

1999

Joy Pinckney v. John David Snideman : Brief of Appellant

Utah Court of Appeals

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Thomas J. Klc; attorney for appellee.

Richard L. Tretheway; attorney for appellant.

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UTAH COURT OF APPEALS

JOY PINCKNEY

Plaintiff/Appellant

JOHN DAVID SNIDEMAN

Defendant/Appellee

Case No. 990944-CA

Oral Argument Priority No. 15

BRIEF OF APPELLANT

On Appeal from a Judgement Entered
in the Fourth district Court , In and For Utah County,
Honorable Merrill Hermansen

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Salt Lake City , Ut. 84117-5402
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Attorney for Appellee

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FILED

Utah Court of Appeals

MAR 31 2000

Julia D'Alesandro
Clerk of the Court

COMPLETE LIST OF PARTIES IN THE DISTRICT COURT

JOY PINCKNEY

JOHN DAVID SNIDEMAN

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JURISDICTIONAL STATEMENT

This court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(4) because the judgment appealed from has been transferred by the Utah Supreme Court to The Utah Court of Appeals for disposition.

ISSUES PRESENTED

1. Whether a person in possession of a property pursuant to an oral lease with the property owner is a proper party in an action for unlawful detainer and payment of back rents.

This is a question of law that is reviewed for correctness. *See State v. Pena*, 869 P.2d. 932, 939 (Utah 1994). R. 29-30, R.47-49 R. 70-73

2. Whether the trial court erred as a matter of law in awarding attorney's fees to Snideman when there is no contract or written agreement between the parties providing for the award of attorney fees in an action between the parties.

This is a question of law that is reviewed for correctness. *See State v. Pena*, 869 P.2d. 932, 939 (Utah 1994). R. 48, R 53, R72-73, R 107.

3. Whether the Findings of Fact and Conclusions of Law is sufficient to support the judgment of the trail court?

A trial courts findings of fact are reviewed under a clearly erroneous standard. *See Young v. Young*, 979 P.2d 338, 342 (Utah 1998). R 26-27, R47-49, R 53-55,R 69-70

DETERMINATIVE CONSTITUTIONAL OR STATUTORY PROVISIONS

1. CONSTITUTIONAL PROVISIONS. There are no constitutional provisions that are determinative of this appeal.

2. STATUTORY PROVISIONS. The following are statutory provisions that are determinative of this appeal.

A. Utah Code Ann. § 78-36-10 (3). Judgment for restitution, damages, and rent - Immediate enforcement - Treble damages. . . . (3) The judgment shall be entered against the defendant for the rent, for three times the amount of the damages assessed under Subsections (2) (a) through (2) (c), and for reasonable attorneys' fees, if they are provided for in the lease or agreement.

B. Utah Code Ann. § 78-36-7. Necessary parties defendant. (1) No person other than the tenant of the premises, and subtenant if there is one in the actual occupation of the premises when the action is commenced, shall be made a party defendant in the proceeding, except as provided in Section 78-38-13 , nor shall any proceeding abate, nor the plaintiff be non-suited, for the non-joinder of any person who might have been made a party defendant; but when it appears that any of the parties served with process or appearing in the proceedings are guilty, judgment shall be rendered against those parties.

C. Utah R. Civ. P. 17(a). Parties plaintiff and defendant. (a) Real party in interest. Every action shall be prosecuted in the name of the real party in interest. An

executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's name without joining the party for whose benefit the action is brought;

D. Utah R. Civ. P. 52(a). Findings by the court. (a) Effect. in all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon"

E. Utah Ct. R. Ann. § 4-505. Attorney fees affidavits. . . . 1. Affidavits in support of an award of attorney fees must be filed with the court and set forth specifically the legal basis for the award, the nature of the work performed by the attorney, the number of hours spent to prosecute the claim to judgment, or the time spent in pursuing the matter to the stage for which attorney fees are claimed, and affirm the reasonableness of the fees for comparable legal services.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition in the District Court

Plaintiff Joy Pinckney ("Pinckney") filed suit in the Fourth District Court for Utah County against the Defendant John David Snideman ("Snideman") for unlawful detainer and past due rents. (R. at 1-5). Pinckney's right to seek said rents arises out of an assignment (R. 121, Exhibit 4) of an All-Inclusive Trust Deed (R. 121, Exhibit 2) and a Trust Deed Note (R. 121, Exhibit 3). The property at issue was owned by Prodigy

