

2005

J. J. Abernathy v. John Mzik : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Abernathy v. Mzik*, No. 20051101 (Utah Court of Appeals, 2005).
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**IN THE COURT OF APPEALS
OF THE STATE OF UTAH**

J.J. ABERNATHY,

Petitioner/Appellee,

vs.

JOHN MZIK,

Respondent/Appellant.

Appellate No. 20051101-CA

District Court No. 050500870

APPELLANT'S REPLY BRIEF

Appeal from the Judgment and Orders of the District Court
of the Fifth Judicial District, State of Utah
the Honorable James L. Shumate, Presiding.

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ARGUMENTS

I. APPELLANT'S BRIEF IS NOT DEFECTIVE

The alleged errors brought up by Appellee are de minimus and should not make the brief defective. In Carrier v. Salt Lake County, 513 Utah Adv. Rep. 23, (2004), the Supreme Court denied a motion to strike the brief because the brief failed to include citations to the record, did not include supporting legal authority, and provided inaccurate citations. The rationale for the Court was that it was able to navigate the record with the citations provided. The Appellant's brief contains some minor errors, but none that would prevent the Court from finding the information it was looking for and none that would affect the merits of this action.

A. Appellant Was Not Given An Opportunity To Preserve A Record Below

The Trial Court traditionally hears these type of cases in a quick inquisitorial manner where the Court does not allow for opening arguments nor closing arguments. The Trial Court also does not tend to hear cases past 5:00 p.m. and when it does go over it tries to keep everything as short as possible. In this case, Judge Shumate indicated at the beginning, "I've had an opportunity to go through these files. I intend to conduct today's hearing myself pretty much in an inquisitorial fashion in determining for myself from the testimony of the parties and other evidence or witnesses that you may have regarding these matters." (R. 266 p. 3, 14-18). By making this demand at the beginning of the case, the Court stated that it was going to take over the presentation of the case and did not allow for opening arguments nor closing arguments.

At the end of the hearing when the Court asked if there was anything else, it was a specific reference to the fine points of the findings and not an open invitation to argue the Court's ruling. The Court stated, "All right, Counsel. The Court having heard the testimony and the evidence offered by the petitioner, as well as the respondent, I'm going to make certain findings with respect to Kellie Abernathy first. The Court is not persuaded by the burden of proof that Kellie Abernathy ever made a threat of physical harm – Mr. Braithwaite: Your Honor, it's Kellie Mzik. The Court: Mzik, I'm sorry, Counsel. I appreciate you correcting me. It's 5:25 and it's been a long afternoon. I appreciate that. The Court does not find that there was ever a threat of physical harm to Mrs. Abernathy by Kellie Mzik. . . ." (R. 266 p. 139, 16-25 – p. 140, 1). The Court went on to make its findings with regards to Kellie Mzik and then to John Mzik. At no point did the Court invite, nor even gave an opportunity for counsel to make a closing argument as to what the findings should be. The Court made its findings and then asked for help in fine tuning the order, as was the customary practice of the Court in these types of cases. It was after 5:00 p.m. and the Court did not want to stay there any longer and did not want counsel to make any type of closing argument. This is evident by the court's statement at the beginning that it was going to take over the presentation of the case and by its conduct at the end. The Appellant should not be precluded from appealing the Court's decision based upon the Court not having the time to make an adequate record.

B. Appellant Did Marshall The Evidence

The Appellant marshaled all of the relevant evidence and included it in his Statement of Facts as well as in the arguments in the brief. The facts excluded were

irrelevant to the legal issue and were not necessary. Hurt v Hurt, 793 P.2d 948 (Utah 1990).

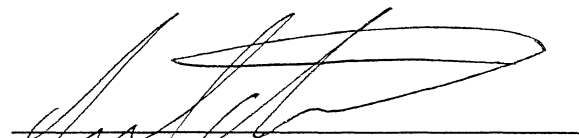
The requirement of marshalling evidence in support of an appeal applies only to challenges of factual findings, not to conclusions of law. Peirce v. Peirce, 994 P.2d 193, (Utah 2000). The Appellant is challenging the Court's interpretation of the statute in applying the facts to the statute.

The Appellant contends that the Court did not correctly interpret "emotional distress" as contained in the Civil Stalking Injunction Statute.

CONCLUSION

With respects to the Arguments Nos. II and III of Appellee's Brief, the Appellant would simply restate his arguments in his initial brief. For these reasons, the Trial Court's decision should be reversed and Mr. Mzik should not have a civil stalking injunction against him.

DATED this 8 day of January, 2007.

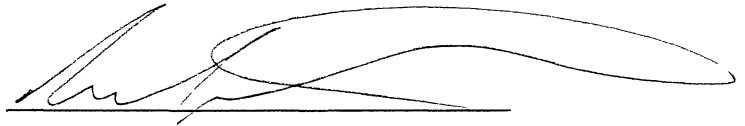


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CERTIFICATE OF SERVICE

I hereby certify that on the 9 day of January, 2007, I caused to be hand-delivered, a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to the following:

Virginus Dabney
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A handwritten signature in dark ink, appearing to read 'Virginus Dabney', is written over a horizontal line.