

1995

Water Power Company v. Strawberry Water Users Association : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WATER POWER COMPANY, a Utah
corporation,

Plaintiff/Appellant,

No.: 950235-CA

vs.

Lower Court No.: 900400932CV
Priority No. 15

STRAWBERRY WATER USERS
ASSOCIATION, a Utah
corporation,

Defendant/Appellee.

BRIEF OF DEFENDANT/APPELLEE

APPEAL FROM THE DECISION RENDERED BY JUDGE LYNN W. DAVIS,
FOURTH DISTRICT COURT, STATE OF UTAH

UTAH COURT OF APPEALS

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DOCKET NO. 950235CA

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FILED

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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Plaintiff/Appellant,

vs.

STRAWBERRY WATER USERS
ASSOCIATION, a Utah
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Defendant/Appellee.

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STATEMENT OF JURISDICTION

Appellee Strawberry Water Users Association ("Strawberry") agrees with the statement of jurisdiction contained in Appellant Water Power Company's ("Water Power") principal brief.

TEXT OF AUTHORITIES

Utah Code of Judicial Administration, Rule 4-505(1):

Intent:

To establish uniform criteria and a uniform format for affidavits in support of attorneys' fees.

Applicability:

This rule shall govern the award of attorneys' fees in the trial courts.

Statement of the Rule:

(1) Affidavits in support of an award of attorneys' fees must be filed with the court and set forth specifically the legal basis for the award, the nature of the work performed by the attorney, the number of hours spent to prosecute the claim to judgment, or the time spent in pursuing the matter to the stage for which attorneys' fees are claimed, and affirm the reasonableness of the fees for comparable legal services.

ISSUE AND STANDARD OF REVIEW

Water Power appeals the trial court's denial of attorney fees for the civil and administrative proceedings below and asks for attorney fees expended on appeal. (Appellant's Brief at 1). However, Water Power misconstrues the appropriate standard of review for this issue.

This Court will affirm a trial court's denial of attorney fees absent an abuse of discretion. Baldwin v. Burton, 850 P.2d 1188, 1198 (Utah 1993); Equitable Life & Cas. Ins. Co., 849 P.2d 1187, 1194 (Utah App. 1993), cert. den. 860 P.2d 943 (Utah 1993).

The proper standard is not, as Water Power contends, the "correctness" standard used for reviewing summary judgments. Water Power is not appealing the trial court's grant of summary judgment against the causes of action in its Complaint, but the denial of its incidental request for attorney fees.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition in Court Below.

Water Power filed a Complaint against Strawberry in 1990 seeking damages for breach of contract, anticipatory breach of contract, and declaratory relief. (R. 24-33). The trial court granted Strawberry's Motion for Summary Judgment on the ground that the causes of action raised in Water Power's Complaint were moot. The Court also denied plaintiff's belated and unsupported request for an award of attorney fees. (R. 268-9; 290) (Ruling on Defendant's Motion for Summary Judgment and Order on Summary Judgment attached as Addendum A).

B. Statement of Facts.¹

The parties entered an agreement in 1983 calling for Water Power to provide certain products and services in connection with the construction of a hydroelectric powerhouse for Strawberry.

¹Water Power does not cite to the record in its "Statement of the Case," as required by Utah Rule of Appellate Procedure 24(a)(7). Since there is no support for the statements contained therein, Strawberry asks this Court at a minimum to disregard Water Power's "Statement of the Case." Additionally, this Court may disregard the issues presented on appeal for lack of evidentiary basis and assume the correctness of the judgment below as in English v. Standard Optical Co., 814 P.2d 613, 618-9 (Utah App. 1991).

(R. 31) (contract attached as Addendum B). Although both parties assumed that the transaction was exempt from state sales, excise or use tax, the agreement stated in boilerplate terms appended to the contract that Strawberry Water would be responsible for the payment of taxes. (R. 161).

1. AFTER ELECTING TO PURSUE ITS OWN TAX APPEAL, WATER POWER CLAIMED STRAWBERRY WAS RESPONSIBLE FOR THE INTEREST AND COSTS ACCRUED AFTER STRAWBERRY'S APPEAL HAD BEEN RESOLVED.

In March 1987 the Utah State Tax Commission served Water Power with a preliminary notice assessing Water Power for sales made in connection with the agreement. (R. 29-30). A similar notice was served on Strawberry for sales and use taxes due under the same transaction. (R. 65).

Both parties opposed the tax assessments. (R. 130). They initially agreed, upon Strawberry's suggestion, to consolidate their petitions before the Tax Commission and divide legal fees. (R. 130, 193). However, in August 1987, Water Power altered that agreement by voluntarily choosing to pursue its appeal on its own. (R. 130; 160). Strawberry's tax appeal was resolved in March 1990 when the Tax Commission affirmed the assessment. (R. 2, 29).

On December 21, 1990, many months after Strawberry's administrative appeal was resolved and while Water Power's administrative appeal was pending, Water Power filed a Complaint against Strawberry in the Fourth Judicial District Court of Utah. (R. 33). The Complaint alleged breach of contract and

anticipatory breach of contract and sought as damages only the amount of taxes plus interest assessed by the Tax Commission, or \$184,970.76. (R. 25-7). The Complaint also sought costs incurred in pursuing the Tax Commission appeal but did not include any request for attorney fees. (R. 25-7). On July 2, 1991, Strawberry sent Water Power a settlement offer of \$132,148.87, representing the principal amount of tax owing and the majority of the penalty. (R. 187, 189). Water Power never responded to the offer in any fashion. (R. 201).

