

2007

Papanikolas Brothers Enterprises, LC and White Investment Co. Inc. v. Wendy's Old Fashioned Hamburgers of New Young, Inc. : Brief of Appellant

Utah Supreme Court

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Ronald C. Russel, Esq.; Parr Waddoups Brown Gee & Loveless; Counsel for Defendant/Appellee. Michael Z. Hayes; Todd J. Godfrey; Mazuran & Hayes PC; Counsel for Plaintiffs/Appellants.

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IN THE SUPREME COURT OF THE STATE OF UTAH

**PAPANIKOLAS BROTHERS
ENTERPRISES, LC and WHITE
INVESTMENT CO., INC.,**

Plaintiffs/Appellants,

vs.

**WENDY'S OLD FASHIONED
HAMBURGERS OF NEW YORK,
INC.,**

Defendant/Appellee.

No. 20070580

BRIEF OF PLAINTIFFS/APPELLANTS

**Appeal from a Decision of the Utah Court of Appeals Affirming Portions of a
Summary Judgment Grant of the Third Judicial District Court in and for Salt Lake
County, Utah, Honorable Judge J. Dennis Frederick, Case No. 040915948**

Ronald G. Russell, Esq.
**PARR WADDOUPS BROWN
GEE & LOVELESS**
185 South State Street, Suite 1300
Post Office Box 11019
Salt Lake City, UT 84147-0019
Telephone: (801) 532-7840
Fax: (801) 532-7750
Counsel for Defendant/Appellee

Michael Z. Hayes (1432)
Todd J. Godfrey (6094)
MAZURAN & HAYES, P.C.
2118 East 3900 South, Suite 300
Salt Lake City, UT 84124
Telephone: (801) 272-8998
Fax: (801) 272-1551
Counsel for Plaintiffs/Appellants

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DEC - 5 2007

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Todd J. Godfrey (6094)
MAZURAN & HAYES, P.C.
2118 East 3900 South, Suite 300
Salt Lake City, UT 84124
Telephone: (801) 272-8998
Fax: (801) 272-1551
Counsel for Plaintiffs/Appellants

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2118 East 3900 South, Suite 300
Salt Lake City, UT 84124
Telephone: (801) 272-8998
Fax: (801) 272-1551
Counsel for Plaintiffs/Appellants

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JURISDICTION OF THE UTAH SUPREME COURT

Jurisdiction is vested in this Court for consideration of this Appeal pursuant to *Utah Code Ann.* § 78-2-2(3)(a).

ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals err when it sustained the trial court's grant of an injunction against the Plaintiffs/Appellants (the "Owners"), enjoining the Owners from interfering with the Defendant/Appellee's ("Wendy's") sole and exclusive use of the Owners' property? In making this determination the Utah Supreme Court gives no deference to the decision of the Utah Court of Appeals and reviews the decision for correctness. *Hansen v. Eyre*, 116 P.3d 290, 292 (Utah 2005).

DECISION OF THE COURT OF APPEALS

The Court of Appeals' decision is found at 2007 UT App 211; 580 Utah Adv. Rep. 13. A full copy of the opinion is included in the Appendix to this Brief.

CONTROLLING STATUTORY PROVISIONS

There are no statutory provisions which are controlling or determinative of this appeal.

STATEMENT OF THE CASE

Owners ask the Utah Supreme Court to find that the Court of Appeals erred in affirming an injunction issued by the Third District Court.

The case was filed by the Owners in the Third District Court on claims of Trespass and Breach of contract. Wendy's answered the Owners' Complaint and filed a

Counterclaim seeking injunctive and declaratory relief. On Wendy's motion for summary judgment, the trial court granted the motion and enjoined the Owners from taking any action that would interfere with Wendy's continued use of Drive-Through Facilities located on the Owners' property. On appeal, the Utah Court of Appeals determined that portions of the trial court's summary judgment decision were incorrect and remanded the matter for proceedings on those portions of the case. However, the Court of Appeals also held that the Owners' trespass and breach of contract claims were barred by the statute of limitations, and that the injunction requested by Wendy's in its counterclaim, and issued by the trial court, was proper. The effect of the ruling of the Court of Appeals is to vest Wendy's with the sole and exclusive use of the Owners' property. Owners are enjoined from any further use of the drive-through property at issue. A Statement of Relevant Facts of the Case follows.

STATEMENT OF FACTS

1. Defendant/Appellee Wendy's Old Fashioned Hamburgers of New York, Inc. ("Wendy's") owns the real property located at 3259 East 3300 South, Salt Lake City, Utah (the "Wendy's Property"), on which is located a restaurant building and related improvements. R. at 119, ¶ 1.

2. The Wendy's Property is adjacent to the Canyon Rim Shopping Center (the "Shopping Center"), which is owned by Plaintiffs/Appellants ("Owners"). R. at 119, ¶ 2.

3. Both the Wendy's Property and the Shopping Center are included in the property described in a Declaration, which was recorded in the office of the Salt Lake

County Recorder on September 24, 1982 as Entry No. 3714292, in Book 5410, at Page 823. R. at 119, ¶ 3.

4. The Declaration identifies three distinct parcels of property within the property described therein. The Wendy's Property is located within what the Declaration refers to as "Parcel Three." R. at 119, ¶ 5.

5. The Wendy's Property was developed as a Burger King restaurant in or about 1982. R. at 120, ¶ 6.

6. At the time the Burger King restaurant was constructed on the Wendy's Property in or about 1982, a drive-through lane was also constructed on the north side of the Wendy's Property. The drive-through lane is bounded on the north by a narrow, landscaped island edged with concrete curbing, and on the south by the restaurant (the drive-through lane and related island are referred to hereinafter as the "Drive-Through Facilities"). R. at 120, ¶ 7.

7. The Drive-Through Facilities extend from the northwest corner of the restaurant located on the Wendy's Property to the northeast onto the Owners' property. R. at 80, ¶ 11.

8. The Owners' property which is encumbered by the Drive-Through Facilities is identified in the Declaration as a portion of the "Common Area" of the Shopping Center. R. at 80, ¶ 11.

9. The Declaration contains an Exhibit A, referred to as the Plot Plan. The Plot Plan is a proposed site plan for the Canyon Rim Shopping Center. R. at 79, ¶ 6.

10. The Plot Plan shows the Drive-Through Facilities as two curved lines running from the northwest corner of the restaurant located on the Wendy's Property to the northeast. R. at 7.

