3-13-2018

Hodge for and on behalf of Welch v. Waggoner Appellant's Reply 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 REPLY 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

ATTORNEY FOR APPELLANT
Kirk A. Melton (ISB #8707)
WORST, FITZGERALD & STOVER, PLLC
905 Shoshone Street North
P.O. Box 1428
Twin Falls, Idaho 83303-1428

ATTORNEY FOR RESPONDENT
John B. Lothspeich (ISB #4221)
WILLIAMS, MESERVY & LOTHSPEICH, PLLC
153 East Main Street
P.O. Box 168
Jerome, ID 83338

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I. INTRODUCTION

In the Appellant's Brief, Jim Hodge, as Personal Representative of the Estate of Paul Robert Welch ("Welch Estate"), argued that Idaho Code section 15-2-803 ("Slayer Statute") did not apply to the subject checking and savings accounts with Farmers Bank (the "Accounts") because Paul Robert Welch ("Welch") had contributed all monies to the Accounts and Idaho Code section 15-6-103 ("Joint Account Statute") provides that the contributor of monies to a joint account is the owner of the monies. The Welch Estate further argued that the district court erred by raising, *sua sponte*, two provisions of the Slayer Statute that were not raised by the Estate of Barbara Sue Chitwood ("Chitwood Estate"), and also making a finding of fact—that Welch was a "slayer"—that was not raised for decision in a motion for summary judgment.

In response, the Chitwood Estate argues principles of joint tenancy without ever mentioning the Joint Account Statute. Additionally, the Chitwood Estate does not explain how the district court can raise causes of action *sua sponte* and argues that the district court could decide whether Welch was a "slayer" on summary judgment because that was an issue in the case, even though it was not raised in a motion for summary judgment.

As a matter of clarification, the Chitwood Estate pointed out that the Welch Estate was mistaken in regards to what subsections of the Slayer Statute were applied by the district court. *See Respondent's Brief*, p. 13, n. 1. In Section C of its Appellant's Brief, the Welch Estate incorrectly stated that the "trial court awarded the Account Funds to the Chitwood Estate based upon subsections (c) and (g) of the Slayer Statute." Appellant's Brief, p. 13. As noted in the prior

Section B, the trial court found that subsections (c) and (h) applied. Subsection (g) was the only ground raised by the Chitwood Estate for obtaining the Account funds and the district court had rejected that basis.

II. ARGUMENT

A. THE TRIAL COURT ERRED BY MAKING A FINDING THAT WELCH WAS A "SLAYER" ON SUMMARY JUDGMENT WHEN THAT ISSUE WAS NOT RAISED FOR DECISION IN A MOTION.

As noted in the Appellant's Brief, the Welch Estate raised the issue of the legal applicability of the Slayer Statute in its *Motion for Summary Judgment.* The Welch Estate did not raise, nor argue, the factual dispute of whether Welch was or was not a "slayer." As the Court reviews the Welch Estate's argument, it is clear that the issue of whether or not Welch can be considered a "slayer" would be rendered moot should Welch's argument be correct.

The Chitwood Estate misstates the Welch Estate's position, stating, "Welch makes the claim that in filing a motion for summary judgment, the 'Slayer Statute' was not properly before the court." Respondent's Brief, p. 5. To be clear, it is the Welch Estate's position that a portion of the Slayer Statute was properly before the trial court on a motion for summary judgment because the Welch Estate was arguing that the Slayer Statute had no legal application. The Welch Estate continues to contend that the factual issue of whether Welch is a "slayer" was not before the trial court because no party raised that issue for determination in a motion for summary judgment.

Simply because an issue may ultimately be decided by a trial court does not mean that it is properly before the court on a motion for summary judgment. The Chitwood Estate argues that this factual issue was properly before the court because "[i]n 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." Respondent's Brief, p. 6. While evidence would certainly be appropriate on this issue at a trial, where all issues in a case are tried, evidence of this factual issue is only appropriate in a summary judgment proceeding if that factual issue is raised in a motion for summary judgment for determination. As the Welch Estate was the only party moving for summary judgment and did not raise that issue, it was not properly before the court for determination at that time.

As noted by the Welch Estate in its Appellant's Brief, issues not raised in a motion for summary judgment may not be decided by the trial court in its ruling on summary judgment. *Harwood v. Talbert*, 136 Idaho 672, 678, 39 P.3d 612, 618 (2001). 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).

