

2004

Michael T. Bilanzich v. John Lonetti, Eunes I. Lonetti, JDL Holdings, L.L.C. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL T. BILANZICH,

Plaintiff/Appellant

v.

JOHN LONETTI, an individual, EUNES I.
LONETTI, an individual, JDL HOLDINGS,
L.L.C., a Utah limited liability company,

Defendants/Appellees

Case No. 20040640-CA

On appeal from an order of the Fifth District Court for Washington County
The Honorable James L. Shumate

BRIEF OF APPELLEES

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Oral Argument Requested

FILED
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APR 14 2005

RULE 24(a)(1) STATEMENT OF PARTIES

The caption of the case does not contain the names of all parties to the proceeding before the district court; therefore, in accordance with Utah R. App. P. 24(a)(1), such parties are listed separately as follows:

Plaintiff:

Michael T. Bilanzich

Defendants:

Jones, Waldo, Holbrook & McDonough, a professional corporation

D. Williams Ronnow, Esq. an individual

Cambridge Capital Group, Inc., a Delaware corporation

Cambridge Holdings, Inc., a Delaware corporation

Eric Cummings, an individual

Old Hill Partners, a partnership

Reese's Enterprises, Inc., a Nevada corporation

Footbridge Limited Trust, a Bermuda corporation

John C. Howe, an individual

Eunes I. Lonetti, an individual

John Lonetti, an individual

JDL Holdings, L.L.C., a Utah limited liability company

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- B. Term Sheet

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JURISDICTION

The final order of the district court was entered on June 23, 2004. The notice of appeal was filed on July 7, 2004. The Utah Supreme Court transferred the appeal to this Court on August 5, 2004. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2002).

ISSUES AND STANDARDS OF REVIEW

Bilanzich frames only one issue on appeal, then raises two issues. Correctly framed, those issues are as follows:

I.

Whether attorney fees may be awarded under a guaranty in which the guarantor has guaranteed payment of attorney fees incurred with regard to the underlying obligation but there is no language in the guaranty itself regarding attorney fees incurred in litigation concerning the guaranty.

Standard of Review. Whether attorney fees are recoverable under a contract is a question of law reviewed for correctness. See R.T. Nielson Co. v. Cook, 2002 UT 11, ¶16, 40 P.3d 1119

Preservation. This issue was presented below and is preserved in the Record at R. 2432-2433, 2488-2489.

II.

Whether a party who has successfully avoided his obligations under a contract by having it nullified can thereafter rely on that contract to obtain an award of attorney fees.

Standard of Review. Whether attorney fees are recoverable is a question of law reviewed for correctness. See R.T. Nielson, 2002 UT 11 at ¶16.

Preservation. This issue was presented below and is preserved in the Record at R. 2520-2536.

STATUTORY PROVISIONS INVOLVED

Utah Code Ann. § 78-27-56.5 (2002), which states:

Reciprocal rights to recover attorney's fees. A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees.

STATEMENT OF THE CASE

A. Nature of the Case

This appeal challenges the trial court's denial of a motion for an award of attorney fees arising out of the terms of a personal guaranty. The trial court had previously entered a judgment declaring the guaranty unenforceable and nullifying the same. The guarantor, who successfully obtained that judgment, then sought his attorney fees based on the terms of the guaranty. The trial court denied the motion on the grounds that its

prior ruling declaring the guaranty unenforceable precluded the guarantor from relying on the guaranty to recover attorney fees.

B. Course of Proceedings and Disposition Below

Plaintiff/Appellant Michael Bilanzich filed this action in August 2000. His complaint named numerous defendants including Defendants/Appellees JDL Holdings, L.C. and John and Eunes Lonetti. JDL Holdings filed a separate action against Bilanzich which was consolidated into the instant litigation. With respect to JDL and the Lonettis, Bilanzich sought to rescind and have his guaranty declared unenforceable. He also sought a claim for unjust enrichment. JDL's complaint sought to enforce the guaranty against Bilanzich.

In August 2003, Bilanzich filed a motion for partial summary judgment against JDL and the Lonettis. The trial court granted the motion and entered partial judgment against JDL and the Lonettis declaring the guaranty unenforceable. Subsequently, Bilanzich, JDL, and the Lonettis stipulated to a dismissal of the remainder of Bilanzich's claims against them. On February 23, 2004, Bilanzich filed a motion for an award of attorney fees. On June 23, 2004, the trial court denied the motion. Bilanzich appeals.

STATEMENT OF FACTS

In December 1996, Defendants/Appellees JDL Holdings, L.C. and John and Eunes Lonetti (hereafter collectively, "Lonetti") loaned Reese's Enterprises, Inc. ("REI") approximately \$1,780,600.00 which loan was evidenced by a promissory note and

secured by a security agreement and trust deed. (R. 1822,¹ 2441.) In April 1998, Lonetti and REI entered into an agreement modifying the promissory note (“Modification”) to increase the principal balance due to Lonetti from REI to \$2,167,717.00. (R. 2441; *see also* Add. A.)² The only parties to the Note were John Lonetti, Eunes Lonetti, and REI. (R. 2443; *see also* Add. A.)

In his statement of facts, Bilanzich asserts that the Modification contains a reciprocal attorney fees provision that, according to Bilanzich, states: “If any action is instituted with respect to this Agreement or supporting documents, the prevailing party shall be entitled to an award of attorney’s fees and costs to be paid by *the other parties*.” (Br. at 6) (Emphasis added.) This is not accurate. The attorney fees provision in the Modification provides: “If any action is instituted with respect to this Agreement or supporting documents, the prevailing party shall be entitled to an award of attorney’s fees and costs to be paid by *the other party*.” (R. 2442; *see also* Add. A ¶3) (Emphasis added.) The Modification contains a choice of law provision subjecting it to interpretation and construction under Nevada law. (R. 2442; *see also* Add. A ¶4.)

¹ In reviewing the record, it appears that there are at least two pages in volume 7 of the record with the page number 1822. Page number 1822 cited herein is to an affidavit of John Lonetti submitted in a bankruptcy court action in Nevada, which is attached to an exhibit in Bilanzich’s request for judicial notice.

² A copy of the Modification is attached as Addendum A.

Subsequent to the Modification, litigation was initiated between Lonetti and REI which culminated in a settlement agreement. (R. 2084.³) The settlement agreement was memorialized in a document dated September 1999 and referred to as the “Term Sheet.” (R. 2084, 1776.)⁴

On September 30, 1999, Bilanzich executed a guaranty (“Guaranty”)⁵ in favor of Lonetti, guaranteeing to pay REI’s obligations to Lonetti. (R. 528, 2445; *see also* Add. C.) The Guaranty contains a sentence which states, “[t]his Guaranty includes all principal, interest, costs, expenses, and attorney fees incurred in collection of the Note and realization of the security.” (R. 528; *see also* Add. C.)

In August 2000, Bilanzich initiated this litigation, seeking, with respect to Lonetti, that the Guaranty be rescinded and declared unenforceable and asserting a claim for unjust enrichment. (R. 1, 10-13, 1325-29.) JDL initiated a separate action against Bilanzich seeking to enforce the Guaranty. (R. 2499-2501.) That action was consolidated into the instant litigation. (R. 671-72.)

Bilanzich brought a motion for partial summary judgment against Lonetti asserting that conditions precedent to the enforcement of the Guaranty, as contained in the Term Sheet, did not occur, and therefore the Guaranty was not enforceable. (R. 1735-1736.) In that motion, Bilanzich asserted, as undisputed fact, that “[t]he Term sheet and Bilanzich

³ In reviewing the record, it appears that there are at least two pages in volume 8 of the record with the page number 2084. Page number 2084 cited herein is to Lonetti’s Memorandum in Opposition to Bilanzich’s Motion for Partial Summary Judgment.

