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Robert V. Tiller and Mildred Molinari v. Loren G. Norton et al : Brief of Respondents

Utah Supreme Court

7770

In the Supreme Court of the State of Utah

ROBERT V. TILLER, also known as ROBERT V. TILLIER, also known as ROBERT B. SWANN, and MILDRED MOLINARI,

Plaintiffs and Appellants,

v.

LOREN G. NORTON, LOREN G. NORTON, administrator of the Estate of CHARLES CARSON, also known as H. F. SWANN, also known as R. C. TILLER, deceased, also known as ROBERT C. TILLER, deceased, and THE EMPLOYEES LIABILITY ASSURANCE CORPORATION, LTD., a corporation, and E. LE ROY SHIELDS, as Executor of the Estate of Grace Catherine Carson, deceased and E. LE ROY SHIELDS,

Defendants and Respondents,

and

LOREN G. NORTON, GLORIA NORTON, wife of Loren G. Norton, EDITH M. HAZELRIGG and CATHEDRAL OF THE MAGDALENE CATHOLIC CHURCH OF East South Temple, Salt Lake City, Utah, also known as ROMAN CATHOLIC BISHOP OF SALT LAKE CITY, a corporation sole,

Cross Defendants.

Civil No. 7770

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BRIEF OF RESPONDENTS

E. LE ROY SHIELDS, As Executor of the Estate of Grace Catherine Carson, deceased, and E. LE ROY SHIELDS.

SHIELDS & SHIELDS
Attorneys for Defendant

STATEMENT OF THE CASE

This action was originally commenced by the appellants and against LOREN G. NORTON, administrator of the Estate of Charles Carson, also known as H. F. Swann, also known as R. C. Tiller, also known as Robert C. Tillier, deceased, and the Employers Liability Assurance Corporation, Ltd., the latter being the bondsman of LOREN G. NORTON, the administrator. Subsequently, the Complaint was amended and the following defendants were added to the same: Edith M. Hazelrigg and Cathedral of the Magdalene Catholic Church of East South Temple, Salt Lake City, Utah also known as Roman Catholic Bishop of Salt Lake City, a corporation sole. The defendants then answered the Complaint and filed a Cross-complaint thereto, at which time the plaintiff obtained an order of the court to file a second amended Complaint, adding as party-defendant E. LeRoy Shields, as executor of the Estate of Grace Catherine Carson, deceased, and E. LeRoy Shields, individually. Answer was then filed by the various defendants to the plaintiff's Second Amended Complaint and trial was had upon the same. After a trial was had upon the issues of said Complaint, a judgment was entered in favor

of all of the defendants and against the plaintiffs, no cause of action.

POINTS INVOLVED

Is there any evidence in the record upon which these defendants can be held to the Plaintiffs, or upon which the Court's judgment could be reversed?

ARGUMENT

From this judgment the plaintiff appeals.

The plaintiff and appellant has filed its brief and the only place that the defendant, E. LeRoy Shields, executor of the Estate of Grace Catherine Carson and E. LeRoy Shields, individually, is mentioned in the brief of the plaintiff and appellant is on Page 87 thereof, and the only mention made of him is in the following paragraph:

"We respectfully contend that Grace Carson, Loren G. Norton, administrator and E. LeRoy Shields, as executor of the Estate of Grace Carson, deceased, have not acted in good faith either to the appellants and the plaintiffs or the court in the handling of this matter and have been guilty of extrinsic fraud sufficient to justify the intervention of a court on equity."

A close search of the appellant's brief does not in any way enlighten these defendants as to any action or position by them from which the plaintiff and appellants seek relief.

The brief does not disclose in any way how these defendants have in any way breached their duty, nor does it point out or set forth in any manner how defendants have violated any rights of the plaintiffs and appellants, nor have they set forth in any way what theory it is claimed by the appellants that any relief should be granted against these defendants from the judgment entered in their favor in the trial of said case of "no cause of action."

These defendants, feeling that there is no cause of action against them in said case and no evidence adduced against them which would justify a judgment against them in the case and feeling that they are justified in having the judgment against them sustained and dismissed as party defendant to said action, deems it advisable to file this brief and reply to the appellants' brief as against them. It will be noted from the record that this action was tried solely against the party defendants as the executor of the Estate of Charles Carson, deceased, and nowhere in the evidence or the brief of appellants is there any indication that said case reaches into or covers any action as against the executor or the attorneys of the Estate of Grace Catherine Carson, deceased, and inasmuch as these defendants represented the Estate of Grace Catherine Carson, deceased, after her death, as the executor named in her will, we cannot determine under what theory these defendants should be held as party defendants to this present action. We must concede then that they should not be held as defendants upon any theory and by the judgment of the District Court so far as they are concerned, should be affirmed and a judgment against them of no cause of action against

them should be sustained. True, that money which came into the hands of E. LeRoy Shields as executor of the Estate of Grace Catherine Carson, deceased, administrated and distributed to her under the various orders of the court, and nobody has attempted to challenge these orders, has been upon the basis that the court lacked jurisdiction to make the various orders which was made in said estate. Whether under any theory an executor can be held liable under the circumstances existing here, we refer to the case of H. W. Holland v. James H. McGill, a Florida case, recited in 87 A. L. R. on Page 171, quoting from page 173, we have the following:

