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Aurora Credit Services, a Minnesota corporation, on behalf of itself and all other shareholders of Liberty West Development, a corporation, v. Liberty West Development, a Utah corporation, XM INTERNATIONAL, a Utah limited liability company, and DENNIS W. GAY, an individual : Reply Brief

Utah Court of Appeals

James E. Magleby; Magleby & Greenwood; Attorney for Respondents.
Eric P. Hartman; Attorney for Appellants .

IN THE SUPREME COURT OF THE STATE OF UTAH

AURORA CREDIT SERVICES, INC., a Minnesota corporation, on behalf of itself and all other shareholders of Liberty West Development, a corporation, Plaintiff/Appellant, v. LIBERTY WEST DEVELOPMENT, INC., a Utah corporation, XM INTERNATIONAL, a Utah limited liability company, and DENNIS W. GAY, an individual, Defendants/Respondents.	Appellate No. 20060964 CA

REPLY BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY, JUDGE L. A. DEVER

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Request for Oral Argument and Published Decision

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES AND RULES

OBJECTION TO DEFENDANTS' STATEMENT OF THE CASE

Aurora objects to defendants' statement of the case to the extent that it goes through a lengthy recitation of defendants' view of what defendants claim transpired herein prior to the trial court's entry of the previous final judgment on July 13, 2004. Without getting into what Aurora considers numerous errors in that portion of their statement of the case, it is clear that what may have transpired prior to the July 13, 2004 final judgment is simply irrelevant and immaterial to the issues in this appeal, and should be stricken or ignored by the appellate court.

ARGUMENT

POINT I

DEFENDANTS' INTERPRETATION OF RULE 54(d) IS COMPLETELY UNSUPPORTED UNDER THE EXPRESS LANGUAGE OF THE RULE OR ANY CASE AUTHORITY CITED BY DEFENDANTS

Defendants' assert that Aurora's interpretation of Rule 54(d), Utah R. Civ. Pro., does not harmonize the two subsections of Rule 54(d) pertaining to costs, while their interpretation of those subsections does. Defendants fail to articulate any rational support for this bold declaration, for the simple reason that there is none and defendants' interpretation is contrary to "well-established" Utah law.

A. The Express Language of Rule 54(d) Does Not Support Defendants' Interpretation.

Rule 54(d) of our civil procedure rules is made up of two

subsections. Subsection (d)(1) sets out who is entitled to seek an award of costs, whereas subsection (d)(2) sets out the procedure a party must follow in order to secure a cost award.

Defendants' entire argument to support their contention that Rule 54(d) expressly allows a party to seek trial court costs after an appeal is completed (in spite of the obvious contradiction with the express language of subsection (2)), is based on one clause contained in subsection (1), that is, "... ; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause."

Under basic rules of interpreting our American-English language, this clause qualifies the portion of the sentence which precedes it, in this case, "Except when express provision therefore is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs;" (immediately followed by the clause quoted in the preceding paragraph). Thus, the clause upon which defendants' hang their hats does not at all qualify the express provisions of subsection (2) of Rule 54 as to how a party must procedurally seek a cost award, but simply means, completely consistent with Aurora's interpretation of the rule, that we all recognize that when an appeal or other review is pursued, the previously prevailing party may, after the appellate decision, no longer be the "prevailing party" or certain costs which <u>were</u> awarded may have been reversed in whole

or in part, and any final award of costs must be conformed to, or "abide", the final determination. The use of the term "abide" in itself suggests the necessity of there being an existing cost award prior to the appeal.

Clearly, Aurora's interpretation harmonizes both subsections of Rule 54(d) and defendants' interpretation completely eviserates subsection (2) of Rule 54(d). When Rule 54(d)(2) refers to the entry of judgment, it is referring the judgments which are commonly designated as "final" under the provisions of Rule 54(a) or (b) which dispose of either all of the claims of all of the parties under R. 54(a) (as was the case herein), or are certified as final as to one or more but fewer than all of the claims or parties under R. 54(b), and that was the judgment entered on July 13, 2004, not some "new final judgment" the defendants conned the trial court into entering more than two years after their request for costs were time-barred under the express provisions of R. 54(d)(2).

It should be obvious to anyone that the requirement of R. 54 (d)(2) that the verified cost memorandum must be filed within five days of entry of the final judgment is, at least in part, structured that way to ensure that the courts are not wasting judicial time and resources in a second appeal over the propriety of a separate cost award, as defendants' actions have necessitated herein.

B. Cases Cited By Defendants Are Completely Inapposite to the Issues Herein.

Defendants have cited a few cases in an attempt to support

their clearly untimely request for trial court costs. Not surprisingly, none of the cited cases lend any support whatsoever to defendants' position.

