2011

Anderson and Karrenberg v. Jerry Warnick, Martin Tanner, David Thayne and Heritage communications, Inc. : Brief of Appellant

Utah Court of Appeals

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THE UTAH COURT OF APPEALS

450 South State Street, Salt Lake City, Utah 84111

ANDERSON & KARRENBERG, Plaintiff/Appellee, **vs.** JERRY WARNICK, Martin Tanner, David Thayne and Heritage Communications, Inc., Defendants/Appellant.	)	**APPELLANT'S OPENING BRIEF** Case No. 2011-0553-CA

Appeal from Final Order & Judgment of
Third District Court Judge L. A. Dever

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LIST OF ALL PARTIES

Plaintiff/Appellee:	Anderson & Karrenberg
Defendant/Appellant:	Jerry Warnick

Defendants not appealing:	Martin Tanner, David Thayne, and Heritage Communications, Inc.
Other parties:	None

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JURISDICTIONAL STATEMENT

This is an appeal from a final ruling of the Third District Court, transferred to the Court of Appeals from the Utah Supreme Court. The Court of Appeals has jurisdiction over this appeal under Section 78A-4-103, Utah Code Ann., which in pertinent part provides for Court of Appeals jurisdiction over the following:

> **(2)** The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:
>
> **(a)** the final orders and decrees . . . from the district court
>
> . . . .
>
> **(j)** cases transferred to the Court of Appeals from the Supreme Court.

STATEMENT OF ISSUE

Did the trial court incorrectly interpret and incorrectly apply the law in ruling Jerry Warnick was not the prevailing party and therefore not entitled to an award of attorney's fees under § 78B-5-826, Utah Code Ann., Record at 1572, when he prevailed on the issue which underlies every single cause of action in the complaint and counterclaim, namely, whether he should be required to pay attorneys' fees Anderson & Karrenberg sought from him?

Preserved in the record in Warnick's *Motion for Award of Attorney's Fees*, Record at 1462; *Memorandum in Support of Motion for Award of Attorney's Fees*, Record at 1460; *Reply Memorandum in Support of Motion for Award of Attorney's Fees*, Record at 1474; *Memorandum in Support of Jerry Warnick's Motion for Attorney's Fees*, Record at 1515, and supporting documents.

STANDARD OF REVIEW

The outcome of this appeal will initially turn on selection of the appropriate standard of review. Section 78B-5-826, Utah Code Ann., provides that "[a] court ***may*** award ... attorney fees," so superficially, an abuse of discretion standard may appear appropriate. Utah Code Ann. § 78B-5-826 (2008) (emphasis added); *see, also, Bilanzich v. Lonetti*, 2007 UT 26, ¶ 17, 160 P.3d 1041 (§ 78B-5-826 allows courts to exercise discretion in awarding fees).

However, the trial court's ruling that Warnick was not the prevailing party and thus not entitled to an award of attorneys' fees, Record at 1572, was **not based on**

exercise of discretion. It was based on **incorrect interpretation and misapplication** of Section 78B-5-826. Record at 1579-80. "Trial courts do not have discretion to misapply the law." *State v. Barrett*, 127 P.3d 682, 687 (Utah 2005). A trial court has no discretion to misapply the law because "interpretation of a statute is a question of law . . . review[ed] for correctness without any deference to the legal conclusions of the district court." *Jaques v. Midway Auto Plaza, Inc.*, 240 P.3d 769, 774 (Utah 2010).

The issue presented for review is thus whether the trial court misinterpreted and misapplied Section 78B-5-826 when it ruled neither party prevailed, by merely counting or miscounting the number of claims and counterclaims of each party in the court's "chart" without looking at the gravamen or underlying grievances of the parties' claims, which was whether Warnick owed Anderson & Karrenberg fees. The jury determined that was not the case. Hence Warnick prevailed.

STATUTES & RULES

1. Utah Code Ann. § 78B-5-826. **Attorney fees - Reciprocal rights to recover attorney fees**. A court may award costs and attorney fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney fees.

STATEMENT OF THE CASE

This case was a dispute over whether Jerry Warnick should be required to pay Anderson & Karrenberg fees it claimed Warnick owed. After trial, the jury determined Warnick owed nothing. Record at 1399-1400. Warnick prevailed on the sole, underlying issue.

