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Leon H. Saunders, Robert Felton, saunders Land
Investment Corp., White Pine Ranches, and White
Pine Enterprises v. John C. Sharp and Geraldine Y.
Sharp : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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900332CA IN THE UTAH COURT OF APPEALS

DOCKET NO.

LEON H. SAUNDERS; ROBERT FELTON;
SAUNDERS LAND INVESTMENT CORP.,
a Utah corporation; WHITE PINE
RANCHES, a Utah general
partnership; and WHITE PINE
ENTERPRISES, a Utah general
partnership,

Plaintiffs/Appellants,

vs.

JOHN C. SHARP and GERALDINE Y.
SHARP,

Defendants/Appellees.

Case No.
900332-CA

Priority 16

APPELLANTS' REPLY BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE J. DENNIS FREDERICK,
DISTRICT JUDGE PRESIDING

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FILED

JAN 11 1991

LEON H. SAUNDERS; ROBERT FELTON;
SAUNDERS LAND INVESTMENT CORP.,
a Utah corporation; WHITE PINE
RANCHES, a Utah general
partnership; and WHITE PINE
ENTERPRISES, a Utah general
partnership,

VS.

Defendants/Appellees.

Priority 16

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LIST OF ALL PARTIES

All parties to the proceeding in the District Court are listed in the caption on the cover page of Appellants' Brief filed herein, with the exception of Kenneth R. Norton, dba Interstate Rentals, Inc., a Nevada corporation.

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LEON H. SAUNDERS; ROBERT FELTON;)	
SAUNDERS LAND INVESTMENT CORP.,)	
a Utah corporation; WHITE PINE)	Case No.
RANCHES, a Utah general)	900332-CA
partnership; WHITE PINE)	
ENTERPRISES, a Utah general)	
partnership,)	
)	
Plaintiffs/Appellants)	
)	
vs.)	
)	
JOHN C. SHARP and GERALDINE Y.)	Priority 16
SHARP,)	
)	
Defendants/Appellees)	

A. THE SHARPS HAVE CONCEDED THAT THE JUDGMENT IMPERMISSIBLY COMPOUNDS INTEREST. THIS COURT SHOULD ENTER AN ORDER THAT WHITE PINE PREVAILED ON APPEAL WITH RESPECT TO THIS ISSUE.

1

12-14. Although the Sharps have denied the Judgment (as supplemented) provides for compound interest, they admit that on November 9, 1990 -- five months after White Pine filed this appeal -- they filed a motion in the district court to "amend" the Amended Order so the Judgment would not bear compound interest. Sharps' Brief ("SB") at 9-11 and Addendum thereto at 85-86.

By Minute Entry dated December 18, 1990 (the "Minute Entry"), the district court granted the Sharps' motion to amend the Amended Order to avoid the compounding of interest. A copy of the Minute Entry is included in the Addendum hereto at "A". Even though the district court lacked subject matter jurisdiction to consider the motion or make the Minute Entry,¹ there is no question that by filing the motion, the Sharps conceded the Judgment provided for compound interest just as White Pine has contended in this appeal.

The Sharps would have this Court believe White Pine just seized on some minor, technical problem that is now resolved by the Minute Entry. That suggestion is wrong for several reasons: First, White Pine specifically raised the compounding-of-interest problem

¹ Due to the pendency of this appeal, the district court unquestionably lacked subject matter jurisdiction to consider the motion to amend the Amended Order or make the Minute Entry. See, § II hereof, infra. Since no order has yet been entered by the district court, no appeal has yet been lodged by White Pine with respect to the granting of that motion. Nonetheless, there is no question that the Sharps conceded that the Judgment and the Amended Order, contrary to law, provided for compound interest.

in more than one objection filed with the district court. Twice in conjunction with this appeal White Pine explained the problem to the Sharps: once when the Sharps sought to have this appeal summarily dismissed; again in White Pine's Brief after the Sharps' motion for summary dismissal was denied. WPB at 8-11.

Second, rather than simply telling this Court they conceded the issue, it is apparent White Pine, following this appeal, sought a modification of the Judgment in the district court to avoid a declaration that White Pine was the prevailing party with respect to this issue. Because of the third issue in this appeal -- the awarding of attorney's fees to the prevailing party -- it is obvious that such a declaration has significant implications for the Sharps. Accordingly, this Court should enter an order reversing the district court's entry of the Judgment (as amended) to the extent it compounds interest. Doing so would avoid the necessity of yet a third appeal in this case.

