

2007

Helen Marasco v. Joane Pappas White : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

HELEN MARASCO,	:	
	:	BRIEF OF APPELLEE
Plaintiff/Appellant,	:	
	:	
vs.	:	Appellate No. 20070998
	:	District Court No. 060701108
JOANE PAPPAS WHITE,	:	
	:	
Defendant/Appellee.	:	
	:	

**APPEAL FROM ORDER OF THE SEVENTH JUDICIAL DISTRICT COURT
CITY OF PRICE, CARBON COUNTY, UTAH
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
HONORABLE JAMES L. SHUMATE PRESIDING**

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HELEN MARASCO,

Plaintiff/Appellant,

vs.

JOANE PAPPAS WHITE,

Defendant/Appellee.

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BRIEF OF APPELLEE

Appellate No. 20070998
District Court No. 060701108

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STATEMENT OF JURISDICTION

Original jurisdiction in this matter was vested in the Utah Supreme Court pursuant to Utah Code Ann. §78-2-2(3)(j). Jurisdiction is now properly vested in the Court of Appeals pursuant to the provisions of Utah Code Ann. § 78-2-2(4) and § 78-2a-3(2)(j).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Did the trial court correctly grant defendant Joanne Pappas White's Motion for Summary Judgment, dismissing with prejudice plaintiff Helen Marasco's Complaint for professional negligence? This court reviews the district court's decision to grant summary judgment for correctness, affording the trial court no deference. Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Crestwood Cove Apartments Business Trust v. Turner*, 2007 UT 48, ¶ 10, 164 P.3d 1247. The trial court's order granting summary judgment was entered November 16, 2007. (R. 275). Plaintiff preserved the foregoing issue for appeal by filing a Notice of Appeal on December 13, 2007. (R. 281).

DETERMINATIVE STATUTES

Rule 56(c) of the Utah Rules of Civil Procedure is the sole determinative statute on appeal.

It provides:

The judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue

as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

A. Nature of the Case

This is a lawsuit for attorney malpractice brought by plaintiff Helen Marasco (“Mrs. Marasco”) against attorney Joane Pappas White (“attorney White”). Mrs. Marasco alleges attorney White committed negligence and breach of contract, during her representation of Mrs. Marasco in a family dispute over the ownership of certain real property in Carbon County, Utah. (R.49-50). In brief, Mrs. Marasco claims she retained attorney White to help her recover certain real property from her son, Terry Marasco. (R. 47). Mrs. Marasco conveyed that property to Terry Marasco, but then alleged the conveyance should be set aside based upon various theories. (R. 46-7).

Mrs. Marasco claims that attorney White failed to timely file suit against Terry Marasco in order to recover the property. But represented by a different attorney, Mrs. Marasco did file suit and proceeded to trial in an effort to recover the property. Her claims of mistake and fraud were dismissed on grounds they had not been timely filed under the applicable statute of limitation. (R. 48-9). Various other theories for recovery of the property proceeded to trial in that underlying lawsuit, and were rejected on their merits. (R. 48-9).

In her malpractice lawsuit against attorney White, Mrs. Marasco alleges her mistake and fraud claims would have been “viable” had they been timely filed. (Id. ¶ 47). She concludes, therefore, that

her underlying lawsuit would have succeeded, and she would have recovered the property from her son, but for attorney White's failure to timely file the claims of mistake and fraud. (R. 50-1).

B. Course of Proceedings and Disposition at Trial Court Level

The trial court granted attorney White's motion for summary judgment and dismissed Mrs. Marasco's attorney malpractice suit. The trial court's dismissal relies upon the final judgment entered in Mrs. Marasco's underlying lawsuit, *Helen Marasco v. Terry Marasco*, Seventh Judicial District Court, Case No. 030700583. (R. 53-61). Certain findings and conclusions, entered following trial of that underlying lawsuit, defeat Mrs. Marasco's claims of mistake and fraud, on their merits, regarding the underlying property transfer. Therefore, even if those claims were time-barred, they also failed under the principle of issue preclusion.

