

1979

Imperial-Yum Production Credit Association v. Earl Hunter and Lavon Hunter et al : Reply Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

James M. Dunn; Attorneys for Plaintiff-Respondent;

Macoy A. McMurray and Robert J. Dale; Attorneys for Defendants-Appellants;

Recommended Citation

Reply Brief, *Imperial-Yuma Production Credit Ass'n v. Hunter*, No. 16202 (Utah Supreme Court, 1979).

https://digitalcommons.law.byu.edu/uofu_sc2/1539

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
OF THE STATE OF UTAH

IMPERIAL-YUMA PRODUCTION
CREDIT ASSOCIATION, a
corporation,

Plaintiff and
Respondent,

vs.

EARL HUNTER and
LAVON HUNTER, his wife,

Defendants and
Third Party
Plaintiffs and
Appellants,

vs.

GLS LIVESTOCK MANAGEMENT,
INC., a Utah corporation,
and GEORGE L. SMITH,

Third Party
Defendants.

Civil No. 233316

REPLY BRIEF OF APPELLANT

Appeal from the Judgment of the
Third District Court for Salt Lake County
Honorable James S. Sawaya, Judge

James M. Dunn of
JARDINE, LINEBAUGH, BROWN & DUNN
400 Commercial Security Bank Bldg.
79 South State Street
Post Office Box 11503
Salt Lake City UT 84147

Attorneys for Plaintiff-
Respondent

Macoy A. McMurray and
Robert J. Dale of
McMURRAY & ANDERSON
800 Beneficial Life Tower
36 South State Street
Salt Lake City UT 84111

Attorneys for Defendants-
Appellants

TABLE OF CONTENTS

	Page
AUTHORITIES CITED	141
STATEMENT OF THE KIND OF CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
IDENTIFICATION OF THE PARTIES AND EXPLANATION OF ABBREVIATIONS	2
STATEMENT OF FACTS	3
ARGUMENT	4
POINT I	4
IN PAYING SMITH'S DRAFTS DRAWN ON "EARL H. HUNTER", AND CHARGING THOSE DRAFTS TO DEFENDANT EARL HUNTER, PLAINTIFF EXCEEDED DEFENDANT EARL HUNTER'S POWER OF ATTORNEY, AND THEREFORE PLAINTIFF HAD THE BURDEN OF OFFERING EVIDENCE THAT DEFENDANT EARL HUNTER RECEIVED THE BENEFIT OF THOSE "EARL H. HUNTER" DRAFTS; NO SUCH EVI- DENCE WAS PRESENTED.	
POINT II	9
THE FACT THAT SMITH WAS THE DEFENDANT'S AGENT DID NOT AUTHORIZE THE PLAINTIFF TO CHARGE TO DEFENDANTS' ACCOUNT DRAFTS DRAWN BY SMITH ON ANOTHER PERSON'S AC- COUNT WITHOUT DEFENDANTS' AUTHORIZATION.	
POINT III	10
THE AWARD OF ATTORNEY FEES TO THE PLAINTIFF WAS NOT BASED ON ANY SUPPORTING EVIDENCE, NO EVIDENCE WHATSOEVER HAVING BEEN PRE- SENTED AS TO THE EFFORTS OF PLAINTIFF'S COUNSEL IN PROSECUTING THE PROMISSORY NOTE AS OPPOSED TO DEFENDING AGAINST DEFENDANTS' COUNTERCLAIM AND RESISTING THE CLASS ACTION MOTION.	

POINT IV	15
--------------------	----

IT WOULD BE IMPROPER TO REMAND THIS CASE
FOR FURTHER EVIDENCE REGARDING THE IDEN-
TITY OF EARL H. HUNTER OR THE ALLOCATION
OF TIME IN AWARDING ATTORNEY'S FEES.

