

1995

In the Matter of the Estate of Marjorie S. Sims, Neil R. Mitchell v. Lynda Wood : Reply Brief

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.

John L. McCoy; Attorney for Respondent.

John E. Gates; Kim R. Wilson; David L. Pinkston; Attorneys for Appellant.

Recommended Citation

Reply Brief, *Mitchell v. Wood*, No. 950734 (Utah Court of Appeals, 1995).
https://digitalcommons.law.byu.edu/byu_ca1/6955

This Reply Brief 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.

BRIEF

UTAH
DOCUMENT
KFU
50
.A10

DOCKET NO. 950734

IN THE UTAH STATE COURT OF APPEALS

In the Matter of the Estate of
Marjorie S. Sims,
Deceased,

Appeal No. 950734
(Civil No. 933900278 ES)

Neil R. Mitchell
Petitioner / Appellant
Cross-Appellee,

Priority No. 15

Lynda Wood,
Respondent / Appellee /
Cross-Appellant.

(ORAL ARGUMENT REQUESTED)

REPLY BRIEF OF CROSS-APPELLANT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY
STATE OF UTAH, THE HONORABLE TIMOTHY HANSON, DISTRICT JUDGE

JOHN L. MCCOY
Attorney for Cross-Appellant
310 S. Main, #1305
Salt Lake City, UT 84101

JOHN E. GATES
KIM R. WILSON
DAVID L. PINKSTON
Attorneys for Petitioner / Appellant
#10 Exchange Place, 11th Floor
P.O. Box 4500
Salt Lake City, UT 84145

ED

JAN 29 1996

COURT OF APPEALS

IN THE UTAH STATE COURT OF APPEALS

**In the Matter of the Estate of
Marjorie S. Sims,
Deceased,**

**Appeal No. 950734
(Civil No. 933900278 ES)**

**Neil R. Mitchell
Petitioner / Appellant
Cross-Appellee,**

Priority No. 15

**Lynda Wood,
Respondent / Appellee /
Cross-Appellant.**

(ORAL ARGUMENT REQUESTED)

REPLY BRIEF OF CROSS-APPELLANT

**APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY
STATE OF UTAH, THE HONORABLE TIMOTHY HANSON, DISTRICT JUDGE**

**JOHN L. MCCOY
Attorney for Cross-Appellant
310 S. Main, #1305
Salt Lake City, UT 84101**

**JOHN E. GATES
KIM R. WILSON
DAVID L. PINKSTON
Attorneys for Petitioner / Appellant
#10 Exchange Place, 11th Floor
P.O. Box 4500
Salt Lake City, UT 84145**

I. LIST OF ALL PARTIES

1. Respondent / Appellee / Cross-Appellant: Lynda Wood, Personal Representative of the Estate of Marjorie S. Sims

2. Petitioner / Appellant / Cross-Appellee: Neil R. Mitchell, Successor Personal Representative of the Estate of G. Grant Sims

II. TABLE OF CONTENTS

III. TABLE OF AUTHORITIES	3
IV. INTRODUCTION	4
V. ARGUMENT	4
A. MARJORIE WAS ENTITLED TO THE PROCEEDS OF HER LATE HUSBAND'S PERSONAL INJURY SETTLEMENT AS A MATTER OF LAW	4
B. APPELLANTS SHOULD NOT BE AWARDED INTEREST ON THE CASH DEFICIENCY OF \$48,100.00 AS APPELLEE OFFERED THE AMOUNT IN SETTLEMENT PRIOR TO THIS CLAIM AND APPELLANT REFUSED THE OFFER	10
VI. CONCLUSION AND RELIEF SOUGHT	12

III. TABLE OF AUTHORITIES

CASES

<u>Colby v. Reed</u> , 99 U.S. 560, L.Ed. 484 (1879)	11
<u>In re Behm's Estate</u> , 213 P.2d 657 (Utah 1950)	8,9
<u>Winters v. Charles Anthony Jewelers</u> , 586 P.2d 453 (Utah 1978)	10

STATUTES

U.C.A. § 75-3-301	8
U.C.A. § 78-11-12	5,7
U.C.A. § 104-3-111 (1943)	8

IV. INTRODUCTION

This Reply Brief of Cross-Appellant, Lynda Wood ("Ms. Wood"), responds to issues raised in the Reply Brief of Cross-Appellee, Neil R. Mitchell ("Mr. Mitchell") to the Cross-Appeal.

