

1990

Leanna Broadwater v. Old Republic Surety,
Northwestern National Insurance Company of
Milwaukee Wisconsin, Atlas Stock Transfer, Check
Rite International Inc., Cardinal Energy
Corporation, Scott J. Fletcher : Reply Brief

Utah Supreme Court

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BRIEF

900508

IN THE SUPREME COURT OF THE STATE OF UTAH

LEANNA BROADWATER,

Plaintiff-Appellee,

vs.

OLD REPUBLIC SURETY, a Wisconsin
corporation doing business in
Utah, NORTHWESTERN NATIONAL
INSURANCE COMPANY OF
MILWAUKEE, WISCONSIN, a Wisconsin
corporation doing business in Utah,
ATLAS STOCK TRANSFER, a Utah
corporation, CHECK RITE
INTERNATIONAL INC., f/k/a
CARDINAL ENERGY CORPORATION,
and SCOTT J. FLETCHER, a Utah
resident,

Defendants-Appellants.

Case No. 900508

Priority No. 16

APPELLANTS' REPLY BRIEF

Appeal from the Orders of the
Third Judicial District Court of Salt Lake County
The Honorable Raymond S. Uno, presiding

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Northwestern National

NOV 21 1991

PREME COURT
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

LEANNA BROADWATER,)	
)	
Plaintiff-Appellee,)	
)	Case No. 900508
vs.)	
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Utah, NORTHWESTERN NATIONAL)	
INSURANCE COMPANY OF)	
MILWAUKEE, WISCONSIN, a Wisconsin)	
corporation doing business in Utah,)	
ATLAS STOCK TRANSFER, a Utah)	
corporation, CHECK RITE)	
INTERNATIONAL INC., f/k/a)	
CARDINAL ENERGY CORPORATION,)	
and SCOTT J. FLETCHER, a Utah)	
resident,)	
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Defendants-Appellants.)	

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IN THE SUPREME COURT OF THE STATE OF UTAH

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ATLAS STOCK TRANSFER, a Utah)	
corporation, CHECK RITE)	
INTERNATIONAL INC., f/k/a)	
CARDINAL ENERGY CORPORATION,)	
and SCOTT J. FLETCHER, a Utah)	
resident,)	
)	
Defendants-Appellants.)	

SUMMARY OF ARGUMENT

In determining the proper measure of damages for converted goods with a widely fluctuating market value, Utah courts have adopted the "New York rule." Under the New York rule, damages are fixed at the highest market price the converted good reach at any time between the time the injured party has notice of the conversion and a "reasonable time" thereafter. The trial court in this case committed error in ruling as a matter of law that 90 days constituted a reasonable time in which to fix plaintiff's damages under the facts of this case.

Plaintiff relies on an assortment of irrelevant facts to support her assertion that she should be allowed at least 90 days from notice of the conversion of her stock to have her damages

fixed. For purposes of the cross motions for partial summary judgment, defendants assumed, arguendo, the following critical undisputed facts:

1. On or about May 4, 1988, plaintiff's stock was converted;
2. The act of conversion was committed by defendants Atlas and Check Rite; and
3. Plaintiff had notice of the conversion of her stock on or about May 4, 1988.

Many of the facts relied upon by plaintiff in her motion for partial summary judgment were either in dispute or were immaterial to the fixing of her damages, if any, proximately caused by the conversion of plaintiff's stock by defendants Atlas and Check Rite. Under the undisputed material facts of this case, plaintiff, as a matter of law, should be given no more than 30 days to either have mitigated her damages by purchasing replacement shares or have her damages fixed at that point in time in accordance with the under the New York rule.

Defendants properly raised several evidentiary objections to the affidavits submitted by plaintiff in support of her cross motion for partial summary judgment. Since the trial court improperly refused to strike certain portions of the affidavits of plaintiff, Chuck Burton, Potter Investment, and Penny Grace, the trial court's ruling granting partial summary judgment in favor of plaintiff based upon those affidavits should be reversed.

Plaintiff asserts that the trial court's award of attorney's fees should be affirmed because they were awarded as consequential damages, rather than as sanctions under Utah Code Ann. § 78-27-56. Well-established Utah law provides that as a general rule, attorney's fees may not be awarded absent a contractual or statutory basis therefor. The "third-party tort rule," adopted in South Sanpitch Co. v. Pack, 765 P.2d 1279 (Utah Ct. App. 1988), does not support the award of attorney's fees in this case. Plaintiff's amended complaint claimed that she was only entitled to an award of attorney's fees pursuant to Utah Code Ann. § 78-27-56. Since the trial court made no specific findings of fact, as required under Utah Code Ann. § 78-27-56, this court should reverse the trial court's award of attorney's fees.

