

2008

Johnson v. Johnson : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

INA MARIE JOHNSON,

Petitioner and Appellee,

vs.

NELDON PAUL JOHNSON,

Respondent and Appellant.

REPLY BRIEF OF APPELLANT

Case No. 20080274

District Ct. No. 004401468

APPELLANTS' REPLY BRIEF

Appeal from a final order Forth District Court, Utah County,

The Honorable Steven L. Hansen, Judge, Presiding.

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RESPONSE TO PETITIONER'S STATEMENT OF FACTS

The Court will note that Petitioner has resorted in a number of instances in her Statement of Facts to a presentation of argument and in other instances to the presentation of facts which are not supported by a citation to the record. Those failures to follow the rules will be apparent to the Court and hence Respondent will only take brief notice of the failure.

Respondent also generally responds to the Statement of Facts by pointing out to the Court that most of the facts stated by Petitioner have nothing to do with the issues on appeal and are merely an attempt to divert attention from the issues. The appeal concerns the question of whether the doctrine of estoppel enables Petitioner to rely on her own undisputed, unexplained, unexcused and knowing misrepresentation to the Court and the Respondent's explained acquiescence in that misrepresentation in overcoming an undisputed lack of subject matter jurisdiction. The conduct of the parties in regard to the unrelated matters repeatedly referred to by Petitioner has nothing to do with the issues on appeal.

In regard to paragraph 4 of the Statement of Facts wherein Petitioner states the following:

Alimony Under the Amended Decree

Based upon the amount of property accumulated by the parties and particularly, the size of the monthly payments the Respondent was to pay to the Petitioner, no alimony was awarded to the Petitioner (Paragraph 11, Amended Decree).

The foregoing is a misstatement of the Amended Decree. Paragraph 11 of the Amended Decree states as follows:

11. In consideration of the foregoing award, there should be no award of alimony to Petitioner.

Hence all of the provisions of the Amended Decree were consideration for no alimony being awarded to Petitioner.

RESPONDENT'S REBUTTAL ARGUMENT

I. Regarding *Caffall v. Caffall*, 5 Utah 2d 407, 410 (1956).

Petitioner misrepresents Respondent's position to the Court on *Caffall*. Petitioner states: "The Appellant does not dispute that *Caffall* is controlling but contends that the elements contained therein were not met in this case and that later case law adds additional elements to the test enunciated in *Caffall* (See Appellant's Brief at pp. 18-22)." App'ee Br. 17. [Emphasis added.] Respondent does dispute whether *Caffall* is controlling. There is a difference between acknowledging a particular case is still good law and acknowledging it is the controlling law on a particular case. See Respondent's Issue No. 8.:

8. ***Caffall* Distinguished:** Whether the trial court erred in finding *Caffall v. Caffall*, 5 Utah 2d 407, 410 (1956), 303 P.2d 286 is controlling authority for this case and whether this case is distinguishable from *Caffall*.

Issue 8. App'nt Br. 5.

See also:

Respondent acknowledges that *Caffall* is still good law.¹ However, its holding of allowing judicial estoppel to trump a defense of subject matter jurisdiction seems to be limited to just the facts of that case. While *Caffall*, itself a split decision, is still good law it has not been widely followed and was criticized by the Utah Court of Appeals in *Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335 (Utah App. 1991). Respondent knows of only two cases that have cited *Caffall* as authority, *Van Der Stappen*, supra, (following, but critical) and a Maryland state case, *Pryor v. Pryor*, 240 Md. 224 (1965), which cited *Caffall* as authority for something other than the issues present here.

App'nt Br. 37. [Footnote added.]

Petitioner's statement to the contrary, Respondent does dispute whether *Caffall* is controlling. *Caffall* is still good law. It stands for the proposition, among other things, that there must have been a marriage in order to vest the court with subject matter jurisdiction to adjudicate a divorce. Beyond that Respondent asserts his case is distinguished from *Caffall*. *Caffall* was a split decision on a narrow issue of law and has not been widely followed by Utah courts. Recent Utah cases cited in Respondent's Opening Brief state that a proponent of judicial estoppel must prove a fifth element of bad faith (in addition to the traditional four element) in order to prevail. *Orvis v. Johnson*, 2006 UT App 394, 146 P.3d 886 ; *Orvis v. Johnson*, 2008 UT 2, 177 P.3d 600. Other Utah cases cited by Respondent state knowledge or equal access to knowledge has long nullified judicial estoppel as a defense. *Tracy Loan & Trust Co. v. Openshaw Inv. Co. et al.*, 102 Utah 509 (1942), 132 P.2d 388. Other Utah cases state the long recognized

¹*Caffall* is still good law, meaning that the Utah Supreme Court has not expressly over-turned *Caffall*.

general principle that equity requires clean hands of the one seeking equitable relief such as in this case where Petitioner is seeking to enforce equitable estoppel. *Hone v. Hone*, 2004 UT App 241, 95 P.3d 1221, ¶ 7.