However, after the jury's decision, when Warnick sought an award of attorney's fees under Section 78B-5-826, Utah Code Ann., incredibly, the trial court refused to award Warnick fees on the basis that neither party prevailed. Record at 1580.

Both parties applied various legal theories to the underlying question of whether Warnick owed Anderson & Karrenberg money for legal services. There were two causes of action in Anderson & Karrenberg's complaint. Record at 3-4. The first alleged Warnick breached his contract to pay Anderson & Karrenberg for legal services and sought a judgment of $50,810.01 plus interest against Warnick. Record at 3. The second cause of action alleged Warnick was unjustly enriched by failing to pay Anderson & Karrenberg $50,810.01 plus interest for legal services. Record at 4.

In his answer and counterclaim, Warnick claimed he did not owe Anderson & Karrenberg fees and the claim he did was outrageous and made in bad faith since Anderson & Karrenberg had reneged on its promise to keep legal fees in the $20,000 range by now suing for over $50,000.00. Record at 12-15.

Thus, although styled in various legal theories, the sole underlying issue in the complaint and counterclaim was whether Warnick owed Anderson & Karrenberg $50,810.01 plus interest. Record at 12-17. The jury said no, deciding Anderson & Karrenberg breached its contract with Warnick, who owed Anderson & Karrenberg nothing. Record at 1399-1400. Warnick requested attorneys' fees under Section 78B-5-826, Utah Code Ann., Record at 1460, 62, 74 and 1515, but incredibly, the trial court ruled there was no prevailing party, so Warnick was not entitled to an awarded under Section 78B-5-826. Record at 1580. Warnick appealed. Record at 1582.

STATEMENT OF FACTS

1. On December 29, 2005, Anderson & Karrenberg entered into an "Engagement Agreement" with Warnick which in part provides:

> In the event that sums payable under this agreement become the subject of litigation, your signature constitutes your agreement to pay all collection costs, including attorneys' fees, incurred in the enforcement of this letter agreement.

Record at 1526-27.

2. Subsequently, disputes arose between the parties culminating in this litigation in which Anderson & Karrenberg sued Warnick for unpaid attorney's fees, while Warnick counterclaimed, claiming he did not owe Anderson & Karrenberg fees and its claims seeking fees were in bad faith. Record at 1, 11.

3. Initially, both Anderson & Karrenberg and Warnick appeared pro se. Record at 1, 11.

4. On August 23, 2009, this court dismissed Warnick's counterclaims citing lack of damages. The trial court reasoned that Warnick's counterclaim was no different than his 5th, 6th and 7th affirmative defenses. Record at 567-68.

5. If Warnick's affirmative defenses prevailed, he would have no damages since he would owe nothing. If Warnick lost he would by necessity not have prevailed on his counterclaim. Thus Warnick's counterclaim was superfluous and should be dismissed, there being no damages outside the principal case. Record at 12-14 and 554.

6. More than five months after his counterclaims were dismissed, Warnick retained Brian Steffensen of Steffensen Law Firm ("Steffensen") who filed his appearance on November 13, 2009. Record at 641

7. None of Steffensen's work for which attorneys' fees are sought pertain to the dismissed counterclaim.

8. The case went to trial before a jury which found a contract existed between the parties, Anderson & Karrenberg had breached it, Warnick had not, and thus Warnick owed nothing. Record at 1399-1400.

9. Warnick filed a motion for attorneys' fees under Section 78B-5-826. Record at 1460, 62, 74 and 1515.

10. The trial court's minute entry of November 24, 2010 said "the parties have inadequately briefed" the attorneys' fees issue and ordering Warnick to "submit a brief fully addressing" his theory including a "table" outlining "required provisions and the related application/outcome[.]" Record at 1511.

11. Warnick's counsel submitted a brief "fully addressing" his theory including a "table" outlining the required provisions and the related application and outcome showing he should prevail under existing Utah case law. Record at 1515 and 1564.

12. Nevertheless, the trial court ruled against Warnick stating there was no prevailing party. Record at 1580. Warnick appealed. Record at 1582.

SUMMARY OF ARGUMENT

The trial court misinterpreted and misapplied the applicable statute when it ruled there was no prevailing party because Warnick prevailed on the gravamen of the case; he prevailed on the single and only underlying issue, whether he owed Anderson & Karrenberg fees.

