1989

Bruno D'Aston v. Dorothy D'Aston : Response to Petition for Rehearing

Utah Court of Appeals

S. Rex Lewis; Attorneys for Plaintiff and Respondent.
Brian C. Harrison; Attorney for Defendant and Appellant.

orange [redacted]

IN THE COURT OF APPEALS OF THE STATE OF UTAH

BRUNO D'ASTON,

Plaintiff and Respondent,

-vs-

DOROTHY D'ASTON, et al,

Defendant and Appellant.

: Court of Appeals
: No. 89-0050 CA
: Priority Classification
: 14-B

RESPONSE TO PETITION FOR REHEARING

Appeal from the Decree of the 4th Judicial
District Court for Utah County,
Honorable Boyd L. Park, Presiding.

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RESPONSE TO PETITION FOR REHEARING

SUMMARY OF ARGUMENTS

Respondents' petition for rehearing does not present any points of law which were overlooked or misunderstood by this Court.

Respondent's complaint that this Court's decision is restrictive is merely an attempt to introduce new theories of the case or reargue old theories which were rejected at trial.

Respondents' claim that appellant's post-trial actions should form the basis of a dismissal of this appeal is without merit and contrary to the specific ruling of the trial court and of the Court of Appeals.

ARGUMENT

I. RESPONDENTS' PETITION FOR REHEARING DOES NOT PRESENT ANY PROPOSITIONS OR QUESTIONS EITHER OF LAW OR FACT WHICH WERE NOT FULLY CONSIDERED BY THE COURT.

The function of a Petition for Rehearing is to present to the court errors of law or fact or both asserted to have been made by the court. (L.'Abbe v. District Court 26 Colo 386 , 58 P 604)

Rule 35 of the Utah Rules of Appellate Procedure provides in part:

> The petition shall state with particularity the points of law or fact which the petitioner claims the court has overlooked or misapprehended.

Respondent (Bruno) argues that his allegations of theft against appellant (Dorothy) constitute a fact that was not fully considered by the court. The record shows, however, that these allegations form the main theory of Bruno's case. These allegations were simply not proven at trial. Bruno would like to reopen this theory and do what he failed to do at trial; namely, prove his theory. Bruno did not

appeal this issue or any other issue. This assertion has been fully considered by both the trial court and this court.

Bruno further argues that the trial court "determined that it was not necessary to make a finding as to what occurred, because the trial court held that the 1973 Agreement was not enforceable in any event."

This statement by Bruno is a misstatement of the trial court's ruling. The trial court made no such finding. As a matter of fact, the trial court specifically recited both parties' version of the disputed theft and declined to make any finding whatsoever on that issue.

Bruno cites the case of Noble v. Noble 761 P.2d 1369 (Utah 1988) as authority for his argument. Noble may be easily distinguished. Noble involved a trial court finding of tortious conduct by virtue of the husband having shot the wife in the head. After partially recovering, the wife filed for divorce and the court awarded substantial separate property to the wife which had belonged to the husband. The clear distinction in the present case is that no finding was made that Bruno had even proven that a theft had occurred, let alone who was supposed to have committed the offense.

Bruno continues to argue his version of the facts without acknowledging that, after presenting four days' worth of evidence, the trial court was not persuaded that Dorothy was involved in any way.

Bruno next proposes that the 1973 Agreement was rescinded by the conduct of the parties, and that this constitutes a new fact which should be considered on rehearing. Again, the theory of rescission was at the heart of Bruno's case in the trial court. However, the record does not support this theory. The record does support the decision issued by this court that the 1973 Agreement was unambiguous, not entered into as a result of fraud or coercion or material non-disclosure, and that it should be enforced pursuant to its terms. Bruno attempts to retry the issue of rescission, but without evidence in the record to sustain his theory.

Again this argument is based upon Bruno's allegation that Dorothy robbed Bruno of his records. No finding was made supporting this allegation and it remains as untrue as it is unproven.

Neither the issue of an alleged theft nor the issue of conduct constituting a rescission constitutes law or fact which were overlooked or misapprehended by this court.

Furthermore, any reference to case number 900223-CA is irrelevant and improper in this court. Dorothy was not a party to the dispute between Bruno and his son, Eric, nor was she represented by counsel in that case.

