

2004

John F. Stout, et. al. v. Creekside East Condominium Homeowners Association : Reply Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOHN F. STOUT et. al.,

Plaintiff and Appellee,

**REPLY BRIEF
OF THE APPELLANT**

vs..

CREEKSIDE EAST CONDOMINIUM
HOMEOWNERS ASSOCIATION,

Case No. 20040641

Defendant and Appellant.

**AN APPEAL FROM A JURY VERDICT AND AN AWARD OF ATTORNEY'S
FEES ENTERED BY THE TRIAL COURT
JUDGE DENISE P. LINDBERG AND JUDGE TIMOTHY R. HANSON**

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**UTAH COURT OF APPEALS
BRIEF**

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RESPONSE TO APPELLEE'S STATEMENT OF FACTS

Appellee's/Pioneer Roofing's paragraph # 2 indicates that it submitted to Creekside a bill for \$30,906.00. While this is true, it ignores that fact that Creekside paid an additional \$5,000. This is why the complaint requested \$25,906 in damages and not \$30,906. TR 2.

Appellee's/Pioneer Roofing's paragraph # 8 asserts that Creekside did not respond to Pioneer's settlement offer, yet it prepared and mailed settlement documents on November 19, 2002, as noted in its billing record (TR 678 ¶ 35) and Creekside's attorney spoke with Pioneer's attorney on December 2, 2002. (TR 696). Moreover, Pioneer's counsel Rick Sorensen indicated by affidavit that settlement discussions did occur between September 2002 and January 2003. TR 119 ¶ 6, 129 ¶ 5. This evidence in the records demonstrates that more occurred than is represented by Pioneer.

Appellee's/Pioneer Roofing's paragraph #19 provides Judge Lindberg's justification for her grant of Creekside's Motion to Recuse. Creekside respects this explanation, but would indicate that, given that the Motion was granted, the Judge's palliative comments are dicta. Moreover, Creekside reiterates that its Motion was made in good faith. Whether or not this court or Judge Lindberg concedes that the allegations made in the motion are true, it is at this time irrelevant, and therefore, the delay caused thereby should not prejudice Creekside. Undue delay should not be ascribed to successful

litigation motions.

Appellee's/Pioneer Roofing's paragraph #20 asserts that it was "ordered" to respond to Creekside's Motion to Extend. This is incorrect. It was allowed to Respond after the deadline to do so had passed. TR 315-317.

**RESPONSE TO PIONEER'S SUMMARY OF ARGUMENT
AND ARGUMENT**

Pioneer argued that its, "honesty is not at issue," in these proceedings. It went on to argue:

Creekside is not entitled to discovery regarding Pioneer Roofing's honesty unless Pioneer Roofing's honesty is at issue in this pending matter. Rule 608 of the Utah Rules of Evidence provides that 'evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.' Creekside has not attacked Pioneer Roofing's character for truthfulness."

This statement is illogical and erroneous for two reasons. First, the honesty of Pioneer Roofing or its alter ego and owner, John Stout, was at issue when the case was filed and especially the moment John Stout took the stand to testify. He in fact did testify. It cannot be reasonably disputed that he testified about matters that were in direct contravention with the testimony of many of Creekside's witnesses. Secondly, had Creekside been allowed to engage in discovery that uncovered evidence of Pioneer Roofing's character for untruthfulness, it would have attacked its character and then Pioneer could have presented evidence of truthful character pursuant to Rule 608.

In *Lucas v. Murray City Civil Service Commission*, 949 P.2d 746 (Utah 1997) the

Utah Court of Appeals stated that Rule:

608(c) of the Utah Rules of Evidence provides that ‘bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.’ Similarly, Utah Code Ann. 78-24-1 (1996), states **that in every case[,] the credibility of the witness may be drawn into question, by the manner in which he [or she] testifies, by the character of his [or her] testimony, or by evidence affecting his [or her] character for truth, honesty or integrity, or by his [or her] motives, or by contradictory evidence.** Utah case law supports the well established principle that testimony reflecting on the bias and motives of a witness is admissible at trial. (Emphasis added, citations omitted.)

Again, parties to lawsuits should always be allowed to engage in discovery that is reasonably calculated to lead to relevant evidence. Requesting information in discovery that may impugn a litigants honesty or the honesty of its agents and witnesses is always relevant to any dispute.

Next Pioneer in pages 15 –16 of its brief addresses an issue not raised in Creekside’s appellate brief regarding Creekside’s requested interrogatories 6 and 7.

Pioneer argues, “Creekside refused to allow discovery . . . within the 240 days after the first answer,” was filed. It then goes on to detail alleged conversations between counsels that have never been a part of the record. It also argues that Creekside also failed to conduct its discovery in a timely manner, stating, “When its time had run, it filed two motions to extend the discovery deadlines, but failed to submit either motions to the trial court for decision.”

As demonstrated in Creekside’s Appellant Brief, it consistently prosecuted the case up and until submitting discovery to Pioneer. It was then Pioneer that failed to submit

timely responses to discovery. This in and of itself was most likely an undue manipulation of the circumstances to create the argument that it now makes here of undue delay. When it finally responded to discovery, it interjected numerous objections. By the time those objections were determined, the discovery deadlines had passed.

Creekside then moved to extend the deadlines. During the same period of time the first trial judge was recused and there was no judge for a period of time so that Creekside could notice up its Motions to Extend. It is therefore disingenuous to argue that Creekside “refused” to complete discovery, and that Creekside failed to submit its motions.

