

2008

Kaylnn Jones, Charles Jones, CJ's Rentals v. Tammie Riche, Paul Riche : Brief of Appellant

Utah Court of Appeals

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Don M. Torgerson; Chiara and Torgerson, PLLC; Attorney for Appellants.

Sonny J. Olsen; Ascione Heideman and McKay, LLC; Attorney for Appellees.

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IN THE UTAH COURT OF APPEALS

MYLNN JONES and CHARLES
JONES, dba CJ'S RENTALS,

Plaintiffs/Appellants,

v.

TAMMIE RICHE and PAUL RICHE,

Defendants/Appellees.

Appellate No: **20080464-CA**

APPELLANTS' INITIAL BRIEF

DIRECT APPEAL FROM FINAL ORDERS AWARDING
ATTORNEY'S FEES ENTERED IN THE SEVENTH JUDICIAL DISTRICT
COURT, CARBON COUNTY, BY JUDGE DOUGLAS B. THOMAS.

Sonny J. Olsen
Heugly & Olsen, PLLC
1375 South 100 East
Price, Utah 84501

Don M. Torgerson #10318
Samuel P. Chiara #7829
CHIARA & TORGERTSON, PLLC
98 North 400 East
PO Box 955
Price, Utah 84501
Telephone: (435) 637-1542
Facsimile: (435) 636-0138

Attorney for Appellants

UTAH APPELLATE COURTS

ORAL ARGUMENT REQUESTED

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CHIARA & TORGERSO**N, PLLC**
98 North 400 East
PO Box 955
Price, Utah 84501
Telephone: (435) 637-1542
Facsimile: (435) 636-0138

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JURISDICTION AND NATURE OF PROCEEDINGS

Kalynn and Charles Jones appeal from an *Order Re: Attorney Fees* entered on March 20, 2008, and from the final order and judgment entered by Judge Douglas B. Thomas on April 29, 2008. This Court has jurisdiction by assignment from the Utah Supreme Court under Utah Code § 78A-4-103(2)(j).

ISSUE ON APPEAL AND STANDARD OF REVIEW

Issue: The trial court disregarded the parties' contract allowing attorney's fees against the "defaulting party" and ruled that the reciprocal attorney's fee provision of Utah Code § 78B-5-826 superseded the parties' agreement and allowed attorney's fees to the "prevailing party". Did the trial court incorrectly disregard the contract and misinterpret the statute?

Where Preserved: Plaintiffs' Objection and Motion to Strike: Affidavit of Sonny Olsen for Attorney's Fees (R113); Notice of Appeal (R142).

Standard of Review: Attorney fee decisions that involve questions of law or statutory interpretation are reviewed for correctness.¹

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following statute is of central importance to this appeal:

78B-5-826. Attorney fees -- Reciprocal rights to recover attorney fees.

A court may award costs and attorney fees to either party that prevails in a civil action based upon any promissory note, written contract, or

¹ *A.K. & R. Whipple Plumbing and Heating v. Guy*, 94 P.3d 270, 272 (Utah 2004). See also *Bilanzich v. Lonetti*, 160 P.3d 1041, 1044 (Utah 2007).

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 fees.

Utah Code § 78B-5-826 (2008)

STATEMENT OF THE CASE AND FACTS

On January 9, 2007, Appellants Charles and Kalynn Jones (“Jones”) filed their complaint against Paul and Tammy Riche (“Riche”) seeking damages for breach of contract and waste arising out of a landlord/tenant rental contract (R001). On January 22, 2007, Riche filed their answer and counterclaim to the Jones complaint (R012). Riche’s answer included fourteen “affirmative” defenses and their counterclaim consisted of two causes of action against Jones---fraud and unjust enrichment (R012). On February 13, 2008, a jury trial was conducted on all of Jones’s causes of action and all of Riche’s defenses and counterclaim causes of action (R078). The jury returned a special verdict in favor of Jones on all counts and determined Jones’s damages to be \$1,662.00 (R099).

The jury determined that Riche had breached the parties’ contract and had committed waste (R099). The jury also determined that the acts of waste committed by Riche were willful (R099). Additionally, the jury determined that Riche’s counterclaims were unsupported, finding no liability for fraud or unjust enrichment against Jones (R099).