Petitioner misrepresents the facts from *Caffall* on one critical point stating, “The facts in that case [*Caffall*] established that the parties were married on July 22, 1936. At that time however, the parties acknowledged that the one or both of them had prior spouses from whom they had not been divorced.” App’ee Br. 17. [Emphasis added; Text added.] Petitioner gives no citation to *Caffall* in support of her contention that the parties (plural) acknowledged that one or both of them had prior spouses. Indeed there is none. Nowhere in *Caffall* does the Court say “the parties acknowledged that the one or both of them had prior spouses from whom they had not been divorced.” Id. [emphasis added.] That is the crux of the matter. There simply is nothing in *Caffall* to show that Mrs. Caffall knew that the parties were not free to marry or that she intentionally misled the court regarding the parties’ marital status. While it is true that Mrs. Caffall plead that the parties were married, there is nothing in the Court opinion stating that Mrs. Caffall knew that her allegation was false when she made it. Unlike *Caffall*, it is undisputed that the Petitioner herein knew the parties had never married and she misled the court when she pled (in what amounts to a verified complaint) that the parties were married on May 3, 1964 when they were not. R. at 0004.

The issue of what the parties knew and when they knew it was clearly raised by Respondent in the Court below. Yet Petitioner never filed an affidavit in opposition,

never disputed the facts asserted by Respondent and has never denied that she misled the Court. It is interesting to note, so far as Respondent recalls, the first time Petitioner acknowledged that the parties were never married was in her appeal brief in the Summary of the Argument. "Appellee acknowledges that the parties were never married." App'ee Br. 15. It has taken a long time to get her to say that.

Petitioner has never sought to explain why she pled there was a marriage when she knew there was not one, although she had ample opportunity to do so. Petitioner claims the same of Respondent (i.e., he cannot explain how or why he admitted a marriage when he knew they were never married. App'ee Br. 20 - 21. That is not true. Respondent filed an affidavit explaining why he admitted the marriage and why he conducted himself as though he was (or had been) married until about September 2008. He stated it was because he thought thirty-seven years made a common law marriage. He thought lack of a marriage ceremony made no difference to their legal position because they had lived together for more than thirty years. Not only is there nothing in the record to dispute that assertion, but it is a plausible, logical explanation. See ¶ 11 of Respondent's Affidavit. R. at 1911-1912 and App'nt Br. 11 - 12. Petitioner filed no similar affidavit and did not dispute Respondent's affidavit.

At a minimum the case at bar is a case of first impression. Unlike *Caffall*, where only Mr. Caffall knew of the impediment to marriage, both parties in the present case misled the trial court regarding their marital status, stating that they were married when they were not. Respondent asserts that the better reasoned argument is that there are

ample other Utah cases (both in and out of the context of a divorce case) that unequivocally hold that Petitioner cannot assert judicial estoppel as a defense to subject matter jurisdiction when Petitioner had equal or greater knowledge regarding the essential fact that the parties were never married and when she had unclean hands (misled the court) by misrepresenting the status of the parties marriage. See *Tracy Loan & Trust Co. v. Openshaw Inv. Co. et al.*, 102 Utah 509 (1942), 132 P.2d 388 and *Hone v. Hone*, 2004 UT App 241, 95 P.3d 1221, ¶ 7, respectively.

So, while *Caffall* is still good law, it decided a very narrow, fact specific, issue different than what is present here. *Caffall* is a case where only one party knew of the void marriage or the impediment to marriage, whereas in the present case both parties knew they were never married. There are other differences which are fully discussed in Respondent's Opening Brief and need not be repeated here. Finally, there are ample other Utah cases where the facts and issues are on point with the issues and facts in this case.

Petitioner also states of Respondent:

However, the Respondent cannot explain how or why, when confronted with the specific allegation in the Complaint that the parties were married on May 3, 1964, he not only admitted the allegation but made numerous representations relating thereto during the course of the divorce proceedings, including the Stipulation, Decree, Amended Findings, Amended Conclusions and Amended Decree, which he either signed or approved. Importantly, the Appellant did not counter the allegation of marriage in the Complaint with a response indicating that he agreed that the parties lived together as husband and wife from May 3, 1964, but he denied that there was a marriage ceremony on a specific date—May 3, 1964. Respondent is a bright and conniving man and it is obvious to all that there

can be no misunderstanding or confusion when he attested to this Court that there was a marriage ceremony conducted on a specific date and the parties lived as husband and wife thereafter.

