

2009

Linda Anderson v. Glen Hunter Thompson : Brief of Appellee

Utah Court of Appeals

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Bruce L. Richards, Dean A. Stuart; attorneys for appellee.

David J. Friel; attorney for appellant.

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IN THE UTAH COURT OF APPEALS

LINDA ANDERSON,)	
(f.k.a. Linda Thompson),)	
)	
Petitioner/Appellant,)	Appellate Case No. 20090892-CA
)	
vs.)	
)	
GLEN HUNTER THOMPSON,)	
)	
Respondent/Appellee.)	

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT

FOR TOOELE COUNTY, STATE OF UTAH

JUDGE STEPHEN L. HENRIOD

BRIEF OF APPELLEE

David J. Friel, Bar No. 6225
Attorney for Petitioner/Appellant
River Park Executive Suites
10808 South River Front Pkwy. #310
South Jordan, UT 84095
Telephone (801) 984-8081

Bruce L. Richards, Bar No. 2737
Dean A. Stuart, Bar No. 7640
Attorneys for Respondent/Appellee
1805 South Redwood Road
P.O. Box 25786
Salt Lake City, UT 84125-0786
Telephone: (801) 972-0307

ORAL ARGUMENT IS REQUESTED

FILED
UTAH APPELLATE COURT
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17

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1805 South Redwood Road
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LIST OF PARTIES

All parties are shown in caption on the cover.

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STATEMENT OF JURISDICTION

The Court has jurisdiction pursuant to Utah Code Ann. §78A-4-103(2)(h).

STATEMENT OF ISSUES

1. Did the Third District Court properly award Respondent/Appellee his attorneys' fees on the second appeal given the applicable law and the finding that Respondent/Appellee clearly prevailed on appeal?

Standard of Review. The standard of review as to an interpretation of a Court's decision on appeal is a question of law. Amax Magnesium Corp. v. Utah State Tax Commission, 874 P.2d 840, 842 (Utah 1994). A correction of error standard applies. Allen v. Utah Department of Health, 850 P.2d 1267, 1269 (Utah 1993).

2. Does the mandate doctrine apply to circumstances in which application of the doctrine is clearly erroneous?

Standard of Review. The standard of review as to an interpretation of a Court's decision on appeal is a question of law. Amax Magnesium Corp. v. Utah State Tax Commission, 874 P.2d 840, 842 (Utah 1994). A correction of error standard applies. Allen v. Utah Department of Health, 850 P.2d 1267, 1269 (Utah 1993).

3. If the Third District Court erred in awarding Respondent/Appellee his attorneys' fees, was this error harmless error?

Standard of Review. The standard of review as to an interpretation of a Court's decision on appeal is a question of law. Amax Magnesium Corp. v. Utah State Tax Commission, 874 P.2d 840, 842 (Utah 1994). A correction of error standard applies. Allen v. Utah Department of Health, 850 P.2d 1267, 1269 (Utah 1993).

4. Is Respondent/Appellee entitled to his attorneys' fees in connection with this appeal?

Standard of Review. The standard of review as to an interpretation of a Court's decision on appeal is a question of law. Amax Magnesium Corp. v. Utah State Tax Commission, 874 P.2d 840, 842 (Utah 1994). A correction of error

standard applies. Allen v. Utah Department of Health, 850 P.2d 1267, 1269 (Utah 1993).

Issue Preserved in the Trial Court. One of the two issues on remand was attorneys' fees. This issue of attorneys' fees on appeal is also raised in this Brief of Appellant.

DETERMINATIVE STATUTE

Utah Code Ann. §30-3-3(2)

(2) In any action to enforce an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against a party if the court finds the party is impecunious or enters in the record the reason for not awarding fees.

STATEMENT OF THE CASE

This is the third appeal in this case. Appellant (hereinafter "Anderson") claims that the Third District Court erred in awarding attorneys' fees to the Appellee (hereinafter "Thompson") for fees incurred by Thompson in the second appeal. Thompson responds that the Third District Court ruled correctly on the remand in awarding Thompson his attorneys' fees on the second appeal. Alternatively, Thompson submits that the mandate doctrine is not applied inflexibly giving the Third District Court the ability to award Thompson his

attorneys' fees on appeal. Thompson also submits that even if an error occurred, any error was harmless error. Thompson, as the prevailing party on the second appeal, was entitled to his attorneys' fees on appeal. Thompson requests that the Third District Court award of his attorneys' fees should be affirmed and that the case should be remanded to the Third District Court for an award of his attorneys' fees on this appeal.

STATEMENT OF FACTS

The Third District Court entered an Order from Hearing Held April 16, 2007 on June 15, 2007. (R. @ 398-400). This Court reversed the Third District Court Order from Hearing held April 16, 2007.

This Court remanded the case to the Third District Court for a determination as to whether a basis existed for an award of \$455.08 to Anderson and "to determine if an award of costs and attorneys' fees should be awarded the husband (Thompson) and, if so, to determine the amount." (R. Pg. 536 and Appellant Addendum 3). Opinion reported at 2008 UT App. 170.

Disposition in Third District Court. The Affidavit of Bruce L. Richards setting forth the attorneys' fees related to trial court proceedings based on Anderson's Order to Show Cause dated February 22, 2007 and the Appeal from the Order from Hearing Held April 16, 2007 (the Second Appeal) was filed January 12, 2009 (R. Pgs. 572-589). The Third District Court held an evidentiary

hearing on February 9, 2009. Following the February 9, 2009 evidentiary hearing, the Third District Court entered a Minute Entry on March 20, 2009 (R. Pgs. 723-727 and Appellee Addendum 1).

