

1994

# G&K Services v. Pacific Bay Baking Company : Reply Brief

Utah Court of Appeals

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## Recommended Citation

Reply Brief, *G&K Services v. Pacific Bay Baking Company*, No. 940119 (Utah Court of Appeals, 1994).  
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IN THE UTAH COURT OF APPEALS

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G & K SERVICES, INC., a  
Corporation,

Plaintiff/Appellee,

vs.

PACIFIC BAY BAKING COMPANY,  
a Utah Corporation,

Defendant/Appellant.

Appeal No. 940-119 CA  
Circuit Case No. 920002083CV

ARGUMENT PRIORITY 15

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REPLY BRIEF OF DEFENDANT/APPELLANT  
PACIFIC BAY BAKING COMPANY

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On Appeal from the Third Circuit Court  
of Salt Lake County  
Honorable Michael L. Hutchings

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UTAH COURT OF APPEALS  
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940119

**FILED**  
Utah Court of Appeals

AUG 12 1994

Marilyn M. Branch  
Clerk of the Court

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## I. INTRODUCTION

Pacific Bay Baking Company ("Pacific Bay") respectfully submits its reply brief on appeal.

## II. ARGUMENT

### A. G&K Services has Briefed the Wrong Appeal.

In its opening brief, Pacific Bay argued that attorney's fees should be allocated on a claim by claim basis. Thus, Pacific Bay is entitled to fees attributable to its successful defense of G&K Service's claim for liquidated damages, regardless of whether G&K is entitled to fees attributable to the stipulated judgment in this matter.

Rather than the one at bar, G&K has briefed a case in which only one claim is at issue and thus where there can be only one party entitled to fees.<sup>1</sup> By changing the facts (from a multiple to single claim case) as well as the issue on appeal, G&K is thus able to cite authority for the proposition that a plaintiff who obtains some but not all of the relief sought is normally entitled to fees.<sup>2</sup>

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<sup>1</sup> G&K spends its entire brief attacking what Pacific Bay clearly labeled an alternative argument: if the Court disagrees that fees should be allocated claim by claim, Pacific Bay was nonetheless the prevailing party under the circumstances. Opening Brief, pp. 14, 24. Cf. Response Brief, pp. 27, 34.

<sup>2</sup> See First Southwestern Financial Services v. Sessions, 875 P.2d 553 (Utah 1994) (single claim for deficiency action); Highland Constr. Co. v. Stevenson, 636 P.2d 1034 (Utah 1981) (affirmative judgment rule on single claim); Underwriters at Lloyd's of London v. North American Van Lines, 829 P.2d 978 (Okla. 1992) (defendant succeeded in lowering damages paid, but did not defeat claim entirely). But see Smith v. Jenkins, 873 P.2d 1044 (Okla. 1994) (rejecting net judgment rule in comparative negligence action).

Pacific Bay does not quibble with G&K's rule as applied to most single claim cases. Opening Brief, p. 21. This is not a single claim case.

B. G&K's Misunderstanding of the Issues on Appeal Permeates its Argument on the Standard of Review.

While it correctly notes that Pacific Bay "does not challenge the language of the contract," G&K incorrectly concludes that the abuse of discretion standard must therefore apply. The language is what it is. The issue is not what the words are, but how they are affected by the facts and law.

While G&K makes the inevitable claim in a footnote that the trial court erred in finding that G&K breached the contract, it did not feel strongly enough about this issue to cross-appeal. The facts are thus undisputed, leaving this Court with an issue of law: did the trial court err in denying Pacific Bay fees attributable to its success on a discrete claim at trial?

