

1995

Wayne Takashi Satsuda and Seon Sil Satsuda v. Hasin Oh and Myung Ja Oh : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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DOCKET NO. 950569-CA

WAYNE TAKASHI SATSUDA and SEON
SIL SATSUDA,

Plaintiffs and Appellants,

vs.

HASIN OH and MYUNG JA OH,
Defendants and Appellees.

HASIN OH and MYUNG JA OH,

Third-Party Plaintiffs/ Appellees
and Cross-Appellees,

vs.

KEE UM and SHI JA UM,

Third-Party Defendants, Appellees and
Cross-Appellants.

**BRIEF OF CROSS-APPELLEES
HASIN OH AND MYUNG JA OH**

Case No.: 950569-CA

Appeal from the Third Judicial District Court,
In and for Salt Lake County
The Honorable J. Dennis Frederick
Argument Priority Classification 15

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FILED

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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SIL SATSUDA, :
Plaintiffs and Appellants, :

vs. :

HASIN OH and MYUNG JA OH, :
Defendants and Appellees. :

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF JURISDICTION	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	6
STATEMENT OF ISSUES	11
STANDARD OF REVIEW	12
SUMMARY OF ARGUMENT	12
ARGUMENT	13
UMS HAVE FAILED TO ADEQUATELY MARSHALL THE EVIDENCE SUPPORTING THE TRIAL COURT'S ATTORNEY FEE AWARD	13
UMS ARE NOT "PREVAILING PARTIES" IN THE THIRD PARTY LITIGATION FOR PURPOSES OF CONSIDERING AN AWARD OF THEIR ATTORNEY'S FEES AGAINST OHS	15
THE DISTRICT COURT'S AWARD OF UMS' ATTORNEYS FEES DIRECTLY AGAINST SATSUDAS, BYPASSING OHS, WAS A REMEDY CRAFTED WITHIN THE DISCRETION AFFORDED TO THE TRIAL COURTS CONCERNING AWARDS OF ATTORNEYS FEES IN LITIGATION	19
OHS ADEQUATELY PRESERVED ISSUES CONCERNING AWARD OF UMS ATTORNEYS FEES AT THE TRIAL COURT	22
CONCLUSION	23

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<u>Beckstrom v. Beckstrom</u> , 578 P.2d 520 (Utah 1978)	12, 20
<u>Broadwater v. Old Republic Surety</u> , 854 P.2d 523 (Utah 1993)	21
<u>Collier v. Heinz</u> , 827 P.2d 982 (Utah App. 1982)	21
<u>Dixie State Bank v. Bracken</u> , 764 P.2d 985 (Utah 1988)	12, 18, 20, 23
<u>Gilbert v. City of Caldwell</u> , 732 P.2d 355 <u>appealed after remand</u> , 772 P.2d 242 (Idaho 1987)	20
<u>Gill v. Timm</u> , 720 P.2d 1352 (Utah 1986)	22
<u>Jenkins v. Bailey</u> , 676 P.2d 391 (Utah 1984)	12, 18, 20
<u>Maynard v. Wharton</u> , 912 P.2d 446 (Utah 1996)	20
<u>Mountain States Broadcasting Company v. Neale</u> , 783 P.2d 551 (Utah App. 1989)	14, 15, 17, 18
<u>Owen Jones and Sons, Inc. v. C.R. Lewis Company</u> , 497 P.2d 312 (Alaska 1972)	17, 18, 20
<u>Pioneer Roofing Company v. Mardian Construction Company</u> , 152 Ariz. 455, 733 P.2d 652 (Ct. App. 1986)	17
<u>Schafir v. Harrigan</u> , 879 P.2d 1384 (Utah App. 1994)	20
<u>South Sanpitch Company v. Pack</u> , 765 P.2d 1279 (Utah App. 1988)	21
<u>State v. Elder</u> , 815 P.2d 1341 (Utah App. 1991)	21
<u>Turtle Management, Inc. v. Haggis Management, Inc.</u> , 645 P.2d 667 (Utah 1982)	12, 18, 20

STATUTES

	<u>Page</u>
Utah Code Ann. § 78-2a-3(2)(j)	2
Utah Code Ann. § 78-27-56.5	12, 15, 18, 20
Utah Rule of Appellate Procedure 24(a)(5)(A)	22

MISCELLANEOUS

<i>Annotation, Who is the "Successful Party" or "Prevailing Party"</i> <i>For Purposes of Awarding Costs Where Both Parties Prevail on</i> <i>Affirmative Claims, 66 A.L.R. 3d 115 (1975),</i>	17
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STATEMENT OF JURISDICTION

Jurisdiction over this appeal, and the cross appeal of Ums to which Ohs reply herein, is proper under Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF THE CASE

This lawsuit arose out of the January 1990 sale of the Capitol Motel by Hasin Oh and Myung Ja Oh ("Ohs") to Wayne Takashi Satsuda and Seon Sil Satsuda ("Satsudas"). The Ohs and Satsudas entered into an Earnest Money Sales Agreement for the sale on November 16, 1989, and executed the final closing documents in the transaction on or about January 5, 1990.