Oral argument was subsequently held on Anderson's objections to the Findings of Fact and Conclusions of Law and Order Regarding Fees and Costs on Remand on June 17, 2009. The Court entered Findings of Fact and Conclusions of Law (R. 816-820 and Appellant Addendum 1) and Order Regarding Fees and Costs on Remand (R. 821-822 and Appellant Addendum 2). The basis for Thompson's attorneys' fee claim is Utah Code Ann. §30-3-3(2). The District Court ruled Thompson clearly prevailed on the second appeal. (R. @ 829).

SUMMARY OF ARGUMENT

Respondent/Appellee Glen Thompson submits that the Third District Court correctly awarded him his attorney's fees on the second appeal. This Court's instructions on remand are not limited to trial court fees. Thompson met all requirements for an award of attorneys' fees on appeal.

The mandate doctrine does not apply to circumstances in which application of the mandate doctrine is erroneous. The mandate doctrine is not applied inflexibly. The Third District Court correctly awarded Thompson his attorneys' fees on appeal. To do otherwise would be erroneous and would work a manifest injustice.

If the Third District Court erred in awarding Thompson his attorneys' fees on appeal, any error was harmless. If a specific remand instruction should have been given, the ultimate result is the same. Thompson was entitled to his attorneys' fees on appeal.

Thompson is also entitled to his attorneys' fees on this appeal. This appeal should be remanded to the Third District Court for this award of fees.

ARGUMENT

POINT I

THE THIRD DISTRICT COURT
CORRECTLY FOLLOWED THE COURT
OF APPEALS REMAND BY
CONSIDERING ATTORNEYS' FEES
BOTH AT THE TRIAL COURT AND
APPELLATE COURT LEVEL.

The Court of Appeals remanded the case to determine if an award of costs and attorneys' fees should be made to Thompson and, if so, to determine the amount. The determination of whether an award of costs and attorneys' fees should be made involved making a finding as to whether Thompson was the prevailing party. The Third District Court found Thompson clearly prevailed on appeal in the Minute Entry entered March 20, 2009 (R. @ 725 and Appellee Addendum 1). This finding is also made in the Findings of Fact and Conclusions of Law entered September 24, 2009 (R. Par. 17 @ 818).

The instructions on remand are not limited to trial court fees. The instructions are to determine if an award of attorneys' fees should be made and to determine the amount. Thompson met all of the requirements for an award of attorneys' fees on appeal.

Utah Code Ann. §30-3-3(2) provides a statutory basis for the award of attorneys' fees. This statute as relied on by this Court in remanding the case states:

Utah Code Ann. §30-3-3(2), provides that, "in any action to enforce an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the Court may award costs and attorneys fees upon determining that the parties substantially prevailed upon the claim or defense." Accordingly, we remand to the District Court to determine if an award of costs and attorneys fees should be awarded the husband and, if so, to determine the amount.

2008 Ut. App. 170 @ 10.

The standard for awarding attorneys' fees on appeal is whether a party is entitled to attorneys' fees in the trial court. In Oliekan v. Oliekan, 147 P.3d 464, 471, 562 Utah Adv. Rep. 15 (Ut. App. 2006), this Court stated the law applicable to attorneys' fees on appeal as follows:

...In divorce actions, we will generally award attorneys fees on appeal to the prevailing party if the trial court awarded attorneys fees and the receiving party

prevails on the main issues on appeal...
(Citations omitted.)

In Oliekan, the Court determined that the wife had not prevailed on appeal and was not entitled to attorneys' fees. However, in this appeal, the case was remanded to the District Court to determine if under the standards of Utah Code Ann. §30-3-3(2) Respondent was entitled to an award of costs and attorneys' fees. The standard to be applied was whether the Respondent substantially prevailed upon the claim or defense. The Third District Court (in Finding of Fact 17 and Conclusions of Law 4 that are not subject to Anderson's appeal) found that Thompson clearly prevailed on the appeal and was entitled to attorneys' fees. (R. @ 817-818 and Appellant's Addendum 1). These attorneys' fees include those on appeal.

Attorneys' fees on appeal were requested by Thompson. Thompson in the second appeal requests attorneys' fees in the Appellant's Brief (Appellee's Addendum 2) and in the Reply Brief (Appellee's Addendum 3). Issue 4 in the Statement of Issues is "Did the District Court err in not awarding Respondent his attorneys' fees?" (Appellee's Addendum 2 Pg. 6). Point VII of the Appellant's Brief in the second appeal not only addresses denial of Anderson's fees, it also request Thompson's attorneys' fees. As to fees on appeal, the Appellant's Brief states, "Respondent is also entitled to his attorneys' fees and costs of appeal." (Appellee's Addendum 2 Pgs. 26-28).

In Point V of the Appellant's Reply Brief in the second appeal, the basis for attorneys' fees is analyzed. In the Conclusion, Thompson states: "This case should be remanded for an award of the Appellant's attorneys' fees including fees on appeal." (Appellee's Addendum 3 Pg. 11).

Thompson met all the requirements to recover his attorneys' fees on appeal. The remand instructions should be read to require a determination of the amount for attorneys' fees for Thompson at both the trial court and appellate court levels.

POINT II

THE DISTRICT COURT ON REMAND HAD AUTHORITY TO ADDRESS THE ATTORNEYS' FEES AND COSTS AT THE TRIAL COURT AND APPELLATE COURT LEVEL.

As set forth in Point I, Thompson was entitled to attorneys' fees at the trial court and appellate court levels as the prevailing party in the trial court and as the prevailing party in the second appeal. Anderson relies upon Cache County v. Beus, 128 P.3d 63, 539 Utah Adv. Rep. 72 (Ut. App. 2005) as support that attorneys' fees can be awarded only when specifically remanded. Anderson's reliance upon Beus is in error based upon the facts and circumstances of the Beus case as well as the holding. Beus was before the Court of Appeals on two occasions.

