

1959

Richard H. Holder v. Ruth M. Holder : Reply Brief of Appellant

Utah Supreme Court

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Recommended Citation

Reply Brief, *Holder v. Holder*, No. 8984 (Utah Supreme Court, 1959).
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IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED

APR 15 1959

RICHARD H. HOLDER,

Respondent and Plaintiff,

—vs.—

RUTH M. HOLDER,

Appellant and Defendant.

Supreme Court, Utah

Case

No. 8984

REPLY BRIEF OF APPELLANT

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STATEMENT OF FACTS

Defendant will not take specific exception to plaintiff's summary of the facts in his brief other than to note that the conclusion he urges drawn from those stated are entirely speculative as to the crucial issue as to whether defendant was pregnant prior to being with

plaintiff again and having intercourse on December 24, 1956. He relies heavily on the dependability of such speculation by referring to a remark of Dr. Holbrook in a deposition concerning the degree of possibility requested (R. 57). However, it is evident from reading this in context that Dr. Holbrook did not mean to be understood as giving any reliable estimate as to the statistical possibility of this child being conceived on the date in question and certainly not one chance in 10,000, as plaintiff now argues. (R. 59, 60)

STATEMENT OF POINTS

POINT I

THE CHILD IN QUESTION WAS A "NEAR TERM" BABY, NOT A "FULL TERM" BABY.

POINT II

THE PREPONDERANCE OF THE EVIDENCE IS THAT DEFENDANT DID NOT MAKE THE ADMISSIONS REFERRED TO IN POINT II OF PLAINTIFF'S BRIEF.

POINT III

THE EVIDENCE IS NOT CONCLUSIVE THAT DEFENDANT MUST HAVE BEEN PREGNANT ON DECEMBER 24, 1956.

POINT IV

THE COURT DID ERR IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL.

ARGUMENT

POINT I

THE CHILD IN QUESTION WAS A "NEAR TERM" BABY, NOT A "FULL TERM" BABY.

Plaintiff in his brief impliedly concedes that the evidence does not support Finding of Fact No. 8 as he makes the term in the alternative and thus at variance with the finding of the trial court on this point.

POINT II

THE PREPONDERANCE OF THE EVIDENCE IS THAT DEFENDANT DID NOT MAKE THE ADMISSIONS REFERRED TO IN POINT II OF PLAINTIFF'S BRIEF.

Since this case is one in equity, this Honorable Court is not bound to accept plaintiff's parents' testimony as true because of the lower court's Findings of Fact No. 9 and No. 10. Again it should be remembered that the only important admission of the two was not even mentioned in the Memorandum Decision which was prepared by the trial judge (R. 106). Defendant's testimony, which is based on direct evidence and not admissible hearsay, was a complete denial of such admission, and she is supported entirely in this by the only other person having actual knowledge thereof, namely Dr. Trowbridge, a party disinterested in the results of this lawsuit (R. 117).

It is significant that plaintiff's brief makes no rebuttal at all to defendant's contention that such admission would be so contrary with the normal pattern of conduct

that testimony as to its occurrence is not worthy of belief, at least where reliable evidence is to the contrary. Plaintiff fails to point out wherein or why such admission is compatible with any conduct that could be expected of one in such a situation as he contends defendant was in. The conduct of defendant referred to by plaintiff is entirely prior to and unrelated to the important admission in question. He states that the record is "filled with evidence" that the defendant began to claim she was pregnant on December 25, 1956, and infers that this is based on admissions of defendant in her testimony, but he fails to state wherein the record such is to be found and appellant submits that the same is found only in the self-serving testimony of plaintiff or his parents.

Appellant objects to the inference that Dr. Trowbridge's affidavit was doctored up after he signed it. This is not so. The alteration was requested by the doctor and appellant's counsel considers the affidavit as originally presented just as effective and can not see how such alteration increases its potency any.

It is certainly a *non sequitor* that plaintiff's mother could not have known about defendant's visit to Dr. Trowbridge **absence** any admission about consulting him regarding pregnancy. In view of defendant's illness on the trip to California, it would be quite natural to state that she had consulted with Dr. Trowbridge regarding her flu. Defendant denied having *the* conversation related by plaintiff's mother, not that she ever had a con-

versation regarding consulting with Dr. Trowbridge before her trip about a flu illness.

While it would have been possible for defendant to have called Dr. Trowbridge as a rebuttal witness, that would hardly seem to be necessary in view of the well settled presumption of the law that evidence which is available to a party who would normally be expected to produce such evidence if favorable would be adverse if produced upon the failure of such party to produce that evidence. Plaintiff has the burden of proving pregnancy prior to his first applicable intercourse and Dr. Trowbridge's testimony would have been vital, if not conclusive, in proving that if defendant had made the admission testified to by plaintiff's mother. Appellant ought not to be required to prove the negative after demanding that plaintiff produce such evidence if it proved the fact he contended for. In any event, where the presumption is proved to be correct, as here, such evidence ought to be considered in determining whether the opposite was true or not.

