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# Leger Construction Company v. Roberts, Inc. : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT FOR THE STATE OF UTAH **BRIGHAM YOUNG UNIVERSITY**  
**J. Reuben Clark Law School**

LEGER CONSTRUCTION COMPANY, )

Plaintiff-Appellant, )

vs. )

ROBERTS, INC., )

CASE NO. 13737

Defendant-Respondent, )

vs. )

UNITED STATES FIDELITY AND )  
GUARANTY COMPANY, )

Defendant-Added. )

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RESPONDENT'S PETITION FOR  
REHEARING AND SUPPORTING BRIEF

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Appeal from a Judgment of the Third Judicial  
District Court of Salt Lake County  
Honorable Bryant H. Croft, Judge

---

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**FILED**

JUN - 9 1976

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT FOR THE STATE OF UTAH

LEGER CONSTRUCTION COMPANY, )  
Plaintiff-Appellant, )  
vs. )  
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Defendant-Respondent, )  
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GUARANTY COMPANY, )  
Defendant-Added. )

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RESPONDENT'S PETITION FOR  
REHEARING AND SUPPORTING BRIEF

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PETITION FOR REHEARING

Roberts, Inc., defendant and respondent herein, respectfully petitions the court for a rehearing on the following grounds:

1. The court's holding, with respect to the proper procedure for filing a verified memorandum of costs after the amendment of findings of fact, is ambiguous and should be clarified to prevent prejudicial confusion in the district courts.
2. The court's holding, in reversing the allowance of attorney's fees for the failure of respondent to include them

in its cost bill, is unduly harsh and contrary to the compensatory purpose of §14-1-8, U.C.A. in the instant case where there was no dispute concerning the application of the statute and where the plaintiff was not prejudiced or surprised by the award.

#### BRIEF IN SUPPORT OF PETITION

##### NATURE OF CASE

This was an appeal by plaintiff from a judgment for defendant on a counterclaim concerning breach of contract in an action tried before the court wherein defendant was awarded its attorney's fees pursuant to statute (§14-1-8, U.C.A.).

##### DISPOSITION ON APPEAL

The court held that the judgment of the trial court was correct and should be affirmed but reversed that judgment with respect to the award of attorney's fees to defendant. The primary ground upon which the court refused to award defendant its attorney's fees was defendant's failure to include them in its memorandum of costs. Respondent seeks a rehearing to re-examine the court's disposition of the trial court's judgment with respect to the award of these attorney's fees.

##### STATEMENT OF FACTS

On August 9, 1971, appellant (Leger) and respondent (Roberts) entered into a contract under which respondent

was to perform mechanical and plumbing work on maintenance stations at Salt Lake City, and Manila, Utah. In connection with this contract appellant, as principal, and United States Fidelity and Guaranty Co. (USF&G), as surety, executed and delivered to the State of Utah a labor and material payment bond pursuant to the provisions of Title 14, Chapter 1, Section 5, U.C.A. 1953 (as amended).

Appellant commenced an action against respondent claiming \$2,782.00 allegedly due from respondent under the terms of the contract, and respondent (1) counterclaimed for \$14,172.04 owed to it under the contract, plus interest and attorney's fees, (2) joined USF&G as an added defendant, and (3) claimed \$3,249.77 due from appellant on other jobs. The district court awarded respondent a joint and several judgment against appellant and its surety on respondent's first claim in the sum of \$8,494.95, and against the appellant only on respondent's second claim for \$782.25. This court affirmed these portions of the district court's judgment.

In its answer and counterclaim, respondent made specific reference to the provisions of §14-1-5 (Answer, ¶7) and in its prayer asked for "a reasonable attorney's fee to be fixed by the court on its first claim" (Answer, p.3). Appellant's reply to the counterclaim specifically admitted paragraph 7 of the counterclaim and did not deny respondent's prayer for

attorney's fees.

