

2007

Maxine B. Nickel Trust, Palatial Living Mobile Home Park v. David Craig Carlsen : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE MAXINE B. NICKEL TRUST, doing)	
business as PALATIAL LIVING MOBLIE)	
HOME PARK,)	No. 20070621-CA
)	
Plaintiff/Appellee,)	
)	
v.)	
)	
DAVID CRAIG CARLSEN,)	
)	
Defendant/Appellant.)	
)	

BRIEF OF APPELLEE

APPEAL FROM A JUDGMENT OF THE FIRST JUDICIAL DISTRICT COURT
HONORABLE BEN HADFIELD, PRESIDING

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the First Judicial District Court in a civil case. (R. 1368-1370) Mr. Carlsen filed his Notice of Appeal in the First Judicial District on June 12, 2007. (R. 1372) The Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j).

ISSUES PRESENTED FOR REVIEW

This case presents five discrete issues for decision. Palatial Living accepts Appellant David Craig Carlsen's contention that he preserved issues I through IV. Carlsen however failed to preserve the arguments he presents in issue V.

I. Carlsen's first issue contains two subparts. In the interest of clarity, Palatial Living will treat them as sub-issues.

A. Was reviewing Judge Larry E. Jones within his discretion when he ruled that Carlsen's Affidavit of Bias against Judge Hadfield was legally insufficient to require disqualification because it provided only conclusory allegations? Judge Hadfield complied with Utah Rule of Civil Procedure 63(b) by certifying Carlsen's Affidavit of Bias to a reviewing judge. This Court therefore reviews the reviewing judge's decision for abuse of discretion. *Bacon v. Jorgensen*, 2006 UT App 25, *1, 2006 WL 181523, citing *State v. Alonzo*, 973 P.2d 975, 979 (Utah 1998).

B. May litigants object to the sufficiency of an affidavit of bias, and if not, is allowing said objection harmless? The court reviews this legal question for correctness. *State v. Deli*, 861 P.2d 431, 433 (Utah 1993).

II. May the owner of a mobile home park promulgate rules for the park under the Utah Mobile Home Park Residency Act, Utah Code Ann. § 58-16-1, et seq., without incurring tort liability? This Court reviews grants of summary judgment for correctness. *Wilcox v. Anchor Wate, Co.* 2007 UT 39, ¶ 10, 164 P.3d 353.

III. May a trial court grant summary judgment *sua sponte* on a claim on which there is no genuine issue of material fact without violating the Utah Constitution's open courts provision? This Court reviews grants of summary judgment for correctness. *Id.*

IV. May a trial court deny a futile motion to amend? "The standard of review of a denial to amend pleadings is abuse of discretion." *Kasco Serv. Corp. v. Benson*, 831 P.2d 86, 91 (Utah 1992) (citation omitted).

V. Should this Court affirm the trial court's decision to hold a status conference in Brigham City instead of Logan because Carlsen failed to preserve his arguments and cannot show that any error committed was prejudicial?

Carlsen failed to preserve this issue for appeal. He claims, in his Appellant's Brief, that he raised the issue before the trial court in the Defendant's Objections to Place of Status Conference. (R. at 812-814) That pleading, however, fails to discuss Utah Rule of Civil Procedure 77(b). Instead, it advances arguments regarding venue. If this Court finds that Carlsen did preserve his Rule 77(b) argument, it should limit its review to the one hearing to which Carlsen directs the court.

STATEMENT OF THE CASE

NATURE OF THE CASE

Palatial Living filed this lawsuit to evict Carlsen from its mobile home park after Carlsen made several residents fear for their safety. (R. 14) Carlsen counterclaimed in an attempt to impose liability on Palatial for enforcing the rules of its mobile home community. (R. 17)

COURSE OF PROCEEDINGS BELOW

Palatial Living filed an action to evict Carlsen on April 28, 2004. (R. 1-16) Carlsen filed his forty-eight page Answer, Counterclaim and, Third-Party Complaint on May 13, 2004. (R. 17-100) Palatial Living successfully petitioned the trial court to bifurcate Carlsen's claims from its eviction action. (R. 781-782) The parties conducted discovery, and Palatial Living moved the trial court for summary judgment on Carlsen's counterclaim on December 28, 2006. (R. 1292-1297) The trial court granted that motion on March 6, 2007. (R. 1355)

STATEMENT OF FACTS

Carlsen Agrees to Repair and Buy a Mobile Home

1. On May 30, 2001, Appellant David Craig Carlsen entered into a Real Estate Purchase Contract with Lyle Cooper. (R. 55-58)
2. That contract provided that Carlsen would purchase a mobile home in Logan, Utah from Cooper provided certain terms were met. *Id.* Carlsen retained the right to cancel the contract if he did not approve of the "physical condition inspection of the property." (R. 55)

3. Cooper and Carlsen also agreed to an addendum to the Real Estate Purchase Contract on June 13, 2001. (R. 59) The agreement acknowledges that certain repairs to the structure would be completed. *Id.* Cooper agreed to weed the flower beds and supply paint to Carlsen. *Id.* Carlsen agreed to paint certain parts of the structure. *Id.*

4. Palatial Living confirmed that Cooper and Carlsen had reached this arrangement in two letters from its counsel to Cooper's counsel. (R 62-63, 64)

5. The letters show that Carlsen agreed to complete the repairs by August 12, 2001. *Id.*

Carlsen's Agreements with Palatial Living

6. Palatial Living accepted Carlsen into the park and allowed him to execute a lease on June 27, 2001. (R. 10-13)

7. The lease states, "To insure [sic] our Park maintains a safe, healthy and attractive environment, we have adopted the following rules and regulations. These rules apply to all Residence [sic] of the Park. . . . The Management reserves the right to refuse admittance . . . or terminate the Lease . . . to [sic] anyone whose mobile home does not meet the Park quality size and appearance standards." (R. 11)

8. By signing the lease, Mr. Carlsen agreed to remove his automobile from the park if it began to leak oils or other fluids. The lease provides "[V]ehicles leaking fluids or oil and grease must be repaired offsite or removed from the Park. . . ." (R. 12)

