

1990

Lloyd D. Coley v. Nancy P. Coley : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. _____ IN THE UTAH COURT OF APPEALS

LLOYD D. COLEY,

PLAINTIFF/APPELLANT,

vs.

NANCY P. COLEY,

DEFENDANT/APPELLEE.

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COURT OF APPEALS

CASE NO. 900446-CA

SUPPLEMENTAL BRIEF OF APPELLANT

APPEAL FROM A FINAL ORDER OF JUDGE MICHAEL MURPHY DATED
AUGUST 7, 1990 DENYING THE APPELLANT AFFIDAVIT OF BIAS OR
PREJUDICE, IN THE THIRD DISTRICT COURT IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH

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FILE

APR 19 1991

IN THE UTAH COURT OF APPEALS

LLOYD D. COLEY,	:	
	:	
PLAINTIFF/APPELLANT,	:	
	:	
vs.	:	
	:	
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SUMMARY OF ARGUMENTS

JUDGE SAWAYA HAS SHOWN PERSONAL BIAS FOR THE APPELLANT THAT IS LEGALLY SUFFICIENT TO DISQUALIFY FROM SETTING ON THIS CASE. THE ACTIONS OF JUDGE SAWAYA INCLUDE BUT NOT LIMITED TO: DENYING APPELLANT DUE PROCESS OF LAW, MAKING NEGATIVE PERSONAL COMMENTS ABOUT THE APPELLANT, PREJUDGING THE CASE, BEEN AFFECT BY OUTSIDE INFORMATION, CALLED THE INTEGRITY OF APPELLANT INTO QUESTION, ORDER EXCESS PUNISHMENT FOR THE APPELLANT, IGNORED FACT IN THE RECORD AND PRIOR ORDERS, AND CREATED FINDINGS OF FACT, NOT BASES OF THE RECORD, TO SUPPORT HIS PRIOR ORDER

STATEMENT OF ISSUE ON APPEAL

DID JUDGE MICHAEL MURPHY ERROR IN FINDING THAT THE APPELLANT PRESENTED NO LEGAL SUFFICIENT REASON TO RECUSE JUDGE SAWAYA FROM PRESIDING OVER THIS CASE?

STATEMENT OF THE FACTS

1. THE APPELLEE BROUGHT THE APPELLANT INTO COURT ON APRIL 8, 1986, WITH AN ORDER TO SHOW CAUSE. THE APPELLEE WANTED THE APPELLANT FOUND GUILTY OF CONTEMPT AND TO HAVE HIS VISITATION MODIFIED TO EXCLUDE SUNDAYS.

2. JUDGE PHILLIP FISHLER, AFTER HEARING APPELLEE'S ARGUMENTS FOR DENYING APPELLANT'S SUNDAY VISITATION, BECAME SO AFFECTED APPELLEE'S ATTORNEY'S INSISTENCE ON THE DENIAL OF THOSE VISITS THAT HE RECUSED HIMSELF FROM THE CASE AND ASSIGNED IT TO JUDGE JAMES S. SAWAYA.

3. JUDGE SAWAYA SIGNED AN ORDER REFLECTING JUDGE FISHLER DECISION ON THE 22ND DAY OF APRIL 1986. ORDER #2 OF THAT JUDGEMENT STATES "THE ISSUE OF CONTEMPT AGAINST PLAINTIFF FOR HIS FAILURE TO PAY JUDGEMENTS AND OBLIGATIONS IS RESERVED UNTIL THE HEARING ON A PETITION BY PLAINTIFF FOR MODIFICATION OF THE DECREE OF DIVORCE WHICH WILL ADDRESS THE ISSUE OF THE PLAINTIFF'S ABILITY TO PAY SAID JUDGEMENTS AND OBLIGATIONS."

4. THE APPELLEE BROUGHT THE APPELLANT BACK TO COURT ON OCTOBER 3, 1988, WITH A ORDER TO SHOW CAUSE. THE APPELLEE WANTED THE COURT TO REQUIRE THE APPELLANT TO BEGIN MAKING

WEEKLY PAYMENTS TO HER, AND IF HE DID NOT, THAT THE APPELLANT BE ARRESTED UNTIL HE IS WILLING TO DO SO.

5. JUDGE SAWAYA HELD A HEARING ON APPELLEE'S ORDER TO SHOW CAUSE ON OCTOBER 3, 1988. THE FOLLOWING OCCURRED IN THE HEARING.

A. THE HEARING WAS ON JUDGE SAWAYA'S LAW AND MOTION CALENDER AND THE APPELLANT AND HIS COUNSEL WERE TOLD BY THE COURT THAT NO EVIDENCE WOULD BE TAKEN AT THE HEARING, APPELLANT WAS PREPARED TO STIPULATE TO APPELLEE REQUESTS.

B. JUDGE SAWAYA MOVED THE CASE TO THE END OF THE CALENDER AND MADE HIS OWN MOTION FOR CONTEMPT WITH DIFFERENT PUNISHMENT.

C. APPELLANT TOLD THE COURT, "I MADE A MOTION AT THE TIME TO MODIFY TO BRING IT DOWN." APPELLANT WAS REFERRING TO HIS PETITION TO LOWER CHILD SUPPORT PAYING THAT WAS STILL PENDING BEFORE THIS COURT.

