

2003

Larry Briggs v. Valley Spas, Inc.; Salt Lake Valley Spas, Inc.; Lowell Brown; Valley Spa I, Inc. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

Larry Briggs,

Plaintiff & Appellant,

v.

Valley Spas, Inc.; Salt Lake Valley Spas,
Inc.; Lowell Brown; Valley Spa I, Inc.,

Defendants & Appellees

APPEAL

Case no. 20030829-CA

REPLY BRIEF OF APPELLANTS

Larry Briggs appeals the decision of
Stephen Henriod
Third District Court

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ARGUMENT

Defendants admit that they took Mr. Briggs' money and never delivered the goods, and this fact has forced Briggs to litigate just to get his money back. In their Brief of Appellees (“Opp’n Br.”), Defendants have misrepresented the applicable law and Mr. Briggs’ legal arguments. Defendants have further taken unwarranted liberties with the facts in evidence and the record, including such whoppers as “Mr. Briggs knew that his \$70,000 damages claim was meritless.” (Opp’n Br. at 34) Needless to say, Mr. Briggs has consistently denied ever knowing that his claim was meritless and Defendants have admitted his claim had at least \$8,939.19 worth of merit (Opp’n Br. at 30). In addition, Defendants admit that there are material facts in dispute. Finally, Defendants rely (perhaps unintentionally) on case law that supports Mr. Briggs’ position that summary judgment was improperly granted.¹

Rebutting every falsehood, mischaracterization, and errant legal citation in Defendants’ brief would be needlessly burdensome for both Mr. Briggs and this Court, so this Reply Brief addresses the errors and admissions that directly affect the summary judgments at issue in this appeal.

I. INTRODUCTION

Despite a raft of disputed facts, the Third District Court granted two summary

¹ See below for our discussion regarding Defendants’ reasonable time inference, construction against the drafter, and materiality arguments – each of which raises

judgments against Mr. Briggs. Since the only issues on appeal involve summary judgment, this Court addresses only two questions: 1. are there genuine disputes regarding material facts, and 2. did the District Court correctly apply the law? *See Thornock v. Cook*, 604 P.2d 934, 936 (Utah 1979) (“Our inquiry on review is whether there is any genuine issue as to any material fact, and if there is not, whether the plaintiffs are entitled to judgment as a matter of law.”) This Court reviews the District Court’s judgment for correctness.

The first summary judgment dismissed Mr. Briggs' entire complaint (Record on appeal (“R.”) at 375; addendum to Brief of Appellant (“Addendum”) tab 6). The second granted Defendants’ counterclaim for attorney’s fees (R. at 866; Addendum tab 7).

II. DEFENDANTS INCORRECTLY STATE THE STANDARD OF REVIEW

Before addressing Defendants’ arguments on the substance of this appeal, we must address their inappropriate standard of review and marshaling arguments. Throughout their brief, Defendants wrongly claim that the District Court’s ruling requires Mr. Briggs to “marshal the evidence” supporting the District Court’s purported factual finding that Mr. Briggs filed this case in bad faith (*see, e.g.*, Opp’n Br. at 3, 29-30, 38, 39, 40). Defendants further claim that the District Court’s purported factual finding that Mr. Briggs asserted his claims in bad faith is to be reviewed “under a clearly erroneous

questions for the finder of fact to decide.

standard.” (*Id.*)

Summary judgment does not resolve factual disputes; the District Court erred by making a finding at all. Whether the District Court’s finding was right or wrong is immaterial to this appeal – the issue is whether the District Court could make any finding of fact on summary judgment. Defendants’ burdensome and inaccurate argument focusing on the correctness of the finding is immaterial and does not assist this Court on appeal.

A. Appellant does not need to marshal the facts in an appeal of summary judgment

Utah law directly contradicts Defendants’ claim that Mr. Briggs must marshal the evidence in a summary judgment appeal.

