

1979

L. Keith Lignell et al v. Clifford M. Berg et al : Appellants' Supplemental Brief

Utah Supreme Court

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Joseph S. Knowlton; Attorney for Plaintiff and Cross-Respondent;
Callister, Skeene & Nebeker; Attorneys for Defendant-Respondent;
Wilford A. Beesley; Attorney for Defendant-Respondent;
Earl S. Tanner & Associates; Attorneys for Plaintiffs-Appellants;

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IN THE SUPREME COURT OF THE STATE OF UTAH

E. KEITH LIGNELL, MARIAN H. *
LIGNELL, his wife, BURTON M. *
TODD and PHYLLIS W. TODD, *
his wife, *

Plaintiffs and *
Appellants, *

v. *

CLIFFORD M. BERG and *
WILLIAM R. BERG, a partner- *
ship, dba BERG BROTHERS *
CONSTRUCTION COMPANY, and *
FIDELITY AND DEPOSIT COMPANY *
OF MARYLAND, a corporation, *

Defendants and *
Respondents. *

Case No. 15001

APPELLANTS' SUPPLEMENTAL BRIEF

EARL D. TANNER & ASSOCIATES
Earl D. Tanner
J. Thomas Bowen
Suite 101
345 South State Street
Salt Lake City, Utah 84111
Attorneys for Plaintiffs-
Appellants

Wilford A. Beesley
15 East 400 South
Salt Lake City, Utah 84111
Attorney for Defendant-
Respondent Berg Brothers
Construction Company

CALLISTER, GREENE & NEBEKER
Richard H. Nebeker
800 Kennecott Building
Salt Lake City, Utah 84133
Attorneys for Defendant-
Respondent Fidelity and
Deposit Company of Maryland

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Clerk, Supreme Court, Utah

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EARL D. TANNER & ASSOCIATES
Earl D. Tanner
J. Thomas Bowen
Suite 101
345 South State Street
Salt Lake City, Utah 84111
Attorneys for Plaintiffs-
Appellants

Wilford A. Beesley
15 East 400 South
Salt Lake City, Utah 84111
Attorney for Defendant-
Respondent Berg Brothers
Construction Company

CALLISTER, GREENE & NEBEKER
Richard H. Nebeker
800 Kennecott Building
Salt Lake City, Utah 84133
Attorneys for Defendant-
Respondent Fidelity and
Deposit Company of Maryland

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Case No. 15001

APPELLANTS' SUPPLEMENTAL BRIEF

Pursuant to the notice from the office of the Clerk of the Court dated February 8, 1979, respecting further oral argument in this matter, plaintiffs-appellants submit the following Brief on the question of the award of attorney's fees.

POINT I

ATTORNEY'S FEES ARE RECOVERABLE ONLY IN CERTAIN LIMITED CIRCUMSTANCES.

It is a long established rule of this Court that attorney's fees are not recoverable within the action itself unless expressly provided by contract or authorized by statute. Cluff v. Culmer, 556 P.2d 498 (Utah 1976); C. G. Hormon Co. v. Lloyd,

28 Utah 2d 112, 499 P.2d 124 (1972); Hawkins v. Perry, 123 Ut. 16, 253 P.2d 372 (1953); Marks v. Culmer, 7 Utah 163, 25 P.2d 163 (1891). This Court, however, apparently espouses the view that under certain circumstances attorney's fees may be awarded as an element of consequential damages if incurred in a separate action with a third party. Pacific Coast Title Insurance Co. v. Hartford Accident and Indemnity Co., 7 Utah 2d 377, 325 P.2d 906 (1958). Plaintiffs are aware of no provision that would require this Court to award attorney's fees, thus even if a party might qualify for attorney's fees on appeal, such an award is clearly discretionary with this Court. Downey State Bank v. Major-Blakeney Corp., 556 P.2d 1273 (Utah 1976); Swain v. Salt Lake Real Estate & Investment Co., 3 Utah 2d 121, 279 P.2d 70 (1955). Plaintiffs submit, however, that the criteria for a party to qualify for an award of attorney's fees on appeal is very limited and that defendants do not so qualify under the facts of this case. In the instant case it is undisputed that none of the contracts between the parties provided for an award of attorney's fees; therefore, any award must be justified as an element of consequential damages or must be based upon a statute.

