

2001

In the Matter of Edwin L. Sheville, a protected
person, David Grindstaff v. Sue Ann Sheville,
Sandra Sheville Holman, Sue Ann Sheville : Reply
Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Cameron S. Denning; Hanks, Rooker, Denning; Attorneys for Appellant.

Kent B. Alderman; Sean D. Reyes; Parsons, Behle, Latimer; Attorneys for Appellee.

Recommended Citation

Reply Brief, *Sheville v. Sheville*, No. 20010642 (Utah Court of Appeals, 2001).
https://digitalcommons.law.byu.edu/byu_ca2/3400

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

—0000000—

**In the Matter of Edwin L. Sheville,
a protected person.**

: Appellate Case No. 20010642-CA

—0000000—

David Grindstaff,

$$:$$

Appellant,

**: REPLY BRIEF OF APPELLANT
SANDRA SHEVILLE HOLMAN**

V.

•

Sue Ann Sheville,

$$\vdots$$

Appellee.

: Argument Priority 15

and

:

SANDRA SHEVILLE HOLMAN,

•

Appellant,

$$\vdots$$

V.

•

SUE ANN SHEVILLE,

:

Appellee.

•

—0000000—

Appeal from the Judgment and Orders of the Third Judicial District Court, Salt Lake County, Judge Stephen L. Henriod

Cameron S. Denning (USB #6863)
HANKS, ROOKER & DENNING, P.C.
8 E. Broadway, The Judge Building, Suite 740
Salt Lake City, Utah 84111
Telephone: (801) 363-0940
Attorneys for Appellant Sandra Holman

**Kent B. Alderman
Sean D. Reyes
PARSONS, BEHLE & LATIMER
P.O. Box 45898
Salt Lake City, Utah 84145
Attorneys for Appellee**

**David Grindstaff (Deceased)
P. O. Box 571453
Salt Lake City, Utah 84157
Attorney for Appellant David Grindstaff**

IN THE UTAH COURT OF APPEALS

—0000000—

In the Matter of Edwin L. Sheville, : Appellate Case No. 20010642-CA
a protected person.

—000000—

David Grindstaff, :

Appellant, : **REPLY BRIEF OF APPELLANT**

v. : **SANDRA SHEVILLE HOLMAN**

Sue Ann Sheville, :

Appellee. : **Argument Priority 15**

and :

SANDRA SHEVILLE HOLMAN, :

Appellant, :

v. :

SUE ANN SHEVILLE, :

Appellee. :

—000000—

Appeal from the Judgment and Orders of the Third Judicial District Court, Salt Lake County, Judge Stephen L. Henriod

Cameron S. Denning (USB #6863)
HANKS, ROOKER & DENNING, P.C.
8 E. Broadway, The Judge Building, Suite 740
Salt Lake City, Utah 84111
Telephone: (801) 363-0940
Attorneys for Appellant Sandra Holman

**Kent B. Alderman
Sean D. Reyes
PARSONS, BEHLE & LATIMER
P.O. Box 45898
Salt Lake City, Utah 84145
Attorneys for Appellee**

**David Grindstaff (Deceased)
P. O. Box 571453
Salt Lake City, Utah 84157
Attorney for Appellant David Grindstaff**

TABLE OF CONTENTS

ARGUMENT	1
I. <u>THE TRIAL COURT’S AWARD OF ATTORNEY FEES WARRANTS REVERSAL.</u>	1
II. <u>THE TRIAL COURT ERRED IN AWARDING SHEVILLE HER COSTS.</u>	11
III. <u>THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING SHEVILLE NEARLY \$40,000 IN COSTS.</u>	16
IV. <u>THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING SHEVILLE MORE THAN \$26,000 IN ATTORNEY FEES.</u>	19
V. <u>THE TRIAL COURT ERRED BY FINDING HOLMAN JOINT AND SEVERALLY LIABLE FOR SHEVILLE’S ATTORNEY FEES.</u>	21
CONCLUSION	23

TABLE OF AUTHORITIES

A. Cases

Classic Cabinets, Inc. v. All Am. Life Insur. Co., 978 P.2d 465, 469 (Utah Ct. App 1999) . . .	15, 16
Foote v. Clark, 962 P.2d 52, 55 (Utah 1998)	19-22
Frampton v. Wilson, 605 P.2d 771, 774 (Utah 1980)	17
Hatch v. Boulder Town Council, 2001 UT App 55, 21 P.3d 245	3-5
Highland Const. Co. v. Union Pac. R.R., 683 P.2d 1042, 1052 (Utah 1984)	15
In re Lande, 983 P.2d 316 (Mont. 1999)	13, 14
Jeschke v. Willis, 811 P.2d 202, 203-04 (Utah Ct. App. 1991)	2
Lyon v. Burton, 2000 UT 19, 5 P.3d 616	15, 16
Morgan v. Morgan, 795 P.2d 684 (Utah Ct. App. 1990)	17, 18
Valcarce v. Fitzgerald, 961 P.2d 305, 315 (Utah 1998)	1, 2, 6, 7, 9-11, 13, 15
Wardley Better Homes and Gardens v. Cannon, 2002 UT 99, ¶29, 458 Utah Adv. Rep. 15 . . .	1, 7
Warner v. DMG Color, Inc., 2000 UT 102, ¶22, 20 P.3d 868	1, 8

B. Rules

Utah Rules of Civil Procedure 54	11-16, 19
--	-----------

C. Statutes

Montana Code Ann. § 25-10-501	13, 14
Montana Code Ann. § 72-12-206	13, 14
Utah Code Ann. § 10-9-402	4
Utah Code Ann. § 75-1-310	11-14, 18

Utah Code Ann. § 75-5-309 3, 7

Utah Code Ann. § 75-5-311 3, 7

Utah Code Ann. § 78-27-56 1, 4, 6, 8, 11, 19

Appellant Sandra Holman (“Holman”) submits the following Reply Brief in response to Appellee Sue Ann Sheville’s (“Sheville”) Opposition Brief. As more fully set forth below, the trial court’s award of attorney fees and costs should be reversed.