On March 6, 2008, Jones objected to Riche’s request for attorney’s fees and the trial court’s proposed award of attorney’s fees to Riche (R113). The objection was based upon the following: 1) the parties contract required an award of

attorney's fees against the "defaulting party," 2) the trial court did not have discretion to disregard the parties' contract in awarding attorney's fees, and 3) case law relied upon by the trial court when contemplating an award of attorney's fees to Riche did not apply to this case (R113).

On March 17, 2008, the trial court entered its order awarding attorney's fees to Riche (R134). The trial court relied upon Utah Code § 78-27-56.5 (recodified as 78B-5-826) and determined that the statute "allows the court to award attorney's fees to the prevailing party when the action is based on a written contract that contains an attorneys fees provision" (R134). The trial court then determined that, although Riche had lost each of their causes of action and Jones had prevailed on their complaint and been awarded a money judgment, that the Riches were the "prevailing party" because Jones had not recovered the full amount of damages requested at trial (R134).

On April 29, 2008, the trial court entered its final order and judgment, including the award of attorney's fees (R139, R141). Notice of Appeal was timely filed on May 23, 2008 (R142). The Utah Supreme Court transferred the case to the Court of Appeals.

SUMMARY OF ARGUMENT

The trial court erred, as a matter of law, by failing to award attorney's fees in strict accordance with the contractual language of the parties' written contract. The jury determined that Riche breached the contract and willfully committed waste to the leased premises. Under the contract, the trial court was

required to award attorney's fees, if any, against Riche as the "defaulting party," and the trial court refused to do so. Instead, the trial court awarded attorney's fees against Jones in contravention of the plain contract language.

The trial court erred by applying Utah Code § 78B-5-826 in this case. The statute authorizes a reciprocal right to attorney fees in one-sided contracts where provision is made for attorney fees to only one party. However, in this case, the trial court was obligated to look first to the terms of the written contract and strictly enforce the parties' agreement. The reciprocal right to attorney's fees was never at issue in this case because the contract language applied equally to both parties. Moreover, the trial court plainly misinterpreted the language of the statute by ruling that the statute allowed the court to disregard the parties' contract and award attorney's fees under a "prevailing party" standard in all cases.

Finally, the trial court erred by ruling that Riche was the prevailing party where Riche lost each cause of action and affirmative defense presented to the jury and where Jones prevailed on all causes of action pleaded in the Complaint.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT RULED THAT § 78B-5-826 SUPERSEDED THE NEGOTIATED TERMS OF THE PARTIES' CONTRACT.

A. Attorney's fees must be awarded in strict accordance with the terms of the contract if a bilateral contract provision existed between the parties.

Attorney's fees in Utah are awarded only as a matter of right that arises from a contract or statute.² Where fees are provided for by contract, they are allowed only in strict accordance with the terms of the contract.³ Moreover, when authorized by contract, attorney's fees are not subject to an equitable standard of evaluation by the court because they are awarded as a matter of legal right.⁴ Accordingly, since the right is contractual, the court does not have the same equitable discretion to deny attorney's fees as it does when applying a statute that allows for discretion.⁵ Therefore, the provisions in contracts that allow for attorney's fees "...should ordinarily be honored by the courts."⁶

In *Foote*, the Utah Supreme Court interpreted the clause in the parties' contract providing that "the defaulting party shall pay all costs and expenses, including reasonable attorney's fee, which may arise or accrue...in pursuing any remedy provided...by applicable law."⁷ The Court held that under the language of that particular contract, the amount of plaintiff's recovery in the case was

² *Foote v. Clark*, 962 P.2d 52, 54 (Utah 1998).

³ *Id.*

⁴ *Cobabe v. Crawford*, 780 P.2d 834, 836 (Utah Ct.App. 1989).

⁵ *Id.*

⁶ *Saunders v. Sharp*, 840 P.2d 796, 809 (Utah Ct.App. 1992).

