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Utah Court of Appeals

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BEFORE THE UTAH COURT OF APPEALS

ANDERSON & KARRENBERG, Plaintiff/Appellee, v. **JERRY WARNICK, MARTIN TANNER, DAVID THAYNE AND HERITAGE COMMUNICATIONS, INC.,** Defendants/Appellant.	)	**Case No. 20110553-CA**

BRIEF OF APPELLEE

APPEAL FROM THE THIRD DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE L. A. DEVER
CIVIL NO. 080901745

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BEFORE THE UTAH COURT OF APPEALS

ANDERSON & KARRENBERG,

Plaintiff/Appellee,

v.

JERRY WARNICK, MARTIN TANNER, DAVID THAYNE AND HERITAGE COMMUNICATIONS, INC.,

Defendants/Appellant.

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I. STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code sections 78A-3-102(3)(j) and 78A-4-103(2)(j) as this is a direct appeal from a final judgment of the Third District Court, which was transferred to the Court of Appeals from the Supreme Court.

II. STATEMENT OF ISSUES

Did the district court apply the correct standard to consider Appellant Jeremy Warnick's ("Warnick")[1] fee request when it adopted a "flexible and reasoned" approach and considered the *Nielson* factors, and did the trial court act within its sound discretion when it concluded that based on the fact neither party prevailed on its substantive claims, and a consideration of the *Nielson* factors, "neither party is a prevailing party" and/or is "entitled to an award of fees."

III. STANDARD OF REVIEW

An abuse of discretion standard of review applies because Warnick is challenging the district court's conclusion that neither party prevailed. It is well established a district court's determination as to which, if any, party prevailed is reviewed under an abuse of discretion standard:

> 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. ***We therefore review the trial court's determination as to who was the prevailing party under an abuse of discretion standard.***

---

[1] Warnick, together with Martin Tanner, David Thayne and Heritage Communications, were the defendants in the action before the district court (hereinafter collectively referred to as "Defendants"). Only Warnick went to trial on the underlying case and only Warnick brings this appeal.

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R.T. Nielson Co. v. Cook, 2002 UT 11, ¶ 25, 40 P.3d 1119 (emphasis added); *see also Carlson Distrib. Co. v. Salt Lake Brewing Co., L.C.*, 2004 UT App. 227, ¶ 16, 95 P.3d 1171 ("[w]hether a party is a prevailing party in an action is a decision left to the sound discretion of the trial court and reviewed for an abuse of discretion."); *Larry J. Coet Chevrolet v. Labrum*, 2008 UT App. 69, ¶ 16, 180 P.3d 765 (same); *Neff v. Neff*, 2011 UT 6, ¶ 74, 247 P.3d 380 (finding trial court did not abuse its discretion in finding neither party prevailed where parties filed competing claims with limited success on claims filed). Here, the district court denied Warnick's request for fees because it concluded "neither party is a prevailing party." (R.1572–1581.) Accordingly, the abuse of discretion standard is the appropriate standard of review.

Despite Warnick's attempts to claim otherwise, the correctness standard of review only applies where the issue on appeal is a determination regarding the applicability of the statute or contract conferring the legal right to collect fees. *See e.g. Hooban v. Unicity Int'l, Inc.*, 2009 UT App. 287, ¶¶ 6-11, 220 P.3d 485 (reviewing for correctness determination that third party could not recover fees under Utah's reciprocal fee statute[2] because it was not a party to the contract containing the attorney fee provision); *Chase v. Scott*, 2001 UT App. 404, ¶¶ 8 & 11-17, 38 P.3d 1001 (reviewing for correctness determination that defendant who successfully argued against plaintiff's claim of rescission could recover fees under reciprocal fee statute where contract term allowed one

[2] Utah Code Ann. § 78B-5-826 provides a Court *may* award fees to either party that prevails where the terms of the parties' agreement allows only one party to recover such fees. This will be referred to hereinafter as the "reciprocal fee statute."

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party to recover fees to "enforce agreement"); *Bilanzich v. Lonetti*, 2007 UT 26, ¶¶ 10-23, 160 P.3d 1041 (reviewing for correctness the district court's determination that the reciprocal fee statute did not apply where the guaranty that contained the attorney fee provision was rescinded).

A determination that "neither party is a prevailing party" is not a determination regarding the applicability of the reciprocal fee statute or terms of the agreement. Indeed, in *R.T. Nielson*, the Utah Supreme Court specifically recognized this point. There the court reviewed for correctness the district court's finding that the modified agreement contained an attorney fee provision giving the prevailing party a right to recover its fees, but reviewed under the abuse of discretion standard the district court's finding the plaintiff was the prevailing party. *R.T. Nielson*, 2002 UT 11 at ¶¶ 16 & 25.