ARGUMENT

I. THE TRIAL COURT’S AWARD OF ATTORNEY FEES WARRANTS REVERSAL.

The trial court plainly erred by awarding Sheville her attorney fees under Utah Code Ann. § 78-27-56. Before awarding attorney fees under Utah Code Ann. § 78-27-56, the trial court must first conduct a two-part analysis. See Valcarce v. Fitzgerald, 961 P.2d 305, 315 (Utah 1998). First, the trial court must determine that the action was “without merit,” meaning the action was frivolous or “of little weight or importance having *no* basis in law or fact.” Warner v. DMG Color, Inc., 2000 UT 102, ¶22, 20 P.3d 868. Second, the trial court must determine the action was brought in “bad faith,” meaning the party bringing the action (1) lacked an honest belief in the propriety of the activities in question; (2) intended to take unconscionable advantage of others; or (3) intended to or acted with the knowledge that the activities in question would hinder, delay, or defraud others. Wardley Better Homes & Gardens v. Cannon, 2002 UT 99, ¶29, 458 Utah Adv. Rep. 15. If the trial court fails to find that the action was both without merit *and* brought in bad faith, the trial court is precluded from awarding fees under the statute. See Valcarce, 961 P.2d at 315.

In reviewing an award of fees under Section 78-27-56, this Court employs two drastically different standards of review. This Court reviews the trial court’s determination that an action was without merit for correctness, a more exacting standard, giving *no deference* to the trial

court's determination. See Jeschke v. Willis, 811 P.2d 202, 203-04 (Utah Ct. App. 1991). This Court reviews the trial court's determination that an action was brought in bad faith under a "clearly erroneous" standard. See id. Despite the deferential nature of the second standard of review, the record and the trial court's findings must support the trial court's determination. See Valcarce, 961 P.2d at 316. In the present matter, the trial court incorrectly determined that Holman's claim was without merit. Moreover, neither the record nor the trial court's Order support its determination that Holman pursued her claim in bad faith. The trial court's fee award must therefore be reversed.

A. The Trial Court Incorrectly Applied The Law.

The trial court erred as a matter of law when it determined that Holman's objection to Sheville's appointment as guardian was frivolous and without basis in law, and therefore without merit. In its Order, the trial court states "The Court finds that Ms. Holman's actions in this case were without merit. Ms. Holman knew or should have known that Mr. Sheville was incapacitated and Holman's objections to the guardianship proceedings and pursuit of a fraudulent protective order were frivolous." (R. at 338). The trial court's finding that Holman knew or should have known that Mr. Sheville was incapacitated fails to support its determination that Holman's objection to Sheville being appointed as Mr. Sheville's guardian was without merit. Indeed, the trial court's sole finding on the issue is wholly irrelevant to Holman's objection. While Mr. Sheville's competency is obviously the central and foremost issue in determining whether the trial court *need appoint a guardian*, that issue has nothing to do with Holman objecting to the trial court *appointing Sheville* as Mr. Sheville's guardian. The trial

court's finding plainly fails to support its determination that Holman's *objection* was without merit.

Moreover, Holman's right to object to Sheville's appointment and seek that appointment herself is firmly based in law. Pursuant to Utah Code Ann. § 75-5-309, Holman was entitled to notice of the guardianship proceeding and to participate therein. Indeed, she was given notice of the proceeding. Further, as Sheville's Petition for Appointment of Guardian expressly states, "*each person having a higher or equal priority to appointment shall be given notice of this Petition and shall have the opportunity to object to petitioner's appointment.*" R. at 19.

(emphasis added). Pursuant to Utah Code Ann. § 75-5-311, Holman not only qualified for appointment as Mr. Sheville's guardian, but as one of Mr. Sheville's "adult child[ren]," she had a priority for such appointment and stood on equal footing with Sheville for the same. *Id.*¹

Nowhere in either the record or the trial court's Order does the trial court find that Holman had no legal right to object to Sheville's appointment. Indeed, the trial court could not have made such a finding because as Mr. Sheville's daughter she clearly had a right to do so.

This Court's analysis in Hatch v. Boulder Town Council, 2001 UT App 55, 21 P.3d 245, is persuasive in this case. In Hatch, the appellants were residents of Boulder, Utah (the "Town"). See id. at ¶ 2. The appellee (the "Town Council") passed a land-use ordinance that divided the Town into nine different zoning districts. See id. Pursuant to Utah law, prior to adopting such an ordinance, the Town's Planning Commission was to submit to the Town Council the full text

¹In her brief, Sheville argues that she had priority for appointment over Holman because the durable power of attorney was a "non-statutory nomination." Appellee Opposition Brief at 18 (referencing Utah Code Ann. § 75-5-311). Sheville, however, cites no authority to support her contention and, indeed, Holman's research failed to uncover any. Nowhere in the record, the trial court's Minute Entry, or its Order is this issue raised. In fact, Sheville's counsel only argued that Sheville was "the appropriate person" for the appointment. R. 413 (Trans. at 105).

of the ordinance and a map representing the same. See id. at ¶6 (citing Utah Code Ann. § 10-9-402). Sometime thereafter, the Town granted land-use permits under the ordinance. See id. ¶2. The appellants appealed the grant to the Town Council, which affirmed the grant. See id. at ¶¶ 2-3. The appellants then sought a preliminary injunction from the district court, arguing the Town's actions in enacting the ordinance were arbitrary, capricious, and illegal. See id. Specifically, the appellants argued the Town's Planning Commission failed to prepare and present to the Town Council a map depicting the proposed zoning districts. See id. at ¶6.

