

1997

Wardley Corporation, Plaintiff, Appellee and Cross-Appellant, v. Grant Welsh, Defendant and Appellant : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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SECRET NO. 970401-CA

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

WARDLEY CORPORATION,

Plaintiff, Appellee and
Cross-Appellant,

v.

GRANT WELSH,

Defendant and Appellant.

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970401-CA
Appeal No. 970074

Priority No. 15

REPLY BRIEF OF APPELLEE AND CROSS-APPELLANT
TO RESPONSE OF APPELLANT ON ISSUES RAISED BY CROSS-APPEAL

APPEAL FROM FINAL JUDGMENT ENTERED BY THE THIRD JUDICIAL
DISTRICT COURT, DIVISION II, SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE ROBIN W. REESE PRESIDING

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	:	
v.	:	Priority No. 15
	:	
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	:	
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TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u>	ii
CASES	ii
STATUTES, RULES AND REGULATIONS	ii
<u>INTRODUCTION</u>	1
<u>SUMMARY OF ARGUMENTS</u>	1
<u>ARGUMENT</u>	2
I. THE CONTRACT, BY ITS CLEAR TERMS, PROVIDES FOR THE RECOVERY OF ATTORNEYS' FEES BY THE PREVAILING PARTY IN AN ACTION ARISING OUT OF THE CONTRACT	2
II. THE TRIAL COURT CORRECTLY HELD THAT THE PARTIES PRODUCED NO EXTRINSIC EVIDENCE ON THE INTENT OF THE PARTIES RELATING TO THE ATTORNEYS' FEE PROVISION	3
III. THE CONTRACT SHOULD PROPERLY BE CONSTRUED AGAINST WELSH AS THE DRAFTER	6
IV. OTHER JURISDICTIONS HAVE PROPERLY AWARDED ATTORNEY'S FEES TO THIRD-PARTY BENEFICIARIES	9
<u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

CASES

<u>Caldwell v. Consolidated Realty & Mgmt. Co.</u> , 668 P.2d 284 (Nev. 1983)	6
<u>Craig Taylor Equipment v. Pettibone Corp.</u> , 659 P.2d 594 (Alas. 1983)	6
<u>Estate of Walker</u> , 743 P.2d 191 (Utah 1987)	8
<u>Golden West Insulation v. Stardust Investment Corp.</u> , 615 P.2d 1048 (Or. App. 1980) ..	9
<u>In re Estate of Bartel</u> , 776 P.2d 885, 886 (Utah 1989)	8
<u>Interwest Construction v. Palmer</u> , 923 P.2d 1350 (Utah 1996)	8
<u>Jacobs v. Hafen</u> , 875 P.2d 559 (Utah App. 1994)	8
<u>National Indemnity Co. v. St. Paul Insurance Companies</u> , 724 P.2d 578 (Ariz. App. 1985)	9
<u>Ron Case Roofing & Asphalt v. Blomquist</u> , 773 P.2d 1382 (Utah 1989)	5
<u>Trolley Square Associates v. Nielson</u> , 886 P.2d 61 (Utah App. 1994)	5, 6
<u>Wilburn v. Interstate Elec.</u> , 748 P.2d 582 (Utah App. 1988)	6

STATUTES, RULES AND REGULATIONS

UTAH CODE ANN. § 78-27-56.5	9, 10
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INTRODUCTION

This brief is submitted by Appellee and Cross-Appellant Wardley Corporation (hereinafter “Wardley”) in reply to the response of Appellant Grant Welsh (hereinafter “Welsh”) on the issues presented by Wardley’s cross-appeal relating to the trial court’s denial of Wardley’s attorney’s fees. The jurisdiction, issues on cross-appeal, determinative statutes and authority, statement of the case and statement of facts have all been previously set forth in Wardley’s Brief of Appellee and Cross-Appellant, currently on file herein, and are incorporated herein by this reference.

SUMMARY OF ARGUMENTS

The Contract at issue herein provides, “In any action arising out of this contract, the prevailing party should be awarded its attorney’s fees.” As this is an action arising out of the contract, and Wardley is the prevailing party, it follows that Wardley should properly be awarded its attorney’s fees based upon this unambiguous contractual provision. The trial court, however, determined that the Contract was not clear on whether Wardley, as a named third-party beneficiary, could recover under this provision. Since the rights of a third-party beneficiary are determined by the intentions of the contracting parties, the trial court sought to determine those intentions.

