

2001

Phyllis Lang v. J. Robert Lang, Samuel J. Carter : Petition for Rehearing of Intervenor-Respondent

Utah Supreme Court

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KET NO. 10225 P

URT

of the
STATE OF UTAH

PHYLLIS LANG,
Plaintiff-Appellant,

vs.

J. ROBERT LANG,
Defendant,

SAMUEL J. CARTER,
Intervenor-Respondent.

Case
No.
10225

PETITION FOR REHEARING OF
INTERVENOR-RESPONDENT

Appeal from Order setting aside Garnishee Judgment
of the District Court of the Third Judicial District in and
for Salt Lake County

Hon. Ray Van Cott, Jr., Judge

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IN THE SUPREME COURT
of the
STATE OF UTAH

PHYLLIS LANG,

Plaintiff-Appellant,

vs.

J. ROBERT LANG,

Defendant,

SAMUEL J. CARTER,

Intervenor-Respondent.

} Case
No.
10225

PETITION FOR REHEARING OF
INTERVENOR-RESPONDENT

TO THE HONORABLE SUPREME COURT OF THE
STATE OF UTAH:

The intervenor-respondent (properly designated garnishee-respondent) above named respectfully petitions this Honorable Court for a rehearing of the appeal in the above entitled cause and in support of this petition represents to the Court as follows:

1. The garnishee-respondent reserves his argued position as to each of the points of appeal but in this petition addresses himself solely to those features of the

decision wherein it is believed by him that the Court may be convinced its result is based upon the application of incorrect legal principles.

2. Therefore this petition is devoted to convincing the Honorable Court that it has erred in its determination that the garnishee-respondent, an executor appointed by the Superior Court of Orange County, California, is subject to the orders and processes of courts of the State of Utah in so far as the assets of the California estate are concerned.

POINT 1

THE COURT DID NOT RULE ON THE MOTION OF THE GARNISHEE-RESPONDENT TO STRIKE CERTAIN IRRELEVANT AND EXTRANEIOUS MATTERS FROM THE RECORD ON APPEAL. THE GARNISHEE-RESPONDENT IS ENTITLED TO A RULING ON THIS MOTION.

Point I of the garnishee-respondent's chief brief on appeal reads as follows:

“The motion of garnishee-respondent Carter, Executor of the Estate of Robert Lang, deceased, filed in this Court and cause to strike from the record on appeal certain documents and papers should be granted.”

The Court's opinion entirely ignored garnishee-respondent's motion to strike certain irrelevant and extraneous

matters from the record on appeal. There is a definite implication in the Court's opinion that the Court, notwithstanding the pendency of this motion before it, considered statements of the plaintiff-appellant contained in these irrelevant and extraneous documents. Garnishee-respondent emphatically reasserts his argument in support of the striking of these documents from the record on appeal. He respectfully requests the Court not only to consider his motion but also to carefully read his argument in support thereof. Unless there is a definitive ruling on this motion it is most difficult to tell from the opinion whether it is based only upon the facts set forth in the legitimate and proper record on appeal or whether the Court considered matters set forth in these documents which have no relevancy to the legal issues involved in this case.

POINT II

THE COURT HAS WHOLLY IGNORED THE FACT THAT ALL LEGAL PROCESS IN THIS ACTION RAN AGAINST CARTER IN HIS CAPACITY AS CALIFORNIA EXECUTOR APPOINTED BY THE CALIFORNIA SUPERIOR COURT AND NOT AGAINST CARTER AS AN INDIVIDUAL.

The Court uses this language to justify its decision:

“The ends of justice are not best served by being unduly concerned with niceties as to names or titles. To accomplish its objectives it is often necessary to disregard technicalities of

nomenclature and look to substance and to the basic rights of the parties involved. In doing so here, it will be seen that the fundamental facts are that Mr. Carter, by whatever title he may be addressed, was here in the state of Utah; that he had in his possession here money which it had been judicially determined belonged to Robert Lang; and which had been ordered paid over to the latter."

