

1992

Toyota of Ogden, a Utah Corporation v. John R. Bullock : Petition for Rehearing

Utah Court of Appeals

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COMES NOW John R. Bullock, defendant/appellant alone named, in reply to the Response of Toyota of Ogden, plaintiff/appellee, to the Brief filed in this appeal.

As to the pertinent parts in particular:

JURISDICTION

TOYOTA challenges the Court's jurisdiction in the appeal at Bar. BULLOCK advocates that the hearing, review, and judgement of this Court - for reasons of judicial efficiency and economy - are presently appropriate.

The doctrine of res judicata has two related but distinct branches. Both branches, however, have the dual purpose of protecting litigants from relitigating an identical issue and of promoting judicial economy by preventing needless litigation. (See DeBry v. Fidelity 828 P.2d 520, Kemp v. Murray 680 P.2d 758, and Saunders v. Sharp 818 P.2d 574.) The concern for flexibility, judicial economy, and the preservation of substantial rights by preventing redundant litigation seem apparent in this appeal.

TOYOTA's position that this Court lacks jurisdiction is premised on the contention that BULLOCK's change to the Docketing Statement was beyond timeliness constraints. The determination by this Court that it has jurisdiction would in no way abridge any of the substantial rights of the appellee, whereas a dismissal would involve significant redundancy to bring this matter to this point again.

In the event the Court determines to dismiss this appeal, the Court's appropriate comments on BULLOCK's contentions as basis for this appeal would serve judicial efficiency in that such contentions will arise again at the trial court level.

APPELLANT IS ENTITLED TO REVERSAL OR NEW TRIAL

TOYOTA maintains that BULLOCK's claim of ineffective counsel should be denied because 1) it cannot be raised for the first time on appeal, and 2) this was a contempt hearing in a civil case and a constitutional claim of ineffective assistance of counsel does not apply.

In State v. Humphries, 818 2.Pd 1027, this Court determined that judicial economy may be served in peculiar, narrow circumstances including ineffectiveness of counsel as a new issue on appeal. The original meritless basis used by BULLOCK's counsel for the filing of the appeal at Bar and the subsequent withdrawal of BULLOCK's counsel six months after filing this appeal for reasons of disbarment, in conjunction with a lack of diligence supported by the record and fully noted in BULLOCK's Brief seem to meet such peculiar, narrow circumstances.

As noted in BULLOCK's Brief, the Order to Show Cause and the contempt proceeding - though ancillary to a civil case - was a criminal contempt proceeding and in State v. Lush, 95 N.W.2d 695 at [4] "... we have often said that a prosecution for criminal contempt is governed by, and to be conducted in accordance with, the strict rules applicable in criminal prosecutions." Presumably such should include the constitutional guarantee of effective counsel.

TOYOTA further maintains, beyond these two bases for dismissal, that BULLOCK has failed to meet the burden of showing that counsel was ineffective and that had his counsel done the things BULLOCK claims should have been done, the result would have been different.

TOYOTA presents in its response to the Brief in the statement of facts the full transcription of the ten messages left on the

answering machine of Mr. Tony Divino between 5:10 p.m. and 10:37 p.m. on Saturday, June 27, 1992. BULLOCK's drunken spree in essence amounts to his talking to himself for a total period of less than five minutes. Though BULLOCK is contrite with regard to the language used in these messages, BULLOCK does proffer that had his evidence of mitigating circumstances been allowed by the trial judge this language would appear mild and tame as compared to that used to provoke BULLOCK.

TOYOTA also maintains at point 13. pg 10 of its Response that the trial court heard testimony and concluded that TOYOTA's "goading" or provocation would not have occurred had BULLOCK not made the initial call to TOYOTA's place of business. Because the trial court sustained TOYOTA's objection to the presentation of testimony and evidence regarding mitigating circumstances, such was never fully presented to the court. The judge's opinion that the provocation would not have occurred without BULLOCK's first calling TOYOTA's place of business lacked adequate basis in its finding of fact. Though BULLOCK has maintained, as noted by TOYOTA, that his counsel was persistent at the trial on this single issue, it should be noted that BULLOCK's counsel, through an apparent lack of diligence, did not follow up and use this as basis in the original filing of this appeal.

With regard to the trial court's jurisdiction TOYOTA maintains on page 20 of its Response that, "Even if counsel had objected [to the presentation of an amended constable's return], it is apparent the result would have been the same." Such objection may have resulted in an evidentiary hearing that would have allowed counsel a reasonable time for preparation of BULLOCK's case, such extension having been denied by the trial court judge. With proper preparation, the outcome of this case may have determined that the ten calls placed to the

answering machine of Tony Divino were a single violation of the trial court's order enjoining Bullock from responding to TOYOTA's provocations. The outcome may have been significantly different.

As to the reasonableness of attorney's fees awarded, TOYOTA has chosen not to address the prima facie case of the trial judge lacking adequate fact or the argument of excessive burden in hours presented in BULLOCK's brief on pages 20, 21 and 22 except to essentially say because counsel presented them the fees were reasonable.

The "clearly erroneous" standard of Von Hake v. Thomas, 759 P.2d 1162, appears to be present in this appeal.

CONCLUSION

As to TOYOTA's request to be awarded costs and attorney's fees in defending this appeal, BULLOCK respectfully submits that this appeal has merit and is not frivolous. As such TOYOTA has no claim by contract or in law for the awarding of attorney's fees.

BULLOCK humbly requests this Court to allow the hearing of this appeal and grant the relief requested by appellant.

Respectfully submitted this 9TH day of February, 1994.



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