When appealing a district court’s grant of summary judgment, however, the appellant has no obligation to marshal the evidence. ... At the summary judgment stage, the district court is not concerned about the sufficiency of any evidence because it does not resolve any factual disputes. Therefore, the defendants’ marshaling argument was inappropriate.

Smith v. Four Corners Mental Health Center, Inc., 2003 UT 23, ¶16 n.6, 70 P.3d 904

(citation omitted). Defendants’ effort to throw a monkey wrench into Mr. Briggs’ appeal is just as inappropriate as it was for the defendants in *Smith*.

B. Correctness is appropriate standard of review

The recent case, *In re Discipline of Sonnenreich*, 2004 UT 3, 86 P.3d 712 provides a lot of guidance for the issues in this appeal. Defendants, however, wrongly rely on it for their assertion that the proper standard of review is “clearly erroneous” (*see, e.g.*, Opp’n Br. at 3, ¶¶8&9). What Defendants do not tell this Court is that, in *Sonnenreich*, the trial

court dismissed the complaint by summary judgment, but did not grant attorney's fees until a separate motion was made and heard: "Following this dismissal, Sonnenreich filed a motion for attorney fees pursuant to section 78-27-56 of the Utah Code." *Sonnenreich*, *supra*, ¶10. This distinguishes *Sonnenreich* from the current case, where the District Court awarded attorney's fees in summary judgment, and therefore summary judgment standards apply.

Summary judgment, as the Utah Supreme Court has said, "presents for review only conclusions of law because, by definition, cases decided on summary judgment do not resolve factual disputes. We therefore accord no deference to a trial court's legal conclusions given to support the grant of summary judgment, but review them for correctness." *Schurtz v. BMW of North America, Inc.*, 814 P.2d 1108, 1111-1112 (Utah 1991)(citations omitted).

Bad faith, in the context of attorney's fees, is a question of fact to be decided by the trier of fact: "The issue of bad faith ... is a question of fact to be ascertained by the finder of fact." *Broadwater v. Old Republic Sur.*, 854 P.2d 527, 534 n.3 (Utah 1993). Even regarding the award of attorney's fees in summary judgment, the District Court cannot make findings of fact because summary judgment does not resolve factual disputes. Therefore, the fact of bad faith *must be undisputed*: "Although it may be unusual for the facts concerning attorney fees to be undisputed, the rule is no different where the subject of the summary judgment is a claim for attorney fees." *Taylor v. Estate of Taylor*, 770

P.2d 163, 168 (Utah App. 1989).

III. DEFENDANTS' "REASONABLE TIME" ARGUMENT CREATES A QUESTION OF FACT, INVALIDATING SUMMARY JUDGMENT

In his Nov. 9, 1999 letter (Briggs Offer), Mr. Briggs tells Defendants that they have until Nov. 20, 1999 to get back with him and totally resolve this matter. (R. at 184; Addendum tab 2) Defendants argue that Mr. Briggs was simply seeking a phone call by Nov. 20, 1999 (Opp'n Br. at 18-19). Mr. Briggs has testified by affidavit that he demanded performance by Nov. 20, 1999 (R. at 209, ¶15; Addendum tab 4).

On pages 14-15 of their brief, Defendants argue that the District Court can imply a "reasonableness" term to resolve the time for performance ambiguity in Briggs Offer. In support of this proposition, Defendants cite *Coulter & Smith, Ltd. v. Russell*, 966 P.2d 852 (Utah 1998). However, *Coulter* is fatal to Defendants' argument.

Coulter revolves, as does this appeal, around a grant of summary judgment. The District Court in *Coulter* granted summary judgment, ruling that an option contract was invalid because of the rule against perpetuities, and the Court of Appeals affirmed. The Utah Supreme Court reversed, saying that the time for performance in the contract was ambiguous and ruled that the "reasonable time" implication *might* avoid an unenforceable perpetuity.

