1995

Salt Lake Knee and Sports Rehabilitation, Inc. f/k/a Professional Therapy, Inc. v. Salt Lake Knee and Sports Medicine, a Utah General Partnership and Lonnie E. Paulos, M.D., P.C., a Utah Professional Corporation and Thomas D. Rosenberg, M.D., P.C., a Utah Professional Corporation, General Partners : Reply Brief

Utah Court of Appeals

Mark O. Morris; Snell & Wilmer; Attorneys for Appellees.
John C. Green; Kim M. Luhn; Green & Luhn; Attorneys for Appellant.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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SALT LAKE KNEE & SPORTS REHABILITATION, INC. f/k/a PROFESSIONAL THERAPY, INC.	:	Case No. 950287
Plaintiff/Appellant,	:	District Court No. 910906316CN
v.	:	
SALT LAKE CITY KNEE & SPORTS MEDICINE, a Utah General Partnership and LONNIE E. PAULOS, M.D., P.C., a Utah Professional Corporation and THOMAS D. ROSENBERG, M.D., P.C., a Utah Professional Corporation, General Partners,	:	Argument Priority Classification 15
Defendants/Appellees.	:	

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REPLY BRIEF OF PLAINTIFF/APPELLANT SALT LAKE KNEE & SPORTS REHABILITATION, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES
STATUTES AND RULES

Page

CASES CITED

DETERMINATIVE AUTHORITY

All Determinative Authority has been previously identified in Appellees' primary brief.

ARGUMENT

The Appellees, Salt Lake Knee & Sports Medicine ("Medicine") and Lonnie E. Paulos, M.D., P.C. ("Paulos") and Thomas D. Rosenburg, M.D., P.C. ("Rosenburg") rely on the case of Schafir v. Harrigan 879 P.2d 1384 (Utah App. 1994) for the proposition that Utah Code Ann. §78-27-56.5 (1992) supports the trial court's award of attorneys fees to them in this case. These parties also argue that the statute is not ambiguous, and therefore, this court cannot look to the statute's legislative history for assistance in interpreting its application.

Salt Lake Knee & Sports Rehabilitation ("Rehabilitation") admits that the Schafir case would suggest that this Court did not disagree that the trial court has discretion under § 78-27-56.5 to award fees despite language in the contract quite similar to the language in this case. However, the case is factually distinguishable. To begin with, the primary issue before this court in Schafir was whether the trial court had abused its discretion in failing to allocate fees attributable to claims under the contract. With numerous claims among numerous parties, some of which were not parties to the contract which provided for the fees, it is easy to see why the court of appeals held as it did.

From the language of the opinion, it is clear that the appellants did not challenge the applicability of the statute to the language at issue, but instead relied on the fact that an allocation of fees is in the discretion of the trial court. Therefore, Rehabilitation respectfully asserts that the issue contained in this appeal has not yet been decided. Rehabilitation also respectfully asserts that the complaint in Schafir was a breach of contract action, whereas in this

case the trial court was dealing with a Declaratory Judgment action. Therefore, from a public policy standpoint, to affirm the trial court's award of attorneys fees in this case would have a chilling effect on a party seeking a judicial opinion as to disputed contract language.

Medicine, Paulos and Rosenberg also argue that, since the statute is not ambiguous, this court cannot look to its legislative history in an attempt to determine its intended applicability. To begin with, Rehabilitation believes that the plain language of the agreement in this case precludes the award of attorneys fees - period, and the statute does not apply to alter this result. However, given Medicine's interpretation of the statutory language, it is subject to two quite distinct, and in light of the Schafir case, plausible interpretations. It must, therefore be, ambiguous. (See Property Assistance Corp. v. Roberts, 768 P.2d 976 (Utah App. 1989).) As a result, this court may look to its legislative history to resolve the issue on appeal.

Specifically, the statute allows a trial court to award fees to either party where the contract "allow[s] at least one party to recover attorney's fees." As the court is well aware, certain contracts only expressly allow one party, (e.g. the landlord, the bank, the creditor, the party in the strongest negotiating position) to recover attorney's fees in the event of a dispute, in a blatant attempt to exclude the other party (e.g. the tenant, the debtor, the party in the weakest negotiating position) from the same rights and benefits. It is to these circumstances that the statute was meant to apply. Conversely, it should not be applied to alter contractual rights where parties of equal bargaining positions negotiate a contract and limit their rights equally.

In this instance, the attorney's fees provision of the Purchase Agreement is already reciprocal. To begin with, there is a condition precedent: "Should either party default in or

breach any of the covenants or agreements contained herein..." Neither party did; therefore neither party is obligated to pay the other's fees. The result urged by Medicine, Paulos and Rosenberg results in the court rewriting a contract, and making a better bargain for one party than the party made for itself. This is clearly beyond the authority of the trial court, and is egregious where the party benefiting from the Court's interference is the party which drafted the contract. Instead, it should be construed against them. (See Sears v. Reimersma 655 P.2d 1105 (Utah 1982) and Rio Algom Corp v. Jimco Ltd. 618 P.2d 497.505 (Utah 1980).)

Although Medicine, Paulos and Rosenberg argue that the case cited by Rehabilitation, Faulkner v. Farnsworth 714 P.2d 1149 (Utah 1986) has been overruled by the statute, this is far from clear. In Faulkner, the Utah Supreme Court relied on the plain and unambiguous language of the contract to reach its decision; as argued above, this was not the issue in Schafir. Therefore, Rehabilitation believes that Faulkner is much more applicable to the facts of this case than is Schafir.

The interpretation offered by Medicine, Paulos and Rosenberg is a tortured interpretation of the plain meaning of the statute. If the statutory language is in fact subject to this interpretation, then it is ambiguous as a matter of law, and the interpretation offered by Medicine, Paulos and Rosenberg is contrary to the legislative intent. It flies in the face of other principles of law such as the principles governing contract interpretation and enforceability. The trial court's award of attorneys fees should be reversed.

CONCLUSION

The plain meaning of the language employed by the parties in this case precluded the lower court's award of attorneys fees to the appellees. The provisions of Utah Code Ann. § 78-27-56.5 (1992) do not apply to alter this conclusion. Instead, the contract was negotiated between parties of equal bargaining power, and the lower court erred in rewriting the contract for the benefit of one party. It was drafted by Appellees and should be construed against them.

Based upon the foregoing, this Court should reverse the lower court's award of attorneys fees and costs to the Appellees.

RESPECTFULLY SUBMITTED this 3rd day of Oct., 1995.

GREEN & LUHN, P.C.

KIM M. LUHN
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of Oct., 1995, I caused a true and correct copy of the foregoing to be [✓] mailed, postage prepaid via U.S. Mail, [ ] hand delivered to:

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