1984

Dixie State Bank v. Kirk Bracken And Linford Bracken : Respondent'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

RESPONDENT'S BRIEF

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

WRIGHT & MILES
John L. Miles
60 North 300 East
St. George, Utah 84770
Attorney for Respondents

THOMPSON HUGHES & REBER
Michael D. Hughes
Dale R. Chamberlain
148 East Tabernacle
St. George, Utah 84770
Attorneys for Appellants

IN THE SUPREME COURT
OF THE STATE OF UTAH

[illegible] STATE BANK,	)	
Plaintiff and Appellant,	)	
	)	Case No. 19375
s.	)	
[illegible] BRACKEN and LINFORD [illegible]SEN,	)	
Defendants and Respondents.	)	

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Attorney for Respondents

[illegible] & REBER
[illegible] Hughes
[illegible] Chamberlain
[illegible] Tabernacle
[illegible], Utah 84770
[illegible] for Appellants

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KEY TO ABBREVIATIONS

R -- Record On Appeal
T -- Transcript
P -- Page
L -- Line
E -- Exhibit, P for Plaintiff, D for Defendant
¶ -- Paragraph Number

CASES CITED

TREATISES AND OTHER AUTHORITIES

IN THE SUPREME COUPT OF THE STATE OF UTAH

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RESPONDENTS' BRIEF

NATURE OF THE CASE

Plaintiff sued for a deficiency judgment after repossession and sale of a 1979 Ford Pickup. Defendants filed counterclaim alleging wrongful repossession based on the Plaintiff's failure to act in good faith. On the day of trial stipulation was reached in which Plaintiff would obtain judgment for the amount of its complaint, plus accrued interest and costs Defendants would agree to a dismissal of their counterclaim, and the issue of attorney's fees claimed by Plaintiff would be submitted to the trial judge for determination. Evidence was presented on the issue of reasonable attorney's fees and the trial court awarded Plaintiff $1,500.

Plaintiff has appealed this award, claiming that $1,5 is clearly an abuse of discretion in light of some conciliatory

judgments made by the trial judge and a finding that the higher [illegible] sought by Plaintiff were reasonable.

Defendants maintain that an agreement was reached to submit the issue of attorney's fees to the trial judge for determination and to accept without appeal whatever fees were awarded, and that this agreement to accept the trial court's decision was the only consideration Defendants' received in exchange for the dismissal with prejudice of their counterclaim.

Further, Defendants believe the decision of the trial judge on the issue of attorney's fees is correct, being based on conflicting evidence and on equitable considerations that caused the court below to award less than the amount Plaintiff sought. For example, the trial judge made a specific finding of fact that the Plaintiff made the initial mistake when it set up the loan on a semi-annual basis, rather than a monthly basis, which caused Defendants' account to show that their payments were current or paid in advance on the loan until the bank discovered its error.

DISPOSITION OF CASE IN LOWER COURT

The trial judge accepted the stipulation of the parties, and granted judgment of $4,748.39, being $3,858.84 principal deficiency and $889.55 accrued interest to date of judgment. The trial judge then heard the testimony of the attorneys for both parties on the issue of a reasonable attorney's fee in this case, listened to the arguments of counsel

for both parties, and ruled that Defendants should pay [illegible] the sum of $1,500 for its attorney's fees.

NATURE OF RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have the Supreme Court find that trial judge abused his discretion in awarding attorney's fees $1,500 or that having once stated that Mr. Hughes did not waste his time and that his fees were reasonable for the time and effort he expended, that the court below was committed to award the fees requested.

Defendants believe the agreement to accept the trial judge's decision as final prevents this appeal. In any event Defendants maintain that the fees awarded were within the parameters of the evidence presented and well within the discretion conferred on the lower court, which discretion should not be disturbed on this appeal because of the equitable facts involved in this case.

STATEMENT OF FACTS

Dixie State Bank ("bank"), the appellant, made a mistake when it set up a loan given to respondents ("Brothers") as co-obligors, on July 19, 1979. The loan was in the amount $7,695 and called for interest at the rate of 14% per annum, required 48 monthly payments of $210.30. (R P-1, R 112 Ex.