D. APPELLEE'S ATTORNEY SUMMERIZED HIS CASE BY SAYING "AND IT'S BECAUSE OF THAT, YOUR HONOR, THAT WE REQUEST THE RELIEF SET FORTH IN THE VERIFIED MOTION FOR THE ORDER TO SHOW CAUSE. THAT MR. COLEY BE PUT ON A VERY STRICT PAYMENT PLAN....AND THAT IF ANY PAYMENTS ARE MISSED UPON PROOF OF AN AFFIDAVIT TO THE COURT THAT MR. COLEY BE TAKEN INTO CUSTODY AND BE PLACED INTO THE SALT LAKE COUNTY JAIL UNTIL SUCH TIME AS HE IS WILL TO COMPLY..."

D. MR. BUCHER, APPELLANT ATTORNEY, BROUGHT TO THE COURT ATTENTION TO, "...THERE HAS BEEN A MOTION BEFORE THE COURT

TO REDUCE THE SUPPORT PAYMENTS....HER INCOME HAS DOUBLED SINCE HIS HAS ALMOST BEEN WIPE OUT."

E. APPELLEE'S ATTORNEY MOVED TO STRIKE MR. BUCHER STATMENT AND JUDGE RULED "...THERE IS NO EVIDENCE."

F. JUDGE SAWAYA THEN OFFERED THE FOLLOWING STATEMENT IN HIS DECISION:

"...MR. COLEY...IT DOESN'T LOOK LIKE YOU HAVE MISSED ANY MEALS OVER THE PAST THREE YEARS... APPARENTLY YOU PICKED THE WRONG JUDGE THIS TIME...I DON'T KNOW WHAT KIND OF DEAL YOU GOT WITH THE IRS IN NOT HAVING FILED AN INCOME TAX RETURN FOR THE PAST FOUR OR FIVE YEARS. I SUSPECT MAYBE YOU ARE NOT TELLING THE TRUTH ABOUT THAT EITHER...I AM TELLING YOU RIGHT NOW WE ARE GOING TO GET YOU ON A PAYING BASIS UNLESS YOU WANT TO SERVE THE REST OF THOSE NINE YEARS IN THE COUNTY JAIL...YOU WOULD NOT BE THE FIRST MAN I PUT IN JAIL FOR NOT PAYING HIS SUPPORT."

6. THE APPELLEE SERVED THE APPELLANT WITH ANOTHER ORDER TO SHOW CAUSE SET FOR THE 24TH DAY OF APRIL 1990. SAID OSC WAS SCHEDULED WITHOUT THE COURT PERMISSION AND WHEN THE COURT RECEIVED THE NOTICE THE COURT CANCELED SAID OSC. AFTER THE COURT CANCELED SAID OSC APPELLEE'S ATTORNEY CONTINUED, WITHOUT CONTACTING EITHER APPELLANT NOR HIS ATTORNEY. APPELLANT ATTENDED SAID HEARING ON THE 24TH DAY OF APRIL, 1990, AND WAS INFORMED BY THE COURT THAT THE HEARING HAD BEEN CANCELED BY THEM AND THAT THE APPELLEE WOULD HAVE TO RESERVE HIM BEFORE THEY WOULD HEAR THE OSC.

7. APPELLEE'S ATTORNEY ATTENDED THE HEARING HE

CONTINUED, WITHOUT THE CONSENT OF APPELLANT NOR HIS ATTORNEY, ON THE 21ST OF MAY, 1990. APPELLANT SENT TO THIS HEARING MR. RAY STODDARD, AN ATTORNEY WHO HAD REPRESENTED THE APPELLANT IN THE PAST, TO INFORM THE COURT OF THE APPELLANT ABILITY TO ATTEND SAID HEARING IF THE JUDGE WANTED TO HAVE SAID HEARING. APPELLANT WOULD ONLY NEED 15 MINUTES TO ARRIVED TO THE HEARING. JUDGE SAWAYA STATED THE HE KNEW AND YOU KNOW AND EVERYBODY KNOWS WHAT'S GOING ON IN THIS CASE. JUDGE SAWAYA REFUSED TO ALLOWED APPELLANT ANY TIME TO ARRIVED AT SAID HEARING AND ISSUED A **NO BAIL BENCH WARRANT** FOR THE APPELLANT ARREST.

8. ON THE 24TH OF MAY, 1990 JUDGE SAWAYA, AFTER BEING SHOWN PROOF OF THE COURT'S CANCELING THE 24TH HEARING, RECALLED THE BENCH WARRANT FOR THE APPELLANT. JUDGE SAWAYA RULED THAT THE APPELLANT NEED NOT BE SERVED WITH THE OSC AND SET THE HEARING FOR THE 18TH OF JUNE.

9. ON JUNE 18TH, 1990, THE FOLLOWING STATEMENTS WERE MADE AT THAT HEARING:

A. "MR. HOLGREM: MAY I MAKE A BRIEF OPENING STATEMENT AS TO THAT?

THE COURT: I AM DEAD FAMILIAR WITHE THE FACTS OF THIS CASE. I DON'T THINK THAT IS NECESSARY."

B. "MR. BUCHER: ...IT DOES NOT HOLD THAT YOU CAN TERMINATE VISITATION FOR SIMPLE NONPAYMENT OF SUPPORT.

THE COURT: IF I CAN FIND IT. IT IS WILLFULL DISOBEDIENCE, THAT HE NOT DOING IT BECAUSE OF ECONOMIC REASONS, BUT BECAUSE HE'S JUST TRYING TO AVOID THE

RESPONSIBILITY, SOME MEAN-SPIRITED REASON, THAT I CAN'T UNDERSTAND--

MR. BUCHER: MY UNDERSTANDING IS THERE HAS TO BE AN AN EXPERT FINDING, WELFARE OF THE CHILD IS AN ISSUE. I AM ALSO--- I ALSO TAKE ISSUE WITH THE NOTION IN THE MEMORANDUM AND ORDER TO SHOW CAUSE THAT SIX MONTHS SENTENCE FOR CONTEMPT CAN BE ENTERED. I THINK A THIRTY DAY SENTENCE IS WHAT THE STATUTE CONTEMPLATES EXCEPT FOR AN ON-GOING CONTEMPT.

