1983

Lenore M. Gill v. Ruland J. Gill : Brief of Plaintiff-Appellant Lenore M. Gill

IN THE SUPREME COURT

OF THE STATE OF UTAH

* * * * * * *

LENORE M. GILL,	)
	)
Plaintiff/Appellant,	)
	)
vs.	)
	)
RULAND J. GILL,	)
	)
Defendant/Respondent.	)

BRIEF OF PLAINTIFF/APPELLANT
LENORE M. GILL

Case No. 19142

Gary L. Paxton
CLYDE, PRATT, GIBBS & CAHOON
Attorneys for
Plaintiff/Appellant
77 West Second South, #200
Salt Lake City, Utah 84101

Dwight L. King
KING & PETERSON
Attorneys for
Defendant/Respondent
2121 South State Street
Salt Lake City, Utah 84115

IN THE SUPREME COURT

OF THE STATE OF UTAH

* * * * * * *

LENORE M. GILL,	)
	)
Plaintiff/Appellant,	)
	)
vs.	)
	)
RULAND J. GILL,	)
	)
Defendant/Respondent.	)

BRIEF OF PLAINTIFF/APPELLANT
LENORE M. GILL

Case No. 19142

Gary L. Paxton
CLYDE, PRATT, GIBBS & CAHOON
Attorneys for
Plaintiff/Appellant
77 West Second South, #200
Salt Lake City, Utah 84101

Dwight L. King
KING & PETERSON
Attorneys for
Defendant/Respondent
2121 South State Street
Salt Lake City, Utah 84115

TABLE OF CONTENTS

Cases

Treatise

NATURE OF THE CASE

This is an appeal from the property distribution and attorney's fee parts of a final Judgment entered by the Third District Court of Salt Lake County, Utah, in a divorce action.

DISPOSITION IN THE LOWER COURT

The Judgment sought to be reversed was entered on March 14, 1983. On April 7, 1983, the trial court denied Plaintiff's Motion to Amend Findings, Conclusions and Judgment made pursuant to Rules 52(b) and 59(a)(6) and (7), and (e), U.R.C.P., thus reinstating the original judgment.

NATURE OF RELIEF SOUGHT ON APPEAL

Appellant requests this Court to either (1) make findings of its own and award her an additional $22,400.00 from the distributive share of the marital assets remaining at the time of trial awarded to Respondent as and for reimbursement of approximately one-half the value of the Fleetway business inventories dissipated by him during the pendency of the action in violation of the Court's injunction, together with an increased award of counsel fees and costs, or (2) remand the matter to the trial court with instructions to amend its Judgment in that manner.

STATEMENT OF THE FACTS

The facts material to the issues on appeal are as follows:

The parties separated on September 6, 1979, after 38 years of marriage (Record on Appeal [hereinafter "R."] 416-17). On that date, their marital estate consisted of a residence, an automobile, a pickup truck and camper, horses and related tack and trailers, life insurance policy cash values, a gun collection and miscellaneous camping equipment, furniture, jewelry and other items personal to each, and the assets of two Utah business corporations, Gill's Tire Market and Fleetway Tire, Inc. ("Fleetway") (R.422). The divorce action was commenced on September 17, 1979 (R.1A).

When the parties separated, Gill's Tire Market was defunct (R.420). Before the end of 1979, Respondent, as a director and its managing officer and without Appellant's participation, commenced a U. S. Bankruptcy Court Chapter 11 proceeding involving that corporation (R.186-87, 420-21). That proceeding was still pending at the time of trial in December 1982 (R.187).

Respondent had taken an investor-partner, Candland, into his Fleetway business in September 1978 (Exhibit P-1; R.187). They became deadlocked in business affairs and Candland commenced a dissolution action in 1979 (R.195). That suit was settled by arbitration in about August 1979, pursuant to which Respondent became sole owner of the Fleetway business and assets, and Candland received cash from a joint business account (R.195, 198, 247). The final settlement sum paid to Candland was based, in

part, upon each party's suggestion to the arbitrator of the value of the Fleetway inventories which influenced that settlement sum dollar-for-dollar (R.250-51). By a list in his own handwriting, Respondent identified those inventory items and claimed their value to be $51,237; Candland made corrections to that list and asserted a value of $57,500 (Exhibit P-3; R.197). After conclusion of the arbitration Respondent was in sole control of the Fleetway assets (R.200, 278) which included the inventory items listed on Exhibit P-3 (R.197-98).