The facts relevant to this Reply Brief are set forth in Section VIII of the Cross-Appeal in Ms. Wood's Brief of Appellee and are incorporated herein by this reference.

V ARGUMENT

A. MARJORIE WAS ENTITLED TO THE PROCEEDS OF HER LATE HUSBAND'S PERSONAL INJURY SETTLEMENT AS A MATTER OF LAW

The trial court incorrectly concluded that Marjorie Sims ("Marjorie") was not entitled to the settlement of Grant Sims' ("Grant") personal injury suit. Under U.C.A. § 78-11-12(b), Marjorie, as Grant's personal representative and only intestate heir, was entitled to reimbursement for expenses she incurred caring for Grant as a result of his injury. However, the trial court assumed against evidence to the contrary that Grant paid his own medical expenses. Since Marjorie actually paid nearly \$19,000.00 for Grant's and her combined medical expenses, while his records show that he paid little over \$100.00, the \$12,445.86 settlement of his personal injury suit was rightfully Marjorie's.

The personal injury survival statute states,

If prior to judgment or settlement the injured person dies as a result of a cause other than the injury received as a result of a wrongful act or negligence of the wrongdoer, the personal representative or heirs of that person are entitled to receive no more than the out-of-pocket expenses incurred by or on behalf of that injured person as the result of his injury.

(U.C.A. § 78-11-12(b)) (emphasis added)

The statute has never been interpreted or explained by Utah appellate courts. The trial court's interpretation, however, was in error as it seemed to rest on the incorrect assumption that Grant paid his own medical expenses. Therefore, it falls on this Court to render an explanation of this statute which is consistent with decided Utah Supreme Court cases interpreting a similarly worded statute in a wrongful death action.

The court below explained that the settlement in Grant's suit

was received after the death of Mr. Sims, it was for actual expenses incurred by Mr. Sims as a result of the personal injury, and pursuant to statute is required to be paid over to the personal representative of the deceased's (Mr. Sims') Estate [T]he funds were properly paid over to Mrs. Sims in her capacity as personal representative, and should have been deposited in the accounts of the Estate, the funds representing expenses incurred personally by Mr. Sims as a result of the personal injury case.

(emphasis added)

In this statement, the trial court made several errors of fact and law. First, the court incorrectly stated that Grant paid his own medical expenses resulting from the personal injury. However, this is unsupported by any evidence. On the contrary, the evidence proved Marjorie paid nearly all Grant's medical expenses. The final accounting of Grant's Estate shows he only paid \$112.30 in medical bills from the time of his injury, approximately one year before his death. (R.461). Marjorie's Estate, on the other hand, expended \$18,943.30 from 1990 - 1991 on medical bills, attributed by the accounting to either Grant or "Both", that is, between Marjorie and Grant. (R. 462). Marjorie's pocket, not Grant's, bore the greater loss from the medical expenses resulting from Grant's personal injury. Thus, under the trial court's reasoning, the settlement should provide for the expenses paid by Marjorie, not by Grant.

Second, the court was also incorrect in its interpretation of the law. As the statute indicates, the judgment or settlement should go to the personal representative to cover out-of-pocket expenses incurred on behalf of the injured person. The statutes only limitations restrict (a) the judgment or settlement to the personal representative or heir, (b) the amount to out-of-pocket expenses resulting from the injury, and (c) the expenses to those incurred either by the injured party or on behalf of the injured party. The statute does not require that the settlement be turned

over to the decedent's estate.