The key that *Coulter* provides to this appeal is what the court says next:

What is a reasonable time under the circumstances and whether that period is less than

twenty-one years is a *factual determination beyond the scope of our review*. ... Thus, the option will be valid under the rule against perpetuities so long as a *trier of fact determines* that a reasonable time in this case is less than twenty-one years.

Coulter & Smith, Ltd. v. Russell, 966 P.2d 852, 858-859 (Utah 1998)(emphasis added).

Coulter thus explains that, while the court can imply a reasonable time for performance if the contract on its face is ambiguous, what that reasonable time would be is a question of fact and precludes summary judgment (as it did in *Coulter*).

IV. CONSTRUCTION AGAINST THE DRAFTER RULE UNAVAILABLE IN SUMMARY JUDGMENT

In a footnote, Defendants try to short-circuit the ambiguity issues by saying that the District Court could construe the ambiguities against Mr. Briggs (Opp'n Br. at 19, n.15). Defendants' attempt to apply this rule fails on two fronts simultaneously. First, ambiguity in a contract precludes summary judgment. Second, the "construed against the drafter" rule is not favored in Utah and courts will apply it only as a last resort.

Utah law holds that ambiguities prevent summary judgment where there is a dispute about them. "A motion for summary judgment may not be granted if a legal conclusion is reached that an ambiguity exists in the contract and there is a factual issue as to what the parties intended." *WebBank v. American General Annuity Service Corp.*, 2002 UT 88, ¶22, 54 P.3d 1139 (quotation marks and citation omitted). Consequently, ambiguities cannot be resolved in summary judgment.

In Utah, the rule providing for construction against the drafter is resorted to only if extrinsic evidence fails to resolve the parties' intent. In other words, it is a rule of last resort. "However, in interpreting a contract, we first look to the four corners of the agreement to determine the intent of the parties. If a contract is ambiguous, it will be construed against the drafter only if extrinsic evidence fails to clarify the intent of the parties." *Cherry v. Utah State University*, 966 P.2d 866, 869-870 (Utah App. 1998)(internal quotation marks and citations omitted). Note that *Cherry* allows for extrinsic evidence and construction rules *only after* the court has determined the contract is ambiguous. *WebBank, supra*, holds that ambiguity renders summary judgment unavailable.

Furthermore, Defendants have cited no case law for their implied proposition that such a rule of construction overrides the "all inferences viewed in a light most favorable to the nonmoving party" summary judgment rule when deciding contract ambiguity.

Defendants do cite two cases in their attempt to invoke rules of construction against Mr. Briggs,² but neither one is helpful. Defendants first cite *Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366 (Utah 1996), but that case deals with a disputed fee agreement between attorney and client, and the courts rightly hold lawyers to a higher standard of clarity in drafting when dealing with clients, and it does not

² We note, in passing, that while Defendants want Mr. Briggs' chosen language held against him, they do not seem as anxious to apply the same rule to Defendants' choice of "proposal" and "If you are in agreement..." in their response to Mr. Briggs' offer.

involve summary judgment. Defendants' second case, *Coulter & Smith, Ltd. v. Russell*, 966 P.2d 852 (Utah 1998), applies a principle of interpretation, in the rule against perpetuities, which prefers to avoid invalidation: "Furthermore, where two different constructions of an instrument are possible, and only one of them results in an interest violative of the rule [against perpetuities], the interpretation favoring validity should be adopted." *Id.* at 858.

Defendants again fail to inform the Court that, as discussed above, *Coulter* reversed summary judgment, holding that the ambiguities discussed presented issues for the trier of fact.

Defendants' "conduct of the parties" argument (*see e.g.*, Opp'n Br. at 23-24) raises similar extrinsic issues, and thus fails for the same reason.

