

2008

William Campbell and Marjorie Campbell v. Christopher Stuhmer and Michelle Stuhmer : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WILLIAM CAMPBELL and MARJORIE
CAMPBELL, husband and wife,

Plaintiffs/Appellees,

vs.

CHRISTOPHER STUHMER and
MICHELLE STUHMER, as Trustees of the
Stuhmer Family Trust,

Defendants/Appellants.

REPLY BRIEF OF APPELLANTS

APPEAL NO. 20080295-CA

Appeal from the Third Judicial District Court, Summit County, State of Utah

The Honorable Bruce Lubeck, District Court Judge

Trial Court Case No. 030500815MI

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INTRODUCTION

The Stuhmers¹ appealed the trial court's ruling that denied awarding the Stuhmers' attorneys' fees on two grounds: (1) that the Stuhmers are entitled to attorneys' fees pursuant to the Declaration; and (2) that the Stuhmers are entitled to attorneys' fees pursuant to Utah Code Ann. § 78B-5-826² because the Campbells would have been entitled to attorneys' fees had they prevailed due to their status as Declarants because they were the Collisters' successor and/or assignee pursuant to Sections 2.3 and 9.1 of the Declaration.

With respect to the Stuhmers being entitled to fees under the Declaration, the plain language of the Declaration awards fees to the Declarants and their "successors" and "assigns." With the language being stated in the plural, fees should be awarded to the Stuhmers due to their status as "Declarants" and as "successors" and "assigns." (R.18, Exhibit C, p. and Exhibit "G" to the Addendum attached to the Stuhmers' initial appeal brief.)

The Campbells' opposition is based on three grounds: first, the Campbells assert that the Stuhmers are not entitled to fees because they are allegedly not Declarants under the Declaration. In making this argument, the Campbells rely on the definition of "successor" and the argument that if the terms of the Declaration were construed as the

¹ The Stuhmers' initial appeal brief listed the Stuhmers as appellees because the Stuhmers were so referenced in prior documents. With the dismissal of the Campbells' appeal, the Stuhmers are now Appellants.

² Formerly Section 78-27-56.5.

Stuhmers contend, the terms “Declarants” and “Owner” would be redundant because they would essentially have the same meaning. The Campbells’ construction of the terms “successors” is not appropriate, and even if it were, the Campbells do not contest the Stuhmers’ analysis with respect to the term “assigns,” which the Declaration establishes is a group to whom fees are awarded. There is no dispute that the term “assigns” applies to the Stuhmers. Therefore, the attorneys’ fee provision also applies to the Stuhmers who should be awarded their fees in defending this action.

Second, the Campbells claim that the court ruled that neither party was entitled to fees due to the overly litigious nature of the parties. The court did make some comments regarding the parties’ excessive briefing of certain matters, but in conjunction with the court’s ruling to deny fees, the court made no such finding that the Stuhmers were not entitled to fees on that basis. (R. 1329.) Furthermore, it was the Campbells who filed this action and amended claims while requesting that the Stuhmers multi-million dollar home be torn down due to the allegations that the roof was a few inches too high and the allegation that the home constituted two structures, in spite of the fact that the Stuhmers complied every step of the way with obtaining appropriate permits and approvals from the County and the Homeowners’ Association. (R. 1-15; 97-101; 245-257; 417-436.)

Third, the Campbells assert that the Stuhmers are not the prevailing parties because the Campbells prevailed on their claim regarding the no trespassing sign. However, the no trespassing sign issue was moot prior to the trial because the Stuhmers took down the no trespassing signs pursuant to the Campbells’ request. (R. 1403, pp.

623-637; 1096-1097.) The court nevertheless considered the minor trespassing sign issue and made a ruling that although the Stuhmers could put up signs warning of danger, they could not put up a sign that says “no trespassing.” (R. 1381.) In any event, the no trespassing sign claim was just a fraction of the case and the court expressly determined that the Stuhmers were the prevailing party. (R. 1382.)

