

1971

Mary Nelson Watts v. Wayne D. Watts : Appellant's Brief

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IN THE SUPERIOR COURT OF THE STATE OF UTAH

STATE OF UTAH

MARY NELSON

vs.

WAYNE D. NELSON

Appeal from the

Court of the

County of

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Ogden, Utah

Attorney for Respondent

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**IN THE SUPREME COURT
OF THE STATE OF UTAH**

MARY NELSON WATTS,
Plaintiff-Appellant

vs.

WAYNE D. WATTS,
Defendant-Respondent

Case No.
12097

APPELLANT'S BRIEF

NATURE OF THE CASE

Appellant commenced an action in the lower court for separate maintenance and the respondent filed a counterclaim for a divorce.

DISPOSITION IN THE LOWER COURT

The lower court awarded a divorce to the respondent on his counterclaim and awarded the custody of the minor child, Jonnie Watts, to the respondent and the custody of the minor child, Linda Watts, to the appellant. The respondent was ordered to pay \$75.00 per month child support for the minor child, Linda Watts, and to pay \$200.00 per month alimony to the appellant provided, however, that said alimony was to be reduced on January 1, 1972, in accordance with the circumstances then existing. The court awarded the appellant the possession of the parties' home during her lifetime or until she should remarry, at which time said home was to be sold and the net proceeds of the sale divided 65 percent to the appellant and 35 percent to the respondent. Each party was ordered to pay one-half of the general taxes due upon said property. The appellant was awarded a Mustang automo-

bile and the respondent was awarded an International truck and a car being used by his son. The other property of the parties was awarded to the party having possession.

The appellant filed a motion for a new trial and a motion to amend the judgment based on a supporting affidavit. The lower court denied both motions.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the lower court's denial of the appellant's motions and requests a new trial or a setting aside of the divorce judgment and an opening of the judgment for the purpose of taking additional testimony and amending the findings of fact, conclusions of law and order of the lower court.

STATEMENT OF FACTS

A complaint for separate maintenance was filed by the plaintiff-appellant, Mary Nelson Watts, on July 14, 1967, in the District Court of Weber County. On the 7th day of July, 1969, the defendant-respondent, Wayne D. Watts, filed an answer and a counterclaim for a divorce. On the 3rd day of December, 1969, the appellant filed an answer to the respondent's counterclaim and a motion to vacate trial date and order for appointment of marriage counselor. A trial on the issues was held on the 15th day of December, 1969, at which time the district court dismissed the separate maintenance action of the appellant and tried the case on the counterclaim of the respondent. Both the appellant and respondent together with their respective attorneys were present at the trial and presented testimony as to physical abuse and mental cruelty on the part of both parties. Testimony was also presented concerning the income and the property of the parties.

The evidence produced at the trial established that the parties had two motor vehicles (T-10, 38, 39), life insurance

(T-10, 11, 16), miscellaneous furniture (T-10) and a home valued between \$22,500.00 and \$30,000.00 (T-17, 37). Testimony was also given concerning the income of the respondent. (T-28, 29, 43, 46) The respondent testified at the trial that his net income amounted to \$514.57 per month and that his income increased during the latter part of the year to approximately \$538.00. He also stated that \$200.00 per month was deducted from his income and paid to the credit union. (T-28, 29) On another occasion during the trial the respondent testified that he received \$520.00 per month for the first half of the year and \$582.00 per month for the second half of the year. (T-43) On cross examination the respondent admitted that the \$200.00 per month which he had previously testified was paid into the credit union was, in fact, being used by him for living expenses. The respondent also testified that he had nothing to show for his earnings except the income and property set out above. (T-39)

Both the appellant and respondent testified concerning the appellant's ability to work. The appellant testified that she was not physically able to work because of medical reasons. (T-19) The respondent testified that the appellant was capable of working in spite of her physical condition. (T-29, 30, 31, 48, 49) The appellant's attorney, Mr. Hendricks, attempted to offer into evidence a letter from the appellant's doctor concerning her physical ability to work. (T-51)

On the 27th day of February, 1970, the court signed a divorce decree. The provisions of that decree are specifically set out in this brief under Disposition in the Lower Court.

On March 9, 1970, a motion for a new trial or in the alternative to amend the judgment was filed with the lower court supported by an affidavit of the appellant. The motion was based upon the fact that the respondent had misrepresented facts to the court concerning his income, property and

his wife's health. The motion and affidavit also alleged that the attorney who represented the appellant in the trial had failed to present evidence on her behalf in relationship to her husband's income, property and the appellant's physical ability to work. On April 1, 1970, the argument on the appellant's motion was heard by the lower court. The appellant's counsel enumerated the points set out in his motion. (T-55-60) The respondent's counsel stated that the defendant had not misrepresented the facts to the court and that the respondent had testified at the trial that he made \$532.00 every two weeks instead of every month. The respondent also said this was correct. (T-62, 63) The respondent's counsel also admitted that his client had an interest in a profit sharing program in connection with his employment. (T-63)

The appellant based her motion on Rules 59(a) and 60(b), Utah Rules of Civil Procedure. (T-60, 61) On April 7, 1970, the court denied the appellant's motion and on May 11, 1970, the appellant filed an appeal to the Utah State Supreme Court.

