

2006

Mark Hopkins and Cathy Hopkins dba Elkridge Financial v. Bill Hales : Brief of Appellee

Utah Court of Appeals

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Stanford A. Graham; Attorney for Defendant-Appellee.

D. Bruce Oliver; D. Bruce Oliver LLC; Attorney for Plaintiffs-Appellants.

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20060787-CA

UTAH COURT OF APPEALS

MARK HOPKINS and KATHY HOPKINS
d.b.a. ELKRIDGE FINANCIAL

Plaintiffs and Appellants,

vs.

BILL HALES,

Defendant and Appellee.

BRIEF OF APPELLEE

Appeal from the Final Order and Judgment of the
Sixth Judicial District Court, Sanpete County
State of Utah, by the Honorable David L. Mower

D. Bruce Oliver #5120
D. BRUCE OLIVER, L.L.C.
180 South 300 West, Suite 210
Salt Lake City, UT 84101

Attorney for Plaintiffs - Appellants

Stanford A. Graham #6392
STANFORD A. GRAHAM
4548 South Atherton Drive,
Salt Lake City, UT 84123

Attorney for Defendant – Appellee

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UTAH APPELLATE COURTS

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Salt Lake City, UT 84101

Attorney for Plaintiffs - Appellants

Stanford A. Graham #6392
STANFORD A. GRAHAM
4548 South Atherton Drive,
Salt Lake City, UT 84123

Attorney for Defendant – Appellee

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STATEMENT OF JURISDICTION

Jurisdiction is conferred on this Court by Utah Code Ann. § 78-2a-3(j) (1953, as amended).

STATEMENT OF ISSUES

Whether the trial court was correct in granting Defendant's attorney's fees pursuant to Utah Code § 78-27-56, where there are no written findings of bad faith in the bringing of the claim, but where it is reasonable to assume that the court actually made such findings?

STANDARDS OF REVIEW

Findings of Fact. The appellate court reviews a trial court's findings of fact under a clearly erroneous standard. *See State v. Pena*, 869 P.2d 932, 936 (Utah 1994). "For a reviewing court to find clear error, it must decide that the factual findings made by the trial court are not adequately supported by the record, resolving disputes in the evidence in a light most favorable to the trial court's determination. *Taylor v. Hansen*, 958 P.2d 923, 929 (Utah Ct. App. 1998). "This standard is highly deferential to the trial court because it is before that court that the witnesses and parties appear and the evidence is adduced. The judge of that court is therefore considered to be in the best position to assess the credibility of witnesses and to derive a sense of the proceeding as a whole, something an appellate court cannot hope to garner from a cold record." *Pena*, 869 P.2d at 936.

Questions of Law. The appellate court “accords no deference to the trial court and reviews the trial court's decisions for correctness.” *J.H. v. West Valley City*, 840 P.2d 115 (Utah 1992). “Statutory interpretation presents a question of law which we review for correctness.” *Taylor v. Hansen*, 958 P.2d 923, 929 (Utah Ct. App. 1998).

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

Utah Code Ann. § 78-27-56 (2005)

Utah Rules of Civil Procedure, Rule 54

Utah Code Ann. § 78-27-56.5 (2005)

Utah Rules of Appellate Procedure, Rule 34

Utah Rules of Appellate Procedure, Rule 24a9

(These provisions have been reproduced in the attached Addendum “A”).

STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal of a civil matter from the Sixth District Court in Sanpete County, Manti Division. Plaintiffs – Appellants, Kathy Hopkins and Mark Hopkins (together, the “Hopkins”) filed a complaint against Defendant – Appellee, Mr. Hales, to enforce a Non-Competition Agreement and a Non-Disclosure Agreement (hereinafter, the “Agreements”), after they terminated his employment with them.

Based on the evidence accepted by the district court, the court held that the Agreements were unenforceable and were the products of Hopkins’ intentional and repeated bad faith conduct against Hales during his employment with them. Before the

final judgment was entered by the district court, Mr. Hales filed a motion seeking costs and attorney's fees.

II. Course of the Proceedings

The Hopkins filed their complaint and motion for temporary restraining order on December 28, 1999. R. 1, 358. Mr. Hales' counsel, Mr. Graham, entered an appearance on January 7, 2000 and filed an answer and counterclaim on February 17, 2000. R. 19, 29, 358. A scheduling conference was conducted on April 12, 2000, at which the court scheduled the Hopkins' temporary restraining order hearing for May 3, 2000. R. 65, 67, 68, 358, 359.

After a full day evidentiary hearing on May 3, 2000, the court recessed. The court thereafter scheduled a second full day to continue the evidentiary hearing for May 17, 2000. R. 86, 359. During the May 17, 2000 hearing, the Agreements and other evidence submitted by the parties were received. On the scant evidentiary record provided by Plaintiffs, the following evidence was also received: (1) From Kathy Hopkins—that the Agreements were signed with promises of benefits; (2) From Bill Hales—promises were given regarding employment with Elkridge, benefits, training, income, and future business possibilities; (3) From Tami Baugh (Defendant's witness—the conditions of Mr. Hales employment and benefits offered but never give. R. 300-301. The parties then stipulated to reconvene on May 24, 2000 at 10:00 a.m. R. 93.