G&K's argument for an "abuse of discretion" standard ducks the question. The issue of "discretion" comes up when the amount of fees are at issue. Opening Brief, p. 5 n. 1. This is not such a case, except to the extent the trial court failed to make adequate findings in support of its fee award to G&K.<sup>3</sup>

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<sup>3</sup> Concerning the standard of review, the only case which G&K cites and Pacific Bay did not is Baldwin v. Burton, 850 P.2d 1188 (Utah 1993). Baldwin did not involve a contract, but instead Utah Code Ann. § 78-27-56(1), which permits the court to award fees in the event a claim or defense is 1) meritless and 2) was asserted in bad faith. The Baldwin court first addressed whether fees were appropriate under the statute, and then turned to what it termed the "discretion" issue: the amount of the award. Id. at 1199. See also Bailey-Allen Co. v. Kurzet, \_\_\_ P.2d \_\_\_, 240 Utah Adv. Rpt. 17, 21 (Utah App. 1994) (mechanics lien statute obligated court to award fees to defendant who successfully  
(continued...)

The question at bar is one of law. Review is de novo.

C. Pacific Bay is Entitled to Fees for its Success at Trial Regardless of whether it Counterclaimed.

G&K argues that only defendants who prevail on counterclaims are entitled to fees. Instead, Utah law permits a party who successfully defends against a claim to "recover the fees attributable to those claims on which the party was successful." Occidental/Nebraska Fed. Sav. Bank v. Mehr, 791 P.2d 217, 221 (Utah App. 1990). See also Stacey Properties v. Wixen, 766 P.2d 1080 (Utah App. 1988), cert. denied, 779 P.2d 688 (1989) (defendant was entitled to fees for claims on which it was successful, including not only counterclaims but successful defense of attempt to accelerate promissory note). Cf. Dixie State Bank v. Bracken, 764 P.2d 985, 990 n. 9 (Utah 1988) ("Trial courts are accustomed to apportioning attorney fees between multiple parties and attributing fees to separate causes of action."); Bailey-Allen Co. v. Kurzet, supra, n. 3, \_\_\_ P.2d \_\_\_, 240 Utah Adv. Rpt. 17, 20-21 (Utah App. 1994) (trial court erred under mechanics lien statute in not awarding defendants fees attributable to successful motion for summary judgment dismissing mechanic's lien action).

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<sup>3</sup>(...continued)

sought summary judgment dismissing a mechanics lien action, while bond statute allowed court discretion).

For its discretion standard, Baldwin cites Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988), in turn citing Turtle Management v. Haggis Management, 645 P.2d 667 (Utah 1982). Both of these cases centered on the amount of fees awarded. Dixie State Bank, 764 P.2d at 989 and n. 6; Turtle Management, 645 P.2d at 671.



G&K distinguishes this authority only by artifice. G&K gives Occidental/Nebraska barely a nod, Response Brief, p. 19, and incorrectly claims that the defendant in Stacey Properties received fees only because it won on a few counterclaims. Response Brief, p. 33.

Similarly, G&K dismisses Marassi v. Lau, 859 P.2d 605 (Wash. App. 1993), recon. denied, 1993 Wash. App. Lexis 390 (1993) in a footnote, arguing that Marassi dealt with (and implicitly, only with) fees for a successful counterclaim. Response Brief, p. 28, n. 8. Marassi is instead directed squarely to the issue at bar, and teaches that the net judgment rule fails when "a defendant has not made a counterclaim for affirmative relief, but merely defends against the plaintiff's claims." 859 P.2d at 607.<sup>4</sup>

While it at least cites Occidental, Stacey, and Marassi (although it inaccurately recounts the latter two), G&K is simply mum on the Florida cases which Pacific Bay discussed in its opening brief. See Folta v. Bolton, 493 So.2d 440 (Fla. 1986); Consolidated Southern Security, Inc. v. Geniac & Assocs., Inc., 619 So.2d 1027 (Fla. App. 1993); Park Lane Condominium Ass'n v. DePadua, 558 So.2d 85 (Fla. App. 1990). These cases are fully consistent with Utah law: attorney's fees should be awarded on a claim by claim basis, regardless of whether the defendant

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<sup>4</sup> Thus, "when the alleged contract breaches at issue consist of several distinct and severable claims, a proportionality approach is more appropriate." Id. at 608.