CONCLUSION	17
----------------------	----

AUTHORITIES CITED

CASES CITED

<u>Bowlin v. Freeland</u> , 289 S.W. 721 (Tex. Ct. App. 1926)	8
<u>Clark v. National Adjustors, Inc.</u> , 348 P.2d 370 (Colo. 1959) . . .	8
<u>Nelson v. District Court</u> , 320 P.2d 959 (Colo. 1957)	8
<u>Nelson v. Newman</u> , 583 P.2d 601 (Utah 1978)	12
<u>Stubbs v. Hermert</u> , 567 P.2d 168 (Utah 1977)	13
<u>Tate v. State</u> , 122 S.E. 2d 528 (Ga. App. 1961)	8

IN THE SUPREME COURT
OF THE STATE OF UTAH

IMPERIAL-YUMA PRODUCTION
CREDIT ASSOCIATION, a
corporation,

Plaintiff and
Respondent,

vs.

EARL HUNTER and
LAVON HUNTER, his wife,

Defendants and
Third Party
Plaintiffs and
Appellants,

vs.

GLS LIVESTOCK MANAGEMENT,
INC., a Utah corporation,
and GEORGE L. SMITH,

Third Party
Defendants.

Civil No. 233316

REPLY BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action by Imperial-Yuma against Earl and LaVon Hunter to recover an amount, alleged to be owing on account under a level line of credit arrangement evidenced by a promissory note, together with attorney's fees. Involved is the accuracy of an accounting

prepared by Imperial-Yuma and debtor identification. Also involved is the propriety of an award of attorney's fees to Imperial-Yuma where a counterclaim with multiple issues was involved and where no effort was made to allocate the legal services rendered in connection with the counterclaim and other matters.

DISPOSITION IN THE LOWER COURT

The case was tried to the court without a jury. The District Court awarded Plaintiff judgment against Defendants, Earl Hunter and LaVon Hunter, jointly and severally, in the sum of \$9,135.93, together with attorney's fees in the sum of \$4,000.00, and costs.

At the time of trial the Third Party Defendants GLS Livestock Management, Inc. and George L. Smith were bankrupt and, accordingly, the Defendants' Third Party Complaint was not pursued.

RELIEF SOUGHT ON APPEAL

Defendants-Appellants, Earl Hunter and LaVon Hunter, seek a reversal of the judgment of the trial court by eliminating all charges against an "Earl H. Hunter" and eliminating the award for attorney's fees.

IDENTIFICATION OF THE PARTIES AND EXPLANATION OF ABBREVIATIONS

Earl Hunter and LaVon Hunter, his wife, Defendants and Appellants, are herein referred to as the "Defendants," or where appropriate, by their names. Imperial Yuma Production Credit Association,

the Plaintiff and Respondent, is herein referred to as the Plaintiff or where appropriate, as "Imperial-Yuma".

"R" refers to a page reference in the record of the case.

"T" refers to a page reference in the transcript of the case.

STATEMENT OF FACTS

The Court's attention is invited to the Statement of Facts set forth in the Appellant's initial brief and to factual statements as they appear in the course of argument.

ARGUMENT

POINT I

IN PAYING SMITH'S DRAFTS DRAWN ON "EARL H. HUNTER", AND CHARGING THOSE DRAFTS TO DEFENDANT EARL HUNTER, PLAINTIFF EXCEEDED DEFENDANT EARL HUNTER'S POWER OF ATTORNEY, AND THEREFORE PLAINTIFF HAD THE BURDEN OF OFFERING EVIDENCE THAT DEFENDANT EARL HUNTER RECEIVED THE BENEFIT OF THOSE "EARL H. HUNTER" DRAFTS; NO SUCH EVIDENCE WAS PRESENTED.

