

1-7-2009

Carpenter v. Turrell Appellant's Reply Brief Dckt. 35576

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES C. CARPENTER,

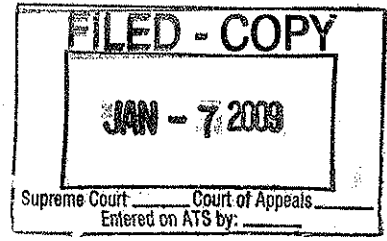
Respondent,

vs.

TIM TURRELL and PEGGY TURRELL,
husband and wife,

Appellants

) Supreme Court No. 35576
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APPELLANTS' REPLY BRIEF

Appeal from the District Court of the First Judicial District
of the State of Idaho in and for the County of Bonner

Honorable John T. Mitchell, presiding

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INTRODUCTION

Carpenter's Brief contains little of substance that need be addressed by the Turrells. However, Carpenter does make two misstatements about the evidence at trial, which the Turrells believe should be debunked at the outset of their Reply Brief.

First, Carpenter's claims that a "disinterested witness, David Boudier," corroborated his testimony about his supposed bailment contract with Herbert Turrell, thus making the application of Idaho's Dead Man's Statute irrelevant or the trial court's ruling on that issue harmless error. (Respondent's Brief ("RB"), p 8, 9). In truth, Mr. Boudier did not corroborate Carpenter's testimony on any point material to the existence of the contract he alleges. To the contrary, Mr. Boudier highlighted why the Dead Man's Statute should be applied in this case. Mr. Boudier did not testify as to who owned the buildings or support Carpenter's testimony that they had first tried to place the buildings on Carpenter's property before moving them to the Turrells' land. Instead, Mr. Boudier simply testified that he helped move the buildings from a location on Seltice Way to Herbert Turrell's property (Tr 89, L 8-15), never suggesting that they moved the buildings to the Turrell property because they could not get them on to Carpenter's. Most importantly, Mr. Boudier emphatically said that he was not privy to any conversation with Herbert Turrell about the buildings (Tr 91, L 23).

Nothing Mr. Boudier said "corroborated" Carpenter's version of his alleged arrangement with Herbert in the slightest. Instead, Mr. Boudier's testimony was entirely consistent with what all other facts suggested - that Herbert had simply purchased the buildings, by trade or cash, from

Carpenter and naturally would not have objected when they were moved to his property.¹

Carpenter's only evidence that he still owned the buildings, did not sell or trade them to Herbert, and was storing them for years on the Turrells' property by agreement with Herbert was his own testimony, testimony that Herbert could not rebut by the time Carpenter first voiced his claim in court.

Second, Carpenter's repeated suggestion that the trust was not valid or effective because it was not registered with the court in Kootenai County is dead wrong as a matter of law (RB, p. 5, 7, 11). The record is clear that all pertinent trust related documents, including a Statement of Registration, were prepared by legal counsel, executed by the Turrells, and recorded with the Recorder's Office in 1993 (Exhibits H – N). Regardless of what the practice may have been for registering such trusts in Kootenai County 15 years ago (an issue Carpenter ignores), the Turrells clearly relying on legal counsel believed they had complied with the law. Moreover, a failure to properly register the trust, whether technical or not, does not in any way affect the validity of the trust agreement or the trust itself (IC § 15-7-107).²

ARGUMENT

A. The Dead Man's Statute Should Apply. Carpenter's arguments as to why the IC § 9-202(3) is inapplicable are difficult to follow and do not begin to address any of the points

¹ Carpenter did nothing to document his continued ownership or to insure that the family of a man he knew was in failing health understood that the buildings were simply being stored until Carpenter could find a buyer. Instead, he left the buildings sit amid a field of other junk for almost 4 years without doing anything to confirm his ownership or arrangement with Herbert even after Herbert died. The facts probably create a presumption of ownership in Herbert (*Paine v. Strom*, 51 Idaho 532, 537 (1931)).

² Similarly, no Idaho law requires the registration to be amended any time a trustee is substituted as Carpenter repeatedly asserts.

raised by the Turrells in the opening argument of their Brief. Carpenter begins by making the fallacious assertion that Tim Turrell could not be a successor trustee since the trust was not registered. He then simply regurgitates the very legal conclusions made by the trial court about the need for a formal probate proceeding before § 9-202(3) comes into play without citing any authority or addressing any of the Turrells' arguments. Carpenter then follows with mythical claims about the corroborative value of Mr. Boudier's testimony and a thoroughly puzzling suggestion that the Turrells should have sued Herbert's estate or the trust for some unfathomable reason rather than defending themselves. Carpenter then loops back to his claims about the formalities of probating an estate and registering a trust, ending by returning to the argument Mr. Boudier's testimony independently established a gratuitous bailment, thus making any trial court error about the application of § 9-202(3) harmless.

