1978

Russell Carson and Peggy Carson v. Clifford M. Brisbois et al : Brief of Appellant

Utah Supreme Court

Joseph W. Anderson; Attorney for Appellant;
Thomas R. Blonquist; Attorney for Respondents;

IN THE SUPREME COURT

OF THE STATE OF UTAH

* * * * * * *

RUSSELL CAPSON and PEGGY CAPSON, his wife,	)
Plaintiffs and Respondents,	)
vs.	)
CLIFFORD M. BRISBOIS and SHIRLEY G. BRISBOIS, his wife, and TRACY REALTY COMPANY, a Utah corporation,	)
Defendants and Appellant,	)

APPEAL BRIEF OF APPELLANT

CASE NO. 15746

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE HONORABLE DEAN E. CONDER, PRESIDING

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of and for
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RUSSELL CAPSON and PEGGY CAPSON, his wife, Plaintiffs and Respondents, vs. CLIFFORD M. BRISBOIS and SHIRLEY G. BRISBOIS, his wife, and TRACY REALTY COMPANY, a Utah corporation, Defendants and Appellant.	)	APPEAL BRIEF Case No. 15746

* * * * * * *

I. NATURE OF THE CASE

Appellant appeals from an "Order Releasing Funds Deposited With The Court" wherein the trial court denied Appellant's motion for costs and attorneys fees incurred in bringing the interpleader action pursuant to which the Order was issued.

II. DISPOSITION IN THE LOWER COURT

The Trial Court ordered, pursuant to plaintiffs' motion, that the fund deposited with the court by the Appellant be released to plaintiffs through their counsel. In so ordering the Trial Court denied Appellant's Motion for Costs and Attorney's Fees.

III. NATURE OF RELIEF SOUGHT ON APPEAL

Appellant seeks a ruling that it is entitled to costs and attorney's fees incurred in bringing this interpleader action as a disinterested stakeholder, and that the case be remanded to the Trial Court to award such costs and fees to the Appellant.

IV. STATEMENT OF FACTS

On May 3, 1975, Russell Capson and Peggy Capson, his wife (hereinafter "Capson"), plaintiffs below, and Clifford Brisbois and Shirley G. Brisbois, his wife (hereinafter "Brisbois"), defendants below, entered into an Earnest Money Agreement pursuant to which Brisbois agreed to purchase from Capson a parcel of land in Sandy, Utah. (R. 1). A deposit in the amount of $1,000.00 was made with appellant Tracy Realty Company (hereinafter "Tracy Realty"), defendant below, as an earnest money deposit with respect to said Earnest Money Agreement. (R. 1). Subsequent events resulted in a failure to consummate the Agreement to Purchase. (R. 1). On May 3, 1976, Russell Capson submitted to Tracy Realty a demand for the $1,000.00 earnest money deposit in connection with the above-described transaction. (R. 2). On that same date, Tracy Realty wrote to Brisbois indicating that Capson had made a demand for the earnest money deposit and indicating that Tracy Realty would comply with said request within ten (10) days unless it heard otherwise from Brisbois. (R. 2).

Subsequently, Tracy Realty was contacted by Shirley Brisbois who indicated that Tracy Realty was not to release the earnest money deposit. (R. 8).

Thereafter, on or about August 2, 1976, Tracy Realty was served with a Summons and Complaint in this action. (R. 6). On August 23, 1976, Tracy Realty filed its Answer and Counterclaim and Crossclaim for Interpleader in this matter and deposited with the court below the $1,000.00 earnest money deposit claimed by Capson and Brisbois. (R. 7, 10, 11).

On January 31, 1978, a judgment by default in the amount of $10,659.80 was entered against Brisbois. (R. 20). On that same date, Capson filed a Motion for Order Releasing Funds Deposited With The Court. (R. 21). Subsequently on February 7, 1978, Tracy Realty filed a Motion for Costs and Attorney's Fees and on February 9, 1978, filed an Affidavit and Memorandum of Points and Authorities in Support of its Motion. (R. 24, 26, 28).

