1999

Lee O. Barney v. John D. Siddoway and Standard Tile, Inc., a Utah Corporation : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LEE O. BARNEY Plaintiff, Appellee, & Cross Appellant, vs. JON D. SIDDOWAY and STANDARD TILE, INC., a Utah Corporation, Defendants, Appellants, & Cross Appellees.	)	Appellate Court No. 990579-CA Priority No. 15

REPLY BRIEF OF APPELLEE AND CROSS APPELLANT LEE O. BARNEY

APPEAL FROM A JUDGMENT IN THE THIRD DISTRICT COURT
ON JUNE 7, 1999
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Jon D. Siddoway & Standard Tile, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Statutes Cited

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ARGUMENT

I. BARNEY IS ENTITLED TO PRE-JUDGMENT INTEREST BECAUSE THE DAMAGES WERE DETERMINED WITH CERTAINTY AND THE LOSS WAS FIXED AS OF FEBRUARY 1996.

In Uinta Pipe Line Corporation v. White Superior Company, 546 P.2d 885 (1976) the Supreme Court reversed the trial court, when it determined that Respondent and cross appellant was not entitled to pre-judgment interest. The Court stated:

> *"The respondent cross-appeals because of the refusal of the trial court to allow interest on the amount awarded prior to the date of judgment. The trial court specifically instructed the jury not to include anything by way of interest in the verdict.*
> *The law is set forth generally in the preface to an annotation in 96 A.L.R. at page 18 as follows:*
> *While the rule is sometimes stated that interest cannot be recovered on unliquidated damages, the tendency of the more modern cases is to allow interest whenever justice and equity require allowance, and, although there is a conflict in the decisions, the rule may be stated generally that for injury to, or detention, loss, or destruction of, property, interest may be recovered either eo nomine on the damages found, or as a part of the damages." 546 P.2d 885 at 887*

The Court in Uinta, supra went on to quote from the case Fell v. Union Pacific Ry. 31 UT 101, 88 P. 1003 (1907). Quoting from Fell , the Court stated:

> *". . . The rule has become general, and that the allowance of interest is cases of torts to property is in harmony with the trend of modern authority. It is quite true that there are cases against this rule, but they are not, as we conceive, based on either good reason or good logic . . . In the class of cases, therefore, where the damage is complete, and the amount of the loss is fixed as of a particular time, there is–there can be –no reason why interest should be withheld merely because the damages are unliquidated. There are certain cases of unliquidated damages where interest cannot be allowed. In all personal injury cases, cases of death by wrongful act, libel, slander, false*

imprisonment, malicious prosecution, assault and battery, and all cases where the damages are incomplete and are peculiarly within the province of the jury to assess at the time of the trial, no interest is permissible. But this is so because the damages are continuing and may even reach beyond the time of the trial." 546 P.2d 885 at 887

In Bjork v. April Industries, Inc., 560 P. 2d 315 (Utah 1977) the Supreme Court also stated:

" As to the allowance of interest before judgement, this court has heretofore spoken, and the law in Utah is clear, viz, where the damage is complete and the amount of the loss is fixed as to the particular time and that loss can be measured by facts and figures, interest should be allowed from that time and not from the date of judgement. On the other hand where damages are incomplete or can not be calculated with mathematical accuracy, such as in the case of personal injury, wrongful death, defamation of character, false imprisonment, etc., the amount of damage must be ascertained and assessed by the trier of fact at trial and in such cases pre-judgment interest is not allowed." 560 P.2d 315, at 316.

The damages sustained by Barney are precisely the type which should include pre-judgment interest.

One of the elements of Barney's damage dealt with an interest in real property. The value was determined based on the purchase price of the property which Siddoway received directly. That information was obtained from the closing documents which were provided by Siddoway in discovery and introduced into evidence. The amount could be determined specifically from the facts and figures contained in the closing documents. On cross examination, Siddoway admitted that the closing documents were accurate and the amounts were received by him and not put into the corporation or shared with Barney.

