

1992

American Vending Services, Inc. v. Wayne L. Morse  
and Dianne L. Morse, individually and as Trustees  
of the Wayne L. Morse and Dianne L. Morse  
Irrevocable Family Trusts v. Douglas M. Durbano  
and Kevin S. Garn : Petition for Rehearing

Utah Court of Appeals

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SET NO. 920651 IN THE UTAH COURT OF APPEALS

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American Vending Services, Inc.,

Plaintiff, Appellee,  
and Cross-Appellant,

v.

Wayne L. Morse and Dianne L. Morse,  
individually and as Trustees of the Wayne  
L. Morse and Dianne L. Morse  
Irrevocable Family Trusts,

Defendants, Appellants,  
and Cross-Appellees,

v.

Douglas M. Durbano and Kevin S. Garn,

Involuntary Plaintiffs,  
Counterclaim Defendants,  
and Appellees.

Case No. 920651-CA

District Court No. 920902364

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**PETITION FOR REHEARING**

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Appeal from the Third Judicial District Court for  
Salt Lake County, the Honorable James S. Sawaya

---

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IN THE UTAH COURT OF APPEALS

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American Vending Services, Inc.,

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Pursuant to Rule 35, Utah Rules of Appellate Procedure, appellants Wayne L. Morse and Dianne L. Morse individually and as Trustees of the Wayne L. Morse and Dianne L. Morse Irrevocable Family Trusts, file the following Petition for Rehearing.

### **ARGUMENT**

#### **THE COURT FAILED TO RULE ON POINT VI OF APPELLANTS' BRIEF REQUESTING APPELLANTS' ATTORNEY FEES ON APPEAL**

Point VI of Appellants' Brief requests appellants' attorney fees on appeal (see copy of Point VI reproduced in Addendum to this brief). The basis for such an award is the contract documents, which provide for attorney fees to the prevailing party in the event of breach.

Appellants are clearly the prevailing parties on this appeal. This Court's opinion, dated June 28, 1994, rules in appellants' favor on every other point on appeal.

This Court's opinion, however, fails to address Point VI. Accordingly, this court should amend its Opinion to state that appellants are entitled to their attorney fees incurred in this appeal.

### **CONCLUSION**

This Court should amend its opinion to address Point VI of Appellants' Brief and should rule that appellants are entitled to their attorney fees incurred on appeal.

**CERTIFICATION OF GOOD FAITH**

I certify that this Petition for Rehearing is presented in good faith and not for delay.

DATED and CERTIFIED this 11<sup>th</sup> day of July, 1994.

CORBRIDGE BAIRD & CHRISTENSEN

By: Mark J. Morrise  
Mark J. Morrise

**CERTIFICATE OF SERVICE**

I certify that on the 11<sup>th</sup> day of July, 1994, I mailed, postage prepaid, two true and correct copies of the foregoing Petition for Rehearing to each of the following:

Douglas M. Durbano  
Walter T. Merrill  
DURBANO & ASSOCIATES  
Attorneys for Appellees/  
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Robert K. Hilder  
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175 South West Temple  
Salt Lake City, Utah 84101

Mark J. Morrise  
Mark J. Morrise

## **ADDENDUM**

In short, the trial court's minute entry fails to address any of the factors which must be considered in determining attorney fees, and wholly ignores a very important factor, i.e., the difficulty of the litigation caused by the unmeritorious tactics of the plaintiffs. Therefore, the trial court's attorney fee award should be reversed, and the case remanded for a new determination of attorney fees. On remand, the trial court should consider the Trusts' revised affidavit, and should use as a guide in determining attorney fees the factors set forth above.

The plaintiffs will undoubtedly argue that the trial court acted properly in reducing the fees because the Trusts' original fee affidavit included work on issues upon which the Trusts lost at trial. Such an argument ignores the Trusts' revised fee affidavit, which eliminated all such work, leaving only work on issues upon which the Trusts prevailed at trial.

#### **POINT VI**

##### **The Trusts Should Be Awarded Their Attorney Fees on Appeal**

The basis for the Trusts' counterclaims was the Purchase Agreement, promissory note, and trust deed signed by Durbano and Garn on behalf of American Vending. See Defendant's Trial Exhibits 24, 27 and 28. Those agreements provide for attorney fees to the prevailing party in the event of breach. Therefore, if the Trusts are successful on this appeal, they should be awarded their attorney fees incurred on the appeal. E.g. Management Services Corp. v. Development Associates, 617 P.2d 406 (Utah 1980); Coloabe v. Crawford, 780 P.2d 834 (Utah App. 1989).