

1986

Vie Steele v. Robert H. Breinholt : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 860321-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

VIE STEELE,

Appellant,

vs.

ROBERT H. BREINHOLT dba
ASPEN CARE CENTER,

Respondent.

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Case No. 860347

860321-CA

BRIEF OF RESPONDENT

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY,
JOHN F. WAHLQUIST, DISTRICT JUDGE

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FILED

0070-1-11

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

VIE STEELE,

Appellant,

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STATEMENT OF THE ISSUE ON APPEAL

Did the trial court err in refusing to instruct the jury on the statutory defense to criminal trespass contained in Utah Code Ann. §76-6-206(4) (1978)?

STATEMENT OF THE CASE

On October 22, 1984, an employee of the Aspen Care Center instigated a citizen's arrest of appellant Vietta Steele who was demanding to visit an elderly resident patient. The appellant had previously been requested, in writing, from the patient's private attorney, to refrain from visiting with and causing disturbances with the patient. The arrest also occurred after the patient had informed two Aspen Care employees that he did not want to see Mrs. Steele and after she had been requested to leave the premises by Aspen Care Center employees and a policewoman. The appellant was taken by the policewoman to the Ogden City Police Station, booked and released on her own recognizance to appear for trial on trespassing charges on November 28, 1984. The elderly patient died on October 26, 1984, and on November 28, 1984, charges against Mrs. Steele were dismissed without any trial, based on representations of the City Prosecutor that the City had decided to dismiss the charges after conferring with Aspen Care Center employees when it was learned the patient had died and Aspen Care Center did not believe there was any purpose at that point, in following through with the trial. Thereafter the appellant filed suit against respondent Robert Breinholt dba Aspen Care Center seeking actual and punitive damages for malicious prosecution, abuse of process, false imprison-

ment and the tort of outrage.

Appellant Vietta Steele appeals from an adverse judgment in the trial court, claiming that it was prejudicial error for the trial court to refuse to instruct the jury on the statutory defense to the charge of criminal trespass, contained in Utah Code Ann. §76-6-206(4)(1978). Appellant seeks a new trial on the basis of that error.

STATEMENT OF FACTS

The appellant's Statement of Facts ignores the cardinal rule of appellate review that the record will be reviewed in the light most favorable to the prevailing party in the trial court. Kohler v. Garden City, 639 P.2d 162 (Utah 1981); Hutcheson v. Gleave, 632 P.2d 815, 816 (Utah 1981); Charlton v. Hackett, 11 Utah 2d 389, 360 P.2d 176 (1961). Indeed the Statement of Facts set forth in appellant's brief only recites that evidence which allegedly supports her claim of error and ignores material evidence which supports the trial court's decision. This has been held to be an independent basis for affirmance. Hobbs v. Denver & Rio Grande Western R.R., 677 P.2d 1128 (Utah 1984). The following statement of facts simply directs the court's attention to those facts which clearly support the trial court's finding in favor of respondent.

This case arises from the events surrounding appellant Vietta Steele's ("Steele") long-time friendship with a man named Zenon Dompore ("Dompore"). Dompore was an elderly patient at the Aspen Care Center ("Care Center"), a privately owned and operated skilled nursing home facility in Ogden, Utah. (R.912-913) Mr. Dompore had

no family except a sister living in the Philipines and a niece in Illinois. (R.613, 614) He suffered a stroke in June of 1970.

(R.613)

The appellant, Vietta Steele was a resident of Clearfield, Utah, (R.612), and at the time of her arrest was neither a relative, next of kin or guardian of Mr. Dompur. Nevertheless, following Mr. Dompur's stroke, Mrs. Steele became a dedicated and vigorous advocate on his behalf concerning his finances and the quality of care provided to him. (R.652-653) For several years she had complained to many persons, health care providers, state and federal agencies overseeing skilled nursing facilities and even Channel 5 News concerning what she perceived to be inadequate care provided to Mr. Dompur, by not only Aspen Care Center, but by other skilled care centers. (R.618, 621, 653, 655, 740)

In 1984, Zenon Dompur became upset over Mrs. Steele's involvement in his affairs. (R.885) He hired a lawyer named David Havas who sent a letter to Mrs. Steele dated March 22, 1984, to terminate any power of attorney she may have had, together with a termination of power of attorney signed by Zenon Dompur. (R.622, 885) Dompur believed Steele may have had power of attorney over his affairs, and told Havas that he didn't want Steele to "have anything to do with him or interfere with his life." (R.885) After that time, Steele continued to visit Dompur at the Care Center with the same frequency as before, but she tried to avoid the Care Center staff. (R.623)

Mr. Havas again sent a letter dated June 21, 1984, to Mrs.

