

2002

Mary Kaye Green, fka Mary Kay Kuhlman v. Gary G. Kuhlmann : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

**MARY KAYE GREEN, fka MARY
KAYE KUHLMANN,**

Petitioner and Appellant,
v.

GARY G. KUHLMANN,

Respondent and Appellee .

REPLY BRIEF OF THE APPELLANT

Court of Appeals No. 20020698-CA

**APPEAL FROM AN INTERLOCUTORY ORDER
OF THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH,
HONORABLE ROBERT T. BRAITHWAITE PRESIDING**

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ARGUMENT

In addition to those arguments set forth in Appellant's Brief, Appellant (hereinafter "Petitioner") argues the following points in reply to the arguments set forth in Appellee's Brief:

I. THE REQUESTED DISCOVERY IS NOT DISCOVERABLE UNDER RULE 26 OF THE UTAH RULES OF CIVIL PROCEDURE, AND SHOULD HAVE BEEN PROTECTED BY THE TRIAL COURT.

Respondent argues that the broad scope of discovery established in Rule 26 of the Utah Rules of Civil Procedure gave license to the trial court to order disclosure of the controversial information. However, because the trial court misinterpreted controlling case law that would have effectively limited the scope of discoverable information, the trial court abused its discretion in ordering the disclosure of what should have been classified as irrelevant information under Rule 26 of the Utah Rules of Civil Procedure.

The scope of discovery is not without its limitations. Rule 26(b)(1) of the Utah Rules of Civil Procedure defines the scope of discovery thus:

Parties may obtain discovery regarding any matter, not privileged, which is *relevant to the subject matter* involved in the pending action, whether it relates to the claim or defense or the party seeking discovery or to the claim or defense of any other party...It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears *reasonably calculated to lead to the discovery of admissible evidence*.

(Emphasis added.) Thus, only information that is "relevant to the subject matter" and, if not admissible itself, "reasonably calculated to lead to the discovery of admissible evidence" is

properly discoverable. These requirements are important limits placed upon the discovering party that should not be viewed lightly. Discovery is not a license to pry into a person's life and expose irrelevant information:

The use of discovery should not be extended to permit ferreting unduly into detail, nor to have the effect of cross-examining the opposing party or his witnesses. Nor should it be distorted into a 'fishing expedition' in the hope that something may be uncovered. It should be confined within the proper limits of enabling the parties to find out essential facts for its legitimate objective[.]

State ex rel Rd. Comm'n v. Petty, 412 P.2d 914, 918 (Utah 1966).

In the instant case, Respondent's request for intimate details of Petitioner's pre-divorce sexual life dating back to 1979 looks more like a harassing "fishing expedition" than a legitimate request for discoverable information. As is discussed in detail in Appellate's Brief, the controversial information sought by Respondent should not be admissible at a trial in this matter under the *Hogge-Becker* test, even when that test is tempered by the correct application of *Elmer* and its progeny.

Petitioner concedes that under Rule 26(b)(1) of the Utah Rules of Civil Procedure, the inadmissibility of the requested evidence at trial is no defense to its disclosure, but only so long as such disclosure is "reasonably calculated to lead to the discovery of admissible evidence." It is inconceivable that Petitioner's disclosure of the controversial information sought by Respondent would lead Respondent to any admissible evidence. Any evidence garnered by a hypothetical disclosure of Petitioner's alleged pre-divorce extra-marital sexual activities should also be deemed inadmissible under a proper application of the *Hogge-*

Becker test.

In addition to the reasonable conclusions that the requested discovery would itself be inadmissible under the proper application of the *Hogge-Becker* test, and that disclosure of the requested discovery would not lead to the discovery of admissible evidence, it is also apparent that the requested discovery is not “relevant to the subject matter involved in the pending litigation.” The subject matter of this action is of a limited scope. The strictures of the *Hogge-Becker* test, and in particular its requirement that a motion for change of custody must be premised upon a material change in circumstances since the latest order regarding custody, considerably narrows the scope and time frame of the relevant issues and facts in this action to those occurring after the parties’ latest stipulated modification. The nature of the action and the authoritative law pertaining thereto should define the “subject matter involved in the pending litigation.” In this case, the authoritative case law, as explained in Appellant’s Brief, is clear that the subject matter of this litigation should be confined to activities occurring after the parties’ most recent stipulated modification. Thus, requests for discovery of information outside of those parameters are improper, as they are not “relevant to the subject matter involved in the pending litigation.”

Thus, under the plain language of Rule 26(b)(1) of the Utah Rules of Civil Procedure, the requested discovery would have been protected by the trial court had the trial court properly interpreted *Elmer* and its progeny. The trial court’s mistaken interpretation of controlling case law, however, led the court to improperly broaden the scope of the “subject

matter involved in the pending litigation.” As is more fully discussed below, by basing its decision on an inaccurate interpretation of controlling case law, the trial court abused its discretion in ordering disclosure of the irrelevant information.

II. BY BASING ITS DECISION ON AN INACCURATE INTERPRETATION OF CONTROLLING CASE LAW, THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING DISCLOSURE OF THE IRRELEVANT INFORMATION.

