

1993

# Jerald G. Seare v. University of Utah School of Medicine : Brief of Appellant

Utah Court of Appeals

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**FILED**  
Utah Court of Appeals  
**SEP 29 1994**  
Marilyn M. Branch  
Clerk of the Court

JERALD G. SEARE,  
Appellant-Plaintiff,  
vs.  
UNIVERSITY OF UTAH SCHOOL OF  
MEDICINE, DEPARTMENT OF SURGERY,  
an entity of the State of Utah;  
WILLIAM A. GAY, JR.; JAMES M.  
MCGREEVY; and JOHN DOES I through  
X,  
Appellees-Defendants.

PETITION FOR REHEARING OF THE APPEAL FROM THE  
JUDGMENT AND ORDER OF THE THIRD JUDICIAL DISTRICT COURT FOR  
SALT LAKE COUNTY, STATE OF UTAH  
HONORABLE F. DENNIS FREDERICK, DISTRICT JUDGE

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### **BACKGROUND**

On or about May 29, 1993, Dr. Jerald G. Seare ("Dr. Seare") file an appeal from the judgment and order of the District Court in and for Salt Lake County, State of Utah, the Honorable F. Dennis Frederick presiding. On or about August 5, 1993, the defendants filed a responsive brief. The Court heard oral argument on Dr. Seare's appeal and issued an opinion affirming the decision of the trial court below on or about September 15, 1994.

### **ARGUMENT**

Dr. Seare petitions this Court, pursuant to Rule 35 of the Utah Rules of Appellate procedure, for rehearing of his appeal from the judgment and order of the Third Judicial District Court. This Court issued its opinion on Dr. Seare's appeal on September 15, 1994. Dr. Seare's Petition for Rehearing is based on several points of fact and law which have been overlooked and/or misapprehended by the Court.

Dr. Seare contends that the Court erred in affirming the decision of the court below granting summary judgment in favor of appellees/defendants. There are several key, material facts which are in genuine dispute. Moreover, as a matter of law the appellees/defendants were not entitled to judgment in the court below nor were they entitled to an affirmance of that judgment by the Court. The record on appeal as well as the opinion of this Court corroborate Dr. Seare's contentions.

**I. THE COURT MISAPPREHENDED UTAH LAW REGARDING AMBIGUOUS CONTRACTS WHEN IT FOUND THAT THE CONTRACT TERMS WERE AMBIGUOUS AND THEN PROCEEDED TO CONSIDER EXTRINSIC EVIDENCE.**

On page six (6) of the its opinion, the Court states

We conclude that this language [as to "appropriate certificate" and "satisfactory completion"] is ambiguous and therefore look to other language in the contract to determine the intent of the parties. ... Because the contract is ambiguous, we further determine the University's obligations by looking to extrinsic evidence submitted to the trial court.

Opinion of the Utah Court of Appeals dated September 15, 1994 at page 6. In Utah, summary judgment is inappropriate when the intent of the parties cannot be determined as a result of an ambiguous contract.

In interpreting a contract, it is a well settled rule that the court looks initially to the four corners of the document to determine the intent of the parties. *HCA Health Service of Utah, Inc. v. St. Mark's Charities*, 846 P.2d 476, 484 (Utah Ct. App. 1993); *Anesthesiologists Associates of Ogden v. St. Benedicts Hospital*, 852 P.2d 1030 (Utah Ct. App. 1993). Moreover, because in the instant case there are several contracts executed between the parties which are clearly interrelated, the contracts "must be construed as a whole and harmonized, if possible." *HCA Health Service of Utah, Inc. v. St. Mark's Charities*, 846 P.2d at 484 (citing *Verhoef v. Aston*, 740 P.2d 1342, 1344 (Utah Ct. App. 1987) (quoting *Atlas Corp. v. Clovis Nat'l Bank*, 737 P.2d 225, 229 (Utah 1987) (citation omitted))).

