

1995

# Wayne Takshi Satsuda and Seon Sil Satsuda, his wife v. Hasin Oh and Myung Ja Oh, his wife : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jeffery Weston Shields; Attorney for Defendants; Jones, Waldo, Holbrook & McDonough.

Jimi Mitsunaga; Attorney for Plaintiffs.

---

## Recommended Citation

Brief of Appellee, *Satsuda v. Oh*, No. 950569 (Utah Court of Appeals, 1995).

[https://digitalcommons.law.byu.edu/byu\\_ca1/6848](https://digitalcommons.law.byu.edu/byu_ca1/6848)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

[http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH  
DOCUMENT  
K F U  
50

**In the Utah Court of Appeals**

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

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

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

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

Stephen R. Smith, Jr. (3015)  
Attorney for third-party Defendants,  
Appellees/Cross-Appellants  
Kee Hong Um and Shi Ja Um  
C/O Mooney Law Firm  
50 West Broadway, 4th Floor  
Salt Lake City, Utah 84101-2006  
Telephone: (801)364-5635

Jeffrey Weston Shields (2948)  
Lawrence R. Dingivan (5193)  
Attorneys for Defendants, third-party Plaintiffs, and Appellees  
Purser Edwards & Shields, L.L.C.  
215 South State Street, Suite 800  
Salt Lake City, Utah 84111-2340

Jimi Mitsunaga (2279)  
Attorney for Plaintiffs, Appellants, and Cross-Appellees  
731 East South Temple  
Salt Lake City, Utah 84102

**FILED**

OCT - 4 1996

**COURT OF APPEALS**

## **Table of Contents**

Table of Authorities .....	ii
Cases Listed Alphabetically With Parallel Citations .....	ii
Statutes .....	ii
Rules .....	ii
 Jurisdiction .....	 1
 Issue Presented on Cross-Appeal - Right to Attorney Fees .....	 1
 Issues Presented on Appeal - Objection .....	 2
 Determinative Statutes and Rules .....	 3
 Statement of the Case .....	 3
A. Nature of the case .....	3
B. Course of proceedings .....	4
C. Disposition in the trial court .....	4
D. Statement of facts relevant to the issues presented for review .....	5
 Summary of Arguments .....	 8
 Arguments .....	 8
1. Ums' Third Party Defense Enforced Contract .....	8
2. Prevailing Party Attorney Fees Allowed Under Utah Code Ann. §78-27-56.5 .....	11
3. By Contract, if Litigation Concerns Property, Prevailing Party to be Awarded Attorney Fees .....	14
4. Prevailing Party Attorney Fees Allowed on Appeal .....	16
 Conclusion .....	 16

## Table of Authorities

### Cases Listed Alphabetically With Parallel Citations

<i>Beehive Medical Electronics, Inc. v. Square D Co.</i> , Utah, 669 P2d 859 (1983) . . . . .	10
<i>Cabrera v. Cottrell</i> , 694 P2d 622 (Utah 1985) . . . . .	11
<i>Callan v. Biermann</i> , 194 Kan. 219, 398 P2d 355 (1965) . . . . .	10
<i>Dixie State Bank v. Bracken</i> , 764 P2d 985 (Utah 1988) . . . . .	11, 14
<i>Gill v. Timm</i> , 720 P2d 1352, 31 Utah Adv. Rep. 24 (Utah 1986) . . . . .	10
<i>Graco Fishing &amp; Rental Tools, Inc. v. Ironwood Exploration, Inc.</i> , 766 P2d 1074 (Utah 1988) . . . . .	11
<i>James Constructors v. Salt Lake City</i> , 888 P2d 665, 674 (Utah App. 1994) . . . . .	16
<i>Management Services v. Development Associates</i> , 617 P2d 406 (Utah 1980) . . . . .	16
<i>Maynard v. Wharton</i> , 912 P2d 446, 284 Utah Adv. Rep. 35 (Utah App. 1996) . . . . .	8, 11, 12, 14, 15
<i>Morgan v. Quailbrook Condominium Co.</i> , Utah, 704 P2d 573 (1985) . . . . .	10
<i>Mountain States Broadcasting Co. v. Neale</i> , 783 P2d 551 (Utah App. 1989) . . . . .	10
<i>Occidental/Nebraska Federal Savings Bank v. Mehr</i> , 791 P2d 217, 132 Utah Adv. Rep. 55 (Utah App. 1990) . . . . .	10
<i>Salmon v. Davis County</i> , 916 P2d 890 (Utah 1996) . . . . .	16
<i>Saunders v. Sharp</i> , 818 P2d 574 (Utah App. 1991) . . . . .	11
<i>Schafir v. Harrigan</i> , 879 P2d 1384, 245 Utah Adv. Rep. 15 (Utah App. 1994) . . . . .	13, 14
<i>Stacey Properties v. Wixen</i> , 766 P2d 1080 (Utah App. 1988) . . . . .	11
<i>State v. Brown</i> , 856 P2d 358 (Utah App. 1993) . . . . .	10
<i>Stubbs v Hemmert</i> , 567 P2d 168 (Utah 1977) . . . . .	12
<i>Western Kane County Special Serv. Dist. No. 1 v Jackson Cattle Co.</i> , 744 P2d 1376 (Utah 1987) . . . . .	2