ARGUMENT

I. THE STUHMERS ARE THE PREVAILING PARTY.

The Campbells assert that the Stuhmers were not necessarily the prevailing party because the Campbells succeeded on their claim regarding the impropriety of the no trespassing signs. The error in the Campbells’ assertion is easily established by the court’s own finding that the Stuhmers were the prevailing party. The judgment itself expressly states that “[t]he Stuhmers are also entitled to costs as the prevailing party. . . .” (R. 1382.)

The Campbells also assert that the court made an express ruling that the Stuhmers were not entitled to attorneys’ fees due to the litigious conduct of the parties. However, the court made no such ruling in connection with its decision to deny attorneys’ fees. The basis for the court’s determination that the Stuhmers were not entitled to attorneys’ fees in the court’s finding that the Stuhmers were not entitled to fees pursuant to the Declaration. (R. 1403, pp. 623-637; 1327-1329.)

An examination of the claims that the parties prevailed upon also clearly establishes that the Stuhmers were the prevailing party. The Stuhmers prevailed on the

Campbells' two claims that the Stuhmers' home should be torn down. Those claims were that: (1) the Stuhmers' home allegedly was too high; and (2) the Stuhmers' home allegedly constituted two structures. These issues involved the bulk of the case and requested potential costs to the Stuhmers of millions of dollars.

The no trespassing signs, on the other hand, involved a few signs that were approximately 2 feet by 3 feet, that were placed on the Stuhmers' property. The no trespassing signs were removed in a matter of minutes and were removed prior to trial. (R. 432; 1380; 1403, pp. 623-637; 1096-1097.) Pursuant to a request from Mrs. Campbell prior to the trial, the Stuhmers removed the no trespassing signs. (R. 1380; 1401, p. 92; 1403, p. 616; 1096-1097.) The Stuhmers informed the court that the issue was moot. (R. 1096-1097.) Nevertheless, the court ruled on the issue. (R. 1381.)

The prevailing party is defined as "[a] party in whose favor a judgment is rendered." A.K. & R. Whipple Plumbing & Heating v. Guy, 2002 UT App 73, ¶ 11, 47 P.3d 92 (quoting Black's Law Dictionary 1145 (7th ed. 1999)). In determining the prevailing party, the Court may employ a "flexible and reasoned" approach that includes the net judgment rule. See J. Pochynok Co., Inc. v. Smedsrud, 2005 UT 39, ¶ 10, 116 P.3d 353, 356. The net judgment rule determines the prevailing party by looking at which party receives the bigger judgment. Id. However, "rigid application of the net judgment rule can result in unreasonable awards of attorney fees," which "would deprive trial courts of their power to apply their discretion and common sense to this issue." See A.K. & R. Whipple Plumbing and Heating v. Guy, 2004 UT 47, ¶¶ 25-26, 94 P.3d at 277. The

“flexible and reasoned” approach avoids unreasonable awards in those instances.

Pochynok, 2005 UT 39, ¶ 10, 116 P.3d at 356. It “requires not only consideration of the significance of the net judgment in the case, but also looking at the amounts actually sought and then balancing them proportionally with what was recovered,” together with “additional common sense perspectives.” Whipple, 2004 UT 47, ¶ 26, 94 P.3d at 277 (internal quotation marks and citations omitted).

This case was primarily about the Campbells’ two claims that the Stuhmers’ home should be torn down because a portion of the roof was allegedly too high and because the home allegedly constituted two structures. (R. 1381.) The court ruled the Stuhmers were the prevailing party and the Campbells have not challenged the ruling establishing the Stuhmers as the prevailing party, but have instead mistakenly argued that both parties prevailed and the Stuhmers are not the prevailing party. “[T]here can be only one prevailing party.” Mountain States Broad. Co. v. Neale, 783 P.2d 551, 556 (Utah Ct. App. 1989). The prevailing party is the Stuhmers.³

II. THE STUHMERS ARE ENTITLED TO THEIR FEES PURSUANT TO THE DECLARATION.

In section 2.3 of the Declaration, which governs the Homeowners’ Association, the term “Declarants” is defined and that term identifies, by name, all the parties who initially established the Homeowners’ Association, and also identifies as “Declarants” all

³ The Campbells’ claims for injunctive relief related to the streambed were also unsuccessful and the Campbells received no damages from the jury related to the streambed. (R. 1381-1382.)

their "successors, mortgagees and assigns." (R. 18, Exhibit C, p. 4 and Exhibit "G" to the Stuhmers' Addendum.) Section 2.7 of the Declaration later defines the term "Owner" as the record owner or owners of any lot in the White Pine Ranches Subdivision. (Id.)

