2016

Aria Rebekah Marshall (f.k.a. Card) v. Devin John Card, Appellant/ Respondent

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

ARIA REBEKAH MARSHALL, (f.k.a. **CARD**) Appellee/Petitioner, v. **DEVIN JOHN CARD,** Appellant/Respondent.	Appellate Case No.: 20151001

Reply Brief of Appellant Devin Card

Appeal from Order Denying Objection to Commissioner Recommendation Re: Motion to Vacate Protective Order

Third District Court, Salt Lake Department
The Honorable Judge Paul G. Maughan presiding

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Table of Contents

Table of Authorities 3-4

Reply to Ms. Marshall's Statement of the Case 5

Reply to Ms. Marshall's Arguments 6-16

I. Because the court below based its decision to continue the Protective Order on a flawed understanding of the legal definition of "abuse," its decision constituted an inherent abuse of discretion. 6-10

A. Even if the statute gave judges a measure of discretion in deciding whether to vacate a Protective Order in effect for over two years, the trial court's decision would constitute an abuse of that discretion because it is premised on a flawed interpretation of the statutory term "abuse." 6-8

B. Read as a whole, the statute presumes a Protective Order between a divorcing couple should be dismissed at the time of their divorce absent a showing that the petitioner harbors a reasonable fear of future abuse. 8-10

II. Under Civil Rule 108, a trial judge cannot adopt "findings" made by a commissioner unless admissible evidence presented to the judge independently confirms those findings. 10-15

A. Ms. Marshall failed to present admissible evidence to the judge to support her prior proffer to the commissioner. 11-13

B. Even if it were permissible for the judge to rely upon the commissioner's findings – and it is not – Ms. Marshall's argument that such findings support the judge's decision is inadequately briefed. 13-15

III. The trial court's fee award was erroneous because it was premised on a flawed legal conclusion. 15-16

Conclusion 16

Certificate of Service 18

Certificate of Compliance with Utah R. of App. P. 24(f)(1)(A) 17

Table of Authorities

Utah Supreme Court

Broderick v. Apartment Mgt. Consult., LLC, 2012 UT 17, 279 P.3d 391 13-14

In re Baby B., 2012 UT 35, 308 P.3d 382 7

Lund v. Brown, 2000 UT 75, 11 P.3d 227 6-7

Macris & Assoc. Inc. v. Neways, Inc., 2000 UT 93, 16 P.3d 1214 9

Stan Katz Real Estate, Inc. v. Chavez, 565 P.2d 1142 (Utah 1977) 12

State v. Barrett, 2005 UT 88, 127 P.3d 682 7

State v. Petersen, 810 P.2d 421 (Utah 1991) 7

Utah Court of Appeals

Larson v. Larson, 888 P.2d 719 (Utah App. 1994) 12-13

Lilly v. Lilly, 2011 UT App 53, 250 P.3d 994 8-9

Tolman v. Salt Lake Cnty. Atty., 818 P.2d 23 (Utah App. 1991) 7

Statutes and Court Rules

Utah Code 78B-7-102 ..... *Passim*

Utah Code 78B-7-115 ..... *Passim*

Utah R. of App. P. 24 ..... 11, 14

Utah R. of Civ. P. 43 12

Utah R. of Civ. P. 83 13

Utah R. of Civ. P. 108 10-15

Other Authorities

Merriam-Webster Dictionary (6th. Ed) 11

Reply to Ms. Marshall's Statement of the Case

Ms. Marshall's remarks concerning the procedural history of this matter are irrelevant to any of the issues on appeal and misleading. Nevertheless, to set the record straight: The so-called "motion to dismiss" Mr. Card filed in July 2012 was the functional equivalent of an objection to the commissioner's original recommendation entering a Protective Order against him without the benefit of an evidentiary hearing. [R:49-56]. His *pro se* "motion to vacate minute entry" filed in October and December 2012 asked the judge to reconsider his earlier decision denying his *pro se* objection to the commissioner's recommendation on procedural grounds. [R:137-138, 156-173]. His *pro se* "motion to vacate void judgment" was premised on the commissioner committing what Mr. Card believed was a jurisdictional defect by failing to clearly designate when the Civil Portion of the Protective Order expired. [R:194-198].

The only matter that is before this Court is Mr. Card's April 2015 motion to vacate the Protective Order pursuant to Utah Code 78B-7-115(1) after nearly three (3) years passed since it was originally issued.

Reply to Ms. Marshall's Arguments

I. Because the court below based its decision to continue the Protective Order on a flawed understanding of the legal definition of "abuse," its decision constituted an inherent abuse of discretion.

