1996

James A. Tanasse, Club St. George In., Young Tanasse, Inc. v. Steven Snow, and Sno, Nugger, Engstrom, and Drake : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

JAMES A. TANASSE, CLUB ST. GEORGE, INC., a Utah Corporation, and YOUNG TANASSE, INC., a Utah Corporation, Appellants, vs. STEVEN SNOW and SNOW, NUFFER, ENGSTROM and DRAKE, a Utah Corporation, Appellees.	Case No. 960187-CA

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Fifth Judicial District Court of the State of Utah, In and For the County of Washington

The Honorable James L. Shumate, Judge

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COMES NOW, Appellants, James A. Tanasse, Club St. George, Inc., a Utah Corporation, and Young Tanasse, Inc., a Utah Corporation (hereafter referred to as "Tanasse"), by and through their counsel, Robert O. Kurth, Jr., Esq., of the law offices of EICHACKER & KURTH, and submits the following Appellant's Reply Brief:

I.
SUMMARY OF ARGUMENT

The Appellees argue that the execution, levy and sale on Appellants' malpractice cause of action is not void because Appellants cannot point to any authority directly on point that prohibits the sale of a chose in action. Appellees further argue that they did not violate any duty owed to Tanasse and that this execution and sale was legal because attorneys are allowed to collect debts owed them by clients. This is a clear case of "smoke screen" tactics when considering what Appellees argue in their brief; not much. They can only point to the Rule of Civil Procedure allowing the sale of a chose in action. Basically, they simply failed to argue.

Simply put, this is a case of first impression and should be decided on the facts and legal questions it presents, all in accordance with sound public policy. Appellees failed to address the issue of public policy, equity, fairness and justice in their Brief because they have no leg to stand on regarding these issues.

II.
ARGUMENT

1. APPELLEES' CONTENTION THAT PROCEDURAL ERRORS SHOULD RESULT IN DISMISSAL OF THIS APPEAL IS AN ATTEMPT TO BY-PASS THE IMPORTANT FACTUAL AND LEGAL ISSUES OF THIS APPEAL.

Appellees, Snow, Nuffer, Engstrom and Drake (hereafter referred to as "SNED"), seem to have delusions that this Court will overlook the real issues in this case and dismiss this Appeal based upon procedural error, which has been rectified (Appellee's Brief, page 5). Appellants, Tanasse, have corrected any procedural errors by filing a Supplement to their opening Brief with the clerk of the Utah Supreme Court, which was inserted into the Original Opening Brief, and by correcting the caption in their Reply Brief. Appellants Supplement to their Opening Brief included copies of pertinent documents and stated the standard of appellate review with supporting authority. Although Appellants' Brief was

originally served on counsel who was only representing SNED in the malpractice case that has not yet been appealed, that error has been corrected and opposing counsel, SNED, has received notice, which is apparent since they filed an opposing Brief. Though, SNED's counsel may not have received the Supplement as it was to be added to the Opening Brief by the clerk of the Supreme Court and Appellants are unsure whether they also provided a copy to SNED. Further, the designation of Plaintiff and Defendant and the deletion of Nadine Young as a party have also been corrected in the caption to this Reply Brief.

SNED also asserts in their first argument that Tanasse's argument and statements of issues and facts are confusing and impossible to understand. SNED seems to indicate that due to this confusion, the Appeal should be dismissed (Appellee's Brief, page 7).

There is nothing confusing about the facts or issues in this case. The facts are simple. Tanasse owed SNED approximately $14,379.68 in fees. Tanasse sued SNED for malpractice. SNED took action against Tanasse to recover the fees in the form of the execution, levy and sale of Tanasse's chose in action (a Complaint for legal malpractice against SNED). At the execution sale, SNED bought the malpractice chose in action in which they are the named Defendants. Subsequently, SNED substituted themselves in as party Plaintiff and then dismissed the malpractice action against themselves in case **335**.

The only confusing part of this scenario is why any respectable law firm would stoop to such unscrupulous and unethical behavior and why they would expect a stamp of approval from this Court for so doing.

2. SNED's RELIANCE ON LACK OF CASE LAW AND THEIR FAILURE TO ADDRESS ISSUES OF PUBLIC POLICY AND EQUITY SUPPORT TANASSE's ARGUMENT THAT THE SALE SHOULD BE SET ASIDE.

SNED's second argument, which is only based upon Rule 69, U.R.C.P., and is contained in approximately one and one-half (1 1/2) pages, rests upon the rationale that because there is no Utah case law or other authorities directly on point regarding authorization for execution upon a legal malpractice action as a chose in action by the malpractice Defendant, Tanasse should not be able to

assert their claim on appeal (Appellees' Brief, page 8).

When considering SNED's "tunnel vision" point of view, no case of first impression should be heard by the Court. Therefore, the argument that follows such rationale is that if you are unscrupulous in your business dealings and use actions and methods that no one else would dare employ, then there will be no case law on point and you will be allowed to continue your outrageous practices. Clearly, this is a ludicrous argument.

It is one of the Court's many responsibilities to hear cases of first impression. Moreover, as the Court considers cases of first impression, one of its many duties is to ensure that its decision reflects a sound public policy decision. SNED ignores the issue of public policy in their Brief because they understand that their actions defied any consideration of public policy. When assigning actions or executing upon choses in action for the purpose of collecting a debt, it is sound public policy to assign actions to someone who will put themselves in the Plaintiff's shoes and have the same incentive to pursue the claim to the fullest extent possible. Obviously, SNED had no intention of pursuing Tanasse's claim for legal malpractice against themselves to the fullest extent possible. Their intention was merely to dismiss the claim against themselves and avoid having to litigate the matter.

