

1998

Joe W. Ruden v. Betty Ruden : Brief of Appellee

Utah Court of Appeals

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John E. Schindler; Attorney for Appellee.

Steven Lee Payton; Attorney for Appellant.

Recommended Citation

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BRIEF

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DOCKET NO. 981379

IN THE UTAH COURT OF APPEALS OF THE STATE OF UTAH

| | |
|--|---|
| JOE W. RUDEN, Petitioner/APPELLANT, vs. BETTY RUDEN, Respondent/APPELLEE | BRIEF OF APPELLEE Case No.: 981379-CA |
|--|---|

BRIEF OF APPELLEE BETTY RUDEN

APPEAL FROM THE SEVENTH DISTRICT COURT
CARBON COUNTY, STATE OF UTAH
JUDGE BRUCE K. HALLIDAY

STEVEN LEE PAYTON (#2554)
213 East Broadway
Salt Lake City, Utah 84111-2413
Telephone: (801) 363-7070
Fax (801) 363-7071

Attorney for Petitioner/APPELLANT

JOHN E. SCHINDLER (#3619)
80 West Main, Suite 201
Price, Utah 84501
Telephone: (435) 637-1783
Fax: (435) 637-5269

Attorney for Respondent/APPELLEE

FILED
APR 16 1999
COURT OF APPEALS

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STATEMENT OF JURISDICTION

Mrs. Ruden acknowledges that this Court is the appropriate court for this appeal.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

The only issue presented by Mr. Ruden is his argument that "there exists an absolute right to have closing argument in a civil case".

Mr. Ruden makes no citation to the record indicating that he has preserved the issue for appeal.¹

Mr. Ruden seems to argue that the trial court has denied him a constitutionally guaranteed right, i.e. the right to closing argument in a divorce case. Mrs. Ruden argues that the standard of review in such cases is a "correction of error standard". ***State vs. Kiriluk***, 1998 Ut. App. LEXIS 115.

STATEMENT OF THE CASE

The parties were divorced by Decree dated August 22, 1989. The Decree was entered pursuant to the stipulation of the parties. A "Stipulation And Property

¹Mrs. Ruden notes that Mr. Ruden, the Appellant, failed to order a record.

Mrs. Ruden argues that this failure is fatal to this appeal as Mr. Ruden cannot satisfy the Rules of Appellate Procedure which require an Appellant to cite to the record showing the issue was preserved in the trial court. See Utah Rules of Appellate Procedure 24 (5) (A), and Rule 11 (c).

Settlement Agreement" is on file and contains the terms and conditions of the parties' agreement which were incorporated into the Decree.

The present proceeding was initiated by a Petition for Modification submitted by Mr. Ruden. Said Petition is dated May 23, 1997. Said Petition requested the following:

1. That alimony terminate in its entirety;
2. In the alternative, should alimony not be entirely terminated, Mr. Ruden requested an order "articulate in conditions under which alimony shall terminate or in the alternative be modified.";
3. Costs of suit;
4. An award of attorney's fees.

Mrs. Ruden filed a Petition for Modification. Said Petition is dated June 20, 1997. Said Petition requested the following:

1. That the Decree be modified, in the event the Court elected to modify and/or terminate Mrs. Ruden's alimony awarded pursuant to the Decree, by awarding her one-half of the retirement received by Mr. Ruden;
2. For an award of reasonable attorney's fees.

General denials were filed to both Petitions.

Trial was conducted on January 29, 1998 and April 24, 1998. At the conclusion of the trial, the trial court indicated its ruling in favor of Mrs. Ruden on Mr. Ruden's Petition and against Mrs. Ruden on her Petition. The trial court directed preparation

of Findings of Fact and an Order by counsel for Mrs. Ruden.