⁴ A copy of the Term Sheet is attached as Addendum B.

⁵ A copy of the Guaranty is attached as Addendum C.

Guaranty are the only written agreements between the Lonettis and Bilanzich.” (R. 1731.) Nowhere in the Term Sheet is there mention of an award of attorney fees to the prevailing party in litigation concerning the same. (R. 1776-1777; *see also* Add. B.) The trial court granted Bilanzich’s motion. (R. 2221-2223.)

Thereafter, Bilanzich, through his attorney, approached Lonetti’s attorneys about settlement. (R. 2456; *see also* Add. D. Aff. Wade ¶5.) Bilanzich had sent a letter outlining his proposed settlement terms to Lonetti. (R. 2456, 2460-61.) However, numerous settlement discussions concerning the remaining claims occurred following the time Bilanzich sent this letter. (R. 2447, 2455-2457.)⁶

Pursuant to these settlement discussions, Bilanzich offered to dismiss all remaining claims against Lonetti in exchange for Lonetti waiving his right to appeal the trial court’s entry of partial summary judgment. (R. 2456-2461.) During the settlement negotiations, it was communicated to Lonetti’s attorneys that acceptance of the settlement offer would bring the litigation between Bilanzich and Lonetti to a conclusion and that Lonetti would have no further liability relative to claims by Bilanzich. (R. 2456-2457.)

Pursuant to these representations, and out of a desire to see the litigation come to an end, Lonetti agreed to the settlement. (R. 2457.) In connection with the settlement, Bilanzich prepared a joint motion and stipulation for dismissal and an order of dismissal, which were forwarded to Lonetti’s attorneys. (R. 2409, 2421.) After obtaining approval of the settlement, Bilanzich, without providing any notice to Lonetti, filed a motion for award of attorney fees and costs seeking fees and non-taxable costs in the amount of

⁶ Affidavits setting forth these discussions are attached at Addendum D.

\$89,161.92. (R. 2385-86, 2410, 2456-57.) In the motion Bilanzich claimed he was the prevailing party in the litigation and was entitled to attorney fees and costs under the terms of the Guaranty and Utah Code Ann. § 78-27-56.5. (R. 2391-92.)

Lonetti opposed the motion on the grounds that (1) there was no contractual or statutory authority or basis for Bilanzich to obtain an attorney fees award against Lonetti and (2) Bilanzich's motion for fees was contrary to and a violation of his settlement agreement with Lonetti. (R. 2427-2438.)

On May 4, 2004, the trial court held a hearing on the motion. (R. 2248.) At that hearing, the trial court, sua sponte, asked the parties to address an issue neither had considered in their memoranda, which the trial court believed was threshold to the motion. (R. 2248 Tr. 6:20-22.) The trial court stated, "[t]he law of the case and the Court's [partial summary judgment] ruling on this matter already is that [Bilanzich] has no liability under that guarantee, and if he has no liability under that guarantee how can he come back and get attorneys fees under something that is basically a nullity as to his legal rights and responsibilities. That's what worries me." (R. 2248 Tr. 3:21-25, 4:1.)

The court continued, "I . . . need some authority to back up what is basically a legal consequence of the law of the case, and no one seems to have addressed it[.]" (*Id.* at Tr. 6:20-22.) The trial court instructed both parties to submit supplemental memoranda addressing the issue. (*See id.* at Tr. 7:2-4.) The parties provided supplemental briefing to address the issue. (R. 2520-2536.) On June 23, 2004, the trial court, in a signed minute entry, denied Bilanzich's motion for attorney fees. (R. 2560.)

Bilanzich appeals.

SUMMARY OF ARGUMENTS

The trial court correctly denied Bilanzich's motion for an award of attorney fees. Its previous ruling granting partial summary judgment for Bilanzich nullified the Guaranty and thus precluded Bilanzich from thereafter relying on the Guaranty to claim an award of attorney fees against Lonetti. In making this determination the trial court faithfully followed established precedent of our appellate courts and reached the decision mandated by such precedent—that one cannot avoid a contractual obligation by having it declared unenforceable and then rely on that very contract to claim an attorney fees award.

There are at least two alternative grounds for affirmance. *First*, the Guaranty at issue does not provide for an attorney fees award. In Utah, attorney fees are awardable only if authorized by statute or contract.” R.T. Nielson Co. v. Cook, 2002 UT 11, ¶17, 40 P.3d 1119 (citation omitted). When authorized by contract, attorney fees “are awardable only in accordance with the explicit terms of the contract and only to the extent permitted by the contract.” Wardley Corp. v. Welsh, 962 P.2d 86, 92 (Utah Ct. App. 1998) (citation and quotation omitted). The Guaranty makes passing reference to attorney fees but does not specifically provide for an attorney fees award in litigation concerning the Guaranty itself. Under Utah law, this is fatal to a claim for attorney fees arising out of a contract.

Additionally, under the plain language of the reciprocal attorney fees statute, at least one party to an agreement must be entitled to attorney fees before the other party

can claim a reciprocal right to attorney fees. See Utah Code Ann. § 78-27-56.5 (2002). Because the Guaranty contains no provision for an award to Lonetti in litigation concerning the Guaranty, Bilanzich cannot claim a reciprocal right to recover attorney fees under section 78-27-56.5. This is so, regardless of whether or not Lonetti may have sought recovery of his own attorney fees incurred to enforce the Guaranty against Bilanzich. See Fericks v. Soffe, 2004 UT 85, ¶25, 100 P.3d 1200.

Second, Bilanzich's motion for attorney fees is contrary to his settlement agreement with Lonetti. Bilanzich agreed to dismiss his remaining claims against Lonetti if Lonetti agreed to forego an appeal of the trial court's entry of partial summary judgment. In essence, both parties agreed to lay down their weapons and go their separate ways. However, once Lonetti dropped his weapon, Bilanzich continued the battle he agreed to walk away from by filing his motion seeking \$89,000-plus in attorney fees and costs. Bilanzich's decision to continue the litigation by seeking attorney fees from Lonetti is a breach of that agreement. Under Utah law, this Court may summarily enforce that agreement by affirming the trial court's order denying Bilanzich's motion.

In this regard, settlement agreements are governed by the basic rules of contract law. Therefore, at a minimum, this issue requires remand to the trial court to determine whether there was in fact a meeting of the minds sufficient to constitute an agreement to settle the case. Thus, even if this Court determines that Bilanzich is entitled to attorney fees under the Guaranty or reciprocal fees statute, it cannot remand to the trial court with instructions to award such fees without first requiring the trial court to address the settlement issue.

ARGUMENT

I. BILANZICH HAS NO LEGAL BASIS TO RECOVER ATTORNEY FEES UNDER THE GUARANTY OR THE RECIPROCAL FEES STATUTE.

A. The Guaranty Does Not Provide For An Attorney Fees Award.

Bilanzich first argues that the Guaranty contains an attorney fees provision. This argument is meritless. “In Utah, attorney fees are awardable only if authorized by statute or contract.” R.T. Nielson Co. v. Cook, 2002 UT 11, ¶17, 40 P.3d 1119 (citation omitted). When authorized by contract, attorney fees “are awardable only in accordance with the explicit terms of the contract and only to the extent permitted by the contract.” Wardley Corp. v. Welsh, 962 P.2d 86, 92 (Utah Ct. App. 1998) (quoting Maynard v. Wharton, 912 P.2d 446, 451 (Utah Ct. App. 1996)).

