

2009

Melvyn Bircoll, and Janine Bircoll, individuals v.  
Southwest Marble & Granite, Inc., a Utah  
corporation, et. al. : Brief of Appellant

Utah Court of Appeals

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Shawn Ferris, Esq.; Attorney for Defendants/Appellees.

Mel Bircoll; Pro Se Plaintiff/Appellant.

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IN THE UTAH COURT OF APPEALS

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MELVYN BIRCOLL and JANINE  
BIRCOLL, individuals,

Plaintiffs/Appellants

Appellate Case No. 20090179

vs.

SOUTHWEST MARBLE & GRANITE,  
INC., a Utah corporation, et. al.

Defendants/Appellees

BRIEF OF THE APPELLANT

APPEAL FROM THE TRIAL COURT, JUDGE LUDLOW  
and  
MOTION TO BE EXCUSED FROM COMPLIANCE WITH STANDING ORDER 8

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St. George, UT 84770

Mel Bircoll  
Pro se Plaintiff/Appellant  
2700 Casiano Road  
Los Angeles, CA 90077

**Please note that I am pursuing this appeal pro se for financial reasons.**  
**As a layperson, I ask you to please excuse the form of this brief.**

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UTAH APPELLATE COURT  
JUL 01 2009

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UTAH APPELLATE COURTS

JUL 07 2009

## Form 10. Certificate of service.

Mel Bircoll, M.D.  
2700 Casiano Road  
Los Angeles, CA 90077  
310 471 1550

[ALTERNATIVE 1: ACKNOWLEDGMENT OF RECEIPT.] I, (name) , acknowledge receipt of service of the attached (document)

Date: \_\_\_\_\_ (signature)

Name

Address

[ALTERNATIVE 2: PERSONAL SERVICE.] I, (name) , certify that on (date) I served a copy of the attached (document) upon (name) , the [counsel for the] [appellant] [appellee] in this matter, by personally hand delivering it to [him] [her] at the following address:

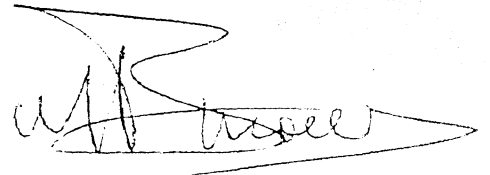
(signature)

Attorney of Record

[ALTERNATIVE 3: SERVICE BY MAIL.] I Mel Bircoll, M.D., certify that on July 1, 2009

I served a copy of the attached Brief of the Appellant upon Shaun Ferris , the counsel for the appellees in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

Shawn Ferris  
2107 W. Sunset Blvd., 2<sup>nd</sup> Floor  
St. George, UT 84770



Mel Bircoll, M.D.,  
Acting pro se in this matter.

## References

Utah R. App. P. 3(e); 14(c); 21(b); 21(c); 21(d); 40(a)

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DATE: July 9, 2009  
NO. PAGES: 2

**MESSAGE:**

Let me know if this is sufficient.  
Thank you,  
Mel Bircoll, M.D.

IN THE UTAH COURT OF APPEALS

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MELVYN BIRCOLL and JANINE  
BIRCOLL, individuals,

Plaintiffs/Appellants

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## I. Appeal

I am appealing the award of attorney's fees, specifically the reduction by seventy-five percent (75%) of the attorney's fees my wife and I actually incurred in this action, as being both against public policy and inequitable.

### Summary of facts:

My wife and I, new residents of the State of Utah, built a home in 2005 with the highest standards of on-time and courteous payment to all our contractors and vendors. When we discovered that Southwest had installed a bathroom countertop that was not what we had ordered (in terms of color, thickness or edge), we promptly brought the matter to Southwest's attention and made an arrangement with Southwest regarding the mistake. The arrangement, made with Southwest representative Mark Burnett, was that there would be no charge for the bathroom countertop. (Southwest did other work on our home, work for which it was promptly paid in full.) We subsequently learned that Southwest had placed a lien on our new home for the unpaid amount of the bathroom countertop.

After several initial attempts on our part to resolve the matter amicably and privately went unanswered, my wife and I engaged counsel to help get the lien off our home and confirm resolution of the dispute.

Although we ultimately prevailed at trial and were awarded damages on the contract claims in addition to our attorney's fees, the court awarded only \$4,310.88 in attorney's fees, only twenty-five percent (25%) of the attorney's fees we actually paid (i.e., the \$17,243.50), despite the fees having been, by all accounts including the Court's, reasonable. This reduction has worked a great injustice on my wife and me, individuals who were forced to litigate by Southwest's refusal to remove the lien from our new home.

We look to this court for a determination that the amount of attorney's fees that should be awarded should be reconsidered and augmented to the full amount requested. We would ask to the Court to consider, in this regard, the fact that the trial court's original judgment (entered on May 7, 2008) was in the amount of \$19,177.00, a sum that did cover all of our attorney's fees.

To date, Southwest has paid no portion of the trial award.

