

2002

J. Pochynok Company Inc., a Corporation,
Plaintiff/Appellant, vs. Gregory SmedSmedsrud
and Louann Smedsrud, Defendants/Appellees:
Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Ray G. Martineau, Anthony R. Martineau, Brett D. Cragun; attorneys for appellees.

Vincent C. Rampton, Ross I. Romero; Jones, Waldo, Holbrook & McDonough; attorneys for appellees.

Recommended Citation

Reply Brief, *Pochynok Company v. Smedsrud*, No. 20020940 (Utah Court of Appeals, 2002).
https://digitalcommons.law.byu.edu/byu_ca2/4051

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

J. POCHYNOK COMPANY, INC., a
Corporation,

Plaintiff/Appellant,

vs.

GREGORY SMEDSRUD and LOUANN
SMEDSRUD,

Defendants/Appellees.

Case No. 20020940-CA

REPLY BRIEF OF APPELLANT

ATTORNEYS FOR DEFENDANTS/
APPELLEES SMEDSRUD

Vincent C. Rampton

Ross I. Romero

JONES, WALDO, HOLBROOK &
MCDONOUGH

170 South Main Street, Suite 1500

Salt Lake City, UT 84145

Telephone: (801) 521-3200

ATTORNEYS FOR PLAINTIFF/
APPELLANT

Ray G. Martineau

Anthony R. Martineau

Brett D. Cragun

3098 Highland Dr., Suite 450

Salt Lake City, UT 84106

Telephone (801) 486-0200

ORAL ARGUMENT AND PUBLISHED DECISION IS REQUESTED

FILED
Utah Court of Appeals

JUN 23 2003

Pauletta Stagg
Clerk of the Court

IN THE UTAH COURT OF APPEALS

J. POCHYNOK COMPANY, INC., a Corporation,)	Case No. 20020940-CA
)	
Plaintiff/Appellant,)	
)	
vs.)	
)	
GREGORY SMEDSRUD and LOUANN SMEDSRUD,)	
)	
Defendants/Appellees.)	
)	

REPLY BRIEF OF APPELLANT

ATTORNEYS FOR DEFENDANTS/
APPELLEES SMEDSRUD
Vincent C. Rampton
Ross I. Romero
JONES, WALDO, HOLBROOK &
MCDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, UT 84145
Telephone: (801) 521-3200

ATTORNEYS FOR PLAINTIFF/
APPELLANT
Ray G. Martineau
Anthony R. Martineau
Brett D. Cragun
3098 Highland Dr., Suite 450
Salt Lake City, UT 84106
Telephone (801) 486-0200

ORAL ARGUMENT AND PUBLISHED DECISION IS REQUESTED

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
Point 1	1
Point 2	6
CONCLUSION	9

TABLE OF AUTHORITIES

Cases

<i>A.K. & R. Whipple Plumbing and Heating v. Guy</i> , 47 P.3d 92 (Utah Ct. App. 2002)	2
<i>Checketts v. Collings</i> , 1 P.2d 950 (1931)	5
<i>Mountain States Broad. Co. v. Neale</i> , 783 P.2d 551, 555-556 (Utah Ct. App. 1989)	2
<i>Occidental/Nebraska Fed. Savings Bank v. Mehr</i> , 791 P.2d 217 (Utah Ct. App. 1990)	2, 3, 4, 5
<i>Peterson v. Peterson</i> , 571 P.2d 1360 (Utah 1977)	9
<i>R.T. Nielson Company v. Cook</i> , 40 P.3d 1119 (Utah 2002)	5
<i>Trayner v. Cushing</i> , 688 P.2d 856 (Utah 1984)	5

Statutes

Utah Code Annotated § 31-1-18	1, 10
-------------------------------------	-------

ARGUMENT

In their opposition brief, the Smedsruks argue the trial court was correct when it applied the “flexible and reasoned” approach when determining that they were the “successful party” in the underlying litigation. The Smedsruks further argue that statutory amendment in Utah Code Ann. § 38-1-18(3) should be applied retroactively in this matter. Finally, the Smedsruks contend the trial court correctly ruled that the garnishment proceeding in this matter was proper.

Pochynok Company’s position is that the trial court erred when it used the “flexible and reasoned” approach, rather than the “simple” or “net judgment” approach when determining which party was the “successful party” in the underlying litigation. Further, it is Pochynok Company’s position that the amendment to § 38-1-18(3) is not applicable in this matter. Lastly, Pochynok Company contends the trial court erred when it determined the construction funds in Pochynok Company’s bank account were funds that were subject to garnishment by the Smedsruks.