POINT II

AN AWARD OF ATTORNEY'S FEES AS AN ELEMENT OF CONSEQUENTIAL DAMAGES WOULD NOT ENTITLE DEFENDANTS TO ANY ATTORNEY'S FEES ON APPEAL.

Although attorney's fees incurred in another action

in some instances, be a proper element of consequential damages, they can only be considered if such fees are reasonable, incurred in good faith and with a reasonable probability of success, and were reasonably foreseeable by the parties. Pacific Coast Title Ins. Co. v. Hartford Accident Indemnity Co., supra; Armstrong Construction Co. v. Thompson, 390 P.2d 976 (Wash. 1964); Annot., 4 A.L.R. 3d 270 (1965). Fees incurred in prosecuting or defending a case between the parties cannot, however, be awarded as an element of consequential damages. Defendants here, therefore, would not be entitled to attorney's fees on appeal since such attorney's fees would be "within the action itself" and are clearly precluded by the decisions of this Court. Pacific Coast Title Ins. Co. v. Hartford Accident Indemnity Co., supra.

A. An award of attorney's fees as consequential damages below would preclude both Berg and the surety from any award of attorney's fees.

If this Court concludes that the attorney's fees were awarded by the trial court as an element of consequential damages the only portion of those fees that could be sustained against the owners would be those awarded to the electrical contractor (\$21,000.00) and to the drywaller (\$11,000.00). The award by the trial court to the surety (\$21,000.00) and to Berg (\$21,000.00) could not be sustained because such an award would be "within the action itself." Even as an element of consequential damages, however, the assessment against the owners of the attorney's fees awarded to the subcontractors would be improper

under the facts of this case and the state of the record.

B. Neither Berg nor the surety pled nor proved attorney's fees as an element of consequential damages.

The counterclaims filed by Berg Brothers and the surety request attorney's fees in the amount of \$35,000.00 each under the Labor and Material Bond statute, §14-2-3, U.C.A. (Copies of the counterclaims are attached hereto as Appendix pages A-1 and A-2). Neither of the defendants requested that they be awarded the attorney's fees incurred in their suits with the subcontractors as an element of their damages. Further, there is no finding by the trial court in this matter that the fees were incurred in good faith. In fact, the record indicates to the contrary; the subcontractors, Berg Brothers and the surety banded together against the owners (Supp. T.15). See Bryce Plumbing & Heating Co. v. Maryland Casualty Co., 21 F.Supp. 851 (D.C.S.C. 1938) (attorney's fees unnecessarily incurred not awardable). There was no finding or evidence which would permit a determination of how much of the time and effort of the attorneys for the drywaller and the electrician was devoted to their claims against the contractor and the surety and how much of their time and effort was devoted to the various claims brought by them against the owners directly. In the absence of such a breakdown it is impossible to tell what portion of attorney's fees awarded to the subcontractors would be properly included as an element of consequential damages had that matter been raised at trial. Further, there is no pleading and no finding by the tri-

court that the attorney's fees awarded to the subcontractors against the surety were reasonably foreseeable at the time the contract was made.¹ Pacific Coast Title Ins. Co. v. Hartford Accident Indemnity Co., supra.

C. The contract between the owners and the surety specifically excludes an award of attorney's fees as an element of consequential damages.

The Labor and Material Bond, as it relates to the obligation between the surety and the owners, provides:

"2. The above named Principal and Surety hereby jointly and severally agree with the Owner that every claimant as herein defined, who has not been paid in full before the expiration of a period of ninety (90) days after the date on which the last of such claimant's work or labor was done or performed, or materials were furnished by such claimant, may sue on this bond for the use of such claimant, prosecute the suit to final judgment for such sum or sums as may be justly due claimant, and have execution thereon. The Owner shall not be liable for the payment of any costs or expenses of any such suit." (emphasis added) (See Page A-5 in the appendix to the Appellants' Brief where the Labor & Material Payment Bond is set forth in its entirety.)

