

1978

J.W. Broadwater v. Glen Van Tassell, Erma Van Tassell, His Wife, and Dick Van Tassell v. J.W. Broadwater and Jane Doe Broadwater, His Wife and Andrew R. Birrell, Jr., and Patricia J. Birrell, His Wife, and Joseph H. Shool and Jane Doe Shool, His Wife : Appellant's Reply Brief

Utah Supreme Court

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Recommended Citation

Reply Brief, *Broadwater v. Tassell*, No. 15319 (Utah Supreme Court, 1978).
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IN THE SUPREME COURT
OF THE
STATE OF UTAH

J. W. BROADWATER,

Plaintiff and Respondent,

vs.

GLEN VAN TASSELL, ERMA VAN TASSELL,
his wife, and DICK VAN TASSELL,

Defendants and Appellants.

GLEN VAN TASSELL, and ERMA VAN
TASSELL, his wife,

Third Party Plaintiffs,

vs.

J. W. BROADWATER and JANE DOE
BROADWATER, his wife, and ANDREW
R. BIRRELL, JR., and PATRICIA J.
BIRRELL, his wife, and JOSEPH H.
SHOOL and JANE DOE SHOOL, his
wife,

Third Party Defendants.

Case No. 15319

APPELLANTS' REPLY BRIEF

Appeal from the Judgment of the Second Judicial District Court
for Davis County, Honorable J. Duffy Palmer, District Judge

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FILED

MAR 10 1978

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APPELLANTS' REPLY BRIEF

ARGUMENT

Without belaboring the points raised in Appellants' initial

brief and Respondents' brief it suffices to say that the question of sufficiency of evidence and the discretion of the trial court in refusing to accept newly-offered evidence are so interwoven that they cannot be logically separated.

As has been stated previously the trial court was faced with two diametrically opposed stories. Van Tassell claimed that he had paid Broadwater the full amount of the obligation and even an excess. Broadwater, on the other hand, claimed that only a very small portion of the debt had been paid to him. Since there was no question as to the initial obligation incurred by Van Tassell as evidenced by the notes and mortgage, the sole question for determination was that of receipts--were the gasoline receipts offered by Van Tassell sufficient evidence to show payment of the debt?

Respondents in their brief emphasize that Van Tassell adamantly stated that the gasoline receipts were not signed by Broadwater until the amount of payment had been physically placed upon the receipt. (Respondents' Brief, pp. 6-7). The theory then continues that since Mr. Grube testified that his examination of the receipts showed that in all six cases of the receipts examined the signatures were placed before the payment notations that it was conclusive that Van Tassell must have altered the receipts after Broadwater had merely signed them for gasoline.

It should be noted, however, that only six of the fourteen disputed receipts could be examined by Mr. Grube. This left eight receipts with no examination. A review of the testimony by Mr. Van Tassell hardly shows that he was positive as to the order of the signatures but in fact stated that in some instances the gasoline would have been signed for by Mr. Broadwater and that the notations would be placed on the receipt after such signature. A few brief excerpts of the testimony show this fact.

Q. (By Mr. Fullmer) Okay now, back to these receipts. Did you ever get the receipt made out and signed and about to take it out and then the money was discussed?

A. That happened quite a few different times.

Q. So in a circumstance, when was this information about paying, receiving money from you to him be put on there?

A. Well, it was in the machine and while we were talking.

Q. So would his signature be on it or not?

A. His signature, when I gave him the-- no, his signature wasn't on it till I wrote it out and then we would sign it.

Q. But then for instance, you could tell if he had signed it before you put this, number 14, if he signed it before you put this \$2,500 on it or after, can you?

- A. No. Sometimes he got the gas and signed and then we would be talking and maybe I would pay him and maybe he would already have signed it. I wouldn't say that it couldn't have happened, but generally he would sign it after he got the money and stuff. It could have happened, I wouldn't say it didn't, but it was signed before it was ever taken out of the box and he had a copy of it. (Tr., p. 109).