9. Mr. Carlsen also agreed that he would not sublet or lease his mobile home while it was in the park. *Id.*

10. The lease also informed Mr. Carlsen that the park's rules would change from time to time. *Id.* at 13.

11. Notwithstanding the contracts he entered with Palatial Living and Cooper, Carlsen failed to complete the repairs in a timely fashion. Palatial Living representative Tawnya Franckowiak reminded Carlsen of the repairs he agreed to complete as part of his admission to the park. (R. 65)

12. Carlsen requested an extension of time in which to complete the repairs he agreed to complete. (R. 67) Palatial Living agreed to allow Mr. Carlsen additional time to complete some tasks, but required that he weed the garden and flower areas around his mobile home by the agreed-upon date of August 12, 2001. *Id.* Palatial Living also required that if Mr. Carlsen needed an extension, it would require that he remove an unattractive tire planter from his leased premise on or before August 12, 2001. *Id.*

Carlsen's Fails to Honor His Contracts

13. Carlsen agreed to follow the park's rules while he was resident. (R. 7)

a. In August of 2001, Franckowiak became aware that Carlsen's automobile was leaking oil in contravention of the park's rules. She drafted a note on August 13, 2001, that requested that Carlsen either repair the vehicle outside of the park or remove it from the premises. (R. 68)

b. Palatial Living periodically delivered reminders and suggestions to its residents. Carlsen claims that he received these reminders and now takes umbrage to the rules to which they refer and the suggestions they made. (R. 70-76)

c. Franckowiak sent a notice to residents on October 12, 2001, to remind them to test and turn on their “heat tapes” to ensure that their pipes did not burst. (R. 70)

d. Franckowiak informed residents that their lawns needed to be watered. (R. 75) She suggested watering in the night or early morning to conserve water.

e. Franckowiak stated that hoses should be removed from the outside of a residence before winter. (R. 70)

f. Each above mentioned reminder furthered the Palatial Living’s goal, and the park’s rule, that “[y]ards and mobile homes must be maintained in a clean, neat, and orderly manner.” (R. 11)

14. Carlsen and the other residents of the park did not get along well. Palatial Living received numerous complaints that Carlsen engaged in loud arguments, fights, and other behavior that violated the rules of the park. (R. 14)

15. Carlsen caused neighbors to ‘live in fear of their security, safety, well-being and health.’ *Id.*

16. Based on these concerns, Palatial Living served Carlsen with a Notice to Quit on March 30, 2004. *Id.* The notice requested that Mr. Carlsen leave the park within a week. *Id.*

17. Carlsen refused to leave the park, and on April 28, 2004, Palatial Living filed a Complaint for Eviction. (R. 3)

18. Carlsen, who is no stranger to the civil courts of this state, filed his Answer, Counterclaim, and Third-Party Complaint shortly thereafter. (R. 17)

Carlsen's Judge Shopping

19. Carlsen regularly attempts to disqualify judges. He successfully persuaded Judge Jack L. Stevens and Judge Cheryl A. Russell to recuse themselves from a criminal case brought against him in August of 2001. (R. 464) Carlsen also unsuccessfully attempted to disqualify Judge Terry Moore during the trial of that action. (R. 464-465)

20. Carlsen has applied that tactic in this litigation. Carlsen persuaded Judge Thomas L. Willmore to recuse himself by filing a complaint with the Judicial Conduct Commission. (R. 320-321, 330-331)

21. Judge Willmore recused himself to avoid the appearance of impropriety, but he denied every allegation Carlsen leveled against him.

I have reviewed the Defendant's complaint with the Judicial Conduct Commission and none of the allegations concerning me are true. There has been no wrong doing or misconduct on my part as alleged by Mr. Carlsen. I could continue to act as the assigned judge in this matter. . . . However, in the interests of avoiding any appearance of impropriety, I hereby recuse myself from this case and an Order of Recusal will be entered herein.

(R. 330-331)

22. Carlsen continued his practice of attempting to disqualify judges after the case was reassigned to Judge Ben Hadfield. He filed a Motion for Change of Judge and Affidavit of Bias. (R. 409-412) The Affidavit assumes that Judge Hadfield was prejudiced because he denied Carlsen's motions in another case. (R. 411-412)

23. Carlsen also claims that the judge was biased because he referred to Carlsen as being *pro se* in a matter in which he was, in fact, *pro se*. *Id.*

24. Carlsen also filed a complaint against Judge Hadfield with the Judicial Conduct Commission in an earlier matter. *Id.*

25. Finally, Carlsen claims that a man testified against him while committing the crime of impersonating a peace officer. (R. 411) He does not attempt to explain that charge, nor does he link his allegations against that man to Judge Hadfield. *Id.*

26. Judge Hadfield did not recuse himself. He certified the Affidavit of Bias to a reviewing judge pursuant to Utah Rule of Civil Procedure 63(b). (R. 726) Judge Larry E. Jones was assigned the matter, and he reviewed the Affidavit for legal sufficiency. (R. 763-768)

27. Judge Jones dismissed each of Carlsen's complaints as legally insufficient, inapposite, or irrelevant. (R. 763-769) Carlsen sought interlocutory review to, and this Court denied his request. (R. 773-775, 789)

Carlsen's Attempts to Amend His Third-Party Complaint and Counterclaim

28. Carlsen also sought to amend his forty-eight page Answer, Counterclaim, and Third-Party Complaint. (R. 696-705) Most, if not all, of the issues Carlsen sought to raise related to claims against entities not party to this appeal. *Id.*

29. Carlsen alluded to amending his counterclaim to include fraud and fraudulent non-disclosure causes of action against Palatial Living. (R. 697)

30. Judge Hadfield dismissed Carlsen's Third-Party Complaint. (R. 783-784) He also denied Carlsen's motions to amend because they were futile. (R. 784)

SUMMARY OF ARGUMENT

Carlsen's claims arise out of contracts he entered into of his own volition.