11. With respect to Parcel Three, the Declaration provides that "[n]o building featuring drive-in, drive-up or drive-through traffic shall be located on Parcel Three, except as shown on the Plot Plan" R. at 38.

12. The physical relationship between the location of the Wendy's building and the Drive-Through Facilities as shown on the Plot Plan is not consistent in scale with the physical location of the Wendy's building and Drive-Through Facilities as physically located on the ground. R. at 280, ¶ 8.

13. The Wendy's building, as built, begins approximately 8 feet farther from the North edge of the 33rd South right-of-way and is approximately 13 feet longer than the building shown on the Plot Plan. R. at 280, ¶ 9.

14. With respect to signage on Parcel Three, the Declaration states that:

The Owner of Parcel Three shall have the right to construct two (2) free-standing pylon, monument or other signs at the location designated on the Plot Plan as "Parcel Three Sign." No other pylon, monument or other free-standing sign shall be permitted on Parcel Three without the prior written approval of all Owners

R. at 39, 40.

15. In November, 2002, Wendy's became aware that the Drive-Through Facilities then being operated by Burger King encroached upon Owners' property

through a survey commissioned by Wendy's and performed by Larsen & Malmquist. R. at 151, ¶ 3; 261, ¶ 1.

16. Shortly thereafter a representative of Wendy's contacted Mark Papanikolas, a representative of the Owners, to inquire about purchasing an easement over Owners' property. R. at 261, ¶ 2.

17. In December, 2002, Owners notified Wendy's that Owners would not allow drive-through facilities to be located on Owners' property without compensation being paid to Owners. R. at 261, ¶ 3.

18. On or about February 28, 2003, Wendy's purchased the Burger King Restaurant property located at 3259 East 3300 South, Salt Lake City, Utah and converted the restaurant from a Burger King to a Wendy's. R. at 262, ¶ 4.

19. Following the purchase by Wendy's of the Burger King property, Wendy's replaced the Burger King free-standing signs and added additional free-standing and monument signs, at least one of which is alleged to have been constructed on Owners' property. R. at 262, ¶ 5; 287.

20. Wendy's is currently maintaining the Drive-Through Facilities and landscaped area as shown on the Larsen & Malmquist survey to be on Owners' property and has planted and continues to maintain flowers, shrubs and grass on Owners' property, together with one of Wendy's signs. R. at 262, ¶ 6.

21. In addition to a pylon sign along 3300 South at the south end of the Wendy's Property, and a directional sign located on the Drive-Through Facilities,

Wendy's also constructed two additional menu-board signs on the Wendy's Property (the "Menu-Board Signs"). R. at 254, ¶ 5, 283, ¶¶ 8-9.

22. In July, 2004, Owners filed suit against Wendy's alleging trespass and breach of contract based on the location of Wendy's Drive-Through Facilities on Owners' property. R. at 1.

23. Wendy's answered Owners' Complaint and filed a Counterclaim that included a request for an injunction. R. at 14.

24. Wendy's brought a Motion for Summary Judgment on Owners' claims and on Wendy's counterclaims on September 30, 2005. R. at 114.

25. A hearing was held on Wendy's motion on December 12, 2005. R. at 306.

26. On December 12, 2005, the Court entered a Minute Entry granting Wendy's Motion for Summary Judgment. In the Minute Entry the Court states:

After reviewing the record in this matter, as well as the applicable Utah law, the Court finds the proper focus in a statute of limitations analysis is the time at which the cause of action accrued, not the identity of the parties involved. *See Utah Dep't of Env't. Quality v Redd*, 2002 UT 50, ¶ 16, 48 P.3d 230 (*citing Utah Code Ann.*, § 78-12-1). While the Plaintiffs' suggest the trespass is continuing, rather than permanent and, therefore, their lawsuit is timely, the Court disagrees. At issue in this case is a landscaped island edged with concrete curbing, which is considerably more permanent than the pile of "rocks, soil, and other debris" which constituted the act of trespass contested in *Brieggar Properties, L.C. v. H.E. Davis & Sons, Inc.*, 2002 UT 1953, p. 11, 52 P.3d 1133. This said, it is undisputed the alleged trespass and breach of the Declaration occurred in or about 1982 and, consequently, the causes of action are time barred.

Based upon the foregoing, the Defendant's Motion for Summary Judgment is granted. Defendant is asked to prepare the appropriate affidavit of fees and submit the same for consideration by the Court.

R. at 307.

27. The trial court entered Findings of Fact and Conclusions of Law and a Final Judgment in this matter on March 21, 2006. R. at 375.

28. The Court of Appeals entered its final decision on June 21, 2007. A copy of the decision of the Court of Appeals is included in the appendix to this Petition.

29. In its decision, the Court of Appeals states:

¶28 Although, “[i]n addition to damages, [a] plaintiff may seek to stop the conduct that is creating the trespass,” and although “issuance of an injunction to remove the encroachment remains discretionary with the court,” 9 Richard R. Powell, *Powell on Real Property* § 64A.05[8] (Michael Allen Wolf ed. 2007), the question here is whether an equitable remedy of removal is still available after the statute of limitations has run. The parties do not cite, and we do not find, any Utah law directly on point. In at least one state, however, courts have held that requests for injunctive relief for the removal of permanent trespasses on property are, like trespass claims, barred by the three-year statute of limitations. *See Field-Escandon v. DeMann*, 251 Cal. Rptr. 49, 52-53 (Cal. Ct. App. 1988); *see also Troeger v. Fink*, 332 P.2d 779, 782, 783 (Ca. Ct. App. 1958) (stating that “causes of action for damages and for injunctive relief accrue when the [permanent] trespass is committed and are barred three years thereafter” and that “[g]enerally, the running of an applicable statute of limitations will also bar equitable relief”).

¶29 This approach makes sense. After all, the three-year statute of limitations bars any trespass “action.” Utah Code Ann. § 78-12-26(1). Therefore, Plaintiffs cannot assert the

trespass action that would support their remedy – regardless of whether that remedy is equitable or is for damages.

¶30 Even if this were not the case, the Utah Supreme Court has held that “[e]quitable claims will be barred after the time fixed by the analogous statute of limitations unless extraordinary circumstances make the application unjust.” *CIG Exploration, Inc. v. State*, 2001 UT 37, ¶11, 24 P.3d 966; *see also Hatch v. Hatch*, 46 Utah 116, 148 P. 1096, 1101 (1915) (“Generally, in the state courts, the statute of limitations applies to equitable as well as legal actions.”).