In the first appeal reported at 978 P.2d 1043, 368 Utah Adv. Rep. 13 (Ut. App. 1998), the Court concluded that Beus (not Cache County) substantially prevailed on appeal. Beus was awarded his reasonable attorneys' fees incurred on appeal. Following the remand in the first appeal and in contradiction to the award of fees to Beus, the trial court awarded Cache County all of its attorneys' fees including fees on appeal. This Court reversed this award of fees to Cache County on two bases. First, the contract pursuant to which attorneys' fees were recoverable provided that costs and fees were recoverable for successful vindication of contractual rights. The trial court's award of attorneys' fees and costs to Cache County from the inception of the case failed to consider only fees and costs attributable to the successful vindication of contractual rights. Second, the Court reversed the trial court as to attorneys' fees on the first appeal because the first appeal decision had not awarded Cache County fees but had awarded Beus attorneys' fees. The Court did not allow the trial court to make an inconsistent determination of fees.

Anderson incorrectly analyzes Slattery v. Covey & Co., 909 P.2d 926, 929 (Ut. App. 1995). Anderson asserts that this case stands for the proposition that the trial court cannot consider attorneys' fees on appeal except as specifically authorized to do so. However, in the first Slattery appeal, the trial court had ruled that each party would bear its own attorneys' fees. Slattery made its first request

for attorneys' fees at the Court of Appeals based on an employment contract. The Court refused to address the claim for attorneys' fees. The Court stated:

Slattery also seeks attorneys' fees on appeal, based on the employment contract. However, she was not awarded attorneys' fees at the trial and did not appeal from that determination. Because Slattery does not present any argument to support her request for fees on appeal, we decline to address the issue.

857 P.2d 243 at 249.

The Slattery decision found the trial court exceeded its authority on remand because the Court of Appeals awarded no attorneys' fees. The finding of the trial court that each party would bear their own costs and attorneys' fees was not appealed. A separate effort to claim attorneys' fees on appeal even though not allowed at the trial court level was not addressed by the Court of Appeals. The trial court's subsequent award of attorneys' fees was inconsistent with the original trial court decision that had not been appealed, the Court of Appeals' refusal to allow attorneys' fees on appeal when first raised at the Court of Appeals level and the Court of Appeals remand.

Other cases cited by Anderson also are different from the current situation and are not controlling. Anderson cites a footnote from TS 1 Partnership v. Allred, 877 P.2d 156, 239 Ut. Adv. Rep. 51 (Ut. App. 1991) for the proposition that it is not within the province of a trial court to award attorneys' fees on appeal from that

court. An award of attorneys' fees on appeal is the prerogative of the appellate court. TS 1 Partnership involved an improper certification of a final order pursuant to Rule 54(b), Utah Rules of Civil Procedure. The appellate court found both parties should pay their own costs related to the improper certification and appeal of the original summary judgment that was not a final order. The Court footnoted that an award of attorneys' fees on appeal is the prerogative of the appellate court. The basis for not awarding attorneys' fees related to the nature of the proceeding and the outcome, not to entitlement to attorneys' fees on appeal.

In Yorke Management v. Castro, 406 Mass. 17, 546 N.E.2d 342, 344 (1989), the Massachusetts Court addressed a Massachusetts procedure different from that applicable in Utah respecting the determination of attorneys' fees on appeal. The Massachusetts Court acknowledged that a basis for attorneys' fees existed under Massachusetts law. The Court stated: "the right to appellate attorneys' fees under the statutes is beyond dispute." The language of the Yorke Management case about authorization from an appellate court to a trial judge related to the procedure wherein the Massachusetts appellate court addressed the amount and appropriateness of attorneys' fee claims rather than remanding this determination to the trial court. The Massachusetts Court did not change its existing procedure retaining for the appellate court the responsibility for determination of the attorneys' fees on appeal.

In Vinton Eppson Inc. of Albuquerque v. Showe Homes, 638 P.2d 1070 (New Mexico 1981), the Supreme Court of New Mexico addressed a request to remand the case for an assessment of appellate attorney fees and decided against remanding for that purpose. Consequently, on the subsequent appeal, the Supreme Court ruled the District Court had exceeded the mandate of the Supreme Court of New Mexico by awarding appellate attorneys' fees.

In Schere v. Z.F. Inc., 578 So.2d 729 (Fl. 3d DCA 1991), the Court addressed two separate requests for attorneys' fees on appeal. One of two plaintiffs proceeded to obtain a final judgment of foreclosure. This judgment was affirmed on appeal with a motion for attorneys' fees being denied. See Tobin v. Compte, 553 So.2d 1180 (Fl. 3d DCA 1989). The plaintiff subsequently filed a motion for attorneys' fees in the trial court. The trial court granted the motion but denied the request for attorneys' fees incurred at trial and fees for defending a judgment on appeal and costs. These additional motions that included the request for attorneys' fees on appeal were denied. The Florida appellate court reversed the denial of the motion for trial fees and costs.

The second creditor filed a foreclosure action. The holder of a third mortgage was a defendant who moved to dismiss the action. A motion to dismiss was denied. The defendant creditor appealed with the appeal being affirmed. See Tobin v. Schere, 546 So.2d 796 (Fl. 3d DCA 1989). The appeals court denied a

motion for attorneys' fees. The case was then voluntarily dismissed with prejudice by the plaintiff. The plaintiff then sought costs and attorneys' fees for services before the trial court and for defending the appeal. The trial court denied the motion for fees and the appeal was taken. Because the plaintiff had voluntarily dismissed, the appellate court ruled the voluntary dismissal terminated the trial court's jurisdiction thereby removing jurisdiction from the court for further proceedings.

