

2007

Kiley Miller and John Rzeczycki v. San Juan
County, a Utah Political Subdivision, Red Rock
4-Wheelers, Inc., and State of Utah by and through
the School and Institutional Trust Lands
Administration, and John and Jane Does 1-5 : Brief
of Appellant

Utah Court of Appeals

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Paul Mortensen; Hanks and Mortensen; Walter J. Bird; Deputy San Juan County Attorney; Thomas A. Mitchell; Attorneys for Appellees/Defendants.

Bruce R. Baird; Alain C. Balmanno; Hutchings Baird Curtis and Astill; Attorneys for Appellants/Plaintiffs.

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IN THE UTAH COURT OF APPEALS

KILEY MILLER and JOHN RZECZYCKI

Plaintiffs/ Appellants

vs.

SAN JUAN COUNTY, a Utah Political
Subdivision; RED ROCK 4-WHEELERS,
INC. AND STATE OF UTAH by and through
the SCHOOL AND INSTITUTIONAL
TRUST LANDS ADMINISTRATION, and
JOHN and JANE DOES 1 - 5

Defendants/ Appelles.

BRIEF OF APPELLANTS

Case No. 20070546 CA

Appeal from the Seventh District Court, San Juan County, Judge Lyle R. Anderson

Attorneys for Appellee/Defendant Red Rock 4-Wheelers:

Paul Mortensen

Hanks & Mortensen

8 East Broadway, Suite 740

Salt Lake City, UT 84111-2204

Attorney for Appellee/Defendant San Juan County:

Walter J. Bird,

Deputy San Juan County Attorney

117 South Main

PO Box 9

Monticello, Utah 84535

Attorney for SITLA:

Thomas A. Mitchell

675 East 500 South, Suite 500

Salt Lake City, UT 84102

Attorneys for Appellants/Plaintiffs:

Bruce R. Baird (#0176)

Alain C. Balmano (#3985)

HUTCHINGS BAIRD CURTIS & ASTILL

9537 South 700 East

Sandy, Utah 84070

Telephone: (801) 328-1400

Facsimile: (801) 328-1444

Email: bbaird@hbcalaw.com

UTAH APPELLATE COURT

NOV - 1 2007

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b. Rules

Utah R. Civ. P 41(b)	passim
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c. Statute

Utah Code Ann. § 78-2-2(3)(j)	3
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JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

a. i) The Court below ruled that an Order in a prior case between these parties was binding on the parties in a new action, although the Order in the prior case read “this ruling applies only to this action and, except in this action, shall have no affect of legal or factual precedent, res judicata, collateral estoppel or other issue preclusion on the parties hereto, those in privity with them, or on any other persons or action.”

In its decision, the Court below relied on language in Utah R. Civ. P. 41(b). This is an error of law because Rule 41(b) is not applicable to the Order in the prior case which was a grant of summary judgment to the Defendants/Appellees, not a dismissal of an action.

ii) Standard of Review. The Court of Appeals reviews a trial court's application of rule 41(b) for correctness. *C&Y Corp. v. Gen. Biometrics, Inc.*, 896 P.2d 47, 53 (Utah Ct. App. 1995).

b. i) The Court below further held that the Order in the prior case was effective to create claim preclusion. This was also error because res judicata is claim preclusion, and res judicata was expressly withheld from the application of the Order in the prior case.

ii) Standard of Review. The determination of whether res judicata bars an action presents a question of law which is reviewed for correctness. *Macris & Assocs. v. Neways, Inc.*, 2000 UT 93, P17, 16 P.3d 1214.

STATEMENT OF THE CASE

a. Nature of the case: This appeal is from a final *Order of Dismissal with*

Prejudice issued by the Honorable Judge Lyle R. Anderson, in the Seventh Judicial District Court for San Juan County, Utah, on a motion to dismiss made by Defendants/Appellees

b Course of the proceedings Plaintiffs/Appellants (the ‘Landowners’) filed a complaint seeking declaratory, injunctive relief and damages for wrongful use of Plaintiffs’ land by the Defendants/Appellees (‘RR4W and the County’ or ‘Defendants’). The claims were essentially the same as those forming the basis of a prior case between the same parties, decided by the same lower Court in March 2006. The Defendants filed a *Motion to Dismiss Complaint with Prejudice*, arguing 1) issue preclusion, 2) res judicata, 3) no means of meaningful relief, and 4) bad faith on the parts of the Plaintiffs.

