1988

Cleo B. Mason v. Western Mortgage Loan Corporation : Petition for Rehearing

Utah Court of Appeals

Jackson Howard, Leslie W Slaugh; Fred D. Howard; Howard, Lewis and Petersen; Attorney for Respondent.
Gregory S Bell; David M Wahlquist, Merrill F Nelson; Kirton, McConkie and Bushnell; Attorney for Appellant.

IN THE COURT OF APPEALS

OF THE STATE OF UTAH

CLEO B. MASON,

Plaintiff-Respondent,

vs.

WESTERN MORTGAGE LOAN CORPORATION,

Defendant-Appellant.

Case No. 880070-CA

PETITION FOR REHEARING

PETITION FOR REHEARING OF DECISION REVERSING THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH, JUDGE GEORGE E. BALLIF

JACKSON HOWARD,
FRED D. HOWARD, and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601

ATTORNEYS FOR PLAINTIFF-RESPONDENT

GREGORY S. BELL,
DAVID M. WAHLQUIST, and
MERRILL F. NELSON, for:
KIRTON, McCONKIE & BUSHNELL
330 South 300 East
Salt Lake City, Utah 84111

ATTORNEYS FOR DEFENDANT-APPELLANT

IN THE COURT OF APPEALS

OF THE STATE OF UTAH

CLEO B. MASON,	:	
Plaintiff-Respondent,	:	
vs.	:	
WESTERN MORTGAGE LOAN CORPORATION,	:	Case No. 880070-CA
Defendant-Appellant.	:	

PETITION FOR REHEARING

PETITION FOR REHEARING OF DECISION REVERSING THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH, JUDGE GEORGE E. BALLIF

JACKSON HOWARD,
FRED D. HOWARD, and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601

ATTORNEYS FOR PLAINTIFF-RESPONDENT

GREGORY S. BELL,
DAVID M. WAHLQUIST, and
MERRILL F. NELSON, for:
KIRTON, McCONKIE & BUSHNELL
330 South 300 East
Salt Lake City, Utah 84111

ATTORNEYS FOR DEFENDANT-APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited: Page

Statutes and Rules Cited:

IN THE COURT OF APPEALS

OF THE STATE OF UTAH

CLEO B. MASON,	:	
Plaintiff-Respondent,	:	
vs.	:	
WESTERN MORTGAGE LOAN CORPORATION,	:	Case No. 880070-CA
Defendant-Appellant.	:	

PETITION FOR REHEARING

PETITION

Pursuant to Rule 35a of the Rules of the Utah Court of Appeals, plaintiff-respondent Cleo B. Mason hereby petitions the Court for a rehearing of the above-entitled matter.

The ground for this petition is that the Court erred in holding that defendant should be denied an award of prejudgment interest because she failed to specifically request such an award before the trial court.

The undersigned counsel hereby certify that this Petition is presented in good faith and not for delay.

ARGUMENT

PLAINTIFF'S REQUEST FOR JUDGMENT SHOULD BE TREATED AS A REQUEST FOR AT LEAST PREJUDGMENT INTEREST.

The facts of this case are set forth in this Court's opinion, a copy of which is attached hereto as Appendix "A".

Plaintiff argued on appeal in this matter that any error of the trial court in awarding judgment interest was harmless, because plaintiff was entitled in any event to an award of prejudgment interest from the date of the wrongful disbursements. This Court rejected that argument, holding that plaintiff was not entitled to prejudgment interest because she had not requested it at trial. This Court stated as follows:

> On appeal, Mason argues that under our holding in Fitzgerald v. Critchfield, 744 P.2d 301 (Utah App. 1987), her failure to raise the issue of prejudgment interest at trial is "of no consequence" to her request on appeal. In Fitzgerald, we held a party's "failure to specifically plead a request for prejudgment interest is of no consequence because 'the interest issue is injected by law into every action for the payment of past due money.'" Id. at 304 (quoting Lignell v. Berg, 593 P.2d 800, 809 (Utah 1979)). Although Fitzgerald failed to request prejudgment interest in his original pleading, he did, contrary to Mason, request it at trial and the trial court so awarded.

Mason v. Western Mortgage Loan Corporation, No. 880070-CA, slip op. at 2 n.1 (Utah Ct. App. May 19, 1988).