This would be a fair and logical conclusion if the decedent had incurred the expenses and thus stood to be reimbursed. The statute on its face gives the right to collect out-of-pocket expenses to the party who has incurred the debt. Thus, where the personal representative and only interested heir, Marjorie, incurred the expenses out of her own pocket on the decedent's behalf, the fair and logical conclusion is that the settlement should reimburse the personal representative.

Mr. Mitchell has argued the amount should be put in Grant's Estate and then disbursed to the heirs. However, this would not reimburse Marjorie's Estate for her expenditures and financial loss, not to mention her personal loss. Instead, the settlement would ultimately go to Mr. Mitchell, his mother Elna Mitchell, and Ms. Wood, none of whom bore any expense from Grant's injury. Marjorie, on the other hand, would still be limited to money from Grant's Estate for her health, support and maintenance; she would not have been able to seek reimbursement for Grant's medical expenses from his Estate without raising another claim. Thus, the settlement should be awarded to Marjorie's Estate in compliance with the statute.

Third, the Cross-Appellee in his Reply Brief to Cross-Appellant's memorandum states that the relevant statute, U.C.A. § 78-11-12, provides that the proceeds of a settlement would go to

the personal representative of decedent's estate if he died with a valid will or to an intestate heir if he did not die with a valid will. This interpretation is not necessarily true. A personal representative is appointed under Utah law regardless of whether there was a valid will at death. See U.C.A. § 75-3-301(4). Thus, the existence or non-existence of a valid will as Cross-Appellee argues does not explain the use of "the personal representative or heirs" by the legislature.

The interpretation of the above personal injury survival statute has not been interpreted by Utah courts. Therefore, the Court should look to the interpretation of a similar statute concerning wrongful death actions, In re Behm's Estate, 213 P.2d 657 (Utah 1950). In that case, the Utah Supreme Court interpreted the wrongful death statute, §104-3-111 U.C.A. (1943), which uses the same words "his heirs or his personal representatives" as the recipient of the proceeds as in the personal injury survival statute now before the Court. The court considered the reimbursement of a husband from his late wife's estate for expenses related to her illness and burial. The court remarked, "[t]o distribute the fund in proportion to the losses suffered makes the allocation more consonant with the underlying theory of damages. . . . To reduce [the surviving husband's] interest in recovery below the amount he so expended would deny him the right to recover the sum he was legally required to pay as a result of the wrongdoer's

negligence" Id. at 661-62. Thus, the court concluded, "The wording of this section compels a conclusion that the legislature intended that the proceeds obtained from the wrongdoer would not be intermingled with other assets of the estate of the deceased." Id. at 660.

While Behm and its reasoning pertain to a wrongful death situation, the language of the statute and its rationale are the same for a personal injury. The Court should recognize the statute is intended only to reimburse the estate of the deceased where the deceased incurred the medical expenses relating to his injury, but that the personal representative should be reimbursed where she incurred the expenses on the deceased's behalf.

Accordingly, the Court should overturn the lower court's holding in this matter and award Marjorie's Estate \$12,445.86 from the settlement of Grant's personal injury suit in her capacity as personal representative of Grant's Estate. Marjorie is entitled to the settlement as reimbursement for the expenses she incurred providing for her husband's medical care and she would have a claim against Cross-Appellee's estate for the same amount if the Court were to deny Cross-Appellant's claim.

B. APPELLANTS SHOULD NOT BE AWARDED INTEREST ON THE CASH DEFICIENCY OF \$48,100.00 AS APPELLEE OFFERED THE AMOUNT IN SETTLEMENT PRIOR TO THIS CLAIM AND APPELLANT REFUSED THE OFFER

The trial court erred in awarding interest on the \$48,100.00 Cash Deficiency to Mr. Mitchell because Ms. Wood offered to repay that amount to Mr. Mitchell prior to this claim and several times since and Mr. Mitchell has consistently refused her offer. Further, the award of interest was not a part of the trial court's original decision but was added for the first time in the Order. Therefore, in fairness to Ms. Wood for her good faith offers, and consistency with the trial court's Order, the Court should withdraw the award of interest and limit the award to the \$48,100.00 Cash Deficiency.

