

2016

Goldenwest Federal Credit Union, a Utah Corporation, Plaintiff and Appellant v. Kathleen Kenworthy, Defendant and Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

<p>GOLDENWEST FEDERAL CREDIT UNION,</p> <p>Plaintiff and Appellant,</p> <p>v.</p> <p>KATHLEEN F. KENWORTHY,</p> <p>Defendant and Appellee</p>	<p>Case No. 20150397-CA</p>
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BRIEF OF THE APPELLEE

On Appeal from the Third District Court, Salt Lake County
Case No. 149905786, Judge Elizabeth Hruby Mills

SMITH KNOWLES P.C.

Dana T. Farmer

2225 Washington Blvd., Ste 200

Ogden UT 84401

Attorney for Appellant

P.A.K. LAW

Peter A. Klc

4725 S. Holladay Blvd., Ste 110

Salt Lake City UT 84117

Attorney for Appellee

(counsel for filing party)

FILED
UTAH APPELLATE COURTS

FEB 08 2016

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Salt Lake City UT 84117

Attorney for Appellee

(counsel for filing party)

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JURISDICTION

Pursuant to the Utah Rules of Appellate Procedure (“URAP”) Rule 24(a)(4), this Court has jurisdiction in accordance with Utah Code Annotated (“UCA”) § 78A-3-102(3)(j) and (4).

ISSUES PRESENTED FOR REVIEW

Pursuant to URAP Rule 24(b)(1), Appellee is dissatisfied with Appellant’s Statement of Issues. URAP Rule 24(a)(5)(A) and (B) require Appellant to provide a citation to the record showing that the issue was preserved in the trial court; or a statement of grounds for seeking review of an issue not preserved in the trial court. In the present case, Appellant’s brief fails to satisfy such requirement. Furthermore, the issues presented in Appellant’s brief do not accurately reflect those subsequently argued therein. Accordingly, the following issues are argued in Appellant’s brief:

ISSUE #1. Whether the trial court erred by neglecting to analyze the contract as an installment agreement. See Appellant’s brief Pg. 9. This issue was not preserved for appeal.

ISSUE #2. Whether the trial court erred in concluding that an oral modification to a written agreement is subject to the four-year statute of limitations. See Appellant’s brief Pg. 11. “[T]he application of a statute of limitation is a legal determination which we review for correctness, however, to the extent that the statute of limitations analysis involves subsidiary factual determinations, we review those factual determinations using a clearly erroneous standard.” *Griffin v. Cutler*, 339 P.3d 100, 103 ¶ 14 (Utah App. 2014) (internal citation omitted). A finding is clearly erroneous if it is against the clear weight

of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made. *Cal Wadsworth Const. v. City of St. George*, 898 P.2d 1372, 1378 (Utah 1995) (internal citations omitted).

ISSUE #3. Whether the trial court erred in awarding attorney fees. This issue was not preserved for appeal.

STATUTES, ORDINANCES, RULES AND REGULATIONS

Pursuant to URAP Rule 24(a)(6), the following statutes and rules are of central importance to the appeal:

Utah Rules of Civil Procedure(“URCP”) Rule 61. Harmless Error. No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is grounds for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Utah Rules of Appellate Procedure (“URAP”) Rule 33. Damages for delay or frivolous appeal; recovery of attorney’s fees.

(a) Damages for Delay of Frivolous Appeal. Except in a first appeal of right in a criminal case, if the court determines that a motion made of appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party’s attorney

(b) Definitions. For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) Procedures.

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee’s motion for summary disposition under Rule 10, as part of the appellee’s brief, or as part of a party’s response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

Utah Code Annotated ("UCA") § 78B-2-113. Effect of payment, acknowledgement, or promise to pay.

(1) An action for recovery of a debt may be brought within the applicable statute of limitations from the date:

- (a) the debt arose;
- (b) a written acknowledgment of the debt or a promise to pay is made by the debtor; or
- (c) a payment is made on the debt by the debtor.

