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Tristram B. Johnson v. Roswell Miller, III : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

FILED
AUG 26 1956

TRISTAM B. JOHNSON,
Plaintiff and Respondent,

vs.

ROSWELL MILLER, III,
Defendant and Appellant.

Supreme Court, Utah

Case No.
8522

BRIEF OF RESPONDENT

DENNIS McCARTHY,
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TRISTAM B. JOHNSON,
Plaintiff and Respondent,

vs.

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Defendant and Appellant.

} Case No.
8522

BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

This is an appeal from an order entered by the trial court on the 22nd day of March, 1956, in favor of Plaintiff and Respondent, ordering the Defendant and Appellant to answer certain questions propounded to him in a deposition (R. 47-48).

Plaintiff, Tristram B. Johnson, commenced this action against the Defendant, Roswell Miller, III, to recover damages for the alienation of affections and criminal conversation of Plaintiff's former wife (R. 1-4). Defendant and Plaintiff's former wife were married and living in Salt Lake City, Utah at the time this action was commenced, and were at that time and for some time had been residents of the State of Utah (R. 1, 14, 65, p. 2). Plaintiff's complaint alleges generally that between January, 1954 and July, 1955, Defendant alienated the affections of Plaintiff's wife and engaged in criminal conversation with her. Defendant's motion for more definite statement, to require Plaintiff to allege the time and place the alleged wrongful misconduct occurred, was denied (R. 11). Thus, Plaintiff was not limited by his complaint as to the particular times and places at which the alleged acts occurred.

On January 13, 1956, prior to the filing of Defendant's answer, Plaintiff took the deposition of the Defendant upon oral examination (R. 65). Defendant refused to answer many of the questions on the specific ground that the answers might tend to incriminate him (R. 65, at p.p. 7, 8, 12, 13, 14, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 and 37). No other ground for refusing to answer said questions was stated. Thereafter, pursuant to Plaintiff's motion (R. 23-24), the trial court entered the order from which this appeal was taken, ordering the Defendant to answer the questions and assessing attorneys' fees against Defendant in the sum of \$100.00 (R. 47-48).

STATEMENT OF FACTS

The facts which are material to this appeal relate primarily to the record and history of the case from the commencement of the action to the present appeal. Since Appellant's brief does not disclose the sequence of events, the following summary of the litigation from the commencement of the action to the entry of the order of the trial court is necessary:

1. On November 8, 1955, Plaintiff commenced suit against the Defendant and a complaint was filed setting forth two causes of action, one for alienation of affections, and the other for criminal conversation (R. 1-6).

2. On November 28, 1955, a stipulation was entered into by the parties and an order was entered giving the Defendant until December 8, 1955 to answer or otherwise plead to Plaintiff's complaint (R. 7).

3. On December 5, 1955, Plaintiff served notice upon the Defendant that Defendant's deposition would be taken on December 21, 1955 (R. 8).

4. On December 8, 1955, Defendant filed a motion to dismiss and a motion to require Plaintiff to make a more definite statement (R. 9).

5. At the request of the Defendant and based upon his illness, the deposition was continued until January 4, 1956. Subsequently, at the further request of the Defendant, the deposition was continued until January 13, 1956.

6. On January 5, 1956, Plaintiff served notice that Defendant's motion to dismiss and to make a more definite

statement would be called up for hearing on January 11, 1956 (R. 12).

7. On January 11, 1956, Defendant's motion came on for hearing; Defendant did not appear to argue in support of said motions, and the trial court denied both motions and granted the Defendant ten days in which to file an answer to Plaintiff's complaint (R. 13).

8. On January 13, 1956, Defendant's deposition was taken before Hyrum R. Moulton, a certified shorthand reporter (R. 65).

9. On January 23, 1956, Defendant filed his answer denying generally the allegations of Plaintiff's complaint (R. 14-15).

10. On February 17, 1956, Plaintiff filed a motion pursuant to Rule 37(a) of the Utah Rules of Civil Procedure for an order directing and compelling the Defendant to answer the questions propounded in said deposition. On the same date, a notice was served and filed, calling said motion up for hearing on February 27, 1956 (R. 23).

