1984

Kae Smith v. Dan M. Vuicich : Reply Brief of Appellant

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IN THE SUPREME COURT OF THE

STATE OF UTAH

KAE SMITH, :

Plaintiff/Appellant, :

vs. :

DAN M. VUICICH, :

Defendant/Respondent. :

Case No. 19392

REPLY BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF DISTRICT COURT
OF SALT LAKE COUNTY

HONORABLE KENNETH RIGTRUP, JUDGE

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TABLE OF CONTENTS

STATUTE CITED

CASES CITED

TEXTS CITED

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ARGUMENT

POINT I

RESPONDENT'S COUNTERCLAIM DOES NOT STATE A CLAIM

Although Respondent contends that its pleading did "provide Appellant with fully adequate notice of the nature of Respondent's claim (P.6), his counsel's brief quoted W. Prosser to the effect that abuse of process is essentially its use "for an end other than that which it was designed to accomplish" (P.5), it is to be noted that it was not alleged in Respondent's pleading that her use of a trespass claim was for any purpose other than that for which that action was designed.

It is significant also that Respondent totally ignored the one Utah case which bears on this issue, to wit: Crease v. Pleasant Grove City, 519 P.2d 888, 30 Utah 2d 451

(1974). This is no doubt due to the fact that that case emphasized the essence of the cause of action as being a "perversion of the process to accomplish some improper purpose" whereas no improper purpose or perversion was alleged in Respondent's pleading here challenged.

As for the dispute in the authorities as to a requirement of "without probable cause," Appellant respectfully submits that on principle such a requirement should be adopted by this Court as being the law in Utah to guard against the prospect of routine assertions of such a claim and its utilization to effect a switch from the American rule to the English rule with respect to attorney's fees being awarded to the prevailing party. If such a policy is to be adopted, Appellant submits that it ought to be one mandated by the legislature rather than the judicial branch of goverment.

POINT II

THERE WAS INSUFFICIENT EVIDENCE OF ANY IMPROPER PURPOSE ON THE PART OF PLAINTIFF/APPELLANT TO SUSTAIN A JUDGMENT FOR ABUSE OF PROCESS.

Respondent's Brief concedes that there was no direct evidence of any improper purpose. It contends, however, that an inference of an improper purpose could be drawn from the "weight of the evidence" present at trial (P.10). Appellant faults such argument on two grounds: (1) it expands the proper use of an

inference far beyond its proper bounds. An "inference" is defined in Black's Law Dictionary (Fourth Edition) as follows:

> In the law of evidence, a truth or proposition drawn for from another which is supposed or admitted to be true. A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts or a state of facts already proved or admitted.

In this case Respondent has made no attempt to identify a specific fact or even a set of facts from which an improper purpose may be inferred. Certainly, such purpose could not be inferred from the facts set forth in Respondent's Brief on this point. No purpose--proper or improper--could be inferred from the testimony of Roy Wilkins set forth on page 7 which related to oral consent or the efforts of Respondent and his agents to restore the property to as good or better a condition after heavy equipment had traversed it twice. Likewise, with the opinion of two neighbors that no damage was done or what a prospective buyer might do with the property.

In short, the Respondent is asking this Court to allow the jury to conjecture and to speculate as to whether plaintiff's purpose was proper or not. Utah's standard jury instruction on this point which is number 2.3 reads as follows:

> The party upon whom the burden of proof rests must sustain it by a preponderance of the evidence. The law does not permit you to base a verdict on speculation or conjecture as to the cause of the (collision) incident in question. If the evidence does not preponderate in favor of the plaintiff (party) making the charge of negligence, then (he) has failed to fulfill (his) burden of proof and your finding must

> be against that party on that issue. In other words, if after considering all of the evidence, it should appear to you just as probable that the (defendant) was not negligent as that he was, or that his negligence, if any, was not a proximate cause of the (collision) incident as that it was such a proximate cause, then a case has not been established against him by a preponderance of the evidence as the law requires and he cannot be held liable.

Of course "improper purpose" would have to be substituted for "negligence" to make it applicable to this case, but the principle is the same regardless of the type of cause of action.

As for (2), the claimed inference flies directly in the face of Respondent's own testimony as to what motivated plaintiff in bringing this action. He testified she did it for money and that, "I can't see any other reason" (T135). Although the Respondent himself could not see any other motivation than money, his counsel now contends that Appellant's purpose was to vex, harass or extort without any evidence whatsover that she did any of those things or even threatened to do any of those things. Such objectives almost certainly would be evidenced by such overt conduct as personal confrontations, phone calls, letters and contacts by third parties or at least some of such activities. Here absolutely zero. Assuming arguendo that the lawsuit itself and alone could be used for such purposes, the record is devoid of such abuses as a threat to sue unless X dollars is paid, abusive discovery to run up excessive legal fees or perjury.

Is this Court's decision in Leigh Furniture and Carpet Company v. Isom, 657 P.2d 293 (Utah 1982) dispositive or even persuasive as applied to the instant case? No. In that case this Court had before it a record in which the evidence was in conflict. Here there is no conflict in the evidence regarding Appellant's purposes (there was sharp conflict as to consent, but that went to the trespass claim only). Both parties testified she had sued for money, a proper purpose, and in addition, Appellant said she sued to protect herself against third party claims that might result from soil subsidence.

Finally, Respondent's Brief made no attempt to address the issue as to whether an abuse of process judgment may stand when the trial judge determined that an award of attorney's fee pursuant to Section 78-27-56, U.C.A. 1953 (Supp. 1981) should not be made. Is not declining to award attorney's fees in such a situation tantamount to the trial court drawing opposite inferences to the jury (assuming arguendo that inferences may be drawn from the "weight of the evidence" rather than from particular facts)? If the judge drew the same inferences as the jury, would he not be acting contrary to the legislative intent that such fees should be awarded when the suit was without merit and not brought in good faith?

CONCLUSION

Respondent neither alleged nor proved (1) an absence of probable cause, (2) an improper purpose for the suit which support the judgment for abuse of process appealed from.

Litigants should have the right to have their day in court, and lose, without having the loss in and of itself represent a finding of bad faith or malice on the part of the loser for having originally initiated the action. The judgment should be reversed and the lower court ordered to enter judgment of "no cause on action" upon the Counterclaim.

RESPECTFULLY SUBMITTED this 7th day of June, 1984.

Robert B. Hansen
Attorney for Plaintiff/Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Brief to Lynn S. Davies, P.O. Box 2465, Salt Lake City, Utah 84110, postage prepaid, this 8th day of June, 1984.

Robert B. Hansen