1993

Barbara Lynn Bunch v. Brian Lynn Englehorn : Reply Brief

Utah Court of Appeals

Willard R. Bishop; Attorney for Defendant/Appellee.
Stephen Julien; Gary Bell; Attorney for Plaintiff/Appellant.

BRIEF

IN THE COURT OF APPEALS DOCKET NO. 930707CA

STATE OF UTAH

BARBARA LYNN BUNCH,	:	
Plaintiff/Appellant,	:	Case No. 930707CA
vs.	:	
BRIAN LYNN ENGLEHORN,	:	Priority No. 15
Defendant/Appellee.	:	

REPLY BRIEF OF APPELLANT BARBARA LYNN BUNCH

Appeal from Judgment of Dismissal With Prejudice

In the Fifth Judicial District Court
for Iron County, State of Utah

Honorable J. Philip Eves
District Court Judge

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IN THE COURT OF APPEALS

STATE OF UTAH

BARBARA LYNN BUNCH,	:	
Plaintiff/Appellant,	:	Case No. 93070-CA
vs.	:	
BRIAN LYNN ENGLEHORN,	:	Priority No. 15
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REPLY BRIEF OF APPELLANT BARBARA LYNN BUNCH

CONSTITUTIONAL PROVISIONS AND STATUTES

UTAH CODE ANN. § 21-7-3 (1991)
Impecunious litigants - Affidavit

Any person may institute, prosecute, defend and appeal any cause in any court in the state by taking and subscribing, before any officer authorized to administer an oath, the following:

I,A,B, do solemnly swear (or affirm) that owing to my poverty I am unable to bear the expenses of the action or legal proceedings which I am about to commence (or the appeal which I am about to take), and that I verily believe I am justly entitled to the relief sought by such action, legal proceedings or appeal.

RULE 10(f), Utah Rules of Civil Procedure
Enforcement by clerk: waiver for pro se parties

The clerk of the court shall examine all pleadings and other papers filed with the court. If they are not prepared in conformity with this rule, the clerk shall accept the filing but may require counsel to substitute properly prepared papers for nonconforming papers.

RULE 3(a), Utah Rules of Appellate Procedure
Filing appeals from final orders and judgments

Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is grounds only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

RULE 3(f), Utah Rule of Appellate Procedure
Filing and docketing fees in civil appeals

At the time of filing any notice of separate, joint, or cross-appeal in a civil case, the party taking the appeal shall pay to the clerk of the trial court such filing as are established by law, and also the fee for docketing the appeal in the appellate court. The clerk of the trial court shall not accept a notice of appeal unless the filing and docketing fees are paid.

RULE 4(a), Utah Rules of Appellate Procedure
Appeal from final judgment and order

In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 dyas after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

ARGUMENT

POINT ONE
THE APPEAL WAS TIMELY FILED

Englehorn argues that this court has no jurisdiction to hear the appeal because the appeal was not filed within thirty days of the filing of the trial court order. While Englehorn admits that a filing took place within thirty days, he claims the filing was a nullity because no fee was paid and because the affidavit of impecuniosity filed in lieu of the fee was defective. Englehorn argues that the affidavit was defective because Bunch did not raise her hand and swear an oath to its truthfulness before signing.

Utah Code Ann. § 21-7-3 (1991) provides that:

> Any person may institute, prosecute, defend and appeal any cause in any court in this state by taking and subscribing, before any officer authorized to administer an oath, the following:
>
> I,A,B, do solemnly swear (or affirm) that owing to my poverty I am unable to bear the expenses of the action or legal proceedings which I am about to commence (or the appeal which I am about to take), and that I verily believe I am justly entitled to the relief sought by such action, legal proceedings or appeal.

The operative language of this section, as pointed out by the trial judge, is the phrase, ". . . by taking and subscribing . . . " The trial judge stated:

> The language requires only that the affiant take the prescribed affidavit to a person authorized to administer oaths and there, before that officer, subscribe to the affidavit. There is no requirement in the statute that the affiant actually swear to an oath in addition to subscribing to the affidavit. If the legislature intended that

> an oath be given other than the one that must be subscribed before a person authorized to administer oaths, it could have easily so provided.