In September 1992, over two years after Strawberry obtained resolution of its appeal, Water Power's appeal was resolved, wherein the Tax Commission affirmed the tax. (R. 124-6). The Tax Commission noted that Water Power had not raised any issues substantially different from those raised by Strawberry in its appeal. (R. 125).

2. THE TRIAL COURT EXERCISED ITS BROAD DISCRETION IN DENYING WATER POWER'S VAGUE REQUEST FOR ATTORNEY FEES.

On January 13, 1994, Water Power moved for summary judgment on the ground that Strawberry should pay the tax liability assessed against the parties. (R. 182). Water Power also mentioned without explanation that it was seeking attorney fees "as provided in the contract." (R. 176). Based upon a Rule 56(f) affidavit submitted by Strawberry, the court granted a sixty-day continuance and directed Strawberry's counsel to determine what it would take to satisfy the state for the taxes due. (R. 254, 261).

Strawberry's counsel then contacted the Tax Commission and learned that the state would accept \$120,135.00, the principal amount of the tax, in full satisfaction of the assessment. (R. 259, 261).

Shortly thereafter, Strawberry satisfied the tax warrant by paying the Tax Commission \$120,135.00, less than the amount it offered to Water Power several years earlier. (R. 268, 282-3). With this satisfaction both Water Power and Strawberry were released from further liability for the tax. (R. 265). Strawberry then submitted a motion for summary judgment on the basis that Water Power's claims against it were extinguished by the satisfaction of the tax warrant. (R. 269). Water Power opposed the motion, declaring without explanation or support therefor that it was entitled to attorney fees for the tax appeal and the civil lawsuit. (R. 271-2). The trial court granted Strawberry's Motion for Summary Judgment and found an award of attorneys fees unwarranted given the circumstances in the case. In doing so, the court acted well within its discretion. (R. 287).

SUMMARY OF ARGUMENTS

POINT I: Water Power cannot be awarded attorney fees based solely upon the contract provision. Not only did Water Power fail to preserve this issue below, but the provision only applies to prevailing parties in breach of contract actions. Additionally, Water Power failed to demonstrate to the trial court that the fees it requests are reasonable as required by the

contract provision and by Utah law. Any attorney fees expended by Water Power resulted from its refusal to join Strawberry in appealing the tax assessments and in rejecting Strawberry's settlement offer--an offer which was sufficient to satisfy the Tax Commission.

POINT II: Water Power also cannot be awarded attorney fees based on the third party tort rule. Water Power did not raise this issue below, and in any event the theory can only be used if attorney fees incurred were proximately caused by the tortious acts of another person, which did not occur in this case.

POINT III: Water Power cannot be awarded attorney fees on appeal because it was not awarded attorney fees below.

ARGUMENTS

POINT I

WATER POWER IS NOT ENTITLED TO ATTORNEY FEES UNDER THE CONTRACT PROVISION.

Water Power is not entitled to attorney fees incurred in the administrative and civil proceedings below based on an inapplicable contract provision that it cites for the first time on appeal. Neither can it demand attorney fees when it did not request an award of attorney fees in its Complaint and when it has made no showing that the fees requested are reasonable as required by the contract and Utah law.

A. Water Power Cannot Rely On The Contractual Provision Because It Is Not A Prevailing Party.

On appeal, Water Power bases its claim for attorney fees on the following language in the contract between the parties:²

In the event of a breach of this Agreement, the prevailing party shall be entitled to recover reasonable Attorney's fees.

Thus, this provision only applies to benefit the party that prevails in a breach of contract action. While Water Power brought a breach of contract claim against Strawberry, this claim did not prevail. The lower court granted Strawberry's motion for summary judgment against all claims, including the breach of contract claim. Enforcing the contract according to its terms, Water Power is ineligible for attorney fees since the court never determined that Strawberry breached the contract. See Stacey Properties v. Wixen, 766 P.2d 1080, 1084-5 (Utah App. 1988) (plaintiff who did not prevail on complaint for acceleration not entitled to attorney fees under provision awarding them for enforcement of contract); Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988) (attorney fees provided for in contract allowed only in accordance with contractual terms).

Water Power has failed to point out how it might be considered the prevailing party when summary judgment was granted against it. The court never ruled that Strawberry breached the contract. In Fashion Place Associates v. Glad Rags, 754 P.2d 940, 942 (Utah 1988), the Supreme Court noted that in order to be

²No such allegation or claim is raised in the Complaint.

considered a "successful party" entitled to attorney fees under a contract, the party must prevail both on legal theory and damages. Water Power prevailed on neither. The court granted summary judgment against its breach of contract claim, and it could not show that it suffered damage because Strawberry paid the tax assessment against them. Water Power is not contractually entitled to attorney fees because the provision only applies to prevailing parties.