207 UT App 211, ¶¶ 28-30.

30. The Owners filed a Petition for Certiorari on July 23, 2007, and this Court subsequently granted the Owners’ Petition.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals in this case sustained the injunction issued by the trial court. This decision of the Court of Appeals is in conflict with prior precedent of this Court. The decision allows Wendy’s to continue its sole and exclusive use of Owners’ property, despite the fact that Wendy’s has no ownership interest in the property. This is contrary to the policy set forth by this Court in *Nyman v. Anchor Development, L.L.C.*, 2003 UT 27, 73 P.3d 357.

The decision of the Court of Appeals is also incorrect because it awarded affirmative relief to Wendy’s on its Counterclaim in the form of an injunction prior to any determination on the merits that would support the injunction.

ARGUMENT

I.

THE COURT OF APPEALS' DECISION IN THIS CASE SHOULD BE REVERSED BECAUSE IT CONFLICTS WITH PRIOR PRECEDENT OF THIS COURT.

In its opinion in this case, the Court of Appeals found that the injunction issued by the trial court was proper. The Court reached this result through reliance on case law from the State of California which holds that requests for injunctive relief for the removal of permanent trespasses on property are, like the trespass claims, barred by the same statute of limitations. *See Papanikolas v. Wendy's*, 207 UT App. 211, ¶¶ 28–29. As a result of that decision, the trial court's Order, which prevents the Owners from taking any action which would inhibit Wendy's use of the Drive-Through Facilities, has been sustained.

It is undisputed that Wendy's use of the Drive-Through Facilities is completely exclusive of any use the Owners could make of their own property. Therefore, the injunctive order issued by the trial court, and sustained by the Court of Appeals, has created a situation where Wendy's has the sole and exclusive use and possession of the Owners' property. They have obtained this right despite the absence of any legal ownership interest in the property and despite the fact the Court of Appeals specifically declined to address the issue of whether or not the Declaration in this case authorizes Wendy's trespass. *See Papanikolas v. Wendy's*, 207 UT App. 211, ¶ 20.

The aforementioned decision of the Court of Appeals, granting Wendy's the sole and exclusive use of Owners' property, is contrary to the decision of this Court in *Nyman*

v. *Anchor Development, L.L.C.*, 2003 UT 27, 73 P.3d 357. In *Nyman*, a property owner sought a judgment of adverse possession or, in the alternative, a prescriptive easement where he had constructed his garage partially on a neighbor's property. This Court denied the appellant's claim to a prescriptive easement on the basis that the appellant's proposed use was exclusive of the primary owner's use of the property. The opinion of this Court states:

The trial court also rejected *Nyman's* alternative argument that even if he is not entitled to adverse possession of the disputed portion of Lot 17, he has a right to a prescriptive easement allowing him to continue to use the property for his garage. The trial court held that *Nyman's* claimed right could not be construed as an easement because it would leave Miller, the holder of record title, with no rights at all in the disputed property. *Nyman* argues that the trial court erred by granting summary judgment to Miller on this issue.

¶ 18 “A prescriptive easement is created when the party claiming the prescriptive easement can prove that ‘use of another’s land was open, continuous, and adverse under a claim of right for a period of twenty years.’ ” Here, the term “use” implies an inherent distinction in the property rights conferred by an easement, on the one hand, and outright ownership, on the other. “A prescriptive easement does not result in ownership, but allows only use of property belonging to another for a limited purpose.” *Marchant v. Park City*, 771 P.2d 677, 681 (Utah Ct.App.1989), *aff'd*, 788 P.2d 520 (Utah 1990). Thus, we have previously observed that:

Whenever there is ownership of property subject to an easement there is a dichotomy of interests, both of which must be respected and kept in balance. On the one hand, it is to be realized that the owner of the fee title, because of his general ownership, should have the use and enjoyment of his property to the highest degree possible, not inconsistent with the easement. On the other, the owner of the easement should likewise have the right to use and enjoy his easement to the

fullest extent possible not inconsistent with the rights of the fee owner.

N. Union Canal Co. v. Newell, 550 P.2d 178, 179 (Utah 1976). Maintaining such a balance between the rights of the fee title owner and a purported easement holder becomes impossible where the latter asserts a right to permanent exclusive occupancy of the fee title owner's land. We conclude that the right to keep a garage on another's property falls outside the scope of a prescriptive easement, and therefore the latter is simply unavailable to Nyman as an alternative in this case. Indeed, we know of no prior Utah case recognizing a prescriptive easement right to maintain a permanent structure on someone else's property.

Nyman, 2003 UT 27, ¶ 17-18, 73 P.3d 357, 361-362. The Court of Appeals decision in this case creates the precise result which this Court found untenable in *Nyman*: Wendy's has the exclusive use and possession of the enclosed drive-through property at issue while the Owners, still with "legal title" to the property, are excluded from any use of the property whatsoever.

The decision of the Court of Appeals rests on the notion that where a statute of limitations bars a legal action, it also bars the Owner from taking any action to recover its property. *Papanikolas*, 2007 UT App. 211, ¶28-30. The injunction was sustained without any determination by the Court of Appeals on the merits of Wendy's claim of a right to continue in sole possession of the property. Despite the fact that Wendy's has alleged a cause of action seeking a prescriptive easement in its counterclaim and essentially abandoned that claim, the Court of Appeals decision vests the sole and exclusive use of the Owners' property in Wendy's wholly on the basis of a statute of limitations determination. In short, as a result of the decision of the Court of Appeals, the Owners

are the owners of property from which they are completely excluded, and Wendy's is in exclusive possession of property it does not own. This result is in direct conflict with the decision of this Court in *Nyman*.

The Court's emphasis in *Nyman* on the permanent nature of the encroachment is highlighted in this case. The designation of the Drive-Through Facilities here as a "permanent" trespass is significant. The Court of Appeals explained the distinction between "permanent" trespass and "ongoing" trespass, noting that "the act of constructing the Drive-Through Facilities was permanent in that "[its] installation amount[ed] to a single act with a single impact on the land." *Papanikolas*, 2007 UT App 211, ¶25. The Court of Appeals' reasoning rests on the fact that once an act of permanent trespass is committed, there is no further contact of an interfering nature with the land. The underlying owner is no longer impacted in its use of the property. Given this distinction, it is difficult to understand why an owner should be prohibited from using self-help to restore its property to its pre-trespass condition. The Court of Appeals decision in this case would have prohibited the property owner in *Brieggar Properties, L.C. v. H.E. Davis & Sons, Inc.*, 2002 UT 53, 52 P.3d 1133,¹ from removing the offending pile of rocks and debris from his property. This result is unwarranted. The Court of Appeals decision on this point should be reversed.