The same week that the parties separated Respondent was forced to completely shut down Fleetway operations as a result of an execution sale by its landlord (Exhibit P-7; R.278-79). Respondent was able to secure removal of Fleetway's equipment and inventories (R.278-79) which he stored at various locations in Salt Lake County including the premises of a business operated by his sister, Bea Lund, and the warehouse of a friend, Peck (R.205, 296, 385-86). Fleetway did not resume business, and its corporate income tax return reporting the 1979 final year's operations disclosed balance sheet closing inventories valued at $47,554 and depreciable equipment with a basis of approximately $13,300 (Exhibit P-25).

Although Appellant was a nominal officer of Fleetway, she had no control over management decisions or day-to-day conduct of the business (R.420). She had not been involved in the Fleetway business deal with Candland (R.421).

The month following Fleetway's closing, on October 29, 1979, a restraining order was entered against Respondent pursuant

to an order to show cause and stipulation by which he was enjoined pendent lite from encumbering or disposing of any marital properties--and specifically Gill's Tire Market and Fleetway business assets--without Appellant's express prior knowledge and approval or without obtaining a court order upon application and notice (R.8, 18-22).

In December 1979, Appellant obtained an order bifurcating the divorce issue from the other issues joined in the action, in part, for the reason that the Gill's Tire Market bankruptcy proceeding would necessarily delay resolution of the economic issues (R.30-31). A Decree of Divorce was granted to Appellant on January 22, 1980 (R.40-41).

In October 1980, and without notifying Appellant or obtaining her approval or a court order, Respondent used the Fleetway equipment and remaining inventories to open a tire sales and service sole-proprietorship business in Salt Lake County under the name "Tire City" (R.205, 210, 365-69). He operated that business for two years, selling its assets two months prior to trial for $15,000 (R.205-6). The buyer allocated $12,000 of that price to the value of equipment which was almost equal to its basis reported in the final Fleetway tax return; the balance of the purchase price was for inventory (Exhibit P-5; R.394). The purchasers' $5,000 down-payment was paid to Respondent's sister, Bea Lund, who saw to its application in satisfaction of Tire City obligations; the $10,000 contract balance was found to be subject to prior claims of Mrs. Lund and Mr. Peck for obligations that did not involve Appellant (Findings of Fact, Para. XVII; R.161). The

Court found that "The businesses [including Fleetway and Tire City] have not prospered and there have not been any increase in the assets of the parties used by the defendant to operate the businesses or maintain himself," (Findings of Fact, Para. XI; R. 160), and that "If any additional monies remain [from the Tire City $10,000 contract balance after the payment of the prior claims], it is the joint property of plaintiff and defendant." (Findings of Fact, Para. XVII; R. 161). (Emphasis added)

Appellant's initial discovery was served in December 1979; the first interrogatory concerned the identification, location and valuation of the parties' business assets, particularly Fleetway (R.23-24). Respondent's attitude toward the discovery process, and his willingness to comply therewith, was reflected by his answer to that first interrogatory: "None, with the exception of horses" (R.46). That answer was not filed until seven months after service of the interrogatory and only after a motion to compel (R.42). Thereafter Respondent pursued a course of delay, obfuscation and non-compliance with Appellant's attempts to trace the marital assets under his control, all of which is shown by the record: motion to compel deposition discovery, September 1980, and compulsion order, November 1980 (R.56, 59, 66-67); deposition document requests, December 1980, motion to compel document-production and continued deposition discovery, January 1981, and second compulsion order, March 1981 (R.75, 82); motion and order in supplemental proceedings, May 1981, and order to show cause for failure to appear, July 1982 (R.93-94, 98-99); unanswered request for supplementation of discovery responses, July 1982 (R.101);

failure to appear for deposition discovery pursuant to notice, November 1982 (R.115); and a motion for sanctions, November 1982 (R.118-19).