It is apparent, therefore, that the only contract between the surety and the owners respecting attorney's fees required the surety to save the owners harmless from all costs and expenses in suits brought by materialmen and laborers under that bond. This indicates that the surety, the owners and the prime contractor all contemplated the possibility that there would be costs and expenses incurred in suits by subcontractors and

¹It is submitted that in this case it would have been impossible to foresee that the bonding company would refuse to pay claims which it believed to be fair and just and proper in amount.

specifically provided in the bond that the owners would not be liable for such. Therefore, even if this Court can ignore the fact that no request was made below by defendants for an award of attorney's fees as consequential damages, no findings were made by the trial court respecting that issue and no findings were made by the court which would support an award of consequential damages, the clear language of the contract between the parties would preclude such an award and should be controlling with respect to that issue.

If this Court were inclined to the belief that the contractor and surety should be entitled to recover as consequential damages the attorney's fees awarded to the subcontractors below, this cause would have to be remanded for evidence and findings on (1) the good faith of the surety in requiring the subcontractors to go to trial on their claims under the bond, (2) the portion of subcontractors' time spent pursuing the bond claims as distinguished from that spent pursuing the many causes of action pleaded by the subcontractors against the owners,² all of which were successfully defended by the owners who received judgment of "no cause," and (3) the foreseeability of the surety's action in refusing to pay subcontractors even though surety believed the subcontractors' claims to be meritorious.

²No evidence was adduced at the trial on this allocation, the award was for all services rendered, without pro-rating.

POINT III

SECTION 14-2-3, U.C.A., DOES NOT PROVIDE FOR AN AWARD OF ATTORNEY'S FEES BELOW OR ON APPEAL UNDER THE CIRCUMSTANCES OF THIS CASE.

Even if this Court concludes that the award of attorney's fees below was based upon §14-2-3, and was not an element of consequential damages, defendants still would not be entitled to attorney's fees on appeal.

A. Under statutes such as §14-2-3, U.C.A., no award can be made for attorney's fees incurred on appeal.

A recent Florida case has met head-on the question of the award of attorney's fees for services of attorneys on appeal. Section 84.291 of the Florida Statutes, a statute similar to our §38-1-18, U.C.A., states:

"In any action brought to enforce a lien under this chapter, the prevailing party shall be entitled to recover a reasonable fee for the services of his attorney, to be determined by the court which shall be taxed as part of his costs."

The District Court of Appeals for the First District in John T. Wood Homes, Inc. v. Air Control Products, Inc., 177 So.2d 709 (Fla. 1965), held that such a statute would not permit the allowance of attorney's fees for services on appeal. This holding was affirmed by the Supreme Court of Florida in Sunbeam Enterprises, Inc. v. Upthegrove, 316 So.2d 34 (Fla. 1975), citing inter alia, a United States Supreme Court case which held that the "American rule" respecting the award of attorney's fees was that, since statutes providing for the award of attorney's fees

were in derogation of the common law, they should be strictly construed. The Supreme Court of Florida held:

"[2] This Court has consistently held that the award of attorney's fees is in derogation of the common law and that statutes allowing for the award of such fees should be strictly construed. Weathers, for Use and Benefit of Ocean Accident & Guarantee Corp. v. Cauthen, 152 Fla. 420, 12 So.2d 294 (1943); Great American Indemnity Co. v. Williams, et al., 85 So.2d 619 (Fla. 1956); Kittel v. Kittel, 210 So.2d 1 (Fla. 1968); Stone v. Jeffres, 208 So.2d 827 (Fla. 1968). See also Jackson v. Hatch, supra.

"[3] We agree with petitioner that the District Court erred in awarding attorney's fees on appeal to respondent since Section 713.29 (formally §84.291) does not expressly authorize the award of attorney's fees on appeal and we would adopt the reasoning of the District Court of Appeals, First District, in John T. Wood Homes, Inc. v. Air Control Products, Inc., that ' . . . the statute by not specifically setting out attorney's fees incurred on appeal would not encompass the allowance of such a fee.' Accord, Babe's Plumbing, Inc. v. Maier, supra. See, Alyeska Pipeline Service Co. v. Wilderness Society, et al., 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), Supreme Court of the United States, opinion filed May 12, 1975."