(2) If a right or action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground for defense.

UCA § 78B-2-307 Within four years.

An action may be brought within four years:

(1) after the last charge is made or the last payment is received:

- (a) upon a contract, obligation, or liability not founded upon an instrument in writing;
- (b) on an open store account for any goods, wares, or merchandise;
- (c) on an open account for work, labor or services rendered, or materials furnished;

(2) for a claim for relief or a cause of action under the following section of Title 25, Chapter 6, Uniform Fraudulent Transfers Act:

- (a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action one year, under Section 25-6-10;
- (b) Subsection 25-6-(5)(1)(b); or
- (c) Subsection 26-6-6(1); and

(3) for relief not otherwise provided for by law.

UCA § 78B-2-309. Within six years – Mesne profits or real property – Instrument in writing.

An action may be brought within six years:

- (1) for the mesne profits of real property;
- (2) upon any contract, obligation, or liability found upon an instrument in writing, except those mentioned in section 78B-2-311; and
- (3) to recover fire suppression costs or other damages caused wildland fire.

STATEMENT OF THE CASE

Pursuant to URAP Rule 24(a)(7), the nature of the case regards the statute of limitations on an oral agreement. The course of proceedings and disposition of the court below is as follows:

1. On May 15, 2014, Goldenwest Credit Union (the “Appellant”), filed a Complaint. R.1-6.
2. On June 16, 2014, Kathleen Kenworthy (the “Appellee”), filed an Answer and Counterclaim. R.20-24.
3. On August 8, 2014, Appellee filed a Motion for Summary Judgment and supporting Memorandum. R.63-70.
4. On August 22, 2014, Appellant filed a Memorandum in Opposition. R.73-94.
5. On August 29, 2014, Appellee filed a Reply Memorandum. R.97-119.
6. On November 7, 2014, Appellant and Appellee attended oral argument on the Motion for Summary Judgment. R.282-292
7. On December 22, 2014, the trial court entered a ruling granting the Motion for Summary Judgment. R.167-174.
8. On February 24, 2015, Appellee filed an Affidavit and Request for Attorney Fees. R.175-200.
9. On April 14, 2014, the trial court entered an Order to Pay Attorney Fees. R.210-211.
10. On May 11, 2015, Appellant filed a Notice of Appeal. R.214-215.

STATEMENT OF FACTS

Pursuant to URAP Rule 24(a)(7), a statement of the facts relevant to the issues presented for review are as follows:

1. On April 24, 2006, Appellant and Appellee entered into a written loan agreement for the purchase a 2006 Nissan Frontier (“property”) secured by the property. R.4-6.
2. The written agreement contains a provision which states “when you are in default, the credit union can, without advance notice to you, require immediate payment of what you owe on the loan and take possession of the property.” R.6.
3. On May 9, 2008, Appellant claimed insurance proceeds on the property in the amount of \$17,549.60 and applied such amount to the outstanding balance under the written agreement. R.41 and Appellant’s Brief Addendum #2 Pg. 5.
4. On May 9, 2008, Appellant and Appellee orally agreed to the payment of \$200.00. R.168 and Appellant’s Brief Addendum #2 Pg. 5.
5. On May 9, 2008, Appellee paid Appellant \$200. R.168.
6. On May 9, 2008, Appellee told Appellant “best for now may be able to do more later”. Appellant’s Brief Addendum #2 Pg. 5.
7. After May 9, 2008, Appellee made no payments to Appellant. R.168.

SUMMARY OF ARGUMENTS

Appellant has failed to demonstrate trial court error. The issues raised by Appellant are either not preserved on appeal, harmless error, or supported only by Appellants own assertions to which neither the facts of this case nor Utah law support. Appellant’s claim is based on an oral agreement subject to the four-year statute of

limitations which expired prior to May 13, 2014 when Appellant filed its claim.

Therefore, Appellant's claim is barred and the trial court did not err in so ruling.