POINT I

THE TRIAL COURT ERRED WHEN IT APPLIED THE FLEXIBLE AND REASONED APPROACH RATHER THAN THE “SIMPLE” OR “NET JUDGMENT” APPROACH WHEN DETERMINING THE SUCCESSFUL PARTY IN THIS MATTER

The jury verdict in this matter states in relevant part as follows:

We, the jury, duly empaneled in the above-entitled matter, hold as follows in the above entitled action:

1. Based on the law as it has been explained to us, we find in favor of plaintiff J. Pochynok Company, Inc., and against defendants Gregory and LouAnn Smedsrud, in the amount of \$7076.56.

2. Based on the law as it has been explained to us, we find in favor of defendants Gregory and LouAnn Smedsrud, and against plaintiffs J. Pochynok Company, Inc., in the amount of _____.

(R. 354-355)

Thus, the jury in this matter explicitly found in favor of Pochynok Company. The jury found that the Smedsruds were entitled to nothing in relation to their claims. The jury could have entered any amounts on the jury verdict form. It could have awarded Pochynok Company \$50,000.00 in relation to its claims, and the Smedsruds \$42,923.44 in connection with their claims, which would have tended to show both parties were at least partially successful with their claims. The jury, however, did not do so. The jury awarded Pochynok Company, and did not award the Smedsruds anything.

As was cited in Pochynok Company's opening brief, Utah case law clearly explains that when plaintiff sues defendant, and plaintiff is awarded judgment, plaintiff has prevailed. If defendant successfully defends and avoids an adverse judgment, defendant has prevailed.¹ In the present case, Pochynok Company was awarded judgment, the Smedsruds were not. Accordingly, Pochynok Company is the prevailing party.

Contrary to this position, the Smedsruds cite the Utah Court Court of Appeals decision of *Occidental/Nebraska Fed. Savings Bank v. Mehr*, 791 P.2d 217 (Utah Ct.

¹ See, *A.K. & R. Whipple Plumbing and Heating v. Guy*, 47 P.3d 92 (Utah Ct. App. 2002) and *Mountain States Broad Co. v. Neale*, 793 P.2d 551 (Utah Ct. App. 1989).

App. 1990) in support of their position that they are the prevailing parties in this matter. Defendants assert that the *Occidental* court, "...determined that, even though plaintiff obtained a judgment against Defendants, they were the 'prevailing parties' by the reason of the nominal amount thereof, and awarded them costs and attorneys' fees." This statement is misleading and does not accurately reflect the holding in *Occidental*.

In *Occidental*, the plaintiff, Occidental Federal Savings Bank ("Occidental") conducted a trustee's sale of property owned by the defendants, the Mehrs. At the trustee's sale, the only bid was from Occidental in an amount of \$983,086.33. Occidental's purchase at this price resulted in a deficiency, *stipulated to at trial*, of \$7,339.44. After filing an action to collect the deficiency, Occidental claimed that the earlier trustee's sale was procedurally defective. Subsequently, Occidental sent a new notice a sale to the Mehrs, thereby scheduling a second trustee's sale. At this second sale, Occidental again was the only bidder, bidding only \$400,000, in contrast to its \$983,086.33 bid from the earlier sale.

Following the second sale, Occidental amended the complaint in its deficiency action to reflect the deficiency created by the second trustee's sale. In defense of the amended claim for a deficiency judgment, the Mehrs argued that the first trustee's sale was valid and that the second sale had no effect. The trial court concluded that the first trustee's sale was valid and entered judgment against the Mehrs for the stipulated \$7,399.44 deficiency resulting from the first sale. The trial court also awarded attorney fees and costs of \$4,451.98 to the Mehrs.

Occidental appealed asserting that the trial court erred in granting the Mehrs attorney fees as it was the prevailing party. Occidental claimed that because judgment was entered in its favor, it was the prevailing party in the lawsuit, and that it should be entitled collect fees. In response to Occidental's argument, the Mehrs stated that while a judgment was entered against them, they prevailed on the *only contested issue at trial*, i.e., the validity of the first trustee's sale.

In evaluating these facts, the appellate court stated:

The only contested issue at trial was whether the deficiency would be based on the December sale or the April sale. At trial, Occidental's calculations of the deficiency resulting from the December 1985 trustee's sale, i.e., \$7,300, were stipulated to by the Mehrs. The remainder of the litigation involved Occidental's efforts to establish its claim to a deficiency resulting from the invalid trustee's sale in April 1996. The Mehrs were successful in defending against Occidental's claim for a \$600,000 deficiency based on the April sale. The Mehrs successfully demonstrated the validity of the December sale, thus the deficiency judgment was for the stipulated amount of \$7,339.44. In light of the circumstances involved and the issues contested at trial, the trial court did not err in granting the Mehrs attorney fees and costs as the prevailing party.

Id. At 222.