Despite Warnick's attempts to manipulate the language of the issue on appeal to persuade the Court the correctness standard of review applies—it is clear the question presented for review is the district court's conclusion that neither party prevailed. Neither should the Court be fooled by Warnick's mischaracterization of the case as simply a determination of whether "Warnick owed [A&K] fees:" (App. Br. 13.) Warnick did not just defend himself against A&K's claim to recover amounts due and owing to A&K; he brought affirmative claims against A&K seeking more than $1 million in damages. A&K wholly prevailed on those claims, which were summarily dismissed when the Court determined several essential elements were lacking. This was an essential fact in the district court's determination that neither party prevailed and that neither party is entitled to an award of fees.

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The abuse of discretion standard, unquestionably, is the applicable standard to review the district court's determination that neither party prevailed.

IV. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

Utah Code Ann. Section 78B-5-826: 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.

V. STATEMENT OF CASE

From approximately December 2005 until December 2006, Appellee Anderson & Karrenberg ("A&K") served as legal counsel to Warnick, Martin Tanner, David Thayne and Heritage Communications, representing them in connection with claims against an entity, Co-Connect, and in other matters. (R.0002, ¶ 8; R.0012, ¶ 1 & R.0039, ¶ 1.) At the outset of this representation, A&K and Warnick entered into an engagement agreement, governing the terms of the representation, and including an attorney fee provision allowing A&K to recover the fees it incurs in enforcing the agreement. (App. Br. 11; R.1515-1516, & Ex. A (R.1526-1527); R.1399, ¶ 1.) The representation naturally ended when the parties entered into a Settlement Agreement resolving their disputes with Co-Connect. (R.0328, ¶ 6.)

In early 2008, A&K filed a Complaint with the Third District Court seeking to recover attorney fees A&K believed were due and owing from Warnick, Tanner, Thayne

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and Heritage Communications, for the legal services it provided. (R.0001-0010.) Warnick responded to the Complaint by filing an Answer and bringing two affirmative claims; one for fraud and misrepresentation and one for bad faith. (R.0011-0018, ¶¶ 21-27.) Both claims alleged, primarily, that A&K induced Warnick to enter into the engagement agreement by representing the legal fees would not exceed $20,000, and sought more than $1 million in damages. (R.0011-0018, ¶¶ 21-27.) A&K summarily defeated both of these claims on their merits through a motion for summary judgment. The district court in granting A&K's motion found "there were several elements missing from the fraud claim, the presently existing fact, the reasonable reliance upon it, and really the question of injury and damages." (R.0567-0569; Hrg. Tr. 20-21 (A&K's Mot. Summ. J.)[3].) It also found the bad faith claim "ha[d] not been made out" because "[t]here [was] no showing that the plaintiffs filed this action in bad faith." (R.0567-0569; Hrg. Tr. 20-21 (A&K's Mot. Summ. J.).) Tanner filed an almost identical Answer and brought the same affirmative claims, which were also summarily dismissed on the same grounds. (R.0038-0044.)[4]

[3] The transcript of the hearing on A&K's Motion for Summary Judgment was received into the district court's record on June 9, 2010. (*See* Docket, attached to the addendum hereto as Ex. A.) The transcript, however, was simply enclosed loosely in the district court files, and not given a record designation by the Clerk of the Court. Accordingly, citation is made directly to that transcript.

[4] David Thayne and Heritage Communications did not participate in the litigation. David Thayne was served by alternative service and a default judgment was entered for the full amount A&K claimed. (R.0084-0086; R.0114-0115; R.0180-0182.) Heritage Communications was served but failed to respond and a default judgment was also entered against it for the full amount claimed. (R.0121-0123; R.0177-0179.)

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A&K later resolved its claims against Tanner, and the case proceeded to trial on A&K's claims against Warnick. At trial the jury found there ***was*** an agreement between A&K and Warnick to pay attorney fees, and ***rejected*** Warnick's claim there was a term imposing a $20,000 cap on the attorney fees to be paid under that agreement. (R.1399-1400, ¶¶ 1 & 2.) The jury, however, found Warnick did not breach his obligation to pay A&K, resulting in no judgment for A&K. (R.1400, ¶ 6.)

After conclusion of the trial, Warnick sought an award of fees pursuant to the attorney fee provision contained in the parties' engagement agreement and Utah's reciprocal fee statute. After receiving extensive briefing on the issue, the district court issued a ruling that ultimately concluded neither party prevailed. (R.1572-1581.) In reaching this determination, the district court considered the fact that neither party prevailed on their substantive claims, and determined based on that and a consideration of the *Nielson* factors that neither party prevailed and neither party was entitled to an award of fees. (R.1579-1580.) In an attempt to obtain a different result, Warnick appeals to this Court, incorrectly claiming the district court somehow misapplied the law in reaching its conclusion.

