

2003

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

Utah Court of Appeals

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Steven E. McCowin; Attorney for Appellees.

Affordable Legal Advocates; Gregory B. Smith; Attorney for Appellant.

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)	
LARRY BRIGGS,)	
Plaintiff/Appellant)	
)	APPEAL
vs.)	
)	
VALLEY SPAS, INC.; SALT LAKE)	
VALLEY SPAS, INC.)	
Defendants;)	
)	
LOWELL BROWN;)	Case No. 20030829-CA
VALLEY SPA I, INC.)	
Defendants/Appellees)	

**APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,
HONORABLE JUDGE STEPHEN L. HENRIOD**

*Attorney for Defendants/Appellees
Lowell Brown and Valley Spa I., Inc.*

FILED
UTAH APPELLATE COURTS
MAR 15 2004

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 Plaintiff/Appellant)
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 vs.) APPEAL
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 VALLEY SPAS, INC.; SALT LAKE)
 VALLEY SPAS, INC.)
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JURISDICTIONAL STATEMENT

This appeal is within the jurisdiction of the Utah Supreme pursuant to Utah Code Ann. § 78-2-2(3)(j), and was transferred to the Utah Court of Appeals pursuant to Utah Code Ann. § 78-2-2(4).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellant/plaintiff Larry Briggs (“Mr. Briggs”) presents nine issues for review:

1. Whether the trial court correctly ruled that appellees/defendants Lowell Brown (“Mr. Brown”) and Valley Spa I, Inc. (“Valley Spa”) accepted Mr. Briggs’ settlement offer.

The Court of Appeals “review[s] the trial court’s legal conclusions for correctness, granting no deference,” and “view[s] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.” Alder v. Bayer Corp., 461 Utah Adv. Rep. 11, 14 ¶ 20 (Utah November 26, 2002).

2. Whether the trial court incorrectly resolved genuine disputes of fact material to whether or not Mr. Brown and Valley Spa accepted Mr. Briggs’ settlement offer.

Review “for correctness . . . view[ing] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.” Alder v. Bayer Corp., 461 Utah Adv. Rep. 11, 14 ¶ 20.

3. Whether the trial court ruled that Mr. Briggs had no rights whatsoever, *neither* under his original claim, *nor* under the parties’ Settlement Agreement.

Review “for correctness . . . view[ing] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.” Alder v. Bayer Corp., 461 Utah Adv. Rep. 11, 14 ¶ 20.

4. Whether the trial court ruled that the parties’ Settlement Agreement

extinguished all of Mr. Briggs' claims.

Review "for correctness . . . view[ing] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Alder v. Bayer Corp., 461 Utah Adv. Rep. 11, 14 ¶ 20.

5. Whether the trial court correctly ruled that Mr. Briggs' settlement offer was not made under duress.

Review "for correctness . . . view[ing] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Alder v. Bayer Corp., 461 Utah Adv. Rep. 11, 14 ¶ 20.

6. Whether the trial court correctly ruled that Mr. Brown and Valley Spa did not breach their obligations under the parties' Settlement Agreement.

Review "for correctness . . . view[ing] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Alder v. Bayer Corp., 461 Utah Adv. Rep. 11, 14 ¶ 20.

7. Whether the trial court incorrectly resolved genuine disputes of fact material to Mr. Brown and Valley Spa's Counterclaim for attorney's fees.

The legal conclusion that Mr. Briggs' claims were without merit is reviewed "for correctness . . . view[ing] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Alder v. Bayer Corp., 461 Utah Adv. Rep. 11, 14 ¶ 20. The factual finding that Mr. Briggs asserted his claims in bad faith is reviewed "under a clearly erroneous standard." In re Discipline of Sonnenreich, 491 Utah Adv. Rep. 15 ¶ 45 (Utah January 16, 2004). To challenge this factual ruling, Mr. Briggs is required to "marshal the evidence . . .

[and] demonstrate why, even when viewed in the light most favorable to the trial court, the evidence is insufficient to support the challenged finding.” Rohan v. Boseman, 46 P.3d 753, 759-760 (Utah App. 2002).

8. Whether the trial court correctly awarded attorney’s fees to Mr. Brown and Valley Spa pursuant to Utah Code Ann. § 78-27-56.

The legal conclusion that Mr. Briggs’ claims were without merit is reviewed “for correctness . . . view[ing] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.” Alder v. Bayer Corp., 461 Utah Adv. Rep. 11, 14 ¶ 20. The factual finding that Mr. Briggs asserted his claims in bad faith is reviewed “under a clearly erroneous standard.” In re Discipline of Sonnenreich, 491 Utah Adv. Rep. 15 ¶ 45 (Utah January 16, 2004). To challenge this factual ruling, Mr. Briggs is required to “marshal the evidence . . . [and] demonstrate why, even when viewed in the light most favorable to the trial court, the evidence is insufficient to support the challenged finding.” Rohan v. Boseman, 46 P.3d 753, 759-760 (Utah App. 2002).

9. Whether the trial court correctly exercised its equity powers to award attorney’s fees in the interest of justice.

The factual finding that Mr. Briggs asserted his claims in bad faith is reviewed “under a clearly erroneous standard.” In re Discipline of Sonnenreich, 491 Utah Adv. Rep. 15 ¶ 45 (Utah January 16, 2004). To challenge this factual ruling, Mr. Briggs is required to “marshal the evidence . . . [and] demonstrate why, even when viewed in the light most favorable to the trial court, the evidence is insufficient to support the challenged finding.” Rohan v. Boseman, 46 P.3d 753, 759-760 (Utah App. 2002).

DETERMINATIVE STATUTORY LAW

Utah Code Ann § 78-27-56(1):

In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith.

STATEMENT OF RELEVANT FACTS

1. Mr. Briggs entered into a contract with Valley Spa for the purchase of a Cal Spas hot tub and gazebo. Mr. Briggs finished paying the purchase price of \$8,939.19 on September 16, 1995. (R. at 172-73.)

2. For the next four years, Mr. Briggs made no attempt to contact Valley Spa, either to request delivery of a hot tub and spa, or to request a refund. (R. at 173.)

3. Mr. Briggs contacted Valley Spa in September of 1999, because he had heard that Valley Spa no longer regularly carried Cal Spas spas and gazebos. (Briggs' Br. at 12 ¶ 3.)

4. A dispute arose between Mr. Briggs and Valley Spa about how to satisfy Mr. Briggs' contract. (R. at 173.)

5. Mr. Briggs formulated a settlement offer "that we could both live with," and communicated it to Mr. Brown and Valley Spa, first in a telephone conversation on November 4, 1999, and then in a written letter dated November 9, 1999 (the "November 9 settlement offer"). (R. at 489; Briggs' Addendum Tab 2.)

6. Mr. Brown and Valley Spa orally accepted the November 9 settlement offer in a telephone conversation with Mr. Briggs on November 11, 1999. (R. at 489.)

7. Mr. Brown and Valley Spa repeated their acceptance in writing in a letter dated

November 11, 1999 (the “November 11 acceptance”). (Briggs’ Addendum Tab 3.)

8. Valley Spa began performing its obligations under the Settlement Agreement by ordering the gazebo specified therein. (R. at 181.)

9. Mr. Briggs filed this law suit on November 29, 1999. (R. at 1.)

10. Although Mr. Briggs’ contract with Valley Spa was worth only \$8,939.19, he asserted a damages claim of \$70,000 plus his attorney’s fees and costs of court.” (R. at 11.) Mr. Briggs knew that there was no plausible basis for this inflated damages claim. (R. at 418 ¶ 7.)

11. Although Mr. Briggs’ contract was with Valley Spa, and not with Mr. Brown personally, he asserted his \$70,000 damages claim against Mr. Brown personally. Mr. Briggs knew that there was no plausible basis for this personal claim against Mr. Brown. (R. at 418-19 ¶ 8; 541 ¶ 4; 659 ¶ 8.)

12. Although Mr. Briggs subsequently reduced his damages claim to \$12,000, he continued to demand \$15,000 to settle – \$6,000 more than he had paid Valley Spa, and \$3,000 more than his restated damages claim. (R. at 428 ¶ 56.)

13. Mr. Briggs knew that his claim against Valley Spa had been settled. (R. at 489; Briggs’ Addendum , Tabs 2 & 3.)

14. When the gazebo that Valley Spa had purchased for him arrived, Mr. Brown and Valley Spa invited Mr. Briggs to inspect it to satisfy himself that it was in fact the correct gazebo. Mr. Briggs never did so; nor did Mr. Briggs take any other discovery regarding the gazebo. (R. at 163.)

15. Mr. Briggs made repeated misrepresentations of fact to the trial court. (R. at 419 ¶¶ 9-12; 420-21 ¶¶ 17-19; 422 ¶¶ 23-24; 426 ¶¶ 40-43; 428 ¶ 54a; 429 ¶¶ 59-60; 431 ¶ 70; 432 ¶¶

73, 76; 433 ¶ 78; 434-35¶¶ 79-82; 541 ¶ 5; 542-43 ¶¶7-11; 549-550 ¶¶ 23-26; 553-54 ¶¶ 35-38; 659 ¶ 12; 660-63 ¶¶17-19; 664-665 ¶¶ 40-42, 43; 668 ¶¶ 78-79.)

16. Mr. Briggs repeatedly made frivolous legal arguments to the trial court. (R. at 431-33 ¶¶ 71-72, 74, 76-77.)

17. Mr. Briggs was pointlessly intransigent on numerous occasions. (R. at 425 ¶ 39; 426-27 ¶¶ 44-53; 428-29 ¶¶ 57-61; 429 ¶ 62; 430-31 ¶¶ 66-68, 70; 550-51 ¶¶ 27-30; 552 ¶ 32; 665-66 ¶¶ 44-53; 667 ¶ 62.)

