

1977

Ronald P. Stubbs v. Lyman W. Hemmer : Appellant's Brief On Petition For Rehearing

Utah Supreme Court

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McCune & McCune; Attorneys for Appellant Dale M. Dorius; ATTORNEY RESPONDENT

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

RONALD P. STUBBS,
Plaintiff and Appellant,
vs.
LYMAN W. HEMMERT,
Defendant and Respondent.

Case No.
14801

APPELLANT'S BRIEF ON PETITION FOR REHEARING

Appeal from Judgment of Fourth Judicial District
Court, Utah County, State of Utah, Honorable
J. Robert Bullock, District Judge

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FILED

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TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE	1
DISPOSITION IN LOWER COURT	1
DISPOSITION IN SUPREME COURT	1
RELIEF SOUGHT ON REHEARING	1
STATEMENT OF FACTS	2
PETITION	5
ARGUMENT	6
CONCLUSION	13
CERTIFICATE OF MAILING	14

IN THE SUPREME COURT OF THE STATE OF UTAH

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RONALD P. STUBBS,)	
Plaintiff - Appellant,)	Appellant's Petition
)	for
vs.)	Rehearing
)	
LYMAN W. HEMMERT,)	
Defendant - Respondent,)	No. 14801

STATEMENT OF THE KIND OF CASE

This is an action by appellant on a note foreclosing a mortgage securing same and counterclaim by respondent for breach of contract.

DISPOSITION IN LOWER COURT

Plaintiff was granted judgment and foreclosure in the amount of \$810.00 on unpaid note and \$150.00 attorney fee minus setoff of \$62.04 for utility bill and \$200.00 damage for breach of contract to supply cooling equipment.

DISPOSITION IN SUPREME COURT

The trial of court was affirmed on all four points raised by plaintiff - appellant and costs were awarded to defendant.

RELIEF SOUGHT ON REHEARING

Appellant requests the high court to alter its original decision concerning Point 4 of the original appeal by increasing the award of attorney fees from \$150.00 to a higher more reasonable sum.

STATEMENT OF FACTS

On February 3, 197., plaintiff and defendant entered into an agreement whereby plaintiff would buy defendant's home in Provo, Utah and transfer to defendant all of plaintiff's interest in a store in Santaquin, Utah which plaintiff had run as a grocery store until December 31, 1970 (T27). Plaintiff was allowed a sales price of \$13,000.00 for said store (T7:12), \$8,700.00 of which was applied as a down payment on the purchase of defendant's home and the balance of \$4,300.00 was reduced to a note (Exhibit "A" of Complaint, R100; pre-trial order, R44).

The original earnest money receipt and exchange agreement provided that two walk-in coolers and their cooling equipment were to be part of the exchange and sale (D1).

Plaintiff executed a Warranty Deed in favor of defendant to the store on February 18, 1971, and defendant and his now deceased wife gave plaintiff a mortgage on said store dated February 20, 1971, to secure plaintiff's \$4,300.00 note from the Warranty Deed and mortgage were recorded in the office of the Utah County Recorder on February 23, 1971.

At the time the store exchange was made, the parties agreed that plaintiff could leave the display cases and other personal property of the grocery store business in the store building and the parties would attempt to sell the personal property and realty together (T8:2-9; 15:5-15; 33:1-5). When this proved

fruitless, plaintiff sold \$3,200.00 of the personal property inventory to Burt Durrant (T32; 37:22-30; 38).

Mr. Durrant removed two compressors from the walk-in coolers when he was removing the rest of the equipment purchased by him (T34:14-30).

Defendant was very anxious to sell the store (T15:5-10) but no offers were received from anyone desiring to buy the building to operate as a grocery store or otherwise use the walk-in coolers (T16:24-30). Then defendant sold the building to Milo Janssen for \$7,500.00 on August 1, 1973 (T9:30; 23-25; D4).

About July 30, 1974 plaintiff began contacting defendant about delinquent payments on the mortgage and note (T36:1-2), after which defendant sent plaintiff a memo dated August 19, 1974, complaining about the two compressors (D2). Plaintiff responded and requested payments on the delinquent note (D2).

