

1990

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

Utah Court of Appeals

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Gary W. Pendleton; Attorney for Appellant.

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

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BRIEF

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IN THE UTAH COURT OF APPEALS

GEORGE RONALD WRIGHT,)	
Plaintiff and Appellant,)	Case No. 900300 CA
vs.)	
WESTSIDE NURSERY, a Utah)	
limited partnership, and	)	Priority No. 14b
DARREL HUMPHRIES, an)	
individual,)	
Defendants and Appellees.)	

BRIEF OF APPELLANT

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

Gary W. Pendleton (2564)
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150 North 200 East, Suite 202
St. George, Utah 84770

Attorney for Appellant

Hans Q. Chamberlain (0607)
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Attorney for Appellee

FILED

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COURT OF APPEALS

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vs.)	
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limited partnership, and)	Priority No. 14b
DARREL HUMPHRIES, an)	
individual,)	
Defendants and Appellees.)	

APPELLATE JURISDICTION

Jurisdiction to hear this appeal is conferred upon the above-entitled court by provision of Section 78-2a-3(2)(j), U.C.A. 1953 as amended.

NATURE OF THE CASE

Plaintiff initiated this civil proceeding in the Fifth District Court and Defendants counterclaimed. Following trial and the denial of post-trial motions for judgment notwithstanding the verdict and for new trial, Plaintiff appealed seeking reversal of the judgment awarding Defendants damages for fraudulent misrepresentation and challenging other aspects of the proceedings. Defendants cross-appealed seeking the entry of judgment awarding damages for the wrongful termination of Defendant Humphries' employment contract and other relief. The prior appeal was before this Court as case no. 880544-CA.

This Court reversed and vacated the judgment for damages arising out of the alleged fraudulent misrepresentation, affirmed

the judgment to the extent that the district court had required Plaintiff to reimburse Defendant Humphries certain funds deposited directly into the Westside Nursery account, affirmed the judgment to the extent that the Court had denied Humphries damages for wrongful termination, reversed the judgment to the extent that the district court had refused to exonerate the preliminary injunction bond and remanded the case for the purpose of assessing Plaintiff's attorney fees reasonably incurred on appeal and considering a reduction of the attorney fees awarded Defendants at trial.

On remand, the district court assessed attorney fees against Defendants but refused to reduce the attorney fees awarded Defendants at trial and ordered Plaintiff's bill of costs on appeal stricken. From that order, Plaintiff prosecutes this second appeal.

STATEMENT OF THE ISSUES

1. Did the district court err in interpreting this Court's opinion as denying Plaintiff's costs on appeal and in ordering Plaintiff's bill of costs stricken?

2. Did the district court err in refusing to modify the attorney fees awarded Humphries at trial?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The text of all relevant authorities is quoted in the body of this brief. Additionally, the text of proposed Rule 34, Utah Rules of Appellate Procedure, together with the advisory committee's note are included as Addendum A.

STATEMENT OF THE CASE

The prior appeal was decided on February 2, 1990, and is reported at 127 Utah Adv. Rep. 21, 787 P.2d 508. A copy of that opinion is attached as Addendum B. References to the language of the opinion are located by citing the reporters.

For the sake of clarity and continuity, the Appellant is referred to hereinafter as "Wright" and the Appellees, as "Humphries."

On the prior appeal, the principal issues Wright raised related to fraudulent misrepresentation, repayment of funds which Humphries had deposited into the Westside Nursery account and the exoneration of a preliminary injunction bond.

On cross-appeal, Humphries sought the entry of a judgment for wrongful termination of his employment contract, additional interest and attorney fees on his "indemnification" claim, and prejudgment interest on the fraud claim.

Wright prevailed on every issue presented on the appeal with the exception of the issue relating to the repayment of funds deposited into the nursery account. Humphries was denied any relief on his cross-appeal.

This Court ultimately reduced Humphries' net judgment (excluding attorney fees) from \$58,780.21 to \$20,180.00. Accordingly, the Court concluded: "[S]ome adjustment may be necessary so that [Humphries] does not recover [attorney] fees attributable to issues on which he did not prevail." 127 Utah Adv. Rep. at 27, 787 P.2d at 517.

Finally, this Court concluded that Wright was "properly regarded as the party who prevailed on appeal and 'is entitled on remand to an award of [his] attorney fees reasonably incurred on appeal.'" 127 Utah Adv. Rep. at 27, 787 P.2d at 517.

The remittitur was docketed in the district court on March 6, 1990 (R 1). On March 7, Wright filed his bill of costs and mailed a photocopy thereof to Humphries' attorney on the same day (R 14-15).

Wright simultaneously filed a motion to reduce the attorney fees awarded Humphries at trial and to assess against Humphries the attorney fees which Wright reasonably incurred on appeal (R 12-13, 16-17). That motion was heard on March 21, 1990 (R 18-19). At the hearing, Humphries verbally, and for the first time, voiced an objection to the bill of costs.

As the hearing proceeded, Wright's counsel testified that fully 90% of his fee was attributable to the defense of the fraud claim which Humphries had asserted against Wright (T 6). On the other hand, Humphries' counsel stated that only approximately 20% of his time was related to the fraud issue (T 19). He expressed no opinion regarding the amount of time expended in connection with the wrongful termination claim which failed in post-trial proceedings and ultimately on Humphries' cross-appeal (T 19-20).

Wright's counsel, in testimony, suggested an adjustment based upon the 66% reduction on the judgment mandated by the Court of Appeals as a reasonable basis for reducing the attorney fees awarded Humphries at trial (T 7).

Humphries' counsel suggested that inasmuch as the jury had not awarded him all of the attorney fees he had sought, the jury had already made an appropriate adjustment in Humphries' attorney fees (T 16).

Because it was impossible to divine the basis of the jury award of attorney fees and determine how much of the award was attributable to issues upon which Humphries did not ultimately prevail, the district court refused to make any adjustment of the award (T 24-26; R 20-23; See Addendum D).

Finally, the district court ordered Wright's bill of costs stricken (R 21) because the opinion of "the Court of Appeals doesn't mention costs" (T 24).

SUMMARY OF ARGUMENT

Wright was specifically identified as "the party who prevailed on appeal" and is under prevailing rules and precedents, entitled to the costs he incurred on the prior appeal.