V. QUESTIONS OF FACT REGARDING WHETHER THE GAZEBO DESCRIBED IN BROWN RESPONSE IS THE SAME AS THE ONE DESCRIBED IN BRIGGS OFFER PRECLUDE SUMMARY JUDGMENT

On pages 19-23 of their brief, Defendants argue that there is no difference between the gazebo Mr. Briggs demanded in Briggs Offer and the one Defendants claim to have ordered in Brown Response. They argue that color, model year, and size differences are not material. Mr. Briggs has said that the gazebo described by Defendants in Brown Response is not what he agreed to accept (R. at 489). As the party moving for summary judgment, Defendants must present undisputed facts proving that there was a meeting of

the minds on all material terms and conditions, and they have not done so. “[T]he burden of proof for showing the parties' mutual assent as to all material terms and conditions is on the party claiming that there is a contract.” *Cal Wadsworth Const. v. City of St. George*, 898 P.2d 1372, 1376 (Utah 1995). These differences, along with the conditional language used by Defendants in Brown Response asking for Mr. Briggs agreement, make Brown Response a counter-offer, or at least present genuine, material disputed facts precluding summary judgment.

VI. MR. BRIGGS' SUIT WAS MERITORIOUS IN FACT AND LAW

“A claim is without merit if it is of little weight or importance having no basis in law or fact.” *Sonnenreich, supra*, ¶ 47 (internal quotation marks and citation omitted).

Appellant's opening brief, at 12-14 states the unrebutted facts: Mr. Briggs paid Defendants more than \$8,900, more than four years before this suit, for a specific model Cal Spas hot tub and gazebo. Defendants could not deliver when Mr. Briggs demanded delivery because they no longer carried Cal Spas products. Mr. Briggs demanded a refund or equivalent merchandise, Defendants refused. Negotiations broke down and Mr. Briggs sued.

Defendants' response to this suit was to twist a letter sent just before negotiations broke down into an “unconditional acceptance” of a previous offer to settle by Mr. Briggs (Briggs Offer, R. at 184; Addendum tab 3). Even though Defendants' Nov. 11, 1999

(Brown Response, R. at 185; Addendum tab 4) promises to pay a refund by Nov. 18, 1999 that Defendants did not pay, and even though the gazebo described in Brown Response was not as demanded in Briggs Offer, and even though Brown Response demands that Mr. Briggs agree with its terms and identifies itself as a proposal, Defendants insist that their letter was an “unconditional acceptance” of Mr. Briggs’ letter. At the District Court, this argument prevailed and the court granted summary judgment dismissing Mr. Briggs’ complaint.

This case is rife with material questions of fact: what gazebo Mr. Briggs did demand (Br. of Appellant at 19 *cf.* Opp’n Br. at 19); whether the gazebo Brown Response described was that gazebo (Br. of Appellant at 19 *cf.* Opp’n Br. at 20); whether Mr. Briggs’ demand that Defendants get back with Mr. Briggs and totally resolve this issue by November 20, 1999 was a demand just *to communicate* or a demand *to complete performance* on his offer by that date (Br. of Appellant at 19 *cf.* Opp’n Br. at 18); whether the Brown Response amounted to an unconditional acceptance despite its conditions (Br. of Appellant at 20 *cf.* Opp’n Br. at 16); whether, if there was an unconditional acceptance, Defendants were in breach by not delivering the refund and gazebo (Br. of Appellant at 33 *cf.* Opp’n Br. at 27-28).

Defendants have also impliedly admitted that Mr. Briggs’ suit had merit regarding at least the more than \$8,900 Mr. Briggs paid to Defendants (Opp’n Br. at 26).

These disputes militate against the District Court’s first grant of summary judgment

and they do not support a conclusion that Mr. Briggs' complaint was frivolous or "of little weight or importance having no basis in law or fact." *Cady v. Johnson*, 671 P.2d 149, 151 (Utah 1983).