Instead of setting this loan up as a monthly payment, [illegible] should have, the bank set the loan up on its computers as a [illegible]-annual loan (E P-7). Thus, as long as Brackens made one [illegible] every six months, the bank's records would reflect a [illegible] status on this loan.

The bank was clearly responsible for this error. In [illegible] stipulating statement to the court, the bank's attorney stated:

> "By reason of Dixie State Bank making an internal computer error, they failed to discover the delinquency of the Brackens until January of 1981 . . ." (T 4, L 10-12).

The error is shown on the face of Plaintiff's Exhibit No. 7. [illegible] Bracken inquired about the status of the loan on several occasions and was told that the loan was current and even paid in advance (R 22 ¶5; T 8, L 1-18). That such an error on the bank's part could result in Brackens being told they were current or even paid in advance was admitted by Murray Gubler, the bank's Vice President, in his deposition on page 18, lines 7-20. (R [illegible]).

The trial judge specifically found that the original error or fault should be placed on the bank, and this undoubtedly was very significant in his ruling regarding attorney's fees, as [illegible] by the following colloquy between the trial judge and [illegible] after the ruling of $1,500 attorney's fees had been made:

> "Mr. Hughes: Let me say, for the record, I think the fees are extremely low for what has happened in this case.
> The Court: All right. As a matter of fact, I want in the findings the fact that the initial mistake was made by the bank. And that's uncontroverted, isn't that correct?" (T 38, L 15-21).

Mr. Hughes failed to include this finding in the "Findings Of Fact And Conclusions Of Law" he presented to the judge for his signature (R 111-116). Objection to these [illegible] was made by respondents' attorney for the failure to include finding (R 88, ¶2), as well as for adding many findings that [illegible] not made by the lower court (R 87-101) and cannot be found in reading the transcript of the Court Proceedings of May 11, 19[illegible] A comparison of the Transcript, pages 34-40, with the "Findings Of Fact And Conclusions Of Law" (R 111-116), illustrates the literary license employed by Mr. Hughes in drafting the "findings" to support his appeal. Respondents have filed a cross-appeal (See respondents' points on cross-appeal filed with the Supreme Court on or about August 26, 1983.) contending that the trial court committed reversible error by summarily denying (R 119), without allowing argument, these proper objections.

This omitted, but crucial, finding that the appellant made the initial error was eventually corrected by Mr. Hughes when he prepared, and the trial court signed, an additional "Finding Of Fact" which was filed in the Supreme Court on [illegible] 6, 1983. That finding states:

> "1. That the initial error was made by the Plaintiff Bank when it set up the loan on a semi-annual basis instead of a monthly basis, and that the Bank's records consequently showed that Defendants were current [illegible] in fact paid in advance on this loan) until the Bank discovered its error."

After the bank discovered its error, Murray Cutler wrote to Kirk Bracken (Defendant's Exhibit 24) asking him to [illegible] $787.04 immediately and to sign, and have Linford Bracken [illegible] new note and security agreement for the same original amount

,095.00. However, the new note was at the interest rate of eighteen (18%) percent instead of the fourteen (14%) percent contained in the original note (Plaintiff's Exhibit 1; R 112, ¶11). The Brackens objected to the increase of four (4%) percent in the interest rate, and Murray Gubler admitted in his deposition that the Brackens were never offered the chance to rewrite the loan at the lower 14% rate (Deposition of Murray Gubler, page 21; R 141).

Again, on June 29, 1981 Murray Gubler wrote to Kirk Bracken asking him to pay accrued interest of $946.12 and to sign the new note and security agreement enclosed, or to refinance the "truck somewhere else." See Defendant's Exhibit No. 27. As before, the rate of interest had been increased from the original 14% to 18%. The enclosed note called for the first payment to be made on August 5, 1981. Upon receiving these last documents, Brackens felt they had until August 5, 1981 to refinance, if they could, or to sign the papers and make their first payment, but while they were in the process of seeking refinancing, the truck was repossessed on July 25, 1981 (Defendants' Exhibits 28, 29, & 30), some ten days prior to the due date of the first payment required by the bank's documents. Except for the increase in the interest rate, the Brackens agreed to everything else the bank had requested. (R 24, ¶7-9).

