

1980

Isaac Cruz v. Michele Cruz : Brief of Appellant, Isaac Cruz

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Cruz v. Cruz*, No. 16789 (Utah Supreme Court, 1980).
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IN THE SUPREME COURT OF THE STATE OF UTAH

ISAAC CRUZ,)
Plaintiff-Appellant,)
-vs-) Supreme Court No. 16789
MICHELE CRUZ,)
Defendant-Respondent,)

BRIEF OF APPELLANT, ISAAC CRUZ

Appeal from Judgment of the District Court of Salt Lake County,
State of Utah, Honorable Dean E. Conder, Judge

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FILED

FEB -4 1980

Clerk, Supreme Court, Utah

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DESIGNATION OF PARTIES

For the purpose of brevity and clarity the parties will be identified herein, as they were identified in the Court below.

NATURE OF THE CASE

Plaintiff appeals from an award of \$1500.00 attorney's fees and a further award of \$150.00 per month alimony, when said award was given to the complete surprise of the plaintiff, when no counterclaim nor any pleading of any type or nature was filed in which attorney's fees were claimed or alimony was claimed. The Divorce herein, having been granted to the plaintiff.

RELIEF SOUGHT ON APPEAL

The plaintiff is entitled to a new trial on issues which were not plead nor tried and issues to which plaintiff's attorney was taken by complete surprise in that the defendant never asked for attorney's fees and never asked for alimony, and yet the Court, some ten days after, ruling otherwise, granted \$1500.00 attorney's fees and \$150.00 a month alimony.

FACTS

The plaintiff filed for a Divorce. The defendant filed a general denial in which she merely denied the allegation of the plaintiff's complaint. At no time did the defendant file a counterclaim or any type of pleading in which attorney's fees and/or alimony was requested or prayed for. When the parties rested the issue of attorney's fees was argued to the Court and the Court, at page 62, made this remark:

The Court: "If she isn't asking for a divorce, how can you claim attorney's fees, Mr. Hunt? The only basis I find for awarding attorney's fees is the right of a wife to attorney's fees when she is forced to go to Court to enforce the Divorce Decree. It would not be different if she is getting temporary alimony and where she is asking for any relief. Without affirmative relief, how can I award attorney's fees?"

Mr. Hunt then agreed to furnish authorities to the Court. As of this day no authorities were furnished and to the plaintiff's surprise approximately a week to ten days after the Court made its ruling, the defendant was awarded \$1500.00 attorney's fees, and \$150.00 a month alimony. This plaintiff would have no objection to the award had the matter been pleaded and tried. The plaintiff was misled in this regard by the defendant's failure to counterclaim or file an affirmative answer or in any manner

request attorney's fees or alimony.

ISSUES BEFORE THE COURT

1. Where the defendant refused to raise the issue of alimony or attorney's fees and the plaintiff is denied a full opportunity to meet this issue, it is asserted that the plaintiff is entitled to a new trial on the two issues.

ARGUMENT

The defendant herein, failed to file any answer or response of pleading until the trial was commenced. At this time she filed an answer in which she merely denied all the allegations in the plaintiff's complaint. Under these facts and circumstances the plaintiff had a right to assume and rely on the fact that the defendant was not requesting (1) a Divorce, (2) alimony, or (3) attorney's fees. The plaintiff presented his case on the issues set forth in the pleadings. When the case was concluded the Court will note that on page 37 of the transcripts, the objection was made to the defendant's question in which was stated:

Question: "Was it your desire that Mr. Cruz pay alimony for a period of time until you are able to regain some stability of your income?"

Mr. Miner: "Object to the question, your Honor."

The Court: "Overruled."

It's obvious at this point the plaintiff was taken by complete surprise in that this is the first mention of alimony in the trial of the cause. The defendant's attorney did testify in regard to attorney's fees, but his entire testimony referred to a Court appearance that he made during the month of January and December prior to this attorney's entrance to the case and he testified concerning dealings with Barbara Johnson in the thirty minute hearing before Judge Leary.

At no time throughout the trial of the cause did the defendant ask for a Divorce. No affirmative relief was even requested until the matter was tried and at this time the Court stated and indicated that he was not going to grant attorney's fees. It asserted that it is wholly and totally unfair to raise issues at the tail end of a law suit and not give the plaintiff an opportunity to prepare and meet the issues.

The plaintiff herein is well aware of Rule 54(C) 1, also the ruling as set down in Ferguson Vs. Ferguson, 564 Pac. 2nd, 1380, and Palombi vs. D and C Builders, 22 Utah 2nd, 297, 452 Pac. 2nd, 325. It is respectfully submitted that this case is beyond the rulings as set forth in those

cases and it is respectfully urged that this case falls within the exception in which this Court has held that it is important indeed, that the issues be raised and that the parties have a full opportunity to meet it. This opportunity was never given the plaintiff and for this reason that the plaintiff urges and asserts that is was error in not giving the plaintiff a new trial on these two issues, giving the plaintiff the opportunity to meet issues which were never pleaded or proved.

