

1998

Peggy B. Odak v. Perry D. Odak : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS

PEGGY B. ODAK,

BRIEF OF APPELLEE

Plaintiff/ Appellee,

-vs-

Appeal No. 980133 CA
Priority No. 15

PERRY D. ODAK,

Defendant/Appellant.

BRIEF OF APPELLEE

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

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(Utah 1980) Pg. 6

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UTAH COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

PEGGY B. ODAK,

Plaintiff/ Appellee

vs.

PERRY D. ODAK,

Defendant/ Appellant

BRIEF OF APPELLEE

Appeal No.: 980133 CA
Priority No. 15

I.

JURISDICTION

This Court has jurisdiction over this appeal pursuant to §78-2a-3(2)(i), Utah Code Annotated, as this is an appeal from a final Order of the District Court.

II.

STATEMENT OF THE CASE

A. Course of Proceedings Below.

The proceedings at issue arose out of a Decree of Divorce between the parties entered on April 8, 1992. Commencing in 1995, numerous hearings took place occasioned by Mr. Odak's failure to pay certain IRS obligations, resulting in the garnishment of Ms. Odak's alimony payments. (R.268-69, 328-29).

The matter was heard by the Honorable Pat. B. Brian on October 30, 1997. At issue were the motions of Ms. Odak to reduce the alimony arrearages to judgment, collect attorney's fees, and have Mr. Odak found in contempt. Mr. Odak argued his motion to terminate alimony based on cohabitation (which motion was denied), and his motion seeking a finding of contempt arising out of an alleged violation of a non-denigration clause in the Decree of Divorce.

Prior to the hearing, in a telephonic conference call, counsel and the Court agreed that the matter could be presented to the Court by way of proffers of testimony. At the commencement of the hearing, the Court reiterated that agreement, and added that the Court could then determine whether it wanted to hear additional evidence. (R409). The only persons present in the Court room at the hearing who could have been called as witnesses to testify were the parties themselves.

Counsel for Mr. Odak commenced the proffer (R409-425). Counsel for Ms. Odak responded with a proffer based on the deposition testimony of witnesses taken in Ohio (R425-430). Counsel for Mr. Odak was then given the opportunity to respond, which he did (R430-437). He was given another opportunity to comment with regard to the contempt issue, which, incidentally, counsel for Mr. Odak characterized as the issue of "defamation." (R441-447). After further discussion between the Court and counsel regarding calculation of arrearages, the Court inquired as to whether counsel would submit the pending issues for ruling. Both counsel submitted the issues (R451). At no time did counsel for Mr. Odak request the

opportunity to call witnesses or present additional evidence other than the proffers that were made to the Court.

B. Statement of Facts.

1. At the October 30, 1997 hearing, the Court, by agreement with counsel, took proffers of proof from the parties. Neither party requested that the Court take any additional evidence at the hearing. (R409-458).

2. After Mr. Odak's proffer of evidence, a proffer with regard to the contempt issue was made on behalf of Ms. Odak. Among the matters proffered were a challenge to the credibility of Mr. Odak's main witness who had told Ms. Odak that her husband had been murdered by the mob, but then testified that she thought the FBI had murdered him (R426), that Ms. Odak had simply expressed that Mr. Odak is a very powerful person and that she is afraid of and intimidated by him (R427). The responsive proffer further indicated that Mr. Odak essentially could not describe any business relationship that he claimed had been harmed by the alleged statement of Ms. Odak, with the exception of a speculative relationship with a bank for which he might do consulting (R428), and the only personal relationship that he could describe that might have been affected was one with a resident of Ms. Odak's small town whom he had not even seen since 1992 (R428-429).

At the conclusion of Ms. Odak's proffer, additional comment and proffer was made by counsel for Mr. Odak not one, but two additional times (R430-432, R441-442).

3. No request was made for either side to have the Court hear additional evidence, and the matter was submitted to the Court for resolution (R451).

4. The Court granted to Ms. Odak judgment for alimony arrearages with interest, awarded attorney's fees and costs, denied both motions for contempt, found that Mr. Odak had not proven his claim of defamation, and dismissed the claim of cohabitation (R452-457).

III.

SUMMARY OF ARGUMENT.

