

2008

John F. Fay v. Global Travels Network, Inc., and Todd Rodgers : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David Maddox; Attorney for Appellee.

James L. Mouritsen; Attorney for Appellant.

Recommended Citation

Reply Brief, *Fay v. Rodgers*, No. 20081012 (Utah Court of Appeals, 2008).
https://digitalcommons.law.byu.edu/byu_ca3/1346

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

JOHN F. FAY,

Plaintiff and Appellant,

vs.

Case No. 2008-1012 CA

**GLOBAL TRAVEL
NETWORK, INC.,**

Defendant, and

TODD RODGERS,

Defendant and Appellee.

REPLY BRIEF OF APPELLANT JOHN F. FAY

**APPEAL FROM AN ORDER OF THE THIRD DISTRICT
COURT, SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE ROBERT FAUST,
CASE NO. 06-090014**

James L. Mouritsen (USB No. 6117)
170 South Main Street Suite 375
PO Box 992, Salt Lake City, Utah 84110
T 801 364-5600
F 801 364-5601

Attorney for John F. Fay

David Maddox
1234 W. South Jordan Pkwy, # C-2
South Jordan, UT 84095
T 801 466-3788
F 801 365-7215

Attorney for Todd Rodgers

**FILED
UTAH APPELLATE COURTS**

SEP 18 2009

IN THE UTAH COURT OF APPEALS

JOHN F. FAY,

Plaintiff and Appellant,

vs.

Case No. 2008-1012 CA

**GLOBAL TRAVEL
NETWORK, INC.,**

Defendant, and

TODD RODGERS,

Defendant and Appellee.

REPLY BRIEF OF APPELLANT JOHN F. FAY

**APPEAL FROM AN ORDER OF THE THIRD DISTRICT
COURT, SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE ROBERT FAUST,
CASE NO. 06-090014**

James L. Mouritsen (USB No. 6117)
170 South Main Street Suite 375
PO Box 992, Salt Lake City, Utah 84110
T 801 364-5600
F 801 364-5601

Attorney for John F. Fay

David Maddox
1234 W. South Jordan Pkwy, # C-2
South Jordan, UT 84095
T 801 466-3788
F 801 365-7215

Attorney for Todd Rodgers

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATUTES AND RULESvii
I. ARGUMENT	1
1. THE DUTY TO MARSHAL EVIDENCE IS PREMISED ON A DISPUTE WITH THE TRIAL COURT’S FINDINGS OF FACT	1
A. Appellant has Little Factual Disputes With Minute Entry Order	1
B. Absence of ANY Ruling on Fay’s Claims Against Rodgers, Personally, Arising Out of the Signing and Dating of the Settlement Agreement ..	5
2. THE TRIAL COURT’S FINDINGS OF FACTS, <u>ARE</u> CLEARLY ERRONEOUS, AS THEY ARE BASED ON SUPPOSITION AND THEORY RATHER THAN FACTS IN THE RECORD.....	6
3. CORRESPONDENCE FROM RODGERS AND MADDOX CONTRIBUTED TO THE CONFUSED UNDERSTANDING THAT FAY HAD OF RODGERS’ STATUS IN RELATION TO GLOBAL TRAVEL	8
4. THE AWARD OF ATTORNEY FEES UNDER RULE 11 IS SUBJECT TO A STANDARD OF REASONABLENESS AND DIRECT RELATION TO THE ACT IN QUESTION	9
CONCLUSION	11

TABLE OF AUTHORITIES

Utah Rules of Civil Procedure:

Rule 11	7, 9 - 12
Rule 11(c)(2).	9 - 11
Rule 12	11

Cases:

<i>Griffith v. Griffith</i>, 1999 UT 78, 985 P.2d 255.	7
<i>Scharf v. BMG Corp.</i> 700 P.2d 1068, 1070 (Utah 1985)	1
<i>Willey v. Willey</i>, 951 P.2d 226, 230 (Utah 1997)	7
<i>West Valley City v. Majestic Inv. Co.</i>, 818 P.2d 1311 (Utah App. 1991)	4-5

1. THE DUTY TO MARSHAL EVIDENCE IS PREMISED ON A DISPUTE WITH THE TRIAL COURT'S FINDINGS OF FACT

As discussed in some detail in the Brief of Appellee (hereafter, “Rodgers’ Brief”), in an appeal in which the appellant challenges the trial court’s findings of fact, there is a duty on the appellant to marshal all evidence arguably supportive of the trial court’s disputed findings, and then to point out the legal flaw in the reasoning or logic connecting those facts to the trial court’s Order. (See, e.g., *Scharf v. BMG Corp.* 700 P.2d 1068, 1070 (Utah 1985)). This usual duty to marshal evidence is premised, of course, on an appellant’s dispute with the trial court’s findings of fact.