## **Statutes**

Utah Code Ann. §78-2-2(3)(j) . . . . .	1
Utah Code Ann. §78-2a-3 . . . . .	1
Utah Code Ann. §78-27-56.5 . . . . .	3, 8, 11, 13, 14, 17

## **Rules**

Utah R.App.P. 24(a)(5) . . . . .	2
Utah R.App.P. 24(j) . . . . .	3

## **Jurisdiction**

This Court has jurisdiction to hear this appeal pursuant to Utah Code Ann. §78-2-2(3)(j), which gives this Court jurisdiction over "orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction"; and Utah Code Ann. §78-2a-3, which generally does not give the Court of Appeals original appellate jurisdiction over civil matters originating in the district court which are neither administrative nor domestic. On September 7, 1995 the Utah Supreme Court ordered this appeal poured-over to the Utah Court of Appeals.

### **Issue Presented on Cross-Appeal - Right to Attorney Fees**

Where both the original and third party actions are dismissed with prejudice as to all counts and attorneys fees are awarded to both prevailing parties pursuant to contract, are the third party defendants entitled, as a matter of right, to their costs and reasonable attorneys fees incurred in defending the action to be awarded against the third party plaintiffs whose action was dismissed? Third-party Defendants and Appellees/Cross-Appellants Kee Hong Um and Shi Ja Um (hereinafter the "Ums") seek on appeal an order entitling them to an award of judgment against third-party Plaintiffs/Defendants and Appellees/Cross-Appellees Hasin Oh and Hyung Ja Oh (hereinafter the "Ohs") and Plaintiffs and Appellants Wayne Takashi Satsuda and Seon Sil Satsuda (hereinafter the "Satsudas"), jointly and severally.

Although the captioning of the briefs submitted by the other parties in this matter indicate otherwise, the Ums are not appealing their judgment against the Satsudas, who are not cross-appellees of this appeal. The Ums are seeking judgment against the Ohs jointly and severally with the Satsudas. To the extent that they are successful as appellees and cross-appellants, the Ums are also seeking their costs and reasonable attorneys fees, as a

judgment against the Satsudas and the Ohs jointly and severally, incurred for prosecuting this cross-appeal and defending against the Satsudas' appeal.

**Standard of Review:** Regarding the judgment of the Trial Court, the Ums are not challenging its factual Findings, but the application of them to the law in the Conclusions of Law. While findings of fact will not be set aside unless they are clearly erroneous, conclusions of law are simply reviewed for correctness without any special deference, *Western Kane County Special Serv. Dist. No. 1 v Jackson Cattle Co.*, 744 P2d 1376 (Utah 1987).

**Citation to the Record Showing Issue Preserved:** Ums' Objection to Defendants' Findings of Fact and Conclusions of Law, and Proposed Order of Dismissal and Judgment, and Request for Clarification of Minute Entry, all five pages.

#### **Issues Presented on Appeal - Objection**

The Ums object to the Satsudas' statement of issues presented on appeal for failing to appropriately refer to the record of the case to show where each issue was preserved for appeal, or a statement of grounds for seeking review of any issue not preserved in the trial court, as is required by Utah R.App.P. 24(a)(5). The failure of the Satsudas to establish grounds for review of each issue is all the more egregious for the fact that 16 issues are stated in Appellants' Brief pp. 4-7 (issue no. 12 repeated twice), while only 14 issues are raised in their docketing statement. Issue 15 is newly raised in their brief, attacking an earlier partial summary judgment issue which was subsequently tried, although not specifically ruled upon.

The Ums were not defendants in the Satsudas' complaint. The Ohs have declined to appeal the dismissal, with prejudice, of their third-party action against the Ums; and they have declined to appeal any other finding of fact or conclusion of law of the Trial Court.