Since lack of merit is a legal conclusion, this Court reviews the District Court's conclusion for correctness (*see, e.g., Sonnenreich, supra*), and since this conclusion was reached in summary judgment proceedings, this Court gives no deference to the trial court, viewing the undisputed facts and all reasonable inferences drawn from them in the light most favorable to Mr. Briggs (*see, e.g., Alder v. Bayer Corp., AGFA Div.*, 2002 UT 115).

When the undisputed facts are viewed in a light most favorable to Mr. Briggs, the conclusion that this suit was without merit is wrong and the District Court's judgment must be reversed.

VII. CONTRARY TO DEFENDANTS' ASSERTION, THE BAD FAITH ALLEGATION AGAINST MR. BRIGGS IS STRONGLY DISPUTED.

Defendants assert, repeatedly, that it is undisputed that Mr. Briggs filed this suit in bad faith (*see, e.g.,* Opp'n Br., at 34, ¶1, Opp'n Br., at 35, ¶5, Opp'n Br., at 5, ¶¶10-11). "[A] finding of bad faith turns on a factual determination of a party's subjective intent." (*Sonnenreich, supra*, ¶47). To demonstrate bad faith Defendants must prove one or more of the following is lacking: "(1) [a]n honest belief in the propriety of the activities in

question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will hinder, delay, or defraud others.” (*Sonnenreich, supra*, ¶48, quoting *Cady v. Johnson*, 671 P.2d 149 (Utah 1983) alteration in original).

Since Defendants have not produced a “smoking gun” (*e.g.* a competent affidavit that “Mr. Briggs told me he did not honestly believe in the propriety of this lawsuit.”) and Mr. Briggs has not filed a conclusory and obviously self-serving affidavit (*e.g.* “I honestly believe in the propriety of this lawsuit”), Defendants’ burden, as movants at summary judgment is very high; the undisputed facts must foreclose the possibility that a jury could find for Mr. Briggs on the factual question of bad faith. “We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

Defendants must show that the undisputed facts, viewed in the light most favorable to Mr. Briggs, allow for no other reasonable conclusion than Mr. Briggs’ subjective intent rose to bad faith. (“It is inappropriate for courts to weigh disputed material facts in ruling on a summary judgment. It matters not that the evidence on one side may appear to be strong or even compelling.” *Lucky Seven Rodeo Corp. v. Clark*, 755 P.2d 750, 752 (Utah App. 1988)(citation omitted)). Defendants must prove that no sworn statement of Mr. Briggs disputes the purported finding of bad faith. “One sworn statement under oath is all

that is needed to dispute the averments on the other side of the controversy and create an issue of fact, precluding the entry of summary judgment.” *Id.*

In his sworn response to Defendants’ interrogatories, Mr. Briggs gives a detailed account of his dealings with Defendants. For example, he recounts a conversation with Defendant, Lowell Brown, in which, after telling Mr. Briggs that he would not get what he had already paid for, Defendant Brown threatens that if Mr. Briggs was going to “put him in a position that were just gonna butt heads that’s fine then we butt heads, you have to do what you gotta do, I gotta do what I gotta do.” (R. at 488; errors in original). Mr. Briggs goes on to express his opinion that Defendants “had done nothing but try and cheat me from day one ... and I wasn’t going to [accept] his mystery gazebo [*i.e.* the gazebo Defendants claim to have ordered] to settle this matter. I figured the only way to stop him from doing this to me was to take him up on his offer and get an attorney.” (R. at 491). Later, “I went to [Plaintiff’s counsel, Greg Smith] and had him proceed that day.” *Id.* Thus, we see Defendants playing “hardball” with Mr. Briggs, even challenging him to “butt heads” and to get a lawyer. What we do not see in the record is undisputed evidence that conclusively shows Mr. Briggs’ alleged lack of good faith.

In fact, considering that Mr. Briggs had fully paid Defendants for a particular spa and gazebo four years earlier and Defendants dogged refusal to live up to their end of the bargain, the entirety of Mr. Briggs’ interrogatory responses (R. at 485-496) demonstrates his great patience in dealing with Defendants.

