

1990

# George Ronald Wright v. Westside Nursery, a Utah limited partnership, and Darrel Humphries, an individual : Brief of Appellee

Utah Court of Appeals

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Gary W. Pendleton; Attorney for Appellant.

Hans Q. Chamberlain; Chamberlain & Higbee; Attorney for Appellees.

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**BRIEF**

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IN THE UTAH COURT OF APPEALS

GEORGE RONALD WRIGHT, )

Plaintiff and Appellant, )

vs. )

Case No. 880544-CA

WESTSIDE NURSERY, a Utah )  
limited partnership, and )  
DARREL HUMPHRIES, an )  
individual, )

Priority No. 14b

Defendants and Appellees.

BRIEF OF APPELLEES

APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT IN  
AND FOR WASHINGTON COUNTY, STATE OF UTAH,  
THE HONORABLE J. PHILIP EVES PRESIDING

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Attorney for Appellees

**FILED**

AUG 9 1990

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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GEORGE RONALD WRIGHT, )

Plaintiff and Appellant, )

vs. ) Case No. 880544-CA

WESTSIDE NURSERY, a Utah ) Priority No. 14b  
limited partnership, and  
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APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT IN  
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Attorney for Appellees

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- A. Rule 34, Utah Rules of Appellate Procedure.
- B. Order Assessing Attorney's Fees Incurred on Appeal, Directing Disbursements of Supersedeas Bond and Exonerating Preliminary Injunction Bond, dated March 22, 1990.

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IN THE UTAH COURT OF APPEALS

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Plaintiff and Appellant, )

vs. )

WESTSIDE NURSERY, a Utah )

limited partnership, and )

DARRELL HUMPHRIES, an )

individual, )

Defendants and Respondents.

---

Case No. 880544-CA

---

BRIEF OF RESPONDENT

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JURISDICTION OF COURT OF APPEALS

Jurisdiction is conferred upon this Court by Utah Code Ann. § 78-2a-3(2)(j) (1953, as amended).

NATURE OF THE PROCEEDINGS

Humphries adopts the nature of the proceedings as stated by Wright.

STATEMENT OF THE ISSUES

1. Is Rule 34 of the Utah Rules of Appellate Procedure clear and unambiguous concerning costs on appeal.

2. Given the language of Rule 34 of Utah Rules of Appellate Procedure and this Court's prior decision, did

the trial court on remand have any discretion in awarding costs on appeal.

3. Did the trial court abuse its discretion in refusing to modify attorney's fees awarded Humphries at trial?

4. Is this appeal so frivolous that attorney's fees should be awarded Humphries on this second appeal.

#### CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

There are no Constitutional provisions at issue. Rule 34 of the Utah Rules of Appellate Procedure is controlling and is attached as Addendum A.

#### STATEMENT OF THE CASE

Humphries adopts Wright's Statement of the Case, but adds the following clarifications:

1. At the hearing on remand, Humphries' counsel took the position that (a) because costs were not awarded by this Court and (b) Rule 34 of the Utah Rules of Appellate Procedure cannot be construed as awarding Wright costs, there was no need to file an objection to Wright's Memorandum of Costs. It was therefore improper for Wright to seek costs based on a reading of this Court's decision and Rule 34 of the Utah Rules of Appellate Procedure.

2. The trial court correctly followed the directive of this Court and awarded Wright \$8,152.50 for attorney's fees incurred on appeal.

3. Humphries' counsel also suggested (in argument that was not recorded by the court reporter) that:

A. The jury had already reduced attorney's fees based on the equities of this matter. Such a decision by the jury or the court is within the province of the fact finder.

B. Post-verdict and while the jury was still impaneled, Wright failed to make inquiry why the jury reduced attorney's fees, or on what issue attorney's fees were awarded. Failure to make that inquiry constitutes waiver.

C. The burden was on Wright to prove by a preponderance of the evidence why and how attorney's fees should be reduced. There was conflicting testimony at the remand hearing on the attorney's fees incurred by Humphries for the issues Wright prevailed on in his appeal. Wright failed to meet his burden, and the Court would not speculate in that area.

4. The Court of Appeals' decision did not mandate a reduction of attorney's fees.



#### STANDARD OF REVIEW

The trial court found that Wright failed to meet his burden on remand on the issue of a reduction in attorney's fees awarded Humphries at trial. The court refused to speculate in that area. (T.24, 25). (See Order Assessing Attorney's Fees Incurred on Appeal, Directing Disbursements of Supersedeas Bond and Exonerating Preliminary Injunction, Addendum B).

