2008

Kim Fisher and Michael Fisher v. Brent Fisher : Reply Brief of Appellee and Cross-Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

In the Matter of the George Fisher, Jr. Family Inter Vivos Revocable Trust.	**REPLY BRIEF OF APPELLEE AND CROSS-APPPELLANT**
KIM FISHER and MICHAEL FISHER, Petitioners, Appellants, and Cross-Appellees, vs. BRENT FISHER, Respondant, Appellee, and Cross-Appellant.	No. 20080389-CA Oral Argument Requested

ON APPEAL FROM THE JUDGMENT OF THE EIGHTH JUDICIAL DISTRICT COURT, DUCHESNE COUNTY

The Honorable A. Lynn Payne, District Court Judge, Presiding
District Court Case Civil No. 043800019

Charles M. Bennett
BLACKBURN & STOLL LC
257 East 200 South, Suite 800
Salt Lake City, UT 84111-2048

Attorneys for Petitioners-Appellants

BENSON L. HATHAWAY, JR. (Bar No. 4219)
THOMAS A. MECHAM (Bar No. 6612)
CHRISTOPHER S. HILL (Bar No. 9931)
KIRTON & McCONKIE
1800 Eagle Gate Tower
60 East South Temple
P.O. Box 45120
Salt Lake City, UT 84145-0120

Attorneys for Respondant-Appellee

IN THE UTAH COURT OF APPEALS

In the Matter of the George Fisher, Jr. Family Inter Vivos Revocable Trust.	**REPLY BRIEF OF APPELLEE AND CROSS-APPPELLANT**
KIM FISHER and MICHAEL FISHER, Petitioners, Appellants, and Cross-Appellees, vs. BRENT FISHER, Respondant, Appellee, and Cross-Appellant.	No. 20080389-CA Oral Argument Requested

ON APPEAL FROM THE JUDGMENT OF THE EIGHTH JUDICIAL DISTRICT COURT, DUCHESNE COUNTY

The Honorable A. Lynn Payne, District Court Judge, Presiding
District Court Case Civil No. 043800019

Charles M. Bennett
BLACKBURN & STOLL LC
257 East 200 South, Suite 800
Salt Lake City, UT 84111-2048

Attorneys for Petitioners-Appellants

BENSON L. HATHAWAY, JR. (Bar No. 4219)
THOMAS A. MECHAM (Bar No. 6612)
CHRISTOPHER S. HILL (Bar No. 9931)
KIRTON & McCONKIE
1800 Eagle Gate Tower
60 East South Temple
P.O. Box 45120
Salt Lake City, UT 84145-0120

Attorneys for Respondant-Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Brent Fisher ("Brent") hereby submits his reply brief in support of his cross appeal. Pursuant to Rule 24(g) of the Utah Rules of Appellate Procedure, Brent limits his reply to those issues raised by appellants Kim and Michael Fisher ("Kim" and "Michael" respectively) in that portion of their cross-appellee brief, being their opposition to Brent's cross appeal on the issues of prejudgment interest and attorneys' fees.

ARGUMENT

I. PREJUDGMENT INTEREST SHOULD HAVE BEEN PRECLUDED IN WHOLE OR IN PART.

A. Limitation of Liability Clause.

Kim and Michael offer the Court a second interpretation of the limitation of liability clause, without any authority or justification, for this Court to apply to the Trust language. Because Brent's application results in logical consistency, this Court should reject Kim and Michael's interpretation and apply the clause to preclude all prejudgment interest damages.

The limitation clause states that "[a]ny liability whatsoever, of any trustee... shall be limited and confined to the principal and income of the Trust Estate itself." Trust, Exh. 18, p.13.

Brent's interpretation, urged to this Court, is that his father intended for the trustee to be liable to the beneficiaries for any principal and income damages he cannot account for, but no more. Under the Trust, liability for any other type of losses, including interest, penalties, consequential damages, punitive damages, and the like, are not imposed upon the trustee. He is liable for any actual benefit retained. This interpretation

is certainly understandable, as George and his wife served as the initial trustees and incurred this same liability under the Trust to the other beneficiaries for more than sixteen years, and he knew he would thrust this obligation on family members upon his death.

The trial court found that the principal of the Trust included 50 head of cattle, and made Brent liable therefor. The trial court also found that the Trust included certain real property, and made Brent liable for the rental income on that property that should have been recovered. Precluding prejudgment interest damages is not a windfall to Brent that violates any public policy. It is merely a statement of intent by George to limit the liability of those family members designated as trustees to any benefits actually wrongfully obtained.

Kim and Michael would have this Court believe that this clause sets a cap on trustee damage exposure at $632,312 – the value of the Trust principal on the date of George's death (presumably plus any income received thereafter). This is the illogical interpretation, as it can lead to inconsistent results. For example, it is an arbitrary limitation not tied to any actual conduct giving rise to the damages. Under this reading, if a trustee were to abscond with all of the Trust property, he would be liable for only the value of that property and no more, but if he only removed half of the property, he can be liable for interest and consequential damages up to twice the benefit obtained.