First, defendants cite the Utah case of Benjamin v. Amica Mut. Ins. Co., Utah 2006, 140 P.3d 1210. Although defendants acknowledge that the Benjamin case was merely an interlocutory appeal, they go on to argue that the Benjamin Court's reasoning should apply herein because both cases had not had a "final determination" entered prior to the appeal. This assertion simply ignores the point of the Benjamin opinion. The Benjamin Court clearly rejected the request for costs because it was not dealing with a final judgment, but with an interlocutory appeal, and there could be no determination as to who was the prevailing party, but the Court instructed the trial court to weigh the insured's costs on the interlocutory appeal once "it can identify the prevailing party." Id. at p. 1218. That is, once a final judgment had been entered. Clearly, the Benjamin decision merely stands for the proposition, in agreement with the Arizona Supreme Court's decision on the same issue, that costs should not be sought in connection with a petition for an interlocutory appeal until there has been a final judgment entered and the prevailing party is identifiable. Id. At that point, costs incurred on the interlocutory appeal can be evaluated along with other cost issues which arose prior to the entry of a final judgment. Thus, Benjamin, supra, is simply inapposite to the issue in this case where a final judgment had been entered on July 13, 2004. A brief comment is appropriate on defendants' suggestion at the top of

page 21 of their brief that, "Thus, unlike in this case, in the cases relied on by Aurora, there was no dispute about whether a "final judgment" -- or, in the language of Rule 54(d)(1), a "final determination" -- had been entered, and the issue was therefore not before those courts." (Emphasis added.) This attempt to suggest that there was, in fact, some dispute that the July 13, 2004 Order was a final judgment from which "an appeal lies," which defendants expounded upon through pages 21-22, is patently false. It was clear to anyone that the July 13, 2004 Order striking Aurora's complaint as a discovery sanction was a final judgment, triggering the five day time limit in which defendants had to seek their trial costs under R. 54(d)(2). Defendants themselves conceded in the prior appeal that the July 13, 2004 Order was "final" for purposes of appeal by conceding the appellate court's jurisdiction thereon. Defendant's attempt to suggest in their brief at p. 22 that the Order, which their counsel drafted, had what were seemingly unnecessary, superfluous provisions in it that defendants claim "suggested" that post-appeal proceedings were anticipated, is simply irrelevant. Whether post-appeal procedings were anticipated did not relieve defendants of seeking their trial costs within five days of the entry of the July 13, 2004 Order, which was clearly a "final judgment." Defendants are merely attempting to confuse the issue by using interchangably the terms "final judgment" and "final determination of the cause." In actuality, "final judgment" is the commonly used term for those judgments, orders or decrees from which an appeal lies under R. 54(a) & (b), whereas the

phrase "final determination of the cause" is simply used in R.54(d)(1) to indicate that stage of litigation proceedings after an appeal has been decided which may alter the trial court's initial determination as to who the prevailing party is. The terms, as used in R. 54(d), are clearly not the same, and do not refer to the same stage of the proceedings.

Second, defendants cite a couple cases from Florida, one from Maryland and one from Alabama to support their claim that Utah's Rule 54(d) allows a party to wait until after an appeal to apply for trial court costs. Those cases are again simply inapposite to this case, and offer no support to defendants' position.

Of course, when citing decisions from foreign jurisdictions to support a particular interpretation of Utah procedural law, it is incumbent on the propounding party to demonstrate why these foreign decisions should be persuasive to the Utah court, which is generally done by showing the similarity of, if not outright identical, language of the two state's statutory or procedural provisions. Of course, defendants provide no comparison of the respective rules pertaining to awards of trial costs. A more careful look into the cases cited by defendants and those states' procedural rules reveals why: those states'procedural rules either are not or were not at the time of the cited decisions similar to Utah's.

In the case from Alabama, Hinson v. Holt, 776 So.2d 804 (Ala.Civ.App.1998), Alabama's Rule 54(d) is like that of the federal rules, that is, without any express time limit as to when

a motion for costs must be pursued, and the Hinson Court, citing prior Alabama case authority, concluded that since the assessment of costs under Alabama law may be done at any time prior to issuance of execution, the pendency of an appeal was immaterial to the question of the timeliness of the motion for assessment of costs. Thus, the Hinson decision is completely inapposite to the issue herein because of Utah's express time limitation for filing for trial costs.

In the Maryland case, Litty v. Becker, 656 A.2d 365 (Md.App. 1995), the court was dealing with interpreting a statute which imposes costs as a sanction under standards similar to federal Rule 11. However, the decision was based upon the fact that the Maryland rule at issue "contains no time limit for filing a motion for costs." Id. at p. 369. Thus, the Maryland court concluded that the only time limitation on such a cost request was the equitable consideration of whether considering such a motion "would unduly prejudice the non-moving party." Id. at p. 368.