B. The Fees Requested By Water Power Are Not Reasonable As Required By The Contract And By Utah Law.

1. WATER POWER ITSELF HAS NEVER SUGGESTED THAT THE AMOUNT IT REQUESTS IS REASONABLE.

Water Power made a blanket demand for attorneys fees without any explanation or documentation whatsoever of that amount. It never submitted an itemization. It never filed an affidavit from counsel. It never explained the nature of the legal services performed.

Besides restricting attorney fees to only the prevailing party in a breach of contract action, the contract provision mandates that attorney fees be reasonable. This requirement parallels the common-law rule that even when a party is entitled to attorney fees by contract, the fees requested must be reasonable. Hoth v. White, 799 P.2d 213, 219 (Utah App. 1990).

It is impossible for a court to determine whether attorney fees are reasonable unless supporting evidence accompanies the request. In Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350 (Utah App. 1990), cert. den. 795 P.2d 1138 (Utah 1990), a party

sought attorney fees solely on the basis of a contractual provision without offering evidence that the particular amount sought was justified. The provision was less restrictive than the one in this case, stipulating for the reimbursement of attorney fees arising from all claims made by the other party. The Court of Appeals affirmed the trial court's denial of fees, explaining that

[i]t is well established that to justify a finding of a reasonable attorney's fee, there must be evidence in support of that finding.... It is beyond dispute that an evidentiary basis is a fundamental requirement for establishing an award of attorney fees.

Ringwood, 786 P.2d at 1361 (citations omitted).

Rule 4-505 of the Code of Judicial Administration details the format for presenting this evidentiary basis. It requires that an affidavit accompany a request for attorney fees which

set[s] forth specifically the legal basis for the award, the nature of the work performed by the attorney, the number of hours spent to prosecute the claim to judgment, ... and affirm[s] the reasonableness of the fees for comparable legal services.

Rule 4-505(1), Utah Code of Judicial Administration.

Water Power never submitted such an affidavit, much less attempted to document the reasonableness of the fees in any other form.

The presence of a contractual provision for attorney fees does not automatically entitle a party to whatever amount it demands. Once it establishes that the contractual terms have been satisfied, it must then provide evidentiary support for the

amount requested in compliance with Rule 4-505. Unless a party does this, its request for fees simply cannot be entertained.

2. WATER POWER'S DILATORY ACTIONS INDICATE THAT ITS REQUEST IS UNREASONABLE.

After a party submits a Rule 4-505 affidavit, the trial court may consider other factors to determine the reasonableness of the fee requested. Included among these factors is the efficiency of the party in bringing and terminating the case. Dixie State Bank v. Bracken, 764 P.2d 985, 988-90 (Utah 1988).

The record demonstrates Water Power's lack of efficiency. It initially agreed to share attorney fees by presenting a joint appeal to the Tax Commission. However, it later elected to pay attorneys to pursue its own appeal. Water Power's appeal ended two years after Strawberry's appeal, presented the same issues for consideration, and achieved the same result.

Water Power also resisted Strawberry's efforts to terminate the civil action. Only months after Water Power filed its Complaint, Strawberry offered it enough money to satisfy the Tax Commission's warrant. In fact, Strawberry offered Water Power over \$12,000 more than the state accepted as full satisfaction several years later. Water Power failed to respond to this offer, instead choosing to continue litigation until the court terminated it more than three years later in Strawberry's favor. Water Power refused an offer to settle the case which resulted in more litigation and this appeal. When a party declines such gratuitous settlement offers, the court may appropriately deny

attorney fees even if authorized by contract. Cable Marine, Inc. v. M/V Trust Me II, 632 F.2d 1344 (5th Cir. 1980), cited with approval in Cobabe v. Crawford, 780 P.2d 834, 836 n.3 (Utah App. 1989) (Cable Marine attached as Addendum C).

At many points during the civil and administrative proceedings, Strawberry gave Water Power opportunities to curtail attorney fees. Having refused each opportunity, Water Power must absorb its self-generated expenses.

C. Water Power Has Not Preserved This Issue Below And Is Therefore Barred From Presenting It On Appeal.

Water Power vaguely introduced its request for attorney fees to the court below by stating that fees were provided for in the contract. It never cited the alleged provision nor attempted to explain how the provision was applicable. With nothing more before it than a bare assertion that the contract allowed attorney fees, the trial court properly rejected Water Power's request. This Court has previously stressed that "[t]he mere mention of an issue...when no supporting evidence or relevant legal authority is introduced...is insufficient to raise an issue at trial and thus insufficient to preserve the issue for appeal." LeBaron & Assoc. v. Rebel Enterprises, 823 P.2d 479, 483 (Utah App. 1991). Because Water Power does not comply with Utah Rule of Appellate Procedure 24(a)(5)(A), it is impossible to tell where, if anywhere, it believes it preserved this issue with sufficient specificity. Water Power's obscure reference below to "the contract" is insufficient to allow it on appeal finally to

cite the contractual provision and present a full-fledged legal argument.

POINT II

WATER POWER CANNOT RECEIVE ATTORNEY FEES UNDER THE THIRD PARTY TORT RULE.

This Court should reject Water Power's contention that Strawberry must pay attorney fees incurred in the Tax Commission appeal because Strawberry "forced" it to appeal.³ (Appellant's Brief at 9). The third party tort rule is inapplicable to this case.