The trial court found "the evidence sufficiently establishes that the [zoning map exists]." Id. at ¶10. The trial court made this despite the fact that only the appellants testified during the hearing, and their testimony was that no map existed. See id. The trial court then determined that the appellants' claims were without merit and brought in bad faith and awarded the Town Council attorney fees under Utah Code Ann. 78-27-56. See id. at ¶4.

This Court reversed the trial court's award of fees. See id. at ¶15. Initially, this Court explained that it was "troubled by the trial court's finding that 'the evidence sufficiently establishes that [the zoning map] exists,'" because the appellants were the only witnesses to testify at the hearing. Id. ¶10. This Court then explained that the appellants' claim had both a "basis in law and in fact," and therefore, the trial court could not "conclude that the claim [wa]s without merit and brought in bad faith." Id. at ¶15. Further, this Court explained

The trial court seems to have had in mind that it was bad faith for [a]ppellants to seek judicial review after having failed in their administrative challenge to the ordinance. However, Utah Code Ann. § 10-9-1001 (1999) expressly provides a mechanism for citizens to seek judicial review of a municipality's land use decisions after they have exhausted their administrative remedies.

Id. This Court then concluded that “[e]ven had our ruling been otherwise on the legal issue presented, we would *not agree that [a]ppellants’ claims were so meritless as to warrant an award of attorney fees.*” Id. (emphasis added).

Similar to the appellants in Hatch, Holman had a statutory right to both notice and the right to be heard in Mr. Sheville’s guardianship proceeding. Holman also had a priority, pursuant to statute, equal or superior to any other’s appointment as Mr. Sheville’s guardian. Further, as in Hatch, Sheville presented no evidence to suggest that Holman had lied about caring for Mr. Sheville nor that Holman desired not to continue to provide his care. Indeed, the trial court’s order makes no mention of Holman’s desire to care for Mr. Sheville, Holman’s legal right to object to Sheville’s appointment, nor Holman’s priority for appointment as Mr. Sheville’s guardian. Instead, as in Hatch, the “trial court seem[ed] to have in mind that it was bad faith [and frivolous]” for Holman to pursue her objection to Sheville’s appointment because Mr. Sheville was incapacitated. Id. This despite the unequivocal fact that Utah law “expressly provides a mechanism” for notice and the right to be heard in guardianship proceedings and establishes priorities for appointing the guardian. The conclusion is inescapable that Holman had both a legal right and a factual basis for asserting her objection, all of which the trial court ignored. Finally, because Utah law expressly provides for notice and a right to be heard in guardianship proceedings, this Court should be unwilling to find that Holman’s exercise of that right “w[as] so meritless as to warrant an award of attorney fees.” Id. at ¶15.

Further, a review of the cases wherein the Utah Supreme Court has affirmed a trial court’s “without merit” finding indicates the claims pursued in the cases below had little or no basis in law or those claims were precluded by statute. That is simply not the case here.

Comparing these cases to the present matter plainly shows that the trial court in this case erred in making that determination.

In Valcarce, the appellant brought a claim for trespass against the appellee. See Valcarce, 961 P.2d at 310. In response, the appellee counterclaimed seeking to quiet title to an irrigation canal traversing the appellant's property, and for intentional interference with the canal and the water delivery system. See id. The irrigation canal had been in existence and benefitted both the appellant's and the appellee's parcels of land for "at least forty years." Id. The dispute arose when the appellant's brother, a co-defendant later dismissed, damaged the head gate to the canal, preventing the appellee from watering his crops. See id. The appellee installed "damming devices" to repair the same. Id. Subsequently, "on numerous occasions," the appellee saw the appellant's brother remove the damming devices, as well as plow dirt into the irrigation canal. Id. The appellee repaired the canal and placed a "ten-inch PVC irrigation pipe" across the eastern end of the appellant's property to deliver water to his crops. Id. The pipe leaked and flooded the appellant's property, which resulted in the appellant's trespass claim. See id.

Ultimately, the trial court ruled in favor of the appellee, finding the existence of a prescriptive easement, and permanently enjoining the appellant from interfering with the water delivery system. See id. The trial court also awarded the appellee attorney fees under Utah Code Ann. § 78-27-56, finding that appellants' claims and defenses "were maintained in bad faith and were wholly without merit." Id.

On appeal, the Utah Supreme Court affirmed the trial court's award of attorney fees. The Court explained that "[a]lthough [the appellants'] claims may have had *some* basis in law and they *ostensibly provided evidence of their factual claims*, the trial court found the facts contrary

to that evidence.” Id. (emphasis added). In support of its analysis, the Court noted, essentially, that the appellants had lied to defend their claims. See id. at 315. The Court concluded that “testifying falsely is not a legitimate mode of defense,” and that the appellants other claims were similarly without merit. Id.

Unlike Valcarce, Holman’s objection to Sheville’s appointment was *completely* founded upon her legal right under statute. Inasmuch as Holman presented facts that she had cared for Mr. Sheville, was capable of caring for him, and desired to continue to do so, neither the trial court’s Minute Entry nor its Order takes exception to those facts presented, nor did the trial court find the foregoing “incredible” or false. Id. Accordingly, although Sheville relies on Valcarce to a great degree in her brief, Valcarce is readily distinguishable from the present matter.