The testimony of Plaintiff's own branch manager and secretary/treasurer, Roy S. Richter, set forth at length on pages 5 through 10 of Plaintiff's brief, does not evidence that the accounts of "Earl H. Hunter" and Defendant Earl Hunter are the same, as Plaintiff contends. The testimony does establish, however, that without any authorization whatsoever, the Plaintiff treated those accounts as the same and applied "Earl H. Hunter" charges to the account of Defendant Earl Hunter and LaVon Hunter. Mr. Richter never did testify that Earl Hunter and "Earl H. Hunter" were the same persons. He merely testified that Plaintiff applied the charges found in Exhibit 16 to the account of Defendants Earl Hunter and LaVon Hunter. Exhibit 16, however, contains not only drafts for Defendant Earl Hunter, but for "Earl H. Hunter" as well. Mr. Richter offered no explanation as to why Plaintiffs charged "Earl H. Hunter" drafts to the account of Defendant Earl Hunter.

In paying Smith's "Earl H. Hunter" drafts and charging them to

Defendant Earl Hunter, Plaintiff ignored the express language of the

power of attorney given by Defendant Earl Hunter to George L. Smith for Smith to make draws on Earl Hunter's account with the Plaintiff:

This will be your authority to pay drafts drawn on Earl Hunter and signed by George L. Smith, whose specimen signature appears below [See Exhibit 8, Appendix A, page 1, of Defendants' initial brief].

The plain language of that power of attorney upon which Plaintiff allegedly relied, gave authority to Smith to present drafts to Plaintiff for payment on the account of Defendant Earl Hunter; there is no authority in that power of attorney, however, or any other document, authorizing the Plaintiff to pay drafts draw on "Earl H. Hunter" and to charge those drafts to Earl Hunter.

Having exceeded Defendant Earl Hunter's power of attorney in paying Smith's unauthorized "Earl H. Hunter" drafts and charging them to the account of Defendant Earl Hunter, Plaintiffs had the burden not only of establishing that Earl Hunter and "Earl H. Hunter" are the same individuals, but of showing also that Defendant Earl Hunter received the benefit of those drafts. Plaintiff offered no evidence, however, that Smith applied any proceeds of those "Earl H. Hunter" drafts to Defendant Earl Hunter's interest or benefit in the cattle investment pool. Significantly, Plaintiff did not even attempt to argue in its brief that any such evidence was presented at trial. To the contrary, Plaintiff admitted at trial that it had no idea where the funds from the "Earl H. Hunter" draws went (T-18); nor do the Defendants, since all the facts pertaining to the "Earl H. Hunter" drafts were in the exclusive possession of the Plaintiff.

It does not follow and is illogical to argue, as Plaintiff alternatively does on pages 10 and 11 of its brief, that because Plaintiff stipulated and testified at trial that the Defendant in the instant case, Earl Hunter, is entitled to "Earl H. Hunter" credits (T-66 and T-67; see pages 12 and 13 of Defendants' initial brief), Defendant is therefore bound to accept "Earl H. Hunter" charges. Since Plaintiff was in exclusive possession of the facts regarding the "Earl H. Hunter" and Earl Hunter accounts, it may well be that Defendants are entitled to more credits than stipulated and testified to by Plaintiff. It is fundamental, however, that Plaintiff still has the burden of proving that the disputed charges are for Defendants' account.

Plaintiff also implies on page 11 of its brief, but stops short of expressly asserting, that because only one "Hunter" names appears on the Hanalei distribution slips (Exhibit 18), and because all credits and charges to Defendants' account bear the reference "Hanalei", there was only one Hunter investor in the Hanalei group. Plaintiff stops short of making that assertion for good reason: Plaintiff well knows that there was no evidence whatsoever before the trial court that the Defendant Earl Hunter was the only "Hunter" in the United States or elsewhere who was an investor in the Hanalei group. As a matter of fact, the Plaintiff presented no evidence whatsoever of who made up the Hanalei pool. Exhibit 18 does not even purport to be an exhaustive listing of all individuals throughout the United States and elsewhere involved as investors in the "Hanalei" cattle feeding group.

