

2015

**Aspenwood Real Estate Corporation, Elite Legacy . Corporation,
and Hilary "Skip" Wing, Plaintiffs/ Appellants, vs. Cathy Code
Defendant/ Appellee.**

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Aspenwood Real Es v Code*, No. 20130854 (Utah Court of Appeals, 2015).
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UTAH COURT OF APPEALS

**ASPENWOOD REAL ESTATE
CORPORATION, ELITE LEGACY
CORPORATION, and HILARY "SKIP"
WING,**

Plaintiffs/Appellants,

vs.

CATHY CODE

Defendant/Appellee.

APPELLANT'S REPLY BRIEF

APPELLATE CASE NO. 20130854-CA

DISTRICT CASE NO. 060906802

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UTAH APPELLATE COURTS**

SEP 02 2015

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TABLE OF CONTENTS

STANDARD OF REVIEW.....	1
REPLY ARGUMENT.....	1
I. The Brokerage's appeal does not fail on threshold grounds.	1
A. The Brokerage preserved its arguments... ..	2
1. The timing of the Rule 59 Motion is immaterial... ..	2
2. The court's written order is not limited to Skip's status as a judgment creditor.....	4
3. Both the Brokerage and Cathy argued below whether Skip should be a judgment debtor... ..	5
B. The Brokerage did not invite the trial court's error.....	6
1. Referring to a party without indicating the party's representative status in each and every reference is a routine practice; it does not establish personal involvement in this case.. ..	7
2. Even if counsel initially invited the error, the court has already corrected the error.....	10
C. The Brokerage challenged all grounds on which the trial court relied.....	11
II. Cathy interprets the reciprocal-fee statute and corresponding cases incorrectly.	12
A. Summary of Primary and Responsive Arguments... ..	12
B. The trial court found that Skip did not assert that he, in his personal capacity, was a party to the contract.. ..	13
C. Cathy ignores the requirement in Hooban that a party be either a contracting party or attempt to insert itself as a contracting party.	13

III. Cathy's unsupported argument regarding representatives' personal liability fails.	16
A. Summary of Primary and Responsive Arguments	16
B. The Brokerage preserved this argument.	17
C. Representative litigants are not personally liable for judgments or attorney fees.	17
IV. Cathy claims incorrectly that Skip will personally benefit from this lawsuit.	18
A. Summary of Primary and Responsive Arguments	18
B. Skip will not benefit from this lawsuit personally.	18
C. The Brokerage's policy concerns are valid.	21
D. Cathy does not dispute that if Skip cannot benefit from the FSBO then he should not be liable for attorney fees.	22
V. Attorney Fees ..	22
CONCLUSION.....	23

TABLE OF AUTHORITIES

Cases

<i>2 Ton Plumbing, L.L.C. v. Thorgaard</i> , 2015 UT 29, 345 P.3d 675	1
<i>Angel Investors, LLC v. Garrity</i> , 2009 UT 40, 216 P.3d 944	7
<i>Anglin v. Contractor Fabrication Machining</i> , 2001 UT App 341, 37 P.3d 267..	15
<i>Burdick v. Horner Townsend & Kent, Inc.</i> , 2015 UT 8, 345 P.3d 531	3
<i>Dunn v. Wallingford</i> , 155 P. 347 (Utah 1916)	17, 18
<i>Fisher v. Fisher</i> , 2009 UT App 305, 221 P.3d 845	17, 18
<i>Hooban v. Unicity Int'l, Inc.</i> , 2012 UT 40, 285 P.3d 766	13, 14, 15
<i>L.G. v. State</i> , 2015 UT 41, 353 P.3d 131	3
<i>M.F. v. J.F.</i> , 2013 UT App 247, 312 P.3d 946.... ..	4
<i>Prince v. Bear River Mut. Ins. Co.</i> , 2002 UT 68, 56 P.3d 524.....	22

Rules

Utah R. Civ. P. 7(f)(2).....	5
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STANDARD OF REVIEW

Cathy Code asserts throughout her brief that the trial court's ruling holding Skip Wing personally liable should be reviewed under an abuse of discretion standard or even for clear error. But the trial court's determination that Skip was personally involved and therefore personally liable was based on the court's erroneous interpretation and application of Utah Code § 78B-5-826 and corresponding case law. Br. of Appellant, 8-12. Thus the trial court's ruling is reviewed for correctness, not an abuse of discretion: "A district court's interpretation of relevant statutory provisions is reviewed for correctness, giving no deference to the district court's decision." *2 Ton Plumbing, L.L.C. v. Thorgaard*, 2015 UT 29, ¶ 17, 345 P.3d 675 (internal quotation and citations omitted).

