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Checkrite Recovery Services v. Deborah M. King : Amicus Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

CHECKRITE RECOVERY SERVICES,
Appellant,

vs.

DEBORAH M. KING,
Appellee.

***AMICUS CURIAE* BRIEF ON BEHALF OF VAN COTT, BAGLEY, CORNWALL & MCCARTHY**

Case No. 20010006-SC

Priority No. 15

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STATEMENT OF THE ISSUE ON APPEAL

AND STANDARD OF REVIEW

I. DID THE DISTRICT COURT ABUSE ITS DISCRETION BY ENTERING A DEFAULT JUDGMENT THAT DID NOT INCLUDE APPELLANT'S CHECK COLLECTION FEE?

A trial court's award of costs and the disallowance of a particular item as a cost is reviewed under an abuse of discretion standard. See Stevenett v. Wal-Mart Stores, Inc., 977 P.2d 508, 516 (Utah Ct. App. 1999).

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ENTERING A DEFAULT JUDGMENT THAT DID NOT INCLUDE APPELLANT'S CHECK COLLECTION FEE.

The Appellant's brief makes two primary arguments: (a) the Tholen case established a definition of "all costs of collection" that is dispositive of this matter; and (b) the District Court misread the plain language of the statute. Appellant's arguments fail for three reasons: (a) the Tholen case said nothing about whether a collection agency's collection fee is recoverable as "costs"; (b) the District Court acted within its broad discretion and consistent with applicable Utah case law in refusing to tax a collection fee as "costs"; and (c) the plain language of the Utah Bad Check Law does not compel a trial court to award a check collection agency its collection fee.

A. The Case of *Tholen v. Sandy City and Southridge Special Improvement District* is Not Dispositive of Any Issue in this Appeal.

Appellant argues that the case of Tholen v. Sandy City and Southridge Special Improvement District, 849 P.2d 592, 596 (Utah Ct. App. 1993), is dispositive of this matter. However, the issue in Tholen is entirely unrelated to the issue before the Court in this appeal. The issue in Tholen was whether a statute providing for recovery of costs allowed the prevailing party to recover attorney's fees. See id. at 595. The Tholen Court concluded that, because the statue at issue

in that case did not expressly provide for the recovery of attorney's fees, those fees could not be recovered as "costs." See id. at 596. The issue in *this* case is whether the statutory language allowing for recovery of "all costs of collection, including all court costs and attorney's fees" *required* the District Court to award Appellant its check collection fee. Not only is Tholen not dispositive of the issue in this case, Tholen is not even relevant. The fact that the Court of Appeals in Tholen distinguished "costs" from "attorney's fees" does not lead to the conclusion that "costs" must, as a matter of law, include a check collection agency's collection fees.

B. The District Court Did Not Abuse its Discretion in Refusing to Award Appellant a Check Collection Fee.

The only issue properly before this Court is whether the District Court erred in refusing to tax as "costs" the expenses Appellant claims to have incurred as a result of its collection efforts.[1] Under well established Utah law, "the allowance or disallowance of a particular item as a cost falls within the sound discretion of

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[1] Appellant is attempting to frame the issue before this Court as whether the Judges of the District Court can lawfully adopt a uniform policy regarding the interpretation of a statute. However, Appellant failed to raise in the District Court the issue of the Judges' authority to adopt the January 10, 2000 memorandum as official court policy. In fact, counsel for Appellant, when arguing before the District Court, expressly acknowledged that "the policy is fair as far as it goes." Hearing Transcript, Nov. 29, 2000 at 5. The issue of the policy's lawfulness has therefore not been properly preserved for appeal. Whether or nor such a policy was lawful, Judge Fratto made it very clear at the hearing that he considered himself authorized to deviate from that policy. See id. at 4. Accordingly, the District Court did not blindly adhere to the policy but merely, in its broad discretion, disallowed a particular item as "costs." The decision is therefore subject to review only as an abuse of discretion. See Stevenett v. Wal-Mart Stores, Inc., 977 P.2d 508, 516 (Utah Ct. App. 1999).

the trial court." Stevenett v. Wal-Mart Stores, Inc., 977 P.2d 508, 516 (Utah Ct. App. 1999). See also Morgan v. Morgan, 795 P.2d 684, 686 (Utah Ct. App. 1990).

What the Appellant seeks to recover as "costs" in this appeal are the expenses it claims to have incurred as a result of its check collection efforts. Such expenses are not taxable "costs" under Utah law. This Court, in Frampton v. Wilson, discussed the

> distinction to be understood between the legitimate and taxable "costs" and other "expenses" of litigation which may be ever so necessary *but are not properly taxable as costs.*

605 P.2d 771, 774 (Utah 1980) (emphasis added). The fees Appellant seeks to recover are more appropriately described not as taxable "costs," but rather as other "expenses" Appellant has incurred. The District Court did not abuse its discretion in refusing to tax Appellant's collection fees as costs in the default judgment against Appellee.

In fact, the *Amicus Curiae* has found no Utah case law holding that such expenses are appropriately taxable as costs, let alone case law *mandating* that such expenses be so taxed. Rather, Utah case law suggests that those items properly taxable as costs are "those fees which are required to be paid to the court and to witnesses." Frampton v. Wilson, 605 P.2d 771, 774 (Utah 1980. The Appellant's collection fees are not "required to be paid to the court," nor are they payments to witnesses. While Utah courts have allowed other expenses to be taxed as costs,

such expenses have generally been limited to costs of depositions and related expenses, and each claim for costs is evaluated on a case-by-case basis. See, e.g., Morgan, 795 P.2d at 687 (declining to tax accounting and appraisal fees as "costs").

