2-21-2018

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

IN SUPREME COURT OF THE STATE OF IDAHO

JIM HODGE, as Personal Representative of the Estate of PAUL ROBERT WELCH, (deceased), Interpleader-Defendant/ Crossclaimant/Appellant, v. KATHY WAGGONER and TERESA VITEK, Co-Personal Representatives of the Estate of BARBARA SUE CHITWOOD, (deceased), Interpleader-Defendants/ Crossdefendants/Respondents.	Supreme Court Docket No. 45336-2017 Twin Falls County Case No. CV42-15-3687

RESPONDENTS' BRIEF

Appeal from the District Court of the Fifth Judicial District of the State of Idaho,

In and for the County of Twin Falls

The Honorable Randy J. Stoker, District Judge, Presiding

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A. NATURE OF THE CASE

This is an appeal of the trial court's decision and judgment regarding application of Idaho Code §15-2-803 (the "Slayer Statute") to joint bank accounts designated with right of survivorship deposited with the court by Farmers Bank. Jimmie Hodge as Guardian of Paul Welch ("Welch"), claimed the funds were solely deposited by Welch and remained his regardless of whether Welch murdered Barbara Sue Chitwood, the joint account holder. The Estate of Barbara Sue Chitwood ("Chitwood") claimed that Idaho Code §15-2-803 (the "Slayer Statute") was applicable and mandating ownership of the accounts to her Estate due to Welch murdering her and causing her wrongful death.

B. COURSE OF PROCEEDINGS

Farmers Bank deposited funds from two (2) joint accounts with right of survivorship with the district court in interpleader. Welch and Chitwood filed their Answers, neither of which demanded a jury trial. Welch filed an initial Motion for Summary Judgment, which the court decided under an application of the "Slayer Statute", Idaho Code §15-2-803. The court also stayed the proceedings pending the outcome of Welch's criminal case in which he had been indicted for the murder of Chitwood. Welch was later deemed incapacitated. A Guardian was appointed on his behalf. Welch's Guardian filed a second Motion for Summary Judgment, which was denied and the court ordered the joint accounts awarded to Chitwood. This appeal then ensued. Welch has since died and has Estate has been substituted in as the proper party.

C. STATEMENT OF FACTS

Welch and Chitwood were a couple, having begun living together in 2005. R.483. On June 11, 2013, Welch added Chitwood to checking and savings accounts at Farmers Bank, establishing

each individually as "joint account with right of survivorship". R.483. The checking account had previously been in the names of Welch and his wife, Lillian, who died in 2012. The savings account had been opened in July of 2012, initially listing Chitwood as POD. R.483. On June 11, 2013, both Welch and Chitwood signed signature cards for these joint accounts. R.483, 49, 51. Regarding ownership of account, other options available, but not chosen were: Individual; Joint-No Survivorship; Community Property Account-No Survivorship; and Trust. R.49, 51. Both Welch and Chitwood signed both signature cards for both accounts, explicitly choosing "Joint-With Survivorship". R.49, 51. Chitwood wrote checks on the checking account. R.205, 217.

Welch murdered Chitwood on August 21, 2015. R.420, 421, 484. After Chitwood's murder, the Co-Personal Representatives of the Chitwood Estate sought to transfer the funds for the accounts to the estate. R.350-351. Farmers Bank was alerted as to the accounts being in dispute and deposited the funds with the court, initiating the interpleader action. R.11-15. In its answer, Chitwood asserted the "Slayer Statue", Idaho Code §15-2-803, and claimed Welch was not entitled to the joint accounts. R.20-21. Welch filed an initial Motion for Summary Judgment, claiming he contributed all monies to the joint accounts and that the "Slayer Statute" did not apply. R.35-39. Chitwood responded in asserting broad application of the "Slayer Statute" and specifically applying Idaho Code §15-2-803(g). R.232-247.

At hearing, the court noted that Chitwood had an interest in the "account", and that the parties created a joint account. (Tr. p. 14, lines 9-10, 20-21). Significant argument and colloquy between court and counsel ensued discussing the application of the "Slayer Statute". (Tr. pp. 14-43). At the time of argument, Welch was awaiting trial on an indictment of first degree murder. (Tr. p. 49, lines 19-24, p. 50, lines 1-2). The court referenced application of the "Slayer Statute" and denied the Motion for Summary Judgment. (Tr. p. 51, lines 3-9). The case was then stayed

pending the outcome of Welch's criminal trial. Subsequent thereafter, Welch was found incapacitated and a Guardian appointed. R.310.