Steele's attorney reflecting Mrs. Steele had been at Aspen Care Center causing disturbances involving Zenon Dompur and requesting her to stay away and refrain from causing further disturbances or he would be forced to obtain a restraining order. (R.624, 892)

Steele had recently visited Dompur at the Care Center and caused a disturbance which upset Dompur. (R.893) The Care Center believed it was "detrimental to [Dompur's] well being" for Steele to continue visiting, and therefore requested Havas to send the letter. (R.893) An officer at the state Ombudsmen's office also requested that Havas write the letter. (R.893) Dompur told members of the Care Center staff in June of 1984 that he did not want Steele to visit him. (R.776)

Just past noon on October 22, 1984, the appellant Vietta Steele marched into the Aspen Care Center with a tape recorder in hand and walked over to visit with Mr. Dompur. (R.632) Two Aspen Care Center employees (Jolene Anderson, a Social Work Designee and Debbie Hill, a Medical Records Clerk) separately asked Mr. Dompur if he wanted to be visited by Mrs. Steele and he replied no. (R.780, 805) In addition, Dompur had come to Hill earlier that morning, before Steele's arrival and crying, told Hill that Steele had visited him the night before and that he did not want to visit her any more. (R.775) Dompur told Hill that he was afraid Steele was "after his money." (R.775)

Jolene Andersen and Debbie Hill each asked Mrs. Steele several times to leave but each time she refused. (R.786, 804, 823) They called a policewoman who also asked her to leave and she

refused. (R.817) Mrs. Steele even rejected her husband's plea to leave. (R.824) She was advised by the officer, if she did not leave she would be arrested for trespassing on private property. (R.817) She refused to leave and Debra Hill signed a citizen's arrest form. (R.836) The officer took her to jail where she was booked and released on her own recognizance. (R.649-650) As Steele was being driven to the police station by Officer Grotegut, Steele told Officer Grotegut that since she was being arrested, all the "horrible things" that were happening to Dompur at the Care Center could now be documented. (R.838-839) While still at the Care Center, Steele had at one point told Anderson that she wanted to be arrested so that the events of that day would be documented. (R.823)

On the morning of November 28, 1984, when Steele was scheduled for arraignment, she was notified that the trespass charge would not be prosecuted because Dompur had died four or five days after the arrest. (R.651) Steele then brought this action against the Care Center and its owner Robert Breinholt, alleging malicious prosecution, abuse of process, the tort of outrage, and false imprisonment.

SUMMARY OF ARGUMENT

The trial court properly refused the requested instruction because there was no substantial evidence to support either element of the defense.

I. The evidence shows conclusively that the Care Center was not open to the public so far as appellant Steele was concerned.

Steele knew she had been prohibited from entering the premises, and Dompore had told Care Center employees that he didn't want to see Steele. She had been requested by Dompore's attorney not to visit him and by representatives of the Care Center to leave and by the officer to leave.

II. The evidence also demonstrates conclusively that Steele's presence substantially interfered with the operation of the Care Center. Testimony showed that Dompore was emotionally upset about Steele's prior visits and that her presence on October 22, 1984, further upset him emotionally.

ARGUMENT

The sole issue raised on this appeal is whether it was error for the trial court to refuse to instruct the jury on the statutory defense to the charge of criminal trespass which is contained in Utah Code Ann. §76-6-206(4)(1978). The trial judge instructed the jury that if they found that Steele would have been guilty of criminal trespass, she could not recover on any of the civil causes of action alleged. If the trial court had instructed the jury regarding the statutory defense, and the jury had found the defense applicable, Steele may have obtained a favorable verdict on her civil claims. Steele, therefore, claims that she was prejudiced by the trial court's refusal to instruct on the statutory defense which reads as follows:

- (4) It is a defense to prosecution under this section:
 - (a) That the property was open to the public when the actor entered or remained; and
 - (b) The actor's conduct did not substantially interfere with the owner's use of the property.

Utah Code Ann. §76-6-206(4)(1978).

