1993

Brian M. Barnard, Petitioner, v. The Hon. Michael R. Murphy, Judge, Third District Court in and for Salt Lake County, Respondent. : Respondent's Petition for Rehearing

Utah Court of Appeals

Brian M. Barnard; John Pace; Utah Legal Clinic; Attorneys for Plaintiff/Petitioner.
Colin R. Winchester; Attorney for Defendant/Respondent.

IN THE UTAH COURT OF APPEALS

BRIAN M. BARNARD, Petitioner, v. THE HON. MICHAEL R. MURPHY, Judge, Third District Court in and for Salt Lake County, Respondent.	Case No. 930136-CA

RESPONDENT'S PETITION FOR REHEARING

Petition for Rehearing from the Court of Appeals' Per Curiam Opinion dated April 29, 1993

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IN THE UTAH COURT OF APPEALS

BRIAN M. BARNARD, Petitioner, v. THE HON. MICHAEL R. MURPHY, Judge, Third District Court in and for Salt Lake County, Respondent.	Case No. 930136-CA

RESPONDENT'S PETITION FOR REHEARING

PETITION

Judge Michael R. Murphy petitions this Court for a rehearing of this matter pursuant to Utah R. App. P. 35, submitting that the following points of law or fact were overlooked or misapprehended by this Court.

1. RULE 63(b) DOES NOT PROHIBIT A JUDGE WHO IS THE SUBJECT OF THE AFFIDAVIT FROM STATING HIS REASONS FOR FINDING THE AFFIDAVIT INSUFFICIENT IN THE ORDER CERTIFYING THE AFFIDAVIT TO ANOTHER JUDGE

Nothing in Rule 63(b) prohibits a judge who is the subject of the Affidavit from stating his reasons for finding the Affidavit

insufficient. Mr. Barnard has not revealed, nor has Judge Murphy's counsel located, any caselaw from this state or elsewhere which would impose such a prohibition. In fact, in State v. Poteet, 692 P.2d 760 (Utah 1984), the Utah Supreme Court was asked to overturn a trial judge's finding of insufficiency of a Rule 63(b) Affidavit because the trial judge failed to include the reasons therefor. The Supreme Court stated that the reasons need not be included, but did not suggest that the reasons, if included, would be improper.

In addition, the failure to state the reasons for finding the Affidavit insufficient may cause confusion or unnecessary delay. For example, if an Affidavit is not presented timely, the subject judge should indicate that fact in the order of reference. Failure to do so may result in unnecessary review and hearings on the merits of the bias and prejudice allegations, despite the failure to comply with the Rule 63(b)'s threshold time requirements. The same is true if the Affidavit is filed when no issue remains to be "tried or heard," as more fully set forth below.

2. THE PER SE RECUSAL MEMORANDUM IS GERMANE TO THE ISSUE OF DISQUALIFICATION PURSUANT TO RULE 63(b), AND WAS NOT IMPROPERLY REQUESTED BY JUDGE MURPHY

This Court stated in its Opinion that the requested memorandum of law on the per se recusal issue is "not germane to the issue of disqualification for bias or prejudice under Rule 63(b)." That statement is inaccurate, both when considered in light of the facts of this case, and generally.

The only reason Judge Murphy did not act on the Affidavits at the time they were filed was because Mr. Barnard had failed or

refused to file the requested memorandum of law on the issue of per se recusal. If in fact Mr. Barnard had presented the memorandum as requested, and if the memorandum had concluded that per se recusal was required, Judge Murphy may well have found each of the Affidavits sufficient and reassigned the cases without further unnecessary involvement by himself or other judges. The memorandum is therefore germane to the issues raised by the Affidavits.[1]

Additionally, nothing in Rule 63(b) prohibits a subject judge from requesting a memorandum of law, on this or any other issue related to the Affidavit. Again, Mr. Barnard has not revealed, nor has Judge Murphy's counsel located, any judicial authority to support such a prohibition.

3. THERE IS NO ACTION OR PROCEEDING TO BE "TRIED OR HEARD" IN THE MORRIS AND SHELLEY MATTERS

Rule 63(b) states in part:

> Whenever a party . . . or his attorney shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice . . . such judge shall proceed no further therein, except to call in another judge to hear and determine the matter. Emphasis added.

In Shelley v. Shelley, Mr. Barnard's Rule 63(b) Affidavit was filed on January 5, 1993. Before Judge Murphy acted on the Affidavit, Commissioner Arnett signed an Order Modifying Decree of

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[1] Several courts have held that a judge is not biased or prejudiced merely because the judge has been sued by a current party or attorney. Eismann v. Miller, 619 P.2d 1145 (Idaho 1980); Matter of Ronwin, 680 P.2d 107 (Ariz. 1983); United States v. Grismore, 564 F.2d 929 (10th Cir. 1977).

Divorce, resolving all of the pending issues. This Court's Opinion requires Judge Murphy to act upon the Affidavit even though there is no longer any matter to be "tried or heard" by the trial court, contrary to the express language of Rule 63(b).

In Morris v. Morris, the parties executed a stipulation resolving the issues on December 31, 1992. Mr. Barnard's Rule 63(b) Affidavit was not filed until January 5, 1993. At that time, there was (and still is) nothing to be "tried or heard." The Affidavit does not therefore comply with Rule 63(b). Again, this Court's Opinion requires Judge Murphy to act on the Affidavit though the rule contains no such requirement.

CERTIFICATION OF COUNSEL

Counsel for Respondent certifies that this petition is presented in good faith and not for delay.

DATED this 13th day of May, 1993.

Colin R. Winchester
Counsel for Respondent

CERTIFICATE OF SERVICE

I certify that I hand-delivered a true and correct copy of the foregoing Petition For Rehearing to Brian M. Barnard, Esq., Utah Legal Clinic, 214 East 500 South, Salt Lake City, Utah 84111, on the 13th day of May, 1993.

Colin R. Winchester