Not until a deposition three weeks prior to trial--and after Appellant sought Rule 37 sanctions against him--did Respondent produce the first of the documents and records related to the Fleetway assets and the Tire City business, as he had been ordered to do nineteen months earlier (R.82). Those documents were critical to Appellant's case and had first been requested in detailed, itemized discovery in December 1980 (R.70-71)! His disclosure of those records continued piecemeal after that deposition to the second day of trial; even then, and notwithstanding service of a subpoena duces tecum, all the documents were not produced (R.219-223, 347). His explanation for not producing sales books and receipts for Tire City was, "I might could get some. I didn't think they were relevant. . . ." (R.225).

A certified public accountant called by Appellant as an expert witness testified that Tire City experienced a cash loss of $37,000 in two years. His computation of that loss took into account the Tire City sale price and unreported cash used by Respondent to purchase used tires for resale (R.474). The expert testified that such a loss could only be accounted for by debts or infusions of business capital either in the form of cash or assets converted to cash (R.458). Because Respondent had furnished no information to the contrary and all business debts had been accounted for, the expert gave his opinion that he presumed the losses were financed by cash from converted assets (R.459-60,

477). When asked by his counsel to explain the losses, Respondent was unable to do so stating, ". . . I don't understand it" (R.570). Respondent admitted that he had used an additional $300 per month cash from the till for personal use which was not documented in Tire City's records (R.595). The expert had testified that any such cash paid-outs would increase the operating loss (R.455). Accordingly, Respondent's total use of unexplained cash during the period he operated Tire City approximated $44,200 which was roughly equivalent to the dollar-value of the Fleetway inventories reported on the corporation's final tax return ($47,554), less the ending inventory at the time of sale ($2,722) (Exhibits P-25 and P-19).

Respondent's accounting for his disposition of the Fleetway closing inventories was contradictory and incomplete. His testimony was: that wheels, tires and shock absorbers valued at $6,100 which he had transferred to his sister, Bea Lund, in payment of a debt constituted the sole Fleetway inventories invested in Tire City (Exhibit P-19; R.211, 215); that approximately $12,000-$14,000 worth of Fleetway's recap tire inventory had been destroyed by Peck and him in August 1979 pursuant to an order by the U. S. Department of Transportation (R.289, 404); that some of the inventory items, ". . . under $10,000 worth," had been used to pay Fleetway debts (R.362); and that some had been sold to Fleetway customers (R.276). Later testimony and exhibits showed: Respondent's sister admitted no ownership interest in the Tire City business (R.292, 299-301) and testified that the transfer to her of inventory valued at $6,100 had been a form of security for

the prior debt which she had surrendered by releasing that inventory to her brother for his use in the Tire City business (R.309-10); Respondent's original copy of the government purchase order for the sample recap tires inspected for safety compliance pre-dated by two years his purchase from Candland of the recap tires he claimed to have destroyed, and affidavits of the director of the U. S. Department of Transportation office charged with enforcement of the safety regulations claimed by Respondent to be the reason he had to destroy the recaps established that the tires purchased from Respondent's businesses met safety standards and that no enforcement action was necessary and that none had been taken (Exhibits P-21, P-22, P-23; R.272-74, 348, 351); and, despite Appellant's repeated requests, Respondent failed to produce any documents whatever verifying the amounts or dates of sales to Fleetway customers or the claimed inventory trade-outs in payment of Fleetway obligations (R.276, 362). Except for these explanations, Respondent admitted that all the Fleetway inventories ended up at his Tire City business (R.366-69).