Bunch did all that was required by the statute.

Rule 10(f), Utah Rules of Civil Procedure, provides in pertinent part:

> The clerk of the court shall examine all pleadings and other papers filed with the court. If they are not prepared in conformity with this rule, the clerk shall accept the filing but may require counsel to substitute properly prepared papers for nonconforming papers.

If § 21-7-3 requires Bunch to raise her hand and take an oath before signing an affidavit of impecuniosity, the clerk under Rule 10(f) can still accept Bunch's affidavit but require her to substitute a corrected affidavit for the nonconforming one. The rule allows Bunch the opportunity to return to the notary, explain the problem, and sign a new affidavit after raising her hand and swearing an oath. While Rule 4(a), Utah Rules of Civil Procedure requires an appeal to be filed within 30 days from the entry of the judgment or order, it does not require that the appeal be dismissed because a supporting affidavit of impecuniosity is not correct in every detail. It is submitted that historically most notaries witnessing affidavits of impecuniosity have not required the parties to raise their hand and swear to an oath. The law must be flexible enough to allow for mistakes of this nature to be corrected, otherwise, a party's fate will rest in the hands of the notary he or she may choose to use. Rule 3(a), Utah Rules of

Appellate Procedure, recognizes this in stating:

> Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is grounds only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

Englehorn cites Rule 3(f), Utah Rule of Appellate Procedure, as support for his position. The rule states:

> At the time of filing any notice of separate, joint, or cross-appeal in a civil case, the party taking the appeal shall pay to the clerk of the trial court such filing as are established by law, and also the fee for docketing the appeal in the appellate court. The clerk of the trial court shall not accept a notice of appeal unless the filing and docketing fees are paid.

Bunch believes Rule 3(f) is saying that if one is not impecunious, a fee must be paid by that person. The statute does no apply here because Bunch was impecunious at the time she commenced her appeal. Section 21-7-3 pertains to her situation and simply requires that she file an affidavit of impecuniosity with her notice of appeal. Bunch did that.

Englehorn points out that in McClain v. Conrad, 431 P.2d 571 (Utah 1967) an appeal was dismissed because the filing fee was not paid until after the time for filing an appeal had run, though the notice of appeal had been left with the clerk prior to the appeal deadline. In this case no filing fee was involved and a filing took place within the prescribed period. For these reasons, McClain is distinguishable from this case.

POINT TWO

THE JUDGMENT OF DISMISSAL WITH PREJUDICE IS AN APPEALABLE ORDER

Englehorn argues that the judgment of dismissal with prejudice is not a final order because the issue of attorney fees remains open. It appears that on the one hand Englehorn is stating that the appeal must be dismissed because it was not filed within thirty days, and on the other hand, that the case is not yet ripe for appeal. It is clear to Bunch that the ruling of the trial court was a final order. The trial judge stated:

> 1. That Plaintiff's Complaint in this action should be and it hereby is, dismissed with prejudice and upon the merits, for the reason that no court or administrative order was ever obtained establishing the parties' relationship as a marriage within the required time limits.
>
> 2. That should Defendant desired to claim attorney fees pursuant to UCA 78-27-56 (1953, as amended), he may do so through the filing of an appropriate motion, with appropriate supporting affidavit and memorandum, in order to give Plaintiff ample opportunity to respond. (Record on Appeal, pp. 000114-115.)

In essence, the trial judge ordered that Bunch's complaint be dismissed with prejudice and upon the merits and that Englehorn have the right to pursue attorney fees pursuant to Utah Code Ann. § 78-27-56 (1992) if desired. That ruling was final and adjudged all claims of the parties. Bunch's complaint was dismissed with prejudice and upon the merits and Englehorn's claim to puruse attorney fees was granted. Bunch seeks to overturn those rulings.

