

1986

Jeri H. Sartori Spears v. Henry Earl Sartori : Reply Brief

Utah Court of Appeals

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DOCKET NO. 860230-CA

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

JERI H. SARTORI SPEARS,	:	
Plaintiff-Respondent,	:	
vs.	:	No. 860230-CA
HENRY EARL SARTORI,	:	
Defendant-Appellant.	:	

REPLY BRIEF

On Appeal from the Third Judicial District Court of
Salt Lake County, State of Utah
Honorable John A. Rokich
District Court Judge

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NEW ISSUE PRESENTED IN RESPONDENT'S BRIEF

Whether or not it was necessary for defendant to object to the court's ruling that the defendant is liable for the children's dental expenses.

STATEMENT OF FACTS

1. At the outset of the hearing the court stated that:

"The Court is going to find as a matter of law that the medical expenses include all of the dental. The dental will be included. That's the way I interpret it. The Complaint evidently referred to dental and medical, and then the Decree said all of the medical."

"I'm of the position that when Mr. Hisitake drafted this Decree and said 'All Medicals,' I'm interpreting that to mean dental and all associated expenses, dental and medical expenses for the treatment of the children."

"That's how I interpret that, so I will sustain the Commissioner in that regard." (T-2)

2. During defendant's questioning of the defendant on direct examination, defendant tried to elicit testimony regarding defendant's agreement with plaintiff regarding the children's dental expenses. (T-69)

3. Plaintiff objected to defendant's questioning regarding the dental and medical expenses. (T-69)

4. Subsequent to plaintiff's objection, an exchange with the court took place in which defendant attempted to explain the necessity and importance of testimony regarding dental and medical expenses. (T-70, Lines 1-2, 9-11)

5. The court reiterated its earlier ruling and made clear its intention not to allow testimony regarding the dental, medical issue. (T-69, Lines 19-25; T-70, Lines 6-8; T-70, Lines 12-16)

SUMMARY OF ARGUMENTS

1. Rule 46 of the Utah Rules of Civil Procedure require that at the time of a court's ruling a party must either inform the court of the action that party desires the court to take, or object to the court's ruling stating the grounds for the objection. Defendant contends that as the court was aware of the action that defendant wished the court to take, it was not

necessary for defendant to state the action the defendant wanted the court to follow.

2. Despite the court's previous ruling that defendant was responsible for the children's dental and orthodontic expenses, defendant made persistent efforts to introduce testimony on that issue. Defendant contends that this persistent effort to introduce testimony precluded the Rule 46 requirement for objection.

3. The court's ruling combining medical and dental expenses effected the foundation of the defendant's claim and as such was a fundamental error. Defendant contends that defendant was not required to object to such a fundamental error.

ARGUMENT

I.

AS THE COURT WAS AWARE OF THE CLAIMS AND ALLEGATIONS OF THE DEFENDANT, IT WAS NOT NECESSARY FOR DEFENDANT TO OBJECT TO THE COURT'S CONTRARY RULING

Rule 46, Utah Rules of Civil Procedure, states that:

"Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

The Utah rule is fashioned after Rule 46 of the Federal Rules of Civil Procedure. In Monaghan v. Hill, 140 F.2d 31 (9th Cir. 1944), the opponents were attorneys who were appealing the trial court's award to them of what they deemed to be an insufficient attorney's fee. The appellants had not objected to the lower court's ruling on the amount of the attorney's fee. The respondent claimed the lack of objection barred the attorneys from pursuing the issue on appeal. In holding for the attorney's, the court considered the purpose of Rule 46:

"The purpose of informing the court of supposed error is to give it an opportunity to reconsider its ruling and to make any changes deemed advisable. . . , and the court knew from the petitions that petitioners thought they were entitled to more than the amount of the judgment he awarded."
Id. at 34.

Commenting on this ruling, 5A Moore's Federal Practice, § 46.02 states:

"The requirement of an objection is to be construed practically . . . , there is no need for formal objection where the court is fully aware that the party does not agree with his decision."
Id. at p. 1907.

In the instant case the court was aware of the defendant's allegations. (T-2, 68, 69, 70) The court knew that the defendant did not agree with its ruling. The court was aware that its ruling regarding the inclusion of the dental expenses in the defendant's medical obligation was contrary to

defendant's position and objection by defendant would not serve the purpose of Rule 46.