The record is clear that at all times after entry of the Court's restraining order Respondent dealt with the Fleetway joint properties while Appellant attempted via discovery to identify, locate and value them. She did not approve his using them and he obtained no court order authorizing him to do so. Against this evidentiary background, the Court announced that it could not find "that Mr. Gill, the defendant, intentionally secreted or hid assets to deprive the plaintiff" (R.618).

Respondent voluntarily accounted to Appellant for his

sale of certain horses by giving her half of the proceeds which she used, primarily, to pay marital obligations (Exhibits P-26, D-10; R.267-70). However, he apparently used $1,000 from the sale of a horse for his business (R.286-87). The total of his contributions to her support during the three-year period between their separation and the time of trial was $852.72 paid with Tire City checks and a pair of snow tires (Exhibit D-9). Respondent refused to make any mortgage payments on their home which was being occupied by Appellant, and except for four months' arrearages paid out of the horse-sale money given to her (R.427-28), Appellant made all mortgage payments and paid sums demanded by judgment-lien creditors to forestall execution on that residence with her $768 monthly net income and money provided by her son (R.433-34). That home constitutes the parties' principal remaining marital asset.

Following entry of the divorce decree, Appellant's counsel's services in the case were directed primarily toward reconciling the parties' property rights as they related to Respondent's use of the Fleetway assets (R.552). Counsel's fees for services rendered to the conclusion of trial for which Appellant asserted claim for contribution by Respondent were $9,683 (R.546). The Court, however, discounted entirely the fees and costs Appellant had incurred in presenting her claims at trial after the laborious and time-consuming preparation necessitated by Respondent's actions. She was awarded only $1,553.25 attorney's fees, specifically attributed to the legal services rendered to the date of entry of the divorce decree, January 22, 1980, together with costs to that date (R.558-59).

ARGUMENT

POINT I

THE COURT ERRED IN LAW BY REFUSING TO AWARD APPELLANT A LARGER SHARE OF THE REMAINING MARITAL ASSETS TO COMPENSATE HER FOR RESPONDENT'S VIOLATION OF THE COURT'S INJUNCTION AND RESTRAINING ORDER.

A. THE COURT'S FINDING OF AN ABSENCE OF INTENT IS IMMATERIAL TO APPELLANT'S RIGHT OF RECOVERY.

Appellant requested the Court to grant her recovery for one-half the value of the Fleetway assets dissipated by Respondent in violation of its restraining order. Finding that Respondent had not ". . . intentionally secreted or hid assets to deprive the plaintiff" (R.618), the Court denied Appellant recovery and ordered a distribution of the last remaining marital assets in a manner it apparently viewed as creating an approximate equivalence between the parties.

Temporary restraining orders and injunctions serve the purpose of maintaining the status quo between litigants and preventing future acts which would otherwise injure a party. 42 Am Jur 2d, "Injunctions," §§2 and 4, pp.727-731. Alternate remedies are available upon violation of an injunction including citing the violator for contempt, subjecting the violator to the penalty provided in the Court's order or compelling him to refund monies obtained by his act of disobedience. Id. at §339, p. 1145.

Utah law recognizes the accepted distinction between two classes of contempt proceedings: civil and criminal. When an injured party requesting relief also seeks to vindicate the power

and dignity of the Court via imposition of a fine or imprisonment upon the violator which is punitive in purpose, the proceedings are criminal in character; however, when the proceedings brought by the injured party are for the purpose of seeking compensation or damages for losses sustained as a result of violation of the Court's lawful order, they are classified as civil. Davidson v. Munsey, 29 Utah 181, 80 P. 743 (1905). It is held that proof of intent is not required in a civil contempt proceeding in order for the injured party to obtain relief.

> The absence of wilfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. [Citations omitted.] Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act.
>
> McComb v. Jacksonville Paper Co., 336 U.S. 187, 191, 69 S.Ct. 497, 499, 93 L.Ed. 599 (1949).

