2005

Greg J. Hansen v. Julie Ann Kik, fka Hansen : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GREG J. HANSEN, Plaintiff and Appellee, vs. JULIE ANN KIK fka HANSEN, Defendant and Appellant	Trial Court No. 944600366 Appellate Court No. 20050464-CA

BRIEF OF APPELLEE

APPEAL FROM THE AMENDED ORDER OR ORDER TO SHOW AND JUDGMENT DATED NOVEMBER 16TH, 2004 IN THE SIXTH DISTRICT COURT, SANPETE COUNTY, THE HONORABLE PAUL D. LYMAN

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JURISDICTION

Jurisdiction is conferred on the Court by Utah Code Ann. § 78-2a-3(2)(h).

STATEMENT OF ISSUES

1) Whether Appellant **Greg Hansen timely filed his appeal of the November 16th, 2004 order on May 18th, 2005?**

Utah Rule of Appellate Procedure 4 requires a Notice of Appeal to be filed within 30 days of the judgment or order appealed from, with a possible 30 day extension.

2) **Whether, assuming the appeal was timely filed, the trial court incorrectly applied the law in allowing a judgment to be enforced despite claims of limitations, thus applying the equitable version of the Discovery Rule?**

a) This issue was preserved in the trial court, at R. 80-85

b) The standard of review for statute of limitations questions and the application of the Discovery Rule is a question of law, and this Court need show no deference to the trial court. Russell Packard Development, Inc. v. Carson; 2005 UT 14 ¶ 18.

3) **Did the Trial Court correctly place the burden of proof on the wrongdoer to suffer imprecise damages?**

a) This issue was preserved at the trial court at Tr. 1-2.

b) The standard of review is whether there was a rational basis for the damage award; Rees v. Intermountain Health Care Inc.; 808 P.2d 1069, 1079 (Utah 1991).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Utah Code Ann. §78-12-22 Statute of Limitations -- Eight years.

An action may be brought within eight years upon a judgment or decree of any court of the United States, or of any state or territory within the United States.

STATEMENT OF THE CASE

1) This action arose from a divorce matter. Petitioner/Appellant Greg Hansen and Respondent/Appellee Julie Kik were married on June 27th, 1976 and divorced in the Sixth District Court on November 15th, 1994. R. 60-66.

2) On September 30th, 2004 Julie Kik filed an Order to show cause to enforce certain parts of the Divorce decree, namely transfer of equity and personal property to her. R. 70-75

3) On October 22, 2004 the trial court held a hearing on the Motion, and heard testimony from Julie Kik, Greg Hansen and their daughter Christie. R. 86-87.

4) On November 15th, 2004 the Honorable Paul D. Lyman entered his Order on Order to Show Cause and Judgment; ordering Petitioner Greg Hansen to pay to Respondent Julie Kik $4,000 for equity and an additional amount for personal property, leaving both sides responsible for their own attorney's fees. R. 89-94.

5) On April 21, 2005 Respondent/Appellee Julie Kik moved the trial court to correct a clerical error in the judgment. The trial court issued an Amended Order on Order to Show Cause and Judgment on May 5th, 2005 but ordered it to be entered nunc pro tunc on November 15th, 2004. R. 125-129.

6) Petitioner/Appellant Greg Hanson filed his notice of appeal on May 18th, 2005. R. 139-140.

STATEMENT OF FACTS

1) Petitioner/Appellant Greg Hansen and Respondent/Appellee Julie Kik were married on June 27th, 1976 and divorced in the Sixth District Court on November 15th, 1994. R. 60-66.

2) In the divorce decree, Julie Kik was awarded a lien of $4,000 against the real property of the marital estate, with no timeline to execute that lien. Id.

3) Appellee Julie Kik was also awarded certain items of marital property, but allowed to store them at Appellant Greg Hansen's property for a time. Id.

4) Greg Hansen eventually gave some items of that personal property to her, but not most of it. This was around 1999. R. 89-94.

5) When Respondent/Appellee Julie Kik would ask for her property, she testified she was intimidated by Appellant Greg Hansen. Tr. 34.