Plaintiff respectfully submits that the distinction between the timing of the request of interest in Fitzgerald is not materially different from the timing of the request in the instant matter, for at least two reasons: First, the request

for interest in Fitzgerald was not made until after trial. Second, where plaintiff requested interest at the post-judgment rate, there would have been no point in also requesting interest at the prejudgment rate. These arguments will be addressed in order.

The trial in Fitzgerald occurred on March 22, 1984. (See Fitzgerald judgment, a copy of which is attached hereto as Appendix "B".) The first time that prejudgment interest was requested in Fitzgerald was in the plaintiff's proposed Judgment and Findings of Fact and Conclusions of Law. (See page 3 of Memorandum of Points and Authorities in Support of Defendant's Objections to Proposed Findings of Fact, Conclusions of Law and Judgment, filed by the defendant in Fitzgerald, a copy of which is attached hereto as Appendix "C".) The trial court nonetheless awarded prejudgment interest, and this Court affirmed.

Part of this Court's rationale for affirming the award of prejudgment interest was that a party should be awarded the relief to which she is entitled even if not requested in the pleadings. Fitzgerald, 744 P.2d at 304, (citing Butler v. Wilkinson, 740 P.2d 1244, 1263 (Utah 1987); Utah R. Civ. P. 54(c)(1)). See also Arizona Title Insurance and Trust Co. v. O'Malley, 11 Ariz. App. 486, 484 P.2d 639, 648 (1971).

It is, therefore, clear that plaintiff would have been entitled to an award of prejudgment interest had she requested it. Had she failed to request it and later discovered the error, she would have been entitled under Utah R. Civ. P. 60(b)

to have the judgment amended to include the award of interest. Lucas v. Liggett & Myers Tobacco Co., 51 Hawaii 346, 461 P.2d 140, 144 (1969).[1] Finally, had she made a request for pre-judgment interest but erroneously requested a lesser amount than that to which she was entitled, she would have still been entitled to an award of the full amount. Martinez v. Jesik, 703 P.2d 638, 639 (Colo. App. 1985).

Plaintiff did not, however, specifically request an award of prejudgment interest, because she had requested and received an award of interest at the post-judgment rate. At least with respect to the period from the date of the first judgment (October 14, 1982) to the date of the second judgment (January 6, 1986), there would have been no point in also requesting an award of prejudgment interest. Plaintiff is accordingly

---

[1]The plaintiff in Lucas was awarded judgment against only one of two defendants, and appealed the failure to award judgment against both defendants. The appellate court remanded with instructions to enter judgment against both defendants. The appellate court did not, however, make any mention concerning interest, because plaintiff had not requested an award of interest.

On remand, the trial court entered judgment in accordance with the appellate decision. After the entry of the judgment, plaintiff requested, apparently for the first time, that the judgment include interest from the time of the first judgment. The trial court declined to make such an award, and the plaintiff again appealed. The Hawaii Supreme Court held that the trial court would not have had jurisdiction to award interest where such was not specified in the mandate from the prior appeal. The court commented, however, that the failure to request interest was a clear case of excusable neglect, and remanded for entry of an award of interest.

entitled to recover at least prejudgment interest for that period.[2]

CONCLUSION

Plaintiff's request for interest at the post-judgment rate should be treated as a timely request for judgment at the maximum rate allowable, which under this Court's ruling is 10%. This case should be remanded with instructions reduce the award of interest from $6,789.86 to $5,536.80.

DATED this 2nd day of June, 1988.

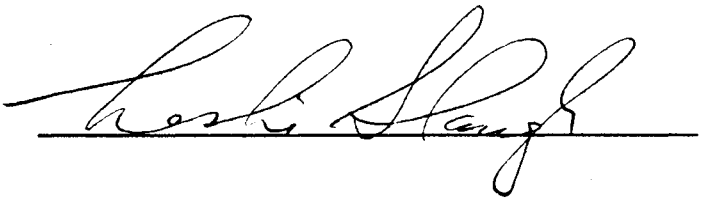
JACKSON HOWARD,
FRED D. HOWARD, and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiff-Respondent

[2]Interest on the principal portion of the judgment ($15,380.00) at 10% from October 12, 1982, through January 29, 1986, is $5,536.80.

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 2nd day of June, 1988.