Respondent cites page 137 of the transcript to support Van Tassell's sureness of the order of signature. (Respondent's brief, p. 7). A review of this testimony shows that Van Tassell was anything but sure.

- Q. (By Mr. Tibbals) Had you written that on there at the time Mr. Broadwater signed that receipt?

A. I did.

- Q. It was written on there at the time he signed it?

A. As far as I know, that's the way I remember. It's put on the machine and then he signed it and we would give it to him and he would sign on-- sometimes he may have signed it and I wrote it on there and gave him the machine or gave him the money.

- Q. Well, that becomes quite significant, doesn't it, because if he didn't put his name on there after you wrote the \$2,500 on there, he wasn't receipting for the \$2,500, was he? He was just receipting for the gas?

A. Well no, what he did was get the gas and then he would sign, might have signed it. I wouldn't say that he did or didn't, but then he would then

say, "Do you want to give me any money?" and sometimes I would give it to him and write it there. I couldn't say. Sometimes it had been signed before and sometimes after, but most of the time I would say, ninety-nine per cent of the time, he would sign it after I gave him the money. But, I can't remember exactly. There is a possibility. (Tr., p. 137).

Neither Broadwater nor Van Tassell disputed the fact that all signatures were made in the machine. Nor was there any dispute that the receipts contained three separate pieces of paper separated by carbons which were discarded at the time the three copies were removed from the machine and the perforated ends were broken. Testimony was clear that Broadwater either received a pink copy or a yellow copy of the invoice. Broadwater produced no copies of any receipts at the trial.

Van Tassell claimed that all the writing was done in the machine and that Broadwater accordingly signed it in the machine. If, as Respondent claims, Van Tassell altered the original white receipt after it had been removed from the machine and a copy given to Broadwater then he would also have had to have altered the second copy in order to show a consistent result. Unfortunately for Van Tassell the crucial yellow receipts concerning the fourteen payment entries were not available to him at the time of trial and were therefore not introduced into evidence. Mr. Grube testified that for the copies

to be aligned after they had been removed from the machine would have been extremely difficult and would have required someone of competence who knew how to use special equipment in order to make the copies consistent. (Tr., p. 177).

Certainly, the existence of a second duplicate copy of the disputed receipts and the admitted difficulty in duplicating such receipt out of the machine could have been a serious consideration for a trier of fact in that Mr. Breachwater produced no receipts contradicting the fourteen receipts in dispute.

Van Tassell after inadvertently discovering these crucial receipts after trial as explained in his affidavit of July 1, 1977 (R., pp. 437-440) attempted to offer these duplicate copies to the trial court for its consideration. (R., p. 441) This offer was rejected by the trial court who obviously had made up its mind and refused to examine this new evidence.

While Appellant Van Tassell realizes a great deal of discretion is left to a trial court in determining whether a new trial should be granted because of evidence it is also clear that the trial court must view the evidence objectively and cannot refuse such consideration of this new evidence. The trial court obviously believed that Van Tassell had purged himself on the stand concerning the receipts by the court's statement suggesting to the plaintiff that the County Attorney had been contacted. (Tr., p. 191). It thus stands to reason that

subsequent offers of proof were highly questioned by the trial court as a furtherance of this scheme.

There can be no doubt that had these duplicate copies been introduced at trial originally a serious question would have arisen as to Van Tassell's original story that the signatures and notations were done in the machine before being given to Broadwater. The failure of Broadwater to produce a single contradictory receipt in rebuttal would then give credibility to Van Tassell.

Appellant therefore submits that the omission of these documents together with those mentioned in the motion concerning checks and other receipts were prejudicial to Van Tassell and as stated in the affidavit could not have been produced at the trial. Appellant further submits that if a new trial were held these documents would have a substantial effect upon an impartial trier of fact and could be further analyzed by any experts either side might wish to call. For these reasons, the trial court erred in failing to conclude that these documents may have had a significant effect upon the outcome of the trial and in failing to grant a new trial so that such documents could be introduced.

For this reason, a new trial should be ordered to give Van Tassell the opportunity to present this evidence.