The district court was presented ample evidence upon which it could have made a reasonable reduction of the attorney fees awarded Humphries at trial. In light of the substantial modification of the judgment on appeal, the district court erred in refusing to make any modification of Humphries' attorney fees.

ARGUMENT

POINT I

WRIGHT WAS ENTITLED TO AND AWARDED COSTS ON THE PRIOR APPEAL.

On the prior appeal this Court concluded that Wright was

"properly regarded as the party who prevailed on appeal and 'is entitled on remand to an award of [his] attorney fees reasonably incurred on appeal.'"

Rule 34, R.Utah Ct.App., effective at the time of the decision on the prior appeal, provided in relevant part:

(a) 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 the appellant unless otherwise ordered; if a judgment or order is reversed, costs shall be taxed against the respondent 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.

Paragraph (c) then enumerates the items taxable as costs "in favor of the prevailing party in the appeal" and paragraph (d) mentions "the cost bill of the prevailing party."

When the new rules of appellate practice were proposed in 1984, the language of proposed Rule 34 was substantially the same as that quoted above. The Advisory Committee Note¹ regarding Paragraph (a) stated:

This Paragraph provides that the prevailing party shall generally be awarded costs, unless the Supreme Court orders otherwise. It is not anticipated that the written opinion of the Supreme Court will, after adoption of this rule, specifically award costs unless there is a departure from the general rule.

In delivering its opinion this Court took time to analyze the numerous issues presented on appeal and cross-appeal concluded

¹Attached Addendum A is a reproduction of Rule 34 as proposed in 1984, together with the Advisory Committee Note. When the Court of Appeals was later created, Rule 34 was adopted as a rule of this Court with only minor changes.

that Wright was "the party who prevailed on appeal" and ordered the district court to award him attorney fees reasonably incurred on the appeal.

The designation of Wright as "the party who prevailed on appeal" and the award of attorney fees are incongruous with the district court's conclusion that Wright is not entitled to the costs incurred on the appeal.²

In Everts v. Worrell, 58 Utah 238, 197 P. 1043 (1921), Everts won the reversal of a judgment in favor of Worrell. The Utah Supreme Court's opinion concluded with the following:

Judgment is therefore reversed, and the causes remanded to the district court of Weber county, with directions to grant Plaintiff a new trial at defendant's cost.

On remand the district court refused to allow Everts to enforce a judgment for costs against Worrell, interpreting the language of the Supreme Court opinion to apply only to costs incident to the new trial and not to costs on appeal. On Everts' application for writ of mandate, Everts v. Barker, 58 Utah 519, 200

²In reciting the basis of its decision, the district court stated:

[BY THE COURT] In reviewing the opinion in this case, the Court of Appeals doesn't mention costs. I don't know if that's because no application was made for costs before the Court of Appeals, or because the issue just wasn't considered. But whatever the reason, the Court of Appeals, in fact, did not award Mr. Wright his costs.

Going strictly by the language of Rule 34, I have to conclude, therefore, that this Court is without jurisdiction to make any determination on the applicability or the award of costs as requested by Mr. Wright. That's an issue that should have been raised and decided upon before the Court of Appeals. Therefore, the request for an award of costs is denied.

P. 473 (1921), the Supreme Court held that the language of an appellate opinion must be construed in light of the circumstances of the case and prevailing rules of practice and precedents. An opinion must not be construed so as to result in an absurdity. The writ was issued.³

Wright incurred an expense of nearly \$3,000 in merely having a transcript of the trial proceedings prepared for review on appeal. A construction of the appellate opinion denying Wright costs will effectively impose upon him all of the costs associated with marshalling the evidence on an appeal in which he prevailed.

The order of the district court must be reversed and Wright's bill of costs reinstated and enforced as a judgment.

POINT II

HUMPHRIES HAS WAIVED ANY OBJECTION TO WRIGHT'S BILL OF COSTS BY HIS FAILURE TO OBJECT THERETO.

Under Rule 34(d), R.Utah Ct.App., any objection to a bill of costs had to be filed within five days of the service of the bill, together with a motion to have the costs taxed by the court. "If there is no objection to the bill of costs within the allotted time, the clerk of that court shall tax the costs as filed and enter judgment for the party entitled thereto * * * If the cost bill of the prevailing party is timely opposed, the clerk, upon

³Uncertain about the appropriate means of procuring enforcement of this Court's prior decision and review of the district court's orders on remand, Wright will simultaneously petition this Court for writ in the form of mandate. In some jurisdictions costs are taxed by the clerk of the appellate court and any objection to the Clerk's determination is considered directly by the appellate court. See Family Medical Bldg. v. State, D.S.H.S., 38 Wash.App. 738, 689 P.2d 413 (1984).

reasonable notice and hearing, shall tax the costs and enter a final determination and judgment . . ." Any determination made by the clerk was reviewable by the court upon a request by either party made within five days of the entry of the judgment.

The district court clerk has in fact entered Wright's cost bill on the judgment docket pursuant to Rule 34(d), R. Utah Ct. App.⁴

POINT III

THE DISTRICT COURT ERRED IN REFUSING TO REDUCE THE ATTORNEY FEES AWARDED HUMPHRIES AT TRIAL.

This Court was fully aware of the fact that the issue of attorney fees had been submitted to the jury. The opinion clearly reflects an awareness of the fact that the district court had not made the initial determination⁵. Nevertheless, the district court was instructed to reexamine the issue of attorney fees in light of the decision on appeal.

The Court of Appeals did not instruct, encourage, or expect the district court to divine the basis of the jury's findings. The task presented to the district court on remand had

⁴Note the docketing notation on the original bill of costs located at R. 14-15 and reproduced here as Addendum C.

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The jury instruction regarding attorney fees was broader than the provisions in the Purchase Agreement which only provided for recovery of fees to the prevailing party who was "enforcing performance of any covenant or representation hereunder or for damage for breach thereof." The instruction given allowed the jury to award fees to the party who prevailed in the action. Neither party objected to this instruction and both thereby acquiesced in the instruction as given. Nor did either party object to having the jury make the attorney fee decision, a matter ordinarily better entrusted to the court.

nothing to do with the reconstruction of the jury's decision-making process. The jury concluded that \$10,000 was a reasonable fee to be awarded Humphries in connection with the prosecution of all the claims presented. Such was the scope of the instructions given the jury. In terms of dollars and cents, only approximately one-third of Humphries' claim survived the appeal.