App'ee Br. 20 - 21.

Respondent did explain why he filed an answer to Petitioner's complaint on August 17, 2000 admitting Paragraph 2 of Petitioner's complaint and why he continued with that position until September 2008. In pertinent part Respondent states as follows:

Shortly before Respondent filed his *Motion to Vacate Decree of Divorce and Amended Decree of Divorce and Motion to Dismiss for Want of Subject Matter Jurisdiction* (referred to herein as "Motion to Vacate") on September 18, 2007 he learned that it took more than a specific amount of time living together to create a valid common law marriage under Utah law. Once Respondent learned that time alone (of any length) does not create a valid marriage, he caused his Motion to Vacate to be filed. In support he filed an affidavit explaining, among other things, why he admitted the parties were married in his answer, and by extension, why he acted as though the parties had been married in the years prior to filing his Motion to Vacate. Respondent states:

Because we had lived as man and wife for more than thirty years when Ina filed for divorce I believed that the amount of time alone had established a common law marriage between us until I was recently informed otherwise. Consequently when I answered Ina's petition for divorce I did not think to plead that we were never married or that Ina was only 15 ½ years old when we began cohabiting. At the time I answered Ina's Petition because of the passage of time I believed those things made no difference.

See ¶ 11 of Respondent's Affidavit. R. at 1911-1912.

App'nt Br. 11 - 12.

II. Petitioner's repeated averments and sworn testimony stating that the parties were married when she had absolute knowledge that the parties were never married is fraud on the court, it

constitutes unclean hands on her part (as the one asking for equitable relief) and negates any possibility of reasonable reliance on Respondent's acquiescence or statements that the parties were married. Her knowledge (or equal access to knowledge) that the parties were never married bars the application of any form of estoppel.

Although Petitioner has never refuted the fact of the party's non-marriage, nor could she have, she has never admitted it until now. In so far as Respondent is aware it is the first time Petitioner has made that admission. She states: "Appellee acknowledges that the parties were never married." App'ee Br. 15. It is also important to note that even though she has been given ample opportunity to explain why she falsely pled that the parties were married she never has. She was challenged at the trial court level and in Petitioner's Opening Brief and she has never offered an explanation why she pled a marriage when she knew there was none. Petitioner has not been forthcoming with the Court. She now seeks to have the court ignore her fraud while simultaneously seeking to invoke judicial estoppel against Respondent for his acquiescence and misstatements. It is true that Respondent never took a position in the proceedings that the parties were not married until he filed his motion to vacate for want of subject matter jurisdiction, but he explained why he did not bring the party's non-marriage to the attention of the Court. That explanation stands unrefuted.

Petitioner's position is not the same as Mrs. Caffall in the *Caffall* case. In the present case both parties unquestionably knew that they were never married. However, only the Respondent sought to explain why he thought the parties non-marriage did not

make any difference. He believed that the parties thirty plus years of living together created a valid common law marriage. Once he knew that time alone was not sufficient to create a valid marriage he sought to set the record straight.

III. General Estoppel. Estoppel is a principle of equity requiring its advocate to come to court with clean hands. Petitioner hands are not clean.

Petitioner argues that principles of general estoppel compel this Court to ignore her fraud and affirm the ruling below. Petitioner makes several points regarding the present case, *Caffall v. Caffall*, 5 Utah 2d 407, 410 (1956) and *Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335, 1338 (Utah App. 1991) in furtherance of her argument. (1) First, Petitioner states that the cases of *Caffall* and *Van Der Stappen* are directly on point. App'ee Br. 32. (2) Second, Petitioner states the Court in *Van Der Stappen* "explicitly noted that both the parties in *Caffall* knew that the marriage was void because both of them have have [sic] had prior spouses." App'ee Br. 33. (3) Third, Petitioner makes the point that neither *Caffall* or *Van Der Stappen* required that the party seeking the application of estoppel not know about the underlying flaw in the marriage. App'ee Br. 33. (4) Finally Petitioner states: "The Appellant, as with the cited cases, is attempting to set aside the Amended Decree to avoid the obligations to which he stipulated and to which he has been unable to escape by the use of every artifice one could design." Each point will be briefly discussed.