In addition, Smith was involved in many cattle feeding pools

and many deals all across the country (T-51). At the time of Hunter's dealings, Imperial-Yuma had about thirty-four (34) loans of the type involving Earl Hunter -- transactions with Smith (T-41, 42, 47). Imperial-Yuma did not have any way of knowing how many loans it would have had at any time involving Smith; they did not keep track of the number (T-43). Imperial-Yuma was financing only a portion of Smith's cattle feeding pools (T-51). Imperial-Yuma was probably in five or six other pools right in that area (T-51, 52). The number of people in the various pools would differ (T-52) and would involve people throughout the United States (T-52) and, in addition, there are a number of other pools that Smith might have had that were being financed with other companies or where other investors were involved (T-52). Accordingly, no conclusions can be drawn at all from Exhibit 18 as to whether there were other investors in the United States or elsewhere with names similar to the Defendant Earl Hunter (e.g., "Earl H. Hunter"), who were investors in the "Hanalei" feeding pool.

Finally, Plaintiff cites four cases on pages 11 and 12 of its brief which Plaintiff apparently contends stand for the proposition that the burden was on Defendant Earl Hunter to prove that Defendant Earl Hunter and "Earl H. Hunter" are not the same individual. None of those cases, however, dealt with exceeding the authority of a power of attorney nor were the respective facts regarding identity exclusively in the possession of the prevailing party, as in the instant case. In addition, in each of these cases, unlike the facts in the instant case,

either substantial evidence was presented or there was no dispute as to

who the person was whose name was in question. See, Nelson v. District Court, 320 P.2d 959 (Colo. 1957) (court listed at length substantial evidence offered by Plaintiff showing Defendant, Elizabeth G. Nelson, was same "Elizabeth L. Nelson" involved in automobile accident; the court stressed Defendant's failure to present any rebuttal testimony or evidence when Defendant knew whether she was involved in the accident); Clark v. National Adjusters, Inc., 348 P.2d 370 (Colo. 1959) (holding it inconsequential that a summons named "Odessa Clark" instead of Odessa W. Clark, because it was undisputed that the individual served, by whatever name, owed the debt, thus making the defense in that case one of a mere technical error in the summons rather than a question of identity); Tate v. State, 122 S.E. 2d 528 (Ga. App. 1961) (holding inconsequential erroneous allegations in an indictment naming "Connie Lynn Day" rather than Connie Anne Day, the minor child actually abandoned, where there was "no question but the identity of the child was proved as being the infant referred to in the indictment"); Bowlin v. Freeland, 289 S.W. 721 (Tex. Ct. App. 1926) (analysis of separately recorded chains of title disclosed apparent common grantor evidencing common identity of "J. K. Freeland" and "J. R. Freeland" as grantor; no other factual circumstances cited to suggest otherwise).

POINT II

THE FACT THAT SMITH WAS THE DEFENDANT'S
AGENT DID NOT AUTHORIZE THE PLAINTIFF
TO CHARGE TO DEFENDANTS' ACCOUNT DRAFTS
DRAWN BY SMITH ON ANOTHER PERSON'S AC-
COUNT WITHOUT DEFENDANTS' AUTHORIZATION

Plaintiff illogically argues in Point II (page 13 and 14) of its brief that because Plaintiff paid Smith's unauthorized "Earl H. Hunter" drafts and thereby exceeded Defendant Earl Hunter's power of attorney, the Defendants are bound by Plaintiff's actions. This argument is contrary to fundamental agency law. Smith's agency was express and limited. When Plaintiff allowed Smith to exceed his agency, the Plaintiff dealt with him at its (the Plaintiff's) peril -- not at the Defendants' peril.

Plaintiff's argument ignores the express and limiting language of Defendant's power of attorney that Plaintiff claims to have relied on in paying Smith's "Earl H. Hunter" drafts:

This will be your authority to pay drafts drawn on Earl Hunter and signed by George L. Smith, whose specimen signature appears below [See Point II, p. 18 of Appellants' initial brief for discussion regarding this power of attorney].