On March 15, 1990, the Satsudas initiated this civil action against the Ohs. In a complaint setting out three causes of action, the Satsudas claimed that the Ohs had failed to tell them of zoning and regulatory code violations that plagued the Capitol Motel. The Satsudas maintained that, as a result of these legal deficiencies, they were denied the benefit of their bargain in purchasing the Capitol Motel; were forced to initiate costly administrative proceedings to obtain a zoning variance; and were obliged to make extensive repairs to the Motel.

In their first cause of action, the Satsudas claimed that the Ohs breached warranties in the Earnest Money Sales Agreement in three respects:

1. The Capitol Motel had sufficient parking spaces under Salt Lake City zoning regulations to allow for the rental of only 33 of its 40 rooms at any time to the public;
2. Several of the Capitol Motel's rooms had inadequate ventilation as well as substandard plumbing and electrical fixtures; and
3. Seven of the Motel's rooms were constructed without a Salt Lake City building permit.

In their second and third claims, the Satsudas alleged that the Ohs intentionally misrepresented the physical condition of the Capitol Motel and the Motel's compliance with applicable zoning and regulatory requirements. The second cause of action took as its misrepresentations the three deficiencies set out in the First Cause of Action, while the Third Cause of Action maintained that, although the Ohs represented that the Capitol Motel was a 40-unit motel, it was actually only a 33-room facility due to various health, safety, and building code violations that afflicted 7 of its rooms.

On April 8, 1993, the Ohs filed a third-party action against the Ums, from whom they had purchased the Capitol Motel in May 1987. In their Third-Party Complaint, the Ohs alleged that the Ums knew of the Capitol Motel's structural and legal faults, yet failed to disclose them prior to the 1987 sale. In other words, for third-party pleading purposes, Ohs alleged, essentially, that the defects in the property claimed by Satsudas in the Complaint existed in the property while under Ums' ownership and prior to the sale to Ohs. The Ohs sought monetary damages from the Ums and indemnification for any damages for which they might be found liable to Satsudas.

On February 14 and 15, 1995, trial was conducted to the Court, the Honorable J. Dennis Frederick presiding. At trial, the Satsudas pressed only three claims against Ohs. They argued that they were due monetary compensation for: (1) profits lost due to their inability to rent the seven motel rooms that were constructed by the Ums without a building permit; (2) costs incurred to bring the seven rooms into compliance with Salt Lake City health and safety regulations; and (3) attorney's fees incurred to obtain a zoning variance authorizing the operation of a 40-room motel with only 33 parking stalls.

The District Court took the matter under advisement at the close of the evidence and, on February 17, 1995, rendered its decision from the bench. In its ruling, the Court declared that the Satsudas had failed to state any cause of action against the Ohs and, accordingly, dismissed their Complaint with prejudice. In light of the Satsudas' failure of proof, the Court also determined that the Ums could not be held liable to the Ohs on a theory of indemnity and therefore dismissed the Third-Party Complaint with prejudice.

On May 2, 1995, Judge Frederick's "Order of Dismissal of Complaint and Third-Party Complaint and Judgment in Favor of Defendant Ohs against Plaintiff Satsudas for Attorney's Fees" (the "May 2 Order and Judgment") was entered on the judgment docket of the District Court. In the May 2 Order and Judgment, the Court memorialized the elements of its February 17 oral ruling. Specifically, the court concluded:

1. The Complaint of plaintiffs against defendants Hasin Oh and Myung Ja Oh be and herewith is dismissed, with prejudice, on the merits, the Court finding no cause of action thereon.
2. The Third-Party Complaint against third-party defendants Kee Hong Um and Shi Ja Um be and herewith is dismissed with prejudice, on the merits, the Court finding no cause of action thereon as a result of the Court finding no cause of action on the Complaint.
3. Defendants Hasin Oh and Myung Ja Oh are awarded their attorney's fees as requested against plaintiffs Wayne Takashi Satsuda and Seon Sil Satsuda, [in the amount of \$44,959.86 plus post-judgment interest], the court finding that the fees requested are reasonable and necessary and that an adequate basis in the contract exist for such an award.
4. The Court denies the third-party defendants' application for attorney's fees at this time, without prejudice subject to further proceedings concerning that application.

May 2 Order and Judgment at 2-3, Record on Appeal ("ROA"), V.4 at 1655-58 (emphasis added). On June 5, 1995, the Satsudas filed a Notice of Appeal from the District Court's May 2 Order and Judgment.

On June 9, 1995, Judge Frederick's "First Amended Order of Dismissal of Complaint and Third-Party Complaint and Judgment in Favor of Defendants Ohs Against Plaintiff Satsudas for Attorney's Fees (the "First Amended Order") was entered. The First Amended Order differed from the May 2 Order and Judgment in only one significant respect. Where the May 2 Order and Judgment stated that "[t]he Court denies the Third-Party Defendants' application for attorney's fees at this time, without prejudice subject to further proceedings concerning that application," the First Amended Order read "[t]he Court awards the Third-Party Defendants' reasonable attorney's fees at this time subject to further proceedings concerning the amount to be awarded which shall be the subject of a further order and judgment." On July 10, 1995, the Satsudas filed an "Amended Notice of Appeal" from the First Amended Order.