A. The Facts And Context Of This Case Make The Third Party Tort Rule Inapplicable.

The third-party tort rule allows a party to recover reasonable attorney fees incurred in pursuing litigation with a third party that are a natural consequence of one's negligence. Broadwater v. Old Republic Sur., 854 P.2d 527 (Utah 1993). This rule cannot apply to the present situation, primarily because Strawberry has not committed a negligent or otherwise tortious act. Although Water Power claims for the first time on appeal that it became liable for the tax due to Strawberry's "negligent, or intentional" nonpayment, Water Power has never before suggested that Strawberry acted tortiously. (Appellant's Brief at 9). Nothing prevented Water Power from including a cause of action for negligence or intentional tort in its

³Water Power's claim is curious given the fact that at the time the assessments were made both Strawberry and Water Power believed the assessments were invalid and determined to appeal the assessments.

Complaint, but Water Power chose to limit its allegations against Strawberry to breach of contract. At any rate, Water Power cites no support in the record to establish that Strawberry committed tortious conduct.

The third-party tort rule also does not apply to this case because Water Power has not shown that it incurred attorney fees in the administrative proceeding as a natural consequence of Strawberry's actions. To the contrary, Water Power chose to initiate its own appeal entirely of its own volition. Had it not reneged on the agreement to pursue a joint appeal, it would never have incurred the "consequential damages" it is now claiming.

B. Water Power Did Not Preserve This Issue For Appeal.

As with its contractual basis for attorney fees, Water Power did not preserve the third party tort rule issue below. There is absolutely no mention in the record of this rule as a means of awarding attorney fees. Because Water Power did not present this argument to the court below, this Court should disregard it. See Palmer v. Hayes, 892 P.2d 1059 (Utah App. 1995) (claim for attorney fees under statute raised for first time on appeal cannot be considered).

Water Power cannot rely on the newly-raised third party tort rule as a means of receiving attorney fees incurred in the Tax Commission appeal. The rule was never meant to stretch to every situation where a party claims it incurred legal fees due to another party's actions.

POINT III

WATER POWER CANNOT RECEIVE
ATTORNEY FEES FOR THIS APPEAL.

A party may only be awarded attorney fees for appeal if it received attorney fees below and prevails on appeal. Wade v. Stangl, 869 P.2d 9 (Utah App. 1994). Because the lower court properly denied Water Power's claim for attorney fees, Water Power is not entitled to attorney fees expended on appeal.

CONCLUSION

Water Power has failed to demonstrate that the lower court abused its discretion in denying attorney fees. It asks this Court for an award of attorney fees based upon arguments that were not presented to the lower court. Even so, the contract provision and third party tort rule arguments are meritless. Finally, Water Power has made no attempt to show that the fees it demands are reasonable. Strawberry requests that this Court affirm the lower court's denial of attorney fees.

DATED this 10th day of August, 1995.

SNOW, CHRISTENSEN & MARTINEAU

By *Julianne P. Blanch*
Reed L. Martineau
Ryan E. Tibbitts
Julianne P. Blanch
Attorneys for Appellee

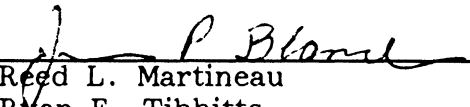
CERTIFICATE OF SERVICE

I hereby certify that I caused two (2) true and correct copies of the foregoing BRIEF OF APPELLEE to be served upon the following:

Jeffrey B. Brown
BROWN & BROWN, P.C.
Attorneys for Appellant
4685 South Highland Drive
Suite 175
Salt Lake City, Utah 84117

by causing the same to be mailed first class, postage prepaid, on the 10th day of August, 1995.

SNOW, CHRISTENSEN & MARTINEAU


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Julianne P. Blanch
Attorneys for Appellee

ADDENDUM A:

Ruling on Defendant's Motion for Summary Judgment and
Order on Summary Judgment

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FILED 1-19-95
Court of
Salt Lake County
JK Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT
COUNTY OF UTAH, STATE OF UTAH

WATER POWER COMPANY, a Utah
corporation,

Plaintiff,

vs.

STRAWBERRY WATER USERS
ASSOCIATION, a Utah corporation,

Defendant.

ORDER ON SUMMARY JUDGMENT

Case No. 900400932CV
Judge Lynn Davis

This matter having come before the Court on Defendant's Motion for Summary Judgment, both parties having submitted memoranda in support of their respective positions, and the matter having now been submitted for decision, the Court, after carefully considering the memoranda submitted by counsel, hereby ORDERS, ADJUDGES AND DECREES:

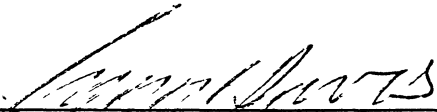
1. The facts as set forth in Defendant's initial memoranda were not disputed by Plaintiff and, therefore, the Court adopts those facts and accepts them as true;

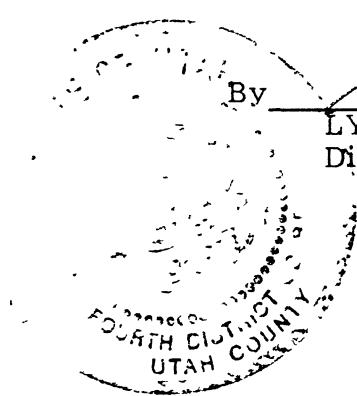
2. Based upon the unique facts and circumstances surrounding this matter, the Court is not inclined to award Plaintiff attorney's fees;

3. Defendant's Motion for Summary Judgment is hereby granted and judgment is awarded in favor of Defendant, no cause of action, on all claims asserted by Plaintiff. Each party to bear their own costs and fees.