18. On June 11, 2001, the trial court granted Mr. Brown and Valley Spa's first Motion for Summary Judgment, ruling that Mr. Brown's November 11 acceptance was an unconditional acceptance of Mr. Briggs' November 9 settlement offer, and that the resulting Settlement Agreement required the dismissal of Mr. Briggs' claims. (R. at 372-76).

19. In a Minute Entry dated July 25, 2003, and a Final Judgment entered on August 29, 2003, the trial court granted Mr. Brown and Valley Spa's second Motion for Summary Judgment, which dealt with their Counterclaim for attorney's fees. The trial court found that Mr. Briggs "knowingly and improperly asserted claims which he had previously agreed to settle," and that Mr. Briggs' claims were "without merit, and were not asserted in good faith." Ruling both under Utah Code Ann. § 78-27-57 and under its inherent equity powers, the trial court ruled that Mr. Brown and Valley Spa were entitled to recover the \$26,062.50 in attorney's fees they had been forced to incur, offset by the \$8,939.19 in value that Mr. Briggs was to have received under the Settlement Agreement. (R. at 865-69, 884-86.)

SUMMARY OF ARGUMENTS

Mr. Briggs did not make his settlement offer under duress. There is no evidence of any improper threat, nor is there evidence that he was ever left without any reasonable alternatives.

Mr. Brown and Valley Spa accepted Mr. Briggs' settlement offer, first orally in a telephone conversation on November 11, 1999, and then in a letter written the same day.

There were no genuinely disputed issues material to the question of whether the settlement offer was accepted, and the trial court therefore correctly granted summary judgment enforcing the Settlement Agreement.

The trial court did not in fact extinguish all of Mr. Briggs' rights under both the Settlement Agreement and under the parties' underlying contract.

Mr. Briggs had no "other claims" that were not resolved by the Settlement Agreement.

Mr. Brown and Valley Spa did not breach the settlement agreement. Rather, Mr. Briggs' breach of that agreement relieved them of any further duty to perform thereunder.

Mr. Briggs fails to marshal the evidence in support of the trial court's finding that he acted in bad faith. There are no genuine disputes of fact material to that issue, and much less did the trial court commit any clear error.

The trial court's judgment awarding legal fees under Utah Code Ann. § 78-27-56 is legally sufficient.

The trial court appropriately exercised its equitable powers as an independent basis on which to award attorney's fees.

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT MR. BRIGGS DID NOT OFFER TO SETTLE UNDER DURESS¹

On pages 30-32 of his brief, Mr. Briggs argues that he made his settlement offer under “duress.”² Duress requires “[1] an improper threat by another party [2] that leaves the victim no reasonable alternative,” Andreini v. Hultgren, 860 P.2d 916, 921 (Utah 1993) (quoting Restatement (Second) of Contracts § 175(1)), and must be proven by “clear and convincing evidence.” In re Adoption of B.T.D., 68 P.3d 1021, 1026 (Utah App. 2003). Far from “clear and convincing” evidence, here there is no record evidence of either element of duress.

A. There Is No Record Evidence of Any Improper Threat.

Although Mr. Briggs does not specifically identify what he contends the “improper threat” to have been, he asserts that Mr. Brown and Valley Spa

insisted that they would not honor their end of the contact . . . threatened to illegally convert [Mr. Briggs’] paid-for spa and gazebo into a virtually unusable “store credit” . . . [and threatened that he would otherwise] *get nothing*.

(Briggs’ Br. at 30-32.) Mr. Briggs cites to no record evidence that the store credit was “virtually unusable,” or that Mr. Briggs was ever told he might “get nothing.”³ Nor is there record evidence

¹Mr. Briggs makes his duress argument in the fifth section of his brief. However, because the validity of the settlement offer is logically prior to the validity of the acceptance of that offer, Mr. Brown and Valley Spa address the question of duress first.

²Mr. Briggs represents that the issue of duress was presented to the trial court on pages 188-196 of the Record. (Briggs Br. at 8.) Although Mr. Briggs asserts “duress” in those pages, the trial court noted that his argument was “confusing” and failed to “clearly set forth any of the elements” of duress. (R. at 373.)

³Mr. Brown and Valley Spa’s search of the record has not revealed any such evidence. In his affidavit to the trial court, Mr. Briggs testified that he “*felt* coerced to settle with Lowell Brown on terms that would be acceptable to him, or I would get nothing.” (Briggs’ Addendum,

that Mr. Brown or Valley Spa “insisted” on breaching the underlying contract, or threatened to “convert” a spa and gazebo into store credit. Rather, as Mr. Briggs concedes on page 12 of his brief, Valley Spa was “unable to honor” the underlying contract because it ceased carrying Cal Spas products during the four years between 1995 when Mr. Briggs paid the purchase price and 1999 when he reappeared and sought delivery.

The only evidence Mr. Briggs presented to the trial court was that Mr. Brown “refused” his request for a refund, and “told me that I had to spend my (store credit) on current merchandise on current prices.” (Briggs’ Addendum, Tab 4, ¶¶ 7-9.) Mr. Brown and Valley Spa respectfully submit that this cannot be a “wrongful threat” sufficient to show duress. Otherwise, such disputes could never be settled: If a merchant ever failed to grant a customer’s request for a full refund, but instead reached a compromised settlement agreement, that agreement would always be vitiated by “wrongful duress.” See State Bank of Southern Utah v. Troy Hygro Systems, 894 P.2d 1270, 1275 (Utah App. 1995) (“[t]he mere fact that a contract is entered into under stress or pecuniary necessity is insufficient [to constitute duress]”) (*quoting Horgan v. Industrial Design Corp.*, 657 P.2d 751, 753 (Utah 1982)).

B. There Is No Record Evidence That Mr. Briggs Lacked Reasonable Alternatives.

Mr. Briggs also cites no record evidence that offering to settle was his only “reasonable alternative.” 860 P.2d at 921. Rather, the undisputed record evidence demonstrates that Mr. Briggs had – and knew he had – a number of reasonable alternatives.

First, nothing in the record suggests any urgency in Mr. Briggs’ wish to receive a refund. To the contrary, it is undisputed that after paying the \$8,939.19 purchase price in 1995, he waited

Tab 4, ¶ 9; italics added.)

four years before contacting Valley Spa; during these four years he never requested a refund or delivery of the gazebo and hot tub. (R. at 417 ¶2; 533; 658.) Moreover, Mr. Briggs concedes that the only reason he finally approached Valley Spa and demanded a refund at the end of these four years is that he learned Valley Spa no longer carried Cal Spas products. (Briggs' Br. at 12 ¶ 3.) This situation seems to have been anticipated by the Restatement drafters: "Since alternative sources of funds are ordinarily available, a refusal to pay money is not duress, absent a showing of peculiar necessity." Restatement (Second) of Contracts § 175 cmt. b (1981). Here there is no record evidence of any such "peculiar necessity" for a refund. Therefore, one reasonable alternative open to Mr. Briggs was to wait and continue negotiating.

Second, in the settlement offer itself, Mr. Briggs represented that he was sending the offer pursuant to his counsel's instructions, and threatened to pursue legal action if Mr. Brown did not "get back with" him to accept the offer. (Briggs Addendum, Tab 2.) Therefore, a reasonable alternative that Mr. Briggs understood (and threatened) was that he "could have sought relief from the courts." Horgan v. Industrial Design Corp., 657 P.2d 751, 754 (Utah 1982).⁴

Finally, in his verified interrogatory response, Mr. Briggs described the negotiations leading up to his settlement offer. Mr. Briggs clearly understood that he had various alternatives:

[Mr. Brown's letter to the Better Business Bureau] states that I have a \$8,939.19 credit currently with his store. . . . Anyway, with this so called credit in mind and with [Mr. Brown] saying in our earlier conversation I [sic] that we both have to give a little bit, I thought I would try to come up with a solution to resolve[sic] this matter, I didn't want to go to court. . . . After thinking about it, I thought that I had come up with a solution that both of us could live with to resolve this matter.

⁴Cf. Restatement (Second) of Contracts § 175 cmt. b (1981) (Even an improper threat to commence a legal action "does not usually amount to duress because the victim can assert his rights in the threatened action, and this is ordinarily a reasonable alternative to succumbing to the threat.")

. . . I called Mr. Brown . . . and gave him my new proposal He rejected this offer. I told him that I would try to think of another solution that we could both live with and call him back. . . . I thought I had come up with another solution I called [Mr. Brown] and proposed to him my new offer [Mr. Brown] responded by saying . . . I'm not saying I won't except [sic] this offer and on the other hand I'm not saying I will, however if you'll let me think about it over night I'll call you tomorrow morning with my answer. I told him that would be fine. . . . I hadn't heard from [Mr. Brown] for five days so I decided to send him a certified letter stating that if he didn't have this final offer settled with me by 11-2-99 that I would take him to court to settle it.

(R. at 489.) The "certified letter" was Mr. Briggs' November 9 settlement offer. (*Id.*) This record evidence demonstrates that Mr. Briggs understood that he had reasonable alternatives, and that his settlement offer was a deliberate compromise of the parties' dispute. Certainly there was a dispute – Mr. Brown and Valley Spa were not willing to give Mr. Briggs everything he wanted. But the existence of the dispute cannot, in and of itself, constitute duress.

II. THE TRIAL COURT CORRECTLY RULED THAT THE SETTLEMENT OFFER WAS UNCONDITIONALLY ACCEPTED

On pages 17-21 of his brief, Mr. Briggs argues that the trial court erred in ruling that Mr. Brown and Valley Spa accepted the settlement offer. However, an unconditional acceptance is shown both by Mr. Briggs' own verified interrogatory response regarding his telephone conversation with Mr. Brown on November 11, 1999, and by the language of Mr. Brown's acceptance letter of the same date.