VI. SUMMARY OF ARGUMENT

This Court should not disturb the district court's conclusion that "neither party is a 'prevailing party'" and that "neither party is entitled to an award of fees." (R.1579.) Under the reciprocal fee statute, a court may award fees if it determines one party prevailed, but the terms of the parties' agreement only allows the other party to collect fees. It is well recognized that whether a party did in fact prevail depends, to a large

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measure, on the context of each case, and therefore, it is appropriate to leave this determination to the sound discretion of the trial court. Here, the district court reached the conclusion that neither party prevailed after properly adopting a "flexible and reasoned" approach and considering the *Nielson* factors, which this Court and the Utah Supreme Court has repeatedly recognized is the standard for determining if a party did indeed prevail.

Moreover, an examination of the four factors enunciated in *R.T. Nielson*, and recognized as appropriate considerations in making the prevailing party determination, demonstrate the district court did not abuse its discretion in reaching the conclusion neither party prevailed. The first factor, the language of the attorney fee provision in the parties' agreement, supports the district court's approach of considering all the parties' claims in making its determination. The second, third and fourth factors that consider the number of claims and counterclaims brought by the parties, the importance of those claims in the context of the lawsuit as a whole, and the dollar amounts attached to and awarded in connection with the parties' claims all clearly support the district court's conclusion no one prevailed. The parties each lost their substantive claims (or stated another way, prevailed in defeating the claims against them), which were of ***at least*** equal significance in the context of the case as a whole: A&K only sought $70,000 in damages, but defeated claims seeking more than $1 million in damages. Moreover, A&K's success in defeating Warnick's claims was necessary for it to pursue its claims.

In contrast, the arguments raised by Warnick do not show the district court abused its discretion or otherwise erred in reaching its conclusion. Warnick's argument that the

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reciprocal fee statute applies in this circumstance, and the argument that he is only claiming attorney fees for the claim on which he prevailed (and for which he was represented), are not relevant to this Court's review of the conclusion that neither party prevailed. These points only become relevant ***if*** a district court concludes one party did in fact prevail: If there is a prevailing party the applicability of the reciprocal fee statute becomes relevant as it may confer a right to recover on the prevailing party if the language of the agreement does not, and the details of the claims for which fees are sought becomes relevant as it dictates the amount of fees to award as a prevailing party can only recover fees for claims on which it prevailed. These arguments, however, are wholly irrelevant to the district court's analysis of whether one party did indeed prevail.

The Court can also disregard any argument that Warnick in fact prevailed because he prevailed on the "gravamen" of his claims, and those claims should have been pled as affirmative defenses. Warnick did not prevail on the "gravamen" of his claims. Those claims and his primary defense to the breach of contract claim were based on a claim that the attorney fee agreement contained a term capping A&K's fees at $20,000. As demonstrated by the jury verdict form, Warnick wholly failed to establish that fact and that claim. Likewise, Warnick's claims sought more than $1 million in damages and were not and should not be treated as affirmative defenses.

Finally, even if this Court were to find the district court did abuse its discretion or otherwise erred in concluding neither party prevailed, such error is harmless. As a law firm representing itself, A&K is not entitled to collect its fees and Warnick was never at

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risk of having to pay A&K's attorney fees. Accordingly, the reciprocal fee statute should not even apply in this circumstance.

VII. ARGUMENT

A. THE DISTRICT COURT'S DETERMINATION THAT NEITHER PARTY PREVAILED SHOULD NOT BE DISTURBED BECAUSE THE DISTRICT COURT APPLIED A "FLEXIBLE AND REASONED" APPROACH AND ACTED WITHIN ITS DISCRETION.

1. The District Court Applied a "Flexible and Reasoned" Approach as Required to Determine Neither Party Prevailed.

The district court, adopting a "flexible and reasoned" approach, concluded neither party prevailed. This finding should not be disturbed. The reciprocal fee statute permits a court to award fees to either party that *prevails* in a civil action if, as here, the terms of the parties' agreement allows only one party to recover fees. Utah Code Ann. § 78B-5-826 (emphasis added).