The district court was presented ample evidence upon which a reasonable reduction of Humphries' attorney fees could and should have been made. In light of the substantial modification of the judgment on appeal, the district court erred in refusing to make any modification.

CONCLUSION

Based on the foregoing it is respectfully submitted that the order of the district court striking Wright's cost bill must be reversed and said bill reinstated as a judgment. Furthermore, the district court's order refusing to modify the attorney fees awarded at trial should be reversed and this Court should specify the extent of any such reduction.

DATED this _____ day of June, 1990.

Gary W. Pendleton
Attorney for Appellant

MAILING CERTIFICATE

I do hereby certify that on this _____ day of June, 1990, I did personally mail four true and correct copies of the above and foregoing Brief to Hans Q. Chamberlain, Attorney for Defendant at 250 South Main, P. O. Box 726, Cedar City, Utah 84720.

Gary W. Pendleton

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POINT III

THE DISTRICT COURT ERRED IN REFUSING TO REDUCE THE ATTORNEY FEES AWARDED HUMPHRIES AT TRIAL.

This Court was fully aware of the fact that the issue of attorney fees had been submitted to the jury. The opinion clearly reflects an awareness of the fact that the district court had not made the initial determination⁵. Nevertheless, the district court was instructed to reexamine the issue of attorney fees in light of the decision on appeal.

The Court of Appeals did not instruct, encourage, or expect the district court to divine the basis of the jury's findings. The task presented to the district court on remand had

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The district court was presented ample evidence upon which a reasonable reduction of Humphries' attorney fees could and should have been made. In light of the substantial modification of the judgment on appeal, the district court erred in refusing to make any modification.

CONCLUSION

Based on the foregoing it is respectfully submitted that the order of the district court striking Wright's cost bill must be reversed and said bill reinstated as a judgment. Furthermore, the district court's order refusing to modify the attorney fees awarded at trial should be reversed and this Court should specify the extent of any such reduction.

DATED this 6 day of ^{July}~~June~~, 1990.

151
Gary W. Pendleton
Attorney for Appellant

MAILING CERTIFICATE

I do hereby certify that on this 6 day of ^{July}~~June~~, 1990,
I did personally mail four true and correct copies of the above and
foregoing Brief to Hans Q. Chamberlain, Attorney for Defendant at
250 South Main, P. O. Box 726, Cedar City, Utah 84720.

151

Gary W. Pendleton

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 respondent 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 and attachments not to exceed \$3.00 ^{even though they make no sense} 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 from a lower court, a party claiming costs shall, within 15 days after the remittitur is filed with the clerk of the court below, serve upon the adverse party and file with the clerk of the 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 court below. If there is no objection to the cost bill within the allotted time, the clerk of the 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 district court upon the request of either party made within 5 days of the entry of the judgment.

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(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 lower 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 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.

ADVISORY COMMITTEE NOTE

This Rule is a substantial departure from current practice and rules.

Paragraph (a). This Paragraph provides that the prevailing party shall generally be awarded costs, unless the Supreme Court orders otherwise. It is not anticipated that written opinions of the Supreme Court will, after adoption of this Rule, specifically award costs unless there is a departure from the general rule.

Paragraph (b). Prior practice under Rule 54(d)(1) allowed costs against the State, its officers and agencies only to the extent allowed by law. Rule 33 modifies that concept to allow costs either for or against the State of Utah, its officers and/or agencies under the theory that if the State can recover costs, it should also be subject to costs at the discretion of the Court, unless specifically prohibited by law.

Paragraph (c). The paragraph sets forth with particularity what costs are recoverable, and raises the allowable costs for each page of the original brief to \$3.00 per page from \$2.00 per page under prior Rule 75(p)(5) URCivP. The words "actual costs" in the paragraph ensure that parties only seek actual costs where the actual costs are less than \$3.00 per page.

Paragraph (d). This paragraph deals with costs on appeal from lower courts. The rule differs substantially from prior Rule 54(d)(3) URCivP in that costs are taxed, if an objection is timely made, by the district court clerk. It is not anticipated that the district court would be involved in taxing costs unless a party objects to the district court clerk's taxation of costs. The costs taxed by the district court will automatically be docketed as a judgment without the necessity of a formal motion to enter a judgment for costs. The rule is self-enforcing, and a party desiring to recover costs must make a timely filing in the district court or costs are waived.

✓ Paragraph (e). This paragraph deals with awarding costs in proceedings other than appeals from district courts, such as original proceedings and agency appeals. Costs and the taxing of costs are handled by the Clerk of the Supreme Court in the same manner as prescribed for the clerk of the district court under paragraph (d) of this rule, including a review without oral argument by the Supreme Court if proper application is filed. A judgment for costs in the Supreme Court may be filed and docketed with any district court in the State of Utah with the same force and effect as a judgment entered by the district court.

The provisions of Rule 54(d)(3) and (4) URCivP dealing with the assessment and taxing of costs on appeal and in original proceedings before the Supreme Court are repealed as of the effective date of these Rules.

IN THE UTAH COURT OF APPEALS

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George Ronald Wright,
Plaintiff, Appellant,
and Cross-Respondent,

v.

Westside Nursery, a Utah
limited partnership, and
Darrel Humphries, an
individual,

Defendants, Respondents,
and Cross-Appellants.

)
) OPINION
) (For Publication)
)

) Case No. 880544-CA
)

FILED

FEB 2 1990
Mary Stinson
Clerk of the Court
Utah Court of Appeals

Fifth District, Washington County
The Honorable J. Philip Eves

Attorneys: Gary W. Pendleton, St. George, for Appellant
Hans Q. Chamberlain, Cedar City, for Respondents

Before Judges Bench, Billings, and Orme.

ORME, Judge:

Plaintiff George Wright ("Wright") appeals from several adverse rulings made during the course of trial in this complicated case. Defendants Westside Nursery and Darrel Humphries ("Humphries") cross-appeal from two postjudgment rulings in the same case. We affirm in part, reverse in part, vacate in part, and remand to the trial court for further proceedings consistent with this opinion.

The numerous issues raised on appeal require, regrettably, a somewhat laborious presentation of the facts. Except where the discrepancies are identified, the facts as set forth are essentially undisputed.

PRETRIAL FACTS

Humphries was general partner and manager of Westside Nursery located in St. George, Utah. In 1985, Wright contracted with Westside Nursery to landscape his residence in St. George. During this time, Wright and Humphries began to discuss the possibility of Wright purchasing the nursery. At some point in the negotiations, the parties agreed Wright would exchange real estate for the nursery.