In the Palombi vs. D and C Builders, page 300, this Court specifically stated that the action which was commenced was a suit for damages and attorney's fees could not have been paid for in the original complaint. Such was not the case here. The defendant had ample opportunity to file an Answer and Counterclaim or assert some type of affirmative defense, and thereby place at issue the issues of attorney's fees and alimony. This was never done. It is respectfully urged that it was never intended by a ruling in Pope vs. Pope, 55, 89 Pac. 2nd 782, that the defendant may fail and refuse to plead, prove or assert the issues and then wait until plaintiff's case has been placed before the Court at which time the defendant then for the first time asserts alimony, attorney's fees and other items. To permit this, under the ruling in Pope vs. Pope, would give rise to numerous and great inequities and injustices in

that the plaintiff would be taken by complete surprise and immediately be place in a dilemma as to how to proceed. In this case plaintiff's attorney objected and was overruled by the Court. Subsequently, the Court by his own remarks indicated that the plaintiff was right and then, ten days after the matter was tried, reversed himself and granted \$1500.00 attorney's fees. It is doubted that such was ever intended by the ruling in Pope vs. Pope, 55, 89 Pac. 2nd 782.

CONCLUSION

A cursory glance at the file will reveal that the defendant failed and refused to file pleadings, which placed in issue attorney's fees, and/or alimony. In this regard, it is conceded that the Utah Rules of Civil Procedure should be liberally construed to secure a just determination of every action, but as set forth in Taylor vs. E.M. Royle Corporation, 1 Utah 2nd 175, this Court has specifically stated liberal construction does not represent a one-way street down which one litigant may travel, and that the Utah Rules of Civil Procedure provides that a party must be extended every reasonable opportunity to prepare his case and to meet the adversary's claim. The Court's attention is made to the fact that no effort was made to amend the complaint to conform with any different

proof. The Court by his own remarks stated that the defendant, having not asked for a divorce, is not entitled to attorney's fees. In light of the Court's remarks, the plaintiff was completely misled on this issue. It is urged that the new Rules, although liberally construed, should not be permitted to be used as a means of deception or surprise, whereby one of the parties is deprived of his opportunity to prepare his case and to meet his adversary's claims. This court has stated time and time again, that a party must be protected against surprise and be insured an equal opportunity and facility to present and prove counter contentions, else unilateral justice and injustice would result, and as in this case it has resulted and that the plaintiff herein was taken by complete surprise, was placed in a very serious dilemma, sufficient to raise serious doubt as to the constitutional due process guaranteed.

Is it asking too much to require a defendant in a Divorce action to file a Counterclaim or even an Answer in which they seek some type of affirmative relief? Are our Rules and cases now such that a defendant may file an Answer on the day of the trial, which merely denies each and every allegation set forth in the complaint, and on the basis of such an answer be permitted to try a Divorce case

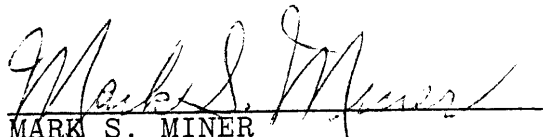
in its entirety including property settlements, alimony, and attorney's fees, if such is the case, then why wouldn't it be to a defendant's advantage to wait until the day of the trial and merely file a general denial as was done in this case. Such conduct would completely lull the plaintiff into believing that there were no issues in regard to alimony and attorney's fees, and then the defendant could completely surprise the plaintiff, by putting on a full-fledged case regarding these items as was done here. Shouldn't this Court enforce the established law of Taylor vs. E.M. Royle Corporation, 1 Utah 2nd, 175, thereby require a defendant to give the plaintiff a reasonable opportunity to prepare this case and meet his adversary's claims? Rule 54(C)1 certainly was never intended to be used as a means to grant unfair advantage to a defendant by permitting him not to file Answers or Counterclaims and come in and prove issues not properly before the Court. Again it is pointed out that the defendant never moved to amend his pleadings to conform with any proofs.

The Court's attention is further called to the fact that the defendant and her attorney failed and refused to appear at the pretrial and discuss the issues which were before the Court, which added to the further surprise of the plaintiff, herein, at the trial. Under the rules and holdings of this Court in Taylor vs. E.M. Royle Corporation,

1 Utah 2nd, 175, 264 Pac. 2nd 279, Morris vs. Russell, 120
Utah 545, 236 Pac. 2nd, 415, 26 ALR 2nd 945. Plaintiff
respectfully urges, in the interest of justice, that this
matter be sent back for a new trial, that he be permitted
to fully and completely have an opportunity to meet issues
which were not raised by the pleadings. Attention is
called to the statement made by Justice Henroid, on page
176, the Taylor case supra, where,

"THE RULES ALLOW LOCOMOTION IN BOTH DIRECTIONS BY ALL INTERESTED TRAVELERS. THEY ALLOW THE PLAINTIFF CONSIDERABLE LATITUDE IN PLEADING AND PROOF, TO THE POINT WHERE SOME PEOPLE HAVE EXPRESSED THE OPINION THAT CARELESS LEGAL CRAFTMANSHIP HAS BEEN INVITED RATHER THAN DISCOURAGED. BE THAT AS IT MAY, A DEFENDANT MUST BE EXTENDED EVERY REASONABLE OPPORTUNITY TO PREPARE HIS CASE AND TO MEET AN ADVERSARY'S CLAIMS. ALSO HE MUST BE PROTECTED AGAINST SURPRISE AND BE ASSURED EQUAL OPPORTUNITY AND FACILITY TO PRESENT AND PROVE COUNTER CONTENTIONS,--ELSE, UNILATERAL JUSTICE AND INJUSTICE WOULD RESULT SUFFICIENT TO RAISE SERIOUS DOUBTS AS TO THE CONSTITUTIONAL DUE PROCESS GUARANTEED."

Respectfully submitted,


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