THE COURT: EACH NONPAYMENT OF SUPPORT, I GUESS, WOULD BE AN INDIVIDUAL AND SEPARATE CONTEMPT WOULDN'T IT? THIRTY DAYS FOR EACH ONE OF THOSE PAYMENTS MISSED.

MR. BUCHER: NO.

THE COURT: SOMETHING LIKE TWENTY YEARS.

MR. BUCHER: AS I SAID, I THINK THE COURT HAS TO DO IT--- A THIRTY DAYS SHOT AT A TIME.

THE COURT: DO YOU? YOU MAY HAVE TO GET THE SUPREME COURT OR COURT OF APPEALS TO TELL ME OTHERWISE.

MR. BUCHER:HE CAN'T MAKE ENOUGH MONEY TO GET OUT OF THAT PIT.

THE COURT: WELL , IF WE WERE NOT IN COURT I WOULD HAVE A WORD, MAYBE A COUPLE WORDS FOR THAT."

10. JUDGE SAWAYA FOUND THAT THE APPELLANT WAS GUILTY OF CONTEMPT FOR THE NON-PAYMENT OF CHILD SUPPORT AND THEN TERMINATED HIS VISITATION RIGHTS WITH HIS DAUGHTER AND ORDERED APPELLANT TO HAVE NO CONTACT WITH THE APPELLEE OR HIS DAUGHTER.

11. APPELLANT FILED ON THE 11TH OF JULY, 1990, OBJECTION TO ORDER ON ORDER TO SHOW CAUSE, STATING, IN PART, THAT HE ORDER WAS NOT SUPPORTED BY FINDINGS OF FACT AND CONCLUSIONS OF LAW.

12. JUDGE SAWAYA SIGNED THE APPELLEE'S PROPOSED ORDER OVER THE FILED OBJECTIONS, AND WITHOUT A HEARING ON SAID ORDER, ON THE 13TH DAY OF JULY, 1990.

13. APPELLANT FILED AN AFFIDAVIT OF BIAS OR PREJUDICE ON THE 16TH OF JULY, 1990.

14. JUDGE SAWAYA HELD THE REVIEW HEARING, OVER THE OBJECTION OF APPELLANT, ON JULY 16TH 1990. APPELLANT OBJECTED TO JUDGE SAWAYA STATING THAT ACCORDING TO UTAH LAW ONCE A AFFIDAVIT OF BIAS HAS BEEN FILED THAT JUDGE CANNOT DO ANYTHING IN THE CASE EXCEPT EITHER GRANT THE AFFIDAVIT OR DENY IT AND SEND IT TO ANOTHER JUDGE TO REVIEW. JUDGE SAWAYA STATED THAT HE WAS NOT BIAS AND THEREFORE CONTINUED WITH THE HEARING AT WHICH HE ACCEPTED A \$500.00 CASH PAYMENT FROM THE APPELLANT AND THEN ORDER THE APPELLANT TO MAKE WEEKLY PAYMENT TO THE COUNSEL OF APPELLEE.

15. JUDGE SAWAYA REVIEWED THE AFFIDAVIT AND QUESTIONS IT SUFFICIEENCY AND ORDER THE SAME TO JUDGE MURPHY FOR HIS DETERMINATION ON AUGUST 1, 1990. ACCORDING TO THE MINUTE ENTRY THIS REVIEW WAS HELD WITHOUT THE PRESENT OF THE APPELLANT BUT IN THE PRESENT OF THE APPELLEE'S ATTORNEY.

16. ON AUGUST 7TH, 1990 JUDGE MURPHY AND HE DETERMINED THAT IT IS LEGALLY INSUFFICIENT.

17. APPELLANT FILED A NOTICE OF APPEAL ON THE 13TH DAY

OF AUGUST, 1990 AND ON THE 16TH DAY OF AUGUST A MOTION FOR STAY PENDING APPEAL.

18. JUDGE SAWAYA DENIED APPELLANT MOTION FOR STAY ON THE 27TH DAY OF AUGUST, 1990.

19. JUDGE SAWAYA ACCEPTED SEVERAL LETTERS FROM APPELLEE'S COUNSEL BETWEEN AUGUST 10 AND SEPTEMBER 18, 1990.

20. APPELLANT MOTION CAME BEFORE JUDGE SAWAYA ON THE 27, OF AUGUST AND WAS DENIED. JUDGE SAWAYA ASKED APPELLANT ABOUT INFORMATION ALLEGED IN THOSE LETTER OF APPELLEE'S COUNSEL APPELLANT OBJECTED TO SUCH QUESTION AND RAISED THE ISSUE IF IT WERE PROPER FOR THE COURT TO ACCEPT CORRESPONDENCE WITH THE APPELLEE'S COUNSEL WITHOUT THE KNOWLEDGE OF THE APPELLANT.

21. JUDGE SAWAYA HELD A REVIEW HEARING ON THE 18TH DAY OF SEPTEMBER, 1990, AT SAID HEARING APPELLANT REQUESTED THAT THE REVIEW BE CONTINUED UNTIL AFTER THE COURT OF APPEALS COULD RULE ON APPELLANT'S MOTION FOR STAY, JUDGE SAWAYA THEN CONTINUED THE HEARING UNTIL THE DAY FOLLOWING THE COURT OF APPEALS HEARING.

