

1998

Peggy B. Odak v. Perry D. Odak : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PEGGY B. ODAK,)
) APPELLANT'S REPLY BRIEF
Plaintiff/Appellee,)
)
-vs-)
)
PERRY D. ODAK,)
) Case No. 980133 CA
Defendant/Appellant.) Priority No. 15
)

APPEAL FROM THE THIRD JUDICIAL DISTRICT
COURT, SUMMIT COUNTY, JUDGE PAT B. BRIAN

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**UTAH COURT OF APPEALS
BRIEF**

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Julia D'Alesandro
Clerk of the Court

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I.

OBJECTIONS TO APPELLEE'S STATEMENT OF THE CASE

Appellant Perry D. Odak ("Mr. Odak") objects to Appellee Peggy B. Odak's ("Mrs. Odak") statement of the case in the following respects.

1. Mrs. Odak asserts that in a conference call with the court the day prior to the hearing that counsel and the court agreed that the matter could be presented to the court by way of proffers of testimony. [Appellee's Brief, p. 2]. In fact, the agreement was that the parties would proffer the evidence they intended to present and then the court would determine if it wanted

to hear any evidence before ruling on the motions before the court. [R. 409].

2. Mrs. Odak states the only persons present in the courtroom at the hearing that could have been called as witnesses to testify were the parties themselves. This statement is misleading. In fact, a number of depositions had been taken of witnesses located in Ohio. [R. 414 and 424].

II.

ARGUMENT

A. MR. ODAK DID NOT STIPULATE OR AGREE THAT THE COURT COULD MAKE EVIDENTIARY FINDINGS WITHOUT TAKING EVIDENCE.

Mrs. Odak argues that because at the hearing Mr. Odak did not specifically request that the court hear evidence before issuing its ruling, Mr. Odak consented to the manner in which the proceedings were handled by the court and cannot complain about the court's failure to take evidence before making an evidentiary ruling. It is respectfully submitted that this argument is without merit.

Mrs. Odak glosses over the fact that the court prior to the hearing had already determined that it would proceed by taking proffers of testimony and then the court would determine if it wanted to hear evidence before ruling. The court was entitled in its discretion to proceed in that fashion. After hearing the

proffers, the court could have determined to rule on the contempt motion in such a manner that the court would not need to resolve disputed issues of fact. In that event, there was no need to hear evidence. For example, if the proffers demonstrated as a matter of law that Mrs. Odak had denigrated Mr. Odak, the court could have so ruled as a matter of law without hearing any evidence. The problem is that the court did not rule on the contempt motion as a matter of law. The court ruled by purporting to make an evidentiary finding that Mr. Odak had failed to prove defamation by a preponderance of the evidence without taking any evidence. This was clear error.

The only case cited by Mrs. Odak to attempt to support her position is not on point. In Jenkins v. Weis, 868 P.2d 1374 (Utah App. 1994), the defendant made a motion for a directed verdict orally after presentation of the plaintiff's evidence. Plaintiff contended that he was entitled to prior notice and a hearing. The court stated that motions for directed verdicts are typically made orally during trial, that plaintiff received the usual notice for the motion and hearing and that in any event the plaintiff had not objected. In the present case, Mr. Odak had no way of knowing prior to the time the court actually issued its ruling that the court would improperly include in its ruling findings on a disputed factual issue without taking evidence.

Mr. Odak's proffer of evidence was clearly sufficient to demonstrate Mrs. Odak had violated the divorce decree by

denigrating and defaming him. It was clear, palpable error for the court to decide to the contrary.

B. THE COURT ERRED IN REQUIRING PROOF OF DEFAMATION RATHER THAN DENIGRATION.

The divorce decree prohibited the parties from denigrating each other. One of the meanings of the word denigration is to defame a person. But denigration has a broader meaning than defamation, including "to cast aspersions on, defame . . . or belittle." [Webster's Ninth New Collegiate Dictionary (1989)]. It was therefore error for the court in its ruling to implicitly require that Mr. Odak prove the tort of defamation.

Mrs. Odak argues that the court's ruling was justified because at the hearing Mr. Odak's counsel used the term "defamation" in arguing the matter. The fact that Mr. Odak's counsel stated that Mrs. Odak had defamed Mr. Odak does not in any way change the relevant provision of the divorce decree or what Mr. Odak was required to prove in order to show the decree was violated. Moreover, Mrs. Odak does not fairly characterize counsel's argument.