As directed by the First Amended Order, the Ums submitted Supplemental Findings of Fact and Conclusions of Law pertaining to their claim for attorney's fees and drafted a proposed Supplemental Judgment that awarded them fees of \$56,126.77 plus post-judgment interest. On July 7, 1995, the District Court executed the Supplemental Judgment and its associated findings and conclusions. On July 27, 1995, the Satsudas filed a "Second Amended Notice of Appeal" from the July 7 Supplemental Judgment and on August 2, 1995, the Ums submitted their Notice of Cross-Appeal from the Supplemental Judgment.

STATEMENT OF FACTS

1. The Capitol Motel was in a dilapidated condition when it was bought by Kee Hong Um and Shi Ja Um (the "Ums") on September 1, 1982. Immediately thereafter, Salt Lake City officials closed the Capitol Motel entirely. ROA, V.3 at 1185.

2. One room on the second floor of the Capitol Motel's main building had been converted from a storage area to a rental unit by Juan Garcia, the owner of the Capitol Motel prior to the Ums. Id. at 1186.

3. In the Spring of 1983, the Ums completed repairs to the Capitol Motel that restored all 34 of the Motel's licensed rental units to operation. Id. at 1185.

4. Also in the Spring of 1983, the Ums covered over the swimming pool on the Capitol Motel grounds to allow construction of a small grocery store on the Capitol Motel premises. Id. at 1186.

5. In January 1984, the Ums converted the grocery store into rental units, giving the Capitol Motel a total of 40 units available for rent when Ohs purchased the property in 1987. Id.

6. The Ums knew that no building permit had been obtained for the conversion of the grocery store into the five rental units. The Ums did not instruct their construction contractor to obtain such a permit and none was obtained. Id.

7. The Ums never notified Salt Lake City officials that the five additional units were constructed on the Capitol Motel premises. Id.

8. The Ums did not amend their business license for the Capitol Motel after adding five new units; instead, the Ums annually renewed their business license to show only a 34-unit motel. Id., at 1187.

9. During the Ums' ownership of the Capitol Motel, the Salt Lake City-County Health Department and the Salt Lake City Fire Department inspected the Motel's buildings and grounds. Both agencies found that the Motel met applicable inspection standards after repairs were completed in 1982-83. Id. at 1186.

10. On March 21, 1985, the Capitol Motel was inspected by Salt Lake City officials under Construction Permit No. 33603 and approved for occupancy. Id. at 1186.

11. After passing inspection on March 21, 1985, the Ums never received any written notice that the additional five units did not meet Salt Lake City building code standards. Id. at 1187.

12. Thereafter, the Ums operated the Capitol Motel with a total of 40 rooms available for rent to the public. Id.

13. From March 21, 1985, until January 1990, the Capitol Motel passed every health, building, and fire inspection following the construction of the five additional rooms. Id.

14. On February 28, 1987, the Ums executed an Earnest Money Sales Agreement with the Ohs for the sale of "a 40-unit motel called Capitol Motel" for \$550,000. Id.

15. Between the execution of the February 1987 Earnest Money Sales Agreement and the closing of the Capitol Motel, the Ums told the Ohs that they could earn a good income from the operation of the Motel and gave the Ohs copies of the Motel's handwritten Income and Expense Statement. The Ums also told the Ohs that they had remodeled or repaired most of the rooms in the Capitol Motel and had made repairs to the main building of the Motel. Id. at 1187-88.

16. In conjunction with the 1987 sale of the Capitol Motel, the Ums also told the Ohs that the Motel had up to 40 units available for rental. Id. at 1188.

17. The Ohs visited the Capitol Motel about ten times prior to executing the February 1987 Earnest Money Sales Agreement. During those visits, the Ohs inspected only a few rooms on the ground floor of the Motel's main building. Id. at 1188.

18. The Ohs did not obtain a professional inspection of the Capitol Motel before purchasing it from the Ums. Id.

19. At no time before or after the 1987 sale of the Capitol Motel did the Ohs expressly ask the Ums to provide information about parking, building inspections, construction of additional rooms, putting additional rooms into service, or inspection of the Motel property by the Ums or Salt Lake City officials. Id.

20. On March 20, 1987, the Salt Lake City/County Health Department inspected the Capitol Motel and found only minor infractions of health regulations such as dust under a bed, a dirty bathroom, and no lid on the Motel dumpsters. Id.

21. On May 1, 1987, the Ums, as sellers, and the Ohs, as buyers, executed a Uniform Real Estate Contract for the purchase of the Capitol Motel. The purchase price of the Motel was \$540,000. Id. at 1189.

22. During their ownership of the Capitol Motel, the Ohs advertised to the public that the Motel had 40 rental units. In addition, the Ohs consistently rented more than 34 units at a time to the public. Id.

23. The Salt Lake City Fire Department conducted fire safety surveys on the Capitol Motel in 1982, 1984, 1986, in November 1989, January 1990, February 1990, and June 1993. Id. at 1189.