Accordingly, even if the Satsudas successfully prevail on all issues raised on appeal, the Ums may no longer be found liable to either the Ohs or the Satsudas. Under these circumstances, the Ums are appellees only as to the Satsudas' appeal of the Ums' judgment for attorney fees, being issues 9, 10, and 14. Only these issues, dealing with the Ums' right to attorney's fees and the Satsudas' indirect liability for them will be briefed by the Ums.

### **Determinative Statutes and Rules**

Relevant to where a successful defense establishes no default under a contract and still seeks prevailing party attorney fees is Utah Code Ann. §78-27-56.5, which provides:

**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.

Relevant to the Satsudas' failure to establish that each issue raised was preserved for appeal, Utah R.App.P. 24(j) provides:

**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.

### **Statement of the Case**

**A. Nature of the case:** In 1990, the Satsudas, as buyers, brought an action against the Ohs, as sellers, after suffering an adverse building inspection of a motel which had been purchased about a month earlier (Hereinafter the "Property"). The Ohs filed a third party action against the Ums, who had sold them the Property over three years earlier, and who had undertaken the complained of changes in the Property.



**B. Course of proceedings:** On March 15, 1990 the Satsudas filed their action against the Ohs for breach of their Earnest Money Agreement with them (herein after the "Satsudas Earnest Money"), loss of value, special and general damages, and attorneys fees. The Ohs filed against the Ums on July 5, 1991, were dismissed, and filed again on April 19, 1993, having alleged six causes against the Ums based upon their Earnest Money Agreement with Ums (hereinafter the "Ohs Earnest Money") and similar to those claimed by the Satsudas, plus a right to indemnification. On May 2, 1995 the original order of dismissal of Satsudas' complaint and judgment of the Ohs' attorney's fees against them was signed and entered. On May 12, 1995 the Ums filed their motion, pursuant to Rule 59, Utah Rules of Civil Procedure, to open, alter, or amend the previous order and judgment. On June 9, 1995 the first amended order of dismissal of the Satsuda's complaint and judgment of costs attorney's fees against the Satsudas for the Ohs and Ums was signed and entered. On July 9, 1995 the supplemental order of judgment appealed from was signed and entered, disposing of the Ums' Rule 59 motion and setting the amount of the Ums' attorneys fees to be awarded against the Satsudas, but not allowing the Ums any judgment for costs and fees against the Ohs. The Satsudas filed notices of appeal on June 5, July 10, and July 27, 1995. On August 1, 1995 the Ums' notice of appeal was filed.

**C. Disposition in the trial court:** After the matter was tried to the bench over two days, all causes of action raised under both the complaint and the third party action were dismissed. The Ohs were awarded their prevailing party attorney's fees, in the sum of \$44,959.86, against the Satsudas pursuant to contract, as were the Ums awarded their attorney's fees and costs, in the sum of \$56,126.77, directly against the Satsudas as a cost of the Ohs. However, the Ums were not awarded a joint and several judgment sought against both the Ohs and the Satsudas.

**D. Statement of facts relevant to the issues presented for review:**

1. On February 28, 1987, the Ums executed the Ohs Earnest Money with the Ohs for the sale of "a 40 unit motel called capitol motel" located at 1749 So. State St., Salt Lake City, Salt Lake County, State of Utah (the Property) for the sum of \$550,000.00 (Statement of Stipulated Facts ¶20, Brief of Appellant, Addendum no. 3).

2. The Ums sold the Property to the Ohs on May 1, 1987 for \$540,000.00 through execution of a Uniform Real Estate Contract (hereinafter the "Contract"). At that time, the Property consisted of 39 units. (¶6, First Amended Findings of Fact and Conclusions of Law, Brief of Appellant, Addendum no. 12, hereinafter "Findings").

3. Paragraph 18 of the Contract provides: "With respect to the physical condition of the Property, Seller warrants the following: Buyer has inspected the subject premises and accepts the subject property 'as is'" (Brief of Appellees, Addendum no. 2).

4. On November 16, 1989, the Satsudas had executed the Satsudas Earnest Money to purchase the Property as a 40-unit motel for some \$620,000.00 (¶19, Findings).

5. The sale of the Property to the Satsudas by the Ohs closed on January 5, 1990 by execution of closing documents, which included an assignment to the Satsudas of the Contract (Hereinafter the "Assignment") (¶20, Findings).

6. On February 12, 1990, the Satsudas were advised of the zoning and building code deficiencies disclosed by the Lawrence Suggars inspection of the Property in January, 1990 (¶21, Findings).