Gregory S. Bell
David M. Wahlquist
Merrill F. Nelson
KIRTON, McCONKIE & BUSHNELL
330 South 300 East
Salt Lake City, Utah 84111



APPENDIX "A"

IN THE UTAH COURT OF APPEALS

----ooOoo----

Cleo B. Mason, Plaintiff and Respondent,	)	OPINION (For Publication)
v.	)	
Western Mortgage Loan Corporation, Defendant and Appellant.	)	Case No. 880070-CA

Before Judges Bench, Davidson and Orme.

BENCH, Judge:

Defendant appeals from an award of judgment interest. We reverse and remand.

In 1977, plaintiff Cleo Mason entered into two loan agreements with defendant Western Mortgage Loan Corporation (Western) under which Western would provide approximately $54,000 for the construction of two houses. While Western disbursed $25,000 of the construction funds upon joint authorization of Mason and her general contractor, $29,000 was disbursed at the sole request of the contractor, without Mason's express authorization. Prior to completion of the homes, the loan funds were exhausted. Mason discharged the contractor and spent another $14,000 of her own funds to complete the houses. Mason then filed this action against Western, claiming the $29,000 disbursed without her authorization violated the terms of the loan agreements.

Trial was held in January 1982. In its findings and conclusions dated October 14, 1982, the trial court found that although Western disbursed construction funds without Mason's authorization, Mason failed to prove said disbursements were not used for construction labor and materials. Since Mason failed to prove any damages, the court dismissed her action and entered judgment for Western.

Mason appealed the trial court's decision. The Utah Supreme Court held, as a matter of law, Mason had satisfied her burden of proving damages, and the burden was then on Western to show which of the unauthorized disbursements, if any, were incorporated into the two houses. The Court reversed the trial court's judgment and remanded for entry of judgment in Mason's favor in the amount of damages to be established at trial. See Mason v. Western Mortgage Loan Corp., 705 P.2d 1179 (Utah 1985).

On remand, Mason conceded all but $15,380 of the wrongly disbursed $29,000 was used directly in the construction and proposed a judgment in that amount, plus interest from October 14, 1982, the date of the original judgment for Western. Over Western's objections, the trial court entered judgment for Mason for the principal amount and interest requested. Western appealed both the award of damages and judgment interest. The parties filed cross-motions for summary disposition. The Utah Supreme Court summarily affirmed the damages award but reserved the issue of judgment interest. This case was subsequently transferred to this Court pursuant to R. Utah. S. Ct. 4A.

On appeal, Western argues the trial court erred in awarding judgment interest from the date of the original 1982 judgment for Western rather than the 1986 judgment for Mason. In her respondent's brief, Mason requests prejudgment interest dating from the 1977 disbursements. However, Mason failed to request prejudgment interest at trial and did not file a cross-appeal. We therefore decline to reach this issue on appeal. James v. Preston, 746 P.2d 799 (Utah App. 1987); Halladay v. Cluff, 739 P.2d 643 (Utah App. 1987).[1]

The issue of whether a judgment following appellate remand bears interest from the date of its entry or from the

---

1. On appeal, Mason argues that under our holding in Fitzgerald v. Critchfield, 744 P.2d 301 (Utah App. 1987), her failure to raise the issue of prejudgment interest at trial is "of no consequence" to her request on appeal. In Fitzgerald, we held a party's "failure to specifically plead a request for prejudgment interest is of no consequence because 'the interest issue is injected by law into every action for the payment of past due money.'" Id. at 304 (quoting Lignell v. Berg, 593 P.2d 800, 809 (Utah 1979)). Although Fitzgerald failed to request prejudgment interest in his original pleading, he did, contrary to Mason, request it at trial and the trial court so awarded.

date of the prior adverse judgment that was reversed on appeal is one of first impression in Utah. Mason contends the Utah Supreme Court's decision in Hewitt v. General Tire and Rubber Company, 5 Utah 2d 379, 302 P.2d 712 (1956), should be controlling in the instant case. In Hewitt, the trial court granted defendant's motion for a directed verdict and set aside the judgment for plaintiff entered on a jury's verdict. The Utah Supreme Court reversed and ordered that the judgment for plaintiff be reinstated. On remand, the trial court disallowed interest from the date of the original entry of judgment. The Utah Supreme Court reversed the trial court's order denying interest, explaining "we see [no] good reason why plaintiff should lose his interest because defendant was able to convince the trial court to make an erroneous ruling." Id. at 382, 302 P.2d at 714.