As argued in Appellants' brief in chief the court's de-

cision at trial was not supported by the evidence. This is especially true in two areas. First, attorney's fees and second, interest.

As to attorney's fees the court arbitrarily awarded approximately \$8,000 in attorney's fees to the plaintiff. (Tr. pp. 191-192). The Findings of Fact and Conclusions of Law prepared by plaintiffs' attorney repeatedly reflect the notation "a reasonable attorney's fee". (R., pp. 378-386). The judgment and decree of foreclosure also reflect the award of attorney's fees in excess of \$8,000.

The record is absolutely void of any evidence presented by plaintiff concerning reasonable attorney's fees. The record is also void of any stipulation or agreement allowing the court to make this conclusion based upon the court's own knowledge. The absence of any evidence to substantiate these attorney's fees requires a modification of the judgment vacating this amount.

This Court in F.M.A. Financial Corporation v. Build Inc 17 Utah 2d 80, 404 P.2d 670 (1965) was faced with an identical problem concerning the absence of evidence to support an award of attorney's fees. The Court stated that it is fundamental that a judgment be based upon findings of fact which in turn must be based upon the evidence. The Court acknowledged that judges have a special knowledge as to the value of legal ser-

vices and that if submitted upon stipulation a court may fix the amount of attorney's fees without formally hearing evidence. Without such evidenciary hearing or stipulation, however, this Court concluded that a judgment for attorney's fees must fail. The Court stated:

Any one of these would have provided an evidenciary basis for making the determination. However, it was an issue of fact which was denied. Thus it was a part of the plaintiff's case to which it had the burden of proving. Failing to offer proof of any character on this issue had the same effect as would the failure to offer proof as to any other controverted issue. There is nothing upon which to base a finding. The defendant's objection that the finding as to attorney's fees is not supported by any evidence is well-taken and the judgment must be corrected in that particular. (404 P.2d at 673-674).

While it is true that appellants did not dispute the existence of the notes and mortgages there is no amount established in the notes or mortgages concerning a reasonable attorney's fee. Plaintiff failed in its burden of showing what a reasonable attorney's fee was in reference to those notes and mortgages admitted into evidence. For this reason, the award of attorney's fees should be vacated.

Finally, the court granted judgment with interest at 8 per cent prior to the time of judgment. Even though the testimony of Broadwater was to the effect that Van Tassell defaulted all of Broadwater's obligations the court allowed 8 per

cent interest to be charged even though the notes specifically stated "legal" interest. Exhibits L, G, and E all refer to either "legal" or "legal rate" when speaking in terms of interest at default. The notes read as follows:

Any installments of principal and interest not paid when due shall, at the option of the legal holder hereof, bear interest thereafter at the rate of (legal) per annum until paid.

Only Exhibit J in the amount of \$4,500 specifically stated "eight" per cent per annum.

Since Section 15-1-1 defines the legal rate of interest before judgment as 6 per cent the court obviously erred in computing the 8 per cent rate. Thus, this Court should order recomputation of the interest as to those notes containing the legal rate amount and should modify the judgment accordingly. Peterson v. Western Casualty and Surety Company, 40 P.2d 769 (Utah 1967).

In summary, the trial court obviously chose to believe Broadwater's version of the story as opposed to Van Tassell's. This was his privilege. However, this belief could not prevent the court from objectively looking at new evidence not available at trial which could have had a substantial effect upon the court's decision had it been originally introduced.

The failure to give Van Tassell an opportunity to present this evidence anew to an impartial trier of fact was error.

Regardless of the other subjective areas of decision concerning the court's judgment and findings there can be no doubt that Broadwater failed to prove what a reasonable attorney's fee would be under the circumstances and failed to obtain a stipulation that the court could decide this question without evidence. Further, the court erred in allowing 8 per cent interest on obligations which clearly stated the legal rate of interest which is 6 per cent.

For these reasons, if the judgment is affirmed it should be modified accordingly.

Respectfully submitted,


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Attorney for Appellants