6) On September 30th, 2004 Julie Kik filed an Order to show cause to enforce certain parts of the Divorce decree, namely to receive her lien amount of $4000, and her remaining personal property. R. 70-75

7) On October 22, 2004 the trial court held a hearing on the Motion, and heard testimony from Julie Kik, Greg Hansen and their daughter Christie. R. 86-87.

8) On November 15th, 2004 the Honorable Paul D. Lyman entered his Order on Order to Show Cause and Judgment; ordering Petitioner Greg Hansen to pay to Respondent Julie Kik $4,000 for equity and an additional amount for personal property, leaving both sides responsible for their own attorney's fees. R. 89-94.

9) The Court, at the November 15, 2004, hearing found major inconsistencies in the Petitioner's testimony and most of what he testified to was questionable. The Court also found that the Petitioner's sworn affidavit was inconsistent with his testimony at trial. R. 89-94.

10) On April 21, 2005 Respondent/Appellee Julie Kik moved the trial court to correct a clerical error in the judgment. The trial court issued an Amended Order on Order to Show Cause and Judgment on May 5th, 2005 but ordered it to be entered nunc pro tunc on November 15th, 2004. R. 125-129.

11) Petitioner/Appellant Greg Hanson filed his notice of appeal on May 18th, 2005. R. 139-140.

SUMMARY OF ARGUMENT

Petitioner/Appellant Greg Hansen has not timely filed his appeal; rather filing it 5 months late. He bases his time for appeal on an Amended Order, but that Order was nunc pro tunc, as it made no material changes. Therefore, his appeal is 5 months late and untimely, and should be dismissed for lack of jurisdiction.

However, if he did file his appeal on time, Appellee Julie Kik was not outside the statute of limitations when she filed her Order to show cause. Statute of limitations are questions of law, reviewed for correctness. The 8 year statute of limitation begins to run from when the judgment is breached, not when it is entered. To hold otherwise would be to eviscerate judicial liens, alimony, child support, and other awards. In this case, the time when the judgment was breached was around 1999, and thus, the statute of limitations would run from then, and Appellee Julie Kik was in plenty of time.

Even if the statute of limitations runs from the date of entry, it was tolled by the discovery rule. And the trial court had a rational basis for its damage awards. Therefore, Appellee Julie Kik asks this Court to dismiss Appellant Greg Hansen's appeal for untimeliness, and to uphold the trial courts ruling.

ARGUMENT

I. DID PETITIONER/APPELLANT GREG HANSEN TIMELY APPEAL?

It is clear that this appeal should be dismissed for being untimely. The final Order being appealed from was entered on November 16th, 2004, and the Notice of Appeal was not filed until May 18th, 2005, a total time of over 6th months. Utah R. App. Procedure 4 allows a time period of 30 days to file a Notice of Appeal from a final order. Petitioner/Appellant Greg Hansen's appeal is clearly untimely, and should be stricken.

There have been no post order motions that would toll the time period, thus saving the time for appeal.

Petitioner Greg Hansen relies on the fact that the trial court did grant a motion to amend the Order on May 5th 2005. If May 5th, 2005 is the time when the final order was issued, then the appeal was timely, if not, it should be dismissed. The Amended Order on Order to Show Cause was by its own terms effective as of November 16th, 2004, not May 5th, 2005.

The Motion to Amend was to correct a clerical error. R. 112-115. The trial court issued it nunc pro tunc, related back to the date of the original judgment, November 16th, 2004.

The rule governing amended judgments is clearly laid out:

> [W]here a belated entry merely constitutes an amendment or modification not changing the substance or character of the judgment, such entry is merely a nunc pro tunc entry which relates back to the time the original judgment was entered, and does not enlarge the time for appeal; but where the modification or amendment is in some material matter, the time begins to run from the time of the modification or amendment.

State v. Kelly Lafe Garner; 2005 UT 6, ¶11 (quoting Adamson v. Brockbank, 185 P.2d 264, 268 (Utah 1947)). Thus, the materiality of the modifications is crucial.