C. Statement of Facts

1. Mrs. Marasco is a widow whose husband died in 1992. (R. 45).
2. Having inherited the bulk of her husband's estate, Mrs. Marasco in mid-1999 sought financial and legal advice regarding her own estate planning. (R. 45, 54-5).
3. The estate planning included plans for the disposition of Mrs. Marasco's real property, consisting of about 7.5 acres of land which includes Mrs. Marasco's residence, acreage farmed by her son, Terry Marasco, and a mobile home where Terry Marasco's son (Mrs. Marasco's grandson) and his family reside. (R. 54).

4. The options for Mrs. Marasco's estate planning, as discussed with her accountant and with an estate planning attorney, included creation of a trust to hold certain of Mrs. Marasco's personal and real property. In conjunction with, or as an alternative to the trust, the options included transfer of Mrs. Marasco's above-described real property to her son, Terry Marasco. (R. 45, 54-5).

5. Terry Marasco participated in Mrs. Marasco's initial meeting with the estate planning attorney, and Terry asked the attorney about transferring Mrs. Marasco's real property to him, rather than transferring it into a trust. This option was discussed among Mrs. Marasco, Terry Marasco, and the estate planning attorney. (R. 55).

6. There are conflicting accounts of that discussion. According to the estate planning attorney, Mrs. Marasco announced that she intended to make a lifetime transfer of the real property—specifically, her residence and the farmland—to Terry Marasco. However, according to Mrs. Marasco, she stated an intention to transfer only the farmland, and not her residence, to Terry. (R. 55).

7. After the above-described discussion, the estate planning attorney drafted a quit-claim deed for the property, naming Helen Marasco as the grantor and Terry Marasco as the grantee. The deed as drafted by the estate planning attorney did not include the legal description of the property. Terry Marasco took the quit-claim deed to another law office, the Harmond law office, where the legal description was inserted into the quit-claim deed. (R. 55-6).

8. Terry Marasco did not instruct the Harmond law office as to the proper content of said legal description. He did notify Mrs. Marasco that the quit-claim deed was completed and ready for her signature. (R. 56).

9. On October 1, 1999, Mrs. Marasco, unaccompanied by Terry Marasco, signed the quit-claim deed at the Harmond law office. Someone at the Harmond law office then caused the deed to be recorded. (R. 56).

10. The trial court in the underlying lawsuit found the following regarding Mrs. Marasco's execution of the quit-claim deed: "When Helen Marasco signed the deed, she believed she had signed 'our place' to Terry Marasco, and she acknowledged that 'our place' included both the residence and the farm[land]." (R. 56).

11. About four days after Mrs. Marasco signed the quit-claim deed, she had a "serious argument" with Terry Marasco regarding some missing money. The money, apparently the property of a trucking business operated by Terry, had been kept in a safe in Mrs. Marasco's residence. Terry Marasco believed that the money had been taken by his sister, Trudy. He was upset with Mrs. Marasco "for not insisting that Trudy give it back." (R. 57).

12. The trial court in the underlying lawsuit found the following regarding Mrs. Marasco's response to the argument with Terry: "As a result of the argument, Helen changed her mind about Terry having the Property. The real reason for [the underlying] action is that she is angry at Terry about what he said in that argument." (R. 57).

13. Mrs. Marasco alleged that she retained attorney White soon after the argument with Terry, in October 1999, to represent her in efforts to recover the real property that had been conveyed by the quit-claim deed to Terry. (R. 47).

14. Attorney White attempted to resolve the property dispute between Mrs. Marasco and Terry Marasco extrajudicially, but was unsuccessful. (R. 47).

15. For purposes of attorney White's motion for summary judgment, it was assumed attorney White did not timely file a lawsuit on Mrs. Marasco's behalf. By the time Mrs. Marasco consulted substitute counsel, the limitations period for filing a lawsuit based upon mistake or fraud had expired. (R. 48).

16. The underlying lawsuit filed by Mrs. Marasco's substitute counsel alleged the following bases to avoid or rescind the October 1999 quit-claim deed: (1) undue influence; (2) unjust enrichment; (3) breach of fiduciary duty; (4) fraud; (5) mistake; (6) constructive trust; and (7) quiet title. (R. 58).

17. Before trial of the underlying lawsuit, the trial court dismissed on motion Mrs. Marasco's claims of mistake and fraud, ruling that such claims were time-barred under the limitations period of Utah Code Ann. § 78-12-26(3) (2002). (R. 53,60).