Whether a party is the prevailing party depends in large measure on the context of each case. *Carlson*, 2004 UT App. 227 at ¶ 37. Accordingly, district courts are instructed to adopt a "flexible and reasoned" approach to determining which party prevailed. *Larry J. Coet Chevrolet v. Labrum*, 2008 UT App. 69, ¶ 23, 180 P.3d 765; *Olsen v. Lund*, 2010 UT App. 353, ¶7, 246 P.3d 521 (stating "[o]ur courts have developed a 'flexible and reasoned approach' for determining which party has emerged the 'comparative winner'") "Under this approach, [a] trial court may appropriately consider, among other things (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

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whole, and (4) the dollar amounts attached to and awarded in connection with the various claims." *Larry J. Coet*, 2008 UT App. 69 at ¶ 23; *Carlson*, 2004 UT App. 227 at ¶ 37 *citing R.T. Nielson*, 2002 UT 11 at ¶ 25 (and referring to these factors as the "*Nielson* factors"). Analysis of these factors allows "a case-by-case evaluation by the trial court, and ***flexibility to handle circumstances where both, or neither, parties may be considered to have prevailed***." *R.T. Nielson*, 2002 UT 11 at ¶ 25 (emphasis added); *Neff*, 2011 UT 6 at ¶ 70.

Warnick oversimplifies the district court's analysis when he describes it as simply counting the captions in the pleadings. (App. Br. 18.) It is clear from the district court's ruling, which includes a lengthy discussion of the applicable legal standards, that the court carefully considered the appropriate standard and then adopted a "flexible and reasoned" approach and considered these factors in making its determination. (R.1579-1580.) It is also clear from the district court's use of a table to detail the claims on which each party prevailed, that it found significant the fact that neither party prevailed on its substantive claims and that it considered the claims of at least equal significance. *See e.g. A.K. & R. Whipple Plumbing & Heating v. Guy*, 2004 UT 47, ¶ 30, 94 P.3d 270.

Indeed, in *A.K. & R. Whipple*, the Utah Supreme Court found "although lacking in detail [the] district court's explanation of its rationale was adequate" where it simply stated it was of the opinion there was essentially a "draw" because plaintiff was seeking $13,000 and defendant was seeking $25,000, and the net recovery was only $527. The court went on to find that it was "apparent from the trial court's reasoning that it believed the defendant's net recovery of only two percent (2%) of its claimed damages was

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insufficient to make it the successful party." *A.K & R. Whipple*, 2004 UT 47 at ¶ 28. Likewise, it is apparent here that the district court found significant both parties failure on their substantive claims, and considered the claims of at least equal significance.

Because the district court correctly applied a "flexible and reasoned" approach to find neither party prevailed, and because it is appropriate to leave this determination to the sound discretion of the trial court, the district court's finding should not be disturbed.

2. A Consideration of the *Nielson* Factors Demonstrates the District Court Acted Within Its Discretion When It Concluded Neither Party Prevailed.

a. The Parties' Prevailed or Lost on an Equal Number of Claims of *At Least* Equal Significance.

The parties prevailed or lost on an equal number of claims of at least equal significance, showing the district court did not exceed its discretion when it concluded neither party prevailed. Under the second and third *Nielson* factors a district court may consider the number of claims and counterclaims brought by the parties, and the importance of those claims relative to each other and their significance in the context of the litigation as a whole. *R.T. Nielson Co.*, 2002 UT 11 at ¶ 25.

Again, in *A.K. & R. Whipple* where the plaintiff and defendant each were partially successful in prosecuting their claims and partially successful in defending against the claims against them, the district court declared a "draw," determining neither party prevailed despite the fact a net judgment was issued in favor of one of the defendants. 2004 UT 47 at ¶ 27. The Utah Supreme Court found this Court correctly affirmed the district court's finding of a "draw." *Id.* at ¶ 30.

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This case presents an even more classic example of a circumstance where neither party prevailed because both parties failed to recover anything on their affirmative claims (or, put another way, both parties wholly prevailed on the claims against them). Moreover, it was appropriate for the district court to treat at least equally A&K's success in defeating the claims against it. A&K only sought $70,000 in damages, but defeated claims seeking more than $1 million in damages. Further, to even be able to proceed with its breach of contract claim, it was essential for A&K to defeat Warnick's claims. In light of these facts, it is clear the court acted within its discretion when it concluded neither party prevailed.

b. The Dollar Amounts Attached to the Parties' Claims Also Show the District Court Did Not Abuse Its Discretion When It Concluded Neither Party Prevailed.

The fourth *Nielson* factor permits consideration of the dollar amounts attached to and awarded in connection with the parties' claims, which also supports the district court's conclusion. Recent Utah decisions are instructive this point. For example, in *Olsen v. Lund,* this Court noted the determination of who received the net judgment is only the starting point when determining the prevailing party, and that the amounts sought by either party, and a balancing of those amounts proportionate to the amount actually recovered, should also be considered. *Olsen*, 2010 UT App. 353 at ¶ 7. In that case, where the plaintiffs brought a claim for approximately $20,000 and recovered only $750, the defendants were considered the "comparative winners" and thus the prevailing party for purposes of the attorney fee provision. *Id.* at ¶¶ 13-15.

