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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

J. W. BROADWATER, Plaintiff, vs. GLEN VAN TASSELL, ERMA VAN TASSELL, his wife, and DICK VAN TASSELL, Defendants.	Case No. 15319

VAN TASSELL'S BRIEF ON REHEARING

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

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FILED
JUL - 5 1978
Clerk, Supreme Court, Utah

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VAN TASSELL'S BRIEF ON REHEARING

INTRODUCTION

On April 11, 1977 a trial was held before the Honorable Duffy Palmer in Davis County concerning this action. On May 16, 1977 the trial court's Findings of Fact and Conclusions of Law and Judgment were entered. This appeal was taken from these Findings and Judgment.

On September 30, 1977 Van Tassell filed his brief with this Court. On October 26, 1977 respondent filed his brief. On March 9, 1978 Van Tassell's reply brief was filed with this Court. Shortly thereafter, respondents filed a Motion to Strike the Reply Brief.

On March 16, this matter was argued before this Court by Mr. Tibbals and by Mr. Cook. At that time Mr. Tibbals renewed his Motion to Strike the Reply Brief and a thorough discussion [illegible] as to the content of the reply brief and its relation-

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ship with the arguments raised by Van Tassell.

On April 12, 1978 this Court in a unanimous decision affirmed the lower court's findings but reversed as to the matter of attorney's fees.

On May 1, 1978 respondent petitioned for a rehearing and submitted his brief in support. On May 4 this Court granted respondent's Petition for Rehearing and this matter is now before this Court on rehearing.

Since there is an absolute void in Utah case law concerning the procedure to be used during a rehearing, inquiries were made by both parties to this Court and its Clerk concerning certain questions. Based upon these answers Van Tassell in this action assumes that he has now become the equivalent of a respondent because it is Broadwater's burden to show that the original decision was incorrect. However, to eliminate confusion as to the status of the parties no reference will be made in this brief to either appellants or respondents since the parties are obviously different depending upon which stage of the proceeding is being discussed.

Van Tassell also assumes that the only issue before this Court is the propriety of its previous decision in striking the attorney's fees from the judgment and that other matters raised by Van Tassell in the previous hearing are not arguable in this proceeding.

Van Tassell has taken this opportunity to elaborate on

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his understanding at this juncture for the benefit of Broadwater and this Court so that a correction of these assumptions may be made before oral argument if necessary.

RELIEF SOUGHT ON REHEARING

Van Tassell seeks ratification of the previous decision reversing that part of the judgment relating to the awarding of $8,500 in attorney's fees.

ARGUMENT

POINT I

BROADWATER WAS NOT DENIED DUE PROCESS OF LAW BY VAN TASSELL'S FAILURE TO OBJECT TO THE AWARD OF ATTORNEY'S FEES IN THE LOWER COURT.

Broadwater in his rehearing petition makes the following statement:

> If the defendant's counsel did not consider the record supported the finding of the court he was obliged under the existing precedent to make a timely objection to the court's action and thereby afford counsel the opportunity to present additional proof on that issue. (Rehearing Petition, p. 12).

Broadwater further comments:

> For counsel for the defendant to acquiesce in the action of the District Court in allowing attorney's fees (R., p. 464; Tr., p. 191) and not timely raise any issue thereon when had the matter been raised it could have been forthwith corrected is to permit the defendant to deprive the plaintiff of a valuable contract right by cupidity. This is neither fair nor just. (Rehearing Petition, p. 13).

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These statements must be considered remarkable since they seem to imply that Van Tassell was obligated to correct any errors made by Broadwater during the trial so that Broadwater would have an opportunity to sustain his burden.

Broadwater in his "Respondent's Brief" admits that the appeal in this action is from a "trial". (Respondent's brief p. 3). Under Broadwater's theory any party in a trial proceeding is obligated to inform the other party that he has failed to prove an essential part of his case so that the failing party has not been denied due process.

Obviously, such an argument is absurd and Van Tassell was perfectly justified in "remaining silent" as to the evidence relating to attorney's fees in the lower court since this was not a matter where formal objection was required. During the trial it would have been ridiculous for Van Tassell to enter an objection that Broadwater had failed to put on evidence concerning the proof of attorney's fees. No such objection exists.