The repossessed truck was sold at public sale on September 10, 1981 (Plaintiff's Exhibit No. 12) to the Brackens for $5,000.00. (T 5, L 4-13). Just minutes prior to this public sale the Brackens met with Murray Gubler and agreed to all of the

bank's demands, including the increase in the interest rate, attorney's fees to that point of $145 (T 23, L 10-11), and they agreed to apply the entire $5,000.00 Brackens had scraped together toward the loan. (R 24, ¶10-13; T 10-11). Mr. Gubler left the room to get the figures to conclude the agreement, and while he was out he spoke to the bank president, Mr. Hickman, who testified to that conversation as follows:

> "Q. What was said by you and what was said by Murray Gubler during that conversation?
> A. Well, I was interested in finding out what was going on, because I was not that closely involved with the situation. When I saw the Brackens in there, he indicated that they -- that was the day for the sale of the truck and that the Brackens were interested in trying to negotiate a new arrangement with the bank. I told Mr. Gubler that I was not interested in renegotiating the situation again; that I wanted the sale to go through.
> Q. Did Mr. Gubler convey to you the terms of the, as you word it, renegotiations that were being discussed?
> A. No, he did not." (R 140, Deposition of John Will Hickman, page 9, lines 6-18).

Thereafter, the bank brought suit for a deficiency in the amount of $3,858.84 (R 2, ¶13) and Brackens counterclaimed alleging a wrongful repossession because the repossession took place some 10 days prior to the due date of the first payment required by the bank's offer of June 29, 1981 (Defendant's Exhibit No. 27). The counterclaim also alleged the bank had not acted in "good faith", and sought relief for "the amount proved at trial" (R 45, ¶2) for damages to Brackens credit reputation and for exemplary damages of "$200,000.00 or such other sum as will serve the purpose of punitive damages." (R 45, ¶3).

On May 11, 1983 the trial began. Both attorneys presented their opening arguments. A recess was taken, and

ing that recess an agreement was reached that (1) appellant ve judgment against respondents on its complaint for the entire eficiency of $3,858.84 plus accrued interest of $889.55, for a tal of $4,748.39, plus costs to be submitted by a "Memorandum Costs"; (2) that respondents' counterclaim be dismissed with ejudice; and (3) that the only remaining issue of a reasonable ttorney's fee be submitted on testimony to the trial court for etermination and that the parties accept whatever the trial ourt awarded. Appellants now claim that this last condition was ot a part of the agreement. Mr. Hughes presented the tipulation to the Court, and it is concededly not clear what was eant by his statement that:

> "That the judgment is not to be executed on for 90 days; and that I will submit this morning testimony regarding attorney's fees, and that the Court will rule on that matter." (T 15-16).

The Court then heard the testimony of Mr. Hughes and Mr. Miles egarding attorney's fees, and ruled that Prackens should pay the k $1,500 attorney's fees in addition to the amount of the udgment plus costs (T 36, L 8-14). In ruling, the Court added his statement:

> "One final caveat. I believe I put it in the area where both of you probably will consider appealing it. May I encourage you to do so?" (T 36, L 11-14).

As soon as the Court made this statement, respondents' rney advised the trial court that the parties had agreed to ept, without appeal, his decision on the amount of attorney's es (T 38, L 6-10), and this fact is supported by Linford ackens's testimony (R 95, ¶6-9). However, the trial court felt either party could appeal his ruling (T 38, L 11-14).

Although the record does not reflect it, as soon as the Court ruled that the fees awarded Plaintiff were $1,500, Mr. Hickman, the bank President, and Mr. Hughes, the bank's attorney, immediately demonstrated their displeasure, which prompted the above quoted statement inviting an appeal. From that point on, as a reading of the transcript clearly shows, Mr. Hughes expressed his objections to the trial court, which resulted in the trial court making some conciliatory statements that have found their way into the "Findings Of Fact And Conclusions Of Law" to support appellant's argument that a finding that its requested fees were reasonable should now preclude the trial court from awarding less than the full fees found "reasonable".

However, the trial court obviously took into consideration equitable issues, such as the fact that the bank made the initial mistake that caused the default situation to arise (T 38, L 18-21), and made that clear when pressed by Mr. Hughes (T 39, L 4-5, 14-17).