REPLY ARGUMENT

Skip Wing could not have sued Cathy Code in his personal capacity, even if he wanted to. Under basic contract law, Skip cannot sue to enforce a contract to which he is not a party and in which he has no interest. Under the principal broker statute, Skip could not sue in his individual capacity, but only in his capacity as a principal broker. If Skip could not be and was not involved in this case personally, he legally cannot be subject to personal liability. As a result, the court's ruling holding Skip personally liable must be reversed. Cathy fails to show otherwise.

I. The Brokerage's appeal does not fail on threshold grounds.

In its Opening Brief, the Brokerage argued that the plaintiff Skip Wing is involved in this case as a representative only and therefore it is inappropriate as a matter of law to hold him personally liable for an award of attorney fees. Skip never asserted that he was a

party to the contract and never sought to enforce it on his own behalf. Skip will not and legally cannot benefit personally from the contract, and therefore cannot be held personally liable under that contract.

In response, the Appellee Cathy Code asserts that the Brokerage's appeal fails on threshold grounds, for three reasons. First, Cathy argues that the Brokerage did not preserve two of its arguments on appeal: 1) that a representative litigant cannot be liable for attorney fees; and 2) that the trial court found that Skip was only a representative and not personally involved in the litigation. Br. of Appellee, 25–26. Second, Cathy asserts that if any error occurred, the Brokerage invited that error. *Id.* Finally, Cathy asserts that the Brokerage failed to challenge the trial court's alternative grounds for holding Skip personally liable. *Id.* at 27. Each argument lacks merit.

A. The Brokerage preserved its arguments.

Cathy argues that the Brokerage did not preserve its representative-capacity arguments for two reasons: 1) the Brokerage did not raise these arguments until after judgment; and 2) the Brokerage did not move the court for a ruling that the court's amended findings affected Skip's status as a judgment creditor. Br. of Appellee, 26; 34–35

1. The timing of the Rule 59 Motion is immaterial.

Concerning Cathy's first assertion, it is true that the Brokerage first argued that Skip should not be personally liable in a Rule 59 motion that arose after trial and after an initial ruling on attorney fees. Cathy argues that the Brokerage should have raised its argument in the initial arguments on attorney fees. Br. of Appellee, 34. But those

arguments concerned only whether Cathy was a prevailing party; whether Skip should be held personally liable was not addressed by any party. R. at 5977–85; 6331–48; 6431–38. If the Brokerage had prevailed in that argument, the question of Skip’s personal liability would have been immaterial.

Once the trial court ruled that Cathy was a prevailing party and was entitled to attorney fees, Skip’s personal liability then became relevant. The court’s ruling provided no guidance on this issue. As a result, determining Skip’s status was the natural next step in resolving the attorney-fees question and the Brokerage accordingly filed its Rule 59 motion seeking clarification.

In any event, the Brokerage did everything necessary to preserve these arguments, even if Cathy believes the Brokerage could have raised them earlier. An issue is preserved where it is presented to the court “in such a way that the trial court has an opportunity to rule on it.” *L.G. v. State*, 2015 UT 41, ¶ 9, 353 P.3d 131 (quoting *In re Adoption of Baby E.Z.*, 2011 UT 38, ¶ 25, 266 P.3d 702); see also *Burdick v. Horner Townsend & Kent, Inc.*, 2015 UT 8, ¶ 50, 345 P.3d 531 (holding that arguments against summary judgment were preserved where the arguments were raised for the first time after trial in a motion to reconsider).

This analysis does not consider, as Cathy asserts, whether the issues in the Rule 59 motion should have been raised earlier; it requires only that the issues were raised and considered and that the trial court had an opportunity to rule. And there is no dispute that the Rule 59 motion was fully briefed and the court issued a ruling. Thus the Brokerage preserved this argument.

2. *The court's written order is not limited to Skip's status as a judgment creditor.*

Cathy's second assertion is that the Brokerage did not preserve its arguments because it did not move the court for a ruling that the court's amended findings affected Skip's status as a judgment creditor. Br. of Appellee, 26, 34–35. In other words, Cathy asserts that even though the trial court found that Skip was involved in the case as a representative only, this fact cannot affect Skip's status as a judgment debtor because the Brokerage never filed a motion requesting this relief. But Cathy relies erroneously on the trial court's oral ruling and ignores the content of the written order.

Cathy erroneously relies on the oral ruling because the written order controls and does not limit the scope of the court's amended findings. When a court's oral ruling differs from a final written order, the written order controls. *M.F. v. J.F.*, 2013 UT App 247, ¶ 6, 312 P.3d 946.

In this case, Cathy correctly points out that the trial court stated in an oral ruling that the court was not ruling on Skip's status as a judgment debtor. Br. of Appellee, 22–23. But the written order contains no such limitations—it simply states that wherever Skip is identified in litigation, that identification refers to Skip as an agent or representative. R. at 8246–47. It also clarifies that Skip in his individual capacity did not have or bring any claims in this case. *Id.* Nowhere does the written order state that the clarification regarding Skip's role was limited to his status as a judgment creditor.

