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Russell Carson and Peggy Carson v. Clifford M. Brisbois et al : Appeal Brief of Plaintiffs-Respondents

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

RUSSELL CAPSON and PEGGY CAPSON, his wife,

Plaintiffs and Respondents,

v.

CLIFFORD M. BRISBOIS and SHIRLEY G. BRISBOIS, his wife, and TRACY REALTY COMPANY, a Utah corporation,

Defendants and Appellant,

APPEAL BRIEF OF PLAINTIFFS-RESPONDENTS

CASE NO. 15746

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

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Plaintiffs and Respondents,	)
v.	)
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BRIEF OF PLAINTIFFS-RESPONDENTS

NATURE OF THE CASE

Plaintiffs adopt appellant's statement of the nature of the case.

DISPOSITION IN THE LOWER COURT

Plaintiffs adopt appellant's statement of the disposition in the lower court.

NATURE OF RELIEF SOUGHT ON APPEAL

Plaintiffs seek a ruling that the trial judge was correct in denying an award of attorney's fees and costs incurred by appellant in bringing the interpleader action.

STATEMENT OF FACTS

Plaintiffs adopt appellant's statement of facts.

LEGAL ARGUMENT

POINT I

UNDER UTAH LAW, ATTORNEY'S FEES AND COSTS ARE PROPERLY AWARDED ONLY WHEN AUTHORIZED BY STATUTE OR BY EXPRESS TERMS OF A CONTRACT BETWEEN THE PARTIES.

Utah law is clear that the court may award attorney's fees only when such an award is authorized by statute or by express terms in a contract between the parties. Walker v. Sandwick, 548 P.2d 1273, Utah 1976; Cluff v. Culmer, 556 P.2d 498, Utah 1976; Stubbs v. Hemmert, 567 P.2d 168, Utah 1977; Hawkins v. Perry, 126 Utah 16, 253 P.2d 372 (1953); Holland v. Brown, 15 Utah 2d 422, 394 P.2d 77, 10 A.L.R. 3d 449 (1964).

Utah's rule regarding interpleader actions, Rule 22, Utah Rules of Civil Procedure, makes no provisions for an award of attorney's fees nor, in this action, is there any agreement or contract between plaintiffs and Tracy Realty Company, the interpleader and appellant, permitting such an award. Therefore, the ruling of the trial court denying Tracy Realty Company attorney's fees was proper and should not be disturbed.

Appellant points to the case of Maycock v. Continental Life Ins. Co., 79 Utah 248, 9 P.2d 179 (1932), in which the interpleader's request for attorney's fees was

denied, as supporting its position that attorney's fees should be awarded in the instant case. The facts of the Maycock case are remarkably similar to those here. Maycock, the plaintiff, claiming to be a beneficiary of an insurance policy of the decedent, filed an action against Ogden State Bank, the executor of the estate, and against Continental Life Insurance Company, which issued the policy. The insurance company filed an answer (which is very similar to the one filed by Tracy Realty in the instant case) alleging, among other things, that it was without sufficient knowledge to form a belief as to plaintiff's allegations and that it was ready and willing to pay the proceeds to the proper party but that it was unable to determine who the proper party was. No answer was filed by the bank, and a default judgment was entered against it. Similarly, in the instant case, no answer was filed by defendant Brisboisies, and a default judgment was entered against them.

The court in Maycock subsequently found that the plaintiff was entitled to the insurance proceeds and denied the insurance company's request for attorney's fees. The Utah Supreme Court upheld the lower court's denial of attorney's fees. Among the court's criticisms of the insurance company's actions was that the company, despite its stated willingness to pay the proceeds to the proper party, had also "assumed the role . . . of a defendant resisting plain-

tiff's claim to the proceeds of the policy." Tracy Realty has assumed a similar role in that it resisted plaintiffs' claim to the money because of defendant Shirley Brisbois' instructions not to pay the money to plaintiffs. If the court now follows the reasoning of Maycock, the denial of attorney's fees to Tracy Realty will likewise be upheld.