Carlsen, as part of his purchase contract with Lyle Cooper, agreed to make certain repairs to his mobile home. Palatial Living was not a party to that contract, but Carlsen now claims that it should be liable for the cost of the repairs that he agreed to carry out. He fails, however, to provide any applicable legal authority to support that position. The provisions he cites from Utah's Mobile Home Park Residency Act regulate the relationship between a mobile home park and a lienholder who is attempting to sell a mobile home. The Act in no way requires Palatial Living to police private contracts between the lienholder and a possible buyer.

Moreover, Carlsen fails to show that a mobile home park may not condition its consent to a lease upon repairs being made to a property. No provision of Utah law restricts a party's right to enter into such a contract. Carlsen also fails to show that he was in any way coerced or placed under duress. Summary judgment should therefore be affirmed.

Carlsen's conversion claims also fail as a matter of law. He complains that Palatial Living converted his property by reminding residents of the mobile home park's rules and regulations. It is undisputed, however, that Palatial Living has a statutory right to promulgate and enforce such rules to further the health and welfare of the park. Carlsen also agreed to be bound by these regulations in his lease.

Carlsen's conversion claims also fail as a matter of law because he fails to allege that Palatial Living performed any act serious enough to justify imposing the full cost of

the property on them. Palatial Living's reminders were at worst an enforcement of their rights and at best a neighborly gesture that likely saved members of the park from serious problems with their homes.

Each of Carlsen's procedural claims also fail. First, his attempts to disqualify Judge Hadfield were legally insufficient, and he therefore fails to show that reviewing Judge Larry E. Jones abused his discretion. It is well settled that no inference of bias can be drawn from a judge's past rulings. Carlsen also fails to connect Judge Hadfield to any act, so he cannot show the extreme bias needed to require disqualification. There is also no legal reason to bar Palatial Living from objecting to Carlsen's Affidavit.

There are also no facts to show that Judge Hadfield's rulings violated the open courts provision of the Utah Constitution. That provision entitles litigants to access to the courts as well as the rights to have their claims decided on the merits. Carlsen clearly had access to the courts; he filed a counterclaim, a third-party complaint, and innumerable motions and objections. He also had his counterclaim decided on the merits. He does not argue that Judge Hadfield's decision to grant summary judgment on all of his claims was legally incorrect, and he has now waived the ability to raise that issue.

Finally, Carlsen failed to raise his Rule 77(b) objections to the place of a status conference at the trial level, so he may not raise it on appeal. Carlsen also fails to show or even allege any sort of harm that accrued as the result of holding a status conference in Brigham City instead of Logan. No substantive rights were determined at the hearing, and Carlsen participated telephonically. He therefore had every opportunity to advocate

his position at the hearing, even though no issues that would have any bearing on this appeal were decided at that time.

ARGUMENT

I. Judge Hadfield is not biased against Carlsen, and Palatial Living is not barred from objecting to Carlsen's Affidavit of Bias.

Carlsen failed to proffer any valid argument that would show that reviewing Judge Larry E. Jones abused his discretion when he found that Judge Hadfield could continue to preside over this case. He has not produced any legally sufficient argument to show that Judge Hadfield was even biased. Instead, he produces a list of complaints about Judge Hadfield's past rulings and other events that he fails to connect to Judge Hadfield in any manner. This Court should therefore affirm reviewing Judge Larry E. Jones' ruling that Judge Hadfield could preside over this case.

Judge Hadfield followed the provisions of Utah Rule of Civil Procedure 63(b) by allowing a reviewing judge. That judge determined that Carlsen's Affidavit of Bias was legally insufficient. This Court should therefore review that decision for abuse of discretion. *Bacon v. Jorgensen*, 2006 UT App 25, *1, 2006 WL 181523, *citing State v. Alonzo*, 973 P.2d 975, 979 (Utah 1998).

A. There was no reasonable basis to disqualify Judge Hadfield, and therefore Judge Jones did not abuse his discretion.

Carlsen fails to produce arguments that would show that Judge Jones abused his discretion when he found that the Affidavit of Bias was legally insufficient to require disqualification of Judge Hadfield. "[J]udges are presumed to be qualified." *In re Affidavit of Bias*, 947 P.2d 1152, 1154 (Utah 1997) (citation omitted). Carlsen therefore

bears the burden of showing this Court that Judge Hadfield had an “extreme” or “deep-seated antagonism” toward Carlsen. *In re the Interest of M.L.*, 965 P.2d 551, 556 (Utah Ct. App. 1998) (citation omitted). Carlsen must show that Judge Hadfield was “had such a bias . . . that he could not fairly or impartially determine the issues.” *Poulsen v. Frear*, 946 P.2d 738, 742 (Utah Ct. App. 1997) (citation omitted). Finally, he must make these showings with facts, rather than conclusions. *Madsen v. Prudential Fed. Sav. & Loan*, 767 P.2d 538, 544 n.5 (Utah 1988).

Carlsen focuses on Judge Hadfield’s rulings in prior cases. He states that Judge Hadfield was biased against him “because he denied each and every motion, request, and objection made by Carlsen in . . . two cases.” (Appellant’s Brief at 21-22.) No inference of bias may be drawn from a judge’s past rulings, and these allegations are therefore irrelevant. *In re Affidavit of Bias*, 947 P.2d at 1154. Further, even if Judge Hadfield’s past rulings could be considered, they would not avail Carlsen since he fails to describe how those rulings were incorrect.

Carlsen also claims that Judge Hadfield is biased because the record of this or another case was moved from Cache County to Box Elder County. (Appellant’s Brief at 22) He fails, however, to allege or show that Judge Hadfield was responsible for the transfer of the records. He also fails to offer any non-speculative link between the location of the record and any alleged bias. *See Madsen v. Prudential Fed. Sav. & Loan*, 767 P.2d at 544 n.5 (stating that allegations of bias must be supported by fact, not speculation). These claims therefore are legally insufficient to show bias because Carlsen fails to factually connect Judge Hadfield to the act and he fails to connect the act to bias.