POINT I

THE TRIAL COURT'S AWARD OF $1,500 ATTORNEY'S FEE WAS PROPER AND WAS NOT A CLEAR ABUSE OF DISCRETION, BUT WAS BASED ON (1) CONFLICTING EVIDENCE REGARDING A REASONABLE FEE; (2) THE AMOUNT INVOLVED IN THE CASE; AND (3) SEVERAL EQUITABLE FACTORS

(1) THE CONFLICTING EVIDENCE: In his opening statement Mr. Hughes, appellant's counsel, stated he was seeking fees of $10,000 (T 13), and the possibility that respondents might be assessed such a high fee in resisting a $3,858.84 claim (R ¶1), obviously proded respondents into seeking settlement (T 14-16).

In his actual testimony, however, Mr. Hughes testified [illegible] fees of $145 at the time the repossessed truck was sold (T 18, [illegible]). His testimony was that his fees had increased to $2,155 [illegible] the Wednesday one week before the trial on Wednesday, May 11, 1983 (T 23, L 10-13). He testified that he spent 31 hours preparing jury instructions between the Wednesday prior to trial [illegible] Monday the week of the trial, working on both Saturday and Sunday (T 22, L 6-12). Appellants sought fees of $2,325 (31 hours times $75.00 per hour) for this time, mostly spent on drafting jury instructions (T 21, L 9-14). An additional $300 was requested for paralegal time to review with Mr. Hughes the jury instructions and to put the file together (T 21, L 14-16), and he also requested $67.50 for clerk's time (T 21, L 17-23). The sum of $2,155, $2,325, $300 and $67.50 is $4,847.50, which is the total fees sought by appellants (T 23, L 10-19). The fees sought by appellants exceeded the $3,858.84 (R 3, ¶1) principal deficiency sued upon by almost $1,000.00!

On cross-examination, however, Mr. Hughes acknowledged that his preparation went well beyond the pleadings, admitting that he had prepared to defend against matters not within the pleadings (T 24-25). In fact, he admitted that he had spent time preparing to defend against estoppel and waiver arguments, which [illegible] affirmative defenses that must be specifically pled (T 25). These affirmative defenses were not pled in the "Answer And Counterclaim" of respondents (R 42-45). No constitutional issues were raised in the counterclaim.

The trial court found that the jury instructions were somewhat cross and criss-cross and perhaps even attempted to educate the Court with respect to all potentialities after the proof is in." Emphasis Added. (T 34, L 23-25).

The trial court heard the testimony of Mr. Miles regarding a reasonable fee in this case, and it was his testimony that a reasonable fee would be 20% of the amount due, which would be approximately $900 or a $4,700 principal and interest due (T 30, 18-25). Respondents' attorney testified that his fees up to the day of trial amounted to a total of $1,281 (T 28, L 11-19). The trial court found that these fees were not excessive (T 37, L 10-15).

The evidence presented to the trial court ranged from a $900 fee, to a $1281 fee, to the $4847.50 fee sought by appellant. The trial court stated that the jury instructions were excessive (T 36, 21-25; T 37, L 1-5). The conclusion is inescapable that the trial judge properly weighed the conflicting evidence in light of his review of the file, his knowledge of the issues in this action, and in light of his own experience, and determined that a reasonable fee in this case was $1,500.

(2) THE AMOUNT INVOLVED IN THE CASE. The trial court obviously felt that appellant's attorney had grossly overworked this case, as evidenced by the trial court's analogy when the judge stated:

> "Let me say this to you: You can take two little cars out and wreck them in the middle of the Court and have all the people in here witness it, then take all of their depositions and prepare for trial and

> instructions and take the time of the Court, and the lawyers can do all of those things. And when you get down to it, you can try the suit on the same basis and principle that would apply in any kind of a case of similar kind. But keep in mind it was just little toy cars out there. And so I find that in this case that the attorney fee is in relationship to the amount to be assessed against the defendant." (T 37, L 16-25; T 38, L 1).

This fact is made clear by reading the finding of the trial court, where the trial judge added, in his own handwriting, the underlined portion quoted below:

> "18. The Court finds that the amount of attorney's fees claimed of $4,747.50 (sic), though reasonable in all regard, constitutes a sum approximating the debt due on the note, absent any assessment for attorney's fees, and from the testimony and the file the Court finds $1,500.00 is a reasonable fee to be assessed against Defendants." (R 115, ¶ 18).