A. Mr. Brown Accepted the Settlement Offer in a Telephone Conversation on November 11.⁵

In his interrogatory response, Mr. Briggs stated that after he had mailed his November 9 settlement offer, he had a telephone conversation with Mr. Brown on November 11, 1999.

⁵The trial court based its judgment on Mr. Brown's November 11 acceptance letter discussed in section II.B. below. (R. at 375.) Mr. Brown's oral acceptance in this November 11 telephone conversation provides an alternative basis for affirming.

In this phone call [Mr. Brown] agreed to my final offer and stated that he would write me a letter corresponding to this agreement and send it to me for my signature of approval to settle this matter. He stated that once he had this signed letter back in his possession that he would order the gazebo and immediately send me a check in the amount of \$2,563.51.

(R. at 489.) According to Mr. Briggs, Mr. Brown did not say that he “might accept if . . .,” nor that he “would accept when” Rather, Mr. Briggs concedes that Mr. Brown simply “agreed to” the settlement offer, and stated that he would prepare and send a letter “corresponding to *this agreement*.” (Emphasis added.) Mr. Brown and Valley Spa respectfully submit that Mr. Briggs’ sworn interrogatory response shows an unqualified acceptance of the settlement offer.

Mr. Brown’s acceptance of the settlement offer is not invalidated by what he said thereafter. Mr. Brown asked Mr. Briggs to sign and return the letter. That would simply acknowledge what was legally implicit in the settlement offer, i.e., that Mr. Brown’s acceptance of the offer would create a legally binding Settlement Agreement. See 1 Corbin on Contracts (1963) § 87 p. 373 (“The expression in words of that which is already implied in the terms of the offer is not a variation therefrom.”).⁶ Moreover, the requested acknowledgment was not a condition to Mr. Brown’s acceptance; Mr. Brown had “agreed to” the settlement offer, and was

⁶See also Hawaiian Equipment Co. v. EIMCO Corp., 207 P.2d 794, 801 (Utah 1949) (“Sometimes an acceptor from abundance of caution inserts a condition in his acceptance which merely expresses what would be implied in fact or law from the offer. As such a condition involves no qualification of the acceptor’s assent to the terms of the offer, a contract is not precluded.”) (*quoting* 1 Williston on Contracts § 78 (Rev. Ed)); 2 Williston on Contracts § 6:15 at 122 (4th Ed. 1991) (same); R. J. Daum. Const. Co. v. Child, 247 P.2d 817, 821 (Utah 1952) (an acceptance “must unconditionally agree to all the material provisions on the offer, and must not add any new material conditions, but all of the provisions of an offer need not be expressly stated therein – some may be implied from the surrounding circumstances”); Panhandle Eastern Pipe Line Co. v. Smith, 637 P.2d 1020, 1023 (Wyo. 1981) (“An offer must be accepted unconditionally; but there is, as always, an exception to that rule. An acceptance is still effective if the addition only asks for something that would be implied from the offer and is therefore immaterial.”).

bound by the resulting Settlement Agreement whether or not Mr. Briggs signed and returned the letter. See Restatement (Second) of Contracts § 61 (1981) (“An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms.”).⁷ As this Court held in Goodmansen v. Liberty Vending Systems, 866 P.2d 581, 585 (Utah App. 1993) (citation omitted), “[i]f a written agreement is intended to memorialize an oral contract, a subsequent failure to execute the written document does not nullify the oral contract.”

Likewise, Mr. Brown’s acceptance was not qualified or invalidated by his proposal of *when* Valley Spa would perform under the Settlement Agreement. In his settlement offer, Mr. Briggs set a November 20 deadline for Mr. Brown to “get back to” him and accept the offer, but did not specify when Valley Spa was to deliver the gazebo and pay the refund. (See discussion in section II.B.2. below.) In a case such as this where there is no agreement as to the time of

⁷See also Chouros v. Evona Inv. Co., 93 P.2d 450, 452 (Utah 1939) (a conditional exercise of an option “amounts to a rejection; but it is otherwise where the acceptance is in the first instance unconditional, and a mere request is added for a departure from the terms of the option as to the time and place of completing the transaction”); Sea-Van Investments Associates v. Hamilton, 881 P.2d 1035, 1038 (Wash. 1994) (“an acceptance can also request a modification of terms, so long as the additional terms are not conditions of acceptance and the acceptance is unequivocal”); Alpha Venture/Vantage v. Creative Carton, 370 N.W.2d 649, 652 (Minn. App. 1985) (“requested modifications of the offer will not preclude the formation of a contract where it clearly appears that the offer is positively accepted, regardless of whether the requests are granted”); Kodiak Island Borough v. Large, 622 P.2d 440, 448 (Alaska 1981) (“when the acceptance of the offer is initially unconditional, the fact that it is accompanied by a request or a direction looking to the performance of the contract does not render the acceptance ineffective nor give it the character of a counter-offer so long as it does not limit the contract”); 2 Williston on Contracts § 6:15 at 127 (4th ed. 1991) (“when an acceptance was first made in positive terms and the offeree in addition demanded some performance to which he would not be entitled under a proper interpretation of the agreement. . . the additional demand, under a proper interpretation of the agreement, did not invalidate the acceptance and prevent the formation of a contract, on the theory that the acceptance was unconditional, and the demand related to performance following acceptance”).

performance, courts imply a “reasonableness” term.⁸ After accepting the settlement offer, however, Mr. Brown proposed that Valley Spa would order the gazebo and deliver the refund check “immediately” when he received the signed letter back from Mr. Briggs. Mr. Brown’s acceptance of the settlement offer was not made conditional upon Mr. Briggs’ assent to the proposed addition of this timing term, and therefore Mr. Brown’s acceptance “is not thereby invalidated.” See Restatement (Second) of Contracts § 61.⁹

Finally, Mr. Brown’s understanding that an enforceable settlement agreement had been formed is demonstrated by the undisputed fact that – as stated in Mr. Brown’s November 11 acceptance letter (discussed in section II.B. below) – he did order the gazebo for Mr. Briggs. (R. at 181.) See Goodmansen v. Liberty Vending Systems, 866 P.2d 581, 585 (Utah App. 1993) (offer and acceptance supported by the fact that “the conduct of the parties indicates that both parties believed a settlement agreement had been reached”). Cf. 1 Corbin on Contracts (1963) § 87 p. 373 (“The acceptance should not be held to be conditional if the offeror himself did not so treat it; and after action has been taken in the belief that agreement has been reached, a court should not over-weigh minor differences in form.”)

For these reasons, Mr. Briggs’ verified interrogatory response shows that Mr. Brown made an unqualified, oral acceptance of the settlement offer in the November 11 telephone conversation. This oral acceptance provides an alternative basis upon which the judgment of the trial court can be affirmed.

⁸See Coulter & Smith, Ltd. v. Russell, 966 P.2d 852, 858 (Utah 1998) (“if a contract fails to specify a time of performance the law implies that it shall be done within a reasonable time under the circumstances”).

⁹See also authorities cited in footnote 7 above.

B. Mr. Brown Accepted the Settlement Offer, at the Very Latest, in His November 11 Acceptance Letter.

The trial court ruled that Mr. Brown's "November 11 letter is an unconditional acceptance of" Mr. Briggs' settlement offer. (R. at 375.)¹⁰ On pages 17-21 of his brief Mr. Briggs asserts that the trial court erred, and that the November 11 letter actually rejected his settlement offer and made a counteroffer for settlement on different terms.

¹⁰Mr. Briggs includes the two letters in the Addendum to his brief, but quotes only snippets of each. The November 9 settlement offer reads in relevant part as follows:

Again I will reiterate my offer. On Thursday (11-4-99) over the phone I told you that I was willing to pay the current high price of \$5,995.00 + applicable tax for the Gazebo as described in my contract. . . . I also stated that after paying Valley Spa for the Gazebo that there was a remaining balance on my contract of around \$2,570.00. Because this amount isn't enough to purchase a spa to my satisfaction I told you that you would have to refund this amount back to me.

Since was had this conversation on Thursday . . . I made an appointment to see a Contract Attorney on Tuesday. . . . [H]e told me the first thing that I should do is write you this letter before we pursue legal action against Valley Spa. . . . If you do not except [sic] my offer as described above we will settle this in court. . . . If you do not except [sic] this offer and it goes to court, I'm suing for the return of the contract price + interest. . . .

Mr. Brown you now have until November 20, 1999 to get back to me and totally resolve this issue. If it is not resolved by this date, we will settle it in court.

You can contact me by phone at 968-3788. If I am not at home you can leave a message, the answering machine is always on.

(Mr. Briggs' Addendum, Tab 2.) The November 11 acceptance letter reads as follows:

As per your request I have ordered an Omni Luxury 12X16 green metal roof gazebo by Cal Spa. This is the 1999 version of the product purchased on September 16, 1995. The agreed upon price is stated in my October 21, 1999 letter to you, the Better Business Bureau, and the Utah Division of Consumer Protection.

In addition, Valley Spa has agreed to pay the balance of the contract by November 18, 1999. Our agreement is as follows: \$5995.00 plus tax of \$380.60 totaling \$6375.68 will be subtracted from the current in sort credit of \$8,939.19. The balance of \$2,563.51 will be paid to you. If you are in agreement with this letter please acknowledge by signing below where provided. Valley Spa will issue a check at the same time you provide us with agreement of this letter.

Thank you for your time and consideration of this proposal.

(Mr. Briggs' Addendum, Tab 3.)

1. The November 11 letter expressed unqualified acceptance.

Although Mr. Briggs argues at length about what Mr. Brown did or did not say in his November 11 letter, remarkably Mr. Briggs never sets out the full text of that letter. Mr. Briggs' assertion that the November 11 letter was "not an 'unconditional acceptance'" of the settlement offer (Briggs' Br. at 21) ignores the following language:

As per your request I have ordered an Omni Luxury 12X16 green metal roof gazebo by Cal Spa. . . . *The agreed upon price* is stated in my October 21, 1999 letter. . . . Valley Spa *has agreed* to pay the balance of the contract. . . . *Our agreement* is as follows The balance of \$2,563.51 *will be paid to you*.