The principle that trial courts should not consider issues not raised in movant's motion is not new. In *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 528, 887 P.2d 1034, 1035 (1994), an insured sued its insurer in negligence for failure to raise insurance coverage pursuant to the insured's request. The insurer moved for summary judgment, arguing that there was no

duty owed and that, if there was a duty, the insurer did not breach it. *Id.* Even though the district found that there were issues of fact regarding the duty and breach, it nonetheless granted summary judgment finding there was no issue of material fact regarding proximate causation. *Id.* at 528–29, 887 P.2d at 1035–36. On appeal, and in a section entitled, "In ruling on the motion for summary judgment, the district court should not have considered issues not raised in the movant's briefing," the Supreme Court of Idaho agreed with the insured that the "district court should not have granted summary judgment on the issue of proximate causation because the [insurer] never raised this issue in their motion." *Id.* at 530, 887 P. 2d at 1037. The Court noted that a party responding to a motion for summary judgment is only required to address "elements *challenged* by the moving party's motion" and since the issue of proximate causation was not raised, the insured "were not required to address this element of negligence even though they will ultimately have to prove it at trial." *Id.* (emphasis in original).

The circumstances in this case are similar, albeit more prejudicial. The issue of whether Welch was a "slayer" was not raised by the Welch Estate in its motion for summary judgment, but nonetheless, the trial court made that factual determination *against* the Welch Estate, the *moving party*. Despite the Chitwood Estate's argument that the issue of whether Welch was a "slayer" was for the trial court to determine, as noted in *Thomson*, above, only those elements challenged in a motion for summary judgment are appropriate for decision. As the element of "slayer" status was not raised in a motion, it was not appropriate to decide that issue as part of deciding that motion.

B. THE TRIAL COURT ERRED BY *SUA SPONTE* RAISING CAUSES OF ACTION NOT RAISED BY THE CHITWOOD ESTATE.

Additionally, the trial court raised two causes of action not raised by the Chitwood Estate, and then made its determination based upon those new causes of action. The Chitwood Estate argues that the subsections relied upon by the district court were not causes of action and that the trial court was obligated to raise those not raised by the Chitwood Estate. The Chitwood Estate is incorrect.

To begin, causes of action are distinctively identifiable by their elements.[1] For example, the cause of action "negligence" requires a showing of (1) a duty, (2) a breach, (3) causation, and (4) actual loss or damage. *Id.* at 529, 887 P.2d at 1036. At times, similar causes of action have overlapping elements, but not the exact same elements, such as the nine elements of fraud versus the elements of constructive fraud which include seven of the nine elements of fraud (excluding knowledge of falsity and intent to induce reliance) and an additional element (breach of duty arises from a relationship of trust and confidence). *Gray v. Tri-Way Const. Services, Inc.*, 147 Idaho 378, 386, 210 P.3d 63, 71 (2009).

It appears that for this reason, the Idaho Supreme Court has held that a party asserting statutory rights, where numerous bases may exist, must articulate which provision is being pursued. In *Taylor v. McNichols*, 149 Idaho 826, 846, 243 P.3d 642, 662 (2010), the Idaho Supreme Court noted that the Idaho Consumer Protection Act only permitted recovery for

[1] The Estate of Chitwood cites to Black's Law Dictionary to define "cause of action." Respondent's Brief, p. 13. In so doing, the Estate of Chitwood omits the relevant portion of the definition, which states, "[a] legal theory of a lawsuit." *Cause of Action*, Black's Law Dictionary (8th ed. 2005).

specific statutorily-enumerated acts and a claimant "failed to state a claim for which relief may be granted" under that Act by failing to specify the prohibited unfair or deceptive practice.

Similarly, each subsection of the Slayer Statute is a distinct cause of action. The Slayer Statue has specific statutorily-enumerated bases giving certain rights for recovery. Each one of those bases has its own elements to be proven, with some elements overlapping. Subsection (c)'s elements include:

(1) the person is a "slayer" (which includes its own elements), and
(2)(a) property is to pass from decedent to slayer under statues of descent and distribution; or
(b) property is acquired by slayer
(i) by statutory right as surviving spouse; or
(ii) under any agreement made with the decedent.