The trial court was obviously saying that while the fees claimed by the appellant were reasonable in the abstract, they must be tempered by factors in this specific case such as the amount of the debt on which suit was brought. That amount was $3,858.54 (R 3, ¶ 3), and with accrued interest, was $4,748.39 (T 16, L 3-6). The trial court was saying it was unreasonable to incur attorney's fees that exceeded or approximated this debt. Respondents will readily acknowledge that as the amount in issue decreases, a reasonable attorney's fee may equal or even exceed the amount claimed, especially in cases involving less than [illegible]. But when the claim is approximately $4,000.00, the trial judge felt a reasonable fee should not approximate the $4,000.00 debt, and found a reasonable fee would be $1,500.

The relationship of the fee to the amount recovered was the first of several factors mentioned by the Utah Supreme Court

in Turtle Management, Inc. v. Haggis Management 649 P. 2d 67 (Utah 1982) as important in determining a reasonable attorney fee. The Court said, at page 671, that:

> "Several factors have been considered by various courts in determining the appropriate award of attorney's fees: the relationship of the fee to the amount recovered, the novelty and difficulty of the issues involved, the overall result achieved, and the necessity of initiating a lawsuit to vindicate the rights in the contract. 58 A.L.R. 3d 235 (1974); 26 Jur.2d Costs §78 (1965); 25 C.J.S. Damages §50 (1966). The district court appropriately took into account factors such as the complexity of the issues involved and the results achieved in awarding attorney's fees." Emphasis Added.

In Maryland Casualty Co. v. Tacoma, 199 Wash. 72, 90 P.2d 226, 123 ALR 399 the court held that an attorney's fee allowed as a part of the recovery must, to some extent, be based on the amount recovered, irrespective of the amount of work done by counsel.

An award of $1,056 attorney's fees for successfully foreclosing a $6,068 mortgage was upheld on appeal where the defendant set up as a defense a breach of a separate contract and a counterclaim for specific performance in Wallace v. Pulsipher (1965) 16 Utah 2d 401, 402 P.2d 699.

In this case the trial judge appeared to emphasize the relationship of the fee to the amount recovered, but he also had before him the pleadings from which he could assess the novelty and difficulty of the issues, and of course he was aware of the results achieved. He may have also felt that it was not necessary for appellant to repossess and sell respondents' vehicle because the bank had just sent new loan documents for respondents to sign (Defendants' Exhibit No. 27) and without

further notice had the vehicle repossessed 26 days later (Defendants' Exhibit No. 28; R 113, ¶6). The trial court may have felt it was not necessary to file suit against the respondents because just prior to the sale of the repossessed vehicle the respondents had attempted to reinstate the contract by agreeing to all of the bank's requirements, including the increase in interest rate and the attorney's fees of $145, and to pay $5,000.00 toward the debt! (R 24, ¶10-12; T 23, L 10-11). As in Turtle Management, Inc. v. Haggis Management, supra, the trial court in this case "appropriately took into account" several factors the Supreme Court has held to be important in deciding a reasonable attorney's fee. No abuse of discretion has been shown.

(3) EQUITABLE FACTORS. There is no doubt that the trial court also took into account the fact that the bank made the mistake (T 38, L 18-21; see also the additional finding filed with the Supreme Court on October 6, 1983) which caused the default situation to arise. After stating that appellants jury instructions "cross and criss-cross" (T 34, L 23-24), but that it was not "foolishness" (T 35, L 1) to go to such lengths in preparation for trial, the judge stated "But I am not going to assess all of that to the defendants in the case." (T 34, L 2-3).

The reasons for refusing to assess all of the requested fees against the defendants (respondents) were that (1) "And so I find in this case that the attorney fee is in relationship to the amount to be assessed against the defendant." (T 37, L 24-25),

and (2) when pressed by appellant's counsel to justify his ruling, the transcript reports:

> "Mr. Hughes: Let me say, for the record, I think the fees are extremely low for what has happened in this case.
> The Court: All right. As a matter of fact, I want the findings the fact that the initial mistake was by the bank. And that's uncontroverted, isn't that correct?" (T 38, L 15-21).