ARGUMENT

POINT I.

PLAINTIFF'S DAMAGES, AS A MATTER OF LAW, MUST
BE FIXED WITHIN 30 DAYS OF PLAINTIFF'S NOTICE
OF THE ACT OF CONVERSION.

Although plaintiff correctly points out that other jurisdictions have adopted varying rules for measuring damages for the conversion of goods with widely fluctuating values, the Utah Supreme Court adopted the "New York rule" in Western Securities Co. v. Silver King Consolidated Mining Co., 57 Utah 88, 192 P. 664 (1920). Under the New York rule, a party is entitled only to recover the highest value her stock reached within a "reasonable time" of her learning of the conversion of her stock. Since the

adoption of the New York rule by the Utah Supreme Court in Western Securities, no Utah appellate court has questioned the continued viability of the New York rule as the proper test for fixing damages in a case such as the instant case. Furthermore, the Tenth Circuit Court of Appeals in Nephi Processing Plant, Inc. v. Talbott, 247 F.2d 771 (10th Cir. 1957), also recognized the continued viability of the New York rule in Utah.

Plaintiff admits that the numerous cases cited by defendants in their initial brief establish that time periods of 30 days or less may be considered "a reasonable time" for fixing damages under the New York rule. However, plaintiff points to several "facts" in support of her claims that the New York rule is either inapplicable or that she should be allowed at least 90 days from her notice of defendants' conversion to have her damages fixed.

Plaintiff first asserts that the trial court's ruling should be affirmed because the defendants knowingly and intentionally converted her stock. Defendants respectfully point out that the tort of conversion, such as is alleged in counts I and II of plaintiff's amended complaint, is by its very definition an intentional tort. The Restatement (Second) of Torts § 222A (1965) defines conversion as:

- (1) Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.

The authors of the Restatement of Torts further clearly provided that conversion cannot be committed through mere negligence:

One who does not intentionally exercise dominion or control over a chattel is not liable for a conversion even though his act or omission is negligent.

Restatement (Second) of Torts § 224 (1965). Since conversion is always an intentional tort, the distinction which plaintiff attempts to draw between this case and those cited by defendants is a distinction without a difference.

Plaintiff next asserts that her damages should be fixed 90 days after she learned of the conversion because the defendants failed to immediately remedy the conversion despite their knowledge that her stock was increasing in value. Such factors were present in each of the cases cited by defendants in their initial brief. Since each of the cited cases involved a conversion by one with a general working knowledge of the securities market, it can be safely assumed that all such tortfeasors know that the value of converted stock might fluctuate. Furthermore, it should be pointed out that plaintiff's affidavits, at most, establish that Old Republic knew that the Check Rite stock was likely to fluctuate in value. It is undisputed that Old Republic did not convert plaintiff's stock. As a result, any knowledge held by Old Republic concerning the fluctuating value of Check Rite's stock is irrelevant to the application of the New York rule in this case.

Plaintiff also asserts that this case is distinguishable from those cited in defendants' initial brief because this case involves

a surety bond. The presence or absence of a lost instruments bond is irrelevant to an action brought by the rightful holder of a stock certificate against a party accused of converting the holder's stock certificate. Although Old Republic, through its predecessor in interest, issued a lost instruments bond on behalf of defendants Scott Fletcher, Atlas and Check Rite, the subject bond in no way excuses plaintiff's duty to mitigate her damages nor obviates the applicability of the New York rule in this case.

In addition, plaintiff asserts that the New York rule is inapplicable because plaintiff's stock was not converted in a "sale in the market" of her stock. The critical issue in this case is not the manner in which the act of conversion was committed by several of the defendants, but rather that a conversion of goods having a widely fluctuating value occurred. The fact that Check Rite shares are not traded on the New York Stock Exchange and that the shares were not converted in some type of a transactional purchase or sale is irrelevant to the determination of what constitutes a reasonable time in which to fix plaintiff's damages under the New York rule.

Finally, plaintiff asserts that she should be permitted at least 90 days in which to have her damages fixed since she had no subjective intent and no resources to go into the open marketplace to purchase replacement shares. The law places a duty to mitigate upon every injured party. An aggrieved party's subjective intent or inability to mitigate should not be controlling factors in

determining when damages should be fixed in a case where goods with a widely fluctuating value have been converted. Indeed, the New York rule has been carefully crafted to obviate the need to refer to the injured party's subjective intent or ability to purchase replacement shares.