In Wardley, the Utah Supreme Court affirmed a trial court’s award of attorney fees under Section 78-27-56. 2002 UT 99 at ¶¶29-30. The Court concluded that the appellant had no “*legal right*” and “clearly had no legal basis for recover[ing] the sale’s commission it sought. Id. The Court explained that the appellant relied on “fraudulently-altered” documents to support its claim. Id. at ¶30.

Wardley is readily distinguishable from the present matter. Simply put, Holman’s objection to Sheville’s appointment and her attempt to seek that appointment herself were both firmly based on her rights under Utah law. See Utah Code Ann. §§ 75-5-309, and 311. The trial court wholly failed to find otherwise. Instead, the trial court determined that Holman’s objection was without merit because she pursued her legal right in spite of the fact that Mr. Sheville was incapacitated. Such a determination lacks reason and does not support the trial court’s legal conclusion that Holman’s claim was without merit.

In Warner, the Utah Supreme Court also affirmed a trial court's award of attorney fees under Utah Code Ann. § 78-27-56. See id. at ¶22. In reaching its conclusion, the Court explained:

It is clear that [appellant's] ability to assert the claims he did below . . . were cut off by the bankruptcy proceeding and the sale of claims[, which the appellant facilitated]. Additionally, his fraudulent transfer claim was barred by the applicable statute of limitations. If [appellant] was dissatisfied with the results of the sale, his only recourse was clearly in the federal bankruptcy proceeding. [The appellant's] action in the trial court had no basis in law, and was thus without merit.

Id. at ¶22 (emphasis added).

Tantamount to the Court's conclusions in the aforementioned cases was that the appellants' claims had little or no basis in law. Such is not the case here. Moreover, unlike Warner, nothing in either the trial court's Minute Entry or its Order indicate that Holman was precluded by statute or otherwise from asserting her legal right to oppose Sheville's appointment and seek that appointment herself. Finally, unlike Warner, Holman's "only recourse was clearly in the" trial court. Id. Following the Court's analysis in Warner, Holman's claims plainly had merit.

In all, unlike the appellants in the aforementioned cases, Holman had a legal right to oppose Sheville's appointment. That right was firmly based in Utah law. Holman did not obtain that right through deceitfulness or fraud nor was Holman precluded by law from exercising her legal right. Indeed, the trial court made no such finding. Accordingly, the conclusion is inescapable that the trial court incorrectly determined that Holman's claims were without merit, and therefore, the trial court's award of fees under Section 78-27-56 must be reversed.

B. The Trial Court Plainly Erred In Finding Holman Acted in Bad Faith.

Neither the record nor the trial court's "finding" support its determination that Holman pursued her objection to Sheville's appointment in bad faith. In its Minute Entry and Order the trial court makes no finding but merely concludes that Holman acted in bad faith. The trial court's Minute Entry states "Holman lacked an honest belief in the propriety of her actions and undertook activities, including perjury, which improperly hindered and delayed Ms. Sheville's appointment as guardian." R. at 338. While the trial court's Minute Entry parrots the standard necessary to find bad faith, it offers nothing in the way of fact to support its conclusion. Indeed, the record lacks any evidence or findings on that evidence sufficient to support the trial court's conclusion. As Holman stated in her original brief, "the trial court likely based its finding not on fact, but rather Sheville's counsel's argument."² Holman's Original Brief at 24. The trial court's utter failure to make any factual findings as to bad faith, coupled with its insufficient and erroneous finding that Holman's claims were without merit, necessarily lead to the conclusion that the trial court's award of fees must be reversed.

Holman concedes that the trial court's utter failure to enter factual findings, "alone, does not warrant reversal." Valcarce, 961 P.2d at 315 n.1. However, this failure, when coupled with the trial court's obvious error in determining Holman acted in bad faith, necessitates a reversal of the trial court's award. In Valcarce, the Court explained

In cases in which factual issues are presented to and must be resolved by the trial court but no findings . . . appear in the record, we assume that the trier of fact found them in accord with its

²Holman then proceeded to address the purported facts in that argument in steadfast order, and therefore satisfied the marshaling requirement.

decision, and we affirm the decision *if from the evidence it would be reasonable to find facts to support it.*

Id. at 316 (citation omitted) (emphasis added). The Court also explained that it would affirm a trial court's decision that lacked factual findings "whenever *it would be reasonable to assume that the court actually made such findings.*" Id. (emphasis added). The Court then concluded that the trial court's finding that the appellants "acted with the intent to harass and to increase litigation costs was sufficiently specific" as to bad faith. Id.

Under such an analysis, the trial court's award warrants reversal. First, as Holman aptly points out in her original brief, the evidence is wholly insufficient to support the trial court's finding of bad faith. See Holman's Original Brief at pp. 23-32. Indeed, a review of the record in this matter plainly reveals that the trial court relied on Sheville's unsubstantiated allegations and arguments instead of the factual evidence presented to it in reaching its decision. Moreover, the trial court failed to make any findings on Sheville's unfounded allegations.

Based on the lack of evidence in the record, the utter lack of any factual findings, and the trial court's erroneous determination that Holman's claims were without merit, "it is [not] reasonable [for this Court] to assume the [trial] court made any such findings." Id. This conclusion is further bolstered by the trial court's failure to conduct any "meaningful evaluation" of Sheville's fee request, and the trial court's willingness to award Sheville costs not authorized by statute and submitted forty one (41) days after entry of the trial court's judgment, all of which were clearly erroneous and punitive in nature.

