

1994

G&K Services v. Pacific Bay Baking Company : Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Theodore E. Kanell; Daniel L. Steele; Hanson, Epperson and Smith. Attorneys for Appellee
David M. Connors; Mark W. Dykes; LeBoeuf, Lamb, Greene and MacRae. Attorneys for Appellant.

Recommended Citation

Petition for Rehearing, *G&K Services v. Pacific Bay Baking Company*, No. 940119 (Utah Court of Appeals, 1994).
https://digitalcommons.law.byu.edu/byu_ca1/5820

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

G & K SERVICES, INC., a
Corporation,

Plaintiff/Appellee,

vs.

PACIFIC BAY BAKING COMPANY,
a Utah Corporation,

Defendant/Appellant.

Appeal No. 940-119 CA
Circuit Case No. 920002083CV

ARGUMENT PRIORITY 15

PETITION FOR REHEARING BY DEFENDANT/APPELLANT
PACIFIC BAY BAKING COMPANY

On Appeal from the Third Circuit Court
of Salt Lake County
Honorable Michael L. Hutchings

THEODORE E. KANELL
DANIEL L. STEELE
HANSON, EPPERSON & SMITH
4 Triad Center, Suite 500
Salt Lake City, Utah 84180

Attorneys for Appellee
G & K Services, Inc.

DAVID M. CONNORS
MARK W. DYKES
LeBOEUF, LAMB, GREENE & MacRAE
136 South Main, Suite 1000
Salt Lake City, Utah 84101

Attorneys for Appellant
Pacific Bay Baking Company

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU

50

.A10

DOCKET NO.

940119

FILED

APR 27 1995

COURT OF APPEALS

On April 13, 1995, this Court filed a short memorandum decision upholding the trial court's decision not to award Pacific Bay any attorney's fees for its victory on the sole claim tried below. The Court's opinion addressed few of Pacific Bay's arguments, and overlooked the matters below.

I. ARGUMENT

A. The Net Judgment Rule Cannot Apply in the Absence of Counterclaims.

This Court ruled that the trial court properly applied the "net judgment rule." While this rule is disfavored, Brown v. Richards, 840 P.2d 143, 155 n. 10 (Utah App. 1992), cert. denied, 853 P.2d 897 (1993), regardless the rule simply cannot work here.

The "net judgment rule" presupposes that there is something to "net," i.e., a recovery on both sides. Absent a counterclaim, a defendant can never be the prevailing party under the net judgment rule, even if the defendant defeats all but one claim of the case. This result unfairly penalizes defendants who do not counterclaim, and unfairly rewards plaintiffs who bring only one meritorious claim amongst many groundless ones.

Pacific Bay did not counterclaim. Pacific Bay did defeat G&K on the only claim tried. The net judgment rule, as a matter of law, is immaterial to this case.

B. THIS COURT'S DECISION DOES NOT ADDRESS THE PROPER STANDARD OF REVIEW OR THE SEPARATE CLAIM RULE.

This Court ruled that the trial court acted within its discretion. The Court did not address Pacific Bay's argument that interpretation of a contract is not a matter of discretion, and that as a matter of law Pacific Bay was entitled to fees

attributable to its success on a wholly discrete claim at trial.

Substantial case law, which this Court's decision does not address or comment on, supports Pacific Bay's argument:

1. Trayner v. Cushing, 688 P.2d 856, 858 (Utah 1984)
(where each party was successful on one or more points and unsuccessful on others, the trial court erred in applying "net judgment" rule to award fees only to plaintiffs).¹
2. Brown v. Richards, supra, 840 P.2d at 154, n.10 ("both parties are entitled to fees when both parties are successful in enforcing different provisions of a contract against the other").
3. Occidental/Nebraska Fed. Sav. Bank v. Mehr, 791 P.2d 217 (Utah App. 1990) (limiting Mountain States to its "particular facts;" Utah law permits each party to recover fees attributable to that party's success on a claim at trial; party who stipulated to partial damages and then defeated only claimed tried was prevailing party).
4. Marassi v. Lau, 859 P.2d 605, 608 (Wash. App. 1993)
(net judgment rule does not work in absence of counterclaims; under contractual fee clause, defendant is entitled to fees attributable to successful defense of claim).
5. Folta v. Bolton, 493 So.2d 440, 442-43 (Fla. 1986)
(rejecting net judgment rule in multiple claim cases in favor determining entitlement to fees on a claim by claim basis).

¹ Brown cites Trayner (along with two other cases) as being in conflict with the net judgment rule of Mountain States. Brown, 840 P.2d at 154 n. 10.

6. Park Lane Condominium Ass'n v. DePadua, 558 So.2d 85 (Fla. App. 1990) (trial court erred under Folta in not awarding fees on a claim by claim basis, with defendant entitled to fees for claims successfully defended against).

