1-23-2018

Hodge for and on behalf of Welch v. Waggoner Appellant's Brief Dckt. 45336

IN THE SUPREME COURT OF THE STATE OF IDAHO

JIM HODGE, as Personal Representative of the Estate of Paul Robert Welch, Interpleader-Defendant/ Cross Claimant/Appellant, v. KATHY WAGGONER and TERESA VITEK, Co-Personal Representatives of the Estate of BARBARA SUE CHITWOOD, deceased, Interpleader-Defendants/ Cross Defendants/Respondents.	Supreme Court Docket No. 45336-2017 Twin Falls County Case No. CV42-15-3687

APPELLANT'S BRIEF

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls

Honorable Randy J. Stoker, District Judge, Presiding

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I. STATEMENT OF CASE

A. NATURE OF THE CASE

This is an appeal of the trial court's decision in an interpleader action regarding the disposition funds from joint bank accounts. Jimmie Hodge, as Guardian, for and on behalf of Paul R. Welch ("Welch"), an incapacitated person, asserted that the funds were Welch's under Idaho law as Welch contributed all the funds that were in the subject accounts. The Estate of Barbara Sue Chitwood ("Chitwood Estate") asserted that Idaho Code section 15-2-803 (the "Slayer Statute") operated to prohibit Welch from having the money he contributed.

B. COURSE OF PROCEEDINGS

Farmers Bank initiated this interpleader suit, depositing money from two joint accounts with the district court. Welch and the Chitwood Estate filed answers. Welch filed his first *Motion for Summary Judgment*, which the trial court denied and then issued a stay on the proceedings pending the outcome of Welch's criminal case. The issue of ownership of two vehicles was joined into this action. After Welch was deemed incapacitated, Welch's guardian filed a second *Motion for Summary Judgment*. In its decision on Welch's second *Motion for Summary Judgment*, the trial court awarded the joint account funds to the Chitwood Estate and the vehicles to Welch. After the decision by the trial court and the Notice of Appeal was filed, Welch passed away. A Substitution of Party was filed on or about October 30, 2017, substituting in Jim Hodge, as Personal Representative of the Estate of Paul Robert Welch ("Welch Estate").

C. STATEMENT OF FACTS

Welch dated Chitwood and started living with her in 2005. R. 483. Welch had a checking account and a savings account with Farmers Bank (the "Accounts"). R. 41. In June 2013, Welch added Chitwood to his Accounts as "Joint-With Survivorship." R. 41, 49, 51. At that time, the Farmers Bank employee who assisted with this change on the Accounts recalled that Welch had difficulty speaking and communicating due to a recent stroke. R. 384. Even though Chitwood was on the Accounts, Welch contributed all of the funds to the Accounts. R. 483.[12]

Chitwood died in August 2015. R. 484. Shortly thereafter, the Co-Personal Representatives of the Chitwood Estate transferred the funds from the Accounts. R. 350–51. After Farmers Bank realized there was a dispute over the funds, it transferred the funds back to the Accounts, filed an interpleader action, and deposited the funds with the trial court. R. 11–15.

Additionally, the Chitwood Estate transferred two vehicles to itself following Chitwood's death. R. 310. Those vehicles had been titled in the names of Welch "or" Chitwood. R. 484. Welch contributed all funds to purchase these vehicles. *Id*. Welch filed a claim in the Chitwood

[1] The trial court made the finding that "Welch contributed all of the funds in the accounts from his separate property." R. 483. The trial court reiterated that it "also stands by its finding that Welch contributed 100% of the funds in the accounts." R. 492. This finding was made after substantial evidence was presented by way of affidavits, including bank statements. The citation to those can be found in the record on pages 311-316. The trial court's finding has not been challenged on appeal, and therefore, in the interest of brevity, the Welch Estate will not fully recite the facts that gave rise to the trial court's finding. The Welch Estate does note that this case was slated for a bench trial, and therefore the trial court was permitted to "arrive at the most probable inferences based upon the undisputed evidence properly before it…despite the possibility of conflicting inferences." *Intermountain Eye and Laser Centers, P.L.L.C. v. Miller*, 142 Idaho 218, 222, 127 P.3d 121, 125 (2005). Additionally, the appellate court does not disturb the trial court's findings of fact on appeal, unless those findings are clearly erroneous. *City of Meridian v. Petra Inc.*, 154 Idaho 425, 435, 299 P.3d 232, 242 (2013).