Subsection (h)'s elements include:

(1) the person is a "slayer" (which includes its own elements);
(2) the slayer holds a contingent remainder or future interest; and
(3) said contingent remainder or future interest becomes vested or increased upon the death of the decedent.

These two subsections have some overlapping elements, but other elements are distinct. Therefore, these two subsections are not the same cause of action, but two separate causes of actions with their own elements, much like fraud and constructive fraud are two distinct causes of action.

The Chitwood Estate cites to *Mason v. Tucker and Associates*, 125 Idaho 429, 871 P.2d 846 (Ct. App 1994) in support of its argument that "if the trial court correctly applied the 'Slayer Statute', it should be affirmed" regardless of whether the Chitwood Estate asserted the specific

Slayer Statute subsections that the trial court relied upon. *Mason* does not support that contention.

In *Mason*, the trial court granted summary judgment to a moving defendant on a basis that was not asserted by the defendant. *Id.* at 431, 871 P.2d at 848. On appeal, the Court of Appeals agreed "that the district court erred in granting summary judgment on bases not asserted in the defendants' motion." *Id.* However, the Court then recognized that if the district court's order was correct on another theory properly raised, then the Court would affirm on that theory. *Id.* at 432, 871 P.2d at 849. The Court specifically stated that it would "consider whether the summary judgment dismissing plaintiff's claims should be affirmed on the statute of limitations grounds advanced by the defendants below." *Id.* (emphasis added).

In regards to the *sua sponte* raising of causes of action, this case is not like *Mason*. In *Mason*, the issue was not whether the causes of action or defense was raised by a party in the case, but whether a basis supporting a summary judgment order was raised in the motion for summary judgment. In this case, the Chitwood Estate did not raise subsections (c) or (h) at all. As the *Mason* Court looked back to address the "grounds advanced by the defendants below," this Court cannot do the same in regards to subsections (c) or (h) because those were never raised as bases by the Chitwood Estate. Therefore, *Mason* does not apply to allow this Court to affirm the trial court's imposition of and ruling on subsections (c) and (h).

Finally, the Chitwood Estate argues in passing that it "had referenced subsection (c) and (g) as applicable." Respondent's Brief, p. 13. That assertion contains no citation to the record

and the Welch Estate is unaware of where the Chitwood Estate raised subsection (c) at the trial court level.

It is wholly improper for a trial court to interject new theories or causes of action into a case, even more improper to do so on a motion for summary judgment, and even more so decide the motion for summary judgment based upon the causes of action raised by the trial court.

C. THE TRIAL COURT ERRED IN ITS INTERPRETATION OF SUBSECTIONS (C) AND (H).

Even if it were permissible for the court to raise subsections (c) and (h) *sua sponte*, the trial court erred by applying those subsections. Even the Chitwood Estate, in its attempt to justify the trial court's decision, fails to identify what property interest or right in the Accounts "passed to," was "acquired by," or otherwise "vested" in Welch as a result of Chitwood's death.

By and large, the greatest omission in the Chitwood Estate's brief is any mentioning of the Joint Account Statute, which 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...." Despite that clear language identifying the parties' interests in the money, the Chitwood Estate asserts general principles of joint tenancy—which do not apply here because Welch contributed all monies in the Accounts[2] and that finding has not been challenged on appeal.

[2] *See also* R. 487 (district court holding that "presumptively, prior to Chitwood's death, the accounts belonged to Welch even though it was designated with the bank as a joint account.").

1. Subsection (c) does not apply.

The Chitwood Estate argues that subsection (c) of the Slayer Statute applies in this case. In support, the Chitwood Estate engages in an analysis of joint tenancy and raises *Sikora v. Sikora*, 499 P.2d 808 (Mont. 1972). Reliance on joint tenancy and *Sikora* is misplaced.

Subsection (c) provides that a "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."

First, and although the Accounts were designated "joint," the principles of joint tenancy are not applicable to the Accounts. As mentioned above, 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...." Therefore, principles on tenancy are irrelevant as Idaho Code has already designated how ownership of joint accounts is determined.

Nothing passed or would have passed pursuant to subsection (c). As the money was owned by Welch, it could not have "passed" to Welch or been "acquired" by him as one cannot "acquire" that which he already had.

