1995

Salt Lake City, a municipal corporation v. Willis Dorman-Ligh : Reply Brief

Utah Court of Appeals

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Kathryn Collard; Attorney for Defendant/Appellee.

IN THE COURT OF APPEALS DOCKET NO. 950166 CA

STATE OF UTAH

SALT LAKE CITY, a municipal corporation, Plaintiff/Appellant, vs. WILLIS DORMAN-LIGH, Defendant/Appellee.	)	Case No. 950166-CA Priority 15

REPLY BRIEF OF APPELLANT

APPEAL FROM THE THIRD CIRCUIT COURT
SALT LAKE DEPARTMENT, STATE OF UTAH
THE HONORABLE FRANCES M. PALACIOS, COMMISSIONER, PRESIDING

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FURTHER STATEMENT OF THE CASE

Appellant Salt Lake City ("City") takes exception to Appellee Dorman-Ligh's ("Dorman-Ligh") Statement of the Case in the following respects:

1. Dorman-Ligh states that on April 18, 1994,(Appellee's brief, p. 5), Commissioner Palacios ordered that the City Prosecutor appear at the May 19, 1994 hearing and that the City submit a brief in opposition to Dorman-Ligh's Motion to Dismiss. In fact, the Commissioner did not order such. It is the City's contention that the Commissioner made a non-binding suggestion or request. (Record, pp. 116-117, 119, 121.)

2. Dorman-Ligh's reference to the Circuit Court's ruling of September 26, 1994 (Appellee's brief, p. 7) might be read to say that the Court ultimately granted Dorman-Ligh's Motion to Dismiss. In fact, the Court reversed its earlier dismissal and granted the City's Motion. (Record, pp. 197-198. Also see Findings numbered 8, 9 and 10 at Record, p. 99.)

3. The Appellee brief (p. 7) suggests that the Findings of Fact, Conclusions of Law and Judgment and Order of Dismissal were entered on January 9, 1995. In fact, they were not entered until February 23, 1995.

ARGUMENT

INTRODUCTION

Dorman-Ligh has not addressed or responded in her Appellee brief to any of the substantive issues raised by the City in its appeal. Rather, Dorman-Ligh has risked her entire response on one argument: that the issues raised by the City were not preserved for appeal from the lower court. Unfortunately, Dorman-Ligh's argument must fail, since the issues were very clearly preserved in the lower court, by the court itself, as has been pointed out in the City's initial brief.

POINT I

THE CITY HAD NO OPPORTUNITY TO OBJECT TO THE CIRCUIT COURT'S FINDINGS AND JUDGMENT PRIOR TO THEIR ISSUANCE

The City set forth in detail in its appeal brief the strange set of circumstances which led to the issuance by the Circuit Court Commissioner of her judgment of dismissal, with prejudice, of the City's case. Those circumstances are the basis for this appeal.

To reiterate briefly, a hearing was held on May 19, 1994 on Dorman-Ligh's Motion to Dismiss. After taking evidence and argument, the Commissioner verbally ruled that the City's case was dismissed on its merits. Before the dismissal order was entered, the City filed a Motion for Rehearing. On September 1, 1994, a hearing was held before the Commissioner on the City's motion. After receiving memoranda and argument from counsel for both parties, the Commissioner stated that she was reversing the previous dismissal and was granting the City's motion. However, she then stated that she was instead dismissing the City's case, with prejudice, because Cheryl Luke, the City Prosecutor, had not appeared at and been prepared for the May 19, 1994 motion hearing. Rather, Ms. Luke had assigned another prosecutor to handle the matter. (See Record, pp. 197-198. See also Findings

numbered 8, 9, and 10 at Record, p. 99.)

In effect, the Commissioner's judgment of dismissal was the result of the Court's own motion, rather than the result of any motion made by the parties. The City had fully briefed and argued the issues raised in its Motion for Rehearing, but the City had no notice of the Court's own motion nor any opportunity to argue or object to the judgment of dismissal prior to its issuance. Once the written findings and judgment were entered, the City, within the time allowed under the rules, filed its appeal of those findings and that judgment to this Appellate Court.

The purpose for the rule requiring that issues on appeal must have been preserved in the lower court is to insure that the lower court will have an opportunity to be fully advised on the issue and make an appropriate ruling accordingly. As was stated in the case of Broberg v. Hess:

> "A timely and recorded objection to the trial court's failure to comply with a request at trial puts the judge on notice of the asserted error and allows the opportunity for correction at that time in the course of the proceeding." Broberg v. Hess, 782 P.2d 198, 201. (Utah App. 1989)

In the instant case, the Commissioner was fully advised and on notice since the findings and dismissal were the result of her

own motion. Such action was obviously adverse to the City's interest in avoiding a dismissal.

