1984

Dixie State Bank v. Kirk Bracken And Linford Bracken : Appellant's Brief

IN THE SUPREME COURT
OF THE STATE OF UTAH

DIXIE STATE BANK, Plaintiff and Appellant, vs. KIRK BRACKEN and LINFORD BRACKEN, Defendants and Respondents.	)	Case No. 19375

APPELLANT'S BRIEF

Appeal from Judgment of Fifth Judicial
District Court of Washington County,
State of Utah,
the Honorable J. Harlan Burns,
District Judge

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KEY TO ABBREVIATIONS

R - Record
T - Transcript
P - Plaintiff's Exhibit

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATEMENT OF FACTS

On July 19, 1979, the respondents, as co-obligors, executed an installment promissory note in favor of the appellant bank, in the amount of $7,695, said note bearing interest at 14% per annum. (R 112 ¶1) The respondents also executed a security agreement giving the appellant a security interest in a 1979 Ford pickup truck. The installment note and security agreement both contained an attorney's fee provision, providing for the payment of a "reasonable" attorney's fee in the event of default. (R 4, 6, 112 ¶1).

The respondents made four payments on said obligation, the last payment being made in the month of January, 1980. (R 112 ¶2).

The truck, collateral for the loan, was lawfully repossessed on July 25, 1981, and sold to the respondent Kirk Bracken at public sale pursuant to notice. (R 113 ¶ 7 and 8).

The appellant thereafter, brought suit [illegible] deficiency on the note in the amount of $3,858.84 and [illegible] costs and attorney's fees. (R 1-3).

The respondents filed a motion to dismiss the complaint, pursuant to Rule 12(b)(6) U.R.C.P. The appellant filed an opposing affidavit and memorandum, and subsequently appeared in the District Court to contest this motion, which motion was subsequently denied. (R 11-29, 36-41).

After the trial court's denial of motion to dismiss, (R 41) the respondents answered the complaint and counter-claimed for $205,000, claiming wrongful repossession, damage to the respondents' credit reputation in conjunction with the repossession of the vehicle and for punitive damages. (R 42-45, 113)

On April 14, 1982, the appellant noticed the depositions of respondent Kirk Bracken and Bernice Bracken, his wife. Said depositions were taken on May 10, 1982. (R 56)

On May 19, 1982, the appellant requested an immediate trial setting and gave notice of its readiness for trial. (R 58, 59).

On May 29, 1982, the respondents objected to the request for immediate trial setting, stating that they then desired to take the depositions of William Hickman and Murray Gubler, two of the appellant's officers. (R 60

Thereafter, on July 14, 1982, the respondents took a deposition, but only of Mr. Hickman, which deposition was defended by the appellant's counsel, Mr. Hughes. (R 140)

On the 25th day of August, 1982, the trial Court set the matter for a non-jury trial on September 21, 1982. Two weeks later, on September 10, 1982, the respondents again moved to continue the trial setting re-stating their desire set forth in May of 1982, to take the deposition of Mr. Gubler. (R 66, 72) Respondents also demanded a jury trial.
(R 68)

As the trial had been set and the Court had not ruled on the respondents' motion, the appellant appeared in the District Court on September 21, 1982, ready for immediate trial. The trial Court, however, granted the respondents' motion to continue despite appellant's protestations that the motions were not timely, as local court procedure did not, as a practical matter, provide for such a quick impaneling of a jury, and that the respondents' grounds for continuance were largely the same as those expressed months earlier in May of 1982. (R 72).

After this continuance, the deposition of Murray Gubler was taken on October 6, 1982 and defended by appellant's counsel Mr. Hughes. (R 141).

Jury trial was then re-set for May 11, 1983. (R 78).