There have been numerous cases in Utah respecting the award of attorney's fees to the "successful party" under §38-1-18 relating to mechanic's liens foreclosure. None appear to deal with the award of attorney's fees for services on appeal. See, e.g., Palombi v. D & C Builders, 22 Utah 2d 297, 452 P.2d 325 (1969).

Plaintiffs submit that when dealing with attorney's fees awardable by statute the "Florida rule" is correct and that the provisions of §38-1-18, and those of its sister statute §14-2-3, relating to labor and material claims under the bond

statute, should be strictly construed as in derogation of the common law and that no attorney's fees for services in an appeal should be taxable as costs on appeal in the absence of express statutory authority to that effect. In cases involving contract provisions for attorney's fees, however, such an award for appellate services would be a matter of the discretion of the court. Swain v. Salt Lake Real Estate Board, supra (attorney's fees denied). Of course, in this case there is no such contractual provision.

B. An award of attorney's fees below based on §14-2-3 would preclude the pass through of the subcontractors' fees to the owners.

If the award of attorney's fees below was based upon the bond statute, a conclusion which plaintiffs contend cannot be supported by the record of this case since the action between plaintiffs and defendants surety and contractor was not an action based upon a Labor and Material Payment Bond but, rather, was based upon a Performance Bond (see Appellants' Brief, pp. 46-58 and Appellants' Reply Brief, pp. 29-34), the award over of the attorney's fees with relation to the electrical subcontractor and the drywaller must be reversed. There is no provision in that statute, nor any other, for the contractor and the surety to recover over against the owners the attorney's fees awarded to the subcontractors whom they failed and refused to pay. Such recovery over can only be obtained by pleading and proving a claim for consequential damages as has been discussed above.

C. Expansion of the Labor and Material Payment Bond statutes to Performance Bonds would be injudicious.

Plaintiffs have previously argued in their Brief that the attorney's fees provisions of §14-2-3 should not be expanded to include suits by an Owner against his prime contractor and surety under a construction contract and Performance Bond. Such an expansion would be in derogation of the common law rule and subject to the rule that statutes providing for attorney's fees should be construed strictly.

Further, this Court should be particularly careful not to write into the contractor's bond statute or the Performance Bond contract a provision permitting the successful party in a suit on a Performance Bond to recover attorney's fees. This would open the doors for any successful owner bringing suit on a Performance Bond to recover, in addition to the principal obligation, its attorney's fees. The bonding companies have specifically left such a provision out of their contract. No such provision appears in the statutes and even if it did it would be subject to strict construction. Nonetheless, the trial court made an award of attorney's fees as part of the costs in this case. This award is erroneous and should be reversed and there should be no attorney's fees award to either the appellant or respondent for the services of its attorneys below or on appeal.

In addition, the mere fact that the cases were combined for trial would not justify obliterating the distinction between

the essential elements of the causes of action pursued by the subcontractors and the claim made on the Performance Bond and the principal contract between the owners and the prime contractor.

D. The owners were awarded their costs against the subcontractors.

As has been noted, under §14-2-3 attorney's fees are awarded to the successful party and taxed as costs. The owners were the "successful party" in all of the suits brought by the subcontractors against them and the trial court awarded the owners their costs against those subcontractors. As this Court recognized a long time ago, in any lawsuit there can only be one "prevailing party" so far as costs are concerned. Checketts v. Collins, 78 Utah 93, 1 P.2d 950 (1931). Thus, it would be improper now, under the guise of the bonding statute, to assess against the "prevailing party" i.e. the owners, those attorney's fees awarded as costs to the subcontractors in their suits with Berg and the surety.

E. The clerk's notice appears to preclude an award under §14-2-3.

The notice prepared by the Clerk of the Supreme Court requests information on the issue of the award of attorney's fees as distinguished from those assessed as damages. Since an award under §14-2-3 is not assessed as damages but is taxed as costs, plaintiffs assume that the real area of inquiry by this Court is that of attorney's fees as consequential damages and not attorney's fees as costs under §14-2-3. If so,

defendants-respondents clearly would not be entitled to fees on appeal.