In August 1985, Humphries flew to Ogden, Weber County, where Wright owned several acres of land, and stayed the night in Wright's home. There was conflicting evidence about whether the parties were contemplating the property exchange at this time and about whether Humphries viewed the property during this visit.

In October 1985, Humphries and his wife traveled to the Ogden area. On October 4th, the parties spent several hours reviewing and revising two agreements which had been previously drafted by Wright's attorney. The first agreement, the Agreement for Purchase of Assets ("Purchase Agreement"), concerned the exchange of the property for the nursery. The second, the Contract for Management Services ("Management Agreement"), concerned Wright's employment of Humphries as nursery manager. The agreements were signed and deeds were executed conveying the Weber County property to Humphries.

Although Humphries inspected the property on the same day that the contracts were executed, the parties disagree on whether he saw it before or after the execution. Humphries testified that he saw it only afterward. While showing Mr. and Mrs. Humphries the property, Wright identified several surrounding parcels of property and the range of prices for which they had been purchased. He also pointed out that there was no sewer currently servicing the area, but informed Humphries that he expected one to be installed within a year and a half. No evidence was admitted to suggest that any of this information was false. Moreover, the sewer was in fact installed within two years.

Humphries' position throughout the trial was that Wright had represented the Weber County property as being worth at least \$90,000. He alleged that Wright told him this on October 4th when they went to see the property. Wright consistently maintained that the property was indeed worth \$90,000, but denied ever having made this representation prior to executing the contracts.

Wright admitted during the trial that he did not know the exact value of the property. There was no evidence to suggest that an appraisal had ever been made of the property prior to this litigation. However, Wright did testify about the selling price of similar properties in the surrounding area. Moreover, he introduced evidence that the property was valued at approximately \$104,000 for tax purposes. The parties each introduced expert testimony concerning the value of the property as of when the transaction was finalized. The appraisals covered a wide range, from \$35,000 to \$84,000. Humphries testified that he sold the property for \$54,700, to a neighboring landowner, a few days before trial.

Meanwhile, on October 15, 1985, only a few days after the transaction closed, the Weber County Commission declared a limited moratorium on the area which contained the subject parcel of land. The moratorium prevented owners from building subdivisions on the affected land without approval from the commission. Evidence was introduced demonstrating that Wright knew of the potential for this moratorium before the October 4th closing but did not disclose the possibility to Humphries. However, Wright introduced un rebutted evidence he had spoken to several governmental officials about the potential moratorium and that they had led him to believe the moratorium would probably not be declared and that, if it were, his property would probably receive approval for development anyway.

After execution of the contracts and before the end of November 1985, Humphries claims he heard rumors that the Weber County Property might not be worth \$90,000. He then made some inquiries and determined that he had been defrauded. On December 10, 1985, Humphries' attorney wrote a letter to Wright expressing his suspicions and proposing to settle the dispute. On December 18, the attorney wrote a second letter informing Wright that Humphries considered the Purchase Agreement cancelled and rescinded.

On December 23, Wright initiated an action to determine the ownership of the nursery. On the same day, the trial court issued a temporary restraining order which prohibited Humphries from doing anything with the nursery inconsistent with Wright's ownership and prevented him from incurring further debt on behalf of Wright or the nursery.

From October 1985 through March 1986, Humphries managed the nursery pursuant to the Management Agreement and drew a salary of \$2,500 per month. Prior to the sale of the nursery to Wright, Humphries had obtained a \$15,000 loan from Zions Bank which he remained obligated to pay under the Purchase Agreement.

Subsequent to the sale, Humphries signed a second promissory note for \$30,000 in favor of Zions Bank. He drew \$15,000 against the note on December 13, 1985, prior to the December 23 restraining order. On December 30, he drew an additional \$5,000 on the note, and the remaining \$10,000 on January 6, 1986. The entire \$30,000 was, at least initially, deposited into the nursery account.

In March 1986, Wright sought possession of the nursery. The trial court ordered Humphries to relinquish his possession of the nursery to Wright, imposed various duties on the parties, and appointed a receiver to assist the court in monitoring the business and the parties' compliance with its order. As a condition to issuance of this second temporary restraining order,¹ the court ordered Wright to procure a \$50,000 injunction bond. Wright did so. He then discharged Humphries and took possession of the nursery.

LITIGATION FACTS

As indicated, Wright filed a complaint against Humphries in December 1985. In due course, Humphries answered the complaint and raised various counterclaims. On September 17, 1986, a hearing was held concerning several pending motions. Most significantly, the district court found that Humphries had waived his right to seek rescission of the contract and that adequate remedies existed at law. Therefore, the court dismissed Humphries' claim for rescission with prejudice.

The balance of the dispute was tried to a jury in April 1988, and trial took five days to complete. Wright attempted to establish that Humphries had breached the contracts by misappropriating nursery money for his own use and borrowing funds from Zions Bank without authorization and therefore should not be reimbursed for any of those monies. Humphries attempted to establish that Wright had induced him to enter into the contract by fraudulently misrepresenting the value of the property. He also introduced evidence to suggest that Wright had tortiously failed to disclose the potential moratorium, although the jury was never instructed regarding fraudulent omission. Both parties argued for attorney fees and Humphries introduced evidence that he had incurred over \$30,000 in attorney fees and

1. Although captioned as a temporary restraining order, the March order giving Wright possession of the nursery was procedurally, and in substance, a preliminary injunction.

costs. The case was submitted to the jury for special verdicts in accordance with Utah R. Civ. P. 49(a).

The jury returned the following special verdicts: (1) Humphries breached the agreements between the parties and as a result should pay Wright \$6,805; (2) Wright breached the agreements by terminating Humphries and should pay Humphries \$15,000; (3) Wright breached the agreements in other respects but no damages resulted; (4) Wright should pay up to \$5,000 in accounts payable existing prior to the transaction; (5) Humphries should pay such accounts beyond \$5,000; (6) Humphries should receive the accounts receivable prior to October 4, 1985; (7) Humphries should pay the \$15,000 loan acquired prior to October 4, 1985; (8) Wright should pay the \$30,000 loan acquired after October 4, 1985, with interest; (9) Wright made fraudulent misrepresentations about the value of the property and should pay Humphries \$38,582 in damages; (10) Wright should pay Humphries \$10,000 in attorney fees.

