

1998

Daryl W. Hennick v. Susan Greene : Brief of Appellant

Utah Court of Appeals

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Don S. Redd; Attorney for Defendant/Appellant.

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IN THE UTAH COURT OF APPEALS CASE NO. 981471-CA
STATE OF UTAH

DARYL W. HENNICK)

Plaintiff / Appellee,)

) Case No. 900000140 DA 981471-CA

vs.)

SUSAN GREENE)

) Priority No. 15

Defendant / Appellant.)

BRIEF OF DEFENDANT/APPELLANT

Appeal from Bench Trial Review of the
First Judicial District Court
Honorable Clint S. Judkins, Judge

Don S. Redd (#2705)

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FILED

Utah Court of Appeals

FEB 19 1999

Julia D'Alesandro
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Attorney for Plaintiff/Appellee

TABLE OF AUTHORITIES

STATUTES:

Rule 61, Utah Rules of Civil Procedure

Rule 4-504 Rules of Judicial, Operation of the Courts

United States Constitution Amendment XIV

Constitution of Utah, Article 1 Section 2

CASE LAW:

Aragon v Clover Club Foods Company,

857 P.2d 250 (Utah Court of Appeals 1993);

Rollins v Petersen,

813 P.2d 1156 (Utah Supreme Court 1992);

GNS Partnership v. Fullmer,

237 Utah Adv. Rep. 32

Utah Sand & Gravel Products Corp. v. Tolbert,

402 P.2d 703 (Utah 1965)

STATEMENT OF JURISDICTION OF THIS COURT

Jurisdiction of this Court is granted pursuant to the provision of Section 78-2a-3(2)(h), Utah Code Annotated.

ISSUES PRESENTED FOR REVIEW

I. Was the trial Court correct in disregarding respondent's Memorandum which was mailed within the time allowed by the court.

II. Was the trial Court correct in denying respondent's Objection to Memorandum Decision.

STANDARD OF REVIEW

The standard of review is a “correction of error” standard, in which the Court of Appeals gives the trial court no particular deference in its legal analysis and conclusions. See generally *Aragon vs. Clover Club Foods Company*, 857 P.2d 250 (Utah Court of Appeals 1993); *Rollins v Petersen*, 813 P.2d 1156 (Utah Supreme Court 1992); *GNS Partnership v. Fullmer*, 237 Utah Adv. Rep. 32

STATEMENT OF THE CASE

This case concerns a divorce between the plaintiff, Daryl W. Hennick, and the defendant, Susan Noorlander Greene. After this couple was married, Susan received her inheritance from her father in the form of patents on his inventions. Susan’s father then set up Mr. Hennick with the production facilities to produce the patents. From this business Mr. and Mrs. Hennick became millionaires. While Mr. Hennick became wealthy

from Susan's inheritance, Susan spent her time raising twelve children, many of whom she personally adopted from third world nations. Sometime later, Mr. Hennick instructed Susan to leave their home, after which Mr. Hennick's secretary, whom he later married, moved in.

At that time Mr. Hennick foisted an unconscionable divorce upon Susan, giving her nearly nothing. Susan finally got legal counsel who succeeded in setting aside the original decree and gaining for Susan a little better settlement. Since Mr. Hennick claimed that he couldn't come up with the full amount of the settlement, a portion of it was structured to be paid in annual payments – with interest.

Mr. Hennick has made the payments (late) each year. However, taking advantage of Susan's lack of counsel or financial expertise, he calculated the interest in a bizarre, unconventional and unheard of way that saved himself thousands of dollars.

After a review of the situation by one familiar with interest calculations, in October 1996 Susan filed a motion for an Order to Show Cause why the plaintiff should not be held in contempt for failing to comply with the requirements of the Second Amended Decree requiring payments of principle and interest to the defendant and asking that the plaintiff be ordered to comply with the payment arrangements.

Mr. Hennick countered with an Order to Show Cause concerning some attempts Susan had made to contact her children some years earlier.