Lost in Carpenter's words is any focus on the issues raised by the Turrells – is the application of the Dead Man's Statute limited to situations where a personal representative is formally appointed by a court or, as logic dictates, does its protection extend to the modern personal representative who is appointed upon death of the settlor to manage the affairs of the decedent who placed his estate in trust or who acts under the auspices of the Small Estates Administration Act? Nothing Carpenter relates in this brief addresses either side of that issue.

B. Tim Turrell Was A Personal Representative. Carpenter misinterprets the Turrells' Brief to create a reply to their argument that that Tim Turrell should be protected if § 9-202(3) extends to more than just formally appointed executors and administrators. Completely at odds with what the Turrells actually said, Carpenter asserts that the Turrells argue that the trial court

did not have any evidence “Tim had not been appointed by the Court in a formal probate proceeding” (RB, p. 10). Since that is not what the Turrells said, very little need be raised in reply.

The Turrells concede (and never claimed) that Tim was ever been formally appointed by a court to any position relative to his father’s estate. Instead, their argument as is clear in their Brief is that Tim Turrell acted in a representative capacity and should receive the same protection as if a formal probate proceeding existed. The Turrells contend that Tim Turrell was acting as the personal representative of his father’s estate and as successor trustee by the unchallenged agreement of his family and should therefore be protected under § 9-202(3). Alternatively, Tim Turrell was, as the trial court found, an agent of his mother, who was, as the trial court also found and as Herbert’s will and trust so speak, the first named personal representative and surviving trustee. As an agent of the person who was clearly the personal representative of Herbert’s estate, Tim Turrell should logically receive the same protection as his mother would have.³

As before, Carpenter did not give any reason or authority as to why the Turrells are wrong.

C. “Backdooring” the Dead Man’s Statute. Without citing a single apposite case or addressing even one point raised by the Turrells about the trial court’s conclusion a plaintiff can avoid § 9-202(3) by simply alleging he is suing the personal representative in his individual

³ An agent should receive the same protection under § 9-202(3) as his principal. Otherwise, anyone acting on behalf of, or at the direction of, a personal representative (including employees of a corporate personal representative) could be held liable in a case such as this for conversion when their principal could not.

capacity, Carpenter simply rehashes his arguments about formal probates, court appointments and legally incorrect assertion that Tim Turrell was required by Idaho law to register his appointment as successor trustee. Carpenter simply makes no effort to explain why someone who could not be permitted to testify because of the proscription of § 9-202(3) in an action against the personal representative of an estate would be entitled to testify as to an agreement he had with the decedent by simply claiming he was suing the personal representative in his individual capacity or by suing an agent of the representative or an heir of the estate to whom the property at issue (or its proceeds) was distributed.

D. Immediate Possession Is A Relevant (And Missing) Element. The fact that the case of *Luzar v. Western Surety Co.*, 107 Idaho 693, 696 (1984) did not involve a bailment contract, gratuitous or otherwise, is as meaningless as Carpenter's argument that the Turrells have not cited any authority "which would deny a bailor immediate possession of his property from a bailee in a gratuitous bailment situation" misses the mark.

The right to immediate possession is an essential element of the tort of conversion (*Forbush v. San Diego Fruit & Produce Co.*, 46 Idaho 231, 243 (1928); *Portland Seed Co. v. Clark*, 35 Idaho 44, 46 (1922), not just an element of cases involving collateral pledges. To hold otherwise would mean that a person who was not entitled to possession could nevertheless sue to recover possession or damages as to property he was not entitled to possess. Accordingly, to recover conversion damages against an agent of a principal who had possession of the property in issue a plaintiff must prove that he had a right to possession superior to that of the principal (Restatement of Torts 2nd, § 233(1)).

The issue here is also not whether a bailor in a gratuitous bailment relationship is entitled *as a general principal* to “immediate possession” from the bailee, but whether Carpenter under the facts of this case was entitled to possession of the buildings superior to that of the estate of Herbert Turrell at time they were sold by Tim Turrell. Obviously, the Turrells do not argue or suggest that as an abstract principal of law a bailor in a gratuitous bailment arrangement does not have an immediate right to secure possession of his property from the bailee. Of course, he does. That, however, does not answer the issue presented.