Enterprises, Inc., who conveyed the property as Trustor pursuant to the All-Inclusive Trust Deed to Old Republic Title Company as Trustee and in which Robin Lott ("Lott") was the Beneficiary. Lott subsequently assigned the All-Inclusive Trust Deed and the Trust Deed Note to Pinckney. Paragraphs 10 and 11 of the All-Inclusive Trust Deed provide that the Beneficiary has the right to collect all rents, including those past due and unpaid, if the Trustor is in default. At the time Pinckney brought the action, Snideman was in possession of the property pursuant to an oral lease with the property owner, Prodigy Enterprises, Inc.

The trial court ruled that the proper parties were not before the court and granted judgment to Snideman, awarding attorney fees in the sum of \$3,618.00 and costs.

Pinckney filed her notice of appeal on November 1, 1999. (R. 113).

Statement of Facts

Robin Lott ("Lott") sold the property at issue to Prodigy Enterprises, Inc. (R. 120, p.25, lines 9-10; R. 121, Exhibit 2; R. 121, Exhibit 6). Lott, as part of the consideration for the sale of the property, took back a note for \$195,000.00 secured by an All Inclusive Deed of Trust. (R. 120, p. 25, lines 15-17). A few days after selling the property, Lott borrowed \$20,000.00 from Pinckney and secured the loan with an assignment to Pinckney of Lott's interests and rights in the All- Inclusive Deed of Trust and the Trust Deed Note Lott had received from Prodigy Enterprises, Inc. (R. 121, Exhibit 1; R. 121, Exhibit 4).

Subsequently Lott defaulted in her payments to Pinckney. (R. 120, p. 16, lines 13-15; R. 120, p. 26, lines 3-5). Pinckney exercised the assigned right under the All-Inclusive Deed of Trust to collect rents, including those past due, from the property. (R. 120, p. 26, lines 6-12).

Prodigy Enterprises, Inc. was delinquent in its payments to Lott and notice of default was given and the foreclosure of a trust deed proceeding was commenced and ongoing at the time of the unlawful detainer action of the case at hand. (R. 120, p. 26, lines 3-16).

Snideman was delinquent in his payments of rents to Prodigy Enterprises, Inc. (R. 120, p. 29, lines 3-11; R. 121, Exhibit 5). At a meeting between Lott and Snideman, held in the office of Tretheway, the attorney for Pinckney, an accounting was made and agreed upon showing a delinquency in rents in the sum of \$6,477.00 as rent due. This agreement was formalized in the Letter from Tretheway Law Offices (R. 121, Exhibit 5). The said agreement also provided for future payments to be made by Snideman. (R. 121, Exhibit 5). After this meeting, Snideman failed to make further rental payments pursuant to the agreement. (R. 120, p. 26, lines 13-16). Snideman was in possession of a portion of the subject property (R.120, p. 39, lines 7-13) and paid rent on said property (R. 121, Exhibit 5; R. 120, p. 40, lines 1-10) pursuant to an oral lease between Snideman and Prodigy Enterprises, Inc. Pinckney, pursuant to paragraphs 10 and 11 of the All-Inclusive Trust Deed filed suit against the person in possession of the property for Unlawful detainer and

collection of rents. (R.1-5).

SUMMARY OF THE ARGUMENTS

Pinckney's suit against Snideman for unlawful detainer was between the proper parties. Pinckney had an assignment of rents from Prodigy Enterprises, Inc., the owner of the property, through an assignment from Lott. Snideman, as the party in possession of the property should be the proper defendant. The concurrent action for foreclosure should stand completely separate from Pinckney's action for unlawful detainer and past due rents.

There was no written agreement as between the Pinckney and Snideman providing for attorney fees. Therefore the award of attorney fees to Snideman was completely in error.

The law is clear that there must be Findings of Facts on all material and substantive issues. In this case there are insufficient findings to support the judgments.