The Trust does not use Kim and Michael's word "damages." It does not say "damages" are limited and confined to principal and income. The limitation is on liability, or "legal obligation." Black's Law Dictionary 914 (6th Ed. 1991). The Trust limits Brent's obligation to principal and income. The Trust precludes Brent from being

obligated for anything more. This is simply the application of the canon of construction latin maxim "*expressio unius est exclusio alterius*," (to express one thing is to exclude another). *Field v. Boyer Co.*, 952 P.3d 1078, 1086-87 (Utah 1998); *Mifflin v. Shiki*, 77 Utah 190, 195 (Utah 1930). Therefore, interest was not property included as an element recoverable against Brent, and should be removed from the judgment calculation.

Section 1008 of the Utah Trust Code does not apply, as it requires conduct "in bad faith or with reckless indifference...." Utah Code Ann. § 75-7-1008. Kim and Michael argue the assumption with no support whatsoever that Brent acted with reckless indifference. There was no finding to support this conclusion. Kim and Michael would require this Court to make a factual finding as to Brent's culpability on evidence not presented for consideration by this Court. Moreover, to ascribe reckless indifference to Brent's conduct would reverse the trial court's express factual finding that Brent's conduct was in "good faith," and merely a "mistake[]." R.537, ¶ 10. That finding was never presented for reversal by this Court.

B. Inability to Fix the Date and Amount of Loss.

Prejudgment interest is also improper on a separate ground as applied to the cattle damages. Kim and Michael offer no authorities to contradict Brent's articulation of the law of prejudgment interest. They offer no challenge to Brent's argument regarding the lack of definiteness as to the cattle damage value calculation. Absent any reason to deviate from prejudgment interest law, because these damages "cannot be calculated with mathematical accuracy... prejudgment interest is not allowed." *Cornia v. Wilcox*, 898 P.2d 1379, 1387 (1995).

Kim and Michael do challenge Brent's alternative basis for denying these damages – that the loss cannot be "fixed as of a particular time." *Id.* They recognize the trial court expressly found that there was no evidence of the date of cattle conversion. Appellant's [sic] Reply Brief, p.1. They ascribe error to that finding, but short of overturning this factual finding, the legal effect of this finding is an inability to fix the date of loss.

Kim and Michael identify three pieces of evidence they claim "establish[]" April 18, 1992 as the date of conversion. *Id.* These are not persuasive at all, let alone sufficient to overturn the trial court's factual finding as clearly erroneous.

First, failure to account for cattle on February 23, 2004 (*see* Ex. 1) does not "establish" that the date of conversion was April 18, 1992. It merely establishes a date of conversion prior to February 23, 2004.

Second, Brent's testimony that the Trust owned no cattle at the time of his father's death does not establish a date of conversion. Had this testimony been accepted by the trial court, it would have absolved Brent of all liability on the cattle, as they never would have come under his stewardship. However, it is not evidence of any date of conversion.

Finally, the May 8, 1995 Trustee's Allocation does not establish any date as the date of conversion, much less April 18, 1992. Ex. 15. Rather, it purports to identify the existence of cattle on that date, not the disappearance thereof.

All Kim and Michael's evidence establishes is that if there were any cattle in the Trust during Brent's administration, they were unaccounted for sometime between April 18, 1992 and February 23, 2004. The trial court found it persuasive that by including the cattle on the Trustee's Allocation when that was prepared on May 8, 1995, the cattle were

present at least as of that date, and the conversion occurred sometime thereafter. Kim and Michael offer no evidence to the contrary.

All Kim and Michael rely on to override Utah Supreme Court holdings on the availability and application of prejudgment interest are "equitable principles." Appellant's Reply Brief, p.10. While *Hughes v. Cafferty*, 2004 UT 22, 89 P.3d 148, does afford a trial court "discretion and latitude in fashioning equitable remedies" (*Id.* at ¶ 24), Kim and Michael misunderstand its application. It is a maxim of equity jurisprudence that "equity follows the law." *Smith v. Batchelor*, 832 P.2d 467, 471 (Utah 1992); *Martin v. Hickenlooper*, 59 P.2d 1139, 1153 (Utah 1936). "A Court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law...." *INS v. Pangilinan*, 486 U.S. 875, 893 (1988). When the Utah Supreme Court makes pronouncements on the conditions required to apply prejudgment interest the trial court cannot ignore these principles in the name of equitable jurisdiction or public policy. It was legal error for the trial court to award cattle prejudgment interest, and this Court should reverse that ruling.

II. PREJUDGMENT INTEREST IS PRECLUDED IN WHOLE OR IN PART IN THIS CASE.

Brent's statutory entitlement to attorneys' fees reimbursement stands. Section 75-7-1004 of the Utah Uniform Trust Code applies, and no law to the contrary would require the trial court to deny Brent his fees – which the trial court later ruled it had not intended to do. R.899.