(Briggs' Addendum, Tab 3; italics added.) Mr. Brown and Valley Spa respectfully submit that this language constitutes an unconditional acceptance of Mr. Briggs' settlement offer.¹¹

Mr. Briggs never acknowledges the above-quoted language. Rather, on pages 20-21 of his brief he asks the Court to focus only on the last three sentences of the November 11 letter:

If you are in agreement with this letter please acknowledge by signing below where provided. Valley Spa will issue a check at the same time you provide us with agreement of this letter.

Thank you for your time and consideration of this proposal.

Mr. Briggs argues that this language amounts to a rejection of his settlement offer, and a counteroffer to settle "different terms." (Briggs' Br. at 18.) Mr. Briggs' argument would of course have merit if the November 11 letter stated that "*if* you acknowledge this letter, *then* Valley Spa *will agree* to pay the balance of the contract . . ." This is not, however, what the letter says. Rather, as in the prior telephone conversation between Messrs. Briggs and Brown

¹¹Indeed, the quoted language refers to the Settlement Agreement as an accomplished fact. This makes sense in light of Mr. Briggs' sworn interrogatory response (discussed in the preceding section) that Mr. Brown had already "agreed to" the settlement agreement in the prior telephone conversation.

(discussed in section II.A. above), in his November 11 letter Mr. Brown first accepts the settlement offer using the unconditional language quoted above. He then asks Mr. Briggs to acknowledge what was legally implicit in the settlement offer itself – that Valley Spa’s acceptance of the offer would create a legally binding Settlement Agreement.¹² Mr. Brown’s acceptance of the settlement offer, including his commitment that, “The balance of \$2,563.51 will be paid to” Mr. Briggs, did not depend upon whether or not Mr. Briggs provided the requested acknowledgment. Nor did the acceptance depend upon whether or not Mr. Briggs agreed to the proposal regarding when Valley Spa would perform.¹³ As discussed in section II.A. above in connection with Mr. Brown’s oral acceptance during the parties’ telephone conversation, “An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms.” Restatement (Second) of Contracts § 61 (1981).¹⁴

And finally, as argued above in connection with the oral acceptance, Mr. Brown’s understanding that an enforceable settlement agreement had been formed is demonstrated by the undisputed fact that – as stated in the November 11 acceptance – he did order the specified gazebo for Mr. Briggs. (R. at 181.) See Goodmansen, 866 P.2d at 585 (offer and acceptance supported by the fact that “the conduct of the parties indicates that both parties believed a

¹²See 1 Corbin on Contracts (1963) § 87 p. 373 (“The expression in words of that which is already implied in the terms of the offer is not a variation therefrom.”) and other authorities cited in footnote 6 above.

¹³On page 24 of his brief, Mr. Briggs asserts that the “Brown Response [i.e., the November 11 acceptance] demands Mr. Briggs’ acceptance.” This assertion has no basis in the actual documents.

¹⁴See also other authorities cited in footnote 7 above.

settlement agreement had been reached”). Cf. 1 Corbin on Contracts (1963) § 87 p. 373 (“The acceptance should not be held to be conditional if the offeror himself did not so treat it; and after action has been taken in the belief that agreement has been reached, a court should not overweigh minor differences in form.”) The gazebo that Mr. Brown ordered was delivered to Valley Spa in due course. Despite repeated invitations to inspect the gazebo, Mr. Briggs never did so.

2. The settlement offer set a time limit for acceptance, not for performance.

Notwithstanding the language of unqualified language in the November 11 letter, Mr. Briggs argues that there was no valid acceptance because his settlement offer

demanded that Defendants perform by November 20, 1999. . . . The Briggs Offer thus called for delivery of the specified gazebo and refund of money by November 20, 1999.

(Mr. Briggs’ Br. at 19.) Mr. Briggs’s argument ignores the actual language of his settlement offer. At the beginning of his settlement offer he complains of Mr. Brown’s “not getting back with me stating your position on whether you were willing to except [sic] my last offer.” (Mr. Briggs’ Addendum, Tab 2.) Then, at the close of his settlement offer, Mr. Briggs states,

Mr. Brown you now have until November 20, 1999 to get back with me and totally resolve this issue. If it is not resolved by this date, we will settle it in court. . . . You can contact me by phone at 968-3788. If I am not at home you can leave a message, the answering machine is always on.

(Id.) Thus, November 20 was the deadline for Mr. Brown to “get back with” Mr. Briggs and accept the offer. The settlement offer provided that if Mr. Brown did so this dispute would be “totally resolve[d].” The settlement offer even suggested that Mr. Brown could accept the offer by telephone or by leaving an acceptance on Mr. Briggs’ answering machine. Contrary to the argument in Mr. Briggs’ brief, however, his settlement offer did not “demand” that Mr. Brown

and Valley Spa complete their performances under the Settlement Agreement by November 20.¹⁵

3. Mr. Brown Agreed to procure the correct model of gazebo.

Mr. Briggs also argues that the November 11 acceptance letter was defective because Mr. Brown stated that he had ordered

an Omni Luxury 12X16 green metal roof gazebo by Cal Spa. This is the 1999 version of the product purchased on September 16, 1995.

(Briggs Addendum Tab 3.) Mr. Briggs asserts that this was the wrong gazebo in three respects – wrong dimensions, wrong roof color, and wrong model year. (Briggs Br. at 19–20.)

i. The original contract between Valley Spa and Mr. Briggs was for an “Omni Luxury 12X16” gazebo.

Mr. Briggs’ argument regarding the dimensions of the gazebo contradicts his repeated representations to the trial court, and ignores the undisputed record. Mr. Briggs’ settlement offer said he wanted “the Gazebo as described in” his original contract with Valley Spa. (Briggs Addendum Tab 2.) As Mr. Briggs repeatedly represented to the trial court, that original contract was for a Cal Spa Omni Luxury 12X16 gazebo.¹⁶ Thus, in both his Complaint and his Amended

¹⁵Even if the November 9 settlement offer had been ambiguous regarding what is was that had to be done by November 20 (i.e., get back to Mr. Briggs to accept, or complete all of Valley Spa’s performance), any such ambiguity should be resolved against Mr. Briggs. See Jones, Waldo, Holbrook, etc. v. Dawson, 923 P.2d 1366, 1372 (Utah 1996) (“In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.”) (Citation omitted.); Coulter v. Smith, Ltd., 966 P.2d 852, 858 (Utah 1998) (“The choice of contract interpretations which avoid invalidating an agreement is favored under Utah law.”).

¹⁶In his settlement offer, Mr. Briggs stated that he was “willing to pay the current high price of \$5,995.00 + applicable tax for the Gazebo as described in my contract.” (Briggs Addendum Tab 2.) The figure of “\$5,990.00” comes from an earlier letter from Mr. Brown suggesting that the parties settle for “the exact 12X16 Cal spa Omni luxury metal roof gazebo. . . . This unit [is] currently costing \$5,995.00.” (R. 173-74.)

Complaint, Mr. Briggs pleaded that he “contract to buy an ‘Omni Luxury’ gazebo that was 12' by 16'.” (R. at 4, 39.) When Mr. Brown and Valley Spa moved for summary judgment regarding the Settlement Agreement, and stated as an undisputed material fact that the original contract had been for a “Cal Spas Omni Luxury 12X16 gazebo” (R. at 172), Mr. Briggs did not dispute this fact. To the contrary, in his memorandum opposing summary judgment, Mr. Briggs confirmed that his original contract was for “a product from Cal Spas: Omni Luxury 12' by 16'.” (R. at 196.)¹⁷

Mr. Briggs bases his argument regarding the gazebo’s dimensions on the following parenthetical notation on the second of the two original contract documents he executed with Valley Spa: “(outside dim. 16'7" x 12'7").” (Briggs Addendum Tab 1¹⁸.) Based on this notation, Mr. Briggs argues that notwithstanding all of his prior representations to the trial court, his original contract was for something other than a “Omni Luxury 12X16" gazebo. (Briggs Br. at 20.)¹⁹ As Mr. Briggs knows, however, and as the undisputed record evidence demonstrates, the “12X16” in the model name of the gazebo he contracted for refers to the gazebo’s *inside dimensions*. (R. at 309.) Indeed, a document which Mr. Briggs produced in response to

¹⁷See also Mr. Briggs’ affidavit referring to the gazebo he was to receive under the Settlement Agreement as a “deluxe 12' x 16' gazebo.” (R. at 210.)

¹⁸The first of the two original contract documents is partially illegible, but appears to describe the gazebo as “12X16 luxury.” (R. at 182.)

¹⁹The first time Mr. Briggs raised in the trial court this argument regarding the gazebo’s outside dimensions appears to have been on February 12, 2003 – over a year and a half after the trial court had granted Mr. Brown and Valley Spa’s first Motion for Summary Judgment, ruling that the Settlement Agreement extinguished Mr. Briggs’ claims. (R. at 535, 372-76.) Mr. Briggs never asked the trial court for consideration of that judgment; rather, he raised this argument only in opposition to Mr. Brown and Valley Spa’s second Motion for Summary Judgment, which addressed their Counterclaim for attorney’s fees.

discovery requests and then himself introduced into the record suggests that the outside dimensions of the “Omni Luxury 12X16” gazebo are 12’8” × 16’8”. (R. 500, 632.) If Mr. Briggs had responded to one of the repeated invitations to inspect the gazebo (R. at 521), he could have satisfied himself regarding its outside dimensions. But Mr. Briggs took no such discovery. (R. at 163.) The only competent record evidence is Mr. Brown’s testimony that the gazebo which was specified in the November 11 acceptance letter, and which was ordered by and delivered to Valley Spa, was the gazebo specified by Mr. Briggs’ original contract with Valley Spa. (R. at 181.) The parenthetical notation regarding the outside dimensions of a “Omni Luxury 12X16” gazebo does not contradict this fact.

