

1993

Julie Rimensburger v. Joseph Rimensburger : Petition for Rehearing

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 RIMENSBERGER,	:	
	:	
Plaintiff and Appellee,	:	PETITION FOR REHEARING
	:	
vs.	:	
	:	
JOSEPH RIMENSBERGER,	:	
	:	
Defendant and Appellant.	:	Case No. 930384-CA
	:	

PETITION FOR REHEARING

Wendell P. Ables
Attorney for Defendant/Appellant
255 East 400 South, #150
Salt Lake City, Utah 84111

Lynn J. Clark
Attorney for Plaintiff/Appellee
1627 East Granada Drive
Midvale, Utah 84047

FILED
Utah Court of Appeals

DEC - 1 1994

Marilyn M. Branch
Clerk of the Court

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Defendant and Appellant, by his attorney of record, pursuant to Rule 35, Utah Rules of Appellate Procedure, petitions this court for rehearing certifying that this petition is presented in good faith and not for delay. The Petition for Rehearing is sought on the following grounds:

The Court's Memorandum Decision is in error when it attributes the references to "reasonable expenses" to Rule 34, Utah Rules of Appellate Procedure.

The imposition on Appellee wife's attorney of "reasonable expenses and attorney fees" in Rimensberger, 190 UAR 48, 49 (Utah App. 1992) and "reasonable expenses and attorney fees incurred up to the filing of the Notice of Appeal, but not for those incurred on appeal."*** "Wife's attorney to pay husband for his reasonable expenses and attorney fees as directed herein.", in Rimensberger, 841 P.2d 709, 712 (Utah App. 1992) and the final paragraph of the Order dated November 6, 1992 referring to the award of reasonable expenses and attorney fees was the result of a Rule 11 violation by

Appellee wife's attorney. Rule 11, Utah Rules of Civil Procedure, provides in part that upon a violation of Rule 11, as found by this court on the part of Appellee wife's attorney, that:

...the court upon motion or upon its own initiative, 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 or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. (Emphasis added)

Thus, when the Memorandum Decision states on page 2 that:

This order denying "reasonable expenses" to Appellant on appeal contemplated the costs described in Rule 34 of the Utah Rules of Appellate Procedure,

it is in error.

Rule 34, Utah Rules of Appellate Procedure, contains no reference in the entire Rule to "reasonable expenses" and a look at the relevant portions is in order.

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.

(b) **Costs for and against the state of Utah.** In cases involving the state of Utah or an agency or officer thereof, an award of costs for or against the state shall be at the

discretion of the court unless specifically required or prohibited by law.

(c) Costs of briefs and attachments, records, bonds and other expenses on appeal. 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. (Emphasis added)

The "other expenses on appeal" in paragraph 34(c) are the fees for filing and docketing the appeal and these are prescribed by Utah Code Ann. § 21-1-5. There is no latitude in determining these costs or reasonableness thereof as they are set by court rule, statute or actual costs. Thus, the "reasonable expenses" has nothing to do with the costs on appeal as set forth in Rule 34, Utah Rules of Appellate Procedure.

The Court's Memorandum Decision is in further error when it states in footnote 1, "Our subsequent order upon Appellant's second Motion for Rehearing did not modify this aspect of the original order." The Rimensberger case, 841 P.2d 709 (Utah App. 1992), indeed stated as follows:

We therefore order Wife's attorney to pay Husband for his reasonable expenses and attorney fees incurred up to the filing of the notice of appeal, but not for those incurred on appeal.

The editors of the Pacific Reporter were not misled by this language, when in headnote 7, they concluded:

...and did not subject former wife's attorney to liability for former husband's attorney fees incurred on appeal. (Emphasis added)

The editors correctly concluded that the ruling of the court had nothing to do with the award of costs on appeal.

Both petitions for rehearing were directed at the award of attorney fees only and not a word is said about costs on appeal or for that matter "reasonable expenses." The second Petition for Rehearing dealt exclusively with attorney fees incurred after the Motion to Dismiss was denied until the preparation of the Notice of Appeal.

The order of this court dated November 6, 1992, made pursuant to the second Petition for Rehearing, contains in the in penultimate paragraph the factual and legal rationale for the action taken by the Court of Appeals vis a vis Rule 11 sanctions against Appellee wife's attorney and stated as follows:

We find Wife's attorney's argument to be well-taken: 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 reply on the ruling of the trial court regarding the proper court in which to file the petition for modification. (Emphasis added)

There is no language or reference in any of the Rimensberger decisions, 190 UAR 48 (Utah App. 1992), 841 P.2d 709 (Utah App. 1992) or the decision of this court dated November 6, 1992 that would even remotely suggest a denial of an award of costs on appeal. There is no basis in law or reason why Appellant should

not be awarded costs on appeal. The ruling that the previous panel of this court ordered no costs on appeal is at best erroneous.

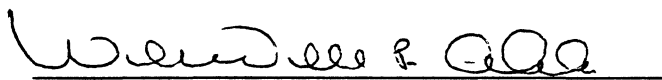
Appellant's cost bill consists of the filing of fees on appeal in the sum of \$155 and \$42 for the brief at \$3.00 per page for 14 pages for a total cost of \$197. These are not "reasonable expenses" but actual expenses incurred as authorized by the Rule and by statute.

CONCLUSION

Appellant was the prevailing party in the previous proceeding before this court and should be awarded costs on appeal pursuant to Rule 34, Utah Rules of Appellate Procedure.

Dated this 1st of December, 1994.

Respectfully submitted,


Wendell P. Ables
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of December, 1994 a true and correct of the foregoing Petition for Rehearing was mailed, postage prepaid, to the following:

Lynn J. Clark
Attorney for Defendant/Appellant
1627 East Granada Drive
Midvale, Utah 84047

