

1994

Susan Slattery v. Covey & Co. : Reply Brief

Utah Court of Appeals

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DOCKET NO. 940061-CA

IN THE UTAH COURT OF APPEALS

SUSAN SLATTERY,)	
)	
Plaintiff/Appellee,)	
)	
vs.)	
)	Case No. 940061-CA
COVEY & CO., INC.,)	
)	Priority No. 15
Defendant/Appellant.)	

REPLY BRIEF OF APPELLANT COVEY & CO., INC.

Appeal From a Judgment
of the Third Judicial District Court
in and for Salt Lake County
Honorable David S. Young
Sitting as a District Court Judge

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INTRODUCTION

In the present case, Covey & Co., Inc. ("Covey & Co.") has sought the reversal of a judgment entered by the district court awarding Susan Slattery ("Slattery") damages for the value of certain securities in Slattery's personal account at Covey & Co. and for Slattery's appellate attorney's fees and costs.

On July 7, 1993, this court rendered its opinion in *Susan Slattery v. Covey & Co., Inc.*, Case No. 910570-CA ("Slattery I") which, among other things, remanded the case to the trial court for entry of findings consistent with its opinion as to the reversal of certain credits to charges to the error account of Slattery at Covey & Co. On remand to the district court, Slattery sought to introduce evidence relating to the value of certain securities in Slattery's account at Covey & Co., as well as evidence relating to Slattery's appellate attorney's fees and costs. Covey & Co. objected on the grounds that consideration of those issues was beyond the mandate in the opinion rendered by the Utah Court of Appeals in Slattery I and thus not within the jurisdiction of the trial court. The trial court overruled the objection of Covey & Co.; heard evidence on both the issues of the value of certain securities in Slattery's account at Covey & Co. and Slattery's appellate attorney's fees and costs; and rendered judgment.

Covey & Co. and Slattery take opposition positions on this appeal as to whether the trial court had jurisdiction to address the issues of appellate attorney's fees and costs and the value of certain securities in Slattery's account at Covey & Co. The cases relied upon by Slattery in this regard show clearly that the trial court lacked jurisdiction.

ARGUMENT

In her brief filed in this case, Slattery relies principally on *Street v. Fourth Judicial Dist. Ct.*, 113 Utah 60, 191 P.2d 153 (1948); *Hidden Meadows Development Co. v. Mills*, 590 P.2d 1244 (Utah 1979); *Larsen v. Gasberg*, 43 Utah 203, 134 P. 885 (1913); *Utah Copper Co. v. District Court*, 91 Utah 377, 64 P.2d 241 (1937); and *Bank of New Mexico v. Earl Rice Construction Co.*, 79 N.M. 115, 440 P.2d 790 (1968).

In *Street*, as in this case, there had been a previous appeal. In connection with that appeal, the Utah Supreme Court remitted the case to the trial court for an accounting. Upon remittitur, the trial court permitted the amendment of defendant Graham's complaint to demand an accounting based upon a new theory. Plaintiff Street then petitioned the Supreme Court for mandamus prohibiting the trial court from allowing the amendment to assert the new theory of accounting. It was in this context that the Supreme Court stated: "But where the entire case is not settled by the appellate tribunal where certain issues are left open by its judgment or decree, the trial court ordinarily has discretion to permit amended or supplemental pleadings as to those matters which have been left open." This language makes it clear that on remand a trial court has jurisdiction to address open issues relating to those matters that were specifically remanded for further proceedings. In fact, the prior appeal was an interlocutory appeal of an order of the trial court in which the trial court had retained jurisdiction to settle all accounts between the parties. The remand therefore contemplated the trial court's jurisdiction over those open issues.

The court in *Street* elaborates on the foregoing with the following quotation: "If a cause is remanded without specific directions, or with general directions for a new trial either upon an affirmance or reversal, the lower court has, as a general rule, the power to permit amendments to the pleadings as the trial court in its discretion may allow. . . ." *Street* at 158 (citing 3 AM. JUR. 2D § 1241). The ruling of the Utah Supreme Court in *Utah Copper Co., supra*, addressed the flip side of the issue and set forth the limits imposed on the trial court on remand.

In that case, the court stated:

The lower court upon remand of a case from a higher court, must obey the mandate or remittitur and render judgment in conformity thereto and has no authority to enter any judgment not in conformity with the other. Whatever comes before and is decided and disposed of by the reviewing court is considered as finally settled, and the inferior court to which a mandate issues is bound by the decree as the law of the case and must carry it into execution according to the mandate, and after the reviewing court has determined the case before it and remanded it to the lower court, the latter is without power to modify, alter, amend, set aside, or in any manner disturb or depart from the judgment of the reviewing court

Id. at 250 (citation omitted).

