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Marie S. Facer, the surviving spouse of William Henry Facer v. Reed H. Facer and Martha F. Proctor individually and as executors of the estate of William Henry Facer : Appellant's Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

Case No. 900488-CA

Argument Priority Classification 16

MARIE S. FACER, THE SURVIVING SPOUSE OF
WILLIAM HENRY FACER

PLAINTIFF AND APPELLANT

vs.

REED H. FACER AND MARTHA F. PROCTOR
INDIVIDUALLY AND AS EXECUTORS OF THE
ESTATE OF WILLIAM HENRY FACER

DEFENDANTS AND RESPONDENTS

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
STATE OF UTAH, COUNTY OF UTAH
HONORABLE GEORGE E. BALLIF, JUDGE

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

APPELLANT'S REPLY TO RESPONDENT'S ISSUES PRESENTED FOR REVIEW

- I. Was the Trial Judge justified in dismissing Plaintiff's Complaint with prejudice and granting sanctions after Plaintiff-Appellant was in contempt of four (4) Court Orders to appear and have her oral deposition taken?
- II. Does URCP 30(b)(2) justify Plaintiff's refusal to appear for the taking of her deposition?
- III. Did the Trial Court violate any statutory or Constitutional Rights of Plaintiff by the imposition of Rule 37(b)?
- IV. Were the Orders of the Trial Court in proper form and properly served?

DETERMINATIVE PROVISIONS SET OUT IN THE APPELLANT'S BRIEF AS FOLLOWS:

Constitution of Utah Art I Sec. 11(App-15)

State of Utah Rules of Civil Procedure:

Utah Rules of Civil Procedure Rule No. 30(b)(2) .(App-17)

Utah Rules of Civil Procedure Rule No. 37(b). . .(App-19)

Utah Rules of Civil Procedure Rule No. 56(e). . .(App-21)

Utah Rules of Civil Procedure Rule No. 56(f). . .(App-21)

Utah Rules of Civil Procedure Rule No. 58A(d) . .(App-22)

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Utah Code of Judicial Administration Rule Nos.

4-501(5),(9).(App-23)

Utah Uniform Probate Code No. 75-2-102(App-24)

Utah Uniform Probate Code No. 75-2-502(App-25)

SUMMARY OF THE ARGUMENTS

The Trial Judge was not justified in dismissing the Plaintiff's Complaint with prejudice. The URCP 30(b)(2) does justify the Plaintiff's refusal to appear for the taking of her deposition. The Trial Court did violate the statutory, and Constitutional Rights of the Plaintiff by the imposition of Rule 37(b). The Orders of the Trial Court were not in proper form, nor properly served.

DETAIL OF THE ARGUMENTS

ISSUE I

THE TRIAL JUDGE WAS NOT JUSTIFIED IN DISMISSING THE PLAINTIFF'S COMPLAINT WITH PREJUDICE.

The Appellant's careful and precise analysis set forth in ISSUE II of the Appellant's Brief is virtually uncontroverted in any way by the Respondents when they describe without any citations to the record the bald assertion that "The trial court ordered Plaintiff to appear for the taking of her deposition in four (4) separate Orders."

The Respondent's ignorance and disregard for the Appellant's cited Authorities, citations to the record in ISSUE I of the Appellant's Brief, clearly established appropriate, valid, lawful reasons for not going to a deposition, for a Pro-Se litigant. Thus, controverting the Respondent's asserted claim, "No valid [or] lawful reasons are given to justify her refusal to appear."

The Respondent proclaims without any citations to the record, as if ignorant of the stated facts in ISSUE I of the Appellant's

Brief, that:

"In this case the Plaintiff refused to respond to Defendant's Request For Admissions or Production of Documents and also refused to answer deposition questions on the grounds that the answers might tend to incriminate her."

This is nothing less than an outright lie! The Respondent's have pursued the deposition as the only means of discovery, rather than the request for admissions, interrogatories, and the production of documents, (R at 38; 47, 49; 67; 71, 74, 75, 77, 79; 91, 92, and 93).

Furthermore, the Respondents cited authorities have no similar factual basis to the case at bar, i.e., neither case is dealing with the issue of depositions, as the only means of discovery, for pro-se litigants, who have refused to submit to a special tribunal, a "Kangaroo Court" outside of the court room, in violation of their U.S. Constitutional rights to "due process." Nor, is either case dealing with the issue of URCP Rule No. 56(f), a required, prerequisite Utah Rule of Civil Procedure for opposing Summary-Judgment-Motion claims in attempting to establish an issue of material fact.