Shortly thereafter, plaintiff enlisted the services of his counsel to collect the note and foreclose the mortgage (T36:13-15).

Numerous contacts were made to get the note paid including efforts on the part of plaintiff to contact Durrant, obtain the return of the compressors by Durrant to Stubbs, and attempt to return said compressors to the store in Santaquin but defendant rejected said compressors and was uncooperative (T10:17; 29; 36; 28; 39; 21:51-55). Plaintiff's

attorneys have since performed considerable services for plaintiff in foreclosing plaintiff's mortgage (T52-58; R1-106).

The high court on July 13, 1977, through opinion of the Honorable Justice Wilkins, among other things affirmed the trial court's award of \$150.00 attorney fees for foreclosure of the mortgage note by stating in its opinion that plaintiff's attorney testified that he has expended 3-3/8 hours on the collection and foreclosure action and that the remainder of his time appeared to have been concerned with the negotiation and defense of the counterclaim. (See original decision of the high court dated July 13, 1977.)

PETITION FOR REHEARING

Pursuant to Rule 76, Utah Rules of Civil Procedure, as amended, plaintiff - appellant petitions the court to reconsider and alter its original decision herein regarding Point IV of plaintiff - appellant's original appeal pertaining to reasonable attorney fees for foreclosure.

This petition is based upon the files and records in this case, and the argument filed in support thereof.

It is felt that the high court failed in the following particulars:

- 1) The court misconstrued the transcript of counsel for plaintiff regarding time spent.
- 2) The court overlooked the work product of counsel for plaintiff evidenced by the files herein.

ARGUMENT

THE HIGHER COURT ERRORED IN DETERMINING THAT PLAINTIFF'S ATTORNEY TESTIFIED THAT HE HAD EXPENDED ONLY 3-3/8 HOURS ON A COLLECTION AND FORECLOSURE ACTION AND THAT THE REMAINDER OF HIS TIME APPEARS TO HAVE BEEN CONCERNED WITH THE NEGOTIATION AND DEFENSE OF THE COUNTERCLAIM.

Plaintiff respectfully submits that the higher court has made a mistake in determining that plaintiff's attorney testified that he had expended only 3-3/8 hours on the collection and foreclosure action and that the remainder of plaintiff's time appears to have been concerned with the negotiation and defense of the counterclaim.

The transcript of trial of counsel per plaintiff's testimony as to professional time spent reads as follows:

Q Do you have that time totaled or computed as to various phases of the matter prior to suit and after suit?

A Yes, I do.

Q Would you state to the Court what your records show the general type of services performed during a certain period?

A Since Mr. Stubbs first approached me on November 8, 1974, I spent approximately four hours, four and on-eighth hours, to be exact, in negotiating a return of the compressors by Mr. Durrant to Mr. Hemmert and negotiating a possible settlement with Mr. Hemmert and Mr. -- Yes, with Mr. Hemmert.

Q That was your time spent prior to the filing of the complaint?

A That's correct.

Q Would you state the next type of services category?

A Then we commenced the suit in preparation of the Complaint, lis pendens, and further negotiation with Mr. Dorius and Mr. Hemmert regarding the Possible settlement. I spent three hours, three and three-eighths hours. And then following this initial negotiation period I spent an additional six and three-eighths hours in responding to the Counterclaim, and preparing interrogatories for the defendant, and in attempting to obtain answers to those interrogatories. And I spent another three and one-fourth hours in preparing a motion to dismiss, which was heard in this court on August 22, 1975, based upon the fact that proper answers to interrogatories had not been received. The Court at that time awarded me a fee of \$75.00 for that motion and proceedings, which I have received. I then spent six and one-half hours in further discovery after receiving answers to Mr. -- answers from attorney Dorius regarding the interrogatories, pursuant to the Court's order of August 22nd. An additional six and three-eighths hours in pre-trial preparation from the time that the Court sent notice of pre-trial and including the pre-trial conference and negotiations regarding settlement. And up to yesterday I spent three and seven-eighths hours in trial preparation for trial today.

Q Do you have a total of your hours on those matters?

A That comes to a total of 33 hours -- 33 and seven-eighths hours.