Proposed Findings of Fact, Conclusions of Law and Order on Petitioner's and Respondent's Petitions to Modify were submitted to Petitioner's counsel on April 30, 1998. A Notice of Submission of Proposed Order was filed with the trial court confirming that submission. By a letter dated May 8, 1998, Mr. Ruden's counsel submitted to Mrs. Ruden's counsel certain observations concerning the proposed Findings of Fact, Conclusions of Law and Order. This letter indicates that a copy was provided to the court. However, no pleading was filed. Mrs. Ruden's counsel responded to Mr. Ruden's counsel's May 8, 1998 letter by letter dated May 12, 1998. Mrs. Ruden's proposed Findings of Fact, Conclusions of Law, and Order were submitted to the trial judge by letter dated May 28, 1998.

Mrs. Ruden's proposed Findings of Fact, Conclusion of Law and Order were signed by the court June 9, 1998 and filed June 24, 1998.

Mr. Ruden's Notice of Appeal is dated July 3, 1998.

SUMMARY OF ARGUMENT

Mrs. Ruden argues this appeal should be denied, and the trial court's ruling affirmed on any, or all, of the following grounds:

1. Mr. Ruden failed to preserve his argument before the trial court as there was

no objection made;

2. Mr. Ruden has failed to satisfy the Rules of this Court by failing to show that his argument was preserved before the trial court;

3. Mr. Ruden has failed to show that there is a constitutional right to closing argument in a divorce case.

ARGUMENT

POINT I

Argument Not Preserved

An Appellant has the duty to designate the record for their appeal. Rule 11(c) Utah Rules Of Appellate Procedure.

In this case, Mr. Ruden, the Appellant, did not designate that a record of the trial be prepared. Therefore, this Court cannot tell whether Mr. Ruden preserved the argument he presents to this Court as an appellate issue.

Mrs. Ruden argues that this appeal should be dismissed as Mr. Ruden has failed to show that his argument presented on appeal was preserved before the trial court.

POINT II
Appellant Must Show Argument Preserved

It is well settled in this State that an appellant must preserve an argument for appeal. *Harper vs. Summit County*, 963 P.2d 768 (Ct. App. 1998) Alleged errors not preserved before the trial court will not be considered on appeal. *State vs. Hyatt*, 965 P.2d 525 (Ct. App. 1998), *Taylor vs. DOC*, 952 P.2d 1090 (Ct. App. 1998), *Hart vs. Salt Lake County Commission*, 945 P. 2d 125 (Ct. App. 1997).

In this case, this Court entered an Order remanding the case for preparation of an agreed-upon statement. (See Addendum Exhibit 1.) Upon receipt of said Order, Mrs. Ruden's counsel prepared a proposed Stipulation and submitted same to counsel for Mr. Ruden by letter dated February 12, 1999. (See Addendum Exhibits 2 and 3.)

Mrs. Ruden's counsel did not receive any reply from Mr. Ruden's counsel. On February 24, 1999, Mrs. Ruden's counsel sent a follow-up memo to Mr. Ruden's counsel concerning the proposed Stipulation. (See Addendum Exhibit 4.)

On March 17, 1999, this Court entered an Order of Dismissal. (See Addendum Exhibit 5.)

Mr. Ruden filed his Brief on or about March 26, 1999. No agreed-upon statement, as contemplated by this Court's February 9, 1999, Order, was completed.

Mrs. Ruden argues that Mr. Ruden has failed to preserve his argument for appeal and to confirm to this Court that his argument was preserved for appeal.

POINT III
Constitutional Right to Closing Argument In Divorce Cases

Mrs. Ruden argues that Mr. Ruden has failed to establish that he has a constitutional right to a closing argument in a divorce case. Four of the five cases cited by Mr. Ruden are criminal cases. Three of the four cases are Utah cases.

Herring vs. New York, 442 U.S. 853 (1975) involved the constitutionality of a New York statute which allowed discretion to the trial court as to whether closing argument would be allowed. In that case, the United States Supreme Court found the challenged New York statute violated the Sixth Amendment of the United States Constitution as applied to the States by the Fourteenth Amendment. Mrs. Ruden argues ***Herring*** has no application to this case.

Likewise, the three Utah cases cited by Mr. Herring have no application. Pursuant to Rule 17 (c) Utah Rules Of Criminal Procedure, all felony cases must be tried with a jury unless the jury is waived. Closing argument is allowed pursuant to Rule 17 (g) (7) Utah Rules of Criminal Procedure.