A. The parties agreed to proceed by proffer. Mr. Odak did not request that the Court take additional evidence, did not object to the manner in which the hearing was conducted, agreed that the matter could be submitted on the basis of the proffers made to the Court, and cannot now object to the findings of the Court on the basis that additional evidence was not taken.

B. Both the Court and Mr. Odak used the terms "denigration" and "defamation" interchangeably. At no time did Mr. Odak object to the Court considering the issue of defamation, and his right to challenge the Court's findings on that basis was waived.

C. Ms. Odak is entitled to an award of attorney's fees and costs on an appeal. Ms. Odak was awarded attorneys fees in the Court below, and as a prevailing party in this Appeal, should be awarded her fees and costs incurred in defending this matter.

IV.

ARGUMENT

A. Mr. Odak agreed to the procedure to take evidence and argument employed by the trial court. It is undisputed that he did not, at any time, raise an objection to the

procedural course of the proceedings, did not ask the Court to take additional evidence and specifically submitted all issues to the Court for decision at the conclusion of the hearing. Clearly, he has not preserved the issue for appeal. The instant proceeding is quite similar to the situation in Jenkins v. Weis, 868 P2d 1374 (Utah App. 1994), in which the plaintiff in a defamation action appealed the decision of the trial court that defendant was a public figure. In affirming the Court's ruling, the Court of Appeals noted:

...He does not contend that he objected to the motion, objected to the ruling, asked that the motion proceedings be placed on the record, or requested additional time to respond. Jenkins, by his failure to take any affirmative actions at trial, has not preserved the issue for appeal. Id. at 1374 (citations omitted).

B. Mr. Odak asked the Court to make fact findings regarding certain statement allegedly made by Ms. Odak. Although the language of the Divorce Decree spoke in terms of "denigration", Mr. Odak, by way of comments of his counsel, used the term "defamation" in the hearing at least four different times. First, he tells the Court:

"Secondly, we filed a Motion for an Order to Show Cause, in re: Contempt, with respect to violation of the Divorce Decree, in that Mrs. Odak has been making defamatory and denigrating statements against Mr. Odak, in violation of the Divorce Decree." (R413).

Again, counsel for Mr. Odak states: "I think I am going to be real brief on defamation." (R423).

Later, counsel for Mr. Odak asks the Court, "Can you seriously argue that the statements that have been made against Mr. Odak are not defamatory, are not likely to negatively affect his personal, professional or business relationships?" (R432)

Finally, counsel again is given an opportunity to discuss the matter with the Court, and states, "One last word on the defamation." (R441).

Indeed, in Mr. Odak's brief he sets forth a definition of "denigrate" which includes the synonym "defame". The bottom line is that Mr. Odak agreed with the procedure to be followed by the Court, never objected to it, asked the Court on several occasions to make findings with regard to an alleged claim of defamation, and simply did not like the answer the Court gave him with regard to the requested findings. There is no error of law as argued by the Appellant and the Appeal should be dismissed.

C. In the course of the proceedings, Ms. Odak was awarded attorney's fees on two different occasions. At the hearing in October of 1997, the Court awarded to Ms. Odak attorney's fees and costs of \$10,000.00. The Court further ordered that those fees and costs would be forgiven if Mr. Odak paid all judgments in their entirety before December 1, 1997 (R455). It is well-settled that the party who was awarded attorney fees below and who prevails on appeal is entitled to an award of fees reasonably incurred on appeal. Management Services Corp. v. Development Associates., 617 P.2d 406, 408-409 (Utah 1980). As the party who fulfills both of these conditions, Ms. Odak is entitled to an award of fees on appeal.

V.

CONCLUSION

The evidentiary procedure employed by the Court was proper and agreed to by the parties, and the Court properly found that Mr. Odak had not established a claim of defamation.

Respectfully submitted this 3 day of September, 1998.

LITTLEFIELD & PETERSON

A handwritten signature in black ink, appearing to read 'Ann Wassermann', written over a horizontal line.

ANN WASSERMANN

Attorney for Plaintiff/Appellee

CERTIFICATE OF HAND DELIVERY

I hereby certify that I caused to be hand delivered, two copies each of the foregoing,
APPELLEE'S BRIEF, this 4 day of September, 1998, to:

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