Q And of that three and one-fourths hours on the motion regarding the interrogatories has been paid?

A Yes.

Q Is that correct?

A That's correct.

Q Are you familiar with the usual and ordinary minimum fee charged by attorneys in this area for office work and court work?

A Yes.

Q What is your information on that?

A I have information that the attorneys in this area charge \$35.00 per hour in Provo area, in the Salt Lake area between \$47.00 and \$52.00 an hour.

Q Are you making or have you made a request to the Court as to the amount of attorney fees to be awarded to you, in the event you are successful for these plaintiffs?

A I have in the Complaint asked for a fee of \$600.00 in this matter, since there is a foreclosure involved and there would be additional papers that would need to be prepared, drafted and submitted, and sale held, and also includes the court time today. (T55:11 through 55:13)

The higher court has said plaintiff's attorney testified

that he had expended 3-3/8 hours on the collection and foreclosure action. However, a review of the testimony shows no such disclosure.

Plaintiff's counsel testified that he spent 3-3/8 hours in preparation of the complaint, lis pendens, and negotiation with Mr. Dorius and Mr. Hemmert regarding possible settlement. But this is the only time during his testimony that he refers to the figure 3-3/8 hours.

Much more time was spent on the foreclosure of the mortgage note than 3-3/8 hours. The testimony of plaintiff's counsel shows 6-3/8 hours spent in responding to the counterclaim, which would be a portion of the defense of the counterclaim and not recoverable under the higher court's decision herein, but also goes on to state that said 6-3/8 hours was also used in preparing interrogatories for defendant and in attempting to obtain answers to those interrogatories.

An examination of the interrogatories of plaintiff to defendant (R 88) shows that interrogatories 1 through 4, 10 through 17, and 22 through 28 specifically pertain to plaintiff's complaint for foreclosure and the general and affirmative defenses raised by defendant to said complaint. Said interrogatories do not bear upon the counterclaim of defendant. Other interrogatories also interrelate with both the complaint of plaintiff and the counterclaim. Nineteen out

of the 41 interrogatories required to be answered by defendant specifically relate to proving of plaintiff's foreclosure complaint and overcoming general and affirmative defenses raised by defendant thereto.

Further examination of the testimony of plaintiff's attorney shows that 6-1/2 hours in discovery was spent after receiving answers to plaintiff's interrogatories and an additional 6-3/8 hours in preparation for the pre-trial and including the time at the pre-trial court hearing and negotiation regarding settlement. (T56:10-16)

The higher court's conclusion that all time with the exception of 3-3/8 hours spent by plaintiff's counsel "appears to have been concerned with the negotiation and defense of the counterclaim" is respectfully traversed.

The honorable Supreme Court in your original decision further states that the foreclosure action was fully settled at the time of the pre-trial conference. But much transpired before the pre-trial conference which was not held until May 14, 1976. The pre-trial order (T44) also reflects that counsel for plaintiff prepared and drafted said order. It also shows that the issue of the note and mortgage was not settled until that date.

In addition, counsel for plaintiff testified that additional papers would need to be drafted in the matter and submitted to the court (T57:10-13). The Findings of Fact and Conclusions of Law

(R35) show that they were prepared by plaintiff's counsel and the Decree of Foreclosure and Judgment (R31) shows that said Decree and Judgment was further drafted and prepared by plaintiff's counsel. The substantial substance of said Findings Decree and Judgment pertain directly to the mortgage note foreclosure and not to the judgment awarded defendant on the counterclaim, although that is also treated.

The point plaintiff - appellant is attempting to make is that much professional time over and above the amount of 3-3/8 hours was testified to by plaintiff's counsel as being used to obtain admission from defendant that plaintiff's claim on the mortgage note and foreclosure was valid. The higher court has already concluded that time spent at the trial after the issues of the mortgage note had been settled at the pre-trial conference cannot be considered in awarding attorney fees for collection of the mortgage note. However, the only time testified to by plaintiff's attorney that was specifically spent after the pre-trial conference was testified to be 3-7/8 hours (T56:17-18).

