

1995

Shawn F. Reeves and Julie N. Reeves v. Thad B. Steinfeldt : Petition for Rehearing

Utah Court of Appeals

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D. David Lambert; Philip E. Lowry; Howard, Lewis & Petersen; Attorney for Appellees.

William M. Jeffs; Jeffs & Jeffs, P.C.; Attorneys for Appellant.

Recommended Citation

Legal Brief, *Reeves v. Steinfeldt*, No. 950132 (Utah Court of Appeals, 1995).

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BRIEF

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DOCKET NO. 950132-CA

IN THE UTAH COURT OF APPEALS
OF THE STATE OF UTAH

SHAWN F. REEVES and
JULIE N. REEVES,

Plaintiffs-
Appellees,

vs.

THAD B. STEINFELDT dba
STEINFELDT CONSTRUCTION

Defendant-Appellants.

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Case no. 950132-CA

Oral Argument
Priority 15

RESPONSE TO PETITION FOR REHEARING

Appeal from the Judgment of the Fourth Judicial
District Court, Utah County, State of Utah,
The Honorable Ray M. Harding

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ATTORNEYS FOR Appellee

FILED

APR - 3 1996

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS
OF THE STATE OF UTAH

SHAWN F. REEVES and
JULIE N. REEVES,

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ATTORNEYS FOR Appellee

COMES NOW Steinfeldt, by and through counsel, William M. Jeffs, of the firm of JEFFS & JEFFS, P.C., and files a brief in Response to Reeves Petition for Rehearing as requested by the Court. Steinfeldt's Response to Reeves Petition for Rehearing is as follows: REEVES FAILED TO SPECIFICALLY ASK THAT ATTORNEY FEES BE AWARDED IN THE CROSS-APPEAL AND, COURT HAS THE DISCRETION TO AWARD REASONABLE ATTORNEY FEES.

Reeves's Petition for Rehearing refers to Reeves's Motion to Dismiss filed on May 10, 1995. They referred to this Motion and Memorandum as specifically requesting attorney fees under UTAH CODE ANN. § 38-1-18. See Motion to Dismiss, attached as Exhibit "A". The Motion and Memorandum fails to specifically request attorney fees in any way. Reeves Reply Memorandum in support of the Motion to Dismiss or in the Alternative Motion For Reconsideration, filed on May 23, 1995, attached as Exhibit "B," also does not mention or specifically ask that attorney fees be awarded to the Reeves.

The Response Brief of Appellees and Brief of Cross-Appellants filed by the Reeves on August 15, 1995 contains one sentence that refers to the awarding of attorney fees, but that statement was referring to Steinfeldt's request for attorney fees on his appeal. The Response Brief of Appellee's states on page 18, "The award of attorney fees to Reeves as a defending successful party was permissible under the statute." This statement is in Reeves's brief responding to Steinfeldt's Request for Attorney Fees and is not in and of itself a request for attorney fees on the part of Reeves. Reeves did not in the filing of the Brief of Appellee or in his cross appeal ask this court for an award of attorney fees. It is not appropriate, as a Petition for Rehearing to now, for the first time, ask for attorney fees on the appeal. Reeves was arguing to sustain the award from the trial court.

In the opinion of this court, ruling on the appeal and cross appeal, the panel did not award attorney fees to Reeves. The panel could have awarded the attorney fees if they had felt it was appropriate to award such fees and if the request for attorney fees had been a part of the

appeal. Reeves failed to make any affirmative requests for fees in any pleading before the Utah Court of Appeals. Steinfeldt requests that the Petition for Rehearing be denied and the request for attorney fees also be denied.

DATED AND SIGNED this 2nd day of April, 1996.