After the Findings of Fact were entered by the trial court Van Tassell had a choice of either bringing this failure to the lower court's attention or taking it directly on appeal. Rule 52(b) of the Utah Rules of Civil Procedure specifically provides:

> Upon motion of a party made not later than ten days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. <u>When findings of fact are made and actions</u>

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tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the District Court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial. (Emphasis added).

It was, therefore, completely discretionary upon Van Tassell whether to raise the sufficiency of the evidence concerning attorney's fees before the trial court. Broadwater's arguments that he has been denied "an opportunity" to argue this issue is without merit since under Utah Rules there is no automatic right that such issue be presented before the lower court.

Broadwater during oral argument and in his Petition for a Rehearing blames Van Tassell for his own failure to produce evidence as to the reasonable value of attorney's fees or to put a stipulation into the record that such evidence would not be necessary. He continually states that it was agreed by counsel and by the parties that such evidence would not be necessary. Van Tassell disputes this fact and states for the record that no such stipulation was ever entered into on behalf of Van Tassell.

This Court in Watkins v. Simones, 385 P.2d 154 (Utah 1963) (cited by Broadwater in his Petition for Rehearing, p. 9) stated that a stipulation not in the record cannot be considered by this Court. This Court stated:

> Nor is there any suggestion that the plaintiffs were in any way prevented from making and bringing to this Court any record they

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have desired.. . .In any event, this Court cannot consider facts stated in the briefs which may be true but absent in the official record.

As stated by Justice Crockett in the original opinion in this matter:

> This Court has consistently held that such an award (attorney's fees) just like any other aspect of a judgment, must have a foundation in evidence and a finding based thereon. Plaintiff fails to meet that burden.

The opinion is supported by numerous authorities which have held that it is the burden of the party seeking attorney's fees to affirmatively prove or to obtain stipulations as to the reasonable value of such fees. In Brasher Motor and Finance Co. v. Anderson, 433 P.2d 608 (Utah 1967) this Court stated the following:

> The Court awarded to the plaintiff attorney's fees based upon the promises set forth in the notes issued by the corporate defendant. It does not appear that there was evidence to support the award of attorney's fees nor does it appear that the defendants agreed that the Court might fix the amount of such attorney's fees. In view of the prior decisions of this Court it would appear that the granting of attorney's fees based upon the record in this case is error. Id at 609-610.

In Butler v. Butler, 461 P.2d 727 (Utah 1969) this Court stated that it has consistently held that an attorney's fee may not be awarded where there is nothing in the record to sustain the award either by way of evidence or by stipulation of the parties as to how the court may fix it.

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Finally, in Financial Corporation v. Byld, 404 P.2d 670 (Utah 1965) this Court made the following pertinent statements:

> It is fundamental that the judgment must be based upon findings of fact, which in turn must be based upon the evidence. This rule has been followed by this Court and other jurisdictions in regard to awarding attorney's fees. Because both judges and lawyers have special knowledge as to the value of legal services, this is not always required to be proved by sworn testimony. It is sometimes submitted upon stipulation: as to amounts; or that the Judge may fix it on the basis of his own knowledge and experience; and/or in connection with reference to a Bar approved schedule. Any one of these would have provided an evidentiary basis for making the determination. However, it was an issue of fact which was denied. Thus it was 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 objections 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. Id. at 673-674.

The cases cited by Broadwater in his Petition for Rehearing do not contradict these well-established Rules of Civil Procedure and evidentiary requirements. In the Huber case and the North Salt Lake case (Broadwater's Petition for Rehearing, p. 4) matters other than the sufficiency of evidence were being attacked and the Court correctly stated that in such cases objections must be raised in the lower court.

Likewise, in the Pettingill case (Broadwater's Petition

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for Rehearing, p. 6) the issue there concerned instructions to the jury which necessarily involved objections to the trial court at the time they are made. This again is a far cry from sufficiency of the evidence and from Rule 52(b) which specifically allows no objection to be made.