POINT III

THE EVIDENCE IS NOT CONCLUSIVE THAT DEFENDANT MUST HAVE BEEN PREGNANT ON DECEMBER 24, 1956.

Plaintiff contends that the following items of evidence which are italicized conclusively prove plaintiff's case. Appellant contends that they do not. Apparently

this appeal must stand or fall on this point. If *any* of these eight items proved this conclusively, as plaintiff must do to sustain his decree in the lower court according to the authorities cited hereinafter, the other seven would not be needed. If none do so *per se*, then the collection cannot do so because it could only strengthen the statistical probability that the speculation urged by plaintiff is a correct one.

1. *Dr. Holbrook's estimate that baby would be born in middle of August.*

This certainly is not conclusive. This can only be accepted for what it is — an estimate. Even Dr. Holbrook does not appear to have been very sure that the baby was going to be born when she was in view of the fact that doctors normally see patients weekly during the last month of pregnancy and this baby was born between appointments three weeks apart (R. 63, 64).

2. *According to plaintiff's father, defendant expressed an intent to become pregnant before being with plaintiff.*

Not only is this inconclusive but, if true, would tend to prove plaintiff is the father. Since this was covered in some detail on pages 4 and 5 of appellant's brief, it will not be repeated here except to note that respondent failed to make any rebuttal at all to appellant's argument that such conduct was improbable and incredible.

3. *According to plaintiff's mother, defendant admitted contacting a doctor relative to missing a menstrual period.*

If true, this could be considered conclusive, but Dr. Trowbridge's affidavit (R. 117) proves it is not true. It is well to bear in mind the fact that plaintiff had resolved to terminate the marriage immediately following the baby's birth (R. 81) and this was known to plaintiff's parents (R. 81). Thus the alleged conversation took place at a time plaintiff and his parents were preparing for trial. Plaintiff's argument that plaintiff's mother could not have known about defendant contacting (this was a call not a visit as respondent calls it—see R. 25) Dr. Trowbridge if no conversation between them about it had taken place is sound as far as it goes but it certainly does not go to the point of proving or even raising an inference that this contact related to possible pregnancy. In fact, investigation by plaintiff's parents before trial determined that this was not the purpose for which defendant contacted Dr. Trowbridge and this is why plaintiff did not call this doctor as a witness (R. 117).

There is a well established presumption in law that a party will produce evidence which is favorable to him if such evidence exists and is available. *Jones on Evidence, Civil Cases* (4th Ed.) P 49, says :

“The mere withholding or failing to produce material evidence which is available and would, in the circumstances of the case, be expected to be

produced, gives rise to a natural inference — less forceful than that arising from the destruction, fabrication, or suppression of evidence in which other parties have a legal interest but constantly acted upon by the courts — that such evidence is held back because it would be unfavorable or adverse to the party withholding it.” (citing 15 cases to this effect.)

The instant case proves the wisdom of such a presumption. Appellant ought not to be precluded from establishing the real facts through Dr. Trowbridge because of reliance on that presumption, particularly after making demand upon respondent for the production of such evidence if favorable when the witness to the contrary would have a natural prejudice.

4. *According to plaintiff, defendant claimed she was pregnant on December 25th.*

How conclusive would that be? Again plaintiff seeks to prove a case against defendant by attributing statements to her which defendant denies. Even if it were so, it would be only a prognostication which subsequent developments proved to be correct.

5. *Defendant failed to tell plaintiff of Dr. Holbrook's prediction as to when the baby would be born.*

What is unnatural about that? Does it tend to prove defendant guilty of improper conduct that she did not raise suspicions in her husband's mind based on refusal

of some people to accept the exceptions to the average period of gestation?

6. *Defendant took a pregnancy test on January 7th, two weeks following her intercourse with plaintiff.*

Was that unnatural since it was then 43 days since her last period, much longer than even her irregular periods, and she had good cause to suspect she might be pregnant due to relations with plaintiff?

7. *Freeman test normally does not determine pregnancy within the period in question.*

This is not conclusive. The evidence did not establish how unusual this was but even if this is rare, it hardly does more than show this was an exceptional case. An exceptional baby, however, is entitled to the same protection of legitimacy as one within the statistically more common range.

8. *Defendant admitted being sick or nauseated on the way to California.*

Does that prove morning sickness? If it did, there would be more babies than there are and some born to the wrong sex. It is uncontradicted that there was flu in defendant's family at the time, that she had called Dr. Trowbridge about treatment for flu and that she had missed school a few days before the trip because of it. Some people become car sick without other illness. To

conclude this was morning sickness is speculation of the rankest sort.