The only provision in the Guaranty that references attorney fees is the last sentence in the second paragraph which states: “This Guaranty includes all principal, interest, costs, expenses, and attorney fees incurred in collection of the Note and realization of the security.” The Note is a reference to the promissory note and Modification between Reese’s Enterprises, Inc. and Lonetti. The security referenced in the Guaranty, is not the Guaranty itself, it is the trust deed referenced in the Note and Modification. Bilanzich is not a party to the Note, the Modification, or the trust deed referenced therein.

There is no ambiguity with regard to the subject provision of the Guaranty. Bilanzich has simply guaranteed payment of principal, interest, cost, expenses, and attorney fees incurred in any collection of the Note and realization of the security

thereunder. What the Guaranty does not provide and cannot be construed to mean, however, is that the prevailing party in litigation to enforce the Guaranty is entitled to an award of attorney fees.

Cases wherein recovery of attorney fees has been founded upon contractual language have routinely and without fail involved contracts which contain unambiguous and clear reference to recovery of fees by the prevailing party as a result of some triggering mechanism contained within the terms of the contract at issue. See Kraatz v. Heritage Imports, 2003 UT App 201, ¶23, 71 P.3d 201, *cert. denied*, 84 P.3d 239 (Utah 2003) (providing “defaulting party shall pay all expenses and costs incurred by the other party in enforcing the terms hereof”); Chase v. Scott, 2001 UT App 404, ¶11, 38 P.3d 1001 (providing for attorney fees in “litigation . . . to enforce” the contract); Keith Jorgensen’s, Inc. v. Ogden City Mall Co., 2001 UT App 128, ¶¶25-26, 26 P.3d 872 (providing for award of attorney fees if one party “institutes any action or proceeding against the other relating to the provisions of this Lease or any default hereunder”); Equitable Life & Cas. Ins. Co. v. Ross, 849 P.2d 1187, 1194 (Utah Ct. App. 1993) (providing “the prevailing party to such resulting action shall have a right to recover from the non-prevailing party any and all costs and expenses, including reasonable attorneys’ fees”); Carr v. Enoch Smith Co., 781 P.2d 1292, 1296 (Utah Ct. App. 1989) (providing that party failing to perform agreement “agrees to pay all expenses of *enforcing this agreement*, or of any right arising out of the breach thereof, including a reasonable attorney’s fee”) (emphasis original)).

Rather than relying on the terms of the Guaranty or Utah law governing attorney fee awards, Bilanzich relies on two non-Utah cases in support of his argument—neither of which are on point or persuasive. He cites Ashland Oil, Inc. v. Cardinal Fuels, Inc., 872 F.2d 416 (4th Cir. 1989) (*unpublished table decision*)⁷ for the proposition that the language in the Guaranty de facto establishes a right to an award of attorney fees by a guarantor in his position. (Br. at 9-10.) However, the court in Ashland Oil does not provide any analysis or discussion of the substantive law governing an award of attorney fees under the agreement it was addressing—in fact, the court does not even quote from or provide an excerpt of the agreement containing the fee provision at issue. See 1989 WL 28404 **2. This is hardly the type of analysis that would mandate or justify a departure from clearly established Utah law.

The same must be said of the court’s analysis in the other case relied upon by Bilanzich, Connecticut National Bank v. Foley, 560 A.2d 475 (Conn. App. Ct. 1989). (Br. at 10-11.) There, in reference to an attorney fees award to a guarantor, the court stated that “[t]his claim requires little discussion[,]” id. at 478, and it provides none. Significantly, the case has never been cited in a published decision for the proposition that Bilanzich advances here. Thus, while the contractual language in Foley may bear some similarity to the Guaranty at issue here, without more, it is not enough to displace the rules governing recovery of attorney fees under a contract pursuant to Utah law.

Finally, Bilanzich baldly asserts that Lonetti’s prayer for recovery of attorney fees from Bilanzich constitutes some type of admission that the Guaranty provides for an

⁷ For the Court’s convenience, a copy of Ashland Oil is attached as Addendum E.

award of attorney fees. (Br. at 10.) This is also a meritless assertion. Attorney fees are not recoverable merely because one party has prayed for the same in their complaint. See Fericks v. Soffe, 2004 UT 85, ¶25, 100 P.3d 1200. Allegations or relief sought in a complaint do not replace language in a contract. See id. Moreover, the complaint against Bilanzich, while generally seeking recovery of attorney fees, does not specifically allege that such fees are recoverable under the terms of the Guaranty. (R. 2499-2501.) Thus, this Court must reject Bilanzich’s meritless attempt to create a fees provision out of whole cloth by supplanting language in a contract with a general prayer for relief in a complaint.

In sum, the Guaranty does not contain an attorney fees provision that would entitle Bilanzich to an award of attorney fees incurred in litigation involving the Guaranty. Therefore, this Court can summarily affirm the trial court on this basis alone.

B. Without An Underlying Contract Providing For An Attorney Fees Award, Bilanzich Has No Claim For Recovery Of Fees Under The Reciprocal Attorney Fees Statute.

Bilanzich next argues that Utah Code Ann. § 78-27-56.5 entitles him to an award of attorney fees. (Br. at 11.) The plain language and threshold requirement of reciprocal recovery of attorney fees under section 78-27-56.5 is that at least one party to the agreement be entitled to attorney fees in litigation concerning the agreement. See Utah Code Ann. § 78-27-56.5 (2002) (reciprocal right to fees exists only where “at least one party” has right to recover fees). Section 78-27-56.5 does not provide and cannot be stretched to mean that the simple mention of the term “attorney fees” in an agreement

gives any party the right to an award of attorney fees if it is a prevailing party in litigation involving that agreement.

Because the Guaranty does not provide for an award of attorney fees to Lonetti against Bilanzich in litigation concerning the Guaranty, the reciprocal attorney fees statute provides no basis for such an award to Bilanzich. Therefore, Bilanzich is not entitled to his attorney fees under section 78-27-56.5.

To be sure, Bilanzich asserts in his issue statement and implies in the substance of his brief that the Modification provides some basis for an award of attorney fees to Bilanzich under section 78-27-56.5. (Br. at 1, 10.) This argument, whether express or implied, is without merit for two reasons.

First, as set forth in detail above, it is undisputed that Bilanzich is not a party to the Note or the Modification. In Anglin v. Contracting Fabrication Machining, Inc., 2001 UT App 341, 37 P.3d 267, this Court addressed this same situation and held that the reciprocal right to recover attorney fees on a promissory note or other writing under section 78-27-56.5 is limited and restricted “to include only the parties to the original promissory note, not any party to the litigation.” *Id.* at ¶10. Because Bilanzich is not a party to the Note or the Modification, he has no right to recover attorney fees under section 78-27-56.5.

Second, the Modification is not subject to section 78-27-56.5. Rather, it is subject to Nevada law (*see* Add. A ¶4) which does not have a reciprocal attorney fees statute. See Nev. Rev. Stat. 18.010 (governing award of attorney’s fees); see also Pandelis Construction Co., Inc. v. Jones-Viking Assocs., 734 P.2d 1236, 1238 n.3 (Nev. 1987)

(holding that an attorney fees provision which by its terms applies only to one party to an agreement must be enforced as written no matter how unfair that result). Moreover, as in Utah, see Wardley, 962 P.2d at 92, in Nevada, a court can only award attorney fees to actual parties to the agreement containing an attorney fees provision—not any party to the litigation concerning the agreement. See Wyatt v. Bowers, 747 P.2d 881, 884 (Nev. 1987).