The prior Florida cases cited in Schere for the proposition that a specific remand for appellate attorneys' fees is required are likewise different than this appeal. In Hornsby v. Newman, 444 So.2d 90 (Fl. 3d DCA 1984), the trial court made an award of attorneys' fees in connection with a custody action on a claim for allowance of temporary attorneys' fees. The court reversed the award of temporary attorneys' fees because it impermissibly compensated Appellee's counsel for services rendered during prior appeals. The Court stated:

Absent a remand from an Appellate Court, a trial court lacks authority to award appellate attorneys' fees. Furthermore, there is another, perhaps even more glaring deficiency in the record. An Appellee/mother failed to establish her need for, and the father's ability to pay a reasonable attorneys' fee... (Citations omitted.)

444 So.2d 90 at 91.

In Ellswick v. Martinez, 394 So.2d 529 (Fl. 3d DCA 1981), the Court addressed an appeal of orders awarding child support, expert witness fees, travel expenses and costs incident to a birth in a contested paternity case. The award of attorneys' fees was affirmed with the exception of the portions expressly attributed to legal services on the prior appeal. The prior appeal, Ellswick v. Martinez, 341 So.2d 1095 (Fl. 3d DCA 1976), involved a one-word opinion "affirmed."

The Florida cases involve unique Florida procedures. Rule 9.400 Florida Rules Appellate Procedure provides a motion for attorneys' fees to be served not later than the time for service of the Reply Brief and shall state the grounds upon which relief is sought. The assessment of attorneys' fees may be remanded to the lower tribunal. If attorneys' fees are assessed by the court, the lower tribunal may enforce payment.

In three of the cases cited by Anderson, the trial court acted on attorneys' fees on appeal after the issue had been specifically rejected. (Beus, Slattery and TS 1 Partnership). In Vinton Eppson there was no remand to the trial court. In Yorke Management and Schere, Massachusetts and Florida had unique procedures for appellate attorneys' fees not applicable to this case. In this appeal, the cases cited by Anderson do not support her position that the trial court acted in opposition to the mandate of this Court. Rather, in this case, Thompson meets the requirements for recovery of attorneys' fees on appeal.

POINT III

THE MANDATE DOCTRINE DOES NOT APPLY TO CIRCUMSTANCES IN WHICH APPLICATION OF THE RULE IS ERRONEOUS.

The mandate doctrine is a law of the case doctrine providing that matters adjudicated by an appellate court are final and not subject to further trial court action. The mandate doctrine did not preclude the Third District Court from awarding Thompson his attorneys' fees on appeal.

As set forth in this Brief, the trial court acted within the scope of the remand in addressing appellate attorneys' fees for Thompson. There was a remand for attorneys' fees without limitation as to the trial court or appellate court levels. Assuming arguendo that the Court did not make a remand to the Third District Court specific enough to allow consideration of appellate attorneys' fees, exceptions to the mandate rule apply to allow a trial court to consider the attorneys' fees on appeal. In Street v. Fourth Judicial District Court, 113 Ut. 60, 191 P.2d 153 (Ut. 1948), the Utah Supreme Court addressed whether on remand the District Court could consider amended pleadings and different issues than existed prior to the remand. The Court stated:

The principles boil down to this fundamental proposition: As to all matters adjudicated by the appellate court, both the trial court and the parties are foreclosed from further trying those matters. They become the law of the

case. But as to matters left open by the appellate court, it is within the sound discretion of the trial court to permit amended or supplemental proceedings as to those matters.

191 P.2d 153 @ 158.

This Court instructed the Third District Court to “determine if an award of costs and attorneys’ fees should be awarded the husband and, if so, to determine the amount.” (R. @ 536). This Court did not deny attorneys’ fees to Thompson. Consequently, the remand to the District Court for consideration of attorneys’ fees involves at least a matter left open by this Court.

In Gilden v. Guardian Title, 31 P.3d 543, 438 Ut. Adv. Rep. 21 (Ut. 2001), the Court addressed the implications of the mandate doctrine. The Court noted that the mandate doctrine is not applied inflexibly. The Court stated:

... Indeed, this court need not apply the doctrine to promote efficiency at the expense of the greater interest in preventing unjust results or unwise precedent. Accordingly, the doctrine will generally not be enforced under the following exceptional circumstances:

- (1) When there has been an intervening change of controlling authority;
- (2) When new evidence has become available; or
- (3) When the court is convinced that its prior decision is clearly erroneous and would work a manifest injustice.

In this case, assuming that the Appeals Court did not remand for a determination of Thompson's appellate attorneys' fees, the third exception to the mandate rule applies. Thompson met all of the requirements to be awarded appellate fees. To deny Thompson the appellate fees would be clearly erroneous and would work a manifest injustice. The manifest injustice being that Thompson would be denied the fees he is entitled to because no specific reference to appellate fees was made in the remand of this Court. The award of attorneys' fees at the trial court and appellate court level for Anderson in the first appeal while denying appellate fees to Thompson on a similar basis points out the injustice of Anderson's position.

In Plumb v. State, 809 P.2d 734 (Ut. 1990), the Utah Supreme Court discussed the rationale of the law of the case doctrine. The doctrine protects the decisions already made in a case. Specifically, the Court stated:

... The law of the case doctrine generally provides that a decision on an issue at one stage of a case is binding in successive stages of the same litigation. However, this doctrine does not prevent a judge from reconsidering his or her previous non-final orders. As Justice Holmes once noted, the law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.".. (Citations omitted).

809 P.2d 734 @ 739-740.

The issue of Thompson's appellate attorneys' fees was not decided by the District Court or the Court of Appeals prior to the appeal. There was no prior decision that was being revisited by the trial court in opposition to the decision of this Court. The District Court properly acted within its power. The Third District Court's award of attorneys' fees is consistent with the Court of Appeals remand and applicable law.

