

1995

Wayne Takashi Satsuda and Seon Sil Satsuda, his wife v. Hasin Oh and Myung Ja Oh, his wife; Hasin Oh and Myung Ja Oh, his wife v. Kee Hong Um and Shi Ja Um, his wife : Reply Brief

Utah Court of Appeals

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**In the Utah Court of Appeals**

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Wayne Takashi Satsuda and  
Seon Sil Satsuda, his wife,  
Plaintiffs & Appellants,  
v.  
Hasin Oh and Myung Ja Oh, his wife,  
Defendants and Appellees,

**Reply Brief of Cross-Appellants/Appellees  
Kee Hong Um & Shi Ja Um**

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Hasin Oh and Myung Ja Oh, his wife,  
third-party Plaintiffs,  
Appellees/Cross-Appellees  
vs.  
Kee Hong Um and Shi Ja Um, his wife,  
third-party Defendants,  
Appellees/Cross-Appellants

Case No. 950569 - CA  
Priority Classification 15

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Appeal From The Third Judicial District Court  
Salt Lake County, State of Utah  
Honorable J. Dennis Frederick

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**Rules**

Utah R.App.P. 11(e)(2) . . . . . 1

## Reply Arguments

### 1. The Findings and Conclusions of the Trial Court Support an Award of the Ums' Attorney's Against the Ohs.

The Ohs' claim that the Ums have failed to "marshall the evidence" to support a challenge of the Trial Court's refusal to award the Ums a judgment of attorneys fees against the Ohs fails to point to any finding of fact or conclusion of law which the Ums are allegedly challenging. Findings of fact marshalled by the Ohs to support the judgment of the Trial Court to refuse an award of attorney to the Ums are also marshalled to overcome the Trial Court's dismissal of all the Ohs' claims against the Ums and the specific finding that the Ums prevailed over the Ohs. The findings relied upon are not sufficient to accomplish either purpose.

Further, while claiming that the Ums have failed to marshall the evidence in favor of the Trial Court's findings of fact, as required by *Mountain States Broadcasting Co. v. Neale*, 776 P2d 643 (Utah App. 1989), hereinafter *Mountain States I*, the Ohs fail to point out which findings of fact are being attacked by the Ums as clearly erroneous. The reason for this is that the Ums have challenged none of the findings of fact of the Trial Court. Because the Ums are challenging the judgment and none of the findings, this Court may apply a "substitution of judgment" standard of review of the Trial Court's legal reasons, if any, for denying the Ums an award of attorneys fees against the Ohs. Unless overcome by a clear marshalling of the evidence in opposition to a particular finding, the written findings of fact of the Trial Court are to be accepted as valid, regardless of any oral statements from the bench by the Trial Court varying or interpreting those findings; and regardless of any interpretation which the Ohs wish to place upon those findings.

Although Utah R.App.P. 11(e)(2) requires that a transcript of all evidence relevant to a challenged finding or conclusion be included in the record on appeal, this Court has

not required such marshalling where the challenge is a legal one. In *Saunders v Sharp*, 806 P.2d 198 (Utah 1991), this Court overturned an affirmation of judgment by the Court of Appeals for appellant's failure to marshal the evidence with the following analysis:

If a challenge is made to the findings, an appellant must marshal all evidence in favor of the facts as found by the trial court and then demonstrate that even viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings of fact. If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case. *Grayson Roper Ltd. v. Finlinson*, 782 P.2d 467, 470 (Utah 1989); *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985).

However, the court of appeals erred when it then automatically affirmed the judgment based on plaintiffs' failure to show the findings of fact to be unsupported. An appellate court is to review the trial court's conclusions of law for correctness. *Landes v. Capital City Bank*, 795 P.2d 1127, 1129 (Utah 1990). Once the findings of fact (rather than the judgment) were affirmed by the appeals court, it was then incumbent on that court to review the trial court's conclusions of law and its application of the law to the facts as found. -*Saunders*, 806 P.2d at 199

Unlike *Saunders*, the Ums are not disputing of the findings of fact, but they are disputing the correctness of the conclusions of law made based upon those factual findings, particularly with regard to the trial court's application of the law to the facts found in this case.

The Court of Appeals, in *Campbell v Campbell*, 896 P.2d 635 (Utah App 1995) has recently relaxed the marshalling requirement when the findings of fact are legally insufficient to support a judgment, holding that ". . . appellants need not engage in a futile marshalling exercise if they can demonstrate the findings, as framed by the court, are legally insufficient." *Campbell*, 896 at 638. Here, as in *Campbell*, the findings of the trial court are legally insufficient to support the ultimate judgment denying the Ums any recovery against the Ohs.

While attacking the Ums' failure to marshal the evidence in support of their

argument for an award of attorney's fees against the Ohs, the Ohs have failed to acknowledge the specific finding of fact of the Trial Court that: "With the dismissal of third party Plaintiffs' action against them with prejudice, third party Defendants have prevailed against third party Plaintiffs" (Supplemental Findings, ¶1 Findings of Fact); and also ignores the Trial Court's conclusion of law that: "Pursuant to paragraph 15 of the uniform real estate contract, third party Defendants [the Ums] are entitled to an award against Defendants and third party Plaintiffs [the Ohs] of all their costs and reasonable attorneys fees incurred in defending this action.