Defendants respectfully submit that plaintiff should not be allowed to rely upon alleged "lulling" and "stalling" activities of a third party, such as Old Republic, which did not participate in the act of conversion in order to recover higher damages against those parties which converted plaintiff's stock. The only conduct in this case which is relevant to the determination of when to fix plaintiff's damages is the conduct engaged in by defendants Atlas and Check Rite in allegedly failing to transfer plaintiff's shares on or about May 4, 1988. Since plaintiff had knowledge of the conversion on or about May 4, 1988, her damages should be fixed within a "reasonable time" thereafter. Defendants submit that the trial court erred in failing to hold that 30 days constitutes a reasonable time in which to fix plaintiff's damages under the New York rule.

POINT II.

THE AFFIDAVITS UPON WHICH PLAINTIFF RELIED IN
HER CROSS MOTION OF SUMMARY JUDGMENT SHOULD
HAVE BEEN STRICKEN.

Plaintiff asserts that defendants' motion to strike portions of the affidavits of plaintiff, Chuck Burton, Potter Investment, and Penny Grace, was properly denied because defendants failed to

indicate why said affidavits were objectionable. At the time of the hearing for the cross motions for partial summary judgment, defendants submitted a written memorandum detailing why said affidavits failed to comport with Rule 56(e), U.R.C.P. (R. 428-431) Although Judge Uno did not allow oral argument on defendants' motion to strike, counsel specifically requested that Judge Uno take into consideration the pending motion to strike when ruling on the parties' cross motions for partial summary judgment. (R. 646)

Plaintiff's affidavit of February 13, 1990, contains facts not supported by adequate foundation and impermissible opinion and legal conclusions drawn by a layman. (R. 389-392) In paragraph 2 of her affidavit, plaintiff impermissibly concludes that she was "mistreated, misled, and lulled" by certain of the defendants. In paragraph 3, plaintiff speculates "that she would have received the highest price that such stock reached in 1988." In paragraph 4, plaintiff opines that she "believes that the defendants . . . had a duty to make her whole." Paragraph 5 of the affidavit is replete with unsubstantiated facts and opinions. Paragraph 6 of the affidavit contains impermissible opinions and legal conclusions concerning plaintiff's duty to mitigate.

Plaintiff's second affidavit, which was submitted in opposition to defendants' motion for partial summary judgment, is likewise defective. (R. 413-416) In fact, this affidavit consists of nothing more than legal argument of counsel put in the form of an affidavit signed by the plaintiff. The affidavit deals with the

parties' respective duties under the law and the plaintiff's own opinions that she acted reasonably and that the defendants did not.

The affidavit of Chuck Burton sets forth hearsay evidence of what plaintiff allegedly told Mr. Burton during a telephone conversation in July, 1988. (R. 379-80) Furthermore, Mr. Burton's affidavit lacks any foundation concerning the alleged transaction involving Check Rite stock referred to in paragraphs 4 and 5 of his affidavit. Mr. Burton's affidavit also fails to clearly set forth the foundational basis for which he claims to have personal knowledge of said transaction.

The affidavit of George Potter on behalf of Potter Investment Company was likewise defective. (R. 381-83) Mr. Potter opines without foundation in paragraph 2 of his affidavit that Check Rite stock certificate No. 258 had been properly endorsed by defendant Scott Fletcher and that plaintiff had tendered valuable consideration for said shares of stock. Such factual assertions also amount to impermissible legal conclusions. Paragraph 3 of Mr. Potter's affidavit likewise contains hearsay evidence and lacks sufficient foundation for the introduction of the facts set forth therein.

Finally, the affidavit of Penny Grace fails to set forth that she is authorized on behalf of the Thomson McKinnon Securities Company to render the affidavit. (R. 387-388) Likewise, Ms. Grace's affidavit fails to set forth any evidence of the price at which Check Rite stock could be sold. In addition, evidence as to

the price Ms. Grace was required to pay for Check Rite stock is irrelevant to the issues in this case.

In view of the deficiencies in the affidavits submitted by plaintiff in support of her cross motion for partial summary judgment, the trial court should have stricken the affidavits in conformity with Rule 56(e), U.R.C.P. Since the trial court granted partial summary judgment in favor of the plaintiff in part based upon the affidavits submitted by her, this court should reverse the entry of partial summary judgment in favor of plaintiff.

POINT III.

DEFENDANTS' ARGUMENT CONCERNING THE AWARD OF ATTORNEY'S FEE WAS PROPERLY RAISED IN THE COURT BELOW.

