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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 : Plaintiff-Respondent's Reply To Van Tassell's Brief On Re-Hearing

Utah Supreme Court

Tibbals & Staten; Attorneys for RespondentBoyd M. Fullmer; Attorney for Appellants

IN THE SUPREME COURT
OF THE
STATE OF UTAH

J. W. BROADWATER, Plaintiff and Respondent, vs. GLEN VAN TASSEL, 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

PLAINTIFF-RESPONDENT'S REPLY
TO VAN TASSELL'S BRIEF ON RE-HEARING

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

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GLEN VAN TASSELL and ERMA VAN TASSELL, his wife, Third Party Plaintiffs,	:	Case No. 15319
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J. W. BROADWATER and JANE DOE BROADWATER, his wife, and ANDREW BIRRELL, JR., and PATRICIA J. BIRRELL, his wife, and JOSEPH H. SHOOL and JANE DOE SHOOL, his wife, Third Party Defendants.	:	

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AUTHORITY FOR FILING OF REPLY

Since the Rules of Civil Procedure do not cover specifically

the procedures in the Supreme Court once a re-hearing has been granted by the Court, counsel for both the Appellant and Respo... requested advice on procedure from the Court. The procedure was verbally agreed upon with Chief Justice Ellett. The attorney f... Van Tassell was granted until the 3rd of July within which to file his brief in reply to the brief of Broadwater on the petit... for re-hearing. It was agreed further that the Respondent Broadwater would have until the date of oral argument, which was scheduled to be July 17th at 9:00 a.m., in which to present to the Supreme Court any reply which the Respondent Broadwater might deem necessary to the brief of Van Tassell. This reply is accordingly submitted.

DESIGNATION OF PARTIES

Throughout this reply, J. W. Broadwater will be desi... herein by name or as Respondent. The Van Tassells will be refe... to herein by name or as Appellants.

REASON FOR REPLY TO APPELLANT'S BRIEF ON RE-HEARING

Examination of the brief submitted by counsel for Mr. Van Tassell, the Appellant, disclosed a number of inaccura... and assumptions which cannot be substantiated in the record. T... may well be that this stems from the fact that Craig Stephens Cook, present counsel, did not participate in the proceedings

at any time before the lower court. Mr. Cook's first appearance in this matter was in connection with the filing of the Reply Brief. For the purpose of clarification and limitation of the problem before the Court, Petitioner-Respondent submits this reply.

ARGUMENT

Point I

THE APPELLANT CONCEDES RESPONDENT IS ENTITLED TO ATTORNEY'S FEES AND SEEKS AVOIDANCE SOLELY ON TECHNICALITIES, WHICH ARE IMPROPERLY RAISED BEFORE THIS COURT. NO CLAIM IS MADE THAT THE ATTORNEY'S FEES ARE NOT REASONABLE.

The inherent weakness of the position taken by Appellant is made manifest by the statement appearing on Page 9 of Van Dassell's Brief on the Petition for Re-Hearing:

> "In this case, however, there was no dispute that should Broadwater prevail in the action, a reasonable attorney's fee was legally required."

Throughout the Brief filed by Appellant, no attack was levied upon the reasonableness of the fees awarded by the District Court. Wherein then does any complaint lie over the fees awarded by the District Court? The concession that it was a legal requirement that the fee be awarded makes academic the discussion, which the Appellant now seeks to force upon this Court. The determination of the fee, if legally required, in such cases has always been made either based upon a percentage of the amount of the foreclosure as was recognized in the Bar Fee Schedule in 1959,

approved by the Third Judicial District Court as follows:

> "The following schedule of attorney's fees has been adopted by the Third Judicial District Court as of December 1, 1959, in default cases presented without proof as to the reasonableness of attorney's fees in actions for the collection of money . . ."
>
> "(Notes, Mortgages and Contracts That Are Supported By a Mortgage or Lien.)