II.

AS DEFENDANT PERSISTENTLY ATTEMPTED TO INTRODUCE TESTIMONY REGARDING THE ISSUE OF DENTAL EXPENSES, DEFENDANT NEED NOT HAVE FORMALLY OBJECTED TO THE COURT'S RULING

In Ulm v. Moore-McCormack, 115 F.2d 492 (2th Cir. 1940), the plaintiff brought a personal injury action against the defendant. At trial defendant attempted on seven occasions to admit hospital records. The trial court excluded the evidence. The appeals court held that there was no waiver of objection stating that:

"Counsel's very persistence made clear the importance he attached to the rulings, and there was no permanent waiver of objections plaintiff now asserts. The taking of formal exceptions is no longer necessary." Federal Rule 46. Id. at 494.

In the instant case, as in Ulm, Supra, defendant persistently attempted to bring forth evidence regarding the dental obligation. (T-68, 69, 70) This persistent effort precludes the absence of a formal objection from being construed as a waiver of objection.

III.

DEFENDANT WAS NOT REQUIRED TO OBJECT TO THE COURT'S RULING AS SAID RULING WAS FUNDAMENTAL ERROR.

Commenting on Rule 46 of the Federal Rules of Civil Procedure:

". . . Points not raised and preserved below will not be considered on appeal unless they amount to 'fundamental error.'" 5A Moore's Federal Practice, § 46.02.

An accompanying footnote adds that:

"Now as formerly a fundamental error, that is one that goes to the foundation of the claim or part of it, and was not curable, may be corrected on appeal, notwithstanding that no objection was made below." Id. at 1906.

The issue of fundamental error was before the court in National Fire Insurance Company v. School District No. 68, 115 F.2d 232 (10th Cir. 1940). In that case the insurance company appealed a lower court ruling in which the plaintiff, a school district, was awarded, among other items of damage, interest. The fact that the insurance company had not objected to the court's ruling regarding interest did not bar it from presenting that issue on appeal:

"It is the general rule the questions not raised and properly preserved for review in the trial court will not be noticed on appeal . . . The error raised is fundamental in character. It goes to the foundation of the right of the District to recover an item of its claim . . . HENCE, WE ARE OF THE OPINION THAT IT IS PROPER TO NOTICE THE OBJECTION HERE." Supra, 234. (Emphasis added)

In the instant case defendant's major contention was that by prior agreement between parties and prior counsel, defendant was not to be responsible for any dental or orthodontic expenses of the parties' minor children. The court, based

upon its interpretation of pleadings in the file, made its ruling regarding these expenses. This ruling effected the heart and foundation of the defendant's case. As the court's ruling took away the foundation of defendant's claim, the court's ruling was a fundamental error. Defendant is not required to object to such a fundamental error.

CONCLUSION

Rule 46 exists to fulfill a particular purpose. That purpose is to inform the court of the reason why a party disagrees with the court's ruling. The rule enhances informed decisions by the trial court as the trial court may be persuaded by the objecting party that its proposed ruling was in error. There are three reasons why it was not necessary for the defendant to object to the court's ruling that defendant was liable for the parties' minor children's medical and dental expenses:

(1) the court was aware of the claims that the defendant was making;

(2) defendant persistently attempted to illicit evidence regarding the excluded evidence; and

(3) the court ruling effected the very foundation of the defendant's claim.

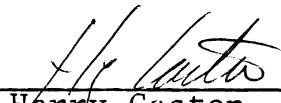
Striking out the foundation of defendant's claim was a fundamental error. Defendant need not have objected to such a fundamental error. For the above stated reasons, defendant's

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objections would not have served the purpose of Rule 46 and thus defendant should not be prejudiced by a lack of objection to the court's ruling.

DATED this 8th day of June, 1987.

McKAY, BURTON & THURMAN

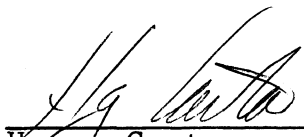
By 
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DELIVERY CERTIFICATE

I hereby certify that I caused to be delivered four (4) true and correct copies of the Defendant-Appellant's Reply Brief to the following:

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DATED this 8th day of June, 1987.


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