7. The Satsudas obtained a zoning variance for the Property's parking lot at a cost of approximately \$2,500.00 in attorney's fees (¶22, Findings).

8. The Satsudas remodeled deficient rental units on the Property to comply with applicable Salt Lake City codes except for unit 35 which was permanently closed. The

Satsudas completely closed certain other rental units during remodeling, an action which was not required by Salt Lake City (¶23, Findings).

9. The Satsudas sold the Property on January 5, 1994, during the pendency of this matter for some \$860,000.00, \$240,000.00 more than their purchase price (¶24, Findings).

10. With the dismissal of the Ohs' action against them with prejudice, the Ums have prevailed against Ohs. (¶1, Supplemental Findings of Fact and Conclusions of Law Regarding Assessment of Third Party Defendants' Attorneys' Fees Against Plaintiffs, Brief of Appellant, Addendum no. 18, hereinafter "Supplemental Findings").

11. The Contract entered into by the Ums as Sellers and the Ohs as Buyers, and later assumed by the Satsudas, provides in ¶15 that "the prevailing party in litigation, shall be entitled to all costs and expenses, including a reasonable attorney's fee" for pursuing any remedy provided by the Contract "or by applicable law." (¶2, Supplemental Findings).

12. Paragraph 3b of the Assignment obligates the Satsudas, as assignees, to hold harmless the Ohs, as assignors, from "any and all actions, suits, costs, damages, claims and demands whatsoever arising by reason of an act or omission of the assignees." (¶4, Supplemental Findings).

13. Based upon the undisputed and uncontroverted evidence on record before the Court, as of February 17, 1995, the Ums incurred necessary and reasonable costs and attorneys fees in the sum of fifty-six thousand one hundred twenty-six dollars and seventy-seven cents (\$56,126.77) (¶11, Supplemental Findings).

14. The Satsudas claimed in their complaint, at ¶¶ 39 & 40, that the Satsudas Earnest Money obligated the Ohs, as the defaulting party, to pay the Satsudas' reasonable attorney's fees, plus all costs and expenses (pg. 7, Brief of Appellant, Addendum no. 1).

15. The Ohs claimed in their third party complaint, at ¶¶ 28 & 29, that the Oh Earnest Money obligated the Ums, as the defaulting party, to pay all the Ohs' costs and expenses, including reasonable attorney's fees (pg. 5, Brief of Appellant, Addendum no. 2).

16. Regarding attorney's fees, ¶B of the Ohs Earnest Money (Brief of Appellant, Addendum no. 21), and ¶N of the Satsudas Earnest Money (Brief of Appellant, Addendum no. 24) both provide:

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.

17. The Satsudas' complaint makes no reference to, or even an acknowledgment of, the existence of the Contract or the Assignment (Complaint, Brief of Appellant, Addendum no. 1).

18. The Oh's third-party complaint attaches the Contract as Exhibit B and refers to the Contract's existence only once, in ¶4, alleging that the Ohs purchased the Property from the Ums on February 28, 1987, the date of the execution of the Ohs Earnest Money (Complaint, Brief of Appellant, Addendum no. 2).

19. Both the Ohs and the Satsudas relied upon a breach of the representations contained within their respective earnest money agreements to establish their causes of action, claiming a breach of Seller's warranties under ¶C (¶12, Complaint, Brief of Appellant, Addendum no. 1; ¶7, Complaint, Brief of Appellant, Addendum no. 2).

20. Additionally, the Ohs claimed damages for breach of contract for the misrepresentation that the Property sold under the Oh Earnest Money was described as "a 40 unit motel called Capitol Motel", when a number of rooms had been added without a

building permit (¶5, Complaint, Brief of Appellant, Addendum no. 2).

### **Summary of Arguments**

1. The Ums' defense to the Oh's complaint was to raise the terms of the Contract as a bar to the Oh's reliance upon the preceding Oh Earnest Money. As such, the Ums' attorney's fees were incurred in enforcing the Contract. The Ohs prepared and filed the Findings, and raised no objection to the Supplemental Findings.

2. The Ums and Ohs are entitled to their judgments for attorneys fees against the Satsudas under Utah Code Ann. §78-27-56.5, which statutorily varies the meaning of all contracts executed after April 28, 1986 to allow prevailing party attorney fees where **any** party to the contract which is the basis for the litigation could have recovered their fees under that contract.