The Landowners opposed the *Motion to Dismiss*, noting the Order in the prior case provided that “this ruling applies only to this action and, except in this action, shall have no effect of legal or factual precedent, res judicata, collateral estoppel or other issue preclusion on the parties hereto, those in privity with them, or on any other persons or action.”

c Disposition at trial court The Court below issued its ruling granting the *Motion to Dismiss*, finding that the Order in the prior case “does not state that the Order is a dismissal without prejudice or that it does not operate as an adjudication upon the merits.” The Court below applied Rule 41(b) to its prior Order, and concluded that the order in the prior case is “most reasonably interpreted to eliminate any issue preclusion effect of the Order in any other dispute involving” these parties.

RELEVANT FACTS

All relevant facts are taken from the trial court's *Order of Dismissal with Prejudice (Order)*, which is attached to this Brief.

1. This case involves the same parties and the same claims as one previously decided by the same trial court in March 2005. *Order* at 1.

2. The Order in the prior case contained the following language in its paragraph 2(c): "This ruling applies only to this action and, except in this action, shall have no affect of legal or factual precedent, res judicata, collateral estoppel or other issue preclusion on the parties hereto, those in privity with them, or on any other persons or action." *Order* at 2.

3. The Order in the prior case was a grant of summary judgment in favor of the Defendants/Appelles. *Order* at 3.¹

The issues presented in this appeal turn on the meaning of the language in paragraph 2(c) of the Order in the prior case.

SUMMARY OF THE ARGUMENT

The Landowners argue that:

¹ The Order in the prior case strangely held that the Plaintiffs had acquired the property subject to a temporary easement of indefinite duration. *Order* at 2. One strains to understand how a temporary easement can be of indefinite duration. The Trial Court so held in spite of the fact that no easement was recorded against the property when Plaintiffs purchased the property, that Red Rock 4-Wheeler and San Juan County failed to seek a permanent easement when they could have, that SITLA denied having any obligation to grant such an easement (and denying that the statute in question provides for such an easement), and that public notice was given by SITLA that the property was being sold and that the temporary easement would thus be extinguished.

1. Rule 41(b) does not apply to the Order in the prior case because Rule 41(b) applies to dismissals and the Order in the prior case granted summary judgment pursuant to Rule 56. Rule 41(b) must be interpreted in accordance with the plain language of the Rule.

2. Even if Rule 41(b) did apply to the Order in the prior case, the language of paragraph 2(c) of that order specifically limited the application of the Order in future cases. The language of paragraph 2(c) is clear and unambiguous, and limits the application of the Order by providing that the ruling is to have no affect of legal or factual precedent, no res judicata, no collateral estoppel, and no issue preclusion on the parties to the first case.

3. Trial courts have the power to limit the preclusive effect of rulings, and to curtail the application of res judicata and claim preclusion.

DETAILS OF THE ARGUMENT

1. Rule 41(b) does not apply to the Order in the prior case, and its application was error.

Rule 41(b) applies to dismissal of actions. *See text of Rule 41(b) in Addendum.* Courts interpreting Rule 41 do so according to the plain language of the Rule. *First Equity Fed., Inc. v. Phillips Dev., LC*, 2002 UT 56 ¶¶ 13 and 16; 52 P.3d 1137 (we therefore construe Rule 41 ... to mean exactly what it says”); *Beaver County v. Qwest, Inc.*, 2001 UT 81 ¶ 19; 31 P.3d 1147.

The Rule is titled “Dismissal of actions.” Rule 41(b) applies when a defendant moves for dismissal of a claim upon failure of the plaintiff to prosecute or to comply with

the rules of evidence or to obey any order of the court. It also applies when the court is the trier of fact as when a matter is tried to the court without a jury, and the court determines that the plaintiff has not met its burden of proof.