None of the authorities cited by respondent in his brief provide a precedent for finding a child born under the circumstances of this case to be illegitimate. Appellant does not take issue with the extract from *Estate of McNamara*, 181 Cal. 82, 183 (P) 552, 7 ALR 313, to the effect that the presumption can not be conclusive in extreme and exceptional cases (cited in respondent's brief on page 12). Reference to the facts in that case set forth in *Gonzales v. Pacific Greyhound Lines*, 202 P. (2d) 135, at page 138 shows that in there the mother of the child left her husband on December 23, 1913, and immediately went to live with one McNamara. She lived with him until his death in May 1916. The child was born October 24, 1914, 304 days after the wife had left her husband. The evidence there was that prolonged pregnancies up to 300 days are possible but unusual. There, unlike here, it was undisputed that another possible father was involved. It is also well to remember that the interests of the child in question there were served by finding him an issue of the decedent. The problem in the *Gonzales v. Pacific Greyhound Lines* (supra), from which that extract was taken was to determine whether or not 234 days was such an unusually short pregnancy period as to take it out of the category of a conclusive presumption and make it rebuttable. The court there found it was not so unusual and applied the conclusive

presumption. There is no intimation in that case that the two shorter days here would have altered the holding, particularly since the court there cited with approval the case of *Dazey v. Dazey*, 50 Cal. (2d) 15, 122 P. 2d 308, which applied the conclusive presumption in a pregnancy of 225 days and in which case the Supreme Court of California denied a hearing without a dissenting vote.

In the case of *Murr v. Murr*, 197 P 2d 369, a decision of the 2nd District Court of Appeals of the State of California, cited by respondent, it was held that the presumption of legitimacy of a child born 190 days after earliest possible fruitful coitus with husband was rebuttable and reversed the judgment of the trial court who held the presumption to be conclusive and granted the husband a new trial. Even there the court did not conclude as a matter of law that the child could not have been the lawful issue of the husband despite the fact that the decision refers to testimony of unrelated witnesses to the effect that the mother was seen in the company of another man, was seen kissing him and was indecently exposed. Under those facts, appellant takes no issue with the quotation from it cited by respondent.

It is true that the parties were not husband and wife at the time the first intercourse took place, but the overwhelming weight of authority in the United States applies the presumption in case of premarital intercourse as well, although some jurisdictions require less evidence to over-

come the presumption in such cases than otherwise (57 ALR 2nd 729).

Cases are collected in 57 ALR (2d) 729 under section (f) on Page 742 which deal with what proof is necessary to rebut the presumption of legitimacy. There the case of *Needham v. Needham*, 299 SW 832 (Missouri) is quoted as follows:

“The modern doctrine undoubtedly is that the presumption of legitimacy arising from in wedlock may be overthrown by any competent and relative evidence disclosing that the husband could not have been the father of the child.”

This has been established by showing that the husband was entirely absent so as to have had no intercourse with the mother. In *Eldridge v. Eldridge* (1944) 153 Fla. 873, 16 So. 2nd 163, it was held that evidence that the child there was born 226 days after the first meeting of the husband and wife, and it appearing from two days after their first meeting and until their marriage some three weeks later the husband engaged in frequent acts of intercourse with the mother, and the medical testimony disclosed that the normal period of gestation is 280 days and that after the 190 days a child has a fair chance to live was held insufficient to overcome the presumption. (Our case except 6 days longer period in this one.) Many cases have declared that the party assailing the child's legitimacy has the burden of proving beyond all reasonable doubt that the husband was not the father of the

child. *Gross v. Gross* (1953 Ky.) 260 S.W. 2d 655, *Phillips v. Allen* (1861) 84 Mass. (2 Allen) 453, *Secondine v. Secondine*, (1957 Okla.) 311 P. 2d 215, *Vorvilas v. Vorvilas* (1948) 252 Wis. 333, 31 NW 2nd 586 and *Mader v. Mader* (1950) 258 Wis. 117, 44 NW 2nd 924.

POINT IV

THE COURT DID ERR IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL.

Argument under prior points, which will not be repeated here, establishes the error in the lower court not considering the testimony of Dr. Trowbridge which refuted the main basis of plaintiff's case. It is evident, however, that his decision was not based on Findings of Fact No. 10 and hence, therefore, would have ruled as he did even if defendant had satisfied the court on a new trial that no such admission was made. If the other evidence does not conclusively prove that defendant was pregnant on December 24, 1956, and if the alleged admission could establish such proof, even when contradicted by this doctor, appellant respectfully submits that the testimony of Dr. Trowbridge on this point should be received in new trial.

SUMMARY

The evidence did not conclusively establish that the child born August 13, 1957, was not the child of the plaintiff. The evidence did conclusively prove that the parties

hereto had sexual intercourse at a time when by the laws of nature the plaintiff might be the father of the child in question. It must be conclusively presumed, therefore, that plaintiff is the father of this child. The annulment decree of the lower court should be vacated, the cause remanded to the District Court of Salt Lake County to ascertain what alimony, support money, and counsel fees, if any, plaintiff should pray and a decree of divorce granted to defendant accordingly.

Respectfully submitted,

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