The foreman of the jury was questioned by the court concerning the \$6,805 award for Humphries' breach of the contracts. The foreman explained that the amount represented various payments Humphries had made out of the nursery account which the jury found he misappropriated to his own use.

After the trial, Wright moved for judgment notwithstanding the verdict and for the court to exonerate the injunction bond. The court denied the motions. It did, however, deny the \$15,000 award to Humphries because the court found as a matter of law that Humphries had been properly terminated given the jury finding he misappropriated nursery funds. In its judgment on the verdict, the court affirmed all of its previous orders including the two restraining orders. In total, it awarded Humphries a judgment of \$68,780.21, to bear interest at the legal rate until paid in full.

Most of the net award to Humphries came directly from the special verdict. However, \$20,198.21 of the award bears some additional explanation. The jury found that Wright was obligated to pay the \$30,000 loan from Zions Bank plus interest which had accrued as of the date of trial. The interest amounted to approximately \$7,000. From the \$37,000 total, the court subtracted approximately \$17,000. This amount represented the nursery account monies that Humphries had misappropriated to himself, as found by the jury, and additional sums paid for legitimate nursery expenses for which Humphries was liable under the jury's verdict. In essence, the court did not agree with the

jury that Wright was actually liable for the \$30,000 loan. Instead, the court held that Wright was obligated to reimburse Humphries for that portion of the \$30,000 loan which made its way into the nursery account and was used to pay obligations for which Wright was ultimately responsible.

On appeal, Wright makes the following arguments:

(1) Humphries failed to prove a prima facie case of fraudulent misrepresentation; (2) the jury determination of the value of the real property at the time of the transaction was unsupported by the evidence; (3) the evidence was insufficient to demonstrate that Wright should indemnify Humphries for the \$30,000 loan from Zions Bank; (4) Humphries was not entitled to attorney fees; and (5) the district court erred in failing to exonerate the injunction bond. Humphries cross-appeals and makes the following arguments: (1) The district court erred in dismissing the \$15,000 jury award for Humphries' wrongful termination; (2) the district court erred in failing to award prejudgment interest on the \$38,582 fraud award; and (3) this court should direct the trial court to amend its judgment to include postjudgment interest, costs, and attorney fees on the part of the judgment premised on Wright's obligation to pay most of the amount attributable to the \$30,000 note. We will discuss each of these claims.

FRAUD

Wright argues on appeal that the jury did not have sufficient evidence upon which to base its verdict of fraud. We of course consider the evidence in a light favorable to the verdict and "we will not substitute our judgment for that of the jury where the verdict is supported by substantial and competent evidence." Von Hake v. Thomas, 705 P.2d 766, 769 (Utah 1985). Moreover, Wright's duty on appeal is to "marshal all the evidence supporting the verdict and demonstrate that, even viewing the evidence in the light most favorable to that verdict, the evidence is insufficient to support it." Id. (citing Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985)). With this standard of review in mind, we note that Wright's marshaling of the evidence is adequate to permit our consideration of this issue.²

2. Wright beseeches us to make a thorough review of the whole record, which fills a box the size of an orange crate. We do not apologize for declining Wright's invitation. The very purpose of

At trial, Humphries had the burden to prove all the essential elements of the fraud claim. Pace v. Parish, 122 Utah 141, 247 P.2d 273, 274 (1952). Although both parties address two fraud theories on appeal--fraudulent misrepresentation concerning the value of the property and fraudulent concealment of the building moratorium--the jury was only instructed regarding the first theory. We cannot affirm the verdict based upon a theory which was not presented to the jury for consideration. Consequently, Humphries may only prevail if he sustained his burden of proving each element of the fraudulent misrepresentation claim. He failed to meet this burden.

The elements of a fraudulent misrepresentation claim are:

(1) That a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

Pace, 247 P.2d at 274-75. Distilling the argument somewhat, Wright basically argues that the evidence was insufficient to support elements 2 (material fact) and 4 (mental state). Because the representation of value, if made, was a matter of opinion and not of fact, we need not address the sufficiency of the evidence regarding Wright's state of mind.

(footnote 2 continued)

such devices as the "marshaling" doctrine and R. Utah Ct. App. 24(a)(7), requiring that all references in briefs to factual matters "be supported by citations to the record," is to spare appellate courts such an onerous burden. Absent exceptional circumstances, our review of the record is limited to those specific portions of the record which have been drawn to our attention by the parties and which are relevant to the legal questions properly before us.

Humphries alleged at trial that Wright had falsely represented the value of the Weber County property. However, "misrepresentations as to value do not ordinarily constitute fraud, as they are regarded as mere expressions of opinion or 'trader's talk' involving matter of judgment and estimation as to which men may differ." Baird v. Eflow Inv. Co., 76 Utah 232, 289 P. 112, 114 (1930). See also Frazier v. Southwest Sav. & Loan Ass'n, 134 Ariz. 12, 653 P.2d 362, 365 (Ct. App. 1982) ("Mere representations as to value are generally considered expressions of opinion and will not support a claim for fraud."); Dolson Co. v. Imperial Cattle Co., 624 P.2d 993, 996 (Mont. 1981) ("Statements as to the value of property are generally considered declarations of opinion. . . ."); Davis v. Schiess, 417 P.2d 19, 21 (Wyo. 1966) ("[A]n expression of opinion as to value is not fraud."). Indeed, the jury was instructed to this effect.³

Although usually opinion, expressions of value have occasionally been regarded as fraudulent misrepresentations of fact. Mostly, parties have prevailed when they have offered "substantial evidence to show bad faith or to show the expression of value was not [the owner's] real opinion." Davis, 417 P.2d at 21. See also Baird, 289 P. at 114 (listing examples of the kinds of bad faith indicia which demonstrate that the representation is not a bona fide opinion).⁴ In this case, however, the record is devoid of any evidence of this kind.