- ii. The color of the gazebo’s roof was immaterial, and Mr. Briggs’ right to raise this issue was waived by his delay in doing so.

Mr. Briggs also argues that the November 11 acceptance letter was invalid because Mr. Brown stated therein that he had ordered a gazebo with a “green metal roof.” (Briggs Addendum Tab 3.) Mr. Briggs argues that this was the wrong color. (Briggs Br. at 19-20.) The settlement offer did not specify a roof color, but referred to the parties’ original contract. (Briggs Addendum Tab 2.) The second of the two documents forming that contract is not terribly legible, but does appear to call for a grey roof (Briggs Addendum Tab 1); if so, Mr. Brown may have misread that document. However, an acceptance is valid so long as it “assent[s] to all *material* terms presented in the offer.” Cal Wadsworth Const. v. City of St. George, 898 P.2d 1372, 1376 (Utah 1995) (emphasis added). The immateriality of the roof color is demonstrated by Mr. Briggs’ delay of over three years before ever raising this issue.

Although Messrs. Brown and Briggs had a telephone conversation regarding the gazebo a

few days after Mr. Briggs had received the November 11 acceptance letter (R. at 10-11), there is no indication in the record that Mr. Briggs raised the issue of the gazebo's roof color. Nor did Mr. Briggs mention this issue in his pleadings (R. at 1-13, 34-50), nor even in his opposition to Mr Brown and Valley Spa's first Motion for Summary Judgment which sought enforcement of the Settlement Agreement. (R. at 188-219.) Instead, the first time Mr. Briggs objected to the gazebo's roof color appears to have been February 12, 2003 – over three years after he had received Mr. Brown's November 11, 1999, acceptance letter, and over a year and a half after the trial court had ruled that the Settlement Agreement extinguished Mr. Briggs' claims. (R. at 535, 372-76.) And Mr. Briggs raised the roof color issue not in the context of a motion for reconsideration of that first ruling (indeed, Mr. Briggs never asked the trial for such reconsideration), but only in opposition to summary judgment on Mr. Brown and Valley Spa's Counterclaim for attorney's fees. (R. 535.) And when Mr. Briggs did finally raise this issue before the trial court, even he got it wrong. Mr. Briggs first stated to the trial court that the parties' original contract "describes a gazebo that is 'grey,'" but then that Mr. Brown and Valley Spa "substituted the color grey for green." (R. at 535.)

Mr. Brown and Valley Spa respectfully submit that Mr. Briggs' delay of over three years before he raised the color of the gazebo's roof demonstrates that he considered it an immaterial detail.²⁰ Mr. Brown and Valley Spa further submit that through his unreasonable delay, Mr. Briggs has waived any right to raise this issue, and that the trial court properly disregarded this belated argument when Mr. Briggs asserted it in opposition to the second Motion for Summary

²⁰The roof color might have been quickly and easily switched if Plaintiff had mentioned it in a timely manner.

Judgment, which dealt with the Counterclaim for attorney's fees.

- iii. There is no record evidence of any material difference between the 1999 and the 1993, 1994 or 1995 versions of the Cal Spa Omni Luxury 12X16 gazebo.

Finally, Mr. Briggs argues that the November 11 acceptance letter is invalid because it refers to the "1999 version" of the gazebo. The parties' original contract does not specify any particular model year. Nevertheless, Mr. Briggs' argument seems to be premised on a speculation of fact that the 1999 gazebo is somehow materially different from the gazebo he wanted. Mr. Briggs' speculation is only that; as noted above, he never inspected the gazebo. Therefore, the only competent record evidence is Mr. Brown's testimony that the gazebo named in the November 11 acceptance letter and subsequently delivered to Valley Spa, was the gazebo specified in the parties' original contract. (R. at 181.)

For these reasons, the trial court correctly ruled that Mr. Brown and Valley Spa accepted Mr. Briggs' November 9 settlement offer. That acceptance was made orally in the November 11 telephone conversation between Messrs. Briggs and Brown, and repeated in writing in Mr. Brown's November 11 acceptance letter. In either event, there was a binding Settlement Agreement.

III. THE TRIAL COURT'S RULING ON THE SETTLEMENT AGREEMENT DID NOT INVOLVE ANY GENUINE DISPUTES OF FACT

On page 22 of his brief, Mr. Briggs appears to argue that as a matter of law, the question of whether an offer has been accepted is *always* a genuine dispute of fact that can *never* be decided on summary judgment. Therefore, argues Mr. Briggs, the trial court necessarily erred when it granted Mr. Brown and Valley Spa's first Motion for Summary Judgment, ruling that they

had accepted the settlement offer. If this were the law, summary judgment would never be available in contract actions unless all parties stipulated to acceptance. The case Mr. Briggs cites for this rule – Cal Wadsworth, 898 P.2d at 1378 – does not so hold. The question in Cal Wadsworth was whether an offer had been accepted *orally*; there was conflicting testimony about whether the offeree had in fact said that he accepted the offer. 898 P.2d at 1378. Given such a factual dispute, it is certainly correct that “[a] trial court’s finding about whether a party accepted an offer or a counteroffer is a finding of fact.” Id. However, when there is no such “material dispute of fact, the existence of a contract is a conclusion of law.” Reedeker v. Salisbury, 952 P.2d 577, 582 (Utah App. 1998).

On pages 22-24 of his brief, Mr. Briggs asserts that there were genuine factual disputes that were material to the issue of acceptance, and that the trial court therefore erred when it granted Mr. Brown and Valley Spa’s first Motion for Summary Judgment. Mr. Briggs does not, however, identify any such factual disputes. Unlike the situation in Cal Wadsworth where the parties disputed what had been said, in the instant case the acceptance is both established by Mr. Briggs’ own verified interrogatory response (section II.A. above), and embodied in a written document (section II.B. above). There is therefore no factual dispute about what words were used. The only potential ambiguity in the two documents is whether the gazebo which Mr. Briggs referred to in his November 9 settlement offer is materially different from the gazebo Mr. Brown referred to in his November 11 acceptance. As discussed at length in the preceding section, the undisputed record evidence establishes that there is no such material difference.²¹

²¹Moreover, as noted in the preceding section, the supposed differences which Mr. Briggs argues to this Court – dimensions, color, and model year – were never presented to the trial court in opposition to Mr. Brown and Valley Spa’s first Motion for Summary Judgment. Instead, Mr.

Thus, contrary to Mr. Briggs' argument, there are no facts material to the question of acceptance that were ever materially disputed. The trial court correctly ruled that the language of Mr. Brown's November 11 letter manifested an unconditional acceptance of the settlement offer. (See discussion in section II.B. above.) The unconditional acceptance of the settlement offer is also shown by Mr. Briggs' interrogatory response regarding his November 11 telephone conversation with Mr. Brown. (See discussion in section II.A. above.)

IV. THE TRIAL COURT DID NOT EXTINGUISH ALL OF MR. BRIGGS' RIGHTS UNDER THE SETTLEMENT AGREEMENT

On pages 24-26 of his brief, Mr. Briggs argues that the trial court extinguished *all* of his rights under *both* the parties' underlying contract and their subsequent Settlement Agreement, thereby leaving Mr. Briggs "stripped naked at the bar of justice." (Briggs Br. at 26.)²² Mr. Briggs' misrepresents the trial court's ruling.

The trial court ruled that Mr. Brown and Valley Spas' November 11 acceptance of Mr. Briggs' November 9 settlement offer created a binding Settlement Agreement that "totally resolve[d]" the parties' dispute, and required the dismissal of Mr. Briggs' attempt to assert the settled claims. (R. at 372-375.) The trial court also ruled that it was Mr. Briggs who breached the parties' Settlement Agreement when he filed his \$70,000 Complaint on November 29, 1999, and that Mr. Briggs' breach "relieved [Mr. Brown and Valley Spa] of any duty they had to

Briggs raised them over a year and a half *after* the trial court had granted that motion, and only in opposition to Mr. Brown and Valley Spa's second Motion for Summary Judgment, which dealt with their Counterclaim for attorney's fees. (R. 535.)

²²Mr. Briggs does not include this argument in his Statement of Issues Presented For Review, and does not indicate if it was preserved below. Mr. Brown and Valley Spa have been unable to locate any mention of this argument in the record.

perform under the [Settlement] Agreement.” (R. at 867.)²³ Finally, the trial court ruled that because of the bad-faith nature of Mr. Briggs’ claims, and his many wrongful litigation tactics documented in Mr. Brown and Valley Spa’s memoranda, Mr. Briggs was would be required to reimburse the \$26,062.50 in attorneys’ fees he had wrongfully forced Mr. Brown and Valley Spa to incur; the trial court based this judgment on both Utah Code Ann. § 78-27-56, and on the court’s general equity powers. (R. at 866, 885; see discussion in sections VIII-IX below.)

If, as Mr. Briggs represents, the trial court had simply extinguished all of his rights under the Settlement Agreement, the trial court would have entered judgment for Mr. Brown and Valley Spa in the amount of \$26,062.50 – their entire attorney’s fees. The trial court did not do so. Rather, the trial court imposed an offset in the amount of “the \$8,939.19 in cash and value that [Mr. Briggs] was to receive under the parties’ settlement agreement,” and entered judgment in the amount of \$17,123.31. (R. at 886.) Therefore, although Mr. Briggs was held responsible for the attorney’s fees he had wrongfully forced Mr. Brown and Valley Spa to incur, he was also given all of the benefit he was to receive under the Settlement Agreement.

