

1997

Cheryl Poulson v. Utah Office of Crime Victims Reparations : Reply Brief

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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Court of Appeals
~~UTAH SUPREME COURT~~

CHERYL POULSON,

Petitioner/Appellant,

v.

THE UTAH OFFICE OF CRIME
VICTIMS' REPARATIONS,

Respondent/Appellees.

Priority No. 14

Case No. 970763-CA

REPLY BRIEF OF APPELLANT

**PETITIONER APPEALS FROM THE TRIAL DE NOVO REVIEW
IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE
COUNTY OF RESPONDENT'S INFORMAL ADJUDICATIVE
PROCEEDING AND FINAL AGENCY ACTION UNDER UTAH
CODE ANN. § 63-46b-15 (1997), THE HONORABLE TYRONE E.
MEDLEY, PRESIDING**

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FILED

Utah Court of Appeals

JUN 24 1998

Julia D'Alesandro
Clerk of the Court



IN THE UTAH SUPREME COURT

CHERYL POULSON,	:	
	:	
	:	Priority No. 14
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	:	
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ARGUMENT

I. APPELLANT'S CLERICAL ERROR DOES NOT JUSTIFY DISMISSAL OF THIS APPEAL.

The Utah Office of Crime Victims Reparations ("Crime Victims") seeks to have this appeal dismissed on the merits because the wrong case number was used on the Notice of Appeal. This remedy is inappropriate under the circumstances. The Court of Appeals looks "to the substance of a notice of appeal and not its caption." Reeves v. Steinfeldt, 915 P.2d 1073 (Utah App. 1996). In this case, the body of the Notice of Appeal states that appellant appeals "the Minute Entry of the Honorable Tyrone E. Medley dated the 10th day of September, 1997." Thus, from the substance of the Notice of Appeal, it is obvious which case is being appealed.

In addition, the Notice of Appeal used the same caption and civil number used by Judge Medley on the Minute Entry. Addendum E to Respondent's Brief. Under the circumstances, it was obvious to all concerned which matter was being appealed. This procedural defect has caused no prejudice to Crime Victims and should not be the basis for dismissal.

II. BECAUSE MS. POULSON APPEALS A LEGAL ISSUE, THE DOCTRINE OF MARSHALLING OF THE EVIDENCE DOES NOT APPLY.

Crime Victims also argues that Ms. Poulson has failed to marshal the evidence in this appeal. This argument has no application to this appeal because Ms.

Poulson appeals a legal issue, not a factual question. All of the cases from Utah’s appellate courts regarding marshalling of the evidence stand for the proposition that evidence must be marshalled in order to challenge a finding of fact. In Birch Creek IRR. v. Prothero, 858 P.2d 990 (Utah 1993), the Protheros appealed the grant of a temporary restraining order and subsequent permanent injunction. Birch Creek argued that the Protheros failed to marshal the evidence on appeal. The Supreme Court ruled that such an attack “misconstrues the nature of the challenge. The Protheros are not attacking the sufficiency of the evidence; rather, they are arguing that the trial court did not comply with the requirements of the applicable rules as a matter of law in granting the permanent injunction and temporary restraining order. Therefore, the Protheros were not required to marshal the evidence in the manner contemplated by Doelle v. Bradley, 784 P.2d 1176, 1178 (Utah 1989).” Birch Creek Irr. v. Prothero, 858 P.2d 990 (Utah 1993).

Ms. Poulson argues that Crime Victims’ policy about Medicaid is ineffective because it did not comply with the requirements of the Rulemaking Act and that the statutory definition of “collateral source” does not allow Crime Victims to withhold payment in this case. These are questions of law, not fact, and thus do not require marshalling of evidence.

Furthermore, this case was decided upon stipulated facts. There was no question of fact decided by the District Court. Judge Medley interpreted the Crime

Victims' Reparations Act in light of the stipulated facts. It makes no sense to require "marshalling" of facts, when those facts are found in a fifteen paragraph stipulation contained in the record.