24. The Salt Lake City Fire Department's "Premises History Report" for the Capitol Motel shows that minor fire code violations were noted in the Fire Department's 1986 inspection. These discrepancies were promptly corrected. Id.

25. The Premises History Report also shows that the Capitol Motel passed fire safety surveys on November 7, 1989, and January 4, 1990, just before the Ohs sold the property to the Satsudas. Id.

26. On November 16, 1989, the Ohs executed an Earnest Money Sales Agreement with the Satsudas for the sale of the Capitol Motel for \$620,000. Id. at 1189-90.

27. During the negotiations for the sale of the Capitol Motel to the Satsudas, the Ohs represented orally and on Mr. Oh's business card that the Capitol Motel was a 40-unit motel. Id. at 1190.

28. Also during negotiations for the sale of the Capitol Motel to the Satsudas, Mr. Oh gave the Satsudas his business records which showed the Capitol Motel's daily income figures for 1987 through September 1989. The Ohs' business records showed the number of the Capitol Motel's units that were rented at any one time. Id.

29. The Satsudas submitted an Offer to Purchase the Capitol Motel to a Mr. Kim, the Ohs' sales agent, after two meetings with the Ohs at the Capitol Motel. Id.

30. The Satsudas inspected the Capitol Motel's laundry room, boiler rooms, and four or five rental units prior to closing their purchase of the Capitol Motel. Id. at 1190.

31. Prior to closing on their purchase of the Capitol Motel, the Satsudas neither requested nor obtained an inspection of the Motel's buildings and grounds by a professional inspector or any other third party. Id.

32. The Satsudas began operating the Capitol Motel on January 1, 1990. Id.

33. The Ohs displayed the Capitol Motel's business license on the wall of the Motel office. The Satsudas examined the business license there on January 1, 1990, four days before they closed on their purchase of the Motel. Id. at 1191.

34. On January 5, 1990, the Ohs assigned their purchaser's interest in the May 1, 1987, Uniform Real Estate Contract to the Satsudas. Id.

35. On or about January 31, 1990, Lawrence Suggars, an enforcement officer with the Salt Lake City Department of Building and Housing Services, inspected the Capitol Motel premises. Mr. Suggars was accompanied on his inspection by representatives of the Salt Lake City Fire Department and the Salt Lake City Health Department. Id.

36. During the course of his inspection of the Capitol Motel, Mr. Suggars called in additional Salt Lake City building inspectors to examine the Capitol Motel's electrical and plumbing systems. Id. at 1191.

37. On February 12, 1990, the Salt Lake City Department of Building and Housing Services issued a "Notice of Deficiencies" to the Satsudas stating that the Capitol Motel was in violation of certain City health and safety ordinances. Id.

38. By letter dated February 22, 1990, Robert M. Bridge, the Salt Lake City Business License Supervisor, advised the Satsudas that the Capitol Motel's business license would not be approved due to the incorrect number of rental units listed on the license. Immediately thereafter, the Satsudas corrected the number of units shown on their license. Id. at 1191-92.

39. The Satsudas contacted the Ums about the Notice of Deficiencies. At that time, Mr. Um told Mrs. Satsuda that he had fully disclosed to the Ohs the fact that the five additional rental units at the Capitol Motel had been built without a building permit. Id. at 1192.

40. When the Ohs sold the Capitol Motel to the Satsudas, parking at the Motel was limited to only 33 vehicles, less than one vehicle per rentable room at the Motel. Id.

41. The Satsudas spent approximately \$2,500 in attorney's fees to obtain a variance in the parking requirements in order to allow the rental of all 40 of the Capitol Motel's rooms. Id.

42. During his January 1990 inspection of the Capitol Motel, Lawrence Suggars determined that rooms 0, 7 and 35-39 were plumbed incorrectly and had substandard electrical wiring. Id.

43. These remaining five rooms at the Capitol Motel were remodeled after the parking variance was approved by Salt Lake City in November 1990. Construction on rooms 0, 7 and 35-39 started in February 1991 and was completed in March 1991. Id.

44. On January 5, 1994, the Satsudas sold the Capitol Motel for \$860,000, a sum \$240,000 greater than the price they paid for the Motel in January 1990. Id.

STATEMENT OF ISSUES

Um's cross-appeal brief fails to succinctly state the issues presented in the cross-appeal. Likewise, the cross-appeal brief fails to clearly parse the issues presented on the cross-appeal from those presented in the main appeal. Consequently, Ohs present the issues to be determined on this cross-appeal as follows:

1. With respect to the Third-Party Complaint, were Ums a "prevailing party" and thus entitled to an award of attorney's fees as a matter of right against Ohs?

2. Did the District Court err in awarding Ums attorney's fees as a "pass through" directly against Satsudas while refusing to adjudge Ohs jointly and severally liable for those same attorney's fees?