DATED 6 JAN 1995.

BY THE COURT:

By 
LYNN DAVIS
District Court Judge



AFFIDAVIT OF SERVICE

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Cynthia Northstrom, being duly sworn, says that she is employed by the law offices of Snow, Christensen & Martineau, attorneys for Defendant herein; that she served the attached **Order on Summary Judgment** (Case Number 900400932CV, Fourth Judicial District Court, Utah County, State of Utah) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Charles C. Brown, Esq.
Budge W. Call, Esq.
Brown & Brown
505 East 200 South, #400
Salt Lake City, Utah 84111

and causing the same to be mailed first class, postage prepaid, on the 21st day of December, 1994.

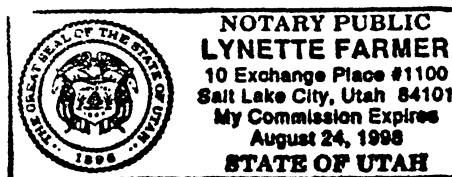

Cynthia Northstrom

SUBSCRIBED AND SWORN to before me this 21st day of December, 1994.


NOTARY PUBLIC
Residing in the State of Utah

My Commission Expires:

8-24-98



FILED
Fourth Judicial District Court
Utah County, State of Utah
CARMEL B. SMITH, Clerk
12/16/94
(11)

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

<p>WATER POWER COMPANY, a Utah corporation,</p> <p style="text-align: right;">Plaintiff,</p> <p>vs.</p> <p>STRAWBERRY WATER USERS ASSOCIATION, a Utah corporation,</p> <p style="text-align: right;">Defendant.</p>	<p>RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT</p> <p>CASE NO. 900400932</p> <p>DATE: December 15, 1994</p> <p>JUDGE: LYNN W. DAVIS</p>
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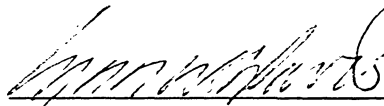
This matter came before the Court on Defendant's Motion for Summary Judgment. Defendant, represented by Ryan E. Tibbitts, filed memoranda in support of its motion, and Plaintiff, represented by Charles C. Brown, filed a memorandum in opposition to the motion. The Court, after carefully considering the memoranda submitted by counsel, now enters the following:

RULING

The facts as set forth in Defendant's initial memoranda were not disputed, and therefore, the Court adopts those facts and accepts them as true. Based upon the unique facts and circumstances surrounding this matter, the Court is not inclined to award Plaintiff's attorney fees. Therefore, Defendant's Motion for Summary Judgment is hereby granted, and the case is closed. Counsel for Defendant is instructed to prepare an order consistent with this ruling.

Dated at Provo, Utah, this 16 day of Dec, 1994.

BY THE COURT

A handwritten signature in cursive script, appearing to read "Lynn W. Davis", written over a horizontal line.

Judge Lynn W. Davis

cc: Ryan E. Tibbitts, Esq.
Charles C. Brown, Esq.

ADDENDUM B:

Contract

AGREEMENT

THIS AGREEMENT, made and executed as of the 24th day of January, 1983 by and between STRAWBERRY WATER USERS ASSOCIATION, a Utah Corporation, hereinafter referred to as "Buyer" and WATER POWER COMPANY, a Utah Corporation, hereinafter referred to as "Company".

WITNESSETH:

WHEREAS, the Buyer desires to build a new 3500 kw hydropower facility near the existing Upper Spanish Fork Hydro Plant, (herein after referred to as "Project"), and

WHEREAS, the Buyer desires to engage the services of the Company on the Project and the Company desires to perform such services, pursuant to the terms and conditions of this Agreement as herein set forth.

NOW, THEREFORE, for and in consideration of the mutual covenants herein contained and the monetary consideration herein recited, it is mutually agreed by and between the parties as follows:

1. **WORK TO BE PERFORMED BY THE COMPANY.** The Buyer hereby engages the Company, and the Company does hereby agree to perform the following:

A. General: The Company will design, fabricate, install and start up penstock and turbine generator units to the following specifications:

Two Turbines: (each)

Power - 2450 hp
Speed - 600 rpm
Head Effective - 125 ft
Flow - 200 cfs

Generator: Power - 1750 kw
Speed - 600 rpm
Voltage - 2300 volts
Temp. Rating - 60°C continuous

Penstock: Size - 2-60 inch diameter
Length - 340 feet each

Existing Wasteway: Repair the overflow crest of existing wasteway

B. Specific: The Company shall proceed diligently to perform the following in a good and workmanlike manner for the fee as provided for herein:

TURBINE:

Design and manufacture two Francis turbines to the specifications of Paragraph 1A. The turbine runner, wicket gates and gate shafts will be stainless steel as per HydroWest Group standard specs. Spiral case and all other related parts will be cast or fabricated steel.

