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Jeroldene Bayles nka Jeroldene Bailey v. Randee Bayles : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JEROLDENE BAYLES, nka JEROLDENE BAILEY, Plaintiff/Appellant/ Petitioner, vs. RANDEE BAYLES, Defendant/Appellee, Respondent.	Case No. 980347-CA Priority No. 10

REPLY BRIEF

INTERLOCUTORY APPEAL FROM THE ORDER
DENYING PETITIONER'S MOTION TO DISMISS
RESPONDENTS MOTION FOR MODIFICATION
IN THE SEVENTH DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH
THE HONORABLE LYLE R. ANDERSON, PRESIDING

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REPLY BRIEF

INTRODUCTION

Petitioner, Jeroldene Bailey, relies on her opening brief and refers this Court to that brief for the statements of jurisdiction, issues, standards of review, cases and facts[1] Petitioner responds to Respondent answer to her opening brief as follows

SUMMARY OF ARGUMENT

The threshold requirement for a modification is a showing of a substantial change of circumstances occurring since the entry of the divorce decree Randee's allegations all involve activity that occurred prior to the entry of the

[1]There is an error in Petitioner's opening brief, at page 3, fn 1 which indicated that Douglas Terry Esq, entered his first appearance by way of Petitioner's Motion to Bifurcate Terry entered his appearance on April 4, 1997 by signing a substitution of counsel (R 22)

divorce decree. Thus, his contention that he is entitled to a hearing to determine if any wrongdoing occurred, and if it did, whether it had been litigated, must fail (Appellee's Brief at 14-15).

Randee's allegation that the Motion to Dismiss procedurally blocked his ability to show a change of circumstances is disingenuous (Appellee's Brief at 15). Although he submitted a written response to the Motion to Dismiss, he never requested a hearing.

Randee attempts to justify his lack of diligence by claiming that it was Jeroldene's fault, because she withheld documents (Appellee's Brief at 16). This, however, is not supported by the facts. By entering the stipulated property settlement, Randee abandoned his right to enforce discovery and to pursue any issues that he was concerned about. Likewise, Randee abandoned his right to set aside the judgment because he failed to act diligently, within the three-month time period, although he continued his "investigation" during this same time period.

POINT 1
RESPONDENT HAD A FAIR OPPORTUNITY TO LITIGATE THE MATTER
(Reply to Point 1 of Appellee's Brief)

A critical issue in determining the applicability of res judicata is whether the parties had "a fair opportunity to present and have determined [all of the issues]." *Throckman v. Throckman*, 767 P.2d 121, 124 (Utah Ct. App. 1988).

In *Jacobson v. Jacobson*, 703 P.2d 303 (Utah 1985), the ex-husband

("Jacobson") filed an independent action against his second wife, claiming that she induced him to sign a property settlement in their divorce, based on the promise that she would reconvey his one-half interest in a parcel of land. *Id.* at 304.

There, while Jacobson was still married to his second wife, his first wife sought a judgment against him. *Id.* Prior to that judgment being entered, Jacobson conveyed his interest in a parcel of property to his second wife (that he and his second wife held in joint tenancy). *Id.* The understanding was that once the litigation with his first wife was resolved, his second wife would reconvey that interest back to him. *Id.*

That same parcel of property became the subject of another suit during his second marriage, but Jacobson was dismissed as a party based on his representation that he had no interest in that property. *Id.* That litigation was dismissed and his second wife retained the parcel. *Id.*

Jacobson and his second wife were subsequently divorced and a decree was entered based on a stipulated property settlement wherein the second wife retained that same parcel of property. *Id.*

Jacobson then brought the independent action and the trial court dismissed his claim based on the lack of good faith and upon the grounds of res judicata. *Id.* at 304.