On February 10, 1978, argument with respect to Tracy Realty's Motion for Costs and Attorney's Fees was heard before Judge Dean E. Conder, District Judge, Third District Court for Salt Lake County, State of Utah. (R. 35). As a result of said hearing, Judge Conder issued an "Order Releasing Funds Deposited With The Court," dated February 21, 1978, and an "Amended Order Releasing Funds Deposited With The Court and Dismissing Plaintiff's Complaint as to Defendant Tracy Realty Company," dated March 23, 1978. (R. 37, 48).

In both the Order and Amended Order, Judge Conder denied appellant's request for costs and attorney's fees incurred incident to depositing the funds into court pursuant to the interpleader action. (R. 37, 48).

V. ARGUMENT

A. INTRODUCTION

This case appears to be one of first impression before this court. As noted in the Statement of Facts, in the court below, Appellant, Tracy Realty Company (Tracy Realty) interpleaded certain parties to an earnest money agreement for the purpose of determining rights in an earnest money deposit which Tracy Realty held as a disinterested stakeholder. Tracy Realty incurred costs and attorney's fees as a result of the interpleader action and sought to recover the same upon judgment of the case. (R. 26). Tracy Realty's motion to this effect was denied by the trial court on the ground that costs and attorney's fees are not recoverable in the absence of statute or contract providing therefore.

The issues presented for determination by this Court are whether the trial court has equitable power to grant attorney's fees and costs to Appellant, Tracy Realty; whether the court below abused its discretion in denying costs and attorney's fees to Appellant; and whether such costs and attorney's fee are recoverable out of the fund deposited by Appellant with the lower court.

B. APPELLANT, TRACY REALTY, IS ENTITLED TO RECOVER REASONABLE ATTORNEY'S FEES AND COSTS UNDER THE EQUITABLE DOCTRINE OF "COMMON FUND."

1. The "Common Fund Doctrine" Is A Recognized Exception To The "No-Attorney-Fees Rule."

Under common law there are no provisions for attorney's fees and costs. Thus, many jurisdictions hold that in the absence of statute or contract providing therefore, attorney's fees and costs will not be awarded, and each party will be required to bear his own expenses. Cluff v. Culmer, 556 P.2d 498 (Utah 1976); B & R Supply Company v. Bringhurst, 28 Utah 2d 442, 503 P.2d 1216 (1972); Blake v. Blake, 17 Utah 2d 369, 412 P.2d 454 (1966).

However, there is a recognized exception to the no-attorney-fees rule known as the equitable "common fund" doctrine. This rule states that a court of equity is deemed to have powers to award costs and counsel fees in its discretion, in an appropriate situation, and may properly do so where a party has, at his own expense, maintained a successful suit for the preservation, protection, or increase of a common fund or, at his own expense, has created or brought into court a fund in which others may share. Buford v. Tobacco Growers Co-op Association, 42 F.2d 791, 792 (4th Cir. 1930). The rationale behind this exception is that awarding costs and attorney's fees out of a fund deposited with the court is not awarding such costs and fees in the traditional sense. "The theory, among others, is that

the party reimbursed has acted as a trustee in the common interest. Gold Dust Corporation v. Hoffenberg, 87 F.2d 451, 453 (2nd Cir. 1937)(emphasis in text). In an interpleader action the party bringing the suit and depositing the funds into the court as a disinterested stakeholder is in a real sense a trustee for the commmon interest, and thus qualifies to be reimbursed as such for its expenses. The reimbursement cannot be correctly categorized as "awarding costs," as costs properly signify payment by an adverse party, Id., and the parties to an interpleader cannot by definition be adverse to a disinterested stakeholder.

Thus it was held in Hsu Ying Li v. Tang, 87 Wash.2d 796, 557 P.2d 342 (1976):

> A court may also award attorney's fees if a party meets the requirements of the common fund exception to the no-attorney-fees rule. We have applied this exception in cases where the litigant created or preserved a specific fund for the benefit of others, as well as the litigant. (Citations omitted).

Id. at 344.

In Estate of Johnson, 27 Or. App. 461, 556 P.2d 969, (1976), the Washington Supreme Court outlined the exception as follows:

> When a fund is brought into the court through the services of an attorney or where his services have added to or preserved or increased the amount being administered, the court of primary jurisdiction may properly allow a reasonable compensation for his services to be paid from the fund.

Id. at 971.