At a hearing on the motion it was determined that the language in the Second Amended Decree (prepared by plaintiff's counsel) regarding the payment of interest was ambiguous concerning the calculation of interest. Testimony was given by an expert witness that the method used by Mr. Hennick was unheard of and not at all used conventionally to calculate interest.

After a hearing on July 3, 1998 Commissioner Dan Garner denied Susan's motion. Further, Susan agreed to spend five days in jail in exchange for a hold harmless agreement on any previous claims of contempt Mr. Hennick may bring. Mr. Hennick's

counsel was instructed, on July 3, 1998, to prepare an order reflecting the agreement in accordance with Rule 4-504 Rules of Judicial Administration.

In July of 1998 Susan served her five days in jail and appealed the Commissioner's decision, requesting a trial de novo. Judge Clint S. Judkins, in lieu of a trial de novo, agreed to review the Commissioner's ruling.

On several occasions during the next several months Susan's counsel phoned Mr. Hennick's attorney asking for a copy of the order. Finally, the plaintiff's counsel submitted an Order concerning the hold-harmless agreement to the Court. However, such an order was never received by Susan's attorney to approve as to form. The order finally prepared and signed did not agree with the understanding had by Susan and her counsel.

On 12 December 1997, Judge Judkins requested both sides to send him a memorandum within ten days. On 22 December 1997, ten days later as directed by the Court, Susan, who resides in San Pete County though her attorney resides in Davis County, mailed in her memorandum to Judge Judkins in Cache County.

Plaintiff's counsel argued to Judge Judkins that Susan's memorandum was late and should therefore be disregarded. Judge Judkins agreed and declining to consider Susan's memorandum, ruled in favor of the plaintiff.

A R G U M E N T

I. Minor Defects do not Forfeit Rights

There was some confusion as to how the defendant's appeal of the Commissioner's ruling would be handled. While defendant's counsel was expecting a trial de novo, evidently in the First District the policy is different in each of the two District Courts a review instead of a trial de novo, (which seems to be consistent with

the statute Judge Judkins gives.) The ten-day time limit suggested by the Judge was not a time limit set by statute or by rule. The defendant's memorandum was mailed to the Court in Logan on the tenth day. The Court received it two days later, following the weekend.

Rule 61 of the Utah Rules of Civil Procedure states that:

The court at every stage of the proceeding *must disregard* any error or defect in the proceeding which does not affect the substantial rights of the parties. (emphasis added)

This rule has been upheld by the Utah Supreme Court, stating that:

Liberality in interpretation and application of new rules of civil procedure should be indulged where no prejudice or disadvantage to anyone results, but where failure to comply with rules will result in some substantial prejudice or disadvantage to a party, they should be adhered to with fidelity. *Utah Sand & Gravel Products Corp. v. Tolbert*, 402 P.2d 703 (Utah 1965)

By failing to consider the defendant's position, as stated in her memorandum, while considering only the plaintiff's position the Court has violated the defendant's rights to *equal* protection of the laws under the United States Constitution Amendment XIV. Also, the Constitution of Utah, Article 1 Section 2 mandates that "All courts shall be open, and every person, for any injury done to him in his person, property or reputation shall have a remedy by due course of law." Disallowing the defendant's memorandum to be considered in the Court's decision effectively violates this "open courts" provision and denies the defendant her "day in court." It also denies her rights of redress in violation of the Constitution of Utah Article 1 Section 11 and her right to due process in violation of the United States Constitution Amendment V and Amendment XIV.

When Plaintiff's counsel violated the mandated time allowed by Rule 4-504 to prepare an order Defendant's counsel indulged the gross tardiness. However, when Defendant's counsel mailed her Memorandum within a judicially imposed time limit, Plaintiff's counsel allowed no indulgence for the two days it took Defendant's Memorandum to arrive in the mail. Susan lives in Manti, while her counsel is in Layton and the Court is in Logan. The Plaintiff lives new the Court in Logan. Defendant's counsel worked within the constraints of logistics to the best of his ability. It had seemed, by Plaintiff's dilatory negligence of the time limit stipulated by Court Rules, that the mailing of Susan's Memorandum by her counsel within the ten days requested by the Court should not have been a serious concern to Plaintiff's counsel.

