

1997

Harrington Properties, Inc. a Utah Corporation;
Robert L. Harrington and Jane R Harrington v.
Marilyn Hamilton Petersen; and Global Motor
Inns, a Utah corporation : Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

HARRINGTON PROPERTIES, INC. a Utah
corporation; ROBERT L. HARRINGTON and
JANE R. HARRINGTON,

Plaintiffs/Appellees,

v.

MARILYN HAMILTON PETERSON; and
GLOBAL MOTOR INNS, a Utah corporation,

Defendants/Appellants and
Petitioners

**PETITION OF APPELLANTS
FOR REHEARING ON
OMITTED ISSUE OF
ATTORNEY FEES**

Case No. 970717-CA

**Appeal from Declaratory Judgment Confirming Two Separate
Awards of Partial Summary Judgement in Favor of Plaintiffs.
Third Judicial District Court, Salt Lake County, Utah.
The Honorable Sandra Peuler Presiding**

**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 970717-CA

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VIA HAND DELIVERY

**Re: Supplemental Authority for Consideration by the Court in Connection with
Appellants' Petition for Rehearing Granted January 11, 1999 in Case No.
971717-CA, Harrington Properties, Inc. v. Peterson**

Honorable Judges Billings, Bench, and Orme:

Pursuant to the provisions of Rule 24(i) of the Utah Rules of Appellate Procedure, concerning supplemental authorities, this panel ought to be aware of and consider the reasoning of a different panel of this Court in the case of *J.V. Hatch Construction, Inc. v. Kampros*, 359 Ut. Adv. Rpts. 18 (Utah Court of Appeals, December 24, 1998). The undersigned counsel just learned of this new opinion of this Court reviewing volume 359 of the Utah Advance Reports, dated January 5, 1999 and not received at this law firm until several days thereafter, and only today circulated to the undersigned counsel.

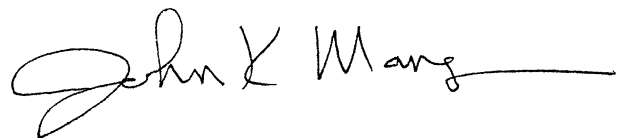
In *Kampros*, this Court held that a mechanic's lien claimant who prevails on the merits of his case and makes out a prima facie case for entitlement for attorney fees under the Utah Mechanic's Lien Statute, does not waive its claim to attorney fees by failing to address or initially prove that it complied with the requirement to mail a copy of the Notice of Lien to the reputed owner, which mailing requirement is more in the nature of an affirmative defense, as to which the burden of proof lies with the defendant in order to defeat the claim for attorney fees. In reaching that holding, this Court found instructive, although not dispositive, the reasoning of the Utah Supreme Court in *Meadowbrook, L.L.C. v. Flower*, 959 P.2d 115, 117-19 (Utah 1998), wherein the Utah Supreme Court noted the ancillary nature of attorney fee claims, the logic of deferring, where possible, consideration of claims to attorney fees until after determination of which party prevails,

and expressly repudiated any earlier implication "that a prevailing party must litigate the issue of attorney fees before resting its case or waive any claims to such fees where they are to be determined by the trial court." *Id.* at 119.

That same reasoning, transposed to the appellate setting, may profitably be considered by this Court as it considers the particular circumstances of Mrs. Peterson's request for attorney fees, and particularly whether there has been any waiver thereof as newly claimed by the Harrington Appellees at page 2, section 1 of their Answer dated January 4, 1999 to the Appellants' Petition for Rehearing.

Given the limitations provided by Rule 24(i) of the Utah Rules of Appellate Procedure, it would not be appropriate to say any more in this letter about the arguments raised by Appellees in their January 4, 1999 Answer to Appellants' Petition for Rehearing. However, now that the Court has granted that Petition for Rehearing, it should know that Appellants are prepared and desire to address more fully the arguments contained in Sections I through III of Appellees' Answer dated January 4, 1999, to show why those arguments lack merit and believe it may assist the Court in deciding how to address the issue of attorney fees if the Court were to request or allow further limited briefing on those points, which could be promptly provided by Appellants in not more than approximately five pages.

Sincerely,



John K. Mangum
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Attorneys for Appellants Marilyn H. Peterson
and Global Motor Inns

JKM/ck

cc: James S. Jardine
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ARGUMENT

I.

APPELLANTS ARE ENTITLED TO AN AWARD OF THEIR ATTORNEY FEES.

Petitioners Marilyn H. Peterson and Global Motor Inns, the Appellants on this appeal, succeeded in obtaining almost all of what they sought on this appeal under the Court's opinion filed November 27, 1998. Petitioners succeeded in having this Court determine that they are entitled to have the 1993 advances made by Mrs. Peterson declared secured under the provisions of the original trust deed Mr. Harrington gave Mrs. Peterson. Petitioners also succeeded in overturning in significant part the ruling of the trial court that they were not entitled to any interest on the original \$95,000.00 Promissory Note Mr. Harrington gave Mrs. Peterson. Having thus prevailed in enforcing the terms of the underlying agreements which also provided for attorney fees, Petitioners are entitled to their attorney fees in obtaining this relief, both fees expended below on these issues and on appeal.