It is incredible to argue that the Plaintiff, having paid "Earl H. Hunter" drafts not authorized by Defendant Earl Hunter, is entitle to charge those drafts against Defendant Earl Hunter because George L. Smith was Earl Hunter's agent. Smith was Defendant Earl Hunter's agent with only such authority as is set forth in the power of attorney. That document gave no authority to Plaintiff to pay any

In Point II (page 18-21) of their initial brief, Defendants cite cases that Plaintiff takes no exception to which clearly support the fundamental proposition that Plaintiff could not knowingly or negligently allow George L. Smith to exceed the express written authority given him by Defendant Earl Hunter and then take the position that Defendant Earl Hunter is bound by the actions of Smith and the Plaintiff. Plaintiff, on the other hand, cites no cases supporting its position; nor do Defendants believe it could.

At the very least, because Plaintiff allowed George L. Smith to draw drafts, contrary to the written power of attorney, on the account of "Earl H. Hunter" rather than Defendant Earl Hunter, it was incumbent upon Plaintiff to establish that the monies so drawn by George L. Smith for "Earl H. Hunter" were then applied to the benefit of Defendant Earl Hunter in the cattle investment pool in which he was an investor. Plaintiff offered no such evidence.

POINT III

THE AWARD OF ATTORNEY'S FEES TO THE PLAINTIFF WAS NOT BASED ON ANY SUPPORTING EVIDENCE, NO EVIDENCE WHATSOEVER HAVING BEEN PRESENTED AS TO THE EFFORTS OF PLAINTIFF'S COUNSEL IN PROSECUTING THE PROMISSORY NOTE AS OPPOSED TO DEFENDING AGAINST DEFENDANTS' COUNTERCLAIM AND RESISTING THE CLASS ACTION MOTION

In Point III beginning on page 14 of its brief, Plaintiff recites the trial court's Finding of Fact No. 13 to the effect that the award of \$4,000.00 attorney's fees to Plaintiff is a reasonable attorney's fee awarded to Plaintiff "exclusive of the Defendants' counterclaim". Plaintiff then admits, however, on page 15 of its brief, that counsel for Plaintiff

did not make a specific allocation of time spent between plaintiff's action on the promissory note and the defense of Defendant's counterclaim.

By admission, then, the trial court had no evidence before it upon which to base the award of \$4,000.00 attorney's fees for just the prosecution of the note. All the trial court had was the testimony of counsel for the plaintiff that his total fees in the entire case had a reasonable value of \$7,164.00. The court had no evidence of any kind indicating how much of that total effort was spent in prosecuting the promissory note as opposed to defending against Defendants' counterclaims. How could the trial court, then, have possibly come up with the \$4,000.00 figure other than to have arbitrarily imposed that figure on the Defendants?

The arbitrary nature of the trial court's assessment of attorney's fees at \$4,000.00 is striking when it is considered that the total principal amount of the account sought to be collected by the plaintiff was only \$5,439.41. For that small account, the trial court awarded \$4,000.00 in attorney's fees and called it "reasonable". Undoubtedly, if counsel for the plaintiff would have allocated for the court his efforts between prosecution of the promissory note and defense

against the Defendants' counterclaims, the trial court would have been apprised of the fact that a much more substantial portion of the \$7,164.00 fee was incurred in defending the counterclaims, and not in prosecuting the note. Allocation, however, by counsel's own admission, was never made; in that regard, the Court's attention is further invited to counsel's testimony elicited on cross-examination (T-106-112).

Clearly, \$4,000.00 in attorney's fees could not possibly have been reasonably incurred in prosecuting this promissory note for a \$5,439.41 principal amount. Not even Plaintiff has contended, either in its brief or before the trial court, that it incurred \$4,000.00 legal expenses in just prosecuting the note. Of the \$4,000.00 awarded by the trial court to the Plaintiff as attorney's fees for prosecution of the note, supposedly "exclusive of the defense of Defendants' counterclaims", a large portion must actually have been incurred in defending against the fraud and security violation counterclaims and in meeting the Defendants' class action motion.