POINT IV

IF THE TRIAL COURT ERRED IN
AWARDING THOMPSON'S
ATTORNEYS' FEES ON APPEAL
WITHOUT A SPECIFIC REMAND, THIS
ERROR WAS A HARMLESS ERROR.

The law applicable to appellate attorneys' fees is not in dispute. Thompson is entitled to fees on appeal if Thompson was entitled to fees at the trial court level. The trial court found Thompson to be entitled to these fees. Anderson does not argue that Thompson did not prevail at the trial court or on appeal. Rather, Anderson argues that this Court's failure to specifically identify appeal fees and costs leads to a result that those fees and costs are not recoverable.

At the oral argument held June 17, 2009, Anderson's counsel argued the following regarding the basis for denying Thompson his attorneys' fees:

"...Husband argues that with a reversal he should be awarded his attorney fees and costs below," and we're not going to dispute

that. But it doesn't say anything about his attorney fees for appeal two.

And they're saying in the affidavit Mr. Richards providing in February, had a total of the pre-appeal fees of \$3,900 - \$3,902.50 and then had his appeal two fees in addition which I don't think, well, don't think – the court didn't say that they would be entitled to that.

Now, I understand the argument, what's good for the goose is good for the gander. Get it. Because in appeal one the Court of Appeals did outline that and so I understand it. If the Court looks and it says, Well, since the Court of Appeals said the lower court could look at an award of attorney fees for the appeal, why can't we do it here in appeal two? And I'll be the first to admit that it's an interesting argument, but they did not specifically set that forth.

(R. @ 417 Pgs. 6-7, Appellee Addendum 4.)

Anderson argues for a result acknowledged to occur only by a hyper-critical reading of this Court's remand and a result inconsistent with applicable law.

The Utah Supreme Court in Glew v. Ohio Savings Bank, 598 Ut. Adv. Rep. 47, 2008 Utah 17 (Ut. 2008), considered a petition for rehearing for an award of fees on appeal. The petition followed a successful defense of an appeal reported in Glew v. Ohio Savings Bank, 288 P.3d 791, 582 Ut. Adv. Rep. 27 (2007). The Supreme Court while noting that a motion brought under Rule 23, Utah Rules of

Appellate Procedure would be the basis for applying for an award of attorneys' fees on appeal, stated:

The availability of fees on appeal is, however, an issue that is in almost all instances, ancillary to the issues to which the parties have devoted their energies and precious brief pages. This issue is never an issue on appeal that can be expected to appear in a docketing statement under the requirements of Rule 9(c)(7) of the Utah Rules of Appellate Procedure...

The Supreme Court reiterated the “settled view” that a party who received an award of attorneys' fees below is entitled to their fees on appeal granting the application for attorneys' fees. In Glew, the Supreme Court did not address attorneys' fees in its holding. The error was corrected by entering an order allowing fees. In this case, Respondent's right to attorneys' fees and costs was remanded to the Third District Court.

In Glew, the Court utilized the motion as a means to correct the error. In this case, either no error occurred and the case was remanded for a determination of all attorneys' fees both at the trial and appellate levels or this Court erred by not setting forth a specific remand for appellate fees. This error can be corrected by this Court by affirming the District Court's award of attorneys' fees.

POINT V

APPELLEE IS ENTITLED TO HIS ATTORNEYS' FEES ON APPEAL.

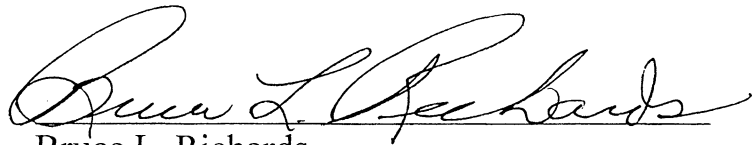
Thompson's basis for recovery of attorneys' fees is statutory. Utah Code Ann. §30-3-3(2) provides for attorneys' fees in this action. Thompson submits that the Third District Court's Order should be affirmed. An affirmance makes Thompson the prevailing party in this appeal. Consequently, this case should be remanded to the Third District Court for a determination of an award of attorneys' fees to Thompson on this appeal.

CONCLUSION

The Order of the Third District Court awarding Thompson attorneys' fees on appeal should be affirmed. This case should be remanded to the Third District Court for an award of attorneys' fees incurred on appeal to Thompson.

DATED this 7th day of May, 2010.

BRUCE L. RICHARDS & ASSOCIATES

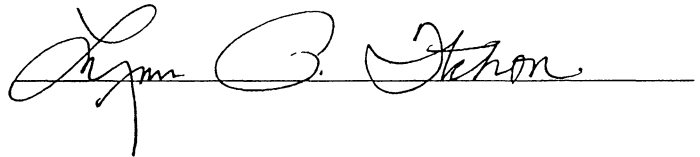
A handwritten signature in cursive script, appearing to read "Bruce L. Richards", written over a horizontal line.

Bruce L. Richards
Attorney for Appellee

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing Brief of Appellee to be mailed on this 7th day of May, 2010, by United states mail, first class, postage prepaid, to

David J. Friel
River Park Executive Suites
10808 S. River Front Pkwy. #310
South Jordan, UT 84095

A handwritten signature in black ink, appearing to read "Lynn B. Stehman", is written over a horizontal line.

ADDENDUM 1

Third District Court
Minute Entry
Entered March 20, 2009

FILED DISTRICT COURT
Third Judicial District

MAR 23 2009

By TOOELE COUNTY
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR TOOELE COUNTY, STATE OF UTAH

LINDA LAREE ANDERSON, fka	:	MINUTE ENTRY
LINDA LAREE THOMPSON,	:	CASE NO. 994300102
Petitioner,	:	
vs.	:	
GLENN HUNTER THOMPSON,	:	
Respondent.	:	

The Court of Appeals remanded this matter for consideration of attorney's fees claims twice: on petitioner's claim for fees after the decision on appeal, January 4, 2008, in favor of the petitioner; and after the decision on appeal, May 15, 2008, in favor of the respondent.