It is well established in Utah law that a party is entitled to have the jury instructed on his theory of the case if there is any substantial evidence to justify such an instruction. Black v. McKnight, 562 P.2d 621, 622 (Utah 1977); State v. McCumber, 622 P.2d 353, 359 (Utah 1980); See also Watters v. Querry, 626 P.2d 455, 458 (Utah 1981). However, where the evidence provides no reasonable basis to support the instruction, a trial court's refusal to give the instruction is not reversible error. Dixon v. Stoddard, 627 P.2d 83, 86 (Utah 1981); Powers v. Gene's Bldg. Materials, Inc., 567 P.2d 174, 176 (Utah 1977). In addition, even where the failure to instruct may have been error, if it appears that the outcome of the trial would not have been affected by giving the requested instruction, failure to instruct is not prejudicial error. State v. Smith, 700 P.2d 1106, 1110 (Utah 1985); State v. Bell, 563 P.2d 186, 188 (Utah 1977).

The question whether this instruction was properly refused, therefore, requires an analysis of whether there was any substantial evidence to justify an instruction on the defense. The defense has two elements. A jury when given an instruction on this defense, must find that (1) the premises were open to the public at the time of the alleged trespass, and (2) the person's presence did not substantially interfere with the owners use of the property. Utah Code Ann. §76-6-206(4)(1978). Unless both of those elements are established, the defense is not available to the appellant. The

sufficiency of the evidence as to each element of the defense is discussed below.

POINT I.

OPEN TO THE PUBLIC

The Utah Supreme Court has not interpreted the phrase "open to the public" as contained in §76-6-206(4). Therefore, reference must be made to the decisions from other states which have interpreted that phrase in the same context. In State v. Ocean, 24 Or.App. 289, 546 P.2d 150, 152 (Or.Ct.App. 1976), the Oregon Court of Appeals interpreted the phrase "open to the public" as it is found in Oregon's criminal trespass statute. In that case, the defendant had received written notice from Fred Meyer Corporation prohibiting him from entering any Fred Meyer store without the permission of an officer of the corporation. Despite this prohibition, defendant entered a Fred Meyer store and was charged with criminal trespass. The defendant claimed his entry was not unlawful because the store was "open to the public" at the time of his entry. In deciding the meaning of the phrase "open to the public," the Oregon court referred to the statutory definition of that phrase as contained in Or.Rev.Stat. §164.205(4)(1953), which definition reads as follows:

"Open to the public" means premises which by their physical nature, function, custom, usage, notice or lack thereof or other circumstances at the time would cause a reasonable person to believe that no permission to enter or remain is required."

Under Oregon law, as under Utah law, a person is not guilty of

unlawful entry if the premises are open to the public at the time. See State v. Taylor, 17 Or.App. 499, 522 P.2d 499, 500-501 (Or.Ct.App. 1974). However, the court held that because the defendant had been prohibited from entering the premises of any Fred Meyer store, he was "not a member of the general public to whom the premises were open, even during business hours." State v. Ocean, 546 P.2d at 152-153.

Applied to the facts of this case, the above interpretation of the phrase "open to the public" yields the same result here as in Ocean. Steele had received a letter from Mr. Dompur's attorney requesting she not visit Dompur. According to her own testimony, Steele understood that she was prohibited from entering the Care Center premises and that she did not obtain permission to enter the premises on October 22, 1984. According to the testimony of Debra Hill, Jolene Andersen, and Officer Ann Grotegut, Steele was asked repeatedly to leave the premises and each time refused. In light of this evidence, it is clear that Steele was not a member of the general public to whom the Care Center was open. Furthermore, there is more reason in this case to hold that the premises were not open to the public than there was in Ocean. In that case the premises involved were that of a Fred Meyer retail department store. A retail store extends a broad invitation to the general public to enter its premises, to look, and to buy its products. A nursing home such as the Care Center, makes no such invitation. On this basis alone, the court may find that the Care Center was not open to the public when Steele entered its premises on October 22,

1984.

However, there is an additional basis such a finding to support such a finding. Dompur's election on the basis of his right as a patient at the Care Center supports the determination that the Care Center was not open to the public so far as Steele was concerned. Dr. Breinholt, the owner of the Care Center, testified that as a condition of the patients' participation in the Medicare and Medicaid programs, the Care Center is required to establish certain patients' rights. See 20 C.F.R. §405.1121 (K)(1977). A copy of the rights adopted by the Aspen Care Center is marked as Exhibit "11-D" at trial and is a part of this record on appeal. A much larger copy of that list of rights was posted in the lobby of posted in the lobby of the Care Center in October of 1984. One of those rights reads as follows:

"The patient has the right to associate and communicate with persons of his choice....."