Pursuant to the pleadings of the parties, discovery, and primarily because the respondents' had requested a jury trial, the appellant's counsel prepared instructions covering issues raised by both the complaint and counter-claim. (R 86, 114 ¶ 12, 13, P 32)

On the afternoon of Monday, May 9, 1983, just days before trial, respondents' counsel advised the appellant's counsel that the respondent did not desire to proceed with jury trial. (T 2: 15-3: 7, R 114 ¶ 12) By this time however, appellant's counsel had already prepared jury instructions, and other preparations for trial had been completed. (R 114 ¶ 12, 21:6-16) The parties thereafter stipulated, on the date of the trial, that jury trial was not necessary. (R 83) Respondents' late withdrawal of their earlier request for a jury became clear when their counsel testified that he had not, at any rate, ever prepared jury instructions. (T 32: 3-7)

At the initiation of trial, the parties stipulated to three items: One, that appellant take judgment against the respondents on its complaint for $4,748.39; two, that the counter-claim be dismissed with prejudice; and three, that the remaining issue of appellant's attorney's fees be submitted on testimony to the trial court for a decision (R 84, T 15: 9-25, 16: 2)

The appellant's counsel testified that the value of his time spent in prosecuting the plaintiff's case and defending against the $205,000.00 counter-claim was $4,[illegible] (T 21:16-19, 22: 23-23:2).

The lower court, thereafter, entered judgment for appellant in the principal sum of $4,748.39 and an additional $1,500 for attorney's fees. (R 115 ¶ 2, R 117)

In its Findings of Fact and Conclusions of Law, the trial court specifically found that $4,747.50 for an attorney's fee was a "reasonable fee", and in fact, found that such a fee "adequately represents the necessary time and preparation for the case." (R 114 ¶15, emphasis added.)

Preliminary to this finding, and as a basis therefore, the trial Court significantly found that the matter had been set for trial two times, and in each instance the appellant was ready to go forward but that respondents had delayed the trial by their requests to impanel a jury and take additional discovery. (R 113 ¶9) The court likewise found that the several depositions taken were reasonable, and also that the jury instructions prepared by the appellant's counsel and received as evidence by the Court were also a factor in determining the attorney's fees, and were reasonable and necessary under the premises. (R 113 ¶ 10; 114 ¶13, 14)

After carefully making these initial findings, the Court found as follows:

> The amount of the attorney's fees claimed of $4,747.50, though reasonable in all regard, constitute a sum approximating the debt due on the note, absent any assessment for the attorney's fees and from the testimony and the file, the Court finds $1,500 a reasonable fee to be assessed against the defendants. (R 115 ¶18).

The trial court's comments to counsel explain why the court found on the one hand that $4,747.50 was a reasonable fee, but then awarded only $1,500. The court said:

> We have reached a point in this society, where many members of the public, that we all work for believe that the law is for those who can afford it. The Court would find the fees must have some reasonable relationship to the amount that can be gained, or whatever could potentially be lost. (T. 34:16-20).

Recognizing the seeming inconsistency in first finding that a fee of $4,747.50 was reasonable and then only awarding $1,500 for an attorney's fee, the trial court encouraged the filing of this appeal, stating:

> Again, I encourage you both to take it on appeal. I think it is a case that should be addressed by the Supreme Court of the State of Utah, with respect to fees. I have indicated that I think the subject should have some attention to give guidelines to lawyers in similar law suits. (T. 14-18).

The appellant thereafter appealed the judgment of the district court to this Court in order to determine whether the trial court properly awarded attorney's fees in light of the evidence and explicit contrary findings made by the Court.

POINT I.

THE TRIAL COURT'S AWARD OF A REDUCED ATTORNEY'S FEE BASED SOLELY ON THE COURT'S FINDING THAT AN AWARD OF ATTORNEY'S FEES SHOULD NOT APPROXIMATE THE AMOUNT OF THE APPELLANT'S RECOVERY WAS A CLEAR ABUSE OF DISCRETION

On May 11, 1983, Michael D. Hughes, attorney for the appellant, testified that a reasonable attorney's fee in this case was $4,747.50. The parties had previously stipulated that the appellant was to have judgment for $4,748.39 and that the respondents' counter-claim would be dismissed with prejudice. Mr. Hughes catalogued, for the trial court, the actions and labor undertaken in prosecuting the appellant's claim for a deficiency and in defending a $205,000 counterclaim. This recital included testimony that the appellant had defended motions, taken and defended depositions conducted research, twice prepared for trials that were continued by the respondents' motions, and prepared jury instructions only after the respondents had demanded a jury.