An evidentiary hearing was held February 9, 2009, to consider both of these matters. Petitioner was present and represented by David J. Friel, and respondent was present and represented by Bruce L. Richards. The parties testified, the Court received exhibits, and now makes this ruling.

On the first remand, this Court was directed to consider the standard criteria for award of fees: (1) requesting party in need of assistance; (2) fees reasonableness; and (3) responding party's ability to pay. The respondent stipulated that he has the ability to pay.

The evidence showed petitioner has gross monthly income of \$728, plus \$2,061 in monthly child support, plus an annual child support

payment earmarked for Christmas and birthday gifts in the amount of \$2,200. Her income has been static for the past eight years. She works approximately 25 hours per week in a daycare facility. She previously cut and colored women's hair in a salon in her home, but does that only once or twice a year at the present time. She has remarried as of 2004, has an additional child, and her spouse earns \$13.50 per hour working full-time. Petitioner testified that she can't afford her attorney's fees and needs help. The total family income at the present time is approximately \$3,138 per month gross. Petitioner's family has a marital home, two vehicles which are paid for, and claims total monthly living expenses of \$4,982, with expenses exceeding income in a relatively small amount. Attorney fees were not included in said monthly expenses.

Petitioner's counsel's Affidavit indicates that he bills his time at \$200 per hour and bills his office staff at \$40 per hour, and that on the first appeal billed petitioner \$9,605.20. The Court finds that petitioner's hourly rate is toward the top end of hourly rates for domestic work in Tooele County, but is not unreasonable, but finds that billing out office staff time at \$40 per hour is neither reasonable nor ethical. Mr. Friel stated that his staff is not paid the \$40 per hour unless the client pays, so his staff has exactly the same interest in the firm's accounts receivable as he does. A review of the time spent on the appeal does not indicate that increments of time expended on specific aspects of the appeal were unreasonable.

Respondent objects to both the hourly rate and the time expended on the basis that counsel for respondent bills at \$175 per hour and spent less time on the appeal than did counsel for petitioner. The Court finds that the time and hourly rates of Mr. Friel are reasonable and that the petitioner should be awarded fees in that amount, specifically not including any amounts billed for staff from Mr. Friel's office.

The first appeal was simply regarding the ruling after trial. The second appeal was different. Respondent appealed the Court's Order holding him in contempt. The Appeals Court reversed and remanded, specifically stating:

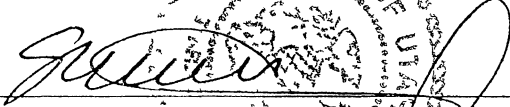
Utah Code Ann., § 30-3-3(2), provides that, "In any action to enforce an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense." Accordingly, we remand to the District Court to determine if an award of costs and attorney fees should be awarded the husband and, if so, to determine the amount.

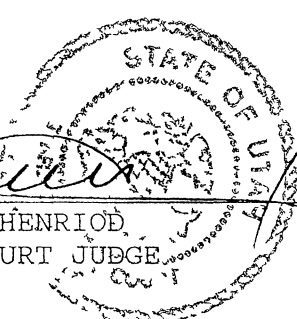
Respondent clearly prevailed on appeal. Since the Appeals Court relied on the enforcement provision of the statute, it does not appear that this Court needs to use the same analysis as used on the first remand, that of need and ability to pay, but should of course consider reasonableness. A review of Mr. Richards' Affidavit regarding the attorney fees and costs expended on appeal shows that both the hourly rate and the time increments for the tasks performed were necessary and

reasonable, and therefore respondent is awarded attorney's fees in the amount set forth in said Affidavit.

Mr Richards shall prepare Findings, Conclusions and a Judgment consistent with this Minute Entry

Dated this 19 day of March, 2009


STEPHEN L. HENRIOD
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 20 day of March, 2009:

David J. Friel
Attorney for Petitioner
2875 S. Decker Lake Drive #225
Salt Lake City, Utah 84119

Bruce L. Richards, Esq.
Dean A. Stuart, Esq.
1805 S. Redwood Road
P.O. Box 25786
Salt Lake City, Utah 84125-0786

Nancy Watkins

ADDENDUM 2

Thompson's Brief of Appellant
In Appellate Case 20070514

Statement of Issues
And
Point VII
And
Conclusion

IN THE UTAH COURT OF APPEALS

LINDA ANDERSON,)
(f.k.a. Linda LaRee Thompson),)
)
Petitioner,)
)
v.)
)
GLENN HUNTER THOMPSON,)
)
Respondent.)

Appellate Case No. 20070514

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
FOR TOOELE COUNTY, UTAH
JUDGE MARK S. KOURIS

BRIEF OF APPELLANT

David J. Friel
Attorney for Petitioner
f.k.a. Linda LaRee Thompson
2875 South Decker Lake Dr. #225
Salt Lake City, UT 84119
Telephone: (801) 975-8611

Bruce L. Richards
Dean A. Stuart
Bruce L. Richards and Associates
Attorneys for Respondent
1805 South Redwood Road
P.O. Box 25786
Salt Lake City, UT 84125-0786
Telephone (801) 972-0307

ORAL ARGUMENT IS REQUESTED

ISSUE 4: Did the district Court err in not awarding Respondent his attorney's fees?

ISSUE PRESERVED AT TRIAL: The issue of the award of attorneys' fees for the Respondent was raised at the evidentiary hearing. Specific objection to the attorneys' fee award took place at the end of the evidentiary hearing. (R@416 P. 78-79).