Second, *Sikora* does not support the Chitwood Estate's claim to the Accounts. In *Sikora*, a wife killed her husband and thereafter sought to be named the sole heir to his estate. 499 P.2d at 809–10. On appeal, the "controlling issue" was whether the wife could "share in [husband's]

estate by operation of the laws of joint tenancy, intestate succession, and dower." *Id.* at 810. The Court in *Sikora*, as quoted by the Chitwood Estate, stated:

> 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 the Estate of Cox....that a joint tenant, who had intentionally and wrongfully killed another joint tenant, was not entitled to the survivorship share in the property.

Id. (emphasis added).

Sikora is inapplicable to the Accounts. As noted above, the money in the Accounts belonged to Welch solely. Therefore, Welch was not taking anything by a survivorship share as the money was already his. In fact, the *Sikora* Court limited the prohibition to the "survivorship share" and not the entire property. Presumptively, under that qualification, the wife would have retained her own interest in any jointly-owned property and been prohibited from acquiring husband's interest in the property. That is precisely how the Slayer Statute is supposed to operate.

In this case, however, the district court stripped Welch of his own money and gave it to the Chitwood Estate. There were no interests of survivorship that were triggered here. Had Chitwood owned any of the money in the Accounts pursuant to Idaho Code section 15-6-103(a) and Welch tried to acquire that money via his right of survivorship and Welch was, in fact, a "slayer," then *Sikora*, and the Slayer Statute would be applicable as to the amount that was owned by Chitwood prior to her death. No such monies are at issue in this case.

Subsection (c) does not apply here. That statute refers to property "passed" and "acquired" following the death of the decedent. No property was "passed" from Chitwood to

Welch or "acquired" by Welch by way of Chitwood's death because, pursuant to Idaho law, Welch owned all money in the Accounts and Chitwood owned none of the money.

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

Similarly, subsection (h) does not apply in this circumstance. In defending the trial court's decision, the Chitwood Estate misidentifies the appropriate parties to reach a conclusion that subsection (h) applies. 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). After quoting subsection (h), the Chitwood Estate cites to Idaho Code section 55-105, which states, "[a] future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property upon the ceasing of the immediate or precedent interest." Respondent's Brief, p. 11. Thereafter, the Chitwood Estate argues:

> 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 benefitted as a result of murdering Chitwood, which is not allowed under the "Slayer Statute".

Id. The Chitwood Estate's argument suffers from at least two errors.

First, Welch did not have a future interest in the money in the Accounts—he had a present vested interest. He may have had a right of survivorship as to that which Chitwood would have contributed, but since Chitwood did not contribute any of the funds, there was nothing for Welch to have a right of survivorship in. In fact, Welch's interest in the Accounts was that of the "immediate or precedent interest" recognized by Idaho Code section 55-105 because Welch contributed all funds to the Accounts.

Second, Chitwood's "right of survivorship" is irrelevant in an analysis of subsection (h). Subsection (h) addresses the alleged slayer's future interest, not the decedent's. This makes sense as the Slayer Statute is designed to prevent the slayer from acquiring property, not necessarily how the decedent could acquire property.

In sum, subsection (h) does not apply because it addresses future interests of property held by the slayer and Welch did not have a future interest in the Accounts because he had a present interest—that of sole ownership—in all of the funds in the Accounts.

III. CONCLUSION

The Slayer Statute does not operate to take property from the alleged slayer. The Chitwood Estate argues that Welch should be prohibited from "benefitting" from Chitwood's death. However, common sense indicates that Welch did not "benefit" because the money at issue was already his. To interpret the Slayer Statute in such a way to strip Welch of his own money would not only be an overly expansive use of the Slayer Statute, but go against the Slayer Statute's express provisions that it is not to be a penalty.

Therefore, 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.

DATED this 13th day of March, 2018.

WORST, FITZGERALD & STOVER, PLLC

By: _____
Kirk A. Melton
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 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:

John B. Lothspeich
WILLIAMS, MESERVY & LOTHSPEICH, LLP
P.O. Box 168
Jerome, ID 83338
Attorneys for Respondents

☒ U.S. Mail
☐ Overnight Mail
☐ Facsimile: *(208) 324-3135*
☒ Electronic Mail: *wmlcourt@wmlattys.com*

_____
Kirk A. Melton