Utah courts have been reluctant to expand the range of expenses that may be taxed as costs; that reluctance is consistent with this Court's charge that a trial court "has a duty to guard against any excesses or abuses in the taxing" of costs. Frampton, 605 P.2d at 774. A trial court cannot possibly guard against excesses or abuses if it has no discretion to determine, in a particular case, what items may be properly labeled as "costs." The District Court in this matter properly heeded this Court's warning and did not abuse its discretion in disallowing Appellant's collection fees as costs.

C. Utah Code Ann. § 7-15-1 Does Not Compel a Trial Court to Award Check Collection Fees in a Default Judgment.

Appellant's attempt to frame the issue before this Court as one of statutory construction is flawed because it assumes the District Court decided more than it actually did. The District Court did not rule that no "costs" other than court costs could *ever* be recovered under the Bad Check Law. Rather, the District Court merely held that the Appellant's collection expenses were not, *in this particular case*, recoverable as "costs." In fact, the District Court gave Appellant the opportunity to file, after a final ruling, an affidavit explaining how the collection

expenses were incurred.[2] See Hearing Transcript, Nov. 29, 2000 at 9. Appellant never filed an affidavit and thus never articulated to the District Court any reason why its expenses should be taxed as "costs." The District Court therefore had no reason to find that Appellant's collection fees were anything more than "expenses," and were thus unrecoverable.

Accordingly, the only ruling the District Court actually made concerning the language of the Bad Check Law was, by implication, that the Bad Check Law does not *compel* a trial court to award a collection agency's expenses as costs in a default judgment. That holding is entirely accurate because the Bad Check Law does not expressly provide that collection agency's fees are included in the definition of "collection costs." The only items expressly included as "collection costs" are court costs and attorney's fees, both of which Appellant was awarded. See Utah Code Ann. § 7-15-1 (7)(b)(iii). The District Court's interpretation is also consistent with the plain language of the statute which allows a trial court to "waive all or part of the amounts owed under Subsections 7(b)(ii) through (iv) upon a finding of good cause." Id. § 7-15-1(7)(c). Thus, even if a collection agency's fees are recoverable as costs, a trial court has discretion to waive them and is therefore not *compelled* to award those fees in a final judgment.

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[2] Appellant could also have submitted an affidavit setting forth the basis for its claim for "costs" with its proposed judgment, but Appellant chose not to do so. Appellant has not explained why it has never, despite an express invitation from the District Court to do so, set forth in writing how its collection expenses are calculated.

Additionally, it would now be inconsistent for Appellants to argue that the Bad Check law *requires* the trial court to award collection expenses in all cases, regardless of whether the plaintiff has provided any evidence explaining how and why those expenses were incurred. During the hearing regarding this matter before the District Court, counsel for Appellant acknowledged that there have been "some abuses with collection costs . . . [a]nd definitely those should be stopped." Hearing Transcript, Nov. 29, 2000 at 10. A trial court cannot possibly stop abuses with collection costs if it has no discretion under the Bad Check Law to deny such expenses in appropriate cases.

Appellant argues that if "costs of collection" as used in the Utah Bad Check Law does not include Appellant's $20.08 per check collection fee then a collection agent "has lost his incentive to sue." Appellant's Brief at 17. That argument is entirely without merit because the Bad Check Law allows for the recovery of (a) the amount of the check, (b) interest, (c) court costs and attorney's fees, **and** (d) damages equaling the greater of $100.00 per check or triple the check amount. The "original payee" of the check is thus more than made whole even if it does not receive a collection fee, and has ample additional funds from which to compensate the check collection agency.

Moreover, there is nothing in the Bad Check Law to prevent an agent from contracting with the "original payee" to received a fixed fee for its collection efforts. The fact that the statute precludes an "original payee" from contracting "for a person to retain any amounts charged or collected" as damages in no way

prevents an "original payee" from simply contracting to pay the agent a fixed fee for its services if a matter progresses to litigation. Thus, Appellant must simply reevaluate the manner in which it secures payment for its services; it seems doubtful that Appellant will lose all incentive to sue if its expenses are not taxable as "costs."

Indeed, one can only presume that Appellant already has a system whereby it is compensated in a manner that allows it some profit. During the hearing before the District Court, Appellant's stated that the $20.08 collection fee is "only [Appellant's] costs of collection. There's no profit involved, it's just - - it just brings [Appellant] back to even." Hearing Transcript, Nov. 29, 2000 at 9. Assuming Appellant is not a nonprofit corporation, Appellant must have some arrangement with its customers that allows it to be a profitable enterprise. Accordingly, even if the $20.08 per check charge only covers Appellant's "costs," there is no reason why Appellant cannot amend its contractual arrangements to ensure that its costs *and* profit are paid.

CONCLUSION

For the reasons set forth above, the *Amicus Curiae* respectfully submit that the District Court did not abuse its discretion by entering a default judgment that did not include Appellant's check collection fee.

DATED this 10th day of August, 2001.

VAN COTT, BAGLEY, CORNWALL & MCCARTHY

By: _____
David A. Greenwood
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of August, 2001, I caused a true and correct copy of the foregoing to be sent via U.S. Mail to the following:

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