The Utah case of Gunnison Irrigation Co. v. Peterson, 74 Utah 460, 280 P. 715 (1929), is in accord. In Gunnison, an adjudication of defendant's contempt was reversed for reasons related to interpretation of the water rights decree in question and the adequacy of the lower court's findings. Although we are not told whether a fine or imprisonment had been imposed upon defendant, and the case does not discuss the distinction between civil and criminal contempt proceedings, this Court stated:

> The entire question to be determined in this proceeding is whether the defendant in fact took or diverted water decreed to plaintiff as alleged in the affidavit, without plaintiff's consent and to its injury. The pleadings and proofs suggest that the defendant believed he had a right to take the water. But that cannot be a defense to the charge.

It has frequently been said by the courts that good faith, ignorance of law, or acting upon the advice of counsel, is not a defense. In Rodgers v. Pitt (C.C.) 89 F. 424, 429, the court used the following language:

> "The defendant in this case was bound to obey the injunction, and, when he interfered with the court's order, he was acting at his peril. He certainly ought not to have acted upon his own judgment as to what his rights were, when it was manifest that his acts would, at least, amount to a technical violation of the terms of the injunction. It was not for him to set up his own opinion as to the meaning and effect of the injunction. If he entertained any doubt as to what he might do without violating the injunction, he should have applied to the court for a modification of the injunction, or for the privilege of doing certain acts which, by the advice of counsel, he claims he had the right to do." [Citation omitted]

Each of these parties undoubtedly acted at his peril when he proceeded to use the waters so adjudicated in the face of the restraining orders issued . . . . If either took water belonging to the other against his will, whether in good faith, under a misapprehension of the terms of the decree, or under mistake of law, such party thereby came into contempt of the court.

74 Utah at 466.

In the Rodgers v. Pitt case cited in Gunnison, above, the Court went on to state:

> The belief, motive, or intent of the defendant not to violate the injunction does not excuse him if in fact his acts resulted in a violation of it. The breach of the injunction consists in doing the forbidden thing, and not in the intention with which it is done.

89 F. 424 at 429.

Gunnison also cited Weston v. John L. Roper Lumber Co., 73 S.E. 799 (1912), in which the Court said:

> The motive for violating the order is not considered in passing upon the question of contempt, and the respondent cannot purge himself by a disavowal of any wrong intent. It is the fact of his obedience that alone will be considered. [Citations omitted]
>
> In deciding whether there has been an actual breach of an injunction, it is important to consider the objects for which relief was granted, as well as the circumstances attending it; and it is to be observed that the violation of the spirit of an order or writ, even though its strict letter may not have been disregarded, is a breach of the mandate of the court.
>
> 73 S.E at 800.

Appellant has not overlooked this Court's contempt cases, such as Thomas v. Thomas, 569 P.2d 1119 (Utah 1977), in which it is stated that the offending party must be shown to have willfully and knowingly failed to obey the Court's order. Those cases are distinguishable, however, as being contempt proceedings of a criminal nature.

Courts of general jurisdiction possess the inherent power to punish for contempt, In re Evans, 42 Utah 282, 130 P. 217 (1913), just as they have the inherent power to enforce their lawful injunctive orders upon the request of a party. It is recognized that the violator of an injunction or restraining order may be compelled to respond in damages at the request of the injured party whether or not a contempt citation is sought. Hanna v. Martin, 49 So.2d 585 (Florida 1950); Theis v. Federal Finance Co., Inc., 480 P.2d 244 (Washington 1971); and Griggs v. Doctor, 61 N.W. 761 (Wisconsin 1895). Appellant did not seek to have Respondent adjudged in contempt of court.

If Respondent's intent would have been immaterial in a civil contempt proceeding in which she sought damages, surely her right to recover when seeking compensation for a violation of the Court's injunctive order purposed for her protection should not be barred by a finding of absence of intent. The lower court found that Respondent had used joint Fleetway assets in the Tire City business to maintain himself and that any remaining Tire City contract proceeds would be their joint property (Findings of Fact, Para. XI and XVII). Because the Court made no findings in justification or excuse of Respondent's violation of its injunction, its ruling against Appellant was necessarily based upon its "no intent" finding and, as such, was legally erroneous.