In this case, the change was minor, and did not change the substance or character of the judgment. Paragraph 9 of the findings and Paragraph 1 of the Order were changed by one word each. In each case, the Petitioner was mistakenly substituted for Respondent in the beginning of the paragraph. The Amended Order reads as follows:

> [Paragraph 9 of the Findings]The **Respondent** should be awarded judgment for the value of the personal property items on Exhibit No. 1 for a total of $8,172. The Petitioner should receive a credit against this sum for the reasonable costs of storage of the items in the sum of $1,320. The Respondent should then be awarded a judgment against the Petitioner in the sum of $6,855, which represents the value of the personal property awarded to her in the decree.
>
> [Paragraph one of the Order]The **Respondent** is awarded judgment for the value of the personal property items on Exhibit No. 1 for a total of $8,172. The Petitioner shall receive a credit against this sum for the reasonable costs of storage of the items in the sum of $1,320. The Respondent is then awarded the judgment against the Petitioner in the sum of $6,855, which shall bear interest at the statutory rate until paid in full, which represents the value of the personal property awarded to her in the decree.

The bold word in each paragraph was changed from the word "Petitioner" in the Amended Order on Order to Show Cause. This change is clearly not a material change, for even if the order had remained unchanged, each paragraph is applying a formula, and only can be interpreted as ultimately awarding the Respondent Julie Kik $6,855.

The trial court simply took the total value of the personal property items, subtracted the Petitioner Greg Hansen's storage cost, and then awarded the Respondent Julie Kik the value remaining. Whether the original value of the personal property items was awarded to Greg Hansen or Julie Kik (all the Amended Order corrected), the value was reduced by the storage fees and the remaining value was clearly awarded to Julie Kik. Thus, it is not a material change at all, for the final award, and the figures involved, were not changed in the slightest.

Petitioner Hansen was not harmed or otherwise had his duties changed by this amended order—it was simply a clerical mistake. Thus, the amendment was properly related back to the time of original entry by the trial court, and Petitioner/Appellant Greg Hansen's appeal is untimely and should be dismissed.

II. ASSUMING A TIMELY APPEAL, THE TRIAL COURT PROPERLY ALLOWED THE ORDER TO SHOW CAUSE TO PROCEED

Assuming that Petitioner Greg Hansen timely filed his Appeal, it is clear that the Trial court properly applied the statute of limitations in this case. Statute of limitations and discovery rule questions are questions of law, and are reviewed for correctness. Russell Packard Development, Inc. v. Carson; 2005 UT 14, ¶ 18.

Petitioner/Appellant Greg Hansen's main argument on appeal is that of statute of limitations. He contends that the Order to show cause was filed outside the proper limitations period, and thus the trial court should be reversed, and the judgment against him overturned. This is not so, the trial court correctly applied the law.

The appropriate limitations period in this case is 8 years, as found in Utah Code Ann. §78-12-22: "An action may be brought within eight years upon a judgment or decree of any court of the United States, or of any state or territory within the United States." The original judgment in this case was entered on November 15th, 1994, while the Order to Show cause was filed on September 30th, 2004. Clearly, this was 9 years after the judgment was issued. Petitioner/Appellant Greg Hansen argues that therefore, the Order on Order to show Cause and Judgment was improperly issued against him. He relies heavily on Kessimakis v. Kessimakis; 1999 UT App 130.

As a threshold matter, a statute of limitations begins to run when the last element of the cause of action finally accrues. Russell Packard, 2005 UT 14 at ¶20. The question is, therefore, when did the statute start running in this case? Appellant Greg Hansen contends it started the day the decree was entered. This simply makes no sense, however, for if the rule was that you could only sue on a judgment 8 years after it was entered, regardless of the terms of the judgment, then alimony, child support, etc would be effectively limited to 8 years. This is not the case. It would be a poor rule indeed, if child support could cease on the 8th anniversary of the entry of the final order, regardless of the age of the child (who may not even be 8 yet).

The rule must simply be the same as any other statute of limitation: once the action for a breach of the judgment arises, you have 8 years to make your claim, regardless of when the actual judgment was entered.