[2] During this period and until her death, Chitwood had and maintained her own separate bank accounts, into which she would deposit money that Welch would give her. R. 318–21.

Estate probate, and the probate court granted the Chitwood Estate's request to join the issue the ownership of those vehicles into this case. R. 310-311.

The Chitwood Estate answered the Interpleader Complaint, asserting the Slayer Statute generally. R. 21. Shortly thereafter, Welch filed for summary judgment, demonstrating therein that he contributed all monies to the Accounts, he was the owner of those funds pursuant to Idaho Code section 15-6-103(a), and regardless of whether he was determined to have caused Chitwood's death, the Slayer Statute did not operate to take his property from him. R. 35–39. The Chitwood Estate responded, asserting that subsection (g) of the Slayer Statute applied and that it was entitled to the funds in the Accounts. R. 237–40. The Chitwood Estate did not raise any other subsection of the Slayer Statute as a basis for it to be awarded the funds. *See* R. 232–46.

At the hearing on the motion for summary judgment, the trial court *sua sponte* raised subsection (c) of the Slayer Statute. Tr. P. 26, ll. 17-18. The trial court stated:

> Slayer shall be deemed to have predeceased the decedent as to property which would have passed from the decedent to the estate to the slayer under the statute of dissent and distribution or have been acquired by statutory right of surviving spouse, which doesn't apply here, or under any agreement made by the decedent. Isn't that exactly what we have here? We have a joint tenancy with right of survivorship, and we have a pay on death account for the checking account. Those are agreements, are they not?

Tr. p. 26, ll. 22-25, p. 27, ll. 1-7. Welch responded, "But subsection C contemplates a situation where the property would have passed from the decedent or his state to the slayer, and that is not what we have here. We have a situation where it's going in the other direction." Tr. p. 27, ll. 10-14. The trial court responded, "Okay. That's your interpretation. That's fine." Tr. p. 27, ll. 15-16.

The trial court denied summary judgment, specifically noting that it did not believe that subsection (g) was applicable, but that subsection (c) was. Tr. p. 51, ll. 3-4. The trial court also placed a stay on the case pending Welch's criminal case outcome, as Welch had asserted his Fifth Amendment rights when deposed. *See* tr. pp. 45–52.

After that hearing, Welch was deemed to be incapacitated and his guardian was substituted into this action. R. at 310. Also, the depositions of the Co-Personal Representatives of the Chitwood Estate had been conducted. *Id*. Therefore, it was ripe to raise a second motion for summary judgment.

In Welch's second *Motion for Summary Judgment*, Welch addressed the trial court's argument regarding subsection (c) of the Slayer Statute. R. 329–30. Welch addressed only the ownership of the money in the Accounts and did not address whether Welch could be considered a "slayer." Specifically, Welch stated, "The argument is, even if we assume that Welch qualifies as a 'slayer,' Chitwood's estate still would not be entitled to the funds from the account." R. 330, n. 2. Welch also argued that the vehicles were owned entirely by him. R. 330–32. In response, the Chitwood Estate argued that Welch was a "slayer" and that subsection (g) applied. R. 448-49, 458. The Chitwood Estate did not argue for subsection (c) of the Slayer Statute or any other subsection as a basis for its claim to the money. *See* R. at 444–59. The Chitwood Estate did not move for summary judgment. R. 7–9.

At the hearing, the trial court again raised a subsection of the Slayer Statute *sua sponte*. This time, it was subsection (h). Tr. p. 76, ll. 18–19. Welch noted that he was unprepared to discuss subsection (h) as it had not been raised prior to the hearing. Tr. p. 76, ll. 22-25, p. 77, ll.

1–6, p. 80, ll. 13–22. The trial court recognized that it should not "start interjecting [its] own theories in this case." Tr. p. 80, ll. 24–25, p. 81, l. 1.

Nonetheless, in its *Memorandum Opinion on Motion for Summary Judgment*, the trial court awarded the vehicles to Welch and the money from the accounts to the Chitwood Estate on the bases of subsections (c) and (h) of the Slayer Statute—the two subsections that the trial court raised *sua sponte*. R. 491–93. The trial court also made a finding that Welch killed Chitwood, even though no party had moved the trial court to make that determination. R. 484. The trial court ordered that the money from the Accounts be released from the court to the Chitwood Estate 43 days after judgment, and that the Chitwood Estate deliver the vehicles to Welch 43 days after judgment. R. 495. Welch filed a *Notice of Appeal*, and a *Motion to Stay Distribution of Interpleader Funds*. R. 9. In response, the Chitwood Estate filed a *Motion to Stay* on the vehicles. *Id*. The trial court granted both motions after the 43 days had passed, even though the Chitwood Estate had not filed an appeal. The Welch Estate applied to the Supreme Court to vacate the stay order as it pertained to the vehicles and the Supreme Court granted that application. *See Order Vacating Stay*, Ref. No. 17-413.

