

1994

Kenneth F. Palmer Jr., and Rebecca A. Palmer,  
husband and wife v. Edward Hayes and Stephanie  
Hayes, husband and wife : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 940416

IN THE UTAH COURT OF APPEALS

KENNETH F. PALMER, JR., and  
REBECCA A. PALMER, husband  
and wife,

Plaintiffs/Appellants,

vs.

EDWARD HAYES and STEPHANIE  
HAYES, husband and wife,

Defendants/Appellees,

MAPLE HILLS REALTY, a Utah  
corporation, RONALD L.  
MARSHALL, TOM BAKER, and  
CAROL D. EDGMON,

Defendants.

REPLY BRIEF OF THE APPELLEES

Appellate Court No. 940416-CA

Argument Priority  
Classification 15

APPEAL FROM SUMMARY JUDGMENT AND RULE 54(b)  
CERTIFICATION OF THE THIRD JUDICIAL DISTRICT  
COURT IN AND FOR SALT LAKE COUNTY, JUDGE  
HANSON

**FILED**

Utah Court of Appeals

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TABLE OF CONTENTS

Table of Authorities . . . . .	2
Determinative Constitutional Provisions, Statutes, Ordinances, Rules, and Regulations . . . . .	3
Argument . . . . .	4
Conclusion . . . . .	9

TABLE OF AUTHORITIES

CASES:

<u>Cabrera v. Cottrell</u> , 694 P.2d 622 (Utah 1985) . . . . .	9
<u>Cobabe v. Crawford</u> , 780 P.2d 834 (Utah App. 1989) . . . . .	9
<u>Hackford v. Snow</u> , 657 P.2d 1271 (Utah 1982) . . . . .	9
<u>Saunders v. Sharp</u> , 793 P.2d 927, 931 (Utah App. 1990), <u>on remand</u> , 840 P.2d 796, 809 (Utah App. 1992) . . . . .	9

STATUTES AND REGULATIONS:

Utah Code Ann. § 78-27-56.5 (Attorney's fees--Reciprocal rights to recover attorney's fees.) . . . . .	4- 8
Utah Administrative Code § R162-4.2.7.3 . . . . .	7

**DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES**  
**RULES, AND REGULATIONS**

Utah Code Ann. § 78-27-56.5 (Attorney's fees--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.

Utah Administrative Code § R162-4.2.7.3

When it becomes apparent to the principal broker that a transaction has failed, or if a party to the failed transaction requests disbursement of the earnest money or other trust funds, those funds may be disbursed by the principal broker only if a written release is obtained from the parties not receiving the funds . . . .

#### ARGUMENT

**I. THE AWARD OF ATTORNEY'S FEES TO THE HAYES ON THE BASIS OF UTAH CODE ANN. § 78-27-56.5 IS APPROPRIATE FOR FEES INCURRED ON APPEAL EVEN IF THE STATUTE WAS NOT RAISED ON THE TRIAL COURT LEVEL.**

Even though the application of Utah Code Ann. § 78-27-56.5 was not raised in this case on the trial court level this Court is not entirely barred from considering its application to the case as the Palmers contend. This Court should still consider the application of Utah Code Ann. § 78-27-56.5 to the attorney's fees incurred by the Hayes on the appeal of this matter. The award of attorney's fees on an appeal is an original matter for the appellate court to decide.

The purpose of the reciprocal attorney's fees statute is to award attorney's fees to either side that prevails in an action where it is clear that one side would recover its attorney's fees if it were to prevail in the action:

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.<sup>1</sup>

If the Palmers prevail in their suit to recover damages from the Hayes for an alleged default in the Hayes' performance of the Earnest Money Agreement, it is clear that the Palmers will be

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<sup>1</sup>Utah Code Ann. § 78-27-56.5 (Attorney's fees--Reciprocal rights to recover attorney's fees).

entitled to recover their reasonable costs and attorney's fees incurred in this action. Paragraph "N" of the Agreement states that:

Both parties agree that should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise.<sup>2</sup>

In situations like this one where it is clear that one side would be entitled to an award of attorney's fees if successful, the legislature wanted to give the courts equitable discretion to award attorney's fees to either side.