Mr. Miles, attorney for respondents, testified that in his opinion a reasonable fee for the appellant's work was $2,000 (T 28:4-10) Mr. Miles opinion was based not on what effort the appellant's counsel had expended, but rather what fees he, Mr. Miles, had charged his client for his own work on the case, which fees had been substantially reduced by a "rebate" Mr. Miles had given his client. (T 28: 11-23)

The trial court, having all of the appellant's efforts well in mind, specifically found that the fees charged by the appellant's attorney were reasonable and necessary in light of what the appellant was required to do

and what it was facing. (R 114¶15) The lower court, however, refused to award $4,747.50 to the appellant for attorney's fees, even though the court had found that these fees were reasonable and necessary, because it found that this sum approximated the appellant's judgment of $4,748.00. Thereafter, the lower court awarded only $1,500 for attorney's fees which was less than one-third the amount which the trial court had otherwise found reasonable, and even lower than respondents' counsel's own testimony as to a reasonable award for appellant's attorneys fees. Thus, incongruously, the lower court's award was substantially less than what either attorney had testified to as being reasonable on appellant's behalf.

The initial issue to be decided by this Court is whether the trial court, having found $4,747.50 to be a reasonable attorney's fee, can thereafter award only $1,500 on the theory that an award of attorney's fees should not approximate the recovery obtained.

It has long been the rule in this jurisdiction that a trial court's award of attorney's fees will not be disturbed absent a showing of an abuse of discretion. Alexander v. Brown 646 P.2d 692 (Utah 1982); Beckstrom vs. Beckstrom 578 P.2d 520 (Utah 1978). The appellant urges that the trial court abused its discretion in awarding only $1,500 in view of its finding that $4,747.50 was reasonable and the testimony of both appellant's and respondents' attorneys that a greater fee was in order. (T 21:16-19, 23, 23: 2, T 28: 11-23)

In Bermes v. Sylling, 583 P.2d 377 (Mont. 1978) the Montana Supreme Court, citing First Security Bank v. Jenkes, 547 P.2d 1328 (Mont. 1976), listed several factors, which that Court believed ought to be considered in determining a fee award. The Court stated:

> The circumstances to be considered in determining the compensation to be recovered are the amount and character of the services rendered, the labor, time and trouble involved, the character and importance of the litigation in which the services were rendered, the amount of money or the value of property to be affected, the professional skill and experience called for, the character and standing in their profession of the attorneys. . . The result secured by the services of the attorney may be considered as an important element in determining their value. Bermes, supra, at 387.

The factors described by the Bermes Court, clearly follows the factors set out in the 1976 version of the ABA's Code of Professional Responsibility. Disciplinary Rule 2-106(B), states as follows:

> Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> 1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> 2) Likelihood, if apparent to the client, that the acceptance of the particular employment will perclude other employment by the lawyer.
>
> 3) The fee customarily charged in the locality for similar legal services.
>
> 4) The amount involved and the results obtained.
>
> 5) The time limitations inposed by the client, or the circumstances.

6) The nature and length of the professional relationship with the client.

7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

8) Whether the fee is fixed or contingent.

The appellant believes that the trial court should have considered these factors, but did not. Certainly the amount in controversy ought to be considered as a relevant factor in determining what is a reasonable attorney's fee. However, the appellant strenuously asserts that having determined that the $4,747.50 was a reasonable fee, the trial court ought not to spin off the single factor of the amount involved and view this factor in isolation from the facts of the case and the circumstances which caused the fee to be incurred.