Thus, where a disinterested stakeholder deposits a fund with a court of equity pursuant to an interpleader action, and does not become an adverse party to the action the court may properly award attorney's fees and costs to the disinterested stakeholder. The Utah no-attorney-fees rule referred to above is not inconsistent with this equitable exception. The cases cited above which support the no-attorney-fees rule all involved adversary proceedings in law, wherein the party seeking reimbursement for attorney's fees and costs was an adverse party. Cluff v. Culmer, supra., at 499 (attorney's fees sought in bringing suit on defaulted contract); B & R Supply Co. v. Bringhurst, supra., at 1217 (attorney's fees sought on rescission of contract); Blake v. Blake, supra., at 456 (attorney's fees sought in action to avoid sales agreement and warranty deed). The present case does not involve an adversary proceeding at law, but rather a non-adversary proceeding in equity. In this regard Utah law is presently unclear as to whether attorney's fees and costs may properly be awarded under the Utah interpleader statute.

2. A Majority Of American Jurisdictions Including All Federal Courts Have Interpreted Their Interpleader Statutes To Allow Attorney's Fees And Costs Under The Common Fund Doctrine.

The Utah interpleader statute, Rule 22, Utah Rules of Civil Procedure, is identical to subsection (1) of the

federal interpleader statute, Rule 22, Federal Rules of Civil Procedure, (Subsection (2) deals solely with Federal jurisdiction) and like the federal statute, the Utah statute does not have a provision allowing for attorney's fees. Notwithstanding the fact that there is no provision in the statute for attorney's fees, all federal circuit courts have interpreted the federal statute so as to allow such fees to disinterested stakeholders. Ferber Co. v. Ondrick, 310 F.2d 462 (1st Cir. 1962), cert. denied 373 U.S. 911 (1962); A/S Krediit Pank v. Chase Manhattan Bank, 303 F.2d 648 (2d Cir. 1962); Callwood v. Virgin Islands National Bank, 221 F.2d 770 (3d Cir. 1955); Board of Education of Raleigh County v. Winding Gulf Collieries, 152 F.2d 382 (4th Cir. 1946); Gulf Oil Corp. v. Oliver, 412 F.2d 938 (5th Cir. 1969); Mutual Life Ins. Co. v. Bondurant, 27 F2d. 646 (6th Cir. 1928); John Hancock Mutual Life Ins. Co. v. Beardslee, 216 F.2d 457 (7th Cir. 1954) cert. den. 348 U.S. 964, (1954); New York Life Ins. Co. v. Miller, 139 F.2d 657 (8th Cir. 1944); Schirmer Stevedoring Co., Ltd. v. Seaboard Stevedoring Corp., 306 F.2d 188 (9th Cir. 1962); Home Ins. Co. v. Burns, 474 F.2d 1001 (9th Cir. 1973); United Fidelity & Guaranty Co. v. Sidwell, 525 F.2d 472 (10th Cir. 1973).

Likewise most state courts have held that attorney's fees and costs are allowable in interpleader actions. The following states have statutes similar to the Federal

and Utah rules and have interpreted their statutes in accordance with the common fund doctrine, allowing attorney's fees and costs: Colorado (CRCP Rule 22), Liebhart v. Avison, 123 Colo. 338, 229 P.2d 933 (1951); Delaware (DCA Rule 22), Everitt v. Everitt, 146 A.2d 338 (Del. 1958); Florida (FRCP 1.240), Miller v. Gulf Life Ins. Co., 148 Fla. 1, 3 So.2d 519 (1941); Hawaii (HRS 634-11), Manufacturers Life Ins. Co. v. Von Hansen-Young Co., 34 Hawaii 288, Reh. Den. 34 Hawaii 316 (1937); Illinois (Ill. A.S. 110-26.2), Fireman's Ins. Co. of Newark, New Jersey v. Newell, 10 Ill. App. 2d 371, 135 N.E.2d 116 (1956); Maine (MRCP 22), First National Bank v. Reynolds, 127 Me. 340, 143 A. 266, 60 A.L.R. 712 (1928); Maryland (B.U. 70-74), Maulsby v. Scarborough, 179 Md. 67, 16 A.2d 897 (1940); Massachusetts (MCR 22) Mason v. Taylor, 351 Mass. 347, 221 N.E.2d 400 (1966); Michigan (MSA 19.7603), Star Transfer Line v. General Exporting Co, 308 Mich. 86, 13 N.W.2d 217, Cert. Den. 323 U.S. 724 (1944); Mississippi (MCA(1972) 11-35-41, 11-35-43), Gayden v. Kirk, 44 So.2d 410 (Miss. 1950); Missouri (AMS 507.060), John A. Moore & Co. v. McConkey, 240 Mo. App. 198, 203 S.W.2d 512 (1947); Montana (MRCP 22), First National Bank of Circle v. Garner, 567 P.2d 40 (Mont. 1977); Nevada (NRCP 22), Mooney v. Newton, 43 Nev. 441, 187 P.721 (1920); New Jersey (NJSA 48: 20-24), Sunset Beach Amusement Corp. v. Belk, 33 N.J. 162, 162 A.2d 834 (1960); New Mexico (NMS (1953) 21-1-1 (22)), Employers Mutual Liability Ins. Co. of

