

1993

Julie Rimensburger v. Josphe Rimensburger : Brief of Appellee

Utah Court of Appeals

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Lynn J. Clark; Attorney for Plaintiff/Appellee.

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KET NO. 930384 CA

IN THE UTAH COURT OF APPEALS

JULIE RIMENSBURGER,
Plaintiff and Appellee,

vs.

JOSEPH RIMENSBURGER,
Defendant and Appellant

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Case No. 930384-CA

Priority No. 15

BRIEF OF APPELLEE

**Response to Defendant's Appeal from Findings and Order of the Third
District Court, Salt Lake County, denying Defendant's and Appellant's
Motion for costs on appeal.**

Honorable Homer F. Wilkinson, Judge.

Lynn J Clark
Attorney for Plaintiff/Appellee
935 East South Union Avenue, D-102
Midvale, Utah 84047

Wendell P. Ables
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Salt Lake City, Utah 84102

FILED
Utah Court of Appeals

JAN 28 1994



Mary T. Noonan
Clerk of the Court

TABLE OF CONTENTS

| | |
|---|----|
| TABLE OF CONTENTS | i |
| TABLE OF AUTHORITIES | ii |
| JURISDICTION | 1 |
| ISSUES ON APPEAL AND STANDARD OF REVIEW | 1 |
| STATEMENT OF CASE | 2 |
| STATEMENT OF FACTS | 3 |
| SUMMARY OF ARGUMENT | 4 |
| POINT I | 4 |
| POINT II | 4 |
| ARGUMENT | 4 |
| POINT I | 4 |
| POINT II | 6 |
| CONCLUSION | 7 |
| CERTIFICATE OF SERVICE | 8 |

TABLE OF AUTHORITIES

| RULES OF EVIDENCE | PAGES |
|--|------------|
| Rule 34, Utah Rules of Appellate Procedure | 4, 5, 6, 7 |

IN THE UTAH COURT OF APPEALS

JULIE RIMENSBURGER,

Plaintiff and Appellee,

vs.

JOSEPH RIMENSBURGER,

Defendant and Appellant.

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Case No. 930384-CA

BRIEF OF APPELLEE

JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. Section 78-2a-3(2)(i)(1992).

ISSUES ON APPEAL AND STANDARD OF REVIEW

I

Whether Defendant/Appellant, who, having been granted specific relief on Appeal is now entitled to an award of more than what was specifically granted to him by this Court's Order as interpreted by the District Court.

The relief granted Defendant was specifically set forth by this Court in it's second amended unpublished opinion entered by this Court on the 6th day of November 1992. The Court's specific language is as follows:

We therefore order Wife's attorney to pay Husband only for those reasonable expenses and attorney fees incurred up to June 20, 1991, the date the Trial Court entered its Order denying Husband's motion to dismiss, but not for those fees and expenses incurred thereafter.

STATEMENT OF CASE

Defendant's appeal from an Order of the Third District Court prevailed in this Court on the issue of jurisdiction. However, the original Order of the Court was amended twice with the final opinion being issued November 6, 1992. Although the issue of jurisdiction which was before the Court was never modified, this Court entered two (2) modifications of its award of expenses and fees to Defendant, each amended Order reducing the award of expenses and fees. After the second amended Order, the case was remanded to the District Court with instruction to a) dismiss Plaintiff's Petition for Modification, and b) award Defendant his reasonable expenses and attorney fees incurred up to June 20, 1991, but denying Defendant any expenses or attorney fees which he incurred after June 20, 1991. There was no language in the final Order either awarding Defendant his costs or denying an award of those costs to Defendant.

Thereafter, Defendant filed a motion with the District Court for an Order awarding him his reasonable attorney fees, expenses and costs. Both parties filed memoranda in support of their positions. The District Court, Judge Wilkinson

presiding, awarded Defendant expenses and attorney fees for all of the work done by Defendant's attorney not only up to June 20, 1991, but for an additional one-half (1/2) hour which Defendant's attorney spent after June 20, 1991, in preparing written Orders reflecting the Court's Order entered June 20, 1991. Judge Wilkinson awarded Defendant his entire request for attorneys fees in spite of the fact that the issue of jurisdiction was only a part of the total task Defendant's attorney had in responding to Plaintiff's Petition to Modify. Judge Wilkinson then denied Defendant's request for costs on appeal of some \$197.00. His denial of any award of Defendant's costs was based on the fact that this Court was silent as to the issue of costs in this Court's Order of November 6, 1992. From that denial of costs, Defendant has brought the current appeal.

STATEMENT OF FACTS

The facts as stated by Defendant are essentially correct. After receiving Defendant's motion for the award of expenses, attorney fees and costs, the Third District Court, Judge Wilkinson, interpreted this Court's second amended Order of November 6, 1992, awarding expenses and attorney fees, but denying Defendant's request for costs because the language of this Court's specific Order was silent as to whether costs should be awarded or not.

SUMMARY OF ARGUMENT

POINT I

Whether Defendant was or was not entitled to an award of his costs on appeal is a matter based on the intent of this Court at the time it entered its Order of November 6, 1992, and of whether or not Judge Wilkinson correctly interpreted that Order. In either case, the confusion will easily be resolved by a simple clarification of that point by this Court.

POINT II

Plaintiff's attorney did not violate Rule 11 of the Utah Rules of Civil Procedure and Defendant is not entitled to an award of attorney fees as requested.

ARGUMENT

POINT I

Rule 34(a) of the Rules of Appellate Procedure is as follows:

Rule 34. Award of costs.