A fundamental prerequisite to a right to possession in a case such as this is ownership of the buildings. If Carpenter owned the buildings as he alleges, the personal property deed executed by the Turrells did not convey title to the trust (Exhibit M). Whether that deed could effectively convey after acquired property or not, the deed could not convey title to property neither Herbert nor his wife owned. Since Carpenter admits that Marian was not involved in his arrangement with Herbert (RB, p. 3, 14), Herbert’s estate was in possession of the buildings when they were sold. To get possession of the buildings, Carpenter would have had to file suit against the estate if a demand for their return had been made and rejected. To prove ownership, Carpenter would have to testify in that action as to the details of his arrangement with Herbert – that Herbert was holding the buildings at Carpenter’s pleasure and not as the owner. Since he was the only surviving witness to his alleged arrangement with Herbert, Carpenter’s testimony would unquestionably be barred by § 9-202(3). He thus could not prove the bailment contract and consequently his ownership of the buildings. Carpenter could not then establish his right to immediate possession of the buildings.

Whether or not Tim Turrell was a personal representative within the meaning of § 9-202(3), he was undeniably acting as an agent of that estate since there is no evidence of any kind that Tim Turrell benefited personally from the sale. He therefore cannot be held liable for selling something that Carpenter did not have a legal right to recover from Herbert's estate.

E. Breach of Contract and Negligence. Carpenter concedes in his Brief that the sole theory on which the trial court awarded judgment in his favor was conversion. The Turrells raised the issue because the decision of the trial court was unclear. With Carpenter's concession, the arguments made by the Turrells are moot.

F. The Judgment Against Mrs. Turrell Is Improper. Carpenter presents arguments that do not change the fact that the judgment as entered against Peggy Turrell is improper. Initially, the suggestion that "this Court must proceed on the assumption that the Defendant's Acts benefited the community and in turn Peggy Turrell" finds absolutely no support anywhere in the record. Tim Turrell testified that the proceeds of the sales were deposited in the trust banking account (Tr 141, L 8) a claim that was completely unchallenged by Carpenter at any relevant time.

More importantly, however, whether or not Tim Turrell committed a tort that benefited the community, the judgment as entered is against Mrs. Turrell individually. As such, Carpenter could execute on her separate property, not just her interest in community property owned with her husband. Carpenter does not address that fact, but by his arguments apparently concedes that he would not be entitled to do so because Peggy Turrell was admittedly not a joint tortfeasor.

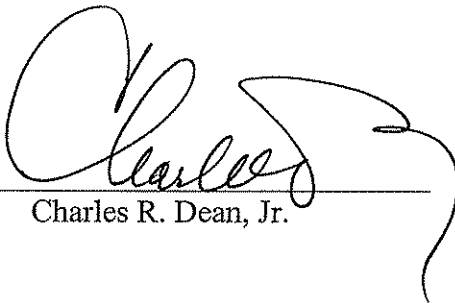
G. Carpenter Is Not Entitled To Fees On Appeal. Should this Court disagree with the arguments raised by the Turrells, Carpenter is not entitled to recover fees he incurred in defending the judgment entered by the trial court. Contrary to Carpenter's arguments, the Turrells have not challenged one factual finding of the trial court. The Turrells instead challenge the trial court's legal conclusions based on the facts as it found them and specifically argue in good faith for a logical extension of existing law.

In order to support an award of fees because a defense was frivolous or without foundation, a court must affirmatively find that the argument of counsel is "not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law (*Hanf v. Syringa Realty, Inc.*, 120 Idaho 364, 369-370 (1991)). In this case, no such showing can be (or has been) made.

Respectfully submitted

Dated: 1/5/09

Dean & Kolts

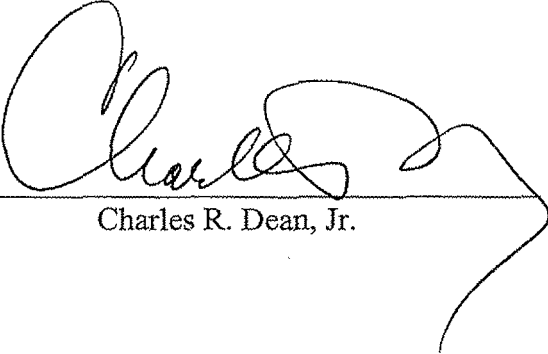
By 
Charles R. Dean, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of January 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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- U.S. MAIL
- FEDEX GROUND
- HAND DELIVERED
- OVERNIGHT MAIL
- FACSIMILE



Charles R. Dean, Jr.