Mr. Briggs only remaining duty under that contract was to enjoy the spa and gazebo he had paid for four years earlier. Rather than deal with Mr. Briggs honestly and fairly, and give him what he what he was entitled to, Defendants chose to “butt heads.” Mr. Briggs, unable to persuade Defendants to deal with him fairly, sought his remedy in court, as Article1, § 11 of the Utah state Constitution declares he has the right to.

VIII. DEFENDANTS’ BRIEF VIOLATES UTAH RULES OF APPELLATE PROCEDURE, 24(J) AND SHOULD BE DISREGARDED

The rules are clear about the requirements of briefing to this Court:

Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. 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.”

Utah Rules of Appellate Procedure, Rule 24(j).

In what seems to be an effort to bury Mr. Briggs and the Court in an avalanche of immaterial minutiae, Defendants offer many serial citations to the record that do not serve to prove that which Defendants must prove, that the undisputed *facts* compel summary judgment. For example, *see* Opp’n Br., at 35, ¶5 where Defendants proclaim: “Mr. Briggs made repeated misrepresentations of fact to the trial court.” Defendants then cite 48 paragraphs, spanning from page 419 to page 688 in the record that “prove” this point. However, each of these citations is to memoranda, either in support of Defendants’

second motion for summary judgment, or to Mr. Briggs' memorandum in opposition.

Defendants' brief does not cite to affidavits, sworn interrogatories, or deposition testimony.

All of these burdensome citations to previous argument do nothing to prove the *facts* Defendants must prove. However, they do make a telling point as to why this litigation has lasted 4½ years.

These dizzying citations offer no undisputed material facts demonstrating conclusively that Mr. Briggs suit was meritless and Mr. Briggs subjectively brought and pursued this case in bad faith. What they do suggest is the “oft-quoted adage: If the law is against you, argue the facts; if the facts are against you, argue the law; and if they both are against you, pound the table and attack your opponent.” *U.S. v. Griffin*, 84 F.3d 912, 927 (7th Cir. 1996).

Furthermore, Defendants misrepresent the facts to this Court. For example, they cite a case holding that affidavits made on “information and belief” are insufficient to provoke a genuine dispute of fact (Opp’n Br. at 31) when Defendants know that the affidavits, which they did not object to at the District Court, are made on “personal knowledge and belief” (*Id.*) regarding matters that Mr. Briggs is competent to testify to, and therefore sufficient.

In another example, Defendants blend two paragraphs of the Briggs Offer to make it appear, falsely, that they are part of one thought. By eliminating the blank line between

the deadline paragraph and the closing paragraph (with instructions on how to reach Mr. Briggs) Defendants make it appear that the two separate paragraphs are one (i.e. “you can contact me” is a continuation of “get back to me and totally resolve”) (*see* Opp’n Br. at 18, bottom block quote). Defendants obscure this omission by including an ellipsis, but the only thing omitted is the blank line that indicates a new paragraph. That blank line makes a clear break between the deadline paragraph and the contact information paragraph. The blank line is necessary to understanding the context. Defendants' tricky omission violates their duty to present with accuracy.

IX. DEFENDANTS ADMIT THAT MR. BRIGGS RAISED GENUINE DISPUTES OPPOSING DEFENDANTS’ SECOND MOTION FOR SUMMARY JUDGMENT

“One sworn statement under oath is all that is needed to dispute the averments on the other side of the controversy and create an issue of fact, precluding the entry of summary judgment.” *Lucky Seven, supra*, at 752.

Defendants admit that Mr. Briggs raised genuine disputes to their second motion for summary judgment (Opp’n Br. at 28, 29). Defendants then argue that these disputes were not necessary to their claim, so it was acceptable for the District Court to grant summary judgment in spite of them. However, Defendants are the ones who declared that these facts were material. Defendants now try to duck the consequences by claiming that the material facts, which they admit are in dispute, are not material for Utah R. Civ. P. 56

purposes (“[T]hose disputes are immaterial within the meaning of Rule 56.” Opp’n Br. at 29). While claiming that these disputed facts are not material “within the meaning of Rule 56,” Defendants appear to forget that the motion wherein *they* certified that the facts *they* recited were material *was a Rule 56 motion*.