STANDARD OF REVIEW

Decisions concerning the award of costs and attorneys fees to litigants at the conclusion of a case are reviewed for abuse of discretion. See. e.g., Utah Code Annotated, § 78-27-56.5 (1986); Jenkins v. Bailey, 676 P.2d 391, 393 (Utah 1984); Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 671 (Utah 1982); Beckstrom v. Beckstrom, 578 P.2d 520 (Utah 1978); Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988).

SUMMARY OF ARGUMENT

Ums have failed to marshall the evidence supporting the District Court's refusal to award Ums' attorneys fees against Ohs jointly and severally with its award of Ums' attorneys fees against Satsudas. The evidence supporting this judgment includes: testimony that the defects in the Capitol Motel claimed by Satsudas in their suit against Ohs were created by Ums or otherwise existed during Ums' ownership of the property; and, testimony that Ums failed to disclose these defects and conditions to Ohs when Ohs purchased the Capitol Motel from Ums.

Ohs' second argument is that Ums' presumption that they were the "prevailing parties" in the third-party action is misplaced. Ohs' claims against Ums in the third-party action were claims basically in indemnity and because the District Court dismissed Satsudas' claim against Ohs on the merits, the District Court never reached the question of whether Ums breached the contract with Ohs or, otherwise stated, whether Ums successfully defended a claim of breach of contract. Utah case law does not provide a bright-line rule for determining who is a "prevailing party" in

multiple party litigation, but demands, to the contrary, a flexible and reasoned approach to deciding in particular cases who actually is the prevailing party. Because the District Court dismissed the Third-Party Complaint *solely* because Ohs had prevailed against Satsudas in the main claim, Ums cannot be considered a "prevailing party" with respect to the Third-Party Complaint sufficient to form a basis for an award of Ums attorneys fees directly against Ohs.

Ohs' third argument is that the District Court award of Ums' attorneys fees directly against Satsudas, without a joint and several judgment for those fees against Ohs, was a remedy crafted within the grant of discretion to trial courts over whether to award attorneys fees, against whom, and in what amount. Ums are incorrect in urging an error of law standard of review in this cross-appeal; when awards of attorneys fees are involved, the standard is abuse of discretion.

ARGUMENT

UMS HAVE FAILED TO ADEQUATELY MARSHALL THE EVIDENCE SUPPORTING THE TRIAL COURT'S ATTORNEY FEE AWARD

Ums, despite claiming that they challenge only the District Court's Conclusions of Law with respect to its refusal to award Ums' fees against Ohs, essentially challenge the District Court's Findings of Fact with respect to the provisions of the agreements between Ohs and Ums concerning award of attorneys fees in the event of litigation.

Ums blithely conclude that they are necessarily "prevailing parties" as that term is used in the agreements between them and Ohs, and that the District Court must necessarily make factual findings that their prevailing party status, combined with the provisions of the agreements, translate into an automatic right to an award of fees against Ohs. By proceeding immediately to this conclusion in their Brief, Ums have failed to marshall the evidence supporting the factual underpinnings of the attorneys fee remedy entered by the District Court.

In order to challenge a trial court's findings of fact, a party "must marshal the evidence *in support* of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be "against the clear weight of the evidence" thus making them "clearly erroneous.'" (Citation omitted.)

Mountain States Broadcasting Company v. Neale, 783 P.2d 551, 553 (Utah App. 1989)

(emphasis in original). "Appellants often overlook or disregard this heavy burden." *Id.* Evidence supporting an award of Ums' attorneys fees that bypasses Ohs and is assessed only against Satsudas includes: that the construction of 6 additional units, bringing the motel to 40 units, thus creating a conflict with the zoning regulations concerning available parking, occurred during Ums' ownership of the property and that Ums failed to obtain building permits for this construction during their ownership of the Motel (ROA, V.3 at 1185); and Mr. Ohs' trial testimony that the Ums failed to inform him of the failure to obtain a building permit for construction of additional rooms or that the business license failed to account for the number of rooms Mr. Um made available for rent. Transcript of Trial Proceedings, pp. 196-97, ROA at 2138-39.

"When the duty to marshal is not properly discharged, [the appellate court] [will] refuse to consider the merits of challenges to the findings and accept the findings as valid (citations omitted)". Mountain States Broadcasting Company, *supra* at 553. Because of Ums' failure to marshal evidence supporting the District Court's award of attorneys fees, their challenge to the findings must be rejected.

**UMS ARE NOT "PREVAILING PARTIES" IN THE THIRD
PARTY LITIGATION FOR PURPOSES OF CONSIDERING
AN AWARD OF THEIR ATTORNEY'S FEES AGAINST OHS**

Citing to Utah Code Ann. § 78-27-56.5 and the "prevailing party" attorneys fee award provisions in the written agreements between Ohs and Ums, Ums argue that they are the "prevailing parties" in the third-party litigation simply because the Third-Party Complaint was dismissed. Ums Cross-Appeal Brief at 10-11. Ums premise this argument on the mistaken belief that they "successfully raised the contract and its provisions in defense against the Ohs' and Satsudas' claims, resulting in a complete nonsuit" *Id.* at 11. Ums also erroneously assume that the District Court implicitly concluded that "there is no default or breach of the terms of the contract [between Ohs and Ums]," *Id.* at 11, and that the dismissal of the Third-Party Complaint was, *ipso facto*, a "net" judgment in favor of Ums. *Id.* at 10.