Thus, to the extent Bilanzich claims his fees based on the Modification or Note in connection with Utah Code Ann. § 78-27-56.5, his claims must be rejected.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT ITS PRIOR RULING DECLARING THE GUARANTY A NULLITY DEPRIVES BILANZICH OF ANY CLAIM TO ATTORNEY FEES.

Even if this Court determines that the Guaranty does contain an attorney fees provision, the trial court correctly concluded that its prior ruling declaring the Guaranty a nullity deprives Bilanzich of any claim to an award of attorney fees under the Guaranty.

Under Utah law, a party that successfully avoids or nullifies a contract cannot, at the same time, claim the benefit of an attorney fees provision in the contract. The seminal and controlling case on this issue is BLT Investment Co. v. Snow, 586 P.2d 456 (Utah 1978). In BLT, the plaintiff sought specific performance of a written contract with the defendant. See id. at 456. In defense, the defendant sought to rescind the contract. See id. The trial court, finding a failure of condition precedent to the effectiveness of the contract, ordered rescission of the same and also awarded the defendant his attorney fees pursuant to a provision in the contract providing for such fees. See id. at 457-58.

The Utah Supreme Court affirmed the trial court's rescission of the contract but reversed the award of attorney fees. See id. at 456. In reversing the attorney fees award, the supreme court adopted the rule that a party "may not avoid the contract and, at the same time, claim the benefits of the provision for attorney fees." Id. at 458 (citation omitted). This rule applies here.

Bilanzich avoided the Guaranty by having it nullified and declared unenforceable. That ruling, as observed by the trial court at the May 4 hearing, constitutes the law of the case. (R. 2248 Tr. 6:20-22.) See also Thurston v. Box Elder County, 892 P.2d 1034, 1037 (Utah 1995) (stating "a decision made on an issue during one stage of a case is binding in successive stages of the same litigation"). Under BLT and the law of the case doctrine, Bilanzich cannot claim the benefit of an attorney fees provision under a Guaranty he previously avoided by having the trial court declare the same unenforceable.

Although BLT was decided prior to the enactment of Utah's reciprocal attorney fees statute, Utah Code Ann. § 78-27-56.5,⁸ subsequent case law makes clear that BLT has survived the enactment of 78-27-56.5, and is the current state of law in Utah on this issue. See, e.g., Chase v. Scott, 2001 UT App 404, ¶14, 38 P.3d 1001 (stating "because the party had successfully rescinded the contract, the contract no longer existed, and therefore they could no longer rely upon any of its terms." (quoting BLT, 586 P.2d at 458)).

⁸ Section 78-27-56.5 is applicable to cases involving contracts executed after April 29, 1986. See Utah Code Ann. § 78-27-56.5 (2002). BLT was decided in 1978.

In Chase v. Scott, the party seeking fees under the contract at issue mounted a *successful defense* to an action for rescission of that contract. See id. at ¶14. This Court determined that the party mounting the successful defense to rescission is entitled to an award of attorney fees under the contract because the contract remains in force and effect. See id. at ¶¶16-17. The court then expressly determined that this holding was consistent with both BLT **and** section 78-27-56.5.

This Court recognized that “[t]he [supreme] court reasoned [in BLT] because the party [seeking fees] had successfully rescinded the contract, the contract no longer existed, and therefore they could no longer rely upon any of its terms.” Id. at ¶14. It then stated that “our [holding] would be consistent with BLT limiting awards under this type of contractual provision to only those parties who successfully defend against rescission and thus enforce the contract.” Id. ¶16. The court of appeals determined that its holding was consistent with the reciprocal attorney fees statute because either party would be entitled to attorney fees if they successfully defended against rescission. See id.

Thus, according to Chase, had either party in the instant case successfully defeated an attempt by the other party to have the Guaranty declared unenforceable, he would have been entitled to fees under the Guaranty because the Guaranty would have survived and remained in place.⁹ However, where, as here, the Guaranty is declared unenforceable and is a nullity, BLT and Chase foreclose any right Bilanzich may have had to obtain his attorney fees based on the Guaranty.

⁹ Of course, as set forth above in Point I, we maintain that under Utah law, the Guaranty contains no provision awarding attorney fees to any party in litigation concerning the Guaranty. We only assume it does here for purposes of analysis under Point II.

In sum, the trial court declared the Guaranty unenforceable. This was a result of Bilanzich's own motion that allowed him to avoid his obligations under the Guaranty. Because the Guaranty has been avoided and is of no force or effect, Bilanzich cannot rely upon its terms to obtain an award of attorney fees. The trial court correctly denied Bilanzich's motion for fees on this basis. This Court must affirm.

III. BILANZICH'S MOTION FOR ATTORNEY FEES IS CONTRARY TO HIS SETTLEMENT AGREEMENT WITH LONETTI.

Bilanzich's motion for attorney fees is contrary to his settlement agreement with Lonetti. This agreement was reached after extensive discussions between counsel for the parties in which Bilanzich agreed to dismiss his remaining claims against Lonetti if Lonetti agreed to forego an appeal of the trial court's entry of partial summary judgment. As set forth in undisputed affidavits submitted by counsel for Lonetti (*see* Add. D), it was understood by Lonetti that this settlement meant that the litigation between Bilanzich and Lonetti would come to a conclusion and that Lonetti would have no further liability to Bilanzich. Yet, obviously, the litigation has not ended. Bilanzich chose to continue the litigation and further expose Lonetti to liability—contrary to the assurances and representations made to Lonetti's counsel in the course of negotiations. (R. 2457; *see also* Add. B. Wade Aff. ¶6(b).)

In response to these affidavits and arguments raised below, Bilanzich simply asserted that attorney fees were not discussed and were not part of the settlement discussions. (R. 2492-2493.) However, Bilanzich did not submit a single affidavit disputing the facts set out in the Lonetti affidavits. (R. 2487-2506.) Rather, Bilanzich

treats this as a small matter and takes comfort in the fact that there was no written agreement to waive attorney fees and costs. (Br. at 4.) This is no small matter.

In Utah, “[i]t is a basic rule that the law favors the settlement of disputes.” Goodmansen v. Liberty Vending Sys., Inc., 866 P.2d 581, 584 (Utah Ct. App. 1993) (citation omitted). In this regard, courts have inherent authority to summarily enforce settlement agreements. See id. Moreover, contrary to Bilanzich’s assertions, it is of no legal consequence that the parties have not signed a settlement agreement or that the settlement agreement is not reduced to writing. See id. at 584-85. Rather, “[s]ettlement agreements are governed by the rules applied to general contract actions.” Sackler v. Savin, 897 P.2d 1217, 1220 (Utah 1995). “Under the principles of basic contract law, a contract is not formed unless there is a meeting of the minds.” Id.

Here, it is undisputed that Lonetti’s understanding of the settlement was that if he waived an appeal of the trial court’s partial summary judgment, he would be allowed to walk away from the litigation unscathed, having no further liability to Bilanzich. While the issue of attorney fees may not have been specifically addressed in conversations or correspondence between the parties, it is of little consequence. The end of litigation means the end of litigation—no matter how Bilanzich chooses to justify his actions, his motion for almost \$90,000 in fees and costs directly contradicts his representations and assurances which constitute the basis for the settlement agreement.