¹ In *Brieggar*, the offending trespass was a pile of rocks and other construction debris that was mistakenly placed on Brieggar's property. The trespassing party mistakenly dumped the material, believing that Brieggar's property belonged to someone else.

II.

THE DECISION OF THE COURT OF APPEALS IMPROPERLY GRANTS AFFIRMATIVE RELIEF TO WENDY'S ON THE BASIS OF THE STATUTE OF LIMITATIONS.

On certiorari review, this Court will review the decision of the Court of Appeals for correctness, focusing on whether that court correctly reviewed the trial court's decision under the correct standard of review. *Pratt v. Nelson*, 2007 UT 41, 164 P.3d 366. In the context of a Summary Judgment Motion, it is the obligation of the trial court and the Court of Appeals to view the facts and the inferences to be drawn from them in a light most favorable to the non-moving party, here, the Owners. *Id.*

In its decision, the Court of Appeals sustained the primary portion of the trial court's ruling when it determined that Owners' trespass and breach of contract claims were time barred. However, Wendy's request for an injunction is founded on the allegations of its Counterclaim, which asserts a right to the current location of the Drive-Through Facilities based on the terms of the Declaration. The record in this case reveals no dispute of fact on the issue of Wendy's encroachment on the Owners' property. R. at 261, ¶¶1-2. At the very least, the facts, taken in a light most favorable to the Owners, indicate the existence of a genuine dispute of fact as to whether or not the Drive Through Facilities of Wendy's are consistent with the Declaration. R. at 280, ¶8. Therefore, in the context of Wendy's Summary Judgment Motion on which this matter was decided, the trial court and the Court of Appeals were precluded by the record from

concluding that Wendy's Drive-Through Facilities were located in a manner that is consistent with the Declaration.

In support of its decision to sustain the Injunction, the Court of Appeals noted that "the question here is whether an equitable remedy of removal is still available after the statute of limitations has run." *Papanikolas*, 2007 UT App 211, ¶28. The Court then relied on a decision from California and held that because equitable relief should likewise be barred by the same statute of limitations applicable to damages actions, the trial court's injunction should be sustained. The Court of Appeals' decision rests on the incorrect assertion that the Owners were seeking equitable relief to authorize removal of the encroachment. In fact, the only injunction at issue before the trial court or the Court of Appeals was the injunction issued by the trial court on Wendy's request. Owners' request for equitable relief in the matter was not before the Court.

As noted above, the state of the record in this case prevented any determination that Wendy's was not trespassing on Owners' property. Additionally, because the Court of Appeals affirmed the trial court's decision on the statute of limitations, the Court of Appeals stated:

[2] ¶ 20 We do not reach the issue of whether the trial court correctly interpreted the Declaration, as we agree with the trial court that Plaintiffs' trespass and breach of contract claims concerning the Drive-Through Facilities are time-barred.

Papanikolas, 2007 UT 211, ¶ 20. Therefore, without any judgment on the merits of the breach of contract claim, the trial court awarded the affirmative relief requested by

Wendy's in its Counterclaim. The use of the statute of limitations in this way was legally incorrect. The Tenth Circuit Court of Appeals has stated the law in this manner:

It is the general rule of wide application that the statute of limitations is available in judicial proceedings only as a defense and can never be asserted by a plaintiff as a cause of action in him or as conferring upon him an affirmative right of action. The principle has sometimes been expressed in the figure of speech that the statute is available only as a shield, not as a sword.

Northern Pac. Ry. Co. v. United States, 277 F.2d 615, 623-624 (10th Cir. 1960). The affirmative relief granted to Wendy's was awarded without any determination of the merits and therefore, the injunction issued by the trial court was incorrectly sustained by the Court of Appeals.

CONCLUSION

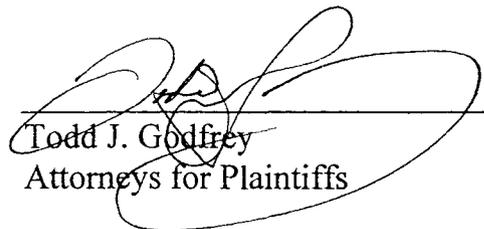
From the foregoing, it is clear that the Court of Appeals' decision rests on faulty reasoning and an incorrect understanding of the claims of the parties. The trial court and the Court of Appeals in this matter determined that Wendy's trespass is permanent. The characterization of the trespass as permanent implies a single entry, and a single impact on the property. There is, according to this characterization, no ongoing interference with the Owners' use of the property. If the reasoning behind the characterization were accurate, the Owner would be entitled to, and able to fully use and enjoy the property. The decision of the Court of Appeals in this case, while characterizing the trespass as permanent, precludes the Owners from any use of their own property and awards the sole and exclusive use of the property to Wendy's. This is contrary to any reasoned policy.

The decision also affirms an injunction awarded to Wendy's on its counterclaim without any determination that the counterclaim has merit. The injunction was based solely on the Court of Appeals determination that Owners' trespass and breach of contract claims are barred by the statute of limitations. It turns the statute from a shield to a sword which affords affirmative relief. The decision is also erroneous on this point and should be reversed.

For the foregoing reasons, Owners request that this Court overturn that part of the Court of Appeals' decision which upholds the injunction issued by the trial court and remand this matter to the trial court for a determination of the merits of the parties' remaining claims. The Owners further request an Order awarding them their costs as allowed by law.

RESPECTFULLY SUBMITTED this 5th day of December, 2007.

MAZURAN & HAYES, P.C.

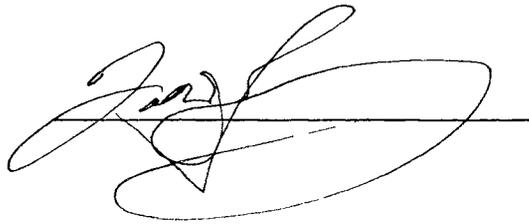


Todd J. Godfrey
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of December, 2007, I caused to be served a true and correct copy of the foregoing by mailing, postage prepaid, first-class United States mail, to the following:

Ronald G. Russell, Esq.
Parr Waddoups Brown Gee & Loveless
185 South State Street, Suite 1300
Post Office Box 11019
Salt Lake City, UT 84147-0019

A handwritten signature in black ink, appearing to read "Ronald G. Russell", is written over a horizontal line. The signature is stylized and cursive.

