

1998

Vickie M. Nielsen v. The Estate of Mary Jane Hefferon : Petition for Rehearing

Utah Court of Appeals

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Paul M. Halliday, Jr.; Paul M. Halliday; Halliday, Watkins & Henrie.

Russell C. Fericks; Melinda A. Morgan; Richards, Brandt, Miller & Nelson; Attorneys for Defendant/Appellee.

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DOCKET NO. 981711-CA

IN THE UTAH COURT OF APPEALS

VICKIE M NIELSEN,

Plaintiff/Appellant,

vs.

THE ESTATE OF MARY JANE
HEFFERON,

Defendant/Appellee

APPEAL No. 981711-CA

Priority No. 15

PETITION FOR REHEARING

PETITION FOR REHEARING ON DECISION OF THE COURT OF APPEALS
ENTERED IN THIS MATTER ON NOVEMBER 4, 1999

Paul M. Halliday, Jr.
Paul M Halliday
HALLIDAY, WATKINS & HENRIE
376 East 400 South, Suite 300
Salt Lake City, Utah 84111

RUSSELL C. FERICKS [A3793]
MELINDA A. MORGAN [A8392]
RICHARDS, BRANDT, MILLER & NELSON
Attorneys for Defendant/Appellee
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-2000
Fax No.: (801) 532-5506

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APPEALS

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376 East 400 South, Suite 300
Salt Lake City, Utah 84111

RUSSELL C. FERICKS [A3793]
MELINDA A. MORGAN [A8392]
RICHARDS, BRANDT, MILLER & NELSON
Attorneys for Defendant/Appellee
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-2000
Fax No.: (801) 532-5506

SUMMARY

In its Memorandum Decision of November 4, 1999, this Court reversed both the trial court's denial of plaintiff's motion to amend her Complaint and the trial court's granting of summary judgment in favor of the defendant. In doing so, defendant believes the Court inadvertently and inappropriately merged two separate issues. Clarification of the Court's intent regarding these two separate issues is necessary to guide the trial court's further proceedings.

In reversing the trial court's grant of summary judgment in favor of the defendant, this Court reasoned that:

Because plaintiff's affidavits and proposed amended pleadings raised genuine issues of material fact bearing on [1] fraudulent inducement and [2] **alteration of the release**, summary judgment for defendant was inappropriate.

Court of Appeals Memorandum Decision, filed November 4, 1999, at 2. (bracketed numeration and bold text added.) In reversing the trial court's denial of plaintiff's Motion to Amend, the Court's Decision goes on to say:

The trial court erred by relying on [the best evidence rule] in that plaintiff does not dispute the content of the release produced by defendant. Rather, plaintiff claims that defendant either [1] fraudulently induced her into signing the release or [2] fraudulently altered the release.

Id. (bracketed numeration added.)

These are two entirely separate issues: [1] fraudulent inducement to entering into the Release; and [2] fraudulent alteration of the Release. The defendant acknowledges the basis for the Court's ruling about parol evidence on the first issue; and while defendant does not particularly like the result, it is willing to live with it. But there is absolutely no basis or evidence to support the submission of the second issue to a jury.

ARGUMENT

POINT I

THERE IS NO DISPUTE OVER THE FACT THAT THE ORIGINAL RELEASE IS AUTHENTIC.

In her own Motion to Amend in the trial court, the plaintiff did not distinguish or articulate a separate "fraudulent alteration" claim or issue; she requested leave only to add "claims of fraud and bad faith." (R. at 51.) In fact, not until the hearing on the defendant's Motion to Dismiss and the plaintiff's Motion to Amend Answer did plaintiff's counsel even request to examine the original Release. (R. 123 at 17:8-19.) Then, after studying the Release with his client for several minutes, plaintiff's counsel told the Court, "Your Honor, these

appear to be our signatures, but I don't know how it got on this document." (R. 123 at 18:3-5.)

When the Court asked plaintiff's counsel how it was that the original Release did not have any interlineations on it, and plaintiff's counsel's copy did, plaintiff's counsel had no coherent explanation. (R. 123 at 18:6-9.) In addition, plaintiff's counsel acknowledged that there was only one original.¹ In essence, the totality of the evidence is that the original Release is an unaltered original.

Obviously, based on the Court's Memorandum Decision, the plaintiff can now argue that entry into the original Release

¹ The Court:

Okay. But you don't have one [Release] with original signatures any place in your files or your client's?

