

2006

Bryner v. Cohne Rappaport & Segal : Brief of Appellee

Utah Court of Appeals

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Roger Bryner; Plaintiff and Appellant.

Attorneys for Defendants and Appellees; Cohne, Rappaport and Segal.

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IN THE UTAH COURT OF APPEALS

ROGER BRYNER,

Plaintiff and Appellant,

vs.

COHNE, RAPPAPORT & SEGAL; and
EMILY SMOAK,

Defendants and Appellees.

APPELLEES' BRIEF

Appellate Case No. 20061031

District Court No. 050922650

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Pursuant to Utah Rule of Appellate Procedure 24, Appellees submit the following brief in response to the arguments set forth by Appellant.

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Statement of Jurisdiction

This Court has jurisdiction over this matter pursuant to Utah Code section 78-2(a)-3(j), as this case was poured over from the Utah Supreme Court. *See* Utah Code Ann. § 78-2(a)-3(j).

Statement of the Case

A brief statement of the case may be of assistance to the Court. Plaintiff filed the Complaint in the underlying action in December 2005. R. 1-4. On March 10, 2006, Appellees filed a Motion to Dismiss the Complaint, *see* R. 82-94, and a motion for attorney fees pursuant to Utah Code Ann. § 78-27-56, *see* R 118-19. On July 18, 2006, the district court entered its Determination of Undisputed Fact, Questions of Law and Order on Motion to Dismiss. R 675-682. On October 26, 2006, the district court entered an Order and Judgment Awarding Attorney Fees, *see* R. 924-26. This particular appeal challenges only the award of attorney fees. *See* Appellant's Brief, p. 4.

Summary of Arguments

Appellant's arguments are insufficiently briefed and should be dismissed for failure to comply with rule 24(a)(9) of the Utah Rules of Appellate Procedure.

To the extent that Appellant sets forth cognizable arguments, such arguments are without merit.

Argument

I. Appellant's Claims Are Inadequately Briefed.

Appellant appeals an order to award attorney fees. However, Appellant offers *no argument* describing why that order is subject to reversal. Instead, Appellant's Brief focuses solely on issues relating to Utah Rule of Civil Procedure 12(b) and Appellees' Motion to Dismiss. Accordingly, this court should dismiss this appeal on the basis that Appellant's claims are inadequately briefed.

"It is well established that a reviewing court will not address arguments that are not adequately briefed." *State v. Thomas*, 961 P.2d 299, 304 (Utah 1998); *see also Valcarce v. Fitzgerald*, 961 P.2d 305, 313 (Utah 1998) (declining to address appellant's claim on appeal due to inadequate analysis).

Utah Rule of Appellate Procedure 24(a)(9) states that the argument in the appellant's brief

shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on.

Utah R. App. P. 24(a)(9). Compliance with this rule "is mandatory, and failure to conform to these requirements may carry serious consequences." *Beehive Tel. Co. v. Public Serv. Common*, 2004 UT 18, ¶ 12, 89 P.3d 131. "For example, 'briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court.'" *Id.*, ¶ 12 (quoting Utah R. App. P. 24(j)).

Appellant's brief fails to comply with rule 24(a)(9). Appellant urges that the district court erred when it entered an order awarding attorney fees. Appellant does not challenge the underlying dismissal upon which that award was based. Indeed, Appellant expressly states "this is an appeal of the award of attorneys fees only, not of dismissal." Appellant's Brief, p. 4. However, Appellant fails to describe the basis for the fee award, let alone explain why the district court erred in making its determination. Appellant sets forth a principle of law - that a motion is improperly granted under Utah Rule of Civil Procedure 12(b) if matters outside of the pleadings are considered - but fails to tie this argument to the district court's ruling on attorney fees.

Appellee cannot even address Appellant's argument directly, because Appellant fails to assign a particular basis for finding error. Appellant apparently hopes that this Court will scour the record for an instance that supports Appellant's general assertions. This is not the Court's obligation. Appellant has "impermissibly shifted the burden of analysis to the reviewing court in this case." *Smith v. Smith*, 1999 UT App 370, ¶ 9, 995 P.2d 14 (declining to review inadequately briefed issue where "the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court," *id.* at ¶ 8 (quotations and citation omitted)).

"To permit meaningful appellate review, briefs must comply with the briefing requirements sufficiently to enable [the Court] to understand . . . what particular errors were allegedly made, where in the record those errors can be found, and why, under applicable authorities, those errors are material ones necessitating reversal or other

relief.” *State v. Lucero*, 2002 UT App 135, ¶ 13, 47 P.3d 107 (quoting *Burns v. Summerhays*, 927 P.2d 197, 199 (Utah Ct. App. 1996)).

Appellant’s brief makes no attempt to conform to these standards. Accordingly, this Court should decline to reach the merits. *See Thomas*, 961 P.2d at 305.

II. Even If Appellant’s Claims Are Sufficiently Briefed, They Are Without Merit.

To the extent Appellant sets forth cognizable arguments, they are without merit.