(See Exhibit "11-D"). The evidence shows that Mr. Dompur's attorney advised Mrs. Steele by letter not to visit him at the Care Center. In addition, Mr. Dompur told Care Center employees Debra Hill and Jolene Anderson on more than one occassion that he did not want Mrs. Steele to visit him. By prohibiting Steele from entering the premises, the Care Center simply enforced Dompur's right.

This evidence clearly shows that the Care Center was not "open to the public" on October 22, 1984, so far as the appellant Vietta Steele was concerned, and that there was no substantial evidence to support the instruction. Since both requirements of

§76-6-206(4) must be met to establish the statutory defense the defense must fail, and this court should affirm the trial court's ruling that the instruction was not warranted. However, even if the court should find that the Care Center was open to the public to Mrs. Steele on October 22, 1984, the statutory defense is still not available to Steele because her conduct substantially interfered with the owner's use of the premises.

POINT II

SUBSTANTIAL INTERFERENCE

The statutory defense contained in Utah Code Ann. §76-6-206(4)(1978) requires as its second element a showing that "the actor's conduct did not substantially interfere with the owners use of the property". As with the first element of this defense, there is no Utah Case law which explains what substantial interference means in the context of this statute. In addition, a search of the case law in other states reveals no definition of substantial interference in the context of a criminal trespass. The question whether Steele's presence at the Care Center substantially interfered with the operation of the Care Center must, therefore, be decided on the basis of logic and sound reasoning, in light of the practical realities of nursing home administration.

To substantially interfere with the operation of a nursing home facility, the person's conduct must constitute such a burden upon the operation of the facility that the owner is unable to carry on the operation in a reasonably safe and proper manner. To operate a nursing home facility in a reasonably safe and proper manner, in

this context, means to be able to assure the patients' reasonable protection from disturbing and upsetting influences. To achieve that protection, the administrator of a nursing home facility must be able to control the environment within the facility. That includes the right to prohibit certain persons from visiting that facility who are likely to disturb or upset a patient. The patient himself, may certainly request that such persons be prohibited from entering the premises if that patient does not want to visit those people. See State v. Hoyt, 304 N.W.2d 884, 888-889 (Minn. 1981) (resident has the right to determine who he may associate with). In addition, the administrator of the facility has the discretion to prohibit such visits if in its judgment those visits would adversely affect the physical or emotional health of the patient. This is the proper standard to determine whether Steele's conduct constituted substantial interference in this case. This court should adopt that standard in deciding whether the second element of the statutory defense is met.

As measured by that standard, Steele's conduct on October 22, 1984 substantially interfered with the operation of the Care Center, and the second element of the statutory defense is, therefore, not met. The evidence shows that Dompur, his attorney and the Care Center had requested that Steele not return to visit Dompur. According to the testimony of Care Center employees, Dompur was emotionally upset by Steele's visits. Shortly before Steele's arrest, Dompur approached Care Center employee Debra Hill about Steele's visits. Dompur was crying and emotionally upset. He told

Hill that Steele had visited him the night before and that he did not want her to visit him again. Dompur had expressed the same concern some four months earlier and the Care Center sent the June 21st letter to Steele prohibiting her from visiting Dompur. Mr. Havas testified that when he visited Dompur, Dompur became visibly upset at the mention of Steele's name. In addition, when Steele arrived at the Care Center on the day of her arrest, Dompur once again told both Hill and Andersen that he did not want to see Steele. Andersen and Hill testified that in their judgment Steele's presence and the commotion she caused would adversely affect Mr. Dompur's emotional condition.

On that evidence, it is clear that Dompur did not want Steele to visit him. It is also clear that in the Care Center's judgment, Steele's visits were likely to further upset Dompur emotionally. Steele's visits, therefore, constituted a substantial interference with the operation of the Care Center. Her visits rendered the Care Center employees unable to protect Dompur from emotionally upsetting or disturbing influences. On this evidence, all reasonable men must conclude that there was no basis for a jury instruction on §76-6-206(4)(b). This court, therefore, should conclude that the requested instruction was properly denied.