He also contends that, in another proceeding before Judge Hadfield, a witness committed the crime of impersonating a peace officer. (Appellant's Brief at 22) Carlsen again fails to explain this incident sufficiently. He does not explain how or why the man impersonated a peace officer. He does not indicate whether Judge Hadfield was aware of his concerns. This allegation, like the others, is therefore conclusory and insufficient to show that Judge Jones abused his discretion.

The Utah Supreme Court has clarified that a litigant must do more than point out adverse rulings and lob allegations to disqualify of a member of the judiciary. They must provide facts to support their allegations. Carlsen's latest attempt at judge-shopping therefore fails as a matter of law, and he fails to show that Judge Jones abused his discretion.

B. No rule prevents Palatial Living from entering objections to Carlsen's Affidavit of Bias.

Carlsen suggests that because Utah case law prohibits Judges from commenting on the legal sufficiency of an Affidavit of Bias filed to disqualify that judge from the case, parties should also not be allowed to comment on the sufficiency of an affidavit of bias. The argument has no basis in the Rules of Civil Procedure and should be disregarded. Rule 63(b) stipulates that when a litigant seeks to disqualify a judge, that judge should either recuse him or herself or certify the affidavit to another judge who will weigh the affidavit's legal sufficiency. *See Young v. Patterson*, 922 P.2d 1280, 1281 (Utah 1996). Based upon that theory, Utah courts hold that while judges may include pertinent parts of the record in their certification, they may not comment upon the affidavit's sufficiency

directly. *Id.* They are, after all, expressly removed from the review process by Rule 63(b).

The rules, however, do not remove litigants from that process in the same manner, and the logic of the *Young* case is therefore inapplicable. Rule 63(b) expressly allows litigants the right to comment on the bias of their judge. It certainly doesn't draw barriers against litigants like it does against judges. Carlsen's argument is therefore misplaced. Nothing prevents litigants from filing objections to an affidavit.

Moreover, even if the objections should not have been filed, any error in allowing them was harmless and does not allow reversal. As Judge Jones notes in his Opinion, Carlsen failed to produce any reason in his Affidavit that would lead the Court to find that Judge Hadfield was biased against Carlsen. (R. 763-769) Judge Jones also does not refer to, cite, or rely upon any analysis contained in Palatial Living's Objections. It therefore suggests that any error in allowing the Objections was harmless because Carlsen's Affidavit was facially insufficient.

C. Judge Jones' ruling that Judge Hadfield could hear the case, even if in error, was harmless.

"If there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." *Patel v. Patel*, 599 S.E.2d 114, 118 (S.C. 2004); *see also Doe v. Howe, III*, 626 S.E.2d 25, 29 (S.C. Ct. App. 2005) (same); *Michigan v. White*, 2004 WL 1392302, *5 (Mich. Ct. App. 2004) (citation omitted) (stating that because a litigant failed to connect alleged bias to any act during a court proceeding, any error in

failing to recuse was harmless). This approach is intuitively correct. If a litigant is afforded a fair trial, there is no reason to overturn a lawfully obtained and fair judgment.

Carlsen has not shown, nor could he show, that any bias Judge Hadfield may have had against him in any way prejudiced his rights. He therefore also failed to show that if Judge Hadfield had been disqualified that there is a reasonable likelihood that the case would have had a different outcome. Any error committed is therefore harmless. *See Jones v. Cyprus Plateau Min. Corp.*, 944 P.2d 357, 360 (Utah 1997), *citing Harline v. Barker*, 912 P.2d 433, 442 (Utah 1996) (an error is harmless unless there is a reasonable likelihood that the error affected the outcome of the lawsuit).

II. Summary judgment was appropriate because each cause of action raised fails as a matter of law.

Carlsen's causes of action against Palatial Living, although creative, fail as a matter of law. His counterclaim attempts to rescind a contract he made with a third party. Carlsen also attempts to reframe Palatial Living's innocuous efforts to inform its residents of the park's rules and regulations into a nefarious scheme to convert his property. Finally, Carlsen tries to impose tort liability upon Palatial Living for enforcing a provision of the lease to which Mr. Carlsen agreed. Each of these claims fail as a matter of law and as a matter of logic, and summary judgment should be affirmed.

A. *Carlsen was required to repair his trailer pursuant to his contract with Cooper.*

Carlsen's first cause of action against Palatial Living seeks reimbursement for repairs he made to his own property pursuant to an agreement he made with a third party. Palatial Living was not a party to the contract in which Carlsen first agreed to make the

repairs. Thus, there is no basis in contract or law to hold it liable for any damages.

Summary judgment should therefore be affirmed.

Carlsen agreed to purchase the mobile home from Lyle Cooper on May 30, 2001. (R. 53) Carlsen also agreed to an addendum to that contract on June 6, 2001. (R. 59) In the addendum, Carlsen agreed to perform a number of repairs to the residence. *Id.* Carlsen then reaffirmed his commitment to performing the repairs to his mobile home by signing two letters evidencing a completely separate agreement that Cooper had entered with Palatial Living. (R. 63-64) Simply put, Palatial Living was not a party to the addendum to which Carlsen agreed. It therefore cannot be held liable for any repairs that Carlsen completed.

Carlsen's citations to provisions of the Utah Mobile Home Park Residency Act are red-herrings. Each provision applies only to lienholders attempting to sell a mobile home, not a buyer. The provisions on which Carlsen relies read as follows:

(2) . . . If the *lienholder* pays rent and service charges as provided by this section, the *lienholder* shall have the unconditional right to resell the mobile home within the park, subject to the purchaser being approved for residency by the park, which approval cannot be unreasonably withheld. . . .

. . .

(4) The mobile home park may require the *lienholder* to remove a mobile home covered by this section from the park if the mobile home, at the time of sale, is in rundown condition or disrepair, if the mobile home does not meet the park's minimum size specifications, or if the mobile home does not comply with reasonable park rules. The *lienholder* shall have 60 days to make repairs and comply with park rules after notice of required repairs and rule violations is given to the *lienholder* by the park owner or its agent.

