

1990

Vivian M. Scheller and Steven D. Tollstrup v. Dixie Six Coporation : Brief of Appellant

Utah Court of Appeals

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COURT OF APPEALS
BRIEF

900392CA

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

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VIVIAN M. SCHELLER and
STEVEN D. TOLLSTRUP,

Plaintiff/Appellee,

v.

DIXIE SIX CORPORATION,

Defendant/Appellant.

:
:
: Case No. 900392-CA
:
: Priority 14(b)

---oooOooo---

BRIEF OF APPELLANT

AN APPEAL FROM THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
THE HONORABLE LEONARD H. RUSSON PRESIDING

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

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VIVIAN M. SCHELLER and	:	
STEVEN D. TOLLSTRUP,	:	Case No. 900391-CA
Plaintiff/Appellee,	:	Priority 14(b)
v.	:	
DIXIE SIX CORPORATION,	:	
Defendant/Appellant.	:	

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	:	
v.	:	
	:	
DIXIE SIX CORPORATION,	:	
	:	
Defendant/Appellant.	:	

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JURISDICTION

Jurisdiction to hear this appeal is conferred on the Court by Utah Code Anno. §78-2-2a(3)(j) (1989). The matter was poured over to the Court of Appeals by the Utah Supreme Court on June 28, 1990.

ISSUES ON APPEAL AND STANDARD OF REVIEW

The issues presented by the appeal are:

A. Does the "law of the case" doctrine prevent the trial court, in the second trial of a matter, from receiving and considering evidence of the actual agreement of the parties as being determinative of the correct value of the services of the parties? This is a question of law to be reviewed by this Court for correctness.¹

¹*Doelle v. Bradley*, 784 P.2d 1176 (Utah 1989).

B. If the appellate court has erroneously assumed facts when those facts have been specifically briefed by Appellee, is the trial court precluded from taking evidence and basing its decision on the actual facts? The issue of whether the trial court has discretion is a question of law to be reviewed by this Court for correctness.²

C. When attempting to find the value of the services of a party to a contract should the court determine what value the parties would have put on the services at the time they entered into the contract given the facts and circumstances extant at that time, or should it determine the value of the services by taking evidence as to what was actually done by the party seeking compensation? This is a question of law to be reviewed by this Court for correctness.³

AUTHORITY

The following cases, among others, may be determinative of the issues stated:

Major v. Benton, 647 F.2d 110 (10th Cir 1981);

Searle v. Allstate Life Ins. Co., 696 P.2d 1308 (Cal. 1985).

²*Id.*

³*Id.*

STATEMENT OF THE CASE

Nature of the Case

This is a declaratory judgment action filed by the limited partners (Appellees herein) of a Utah Limited Partnership known as D.S.T. Limited against the General Partner (Dixie Six Corporation) to determine the appropriate division of the partnership profits.

Proceedings Below

Pertinent proceedings below include:

A. On September 23, 1983, Plaintiffs/Appellees Vivian M. Scheller and Steven D. Tollstrup ("Scheller and Tollstrup") filed suit in the Third Judicial District Court of Salt Lake County seeking a declaratory judgment against Defendant/Appellant Dixie Six Corporation ("Dixie Six").⁴

B. On May 10, 1985, following trial without jury, the Honorable Dean E. Conder ruled that under the terms of the written contract between the parties, the profits, after payment of expenses to both parties and a real estate commission to Dixie Six Corporation, should be divided equally between the parties; judgment was entered accordingly on June 18, 1985.⁵

⁴R. at 2-14.

⁵R. at 129-131.

C. Scheller and Tollstrup appealed Judge Conder's decision; the Court of Appeals, under case number 20850, affirmed in part and reversed in part, ruling that the contract of the parties did not provide for a split in the profits in the event improvements on the property were not constructed and directing that the trial court determine, on the basis of *quantum meruit*, the value of the services of the general partner, Dixie Six Corporation. The Court of Appeals' decision is reported at 753 P.2d 971 (1988).⁶

D. Defendant, believing that the Court of Appeals failed to consider a provision in the parties' contract (Article XVIII) requiring a 50/50 split of profits in the event of dissolution, petitioned the Utah Supreme Court for a Writ of Certiorari on May 25, 1988. The petition was denied.