B. THE MOOTNESS DOCTRINE HAS NO APPLICATION TO THIS CASE.

There are two reasons why this Court should not invoke the "mootness" doctrine. First, that doctrine provides that an appeal is moot when the present controversy between the parties is ended and "the requested judicial relief cannot affect the rights of the litigants." Burkett v. Schwendiman, 773 P.2d 42, 44 (Utah 1989).

See, also, Duran v. Morris, 635 P.2d 43, 45 (Utah 1981). The judicial policy represented by the mootness doctrine is the reluctance of appellate courts against "rendering an advisory opinion." Black v. Alpha Fin. Corp., 656 P.2d 409, 410-11 (Utah 1982).

In this case, the present controversy between the parties is far from ended. The Utah Supreme Court has granted White Pine's Petition for Certiorari, see, 150 U.A.R. 28, and all the issues contained in White Pine's first appeal to this Court will now be considered by the Utah Supreme Court. Moreover, now that the district court has taken it upon itself to lift its previously imposed stay, White Pine is faced with the ongoing threat of the Sharps' presentation of yet another motion or order to the district court seeking to lift the stay in this matter.

Second, even if the mootness doctrine were properly applied in this case, which it is not, there are numerous, established exceptions to that doctrine. See, e.g., Reynolds v. Reynolds, 788 P.2d 1044, 1045-46 (Utah App. 1990). One such exception exists when an issue "is of wide concern, affects the public interest, [and] is likely to recur in a similar manner, . . ." Id. at 1046 (quoting In re J.P., 648 P.2d 1364, 1371 (Utah 1982) (quoting Wickham v. Fisher, 629 P.2d 896, 899 (Utah 1981))).

No issue is any more fundamental to the orderly administration of justice than whether a court has the freedom to grant relief that was never requested, never argued, and never explicitly ruled upon.

C. THE DISTRICT COURT WAS POWERLESS TO LIFT THE PREVIOUSLY IMPOSED STAY.

Point III of the Sharps' Brief, contained at pp. 12-18, addresses White Pine's argument at pp. 19-20, that the district court lacks subject matter jurisdiction to lift or revoke the stay. Nowhere in the pages the Sharps devote to this issue do they present any authority holding or even suggesting that a district court has the power to lift or revoke a previously imposed stay.²

The clear and explicit holding of In re Fed. Facilities Realty Trust, 227 F.2d 651 (7th Cir. 1955), that district courts have no power to revoke stays, is not challenged by any of the cases cited by the Sharps. Moreover, as pointed out at p. 19 of White Pine's initial Brief, the Seventh Circuit there interpreted a federal rule functionally identical to Utah R. Civ. P. 62(d).

² Porter v. Superior Court, 78 Cal. App. 790, 248 P.1077 (App. 1926), cited by the Sharps at p. 14 of their Brief, contains language suggesting a district court does have this authority. An examination of Porter, however, plainly discloses that case was decided pursuant to a wholly different statutory and regulatory scheme than exists in Utah, and that the case is not applicable here. No other case cited by the Sharps even addresses the question of vacating, lifting, terminating or revoking an existing stay.

The Sharps argue, however, that in some way Utah R. App. P. 8(a) abrogates the clear holding of Federal Facilities. This is not so. Rule 8(a) provides, in part, that a party may apply "for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal . . ." (emphasis added). Rule 8(a) is explicit: A district court is free to suspend or modify an injunction, but is empowered only to approve a supersedeas bond. By its express and unambiguous language, Rule 8(a) is consistent with the holding of Federal Facilities that "the order purporting to vacate the stay in a cause already on appeal was void ab initio, and that the stay continued in effect." Id. at 656 (emphasis added).