Since Ms. Wood offered to repay the cash deficiency almost as soon as it was requested, it would be unfair for Cross-Appellee to expect an award of interest simply for rejecting the offer. According to the Utah Supreme Court's principle that rules regarding damages on conversion "can be modified in the interest of fairness, Winters v. Charles Anthony Jewelers, 586 P.2d 453, 454 (1978), this Court should eliminate the award of interest.

Additionally, the trial court did not award interest on the Cash Deficiency in its Memorandum Decision, nor does it appear the court intended to award interest on this amount. The addition of interest was added for the first time in the Order itself. In a

personal memo by Judge Hanson (Appendix "A"), which was not sent to either party, the Judge explained, "Marjorie Sims' Estate agrees that \$48,100 should come back to the George Sims Estate, but without interest, inasmuch as they offered that amount as soon as it was requested, and that is probably legitimate. . . . I ought to grant Summary Judgment to the George Sims Estate, the claimant, against the Marjorie Sims Estate for the \$48,100 without interest . . ." (R. 517-18) (emphasis added). In the Memorandum Decision, all the trial court awarded was "the \$48,100 which the personal representative of Marjorie Sims Estate has offered to return heretofore." (R. 512). Despite this decision, the Orders for Motions on Summary Judgment directed Marjorie's Estate to pay \$48,100.00 with interest added at 10% per annum. (R. 521).

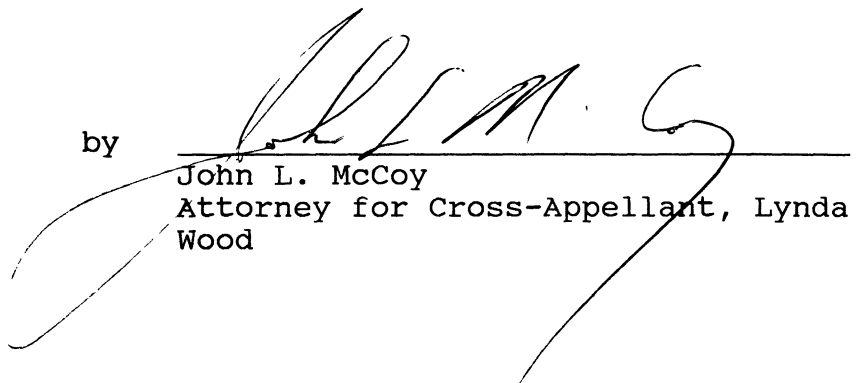
Further, a tender of the converted property prior to the commencement of the action will serve to reduce the damages of the claimant. Colby v. Reed, 99 U.S. 560, L.Ed. 484 (1879). These matters were argued to the trial court in final argument. (R. 563). Despite all these facts, the Order drafted by Mr. Mitchell's attorneys and signed by the trial court awarded interest on this amount. The Cross-Appellant takes the position that the imposition of interest on the Cash Deficiency was error where the Cross-Appellant offered to return the same amount prior to the claim being made and the Appellant refused that offer and where the trial judge appeared to have decided against the imposition of interest.

VI. CONCLUSION AND RELIEF REQUESTED

Lynda Wood respectfully requests this Court find in her favor and reverse the trial court's ruling on the Personal Injury Settlement and on the imposition of interest on the Cash Deficiency. Since the personal injury survival statute seeks to reimburse the party damaged by the decedent's injury, and it was Marjorie who was so damaged, financially as well as personally, the settlement should be awarded to Marjorie Sims' Estate in reimbursement. Also, the imposition of interest on the Cash Deficiency should be withdrawn as it is unfair to Marjorie's Estate which offered to return the Cash Deficiency though Mr. Mitchell rejected the offer, and contrary to the trial court's express intent in it's memo and Order.