ARGUMENT

ISSUE #1. The Appellant's argument that the trial court neglected to properly analyze the loan liner contract ("contract") as an installment contract.

1. Appellant's Argument fails as it was not preserved for appeal.

The preservation rule is an essential part to our adversary system... This requires counsel to make a timely and specific objection on the record with evidence and legal authority to support it... If a party wishes to challenge on appeal the adequacy of the trial court's findings, trial counsel must first raise the objection in the trial court with sufficient clarity to alert the trial court to the alleged inadequacy... The responsibility for detecting error is on the party asserting it, not on the court... It generally would be unfair to reverse a district court for a reason presented first on appeal... Merely mentioning an issue does not preserve it... Objection at trial based on one ground... does not preserve for appeal any alternative ground for objection.

Utah Appellate Law Update Vol. 26 No. 6 Pg. 20 (internal citation omitted). In the present case, Appellant failed to argue in the trial court that the contract should be analyzed as an installment contract. While Appellant did argue that the statute of limitation did not begin to run on the contract until June 15, 2008, it did so under the premise that the entire contract was breached on that date and not just an installment. R.75 ¶ 6. Therefore, such argument was not preserved for this appeal.

Furthermore, Appellant failed to comply with URAP Rule 24(a)(5)(A) and (B). Such requires Appellant "to provide a citation to the record showing that the issue was preserved in the trial court; or a statement of grounds for seeking review of an issue not preserved in the trial court." URAP Rule 24(a)(5)(A) and (B). In the present case,

Appellant's brief does not contain the required citation or alternative statement of grounds. Therefore, such argument was not preserved on appeal.

2. *In the alternative, should this Court decide that such argument was preserved for appeal, such argument is harmless error as Appellant exercised its option to accelerate the alleged installments.* URCP Rule 61 states "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." URCP Rule 61. In the present case, the Appellant exercised its option to accelerate the alleged installments under the contract on May 9, 2008 causing the debt to arise, or in Appellant's words "performance due", on each installment before May 12, 2008 as found by the trial court. "[A]ll the acceleration clause does is accelerate the due date of future installments to the date of the exercise of the right of acceleration." See Appellant's Brief Pg. 7 (citing *Farmers Merchants Bank v. Templeton*, 646 S.W.2d 920, 923 (Tenn. App.1982)).

"[T]here must be some exercise of the option, some affirmative act showing an intent to elect to accelerate; and that the additional clause 'without demand of notice' means, simply, that the holder may exercise such option without giving to the maker any notice of such intention and without demand for payment of the unpaid balance which would thus be accelerated... such as by bringing suit thereon, or say, by entering the entire unpaid balance as immediately due and payable upon [the] books of account."

Carmichael v. Rice, 49 N.M. 114, 117 (N.M. 1945) (cited by *KLXX Inc. v. Stallion Music, Inc.*, 610 P.2d 1385 (Utah 1980). In the present case, the contract has an acceleration clause which states "when you are in default, the credit union can, *without*

advance notice to you, require immediate payment of what you owe on the loan and take possession of the property.” R.6 (emphasis added). On May 9, 2008, Appellant claimed insurance proceeds on the property in the amount of \$17,549.60 and applied such amount to the outstanding balance. R.41 and Appellant’s Brief Addendum #2 Pg. 5. Such affirmative act, despite no notice to Appellee as none was required, constitutes Appellant’s exercise of its option to accelerate any future installments, causing the debt to arise on each alleged installment before May 12, 2008 as found by the trial court. Therefore, the trial court’s alleged neglect to analyze the contract as an installment contract is harmless as the statute of limitations on each alleged installment still expired prior to May 13, 2014 when Appellant filed its claim.

3. Also in the alternative, should this Court decide that such argument was preserved for appeal and that Appellant did not exercise its option to accelerate the alleged installments, such argument is harmless error as the statute of limitations on each alleged installment still expired prior to May 13, 2014 when Appellant filed its claim.

