

2000

Jeannie Stringam v. Morris Myers, et al. : Reply Brief

Utah Court of Appeals

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**IN THE COURT OF APPEALS FOR THE
STATE OF UTAH**

450 South State, Salt Lake City, Utah 84114-0230

JEANNIE STRINGAM,

Plaintiff/Appellee/Cross-Appellant,

v.

MORRIS MYERS, et al.

Defendant/Appellant/Cross-
Appellee.

Appeal No. 20000179-CA

Case No. 970400100
(Fourth District Court, Utah County, Judge
Guy Birmingham)

Priority Classification 15

APPELLEE JEANNIE STRINGAM'S REPLY BRIEF

**APPEAL FROM THE JANUARY 31, 2000, FINAL ORDER AND JUDGMENT,
AND THE FEBRUARY 4, 2000, ADDENDUM TO FINAL JUDGMENT AND
ORDER**

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Clerk of the Court

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II. TABLE OF AUTHORITIES

A. CASES

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<u>William C. Selvage & Wm. C. Selvage, Inc. v. J.J. Johnson & Associates</u> , 910 P.2d 1252 (Utah App. 1996)	5

B. RULES

Utah R. App. P. 3	6
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III. INTRODUCTION

Appellee Jeannie Stringam (“Stringam”) hereby submits the following Response Brief to Appellant Morris Myers (“Myers”) Reply Brief pursuant to Utah Rule of Appellate Procedure 24(c).

IV ARGUMENT

A. THE AMBIGUITY OF THE AGREEMENT.

In response to the arguments raised by Myers’ in his Reply Brief regarding the ambiguity of the Agreement, Stringam respectfully requests that the Court review the district court’s extensive Findings of Fact and Conclusions of Law for the district court’s reasoning behind its conclusion of ambiguity. The district court’s Findings and Conclusions are supported by the facts and by the correct law.

In Myers’ Reply Brief, four subsections are dedicated to the ambiguity of the Agreement and to the district court’s admission of parole evidence to interpret the Agreement. In Subsection 1 Myers argues that the district court failed to identify the different interpretations of the Agreement. This is a misstatement by Myers. The record reflects numerous statements by the district court regarding the different interpretations of the Agreement. See Rec. at 1034-38 and 1026-32.

In Subsection 2 Myers argues that Stringam and Erin Stovall are too biased for their individual “subjective” intents to have been properly considered by the district court. However, Myers arguments regarding bias – or “credibility” as Myers states it – is not persuasive. First, if bias is in question, Myers’ bias should also be considered. There

is no question here that Myers would like the Agreement to be construed as a joint-venture. Second, Myers' depiction of Erin Stovall's alleged bias is misconstrued. Erin Stovall would have received her money – one-half of the proceeds of the sale of the home in excess of \$109,000 (Rec. at 901, Exhibit A, ¶¶ 10-11; and Rec at 820, Exhibits 54 & 59, located in manilla envelope Marked "Exhibits") – regardless of whether the Home was sold to Stringam or to a third party. Finally, Myers' reply argument twists the analysis in Watkins and Sun Oil, and appears to imply that Stringam's and Erin Stovall's subjective intents should not be considered because it is "the objective intent [of the instrument] that controls." See Myers' Reply Brief at 3 (citing Watkins v. Petro-Research, Inc., 689 F.2d 537 (5th Cir. 1992), and Sun Oil Co. v. Madeley, 626 S.W. 2d 726, 731 (Tex. 1981)). This is simply a restatement of Myers' position that the Agreement is not ambiguous. However, the district court clearly concluded that the Agreement is ambiguous; the court's conclusion is sustained by a correct application of the law. See Rec. at 1018 and 1026. While it is true that an unambiguous instrument expresses the parties' objective intent, the subjective intent of the parties is admissible as extrinsic evidence when an instrument is ambiguous. U.P.C. v. R.O.A. Gen. Inc., 1999 UT App. 303, ¶ 39, 990 P.2d 945. Moreover, when an instrument is ambiguous it is construed against its drafter. Id. Myers drafted the Agreement.