The *Occidental* case is clearly distinguishable from the case presently before this Court. In *Occidental*, the court determined that the Mehrs prevailed on the only contested issue at trial. All other facts were stipulated to. As such, the appeals court did not decide that the Mehrs were the prevailing party because of the disparity between the \$600,000.00 claim and the \$7,300.00 judgment, but rather, the Mehrs were deemed the prevailing party because they established that the earlier trustee's sale was valid. In effect, there was only one contested claim, and the Mehrs prevailed on that contested

claim. The “flexible approach” approach was needed in *Occidental* because even though there was a stipulated judgment for the plaintiff, the defendants prevailed on the only contested claim.

In the case presently before this court, however, plaintiff prevailed on both contested issues at trial. The jury determined that defendants owed plaintiff money, and the jury determined that the plaintiff did not owe defendants money.

The Smedsruds also contend language in the recent Utah Supreme Court decision of *R.T. Nielson Company v. Cook*, 40 P.3d 1119 (Utah 2002) supports its position. While the Smedsruds correctly cite the *Nielson* opinion, the following passage is omitted:

The court of appeals, when presented with a similar agreement awarding attorney fees to the prevailing party, noted that “under the provision at issue, there can be only one prevailing party even though both plaintiff and defendant are awarded money damages on claims arising from the same transaction.” *Id.* At 556. In support, the court of appeals cited two of our cases, *Checketts v. Collings*, 78 Utah 93, 1 P.2d 950 (1931), and *Trayner v. Cushing*, 688 P.2d 856 (Utah 1984). *Checketts* states that “[t]here can be but one prevailing party in an action at law to recover a money judgment.” 78 Utah 93, 101-02, 1 P.2d 950, 953 (citation omitted). In *Trayner*, however, we noted that both parties to a contractual claim may be entitled to attorney fees as the prevailing party where the contractual provision awarding attorney fees does not mention “prevailing party” and each party is successful on one or more claims. 688 P.2d at 858. The court of appeals, in a series of footnotes in *Mountain States Broadcasting Co.*, noted the difficulty in determining which party prevails in complicated cases involving multiple claims and parties, mentioned that in some circumstances both parties may be considered to have prevailed, and expressed the “need for a flexible and reasoned approach to deciding in particular cases who actually is the ‘prevailing party.’” 783 P.2d at 556 n.7-10.

The case presently before the court is not a complicated case involving multiple claims and parties, nor is it a case where both parties prevailed. Again, the jury only

awarded Pochynok Company. As such, the trial court erred when it determined the Smedsruks prevailed in the litigation.

POINT II

THE TRIAL COURT ERRED WHEN IT DETERMINED THE FUNDS IN POCHYNOK COMPANY'S BANK ACCOUNTS WERE SUBJECT TO GARNISHMENT BY THE SMEDSRUDS

The Smedsruks argue that the trial court correctly found that certain funds in Pochynok Company's bank account were properly garnished. The Smedsruks further contend that Pochynok Company's objection to the garnishment suffered from both procedural and substantive defects.

POCHYNOK COMPANY PRESENTED CLEAR AND CONVINCING EVIDENCE AT THE GARNISHMENT HEARING WHICH ESTABLISHED THE FUNDS IN POCHYNOK COMPANY'S ACCOUNT WERE NOT SUBJECT TO GARNISHMENT

On October 4, 2002, Pochynok Company's counsel contacted the trial court's clerk regarding the trial court's procedure for the October 7, 2002 Objection To Garnishment Hearing ("Garnishment Hearing"). Pochynok Company's counsel was informed that the hearing would be conducted in a similar fashion to a law and motion hearing, and from this conversation Pochynok Company's counsel understood that evidence should be presented by way of proffer. (R. 810-812)

At the Garnishment Hearing, Pochynok Company's counsel presented certain documents which established that the money garnished by defendants was deposited into Pochynok Company's account by Pochynok Company's then current project owner, Steve Young, and that those funds were specifically designated to be paid to entities

which had completed work on the Steve Young project. (*See*, Brief Of Appellant, Statement Of Facts, ¶¶ 10-18)

In response to Pochynok Company's counsel's presentation, the Smedsruks' counsel made several arguments and assertions regarding Pochynok Company's bank account, which arguments and assertions were also offered by way of proffer. The Smedsruks' counsel further stated that Pochynok Company had not established by clear and convincing evidence that Pochynok Company did not own the funds that were garnished from plaintiff's account, arguing that Pochynok Company's counsel had provided un-sworn testimony. The Smedsruks' counsel also misstated facts regarding the timeliness of Pochynok Company's Request For Hearing on the garnishment issue. (Although the trial court ruled in favor of the Smedsruks on the timeliness issue, apparently based upon the Smedsruks' counsel's representations, counsel later admitted that his representations were made in error.)