URCP Rule 61 states “The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.” URCP 61. In the present case, the debt arose on each alleged installment of the oral agreement on or before April 15, 2010 causing the four-year statute of limitations on each alleged installment to expire no later than April 15, 2014 almost a month prior to May 13, 2014 when Appellant filed its claim. “The cause of action accrues on each installment when it becomes due and the installment begins to run from that moment on

that installment.” See Appellant’s brief Pg.7 (citing *Templeton*). In the present case, Appellants allege that Appellee owes a principle amount of \$4,614.02. R.2 ¶ 8. On May 9, 2008, the parties orally agreed to Appellee’s repayment of debt in the amount of \$200 per month. R.168 ¶ 2. The adjusted repayment term can be ascertained through calculation. See Appellant’s brief Pg. 15. Such term would require 23 months of \$200 payments to pay the principle amount ($\$4,414.02/\$200 = 23$ months), causing the debt to arise on each alleged installment by April 15, 2010 (23 months after June 15, 2008). Therefore, the trial Court’s alleged neglect to analyze the Contract as an installment contract is harmless as the four-year statute of limitations on each alleged installment still expired prior May 13, 2014 when Appellant filed its claim.

ISSUE #2. Appellant’s argument that the trial court erred in concluding that an oral modification to a written agreement is subject to four-year statute of limitations.

1. Appellant’s argument fails as Appellant had the burden of establishing that whether the oral agreement is a modification or a separate agreement is a genuine issue of material fact.

The moving party has the burden of presenting evidence to demonstrate that no genuine issue of material fact exists and that judgment as a matter of law is proper. However, once the moving party challenges an element of the nonmoving party’s case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact.

Appellant’s brief Pg. 12 (citing *Orvis v. Johnson*, 177 P.3d 600, ¶ 17 (Utah 2008)).

Material fact is defined as crucial to the determination of the issue at hand. See Black’s Law Dictionary definition of Material Fact. In the present case, Appellee argued at trial

that whether the oral agreement is a modification or a separate agreement is not a genuine issue of material fact as both are oral obligations and subject to the four-year statute of limitations. R.285. Such challenge shifted the burden to the Appellant to establish sufficient evidence of a genuine issue of material fact. However, Appellant failed to meet this burden. Although Appellant argued that whether the oral agreement is a modification or a separate agreement is a question of fact, Appellant does not argue or supply evidence that is sufficient to establish that such fact is crucial to the determination of whether to apply the six or four-year statute of limitations. R.287. Therefore, Appellant failed to meet its burden and should not now be allowed to fault the trial court.

Furthermore, the trial court supported Appellee's argument that whether the oral agreement is a modification or a separate agreement is not a genuine issue of material fact. "[W]hether [the oral agreement] was a wholly new oral agreement ... or a modification to the Original Agreement ... the result is the same." R.171. In support of its conclusion, the Court cited the Strand case stating "where a specific material term of the contract in writing is subsequently changed orally, the statute of limitations for oral contracts applies." Strand v. Union Pacific Railroad Co., 312 P.2d 561, 563 (Utah 1957). Although Appellant now attempts to distinguish the Strand case from the present one, such effort is insufficient to establish a genuine issue of fact. Therefore, Appellant fails to meet its burden and should not now be allowed to fault the trial court.

2. Appellant's argument fails as Appellant incorrectly asserts that conditions precedent to enforcement of an oral modification also distinguish such from a separate agreement.