In Nelson v. Trujillo, 657 P.2d 730 (Utah 1982) the Utah Supreme Court held that a district court had erred in ordering a remittitur on the basis of alleged misconduct of plaintiff's attorney, since the judge had specifically found that the damages were reasonable and not excessive. In short, Nelson holds that the trial court could not on one hand find an award of damages not excessive and then order a remittitur on some other basis; a prerequisite to remittitur being a finding of an excessive award. By analogy finding that the requested award is unreasonable should be a prerequisite to the exercise of the trial court's discretion to reduce an attorney's fee. In this case, the trial court specifically found the requested award to be reasonable

Appellant is unaware of any authority to reduce an award of attorney's fees for the sole reason that the award requested otherwise approximates the monetary recovery.

In John Deere Company v. Catalano, 525 P.2d 1153 (Colo. 1974), the appellant argued that an award of $1,500 was excessive as a matter of law, because the award exceeded the amount of the underlying deficiency judgment of $1,300.59. The Colorado Supreme Court rejected the proposition that an attorney's fee could not exceed the amount of recovery, stating that there was "no authority" for such a proposition. Id. at 1157. Similarly, this Court should also reject the position taken by the lower court in the instant case that an attorney's fee cannot approximate the prevailing party's recovery. Simply stated, such a proposition is bad law and bad public policy because it ignores several recognized factors in determining the fee award, and unduly isolates and emphasizes but one factor.

The Colorado Court of Appeals in Zambruk v. Perlmutter 3rd Generation Builders, 510 P. 2d, 472 (Colo. App. 1973), stated as follows:

> The purpose of a provision for attorney's fees is to indemnify the creditor of the prevailing party against the necessity of paying an attorney's fee and to enable him to recover the full amount of the obligation.

In Management Services Corporation v. Development Associates, 617 P.2d 406 (Utah 1980), this Court, in a case in which a respondent requested attorney's fees for successfully defending an appeal, approved the "indemnity" doctrine

of the Zambruk case stating that indemnifying a prevailing party was "the most cogent reason for allowing of such fees on appeal." Id. at 409.

The Management Services Corporation proposition that contractual attorney's fees clauses are meant to "indemnify" a prevailing party is grossly emaciated if the lower court's position that fees cannot approximate recovery is allowed to stand. Such a position unduly narrows the factors which courts ought to be focusing upon to determine a fee award, and undermines the policy of the Management Services Corporation case and the other authorities cited. The practical result of accepting the lower court's position would be that many litigants seeking small recoveries will not be able to be indemnified. Vindication of wrongs and protection of rights, with the expectation of being made whole, then becomes a privilege of the litigant who has a large recovery, and a sham to litigants with smaller recoveries obtained only after protracted litigation with a recalcitrant party. Indeed, the policy itself encourages recalicitrant parties to unduly protract litigation with relative impunity regarding fees for the prevailing party, particularly where the prevailing party, as here sought a modest, good faith recovery. On the other hand, if a litigant were to abuse an attorney's fee clause to artificially inflate the recovery or force settlement, the matter could be dealt with through specific findings or in extreme cases, through disciplinary action. Clearly, however, this is not the case here.

The appellant does not contend that the lower court lacks the discretion to reduce the amount of attorney's fees to something less than that testified to by the appellant's attorney, Mr. Hughes. Clearly, if the court had found, on admissible testimony, that the fees were unreasonable, or that the equities of the case were against the prevailing party, then the court might reduce the award to a "reasonable extent." Arnold Machinery Company, Inc.v. Intrusion Prepakt, Inc., 11 Utah 2d 246, 357 P.2d, 496 (1960). Indeed, the Utah Supreme Court has decided a number of cases, in which the trial Court had exercised its discretion to deny or reduce attorney's fees. See Alexander v. Brown, supra,; Fullmer v. Blood, 546 P.2d, 606 (Utah 1976); American Gypsum Trust v. Georgia Pacific Corporation, 512 P. 2d 658 (Utah 1973); Fireman's Insurance Company v. Brown, 529 P.2d, 419 (Utah 1974); Beckstrom v. Beckstrom, supra; and Arnold Machinery Inc. v. Intrustion Prepakt Inc., supra. In each of these cases, however, this Court has been careful to note that the lower court's discretion to deny or reduce attorney's fees is not unlimited. See Arnold Machinery Company vs. Intrusion Prepakt Inc., 11 Utah P. 2d 246, 357 2d 496 (1960). Thus, in each case, in which this Court upheld a trial Court's reduction of an attorney's fee, the trial Court had further articulated or found on admissible evidence some equitable consideration, other than the bare amount of recovery, to justify the reduction of fees. The reduction of an attorney's fee based solely on the fact that