Welch filed another Motion for Summary Judgment. Welch, again, argued that Chitwood had no interest in the accounts since Welch contributed all of the funds and did not address whether Welch was a slayer. R.329-330. Chitwood responded that Welch murdered Chitwood and that the "Slayer Statute" was applicable to the accounts, under broad application. R.448-449. Chitwood argued the application of Idaho Code §15-2-803(b), which states:

> "No slayer shall, in any way, acquire any property or receive and benefit as a result of the death of the decedent."

This is a broad statement of the legislative intent under the "Slayer Statute". At hearing, the court noted that the "Slayer Statute" had to be considered, as raised by the defense. The court indicated that any part of the "Slayer Statute" is therefore applicable. (Tr. p. 65, lines 7-12). The court correctly identified the accounts as property and property rights attendant with the account. (Tr. p.74, lines 11-22). The court identified the "Slayer Statute" provisions to include any real or personal property and <u>any</u> rights therein. The court then indicated that the right of survivorship was a property interest of Chitwood in the accounts. (Tr. p. 75, lines 9-16).

The court also determined that Welch took Chitwood's life. (Tr. p. 78, lines 8-14). R.490-491. By so doing, Welch extinguished Chitwood's right of survivorship in the accounts. (Tr. p. 78, lines 15-16). Welch acknowledged at hearing that the matter was set for court trial and that the court was required to decide the case based upon the law. (Tr. p. 81, lines 1-6).

In its *Memorandum Opinion on Motion for Summary Judgment,* the court reviewed whether Chitwood had <u>any</u> interest in the bank accounts. The court determined that the joint accounts contained survivorship and "it is a basic rule of law that a right of survivorship is what distinguishes a joint tenancy from other property interests". R.486. The court noted that Welch

focused solely on ownership of the funds in the accounts, as deposited by Welch, and Chitwood's property interest in the accounts. R.487.

The court reviewed the meaning of "property" within the "Slayer Statute", Idaho Code §15-2-803(a)(3). The court noted that Chitwood had a "bundle of rights" in property. First, Chitwood could withdraw funds independent of Welch. Further, Chitwood's creditors could garnish the accounts. Secondly, Chitwood had the right of survivorship. R.487. The court went on to find that Welch intended Chitwood to have a survivorship interest in the funds. Having chosen between options at account formation, Welch and Chitwood chose Joint-With Survivorship. (R.488). On that basis, the court found a property interest of Chitwood in the accounts and that Idaho Code §§15-2-803(c) and (h) were applicable to the accounts, awarding same to Chitwood's Estate. R.491-493.

II. ISSUES ON APPEAL

A. THE TRIAL COURT WAS REQUIRED TO AND CORRECT IN FINDING WELCH A SLAYER.

B. THE TRIAL COURT CORRECTLY INTERPRETED AND APPLIED "THE SLAYER STATUTE".

C. THE TRIAL COURT CORRECTLY AWARDED THE JOINT ACCOUNTS TO CHITWOOD.

III. STANDARD OF REVIEW

In appeal from an order of summary judgment, the standard of review is the same as the standard of review used by the trial court in ruling on a motion for summary judgment.

> "All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can drawn from the record are to be drawn in favor of the non-moving party. Summary judgment is appropriate if the pleadings, depositions and admission on file, together with the affidavits, if any, show that there's no genuine issue as to any material fact and that the moving party is entitled to a judgment as matter of law." (*Estate of Becker vs. Callahan*, 140 Idaho 522, 96 P.3d 623 (2004)).

V. ARGUMENT

A. THE TRIAL COURT WAS REQUIRED TO AND CORRECT IN FINDING WELCH A SLAYER.

Welch contends that the trial court erred in making the finding that Welch caused the death of Chitwood. Welch erroneously claims that the issue of whether or not Welch was a slayer was not properly before the trial court. Welch makes the claim that in filing a motion for summary judgment, the "Slayer Statute" was not properly before the court. However, the court and the parties expansively discussed the "Slayer Statute" in the first motion for summary judgment.