11. On or about February 23, 1956, pursuant to Defendant's request, the above motion was stricken from the calendar.

12. On March 1, 1956, Plaintiff served and filed a demand for trial, certificate and order (R. 51).

13. Plaintiff's motion to compel Defendant to answer the questions propounded in said deposition was reset to be heard before the court on March 14, 1956.

14. On March 9, 1956, pursuant to an ex parte order of the court, Defendant filed an amendment to his answer pleading for the first time the statutes of New Jersey and New York abolishing suits for alienation of affections (R. 16-17).

15. On March 14, 1956, Plaintiff's motion was argued to the trial court and was taken under advisement (R. 25-42).

16. On March 14, 1956, the same day Plaintiff's motion was heard by the court, Defendant obtained leave ex parte and filed an amendment to the amendment filed on March 9, 1956, pleading certain other foreign statutes (R. 19-20).

17. On March 16, 1956, Defendant again obtained leave ex parte from the court and filed a second amendment to the amendment filed March 9, 1956 (R. 21-22).

18. On March 21, 1956, further proceedings and stipulations were held and made before the trial court to allow Defendant to introduce still more statutes for the first time (R. 43-46).

19. On March 22, 1956, the trial court entered its written order granting Plaintiff's motion and ordering Defendant to answer the questions propounded in the deposition (except such questions as were objected to on the ground of privilege between husband and wife). Plaintiff was awarded One Hundred Dollars (\$100.00) as reasonable attorneys' fees in obtaining said order, on the ground that Defendant's refusal to answer said questions was without substantial justification.

The deposition of Defendant was taken on January 13, 1956, prior to the filing of Defendant's answer. The deposition was taken by Plaintiff for the purpose of discovery and to obtain evidence from the Defendant that would otherwise have required a great deal of expense and the examination of numerous witnesses from many jurisdictions. The Defendant refused to answer all of the questions propounded with reference to his conduct with Plaintiff's former wife, Helen Harris Johnson. In answer to the first such question, Mr. McBroom, counsel for the Defendant, stated (R. 65, p. 7) :

"Just a moment. The witness declines to answer the question because the question calls for an answer that may tend to incriminate the witness."

Defendant's refusal to answer the other questions concerning this subject merely referred back to the above objection. At no time was any objection to the questions propounded interposed on the ground that the causes of action complained of were barred by statutes in certain other states or that the answers would tend to degrade the Defendant.

Plaintiff's motion to compel the Defendant to answer said questions was filed on February 17, 1956 and it was noticed to be heard on February 27, 1956 (R. 23). Defendant did not even plead the statutes of the other states, which he now relies upon, until on and after March 9, 1956 (R. 16-17). Had it not been for the indulgence of Plaintiff in agreeing that his motion would not be called for hearing on February 27, 1956, these statutes would not even have been part of the record prior to the court's order from which this appeal is taken.

STATEMENT OF POINTS

POINT I

THE ISSUES RAISED BY POINT I OF APPELLANT'S BRIEF WERE NOT PROPERLY IN ISSUE BEFORE THE TRIAL COURT.

POINT II

THE STATUTES RELIED UPON BY APPELLANT DO NOT LEGALLY JUSTIFY THE REFUSAL BY APPELLANT TO ANSWER THE QUESTIONS PROPOUNDED.

POINT III

THE ORDER APPEALED FROM DOES NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHT AGAINST SELF INCRIMINATION.

POINT IV

THE TRIAL COURT DID NOT COMMIT ERROR IN AWARDING RESPONDENT ATTORNEYS' FEES.

ARGUMENT

POINT I

THE ISSUES RAISED BY POINT I OF APPELLANT'S BRIEF WERE NOT PROPERLY IN ISSUE BEFORE THE TRIAL COURT.

The first and primary ground relied upon by Appellant for the reversal of the order of the trial court relates to the existence of certain statutes in the states of New Jersey, New York, Pennsylvania, Nevada and Wyoming abolishing the causes of action for alienation of affections and criminal conversation. Appellant studiously avoids pointing out, however, as is so clearly shown by the above statement of facts and the record on file herein, that these statutes were not in issue before the trial court.

One can search the deposition of the Defendant in vain for any objection whatsoever based on these statutes on which Defendant now relies. As quoted *supra* on page 6, Defendant's sole objection to the questions propounded related to the issue of self incrimination.