V. THE SETTLEMENT AGREEMENT TOTALLY RESOLVED MR. BRIGGS’ UNDERLYING CLAIMS

On pages 26-30 of his brief, Mr. Briggs argues that the trial court erred by dismissing his “other claims.”²⁴ Mr. Briggs implies that the parties’ Settlement Agreement was somehow limited

²³Mr. Briggs quoted this part of the trial court’s ruling on page 26 of his brief. Yet on the preceding pages 24 and 25 he simply ignores this, and asserts that it was Mr. Brown and Valley Spa who breached the Settlement Agreement, and that he therefore had an election of remedies.

²⁴The only record citation given by Mr. Briggs to demonstrate that his argument was preserved before the trial court is his Amended Complaint – R. at 34-50. (Briggs Br. 7.) The Amended Complaint does not suggest any theory by which “other claims” could have survived the Settlement Agreement. Nor have Mr. Brown and Valley Spa been able to find anywhere else in

in scope – that some “other claims” were carved out from it. There was, however, no such “carve-out” in Mr. Briggs’ November 9 settlement offer. To the contrary, he offered to “totally resolve” his underlying dispute. (Briggs Addendum Tab 2.) Therefore, Mr. Briggs has no “other claims” that survived the Settlement Agreement.

VI. MR. BROWN AND VALLEY SPA DID NOT BREACH THE SETTLEMENT AGREEMENT

On page 33 of his brief, Mr. Briggs refers to the trial court’s holding that Mr. Briggs “breached the Settlement Agreement” on November 29, 1999, when he filed his \$70,000 Complaint, and that this breach by Mr. Briggs “relieved [Mr. Brown and Valley Spa] of any duty they had to perform under the Agreement.”. (R. at 867.) Mr. Briggs asserts that Mr. Brown and Valley Spa have “admitted” committing a prior breach of the Settlement Agreement, and that the trial court’s judgment is therefore in error. (Briggs’ Br. at 33.)

Mr. Briggs’ argument relies on a statement by Mr. Brown and Valley Spa in March of 2003 – long after Mr. Briggs had breached the Settlement Agreement. Mr. Briggs had argued to the trial court that Mr. Brown and Valley Spa were still legally required to perform all of their obligations under the Settlement Agreement (R. at 685-688) – despite the facts that Mr. Briggs had first breached the agreement over three years before, still refused to acknowledge the existence of the agreement, and had wrongfully forced Mr. Brown and Valley Spa to incur over \$20,000 in legal fees. Mr. Briggs and Valley Spa replied that

[Mr. Briggs] breached the Settlement Agreement by filing this law suit; that breached relieved [Mr. Brown and Valley Spa] of any duty to continue performing under the Settlement Agreement. . . . Moreover, because [Mr. Briggs] refuses to acknowledge the existence of the Settlement Agreement, it would be foolhardy for

the record where Mr. Briggs preserved this argument below.

[Mr. Brown and Valley Spa] to perform thereunder: [Mr. Briggs] would only retain the benefits of that performance, and argue that he still had claims against [Mr. Brown and Valley Spa].

(R. at 693.) The statement upon which Mr. Briggs purports to rely in no way contradicts the fact it was he who first breached the Settlement Agreement; he did so when he ignored that agreement, and filed his unfounded \$70,000 complaint against Mr. Brown personally and against Valley Spa.

**VII. THERE WERE NO GENUINE DISPUTES OF MATERIAL FACT
PRECLUDING SUMMARY JUDGMENT ON THE COUNTERCLAIM
FOR ATTORNEY'S FEES**

Mr. Brown and Valley Spa counterclaimed for the \$26,062.50 in legal costs Mr. Briggs had forced them to incur by his bad-faith assertion of baseless claims, and by the wrongful litigation practices he employed. Mr. Brown and Valley Spa moved for summary judgment on this Counterclaim in their second Motion for Summary Judgment. (R. at 415.) Their memorandum in support of that motion chronicled Mr. Briggs' wrongful conduct in 87 paragraphs of "undisputed material facts." (R. at 417-436.)

On page 34 of his brief, Mr. Briggs refers to the fact that in his memorandum in opposition to the second Motion for Summary Judgment, he purported to dispute 33 of those 87 paragraphs. (R. at 533-544.) Mr. Briggs argues that therefore the trial court could not properly grant summary judgment.

However, as Mr. Brown and Valley Spa demonstrated in their reply memorandum in support of the second Motion for Summary Judgment (R. at 655-669), Mr. Briggs raised *genuine* disputes as to only six of the 87 paragraphs of "undisputed material facts." Mr. Briggs' non-genuine disputes of 27 of the paragraphs do not preclude summary judgment. See Utah Rule of

Civil Procedure 56(c) (summary judgment “shall be rendered” when the record shows “no *genuine* issue as to any material fact”) (emphasis added).²⁵ Mr. Briggs’ pattern of wrongful conduct shown in the 81 undisputed paragraphs supports the trial court’s award of summary judgment on the Counterclaim. Therefore, although Mr. Briggs raised genuine disputes as to the particular instances of his misconduct described in six of the 87 paragraphs, those disputes are immaterial within the meaning of Rule 56. See Kesler v. Kesler, 583 P.2d 87, 89 n.1 (Utah 1978) (“Where some of the facts are in dispute, summary judgment can properly be rendered against a defendant if, on the undisputed facts, he has no valid defense.”)

A. Mr. Briggs Fails to Marshal Evidence in Support of the Trial Court’s Finding That He Asserted His Claims in Bad Faith.

The trial court based its grant of summary judgment on the Counterclaim on two separate legal theories: (1) Utah’s “bad faith” litigation statute, Utah Code Ann. §78-27-56, and (2) the court’s inherent equitable powers to award attorney’s fees where a party has acted in bad faith.” (R. at 885.) Under each of these legal theories, the trial court made a finding of fact that Mr. Briggs’ claims “were not asserted in good faith.” (*Id.*)²⁶ In order to challenge the trial court’s finding, Mr. Briggs “was required to marshal the evidence, citing the appellate court to all the evidence supporting [the] trial court’s ruling . . . [and] demonstrate why, even when viewed in the light most favorable to the trial court, the evidence is insufficient to support the challenged

²⁵See also Heglar Ranch, Inc. v. Stillman, 619 P.2d 1390, 1391 (Utah 1980) (summary judgment is not precluded “simply whenever some fact remains in dispute, but only when a *material* fact is *genuinely* controverted”) (italics added).

²⁶See In re Discipline of Sonnenreich, 491 Utah Adv. Rep. 15 ¶ 45 (Utah January 16, 2004) (“Whether a claim has ‘not [been] brought or asserted in good faith’ [under Utah Code Ann. § 78-27-56] is a question of fact and we review it under a clearly erroneous standard.”).

finding.” Rohan v. Boseman, 46 P.3d 753, 759-760 (Utah App. 2002) (internal citations omitted.)²⁷ Mr. Briggs attempts no such marshaling.

B. Mr. Brown Did Not Genuinely Dispute 81 of the 87 Paragraphs of “Undisputed Material Facts” in Mr. Brown and Valley Spa’s Summary Judgment Memorandum.

Mr. Briggs does not even claim to have disputed the majority of the 87 paragraphs of “undisputed material facts.” These concededly undisputed paragraphs establish a large portion of Mr. Briggs’ wrongful litigation conduct. Thus, there was no dispute (genuine or otherwise) that although Mr. Briggs paid Valley Spa only \$8,939.19, he initially asserted a baseless damages claim of \$70,000 (R. at 418 ¶ 7), and that although he subsequently reduced his damages claim to \$12,000, he continued to demand \$15,000 to settle. (R. at 428 ¶¶ 55-56.) Nor did Mr. Briggs dispute that although his pleadings quoted at length from a telephone conversation he had with Mr. Brown on November 15, 1999, he subsequently denied having any recording of that conversation. (R. at 419 ¶¶ 9-12²⁸.) Nor did Mr. Briggs dispute facts that establish that he made additional factual misrepresentations to the trial court (R. at 422 ¶¶ 23-24; 428 ¶ 54a; 429 ¶¶ 59-60; 431 ¶ 70; 432 ¶¶ 73, 76; 434-35 ¶¶ 80-82), made frivolous legal arguments (R. at 431-33 ¶¶ 71-72, 74, 76-77), and was pointlessly intransigent. (R. at 426-27 ¶¶ 44-47, 50, 52; 428-29 ¶¶ 57-61; 430-31 ¶¶ 66-68, 70.) Finally, Mr. Briggs did not dispute the amount and reasonableness of the legal fees Mr. Brown and Valley Spa had been forced to incur; he simply asserted to the trial court that those paragraphs of “undisputed material facts” “should be stricken.” (R. at 554 ¶

²⁷See also Wardley Better Homes and Gardens v. Cannon, 61 P.3d 1009, 1014 (Utah 2002) (“To mount a successful challenge to a trial court’s findings of fact, an appellant must marshal the evidence supporting the trial court’s findings.”)

²⁸Although Mr. Briggs claims to have disputed paragraphs 12 and 23 of the “undisputed material facts,” he actually responded to only a portion of each. (R. at 541 ¶ 5, 544 ¶ 13 .)

38.)

Mr. Brown and Valley Spa need not, however, rely on the facts in these admittedly undisputed paragraphs. The disputes Mr. Briggs purports to have raised to an additional 27 of the paragraphs are not “genuine” within the meaning of Rule 56(c). In his attempt to show disputes of fact, Mr. Briggs relied heavily on his own affidavits, all of which, however, are based only on his “personal knowledge and belief.” (R. at 561, 563, 590; Briggs Addendum, Tab 4.) These affidavits were incompetent under Utah Rule of Civil Procedure 56(e),²⁹ and cannot raise a genuine dispute of fact. Treloggan v. Treloggan, 699 P.2d 747, 748 (Utah 1985) (“an affidavit on information and belief is insufficient to provoke a genuine issue of fact”).