After determining that the Contract was not clear, the court further determined that no extrinsic evidence had been produced at trial regarding the parties’ intentions as to

Wardley's recovery of attorney's fees. Welsh claims that evidence of intent was provided by a brief segment of his trial testimony wherein he stated that he and Leon Peterson, the other signatory party to the Contract, never had any conversations in relation to the applicability of the attorney's fee provision to Wardley. Non-existent conversations, however, do not provide evidence of intent. Since no extrinsic evidence of the parties' intentions were produced at trial, well-established contract law requires that the Contract be construed against Welsh as a drafter of the contract. Further, other neighboring jurisdictions have allowed recovery of attorney's fees by a third-party beneficiary of a contract under a similar contractual provision.

ARGUMENT

I.

THE CONTRACT, BY ITS CLEAR TERMS, PROVIDES FOR THE RECOVERY OF ATTORNEYS' FEES BY THE PREVAILING PARTY IN AN ACTION ARISING OUT OF THE CONTRACT

The contract which is the subject hereof contains the following provision: "In any action arising out of this contract, the prevailing party shall be entitled to costs and reasonable attorneys' fees." (R. at 4.) In determining whether this provision only applies to signatory parties to the Contract, it is helpful to consider other provisions of the Contract. Notably, the signatory parties are repeatedly referred to throughout the Contract as "Buyer" and "Seller." Yet, the provision relating to attorney's fees makes no reference to the Buyer

and Seller, which easily could have been done, as evidenced by numerous other provisions in which such a distinction is made. Further, the Contract itself does not limit recovery of attorneys' fees to issues involving the Buyer and Seller. Rather, the contract entitles the **prevailing party in any action arising out of the contract** to its attorneys' fees and costs. Wardley is a prevailing party, this is an action arising out of the Contract, and Wardley is entitled to its attorney's fees herein. Construing the contract to limit attorneys' fees only to the signatory parties not only is contrary to the express contract wording itself but, also, adds provisions and limitations to the Contract which were not included by the contracting parties.

II.

THE TRIAL COURT CORRECTLY HELD THAT THE PARTIES PRODUCED NO EXTRINSIC EVIDENCE ON THE INTENT OF THE PARTIES RELATING TO THE ATTORNEYS' FEE PROVISION

Following the trial, the Court issued Supplemental Findings of Fact and Conclusions of Law, which were drafted by the Court itself and which address the sole issue of the application of the contract's attorney's fee provision to Wardley as a named third-party beneficiary. (R. at 477-78.) The Court found, "There was no evidence at the trial on the application of the attorney's fee provision to the plaintiff." (R. at 478.) Welsh's Reply Brief claims that such a finding was erroneous based upon a brief segment of Welsh's trial testimony. Examination of this testimony, however, reveals that the testimony provides no

evidence whatsoever of the parties' intentions relating to attorney's fees. The trial testimony is as follows:

Q. Grant, when you signed Defendant's Exhibit 2, the contract (unintelligible) with Leon Peterson, before you signed that, the very next meeting that you had with him, did you and he have any conversation about whether or not either one of you had intended that Wardley get attorneys fees if they had to sue for their commission?

A. No discussion whatsoever.

.....

Q. . . . [D]id you have any conversation with Mr. Peterson at any time other than the time you signed the agreement concerning whether or not Wardley would have an entitlement to attorneys fees if they didn't get their commission?

A. No.

Q. Was it ever your intent in signing that agreement that if Wardley didn't get their attorneys fees they would be able to collect--or didn't get their commission, they would be able to collect--

.....

A. No.

(R. 717-19).

Significantly, the first and second questions constitute no evidence of the contracting parties' intent as to attorneys' fees to a third-party beneficiary. To the contrary, this testimony merely states that the parties never discussed their intentions relating to this contractual provision, providing no evidence either way on this issue. Non-existent conversations provide no evidence of intent. It follows that the court must take the next step,

beyond a consideration of extrinsic evidence, to interpret the contract. As set forth below, under well-established contract law, the next step to be taken by the Court is to construe the contract against its drafter. *See, Trolley Square Associates v. Nielson*, 886 P.2d 61, 64 (Utah App. 1994).