POINT II

THE COMMON FUND DOCTRINE IS NOT APPLICABLE TO INTERPLEADER ACTIONS.

Appellant states that the "common fund doctrine" is a recognized exception to the rule of no attorney's fees unless authorized by statute or contract. This doctrine states that a court of equity may, in its discretion, properly award attorney's fees to one who, at his own expense, has maintained a successful suit to preserve, protect, or increase a common fund or has brought into court a fund which others may share with him. 20 Am. Jur. 2d, Costs, Sec. 83.

Plaintiffs do not challenge the correctness of this ruling; however, it has no applicability to interpleader actions. An interpleader action involves a situation wherein two or more parties are claiming a right to the same fund, and the stakeholder, claiming no interest in the fund, deposits the fund with the court, leaving all claimants to litigate their claims so that it can be determined who is entitled to the fund. The interpleader is not preserving, protecting, or increasing a common fund; rather, he is

protecting himself from multiple claims or against liability should he pay the funds to the wrong person. An action concerning a common fund involves a situation wherein a party brings an action to actually preserve, create, or increase a common fund. "The rule rests upon the ground that where one litigant has borne the burden and expense of the litigation 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." 20 Am. Jur. 2d, Costs, Sec. 83.

Appellant has cited no case in which attorney's fees have been awarded to the interpleader-stakeholder based on the theory of the common fund.

Buford v. Tobacco Growers Co-op Association, 42 F.2d 791 (4th Cir. 1930), cited by appellant, was not an interpleader action. The Tobacco Growers Co-op Association had brought an action asking that the court appoint receivers on the ground of mismanagement and imminent insolvency of the association. As a result, receivers were appointed, and a fund of $500,000 was realized. Had the suit not been instituted, the fund would not have been realized.

In Estate of Johnson, 27 Or. App. 461, 556 P.2d 969 (1976), also cited by appellant, the estate's personal representative, who was one of three equal beneficiaries, filed an accounting which failed to include a certain bank account. One of the other beneficiaries filed an action

claiming that account should have been included, and the court agreed. The person bringing the suit was awarded his attorney's fees because his action increased the value of the estate by more than $11,000, and therefore, those who benefited should share the cost.

Gold Dust Corporation v. Hoffenberg, 87 F.2d 451 (2nd Cir. 1937), and Hsu Ying Li v. Tang, 87 Wash. 2d 796, 557 P.2d 342 (1976), two other common fund doctrine cases cited by appellant, were likewise not interpleader actions.

On page 7 of its brief, appellant states: "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." However, not one of the interpleader cases cited on pages 8, 9, or 10 in support of that proposition even mentioned the common fund doctrine. In fact, most of those cases support the proposition that an award of attorney's fees would not be proper in the instant case.

The following cases, all cited by appellant, illustrate the above:

Ferber Co. v. Ondrick, 310 F.2d 462 (1st Cir. 1962): The lower court denied attorney's fees, and the appellant court affirmed, stating that the lower court did not abuse its discretion. No mention was made of the common fund doctrine.

A/S Krediit Pank v. Chase Manhattan Bank, 303 F.2d 648 (2nd Cir. 1962): The interpleader was allowed costs and attorney's fees because the plaintiff unjustifiably resisted the interpleader action, but the case does not make it clear whether attorney's fees were charged to the firm or to the plaintiff/appellant.

Board of Education of Raleigh County v. Winding Gulf Collieries, 152 F.2d 382 (4th Cir. 1946): Attorney's fees were awarded to the interpleader because a West Virginia law, Chap. 107, Sec. 6, Code, specifically authorized the court in interpleader actions to make orders regarding costs and attorney's fees.

Gulf Oil Corp. v. Oliver, 412 F.2d 938 (5th Cir. 1969): The court refused to award attorney's fees, stating "...the matter is ultimately vested within the sound discretion of the trial judge. 3 A. J. Moore, Federal Practice, Paragraph 22.16, at 3144-45. We find no abuse of discretion here."