Chitwood asserted application of the "Slayer Statute" in the answer filed at the commencement of the interpleader action. Welch claims that issues not raised in a motion for summary judgment may not be decided by the trial court in its ruling on summary judgment, citing *Harwood vs. Talbert*, 136 Idaho 672, 39 P.2d 617 (2001). However, *Harwood* actually supports the court's action in the instant matter. In *Harwood*, this court wrote:

> "In this case, partial summary judgment was granted to Harwood, the non-moving party. This court has determined "summary judgment may be rendered for any party, not just the moving party, on any or all the causes of action involved, under the Rule of Civil Procedure", thus allowing trial courts flexibility in determining the form of relief granted in summary judgment orders." (*Id* at 617, 677).
>
> "The district court may grant summary judgment to a non-moving party even if the party has not filed its own motion with the court. A motion for summary judgment allows the court to rule on the issues placed before it as a matter of law; the moving party runs the risk that the court will find against it, as in this case." (*Id* at 617, 677; see also *Brummett vs. Ediger*, 106, 724, 682 P.2d 1271 (1984)).

Welch maintains that, in his motion for summary judgment, the "Slayer Statute" did not apply because the funds were owned by Welch, not Chitwood. Welch points out that nowhere in its brief did he raise the issue whether or not he was a slayer as defined by the "Slayer Statute". In its brief, Welch then claims "despite this fact, the trial court took it upon itself to make that factual finding". (Appellant's Brief p.7). That is entirely wrong.

In its answer and both responses to the motions for summary judgment, Chitwood repeatedly indicated that the court was required to apply the "Slayer Statute" and ultimately determine if it was applicable in a finding that Welch was indeed the slayer of Chitwood.

Welch erroneously claims that the trial court failed to recognize that the reason no evidence to contradict the showing the evidence that Welch was a slayer was needed to be presented because it wasn't raised for decision. This is nonsense. The application of the "Slayer Statute" was the seminal issue as to the application of funds held in interpleader from the very outset of the case. Welch then claims that had the trial court advised the parties it would be making a determination regarding the slayer status of Welch, Welch would have had an opportunity to address the issue. Welch was well advised as to the application of the "Slayer Statute" at the outset of the case and upon the court's initial ruling in denying the initial motion for summary judgment.

Welch then requests that this Court remand the matter for purposes of having the factual issue of whether Welch qualifies as slayer addressed by the trial court in what Welch deems a "procedurally appropriate manner". (Appellant's Brief p.8). The procedurally appropriate manner claimed, is supposedly that Welch be given notice of its application, which has been repeatedly advanced by Chitwood from the outset. Further, Welch had the opportunity to rebut the evidence of Chitwood's murder, but chose not to. Additionally, if the court grants the *Motion to Augment Record* filed by Chitwood herein, Welch has already been adjudged causing the wrongful death of Chitwood in the collateral action, Twin Falls County Case No. CV42-15-3921.

The court had the authority to apply the "Slayer Statute" and rule upon the issues placed before it is a matter of law and determined the appropriate relief from the cause of action involved. Welch, as moving party, ran the risk that the court would apply the "Slayer Statute" and rule upon its effect upon the subject accounts. The trial court's ruling was entirely appropriate.

B. THE TRIAL COURT CORRECTLY INTERPRETED AND APPLIED "THE SLAYER STATUE".

Welch has steadfastly maintained that the "Slayer Statute" has no application. In its rulings denying both motions for summary judgment, and ultimately awarding the accounts to Chitwood, the trial court, as the trier of fact, correctly and expansively reviewed the application of the "Slayer Statute".

Courts have occasionally been required to raise and decide issues *sua sponte*, in the interest of justice. This has applied both at the trial and appellate levels. Professor Robert Martineau provided a metaphor for *sua sponte* appellate decision making as follows:

> "There's a general rule that appellate courts should not decide issues not raised by the parties. And then, there's the exception, known as the "gorilla rule", that is "unless they do". Because, the 800 pound gorilla may sit wherever it wants." (*R. Martineau, Considering New Issues on Appeal: the General Rule and the Gorilla Rule*, 40 Vanderbilt Law Review 1023 (1987)).

The United States Supreme Court has not adopted a general rule regarding *sua sponte* decision making on the appellate level. In *Singleton vs. Wulff*, 428 US 106, 121 (1976), the court wrote:

> "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeal, to be exercised on the facts of individual cases. We announce no general rule."

Notably, a landmark Supreme Court case, *Mapp vs Ohio*, 376 US 643 (1961), went well outside the bounds of general review whereas the Supreme Court overruled earlier precedent and applied the 4th Amendment Exclusionary Rule to the states without briefing or hearing arguments on that issue. That landmark case has expansive application under 4th Amendment Constitutional Law on a daily basis in the courts even today.