While looking at the contract to determine the intent of the parties, the court must necessarily determine whether the intent

of the parties is ambiguous. Whether the terms of the contract are ambiguous is a question of law. *Anesthesiologists Associates of Ogden v. St. Benedicts Hospital*, 852 P.2d at 1035; *Sparrow v. Tayco Construction Co.*, 846 P.2d 1323, 1327 (Utah Ct. App. 1993). This question of law must be decided prior to the consideration of parol or other extrinsic evidence. *Faulkner v. Farnsworth*, 665 P.2d 1292, 1293 (Utah 1983). Only if the court determines as a matter of law that the terms of the contract are ambiguous, can it consider extrinsic evidence to determine the intent of the parties. *Sparrow v. Tayco Construction Co.*, 846 P.2d 1323; *Ron Case Roofing & Asphalt v. Blomquist*, 773 P.2d 1382 (Utah 1989). It is evident from reading the opinion of the Court, that the intent of the parties was ambiguous. Such a determination was properly made by the Court.

However, because of the ambiguity, it was inappropriate for the Court and the trial court below to consider extrinsic evidence. "If a contract is ambiguous, extrinsic evidence should be considered to determine the parties' intent, and 'questions of intent as determined by extrinsic evidence are questions of fact....'" *Anesthesiologists Associates of Ogden v. St. Benedicts Hospital*, 852 P.2d at 1035 (quoting *Fitzgerald v. Corbett*, 793 P.2d 356, 358 (Utah 1990)) (emphasis added).

The Utah State Supreme Court has also spoken on this issue:

[T]he court should first examine the language of the instruments and accord to it the weight and effect which it may show was intended and if the meaning is ambiguous or uncertain then consider parol evidence of the parties intentions. *Faulkner v. Farnsworth*, 665 P.2d at 1293 (quoting *Big Butte Ranch, Inc. v. Holm*, 570 P.2d 690, 691



(Utah 1977)). Of course, a motion for summary judgment may not be granted if a legal conclusion is reached that an ambiguity exists in the contract and there is a factual issue as to what the parties intended. *Faulkner v. Farnsworth*, 665 P.2d at 1293 (citing *Grow v. Marwick Development, Inc.*, 621 P.2d 1249 (Utah 1980)) (emphasis added).

See also *Winegar v. Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991) ("A motion for summary judgement may not be granted if a legal conclusion is reached that an ambiguity exists and there is a factual issue as to what the parties intended." (citation omitted)).

Based on the clear and well established legal precedent, the Court either misapprehended or overlooked Utah law and committed error warranting rehearing when it made a legal conclusion that the contract was ambiguous and then went on to consider extrinsic evidence to determine the intent of the parties. Moreover, what the parties intended is strongly contested and is therefore a genuine issue of material fact. Even more telling is the recognition of the Court given to the disputed facts regarding the intent of the parties.

The Court contrasts the conflicting evidence of Dr. McGreevy's and Dr. Seare. There is direct conflict in the Court's discussion. The Court chose to credit Dr. McGreevy's evidence and to disbelieve Dr. Seare's evidence. Judging the credibility, veracity, and character of a witness is not within the province of an appeals court. Such a function lies within

the province of the fact finder.<sup>1</sup>

Dr. Seare's Petition for Rehearing must be granted. Utah law is well settled: whether a contract is ambiguous is a question of law. If the legal conclusion is drawn that a contract is ambiguous, then the Court must necessarily consider parol or extrinsic evidence. Such evidence presents a question of fact, and in the procedural posture of a summary judgment motion the court committed error by considering extrinsic evidence.

**II. THE COURT MISAPPREHENDED THE LAW AND/OR OVERLOOKED THE DISPUTED MATERIAL FACTS REGARDING THE EXISTENCE OF CONTRACT(S) BETWEEN THE PARTIES.**

The Court failed to address the contract and/or contracts that existed between the parties. Initially, on page five (5) of its opinion, the Court simply states "[r]egardless of the nature of the 3 + 3 program, we agree with the trial court that it was abrogated by the parties' subsequent action." Opinion of the

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<sup>1</sup> As to Dr. Seare, the Court notes that there is nothing in the record to substantiate the expectations of Dr. Seare. Whether Dr. Seare's expectations are reasonable is a question of fact and not of law. In the present case, such a determination cannot rightfully be made by an appellate court. Moreover, "[c]ontracts are to be construed in light of the reasonable expectations of the parties as evidenced by the purpose and language of the contract." *HCA Health Services of Utah, Inc. v. St. Mark's Charities*, 846 P.2d at 481 (quoting *Nixon and Nixon, Inc. v. John New & Associates*, 641 P.2d 144, 146 (Utah 1982)). If the contract is ambiguous as determined by the Court, then of course, it is difficult to substantiate the expectations of the parties. However, Dr. Seare submitted an affidavit explaining his understanding, intent and expectations. The court has misapprehended its role by finding substantiation in Dr. McGreevy's position and determining that no substantiation exists for Dr. Seare's position. This is untenable as any such determination should be made by a finder of fact and not an appellate court.