The evidentiary hearing was concluded on May 24, 2000 and the court scheduled oral arguments for June 21, 2000 at 2:00 p.m. R. 93, 95, 359. On June 21, 2000, the court heard oral arguments. R. 98, 359. The arguments commenced at 2:06 p.m. and the

matter was taken under advisement at 5:07 p.m. R. 98, 359. At the closing of the arguments, the court ordered each party to prepare their respective proposed findings of fact and conclusions of law and to submit them to the court. R. 99, 359. The proposed findings were submitted to the court on July 3, 2000. R. 100, 106, 359. The court entered its Findings of Fact and Conclusions of Law and associated Order on July 27, 2000, finding that Hopkins had acted in bad faith, that the Agreements had been negotiated by Hopkins in bad faith, that the Agreements were unenforceable and that Plaintiffs pay Defendant's attorney's fees. R. 132, 134, 359.

On October 16, 2000, Defendant's counsel filed an Amended Affidavit of Attorney's fees. On November 13, 2000, Plaintiffs filed an objection to the costs and attorney's fees, as well as a Motion to Vacate the Court's Order. After considerable debate over the July 2000 order, findings, and decree, the court granted Plaintiffs' Motion to Vacate the Order on March 21, 2001. A new order was entered on December 19, 2002. R. 256, 359. The court re-accepted and re-entered with no change the Findings of Fact and Conclusions of Law that had been filed by the Defendant. Plaintiffs continued to object to defendant's attorney's fees affidavit. Defendant continued to amend the Attorney's Fees affidavit according to the direction of the court. On March 15, 2004, pursuant to its decision to grant Defendant's Motion and award attorney's fees to Mr. Hales, the court entered its Order for Plaintiffs to pay Defendant's attorney's fees in the amount of \$6,5085.00. R. 462

III. Disposition in Trial Court

On July 27, 2000, after briefing and argument by the parties, the court issued its Order denying Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and entered its Findings of Fact and Conclusions of Law. As part of the Order, the court awarded attorney's fees to the Defendant. That Order was vacated by the court on March 21, 2001, and a new order was entered on December 19, 2002, reserving the issue of attorney's fees. On March 15, 2004, the court granted the Defendant attorney's fees under the December 19, 2002 Order, stating that "[t]he Findings of Fact and Conclusions of Law in this case provide a sufficient basis for an award of attorney fees pursuant to section 78-24-56¹, Utah Code." The court required a new motion to be filed because of deficiencies. R. 326. On July 26, 2006, the Honorable David L. Mower entered a judgment for attorney's fees in the amount of \$6,085.00 to the Defendant. R. 462.

STATEMENT OF FACTS

The Hopkins are individuals residing in Gunnison City, Sanpete County, Utah, and are the sole proprietors of Elkridge Financial. R. 256-57. They maintained their principal place of business in Gunnison. R. 257. The Hopkins began doing business as Elkridge on or about February, 1997. R. 257. The Hopkins became acquainted with Bill

¹ Mr. Hales agrees with the Hopkins that the court's reference to U.C.A. § 78-24-56 of the Utah Code was a clerical error, and that they court meant to cite U.C.A. § 78-27-56.

Hales on or about March, 1999, when Mr. Hales sought to obtain a loan through the services of Elkridge. R. 257.

Shortly thereafter, on or about March, 1999, Hales and Hopkins entered into a business relationship whereby Hales was employed by Elkridge as an independent contractor and consultant. R. 257. Prior to his employment relationship, Hales had no experience in the loan or mortgage broker industry. The Hopkins agreed to pay Hales \$2,000.00 per month. R. 257. Elkridge did not provide a written employment agreement to Hales at the time of his initial employment. On May 13, 1999, the Hopkins and Mr. Hales executed two agreements: a Non-Compete Agreement, and a Non-Disclosure Agreement. The limitations contained in the Agreements consisted of a time restraint of five (5) years and a geographical restriction of a 100 mile radius from Elkridge's principal place of business in Gunnison, Utah. R. 258. The only training Hales received was how to fill out loan applications. R. 257-58. All other information that Hales learned concerning the mortgage lending business he learned on his own and through his own efforts. R. 258, 300-301.

In or about April, 1999, the Hopkins determined to open an office in Richfield, Utah. R. 259. Mr. Hales was required to man the Richfield office alone beginning in or about August, 1999. One month later, Hopkins told Hales he would need to find new work because Hopkins could not pay him. R. 300-301. Prior to lending, Mr. Hales had acted as a police officer. R. 258. He looked for employment in law enforcement with no success. R. 259-260. Consequently, he began looking for employment with other mortgage brokers. R. 260. Meanwhile, as Hales continued soliciting loans and acquiring

information and applications for potential loan applicants for Elkridge, Mrs. Hopkins assured him that his employment with Elkridge was secure. R. 260.

In November, 1999, Mr. Hales was asked to relinquish his keys to the Richfield office and the files which he was working on for Elkridge. R. 260. Hales promptly did so. R. 260. Pursuant to his earlier employment search efforts, Hales immediately contacted another mortgage broker to pursue employment. Such pursuit was fruitful and Hales began to solicit loans for the new mortgage broker company towards the end of December, 1999, about three (3) weeks after his termination. R. 260. Having learned of Hales' activities in December, 1999, the Hopkins filed this action against him for breach of the Agreements. R.1.

SUMMARY OF THE ARGUMENT

The district court judge was correct in awarding Defendant's attorneys fees because the Plaintiffs claim was without merit and was brought in bad faith, thus satisfying the requirements of both the statute and the case law regarding the granting of attorneys fees. Furthermore, the court was not required to make written findings of bad faith litigation if the evidence in the record makes it reasonable to assume that it made such findings.

Plaintiffs argument that Utah Code Section 78-27-56.5 is controlling is irrelevant to this appeal because the issue was never raised in the court below and is, therefore, waived. Even if it had been preserved, the plaintiffs would not prevail in their argument

because sections 78-27-56 and 78-27-56.5 are not mutually exclusive as the Plaintiffs posit.