Pochynok Company's counsel was not afforded an opportunity by the trial court to respond to the Smedsruks' counsel's arguments and misstatements. In fact, John Pochynok, Pochynok Company's president, was present at the hearing, and was available and prepared to testify regarding the documents that were submitted to the Court. (R. 810-812)

The Smedsruks' position that plaintiff presented no evidence at the Garnishment Hearing is disingenuous. In fact, even the Ruling On Writ Of Garnishment prepared by the Smedsruks' counsel states, "The Court having heard presentations of counsel, *having reviewed all submittals of counsel*, and being fully advised in the premises and good

cause appearing, IT IS HEREBY ORDERED as follows:” (italics added) (R. 776-778)

Thus, the ruling signed by the trial court establishes that the submittals of counsel were considered by the trial court. Accordingly, it must be determined whether the information provided to the trial court at the Garnishment Hearing established by clear and convincing evidence that the funds in Pochynok Company’s account were not owned by Pochynok Company, and therefore not subject to garnishment by the Smedsruks.

The facts and documents supporting Pochynok Company’s position that it did not own the funds garnished by the Smedsruks are set forth in record. (R. 748-769) These facts and documents clearly demonstrate that the construction funds in Pochynok Company’s account at the time of the garnishment were deposited by Steve Young, the project owner of Pochynok Company’s then current project. The facts and documents further establish the bank account that was garnished was established solely for the Steve Young project. When the money was wired into Pochynok Company’s account, direction was given to Pochynok Company by Steve Young on how to disburse the construction funds. Pochynok Company had in fact disbursed the funds (by mailing checks to the parties Steve Young directed to be paid) before the funds were garnished by the Smedsruks.

The question of error in this matter relates to the character of Pochynok Company’s legal interest in the construction funds at the time the garnishment took place. The Smedsruks contend that, “The funds, once in the account, were J. Pochynok Company’s alone, to do with as it pleased, but subject to competing obligations, including the judgment in favor of Defendants and Appellees.” The Smedsruks assertion

is simply not true. The specific purpose of the construction funds (as set forth by the project owner) was to pay certain subcontractors who had completed work on the project. The funds were not a gift to Pochynok Company. The funds were not payment for Pochynok Company's work on the project. The construction funds in the account were trust funds that were held in Pochynok Company's account to be used to pay subcontractors. As such, the funds were not subject to garnishment.

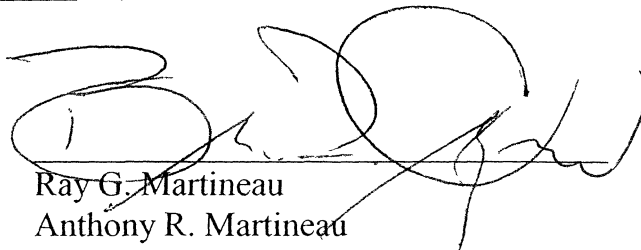
As has been established by the Utah decision of *Peterson v. Peterson*, 571 P.2d 1360 (Utah 1977), the fact that money is deposited into a checking account, does not necessarily mean that the money is owned by the owner of that checking account. In this case, it is undisputed that the money that was garnished in this matter was deposited into plaintiff's account by Steve Young, and that money was to be used, and was attempted to be used, to pay for work that had been completed on Steve Young's project. The money, however, was garnished before payment checks had cleared Pochynok Company's account. The money that was garnished was Steve Young's money.

CONCLUSION

The threshold issue in this matter is which party is the "successful party" as is defined by Utah law. Pochynok Company, as the only party awarded by the jury, should have designated by the trial court as the successful party at trial. As the successful party, Pochynok Company is entitled to recover its costs and fees pursuant to Utah statute. Moreover, the trial court erred when it allowed the garnishment of non-owned funds from Pochynok Company's account. Based upon the foregoing, Pochynok Company respectfully requests that this Court reverse the ruling of the trial court that the

Smedsruds were the successful party herein, reverse the trial court's ruling that § 38-1-18(3) should be retroactively applied in this matter, and reverse that trial court's ruling that the garnishment herein was proper.

RESPECTFULLY SUBMITTED this 23rd day of June, 2003.



Ray G. Martineau

Anthony R. Martineau

Brett D. Cragun

Attorneys For Plaintiff/Appellant

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Reply Brief Of Appellant was served upon the following individuals by mailing a copy thereof, postage prepaid, to said individuals at the following address this 23rd day of June, 2003.

Vincent C. Rampton
Ross I. Romero
Jones, Waldo, Holbrook & McDonough
1500 Wells Fargo Plaza
170 South Main Street
P.O. Box 45444
Salt Lake City, UT 84145-0444