the fee sought approximated the amount of recovery, however, appears to be without precedent in Utah.

It is the appellant's contention that the lower court's determination to reduce the appellant's attorney fees on the grounds that the fees approximated the appellant's recovery, should necessarily have been coupled with a specific articulated finding that the fees were unreasonable or that other equitable considerations based on admissible evidence militated against the appellant and required a reduction of the attorney's fee. Instead, the lower court's award of the reduced attorney's fee is coupled with the finding that the fee requested by the appellant was reasonable and necessary. The appellant urges that this Court hold that, absent some finding based on admissible evidence that the fee was unreasonable or that admissible equitable considerations justified a reduction, the trial court may not reduce an award of attorney's fees for the sole reason that the fees otherwise requested would approximate the amount of recovery.

POINT II.

THE LOWER COURT ERRED IN AWARDING ONLY $1,500 IN ATTORNEY'S FEES, AFTER THE APPELLANT SUCCESSFULLY DEFENDED A $205,000 COUNTER CLAIM

The respondent filed a counter-claim seeking $205,000 in damages. The respondents alleged that the

vehicle which had been sold pursuant to notice, had been wrongfully repossessed, and that the respondent Kirk Bracken had been damaged thereby. (R 43 ¶'s 14, 15, 16) The respondents additionally alleged punitive damages resulting from "an intent to vex, annoy, and harrass the defendants as evidenced by the repossession . . ." (R 44 ¶20)

Clearly, the counter-claim challenged the appellant's right to repossess the vehicle under the facts as they existed at the time of the repossession.

Before the trial Court, the respondent's attorney tried to minimize the significance of the counter-claim by implying that the appellant's counsel should not have incurred attorney's fees in asserting its rights pursuant to the the security agreement to defend against it. Respondents' counsel stated:

> Well, your Honor, the counter-claim was based on bad faith. Under the uniform commercial code, the Court has the power to award punitive damages and the John Deere case held exactly that. So that was the basis of the $205,000. We are dealing with a bank of the size of Dixie State Bank.
>
> I think Mr. Hughes knows, as well as I and the Court, that you plead more than you think you can get. (T 14: 4-12, emphasis added)

When questioned by Mr. Hughes, under oath, about the $205,000 counter-claim, Mr. Miles, respondents' attorney testified:

> I think in my view, the $205,000 claim was something to give the bank a cause for concern, maybe they would suggest a settlement and we would resolve the matter. (T 32: 13-16)

The appellant urges that it was entitled to vig-
ously defend against the counter-claim as plead within
parameters of its note and security agreement. There
requirement and indeed there should not be any require-
that the appellant divine the seriousness of the counte
claim or the respondent's intentions or reasons for inte
posing the counter-claim. Indeed, pursuant to the prescrip-
tions of Rule 11, U.R.C.P., the appellant must assume th
respondent's counter-claim was based on respondents' co-
sel's belief that there was good ground to support it.
stated in the rule:

> The signature of an attorney constitutes a cer-
> ficate by him that he has read the pleading, th
> to the best of his knowledge, information an
> belief, there is good ground to support it, a
> that it is not interposed for delay . . .

