2004

Julie Cline Camp v. Cline : Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
OF THE STATE OF UTAH

JULIE CLINE CAMP Plaintiff and Appellee Vs. EARL L. CLINE II Defendant and Appellant	))))))))))	**Petition For Re-Hearing** Argument Priority Classification -- Case No. 20040022 - CA

APPEAL FROM THIRD DISTRICT COURT, Salt Lake County
JUDGE Robert Hilder
Case number 034907206 CA

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APPELLANT PURSUANT TO RULE 35, of the Utah Rules of Appellate Procedure submits this Petition For Re-Hearing.

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STATEMENT OF FINDINGS

Petitioner hereby submits this petition for Re-Hearing in Accordance with Rule 35 of the Utah Rules of Appellate Procedure.

Court of Appeals has affirmed the Decision of Judge Hilder in the Protective order case on the following grounds;

1. Court declined to review the issues of incomplete petition for Protective Order.
2. Court concluded that statement of "Why, are you afraid I'm going to come and beat you up? Well I'm not." Fits the definition of Abuse under the cohabitant abuse act. Appellate court concluded that "due to the couples litigious history, "a climate of hostility" existed in which a statement could be "reasonably construed . . as threats or intimidation"
3. Court Rejected the Res Judicata claims as not valid. Court also rejected the argument made to trial court that many of Petitioners claims were spurious and had been

rejected in previous hearings. This court then went on to state that "the record provides the grounds for us to doubt the accuracy of Clines assertions". In concluding that Respondent was not believable court used an incident related to permission to taking a car from a previous case with Hilder.

4. Court rejected both constitutional claims and due process claims, by stating the "cline was adequately prepared to respond".
5. Finally Court of Appeals refused to hear Clines argument that court Trial Court should have dismissed Steve Wall from the proceedings.

ARGUMENT

On the First Issue of the protective order not being properly being filled out Respondent argues that the issue is not irrelevant. First of all Respondent did in fact argue that the petition was not filled out properly. (First Trial Transcripts pp 5) The issue also involves jurisdiction of Juvenile Court. Issues of Jurisdiction can be raised for first time on appeal. Also if some one intentionally fails to disclose Jurisdiction of another court, then it is fraud upon the court. Petitioner in this case knew that it needed to be done because this very issue has been argued in court before. Also when someone is deprived of basic liberty by fraud, then everything they do in getting themselves freed from the fraud is excusable.[1]

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[1] The Amistad 40 U.S. 518 (1841)

On the issue of what constitutes abuse the statute is very clear that "Abuse means **Intentionally** or **Knowingly** causing or attempting to cause a cohabitant physical harm or **Intentionally** or **Knowingly** placing a cohabitant in reasonable fear of imminent physical harm. The statute is very clear that it has to be done intentionally. Trial Court stated "well to some extent a threat is how something is reasonably perceived" (Second transcript pp 19) The problem is that the Court has not exceeded what authority the legislator gave by ignoring the fact that how something is reasonably perceived is irrelevant. The issues are what are intended. If Respondent stated "why are you afraid I am going to come and Beat you up? Well I am not. It is very clear that his intention was not to cause her fear, but to alleviate that fear that she may have because of Respondent just getting out of jail. The Supreme Court has stated that the interpretation of a statute is a question of law.[2] The Supreme Court has also stated that "we. . .look first to the . . . plaint language" recognizing that "our primary goal is to give effect to the legislatures intent in light of the purpose the statute was meant to achieve."[3] Court has also stated that it is there obligation to avoid statutory constructions that "render some part of a provision nonsensical or absurd,"[4] If trial court got to include how a person perceived a statement to be a threat, then everyone would be a candidate for a protective order just for saying to your wife, are you afraid"? If the wife then went down and filed a protective order, then

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[2] Parks v Utah Transit Authority 53 P.3d 473 (UT 2002)
[3] Dowling v Bulling #20041008 (UT 2004)
[4] Millet v. Clark Clinic Corp. 609 P.2d 934 (UT 1980)

almost any speech after that becomes a criminal act, and any property rights and rights to children become void able just for incidental running into cohabitant in grocery store If that is what the legislature intended then protective order statutes are in violation of First, Fifth and Fourteenth Amendments to the Constitution. If Trial court is correct about it's reading of the statute, then once litigation starts between parties, that they are eligible for a protective order. This would be the case even if one party entrapped the other party by filing false allegations in court documents and then asking for a protective order based solely upon the fact that there was litigation going on between parties.