Ums' legal and factual assumptions concerning their "prevailing party" status in the third-party action is misplaced because: (1) the Third-Party Complaint was dismissed *solely* because Ohs prevailed on the main claim against Satsudas, rendering the third-party indemnity claim essentially moot, such that the District Court did not reach the issue of whether Ums actually breached their agreements with Ohs (or, indeed, whether Ums successfully defended, on the merits, a contract claim by Ohs); and (2) this Court has not adopted the rigid determinative standard of "prevailing party" status premised on the simple dismissal of claims urged by Ums, but, rather, recognizes "the need for a flexible and reasoned approach to deciding in particular cases who actually is the prevailing party." Mountain States Broadcasting, *supra*, at 557.

Under both the facts of this case and the applicable legal standard, Ums cannot be construed as a "prevailing party" in the third-party action sufficient to provide a basis for joint and several award of their attorneys fees against both Ohs and Satsudas.

An accurate understanding of the District Court's basis for dismissing the Third-Party Complaint is essential to proper resolution of this issue. In the final Order entered by the District Court dismissing the Complaint and the Third-Party Complaint, the basis for dismissal of the Third-Party Complaint was clearly explained:

2. The Third-Party Complaint against third-party defendants Kee Hong Um and Shi Ja Um be and herewith is dismissed with prejudice, on the merits, the Court finding no cause of action thereon *as a result of the Court finding no cause of action on the Complaint.*

First Amended Order of Dismissal of Complaint and Third-Party Complaint and Judgment in Favor of Defendant Ohs against Plaintiffs Satsudas for Attorney Fees, ROA, V. 4, at 1716-17. Moreover, in its oral ruling from the bench, the District Court recognized, in the context of discussion concerning the appropriate amount of attorneys fees, that Ums "success" on the Third-Party Complaint was entirely a function of the District Court's ruling on the Complaint:

(BY JUDGE FREDERICK): I am somewhat concerned, given the identity - - essential identity of role in this case between the defendants and the third-party defendants that there not be duplication in the claimed fees to be paid here. While it is true that a better posture of the case may well have been to name third-party defendants as defendants so that this issue was not as confused as it is, the fact is that is not the case, so I am confronted with the need to make a determination about fees to the defendants and then, in turn, fees to the third-party defendants

. . . .

Reporter's Transcript of Judge's Ruling of February 17, 1995, ROA at 2237. Moreover, the Amended Findings of Fact and Conclusions of Law contain no findings or conclusions concerning breach of or compliance with the terms of the written contracts between Ohs and Ums

but, rather, address only the substantive findings and conclusions with respect to Ohs' successful defense against Satsudas claim. First Amended Findings of Fact and Conclusions of Law, ROA, V. 4, at 1704 - 14. With respect to the dismissal of the Third-Party Complaint, the Conclusions of Law entered by the District Court simply and accurately state that "[t]he Court concludes that the third-party case was and is a necessary step taken by defendants to defend the Complaint and the dismissal of the Third-Party Complaint *is a direct result of dismissal of the complaint.*" *Id.* at 1713 (emphasis added).

This Court has expressly rejected the mechanical application of the "net judgment rule" for determining who is the prevailing party in any particular case. Mountain States Broadcasting Company v. Neale, *supra*, at 557. Instead, this Court has recognized that "the determination of a "prevailing party" becomes even more complicated in cases involving multiple claims and parties." *Id.* at 556, n.7, citing, Pioneer Roofing Company v. Mardian Construction Company, 152 Ariz. 455, 733 P.2d 652 (Ct. App. 1986). This Court also appropriately recognized that where the ultimate award of money damages does not adequately represent the actual success of the parties under the peculiar posture of the case, there is a particular need for a flexible and reasoned approach to deciding in particular cases who is the *prevailing party*. *Id.*, citing, Owen Jones and Sons, Inc. v. C.R. Lewis Company, 497 P.2d 312, 313-14 (Alaska 1972).

Courts across the country have taken varying approaches to determining "prevailing party" status for purposes of attorney fee awards, all of which incorporate a flexible, reasoned approach to the facts of a particular case rather than a rigid approach to what can often be a complicated determination. *See, e.g.,* Annotation, *Who is the "Successful Party" or "Prevailing Party" For*

Purposes of Awarding Costs Where Both Parties Prevail on Affirmative Claims, 66 A.L.R. 3d 115 (1975), cited in Mountain States Broadcasting Company v. Neale, *supra*, at 556.

A determination of which party prevails and is entitled to costs is within the discretion of the trial judge. Owen Jones and Sons, Inc. v. C.R. Lewis Company, *supra*, at 314; Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988), citing, Jenkins v. Bailey, 676 P.2d 391, 393 (Utah 1984) and Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 671 (Utah 1982).¹ Consequently, this Court need only decide whether, under the facts of this particular case, the District Court abused its discretion by refusing to award Ums' attorneys fees against Ohs by finding, at least implicitly, that Ums were not the prevailing party with respect to the third-party action.