In its brief, Appellant asserts that part performance, meeting of the minds, statute of frauds, and a narrow change in terms distinguish the oral agreement as a modification. See Appellant's brief Pg. 12 & 13. However, such elements do not distinguish the oral agreement as a modification as such elements are also elements to establish a separate oral agreement. See *Goggin v. Goggin*, 267 P.3d 885, 893 ¶ 37 (Utah 2011) (stating "it is fundamental that a *meeting of the minds* on the integral features of an agreement is essential to the formation of a contract") and *Martin v. Scholl*, 678 P.2d 274, 275 (Utah 1983) (stating "that *part performance* allows a court of equity to enforce an oral agreement, if it has been partially performed notwithstanding the *statute [of frauds]*"). The only element set forth by Appellant that is not also an element to establish a separate oral agreement is a narrow change in terms. In support of this element, Appellant cites the Fisher case, in which a change in the due date of annual payments was held to be a narrow modification, and argues that such is analogous to the change of the amount due in the present case. However, the Court in the Fisher case expressly disagrees with such analogy stating "the modification as limited to the timing of payments only. It did not change the amount due." *Fisher v. Fisher*, 907 P.2d 1172, 1177 (Utah App. 1995). Therefore, the elements set forth by Appellant do not distinguish the oral agreement as a modification.

3. Appellant's argument fails as Appellant ineptly attempts to distinguish the Strand case.

In its brief, Appellant asserts that the Strand case is inapplicable because the terms of the modification can be proven without resort to parol evidence and the oral agreement is

within the statute of frauds. See Appellant's brief Pg. 14. However, the court in the Strand case does not rely, or even mention, either of these factors in affirming "the well-established rule that actions on contracts which are partly in writing and partly oral are subject to the statute of limitations covering oral contracts" *Strand* at 563. Converse to Appellant's assertion, the Strand case is very analogous to the present case. In the Strand case, an oral agreement was entered between the parties for the purpose of adjusting the manner and time of performance (i.e. insurance, expenses, costs, completion date, capital expenditures). In the present case, an oral agreement was entered between the parties also for the purpose of adjusting the manner and time of performance (i.e. payment amount, balance due, which adjusts completion date). R.168 ¶ 2.

Moreover, the only fact distinguishing the Strand case from the present case is that the written contract in the Strand case contained a clause providing for subsequent adjustments by oral agreement. However, even with such a clause, the court in the Strand case still ruled that "the contract becomes an oral one and any claim arising under such a contract is governed by the [statute of limitations for oral contracts]" *Strand* at 564. Therefore, the Strand case is applicable and, pursuant thereto, the entire contract, both written and oral terms, are subject to the four-year statute of limitations.

4. Appellant's Argument fails as Appellant's first ipse dixit assertion is not supported by relevant law. In its brief, Appellant incorrectly asserts that:

[W]here an agreement is governed by the statute of frauds and the evidence of the terms of the agreement are sufficient to meet the requirements of the statute of frauds, the written nature of the agreement is established and the

oral nature of any evidence is not determinative of the treatment of the contract.

See Appellant's brief Pg. 15. In support of its assertion, Appellant cites *Texas W. Ry. Co. v. Gentry*, 8 S.W. 98 (Texas 1888). However, the Gentry case does not support Appellant's assertion for the following reasons: (1) the Gentry case is limited to corporate resolutions and not relevant to the present case; (2) the Gentry case is a Texas case and not binding precedent in Utah; (3) the court in the Strand case did not cite the Gentry case but *Luglan v. Tomlin*, 287 S.W.2d 188 (Tex.Civ.App.-San Antonio 1956) to support its holding that "changing some of the terms rendered the contract part oral and part written, and the four year statute of limitations applies" *Strand* at 563; (4) the Luglan case, decided 68 years after the Gentry case, more adequately reflects the current position of the Texas court. Therefore, as Appellant's assertion is not supported by relevant law, such should not be adopted by this Court nor applied to the present case.

5. *In the alternative, should this court decide to adopt Appellant's assertion, Appellant's argument fails as the oral agreement does not satisfy the statute of frauds.* "[the] standard for sufficient part performance [is]: First, the oral contract and its terms must be clear and definite; Second, the acts done in performance of the contract must equally be clear and definite; and third, the acts must be in reliance on the contract." *Martin* at 275. In the present case, the terms of the oral agreement were not clear and definite. Although Appellee paid \$200.00 on May 9, 2008, it was not clear whether payments would remain at \$200.00. See Appellant's brief Addendum #2 Pg. 5 (stating "best for now may be able

to do more later”). Also, it is not clear whether such payments were to be applied to the entire balance on the note or remaining balance after offset of insurance proceeds. See Appellant’s brief Addendum #2 Pg. 5 (stating “payment of \$17,549.60 made on 05/08/08 toward \$487.21 payment). Also, as the payment amount and the balance due are not clear and definite the payment schedule and application of interest are also not clear and definite. Therefore, even if this Court adopts Appellant’s assertion, such is not satisfied in the present case.

