2007

Brianne Cammack-White, Craig Cammack, Sharon Cammack v. Jason Harbaugh : Reply Brief

Utah Court of Appeals

Diana J. Huntsman; Huntsman Evans & Lofgran; Attorney for Respondent/Appellee.
Heather M. Jensen; Attorney for Petitioners/Appellants.

IN THE COURT OF APPEALS

STATE OF UTAH

BRIANNE CAMMACK-WHITE & CRIAG & SHARON CAMMACK	*	**REPLY BRIEF OF APPELLANTS**
Petitioners/ Appellants,	*	
vs.	*	
JASON HARBAUGH,	*	APP. CASE NO. 20070168
Respondent/ Appellee.	*	TRIAL CASE NO. 513145

Nature of the proceeding in Appellate Court:	Appeal
Name of Court below:	Third District Juvenile Court West Jordan State of Utah
Name of Judge Presiding:	Elizabeth A. Lindley

Diana J. Huntsman (6750)
Attorney for Respondent/Appellee
Huntsman Evans & Lofgran, PLLC
3995 S. 700 E., Ste 400
Salt Lake City, Utah 84107

Heather M. Jensen, P.C. (9775)
Attorney for Petitioners/Appellants
25 South 100 East, Suite J
Richfield, Utah 84701

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The Cammacks reaffirm all arguments as set forth in the Brief of Appellant, and furthermore, address the specifics of the Brief of Appellee as follows:

RESPONSE TO APPELLEE'S ARGUMENT A:

Mr. Harbaugh contends that the Cammack's issues should not be considered because they were not raised at the juvenile court level. Brief of Appellee, page 10. Mr. Harbaugh's contention misleads the court. All issues were adequately preserved at the lower level court, and citations to the record are given in Appellee's Brief, page 9-12.

Mr. Harbaugh argues that the Cammacks "have not alleged that a plain error was made by Judge Lindley" in relation to the issues. Brief of Appellee, page 11. He also alleges that the Cammacks have not established that error should have been obvious to the trial court, and that the Cammacks have not alleged that the error was harmful. *Id.* On the contrary, the Cammacks have stated, "the juvenile court made an error of law and must be reversed." Brief of Appellant, page 23. The Cammacks have also alleged that the trial court made a conclusion that the Cammack's Petition for Protective Order was "unsubstantiated," and that the trial court then made an award of attorney's fees as if it had exonerated Mr. Harbaugh. Brief of Appellee, page 23-7. The trial court did not understand the difference between "unsubstantiated" and "without merit." This

difference is stated in UTAH CODE ANN § 62A-4a-101, and should have been obvious to all involved. A petition cannot be both "unsubstantiated" ("unsupported") and also "without merit" (exoneration for the defendant). The Cammack's, being ordered to pay over $20,000 in attorney's fees and costs for a protective order action, have certainly established the harmfulness of the error.

RESPONSE TO APPELLEE ARGUMENT C:

Mr. Harbaugh claims that "Judge Lindley found the allegations of abuse in this case to be 'without merit' for purposes of imposing attorney's fees under Rule 37(d)." Brief of Appellee, page 12. Mr. Harbaugh completely ignores the facts that Judge Lindley, in one hand, states that the protective order was denied due to "insufficiency of the evidence presented," and in the other hand states that the fees are only allowed "if the Court finds the petition is without merit." Brief of Appellee, page 13, citing Judge Lindley's Findings and Order Regarding Order to Show Cause and Request for Attorney's Fees, Rec. 365-366. Mr. Harbaugh has not directed the Appellate Court to any instance where the juvenile court made a finding that the protective order was "without merit." The only findings that were made, were that the protective order was "unsubstantiated." Fees are not allowed for "unsubstantiated" protective orders. They are only allowed for "without merit" protective orders. The court's written findings were

conflicting and in error.

Mr. Harbaugh argues that this court should "assume" that Judge Lindley made a "without merit" finding because there is no transcript from the first hearing. Brief of Appellee, page 14. A transcript from the first hearing is not necessary. We have the minutes of the first hearing, which plainly state that "[t]he Court finds that there has not been sufficient evidence to prove that by a preponderance of the evidence the child has been abused or is in imminent threat of being abused." Rec. at 365. Why should the Appellate Court "assume" that the juvenile court would make a oral finding in direct contradiction of the Court Minutes? The Appellate Court should not make such an assumption, as suggested by Mr. Harbaugh. If the Appellate Court should assume anything, it should assume that findings were made that were consistent with the conclusion that the protective order was "unsubstantiated."