Hewitt is factually distinguishable from the instant case. In Hewitt, there was a valid judgment on which plaintiff would have been entitled to interest had not the judgment been set aside. In the instant case, the original judgment was for Western, not Mason. In Hewitt, the Utah Supreme Court stated its reversal "reinstated" or "vitalized" the original judgment. In the instant case, Mason had no original judgment which could be reinstated or vitalized. As the issue raised in this appeal is one of first impression, we will review the decisions of other jurisdictions to aid in our determination.

In Stockton Theatres, Inc. v. Palermo, 55 Cal.2d 439, 360 P.2d 76, 11 Cal. Rptr. 580 (1961), the Supreme Court of California held:

> A judgment bears legal interest from the date of its entry in the trial court even though it is still subject to direct attack. When a judgment is modified upon appeal, whether upward or downward, the new sum draws interest from the date of entry of the original order, not from the date of the new judgment. On the other hand, when a judgment is reversed on appeal the new award subsequently entered by the trial court can bear interest only from the date of entry of such new judgment.

360 P.2d at 78 (citations omitted) (emphasis added). The Stockton approach is now the majority rule in American jurisdictions. See Isaacson Structural Steel Co. v. Armco

Steel, 640 P.2d 812, 817 n.12 (Alaska 1982). One reason in support of the majority rule is the original judgment, once reversed, is extinguished, thus leaving no judgment on which to accrue interest. Rexnord, Inc. v. Ferris, 69 Or. App. 146, 684 P.2d 26 (1984).

The minority rule, as adopted by the Alaska Supreme Court in Isaacson, states, "[W]hen the trial court's judgment is erroneous, the judgment of the [appellate court] must take its place and plaintiff is entitled to interest from the date of the erroneous judgment." 640 P.2d at 817 (quoting Thornal v. Cargill, Inc., 587 S.W.2d 384, 385 (Tex. 1979). See also Pascack Valley Bank and Trust Co. v. Ritar Ford Sales, Inc., 6 Conn. Cir. Ct. 646, 295 A.2d 667 (1972). One reason these jurisdictions follow the minority rule is that they do not consider responsibility for a delay of payment as a factor in making an interest award; rather the interest award is in the form of compensation for the period that plaintiff remains "less than whole." Farnsworth v. Steiner, 638 P.2d 181, 185 (Alaska 1981); Pascack Valley, 295 A.2d at 668.

We hereby adopt the majority rule that when a judgment is reversed on appeal, the new judgment subsequently entered by the trial court may bear interest only from the date of entry of that new judgment.[2] The majority rule is in line with Utah R. Civ. P. 54(e) and R. Utah Ct. App. 32 (interest awarded only from entry of judgment). The minority rule and its reasoning, on the other hand, is contrary to Utah case law. See L & A Drywall, Inc. v. Whitmore Constr. Co., Inc., 608 P.2d 626 (Utah 1980) (prejudgment interest represents amount awarded as damages due to opposing party's delay in paying amount owed under obligation).

The trial court's award of judgment interest is reversed. The matter is remanded to the trial court for entry of an award

---

2. Of course, in cases where prejudgment interest is available and has been timely requested, plaintiff would be entitled to prejudgment interest from the time her loss is fixed and accurately calculable until entry of the new judgment. Compensation is at a slightly higher rate of interest following entry of judgment. See Utah Code Ann. § 15-1-1, -4 (1986).

of interest at the statutory rate from January 31, 1986, the date of the new judgment.

Russell W. Bench, Judge

WE CONCUR:

Richard C. Davidson, Judge

Gregory K. Orme, Judge

APPENDIX "B"

BRIAN C. HARRISON
Attorney for Plaintiff
290 West Center
Provo, Utah 84601
Telephone: 375-2500

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JAMES FITZGERALD, Plaintiff, -vs- GALE CRITCHFIELD, Defendant.	JUDGMENT Civil No. 64,330

This matter having come on regularly for hearing on the 22nd day of March, 1984, Plaintiff appearing in person and by his attorney Brian C. Harrison, and the Defendant appearing in person and by his attorney Joseph Rust, and the Court having received the evidence of the parties and of witnesses, and the Court having entered its Findings of Fact and Conclusions of Law, and being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff is entitled to Judgment against Defendant in the sum of $11,367.50 with said Judgment to bear interest at the rate of 10% per annum from April 19, 1983 until the entry of Judgment, after which time said sum shall bear interest at the legal rate of interest until paid.

2. Plaintiff is entitled to Judgment against Defendant

for costs of Court incurred in this action in the sum of $35.00.