Finally, the trial court in Valcarce at least provided some basis for finding bad faith. Specifically, the Court noted the trial court's finding that the appellants "acted with the intent to

harass and to increase litigation costs was sufficiently specific.” Id. Here, Holman is left to guess and wonder what “actions” and “activities” she may have undertaken that the trial court could have perceived were in bad faith. R. at 338. There is no evidence that remotely establishes or even suggests that Holman facilitated, participated in, or encouraged the filing of the protective order, or in Mr. Sheville’s marriage. The sum and substance of Holman’s testimony was essentially that she sent Mr. Sheville money, cared for him, introduced him to Betty Quigley (Mr. Sheville’s ex-wife), and that she believed Mr. Sheville felt “safe staying with her” and “loved” the “home environment.” Such testimony cannot be the basis for a finding of bad faith. Accordingly, the trial court’s determination that Holman acted in bad faith is clearly erroneous and should be reversed.

II. THE TRIAL COURT ERRED IN AWARDING SHEVILLE HER COSTS.

The trial court’s Minute Entry and its Order both indicate the trial court awarded Sheville her costs based upon Holman’s “bad faith claim” and her “actions”; therefore, reasonably suggesting the trial court awarded both fees and costs under Utah Code Ann. § 78-27-56. R. at 338-339, 342-343. As explained in Holman’s original brief, an award of costs under Section 78-27-56, is plainly in error as the Section refers “only to attorney fees, with no mention of ‘costs’ recoverable under the statute.” Valcarce, 961 P.2d at 318. Accordingly, under *any* standard of review, the trial court plainly erred in awarding Sheville costs under Section 78-27-56.

A. Utah Code Ann. § 75-1-310 Plainly Does Not Apply.

Sheville concedes that her costs are not recoverable under section 78-27-56, and in an attempt to avoid the same and Rule 54(d)’s stringent requirements, see Utah R. Civ. P. 54(d)

(stating a prevailing party's memorandum of costs must be filed within five days of judgment), Sheville attempts to argue the trial court awarded her costs under Utah Code Ann. § 75-1-310. See Appellee's Opposition Brief at 27. Sheville is mistaken. Section 75-1-310 states: "*When not otherwise prescribed in this code*, the court . . . *may*, in its discretion, order costs to be paid by any party to the proceedings or out of the assets of the estate as justice may require." Id. (emphasis added). Initially, Sheville's contention wholly lacks any support in the record, the trial court's Minute Entry, or its Order. Simply put, nowhere in any of the aforementioned is Section 75-1-310 mentioned. Further, Sheville offers no authority whatsoever to support her contention that Section 75-1-310 applies to the present matter, particularly in light of the fact that "as a matter of course" the trial court "shall" award Sheville her costs as the prevailing party in the litigation. Utah R. Civ. P. 54(d).

Indeed, Section 75-1-310's plain and narrowly drawn language clearly shows that the Section does not apply to the present matter. Section 75-1-310 provides that a court "*may*" award costs under this provision "[w]hen [such an award is] not otherwise prescribed in this code." Id. The "code" clearly prescribes an award of costs in this matter. Rule 54(d) of the Utah Rules of Civil Procedure expressly and unequivocally states that Sheville "shall be allowed [her costs] as of course" as the prevailing party. Id. The express language of Rule 54(d) and its mandate that costs "shall" be awarded, as well as Rule 54(d)'s plain applicability to the present matter, make Section 75-1-310 wholly inapplicable and unnecessary. By its own restrictive terms, Section 75-1-310 "stands down" when *any* other provision provides for an award of costs, which Rule 54(d) clearly does. Further, where a trial court's order is silent as to the basis for its award of costs or vaguely awards "costs along with fees," the Utah Supreme Court has

interpreted that "reference to the *generally understood meaning of costs in [R]ule 54(d) and to the fact that the prevailing party is to recover them as of course.* Valcarce, 961 P.2d at 318 (emphasis added). Section 75-1-310 is simply not applicable to the present matter.

Assuming *arguendo* the trial court did in fact award Sheville her costs under Section 75-1-310, Sheville is not relieved of her obligation, under Rule 54(d)(2), to file a verified memorandum of costs within five days after entry of judgment. The plain and unequivocal language of Rule 54(d)(2) states a "party who claims his costs" must within the five-day period file the aforementioned memorandum, and makes no distinction as to the particular type of proceeding. Utah R. Civ. P. 54(d)(2). While not controlling, In re Lande, 983 P.2d 316 (Mont. 1999) is nonetheless persuasive authority on the issue.

In Lande, the decedent's personal representatives successfully defeated a challenge to decedent's executed will. See id. at 317. The personal representatives claimed costs on behalf of the decedent's estate, and filed their memorandum or "bill" for the same more than five days after "notice of the court's decision." Id. The challengers to the will ("Contestants") resisted the trial court's award of costs due to, among other things, the personal representatives' failure to timely file their "bill of costs." Id. The trial court rejected the Contestants' argument concluding that Montana Code Ann. § 25-10-501, which mandates that a claim for costs be filed within five days, did not apply to the probate action. See id. Rather, the trial court determined that Montana Code Ann. § 72-12-206 (the "Probate Statute"), a probate statute that awards costs to a party who successfully defends the validity of a will, controlled because it was "a specific statute relating to probate actions." Id. at 319.

On appeal, the Montana Supreme Court reversed the trial court's award of costs as untimely. See id. at 319-20. The Court concluded that despite the trial court awarding costs under the Probate Statute, the five-day period required under Section 25-10-501 nevertheless applied. See id. The Court explained that Section 25-10-501 is titled "Claiming Costs," and that by its caption and the terms therein the statute provides for the "means and manner in which costs are claimed." Id. at 319. The Court determined that a prevailing party who "claims his costs" is required to adhere to the five-day period, and that "[t]he language of the statute is plain and unequivocal *in encompassing all claims for costs.*" Id. (emphasis added) (citation omitted). The Court then explained that by carrying the trial court's analysis to its "logical conclusion, all costs allowed as matter of course . . . would be exempt from the [five-day] time requirement and the exceptions would swallow the clear five-day requirement." Id. at 319-20.