Wisconsin v. Jarde, 73 N.M. 371, 388 P.2d 382 (1963); New York (CPLR 1006), Bank of America v. Transpollux Carriers Corp., 26 Misc.2d 524, 204 N.Y. S.2d 962 (1960); Oklahoma (OSA 12 Section 238), Fisher v. Superior Oil Co., 390 P.2d 521 (Okla. 1964); Oregon (ORS 13.120), Gresham State Bank v. O. K. Construction Co., 370 P.2d 726 (Or. 1962); Texas (West's Texas Rules Ann. CP 43), Suiter v. Gregory, 279 S.W. 2d 909 (Tex. Civ. App. 1955); Washington (RCWA 4.08.15 Hsu Ying Li v. Tang, 87 Wash. 2d 796, 557 P.2d 342 (1976). While the interpleader statutes of California and New Hampshire vary significantly from the federal statute they are, nevertheless, similar in that neither specifically provides for attorney's fees. Like the courts indicated above, the courts of these states have also interpreted their statutes to allow for recovery of attorney's fees and costs. California (CCP 386, 389.5), Fritschi v. Teed, 213 Cal. App. 2d 718, 29 Cal. Rptr. 114 (1963); New Hampshire (NHCH 334: 21), Manchester Federal Savings & Loan v. Emery Waterhouse Co., 153 A.2d 918 (N.H. 1959).

A number of state jurisdictions provide for attorney's fees by statute; Alabama (ARCP 22); Connecticut (GSC (Revised) 451-484); Georgia (GCA 37-1503); Idaho (IC 5-321); Louisiana (LSA 4659); Pennsylvania (PPCSA §2503); Virginia (VC §8,01-573); West Virginia (WVC 56-10-1). Some of these states allowed for attorney's fees in interpleader

actions prior to legislation specifically providing therefore. New York Life Ins. Co. v. Bidoggia, 15 F2d. 126 (D.C. Idaho 1926); Edwards v. Metropolitan Life Ins. Co., 215 Pa. Super. 390, 259 A.2d 183 (1969); Pettus v. Hendricks, 113 Va. 326, 74 S.E. 191 (1912); Union Mutual Life Ins. Co. v. Linda Mood, 108 W.Va. 594, 152 S.E. 321 (1930).

There can be no doubt that the common fund doctrine is a majority rule in the United States. At least thirty states and all federal courts follow this doctrine. On the basis of this authority, this Court should adopt the common fund doctrine as it applies to interpleader actions and award attorney's fees and costs to appellant in the present action.

3. Utah Law Is Impliedly Similar To Case Law In Sister Jurisdictions Which Have Adopted The Common Fund Doctrine.

Utah cases have not directly ruled upon the availability of costs and attorney's fees in interpleader actions; however, in Maycock v. Continental Life Ins. Co., 79 Utah 248, 9 P.2d 179 (1932), this Court, after discussing the dilatory tactics of a plaintiff insurance company in an interpleader action, stated:

> The insurance company owed a duty to the claimants of the fund . . . to promptly pay the money into court and withdraw from the litigation. The failure of the insurance company to perform such duty precludes it from the recovery of costs and attorney's fees incurred in the trial of this cause . . . .

79 Utah at 255.

The obvious corollary to the Maycock case is that, had the insurance company acted promptly and in good faith, its costs and attorney's fees would have been granted.

Thus pursuant to the Maycock rationale and the great weight of authority from sister jurisdictions, this court should follow the majority rule and hold that attorney's fees and costs are allowable to a disinterested stakeholder in a proper interpleader action.