ARGUMENTS

I. SNIDEMAN AND PINCKNEY ARE THE PROPER PARTIES IN AN UNLAWFUL DETAINER ACTION

Pinckney was the proper plaintiff to bring the unlawful detainer action before the trial court. Pinckney received an assignment of Lott's interests and rights in the All Inclusive Deed of Trust and the Trust Deed Note Lott had received from Prodigy Enterprises, Inc. When Lott defaulted on the loan from Pinckney, Pinckney exercised her

rights under the Trust Deed and collect the assignment of rents. In Paragraph 10 of the All-Inclusive Deed of Trust, upon any default by Trustor [Prodigy Enterprises, Inc.] Pinckney had the right to “with or without taking possession of the property affected hereby, to collect all rents, royalties, issues, and profit.” (R. 121, Exhibit 2).

Utah R. Civ. P. 17(a) states:

(a) Real party in interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's name without joining the party for whose benefit the action is brought

Utah R. Civ. P. 17(a) (1999). Therefore, Pinckney, as an assignee to the All-Inclusive Deed of Trust was a proper party.

Snideman, as the person in possession of the property in interest, should be the proper party in an action for unlawful detainer. In *Pearce v. Shurtz*, the court said that “Unlawful detainer, however, is an action to remove a tenant from possession and is **primarily against the person in possession**. It is not similar to a quiet title action wherein anyone with any interest should be joined. Neither is it similar to an action upon the promissory note.” *Pearce v. Shurtz*, 70 P.2d 442, 443 (Utah 1954) (emphasis added).

Utah Code Ann. § 78-36-7 provides:

No person other than the tenant of the premises, and subtenant if there is one in the actual occupation of the premises when the action is commenced, need be made a party defendant in the proceeding, except as provided in Section 78-38-13, nor shall any proceeding abate, nor the plaintiff be non-

suites, for the non-joinder of any person who might have been made a party defendant; but when it appears that any of the parties served with process or appearing in the proceedings are guilty, judgment shall be rendered against those parties.

Utah Code Ann. § 78-36-7 (1999).

It is manifest after reviewing the above law and the All-Inclusive Deed of Trust, (R. 121, Exhibit 2), the Assignment of the Trust Deed, (R. 121, Exhibit 4) and the Letter from Tretheway Law Offices (R. 121, Exhibit 5) that Snideman, and not Prodigy Enterprises, Inc., is the proper party in an unlawful detainer action. Snideman was the real party in interest as defined by the above cited code and pursuant to the law in the *Schurtz*.

In the Letter from Tretheway Law Offices (R.121, Exhibit 5) wherein Snideman admits rent is owed, Snideman signed individually, and not in his capacity as President of Prodigy Enterprises, Inc. The letter contains the terms, amount Snideman paid and the balance owing always refer to rents. The Letter from Tretheway Law Offices (R.121, Exhibit 5) and testimony found at R. 120, p. 39, lines 7-13 and R. 120, p. 54, lines 5-9, support the conclusion that Snideman was in possession of the property and delinquent in payment of the rent to Prodigy Enterprises Inc. Prodigy Enterprises, Inc. was unable to make payments on the note to Lott due to the failure of the tenant Snideman to make his rent payments to the Corporation.

Pinckney had the right to sue the tenant pursuant to paragraphs 10 and 11 of the

All-Inclusive Deed of Trust, therefore, Pinckney and Snideman were the proper parties before the court.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN AWARDING ATTORNEY FEES BECAUSE THERE WAS NOT A CONTRACT OR WRITTEN AGREEMENT BETWEEN THE PARTIES PROVIDING FOR THE AWARD OF ATTORNEY FEES.

The court in *Dixie State Bank v. Bracken* stated that “attorney fees are awardable only if authorized by statute or by contract. 764 P.2d. 985, 988 (Utah 1988). The applicable statute, Utah Code Ann. § 78-36-10, states:

Judgment for restitution, damages, and rent - Immediate enforcement - Treble damages. . . . 3) The judgment shall be entered against the defendant for the rent, for three times the amount of the damages assessed under Subsections (2) (a) through (2) (c), and for reasonable attorneys’ fees, **if they are provided for in the lease or agreement.**

Utah Code Ann. § 78-36-10 (1999) (Emphasis added). Thus, before attorney’s fees can be awarded, the court must find that the agreement between the parties provides for the award of attorney’s fees.