Utah Court of Appeals dated September 15, 1994 at page 5. The Court further discusses the "University's intent at this point ...." However, the Court does not address the intent of the parties nor the intent of Dr. Seare.

Based on the opinion of the Court, it appears from its opinion that the Court assumed that the 3 + 3 contract did in fact exist. If that is the case, any modification of the contract must have been consented to by the parties to the contract. Dr. Seare never intended nor consented to any modification of his 3 + 3 contract with the defendants. Moreover, merely because the Court posits what the intent of the University was, such a determination does not reflect the intent of Dr. Seare, a party to the 3 + 3 contract. This is a question of fact, not law, which should be determined by a fact finder.

Also, the Court fails to discuss whether there was a contract or contracts between the parties. The Court glosses over this issue artfully by stating that it agrees with the trial court below. However, such a gloss is inappropriate. There are no findings regarding the nature of the contractual relationship between the parties. Are they governed by a block contract such as the 3 + 3 contract or the 5 + 2 contract? Or are the parties governed by yearly contracts such as the house officer contracts entered into every year between the parties? Or are the parties governed by both a block contract and the yearly contracts? This is a disputed question of fact, based upon the intent of the parties. Moreover, the terms of the various contracts and

whether there was a breach of the various contracts by any of the parties is a disputed question of material fact. Any conclusions based on the assumptions of the Court in this regard are inappropriate without the benefit of specific findings. The Court failed to enunciate what the contract was that existed between the parties. But, how could it do so when such a determination is a question of disputed material fact? Thus, Dr. Seare's Petition for Rehearing should be granted as it would allow the Court to more carefully consider the contractual relationship between the parties.

**III. BECAUSE THE COURT ON NUMEROUS OCCASIONS DISCUSSES THE DISPUTED MATERIAL FACTS AND THEN CREDITS THE TESTIMONY OF SOME WITNESSES AND NOT OTHERS, THE COURT HAS ACTED IN A FACT FINDING MANNER AND HAS MISAPPREHENDED ITS FUNCTION AS A REVIEWING COURT.**

The Court's opinion is replete with instances where it discusses the disputed material facts and then credits the testimony of one witness, Dr. McGreevy, and disbelieves the testimony of another witness, Dr. Seare. In other instances, the Court overlooks certain facts and misstates certain facts, disputed or not.

First, on page three (3) of the Court's opinion, the Court finds that "[a]lthough the University was prepared to certify Seare to sit for the board exam to allow him to enter into a plastic surgery residency, it refused to certify him to sit for the board exam given his stated intention to practice medicine as a general surgeon." The facts show that there was no determination on the certification of Dr. Seare. The University

and Dr. McGreevy refused to certify Dr. Seare for anything at all, including general surgery. The only time a possibility of certification, limited in scope or not, was discussed was in the context of settlement negotiations between the parties. Thus, the conclusion by the Court as to this fact is simply not true.

Second, while it is true that the University argued that Dr. Seare did not have the necessary experience for certification as corroborated by several of the physicians with whom Dr. Seare worked, several other physicians, also acting in response to Dr. McGreevy's inquiry found and determined that Dr. Seare was qualified for general surgery certification. See Exhibit 15 attached to the defendants' Memorandum of Points and Authorities in Support of Motion for Summary Judgment presented to the trial court.

The statements and letters of the responding physicians present a genuine issue of material fact on two fronts. Initially, was the fifth year provided to and completed by Dr. Seare standard or substandard? The evidence on this issue presents a genuine issue of material fact. Despite the fact that Dr. McGreevy contends that Dr. Seare's fifth year was not standard and was by no means a "chief resident" year, Dr. Seare contends otherwise. Moreover, this disputed fact is exemplified by the letters from the physicians responding to Dr. McGreevy's inquiry.<sup>2</sup> In addition, there is a genuine issue of material

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<sup>2</sup> For example, Dr. Lawrence E. Stevens, M.D., explains that he expected Dr. Seare to proceed into a plastic surgery residency and that Dr. Seare was qualified to do this, but that Dr. Seare

fact as to whether and why Dr. Seare's fifth year was substantively different from the fifth year of other general surgery residents. Whether Dr. Seare's performance was deficient is also a disputed question of fact.