C. APPELLANT, TRACY REALTY, QUALIFIES AS A DISINTERESTED STAKEHOLDER ELIGIBLE FOR REIMBURSEMENT FOR ATTORNEY'S FEES AND COSTS UNDER THE "COMMON FUND DOCTINE," AND THE TRIAL COURT ABUSED ITS DISCRETION IN NOT AWARDING SAID COSTS AND ATTORNNEY'S FEES.

1. Appellant Qualifies As A Disinterested Stakeholder.

The criteria for determining whether a party bringing a fund into court as a disinterested stakeholder is qualified to receive costs and attorney's fees under the common fund doctrine, is well set out in Niedermyer v. Fehl, 153 Or. 656, 57 P.2d 1086 (1936) as follows:

> Plaintiff claims no interest in the fund involved. It appears that it is now and has been, since it offered to tender money into court, willing at all times to pay the fund involved to whomever it rightfully belongs, as soon as the plaintiff could safely do so. Its acts . . . have been at all times free and above board.

Id. at 1090. See also Gresham State Bank v. O.K. Construction Co., 372 P.2d 187 (Or. 1962).

It is clear that appellant, Tracy Realty, has met all of the requirements set forth in Niedermyer, qualifying it for an award of costs and attorney's fees in the present case. Appellant first received formal notice of Capson's claim to the deposited funds on May 3, 1976 and immediately sought to notify Brisbois of said claim so as to resolve the question of which party should receive the earnest money deposited. (R. 8). Appellant first received notice of the claim of Brisbois sometime thereafter, but prior to June 17, 1976. Appellant was served with a Summons and Complaint in this matter on August 2, 1976, and filed its Answer and Crossclaim and Counterclaim for Interpleader on August 23, 1976. Appellant has at no time claimed or expressed any interest in the earnest money deposited with the court, and has been willing at all times to pay said deposit over to the party to whom it rightfully belongs. Further, Appellant has been neither dilatory nor obstreperous with respect to the prosecution of this cause of action. As set forth in the affidavit contained in the Record at pages 26-27, as a result of the action in the court below, the attorneys for Tracy Realty have rendered services and incurred costs on behalf of said Appellant with a reasonable value of $385.00 and should be compensated therefore.

2. Limitations On The Common Fund Doctrine Do Not Apply To The Appellant In The Present Case.

There are four recognized limitations placed on the recovery of attorney's fees and costs in interpleader actions:

(1) Attorneys fees will be disallowed when an attorney or his client is an active or adverse party in the litigation, thus jeopardizing the beneficial use of the fund by others (as when the liability of the plaintiff or the amount of fund is in dispute). Maycock v. Continental Life Insurance Company, 79 Utah 248, 9 P.2d 179 (1932).

(2) Attorneys fees will be disallowed where an attorney or his client unreasonably delays bringing the fund into court. Id.

(3) Attorneys fees will be disallowed when the interpleader action is unwarranted. American United Life Insurance Company v. Luckman, 21 F.Supp. 39 (S.D. Cal. 1937).

(4) Attorneys fees will be disallowed where the interpleader action is necessitated by the fault of the plaintiff seeking attorneys fees. Gresham State Bank v. O. K. Construction Co., 370 P.2d 726 (Or. 1962).

None of these specific limitations apply to appellant Tracy Realty in the present case. First, the appellant is not an active or adverse party in the litigation, it has not disputed the amount of funds so deposited and has not jeopardized the beneficial use of fund by the parties entitled thereto. Second, the appellant acted reasonably and in due haste in bringing the contested fund into

court, thereby avoiding any limitations regarding unreasonable delay. Third, interpleader was clearly warranted in the present case pursuant to Rule 22, Utah Rules of Civil Procedure, which provides for interpleader in actions in which the moving party may be exposed to multiple or double liability. It is clear in the present case that had the appellant not brought the interpleader action it may have been liable to either Capson or Brisbois or both, since the appellant held funds to which each party claimed a dominant interest. By depositing the fund with the court, appellant avoided this exposure to double or multiple liability as provided for in Rule 22. Thus, interpleader was warranted in the present case, and any limitation in this regard is not applicable to the appellant. Fourth, there is no evidence to suggest that the appellant in any way caused the circumstances underlying the bringing of the present action. Indeed, the record is clear that the appellant at all times stood as a disinterested stakeholder awaiting the outcome of adverse claims to the fund.