Appellate Court was also in error when it used its own judgment to determine that Cline may not have been truthful. On one hand the record that Court refers to, the issue of the taking of the car, Cline did in fact provide Trial Court a letter from Petitioner, during the Contempt hearing, that stated that she had given Cline permission to take car. So there is absolutely nothing about that statement that concluded that Cline wasn't being truthful to the court. Trial court in fact only found that it had not allowed that document admitted into evidence and as such believed Petitioners subsequent statement that she had never given Respondent permission to take car. So in fact both Court and Cline were correct, because Cline had a written document, but court overlooked it to rule in favor of Plaintiff. But the point is that there is nothing in that statement that would suggest that Cline was not being truthful. And even if there was, this court is in error to substitute its

judgment of credibility for that of the Trial Court.[5] There is absolutely no evidence of any decision on part of Trial Court that anything Cline was stating was not believable. On the contrary there was an incredible amount of evidence presented that Plaintiff was the one that was not believable.

The last issue has to do with constitutional rights being violated. The issue of gender discrimination was preserved in trial record. (pp 48 and 50) The issue of not being given proper way to present a defense is very relevant because if Cline had been given a chance to look at statutes involving qualifications for protective orders, maybe he could have re-phrased his responses and outcome would have been different. Also Court stating that issue was never raised in Trial Court is ridicules, for the reason that how can someone properly raise an issue when he is presented from researching it before his being put in front of trial court. That is the very point that Milton v Morris[6] is trying to convey, which is that issues can not reasonably be expected to be raised by someone not trained in the law, if not given a proper chance to prepare his defense.. In addition a number of other due process violations have occurred. In addition a number of due process violations occurred. For example, Petitioner knowingly made false allegation of child abuse against Respondent. (Second transcripts pp 10 see also trial record, pp 52) Several Federal Court have determined that using false allegations of abuse against a parent are basic Due

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[5] Willey v. Willey 951 P.2d 226 (UT 1997)
[6] Milton v. Morris 767 F.2d 1443 (1985)

Process rights. [7] (Trial Record PP 52) Due Process rights are also violated when the Guardian ad Litem is allowed to participate in the proceedings. [8] (Trial Record PP 52) Supreme Court concluded that this was plain error on part of trial court and should have been obvious.

Court refused to Rule on Dismissal of Steve Wall. Courts reason was that there weren't citations to the record and no statement of the standard of review. The standard of review is clearly an error of law because Using wrong standard of evidence is to be reviewed as an error of law. Cline did in fact bring that very issue to the attention of Trial Court. (pp 55) In addition Cline had already briefed the issue in Cline v. Hilder In order to save typing Cline simply referred Court of Appeals to the exact brief that had been presented to this court before. Given Clines status as a pro se litigant defending himself from lots of false allegations it seemed reasonable that he use the exact brief that had been presented to this court before. The issue of Citations to the record is irrelevant because court reviewed the entire case and Cline hadn't provided any reference to the record. Cline is not a trained attorney and the courts did not reject his brief when it was filed. This is the second appeal Cline had written to this court and the other ones were reviewed, so it is obvious that citations to the record are not that big of a deal, unless reviewing court is just looking for a reason not to grant the relief requested. The only

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[7] Wilkinson v. Balsam 885 F. Supp 651 (1995 and
Morris v. Dearborne 181 F.3d 657 (5th Cir. 1999)
[8] State v. Harrison 24 P.3d 936 (UT 2001)

reason court would want to do that is that Clines arguments are 100% correct and court just does not want to disqualify an attorney because it may have long lasting affects on Mr. Walls ability to continue to practice law. These seams very odd to me because Utah Code gives district courts jurisdiction over attorney discipline.[9] This Court has Jurisdiction to review District Courts actions in this type of case.[10] And Clearly the Supreme Court has authority over Attorney Discipline.[11] Rule 8.3(a) clearly states that any attorney that has knowledge of another attorney violating the Rules of Professional Conduct has an obligation to report that Attorney to the bar. But in this case this court wants to just sweep it under the rug. Cline truly does not under stand that.