The trial court misinterpreted the applicable statute when it ruled neither party prevailed considering the (1) contractual language, (2) number of claims, counterclaims, cross-claims, etc., (3) the importance of the claims relative to each other and their significance in the context of the lawsuit considered as a whole, and (4) the dollar amounts attached to and awarded in connection with the various claims. Even using the trial court's approach, it should have ruled Warnick prevailed because:

(a) Warnick prevailed on the contractual language in that the jury determined Anderson & Karrenberg breached the contract, Warnick did not and Warnick owned Anderson & Karrenberg nothing.

(b) The underlying issue on the two causes of action in the complaint and in Warnick's bad faith claim and counterclaim were whether Warnick owed Anderson & Karrenberg fees for legal services. The jury determined he did not.

(c) The important, overarching claims in the lawsuit considered as a whole centered around whether Warnick owed Anderson & Karrenberg fees for legal services. The jury determined he did not.

(d) The dollar amounts attached to and awarded in connection with the various claims centered around whether Warnick owed Anderson & Karrenberg $50,810.01 plus interest for legal services. The jury determined he did not.

ARGUMENT

The trial court determined that neither party prevailed despite the jury's decision Anderson & Karrenberg breached the attorney - client agreement, Warnick did not, and Warnick owed Anderson & Karrenberg nothing. This is a misinterpretation and misapplication of Section 78B-5-826. Warnick prevailed because Anderson & Karrenberg was not successful on any of its causes of action and it obtained non of the relief it sought. Stated another way, Warnick prevailed because he was successful in defending against every single one of Anderson & Karrenberg's claims.

I. SECTION 78B-5-826 APPLIES TO THE CIRCUMSTANCES OF THIS CASE.

"[A]ttorney fees are awarded only when authorized by contract or by statute." *Bilanzich v. Lonetti*, 160 P.3d 1041, 1044 (Utah 2007) (citation omitted). In *Bilanzich*, the plaintiff "ha[d] no contractual right to attorney fees because the fees provision . . . was unilateral, providing for an award of attorney fees and costs only to the [defendant] in the event of a lawsuit." *Bilanzich* at 1344-45. The same is true in the instant case.

The attorneys' fee provision in the December 29, 2005 "Engagement Agreement" only provides for an award of attorney's fees to Anderson & Karrenberg from Warnick. Anderson & Karrenberg is not entitled to attorneys' fees because it did not prevail on its breach of contract claim and because "a law firm does not 'incur' fees when it uses its own attorneys in a collection action." *Jones, Waldo,*

Holbrook, etc. v. Dawson, 923 P.2d 1366, 1375 (Utah 1996). Hence, neither party could have been awarded attorneys' fees under terms of the "Engagement Letter" and Section 78B-5-826 applies.

II. WARNICK DOES NOT SEEK ATTORNEYS' FEES FOR HIS COUNTERCLAIM BECAUSE HE WAS ONLY REPRESENTED BY COUNSEL AFTER THE COUNTERCLAIM WAS DISMISSED.

Warnick does not seek attorney's fees incurred in connection with his counterclaims, which were dismissed before he retained counsel in this action. Thus he is not seeking attorney's fees on his claims which were dismissed. Warnick's claims, If more artfully pled, would have been an affirmative defense rather than a counterclaim since the gravamen of each was that he did not owe Anderson & Karrenberg fees because Anderson & Karrenberg breached its promises to him, which the jury determined was true. Viewed as an affirmative defense, Warnick prevailed on the gist of his counterclaim.

III. WARNICK MEETS THE REQUIREMENTS OF SECTION 78B-5-826.

The sole basis for an award of attorneys' fees is under Section 78B-5-826, which provides as follows:

> A court may award costs and attorney fees to either party that **prevails** in a **civil action** based upon . . . **written contract** . . . when the provisions of the . . . written contract . . . allow at least **one party** to recover attorney fees. (Emphasis added).

Warnick fits squarely under its provisions: This case is a civil action, on a written contract, which has a provision that allows only one party, Anderson & Karrenberg,

to recover attorneys' fees:

> In the even that sums payable under this agreement become the subject of litigation, your [Warnick's] signature constitutes your [Warnick's] agreement to pay all collection costs, including attorneys' fees, incurred in the enforcement of this letter agreement.