Plaintiff asserts that the defendants are claiming for the first time on appeal that the attorney's fees awarded to her constitute sanctions under Utah Code Ann. § 78-27-56. Plaintiff asserts, without any support in the record, that the lower court "based its award of attorney's fees on South Sanpitch Company v. Pack, 765 P.2d 1279 (Utah Ct. App. 1988), and Nephi Processing Plant, Inc. v. Talbott, 247 F.2d 771 (10th Cir. 1957)." (Plaintiff's Opposing Brief at p. 23.) Plaintiff's argument, however, misses the mark.

Defendants have consistently maintained from the time the trial court first considered the parties' cross motions for summary judgment that Utah law does not permit attorney's fees to be

awarded to the prevailing party unless such fees are provided for by contract or statute. (R. 448)

Plaintiff's prayer for judgment against the various defendants in her amended complaint states in pertinent part:

On counts I and II of Plaintiff's complaint, Plaintiff prays for judgment against defendants Atlas and Check Rite in the amount of the highest price of the stock since May, 1988, an amount to be proven on or before trial in which plaintiff calculates to be at least \$12,000, for costs, pre and post-judgment interest at the highest legal rate, attorney's fees in accordance with § 78-27-56, Utah Code Ann., and otherwise, and for any all further relief as the court deems fair and equitable

The prayer of plaintiff's complaint clearly sets forth the sole basis for plaintiff's claim for an award of attorney's fees in this case.

Although plaintiff urged the trial court that South Sanpitch Co. v. Pack and Nephi Processing Plant v. Talbott provide a basis for an award of attorney's fees in this case, defendants respectfully submit that the cases do not support the award made by the trial court in this case. In Nephi Processing Plant, there is absolutely no mention or discussion of attorney's fees as an element of damages. In addition, the Nephi Processing Plant opinion deals with the measure of damages in a case involving breach of warranty. In South Sanpitch Co., the Utah Supreme Court affirmed the general rule that an award of attorney's fees is not appropriate unless provided for by statute or contract, but created a narrow exception commonly referred to as the "third-party tort

rule." South Sanpitch Co., 765 P.2d at 1282-83. The third-party tort rule permits the recovery of attorney's fees as an element of consequential damages "when the natural consequence of one's negligence is another's involvement in a dispute with a third party." Id. at 1282. Under counts I and II of plaintiff's amended complaint, plaintiff seeks direct recovery against defendants Atlas and Check Rite for damages flowing from said defendants' alleged intentional conduct. In a direct action by one claiming that her goods have been converted by the named defendants, the third-party tort rule is inapplicable.

In view of the wording of the prayer of plaintiff's amended complaint and the well-recognized general rule under Utah law, there is absolutely no basis for the award of attorney's fees made by the trial court in this case, unless the trial court intended to award such fees under Utah Code Ann. § 78-12-56. However, the record is silent as to the trial court's reasoning behind its award of attorney's fees. (R. 818-19) In fact, the trial court's order gives no indication, let alone specific findings, as to why the court awarded attorney's fees in this case. Due to the lack of specific findings in the trial court's order and the apparent lack of any basis for such an award, this court should find that the trial court erred in awarding attorney's fees to plaintiff.

CONCLUSION

Based upon foregoing, defendants respectfully request that this court reverse the order granting partial summary judgment in favor of plaintiff on counts I and II of her amended complaint and order that the trial court grant defendants' cross motion for partial summary judgment on counts I and II. The defendants also respectfully request that this court reverse or in the alternative vacate and remand the trial court's order granting attorney's fees to plaintiff.

DATED this 20th day of November, 1991.

STRONG & HANNI

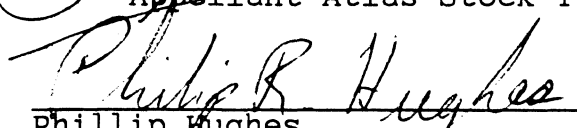
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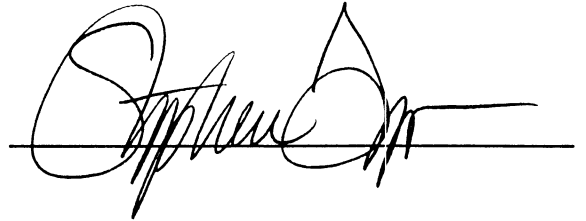
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CERTIFICATE OF SERVICE

I hereby certify that 4 true and correct copies of the foregoing document were mailed, first class postage prepaid, this 21st day of November, 1991.

John Michael Coombs
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Salt Lake City, Utah 84111
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A handwritten signature in black ink, appearing to read "John Michael Coombs", is written over a horizontal line.