GENERATOR:

The generator will be designed and manufactured to HydroWest Group specifications as per the nameplate data listed in Paragraph 1A. The insulation system will be Class FFFX and the stator will have a minimum of 6 RTD's to indicate winding

temperature. The generator field will have adequate WR^2 (built in inertia) to permit stable operation for remote and manual synchronization. The entire rotation assembly will have total runaway speed capability.

EXCITER:

The exciter will be static or brushless and will have solid state voltage regulation.

SWITCHGEAR:

The switchgear and relay protection will be standard utility grade designed for HydroWest Group for local manual and remote operation, including the lower 400 kw Spanish Fork Hydro Plant.

SUPERVISORY CONTROL:

The supervisory control will be designed by HydroWest Group and manufactured by Digitek Corporation to remotely control the two main turbines plus the recently uprated lower 400 kw Spanish Fork Hydro Plant turbine.

STEP-UP TRANSFORMER:

A step-up transformer, low voltage connection box, high voltage disconnect with fuses and lightning arrestors will be furnished with the following capabilities:

1. 5900 KVA minimum with provision for 25% additional capacity from F.O.A.
2. Voltage - 2.3 KV step up to 46 KV with 5 no load taps of 5% each

ASSEMBLY & INSTALLATION:

Will be by contractor working for Water Power Company under the direction of HydroWest Group, Inc.

PENSTOCK:

60" x 5/16" steel with coal tar enamel inner coating and coal tar outer coating with poly-ken protective wrap. Sacrificial anode electrolysis protection

INTAKE:

Two with screens and motorized 6' x 6' vertical slide gates at entrance to each penstock

MEASURING DEVICE:

Mapco Sonic Measuring Device to be installed in 60" penstock to measure instantaneous and totalized flow to each turbine

POWERHOUSE:

Insulated metal building 30' x 30' with thermostatically controlled louvers

Two motorized butterfly valves 60" diameter ahead of turbine

Two motorized slide (sluice) gates 4' x 4' for Salem Canal

Reinforced concrete box culvert between powerhouse and Salem Canal

C. Technical Director: The Company shall furnish a technical representative qualified to install and erect the equipment to be furnished hereunder, together with all other onsite or offsite labor required for the performance of this agreement.

2. **PAYMENT BY OWNER TO THE COMPANY:** The Buyer hereby agrees to pay to the Company for the work to be performed, a sum of \$2,788,000 payable in monthly installments as specified in the attached Exhibit "A", "Construction Control and Payment Schedule". He's agreed that failure to meet the payment schedule will delay extend the completion date.

3. **INFORMATION TO BE PROVIDED BY THE BUYER:** The Buyer agrees to provide the Company with complete information concerning the project and to provide access for the Company to enter the premises as required to perform the work. The Buyer shall designate one individual to act as the Buyer's representative with respect to the work to be performed by the Company under this Agreement. The person designated as the Buyer's representative shall have complete authority to transmit instructions, receive information, interpret and define the Buyer's policy and decisions and approve payments under the "Construction Contract and Payment Schedule" with respect to work covered by this Agreement.

INSURANCE AND INDEMNIFICATION: The Company shall secure and maintain such insurance as will protect the Company from claims under Workmen's Compensation acts and from all other claims for bodily injury, death or property damage which may arise out of the performance of or failure to perform services by the Company under this Agreement and the Company does hereby indemnify and hold harmless the Buyer from any and all such liability, claims or obligations. The Company will provide a one-year warranty from the date of completion for all equipment, and a performance and payment bond for the project.

5. **CHANGES AND MODIFICATIONS:** This Agreement shall be modified only by a written agreement setting forth the terms and

conditions of such changes and modifications and the same being executed by each of the parties hereto.

6. COMPLETION: All work shall be completed on or before September 30, 1983 as shown on the attached "Construction Control and Payment Schedule", identified as Exhibit "A".

7. ADDITIONAL TERMS: The terms and provisions of "Conditions of Sale", attached hereto as Exhibit "B", are hereby agreed to and incorporated herein.

IN WITNESS WHEREOF, the parties hereto have set their hands the day and year first set forth above.

BUYER

COMPANY

BY: *Les Nielsen*

BY: *Asst. Doughtan*

TITLE: *President*

TITLE: *Chairman of Board*

WITNESS: *Matthew*

WITNESS: *Matthew*

ADDENDUM C:

Cable Marine, Inc. v. M/V Trust Me II, 632 F.2d 1344 (5th Cir. 1980)

instruction of which Sarris complains in anyway expressed a view concerning the credibility of any statement made by the informant but rather only informed the jury as to the practical role of informants in cases of this type.² Finally, it is clear that the trial court did give an adequate general instruction as to the assessment of the credibility of witnesses.³

AFFIRMED.



CABLE MARINE, INC.,
Plaintiff-Appellant,

v.

M/V TRUST ME II, M. Whiting, Ronald
Gurvin and Small Boat Rentals, Inc.,
Defendants-Appellees.

No. 80-5181
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit B

Dec. 19, 1980.

Plaintiff appealed from a decision of the United States District Court for the

2. This Court has stated that it is the nature of certain crimes, including gambling, to often be undetectable absent the use of government informants. See, *United States v. Timberlake*, 559 F.2d 1375, 1378, n.7 (5th Cir. 1977).