It is well settled that this Court can affirm the trial court on any alternate ground or theory that is supported in the record. See Dipoma v. McPhie, 2001 UT 61, ¶18, 29 P.3d 1225. Bilanzich’s failure to dispute the affidavits submitted by Lonetti with affidavits of

his own is telling. This is particularly true where significant discussions took place after Bilanzich sent his settlement letter. (R. 2456; *see also* Add. D. Wade Aff. ¶¶5-6.) The affidavits clearly establish a settlement in which the litigation between Lonetti and Bilanzich would cease, Lonetti would forego his right to appeal, and face no further exposure or liability from Bilanzich. Clearly, Bilanzich's continued litigation is in violation of the terms of this agreement. Therefore, this Court would be justified in summarily enforcing the terms of this agreement by affirming the trial court on such grounds.

Alternatively, if this Court determines that Bilanzich is somehow entitled to attorney fees, it must remand to the trial court with instructions to address the settlement agreement issue prior to awarding such fees to Bilanzich. *See Callie v. Near*, 829 F.2d 888, 890 (9th Cir. 1987) (stating "where material facts concerning the existence or terms of an agreement to settle are in dispute, the parties must be allowed an evidentiary hearing"). Here, at minimum, there is a dispute as to the terms of the settlement agreement, and a genuine question as to whether there was a meeting of the minds as it related to integral terms of that agreement, namely, the question of attorney fees.

Such a remand would be consistent with the trial court's own expectations and assurances to Lonetti. At the May 4 hearing, the trial court stated that there would be no reason to address the settlement agreement issue if the issue it wanted addressed (*see* Point II *supra*) mooted any claim Bilanzich had to attorney fees. (R. 2248 Tr. 7:8-25, 8:1-9.) The trial court then assured Lonetti's counsel that the opportunity to address the settlement issue would be available to him. (*See id.* at Tr. 8:4-25, 9:1.) Specifically, the

trial court stated that, if after the supplemental briefing on the nullification issue “I find [Bilanzich’s] position is still well taken, at least as to that issue, then we’ll give you a chance to calendar it and talk about everything else.” (*Id.* at Tr. 8:24-25, 9:1.)

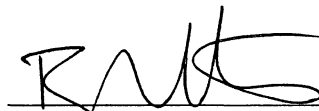
In sum, this Court may affirm on the alternate basis that Bilanzich’s motion for attorney fees violated his settlement agreement with Lonetti. In the alternative, if this Court finds Bilanzich is entitled to an award of attorney fees, it must remand with instructions to the trial court to conduct a hearing to address the settlement agreement issue.

CONCLUSION

For the reasons set forth above, this Court must affirm the trial court.

Respectfully submitted this 14th day of April 2005.

DURHAM JONES & PINEGAR



Terry L. Wade


Bryan J. Pattison

Attorneys for JDL Holdings, L.C., and
John Lonetti and Eunes Lonetti

CERTIFICATE OF SERVICE

In accordance with Utah R. App. P. 26(b), I, Bryan J. Pattison, certify that on April 14th, 2005, I served two (2) copies of the **BRIEF OF APPELLEES** upon counsel for Appellant, via first class mail with sufficient postage prepaid, to the following address:

Richard D. Burbidge
Jefferson W. Gross
BURBIDGE & MITCHELL
215 South State Street, Suite 920
Salt Lake City, Utah 84111
Attorneys for Appellant



Bryan J. Pattison

Tab A

**MODIFICATION OF NOTE SECURED BY DEED OF TRUST
AND SECURITY AGREEMENT**

WHEREAS, REESE'S ENTERPRISES, INC., a Nevada corporation (hereinafter referred to as BORROWER) executed a Promissory Note in the amount of ONE MILLION SEVEN HUNDRED EIGHTY THOUSAND SIX HUNDRED and NO/100 DOLLARS (\$1,780,600.00) dated December 31, 1996 (hereinafter referred to as NOTE) in favor of JOHN and EUNES LONETTI, JR., (hereinafter collectively referred to as LENDER) pursuant to the provisions of the Loan Agreement dated December 31, 1996, which NOTE is secured by a Deed of Trust and Security Agreement, and

WHEREAS, the Loan Agreement was amended on February 4, 1998, to reflect an additional loan from LENDER to BORROWER in the amount of THREE HUNDRED FIFTY FOUR THOUSAND NINE HUNDRED THIRTY EIGHT and 00/100 DOLLARS (\$354,938.00), and

WHEREAS, the parties hereto desire to modify certain provisions of the NOTE without modifying the legal effect or priority of the subject Deed of Trust or Security Agreement to reflect the additional loan made on February 4, 1998.

NOW, THEREFORE, for good and valuable consideration, the parties agree as follows:

1. Modification of Promissory Note. The parties hereto agree that the NOTE shall be modified as follows:

- a. The adjusted outstanding balance of the NOTE as of April 1, 1998, shall be \$2,167,717.00, which amount represents the balance of the principal and

accrued interest of the NOTE and the additional loan made on February 4, 1998.

b. Said adjusted balance together with interest thereon at the stated interest rate within the NOTE, shall be payable in accordance with the terms of the NOTE in monthly installments in the initial approximate amount of \$20,918.94 commencing April 1, 1998.

2. No Modification of Deed of Trust or Security Agreement. The terms, covenants and conditions contained in the NOTE, Loan Agreement, Deed of Trust and Security Agreement, which are not modified by this Agreement shall remain operative and in full force and effect. This Agreement shall serve merely as an amendment to the NOTE and not an alteration of the subject Deed of Trust or Security Agreement, it being agreed and understood that the subject security instruments shall continue to remain a first obligation and encumbrance against property securing the NOTE.

3. Attorney's Fees. If any action is instituted with respect to this Agreement or supporting documents, the prevailing party shall be entitled to an award of attorney's fees and costs to be paid by the other party.

4. Law Governing. The laws of the State of Nevada shall govern the construction and interpretation of this Agreement.


5. Modification. This Agreement may not be modified or terminated orally, and no modification or attempt of waiver shall be valid, unless in writing, signed by all parties hereto.


6. Benefit. This Agreement shall be binding upon and inure to the benefit of the respective parties hereto, their legal representatives, successors and assigns.

7. Entire Agreement. All understandings and agreements heretofore and between the parties are merged in this Agreement which alone fully and completely expresses their understanding and agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the 5th day of April, 1998.

LENDER:

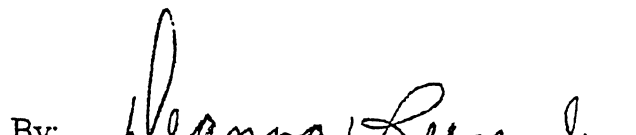

JOHN LONETTI, JR.


EUNICE LONETTI

BORROWER:

REESE'S ENTERPRISES, INC., a
Nevada corporation

By: 
GAYLE REESE, President

By: 
DEANNA REESE, Secretary/
Treasurer

Tab B

Term sheet for discussion only until initiated by counsel - Reese v. Lonetti
REVISED 9/20/99 9:30 am

Each bold outlined deadline is a pre condition to the next step.

Monday

- Counsel will initial this document Monday September 20, 1999, or earlier, after obtaining final approval of parties. It will then be an enforceable settlement subject only to preparation of a final document.

Tuesday, September 21, 1999

- Continue Preliminary Injunction hearing to October 1. (Hearing date may be used to enforce settlement.)

September 20, 1999

- DUP* • Document embodying these terms (including subordination) executed
 - There are no contingencies or conditions that will prevent this document from being prepared and signed; just a matter of writing this up formally and circulating for signatures
- DUP* • Dismissal of suit with prejudice signed and filed. Dismissal includes Rule 11, 78-27-56 claims and exonerates bond. Parties bear own costs and fees. All shareholders of REI approve suit dismissal.
- DAI* • Stipulation on behalf of all shareholders of REI that TD, Sec Ag and Note are valid and enforceable goes in court file at signing of document
- Deposit resignations of Lonetti and endorsed stock in escrow

include follow instructions

December 30, 1999 - at closing

- Right to extend escrow/defer closing date to March 28, 1999 if additional \$30,000.00 cash is paid to Lonetti outside escrow, before December 30, 1999, if financing substantially complete by December, but not ready to close.