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Similarly, in *A.K. & R. Whipple* the Utah Supreme Court affirmed the district court's finding of a "draw" despite the fact the defendant received a net recovery of $527, because the plaintiff had recovered some, but not all, of the damages it sought, and the defendant recovered some, but not all, of the damages it sought on its counterclaim. *A.K & R. Whipple*, 2004 UT 47 at ¶ 30. *See also Neff*, 2011 UT 6 at ¶¶ 70-74 (where the Utah Supreme Court, affirming the district court, found neither party prevailed because both parties successfully defeated claims and avoided liabilities in excess of $1 million and each party made similar minimal recoveries in comparison to the damages claimed.)

Here neither party made ***any*** recovery on ***any*** of their claims, which alone shows the district court did not exceed its discretion when it determined neither party prevailed. Notably, however, a comparison of the dollar amounts shows A&K avoided a much larger monetary liability than Warnick, making it, arguably, the "comparative winner:" By the time of trial A&K's claim was for approximately $70,000, in comparison to Warnick's claims which sought in excess of $1 million in damages.

c. The Language of the Attorney Fee Provision Does Not Limit the District Court from Considering All the Parties' Claims in Making Its Prevailing Party Determination.

The first *Nielson* factor, the language of the attorney fee provision in the parties' agreement, is largely irrelevant because the provision simply identifies the fees which can be recovered. It does not direct a court how to reach the determination of which, if any, party prevailed. The district court, therefore, was free to consider all the parties' claims

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and the facts it deemed most relevant in making its determination that neither party prevailed and/or was entitled to fees.[5]

B. THE ARGUMENTS RAISED BY WARNICK DO NOT SHOW THE DISTRICT COURT EXCEEDED ITS DISCRETION OR OTHERWISE ERRED WHEN IT DETERMINED NEITHER PARTY PREVAILED.

1. The Applicability of the Reciprocal Fee Statute and the Specific Fees Sought Are Not Relevant to the District Court's Determination Neither Party Prevailed.

The Court can ignore Warnick's arguments that the reciprocal fee statute applies in this circumstance, or that Warnick's request for fees are limited to the claims on which he prevailed, as they can demonstrate no error on the part of the district court. A district court determines which, if any, party prevailed by adopting a "flexible and reasoned" approach and considering the *Nielson* factors, *supra* § A, ***not*** by considering whether the reciprocal fee statute applies. Here, the district court denied Warnick's request for fees

[5] Notably, a balancing of A&K's success on the fraud and misrepresentation claim against Warnick's success in defeating the breach of contract claim was especially appropriate because the terms of the parties' agreement allows recovery of fees for both those claims. The agreement allows recovery for fees "incurred in the enforcement of [the] agreement." A&K's defense of the fraud and misrepresentation claim, which sought to invalidate the agreement, was clearly pursuant to A&K's enforcement of the Agreement; *see e.g. Chase*, 2001 UT App. 404 at ¶¶ 11-17 (finding defending against a claim for rescission was "litigation . . to enforce the agreement" and clearly within the attorney fee provision that allowed for recovery of fees "in the event of litigation to enforce the Contract."). *See also Larry J. Coet*, 2008 UT App. 69 at ¶ 2 n.2 (granting defendant attorney fees for defeating plaintiff's breach of contract claim and prevailing on its own fraud and misrepresentation claim where the parties' agreement provided for recovery "in the event any action is taken or brought by either party concerning [the] Agreement."). Accordingly, A&K is just as entitled to collect fees for successfully defeating the fraud and misrepresentation claim—had it not represented itself *pro se* (*see Infra* § C)—as Warnick is for defending the breach of contract claim. However, because the district court determined neither party prevailed, neither party can collect fees.

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because it found "neither party is a prevailing party"—not because it found the fee statute did not apply. Accordingly, the Court can disregard much of Warnick's appellate brief, which simply discusses the applicability of the reciprocal fee statute, as it is not relevant to the issue before this Court.[6]

Likewise, Warnick puts the cart before the horse when he argues that he is entitled to the attorney fees requested because they are limited to the defense of A&K's claims and not prosecution of his counterclaims. That fact only becomes relevant ***if*** the court makes a determination that a party did indeed prevail and is entitled to collect fees. *Eggett v. Wasatch Energy Corp.*, 94 P.3d 193, 203 (Utah 2004) (requiring separation of recoverable and non-recoverable fees because the ***prevailing*** party is only entitled to recover fees permitted under the terms of the contract or statute). The district court did not make this determination and Warnick is not entitled to collect ***any*** fees. Accordingly, Warnick's arguments that he is only claiming fees for the period he was represented and the claims on which he prevailed (and the accompanying table demonstrating these points) are wholly irrelevant to this Court's review of the determination that neither party prevailed, and can and should be ignored.