Record at 1526-27.

Section 78B-5-826 "requires only that a party to the litigation assert the writing's enforceability as basis for recovery" not that "the writing actually be enforceable." *Bilanzich* at 1045. This Warnick did in his post-trial *Jerry Warnick's Motion for Award of Attorney's Fees and Costs*.

IV. WARNICK MEETS THE EQUITABLE PURPOSE AND INTENT OF 78B-5-826.

The purpose and intent of Section 78B-5-826 is to "**level[ ] the playing field** by allowing both parties to recover fees where only one party may assert such a right under contract, **remedying the unequal allocation of litigation risks** built into many contracts[.]" *Bilanzich* at 1046 (emphasis added). Anderson & Karrenberg is a law firm in Salt Lake City with legal and financial resources far greater than Warnick. Application of Section 78B-5-826 would remedy the unequal allocation of litigation risks built into the attorney - client contract by Anderson & Karrenberg, thus leveling the playing field between the parties. The intent and purpose of Section 78B-5-826 is met.

V. WARNICK PREVAILED BECAUSE ANDERSON & KARRENBERG WAS NOT SUCCESSFUL ON ANY OF ITS CAUSES OF ACTION - IT OBTAINED NONE OF THE RELIEF IT SOUGHT, WHILE WARNICK SUCCEEDED IN CONVINCING THE JURY HE OWED ANDERSON & KARRENBERG NOTHING.

With its chart, the trial court simply and superficially added up Anderson &

Karrenberg's two causes of action and said Warnick prevailed on them, and then added up Warnick's bad faith claim and counterclaim and said Anderson & Karrenberg prevailed on them, resulting in a two to two tie. No party prevailed. Record at 1579.

The fallacy of this superficial misapplication of Section 78B-5-826 becomes clear when analyzed from this perspective: If Anderson & Karrenberg had been more creative and included two more causes of action styled quantum meruit and quasi-contract, as often happens is such cases, the trial court's superficial approach would have determined with its "chart" Warnick prevailed against Anderson & Karrenberg **four** causes of action. The trial court kept score by counting the captions in the pleadings. Record at 1579. Warnick's pro se, inartfully pleaded counterclaim mentions not just fraud, but also reneging on promises (breach of contract) and representations (misrepresentation), unjust enrichment and extortion. Record at 15-16. If the trial court had placed these **five** misguided legal theories in its "chart" Anderson & Karrenberg would have been the prevailing party even though it was awarded absolutely nothing it sought and Warnick obtained most of what he sought.

The gravamen of Warnick's bad faith claim and counterclaim each assert he owes Anderson & Karrenberg nothing. The gravamen of Anderson & Karrenberg's two causes of action were that Warnick owed it money. Warnick prevailed on all of those issues. The trial court misinterpreted and misapplied Section 78B-5-826 to

come to its conclusion no one prevailed.

"The trial court can award . . . attorney fees only for those issues on which [a party] was the prevailing party." *Prince v. Bear River Mutual*, 56 P.3d 524, 540 (Utah 2002) (rehearing denied). Indeed:

> a party seeking fees **must allocate its fee request according to its underlying claims**. Indeed, the party **must categorize** the time and fees expended for (1) **successful claims** for which there **may be an entitlement to attorney fees**, (2) **unsuccessful claims** for which there **would have been an entitlement to attorney fees** had the claims been successful, and (3) claims for which there is **no entitlement** to attorney fees. (Emphasis added; citations omitted).

Prince at 540. Thus, as required by *Prince* Warnick's fee request is allocated as follows:

Allocation of Attorneys' Fees Requested by Warnick		
Category	Claim	Fees Requested by Warnick?
Claims on which Warnick was successful and may be entitled to attorneys' fees:	Claims in A&K's Complaint	Yes
Claims on which Warnick was unsuccessful but may have been entitled to fees:	None	No
Claims on which Warnick would not have been entitled to attorneys' fees:	Warnick's Counterclaims (all tort claims - award of attorneys' fees impossible)	No

All attorneys' fees requested by Warnick are in connection with the claim on which he was successful, defending against A&K's claims in its complaint. He was *pro se* and had retained no attorney prior to dismissal of his counterclaims.