The provisions that follow are descriptive of events that occur at the closing. The closing is contingent on financing being obtained by REI from an institutional lender. This financing is NOT the responsibility of Lonetti in any way. If financing is not obtained, the closing will not occur, all items in escrow will be returned to the party depositing them, and Lonetti will foreclose and realize on security.

At closing, these events will occur:

- Endorsed stock from Lonetti delivered out of escrow with resignations of all positions in REI
- All payables to be brought and kept current.
- REI will agree to keep Western Supply current.

Michael Blangenh
9/20/99

David [Signature]
9/20/99
4:15 pm

At closing, one of the two following events will occur:

ALTERNATIVE 1

- Payment to Lonetti of \$2,150,000 (with interest at 10% from September 20, 1999) in full satisfaction of all obligations, security release and stock release.

ALTERNATIVE 2:

- Payment of \$250,000 (\$82,283.00 interest and \$167,717 principal) to Lonetti
- Reduction in principal of Note to \$2,000,000 after payment of \$250,000, and agreement that balance of interest to date is not collectible.
- Modification of Note to provide for interest payments only at 10% from September 20, 1999. First interest installment due June 30, 2000; thereafter interest paid monthly; balloon of all principal and interest due October 1, 2001.
- Lonetti Note receives personal guarantees of Reese and Michael Blanzich principal and holder of all equity interest in listed corporations (see fax of Ronnow with financial statements and letter of Michael Blanzich) with warranty that no other person has any claim on the equity interest in the listed corporations.
- Animals added to Lonetti Security
- Subordination of TD and Security Agreement to max \$3.5 million TD in favor of institutional construction lender with funds to be used for motel construction, remodeling, working capital, and payables. *

As attorney for the minority shareholders of Greer Enterprises, Inc., we have contacted all minority shareholders; except Clair Grewson who holds 100 shares and have received oral authorization from each shareholder contacted accepting and agreeing to the ~~the~~ Terms set forth herein; and have been expressly authorized to dismiss the Shareholder Derivative Action entitled: Gayle Reese, et. al. Vs. John Lonetti, et. al. as provided under the terms and times herein.

John Ronnow
9.20.99/3:36 PM

FRANK

Tab C

GUARANTY

For value received, I, Michael Bilanzich, (Guarantor) 2347 Lake Line Dr
Salt Lake, SALT Lake County, Utah 84109, absolutely guarantee pay-
ment to John Lonetti Jr. and Eunes I Lonetti, of 2200 Red Oak, Las Vegas, Clark
County Nevada 89109, of a Promissory Note dated December 31, 1996, in the original
principal amount of One Million Seven Hundred Eighty Thousand Six Hundred Dollars
(\$1,780,600.00), executed by Reese's Enterprises, Inc., a Nevada Corporation obligor,
and any amendments or modifications thereto. The Note has a current principal balance
of \$2,000,000.00

Guarantor waives notice of acceptance of this Guaranty and waives diligence on
the part of obligee in collection of the indebtedness. Obligee shall have the privilege of
granting such renewals and extensions as obligee may deem proper, without notice to
Guarantor. Guarantor further expressly waives notice of nonpayment, protest, and no-
tice of protest with respect to the indebtedness covered by this Guaranty. This Guar-
anty includes all principal, interest, costs, expenses, and attorney fees incurred in col-
lection of the Note and realization of the security.

This Guaranty is in addition to such other security as obligee now or hereafter
may have. Obligee may surrender or release all or any portion of such other security
without affecting this Guaranty. It shall not be necessary for obligee to enforce payment
by Guarantor of the indebtedness, to first institute suit, or to pursue or exhaust remedies
against obligor, or against any other security that obligor may have.

Guarantor acknowledges that this Guaranty is in effect and binding on Guarantor
without reference to whether it is signed by any other person or persons. Guarantor
agrees that this Guaranty shall continue in full force and effect notwithstanding the
death of Guarantor, or the release by agreement or by operation of law of, or the exten-
sion of time to, any other guarantor or guarantors as to obligations then existing.

Liability of Guarantor under this Guaranty shall not be affected or impaired by the
existence, from time to time, of an indebtedness or liability of principal obligor to obligee
in excess of the amount of this Guaranty.

DATED THIS 30 day of September, 1999.

GUARANTOR:

Michael Bilanzich
MICHAEL BILANZICH

Tab D

FILED
DISTRICT COURT

2004 MAR 10 PM 4:20

WASHINGTON COUNTY

BY BL

Terry L. Wade (3882)
Bryan J. Pattison (8766)
DURHAM JONES & PINEGAR
192 East 200 North, Third Floor
St. George, Utah 84770
Telephone: (435) 674-0400
Facsimile: (435) 628-1610
Attorneys for JDL Holdings, L.C. and
John Lonetti and Eunes Lonetti

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IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

MICHAEL T. BILANZICH,

Plaintiff,

v.

JONES, WALDO, HOLBROOK &
McDONOUGH, a professional corporation, D.
WILLIAMS RONNOW, an individual,
REESE'S ENTERPRISES, INC., a Nevada
corporation, JOHN LONETTI, an individual,
EUNES I. LONETTI, an individual, JDL
HOLDINGS, L.L.C., a Utah limited liability
company, CAMBRIDGE CAPITAL GROUP,
INC., a Delaware corporation, CAMBRIDGE
HOLDINGS, INC., a Delaware corporation,
ERIC CUMMINGS, an individual, JOHN C.
HOWE, an individual, FOOTBRIDGE
LIMITED TRUST, a Bermuda corporation,
OLD HILL PARTNERS, a partnership, and
DOES IV through X,

Defendants.

AFFIDAVIT OF TERRY L. WADE

Consolidated Case No. 010500411

Judge James L. Shumate

STATE OF UTAH)
) ss.
COUNTY OF WASHINGTON)

TERRY L. WADE, being first duly sworn on his oath, deposes and says:

1. I am competent to testify and have personal knowledge of the matters stated in this Affidavit.

2. I am an attorney with the law firm of Durham Jones & Pinegar representing Defendants John Lonetti, Eunes I. Lonetti, and JDL Holdings, L.L.C. in this matter.

3. This affidavit is given in support of Defendants John Lonetti, Eunes I. Lonetti, and JDL Holdings, L.L.C., (hereinafter “Lonetti”) Memorandum in Opposition to Plaintiff’s Motion for Award of Attorney Fees and Costs.

4. On December 15, 2003, the Court entered an Order for Partial Summary Judgment in this action, on Plaintiff's seventh cause of action for Declaratory Relief.

5. As we were evaluating the merits of an appeal of the Court's Order for Partial Summary Judgment, we were contacted by Plaintiff's counsel, Jeff Gross, concerning the possibility of settling the case. His proposal was set forth in a letter dated January 15, 2004, which we received on that same date. This letter is attached hereto as Exhibit A.

6. After reviewing Mr. Gross' proposal for settlement, I spoke with him on Jan. 21, 2004, and again on Jan. 27. While I do not purport to recall exact words used, the following points were discussed in these conversations:

a. Mr. Gross indicated that his client wanted to bring the litigation to a conclusion. He offered to dismiss the remaining cause of action against Lonetti on condition that Lonetti would refrain from filing an appeal.

b. I stated to Mr. Gross that if we were to accept his proposal, and forgo the appeal, we would want the matter to be finally and completely concluded. I expressed that if Lonetti were to “walk”, we would want to be sure that there would not be any remaining exposure to liability relative to him. In this regard, we discussed various scenarios in which further exposure might arise, and Mr. Gross repeatedly and consistently opined that he could not see any realistic possibility that Lonetti could be pursued further by anyone.