DATED this 27th day of January, 1996

by



John L. McCoy
Attorney for Cross-Appellant, Lynda
Wood

JOHN L. McCOY (2164)
Attorney for Lynda Wood-Appellant
310 S. Main Street #1305
Salt Lake City, Utah 84101
Telephone: (801) 355-6400

IN THE UTAH COURT OF APPEALS

IN THE MATTER OF THE ESTATE OF:)	CERTIFICATE OF SERVICE
)	
MARJORIE S. SIMS,)	Case Number 950734-CA
)	
Deceased.)	

I hereby certify that on the date specified below, a copy of the Cross-Appellant's Reply Brief was hand delivered to the following person(s).

Kim R. Wilson
Attorney for Neil Mitchell
10 Exchange Place - 11th Flr.
Salt Lake City, Utah 84111

DATED this 29th day of January, ~~1996~~

ny of January, 1996.

"APPENDIX A"

M E M O

TO: File

FROM: Judge Hanson

DATE: January 18, 1995

RE: In the Matter of the Estate of Marjorie S. Sims
Case No. 933900278

FILED
JAN 19 1995
CLERK OF COURT
[Signature]

There are reciprocal Motions for Summary Judgment in this matter, wherein the Estate of George Sims has made a claim against the Estate of Marjorie Sims, which is the matter before the Court. George Sims' Estate, through its successor personal representative, claims that Marjorie Sims, before she died, diverted sums out of the George Sims Estate that should be paid back. The substance of the claim is that she failed to set up and fund a trust that was provided for in the George Sims Will. There is really no dispute that she failed to set up the trust with the funds from the George Sims Estate, but rather she used them for her own purposes.

The Estate of Marjorie Sims argues that while there has been a technical breach, there is no damage as required by the statute, and so I need to look at the statute that authorizes these types of claims. The Marjorie Sims Estate, represented by attorney McCoy, says there is no damage because she was entitled to the funds in any event.

It is clear that she was entitled to the interest. It is not so clear that she was entitled to an invasion of the principal. There are apparently two lines of cases: Wyoming, Montana, Kansas line and a Colorado line, that talk about whether or not the language necessary is limited to the invasion of principal when the funds of the beneficiary (in this case, Mrs. Sims, while she was alive), are able to take care of her own needs.

It seems that the better cases are that she would have got the principal in any event, therefore, no damages.

Marjorie Sims' Estate agrees that \$48,100 should come back to the George Sims Estate, but without interest, inasmuch as they offered that as soon as it was requested, and that is probably legitimate. The remaining portions of the \$48,100 up to the \$52,000 claimed (and see the chart in this regard), are either interest or principal, I'm unable to tell, but if she would have got them either as interest or principal then, of course, there is no damage.

The \$12,000 for the personal injury claim is not a matter that Mrs. Sims was entitled to, but rather was part of the Estate, and so it would appear that would have to come back. This is not like a wrongful death claim where she is the heir of the wrongful death claim, but rather the Estate is the recipient of his personal injury claim, so the \$12,000 should come back to the Estate; the

\$41,800 they agreed to; the rest, if I accept McCoy's argument, are matters that she would have been entitled to in any event, and therefore there is no damage.

It looks like Summary Judgment ought to be granted both ways in some respects. On McCoy's claim, the \$96,000-plus in accordance with the chart, whether it is interest or principal of the George Sims Estate, and the trust if it would have been set up, would have gone to her in any event for reasonable and necessary living expenses, regardless of the amount of income that she had. Everything beyond the \$48,100 in the second category of \$52,000 would be either principal or interest that she would have been entitled to, therefore that doesn't constitute a damage, and so I should grant Summary Judgment to the Marjorie Sims Estate on that issue.

On the other hand, I ought to grant Summary Judgment to the George Sims Estate, the claimant, against the Marjorie Sims Estate for the \$48,100 without interest, and then the amount of the personal injury claim - \$12,000-plus, because that was part of the George Sims Estate and not something she should have taken as personal representative before she died.

The personal injury amount (\$12,000-plus) so also include interest from the date that it was received. So there will be Summary Judgment in favor of Wilson's client against the Marjorie Sims Estate in that amount.