ARUGMENTS

POINT ONE

PLAINTIFFS HAVE NOT MET THEIR OBLIGATION TO MARSHAL THE EVIDENCE IN CHALLENGING THE COURT'S FACTUAL FINDINGS

Rule 24(a)(9) of the Utah Rules of Appellate Procedure states, in relevant part, that “a party challenging a fact finding must first marshal all record evidence that supports the challenged finding.” This Court ruled on this issue when it stated:

We repeatedly have set forth the heavy burden appellants must bear when challenging factual findings. To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. [Attorneys] must extricate [themselves] from the client's shoes and fully assume the adversary's position. In order to properly discharge the [marshalling] duty..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.

Oneida/SLIC v. Oneida Cold Storage & Warehouse, 872 P.2d 1051, 1052-53 (Utah 1994)

(internal citations omitted).

Appellate Counsel has utterly failed to fulfill this duty. The record to which appellate counsel refers contains only the thinnest skin of the underlying evidence upon which the district court relied in reaching its factual findings and conclusions that Plaintiffs conduct with Defendant was bad faith conduct. Appellate counsel completely fails to provide any of the district court's evidentiary meat, bones, or tissue regarding, among other things: Plaintiffs' bad faith negotiations producing the Agreements; Plaintiffs' promises of consideration made to Hales in exchange for his consent to enter into the Agreements; Plaintiffs' intentional refusal to fulfill those promises; Plaintiffs'

malicious conduct in terminating Hales employment; and Plaintiff's fraudulent conduct in inducing Hales to enter the Agreements, the terms of which were legally unenforceable.

All such evidence has been preserved by the district court on audio tapes, which are available for purchase from the district court upon request. See Addendum "B" (Request for Duplication of Recorded Hearing). Because appellate counsel has failed to satisfy this fundamental requirement, Defendant urges the Court to disregard, sua sponte, Plaintiffs' brief.

POINT TWO
COURT PROPERLY APPLIED SECTION 78-27-56 BECAUSE PLAINTIFFS'
ACTION LACKED MERIT AND WAS BROUGHT IN BAD FAITH

Plaintiffs' main argument is whether the court properly awarded attorney fees pursuant to Section 78-27-56 of the Utah Code. This section gives the court power to grant attorney's fees to a prevailing party where an action or defense was without merit and was brought or asserted in bad faith. That section states in relevant part:

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

Utah Code Ann. § 78-27-56. The Utah Supreme Court's decision in *Cady v. Johnson*, 671 P.2d 149, 151 (Utah 1983), is the seminal case on this issue. There, the Court explicitly enumerated the various requirements of what the prevailing party must demonstrate in order to be awarded attorney fees. The prevailing part must demonstrate that the claim is (1) without merit, and (2) not brought or asserted in good faith. *Cady*, 671 P.2d at 151.

A claim is without merit if it is “of little weight or importance having no basis in law or fact.” *Id.* The Plaintiffs’ claim had no basis in law or in fact because the agreements on which their claim was based were negotiated in bad faith, were without consideration, and were unenforceable. This point is undisputable regardless of Plaintiffs’ continued attempts to argue to the contrary. There is ample evidence of this in the district court’s Findings of Fact. The court also included these issues as Conclusions of Law. For example, the Plaintiffs induced the Defendant into signing the Agreements by continually making promises to pay consideration, while never intending to actually follow through. Specifically, Plaintiffs represented that Defendant would be quickly promoted, receive increased compensation and employment benefits, including health insurance, and equity ownership Plaintiff Elkridge. R. 259. These promises were never fulfilled and the agreed upon consideration was never paid. R. 260-61. The district court concluded that the “Hopkins engaged in bad faith negotiations by promising consideration in exchange for Hales’ signature and thereafter failing to provide that consideration ,” and that the Agreements “were not supported by consideration and are therefore unenforceable.” R. 263-64. Therefore, the first prong of the statute is clearly fulfilled.

Plaintiffs did not bring or assert their claims in good faith, thus satisfying the statute’s second prong. Good faith is defined as having “(1) an honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will

hinder, delay, or defraud others.” *Id.* To establish bad faith, a party must prove that one or more of these factors is lacking.

Plaintiffs’ assertion that they acted in good faith to enforce the agreements must fall on deaf ears. Logic does not permit Plaintiffs to argue that a party which negotiated agreements in bad faith can pursue the enforcement of such bad faith agreements “in good faith.” Yet this is what Plaintiffs attempt to do. Thus, this argument not only flies in the face of the evidence accepted by the district court and the district court’s Findings of Fact and Conclusions of Law, but it flies in the face of reason as well. Moreover, if acting in good faith is acting without malice as Plaintiffs claim, bad faith logically implies acting *with* malice. In fact, Black’s Law Dictionary defines “bad faith” as “involving actual or constructive fraud, or a design to mislead or deceive another,” and “not simply bad judgment or negligence, but rather...the conscious doing of a wrong because of dishonest purpose or moral obliquity.” Black’s Law Dictionary. By simple and valid logic, Plaintiffs impale themselves on the horns of their own argument. Specifically, the district court found that Plaintiffs acted in bad faith vis-à-vis Defendant. Therefore, by definition, Plaintiffs acted with malice, deceit, and fraud vis-à-vis Defendant. They sought to take unconscionable advantage of Defendant, and they certainly acted with the intent to defraud him. In doing so, Plaintiffs failed to meet more than one, if not all three, of the good faith requirements put forth in *Cady*.

Plaintiffs also attempt to argue that while the court below did make written findings of bad faith in the underlying agreements and in the Plaintiffs who forged them, it did not make any written findings of bad faith in the Plaintiffs’ bringing of the claim,

and therefore the court erred in granting attorney's fees under section 78-27-56.