18. After hearing the trial evidence, the trial court rejected, on their merits, all other claims alleged by Mrs. Marasco as grounds to avoid or rescind the quit-claim deed. However, based upon

a stipulation by Terry Marasco, the trial court ordered that Mrs. Marasco would have a life estate in that part of the property used as her residence. (R. 59-60).

19. In addition to those already quoted above, the trial court's underlying FFCL included the following specific findings and conclusions:

The defendant [Terry Marasco] did not instruct the Harmond law office as to the legal description [of the property to be conveyed], and the defendant never looked at the legal description or saw the deed until he saw it in connection with the present legal action. (R. 56).

There is no suggestion of undue influence or unfair conduct by Terry Marasco in connection with any of the events surrounding the decision to make the deed or the signing of the deed. (R. 57).

The Court concludes that it was plaintiff's intent and her own will to transfer the Property to the defendant and that the defendant has met his burden of proof to show no actual undue influence. (R. 59).

[T]he defendant did not do anything that was unfair and did not take unfair advantage of the plaintiff. (R. 60).

Regarding the vulnerable adult claim, the defendant did not engage in any conduct or practice with the intent to deceive or wrongfully deprive the plaintiff of her property. (R. 60).

There is no legal or factual basis to grant plaintiff relief from the deed . . . nor is there any inequitable conduct by defendant upon which to base a decision to invalidate the deed on any ground. (R. 60-1).

Helen [Marasco] continues to live in her home on the Property and Terry always intended for her to live there as long as she wants to do so. (R. 57).

SUMMARY OF ARGUMENTS

The trial court correctly granted attorney White's Motion for Summary Judgment, and dismissed with prejudice Mrs. Marasco's attorney malpractice suit. The trial court's final judgment entered in Mrs. Marasco's underlying case, *Helen Marasco v. Terry Marasco*, bars Mrs. Marasco's claim in this legal malpractice suit. Collateral estoppel precludes Mrs. Marasco from arguing that attorney White "lost" her mistake and fraud claims.

ARGUMENT

I. Collateral Estoppel Bars Mrs. Marasco's Malpractice Complaint Against Attorney White.

Case within a Case

A lawsuit for attorney malpractice is distinctive, in that the aggrieved former-client plaintiff must prove a "case within a case." *See, e.g., Glencore, Ltd. v. Ince*, 972 P.2d 376, 379-80 (Utah 1998). In her lawsuit against attorney White, Mrs. Marasco would have to prove that if her claims of mistake and fraud had been timely filed, she would have prevailed on them. In other words, the attorney malpractice lawsuit succeeds or fails upon Mrs. Marasco's allegation that she had "a viable claim for mistake and [sic: or] fraud," had such claims been timely filed. (R. 49).

Issue Preclusion Elements

Mrs. Marasco's attorney malpractice lawsuit fails, because certain findings and conclusions, entered by the trial court in the underlying *Marasco v. Marasco* lawsuit, preclude her from proving necessary elements of mistake and of fraud. The operative principle is issue preclusion, also referred

to as collateral estoppel. Issue preclusion bars a party from relitigating, in a subsequent lawsuit, facts and issues that were litigated by that party in a prior lawsuit. *Macris & Associates v. Neways, Inc.*, 2000 UT 93, ¶ 19, 16 P.3d 1214. For issue preclusion to apply, the following elements must be satisfied:

[1] The party against whom issue preclusion is asserted must have been a party to or in privity with a party to the prior adjudication; [2] the issue decided in the prior adjudication must be identical to the one presented in the instant action; [3] the issue in the first action must have been completely, fully, and fairly litigated; and [4] the first suit must have resulted in a final judgment on the merits.

Zufelt v. Haste, Inc., 2006 UT App 326, ¶ 9, 142 P.3d 594 (quoting and citing authority).

Mistake and Fraud Elements

In her underlying lawsuit, Mrs. Marasco's claims of mistake and fraud were dismissed because they were time-barred. To prove, in this lawsuit, that her claim of mistake was "viable," Mrs. Marasco must prove mistake, which is defined as follows:

A mistake within the meaning of equity is a non-negligent but erroneous mental condition, conception, or conviction induced by ignorance, misapprehension, or misunderstanding, resulting in some act or omission done or suffered by one or both parties, without its erroneous character being intended or known at the time.