In Subsection 3, Myers again raises the joint-venture argument, an argument that he expressly abandoned during the district court proceedings. (Rec at 1046, Page 31, Lines 2-15). Even if the Court decides to address the substance of the joint-venture

argument, the argument still boils down to the ambiguity and interpretation of the Agreement. Regardless of the fact that Myers insists on constantly re-addressing the issue, the Agreement is ambiguous. Not only does the Agreement not accurately reflect the intent of the parties regarding its nature, it completely fails to address the amortization and eventual sale price. From any angle of attack, the Agreement is ambiguous.

In Subsection 5 Myers once again addresses the ambiguity of the Agreement. Once again he states that the four-corners of the Agreement reflect the parties' intent. Once again he provides a legal standard without providing any analysis. The issue of the Agreement's ambiguity and subsequent interpretation has been sufficiently addressed by the district court and Stringam. The Agreement is ambiguous.

The Court should hold that the district court's conclusion that the Agreement is ambiguous was correct.

B. THE BALLOON PAYMENT

In Subsection 4 of his Reply Brief, Myers states that the whether the district court properly allowed Stringam to tender the balloon payment into the court is no longer an issue. This is a strange averment considering the fact that Myers primary argument before the district court was that Stringam's failure to tender the payment to him was a breach of the Agreement. In fact, after abandoning his joint-venture argument, Myers' entire case revolved around his argument that the Agreement required Stringam to tender the balloon payment to Myers, so Stringam's tender of the \$109,000 into the court was a breach of the Agreement. Furthermore, Stringam's tender of the balloon payment to the

district court was an issue that Myers addressed extensively in his Appellate Brief. How is it that the issues is now “no longer a consideration?” Because Myers raised the issue in his Appellate Brief, the issue must be addressed.

In addition to the above-stated argument, Myers mistakenly implies in his Reply that the reason Stringam was allowed to withdraw the \$109,000 from the district court was because, “through simple mathematical calculation, the trial court determined the balloon payment to be \$134,043.24.” The reason that Stringam was allowed to withdraw the money is because “Myers never established his right to the funds and has not yet furnished proof of his ability to provide Stringam with clear title.” (Rec. at 1022, ¶ 12).

C. ATTORNEY FEES

In Subsection 6, Myers argues that Stringam has waived her right to attorney fees and costs. First, costs are not now, nor have they ever been, at issue here. Second, Myers fails to distinguish between fees and costs. Myers cites Utah Rule of Civil Procedure 54(d)(2), which governs awards of costs. Costs do not include attorney fees. Tholen v. Sandy City, 849 P.2d 592 (Utah App. 1993). Thus, Rule 54(d) does not apply to Stringam’s attorney fee award here. Additionally, Frampton v. Wilson, the case Myers cites as supporting his contention, is not even pertinent to the case at bar. See Frampton v. Wilson, 605 P.2d 771 (Utah 1980) (vacating an award of costs that was above the amount allowed by statute).

“In Utah, the general rule ‘is that attorney fees cannot be recovered by a prevailing

party unless a statute or contract authorizes such an award.” William C. Selvage & Wm. C. Selvage, Inc. v. J.J. Johnson & Associates, 910 P.2d 1252 (Utah App. 1996) (quoting Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 782 (Utah 1994)). Here, the Agreement specifically states that the prevailing party in any litigation regarding the Agreement is entitled to attorney fees. (Rec. at 820, Exhibit 1, ¶ 6). Thus, Stringam is entitled to attorney fees as the prevailing party.

Additionally, while there is no question that courts have the discretion to determine the reasonableness of attorney fees before awarding them, the court may not award less than the prevailing party is entitled to. Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988). Here, Stringam’s counsel submitted an affidavit regarding the amount of attorney fees that Stringam had incurred in prosecuting the action against Myers. The district court reduced the award from \$73,574.90 to approximately \$42, 531.41 without providing any reasons for the reduction and without issuing findings of unreasonableness. The Court should remand for a finding of reasonable attorney fees. See e.g. Tholen v. Sandy City, 849 P.2d 592 (Utah App. 1993) (remanding the trial court’s arbitrary reduction of attorney fees award from \$44,496.50 to \$28,342.50 for an explanation).