The Palmers contend that even if the statute were applicable it would not be equitable to award the Hayes their attorney's fees incurred on this appeal because the "Hayes' own refusal of the deposit from the brokerage where it was held caused or contributed to Palmers' constructive retention of the deposit."<sup>3</sup> There are several problems with this view of the facts. First, the Hayes never refused the refund of the Earnest Money Deposit. The refund of the Earnest Money was the very thing which the Hayes have sought. Sometime in January the Hayes requested orally that the

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<sup>2</sup>R. at 10.

<sup>3</sup>Reply Brief of Appellants at 16.



broker, Maple Hills, return the \$2,000 Earnest Money Deposit. In response Maple Hills sent the Hayes a document which purported to release the Broker, Maple Hills, from all liability in connection with the failed sale. Mr. Hayes did refuse to sign this inappropriate release, but in no way did he indicate that he was refusing the refund of the Earnest Money Deposit.<sup>4</sup>

Second, The Hayes have made clear demand for the return of the Earnest Money Deposit. After receiving the release from Maple Hills, Mr. Hayes wrote to Maple Hills and clearly demanded that the Earnest Money be refunded:

After reviewing the document that was brought to our office regarding the disposition of our deposit, I regret to inform you that I will be unable to sign it. My understanding of the law is that the only person who could have claim on the money would be the Palmers. If they have such a claim, please advise me. You, on the other hand, have no legal right to make conditions under which the deposit would be returned. I suggest strongly that you either forward the money immediately or let me know that the Palmers have requested that it not be returned for some reason.<sup>5</sup>

Maple Hills never refunded the money nor did they give notice of the claims of the Palmers against the Earnest Money.

Third, the retention of the Earnest Money by the Palmers is not a "constructive" retention. In the Palmer's Memorandum in Opposition to Defendant's Motion for Summary Judgment, the Palmers

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<sup>4</sup>See, Letter of Edward Hayes, dated Feb. 8, 1993. R. at 107.

<sup>5</sup>Id.

explicitly requested that the court "hold the \$2,000 to apply it to the huge damages likely to be awarded in this lawsuit."<sup>6</sup> This attempt to bring a suit for damages without refunding the Earnest Money Deposit is more than a mere "constructive retention". It is only now on appeal that the Palmers are attempting to recast their role as one of innocent bystanders who were unable to exercise any control over the \$2,000 deposit.

The release of the Hayes was never necessary for Maple Hills to refund the Earnest money deposit to the Hayes. The Regulations of the Utah Real Estate Commission which the Palmers have quoted at length state that the broker may refund an Earnest Money Deposit "only if a written release is obtained from the parties not receiving the funds."<sup>7</sup> All that was required for the Earnest Money Deposit to be refunded to the Hayes was for the Palmers to request in writing that Maple Hills do so. This authorization was never given by the Palmers and as a result the \$2,000 was never refunded. All of the attorney's fees incurred by the Hayes in defending against this action have been necessitated by the actions of the Palmers in bringing a suit for damages without refunding the Earnest Money in contravention of the Earnest Money Agreement. It is equitable for this Court to award the Hayes their attorney's

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<sup>6</sup>At 4. (find the cite in the record).

<sup>7</sup>Utah Admin. Code § R162-4.2.7.3 (emphasis added).

fees incurred in this appeal, and the Court has been authorized to do so under Utah Code Ann. § 78-27-56.5.

**II. THE ACTIONS OF THE PALMERS DO CONSTITUTE A "DEFAULT" OF THE "COVENANTS AND AGREEMENTS" CONTAINED IN THE EARNEST MONEY CONTRACT, THUS TRIGGERING THE ATTORNEY'S FEE CLAUSE.**

The Palmers claim that the decision below reflects a breach of an implied duty rather than an express duty, and that the contract does not allow for the award of attorney's fees except in the case of breach of an express duty.<sup>8</sup> The retention of the Earnest Money Deposit by the Palmers while bringing suit for damages was not a breach of a "judicially imposed duty"<sup>9</sup> or of an implied duty, but a default of the express provisions of paragraph "N" of the Earnest Money Agreement. The Earnest Money Agreement clearly provides for the award of attorney's fees in the case of "default" of the "covenants or agreements" contained in the contract.<sup>10</sup>

The election of remedies clause in the Agreement states: "In the event of default by buyer, seller may elect to either retain

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<sup>8</sup>See, Reply Brief of the Appellants at 13-14.

