

1985

**K.J. Scharf, dba Western Leasing v. BMG Corporation, Vernon R. Erickson, Michael R. Erickson, and Bruce v. Erickson :
Respondent's Petition For Rehearing and Supporting Brief**

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IN THE SUPREME COURT OF THE STATE OF UTAH

K. J. SCHARF, dba WESTERN)
LEASING)

Plaintiff-Respondent,)

vs.)

BMG CORPORATION, VERNON R.)
ERICKSON, MICHAEL R. ERICKSON,)
and BRUCE V. ERICKSON,)

Defendants.)

VERNON R. ERICKSON,)

Defendant-Appellant.)

Case No. 18963

RESPONDENT'S PETITION FOR REHEARING AND SUPPORTING BRIEF

Appeal from A Decision of the Third
Judicial District Court of Salt Lake County
Honorable David B. Dee, Judge

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Plaintiff-Respondent,) Case No. 18963
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VERNON R. ERICKSON,)
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IN THE SUPREME COURT OF THE STATE OF UTAH

K. J. SCHARF, dba WESTERN LEASING)	
)	Case No. 18963
Plaintiff-Respondent,)	
)	
vs.)	
)	
BMC CORPORATION, VERNON R. ERICKSON, MICHAEL R. ERICKSON, and BRUCE V. ERICKSON,)	
)	
Defendants.)	
_____)	
VERNON R. ERICKSON,)	
)	
Defendant-Appellant.)	
_____)	

RESPONDENT'S PETITION FOR REHEARING AND SUPPORTING BRIEF

PETITION FOR REHEARING

K. J. Scharf, dba Western Leasing, plaintiff-respondent, respectfully petitions the court for a rehearing on the ground that the court, in affirming the judgment, failed to order a remand for determination of attorney's fees to be assessed against defendant in connection with appeal to this court.

SUPPORTING BRIEF

NATURE OF CASE

This is an action to recover a deficiency judgment after repossession and sale of leased equipment. The trial court awarded judgment in favor of the lessor against the lessee's guarantor, Vernon R. Erickson.

STATEMENT OF FACTS

The brief of plaintiff-respondent, in the section entitled "Relief Sought on Appeal," stated:

Respondent seeks affirmance of the judgment, and the award of an attorney's fee for services in connection with the appeal.

This court affirmed the judgment of the trial court in favor of plaintiff-respondent, but in the opinion made no mention of attorney's fees to be awarded to plaintiff-respondent.

Paragraph 22 of each of the two leases involved in this appeal provided as follows:

LESSOR'S EXPENSES. Lessee shall pay lessor all costs and expenses, including reasonable attorney's fees, the fees of collection and agency, and other expenses such as telephone and telegraph charges incurred by lessor in enforcing any of the terms, conditions or provisions hereof.

ARGUMENT

Prior to 1980, this court had held that attorney's fees on appeal would be granted in the discretion of the court, and then only where permitted by statute or rule of court. Swain v. Salt Lake Real Estate and Investment Co., 3 Utah 2d. 121, 279 P.2d 709 (1955); and Downey State Bank v. Major Blakeney Corp., 556 P.2d 1273 (Utah 1976).

In Management Services Corp. v. Development Associates, 617 P.2d 406, 409 (Utah 1980), the court was asked to and did modify the previous rule, saying:

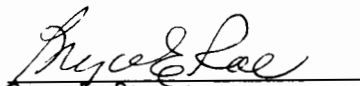
The parties here agreed to pay reasonable attorney's fees if it became necessary to enforce the contract. If plaintiff is required to defend its position on appeal at its own expense, plaintiff's rights under the contract are thereby diminished. We, therefore, adopt the rule of law that a provision for payment of attorney's fees in a contract includes attorney's fees incurred by the prevailing party on appeal as well as at trial, if the action is brought to enforce the contract, and overrule Swain and Downey State Bank on this point insofar as they may be to the contrary.

See also, Rosenlof v. Sullivan, 676 P.2d 372, 376 (Utah 1983), and cases cited therein.

CONCLUSION

Inasmuch as the leases involved in this appeal provided for an award of attorney's fees to plaintiff-respondent, the trial court awarded attorney's fees, and plaintiff requested attorney's fees in her brief on appeal, a rehearing should be granted and the opinion modified to provide that the case shall be remanded to the district court for determination of a reasonable attorney's fee to be awarded to plaintiff-respondent in connection with the appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 30 day of April, 1985, I served the foregoing Petition for Rehearing and Supporting Brief upon Roy G. Haslam, attorney for Appellant, by depositing four copies thereof in the United States mail, postage prepaid, addressed as follows:

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