The Court's reasoning and analysis in Lande equally apply to an award of costs under Utah Code Ann. 75-1-310. Indeed, the Montana Supreme Court's reasoning and analysis are even more applicable in light of the fact that Rule 54(d)(2), unlike the Montana Code Ann. § 25-10-501, makes no mention whatsoever of a "prevailing party," but plainly and unequivocally states that "[t]he party who claims costs must within five days after entry of judgment" file a verified memorandum of costs. Utah R. Civ. P. 54(d)(2). Moreover, Section 75-1-310 specifically cross-references to Rule 54(d). See Utah Code Ann. § 75-1-310 (Cross-References). The conclusion is inescapable that a claim for costs under Section 75-1-310 must comport with Rule 54(d)(2)'s five-day filing requirement. Accordingly, as Sheville filed her memorandum *forty-one* (41) days after the trial court's entry of judgment, the trial court's award of costs must be reversed.

B. Rule 54(d)(2) Mandates That The Trial Court's Award Of Costs Be Reversed.

Assuming this Court follows the Utah Supreme Court's reasoning and conclusion in Valcarce that the trial court's reference to costs in its Minute Entry and Order is a "reference to the generally understood meaning of 'costs' in [R]ule 54(d)(1), the trial court's award of costs must be reversed. Valcarce, 961 P.2d at 318. Sheville argues that Holman failed to preserve this argument, Holman disagrees. See Holman's Original Brief at 13. Regardless, under either a correctness or plain error standard of review, the obviousness and magnitude of the trial court's error warrants reversal. See Classic Cabinets, Inc. v. All Am. Life Insur. Co., 978 P.2d 465, 469 (Utah Ct. App. 1999) (holding a party may prevail under a plain error analysis on appeal where party failed to object to an award of attorney fees below).

It is well-established in a multiplicity of opinions in both the Utah Court of Appeals and the Utah Supreme Court, that a party's failure to file a verified memorandum of costs within five days of the trial court's entry of judgment is fatal to that party's claim for costs. See Highland Const. Co. v. Union Pac. R.R., 683 P.2d 1042, 1052 (Utah 1984) (party failing to file memorandum of costs within five-day period not entitled to an award of costs); Valcarce v. Fitzgerald, 961 P.2d 305 (Utah 1998) (same); Lyon v. Burton, 2000 UT 19, 5 P.3d 616 (same). Indeed, the Utah Supreme Court has expressly stated that the "mandatory language [of Rule 54(d)(2)] leaves no discretion to the court; and therefore, we review this decision for correctness without deference to the trial court's conclusion." Lyon, 2000 UT 19 at ¶76.

Here, Sheville was not even close to meeting the five-day requirement, filing her memorandum of costs forty one (41) days after the trial court entered its judgment. As such,

under a correctness standard of review Sheville's award of costs must be reversed. See id. The result is the same under a plain error analysis. The conclusion that the trial court erred in awarding Sheville costs under Rule 54(d)(2), forty-one (41) days after the entry of judgment is indisputable. See Utah R. Civ. P. 54(d)(2); see Classic Cabinets, 978 P.2d at 469 (stating to prevail under plain error analysis an error must have occurred). Because reviewing and awarding costs is both commonplace and a regular part of a trial court's daily routine, it should have been patently obvious to the trial court that Sheville's memorandum was fatally overdue. See id. (stating the error must have been apparent to the trial court). This Court's reasoning in Classic Cabinets, wherein it reversed a trial court's award of attorney fees for failing to articulate a basis for awarding those fees, is equally applicable to the present matter. This Court stated that "[b]ecause this is a well-established rule [referring to the rule concerning attorney fees], the trial court should have been aware, even absent an objection, that it was error to award the fees to [the plaintiff]." Id. at ¶15. The same reasoning applies in the present matter. As stated above, it should have been patently obvious to the trial court that Sheville's memorandum was untimely. Finally, the trial court's error plainly was harmful to Holman in that the trial court awarded Sheville nearly \$40,000 in costs and Holman has been forced to incur additional costs and fees appealing the same. Accordingly, under either a correctness or plain error standard of review the trial court's award of fees must be reversed.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING SHEVILLE NEARLY \$40,000 IN COSTS.

As stated above, Sheville's claim for costs was untimely, and therefore the trial court's award of costs warrants reversal. However, should this Court determine that an award of costs is

warranted, a review of the trial court's award plainly shows the trial court abused its discretion by awarding Sheville her costs for everything from hotel accommodations (including, but not limited to *pay-per-view movie* charges and room service charges) to Sheville's costs incurred hiring a private detective agency. Simply put, recoverable costs are "those fees which are *required* to be paid to the court and to witnesses, and which the statutes authorize to be included in the judgment." Frampton v. Wilson, 605 P.2d 771, 774 (Utah 1980) (emphasis added). Further, the trial court has a *duty* to guard against any excesses or abuses in the taxing of [costs]." Id. (citation omitted and emphasis added). Plainly, the trial court breached that duty and abused its discretion by awarding Sheville costs not provided for by statute.

In Morgan v. Morgan, 795 P.2d 684 (Utah Ct. App. 1990), this Court reversed a trial court's award of costs that included, among other things, *a business meal, local travel* expenses, copying, word processing, litigation support, and "miscellaneous search." Id. at 687 n4 (emphasis added).³ This Court explained that the aforementioned "miscellaneous costs" were "not provided for by statute," and therefore "not properly taxable as costs." Id. at 687.