The above is referenced only to emphasize that courts, at both the trial court and appellate level have properly raised issues, *sua sponte*, when justice so requires. Therefore, the trial court

here, *sua sponte*, included a review of a section of an applicable statute. This is allowable. In Idaho, this court has ruled that at summary judgment stage, a cause of action not raised in party's pleadings may not be considered on summary judgment nor may it be considered for the first time on appeal. (*Edmonson vs. Shearer Lumber Products*, 139 Idaho 172, 75 P.3d 733 (2003)). However, a clear distinction here is not that the court, *sua sponte*, reviewed a cause of action not raised, but application of provisions within a statute raised by Chitwood in reference to the seminal issue of application of the "Slayer Statute".

In *Barlow's Inc. vs Bannock Cleaning, Corp.*, 103 Idaho 310, 647 P.2d 766 (1982), this court writes:

> "A motion for summary judgment urges the trial court hold that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. (IRCP 56(c)). However, if the court determines, after hearing, that no genuine issues of material fact exists, the court may enter judgment for the parties it deems entitled to prevail as a matter of law. Thus, in appropriate circumstances, the court is authorized to enter summary judgment in favor of non-moving parties." (*Ibid.* at 313, 769).

Additionally, this court has ruled that where a motion to dismiss is transformed into a motion for summary judgment, where the parties submitted affidavits considered by the district court, and although plaintiff did not move for summary judgment, the district court was nonetheless empowered to grant it. (*Just's, Inc. vs Arrington Construction Co., Inc.*, 99 Idaho 462, 583 P.2d 997 (1978)). Clearly, the trial court was authorized to rule as it did.

Here, Welch has been alerted to the existence of the application of the "Slayer Statute" from the answer filed by Chitwood at the onset of the case. R.20-23. In the court's first denial of Welch's motion for summary judgment, the "Slayer Statute's" application was addressed expansively. In *Mason vs. Tucker and Associates*, 125 Idaho 429, 871 P.2d 846 (Ct. App 1994), this court wrote:

> "The district court's error in granting summary judgment based upon rationales not raised by the motion does not necessarily require reversal. If the district court's order for summary judgment was correct, though based upon an inappropriate theory, this court will affirm upon the correct theory. (*Cites omitted*). Therefore, we will consider whether summary judgment dismissing plaintiff's claims should be affirmed on the statute of limitation grounds advanced by the defendants below."

On that basis, if the trial court correctly applied the "Slayer Statute", it should be affirmed. Though differing subsections of the slayer statue were applied, Welch had more than adequate notice to address all aspects of the "Slayer Statute". The trial court did not err in interpreting the "Slayer Statute". Idaho Rule of Civil Procedure 56 also indicates:

> "(c) Procedures.
> (3) Materials Not Cited. The court need consider only the cited materials, but it may consider other material in the record."

In addition, Idaho Rule of Civil Procedure 56(e). Failing to Properly Support or Address a Fact, indicates:

> "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may, :
> (4) issue any other appropriate order."

This explicitly allows the trial court to determine the facts and law supported by the evidence at summary judgment, and issue an appropriate order, which occurred here. Obviously, this required the trial court to determine the **"law"**, and interpret the "Slayer Statute" as it applied to the facts. The court determined that Welch was a slayer. The court applied the "Slayer Statute" to the accounts. The court determined whether or not Chitwood had **"any"** interest in the accounts and found that she did thereby awarding the accounts to her. This is required under the law.

Welch cites Idaho Code §73-113 in reference to statutory construction. The district court carefully and thoroughly reviewed the "Slayer Statute", both at oral argument and in its written decision in applying its plain, usual and ordinary meaning.

1) **The accounts, by Welch's own volition, were made joint accounts with right of survivorship, providing an interest to Chitwood.**

In its brief, Welch points out that the court recognized Welch contributed the funds to the joint accounts. However, Welch is not cognizant that Chitwood had an interest in the accounts when the election was made by Welch and jointly with Chitwood to designate the accounts ownership as joint-with survivorship. Welch, on his own volition, added Chitwood to the accounts and specifically chose the manner of the accounts as joint-with survivorship.

2) **The "Slayer Statute" applies to the accounts.**

Welch argues that the "Slayer Statute" is to prohibit slayers from receiving benefits from causing the death of another. Idaho Code §15-2-803(n) states:

> "This section shall not be considered penal in nature, **but shall be construed broadly in order effect the policy of this state that no person shall be allowed to profit by his own wrong, wherever committed**." (Emphasis added).

