

2009

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

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

Mel Bircoll; Pro Se Plaintiff/Appellant.

Recommended Citation

Reply Brief, *Bircoll v. Southwest Marble & Granite, Inc.*, No. 20090179 (Utah Court of Appeals, 2009).
https://digitalcommons.law.byu.edu/byu_ca3/1549

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

MELVYN BIRCOLL and JANINE
BIRCOLL, individuals,

Plaintiffs/Appellants

Appellate Case No. 20090179

vs.

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

Defendants/Appellees

RESPONSE BRIEF OF THE APPELLANT

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

Shawn Ferris, Esq.
Attorney for Defendants/Appellees
2107 W. Sunset Blvd., 2nd Floor
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 response brief.

FILED
UTAH APPELLATE COURTS

SEP 26 2009

IN THE UTAH COURT OF APPEALS

MELVYN BIRCOLL and JANINE
BIRCOLL, individuals,

Plaintiffs/Appellants

Appellate Case No. 20090179

vs.

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

Defendants/Appellees

RESPONSE BRIEF OF THE APPELLANT

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

Shawn Ferris, Esq.
Attorney for Defendants/Appellees
2107 W. Sunset Blvd., 2nd Floor
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 response brief.

ARGUMENT

Without conceding the points in the Brief of Appellee not specifically addressed herein, I offer the following in response to the Brief of Appellee:

- (1) Abuse of Discretion. With due respect to the trial court, we believe that it was an abuse of discretion to mechanically reduce attorneys' fees by seventy-five percent (75%) for the following reasons:
 - (A) The "non-compensable" contract claims are indispensable to the compensable mechanic's lien claim on which we prevailed;
 - (B) There was significant overlap among all claims;
 - (C) 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 and refusing to remove the lien on our home; and
 - (D) The disparity between the fees we requested (\$17,243.50) and the principal recovery (\$3,747) was a function of the current rate for legal fees in the community, and in no event a result of wasteful billing on the part of our trial attorney.

Moreover, we believe it was an abuse of discretion to disregard the public policy implications of the award, to wit: the effective denial of access to the Utah courts in all cases where the amount in controversy is low, and the encouragement of reckless lien practices. Despite the high standard of review, we trust the Utah Court of Appeal will take an interest in these matters.

- (2) Pro Se. Appellee complains that our brief does not comply with Rule 24 of the Utah Rules of Appellate Procedure. Before preparing the Brief of the Appellant, however, we were given permission by the Court clerk to make a reasonable effort to follow the proper procedures. We did so in good faith. In any event, as *pro se* appellants, we are asking the Court to look beyond the form of our presentation to the substance of our arguments.

(3) Irrelevance of Southwest “Project File”. Appellee’s attempt to distract the Court’s attention with a claim that the countertops as installed comported with notes in its internal files – notes nowhere signed or acknowledged by me or my wife, nor seen by me or my wife until they were produced in Discovery – is an insult to this Court’s intelligence and to the trial court’s Findings. The trial court specifically found that “Defendant failed to perform pursuant to the terms of this agreement because it installed countertops in the bathroom that were ¾ inch thick with a flat, polished edge.” (Record at 77, Paragraph 6 of Conclusions.)

(5) Irrelevance of Fact That Parties’ Agreement was “Oral”. While the parties’ agreement was oral (between me and my wife, on the one hand, and Southwest representative Mark Burnett, on the other), that does not impair its validity. Like Appellee’s attempt to distract the Court’s attention with references to its internal “notes,” Appellee’s characterization of the parties’ agreement as an “[Oral] Contract,” see Brief of Appellee, p. 8, should be disregarded.

(6) Misstatement of Trial Court’s Conclusion. Appellee states on page 4 of its Brief, “The Trial Court concluded that Appellee had *not* installed countertops of the wrong thickness.” (Emphasis added.) Perhaps this was a typographical error. In fact, the trial court concluded as follows: “Defendant failed to perform pursuant to the terms of this agreement because it installed countertops in the bathroom that were ¾ inch thick with a flat, polished edge.” (Record at 77, Paragraph 6 of Conclusions.)

(7) Apparent Inapplicability of *Allen v. Friel*. It appears from Appellee’s own description of the case that *Allen v. Friel* is not on point. In *Allen*, the *pro se* appellant’s procedural flaws (i.e., failure to follow the appellate rules, failure to provide portions of the record central to the appeal) were compounded by substantive flaws (i.e., *pro se* appellant failed to identify flaws in the district court’s order to be reversed, and failed to show that there was not a reasonable basis in the record to support the district court’s holdings). In contrast, we believe we *have* identified flaws in the trial court’s order to be reversed (e.g., failure to consider important public policy ramifications of the award and failure to consider 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 and refusing to remove the lien on our home, and (iv) the disparity between the fees we requested (\$17,243.50) and the principal recovery (\$3,747) 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). For the same reasons, we also believe we have shown that there was not a reasonable basis in the record to support the district court's mechanical, seventy-five percent (75%) reduction of attorney's fees. While we broadly concede our procedural errors in this appeal, as *pro se* appellants, we are at a loss to correct them. Notwithstanding this, we pray that this Court will evaluate and validate the substance of our arguments.

In this connection, it is also not known by us whether the cases cited by Appellant (*i.e.*, *Jolivet* and *Steagall*) are about *pro se* appellants. If not, we would suggest that they, too, are inapplicable.