II. RESPONDENTS' COMPLAINT THAT THIS COURT'S REVERSAL IS OVERLY RESTRICTIVE IS MERELY AN ATTEMPT TO INTRODUCE NEW

THEORIES OR REARGUE OLD THEORIES WHICH WERE REJECTED AT TRIAL AND NOT APPEALED.

Bruno would like this court to permit the trial court enough latitude to reconsider the issues of the alleged theft and rescission by conduct of the parties in order to defeat the clear language of the 1973 Agreement and the intent of this court. This, the court should decline to do. This court's ruling is a fair and considered statement of the law. Bruno should not be allowed to destroy the intent of the 1973 Agreement and this court's ruling in order to satisfy his own purposes.

Bruno introduces a new theory of his case by suggesting that it would be acceptable to him if the court determined that the properties were separate and then proceeded to divide Dorothy's separate property with Bruno. This is an irrational attempt to acknowledge what cannot be denied (the validity of the 1973 Agreement) and yet convey some or all of Dorothy's property to Bruno under a theory of equity.

His argument that the property should be treated as separate property, but that Dorothy's property should be divided with him, is based upon the false premise that merely alleging theft and rescission, which were not proven in the case, constitutes an equitable reason to disregard the Agreement of the parties. This should not be allowed.

This court has stated:

> . . . it is familiar doctrine that every pleader is is required to state the cause of action or defense upon which he relies; that a party in the trial of a cause adopting a theory of the case is generally bound by it, that a case must stand or fall upon the theory upon which the complaint is based, and that a party cannot take or adopt a position in the trial court and thereafter urge a different one on appeal . . . (Utah Copper Company v. District Court 91 Utah 377, 64 P.2d 241 (1937).)

The record shows that Bruno asserts the invalidity of the 1973 Agreement when it suits his purpose, asserts the validity of the 1973 Agreement when it suits his purpose, and that he now requests this court to grant latitude to the trial court to disregard the intent of the 1973 Agreement and convey some or all of Dorothy's property to him under its general equitable powers. There is no evidence in the record to support the existence of unique and compelling circumstances which would justify disregarding an otherwise enforceable agreement.

In this case, the 1973 Agreement was executed, notarized, recorded, deeds exchanged, and property valued at over $1,100,000 (ONE MILLION ONE HUNDRED THOUSAND DOLLARS) transferred to Bruno, and real estate and cash valued at over $500,000 (FIVE HUNDRED THOUSAND DOLLARS) transferred to Dorothy. Thirteen

(13) years passed before Bruno filed for divorce and claimed the Agreement was not binding. There is a difference between a long-standing marital contract and a proposed stipulation that is submitted for approval and inclusion in a divorce decree, as set forth in the case of Coleman v. Coleman 743 P.2d 782 (1987). Bruno's reliance upon Coleman is not well-taken. The facts of Coleman do not apply to this case nor does the reasoning.

III. RESPONDENT'S CLAIM THAT APPELLANTS POST-TRIAL ACTIONS SHOULD FORM THE BASIS OF A DISMISSAL OF THIS APPEAL IS WITHOUT MERIT AND CONTRARY TO THE SPECIFIC RULING OF THE TRIAL COURT AND THIS COURT.

Under the original decree of divorce Dorothy was ordered to pay approximately $236,800 (TWO HUNDRED THIRTY SIX THOUSAND AND EIGHT HUNDRED DOLLARS) to Bruno. This Order became moot when this court reversed the trial court on the issue of the validity of the 1973 Agreement.

However, before ruling on the merits of this case, this court required Dorothy to appear and submit to court process. This she has done. (See Addendum Exhibit 1, page 4, line 12-15)

In addition, Dorothy was given 45 days to purge her contempt by paying the foregoing sum to the court. Dorothy explained that she was without any money and was caring for her cancer-ridden father.

The trial court then remarked "if the Appellate court doesn't reverse this thing, affirms what I have done, then I think she is in deep trouble." (See Addendum, Exhibit 1, page 5, line 11) The trial court knew that it might be reversed and that a reversal would render the order of payment moot, because those funds were from Dorothy's separate property under the 1973 Agreement.