3. The Trial Court Abused Its Discretion In Not Awarding Costs And Attorney's Fees To The Appellant.

The foregoing limitations being inapplicable to Tracy Realty, said appellant qualifies under the common fund rule, and therefore it was an abuse of the trial court's discretion to deny the costs and attorney's fees incurred

in the action as prayed for by said appellant. Globe Indemnity Company v. Puget Sound Company, Inc., 154 F.2d 249 (2nd Cir. 1946).

Globe Indemnity, supra, involved the question of whether a qualified disinterested stakeholder could recover costs and attorney's fees incurred in depositing a contested fund into court. In that case the court held that "[t]he rules as to costs and attorney's fees in an interpleader action brought under the federal statute [Rule 22, Federal Rules of Civil Procedure] are no different than those that prevail in an ordinary equity interpleader." Id. at 250. The court went on to point out that in ordinary equity interpleaders the "usual practice" is to allow a disinterested stakeholder reimbursement of costs and attorney's fees necessitated by the interpleader. The court held that while the granting of attorney's fees is within the discretion of the trial court, ". . .it is a discretion, which in the absence of special circumstances, should be exercised in accordance with the 'usual practice'." Id. at 250, 251.

The Tenth Circuit Court of Appeals is in accord. In United Fidelity & Guaranty Co. v. Sidwell, 525 F.2d 472 (10th Cir. 1975), an action by a surety to determine rights in a subcontractor's fund, the court held that it is the "usual" practice to allow reimbursement to a disinterested stakeholder of costs and attorney's fees incident to bringing the funds into court, and that any objection to the

granting of the fee by one who benefited by the funds being brought into court is "frivolous". Id. at 471.

This same rule adheres in the Ninth Circuit Court of Appeals which has stated: "We think that the proper rule, in an action in the nature of interpleader, is that the plaintiff should be awarded attorney's fees for the services of his attorneys in interpleading." Schirmer Stevedoring Co., Ltd. v. Seaboard Stevedoring Corp., 306 F.2d 188, 194 (9th Cir. 1962).

In the present case, the trial court did not follow the "usual practice," but rather denied costs and attorney's fees to a qualified disinterested stakeholder on the basis of Utah's no-attorney-fees rule to which the common fund doctrine stands as a recognized exception. Thus, either the trial court erroneously failed to recognize its power to grant fees under the common fund doctrine, or it abused its discretion in not allowing costs and fees in light of the facts of the present case.

D. THE COSTS AND ATTORNEY'S FEES INCURRED BY APPELLANT TRACY REALTY SHOULD BE AWARDED OUT OF THE FUND DEPOSITED WITH THE COURT IN THIS MATTER.

While Utah law does not indicate from whence the award of attorney's fees and costs should come, courts in other jurisdictions have made it clear that such fees and costs should be paid out of the fund deposited with the court. Thus, we read in New York Life Ins. Co. v. Bidoggia, 15 F.2d 126 (D.C. Idaho 1926):

> Apart from this statute [federal interpleader statute] the weight of authority would seem to support the view that an interpleading plaintiff may be allowed his costs, including reasonable attorney's fee, out of the funds deposited with the court (citations omitted).

In United Fidelity & Guaranty Co. v. Sidwell, supra, the court ruled that "ordinarily a fund so deposited [in an interpleader action] is chargeable with the reasonable fees incurred. . . See Moore's Federal Practice, ¶22.16(a); U.S. v. Chapman, 281 F.2d 862, 870, 871 (10th Cir. 1960)." Id. at 475. See also Shenandoah Life Ins. Co. v. Harvey, 242 F.Supp. 680 (D.Maryland 1965), wherein the court awarded the interpleading life insurance company its costs and attorney's fees out of the funds deposited with the court where the widow and a son of a deceased insured claimed the proceeds of his life insurance policy.

In Home Ins. Co. v. Burns, 474 F.2d 1001 (9th Cir.1973) a case involving insurance proceeds payable to a bankrupt insured, the court specifically stated that any attorney's fees incurred by the insurance company in depositing the fund and interpleading the parties should be removed from the deposited fund prior to the fund being deposited with the bankruptcy court. Id. at 1002.