Factors in this case supporting the notion that Ums were not the "prevailing parties," and upon which the District Court could exercise its discretion, are legion:

(1) the third-party claims were claims in indemnity and were dismissed by the District Court specifically, and only, on the basis that Ohs succeeded on the main claim against Satsudas; (2) the District Court never reached the issue, because it did not need to reach the issue, of whether Ums breached their contracts with Ohs (or, conversely, whether Ums successfully defended their performance under the contracts);

¹ Contrary to Ums reading of it, Utah Code Annotated Section 78-27-56.5 affords the trial court discretion over issues of awarding attorneys fees by providing that "[a] court *may* award costs and attorneys fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing" (emphasis added).

(3) the District Court made no findings of fact or conclusions of law concerning Ums' breach of or compliance with the terms of the written agreements between them and Ohs, and Ums never requested any at the District Court;

(4) Ohs prevailed against Satsudas on the merits, thereby protecting Ums from liability on the third-party claim, such that it would be patently inequitable to characterize Ohs as parties who did not prevail in the action; and

(5) the defenses of the main claim and the third-party case were inextricably intertwined, both factually and legally, and Ohs efforts essentially provided Ums defense of the third-party claims.

THE DISTRICT COURT'S AWARD OF UMS' ATTORNEYS FEES DIRECTLY AGAINST SATSUDAS, BYPASSING OHS, WAS A REMEDY CRAFTED WITHIN THE DISCRETION AFFORDED TO THE TRIAL COURTS CONCERNING AWARDS OF ATTORNEYS FEES IN LITIGATION

Ums attack the District Court's award of their attorneys fees solely against Satsudas, without a joint and several judgment against Ohs, as inconsistent with the District Court's findings, contrary to the contractual provisions concerning attorneys fees in the agreements between Ohs and Ums, and contrary to Utah decisional law that Ums interpret as making fee awards mandatory in cases involving contractual disputes such as these. Um Cross-Appeal Brief at 9-10.

As argued above, Ums were not "prevailing parties" in the first instance, and therefore failed to cross the threshold requirement for an award of attorneys fees. Nevertheless, and assuming for sake of argument that Ums were "prevailing parties" in some sense or otherwise entitled to an award of attorneys fees against someone, Ums argument for reversal for the format of the attorneys fee award made by the District Court is still unavailing.

In view of the broad discretion afforded to trial courts in awarding attorneys fees in litigation,² Ums must shoulder the difficult burden of demonstrating that the District Court somehow abused its discretion in awarding their attorneys fees against Satsudas on a "pass through" basis. This Ums cannot do.

Utah appellate courts have routinely affirmed the discretion of trial courts that refused to award attorneys fees to parties that prevailed on a number of issues involving a contract where the contract provides for fee awards. *See, e.g., Maynard v. Wharton*, 912 P.2d 446, 451-52 (Utah 1996)(refusing to award attorneys fees under the terms of an earnest money agreement);³ *Schafir v. Harrigan*, 879 P.2d 1384, 1393-94 (Utah App. 1994)(order denying vendors' motion for attorneys fees pursuant to an earnest money sales agreement after they prevailed in an action brought by purchasers was not an abuse of discretion; only one of the purchasers' claims stemmed from the contract, and the trial court determined that any fees or costs uniquely applicable to the contractual warranty claim were insignificant).

The District Court acted well within its discretion to award Ums' fees as it did. In light of Ums' posture in the case, the District Court's reasons for dismissing the Third-Party Complaint, and the weakness in Ums' "prevailing party" argument, Ums are indeed fortunate that their fees

² *See*, Utah Code Annotated, § 78-27-56.5 (1986)("A court *may* award costs and attorney's fees to either party that prevails . . ."); *Jenkins v. Bailey*, 676 P.2d 391, 393 (Utah 1984); *Turtle Management, Inc. v. Haggis Management, Inc.*, 645 P.2d 667, 671 (Utah 1982); *Beckstrom v. Beckstrom*, 578 P.2d 520 (Utah 1978); *Dixie State Bank v. Bracken*, 764 P.2d 985 (Utah 1988); *Gilbert v. City of Caldwell*, 732 P.2d 355, *appealed after remand*, 772 P.2d 242 (Idaho 1987); *Owen Jones and Sons, Inc. v. C.R. Lewis Co.*, 497 P.2d 312 (Alaska 1972).

³ Ums acknowledge the holding in *Maynard v. Wharton*, arguing only that it "was decided wrongly." Um Cross-Appeal Brief at 12.

were awarded at all and against anyone; with this cross-appeal, Ums look the proverbial gift horse in the mouth. The District Court expressly found that the defects of which Satsudas complained against Ohs were present in the Motel property when Ums sold the property to Ohs originally. The District Court also found that "the third-party case was and is a necessary step taken by defendants to defend the Complaint . . ." ROA, V. 4, at 1713.⁴

While the District Court's method of awarding attorneys fees is well within the broad discretion granted to trial courts generally with respect to fee award matters, the District Court's judgment also finds support in the "third-party fee" rule first enunciated by this Court in Collier v. Heinz, 827 P.2d 982 (Utah App. 1982). That rule holds that even where a contract does not provide for attorneys fees in the event of litigation between parties, the court can nevertheless award attorneys fees as a cost of litigation where litigation with a third party was a foreseeable consequence of the litigation initiated by the plaintiff. *Id.* See also, South Sanpitch Company v. Pack, 765 P.2d 1279 (Utah App. 1988); Broadwater v. Old Republic Surety, 854 P.2d 523 (Utah 1993).