The trial court was basically reducing the requested fees to place some of the loss on the bank because it had mistakenly set the respondents' loan up on a semi-annual basis instead of a monthly basis, and had informed respondents on several occasions that they did not need to make a payment because they were current and even paid in advance, in spite of protests made by respondents that something was wrong. The trial court did not feel it would be proper to assess defendants with all of the bank's fees which were incurred as a result of the bank's own mistake.

Another equitable consideration the trial court was aware of at the time it ruled included the fact that to correct the bank's own mistake the bank was demanding that defendants pay all the accrued interest immediately and sign new loan documents at a four (4%) percent higher interest rate than the original loan.

The bank sent defendants new loan documents at the higher interest rate on June 29, 1981, requesting that defendants sign and return them or "finance the truck somewhere else" (Defendants' Exhibit No. 27). These new loan documents called for the first payment to be made on August 5, 1981. No doubt

was given by the bank for the signature and return of these documents. Defendants reasonably assumed they had until the date of the first payment on August 5, 1981 to either sign and return them or to "finance the truck somewhere else" (Defendants' Exhibit No. 27). Without further notice, the bank proceeded to repossess the truck, giving instructions to that effect on July 23, 1981 (Defendants' Exhibit No. 28), and accomplished the repossession on July 25, 1981 and two days later informed Defendants by mail that it was the bank (and not a thief) who had taken their vehicle (Defendants' Exhibit No. 29). Respondents contend that the trial court took into account the equities of the bank's act in repossession without notice some ten (10) days prior to the expiration of the bank's offer.

A final equitable consideration the trial court may have taken into account was the bank president's cavalier attitude the day of the sale of the repossessed vehicle. The defendants had finally given in to all of the bank's demands, unreasonable as they were in light of the fact it was the bank's own mistake, and had agreed to pay the costs of repossession, the attorney's fees to that point of $145 (T 23, L 10-11), to pay the 4% higher interest rate, and to even apply the $5,000.00 they had available on the loan balance in order to reinstate the loan. The bank president, upon being told about the agreement, or negotiations as he phrased it, ordered that the truck be sold unless defendants paid the entire amount due, all without even having the interest to learn the details of the agreement! (R

140, Deposition Of John William Hickman, page 9, lines [illegible] 10-11).

Appellant admits, at page 13 of its brief, that the trial court found "that the equities of the case were against prevailing party, then the court might reduce the award to a 'reasonable extent'." Respondents submit that this is exactly what the trial judge did in this case, for the "equities" described above.

These kind of equitable considerations are based on the facts and circumstances of the case, and as such, are within the province of the trial court and should not lightly be disturbed on appeal. Thus, appellant's argument in Point I of their brief that the trial court awarded a reduced fee based solely on the finding that the fee should not approximate the amount recovered is absolute wrong on its premise that this was the trial court's sole basis for its award. As shown above, the trial court considered conflicting evidence on the issue of a reasonable fee and took into account the equitable factors described above in making the award, as well as the relationship of the fee to the amount recovered. As the Turtle Management, Inc. v. Haggis Management, supra, case makes clear, one of the most important factors the Utah Supreme Court has mentioned in determining a reasonable fee is the amount recovered. Clearly, no abuse of discretion has been shown.

The John Deere Company v. Catalano 525 P.2d [illegible] 1974) case upon which appellants rely for authority that the attorney's fees awarded ($1,500) may exceed the amount recov-

is distinguishable on two counts, first, that case involved a deficiency judgment of $1,300.59, much smaller than in this case, and respondents readily acknowledge that at smaller amounts, the fees will more frequently approximate the amount recovered; and second, the court in that case specifically found that the "equities in this action do not favor Catalano." In this case the trial court specifically laid the blame on the bank for having made the mistake that led to a default situation. Further, this case did not go to a full blown trial like the John Deere Company case, and yet only $1,500 attorney's fees were awarded in that case, the same as in this case.

(4) STANDARDS ON APPELLATE REVIEW. In Turtle Management, Inc. v. Haggis Management, supra, the Utah Supreme Court also delineated the standards used to review a lower court's award of attorney's fees, saying, at page 671, that:

> "The amount to be awarded as attorney's fees is generally within the sound discretion of the trial court. Yreka United, Inc. v. Harrison, Idaho, 510 P. 2d 775, 780 (1973). This Court has upheld an award of attorney's fees where the amount does not appear to be unreasonable. Parkinson v. Amundson, 122 Utah 443, 250 P. 2d 944 (1952). In the absence of abuse of discretion, the amount of the award by the district court will not be disturbed. 20 Am. Jur. 2d Costs § 78 (1965)."