A trial court's finding of fact, whether based on oral or documentary evidence, will not be set aside on appeal unless clearly erroneous. Copper State Leasing Co. v. Blacker Appl. and Furn. Co., 770 P.2d 88 (Utah 1988); Western Kane County Spec. Service District v. Jackson Cattle Co., 744 P.2d 1377 (Utah 1987); Porter v. Groover, 734 P.2d 434, 435 (Utah 1987).

A trial court's finding is clearly erroneous when, although there is evidence to support it, the court reviewing all the record evidence is left with a definite and firm conviction that a mistake has been made. The Appellate Court may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or induced by an erroneous view of the law. State v. Walker, 743 P.2d 191, 193 (Utah 1987); Western Capital v. Knudsvig, 768 P.2d 989 (Utah 1989).

In order to challenge a trial court's finding of fact, an appellant must first marshal all the evidence that supports the findings and then demonstrate that, despite this evidence, they are so lacking in support as to be "against the clear weight of the evidence" and, thus, clearly erroneous. In re Estate of Bartell, 776 P.2d 885 (Utah 1989). This marshaling of the evidence is a prerequisite to the Appellate Court's determination of whether the findings are clearly erroneous. Cornish Town v. Koller, 758 P.2d 919 (Utah 1988); Fitzgerald v. Critchfield, 744 P.2d 301, 304 (Utah Ct. App. 1987).

Humphries submits that Wright has clearly failed to meet the standard for review established by this Court.

#### SUMMARY OF ARGUMENT

The trial court correctly interpreted Rule 34 of the Utah Rules of Appellate Procedure and this Court's decision on the issue of costs. The trial court had no discretion to award costs.

The trial court properly applied its discretion in denying Wright's attempt to reduce attorney's fees awarded Humphries at trial.

This appeal is so frivolous that Humphries should be awarded attorney's fees. Alternatively, Humphries is

entitled to attorney's fees as the prevailing party if he prevails on appeal.

## ARGUMENT

### POINT I

#### WRIGHT WAS NOT ENTITLED TO NOR WAS HE AWARDED COSTS ON THE PRIOR APPEAL

In Appellant's Brief, Wright totally disregards the language of Rule 34 of the Utah Rules of Appellate Procedure and the holding of this Court on the prior appeal.

Rule 34(a) of the Rules of Appellate Procedure states as follows:

To whom awarded. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment or order is affirmed, costs shall be taxed against appellant unless otherwise ordered; if a judgment or order is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment or order is affirmed or reversed in part, or is vacated, costs shall be allowed as ordered by the court. Costs shall not be allowed or taxed in a criminal case. (Emphasis added).

Applying the rule to the instant matter, we find that the Court of Appeals affirmed in part and reversed in part. In that situation, costs are allowed only as ordered by the court. The Court of Appeals awarded no costs. Rule 34 and the decision by this Court could not be more clear.

Wright suggests that Humphries had an obligation to object to Wright's bill of costs and failure to do so constitutes waiver. That claim is best responded to by the following question: If Rule 34 is to the effect that in a case which is affirmed in part and reversed in part, costs are only awarded when specifically allowed by the court, why should a litigant have to object (thus incurring additional attorney's fees) when what is sought is not allowed in the first place? To hold otherwise will cause an objection to be made every time a party is not awarded costs but still seeks them, resulting in additional pleadings, hearings before the court, and attorney's fees to the client. It will also cause the opposing party to seek Rule 11 sanctions which may in fact be appropriate.

Wright also fails to recognize the underlying reason why Rule 34 is written as it is. The rule simply recognizes that when a case is affirmed in part or reversed in part, the issue of costs is left for decision by the Appellate Court. Failure to award costs is a clear indication by the court that it duly considered whether or not costs should be awarded, and made a conscious decision that neither party should be awarded costs. Stated another way, when a case is reversed and affirmed in part, both parties prevailed on appeal and neither party should be penalized by an award of costs.