In *Slattery I*, this court remanded only one issue to the trial court; the issue of credits to charges in the error account of *Slattery at Covey & Co.* *Slattery v. Covey & Co., Inc.*, 857 P.2d 243, 248 (Utah App. 1993). If there was any possibility of open issues that were proper for the trial court to address on remand, it would have been with respect to credits to error account charges. The issues relating to the value of certain securities in *Slattery's* account at *Covey & Co.* and appellate attorney's fees and costs were resolved in this court's opinion in *Slattery I* and

were not remanded for further proceedings as was the credit to the error account issue. *Id.* at 249.

Hidden Meadows, supra, is another case in which district court action on remand of the case was challenged by way of mandamus. In *Hidden Meadows*, the Utah Supreme Court had remanded the case to the trial court directing that the trial court grant specific performance on an option on real property. The trial court complied with the mandate and ordered the transfer of the property in accordance therewith. However, because the property had been transferred to third parties in the interim, the trial court was required to determine the rights of those third parties. In determining the effect of a *lis pendens* filing made at or about the time the case was initiated, the Utah Supreme Court stated:

The rule is well settled that, where a judgment is reversed and remanded with specific instruction or directions, the case stands in the lower court precisely as it did before a trial was had in the first instance. Hence, that very situation existed in the instant case as a result of our reversal and remand with directions to grant specific performance (footnotes omitted).

In other words, the *lis pendens* had the same effect as if the dismissal that was reversed on appeal had never occurred. This holding does not provide authority for a trial court to address issues not specifically mandated on remand.

Larsen, supra, a case relied upon by the court in *Hidden Meadows*, was an appeal of a judgment entered on remand as opposed to a mandamus action to prevent the trial court from exceeding the mandate of the appellate court on remand. In *Larsen*, the prior appeal had resulted in a reversal with directions to the lower court to grant a new trial. The Utah Supreme Court's

opinion states that "the rule is well settled that, where a judgment is reversed and *a new trial granted without any specific instructions or directions* the case stands in the lower court precisely as it did for the trial that was had in the first instance." *Larsen*, 134 P. at 887 (emphasis added). These facts are different from the instant case. Whereas it might be appropriate for the trial court to address certain issues where the case is remanded for a new trial, such would not be the case if such remand was for a specific purpose detailed in the mandate of the court. In this case, this court was specific in remanding this case for further proceedings on the error account charges. The retrial of any other issue was outside this court's mandate.

Finally, Slattery's reliance on *Bank of New Mexico, supra*, is misplaced. In that case, the Supreme Court of New Mexico had, on the prior appeal of the case, remanded with specific instructions to set aside the judgment entered in the case and enter a new judgment. The trial court followed the specific mandate, and in doing so, determined that interest could not be awarded on the original judgment but could only run from the entry of the judgment entered on remand. On the second appeal, the Supreme Court of New Mexico ruled that its decision on the first appeal constituted a modification of the trial court's judgment as opposed to a reversal of that judgment and that it was therefore appropriate for interest to run from the date of that original judgment. *Id.* at 792. This ruling does not provide authority for a trial court to take action on remand with respect to issues resolved by the appellate court. The New Mexico Supreme Court in this case was simply determining whether its decision on the first appeal was a reversal or modification of the judgment entered by the trial court. The question of whether or

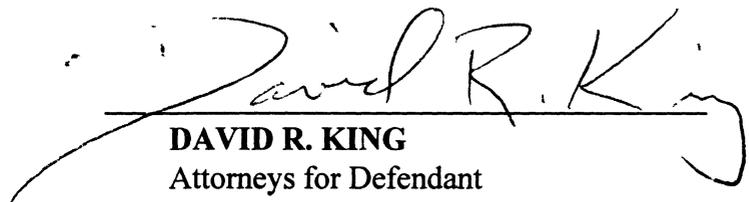
not the trial court had the authority to address issues outside the specific mandate of the court was simply not presented in this case.

CONCLUSION

The trial court erred in hearing evidence and rendering judgment as to the value of securities in Slattery's personal account at Covey & Co. as well as hearing evidence and granting judgment for Slattery's appellate attorney's fees and costs. These issues were outside the mandate of this court on remand and therefore the trial court did not have jurisdiction to hear evidence or render judgment as to these issues. The trial court's judgment should be reversed.

DATED this 21ST day of April, 1995.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing **Reply Brief of Appellant Covey & Co., Inc.** to the following, postage prepaid, this 21st day of April, 1995:

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