Moreover, the written order does not incorporate the court's oral ruling. R. at 8234–49. Had the trial court wished to incorporate the oral ruling into the final, written

order, it would have done so. Because it did not, under the written order each and every reference to Skip is a reference to Skip as an agent or representative only. This includes references that might establish Skip as a judgment debtor.

Cathy cannot complain about this result now. If Cathy believed that the written order did not accurately reflect the judge's oral ruling, Cathy was required to object within seven days of service of the proposed written order. Utah R. Civ. P. 7(f)(2). The other defendants duly filed their objections. R. at 8199–25. In contrast, Cathy chose not to object, perhaps believing that her objection to a previous proposed order on the same motion sufficed. *See* Section I(A)(3), *infra*.

To summarize, Cathy did not object to the proposed written order, the written order addresses *all* references to Skip—without limitation—and the written order trumps the oral ruling. As a result, Cathy cannot rely on limitations that the written order simply does not contain. The written order amended all references to Skip to clarify that he had no personal involvement in this case. And not only does the written order trump the oral ruling, but the issue of Skip's debtor status was addressed more fully than Cathy suggests.

3. Both the Brokerage and Cathy argued below whether Skip should be a judgment debtor.

On August 5, 2014, the defendant Chuck Schvaneveldt filed a motion under Rule 52 asking the court to amend certain findings in its final judgment. R. at 7088–90. One month later, Chuck filed a corresponding proposed order, which included a request that the court clarify that Skip was not a judgment creditor. R. at 7423–25. The Brokerage

filed a memorandum opposing the proposed order, arguing that the court should clarify not only that Skip was not a judgment creditor, but also that Skip was not a judgment debtor. R. at 7538–41. Understanding that her interests may be affected, Cathy filed a memorandum responding to the Brokerage, asserting that Skip should remain as a judgment debtor. R. at 7553–58.

Thus the issue of Skip's judgment status was fully briefed to the court in connection with the Rule 52 motion. Presumably the court relied on all arguments that had been presented when the court issued its written order. And that written order amended Skip's judgment status—without limiting the amendment to Skip's status as a judgment creditor.

B. The Brokerage did not invite the trial court's error.

Cathy next asserts that if the trial court erred regarding Skip's status as a judgment debtor, the Brokerage invited the error. Cathy goes to great lengths to point out statements by counsel that Skip was a party to this litigation. Br. of Appellee, 11–17, 26. Cathy argues that these repeated references to Skip mean that he was involved in the case in an individual capacity, not as a representative; by making these references, counsel invited the court's error in its initial finding that Skip was involved in litigation in his personal capacity. Br. of Appellee, 25–26. But Cathy's reliance on these out-of-context references fails. These references, when viewed in the context of the entire case—including multiple clarifications through all stages of litigation—show that references to Skip were references to Skip as a representative.

1. *Referring to a party without indicating the party's representative status in each and every reference is a routine practice; it does not establish personal involvement in this case.*

Cathy's analysis ignores the reality that representatives in litigation are nearly always referred to without indicating their representative capacity. As just one example, in *Angel Investors, LLC v. Garrity*, 2009 UT 40, ¶ 16, 216 P.3d 944 (cited in the Brokerage's Opening Brief) a company (Angel Investors, LLC) sued on behalf of another company (XanGo LLC). Throughout that opinion the Utah Supreme Court refers to the plaintiff as "Angel Investors," not "Angel Investors, LLC on behalf of XanGo LLC." The shorthand reference to "Angel Investors" does not change the fact that the company was suing in a representative capacity.

The same applies here. Counsel can refer to Skip without pointing out, each and every time, that Skip was involved as a representative only. Under Cathy's theory, every time Skip came up counsel was required to refer to him as "Skip Wing solely as a representative of Aspenwood Real Estate Corporation and Elite Legacy Corporation." This dramatic approach was unnecessary because Skip made his representative nature clear from the outset of his involvement in this case.

Evidence abounds throughout the record that counsel used "Skip" as a shorthand reference for Skip's employers Aspenwood and Elite Legacy because Skip was merely representing those entities. Even within Cathy's record citations, the parties refer to Skip and Remax Elite interchangeably: "I get the idea that Skip Wing only has a \$10,000 stake in this, that Remax Elite only has a \$10,000 stake in this" Br. of Appellee, 14. Such references clarify that Remax Elite (i.e., Aspenwood Real Estate and Elite Legacy) is the

true plaintiff in this case and Skip is only a representative.

This understanding is bolstered by evidence in the record contradicting Cathy's claim that Skip will receive \$10,000 from the proceeds of this case. One example of such evidence is the Assignment of Claim Agreement between Remax Elite and Tim Shea. This Agreement, which gave rise to much dispute in the lower court, shows that Aspenwood and Elite Legacy—not Skip—would receive the \$10,000. *E.g.*, R. at 1425–26, 1704–05, 1889, 8450, pp. 106:9–108:16.