Marassi carefully noted that its plaintiff raised multiple and distinct breaches of contract, not one breach with several alternative damage theories. Id. The same is true here.

prevails on a counterclaim or instead simply defeats one of the plaintiff's claims.<sup>5</sup>

This law is also good policy. Under G&K's "counterclaim" rule, a defendant who resists counterclaiming and then defeats all but one insignificant claim in a multi-claim case is entitled to no fees, while the plaintiff remains entitled to fees (at least to the extent she succeeded). This result penalizes the nonlitigious defendant, while at the same time letting a plaintiff whose claims were all groundless, save one, escape without compensating the defendant for its time.

The claim-by-claim analysis also recognizes that under the rules of joinder, what otherwise would be distinct lawsuits under a contract (such as the case here) may be tried together as separate claims in one action. Liberal joinder serves the salutary purposes of judicial economy. However, a defendant's right to fees for defeating what otherwise would be a wholly separate suit should not be curtailed simply because the plaintiff has chosen to bring her claims all at once. See Folta v. Bolton, 493 So. 2d at 443 (discussing plaintiffs' tactics in joining nonmeritorious claims with meritorious claims in order to jockey for fees). Cf. Elder v. Triax Co., 740 P.2d 1320, 1322 (Utah 1987) (defendant could not use unresolved status of

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<sup>5</sup> G&K cites In re Marriage of Watters, 782 P.2d 1220 (Colo. App. 1989), a single claim suit, for the notion that a party only has to win on a "significant" issue, and receive some of the benefit sought in the litigation, in order to prevail. Response Brief, p. 30. The instant case is not about issues; it is about wholly distinct claims which would have been separate lawsuits absent rules governing joinder. Regardless of what is done in Colorado, Utah law divides cases by claims.

permissive counterclaim to thwart plaintiff's right to fees under separate claim on which plaintiff had already prevailed);<sup>6</sup> Turtle Management v. Hagqis Management, supra, n. 3, 645 P.2d 667, 671 (Utah 1982) (although plaintiff had used Rule 18 to join all possible claims against all defendants, plaintiff was only entitled to fees from the lone defendant against whom it prevailed; plaintiff could not seek a "free ride" for its fees at the expense of the successful defendants).<sup>7</sup>

D. G&K's Offer of Judgment Argument Bears, at Most, Only on the Issue of Whether Pacific Bay was Required to Pay G&K's Fees, not on whether G&K Should Pay Pacific Bay's Fees.

G&K apparently urges either: 1) that Pacific Bay could have cut off liability for fees to G&K by making an offer of judgment; 2) that an offer of judgment would have entitled Pacific Bay to fees; or 3) both.

If G&K means to argue point one, it has again misunderstood this appeal. This case is not about Pacific Bay's liability for

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<sup>6</sup> The Triax dissent (unsuccessfully) argued that the net judgment rule ought to control the fee issue, and that the rule could not be applied until all counterclaims were resolved. 740 P.2d at 1323-24. The dissent noted, again to no avail, that the parties' contract gave the prevailing party in the "suit" the right to fees, and argued that "suit" included counterclaims. Id., 740 P.2d at 1324.

The fee clause in the case at bar requires the "unsuccessful party" in a "legal proceeding" to pay the fees of the successful party. G&K was the unsuccessful party on its wholly discrete claim for liquidated damages.

<sup>7</sup> Florida statutory law requires the courts in multiple-party cases to apportion fees among prevailing parties "in accordance with the principles of equity." Folta v. Bolton, 493 So. 2d at 443. The Folta court found that multiple party actions (such as the kind at issue in Turtle Management) are sufficiently analogous to multiple claim actions to warrant application of the same rule to the latter. Id.

G&K's fees properly attributable to the open account claim. It is about G&K's liability for fees to Pacific Bay on the liquidated damages claim.