3. The following is an excerpt from the trial court's instruction to the jury:

Now, you must consider all of the evidence, but this does not mean that you must accept all of the evidence as being true or accurate. You are the sole judges. You and you alone are the judges of the credibility, or the believability, if the will, of each witness, as well as the weight to be given his testimony.

Southern District of Florida, Norman C. Roettger, Jr., J., denying it attorney fees incurred in its successful suit on maritime lien. The Court of Appeals held that the district court did not abuse its discretion in denying an award of attorney fees to plaintiff, even though attorney fees were authorized by contract, where plaintiff had declined defendant's generous settlement offers made several months before trial.

Affirmed.

1. Federal Civil Procedure ⇐2737.5

Where attorney fees are provided by contract, a trial court does not possess the same degree of equitable discretion to deny such fees that it has when applying statute allowing for discretionary award; however, a court, in its sound discretion may decline to award attorney fees authorized by a contractual provision when it believes that such an award would be inequitable and unreasonable.

2. Federal Civil Procedure ⇐2737.5

District court did not abuse its discretion in denying prevailing plaintiff attorney fees, even though such fees were authorized by contract, where plaintiff declined defendant's generous settlement offers made several months before trial.

Weaver & Weaver, Thomas D. Lardin,
Fort Lauderdale, Fla., for plaintiff-appellant.

In weighing the testimony of a witness, you should consider his relationship to the government, or to any defendant. You should consider his interest, if any, in the outcome of this case. You should consider his manner of testifying, his opportunity to observe or acquire the knowledge that he testified about. You should consider his candor, openness, fairness and intelligence, and you should also consider the extent to which he has been supported, or contradicted by other creditable evidence.

In short, you may accept or reject the testimony of any witness who appeared in this courtroom, either in whole or in part.

Ronald Payne, Fort Lauderdale, Fla., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY, FRANK M. JOHNSON, Jr. and HENDERSON, Circuit Judges.

PER CURIAM:

Plaintiff appeals from the denial of attorney's fees incurred in its successful suit on a maritime lien. Holding the district court did not abuse its discretion in denying attorney's fees, we affirm.

Plaintiff filed suit on October 20, 1978, to recover for repairs it performed on a forty-one foot vessel owned by defendant. Plaintiff claimed \$3,960 as the amount owed, plus costs and attorney's fees. Defendant, contending that it was overcharged for the repairs, had sent a check for \$2,500 to plaintiff prior to the filing of suit, but plaintiff refused to accept this payment.

The parties engaged in settlement negotiations between the time the suit was filed and the time of trial. In March, 1979, defendant offered to settle the action in its entirety for \$3,750. This offer was refused. At least six months prior to trial, defendant raised its settlement offer to \$4,200, but this offer was also declined.

The bench trial took place on December 26 and 27, 1979. Finding that some overcharges did in fact exist, the court awarded plaintiff \$3,460, plus interest and court costs. After a brief hearing, the court ruled that each party should bear its own attorney's fees. Plaintiff appeals from this ruling.

Attorney's fees generally may be awarded only when authorized by statute or contract. See, e. g., *Kessler v. Pennsylvania National Mutual Casualty Insurance Co.*, 531 F.2d 248, 255 (5th Cir. 1976); *Aerosonic Corp. v. Trodyne Corp.*, 402 F.2d 223, 228 (5th Cir. 1968). Attorney's fees are authorized in this case by the work order for the

repairs, which provides for the allowance of reasonable fees to plaintiff in the event it is compelled to initiate collection proceedings. The district court, however, held that it would be unreasonable to assess attorney's fees against defendant. Although its reasons were not clearly articulated, the court apparently believed that plaintiff had acted unreasonably in not accepting either of the earlier settlement offers made by defendant and in forcing the cause to trial.

[1] Where attorney's fees are provided by contract, a trial court does not possess the same degree of equitable discretion to deny such fees that it has when applying a statute allowing for a discretionary award. *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 226 (5th Cir. 1975). Nevertheless, a court in its sound discretion may decline to award attorney's fees authorized by a contractual provision when it believes that such an award would be inequitable and unreasonable. See, e. g., *United States v. Mountain States Construction Co.*, 588 F.2d 259, 263 (9th Cir. 1978); *Manchester Gardens v. Great West Life Assurance Co.*, 205 F.2d 872, 878 & n.14 (D.C.Cir.1953); *Schmidt v. Interstate Federal Savings & Loan Ass'n.*, 421 F.Supp. 1016, 1019 (D.D.C.1976); *Consumers Time Credit, Inc. v. Remark Corp.*, 259 F.Supp. 135, 137 (E.D.Pa.1966). In *Manchester Gardens*, for example, the court held that attorney's fees may be withheld if the claim was pursued unnecessarily.

[2] In this case, defendant had made generous settlement offers several months before trial. In fact, the second offer of \$4,200 was only slightly less than the total of the full amount claimed by plaintiff as the cost of repairs, excluding the charges conceded by plaintiff at trial to be unjustified, and the amount claimed by plaintiff's attorney for his fees up to the date of trial.

Although the plaintiff may have been compelled to initiate a lawsuit to recover the repair costs, the district court could well have concluded that plaintiff acted unreasonably in incurring needless expense by

pursuing the suit beyond the offers of payment. We cannot hold that the court abused its discretion in denying an award of attorney's fees to plaintiff.

