1986

Richardsen Madsen and Nancy Madsen v. Prudential Federal Savings & Loan Assoiation : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

860148

RICHARD MADSEN and NANCY MADSEN, his wife, for themselves and all others similarly situated,	:	
Plaintiffs-Appellants,	:	Supreme Court No. 860148
vs.	:	
PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOCIATION,	:	Category No. 10
Defendant-Respondent.	:	

SUPPLEMENTAL BRIEF OF RESPONDENT

Appeal from Order of Third Judicial District Court
for Salt Lake County, State of Utah

Honorable Philip R. Fishler, District Judge

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ARGUMENT

Introduction.

Appellants Richard and Nancy Madsen's Reply Brief includes 14 case opinions which were not cited in their opening brief and which have not been addressed by Prudential Federal Savings & Loan Association. Most of those opinions are clearly distinguishable without comment. Six of them merit brief discussion, however.

1. Cases Cited in "Madsens' Point I."

The Madsens (their reply brief at 1-3, Point I) urge the Court to ignore Judge Fishler's findings and conclusion and to re-examine the issue of disqualification anew. Federal courts, they contend, do so and they cite three cases in

support: United States v. Nobel, 696 F.2d 231 (3rd Cir. 1982); United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985); United Farm Workers of America, AFL-CIO v. Superior Court, 170 Cal. App. 3d 97, 216 Cal. Rptr. 4 (Cal. App. 4 Dist. 1985). Not one of the cases supports the Madsens' argument.

In United States v. Nobel, the government charged the defendants had devised a scheme to defraud Insurance Company of North America. The district court judge told defense counsel that he and his family owned stock in INA (worth approximately $10,000 to $15,000). He mentioned it again on the eve of trial. Defense counsel did not object. After guilty verdicts were returned, one defendant appealed, contending the judge should have recused himself either under 28 U.S.C. § 455(a) because "his impartiality might reasonably be questioned," or under § 455(b) because he had "a financial interest in the subject matter in controversy." In addressing the issue, the court noted at the outset:

> The accepted standard for reviewing disqualification decisions is to determine whether there has been an abuse of discretion.

Id. at 234. The court's review was plenary only on the legal interpretation of § 455(b):

> However, whether a financial interest in a corporation which was the victim of the crime at issue is a "financial interest in the subject matter in controversy" [within the meaning of § 455(b)] is a matter of law as to which our review is plenary.

Id. at 234. The Court did not hold its entire review was plenary.

United States v. Murphy is another criminal case. The defendant appealed his conviction, contending the close personal relationship between the judge and the prosecutor placed the judge's impartiality in question under § 455(a). The Court held the inquiry into the appearance of partiality is objective, without questions about actual bias. The case says nothing whatsoever about the standard for review on appeal.

United Farm Works v. Superior Court yields two important guidelines, neither of which were mentioned by the Madsens. First, under the disqualification procedure employed by Rule 63(b) (in which the challenged judge must allow another judge to determine the issue of disqualification), the appellate court is bound by the findings of fact made below. Id. at 11. Second, the economic aspects of the case (the costs to retry the case and the overall inconvenience to the parties and to the court) are given no weight:

> While the waste of . . . trial weeks would be unfortunate, the parties' right to a fair trial cannot be compromised by such considerations.

Id. at 11, note 7.

2. Cases Cited in "Madsens' Point II."

Prudential contends (its brief at 48-49, note 20) disqualification relates back and renders all discretionary judicial acts taken by the trial judge void. The Madsens admit (their reply brief at 3-5, Point II) disqualification is

retroactive, but claim retroactivity applies only in cases of actual bias and not when the trial judge merely gives the appearance of partiality. The cases cited by the Madsens actually disprove their own argument.

The case most favorable to the Madsens is United States v. Murphy, supra. There, the court held disqualification works prospectively for one reason:

> Our research has not turned up any case involving mere appearance of impropriety in which the court set aside [prior] decisions . . . .

Id. at 1539. The court then footnoted its statement, noting that a decision from the Fifth Circuit (Hall v. SBA, 695 F.2d 175 (5th Cir. 1983)) appeared to come close but the case was best understood, said the court, as an example of actual bias, not mere appearance. Id. at 1539, note 3. The Madsens' second citation, Health Services Acquisition Corp v. Liljeberg, 796 F.2d 796 (5th Cir. 1986), resolves the matter. In that case the court held a party may move to vacate a prior judgment solely on an appearance of partiality. In support, the court cited its prior decision of Hall, which it said was a case of the appearance of partiality. Id. at 802.