3. In contrast to the attorney's fees language reviewed in *Maynard v. Wharton*, 912 P2d 446, 284 Utah Adv. Rep. 35 (Utah App. 1996), and contained in the earnest monies, the Contract between the parties provides for prevailing party costs and attorney's fees.

4. As a party that was awarded their attorneys fees at trial, the Ums are entitled to an award of their attorneys fees on appeal.

### **Arguments**

#### **1. Ums' Third Party Defense Enforced Contract**

The Contract is significantly different from either the Oh or Satsuda Earnest Monies: It omits many of the representations and warranties contained within the earlier agreements; it identifies the Property only by its street address and its metes and bounds, rather than as a 40 unit motel; and it eliminates all warranties of physical condition, specifying in ¶18 that the Property, after inspection by the buyer having been exercised, is being accepted "as is". The Ums paid for these concessions, reducing the purchase price by \$10,000. Further, the

Contract has two attorney's fees provisions, at ¶¶ 15 and 16, with ¶16, addressing Buyer's Default, containing three separate references to Seller's right to attorney's fees.

The Contract's provisions severely hampered Buyers' claims of breach of warranty and misrepresentation. Further, under the doctrine of merger, any recognition of the binding validity of the Contract would extinguish all terms of the earnest monies, preventing any election of remedies or reliance upon terms and warranties of the earlier agreements. The acknowledgement and enforcement of the terms of the Contract so eviscerated the Satsudas' complaint, that, even now, on appeal, they couldn't bring themselves to attach it or the Assignment as one of the 24 addendums to their brief, although both earnest money agreements are included.

The Trial Court enforced the Contract, invoked the doctrine of merger, and extinguished the earnest monies. Addressing the collateral rights doctrine, the Trial Court concluded that none of the warranties survived the earnest monies. With the dismissal of both complaints, The Trial Court specifically found that the Ums had prevailed over the Ohs in this litigation (¶1, Supplemental Findings).

Having prevailed, the Trial Court concluded that: "Pursuant to paragraph 15 of the uniform real estate contract, [the Ums] are entitled to an award against [the Ohs] of all their costs and reasonable attorneys fees incurred in defending this action" (Supplemental Findings, ¶2 of Conclusions of Law). The Trial Court did not view the Ums' entitlement to an "award" as entitling the Ums to judgment against the Ohs. However, under the Assignment, the Trial Court found that the Ums' "award" entitled them to judgment against the Satsudas (Supplemental Findings, ¶¶ 3 and 4 of Conclusions of Law).

The Ohs neither raised nor filed any objection to the Supplemental Findings, leaving the Satsudas and Ums to raise, and counter, relevant objections. The Ohs have filed no

appeal of any part of the judgements or findings. "As a general rule, appellate courts will not consider an issue, including a constitutional argument, raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances."

*State v. Brown*, 856 P2d 358, 359 (Utah App. 1993). The Utah Supreme Court, in *Gill v. Timm*, 720 P2d 1352, 31 Utah Adv. Rep. 24 (Utah 1986) held that this requirement applies to all parties:

A party objecting to the trial court's ruling must make a clear and succinct objection to the court at the time the error first becomes apparent. The court must be afforded a timely opportunity to correct its error, or the objecting party will have waived its right to argue the objection on appeal. *Beehive Medical Electronics, Inc. v. Square D Co.*, Utah, 669 P2d 859, 861 (1983). This is so whether the error runs to jury instructions, as to which objections are governed by Rule 51, see, e.g., *Morgan v. Quailbrook Condominium Co.*, Utah, 704 P2d 573, 579 (1985), or whether the error involves a question of law or procedure in a bench trial. See, e.g., *Callan v. Biermann*, 194 Kan. 219, 398 P2d 355, 357 (1965).

While the Ohs certainly objected to the award of any judgment directly against them, upon which they prevailed, they have not contested the facts and law underlying that decision, and, upon the authority cited, they may not do so now.