Defendants then, on page 29 of their brief, quote *Kesler v. Kesler*, 583 P.2d 87 (Utah 1978). *Kesler*, is not relevant to Defendants’ argument. In *Kesler*, plaintiff (defendants’ mother) sued for quiet title. Defendants alleged that their late father (plaintiff’s husband) had intended the property be passed to them in a partnership. The court found this argument to have no legal bearing on the question of title to the property, in effect saying Defendants allegations were immaterial. “The statements made by defendants in their depositions and those made by counsel in his proffer of proof do nothing to invalidate plaintiff’s title under joint tenancy.” *Id.* at 88. The court concludes, “[t]here is no issue of fact as to property ownership and the lower court’s decision is hereby affirmed.” *Id.* at 89.

The facts of this case are nothing like *Kesler*. The *Kesler* defendants did not present a cognizable defense. Mr. Briggs has a cognizable defense; that he did not bring his suit in bad faith and that it does have merit, so *Kesler* is not on point.

Defendants concede that Mr. Briggs did raise a genuine dispute about material facts, just not the right material facts. Defendants are playing a shell game with Mr. Briggs and the Court, saying in effect: guess which “undisputed material facts” are *really* material. Defendants should not be allowed to succeed in court by tossing around 87 allegations in

their motion for summary judgment -- certifying to the District Court (pursuant to Utah R. Civ. P. 11) that these allegations are undisputed *and* material -- and then, once the facts are disputed, declare that those allegations that Mr. Briggs did dispute are *not really* material.

X. DEFENDANTS DID NOT RAISE THEIR PURPORTED ALTERNATIVE BASIS FOR AFFIRMING SUMMARY JUDGMENT IN DISTRICT COURT

Defendants argue that Mr. Briggs' interrogatories provide an alternate basis for affirming summary judgment (Opp'n Br. at 11, n5). Defendants correctly point out that the District Court did not rely on the supposed oral agreement mentioned by Mr. Briggs, but Defendants fail to say that the reason the court did not rely on it was that Defendants did not raise it.

While Utah law allows for alternate bases for affirmation, it does not consider such bases if they were not raised at the District Court: "Summary judgment may be affirmed on any ground available to the trial court, even if it is one not relied on below." *Smith v. Four Corners Mental Health*, 2003 UT 23, ¶42 (quotation mark and citation omitted). "Regarding their first alternative argument, the [Appellees] admit that they did not argue this question before the district court Because we do not consider issues raised for the first time on appeal, summary judgment cannot rest on this argument." *Id.* at ¶44 (citations omitted).

Although some Utah cases prior to *Smith* allow for alternative bases not raised at the court below (*see, e.g. Bailey v. Bayles* 2002 UT 58, ¶10, 52 P.3d 1158), such an approach is unavailing here, because it leaves as many, or more, factual questions unanswered, *e.g.* what did Mr. Briggs offer? Were Defendants in breach? Was this an offer and acceptance in the legal sense? Also, the argument ignores the words directly following Defendants' purported acceptance, which say that Defendants were going to draft and send an agreement for Mr. Briggs' approval (implying that final agreement was still pending), and the next paragraph, which says that the gazebo described in the letter was not what Mr. Briggs' had offered to accept (R. at 489).

TABLE OF DISPUTED MATERIAL QUESTIONS OF FACT

In reviewing summary judgment, only two questions are pertinent: (1) are there disputed material facts? and (2) did the court below correctly apply the law? In this case, there have always been disputed material facts, and the District Court misapplied the law on both summary judgments. Defendants' brief to this Court focuses so much on these facts that the disputes become unmistakably clear.