The entire Petition for Extraordinary Writ was included with the brief as an exhibit. But Respondent will now include the information again for the courts benefit. On Trial Record pp 48 -58, Respondent submitted a copy of a Motion to Amend Judgment and or Order to Judge Hilder. Starting at pp 52, Respondent went to great length to present to Judge Hilder the arguments that Steve needed to be disqualified. The summary of the argument is as follows:

1. Earl maintains that Court was in error for not dismissing Steve. In *Poly Software v. Yu Su, 880 F. Supp 1847,* Courts ruled on what it takes to disqualify opposing counsel for conflict. "In order for a party wishing to disqualify opposing counsel

[9] UCA 78-3-4(3)
[10] UCA 78-3a-3h
[11] UCA 78-2-4(3)

on grounds of former representation to demonstrate that opposing counsel previously had implied attorney client relationship with party. Under Utah Law, party must show that it submitted confidential information to lawyer and that it did so with the reasonable belief that lawyer was acting as party's attorney." (See Points of Authority for rest of cases and rulings that support this petition). In fact *Nelson v. Green builder Inc. 823 F. Supp. 1493,* it states; "Party establishes implied attorney-client relationship if it shows that it submitted confidential information to the lawyer and that is did so with the reasonable belief that lawyer was acting as parties attorney". On that basis the court already found enough reason to disqualify Steve.

2. Typically Courts apply a very strict standard of proof when evaluating evidence to refute existence of client relationship and should resolve any doubt in favor of disqualification. (*LaSalle Nat'l Bank 703 F.2d 257).* If Steve is allowed to continue on in the case, Earl will not be able to have a fair trial. Court Ruled that a disqualification would result in a significant interruption to the course of justice. Earl maintains that the fact that Steve didn't disqualify himself early on in the trial has already leaded to a "significant interruption to the course of justice". Ignoring that fact will not fix the issue, but will only allows the problem to continue to perpetuate its-self.

During the hearing on December 17, 2003, Judge Hilder set a trial date for March first and second. A couple of days later, he sent a memo in which he refused to hear any motions for reconsideration or any other motions till the day of trial. At that point it will be two late to do anything about this issue., and irreversible damage will be done to Earl and his chance for a fair trial. This is truly the only way to get justice at this point.

Poly Software v. Yu Su, 880 F. Supp 1847

[2] Party wishing to disqualify opposing counsel because of a former representation under Utah Rules of Civil Procedure, must demonstrate that a previous attorney-client relationship arose with the moving party; that present litigation is substantially factually related to previous representation; and that attorney's present client's interest are materially adverse to movent. [3] In order for a party wishing to disqualify opposing counsel on grounds of former representation to demonstrate that opposing counsel previously had implied attorney client relationship with party. Under Utah Law, party must show that it submitted confidential information to lawyer and that it did so with the reasonable belief that lawyer was acting as party's attorney.

Cole v. Raisoso 43 F.3d 1373

[26] Threshold question for court when ruling on motion to disqualify opposing counsel on ground of former representation is whether there was attorney client relationship that would

subject opposing counsel to ethical obligation of preserving confidential communications and for these to have been attorney client relationship, party need not have executed a formal contract nor is existence of relationship dependent upon payment of fees; however, movent must show that it submitted confidential information to the opposing counsel and did so with the reasonable belief that counsel was acting as movant's attorney.

[27] To protect client confidentiality, party moving for disqualification of opposing counsel on grounds of a former representation need not reveal the substance of its communication to counsel for this would defeat purpose of disqualification; usually showing of circumstances and subject of consultation will be enough to demonstrate whether information was confidential.

Threshold of Reasonableness of Belief

Nelson v. Green Builder Inc. 823 F. Supp. 1439

[4] Party establishes implied attorney-client relationship if it shows that it submitted confidential information to the lawyer and that is did so with the reasonable belief that lawyer was acting as parties attorney.

[5] To create attorney-client relationship it is not necessary that parties execute formal contract, or that relationship be dependent upon payment of fees; fiduciary relationship may arrive solely from nature work performed and circumstances under which confidential information is divulged.

[6] Lawyer may not switch sides in substantially related representations;

[7] Representation is substantially related to prior representation when lawyer could have obtained confidential information in first that would have been relevant in second.

