

1993

John Carl Putvin v. Karen Larie Thompson, Joseph Blaine Thompson : Petition for Rehearing

Utah Court of Appeals

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Daniel Darger. Attorney for Appellee.

Mitchell R. Barker. Attorney for Appellant.

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UTAH COURT OF APPEALS
BRIEF

UTAH
COURT
OF APPEALS
BRIEF

FILE NO. 930359

IN THE UTAH COURT OF APPEALS

JOHN CARL PUTVIN :

Plaintiff and Appellee :

vs. :

Case No: 930359-CA

KAREN LARIE THOMPSON :
JOSEPH BLAINE THOMPSON :

Defendant and Appellant :

Priority No: 4

P E T I T I O N F O R R E H E A R I N G

ON APPEAL FROM AN ORDER OF THE THIRD DISTRICT COURT

STATE OF UTAH

JUDGE TIMOTHY R. HANSON

Mitchell R. Barker
349 South 200 East #170
Salt Lake City, Utah 84111

Attorney for Appellee

Daniel Darger
1000 Boston Building
9 Exchange Place
Salt Lake City, Ut 84111
Telephone 801-531-6686

Attorney for Appellant

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JUN 22 1994

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9 Exchange Place
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Attorney for Appellant

COMES NOW Appellant herein, pursuant to Rule 35, U.R.A.P. and hereby petitions this court for rehearing of the above matter. This petition is based upon the grounds that this court has overlooked or misapprehended fact and law as follows:

I. APPELLANT'S RULE 59 MOTION WAS TIMELY AND THIS COURTS RULING OTHERWISE IS CONTRARY TO LAW.

This Court ruled at page 5 that "[t]he Rule 59 motion would be untimely because Thompson *filed* it more than ten days after the trial court denied the prior Rule 60 motion." (emphasis added) This court misapprehends the law. Rule 59 only requires that a motion under that rule be *served* within 10 days. There is no requirement that it be filed within that time to be timely.

Instead, Rule 5(d) U.R.C.P provides:

All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter.

And the case of *Dehm v. Dehm*, 545 P.2d 525 (Utah 1976) is directly on point on the issue of whether Rule 5(d) applies to a motion brought under Rule 59. This case held that it does and further held that a reasonable time for filing a Rule 59 motion after service was two days.

In the instant case, it is uncontroverted that Appellee was served with Appellant's Rule 59 motion within the ten day time period. The motion was filed with the trial court two days later, on March 24, 1993. Consistent with the above law, Appellant's Rule 59 motion was timely filed and this court's ruling otherwise is in error.

II. THE EVIDENCE WAS NEWLY DISCOVERED AND NOT MERELY CUMULATIVE.

This court appears to rule that the evidence was not "newly discovered" as follows;

- a. The Rule 59 motion was untimely and we will treat it as a rule 60(b) motion.
- b. Darger discovered the evidence on November 18, 1992 and the trial court did not deny the original 60(b) motion until "some four months after Darger discovered the 'new' evidence..." and denied the Rule 59 motion six months after discovery.
- c. "Thus, the "newly discovered" evidence was discovered or discoverable in ample time to move for relief under Rule 59(b) in the first instance; therefore, it does not meet the requirements of Rule 60(b)(2).

This conclusion is certainly correct. For the evidence was not discovered within the six month period within which it could be brought pursuant to Rule 60(b)(2). And, as the Court notes: "[e]ven the date Kimball executed his affidavit was within the ten-day period for a Rule 59 filing."

However, the above analysis is faulty because it is based upon a false premises, ie. that the filing of the Rule 59 motion was untimely. Instead, as noted above, the Rule 59 motion was brought timely under Utah law.

Further, the uncontroverted affidavit of Mr. Darger indicates that he did inquire of Mr. Kimball as to the circumstances surrounding the entry of the default decree shortly after entering an appearance in May, 1992 and was unable to discover the admissions later made by Mr. Kimball. In November, 1992, Mr. Kimball merely indicated that he would be willing to sign a statement as to the facts surrounding the entry of the default decree. It was not until

December 9, 1992 that Darger actually discovered the facts and admissions that Mr. Kimball was willing to provide.

And this evidence was brought to the trial court's attention at the earliest opportunity pursuant to the Rule 59 motion. It must be remembered that although the trial court had entered a ruling denying the Rule 60(b) motion on November 18, 1992, it did not enter an order reflecting this decision until March 11, 1993.

Thus, when Darger discovered the admissions (whether on November 18th or December 9th), it was well beyond the 3 month period from entry of the default decree and could not have been brought to the trial court's attention pursuant to Rule 60(b)(2) even if the trial court had not ruled on that motion already. Counsel had no other readily available procedural method for bringing this evidence before the trial court but to wait for the order denying the Rule 60(b) motion to be entered and then file a timely Rule 59 motion. This is exactly what happened.