1. Neither *Caffall* or *Van Der Stappen* are directly on point.

Petitioner states “The cases are directly on point.”² App’ee Br. 32. The cases of *Caffall* and *Van Der Stappen* both have facts and issues in common with the present case, but neither are directly on point. In *Caffall* only the husband was charged with knowledge of the impediment to the parties’ marriage and with perpetrating a fraud on the court. App’nt Br. 38. In *Van Der Stappen*, to the extent that *Caffall* was controlling, the issue turned on when the appellant knew of the impediment to the marriage and further held that the only evidence in the record on the issue of who knew what and when they knew it was appellant’s undisputed affidavit. Id. at 1339. *Van Der Stappen* also importantly reminds us that the statements of counsel and negative inferences are not evidence. Id. at 1339.

In the present case Respondent is not arguing that the parties had a void marriage, but rather that parties were never married. Both *Caffall* and *Van Der Stappen* stand for the proposition that a Court needs subject matter jurisdiction to adjudicate a case before it and in the case of a divorce proceeding that means there needs to have been a marriage to

² The cases are directly on point. In both, the trial and appellate courts determined that the marriage of the parties was void because the parties were never legally married. Although in this case the Appellant is arguing that the voidness of marriage comes from the lack of a ceremony, the same argument of a void marriage and a lack of subject matter jurisdiction is made. The court in *Van Der Stappen* reversed the trial court’s upholding of the marriage based upon the factual determination that the moving party did not discover the fact that the other party was still married until after the decree was entered. However, the court sustained and upheld the holding of *Caffall*, that if the defrauding party knows of the defect, estoppel applies. If a party acquiesces to a divorce despite knowing that there was no valid marriage, that person has perpetrated a fraud upon the trial court.

confer subject matter jurisdiction.

Respondent has argued and would argue, if it were important to do so, that any marriage ceremony in 1964 would have been void because Petitioner was 15 ½ when the parties began cohabiting, because there was no parental or judicial permission (which would have been required at the time) and because there was never a marriage licence issued. Voidness is not the issue since there never was a marriage.

2. Contrary to Petitioner's assertion both parties in *Caffall* did not know the marriage was void.

Petitioner misstates the holding in *Van Der Stappen*. Petitioner states:

Importantly, the Court in *Van Der Stappen v. Van Der Stappen*, **explicitly noted that both the parties in *Caffall* knew that the marriage was void** because both of them have have [sic] had prior spouses. There was absolutely no requirement in either case that the party seeking the application of estoppel not know about the underlying flaw in the marriage.

App'ee Br. 33.

That statement does not include a citation to the case. Nowhere in *Van Der Stappen* is it "explicitly noted [or stated in any fashion] that **both** the parties in *Caffall* knew the marriage was void." Id. [Text and emphasis added.] What the parties knew and when they knew it is the crux of the matter. In both cases (*Caffall* and *Van Der Stappen*) the court stated Mr. Caffall was the only party charged with knowing that there was an impediment to the marriage. Neither court (*Caffall* or *Van Der Stappen*) found, stated, concluded or implied that Mrs. Caffall knew there was an impediment to the marriage when she filed for divorce.

3. Neither *Caffall* or *Van Der Stappen* dealt with fraud by one seeking to assert judicial estoppel as a defense to subject matter jurisdiction.

Petitioner asserts that neither *Caffall* nor *Van Der Stappen* required that the party seeking the application of estoppel not know about the underlying flaw in the marriage. Neither case dealt with that issue. There is not even a hint that Mrs. Caffall knew her marriage was void when she filed her complaint. Mrs. Van Der Stappen claimed to have told her husband shortly after their marriage that there was a problem. However, Mrs. Van Der Stappen did not offer an affidavit in support of her version of the facts nor offer any other form of proof except her assertions of counsel. Despite the lack of admitted evidence, the trial court sided with Mrs Van Der Stappen and found that Mr. Van Der Stappen become aware of the impediment to the marriage shortly after the parties' June 1984 wedding. *Van Der Stappen* at 1337. Based on that finding, the trial court found no grounds upon which to set aside the decree. On appeal the *Van Der Stappen* court reversed the trial court and stated the following:

The trial court accepted memoranda from the parties on the issue of whether the divorce decree should be set aside. The memorandum submitted by appellee's counsel indicated that appellee had informed appellant of the problem with her nonfinal previous divorce shortly after her wedding to appellant. However, no testimony to this effect was ever given by appellee. Indeed, because no live testimony was taken on the motion, the only evidence of record as to when appellant became aware of the impediment to the parties' marriage is appellant's affidavit.