Utah Code Ann. § 58-16-9(2), (4) (2007) (emphasis added). These provisions govern only the relationship between a lienholder and park operator. They are therefore completely irrelevant to Carlsen who was, at the time he agreed to repair the mobile home, a prospective buyer only.

Palatial Living also had no duty to disclose the arrangements it made under the above-referenced statutes to prospective buyers. Palatial Living was not Carlsen's realtor. Palatial Living was not the seller. Palatial Living did not have any relationship with Carlsen when Carlsen and Cooper contracted to make the purchase and there can be no duty to disclose because there was no relationship between the parties. *See Moore v. Smith*, 2007 UT App 101, ¶ 34, 158 P.3d 562, *citing Yazd v. Woodside Homes Corp.*, 2006 UT 47, ¶¶ 14-15, 143 P.3d 283 (stating that a duty to disclose grows out of and is created by the relationship between two parties).

B. Carlsen's conversion claims all fail as a matter of law.

Carlsen contractually agreed that he would be subject to the rules and regulations of the mobile home park in which he rented space. He now claims that the rules to which he agreed to be bound constitute conversion. He is incorrect. Each act he alleges was lawful. Palatial Living has a statutory right to protect the health and appearance of its park. Utah Code Ann. § 57-16-7(1)(a) (2007). Carlsen also contractually agreed that he would be subject to the park's rules. (R. 5-6) Each act of which Carlsen complains was also insignificant and did not rise to the level of conversion. There are no issues of fact to be decided, and summary judgment should be affirmed.

Carlsen’s conversion allegations may be divided into two categories. First, he argues that the Stipulation of Judgment Palatial Living prepared regarding its Complaint for eviction constitutes conversion. These allegations fail as a matter of law to make out a prima facie case for conversion because, by Carlsen’s own admission, the Stipulation was never executed. Second, he alleges that Palatial Living converted “his” electricity and water in addition to the mobile home and satellite dish. These allegations fail for a number of reasons. Palatial Living never acted unlawfully because Utah law entitles it to promulgate and enforce park rules, and Carlsen agreed to be bound by those park rules. Utah Code Ann. § 57-16-7(1)(a); (R. 5-6).

1. Palatial Living cannot be held liable for preparing a stipulation for Carlsen because that stipulation was not executed.

Carlsen claims that Palatial Living’s attempt to have him execute a Stipulation of Judgment in the eviction action amounts to conversion. He alleges that Palatial Living “unlawfully converted [his] personal property when they attempted to defraud Carlsen of his possession, title, and ownership to such personal property. . . .” (Appellant’s Brief at 36 (emphasis added)). Conversion requires more than an attempt; it requires a completed act that actually deprived the rightful owner of personal property or immediate possession and use of that property. *See Allred v. Hinkley*, 328 P.2d 726, 728 (Utah 1958).

Carlsen’s claim therefore fails as a matter of law because, by his own admission, Palatial Living never exercised control over his personal property as the result of the proposed Stipulation.

2. Carlsen agreed to be bound by the park rules, and therefore Palatial Living's reminders of these rules cannot constitute conversion.

Carlsen proffers a number of complaints about the innocuous requests and reminders that Palatial Living distributed to park residents as well as several park rules. The conduct of which he complains fails, as a matter of law, to satisfy any element of the tort of conversion, and this Court should therefore affirm summary judgment.

The tort of conversion requires an unlawful act. *Allred*, 328 P.2d at 728 (Utah 1958). Palatial Living, however, has a statutory and contractual right to proffer and enforce park rules. “A mobile home park may promulgate rules related to the health, safety, and appropriate conduct of residents of such park and to the maintenance and upkeep of such park.” Utah Code Ann. § 57-16-7 (2007). Carlsen acknowledged this right when he agreed in his lease to be subject to the park’s rules. (R. 5-6) Palatial Living’s attempts to remind residents of its rules as well as its attempts to enforce them are therefore justified by statute and contract. No liability for conversion may therefore arise out of Palatial Living’s attempt to have Carlsen repair his automobile, or its reminders to him about other park rules.

The tort of conversion also requires serious interference with an owner’s use or possession of property. *Allred*, 328 P.2d at 728 (Utah 1958). That interference must be serious enough that the owner of the property is entitled to the full value of the property in a judgment. The acts of which Carlsen complains fail, as a matter of law, to reach the required level of seriousness. For instance, Carlsen claims that Palatial Living’s request that park residents activate their house’s “heat tape” constitutes a conversion of his

electricity as well as his home. (Appellant's Brief at 38-39.) He fails to note, however, that if the heat tape was not activated, pipes could freeze and burst. (R. 70) Moreover, Carlsen fails to show what, if any, action would be taken if the heat tape were not turned on. This neighborly act of informing members of a community of an important fact that could prevent the flooding of their homes plainly does not rise to the level of seriousness required to state a claim for conversion.

The tort of conversion requires an act that interferes with the possessory rights of the owner of personal property. *Jones v. Salt Lake City Corp.*, 2003 UT App 355, ¶ 9, 78 P.3d 988 (citation omitted); *Allred*, 328 P.2d at 728 (Utah 1958). Carlsen fails to show how any act taken by Palatial Living in any way interferes with his right to possess any property. He claims that Palatial Living's suggestions regarding heat tape and water usage converted his right to possess water and electricity, and possibly even his mobile home. Putting aside, for the moment, the issue of whether one can possess water or electricity, if Carlsen never used those commodities he could not, in any sense of the word, ever have been entitled to their possession in the first place. He therefore fails to show that Palatial Living has ever interfered with his possession of any property.

C. *Utah law expressly permitted Palatial Living to either cause Carlsen to replace the siding on his mobile home or remove it from the park.*

Carlsen complains that the letter between attorneys for Palatial Living and Lyle Cooper in which Palatial Living informed Cooper that the buyer of the mobile home would likely be required to re-side it before it was subsequently sold either violated Utah law or constitutes the tort of conversion. However, the Utah Mobile Home Park

Residency Act expressly authorized Palatial Living to require the mobile home to be removed from the park upon sale. The law states: “In order to upgrade the quality of a mobile home park, [the operator] may require that a mobile home be removed from the park upon sale if . . . the mobile home is in rundown condition or in disrepair.” Utah Code Ann. § 57-16-8 (2007).

