

1990

Vivian M. Scheller, Steven D. Tollstrup v. Dixie Six Corporation : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
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COURT OF APPEALS

IN THE SUPREME COURT OF THE STATE OF THE STATE OF UTAH

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VIVIAN M. SCHELLER and
STEVEN D. TOLLSTRUP,

Plaintiff/Appellee,

v.

DIXIE SIX CORPORATION,

Defendant/Appellant.

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90-0392-CA

Case No. [REDACTED]

APPELLANT'S REPLY BRIEF

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FILED

SEP 11 1991

Mooreman
Graham & Co.
Utah Court of Appeals

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Case No. 900218

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IN THE SUPREME COURT OF THE STATE OF THE STATE OF UTAH

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REPLY TO APPELLEES' STATEMENT OF FACTS

Appellees Vivian M. Scheller and Steven D. Tollstrup ("Scheller and Tollstrup") mischaracterize the basis of Appellant Dixie Six Corporation's ("Dixie Six") appeal. It is not that the Trial Court "refused to reinterpret the contract,"¹ as asserted in Appellee's "Statement of Facts." Dixie Six never requested the Trial Court to "reinterpret" anything. Rather, the basis of Dixie Six's appeal is that the Trial Court refused to hear evidence which would have disclosed that the Court of Appeals was mistaken when it concluded that the parties' agreement contained no provision as to the allocation of the proceeds under the circumstances of the case. The Trial Court erroneously concluded that it was prevented by the law of the case doctrine from hearing evidence concerning the content of the parties' agreement.

¹ Brief of Appellees at 1.

With this exception, Scheller and Tollstrup's "Statement of the Facts," as augmented by Dixie Six's "Statement of the Facts," is accurate.

ARGUMENT

POINT I: THE TRIAL COURT ERRONEOUSLY APPLIED THE LAW OF THE CASE DOCTRINE.

Scheller and Tollstrup cite *White v. Murtha*, 377 F.2d 428 (5th Cir. 1967), in support of their arguments regarding the law of the case doctrine. Dixie Six also recognizes *White* as authoritative on the issue. *White* supports Dixie Six's position in several respects. First, *White* makes clear that only an appellate court's decision on legal issues becomes the law of the case.² Admittedly, the interpretation of a contract, the process of giving meaning to its terms, involves questions of law. Accordingly, an appellate court's application of law in interpreting of a contract's terms should generally become the law of the case.

On the other hand, the question of whether a contract terms exists or whether a particular provision is expressed in a written contract are fact issues. Thus, the Court of Appeals's determination that the parties' agreement contained no provision as to the allocation of proceeds involved a fact issue. As indicated by *White*, the Trial Court's reliance on the law of the case doctrine to justify its refusal to consider this fact issue was error.

² *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967).

The second aspect of *White* that supports Dixie Six's position is that it acknowledges that the doctrine "is not an inexorable command."³ Consequently, there are exceptions. The law of the case will not be followed if "the evidence on a subsequent trial [is] substantially different"⁴ The Trial Court prohibited Dixie Six from introducing evidence to show that one of the Court of Appeals's factual conclusions was wrong. Dixie Six was unable to establish that "the evidence on a subsequent trial [is] substantially different"⁵ because the Trial Court refused to hear and consider the evidence.

In short, the law of the case doctrine was not properly applied to foreclose consideration of the contents of the parties' agreement. The use of the doctrine in this manner by the Trial Court was error.

POINT II: TRIAL COURT ERRED IN FAILING TO TAKE INTO CONSIDERATION THE EXPRESS INTENT OF THE PARTIES IN DETERMINING DIXIE SIX'S RECOVERY UNDER QUANTUM MERUIT.

It is true, as Scheller and Tollstrup point out, that the general rule for measuring damages under quantum meruit is that expressed in *Davies v. Olson*, 746 P.2d 264 (Utah App. 1987). The *Davies* Court expressed the rule as follows:

³ Id.

⁴ Id.

⁵ Id.

Technically, recovery in contract implied in fact is the amount the parties intended as the contract price. If that amount is unexpressed, Courts will infer that the parties intended the amount to be the reasonable market value of the plaintiff's services.

Davies, 746 P.2d at 269, quoting Kovacic, *A Proposal to Simplify Quantum Meruit Litigation*, 35 Am.U.L.Rev. 547, 556 (1986). Thus, the initial inquiry when measuring damages under a quantum meruit theory is whether the parties expressed a particular contract price. Only if the Court determines that the parties left unexpressed their intentions regarding the contract price will the Court infer what the parties intended based on "reasonable market value."

As outlined in Dixie Six's original Brief, the parties very carefully expressed a contract price.⁶ The parties' contract unequivocally states that if Dixie Six breaches -- fails to develop as required by the contract -- the partnership is dissolved, assets are liquidated and profits are split according to a prearranged formula.⁷

That the resulting split may favor one party over another is not the concern of the Courts. It is not the role of the Courts to rewrite the parties' agreement based on perceived inequities.⁸

It is the Court's role, however, to look to the parties' agreement for evidence of what they intended as the contract price. The Trial Court concluded that it was bound by

⁶ See Brief of Appellant at 13-15.

⁷ *Id.*

⁸ *Dalton v. Jerico Construction Co.*, 642 P.2d 748 (Utah 1982).

the law of the case doctrine from hearing and considering evidence of the parties' agreement in this regard. This conclusion was error.

DATED this 11th day of September, 1991.

DART, ADAMSON & KASTING

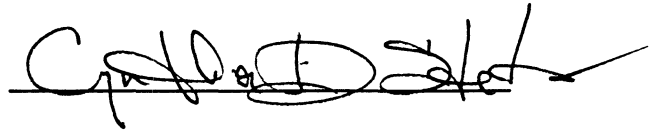


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CERTIFICATE OF MAILING

I hereby certify that on the 11 day of September, 1991, I caused four true and correct copies of the foregoing to be mailed, postage prepaid to:

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A handwritten signature in black ink, appearing to read "Cyndee D. Smith", is written over a horizontal line.