Therefore, the question is—when did the 8 years start to run in this case? The trial court stated there was no deadline for the Petitioner, Greg Hansen, to abide by. Nevertheless, there are some time frames to work with. The original divorce decree was interpreted by the trial court to require Petitioner Greg Hansen to deliver personal property to Julie Kik. Order on Order to show cause, ¶1, R. 90. The testimony of Greg Hansen was that he finally delivered property around five years later, in 1999 or so. Id. at ¶12. At that point, Julie Kik knew or should have known that she would never see her personal property, and the 8 years should start

from that time. Her Order to Show Cause is clearly within the 8 year limit from 1999.

As for the delivery of equity in the household, there was no time limit given in the original divorce decree. It simply awarded equity in real property to Julie Kik, the respondent, and stated that upon payment of $4,000 by Greg Hansen, she would therefore no longer have any equity. R. 61, ¶4. In other words, she had a lien on the property in the amount of $4,000. The trial court found this has never been paid. R. 89-94.

This lien puts this case squarely in line with Coulon v. Coulon; 915 P.2d 1069 (Utah App. 1996). In that case, the parties were divorced in 1983, and the husband had a lien for a certain amount of money on real property. He filed an order to show cause in 1994, well past the 8 year statute of limitations if taken from the date of judgment. The Coulon court, while discussing the 8 year statute of limitations in the context of child support payments, never mentions that the order was late; clearly it was entirely appropriate. Coulon is an incredibly important case, not least because it shows that the 8 year statute of limitations runs from the time the judgment is breached, not entered.

Compared with Kessimakis v. Kessimakis; 1999 UT App 130, the case Appellant Greg Hansen relies on, it is clear that several principles emerge. Kessimakis was a case where the wife was awarded an interest in a corporation, but was paid for her interest. The Court decided that the 8 year statute of limitations barred her receiving the evidence of transfer of the interest, but did not

discuss when her claim arose. Clearly, it arose at the time of the entry of judgment, since the judgment created the transfer immediately, and thus the evidence of that transfer was available immediately.

In contrast, in this case the 1994 divorce decree did not create any duties to immediate transfer. The personal property was not ordered transferred by a time certain; in fact, it was allowed to stay at Greg Hansen's house. The lien falls under Coulon, as explained earlier. Furthermore, the facts in Kessimakis are distinguishable from the present matter in several ways. First, in Kessimakis, the Court specifically concluded that Mr. Kessimakis had not done anything that would operate or toll or stay the statute of limitations, nor had he lulled Ms. Kessimakis into inactivity. Id at 1228. In the present matter, the Court found the Petitioner's testimony not credible, but also that the Respondent had made reasonable efforts and demands for her personal property and that the Petitioner had failed, neglected, or refused to make the personal items available to her. R. 89-94. Kessimakis is simply not applicable.

It's clear that Appellee Julie Kik simply had no cause of action to have the statute run on until around 1999. The lien on the property is like any other lien—it can be foreclosed at any time. The personal property was delivered in 1999—and then discovered to be incomplete, at which point the cause of action arose, and the 8 years started running. The trial court basically agreed, when it stated there was no "judgment" and no "time limit," when it addressed the statute of limitations and laches issues. Tr. 67.

Even if the limitations period did run, the "Discovery rule" would step in and toll the statute of limitations. Russell Packard Development, Inc. v. Carson; 2005 UT 14, decided this year, is the leading case on statutes of limitation and the discovery rule. The 8-year limitations period has an equitable discovery rule, and this case fits under ¶30 of Russell Packard. Basically, assuming that Julie Kik was out of the limitations period, if she can show that the reasonable person would have delayed filing, then the limitations period is tolled until discovery, which as established above was 1999.

While the trial court made no explicit findings, the testimony was that Julie Kik was intimidated and bullied by Greg Hansen, and she didn't want to involve her minor children in another court battle. Tr. 34. This clearly was persuasive to the finder of fact. Thus, the Discovery rule should apply and toll the statute of limitations, and the order to show cause was timely filed.