However, despite what seems like clear language to the contrary² in § 78-27-56, the Utah Supreme Court is adamant that written findings of meritlessness and bad faith are not required. *See, e.g., In re Sonnenreich*, 2004 UT 3, ¶ 51, 86 P.3d 712 (Utah 2004); *Valcarce v. Fitzgerald*, 961 P.2d 305, 315-16 & n.1 (Utah 1998). Regarding the award of attorney's fees pursuant to § 78-27-56, the *Sonnenreich* court stated:

Generally, this court will uphold the district court *even if it failed to make findings on the record* whenever it would be *reasonable to assume that the court actually made such findings*. In so stating, we explicitly reject[] prior dicta implying that section 78-27-56 requires the district court to make specific finds with regard to each element of the statute in order to determine whether the award of attorney fees was based on a meritless claim brought in bad faith or simply because the recovering party prevailed.

In re Sonnenreich, 2004 UT 3, ¶ 51, 86 P.3d 712 (Utah 2004)(internal quotations omitted)(emphasis added). There are cases to the contrary. *See Chipman v. Miller*, 934 P.2d 1158, 1161 (Utah Ct. App. 1997); *see also, Jeschke v. Willis*, 811 P.2d 202, 204 (Utah Ct. App. 1991). But these cases are all the progeny of *Watkiss & Campbell v. Foa & Son*, 808 P.2d 1061, 1068 (Utah 1991), which the Supreme Court has said relied on dicta to so hold. *See, Valcarce*, 961 P.2d at 315 n.1.

Sonnenreich applies directly to this case. While the district court did not make any explicit or written findings that the Hopkins pursued this claim in bad faith, the district court

² A strong textual argument can actually be made that no written findings are required by § 78-27-56. The statute requires that the court “determine” meritlessness and bad faith. When the court concludes that bad faith existed but in its discretion awards no fees or limited fees, it must “find” two elements. *See* § 78-27-56(2); *Canyon Country Store v. Bracy*, 781 P.2d 414, 422 n.7 (Utah 1989). Assuming the legislature knows the meaning of the words it chooses when it crafts statutes, there must be some purpose to that distinction.

stated in its Order dated March 15, 2004, that “[t]he Findings of Fact and Conclusions of Law in this case provide a sufficient basis for an award of attorney fees pursuant to section 78-24-56³, Utah Code.” Based on the explicit written findings of the district court, together with the district court judge’s statement that “this case provide[s] a sufficient basis for an award of attorney fees,” it is “reasonable to assume that the court made” findings of bad faith in the pursuit of the claim.

POINT THREE
SECTION 78-27-56.5 ISSUE WAS NOT RAISED BELOW, AND IS THEREFORE WAIVED

The remaining arguments made by the Plaintiffs are nothing more than an awkward attempt to complicate the main issue discussed above by dangling these red herrings in front of the Court. These issues are irrelevant. Even so, Defendant chooses to address them because the Plaintiffs have raised them.

Plaintiffs claim that the district court judge applied the incorrect section of the Utah Code when he awarded Defendant’s attorney’s fees. Plaintiffs assert that the court should have applied § 78-27-56.5 instead of § 78-27-56 because the claim was based on a contract. Plaintiffs are prevented from raising this issue on appeal because it was never raised in the court below. Neither the Defendant nor the Plaintiffs ever based any claims on § 78-27-56.5, and Defendant raised only § 78-27-56 in his affirmative defenses, which was the statute the court ultimately relied on in granting Defendant’s motion for attorney’s fees.

The general rule of appeals, as discussed by the Utah Supreme Court, is that “[a]bsent plain error or extraordinary circumstances, [the appeals court does] not address

³ Defendant assumes the reference to section 78-24-56 is a clerical error and that the trial court meant to cite 78-27-56.

issues raised for the first time on appeal.” *Bd. of Trs. v. Keystone Conversions, LLC*, 103 P.3d 686 (Utah 2005). Elsewhere, the Court has explained,

In order to preserve an issue for appeal[,] the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue. This requirement puts the trial judge on notice of the asserted error and allows for correction at that time in the course of the proceeding. For a trial court to be afforded an opportunity to correct the error "(1) the issue must be raised in a timely fashion[,] (2) the issue must be specifically raised[,] and (3) the challenging party must introduce supporting evidence or relevant legal authority. *Issues that are not raised at trial are usually deemed waived.*

438 Main Street v. Easy Heat, Inc., 99 P.3d 801 (Utah 2004) (citations omitted)(emphasis added). Because the Plaintiffs failed to raise this issue below, this Court should deem the issue waived.

Even if the Plaintiffs had raised this issue below, they would not have been able to prevail on it here on appeal. Plaintiffs assertion that § 78-27-56.5 of the Utah Code should have been applied by the district court instead of § 78-27-56, because their claim was based on a contract, implies that the two sections are mutually exclusive. Plaintiffs provide no legal authority for such a conclusion because there is none. Moreover, Plaintiffs have disregarded § 78-27-56’s language, which does not include an exemption for contract cases. Plaintiffs’ conclusion is simply incorrect.

Section 78-27-56.5 provides for reciprocal rights to recover attorney’s fees if the civil action is based on a contract. It addresses the unequal bargaining positions usually associated with contract formation and provides relief to the lesser of the two parties by allowing both parties access to attorneys fees should they prevail, even if the contract

explicitly states that only one party is entitled to them. Section 78-27-56.5 is one basis for recovering those fees and costs, and not an exclusive basis for doing so.