The courts appear to be agreed that it is fundamental that the reasonable value of attorney's fees is a question of fact and that the findings of the trial court must be upheld by a reviewing court unless clearly erroneous. For example, in Alexander v. Brown 646 P.2d 692 (Utah 1982) the plaintiff's attorney advocated $1,362.50 as a reasonable fee while

defendant's attorney judged $750.00 to be reasonable. In affirming the lower court's award of $960.00, the Court stated:

> "In the absence of a showing of patent error or clear abuse of discretion, we do not disturb the judgment of the trial court."

In Beckstrom v. Beckstrom 578 P.2d 520 (Utah 1978) the undisputed evidence was that a reasonable attorney's fee would be $800, but the trial court nevertheless awarded only $500. On appeal, the Court held:

> "Even though that evidence is undisputed, the trial judge was not necessarily compelled to accept such self-interested testimony whole cloth and make such an award; and in the absence of patent error or clear abuse of discretion, this court will not disturb his findings and judgment."

POINT II

APPELLANT IS NOT ENTITLED TO ATTORNEY'S FEES FOR DEFENDING THE COUNTERCLAIM

Appellant contends, in Point II of its brief, that the trial court erred in awarding only $1,500 attorney's fees after appellant had "successfully defended" the counterclaim. Appellant takes too much credit, as the counterclaim was not "successfully defended", but was compromised by the stipulation to submit the issue of attorney's fees to the trial court and to accept as final whatever ruling was made.

Appellant makes a great deal of noise about the horrendous counterclaim of $205,000, but fails to mention that the counterclaimed prayed for "$5,000.00, or such other amount proved at trial" (R 45, ¶2) and for "$200,000.00 or such other

amount as will serve the purpose of punitive damages." (R 45, ¶3).

Appellant does not cite any authority for Point II of its brief, and for good reason, since there is no authority that successfully defending a claim automatically includes an award of attorney's fees to the prevailing party. The Utah rule on this point is mentioned in many cases, and was stated again in Turtle Management, Inc. v. Haggis Management, supra, page 671, where the Court states:

> "Utah adheres to the well-established rule that attorney's fees generally cannot be recovered unless provided for by statute or by contract. B & R Supply Company v. Bringhurst, 28 Utah 2d 442, 503 P. 2d 1216 (1972). If by contract, the award of attorney's fees is allowed only in accordance with the terms of the contract. 25 C.J.S. Damages § 50 (1966)."

Appellant may argue that the promissory note and/or security agreement enables appellant to claim attorney's fees, but those fees, by their terms, are limited to pursuing the bank's remedies in seeking collection, but not to protecting the bank from liability should it be sued for wrongdoing. And if the attorney's fees clauses contained in the note and security agreement did extend to cover the bank's wrongs, the clause would be struck down as void as against public policy by allowing a wrongdoer to indemnify himself from expense of attorney's fees.

Clearly, if respondents had paid the deficiency claimed by appellant in its complaint and had then brought suit against the bank (assuming the respondents' claims were not compulsory counterclaims), the bank would not be able to call up the note

and security agreement for its attorney's fees, since the note would have been paid and extinguished.

CONCLUSION

Reviewing the disputed facts in the light most favorable to the judgment entered in the trial court, and recognizing that the judgment of the trial court is presumed to be correct and the findings sustained unless there is patent error or a clear abuse of discretion, it is respectfully requested that the judgment be affirmed.

Pespectfully submitted this 12th day of September, 1984.

John L. Miles
JOHN L. MILES
Attorney For Respondents

MAILING CERTIFICATE

I do hereby certify that I mailed two true and correct copies of the foregoing RESPONDENT'S BRIEF, postage prepaid, to Michael D. Hughes and Dale R. Chamberlain, at THOMPSON, HUGHES & REBER, 148 East Tabernacle, St. George, Utah 84770 this 12th of September, 1984.

Secretary