(8) Mischaracterization of Appellants' "Refusal to Pay." On page 12 of the Brief of Appellee, Appellee states "It was the refusal of the Appellants to pay any portion of this billing related to the subject countertops that resulted in the filing of the mechanic's lien and pursuit of collection." This statement is misleading. In fact, Southwest performed a great deal of kitchen and tile work in our home, and it was paid in full and on time for all of it, in an amount approximating Seventeen Thousand Dollars (\$17,000). Given that, and the fact that Southwest representative Mark Burnett immediately acknowledged Southwest's error, my wife and I were, and continue to be, at a loss to understand why the owner of Southwest would not have even returned our many telephone calls regarding the bathroom countertops before filing the lien against our new home. Please recall, in this connection, that the charge to us for the bathroom countertops was to have been \$2,000, a mere fraction of the \$19,000 of work we had ordered for the home, and that the cost to Southwest of the bathroom countertops was only \$800. (This latter piece of information was provided to us by Southwest representative Mark Burnett.) In any event, we reached an agreement with Mr. Burnett that we would keep the wrong countertops (which actually had a *negative* value to us) for no charge (*i.e.*, that Southwest would write its own mistake off). In short, any implication of a "refusal to pay" on our part is wholly wrong.

(9) Dispute Over Hours Must Be Viewed in Larger Context: Appellee quibbles with the number of hours spent by our attorney in bringing this

matter to trial. We believe that this quibbling must be evaluated in terms of the big picture. To wit, is Seventeen Thousand Dollars (\$17,000) for *any* litigation to trial and judgment unreasonable? The answer must certainly be no. As Your Honors know, litigation over a \$2,000 countertop costs the same as litigation over a \$20,000 countertop or a \$200,000 countertop. And in the instant case, we had no choice but to litigate to trial because Southwest refused to remove the lien from our home. In any event, the \$17,000 was billed by our attorney, and paid by us, in good faith, and even Judge Ludlow said the amount was reasonable. Thus, the result of the trial court's mechanical reduction of those fees by 75% is that we – litigants with a relatively small amount in controversy – are effectively punished for pursuing our contract and real property rights. This must surely be contrary to Utah public policy, and an injustice to us personally.

(10) Misrepresentation of Disparity Between Attorney's Fees and Amount in Controversy. Disturbingly, Appellee misrepresents the disparity between the total amount of Appellants' attorney's fees and the amount in controversy. See Brief of Appellee, page 8 ("Appellants made a claim for attorney's fees which exceeds the amount of recovery by more than 1100%."). In fact, the cost of the countertops *plus* the cost of replacement (both of which costs were awarded to Appellant on the breach of contract claim) totals \$3,747, making the ratio of attorney's fees to costs more like 460%. But even this number must be viewed in terms of the larger context: If we are serious about affording litigants the right to protect their contract and real property rights in court, then we must accept that in cases where the amount in controversy is low – *but a litigant's contract and real property rights are nonetheless wrongfully jeopardized* – there will be a disparity between attorney's fees and the amount in controversy. As long as the attorney's fees are reasonable in the community, and the trial court acknowledged that they were, the disparity should not be a bar to full recovery of attorney's fees for the prevailing party.

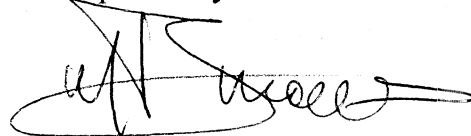
(11) Unfairness of Mechanical Reduction. As laypeople, my wife and I are at a loss to understand how we prevailed on the underlying breach of contract claim and yet not on the abuse of lien claim: If (as the trial court found) Southwest did not give us the benefit of our bargain and we owed them nothing, then why was it not abusive for Southwest to place a lien on our home? More to the point of this appeal, why are we forced to bear 75% of our attorney's fees when we owed Southwest *nothing* for installing the *wrong* bathroom countertops? The mechanical reduction of attorney's fees

by 75% would be understandable if the three other claims in this action were unrelated (e.g., breach of contract and trespass). But in actuality, all claims in the action are irrevocably intertwined. Inexplicably, the trial court acknowledged this, but went on to find that "26.35 hours [1/4 of attorney's fees actually billed and paid for] is a fair and reasonable amount of time to have spent on the mechanic's lien claim and [that] an award for that time adequately vindicates plaintiff's rights under the statute." With due respect to the trial court, we believe it was an abuse of discretion for the court not to have considered that our prevailing on the mechanic's lien claim was *contingent* on our winning the breach of contract issue. Given that one claim *was* contingent on the other, how can our request for fees for the remaining 75% of our attorney's work be denied consistent with equity and Utah public policy?

(12) Designation of Appellant. Appellee characterizes as "posturing" the fact that I asked to be addressed as "Dr. Bircoll" during the trial proceedings but introduced myself as "Mel" in our telephone mediation. See Brief of Appellee, p. 9. This is neither posturing nor inconsistent: I introduce myself by my first name in informal settings but as a retired medical doctor, do ask to be addressed by my correct title in more formal proceedings. I ask the Court to ignore Appellant's personal attack against me and against my status as a *pro se* appellant in this action.

Thank you for your consideration.

Respectfully submitted

A handwritten signature in black ink, appearing to read "Mel Bircoll", with a large, sweeping flourish extending to the right.

Mel Bircoll, M.D.