1984

Associated Industrial Developments, Inc., A California Corporation v. J. Paul Jewkes And Lorna Jewkes, Husband And Wife : Appellant's Petition For Rehearing

IN THE SUPREME COURT

OF THE

STATE OF UTAH

ASSOCIATED INDUSTRIAL DEVELOPMENTS, INC., A California Corporation,	)	
Plaintiff-Respondent	)	
vs.	)	CASE NO. 19374
PAUL JEWKES & LORNA JEWKES,	)	
Defendants-Appellants	)	

APPELLANT'S PETITION FOR REHEARING

An Appeal from the Judgment of
The Fourth Judicial District Court of Utah County
Judge Allen B. Sorensen Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Commentaries

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APPELLANT'S PETITON FOR REHEARING

I

NATURE OF THE CASE

This is a petition for rehearing in this case on the subject of attorney's fees awarded by the trial court.

II

DISPOSITION IN THE COURT BELOW

In this case this Court held that the attorney's fee awarded by the trial court was based on an improper standard, i.e. ten percent of the amount of the deed of trust in a foreclosure case. However, because counsel had successfully objected to testimony by counsel for Plaintiff as to the number of hours worked, the Supreme Court allowed the exhorbitant fee to stand.

III

STATEMENT OF FACTS

Respondent's attorney, in the case below attempted to prove the amount of a reasonable attorney's fee in this foreclosure action by:

1. Offering allegedly expert testimony of Ray Ivie that in a foreclosure action a reasonable attorney's fee is always ten percent of the amount of the trust deed note. The Note was for $265,770, making the fee $26,577. This testimony was received over counsel's strenuous objections.

2. Plaintiff's attorney attempted to take the stand himself as a witness to testify as to the nature and extent of his work. Jewkes' attorney objected on the ground that an attorney may not be a witness in a case in which he also acts as counsel. The court sustained the objection. AID's attorney did not make an offer of proof and did not attempt to prove the amount or value of his services from any other source.

IV

ARGUMENT

The action of the Supreme Court in this case is a novel one. One cannot help but be amused at the spectacle of an attorney who is hoist by his own petard. To see an attorney whose objection is used to punish him for his too clever (or too stupid) by half interference with the proof of his opponent's case may make us smile.

However, the function of this court is not to punish a perhaps untimely or ill considered objection, but rather to do justice. Is it justice to require Mr. & Mrs. Jewkes, already financially distressed defendants in a foreclosure case, to pay a sum more than $20,000.00 in excess of a reasonable attorney's fee because

their counsel, by successfully objecting, had persuaded the trial court that evidence tendered on the subject of attorney's fees was incompetent?

One can hardly argue that an objection sustained by the trial judge is frivolous, and therefore this Court cannot be attempting to punish counsel for making a frivolous objection. The Supreme Court, in attempting to punish counsel for objecting to what it must deem to be competent evidence, has erred in at least three particulars:

1. It has made counsel and not the trial court the final judge of the admissibility of evidence;

2. It has made counsel responsible for allowing the opposition to prove its case;

3. It has ruled that when a party fails to prove its case in the trial court with competent evidence, incompetent evidence may be used to reach a result that is manifestly unjust.

Counsel has been unable to find any case or commentary which sustains the result reached by the Supreme Court in this case. In his opinion, Justice Zimmerman has cited Kohler v. Garden City, 639 P2d 162 (Utah 1981) and Hickman v. Houghton Elevator Co., 268 Or. 192, 195, 519 P2d 369, 373 (1974). Even a superficial analysis of these cases indicates that they do not support the proposition for which they are cited.

In Kohler the attorney who had tendered the evidence in question was contending on appeal that certain evidence should have been accepted as an exception to the hearsay rule. However, the evidence had been excluded at trial for lack of foundation and the attorney tendering the evidence did not urge its admissability at trial on the grounds urged on appeal. The trial court observed that if evidence is excluded on one ground and the evidence may be admissable on

another ground, the attorney offering the evidence must specify the correct ground at trial, citing McCormick on Evidence, p. 112 (1972) as follows:

> If counsel specifies a purpose for which the proposed evidence is inadmisable and the judge excludes, counsel cannot complain of the ruling on appeal though it could have been rightly admitted for another purpose.

Thus, the exclusion of the evidence was sustained.