The Blair Enterprise case (Broadwater's Petition for Rehearing, p. 8) states the rule concerning the necessity of proving attorney's fees and then states:

> The trial court made findings thereon based on evidence adduced, as stated in the judgment, and although the record fails to disclose the evidence, no objection was leveled against them, so we accept them as true taken under familiar rules of review. Id. at 1295.

A footnote following the word "evidence" in this quotation states the following, "No one designated it on appeal." Id. at 1295.

In the Blair Enterprise case it is apparent that none of the adverse parties objected to the reasonableness of the attorney's fees at any stage in the appellate proceedings and that this Court therefore ruled that such objection had been waived. Van Tassell argues, as will be stated later on in this brief, that the sufficiency of this fee was impliedly assigned as error and that in any case it was brought to the Court's attention prior to the decision in this matter.

The Johnson case (Broadwater's Petition for Rehearing, p. 9) was a Montana case involving a counterclaim for attorney's

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fees and concerned the issue of whether any attorney's fee was legally required to be paid. In this case, however, there was no dispute that should Broadwater prevail in the action a reasonable attorney's fee was legally required. It is interesting to note that a prior Montana case cited in the Johnson decision again reiterates the requirement of evidence as to the amount and sufficiency of the attorney's fee. The Montana Supreme Court in Crncevich v. Georgetown Recreation Corporation, 541 P.2d 56 (Mont. 1975) stated the following:

> [I]n contested cases we are inclined to follow those states requiring the introduction of proof from which a reasonable fee may be determined. To award a fee in such a case without proof would be to disregard the fundamental rules of evidence. An award of fees, like any other award, must be based on competent evidence. Furthermore, the proper determination of a legal fee is central to the efficient administration of justice and the maintenance of public confidence in the Bench and Bar. Because of respondents' failure of proof the award of fees was properly denied. Id. at 59.

Finally, the Gardner case cited by Broadwater (Petition for Rehearing, p. 9) concerns an award of $150 in a divorce action. There the court held that evidence as to a reasonable attorney's fee was not necessary when the court awarded "only a modest fee". Certainly, it cannot be said that $8,500 fits into this "modest fee" category.

Broadwater's arguments throughout his Petition for Rehear- [illegible] Judge Palmer was qualified to evaluate a reasonable

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attorney's fee are irrelevant. It was Broadwater's obligation to show in the record that a stipulation to that effect had been approved by Van Tassell and his failure to do so clearly precludes him from now relying upon Judge Palmer's experience or knowledge of the case.

In summary, Broadwater does not have any due process right to correct errors committed by himself because Van Tassell failed to point out such errors at the time of trial or subsequently. At the conclusion of a trial, whether it be tried before the court or a jury, evidence must be sealed and laid to rest unless in those rare cases the trial court grants a new trial because of newly discovered evidence or other extraordinary circumstances.

Broadwater is not entitled to now go back to the trial court and reopen the trial as to the issue of attorney's fees any more than he would be entitled to reopen it as to the data regarding the amounts of the notes themselves.

For these reasons, Broadwater's arguments that he was harmed at the trial level are without merit and should be rejected by this Court.

POINT II

BROADWATER WAS NOT DENIED DUE PROCESS OF LAW ON APPEAL OF THIS CASE SINCE THE SUFFICIENCY OF THE EVIDENCE REGARDING ATTORNEY'S FEES WAS RAISED BY VAN TASSELL AND BROADWATER WAS GIVEN SUFFICIENT OPPORTUNITY TO CHALLENGE THIS POINT AND WAS NOT PREJUDICED OR HARMED IN ANY WAY.

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Broadwater in his Petition for Rehearing argues that the reply brief filed by Van Tassell contained new issues not before raised in appellant's main brief. (Petition for Rehearing, pp. 10-13). He further claims that such alleged raising of the issue violated his right to due process in that he was denied a hearing as to the problem of attorney's fees.

Such contention is without merit. Rule 75(d) of the Utah Rules of Civil Procedure states that no assignment of errors is necessary. Rule 75(p)(2) requires an appellant's brief to state the argument under separate headings insofar as such separation is practicable. Van Tassell in his brief in chief under Point I stated, "The Court's Decision at Trial was not Supported by the Evidence Presented". This heading certainly was sufficient as an assignment of error to attack the sufficiency of evidence relating to all the damages including attorney's fees. Questions on appeal concerning the sufficiency of evidence do not require the specifics of other issues and can be plead more generally. Ronse v. Favre, 103 P.2d 26 (Colo. 1940).