Many of Mr. Briggs’ purported responses to the additional 27 paragraphs of “undisputed material facts” are simply inapposite. For example, in paragraph 9-12 of their “undisputed material facts,” Mr. Brown and Valley Spa referred to the extended quotations Mr. Briggs included in his pleadings. (R. at 419 ¶¶ 9-12.) These quotations are allegedly of a telephone conversation between Messrs. Brown and Briggs on November 15, 1999. (R. at 419 ¶ 9.) Nevertheless, when Mr. Brown and Valley Spa asked for any recording or other documentation from which Mr. Briggs had taken those quotations, he denied that any such recording or documentation had ever existed. (R at 419 ¶¶ 11-12.) In paragraph 12, Mr. Brown and Valley Spa stated that,

If this is so, [Mr. Briggs] simply fabricated the purported quotations in his Complaint and Amended Complaint.

²⁹“Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” Id.

(R. at 419 ¶ 12.) Mr. Briggs purported to dispute this as follows:

This should be stricken because it is a legal conclusion. Furthermore, it relies on the logical error that there are only two possible explanations. [Mr. Brown and Valley Spa] offer no evidence that purports to establish that [Mr. Briggs] fabricated what was in quotes.

(R. at 541 ¶ 5.)³⁰ As Mr. Brown and Valley Spa noted in their reply memorandum to the trial court,

[Mr. Briggs] correctly notes that the fact that he “fabricated the purported quotations in his Complaint and Amended Complaint” arises from simple logic: Such extended quotations are either based upon some record, or are fabricated. Plaintiff denies having any record, so the quotations much have been fabricated. [Mr. Briggs] argues that it is “logical error” to assume there are only two possible explanations. . . , but does not suggest a third possibility.

(R. at 659 ¶ 12.) Mr. Brown and Valley Spa respectfully submit that given Mr. Briggs’ repeated assertions that he had no recording or other documentation from which he might have drawn the alleged quotations, and given his failure to provide any other explanation, he has not genuinely disputed the fact that he must have fabricated those quotations.

Mr. Briggs made a similarly inapposite response to paragraph 51 of the “undisputed material facts.” In paragraphs 50-53, Mr. Brown and Valley Spa referred to Mr. Briggs’ intransigent refusal to stipulate to the authenticity of five documents, despite having previously admitted that they were authentic. (R. at 427-28 ¶¶ 50-53.) In paragraph 51, Mr. Brown and Valley Spa stated that

[Mr. Briggs] refused to include a stipulation as to these documents’ authenticity in a Stipulated Discovery Plan.

³⁰In his further response to paragraph 12, Mr. Briggs mischaracterizes one of the affidavits submitted by Mr. Brown and Valley Spa, and once again denies that he had any recording of the November 15 telephone conversation. (Id.)

(R. 427 ¶ 51.) Mr. Brown and Valley Spa attached to their memorandum a copy of the draft Stipulated Discovery Plan in which Mr. Briggs had crossed through the proposed stipulation. (R. at 505.) Mr. Briggs purported to dispute paragraph 51 by asserting that he objected to a *different* provision in the draft Stipulated Discovery Plan, and asserting that Mr. Brown and Valley Spa “know that the documents in question have not been disputed.” (R. 551 ¶ 29.) Nevertheless, Mr. Briggs did not dispute paragraph 52 which set out his counsel’s attempt to justify his refusal to stipulate to the documents’ authenticity:

You already have whatever my client has as evidence in you possession. You will not get admissions out of me; you must get them out of him – that is the way the system works.

(R. at 427 ¶ 52.) Mr. Brown and Valley Spa respectfully submit that Mr. Briggs failed to genuinely dispute the fact that he refused to stipulate to the authenticity of these documents.

Other of Mr. Briggs’ responses were not so much logically inapposite as legally frivolous. Thus, in paragraph 8 of their “undisputed material facts,” Mr. Brown and Valley Spa referred to the fact that Mr. Briggs had asserted his inflated \$70,000 damages claim not only against Valley Spa, but also against Mr. Brown personally. Mr. Brown and Valley Spa stated as an undisputed fact that Mr. Briggs had no factual or legal basis for this damages claim against Mr. Brown personally. (R. at 418-19 ¶ 8.) Mr. Briggs purported to dispute this paragraph as follows:

[Mr. Briggs] admits that he named Lowell Brown as a party to the lawsuit. Larry Briggs says under oath, “Lowell Brown told me that he made all of the decisions at his business and that the business was his. And that he made all the decisions regarding my gazebo and hot tub purchase.” (Affidavit of Larry Briggs³¹, Ex-10 #5). [Mr. Brown and Valley Spa]’s statement should be stricken because of the legal conclusion it draws. [Mr. Briggs] does not provide any affidavits or other

³¹Mr. Briggs refers to one of his affidavits made on “personal information and belief.” (R. at 590.)

sworn testimony to establish any of the above statements. The Exhibit [Mr. Brown and Valley Spa] point to [i.e., the original contract documents] do not make it clear who the contract is between. Seven names are listed on the contracts that [Mr. Briggs] signed.

(R. 541 ¶ 4.) As Mr. Brown and Valley Spa pointed out in their reply memorandum to the trial court, it was legally frivolous for Mr. Briggs to argue that the corporate veil could be pierced and Mr. Brown held personally liable on a corporate contract simply because he owned and operated the corporation's business. (R. at 659 ¶ 8, *citing Orlob v. Wasatch Management*, 33 P.3d 1078, 1082 (Utah App. 2001).) Moreover, Mr. Brown and Valley Spa also pointed out that it is "clear from the contract documents that Mr. Brown was not personally a party to the contract." (R. at 659 ¶ 8; Briggs' Addendum, Tab 1; R. at 447-48.) Mr. Briggs' had no basis in fact for his assertion to the contrary. Therefore, although Mr. Briggs attempted to show some justification for having asserted a \$70,000 claim against Mr. Brown personally, the attempted justification was legally and factually frivolous. Mr. Briggs therefore failed to genuinely dispute the fact that his claim against Mr. Brown personally was baseless.

The remainder of Mr. Briggs' purported disputes of fact are discussed at length in the reply memorandum which Mr. Brown and Valley Spa filed with the trial court in support of their second Motion for Summary Judgment. (R. at 655-669.) Mr. Brown and Valley Spa respectfully submit that there is no genuine dispute as to 81 of their paragraphs of "undisputed material facts," and that the record before the trial court establishes the following facts:

1. Mr. Briggs knew that his \$70,000 damages claim was meritless. (R. at 418 ¶ 7.)
2. Mr. Briggs knew that his personal claim against Mr. Brown was meritless. (R. at 418-19 ¶ 8; 541 ¶ 4; 659 ¶ 8.)

It must be noted that these first two facts do not depend on the existence of the parties'

Settlement Agreement. With or without the Settlement Agreement, Mr. Briggs could not have any honest belief in the propriety of these claims.

3. Even after he reduced his damages claim to \$12,000, Mr. Briggs continued to demand \$15,000 to settle. (R. at 428 ¶ 56.)
4. Mr. Briggs knew that his claim against Valley Spa had been settled. (R. at 489; Briggs' Addendum, Tabs 2 & 3.)³²
5. Mr. Briggs made repeated misrepresentations of fact to the trial court. (R. at 419 ¶¶ 9-12; 420-21 ¶¶ 17-19; 422 ¶¶ 23-24; 426 ¶¶ 40-43; 428 ¶ 54a; 429 ¶¶ 59-60; 431 ¶ 70; 432 ¶¶ 73, 76; 433 ¶ 78; 434-35 ¶¶ 79-82; 541 ¶ 5; 542-43 ¶¶ 7-11; 549-550 ¶¶ 23-26; 553-54 ¶¶ 35-38; 659 ¶ 12; 660-63 ¶¶ 17-19; 664-665 ¶¶ 40-42, 43; 668 ¶¶ 78-79.)
6. Mr. Briggs repeatedly made frivolous legal arguments to the trial court. (R. at 431-33 ¶¶ 71-72, 74, 76-77.)
7. Mr. Briggs was pointlessly intransigent on numerous occasions. (R. at 425 ¶ 39; 426-27 ¶¶ 44-53; 428-29 ¶¶ 57-61; 429 ¶ 62; 430-31 ¶¶ 66-68, 70; 550-51 ¶¶ 27-30; 552 ¶ 32; 665-66 ¶¶ 44-53; 667 ¶ 62.)
8. As a result of Mr. Briggs' assertion of knowingly false claims, and the wrongful litigation practices with which he attempted to pursue those claims, Mr. Brown and Valley Spa were forced to incur reasonable legal expenses in the amount of \$17,585.10 at the time they filed their second Motion for Summary Judgment (R. at 435 ¶ 85), which increased to the total of \$26,062.50 at the time the trial court entered its final judgment. (R. at 878 ¶ 2.)

Mr. Brown and Valley Spa respectfully submit that given these undisputed facts, Mr.

³²On page 34 of his brief, Mr. Briggs refers to the eight pages in his memorandum to the trial court opposing the second Motion for Summary Judgment in which he purported to dispute the existence of the Settlement Agreement. However, Mr. Briggs' argument to the trial court depended on his own incompetent affidavits, the arguments discussed in sections II.B. above, and a number of additional arguments he has elected not to pursue on appeal.

Moreover, when Mr. Briggs made this argument to the trial court in opposition to the second Motion for Summary Judgment, he simply ignored the fact that it had already been decided. Almost two years earlier, the trial court had ruled that the settlement offer had been accepted, and that the resulting Settlement Agreement required the dismissal of Mr. Briggs' claims. (R. at 375.) Mr. Briggs never acknowledged that the court had already ruled against him on this issue, nor did he ever make a motion for reconsideration of the prior ruling.