The judgment below specifically reserved issues relating to claims for attorney fees. Record at 1140, paragraph 4, Judgment and Order of Dismissal filed August 7, 1997 evidenced by a copy appended under Tab 19 to Opening Brief of Petitioners. On this appeal, both sides sought attorney fees. *See* Appellee's Brief at pp. 34-35 and Reply Brief of Appellants at p. 24 (both describing the same contractual provisions expressly allowing Mrs.

Peterson her reasonable attorney fees). The Court's opinion on this appeal issued November 27, 1998 did not address this issue at all for reasons not given.

Petitioners submit that the Court's opinion should be amended to expressly direct an award of attorney fees to Petitioners, in an amount to be determined upon remand by the trial court, both for work below and on appeal. The applicability of the contractual provisions cited in the briefs as an adequate supporting basis for such an award is readily apparent from a review of the claims of Harringtons.

The Harrington appellees, in Section III of their Brief at pages 34-35, expressly sought an award of their attorney's fees on this appeal. As support for an award of attorney fees for the claim concerning whether the 1993 advances by Mrs. Peterson to Harringtons were secured by the original Deed of Trust in favor of Mrs. Peterson dated June of 1991 (which Harringtons refer to as the Sunset Oaks Trust Deed II), Harringtons cited to paragraph 19 of that trust deed. Harrington Brief at pp. 34-35. In relevant part, paragraph 19 provides as follows:

19. Upon the occurrence of any default hereunder [under the purchase money deed of trust dated June 27, 1991], . . . beneficiary [Marilyn H. Peterson] shall be entitled to recover in such proceedings all costs and expenses incident thereto, including a reasonable attorneys fee in such amount as shall be fixed by the Court.

Record at 195, evidenced by Tab 4 of Appendix to Appellants' Opening Brief, and another copy of which appeared under Tab "B" to the Addendum of Harrington's Brief as referred

to at page 35 of that Brief. The Harrington plaintiffs, by claiming the right to an award of attorney fees under that contractual provision pursuant to the reciprocal statutory provisions of section 78-27-56.5 of the Utah Code, as referenced at page 35 of their brief, have clearly admitted that this particular contractual provision provides a proper basis for an award of attorney fees to the Appellants as prevailing parties on appeal on this issue of security for the 1993 advances, as Appellants claimed in their Reply Brief at page 24.

Similarly, the Harrington appellees sought attorney fees on appeal concerning the issue of interest on the original \$95,000.00 promissory note based on the provisions of paragraph 6 of the agreement between the parties dated December 8, 1992, which agreement also postponed the due date for payment of that \$95,000.00. Appellee's Brief at p. 35. Paragraph 6 of that December 8, 1992 Agreement reads as follows:

6. Attorney Fees. If Harrington or the Owner defaults under the terms of this Agreement, Peterson shall be entitled to recover all costs incurred by her in enforcing the terms hereof, including reasonable attorney fees, subject to the limitation that her recourse to recover the same shall be against the Property and/or the proceeds arising from its sale or transfer.

Record at 34, evidenced by Exhibit under Tab "C" of Addendum to Brief of Appellees; *see* also Record at p. 221, evidenced by Exhibit "12" of Addendum to Brief of Appellants. Because the Harrington plaintiffs based their claim for attorney fees on this interest issue on this contractual provision, pursuant to the statutory principle of reciprocal right (Appellee's Brief at p. 35), they have thereby admitted that this contractual provision also provides a

basis for an award of attorney fees to Mrs. Peterson on this interest issue, as she has now succeeded in obtaining a significant part of this interest denied to her by the trial court.

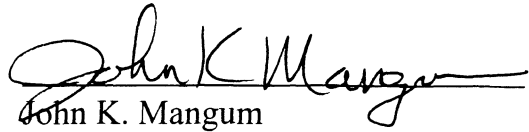
Since this partial but significant victory for Appellants on this interest issue could not have been achieved without essentially the same attorney time as was expended on this issue, Appellants are entitled to an award of all such attorney fees incurred, in an amount to be determined by the trial court upon direction of this Court.

The original slip opinion of the Court of Appeals in this matter, filed November 27, 1998, failed to address these claims for attorney fees. This Court should remedy this omission by amending its opinion to direct an award of attorney fees in favor of Appellants in an amount to be determined by the trial court, with or without granting this Petition for Rehearing, just as this Court did in the case of *PDQ Lube Center, Inc. v. Huber*, 949 P.2d 792, 799-800 (Utah Court App. 1997) (adding a new section “C” to its amended opinion to remedy an omission from the original opinion first reported four weeks earlier at 329 Utah Adv. Rpts. 20).

CERTIFICATION

Pursuant to the provisions of Rule 35(a) of the Utah Rules of Appellate Procedure, the undersigned counsel for Petitioners Marilyn Hamilton Peterson and Global Motor Inns hereby certifies that this Petition is presented in good faith and not for delay.

RESPECTFULLY submitted this 3rd day of December, 1998.



John K. Mangum
of Nielsen & Senior, P.C.
Attorneys for Petitioners Marilyn
Hamilton Peterson and Global Motor Inns

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing **PETITION
OF APPELLANTS FOR REHEARING ON OMITTED ISSUE OF ATTORNEY
FEES**, to be hand delivered this 3rd day of December, 1998, to the following:

James S. Jardine
of RAY, QUINNEY & NEBEKER
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