SNED argues that there is no basis in law for setting aside this sale. Besides public policy concerns, there are times when execution sales are vacated due to unfair circumstances and undue advantage that result in a grossly inadequate sales price. Odell v. Cox, 151 Cal. 70, 90 P. 194 (1907). Additionally, in Young v. Barker, 84 Cal. App. 2nd 654, 655, 198 P.2d 521, 522 (1948), the Court states:

> As the facts in this case unfold there will appear a program, well prepared and almost successful, whereby Plaintiff hoped to acquire a valuable property for a paltry sum by following the forms of law but in defiance of the elemental rules of equity and without simulacrum of justice.

Admittedly, it is hard to place a value on Tanasse's malpractice action. However, when considering the fact that the $10,000.00 purchase price by SNED to themselves did not even cover the debt Tanasse owed them pursuant to the Default Judgment, that the malpractice claim involves a judgment against Tanasse in the approximate amount of $102,000.00, and that SNED had no incentive to bid a fair amount since their objective was to acquire the action and dismiss it, rather than pursue it, the price paid

owed them pursuant to the Default Judgment, that the malpractice claim involves a judgment against Tanasse in the approximate amount of $102,000.00, and that SNED had no incentive to bid a fair amount since their objective was to acquire the action and dismiss it, rather than pursue it, the price paid for the chose in action was grossly inadequate.

Along with an inadequate price, SNED took undue advantage of Tanasse by ignoring justice, equity and ethics. SNED is trying to stamp out the forest fire they created by causing it to smolder by acquiring the action against themselves and then dismissing it.

It is obvious that SNED did not acquire this action to settle a debt owed to them, but instead to enable them to dismiss a suit against themselves. The firm not only acquired valuable property but more importantly, eliminated the stress, expense, and time inherent in defending a malpractice claim. SNED is also attempted to eliminate any bad publicity or harm to their reputation that a malpractice action could bring and of course eliminated the possibility of a large award against themselves. All of the above factors are blatantly against public policy and are definitely not in accordance with the behavior and practices that are succumbed to by members of the legal profession.

3. SNED HAS VIOLATED THEIR ETHICAL DUTIES AS ATTORNEYS.

SNED contends that they did not breach any ethical duties in their dealings with Tanasse. SNED asserts that Tanasses' argument does not have a good faith foundation. Again, SNED ignores the issue of "good faith and fair dealing" with a former client. They merely conclude that their actions were warranted because attorneys are allowed to collect fees owed to them by clients. SNED fails to address this particular execution sale where they not only purchase a chose in action (cause of action); they purchase a cause of action where they are the named Defendants in the malpractice suit. It is this particular transaction that violates the code of ethics and it is this particular kind of transaction that we do not want to encourage or condone and subsequently cause a public outcry. Contrary to what the firm believes, they do have a lasting duty to their former client, Tanasse, not to be entwined in a conflict of interest. There could not be a more blatant conflict of interest than to buy the malpractice suit where you are the named Defendant, and then to dismiss the action against yourself. The firm also fails to realize that it has a duty to maintain the integrity of the profession, and transactions such as this do

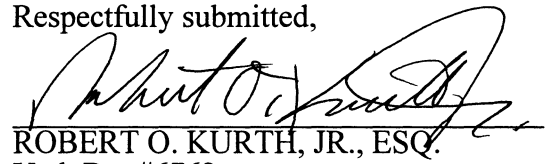
CONCLUSION

SNED's Brief accuses Tanasse of being deficient and misleading in its opening brief (Appellees' Brief, page 9). It is peculiar that SNED should choose this line of attack considering the Brief that the SNED submitted. SNED's Brief consisted of only five pages of argument, none of which contained legal argument, only argument attacking Tanassse's procedural errors and lack of case law. It is extremely noteworthy that SNED did not even address the public policy issue nor give any explanation as to why their actions should be considered legitimate. SNED did not address these issue because they have no answer for the Court. Further, SNED skimmed over the question of fairness because their actions were not fair and never considered public policy or issues of equity and justice. They only considered one area of concern, themselves. They basically admit that they only had one goal in mind while they pushed the ethical envelope to burst at its seams; purchasing the malpractice chose in action at the execution sale and ultimately dismissing the malpractice case in which they were the named Defendants. Simply put, it would be an injustice and a violation of public policy to award SNED for their actions.

WHEREFORE, Appellants, James A. Tanasse, Club St. George, Inc., a Utah Corporation, and Young Tanasse, Inc., a Utah Corporation, and respectfully request that this Court reverse the Order of the District Court allowing the sale, enter an order disallowing the sale and reinstate Appellants' legal malpractice claim. Additionally, Appellant requests such other relief as this Court deems appropriate in the premises.

DATED and DONE this 26th day of April 1996.

Respectfully submitted,



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CERTIFICATE OF MAILING

I, Robert O. Kurth, Jr., hereby certify that on the 26th day of February 1996, I served the forgoing **APPELLANT'S REPLY BRIEF,** by placing a true and correct copy thereof in the United States mail, first class, postage prepaid and addressed to the following:

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