Further, it must be remembered that Darger is in no position to make the trial judge enter the order denying the 60(b) motion any sooner than he did. Once the admissions were discovered, they were brought to the judges attention as soon as the rules of procedure allowed.

Thus, this Court is not correct in noting at Opinion, page 6, that "[t]he 'newly discovered evidence' could have been raised pursuant to either Rule 59 or Rule 60. For while these two rules are the primary procedures for bringing such evidence to the court's attention, Rule 60 was no longer available because the three month limitation in which to do so had long since passed.

This court also rules that the evidence is not "newly discovered" but cumulative because it merely provides a retrospective analysis of the November 4th letter. The court misapprehends the facts. For Appellant has claimed on appeal that even if Kimball were found not to have been discharged by that letter but continued as Appellant's attorney, he nevertheless, executed the findings and decree prejudicing her substantive rights without her authority and contrary to her express direction.

Regardless of the content of the November 4th letter, Mr. Kimball's sworn admission that he had no authority to compromise his client's claim goes far beyond any analysis of the letter. His admissions are evidence that goes to the very heart of our justice system and needed to be brought to the attention of the trial judge. The Court's ruling that these admissions are not "newly discovered" but merely cumulative is in error.

III. THIS COURT HAS FAILED TO PROVIDE RELIEF PURSUANT TO APPELLANTS' APPEAL OF THE DENIAL OF HER RULE 60(b) MOTION CONTRARY TO LAW AS SET OUT IN THE RULES OF PROCEDURE AND THE CONSTITUTION OF THE STATE OF UTAH.

Plaintiff moved to alter or amend on two separate grounds. First, was that the denial of the motion was contrary to law as set forth in the 60(b) motion [Rule 59(6) & (7)]. This argument inserted the original issues of 60(b) motion into the Rule 59 motion. The second ground was the "newly discovered" evidence [Rule 59(4)]. Appeal was taken from denial of the Rule 59 motion on both grounds and constituted an appeal of the denial of the 60(b) motion and all issues raised therein. Yet this Court has failed to rule on any of the issues raised in the 60(b) motion and briefed extensively on appeal.

Failure to even consider the issues Appellant has timely raised on appeal is contrary to the rights guaranteed by Article I, § 11 & 24 of the Utah Constitution. Section 11 provides that "...every person ... shall have a remedy by due course of law, which shall be administered without denial or unnecessary delay..." While case law indicates that this section places limitations upon the legislature to prevent it from closing the doors of the courts [eg. *Berry ex rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670,675 (Utah 1985), the Utah Supreme Court has also held "that a clear implication of this language is 'that an individual [may] not be arbitrarily deprived of effective remedies designed to protect basic individual rights.' ". *Comdemarin v. University Hosp.*, 775 P.2d 348, 357 (Utah 1989), citing *Berry*, supra.

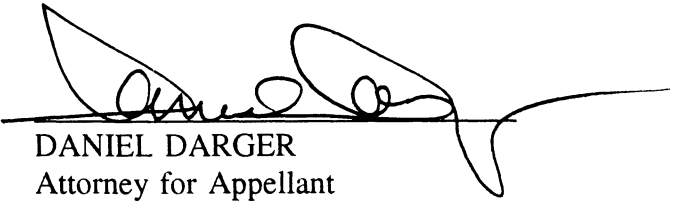
Appellant asserts that Section 11, taken together with the due process protection contained in Section 24, operate as a limitation on the *courts* ability to deny remedies designed to protect basic individual rights. [*Comdemarin v. University Hosp.*, supra; *In re Thomas*, 190 P. 952 (Utah 1920)] This Court's failure to rule upon properly perfected issues on appeal, one way or the other, constitutes such a denial contrary to the above provisions of the Utah Constitution.

This Court's failure to rule on the issues raised in Appellant's appeal is also contrary to Rule 3, U.R.A.P. which allows an appeal as a matter of right from final orders and judgments of a district court. The trial court's denial of Appellant's Rule 60(b) motion was such a final order [*Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950 (Utah 1979)] And Rule 4(b) U.R.A.P. required Appellant to wait until her Rule 59 motion was ruled upon before filing appeal of the denial of her 60(b) motion.

Thus, Appellant has a *right* to have this Court rule on the issues perfected for appeal *on the merits*. This Court's failure to do so is contrary to the above rules and, therefore, contrary to law.

Appellant respectfully requests that this Court vacate its opinion affirming the trial court and consider her appeal on the merits.

DATED this 22, day of June 1994.


DANIEL DARGER
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Rehearing has been hand delivered to Mitchell R. Barker, 349 South 200 East, Suite 170, Salt Lake City, UT 84111, this 22 day of June, 1994.