## POINT II

### WRIGHT FAILED TO MEET HIS BURDEN AT THE REMAND HEARING ON THE ATTORNEY'S FEES ISSUE

The Appellate Court in the prior appeal correctly recognized that Humphries was to be properly regarded as the party who prevailed at trial and was thus entitled to attorney's fees. Wright v. Humphries, 787 P.2d 508, 517 (Utah 1990). However, this Court did not mandate that a reduction of attorney's fees was required on remand, but merely suggested that some adjustment may be necessary, Id. at 517. This Court recognized that it would be Wright's burden to persuade the trial court that (1) sufficient proof existed in the form of itemized billings or other proof that would be applicable to the issues on which Humphries did not prevail; and (2) Wright would have to overcome the legal consequences of (a) submitting the issue of attorney's fees to the jury in the form of a general verdict as to fees, and (b) failing to make inquiry to the jury post-verdict but before discharge, on what issue attorney's fees were awarded and how much.

Even though Humphries' attorney submitted as an exhibit at the time of the original trial a copy of all attorney's fees billed to Humphries, no attempt was made by Wright at the remand hearing to show what work was done by

Humphries' counsel on a particular day which was attributable to a specific issue. (T. 15-20).

There was conflicting testimony at the remand hearing on the issue of attorney fees. Humphries' attorney testified that because of the complexity of the litigation and the numerous issues involved, it was impossible for him to determine how much time he incurred on the fraud issue. (T.18, 19). The time Wright's counsel incurred in defending the issue has no relevance to what Humphries incurred. The trial court apparently weighed all the evidence presented and found that Wright had failed to meet the burden of proof required.

This case was so complex and interwoven that it was impossible to separate out attorney's fees incurred on a specific matter. The conflicting evidence at the remand hearing, coupled with the trial court's recognition that the jury had already reduced the attorney's fee sought by Humphries from 30,000 to \$10,000 was evidence enough to the trial court that it should not speculate and merely guess on an appropriate reduction of attorney's fees. Since the trial court would not speculate, this Court should avoid the urge to do so. As stated by the trial court at the remand hearing:

The jury awarded \$10,000 out of the 30,000 plus that was requested by Mr. Chamberlain, and they were not requested to give any explanation as to why they reduced the requested attorney's fees.

I'm required under this decision to determine whether or not the \$10,000 award of attorney's fees ought to be reduced further, in light of the fact that Mr. Wright has prevailed on the fraud claim, and that's been reversed by the Court of Appeals--the jury's finding on that has been reversed. Since we can't guess why the jury found the \$10,000 fee in the first place, I'm not going to guess on whether or not that should be reduced. I don't know if there was any of that \$10,000 that was awarded on the fraud claim.

As I said, I can say that if I were making the determination, the attorney's fee would have been higher, and it would have included, in all likelihood, some fees for the litigation on the fraud claim, which I would have reduced now, in light of the fact that the fraud claim has been overturned. But I can't assume that the same procedure would be followed with regard to the jury. Therefore, I'm going to allow the \$10,000 attorney's fee to stand. (T. 24, 25). (Emphasis added).

The issue of attorney's fees incurred by Humphries has been decided by both the jury and the trial court. It would be improper for this Court to substitute its judgment for both of these fact finders who have heard the evidence first hand.

### POINT III

#### HUMPHRIES IS ENTITLED TO ATTORNEY'S FEES ON THIS APPEAL

Wright's appeal on both issues is without merit. Humphries should therefore be awarded his attorney's fees

and costs on this second appeal. Since this case is a continuation of a case where attorney's fees were appropriate in the first instance, they are likewise appropriate now, but only if requested by a party. Wright has not requested an award of attorney's fees in this appeal and it would therefore be error for this Court to award attorney's fees to Wright even if he prevails on this appeal.

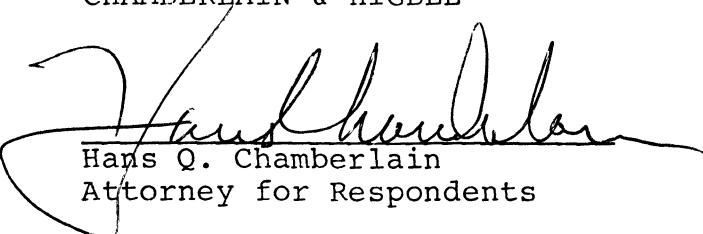
#### CONCLUSION

This Court should deny Wright's claim for costs. The Court should also reject Wright's suggestion that this Court substitute its judgment for the trial court and determine an appropriate reduction for attorney's fees awarded Humphries.