Kim and Michael err in claiming the statute does not apply to Brent. First, the Utah Uniform Trust Code as adopted in 2004

> applies to... judicial proceedings concerning trusts commenced before July 1, 2004 unless the court finds that application of a particular provision of this chapter would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties...."

Utah Code Ann. § 75-7-1103(1)(c) (emphasis added). The Court made no findings to bar application of Section 75-7-1004 as adopted in 2004 to this proceeding.

Section 75-7-1103(3) does not change the analysis. It reads that "[a]n act done before July 1, 2004 is not affected by this chapter." The compensable act Brent undertook entitling him to recover fees was "defend[ing]... any proceeding in good faith, whether successful or not...." Utah Code Ann. § 75-7-1004(2). This defense occurred nearly entirely after July 1, 2004. Occurrence of the acts he was defending is not apposite. He is not seeking to recover fees for that conduct, but rather the good-faith defense of this proceeding.

Further, Kim and Michael take liberties with the applicable standard. They claim this statute "requires" that the trustee act "for the benefit of the trust" to recover fees. Appellant's Reply Brief, p.12. This language is not found in the statute, and Kim and Michael offer no authority for this supposed requirement. The standard is: did Brent defend this proceeding in good faith, whether successful or not. According to the trial court:

> ...given the Courts [sic] ruling, Brent Fisher prevailed on one issue and was successful in reducing the claims to less than ½ on the other issues. He clearly prevailed on the claim that he converted funds,

> his defense reduced the requested recovery on the cows by 2/3 and the recovery on the requested rent by over ½. Where claims are grossly overstated, it is reasonable that a defense be made.

R. 540, ¶ 17. This finding supports a ruling that Brent is entitled by statute to recover his attorneys' fees.

Kim and Michael hyperbolize when asserting that "Utah could stand alone" if it rules in Brent's favor. They cite a single case from Illinois for the proposition that a trustee should not defend these "grossly overstated" (R. 540, ¶ 17) claims with trust reimbursement. Appellant's Reply Brief, pp. 11-12. *Grate v. Grzetich*, 867 N.E.2d 577 (Ill. App. 2007) is not applicable to this Court's analysis. *Grate* involved a challenge to a partial fee award under a discretionary statute permitting reimbursement for expenses incurred "in the management and protection of trust assets." *Id.* at 579. Citing Illinois law, the appellate court ruled that the trustee "did not incur the attorney fees while protecting the trust's assets." *Id.* at 580. Therefore, the reimbursement statute did not reach to the trustee's defense.

In this case, the statute is clear – if the trustee defends any proceeding in good faith, whether successful or not, he is entitled to receive his necessary expenses, including reasonable attorneys' fees. Utah Code Ann. § 75-7-1004(2). If the legislature intended to limit recovery to cases where trust assets were being protected, the statute would not be worded so broad. Indeed, as intended by the legislature, the trustee can recover even if he does not prevail so long as the defense was made in good faith. Here, Brent prevailed on one claim, dramatically reduced the other claims, and the Court expressly

ruled that his defense was reasonable. It would be legal error to deny Brent his fee recovery.[1]

CONCLUSION

For the foregoing reasons, Brent respectfully requests that the Court *reverse* the trial court's conclusions regarding the application of prejudgment interest and the failure to award attorneys' fees to Brent.

DATED this 17th day of April, 2009.

KIRTON & McCONKIE

By _____
Benson L. Hathaway, Jr.
Thomas A. Mecham
Christopher S. Hill
Attorneys for Respondent, Appellee and Cross-Appellant Brent Fisher

---

[1] While Brent is not permitted to respond in this reply to matters Kim and Michael addressed in their reply on opening appeal issues, Brent does call the Court's attention to Kim and Michael's improper efforts to raise new issues on reply. On appeal, Kim and Michael did not designate as issues for review (i) whether the trial court improperly refused to address Brent's duties to account and produce documents, and (ii) challenging the trial court finding of Brent's good faith. On reply, Kim and Michael raise these new challenges for the first time (Appellant's Reply Brief, pp. 6-8), which is not permitted. *State v. Kruger*, 2000 UT 60, ¶¶ 20-21, 6 P.3d 1116. Rather than improperly argue these new matters on cross-appeal reply, Brent raises the issue for the Court to address if and how it deems appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17 day of April, 2009, I caused to be served two copies of the foregoing **REPLY BRIEF OF APPELLEE AND CROSS-APPPELLANT,** by the method indicated below, to the following:

Charles M. Bennett
BLACKBURN & STOLL LC
257 East 200 South, Suite 800
Salt Lake City, UT 84111-2048

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Susan Thacker
P.O. Box 281
Jensen, UT 84035

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Christine Powers

1135404 1