John Hancock Mutual Life Ins. Co. v. Beardslee, 216 F.2d 457 (7th Cir. 1954): The insurance company interpleader was not awarded attorney's fees. One of the claimant's to the fund received attorney's fees because the court found the action filed against her was vexacious, and she was awarded costs and fees pursuant to statute, Chap. 73, Paragraph 767, Section 155, of the Illinois Revised Statutes.

Home Ins. Co. v. Burns, 474 F.2d 1001 (9th Cir. 1973): The question of attorney's fees had not been determined by the district court. The appellant court ordered the district court to exercise its discretion and make a determination as to whether attorney's fees should be awarded.

Employers Mutual Liability Ins. Co. of Wisconsin v. Jarde, 73 N.M. 371, 388 P.2d 382 (1963): Attorney's fees were awarded pursuant to statute, 59-10-23(D), N.M.S.A., 1953 Comp.

Fisher v. Superior Oil Co., 390 P.2d 521 (Okla. 1964): This was not an interpleader action. Plaintiff had requested attorney's fees out of a common fund. The trial court denied the request, and the Oklahoma Supreme Court upheld the ruling, further found no common fund existed, and emphasized "the rule that a court of equity may allow counsel fees to an attorney who has created a fund does not apply where there has been neither a creation, addition, nor protection of a 'common fund'. . ."

Greshem State Bank v. O.K. Construction Co., 370 P.2d 726 (Or. 1962): Attorney's fees were awarded to the interpleader but not out of the fund deposited in court; instead, the court ordered that the losing party be charged. "Where attorney's fees and costs and disbursements are allowed, they must ultimately be borne by the losing party brought into the interpleader proceedings."

Appellant further states on page 10 of its brief that although the interpleader statute of California does not provide for an award of attorney's fees, the court, in Fritschi v. Teed, 213 Cal. App. 2d 718, 29 Cal. Rptr. 114 (1963), nevertheless made such an award. Attorney's fees were indeed awarded but, contrary to appellant's conclusion, pursuant to statute. The court stated: "The judgment under appeal ordered that these sums [attorney's fees and costs] be included in the costs payable by plaintiff Mrs. Fritschi. Her counsel contends that 'there is no statutory basis that award an attorney fee in a case of this nature.' The statutory basis for this award is Section 386.6 of the Code of Civil Procedure."

As seen from the foregoing, the cases cited by appellant offer no support for the position that the common fund doctrine authorizes an award of attorney's fees to an interpleader.

POINT III

ALTHOUGH FEDERAL COURTS HAVE, IN SOME CASES, AWARDED ATTORNEY'S FEES TO THE INTERPLEADER IN INTERPLEADER ACTIONS, THE COURT HAS EMPHASIZED THAT SUCH AN AWARD IS DISCRETIONARY.

Appellant relies heavily on the practice in federal court of awarding attorney's fees in interpleader actions, suggesting that, since federal rules and Utah rules regarding interpleaders are similar, Utah should follow the federal practice. As pointed out in Point II, many of the cases

cited by appellant do not actually support its position. In addition, and equally important, is the fact that the federal courts continually emphasize that an award of attorney's fee is discretionary.

See Paul Revere Life Insurance Co. v. Riddle, 222 Fed. Supp. 867 (Tenn. 1963), wherein the court said:

> The plaintiff had a right as a stakeholder, acting in good faith, to maintain this action in interpleader to avoid the vexation and expense of resisting the adverse claims, even though its officials believed only one of them was meritorious . . .; but that right did not include a further right to impress the fund with the expense of interpleading it.
>
> If the rule were otherwise, every stakeholder confronted with two or more adverse claimants who are claiming, or might claim, to be entitled to money or property could interplead the fund, depositing within the registry of the court, gain the protection afforded the stakeholder by an adjudication, and, in effect, cause the successful claimant to bear the costs, counsel fees, and expenses of the interpleading action.

For similar pronouncements, see First Nat. Bank of Circle v. Garner, 567 P.2d 40 (Mont. 1977); Stuyvesant Insurance Co. v. Dean Construction Co., 254 Fed. Supp. 102 (N.Y. 1966), aff. 382 F.2d 991; American Smelt & Refin. Co. v. Naviera Andes Peruana, S.A., 208 Fed. Supp. 164 (Calif. 1962), aff. 327 F.2d 581; Mut. Life Ins. Co. v. Gustafson, 415 Fed. Supp. 615 (Ill. 1976).