In civil cases, Rule 51 Utah Rules of Civil Procedure indicates that "Arguments for the respective parties shall be made after the court has instructed the jury."

The undersigned has not found any Utah case indicating a closing argument in a divorce case is a constitutionally protected right in the state of Utah.

Closing argument is discussed in ***Joseph vs. W. H. Groves Latter Day Saints***

Hospital, 318 P. 2d 330 (Utah 1997). The reason closing argument was discussed in *Joseph* was because the issue central to the appeal in that case involved rulings made concerning reference to evidence in Plaintiff's closing argument. *Joseph* was a medical malpractice case tried to a jury. Rule 51 Utah Rules of Civil Procedure applied to *Joseph*. As previously indicated, Rule 51 Utah Rules of Civil Procedure, allows argument by the parties after the court has instructed the jury.

Mrs. Ruden argues, in the case before the Court, that a trial court has authority to run its courtroom in any manner it sees fit, provided a party's legal and constitutional rights are not violated.

In this case, Mr. Ruden has not established that closing argument is a constitutionally protected right in a divorce case in the State of Utah.²

CONCLUSION

Mrs. Ruden submits that this appeal should be dismissed on any, or all, of the following grounds:

1. Mr. Ruden failed to preserve his argument before the trial court as there was no objection made;

²By making this argument, Mrs. Ruden does not abandon her argument that Mr. Ruden failed to preserve his argument for appeal, or that Mr. Ruden failed to establish to this court that his argument was preserved before the trial court.

2. Mr. Ruden has failed to satisfy the Rules of this Court by failing to show that his argument was preserved before the trial court;

3. Mr. Ruden has failed to show that there is a constitutional right to closing argument in a divorce case.

Particularly, Mr. Ruden has failed to follow the Rules of this Court. Rule 24 (a) (5) (A) requires the appellant to indicate, in his brief "citation to the record showing that the issue was preserved in the trial court". That reference is absent as Mr. Ruden failed to preserve the issue before the trial court as he failed to make an objection. This Court allowed Mr. Ruden an opportunity to obtain a record when the Order labeled, "Order Temporarily Remaining Case for Preparation Of Agreed-upon Statement; Setting Deadline for Appellant's Brief" was entered. As demonstrated, Mr. Ruden failed to take advantage of that opportunity.

Applicable are the cases cited by Mrs. Ruden wherein this Court has found that an issue would not be addressed on appeal unless it was preserved before the trial court.

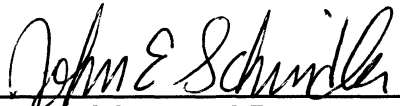
Mrs. Ruden argues that she has a constitutionally protected right guaranteed her by the Rules of Appellate Procedure to have this appeal processed pursuant to those Rules. Mrs. Ruden requests this Court apply the Rules established and memorialized in the Rules of Appellate Procedure -- particularly Rule 24 (a) (5) (A).

Mr. Ruden failed to preserve his appellate argument before the trial court and

has failed to submit a citation to the record in his Brief showing that the issue was presented in the trial court.

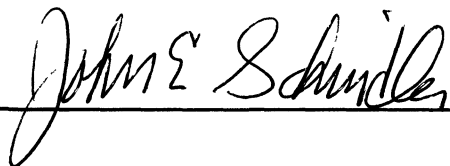
Mr. Ruden's appeal should be dismissed and the trial court's ruling affirmed.

DATED this 16 day of Apr., 1999.


JOHN E. SCHINDLER
Attorney for Respondent/Appellee

CERTIFICATE OF MAILING

I hereby certify that on the 16 day of Apr., 1999, I mailed a true and correct copy of the above **BRIEF OF APPELLEE** by placing same in the U. S. Mail, postage prepaid, to Steven Lee Payton, Attorney for Petitioner/Appellant, 213 East Broadway, Salt Lake City, Utah 84111-2413.