Plaintiff - appellant has no disagreement with the high court's conclusion that the amount of professional time expended in a matter and the value at which said time is charged by attorneys in the community is basic criteria for

determining a reasonable fee. But in this case, the court has clearly misread the transcript and overlooked the work product in the case file. When a counterclaim is brought, it would be very difficult to separate with absoluteness every moment of time an attorney spends in the matter into pockets of time for prosecution of the complaint and pockets of time for defense of a counterclaim. The two are inter-related. The court can make a reasonable determination of the allocation of time between complaint prosecution and counterclaim defense by examining the work product in the file and the time spent in the various steps of the trial procedure.

CONCLUSION

Plaintiff - appellant pleads with the sovereign body of our highest state court for substantial justice. Please examine the transcript of the testimony of plaintiff's attorney and the work product in the file and what the work product relates to. Please consider the amount of work which an attorney expends and which you expended when you were in private practice in preparing interrogatories, uncovering the facts, interviewing witnesses and performing other discovery, and drafting pre-trial orders and final findings, conclusions, and decrees.

Please consider the value and necessity of negotiation between parties and arriving at compromise settlements and admissions at pre-trial. Please review the transcript to see if in fact an error has been committed in assuming that the testimony of plaintiff's attorney showed that only 3-3/8 hours was spent on the collection and foreclosure action.

After the above considerations are taken, plaintiff - appellant pleads with the court to revise its decision regarding reasonable attorney fees in the mortgage note foreclosure granting plaintiff - appellant a more equitable amount as judgment for reasonable fees.

Respectfully Submitted,

McCUNE & McCUNE
96 East 100 South
Provo, Utah 84601

CERTIFICATE OF MAILING

Mailed 2 copies of the foregoing Appellant's Petition for Rehearing to Mr. Dale M. Dorius, Attorney at Law, P. O. Box 165, Brigham City, Utah 84032, on this 28th day of July 1977.

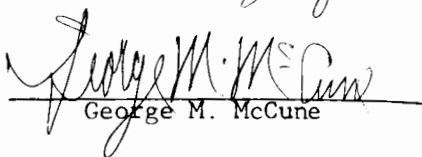

George M. McCune

TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE -----	1
DISPOSITION IN LOWER COURT -----	1
RELIEF SOUGHT ON APPEAL -----	2
STATEMENT OF FACTS -----	2
ARGUMENT -----	3
POINT I	
THE LOWER COURT'S FINDING OF FACT THAT RESPONDENTS WERE PURCHASING MERCHANDISE FROM APPELLANT AS AGENTS OF LITTLE LEAGUE BASEBALL, INC WAS CLEARLY ERRONEOUS AND NOT SUPPORTED BY THE EVIDENCE -----	3
POINT II	
THE LOWER COURT'S RULING THAT APPELLANT KNEW THAT RESPONDENTS WERE ORGANIZING UNDER AUTHORITY AND DIRECTION OF LITTLE LEAGUE BASEBALL, INC. IS CLEARLY ERRONEOUS AND NOT SUPPORTED BY THE EVIDENCE. -----	8
POINT III	
THE TRIAL COURT'S FINDING OF AGENCY BETWEEN RESPONDENTS AND LITTLE LEAGUE BASEBALL, INC. SHOULD HAVE BEEN LIMITED BY THE TRIAL COURT TO MATTERS REGARDING USE OF NAME, RULES, EMBLEMS, ETC., -----	9
POINT IV	
THE TRIAL COURT ERRED IN FAILING TO RULE THAT RESPONDENTS ARE LIABLE FOR THEIR DEBT TO APPELLANT -----	10
CONCLUSION -----	12

CASES CITED

	PAGE
<u>Conner v. Steel, Inc.</u> , 470 P2d 71 (Colo. Ct. App. 1970) -----	8
<u>Noujoks v. Shurmann</u> 9 Utah 2d 84, 337 P2d 967 (Utah 1959) -----	9

AUTHORITIES CITED

7 C.J.S., Associations Section 20 p. 54 -----	11
6 Am. Jur. 2d, Associations and Clubs, Section 146, p. 477 -----	11

STATUTES CITED

Rule 17 (D), Utah Rules of Civil Procedure -----	11
--	----