4-28-2014

Brown v. Brown Appellant's Reply Brief Dckt. 41483

IN THE SUPREME COURT OF THE STATE OF IDAHO

HEATHER G. BROWN

Plaintiff/Respondent,

vs.

MICHAEL L. BROWN,

Defendant/Appellant,

Supreme Court Docket No. 41483-2013
Kootenai County No. 2010-4386

APPELLANT'S REPLY BRIEF
Appeal from the District Court of the
First Judicial District of the State of Idaho
In and for the County of Kootenai

HONORABLE BENJAMIN R. SIMPSON
District Judge

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I.

STATEMENT OF THE CASE

A. Nature of the Case

Appeal is taken from the District Court's Order of Dismissal and Judgment of Dismissal of Defendant's Appeal of the Decree of Divorce-said order and judgment having been entered on September 19, 2013 (R., Vol. I, pp 159-162), wherein the District Court Dismissed Defendant's Appeal as untimely. Defendant was served with the Decree of Divorce by the Court on July 24, 2013, just one (1) day before the Notice of Appeal was due to be filed. See R., Vol. I, p. 85 notes by clerk #2242 as to "refaxed" Decree.

B. Course of Proceedings and Statement of Facts.

Appellant stands by his statement of the course of proceedings and statement of facts. Appellant would emphasize that Respondent stresses that Respondent's counsel told Appellant's counsel she was *going to* file the Decree of Divorce. Stating that something is *going to* be done, is not any kind of legally recognized notice that a thing has *actually been* done. What is important here is that *when* the Decree was filed, Appellant was not given notice that it *had been* filed, as Appellant's counsel's facsimile number was incorrectly listed on the certificate of service, which was supplied by Respondent. Appellant had no affirmative duty to continually check with counsel for Respondent or the court to see if the Decree had in fact been filed by the Respondent.

Heather's Response Brief has not countered Michael's claims that he did not receive actual notice of the entered Decree. Heather's Response Brief focuses on her counsel's having sent Michael's counsel a copy of the proposed brief and telling him that she would be filing the

same if she did not hear back from him. This line of argument has no bearing on the legal issue raised on appeal, that is the actual, or lack thereof, of actual notice of the the entry of the Decree.

Heather's Response brief cites the record stating that "Mr. Madsen has admitted he had actual notice within the 42-day period. The Court finds the issue is clear, based upon the applicable rules. It is jurisdictional." (TR. Motion to Dismiss, p.9, Lns. 22-25). As Michael has pointed out, yes his counsel did have notice, 1 days notice (Id.). The question before this court is, was the 1 day actual notice sufficient.

The cases cited by both parties dealt with actual notice of more than 1-2 days. Cline v. Roemer, 97 Idaho 666, 667, 551 P.2d 621, 622 (1976) states that actual notice is effective even when official notice has not been received. While the Cline case does not state the actual amount of time between notice and the filing of the Notice of Appeal, the court states "... the time for appeal from judgment has long since passed..." Tanner v. Estate of Cobb, 101 Idaho 444, 614 P.2d 984 (1980), cited by Herrett v. Herrett, 105 Idaho 358, 360, 670 P.2d 63, 65 (Ct. App. 1983), which dealt with thirteen (13) days actual notice of the underlying judgment.

In the case at hand, 'actual' notice at best, was one day before 'official' notice was given by the district court, or two (2) days actual notice. The earliest date actual notice in this case could only be said to have been given when Heather's counsel e-mailed a copy of the entered Decree to Michael's counsel on July 23, 2013 (R. Vol. I, p.118), two (2) days before the deadline to file the Notice of Appeal.

Heather cites Swayne v. Otto, 99 Idaho 271, 272, 580 P.2d 1296, 1297 (1978) for the proposition that constructive notice is sufficient. However, Swayne, supra, found constructive

notice because counsel for Appellant had attended a hearing where the entered Order was in the Court's file:

> The holding of the district court was that appellants had "constructive notice" that the judgment had been entered, notwithstanding the alleged omissions and errors of the clerk, from the fact that at the hearing for costs on April 11, 1975, the judgment was marked "filed" March 28, 1975, and was in the court's file at the hearing and available to counsel.