As discussed above, § 78-27-56 provides an entirely separate and distinct basis by which a party may recover attorney's fees and costs; that of demonstrating that the claim at issue was without merit and was brought in bad faith. If this Court were to follow the Plaintiffs' reasoning of mutually exclusivity, it would be precluded from ever awarding attorney's fees in contract cases brought in bad faith.

**POINT FOUR
DEFENDANT'S REQUEST FOR ATTORNEY'S FEES WAS TIMELY.**

The Hopkins' argument that Mr. Hales' Motion for Attorney's Fees was untimely is wrong and misses significant legal and factual points. Defendant's Amended Affidavit for Costs and Attorney's Fees was timely submitted as required under Rule 54(d). This the Plaintiffs do not dispute. Rule 54(d) states in relevant part:

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date the judgment is entered.

Utah R. Civ. P. 54(d)(2). Defendants filed his Affidavit of September 2000, a true and correct copy of which is attached hereto as Addendum "C", with the district court after the court determined to deny Plaintiffs' Motion for Temporary Restraining Order and to dismiss its Complaint, or after service and filing of the findings of fact and conclusions of law but before the entry of judgment in December 2002. Therefore, notwithstanding the Hopkins' argument to the contrary, Mr. Hales has complied with Rule 54(d)(2).

The district court's determination to vacate its original Findings of Fact and Conclusions of Law, as well as its Order of July 27, 2000, did not invalidate the proper and timely filing of Defendant's Affidavit for Costs and Attorney's Fees. Indeed, Plaintiffs do not even dispute this point.

Additionally, the district court noted in the June 21, 2001 hearing that the vacation of its initial Order and Findings of Fact and Conclusions of Law had nothing to do with the merits of the case. The court also made clear to Plaintiffs and Defendant at the hearing that the court intended to reenter Defendant's Findings of Fact and Conclusions of Law. The district court recognized this issue's lack of merit and disposed of it.

Thus, the Hopkins' arguments that Mr. Hales did not act timely under Rule 54(d) are legally and factually inaccurate and wrong. Therefore, this Court, relying on Defendant's Amended Affidavit of October 2000, should affirm the district court's order granting Defendant's Motion for Attorney's Fees.

POINT FIVE ARGUMENTS PREVIOUSLY ADDRESSED AND ANSWERED

In Points Three, Four and Five of Plaintiffs' brief, the Plaintiffs have cut and pasted the arguments they made in their Memorandum in Opposition to Motion For Attorney Fees dated October 7, 2003. These issues were addressed, clarified, and corrected by Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion for Attorney's Fees Pursuant to Court Order Dated March 10, 2004, and dated April 7, 2004 (attached hereto as Addendum "D"). Defendant's April 7, 2004 Memorandum and Amended Affidavit for Attorney's Fees was the sole basis for the

district court's granting Defendant's motion for attorney's fees. All the information included in points three, four, and five is out-of-date and irrelevant to this proceeding.


POINT SIX
DEFENDANT ASKS THE COURT FOR ATTORNEY FEES INCURRED ON
APPEAL

As a final matter, Defendant asks this Court that it not only award costs pursuant to Rule 34 of the Utah Rules of Appellate Procedure, but that the Court also award attorney's fees incurred by Defendant on appeal. The Utah Supreme Court stated in *Salmon v. Davis County*, 916 P.2d 890, 895 (Utah 1996), that "this court has interpreted attorney fee statutes broadly so as to award attorney fees on appeal where a statute initially authorizes them." The Court later added that "when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal." *Valcarce v. Fitzgerald*, 961 P.2d 305, 319 (Utah 1998). As such, Defendant asks this Court to award both costs and attorney fees that Defendant has incurred on appeal.

CONCLUSION

Based on the fore going arguments, Defendant asks this Court to affirm the district court's granting of Defendant's motion for attorney's fees. Defendant additionally asks the court to award the costs and attorney's fees Defendant has incurred on this appeal.

RESPECTFULLY SUBMITTED this 21st day of July, 2007.



STANFORD A. GRAHAM
Attorney for Defendant – Appellee

CERTIFICATE OF SERVICE

I, Stanford A. Graham, hereby certify that on this 21st day of July, 2007, I mailed two true and correct copies of the foregoing **BRIEF OF APPELLEE**, postage prepaid, to:

D. Bruce Oliver #5120
D. BRUCE OLIVER, L.L.C.
180 South 300 West, Suite 210
Salt Lake City, UT 84101

Attorney for Plaintiffs – Appellants



ADDENDUM A

1 of 1 DOCUMENT

UTAH CODE ANNOTATED

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*** STATUTES CURRENT THROUGH THE 2007 GENERAL SESSION. ***

*** ANNOTATIONS CURRENT THROUGH 2007 UT 34 (4/19/2007); 2007 UT APP 119 (4/19/2007) AND APRIL 15, 2007 (FEDERAL CASES). ***

TITLE 78. JUDICIAL CODE
PART III. PROCEDURE
CHAPTER 27. MISCELLANEOUS PROVISIONS

Go to the Utah Code Archive Directory

Utah Code Ann. § 78-27-56 (2007)

§ 78-27-56. Attorney's fees -- Award where action or defense in bad faith -- Exceptions

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

HISTORY: L. 1981, ch. 13, § 1; 1988, ch. 92, § 1.

NOTES TO DECISIONS

ANALYSIS

Appeal.

-- Frivolous appeal.

-- Prevailing party.

Award.

-- Distinguishing between fees.

Bad faith.

Discretion of court.

Essential elements.

Fees properly awarded.

Fees properly denied.

Findings.

Good faith by insurer.

Hearing.