SUMMARY OF ARGUMENT

The respondent presented incorrect and inconsistent information to the trial court concerning his income and his property. Because of a misunderstanding on the part of the appellant's attorney the appellant was prevented from presenting correct information to the court concerning the respondent's interest in a profit sharing program, the respondent's correct income and the appellant's physical health and ability to work. The trial court did not receive a full and correct disclosure of all of the facts in this case and, therefore, was in error in not granting the appellant's motion for a new trial or setting aside the judgment and taking additional testimony so that the court could be fully informed before making a final decision concerning the interests and rights of the parties.

ARGUMENT

I.

THE LOWER COURT ERRORED IN DENYING THE APPELLANT'S MOTION FOR A NEW TRIAL OR IN THE ALTERNATIVE TO OPEN THE JUDGMENT AND ACCEPT ADDITIONAL TESTIMONY BY REASON OF THE FACT THAT THE EVIDENCE CLEARLY SHOWED THAT THE RESPONDENT MISREPRESENTED AND FAILED TO FULLY REPRESENT THE CORRECT AMOUNT OF HIS INCOME AND PROPERTY.

Rule 59(a), Utah Rules of Civil Procedure, clearly states that a new trial can be granted or the court can open the judgment and take additional testimony when there is irregularity in the proceedings of the court or of an adverse party or when the evidence produced at the trial is insufficient to justify the verdict or decision of the court. Rule 60(b) (3) Utah Rules of Civil Procedure provides that the court may relieve a party from a final judgment when there has been misrepresentation or other misconduct on the part of the adverse party. Section 7 of 60(b) states that a judgment can be set aside for any other reason justifying relief.

It is the appellant's contention that the respondent was guilty of misconduct justifying a new trial or the taking of additional testimony. Throughout the trial the respondent was asked concerning his property. He never once mentioned that he had a very large and substantial amount of money held in a profit sharing program in connection with his employment. In fact, on one occasion the respondent specifically indicated that he had no property other than a home, motor vehicles, miscellaneous furniture and personal effects. The respondent was asked, "Other than these assets do you have anything to show for your earnings?" He answered, "No." (T-39) Later during the trial on cross examination the respondent was asked if he had any severance pay or anything from

his job other than the income he had testified to. The respondent replied, "No." (T-46) The respondent's counsel in arguing against the appellant's motion for a new trial admitted that the respondent participated in a profit-sharing program but alleged that it was not worth \$30,000.00. (T-63)

The testimony of the respondent in regard to his income is also inconsistent and misleading. When first asked about his income the respondent stated that he made \$514.57 per month and that his income increased during the latter part of the year to approximately \$538.00 per month. (T-28) The court specifically asked the respondent, "Would that be for a month?" The respondent replied, "Yes." (T-29) The respondent also testified that \$200.00 per month was taken from his income for the purpose of paying an indebtedness to the credit union. (T-29) However, on another occasion during the trial the respondent testified that the \$200.00 per month was being used by him for living expenses. (T-46) Later in the trial the respondent testified that he received \$520.00 per month for the first half of the year and \$582.00 per month for the second half of the year. (T-43) However, during the argument had on the appellant's motion for a new trial the respondent's counsel stated:

"And what Mr. Echard has represented to the court is just not true.

"Let me take the first point: There was a check stub introduced in evidence, and it should be in the file, which was Mr. Watts' current check showing the deductions and the amount of his pay. So, Your Honor was informed. And the pay was \$532.00 take-home pay every two weeks; Is that correct?

"MR. WATTS: That was the total, actually, for a two-week period."

* * *

"So, the fact that he testified that he was only mak-

ing \$532.00 per month is just not true." (T-62, 63)

The exhibits introduced by the respondent indicated that on January 8, 1969 the respondent received a gross pay of \$461.54 with a net pay of \$243.88 after \$100.00 had been paid to the credit union. On January 22, 1969, the respondent received a gross pay of \$473.08 with a net pay of \$270.60 after \$100.00 was deducted for the credit union. Two other exhibits were introduced on behalf of the respondent, one of them showing a gross pay of \$484.00 with a net pay of \$301.09 with \$100.00 going to the credit union on October 25, 1969. The other exhibit was dated November 8, 1969, and showed a gross pay of \$484.60 with a net pay of \$281.29 with \$100.00 going to the credit union. From the exhibits presented by the respondent and the inconsistent testimony of the respondent regarding his income it is not possible to accurately determine how much the respondent makes per year. If the net income figures presented by the respondent at the trial are accepted then the respondent would be making approximately \$7,600 per year as a net take-home pay. However, if the respondent, in fact, is using the \$200.00 per month which the exhibits reflect is being withheld by the credit union then his net income per year would be increased by \$2,400.00 making the net income \$10,000 per year.