Statement of issues:

(A) **Is the award against public policy?** The award of attorney's fees – a total of \$4,310.88 out of the \$17,243.50 my wife and I (the prevailing party) actually paid – is against public policy in two respects:

(1) **It effectively denies litigants their right to trial.** If wrongly-liened parties, even those who prevail at trial, are to be punished to the extent of having to bear three quarters (3/4) of their attorney's fees, they may have to forgo their right to trial for financial reasons. This is surely an injustice in its own right. But in the instant case, where Southwest had put a lien on our newly completed home, a decision to forgo our right to trial might also have precipitated a wrongful foreclosure on our home. In short, if judges are going to reduce even *reasonable* attorney's fees to the point where prevailing litigants are effectively punished for vindicating their rights, then parties should not litigate any case where the amount in controversy is low because



litigation to trial will of necessity cost multiples of the amount in controversy. This would mean there would be no avenue for vindication of property rights whenever the amount in controversy is low.

(2) It encourages reckless lien practices. If wrongly-liened parties, even those who prevail at trial, are going to be punished by being awarded only a small fraction of their attorney's fees, bad actors may well be encouraged to place liens on property as an extortion method: The minute attorney's fees exceed the amount in controversy in a given litigation, awards like this one will effectively force plaintiffs to settle, at whatever cost to their property rights. This result is a subsidy to those who would abuse lien privileges or be reckless with them, and a real injustice to homeowners.

(B) Is the award inequitable? The award of attorney's fees – a total of \$4,310.88 out of the \$17,243.50 my wife and I (the prevailing party) actually paid – is inequitable in the following respects:

(1) The award does not address the fact that the Court *itself* ordered

mediation, thereby increasing the plaintiffs' costs. A plaintiff should be able to assume that his *court-ordered* additional attorney's fees will be reimbursed in the event he prevails at trial. We complied with the court-ordered mediation, and we did so in good faith. But Southwest was unwilling to settle and because the lien remained on our home, we had no choice but to proceed to trial. In the end, we were penalized to the extent of these court-ordered additional fees and beyond.

(2) The award does not address the necessity of the litigation to trial in this particular case. Because there was a lien on our home, we had no choice but to litigate to trial. But the trial court does not apply the case he cites (Trayner v. Cushing , 688 P 2d 856 (Utah 1984)) in his Order (regarding the “necessity of initiating an action to vindicate plaintiff's rights”) to the facts of our case. Surely, this should have counted in our favor when in its discretion the court awarded fees. But the fact that we had no choice but litigate (given Southwest's refusal to remove the lien from our home) was not even mentioned.

(3) The award misconstrues the import of the “Juperana Bordeaux” (i.e., color) question. While the award seems to place a lot of weight on our having lost on the question whether Southwest provided the right *color* marble, it elides the facts that (1) Southwest lost on the broader contract claims (i.e., Southwest did not provide what was ordered in terms of edge and thickness even assuming it got the color right), and (2) Southwest’s loss on the contract claims goes to the very heart of its loss on the lien claim (i.e., the lien was wrongly placed to the extent that we did not owe Southwest anything). We prevailed on the contract claims and on one lien claim, but are having to bear attorney’s fees in an amount almost seven (7) times higher than the cost of the countertops we ordered and never received. This works an injustice on my wife and me.

(4) The award does not balance the equities in a fair way. The court awards only one quarter (1/4) of the attorney’s fees my wife and I requested because, it finds, attorney’s fees were recoverable on only one of the four total claims in the action. But this mechanical reduction elides the facts that: (i) the “non-compensable” contract claims are indispensable to the compensable mechanic’s lien claim on

which we prevailed, (ii) there was significant overlap among all claims, (iii) the total amount of attorney's fees we requested was reasonable and in no event burdensome to Southwest, which itself precipitated the need for litigation to trial by wrongfully placing the lien on our home, and (iv) the disparity between the fees we requested (\$17,243.50) and the principal recovery (\$1,565) was a function of the current rate for legal fees in the community and not a result of wasteful billing on the part of our trial attorney. We note with interest and regret in this regard that the trial court awarded our *full* fees in its original judgment dated May 7, 2008.

### Conclusion

In view of the public policy ramifications of the trial court's award – specifically, the effective denial of access to the Utah courts – and of the financial injustice worked on my wife and me by it, we look to this court for a determination that the amount of attorney's fees awarded should be reconsidered and augmented to the full amount requested (i.e., \$17,243.50, in addition to the compensatory damages). We would ask the Court to recall, in this regard, the fact that the trial court's original judgment (entered

on May 7, 2008) was in the amount of \$19,177.00, a sum that did cover all of our attorney's fees.

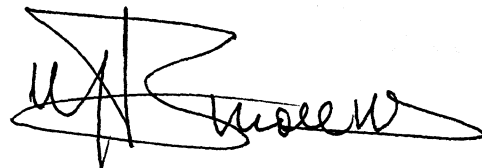
II. Motion to Be Excused from Standing Order No. 8

As a layperson, I have done my best to comply with Standing Order No. 8.

To the extent I have not met the Order's technical requirements, I move to be excused from Standing Order No. 8.

Thank you for your consideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mel Bircoll', written over a horizontal line.

Mel Bircoll, M.D.