Respondent argues that the trial court did not abuse its discretion since no evidence was *admitted*. Admittedly, Respondent bases this argument on Petitioner’s unfortunate and inaccurate choice of words on page 28 of Appellant’s Brief. Of course Petitioner understands that the trial court did not actually *admit* evidence by ordering the disclosure of the requested discovery. Semantics aside, however, Respondent is still incorrect. Trial courts can and have abused their admittedly considerable discretion by allowing the discovery of irrelevant information:

Although trial courts have broad discretion in matters of discovery, the trial court, in exercising such discretion, must apply the correct law to its findings of fact, and its findings of fact must be supported by sufficient evidence. An appellate court will not find abuse of discretion absent an erroneous conclusion of law or where there is no evidentiary basis for the trial court's ruling. *See State v. Pena*, 869 P.2d 932, 937 (Utah 1994) (while appellate courts always decide what the law is, deference may be given to trial court's application of law to the facts); *accord Brown v. Superior Court*, 137 Ariz. 327, 670 P.2d 725, 729-30 (1983) (trial court discretion in discovery matters "includes the right to decide controverted factual issues, to draw inferences where conflicting inferences are possible and to weigh competing interests. It does not include the privilege of incorrect application of law or a decision predicated upon irrational bases.").

Askew v. Hardman, 918 P.2d 469, 472 (Utah 1996). Trial courts abuse their discretion when

they base discovery decisions on erroneous conclusions of law, and/or an insufficient evidentiary basis. In the instant case, the trial court's misinterpretation and misapplication of *Elmer* led to an abuse of discretion that should be corrected by this Court. The trial court's decision was based upon an erroneous conclusion of law and an insufficient evidentiary basis.

III. THE ADMISSIBILITY OF EVIDENCE IS PROPERLY CONSIDERED UNDER RULE 26 OF THE UTAH RULES OF CIVIL PROCEDURE.

Respondent argues that the admissibility or inadmissibility of the requested evidence is properly considered only at a trial in this matter, and not at the discovery phase of litigation. Respondent is correct that admissibility questions are properly considered during trial, but that is not the exclusive setting for such determinations.

Rule 26 of the Utah Rules of Civil Procedure delineates baseline minimum requirements for the discovery of potentially irrelevant information. As is discussed above, the potential admissibility of requested discovery, or at least that of evidence stemming from the requested discovery, is in fact one of the baseline requirements under Rule 26. The trial court must make some kind of preliminary assessment of the potential admissibility or inadmissibility of evidence when confronted with a motion for protective order. The trial court's preliminary assessment of the potential admissibility or inadmissibility of evidence ought to be informed by correct principals of law pertaining to the nature of the action, in this case a child custody modification. Due to the trial court's erroneous interpretation of *Elmer*,

however, its decision to deny Petitioner's Motion for Protective Order was not thus informed, and should be reversed.

Contrary to Respondent's assertions, Petitioner is not arguing that Respondent should be required to prove his case before he can have access to the requested information. Petitioner is merely attempting to hold Respondent and the trial court to the minimum baseline requirements outlined in Rule 26 of the Utah Rules of Civil Procedure for the discovery of potentially irrelevant and harmful information. This is especially important considering the nature of the requested information and the conceivably insidious effects the requested disclosure could have upon the parties' children and the Petitioner's life. Petitioner is merely trying to protect her children and herself by preventing the legally unwarranted disclosure of irrelevant, inadmissible, and potentially harmful information.

Respondent asserts that the requested information is essential to prove a material change in circumstances. First, if the information is irrelevant and subject to protection under Rule 26 of the Utah Rules of Civil Procedure, Respondent is not entitled to access it no matter what the reason.

Second, the *Hogge-Becker* test and its progeny require Respondent to prove a material change in circumstances since the entry of the most recent order regarding child custody. There is no apparent need for information pertaining to circumstances existing before the parties' most recent modification, much less information dating back to 1979.

CONCLUSION

For the foregoing reasons and those set forth in Appellant's Brief, and in the interests of justice, Petitioner respectfully requests that this Court reverse the interlocutory order of the trial court entered in this matter on August 12, 2002, insofar as it directs Petitioner to respond to Respondent's Interrogatories regarding Petitioner's alleged pre-divorce extra-marital activities. Additionally, Petitioner requests that this Court grant Petitioner her attorney's fees and costs as allowable under applicable law.

DATED this 12 day of June, 2003.

Respectfully Submitted,
CHRISTOPHERSON, FARRIS, WHITE & UTLEY, P.C.

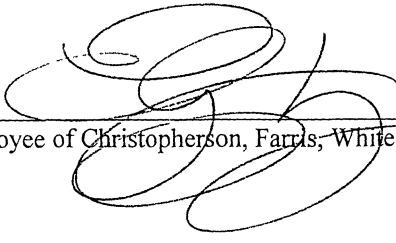


Eric R. Gentry
Attorney for Petitioner

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 12 day of June, 2003, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT** was duly served by depositing in the U.S. mail, postage prepaid, addressed as follows:

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