---

[6] Notably, Warnick's repeated reference to entitlement to recover attorney fees under the reciprocal fee statute is equally misguided. (App. Br. 15-20.) The reciprocal fee statute merely ***permits*** a court to award fees to either party that prevailed where a written agreement confers that right on only one party. Utah Code Ann. § 78B-5-826. *See also Bilanzich v. Lonetti*, 2007 UT 26, ¶ 14, 160 P.2d 1041. It does not, as the tenor of Warnick's argument suggests, ***create*** any independent right to collect attorney fees if there is no attorney fee provision in the parties' agreement.

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2. The Court Can Disregard Any Argument that Warnick in Fact Prevailed.

The Court can disregard Warnick's argument that he in fact prevailed because A&K was not successful on any of its claims, and he was successful in convincing the jury he owed A&K nothing. (*See e.g.* App. Br. 10 & 13.) It would be error and an abuse of discretion if the district court did as Warnick suggests, and simply consider the claims on which Warnick prevailed, ignoring the fact A&K prevailed on both of Warnick's claims. (*See supra* § A (discussing at length the fact that Utah appellate courts have directed district courts to consider the relative successes of the parties' claims when determining which, if any, party prevailed).)

The Court can also disregard Warnick's claims that, although he did not prevail on his claims, he prevailed on the "gravamen" of his claims, and that those claims should have been pled as affirmative defenses and should be treated as such. (*See e.g.* App. 16 & 18.) First, Warnick did not prevail on the "gravamen" of his claims. Throughout the litigation Warnick asserted there had been a representation that A&K's attorney fees would not exceed $20,000. (*See e.g.* R. 0011-0018, ¶¶ 21-27; R.0262-0272; R.0321 & R.0327, ¶ 4 & response; R286-296; R. 1399-1400.) This was the basis for both the fraud and misrepresentation claim and the bad faith claim, and the primary defense to A&K's breach of contract claim. (R.0011-0018, ¶¶ 21-27; R.1399-1400.) As clearly shown by the jury verdict form, Warnick was wholly unsuccessful in establishing this fact and ultimately that claim. (R.1399, ¶ 2.)

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Second, Warnick sought more than $1 million in damages on his claims and they should not be treated as affirmative defenses. (R.0015-0018.) Warnick's attempt to hide behind a claim of inartful pleading is inaccurate. (App. Br. 11 (where Warnick argues that "[i]f more artfully pled, [his claims] would have been affirmative defenses"). By making such argument, Warnick ignores the reality that there is no affirmative defense of "bad faith,"[7] and that the affirmative defense of fraud and misrepresentation requires a different showing of damages than a similar claim for fraud and misrepresentation.[8] The Court should not ignore reality and allow Warnick to recast his claims as affirmative defenses just because it is now convenient for his attorney fee request.

In an attempt to bolster the argument that his claims were in fact affirmative defenses, Warnick misrepresents in his Statement of Facts "that the trial court reasoned that Warnick's counterclaim was no different than his 5th, 6th and 7th affirmative defenses." (App. Br. 11.)[9] The district court made no such finding—it entered judgment on those claims because Warnick failed to establish ***several*** essential elements of ***both*** his

[7] *See e.g. Still Standing Stable, LLC v. Allen*, 122 P.3d 556, 559-60 (Utah 2005) (discussing the elements necessary to establish "bad faith" and of collect attorney fees under Utah Code Ann. § 78B-5-825 for bringing a claim in "bad faith").

[8] In *J. D. Daniels v. Coleman*, 169 S.E. 2d 593, 596-98 (S.C. 1969) the South Carolina Supreme Court, applying similar elements for fraud as Utah, found plaintiffs had not established a claim for fraud because the evidence presented was only sufficient to establish the damage element for an affirmative defense of fraud, not the actual pecuniary damages element necessary for a claim for fraud.

[9] Notably, the portions of the record cited by Warnick to support this assertion do not show the district court made this finding.

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fraud and misrepresentation claim and his bad faith claim.[10] (R.0567-0569; Hrg. Tr. 20-21 (A&K's Mot. Summ. J.).)