The third question asked in this segment of testimony is incomplete. Even with the after-the-fact, self-serving statement, Welsh tried to second guess the question being asked by his attorney and did not even let him finish the question, resulting in a meaningless question without any probative value as to the parties' intentions. Significantly, this small segment of testimony is the only "evidence" that Welsh points to as to the parties' intentions. This excerpt, though, does not clarify or in any way evidence the parties' intent of the parties as to Wardley's attorneys' fees.

In interpreting a contract, the court first looks to the "four corners of the agreement to determine the intentions of the parties. The use of extrinsic evidence is permitted only if the document appears to incompletely express the parties' agreement or if it is ambiguous in expressing that agreement." *Ron Case Roofing & Asphalt v. Blomquist*, 773 P.2d 1382, 1385 (Utah 1989) (citations omitted.) Even if the Court properly determined that the contract was ambiguous on the issue of awarding attorney's fees to a prevailing third-party beneficiary, the parties' intentions were not clarified by extrinsic evidence, and accordingly, the court must interpret the contract against Welsh as the drafter "If a contract is ambiguous,

it will be construed against the drafter if extrinsic evidence fails to clarify the intent of the parties.” Trolley Square Associates v. Nielson, 886 P.2d 61, 64 (Utah App. 1994); *see also*, Wilburn v. Interstate Elec., 748 P.2d 582, 585 (Utah App. 1988).

III.

THE CONTRACT SHOULD PROPERLY BE CONSTRUED AGAINST WELSH AS THE DRAFTER

When the trial court was unable to determine the parties’ intent from extrinsic evidence, the Contract, and specifically the provision relating to attorneys’ fees, should have been strictly construed against Grant Welsh as drafter of that Contract. Id. Although Welsh argues that the Contract was a form contract and, therefore, he was not the drafter of that instrument, this position is contrary to well-established contract law. “Form contracts are to be construed against the furnishing party.” Craig Taylor Equipment v. Pettibone Corp., 659 P.2d 594, 597 (Alaska 1983). “Any ambiguity in a written contract is to be construed against the party who prepared the agreement **or selected the language used.**” Caldwell v. Consolidated Realty & Mgmt. Co., 668 P.2d 284, 286 (Nev. 1983). (Emphasis added.) Where a party has used a form contract, the contract shall be strictly construed against that party as the author of the agreement. Id. As Welsh himself alleges in his Reply Brief, “[T]he ambiguous language concerning the right of a party to recover attorneys fees was not drafted by Welsh at all. It was part of the printed form **used by both Welsh and Leon Peterson in framing the transaction.**” (Reply Brief of Appellant at p. 19.) (Emphasis added.) Welsh

and Peterson decided to use this printed form with its accompanying language, and accordingly, in a dispute between Welsh and Wardley, in which Wardley had no say in the use of the form portion of the Contract or any modification made thereto, the Contract should properly be construed against Welsh.

A further reason the contract should be construed against Welsh is that he was a signatory to the contract, having opportunity to review, modify and clarify any contract provisions before signing. Welsh was in fact the drafter, in the most traditional sense, of Addendum #1 and specifically paragraph 12 of that Addendum which gave rights under the Contract to Wardley, yet Welsh did not clarify the application of the other terms of the Contract, such as the attorney's fee provision, to Wardley. (R. at 249, 277, and 647.) Notably, Welsh did modify terms of the Contract by changes made in the Addendum. For example, in paragraph 9 of the Addendum, Welsh added, "All conditions herein shall survive closing and settlement," which changed the printed abrogation provisions in paragraph 19 of the Contract. (R. at 327-28.) Welsh had obviously considered all of the terms of the Contract and modified those terms which did not fully express the parties' intent. He made no mention or modification of the broad attorney's fee language. Thus, if an ambiguity exists, it should be construed against Welsh, as a drafter of the Contract.

In his Reply Brief, Welsh improperly alleges that Wardley had some duty to marshal the evidence relating to the attorney's fee issue. Welsh does not fully understand the

operation of this burden. Significantly, the trial court itself determined, and specifically held, “There was no evidence at the trial on the application of the attorney’s fee provision to the plaintiff.” (Supplemental Findings of Fact and Conclusions of Law, R. at 477-78.) Wardley agrees with this finding. A party is required to marshal evidence as follows:

To successfully challenge a trial court’s factual finding, “[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court’s findings are so lacking in support as to be ‘against the clear weight of the evidence,’ thus making them ‘clearly erroneous.’”