William M. Jeffs

I hereby certify that the original and six copies of Appellant's Response to Petition for Rehearing were mailed to the Utah Court of Appeals and two true and correct copies of the same were sent to the below named party, with postage pre-paid thereon, this 2nd day of April, 1996, addressed as follows:

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Provo, Utah 84601



William M. Jeffs

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Our File No. 22,330

Attorneys for Plaintiffs-Appellees

IN THE COURT OF APPEALS OF THE
STATE OF UTAH

| | |
|--|--|
| SHAWN F. REEVES and JULIE N. REEVES, | MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR RECONSIDERATION |
| Plaintiffs-Appellees, | |
| vs. | Case No. 950132-CA |
| THAD B. STEINFELDT dba STEINFELDT CONSTRUCTION, | |
| Defendant-Appellant. | |

Pursuant to U.R.A.P. 23, plaintiffs-appellees Shawn and Julie Reeves move this court to dismiss Steinfeldt's appeal for lack of jurisdiction, or, in the alternative, to reconsider the dismissal of their cross-appeal. This motion is accompanied by a supporting memorandum.

MAY 11 1995

DATED this 10th day of May, 1995.

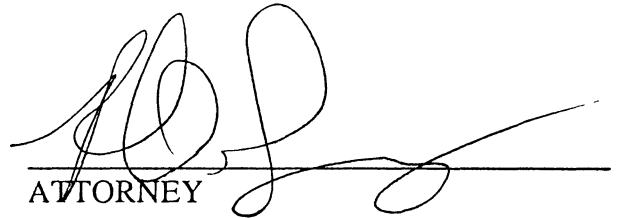


PHILLIP E. LOWRY, for:
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Attorneys for Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing were mailed, postage pre-paid, to the following this 10th day of May, 1995.

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IN THE COURT OF APPEALS OF THE
STATE OF UTAH

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| <p>SHAWN F. REEVES and JULIE N. REEVES, Plaintiffs-Appellees, vs. THAD B. STEINFELDT dba STEINFELDT CONSTRUCTION, Defendant-Appellant.</p> | <p>MEMORANDUM SUPPORTING REEVES' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR RECONSIDERATION</p> <p>Case No. 950132-CA</p> |
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Plaintiffs-appellees Shawn and Julie Reeves have moved this court to dismiss Steinfeldt's appeal for lack of jurisdiction, or, in the alternative, to reconsider the dismissal of their cross-appeal.

ARGUMENT

The argument that Reeves raise is jurisdictional, and thus may be considered by this Court at this time. Indeed, a jurisdictional argument can even be raised at oral argument.

MAY 11 1995

Swenson Associates Architects v. Utah, 889 P.2d 415 (Utah 1994). The Reeves' argument is predicated on the timing of Steinfeldt's notice of appeal. A chronology of this case's docket is appropriate:

1. September 12, 1994. Memorandum decision issued in which Reeves' motion for partial summary judgment is granted, counsel to prepare an appropriate order.

2. October 17, 1994. Memorandum decision issued after trial which substantially favored Reeves. Reeves' counsel to prepare an appropriate order.

3. October 25, 1994. Steinfeldt's "Motion for Reconsideration" is filed.

4. November 4, 1994. Judge Harding signs the Judgment and Findings of Fact and Conclusions of Law (Order was submitted to court by Reeves' counsel on October 27, 1994).

5. November 8, 1994. Steinfeldt's Objection to Plaintiff's Proposed Findings of Fact and Conclusions of Law filed.

6. December 2, 1994. Judge Harding signs an Order granting Steinfeldt's ex parte motion for an extension of time to file notice of appeal.

7. December 17, 1994. Judge Harding issues a Memorandum Decision denying Steinfeldt's Motion for Reconsideration. Reeves' counsel to submit an appropriate order.

8. December 27, 1994. Notice of appeal filed.

9. January 3, 1995. Judge Harding signs an Order disposing of Steinfeldt's Motion for Reconsideration and Objection.

Utah Rule of Appellate Procedure 4(a) provides that a notice of appeal may be filed "within 30 days after the date of entry of the judgment or order appealed from." A notice of appeal filed "after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the date thereof," U.R.A.P. 4(c), *provided*, however, that "[a] notice of appeal filed before the disposition of [a Rule 59 motion for a new trial] shall have no effect." U.R.A.P. 4(b).

In this case a "Motion for Reconsideration", brought ostensibly under U.R.C.P. 54 (see the motion's supporting memorandum), was filed after announcement of the court's decision but before the signing of the final order. At first blush it seems that a notice of appeal would have been timely filed before November 4, 1994 under Rule 4(c)'s saving clause. That all changed, however, when the court issued its final order on November 4, 1994 *without disposing of the outstanding motion*.