Finally, Martin Tanner, a codefendant in this action, is trained as a lawyer in Utah and is familiar with and participates in preparing legal documents. (R.0268-0270; R.0294-0296.) Throughout the litigation, Warnick and Tanner filed almost identical pleadings, including identical counterclaims. (*See e.g.* R.0011-0018-R.0044.) Warnick's suggestion that he should not be held to the same standard as other parties merely because he was acting *pro se* is not only wrong,[11] but is especially inappropriate here, where Warnick and Tanner were clearly cooperating on legal strategy.

The district court was uniquely in a position to observe these facts and other details of this litigation. Accordingly, in the absence of any showing of an abuse of

---

[10] In granting A&K's Motion for Summary Judgment on both Warnick's claims, the district court expressly stated:

> Having reviewed this matter, I believe that the position taken by the plaintiff is the correct position. ***There [are] several elements missing [from] the fraud claim, the presently existing fact, the reasonable reliance upon it, and really the question of injury and damages. So I believe there has not been a claim made out for fraud here by the defendants.***
>
> The bad faith claim ***I believe also has not been made out.*** There is no showing that the plaintiffs filed this action in bad faith, so I'm going to grant the motion for summary judgment as to those two counterclaims.

(Hrg. Tr. 20-21 (A&K's Mot. Summ. J.))

[11] In *Golden Meadows Properties, LC v. Strand*, 2010 UT App. 257, ¶ 3, 241 P.3d 375, this Court rejected the *pro se* litigant's argument that he should have been granted more leniency or given the opportunity to correct his errors finding "[a] party who represents himself will be held to the same standard of knowledge and practice as any qualified member of the bar."

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discretion (or any other error), which Warnick has not and cannot show, the finding that neither party prevailed should not be disturbed.

C. EVEN IF THE DISTRICT COURT HAD ABUSED ITS DISCRETION IN DETERMINING NEITHER PARTY PREVAILED, THE ERROR WOULD HAVE BEEN HARMLESS.

Even assuming *arguendo* that the district court erred in determining neither party prevailed, which it did not, the error was harmless because this is not a case where the reciprocal fee statute even applies. It is well recognized the purpose of the statute is to "'creat[e] a level playing field' [by] allowing both parties to recover fees where only one party may assert such a right under contract . . . ." and that a district court has ***discretion***[12] to apply the statute, where appropriate, to further that purpose. *Bilanzich v. Lonetti*, 2007 UT 26, ¶ 18, 160 P.3d 1041 (discussing section 78-27-56.5, renumbered as section 78B-5-826). This Court, however, has warned district courts <u>**not** to apply the statute</u> and award fees to a prevailing party <u>where there is no unequal risk of exposure to fees</u>. *See Hooban*, 2009 UT App. 287 at ¶ 11 n.3 (citing *Guisti v. Sterling Wentworth Corp.*, 2009 UT 2, ¶¶ 76-7, 201 P.3d 966 ("emphasizing that attorney fees may be awarded under section 78B-5-826 when there is 'an unequal risk of contractual liability for attorney fees' but warning that ***the statute should not be used to simply award attorney fees to a prevailing party when no such unequal risk exists***" (emphasis added).)

---

[12] A grant of fees under the reciprocal fee statute is discretionary. Utah Code Ann. § 78B-5-826 (stating "[a] court ***may*** award costs and attorney fees to either party that prevails in a civil action . . . ." (emphasis added)); *see also Bilanzich v. Lonetti*, 2007 UT 26, ¶ 17, 160 P.2d 1041 ("the language of the statute is not mandatory but allows courts to exercise discretion in awarding attorney fees and costs").

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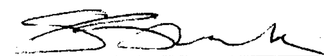
This is exactly the type of case where the statute should not apply. Warnick was never at risk of having to pay A&K's fees because A&K, as a law firm representing itself in a collection action, could never recover its fees regardless of the result of the litigation. *See Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1375 (Utah 1996) (finding a law firm does not "incur" fees when it uses its own attorneys in a collection action and, therefore, was not entitled to recover attorney fees in its *pro se* collection action). Accordingly, even if the district court had abused its discretion (or otherwise erred) in finding neither party prevailed, the error would have been harmless because the statute does not apply and Warnick is not entitled to an award of fees.

VIII. CONCLUSION

The district court is in the best position to appreciate the particular facts and circumstances of this case and to determine, based on those facts, if one party did indeed prevail. After adopting a "flexible and reasoned" approach, and considering the *Nielson* factors, as directed by this Court, the district court concluded neither A&K, nor Warnick, prevailed. Warnick cannot show the district court abused its discretion (or otherwise erred) in reaching that conclusion, and the district court's determination should not be disturbed. Accordingly, A&K respectfully requests this Court affirm the district court's finding that neither party a prevailed.

