2006

Roger Bryner v. Michelle Blomquist, Kerry Sprague, Administrative Office fo the Courts : Reply Brief

Utah Court of Appeals

Roger Bryner
1042 East Ft. Union Blvd #330
Midvale, Utah 84047
Fax: 877-519-3413 Phone: 255-7729

IN THE APPEALS COURT
SATE OF UTAH

ROGER BRYNER Petitioner and Appellant vs. Michelle Blomquist Kerry Sprague Administrative Office of the Courts Respondents and Appeallees	REPLY BRIEF OF THE APPELANT Case No. 20060038-CA Trial Court No: 050921532

Interested parties: As captioned above.

Roger Bryner
1042 East Ft. Union Blvd #330
Midvale, Utah 84047
Fax: 877-519-3413 Phone: 255-7729

IN THE APPEALS COURT
SATE OF UTAH

ROGER BRYNER Petitioner and Appellant vs. Michelle Blomquist Kerry Sprague Administrative Office of the Courts Respondents and Appeallees	)	REPLY BRIEF OF THE APPELANT Case No. 20060038-CA Trial Court No: 050921532

Interested parties: As captioned above.

(3) Table of Authorities

(9) Argument.

Nowhere in the Brief of the Trial Court and Defendant's Lawer does any reference to the Record appear. Nowhere does the Trial Court and Defendant's Lawyer cite to the record to show that the issues of law were preserved by the trial court. Furthermore, the argument that the petition was amended under Rules 2 and 15(a) prior to answer or service, and thus is now properly before the Court, was not addressed. Kelly v. Hard Money could be clarified for those judges who still don't "substance over form."

9.1 Reply to issue 1 argument and Utah Case law.

On page 4 the Trial Court and Defendant's Lawyer sets forth almost the exact language of Defendant's petition, supporting my argument that my original petition was sufficient. No citation to the Record to show that I failed to do exactly what they claim is required by law was given. No finding that "the court is not convinced that the perpetuation of testimony may prevent a failure of justice" is presented. In fact, the Court states clearly in Trial Court and Defendant's Lawyer own Exhibit A stating: "The Petition in this case recites the langue of the rule in stating that the petitioner expects to be a part to an action cognizable in a court of this state but is presently unable to bring the action. In the court's view, a simple recitation of Rule 27...."

The Trial Court and Defendant's Lawyer raises for the first time upon appeal, the issue that "fishing expedition for the purposes of preparing a complaint" appear in the cited case law. In the referenced case, the Court made a finding that the Plaintiff fully intended to bring a lawsuit against the Defendants but was only using the Rule 27 action to prepare for a suit. Notice of intent to file suit had been served in the referenced case. No such finding has been made in this case by the Trial Court, no notice of intent to sue has been served by me. It is essentially impossible from a practical standpoint to sue a Judge in the US, even if the law and act is clear. Innocent people maliciously wrongly convicted and held for 5 years are the level of misconduct required before action is taken, and even then the Supreme Court had to make the ruling. My purpose in bringing this action, more than any other, is to preserve testimony that the Trial Court in case #044904183 approved a stipulation on parent time and custody for my children. Secondary reasons include an interest in preventing failures of justice by political change, and I fully admit I am an Activist. As a citizen, I can be, however I can not simply write (or re-write) law myself as I don't have standing to do so. As the Trial Court and Defendant's Lawyer has raised the issue for the first time upon appeal, and the Trial Court failed to make any findings in this regard, this issue is not properly before the Court of Appeals and can not be raised for the first time here.

9.2 Reply to interpretations of case law mentioning "exceptional circumstances."

The case law cited supports my position that a Rule 27 petition should be granted. To quote Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra, 198 F.3d 473, *; 1999 U.S. App. LEXIS 32006; 45 Fed. R. Serv. 3d (Callaghan) 1; 2000 AMC 317:

> PROCEDURAL POSTURE: Respondent appealed from the United States District Court for the District of Maryland's grant of petitioner's Fed. R. Civ. P. 27 petition, that permitted petitioner to inspect and perpetuate evidence of a ship's condition, prior to arbitration proceedings in United Kingdom . The district court sealed the evidence pending appeal.
> OVERVIEW: Over respondent's objection, petitioner's Fed. R. Civ. P. 27 petition was granted, permitting petitioner to inspect and perpetuate evidence of a ship's condition, prior to arbitration proceedings in United Kingdom. The district court sealed the evidence pending appeal. On appeal, the court agreed petitioner demonstrated "extraordinary circumstances" that justified the discovery in aid of arbitration. Petitioner was in danger of losing access to any evidence of the ship's condition. Given the time-sensitive nature of the request and nature of the evidence sought, the court did not abuse its discretion in entertaining the petition. Petitioner adequately demonstrated that the information sought was otherwise unavailable. In this narrow set of facts, petitioner faced a "special need" that justified preserving the evidence. Rule 81 did not preclude the district court from considering the discovery request. Affirming, the court remanded with instructions to transfer the sealed evidence to the arbitration proceeding.
> OUTCOME: The court affirmed the exercise of jurisdiction to preserve evidence in aid of arbitration, in the extraordinary circumstances presented, on the narrow set of facts presented. The court remanded with instructions to transfer the sealed evidence to the arbitrator in pending foreign arbitration proceeding.

