

1990

Kipp Quinn v. Fenton Quinn, Jr. : Reply Brief

Utah Court of Appeals

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Robert Felton; Attorney for Appellant.

B. Kent Ludlow; Nielson and Senior; Attorneys for Respondent.

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DOCKET NO.

900169CA

In The Utah Court of Appeals

In the Matter of the Estate of,
FENTON GLADE QUINN (Deceased)

KIPP QUINN, successor personal
representative,

Appellant

vs.

FENTON QUINN, JR.,

Respondent

Case No 900169-CA

APPELLANT'S REPLY BRIEF

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LIST OF ALL PARTIES

1. Nielson & Senior, Attorneys at Law, 1100 Eagle Gate Tower, 60 East South Temple, Salt Lake City, Utah.
2. Fenton Quinn, Jr., 2601 West Rustic Drive, South Jordan, Utah, former personal representative of the estate of Fenton Quinn.
3. Kipp Quinn, 7747 Biscayne Drive, Salt Lake City, Utah 84117, successor personal representative of the estate of Fenton Quinn.
4. Robert Felton, Attorney at Law, 310 South Main Street, Suite 1305, Salt Lake City, Utah 84101, attorney for Appellant.

TABLE OF AUTHORITIES

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SUMMARY OF ARGUMENT

The award of attorney's fees was not supported by documentary evidence which was available. Failure to require admission of this material was an abuse of discretion.

ARGUMENT

AN ATTORNEY'S BILLING SUMMARY IS NOT ADMISSABLE TO SUPPORT AN AWARD OF FEES WHERE THE BACKUP DOCUMENTATION IS NOT PRODUCED

Respondent requested fees and costs totaling \$63,058.84 (R., p. 216). A year earlier they had requested \$73,767.48 (Exhibit D-3) This is in an estate where the maximum statutory fee was \$3,600.00 (T., p. 53). The only documentary evidence that the Respondents submitted in support of this award is a computer summary (Exhibit 1). Exhibit 1 was offered and received subject to the Appellant's Motion to Strike or Motion in Limine (T., p. 7). After Exhibit 1 was proffered, the Court stated: "* * * Why don't we let Mr. Felton cross-examine them (Respondent's lawyers) if he has any questions about it" (T., p. 9). The billing summary was the only exhibit submitted by Respondents and the Court shifted the burden to Appellants to disprove the fees. Respondents were never required to submit backup, documentary evidence in support of their summary in spite of two Court orders (R., pp. 184, 208).

The Respondent testified that he prepared an inventory towards the commencement of the probate proceeding in June of 1984 (T., p. 78). That inventory was never produced in spite of the Court's order (R., p. 185). The Respondents claimed and were awarded \$24,181.00 plus \$340.32 for "estate

administration” (R., pp. 218-62). The file in this action was not submitted in support of this application nor was any request made of the Court to take judicial notice of the contents of this file. In fact, the successor personal representative has been unable to obtain the probate records. Upon questioning, one of the attorneys for the Respondents, Mr. Schmutz, responded to counsel’s questions as follows (T., pp. 33-4):

Q (by Mr. Felton): I am curious why the probate documents and assets haven’t been turned over to us as requested in this letter? I mean, the probate file is necessary to complete probate of the estate or any of the assets. Do you know?

A: Well, I have invited you on more than occasion to come and look at whatever you wanted, take whatever copies you wanted, or whatever originals you’ve wanted. There are attorneys (*sic.*) and client communications interspersed in those files, which is why I was reluctant to simply box them up and send them to you.

Q: Has that, before today, this concern, ever been communicated to me or my client?

A: No.

The Respondents claimed and were awarded \$6,965.32 for what they call the “McGrath” action (R., pp. 264-79). No Court file nor records were submitted to support this claim. The Court awarded an additional \$20,706.00 plus costs of \$3,952.60 in regards to defense of the wrongful death litigation, which was handled primarily by the insurance company. Neither the Court File nor any documents substantiating the work or time spent was admitted to allow the Court the ability to examine the documentary evidence and assist him in determining whether the fees were reasonable or an effort was being made to waste the assets of this estate so that the creditors would not receive any compensation.

Appellants attempted to gain access to Respondent's evidence through discovery in order to prepare for trial. On September 6, 1989, Judge Rigtrup ordered (R., p. 208):

Former counsel, Chris Schmutz and/or Nielson & Senior, shall submit their application for fees to counsel for Kipp Quinn, Robert Felton, on or before September 21, 1989. This application shall include a detailed breakdown of the time and charges as well as all backup documentation to support the claim for fees (emphasis added).