Jacobs v. Hafen, 875 P.2d 559, 561 (Utah App. 1994), *quoting* In re Estate of Bartel, 776 P.2d 885, 886 (Utah 1989); Estate of Walker, 743 P.2d 191, 193 (Utah 1987). (Emphasis added.) Since Wardley agrees with and does not challenge that finding, there exists no duty to marshal such evidence in that regard. Wardley’s challenge to the Court’s attorneys’ fees determination goes to legal, rather than factual, issues. *See*, Interwest Construction v. Palmer, 923 P.2d 1350, 1358 (Utah 1996). Wardley challenges the Court’s determination that the Contract was ambiguous and also its failure to construe the Contract against the Welsh as drafter of the Contract after finding that no extrinsic evidence on attorney’s fees was produced at trial.

IV.

OTHER JURISDICTIONS HAVE PROPERLY AWARDED ATTORNEY'S FEES TO THIRD-PARTY BENEFICIARIES

As fully set forth in Wardley's Brief of Appellee and Cross-Appellant, currently on file herein, although Utah has not specifically addressed the issued of whether a litigant who was not a signatory to a contract can recover attorney's fees and costs in an action based upon the contract, other adjoining neighboring jurisdictions have considered this issue and have allowed recovery of attorney's fees by a prevailing litigant who was not a signatory party to the contract. *See* National Indemnity Co. v. St. Paul Insurance Companies, 724 P.2d 578, 581 (Ariz. App. 1985); Golden West Insulation v. Stardust Investment Corp., 615 P.2d 1048 (Or. App. 1980). In both of these cases attorney's fees were awarded to a non-contracting party based upon the contract and State statute providing for recovery of attorneys fees by a prevailing party if the contract provided for attorney's fees to be awarded to at least one party. (The language of the statutes is set forth in Wardley's Brief of Appellee and Cross-Appellant and, therefore, is not repeated herein.)

UTAH CODE ANN. § 78-27-56.5, although not verbatim to the statutes referenced in these cases, similarly provides for recovery of attorney's fees by a prevailing party when the contract provides for attorney's fees to at least one of the parties in the action, as follows:

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.

The Contract undisputedly provides for recovery of attorneys fees by at least one party in an action arising out of the Contract. Wardley is entitled to recover its attorney's fees herein not only due to the unambiguous language of the Contract, but also by operation of UTAH CODE ANN. § 78-27-56.5

In his Reply Brief, Welsh argues that any claim to recovery Wardley may have under the statute is barred since such a statutory claim was not raised in the Complaint. Wardley's claim for attorney's fees, however, is rooted in the Contract itself, which, if not adequate to provide for Wardley's attorney's fees based upon its terms alone, can still be properly extended by operation of UTAH CODE ANN. § 78-27-56.5 to allow such recovery by Wardley. Without the attorney's fee provision of the Contract, Wardley would have no basis to claim its attorney's fees, evidencing that Wardley's claim for attorneys' fees was properly set forth in the pleadings based upon the Contract.

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CONCLUSION

For the reason set forth herein, as well as for the reasons previously set forth in Wardley's Brief of Appellee and Cross-Appellant, currently on file herein, Wardley respectfully requests that the trial court's decision denying Wardley its attorneys' fees be reversed.

DATED this 21ST day of November, 1997.

A handwritten signature in black ink, appearing to read "Neil R. Sabin", is written over a horizontal line.

Neil R. Sabin

Annette F. Sorensen

NIELSEN & SENIOR, P.C.

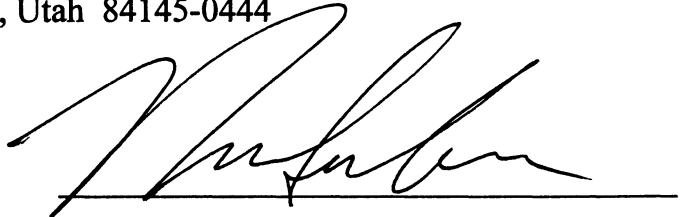
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Cross-Appellant Wardley Corporation

CERTIFICATE OF SERVICE

I certify that on the 21st day of November, 1997, I served four true and correct copies of the foregoing **REPLY BRIEF OF APPELLEE AND CROSS-APPELLANT**, by causing the same to be hand delivered to the following:

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A handwritten signature in black ink, appearing to read 'V. Rampton', is written over a horizontal line.