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Jon Triesault, Elizabeth Triesault, Roger Clive Baker
and Lynnette Jennifer Baker v. QMF, Inc., William
E. Casper, Jr., Shirley A. Casper, George G. Wright,
Jane C. Wright, et al., : Reply Brief

Utah Court of Appeals

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Richard D. Bradford; Bradford, Brady & Rasmussen; Attorneys for QMF, Inc. and Wrights; M. Dayle Jeffs; Jeffs & Jeffs; Attorneys for Caspers.

Leslie W. Slaugh; Howard, Lewis & Petersen; Attorneys for Appellants.

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UTAH COURT OF APPEALS
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IN THE COURT OF APPEALS
OF THE STATE OF UTAH

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DOCKET NO. 970274-CA

JON TRIESAULT, ELIZABETH
TRIESAULT, ROGER CLIVE BAKER
and LYNNETTE JENNIFER BAKER,

Case No. 970274-CA

Plaintiffs-Appellants,

vs.

QMF, INC., WILLIAM E. CASPER,
JR., SHIRLEY A. CASPER,
GEORGE G. WRIGHT, JANE C.
WRIGHT, et al.,

Defendants-Appellees.

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE ORDER OF DISMISSAL
OF THE FOURTH DISTRICT COURT OF UTAH COUNTY, UTAH
THE HONORABLE DONALD C. EYRE

LESLIE W. SLAUGH, for
HOWARD, LEWIS & PETERSEN
120 East 300 North
P.O. Box 1248
Provo, UT 84603

ATTORNEYS FOR APPELLANTS

RICHARD D. BRADFORD
BRADFORD, BRADY & RASMUSSEN, P.C.
389 North University Ave.
Provo, UT 84601

ATTORNEYS FOR QMF, INC. & WRIGHTS

M. DAYLE JEFFS
JEFFS & JEFFS, P.C.
90 North 100 East
Provo, UT 84606

ATTORNEYS FOR CASPERS

FILED

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M. DAYLE JEFFS
JEFFS & JEFFS, P.C.
90 North 100 East
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ATTORNEYS FOR CASPERS

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REPLY BRIEF OF APPELLANTS

RESPONSE TO STATEMENT OF FACTS

Caspers' Statement of Facts, adopted by Wrights, focuses on the propriety of the defendants' actions, and cites the facts most favorable to the defendants. The truth of those claims is not at issue at this stage of the litigation. "[S]tanding in no way depends on the merits" of the case. Warth v. Seldin, 422 U.S. 490, 500 (1975). "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Id., 422 U.S. at 501.

Defendants particularly emphasize their claim that all necessary authorizations for the plat change were obtained before Triesaults purchased their lot. (Caspers' brief 4-5.) The complaint alleges, however, that those authorizations, at least in the case of Bakers, were obtained by misrepresentations and other misconduct by Caspers and Wrights. (Amended Complaint ¶¶ 30.e, 35, 37 (R. 722-21), copy attached to plaintiffs' initial brief.)

Wright's charge that plaintiffs have mischaracterized George Wright's statements regarding funds from the sale of the new lot, and now claim that he said only part of the proceeds would be used for the benefit of the PUD. (Wright's brief 8.) Wright's brief cites to George Wright's deposition testimony. The complaint, however, alleges that "the proceeds" (i.e., all the proceeds) from the sale would be used for the PUD. (R. 725.) Even if Wright's testimony were controlling, plaintiffs would still have a valid claim, for Wright admitted that he did not perform all the landscaping he agreed to do in exchange for the sale of the lot. (R. 164-63.)

ARGUMENT

POINT I: PLAINTIFFS' BRIEF PRESERVED THEIR CLAIMS FOR PERSONAL DAMAGES.

Wright's assert that Triesaults' personal claims against George Wright relating to "picking cherries, Forest Service boundaries, storage buildings, and the access road . . . were not preserved on appeal or addressed in Appellants' brief." (Wright's brief 11.) This statement is just plain wrong. Point I of Triesaults' brief

focuses on those very claims. The paragraph of the complaint containing those allegations was quoted on page 12 of Triesaults' brief.

POINT II: PLAINTIFFS HAVE STANDING.

A. Plaintiffs' interests were adverse to defendants.

Kennecott Corp. V. Salt Lake County, 702 P.2d 451 (Utah 1985), states two requirements for standing: "that (1) the interests of the parties be adverse, and (b) the parties seeking relief have a legally protectible interest in the controversy." 702 P.2d at 454. The evident purpose of the first requirement is to prevent collusive suits. There must be a genuine controversy. In an effort to show that this element is not satisfied, however, Caspers argue the merits of the case. Caspers appear to assert that plaintiffs did not have an adverse interest because plaintiffs would lose. As stated above, "standing in no way depends on the merits" of the case. Warth v. Seldin, 422 U.S. 490, 500 (1975).¹ The allegations of the complaint establish that adversity exists.

In addition, a review of Caspers' argument reveals a misunderstanding of the issue before this Court. This case was decided by summary judgment solely on standing. The merits of the case have never been properly before the trial court for resolution. It is therefore improper to argue that Triesaults should have realized there was going to be a change in the plat, or that Wright was acting on his own and not as an officer of QMF. These are issues

¹Warth was cited approvingly by the Utah Supreme Court in Jenkins v. Swan, 675 P.2d 145, 1149 (Utah 1983).

which may arise at trial, but their resolution is not important at this stage of the litigation. Plaintiffs alleged that Wright was acting on behalf of QMF and Casper. (E.g., Amended Complaint ¶ 14 (R. 727).) That allegation must be accepted as true by this Court.