A. Appellant Has Little, If Any Disputes With Minute Entry Order Facts

In the case now before this Court, the trial court issued a Minute Entry Order dated April 15, 2008 (“trial court’s Order” or “disputed Order”) consisting of 19 sentences (R. 454-57). The trial court states that the Minute Entry decision “will stand as the Order of the Court, granting Mr. Rodger’s [sic] Motion for Sanctions.” *Id.*

Of those sentences, ten are introductory or concluding legal notes, or essentially undisputed statements of fact (see disputed Order, including the

first four sentences, the last five sentences, and sentence number eight: “*As indicated above [sic], Mr. Rodgers was not a party to the contract at issue in this case*”). (R. 455).

Six of the remaining sentences are simply statements of the absence of fact (1. “*there is absolutely no evidentiary support...*”; and, 2. “*In addition...the Court can find no evidence...*”; and, 3. “*In addition, the Plaintiff has never alleged...*”; and, 4. “*Simply put, the Plaintiff has never demonstrated...*”; and, 5. “*the Plaintiff clearly had no factual support...*”; and, 6. “*the Plaintiff had absolutely no legal or factual basis...*”). (*Id.*) It is axiomatic that Fay cannot marshal evidence in support of the trial court’s findings of the **absence of facts**. One cannot prove the non-existence of a negated point.

The remaining three sentences are disputed, to various degrees, but are primarily statements of the trial court’s largely unsupported legal conclusions. As Fay argued in his Opening Brief, it is a practical impossibility to marshal evidence that would arguably support otherwise unsupported conclusions.

Sentence six says: “*Indeed, it is clear from the Plaintiff’s opposition and his Affidavit that he understood throughout these proceedings that Mr. Rodgers was merely representing Global Travel Network.*” (R. 455). On its face, dispute of this legal conclusion would call for a complete restating of Fay’s

Opposition and Affidavit to ferret out precisely what it is that the trial court found Fay to have allegedly “understood throughout these proceedings”. Yet, by the trial court’s conclusion, in sentence six, the supposedly damning evidence that establishes (in the trial court’s view), the alleged fact at issue, is contained somewhere in the entirety of Fay’s Memorandum in Opposition and Affidavit in Support. The trial court does not specify exactly **what** in the Plaintiff’s opposition and in his affidavit contributes to that conclusion. Fay is left to either restate the entire documents, or simply refer to the documents, as did the trial court.

Similarly difficult to marshal is the factual support for the trial court’s conclusion in sentence number twelve: “*Overall, it is important to point out that the Court is not dealing with a simple case of factual errors or misstatements, which are clarified upon reflection or through the discovery process.*” (R. 455). Fay is at a loss as to how he is to marshal facts to show the basis for the trial court’s conclusion that this is **not** “*a simple case of factual errors or misstatements...*”. Once again, he would be called upon to prove a negative proposition, a challenging burden, at best.

Finally, Fay challenges the trial court’s legal conclusion, in sentence fourteen, that “[u]nder these unique circumstances, the Court concludes that the Plaintiff directly violated Rule 11 and that sanctions are warranted.” (R. 456).

This legal conclusion is premised upon a brief summary of almost wholly undisputed facts, and arrived at by leaps of logic that are not clearly supported by the text of the disputed Order. One cannot very well marshal facts in support of an unsupported legal conclusion.

Finally, one sentence is a mix of undisputed fact and a mystifying leap of logic, which is without support in the record. Sentence sixteen states: “*Further, while he subsequently engaged counsel, it appears to the Court that he continued to direct this action in most respects.*” (R. 456). The trial court fails to explain where, in the record, evidence “appears” that makes that conclusion logical. While Fay does not seek review of that conclusion, it remains that the trial court’s apparent certainty on an issue had no evidentiary support in the record. Through the course of litigation in the trial court, covering more than two years, Fay personally appeared in court only once, at the trial. No defendant served any written discovery or took Fay’s deposition. The trial court fails to explain how it reached the conclusion it states above. Such facts do not appear in the record.

Rodgers, in his zeal to convince this Court to sidestep Fay’s appeal without addressing the merits of the matter, accuses Fay of failing to construct the mandatory “magnificent array of supporting evidence.” (See Rodgers’ Brief at 8, citing *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1313 (Utah Ct.

App. 1991). He neglects, however, to specifically parse the disputed Order and its repeated assertions of a complete lack of evidence on key issues. He also fails to discuss, as did the trial court, the merits of Fay's claim against Rodgers for his personal, individual acts in signing the settlement agreement.