In the instant case, the record is void of any evidence of an agreement, lease or writing between Pinckney and Snideman providing for the award of attorney’s fees. In fact, the court is so indefinite in the Findings of Fact that it is not known which provision in the All-Inclusive Deed of Trust (R. 121, Exhibit 2) and/or the Trust Deed Note (R. 121, Exhibit 3) Snideman relies upon to be awarded attorney’s fees. Further, neither of

these documents is a lease or an agreement between Pinckney and Snideman, as required by statute.

It is also possible, but unclear, that the trial court awarded attorney's fees on the theory of third party beneficiary. If this is the case, then *Wardley Corp. v. Welch*, 962 P.2d 86 (Utah Ct. App. 1998), is determinative. In *Wardley*, the plaintiff cross-appealed the trial court's denial of its request for attorney's fees. The plaintiff had requested attorney's fees on the theory of a third party beneficiary. The court stated that "attorney fees authorized by contract are awardable only in accordance with the explicit terms of the contract and only to the extent permitted by the contract." *Id.* at 92; *see also Maynard v. Wharton*, 912 P.2d 446, 451 (Utah Ct. App.), cert. denied, 919 P.2d 1208 (Utah 1996) (holding that the party requesting an award of attorney's fees under a contract must show that the contract's provisions contemplate that award.)

For a third party to enforce a contractual right granting attorney's fees, it must be shown that the contract intended to benefit the third party. *See Rio Algom Corp. v. JIMCO, Ltd.*, 618 P.2d 497, 506 (Utah 1980) ("For a third-party beneficiary to have a right to enforce a right, the intention of the contracting parties to confer a separate and distinct benefit upon the third party must be clear."). And where the contract is specific on the issue, the terms of the contract must be followed. *See Wardley*, 962 P.2d at 92.

In view of these cases, Snideman should not be entitled to attorney's fees based on the contracts between Lott and Prodigy Enterprises, Inc. Snideman refers to the All-

Inclusive Deed of Trust (R. 121, Exhibit 2) and the Deed of Trust Note (R. 121, Exhibit 3) as the basis for his claim for attorney's fees. The All-Inclusive Deed of Trust (R. 121, Exhibit 2), immediately after the assignment of rents provision in paragraph 11, refers to attorney's fees in paragraphs 12. It states:

Upon any default by Trustor hereunder, Beneficiary may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court (Trustor hereby consenting to the appointment of Beneficiary as such receiver), and without regard to the adequacy of any security for the indebtedness hereby secured enter upon and take possession of said property or any part thereof, in its own name sue for or otherwise collect said rents, issues, and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney's fees, upon any indebtedness hereby, and in such order as Beneficiary may determine.

R. 121, Exhibit 2.

It is clear from the wording that this paragraph does not confer any benefit on Snideman. The reference to attorney's fees is for the sole purpose of showing what deductions an assignee of rents is entitled to before applying the rent collected to the indebtedness due the Beneficiary from the Trustor. There is no intent to confer a benefit upon Snideman.

As stated in *Maynard*, "Those requesting an attorney fees award under a contract must show that the contract's provisions contemplate that award." *Maynard*, 912 P.2d at 451. The record is void of evidence supporting any finding or conclusion that a third party benefit was to be conferred on a tenant.

The only provision in the Trust Deed Note regarding attorney's fees is as follows:

If this note is collected by an attorney after default in the payment of principal or interest, either with or without suit, the undersigned, jointly and severally, agree to pay all costs and expenses of collection including a reasonable attorney's fee.

R. 121, Exhibit 3.

Clearly this provision applies only to a collection on the note and does not provide for attorney's fees for an action for collection of rents. Again, applying the law as stated above, Snideman has failed to give any evidence showing the parties to the promissory note intended to confer a benefit upon Snideman for payment of attorney's fees..

Further, there is insufficient proof to comply with Utah Ct. R. Ann. § 4-505.

The rule states:

Attorney fees affidavits. . . . 1. Affidavits in support of an award of attorney fees must be filed with the court and set forth specifically the legal basis for the award, the nature of the work performed by the attorney, the number of hours spent to prosecute the claim to judgment

Utah Ct. R. Ann. § 4-505 (1999). Even if Snideman were to be entitled to attorney's fees, the document submitted and labeled an Affidavit of Attorney Fees (R. 59) fails to comply with the law as set forth in the above rule. The document is not notarized and therefore is not an affidavit; the affidavit does not set forth the legal basis of the award for attorney fees as required; and the nature of the work performed by the attorney is not

stated with specificity as required. Further there is no rule or case that allows one to collect postage and copying as court costs.