The thrust of Ms. Marshall's argument is that because Utah Code 78B-7-115(1) states the court *may* dismiss a protective order after two years have passed if she "no longer has a reasonable fear of future abuse," the court had discretion to keep it in place "indefinitely" regardless of whether she harbored an objectively reasonable fear of future abuse. That is incorrect. Regardless, because the lower court's decision to keep the Protective Order was premised on a flawed interpretation of the statutory term "abuse" as not being limited to physical violence – an interpretation Ms. Marshall makes no effort to defend on appeal – it's decision would still constitute reversible error even if an "abuse of discretion" standard applied because a discretionary decision tainted by a flawed legal conclusion constitutes an abuse of that discretion.

A. Even if the statute gave judges a measure of discretion in deciding whether to vacate a Protective Order in effect for over two years, the trial court's decision would constitute an abuse of that discretion because it is premised on a flawed interpretation of the statutory term "abuse."

Even discretionary decisions "must be based on adequate findings of fact and on the law. A decision premised on flawed legal conclusions, for instance,

constitutes an abuse of discretion." Lund v. Brown, 2000 UT 75, ¶ 9, 11 P.3d 277; See also State v. Barrett, 2005 UT 88, ¶¶ 14-17 and 47, 127 P.3d 682 ("the abuse-of-discretion standard of review will at times necessarily include review to ensure that no mistakes of law affected a lower court's use of its discretion"); State v. Petersen, 810 P.2d 421, 425 (Utah 1991)("[T]rial courts do not have discretion to misapply the law. Therefore, legal determinations concerning the proper interpretation of the statute which grants the trial court discretion are reviewed for correctness."); In re Baby B., 2012 UT 35, ¶¶ 40-92, 308 P.3d 382 (When findings are premised on an erroneous legal premise, an appellate court will ordinarily reverse and remand for reconsideration based on correct legal principles); Tolman v. Salt Lake Cnty. Atty., 818 P.2d 23, 27 (Utah App. 1991) ("Obviously, the making of a clearly erroneous factual finding is an abuse of discretion, as is acting unreasonably or misinterpreting the law. *In essence, a reviewing court never overturns a lower tribunal unless there has been an abuse of discretion.*")(emphasis added).

Here, the court below did ***not*** say it was keeping the Protective Order for reasons independent of whether Ms. Marshall demonstrated a "reasonable fear of future abuse." Rather, it based its ruling on the flawed legal conclusion that

Mr. Card's conduct constituted a "violation" of the Protective Order thereby satisfying the legal standard for "abuse." [R:392-397].[1] However, Ms. Marshall makes little effort to defend that flawed legal premise on appeal. Nor does she make a meaningful effort to show that the lower court's findings of fact were adequately detailed to support its legal conclusions.

Consequently, even if an abuse-of-discretion standard applied – and it does not – this Court should reverse and remand for reconsideration because the trial court's judgment was tainted by a flawed legal conclusion. Ms. Marshall makes no meaningful effort to show the court below would have reached the same conclusion if it applied the correct statutory definition of "abuse."

B. Read as a whole, the statute presumes a Protective Order between a divorcing couple should be dismissed at the time of their divorce absent a showing that the petitioner harbors a reasonable fear of future abuse.

As Ms. Marshall acknowledges, the primary duty in interpreting statutes is to give effect to the intent of the legislature as evidenced by the plain wording of the statute. However, a plain language analysis is not limited to "individual

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[1] In response to Mr. Card's specific request for guidance as to what conditions he could fulfill to have the Protective Order dismissed, the trial court answered "time" and *"some behavior that would alleviate Ms. Marshall's fear."* [R:550]. In the context of the court's ruling, the only "fear" it could have been referring to would be a fear of future "abuse" as it interpreted that term.

words and subsections in isolation." Lilly v. Lilly, 2011 UT App 53, ¶ 11, 250 P.3d 994. "[R]ather, statutory interpretation requires that each part or section be construed in connection with every over part or section so as to produce a harmonious whole." Id.

Applying these principles to Utah Code 78B-7-115(1), it is apparent from a plain reading of the statute the Legislature did not intend to give trial courts unfettered discretion in deciding whether to keep or vacate a protective order once two years had passed. Rather, the statute expressly directs the court to "determin[e] whether the petitioner no longer has a reasonable fear of future abuse" – meaning "physical harm" under Section 78B-7-102(1) – and lists various factors to consider in making *that determination*. Read in context, the statutory term "may" is best interpreted as giving the court jurisdiction to set aside what would otherwise be a final order subject to *res judicata* regardless of the passage of time and intervening changed circumstances. Macris & Assoc. Inc. v. Neways, Inc., 2000 UT 93, ¶ 19, 16 P.3d 1214 (explaining litigants normally cannot re-litigate previously decided claims once the court enters a final judgment). Nothing in the statute states or implies a trial court may arbitrarily refuse to

dismiss the Protective Order even if it finds the petitioner does not harbor an objectively reasonable fear of future abuse.