The Campbells argue that the Stuhmers are not entitled to attorneys' fees under the Declaration because the Stuhmers do not come within the classification of "Declarants." The Campbells claim that the Stuhmers are within the classification of the term "Owner" and that Owners are not identified by the Declaration as being entitled to attorneys' fees in disputes relating to the Declaration. The Campbells further claim that under the Stuhmers construction of the term "Declarants" the term "Declarants" and the term "Owners" would be synonymous and the Declaration would not have needed to make a distinction between the two. This argument is erroneous.

The term "Declarants" identifies specific individuals and their "successors, mortgagees and assigns." (R. 18, Exhibit C, p. 4 and Exhibit "G" to the Stuhmers' Addendum.) Each of these specifically named individuals will always be a Declarant because they are expressly defined as such. If one of those Declarants sells their property they would no longer be an "Owner" but would still be a "Declarant" and if they were forced to litigate some item related to the Declaration after they sold their property they would still be considered a Declarant and would still be entitled to fees. They would however, no longer fall within the classification of an "Owner" because they would no longer own the property. Therefore, an Owner and a Declarant are not entirely identical as the Campbells assert.

The Campbells also take issue with the fact that the Declaration expressly mentions that Declarants are entitled to attorneys' fees, but makes no mention of an award of fees to Owners. Because Owners are "successors" and "assigns" of the Declarants and therefore are also Declarants as defined in section 2.3 of the Declaration, while the Owners own the property, the Owners are already entitled to fees and making the additional express reference again to Owners also being entitled to fees would be redundant. Indeed, section 1.1 of the Declaration expressly provides that "Declarant Developers and Declarants are the Owners. . . ."

The Campbells have also attempted to distinguish the term "successors" in an effort to rebut the Stuhmers' claim that the Stuhmers are entitled to fees as a successor and/or assign of a Declarant. At the trial level, the Campbells cited to several definitions of "successor" from Webster's Dictionary, and from various Utah statutes. (R. 1308-1309.) The Campbells also cited to the "successor in interest" definition from the Ballentine's Law Dictionary. The Campbells cited such definitions for the purpose of showing the use of the term "successor." (R. 1308-1309.) As the Stuhmers pointed out in their reply memorandum to the trial court, it is inconceivable that the drafters of the Declaration intended to incorporate the definitions from two different dictionaries and several code provision when using the term "successor." (R. 1319.) The Stuhmers noted that the term "successor" has a common understanding as one who succeeds to the rights of another. (R. 1319.) Indeed, the general definition from the Webster Dictionary cited by the Campbells is that it is "a person or thing that succeeds, or follows, another. . . ."

(R. 1319.) The Campbells are now citing to yet another definition of the term “successor” from Black’s Law Dictionary, which was not previously cited to the trial court. (R. 1307-1309.) All of the Campbells’ attempted word-smithing does not change the general meaning of the term “successor, which applies in this case.

More importantly, although the Campbells have attempted to distinguish the term “successors,” the Campbells did not address the fact that Section 2.3 of the Declaration provides that the “assigns” of the Declarants also have the rights of the Declarants identified in Section 2.3 of the Declaration. The definition of the word “assign” in Black’s Law Dictionary, 8th Edition, is “See assignee.” The definition of “assignee” is “one to whom property rights or powers are transferred by another.” (R. 1320 and Exhibit “A” thereto.) The Campbells have not attempted to make a distinction regarding the word “assigns” which are also identified in section 2.3 as being entitled to attorneys’ fees. There is no dispute that the Stuhmers fit within the classification of an assign. Additionally, using the plural of the terms “successors” and “assigns,” establishes an intent for the provisions to apply to downline (multiple) successors and downline assigns. As a downline successor and assign, the Stuhmers are entitled to fees.