The plain language of the above-mentioned statute defeats Carlsen’s claims that the letter between Palatial Living and Cooper somehow violated Carlsen’s rights under the Utah Mobile Home Park Residency Act. The Act expressly allowed Palatial Living to demand that Carlsen remove the mobile home from the park upon sale. It does not, however, prevent parties from entering into a contract or other agreement in which differences are settled and the owner is not required to move the mobile home from the park.

The statute also undercuts Carlsen’s claim that Palatial Living’s rules constituted an unreasonable restraint on alienation. First, Carlsen’s claims under the Act fail because the act expressly allows Palatial Living to require an owner to remove a dilapidated mobile home from the property upon sale. Utah Code Ann. § 57-16-8 (2007). Palatial Living also never effected a direct restraint on the alienation of Carlsen’s mobile home because it could always be sold, it just would have to be moved. See *Redd v. Western Sav. & Loan Co.*, 646 P.2d 761, 763 (Utah 1982) (stating that private arrangements affecting alienation are only void if they strip an owner of the “power” to alienate the property).

III. The First District granted Carlsen access to the courts by allowing his suit and deciding it on the merits.

The open courts provision of the Utah Constitution does not allow a litigant to maintain frivolous or unsupported lawsuits through trial. The provision only ensures that litigants can secure their day in court and that litigants may have their lawsuits decided on the merits; it does not allow litigants to press unsupportable causes of action to trial. *Jenkins v. Percival*, 962 P.2d 796, 799 (Utah 1998); *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 675 (Utah 1985).

The undisputed record in this case shows that Carlsen was given his day in court as well as a full hearing on the merits of his counterclaim. Carlsen clearly was allowed to bring suit. The Court also analyzed the merits of Carlsen's lawsuits. Judge Hadfield found that there was no genuine issue of material fact on any cause of action Carlsen asserted. He therefore granted summary judgment on all causes of action.

Tellingly, Carlsen fails to proffer a single argument that would suggest that the Court incorrectly granted summary judgment on Counts IV through VII. He has therefore waived the right to bring these arguments in his Reply Brief. *Maack v. IHC Health Services, Inc.*, 2007 UT App 244, ¶ 30, 166 P.3d 631, citing *Brown v. Glover*, 2000 UT 89, ¶ 23, 16 P.3d 540 (citation omitted). See also *Wilson v. Alaska Dept. of Corrections*, 127 P.3d 826, 833 n.41 (Ala. 2006) (noting that a *pro se* appellant waived his right to raise an issue in his Reply when he failed to address it in his opening brief).

Carlsen's central argument seems to be that he is denied his right to open courts as well as trial because the judge ruled *sua sponte*. The suggestion is belied by judicial

interpretation of the open courts provision as well as other settled case law. Courts routinely entertain motions brought *sua sponte* as well as grant relief beyond that for which litigants pray. The Supreme Court has affirmed this practice without even mention that it violates the open courts provision of the Utah Constitution. In *Workman v. Brighton Properties, Inc.*, the Supreme Court affirmed a trial court, who, when faced with a summary judgment motion from Workman, entered *sua sponte* summary judgment for Brighton. 1999 UT 30, ¶¶ 1, 5, 976 P.2d 1209. The Supreme Court decided a similar case in *Rees v. Albertson's Inc.*, 587 P.2d 130, 131-132 (Utah 1978). There, the court granted defendant's motion for summary judgment and then vacated the order. Then, without a motion, the court reconsidered and re-entered summary judgment for the defendant. *Id.*

The Supreme Court's analysis of each of these cases omits any mention of the open courts provision. The Supreme Court could have raised the issue if *sua sponte* rulings transgressed the Utah Constitution. *See State v. Lee*, 633 P.2d 48, 63-65 (Utah 1981) (stating that appeals courts may raise, *sua sponte*, arguments regarding possible deprivation of constitutional rights). The Court instead concerned itself with the propriety of the judgment as a matter of law and procedure.

IV. Carlsen does not, nor could he, provide analysis as to how he contends the trial court abused its discretion when it denied his motions to amend his pleadings.

Carlsen claims that the trial court should have allowed him to amend his lengthy Answer, Counterclaim, and Third-Party Complaint to include additional parties and additional theories of recovery. His briefing of the issue violates the Rules of Appellate

Procedure, and it should therefore be disregarded. Carlsen also fails to show that Judge Hadfield abused his discretion

A. *This issue is not properly presented for review.*

Carlsen provides this Court with no analysis to support his claim that the trial court abused its discretion when it denied his two motions to amend. His briefing of this matter is therefore inadequate and does not merit review. Carlsen, in his opening brief, is required to proffer “the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on.” Utah R. App. P. 24(a)(9). Appellants’ briefs must therefore include “reasoned analysis based upon relevant legal authority.” *Smith v. Smith*, 1999 UT App 370, ¶ 8, 995 P.2d 14; *State v. Sloan*, 2003 UT App 170, ¶ 15 n.1, 78 P.3d 138 (quoting *Smith*); *State v. Gamblin*, 2000 UT 44, ¶ 7, 1 P.3d 1108. Carlsen may not shift “the burden of argument and research” on this Court. *State v. Thomas*, 1999 UT 2, ¶ 11, 974 P.2d 269, quoting *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988).

In *State v. Lee*, the Supreme Court did not review a claim of ineffective assistance of counsel because the appellant simply recited, in conclusory fashion, the elements of that doctrine and claimed that his counsel met each element. 2006 UT 5, ¶¶ 22-23, 128 P.3d 1179. The court noted that the appellant’s “argument fails to meet the threshold of argumentative completeness mandated by [Utah R. App. P. 24].” *Id.* Carlsen’s argument on this assignment of error is even less complete than the litigant in *Lee*. He simply states the test the trial court applied to the determination and concludes that it should

have allowed him to amend. (Appellant's Brief at 42-43.) Carlsen never addresses the trial court's finding that amendment would be futile. *Id.* He never states a reason for his conclusory assertion that the trial court abused its discretion. *Id.* He never proffers any legal analysis of the claimed error whatsoever. *Id.* Carlsen therefore fails to satisfy Rule 24, and this claimed error should be disregarded.