The court then set a date for further hearing but qualified it as follows:

> I want to know the status of Mrs. D'Aston's father. I want her back in court unless I waive her coming back in . . . (Addendum, Exhibit 1, page 2, line 21) . . . unless there is some compelling reason why she can't be here. If her father is on his death bed or something, or if there's a funeral, or whatever (see Addendum, page 7, line 12 - 14)

This court has already noted that Dorothy complied with its requirement to appear and submit to the trial court process. Bruno's assertion that Dorothy did not satisfy the trial court is not supported by evidence of any kind.

CONCLUSION

Respondent's Petition for Rehearing does not present any points of law or fact which were overlooked or misunderstood by this court.

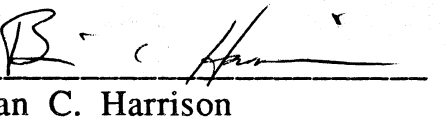
He proposes to produce additional evidence and adopt new theories in order to obtain the original result.

In the alternative, he suggests that, because Dorothy was under a contempt order, based upon a misapplication of the law, that she should be denied her right of appeal on the merits.

Appellant respectfully urges the court to deny the Petition for Rehearing and issue its remittitur to the trial court for proceedings consistent with the decision therein.

DATED this 17th day of August, 1990.

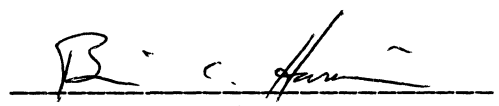
Respectfully submitted,



Brian C. Harrison
Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I certify that I mailed four copies of the foregoing Response to Petition for Rehearing to S. Rex Lewis and Leslie W. Slaugh, 120 East 300 North, Post Office Box 778, Provo, Utah 84603, postage prepaid, this 20 day August, 1990.



Brian C. Harrison

ADDENDUM

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

* * *

DOROTHY D'ASTON

Plaintiff,)

vs.) Civil No. CV-86-1124
ORDER TRANSCRIPT

BRUNO D'ASTON)

Defendant.)

BE IT, REMEMBERED that on Friday, the 4th day of May, 1990, the ORDER - in the above-entitled matter was taken by Richard C. Tatton, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, before the Honorable Boyd L. Park at the Utah County Courthouse, Provo, Utah.

A P P E A R A N C E S

For the Plaintiff: Mr. Brian Harrison
&
Mr. Don Mullin
Attorneys at Law
Provo, Utah 84601

For the Defendant: Mr. S. Rex Lewis
Attorney at Law
Provo, Utah 84601

P R O C E E D I N G S

THE COURT: Well what I am going to do I am going to give you 30 days to purge yourself as I indicated. Then at the end of 30 days Mr. Harrison I want to know what progress has been made in locating Lisa. I want to know what the status is of Mrs. D'Aston's father. I want her back in court unless I waive her coming back in court but the jail time of 60 days will remain. I will review it before she is obligated to go to jail.

In order to do that I will give her 45 days instead of 30 days to purge herself.

MR. HARRISON: I have jotted down that it is 45 days to pay the sum of $236,800.00.

THE COURT: Yes and either deposit with the court or into a agreeable acceptable trust account.

MR. HARRISON: Or secondly and then within that 45 days - -

THE COURT: If she doesn't have it within 45 days , well if she doesn't have it within 40 days you need to apprise the court as to the situation of her father and what has been done to locate Lisa.

MR. HARRISON: Okay. I do believe I have my phone number of Lisa and her boyfriend. I may have have the address as of the time of trial. I will do what I can to follow any leads.

THE COURT: Lisa is a defendant in this action and as far as I am concerned she is still, the court still has jurisdiction over her.

MR. HARRISON: I would note for the record it seem to me as the thing has unfolded obviously at one time I represented all three defendants. I think I am clearly in a conflict of interest now.

THE COURT: Well you have already withdrew from representing the other two.

MR. HARRISON: Right.

THE COURT: Be that as it may I want to see something concrete about Mrs. D'Aston attempting to locate Lisa.

MR. HARRISON: Right.

THE COURT: Then the court will consider at that time whether imposing the 60 days at that time or not. I will review the matter.

MR. HARRISON: Your Honor, with respect to the Court of Appeals matter what is the court's feeling about that?