Indeed, recently enacted Utah Code 78B-7-115(5) states that "[i]f a divorce proceeding is pending between parties to a protective order action, the protective order ***shall be dismissed*** when the court issues a divorce decree" if the petitioner was given notice of both actions and the court finds the order need not continue because "the petitioner no longer has a reasonable fear of future abuse." Logically, because parties to a divorce are always subject to a divorce decree the court can address any concerns between them in that decree. And it can modify or clarify it as needed to address future issues. In this context, a Protective Order becomes a drastic solution in search of a problem that can be remedied through less drastic means thereby enabling ***both*** parties to move on with their lives.

II. Under Civil Rule 108, a trial judge cannot adopt "findings" made by a commissioner unless admissible evidence *presented to the judge* independently confirms those findings.

Under the plain language of Utah R. of Civ. P. 108(f), when a judge conducts an evidentiary hearing in response to an objection to a commissioner's recommendation "[t]he judge ***will*** make ***independent*** findings of fact and conclusions of law based on the evidence, whether by proffer, testimony or

exhibit, ***presented to the judge*** ..." (emphasis added). "Will" is a mandatory term leaving no room for discretion. And the plain meaning of the word "independent" is "not relying on something else." Merriam-Webster Dictionary (6th Ed.). Thus, a judge cannot rely upon findings made by the commissioner *unless* admissible evidence "presented to the judge" at an evidentiary hearing "independent[ly]" confirms those findings.

A. Ms. Marshall failed to present admissible evidence to the judge to support her prior proffer to the commissioner.

Although Ms. Marshall claims all the information cited in the Judge's adoption of the commissioner's findings "had been discussed in prior hearings" and was "readily ascertainable," she fails to provide ***any*** citation to the record where she presented admissible evidence ***to the judge*** supporting her claim about an alleged extortion attempt, request for disparagement of a now-retired commissioner, or a Bar complaint against her counsel. See Utah R. of App. P. 24(a)(9)(Explaining an adequately briefed argument must contain citations to parts of the record relied upon). Nor does she deny her stipulation that all the "charges" referenced in the commissioner's findings had been dropped or dismissed. [R:392, 492-493, 518, 529].

The mere fact she raised these allegations in her attorney's proffer to the commissioner did not convert it into admissible evidence at a subsequent hearing before the judge. See Utah R. of Civ. P. 43 (explaining "in all trials, the testimony of witnesses shall be taken orally in open court" subject to the Utah Rules of Evidence), 108(d)(2)(explaining parties are entitled to an evidentiary hearing when objecting to a commissioner's recommendation in a protective order matter), and 108(f); Cf. Stan Katz Real Estate, Inc. v. Chavez, 565 P.2d 1142, 1143-44 (Utah 1977)(while judges have discretion to hear ordinary motions using proffers and affidavits, it is improper to resolve factual disputes on that basis).

Contrary to Ms. Marshall's assertions, each of those allegations was specifically controverted by Mr. Card in the pleadings. [R: 263-268, 281-294]. Because for whatever reason Ms. Marshall opted ***not*** to present any admissible evidence to support them to the Judge at their evidentiary hearing, there was nothing for Mr. Card to refute. Nor was there anything for the judge to rely upon in making his decision. The trial court was certainly free to weigh and make findings *based upon the admissible evidence independently presented to it*. But, under Civil Rule 108(f) it was not free to make findings outside that record. Consequently, such unsupported findings should be disregarded as clearly

erroneous or at least inadequately detailed. Larson v. Larson, 888 P.2d 719, 724-725 (Utah App. 1994)(A finding of fact not supported by admissible evidence is clearly erroneous and will be disregarded on appeal).

B. Even if it were permissible for the judge to rely upon the commissioner's findings – and it is not – Ms. Marshall's argument that such findings support the judge's decision is inadequately briefed.

Regardless, even if this Court were to overlook the fact such findings were unsupported by admissible evidence, such would not be a basis for affirming the judge's decision. While Mr. Card's litigation strategy prior to obtaining counsel may have been ill-advised, Ms. Marshall makes no effort to explain how it would give her a reasonable fear of "future abuse" justifying an ongoing Protective Order (with all its collateral legal consequences) as opposed to a narrowly tailored order curtailing unnecessary litigation under Utah R. of Civ. P. 83. Likewise, she does not explain why a Protective Order is needed to resolve *ongoing* parent-time disputes when their divorce court ordered them to use ACAFS for parent-time exchanges going forward and there have not been any problems with exchanges since then.