Courts applying Rule 41(b) must weigh the evidence and decide its sufficiency. *Southern Title Guar. Co. v. Bethers*, 761 P.2d 951 (Utah App. 1988); *Handy v. Union Pacific R.R.*, 841 P. 2d 1210 (Utah App. 1992). The procedure for a court to grant summary judgment is completely different. A court granting summary judgment is specifically precluded from weighing the evidence, and can only grant summary judgment if there are no issues of material facts. *See e.g. W. M. Barnes Co. v. Sohio Natural resources Co.*, 627 P. 2d 56 (Utah 1981). Because the Order in the prior case was a grant of summary judgment, Rule 41(b) did not apply to that Order.

2. The language of the Order in the prior case limits its res judicata and claim preclusion effect.

Paragraph 2(c) of the Order in the prior case specifically limits the application of that Order. That language is clear, and on its face, allows the filing of this new action. The ruling is to have no affect of legal or factual precedent, no res judicata, no collateral estoppel, and no issue preclusion on the parties to the first case. Specifically, the language of paragraph 2(c) states:

This ruling applies only to this action and, except in this action, shall have no affect of legal or factual precedent, res judicata, collateral estoppel or other issue preclusion on the parties hereto, those in privity with them, or on any other persons or action.

That language says that the ruling shall have no legal affect on the parties, “except in this [First Case]”. The First Case ended when the time for appeal on that case expired. The language of Paragraph 2C specifically precludes the application of “res judicata, collateral estoppel or other issue preclusion” to the parties in any subsequent action. “Except in this [First Case]” the order has no legal affect “on the parties hereto”.

The Court below concluded that if the Order in the previous case was interpreted as suggested by the Landowners, the Order in the previous case would have no effect in resolving the claims presented in that case. *Order* at 4. The Landowners submit that is exactly the effect of the plain language of paragraph 2(c) of the Order in the prior case.

In its holding the Trial Court reasoned that the language in paragraph 2(c) is “most reasonably interpreted to eliminate any issue preclusion effect of the Order in any other dispute” between the parties, noting that “the parties were understandably concerned about the effect of the Order on any other disputes that might arise.” *Id* at 3-4. The Trial Court may have been right had the language of paragraph 2(c) provided that the Order would ‘not have res judicata effect as to any future issues, not decided in this Order, which may arise between the parties and their privies.’ But that is not what the Order in the prior case provides. It does not limit itself to future claims not adjudicated in the first case. It states quite clearly that the ruling applies only to that action, not to the issues raised in that action.

The Trial Court also observed that it would not have signed the prior Order if any one had “hinted that the order failed to [operate as an adjudication on the merits, and

finally resolve this dispute between these parties].” *Order* at 3. No matter what the Court intended, the Order reads as written, and the interpretation suggested by the Trial Court and by the Defendants is more than a perfunctory or clerical mistake the Court can correct on its own motion. *See Meagher v. Equity Oil Co.*, 299 P. 2d 827 (1956).

Nor is this a situation where the Trial Court can, by operation of its *Order* in the second case, modify pursuant to Rule 60(b), its order entered in the first case. The language in paragraph 2(c), whatever its intent, should be interpreted on its own plain meaning at this juncture.

3. Trial Courts have the authority to limit the preclusive effect of decisions.

As observed by Justice Blakmun, concurring in *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981), “there are cases in which the doctrine of res judicata must give way to ... overriding concerns of public policy and simple justice.” Justice Blakmun also quoted from Moore’s Federal Practice that “just as res judicata is occasionally qualified by an overriding, competing principle of public policy, so occasionally it needs an equitable tempering.”

The argument that res judicata is not without its exceptions, is not foreign to Utah jurisprudence. Utah law recognizes that defining the scope of a claim or cause of action is not an exact science, and that claim preclusion may at times be driven by the relative importance of the finality of the prior judgment. *See American Estate Mgmt Corps v. International Inv. & Dev. Corps*, 1999 UT App 232, 986 P.2d 765. Moreover, Utah courts have also recognized that in some situation judicial economy and the convenience

afforded by the finality of legal controversies do not override other concerns. *See e.g. In re J.J.T.*, 877 P.2d 161 (Utah Ct. App. 1994).