E. On remand, the matter was tried before the Honorable Leonard H. Russon in the Third Judicial District Court for Salt Lake County, on November 21, 1989. The trial judge ruled that he was precluded from hearing evidence of the content of the agreement of the parties because of the statement of the Court of Appeals in its decision that no such term existed in the agreement. The trial judge concluded that the "law of the

⁶R. at 332-336 and 344-349.

case" doctrine prevented him from making a finding different from that of the Court of Appeals.⁷

F. The trial court ruled that the sole issue before it was the valuation of the efforts of the general partner. It further ruled that the value should not be determined by looking at what the parties would have agreed to when the partnership agreement was entered into, but rather by looking at the hours worked and services actually performed, as nearly as they could be reconstructed.⁸

G. On April 17, 1990, Judge Russon entered his Findings of Fact, Conclusions of Law, and Judgment.⁹ This appeal is taken from the judgment dated April 17, 1990.

H. Both Scheller and Tollstrup and Dixie Six filed Motions for Summary Disposition with the Utah Supreme Court, which were denied.

STATEMENT OF THE FACTS

1. In March of 1979, Scheller and Tollstrup and Dixie Six entered into a limited partnership agreement for the purpose of developing a certain piece of real property owned by Scheller

⁷R. at 399, 401, 409.

⁸R. at 401-403.

⁹Findings of Fact and Conclusions of Law (R. 408-410) and Judgment (R. at 416-417) dated April 17, 1990.

and Tollstrup in Salt Lake County, Utah. The limited partnership was named D.S.T. Ltd. ("D.S.T.").¹⁰

2. Dixie Six contributed \$10,000 toward the initial capital for the limited partnership, and Scheller and Tollstrup conveyed the property to D.S.T.¹¹

3. Dixie Six spent considerable time, effort, and money developing the property, but D.S.T. was unable to obtain financing for the project.¹²

4. In early 1983, Scheller agreed to a sale of the property by D.S.T. to an entity known as P.F. West. For irrelevant reasons, the sale was never completed.¹³

5. Eventually, the property was sold to Busch Development Company ("Busch") on essentially the same terms as the proposed sale to P.F. West. Scheller and Tollstrup received a total of \$915,032.03 from the sale of the property.¹⁴

¹⁰R. at 12, 383-384.

¹¹R. at 385.

¹²R. at 386-388.

¹³R. at 388-389.

¹⁴R. at 124-125.

6. A dispute arose among the parties concerning whether Dixie Six was entitled to share in the profits generated from the sale.¹⁵

7. On September 23, 1983, Scheller and Tollstrup filed suit in the Third Judicial District Court of Salt Lake County seeking a declaratory judgment limiting Dixie Six to the recovery of its expenses plus the 6% sales commission for the sale of the property to Busch, and prohibiting Dixie Six from sharing in the profit from the sale as set forth in the limited partnership agreement.¹⁶

8. On May 10, 1985, following trial without jury, the Honorable Dean E. Conder ruled that Dixie Six did not breach the limited partnership agreement and that Dixie Six had developed and marketed the property in accordance with the terms of the limited partnership agreement.¹⁷

9. The trial court found that Scheller and Tollstrup were estopped from claiming that Dixie Six was not entitled to a full share of its profits in accordance with the terms of the limited partnership agreement.¹⁸

¹⁵R. at 2-3.

¹⁶R. at 2-4.

¹⁷R. at 125.

¹⁸R. at 126.

10. Finally, the trial court concluded that Scheller and Tollstrup waived the claims set forth in their Complaint. On June 18, 1985, judgment was entered in favor of Dixie Six.¹⁹

11. Scheller & Tollstrup then appealed Judge Conder's decision. In Judge Orme's written opinion, the Court of Appeals affirmed in part and reversed in part as follows:

1. It determined that, contrary to the trial court's finding, Scheller and Tollstrup were not estopped by their conduct in not objecting to the two prior sales and in only objecting to the distribution of the proceeds from the sale to Busch after the sale had taken place.

