

1993

Julie Rimensburger v. Joseph Rimensburger : Brief of Appellant

Utah Court of Appeals

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Wendell P. Ables; Attorney for Defendant/Appellant.

Lynn J. Clark; Attorney for Plaintiff/Appellee.

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IN THE UTAH COURT OF APPEALS

JULIE RIMENSBURGER,
Plaintiff and Appellee,
vs.

JOSEPH RIMENSBURGER,
Defendant and Appellant

Case No. 930384-CA

Shirley #15

BRIEF OF APPELLANT

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.

Wendell P. Ables
Attorney for Defendant/Appellant
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Salt Lake City, Utah 84102

Lynn J. Clark
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Midvale, Utah 84047

FILED
Utah Court of Appeals

DEC 30 1993

Mary T. Noonan
Mary T. Noonan
Clerk of the Court

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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 APPELLANT

JURISDICTION

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

ISSUES ON APPEAL AND STANDARD OF REVIEW

I

Whether Defendant and Appellant, having prevailed on appeal, is entitled to his costs and disbursements on appeal.

It is submitted that the denial of costs on appeal in this matter is a question of law which should be reviewed for its correctness, with no particular deference to said ruling.

II

Whether Defendant and Appellant is entitled to an award of attorney's fees.

In determining whether a Rule 11 sanction is applicable, (1) questions of fact are determined by the clearly erroneous standard, (2) questions of law are determined by the correctness standard, and (3) the amount of the sanction is determined on the abuse of discretion standard. Barnard v. Sutliff, 846 P.2d 1229, 1235 (Utah 1992).

CONSTITUTIONAL, STATUTORY AND RULE CONSTRUCTION
THOUGHT TO BE DETERMINATIVE OF ISSUES

Rule 34, Utah Rules of Appellate Procedure.

Rule 11, Utah Rules of Civil Procedure.

STATEMENT OF THE CASE

Defendant and Appellant prevailed in this Court in an Amended Opinion on Rehearing, Rimensburger v. Rimensburger, 841 P.2d 790 (Utah Ct. App.1992) and was awarded attorney's fees and expenses incurred up to June 20, 1991. (R.143-146) The case was remanded and Defendant filed a Motion for Award of Attorney's Fees (R.147) supported by an Affidavit (R.150-152) and Memorandum of Costs and Disbursements. (R.148-149)

Plaintiff's attorney objected to the attorney's fees in part and to the award of costs in their entirety (R.153-158; 166-169) and Defendant responded (R.159-165) and the matter was submitted to the Trial Court for decision. (R.172)

The Trial Court entered Findings and Order (R.177,178) allowing the attorney's fees but denying the award of costs and disbursements on appeal. Defendant then filed his Notice of Appeal. (R.179)

STATEMENT OF FACTS

This case has been before this Court previously and was decided unanimously in favor of Defendant by the Amended Opinion on Rehearing in 841 P.2d 709 (Utah Ct. App. 1992) and after a second Petition for Rehearing relating to attorney's fees and expenses in an unpublished Supplemental Order. (R.146) The unpublished Order provided, in part, 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.

The case was then remanded to the Third District Court for Salt Lake County, Utah. (R.142)

Defendant's attorney then filed a Motion for Award of Attorney's Fees in the sum of \$487.50 (R.147) supported by an Affidavit. (R.150, 151) A separate Memorandum of Costs and Disbursements was filed asking for an award of costs on appeal in the sum of \$197.00. (R.147,148)

Plaintiff's attorney then filed an objection to the award of costs, arguing that the award by this Court of "reasonable expenses and attorney's fees incurred up to June 20, 1991. . . but not for those fees and expenses incurred thereafter." was a denial of an award of costs on appeal. (R.153,154) Plaintiff's attorney then claimed the attorney's fees in the sum of \$487.50 was unreasonable and that .5 hour or \$50.00 thereof was incurred on August 14, 1991 in preparing and processing of the written order of denial of Defendant's Motion to Dismiss based on the trial court's minute entry dated June 20, 1991 was improper. (R.154,155)

Defendant's attorney filed a response to Plaintiff's objections. (R.159-165) Although there was no basis in law for further submissions under Rule 4-501, Code of Judicial Administration, Plaintiff's attorney then filed a "Response to

Defendant's Response", again objecting to the .5 hour or \$50.00 increment of attorney's fees incurred on August 14, 1991. (R.166-168)

Defendant's attorney then filed a Notice to Submit for Decision (R.172,173) resulting in the minute entry of the trial court, allowing all attorney's fees, but denying costs on appeal. (R.174)

Defendant's attorney prepared Findings and Order which, after no objection was taken under Rule 4-504, Code of Judicial Administration, was submitted to the trial court and signed and entered on May 11, 1993. (R.177,178)

The Findings and Order provided as follows:

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.
(R.177-178)

Defendant then filed his Notice of Appeal.
(R.179)

SUMMARY OF ARGUMENT

POINT I

Defendant prevailed in the previous appeal and was entitled to an award of costs on appeal pursuant to Rule 34, Utah Rules of Appellate Procedure, as a matter of law.

POINT II

Plaintiff's attorney's argument in support of his objection to the award of costs to Defendant on appeal is in violation of Rule 11, Utah Rules of Civil Procedure, and may have misled the trial court. Defendant is entitled to an appropriate sanction in the form of an attorney's fee or double costs against Plaintiff's attorney only.

ARGUMENT

POINT I

DEFENDANT IS ENTITLED TO AN AWARD OF COSTS ON APPEAL.