Utah Coal and Lumber Restaurant, Inc. v. Outdoor Endeavors Unlimited, 2001 UT 100, ¶ 20, 40 P.3d 581, quoting 27A Am.Jur.2d *Equity* § 7 (1996).

To prove the viability of her fraud claim, Mrs. Marasco must prove:

(1) a representation; (2) concerning a presently existing fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

Andalex Resources, Inc. v. Myers, 871 P.2d 1041, 1046 (Utah Ct. App. 1994), citing *Dugan v. Jones*, 615 P.2d 1239, 1246 (Utah 1980).

Preclusion of Mistake and Fraud Elements

There should be no dispute regarding the first and third elements of issue preclusion against Mrs. Marasco. First, she was the party plaintiff in the underlying *Marasco v. Marasco* lawsuit, in which she attempted to recover the property conveyed to Terry Marasco. As to the third element, the *Marasco v. Marasco* lawsuit was fully and fairly litigated, inasmuch as the case was tried and no appeal was taken from the judgment. Therefore, that judgment is final, and a presumption of regularity applies to it. *See, e.g., Anderson v. Utah County Bd. of County Comm'rs.*, 589 P.2d 1214, 1215 (Utah 1979).

Regarding the fourth element of issue preclusion, it is true that, nominally, Mrs. Marasco's claims of mistake and fraud in her underlying lawsuit were rejected not on their merits, but upon statute of limitations grounds. However, Mrs. Marasco's five other claims (R. 58). were rejected on their merits. In considering and rejecting the merits of those claims, the trial court

made particular findings and rulings that are final, were not appealed, and are therefore not susceptible to collateral attack in this attorney malpractice lawsuit.

Those findings and rulings satisfy the second element of issue preclusion. That is, they squarely defeat identical issues Mrs. Marasco would have to prove in order to prevail in her present claim of attorney malpractice. Regarding mistake, the trial court in the underlying lawsuit was explicit: “When Helen Marasco signed the deed, she believed she had signed ‘our place’ to Terry Marasco, and she acknowledged that ‘our place’ included both the residence and the farm[land].” (R. 56). If there were any doubt about the impact of that ruling, it was erased by the finding of the trial court, advantaged by its ability to assess witness credibility, as to why Mrs. Marasco sought to rescind the quit-claim deed: she had an argument with Terry Marasco, and “[a]s a result of the argument, Helen changed her mind about Terry having the Property. The real reason for this action is that she is angry at Terry about what he said in that argument.” (R. 57).

There is, therefore, no way for Mrs. Marasco, in this “case within a case,” to prove that her conveyance of the property to her son was “induced by ignorance, misapprehension, or misunderstanding,” *Utah Coal and Lumber, supra*. Such allegation was rejected in the underlying lawsuit. Issue preclusion bars her from relitigating it in this one. Accordingly, she has no argument, before this Court, that her claim of mistake remained viable.

Turning to fraud, the judgment in the underlying lawsuit was even more emphatically adverse to Mrs. Marasco. As already observed regarding mistake, the trial court found that Mrs. Marasco

knew the extent of the conveyed property when she signed the deed, and her real reason for suing her son was the argument she had with him. Additionally, the trial court in the underlying case found “no suggestion of . . . unfair conduct by Terry Marasco in connection with any of the events surrounding the decision to make the deed or the signing of the deed.” (R. 57). Her son “did not engage in any conduct or practice with the intent to deceive or wrongfully deprive the plaintiff of her property.” (Id.) Her son “did not do anything that was unfair and did not take unfair advantage of the plaintiff.” (Id.) Ultimately, the trial court found “no legal or factual basis to grant plaintiff relief from the deed . . .” (Id.)

In short, the court in the underlying *Marasco v. Marasco* case found that Terry Marasco made no knowingly or recklessly false statements of fact upon which Mrs. Marasco relied, reasonably or otherwise, when she signed the quit-claim deed. *See Andalex, supra*. In the present attorney malpractice lawsuit, Mrs. Marasco cannot relitigate those findings and rulings. Her claim of fraud, therefore, is not “viable.” Like her claim of mistake, such claim cannot sustain this malpractice lawsuit against attorney White.