The disregard of what the Court designated as "technicalities of nomenclature" has resulted not only in a miscarriage of justice in this particular case but has also set a precedent which will be productive of vicious litigation in the future. The garnishee-respondent (intervenor-respondent) repeats for the purpose of emphasis the statement contained in his original brief in this action:

"The copy of the writ of garnishment served on Carter (R-1) was addressed to him in his capacity as Executor. He answered the same in his capacity as 'Executor of the Estate of John Lang, deceased' (R-1), and by his answers he specifically declared that his possession of the sum of \$9,375.00 was in his role as Executor and not as an individual. The garnishee judgment (R-4) was against 'Samuel J. Carter as Executor of the Estate of John Lang, deceased'; it was not against Carter as an individual. The garnishee execution (R-5) based on said garnishee judgment was against Carter as Executor. The notice of appeal in this action (R-17) is designated the order appealed from as 'setting aside, annulling

and declaring void that certain garnishee judgment rendered in this action on the 28th day of February, 1964, *against Samuel J. Carter, Executor of the Estate of John Lang* and in favor of plaintiff above named' (R-17)." (Italics supplied). (Page 16).

The disregard by the Court of the actualities in this case and the attempt to serve the "ends of justice" denies all principles of the judicial process. It is simply the adoption of the assertion by plaintiff-appellant found at the top of page 12 of her brief to the effect that "the proceeding is not against Mr. Carter in his representative capacity as the Executor of the Estate of John Lang but rather in his capacity as a personal debtor to the defendant. In the subject case no attempt is being made to substitute Mr. Carter as a party for the deceased." This quoted assertion of the plaintiff-appellant is not supported by the record on appeal, and the Court in its opinion made itself a party to this misstatement of the plaintiff-appellant. The Court has literally taken an eraser in hand and erased from the writ of garnishment, the answer of the garnishee-appellant, the garnishee judgment and the garnishee execution the words "Samuel J. Carter as Executor of the Estate of John Lang, deceased" and substituted simply the name "Samuel J. Carter." By this action it has made Mr. Carter the holder and possessor of certain funds, and charges Mr. Carter individually and personally with a liability and responsibility which the record on appeal cannot and does not support.

The argument of the Court as found in the above quotation from its opinion will permit it in any case to recast the facts in order to achieve what it considers "the ends of justice." The effect of such judicial action will be to destroy all symmetry of the judicial process and render judicial precedents valueless in the determination of the rule of law governing a given situation. The observance by the Court of the actual facts of this case as disclosed by the record on appeal would not have permitted it to reverse the action of the Trial Court.

POINT III

THE DECISION IN THE INSTANT CASE IS DIAMETRICALLY OPPOSED TO THE DECISION IN WILCOX VS. DISTRICT COURT, AND HAS RESULTED IN PRODUCING CONFUSION AND UNCERTAINTY WHICH IN THE FUTURE WILL SPELL DIFFICULTIES FOR THE COURT ITSELF AND RENDER PROBATE ADMINISTRATION UNCERTAIN.

The Court attempts in Footnote 5 to distinguish Wilcox vs. District Court, 2 Utah (2d), 227, 272 Pac.(2d), 157, by asserting that in Wilcox there was "the attempt to have the Utah Court assert jurisdiction over a California appointed executrix who was in California so that the persons and the assets were in California." Chief Justice Henriod in his dissenting opinion in this case emphatically denies this interpretation of Wilcox. The garnishee-respondent supports the Chief Justice in