B. Plaintiffs have a legally protectible interest.

Defendants argue that only the executive committee would have standing to assert claims on behalf of the homeowners. (Caspers' brief 12.) This argument ignores (1) the fact that certain of plaintiffs' claims could not have been raised by the executive committee and (2) the principle that the existence of standing in the executive committee does not preclude individual homeowners from having standing.

Bakers' claim, that Bakers approval of the amended plat was induced by Wright's false representations to Bakers, is a claim that only Bakers could bring. Similarly, only Triesaults had standing to pursue their claim that Wright fraudulently induced Triesaults' signatures on a quit claim deed. Plaintiffs, and only plaintiffs, had standing to bring these claims.

The authority granted to the executive committee did not preclude plaintiffs from acting. The PUD agreement does state that the executive committee "shall" conduct the business of the association, but that does not preclude individuals from also acting to protect their own interests. The term as used in the PUD agreement is permissive: it grants authority to the executive committee to act. Nothing in the PUD agreement precludes individuals from also acting where such individuals have a sufficient

personal interest. See Hansen v. Utah State Retirement Board, 652 P.2d 1332, 1342 (Utah 1982) (Crockett, J., concurring) (provision that attorney general "shall" be the legal advisor of state officers was permissive, not mandatory); Bird & Jex Co. v. Funk, 96 Utah 450, 85 P.2d 831, 836-37 (1939) (statute providing that beer advertising "shall be permitted under such regulation as the commission may make" was permissive, not mandatory).

The court in Brickyard Homeowners' Assoc. Mgmt Comm. v. Gibbons Realty Co., 668 P.2d 535 (Utah 1983), held that the statute under consideration there granted standing to the management committee "without limiting the rights of any unit owner to initiate suit on his own behalf." 668 P.2d at 538. The same result should obtain here. Plaintiffs had standing to pursue their claims because plaintiffs' interests were adverse to defendants, and plaintiffs had a legally protectible interest in the controversy.

**POINT III: PLAINTIFFS' MINORITY POSITION DOES
NOT DEFEAT THEIR CLAIM.**

Point III of plaintiffs' initial brief, Point III of Caspers' brief, and Point IV of Wrights' brief discuss whether there was a proper vote of the homeowners. To properly evaluate this issue, it is important to review how it arose.

"Mapleton City required QMF, Inc. to obtain authorization of all the lot owners in order to change the plat." (Caspers' brief at 4, citing R. 505; emphasis added.) Later, "the title company requested that all lot owners sign a quit-claim deed conveying

property to QMF, Inc. so the amended plat could be reconveyed in a proper manner to all of the lot owners." (Caspers' brief at 5, citing R. 439; emphasis added.) Bakers signed the initial authorization given to Mapleton City, and Triesaults and Bakers signed the quit claim deed given to the title company. Plaintiffs' complaint alleges those signatures were obtained by fraud.

As a claimed defense to plaintiffs' lawsuit, defendants argued that any fraud was harmless because plaintiffs' signatures were not necessary--the owners of the eight other lots all supported George Wright's actions. The PUD agreement and the condominium statutes each require only a three-quarter majority for plat amendments. Eight lots is greater than a three-quarter majority; therefore, argue defendants, the plat could have been changed without plaintiffs' consent and any fraud in inducing that consent was harmless.

The trial court adopted defendants' argument. The court stated:

Although no official vote was taken, the Court received affidavits from eight of the ten property owners This Court finds that, because at least three-fourths of the property owners agreed to the property disposal, the Court accepts the affidavits as affirmative votes which effectively bind all property owners, including the Plaintiffs.

(R. 901.)

To challenge this "finding" of the trial court, plaintiffs argued in their brief that "votes" can only be taken in a meeting. Caspers now claim this argument was not timely raised. It was Caspers, however, who raised the argument below. Plaintiffs were

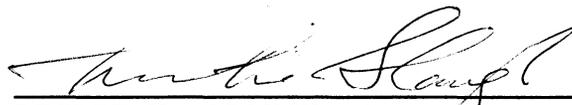
not required to "raise" the argument. In any event, the trial court's decision shows that plaintiffs' arguments were made and considered by the court below.

The discussion about votes is, however, a red herring. Plaintiffs made the argument only to respond to the trial court's decision. The real issue before this Court is standing, not the merits of the lawsuit per se. Regardless of whether Mapleton City or the title company needed to require approval by all lot owners, the fact is the city and title company did require such unanimous approval. Plaintiffs have alleged fraudulent procurement of their signatures. This Court is required to accept that allegation as true. Plaintiffs, and only plaintiffs, clearly have standing to pursue those claims.

CONCLUSION

Plaintiffs had standing, both for private wrongs and for wrongs to all homeowners in the PUD. Plaintiffs did not waive their claims. The dismissal of plaintiffs' complaint should be reversed.

DATED this 22nd day of December, 1997.



LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellants

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to the following, postage prepaid, this 22nd day of December, 1997.

Richard D. Bradford, Esq.
Bradford, Brady & Rasmussen
389 North University Avenue
P. O. Box 432
Provo, UT 84603

Thomas W. Seiler, Esq.
Robinson, Seiler & Glazier
80 North 100 East
P. O. Box 1266
Provo, UT 84603

M. Dayle Jeffs, Esq.
Jeffs & Jeffs
90 North 100 East
P. O. Box 888
Provo, UT 84603