Granting that the Trial Court did not view the Ums' entitlement to an "award" as rising to a right to judgment against the Ohs, it was the liability of the Ohs to the Ums, under the Assignment of Contract from the Ohs to the Satsudas, that the Trial Court found that the Ums' "award" entitled them to judgment directly against the Satsudas (Supplemental Findings, ¶¶ 3 and 4 of Conclusions of Law). It is this inconsistency which the Ums are attacking as a question of law, not of fact, to which legal conclusion of the Trial Court this Court need give no deference. The issue before this Court is, does such a logical inconsistency between the findings of fact, conclusions of law, and judgment rise to an abuse of discretion sufficient to overturn the Trial Court's denial of an award of attorneys fees?

## **2. Ums Are the Prevailing Party**

The Ohs' citation to *Mountain States Broadcasting Co. v. Neale*, 783 P2d 553 (Utah App. 1989), hereinafter *Mountain States II*, for the proposition that determining a prevailing party in litigation is often difficult, and that the record does not compel a finding that Ums are the prevailing party merely because the Ohs' complaint was dismissed on all counts, is

sorely misplaced. In fact, *Mountain States I*, 776 P2d 643, 648, stands for the proposition that a complete nonsuit of a plaintiff determines the defendant as the prevailing party:

Typically, determining the "prevailing party" for purposes of awarding fees and costs is quite simple. Plaintiff sues defendant for money damages; if plaintiff is awarded a judgment, plaintiff has prevailed, and if defendant successfully defends and avoids an adverse judgment, defendant has prevailed. However, this simple analysis cannot be employed here because both plaintiff and defendant obtained some monetary relief against the other. Our review of the relevant case law convinces us that under the provision at issue, there can be only one prevailing party even though both plaintiff and defendant are awarded money damages on claims arising from the same transaction. [citations omitted]. We hold that in the present circumstances the party in whose favor the "net" judgment is entered must be considered the "prevailing party" and is entitled to an award of its fees. [citations omitted].

This Court in *Mountain States II*, 783 P2d 553, 554 was not quite so absolute when, according to the Ohs, it "expressly rejected the mechanical application of the 'net judgment rule' for determining who is the prevailing party in any particular case", stating:

We recognized in footnote 7 of our opinion and here emphasize "the need for a flexible and reasoned approach to deciding in particular cases who actually is the prevailing party." Consistent with that view, we point out that nothing in our opinion should be taken to suggest that the net judgment rule can be mechanically applied in all cases, although it will usually be at least a good starting point.

In this case we remain convinced that application of the net judgment rule does not distort the relative success of the parties at trial, as seen from two additional perspectives implicit in *Mountain States'* petition.

There is no split decision here. The Ohs' complaint was dismissed on all counts and with prejudice. The only finding of fact by the Trial Court on the issue is Supplemental Finding of Fact no. 1, which is specific that the Ums prevailed over the Ohs. The Ohs rely upon their Amended Conclusions of Law to somehow eviscerate the Ums' successful defense; but the only relevant paragraphs in the Amended Conclusions of Law are nos. 9 & 10, which state, "9. For the same reasons, the Defendants have failed to establish their causes of action in their Third-Party Complaint. 10. Consequently, no cause of action is

found on either the complaint or the Third-Party Complaint." The tie-in language asserting that the Ums' successful defense is found only upon the dismissal of the Satsudas' Complaint is contained within ¶12 of the Trial Court's First Amended Order. That order is not a finding of fact. More relevant is Supplemental Conclusion of Law no. 2, recited above, which is explicit that the Ums are entitled to an award of their defense fees and costs against the Ohs.

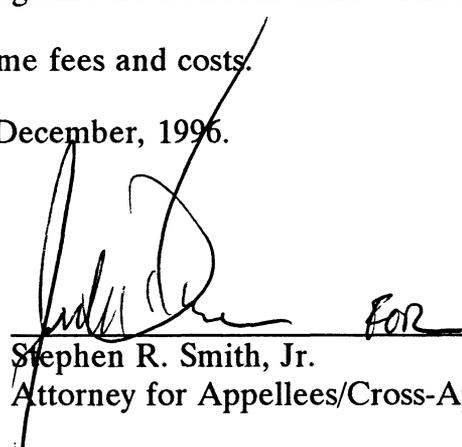
### Conclusion

Relying upon the findings and conclusions of the Trial Court, the Ums need not marshal any evidence to challenge the conclusions of the Trial Court. In fact, the Ohs various assertions and interpretations of the findings in this case are best ignored where the explicit findings fail to make the statements or carry the implications claimed.

With the dismissal of the Ohs' third-party action with prejudice, the Ums are the prevailing party. The findings of fact and conclusions of law in this case, as well as the case law cited by the Ohs, contrary to their assertions, make it clear that the dismissal of all allegations of a complaint with prejudice is a bright-line rule for determining that the defendant is the prevailing party in such litigation.

Having been awarded judgment for their attorneys fees and costs against the Satsudas based upon their prevailing against the Ohs and being "entitled to an award against" the Ohs, it is illogical to allow the Ums' judgment against the Satsudas stand without making the Ohs jointly and severally liable for these same fees and costs.

Respectfully submitted this 23rd day of December, 1996.

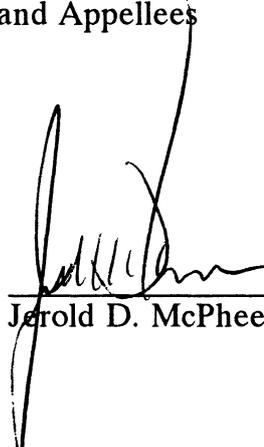
  
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### Certificate of Service

I, Jerold D. McPhee, certify that on December 23rd, 1996 I served two copies of the attached Reply Brief of Appellees/Cross-Appellants upon the attorneys for Appellants and Appellees in this matter, by mailing them to each of them by first class mail with sufficient postage prepaid to the following addresses:

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