APPENDIX

This opinion is subject to revision before
publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

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Papanikolas Brothers)	OPINION
Enterprises, L.C.; and White)	(For Official Publication)
Investment Co., Inc.,)	
)	Case No. 20060350-CA
Plaintiffs and Appellants,)	
)	
v.)	F I L E D
)	(June 21, 2007)
Wendy's Old Fashioned)	
Hamburgers of New York, Inc.,)	2007 UT App 211
)	
Defendant and Appellee.)	

Third District, Salt Lake Department, 040915948
The Honorable J. Dennis Frederick

Attorneys: Todd J. Godfrey and Michael Z. Hayes, Salt Lake City,
for Appellants
Ronald G. Russell and Matthew J. Ball, Salt Lake
City, for Appellee

Before Judges Billings, Davis, and Thorne.

BILLINGS, Judge:

¶1 Plaintiffs Papanikolas Brothers Enterprises, L.C. and White Investment Co., Inc. appeal the trial court's grant of summary judgment to Defendant Wendy's Old Fashioned Hamburgers of New York, Inc. (Wendy's). On appeal, Plaintiffs contend the trial court erred in interpreting the declaration of restrictions and grant of easements and in concluding that the statutes of limitations had run on Plaintiffs' breach of contract and trespass claims. We affirm in part and reverse and remand in part.

BACKGROUND¹

1. "In reviewing a grant of summary judgment, we . . . view the facts and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party." Sanders v. Leavitt, 2001 UT 78, ¶1 n.1, 37 P.3d 1052. "We recite the facts accordingly." Id.

¶2 Plaintiffs and Wendy's are adjacent land owners in Salt Lake City, Utah. Plaintiffs own the Canyon Rim Shopping Center (the Shopping Center), and Wendy's owns property next to the Shopping Center (the Wendy's Property), on which it owns and operates a fast-food restaurant.

¶3 Both the Shopping Center and the Wendy's Property are located on land parcels described in a declaration of restrictions and grants of easements (the Declaration) recorded in 1982. The Declaration describes three distinct land parcels. The Declaration states that Plaintiffs own parcels one and two. The Wendy's Property is located within parcel three.

¶4 The Wendy's Property was originally developed in 1982 as a Burger King restaurant. Wendy's purchased the property in early 2003 and converted the Burger King restaurant to a Wendy's restaurant (the Restaurant).

¶5 The original development of the Wendy's Property in 1982 included construction of a drive-through lane on the north side of the Wendy's Property. As constructed, the drive-through lane was bound on the north by a narrow, landscaped island edged with concrete curbing and on the south by the Restaurant (we refer to the drive-through lane and the related island as the Drive-Through Facilities).

¶6 The Declaration limits the construction of buildings with drive-through traffic on parcel three, allowing such construction only when certain conditions are satisfied. Specifically, the Declaration states that

[n]o building featuring drive-in, drive-up or drive-through traffic shall be located on [p]arcel [t]hree, except as shown on the [p]lot [p]lan [(the Plot Plan)], without the prior written consent of the [o]wner of [p]arcel [t]wo and [the lessor of parcel one], including consent to the location of the drive-in, drive-up or drive-through lanes of such facility. Such consent will not be unreasonably withheld provided that the location of such lanes and the use thereof do not impede or inhibit access to and from and the conduct of business from the buildings in the Shopping Center or access to and from the adjacent streets.

¶7 The parties agree that the Plot Plan details the Drive-Through Facilities as two curved lines running from the northwest corner of the Restaurant to the northeast. They also agree that the Restaurant and the Drive-Through Facilities have, since the

time of their construction, remained in the same location and configuration and have remained in continuous use.

¶8 In addition to the Restaurant and the Drive-Through Facilities, there are also a number of signs located on parcel three, including two pylon signs and two menu board signs (the Menu Board Signs). The Menu Board Signs and one of the parcel three pylon signs are located on the Wendy's Property. Although menu board signs have continuously existed on the Wendy's Property since 1982, Wendy's replaced one of the existing menu board signs and installed an additional menu board sign when it acquired the property in 2003. The Declaration limits the amount and type of signage permitted on parcel three. Specifically, the Declaration states that

[t]he [o]wner of [p]arcel [t]hree shall have the right to construct two(2) free-standing pylon, monument or other signs at the location designated on the Plot Plan as "Parcel Three Sign." No other pylon, monument or other free-standing sign shall be permitted on [p]arcel [t]hree without the prior written approval of all [o]wners and [the lessor of parcel one].

The Declaration also permits, without limit, the construction of directional signs within the designated common areas of each property parcel.

¶9 In 2004, Plaintiffs filed suit against Wendy's for breach of contract and trespass. In 2005, Plaintiffs filed an amended complaint, alleging that the Menu Board Signs are not permitted by the Declaration and therefore constitute a breach a contract; that the Drive-Through Facilities are not physically located "as shown on the Plot Plan" and therefore constitute a breach of contract; and that the Drive-Through Facilities, and patrons' continued use of those facilities, constitute a trespass. Plaintiffs also subsequently asserted that Wendy's committed trespass and breached the Declaration in maintaining landscaping on the Drive-Through Facilities and in constructing a new fence and sign on Plaintiffs' property.²

¶10 Wendy's moved for summary judgment on Plaintiffs' claims. The trial court granted Wendy's motion for summary judgment, concluding that: (1) the Drive-Through Facilities do not violate the Declaration, and thus do not constitute a trespass, because the Declaration "expressly authorizes [the] Drive[-]Through

2. The parties and the record do not make clear whether the alleged fence and sign are located on the Drive-Through Facilities or elsewhere on Plaintiffs' property.