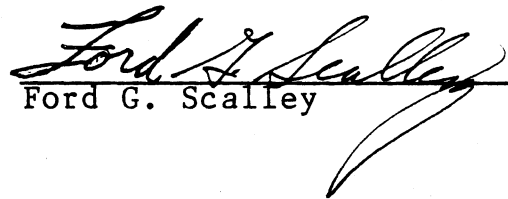
CONCLUSION

The trial court properly denied the jury instruction on the statutory defense to criminal trespass set forth in Utah Code Ann. §76-6-206(4)(1978). There was no substantial evidence upon which to base either element of that defense. The evidence clearly

established that the Care Center was not open to the public as that phrase is used in the statute. In addition, the evidence establishes conclusively that Steele's presence substantially interfered with the operation of the Care Center. Since there is no evidenciary basis to support the requested instruction, the trial court properly denied the same.

DATED this 29th day of October, 1986.

MORGAN, SCALLEY & READING

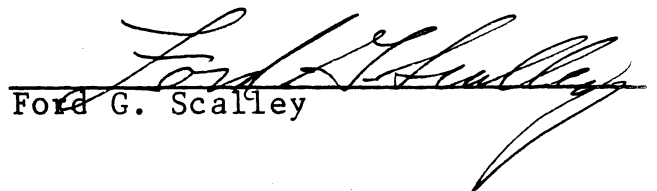


Ford G. Scalley

CERTIFICATE OF MAILING

I hereby certify that on the 29th day of October, 1986, four (4) true and correct copies of the foregoing Brief of Respondent was deposited in the United States mails, postage prepaid, addressed to the following counsel of record:

James R. Hasenyager, Esq.
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Ford G. Scalley

MEDICARE/MEDICAID OPERATING STANDARDS

Skilled Nursing Facilities

405.1121 GOVERNING BODY AND MANAGEMENT, contd.

Interpretive Guidelines: [Issued by HEW's Office of Long Term Care, June, 1975]

1. Policies and procedures recognize the needs of patients to have access to and maintain contact with the community of which they are a part and members of that community have access to him.
2. Subject to reasonable scheduling restrictions, visiting policies and procedures permit patients to receive visits from anyone they wish. A particular visitor may be restricted by the facility for one of the following reasons:
 - a. The patient refuses to see the visitor.
 - b. The patient's physician documents specific reasons why such a visit would be harmful to the patient's health.
 - c. The visitor's behavior is unreasonably disruptive of the functioning of the facility (this judgment must be made by the administrator and the reasons are documented). This is not intended to preclude those who, because they advocate administrative changes to protect patient rights, are considered a disruptive influence by the administrator.
3. Decisions to restrict a visitor are reviewed and reevaluated each time the patient's plan of care and medical orders are reviewed by the physician and nursing staff or at the patient's request.
4. Space is provided for patients to receive visitors in reasonable comfort and privacy.
5. Telephones, consistent with ANSI standards (405.1134(c)), are available and accessible for patients to make and receive calls with privacy. Patients who need help are assisted in using the phone. The fact that telephone communication is possible, as well as any restrictions, is made known to patients.
6. Arrangements are made to provide assistance to patients who require help in reading or sending mail.

(k)(12) May meet with, and participate in activities of, social, religious, and community groups at his discretion, unless medically contraindicated (as documented by his physician in his medical record);

Interpretive Guidelines: [Issued by HEW's Office of Long Term Care, June, 1975]

1. Patients who wish to meet with or participate in activities of social, religious, or other community groups in or outside of the facility are informed and encouraged and assisted to do so. (405.1131(b)).
2. All patients have the freedom to refuse to participate in these activities.

(k)(13) May retain and use his personal clothing and possessions as space permits, unless to do so would infringe upon rights of other patients, and unless medically contraindicated (as documented by his physician in his medical record); and

Interpretive Guidelines: [Issued by HEW's Office of Long Term Care, June, 1975]

1. Patients are permitted to keep reasonable amounts of personal clothing and possessions for their use while in the facility and such personal property is kept in a safe location which is convenient to the patient.
2. Patients are advised, prior to or at admission, of the kinds and amounts of clothing and possessions permitted for personal use, and whether the facility will accept responsibility for maintaining these items (e.g., cleaning and laundry).
3. Any personal clothing or possessions retained by the facility for the patient during his stay is identified and recorded on admission and a receipt given to the patient. The facility is responsible for secure storage of such items, and they are returned to the patient promptly upon request or upon discharge from the facility.

(k)(14) If married, is assured privacy for visits by his/her spouse; if both are inpatients in the facility, they are permitted to share a room, unless medically contraindicated (as documented by the attending physician in the medical record).