this assertion. The decision simply holds that "No action can be maintained against any administrator outside the state of his appointment upon a claim against the estate of decedent." In *Wilcox*, an attempt was made to cause the California executrix to be substituted as a defendant in a divorce action instituted in Utah, and to cause judgment to be entered against her as such for the amount found due for the unpaid support money. It was an active attempt to subject a California executrix to the processes of the Utah Court, just as in this case the plaintiff-appellant has attempted to subject the California executor to the garnishment processes of the Utah Court. If *Wilcox* remains the law in Utah, then the decision of the Court in the instant action is wrong. If the decision in the instant case is allowed to stand as the law of the State of Utah, then the Court should forthrightly and directly overrule *Wilcox* and announce that in Utah a foreign executor and administrator may be sued if the process server can catch him in the State of Utah. The rule of *Wilcox* and the rule announced in the instant case are in direct conflict. The Court must either denounce *Wilcox* as bad law or grant this petition for rehearing.

It is easy to imagine situations which are certain to arise if foreign executors and administrators can be sued in Utah. Let us take this example: "X" is appointed the executor of the estate of "Y", a California resident, by the Superior Court of Los Angeles County, California. There is an individual residing at St. George, Utah,

who asserts that "Y" was indebted to him at the time of his death. "X", while passing through St. George on his way to Zion Park, is served by the sheriff of Washington County with summons and complaint in an action instituted in the District Court of Washington County against "X" as executor by the alleged Utah creditor. The creditor had theretofore presented his claim to "X" as executor and it had been denied payment. The Superior Court, sitting in probate, had approved the action of the executor. The answer to the legal problem presented by this hypothetical set of facts if solved by the application of the rule announced in the instant case produces a situation which is intolerable. "X", as executor, is answerable to the Superior Court of California and yet he is compelled because of the rule announced in the instant case to employ counsel and defend himself as California executor in a Utah court on a claim which has been denied by a California court. Assume further that the Utah creditor secures a judgment of the Utah court against "X" as executor. Here we have a situation where the denial of the claim was approved by the California court sitting in probate but which is the subject of a Utah judgment. There is then and there injected into the situation the question as to whether or not the Utah judgment is entitled to the protection of the "full faith and credit" clause of the Federal Constitution (Article IV, Section I, Constitution of the United States of America). There is further serious constitutional question created by this situation as to whether or not the Utah judgment is void under the Fourteenth Amendment to

the Federal Constitution because of lack of due process of law. The rule as announced by the Court in the instant case has buried in it these fundamental problems of law under the Federal Constitution. (*McMaster v. Gould*, 239 N. Y. 606, 147 N.E. 214; *Helme v. Buckelew*, 229 N.Y. 363, 128 N.E. 216.)

The garnishee-respondent repeats his declaration contained in his original brief that Carter was before the District Court

“as Executor of the Lang Estate and not as an individual. He is before this Court in his role as executor and not as an individual. The plaintiff-appellant by her own action chose to bring Carter before the Court in his representative capacity, and not as an individual.” (Pages 16-17, Brief of Garnishee-Respondent.)

Further, the garnishee-respondent repeats and re-emphasizes this statement contained in his original Brief:

“The funds held by Carter as Executor until actually paid by him to the person entitled thereto remained part of the assets of the California estate and were under the jurisdiction and protection of the Orange County Superior Court. While Carter acknowledged in his garnishment answer that he was indebted as executor to J. Robert Lang, this acknowledgment was simply his statement of an indebtedness due from the California executor to Lang. Unless and until Carter as executor paid these funds to Lang they remained

part of the California estate. There had been no segregation of the same from the general assets of the estate. These funds did not arise from a distribution of the California estate to the devisees or legatees of John Lang, deceased. Nothing in the record on appeal denies that these funds, together with all other assets of the estate were within the State of California and not within the jurisdiction of the Utah courts. The consequence is that no judgment of a Utah court could affect this res which was beyond its jurisdiction." Pages 24-25, Brief of Garnishee-Respondent).