Facilities located on [p]arcel [t]hree as shown on the Plot Plan"; (2) even if the Drive-Through Facilities constituted a breach of contract or trespass, Plaintiffs' claims are barred by the relevant statutes of limitations; and (3) the Menu Board Signs do not violate the Declaration because the Declaration does not explicitly prohibit the signs and, moreover, because the Declaration expressly contemplates the operation of a drive-through restaurant on parcel three, the Declaration must have contemplated the erection of menu board signs--"an inherently necessary feature of modern drive through restaurants." The trial court thus denied Plaintiffs' claims for damages, awarded Wendy's "a declaratory judgment decreeing that the Menu Board Signs may remain in use in their present location and configuration," and "enjoin[ed P]laintiffs from taking any action to inhibit Wendy's from using and maintaining the Drive-Through Facilities and the Menu Board Signs in their present location and configuration." In accordance with a fee provision in the Declaration, the trial court awarded costs and attorney fees to Wendy's. The fee provision states that

[i]n the event that legal proceedings are brought or commenced to enforce any of the terms of th[e] Declaration against any [o]wner or other party with an interest in the Shopping Center, the successful party in such action shall then be entitled to receive and shall receive from the defaulting [o]wner or party a reasonable sum as attorney[] fees and costs, to be fixed by the court in the same action.

In its findings of fact and conclusions of law, the trial court did not apparently consider Plaintiffs' claims concerning Wendy's alleged maintenance of landscaping within the Drive-Through Facilities and its purported installation of a new fence and sign on Plaintiffs' property.

¶11 Plaintiffs appeal.

ISSUE AND STANDARD OF REVIEW

¶12 Plaintiffs argue that the trial court erroneously granted Wendy's motion for summary judgment because the court misinterpreted the Declaration as a matter of law and misapplied the statutes of limitations to Plaintiffs' breach of contract and trespass claims. It is well established that "[s]ummary judgment is appropriate only where (1) 'there is no genuine issue as to any material fact' and (2) 'the moving party is entitled to a judgment as a matter of law.'" Poteet v. White, 2006 UT 63, ¶7, 147 P.3d 439 (quoting Utah R. Civ. P. 56(c)). "In reviewing a grant . . . of summary judgment, [we are] . . . obligated

to . . . review the district court's legal conclusions, as well as the grant of summary judgment as a whole, for correctness." View Condo. Owners Ass'n v. MSICO L.L.C., 2005 UT 91, ¶17, 127 P.3d 697. The trial court's interpretation of the Declaration and its application of the statutes of limitations constitute legal conclusions. See Green River Canal Co. v. Thayn, 2003 UT 50, ¶16, 84 P.3d 1134 ("The trial court's interpretation of a contract presents a question of law, which we review for correctness."); Russell Packard Dev. v. Carson, 2005 UT 14, ¶18, 108 P.3d 741 ("The applicability of a statute of limitations . . . [is a] question[] of law, which we review for correctness." (quoting Spears v. Warr, 2002 UT 24, ¶32, 44 P.3d 742)).

ANALYSIS

¶13 Plaintiffs argue that the trial court improperly granted Wendy's motion for summary judgment on Plaintiffs' claims of trespass and breach of contract. Specifically, Plaintiffs claim that the trial court erred in concluding as a matter of law that the Declaration permits the Menu Board Signs; that the Drive-Through Facilities do not violate the Declaration; and that the Drive-Through Facilities do not constitute a trespass. Plaintiffs also aver that the trial court incorrectly ruled that Plaintiffs' contract and trespass claims concerning the Drive-Through Facilities are time-barred by the relevant statutes of limitations, and that even if their trespass claim is time-barred, the trial court cannot prevent Plaintiffs from obtaining equitable relief to remove the trespass from their property. Plaintiffs further assert that the trial court erred in failing to consider their claims of trespass and breach of contract regarding the alleged maintenance of landscaping and the construction of a new fence and sign on Plaintiffs' property. Finally, Plaintiffs argue that the trial court improperly interpreted the Declaration in awarding costs and attorney fees to Wendy's.

I. Menu Board Signs

¶14 Plaintiffs first contend that the trial court erred in determining as a matter of law that the Declaration permits the Menu Board Signs. The Declaration provides:

The [o]wner of [p]arcel [t]hree shall have the right to construct two(2) free-standing pylon, monument or other signs at the location designated on the Plot Plan as "Parcel Three Sign." No other pylon, monument or other free-standing sign shall be permitted on [p]arcel [t]hree without the prior written approval of all [o]wners

. . . .

Because the parties do not dispute that parcel three currently contains two pylon signs, Plaintiffs contend that the Menu Board Signs violate the Declaration in that they constitute "other free-standing sign[s]," installed without prior written approval, in excess of the number of signs permitted by the Declaration.

¶15 In contrast, Wendy's asserts that the Menu Board Signs do not violate the Declaration because they are not the type of signs prohibited under the Declaration. Specifically, Wendy's contends that the Menu Board Signs are directional in nature and thus not limited under the Declaration.

¶16 In determining that the Declaration does not prohibit the Menu Board Signs, the trial court appeared to adopt Wendy's classification of the Menu Board Signs as not constituting the type of signs--i.e., "pylon, monument or other free-standing"--limited under the Declaration without prior written approval.

¶17 In reviewing the Declaration, "[this court] interpret[s] the provisions of the Declaration as we would a contract." View Condo. Owners Ass'n v. MSICO, L.L.C., 2005 UT 91, ¶21, 127 P.3d 697. In so doing, "the intention of the . . . parties is controlling." Peterson v. Sunrider Corp., 2002 UT 43, ¶18, 48 P.3d 918. Thus, "[i]f the language of the contract is unambiguous, the intention of the parties may be determined as a matter of law based on the language of the agreement." Id. But, "[i]f the contract is found to be ambiguous, the court may consider extrinsic evidence of the parties' intentions." Id. Accordingly, "a motion for summary judgment may not be granted if a legal conclusion is reached that an ambiguity exists in the contract and there is a factual issue as to what the parties intended." Id. at ¶14 (quotations and citation omitted). "A contract provision is ambiguous if it is capable of more than one reasonable interpretation because of uncertain meaning of terms, missing terms[,] or other facial deficiencies." Id. at ¶19 (quotations and citations omitted). "To demonstrate ambiguity, the contrary positions of the parties must each be tenable." Plateau Mining Co. v. Utah Div. of State Lands & Forestry, 802 P.2d 720, 725 (Utah 1990).