DATED this 23rd day of April, 1984.

BY THE COURT:

J. Robert Bullock
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing Judgment to Joseph Rust at 2000 Beneficial Life Tower, 36 South State Street, Salt Lake City, UT 84111, postage prepaid, this 18th day of April, 1984.

Secretary

STATE OF UTAH } ss
COUNTY OF UTAH }

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF UTAH COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT THIS 21st DAY OF May 1984

WILLIAM P. HUISH, CLERK

BY _____

APPENDIX "C"

JOSEPH C. RUST
CHARLES W. HANNA
KESLER & RUST
Attorneys for Defendant
2000 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 355-9333

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JAMES FITZGERALD, Plaintiff, v. GALE CRITCHFIELD, Defendant.	:	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S OBJECTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT Civil No. 64,330

This memorandum of points and authorities is in support of defendant's objections to the proposed findings of fact and conclusions of law and proposed judgment, or in the alternative, defendant's motion to amend the findings and judgment.

POINTS AND AUTHORITIES

POINT I

THE ONLY JUDGMENT RENDERED BY THE COURT WAS THAT THE $1 PER COW CONTRACT WAS IN EFFECT

There was testimony given on both sides whether a contract was ever agreed to by which defendant's cattle would be fed by plaintiff at the rate of $1 per cow. The court has

concluded that the evidence supported such a contract. However, by reason of plaintiff's own testimony, the earliest such a contract could have been struck was sometime around January 15, 1983.

The more important question is what the court found as a result of the evidence. The only thing stated by the court at the conclusion of the trial was that it found the $1 per cow arrangement in order and therefore held defendant Critchfield liable for $11,367.50. The court did not address the subject of the supposedly damaged hay, which according to the figures of plaintiff accounted to $1,200 and was included by him in the overall $11,367.50 being claimed. In addition, the court did not address whether the $1 per cow arrangement continued after the April 8 date, when it was very clear that defendant did not want to keep his cattle at plaintiff's farm.

It is respectfully submitted that from plaintiff's own testimony his responsibilities in exchange for the $1 per cow was more than simply to feed the cows. He was to "take care of them." The testimony was ample that his fences were constantly broken down and not repaired, allowing the cattle to move freely to other parts of his farm. If plaintiff was to take care of the cattle, and if the cattle got out and trampled over other areas, or ate hay from stacks, that was the responsibility of plaintiff as part of his overall duties in caring for the cattle. Therefore, defendant should not be charged for any claimed loss to the hay but, at most, should be

charged only for $1 per cow per day as the court announced in its judgment at the conclusion of the case.

In addition, the court did not specifically state for how long the $1 per day contract was in effect. It is submitted that the $1 per day contract was specifically terminated on April 8, if, as the court has determined, it was in existence prior to that time. Therefore, the maximum charge pursuant to plaintiff's own billing should be the sum of $8,926.50.

POINT II

PLAINTIFF DID NOT SEEK AND THE COURT DID NOT AWARD INTEREST

Plaintiff's complaint did not seek interest. The court at the conclusion of the trial did not award interest. It is improper for that to be added in the Conclusions of Law or Judgment at this point.

CONCLUSION

The court found in favor of plaintiff and against defendant on the issue of a contract. It also found against defendant on the issue of the lost and dead cattle as raised in defendant's counterclaim. The court has apparently also found that plaintiff did not breach the contract by his failure to maintain the premises in a clean condition and his failure to keep the cattle in one fenced-in area without moving them onto other property. It is submitted that in light of the testimony before the court that defendant should not have to pay for the

alleged damaged hay, which was a factor totally under plaintiff's control, nor for the period the cattle were kept against defendant's will after April 8. In short, defendant would submit to the court that the maximum amount it should have to pay is $8,926.50, plus the costs of $35, but not interest prior to judgment.

RESPECTFULLY SUBMITTED this 29 day of March, 1984.

KESLER & RUST

By Joseph C Rust
Joseph C. Rust
Attorneys for Defendant

CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed a true and correct copy of the foregoing MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S OBJECTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT in Civil No. 64,330, postage prepaid, this 29th day of March, 1984 to: Brian C. Harrison, Esq., 290 West Center, Provo, Utah 84601.

Debra Savage

STATE OF UTAH } ss
COUNTY OF UTAH }

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF UTAH COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT THIS 31st DAY OF May, 1988

WILLIAM R. HUISH, CLERK

1635r