1 of 1 DOCUMENT

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*** STATUTES CURRENT THROUGH THE 2007 GENERAL SESSION. ***

*** ANNOTATIONS CURRENT THROUGH 2007 UT 34 (4/19/2007); 2007 UT APP 119 (4/19/2007) AND APRIL 15, 2007 (FEDERAL CASES). ***

TITLE 78. JUDICIAL CODE

PART III. PROCEDURE

CHAPTER 27. MISCELLANEOUS PROVISIONS

Go to the Utah Code Archive Directory

Utah Code Ann. § 78-27-56.5 (2007)

§ 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.

HISTORY: C. 1953, 78-27-56.5, enacted by L. 1986, ch. 79, § 1.

NOTES TO DECISIONS

ANALYSIS

Contractual indemnity provision.

Discretion of court.

Cited.

CONTRACTUAL INDEMNITY PROVISION.

This section did not entitle plaintiff to attorney's fees on the basis of a contractual indemnity clause in favor of defendant. *B.J. Barnes & Sons Trucking, Inc. v. Dairy Farmers of Am., Inc.*, -- F. Supp. 2d --, 2007 U.S. Dist. LEXIS 6720 (D. Utah Jan. 30, 2007).

DISCRETION OF COURT.

In an action involving claims for breach of warranty, misrepresentation, and mutual mistake, where the only claim stemmed from the contract, it was not an abuse of discretion for the trial court to determine not to attempt to allocate the attorney's fees and denial of attorney fees was appropriate. *Schafir v. Harrigan*, 879 P.2d 1384 (Utah Ct. App. 1994).

CITED in *Carr v. Enoch Smith Co.*, 781 P.2d 1292 (Utah Ct. App. 1989); *Saunders v. Sharp*, 840 P.2d 796 (Utah Ct. App. 1992); *Chase v. Scott*, 2001 UT App 404, 38 P.3d 1001.

COLLATERAL REFERENCES

A.L.R. --Attorney's liability under state law for opposing party's counsel fees, *56 A.L.R.4th 486*.
Excessiveness or adequacy of attorneys' fees in matters involving real estate, *10 A.L.R.5th 448*.

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STATE RULES
UTAH RULES OF CIVIL PROCEDURE
PART VII. JUDGMENT

URCP Rule 54 (2007)

Review Court Orders which may amend this Rule

Rule 54. Judgments; costs.

(a) Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings. Judgments shall state whether they are entered upon trial, stipulation, motion or the court's initiative; and, unless otherwise directed by the court, a judgment shall not include any matter by reference.

(b) Judgment upon multiple claims and/or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment.

(1) Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(2) Judgment by default. A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) Costs.

(1) To whom awarded. Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah,

URCP Rule 54

its officers and agencies shall be imposed only to the extent permitted by law.

(2) How assessed. The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(e) Interest and costs to be included in the judgment. The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.

HISTORY: Amended effective January 1, 1985; November 1, 2003

NOTES:

Amendment Notes.-- The 2003 amendment added the last sentence to Subdivision (a) and made stylistic changes.

Compiler's Notes. -- Subdivisions (d)(3) and (d)(4), relating to the award of costs by the appellate court and costs in original proceedings before the Supreme Court, were repealed with the adoption of the Utah Rules of Appellate Procedure, effective January 1, 1985. See, now, Rule 34(d), Utah R.App.P.

This rule is similar to *Rule 54, F.R.C.P.*

Cross-References.-- Continuances, discretion to require payment of costs, U.R.C.P. 40(b).

State, payment of costs awarded against, § 78-27-13.

Stay of judgment upon multiple claims, U.R.C.P. 62(h).

Witness fees, taxing as costs, § 78-46-30.

NOTES TO DECISIONS

Absence of express determination.

Amendment of pleadings.

Appeal as of right.

Certification not determinative.

Costs.

-- In general.

-- Challenge of award.

-- Depositions.

-- Discretionary.

-- Expenses of preparation for action.

-- Extension of time for filing.

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STATE RULES
UTAH RULES OF APPELLATE PROCEDURE
TITLE V. GENERAL PROVISIONS

Utah R. App. P. Rule 24 (2007)

Review Court Orders which may amend this Rule

Rule 24. Briefs.

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(2) A table of contents, including the contents of the addendum, with page references.

(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(4) A brief statement showing the jurisdiction of the appellate court.

(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and.

(A) citation to the record showing that the issue was preserved in the trial court; or.

(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of

the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(10) A short conclusion stating the precise relief sought.

(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and.

(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) Brief of the appellee. The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or.

(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) Reply brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

Utah R. App. P. Rule 24

(f) Length of briefs. Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs. No brief shall exceed 50 pages, and no party's briefs shall in combination exceed 75 pages.

(1) The appellant shall file a Brief of Appellant, which shall present the issues raised in the appeal.

(2) The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant, which shall respond to the issues raised in the Brief of Appellant and present the issues raised in the cross-appeal.

(3) The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee, which shall reply to the Brief of Appellee and respond to the Brief of Cross-Appellant.

(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee.

(h) Permission for over length brief. While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages requested, and the good cause for granting the motion. A motion filed at least seven days before the date the brief is due or seeking five or fewer additional pages need not be accompanied by a copy of the brief. A motion filed less than seven days before the date the brief is due and seeking more than 5 additional pages shall be accompanied by a copy of the draft brief for in camera inspection. If the motion is granted, any responding party is entitled to an equal number of additional pages without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

(i) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

HISTORY: Amended effective October 1, 1992; July 1, 1994; April 1, 1995; April 1, 1998; November 1, 1999; April 1, 2003; November 1, 2004; April 1, 2006; November 1, 2006

NOTES:

Advisory Committee Note. -- Rule 24 (a)(9) now reflects what Utah appellate courts have long held. See *In re Beesley*, 883 P.2d 1343, 1349 (Utah 1994); *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1278 (Utah 1987). "To

1 of 1 DOCUMENT

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STATE RULES
UTAH RULES OF APPELLATE PROCEDURE
TITLE V. GENERAL PROVISIONS

Utah R. App. P. Rule 34 (2007)

Review Court Orders which may amend this Rule

Rule 34. Award of costs.