In his brief, Humphries points to three facts which he believes demonstrate that the representation of value was made

3. Jury Instruction No. 26 included this statement: "The value of property is subjective. It is a matter of opinion."

4. When an owner's opinion of value is the basis of the fraudulent misrepresentation claim, courts are primarily concerned with whether or not the stated value was in fact the owner's actual opinion. In a sense, these cases do not really represent exceptions to the usual rule that the operative misrepresentation be of a presently existing fact. Rather, the owner implicitly represents a fact when he gives his opinion, namely that he presently holds the opinion he is giving. If the stated value is truly the owner's opinion then the buyer may not base his or her fraud claim on that opinion, regardless of the accuracy of the opinion. On the other hand, if the evidence suggests that the stated value was not the owner's true opinion, this fact may be the basis of a fraudulent misrepresentation claim.

in bad faith and was not Wright's honest opinion: (1) Wright did not know the actual value of the property when he made the statement because the property had not been appraised; (2) Wright referred to the selling price of other properties in the development when he allegedly gave Humphries his estimate; (3) Wright failed to disclose the potential building moratorium. We will discuss each of these facts.

The fact that the property had not been appraised before Wright made his representation does not support Humphries' argument. The law does not require a landowner to obtain an appraisal before he or she can state an opinion about the value of his or her land.⁵

Humphries may not prevail under his second argument, i.e., that Wright made reference to the price of other similar properties. Initially, it is difficult to see how Humphries can seriously make this argument. His own position at trial was that he signed the contract before Wright took him to view the property and made reference to the surrounding properties. How, then, could these statements about the value of adjacent property have been relied on by Humphries in deciding to enter into the contract? Moreover, Humphries introduced no evidence to suggest that any of the statements concerning the surrounding properties were false in any way. There was simply no evidence of bad faith concerning statements about the surrounding properties from which the jury could have inferred that Wright's representation was other than honest opinion.

Thirdly, Humphries argues that the failure to disclose the potential moratorium evidenced bad faith and the disingenuousness of Wright's opinion. The only fact to support this argument is that Wright knew of the potential moratorium before the transaction. However, the moratorium was placed on the property after the transaction was formalized and Wright consistently testified that public officials had encouraged his belief that the moratorium, if imposed, would not be a problem--a conclusion borne out by subsequent events. Although the depositions of

5. If an owner is competent to give evidence on the market value of his property, as the jury was correctly instructed in Jury Instruction No. 27, it is logical to assume that he may competently give an opinion of the value without first obtaining an appraisal. Otherwise, he would merely be passing along the appraiser's opinion.

these public officials had been taken prior to trial, Humphries introduced no evidence to rebut Wright's testimony. Thus, there was no substantial, competent evidence from which the jury could have found Wright falsely stated his opinion as to the value of the property because of what he knew about the potential moratorium.⁶

In contrast to Humphries' lack of evidence regarding bad faith, Wright introduced evidence to show his good faith, including the property tax assessment of \$104,688 and his un rebutted testimony that he knew of similar properties in the area which had sold for comparable prices.

We conclude our discussion of the fraud issue with the observation that while the

law provides reasonable protection to purchasers against fraud and deceit[,] . . . it does not go to the romantic length of offering indemnity against the adverse consequences of folly and indolence or a careless indifference to information which would enlighten the purchaser as to the truth or falsity of the seller's assertions as to value.

Dolson, 624 P.2d at 996. The record does not disclose any reason, other than his own blind reliance upon Wright's representations, why Humphries chose to formalize the transaction prior--at least as he recalled--to even viewing the property, much less making independent inquiry or obtaining his own appraisal. "It is reasonable to expect that . . . vendors would attach the highest possible value to the property. Indeed, it would be unreasonable to assume otherwise, and purchasers who rely on such representations proceed at their own risk." Id. at 997. See also Pace, 247 P.2d at 275 ("[P]laintiffs did not use reasonable care and diligence [and]

6. As noted previously in this opinion, Humphries failed to have the jury instructed on a fraudulent omission claim. Had the jury been instructed under this alternative theory, we would be more inclined to affirm the verdict based upon Wright's failure to inform Humphries of the potential moratorium. However, in the context of a fraudulent misrepresentation claim premised on a statement of value, the mere omission of the moratorium information bears little weight given the record before us.

were, therefore, not entitled to rely on the representation"); Baird, 289 P. at 114 ("There was nothing done by the defendants to prevent the plaintiff from making the fullest inquiry and investigation concerning the value of the apartments.").

In the absence of substantial and competent evidence of bad faith on Wright's part, we must reverse the fraud verdict.⁷

"INDEMNIFICATION"

Wright argues that there was insufficient evidence for the jury verdict requiring him to "indemnify" Humphries for the \$30,000 loan from Zions Bank. As noted in the foregoing section, when an appellant challenges the sufficiency of evidence, his duty on appeal is to "marshal all the evidence supporting the verdict and demonstrate that, even viewing the evidence in the light most favorable to that verdict, the evidence is insufficient to support it." Van Hake v. Thomas, 705 P.2d 766, 769 (Utah 1985) (citing Scharf, 700 P.2d at 1070).

Unlike his marshaling with respect to the fraud verdict, Wright's marshaling of the evidence for this argument was inadequate. He completely failed to identify and explain any of the evidence supporting the jury verdict. See also note 2, supra. On the other hand, Humphries refers us to numerous facts from the record upon which the jury could have based its verdict. We will not disturb the jury verdict where, as here, appellant has completely failed to sustain his burden of marshaling the evidence.

In addition to challenging the sufficiency of the evidence, Wright argues that the jury was improperly instructed regarding Humphries' burden to establish his right to reimbursement of monies he expended in connection with the nursery business. We have considered this argument and find it to be without merit. The jury heard conflicting evidence about whether Wright instructed or encouraged further indebtedness and about the use of loan proceeds after they were placed in the nursery account. We believe the jury could reasonably conclude from the instructions given and evidence adduced that

7. Because we reverse the fraud verdict, we need not discuss Wright's arguments that the jury improperly determined the award for that claim or Humphries' claim that he was entitled to prejudgment interest on the fraud award.

Humphries was entitled to reimbursement of the basic amounts found due by the jury. Thus, we affirm as to the "indemnification" issue.

POSTJUDGMENT INTEREST, COSTS AND FEES ON \$30,000 AWARD

Humphries argues that Wright should be obligated to pay all amounts which are incurred postjudgment in connection with the \$30,000 promissory note, including interest as set forth in the note and any costs and attorney fees which he may incur as a result of collection action taken on the note. We disagree.