As to the Florida cases, State Farm Mut. Auto. Ins. v. Horkheimer, 901 So.2d 329 (Fla.App. 4 Dist 2005) and Chamizo v. Forman, 933 So.2d 1241 (Fla.App. 3 Dist 2006), they are both inapposite to the instant action. In the Horkheimer case, the trial court's initial decision had been reversed because the plaintiff had obtained a default against State Farm and then obtained a judgment far in excess of of the relief requested along with attorney fees entered without notice to State Farm. On the initial appeal, the judgments were set aside and the case

remanded to the trial court. The plaintiff then moved for entry of judgment and an award of attorney fees and costs, which were ultimately entered. The Horkheimer Court ruled that since the prior judgment had been entirely set aside, the time limit on the motion for costs and fees did not run until a new judgment was entered, and the motion was therefore timely (though the fee award was set aside again because it still lacked any foundation of time spent and rates charged. Id. at p. 331-32.

The Chamizo case involved a question of whether a judgment which includes an award of attorney fees but reserves the issue of the amount for later hearing acted as an automatic extension of the recently enacted Florida Rule of Civil Procedure 1.525, which required a motion for fees and costs to be filed within thirty days of the filing of the judgment. The Chamizo Court held that it did, relying on Florida case law predating the adoption of R. 1.525. However, the Chamizo decision appears to have been dead on arrival, since the Florida Supreme Court had just issued a decision in Saia Motor Freight Line, Inc. v. Reid, 930 So.2d 598 (Fla. 2006) which rejected the reasoning of the Third District and others in favor of the bright-line reasoning of other Florida appellate districts. Id. Thus, Chamizo appears to have no value in Florida and certainly should have no persuasive effect in light of Utah's "well-settled" law on the timing of a motion for costs.

C. Defendants' Assertion That This Is a Case of First Impression In Utah Is Simply Ridiculous.

Defendants finally assert that because none of the abundant

case authority cited by Aurora specifically involve a situation where the prevailing party waited until after an appeal to request an award of its trial court costs, this is a case of first impression in Utah. To call this argument of defendants specious would be giving it far too much credit. Contrary to the implications of defendants' argument, all of the cases cited by Aurora as authority for the untimeliness of defendants' application for costs were faced with the same issue involved herein: was the prevailing party's application for a trial cost award timely under the requirements of Rule 54(d), Utah R. Civ. Pro.? There is nothing about the fact that the defendants herein were **REALLY** untimely in their application for a trial cost award, as opposed to just a little untimely, that should persuade our appellate courts to think that the reasoning of all these cases cited by Aurora would change because of this immaterial factual distinction. Could it be that all the judges signing off on these opinions could have been wrong? Of course not! Had <u>any</u> of these appellate judges believed that defendants' interpretation of Rule 54(d) was correct or even plausible, they presumably would have ruled completely contrary to how they actually did rule. Instead of uniformly ruling that trial cost requests filed more than five days after the entry of the final judgment under R. 54(a) or (b) and ordering them stricken, the Utah appellate courts would have ruled that since an appeal was filed, there was no issue of timeliness raised. Of course, they did not do so. Further, does anyone really expect that after any of these Utah decisions cited by Aurora, the trial court on remand would have entertained a

motion to enter a "new final judgment" in order to allow a cost award contrary to the express holding of the appellate court? Of course not! Defendants' assertion that this is a case of first impression in Utah is patently absurd, and a further indication that defendants' position was and continues to be frivolous.

POINT II

DEFENDANTS' ARGUMENTS ON THE SANCTIONS ISSUE ARE NOT SUPPORTED BY ANY LEGITIMATE FACTS OR BY UTAH LAW

Defendants arguments as to the issue of whether sanctions under Rule 11, Utah R. Civ. Pro., or various rules of the Utah Rules of Appellate Procedure would be appropriate under the circumstances herein do not provide any real factual or legal support for their position.

Subpoint A of Point II of defendants' brief boils down to a simple declaration that after a "reasonable" investigation they "reasonably" believed their claim for costs was proper, and that since the trial court approved their cost award, it could not have been a violation of Rule 11. Fortunately for Aurora, defendants' argument on this matter is not supported by Utah law.

