1997

Mary Ann Moon v. Stanley W. Moon : Reply Brief

Utah Court of Appeals

Hollis B. Hunt; Attorney for Appellee.
Randy S. Ludlow; Attorney for Respondent.

IN THE UTAH COURT OF APPEALS

MARY ANN MOON,	:	
Petitioner/Appellee,	:	
vs.	:	Appeals Ct. No. 970542-CA
STANLEY W. MOON,	:	
Respondent/Appellant.	:	

REPLY BRIEF OF APPELLANT

AN APPEAL FROM THE THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE HOMER F. WILKINSON, PRESIDING

Randy S. Ludlow #2011
336 South 300 East, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-1300
Attorney for Respondent/Appellant

Hollis B. Hunt
392 East 12300 South, Suite A
Draper, Utah 84020
Telephone: (801) 495-3500
Attorney for Petitioner/Appellee

Priority No. pursuant to Rule 29(b) - 15

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REPLY BRIEF OF APPELLANT

THE APPELLANT, submits the following reply brief to the brief of the appellee.

1. AS TO APPELLEE'S *STATEMENT OF THE CASE*

A. NATURE OF THE CASE

The appellee in her *Statement of the Case* under *A. Nature of the Case* sets forth that the trial court had "made clarifications concerning the meaning of income for purposes of calculating alimony" at p. 3 of her brief. Part of the argument as presented to this court in appellant's brief is that the trial court has in fact made modifications to the Decree of Divorce rather than clarifications. If in fact clarification are what are deemed as being made in this matter then the Decree of Divorce is ambiguous in its meaning and the only way for the same to be resolved is

through modifying the document. This would therefore require the filing of a Petition for Modification.

B. COURSE OF PROCEEDINGS

At p. 4 under *B. Course of Proceedings* of appellee's Brief the appellee fails to inform the court that the trial court had also entered an order in conformity with Commissioner Lisa A. Jones Minute Entry. The order dismissing the Order to Show Cause is found at R-p.964-968.

2. AS TO APPELLEE'S *STATEMENT OF FACTS*

Under the *Statement of Facts* at p.5 of appellee's brief, appellee sets forth that "the respondent then agreed to pay thirty percent (30%) of any additional income over and above $150,000" R at 497." This is a misstatement of the testimony and the Decree of Divorce. The respondent had in fact agreed to pay thirty percent (30%) of any additional *bonuses* that he received, not any additional *income*.

At p.8 the appellee misstates the findings of the Commissioner. The appellee sets forth that the Commissioner had found that the respondent had changed his bonuses to salaries. This is incorrect. The Commissioner had found that the "defendant as a shareholder and officer of MST Trucking voted, with others, to change the corporate structure of the company." (R at 959.) The Commissioner did not find that he had changed his bonuses to salaries.

Further at p.8 under the *Statement of Facts* the appellee sets forth that the trial court "revised the Commissioner's prior ruling dismissing the Order to Show Cause". There was no

revision but rather a "rehearing" of a dismissed Order to Show Cause which occurred over the objections of appellant's counsel.

3. AS TO APPELLEE'S *SUMMARY OF ARGUMENTS*

Pursuant to the appellee's *Summary of Arguments* as found at p.9 of appellee's brief the appellant does not dispute that Rule 54(b) of the Utah Rules of Civil Procedure allows the judge to revise an order before the entry of judgement adjudicating all the claims and the rights and liabilities of all the parties. It is disputed that the Rule is pertinent in this action. In this case the Order to Show Cause was dismissed prior to the filing of the appellee's Petition for Modification. (See Order at R 967-968.)

In ¶ 2 of the appellee's *Summary of Arguments* it is for this court to determine whether or not Judge Wilkinson "appropriately reinstated" the Order to Show Cause. As previously noted this is one of the arguments of the appellant's brief.

The appellee sets forth in her *Summary of Arguments* in ¶ 2 that the respondent diverted income. There was absolutely no testimony or evidence presented that the respondent at any time diverted any income in the form of "bonuses" back to salary or any other type of diversion. The appellee further sets forth that there is an alternative theory based upon the claim of fraud in this matter. There was absolutely no showing of any fraud nor none established nor the same properly pled or proven. The trial court did not find fraud and there is no evidence of any fraud in the record.

In ¶ 3 of the appellee's *Summary of Arguments* appellee cites the case of Morgan v. Morgan, 854 P.2d 559 (Ut.App. 1993). Appellee states that this case stands for the proposition that the court may consider K-1 income in dividing assets among parties in a divorce action. In Morgan the only discussion of K-1 income is discussed at p.566 where the K-1 was used to value an asset to be distributed between the parties. There is no discussion in Morgan that K-1 distributions are income but only that that was the means by determining the value of an asset.

4. AS TO APPELLEE'S *ARGUMENT*

In appellee's *Argument, Point I* at pp. 10-11 it sets forth that the respondent had converted his bonus to salary. There are no references or citations from the record or transcripts by appellee for this proposition because there was no evidence presented or established that the respondent had converted his bonuses to salary.

At p. 11 of the appellee's Brief the appellee sets forth that she waited for the Petition to be in front of Judge Wilkinson before raising a Rule 54(b) motion to request that the matter be before the court on the Order to Show Cause. This is simply untrue. There is no evidence that a Rule 54(b) motion was ever made, requested or sought by the appellee. Appellee can not been point to anything in the record for this type of motion ever being raised. The trial court, *sua sponte*, decided that the matter would be heard on either the Order to Show Cause or the Petition to Modify, as the court considered them to be "one and the same". As noted from the rulings and the arguments as presented in the appellant's Brief the trial court believes that the only difference

between an Order to Show Cause and a Petition for Modification is the retro-active effect. The trial court has not recognized that there are different burdens of proof and different elements between an Order to Show Cause and a Petition to Modify.