Here, the conclusion is inescapable that the costs the trial court awarded Sheville are "not provided for by statute," were not fees required to be paid to the court or to witnesses, and therefore "not properly taxable as costs." Id. Specifically, the trial court awarded Sheville approximately \$7,250.00 in hotel accommodations costs, which included approximately \$1,300.00 in room service charges, local and long distance telephone charges (*three* of those long

³This Court relied on Frampton v. Wilson, 605 P.2d 771, 774 (Utah 1980) in reaching its decision, which held that expenses for a contour model, photographs, and certified copies were not taxable costs.

distance calls alone totaled over \$200.00), pay-per-view movie charges, guest laundry charges, valet parking charges, and restaurant charges, all in addition to the room charges. R. at 240, 243-51. Clearly, if as in Morgan, one *business meal* is not provided for by statute and, thus, not a properly taxable cost, the aforementioned “hotel accommodations” most certainly are not properly taxable costs and the trial court abused its discretion in awarding them. See id.

Further, the trial court awarded Sheville more than \$2,000 in costs for her round-trip airfare. R. at 240. Again, in Morgan, this Court refused to award the appellee her “local traveling expenses,” because those costs were not provided for by statute. Id. Sheville’s airfare costs most certainly are not provided for by statute, and therefore the trial court abused its discretion in awarding the same. Finally, the trial court awarded Sheville nearly \$24,000 in costs associated with retaining a private detective agency. R. at 240. Such a cost is clearly not provided for by statute. Moreover, in Morgan, while obviously not the same type of “search,” this Court found that expenses incurred for a “miscellaneous search” were not properly taxable as costs because those costs were not provided for by statute. Id.

In all, Sheville’s memorandum of costs provides a myriad of costs that simply are not provided for by statute, and therefore the trial court abused its discretion in awarding them. Sheville, in attempt to justify the trial court’s abuse of discretion, contends that “guardianship cases differ significantly from general civil litigation, making the analysis in Frampton inapplicable.” Appellee Opposition Brief at 31. Further, Sheville contends that the trial court’s award of nearly \$40,000 in costs is not excessive, “but rather wholly contemplated by the distinctive nature of guardianship proceedings.” Id. Sheville utterly fails to provide any authority to support her conclusory statements. Indeed, Utah Code Ann. § 75-1-310, which

allows a trial court to award costs in probate proceedings, carves out no exception to the types of costs that are recoverable under Rule 54(d) and supporting case law, and, in fact, cross-references to Rule 54(d). The trial court abused its discretion in awarding Sheville costs not provided for by statute, and therefore the trial court's award must be reversed. As Holman set forth in her original brief, Sheville's recoverable costs are no more than \$198.00. See Holman's Brief at 17.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING SHEVILLE MORE THAN \$26,000 IN ATTORNEY FEES.

Initially, as explained above, the trial court incorrectly determined that Holman's claims were without merit, and therefore erred in awarding Sheville attorney fees under Utah Code Ann. § 78-27-56. No other basis exists for awarding Sheville attorney fees. Accordingly the trial court's excessive and punitive fee award must be reversed.

That said, Sheville contends that the trial court's fee award is both reasonable and should be upheld because, among other things, Sheville "met the documentary requirements for such an award . . . by submitting to the trial court detailed affidavits of attorney fees and costs." Appellee Opposition Brief at 34. Sheville is mistaken. As Holman explained in her original brief, "[a]n award of attorney's fees must be based on the evidence and supported by fact." Foote v. Clark, 962 P.2d 52, 55 (Utah 1998) (citation omitted). Moreover, the party seeking fees "must allocate its fee request according to its underlying claims," as well as categorize those claims according to the various parties. Id. The Utah Supreme Court has expressly held that a trial court abuses its discretion when it awards "wholesale all attorney's fees requested if they have not been allocated as to separate claims and/or parties." Id. at 57.

Here, Sheville plainly failed to “allocate [her] fee request according to [her] underlying claims.” Id. at 55. As Holman more thoroughly explained in her original brief, Sheville failed to properly allocate her fee request according to the “claims for which there is no entitlement to attorney’s fees,” or for that matter to any claims whatsoever. Id. at 55. Specifically, attorney fees for filing the Petition for Emergency Appointment as Guardian; Petition for (Permanent) Appointment as Guardian; defending the Protective Order obtained by Mr. Sheville; and the annulment of Mr. Sheville’s marriage are all fees for “claims for which there is no entitlement for attorney’s fees.” Id. Further, Sheville wholly failed to categorize her claims according to the various parties. Undeniably, Holman and Mr. Sheville separately opposed Sheville’s appointment as guardian. Further, Sheville’s counsel expended significant time and resources “undoing” and opposing actions taken by Mr. Sheville in which Holman had no part. Yet, Sheville’s fee request and her counsel’s affidavit completely fail to categorize any particular fee to either party. Accordingly, the trial court abused its discretion in awarding fees based upon a clearly deficient fee request and supporting affidavit.