While admittedly Mr. Fullmer did not mention that portion of the court's decision concerning attorney's fees such omission is not fatal given the context of this case. The question of sufficiency of evidence concerning the attorney's fees is an extremely simple one. Broadwater could not now complain of any

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lack of due process or notice had Fullmer simply made the statement, "There was insufficient evidence to support the award of attorney's fees by the trial court."

There is nothing else that Van Tassell could do in his main brief to bolster this statement since the absence of evidence cannot be cited. As Justice Crockett stated in In Re Lavelle's Estate, 248 P.2d 372 (Utah 1952):

> The sketchiness of appellant's brief in this regard is excused in some degree by the difficulties inherent in attempting to point out specifically wherein there is "no evidence" to support a given finding. An appellant cannot be asked to go through the transcript, showing how the testimony reported on each page does not support the finding. Yet, insofar as it is practicable, he must detail, with citations to the record where appropriate, the particulars wherein the evidence touching the finding is inconsistent therewith or is not of enough moment to sustain it. Id. at 375.

Since there was no evidence of a stipulation or evidence as to the reasonable value of the attorney's fees in the record, Van Tassell could do no more than to make this simple statement. While he neglected to do so specifically in the main brief he stated the following in the reply brief:

> 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. Van Tassell Reply Brief, p. 8.

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Mr. Tibbals during the oral argument admitted that there was nothing in the record showing a stipulation as to the reasonableness of attorney's fees or evidence proving this fact. Broadwater has cited no evidence in his Petition for Rehearing to the contrary. Thus, Broadwater can show no prejudice by the fact that the statement as to attorney's fees was not specifically mentioned until the reply brief even though the question as to sufficiency of evidence had been generally raised in the main brief.

Broadwater argues he had no opportunity to refute the attorney's fee question raised in the reply brief but can offer no refutation on the merits. Broadwater is attempting to utilize the general appellate procedural rule concerning briefing to eliminate a legitimate question before this Court which was generally raised in the appellant's brief and in which no showing of prejudice has resulted. Broadwater had sufficient opportunity to cite any evidence to the contrary at the oral argument and was totally unable to do so just as he would have been unable to do so in the respondent's brief.

Even if it were conceded that the appellant's brief did not properly raise the question of sufficiency of evidence, courts in numerous jurisdictions have held that an appellate court has discretion to overlook procedural infirmities in ap- [illegible] situations.

In Kingsbury v. Kingsbury, 379 P.2d 893 (Ariz. 1963) the

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defendant argued that the assignment of errors prepared by the appellant was wholly inadequate because it did not distinctly specify each ground of error relied upon as required by the rules. The Supreme Court of Arizona stated the following:

> Strictly speaking we are of the opinion that defendants' contention has merit. But these assignments of error, though poorly drawn, may be taken as an attempt to urge the insufficiency of the evidence to sustain the "Findings of Fact and Judgments". Therefore, we will consider plaintiff's assignments as sufficient to present this issue to the Court, even though it will require a great deal more time and effort to search out the grounds relied upon and the evidence relating thereto. Id. at 894.

The Supreme Court of New Mexico in Henderson v. Texas New Mexico Pipeline Company, 131 P.2d 269 (N.M. 1942) was faced with a similar argument that the procedural rules of the court had been violated. That court stated the following:

> It has been suggested also, by appellee, that Section 6 of Rule XV, Supreme Court Rules, has been violated by appellant in that he failed to set out and state in his brief the substance of all evidence bearing upon the proposition, with proper references to the transcript, in support of his contention that the Findings of Fact are not supported by substantial evidence. It is true that appellant has not observed the rule, exactly, in this respect. He does not set out the substance of all evidence, bearing upon the proposition, although it might be said that he has omitted none of it favorable to his position.. . .We cannot say that appellant's challenge to the evidence should, under the particular circumstances, be ignored, although a strict adherence to the

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> rule might so require. Yet, <u>because of the simplicity of the question at issue, and its importance to the parties, we pass the question of rule violation, if it be that in fact, to consider the case upon its merits</u>. Id. at 271-272. (Emphasis added).