The first	$ 100.	50%	$ 50.00	$ 100.	$ 50.00
The next	400.	33 1/3%	133.00	500.	183.33
The next	500.	25%	125.00	1,000.	308.33
The next	1,000.	15%	150.00	2,000.	458.00
The next	18,000.	10%	1,800.00	20,000.	2,258.33
Above	20,000 no fee is set				

> NOTE: It is recognized that a fee in foreclosures of Mortgages may be on a noncontingent or guarantee fee basis, and the usual factors of amount and time involved, and complexities, etc., may be considered in determining a reasonable fee.
>
> Minimum Fee for Foreclosure of Mortgage on Real Property.....$500.00."

or, it has been based upon the Court's own review of the proceedi taking place before it with such additional testimony or evidenc as the Court might require to facilitate its determination of th fee. The assumption made by the Appellant that counsel for Broadwater erred in not having set forth specific testimony on the amount of the attorney's fees cannot be justified. It is tr that in the portion of the record of this case, which has been presented to the Supreme Court, no specific Stipulation regardi attorney's fees by counsel for Van Tassell appears. Can it be said that simply because this item does not appear in the recor

presented that such a stipulation or concession was not made? We think not. The conduct of the Court and of counsel clearly reflects that the Court was satisfied of its capacity to pass upon the attorney's fees and did so. Whether this capacity was conceded expressly by counsel for Van Tassell or whether it arose solely from the fact that the proceedings all took place before the Court, that the Court record was replete with the work which had been done by counsel, and, therefore, under the doctrine enunciated by this Court in the Blair case, Blair Enterprise v. M. B. Supertire, 28U 2d 192, 499 P2d 1294, it bacame unnecessary to introduce further evidence on this matter should not be a basis for determination of the rightof Mr. Broadwater to recover attorney's fees. It must be remembered that the original pleadings, in the Complaint set forth over the signature of plaintiff's counsel, plaintiff's statement of what constituted a reasonable attorney's fee. This was traversed in the form of a general denial. At the informal conference in the judges chambers immediately before the trial, between counsel and the Judge as to the issues upon which evidence would have to be presented, no requirement was made by the Court or by counsel for Mr. Van Tassell that any testimony would be required on attorney's fees. As more fully stated in Petitioner's

Brief in Support of the Petition for Re-Hearing, counsel for Van Tassell raised no objection to the elimination of attorney's fees from the designation of issues upon which testimony had to be taken or evidence presented at trial. The conduct of counsel and of the Court is consistent with the recognition by all parties of the power and capacity of the Court to determine this issue without additional testimony. It is significant that counsel for Van Tassell in his reply to the petition attempts to distinguish the Blair Enterprise case from the instant matter by contending that:

> "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's Brief on Re-Hearing, Page 8)

Examination of the Brief filed in the Supreme Court of the State of Utah by the Appellant in the Blair case reflects that Point II of the Brief was:

> "The trial court erred in granting sammarily the defendant's claim for attorney's fees without eliciting testimony thereon."

In support of this point, counsel there stated at Page 11 of its Brief filed in the Supreme Court:

> "In the present case, there was no evidence introduced pertaining to the reasonableness of the attorney's fees claimed."

Manifestly, therefore, the statement of counsel for Van Tassell that none of the parties had objected at any stage

the appellate proceedings is not correct. In the record on appeal in that case, no testimony was contained or set forth in support of the attorney's fees. The recital in the Findings of Fact that:

> "Testimony having been presented to the Court that a reasonable attorney's fee, which accrued from enforcing this agreement or in pursuing the remedy afforded to the defendant, Alvin I. Smith, is the sum of $1,500.00."

is surplusage. The Court was not required to make any findings that testimony had been offered. The key part of the finding, which was sustained by this Court was exactly the same as the key finding in the instant case:

> "The Court further finds that the sum of $1,500.00 is a reasonable attorney's fee."

In the instant case, the Court, in Findings 7, 10, 13, 18, 22 and 25, specifically found that by the express terms of the Note and Mortgage, a reasonable attorney's fee was to be allowed and then found that a reasonable attorney's fee was in the amount set forth in each of these Findings. (See Petitioner's Brief in Support of Plaintiff-Respondent's Petition for Re-Hearing, Pages 7 and 8, record 380 through 384).