Accordingly, this Court should explicitly confront this issue and rule that district courts have no power to lift, revoke, or vacate existing stays.³

**D. ONCE THE DISTRICT COURT SET THE INITIAL BOND,
IT WAS POWERLESS TO ESTABLISH A NEW BOND AMOUNT
OR TO MODIFY THE JUDGMENT IN THE WAY IT DID.**

The Sharps rely on the case of Osborn v. Riley, 331 So.2d 268 (Ala. 1976) for the proposition that a trial court is free to

³ At p. 21 of their Brief, the Sharps seem to imply that either this Court or the Utah Supreme Court has in some way passively approved the district court's lifting of the stay. This is incorrect. Neither court has ever expressed any opinion whatsoever on the propriety of the district court's unrequested, unargued and unbriefed lifting of the stay in this case.

increase a bond amount at any time. This expansive reading of Osborn is not justified by its facts. In Osborn, the trial court entered an ex parte Order on May 21 setting the supersedeas bond at \$5,000.00. Seven days later, on May 28, the Rileys filed a Motion to increase the amount of the supersedeas bond based on their contention the initial amount was inadequate. On June 6, the trial court modified its earlier decree and increased the amount from \$5,000.00 to \$20,000.00. See, id. at 270. The Alabama Supreme Court affirmed this modification because it was done during "the 30-day grace period during which the cause remained 'within the breast of the court'." Id. at 273 (quoting, Ward v. Blackwell, 269 Ala. 632, 634, 115 So.2d 41, 42 (1959)).

The White Pine case, however, does not involve a question of a trial court's immediate modification of an initial bond amount obtained ex parte. Rather, it concerns the district court's authority to order a modification many months later after all appellate briefing of the initial order had been completed and only shortly before oral argument was held. Accordingly, Osborn is clearly distinguishable.

In re Long, 93 B.R. 791 (Bankr. M.D. Ga. 1988), also cited by the Sharps, has nothing to do with this case, and is apparently a mis-citation by the Sharps. The immediately preceding case in Volume 93 of the Bankruptcy Reporter, Matter of Ridgemont Apt.

Assoc., Ltd., 93 B.R. 788 (Bankr. N.D. Ga. 1988) does, however, address the question at hand. Once again, Ridgemont does not support the Sharps' position because it addressed Bankruptcy Rule 8005 which specifically grants a bankruptcy court the right to modify its own orders. Id. at 790. Similarly, Venen v. Sweet, 758 F.2d 117 (3rd Cir. 1985) only permits a district court to modify injunctions, a procedure expressly authorized by Rule 8(a).

In short, none of the Sharps' authorities directly stands for the proposition that a district court has any power even to modify, much less to lift, revoke or vacate a stay once it has been entered.

E. THE DISTRICT COURT HAD NO JURISDICTION TO ENTER THE AMENDED ORDER.

Assuming that the Sharps intended to cite Ridgemont rather than Long (a safe assumption since the Sharps quoted from Ridgemont), Ridgemont stands for exactly the opposite proposition argued by the Sharps. The Ridgemont court held it did have the authority pursuant to Bankruptcy Rule 8005 to modify a stay it had issued because such a modification would address "not the Order already on appeal, but the bond required as a condition of the stay pending appeal." Id. At the same time, however, the Ridgemont court specifically agreed "that it cannot modify an Order after jurisdiction over the appeal of the Order vests in the district

court. . . ." Id. This is precisely the rule stated by White Pine at pp. 22-23 of its initial Brief.

Just as Ridgemont supports White Pine's position, none of the cases relied on by the Sharps provides persuasive authority to the contrary.

For example, in Finst Dev. v. Bemaor, 449 So.2d 290 (Fla. Dist. Ct. App. 1983), the trial court expressly reserved jurisdiction to establish attorneys' fees and costs. Id. This is directly contrary to the language in the district court's initial judgment in this case whereby the Sharps were to be awarded attorneys' fees only "after prevailing in any appeal." (R. 2183). Moreover, in Finst, the attorneys' fees and costs awarded were pursuant to the primary judgment because of the reservation. That case did not involve additional fees and costs incurred in addition to fees and costs already awarded.

Dent v. Simmons, 61 Md. App. 122, 485 A.2d 270 (App. 1985) similarly involved the award of attorneys' fees in the first instance, not additional and supplemental attorneys' fees. Although the appellate court found this award proper, it wrote that

the better practice in most cases would be to determine those issues before judgment becomes final on the case in chief, in order to avoid successive appeals Indeed, the decision of the appellate court on the matters in chief may even vitiate the basis for an award of counsel fee. Under those and possibly other circumstances, it may be wiser for the trial judge to defer

determining the issue of attorney's fees until after the completion of the appellate process.

Id. at 274.

Thus, the best case the Sharps can find is one that reluctantly permitted the trial court to award attorneys' fees for the first time, but not supplemental attorneys' fees as obtained by the Sharps in this case. The Maryland court enunciated sound policy reasons why even this was not a good practice.