The Petition and Summary were not filed until October 10, 1989 (R., p. 214), and none of the backup documentation was ever produced even though it was specifically requested by Appellants and ordered by the Court prior to trial. Rule 1006 of the Utah Rules of Evidence provides:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

The original or a copy of the material referred to in the Summary should have been produced, Utah Rules of Evidence, 1002, 1003, and 1004.

The Respondent's claim, which is actually his lawyers' claim, requests compensation for collateral litigation and work not central to this probate. The files and documentary evidence supporting their assertions should have been produced to substantiate their request. A court may not take judicial notice of other proceedings which have been previously determined, *Spencer v. Industrial Commission*, 81 Utah 511, 20 P.2d 618 (1933).

In *Regional Sales Agency, Inc., v. Reichert*, 784 P.2d 1210, 1215 (Utah App., 1989), this Court stated:

An award of attorney's fees must be based on evidence in the record which supports the award. See *Bangerter v. Poulton*, 653 P.2d 100, 103 (Utah, 1983). However, a trial court is not compelled to accept self-serving testimony of a party requesting attorney fee even if there is no opposing testimony. See *Beckstrom v. Beckstrom*, 578 P.2d 520, 524 (Utah, 1978). A court can evaluate the fees requested and determine a lesser amount is reasonable under the circumstances. See *Dixie State Bank*, 764 P.2d 989 (Utah, 1988).* * *

On October 5, 1989, Appellants filed a Motion In Limine to prevent the introduction of this sort of summary because it had not been produced and the other backup documentation was never provided. Counsel for the Appellant reserved the objection as to foundation and adequacy of Exhibit P-1 and specifically reserved the Motion to Strike or Motion In Limine (T., p. 7). At the conclusion of evidence, counsel for the Appellant again requested the Court to rule on this Motion and strike the exhibit. The Court denied this request.

By allowing the Respondents to satisfy their burden of proof by submitting a billing summary prepared immediately before trial constitutes a clear abuse of discretion. The net effect of the Court's ruling was to shift the burden of proof to the Defendants and at the same time deprive them of the evidence or information necessary to effectively defend this matter. It was the Respondents burden to establish entitlement to fees exceeding the statutory maximum by over \$60,000.00. Much of the purported work was reflected or involved the production of documentary material (Exhibit 1). That material was essential to Respondents proving their case and its allowed absence was manifest error.

CONCLUSION

Appellants request this Court reverse the trial court's award of additional fees and direct an award of \$3,600.00 as provided by § 75-3-718 U.C.A. (1953) which was in effect at the time this probate was filed.

RESPECTFULLY SUBMITTED this 30 day of November, 1990.

A handwritten signature in cursive script, appearing to read 'Robert Felton', is written over a horizontal line.

Robert Felton
Attorney for Appellant

letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) **Photographs.** "Photographs" include still photographs, X-ray films, video tapes, and motion pictures

(3) **Original.** An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) **Duplicate.** A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

Advisory Committee Note. — This rule is stance with Rule 1(12), Utah Rules of Evidence the federal rule, verbatim The definition of (1971) "writing" in subdivision (1) corresponds in sub-

Rule 1002. Requirement of original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by other rules adopted by the Supreme Court of this State or by Statute.

Advisory Committee Note. — This rule is Rule 1002, Uniform Rules of Evidence (1974) **Cross-References.** — Proof of writing, § 78-25-9 et seq

NOTES TO DECISIONS

ANALYSIS

In general.
Cited

In general.

Trial court committed error by allowing defendant to read during his testimony from material contained in exhibits that had been previously denied admission Intermountain Farmers Ass'n v Fitzgerald, 574 P 2d 1162 (Utah), cert denied, 439 U S 860, 99 S Ct 178, 58 L Ed 2d 168 (1978)

The best evidence rule generally has come to denote only the requirement that the contents of an available written document be proved by the introduction of the document itself, the best evidence rule has no application to a case where a party seeks to prove a fact which has an existence independent of any writing Roods v Roods, 645 P 2d 640 (Utah 1982)

Cited in Meyer v General Am Corp, 569 P 2d 1094 (Utah 1977), State v Wilson, 608 P 2d 1237 (Utah 1980), Billings v Nielson, 738 P 2d 1047 (Utah Ct App 1987)

Rule 1003. Admissibility of duplicates.