DATED: January 17 2012

ANDERSON & KARRENBERG



Samantha J. Slark
Attorneys for Appellee

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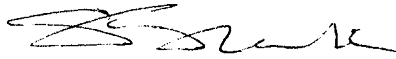
CERTIFICATE OF MAILING

I certify that two true and correct copies of the Brief of Appellee were mailed on January 17, 2012, by first-class mail, postage prepaid, to the following:

Brian W. Steffensen
Larry G. Reed
STEFFENSEN LAW OFFICE
448 East 400 South, Suite 100
Salt Lake City, Utah 84111



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ADDENDUM OF EXHIBITS

A. Court Docket

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Tab A

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3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH
APPEALED: CASE #20110553
ANDERSON & KARRENBERG vs. JERRY WARNICK

CASE NUMBER 080901745 Contracts

CURRENT ASSIGNED JUDGE
L A DEVER

PARTIES

Plaintiff - ANDERSON & KARRENBERG
Represented by: SAMANTHA J SLARK

Defendant - JERRY WARNICK
Represented by: LARRY G REED
Represented by: BRIAN W STEFFENSEN

Defendant - MARTIN TANNER
Represented by: TAD D DRAPER

Defendant - DAVID THAYNE

Defendant - HERITAGE COMMUNICATIONS INC

ACCOUNT SUMMARY

TOTAL REVENUE Amount Due: 874.75
Amount Paid: 874.75
Credit: 0.00
Balance: 0.00

BAIL/CASH BONDS Posted: 300.00
Forfeited: 0.00
Refunded: 0.00
Balance: 300.00

REVENUE DETAIL - TYPE: COMPLAINT 10K-MORE
Amount Due: 155.00
Amount Paid: 155.00
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: COUNTER 2K-10K
Amount Due: 75.00
Amount Paid: 75.00
Amount Credit: 0.00

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Floor - S35 with Judge DEVER.
06-09-10 Filed: Notice of Hearing sent to Brian Steffensen returned: Clerk re-sent to forwarding address
06-09-10 Filed: TRANSCRIPT for Hearing of 07-29-2009
06-11-10 Fee Account created Total Due: 0.75
06-11-10 COPY FEE Payment Received: 0.75
Note: 1.00 cash tendered. 0.25 change given.
06-14-10 Filed: Motion In Limine to Exclude Evidence or Testimony Regarding Certain Alleged Representations of Nathan Wilcox or the Firm and Any Assertions of Fraud or Misrepresentation on the Part of Nathan Wilcox or the Firm
Filed by: ESHELMAN, JENNIFER R
06-14-10 Filed: Memorandum in Support of Motion In Limine to Exclude Evidence or Testimony Regarding Certain Alleged Representations of Nathan Wilcox or the Firm and Any Assertions of Fraud or Misrepresentation on the Part of Nathan Wilcox or the Firm
06-16-10 Filed: Transcript, Hearing, July 29, 2009; Natalie Lake, CCT
06-28-10 Filed: Motion In Limine to Exclude Evidence and Testimony that Warnick and Tanner Were Ever Owners of Defendant Heritage Communications, Inc.
Filed by: DRAPER, TAD D
06-28-10 Filed: Memorandum in Support of Motion In Limine to Exclude Evidence and Testimony that Warnich and Tanner Were Ever Owners of Defendant Heritage Communications, Inc.
06-28-10 Filed: Motion In Limine to Exclude Evidence and Testimony that there is a Written Agreement or Signed Agreement Between the Firm and Tanner
Filed by: DRAPER, TAD D
06-28-10 Filed: Memorandum in Support of Motion In Limine to Exclude Evidence and Testimony that there is a Written Agreement or Signed Agreement Between the Firm and Tanner
06-28-10 Filed: Memorandum in Opposition to Anderson & Karrenberg's: Motion In Limine to Exclude Evidence or Testimony Regarding Certain Alleged Representations of Nathan Wilcox or the Firm and any Assertions of Fraud or Misrepresentation on the Part. .
.
06-28-10 Fee Account created Total Due: 0.75
06-28-10 COPY FEE Payment Received: 0.75
Note: 1.00 cash tendered. 0.25 change given.
06-29-10 Filed: Renewed Notice of Change of Address
06-29-10 Filed: Warnick's joinder in Tanner's Opposition to Plaintiff's Motion in Limine
07-02-10 Filed: Trial Witnesses and Exhibits
07-02-10 Filed: Plaintiff's Proposed Voir Dire
07-02-10 Filed: Plaintiff's Proposed Special Verdict Form
07-02-10 Filed: Plaintiff's Proposed Jury Instructions (With Citations)
07-02-10 Filed: Plaintiff's Proposed Jury Instructions (without citations)
07-05-10 Filed: Jerry Warnick's Proposed Jury Instructions with

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