Under its plain and ordinary meaning, the application of the "Slayer Statute" is not intended to fine an individual for their crime or offense. However, broad construction is required to ensure that the broad public policy is applied that an individual should not profit by their wrongdoing. This is no transient notion but an ancient one. The genesis of the "Slayer Statute" can be traced back to the ancient maxim *ex turpi causa non oritu actio*:

> "Out of base [illegal or immoral], consideration, an action cannot arise." (*Black's Law Dictionary*, 5th Ed. West Publishing Co., 1979 p. 529)

> As Lord Mansfield wrote in *Holman vs. Johnson*, 1KOWP 341, 343 (1775):

> "If, from the plaintiff's own standing or otherwise, there the cause of action appears to rise *ex turpi causa*, or the transgression of a positive law of this country, the court says he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because they will lend their aide to such a plaintiff."

This maxim is implicitly applied in Idaho "Slayer Statue" to mandate that the broad public policy

is followed to ensure that a person does not profit by his own wrongdoing, wherever committed.

Under a broad analysis of the "Slayer Statute", it is undisputed that Welch, having previously been the account holder, elected to place Chitwood on the accounts as a joint owner with survivorship. The trial court then was required, having found that the statute applied because of the murder of Chitwood by Welch, in reviewing Idaho Code §15-2-803, to determine what the effect of the homicide allowed on the distribution of the accounts under a broad policy analysis. In applying Idaho Code §15-2-803(a)(2), the court correctly identified property as:

> "Any real and personal property and any right or interest therein". R.487. (Emphasis added).

The trial court then ruled that (h) and (c) of the "Slayer Statute" are applicable to the account funds. Subsection (h) applies 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." (Idaho Code §15-2-803(h)).

The statute continues:

> "(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." (*Ibid*).

A future interest "vests", when there is a person and being would have a right, defeasible or indefeasible, to the immediate possession of the property upon the ceasing of the immediate or precedent interest. (Idaho Code §55-105). R.491.

The trial court found that Welch had a future interest in these accounts-his own right of survivorship. If Chitwood survived Welch, her right of survivorship would have become "vested". On that basis, the court correctly found that Welch benefited as a result of murdering Chitwood, which is not allowed under the "Slayer Statute". R.491, 492. The trial court then goes on in writing:

> "Subsection (c) also applies. That section provides that a slayer "shall be deemed to have predeceased the decedent as to property which would...have been

> acquired...under any agreement made with the decedent. (Emphasis added). Again, "property" is defined very broadly as "any real or personal property" and "any right or interest therein". (Idaho Code §15-2-803(a)(3) (Emphasis added). R.492.

The trial court's analysis of the "Slayer Statute" application was correct.

Survivorship is the distinctive characteristic or major incident of an estate in joint tenancy. Indeed, at common law, survivorship was an inherent attribute of joint tenancies, and it existed without any mention in the deed of conveyance. The incident of survivorship grows out of the application of common law principles wholly independent of statute. Such right is viewed as existing in a joint tenancy. (48ACJS Joint Tenancy §3). The trial court realized the significance of the accounts themselves, "joint-with survivorship". The trial court seized upon the "with survivorship" meaning.

The trial court's finding, in applying the "Slayer Statute" in the instant case, has also been found to be appropriately applied in other jurisdictions. In *Sikora vs. Sikora*, 160 Montana 27, 499 P.2d 808 (1972), the court applied the same analysis to similar facts. In *Sikora*, the controlling issue raised in the appeal is whether the surviving widow, who was guilty of voluntary manslaughter of her husband, can share in the estate of her husband by the operation of the laws of joint tenancy, etc. The court writes:

> "The question of whether Mrs. Sikora may by right of survivorship take property owned jointly by her husband and herself has already been settled in Montana. This court held in *Estate of Cox*, 141 Montana 583, 380 P.2d 584 (1963), that a joint tenant, who had intentionally and wrongfully killed another joint tenant, was not entitled to the survivorship share in the property. As a remedy in this type of situation we held that constructive trust would be imposed on the property for the benefit of the heirs of the deceased joint tenant. We based this decision on the equitable principle that a wrongdoer may not benefit from his wrongful acts. (Section 49-109, R.C.M. 1947). This same principle holds true in this case. The laws governing joint tenancy will not be given a strict construction where the demands of justice and public policy demand another." (*Ibid.* at 30, 31, 810). (Emphasis added).