¶18 Unlike the trial court, we do not think the Declaration clearly supports Wendy's position that the Menu Board Signs are directional signs allowed under the Declaration. To the contrary, the Declaration appears silent as to the parties' intent regarding the classification and limitation of menu board signs, and the agreement gives no indication as to why Plaintiffs' position that the Menu Board Signs are of a prohibited nature is not equally tenable. Because "[we] ha[ve] determined that the [Declaration] is ambiguous and there are issues of fact regarding the intention of the parties, summary

judgment may not be granted based on contract interpretation." Peterson, 2002 UT 43 at ¶29; see also id. ("Because the meaning of the contract ha[d] not yet been resolved, . . . the trial court's reliance on one construction of it to support summary judgment was improper."). Thus, we reverse the trial court's grant of summary judgment as to Plaintiffs' breach of contract claims regarding the Menu Board Signs and remand for an evidentiary hearing to determine what the parties to the Declaration must have intended as to the signs.³

II. Drive-Through Facilities

¶19 Plaintiffs next contend that the trial court erred in determining as a matter of law that the Drive-Through Facilities do not violate the Declaration and thus do not constitute a trespass. Plaintiffs also claim that the trial court erred in deciding that Plaintiffs' contract and trespass claims concerning the Drive-Through Facilities are time-barred.

¶20 We do not reach the issue of whether the trial court correctly interpreted the Declaration, as we agree with the trial court that Plaintiffs' trespass and breach of contract claims concerning the Drive-Through Facilities are time-barred. Plaintiffs' breach of contract claims are time-barred because the Drive-Through Facilities were constructed in 1982 and Plaintiffs did not file their breach of contract action alleging the facilities violated the Declaration until 2004, well beyond the relevant statute of limitations. See Utah Code Ann. § 78-12-23(2) (2002) ("An action may be brought within six years . . . upon any contract.").

¶21 Plaintiffs' trespass claims concerning the construction and patrons' use of the Drive-Through Facilities are also time-barred. Under Utah law, "[a]n action may be brought within three years . . . for . . . trespass upon or injury to real property." Utah Code Ann. § 78-12-26(1) (2002). Wendy's argues, and the trial court determined, that because the Drive-Through Facilities were first constructed in 1982, the alleged trespass is permanent and Plaintiffs' 2004 trespass claims concerning the Drive-Through Facilities are therefore time-barred. In response, Plaintiffs claim that the statute of limitations does not bar their claims because despite the Drive-Through Facilities' construction in 1982, Wendy's patrons' use of the Drive-Through Facilities and Wendy's alleged maintenance of landscaping within the facilities constitute a continuing, rather than a permanent, trespass.

3. Because Wendy's installed the Menu Board Signs in 2003, Wendy's concedes that if the Menu Board Signs violate the Declaration, Plaintiffs' breach of contract claim regarding the Menu Board Signs is not time-barred.

¶22 As this court recently noted, "[t]he distinction between a permanent and continuing trespass in Utah is defined in Breiggar Properties, L.C. v. H.E. Davis & Sons, Inc. [, 2002 UT 53, 52 P.3d 1133]." Sycamore Family, L.L.C. v. Vintage on the River Homeowners Ass'n, Inc., 2006 UT App 387, ¶3, 145 P.3d 1177, cert. denied, 153 P.3d 185 (Utah 2007). In Breiggar, the Utah Supreme Court explained:

"When a cause of action for nuisance or trespass accrues for statute of limitations purposes depends on whether the nuisance or trespass is permanent or continuing. Where a nuisance or trespass is of such character that it will presumably continue indefinitely it is considered permanent, and the limitations period runs from the time the nuisance or trespass is created. However, if the nuisance or trespass may be discontinued at any time it is considered continuing in character . . . [and] the person injured may bring successive actions for damages until the nuisance [or trespass] is abated"

2002 UT 53 at ¶8 (first and third alteration in original) (quoting Walker Drug Co. v. La Sal Oil Co., 902 P.2d 1229, 1232 (Utah 1995)). In determining whether a trespass is permanent or continuing, "we look solely to the act constituting the trespass, and not to the harm resulting from the act." Id. at ¶10. "Under this view, the difference between a permanent or continuing trespass is purely semantic." Id. at ¶11. "Once an act of trespass has occurred, the statute of limitations begins to run." Id. "If there are multiple acts of trespass, then there are multiple causes of action, and the statutes of limitations begins to run anew with each act." Id. Thus, "[w]e characterize a trespass as 'permanent' to acknowledge that the act or acts of trespass have ceased to occur[, and w]e characterize a trespass as 'continuing' to acknowledge that multiple acts of trespass have occurred, and continue to occur." Id.

¶23 Applying the above analysis, the court in Breiggar determined that the defendant's dumping of debris onto the plaintiff's property constituted a permanent trespass and that the statute of limitations began to run on the date of the dumping. See id. at ¶14. The court explained that "[t]he fact that the pile of debris continued to remain on [the plaintiff's] property, or the possibility that it could be reasonably abated is irrelevant to this conclusion." Id.

¶24 In Sycamore Family, L.L.C. v. Vintage on the River Homeowners Ass'n, Inc., this court considered whether "underground pipes constitute[d] a continuing trespass because water and sewage . . . flow through them on a continual basis." 2006 UT App 387 at ¶3. We explained that such a "contention

require[d the court] to consider the nature of the two components of the trespass . . . : the pipes themselves and the contents of the pipes." Id. at ¶4.

We . . . conclude[d] that the pipes themselves [were] permanent trespasses because, far from being an intermittent invader, they ha[d] been a fixture on the land for several years, and their installation amount[ed] to a single act with a single impact on the land. Although the water and sewage flowing through the pipes were not part of the single act of installation, we conclude[d] that such contents d[id] not constitute a new trespass. "The essential element of trespass is physical invasion of the land," or in other words, there must be an "encroachment on the rights of another." Absent an allegation that the contents of the pipes ha[d] leaked or otherwise affected the land, the wholly enclosed contents of the pipes d[id] not constitute a new encroachment onto the land. Accordingly, regardless of whether the pipes [were] empty or full, the encroachment on [the p]laintiffs' rights to the property [was] the same.

Id. (citations omitted).

¶25 We conclude that, like the pile of rocks in Breiggar and the pipes in Sycamore, the act of constructing the Drive-Through Facilities was permanent in that "[its] installation amount[ed] to a single act with a single impact on the land." Id. We further conclude that each use of the Drive-Through Facilities by Wendy's patrons does not constitute a new act of trespass because, like the waste moving through the pipes in Sycamore, the patrons' alleged encroachment on Plaintiffs' property is "wholly enclosed" within the Drive-Through Facilities. Id. Accordingly, we uphold the trial court's determination that Plaintiffs' trespass claim regarding the Drive-Through Facilities is time-barred.