B. Amendment would have been futile, so the trial court's ruling was not an abuse of discretion.

The trial court correctly found that Carlsen's proposed amendment would have been futile. Its decision was therefore not an abuse of discretion, and it should be affirmed. "[L]eave to file an amended [counter-claim] should be denied when the moving party seeks to assert a new claim that is legally insufficient or futile." *Andalex Resources, Inc. v. Myers*, 871 P.2d 1041, 1046 (Utah Ct. App. 1994). *See also Kasco Services Corp. v. Benson*, 831 P.2d 86, 92-93 (Utah 1992); *Gary Proter Construction v. Fox Construction, Inc.*, 2004 UT App 354, ¶ 30, 101 P.3d 371.

Carlsen, in his two motions to amend, requested that the court allow him to add additional theories and additional parties to his third-party complaint. (R. 703-704, 694-702) The trial court denied these motions as futile in the same Memorandum decision in which it dismissed the entirety of the third-party complaint. *Id.* at 780-786. As mentioned above, the court is clearly within its discretion when it denies leave to amend a complaint that it finds futile. *Andalex*, 871 P.2d at 1046. Carlsen has not challenged the propriety of the dismissal, nor has he argued or even suggested that Judge Hadfield

erroneously concluded that this amendment was futile. The ruling should therefore be affirmed.

Carlsen also intimates that he wished to amend his pleading to include charges of fraud and fraudulent nondisclosure against Palatial Living. His proposed amended counterclaim, however, failed to state a claim against Palatial Living for either cause of action. To make out a claim for fraudulent non-disclosure, Carlsen would have had to show that Palatial Living had a legal obligation to disclose the information and also that he had no knowledge of the information he contends should have been provided. *Moore v. Smith*, 2007 UT App 101, ¶ 33, 158 P.3d 562. He fails, however, to proffer any allegation in his proposed counterclaim that would have shown that Palatial Living had a duty to disclose the substance of its conversations with the seller. Carlsen therefore failed to state a claim against Palatial Living in his proposed counterclaim and Judge Hadfield did not abuse his discretion when he denied Carlsen's motions to amend.

V. Conducting a Status Conference outside of Cache County was, at most, harmless since Mr. Carlsen actually participated in that conference.

Carlsen failed to preserve the arguments he now advances, and even if those arguments were correct, the trial court committed only harmless error. Palatial Living therefore suggests that this Court should dispose of this assignment of error. Carlsen has not preserved the issue, he fails to allege or show prejudice, and the undisputed facts of record shows that Judge Hadfield rescheduled the Status Conference in question so that Carlsen could participate telephonically. Therefore, Carlsen has waived this issue, and he fails to show that he was prejudiced.

A. *Carlsen failed to preserve his Rule 77(b) arguments.*

Carlsen's assignment of error relies on his interpretation of a rule of civil procedure to which he never referred at the trial level.¹ He has therefore waived his opportunity to contend that the location of the Status Conference violated Rule Utah Rule of Civil Procedure 77(b), and this assignment of error should not be considered. Palatial Living acknowledges that *pro se* litigants are usually due more leeway than litigants represented by counsel. The Utah Supreme Court, however, has repeatedly held that *pro se* appellants, especially those such as Carlsen who are familiar with the litigation process, are required to follow the Utah Rules of Appellate Procedure. *See State v. Schwenke*, 2007 UT App 354, *1, 2007 WL 3197537 (stating that “[a]lthough appellate courts are generally lenient with *pro se* litigants . . . such parties must still comply with the rules”), citing *Lundahl v. Quinn*, 2003 UT 11, ¶ 4, 67 P.3d 1000. Carlsen therefore must show that he preserved the arguments that he raises in this appeal. *State v. Winfield*, 2006 UT 4, ¶ 28, 128 P.3d 1171 (a *pro se* litigant must preserve issues for appeal in order to raise them notwithstanding the fact that they are not represented by counsel).

1. Carlsen never mentioned Rule 77(b) until this appeal and has therefore waived his right to raise arguments based on this rule.

Carlsen raised his Rule 77(b) arguments for the first time in his Appellant's Brief, and he therefore failed to preserve them for appeal. “Claims not raised before the [district] court may not be raised on appeal.” *State v. Cram*, 2002 UT 37, ¶ 9, 46 P.3d 230 (citation omitted); *State v. Robinson*, 2006 UT 65, ¶ 13, 147 P.3d 448 (citing *Cram*).

¹ Carlsen also cites to only one hearing in the record, so he has waived the right to refer to any other hearing not held in Cache County.

To preserve this issue, Carlsen was required to present it to the trial court in a timely fashion so that it would have had an opportunity to understand and rule on the issue. 438 *Main Street v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801, *citing Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 968. Carlsen was therefore required to make his objection with enough specificity so that the trial court would have notice of his arguments. *State v. Bujan*, 2006 UT App 322, ¶ 17, 142 P.3d 581; *quoting State v. Johnson*, 774 P.2d 1141, 1144 (Utah 1989). He failed to cite Rule 77(b) or even mention that the Utah Rules of Civil Procedure curtailed the locations in which a hearing may be held. The trial court was therefore never put on notice of Carlsen's instant arguments, and they are now waived.