G&K's complaint alleged two distinct contract claims. The first sought liquidated damages. The second was a claim for services rendered. These claims arose from completely different facts. Pacific Bay's stipulation at the outset of trial on the open account claim had no effect on the liquidated damages claim. The claims could have been tried separately without effect on either one. Cf. Elder v. Triax Co., 740 P.2d 1320, 1322 (Utah 1987) (improper to delay award of fees on one claim pending resolution of counterclaim when counterclaim arose out of wholly separate transaction).

Pacific Bay fully prevailed on the claim for liquidated damages. Pacific Bay is entitled to fees for its success.

C. G&K was in no Event Entitled to Fees Attributable to its Failure at Trial. The Trial Court's Decision to Cut G&K's Fees does not Suffice as an Award of Fees to Pacific Bay.

Pacific Bay did not simply prevail on "some issues", as both the trial court and this Court have said. Rather, Pacific Bay prevailed on an entire claim, and the only claim tried.

The trial court's decision to reduce G&K's fee request from \$2,080.00 to \$1,450.00 does not grant Pacific Bay the fees to which it is entitled. G&K, like any litigant, was never entitled

to fees attributable to its unsuccessful trial.² In docking G&K's fees, the court was not being "fair and flexible" to Pacific Bay, but instead was doing what the law regardless demanded. What the trial court improperly failed to do was grant Pacific Bay an affirmative fee recovery for its success. This was error. See Consolidated Southern Security, Inc. v. Geniac & Assoc's., Inc., 619 So.2d 1027 (Fla. App. 1993) (trial court improperly attempted to "net out" from plaintiff's fee award the amount of time plaintiff's counsel spent on unsuccessful claim; court should have instead accounted for time defendant spent in successful defense of the same claim).

D. A Trial Court's Discretion to Award Fees does not Include the Discretion to Award Fees for Failure at Trial.

Pacific Bay showed in its appellate memoranda that the trial court could not have awarded G&K the fees it did unless the court gave G&K something for its trial work. G&K lost the trial, and is thus not entitled to fees attributable thereto. This Court's decision does not adequately address this issue.

G&K's only victory in this case came through a pre-trial stipulation. G&K is entitled only to fees relating thereto. We know from the default judgment G&K took early in this case (the first time Pacific Bay was ordered to pay G&K's fees), that counsel's preparation time for trial was de minimis.

² Trayner v. Cushing, 688 P.2d 856, 858 (Utah 1984) (per curiam); Paul Mueller Co. v. Cache Valley Dairy Ass'n, 657 P.2d 1279, 1288 (Utah 1982); Stubbs v. Hemmert, 567 P.2d 168, 171 (Utah 1977); Stacey Properties v. Wixen, 766 P.2d 1080, 1085 (Utah App. 1988), cert. denied, 779 P.2d 688 (1989); Graco Fishing and Rental Tools, Inc. v. Ironwood Exploration, Inc., 766 P.2d 1074, 1079-80 (Utah 1988).


The trial court was obligated specifically to find the amount of reasonable fees attributable to G&K's success. Utah law grants no discretion in the matter. The trial court made no specific findings on this issue, but instead took a guess. That was not enough.³

II. CONCLUSION

As a matter of law, the trial court's decision was error. Pacific Bay respectfully requests the Court to rehear this case, reverse the trial court, and direct that Pacific Bay be awarded its fees attributable to its success at trial.

DATED this 27th day of April, 1995

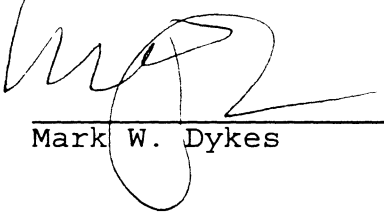
LeBoeuf, Lamb, Greene & MacRae, L.L.P.



Mark W. Dykes
Counsel for Pacific Bay
Baking Company

CERTIFICATE OF COUNSEL

I, counsel for Pacific Bay Baking Company, certify that this Petition for Rehearing is filed in good faith and not for purposes of delay.



Mark W. Dykes

³ See Graco Fishing & Rental Tools, Inc. v. Ironwood Exploration, Inc., 766 P.2d 1074, 1080 (Utah 1988) (grant of attorney fees was remanded for a determination of only those fees attributable to the pursuit of successful claims); Brown v. Richards, 840 P.2d 143, 156 (Utah App. 1992) (trial court must make findings concerning fees attributable to claims on which party succeeded at trial); Mountain States, 783 P.2d at 556 n. 10 (litigant's entitled only to fees attributable to success).

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Petition for Rehearing were served this 27th day of April, 1995, by depositing the same in the United States mails, first class, postage prepaid, addressed to the following:

Theodore E. Kanell
Daniel L. Steele
Hanson, Epperson & Smith
4 Triad Center, Suite 500
Salt Lake City, Utah 84180