II. Mrs. Marasco’s New Argument that the Underlying FFCL were Ambiguous Should not be Considered for the First Time on Appeal

Mrs. Marasco argues, without analysis, that the underlying FFCL “are at the least confusing, vague and inconsistent.” (Op. Brief, p. 12). Mrs. Marasco did not present this argument to the trial court, and this court has observed “Utah courts consistently follow a policy strongly opposed to the raising of issues for the first time on appeal.” *Mel Trimble Real Estate v. Monte Vista Ranch, Inc.*,

758 P.2d 451, 456 (Utah Ct. App. 1988). The rule applies even where facts are not in dispute and the issue raised is one of law. *Id.*, citing *Bangerter v. Poulton*, 663 P.2d 100, 102 (Utah 1983). Because Mrs. Marasco did not previously raise her argument that the underlying FFCL were ambiguous, she should be barred from raising that argument on appeal.

III. The FFCL in the Underlying Case were Clear and Unambiguous

In the event this court considers Mrs. Marasco's newly-raised argument that the FFCL were confusing, vague or inconsistent, that argument should be rejected based on the clear language of the FFCL. It is difficult to determine the basis for Mrs. Marasco's claim that the FFCL are "confusing, vague and inconsistent." It seems to be based on her continuing view that the underlying trial court should not have reached key factual findings regarding her knowledge of the subject real estate transaction, after having dismissed her mistake and fraud causes of action. This argument confuses causes of action with factual issues necessary to resolve specific causes of action.

As set forth above, overlapping factual issues remained to be decided by the trial court in the underlying case, despite dismissal of Mrs. Marasco's fraud and mistake claims. Those overlapping issues largely revolved around Mrs. Marasco's intent, and Terry Marasco's conduct, which issues had to be resolved by the trial court in order to rule upon Mrs. Marasco's remaining claims of undue influence, unjust enrichment, breach of fiduciary duty, constructive trust and quiet title. For example, the court's conclusion that "it was [Mrs. Marasco's] intent and her own will to transfer the Property to [Terry Marasco] and that [Terry Marasco] has met his burden of proof to show no actual undue

influence” was necessary to resolve Mrs. Marasco’s undue influence claim. However, the same conclusion eliminates the possibility of mistake as a viable cause of action for Mrs. Marasco. Similar findings (discussed above) eliminate any possibility of a fraud claim.

Utah courts have long held that “applicability of collateral estoppel does not depend on whether the claims for relief are the same. What is critical is whether the issue that was actually litigated in the first suit was essential to resolution of that suit and is the same factual issue as that raised in a second suit.” *Robertson v. Cambell*, 674 P.2d 1226, 1230 (Utah 1983) (citation omitted). The underlying trial court did not specifically decide Mrs. Marasco’s fraud and mistake causes of action on their merits. But the FFCL show the trial court did decide the issue of Mrs. Marasco’s intent at the time she executed the Quit Claim Deed to Terry Marasco (“when Helen Marasco signed the deed, she believed she had signed ‘our place’ to Terry Marasco, and she acknowledge that ‘our place’ included both the residence and the farm[land].” (R. 56)). Because she fully intended to make the transfer, and because Terry Marasco “did not do anything that was unfair” (R. 60), Mrs. Marasco’s fraud and mistake claims could never have succeeded. Thus her legal malpractice claim against attorney White based on “loss” of those claims was correctly dismissed.

CONCLUSION

The trial court's Order Granting attorney White's Motion for Summary Judgment should be affirmed.

RESPECTFULLY SUBMITTED this 14 day of July, 2008.

KIPP AND CHRISTIAN, P.C.

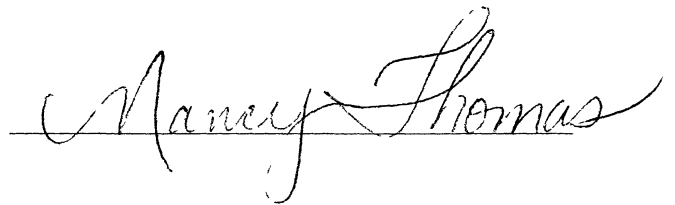


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CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, this 14th day of July, 2008,
a true and correct copy of the foregoing BRIEF OF APPELLEE, to the following:

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A handwritten signature in cursive script, reading "Nancy Thomas", written over a horizontal line.