B. APPELLANT'S PROOF WAS SUFFICIENT UNDER THE LAW TO SUSTAIN THE RECOVERY SHE SOUGHT.

In Foreman v. Foreman, 111 Utah 72, 176 P.2d 144 (1946), the right to recover damages in a contempt proceeding for a party's failure to deliver certain bonds in violation of a temporary restraining order and final decree was acknowledged.

> In a contempt proceeding such as this the damages suffered by the party aggrieved are for all practical purposes measured in the same manner as the damages in the case where the party proceeded against is being sued for his failure to perform an obligation undertaken voluntarily. [Citations omitted]
>
> Any actual loss suffered by the party aggrieved may be recovered if caused by the party through his contemptuous acts. Davidson v. Munsey and cases cited above.
>
> From 1 Sutherland Damages, 4th Ed., 1916, Sec. 75, pp. 272, 273, we quote:

> "Each party to a contract has a legal right to performance by the other according to its legal import and effect. Any default is a violation of that right. The injured party is entitled to a measure of compensation which will place him in as good condition as if the contract had been fulfilled. * * *"
>
> 111 Utah at 82-83.

This Court has often stated that damages need not be proved precisely, but that the injured party must only demonstrate an amount with enough certainty to enable the factfinder to assess an award. "Where there is strong evidence of the fact of damage, a defendant should not escape liability because the amount of damage cannot be proved with precision." Winsness v. M. J. Conoco Distributors, Inc., 593 P.2d 1303 (Utah 1979). Citing Professor Corbin, Winsness states:

> ". . . There is little that can be regarded as 'certain,' especially with respect to what would have happened if the march of events had been other than it in fact has been. Neither court nor jury is required to attain 'certainty' in awarding damages; and this is just as true with respect to 'value' as with respect to 'Profits.' Therefore, the term 'speculative and uncertain profits' is not really a classification of profits, but is instead a characterization of the evidence that is introduced to prove that they would have been made if the defendant had not committed a breach of contract. The law requires that this evidence shall not be so meager or uncertain as to afford no reasonable basis for inference, leaving the damages to be determined by sympathy and feelings alone. The amount of evidence required and the degree of its strength as a basis of inference varies with circumstances. A greater amount and a higher degree are required in those cases in which it is usually possible to produce it than in cases where it is usually impossible or difficult and the defendant had reason to know it. . . ."
>
> 593 P.2d at 1306.

Appellant's evidence established the value of the Fleetway inventories as $51,237 at the time of Respondent's buy-out from his partner (Exhibit P-3), and as $47,554 at the cessation of business that same year, 1979 (Exhibit P-25). Respondent admitted that the Fleetway inventories eventually found their way to his Tire City business (R.366-69). The logical and reasonable inference to be drawn from the evidence of Respondent's use of over $44,200 unexplained cash during the two years he operated Tire City is that during that period he liquidated the total Fleetway inventories which had been in his custody continuously after he closed down Fleetway operations. He did so in a clandestine manner without keeping records of those sales and without disclosing his dealings to Appellant until he was forced by court process to do so. As a result, the marital estate was dissipated for Respondent's own purposes without Appellant's approval. Even if Respondent gained no profit from his actions and the Tire City business did not "prosper," as the Court found (Findings of Fact, Para. XI; R.160), that does not excuse his violation of the injunction. Southwestern Loan & Finance Corp. v. Arkansas Transportation Co., 45 S.W.2d 501 (Arkansas 1932). He certainly benefited, however, by regularly taking money from the till and by making payments to his sister with business checks on a pre-existing debt that did not involve Appellant (Exhibit D-9).

In order to place Appellant in as good condition as if the injunction had not been violated, Foreman, supra, and the marital assets had been divided at the time the divorce decree was granted in January 1980, she should be awarded a sum equivalent to

one-half the value of those joint assets dissipated thereafter, or approximately $22,400. Proof of that damage figure is certain enough in this highly equitable case, especially where the evidence was almost exclusively under Respondent's control and was so difficult to obtain.