RESPONSE TO ARGUMENT D, E:

Mr. Harbaugh argues that the Cammacks have not "marshaled the evidence in support of Judge Lindleyi's finding that the allegations of abuse were without merit." Brief of Appellee, page 16. In response, the Cammacks state as follows:

First, Judge Lindley did not make a "finding" of fact that the allegations of abuse were "without merit." There is no place in the record that comes even close to such a

finding.

Second, Judge Lindley did not make a "conclusion of law" that the petition was "without merit." Judge Lindleyi did make a finding that there was "insufficient evidence," which is the equivalent of an "unsubstantiated" conclusion.

Third, even if there was a "conclusion of law" that the petition was without merit, the requirement of marshaling evidence in support of an appeal only applies to challenges of factual findings, not to conclusions of law. *Peirce v. Peirce*, 994 P.2d 193 (Utah 2000).[1]

Fourth, the Cammacks have adequately marshaled the evidence. The Cammacks have produced the Minutes from the October 20, 2006 hearing and have produced the transcript from the December 4, 2006 hearing.

Fifth, the court did indeed, after hearing the evidence, make a conclusion of law,

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[1]See also *Anderson v. Doms*, 1999 P.2d 392 (1999 UT App. 207), certiorari denied 994 P.2d 1271 (Appellant was relieved of his burden to marshal evidence by reason of inadequacy of trial court's findings, which were unsupported in record or did not support ultimate conclusion on issue of laches.); *Campbell v. Campbell*, 896 P.2d 635 (Utah 1995) (Appellants need not marshals all evidence supporting findings in action tried upon facts without jury or advisory jury in order to challenge findings on appeal, if they can demonstrate that findings as framed by court are legally insufficient.); *Woodward v. Fazzio* 823 P.2d 474 (Utah 1991) (Appellant need not go through the futile exercise of marshaling evidence when findings are so inadequate that they cannot be meaningfully challenged as factual determinations; appellant can simply argue the legal insufficiency of the findings as framed.)

that the Cammack Petition was "unsupported" or "unsubstantiated" (Rec. at 259), and the court later acknowledged and reaffirmed the same conclusion that the petition was "unsupported" or "unsubstantiated." See Rec. at 365-6. The Cammacks do not dispute this conclusion of law. Again, the marshaling requirement is not required when a legal conclusion is at issue. *Peirce*, 994 P.2d 193.

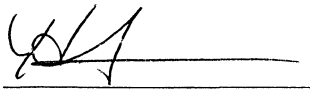
Despite that the Cammacks are not disputing any "findings of fact," (on the issue of whether the petition was "without merit") since there were no "findings of fact" made, Mr. Harbaugh has, on pages 18 - 23 of his brief, outlined "assertions, proffers of testimony, and arguments." Brief of Appellee at 18. This is problematic because, the information provided in these pages was not presented at the October 20, 2006 hearing, when the court determined the petition to be "unsupported." It was presented at the December 4, 2006 hearing, wherein the only issues were the Order to Show Cause and the Attorney's Fees. The court had already made the conclusion at the October 20, 2006 hearing that the petition was "unsupported" or "unsubstantiated." And the court, in its Findings and Order Regarding Order to Show Cause and Request for Attorney's Fees did not overturn its prior conclusion of "unsupported," but it reaffirmed the "unsubstantiated" determination by stating that the protective order was dismissed due to the "insufficiency of the evidence presented." Rec. at 365-6.

CONCLUSION

The juvenile court erred when it found that the petition was "unsupported," but then awarded attorney's fees and costs as if the petition had been "without merit." The juvenile court never exonerated Mr. Harbaugh. One of the most integral parts of the Cammack's argument, is the difference between these two terms, which is found in UTAH CODE ANN § 62A-4a-101. Nowhere in Mr. Harbaugh's brief, does he address this problem, and nowhere does he explain how the juvenile court made a conclusion that the petition was "unsupported," and then can make a harmonious decision that the petition is "without merit." The Cammacks respectfully plead that the Appellate Court reverse this erroneous ruling.

DATED this 16th day of January, 2008.

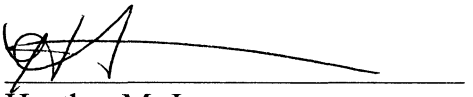
HEATHER M. JENSEN, P.C.



Heather M. Jensen
Attorney for Appellants/Petitioners

MAILING CERTIFICATE

I hereby certify that on the 16th day of January, 2008, I mailed a true and correct copy of the foregoing Reply Brief of Appellants to Diana J. Huntsman, 3995 S. 700 E., Ste. 400, Salt Lake City, Utah 84107.



Heather M. Jensen