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Richard H. Holder v. Ruth M. Holder : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the

STATE OF UTAH

FILED

MAR 18 1959

RICHARD H. HOLDER,
Respondent and Plaintiff,

vs.

RUTH M. HOLDER,
Appellant and Defendant.

Clerk, Supreme Court, Utah

Case No.
8984

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS.....	2
STATEMENT OF POINTS.....	7
ARGUMENT:	
POINT I: THE CHILD WAS A "FULL TERM" OR "NEAR TERM" BABY AND COULD NOT HAVE BEEN CONCEIVED AS LATE AS DECEMBER 24, 1956.	8
POINT II: COVERING POINTS II AND III OF APPELLANT'S BRIEF. THERE IS SUFFI- CIENT EVIDENCE TO SUPPORT THE COURT'S FINDINGS THAT DEFENDANT HAD SPOKEN TO PLAINTIFF'S FATHER REGARDING BE- ING PREGNANT ON RETURN FROM CALI- FORNIA, AND DISCUSSED WITH PLAIN- TIF'S MOTHER MISSING THE MENSTRUAL PERIOD PRIOR TO GOING TO CALIFORNIA.....	9
POINT III: THE EVIDENCE IS CONCLUSIVE THAT DEFENDANT MUST HAVE BEEN PREGNANT ON DECEMBER 24, 1956.	11
POINT IV: THE COURT DID NOT ERR IN DENY- ING DEFENDANT'S MOTION FOR NEW TRIAL.	14
SUMMARY	14

CASES CITED

Anderson v. Anderson, 5 P (2d) 881.....	12
Bement v. Bement, 110 Utah 451, 174 P (2d) 996.....	14
Dazey v. Dazey, et al., 122 P (2d) 308.....	12
Gonzales v. Pacific Greyhound Lines, 202 P (2d) 135.....	12
McNamara, Estate of, 183 Pac. 552, 7 A.L.R. 313.....	12
Murr v. Murr, 197 P (2d) 369.....	12

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vs.

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The parties will be referred to as in the trial court.

Plaintiff brought an action for annulment of a marriage that took place between the parties on February 2, 1957, on the ground that the marriage was induced solely by defendant's representations that she was carrying plaintiff's child; that said representations were fraudulent and relied upon by the plaintiff and plaintiff would not have entered the marriage contract had it not been for the fraudulent representations (R.1).

The defendant answered, denying the fraudulent representations and counterclaimed for divorce, alimony, and child support (R. 4-6). The plaintiff replied to the counterclaim (R. 7-8). The pretrial order set forth that

the pleadings determined the issues (R. 18). The matter was tried before Judge Stewart M. Hanson on May 29, 1958 (R. 19).

Judge Hanson filed a memorandum decision on June 6, 1958 (R. 106-107). Findings and Conclusions (R. 109-111) and a Decree (R. 112), finding for the plaintiff and against the defendant on the complaint and dismissing defendant's counterclaim as no cause of action, were filed on the 24th day of June, 1958. Defendant moved to alter the judgment and for a new trial (R. 115-116) on July 6, 1958, and filed a notice on appeal on July 23, 1958. The court denied the defendant's motions to alter the judgment and to grant a new trial (R. 119), and amended its Findings of Fact changing the date "December 25th" in Findings paragraphs 2, 10, 11 and 12 to read "December 24th" (R. 121). On December 2, 1958, defendant filed a second notice of appeal from the original judgment and for denial of the motions for new trial (R. 122).

STATEMENT OF FACTS

Plaintiff cannot agree with the defendant's Statement of Facts, many appearing to be taken as conclusions and conflicting materially from the facts found by the court. Therefore, we must restate the facts.