As to the assertion that the trial court's approval of defendants' trial cost award should alone foreclose any determination on appeal that Rule 11 was violated, it is contrary to Utah law. It is established Utah law that whether specific conduct amounts to a violation of Rule 11 is a question of law, and no deference is accorded the trial court's ruling thereon. Jeschke v. Willis, 811 P.2d 202 (Utah Ct. App. 1991); Taylor v. Estate of Taylor, 770 P.2d 163 (Utah Ct. App. 1989). Thus, the

mere fact that the trial court, for reasons known only to it, approved defendants trial court costs contrary to "well-established" Utah law does not provide any defense to defendants on the question of whether Rule 11 was violated.

As to defendants' purported "reasonable" belief after their purported "reasonable" investigation, that issue is to be determined by an objective standard, not a subjective one. Giffen v. R.W.L., 913 P.2d 761 (Utah Ct. App. 1996). Although defendants do not provide any meaningful explanation of what investigation they conducted to arrive at their belief that their claim for trial court costs was warranted by existing law, the implication of their statements is that they only looked at the language of Rule 54(d) and concluded that they were justified in believing it was perfectly proper to wait until after the appeal to file for trial court costs, in spite of such action being contrary to the express language of R. 54(d)(2). Apparently defense counsel felt it was not worth their time to actually look at some cases which interpreted the "well-established" law of the time limit set out in R. 54(d)(2), and felt confident in their completely unsupported interpretation of R. 54(d). This is essentially the "empty head - pure heart" defense which has been rejected by courts. Thornton v. Wall, 787 F.2d 1151, 1154 (7th Cir. 1986)("Rule 11 requires counsel to study the law before representing its contents to a federal court. An empty head but a pure heart is no defense."); Chambers v. American Trans Air, Inc., 17 F.3d 998 (7th Cir. 1994), cert. den. 115 S.Ct. 512, 513 U.S. 1001, 130 L.Ed.2d 419(same). Contrary to defendants'

apparent position, Aurora believes it is not objectively reasonable to not look at any case law interpreting this procedural rule because you claim to be satisfied that your interpretation of the rule is correct, particularly when that interpretation is contrary to the express language of the rule. Further, contrary to defendants' implication, a showing of bad faith is not required to find a violation of Rule 11, but certainly may be relevant to the severity of sanction imposed.

Next, defendants' argument in subpart B of Point II of their brief misconstrues the issue of discretion of a trial court under Rule 11 analysis. Obviously, since the trial court simply signed the "new final judgment" and awarded defendants their trial costs, the trial court never even got to the point of exercising its discretion, and therefore defendants' entire discussion about abuse of discretion is not pertinent to any issue herein.

Finally, defendants' argument that the appellate court should not impose sanctions herein construes Rules 33 and 40, Utah R. App. Pro., too narrowly when they suggest that sanctions are not warranted herein. As to Rule 33, defendants suggest that since they are not filing a motion or taking the appeal, sanctions against them under R. 33 are not permitted. Although R. 33(a) does mention only motions or an appeal, subsection (b) makes clear that the rule also applies to a "brief or other paper." Defendants' brief therefore brings them within the parameters of R. 33. As to Rule 40, Subsection (a) clearly includes briefs and other papers within the scope of this rule, which is essentially the appellate equivalent of Rule 11, Utah R.

Civ. Pro. It will be up to the appellate court to determine whether defendants' brief meets the standards set out in Rule 40(a). Aurora believes that in light of the overwhelming, "well-established" decisional authority contrary to defendants' interpretation of R. 54(d), Utah R. Civ. Pro., defendants have proffered no rational basis to justify their arguments in support of their interpretation, and those arguments fail to meet the standards set and are frivolous. Thus, defendants are subject to sanctions under either Rules 33 or 40 if the appellate court agrees that defendants' arguments have no merit.

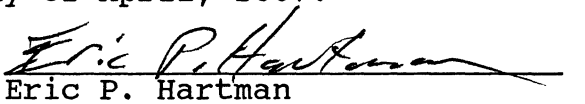
CONCLUSION

The trial court's action of entering a "new final judgment" for the sole purpose of allowing defendants their trial court costs was clearly erroneous under the express language of R. 54(d), Utah R. Civ. Pro., and the numerous cases interpreting it.

The trial court further erred in not sanctioning defendants under Rule 11 for their frivolous argument for the cost award. The Court should direct the trial court to award Aurora sanctions against defendants for asserting such frivolous arguments, awarding Aurora its costs and reasonable attorney fees in amounts to be determined upon remand.

Further, the Court should award Aurora multiple costs along with such other sanctions as the Court deems proper under Rules 33 and 40, Utah R. App. Pro., since defendants have continued asserting their frivolous arguments in this appeal.

RESPECTFULLY SUBMITTED this 30th day of April, 2007.



Eric P. Hartman

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 2007, true and correct copies of the above Reply Brief were mailed, U.S. first-class mail, postage prepaid, pursuant to Rule 28(b), Utah R. App. Pro. to:

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