The applicable special verdict regarding the \$30,000 loan from Zions Bank might have been more artfully phrased. However, the court clearly and correctly concluded from the jury's findings that Wright was obligated to pay that portion of the borrowed \$30,000 which was deposited into the nursery account and legitimately used for nursery purposes for which Wright, rather than Humphries, was properly chargeable. Thus, in calculating a lump sum which Wright should pay to Humphries, the court began with the \$30,000 plus interest accrued as of the date of trial. From this amount, the court subtracted various sums which Humphries was obligated to pay either because he had misappropriated funds or because he was properly chargeable for them under the parties' arrangement.

Although the parties have argued in terms of "indemnification" regarding the \$30,000 loan, this terminology is not altogether appropriate. The court did not anticipate an ongoing relationship between the parties, or responsibility on the part of Wright, as would have occurred with indemnification in the technical sense.⁸ Rather, the court anticipated and implemented a clean break of the relationship through a lump sum payment.

8. Had the court meant Wright to indemnify Humphries it would have awarded only that amount which Humphries had paid on the note as of the date of the judgment, perhaps accompanied with declaratory relief to the effect that Wright should continue to indemnify Humphries for any payments subsequently made. Under this scenario, the payment of postjudgment interest at the contract rate, as well as incurred attorney fees and costs, would make sense, albeit on a prospective basis only.

In effect, the court viewed the \$30,000 as Humphries' money which had been used in part for the operation of Wright's nursery. The court did not require Wright to directly pay off the note. Moreover, it only required Wright to pay to Humphries that portion of the \$30,000 which Humphries had used for the nursery and for which Wright was responsible. Thus, we believe the court correctly viewed payment of the note, per se, as Humphries' obligation.⁹ The operative theory, then, was more one of equitable reimbursement or accounting rather than indemnification. Accordingly, Humphries was not entitled to postjudgment interest at higher than the legal rate, or costs or attorney fees for which Humphries might eventually become responsible if he chose to forego prompt repayment of the note and his bank brought collection action.

EXONERATION OF PRELIMINARY INJUNCTION BOND

In March 1986, the trial court gave possession of the nursery to Wright under an order captioned as a temporary restraining order. But see note 1, supra. Wright was required to post a preliminary injunction bond to compensate Humphries in the event that the order was wrongfully entered. See Utah R. Civ. P. 65A(c). Wright discharged Humphries, took possession of the nursery, and retained control of the nursery thereafter. The injunction and bond remained in effect until the trial, following which the order was specifically affirmed in the court's final judgment. After the trial on the merits, Wright moved to exonerate the injunction bond. The court denied Wright's motion, for reasons which do not appear in the record before us. We hold that it was error for the court not to exonerate the bond.

According to Rule 65A(c) of the Utah Rules of Civil Procedure, the purpose of an injunction bond is to provide "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully

9. This view is bolstered by a discussion between counsel and the court which took place at a post-trial hearing on July 12, 1988. In that hearing the court emphasized the fact that there was no evidence Wright had participated in the loan negotiations or authorized Humphries to accept the bank's terms. Thus, although Wright was obligated to reimburse most of the amounts used for nursery purposes, Humphries was exclusively obligated on the note.

enjoined or restrained." Id. (emphasis added). A right of action on the bond does not arise until the court dissolves the injunction or determines that the injunction should not have been granted. 42 Am.Jur.2d Injunctions § 380 (1969). Moreover, if it is finally determined that the injunction was proper, the purpose for the bond has been achieved and it may be exonerated. See id.

In a pretrial motion for summary judgment, Wright argued that Humphries had waived his right to rescind the Purchase Agreement. The court agreed and dismissed with prejudice Humphries' claim for rescission and consequently his claim for possession of the nursery. Humphries was apparently resigned to that decision--he never sought its reconsideration, did not contest it at trial, and has not appealed it--but rather pursued his remedies at law. Moreover, he has never challenged the validity of the injunction. After the trial on the merits, the court affirmed its prior orders including the injunction. Once final judgment was entered, the preliminary injunction necessarily terminated. The injunction having terminated, the court was bound to exonerate the bond upon proper motion and it erred when it refused to do so.

WRONGFUL TERMINATION

In its special verdict, the jury concluded that Wright terminated Humphries as an employee contrary to the terms of the Management Agreement. It awarded Humphries \$15,000. The court, however, determined that Wright was justified in terminating Humphries as a matter of law and dismissed the wrongful termination claim. Humphries argues that the court abused its discretion in dismissing this claim. We do not agree.

Following the trial and jury deliberations, the foreman read the special verdicts. The trial judge, presumably to clarify apparent conflict among the various awards, then questioned him concerning certain of the damage awards. In particular, the foreman was asked to explain the \$6,805 awarded to Wright for Humphries' breach of the agreements. His response clearly indicated that the jury found Humphries had, on several occasions prior to his termination, misappropriated funds from the nursery for his own use and the award reflected those misappropriations.

It is a basic tenet of agency law that "[a] principal is privileged to discharge before the time fixed by the contract of

employment an agent who has committed such a violation of duty that his conduct constitutes a material breach of contract." Restatement (Second) of Agency § 409(1) (1958). Humphries can hardly argue that misappropriation of thousands of dollars in nursery funds was anything but a material breach of the Management Agreement.

The jury foreman's more detailed responses to the effect that Humphries had misappropriated funds were inconsistent with the general conclusion that Wright had breached the agreements by terminating Humphries as an employee. Courts need to reconcile these kinds of inconsistencies. Bennion v. LeGrand Johnson Constr. Co., 701 P.2d 1078, 1083 (Utah 1985). However, where the two cannot be reconciled, as in this case, the more specific finding must govern the outcome. Cf. Knappe v. Livingston Oil Co., 193 Kan. 278, 392 P.2d 842, 844 (1964) ("If special findings cannot be reconciled with the general verdict and are sufficiently full and complete in themselves, and are not inconsistent in themselves, judgment must follow the special findings."); Johnson v. Tradewell Stores, Inc., 24 Wash. App. 53, 600 P.2d 583, 585 (1979) ("A special finding inconsistent with the general verdict controls."). Thus, we hold that the court appropriately dismissed the wrongful termination claim since Wright had good cause, as a matter of law, to terminate Humphries.¹⁰

ATTORNEY FEES

Wright challenges the award of attorney fees to Humphries as not being rationally based. The jury was instructed that "the prevailing party in this action is entitled to a reasonable