Several of the facts are uncontroverted, those being (1) The parties were married on February 2, 1957, in Salt Lake City, Utah (R. 22). (2) The parties had had no contact or access to each other between the first part of May, 1956, and December 24, 1956, the plaintiff having been in Alaska (R. 22 and R. 46-47). (3) A female child

was born to the defendant on August 13, 1957. (4) The child was born 192 days after the marriage (computation) and 232 day after the first possible applicable act of intercourse between the parties. (5) The defendant went to Dr. Von Holbrook on March 29, 1957 (R. 22). (6) The defendant had a rabbit test on January 7th, two weeks following her first intercourse with the plaintiff.

Other than these facts, the statements of the parties and supporting witnesses vary widely. The defendant, an eighteen-year-old woman, testified substantially as follows: That she had known the plaintiff and had gone around with him regularly for some time prior to May 1956 when he went to Alaska (R. 30); that she was in love with the plaintiff and wanted to marry him (R. 30); that she did not see or have personal contact with the plaintiff between the first part of May 1956, and December 24, 1956; in December of 1956 she went to Monterey, California, with the plaintiff's parents for the purpose of meeting Richard Holder who was returning from Alaska; the parties saw each other for the first time in eight months on Christmas eve and had an act of intercourse on the beach that evening about 10:00 o'clock. Defendant had been to see Dr. Juel Trowbridge of Bountiful relative to nausea and stomach upset prior to going to California. Defendant testified she had her last menstrual cycle (beginning of the flow period) on the 25th of November, 1956, or twenty-nine days prior to her act of intercourse with Richard Holder. She had her previous menstrual cycle on November 6th, nineteen days before the last she claims (R. 26). On the 25th day of December,

or the morning after the initial act of intercourse with the plaintiff, she discussed being pregnant with him (R. 27). On the 29th day of December, or five days after the act of intercourse, she told Mrs. Holder she thought she was pregnant. She testified that she expected the menstrual period on the way home from California (R. 29) and that would be some thirty-five days after the last menstrual period that she claimed.

She had a rabbit test on January 7th, taken by Dr. Trowbridge because because she felt nauseated on the way back from California. However, she also testified that she had nausea on the way to California prior to meeting the plaintiff (R. 34). Her menstrual periods last from two to ten days (R. 31). During the month of January, she talked to plaintiff relative to marriage, saying she was carrying his baby. He told her he did not want to get married (R. 32-33).

The plaintiff, Richard Holder, at the time of the trial was twenty-two years old, had been in Alaska since May of 1956, had not seen the defendant until the 24th of December, 1956. He had intercourse with her on that evening and several other times on the trip. The next day after the first intercourse, or December 25th she told him she thought she was pregnant (R. 47). The first part of January she told him she was "pretty sure" she was pregnant and was going to take a rabbit test (R. 48). He told her from the beginning that he did not think the child was his and that he did not want to marry her (R. 49). He married her only due to her representations that she was carrying his child. Defendant left for Alaska on

May 4, 1957, and has had no relationship with the defendant since that time. Defendant never told the plaintiff that Dr. Holbrook estimated that the baby would arrive in the middle of August.

The plaintiff's father testified that he picked the defendant up at her home in Bountiful to start the trip to Monterey, and at the time he picked her up she told him that she had told her mother she was going to be pregnant when she came back from California. Defendant denied this conversation (R. 39). The plaintiff's mother testified that the defendant first informed her that she was pregnant early in January and that Ruth saw her close to a dozen times at the store and at the house, complaining that Dick did not want to marry her and asking her to prevail upon Dick to marry her (R. 71-72). She further testified that after the baby was born, she had a conversation with the defendant wherein she told the witness that she had her last menstrual period the first part of November (R. 74). She also stated that the defendant told her that she had been to see Dr. Trowbridge concerning flu and nausea prior to the trip to California, and that the doctor thought she was pregnant. She did not mention the doctor by name but the earlier conversation related to Dr. Trowbridge (R. 75). After the witness' husband had informed her that the defendant had told him she had told her mother she was coming back from California pregnant, Mrs. Holder told the defendant "you should not figure on taking the trip with us and coming back in that condition. It wouldn't look very nice on us" (R. 76).