The instant case is a prime example of why attorney's fees cannot be assessed without testimony allocating the attorney's efforts between prosecuting a promissory note, which contractually provides for attorney's fees, and defending against counterclaims, for which attorney's fees are not recoverable, as the court held in Nelson v. Newman, 583 P.2d 601 (Utah 1978).

Plaintiff attempts to distinguish Nelson by arguing that since the trial court in the instant case made a specific finding of fact as to reasonable attorney's fees incurred by plaintiff, "exclusive of the

defense of Defendants' counterclaims", Nelson does not apply. Yet, as in Nelson, the trial court in the instant case may not grant attorney's fees for the defense against the counterclaims, nor may it arbitrarily determine reasonable attorney's fees for prosecution of the note when there is no allocation whatsoever as to time and effort spent in prosecuting the note. It is particularly significant that in Nelson the Court stated:

Counsel testified that he had expended these hours on the entire case, and 'had no idea' what portion of that time was attributable to the collection of the notes.

. . . .

Defendant is entitled to reasonable attorney's fees for the note, as noted ante, but he failed in his burden of proof with regard to the amount of time necessarily spent for that purpose. [emphasis added; 583 P.2d at 604].

Similarly, the Plaintiff in the instant case failed in its proof as noted by Plaintiff itself on Page 15 of its brief: "[Counsel for Plaintiff] did not make a specific allocation of time between Plaintiff's action on the promissory note and the defense of Defendants' counterclaims." Nelson clearly is on point with the instant case since, as in Nelson, Plaintiff here has failed in its burden of proof regarding the amount of time necessarily spent in prosecuting the note as opposed to defending against the counterclaims.

The Plaintiff's assertions on pages 16 and 17 of its brief that Stubbs v. Hemmert, 567 P.2d 168 (Utah 1977) (cited by the Court in Nelson), is consistent with the trial court's award of attorneys fees in

the instant case, clearly is not correct. In Stubbs, the court affirmed the trial court's award of attorney's fees to the prevailing party for prosecution of a promissory note and the foreclosure of a mortgage which secured the note, while disallowing attorney's fees for the negotiation and defense against a counterclaim. Regarding the award of attorney's fees for successful prosecution of the note and foreclosure of the mortgage, the Court stated:

Here, contractual liability is involved and the court properly awarded plaintiff his fees for the foreclosure. Plaintiff's attorney testified that he had expended 3-3/8th hours on the collection and foreclosure action [567 P.2d at 171; emphasis added].

As this Court observed in Stubbs, the trial court properly awarded reasonable attorney's fees for prosecution of the promissory note based upon testimony by Plaintiff's attorney as to the amount of time he had expended on the collection and foreclosure action as well as on his testimony regarding the usual fees charged by attorneys in the community. By Plaintiff's own admission, however, there was no allocation at all in the instant case as to the time necessarily spent by counsel for Plaintiff in prosecuting the promissory note versus defending against the counterclaims of the Defendants. Contrary to Plaintiff's argument, Stubbs stands for the proposition that the trial court, in awarding attorney's fees, must base that decision upon evidence allocating the efforts of Plaintiff's attorney between attempting to collect on a promissory note and defending against counterclaims.

POINT IV

IT WOULD BE IMPROPER TO REMAND THIS CASE FOR FURTHER EVIDENCE REGARDING THE IDENTITY OF EARL H. HUNTER OR THE ALLOCATION OF TIME IN AWARDING ATTORNEY'S FEES.