> "Whatever may be the rights of a successful appel-pellant to have an order of restitution entered in his favor to restore to him his rights in money or property of which he has been deprived by an erroneous decree that has been entered against him, and later set aside or reversed, it is certain that no such order can be entered against a mere attorney of record, summarily requiring him to personally make restitution for moneys which he has obtained for the benefit of his clients, and thereafetr delivered over to them pursuant to such erroneous order, there being no fraud or contempt charged in connection with the procurement of the erroneous order under which the money has been directed to be paid out. This, at least, is the rule in cases where it has not been made to appear that the funds still remain in the attorney's hands as the moneys of his clients.
>
> Conceding that the order of Sepetmber 4, 1929, by which the moneys were paid out on order of the court, was entirely erroneous as contended for by counsel for the successful complainant in the foreclosure case, the right of restitution which would arise against the Weedons in such complainant's behalf,

by reason of that circumstance, does not extend to an imputation of liability against Holland who represented them as a mere attorney of record.

Under the doctrine of restitution an attorney cannot legally be required to personally make good the damages occasioned by an erroneous judicial order, even though such attorney induced the error to be committed by the court, especially in cases where no fraud or bad faith on his part is shown to have been practiced in connection therewith, and no funds belonging to his clients remain in his hands out of which to satisfy the order of restitution. To hold otherwise would make the practice of law one of such hazardous financial responsibility that few men would care to incur the risk of its practice, since nisi prius judges, like other judges, are human beings, and errors will from time to time be made by them, because of the insistence of lawyers, against reversal of which errors no foresight nor precaution taken could adequately guard, other than a gift of prevision concerning the ultimate decisions of the appellate courts that might become vested with jurisdiction to correct the errors of such nisi prius judges."

We new refer to the case of Pendergast v. Muirs, 238 NW 345 Atl. 347:

"The money in question was ordered to be paid to Lynch, Doyle and Mahoney as attorneys for Pendergast, not as individuals. To the extent of the payment, the Pendergast judgment was satisfied of record by the Clerk. The record shows that Lynch, Doyle and Mahoney within a day or so after receiving the money, transmitted it to their clients, the Pendergasts. It is not material that the Pendergasts may have used some of this money, when they received it, to pay attorney's fee due to Lynch, Doyle and Mahoney. Lynch,

Doyle and Mahoney received the money from the Clerk on behalf of the Pendergasts and not otherwise. The law is clear that a party who has received money on behalf of the judgment creditor for instance, as agent or attorney of the judgment creditor, cannot be compelled after reversal of the judgment, to restore the same, unless it be shown that such party still retains it. The general rule supported by a number of citations given is stated upon the record here presented. If there is any right to restitution, it must lie against the Pendergasts who, through the agency of their attorneys, received the money, and upon whose judgment the money was credited."

The case of Green v. Brengle, 6 SE 603, quoting from the syllabus of the court:

"No privity exists between the attorney who prosecuted a suit and the defendant therein, to support an action of assumpit for the recovery of a money judgment paid by defendant and received by the attorneys as the property of their cleint."

From the case of Matter v. White, 81 NY Suppl. 858:

"Where a judgment in plaintiff's favor has been recovered in an action, the money paid to plaintiff's attorney, an action will not lie, on reversal of a judgment against the attorney to recover the money which he had retained, pursuant to an agreement between himself and client, in payment of a debt due him from his client."

The statute prescribed certain duties against an administrator and executor of an estate and we refer to Section 102-12-6 of the Probate Code of Utah.

"When all debts are paid, or sooner if before that time all the property of the estate has been sold or

there are sufficient funds in his hands for the payment of all the debts due by the estate, and the estate is in proper condition to be closed, the executor or administrator must render a final account and pray for settlement of his administration. Such petition shall contain the names and addresses of the heirs, devisees or other persons entitled to participate in such distribution, according to the best knowledge, information and belief of the executor or administrator. The clerk shall file the petition, and the court or clerk shall fix the date of hearing thereon, notice of which shall be given." (C. L. 17 Section 7763).

We have made rather extensive search of the question involved and we are unable to find any cases which hold the executor of an estate that has probated an estate in accordance with the court's order in every respect is chargeable with any liability if the court makes an order distributing the etsate to the wrong persons. Only in such cases as the executor still holds the property of the estate in his hands and demand has been made upon him for the payment of the assets of said estate, to a person other than the ones which the court orders distribution to be made to.

We therefore submit that the judgment of the Court, so far as E. LeRoy Shields, as executor of the Estate of Grace Catherine Carson and E. LeRoy Shields, individually is concerned should be affirmed.

Respectfully submitted,

SHIELDS & SHIELDS

Attorneys for Defendant