At the trial respondent introduced expert testimony as to attorney's fees (Tr. 2d day, p.129-134; Tr. 3d day, p.1-5) and appellant, while fully exercising his right to cross-examine the witness and examine the documentary evidence, never objected to the relevance or propriety of the testimony. Appellant's only objection was with respect to documentation supporting the amount of time spent in preparing the litigation, and this evidence was subsequently produced by responder and received in evidence. Thus, the only controversy concerning attorney's fees centered around the reasonableness of the fee and the amount of time expended by the attorneys. (Tr. 3d day, p.2-5). This controversy was properly resolved by the trier of fact in favor of respondent.

The district court's original judgment was filed on March 19, 1974, and, within the five (5) day period mandated by Rule 54(d)(2), U.R.C.P., respondent filed a memorandum of costs. The memorandum did not include attorney's fees because they were not awarded in the trial court's memorandum decision and thus excluded from the original findings and conclusions of the court. The trial court's memorandum decision denied attorney's fees on the basis that there was no contractual provision therefor. The respondent, therefore, had no basis to determine the amount of the reasonable fee to be taxed as cost at the time the memorandum of cost was filed.



On motion respondent requested the court to modify the findings and amend the judgment, since the trial court had overlooked §14-1-8. After hearing, the court amended its judgment and findings to include an award of \$2,607.50 to respondent as attorney's fees. The fees were assessed pursuant to §14-1-8 as a cost of suit to be borne by the losing party. Since there had been adequate testimony and cross-examination in open court concerning the amount of the fees in question, respondent did not file an amended cost bill but relied on the findings as sufficient verification of the cost of attorney's fees. This court reversed the district court's judgment with respect to the award of attorney's fees as inappropriate since the fees were not included in respondent's memorandum of cost. Respondent now petitions for a rehearing on this portion of the court's decision.

#### ARGUMENT

##### I

THE COURT'S HOLDING, WITH RESPECT TO THE PROPER PROCEDURE FOR FILING A VERIFIED MEMORANDUM OF COSTS AFTER THE AMENDMENT OF FINDINGS OF FACT, IS AMBIGUOUS AND SHOULD BE CLARIFIED TO PREVENT PREJUDICIAL CONFUSION IN THE DISTRICT COURTS.

Even if this court should decline to modify its opinion with respect to the award of attorney's fees, it should clarify its opinion so as to avoid confusion and the potential for prejudice in future litigation involving §14-1-8 and other such

statutes (see e.g. §§38-1-18 and 34-27-1).

This court's opinion states:

Rule 54(d)(2), Utah Rules of Civil Procedure with respect to "Costs," provides that one claiming them must, "within five days" after judgment, serve the other party and file with the court a verified memorandum of items. Roberts did not include any attorney's fees in his cost bill within the five-day prescribed period, - and could not have done so because the original judgment awarded none. He sought the fees nine days after the judgment and four days after the required cost bill filing date. The attorney's fees were incorporated in the judgment and that is the present state of the record. The judgment cannot be amended again on motion because it is too late. As a matter of fact the judgment for attorney's fees is invalid since there was nothing in the contract providing for such an award.

This portion of the court's opinion suggests that unless the prevailing party files a complete cost bill within five days from the entry of the original judgment, the party waives his right to have the court tax additional costs to the losing party, even though the prevailing party can move to amend the judgment and findings within ten days after they have been docketed, and, if approved, these amendments may provide a basis for awarding additional costs to the prevailing party. The quoted language does not suggest how respondent could have preserved its right to the attorney's fees when the fees were neither assessed nor included in the court's findings until after the five-day period for filing a cost bill had lapsed. When statutory attorney's fees were awarded in the

district court's judgment, the court was merely reiterating the assessment of the fee which was stated in the amended findings, for, as this court has stated, unless the parties otherwise agree the district court must take evidence on the issue of reasonable attorney's fees and must make findings thereon. Blain Enterprises v. M-B Super Tire Market, Inc., 28 Utah 2d 192, 499 P.2d 1294 (1972); Provo City Corp. v. Cropper, 27 Utah 2d 1, 497 P.2d 629 (1972); F.M.A. Financial Corp. v. Build, Inc., 17 Utah 2d 80, 404 P.2d 670 (1965). As this court correctly noted, the district court could not award attorney's fees as part of the judgment absent a contractual agreement, but it could and did assess the amount of the fee which it included in the findings.