STANDARD OF REVIEW: The interpretation of a divorce decree is reviewed for correctness, affording the District Court no deference. Hawkins v. Peart, 2000 Utah 94, 37 P.3d 1062 (Utah 2001).

DETERMINATIVE STATUTES

Utah Code Ann. §78-32-1

The following acts or omissions in respect to a court or proceedings therein are contempts of the authority of the Court:

- (1) Disorderly, contemptuous or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding.
- (2) Breach of the peace, boisterous conduct or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding.
- (3) Misbehavior in office, or other willful neglect or violation of duty by an attorney, counsel, clerk, sheriff, or other person appointed or elected to perform a judicial or ministerial service.

non-compliance with reducing the child support amount. Respondent made his January 2007 of 2,500 plus...” (R@396-297).

Inexplicably the Court made Finding of Fact Number 7 that states:

Regarding the issue of refunding \$455.08 from Petitioner to Respondent concerning the difference in the January child support payment is ruled in favor of Petitioner. Therefore, Petitioner has no need to refund those monies. (R@395 ¶ 7.)

An extended discussion involving the Court and Petitioner’s counsel took place during the evidentiary hearing regarding the adjustment to the child support. The Court reviewed Exhibit 7, a letter from Petitioner’s counsel to Respondent’s counsel. The letter stated that an adjustment to the child support could be made based on information provided by the Respondent. Should a different conclusion result based upon subsequently prepared tax returns, a separate adjustment would be required. The Court concluded Respondent had paid the correct amount. (R@146 Pgs. 41-43).

There is no factual basis for ruling in favor of Petitioner regarding the difference in child support. Respondent overpaid the child support and should recover this excess.

POINT VII

PETITIONER IS NOT ENTITLED TO
RECOVERY OF ATTORNEY’S FEES
BASED ON THE TRIAL COURT’S FINDING
OF CONTEMPT OR ON ANY STATUTORY
BASIS.

Utah Code Ann. §30-3-2 provides for a discretionary award of attorney’s fees in an action to enforce a divorce action. Specifically, this statute states:

In any action to enforce an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense.

Utah Code Ann. § 30-3-3(2) (Supp. 2005).

The Decree of Divorce has a provision related to attorney fees. This provision provides that attorney's fees are awarded if the Court finds a party in contempt of court. Specifically, Paragraph 34 of the Decree of Divorce states:

If any party should be found to be in contempt of any provisions of any Order of this Court, that party shall be responsible for paying reasonable attorney's fees and costs for the enforcement thereof. (Appendix C, R@46).

Here, Petitioner brought this Order to Show Cause primarily to recover more child support. This conclusion is bolstered by the claims of the Petitioner in the Order to Show Cause that Respondent had failed to pay the proper amount, Petitioner's Affidavit that she wanted the Court to Order more child support to be paid, the lack of any prior effort by the Petitioner to arrange different payment methods for payment of child support and the lack of any damages by the asserted misconduct of Respondent. The Respondent successfully defended against these allegations and consequently should recover attorney's fees.

As set forth throughout this Brief, Respondent should not be held in contempt of Court. The basis for the award of fees does not exist.

Assuming arguendo that Respondent was in contempt of Court, Petitioner is not entitled to an award of all her attorney's fees. The fees must be allocated to the issues on which Petitioner prevailed.

Respondent is entitled to an award of attorney's fees as the prevailing party. Even if Petitioner were found to have prevailed on some issues, Respondent is entitled to recover his fees for the issues Respondent prevailed on. This includes the child support issue. Respondent is also entitled to this attorney's fees and costs of appeal.

CONCLUSION

Respondent requests that this Court reverse Paragraphs 2, 3 and 4 of the Order from Hearing Held April 16, 2007. Respondent should recover the excess \$455.08 in child support paid in January 2007. Respondent should recover his attorney's fees and costs. For purposes of determining Respondent's attorney's fees and costs, the case should be remanded to the District Court.

Dated this 16th day of November, 2007.

BRUCE L. RICHARDS & ASSOCIATES

15/

Bruce L. Richards
Attorney for Respondent

ADDENDUM 3

Thompson's Reply Brief of Appellant

Point V
And
Conclusion

IN THE UTAH COURT OF APPEALS

LINDA ANDERSON,
(f.k.a Linda LaRee Thompson),

Petitioner,

v.

GLENN HUNTER THOMPSON,

Respondent.

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Appellate Case No 20070176

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
FOR TOOELE COUNTY, UTAH
JUDGE MARK S. KOURIS

REPLY BRIEF OF APPELLANT

David-J. Friel
Attorney for Petitioner
f.k.a. Linda LaRee Thompson
2875 South Decker Lake Dr. #225
Salt Lake City, UT 84119
Telephone: (801) 975-8611

Bruce-L. Richards-
Dean A. Stuart
Bruce L. Richards and Associates
Attorneys for Respondent
1805 South Redwood Road
P.O. Box 25786
Salt Lake City, UT 84125-0786
Telephone (801) 972-0307

ORAL ARGUMENT IS REQUESTED

ambiguity as to what Paragraph 3 means. The District Court, however, did not rule, as a matter of law, that Paragraph 3 was ambiguous.

POINT V

THIS COURT, IN THE FIRST APPEAL OF THIS MATTER, ESTABLISHED THE BASIS FOR AWARDING ATTORNEY'S FEES. FEES MUST MEET THE REQUIREMENTS OF UTAH CODE ANN. §30-3-3. FINDINGS MEETING THE REQUIREMENTS OF THE STATUTE MUST BE MADE.