As noted above, Appellant does not challenge the district court’s determination that dismissal was proper. Instead, he attacks the award of attorney fees. The attorney fee award in this case was based upon a finding of bad faith pursuant to Utah Code section 78-27-56. *See Utah Code Ann. § 78-27-56; Determination of Undisputed Fact, Questions of Law and Order on Motion to Dismiss, R.675-82.* “The trial court’s determination that [a] claim was filed in bad faith is a question of fact that we review under a ‘clearly erroneous’ standard.” *In re Olympus Const., LC*, 2007 UT App 361, ¶ 9, 173 P.3d 192 (citation omitted).

Appellant makes no attempt to explain how or why the district court erred in this regard. Each of Appellant’s arguments describes matters related to the determination of Appellees’ Motion to Dismiss, rather than the decision to award fees. For instance, Appellant’s first argument is, “Did the court improperly consider material outside the briefs in a motion under Rule 12(b) without notice in awarding attorney fees?” Appellant’s Brief, p. 12. This argument bears no relationship to the award of attorney

fees. Similarly, Appellant asks, “Was the award of fees appropriate given the court must make factual inferences in favor of Plaintiff, not Defendant?” While this question at least mentions the award of attorney fees, it instead refers to the order on Appellant’s Motion to Dismiss. While factual inferences may be appropriately decided in favor of the nonmoving party in regards to a dispositive motion, *see* Utah Rules of Civil Procedure 12(b), 56, Appellant provides no authority that this same standard applies to a motion to award attorney fees pursuant to Utah Code Ann. § 78-27-56. Moreover, even if such a standard applied, Appellant provides no examples of how the district court improperly applied it in the context of the award of attorney fees.

The district court made the following findings and conclusions regarding the award of bad faith attorney fees:

13. Plaintiff’s complaint in this action is without merit and frivolous pursuant to U.C.A. § 78-27-56 because it has no basis in law or fact.

14. Plaintiff’s complaint was also not brought in good faith. In the instant case, Plaintiff evidenced an intention to continue to “stir the pot” on the issues raised in his complaint by referencing his ability to report Ms. Smoak to the Office of Professional Conduct of the Utah State Bar. In addition, Plaintiff argued that he filed this action because he felt he was being “harassed” by Ms. Smoak in her actions of sending pleadings to his multiple lawyers. However, Plaintiff’s letter to his attorneys dated September 30, 2005 personally directed Ms. Smoak to send all communications to his lawyers.

15. Given the totality of the circumstances surrounding Plaintiff’s relationship with Defendants, Plaintiff’s decision to file this complaint suggests an intent to hinder and delay Defendants. Plaintiff’s complaint was filed in an attempt to divert resources from the lawsuit between Plaintiff and Svetlana Bryner and to deflect Defendants’ attention from that case, which is both an attempt to hinder or delay Defendants, but it is also

and [sic] attempt to take “unconscionable advantage” of Defendants and Svetlana Bryner.

16. When examined as a whole, the circumstances surrounding Plaintiff’s decision to file the complaint suggests that Plaintiff’s subjective intent in filing the complaint was riddled with bad faith, and that the complaint violates U.C.A. § 78-27-56, warranting an award to Defendants of their reasonable fees and costs incurred in defending this action.

Determination of Undisputed Fact, Questions of Law and Order on Motion to Dismiss, R. 675-682.

Appellant offers no argument that the district court’s conclusions were clearly erroneous. Indeed, Appellant sets forth *no reason* to reverse the district court’s determination regarding an award of attorney fees for Appellant’s bad faith filing of the action. Accordingly, this Court should affirm.

REQUEST FOR ATTORNEY FEES

Appellees were awarded attorney fees below pursuant to Utah Code section 78-27-56. Accordingly, they are entitled to attorney fees on appeal. *See Pack v. Case*, 2001 UT App 232, ¶ 39, 30 P.3d 436 (“When a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal.” (Internal quotations and citation omitted.)).

The Court should be aware, however, that on August 16, 2007, Appellant filed for bankruptcy protection with the United States Bankruptcy Court for the District of Utah, case numbered 07-23795 JAB, which matter was dismissed on March 20, 2008, but is subject to appeal. Accordingly, Appellees’ request for fees, although allowed by Utah

law, is made herein only as allowed by the Bankruptcy Code and to the extent it is not prohibited or otherwise affected by the automatic stay.

CONCLUSION

Appellant's brief is inadequate under Utah Rule of Appellate Procedure 24(a)(9). As a result, this court should decline to reach the merits of Appellant's claims. In the alternative, the Court should determine that Appellant's argument is without merit. In either event, dismissal of this appeal is appropriate, and Appellee's request a remand for a determination of fees on appeal to the extent such fees are not prohibited by the Bankruptcy Code.

DATED this 8th day of May, 2008.

COHNE, RAPPAPORT & SEGAL, P.C.



Jeffrey L. Silvestrini
Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of May, 2008, I caused to be served a true and correct copy of the foregoing Appellees' Brief via First Class Mail, postage fully pre-paid, to the following:

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