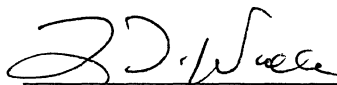
c. I am certain that the fact was made clear to Mr. Gross that we would not waive the right of appeal, unless we were confident that Lonetti would not face further claims of any nature.

d. Despite having clearly conveyed our concerns to Mr. Gross about further exposure to Lonetti, he never once made mention of his client’s desire to recover attorney’s fees and costs from Lonetti. The opportunity arose in multiple conversations with me, as well as another attorney in our office, Bryan Pattison.

7. After conveying our client’s acceptance of the proposal that both Mr. Gross’ client and ours “walk”, Mr. Gross prepared the documentation and pleadings to effect the settlement. He did not include in those pleadings or documents any reference to his client’s claim for attorney’s fees or costs.

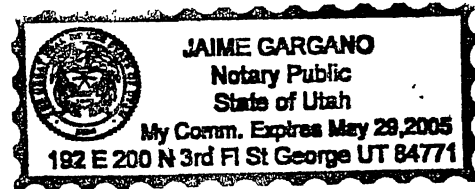
8. I can say that Mr. Gross’ Motion for Award of Attorney Fees and Costs is completely out of line with our discussions about ending the litigation and eliminating the exposure of Lonetti.

DATED this 10th day of March, 2004.


TERRY L. WADE

SUBSCRIBED AND SWORN to (or affirmed) before me this 10th day of March, 2004 by
TERRY L. WADE.

Jaime Gargano
NOTARY PUBLIC
Address: _____
My Commission Expires: _____



MAILING CERTIFICATE

I hereby certify that on the 10th day of March, 2004, I served a copy of the foregoing
AFFIDAVIT OF TERRY L. WADE on the following by depositing a copy in the U.S. Mail, postage pre-
paid, addressed as follows:

Richard D. Burbidge
Jefferson W. Gross
BURBIDGE & MITCHELL
215 South State Street, Suite 920
SLC, UT 84111

Rodney G. Snow
Edwin C. Barnes
CLYDE SNOW SESSIONS & SWENSON
One Utah Center, 13th Floor
201 South Main Street
Salt Lake City, UT 84111-2216

Eric L. Cummings
CAMBRIDGE HOLDINGS GROUP, INC.
c/o CAMBRIDGE CAPITAL GROUP, INC.
PO Box One
Cabin John, Maryland 20818-0001

Cambridge Capital Group, Inc.
18 East 34th Street
Savannah, Georgia 31401

Eric L. Cummings
6700 Persimmon Tree Road
Bethesda, Maryland 20817-4320

V. Lowry Snow
J. Gregory Hardman
SNOW, JENSEN & REECE
134 North 200 East #302
St. George, Utah 84770

Jaime Gargano

EXHIBIT A

JEFFERSON W. GROSS

BURBIDGE AND MITCHELL
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
ATTORNEYS AND COUNSELORS AT LAW
PARKSIDE TOWER
215 SOUTH STATE STREET, SUITE 920
SALT LAKE CITY, UTAH 84111-1103

TELEPHONE
(801) 355-0677
FACSIMILE NUMBER
(801) 355-2341
jwgross@burbridgeandmitchell.com

January 15, 2004

VIA FACSIMILE

Bryan J. Pattison
DURHAM JONES & PINEGAR
192 East 200 North, 3rd Floor
St. George, UT 84770

Re: *Bilanzich v. Jones Waldo, et al.*

Dear Bryan:

You have asked me to memorialize how our client, Michael Bilanzich, is willing to proceed following the Court's Order Granting Partial Summary Judgment. As we have discussed, Mr. Bilanzich's remaining claim against the Lonettis and JDL Holdings, L.C., is for rescission, i.e., the parties would be restored to the position they were in prior to the failed transaction. If Mr. Bilanzich was to prevail on that claim at trial, one aspect of relief would be your clients' return of the \$300,000 which they received from the Cambridge Defendants/Howe Defendants. Because the Cambridge Defendants/Howe Defendants have expressed their desire to continue the litigation in hopes of recovering this \$300,000 from Mr. Bilanzich, we certainly have some motivation to continue pursuit of the claim.

With that said, Mr. Bilanzich will proceed on one of two alternative routes:

1. If John Lonetti, Eunes Lonetti and JDL Holdings, L.C., waive their right to appeal Judge Shumate's Order Granting Partial Summary Judgment, Mr. Bilanzich will dismiss his claim for rescission with prejudice; or
2. Mr. Bilanzich will continue to pursue his claim for rescission against your clients.

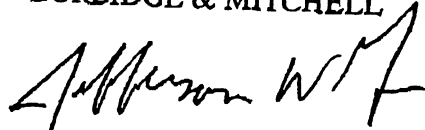
We realize that, with Mr. Brindley's departure, you may still be in the process of getting up to speed on the matter. However, we need to have your answer within one week, i.e., by January 22, 2004.

Bryan J. Pattison
January 15, 2004
Page 2

If you have any questions, please call me.

Sincerely,

BURBIDGE & MITCHELL

A handwritten signature in black ink, appearing to read "Jefferson W. Gross". The signature is stylized with a large, sweeping initial "J" and a distinct "W" and "G".

Jefferson W. Gross


JWG:dms

cc: Stephen Marshall
Michael Bilanzich

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Terry L. Wade (3882)
Bryan J. Pattison (8766)
DURHAM JONES & PINEGAR
192 East 200 North, Third Floor
St. George, Utah 84770
Telephone: (435) 674-0400
Facsimile: (435) 628-1610
Attorneys for JDL Holdings, L.C. and
John Lonetti and Eunes Lonetti

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FILED
CLERK OF COURT
2009 MAR 10 PM 4:20
WASHINGTON COUNTY
BY 

IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

MICHAEL T. BILANZICH,

Plaintiff,

v.

JONES, WALDO, HOLBROOK &
McDONOUGH, a professional corporation, D.
WILLIAMS RONNOW, an individual,
REESE'S ENTERPRISES, INC., a Nevada
corporation, JOHN LONETTI, an individual,
EUNES I. LONETTI, an individual, JDL
HOLDINGS, L.L.C., a Utah limited liability
company, CAMBRIDGE CAPITAL GROUP,
INC., a Delaware corporation, CAMBRIDGE
HOLDINGS, INC., a Delaware corporation,
ERIC CUMMINGS, an individual, JOHN C.
HOWE, an individual, FOOTBRIDGE
LIMITED TRUST, a Bermuda corporation,
OLD HILL PARTNERS, a partnership, and
DOES IV through X,

Defendants.

AFFIDAVIT OF BRYAN J. PATTISON

Consolidated Case No. 010500411

Judge James L. Shumate

STATE OF UTAH)
) ss.
COUNTY OF WASHINGTON)

BRYAN J. PATTISON, being first duly sworn on his oath, deposes and says:

1. I am competent to testify and have personal knowledge of the matters stated in this Affidavit.


2. I am an attorney with the law firm of Durham Jones & Pinegar representing Defendants John Lonetti, Eunes I. Lonetti, and JDL Holdings, L.L.C. in this matter.

3. During January and February of 2004, I engaged in extensive discussions with Jefferson Gross, attorney for Plaintiff Michael Bilanzich in the above-captioned matter.