Dr. Von Holbrook testified that he was a surgeon specializing in obstetrics and gynecology and has been for sixteen years (R. 52), and that defendant consulted him in relation to a pregnancy on the 29th of March at his office, and that he found her to be pregnant (R. 52). According to the menstrual history she gave him she should have been three months pregnant, but from his physical examination it appeared to him that she was further along. He could hear the fetal heartbeat on the first visit which normally comes about four months. It is extremely rare at three and one-half months and only occasional at three and three-quarters months (R. 53). There are times during his sixteen years of practice when he may have heard a fetal heartbeat at three and one-half months but it usually turned out that the person was further along in her pregnancy than expected from her menstrual history (R. 54). The size of the uterus was compatible with a four-month pregnancy (R. 54). It is not probable that conception in this case took place as late as December 25th (R. 55). He testified it is possible that conception took place as late as that date if you mean one chance in 10,000 (R. 57). The Doctor delivered the defendant's child and testified it was not probable that the child was as much as six weeks short of "term". He also testified there was no way that a woman could tell she was pregnant one day after intercourse or within seven days after intercourse (R. 58), and that any nausea or morning sickness within a week after intercourse would be purely psychological; that it is possible that a Freeman test or a rabbit test could show pregnancy on

the 7th day of January when conception occurred on the 24th day of December, but not probable (R. 65).

Dr. Horne, testifying for the defendant, testified that normally he could first detect the fetal heartbeat at sixteen to twenty weeks. He said that in some women it was easier to detect the fetal heartbeat than in others due to their size and physical condition and that, generally speaking, babies weigh less than the defendant's baby if born six weeks before time. He testified that the formula for determining the probable date of birth for a child is by taking the date of the starting of the woman's last menstrual period, adding seven days, and then going back three months. The defendant on direct examination in the defendant's case testified as to necessary living expenses in the event a divorce was granted and expressly denied making the statements as to becoming pregnant and as to the date of the first of November menstrual cycle testified to by the parents of the plaintiff.

STATEMENT OF POINTS

POINT I

THE CHILD WAS A "FULL TERM" OR "NEAR TERM" BABY AND COULD NOT HAVE BEEN CONCEIVED AS LATE AS DECEMBER 24, 1956.

POINT II

COVERING POINTS II AND III OF APPELLANT'S BRIEF. THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE COURT'S FINDINGS THAT DEFENDANT HAD SPOKEN TO PLAINTIFF'S FATHER REGARDING BEING PREGNANT ON RETURN FROM CALIFORNIA, AND DISCUSSED

WITH PLAINTIFF'S MOTHER MISSING THE MENSTRUAL PERIOD PRIOR TO GOING TO CALIFORNIA.

POINT III

THE EVIDENCE IS CONCLUSIVE THAT DEFENDANT MUST HAVE BEEN PREGNANT ON DECEMBER 24, 1956.

POINT IV

THE COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL.

ARGUMENT

POINT I

THE CHILD WAS A "FULL TERM" OR "NEAR TERM" BABY AND COULD NOT HAVE BEEN CONCEIVED AS LATE AS DECEMBER 24, 1956.

The child in question was a "full" or "near term" baby. There is little difference in the testimony of the two doctors in the case when read as a whole. Dr. Holbrook, who delivered the baby, estimated as early as March 29, 1957, that the child would be born about the middle of August. This calculation was made from physical findings which did not concur with the menstrual history given him by the defendant. The child was born on the 13th day of August, 1957. The defendant never informed the plaintiff of Dr. Holbrook's estimated time of birth.