The questions under the Federal Constitution as demonstrated by the hypothetical case above set forth exist with respect to the judgment in favor of the plaintiff-appellant against Carter as California executor of the estate of John Lang, deceased. Carter as executor is answerable to the Superior Court of Orange County, California. Must the California Superior Court honor this judgment against Carter as executor under the "full faith and credit" clause of the federal Constitution, or is the judgment based on such a frail foundation that it is void under the Fourteenth Amendment and need not be recognized by the California court? It is repeated again that these funds were not funds distributed to J. Robert Lang under a decree of distribution of the California court. Carter's answer as garnishee declared that he held funds as executor of the estate of John Lang, deceased, in the Superior Court of California in and for the County of Orange, and that he had in his possession \$9,375.00 owing to defendant in settlement of an action

"brought against me as such executor by defendant and others." These funds were the fruit of litigation and were not funds given by the testator, John Lang, to his son. They remained part of the California assets until paid by Carter as executor to Lang. Regardless of where the funds were deposited Carter's primary responsibility to account for same was and is to the California court, and yet this Court in the instant case requires Carter as executor to pay them to the plaintiff-appellant. There is a direct conflict of jurisdiction, and the validity of this garnishee judgment is vitiated by the provisions of the Federal Constitution above cited.

POINT IV

THE DOCTRINE OF BRISTOL VS. BRENT (38 UTAH 58; 110 PAC. 356) WAS ENTIRELY IGNORED BY THE COURT IN ITS DECISION. THIS DOCTRINE SUSTAINS THE DISTRICT COURT IN HOLDING THE GARNISHEE JUDGMENT VOID.

Attention is invited to the quotation from the decision in Bristol vs. Brent found at pages 25 and 26 of the garnishee-respondents original brief. The Court, in order to sustain its ruling in this case, must overrule Bristol vs. Brent and not ignore it. J. Robert Lang could not have sued Carter as California executor of the estate of John Lang, deceased, in the District Court of Salt Lake County, Utah, if the Court considers that Wilcox vs. District Court still declares the law in Utah.

Since J. Robert Lang could not have sued Carter in the Utah court, the plaintiff-appellant cannot secure a garnishee judgment against Carter as executor in an action against said J. Robert Lang.

WHEREFORE, the garnishee-respondent respectfully prays the Honorable Court for relief as follows:

1. That the Honorable Court grant the garnishee-respondent a rehearing in the above entitled action, and that upon said rehearing the judgment of the District Court of Salt Lake County, Utah, in this action be affirmed;

2. That in the event the Honorable Court denies the garnishee-respondent a rehearing in this action that it particularly consider the points raised by the garnishee-respondent in this petition for rehearing with respect to the application of the "full faith and credit" clause of the Federal Constitution and the application of the Fourteenth Amendment of the Federal Constitution to the judgment against the garnishee-respondent in favor of the plaintiff-appellant, and that to evidence said consideration by the Court of the constitutional questions thus raised as a result of said consideration that it declare for the purpose of the record that it considered these Federal constitutional questions in denying this petition for rehearing, and that the Federal constitutional questions were the basis of its denial of this petition rather

than any rule of State law. And the garnishee-respondent will forever pray.

Respectfully submitted,

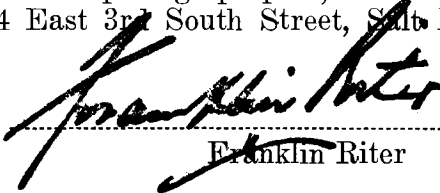
FRANKLIN RITER

FRED L. FINLINSON

*Attorneys for Garnishee-Respondent
(Intervenor-Respondent)*

CERTIFICATE OF SERVICE

I, FRANKLIN RITER, one of the attorneys for the Intervenor - Respondent (Garnishee - Respondent), hereby certify that on the ~~29th~~^{29th} day of July, 1965, three copies of the foregoing Petition for Rehearing were mailed by me to Dudley M. Amos, attorney for Plaintiff-Appellant; said copies of said Petition were inclosed in an envelope with postage prepaid, addressed to said Amos at 974 East 3rd South Street, Salt Lake City, Utah.



Franklin Riter