In Broderick v. Apartment Mgt. Consult., LLC our Supreme Court granted a reversal without reaching the merits of the issues presented for review where,

as here, the appellant came forward with a plausible basis for reversal which the appellee failed to meaningful refute in its opposition brief. 2012 UT 17, 279 P.3d 391. The Court explained that under Rule 24 of the Rules of Appellate Procedure, both appellant ***and appellee*** are expected to meaningfully brief and analyze the issues before the court. Id. ¶¶ 9-10. Appellate courts are "not simply a depository in which [either] party may dump the burden of argument and research" and will not "assume a party's burden of argument and research." Id. ¶ 9. While recognizing that appellants bear the initial burden of persuasion on appeal, once they have met that burden it is incumbent upon the appellee to refute those arguments. Id. ¶ 19. Otherwise, an appellate court is justified in refusing to consider an inadequately briefed argument on the part of the appellees and may reverse on that basis. Id. ¶ 11-12, 14, 18-20.

Here, as in Broderick, Ms. Marshall's arguments are inadequately briefed. She cites no statute, court rule, or caselaw giving the judge power to rely upon claims proffered to the commissioner that were ***not*** presented to the judge and were otherwise controverted in the pleadings. Ms. Marshall makes no effort to refute Mr. Card's analysis that his complained-of conduct did ***not*** constitute a violation of the Protective Order. Nor would it give someone a reasonable fear of

"future abuse" as our Legislature defines that term. Consequently, this Court is justified in refusing to consider her inadequately briefed argument and tacit invitation to assume her burden of argument and research.

III. The trial court's fee award was erroneous because it was premised on a flawed legal conclusion.

Notably, the attorney fees provisions in Utah Code 78B-7-115(3) are contained in the "Dismissal of Protective Order" section of the Cohabitant Abuse Act and ***not*** as an independent section of the Act. When read in context with the entirety of Section 78B-7-115 dealing with proceedings to dismiss a Protective Order, it is apparent that attorney fees are only permissible if the court finds either party acted in bad faith or with intent to harass or intimidate the other party *in the context of moving to dismiss a Protective Order.*

However, while the trial court thought some of Mr. Card's actions were disconcerting and annoying, it did not and could not find that he brought his motion to vacate the Protective Order in bad faith or with the intent of harassment or intimidation in excess of the inherent unpleasantness of litigation.

Although Ms. Marshall protests Mr. Card engaged in a "long and disturbing pattern" of "provocative" and "abusive" behavior such as direct depositing or having a process server deliver his court-ordered child support

payments to her, nowhere in her brief does she argue such conduct constituted a violation of the Protective Order. Nor does she make any meaningful effort to show how such conduct would give someone an objectively reasonable fear of "abuse" as the statute defines that term.

Because the trial court's decision to award fees was premised upon a flawed legal conclusion, its resulting decision constituted an abuse of discretion.

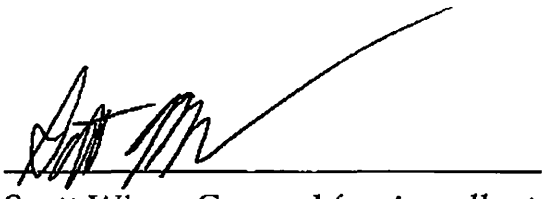
Conclusion

While Mr. Card and Ms. Marshall's divorce was unpleasant, contentious, and involved disconcerting behavior at times, none of Mr. Card's complained-of actions rose to the level of "abusive" conduct or a "violation" of the Protective Order. Because the trial court's decision to keep the Protective Order was premised on its flawed legal conclusion that Mr. Card's conduct constituted "abuse" – a legal determination Ms. Marshall makes little to no effort to defend on appeal – its decision must be reversed.

Additionally, this Court would be justified in reversing the trial court's judgment because Ms. Marshall's arguments are inadequately briefed. This court is not a depository she is free to dump her burden of argument and research upon and will not assume that burden for her.

Respectfully submitted:

DATED THIS 2nd day of June, 2016.



Scott Wiser, Counsel for Appellant

Certificate of Compliance with Utah R. of App. P. 24(f)(1)(A)

Counsel certifies that this brief complies with the word limitations in Utah R. of App. P. 24(f)(1) and contains 2,726 words, excluding those provisions exempted by f(1)(B), according to the Microsoft Word 2010 program used by counsel.

Certificate of Service

I hereby certify that on this 6th day of June, 2016, I sent a true and correct copy of the foregoing document to the following individuals via U.S. Mail, postage prepaid:

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