(a) To whom allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment or order is affirmed, costs shall be taxed against appellant unless otherwise ordered; if a judgment or order is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment or order is affirmed or reversed in part, or is vacated, costs shall be allowed as ordered by the court. Costs shall not be allowed or taxed in a criminal case.

(b) Costs for and against the state of Utah. In cases involving the state of Utah or an agency or officer thereof, an award of costs for or against the state shall be at the discretion of the court unless specifically required or prohibited by law.

(c) Costs of briefs and attachments, record, bonds and other expenses on appeal. The following may be taxed as costs in favor of the prevailing party in the appeal: the actual costs of a printed or typewritten brief or memoranda and attachments not to exceed \$ 3.00 for each page; actual costs incurred in the preparation and transmission of the record, including costs of the reporter's transcript unless otherwise ordered by the court; premiums paid for supersedeas or cost bonds to preserve rights pending appeal; and the fees for filing and docketing the appeal.

(d) Bill of costs taxed after remittitur. A party claiming costs shall, within 15 days after the remittitur is filed with the clerk of the trial court, serve upon the adverse party and file with the clerk of the trial court an itemized and verified bill of costs. The adverse party may, within 5 days of service of the bill of costs, serve and file a notice of objection, together with a motion to have the costs taxed by the trial court. If there is no objection to the cost bill within the allotted time, the clerk of the trial court shall tax the costs as filed and enter judgment for the party entitled thereto, which judgment shall be entered in the judgment docket with the same force and effect as in the case of other judgments of record. If the cost bill of the prevailing party is timely opposed, the clerk, upon reasonable notice and hearing, shall tax the costs and enter a final determination and judgment which shall thereupon be entered in the judgment docket with the same force and effect as in the case of other judgments of record. The determination of the clerk shall be reviewable by the trial court upon the request of either party made within 5 days of the entry of the judgment.

(e) Costs in other proceedings and agency appeals. In all other matters before the court, including appeals from an agency, costs may be allowed as in cases on appeal from a trial court. Within 15 days after the expiration of the time in which a petition for rehearing may be filed or within 15 days after an order denying such a petition, the party to whom costs have been awarded may file with the clerk of the appellate court and serve upon the adverse party an itemized and

verified bill of costs. The adverse party may, within 5 days after the service of the bill of costs file a notice of objection and a motion to have the costs taxed by the clerk. If no objection to the cost bill is filed within the allotted time, the clerk shall thereupon tax the costs and enter judgment against the adverse party. If the adverse party timely objects to the cost bill, the clerk, upon reasonable notice and hearing, shall determine and settle the costs, tax the same, and a judgment shall be entered thereon against the adverse party. The determination by the clerk shall be reviewable by the court upon the request of either party made within 5 days of the entry of judgment; unless otherwise ordered, oral argument shall not be permitted. A judgment under this section may be filed with the clerk of any district court in the state, who shall docket a certified copy of the same in the manner and with the same force and effect as judgments of the district court.

HISTORY: Amended effective November 1, 1999

NOTES TO DECISIONS

Costs awarded.

Cited.

Costs awarded.

Although the court denied the award of attorney fees to husband under Rule 33(a) because the wife's appeal had a reasonable factual and legal basis, costs were awarded to husband under Rule 34. *Cooke v. Cooke* 2001 Utah App. LEXIS 28 2001 UT App 110, 22 P.3d 1249 (Utah Ct. App. 2001).

Cited in *Barber v. Barber*, 792 P.2d 134 (Utah Ct. App. 1990); *Benjamin v. Amica Mut. Ins. Co.* 2006 Utah LEXIS 96.

COLLATERAL REFERENCES

Am. Jur. 2d. -- 5 Am. Jur. 2d Appellate Review § 909 et seq

C.J.S. -- 5 C.J.S. Appeal and Error § 995

ADDENDUM B

Sanpete County Clerk
160 North Main, Box 100
Manti, Utah 84642-0100
Phone 435-835-2121 Fax 435-835-2135

REQUEST FOR DUPLICATION OF RECORDED HEARING

- ☐ Digital Audio (CD) FTR Format (Data) \$10.00 per 4 hours
☐ Digital Audio (CD) CD Player Format \$10.00 per 4 hours
☐ Audio Tape (for tape players with speed control) \$10.00 per tape
(Up to 3 hours per tape.)
☐ Audio Tape (for tape players w/o speed control) \$10.00 per tape
(Up to 45 minutes per tape.)
☐ Video Tape \$15.00 per tape

☐ Mail to address below (Please include \$3.00 shipping & handling)
☐ I will pick up

Requested by: _____

Address: _____

Phone #: _____

Case Number: _____

Hearing Date: _____

Hearing Type: _____

Estimated Hearing Length: _____

Date Needed: _____

**Estimated Cost: _____

** Fees for copy of court record must be paid in advance**

I understand that a copy of the hearing requested will be made as per this request. If
the request was made in error, I am still responsible for payment in full.