In the Assignment Agreement, “Remax Elite” agreed to assign its interest in the FSBO commission claim to Tim Shea. R. at 5839–42. Two parties signed the Assignment: Remax Elite and Tim Shea. R. at 5842. The Assignment refers to “Remax” as the broker involved in the failed property sale. R. at 5839. It acknowledges that under Utah law only Remax may pursue Tim Shea's commission. R. at 5840. Remax agrees to assign the commission claim to Tim and to allow Tim to pursue the lawsuit in Remax's name. R. at 5840. In exchange, Tim agrees to pay Remax—not Skip Wing—\$10,000 from any funds received through the lawsuit. R. at 5840. Skip signed the Assignment, but clearly indicated that he was signing on behalf of the company by including “REMAX ELITE” above his signature line and listing his office with the company (Broker) below his signature line. R. at 5842.

Under this Assignment Agreement, it is unclear whether Skip will ever receive a personal benefit from this litigation. Any funds recovered will go to Remax Elite, i.e., Aspenwood or Elite Legacy, and those funds may or may not trickle down to Skip. Counsel for the Brokerage made this very clear to the court in a pretrial hearing: “Skip

Wing's going to get hardly anything out of this, there were several partners in the brokerage and they're going to get the first \$10,000 and he's going to get his portion of the \$10,000." R. at 8450, p. 104:3-6. Indeed, the most likely result is that Aspenwood and Elite Legacy will pay the entire \$10,000 toward Cathy's substantial attorney-fee award, leaving both Skip and his partners nothing.¹

In addition to the Assignment Agreement, other evidence abounds that counsel's references to "Skip" were all references to Skip as a representative. The Brokerage already cited several examples of both deposition and trial testimony showing that everyone understood that Skip was acting only as a representative. Br. of Appellant, 13-15. Similar examples are found throughout the record. *E.g.*, 1704, 1777-82, 2326, 3591 (identifying Skip in caption as "Hilary Owen 'Skip' Wing, *principal broker*, D/B/A as Remax Elite")(emphasis added), 8450, pp. 103:8-104:9 (In a pretrial hearing: "We're coming in here and asking that Skip Wing as the broker, *not personally*, once again, we're splitting hairs, be awarded the commission and his attorney's fee")(emphasis added), 124:16-18 (The Court: "Skip's going to get, what, the first \$10,000?" Mr. Duncan: "The brokerage will and he'll get a portion of that, yes.")).

Indeed, this was the very purpose of the trial court's "clarification" in its order on the Rule 52 motion. i.e., "to avoid any conclusion that the claims that are identified are

¹ All parties in this case have referred to Aspenwood and Elite Legacy as "defunct." More accurately, Aspenwood and Elite Legacy no longer conduct business, but continue to maintain this lawsuit and thus continue their winding up phase and still exist as legal entities.

individually and separately owned by Mr. Wing, independent of his role in connection with the business entity.” R. at 8247. In other words, to avoid the very conclusion that Cathy now asserts on appeal.

In sum, by amending its findings the court ensured that Skip would not be held personally liable simply because counsel used “Skip” as shorthand for “Skip Wing solely in his capacity as a representative of Aspenwood Real Estate Corporation and Elite Legacy Corporation.” This routine, unremarkable practice of referring to a representative without indicating representative capacity is applied nearly universally by both litigants and courts. Doing so here did not invite the court’s error.

2. Even if counsel initially invited the error, the court has already corrected the error.

When Cathy argues that the Brokerage invited the trial court’s errors, presumably Cathy is referring to the court’s ruling regarding Skip adding himself personally as a plaintiff and Skip claiming that he was a party to the FSBO. R. at 7009–11.

Cathy ignores that the trial court has already amended the erroneous findings that the Brokerage supposedly invited. In its Rule 52 order, the court amended *all* past findings and clarified that references to Skip Wing were not references to him in his individual capacity. R. at 8246–47. In the court’s own words, each and every reference to Skip was “a representation of his role in connection with the business entity, and that . . . role was the role of principal broker, representative, agent, or authorized representative of the brokerage.” R. at 8247.

Accordingly, Skip pursued an award of attorney fees as a “representative, agent, or

authorized representative of the brokerage”—not “individually and separately . . . independent of [Skip’s] role in connection with the business identity.” *Id.* If Skip asserted a claim for attorney fees, or any other claim, that “does not represent his individual and personal ownership of those claims” and Skip “did not individually own or control the rights that were being asserted in the litigation.” R. at 8246–47.

Thus this Court does not need to reverse trial court’s finding that Skip Wing asserted a breach of contract claim personally. The trial court has already amended its own findings to clarify that Skip was not involved personally in any way. Accordingly, the Brokerage need not challenge the trial court’s amended findings where those findings already support the Brokerage on appeal.