Not until after the date originally set for the hearing on Plaintiff's motion to compel the answers to said questions did the Defendant even plead the statutes in question (R. 19-22). At the time Defendant's deposition was taken these statutes were not mentioned and they had not been injected into the case. At the hearing on Plaintiff's motion, counsel for Plaintiff objected to the raising of this additional ground as a basis for Defendant's refusal to answer the questions and argued that the Defendant waived any reliance upon said statutes by virtue of his failure to object and by the denial of his motion to dismiss (R. 34, 38-40).

It is one of the most basic rules of evidence that a party cannot object to the admission of evidence on one specific ground at the trial and upon appeal argue that the evidence was erroneously admitted because of another and different

objection. 4 C. J. S., Appeal and Error, Sec. 248; 3 Am. Jur., Appeal and Error, Sec. 344-346. The same principle is applicable to the situation in this case. Defendant should not be allowed to object to questions posed on deposition on one ground and then rely on another completely different ground at a later hearing to sustain his position.

POINT II

THE STATUTES RELIED UPON BY APPELLANT DO NOT LEGALLY JUSTIFY THE REFUSAL BY APPELLANT TO ANSWER THE QUESTIONS PROPOUNDED.

It is Plaintiff's earnest contention that the trial court was not obligated to take cognizance of this issue, since it was not properly before that court. Defendant's contention however, that the existence of statutes abolishing causes of action for alienation of affections in the various states cited justifies the refusal to answer the questions asked to him on deposition, is wholly without merit.

As previously noted, Plaintiff's complaint alleges a cause of action for alienation of affections and criminal conversation. The complaint alleges that between January, 1954 and July, 1955, defendant alienated Plaintiff's wife's affections and engaged in unlawful relations with her. The nature of the tort involved necessarily comprehends a course of conduct over a period of many months. As is indicated by the questions posed at the deposition, it is Plaintiff's contention that the alienating acts committed by the De-

fendant occurred in many different states in the United States, including possibly the states of Utah and Idaho, as well as in Canada. In order for Plaintiff to present his case, it will be necessary to establish a chain of related events occurring at many different times and places.

The purpose of the Utah Rules of Civil Procedure and the provisions in particular dealing with discovery, are to provide a litigant with an efficient and economical method of discovering and proving the facts essential to his cause of action. Where the facts involved are peculiarly within the knowledge of one of the parties, the use of a deposition provides the best and sometimes the only possible means of obtaining this information.

An example of the type of questions which Defendant refused to answer are the following:

“Were there ever any occasions when you and Helen (Plaintiff’s former wife) would meet when either Tris (Plaintiff) or your wife was not there in January, February or March of 1954?” (R. 65, p. 7).

“Did you and Helen, in January, February or March or April, 1954 ever have any prearranged meetings in places other than Princeton, New Jersey?” (R. 65, p. 8).

“When you were in New York City, did you ever have occasion to see Helen whose name was then Johnson?” (R. 65, p. 16).

“Did you ever make a visit to Twin Falls, Idaho in January, February or March, 1955?” (R. 65, p. 32).

“Were you at the Lake O’Hara Lodge (Canada) from the fourth of July, 1954 to the tenth day of July, 1954?” (R. 65, p. 32).

All of the foregoing questions and the many others which Defendant refused to answer were obviously designed to show this course of conduct by the Defendant to and with the Plaintiff's wife.

Rule 26(b) of the Utah Rules of Civil Procedure provides with respect to the scope of examination upon deposition as follows:

“Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action, whether it relates to the claim or defense of the examining party, or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. *It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.*” (Emphasis added.)

It might be noted that the Defendant made no attempt, prior to the deposition, to have the scope of examination limited as provided in Rule 30(b).

An examination of the questions propounded in the deposition clearly indicates that they all involved matters which were relevant to the subject-matter of the Plaintiff's claim. Even assuming the validity of the argument under Point I, of Defendant's brief, the very most that can be said is that some doubt may exist as to the admissibility

of certain parts of the evidence sought to be obtained. Rule 26(b), quoted above, specifically provides that the inadmissibility of the evidence at the trial is no ground for its exclusion on deposition if it is reasonably calculated to lead to the discovery of admissible evidence. There can be no doubt as to the importance of the information sought to be obtained from the Defendant and its value in discovering admissible evidence when the nature of the cause of action is considered.

