

IN THE UTAH COURT OF APPEALS

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Dell Chryst,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellant,)	
)	Case No. 20050204-CA
v.)	
)	
Hans Braun; Kathy Gould; and)	F I L E D
Weltmeister, Inc.,)	November 3, 2005
)	
Defendants and Appellees.)	2005 UT App 470

Third District, Salt Lake Department, 030912683
The Honorable J. Dennis Frederick

Attorneys: Dell Chryst, Riverton, Appellant Pro Se
Jeffrey T. Colemere, Murray, for Appellee

Before Judges Davis, McHugh, and Orme.

PER CURIAM:

Dell Chryst filed a complaint alleging defamation against appellees Hans Braun, Kathy Gould, and Weltmeister, Inc. Appellees asserted, among other defenses, that they were entitled to immunity pursuant to Utah Code section 34-42-1. See Utah Code Ann. § 34-42-1 (2001). A bench trial was held and Chryst's claims were dismissed pursuant to a motion filed by appellees after Chryst's case was presented. The motion was described below as a motion for a directed verdict pursuant to rule 50 of the Utah Rules of Civil Procedure. However, "[b]y its terms, a directed verdict under [rule 50] contemplates only a jury trial." Grossen v. DeWitt, 1999 UT App 167, ¶7, 982 P.2d 581 (citations omitted). In the context of a bench trial, the directed verdict's procedural counterpart is a motion to dismiss pursuant to rule 41(b). See Utah R. Civ. P. 41(b); see also Grossen, 1999 UT App 167 at ¶8. Chryst argues that the district court erred when it granted appellees' motion.

Under rule 41(b) of the Utah Rules of Civil Procedure, the court may dismiss if "(1) the claimant has failed to introduce sufficient evidence to establish a prima facie case, or (2) the trial court is not persuaded by that evidence." Walker v. Union Pac. R.R., 844 P.2d 335, 340 (Utah Ct. App. 1992). "As with a directed verdict, whether dismissal was appropriate for failure

to make a prima facie case is a question of law reviewed for correctness." Grossen, 1999 UT App 167 at ¶8 (citation omitted).

Chryst argues on appeal that the district court's decision to dispense with opening statements at trial unfairly prejudiced him. Chryst also contends that Utah Code section 34-42-1 is unconstitutional as applied in this case. However, we do not address these issues because Chryst failed to raise them before the district court.¹ See State v. Richins, 2004 UT App 36, ¶8, 86 P.3d 759 ("As a general rule, appellate courts will not consider an issue, including a constitutional argument, raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances.") (quotations and citation omitted). In order to preserve an issue for appeal, it "must be raised in a timely fashion, must be specifically raised such that the issue is sufficiently raised to a level of consciousness before the trial court, and must be supported by evidence or relevant legal authority." Id. (quoting State v. Schultz, 2002 UT App 366, ¶19, 58 P.3d 879). The preservation rule allows "the trial court an opportunity to 'address the claimed error, and if appropriate, correct it.'" Id. (quoting State v. Cram, 2002 UT 37, ¶10, 46 P.3d 230) (additional quotations and citation omitted).

Finally, to the extent Chryst argues that the district court improperly determined the credibility of the witnesses, this argument is without support. "[B]ecause the trial court had the opportunity to view these witnesses and weigh their credibility, we defer to its findings unless the record demonstrates clear error." State v. Nichols, 2003 UT App 287, ¶27, 76 P.3d 1173 (quoting State v. Reed, 839 P.2d 878, 880 (Utah Ct. App. 1992)). Chryst fails to show that any error exists in the record.

Accordingly, we affirm the order of the district court.

James Z. Davis, Judge

Carolyn B. McHugh, Judge

Gregory K. Orme, Judge

¹This ruling is not unduly harsh as to Chryst. Although he appears pro se on appeal, he was represented by counsel at trial.