6. *Appellant’s argument fails as Appellant’s second ipse dixit assertion is not supported by relevant law.* In its brief, Appellant incorrectly asserts that the oral agreement is subject to 6-year statute of limitations as the terms of the alleged modification does not require parol evidence. See Appellant’s brief Pg. 15-16. In support of its assertion, and contrary to its previous argument that the Strand case is inapplicable, Appellant cites the Strand case which states “it is true that a written promise to pay without naming the amount may be construed as founded on a written instrument *where an objective standard for determining the price is provided in the instrument.*” *Strand* at 563 (emphasis added). However, such statement is separate from the rule of law relied on by the court in Strand and not relevant to the present case. In the Strand case, immediately following the statement, the court uses the disjunctive conjunction “but” to separate the statement from the following rule of law: “where a specific material term of the contract in writing is subsequently changed orally, the statute of limitations applicable to oral contracts applies.” *Strand* at 563. The Court then continues by explaining why the rule of law and

not the former statement is applicable. “[S]ince the written contract contained a precise payment schedule, a definite date for completion, and no promise to pay for depreciation or capital outlays, the later oral modification of these certain terms superseded and replaced those written.” *Strand* at 563. Similarly, in the present case, the written contract contained a precise payment schedule and a definite date for completion. R.4. The later oral agreement superseded and replaced the written terms, making the rule of law, and not the former statement, applicable to the present case. Therefore, as Appellant’s assertion is not supported by relevant law, such should not be adopted by this Court nor applied to the present case.

Furthermore, the statement cited in the Strand case has been applied only when an objective standard for determining the price was provided in the written contract. See Lyons v. Moise, 183 S.W.2d 493 (Ky.App. 1944) (“Moise expressly agreed to reimburse Lyons for any advancements made him”) and Rawleigh Co. v. Graham, 103 P.2d 1076 (Wash. 1940) (“the writing contained a promise to pay and furnishes an objective standard for the ascertainment of any amount due thereunder”). In the present case, the written contract does not contain an objective standard for determining the price. R.4-6. The lack of such objective standard makes the statement inapplicable. Therefore, as Appellant’s assertion is not supported by relevant law, such should not be adopted by this court nor applied to the present case.

7. In the alternative should this Court decide to apply Appellant assertion, Appellant’s argument fails as the terms of the oral agreement require parol evidence. Parol evidence

is defined as “testimony provided by any witness in court.” See Black’s Law Dictionary definition of Parol Evidence. In the present case, the terms of the alleged modification require testimony provided by a witness. Such testimony is required to establish: (1) the amount of the payment; (2) the balance on the note; (3) and the payment schedule, and (4) application of interest. See Appellant’s brief Addendum #2 Pg. 5 (stating “best for now may be able to do more later” and “payment of 17,549.60 made on 05/08/08 toward \$487.21 payment). Therefore, even if this Court applies Appellant’s assertion, such is not satisfied in the present case.

ISSUE #3. Appellant’s argument that the award of attorney fees be reversed.

1. Appellant’s argument fails as it was not preserved on appeal.

The preservation rule is an essential part to our adversary system... This requires counsel to make a timely and specific objection on the record with evidence and legal authority to support it... If a party wishes to challenge on appeal the adequacy of the trial court’s findings, trial counsel must first raise the objection in the trial court with sufficient clarity to alert the trial court to the alleged inadequacy... the responsibility for detecting error is on the party asserting it, not on the court... it generally would be unfair to reverse a district court for a reason presented first on appeal... merely mentioning an issue does not preserve it... objection at trial based on one ground... does not preserve for appeal any alternative ground for objection.