Recognizing the fact that the inadmissibility of the evidence is not sufficient to justify Defendant's refusal to answer, Plaintiff then attempts to bolster his position by relying on Section 78-24-9, Utah Code Annotated, 1953, which provides that a witness need not answer questions "which will have a direct tendency to degrade his character unless it is to the very fact in issue or to a fact from which the fact in issue would be presumed." See *State v. Hougensen*, 91 Utah 351, 64 P. 2d 229. In the present case, the degrading conduct of the Defendant is the precise fact in issue. Even if the evidence as to conduct in certain states were inadmissible, certainly the fact that the immoral acts took place in one state would indicate and tend to show the disposition of the deponent to commit such acts and that the same conduct was pursued and continued by the Defendant in other states, including even Utah, Idaho, and in the various provinces of Canada.

It should again be pointed out that Defendant likewise did not rely on Section 78-24-9 or the claim of degradation of character at the time the questions were propounded

or before the trial court on the hearing on Plaintiff's motion below (R. 25-42).

Appellant admits in his brief (p. 3), as is the fact, that part of the questions under consideration concern his conduct with Plaintiff's former wife in the State of Idaho and in Canada. No claim is made, however, that these jurisdictions have enacted statutes barring causes of action for alienation of affections or criminal conversation. Such actions are clearly recognized in the State of Idaho. *Riggs v. Smith*, 52 Idaho 43, 11 P. 2d 358; *Johnson v. Richards*, 60 Idaho 150, 294 Pac. 507. The Canadian Courts likewise recognize causes of action for alienation of affections and criminal conversation. *Lellis v. Lambert*, 24 O. A. R. 653; *Newton v. Hardy*, 149 L. T. 165; *Brune v. Stensto*, 2 D. L. R. 795, 52 B. C. R. 532 (1938); *Mowder v. Roy*, 2 D. L. R. 284, O. W. N. 222 (1944); and *Swan v. Mathers*, O. W. N. 495 (1942). Defendant's argument completely fails as to conduct in these jurisdictions, and as heretofore observed, certainly the conduct of Defendant with Plaintiff's former wife in New York, New Jersey, Pennsylvania and any other state is relevant and probative as to what took place between them in Canada, Idaho, Utah, and other jurisdictions.

The principal decision relied upon by Defendant, *In re Glasser*, 100 N. Y. S. 2d 723 (1950) involved a completely different problem from that presented on this appeal. It was a decision by the New York court, a jurisdiction where the cause of action is abolished, and related to conduct within the State of New York. In the present case, the court entering the order is not faced with a local statute prohibiting such actions and the conduct involved occurred

in many other jurisdictions, only some of which have such statutes.

POINT III

THE ORDER APPEALED FROM DOES NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHT AGAINST SELF INCRIMINATION.

Appellant contends, and indeed it is the only matter properly in issue, that the questions propounded on the deposition required answers that would tend to incriminate him. The only incrimination to which Appellant refers and to which he could possibly be subjected is under the laws of jurisdictions other than the State of Utah, i. e. the states in which some of the conduct inquired into may have occurred and the Federal courts under the Mann Act.

No showing was made before the trial court that the Plaintiff was in any imminent danger of prosecution by the authorities of these other jurisdictions or as a matter of fact in any danger whatsoever (R. 25-46). As heretofore pointed out, Defendant is now and for sometime prior to the commencement of this action was a citizen of the State of Utah. The possibility of criminal prosecution in geographically remote jurisdictions based upon the conduct involved it at least extremely remote. Most of the questions which the Defendant refused to answer did not even call for answers which could incriminate him under the laws of any jurisdiction.

All of the cases relied upon by Defendant in his brief are outmoded Federal cases involving the question of whether the privilege applies in a Federal Court sitting within a state to the danger of criminal prosecution in the State courts

of that state. It is respectfully submitted that these cases are not in point on the issue here presented. The only danger of prosecution conceivably related to the questions propounded to the Defendant would be under the laws of other states or jurisdictions.

The general rule is stated in 58 Am. Jur., Witnesses, Sec. 51, as follows:

“In considering a witness’ claim of privilege against self incrimination, the court will not take notice of the criminal laws of another state or sovereignty.”

