

2001

Beverly Ann Burge v. Gary Thomas Facio : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

BEVERLY ANN BURGE,

Plaintiff/Appellee,

vs.

GARY THOMAS FACIO,

Defendant/Appellant.

Appeal No. 20010442-CA

District Court No 924903403

Priority 15

REPLY BRIEF OF THE APPELLANT

An Appeal from the Third Judicial District Court of Salt Lake County
State of Utah, Judge William Bohling

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FILED

Utah

OCT 12 2001

Paulette Stagg
Clerk of the Court

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ARGUMENT

IF THE PLEADING OBJECTING TO THE FINDINGS WAS NOT DISPOSED OF BY THE TRIAL COURT, THE TIME FOR FILING THE NOTICE OF APPEAL HAS BEEN TOLLED UNTIL THE MOTION IS RULED UPON BY THE TRIAL COURT.

In Regan v. Blount, 978 P.2d 1051 (Utah App. 1999), this court addressed essentially the same jurisdictional issue raised by Burge- the question of whether the Notice of Appeal was filed before a post judgment motion was disposed of. In Regan, this court found the same motion that Facio filed, a pleading objecting to the proposed findings, conclusions, and judgment was a Utah R. Civ. P. 59 motion and therefore tolled the time for filing a Notice of Appeal until the motion has been denied. Id. at 1054. The facts of Regan were similar in two other cases. Debry v. Fidelity National Insurance Co., 828 P2d 520 (Utah App. 1992). Reeves v Steinfeldt 915 P2d 1073 (Utah App. 1996). This court reached the same result in both cases except that in both DeBry and Reeves the post judgment motion was subsequently ruled upon and the time to file a notice of appeal had passed. Facio's motion had not been ruled upon and in accordance with Regan, if the appeal is dismissed it should be dismissed without prejudice.

Although Facio assumed that the motion was denied when he filed his notice of appeal, no denial appears in the record. The motion requested a hearing that was also never granted.

FACIO FILED HIS NOTICE OF APPEAL AFTER HE WAIVED HIS OBJECTIONS TO THE AMENDED FINDINGS OF FACT.

Facio had not received the copy of the signed Findings, Conclusions, and Divorce decree when he filed his objection to them. The documents crossed in the mail. Facio's counsel discussed the objection that was filed and the signed copies of the Findings and Decree that had since been received with Burge's counsel, a few days after they were received. Over the telephone Mr. Larson indicated to Ms. Mower that although he did not believe that many of the findings were accurate, because it had already taken almost a year for the findings to be prepared, Facio had elected to waive his objection to the Findings and move forward with an appeal. It is telling that even after this conversation and after the Notice of Appeal was filed, Burge filed a Second Amended Findings of Fact and Conclusions of Law in the trial court. (R. at 377).

The only thing amended in the second filing was that Burge increased the income of Facio, without supporting documentation, and raised his child support amount accordingly. (R. at 309, 352). These changes were, of course, not in response to the objection filed by Facio and addressed none of the concerns raised in the objection and did not dispose the objection. Burge's assertion that it was reasonable to conclude that Facio's objections were resolved by the second filing, (Brief of Appellee p. 14) is ludicrous as the second filing was basically identical

to the first.

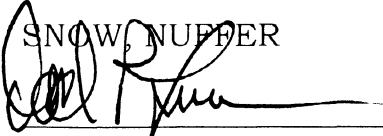
This Court should consider whether the filing of the second amended findings after the first findings were signed, the objections waived by counsel, and the Notice of Appeal filed, was done solely to complicate the matters and obfuscate Facio's appeal rights.

Nevertheless, in accordance with Regan, since the motion has not been ruled upon by the trial court, if this Court finds that it does not have jurisdiction, the appeal should be dismissed without prejudice since the trial court has not disposed of Facio's objection. The issue of attorneys fees should be reserved.

CONCLUSION

Because Facio waived his objections to the Findings, this court should accept jurisdiction and rule on the merits. In the alternative, if this court finds no jurisdiction because the motion filed was not disposed of, the appeal should be dismissed without prejudice pending a final order disposing of the post trial motion.

DATED this 12th day of October, 2001.

SNOW, NUFFER


David P. Larson

CERTIFICATE OF SERVICE

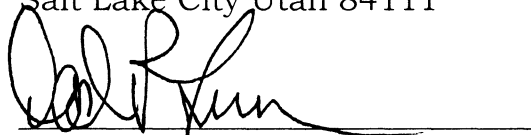
I certify that I mailed a true and correct copy of the REPLY BRIEF
OF APPELLANT to be hand delivered this 12th day of October, 2001 to the
following:

Original and 7 copies to:

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A handwritten signature in black ink, appearing to read "David Larson", written over a horizontal line.

David Larson
Attorney for Appellant