The federal courts have also recognized that where an interpleader action is brought in federal court and where no federal interest is perceived, the court should look to

state law to determine the attorney's fee question. Equitable Life Assurance Society of the United States v. Miller, 299 Fed. Supp. 1018 (Minn. 1964). Therefore, had this action been brought in federal court, the federal judge would have looked to Utah law to determine whether attorney's fees could be properly awarded. The Utah court should do no less.

POINT IV

ATTORNEY'S FEES AND COSTS IN THIS ACTION ARE COSTS OF THE INTERPLEADER'S BUSINESS WHICH SHOULD NOT BE BORNE BY THE PREVAILING CLAIMANT

It is common business practice and procedure for a realty company to hold a deposit tendered by a prospective buyer. The standard earnest money agreement contains a provision that if the buyer defaults the seller may retain the deposit as liquidated damages. Every time a default occurs, a realty company faces the decision of whether to deliver the deposit to the seller pursuant to the contract or, if the buyer demands, to return the deposit to the buyer. That such a situation can and will arise is inherent in the real estate business. Such a risk is foreseeable and should be regarded as a cost of doing business. Such business costs are not recoverable as attorney's fees. In Travelers Indemnity Company v. Israel, 354 F.2d 488 (2nd Cir. 1965), the stakeholder insurance company brought an interpleader action alleging it had been served with claims

by several claimants to insurance proceeds. The court denied attorney's fees to the insurance company stating:

> We are not impressed with the notion that whenever a minor problem arises in the payment of insurance policies, insurers may, as a matter of course, transfer a part of their ordinary cost of doing business to their insureds by bringing an action of interpleader. Denial of allowances [for attorney's fees] in this case was by no means an abuse discretion.

See also Mut. Life Ins. Co. v. Gustafson, supra, where the court stated:

> Although it is true that an interpleader action benefits both claimant and the court by promoting the expeditious resolution of a controversy in one form, the chief beneficiary of an interpleader action is the insurance company. An inevitable and normal risk of the insurance business is the possibility of conflicting claims to the proceeds of a policy. An interpleader action relieves the company of this risk by eliminating the potential harassment and expense of a multiplicity of claims and suits. Furthermore, it discharges the company from all liability in regard to the fund. It thus seems unreasonable to award an insurance company fees for bringing an action which is primarily in its own self-interest.

If Tracy Realty is permitted an award of attorney's fees out of the buyer's deposit in this case, it will have been able to shift the cost of its business to one of the claimants.

But more importantly, this cost would have been shifted to the claimant whom the court determined to be correct in its position. If any party is to be charged with Tracy Realty's attorney's fees, it should be the defaulting buyer, not the sellers who prevailed. See Greshem State

Bank v. O.K. Construction Co., supra, and First Nat. Bank of Circle v. Garner, supra.

CONCLUSION

The trial court's denial of attorney's fees should be upheld for the following reasons:

1. Utah law permits an award of attorney's fees only when authorized by statute or contract between the parties.

2. The common fund doctrine permitting attorney's fees has no applicability to interpleader actions.

3. An award of attorney's fees is within the discretion of the trial judge, whose decision should not be disturbed unless abusive discretion is shown.

4. Awarding attorney's fees to the interpleader here would be enabling it to shift the cost of business to one of the claimants.

5. Making an award of attorney's fees out of the fund deposited with the court charges the prevailing party with the interpleader's attorney's fees.

Dated this 8th day of December, 1978.

Respectfully submitted,

Thomas R. Blonquist
Attorney for Plaintiffs and Respondents

CERTIFICATE OF DELIVERY

The undersigned hereby declares that he caused to be delivered ~~a copy~~ 2 copies of the foregoing brief to Joseph W. Anderson, of PARSONS, BEHLE & LATIMER, attorney for appellant, 79 South State Street, Salt Lake City, UT 84147, this 8th day of December, 1978.