Another element of damage dealt with the equipment. Both Barney and Siddoway had received some of the equipment as of February 1996 and the value thereof was determined by the testimony of both Barney and Siddoway. In as much as Siddoway had taken more of the equipment, Barney was entitled to a judgment for the value of the excess equipment Siddoway took.

Payments made on the Lincoln Continental automobile driven by Mrs. Siddoway in violation of the agreement could also be determined from the books and records of the company. Each monthly payment was determined accurately and specifically. Therefor as of the dissolution, i.e. the end of February 1996, Barney was entitled to his share of the value derived by Siddoway allowing his wife to use the automobile.

The final element of damage was based on the amount Siddoway owed the corporation as of February 1996. Since the amount was a loan and or additional compensation, Barney was entitled to 50% of that amount or $6,707.82. He should have received that when Siddoway fired him and the dissolution process began. The amount of damages were determined to be complete as of February 1996, and could be measured by facts and figures contained in the corporate records. Barney is entitled to pre-judgment interest on these damages as a matter of law.

II BARNEY IS ENTITLED TO AN AWARD OF DAMAGES FOR THE SALARY WHICH WAS TAKEN BY SIDDOWAY IN EXCESS OF, AND IN CONTRAVENTION OF THE AGREEMENT.

Siddoway argues that Barney is raising the issue of excess salary for the first

time on appeal. The only thing Barney has done is to request a share equal to the amount Siddoway took and consistent with evidence and Rule 54 of the URCP. The excess wages was an element of damage Barney claimed from the outset of this case.

In preparation of the exhibit 17, Barney initially requested 25% of the excess salary taken by Siddoway when in fact pursuant to the parties agreement as found by the court, he should have received dollar for dollar the same amount of salary that Siddoway received . The 25% figure on exhibit 17 was not correct.

Exhibit 17 prepared by Barney shows the amount of Siddoway's salary excluding bonuses and the amount of Barney's salary excluding bonuses. Siddoway felt and testified he was entitled to take more, several hundred dollars a month more than Barney. The court found that this was not the parties agreement, based on the testimony of Lee Barney and his recollection of the agreement. The information on exhibit 17 was taken from tax returns, W-2's , and the books and records of STI.

On cross examination, the CPA, Tubber Okuda agreed with the figures based on his own records. Okuda had records for each year except 1998 showing salary and bonuses for both Barney and Siddoway. The information and evidence contained on exhibit 17 therefor is accurate and unrebutted by Siddoway.

Siddoway supports his argument referring to the record where Siddoway is testifying. The court chose not to believe Siddoway as to the nature and terms of the agreement and instead chose to believe Barney on his version of the agreement. Finding number 6 of the Findings of Fact and Conclusions of Law specifically states

that the parties were to receive an equal salary after April 1, 1989.

The damages for the excess salary were clear, undisputed and easily determined with certainty. Barney is entitled to the additional damages and the trial court abused it's discretion in not awarding the relief to which Barney was clearly entitled.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

Pre-judgment interest is a question of law and this case fits within the parameters set forth in the Utah case law for awarding a pre-judgment interest. Barney is entitled to that pre-judgment interest in the amount of $13,423.89 from March 1, 1996 to June 7, 1999. That amount should be made part of the original judgment, and post judgment interest should accrue on that amount as well.

Barney also requests that he be awarded the additional damages for the excess wages taken by Siddoway in violation of the agreement of the parties. Barney is entitled to an award of $42,025.00, the amount equal to the excess salary plus interest taken by Siddoway. Barney should also be awarded pre-judgment interest after February 25, 1999 until June 7, 1999. Barney should also be awarded his costs on appeal.

RESPECTFULLY Submitted this 7th day of March 2000.

Larry A. Kirkham
Attorney for Appellee and
Cross-Appellant

CERTIFICATE OF SERVICE

This certifies that I caused a true and correct copy of the within and foregoing **Brief of Appellee Lee O. Barney**, to be delivered to:

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by depositing the same in the United States first-class mail, postage prepaid, on the 8 day of May, 2000.

Larry A. Kirkham