2. It found that the trial court's definition of the term "develop" was incorrect in that Dixie Six was under an obligation to "build" something on the property.

3. Finally, the Court of Appeals found that, in the event of a breach, no contractual provision existed as to the allocation of the proceeds if the property was sold undeveloped and, therefore, Dixie Six is only entitled to recover under a quantum meruit theory of compensation.

Scheller v. Dixie Six, 753 P.2d 971 (Utah App. 1988).²⁰

12. On or about May 25, 1988, Dixie Six petitioned the Utah Supreme Court for a Writ of Certiorari. The petition was denied.

¹⁹R. at 129-130.

²⁰R. at 344-349.

13. On remand the matter was tried before the Honorable Leonard H. Russon, Third Judicial District Court for Salt Lake County, on November 21, 1989. Judge Russon concluded that he was bound by the "law of the case" doctrine to accept the Court of Appeals' finding that the parties' limited partnership agreement contained no provision addressing the allocation of the sales proceeds in the event of a breach by Dixie Six. On April 17, 1990, Judge Russon entered Judgment awarding Dixie Six the sum of \$36,000 as the value of its efforts to develop the property.²¹ This appeal followed.

SUMMARY OF ARGUMENT

The trial court committed error when it 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 the law of the case doctrine prevented it from reexamining the parties' agreement. The law of the case doctrine is not an inflexible prohibition against departure from legal parameters earlier announced in a case. Furthermore, the doctrine only applies to legal conclusions. By refusing to take evidence which would have revealed the

²¹R. at 416-417.

Court of Appeals's erroneous factual conclusion, the trial court committed error.

The trial court also erred in its determination of the reasonable value of Dixie Six's services. As mandated by the Court of Appeals, the trial court sought to determine the amount of additional compensation to which Dixie Six is entitled under a theory of *quantum meruit*. Rather than determining the reasonable value of Plaintiff's services based on the facts and circumstances existing at the time, and the risks allocated to each party under the agreement, the trial court attempted to reconstruct the actual hours expended by Dixie Six in rendering the services. In doing so, the trial court committed error.

ARGUMENT

POINT I: THE TRIAL COURT COMMITTED ERROR BY REFUSING TO CONSIDER EVIDENCE OF THE PARTIES' AGREEMENT.

The first question presented is whether the trial court's rigid adherence to the "law of the case" was manifest error. Both before and at the trial before Judge Russon, Dixie Six pointed out that the Court of Appeals was mistaken when it concluded that the parties' agreement contained no provision "as to the allocation of proceeds in the event that Dixie Six

failed to develop the property as required by the agreement." *Scheller v. Dixie Six Corp.*, 753 P.2d 971, 975 (Utah App. 1988).²² The trial court refused to hear or consider evidence of the parties' agreement, limiting the inquiry to "the sole question [of] whether Dixie Six was entitled to any compensation in quantum meruit" ²³ The following dialogue illustrates the trial court's position:

MR. ADAMSON: The additional item that we did speak of in chambers, and I want to make a clear record on and we discussed was the fact that in its decision the Court of Appeals says that there is no contract provision which provides for what is to be done on the dissolution of the partnership. And it is our position that the Court of Appeals has misread the contract and failed to take note of those provisions in our brief which point out what the contract said.

THE COURT: Well, that issue is not before this court.

MR. ADAMSON: I understand that, Your Honor. I just want to make a clear record on it and point out and request the Court

²²Dixie Six's position concerning allocation of the proceeds upon sale of the property in an undeveloped state was argued to and accepted by the first trial court (See Judge Conder's Findings and Conclusions dated 6/18/85 attached to Brief of Appellants in Case No. 20850), argued to the Court of Appeals (See Brief of Respondent, Case No. 20850 at pp. 22-27), and argued to the Supreme Court in Dixie Six's Petition for Writ of Certiorari (Petition, Case No. 860147-CA at Point I).

²³Findings of Fact and Conclusions of Law, Civil No. 830906862CV, dated April 17, 1990 (R. at 408-410).

to make a finding that the provision of ¶18 does exist in the contract and a Conclusion of Law that because of the fact the Court of Appeals has said that it is not, that it is not before the Court.