POINT THREE

BUNCH IS NOT RAISING ANY ISSUES FOR THE FIRST TIME ON APPEAL

In this action the court dismissed Bunch's complaint with prejudice and upon the merits and ruled that Englehorn could pursue attorney fees pursuant to Utah Code Ann. § 78-27-56 (1992), if he chose. Bunch has appealed that ruling by claiming that the trial court erred in finding that Bunch could not obtain a common law marriage pursuant to Utah Code Ann. § 30-1-4.5 because more than one year had elapsed since her relationship with Englehorn ended. Clearly, that issue was before the trial court. At the time of trial Englehorn moved the court to dismiss the complaint. He stated:

> Based on counsel's opening statement, we move to dismiss any claims based upon a common-law marriage based upon Subsection (2) of the statute . . . for the reason that by her own admission and statement, the relationship -- even if there were such a relation ship -- which we don't admit -- terminated in the middle of August 1990 and as of this date in 1993, there has never been any establishment by an administrative agency or by the Court that such a relationship constituted a statutory marriage.

Bunch responded by saying:

> Well, I -- I guess I'm confused. I -- I thought filing a Complaint was to . . . to accomplish that very purpose to have that determination made. And because the trial has now occurred much more than a year since the relationship terminated, I can't see how that would -- that should prejudice Ms. Bunch

> simply because the trial has now occurred more than a year after.

The court then stated:

> I don't see any authority there that says that the time is tolled from -- from the point when you file a Complaint. . . .It says clearly that the determination or establishment of the marriage must occur within the relationship or within one year following the termination of the relationship. And admittedly by the facts, it hasn't occurred, has it?

Bunch replied:

> Well, -- if that's the way your going to interpret the statute, then I'm going to have to admit that, yes, but I -- I guess I would have some concerns about the constitutionality of such a statute when it would make it -- when a person files a Complaint to have that determination made, and simply because of the delays and court time and that sort of thing, it can't get it to court.

The court later stated:

> And I don't think that's a constitutional question, because I think your entitled to bring a motion right at the outset of the case to have the Court examine this very issue and determine whether or not there's a valid marriage and establish that before we proceed with the issue of whether you can get a divorce.

Bunch then stated:

> Well, if that's the interpretation of the statute, then I've got to -- to concede that I don't have anything to contest that. (Record on Appeal, pp. 000145-147.)

The quotations only reflect part of the discussion that took place on this issue, but they illustrate the point that at the time of trial the constitutionality of the statute in question was at issue. Bunch has simply appealed the court's interpretation of

that statute. Bunch was not required to detail her reasons for arguing that a complaint need only be filed within one year of the separation of the parties.

The issue of attorney fees was also clearly raised at the time of trial. Englehorn asked the court to allow him to pursue attorney fees, pursuant to § 78-27-56 on the basis that Englehorn's complaint was frivolous. The court stated that Englehorn could do that in motion form at some time in the future on giving proper notice to Bunch. Bunch appealed that part of the court order as well. (Record on Appeal, pp. 000153-154.)

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the allegations raised by Englehorn in his brief are without merit and that the decision of the trial court to dismiss Bunch's complaint with prejudice and upon the merits based on section (2) of Utah Code Ann. § 30-1-4.5 was in error. The trial court should have found section (2) to be a one year statute of limitations from the time of the parties separation. Otherwise, section (2) must be interpreted as a statute of repose and unconstitutional for violating Article I, section 11 and Article I, section 7 of our Utah constitution. The order of the trial court dismissing Bunch's complaint with prejudice should be reversed and the trial court instructed to set the matter for trial on Bunch's complaint and

Englehorn's answer.

RESPECTFULLY SUBMITTED this 9th day of September, 1994.

UTAH LEGAL SERVICES, INC.
By: Stephen W. Julien
Attorneys for Plaintiff/Appellant

CERTIFICATE OF DELIVERY

I hereby certify that on this 9th day of September, 1994, I delivered two true and correct copy of the REPLY BRIEF OF APPELLANT BARBARA LYNN BUNCH: to Willard Bishop, Attorney for Appellee, 36 North 300 West, P.O. Box 279, Cedar City, Utah 84721-0279.