C. The Brokerage challenged all grounds on which the trial court relied.

Cathy asserts that the Brokerage failed to challenge the trial court’s alternative grounds for holding Skip personally liable. Br. of Appellee, 27. Cathy points out four alternative grounds:

1. A finding that all three plaintiffs attempted to enforce the FSBO. Br. of Appellee, 18, 27.
2. A ruling that because the Brokerage referred to Aspenwood, Elite Legacy, and Skip as a group, and because the group tried to enforce the FSBO, Skip tried to enforce the FSBO. Br. of Appellee, 17–18.
3. A ruling that Skip was liable for attorney fees under Utah’s reciprocal fee statute. Br. of Appellee, 18–19.
4. A conclusion that Skip cannot claim the benefits of the FSBO while avoiding its consequences. Br. of Appellee, 20.

The Brokerage has challenged all four grounds. The first two grounds do not

require reversal because the court has already corrected its errors regarding findings. R. at 8246–47. But in any event, the Brokerage has challenged these two grounds by arguing that Skip never attempted to enforce the FSBO. Br. of Appellant, 7–16. And the Brokerage challenged the last two grounds by arguing that Skip was not liable under the reciprocal-fee statute and that where Skip cannot benefit from the FSBO he should not have to bear its consequences. Br. of Appellant, 7–12, 17–21. As a result, Cathy’s alternative-grounds argument is unpersuasive.....

II. Cathy interprets the reciprocal-fee statute and corresponding cases incorrectly.

A. Summary of Primary and Responsive Arguments.

The Brokerage first argued that the district court erred as a matter of law in awarding Cathy an award of attorney fees against Skip personally. The trial court awarded the attorney fees under a contract to which Skip was not a party. Skip never claimed to be a party to the contract and never sought to be recognized as a party to the contract. And no claim in this case required Skip to be a party to the contract. Under Utah law, Skip cannot be held liable under a contractual attorney-fee provision where Skip is not even a party to the contract.

In response, Cathy argued that the trial court found that Skip had asserted that he was a party to the contract, that this finding is dispositive, and that the finding may be reversed only if the finding represents clear error. Br. of Appellee, 27–29. Cathy also argued that Skip attempted to enforce the contract and is therefore liable under the contract as a matter of law. Br. of Appellee, 30–33.

- B. The trial court found that Skip did not assert that he, in his personal capacity, was a party to the contract.

Once again, Cathy ignores that the trial court amended its findings to clarify that Skip Wing was not involved in this lawsuit individually. *See* Section I, Parts A(2) and B(2), *supra*.

Cathy asserts and relies repeatedly on her claim that Skip sought and received an award of attorney fees under the FSBO, that he was distinct from the other plaintiffs, that he had a personal stake in the case, and so on. Br. of Appellee, 2–4, 11–17, 24–29. But the trial court expressly ruled—without qualification—that Skip did not own any claims personally, pursue any claims personally, or identify himself as a plaintiff personally. R. at 8246–47. Skip individually is not a judgment creditor and likewise cannot be a judgment debtor.

In short, under the court’s amended findings, Aspenwood, Elite Legacy, and Skip—as a representative of Aspenwood and Elite Legacy only—asserted a breach of contract claim against Cathy. The same applies to the Brokerage’s pursuit of attorney fees: Skip did not seek or receive attorney fees under the FSBO in his personal capacity. As a result, contrary to Cathy’s claims (Br. of Appellee, 28–29), the trial court found that Skip did not assert any claims in his individual capacity.

- C. Cathy ignores the requirement in *Hooban* that a party be either a contracting party or attempt to insert itself as a contracting party.

Cathy next attempts to argue that Skip is personally liable under Utah’s reciprocal fee statute and cases examining that statute. But Cathy oversimplifies the legal rule established in *Hooban v. Unicity Int’l, Inc.*, 2012 UT 40, 285 P.3d 766 and ignores that

case's factual background.

Cathy attempts to reduce *Hooban* to a simplistic syllogism:

- If litigation is based on a contract and the contract allows one party to recover attorney fees, then any party to the litigation may be liable for attorney fees.
- The litigation here was based on a contract and the contract contained an attorney fee provision.
- Therefore Skip, a party to the litigation, may be liable for attorney fees.

Br. of Appellee, 30–32. This syllogism ignores the requirement in *Hooban* that a litigant be a party to the contract, or at least attempt to establish itself as a party to the contract.

In *Hooban*, Mr. Hooban attempted to establish that he was legally a party to a contract even though he was not an original signatory. *Hooban*, 2012 UT 40, ¶¶ 4–5. After the court determined that he was not a party to the contract, he claimed that as a stranger to the contract he should not be liable under its attorney-fee provision. *Id.*, ¶ 23.