The relevant facts of this case at bar are: the Appellant appropriately served the Respondents on April 4, 1989, the requested discovery (R at 41) after the Respondents failed and refused to provide the requested discovery outside of court (R at 97, 98; 194 through 197). Then, once in court the Respondents have failed and refused to provide the requested discovery in Appellant's Motion for Compelling Discovery (R at 54 through 63).

The Respondents filed several notices for deposition, as the

only means of discovery, and the Appellant filed several objections, all accurately cited in the Appellant's Brief (C. Relevant Facts with Citations to the Record, pages 5 through 13), then, vigorously argued in ISSUES I and II.

The matter of **most significance** to this court is the issue of required discovery after the Appellant, filed the appropriate Motion for Summary Judgment dated September 8, 1989, asserting no issue of material fact, (R at 116 through 189).

The Respondents filed Notice of taking deposition (R at 205, 206) on September 7, 1989, not received by the Appellant until after filing the appropriate Motion for Summary Judgment. **For what asserted issue of material fact?**

During this point in time the Respondent's could have raised an issue of material fact pursuant to the URCP Rule No. 56(e) (App-21) and the Utah Code of Judicial Administration Rule Nos. 4-501(5), (9) (App-23). However, the Respondents raised no issue of material fact, nor did they aver to an issue of material fact, by filing for a continuance pursuant to URCP Rule No. 56(f) (App-21). The Trial Court, in its discretion, could have granted the Respondents requested discovery on the averred issue of material fact that the Respondents believed could have been obtained from the Appellant. This specific **required** prerequisite Utah Rule of Civil Procedure, i.e., URCP Rule No. 56(f), (App-21), should apply to the case at bar as discussed at great length in Downtown Athletic Club v. Horman, 740 P.2d 278, 279 (Utah 1987), and Cox v. Winters, 678 P.2d 312, 313, 314, 315 (Utah 1984).

The Respondents established no issue of material fact in their

pleadings dated September 12, 1989, (R at 219 through 223). Nor, did they aver to or raise any issue of material fact in their pleadings dated September 20, 1989, (R at 224 through 226).

The Appellant pointed this out to the Respondents and the Trial Court in pleadings dated September 22, 1989, (R at 229 through 234).

The Trial Court missed this specific required, prerequisite Utah Rules of Civil Procedure, i.e., URCP Rule No. 56(f), in its Ruling and Order dated December 11, 1989, (R at 237, 238) (App-1, 1A), disregarding and ignoring the requirements of URCP Rule No. 56(e) and 56(f), by asserting:

"As there appear to be genuine issues of material fact, plaintiff's Motion for Summary Judgment is denied."

In summary, the Trial Judge was not justified in dismissing the Plaintiff's Complaint with prejudice and the Appellant's actions were completely justified. The Respondents raised no issue of material fact, nor did they attempt to raise an issue of material fact through the appropriate Utah Rules of Civil Procedure. The Trial Court's efforts, commingled with the Respondent's vigilant pursuit of a deposition as the only means of discovery, was a misguided vector utilized to deflect the Trial Court away from the real issues discussed at length in the Appellant's Brief, ISSUE III.

ISSUE II

THE URCP 30(B)(2) CLEARLY JUSTIFIES THE PLAINTIFF'S REFUSAL TO APPEAR FOR THE TAKING OF HER DEPOSITION.

The Appellant is not represented by legal council, but is prosecuting her surviving spouse statutory rights on her own,

because several lawyers stated there was not enough money involved for them to invest their time and money in her behalf. Therefore, the provisions of URCP Rule No. 30(b)(2) (App-17) must apply in order for the Appellant to apply and utilize the Constitution of Utah Art. I, Sec. 11 (App-15) to the case at bar which states:

"All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself, [or herself], or counsel, any civil cause to which he [or she] is a party."

In conclusion, the unrepresented Pro-Se litigant deposition could not have been used against the Appellant at trial, asserted and vigorously argued in ISSUE I of the Appellant's Brief, and virtually uncontroverted in any way by the Respondent's Brief, which has intentionally evaded the paramount point that the Appellant is not represented by legal counsel when prosecuting her surviving spouse rights Pro-Se. Therefore, the deposition as a discovery tool may not be used against the Appellant pursuant to URCP Rule No. 30(b)(2), (App-17), and the Trial Court's refusal to abide by the URCP Rule No. 30(b)(2), (App-17), is a forceful denial of the Appellant's Utah Constitutional Rights (App-15).