D. JURISDICTION

In Subsection 7, Myers avers that his Appellate Brief argument regarding whether Stringam may appeal from a judgment in her favor (Myers’ Appellate Brief at 5, third paragraph) is jurisdictional and may be raised at any time. While lack of jurisdiction may

be raised at any time, Bradbury v. Valencia, 2000 UT 50, ¶ 8, 397 Utah Adv. Rep. 7, there is no basis in Utah law for Myers' argument here. When Myers raised this issue in his Appellate Brief he was not raising a jurisdictional argument, but a wholly unsustainable legal argument that could be construed as bad faith. For further discussion of this issue, Stringam respectfully requests that the Court direct its attention to the arguments beginning on Page 46 of Stringam's Appellate Brief.

In addition, Subsection 9 of Myers' Reply Brief addresses Stringam's argument that Myers' Notice of Appeal was faulty. Myers cites Utah Rule of Appellate Procedure 3(a) as supportive of his argument that his Notice was proper. However, not surprisingly, Myers conveniently manages to omit the bulk of the sentence that he quotes. The portion of the sentence that Myers omits states that the appellate court may take appropriate action when only Notice of Appeal is filed, it does not forgive faulty notices of appeal. Moreover, Rule 3(a) does not apply to the case at bar because more steps were taken here than filing a Notice of Appeal. In regards to the substantive argument regarding this issue, Stringam respectfully requests that the Court direct its attention to the arguments beginning on Page 33 of Stringam's Appellate Brief.

E. THE CITATION OF SUPPLEMENTAL AUTHORITY

In Subsection 8 of his Reply Brief, Myers argues that his Citation of Supplemental

Authority is properly before the Court because Stringam failed to respond within seven days. Utah Rule of Appellate Procedure 24(i), states in pertinent part that, “[a]ny response shall be made within 7 days of filing and shall be similarly limited.” Thus, the clear reading of Rule 24(i) indicates that a second party’s response to a first party’s citation of supplemental authority would be for the purpose of providing authority to the court rebutting the supplemental authority provided by the first party. If this were not the case, i.e. if an “opposition” were considered a “response”, then there would be no need to place the same restrictions on a response as are placed on a citation of supplemental authority.

Here, Stringam simply opposed Myers’ Citation of Supplemental Authority; Stringam did not respond by submitting authority opposing Myers’ joint-venture citations. Therefore, pursuant to a clear reading of Rule 24(i), Stringam’s opposition to Myers’ Citation of Supplemental Authority was proper.

V CONCLUSION

For the foregoing reasons Stringam respectfully requests that the Court:

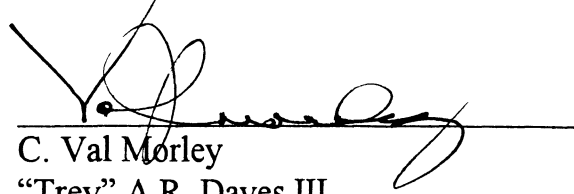
1. Reverse the district court’s incorrect application of U.C.A. § 78-27-3 and require Myers to accept Stringam’s original tender of \$104, 211.74;
2. Reverse the district court’s arbitrary reduction of attorney fees to Stringam

and remand for a determination of reasonableness by the district court;

3. Strike Myers' Citation of Supplemental Authority;
4. Dismiss Myers' appeal for lack of jurisdiction or Decline to consider Myers' arguments;
5. Affirm the district court's denial of Myers' Post-trial Motions;
6. Affirm the district court's conclusion that the Agreement is ambiguous and the district court's admission of extrinsic evidence to interpret the Agreement;
7. Hold that the Addendum to Final Judgment and Order was a final judgment and that Stringam's appeal from the Addendum was proper;
8. Hold that Stringam's appeal is proper even though Stringam was found to be the prevailing party; and
9. Affirm the district court's decision to allow Stringam to tender the \$109,000 balloon payment to the district court.

Date: November 29th, 2000 .

DUVAL HANSEN WITT & MORLEY, P.C.



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CERTIFICATE OF SERVICE

I certify that on November 30th, 2000, I caused a true and correct copy of this STRINGAM'S REPLY BRIEF, to be served by:

✓

mailing it by first class mail to:

causing it to be hand-delivered to:

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