III. THE STUHMERS ARE ENTITLED TO FEES PURSUANT TO UTAH CODE ANN. § 78B-5-826.

Due to the fact that the Campbells are “successors” and “assigns” of the Collisters, who are expressly defined in the Declaration as “Declarants,” the Campbells would have

been entitled to their attorneys' fees had they prevailed, pursuant to Sections 2.3 and 9.1 of the Declaration and Utah Code Ann. § 78B-5-826. Section 2.3 provides:

2.3 Declarants: "Declarants" means Leon H. Saunders, Saunders Land Investment Corporation, a Utah Corporation, White Pine Enterprises, Robert Felton, FDIC in its Corporate Capacity as Purchaser of Certain Assets of Tracy Collins Bank & Trust, Stewart M. Collester & Johanna Collester as Trustees of the Collester Family Trust, White Pine Enterprises, James C. Bard, Donald Lewis Lappe & Alice Ann Lappe as Trustees of the Donald & Alice Lappe Family Trust, Howells Investment, Thomas H. Fey and Carolyn L. Fey, together with their successors, mortgagees and assigns and also, where appropriate includes those described herein as "Declarant Developers."

(R. 18, Exhibit C, p. 4 and Exhibit "G" to the Stuhmers' Addendum.) (Emphasis added.)

Section 9.1 of the Declaration provides as follows:

9.1 Enforcement and Remedies: The obligations, provisions, covenants, restrictions, liens and charges now or hereafter imposed by the provisions of this Declaration or any Amended Declaration shall be enforceable by Declarants, the Association, or any Owner of a Lot by any proceeding at law or in equity. If court proceedings are instituted in connection with the rights of enforcement and remedies provided in this Declaration, the Declarants or the Association shall be entitled to costs and expenses in connection therewith, including reasonable attorney's fees.

(Id.) (Emphasis added.)

Due to the fact that the Campbells would have been entitled to attorneys' fees pursuant to the Declaration if the Campbells had prevailed because the Stuhmers are the Collisters' "assigns" and "successors," the Stuhmers should be awarded fees pursuant to Utah Code Ann. § 78B-5-826, which provides:

A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the

promissory note, written contract, or other writing allow at least one party to recover attorney's fees.


This case was initiated by the Campbells due to their unhappiness with the positioning of the Stuhmers' home. In spite of the fact that Summit County and the HOA's Architectural Committee had approved the Stuhmers' plans (R. 1377), the Campbells filed this action and the Stuhmers were required to either hire counsel and incur substantial attorneys' fees in defending the Campbells' claims or concede the claims and allow their house to be torn down. In such a scenario, where the court has a means for awarding the Stuhmers' fees pursuant to Utah Code Ann. § 78B-5-826, "district courts should award fees liberally under Utah Code section [78B-5-826]", and the Stuhmers should be awarded their attorneys' fees. Bilanzich v. Lonetti, 160 P.3d 1041, 1046 ¶ 19 (Utah 2007).

CONCLUSION

For the foregoing reasons, the Stuhmers should be awarded their fees.

DATED this 24th day of August, 2009.

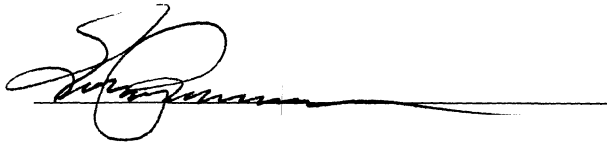
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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2009, I caused two (2) true and correct copies of the **REPLY BRIEF OF APPELLANTS** to be mailed by first class United States Mail, postage prepaid, to the following:

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A handwritten signature in black ink, appearing to read "Michael D. Zimmerman", is written over a horizontal line.