B. Absence of ANY Ruling on Fay's Claims Against Rodgers, Personally, Arising Out of the Signing and Dating of the Settlement Agreement

Fay presented two issues related to Todd Rodgers, as a defendant, to the trial court for a ruling: the first involved Rodgers' relation to the fraud in the telephone call from a Global Travel representative, which issue is the subject of the trial court's disputed Order, as discussed, *supra*. The second issue is against Rodgers, personally, in relation to his acts in signing and dating of the Settlement Agreement, a personal act conducted by Rodgers individually. On this second issue, the trial court remained silent.

The trial court simply ignored that issue, despite acknowledging (R. at 417) receipt and review of Fay's opposition memoranda which specifically raised the argument again, and noted the record evidence in support of the claims. (R. at 371-376, and see R. at 430-33, copies of trial exhibits no. 1 and 19). Here, even more clearly than in the unsupported conclusions of the disputed Order, Fay's alleged duty to marshal the absence of facts is similar to the

mathematical result of zero times zero; the result is zero. Where the trial court does not issue any ruling, and avoids an issue entirely, the result is clear error.

Fay respectfully requests that this Court review the trial court's Order, as well as the lack of ruling on Fay's request to consider the personal liability of Rodgers in his actions in signing and dating the breached Settlement Agreement, and reverse and remand for reconsideration.

2. THE TRIAL COURT'S FINDINGS OF FACTS ARE CLEARLY ERRONEOUS, AS THEY ARE BASED ON SUPPOSITION AND THEORY

The absence of facts, in the repeated assertions of the minute entry order that there are no facts, is the heart of one branch of the contested result. The finding of **zero facts**, where competent evidence was presented to the trial court, is clear error. Where, as here, the appellant can show facts that the trial court overlooked, ignored, or refused to address on entire issues in contest, and evidence in support, the appeal is properly framed for consideration.

Again, there are **two issues** presented squarely on the question of clearly erroneous factual findings in the court below, on this appeal: 1. the finding of **the absence of facts**, as repeatedly asserted by the trial court on the issue of Fay's reasons for naming Rodgers as a defendant in his fraud cause of action

against Global, and 2. the absence of **any ruling whatsoever**, on the issue of Fay's naming Rodgers as a defendant related to his signature and date on the breached Settlement Agreement. (see, e.g., R. 371-76, and Order, R. 454-57).

The trial court's lack of findings, ruling, or statement of any sort on an issue presented to it for ruling, is clear error. As the Utah Supreme Court has made abundantly clear:

a trial court is required to make explicit findings of fact in support of its legal conclusions. *Willey v. Willey*, 951 P.2d 226, 230 (Utah 1977). This is **particularly necessary in the Rule 11 area**. The law requires that a trial court make a series of specific factual findings as a predicate for concluding that the rule has been violated... The trial court's findings and conclusions must reveal the court's reasoning clearly enough that an appellate court can apply the appropriate standard of review to each part of the trial court's ruling." *Griffith v. Griffith*, 985 P.2d 255 (Utah 1995). **[Emphasis added]**.

Fay has shown facts, evidence, and logical connections that the trial court failed to discuss or address, on the first issue, related to the trial court's findings of "no evidence" in support of his claims. Further, the trial court utterly failed to discuss, address, or affirmatively confront, in any ruling, the issue of Rodgers' personal liability for his acts in signing and dating the breached settlement agreement. Both such failures in the trial court's ruling are fatal flaws in the trial court's duty to find facts and state them clearly, particularly in the context of Rule 11 sanctions, and both are clear error, which Fay requests this Court review and reverse.

3. CORRESPONDENCE FROM RODGERS AND MADDOX CONTRIBUTED TO THE CONFUSED UNDERSTANDING THAT FAY HAD OF RODGERS' STATUS IN RELATION TO GLOBAL TRAVEL

Rodgers argues the interpretation of evidence in his brief on this appeal, rehashing issues that were presented to the trial court. The flaw in using this forum to reargue the evidence, though, is that the trial court did not rule on that evidence. The trial court negated the evidence, stating at least six times that no such evidence is to be found in the record.

Rodgers, however, focuses on certain details of the letters at issue (Maddox to Fay of February 22, 2005 (R. 509-510), and Rodgers to Fay of February 24, 2005 (R. 511)). These details that Rodgers discusses, however, are facts that the trial court could have, but did not, address in its conclusions and rulings in this matter. Rodgers seems to want to fill the alleged “void” in evidence that the trial court repeatedly notes in the disputed Order.

Phrases in the body of both letters, however, could reasonably be taken to establish the conclusions Fay reached in drafting his complaint, to the effect that Rodgers had some substantial degree of control and responsibility for the fraudulent activities of the telemarketers who called Fay's home, representing Global Travel Network (see, e.g. Rodgers' statement to the effect that he may seek Fay's assistance in a potential lawsuit he may file against third parties –

which clearly implies that he has standing to sue on behalf of “his company”, Global Travel Network. R. 511).