[8] If substantial relationship is found between present and prior representations, it is unnecessary for former client to prove that lawyer actually received confidential information and used it against him or her; more-over, attorney or party need not divulge any conflicts to prove that they were revealed.

[9] Substantial relationship test for disqualification requires three-part inquiry. First, scope of prior legal representation must be factually reconstructed; Second, court must determine whether it is reasonable to infer that confidential information allegedly given would have been given to lawyer representing client in prior matters; Third, court must decide whether that information is relevant to issues raised in litigation pending against former client.

[10] If the court finds that the representation are substantially related, then presumption arises that lawyer received confidential information during his or her prior representation. [11] When a lawyer switches sides in litigation, presumption of shared confidences is irrefutable and thus disqualification is proper, absent consent of, or waiver by former client.

pp. 1448 "The courts apply a very strict standard of proof when evaluation evidence offered to rebut the two presumptions of shared confidences on a motion for imputed disqualification. This heavy rebuttal burden is satisfied only with "clear and effective" proof. Moreover the court resolves any doubt at to the existence of and asserted conflict of interest in

favor of disqualification 'LaSalle Nat'l Bank 703 F.2d 257, (citing Gulf Oil, 588, F.2d at 225)'".

Dalrymple v. Nat. Bank and Trust Co, 615 F. Supp. 979

[1]In determining whether attorney client relationship has been created, focus is on client; subjective belief that he is consulting a lawyer in his professional capacity, and on his intent to seek professional legal advice.

[2] To disqualify counsel on basis of conflict of interest between former and present clients, it is first necessary to show that attorney-client relationship exists or has existed between counsel and the party seeking disqualification, but not necessary that a strict contractual relationship exists, as relationship may be implied, and foremost among underlying concern is the possibility of attorneys disloyalty and breach of faith towards one who is previously entrusted him with confidences.

[7] Inquire in cases in which disqualification of attorney brought on grounds of previous representation of opposing party is whether attorney was in position to acquire confidences of his clients; the actual receipt of such confidential information is irrelevant.

[8] Implied attorney client relationship exists whenever lay party submits confidential information to an attorney whom he reasonably believes is acting to further his interests

Kearns v. Fred Lavery/Porsche Audi Co, 573 F. 91

[1] The attorney-client privilege attaches and one is considered a client, whenever one consults a lawyer with the view to obtaining professional legal services.

[2] Attorney who represented defendant in patent infringement case and who had consulted with plaintiff in a suit against same patents was disqualified from further representation of defendants because he had received confidential information concerning the other, substantially related case; for attorney to continue his representation would have involved breach of his fiduciary obligation and would have undermined integrity of attorney client privilege. pp.95 "and in Schloetter v. Railoc of Indiana Inc., 546 F.2d 706 it was held; The basic policies underlying and judicially-compelled withdrawal of counsel because of potential conflicts of interest can be found in canons 4 and 9 of the ABA code of professional responsibility . . . Read together, the two cannons indicate that an attorney may be required to withdraw form the case where there exists even an appearance of a conflict of interest.

Rules of Professional Conduct

Rule 1.6 (a) states "a lawyer shall not reveal information relating to representation of a client except as stated in paragraph (b) unless the client consents after consultation."

Rule 1.7 states "A lawyer shall not represent a client if the representation of the client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) Each Client consents after consultation.

Rule 1.8 (b) states "A lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client consents after consultation.

Rule 1.9 states "a lawyer who has formerly represented a client in a matter shall not thereafter: (a) represent another person in the same or substantial factually related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or …".

1.16 states that "a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if; (a)(1) the representation will result in violation of the rules of professional conduct or other law".

CONCLUSION

In Conclusion, Court should re-consider its decision. The decision made in this case makes anyone who in getting a divorce eligible for a protective order no matter how well they are getting along. It is clear that is not the intent of out legislators, otherwise a protective order would be issued as soon as either party filed for divorce. Steve Wall clearly should have been dismissed from this case at the very beginning. There is no doubt that if he had been dismissed that the entire divorce case would have gone much smoother.

Respectfully Submitted this 18 Day of May, 2005

Earl Cline

Appellant (Pro Se)

MAILING CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was hand delivered this, 19 day of May, 2005 to:

Shawn Turner
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