

IN THE UTAH COURT OF APPEALS

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Pacificorp dba Utah Power, an)	MEMORANDUM DECISION
Oregon corporation,)	(Not For Official Publication)
)	
Plaintiff, Appellant, and)	Case No. 20070358-CA
Cross-appellee,)	
)	
v.)	F I L E D
)	(June 19, 2008)
)	
Eaglebrook Corporation, a Utah)	2008 UT App 232
corporation; and R.C. Tolman,)	
an individual,)	
)	
Defendants, Appellees,)	
and Cross-appellants.)	

Fifth District, St. George Department, 050500546
The Honorable Eric A. Ludlow

Attorneys: Anthony L. Rampton, Salt Lake City, for Appellant
Robert C. Graham and Adam P. McMillen, St. George,
for Appellees

Before Judges Greenwood, McHugh, and Orme.

ORME, Judge:

We have determined that "[t]he facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument." Utah R. App. P. 29(a)(3). Moreover, the issues presented are readily resolved under existing law.

After numerous extensions, and without any contemporaneous explanation, Pacificorp opted not to file a brief, and this court dismissed its appeal. See *id.* 26(c). That dismissal stands, and the issues raised by Pacificorp, specifically including the claims that Eaglebrook submitted itself to the trial court's jurisdiction; that the trial court's findings lacked sufficient evidence; and that the trial court's findings were clearly erroneous, are res judicata. See *Brigham Young Univ. v. Tremco Consultants, Inc.*, 2005 UT 19, ¶¶ 26-28, 110 P.3d 678. Because those issues cannot be resurrected in Pacificorp's responsive brief on Eaglebrook's cross-appeal under the guise of argument

against the propriety of an award of fees to Eaglebrook, the only issue before us is the one raised by Eaglebrook's cross-appeal.

Eaglebrook argues that the trial court erred by failing to award its reasonable attorney fees pursuant to Utah Code section 78-27-56. See Utah Code Ann. § 78-27-56 (2002). "In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith[.]" Id. § 78-27-56(1). The plain language of the statute details three requirements that must be met before fees are awarded: "'(1) the party must prevail, (2) the claim asserted by the opposing party must be without merit, and (3) the claim must not be brought or asserted in good faith.'" Gallegos v. Lloyd, 2008 UT App 40, ¶ 9, 178 P.3d 922 (citation omitted).

Eaglebrook was clearly the prevailing party in this case, and Pacificorp's tenacious refusal to renounce its flawed lawsuit was a position lacking merit, as dismissal of the action conclusively shows. But before Eaglebrook may recover attorney fees under section 78-27-56, the trial court must make factual findings to the effect that Pacificorp acted in bad faith in pursuing its original action against Eaglebrook. See id. ¶ 15. Such a finding must be based on at least one of the following factors: "'(i) The party lacked an honest belief in the propriety of the activities in question; (ii) the party intended to take unconscionable advantage of others; or (iii) the party . . . acted with the knowledge that the activities in question would hinder, delay, or defraud others.'" Id. (citation omitted).

In its order dismissing Pacificorp's action, the trial court held that "an award of attorney fees and costs is proper," but awarded only costs, in the amount of \$427.97. In its order, the trial court made several findings addressing Pacificorp's conduct in maintaining its flawed action. The trial court found that Pacificorp "did not take the simple step of withdrawing [its] case, but persisted in advancing an improperly formed case against good reason" and, since it "unnecessarily used the Court's time and caused the Defendants to defend in a void of pleadings and proper procedure, an award of attorney fees and costs is proper." Additionally, the trial court found that Eaglebrook was "entirely without ability to properly or adequately defend this matter as the case, from the beginning, has not been properly framed [by Pacificorp] because of [Pacificorp's] inability to follow basic procedure as set forth clearly in the Utah Rules of Civil Procedure." Finally, the court noted that it "would be [re]miss to ignore [Pacificorp]'s actions and allow this matter to continue in such an improperly

formed case." Obviously, the trial court was highly critical of Pacificorp's course of conduct.

It is true that while appropriate bad faith findings must be made, the exact phraseology of the statute need not be parroted. Cf. Hall v. Hall, 858 P.2d 1018, 1025 & n.7 (Utah Ct. App. 1993). That said, we nevertheless must conclude that the trial court's findings are ambiguous, or at least internally inconsistent, and do not clearly convey whether the trial court found facts establishing bad faith on the part of Pacificorp. If it did so find, its decision to award attorney fees makes sense, but its decision to fix that award at zero does not. If it did not intend to so find, we are puzzled about the import of its findings that speak of Pacificorp "advancing an improperly formed case against good reason," "unnecessarily us[ing] the Court's time," and failing to follow "basic procedure as set forth clearly in the Utah Rules of Civil Procedure." If the trial court did not find bad faith, its decision not to award fees makes sense, although its finding that Eaglebrook is entitled to fees does not.

We remand this case to the trial court for further consideration and supplementation of its findings. If the trial court makes appropriate findings indicating bad faith, then it must award Eaglebrook attorney fees, including the fees Eaglebrook incurred on appeal. See Chang v. Soldier Summit Dev., 2003 UT App 415, ¶ 24 n.4, 82 P.3d 203. If the court finds that none of the three variants of bad faith outlined in Gallegos, see 2008 UT App 40, ¶ 9, fairly characterize Pacificorp's conduct in bringing--or more precisely, in persisting with--its action, then a decision not to award fees is in order.

Gregory K. Orme, Judge

WE CONCUR:

Pamela T. Greenwood,
Presiding Judge

Carolyn B. McHugh, Judge