The defendant testified that she had had her next to last menstrual period prior to birth of the child on the 6th of November, 1956. Applying the formula of Dr. Horne who was the defendant's own witness, taking the

date of the starting of the last menstrual cycle (assuming for purposes of computation that the last menstrual cycle began November 6, 1956), and adding seven days and then counting back three months, we find that the baby would have been expected on exactly the day it was born. This, combined with Dr. Holbrook's physical findings at all stages of the pregnancy, his estimate of the probable birth date, the defendant's own testimony as to nausea prior to arriving in California, the improbability of an affirmative or positive showing on a Freeman or rabbit test with two weeks after conception, and the conflicting testimony as to the statements against interest made by the defendant (a) to plaintiff's father concerning her determination to be pregnant when she came back from California, and (b) her statements to plaintiff's mother that she had contacted Dr. Trowbridge prior to the California trip with relation to flu and missing a menstrual cycle, all fit together to indicate the child was a "full" or "near term" child.

POINT II

COVERING POINTS II AND III OF APPELLANT'S BRIEF. THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE COURT'S FINDINGS THAT DEFENDANT HAD SPOKEN TO PLAINTIFF'S FATHER REGARDING BEING PREGNANT ON RETURN FROM CALIFORNIA, AND DISCUSSED WITH PLAINTIFF'S MOTHER MISSING THE MENSTRUAL PERIOD PRIOR TO GOING TO CALIFORNIA.

The defendant puts great weight on (a) the argument on statements to the plaintiff's parents regarding her determination to become pregnant and her admission

after the baby was born to the plaintiff's mother that she had contacted Dr. Trowbridge were improbable and beyond human belief, and (b) that the defendant offered to waive her doctor-patient privilege if plaintiff wanted to call in Dr. Trowbridge.

With respect to (a) above, it is true there is a conflict in testimony, the plaintiff's father claiming defendant made the statement as to being pregnant when she returned from California when he picked her up in Bountiful at the start of the trip. This the defendant denies. However, Mrs. Holder confirms the statement as to pregnancy with regard to a conversation with the defendant at R. 76. The record is filled with evidence that the defendant began to claim she was pregnant on the 25th of December, less than twenty-four hours after the initial act of intercourse, and continued to make the claim until the time of marriage. The court, who had the opportunity to see the witnesses, evaluate the incredibility, candor, and demeanor, found that defendant had made such a statement. This court has continually held that the opinion and findings of the trial judge must be given great weight due to his personal contact with the witness and opportunity to observe and judge from statements heard from the witness' mouth rather than from the written record.

Under the same reasoning, Judge Hanson was in a more advantageous position to determine the credibility and veracity of the witnesses than is this court from the written record.

With respect to (b) above, the defendant denies that she had a conversation with Mrs. Holder concerning her visit to Dr. Trowbridge prior to the trip to California. However, in her testimony defendant admits contacting Dr. Trowbridge prior to the trip, but claims it was merely with respect to advice as to treatment of the flu. It is interesting to note that had there not been conversation with Mrs. Holder respecting a visit to Dr. Trowbridge, she would have had no way of knowing or finding out about the visit to which she testified.

In his brief, defendant's counsel stresses an affidavit signed by one Juel E. Trowbridge, M.D. (R. 117). Such affidavit was not presented for admission at the trial and is hearsay without opportunity cross examine, and has apparently been altered since being made with the alterations being uninitialed.

We also point out that defendant's counsel in his brief stresses his offer to have defendant waive any doctor-patient privileges between defendant and Dr. Trowbridge if the plaintiff wish to call Dr. Trowbridge in the matter. It would seem that Dr. Trowbridge's testimony might well have been proper rebuttal had the defendant chosen to call the doctor as a witness, which she did not.

POINT III

THE EVIDENCE IS CONCLUSIVE THAT DEFENDANT MUST HAVE BEEN PREGNANT ON DECEMBER 24, 1956.

As discussed in Point I, the child Debbie Holder was born on August 13, 1957, 192 days after the marriage of the parties herein and a maximum of 232 day after

intercourse between the parties. We are aware of the presumption as to legitimacy of a child born in wedlock, but feel that said presumption does not apply here. See *Gonzales vs. Pacific Greyhound Lines*, 202 P (2d) 135. As discussed in that case, it cites *Estate of McNamara*, 183 Pac. 552, 7 A.L.R. 313:

“The conclusive presumption cannot be applied to such extreme and exceptional cases.”