If the respondent's statement made during the argument of the motion for new trial is accepted as being true then the respondent would be making a net income of approximately \$12,700.00 per year.

The appellant contends that the respondent, in fact, is making in excess of \$12,000.00 per year and that this can be substantiated by his income tax returns. (T-56, 57)

The respondent had an obligation to fully disclose to the court any and all property and income he had. This principle is clearly set out in Smith vs. Smith 77 U. 60 291 p.298

(1930) where the court stated,

“In order for the court to make an equitable division of property of the parties, or which is the same thing, to allow to the wife her permanent alimony, it was the duty of both parties to fully disclose to the court just what their condition was as to property . . .”

This court on a number of occasions has pointed out that in making a property settlement and in awarding alimony it is necessary for the court to consider among other things the type and amount of property owned by each party, the source of said property and income, the financial needs of each party, the health of each party and the ability of each party to earn money. Pinion vs Pinion 92 U. 2d 265 67 P.2d 265 (1937), Wilson vs Wilson 5 U. 2d 79 296 P.2d 977 (1956), Anderson vs Anderson 18 U. 2d 286 422 P.2d 192 (1967). Therefore, it is the appellant's contention that in light of the conflicting testimony given by the respondent in relationship to his property and to his income, it was error for the court to refuse to set aside the judgment and take additional testimony from the parties. Since the respondent did not fully disclose the extent of his property and income the trial court was without sufficient information to make a fair and equitable division of the property.

Apparently the court accepted the respondent's representation of his financial status and ability. This is indicated by the fact that the court's judgment is substantially the same as the respondent's recommendations. The respondent was asked what he thought his wife should receive. He replied that he thought his wife should have the Mustang automobile and one half of the house. He also said that he was willing to pay his wife \$200.00 per month. (T-43) Had the court been aware of the misrepresentations that were made by the respondent it is doubtful that it would have placed so much reliance on the respondent's recommendations.

II.

THE LOWER COURT ERRORED IN DENYING THE APPELLANT'S MOTION FOR A NEW TRIAL OR IN THE ALTERNATIVE TO OPEN THE JUDGMENT AND ACCEPT ADDITIONAL TESTIMONY BY REASON OF THE FACT THAT THE APPELLANT'S ATTORNEY DID NOT PRESENT ALL OF THE NECESSARY EVIDENCE CONCERNING THE APPELLANT'S PHYSICAL HEALTH AND THE RESPONDENT'S INCOME AND PROPERTY.

Prior to and throughout the trial the appellant informed her attorney, John Hendricks, that her husband had an interest in a profit sharing program in connection with his work valued at approximately \$30,000.00. However, Mr. Hendricks did not present this information to the court nor cross examine the respondent concerning it. Instead, Mr. Hendricks indicated to his client, the appellant, that he did not understand profit sharing programs and, consequently, he was not going to ask the respondent about it. (T-66) The appellant also informed Mr. Hendricks that the respondent was making more money than he represented to the court. However, her attorney apparently misunderstood her or failed to understand the information and, consequently, did not present said information to the court. One of the important issues raised at the trial concerned the appellant's physical health and her ability to maintain a job. None of this information was presented to the court by the appellant's attorney. On one occasion the appellant's attorney attempted to offer into evidence a letter from the appellant's doctor. However, the letter was objected to and the court did not receive it into evidence.

This court has generally held that a client is bound by the actions of his attorney and that an erroneous judgment will not be overturned on the sole grounds of the negligence of the attorney. However, this court has also indicated that

under Rule 60(b) Utah Rules of Civil Procedure a judgment can be vacated when an erroneous judgment has been entered because of procedural difficulty, the wrongs of the opposing party or misfortunes which prevent the presentation of a claim or a defense. Warren vs Dixon Ranch Co., 123 U. 416, 260 P.2d 741, 744 (1953).

This court has always held that a divorce was an action in equity and that the full disclosure of all of the evidence should be obtained whenever possible. Wilson vs Wilson, 5 U. 2d 79 296 P.2d 977 (1956) It is the appellant's contention that all of the evidence was not obtained at the trial court level because of the apparent misunderstanding on the part of her attorney and because of the misrepresentations and misconduct of the respondent. This court has generally held that it would not reverse the decision of the trial court in granting or denying a new trial unless an abuse of discretion was shown. It is the appellant's contention that while the actions of the appellant's attorney alone would not be sufficient grounds to grant a new trial, it along with the misconduct and misrepresentations of the respondent is enough to require that the appellant be given an opportunity for a new trial or to present further testimony so that the full truth can be presented before a trial court for its decision.

CONCLUSION

It is respectfully submitted that the lower court erred in denying the appellant's motion for a new trial or in the alternative to amend the judgment. The decision of the trial court should be reversed and the case should be remanded for a new trial or to amend the judgment and take additional testimony.

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