The key point, the very most critical common sense concept in connection with Warnick's request for attorneys' fees is that A&K obtained nothing it sought. A&K sought attorneys' fees. It was awarded none. Warnick claimed he owed A&K nothing. Warnick prevailed on what he wanted. He owed A&K nothing.

RELIEF SOUGHT

1. Reversal of the trial court's ruling that Warnick was not the prevailing party and thus not entitled to an award of attorney's fees under Section 78B-5-826, misinterpreting and misapplying that statute.

2. Remand with directions to award Warnick reasonable attorney's fees under Section 78B-5-826.

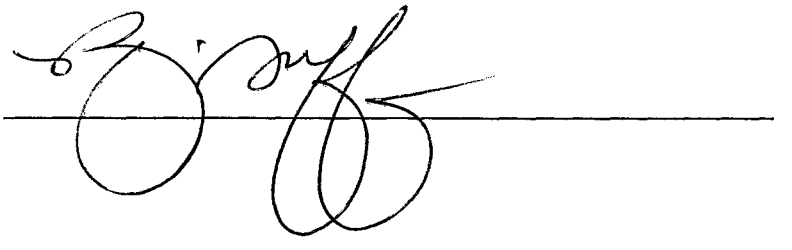
DATED this 14 day of December, 2011.

Brian W. Steffensen
STEFFENSEN ❖ LAW ❖ OFFICE
Attorneys for Jerry Warnick

MAILING CERTIFICATE

I certify that on this the 14 day of December, 2011, I mailed, postage prepaid, a true and correct copy of the foregoing **APPELLANT'S BRIEF**, to the following:

John A. Bluth
Samantha J. Slark
Anderson & Karrenberg
700 Chase Tower
50 West Broadway
Salt Lake City, Utah 84101-2035



ADDENDUM

Final order: Trial Court's May 23, 2011 RULING

IN THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY
STATE OF UTAH

ANDERSON & KARRENBERG, a Utah corporation, Plaintiff, vs. JERRY WARNICK, MARTIN TANNER, DAVID THAYNE, and HERITAGE COMMUNICATIONS, INC., a Utah corporation, Defendants.	**RULING** Case No. 080901745 Judge: L.A. DEVER

The above entitled matter is before the Court on Defendant Jerry Warnick's ("Defendant") Notice to Submit his Motion for Attorneys' Fees and Costs, filed March 22, 12011. Having reviewed Defendant's Motion and Plaintiff's Opposition thereto, and being duly advised in the premises of each, the Court makes the following Ruling.

Background

Plaintiffs' Complaint, filed January 29, 2008, asserts the following claims: (1) Breach of Contract and (2) Unjust Enrichment. Plaintiff's claims stem from the alleged breach of an agreement for legal services. See (Pl.'s Mem. In Supp. For Summ. J. On All Countercl. Ex. A,1).

The relevant portion of the Engagement Agreement provides:

By confirming this letter agreement where provided below, you

> agree to its terms and guarantee the payment of the amounts we incur for fees and costs in this matter. In the event that sums payable under this agreement become subject of litigation, your signature constitutes your agreement to pay all collection costs, including attorneys' fees, incurred in the enforcement of this letter agreement.

Id.

Defendant's counterclaim maintained in relevant part, that "Plaintiff fraudulently induced Defendant to allow Plaintiff enter an appearance on his behalf in the underlying suit by promising that it would not incur legal fees beyond the retainers paid in advance. . . [and] that total legal fees would be kept in the $20,000 range[.]" Id. at Ex. C, p. 5. Additionally, although not cited as an individual counterclaim, Defendant raises a claim of Plaintiff's bad faith. Id.

Discussion o f Case Law, etc.,

Attorneys' Fees

1 Generally

Attorney fees in Utah are awarded only as a matter of right under a contract or statute. Foote v. Clarke, 962 P.2d 52, 54 (Utah 1998)(citations omitted). Those fees provided for by contract are allowed "*only in strict accordance*" with the terms of the contract. Id. (citations omitted) (emphasis added). Moreover, an award of attorney fees must be based on the evidence and supported by findings of fact. Id. at 55 (quoting Cottonwood Mall v. Sine, 830 P.2d 266, 268 (Utah 1992)).

At issue in this case, as related to fees pursuant to the terms of a contract, Utah Code Annotated Section 78B-5-826 provides:

> A court *may* award costs and attorney fees to either party that prevails in a civil action *based upon* any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow *at least one* party to recover attorney fees.