Briggs “has no valid defense” to the Counterclaim. Kesler, 583 P.2d at 89 n. 2. Therefore, even if other instances of his wrongful conduct might be genuinely debated, this does not show any “material” dispute within the meaning of Rule 56.

C. The Rule 11 Motion Filed Against Mr. Briggs’ Counsel Does Not Preclude Summary Judgment on the Counterclaim.

On pages 35-36 of his brief, Mr. Briggs argues that summary judgment should have been precluded by a Motion for Rule 11 Sanctions which Mr. Brown and Valley Spa filed against Mr. Briggs’ counsel. This motion dealt with eight alleged misrepresentations of fact contained in an affidavit by Mr. Briggs’ counsel and an affidavit by Mr. Briggs. (R. at 700-05.)³³ Mr. Briggs had, through his counsel, submitted these affidavits to the trial court in opposition to the second Motion for Summary Judgment. Mr. Briggs’ counsel had opposed the motion on the ground that the alleged misrepresentations were not “significant” enough to warrant Rule 11 sanctions. (E.g.,

³³Five of the alleged misrepresentations were in a sworn affidavit executed by Mr. Briggs’ counsel:

1. that Mr. Brown’s counsel agreed to produce him for an “informal meeting” rather than a real deposition;
2. that Mr. Brown was never placed under oath;
3. that the deposition of Mr. Brown was conducted as an “informal meeting” or “interview” rather than as a deposition;
4. that Mr. Briggs’ counsel had never claimed to have a tape recording of the telephone conversation purportedly quoted in the Complaint and Amended Complaint; and
5. that Mr. Briggs’ counsel never threatened to depose all of Defendants’ Utah State Fair customers, and to inform each that he or she might have a statutory claim against Defendants.

The remaining three alleged misrepresentations were in Mr. Briggs’ affidavit “on knowledge and belief”:

6. that Mr. Briggs had no reason to believe that any gazebo had been ordered for him;
7. that Mr. Briggs was never notified by Defendants that the gazebo had arrived; and
8. that Valley Spa purchased the wrong the gazebo for Mr. Briggs.

(R. at 756.)

R. at 739.)

Mr. Brown and Valley Spa filed a reply memorandum responding to this “significance” argument as follows:

[I]f these representations were so inconsequential, one wonders why [Mr. Briggs] bothered to make them, or why he didn’t withdraw them during the 21-day grace period. In reality, [Mr. Briggs and Valley Spa] challenge only those falsehoods which are relevant to their Counterclaim. [Mr. Briggs] made these false representations in an attempt to raise *material* disputes of fact precluding summary judgment on the Counterclaim. The materiality of each alleged misrepresentation is discussed below.

(R. at 757-58.) Mr. Brown and Valley Spa went on to discuss how each of the eight alleged misrepresentations was relevant to the course of misconduct they alleged against Mr. Briggs in their Counterclaim. (R. at 758-766.)

Mr. Briggs argues that because Mr. Brown and Valley Spa used the words “material” and “materiality,” they have conceded that were not entitled to summary judgment. Mr. Brown and Valley Spa respectfully submit that the eight alleged misrepresentations identified in their motion for Rule 11 sanctions are certainly “material” in the sense of being relevant to the Counterclaim, and in the sense that an attorney should not be able to knowingly misrepresent them with impunity. They are not, however, “material” within the meaning of Rule 56 as applied to the second Motion for Summary Judgment. As discussed in the preceding section, Mr. Brown and Valley Spa were entitled to judgment on their Counterclaim on the basis of the undisputed record. Although, but for these alleged misrepresentations, they might have proven even more examples of Mr. Briggs’ wrongful litigation practices, that does not render these misrepresentations “material” disputes sufficient to preclude summary judgment.

In any event, Mr. Briggs argument on this point continues to ignore his burden of

appealing the trial court's finding that he acted in bad faith. It is not enough for Mr. Briggs simply to show that there was some material factual dispute that might have been decided in his favor. Rather, to challenge the trial court's finding of bad faith, Mr. Briggs "was required to marshal the evidence . . . [and] demonstrate why, even when viewed in the light most favorable to the trial court, the evidence is insufficient to support the challenged finding." Rohan v. Boseman, 46 P.3d 753, 759-760 (Utah App. 2002).

VIII. THE TRIAL COURT PROPERLY AWARDED ATTORNEY'S FEES UNDER UTAH CODE ANN. § 78-27-56

On pages 36-42 of his brief, Mr. Briggs makes additional arguments that the trial court erred in granting summary judgment on the Counterclaim under Utah Code Ann. § 78-27-56. As noted in section VII.A. above, however, Mr. Briggs makes no attempt to marshal the evidence supporting the trial court's finding of fact that Mr. Briggs asserted his claims in bad faith.

On page 37-38 of his brief, Mr. Briggs cites Watkiss & Campbell v. Foa & Son, 808 P.2d 1061, 1068 (Utah 1991), and Chipman v. Miller, 934 P.2d 1158, 1161 (Utah App. 1997), for the rule that the trial court "must make specific findings" of each of the elements required by section 78-27-56. That rule, however, was explicitly rejected in Valcarce v. Fitzgerald, 961 P.2d 305, 315 (Utah 1998). Moreover, as Mr. Briggs concedes on page 39 of his brief, the trial court's Final Judgment did include specific findings that Mr. Briggs' "claims are without merit, and were not asserted in good faith." (R. 885.)³⁴

³⁴On pages 37-40 of his brief, Mr. Briggs seems to argue that the adequacy of the trial court's judgment must be judged on the basis of its Minute Entry, and not on the basis of the Final Judgment. Mr. Briggs does not cite any basis for such a rule, nor are Mr. Brown and Valley Spa aware of any.

On pages 38-39 of his brief, Mr. Briggs accuses the trial court of bias, and of having received an "*ex-parte* letter" from Mr. Briggs and Valley Spa. The accusation of bias does not

On page 40 of his brief, Mr. Briggs cites Cady v. Johnson, 671 P.2d 149, 152 (Utah 1983), for the proposition that a final judgment awarding attorney's fees under section 78-27-56 must include a "recitation of the 'substantial evidence'" that the losing party's claim was without merit. Cady v. Johnson does not so hold; nor does any other authority known to Mr. Brown and Valley Spa. Indeed, such a "recitation" would go beyond the (now rejected) rule of Watkiss & Campbell.

On pages 40-42 of his brief, Mr. Briggs correctly cites a number of cases for the proposition that "bad faith" is a factual question. However, Mr. Briggs then makes a number of factual assertions and argues that,

Viewing these facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party cannot lead to a finding that Mr. Briggs acted in bad faith.

(Briggs' Br. at 42.) Mr. Briggs has the burden exactly backwards. As held in In re Discipline of Sonnenreich, 491 Utah Adv. Red. 15 ¶ 45 n. 14 (Utah January 16, 2004), to challenge the trial court's finding of fact that he acted in bad faith, Mr. Briggs has the burden to "show that the evidence, viewed in a light most favorable to the [district] court, is legally insufficient to support the contested finding." Mr. Briggs makes no pretense of such a showing.

IX. THE TRIAL COURT PROPERLY AWARDED ATTORNEY'S FEES UNDER ITS EQUITABLE POWERS

As noted above, the trial court made its award of attorney's fees on two legal bases: (1) Utah's "bad faith" litigation statute, Utah Code Ann. §78-27-56, and (2) the court's inherent equitable powers to award attorney's fees where a party has acted in bad faith." (R. at 885.) On

seem to merit any response. The supposedly "*ex-parte*" letter" was actually sent both to Mr. Briggs' counsel and to the court.

pages 42 of his brief, Mr. Briggs mischaracterizes the second of these bases. Mr. Briggs represents that the trial court “justified its award of fees on the broad claim that it was ‘in the interests of justice.’” (Briggs’ Br. at 42.) In reality, the trial court ruled as follows:

for the reasons set forth in the Court’s Minute Entry dated July 23, 2003, as well as the grounds set forth in [Mr. Brown and Valley Spa’s] memoranda, [Mr. Briggs’] claims were without merit, and were not asserted in good faith. . . . The court further finds that on the undisputed facts of this case, an award of attorneys’ fees is appropriate in the interests of justice. The court therefore exercises its equity powers to award [Mr. Brown and Valley Spa] the attorneys’ fees they have incurred in this case.

(R. at 885.)

On pages 42-44 of his brief, Mr. Briggs asserts that the trial court did not have the power to make such an award. However, as this Court stated in Rohan v. Boseman, 46 P.3d 753 (Utah App. 2002), “a court has inherent equitable power to award reasonable attorney fees when it deems appropriate in the interest of justice and equity.” 46 P.3d at 759. In order to challenge the trial court’s equitable award, Mr. Briggs had the burden to “marshal the evidence” supporting that award, and to

demonstrate why, even when viewed in the light most favorable to the trial court, the evidence is insufficient to support the challenged finding[s].


46 P. 3d at 759-760, *quoting* Wardley Better Homes & Gardens v. Cannon, 21 P.3d 235. Mr. Briggs has not met that burden. Mr. Brown and Valley Spa respectfully submit, therefore, that the trial court’s award of attorney’s fees was an appropriate exercise of its equitable powers.

CONCLUSION

Based on the preceding arguments, Mr. Brown and Valley Spa submit that Mr. Briggs has failed to show any reversible error below. Mr. Brown and Valley therefore ask that the judgment

of the trial court be affirmed, and that their damages claim against Mr. Briggs be increased to include the attorney's fees incurred on this appeal.

DATED this 15th day of March, 2004.


STEVEN E. McCOWIN
Attorney for Appellees Lowell Brown and Valley
Spa I, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I mailed, postage prepaid, 2 true and correct copies of the foregoing Appellees' Brief on March 15, 2004, to the following:

Affordable Legal Advocates
G. Brent Smith
180 South 300 West, Suite 170
Salt Lake City, Utah 84101