C. THE COURT MADE NO FINDINGS IN JUSTIFICATION OF RESPONDENT'S VIOLATION OF ITS INJUNCTION.

The Court made no finding in excuse or justification of Respondent's violation of its injunction. The burden of proving any such defense was upon Respondent. Thomas, supra. Respondent signed the stipulation and joined in the motion upon which the Court's restraining order was based (R.18-19). He knew what was required of him under the injunction and the Court made no finding of his inability to comply. Foreman, supra.

The Court's use of the non-intent language in its findings to negative the ordinary understanding that the words "hide" and "secret" necessarily imply a design or purpose seems only to support Appellant's suggestion that its sole basis for denying her relief was erroneous in law. The marital Fleetway assets were, in fact, used by Respondent in the Tire City business (Findings of Fact, Para. XI) and the sale-contract vestiges of those assets were recognized by the Court to be joint property (Findings of Fact, Para. XVII). Appellant has no argument with the Court's finding that the Tire City sales proceeds were subject to the claims of Lund and Peck as those claims clearly arose prior to the October 1979 restraining order: Lund, 1977 (R.305) and Peck, August 1979 (Exhibit D-11). However, the Court did not

find that Appellant had prior knowledge and approved of Respondent's use of the Fleetway assets, and if the record otherwise would support a finding that a portion of the Fleetway inventories was disposed of prior to the effective date of the restraining order, the Court failed either to make such a finding or to hold Respondent accountable for the portion of the total inventories that was dissipated in violation of the injunction. Options were available to him: He could have applied to the Court for modification of the injunction or authorization to use the Fleetway assets in his new business, or he could have made a full disclosure to Appellant and obtained her approval. He did neither. Instead, he chose to flaunt the Court's order and frustrate Appellant's attempts to gain information about the joint properties. Respondent did, in fact, violate the letter and spirit of the injunction. In doing so, he acted at his peril.

POINT II

THE COURT'S FINDING OF ABSENCE OF INTENT IS AGAINST THE CLEAR WEIGHT OF THE EVIDENCE.

Assuming that the element of intent was essential to Appellant's right to recover, she submits that the record and evidence clearly preponderate against the Court's no-intent finding.

It cannot be gainsaid that the course of conduct undertaken by Respondent vis-a-vis Appellant's timely, detailed and continuing pursuit of discovery which was directed specifically and primarily to the Fleetway and Tire City assets clearly evidenced a design and purpose to withhold information from her at all costs and for as long as possible.

Respondent's intent to further his unilateral dissipation of those joint properties was also evidenced by his incredible story of the government-ordered destruction of Fleetway recaps and his undocumented claims of sales and trade-outs of Fleetway assets which would necessarily have been accounted for in the corporation's final tax return ending inventory, dated December 1980. In addition, Respondent's sister, Bea Lund, denied ownership of the inventories Respondent claimed to have "transferred" to her. No other explanations of his disposition of those inventory assets was proffered. Appellant suggests this discovery conduct and the evidence contradicting Respondent's testimony, all as established in the record, clearly preponderates against the Court's finding that Respondent did not intend to violate its injunctive order.

POINT III

THE COURT'S REFUSAL TO AWARD APPELLANT THE RELIEF SHE SOUGHT CONSTITUTES AN ABUSE OF DISCRETION.

Appellant submits that the Court's denial of her request for relief under the circumstances of this case results in such a serious inequity that a clear abuse of discretion on the part of the trial judge is manifested.

She did not ask the Court to punish Respondent; any such request would only have evidenced fruitless spite and vindictiveness. Appellant sought only redress for actual losses in an attempt to reconstruct her life. As a consequence of the Court's approbation of Respondent's conduct, Appellant will suffer

irreparable impediment to her ability to make her life as productive and as happy as it otherwise might have been.