ADDENDUM

1. Order Temporarily Remanding Case for Preparation of Agreed upon Statement;
Setting Deadline for Appellant's Brief
2. Letter Dated February 12, 1999
3. Stipulation
4. Follow-up Memo
5. Order of Dismissal

Julia D'Alesandro
Clerk of the Court

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EXHIBIT

TABULAR

1

John E. Schindler
ATTORNEY AT LAW

February 12, 1999

0 West Main, Suite 201
rice, Utah 84501

Telephone: (435) 637-1783
FAX: (435) 637-5269

Steven Lee Payton
Attorney at Law
213 East Broadway
Salt Lake City, UT 84111-2413

Re: Ruden Appeal

Dear Steve:

I have received and reviewed the Order Temporarily Remaining Case for Preparation Of Agreed Upon Statement; Setting Deadline for Appellant's Brief. It appears Judge Bench has instructed that you and I attempt to agree upon a statement indicating what the record would disclose. This Stipulation must be approved by the trial court.

I have prepared a proposed Stipulation and have enclosed same for your review and approval. I believe the proposed Stipulation accurately reflects what the record would disclose if it were prepared. The Stipulation also provides a place for the trial court to approve the stipulation. This Stipulation, I believe, satisfies the directive from Judge Bench, as well as, Rule 11 (f) Utah Rules Of Appellate Procedure.

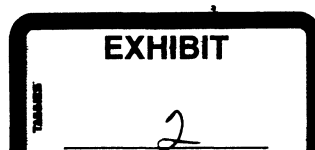
By copy hereof, I am informing Judge Halliday of this submission to you and the content of the proposed Stipulation. As I understand the Rule 11 (f), the terms of the Stipulation are subject to the approval from the trial court. On that basis, I have submitted the Stipulation to Judge Halliday and, by copy hereof, I am requesting that he make any comment concerning its form and contents. This course of action is taken in an effort to avoid the need for a hearing, thus increasing costs to our clients.

If you agree with the proposed Stipulation, you may sign same in the space provided and submit the document directly to Judge Halliday. Please let me know if that course of action is followed. On the other hand, if you do not agree with the proposed Stipulation, please advise.

Sincerely yours,


John E. Schindler

/mo
Enclosure
Pc: Betty Ruden
Bruce K. Halliday, District Court Judge



CERTIFICATE OF MAILING

I hereby certify that on February 9, 1999, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

STEVEN LEE PAYTON
ATTORNEY AT LAW
213 E BRDWAY
SALT LAKE CITY UT 84111-2413

JOHN E. SCHINDLER
ATTORNEY AT LAW
80 W MAIN STE 201
PRICE UT 84501

and a true and correct copy of the foregoing ORDER was deposited in the United States mail to the trial court listed below:

HONORABLE BRUCE K. HALLIDAY
SEVENTH DISTRICT, PRICE DEPT
CARBON COUNTY COURT COMPLEX
149 E 100 S
PRICE UT 84501

and
SEVENTH DISTRICT, PRICE DEPT
ATTN: BARBARA
CARBON COUNTY COURT COMPLEX
149 E 100 S
PRICE UT 84501

Dated this February 9, 1999.

By P. Stagg
Deputy Clerk

Case No. 981379
SEVENTH DISTRICT, PRICE DEPT, 890715786 DA

JOHN E. SCHINDLER
Attorney at Law

80 West Main, Suite 201
Price, Utah 84501

Telephone: (801) 637-1783
Fax: (801) 637-0220

FAX COVER SHEET

DATE: February 24, 1999
TO: **STEVE PAYTON**
FAX NUMBER SENDING TO: (801) 363-7071
NUMBER OF PAGES INCLUDING COVER SHEET: 3
FROM: John E. Schindler
RE: Ruden v. Ruden
HARD COPY TO FOLLOW: YES _____ NO XX
FAX NUMBER SENDING FROM: (801) 637-0220

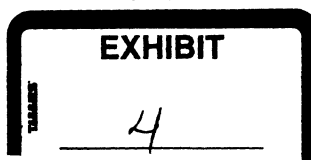
MESSAGE: Steve,

I have not heard from you concerning my letter dated February 12, 1999. I have transmitted herewith a copy of that letter, together with the enclosure referenced therein, in the event that there has been a problem with the mail.