II. ISSUES ON APPEAL

A. Whether the trial court erred by making a finding of fact that was not raised as an issue in the motion for summary judgment.

B. Whether the Slayer Statute operates to take money owned by Welch and award it to the estate of the decedent.

C. Whether the Court erred by awarding the Account funds to the Chitwood Estate upon bases that were not raised by the Chitwood Estate.

III. STANDARD OF REVIEW

In an appeal from an order on summary judgment, the appellate court's "standard of review is the same as the standard used by the district court in passing upon a motion for summary judgment." *Harwood v. Talbert*, 136 Idaho 672, 677, 39 P.3d 612, 617 (2001). "Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court, read in a light most favorable to the non-moving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Id*.

IV. ARGUMENT

A. THE TRIAL COURT ERRED BY MAKING A FINDING OF FACT THAT WAS NOT RAISED IN A MOTION FOR SUMMARY JUDGMENT.

To support the trial court's decision to award of the Account funds to the Chitwood Estate, the non-moving party, pursuant to the Slayer Statute, the trial court was required to make a finding of fact that Welch had caused the death of Chitwood. The trial court made that finding of fact despite that issue not being raised for decision in a summary judgment motion.

Issues not raised in a motion for summary judgment may not be decided by the trial court in its ruling on summary judgment. *Id*. at 678, 39 P.3d at 618. The policy behind such a rule is simple and straightforward: the party against whom the finding of fact will be made "must be

given adequate advance notice and an opportunity to demonstrate" why that finding of fact should not be made. *Id*. (addressing the granting of summary judgment generally).

In this case, Welch filed a motion for summary judgment that the Slayer Statute did not apply because the funds were owned by Welch, not Chitwood, and the Slayer Statute did not operate to take Welch's property from him. Welch made no argument in his motion for summary judgment that the trial court should rule that Welch was not a slayer. In fact, Welch's main arguments were under the headings, "The money from the Accounts was and is owned by Welch," "Slayer Statute does not take Welch's money and give it to Chitwood," and "Welch has 100% ownership interest in the vehicles." R. 326–30. The argument regarding the Slayer Statute was that the Slayer Statute could not be interpreted to take property from an alleged slayer and give it to the decedent. Nowhere in Welch's brief did he raise the issue of whether or not he was a "slayer" as it is defined in the Slayer Statute.

Despite this fact, the trial court took it upon itself to make that factual finding. It stated that it "first…must address…whether Welch is a slayer," and noted that "no evidence to the contrary has been presented." R. 491. The trial court failed to recognize that the reason no evidence to the contrary had been presented was because that issue was not raised for decision in a motion for summary judgment. Welch was the only party moving for summary judgment and his argument did not address whether Welch was a slayer and therefore a factual determination on that issue was irrelevant for purposes of that motion.

Had the trial court advised the parties that it would be making a determination regarding the "slayer" status of Welch, then the trial court would have complied with *Harwood* above, and

Welch would have had an opportunity to address the issue. However, the trial court gave no prior warning and Welch was not given the opportunity to dispute the allegation. Therefore, the trial court erred and, at the very least, this Court should remand for the purposes of having the factual issue of whether Welch qualifies as a "slayer" addressed in a procedurally appropriate manner.

B. THE TRIAL COURT ERRED IN ITS INTERPRETATION AND LEGAL APPLICATION OF THE SLAYER STATUTE.

The trial court determined that subsections (c) and (h) of the Slayer Statute applied to preclude Welch from having his money. Putting aside the fact that neither one of these subsections were argued or asserted by the Chitwood Estate, and the fact that subsection (h) as a basis for recovery was raised by the trial court *sua sponte* at the hearing immediately preceding its decision, neither one of these subsections operate to take Welch's money from him. In fact, the trial court's interpretations of these two subsections are contrary to the explicit instruction of the Idaho Legislature.

"The language of a statute should be given its plain, usual and ordinary meaning." Idaho Code section 73-113.