22. THE COURT OF APPEALS VACATED THOSE PROVISIONS OF THE JULY 13, 1990 ORDER DENYING APPELLANT VISITATION AND CONTACT WITH HIS DAUGHTER.

23. THE APPELLEE THEN PROPOSED A AMENDED ORDER AND SENT A COPY TO THE APPELLANT. APPELLANT THEN MOTION THE COURT TO STRIKE SAID AMENDED ORDER AND OBJECTION TO THE CONTENTS OF THE AMENDED ORDER. APPELLANT ALSO FILED TWO ORDER TO SHOW CAUSE FOR THE APPELLEE AND HER COUNSEL FOR DENYING VISITATION TO THE APPELLANT.

24. APPELLANT'S MOTION, OBJECTIONS AND ORDER TO SHOW CAUSE CAME BEFORE THE COURT ON NOVEMBER 26, 1990. THE FOLLOWING OCCURED DURING THAT HEARING:

A. "MR. COLEY: WHAT I LIKE TO FIRST DO IS DO THE MOTION TO STRIKE.

THE COURT: TO STRIKE WHAT?

MR. COLEY: TO STRIKE THE PROPOSED ORDER.

THE COURT: THAT DENIED. THAT DIDN'T TAKE LONG, NOW DO YOU WANT TO TALK ABOUT YOUR OBJECTIONS, TOO?"

B. "THE COURT: I HAVE BEEN HOLDING IT, WAITING FOR HIS OBJECTIONS AND DID YOU FILE OBJECTIONS?

MR. COLEY: SURE DID, YOUR HONOR,

THE COURT: OKAY. ARE THEY IN THE FILE? I HAVE NEVER SEEN THEM.

MR. COLEY: I BELIEVE SO. I DON'T NOW IF THEY ARE IN THE COURT FILE OR NOT.

CLERK: THEY WERE FILED OCTOBER 29.

THE COURT: HAVE I SIGNED THESE ORDER TO SHOW CAUSE? WHO STAMPED THEM?

MR. COLEY: I BELIEVE ANITA DID.

CLERK: AND YOU APPROVED THE HEARING."

C. "THE COURT: LET'S HEAR WHAT OBJECTIONS -- WHAT ARE YOUR OBJECTION TO THE FINDING?

MR. COLEY: ...I APOLOGIZE TO THE COURT FOR BEING BACK IN FRONT OF IS SO MANY TIMES.

THE COURT: WELL. I SUPPOSE YOU ARE TRYING TO STAY OUT OF JAIL. THAT'S WHAT YOU ARE TRYING TO DO."

D. "THE COURT: I WILL TELL WHAT I AM GOING TO DO, I WILL TAKE THESE FINDING AND I GOING TO AMEND THEM TO SUIT MY SATISFACTION. I WILL MAKE MY OWN FINDINGS AND MR. HOLGREM WILL BE SATISFIED WITH THEM AS WELL AS YOU.

MR. COLEY: OKAY, I APPRECIATE THAT. YOU KNOW THERE ARE THINGS --

THE COURT: YOU MAY NOT LIKE WHAT I END UP DOING..."

E. "THE COURT: WHAT IS GOING TO HAPPEN, I AM GOING TO MAKE PROPER FINDINGS AND AGAIN ENTER AN ORDER DENYING YOU VISITATION.

MR. COLEY: BUT, YOUR HONOR, MAY I ASK THIS QUESTION? IF THERE ARE NO FACTS, IF IN THIS TRANSCRIPT HERE THERE'S NO EVIDENCE THAT SHOWS THAT IT IS IN THE BEST INTEREST OF MY DAUGHTER TO BE DENIED MY VISITATION, CAN YOU NOW ENTER IN IN FINDINGS OF FACT IN A HEARING THAT DIDN'T HAVE EVIDENCE IN IT?

THE COURT: I FOUND INITIALLY THAT THERE WERE SUFFICIENT FACTS UPON WHICH TO BASE THAT ORDER. I AM GOING TO PREPARE FINDINGS OF FACT THAT ORDER NOW. AND I AM GOING TO ENTER IT SO YOU WILL AGAIN BE DENIED VISITATION.

MR. COLEY: I THINK THE COURT WILL VACATE IT AS SOON AS YOU ENTER THAT.

THE COURT: I GUESS YOU WILL HAVE TO KEEP GOING BACK THROUGHT THAT.

MR. COLEY: I WILL GO BACK. AND IT HAS TO BE DONE IN THE BEST INTEREST OF THE CHILD. THAT'S WHAT THE LAW SAYS. THERE'S NO FINDINGS IN HERE, NO EVIDENCE OF THE BEST INTEREST OF THE CHILD BEING SERVED BY MY BEING DENIED--

THE COURT: I FOUND DIFFERENTLY. APPARENTLY, YOU AND I SEE THE EVIDENCE QUITE DIFFERENTLY.

MR. COLEY: THE TRANSCRIPT IS HERE.

THE COURT: THERE'S THE ISSUE OF YOUR CONTEMPT. WHEN DO WE GET TO THAT?"

F. "MR. HOLGREM: MAY I CLARIFY A COUPLE THINGS NOW TO AVOID BEING HERE ON IT AGAIN? WHEN YOU PREPARED -- WHEN YOU SEND YOUR AMENDED FINDINGS TO ME--

THE COURT: THEY WILL BE THE FINDINGS THAT I NEED YOU TO PUT INTO FINAL FORM.

MR. HOLGREM: OKAY, THEN IS HE GOING TO HAVE AN OPPORTUNITY TO HAVE A HEARING ON THOSE?