Mr. Halliday:

No, because we just received the one release.

The Court:

You just received the one?

Mr. Halliday:

Just that one, Your Honor [indicating the original presented by defendant].

R. 123 at 18:13-19.)

was induced by fraudulent misrepresentations, and plaintiff can support that claim with parol evidence. But this is an entirely different issue from whether or not the original Release itself is genuine or has been altered.

In order to prove her theory that the original Release has somehow been altered, plaintiff has the burden to produce some credible evidence. The right to amend under Rule 15(c), U.R.Civ.P., requires more than just a showing of timeliness, or a justification for delay, as cited by the Court on page one of its Memorandum Decision. It also requires a threshold showing that the claim which plaintiff has been given leave to add--in this instance, fraudulent alteration of the original Release--has at least a modicum of substantive merit. Lamb v. Bangart, 525 P.2d 602, 608 (Utah 1974). The newly identified and perhaps unintentionally articulated claim, has no factual merit. The parties' intentions in entering into the Release are irrelevant to whether the original Release is authentic or not.

Not a scintilla of evidence exists to suggest that the original has been altered or that it is not authentic. Ironically, it is plaintiff's photostatic copy of the Release which has been altered, and which will require considerable explanation before it can be admitted into evidence. Utah Code

Ann. § 78-25-17. Hence, the trial court's admonition to plaintiff's counsel that pursuing such a course of evidence was "raising the stakes of this going both ways considerably." (R. 123 at 17:8-19:5.)

POINT II

THIS COURT INADVERTENTLY MADE A RULING ON THE ISSUE OF AUTHENTICITY THAT WAS NOT BEFORE IT.

The defendant requests that this Court re-address its ruling regarding the authenticity of the original Release. This issue was not properly before the Court on appeal. Plaintiff's Motion to Amend and Objection to Defendant's Motion to Dismiss never contested the authenticity of the original Release, only that plaintiff had been fraudulently induced to enter it. Plaintiff's counsel concedes the original is authentic, and that it bears his and his client's signatures.

The Court's statement in its Memorandum Decision that "affidavits and proposed amended pleadings" raised genuine issues of material fact is inaccurate with respect to the original Release's authenticity, since all the facts support its authenticity and none contradict it. Defendant would be prejudiced by having this decision stand as it is currently written since it would require defendant to re-establish what has

already been conceded and to prove at the trial level what was never contested on appeal.

Every litigant knows that the trial process is fraught with uncertainty and surprises. The Court's broad language in the Memorandum Decision inadvertently grants to plaintiff the opportunity to win on an issue--the fraudulent alteration of the original Release--which has never even been pled or alleged. Prejudice to defendant, under these circumstances, is not merely the inconvenience and expense of trying an inappropriate claim, but potentially suffering the entry of a jury verdict on that claim.

CONCLUSION

Although the defendant does not agree with the Court's ruling regarding the issue of fraudulent inducement, it respects the Court's opinion on this issue, and is confident that the jury will rule in its favor on this issue. However, the defendant requests the Court to take a fresh look at the Memorandum Decision, as it bears upon the authenticity of the Release. No evidence shows that this original Release has been altered in any way, and the signatures on it are, as plaintiff concedes, genuine.

The best evidence rule does apply to this original writing, since no one disputes its authenticity. It will be the plaintiff's burden at trial to show that this concededly authentic document was somehow fraudulently induced, but plaintiff should not have the additional benefit of being able to argue the separate issue of alteration to the original Release.

Pursuant to Rule 35 Utah R. App. P., the undersigned counsel hereby certifies that this Petition is presented in good faith and not for delay.

RESPECTFULLY SUBMITTED this 18th day of November,
1999.

RICHARDS, BRANDT, MILLER & NELSON

A handwritten signature in cursive script, reading "Melinda Morgan", written over a horizontal line.

RUSSELL C. FERICKS

MELINDA A. MORGAN

Attorneys for Defendant/Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing instrument were mailed, first-class, postage prepaid, on this 18~~th~~ day of November, 1999, to the following:

Paul M. Halliday, Jr.
Paul M. Halliday
HALLIDAY, WATKINS & HENRIE
376 East 400 South, Suite 300
Salt Lake City, Utah 84111

8871-363
278138

Glenn M. Jensen