(2011)(emphasis added).

2 Reasonableness Evaluation

Although Section 78B-5-826 "does not specifically require that the award of attorney fees and costs be reasonable, the district court may exercise its discretion to impose such a requirement." Bilanzich v. Lonetti, 2007 UT 26, ¶21, 160 P.3d 1041 (citing R.T. Nielson Co. v. Cook, 2002 UT 11, ¶20, 40 P.3d 1119). This exercise of discretion must be based on an evaluation of the evidence. Foote, 962 P.2d at 57 (citation omitted). That is, a court should consider the "relationship of the fee to the amount recovered, the novelty and difficulty of the issues involved, the overall result achieved and the necessity of initiating [the] lawsuit to vindicate [the plaintiff's] rights." Id. (quoting Trayner v. Cushing, 688 P.2d 856, 858 (Utah 1984)).

When determining what is a reasonable award of attorney fees, the district court must calculate the "lodestar," which is the reasonable number of hours spent on the litigation multiplied by a reasonable hourly rate. United Phosphorus, Ltd. v. Midland

Fumigant, Inc., 205 F.3d 1219, 1233 (10th Cir. Kan. 2000) (citation omitted). The district court "must" reduce the actual number of hours expended to a reasonable number to ensure services an attorney would not properly bill to his client are not billed to the adverse party. Id.

When determining the appropriate rate to apply to the reasonable hours, "the district court should base its hourly rate award on what the evidence shows the market commands for ... analogous litigation." Id. (citation omitted). The party requesting the fees bears "the burden of showing that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Id. (citation omitted).

3 Burden on Party Seeking Award

The party requesting attorney fees bears the burden of proving the amount of hours spent on the case and the appropriate hourly rates. United Phosphorous, 205 F.3d at 1233. In order to prove the number of hours reasonably spent on the litigation, the party must submit "meticulous, contemporaneous time records that reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks." Id. (citation omitted). The district court can reduce the number of hours when the time records provided to the court are inadequate. Id. at 1234.

In order to recover any attorney fees *at all*, the prevailing party must apportion or separate out the recoverable fees from the nonrecoverable ones. Eggett v. Wasatch Energy Corp., 94 P.3d 193, 203 (Utah 2004). The requesting party "must" categorize the time and fees expended for "(1) successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees." Foote, 962 P.2d at 55 (citation omitted).

4 Prevailing Party Theory

The Utah Supreme Court explained, "Which party is the prevailing party is an appropriate question for the trial court. This question depends, to a large measure, on the *context of each case*, and, therefore, it is appropriate to leave this determination to the sound discretion of the trial court." R.T. Nielson Co[1], 2002 UT at ¶25, (emphasis added); see also Mt. States Broad. Co. v. Neale, 783 P.2d 551, 555 (Utah Ct. App. 1989)("Typically, determining the 'prevailing party' for purposes of awarding fees and costs is quite simple. Plaintiff sues defendant for money damages; if plaintiff is awarded a judgment, plaintiff has prevailed, and if defendant successfully defends and avoids an

[1]The Court notes that Plaintiff, in its Opposition to Defendant's Motion, relies on Neff v. Neff, 2011 UT 6, 247 P.3d 380, for the proposition that the "prevailing party"theory is outdated. See (Pl.'s Opp. to Def.'s Mot. for Award Att'y's Fees and Costs, 3-4). However, Plaintiff's reliance is misplaced. The trial court in Neff relied on the "flexible and reasoned approach," because the opposition parties each obtained mixed results. Neff, 2011 UT at ¶59. The Neff court does not dismiss the use of the "prevailing party" theory.

adverse judgment, defendant has prevailed.")