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Advisory Committee Note. — This rule is the federal rule, verbatim, and is comparable to Rule 72, Utah Rules of Evidence (1971), but is broader than Rule 72 and the best evidence

provisions of Rule 70, Utah Rules of Evidence (1971).

Cross-References. — Public writings, certified copies furnished, § 78-26-3.

NOTES TO DECISIONS**Photocopies.****—Specific cases.**

Where photostatic copies of automobile title were introduced and oral testimony given that they were true and exact reproductions of the originals, photostatic copies were properly admitted into evidence to prove title to automobile. *State v. Tuggle*, 28 Utah 2d 284, 501 P.2d 636 (1972).

A photocopy of a composite drawing identifying the defendant in a robbery case was admis-

sible in evidence after the court found that the destruction of the original was not done with fraudulent intent and no prejudice to the defendant's substantive rights resulted. *State v. Wilson*, 608 P.2d 1237 (Utah 1980).

Photocopies of defendant's palm prints were sufficiently authenticated and reliable and, therefore, properly admitted into evidence, where the photocopied palm prints were identified by a jailer as the only palm prints he had ever taken. *State v. Casias*, 772 P.2d 975 (Utah Ct. App. 1989).

COLLATERAL REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d Evidence §§ 490, 788; 30 Am. Jur. 2d Evidence §§ 1012, 1015.

C.J.S. — 32 C.J.S. Evidence §§ 709, 714; 32A C.J.S. Evidence § 815.

Key Numbers. — Evidence ⇨ 174, 175, 359.

Rule 1004. Admissibility of other evidence of contents.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

- (1) **Originals lost or destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
- (2) **Original not obtainable.** No original can be obtained by any available judicial process or procedure; or
- (3) **Original in possession of opponent.** At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the content would be a subject of proof at the hearing, and he does not produce the original at the hearing; or
- (4) **Collateral matters.** The writing, recording, or photograph is not closely related to a controlling issue.

Advisory Committee Note. — This rule is the federal rule, verbatim, and embodies in a more comprehensive fashion the provisions of Rule 70, Utah Rules of Evidence (1971).

numerous accounts, parol evidence of contents, § 78-25-16(5).

Proof of instruments affecting real estate, § 78-25-13.

Cross-References. — Original consisting of

NOTES TO DECISIONS

ANALYSIS

Original in possession of opponent.
Cited.

Original in possession of opponent.

Within best evidence rule, telegram delivered by telegraph company to receiver was original. Thus where receiver failed, upon de-

mand, to produce original message received from telegraph company, admission of carbon copy from files of sender was not prejudicial error. *B.T. Moran, Inc. v. First Sec. Corp.*, 82 Utah 316, 24 P.2d 384 (1933).

Cited in *Meyer v. General Am. Corp.*, 569 P.2d 1094 (Utah 1977).

COLLATERAL REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d Evidence § 448 et seq.

C.J.S. — 32A C.J.S. Evidence § 776 et seq.

A.L.R. — Admissibility in evidence of sound recording as affected by hearsay and best evidence rules, 58 A.L.R.3d 598

Admissibility of computerized private business records, 7 A.L.R.4th 8.

Federal Rules of Evidence: admissibility, pursuant to Rule 1004(1) of other evidence of contents of writing, recording, or photograph, where originals were allegedly lost or destroyed, 83 A.L.R. Fed. 554.

Key Numbers. — Evidence ⇌ 157 et seq.

Rule 1005. Public records.

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Advisory Committee Note. — This rule is the federal rule, verbatim, and comports with the substance of Rule 68, Utah Rules of Evidence (1971).

Cross-References. — Proof of official record, Rule 44, U.R.C.P.

COLLATERAL REFERENCES

Am. Jur. 2d. — 30 Am. Jur. 2d Evidence § 962 et seq.

C.J.S. — 32 C.J.S. Evidence § 626 et seq.

A.L.R. — Weather reports and records as evidence, 57 A.L.R.3d 713.

Admissibility in evidence, on issue of negli-

gence, of codes or standards of safety issued or sponsored by governmental body or by voluntary association, 58 A.L.R.3d 148.

Public records kept or stored on electronic computing equipment, 71 A.L.R.3d 232.

Key Numbers. — Evidence ⇌ 325 et seq.

Rule 1006. Summaries.

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.