THE COURT: NO."

G. "MR. COLEY: THE NEW ORDER, I HAVE NO CHANCE TO LOOK AT IT AND MAKE ANY OBJECTIONS?

THE COURT: NOT AS LONG AS THEY CONFORM TO WHAT I DETERMINE THE FINDING SHOULD BE. YOU CAN FILE OBJECTIONS THEREAFTER, BUT IT WON'T DO YOU ANY GOOD."

H. "THE COURT: I THINK I AM SUFFICIENTLY AWARE OF THE PROCEEDINGS THAT HAVE BEEN TAKEN PLACE IN THIS CASE.

MR. COLEY: MAY I MAKE ONE COMMENT?

THE COURT: IF YOU WILL WAIT UNTIL I FINISH, MR. COLEY. THAT I CAN REMEMBER SUFFICIENTLY WHAT I NEED TO FIND IN ORDER TO SUPPORT MY ORDER.

MR. HOLGREM: OKAY. THEN ALSO THERE WAS AN AFFIDAVIT THAT WAS SUBMITTED FOLLOWING ONE OF THOSE EVIDENTIARY HEARINGS FROM MY CLIENT, NANCY COLEY, ON WHAT SHE THOUGHT AS

THE MOTHER OF THE CHILD THAT THE BEST INTERESTS ON THE CHILD WERE, THAT THE COURT MIGHT ALSO WANT TO CONSIDER IN MAKING ITS FINDING.

THE COURT: I AM SURE THAT I WOULD CONSIDER THAT PROBABLY, IF IT WASN'T OFFERED IN EVIDENCE AS PART OF THE RECORD."

I. "MR. HOLGREM: ...THE SECOND THING WAS TO INDICATE SPECIFIC THAT MR. COLEY WOULD NEED TO DO IN ORDER TO HAVE THE VISITATION.

THE COURT: HAVE YOU INCLUDED THAT IN THE PROPOSED ORDER?

MR. HOLGREM: I BELIEVE --

MR. COLEY: YES, HE DID HE MAKE UP SOME.

THE COURT: WE DID, YOUR HONOR. I GUESS WE MADE SOMETHING UP BECAUSE -- IT WAS OUR--IN OUR PROPOSING THESE FINDINGS OF FACT THAT THE COURT KNEW THE EVIDENCE AND THE COURT COULD EITHER ADOPT THESE AS ITS FINDING OR MAKE FINDINGS OF IT OWN, SO THESE ARE PROPOSED FINDINGS BUT WE DID STATE THAT IN ORDER TO GET HIS VISITATION BACK, WE SUGGEST THAT IF THE PLAINTIFF PAYS THE ON-GOING MONTHLY CHILD SUPPORT OF TWO FIFTY A MONTH EVERY MONTH, AS IT COMES DUE, AND IF HE FURTHER PAYS TWO HUNDRED PER MONTH TOWARDS REDUCTION OF THE JUDGMENTS AND INTEREST THAT HAVE ACCURED ...AND IF HE DOES THAT CONSISTENTLY FOR TWO CONSECUTIVE MONTHS, THAT HIS VISITATION COULD BE REINSTATED."

J. "MR. COLEY: CAN I JUST MAKE ON COMMENT, UNLESS I UNDERSTAND, AND MAYBE I AM MISUNDERSTANDING, WE HAD A

HEARING AND AT THAT HEARING YOU MADE A JUDGEMENT. IF I UNDERSTAND THE COURT OF APPEALS CORRECTLY, THEY TOLD YOU TO GO BACK TO THAT HEARING, MAKE YOUR FINDINGS BASED ON THAT HEARING, NOT BASED ON THE HEARING TWO WEEKS LATER, NOT BASED ON WHAT IS HERE TODAY BUT BASED ON WHAT WAS HEARD AT THAT HEARING. THAT'S ALL I AM ASKING IS THAT YOU GO BACK TO AND USE THAT IN THE FINDING OF FACTS AND CONCLUSIONS.

THE COURT: I WILL USE THE EVIDENCE PRESENTED AT EVERY HEARING THAT WE HAVE HAD, MR. COLEY, TO DETERMINE WHETHER OR NOT YOU SHOULD VISIT WITH YOUR CHILD, IT ALL MAKES SENSE.

MR. COLEY: THE ORDER THAT I APPEALED AND THE ORDER THAT YOU SIGNED WAS VACATED AND IT WAS SENT BACK FROM THE COURT OF APPEALS. WAS THAT ORDER BASED ON THE JULY -- OR JUNE 18 HEARING, NOW HOW CAN YOU INCLUDE OTHER INFORMATION AFTER THAT, THAT GETTING TWO BITES OF THE SAME APPLE. IF HE DOESN'T DO IT RIGHT THE FIRST TIME YOU GET A CHANCE TO DO SO IT RIGHT THE SECOND TIME?

THE COURT: WHATEVER THE COURT DETERMINES ARE THE FACTS THAT WILL BE DETERMINED FROM WHATEVER HEARING I HAVE HEARD IN THIS MATTER. IT DOESN'T MATTER WHEN I HEARD IT.

MR. COLEY: WELL, SEE, THE QUESTION I HAVE IS HOW DO I THEN SAY TO THE COURT OF APPEALS THAT WAS NOT EVIDENCE FROM ANOTHER HEARING BECAUSE IT SHOULD BE EVIDENCE IN FRONT OF THE COURT. I AM NOT SAYING THAT YOU MISLEAD THE COURT OF APPEALS BUT I DO NEED A FOUNDATION IN WHICH FOR ME TO APPEAL YOUR ORDER.