Perhaps there was no way of knowing whether the November 4 Order disposed of the motion, but the court's December 17, 1994 removed any doubt that the court did not consider the motion to be a Rule 54 motion, but rather a Rule 59 motion. This is the only appropriate course it could take given the timing of its rulings.

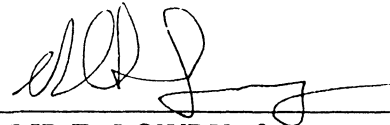
Even were this not so, Steinfeldt's "objection", filed four days after the entry of the court's November 4 Order, was clearly a Rule 59 motion. "Regardless of how it is captioned, a motion filed within ten days of the entry of judgment that *questions the correctness of the court's findings and conclusions* is properly treated as a post-judgment motion under either Rules

52(b) or 59(e)." Debry v. Fidelity Nat'l Title Ins. Co., 828 P.2d 520, 522-23 (Utah Ct. App. 1992); see Brunetti v. Mascaro, 854 P.2d 555, 557 (Utah Ct. App. 1993).

Given these facts, Steinfeldt could not have timely filed his notice of appeal until January 3, 1995, or within thirty days after that date. Swenson Associates Architects v. Utah, 889 P.2d 415 (Utah 1994). This is true even considering Judge Harding's granting of the extension of time to file the notice of appeal. The notice was ineffective given the pending post-judgment motion. Because Steinfeldt did not file a timely notice of appeal, his appeal must be dismissed. See U.R.A.P. 2 (provisions of Rule 4(b) may not be suspended).

If the Court is not persuaded by this analysis, the fact remains that a final order disposing of this case was not filed until January 3, 1995. That means that the period for filing a cross-appeal (accepting that a valid notice of appeal was filed) began to run on January 3, 1995. U.R.A.P. 4(d)("[A]ny other party may file a notice of appeal . . . within the time otherwise prescribed by paragraph (a) of this rule . . ."). The notice of cross-appeal was filed on January 11, well within the thirty-day time limit. Thus, the notice of cross-appeal should be deemed timely and the cross-appeal reinstated.

DATED this 10th day of May, 1995.




PHILLIP E. LOWRY, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing were mailed, postage pre-paid, to the following this 10th day of May, 1995.

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Our File No. 22,330

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IN THE COURT OF APPEALS OF THE
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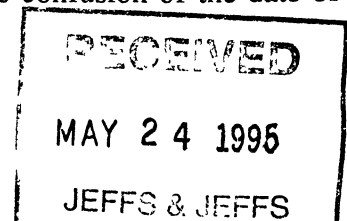
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| SHAWN F. REEVES and JULIE N. REEVES, | REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR RECONSIDERATION |
| Plaintiffs-Appellees, | |
| vs. | |
| THAD B. STEINFELDT dba STEINFELDT CONSTRUCTION, | Case No. 950132-CA |
| Defendant-Appellant. | |

Plaintiffs-appellees Shawn and Julie Reeves reply to Steinfeldt's Memorandum in Opposition.

ARGUMENT

1. The Chronology is Substantively Correct

The Reeves acknowledge that the December Memorandum Decision was issued on December 8, not December 17. This was an oversight caused by the confusion of the date of



the October 17 decision and the December decision, and the Reeves apologize for any confusion this may have caused the Court.

In any event, the mixed dates are a mere curiosity, as they do nothing to affect the substance of the Reeves' arguments. Steinfeldt contends that he "had no knowledge as to when Plaintiffs submitted the Order to the Court for signature." This is irrelevant. Steinfeldt knew that the Order was pending, and it was his duty to be diligent and check with the clerk's office, every day if need be, to ensure that any further documents were filed by him before the filing of the Order. Notice of the Order was not required for the time for filing a notice of appeal to accrue. See U.R.C.P. 58A(d)("The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. *However, the time for filing a notice of appeal is not affected by the notice requirements of this provision.*")(emphasis supplied); Workman v. Nagle, 802 P.2d 749 (Utah Ct. App. 1990).