THE COURT: Well the Court of Appeals says she has 30 days from the day of the issuance of this opinion to bring herself within the process of the trial court. She had done that.

MR. HARRISON: What I did is prepare an order for the court to sign that merely says that she has submitted herself to the process by the court pursuant to this order, would that refect it accurately?

THE COURT: You and Mr. Lewis can argue in front o the Appellate Court whether or not that meets their requirement.

Any objections Mr. Lewis?

MR. LEWIS: No she has appeared I assume that she is still in contempt of the court?

THE COURT: Yes you may add that she is in contempt of court and the court has given her an opportunity to purge herself with 45 days.

MR. LEWIS: Maybe interlineate that on there?

THE COURT: Let's type it up and include that.

MR. LEWIS: You want Mr. Harrison to do it or me?

THE COURT: Probably Mr. Harrison to do it.

MR. HARRISON: What does the court want me to add?

THE COURT: You need to add to that that she is still in contempt of the court. The court has given her 45 days to purge that contempt after which the court will review the matter in the event she hasn't purged herself from that. If the Appellate Court doesn't reverse this thing , affirms what I have done, then I think she is in deep trouble.

MR. LEWIS: What about preparing the order that the court has just made?

THE COURT: Yes that order needs to be made as well.

MR. LEWIS: I will prepare that

THE COURT: Yes you prepare that.

MR. LEWIS: Are you going to set a date certain to come back into court?

THE COURT: I think we need to set a date certain About 40 days down the road. What have you got Diana.

THE CLERK: Friday afternoon, Judge?

THE COURT: That will be fine.

THE CLERK: June 15th?

MR. HARRISON: Not good for me about about the 22nd?

THE COURT: That will be fine.

THE CLERK: 1:30.

THE COURT: All right we will review it on June 22nd at 1:30.

MR. HARRISON: With respect to the Bench Warrant I assume that the court would then order that be withdrawn?

THE COURT: Yes.

MR. HARRISON: That would be included in Mr. Lews' order?

THE COURT: Yes.

MR. HARRISON: I also would have no objection to Mr Lewis putting language in there that should Mrs. D'Aston change her address that she would notify the court within a week of her new address.

THE COURT: Well pursuant to this decision by the Appellate Court I think we have jurisdiction as long as you are around.

MR. HARRISON: That seems like a new law Judge

it seems to me.

THE COURT: But I think that is your obligation to see that to know where your client is at. If he wants to put it in the order he may. But it is your obligation to know where your client is and how to get a hold of her and if the court or anybody else needs her address then you should furnish that.

MR. HARRISON: Fine.

THE COURT: Anything further?

MR. LEWIS: Continuing it to that date and is the defendant to appear on that date in court?

THE COURT: Yes unless there is some compelling reason why she can't be here. If her father is on his death bed or something or if there is a funeral or whatever.

MR. LEWIS: The order she is to be here unless modified for some reason I suppose?

THE COURT: Yes, put that in the order. Mrs. D'Aston I am being extremely lenient with you. Once I allow this sort of thing to go on in the court's order to be held in contempt I don't know who else is going to come along and think they can do the same thing. I just hope you appreciate what a difficult position you have put this court in when it could have been solved. I just do not understand why you should think you should have to give all of this money to your daugther. Unless she has

had a complete change of personality or something as to why you would even trust her with it. That is beyond me.

All right anything further?

MR.HARRISON: No, Your Honor.

MR. LEWIS: No.

THE COURT: Court will be inrecess.

THE BAILIFF: Everyone please arise. Court will be in recess.

(WHEREUPON, this order was concluded)

C E R T I F I C A T E

STATE OF UTAH)
: ss.
COUNTY OF WASATCH)

THIS IS TO CERTIFY that the ORDER TRANSCRIPT was reported by me in Stenotype, and thereafter caused by me to be transcribed into typewriting by Richard C. Taton and that a full, true and correct transcription of said TRANSCRIPT was so taken.

I FURTHER CERTIFY that I am not of kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the event thereof.

WITNESS my hand and official seal at Midway, Utah this 11th day of May, 1990.

Richard C. Tatton

RICHARD C. TATTON, CSR

My commission expires:

June 15, 1993