We believe that the action taken by the District Court in this case supports the same treatment as that afforded in the Blair Enterprise v. M. B. Supertire case, 28 Utah 2d 194; 499 P2d 1294. We direct the Court's attention to the statement made by the Supreme Court in the Blair case:

> "The real estate purchase contract provides that the

defaulting party shall pay all costs and expenses including a reasonable attorney's fee. The trial court awarded the Respondent Alvin I. Smith judgment against the plaintiff for the sum of $1,500.00 as attorney's fees accrued from enforcing the contract. This Court has held unless the parties agree otherwise, the Court is obliged to take evidence on the issue of reasonableness of the attorney's fees and to make findings thereon . . . 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 levelled against them, so we accept them as true taken under familiar rules of review." (Emphasis added)

So in this case, the trial court made findings based on the evidence adduced at the trial and they should be accepted as true under the familiar rules of review.

Point II

THE COURT HAS THE INHERENT POWER AND CAPACITY WHERE THE PROCEEDINGS TAKE PLACE BEFORE IT TO DETERMINE AND ALLOW A REASONABLE ATTORNEY'S FEE BASED ON THE RECORD.

The Court's attention is directed to an annotation appearing in 18 ALR 3d at Page 733 on the subject:

"NECESSITY OF INTRODUCING EVIDENCE TO SHOW REASONABLENESS OF ATTORNEY'S FEES WHERE PROMISSORY NOTE PROVIDES FOR SUCH FEES . . ."

The editor's comments in this annotation at Page 735 we believe worthy of note:

"There seems to be no doubt that a court may take evidence relative to the reasonable value of attorney's fees in relation to a promissory note,[1.5] nor could it be seriously argued that a plaintiff may not present evidence to support his claim as to the reasonableness of the attorney's fee;[2] but the question here under discussion is whether it is necessary to introduce evidence of such value.

Two related, but not entirely identical problems come within the ambit of this annotation. The first is

whether it is necessary to introduce evidence to show the reasonableness of an attorney's fee claimed in an action on a promissory note where the note provides for the payment of a reasonable attorney's fee or provides for the payment of an attorney's fee without specifying the amount thereof in any manner. Since the note in such a case specifically leaves open the question of what amount of attorney's fee is recoverable, this is generally held to be a fact question which can be determined only after the introduction of evidence to support the claim for a fee.[3] There are, however, a number of jurisdictions which hold that the trial judge, by the nature of his position and experience, is best qualified to determine what constitutes a reasonable fee, and therefore need not admit, and is not bound by if he does admit, evidence of the reasonableness of such fees.[4]" (Emphasis added)

In support of footnote 4, the annotation cites cases for the proposition that where a promissory note provides for payment of reasonable fee or provides for the payment of an attorney's fee without specifying the amount thereof in any manner, the trial court may decide what constitutes a reasonable fee without any resort to evidence. Such decisions are generally based on the fact that the trial judge, in view of his experience on the bench and at the bar is best qualified to make the determination of reasonableness. The annotating authority cites in support of this proposition the case of Pitcher v. Balts, 242 Arkansas 625 414 Southwestern 2d 859 and the cases of Baker v. Eiler's Music, 175 California 652 166 Pacific 1006, Mann v. Mann. 76 California Appellate 2d 32 172 Pacific 2d 369, Marsh Wall Products, Inc. v. Henry Marcus Building Specialities, 162 California Appellate 2d 371 328 Pacific 2d 259. The California cases particularly point out that where the note provides for the payment of a reasonable

attorney's fee to be fixed by the Court or similar language such as a reasonable attorney's fee if suit is commenced to enforce payment, etc. The trial court is thereupon vested with the auth to determine the fee in its discretion and without the introduction of any direct evidence upon the matter and that such a determination will be reversed only for an abuse of discretion. A number of other cases are cited including one in the State of Washington, Bird v. Shoning, 138 Washington 187 244 Pacific 381 in support of this general proposition. We believe the princip enunciated in this annotation is supported by the case of Anders Anderson, 54 Utah 309, 181 Pacific 168 where the Supreme Court said:

> "We respectfully submit that had testimony of one of the attorneys for the Petitioner-Respondent taken the stand in the lower court and testified as to attorney's fees, this Court on appeal would have held that the lower court was not bound to accept that testimony and could have found otherwise based upon the record before it."

Under such circumstances, why does not the trial cour have jurisdiction to determine the attorney's fees initially, without the testimony of the attorney, particularly when the plaintiff's point of view as to the reasonableness of attorney's fees is already expressed in the Complaint duly signed by counse To require testimony before fees can be allowed and then concede that the Court can ignore the testimony and determine the fees

from the record creates an anomoly. We submit that where, as here, the case was tried to the Court, the motions and other matters were before the Court, testimony should only be required if the Court requests it as an aid to the Court in determining the attorney's fees to be allowed.