Therefore, this Court should reverse the trial courts award of attorney's fees because there is no written agreement between the Snideman and Pinckney providing for attorney fees, Snideman is not a third party beneficiary, and Snideman failed to file a notarized document that complies with the Utah Courts Rule 4-505.

III. THE FINDINGS OF FACT ARE INSUFFICIENT TO SUPPORT THE TRIAL COURT'S RULING.

Utah R. Civ. P. 52(a) provides that "in all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon" Utah appellate courts "consistently stress" the importance of adequate findings of fact." *State v. Vigil*, 815 P.2d 1296, 1299 (Utah Ct. App. 1991). Finding of Fact 1 and 8 are conclusions of law and not findings of fact. (R. 108-110). The remaining findings are inadequate and will not allow the Appellate Court to come to a proper decision as to the conclusions and Order of the court.

An award of attorney's fees must be based on the evidence and supported by findings of fact. *See Salmon v. Davis Co.*, 916 P.2d 890, 893 (Utah 1996) (quoting *Cottonwood Mall Co. v. Sine*, 830 P.2d 266, 268 (Utah 1992)). In *In re Estate of Quinn*, 784 P.2d 1238, 1249 (Utah Ct. App. 1989), the court states, "The absence in the record before us of findings and conclusions of law on the issue of attorney fees compels us to

remand to the trial court to correct that deficiency.”

In the instant case there are no Findings of Fact as to the issue of whether and under what theory Snideman can be awarded attorney’s fees. Thus, it is not necessary for the Appellant to marshal the evidence.

CONCLUSION

The Appellate Court should reverse the order which is the subject of review on the basis of manifest error on each of the three issues raised. Further the court should rule as to the issue of attorney fees being granted as it would be a necessary issue in the case if remanded.

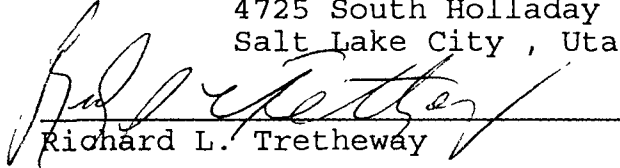
DATED this 30 day of March, 2000


Richard L. Tretheway

CERTIFICATE OF SERVICE

I hereby certify that on the 31 day of March, 2000, I caused a true and correct copy of the Brief of Appellant to be mailed first class mail;, postage prepaid to:

Thomas KLC
Attorney for the Defendant
4725 South Holladay Blvd. Suite 110
Salt Lake City , Utah 84117


Richard L. Tretheway

ADDENDUM A

4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

99 OCT 27 PM 12:59
MKP

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IN THE FOURTH DISTRICT COURT FOR UTAH COUNTY
STATE OF UTAH
PROVO DEPARTMENT

JOY PINCKNEY,

Plaintiff

vs.

JOHN DAVID SNIDEMAN

Defendant

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Civil No. 9804-5816

Judge Davis (assigned judge)
Judge Merrill Hermansen (trial judge)

BY THE COURT:

PURSUANT TO NOTICE, and upon Plaintiff's request for an expedited hearing, a bench trial of the above entitled matter was heard March 9, 1999, before the Honorable Judge Merrill Hermansen, Senior Judge. The Honorable Judge Merrill Hermansen, Senior Judge heard such matter pursuant to the request of the Presiding Judge Steven L. Hansen pursuant to Article VIII, Sec 4, Utah Constitution, Rule 11-201 (2) (d) Supreme Court Rules of Professional Practice, and Rule 3-108 (4) Code of Judicial Administration. Both parties, with attorney Richard L. Tretheway appearing for Plaintiff and attorney Thomas J. Klc appearing for Defendant were present and participated in the proceedings. The court listened to testimony, received evidence, heard argument and made its Findings of Fact and Conclusions of Law and Order and directed Defendant's attorney, Thomas J. Klc, to prepare a written Findings of Fact and Conclusions of Law along with an accompanying Order. Plaintiff objected to the proposed Findings of Fact and Conclusions of Law. Pursuant to Notice and by acquiescence of the parties, a

hearing on such objections was heard by the Court before Judge Hermansen via a telephonic conference call between the Court, attorney Tretheway, and attorney Klc, whereby all participants could hear one another. After discussion, the court directed the filing of an affidavit as to Attorney's fees by Defendant and revision of the Findings of Fact and Conclusions of Law, giving Plaintiff twenty (20) days to object to the same, if at all, before execution. Following is such revision.