Carlsen points the Court to a single document to justify this newly-raised issue. (*See* Appellant's Brief at 5.) He incorrectly claims that he preserved the issue in his Objections to Place of Status Conference. (R. at 812) That pleading includes no reference to Rule 77(b) whatsoever. *Id.* He does not mention or even allude to the Utah Rules of Civil Procedure. Instead, Carlsen relied on a number of Utah statutes regarding jurisdiction and venue.² (Appellant's Brief at 2) Simply put, Carlsen's pleading did not place the District Court or Palatial Living on notice that he intended to advance a Rule

² Carlsen cites several statutes, and each deals with venue and trial. (Appellant's Brief at 5.) Utah Code Ann. § 78-13-8 and -10 each discuss changing the venue of a civil matter. Utah Code Ann. § 78-13-1 and -4 each dictate the area in which actions on real property and written contracts must be tried. Utah Code Ann. § 73-13-9 promulgates situations in which the location of a trial may be changed. Utah Code Ann. § 78-13-11 governs fees for the transfer of venue. Carlsen also refers to a segment of the Code of Judicial Administration that refers to the care of court records. None of the cited rules have any bearing on the question of where hearings may be held within a district.

77(b) theory. He has therefore failed to preserve the issue for appellate review, and he has waived his ability to make further arguments about this issue in his reply. *Maack v. IHC Health Services, Inc.*, 2007 UT App 244, ¶ 30, 166 P.3d 631, *citing Brown v. Glover*, 2000 UT 89, ¶ 23, 16 P.3d 540. *See also Wilson v. Alaska Dept. of Corrections*, 127 P.3d 826, 833 n.41 (Ala. 2006) (noting that a *pro se* appellant waived his right to raise an issue in his Reply when he failed to address it in his opening brief).

2. Judge Hadfield did not commit plain error.

Allowing a Status Conference to be held outside of a county while allowing all interested litigants to appear telephonically is not in error and it does not prejudice a litigant's rights. Carlsen has failed to satisfy his burden to show harm from the hearings set in Brigham City, and therefore, there was no plain error on Judge Hadfield's behalf.³ He also failed to proffer a "statement of grounds for seeking review of an issue not preserved in the trial court." Utah R. App. P. 24(a)(5)(B). "To establish plain error, [a defendant is] required to demonstrate that (i) an error exists; (ii) the error should have been obvious to the [district] court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant." *State v. Robison*, 2006 UT 65, ¶ 14, 147 P.3d 448 (citation and quotation omitted).

Carlsen fails in his Appellant's Brief to allege how any error was harmful. No rights were adjudicated in the Status Conference. No motions were decided, and no oral arguments were held. The Minutes from the Status Conference show that the Court

³ Carlsen did not brief plain error, either. He has therefore waived his right to raise this issue in his Reply.

discussed with the parties ongoing discovery and set a cutoff date to which Carlsen agreed. (R. 902) The Court also discussed jury instructions and other pretrial matters in which Mr. Carlsen was allowed to fully participate. *Id.* None of the issues discussed in the Status Conference have a bearing on Palatial Living's motion for summary judgment. *Id.*

Moreover, the Court allowed Mr. Carlsen to participate fully by telephone. (R. 902) The Minutes of that conference also indicate that Carlsen actively participated in the hearing. *Id.* He, for instance, agreed to the date set by the Court for discovery cutoff. Interestingly, the Minutes also indicate that Palatial Living's attorney was unable to be present either in person or telephonically. *Id.* It is therefore difficult to understand how Carlsen, who participated in the conference, was prejudiced by the conference's location when Palatial Living's attorney was unable to participate at all.

Any error committed by Judge Hadfield in this context would also not have been obvious. The Court, after receiving Carlsen's Objections, agreed to reschedule the hearing and made accommodations that would allow Carlsen to appear at the hearing telephonically. Judge Hadfield could still hold the hearing outside the county in which the action was brought if the parties consented. *See* Utah R. Civ. P. 77(b). Carlsen also attended and participated in the conference telephonically. (R. 902) Given that the Judge made accommodations for Carlsen of which he would later avail himself, it would not have been obvious to Judge Hadfield that Carlsen did not consent to the hearing.

B. Any error in holding this hearing outside of Cache County was harmless because Carlsen actively participated and no adjudication occurred.

Carlsen was heard at the hearing, no rights were determined, and the outcome of this matter would have been the same regardless of the hearing. Regardless of whether or not the trial court erred in conducting the Status Conference in Brigham City, there are no facts in the record that would show Carlsen was prejudiced in any way because the Court held a status conference's location. Regardless of whether or not there was an error, to prevail in this appeal, Carlsen must show that there is a reasonable likelihood that summary judgment would have been granted if the status conference were held in Cache County. *See Jones v. Cyprus Plateau Min. Corp.*, 944 P.2d 357, 360 (Utah 1997) *citing Harline v. Barker*, 912 P.2d 433, 442 (Utah 1996) (an error is harmless unless there is a reasonable likelihood that the error affected the outcome of the lawsuit).⁴

The Minute Entry from the status conference indicates that Carlsen suffered no prejudice because the hearing decided no critical issues and Carlsen was able to participate. The Court, on January 6, 2005, converted the standard hearing into a telephonic one. (R. 900) Carlsen was therefore given the opportunity to advocate and protect his interests. (R. 902) He now fails to set how his telephonic participation prejudiced his rights in any way.

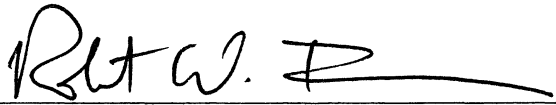
⁴ Carlsen also failed to allege prejudice in his opening brief and he has therefore waived the ability to raise that issue in his Reply. *Maack v. IHC Health Services, Inc.*, 2007 UT App 244, ¶ 30, 166 P.3d 631, *citing Brown v. Glover*, 2000 UT 89, ¶ 23, 16 P.3d 540. *See also Wilson v. Alaska Dept. of Corrections*, 127 P.3d 826, 833 n.41 (Ala. 2006) (noting that a *pro se* appellant waived his right to raise an issue in his Reply when he failed to address it in his opening brief).

CONCLUSION

Based on the foregoing, Palatial Living respectfully asks this Court to affirm the judgment of the First District Court granting summary judgment on Carlsen's counterclaim.

DATED this 10th day of December, 2007.

SNOW, CHRISTENSEN & MARTINEAU

By 
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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of Appellees were served on the 10 day of December, 2007, by U.S. Mail as follows:

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