CONCLUSION

The plaintiff has not shown, as required by Rule 61 URCP cited above, any way in which his rights would be affected by the Court considering the defendant's memorandum. However, by the court granting the plaintiff's request to disallow the defendant's memorandum, her rights to a fair and impartial hearing of her case have been substantially affected, in violation of Rule 61 URCP and the provisions of the United States Constitution and the open courts provisions of the Utah Constitution cited above.

WHEREFORE Defendant requests that the lower Court's decision to disregard her Memorandum for Review be overturned and the matter be remanded for fair and equitable consideration.

DATED this ____ day of February, 1999.



Don S. Redd,

Attorney for Defendant/Appellant

RE: Daryl W. Hennick - Appellee Case No.: 900000140 DA
v. Susan Greene - Appellant

RETURN OF SERVICE

STATE OF UTAH)
 : ss.
COUNTY OF DAVIS)

I, Ronald M Greene, being first duly sworn, state:

That on the 19th day of February, 1999, I received the annexed Brief of appellant

And being a person over the age of 21, a resident of this State and not a party to the action, I served: H. Russell Nettinger

a true and correct copy thereof on February 19, 1999 at 3:00 p.m., by: _____ DELIVERING SAID COPY TO SAID INDIVIDUAL PERSONALLY AT:

LEAVING SAID COPY WITH Georgene Warren
254 W. 400 S. Suite 320 SLK, a person of suitable age and discretion at the usual place of abode/employment of the individual being served and presently residing/working therein.

UPON SERVING THE SAME, I endorsed the date and place of service and my name on the copy served and showed the original to the person served.

DATED the 19th day of February, 1999

AFFIANT: Ronald M Greene

SUBSCRIBED and SWORN to before me this 19 day of February, 1999

Service Fee: \$ _____
Milage: \$ _____
Total Due: \$ _____

[Signature]
NOTARY PUBLIC



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Attorneys for Petitioner

IN THE FIRST JUDICIAL DISTRICT COURT FOR CACHE COUNTY

STATE OF UTAH

* * * * *

DARYL W. HENNICK,	)	ORDER (1) GRANTING
	)	PETITIONER'S OBJECTION
Petitioner,	)	TO RESPONDENT'S
	)	MEMORANDUM IN SUPPORT OF
vs.	)	OBJECTION TO
	)	COMMISSIONER'S RULING;
SUSAN NOORLANDER GREENE,	)	AND (2) DENYING
	)	RESPONDENT'S OBJECTION
Respondent.	)	TO MEMORANDUM DECISION
	)	AND REQUEST FOR TRIAL DE
	)	NOVO
)	
	)	Civil No. 900000140 DA
)	
	)	Judge Clint S. Judkins
)	
	)	Commissioner Daniel W.
	)	Garner

* * * * *

Petitioner's Objection to (1) Respondent's Memorandum in Support of Objection to Commissioner's Ruling, and (2) Affidavit of Stephen Jewell (dated January 5, 1998) (hereinafter "petitioner's Objection"), and respondent's Objection to Memorandum Decision and Request for Trial de Novo (dated September 12, 1997) (hereinafter "respondent's Objection"), each came on regularly pursuant to notice

before the Honorable Clint S. Judkins, District Court Judge, on April 21, 1998. Petitioner was represented by counsel of record, H. Russell Hettinger. Respondent was represented via telephone by counsel of record, Don S. Redd. After having reviewed all of the memoranda and documents filed in support of and in response to respondent's Objection and to petitioner's Objection, and good cause appearing, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. Respondent's Memorandum in Support of Objection to Commissioner's Ruling (hereinafter "respondent's Memorandum") was filed on December 24, 1997, which is after the expiration of the ten day period granted in open court on December 12, 1997 for the filing of said memorandum, and accordingly, respondent's Memorandum is hereby stricken and not considered by the Court; and

2. Respondent's Objection is hereby denied and the Memorandum Decision entered by Commissioner Garner herein is hereby confirmed as the order of this Court.

Dated this ___ day of April, 1998.

BY THE COURT:



Honorable Clint S. Judkins
First District Court Judge