. . . .

THE COURT: And now that the Court of Appeals has ruled, I am not going to open back up any of the provisions of the contract because they have ruled that there may be recovery under *quantum meruit* in this particular case and they gave the reasons why and it was reversed only to that single issue. And the only evidence I will receive will be evidence that goes to that single issue.

Trial Tr. (11/21/89) at 3-5.

The "law of the case" doctrine is not an inflexible prohibition against departure from a rule of law earlier announced in a case.²⁴ Rather, it is a rule "of expedition, designed to bring about a quick resolution of disputes by preventing continued reargument of issues already decided." *Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1981). The doctrine may be disregarded when necessary to avoid an "unjust decision." *Searle v. Allstate Life Ins. Co.*, 696 P.2d 1308, 1314 (Cal. 1985).

²⁴See *Major v. Benton*, 647 F.2d 110 (10th Cir. 1981); *Searle v. Allstate Life Ins. Co.*, 676 P.2d 1308 (Cal. 1985).

Moreover, the doctrine only applies to legal conclusions, as its name implies.²⁵ The Court of Appeals's conclusion concerning the content of the parties' agreement was a factual conclusion. As such, it was not subject to the "law of the case" doctrine.

Finally, the conclusion is wrong. The Court of Appeals held that the conduct of the parties established a contract implied in fact, entitling Dixie Six to a recovery in *quantum meruit*.²⁶ The Court of Appeals premised its holding on its finding that ". . . there was simply no agreement between the parties as to the allocation of proceeds in the event that Dixie Six failed to develop the property as required by the agreement." *Scheller v. Dixie Six Corp.*, 753 P.2d 971, 975 (Utah App. 1988).

This finding ignored Articles XVIII and IX of the parties' agreement. If Dixie Six failed to perform its obligations, Scheller's and Tollstrup's remedy is contained in Article XVIII of the Limited Partnership Agreement, entitled "Dissolution of Partnership," which reads as follows:

²⁵*Searle*, 696 P.2d at 1314.

²⁶*Scheller v. Dixie Six Corp.*, 753 P.2d 971, 975 (Utah App. 1988).

The partnership shall be dissolved upon the occurrence of any of the following events:

(a) the sale of all property to third parties.

(b) the bankruptcy, insolvency, receivership or involuntary dissolution of Dixie.

(c) upon written notice by the limited partners, if Dixie shall fail to perform its obligations hereunder and such failure shall continue for a period of thirty (30) days after receipt of such written notice.

In the event of a dissolution as provided hereinabove, the partnership shall immediately begin to wind up its affairs. **The proceeds from liquidation of partnership assets, after payment to all creditors of the partnership in the order of priority provided by law, shall be paid and applied in accordance with Article IX hereinabove.**

In the event that Dixie Six failed to satisfy its obligation to develop the property, the remedy is to have D.S.T. liquidated and the proceeds from the liquidation distributed in accordance with Article IX of the limited partnership agreement. Article IX, ¶9.2, states:

9.2 Receipts of the partnership shall be allocated as follows:

(a) First, to the actual expenses of the partnership or Dixie relative to the subdividing, development, improvement and sale of the property, such expenses to be itemized on a

monthly statement provided to the limited partners.

(b) Second, to payment to the limited partners for the real property.

(c) Third, one-half of the remainder to Dixie and one-half of the remainder to the limited partners.

The Court of Appeals was wrong in its conclusion that the parties' agreement contained no provision for the allocation of the proceeds on failure of Dixie Six to perform as contemplated. On remand, Dixie Six made it clear that the Court of Appeals overlooked the contract provision. As the California Supreme Court noted in *Searle v. Allstate*, under these circumstances the law of the case doctrine has no application:

The primary purpose served by the law-of-the-case rule is one of judicial economy. Finality is attributed to an initial appellate ruling so as to avoid the further reversal and proceedings on remand that would result if the initial ruling were not adhered to in a later appellate proceeding. (Citations omitted) That reason for the rule is inoperative when the court hearing the subsequent appeal determines that there should be a reversal on a ground that was not considered on the prior appeal.