Thus, the Swayne, supra, case is distinguishable. No hearings were attended, or held wherein there was an entered Decree. Here we have merely that counsel for Heather indicated she was going to file the proposed Decree. Tanner v. Cobb's Estate, 101 Idaho 444, 445, 614 P.2d 984, 985 (1980), citing Swayne, supra, states:

> We conclude that although there is no showing in the court records of a mailing of notice of entry of judgment, where appellants' counsel had actual notice of entry of judgment thirteen days prior to expiration of the time for filing an appeal, appellants' notice of appeal filed forty-four days after the entry of judgment was not timely. See Swayne v. Otto, 99 Idaho 271, 580 P.2d 1296 (1978)

Again the courts were dealing with a situation where the appealing party had thirteen (13) days actual notice. Klaudt v. Klaudt, 156 N.W.2d 72, 76 (N.D. 1968), again citing the Swayne decision, supra, found:

> In this case the record does not disclose that such a written notice was served upon the defendant, but as she had actual notice of the entry of the judgment (as evidenced by her first notice of motion to vacate the original judgment), the purpose of the statute was fulfilled.

Nothing in the record in the instant case points to actual or constructive knowledge by Michael of the entered Decree earlier than two (2) days prior to the running of his time in which to file a Notice of Appeal.

As stated and set forth in Michael's opening brief, the actual notice of the entered Decree was one (1) day. (R., Vol. I, p. 85). The only question that this Court should decide is whether one (1) day's notice of the entry of Decree was sufficient time for Michael to speak to his counsel as to the issues to appeal; come up with the funds to retain counsel for his appeal; and timely file his Notice of Appeal.

II.

ATTORNEY FEES - RESPONDENT

As to Heather's request for attorney fees, this request should be denied. Michael's appeal presents genuine issues of law and fact concerning the adequacy of his actual and constructive knowledge of the entry of the Decree from which he appeals. See Maslen v. Maslen, 121 Idaho 85, 93, 822 P.2d 982, 990 (1991):

> Where an appeal presents a genuine issue of law, fact or discretion for review, we will not award attorney fees on appeal. *Spencer v. Idaho First Nat'l Bank,* 106 Idaho 316, 678 P.2d 108 (Ct.App.1984)

See also Maslen v. Maslen, 121 Idaho 85, 93, 822 P.2d 982, 990 (1991): "Where an appeal presents a genuine issue of law, fact or discretion for review, we will not award attorney fees on appeal." As set out previously, after the judgment of the court upon the record, Michael and Heather began negotiating through their respective counsel as to distribution of the property and a stipulated Decree for months prior to Michael receiving the recorded Decree and thought the proposed Decree had not been submitted to the Court based upon said continuing negotiations.

Further, Ms.Brown's position as to notice and opportunity to timely appeal is clearly unreasonable since it was Ms. Brown who caused Mr. Brown's lack of knowledge as to the final Decree as a result of her supplying the Clerk of Court the wrong fax number for his counsel.

As a result of their bad conduct and unreasonable position they have taken in the above matter, it is Mr. Brown who should be awarded his attorney fees pursuant to I.C. 12-121 should he be the prevailing party in this appeal.

III.

CONCLUSION

Based upon the foregoing, Appellant respectfully requests this Court to set aside the District Court's Order dismissing the appeal in the above matter and for an order of Appellant's attorney fees and costs.

Respectfully submitted this 24th day of April, 2014.

MADSEN LAW OFFICES, PC,
Attorneys for Plaintiff/Appellant

By: _____
HENRY D. MADSEN

CERTIFICATE OF DELIVERY

The undersigned hereby certifies that on this 24th day of April, 2014, two bound, true and correct copies of the foregoing *APPELLANT'S REPLY BRIEF* were delivered to the party shown below by regular mail, addressed as follows:

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_____