In addition, in Kohler the court held that the trial court had correctly decided the case on the basis of the evidence introduced which was sufficient to enable the court to reach its verdict.

The instant case differs from the Kohler case in at least two respects:

1. The appellate court in Kohler held that the trial court had reached a correct result. In this case the Utah Supreme Court has held that the trial court used an impermissible standard and thus reached an incorrect result. The court says, at page 3 of the slip opinions, "In the instant case, the trial court failed to apply the appropriate standard in assessing attorney's fees."

2. The excluded evidence was tendered by the party seeking to reverse the holding, rather than the successful attorney at trial. In this case, the trial court refused to admit evidence which might have assisted it in arriving at a correct decision. There is, however, no indication that the trial court's attorney fee award would in any way have been different had AID's attorney been allowed to testify. Thus counsel did not prevent a correct verdict by his objection. The state of the record on the subject of attorney's fees in the trial court was that improper evidence had been received stating that a reasonable attorney's fee in a $265,000.00 foreclosure action was 10%. No other evidence was admitted. Thus, on the state of the record, the trial court should have ruled that no competent evidence existed on the record and then taken one of two actions: (a) award no

attorney's fees on the ground that no competent evidence as to the amount of a reasonable attorney's fee had been introduced, or; (b) used its own evaluation of the services rendered in the case and awarded fees based on that evaluation. It did neither.

As in the Kohler case, counsel for Plaintiff in this case failed to take the proper actions which would have enabled him to introduce competent evidence of the number of hours worked. He did not, as the Utah Rules of Evidence require make an offer of proof (see old Rule 5, then in effect)

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed by reason of the erroneous exclusion of evidence unless (a) it appears of record that the proponent of the evidence either made known the substance of the vidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers . . . .

Counsel for AID did not make an offer of proof. Neither did he try to prove the hours he worked (as he easily could have done) by calling an employee from his office and offering his time records under the business records exception.

What this court has held is that plaintiff's counsel, though he failed to introduce competent evidence, is entitled to an exorbitant and unjust fee based on improper evidence and an error of the trial court in relying on such evidence.

In addition to Kohler, the court cited Hickman, supra, in support of its decision to let the trial court's error stand. Hickman, again does not support the court's action in this case. In Hickman the trial court had rejected a special jury verdict on the ground that it had been reached contrary to the trial court's instructions. Counsel for defendant contended on appeal that the verdict should have been accepted by the trial court. However, the defendant's attorney had failed to ask the trial court to accept the verdict, asking instead for a mistrial. The Oregon Supreme Court refused to grant relief to defendant on the ground that he had failed to ask for such relief in the trial court.

Once again we do not have a case like the present one. In this case the court has held that counsel objects at this peril to evidence offered by the other side and he is not insulated by the fact that the court has determined his objection to be valid. He is charged with the responsibility of foreseeing all possible consequences of his action. If he makes an error in making an instantaneous decision which can obligate him to bear his opponent's burden of proof, he may wind up with an erroneous verdict which is sustained on appeal because his objection prevented the introduction of evidence which, though the trial court may ignore it, the appellate court may use as a grounds for reversal.

Rule 104 of the current Utah Rules of Evidence states, in pertinent part: "Preliminary questions concerning the . . . admissability of evidence shall be determined by the court." Thus, counsel is not responsible for an erroneous ruling by the court concerning admissibility. Making counsel responsible for errors in admission of evidence would be too heavy a burden. Counsel must bear the weight of proving his own case, but cannot be charged with responsibility for allowing or assisting his opponent to prove his. The side which fails to prove its case must bear the cost of such failure, whether or not it has been triggered by an objection from opposing counsel.

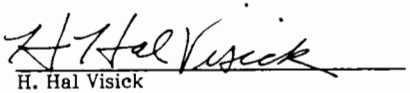
When, as in this case, the failure of proof is compounded by failing to make an offer of proof and failure to use a convenient alternative method of proof, Plaintiff must bear and loss resulting from inability to persuade the court of the admissability of tendered service.

CONCLUSION

It would be unjust to allow a trial court error to stand simply because the trial court could have reached a correct result if it had admitted and based its

...sion upon evidence excluded in response to objection. Sustaining an unjust ...ult is not an acceptable means of punishing counsel for an objection the court ...eems improper.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that I mailed three (3) copies of the foregoing Respondents Brief postage paid to the following:

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on this 19th day of November 1984.

Secretary