ISSUE III

THE TRIAL COURT VIOLATED THE STATUTORY AND CONSTITUTIONAL RIGHTS OF THE PLAINTIFF BY THE IMPOSITION OF URCP RULE No. 37(b).

The Appellant is trying to make some sense out of the multitude of conclusionary assertions set forth by the Respondents in attempting, without any citations to the record, or

controverting authorities, to justify the Trial Court's imposition of URCP Rule No. 37(b).

To begin with, no discovery is required, nor was required from the Appellant to establish:

1. The lawful marriage to William Henry Facer (R at 30),
2. The amount of the estate of William Henry Facer (R at 62 No. 17, and 63),
3. The Appellant as the surviving spouse of William Henry Facer (R at 177),
4. The Utah statutory surviving spouse rights set forth by the Utah State Legislature for the Appellant, Utah Uniform Probate Code Section No. 75-2-102 (App-24), or the U.S. Constitutional Rights of the Appellant, described in (pages 15 and 16 of the Appellant's Brief).
5. That the purported Trust (R at 6 through 14) and the purported Trust Amendment (R at 17) is the direct result of undue influence set forth in Robertson v. Campbell, 674 P.2d 1232, 1233 (Utah 1983); therefore, invalid.
6. That the purported Trust (R at 6 through 14) and the purported Trust Amendment (R at 17) is not in compliance with the Statute of Wills Utah Uniform Probate Code Section No. 75-2-502, (App-25) set forth in Scott on Trusts § 53 page No. 4; therefore, invalid.

All were disregarded and ignored by the imposition of URCP Rule No. 37(b) (App-19), without establishing an issue of material fact, or in averring to an issue of material fact that required any mandatory discovery from the Appellant.

Certainly the Trial Court violated the statutory and Constitutional Rights of the Plaintiff by the imposition of URCP Rule No. 37(b).

ISSUE IV

THE ORDERS OF THE TRIAL COURT WERE NOT IN PROPER FORM, NOR PROPERLY SERVED.

The Respondents assert without any citations to the record, or pointing out any fallacy in the Appellant's Brief, the alleged Rulings and Orders they rely upon when they state "The trial court sent copies of all of its Rulings and Orders to the Plaintiff on a timely basis."

Obviously, the Respondent did not read or apply the Appellant's Brief ISSUE II to any real analysis, nor have they provided any proof of their above-quoted assertion, required by the URCP Rule No. 58A(d) (App-22) as set forth by the Utah Supreme Court when it states:

"Our rules do not require the court to give notice but put the burden on counsel to check periodically with the clerk of the court as to the date of entry of the findings and judgment so that post-trial motions may be timely filed."

Automatic Control Products v. Tel-Tech, 780 P.2d 1260 (Utah 1989).

A casual perusal of the Rulings and Orders dated, May 16, 1990, (App-3, 3A) and December 27, 1989, (App 7, 7A, 7B), have no indication of a mailing certificate--after the signing by the Court--that they were ever served on the Appellant by either the Trial Court or the Respondent.

Therefore, the Respondent's assertions and allegations are without any merit, because the above cited Court Orders lack of

service to the Appellant after the signing by the Court. The imposed sanctions are a reversible error that should now be immediately reversed, because the Trial Court Orders were not properly and timely served.

CONCLUSION

For the above stated reasons, the Appellant's claims to a reversible error should now be granted. Thus, reversing the Trial Court's Orders dated December 11, 1989, February 21, 1990, and May 16, 1990, and requiring the Trial Court to establish an issue of material fact and set for trial, or grant the Appellant's Motion for Summary Judgment dated September 8, 1989, and January 8, 1990, which is the subject of review.

Dated this 14th day of November, 1990.

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Mailing Certificate

I hereby certify that four (4) true and exact copies of the foregoing Appellant's Reply Brief were hand delivered to Thomas S. Taylor, Attorney for the Defendants-Respondents, 2525 North Canyon Road, P.O. 1466, Provo, Utah 84603 on this 14th day of November, 1990.

Marie S. Facer
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