1. The funds in the Accounts were Welch's Property.

To begin, Welch owned the funds in the Accounts. Idaho Code section 15-6-103(a) provides that a "joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit…" As the Court recognized, Welch contributed 100% of the funds of the subject Accounts. Therefore, Welch owned 100% of the money in the Accounts.

2. The Slayer Statute does not operate to take property from alleged slayer.

The purpose of the Slayer Statute is to prohibit slayers from receiving benefits from causing the death of another. Idaho Code section 15-2-803(b) provides that "[n]o slayer shall in any way acquire any property or receive any benefit as a result of the death of the decedent, but *such property shall pass* as provided in the sections following." Emphasis added. This language contemplates that certain property is affected by the death of an individual ("property shall pass"), and that the slayer should not benefit from the passing of that property. The specific subsections that follow go on to address and prohibit several instances in which property could pass to a slayer upon the death of the decedent. *See generally*, Idaho Code section 15-2-803(c)-(l).

The Slayer Statute does not operate to strip alleged slayers of their own property. Not only does the Slayer Statute address property that *passes* upon the death of the decedent, it also concludes: "This section shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of this state that no person shall be allowed to profit by his own wrong, wherever committed." Idaho Code section 15-2-803(n). The Supreme Court of Idaho acknowledged that "[t]he sole purpose of [the Slayer Statute] is to prevent a wrongdoer from profiting from his or her own wrong." *Wilkins v. Fireman's Fund Am. Life Ins. Co.*, 107 Idaho 1006, 1008, 695 P.2d 391, 393 (1985).

In sum, the Slayer Statute does not operate to take property *from* alleged slayers, but to prevent slayers from *receiving* property and benefits that arise from the fact the decedent died.

Despite these stated purposes, the trial court sought out and applied two subsections so that the effect would be to take Welch's property *from* him.

3. Subsection (c) does not apply to the Account Funds.

Subsection (c) of the Slayer Statute does not apply to take Welch's property and give it to the Chitwood Estate. That subsection states:

> The slayer shall be deemed to have predeceased the decedent as to property which would have passed from the decedent or his estate to the slayer under the statutes of descent and distribution or have been acquired by statutory right as surviving spouse or under any agreement made with the decedent.

Idaho Code section 152-803(c). The trial court focused on the last part of this subsection, "or under any agreement made with the decedent." In fact, the trial court specifically raised the argument and then held that the second half did "not require that any property pass from Chitwood to Welch. Instead, it deals with property 'acquired under agreement.'" R. 493. With that view, the trial court, without addressing Idaho Code section 15-6-103(a), declared that Welch "acquired" the Account funds "under his agreement with Chitwood." *Id*.

However, Welch could not acquire property that was already his. As noted above, under Idaho law, the contributor of funds in a joint account is the owner of those funds. "Acquire" is defined as "to come into possession or ownership of." http://www.dictionary.com/browse/acquire?s=t (accessed: January 22, 2018). As Welch owned the Account funds before Chitwood's death, he could not have "acquired" them when she died. Therefore, subsection (c) does not apply to the Accounts in this circumstance.

4. Subsection (h) does not apply to the Account funds.

Subsection (h) of the Slayer Statute does not apply to take Welch's property and give it to the Chitwood Estate. That subsection states:

> As to any contingent remainder or executory or other future interest held by the slayer, subject to become vested in him or increased in any way for him upon the condition of the death of the decedent:
> (1) If the interest would not have become vested or increased if he had predeceased the decedent, he shall be deemed to have so predeceased the decedent.
> (2) In any case the interest shall not be vested or increased during period of the life expectancy of the decedent.

Idaho Code section 15-2-803(h). In construing this subsection, the trial court argued and held that:

> Welch had a future interest in these accounts—his own right of survivorship. That interest would not have vested if he had predeceased Chitwood because in that event, her right of survivorship would have vested. Thus, Welch benefitted as a resulting of killing Chitwood, which is not allowed under the statute.

R. 491–92. While stating that Welch had a future interest in the Accounts may be arguably true, his interest was not at issue and the application of that future interest was erroneous.

The reference to future interest in the Slayer Statute does not include property already owned by the alleged slayer, but to property that would be obtained by the alleged slayer by way of the alleged slayer surviving the decedent. In *In re Trust Estate of Jamison*, 636 A.2d 1190 (Sup. Ct. Penn. 1994) this language was appropriately applied. In *Jamison*, a mother set up a trust that was to benefit her and one of her daughters and, upon the death of both, be distributed in shares whereby the slayer would receive 50%. *Id*. at 1191. The slayer killed the mother and the other beneficiary committed suicide. *Id*. The appellate court in that case applied language the

same as the Slayer Statute's subsection (h) and precluded the slayer from receiving the trust assets as the slayer's entitlement to them were conditioned on her surviving the two beneficiaries of the trust. *Id*. at 1194.