Rule 34, Utah Rules of Appellate Procedure, provides in part as follows:

(a) "Except as otherwise provided by law... if a judgment or order is reversed, costs shall be taxed against the appellee unless otherwise ordered."

(c) "The following may be taxed as costs in favor of the prevailing party in the appeal: the actual costs of a printed or typewritten brief or memoranda and attachments not to exceed \$3.00 for each page; actual costs incurred in the preparation and transmission of the record, including costs of the reporter's transcript unless otherwise ordered by the court; premiums paid for supersedeas or cost bonds to preserve rights

pending appeal; and the fees for filing and docketing the appeal."

The amended opinion and unpublished final order of this court makes no order as to an award of costs on appeal. The final order explains, "...attorney's fees should have been granted only up until the time the trial court denied Husband's motion to dismiss." The final order was an award to Defendant's attorney for "...reasonable expenses and attorney's fees incurred up to June 20, 1991..."

Plaintiff's attorney, who was found by this Court to have violated Rule 11, Utah Rules of Civil Procedure (R.144), argues that the award of "reasonable expenses" up to June 20, 1991, precludes an award of costs on appeal. He argues costs when this Court's limitation was on "reasonable expenses." To him, costs on appeal and reasonable expenses are one and the same thing.

Plaintiff's attorney's argument in the lower court is as follows:

It is clear that Defendant's attorney is not entitled to any costs, or fees which he incurred following June 20, 1991. The costs [on appeal] sought by Defendant's counsel were not incurred until after that date and therefore under the wording of the Appellate Court's Order, he is not entitled to an award of those costs. (R.154)

Amplification of this Court's order regarding fees and expenses is provided in the penultimate paragraph of the unpublished order which states:

In order for this court's ruling to be consistent, attorney fees should have been granted only up until the time the trial

court denied Husband's motion to dismiss. Therefore, Husband is not entitled to attorney fees subsequent to the trial court's denial of the motion to dismiss, because thereafter, Wife's attorney was entitled to rely on the ruling of the trial court regarding the proper court in which to file the petition for modification. (R.146)

Thus, the "reasonable expenses" referred to were expenses incurred at the District Court level and was intended to be co-extensive with the order for attorney's fees. It is submitted that this court did not intend to extinguish costs on appeal or it would have stated, no costs awarded on appeal or some such equivalent statement.

In the original case before this court, Defendant obtained a reversal of the order denying dismissal of Plaintiff's petition, and Defendant was the prevailing party. Under Rule 34, Utah Rules of Appellate Procedure, Defendant was entitled to costs on appeal which were timely filed and proper in every respect. Defendant is entitled to his costs on appeal for the previous appeal.

POINT II

DEFENDANT IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER RULE 11, UTAH RULES OF CIVIL PROCEDURE, FOR PLAINTIFF'S OBJECTION TO THE AWARD OF DEFENDANT'S COSTS ON APPEAL.

In the previous case between the parties, the court ruled at 841 P.2d 711 as follows:

Rule 11 provides, in part, that by signing a document, an attorney certifies that he or she has read it, has made "reasonable inquiry," and certifies that it "is well grounded in fact and is warranted by existing law or a good faith argument for the

extension, modification, or reversal of existing law." The Rule provides that where an attorney has signed a pleading in violation of the rule, the court shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party...the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

It is submitted that Plaintiff's attorney's arguments to the trial court were in direct violation of Rule 11. Nothing is more fundamental at the trial or appellate level than the proposition that the prevailing party is generally entitled to the costs of the action. This proposition is clearly stated in Rule 34, Utah Rules of Appellate Procedure, of which Plaintiff's attorney is charged with knowledge.

The argument advanced that the award of "reasonable expenses" up to June 20, 1991, is tantamount to a denial of costs on appeal is not worthy of a high school debate, much less a judicial proceeding. This specious argument may have influenced the trial court to not award costs on appeal and "...leave the matter to the Court of Appeals."

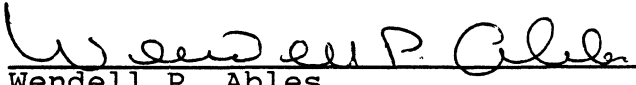
The rulings by the trial court were made as a matter of law and it is for this court to determine if there is a Rule 11 violation and what sanction, if any, is appropriate. See Barnard v. Sutliff, supra.

Defendant is entitled to sanctions in the form of attorney's fees or double costs against Plaintiff's attorney only.

CONCLUSION

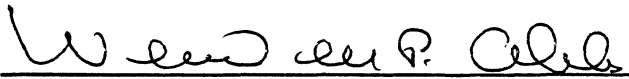
Defendant's attorney is entitled to an award of his costs on appeal for the previous appeal and a reasonable attorney fees or double costs for having to bring this matter before this court for a second time.

Respectfully submitted,


Wendell P. Ables
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of December, 1993, two (2) true and correct copies of the foregoing Brief of Appellant were mailed, postage prepaid, to Lynn J. Clark, Attorney for Plaintiff/Appellee, 9835 East South Union Avenue, Suite D-102, Midvale, Utah 84047.



APPENDIX

THIRD JUDICIAL DISTRICT COURT
Third Judicial District

Wendell P. Ables, Bar No. 11
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:

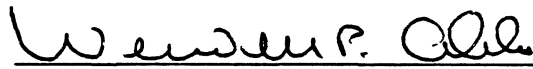
1. That Defendant is awarded a judgment against Plaintiff for attorney's fees in the sum of \$487.50.
2. Costs on appeal are hereby denied.

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. Allen