Here, the "Slayer Statute" adopts the same public policy. As joint tenants of the accounts

with right of survivorship, when Welch murdered Chitwood, he is not entitled to the survivorship share of the property or the ownership of the accounts. That is consistent with the "broad application required in Idaho's "Slayer Statute" to effect the public policy that:

> "...No person shall be allowed to profit by his own wrong, wherever committed." (Idaho Code §15-2-803(n)).

The trial court noted this policy in the instant case, writing:

> "When Welch killed Chitwood, he benefitted by ensuring that he would be the one to acquire the funds in the account. Therefore, he "acquired" those funds under his agreement with Chitwood. The slayer statute precludes that perverse result and rightly so." R.493.

On that basis, the trial court correctly applied "the Slayer Statute" as to the joint accounts with survivorship and upheld the ancient public policy emblazoned in "the Slayer Statute".

C. THE TRIAL COURT CORRECTLY AWARDED THE JOINT ACCOUNTS TO CHITWOOD.

Welch indicates that the trial court erred in awarding the accounts to Chitwood based upon subsection (c) and (g) of "the Slayer Statute".[1]

Chitwood had referenced subsection (c) and (g) as applicable. The trial court applied subsection (c) and (h). Welch claims that the trial court could not consider bases not raised by Chitwood. Welch argues that "a cause of action not raised in a party's pleadings may not be considered on summary judgment". (*Edmondson vs. Shearer Lumber Products*, 139 Idaho 172, 75 P.3d 733 (2003)). (Emphasis added). Chitwood raised "the Slayer Statute" in its pleadings (i.e. Answer). R.20-22.

The "cause of action" in this case is the disputed ownership of funds deposited with the trial court in interpleader. A "cause of action" is defined as:

> "A situation or state of facts which would entitle party to sustain action and give him right to seek a judicial remedy on his behalf." (*Black's Law Dictionary*, 5th Ed.

[1] Welch is mistaken in his brief, as the trial court applied subsection (c) and (h) of "the Slayer Statute".

West Publishing Co., 1979 p. 201).

Professor Silas A. Harris, University of Idaho, College of Law, provides an even better explanation of a "cause of action" as follows:

> "In every civil action the plaintiff is asking the sovereign power through its judicial machinery to come to his aid and require certain conduct of the defendant. This desired conduct is ordinarily designated as relief sought. This relief sought is given only to those in whom the law recognizes a certain right thereto-a remedial right. This remedial right is a creature of the law and arises out of some certain relation of the parties and their conduct with reference thereto. If this is the essence of an action, we should be able to find herein our cause of action; that is, those factors which give cause for the state to act." (Emphasis added). (Silas A. Harris, What is a cause of action? *California Law Review* Vol. 16 Issue 6 Article 1 p.461 (1928)).

In this matter, both parties were requesting the court, as the judicial machinery of the sovereign power, to grant relief sought in the disputed accounts placed with the court in the interpleader action. The trial court's application of subsection (c) and (h) of "the Slayer Statute" is not a new "cause of action" unpled. The "Slayer Statute" is a creature of the law in which both parties sought a remedial right. Ownership of the accounts was the cause of action. The trial court recognized its role in having the ability and duty to apply, what the court felt the appropriate subsections of "the Slayer Statute" were to determine ownership of the accounts. The trial court wrote in footnote 3 of its *Memorandum Opinion on Motion for Summary Judgment*, R.491, as follows:

> "During oral argument concerns were expressed that subsection (h) was never argued by the estate. While it is true that the estate did not specifically cite to subsection (h), the ultimate question to be resolved by the court is which party can have the property. The estate has clearly raised the slayer statute in response to Welch's claim to the property. The estate also clearly argued that Welch intended to give a joint tenancy and a right of survivorship of the funds to Chitwood. Considering the procedural posture of the case, the state of the record, and that this would eventually tried to this court, in the court's view it is obligated to evaluate any portion of the slayer statute that could apply to the arguments made by the estate."

As previously referenced, the court had that ability and properly performed its duty herein. It was not a separate cause of action but an appropriate action of the trial court to resolve the disputes between the parties in applying the appropriate statute.

V. CONCLUSION

For the reasons set forth hereinabove, Chitwood respectfully requests that the court affirm the Judgment of the trial court. Chitwood further requests that the court order attorneys' fees and costs incurred from the appeal ensuing herein.

RESPECTFULLY submitted this 20th day of February, 2018.

Williams, Meservy & Lothspeich, LLP

JOHN B. LOTHSPEICH
Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of February, 2018, I caused the foregoing document to be served upon the following persons in the manner indicated below:

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