Third, the court overlooks the nature of the general surgery boards. There is only one certification for the general surgery boards. Regardless of what the resident chooses to do after general surgery training whether it be general surgery, plastic surgery, orthopedic surgery, etc., that resident must be certified as eligible to sit for the general surgery certification. The certification is NOT different depending on the residents choice of practice area. All residents at the time of their certification should be able to sit for the general surgery boards with the knowledge, skill and guidance they have acquired in their training to that point. The facts before the trial court, and consequently before the Court, illustrate the common understanding of the parties that the ultimate goal and

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would need more training before going into general surgery. Dr. Kent F. Richards, M.D. finds that Dr. Seare is qualified to go into general surgery after his fifth year. Whether Dr. Seare's fifth year was a standard chief resident year as he was told it was by Dr. McGreevy (this too is disputed) or was not is also supported by disputed facts in the record. Dr. Richard R. Price, M.D. comments that Dr. Seare should have the opportunity to "perform in a true chief resident situation...." Dr. C. David Richards, M.D. and Dr. Sherman C. Smith, M.D. both make reference to Dr. Seare's chief resident year at L.D.S. Hospital. Exhibit 15 attached to Defendants' Memorandum of Points and Authorities in Support of Motion for Summary Judgment dated October 6, 1992. Because there is factual dispute as to the nature of Dr. Seare's fifth year of residency summary judgment at the trial court below was inappropriate. Moreover, an affirmance of the trial court's decision wherein there is a genuine issue of material fact is also inappropriate.

purpose of completing a five year residency program, whether for a general surgery or plastic surgery residency, was to prepare Dr. Seare for eligibility to test for certification in general surgery. Regardless of Dr. Seare's change of heart during his fifth year, he should have been eligible to sit for the general surgery boards. Whether Dr. Seare was properly prepared, as a result of Dr. McGreevy's alleged willy-nilly structuring of the fifth year, to sit for the general surgery boards is a genuine issue of material fact which was overlooked by the Court.

Moreover, the Court seemed to overlook the fact, based on the single general surgery board certification, that there is no difference in the status of being "board eligible" at the end of the fifth year of training between those who have chosen to seek further training and those who wish to work in general surgery only.

Fourth, the Court seems to accept Dr. McGreevy's version of the facts that Dr. McGreevy structured Dr. Seare's fifth year differently from the fifth years of other residents. If this is the case, then there is a serious conflict of fact regarding Dr. McGreevy's decision to do so. Moreover, the reasonableness of Dr. McGreevy's refusal is also a disputed question of fact. The record reflects that another doctor, Dr. Chris Tsoi, M.D., was allowed to repeat his third year of residency two times. In addition, Dr. Tsoi did not have an authentic and bona-fide fifth year, yet Dr. McGreevy certified Dr. Tsoi to sit for the general

surgery boards. Such arbitrary decision making based on whatever reasons raises a genuine issue of material fact regarding Dr. McGreevy's and the University's standards. The Court seems to recognize this factual dispute:

Given the tailor-made nature of Seare's training [which is a question of fact itself], the University was apparently only obligated to certify Seare for additional training in a plastic surgery residency if he satisfactorily completed the five-year resident program designed specifically for the purpose.

Opinion of the Utah Court of Appeals at page 8 (emphasis added).

Finally, the Court is fully aware of the dispute as to the material facts. Throughout its opinion it discusses the conflicting positions, both of which are part of the record, of the parties. ("Seare on the other hand, .... "In contrast, Dr. McGreevy testified ....") Opinion of the Utah Court of Appeals at page 3. By recognizing the conflicting testimony and disputed facts and then crediting certain testimony and facts, the Court has committed an error and Dr. Seare's Petition for Rehearing should be granted. Because there are material facts in dispute which the Court either overlooked or misapprehended, an affirmance of the trial court's judgment and order was error.