Rodgers’ insistence, in his Brief, on attempting to assemble what he sees as a “magnificent array” of evidence supporting the trial court’s findings, in truth, simply belies the trial court’s repeated statements to the effect that there is no evidence supporting Fay’s claims. In this appeal, Fay respectfully requests that this Court review the clear error in the trial court’s Order and reverse.

4. THE AWARD OF ATTORNEY FEES UNDER RULE 11 IS SUBJECT TO LIMITATIONS OF REASONABLENESS AND DIRECT RELATION TO THE ACT IN QUESTION

Rodgers quotes Rule 11 correctly in his Brief, but then fails to discuss the most relevant part of the quoted rule. He argues the merits of the inapplicable portions of Rule 11, relating to directives of a non-monetary nature and orders to pay a penalty into court. Neither portion of the rule is applicable here, as the trial court did not to use either of those two options.

Rodgers pointedly avoids discussion of the two key phrases in the critical last sentence of Rule 11(c)(2), a subsection specifically titled “Nature of sanctions; **limitations**” [emphasis added]. It is the limitations that are relevant here, including a restriction that an order of attorney fees or expenses be limited to

*“some or all of the **reasonable** attorney fees”* [emphasis added], and that the fees awarded must be incurred *“as a **direct result**”* of the alleged violation.

The controlling final portion of the relevant language is what allows imposition of an order of attorney fees in favor of the allegedly aggrieved party. The rule allows that a trial court may issue: “an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.” The text of Rule 11(c)(2), and the heading describing it as a “limitation” on the court’s sanction power, indicate that the trial court has a duty to assess the amount of “reasonable” fees incurred, and only grant recovery of some or part of such fees as were caused as a “direct result” of the act.

These two limitations in the rule fit harmoniously with Fay’s argument, by analogy, in his opening Brief, to cases considering the measure of damages under a breached contract. In both circumstances, the allegedly aggrieved party has an affirmative duty to take reasonable measures to limit the attorney fees and expenses incurred.

Further, the black-letter tort principles of proximate and legal cause fit into the equation, as well, in the use of the phrase “as a direct result” of the act to be sanctioned. If the expense allegedly caused may have been cut off, by the

simple act of a defendant bringing an early, dispositive motion, for example, under Rule 12, then it is his duty to thereby limit such expense. If he does not, then it is the trial court's duty to limit the attorney fee recovery to such "reasonable" amount which flowed "as a direct result" from the act that offended the rule.

Fay respectfully requests that this Court review the award of attorney fees, if it finds such an award appropriate, and remand with instructions to the trial court to follow the clear directions of Rule 11(c)(2). In doing so, the amount of attorney fees and expenses allowed to Rodgers, if any, should be limited to that which flowed reasonably and directly from the act of naming Rodgers as a defendant in the initial Complaint, and not include any amount that Rodgers himself, and his counsel, could reasonably have avoided.

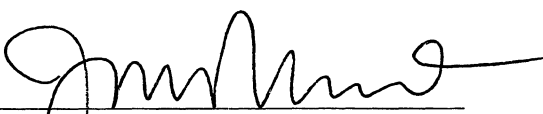
CONCLUSION

Appellant Fay respectfully submits his arguments, as stated above and in his initial Brief, as well as any subsequent oral argument, in support of his request that this Court review the Minute Entry Order of the Third District Court, the Honorable Robert Faust, dated April 15, 2008. Plaintiff submits that this Order fails to follow the direction of Rule 11, U.R.Civ.P., and controlling cases interpreting that rule, in that the Order fails to set forth, specifically and with adequate detail, the ways in which the trial court found that Fay violated the

proscriptions of Rule 11. Further, the trial court neglected to take into account, nor explain the absence of ruling, on Fay's arguments and evidence related to Defendant Rodgers' personal actions in signing and dating the Settlement Agreement at issue. Additionally, the trial court neglected to explain the reasons for failing to address Fay's argument as to the lack of reasonableness of Rodgers' claimed attorney fees and expenses, and the direct connection of those amounts to the alleged violation of the rule.

Fay respectfully requests that this Court reverse the Order of the trial court, and, in the alternative, remand to the trial court for further findings and conclusions in keeping with the requirements of Rule 11. Finally, Fay requests an Order, awarding his reasonable attorney fees and expenses incurred in prosecuting this appeal, and in defending the Motion for Sanctions in the trial court.

RESPECTFULLY SUBMITTED this 15 day of September 2009.


James L. Mouritsen
Attorney for Appellant John Fay

CERTIFICATE OF SERVICE

I affirm that on this 15 day of September 2009, I caused to be delivered, by first class U.S. mail, postage fully prepaid, a true and correct copy of APPELLANT'S REPLY BRIEF, and a PDF computer copy of the same, addressed to:

DAVID MADDUX
1234 W. SOUTH JORDAN PKWY #C-2
SOUTH JORDAN, UT 84095