In response, the Utah Supreme Court did not, as Cathy suggests, discard established contract law providing that only parties to a contract may be bound by that contract. Instead, the Court asked a simple hypothetical question: If Mr. Hooban had prevailed, would he have been a party to the contract? The answer was yes, and therefore the Court applied the reciprocal-fee statute to Mr. Hooban: “[The Defendant] is entitled to fees because it was the prevailing party and because Hooban would have been a party to the contract if he had prevailed in this suit.” *Id.*, ¶ 15. In addition, the Court stated that “had Hooban prevailed in this suit, he would have been a party to the contract upon which the suit is based and would have been contractually entitled to attorney fees.” *Id.*, ¶

32; see also *Anglin v. Contractor Fabrication Machining*, 2001 UT App 341, 37 P.3d 267 (holding that the reciprocal-fee statute applies to parties to a contract only, not to any party in the litigation).

Under this analysis established in *Hooban*, courts ask two questions to determine whether an unsuccessful litigant is liable under a contractual attorney-fee provision: Is the litigant a party to the contract? If not, would the litigant have been a party to the contract if the litigant prevailed? If the answer to either question is yes, the litigant will be held liable. If the litigant was not a party to the contract and would not become a party by prevailing, the litigant cannot be liable.

In this case, Skip was not a party to the contract and—unlike Mr. Hooban—would not become a party to the contract by prevailing. Skip never asked the court to insert his name into the contract, to recognize him as a successor in interest to a contracting party, or to otherwise award him individually any benefit from the contract. Instead, Skip—as a representative only—asserted the FSBO's enforceability as a basis for Remax Elite's recovery, not his own recovery. Skip Wing as an individual was simply not a party to the contract and never sought any recovery for himself.

Of course, even if Skip was involved in this lawsuit personally, he did not assert—as Mr. Hooban did—that he was personally a party to the contract. Instead, Skip asserted that his brokerage was a party to the contract. Accordingly, Skip is not liable under the FSBO.

Cathy disagrees, and asserts that the Brokerage's interpretation of *Hooban* would render the FSBO's attorney-fee provision meaningless. We fail to see how this is the

case. All parties acknowledge that Remax Elite (i.e., Aspenwood and Elite Legacy) was a party to the FSBO. Remax Elite attempted to enforce the FSBO against Cathy. Cathy prevailed. As a result, Cathy is entitled to an award of attorney fees against Remax Elite. Her position is no different than any other prevailing party would be, including the prevailing party in *Hooban*. Moreover, Cathy's suggestion that Skip is the only party capable of satisfying the judgment (Br. of Appellee, 33) is inaccurate; Remax Elite has a judgment against another defendant in this case that far exceeds Cathy's. Br. of Appellant, 4. While that judgment is being challenged on appeal, it would be incorrect to state that Remax Elite lacks the assets to satisfy Cathy's judgment.

To summarize, basic contract law does not allow Skip to be held liable under the FSBO because he was not a party to the FSBO. And unlike Mr. Hooban, Skip would not become a party to the FSBO by prevailing against Cathy. As a stranger to the FSBO and only a representative of the FSBO parties, Skip cannot be personally liable under the FSBO.

III. Cathy's unsupported argument regarding representatives' personal liability fails.

A. Summary of Primary and Responsive Arguments.

The Brokerage next argued that Skip was involved in the litigation as a representative of Aspenwood Real Estate Corporation and Elite Legacy Corporation. Litigants often maintain judicial proceedings as representatives, in which the representatives do not personally receive the benefit of a judgment and do not personally face liability. The trial court expressly found that Skip was involved as a representative

only. R. at 8246–47. That finding is supported by the record. This finding reflects Utah’s preference for substance over form.

In response, Cathy argued that Skip did not preserve this issue, that the trial court’s findings regarding Skip’s representative capacity did not apply to Cathy, and that Skip is personally liable because he voluntarily added himself as a plaintiff—even if he did so as a representative only. Br. of Appellee, 33–37.

B. ... The Brokerage preserved this argument.

Cathy argues that the Brokerage did not preserve its representative-capacity argument because the Brokerage did not raise it while the parties were arguing about attorney fees. Br. of Appellee, 34. The Brokerage did everything it had to do to preserve this argument. *See* Section I, Part A(1), *supra*. The argument was fully briefed by all parties, raised in oral argument, and ruled on as a matter of law by the court. Thus the Brokerage preserved the representative-capacity argument.

C. Representative litigants are not personally liable for judgments or attorney fees.

Cathy argues—without a single citation to legal authority—that representative litigants are personally liable for fees, but may be indemnified by the party they are representing. Br. of Appellee, 35–37. This directly contradicts the case law cited in the Brokerage’s Opening Brief: “[T]rustees being sued in their *representative* capacities are not personally liable for any judgment or attorney fees resulting from such litigation” *Fisher v. Fisher*, 2009 UT App 305, ¶ 20, 221 P.3d 845 (emphasis in original) (internal citation omitted); *see also Dunn v. Wallingford*, 155 P. 347, 351 (Utah 1916) (“The

reason that an administrator becomes personally liable is because he is without authority to act in a representative capacity, and can only act in a personal capacity.”).