**IV. BECAUSE THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO THE EXPRESS COVENANTS OR PROMISES OF THE CONTRACT(S) BETWEEN THE PARTIES, AND BECAUSE THE COURT COMES TO THE LEGAL CONCLUSION THAT THE CONTRACT BETWEEN THE PARTIES IS AMBIGUOUS, THE COURT'S ANALYSIS OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IS MISAPPREHENDED.**

Dr. Seare did not seek to create a contract via the implied covenant of good faith and fair dealing where no contract existed. To the contrary, the evidence shows, as do the Court's



conclusions, that a contract did, in fact, exist, whatever that contract may be. "[E]very contract is subject to an implied covenant of good faith, that implied covenant 'cannot be construed to establish new, independent rights or duties not agreed upon by the parties.'" *Sanderson v. First Security Leasing Co.*, 844 P.2d 303, 308 (Utah 1992) (citation omitted). Thus, whatever the terms of the contract were, which is a question of fact, the implied covenant of good faith and fair dealing allows for relief when the promises and terms of the contract are executed or not in bad faith by one of the parties.

Dr. Seare has maintained that the defendants have breached the contract by acting in bad faith.

Generally, "a covenant of good faith and fair dealing inheres in most, if not all, contractual relationships." *St. Benedict's Dev. v. St. Benedict's Hospital*, 811 P.2d 194, 199-200 (Utah 1991). Under the covenant of good faith and fair dealing, each party to a contract impliedly promises not to "intentionally or purposely do anything which will destroy or injure the other party's right to receive the fruits of the contract." *Id.* at 199. A violation of this covenant gives rise to a claim for breach of contract. *Id.* at 200. Whether there has been a breach of contract is generally a "factual issue to be determined by [the fact finder] after consideration of all attendant circumstances and evidence...."

*Western Farm Credit Bank v. Pratt*, 860 P.2d 376, 380 (Utah Ct. App. 1993). The Court states that "[t]here were no express covenants or promises to train Seare to become a general surgeon or to automatically certify him to sit for the board exam." Opinion of the Utah Court of Appeals at pages 8-9. This statement is contrary to the Court's legal conclusion that the contract was ambiguous, *see supra*. Moreover, the intent,

expectations, and understandings of the parties is a disputed issue of material fact. Thus, again the Court misapprehends the facts and the law and errors in concluding that the implied covenant of good faith and fair dealing does not come into play under the circumstances of this case. Therefore, Dr. Seare respectfully requests that the Court grant his Petition for Rehearing.

**V. THE COURT HAS MISAPPREHENDED THE LAW AND OVERLOOKED THE NATURE OF DR. SEARE'S COMPLAINT IN CONCLUDING THAT THE TRIAL COURT WAS CORRECT IN ITS DETERMINATION OF DR. SEARE'S SECTION 1983 CLAIM.**

Dr. Seare is seeking prospective relief from the defendants via his claims for violation of his civil rights and specific performance. "[S]tate officials sued in official capacity for prospective relief are "persons" for purposes of Section 1983." *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989). Dr. Seare is seeking to have Dr. McGreevy certify him to sit for the general surgery boards. This is prospective relief. If Dr. Seare cannot recover monetary damages pursuant to his Section 1983 claim then so be it. However, his claim for prospective relief, i.e. specific performance is allowed under Section 1983. It appears also from the Court's opinion that it believes that the State and its actors have retained immunity from civil rights actions against them. See Opinion of the Utah Court of Appeals at page 9. This issue has been addressed by the United States Supreme Court.

The Supreme Court held that sovereign and governmental immunity statutes of the individual states do not bar Section

1983 suits. See *Howlett v. Rose*, 496 U.S. 356 (1990); see also *Felder v. Casey*, 487 U.S. 131 (1988).

In *Howlett v. Rose*, 496 U.S. 356, a high school student brought an action against the school board and three school officials. One argument presented by the school board in seeking a dismissal of plaintiff's complaint was that the Florida state waiver of sovereign immunity statute did not extend to claims based on Section 1983. See *id.* at 359. The District Court of Appeal dismissed the complaint. The Court of Appeal also agreed with the school board, however, the Court of Appeal acknowledged the holding of *Martinez v. California*, 444 U.S. 277 (1980) "that a state cannot immunize an official from liability for injuries compensable under federal law." *Howlett*, 496 U.S. at 360.

After considering the decisions in the lower courts, the *Howlett* Court turned to its analysis. The Court expressed a concern that if such an immunity defense were available to prevent suit based on a violation of a federal right, "that a state court may be evading federal law and discriminating against federal causes of action." *Id.* at 366. The Court explained

[f]ederal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum--although both might well be true--but because the Constitution and the laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme 'Law of the Land,'" and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.

*Howlett*, 496 U.S. at 367.