The Trial Court's award of the Ums' fees against the Ohs compels that judgment be entered against the Ohs for the Ums, as it has already been against the Satsudas. "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," *Mountain States Broadcasting Co. v. Neale*, 783 P2d 551, 556 (Utah App. 1989). In *Occidental/Nebraska Federal Savings Bank v. Mehr*, 791 P2d 217, 132 Utah Adv. Rep. 55 (Utah App. 1990), this Court analyzed the prevailing party's right to a judgment for those fees as follows:

Where there was a right to attorney fees, Utah courts have allowed the party who successfully prosecuted or defended against a claim to recover the fees attributable to those claims on which the party was successful. See [*Mountain States Broadcasting*] at 566 n.10 (reasonable fee excludes amounts

attributable to issues or claims on which party otherwise entitled to fee was unsuccessful); *Stacey Properties v. Wixen*, 766 P2d 1080, 1085 (Utah App. 1988) (defendant was entitled to attorney fees for the counterclaims on which he was successful as well as for his successful defense of plaintiff's attempt to accelerate a promissory note), cert. denied, 779 P.2d 688 (Utah 1989); see also *Graco Fishing & Rental Tools, Inc. v. Ironwood Exploration, Inc.*, 766 P2d 1074, 1080 (Utah 1988) (grant of attorney fees was remanded for a determination of only those fees attributable to the pursuit of successful claims).

Other Cases determinative of this issue are: *Cabrera v. Cottrell*, 694 P2d 622, 623 (Utah 1985): "Furthermore, contrary to appellant's contention that attorneys fees should be determined on the basis of an equitable standard, attorneys fees, when awarded as allowed by law, are awarded as a matter of legal right." *Saunders v. Sharp*, 818 P2d 574, 579 (Utah App. 1991): "Where the terms of a contract provide for the award of attorney fees, such fees are 'awarded as a matter of legal right.' [citations omitted]. If reasonable fees are recoverable by statute or contract, it is a mistake of law to award less than that amount. *Dixie State Bank v. Bracken*, 764 P2d 985, 990-91 (Utah 1988)."

Having successfully raised the Contract and its provisions in defense against the Ohs' and Satsudas' claims, resulting in a complete nonsuit, the Ums are entitled, pursuant to the terms of that Contract, to an award of judgment for their attorney's fees against both parties, jointly and severally.

## **2. Prevailing Party Attorney Fees Allowed Under Utah Code Ann. §78-27-56.5**

If there is no default or breach of the terms of the Contract, which is the result of the dismissal of both complaints, may the Ums and the Ohs, as prevailing parties, still recover their costs and attorney's fees? Recently, in *Maynard*, the Utah Court of Appeals interpreted an attorney's fees provision of a standard Utah earnest money agreement as not providing for prevailing party attorney's fees for the successful defense of a breach of contract action when the other party's default under the contract cannot be established. It



reversed the trial court's award of attorney fees to the prevailing defendant sellers.

Here, neither the Satsudas nor the Ohs have failed to make timely payments under the Contract. For the purposes of this appeal it can also be assumed that the property taxes have been paid, insurance maintained, and the property cared for and maintained. No notice of default under the Contract has been conveyed to the Satsudas by the Ohs or to the Ohs by the Ums. The dismissal of the complaints represented the Trial Court's conclusion that no party had engaged in any default, breach, or tort concerning the other in regard to the Property.

*Maynard* was decided wrongly. First the Court of Appeals had just determined that the earnest money agreement containing the relevant attorney's fees provision was "extinguished and unenforceable," quoting *Stubbs v Hemmert*, 567 P2d 168, 169 (Utah 1977), *Maynard*, at 449, 450. The Court then went on to discuss why, under the facts of the case, none of the exceptions to the merger doctrine applied to any of the clauses contained within the earnest money agreement. The opinion concludes with a detailed analysis of why a non-defaulting defendant cannot recover attorney's fees under the earnest money agreement's attorney fee provision.

Rather than state that one cannot recover attorney fees under an extinguished and unenforceable provision of an extinguished and unenforceable agreement, the Utah Court of Appeals ruled that, under the express terms of the provision regarding attorney's fees, only defaulting parties could be held liable. With that decision, any successful defense to an action under an earnest money agreement is denied any contractual recovery of attorney fees. "Paragraph 'N' has limits; it does not award attorney fees to prevailing parties in every suit related to the earnest money agreement. In short, paragraph 'N' does not contemplate an award of attorney fees for sellers just because buyers sued." *Maynard*, at 452.

Whether or not ¶N of the earnest money contemplates attorney fees "for sellers just because buyers sued", Utah Code Ann. §78-27-56.5 provides for such 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.

First, the allowance of costs and attorney's fees is within the sound discretion of the trial court, since it is permissive only. But the discretion granted is broad, allowing prevailing party attorney fees where the action is based upon any promissory note, written contract, or other writing executed after April 28, 1986. All that is required is that the attorney's fees provision within the agreement would have allowed at least one of the parties to have recovered their attorney fees. But the statute does not require that the cause of action would have allowed recovery of attorney's fees by either party under the agreement's attorney's fee provision; it only requires that the action be "based upon" the agreement containing the attorney's fees provision.