AFFIRMED.



Edgar J. BOUDLOCHE, Petitioner,

v.

HOWARD TRUCKING CO., INC., Northwest Insurance Co. and Director, Office of Workers' Compensation Programs, U. S. Department of Labor, Respondents.

No. 80-3045.

United States Court of Appeals,
Fifth Circuit.
Unit A

Dec. 19, 1980.

The Benefits Review Board found that worker had not been within the coverage of the Longshoremen's and Harbor Workers' Compensation Act because his maritime employment was insubstantial. On petition for review the Court of Appeals, Charles Clark, Circuit Judge, held that worker who was directed to regularly perform some portion of what was indisputably longshoring work at fully equipped docks and, for at least some part of his work was required to perform total maritime job at unequipped docks was within coverage though his employer also assigned him broader duties as truck driver, and he was not beyond cover-

age on the ground that his maritime employment was insubstantial.

Reversed and remanded.

Workers' Compensation — 262

Worker who was directed to regularly perform some portion of what was indisputably longshoring work at fully equipped docks and, for at least some part of his work was required to perform total maritime job at unequipped docks was within coverage of Longshoremen's and Harbor Workers' Compensation Act though his employer also assigned him broader duties as truck driver, and he was not beyond coverage on the ground that his maritime employment was insubstantial. Longshoremen's and Harbor Workers' Compensation Act, §§ 1 et seq., 2(3, 4), 33 U.S.C.A. §§ 901 et seq., 902(3, 4).

Weigand & Siegrist, Christopher B. Siegrist, Houma, La., for petitioner.

Carin A. Clauss, Sol. of Labor, Mark C. Walters, Gilbert T. Renaut, U. S. Dept. of Labor, Washington, D. C., Roger J. Larue, Jr., Metairie, La., for respondents.

Petition for Review of an Order of the Benefits Review Board.

Before COLEMAN, Chief Judge, CHARLES CLARK and REAVLEY, Circuit Judges.

CHARLES CLARK, Circuit Judge:

A majority of the Benefits Review Board asserts that Congress did not intend for the Longshoremen's and Harbor Workers' Compensation Act (Act) to cover employees whose maritime employment was insubstantial. Because the Supreme Court has held Congress intended to cover workers when at least some part of their duties involved such employment, we reverse and remand.

Cite as 632 F.2d 1346 (1980)

The facts as found by the Board are as follows. The claimant, Edgar J. Boudloche, was employed by Howard Trucking Company, Inc., (Howard) as a truck driver. Howard was engaged in the business of transporting oil field and marine equipment used in drilling for oil and gas offshore and on land. Boudloche hauled heavy oil field equipment on a large truck and a flatbed trailer rig. Approximately half of his runs were from one land based site to another. The other half required him to either pick up or deliver equipment at a dock. Ten to twenty percent of the docks worked by Boudloche had no loading or unloading equipment or personnel. At such docks Boudloche did all of the work of loading and unloading the equipment by himself. The remaining docks where Boudloche picked up or delivered equipment were equipped with cranes and laborers called "roustabouts" to load and unload. To develop good will for his employer, Boudloche was expected to assist in the loading and unloading process even at those well equipped facilities. Boudloche estimated that he had a delivery or a pick-up two or three times a week at a poorly equipped dock where he had to do the loading or unloading himself.

Boudloche would use either a winch or a gin pole on his truck to load or unload at unequipped docks. This required that he board the barge being loaded or unloaded to secure or release cables on the cargo. Only 2½ to 5 percent of his overall work time was spent loading or unloading cargo at unequipped dock facilities where he had to board vessels.

On the day of his injury, Boudloche was assigned to pick up several small boats used in oil and gas drilling operations. These boats were to be picked up at an unequipped dock facility. When he arrived at the dock with his truck, the boats were tied up at the water's edge. The dock was no more than a gravel and shell-covered slope leading down into the water. Boudloche backed his trailer to the water's edge and

ran his winch line from the back of his cab along the trailer bed and tied it to the front of the first boat. He then winched the boat out of the water and onto his trailer. He loaded two boats in this manner. When he attempted to load the third boat, which was made of steel and much heavier than the first two, the boat slipped and fell on the claimant. Boudloche sustained a crushed pelvis and urological injuries.

Since Boudloche was at a dock at the water's edge when he was injured, he was within the Act's waterfront situs provision. 33 U.S.C. § 902(4). The single issue is whether a claimant who regularly performs indisputably maritime operations, but which maritime operations constitute only a small portion of his overall working time, occupies a status covered by the Act.

Section 2(3) of the Act provides:

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, . . .

33 U.S.C. § 902(3). The Board determined that the Act required a *substantial portion* of an employee's duties be in longshoring operations to be covered. They concluded that because Boudloche spent only 2½ to 5 percent of his overall working time performing the full maritime function of a longshoreman, he did not meet their "substantial portion" of duties requirement.

In *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977), the Supreme Court held the Act's status requirement was met by a terminal laborer who sometimes worked at shore-based jobs and at other times performed a longshoreman's function. They defined longshoremen as "persons whose employment is such that they spend at least some of their time in indisputably longshoring operations %y(4)" 432 U.S. at 273, 97 S.Ct. at 2362. Two years later, in *P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225, the Court held