In this case, that language does not apply. Any future interest in the Accounts for Welch would have been for the funds that were owned by *Chitwood* in the Accounts. As each person on the account owns that which they contribute to the Accounts, under Idaho law, 0% of the Accounts were owned by Chitwood because she contributed 0% of the money in the Accounts. Therefore, Welch would have had a future interest of $0 in the Accounts.

In the trial court's interpretation, the trial court flipped the "future interest" that is the subject of the Slayer Statute. As noted in Idaho Code section 15-2-803(h), the subject is the future interest the slayer has, not the decedent. Despite this view, the trial court continuously looked at what interest Chitwood had. For example, the trial court stated, "[t]herefore, the Court finds that Chitwood had a property interest in these accounts which could trigger the slayer statute." R. 489. That interpretation flips the focus of future interests in the Slayer Statute.

Welch did not have a future interest in the money that was actually in the Accounts. Welch contributed 100% of the money to the Accounts, and therefore would not have a future interest in that money, via a right of survivorship, but a present interest in the money—because it was his money under Idaho law.

As the Account funds were Welch's money, Welch did not have a "future interest" in those funds that would have vested upon the death of Chitwood because the money was already

Welch's, and not Chitwood's, before Chitwood's death. Therefore, subsection (h) of the Slayer Statute cannot apply.

C. THE TRIAL COURT ERRED BY AWARDING THE ACCOUNT FUNDS TO THE CHITWOOD ESTATE PURSUANT TO BASES NOT RAISED OR ASSERTED BY THE CHITWOOD ESTATE.

The trial court awarded the Account Funds to the Chitwood Estate based upon subsections (c) and (g) of the Slayer Statute. However, the Chitwood Estate never sought recovery based upon those subsections.

A court cannot consider bases for recovery not raised in a party's pleadings in a summary judgment motion. *Edmondson v. Shearer Lumber Products*, 139 Idaho 172, 178, 75 P.3d 733, 740 (2003). In *Edmondson*, a terminated employee brought an action against his former employer for wrongful termination. *Id*. at 175, 75 P.3d at 736. On cross-motions for summary judgment, the trial court awarded summary judgment to former employer. *Id*. at 175–76, 75 P.3d at 736–35. The terminated employee appealed, arguing, in part, that the trial court erred by not considering his breach of implied-in-fact limitations claim. *Id*. at 178, 75 P.3d at 739. The Supreme Court of Idaho affirmed, holding that "[a] cause of action not raised in a party's pleadings may not be considered on summary judgment…." *Id*.

The trial court's imposition of bases for recovery that were not asserted by the Chitwood Estate was error. Not only did the Chitwood Estate fail to plead subsections (c) or (g) of the Slayer Statute as claims for relief, it failed to raise those in its argument on Welch's motion for summary judgment. It stands to reason that if a trial court cannot entertain unpled causes of

action or bases for relief on summary judgment, the trial court cannot raise causes of action or bases *sua sponte* in a motion for summary judgment.[3] Therefore, it was error for the trial court to raise subsections (c) and (g) and its ruling based upon those subsections should be vacated.

V. CONCLUSION

For the reasons set forth, above, the Welch Estate respectfully requests that this Court reverse the judgment of the trial court and enter an order for judgment to be entered in favor of the Welch Estate. At the very least and in the event this Court affirms the trial court's interpretation of the Slayer Statute, the Welch Estate respectfully requests that this Court remand for the purposes of determining whether Welch qualifies as a "slayer."

DATED this 23nd day of January, 2018.

WORST, FITZGERALD & STOVER, PLLC

By: _____
Kirk A. Melton
Attorneys for Appellant

[3] Admittedly, the Welch Estate has not found a case directly on point—where a trial court asserted causes of action or bases for relief that were not asserted by the non-moving party, and then ruled on those causes of action in favor of the non-moving party in a summary judgment proceeding. If no such case exists, the Welch Estate asserts that this Court should create a rule or extension of law that it is not appropriate for a trial court to advocate and assert bases for relief that are not asserted by the party-in-interest.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2018, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF to be served by the method indicated below, and addressed to the following:

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