POINT II

THERE IS NO REQUIREMENT IN ANY RULE, STATUTE OR CASE FOR PRESERVING OBJECTIONS TO SUBSTANTIVE PROVISIONS OF A COURT'S FINDINGS AND FINAL JUDGMENT. OBJECTIONS THERETO ARE BY APPEAL TO A HIGHER COURT, AS THE CITY HAS DONE IN THIS CASE.

As was discussed in Point II of the City's initial brief, the lower court's dismissal of the City's case, with prejudice, was, in effect, a sanction against the City Prosecutor for indirect contempt of court. However, the sanction was administered without any notice or opportunity for hearing.

Dorman-Ligh has cited cases which discuss the need for preserving issues which may arise during the course of a trial. For example, State v. Wareham, 772 P.2d 960 (Utah 1989), cited by Dorman-Ligh, is concerned with a defendant's preserving an issue regarding the admissibility of a daughter's testimony by making timely objection during the course of a sexual abuse trial. State v. Reiners, 803 P.2d 1300 (Utah Ct. App. 1990) centers on the admissibility at trial of hearsay statements of a child made to a detective and a social worker in another sexual abuse case. A footnote in Reiners makes the point that in an appeal brief,

the appellant has a duty to set forth the contentions and reasons for each issue raised on appeal (Reiners, at P. 1308, footnote 2).

Neither of the aforementioned cases nor any of the other cases cited by Dorman-Ligh are authority for the proposition that a litigant has a duty to make formal objection to a court's final judgment and findings.

The courts' rules provide for preserving final judgments by requiring that they be reduced to writing and be entered upon the records of the court before any appeal therefrom may be taken. See Rule 26(4)(a), Utah R. Cr. P. and Rule 4(a), Utah R. App. P. The procedure for objecting to the substance of a final judgment is to appeal it to a higher court, which is "permitted as a matter of right" under Rule 4(a), Utah R. App. P.

Under Rule 4-504, Code of Judicial Administration, notice of objections to proposed findings, judgment, and orders are to be filed with the court and counsel within five days of service. However, it is clear that such objections go to the form of the findings and judgment--that is, whether or not they correctly and accurately reflect the trial judge's in-court oral findings and judgment. In the present case, the Commissioner ordered the City to prepare the written findings and judgment, even though the

City was the losing party. The City prepared the proposed findings and judgment in a form which it believed accurately reflected the Commissioner's in-court verbal decision. However, the City's concurrence that the proposed findings and judgment were in proper form did not in any way constitute concurrence with their substance.

POINT III

THE CITY'S APPEAL BRIEF IS IN FULL COMPLIANCE WITH RULE 24(a)(5), UTAH R. APP. P.

Dorman-Ligh argues that the City has failed to comply with Rule 24(a)(5), Utah R. App. P. That rule states that the brief of the appellant shall include:

> "(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and
> (A) citation to the record showing that the issue was preserved in the trial court; or
> (B) a statement of grounds for seeking review of an issue not presented in the trial court."

The City's appeal brief included a section entitled "Statement of Issues" (pages 1-4) which set forth a brief summary of each of the issues presented by the City for review. The statement included the standard of appellate review with supporting authority for each issue. The statement then cited

the specific pages of the lower court record where the issues were preserved. Since the issues were, in each instance, preserved by entering into the record the written findings of fact, conclusions of law and the judgment of dismissal, the reference was made to the pages of the record where those documents are found. Such citation to the record fully complies with the requirements of Rule 24(a)(5).

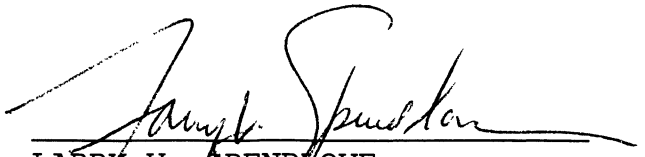
CONCLUSION

The City's appeal is absolutely in compliance with all rules, statutes and case law applicable in this matter. The dismissal from which the City appeals herein was the result of the trial court's own motion, as a sanction against the City. The City had no notice or opportunity to be heard in advance of the dismissal, which caught the City completely by surprise. All of the issues raised by this appeal result from the written findings, conclusions of law and judgment of the Court. Those issues were preserved by the findings, conclusions and judgment being entered on the Court record. The City complied with the Court's rules in citing in its brief to the pages of the record where those issues were preserved.

Constitutional issues of due process and separation of powers, as well as issues of abuse of judicial discretion and

improper estoppel on government enforcement in contravention of public policy, are at stake in this matter. Dorman-Ligh should not be allowed to divert this Court from these considerations by a cavalier and unfounded argument.

RESPECTFULLY SUBMITTED this 11TH day of August, 1995.



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CERTIFICATE OF DELIVERY

I hereby certify that I personally delivered a conforming copy of the foregoing Reply Brief of Appellant to Kathryn Collard, Attorney for Defendant/Appellee, #9 Exchange Place, Suite 1100, Salt Lake City, Utah 84111, this 11TH day of August, 1995.

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