In *Martinez v. California*, 444 U.S. 277 (1980), at issue was

a state statute that purported to immunize public entities and public employees for any liability for parole release decisions. The Supreme Court held that the statute at issue was preempted by Section 1983 "even though the federal cause of action [was] being asserted in the state courts." *Id.* at 284. The Court further explained

'Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. Section 1983 or Section 1985(3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. See *McLaughlin v. Tilendis*, 398 F.2d 287, 290 (7th Cir. 1968). The immunity claim raises a question of federal law.' *Hampton v. Chicago*, 484 F.2d 602, 607 (CA7 1973) cert. denied, 415 U.S. 917 (1973).

*Martinez*, 444 U.S. at 284 n.8. "[A] state law that immunizes government conduct otherwise subject to suit under Section 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy, which of course already provides certain immunities for state officials." *Felder v. Casey*, 487 U.S. 131, 139 (1988) (citations omitted).

*Howlett*, *Martinez*, and *Felder*, make it clear that a state law that immunizes government conduct from liability for violation of civil rights is not applicable to claims made under Section 1983. Thus, the Court has misapprehended the law and Dr. Seare's Petition for Rehearing must be granted.

In addition, the Court overlooked the law and the facts regarding a constitutionally protectable interest of Dr. Seare.

Dr. Seare did have a constitutionally protected property interest in attending the University of Utah. *Davis v. Regis College*, 830 P.2d 1098, 1100 (Colo. Ct. App. 1991) ("[A] student's interest in attending a public university is a constitutionally protected property right."); *Anderson v. Regents of Univ. of Cal.*, 22 Cal.App.3d 763, 770 (1972) ("Attendance at a publicly financed institution of higher education is to be regarded as a benefit somewhat analogous to that of public employment."); see also *Conard v. Univ. of Washington*, 814 P.2d 1242, 1245-6 (Wash. Ct. App. 1991).

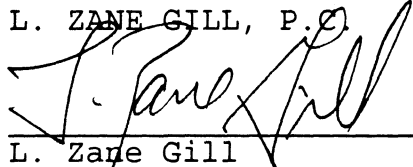
Because the law supports a finding that Dr. Seare does in fact have a constitutionally protected property interest in his education and future employment premised on receiving his benefit of the bargain, the Court misapprehended the law in concluding that Dr. Seare's Section 1983 claim is not permissible. Moreover, the law clearly states that state actors can be sued under Section 1983 for prospective relief. Thus, Dr. Seare respectfully requests that his Petition for Rehearing be granted.

#### CONCLUSION

Based on the foregoing, the appellant/plaintiff respectfully requests that the Court grant his Petition for Rehearing.

DATED and respectfully submitted this 29th day of September, 1994.

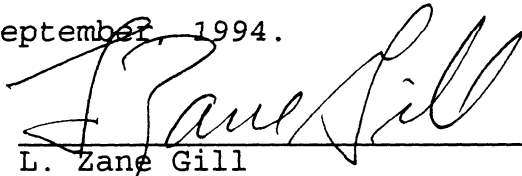
L. ZANE GILL, P.C.

  
\_\_\_\_\_  
L. Zane Gill  
Attorney for Appellant/Plaintiff

**CERTIFICATE OF GOOD FAITH**

I hereby certify, pursuant to Rule 35(a) of the Utah Rules of Appellate Procedure, that the Appellant/Plaintiff's Petition for Rehearing is presented and submitted to the Court in good faith and not for the purposes of delay.

DATED this 29th day of September, 1994.

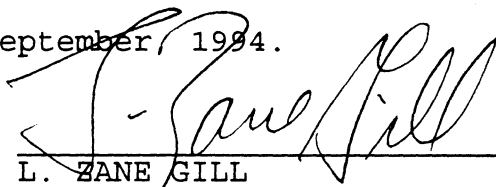
  
\_\_\_\_\_  
L. Zane Gill  
Attorney for Appellant/Plaintiff

**CERTIFICATE OF MAILING**

I hereby certify that two (2) true and correct copies of the foregoing PETITION FOR REHEARING OF THE APPEAL FROM THE JUDGMENT AND ORDER OF THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH HONORABLE F. DENNIS FREDERICK, DISTRICT JUDGE, were mailed, postage prepaid to the following:

Jan Graham  
Utah Attorney General  
Brent A. Burnett  
Assistant Attorney General  
330 South 300 East  
Salt Lake City, Utah 84111

DATED this 29th day of September, 1994.

  
\_\_\_\_\_  
L. ZANE GILL