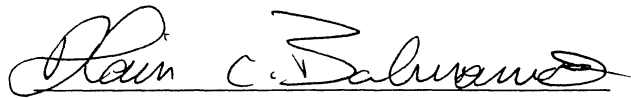
In this case the concern which needs to be protected is that the plain language and plain meaning of court orders must be protected, once those orders are final.

CONCLUSION

The Court of Appeals should reverse the *Order* below, and return the case to the Trial Court for further proceedings. The Defendants' *Motion to Dismiss* should be denied.

DATED this 31st day of October 2007.

HUTCHINGS BAIRD CURTIS & ASTILL PLLC

A handwritten signature in cursive script, appearing to read "Alain C. Balmanno", written over a horizontal line.

Bruce R Baird
Alain C. Balmanno

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 31st of October, 2007, two true and correct copies of the foregoing BRIEF OF APPELLANT were served by mail, postage fully prepaid, upon each of the following:

Paul Mortensen
Hanks & Mortensen
8 East Broadway, Suite 740
Salt Lake City, UT 84111-2204

Thomas A. Mitchell
SITLA
675 East 500 South, Suite 500
Salt Lake City, UT 84102

Walter J. Bird
Deputy San Juan County Attorney
117 South Main
PO Box 9
Monticello, Utah 84535

A handwritten signature in black ink, appearing to read "Paul E. Salmons", with a stylized flourish at the end.

Addendum

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

KILEY MILLER and JOHN
RZECZYCKI,
Plaintiffs,

vs.

SAN JUAN COUNTY, a Utah
Political Subdivision, RED
ROCK 4-WHEELERS, INC., and
JOHN and JANE DOES, and STATE
OF UTAH by and through SCHOOL
AND INSTITUTIONAL TRUST LANDS
ADMINISTRATION, and JOHN DOES
1-5,
Defendants.

ORDER OF DISMISSAL WITH
PREJUDICE

Case No.0707-33

This court is called upon to decide whether the order entered in the earlier case involving these same parties and the same dispute operates to bar the claims now asserted by plaintiffs. The court rules that it does.

The order of this court in Miller, v. San Juan County, Civil No. 0407-37, is found by merging the Order dated March 3, 2005, with the Order Modifying March 3, 2005 Order and Dismissing Defendants' Supplemental Counterclaims and Third-Party Complaints. As thus merged, it reads as follows:

IT IS HEREBY ORDERED as follows:

1. Plaintiffs' motion for summary judgment is denied. Plaintiffs erroneously argue that persons who historically obtained a permit for the Jeep Safari cannot benefit from a

public easement. There is at least a genuine issue of fact about whether the public enjoys an easement to traverse plaintiffs' property. Red Rock 4-Wheelers, Inc. ("RR4W") and members of the public participating in the Jeep Safari have no less right to traverse plaintiffs' property than the general public.

2. Defendants' motions for partial summary judgment are granted as follows:

A. Uncontradicted evidence having been presented that the Strike Ravine trail had been constructed and maintained or used by a responsible authority and existed prior to January 1, 1992, the court determines that San Juan County (the "County") holds for the public, and RR4W, holds for its own uses pursuant to Section 75-5-201, Utah Code, a temporary public easement or right-of-way to use the Strike Ravine trail. All members of the public have the right to travel the Strike Ravine trail. This temporary public easement was not extinguished when the State of Utah sold the land across which the Strike Ravine trail passes to the plaintiffs. The purpose a member of the public has in traveling the Strike Ravine trail is irrelevant.

B. Plaintiffs acquired the property subject to the temporary easement. The temporary easement exists until a permanent easement is established under Section 72-5-203(2). Under plaintiffs' and State Institutional and Trust Lands Administration's ("SITLA") position no permanent easement can be granted (unless the property reverts to SITLA). This means the temporary easement is of indefinite duration. Only if plaintiffs were to forfeit under the certificate of sale or if SITLA were to otherwise resume all equitable as well as legal title would RR4W and the County potentially be able to apply for a permanent easement.

C. This ruling applies only to this action and, except in this action, shall have no effect of legal or factual precedent, res judicata, collateral estoppel or other issue preclusion on the parties hereto, those in privity with them, or on any other persons or actions.