In applying the doctrine of res judicata, the Utah Supreme Court reasoned that Jacobson "had knowledge of the situation for a considerable amount of time, both before and after the divorce." *Id.* The Court noted that Jacobson stipulated to the divorce settlement and that he disclaimed any interest in the property in a civil action which occurred prior to the divorce. *Id.* The Court ultimately held that his claim was barred under the doctrine of res judicata:

> Mr. Jacobson . . . argues that res judicata does not apply, and that he has properly brought an independent action to attack the divorce decree because he had no reason to suspect that Mrs. Jacobson would not convey an interest to him until September 1981. We, however, agree with the trial judge that the doctrine of res judicata does bar the action . . . We have said: . . .[w]hen there has been an adjudication, it becomes res judicata as to those issues which were either tried and determined, or upon all issues which the party *had a fair opportunity to present and have determined in the other proceeding*. [citation omitted].

Id. at 305 (emphasis added).

In the case at hand, Randee had a fair opportunity to address this alleged secreting of assets.[2] The May 7th letter contained his allegation that the corporation had been drained of assets and his acknowledgment that he did not have all of the necessary information:

> The upshot of this is that the corporation has been drained of assets, which we believe should be

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[2]This is not to concede or even suggest that there is any truth to Randee's allegations.

> accounted for and an adjustment made in the settlement . . . At the current time we do not have all of the necessary information with regard to necessary adjustments.

(R. 106).

In that same letter, Randee threatened to compel discovery (R. 106). Based on the suspicions set forth in this letter, Randee had an obligation to address those suspicions beginning with the pretrial process of discovery and/or before any stipulation was entered.

The parties then entered into a stipulated property settlement (R. 41). This stipulation, after being signed by all parties, was accepted and entered by the trial court and incorporated into the divorce decree (R. 56).

There was an "investigation" during the three-month interlocutory period[3] after the final judgment was entered insofar as Randee subpoenaed his ex-wife's personal banking records in July, 1997 (R. 100). Yet, there was no follow-up. That Randee failed to diligently pursue any one of those avenues does not mean that he did not have a fair opportunity to litigate the issue.

Randee's argument that Jeroldene's "failure" to put the documents "'on the table' in the property settlement and the withholding of the financial information constitutes fraud," prevented him from having a fair opportunity to litigate the

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[3]This interlocutory period simply refers to the three-month period when a party can set aside a judgement under Rule 60(b), Utah Rules Civil Procedure. Here, the three month period began June 17, 1997 when the Order in Re: Divorce Settlement was entered by the Court (R. 56).

issue ignores entirely his role in the adversarial process (Appellee's Brief at 16). Rather than placing himself at the mercy of the opposing party in an adversarial proceeding, he had the absolute right, if not obligation, to compel discovery and/or to refuse to sign a stipulation unless and until that matter was resolved.

Randee's argument that the Motion to Dismiss was premature because, at a minimum, he was entitled to a hearing to determine if (1) any wrongdoing occurred and if it did, (2) whether it had been litigated, should also fail (Appellee's Brief at 14). Randee responded to the Motion to Dismiss, but he never requested a hearing on that motion (Appellee's Brief at 12). Thus, this argument should be rejected as waived.

During the interlocutory period, Randee subpoenaed Jeroldene's personal bank records (R. 100). During the three-month interlocutory period when he subpoenaed Jeroldene's personal records, he had several options, including, but not limited to, a motion for order to show cause (for the alleged failure to return the business records) or a motion to set aside the judgment. The only action ever taken during the interlocutory period was the withdrawal of Randee's counsel (R. 63).

Thus, like Jacobson, Randee had "ample opportunity" to litigate his allegations. *Jacobson*, 703 P.2d at 305. Like Jacobson, Randee had knowledge before the divorce and immediately after the divorce. *Id.* Finally, like Jacobson, Randee, knew that at the time that he entered into the stipulated

property settlement, he knew the ownership of the marital property was being determined. *Id.*

POINT II
RESPONDENT'S CLAIM IS NOT PROPERLY BROUGHT IN A PETITION FOR MODIFICATION
(Reply to Point 2 of Appellee's Brief)

Randee relies heavily on *Glover v. Glover*, 242 P.2d 298 (Utah 1952)(Appellee's Brief at 15-16). There, the Utah Supreme Court allowed the reopening of a stipulated property settlement based on the fact that the husband fraudulently induced his wife to not raise an issue in the divorce settlement. *Id.*

Randee however, wholly fails to demonstrate how he was induced by Jeroldene to sign the stipulation. His suggestion that he did this because of reliance on her promise that she would return records is not supported by the record (Appellee's Brief 16).