Point III

THE APPELLANT'S BRIEF DID NOT CONFORM TO THE RULES OF CIVIL PROCEDURE AND CORRECTLY RAISE BEFORE THE SUPREME COURT THE ISSUE OF SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE AWARD OF ATTORNEY'S FEES AND THE MATTER WAS NEVER PROPERLY BEFORE THIS COURT.

In the Argument contained in Point II of Van Tassell's Brief on Re-Hearing commencing at Page 10 of said document, an effort is made to justify the failure of Mr. Fullmer as counsel for the Appellant to comply with the provisions of 75 P (2), Utah Rules of Civil Procedure. Counsel contends that the language of the Appellant's Brief, wherein it was stated:

> "The Court's decision at trial was not supported by the evidence presented . . ."

was a sufficient notice to the Court and to all concerned of the contention subsequently raised before the Supreme Court for the first time in the Reply Brief that there was not evidence to support the award of attorney's fees. The language did not signify this in the lower court. In his motion for new trial, Mr. Fullmer, attorney for Van Tassell stated that the motion was based upon Rule 59, Utah Rules of Civil Procedure, subparagraphs

4, 6 and 7. Paragraph 6 under Rule 59 is:

> "Insufficiency of the evidence to justify the verdict or other decision, or that it is against the law."

The argument on the new trial and the subsequent appeal to the Supreme Court made no mention whatever of attorney's fees. Neither this Court nor the lower court was at any time put on notice of the contention made by the Appellant.

Mr. Cook, author of the Reply to Petitioner's Brief on Re-Hearing, has no difficulty in finding that the failure to have any person take the stand and testify at the trial as to what he considered to be a reasonable attorney's fee was fatal to the award of attorney's fees by the lower court. However, Mr. Cook excuses Mr. Fullmer and does not suggest that any sanctions should be imposed by the Court because Mr. Fullmer as counsel for Van Tassell failed in the court below or in his Brief on appeal to raise the case of insufficiency of the evidence to substantiate the attorney's fees. It must be remembered that Mr. Cook, in a Reply Brief filed in violation of the Supreme Court rules, for the first time raises the issue on attorney's fees. It would seem that in Mr. Cook's view, Mr. Fullmer's error, if in fact it was an error, in raising the issue of attorney's fees is excusable. The error of counsel for the Respondent in failing to offer testimony on the issue of attorney's fees cannot be excused. We submit this is manifestly unfair, inequitable and unjust and if pursued results in the loss of an important and valuable contract

right held by Mr. Broadwater, the Respondent, for no substantiative reason. In no other area than attorney's fees would a technical deficiency such as that claimed to have occured would be allowed to deprive a litigant of a valuable legal right.

CONCLUSION

The Appellant Van Tassell, having conceded the legal necessity for awarding attorney's fees to Respondent Broadwater and never having raised any question with regard to the reasonableness of the fee allowed, deals in semantics when he relies on an apparent omission in the record to deprive the Respondent of this valuable contract right. Clearly, the original counsel who participated in the trial had no thought that the Court had erred in awarding attorney's fees or the amount that was awarded. It ill becomes a stranger to the proceedings to attempt to question the action of the lower court, acquiesed in by the counsel that tried the action and prosecuted the appeal. This Court should give greater sanctity to the proceedings in the lower court than to permit such an attack as here levied. The award of attorney's fees should be affirmed and the Respondent should be granted costs on appeal.

DATED this 13th day of July, 1978.

Respectfully Submitted,

TIBBALS AND STATEN
Attorneys for Plaintiff-
Respondent

BY Allen K. Tibbals

ACKNOWLEDGMENT OF RECEIPT

I hereby acknowledge receipt of two copies of the above and foregoing Respondent's Reply to Van Tassell's Brief on Re-Hearing, this _____ day of July, 1978.

_____
Boyd M. Fullmer

I hereby acknowledge receipt of two copies of the above and foregoing Respondent's Reply to Van Tassell's Brief on Re-Hearing, this _____ day of July, 1978.

_____
Craig Stephens Cook