Plaintiff-Respondent argues in Point IV on page 17 of its brief that pursuant to Rule 76(a), Utah Rules of Civil Procedure, this Court may remand the case to the trial court for further proceedings on the identity of Earl Hunter and "Earl H. Hunter" and the allocation of attorney's fees. Obviously, the identity of Earl H. Hunter and the allocation of attorney's fees could only be further determined by the taking of new evidence on behalf of the Plaintiff. Plaintiff has had its day in court and the opportunity to attempt to prove that Earl Hunter and "Earl H. Hunter" are the same persons and to present testimony regarding the allocation of attorney's fees for prosecution of the promissory note. It would not be proper for Plaintiff to have two bites of the apple and two days in court where it had a complete opportunity, prior to resting its case in the trial court, to present whatsoever relevant evidence it desired. Defendants have already been put to considerable unrecoverable expense because of Plaintiff's failure to even offer evidence on these unresolved critical issues.

In addition, it is important to note as indicated in Point I, page 14, of Defendant's initial brief, that at the conclusion of the trial, after both parties had rested and following closing arguments, Plaintiff moved the trial court to reopen the case to allow Plaintiff to

try to establish that Defendant Earl Hunter is "Earl H. Hunter". The trial court appropriately denied that motion and Plaintiff has not appealed from the ruling.

Rule 74(b), Utah Rules of Civil Procedure, requires a party who desires to cross appeal from an order to file a statement of the points on which he intends to rely on such cross appeal within the time required by Rule 75(d). Rule 75(d) requires the statement of points to be filed within 10 days after the service and filing of the appellant's designation of the record on appeal. No such statement of points was filed by Respondent pursuant to Rules 74(b) and 75(d) and thus Plaintiff has not appealed from the Court's order denying Plaintiff's motion to reopen the trial for the purpose of presenting additional evidence. In not cross appealing from the Court's aforesaid order denying Plaintiff's motion to reopen the case, Plaintiff has already elected to forego any further opportunity to attempt to present evidence to the trial court which it did not present during trial.

In addition, Defendants certainly were not under any obligation, as Plaintiff impliedly contends in Point IV of its brief, to assist in proving Plaintiff's case by pointing out to the trial court or opposing counsel prior to closing arguments that Plaintiff had not submitted any evidence that Earl Hunter and "Earl H. Hunter" are the same persons, that monies issued by Plaintiffs to George L. Smith pursuant to the "Earl H. Hunter" drafts were applied by Smith to the cattle pool account of Defendant Earl Hunter, or that Plaintiff had not allocated its attorney's fees between prosecution of the note and defense of the counterclaim. Plaintiff clearly had that burden.

CONCLUSION

In paying Smith's drafts drawn on "Earl H. Hunter," and charging those drafts to Defendant Earl Hunter, Plaintiff exceeded Defendant Earl Hunter's power of attorney, and therefore Plaintiff had the burden of offering evidence that Defendant Earl Hunter received the benefit of those "Earl H. Hunter" drafts; no such evidence was presented.

The fact that Smith was the Defendant's agent did not authorize the Plaintiff to charge to Defendants' account drafts drawn by Smith on another person's account without Defendants' authorization.

The award of attorney's fees to the Plaintiff was not based on any supporting evidence, no evidence whatsoever having been presented as to the efforts of Plaintiff's counsel in prosecuting the promissory note as opposed to defending against Defendants' counterclaim and resisting the class action motion.

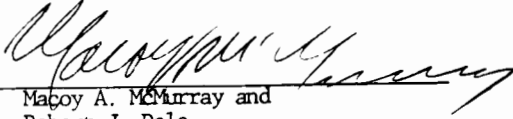
It would be improper to remand this case for further evidence regarding the identity of Earl H. Hunter or the allocation of time in awarding attorney's fees.

The judgment of the trial court should be reversed. The Plaintiff has failed in its proof, both with respect to the accounting and attorney's fees.

Respectfully submitted,

McMURRAY & ANDERSON

By


Maçoy A. McMurray and
Robert J. Dale

Attorneys for Earl and LaVon Hunter
Defendants-Appellants