

2011

# Anderson and Karrenberg v. Jerry Warnick, Martin Tanner, David Thayne and Heritage Communications, Inc. : Reply Brief

Utah Court of Appeals

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# THE UTAH COURT OF APPEALS

450 South State Street, Salt Lake City, Utah 84111

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ANDERSON & KARRENBERG, )

Plaintiff/Appellee, )

vs. )

JERRY WARNICK, Martin Tanner, )  
David Thayne and Heritage )  
Communications, Inc., )

Defendants/Appellant. )

**APPELLANT'S REPLY BRIEF**

Case No. 2011-0553-CA

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

---

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FILED  
UTAH APPELLATE COURTS

FEB 21 2012

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**LIST OF ALL PARTIES**

Plaintiff/Appellee: Anderson & Karrenberg

Defendant/Appellant: Jerry Warnick

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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 district court's decision that Warnick was not the prevailing party, Record at 1572, was not based on exercise of discretion. Instead it was an incorrect interpretation and misapplication of the law, specifically Section 78B-5-826. Record at 1579-80. Trial courts do not have discretion to misapply the applicable law. *State v. Barrett*, 127 P.3d 682, 687 (Utah 2005). "[I]nterpretation of a statute is a question of law . . . review[ed] for correctness[.]" *Jaques v. Midway Auto Plaza, Inc.*, 240 P.3d 769, 774 (Utah 2010). Thus the district court's decision is not entitled to any deference. *Id.*



The issue for review is thus whether the trial court misinterpreted and misapplied Section 78B-5-826 when it used a simplistic A&K "2" Warnick "2" is a tie, so no party won or prevailed approach. Looking at the sole underlying issue in all claims and counterclaims, namely whether Warnick owed A&K attorney's fees, leads to the inescapable conclusion that Warnick prevailed. Why? The jury determined Warnick owed A&K nothing. All Warnick's claims were vindicated by the jury. A&K lost and none of its claims were vindicated by the jury. Hence Warnick prevailed.

## APPLICABLE STATUTE

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

The sole underlying dispute in this case was whether Jerry Warnick owed A&K attorney's fees. After a trial, the jury determined Warnick owed nothing. Record at 1399-1400. Warnick prevailed on the sole, underlying issue.

Yet when Warnick sought an award of attorney's fees, the district court misapplied Section 78B-5-826, by determining Warnick had not won, it was a two to two tie. By failing to see that Warnick prevailed on the sole underlying issue and instead applying a simplistic two to two tie approach, the district court misapplied Section 78B-5-826 by refusing to award Warnick fees. Its approach was neither flexible nor reasoned, as A&K claims. Record at 1580.

## SUMMARY OF ARGUMENT

The District Court Does Not Have Discretion to Misapply the Appropriate Standard as A&K argues. Its simplistic A&K “two” Warnick “two” therefore neither party prevailed is a misapplication of the “Flexible and Reasoned” approach to the jury’s decision. This approach is neither flexible nor reasoned. A Proper “Flexible and Reasoned” approach shows Warnick prevailed and is entitled to attorney’s fees because he won on the sole underlying issue. The jury determined he owed A&K nothing.

## ARGUMENT

### **I. THE DISTRICT COURT DOES NOT HAVE DISCRETION TO MISAPPLY THE APPROPRIATE STANDARD.**

A district court’s interpretation of the law is reviewed for correctness. *Daniels v. Gamma West Brachytherapy, LLC*, 221 P.3d 256, 2009 UT 66, at ¶ 29. Specifically, in the instant case, the district court’s denial of attorney fees, by application or misapplication of the applicable statute, is reviewed for correctness. *Giusti v. Sterling Wentworth Corporation*, 2009 UT 2, at 20. As will be seen below, the district court misapplied the applicable statute, so its denial of attorney’s fees should be overturned. However, even under an abuse of discretion standard, the district court’s decision would not stand because a district court abuses its discretion when it relies on its own erroneous conclusion of law to come to its decision. *Taylor-West Weber Water Improvement Dist. v. Olds*, 224 P.3d 709, 2009 UT 86, at ¶ 3;

*Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶ 23, 199 P.3d 957.

A flexible reasoned approach would have been for the district court to consider that each and every claim of A&K and each and every counterclaim of Warnick could be determined by the resolution of one question: Did Warnick owe A&K any attorney's fees? The jury resolved that underlying issue in Warnick's favor. Thus, a reasoned approach, flexible enough to look beyond the surface at the underlying issue, leads to the conclusion Warnick prevailed.