John

IF THERE ARE ANY PROBLEMS IN TRANSMISSION OR YOU DO NOT RECEIVE THE NUMBER OF PAGES INDICATED ABOVE, PLEASE CALL: (801) 637-1783

The information included in this facsimile transmission contains information which may be confidential or legally privileged and is intended for the use of the individual or entity named above. If you have received this communication in error, please notify us immediately by telephone. Thank you.



JOHN E SCHINDLER, #3619
Attorney for Respondent,
80 West Main, Suite 201
Price, Utah 84501
Telephone (801) 637-1783

IN THE SEVENTH JUDICIAL DISTRICT COURT OF
CARBON COUNTY, STATE OF UTAH

| | | |
|--------------|---|----------------------------|
| JOE W RUDEN, |) | |
| |) | STIPULATION |
| Petitioner, |) | |
| Vs |) | |
| |) | |
| BETTY RUDEN, |) | |
| |) | Civil No 890715786DA |
| Respondent |) | Honorable Bruce K Halliday |

COMES NOW the parties and stipulate an agree as follows:

1. After all testimony had been submitted and both parties had rested, the trial Court indicated that closing argument would not be helpful to the trial Court, and that closing argument would not be received.

2. Neither party requested closing argument.

3 Neither party objected to the trial Court's decision to not receive closing argument

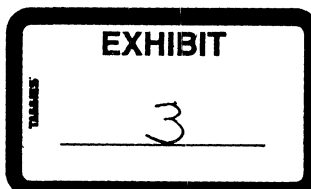
DATED this _____ day of _____, 1999

STEVEN LEE PAYTON
Attorney for Petitioner

John E Schindler
JOHN E SCHINDLER
Attorney for Respondent

Approved

BRUCE K HALLIDAY
District Court Judge



IN THE UTAH COURT OF APPEALS

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ORDER OF DISMISSAL

Joe W. Ruden, Jr.,)
)
 Plaintiff and Appellant,)
)
v.)
)
Betty Jo Ruden,)
)
 Defendant and Appellee.)

Case No. 981379-CA

Before Judges Greenwood, Billings, and Jackson.

For failure of appellant to file the appellant's brief within the time permitted by Utah R. App. P. 26(a), which time expired on March 11, 1999, IT IS HEREBY ORDERED that the appeal is dismissed, see Utah R. App. P. 3(a); provided, however, that if the appellant's brief is submitted within ten (10) days from the date hereof, the appeal shall be thereby reinstated without further order of the court.

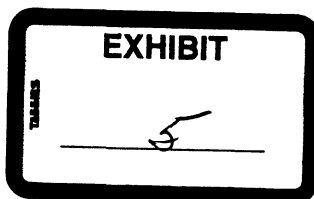
Now therefore, IT IS HEREBY ORDERED that the appeal is dismissed.

Dated this 17 day of March, 1999.

FOR THE COURT:

Judith M. Billings

Judith M. Billings, Judge



CERTIFICATE OF MAILING

I hereby certify that on the 17 day of March, 1999, a true and correct copy of the foregoing ORDER OF DISMISSAL was deposited in the United States mail to the parties listed below:

STEVEN LEE PAYTON
ATTORNEY AT LAW
213 E BRDWAY
SALT LAKE CITY UT 84111-2413

JOHN E. SCHINDLER
ATTORNEY AT LAW
80 W MAIN STE 201
PRICE UT 84501

And a true and correct copy of the foregoing ORDER OF DISMISSAL was deposited in the United States mail to the trial court listed below:

SEVENTH DISTRICT, PRICE DEPT
ATTN: BARBARA
CARBON COUNTY COURT COMPLEX
149 E 100 S
PRICE UT 84501

Dated this 17 day of March, 1999.

By P. Stagg
Paulette Stagg
Deputy Clerk

Case No.: 981379-CA
SEVENTH DISTRICT, PRICE DEPT, #890715786 DA