THE COURT: ALL YOU NEED TO DO IS--THERE'S NOTHING IN

THE RECORD IN THIS CASE THAT WOULD SUPPORT A FINDING WHETHER FROM ONE HEARING OR ANOTHER.

MR. COLEY: WHEN YOU DO YOUR FINDINGS, COULD I ASK YOU TO IDENTIFY WHERE THEY COME FROM?

THE COURT: YOU CAN ASK ME TO BUT I AM CERTAINLY NOT GOING TO."

25. JUDGE SAWAYA SIGNED AN ORDER, DENYING ALL CONTACT BETWEEN APPELLANT AND HIS DAUGHTER, ON JANUARY 9, 1991. THE ORDER CONTAINED THE FOLLOWING STATEMENT, "...IT IS NOT IN THE BEST INTEREST OF THE MINOR CHILD TO HAVE VISITATION WITH THE PLAINTIFF UNTIL SUCH TIME AS PLAINTIFF SHOWS TO THIS COURT THAT HE IS CONCERNED ABOUT THE CHILD'S FINANCIAL SUPPORT AND EXPRESSES THAT CONCERN BY PAYING HIS ONGOING CHILD SUPPORT IN THE AMOUNT OF \$250 PER MONTH AND MAKING A MONTHLY REDUCTION OF \$200 TOWARD THE REDUCTION OF THE JUDGMENTS... AND MAKES BOTH PAYMENTS EVERY MONTH FOR A PERIOD FOUR (4) CONSECUTIVE MONTHS...IF PLAINTIFF THEREAFTER FAILS TO MAKE SUCH PAYMENTS, WITHOUT MAKING A CLEARING SHOWING OF CHANGED CIRCUMSTANCES, THE COURT SHALL, WITHOUT FURTHER HEARING, SUSPEND VISITATION.

STATEMENT OF THE CASE

1. JUDGE SAWAYA HAS DENIED APPELLANT DUE PROCESS OF LAW FROM THE BEGINNING OF HIS APPEARANCE IN THIS CASE. JUDGE SAWAYA DENIED APPELLANT DUE PROCESS BY MAKING HIS OWN MOTION AND THEN HEARING THAT MOTION AT THE END HIS LAW AND MOTION CALENDER, DENYING APPELLANT A CHANCE TO PRESENT A DEFENSE. (STATEMENT OF THE FACT #5 A AND B).

JUDGE SAWAYA AGAIN DENIED APPELLANT DUE PROCESS BY DENYING HIS MOTION TO STRIKE WITHOUT HEARING OF IT CONTENTS, OR EVEN KNOWING ITS' CONTENTS. (SOF #24 A).

JUDGE SAWAYA AGAIN DENIED APPELLANT DUE PROCESS BY NOT GIVING A COMPLETE HEARING ON HIS OBJECTIONS TO AMENDED, OR ALLOWING APPELLANT TO ARGUE HIS OBJECTION IN OPEN COURT. (SOF # 24 D AND F.)

JUDGE SAWAYA AGAIN DENIED APPELLANT DUE PROCESS BY NOT ALLOWING APPELLANT TO ARGUE HIS ORDER TO SHOW CAUSE, JUDGE SAWAYA HAD NOT READ NOR DID HE KNOW WHAT THEY CONTAINED.

2. JUDGE SAWAYA HAS MADE PERSONAL COMMENTS SHOWING HIS BIAS AGAINST APPELLANT. (SOF #5 F, AND #9 B)

3. JUDGE SAWAYA HAS DEMONSTRATED A PROPENSITY FOR PRE JUDGING THIS CASE. (SOF #5 F, #9 A, #14, #24 A, #24 C, # 24 E, AND # 24 J.)

4. JUDGE SAWAYA HAD RECEIVED INFORMATION FROM OUTSIDE OF THE COURT AND HAS USED THEM IN HIS FACT FINDING PROCESS. (SOF # 19, AND # 24 H.)

5. JUDGE SAWAYA HAS QUESTION THE HONESTY OF THE APPELLANT WHEN THERE HAS NO BASES TO DO SO. (SOF # 5 F.)

6. JUDGE SAWAYA ISSUED A NO-BAIL BENCH WARRANT FOR THE ARREST OF THE APPELLANT WHEN THERE WAS NO JUSTIFICATION FOR SAID WARRANT. (SOF # 7)

7. JUDGE SAWAYA HAS PUNISHED APPELLANT FOR CONTEMPT IN EXCESS OF WHAT EVEN THE APPELLEE HAD REQUESTED. (SOF # 5 D AND F, # 24 I AND # 25)

8. JUDGE SAWAYA AFTER RULING THAT HE COULD DENY VISITATION FOR THE SOLE REASON OF NON-PAYMENT OF SUPPORT, AND TOOK NO EVIDENCE CONCERNING THE BEST INTEREST OF THE CHILD, HE FELT HE NEEDED NONE, CREATED HIS OWN SET OF FACTS TO SUPPORT HIS FINDING OF THE BEST INTEREST ON THE CHILD IS NOT TO HAVE CONTACT WITH HER FATHER. (SEE JANUARY 9, 1991 ORDER).

9. JUDGE SAWAYA EITHER DENIED THE EXISTENCE OR IGNORED FACT IN THE RECORD. (SOF # 3, # 5 C, D AND E, AND # 7)

JURISDICTION

1. THIS IS AN APPEAL FROM A FINAL ORDER OF JUDGE MICHAEL MURPHY DENYING APPELLANT AFFIDAVIT OF BIAS OR PREJUDICE DATED AUGUST 7, 1990. JUDGE MICHAEL MURPHY IS A THIRD DISTRICT COURT JUDGE.