* * * *

To the extent that *Caffall* controls here, the trial court's refusal to set aside the divorce decree depends upon its finding that appellant learned of the nonfinal nature of appellee's prior divorce shortly after the parties' wedding, and before their divorce. This finding, however, cannot stand. The only

record evidence on this issue of fact is appellant's affidavit, stating that he did not learn of the impediment to the marriage until after the divorce decree ending that marriage was entered. No evidence to the contrary appears in the record.[fn6]

The representation of appellee's counsel that appellee had a different version of the facts is not sufficient to support the trial court's finding. At best, that representation is nothing more than unsworn hearsay and argument of counsel. While it may appear reasonable to suspect that appellant, wishing to avoid his alimony obligation under the divorce decree, is motivated to misrepresent when he learned of the impediment to the marriage, such suspicion also cannot be considered evidence. We are faced with a situation in which there is simply no evidence that can be marshaled to support the trial court's finding.[fn7]

Given the lack of any actual testimony or other properly admitted evidence to contest appellant's affidavit, we see no basis upon which the trial court could disbelieve or disregard the affidavit. Therefore, the finding cannot stand.

Van Der Stappen at 1337, 1339.

4. Respondent is attempting to set aside the Decree and Amended Decree because there was no subject matter jurisdiction to grant them.

It is true Respondent and Petitioner have always known that there was never a marriage ceremony. Respondent maintained the position that he was married until about September 2008 when he learned for the first time that time alone did not create a valid marriage. As he explained above and in his Opening Brief, Respondent thought a ceremony made no legal difference in the marital status of the parties because they had lived together for more than thirty years. Asserting subject matter jurisdiction as a defense to a case is not an artifice as asserted by Petitioner.

IV. The Trial Court unequivocally did not have Subject Matter Jurisdiction.

It is a fiction to say the trial court had subject matter jurisdiction. The trial court said it did not have subject matter jurisdiction. R. at 2145:9, 16. A marriage is a prerequisite to the court having subject matter jurisdiction to adjudicate a divorce. See *Caffall* and *Van Der Stappen* discussed above. The issue in this case is whether there is a basis for judicial estoppel to override the lack of subject matter jurisdiction. That is also what the trial court said. R. at 2145:9. The question is should Petitioner be allowed to assert such a defense despite her knowing fraud on the court, her unclean hands, and her indisputable knowledge that the parties were never married. Further, should Petitioner be allowed to assert such a defense despite the total lack of any evidence of bad faith by Respondent of the type required to support this defense by Petitioner. Respondent asserts for all the reasons announced herein and in his Opening Brief that the facts of the instant case nullify Petitioner's assertion of judicial estoppel.

Petitioner cites *Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335 (Utah App., 1991) as authority that the court does not need subject matter jurisdiction to adjudicate a divorce. Petitioner's reliance is misplaced and again she misapplies the holding of *Van Der Stappen*. The language Petitioner quotes to support her contention is from footnote 8 and is not the holding of the case. However, the language of footnote 8, put in context is helpful. The sentence in the body of the case from which footnote 8 is taken reads as follows:

Based upon the foregoing, because the only evidence in the record is to the effect that appellant did not learn of the impediment to his marriage with appellee until after entry of the divorce decree, we must hold that the trial court erred in failing to grant appellant's motion to set aside the decree. Under Utah R.Civ.P. 60(b)(5), that decree was void because the trial court, under Caffall, lacked subject matter jurisdiction.[fn8]

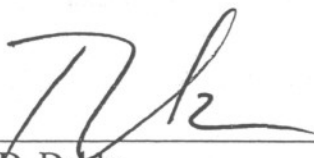
Id. at 1339.

Likewise, the only evidence before this court is that Respondent learned in about September 2008 that he was not married because time alone did not create a legal marriage relationship, whereupon he promptly filed a motion to vacate.

CONCLUSION

For the reasons stated herein and stated in Respondent's Opening Brief, Respondent requests the Court of Appeals reverse the trial court and remand this case to the trial court for entry of an order vacating all prior decrees and orders in this case and for entry of an order of dismissal for lack of subject matter jurisdiction.

DATED this 26nd day of January, 2009.



Robert D. Dahle
Denver C. Snuffer, Jr.
Attorneys for Respondent

PROOF OF SERVICE

I hereby certify that two true and correct copies of the forgoing **REPLY BRIEF OF APPELLANT** were mailed, postage prepaid, faxed or hand delivered to the party listed below and eight (one containing an original signature) were filed with the Utah Court of Appeals:

Rosemond G. Blakelock
75 South 300 West
Provo, Utah 84601
Attorney for Ina Marie Johnson

Sent Via:
☒ Mail (Postage Prepaid)
☐ Hand Delivery
☐ Facsimile

DATED this 26TH day of January, 2009.