<sup>9</sup>Reply Brief of the Appellants at 4.

<sup>10</sup>Paragraph "N" of the Earnest Money Agreement states that, "Both parties agree that should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all the costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement . . . ." R. at 10.

the earnest money as liquidated damages or to institute suit to enforce any rights of seller."<sup>11</sup> This is an express agreement or covenant that the seller (the Palmers) will either retain the Earnest Money Deposit as liquidated damages or institute a suit for damages. To both retain the Earnest Money and sue for damages is a violation or "default" of this "covenant or agreement", triggering the attorney's fee clause.

The Palmers have tried to construe the issue here as one of "constructive retention" of the deposit or a breach of an "implied" or "judicially imposed" duty, and thus avoid the attorney's fee provision. The facts of the case, however, do not match this description. The covenant not to both retain the Earnest Money and institute a suit for damages is expressly stated in the contract. The Palmers have defaulted on this covenant and the Hayes should, therefore, be awarded their reasonable attorney's fees incurred in this action as a matter of right and law.<sup>12</sup>

#### **CONCLUSION**

The Palmers have defaulted in their obligations with respect to the election of remedies clause of the Earnest Money Agreement.

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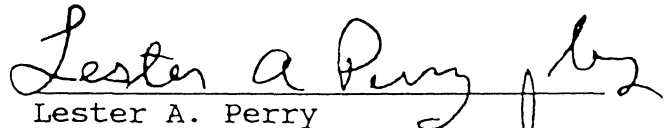
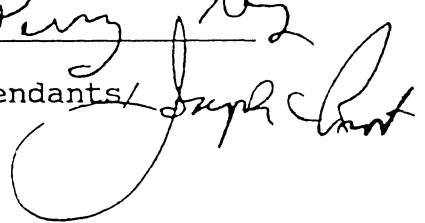
<sup>11</sup>Paragraph "N" of the Earnest Money Agreement (emphasis added). R. at 10.

<sup>12</sup>Cabrera v. Cottrell, 694 P.2d 622, 625 (Utah 1985); Hackford v. Snow, 657 P.2d 1271, 1277 (Utah 1982); Saunders v. Sharp, 793 P.2d 927, 931 (Utah App. 1990), on remand, 840 P.2d 796, 809 (Utah App. 1992); Cobabe v. Crawford, 780 P.2d 834, 836 (Utah App. 1989).

This default entitles the Hayes to award of their reasonable attorney's fees incurred both at the trial court level and on appeal. The Hayes seek a reversal of the trial court ruling with respect to the attorney's fee issue, and an order from this Court awarding them their reasonable attorney's fees. In the event that the Court finds the Palmers not to have been in default of the Earnest Money Agreement, the Hayes seek an order granting them their reasonable attorney's fees incurred on this appeal under the equitable discretion vested in the Court pursuant to Utah Code Ann. § 78-27-56.5.

DATED this 6<sup>th</sup> day of September, 1994.

KESLER & RUST

  
Lester A. Perry  
Attorney for Defendants/  
Appellees 

H:\kmw\hayes\rebrief

CERTIFICATE OF MAILING

I certify that on the 7th day September, 1994, I served four true and correct copies of the foregoing Reply Brief of the Appellees by first class mail, postage prepaid, to the following: Robert H. Henderson, SNOW, CHRISTENSEN & MARTINEAU, Attorneys for Plaintiffs/Appellants, 10 Exchange Place, Eleventh Floor, Post Office Box 45000, Salt Lake City, Utah, 84145.

KESLER & RUST