**II. CONTRARY TO A&K'S CLAIM, THE COURT MISAPPLIED THE "FLEXIBLE AND REASONED" APPROACH BECAUSE ITS ANALYSIS WAS NEITHER FLEXIBLE NOR REASONED.**

Warnick's entire counterclaim consisted of seven paragraphs numbered 18-24. Here is a summary of them. Paragraph 18 realleged affirmative defenses.

Paragraph 19 alleged:

Plaintiff fraudulently or by misrepresentation induced Defendant to allow Plaintiff to enter an appearance on his behalf in the underlying law suit by promising, representing and agreeing that it would ***not incur legal fees beyond the retainers paid in advance*** by Heritage Communications, Inc. (Emphasis added).

(Record at 12-15). Warnick prevailed on that allegation. Even though his counterclaim was dismissed, a jury found Warnick did not owe A&K any legal fees beyond the retainers paid in advance. Warnick prevailed on this issue in his counterclaim.

Paragraph 20 of Warnick's counterclaim alleged: "Plaintiff has reneged on

those promises, representations and agreements and now claims to have incurred legal fees . . . ." (Record at 12-15). Warnick prevailed on that allegation. Even though his counterclaim was dismissed, a jury found Warnick did not owe A&K the legal fees it claimed. Warnick prevailed on this issue in his counterclaim.

Paragraph 21 of Warnick's counterclaim alleged: "Plaintiff has been compensated and paid for all legitimate work it performed." (Record at 12-15). Warnick prevailed on that allegation. Even though his counterclaim was dismissed, a jury found Warnick did not have to compensate A&K at all. Warnick prevailed on this issue in his counterclaim.

Paragraph 22 of Warnick's counterclaim alleged: "Plaintiff's actions [in falsely claiming Warnick owes it attorney's fees as described in paragraphs 19-21] amount to misrepresentation or fraud." (Record at 12-15). Warnick prevailed on that allegation. Even though his counterclaim was dismissed, a jury found A&K's claim that it was due attorney's fees from Warnick to be false. Warnick did not have to pay A&K anything. Warnick prevailed on this issue.

The district court dismissed Warnick's counterclaims as superfluous or redundant because if Warnick prevailed on A&K's claims, Warnick would have had no damages on his counterclaims. Thus, A&K's claims would resolve all issues in the case and Warnick's counterclaims were redundant and unnecessary.

Then, after Warnick prevailed at trial, the district court misapplied the flexible and reasoned approach to the facts and outcome at trial. Even though Warnick

prevailed on the sole underlying issue, whether he owed A&K fees, the district court used this approach: Warnick lost on his two claims. A&K lost on its two claims. Therefore no party prevailed. The district court's logic is flawed.

The district court claims to be employing a "flexible" and "reasoned" approach. However, its logic and reasoning are neither flexible nor reasoned. Instead it applied a rigid, simplistic approach of A&K "two" Warnick "two" which sounds more like the score of a soccer game than a logical and reasoned approach to determine the prevailing party.

### **III. A PROPER FLEXIBLE AND REASONED APPROACH SHOWS WARNICK PREVAILED AND IS ENTITLED TO ATTORNEY'S FEES.**

A genuine flexible, reasoned approach to Warnick's request for attorneys' fees is to look beyond the surface to see which party prevailed on the only underlying issue. When that is done, we see 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. That "Flexible and Reasoned" approach demonstrates Warnick prevailed and the district court's ruling to the contrary should be reversed.

#### **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 21st day of February, 2012.



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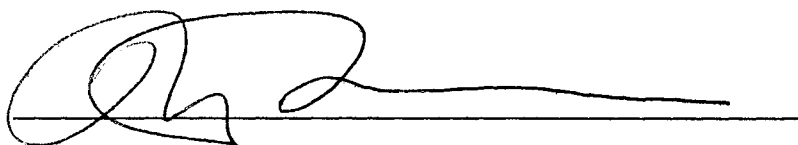
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Attorneys for Jerry Warnick



**MAILING CERTIFICATE**

I certify that on this the 21st 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

A handwritten signature in black ink, consisting of a large, stylized initial 'J' followed by a long horizontal line extending to the right.