Thus, it is clear that the weight of authority favors granting reasonable costs and attorney's fees out of the fund deposited with the court. Appellant, Tracy Realty, having fulfilled the requirements of a disinterested

stakeholder is therefore entitled to be reimbursed from the deposited fund.

E. POLICY CONSIDERATIONS ARISING OUT OF EQUITY WARRANT AN ALLOWANCE OF COSTS AND ATTORNEY'S FEES IN INTERPLEADER ACTIONS.

In the present case, Appellant, Tracy Realty, suffered a wrong in that pursuant to an interpleader action in which Appellant remained a disinterested stakeholder and by its efforts to preserve a fund for those who claimed it, it incurred expenses and attorney's fees for which the law does not provide recompense. The maxim in equity that "equity will not permit a wrong to be suffered without a remedy" is most applicable here. As stated by the Arizona Supreme Court:

> Equity is reluctant to permit a wrong to be suffered without a remedy. It seeks to do justice and is not bound by strict common law rules or the absence of precedents. It looks to the substance rather than the form. It will not sanction an unconscionable result merely because it may have been brought about by means which simulate legality. And once rightfully possessed of the case it will not relinquish it short of doing complete justice.

Sanders v. Folsom, 451 P.2d 612, 618 (Ariz. 1969).

Without recompense for costs and attorney's fees incurred in a successful attempt to preserve a contested fund until the rights of adverse parties can be determined, "complete justice" cannot be done to the appellant.

It is inequitable to require a disinterested stakeholder at the risk of otherwise facing multiple liabilities

to deposit funds for the benefit of others without compensation for expenses incurred in doing so. The Oklahoma Supreme Court stated the rule as follows:

> "The [Common Fund] rule rests upon the ground that where one litigant has borne the burden and expense of the ligitation that has inured to the benefit of others as well as to himself, those who have shared in the benefits should contribute to the expense."

Fisher v. Superior Oil, 390 P.2d 521, 523 (Okla. 1964).

If this court adopts a rule denying attorney's fees to disinterested stakeholders in interpleader actions it will doubtless have the effect of chilling interpleader actions generally. The practice of interpleading parties effectuates the important policy of judicial economy by avoiding duplicity or multplicity of actions. A denial of costs and fees to a disinterested stakeholder bringing an interpleader action will chill the moving party's desire to combine the actions through interpleader and will, in the long run, lead to a substantially increased number of separate actions which should have been combined. Not only will the disinterested party be harmed thereby, but the court system will suffer. Such long range effects of a denial of costs and attorney's fees should be avoided.

Thus, the policy underlying both equity generally and the common fund doctrine specifically weighs heavily in favor of granting attorney's fees and costs in interpleader actions.

VI. CONCLUSION

The equitable "common fund doctrine" stands as an exception to the common law "no-attorney-fees rule". This exception is recognized by a majority of state courts, by all federal courts, and is consistent with case law and statutory law of Utah.

Appellant, Tracy Realty, qualifies as a disinterested stakeholder and therefore is entitled to be compensated for costs and attorney's fees incurred in depositing a fund into court and determining the rights of parties claiming an interest therein. The denial of costs and attorney's fees in the present case was an abuse of discretion on the part of the trial court.

Since bringing the fund into court benefits the adverse parties to the action, it is well settled that reasonable attorney's fees and costs should be taken from that fund.

Policy considerations underlying equity generally and the common fund doctrine specifically mandate the granting of attorney's fees and costs to the appellant.

For the reasons above stated, Appellant, Tracy Realty, prays that the Order of the Third District Court for Salt Lake County, State of Utah, denying attorney's fees and costs to the Appellant be reversed and that the case be remanded directing payment of said costs and fees to the Appellant from the fund deposited with the Court in the amount of $385.00.

DATED this 30th day of May, 1978.

Respectfully submitted,

/s/

JOSEPH W. ANDERSON
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing APPEAL BRIEF OF APPELLANT was personally served upon Thomas R. Blonquist, Esq., Attorney for Respondents, at his office in the Metropolitan Law Building, Second Floor, 431 South Third East, Salt Lake City, Utah, 84111, this 30th day of May, 1978.

/s/

JOSEPH W. ANDERSON