The following table concisely and conveniently presents some of the key disputes of fact that warrant reversing the summary judgments entered, and remanding for trial on the merits.


Material Question of Fact	Defendants' position	Mr. Briggs' position	Status
Is Brown Response an unconditional acceptance of Briggs Offer?	Brown Response unconditionally accepted Briggs Offer (R. at 418, ¶5) -or- Defendants agreed to Mr. Briggs oral offer, made on November 9, 1999, and then also accepted the Briggs Offer (Opp'n Br. at 6; ¶¶ 6-7)	Mr. Briggs never agreed to accept the 1999 Cal Spas gazebo (R. at 621; also R. at 210, ¶19). -and- Brown Response did not correspond to the offer Mr. Briggs had made orally (R. at 621). -and- The final three sentences of Brown Response, asking for Mr. Briggs' agreement and identifying Brown Response as a "proposal" are not consistent with unconditional acceptance. (Brown Response, R. at 185).	<i>Disputed</i>
Is Brown Response's "unconditional acceptance" conditioned on Mr. Brigg's signature indicating acceptance?	Signature requirement simply acknowledges what is legally implicit in the settlement offer (Opp'n Br. at 12).	Brown Response's words asking for acceptance and styling itself as a proposal speak for themselves (R. at 185; Addendum tab 3).	<i>Disputed</i>

Is Defendants' acceptance of Briggs Offer demonstrated by Defendants' actions?	Defendants did order the gazebo (presumably, the one Mr. Briggs had agreed to accept) (Opp'n Br. at 14).	Mr. Briggs never agreed to accept a 1999 Cal Spas gazebo (R. at 621, R. at 210, ¶19), therefore any gazebo they might have ordered was not demonstration of acceptance. -and- Defendants have never tendered the refund they promised to pay by November 18, 1999 (R. at 561, ¶2)	<i>Disputed</i>
Is Defendants' non-acceptance proved by Defendants' failure to comply with their own terms that directed a refund to Briggs?	Defendants are silent on the point that their ostensible unconditional acceptance required them to <i>pay</i> refund by November 18, 1999.	Defendants have never tendered the refund promised by November 18, 1999 (R. at 561, ¶2)	<i>Undisputed</i>
Did Mr. Briggs demand performance by November 20, 1999?	Mr. Briggs demanded <i>acceptance</i> by November 20, 1999 (Opp'n Br., at 13). -or- Mr. Brown had <i>already accepted</i> Mr. Briggs oral offer prior to Briggs Offer (Opp'n Br., at 4, ¶6).	Refund was demanded by November 20, 1999 (R. at 563, ¶15)	<i>Disputed</i>
Did Defendants repudiate their ostensible agreement?	Defendants never repudiated ostensible agreement (R. at 518, ¶12).	Mr. Brown called off any deal (R. at 564, ¶25).	<i>Disputed</i>

CONCLUSION

For all the reasons set forth in Appellant's opening brief and reply brief, Appellant respectfully requests this Court to reverse the summary judgments and award of attorneys' fees, and remand this case to the District Court for further proceedings.

DATED this 13 day of May, 2004.

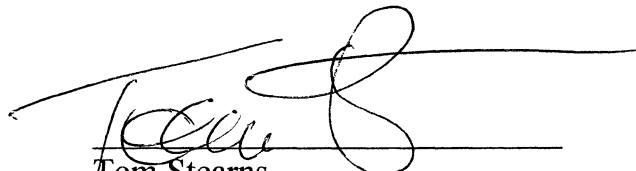


Gregory B. Smith
Attorney for Mr. Briggs

CERTIFICATE OF MAILING

I certify that on the 18 day of May, 2004, I did deliver a true and correct copy of the foregoing to the following persons, postage prepaid:

Steven E. McCowin
435 S. 1200 East
Salt Lake City, UT 84102



Tom Stearns