2. The Motion for Reconsideration Was a Rule 59 Motion.

Steinfeldt states that in his motion for reconsideration he was "only asking for a reconsideration of the Judge's Memorandum Decision." This is essentially an assertion of an error in law. U.R.C.P. 59(a)(7). It is irrelevant how a party styles its motion. What is important is how the court treats the motion. Watkiss & Campbell v. Foa & Son, 808 P.2d 1061 (Utah 1991). Here, the court *did not dispose of the motion for reconsideration until after*

the Order had been signed. The Court, therefore, obviously treated the motion as a Rule 59(b) motion.

Steinfeldt suggests that such an approach is inequitable. This is not true. It is his duty, once again, to determine what motions have been disposed of upon entry of what is presumably a final Order. If there is any doubt as to whether a motion remains outstanding, the party should request a ruling, perhaps moving alternatively for an extension of the time to appeal. It is unfortunate that courts at times fail to give sufficient guidance as to what their rulings mean, but it is the appellant's responsibility to be diligent in finding the answers to any questions left unanswered. That is what this Court and the Supreme Court have required. See, e.g., Swenson Associates Architects v. Utah, 889 P.2d 415 (Utah 1994).

3. The Objections Were a Rule 59 Motion.

Steinfeldt cites no authority for his argument that the Objections he filed were not a post-judgment motion, and does nothing to rebut the authority cited by Reeves. Indeed, Steinfeldt has resorted to a "no notice" argument. This is surprising, given that Reeves attempted such an argument in trying to preserve their cross-appeal (the argument was that because the distinction between "filing" and "service" is ambiguous and a trap for the unwary, a notice of cross-appeal filed more than ten days after filing but before ten days after service should be deemed timely based upon excusable neglect). This Court rejected argument. Why? Because when a time period runs from the time of filing, *actual notice is irrelevant*. Since the court's docket is a public record, a party is *always* on constructive notice of a filing.

Steinfeldt claims that adopting such an approach means that "Defendant may be required to file a new Notice of Appeal or lose the appeal." Steinfeldt is exactly right, and has expertly stated the Supreme Court's ruling in Swenson Associates Architects v. Utah, 889 P.2d 415 (Utah 1994). As for the second prong of Steinfeldt's "dilemma" (one must wait for the signed Order to file the notice of appeal and, if it is not deemed a Rule 59 motion, the notice is deemed untimely), a solution was suggested above: file a request for a ruling pled alternatively with an request for extension of time to file the appeal. Steinfeldt filed a request for extension below, but omitted a request for ruling. It is his fault for failing to ask the court for a clarification as to whether the Motion for Reconsideration had been disposed of.

4. Reeves' Motion for Reconsideration is Proper.

This Court raised its jurisdiction over Reeves' cross-appeal sua sponte, and dismissed the cross-appeal on the grounds that the notice of cross-appeal was not filed within ten days of the December 27 notice of appeal. Reeves have pointed out to this Court that the final Order in the case was not signed until January 3, and thus the cross-appeal was timely. Steinfeldt has argued nothing substantive to the contrary.

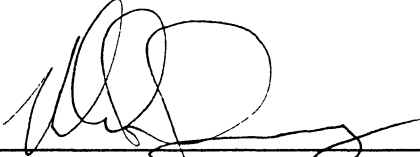
5. Sanctions.

It is not in Reeves' interest to prolong this appeal, and they have no intention to do so. Rule 33(b) clearly requires some kind of nefarious intent, and such has not been demonstrated. Attorneys often think of their best arguments on the way from the courthouse, and should not be punished for raising meritorious arguments as long as there are procedural grounds for doing

so. Jurisdictional arguments may be raised at any time--in Swenson they were raised at oral argument. Reeves have not been dilatory in raising the jurisdictional issue. Therefore, sanctions are not appropriate.

For the above reasons, the appeal should be dismissed, or, in the alternative, the cross-appeal should be reinstated.

DATED this 23rd day of May, 1995.



PHILLIP E. LOWRY, for:
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Attorneys for Plaintiffs

CERTIFICATE OF MAILING

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