Thus, the appellant was entitled to take the counter-cla
at face value, assume its gravity, and defend accordingly
the enforcement of its contractual right derived from th
security agreement to repossess and sell the collateral a
sue for a deficiency on the note.

The respondents by their signed counter-claim, fi-
$205,000 in controversy. The appellant believes, as heret
fore stated, that this Court ought to consider all relev
factors in addition to the amount in controversy in dete
mining its award of atttorney's fees. As stated above, t
Court ought to consider the equities in making its award
that regard, this Court ought to soberly consider the res
dents' counsel's candid statement at trial that the count

claim was brought primarily to "give the bank cause for concern, maybe they would suggest settlement . . ." (T 32: 13-16) Certainly it is not equitable to bring a $200,000 counter-claim, merely for such a purpose and then complain when the defendant of the claim takes the matter seriously. It is even less equitable to deny reasonable attorney's fees expended in defending a concededly overpled matter.

It cannot be said that the lower court was unaware of the appellant's efforts to defend the $200,000 counter-claim, when it awarded on $1,500 in attorney's fees.

The following dialogue between the lower court and the appellant's counsel is instructive:

> Mr. Hughes: Your Honor, may I ask if the Court is taking into account the fact that a $200,000 counter-claim was filed against the bank here? --
>
> The Court: Yes.
>
> Mr. Hughes: In making that attorney's fee?
>
> The Court: I made the ruling with respect to your work and what you were facing and whether or not it was reasonable. I have found your fees to be reasonable.
>
> Mr. Hughes: All right.
>
> The Court: All right, now I want that in the findings.
>
> Mr. Hughes: The Court then, is ruling that I should not have spent time in resisting the $200,000 claim?
>
> The Court: Now, Mr. Hughes, it is clear that I have ruled that the time you put in, the fees you charged, and the instructions and work you did, was fair and reasonable in light of what you were facing. (T 39:18-40:9).

The lower court awarded only $1,500 in attorn fees after having found that the time spent by the appe lant's counsel in defending a $205,000 counter-claim reasonable and necessary. As mentioned above, the court's only explanation for its ruling was that the Co did not feel that it could award an attorney's fee whi approximated the amount of recovery by the appellant.

This Court then, is faced with the questio whether the trial court may award a reduced attorney's fe for the reason that an award of attorney's fees ought not approximate the amount of recovery in a case in which th prevailing party also successfully defended a $205,0 counter-claim, and the trial court has explicitly found tha the fees incurred in pursuing recovery were reasonable

The appellant urges that the lower court erre

CONCLUSION

In awarding a substantially smaller attorney's fe than what the lower court found was otherwise reasonable the District Judge found that an award of attorney's fee "must have some reasonable relationship to the amount tha can be gained or whatever could potentially be lost." 34: 18-20) This appears to have been the lower court guiding principle or condition. The imposition of suc condition on the appellant frustrates this court's poli indemnification and prevents the trial court's balancing weighing of other factors in determining its award, inclu

being, as here, repeated continuances by the respondent, compounded by jury requests. There is no authority for such a condition and it should not be sanctioned by this Court.

It is apparent from the transcript of the proceedings that the lower court felt uncomfortable with its $1,800 award of attorney's fees in light of the fact that the appellant had also defended a $200,000 counter-claim. The court, seeking direction, encouraged the parties to appeal the award. The appellant believes that the lower court's award of attorney's fees is also unreasonable in light of the appellants successful defense of a $200,000 counter-claim. Indeed, in light of both counsels' testimony that a greater fee was in order, the reduction in fees does not stand up to appellate scrutiny in the transcript. As the trial court requested instruction and clarification of the matter, so also does the appellant.

Respectfully submitted, November 30 1993

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MAILING CERTIFICATE

I do hereby certify that I mailed a true and accurate copy of the foregoing APPELLANT'S BRIEF, postage prepaid to John Miles, 60 North 300 East, St. George, Utah 84770 this 13th day of January, 1983.

Linda C. Bamberger