(a) To whom allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment or order is affirmed, costs shall be taxed against appellant unless otherwise ordered; if a judgment or order is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment or order is affirmed or reversed in part, or is vacated, costs shall be allowed as ordered by the court. Costs shall not be allowed or taxed in a criminal case. (Emphasis added)

While Rule 34 of the Rules of Appellate Procedure appears clear in cases where the Court has reversed a lower Court's Judgment or Order, it also makes provision in the second to the last sentence of that rule that where a Judgment has been modified or reversed in part, costs shall be allowed only as ordered by the Court.

While the original Judgment of the District Court on the issue of jurisdiction was reversed, the Order of this Court, with respect to the award of expenses and attorney fees, was modified twice. Such a modification has the effect of requiring this Court to specifically award costs on appeal.

The possibility of confusion with respect to the applicability of the various provisions of Rule 34 coupled with the rather specific language of this Court's Order of November 6, 1992, which denied fees and expenses incurred after June 20, 1991, and the fact that the November Order was silent as to the issue of costs apparently led to Judge Wilkinson's order denying Defendant his costs.

Due to the cut off date for the award of expenses and fees listed in this Court's Order, Judge Wilkinson could reasonably have interpreted that to limit all costs, fees and expenses unless specifically awarded.

It is clear that whether or not Judge Wilkinson interpreted this Court's Order properly or improperly the intent of this Court can and will be made clear by this Court.

POINT II

Plaintiff's argument to the Trial Court with respect to the issue of costs on appeal is sustainable on at least two (2) grounds. First, the language of Rule 34, in the last phrase of the first sentence it states "If a Judgment or Order is affirmed or reversed in part, or is vacated, costs shall be allowed as ordered by the Court". While it is true that the issue on appeal was not reversed in part, the portion of the Court's Order with respect to the award of attorneys fees awarded to Defendant was reversed and modified twice. Such a modification of the Court's Order could reasonably lead to a requirement that an award of costs should have been specifically stated in the Court's Order.

Secondly, the specific cut off date with respect to the award of attorneys fees and expenses could also reasonably have been interpreted to prohibit the Trial Court from awarding costs on appeal which were most certainly incurred following the cut off date stated in the Order.

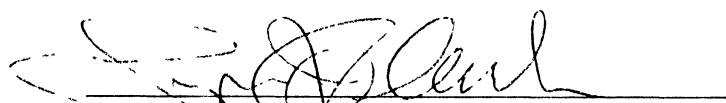
Plaintiff's counsel did not violate Rule 11 of the Utah Rules of Civil Procedure by suggesting reasonable alternatives for the Court's consideration in the interpretation of this Court's Order which was silent as to the issue of costs on appeal.

CONCLUSION

The issue of Judge Wilkinson's interpretation of Rule 34 and/or of his interpretation of this Court's Order of November 6, 1992, is a matter that will be resolved by this Court making its intentions clear as to the award of costs on appeal in the previous appeal.

Defendant's request for sanctions against Plaintiff and/or Plaintiff's attorney are improper for the reason that Plaintiff's arguments to the Court were reasonable and not a per se violation of Rule 11.

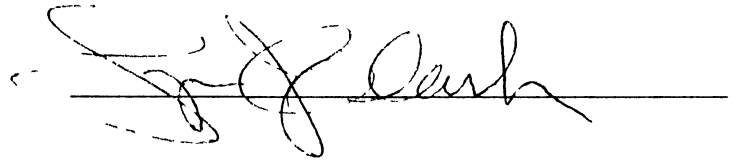
Respectfully submitted,



Lynn J. Clark-
Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of January, 1994, two (2) true and correct copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Mr. Wendell P. Ables, Attorney for Defendant/Appellant, 536 East 400 South, Salt Lake City, Utah 84102.



THIRD DISTRICT COURT
Third Judicial District

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Attorney for Defendant
536 East 400 South
Salt Lake City, Utah 84102
Telephone: (801) 532-7424

MAY 11 1993

SALT LAKE COUNTY

by
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JULIE RIMENSBURGER,

Plaintiff,

vs.

JOSEPH RIMENSBURGER,

Defendant.

:
:
: FINDINGS AND ORDER
: 2183206
: 5-13-93 8:26am
: Civil No. 915900078MI
:
: Judge Homer F. Wilkinson
:

Defendant's Motion for an Award of Attorney's Fees along with payment of a cost bill was submitted to the Honorable Homer F. Wilkinson for decision pursuant to Rule 4-501, Code of Judicial Administration, and the court being fully advised in the premises, now makes and enters the following findings:

FINDINGS

1. That the hourly rate, amount of fees and preparing a court order of June 20, 1991 after that date is a proper charge.
2. The court of appeals was silent in the awarding of cost of appeal against the Plaintiff and therefore this court will leave the matter for the Court of Appeals.

ORDER

NOW THEREFORE, it is hereby ORDERED:

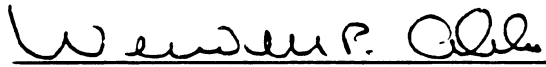
1. That Defendant is awarded a judgment against Plaintiff for attorney's fees in the sum of \$487.50.
2. Costs on appeal are hereby denied.

Dated this 11 day of April, 1993.


HOMER F. WILKINSON
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of April, 1993, a true and correct copy of the foregoing Notice to Submit for Decision was mailed, postage prepaid, to Lynn J. Clark, Attorney for Plaintiff, 935 East South Union Avenue, Suite D-102, Midvale, Utah 84047.


Wendy P. Clark