CONCLUSION

The contractor and surety ^{*under appropriate circumstances,*} may be entitled to an award below of attorney's fees as consequential damages; however, there is no pleading nor proof relating to that matter at this point in the litigation. In addition, such a theory of recovery would clearly preclude an award of attorney's fees to the contractor and surety below and would preclude an award of attorney's fees on appeal. Even if the award of attorney's fees below is held to have been based upon the statute, §14-2-3, a further award of attorney's on appeal would be precluded by the Florida rationale and the pass-through of the subcontractor's fees (some \$32,000.00) as "costs" would have to be reversed.

Plaintiffs respectfully submit that no theory that has appeared in the case so far would sustain an award of additional fees on appeal.

Respectfully submitted,

EARL D. TANNER & ASSOCIATES
Earl D. Tanner
J. Thomas Bowen

Attorneys for Plaintiffs,
Lignell and Todd

A P P E N D I X

the orderly prosecution of the work. In a like manner the plaintiffs failed to make timely progress payments to the electrical subcontractors, Comstock Electric and Murray Electric, and failed and arbitrarily refused to execute written change orders which caused Comstock Electric to quit and walk off the job and delay the construction of the project. Plaintiffs have failed to pay in full for the work performed and material furnished by said subcontractors, all of which acts of interference were contrary to the terms of the contract and caused the said subcontractors to file suit against the plaintiffs and also upon the payment bond issued by this defendant. Defendant denies the allegations of paragraphs 12 and 13.

COUNTERCLAIM

Defendant complains of the plaintiffs E. Keith Lignell and Marion H. Lignell, his wife, and Burton M. Todd and Phyllis W. Todd, his wife, and alleges as follows:

1. Defendant incorporates herein its answers to paragraphs 12 and 13 of Plaintiffs' Third Cause of Action.
2. Defendant furnished its performance and payment bond pursuant to Chapter 2 of Title 14, Utah Code Annotated, 1953. The statute provides as follows:

In any action brought upon the bond provided for under this chapter the successful party shall be entitled to recover a reasonable attorney's fee to be fixed by the court, which shall be taxed as costs in the action.
(14-2-3)

3. Plaintiffs still owe the subcontractors Copinga and Greenwood and Comstock Electric and Murray Electric a sum of money for the work performed by said subcontractors on the Incline Terrace Apartments, and plaintiffs further owe Berg Brothers Construction Company a sum of money for the work performed by the general contractor as alleged in their separate Complaints filed herein.
4. Pursuant to the provisions of 14-2-3, this defendant is entitled to recover a reasonable attorneys' fee to be fixed by the court which defendant alleges to be the sum of \$35,000 for attorneys' fees and expenses.

WHEREFORE, defendant Fidelity and Deposit Company of Maryland

Counterclaim of Surety

COUNTERCLAIM

Defendants Clifford M. Berg and William R. Berg, d/b/a Berg Brothers Construction Company complain of the plaintiffs E. Keith Lignell and Phyllis W. Lignell, his wife, and Burton M. Todd and Phyllis W. Todd, his wife, as follows:

1. Defendants incorporate herein their answers to paragraphs of plaintiffs' Third Cause of Action,

2. Defendants, Clifford M. Berg and William R. Berg, d/b/a Berg Brothers Construction Company as principals on the performance and payment bond furnished the same pursuant to Chapter 2 of Title 14, Utah Code Annotated 1953. The statute provides as follows:

"In any action brought upon the bond provided for under this chapter the successful party shall be entitled to recover a reasonable attorney's fee to be fixed by the court, which shall be taxed as costs in the action.

(14-2-3) "

3. Plaintiffs at the present time owe the subcontractors Coppage Greenwood and Comstock Electric and Murray Electric a sum of money for work performed by said subcontractors on the Incline Terrace Apartments. Plaintiffs further owe Berg Brothers Construction Company a sum of money for work performed by the general contractor as alleged in prior Complaints and Counterclaims filed herein,

4. Pursuant to the provisions of 14-2-3, these defendants seek to recover a reasonable attorneys' fee to be fixed by the court which they allege to be the sum of \$35,000.00 for attorneys' fees and expenses.

Defendants incorporate herein all affirmative defenses, cross-claims and counterclaims which have previously been alleged against the plaintiffs Lignell and Todd.