III. THE TRIAL COURT CORRECTLY PLACED THE ISSUE OF IMPRECISE DAMAGES ON THE WRONGDOER, GREG HANSEN

Petitioner/Appellant argues that the amount of damages awarded against him for the personal property is based on "guesses" and is "speculation." He argues that damages cannot be based on speculation alone, citing DUNN v. McKAY, BURTON, McMURRAY & THURMAN; 584 P.2d 894 (Utah 1978).

While damages cannot be only based on speculation, the rule is stated quite well in Sampson v. Richins, 770 P.2d 998, 1007 (Utah App. 1989):

> We note that in the context of a damage award, a trial court's findings of fact must provide a sufficient basis for this court to determine whether there is a rational legal basis as well as a sufficient factual basis for the award of damages. See, e.g., Bastian v. King, 661 P.2d 953, 957 (Utah 1983). However,
>
> [a]lthough an award of damages based only on speculation cannot be upheld, it is generally recognized that some degree of uncertainty in the evidence of damages will not suffice to relieve a defendant from recompensing a wronged plaintiff. As long as there is some rational basis for a damage award, it is the wrongdoer who must assume the risk of some uncertainty. Where there is evidence of the fact of damage, a defendant may not escape liability because the amount of damage cannot be proved with precision.
>
> Id. at 956 (emphasis added).
>
> Further. "[o]nce a defendant has been shown to have caused a loss, ... the reasonable level of certainty required to establish the amount of a loss is generally lower than that required to establish the fact or cause of a loss." Cook Assocs., Inc. v. Warnick, 664 P.2d 1161, 1166 (Utah 1983) (citations omitted). "The amount of damages may be based upon approximations, if the fact of damage is established, and the approximations are based upon reasonable assumptions or projections." Atkin Wright & Miles v. Mountain States Tel. & Tel. Co., 709 P.2d 330, 336 (Utah 1985).

Sampson v. Richins, 770 P.2d 998, 1007 (Utah App. 1989)(Several citations omitted). This quote quite clearly is dispositive; for the trial court carefully examined the little evidence he had, and drew from his own experience where possible to see that the claimed damages were reasonable. Tr. 68-70. In addition,

the Trial Court found major inconsistencies in the Petitioner's testimony, that most of what he testified to at trial was questionable and that the Petitioner's sworn affidavit was inconsistent with his testimony at trial. R. 89-94. There is a rational basis for the award of damages, and thus, it should be upheld.

As for attorney's fees, Appellee Julie Kik notes that Appellant Greg Hansen is essentially asking for sanctions, which is clearly not applicable. Rule 33 of the Utah Rules of Appellate Procedure only applies in this case to Appellant Greg Hansen. And Appellee Julie Kik has made her arguments both in the trial court and in this Court in good faith. Nor has Appellee forced Appellant Greg Hansen to pursue this appeal by winning at the trial court.

CONCLUSION

Petitioner/Appellant Greg Hansen has not timely filed his appeal; rather filing it 5 months late. Therefore, his appeal should be dismissed for lack of jurisdiction.

However, if he did file his appeal on time, Julie Kik was not outside the statute of limitations when she filed her Order to show cause. The 8 year statute of limitation begins to run from when the judgment is breached, not when it is entered. To hold otherwise would be to eviscerate judicial liens, alimony, child support, and other awards.

Even if the statute of limitations runs from the date of entry, it was tolled by the discovery rule. And the trial court had a rational basis for its damage awards.

Therefore, Appellee Julie Kik asks this Court to dismiss Appellant Greg Hansen's appeal for untimeliness, and to uphold the trial courts ruling.

DATED this 4th day of January, 2006

Douglas L. Neeley
Attorney for Appellee

CERTIFICATE OF SERVICE

I do hereby certify that on this 6 day of January, 2006, I mailed a true and correct copy of the foregoing Appellee's Brief, postage prepaid, to Andrew B. Berrry, Attorney for Appellant, at P.O. Box 600, Moroni, Utah, 84646.

SECRETARY