Utah Appellate Law Update Vol. 26 No. 6 Pg. 20. In the present case, Appellant failed to object to Appellee’s Motion for an Award of Attorney Fees. See Appellant’s brief Pg. 4. Therefore, such argument was not preserved for this appeal.

2. Appellant’s requests that the issue of expenses including attorney fees for this appeal be evaluated by the trial court when the final order is entered fails. “When a party who

received attorney fees below... prevails on appeal, the party is also entitled to reasonably attorney fees incurred on appeal.” *Valcarce v. Fitzgerald*, 961 P.2d 30 (Utah 1988). In the present case, the Appellee received attorney fees in the trial court. R. 210 – 211.

Therefore, should Appellee prevail on this appeal, this Court should award Appellee its attorney fees on appeal.

3. *Appellee is entitled to attorney fees on appeal and damages.* “Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.” URAP Rule 24(k). We agree that Defendant’s brief wholly fails to comply with Rule 24(a) of the Utah Rules of Appellate Procedure and must be stricken. *State v. Smith*, 238 P.3d 1103 (Utah App. 2010). The brief of the appellant shall contain under appropriate headings and in the order indicated ... citation to the record showing that the issue was preserved in the trial court; or a statement of grounds for seeking review of an issue not preserved in the trial court.” Rule 24(a)(5)(A) and (B). In the present case, Appellant’s brief fails to satisfy such requirement. Therefore, Appellant’s brief should be stricken and this Court should award Appellee its attorney fees on appeal.

Furthermore, this Court should award Appellee its attorney fees and damages.

URAP Rule 33 states:

... if the court determines that a ... appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include, single or double costs, and/or reasonable attorney fees, to the prevailing party ... for purposes of these rules, a frivolous appeal ... is one that is not

grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law.

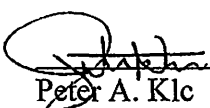
URAP Rule 33. Sanctions are appropriate for appeals obviously without merit, without reasonable likelihood of success, and which result in the delay of a proper judgment.” *Redd v. Hill*, 304 P.3d 861 (Utah 2013). A frivolous appeal is defined as one in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed. *Hunt v. Hunt*, 785 P.2d 414, 416 (Utah 1990). In the present case, Appellant’s brief raised three issues each of which was either not preserved, harmless error, or supported only by Appellants own ipse dixit assertions to which neither the facts of the case nor Utah law support. Therefore, this Court should award Appellee its attorney fees and damages.

CONCLUSION

As set forth herein, Appellant has failed to demonstrate trial court error. Therefore, Appellee respectfully requests that this Court affirm the trial court ruling and award the Appellee attorney fees on appeal and damages pursuant to URAP 33.

DATED this 8th day of February 2016,

Peter A. Klc and Associates, PLLC


Peter A. Klc

CERTIFICATE OF SERVICE

I hereby Certify that two (2) true and correct copies and one (1) searchable CD of the foregoing BRIEF OF APPELLEE were mailed by first class mail with postage fully prepaid to the following:

Dana T. Farmer
SMITH KNOWLES P.C.
2225 Washington Blvd., Ste 200
Ogden UT 84401
Attorney for Appellant

DATED this 8th day of February 2016,

Peter A. Klc and Associates, PLLC


Peter A. Klc

ADDENDUM

Pursuant to URAP Rule 24(a)(11), no addendum is necessary as Appellee as referred to the addendum of Appellant in accordance with URAP Rule 24(b)(2).

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 24(f)(1)(C), I hereby certify that Appellee's Brief complies with the type-volume limitation. I have relied on the word count of the word processing system used to prepare the brief to determine that the brief contain 6224 words.

DATED this 8th day of February 2016,

Peter A. Klc and Associates, PLLC


Peter A. Klc