In addition, aside from accusing Jeroldene of engaging in deceitful and unethical behavior, Randee's personally attacks her counsel[4]:

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[4] Randee contends that the behavior of the Jeroldene's attorneys were parallel to that of the attorney's behavior in *Christensen v. Christensen*, 619 P.2d. 1372, 1374 (Utah 1980):

> Shortly before the trial below, plaintiff's counsel served upon defendant's counsel a written demand for him to produce at trial all books, records and check records relating to the income of the defendant for the year 1978. Defendant's counsel does not deny that he agreed that he would produce them at trial without the necessity of a subpoena duces tecum being served

> Randee requested personally[5] and through counsel that the records be turned over. Both attorneys Reilly and Terry agreed to provide them without the necessity of formal discovery, but never did . . . The failure to provide the records prevented Randee from effective access to the courts.

(Appellee's Brief at 21).

This claim should be ignored because Randee does not, as he cannot, cite to the record to show that either counsel behaved in that manner. It is simply untrue.

> upon his client. At trial, however, the requested documents were not produced and while the defendant admitted the existence of them, he was allows by the trial court to testify concerning his 1978 income and expenses over objection of plaintiff' counsel.
>
> Since the plaintiff was endeavoring also to establish a change of financial circumstances upon which a modification of the alimony provisions of the original decree could be made, we hold that this conduct on the part of the defendant was unjustified and resulted in prejudicial error to the plaintiff in that she was unable to pursue her claim for modification.

Id. at p. 1373 (See, Appellee's Brief at 20-21)

[5]If Randee indeed personally requested the documents, a statement that is not supported by the record, he would have violated the Order to Show Cause wherein he was prohibited from contact with Jeroldene (R. 20). In addition, this again is another attempt to disparage Jeroldene's counsel because the ethical rules clearly prohibit an attorney from discussing matters with the opposing party, where that party is represented by counsel. *See generally*, Rule 4.2, Utah Rules of Professional Conduct.

POINT III
A PETITION FOR MODIFICATION IS BASED ON A CHANGE OF CIRCUMSTANCES SINCE THE ENTRY OF THE DECREE
(Reply to Point Three of Appellee's Brief)

The threshold requirement for a modification is a showing of a substantial change of circumstances *since* the entry of the divorce. *See generally*, *Naylor v. Naylor*, 700 P.2d 707, 710 (Utah 1985). All of Respondent's allegations deal with incidents and circumstances which occurred *prior* to the divorce.

Randee's claim that "[i]t wasn't until after the decree was entered that [he] became aware" of the secreting of assets is flatly contradicted by the May 7th letter (Appellee's Brief 16). It is further complicated by the fact that he ostensibly had to suspect that something was amiss based on his decision to subpoena his ex-wife's personal banking records *after* the divorce was final.[6]

Again the May 7th letter, shows that not one the allegations involved circumstances occurring after the entry, therefore any allegation that these circumstances constitute a substantial change in circumstances is totally baseless.

POINT IV
RESPONDENT'S FAILURE TO DILIGENTLY PURSUE HIS REMEDIES IS NOT TANTAMOUNT TO PETITIONER'S FRAUD.
(Reply to Point Four of Appellee's Brief)

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[6]The final judgment was entered on June 17, 1997 and the subpoena was issued on July 22, 1997 (R. 56, 101).

Randee places a great deal of emphasis on Jeroldene's alleged failure to provide documents as denying him his day in court. He attempts to justify his failure to diligently pursue his remedies as Jeroldene's fraud. The Court should reject based on the fact that at all times, Randee was represented by counsel and had remedies that he either chose to ignore or disregard.

CONCLUSION

For the foregoing reasons, it is respectfully requested that trial court's denial of Petitioner's Motion to Dismiss be reversed.

DATED this 12th day of February, 1999.

UTAH LEGAL SERVICES, INC.
By Rosalie Reilly
Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Reply Brief to Craig C. Halls, 333 South Main, Blanding, Utah 84511, postage prepaid, this 12th day of February, 1999.