The Supreme Court of Colorado in <u>Neilson v. Bowles</u>, 236 P.2d 286 (1955) stated that the court on its own motion may consider errors not raised by either party if such consideration is necessary to do justice. Likewise, the Supreme Court of Alaska in <u>Northern Corporation v. Chugach Electric Association</u>, 523 P.2d 1243 (Ala. 1974) stated: "We are always concerned with notions of equity and fairness, regardless of whether they are presented to us in argument." <u>Id</u>. at 1245. Also, the Supreme Court of Oregon in <u>State v. Hodes</u> noted that the Supreme Court had discretionary power to notice errors even though not assigned if such examination would be in the interest of justice.

Finally, in <u>Bardeen v. Commader Oil Company</u>, 119 P.2d 967 (Ct. App. Cal. 1941) the California appellate court held that a reviewing court is always at liberty to decide the case upon any point which proper disposition may seem to require, whether brought to the court's attention by counsel in the reply brief for the first time or not.

Thus it can be easily seen from the preceding cases that the Supreme Courts of numerous states do not strictly adhere [illegible] procedural rules in cases where such procedure would do injustice to the parties. Van Tassell, by alleging insuffi-

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ciency of the evidence relating to attorney's fees did not preclude Broadwater from arguing the merits of this contention nor prevent him from "having his day in court". The issue was initially raised by the general allegation of insufficiency of evidence and was specifically referred to in the reply brief. Broadwater was not in any way prejudiced by his failure to respond to this point in his respondent's brief.

Van Tassell challenges Broadwater during this rehearing to produce any evidence in the record which would have changed the result of this Court's decision authored by Justice Crockett. Van Tassell vigorously contends that this Court did not misconstrue or overlook any material fact or facts, base its decision on some wrong principle of law, or misapply or overlook something which would materially affect the results. Cummings v. Nielson, 129 P. 619 (1921).

Broadwater was not denied due process of law during the appellate proceedings and was able to effectively present any argument in refutation to this Court upon oral argument. While it is conceded by Van Tassell that in many cases the failure to adequately detail the error claimed may result in prejudice to the opposing side this is surely not the case in an issue as simple as to whether there was evidence supporting the court's award of attorney's fees.

It would be extremely unjust and inequitable to all ...

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Broadwater to escape his failure to prove attorney's fees merely because of alleged inartful pleading by Van Tassell when no prejudice is shown on the mere claim that Van Tassell did not clearly set forth his assignment of error.

CONCLUSION

Broadwater in his Petition for Rehearing urges this Court to reverse itself because of a failure of Broadwater to receive due process of law. Van Tassell submits that Broadwater was given due process of law in that a trial was held in which he obviously emerged the victor. For whatever reason, he failed to prove one element of his damages which was that of reasonable attorney's fees. He argues that Van Tassell should have warned him of this error and should have given him opportunity to correct his mistake.

Van Tassell was not obligated to warn Broadwater of his error, was not obligated to object during the trial to this omission, and was not obligated to raise the insufficiency question before the trial court since Rule 52(b) specifically allows a party discretion without penalty. Thus, Broadwater suffered no loss of due process at the trial court level.

Likewise, Broadwater was sufficiently apprised of Van Tassell's claim by his first assignment of error in his main brief. But even if it were assumed that this statement was insufficient [illegible] had sufficient opportunity to argue the existence of

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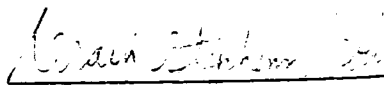
any evidence at the oral argument, but could not do so because of its absence. Broadwater is now attempting to rely upon a procedural rule of this Court concerning briefing to eliminate the substantial right of Van Tassell in claiming that the trial court committed error in granting a judgment where no evidence was introduced to support it.

This Court was correct in its original decision and under its equitable power this Court can review any question in an appeal whether presented by the parties or not. As such, therefore, the decision authored by Justice Crockett should be re-affirmed.

Respectfully submitted,



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