Searle v. Allstate Life Ins. Co., 696 P.2d at 1314.

Evidence concerning the provision in the parties' agreement relating to allocation of the proceeds was not

considered by the Court of Appeals. Judge Russon committed manifest error when he concluded that he was prohibited by the law of the case doctrine from hearing evidence of the parties' agreement, evidence not considered by the Court of Appeals.

POINT II: THE TRIAL COURT ERRED IN ITS DETERMINATION OF THE REASONABLE VALUE OF DIXIE SIX'S SERVICES.

As the Court of Appeals pointed out in *Scheller v. Dixie Six Corp.*, 753 P.2d 971 (Utah App. 1988), recovery in *quantum meruit* ". . . is for the amount the parties can be said to have reasonably intended as the contract price." *Id.* at 975. The best evidence of what the parties "reasonably intended as the contract price" is the contract itself. As noted above, the parties specifically addressed "the contract price," but the trial court felt bound by the law of the case doctrine to focus on evidence other than the parties' agreement.

The direction given on remand was simply to determine "the amount of additional compensation to which Dixie Six is entitled under a theory of *quantum meruit*." *Id.* at 976. Assuming no contract provision, as the Court of Appeals did, the direction was to "infer the amount [the parties intended] to be the reasonable value of the plaintiff's services." *Id.* at 975.

Given this direction, the trial court was faced with either evaluating the issue based on the facts and circumstances existing at the time the parties entered into the contract, including the risks allocated to each party by the terms of the contract, or by determining the value of the services based on what was actually done by the party seeking compensation. In choosing the latter approach, the trial court committed error.

The trial court attempted to reconstruct what actually happened, which had the effect of ignoring the risks and duties allocated by the agreement. The situation is not unlike an attorney-client contingent fee agreement. A hindsight analysis of the reasonable value of the services provided by an attorney under a contingent fee agreement can take into consideration only the hours expended by the attorney. The obvious error in analyzing the issue from this perspective, however, is that it does not take into consideration the risks assumed by the attorney in taking the case, including the risk of no recovery, nor does it give any credence to the express intentions of the parties.

Likewise, the trial court's attempt to value the services provided by Dixie Six based on the amount of time expended by Dixie Six ignores the facts and circumstances existing at the

time the agreement was made, ignores the express intent of the agreement itself, and ignores the allocation of risks between the parties. Like an attorney entering into a contingent fee agreement, Dixie Six's compensation was dependent on a positive result from its development efforts. Dixie Six agreed to put up \$10,000 in initial capitalization plus over \$70,000 in costs for the chance to share in any profits eventually generated by its efforts.

The only evidence before the trial court on the reasonable value of the services provided by Dixie Six in light of these facts and circumstances was given by Richard Moffit, a real estate broker and developer with The Boyer Company.²⁷ Mr. Moffit testified that the reasonable value of the services provided by Dixie Six, considering the risks, is 30% of the net profits.²⁸ The trial court chose to ignore Mr. Moffit's testimony, instead basing its decision on a reconstruction of the hours expended. In doing so, the trial court committed error.

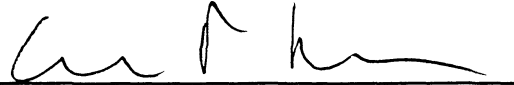
²⁷Mr. Moffit's testimony begins at p. 148 of the transcript of trial (11/21/89).

²⁸Trial Tr. (11/22/89) at 15.

CONCLUSION

For the reasons stated above, the trial court's decision should be reversed and the matter remanded for further consideration of the parties' agreement and its bearing on the issue of the amount of additional compensation due to Dixie Six.

DATED: May 7, 1991.

A handwritten signature in black ink, appearing to read 'Craig G. Adamson', written over a horizontal line.

Craig G. Adamson
Eric P. Lee
Attorneys for Defendant/Appellant

MAILING CERTIFICATE

I hereby certify that on the 7 day of May, 1990, I caused a true and correct copy of the foregoing to be mailed, postage prepaid, to the following:

Walter P. Faber
Attorney for Plaintiff/Appellee
2102 East 3300 South
Salt Lake City, Utah 84109