Citing from *Murr v. Murr*, 197 P. (2d) 369, where we have as in this case a child born only slightly over six months after the marriage was consummated, the appellate court reversed the trial court which applied the conclusive presumption. The appellate court held that under the circumstances, the presumption was rebuttable:

“A mature child having been born after an alleged gestation period of six months and ten days, which period according to authoritative medical opinion was about one month shorter than the shortest (known) period of gestation for such a birth, and the birth certificate being prima facie evidence that it was a nine-months ‘pregnancy’ was only rebuttable.”

In *Dazey vs. Dazey et al.*, 122 P(2d) 308, the California court again holds that where there is an extremely long period of gestation, that is longer than usual or normal, the presumption is not applicable. Citing the case of *McNamara, supra*, and *Anderson vs. Anderson*, 5 P(2d) 881, the court again holds that when a short period of gestation is not within the usual or normal period of gestation the presumption does not apply. In the instant case, besides the testimony of the attending

physician, Dr. Holbrook, that on the first visit he estimated the pregnancy was in its fourth month from the physical findings, which differed from the menstrual history given by defendant, and in applying the formula given by defendant's witness, Dr. Horne, to the defendant of the defendant's admitted menstrual period on November 6th, we arrive at the exact date the baby was born. Dr. Holbrook estimated the time of birth as the middle of August, and his estimate was within two days of the actual time of birth. When those facts are considered with statements of the defendant to the plaintiff's parents, and with her admission to Mrs. Holder after the baby was born that she had contacted a doctor relative to a missed menstrual cycle prior to leaving for California in the latter part of December, combined with her statements that she thought she was pregnant on December 25th, it would appear that defendant knew she was pregnant and was concealing the fact to set up a marriage with plaintiff, coerced by her statements that she was bearing his child. When we consider further that she failed to tell the plaintiff of Dr. Holbrook's estimated time of arrival of the child in August, and her insistence on taking a Freeman or rabbit test immediately upon return from California, the evidence becomes even more conclusive. We must also consider Dr. Holbrook's testimony that it was possible but highly improbable that a Freeman test would give a positive result within that short a period after possible conception. The defendant also admitted on the stand that she had been nauseated

on the way to California before any act of intercourse with the plaintiff.

Considering the testimony as a whole and this court's duty to give weight to the opportunity of the trial judge to observe the witnesses firsthand, it would appear that the evidence is overwhelming that the defendant was pregnant prior to the December 24th act of intercourse with the plaintiff, that she concealed that pregnancy, represented to him that she was carrying his child, prevailed upon his parents thereon and fraudulently induced a marriage which would not have taken place otherwise.

POINT IV

THE COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL.

In view of the findings and the weight of the evidence, the court did not err in denying defendant a new trial. All that was brought forth at the time of new trial was an affidavit signed by Juel E. Trowbridge, whose testimony could have been proper rebuttal to the plaintiff's case had he been produced and been allowed to be cross examined.

The court did amend several of the findings, correcting the date of initial intercourse from December 25, 1956, to December 24, 1956. Such amendment to conform to the evidence was entirely proper.

SUMMARY

It appearing from the case of Bement vs. Bement, 110 Utah 451, 174 P(2d) 996, that misrepresentation by a woman to induce a marriage, stating that she was preg-

nant by the person induced when as a matter of fact she was pregnant by some other person, is a ground for annulment for fraudulent misrepresentation, which the burden being on the plaintiff to sustain his burden of evidence, and proof in the instant case being conclusive that the child born August 13, 1957, was not the child of the plaintiff Richard Holder, and there being ample evidence to support the trial court's finding that the child was not fathered by the plaintiff, we contend that this court should affirm the lower court's decree granting an annulment.

Respectfully submitted,

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