Utah R.Civ.P. 68, governing offers of judgment, is itself directed to discrete "claim[s]," not lawsuits.<sup>8</sup> First Southwestern Financial Services v. Sessions, supra, n. 1, 875 P.2d 553 (Utah 1994), a case decided after Pacific Bay filed its opening brief, was a single claim case. This one is not. Thus, First Southwestern's teaching (that a defendant can cut off its obligation to pay fees on a claim by offering judgment) does not apply. By crossing lines between the two claims at issue, G&K misapplies the rule, as did the trial court.<sup>9</sup>

G&K further errs if it believes that Pacific Bay could have saved its right to fees on the liquidated damages claim only by offering judgment on the open account claim. Rule 68 requires the claims to be treated separately. Moreover, the offer of judgment rule does not apply in the case of a total defense victory on a claim. See 7 J. Moore, J. Lucas & K. Sinclair, Jr., Moore's Federal Practice ¶ 68.06[2] (2d ed. 1994) (discussing

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<sup>8</sup> See also Kehoe v. Keister, 727 F. Supp. 896, 899-90 (D. N.J. 1989) (discussing Rule 68 in context of multiple claim case). Cf. Shores v. Sklar, 885 F.2d 760, 762-63 (11th Cir. 1989), cert. denied, 493 U.S. 1045, 110 S. Ct. 843, 107 L.Ed.2d 838 (1990) (because defendant successfully offered judgment for entire putative class action, not simply on his individual claims, defendant lost right to appeal district court's denial of class certification).

<sup>9</sup> First Southwestern could easily have disavowed Occidental Nebraska or Brown v. Richards, 840 P.2d 143 (Utah App. 1992), cert. denied, 853 P.2d 897 (Utah 1993), but did not. The court further emphasized that it believed its hand was forced by Utah's deficiency statute. 239 Utah Adv. Rep. at 7-8.

Delta Air Lines, Inc. v. August, 450 U.S. 346, 101 S. Ct. 1146, 67 L.Ed.2d 287 (1981)). Pacific Bay did not believe that G&K was entitled to any liquidated damages. Pacific Bay was not obligated to make a meaningless offer of zero on that claim in order to preserve its right to fees attributable to its success on the claim.

G&K also deems Pacific Bay a deadbeat who would not even pay what it agreed that it owed. This needless claim is belied by G&K's own citation to the record, which shows that Pacific Bay had agreed in settlement discussions that it owed G&K a sum certain. Response Brief, p. 21. However, Pacific Bay refused to pay G&K any liquidated damages. Once in the courtroom and able to put on its defense against liquidated damages, Pacific Bay stipulated to judgment in the agreed amount so that only the disputed issue would be tried.

G&K's related complaint about the time and expense it spent on the stipulated issues is more window dressing. Pacific Bay has paid G&K for its time. Pacific Bay's complaint is that much of G&K's fees were not attributable to a success.<sup>10</sup>

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<sup>10</sup> G&K also carps at length about Pacific Bay's "failure to show" at the first trial in this matter, apparently in the belief that this has something to do with the issue on appeal. As explained in its successful moving papers to set aside the default, Pacific Bay did not appear because it did not receive notice of the trial. Record, pp. 29-30. Once it received a copy of the proposed default judgment, Pacific Bay quickly retained counsel, had the default set aside, and went on aggressively to defend this case.

G&K did not suffer by virtue of the default being set aside, since the trial court ordered Pacific Bay to pay G&K's fees for trial preparation (including, presumably, preparation for its failed liquidated damages claim) and even the fees for G&K's  
(continued...)

E. G&K Embraces the Fallacy of the Constructive Award.

G&K urges that if Pacific Bay is entitled to "recognition" for G&K's failure at trial, it has been compensated "almost twice" what it is due by virtue of the trial court's cut in G&K's fees. Response Brief, p. 36. We have discussed in Pacific Bay's opening brief why this argument is so wrongheaded.