While a trial court's adjustment of parties' property interests is entitled to a presumption of validity, this Court should jealously guard the application of its announced principals of equity by the courts which are subject to its power of review. The result of the trial court's ruling in this case deprives Appellant of a fair share of the financial resources and benefits accumulated during the marriage. If the parties' properties had been divided at the time the divorce was granted in January 1980, Appellant unquestionably would have been entitled to one-half of the value of the Fleetway assets. She asked for nothing more at the later trial. To fail to compel Respondent's accounting for his disposition of those assets and reinstate Appellant to a position of parity as it would have existed when the restraining order was entered is inequitable. These circumstances cry for this Court's intervention. The lower court's ruling should not be countenanced or permitted to stand.

POINT IV

THE COURT'S DENIAL OF AN AWARD FOR ATTORNEY'S FEES AND COSTS INCURRED BY APPELLANT AFTER THE DATE OF THE DIVORCE DECREE WAS AN ABUSE OF DISCRETION.

This Court has upheld attorney's fee awards to plaintiff-wives of $8,000 where $14,920 were the total fees incurred, Gramme v. Gramme, 587 P.2d 149 (Utah 1978), and $15,000 where counsel expended $19,100 time on his client's case, Yelderman v. Yelderman, ___P.2d___ (Utah No. 18516 filed August 5, 1983).

In Gramme no abuse of discretion was found as a result of the fractional award of fees because

> Plaintiff was compelled to engage in extensive discovery, particularly in regard to the assets and defendant's ownership thereof, which in several instances he claimed were owned by others.
>
> 587 P.2d at 149.

In Yelderman the award was approved as not being an abuse of discretion under the circumstances that the defendant had refused to make mortgage payments, the plaintiff had found it necessary to obtain a restraining order against him from selling any more marital properties and that it was ". . . apparent that some portion of plaintiff's attorney's fees were incurred because of defendant's own actions."

From the record in this case it is clear that the principal part of the time expended by Appellant's counsel after entry of the decree was referrable to the identification, tracing and valuation of the Fleetway assets under Respondent's control. Respondent's deliberate frustration of the discovery process, his delay in producing the documents and other information properly requested by Appellant and his blatant refusal to comply with valid discovery compulsion orders until the eleventh hour all militate toward this Court concluding that an award of only $1,553.00 attorney's fees is an abuse of discretion. Especially is this so when the trial court awarded them expressly on the basis of time spent to the date of the decree in the bifurcated action. Appellant's extensive efforts after that date were made in pursuit of legitimate objectives, in good faith and were compelled by Respondent's actions.

CONCLUSION

By her claim at trial Appellant sought no more than that to which she would have been entitled had the Court distributed the parties' marital assets at the time she was granted the divorce: one-half the value of all those assets, including the ending Fleetway inventories. This Court can restore to her the approximate $22,400 loss she has sustained by awarding her that amount out of the share of the marital properties which existed at the time of trial awarded to Respondent such as life insurance cash values and any proceeds of the sale of their residence. He dissipated in excess of twice that amount for his own purposes and in violation of the lower court's injunctive order; he should be compelled to respond to Appellant for that injurious conduct. Anything less than such an accounting and award would be a clear signal to litigants by this Court that injunctions and restraining orders intended to protect parties in disadvantaged positions can be violated with impunity.

RESPECTFULLY SUBMITTED this 6 day of September, 1983.

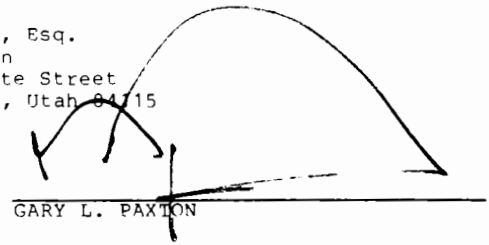
CLYDE, PRATT, GIBBS & CAHOON

By _____
Gary L. Patton
Attorneys for Plaintiff/
Appellant

CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed two (2) true and correct copies of the foregoing Brief of Plaintiff/Appellant Lenore M. Gill, postage prepaid, this 6 day of September, 1983, to:

Dwight L. King, Esq.
King & Peterson
2121 South State Street
Salt Lake City, Utah 84115



GARY L. PAXTON