⁷ *Foote* at 54.

irrelevant and the particular contract did not require any evaluation of the parties' success in the action brought to remedy a default.⁸ Instead, the Court expressly rejected the type of analysis utilized by the trial court in this case and advised that the "sole criterion for the plaintiff to obtain attorney fees ...is to show default by the other contract party."⁹

Importantly, in that case, the trial court found no compensable damages to plaintiffs from the breach of contract and awarded only \$100.00.¹⁰ On appeal, the Supreme Court held that \$100.00 was not nominal damages and upheld the award of attorney's fees.¹¹ The Court explained that nominal damages are a trivial sum awarded to a plaintiff whose legal rights were invaded but who had not proven any actual damages and expressly held that \$100.00 was not a nominal sum.¹² The Court also reaffirmed the purpose of awarding attorney's fees----"to reasonably compensate counsel for their time reasonably expended in pursuing the underlying case *in accordance with the authorizing contract...*"¹³

In this case, the parties' lease agreements utilize the same "defaulting party" language as *Foote*. Both lease agreements provide:

"In the event of default by either party under this Agreement, the defaulting party shall pay all costs and expenses of enforcing the

⁸ *Id.*

⁹ *Id.* at 54-55.

¹⁰ *Id.* at 57-58.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 56 (Emphasis Added).

same, including reasonable attorney's fees incurred, whether or not suit has been filed and whether incurred for or after judgment."¹⁴

The jury specifically determined that Riches were in breach of contract and had committed waste in violation of the contract--- twice finding that they were the "defaulting party" for purposes of the contract. Jones, on the other hand, were not a "defaulting party" in this case. Instead, Jones prevailed on each of their causes of action and also prevailed on each of Riche's causes of action. Jones was ultimately awarded a compensatory judgment against Riche in the amount of \$1662.00---far in excess of the \$100.00 discussed in *Footte*.

In virtually all respects, the important analysis for this case is precisely the same as that in *Footte*. The contract authorizes an award of attorney's fees against the "defaulting party" which, according to the jury, is Riche. Significantly, even though a large compensatory damage award was determined by the jury in this case, the ultimate damages awarded is irrelevant because the contract does not require---or even permit---such an evaluation. Instead, the only criterion required for Jones to obtain attorney's fees is a finding that Riche defaulted and the jury has made that determination. The trial court plainly erred by disregarding the language of the parties' contract and refusing to award attorney's fees in favor of Jones. The award of attorney's fees against Jones was even more misdirected because Jones was never a "defaulting party" under the contract.

¹⁴ R158 Lease Agreements; R001 at Exhibit "A" paragraph 20 and Exhibit "B" paragraph 20;

Jones had a contractual legal right to an award of attorney's fees after the jury determined that Riche was in default. The trial court could not refuse to honor that contractual right and the ruling should be reversed.

B. Utah Code § 78B-5-826 applies only after a determination that a contract unilaterally awards attorney's fees----it does not supersede the parties' agreement in every case.

In awarding attorney's fees to Riche, the trial court deviated from established precedent in two ways. First, the trial court attempted to exercise equitable authority to adopt the "flexible and reasoned approach" to awarding attorney's fees in this case where only one party was successful on its claims. Second, the court wholly disregarded the parties contract and ruled (albeit by incorrectly stating the statutory language), that the reciprocal attorney's fee statute superseded the contract language and converted the contractual language to a "prevailing party" analysis in all cases.

1. The "flexible and reasonable approach" for attorney's fees is not controlling law in this case.

In *Whipple Plumbing and Heating v. Guy*, the Utah Supreme Court evaluated contract language involving the term "successful party" to determine if "successful party" was the same as "prevailing party."¹⁵ However, the facts of that case and its predecessors were unique. All cases involved multiple parties and multiple claims. Importantly, in all cases, multiple parties prevailed on at least

¹⁵ *Whipple Plumbing and Heating v. Guy*, 94 P.3d 270 (Utah 2004).

some of their claims.¹⁶ Accordingly, the Utah Supreme Court was tasked to determine how to allocate attorney's fees in cases where there were multiple winners.

Whipple is not factually similar to this case. Unlike *Whipple*, in this case, only Jones had success on the claims. Admittedly, Jones recovered less at trial than requested of the jury. However, a significant compensatory judgment was still awarded. The recovery of less than the amount requested may be important when determining what constitutes a reasonable attorney's fee for Jones, but it was unreasonable for the trial court to go so far as to award fees to Riches when they lost all claims.