10. Humphries cites us to Bennion v. LeGrand Johnson Constr. Co., 701 P.2d 1078 (Utah 1985), for the proposition that "[w]hen special interrogatories or verdicts are ambiguous, counsel has an obligation either to object to the filing of the verdict or to move that the cause be resubmitted to the jury for clarification." Id. at 1083. As counsel recognized, the purpose of this rule is to avoid "the expense and additional time for a new trial by having the jury which heard the facts clarify the ambiguity while it is able to do so." Id. In this case, the trial court obviated the need for this formality by recognizing the inconsistency and seeking immediate clarification from the jury.

attorney's fee incurred in connection herewith." Based upon this instruction, the jury awarded Humphries \$10,000 in attorney fees.¹¹ Although we have significantly modified the judgment on appeal, Humphries still appears to be properly regarded as the party who prevailed at trial. See generally Mountain States Broadcasting Co. v. Neale, 783 P.2d 551, 555-57 (Utah Ct. App. 1989). However, he did not hold on to all of his trial victory on appeal and some adjustment may be necessary so that he does not recover fees attributable to issues on which he did not prevail. See id. at 556 n.10. On the other hand, "while not enjoying total success on this appeal," Wright is properly regarded as the party who prevailed on appeal and "is entitled on remand to an award of [his] attorney fees reasonably incurred on appeal." Id. at 557. See id. at 557 n.11. We accordingly remand for further consideration of attorney fees and for such further proceedings and relief as may be appropriate in that regard. See generally Halladay v. Cluff, 739 P.2d 643, 645 n.5 (Utah Ct. App. 1987).

CONCLUSION

Humphries failed to prove fraud against Wright and we therefore reverse the \$38,582.00 award. The trial court should have exonerated the injunction bond upon the proper motion of Wright and, thus, we remand to the trial court for appropriate relief in this respect. We also remand to the trial court for

11. The jury instruction regarding attorney fees was broader than the provision in the Purchase Agreement which only provided for recovery of fees to the prevailing party who was "enforcing performance of any covenant or representation hereunder or for damages for breach thereof." The instruction given allowed the jury to award fees to the party who prevailed in the action. Neither party objected to this instruction and both thereby acquiesced in the instruction as given. Nor did either party object to having the jury make the attorney fee decision, a matter ordinarily better entrusted to the court.

further consideration of attorney fees. As to the other issues raised on appeal, we affirm.

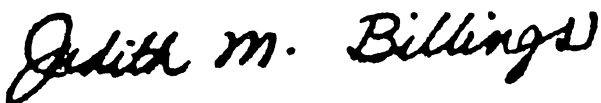


Gregory K. Orme, Judge

WE CONCUR:



Russell W. Bench, Judge



Judith M. Billings, Judge

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

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DEPUTY *Handwritten signature*

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

GEORGE RONALD WRIGHT,)	
Plaintiff,	)	BILL OF COSTS
vs.)	
WESTSIDE NURSERY, a Utah)	
limited partnership and)	
DARREL HUMPHRIES, an	)	Civil No. 85-0536
individual,)	
Defendant.)	

Pursuant to the provisions of Rule 34(c) and Rule 34(d),
R. Utah Ct. App., Plaintiff presents the following Memorandum of
Costs incurred on the appeal in the above-entitled action:

Appeal filing fee (District Court)	\$ 30.00
Docketing fee (Court of Appeals)	125.00
Transcript cost	2,922.50
Printing of Exhibits incorporated into Appellant's brief	42.05
Printing and binding briefs	159.80
Bond premiums incurred during pendency on appeal	2,000.00
Total Costs incurred	<hr/> \$5,279.35

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34-334A

Approved

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STATE OF UTAH)
 SS.
COUNTY OF WASHINGTON)

Gary W. Pendleton, being first duly sworn upon oath deposes and says that he is the attorney for the Plaintiff in the above-entitled action and as such is better informed relative to the above costs and disbursements than the said Defendant; that the items contained in the memorandum are true and correct to the best of affiant's knowledge and belief and that said disbursements have been necessarily incurred in said action.

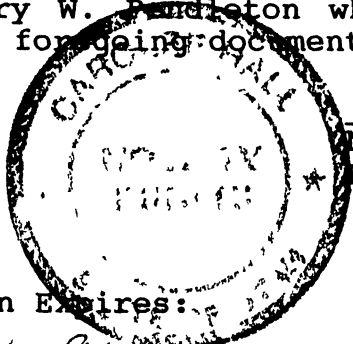
DATED this 7 day of March, 1990.

Gary W. Pendleton

Gary W. Pendleton
Attorney for Plaintiff

STATE OF UTAH)
 SS.
COUNTY OF WASHINGTON)

SUBSCRIBED AND SWORN to before me this 7 day of March, 1990, by Gary W. Pendleton who personally appeared before and executed the foregoing document.



Carolee Hall

NOTARY PUBLIC
Residing at St. George, Utah

My Commission Expires:
5-31-90

MAILING CERTIFICATE

I do hereby certify that on this 7 day of March, 1990, I did personally mail a true and correct copy of the above and foregoing Memorandum to Hans Q. Chamberlain, Attorney at Law, P. O. Box 726, Cedar City, Utah 84721.

Danella Berger
Secretary

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

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DEPUTY CLERK *[Signature]*

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

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.)	

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:

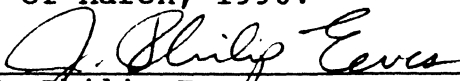
Costs on appeal (none awarded)	-0-
Attorney's Fees awarded Plaintiff on appeal	\$8,152.50
TOTAL ADJUSTMENTS	-8,152.50
ADJUSTED AWARD	\$22,045.71
Post Judgment Interest	\$4,269.01
TOTAL DISBURSEMENT TO DEFENDANT	\$26,314.72

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

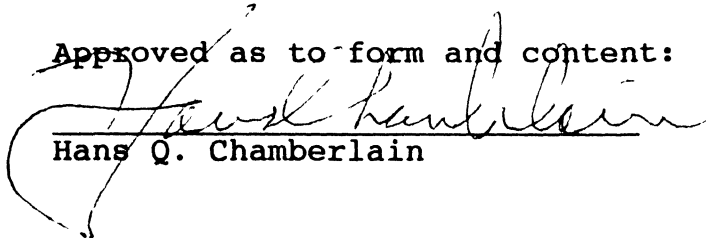
the Plaintiff in the above-entitled action is hereby exonerated and the surety is discharged.

DATED this 22nd day of March, 1990.



J. Philip Eves
District Judge

Approved as to form and content:



Hans Q. Chamberlain