2. THIS APPEAL WAS FILED BY A NOTICE OF APPEAL ON AUGUST 13, 1990, TO THE ABOVE COURT.

3. THIS COURT HAS JURISDICTION OVER THIS APPEAL BY VIRTUE OF UTAH CODE ANNOTATED 77-35-26 (2A) AND (B), AND RULE 3 OF THE RULES OF THE UTAH COURT OF APPEALS.

4. THE ORDER OF THIS COURT ALLOWING APPELLANT UNTIL APRIL 19, 1991 TO FILE SUPPLEMENTAL BRIEF DATED APRIL 10, 1991.

ARGUMENT

1. THE LITIGANT IN A TRIAL HAS THE RIGHT TO A FAIR TRIAL AND TO THE APPEARANCE OF A FAIR TRIAL, WHERE A JUDGE APPEAR TO BE UNFAIR THAT JUDGE SHOULD REMOVE HIMSELF OR BE REMOVED.

"WHEN THERE IS GROUND FOR BELIEVING THAT SUCH UNCONSCIOUS FEELING MAY OPERATE IN THE ULTIMATE JUDGEMENT, OR MAY NOT UNFAIRLY LEAD OTHERS TO BELIEVE THEY ARE OPERATING, JUDGES RECUSE THEMSELVES. THEY DO NOT SIT IN JUDGEMENT, ADMINISTRATION OF JUSTICE SHOULD REASONABLY APPEAR TO BE DISINTERESTED AS WELL AS BE SO IN FACT." PUBLIC UTILITIES COMM'N V. POLLACK, 343 U.S. 451, 466-67.

"WHEN [A LITIGANT] HAS GOOD REASON TO BELIEVE, SUPPORT BY FACTS, THAT [THE JUDGE] WILL NOT AFFORD HIM SUCH [AN IMPARTIAL] TRIAL, HE SHOULD NOT BE COMPELLED TO TAKE A CHANCES OF A TRIAL BEFORE THAT IN ORDER THAT THE TRUTH OF THE MATTER MAY BE DEVELOPED, WHICH MAY NEVER BE DEVELOPED BECAUSE THERE MANY WAYS THAT A PARTIAL OR PREJUDICED JUDGE MAY KNIFE A PARTY THAT HE IS TRYING, WITHOUT IT APPEARING FROM THE RECORD, OR WITHOUT HIS BEING ABLE TO ASCERTAIN THE ACT." MASSIE V. COMMONWEALTH, 93 Ky. 588, 20 S.W. 704 (Ct App. 1892).

"THE PUBLIC DOES NOT FULLY UNDERSTAND THE POSITION OF THE JUDGE IN RESPECT TO HIS IMMUNITY FROM EXPOSURE BY THE

BAR. HIS INIQUITIES OR INCOMPETENCIES, IF ANY, ARE SO COMMITTED AS TO BECOME DIRECTLY KNOWN ONLY TO A FEW PERSONS IN ANY GIVEN INSTANCE; AND THESE FEW PERSONS ARE THE ATTORNEYS IN CHARGE OF THE CASE. TO BEAR OPEN TESTIMONY AGAINST HIM NOW IS TO RISK PROFESSIONAL RUIN AT HIS HANDS IN THE NEAR FUTURE. MOREOVER, THIS RUIN CAN BE PERPETUATED BY HIM WITHOUT FEAR OF THE DETECTION OF HIS MALICE, BECAUSE A JUDGE'S DECISION CAN BE OPENLY PLACED UPON PLAUSIBLE GROUNDS, WHILE SECRETLY BASED ON THE RESOLVE TO DISFAVOR THE ATTORNEY IN THE CASE. HENCE LAWYERS DREAD, MOST OF ALL THINGS, TO GIVE PERSONAL OFFENSE TO A JUDGE." L. GOLDBERG & E. LEVENSON, LAWLESS JUDGES 230.

"THE BIAS NECESSARY TO DISQUALIFY IS NOT THE POSSESSION OF DEFINITE VIEWS ON THE LAW OR EVEN A "PREJUDGMENT" OF THE CONTROVERSY, BUT A PERSONAL ATTITUDE OF ENMITY DIRECTED AGAINST THE SUITOR MAKING THE APPLICATION." COLE V. LOEW'S, Inc., 340 U.S. 954 (1951).

IN THE CASE AT BAR JUDGE SAWAYA'S CONDUCT CLEARLY HAS THE APPEARANCE OF PREJUDICE AND BIAS, EVEN THE APPELLEE'S COUNSEL ADMITTED BEFORE THIS COURT "JUDGE SAWAYA HAS GIVEN ME THE GREATEST LATITUDE IN PURSUING THIS MAN."

2. JUDGES SHOULD RECUSE THEMSELVES WHEN THEY BECOME AWARE OF FACTS THAT ARE NOT IN EVIDENCE, THAT HAVE A BEARING ON THE CASE.

"THE QUESTION IS NOT WHETHER THE MAGISTRATE ACTUALLY RESORTED TO HIS FIRST-HAND INFORMATION IN ASSESSING THE MERITS OF THE CASE. THE EVIL RESIDED IN THE POSSIBILITY OF

HIS CONSCIOUSLY OR UNCONSCIOUSLY DOING SO." JAMES V. STATE, 56 N.J. SUPER. 213, 152 A.2d 386 (1959).