Appropriate considerations in determining the "prevailing party" include, (1) contractual language, (2) the number of claims, counterclaims, cross-claims, etc., brought by the parties, (3) the importance of the claims relative to each other and their significance in the context of the lawsuit considered as a whole, and (4) the dollar amounts attached to and awarded in connection with the various claims." R.T. Nielson Co., 2002 UT at ¶25; compare Trayner v. Cushing, 688 P.2d 856, 858 (Utah 1984) (noting that both parties to a contractual claim may be entitled to attorney fees as the prevailing party where the contractual provision awarding attorney fees does not mention "prevailing party" and each party is successful on one or more claims) and Mt. States Broad. Co, 783 P.2d at 556, n.7(["[T]he determination of a 'prevailing party' becomes even more complicated in cases involving multiple claims and parties . . . and where the ultimate award of money damages does not adequately represent the actual success of the parties under the peculiar posture of the case. These cases demonstrate the need for a flexible and reasoned approach to deciding in particular cases who actually is the prevailing party."); " Szoboszlay v. Glessner,664 P.2d 1327, 1334 (Kan. 1983) (citation omitted) ("[C]ases involving counterclaims have held that a party is 'successful' if he obtains a judgment for an amount in excess of the setoff or counterclaim allowed.")

5 Flexible and Reasoned Approach - Alternate Theory to Prevailing Party

Under the flexible and reasoned approach, instead of relying solely on the "rigid" net judgment rule to determine the prevailing party, the court may consider the net judgment and may also take into account "the amounts actually sought and then balanc[e that] proportionally with what was recovered." Bonneville Distrib. Co. v. Green River Dev. Assocs., 2007 UT App 175, ¶45, 164 P.3d 433 (citation omitted). Initially, the flexible and reasoned approach applied in cases where contracts or statutes called for attorney fees to be awarded to the "prevailing party." Id. (citation omitted). However, the Utah Supreme Court explained that there is essentially no distinction between a "successful party" and a "prevailing party," and therefore, determined that the flexible and reasoned approach applied to statutes or contracts awarding attorney fees to the prevailing party or to the successful party. Id. (citation omitted). The flexible and reasoned approach is based, in part, on the principle that trial courts have broad discretion in awarding attorney fees, and accordingly, should use common sense when deciding whether to award them. Id. at ¶46 (citation omitted) (determining that both parties defaulted and, therefore, neither was entitled to attorney fees).

6 Net Judgment Theory - Alternate Theory to Prevailing Party

Generally, there can be only one final judgment in an action and although a cross-complaint has been filed and matters therein stated are put to issue, "it is not

such a pleading that requires, or permits the rendition of two separate judgments." Szoboszlay, 664 P.2d at 1334 (citation omitted). In such a case, it has uniformly been held that the party awarded the net judgment is the prevailing litigant and therefore, the successful party. Id. (citation omitted); see also Ocean W. Contractors v. Halec Constr. Co., 600 P.2d 1102, 1105 (Ariz. 1979) ("We hold that since the appellants' recovery of $ 791.75 exceeded that of appellees' compulsory counterclaim recovery of $ 500, the 'net judgment' being in appellants' favor for $ 291.75, the trial court erred by not awarding the 'successful' appellants their costs." (citation omitted)).

Analysis

Based upon the noted case law discussion of attorneys' fees, the following table ("Table") reflects the Court's orders, etc., and the related claims/counterclaims, judgment.

Ruling, Order, or other judgment	Claim, Counterclaim, or other Issue	Party Granted Judgment
Aug. 24, 2009, Order granting Plaintiff's Motion for Summary Judgment	Defendant's Counterclaim of Fraud	Plaintiff
Aug. 24, 2009, Order granting Plaintiff's Motion for Summary Judgment	Defendant's Claim of Bad Faith	Plaintiff
Aug. 4, 2010, Special Verdict Form, No. 6	Plaintiff's Claim of Breach of Contract	Defendant
Aug. 4, 2010, Special Verdict Form, Nos. 5-6	Plaintiff's Claim of Unjust Enrichment	Defendant

Conclusions

The Table establishes that neither party is a "prevailing party." In considering the following factors in the entitled matter: "(1) contractual language, (2) the number of claims, counterclaims, cross-claims, etc., brought by the parties, (3) the importance of the claims relative to each other and their significance in the context of the lawsuit considered as a whole, and (4) the dollar amounts attached to and awarded in connection with the various claims;" R.T. Nielson Co., 2002 UT at ¶25, the Court finds that neither party is entitled to an award of fees. Accordingly, Plaintiff's Motion is DENIED.

The following Ruling stands as the Order of the Court. No further order is required.

Dated this 21st day of May, 2011.

BY THE COURT:

L.A. DEVER
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing RULING dated this 23 day of May, 2011, postage prepaid, to the following:

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