G&K was not entitled under any circumstances to be paid for its failure at trial. The trial court did not compensate Pacific Bay at all for its success at trial. This was error.

F. The Trial Court made only Assumptions, not Findings, Concerning the Amount of Fees Awarded to G&K.

The record does in G&K's argument that the trial court made adequate findings concerning the amount of G&K's fees.

G&K's lead counsel proffered testimony that he spent 8.5 hours before trial in this matter. Record, p. 317, lns. 24-25; p. 318, lns. 1-6. Counsel took an additional 2.5 hours in drafting and serving the complaint. Record, p. 317, lns. 19-20.

Counsel's associate spent six hours researching Pacific Bay's course of performance defense on the liquidated damages claim (on which Pacific Bay was completely successful), two hours of trial preparation time, and time at trial. Record, p. 318, lns. 12-19.

Adding in the plaintiff's trial time spent following the proffer, and estimating the amount of additional time the plaintiff would spend on drafting findings and conclusions, the

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<sup>10</sup>(...continued)  
unsuccessful opposition to setting aside the default. Record, p. 50.

trial court arrived at a total fee of \$2,080, which it then reduced to \$1,450.00, in purported recognition of Pacific Bay's success at trial. Record, p. 403, lns. 21-25; p. 404, lns. 12.

Under Utah law, the \$1,450.00 which the trial court awarded must be attributable in toto to whatever success G&K obtained at trial. The trial court made no such finding or computation. Moreover, the record proves that the bulk of G&K's time was directed to the claim upon which G&K failed. The time devoted to this claim encompassed almost the entire trial, as well six hours of research directed to the course of performance issue, and presumably a commensurate amount of actual witness preparation time on the issue.

When G&K defaulted Pacific Bay early in this case, G&K's lead counsel submitted an affidavit of attorney's fees testifying that he had spent 2.5 hours in preparation for trial and for attending trial long enough to proffer evidence and identify witnesses. Record, p. 57, ¶ 3 (affidavit); p. 16-17 (Findings and Conclusions setting forth G&K's proffer). Yet at the real trial, counsel claimed fees for 21.5 hours of his time and his associate's, almost a tenfold increase. This increase can of course be explained: the case went to trial the second time around. However, G&K lost the contested claim at trial.

Although apparently prepared to handle the trial alone when G&K defaulted Pacific Bay, G&K's lead counsel felt compelled to involve an associate at the actual trial once Pacific Bay submitted a trial brief. Record, p. 318, lns. 7-19. This trial brief, however, went solely to the claim upon which Pacific Bay

prevailed. Record, p. 66. Since lone counsel took only 2.5 hours to 1) prepare for the entire first trial (including, presumably, preparation for the liquidated damages claim), and 2) proffer evidence, it is unlikely that any more time than this was required to prepare the second time around on the open account claim, the only claim on which G&K saw success.

In footnote 12 of its brief, G&K offers some after the fact arithmetic showing how the trial court might have arrived at its award. The trial court, not litigants, are required to make findings. The record shows that only a de minimis amount of G&K's time can be fairly charged to a success. The court's award tracks neither the evidence nor law.


The remainder of G&K's argument on the findings question confuses the main issue on appeal (the correctness of awarding fees on a claim by claim basis) with the distinct issue of what fees G&K was entitled to. Nowhere does G&K point to the findings which Utah law demands.

### III. CONCLUSION

The trial court's fee award should be reversed, with instructions for the court to award each party those fees (and only those fees) attributable to the claim on which the party succeeded.

DATED this 12<sup>th</sup> day of August, 1994

LeBoeuf, Lamb, Greene & MacRae

  
\_\_\_\_\_  
Mark W. Dykes  
Counsel for Pacific Bay  
Baking Company



CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Defendant/Appellant Pacific Bay Baking Company was served this 12th day of August, 1994, by depositing same in the United States mails, first class, postage prepaid, addressed to the following:

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