¶26 We remand, however, the issue of whether the alleged maintenance of landscaping within the Drive-Through Facilities and the newly-installed fence constitute new or de minimis trespasses. The trial court did not address these claims below, and the record is insufficient for us to decide these issues on appeal.

III. Injunction

¶27 Plaintiffs contend that the trial court erred in "enjoining [P]laintiffs from taking any action to inhibit Wendy's from using and maintaining the Drive[-]Through Facilities." Namely, Plaintiffs argue that although the statute of limitations may bar their trespass claim for damages, it does not prevent Plaintiffs from obtaining equitable relief to remove the trespass from their property. In raising this issue, Plaintiffs notably fail to cite any relevant authority to support their position.

¶28 Although, "[i]n addition to damages, [a] plaintiff may seek to stop the conduct that is creating the trespass," and although "issuance of an injunction to remove the encroachment remains discretionary with the court," 9 Richard R. Powell, Powell on Real Property § 64A.05[8] (Michael Allen Wolf ed. 2007), the question here is whether an equitable remedy of removal is still available after the statute of limitations has run. The parties do not cite, and we do not find, any Utah law directly on point. In at least one state, however, courts have held that requests for injunctive relief for the removal of permanent trespasses on property are, like trespass claims, barred by the three-year statute of limitations. See Field-Escandon v. DeMann, 251 Cal. Rptr. 49, 52-53 (Cal. Ct. App. 1988); see also Troeger v. Fink, 332 P.2d 779, 782, 783 (Cal. Ct. App. 1958) (stating that "causes of action for damages and for injunctive relief accrue when the [permanent] trespass is committed and are barred three years thereafter" and that "[g]enerally, the running of an applicable statute of limitations will also bar equitable relief").⁴

¶29 This approach makes sense. After all, the three-year statute of limitations bars any trespass "action." Utah Code Ann. § 78-12-26(1). Therefore, Plaintiffs cannot assert the trespass action that would support their remedy--regardless of whether that remedy is equitable or is for damages.⁵

¶30 Even if this were not the case, the Utah Supreme Court has held that "[e]quitable claims will be barred after the time fixed by the analogous statute of limitations unless extraordinary

4. The application of the three-year statute of limitations to bar removal of the permanent trespass is consistent with the distinction between a permanent and continuing trespass. Otherwise, the distinction is without consequence as to the removal.

5. Notably, the courts in Breiggar Properties, L.C. v. H.E. Davis & Sons, Inc., 2002 UT 53, 52 P.3d 1133, and Sycamore Family, L.L.C. v. Vintage on the River Homeowners Ass'n, Inc., 2006 UT App 387, 145 P.3d 1177, gave no indication that equitable relief to remove the permanent trespass was available to the property owner after the statute of limitations on the permanent trespass had run.

circumstances make the application unjust." CIG Exploration, Inc. v. State, 2001 UT 37, ¶11, 24 P.3d 966; see also Hatch v. Hatch, 46 Utah 116, 148 P. 1096, 1101 (1915) ("Generally, in the state courts, the statute of limitations applies to equitable as well as legal actions.").

IV. Additional Trespass and Breach of Contract Claim Regarding the Alleged New Sign

¶31 Plaintiffs also assert that the trial court erred in failing to consider their trespass and breach of contract claims concerning the alleged construction of a new sign. We agree and remand for the trial court to consider this claim. In addressing this claim, the court will need to consider whether the sign is permitted under the Declaration. The court will also need to clarify where the sign is located, as the record is not clear.

V. Attorney Fees and Costs

¶32 In granting summary judgment to Wendy's, the trial court awarded attorney fees and costs to Wendy's pursuant to the Declaration. Plaintiffs contest this award, arguing that even if Plaintiffs are unsuccessful on all their claims, Wendy's is not entitled to fees and costs under the language of the Declaration. We determine the Declaration is ambiguous as to whether the parties intended the fee provision to apply in the present circumstances.

¶33 "In Utah, attorney fees cannot be recovered unless authorized by statute or contract." Shipman v. Evans, 2004 UT 44, ¶22, 100 P.3d 1151. Here, the Declaration provides that:

[i]n the event that legal proceedings are brought or commenced to enforce any of the terms of th[e] Declaration against any [o]wner or other party with an interest in the Shopping Center, the successful party in such action shall then be entitled to receive and shall receive from the defaulting [o]wner or party a reasonable sum as attorney[] fees and costs, to be fixed by the court in the same action.

(Emphasis added.) Plaintiffs contend that under the Declaration Wendy's is not entitled to fees and costs because Plaintiffs, even if unsuccessful in their claims, do not constitute a defaulting party, and that the contracting parties only intended the award of fees and costs when the party enforcing the Declaration is successful in such enforcement. Wendy's disagrees and instead claims that the contracting parties intended "defaulting . . . party" to apply more broadly to allow fees in circumstances such as here where Plaintiffs were dilatory in

bringing the majority of their claims. We conclude that the Declaration is unclear as to its terms, see Peterson v. Sunrider Corp., 2002 UT 43, ¶18, 48 P.3d 918, and each party's interpretation tenable, see Plateau Mining Co. v. Utah Div. of State Lands & Forestry, 802 P.2d 720, 725 (Utah 1990), as to whether the fee provision applies. We therefore vacate the award and direct the trial court to determine, before awarding fees and costs on remand, whether the parties intended the fee provision to apply in the present circumstances.

CONCLUSION

¶34 First, we affirm the trial court's conclusion that Plaintiffs' trespass and breach of contract claims are time-barred with regard to the Drive-Through Facilities. Second, because Plaintiffs' claims regarding the Drive-Through Facilities are time-barred, we affirm the trial court's decision to enjoin Plaintiffs from taking action to remove the Drive-Through Facilities. Third, we reverse and remand the trial court's determination that the Declaration permits the Menu Board Signs. Fourth, we remand for the trial court to address Plaintiffs' trespass claims concerning Wendy's alleged maintenance of landscaping within the Drive-Through Facilities and its purported installation of a new fence on Plaintiffs' property. Fifth, we remand for the trial court to consider Plaintiffs' claims concerning the alleged newly-installed sign. Finally, we vacate the trial court's award of attorney fees and costs and direct the court to determine on remand whether the parties intended the fee provision to apply under the facts of this case.

Judith M. Billings, Judge

¶35 WE CONCUR:

James Z. Davis, Judge

William A. Thorne Jr., Judge