4. Our discussions concerned my clients seeking a Rule 54(b) certification and appeal of the court's granting of Bilanzich's Motion for Partial Summary Judgment or, in the alternative, foregoing certification and appeal in exchange for Bilanzich dismissing his remaining claims against my clients.

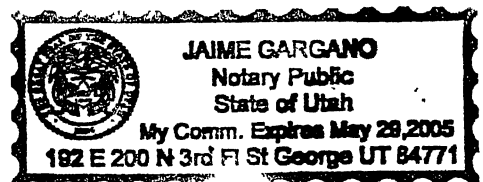
5. The understanding with regard to the dismissal was that the litigation between my clients and Bilanzich would end and my clients would have no further liability to Bilanzich.

DATED this 10 day of March, 2004.


BRYAN J. PATTISON

SUBSCRIBED AND SWORN to (or affirmed) before me this 10 day of March, 2004 by
BRYAN J. PATTISON.

James Gargano
NOTARY PUBLIC
Address: _____
My Commission Expires: _____



MAILING CERTIFICATE

I hereby certify that on the 10th day of March, 2004, I served a copy of the foregoing
AFFIDAVIT OF BRYAN J. PATTISON on the following by depositing a copy in the U.S. Mail, postage
pre-paid, addressed as follows:

Richard D. Burbidge
Jefferson W. Gross
BURBIDGE & MITCHELL
215 South State Street, Suite 920
SLC, UT 84111

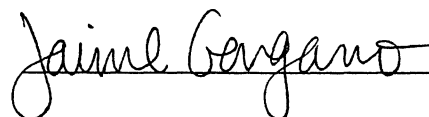
Rodney G. Snow
Edwin C. Barnes
CLYDE SNOW SESSIONS & SWENSON
One Utah Center, 13th Floor
201 South Main Street
Salt Lake City, UT 84111-2216

Eric L. Cummings
CAMBRIDGE HOLDINGS GROUP, INC.
c/o CAMBRIDGE CAPITAL GROUP, INC.
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Cambridge Capital Group, Inc.
18 East 34th Street
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Eric L. Cummings
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V. Lowry Snow
SNOW, JENSEN & REECE
134 North 200 East #302
St. George, Utah 84770



Tab E

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA4 Rule 36 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Fourth Circuit.
 ASHLAND OIL, INC., Plaintiff-Appellee,
 v.
 CARDINAL FUELS, INC., Home Oil Company,
 Inc., Southside Oil Company, Inc.,
 Tucker W. McLaughlin, Defendants-Appellants.
 No. 88-3886.

Argued Feb. 10, 1989.
 Decided March 28, 1989.

W.D.Va.

AFFIRMED.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, Chief District Judge. (CA-81-1028).

Mary Stewart Murphy (Wyatt B. Durette, Jr., McCarthy & Durette, P.C. on brief) for appellants.

Frank Kenneth Friedman (Michael A. Cleary, Woods, Rogers & Hazelgrove on brief) for appellee.

Before K.K. HALL, SPROUSE, and WILKINS, Circuit Judges.

PER CURIAM:

**1 Cardinal Fuels, Inc., Home Oil Company, Inc., Southside Oil Company, Inc. (the Oil Companies), and Tucker W. McLaughlin (collectively, the Defendants) appeal from the grant of summary judgment in favor of Ashland Oil, Inc. on their counterclaim for abuse of process. McLaughlin also appeals from an award of attorneys' fees to Ashland. We affirm.

I.

In 1983 McLaughlin, acting in his official capacity as president of the Oil Companies, signed a

promissory note to Ashland. He also executed a personal guaranty agreement guaranteeing payment of the note and any attorneys' fees and costs incurred in its collection. The Oil Companies were identified in the note as Virginia corporations with addresses in Richlands, Covington, and Halifax, Virginia. The Halifax address, which was also listed in the guaranty agreement for McLaughlin, was the address used by Ashland in mailing statements for the note.

When the Oil Companies defaulted on the note in 1985, Ashland filed suit against the Defendants for payment under the note and the guaranty agreement. It also sought attorneys' fees from McLaughlin under the guaranty agreement. Ashland first attempted service of the summons and complaint by certified mail at what it allegedly believed to be McLaughlin's personal address: 1740 Fifth Street, Isle of Palms, South Carolina. The correct address was, in fact, 17 Forty-fifth Street. When the papers were returned unclaimed, service was again attempted by regular mail to the same address, also unsuccessfully. Service was finally made on the Secretary of the Commonwealth of Virginia pursuant to Va.Code Ann. § 8.01-329 (1950 & 1984 Repl.Vol.).

Defendants failed to timely appear and default judgments were entered against them, jointly and severally, for more than \$200,000.00 in principal and interest due under the note and against McLaughlin for attorneys' fees of \$35,000.00. When McLaughlin subsequently learned of the default judgments, Defendants moved to set them aside pursuant to Federal Rules of Civil Procedure 55(c) and 60(b). For good cause shown, the district court set aside the default judgments. Defendants then filed an answer and a counterclaim for abuse of process arising from the attempted service of the summons and complaint at the South Carolina address. The district court granted summary judgment to Ashland on both its complaint and the counterclaim, and also awarded it attorneys' fees of \$12,500.00.

II.

In Virginia, a claim for abuse of process lies for "the perversion of regularly-issued process to accomplish some ulterior purpose for which the procedure was not intended." Donohoe Constr. Co. v. Mount Vernon Assoc., 235 Va. 531, 539, 369 S.E.2d 857, 862 (1988). The essential elements of the claim are

872 F.2d 416 (Table), 1989 WL 28404 (4th Cir.(Va.))
 Unpublished Disposition
 (Cite as: 872 F.2d 416, 1989 WL 28404 (4th Cir.(Va.)))

"the existence of an ulterior purpose" and "an act in the use of the process not proper in the regular prosecution of the proceedings." *Id.*

Defendants' abuse of process counterclaim rested on the use by Ashland of the incorrect personal address of McLaughlin to attempt service of process rather than the Virginia business address to which it had previously sent the statements. The district court properly granted summary judgment to Ashland because the essence of Defendants' claim was the allegedly improper manner in which Ashland issued the process. "The gravamen of the tort [of abuse of process] lies in the abuse or the perversion of the process after it has been issued," *id.*, not in the issuance of the process.

III.

****2** The guaranty agreement provided that McLaughlin would pay Ashland its "reasonable" attorneys' fees incurred in collection of the note in the event of default. At the time of the hearing on the motion for summary judgment, attorneys for Ashland claimed a total of between \$4000.00 and \$5000.00 in fees, to date, for their efforts to collect on the note. Although collection had not been completed, the district court awarded Ashland a lump sum fee of \$12,500.00. McLaughlin contends that the award was unreasonable and unsupported by sufficient evidence as to value of the services rendered.

Determination of reasonableness is governed by South Carolina law since the guaranty agreement was executed by McLaughlin in South Carolina. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Occidental Fire & Casualty Co. v. Bankers & Shippers Ins. Co.*, 564 F.Supp. 1501, 1503 (W.D.Va.1983). Under the law of South Carolina, the district court award of attorneys' fees equalling approximately six percent of the total debt to be collected is reasonable on its face even in the absence of evidence regarding the value of the services rendered. *See Farmers & Merchants Bank v. Farqnoli*, 274 S.C. 23, 25-26, 260 S.E.2d 185, 187 (1979).

AFFIRMED.

872 F.2d 416 (Table), 1989 WL 28404 (4th Cir.(Va.)), Unpublished Disposition

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