In any event, should this Court determine that Ohs' briefs present persuasive argument in favor of the award of attorneys fees made by the District Court, it may sustain the District Court's decision based on those arguments even if the District Court did not consider them. State v. Elder, 815 P.2d 1341, 1344, n. 4 (Utah App. 1991).

⁴ One could rationally conclude from the totality of the lower court record that the District Court found that Ohs added Ums as third-party defendants on a sound foundation in law and fact given the types of allegations made against Ohs by Satsudas, but that the District Court found that the pleading that essentially brought both Ohs and Ums into the case, Satsudas' Complaint, was not particularly meritorious. It is, therefore, not difficult to understand why the District Court would deem it appropriate to assess both Ums' fees and Ohs' fees against the protagonists of this drama, the Satsudas.

OHS ADEQUATELY PRESERVED ISSUES CONCERNING AWARD OF UMS ATTORNEYS FEES AT THE TRIAL COURT

In a curious reversal of the normal burdens imposed on appellants in an appeal, Ums argue that "Ohs neither raised nor filed any objection to the supplemental findings [concerning Ums entitlement to attorneys fees]. . . and Ohs have filed no appeal of any part of the judgment or findings . . . [W]hile 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." Um Cross-Appeal Brief at 9 - 10. The thesis of this segment of Ums' Cross-Appeal Brief escapes detection, but at the risk of injecting unwarranted precision into Ums' contentions concerning preservation of issues for appeal, Ohs understanding of this point, to which they so respond, is that Ohs did not adequately object at the District Court to an award of Ums' attorneys fees against them, even though the District Court declined to do so.

Ums evidently neglect to remember that Ohs are the *appellees* in this cross-appeal. It is Ums, not Ohs, who appeal from the District Court's order awarding their attorneys fees solely against Satsudas. As the party appealing from the District Court's ruling, it is Ums, not Ohs, who have the obligation to preserve the issue at the District Court to raise it on appeal. Gill v. Timm, 720 P.2d 1352 (Utah 1986); Utah Rule of Appellate Procedure 24(a)(5)(A). Consequently, any suggestion that Ohs, as appellees to this cross-appeal, failed to preserve issues at the District Court for appeal, is simply ludicrous.⁵

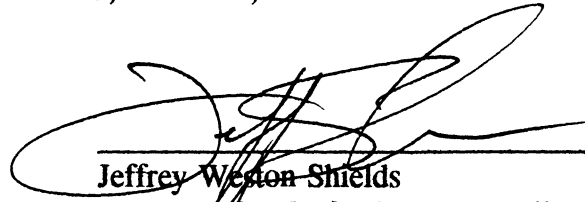
⁵ In the event this Court determines that the District Court should consider awarding Ums' fees against Ohs, Ohs must be given the right to contest the issue of Ums' entitlement
(continued...)

CONCLUSION

In the preceding brief, the Ohs have shown that each issue raised by Ums either ignores the evidence put before the District Court or has no basis in law. For these reasons, the Ohs respectfully ask this Court to affirm the final judgment of the District Court in all respects.

DATED this 21st day of November, 1996.

JONES, WALDO, HOLBROOK & McDONOUGH



Jeffrey Weston Shields
Attorney for Defendants, Appellees, Third-Party
Plaintiffs and Cross-Appeal Appellees

⁵ (...continued)

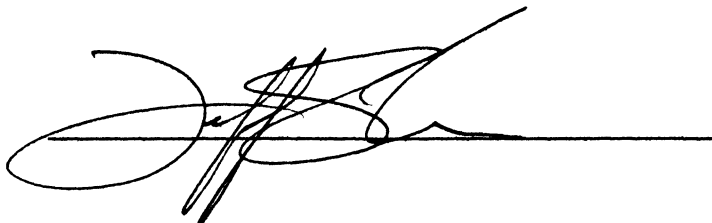
to attorneys fees at the District Court level as well as the amount of those fees. Because the District Court reserved issues concerning attorneys fees to the post-trial segment of the case, ROA at 2237-8, and then proceeded to find that Ums were not entitled to attorneys fees against Ohs, but only against Satsudas, Ohs lacked standing at the District Court to object to Ums' entitlement to fees or the amount of fees. An award of attorneys fees may only be entered after the trial court has analyzed the reasonableness of the fees claimed, the appropriateness of the work actually performed and the claiming parties' entitlement to fees. Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988).

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Appellees Hasin Oh and Myung Ja Oh, by first class mail, postage pre-paid, on 22^d day of November, 1996, to the following:

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A handwritten signature in black ink, appearing to be "Jimi Mitsunaga", is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.