Plaintiffs argue that, once a new action is filed, the Order in Civil No. 0407-37 has no further effect. In effect, plaintiffs

argue that their claims in Civil No. 0407-37 were dismissed without prejudice and can now be relitigated. The County and RR4W argue that paragraph 2.C. only operates to limit the effect of the Order to this particular dispute.

Rule 41(b), U.R.C.P. provides as follows:

Unless the court in its order for dismissal otherwise provides... any dismissal... operates as an adjudication upon the merits.

This court certainly intended that its decision, reached only after several hearings, and mind-bending analysis of the pertinent statutes, would operate as an adjudication on the merits, and finally resolve this dispute between these parties. Had anyone hinted that the Order failed to accomplish that, this court would have refused to sign the Order until after appropriate changes had been made.

Nevertheless, whatever the court intended, it must consider whether the Order has a different effect. The court rules that it does not for the following reasons:

1. Paragraph 2.C. does not state that the Order is a dismissal without prejudice or that it does not operate as an adjudication on the merits. The Order must therefore be read as an adjudication upon the merits of the presented claims. An adjudication upon the merits is a final resolution of presented claims with prejudice.

2. Paragraph 2.C. is most reasonably interpreted to eliminate

any "issue preclusion" effect of the Order in any other dispute involving SITLA, RR4W, the County, or plaintiffs. Because of the peculiar and puzzling nature of this dispute, the parties were understandably concerned about the effect of the Order on any other disputes that might arise. However, they clearly intended that the Order have "claim preclusion" effect in "this action," namely Civil No. 0407-27. To read paragraph 2.C. as plaintiffs advocate would mean that the Order had no effect in resolving the claims presented in Civil No. 0407-37.

The claims presented by plaintiffs in this case being identical to those raised and dismissed in Civil No. 0407-37,

IT IS HEREBY ORDERED that plaintiffs complaint be dismissed with prejudice. Defendants' request for attorney fees is denied because defendants have not claimed, much less shown, that plaintiffs' arguments are completely lacking in merit.

No further Order of the court is required.

DATED this 29th day of May, 2007.


District Court Judge



CERTIFICATE OF SERVICE

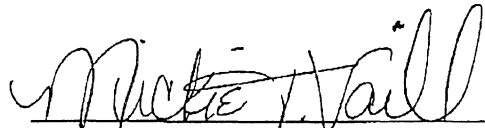
I hereby certify that I mailed, hand delivered, or faxed, a true and correct copy of the foregoing Order of Dismissal with Prejudice, this 29th day of May, 2007, to the following:

Paul W. Mortensen
Hanks & Mortensen, P.C.
Attorney for Defendants Red Rock 4-Wheelers, Inc.
8 East Broadway, Suite 740
Salt Lake City, UT 84111

Bruce R. Baird
Hutchings Baird Curtis & Astill, P.L.L.C.
9537 South 700 East
Sandy, UT 84070

Walter J. Bird
Deputy San Juan County Attorney
PO Box 9
Monticello, UT 84535

Thomas A. Mitchell
School and Institutional Trust Lands Administration
675 East 500 South, #500
Salt Lake City, UT 84102


Deputy Court Clerk

Rule 41 Dismissal of actions.

(a) Voluntary dismissal effect thereof

(a)(1) By plaintiff Subject to the provisions of Rule 23(e), of Rule 66(i) and of any applicable statute, an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or other response to the complaint permitted under these rules. Unless otherwise stated in the notice of dismissal, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim

(a)(2) By order of court Unless the plaintiff timely files a notice of dismissal under paragraph (1) of this subdivision of this rule, an action may only be dismissed at the request of the plaintiff on order of the court based either on

(a)(2)(i) a stipulation of all of the parties who have appeared in the action, or

(a)(2)(ii) upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary dismissal effect thereof For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

(c) Dismissal of counterclaim, cross-claim, or third-party claim The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of previously-dismissed action If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) Bond or undertaking to be delivered to adverse party Should a party dismiss his complaint, counterclaim, cross-claim, or third-party claim, pursuant to Subdivision (a)(1)(i) above, after a provisional remedy has been allowed such party the bond or undertaking filed in support of such provisional remedy must thereupon be delivered by the court to the adverse party against whom such provisional remedy was obtained.