This supports, and does not contradict, the premise that loss of a court tape is an "exceptional circumstance" and that as such a trial court would not be abusing it's discretion to grant such a request. Much like Kelly v. Hard Money, the misquoting of the conservative language in this ruling has lead to the erroneous conclusion that ships

leaving port and old people living abroad are the only things subject to Rule 27. What about space shuttles? Terminal disease? People who will be hit by cars tomorrow, and if so how is that predicted? In fact, it supports the position that the ambiguity with respect to judicial immunity, lawsuit, and appeal as the recourse to the father of his children is grounds for granting a rule 27 petition, and that issues of sealing records or limiting their use are fully addressable in Rule 27 actions by the trial court if properly brought. To further quote from the same case:

> HN13 A petitioner under Fed. R. Civ. P. 27 does not have to demonstrate a cognizable action with absolute certainty.
>
> HN14 Under Fed. R. Civ. P. 27, a cognizable action only requires a sufficient likelihood that the expected litigation will eventuate.
>
> HN18 To show that Fed. R. Civ. P. 27 perpetuation of testimony may prevent a failure or delay of justice, a petitioner must demonstrate a need for the testimony or evidence that cannot easily be accommodated by other potential witnesses. The testimony to be perpetuated must be relevant, not simply cumulative, and likely to provide material distinctly useful to a finder of fact. Evidence that throws a different, greater, or additional light on a key issue might well prevent a failure or delay of justice. Fed. R. Civ. P. 27(a)(3).

9.3 New argument that Requirement that petitioner bears the burden of proving that evidence could be lost in order to satisfy Rule 27.

> This argument was raised nowhere in the Trial Court and thus is not properly before the Appeals Court. The ruling of Judge Quinn does not reference this.
>
> How absurd is this argument in light of the loss of official court records, which is

about the best evidence anyone could have? Also, my own citations in the brief show that like the case above, a reason for upholding the grant of a Rule 27 petition is now being misquoted to argue against granting one, just as with Kelly v. Hard Money. This is the same error of inverting logic.

9.4 New argument that a finding of fact that Petitioner attempts to uncover, rather than perpetuate facts.

This argument is not properly before the Appeals Court, as Trial Court and Defendant's Lawyer as well as the Trial Court itself failed to raise it in the official Court record. Furthermore, this argument, if taken to the extreme, would preclude discovery and introduce a veil of secrecy over all judicial proceedings. I think the obvious specification that "what happened to the records, and what do you remember about what is on the records" is good enough.

9.5 Reply to law cited in support of inability to bring action.

This issue is raised for the first time upon appeal. Nowhere in Defendant and Appellees material have they raised the defense that I only intend to use this as a fishing expedition for bringing a suit or presented any evidence to the Trial Court to justify such a conclusion.

9.6 Reply to newly raised issue preventing cognizable action (and also applied to inability to bring suit.)

The issue of judicial immunity was never raised in the trial court. No citations to rulings or findings of fact on this issue were presented, only arguments in the amended pleading. Administrative Actions of the Court are not subject to immunity, while judicial ones are. That fact alone, that Comissioner Blomquist in approving the stipulation was doing a judicial act, but in recording it only an administrative one, is grounds for considerable uncertainty in exactly what for the legal action will appear and when. Is the action an appeal, petition to modify, or a federal lawsuit? It is not relevant to this case, as cited above the specifics are nor required. Furthermore, the argument that either the action is cognizable but I am unable to bring it due to judicial immunity is possible. As this has not been ruled upon by the Trial Court, it is not properly before the Court of Appeals.

(10) Relief Sought

Petitioner Roger Bryner would like the orders of January 4th 2006 (Record pages 129-130) and December 8th 2005 (Record pages 18-20) reversed and remanded for further hearing at the trial court on the amended complaint of December 12th 2006, with a hearing promptly scheduled with 20 day notice mailed by the Trial Court at which time the right to raise defenses should be forever waved by Defendants unless they raise them then and prevail under Rule 27. Also, if I made any errors in form, law or substance I would appreciate some detail on them so I can correct them in future actions, as I am not a lawyer and am having considerable difficulty doing this right.

Dated this 27th Day of July, 2006

Roger Bryner, Petitioner and Appellant

CERTIFICATE OF SERVICE

I certify that on the ~~29th~~ 31st day of January, 2006, I did cause to be delivered by facsimile and first class mail, postage prepaid, the forgoing document to the following persons:

To: Kerry Sprague
3rd District Court Clerk
450 South State Street
Salt Lake City, Utah
Phone: (801) 238-7480
Fax: (801) 238-7137

To: Michelle Blomquist
3rd District Commissioner
450 South State Street
Salt Lake City, Utah
Phone: (801) 238-7480
Fax: (801) 238-7137

To: Brent Johnson, General Counsel
Administrative office of the Courts
450 South State Street
Salt Lake City, Utah
Phone: 801-578-3800
Fax: 801-578-3843

Roger Bryner