Mr. Odak's counsel clearly argued that the divorce decree prohibited Mrs. Odak from denigrating Mr. Odak:

Paragraph 13 of the Divorce Decree stated that the parties shall "not in any way denigrate each other, publicly or privately, so as to negatively affect each other's personal, professional or business relations, harm each other's professional reputations, or reduce each other's earning power." This provision

wasn't in the Divorce Decree just for the fun of it. It was in there because my client, for many years, has been a top executive of a number of important, substantial companies. It was obviously important that his reputation remain the best it could be, and that it not be denigrated by Mrs. Odak, and the parties not engage in that type of name calling. . .

The depositions that we took demonstrate very clearly that this provision has been violated by Mrs. Odak. . . .

Judge, we would like there to be peace in the valley at the end of this process. It is very important that this provisions of the Divorce Decree be honored. It is very important to us that Mrs. Odak be required to stop making derogatory statements against Mr. Odak. . . . That's what we are asking for the court to do. Thank you. [R. 424-25].¹

Mrs. Odak does not deny that Mr. Odak's proffer of evidence was plainly sufficient to show denigration. How could Mrs. Odak possibly argue that her statements to third parties that Mr. Odak is conniving and devious, pays of judges and witnesses, is vindictive, evil and dangerous, is capable of having people beat up or injured, and that he was probably behind threats of physical violence to her did not constitute denigration?

C. MRS. ODAK IS NOT ENTITLED TO ATTORNEY'S FEES.

Finally, Mrs. Odak argues that in the event this Court were to affirm the district court's order, she should be awarded her attorney's fees. Mrs. Odak erroneously tells the Court in this regard that she was rewarded her attorney's fees below.

¹ Mr. Odak's counsel further stated that ". . . the Divorce Decree says you don't make derogatory comments. You don't denigrate" [R. 431] and that Mrs. Odak should "stop bad-mouthing Perry." [R. 432].

Mr. Odak believes very strongly for all of the reasons stated above that the district court's order should be reversed. However, even if this court decides not to reverse the order, Mrs. Odak is not entitled to her attorney's fees incurred on appeal. Mrs. Odak was not, in fact, awarded her attorney's fees below. Judge Brian ordered that in the event Mr. Odak paid the outstanding judgments for spousal support no later than December 1, 1997 that each party was to pay his or her own legal fees and costs. It is undisputed that Mr. Odak did, in fact, pay the outstanding judgments before December 1, 1997. Thus, Mrs. Odak was not awarded her attorney's fees. Moreover, the conditional award of \$10,000.00 in the event Mr. Odak did not pay the judgments related to the motions directed to spousal support, not Mr. Odak's contempt motion. [R. 455]. There is no basis for awarding any attorney's fees on appeal.²

III.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the district court's order should be reversed with respect to the finding of no defamation and the case remanded for an

² Management Services v. Development Associates, 617 P.2d 406 (Utah 1980), cited by Mrs. Odak, is clearly distinguishable. In that case, the Utah Supreme Court merely held that it would adopt the rule that if a party was entitled to recover attorney's fees by contract the court would enforce that contractual provision by awarding fees on appeal.

evidentiary hearing on the issue of whether Mrs. Odak denigrated Mr. Odak in violation of the decree of divorce. In the alternative, the finding should be set aside.

DATED this 17th day of September, 1998.

BURBIDGE & MITCHELL

A handwritten signature in black ink, appearing to read "Stephen B. Mitchell", written over a horizontal line.

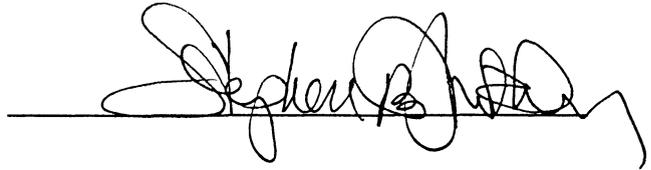
Stephen B. Mitchell
Attorneys for Appellant

js odak\appeal\brief-2

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed two (2) copies of the within to the following parties by depositing the same in U.S. mails, postage prepaid, this 17th day of September, 1998:

Ann L. Wasserman, Esq.
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A handwritten signature in black ink, appearing to read "Stephen Peterson", is written over a horizontal line.