JUDGE SAWAYA AGREED TO LOOK ALL INFORMATION BEFORE HIM TO JUSTIFY HIS DECISION TO DENY ALL CONTACT BETWEEN APPELLANT AND HIS DAUGHTER, IN ONE HEARING HE STATED THAT HE WOULD CONSIDER THE UNSUPPORTED STATEMENT MADE BY THE APPELLEE CONCERNING THE BEST INTEREST OF THE CHILD EVEN IF WERE NOT PART OF THE RECORD. THE ACTION OF JUDGE SAWAYA ARE DEPLORABLE AT BEST, AND DOWNRIGHT DESTRUCTIVE TO THE APPELLANT CASE, HOW CAN ONE COUNTER FACTS HE DOES NOT KNOW ABOUT OR EVEN GIVEN THE CHANCE TO ARGUE AGAINST.

3. THE UNITED STATES CONSTITUTION FOURTEENTH AMENDMENT GUARANTEES DUE PROCESS AND A FAIR TRIAL.

JUDGE SAWAYA HAS DENIED THE APPELLANT HIS ACCESS TO THE LEGAL SYSTEM BY DENYING HIS MOTIONS, ORDER TO SHOW CAUSE AND OBJECTIONS TO APPELLEE'S ORDER. IT IS CLEAR FROM A READING OF THE TRANSCRIPT OF THE HEARING HELD NOVEMBER 26, 1990. JUDGE SAWAYA HAD NOT READ ANY OF APPELLANT'S PAPERS THAT HAD BEEN FILED IN THIS CASE, HE STILL, HOWEVER, DENIED THE MOTION TO STRIKE WITHOUT ORAL ARGUMENT AND STATING THAT HE WAS GOING TO FIX THE ORDER TO SHOW CAUSE PROBLEM BY DENYING APPELLANT VISITATION RIGHT AND THEREFORE HE HAS NO RIGHT TO COMPLAIN ABOUT PAST WRONGS COMMITTED BY THE APPELLEE. THE ISSUE OF NON-PAYMENT WAS NOT BEFORE THE COURT AT THE NOVEMBER 26, HEARING, HOWEVER, IT WAS CLEAR THAT JUDGE SAWAYA WAS ONLY INTERESTED IN THAT PART OF THE CASE AND REFUSED TO CONTINUE HEARING APPELLANT'S CHALLENGE TO HIS UNFAIR CONDUCT.

JUDGE SAWAYA BELIEVED THAT HE COULD DENY THE APPELLANT HIS VISITATION RIGHT FOR THE NON-PAYMENT OF CHILD SUPPORT AND SO STATED IN THE JUNE 18, HEARING AND HIS ORDER OF JULY 13, REFLECTS THE SAME BELIEF AND HE TOOK NO EVIDENCE CONCERNING THE BEST INTEREST OF THE CHILD AT THE JUNE 18 HEARING. JUDGE SAWAYA AGREED WITH THE APPELLANT THAT TO DENY ANY CONTACT WITH HIS CHILD WOULD BE DAMAGING TO HER, HOWEVER WHEN THIS COURT REMANDED THE CASE TO HIM FOR FINDING OF FACT TO SUPPORT HIS DENIAL OF CONTACT BASED ON THE BEST INTEREST OF THE CHILD, JUDGE SAWAYA DECIDED TO CREATE HIS FINDING WITHOUT REHEARING THE CASE. WHEN THERE HAD BEEN NO DISCUSSION OF THE BEST INTEREST ON THE CHILD AT ANY HEARING AND THEN FOR JUDGE SAWAYA TO THEN MAKE FINDING FACTS THAT IT IS THE BEST INTEREST OF THE CHILD, DENIED THE APPELLANT HIS RIGHT TO CHALLENGE THE ASSERTION, TO CALL WITNESSES TO ESTABLISH THE BEST OF THE CHILD WAS TO HAVE CONTINUE CONTACT WITH HER FATHER, THE APPELLANT.

CONCLUSION

THIS APPEAL IS NOT VERY DIFFICULT AT ALL. THE APPELLANT HAS A RIGHT TO A FAIR AND IMPARTIAL JUDGE TO PRESIDE OVER HIS CASE. JUDGE SAWAYA ACTIONS CLEARLY JUSTIFIES HIS REMOVEABLE FORM THIS CASE. IT IS IMMORAL TO ALLOW A JUDGE WITH SUCH CONDUCT TO CONTINUE TO BEAT UP THE APPELLANT THE WAY HE HAS. A JUDGE CAN IN SO MANY BIAS THE OUTCOME OF A CASE INADVERTENTLY THAT WHEN A JUDGE SO ADVERTENTLY SHOW BIAS THIS COURT HAS NO OPTION OTHER THAN TO OVERTURN JUDGE MURPHY DECISION AND REMOVED JUDGE SAWAYA FROM THIS CASE. THE MINIMAL INCONVENIENCE THAT HIS REMOVAL WOULD CAUSE THE COURT SYSTEM CERTAINLY JUSTIFIES SUCH ACTION.

RESPECTFULLY SUBMITTED, THIS 19TH DAY OF APRIL, 1991.

LLOYD D. COLEY, APPELLANT.

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IN THE UTAH COURT OF APPEALS

LLOYD D. COLEY,
PLAINTIFF/APPELLANT,

vs.

NANCY P. COLEY,
DEFENDANT/RESPONDENT,

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CERTIFICATE OF
DELIVERY

CASE No.900446-CA

I, LLOYD D. COLEY, DO HEREBY CERTIFY THAT I DELIVER A
TRUE AND CORRECT COPY OF THE SUPPLEMENTAL BRIEF TO THE
OFFICE OF:

RANDALL HOLGREM
50 WEST BROADWAY
SALT LAKE CITY, UTAH

LLOYD D. COLEY