In Anderson v. Thompson, 594 U. Adv. Rep. 3, the Court addressed attorney's fees in circumstances where the Court found Appellant owed additional child support and other amounts and was in contempt of court. This Court ruled that the requirements of Utah Code Ann. §30-3-3 must be met in order for attorney's fees to be awarded and that the District Court had not made the necessary findings. This Court stated:

Under Utah Code section 30-3-3, a trial court "may order a party to pay the costs, attorney's fees, and witness fees . . . of the other party to enable the other party to prosecute or defend the action." "In doing so, however, the trial court must base its award of attorney's fees—"on evidence of the receiving spouse's financial need, the payor spouse's ability to pay, and the reasonableness of the requested fees" further, "the decision to award attorney's fees" must be based on sufficient findings regarding these factors." (Citations omitted.)

Anderson v. Thompson, 594 U. Adv. Rep. 3, @ par. 40 (Ut Ct. App 2008).

The District Court in this proceeding did not apply Utah Code Ann. §30-3-3. The District Court did not make the findings required by Anderson v. Thompson. The District court further refused to award fees to Appellant or reduce Appellee's fees based on the Appellant

prevailing on the significant issue in this proceeding. This issue was Appellee's claim that Appellant owed more child support in January, February and March, 2007.

The District Court's refusal to award fees to Appellant or reduce Appellee's fees is specifically addressed by Utah Code Ann. §30-3-3. The requirements of Utah Code Ann. §30-3-3(2) apply to this proceeding. Utah Code Ann. §30-3-3(2) provides:

In any action to enforce an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may award costs and attorney's fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against the party if the court finds the party is impecunious or enters in the record the reasons for not awarding fees.

In this case, the trial court did not apply this statute. The Court did not consider that the Appellant was the prevailing party on the claim that the Appellant had not paid the correct child support for January, February and March, 2007. The Appellant, the prevailing party, should have been able awarded his costs attorney's fees with respect to the issue of child support. This fee award would apply unless the District Court found the Appellee impecunious or entered reasons for not awarding fees.

POINT VI

THE REQUIRED FACTS FOR DECIDING THIS APPEAL HAVE BEEN PRESENTED.

Appellee argues that how the appeal should be dismissed because the facts were not marshaled. (Brief of Appellee Argument: Point Two.) Appellee argues that a Finding of Fact is being challenged and all record evidence supporting the finding has not been marshaled. See Utah Rules of Appellate Procedure Rule 24(a)(9).


The issues in this appeal involve errors of law by the District Court and the Findings of the District Court that do not meet the requirements of law. The issues in this appeal are matters of law. The issues of law are the constitutional requirement that a party be afforded due process in a contempt proceeding; the statutory requirement that an Order of the Court be violated; the making of Findings of Fact meeting the three requirements for contempt; finding that the required Findings were found by clear and convincing evidence; and complying with Utah Code Ann. §30-3-3 regarding attorney's fees.

CONCLUSION

Appellant is entitled to reversal of the District Court decision. There is no violation of an Order of Court meeting the constitutional, statutory and judicial requirements for a finding of contempt. There has been no finding by clear and convincing evidence of any violation of a legally sufficient Court Order. Attorney's fees should have been awarded to the Appellant. This case should be remanded for an award of the Appellant's attorney's fees including fees on appeal.

Dated this 25th day of February, 2008.

BRUCE L. RICHARDS & ASSOCIATES

A handwritten signature in cursive script, appearing to read "Bruce L. Richards", written over a horizontal line.

Bruce L. Richards
Attorney for Respondent

ADDENDUM 4

Transcript of Oral Argument
June 17, 2009

Pages 6 and 7

1 February hearing and in your minute entry ruling, found not
2 only that we should be awarded the reasonable attorney fees
3 because of the needs-based analysis that Your Honor did, but
4 Your Honor then specifically awarded our attorney fees for
5 the appeal.

6 And the difference was the Court of Appeals gave
7 this Court direction to do that. So in appeal one it said,
8 we remand, or under appeal one was only remanded for attorney
9 fees. Everything else stood on the contempts and all others.
10 And then it said with the Judge Kouris ruling, since he
11 didn't do the needs-based and reasonableness, it was
12 remanded. So then the Court of Appeals gave this Court
13 direction and said, if the court finds that there was need
14 and does that analysis, then it can enter the attorney fees
15 and specifically the court said, and the court can then
16 address the attorney fees for appeal number one. And so
17 they're not disputing that.

18 And the only reason I bring it up is in appeal
19 number two and that page number 5 specifically then, Your
20 Honor, I'm looking at Line 3 again, backing up just a little
21 bit, it's says, "likewise, there is no basis to grant wife's
22 request for an award of attorney fees and costs on appeal.
23 Husband argues that with a reversal he should be awarded his
24 attorney fees and costs below," and we're not going to
25 dispute that. But it doesn't say anything about his attorney

1 fees for appeal two.

2 And they're saying in the affidavit Mr. Richards
3 providing in February, had a total of the pre-appeal fees of
4 \$3,900 - \$3,902.50 and then had his appeal two fees in
5 addition which I don't think, well, don't think - the court
6 didn't say that they would be entitled to that.

7 Now, I understand the argument, what's good for the
8 goose is good for the gander. Get it. Because in appeal one
9 the Court of Appeals did outline that and so I understand it.
10 If the Court looks and it says, Well, since the Court of
11 Appeals said the lower court could look at an award of
12 attorney fees for the appeal, why can't we do it here in
13 appeal two? And I'll be the first to admit that it's an
14 interesting argument, but they did not specifically set that
15 forth.

16 THE COURT: Thank you, Mr. Friel.

17 MR. FRIEL: Thank you.

18 MR. RICHARDS: Mr. Richards appearing on behalf of
19 the respondent.

20 Your Honor, as I've calculated through and as I
21 indicated we, we by and large had no particular issues or
22 problems. It appears that the Court has approved a total of
23 \$51,964.58 in favor of the petitioner. That includes the
24 amounts that were ordered by the Court plus the attorneys
25 fees of \$7,652.97.