Finally, before the trial court awards fees it must “conduct[] a meaningful evaluation of the amount requested.” Id. at 57. As the aforementioned facts plainly show, the trial court conducted no such evaluation. Moreover, a review of those fees submitted also suggests the trial court conducted no meaningful evaluation, but simply “rubber stamped” Sheville’s fee request. Id. For example, Sheville submitted fees of approximately \$2,100 for drafting the Petitions for Guardianship, letters for the same, acceptances of appointment, and orders. R. 260, 261, 264, and 267. This is associate time and does not include fees for the time Sheville’s lead counsel spent on the same documents. Further, these are form documents which could not reasonably

have taken 17.5 hours (at \$120 per hour) to draft. Of course, Sheville's lead counsel also billed for all of his time on these same tasks, at a significantly higher hourly rate. Sheville submitted fees for approximately \$1,500 to file an opposition to Mr. Sheville's Protective Order, which is not even included in the record. See id. at 263. Again this is associate time and does not include time spent by Sheville's lead counsel. Finally, Sheville submitted fees for approximately \$750.00, for an associate to attend two hearings. See id. at 265. Again, this does not include the time Sheville's counsel spent attending the hearings.

In all, this sampling of fees submitted and awarded by the trial court plainly shows that Sheville's fee request is blatantly unreasonable and oppressive. Further, it shows that the trial court "rubber stamp[ed] [Sheville's] fee request without separately conducting a meaningful evaluation of the amount requested," and therefore clearly abused its discretion. Id. Accordingly, the trial court's award of attorney fees should be reversed.

V. THE TRIAL COURT ERRED BY FINDING HOLMAN JOINT AND SEVERALLY LIABLE FOR SHEVILLE'S ATTORNEY FEES.

The trial court incorrectly determined that Holman and Grindstaff (but not Mr. Sheville) were joint and severally liable for Sheville's attorney fees. As stated above, Sheville's counsel expended significant time and resources "undoing" and opposing actions taken by Mr. Sheville/Grindstaff in which Holman had no part. Nevertheless, because Grindstaff is dead, Holman is must foot the bill. Such a result is plainly incorrect and contrary to law.

While Sheville mistakenly contends that the Utah Supreme Court's analysis in Foot is inapplicable to the present matter, the Court's analysis is both informative and persuasive on the

foregoing issue.⁴ In Footte, the Court undertook to review a trial court’s award of fees for a breach of contract claim. See id. at 55. In so doing, the Court explained that the contract “only authorize[d] fees to be collected for time expended in remedying a default in the purchase agreement.” Id. However, the Court noted that the fee request included “several entries” of fees unrelated to remedying the “default” by the “defaulting party.” Id. at 56. The Court concluded that it “would violate the contract to require the defaulting party to pay attorney fees accrued pursuing these [other] claims when the work done did not tangibly relate to the breach of contract claim as well. . .” Id.

This analysis applies equally as well to the facts before the Court. Holman objected to Sheville’s appointment as Mr. Sheville’s guardian and asserted a claim for appointment as the same. Should this Court determine Sheville is entitled to an award of fees against Holman, that award should be limited to those fees incurred solely to defend Sheville’s Petition and oppose Holman’s appointment. However, as it stands now, Holman is being saddled with fees for items she had nothing to do with, such as those for the annulment of Mr. Sheville’s marriage and opposing the protective order. Just as the Court held in Footte, Holman should not be required to “pay attorney fees accrued pursuing these [other] claims when the work done did not tangibly relate to” Holman’s opposition to Sheville’s appointment or her claim for appointment as the

⁴Sheville argues that Footte only applies “where the party seeking an award of fees was successful on some, but not all claims.” Appellee Opposition at 32. However, Sheville misreads Footte. In Footte, the Court explained that a party seeking fees *must* allocate its fee request according to its underlying claims, including categorizing those claims to their respective opposing parties and claims for which there is no entitlement to fees. See Footte, 962 P.2d at 55. The Court’s mandate applies to all claims for fees as does the Court’s analysis in Footte. Accordingly, Footte plainly applies to the present matter.

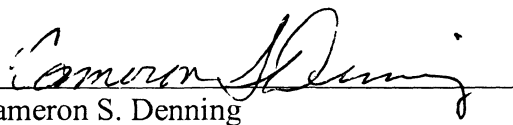
same.⁵ Accordingly, the trial court's determination that Holman should be joint and severally liable for Sheville's attorney fees should be reversed.

CONCLUSION

Holman respectfully requests this Court reverse the trial court's award of attorney fees and costs. For the reasons set forth above, the trial court plainly erred in finding Holman's claims were without merit and pursued in bad faith, necessarily warranting the trial court's award of fees be reversed. Further, the trial court clearly erred in awarding Sheville her costs despite the fact that she submitted her verified memorandum of costs forty-one days after the trial court's entry of judgment and those costs were not provided for by statute. As such, the trial court's award of fees need be reversed. For the foregoing reasons, Holman respectfully requests this Court reverse the trial court's award of costs and fees.

RESPECTFULLY SUBMITTED this 25th day of November, 2002.

HANKS, ROOKER & DENNING, P.C.


Cameron S. Denning
Attorney for Sandra Sheville Holman

⁵While the trial court indicates in its Minute Entry and Order that Holman pursued a fraudulent protective order, the record plainly fails to support this conclusion. Indeed, the trial court expressly states that the "Protective order was pretty obviously a sham. . . . *Whoever* participated in that was perpetrating a fraud on the court." R. at 413 (Trans. pg. 78) (emphasis added). No evidence was adduced by any party that Holman "participated" in the protective order.

CERTIFICATE OF MAILING

I certify that on the 25th day of November, 2002, I caused two (2) copies of the foregoing Reply Brief of Appellant to be mailed, postage prepaid, to each of the following:

Kent B. Alderman
PARSONS, BEHLE & LATIMER
P.O. Box 45898
Salt Lake City, Utah 84145

David Grindstaff (Deceased)
P.O. Box 571453
Salt Lake City, Utah 84157

A handwritten signature in cursive script, reading "Cameron Sherry", is written over a horizontal line.