Neither of Wright's arguments are supported by the evidence or by law. Humphries should be awarded his attorney's fees and costs on this appeal. It is important to note that Wright has not requested attorney's fees on this appeal.

DATED this 7th day of August, 1990.

CHAMBERLAIN & HIGBEE

  
Hans Q. Chamberlain  
Attorney for Respondents



MAILING CERTIFICATE

I hereby certify that on the 5th day of August, 1990, I did personally mail four true and correct copies of the above and foregoing RESPONDENTS' BRIEF to Gary W. Pendleton, Attorney for Appellant, at 150 North 200 East, suite 202, St. George, Utah 84770.

  
Hans Q. Chamberlain

## ADDENDUM A

## Rule 34. Award of costs.

(a) **To whom allowed.** Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment or order is affirmed, costs shall be taxed against appellant unless otherwise ordered; if a judgment or order is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment or order is affirmed or reversed in part, or is vacated, costs shall be allowed as ordered by the court. Costs shall not be allowed or taxed in a criminal case.

(b) **Costs for and against the state of Utah.** In cases involving the state of Utah or an agency or officer thereof, an award of costs for or against the state shall be at the discretion of the court unless specifically required or prohibited by law.

(c) **Costs of briefs and attachments, record, bonds and other expenses on appeal.** The following may be taxed as costs in favor of the prevailing party in the appeal: the actual costs of a printed or typewritten brief or memoranda and attachments not to exceed \$3.00 for each page; actual costs incurred in the preparation and transmission of the record, including costs of the reporter's transcript unless otherwise ordered by the court; premiums paid for supersedeas or cost bonds to preserve rights pending appeal; and the fees for filing and docketing the appeal.

(d) **Bill of costs taxed after remittitur.** When costs are awarded to a party in an appeal, a party claiming costs shall, within 15 days after the remittitur is filed with the clerk of the trial court, serve upon the adverse party and file with the clerk of the trial court an itemized and verified bill of costs. The adverse party may, within 5 days of service of the bill of costs, serve and file a notice of objection, together with a motion to have the costs taxed by the trial court. If there is no objection to the cost bill within the allotted time, the clerk of the trial court shall tax the costs as filed and enter judgment for the party entitled thereto, which judgment shall be entered in the judgment docket with the same force and effect as in the case of other judgments of record. If the cost bill of the prevailing party is timely opposed, the clerk, upon reasonable notice and hearing, shall tax the costs and enter a final determination and judgment which shall thereupon be entered in the judgment docket with the same force and effect as in the case of other judgments of record. The determination of the clerk shall be reviewable by the trial court upon the request of either party made within 5 days of the entry of the judgment.

(e) **Costs in other proceedings and agency appeals.** In all other matters before the court, including appeals from an agency, costs may be allowed as in cases on appeal from a trial court. Within 15 days after the expiration of the time in which a petition for rehearing may be filed or within 15 days after an order denying such a petition, the party to whom costs have been awarded may file with the clerk of the appellate court and serve upon the adverse party an itemized and verified bill of costs. The adverse party may, within 5 days after the service of the bill of costs file a notice of objection and a motion to have the costs taxed by the clerk. If no objection to the cost bill is filed within the allotted time, the clerk shall thereupon tax the costs and enter judgment against the adverse party. If the adverse party timely objects to the cost bill, the clerk, upon reasonable notice and hearing, shall determine and settle the costs, tax the same, and a judgment shall be entered thereon against the adverse party. The determination by the clerk shall be reviewable by the court upon the request of either party made within 5 days of the entry of judgment; unless otherwise ordered, oral argument shall not be permitted. A judgment under this section may be filed with the clerk of any district court in the state, who shall docket a certified copy of the same in the manner and with the same force and effect as judgments of the district court.

### COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d Appeal and Error §§ 1009 to 1024.

C.J.S. — 5 C.J.S. Appeal and Error § 1979.  
Key Numbers. — Costs ⇌ 221 et seq.