III. JUDGE MEDLEY PROPERLY HELD THAT MS. POULSON'S COMPLAINT WAS TIMELY FILED.

Utah's Savings Statute, Utah Code Annotated, Section 78-12-40 provides:

If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

In this case, the original Complaint was dismissed otherwise than upon the merits and this action was filed seventeen days later. The clear language of section 40 applies to "any action". Crime Victims argues that "any action" does not include actions brought under the Utah Administrative Procedures Act, because the UAPA contains a thirty day filing requirement.

An "action" is a defined term. Rule 3(a) of the Utah Rules of Civil Procedure says that a civil action is commenced by filing a complaint with the court or by service of a summons together with a copy of the complaint. The UAPA,

Section 63-46b-15(2) states that the petition for judicial review of informal adjudicative proceedings shall be a complaint governed by the Utah Rules of Civil Procedure. A complaint under the UAPA is an action.

Thus, once the original Complaint was filed, in accordance with 63-46b-15, an action was commenced. Under the Savings Statute, because that action was dismissed other than on the merits, it could be refiled within one year.

The cases cited by Crime Victims in support of its view that the Savings Statute does not apply are distinguishable. In McCann v. City of Lakewood, 642 N.E.2d 48 (Oh.App. 1994), the Court ruled that "McCann could not have refiled a notice of appeal in the common pleas court pursuant to the Savings State, R.C. 2305.19, since this section relates exclusively to original actions and not to appeals." In Ohio, "an appeal from the decision of an administrative agency to a common pleas court is governed by the same statutes which govern appeals to the court of appeals." 642 N.E.2d at 52. By contrast, in Utah, judicial review of informal adjudicative proceedings are governed by the Utah Rules of Civil Procedure. McCann held that Ohio's Savings Statute would not apply to appeal procedures. McCann thus has no bearing on the application of Utah's Savings Statute to complaints seeking judicial review of informal adjudicative proceedings. In addition, McCann discussed an appeal dismissed for want of prosecution and under Ohio law an appeal dismissed for want of prosecution bars a subsequent appeal unless there is newly discovered

evidence. In this case, the original action was not dismissed for want of prosecution, and Utah does not follow a rule barring subsequent appeals.

Crime Victims cites a Tennessee case, Cronin v. Howe, 906 S.W.2d 910 (Tenn. 1995) for the proposition that a savings statute is not applied in a statutory cause of action unless it is specifically authorized by creating statute. Cronin says that a timely filed complaint puts the defendant on notice that he intends to assert his legal rights. Crime Victims' was on notice that Ms. Poulson intended to assert her rights when the original action was filed. Cronin also stands for the proposition that a savings statute is remedial and should be liberally construed in furtherance of its purpose and in order to bring cases within its spirit and fair intention. "In effect, the savings statute confers upon a plaintiff who files a second action within one year of a voluntary non-suit of a first action the same procedural and substantive benefits that were available to the plaintiff in the first action." Cronin holds that the Savings Statute acts to save a medical malpractice action which was initially filed within the three-year statute of repose, but which was voluntarily dismissed and refiled beyond the three-year statute of repose.

Because the plaintiff initially brought her medical malpractice action within the one-year statute of limitations, and within the three-year statute of repose, she complied with the letter of the statute of repose, avoided the substantive bar of the statute, and fulfilled its legislative purpose--to limit the time period during which a physician is subject to a claim of potential liability. Because her suit was brought within the three-year period, it was 'commenced

within the time limited by a rule or statute of limitation' and its conclusion on a ground other than the merits brought its refiling within the long-standing purpose, spirit and express terms of the savings statute . . .

Similarly, Ms. Poulson filed her original action within 30 days. Cronin

supports application of the Savings Statute to her subsequent complaint.