Under current practice, the "reasonableness" of an award of attorney's fees is always a question of fact which demands a finding from the trier of fact in light of the novelty of the case, the time devoted to preparation, and the relative skill of the attorney. Evidence customarily is introduced at trial with respect to this question and the appropriate award is included in the verdict or the findings. The appropriate amount can then be incorporated into the prevailing party's memorandum of costs. A party cannot file a memorandum of costs until those costs are determined, yet this court's

opinion seems to penalize the respondent for failing to do something he could not do at the time required.

Theoretically there should be no need to file a cost bill with respect to costs which have been determined through testimony at trial. The purpose of a verified cost bill is to avoid a needless expenditure of court time with respect to matters which are easily documented and about which there is seldom any dispute. (e.g. filing fees, costs of service complaints, subpoenas, witness fees, etc.). The verified memorandum provides the losing party with an opportunity to have the items of cost presented under oath and subjected to challenge. But, when testimony concerning attorney's fees is presented in court, the opposing party may exercise his right to cross-examine or object and thereby challenge the proposed assessment. Is any valid purpose satisfied by including the fees in a cost bill when testimony concerning them has already been presented? Such a procedure could only spawn confusion, duplication, and additional controversy.

If this court's holding remains the law, a prevailing party will lose his statutory right to an attorney's fee, if, through inadvertence, the amount of the fee is omitted from the findings and those findings are not amended until after the five-day period for filing a cost bill has lapsed. Apparently, this would be true even though there was adequate testimony

at trial concerning the reasonableness of the fee, neither party was in any way surprised or prejudiced by the court's determination and the fees were eventually included in amended findings. It is unlikely that this court intends such a harsh result for such an unavoidable omission.

To avoid this dilemma, future litigants will be required to include their attorney's fees in their initial cost bill whether or not such fees are included in the findings and whether or not there previously has been testimony concerning the reasonableness of the fee. The predictable results of this procedure will be two-fold: First, litigants will be encouraged to avoid placing testimony in evidence at the trial concerning statutory attorney's fees and will instead merely itemize them in their memorandum of costs; and, second, the cost bill will become a major source of contention initiating objections and motions for the court to tax costs with the inevitable prolongation of litigation and the necessity for post-trial hearings to resolve matters which could be more economically disposed of at trial. Moreover, this procedure would be inconsistent with this court's prior decisions, supra, which require testimony as to reasonable attorney's fees be presented at trial.

Respondent urges this court to reconsider the policies

and purposes underlying the timely application of a verified memorandum of costs pursuant to Rule 54(d) (2) and to adopt a holding which more closely conforms to these policies. In the interest of clarity and practicality, respondent suggests that the court amend its holding by either (a) expressly permitting a party to file an amended memorandum of costs within five (5) days after amended findings have been filed whenever the amended findings affect the taxing of costs, or (b) expressly declining to require a memorandum of costs with respect to those items of cost upon which there has been open testimony and written findings. In these latter cases the findings can stand as a superior substitute for the memorandum of costs. Respondent believes that these suggestions will clarify the intent of the court's holding and will serve to better advance the purposes of the cost bill procedure.

Since attorney's fees are statutorily taxed as costs in areas other than suits on bonds (see e.g., mechanics liens §38-1-18, and suits for wages §34-27-1), the instant decision provides an appropriate opportunity for the court to announce the proper procedure and policy to be followed in these cases.

