, Architectural Committee and the Officers, who are called upon to determine the common purpose and good of the Association and its members.

“...courts endeavor to construe contracts so as not to grant one of the parties an absolute and arbitrary right....” Resource Management Co. v. Weston Ranch & Livestock Co., 706 P.2d 1028, 1037 (Utah 1985) See also Beck v. Farmer’s Ins. Exch., 701 P.2d 795, 797-98 (Utah 1985).

The neighbor makes the argument to the appellate court that this matter is similar to zoning violations and their interference with property rights. At the same time, and with a straight face, he is suggesting that he must be allowed to exercise his absolute discretionary right to withhold his permission in order “to protect the residential integrity of the neighborhood.” The comparison is rather empty.

ATTORNEYS FEES

Weinstein requested only that the trial court order that the fence be torn down and did not during litigation or subsequently suggest or introduce any evidence suggesting that he suffered damages (R-0121). The trial court awarded him only nominal damages of \$1.00. The trial court did not award attorneys fees or costs to either party. This determination is entirely within the discretion of the trial court and is solidly supported by law.

The trial court necessarily has broad discretion in determining the amount of a reasonable attorney fee and will not be reversed unless the court abuses its discretion. Dixie State Bank v. Bracken, 764 P.2d 985, 991 (Utah 1988). In the absence of abuse of discretion, the amount of the award by the district court will not be disturbed. 20 Am.Jur. 2d Costs, section 78 (1965).

Where nominal damages are allowed, one dollar is the amount generally awarded. Snyderville Transportation Co. v. Christiansen, 609 P.2d 939 (Utah 1980).

When both parties could be described as successful and unsuccessful, the net result of the litigation leaves no clear successful party to award fees to and no clear unsuccessful party to assess them against. It is proper, therefore, that each party bear its own attorneys fees and costs. See Fashion Place Assocs. v. Glad Rags, 754 P.2d 940 (Utah 1988).

This position is well founded at law. The 10th circuit has adopted the test set forth in Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir 1978) for determining whether a plaintiff is prevailing. To meet that test, a plaintiff must show two things: (1) that the lawsuit is causally linked to securing the relief obtained, and (2) that the defendant's conduct in response to the lawsuit was required by law. See e.g. J&J Anderson, Inc. v. Town of Erie, 767 F.2d 1469, 1475 (10th Cir 1985). The U.S. District Court stated in David C. v. Leavitt, 900 F. Supp. 1547 (10th Cir. 1995) that this test can be characterized thusly: A party may be deemed to have prevailed sufficiently to warrant the award of attorneys' fees under a two part "catalyst test." Under this test a plaintiff must have been a "significant catalyst" causing a defendant to change position, and the defendant's change in position must have been required under law. This test was not satisfied in the instant case.

The United States Supreme Court set forth the most definitive standard in Farrar v. Hobby, 506 U.S. 103, 121 L. Ed. 2d 494, 113 S. Ct. 566, 572 (1992) justifying the trial court's denial of attorneys fees, by holding that where a plaintiff recovers only nominal damages, the only reasonable fee is usually no fee at all. The degree of a prevailing party's "overall success" determines the reasonableness of an award.

The trial court has followed the law in requiring each party to bear its own attorneys fees and costs.

FRIVOLOUS APPEAL

This appeal is frivolous and without merit. It has been undertaken without reasonable basis of prevailing. If Appellant had researched the law set forth by the Appellee in this brief before filing the appeal, it would have been apparent to him that there was no basis. The Popiels have been continuously forced to defend themselves from malicious prosecution in this matter against a vindictive and malevolent neighbor. They built a fence around their yard with the written authorization of their Homeowners Association after submitting a written request for approval. The neighbor refused to accept the Association's actions and made life unbearable for everyone by constant complaining and threatening. The property owners then cooperated with legal counsel for the Association when complaining did not let up by obtaining signatures from all their neighbors and going through a formal variance procedure to obtain the unanimous approval of all homeowners in a formal vote to authorize the fence to remain. Appellant Weinstein refused to accept the will, not only of the board and the officers of the Association, but of all of the homeowners. The property owners were forced to defend themselves in court when the neighbor sued them to have the fence torn down. They prevailed and the trial court allowed the fence to remain. Appellant has again refused to accept even the District Court's ruling and has filed this appeal.

The appeal is frivolous and intended to do nothing more than harass the property owners. The Appellees seek and are entitled to their attorneys fees and costs incurred to defend against this appeal pursuant to Rule 33(a) of the Utah Rules of Appellate Procedure.

CONCLUSION

Appellant Weinstein has failed to show that “there is no reasonable basis” for the trial court’s ruling. The “abuse of discretion” standard requires such a showing. The appeal centers upon the application of the covenant of Good Faith and Fair Dealing, which Weinstein does not believe should be applied to his situation. If, however, he had researched the applicable case law, it would have been readily apparent that there are no grounds for the appeal.

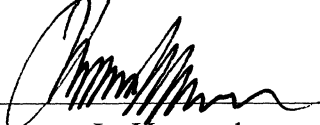
WHEREFORE Appellees Popeil, ask this Honorable Court to deny all relief requested by Appellant, find that this is a frivolous appeal, and award them attorneys fees and costs for having to defend this action. Appellees further request Oral Argument if the Court deems such to be appropriate.

ADDENDUM

No addendum is necessary and none is attached. All references to the trial court’s Ruling are to the Ruling and Order attached to Appellant Weinstein’s brief.

RESPECTFULLY SUBMITTED this 28 day of February, 2003.

LAW OFFICE OF THOMAS HOWARD




Thomas L. Howard
Attorney for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28 day of February, 2003 I served two true, correct and exact copies of the foregoing APPELLEES' BRIEF upon the Appellant by placing same in the U.S. Mail, first-class mail, postage pre-paid, addressed as follows:

George Weinstein
Appellant Pro Se
1821 Browning Court
Park City, Utah 84098



Thomas L. Howard