* * * *

“* * * As defined by the great majority of the courts in this country the protection afforded by our constitutional guarantees against compulsory self incrimination is confined to the giving of testimony which would tend to subject witnesses to criminal liability or to a penalty within the jurisdiction and under the sovereignty in which the privilege is involved * * * all of the more recent cases support the rule that the privilege against self incrimination does not extend to protect a witness as to matters which may tend to incriminate him under the laws of another jurisdiction.”

70 C. J., Witnesses, Sec. 882, likewise concludes:

“In a proceeding in the courts of a state, a witness is not privileged to refuse to answer because of the apprehension of criminal prosecution in another state.”

Confronted with this same problem, the Supreme Court of Vermont in *State v. Wood*, 134 Atl. 697, stated the general rule:

“In disposing of the question whether the respondent had the right to exercise the privilege of silence, we do not notice the criminal laws of any other state nor whether they were violated by her while on the trip in question. The only danger to be considered is such as arose within this jurisdiction and under the state sovereignty.”

The Supreme Court of Massachusetts in *Republic of Greece v. Koukouras*, 162 N. E. 345 held:

“The question is, can the privilege of silence be invoked by a witness when his answer will tend to prove that he has infringed the criminal laws of a foreign jurisdiction by act or conduct which does not violate the criminal laws of the jurisdiction where he is examined? We are of opinion the privilege against self incrimination extends only to crimes which may be prosecuted within the latter jurisdiction, and the rule of protection is confined to what may tend to subject the witness to penalties within this jurisdiction and under the state sovereignty * * *. Neither the Fifth Amendment nor the Fourteenth Amendment to the Constitution of the United States is violated by holding that the privilege against self incrimination does not extend to crimes which are not subject to prosecution in the jurisdiction where the privilege is asked.”

Even the more recent Federal cases decided since the cases on which Plaintiff relies are in accord with this view and have held that the privilege does not apply to the danger of prosecution in another jurisdiction or in state courts. *United States v. Murdock*, 284 U. S. 141, 52 Sup. Ct. 63, 76 L. Ed. 210 (1931); *Claiborne v. United States*, 77 F. 2d 682 (8th Cir. 1935); and *Miller v. United States*, 95 F. 2d

492 (9th Cir. 1938). The *Murdock* case was decided subsequent to any of the Federal cases relied upon by Plaintiff.

In *United States v. Murdock*, the Supreme Court held that the fact that a federal immunity statute did not protect against state prosecution was not grounds for refusal to answer. The Court stated at 284 U. S. 149:

“The English rule of evidence against compulsory self incrimination, on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of another country. * * * This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self incrimination.”

In the case at hand, it is clear that Plaintiff is immune to prosecution in the State of Utah, because no inquiry was made during the deposition as to any acts of misconduct occurring in this state.

Even the older federal cases which have announced the contrary result referred to by Plaintiff require that the danger of prosecution in the state court be a real and present danger and not just a remote possibility.

POINT IV

THE TRIAL COURT DID NOT COMMIT ERROR
IN AWARDING RESPONDENT ATTORNEYS'
FEES.

Respondent's motion to compel Defendant to answer the questions propounded was made pursuant to Rule 37(a) of the Utah Rules of Civil Procedure. This rule provides in part that:

"If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorneys' fees."

The trial court expressly made a finding in its order that the refusal of the Defendant to answer the questions was without substantial justification (R. 47-8). This finding was made pursuant to the discretion granted to the trial court after a complete hearing of the matter with ample opportunity on the part of the trial judge to evaluate the merit of Defendant's refusal (R. 25-46).

An examination of the deposition (R. 65) and the nature of the questions asked, reveals no substantial justification for Defendant's refusal to answer. All of the questions related to facts that will be in issue at the trial and to conduct that will, if necessary, be proved by other witnesses. Defendant's refusal has only served to delay the ultimate conclusion and disposition of this action. The trial

court's order with respect to attorneys' fees was fully within the proper limits of the trial court's discretionary authority.

CONCLUSION

The arguments presented and cases cited in Appellant's brief do not justify the refusal of Appellant to answer the questions propounded in the deposition. The argument raised under Point I of Appellant's brief was not in issue before the trial court, is without merit, and raises issues which may be material at the trial of the case, but which are not now properly before this Court. Appellant's constitutional privilege against self incrimination was not violated. The order of the trial court should be affirmed.

Respectfully submitted,

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