## II

THE COURT'S HOLDING, IN REVERSING THE ALLOWANCE OF ATTORNEY'S FEES FOR THE FAILURE OF RESPONDENT TO INCLUDE THEM IN ITS COST BILL, IS UNDULY HARSH AND CONTRARY TO THE COMPENSATORY PURPOSE OF §14-1-8, U.C.A., IN THE INSTANT CASE WHERE THERE IS NO DISPUTE CONCERNING THE APPLICATION OF THE STATUTE AND WHERE THE PLAINTIFF WAS NOT PREJUDICED OR SURPRISED IN THE AWARD.

Respondent sought and was awarded attorney's fees pursuant to §14-1-8, U.C.A., since the action was brought, in part, on a payment bond and since Roberts was the prevailing party in the action. The appellant had adequate notice of respondent's demand for attorney's fees since this request was included in the prayer of respondent's counterclaim. In Tiano v. Elsensohn, 520 P.2d 358 Ore. (1974) where the losing party objected to the award of statutory attorney's fees for the prevailing party's failure to plead them specifically, the court held:

Because attorney's fees are part of costs, it is unnecessary for plaintiff to make any more mention of them in his complaint than he would have to make concerning other items of costs. They need only be requested in the prayer.

In the immediate case, respondent not only requested attorney's fees in its prayer, but introduced testimony at trial concerning the reasonableness of the fee. Appellant has never disputed the applicability of this statute. Nevertheless, respondent must bear the costs of its attorney's fees from the amount of the contract price awarded in the judgment because of its failure to itemize the fee in its cost bill. This court's opinion mandates this result even though the amount of the fee was verified by testimony in court. -

An award of costs to the prevailing party is intended

to "reimburse" the successful party for the expenses incurred in presenting or defending an action or special proceeding and is merely incidental to the judgment in the action. Fowler v. Gillman, 76 Utah 414, 290 P. 353 (1930). The award of a reasonable attorney's fee as a cost of litigation differs from the award of other costs since the amount of the cost is not prescribed by statute. Thus, while most litigation with respect to statutory costs focuses on the items of cost, controversy over attorney's fees usually centers on the amount of the "reasonable" fee and testimony and findings are inevitably required before attorney's fees can be taxed as costs. Blain Enterprises v. M-B Super Tire Market, Inc., supra.

The procedure prescribed by Rule 54(d)(2), U.R.C.P., is designed to avoid the introduction of evidence with respect to those items of cost which are clearly provided by statute, and, a verified memorandum of costs is generally sufficient evidence of the actual costs incurred without the need to prove costs in court. The purpose of the cost bill, therefore, is to test the veracity of the author and its contents which purport to express a true itemization of costs. Barton v. Carson, 14 Utah 2d 182, 380 P.2d 926 (1963). When, however, the parties have subjected their veracity to the rigors of



the witness stand and to cross-examination, additional itemization in a verified memorandum of costs does not advance the purposes for Rule 54(d)(2) but in fact thwarts them. The procedure which will be required as a result of this court's decision will prove to be unduly burdensome and a trap for the unwary.

As this court recognized in Palombi v. D&C Builders, 22 Utah 2d 297, 452 P.2d 325 (1969), the policy of the Utah Rules of Civil Procedure is one of "liberality" to secure a "just . . . determination of every action." In that case, this court permitted the prevailing party to recover attorney's fees pursuant to §38-1-18, U.C.A., even though the fees were not specifically requested in the pleadings. In the instant case, respondent urges this court to exercise its equitable power and award attorney's fees even though such were not included in the memorandum of costs because the policy of Rule 54(d)(2) was fully complied with without any surprise or prejudice to the appellant. In the alternative, respondent requests permission from this court to amend its memorandum of costs so that the attorney's fees may properly be included therein. Respondent seeks this relief so that the compensatory purpose of §14-1-8 may not be hampered by inadvertence or technical error.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the court should reconsider the opinion heretofore rendered herein and affirm the trial court's award of attorney's fees to the respondent.

DATED this 9th day of June, 1976.

Respectfully submitted,

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