But for the existence of the Contract, by which they acquired the property complained of, neither the Ohs nor the Satsudas would have had a cause of action against the Ums. Clearly then, Utah Code Ann. §78-27-56.5 supports the Trial Court's discretion in awarding the Ums and the Ohs their costs and attorney's fees against the Satsudas.

When Utah Code Ann. §78-27-56.5 was raised on an appeal of the denial of attorney's fees to a prevailing party in *Schafir v. Harrigan*, 879 P2d 1384, 245 Utah Adv. Rep. 15 (Utah App. 1994), this Court supported the trial court's discretion:

The Harrigans cross-appeal from the trial court's denial of their motion for attorney fees. The Earnest Money Sales Agreement provided for payment of reasonable attorney fees to the non-defaulting party. Using this provision as a springboard, the Harrigans requested attorney fees under Utah Code Ann. §78-27-56.5 (1992).

In Utah, the "calculation of reasonable attorney fees is in the sound discretion of the trial court and will not be overturned in the absence of a showing of a clear abuse of discretion." *Dixie State Bank v. Bracken*, 764 P2d 985, 988 (Utah 1988) (citation omitted). In this case, the trial court denied the Harrigans' motion for attorney fees because only one of the Schafirs' claims stemmed from the contract and "any fees or costs uniquely applicable to the [contractual] warranty claim are insignificant." Although the trial court could have attempted to allocate a portion of the fees to the contractual warranty claim, it decided against such action because "it would not be appropriate." We believe that the trial court is in the best position to determine how much of the attorney's time was spent on each of the four issues. In addition, we think that the trial court should determine whether an allocation of fees is appropriate under the circumstances. In this case, the trial court felt it was inappropriate and we defer to its decision because there is no clear abuse of discretion. Therefore, we affirm the trial court's denial of the Harrigans' motion to award attorney fees.

Although *Schafir* was cited twice in *Maynard* as part of that case's analysis of the doctrine of merger, *Schafir's* review of Utah Code Ann. §78-27-56.5 was completely ignored. Under *Schafir*, the Trial Court's exercise of its sound discretion to award the Ums and the Ohs all of their costs and attorney's fees should not be disturbed absent a showing of a clear abuse of discretion. Further, with the Ohs and the Satsudas having raised their actions and having claimed attorney's fees under their earnest money agreements, whether or not those agreements and provisions are extinguished, this Court can use Utah Code Ann. §78-27-56.5 to support the Trial Court's decision to award costs and attorney fees.

**3. By Contract, if Litigation Concerns Property,  
Prevailing Party to be Awarded Attorney Fees**

The Contract's provision allowing prevailing party attorney's fee states at ¶15:

Both parties agree that,

[first alternative]

should either party default in any of the covenants or agreements herein contained, the non-defaulting party

or,

[second alternative]

should litigation be commenced, the prevailing party in litigation,

[result]

shall be entitled to all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from

[nature of action or litigation allowed]

[1] enforcing or terminating this contract, or

[2] in obtaining possession of the Property, or

[3] in pursuing any remedy provided hereunder or

[4] by applicable law. (structure, emphasis, and bracketed language added)

Under this provision any litigation between the parties regarding the Property entitles the prevailing party to an award of attorney's fees and costs, regardless of whether the action arose from a contractual default. In contrast to the agreement language reviewed in *Maynard*, which applied only to the "defaulting party", *id.* at 451, ¶15 establishes the rights of "non-defaulting" and "prevailing" parties. Further, ¶15 does not require a default in the terms of the Contract in order to qualify for prevailing party attorneys fees; it only requires that the parties to the Contract be engaged in litigation concerning the Contract's subject-matter property.

The Contract has three other provisions allowing attorneys fees in the event of buyer's default, under ¶16, at subsections A, B, and C. ¶15 was drafted more broadly, to cover any dispute between the parties concerning the subject-matter of the Contract. Under ¶15 of the Contract, the Ums are entitled to an award of judgment against the Ohs and the Satsudas, since the Ums are the prevailing party, the remedies sought by the Ohs and the Satsudas were legal, and the litigation concerned the Contract Property.