FINDINGS OF FACT

1. The real party in interest in this matter, rather than Defendant John David Snideman is a corporation named Prodigy Enterprises, Inc.
2. Plaintiff and Defendant are residents of Utah County, the subject property is situated in Utah County, and the activities giving rise to the litigation occurred in Utah County, State of Utah.
3. Prodigy Enterprises, Inc. is the signatory to an all-inclusive Trust Deed dated March 1, 1998 with Robin B. Lott and an All-Inclusive Trust Deed Note of the same date. Such Trust Deed was assigned by Robin Lott to Joy Pinckney, Plaintiff, to secure a Promissory Note in the amount of \$20,000.00 from said Robin Lott to Plaintiff Joy Pinckney. The property over which the dispute giving rise to this action is the property that is subject to such Trust Deed.
4. Robin Lott became delinquent in payment of the note to Plaintiff Joy Pinckney. In the instant case, Plaintiff has sought to obtain possession of the subject property and recover damages for non-payment along with costs and attorney's fees from Defendant John David Snideman, a named officer of the corporation, Prodigy Enterprises, Inc.,

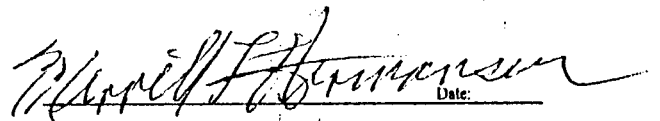
5. No entry of default has been made in the instant case.
6. Plaintiff's attorney has represented that a non-judicial foreclosure of the subject trust d is proceeding outside of the present action.
7. The subject All-Inclusive Trust Deed Note and All Inclusive Trust Deed provide for at least one party to recovery attorney's fees.
8. The reasonable attorney's fees to be awarded Defendant in this matter is the sum of
\$3,418.03
~~\$4,418.03~~

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter of this action. Venue is proper.
2. Issues about obligations owed, if any, is more properly resolved in the foreclosure actio.
3. Under Section 78-27-56.5, the Court may award attorney's fees to the prevailing party.
4. The unlawful detainer claim, if any, should be denied. Defendant should be awarded its costs and a reasonable attorney's fee.

10-27-99

By the Court:


Date: _____

ADDENDUM B

99 OCT 27 PM 12:59

MW

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IN THE FOURTH DISTRICT COURT FOR UTAH COUNTY
STATE OF UTAH
PROVO DEPARTMENT

JOY PINCKNEY,

Plaintiff

ORDER

vs.

Civil No. 9804-5816

JOHN DAVID SNIDEMAN

Defendant

Judge Davis (assigned judge)
Judge Merrill Hermansen (trial judge)

BY THE COURT:

A bench trial of the above entitled matter was heard March 9, 1999, before the Honorable Judge Merrill Hermansen, Senior Judge. The Honorable Judge Merrill Hermansen, Senior Judge heard such matter pursuant to the request of the Presiding Judge Steven L. Hansen pursuant to Article VIII, Sec 4, Utah Constitution, Rule 11-201 (2) (d) Supreme Court Rules of Professional Practice, and Rule 3-108 (4) Code of Judicial Administration. On July 1, 1999, a subsequent hearing by telephonic conference call regarding the proposed findings was heard. Based upon the record and its Findings of Fact and Conclusions of Law, the Court enters its Order as follows:

1. Defendant is granted judgment in the above-entitled case, with prejudice, denying Plaintiff's claim with Plaintiff taking nothing thereby.
2. Defendant is awarded its costs, including a reasonable attorney's fee of ~~\$4,418.03~~ ^{\$3,418.03}.

Dated: 10-27-99

By the Court:

Merrill Hermansen