It is disputed between the parties as to whether or not there would be any applicability of Rule 54(b) of the Utah Rules of Civil Procedure. The rule itself sets forth that it has to be made before the "entry of a final judgement". The intent of the rule is to pertain solely to multiple parties and multiple claims not for the single type of claim against individual parties as exist in this case. As has been noted to this court in the Brief of the appellant there are different elements and burdens of proof between and Order to Show Cause and a Petition for Modification. The denial of relief under an Order to Show Cause can be appealed to an appellate court. The adjudication of an Order to Show Cause is a final order. In this particular case there was a final adjudication of the Order to Show Cause with its dismissal. If the appellee believes that she should have prevailed on the Order to Show Cause the appellee was required to file a Notice of Appeal within thirty (30) days after the entry of the Order by Judge Wilkinson. (See Rule 4 of the Rules of Appellate Procedure). This never occurred. To use Rule 54(b) of the Utah Rules of Civil Procedure is inappropriate and should not be allowed by this court. The intention of that rule is not for the type of actions that were taken by the trial court in trying to adjudicate a matter that had already been dismissed. A motion to reconsider is inappropriate and not allowable. Drury v. Lunceford, 18 Ut.2d 74, 415 P.2d 662 (Ut. 1996) See also Peay v. Peay, 607 P.2d 841 (Ut. 1980)

There was no notice of reconsideration and the first time this was raised as to having the matter "re-adjudicated" under the Order to Show Cause was when Judge Wilkinson, *sua sponte*, proceeds to say that he is going to adjudicate the matter under both theories of Order to Show Cause and the Petition for Modification at the pre-trial which was approximately one-week prior to the time of trial on May 23, 1996.

Point II at p.19 of appellee's Brief appellee argues that the court should view this matter under the doctrine of equitable estoppel. There are no references or citations to in the record to using this particular claim of equitable estoppel being presented at the trial court. This is because equitable estoppel was not argued nor presented to the trial court and the first time for it being brought is now before this court. This also applies to the appellee's claim of fraud commencing at p.21 of appellee's Brief. There was no proof or argument of fraud nor was there any findings of fraud in this matter by the trial court. The appellee wrongfully argues fraud in her brief. There was no evidence of the same nor presentation of the same to the trial court.

At p.25 of the appellee's Brief an argument for retro-activity appellee states that "retro-active relief is available if fraud or material misrepresentation or concealment of the financial condition is shown to have existed at the time of the Decree of Divorce". Again this was not argued at the trial court and there was no evidence of any fraud or material misrepresentation or concealment of financial condition. This is the reason why no reference is made to any parts in the records of these particular acts because none exist.

All of the above arguments of Rule 54(b), equitable estoppel, fraud and retro-activity are being asked to be considered when they were not raised or presented at trial. This court has held that matters not admitted in evidence before the trier of fact will not be considered on appeal to the Court of Appeal. Ebbert v. Ebbert, 744 P.2d 1019 (Ut.App. 1987), cert. denied 765 P.2d 1278. All the above arguments should not be allowed by this court.

In *Point III* of appellee's Brief at p.27 the appellee again cites the case of Morgan v. Morgan. What Morgan stands for as it relates to K-1 income is not the same as is being argued in this particular action. The Morgans had property for distribution purposes which used K-1 for the valuation of an asset not for the determination of the payment of alimony as is being requested in this action.

In *Point IV* at p.28 the appellee discusses the attorney's fees. This court in Morgan v. Morgan set forth the following:

> "The award, however, must be based upon evidence of the receiving spouses financial need for attorneys fees. The ability of the other spouse to pay and the reasonableness of the requested award...."
>
> "Reasonable attorneys fees are not measured by what an attorney actually bills, nor is the number of hours spent on the case determinative in computing these. In determining the reasonableness of attorneys fees, '...[a] court may consider, among other factors the difficulty of the litigation, the efficiency of the attorneys in representing the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in locality for similar services, the amounts involved in the case and the result attained, and the expertise and experience of the attorneys involved.'" Id. at 568, 569, quoting Rasband v. Rasband, 752 P.2d at 1336.

In this case there was no evidence presented of any of these factors in determining the attorneys fees that were requested by appellee's counsel Appellee's counsel was only able to give a total figure for what he billed and what Mr Fankhauser charged There was no showing that what he did was appropriate or reasonable.

CONCLUSIONS

The appellee's arguments relating to Rule 54(b), equitable estoppel, fraud and retro-activity being first raised on appeal should be summarily dismissed by this court The relief as requested by appellant in his Brief is appropriate and should be granted by this court

RESPECTFULLY SUBMITTED this 6 day of July, 1998

RANDY S LUDLOW
Attorney for Respondent/Appellant

MAILING CERTIFICATE

I hereby certify that I caused to be mailed a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT, by placing the same in the United States Mail, in a postage prepaid sealed envelope, this 10 day of July, 1998.

HOLLIS B. HUNT
392 EAST 12300 SOUTH, SUITE A
DRAPER, UTAH 84020

Leslie Christofferson
Secretary