#### **4. Prevailing Party Attorney Fees Allowed on Appeal**

Where a party has been awarded attorney fees at the trial level, the Utah Supreme Court has recognized an equal entitlement to an award of attorney fees on appeal. in *Salmon v. Davis County*, 916 P2d 890 (Utah 1996), it recently affirmed a right to statutory attorney fees for a successful appeal, stating:

Analogously, we have recognized that a contractual obligation to pay attorney fees incurred in enforcing a contract should also include fees incurred on appeal. In *Management Services v. Development Associates*, 617 P2d 406, 408-09 (Utah 1980), we stated that the purpose of an attorney fees provision is to indemnify the prevailing party against the necessity of paying attorney fees and thereby enable him to recover the full amount of the obligation. *Id.* at 409. In accordance with this purpose, we concluded that "a provision for payment of attorney's fees in a contract includes attorney's fees incurred by the prevailing party on appeal as well as at trial, if the action is brought to enforce the contract." *Id.* Similarly, the court of appeals recently ruled that the prevailing party in a dispute over a contractual attorney fees provision was entitled, not only to attorney fees on appeal, but also to the fees it incurred establishing the reasonableness of the fees for which it was entitled to be indemnified. *James Constructors v. Salt Lake City*, 888 P2d 665, 674 (Utah Ct. App. 1994).

Here, the Ums are on appeal to seek the "award" of their attorney fees reduced to judgment against the Ohs. As Appellees, the Ums seek to both justify the dismissal of the Satsudas' action by the Trial Court, and, by so prevailing, support the Trial Court's award of their attorney fees against the Satsudas. Under the case law cited, the Ums are entitled to an award of their attorney fees on appeal, should they prevail.

#### **Conclusion**

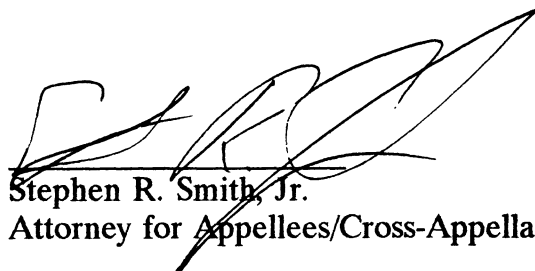
The Satsudas have failed to marshall the evidence to overcome the findings of the Trial Court and have failed to show how their issues were preserved for appeal. Accordingly, based upon the uncontroverted findings of the Trial Court, this Court should affirm the Trial Court's order of dismissal of the complaint and its award of prevailing party attorney fees to the Ohs and Ums.

The Ums have demonstrated to the Court that the Trial Court's decision to award them all their attorney fees is supported by the terms of the Contract as a prevailing party and as a party to the Contract who sought to enforce it as a defense against the actions brought by the Ohs and Satsudas. However, the Trial Court abused its discretion in not giving the Ums judgment against the Ohs for their attorney fees after making an "award" of these fees against the Ohs. If this Court reverses the Trial Court on this issue and awards the Ums judgment against the Ohs and the Satsudas, jointly and severally, then the judgement against the Ohs should be treated as a "cost", enhancing the judgment of the Ohs against the Satsudas by a like amount.

If the Contract's clause on attorney fees is not found to be sufficient, then the Trial Court's discretion in awarding judgment for costs and attorney fees to the Ums and the Ohs against the Satsudas can be supported statutorily, under Utah Code Ann. §78-27-56.5. Further, and under that statute, the attorney fees provisions of the Ohs' and Satsudas' earnest money agreements can be relied upon to justify an award of prevailing party attorney fees, even though the agreements and clauses are extinguished.

Lastly, having prevailed below, the Ums seek an award of their attorney fees on appeal against the Ohs and the Satsudas, jointly and severally.

Respectfully submitted this 4th day of October, 1996.



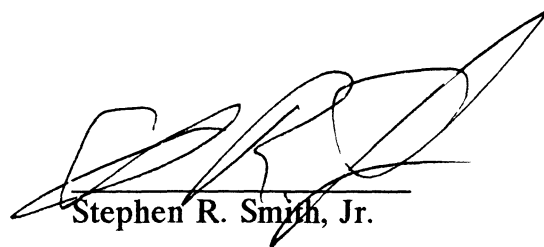
Stephen R. Smith, Jr.  
Attorney for Appellees/Cross-Appellants

### **Certificate of Service**

I, Stephen R. Smith, Jr., certify that on October 4, 1996 I served two copies of the attached 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:

Jimi Mitsunaga, Esq.  
731 East South Temple  
Salt Lake City, Utah 84102

Jeffrey Weston Shields, Esq.  
Lawrence R. Dingivan, Esq.  
Purser Edwards & Shields, L.L.C.  
800 Parkside Tower  
215 South State Street  
Salt Lake City, Utah 84111-2340



Stephen R. Smith, Jr.