## ADDENDUM B

GARY W. PENDLETON USB #2564  
Attorney for Plaintiff  
150 North Second East, Suite 202  
St. George, Utah 84770  
Ph: 628-4411

90 MAR 22 PM 10 23

DEPUTY *A. S. Chamberlain*

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IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR  
WASHINGTON COUNTY, STATE OF UTAH

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GEORGE RONALD WRIGHT,	)	
	)	
Plaintiff,	)	ORDER ASSESSING ATTORNEY'S
	)	FEE'S INCURRED ON APPEAL,
vs.	)	DIRECTING DISBURSEMENTS OF
	)	SUPERSEDEAS BOND AND
WESTSIDE NURSERY, a Utah	)	EXONERATING PRELIMINARY
limited partnership and	)	INJUNCTION BOND
DARREL HUMPHRIES, an	)	
individual,	)	
	)	Civil No. 85-0536
Defendant.	)	

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The above-entitled matter came on regularly for hearing on Plaintiff's motion to reduce the attorney's fees awarded to Defendants at trial and to assess attorney's fees reasonably incurred on appeal to the Utah Court of Appeals. Plaintiff appeared in person and by and through his attorney, Gary W. Pendleton and Defendants appeared by and through their attorney, Hans Q. Chamberlain. The Court having heard the statements of counsel and having taken evidence regarding the issue of attorney's fees and having reviewed the opinion of the Utah Court of Appeals and being fully advised in the premises entered the following orders:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the attorney's fees awarded Defendants at trial are not reduced because

the jury was not requested to disclose the basis of their award of the attorney's fees and the Court is not going to speculate in that area.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff recover from Defendant the sum of \$8,152.50 as reimbursement for attorney's fees reasonably incurred on appeal to the Utah Court of Appeals, the Court having found the same to be reasonably and necessarily incurred.

IT IS FURTHER ORDERED that Plaintiff recover no costs on appeal and his Bill of Costs filed on March 7, 1990, is hereby stricken. This order is made on the grounds and for the reasons that the opinion of the Utah Court of Appeals does not specifically award Plaintiff costs on appeal and such costs are not recoverable by application of Rule 34, Rules of the Utah Court of Appeals.

IT IS FURTHER ORDERED that the Clerk of the District Court immediately disburse the funds now held as supersedeas bond in the above-entitled matter from which the sum of \$26,314.72 shall be paid over to the Defendants and their attorney, Hans Q. Chamberlain, and the balance of which shall be paid over to the Plaintiff and his attorney, Gary W. Pendleton.

The amount due Defendants is calculated by beginning with the \$20,198.21 awarded to Defendants as reimbursement for that portion of the \$30,000.00 loan which made its way into the Westside Nursery Account and was used to pay obligations for which Plaintiff was ultimately responsible. To that sum is added the attorney's fees awarded Defendants at trial.

From this sum is subtracted the attorney's fees Plaintiff incurred on appeal.

Post Judgment interest (589 days at 12% per annum) is added to the adjusted award.

Expressed mathematically:

Items awarded Defendants:

Reimbursement	\$20,198.21
Attorney's Fees awarded Defendants (not modified)	10,000.00
TOTAL AWARD	\$30,198.21

Adjustments:

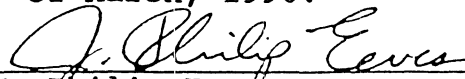
Costs on appeal (none awarded)	-0-
Attorney's Fees awarded Plaintiff on appeal	\$8,152.50
TOTAL ADJUSTMENTS	-8,152.50
ADJUSTED AWARD	\$22,045.71
Post Judgment Interest	\$4,269.01
TOTAL DISBURSEMENT TO DEFENDANT	\$26,314.72

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon disbursement of the supersedeas bond as more specifically set forth above, all monetary judgments entered by this Court in the above-entitled action shall be fully satisfied.

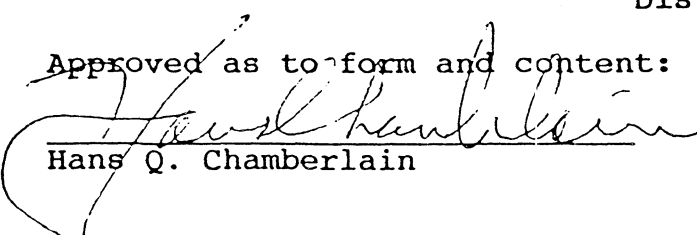
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the preliminary injunction bond in the amount of \$50,000.00 posted by

the Plaintiff in the above-entitled action is hereby exonerated and the surety is discharged.

DATED this 22<sup>nd</sup> day of March, 1990.

  
\_\_\_\_\_  
J. Philip Eves  
District Judge

Approved as to form and content:

  
\_\_\_\_\_  
Hans Q. Chamberlain