Like the trustee in *Fisher*, Skip is acting in a representative capacity only. As a result, Skip is “not personally liable for any judgment or attorney fees resulting from such litigation.” *Fisher*, 2009 UT App 305, ¶ 20. Cathy’s contrary assertion that representative litigants face personal liability is legally incorrect.

IV. Cathy claims incorrectly that Skip will personally benefit from this lawsuit.

A. Summary of Primary and Responsive Arguments.

The Brokerage argued that Skip cannot be held personally liable under a contract where he will receive no benefit from the contract. In addition, the Brokerage asserted that as a matter of public policy the law cannot hold a principal broker personally liable for attorney fees.

In response, Cathy argued that the Skip will in fact receive a benefit from the lawsuit and that the Brokerage’s policy concerns are without merit. Br. of Appellee, 37–38. Cathy failed to respond to the Brokerage’s argument that if Skip cannot benefit from the FSBO then he should not bear its burdens.

B. Skip will not benefit from this lawsuit personally.

Cathy’s argument that Skip will benefit from this lawsuit personally continues her pattern of ignoring the trial court’s ruling that Skip is not asserting any claims personally. Br. of Appellee, 25–26, 28–29, 33–35, 37–38. Cathy’s assertion that Skip is personally entitled to \$10,000 of any recovery is factually incorrect and ignores a key ruling from the court.

An issue that received much attention in the lower court was whether a brokerage could qualify as a principal broker. *E.g.*, R. at 1412–29, 1476–77, 1498–1503, 1773–80. After extensive argument, the court ruled that Remax Elite (meaning the brokerage with which Tim Shea was associated), which at the time was the only named plaintiff, had standing under the principal-broker statute. R. at 1886–88. In its ruling, the court held that standing existed without adding Skip Wing personally as a plaintiff:

[T]his Court concludes that the law allows a brokerage to maintain an action to recover a real estate commission in its own name, so long as the brokerage—a real estate company—had affiliated with it an individual who was licensed as a principal broker at the time of the transaction at issue

Because ReMax had a licensed principal broker affiliated with it at the time of the transaction at issue, ReMax may bring and maintain an action to recover the commission. The fact that Skip Wing is apparently no longer affiliated with ReMax does not divest ReMax of standing.

R. at 1888.

With this ruling in hand, it would not make sense to add Skip Wing as a plaintiff personally—the standing question was already resolved in Remax Elite’s favor. What would make sense is bringing a swift end to the defendants’ incessant filings arguing that Remax Elite, as nothing more than a dba designation, could not maintain a lawsuit. Remax chose to do this by amending its pleadings to clarify the entity underlying the Remax Elite name.

As the Brokerage pointed out in its opening brief, the Defendants filed numerous documents asserting that “Remax Elite,” as nothing more than a name, could not maintain a lawsuit. Br. of Appellant, 3–4. In her responding brief, Cathy ignores the procedural nightmare she and the other defendants created out of this issue and how her

actions led to amending the Complaint to list Skip as a plaintiff. It is no exaggeration that the “defunct dba” argument stalled this case for years.

The “defunct dba” argument first appeared in June, 2009. Br. of Appellant, 3; R. at 931. Over the next roughly two years, the Defendants raised this argument at least 20 times. Br. of Appellant, 3–4; R. at 1196–1208; 1256–83; 1303–25; 1373–85; 1407–62; 1493–504; 1615–39; 1699–714; 1715–25; 2068–104; 2120–36; 2173–89; 2289–98; 2306–14; 2400–3; 2548–53; 2614–22; 2645–52; 2653–60; 3364–93.

This pattern was particularly objectionable because approximately half of these filings came after the trial court ruled against the Defendants on these issues. Br. of Appellant, 4. The court was likely referring to this uncalled-for procedural logjam when it described a post-trial motion as “precisely the type of cumulative and unnecessary [sic] motion that justified the significant attorney fees in this case, and caused this case to languish on the court’s docket for years.” R. at 7012.

Thus, Remax Elite amended its pleadings not to add Skip as a new plaintiff, as Cathy asserts (Br. of Appellee, 28, 35–37), but to clarify the entities underlying and associated with the Remax Elite dba: “The Plaintiff only wishes to clarify who the underlying entity(ies) is/are that owned ReMax Elite when this action was originally filed, by showing the underling entity(ies) and broker associated with ReMax Elite on the pleading caption” R. at 2326.

By clarifying that an actual brokerage had been doing business as Remax Elite, the Plaintiffs sought “to abate the Defendants’ ‘defunct D/B/A’ argument once and for all.” R. at 2321. Listing the brokerages and their principal broker would ensure that the

Defendants could no longer object to the case being maintained under the name "Remax Elite" and would "save the Court and the parties multitudinous hours of time by resolving the D/B/A issue once and for all rather than continuing to file motion after motion on this issue." R. at 2321.