Pioneer further states that, “Settlement was not a matter of negotiating back-and-forth as typically occurs in litigation. Pioneer Roofing made the offer to settle and Creekside simply refused to respond to the settlement offer until December 27, 2002.” Aside from the fact that the citation to the record does not indicate this, this assertion is a mischaracterization of what occurred. Although not memorialized by letter or in the parties’ fee petitions, there were in fact several conversations between counsels regarding the outstanding discovery and the ongoing settlement negotiations. TR 146-147.

This is highlighted by Pioneer’s counsel’s own attorney fees billing records charging Pioneer for the preparation of settlement documents. TR 678 ¶ 35. Moreover, in response to Creekside’s Motion to Compel Discovery, Pioneer’s counsel, by affidavit, also asserted that Pioneer’s excuse for its failure to file timely discovery responses was

because, “between September 11, 2002, and January 2003, the parties sought to settle the issues between the parties, but were unable to do so.” TR 119 ¶ 6, 129 ¶ 5. This is consistent with **Creekside’s** appellate argument and Pioneer is **disingenuous** to now argue the contrary on appeal.

Regarding the discovery cut off, Pioneer suggests that discovery could have been conducted between the discovery cut off deadline and Pioneer’s filing of its certificate of readiness for trial. Pioneer further suggests that Creekside never redrafted its discovery requests. These statements are erroneous. First, the Trial Court had granted Pioneer’s Motion for a Protective order and Pioneer therefore **refused** to engage in any **additional** discovery. TR 164. Second, Creekside did redraft its discovery requests and mailed them to Pioneer on May 5, 2003. TR 289-290. Pioneer even acknowledge receiving them as noted in the Trial Record at page 297 in Pioneer’s Requests for Status Conference, in which Pioneer indicates, “since that time **Defendant has filed . . . Defendant’s Second Set of Interrogatories and Requests for Production of Documents to Plaintiff. . .**”

Pioneer also argues that Creekside failed to marshal the evidence in support of the Trial Court’s findings on attorney’s fees. Creekside is familiar with the requirement to **marshal** the evidence when attacking a jury verdict as contrary to the evidence. The logic **behind this requirement** is that unlike a judge, a jury does not make findings of fact and then conclusions of law that can be scrutinized without a complete review of the trial proceedings. In this case, the trial judge’s findings and conclusions of law are contained

in his decision and may be thoroughly reviewed by the appellate court. As appropriately pointed out by Creekside's appellate brief, the trial court's findings and conclusions standing alone demonstrate that an abuse of discretion did occur.

Pioneer next argues that Creekside's Motions to Recuse were untimely and therefore it had to respond to them. This ignores the fact that such Motions do not require nor allow a responsive pleading. Moreover, it ignores the fact that Judge Lindberg's conduct was ongoing and that the Motions were eventually successful. One further example of Pioneer's excessive filings is its Motion For Order of Preclusion that was not submitted for decision because it had no merit. It is contained in the Trial Record at pages 354-442. It almost would appear that it was filed on the eve of trial so the Defendant could not focus its attention on preparing for trial.

In regards to Creekside's request for invoices through discovery, Pioneer asserts, "Obviously Creekside could have obtained the invoices through discovery by subpoenaing the invoices directly from the supplier but failed to do so." This is a curious argument. Creekside could not have done this because it was unable to conduct discovery to determine and identify the suppliers where Pioneer had purchased its supplies. Therefore, obviously Creekside could not have obtained any invoices through subpoena because of Pioneer's failure to respond to discovery.

Lastly, in regards to Pioneer's allegations of professional misconduct, Creekside's counsel would indicate the following. Creekside's counsel does recall being upset with

Pioneer's discovery delays and verified this conversation in the Trial Record at pages 146-147 when Mr. Sorensen chose to end the conversation. Pioneer's representation is hyperbole. However, Creekside's counsel does recall one occasion in which he raised his voice with opposing counsel during a telephone conversation. This conversation occurred at a time when Creekside's counsel was very ill and had to have an CAT scan of a painful lump he discovered in his neck at that time. This occurred after the Christmas holidays in January and February of 2004. The lump was later shown to be benign. This caused a considerable backlog and Creekside's counsel requested a continuance and Pioneer's counsels refused to grant a continuance. Sometime after this event, after Creekside had expended additional attorney's fees requesting a formal continuance and Pioneer responded, Pioneer's counsel apologized for not granting a **continuance**. (TR 626-631)

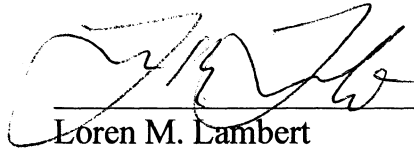
If this is an issue that would prevent this Court from addressing the substantial issues of this appeal, Creekside's counsel would respectfully request that he be allowed to submit his medical documentation and to address the issue in a more appropriate ethical proceeding before the bar. Therefore, perhaps Pioneer's counsel should be directed to file a bar complaint.

CONCLUSION

In conclusion, it is respectfully requested that the Trial Court be found to have **abused its discretion** in not compelling discovery, not extending the discovery deadlines and then in awarding all attorney's fees billed by Plaintiff as the prevailing party.

Dated: Mar 18, 2005

ARROW LEGAL SOLUTIONS GROUP, PC



Loren M. Lambert
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed two true and correct copies of the foregoing document on

March 18, 2005, postage prepaid to:

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