2. The reciprocal attorney's fee statute does not apply.

The trial court ruled that despite the parties' contract, Utah Code § 78B-5-826 "allows the court to award attorney's fees to the prevailing party when the action is based on a written contract that contains an attorneys fees provision."¹⁷ The trial court's written ruling clearly misstates the language of the statute by failing to acknowledge that the statute merely creates a "reciprocal" right of recovery and that the language specifically applies to contracts where "at least one party" is authorized by contract to recover attorney's fees. Importantly, the courts have repeatedly interpreted the statute to apply only in cases of one-sided contract provisions.

¹⁶ *Id.*

¹⁷ R134.

Notably, the Utah Supreme Court analyzed the statute in this manner by looking first at the contract to determine whether a contracting party had a contractual right to recover attorney's fees.¹⁸ In *Bilanzich*, the Court first determined that Bilanzich had no contractual right to attorney's fees because the contract provided only for fees to the opposing party in the event of a lawsuit.¹⁹ Only after that determination was made did the court turn to the reciprocal attorney fee statute. Importantly, the Court also reviewed the policies and pointed out that the legislative intent of the statute was to "...provide a level playing field for parties to a contractual dispute" by allowing both parties to recover and to remedy the risks of uneven litigation created by adhesion-type contracts.²⁰ Clearly, the statute was designed for cases where only one side would benefit from a contract clause in the event of litigation---and the courts have uniformly interpreted the statute to apply only in cases such as that.

In this case, the attorney's fee provision was plainly bilateral and applied equally to both parties. The trial court's determination that the statute supersedes the contract language to apply a prevailing party standard in all contracts is in contravention of this Court's prior rulings and the intent of the statute. To adopt the trial court's analysis would be to nullify all contractual provisions relating to

¹⁸ *Bilanzich v. Lonetti*, 160 P.3d 1041, 1045 (Utah 2007).

¹⁹ *Id.*

²⁰ *Id.* at 1046.

attorney's fees by forcing a prevailing party analysis in all cases and there is no legal authority supporting the trial court's ruling.

C. Riches were not the prevailing party in this case even under the trial court's misinterpretation.

The jury specifically determined that Riches were in breach of contract and had committed waste. The jury further determined that none of Riche's causes of action were supported against Jones. Despite those determinations, the trial court determined that Riche was the "prevailing party" because Jones did not recover all of the damages requested at trial. The trial court's ruling on this issue is absurd.

In analyzing the prevailing party standard, the Utah Supreme Court adopted prior case analysis stating, "...determining the prevailing party for purposes of awarding fees can oftentimes be quite simple...[w]here a plaintiff sues for money damages, and plaintiff wins, plaintiff is the prevailing party; if defendant successfully defends and avoids adverse judgment, defendant has prevailed."²¹

Despite the straightforward analysis that would have easily applied to this case, the trial court confused the group of cases, including *Whipple*, where multiple claims were maintained by all parties and all parties had some measure of success on their claims.²²

In this case, however, only Jones prevailed. Although the trial court minimized Riche's failure to prosecute or support their counterclaim at trial, the

²¹ *R.T. Nielson Co. v. Cook*, 40 P.3d 1119, 1126 (Utah 2002).

²² R134 at paragraph 3.

fact that the Riche counterclaims were presented to the jury is significant. Riche's total failure of proof on their own claims certainly does not aid them to become the prevailing party.

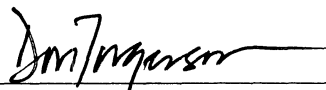
Accordingly, even under the prevailing party standard, the trial court ruled incorrectly.

CONCLUSION

Appellants respectfully request that this Court reverse the trial court's award of attorney's fees and remand this case to the trial court with instructions to enter an award of attorney fees against Riche and in favor of Appellants.

Appellants also request their costs and attorney's fees on appeal.

SUBMITTED this 3rd day of November, 2008.


By: 
Don M. Torgerson
Attorney for the Appellants

CERTIFICATE OF SERVICE

On the 3 day of November, 2008, I served two copies of the foregoing *Appellant's Brief* on all interested parties as follows:

Sonny J. Olsen
Heugly & Olsen, PLLC
Attorney for Appellees
1375 South 100 East
Price, Utah 84501

☐ By Hand
☒ By First Class Mail
☐ By Facsimile Transmission

By: 
Don Torgerson