Date: _____

Signature of Requester

Processed by: _____ Delivered _____ Received by: _____
Mailed _____
(Date)

ADDENDUM C

FILE COPY

IN THE SIXTH JUDICIAL DISTRICT COURT OF SANPETE COUNTY

CITY OF EPHRAIM, STATE OF UTAH

STATE OF UTAH :
 :SS.
COUNTY OF SALT LAKE :

114.57 hours to meet with client, preparation of Answer and Counterclaim and Amended Counterclaim, work on potential claims to pursue against Elkridge, review Non Compete and Non Disclosure Agreement, multiple telephone conferences with client and opposing counsel, multiple meetings with client and witnesses, multiple correspondence to client and opposing counsel,

legal research, prepare Opposition to Temporary Restraining Order, review case law and legal research, prepare client's affidavit, prepare Memorandum in Opposition to Temporary Restraining Order, prepare and attend hearing on the Temporary Restraining Order, prepare Findings of Fact and Conclusions of Law, correspondence to the Court, prepare Order, and prepare Affidavit of Attorney's Fees and Costs.

Reply to Plaintiff's objection Return Opposition not to vacate
Hearings

Mot + Ord Sup Proc, Mot to App't Sue County Prep for Sup. Ord Hear, Comm w/ Court re: Order + Findings

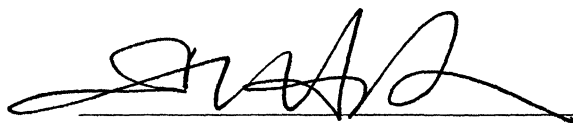
3. Plaintiff's counsel's hourly rate is in the sum of \$150.00 per hour which was necessarily incurred in prosecuting this action.

4. Plaintiff's counsel is familiar with hourly rates charged by other attorneys in this area for similar matters and further states that 114.57 hours is a reasonable amount of time to spend in this action.

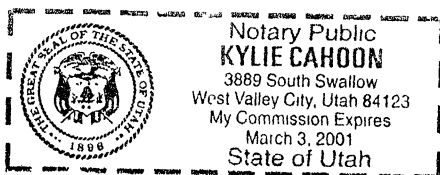
5. Costs incurred in prosecuting this action are as follows:

\$ 90.00 filing fees for Counterclaim.

DATED this 30th day of August, 2000.


STANFORD A. GRAHAM
Attorney for Plaintiff

SWORN AND SUBSCRIBED to before me this 30th day of August, 2000.




Notary Public

MAILING CERTIFICATE

I certify that on 30th day of August, 2000, I mailed via first class mail, a true and exact copy of the foregoing AFFIDAVIT OF ATTORNEY'S FEES AND COSTS, to the Defendants at their last known address as follows:

Douglas L. Neeley, Esq.
427 East 400 South
Manti, Utah 84642

Kylie Cahoon

ADDENDUM D

Stanford A. Graham (6392)
of **STANFORD A. GRAHAM, P.C.**
2120 North Valley View Drive
Layton, Utah 84040
Telephone: (801) 497-0094

Attorney for Defendant, Bill Hales

IN THE SIXTH DISTRICT COURT OF SANPETE COUNTY

CITY OF EPHRAIM, STATE OF UTAH

MARK HOPKINS and KATHY HOPKINS
dba ELK RIDGE FINANCIAL

Plaintiffs,

vs.

BILL HALES,

Defendant.

**DEFENDANT'S MOTION FOR
ATTORNEY'S FEES PURSUANT TO
COURT ORDER DATED
MARCH 10, 2004**

Civil No. 990600458
Judge David L. Mower

Pursuant to the Court's Order of March 10, 2004 wherein the Court found and stated that "[t]he Findings and Conclusions of Law in the case provided sufficient basis for an award of Attorney's Fees pursuant to section 78-24-56, Utah Code . . . "; and further stated that if Defendant or his counsel "intend to seek a specific amount of money, a new Motion would be required", Defendant submits this Motion for Attorney's fees in the amount of \$24,180.00 which were reasonably incurred in Defendant's defense of Plaintiffs' Complaint and Motion for a Temporary Restraining Order, both of which were based on a non-compete agreement and non-disclosure agreement which Complaint and Temporary Restraining Order were brought without merit and

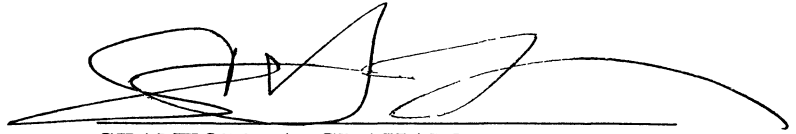
without good faith.

This Motion is based on the more specified information which this Court requested in its Order and more particularly described in the Affidavit of Defendant's counsel, Stanford A. Graham, for the purpose of clarifying to this Court the amount of reasonable Attorney's Fees which the Court should award Defendant pursuant to his necessitated defense. This Motion is filed and served concurrently with a Memorandum of Points and Authorities in Support of the Motion for Attorney's Fees pursuant to the Court's Order Dated March 10, 2004.

THIS SPACE LEFT INTENTIONALLY BLANK

DATED this 7 day of April, 2004.

STANFORD A. GRAHAM, P.C

A handwritten signature in black ink, appearing to read 'Stanford A. Graham', written over a horizontal line.

STANFORD A. GRAHAM
Attorney for Defendant

MAILING CERTIFICATE

I hereby certify that on the 7th day of April, 2004, I mailed first class, postage prepaid a true and exact copy of the foregoing MOTION FOR ATTORNEY'S FEES to the following:

David Bruce Oliver
180 South 300 West #210
Salt Lake City, Utah 84101

A handwritten signature in black ink, appearing to read 'Alegre', written over a horizontal line.
Paralegal