In contrast, the Plaintiffs did not, as Cathy asserts, add Skip personally in an effort to establish standing. Where the court had already ruled that Skip's brokerage had standing under the principal-broker statute, the Brokerage amended its pleadings to put a stop to the flood of filings based on an already-decided issue, i.e., whether "Remax Elite" as nothing more than a dba designation could maintain a lawsuit.

C. The Brokerage's policy concerns are valid.

Cathy dismisses the Brokerage's policy concerns too lightly. These policy concerns bolster the Brokerage's interpretation of *Hooban* and its argument that Skip is involved in this case only as a representative.

Indeed, where the Brokerage argues that holding a broker personally liable under his employer's contract would chill real estate transactions, Cathy's only response is that brokers should purchase insurance or simply make sure they prevail in litigation. But this ignores the reality that under Cathy's requested result brokers will not get involved in recovering commissions unless forced to do so by the agent entitled to the commission, thus spawning unnecessary and duplicative litigation. It also discounts the reality that facing such liability will prevent many persons from becoming principal brokers in the first place.

In short, Utah courts have good reason for not holding representatives personally

liable. If representatives—including principal brokers like Skip, trustees, company officers, guardians and conservators, etc.—face personal liability, those representatives will stop participating in the legal system. And where those representatives receive no personal benefit through litigation, to impose liability upon them, rather than upon their principals, is incongruous and contrary to law.

D. Cathy does not dispute that if Skip cannot benefit from the FSBO then he should not be liable for attorney fees.

Cathy ignores the Brokerage's argument that because Skip cannot benefit from the FSBO he cannot be bound by the FSBO's attorney-fee provision. Br. of Appellee, *passim*. Presumably Cathy ignores this argument because of her insistence that Skip will benefit from the FSBO. But, as the trial court stated before amending its findings, allowing Skip to recover attorney fees from one defendant while avoiding paying fees to Cathy would be incongruous. R. at 7011.

The opposite is also true. Where the company Remax Elite—not Skip—is the only party that can recover attorney fees under the FSBO, forcing any party other than Remax Elite to pay attorney fees would be incongruous. Cathy has not responded to the assertion that as a matter of law Skip cannot be liable under the FSBO if Skip cannot benefit from the FSBO.

V. Attorney Fees

If the Brokerage prevails on appeal, Cathy's request for attorney fees on appeal must be denied. A party that does not prevail on appeal cannot recover fees on appeal.

Prince v. Bear River Mut. Ins. Co., 2002 UT 68, ¶¶ 56–59, 56 P.3d 524.

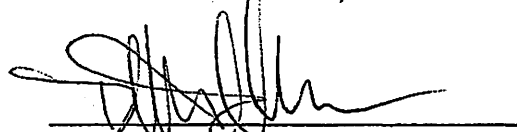
CONCLUSION

The judgment holding Skip personally liable for attorney fees must be reversed because Skip was involved in this case as a representative only. Cathy has not shown otherwise; her brief relies entirely on the mistaken assumption that Skip was involved in this case in his personal capacity. But Skip has shown that he could not have sued in his personal capacity, even if he wanted to.

Where the trial court ruled that Skip was not personally involved, the evidence confirms that ruling, and the law does not allow Skip to be involved in this case personally, Skip cannot be personally liable. To hold otherwise would elevate form over substance, ignore basic contract law, and produce an inequitable result in this and future cases.

DATED and SIGNED this 2nd day of September, 2015.

LEBARON & JENSEN, P.C.

A handwritten signature in dark ink, appearing to read 'L. Miles LeBaron', is written over a horizontal line.

L. Miles LeBaron

Dallin T. Morrow

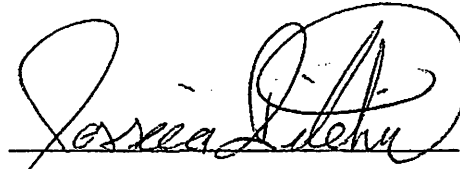
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CERTIFICATE OF MAILING

I hereby certify that I caused two true and correct copies of the foregoing *Reply*
Brief of Appellant to be served via first class U.S. mail, postage pre-paid, to the
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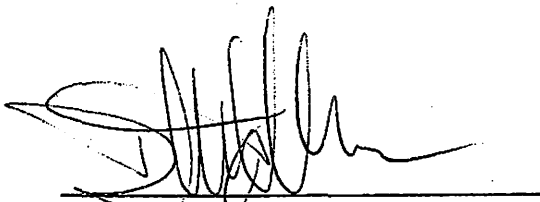
on this 2 day of September, 2015.


Paralegal

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because it contains 6,374 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).

This brief complies with the typeface requirements of Utah R. App. P.27(b) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2003 in Times New Roman, 13 size font.



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Dated: 9/2/15