The Utah case on point is Standard Fed. Sav. & Loan v. Kirkbride, 821 P.2d 1136 (Utah 1991). Standard Federal holds that the Savings Statute applies to Utah's Trust Deed Statute, even though the Trust Deed Statute requires that a deficiency action must be brought within three months of the sale of property. Like Crime Victims in this case, Kirkbride argued that

Section 78-12-40 is a general renewal statute and, as such, it may appropriately be applied in a case asserting a common law action or a cause of action created by a statute lacking a specific limitation period. However, they assert that where a statute creates a cause of action and contains a specific limitation period for that cause of action, it should be inferred that the legislature intended to bar the application of a general renewal statute.

We find this argument unpersuasive. The relevant inquiry is whether the legislature made plain an intention to bar forever claims of those who are guilty of a procedural misstep.

Crime Victims argues that the UAPA is an appellate process. Section 63-46b-15(2)(b) expressly states that "all additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure. Even if the UAPA were an appellate process, however, Rule 23A of the Utah Rules of Appellate Procedure provides that "an appeal dismissed for failure to take a step other than the

timely filing of a notice of appeal may be reinstated by the court upon motion of the appellant. . . " Thus, as long as the requirement of Rule 4 of the Utah Rules of Appellate Procedure is complied with, the Court of Appeals retains the jurisdiction to reinstate an appeal dismissed on procedural grounds. This jurisdiction is not forfeited even if the 30 day period of Rule 4 has elapsed.

Similarly, once the original action in this case was filed within the thirty day time period, its dismissal did not deprive the District Court of jurisdiction.

IV. MS. POULSON IS ENTITLED TO RECOVERY ON THE MERITS.

Crime Victims did not comply with the requirements of the UAPA when it adopted its internal policy that "a victim must use a Medicaid provider if the victim would be entitled to Medicaid." Crime Victims makes only one argument on the merits in its brief. It argues that the Crime Victims Reparations Act made statements of policy binding and that it did not require that those policies be implemented under the Administrative Rulemaking Act. Crime Victims offers as support for this argument Utah Code Ann. Section 63-63-6(2) (1988).

However, Section 63-63-6(1) undermines Crime Victims' argument. It is true that the Act makes rules or other statements of policy binding on the board. Such rules, however, must be made in accordance with the Utah Administrative Rulemaking Act. Section 63-63-6(1)(b) and (c) states:

(1) The board shall:

(b) prescribe policy for the Reparations Office;

(c) adopt rules according to the Utah Administrative Rulemaking Act to implement this chapter and board policies, and establish procedure and practice requirements of the board and staff, which rules may include but are not limited to setting of ceilings on reparations, defining of terms not specifically stated in this chapter, and establishing of rules governing attorneys' fees.

Crime Victims does not challenge the fact that the internal policy was never published and was not adopted pursuant to the Utah Rulemaking Act, section 36-46a-1, which required Crime Victims to file its proposed rule and analysis, publish the proposed change in the bulletin, allow 30 days for public comment, and make the rule available to the public. Stipulated Fact Number 12, found in Addendum C to Crime Victims' Brief, states:

12. Crime Victims has an internal policy, prescribed by the Crime Victims Reparations Board, that a victim must use a Medicaid provider if the victim would be entitled to Medicaid. *This internal policy was never submitted under the Utah Administrative Rulemaking Act.*

(Emphasis added).

Nor does Crime Victims argue in its brief that the statutory definition of "collateral source" would allow it to withhold payment in this case. As indicated in Ms. Poulson's principal brief, the statute does not support such a reading.

CONCLUSION

Ms. Poulson's daughter was the victim of abuse. She fits precisely within the class of individuals who should receive compensation under the Crime Victims' Reparations Act. This Court should order Crime Victims to compensate the Poulsons.

DATED this 23RD day of June, 1998.

PRINCE, YEATES & GELDZAHLER

By 
Robert G. Wing
Attorneys for Petitioner/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 24TH ~~23RD~~ day of June, 1998, I caused the original and nine true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to be hand delivered to the Clerk of the Utah Supreme Court and two copies to be mailed, first-class postage prepaid, to:

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