Those reasons apply with special force in this case. The Utah Supreme Court has granted White Pine's certiorari petition, and the propriety of even the initial award of attorneys' fees is in limbo. Because of the district court's actions in this case, White Pine has been forced to file another appeal addressing attorneys' fees the initial award of which may well never be affirmed by the Supreme Court. As recognized by the Dent court, this is a wasteful process which should not be encouraged.

No Utah case has ever permitted the supplementation of a judgment of the sort performed by the district court in this case. White v. State of Utah, 137 U.A.R. 3 (Utah 1990), approved only a reduction in a judgment to reflect an accounting reality. Besides approving only a reduction, that amendment merely recognized historical fact.

For all the foregoing legal and policy reasons, this Court should specifically hold the district court was without subject matter jurisdiction to supplement its Order in the manner it did.

F. THE DISTRICT COURT'S AWARD OF ATTORNEYS' FEES WAS IMPROPER.

As demonstrated by the foregoing, the district court's award of attorneys' fees was premature. Beyond that, however, it was procedurally improper, and its reversal is required.

Nowhere in their Brief do the Sharps contradict, distinguish or even address the authorities set forth on pp. 26-27 of White Pine's initial Brief. Those cases require a district court to make specific findings of fact and conclusions of law where attorneys' fees are not awarded as prayed for in a parties' request for fees. It is undisputed in this case that the district court reduced the Sharps' requested supplemental attorneys' fees by approximately \$25,000.00 and awarded them nearly \$80,000.00 in fees, all without any findings whatsoever. The Sharps do not anywhere in their Brief dispute that this failure by the district court requires a remand. See, Haumont v. Haumont, 793 P.2d 421, 426 (Utah App. 1990) (when a district court awards attorneys' fees in an amount less than requested, it must identify such factors on the record in order to permit meaningful review on appeal); Matter of Estate of Grimm, 784 P.2d 1238, 1249 (Utah App. 1989) (the absence of findings and

conclusions on the issue of attorneys' fees compels remand to the trial court to correct that deficiency in the record). This error is serious, because this court has no way of determining on appeal why certain fees were awarded and certain ones were not, or if the attorneys' fees awarded were reasonable.

II. CONCLUSION

Because of the district court's legal errors, its Order should be reversed. The district court awarded compound interest contrary to the longstanding and universal rule in this jurisdiction prohibiting such an award. The legal error was not corrected when the district court later acted without jurisdiction to correct it. The district court also committed error when it revoked and lifted a previously granted stay when that remedy was never properly requested, never briefed or argued and, in any event, not within the authority of the court to grant. The district court again committed reversible legal error when it entered its approval of the Sharps' disputed attorneys' fees without making any findings. In addition, the court erred when it entered these orders without subject matter jurisdiction to do so. This Court, in remanding this case to the district court, should instruct that court that White Pine was the prevailing party on all issues appealed, including the compounding of interest issue.

DATED: January 11, 1991.

Respectfully submitted,

ANDERSON & WATKINS

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Glen D. Watkins
Bruce Wycoff
Attorneys for Appellants

CERTIFICATE OF SERVICE

On this 11th day of January, 1991, I hereby certify that I caused to be mailed, via first-class United States mail, postage prepaid, four true and accurate copies of the foregoing Appellants' Reply Brief to the following:

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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

WHITE PINE RANCHES	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 870901621 CV
	:	DATE 12/18/90
VS	:	HONORABLE J. DENNIS FREDERICK
	:	COURT REPORTER
SHARP, JOHN C.	:	COURT CLERK JAB
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY.
D. ATTY.

AFTER REVIEW OF THE PLEADINGS AND UPON RECEIPT OF THE NOTICE TO SUBMIT FOR DECISION FILED DECEMBER 5, 1990 AND THE REQUEST FOR HEARING FILED DECEMBER 5, 1990 THE COURT RULES AS FOLLOWS:

1. DEFENDANTS' MOTION TO AMEND AMENDED ORDER IS GRANTED FOR THE REASONS SPECIFIED IN THE MOVING PAPERS.
2. COUNSEL FOR MOVANTS IS TO PREPARE THE ORDER.
3. DEFENDANTS' REQUEST FOR HEARING ON THEIR CROSS MOTION FOR SANCTIONS PER RULE 11 IS DENIED.
4. THE MATTER WILL BE RULED ON PER RULE 4-501 C.J.A.