In the closing paragraph of Point II, the Madsens contend the successor to Judge Rigtrup has the power to sign and enter findings of fact. The opinion of State v. Kelsey, 532 P.2d 1001 (Utah 1975) is cited as support. The case has no application here. In Kelsey, the original judge tried the defendant; he stated his verdict and judgment on the record; he

prepared a final judgment, the sentence, and an order of commitment; but then he resigned before written findings of fact and conclusions of law were made. His successor later signed findings and conclusions, and this Court ruled he was authorized by Rule 63(a) to sign them. That is not this case. None of the final paperwork had been prepared, signed, or entered by Judge Rigtrup before Prudential moved for disqualification. Moreover, Judge Rigtrup is not disabled within the meaning of Rule 63(a). The telling distinction between the cases, however, is this: The findings and conclusions were not required in Kelsey; they were surplusage. Id. at 1005. That is not true here. Making and entering findings, conclusions, and a judgment are mandatory in a civil case. See Rules 52(a) and 58(A), U.R.Civ.Pro.

3. Cases Cited in "Madsens' Point III."

The Madsens contend a judge need not be disqualified if his financial interest in the outcome of the case is small. They cite Union Carbide Corp. v. U.S. Cutting Service, Inc., 782 F.2d 710 (7th Cir. 1986) for support. Its facts have no application to this case. There, the judge had presided over a complicated plaintiff class action for two and one-half years. Then, in February, 1983, the judge married. Her new husband maintained a personal retirement account which happened to contain $100,000 worth of stock in IBM and Kodak. In May, 1984 and again in May, 1985, the judge disclosed her husband's stock

interests in her annual financial disclosure statements required by federal law. In July, 1985, the defendant moved the judge to recuse herself, pointing out that IBM and Kodak were potential members of the alleged plaintiff class, although then unnamed and a fact previously unknown to the judge. In fact, there was at the time no list of class members. The judge immediately ceased ruling on any motions in the case, referring them to a magistrate or to another judge instead. She instructed the parties to brief the issue whether § 455(b) would be violated if her husband immediately sold the IBM and Kodak stock in his retirement account. In the meantime, she also asked the Advisory Committee on Codes of Conduct of the Judicial Conference of the United States for an advisory opinion. The Committee concluded that a sale of the stock would remove her disqualification under Canon 3C(1)(c) of the Code of Judicial Conduct. The judge ultimately determined she could resume control of the case if her husband sold the stock. He did so, incurring a brokerage fee of $900. The defendant contended on appeal the sale did not cure the disqualification.

The Court of Appeals held the $900 brokerage fee was too small to warrant a reasonable person's belief that the judge was harboring any ill will towards the defendant. It based that conclusion on several factors: her significant salary; that her husband was a partner in one of the largest law firms in Chicago; and that the $900 was less than 1% of the proceeds of the sale. The most important factor, however, was that the fee would have been incurred anyway, whenever the

husband decided to sell the stock in his retirement account. Thus, the $900 fee was inevitable. Id. at 716. Here, Judge Rigtrup stands to gain money, and his interest is the same as every member of the plaintiff class.

4. Cases cited in "Madsens' Point VII(D)."

Prudential noted (its brief at 42, note 24) the trend in federal courts is to find disqualification cannot be waived. The Madsens (their reply brief at 15-16, Point VII (D)) disagree, quoting United States v. Nobel, supra. The Madsens have not read Nobel carefully.

The disagreement between the parties is due to semantics. Prudential's argument is that the issue of disqualification cannot be "waived" (i.e., relinquished, lost, etc.) merely by not asserting it sooner rather than later. The authorities cited by Prudential illustrate the rule (its brief at 42, note 24). The Court in Nobel repeatedly uses the term "waiver" when actually it means "remittal" of disqualifiaction. "Remittal" is the intentional abandonment of a party's claim of disqualification after full disclosure by the judge on the record of the potentially disqualifying factors. Section 455(e) provides for remittal of the appearance of partiality under § 455(a). That is why Nobel focuses on the judge's repeated disclosure of his stock interest in INA:

> [I]t is sufficient under the statute if the judge provides full disclosure of his or her relationship at a time early enough to form the basis of a timely motion at or before trial and under circumstances which avoid any subtle coercion. The election to

> proceed after full disclosure of the relevant facts satisfies those requisites and constitutes an effective waiver [remittal] under the statute.

Id. at 237. Footnote omitted. The court then specifically referred to Canon 3D of the Code of Judicial Conduct (titled "Remittal of Disqualification") and noted that § 455(e), unlike the Canon, does not describe a formal procedure for accomplishing remittal. The court concluded that the advantages from following the Canon's detailed remittal procedure are obvious. Id. at 237.

CONCLUSION

The cases cited by the Madsens in their Reply Brief are not persuasive. The Order of Disqualification entered by Judge Fishler should be affirmed.

DATED this 10th day of April, 1987.

MOYLE & DRAPER, P.C.

By 

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of April, 1987, I hand-delivered four copies of the Supplemental Brief of Respondent to the following:

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