1980

Lynda Lea Tracy and Donna Tracy King v. University of Utah Hospital, Does I Through X Ada Hannah Tracy, Deceased, By and Through Sharon Tracy Voight, Natural Daughter and Next Friend, and Sharon Tracy Voigt : Brief of Respondent University of Utah Hospital

Utah Supreme Court

SNOW, CHRISTENSEN & MARTINEAU; Attorney for Defendents-Respondent;SHARON TRACY VOIGT; Pro se; D. KENDALL PERKINS; Attorney for Plaintiffs;

IN THE SUPREME COURT OF THE

STATE OF UTAH

LYNDA LEA TRACY and
DONNA TRACY KING,

Plaintiffs,

vs.

UNIVERSITY OF UTAH
HOSPITAL, DOES I
through X,

Defendants-Respondent

Case No. 16784

ADA HANNAH TRACY, Deceased,
by and through Sharon Tracy
Voight, natural daughter and
next friend, and SHARON
TRACY VOIGT,

Applicants for
Intervention-Appellant

BRIEF OF RESPONDENT UNIVERSITY OF UTAH HOSPITAL

Appeal from the Judgment of the Third District Court of
Salt Lake County, Honorable Homer F. Wilkinson, Judge

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UNIVERSITY OF UTAH HOSPITAL

STATEMENT OF THE KIND OF CASE

This is a suit by plaintiffs, Lynda Lea Tracy and Donna Tracy King to recover for the wrongful death of their mother arising out of her treatment at the University of Utah Hospital. Applicants for Intervention and Appellant are the decedent and a third daughter, Sharon Tracy Voigt.

DISPOSITION IN LOWER COURT

Appellant's third motion to intervene was heard on November 16, 1979 by the Honorable Homer F. Wilkinson, District Judge. The motion was denied on the ground that a prior motion to intervene had been granted with prejudice and that the granting of the third motion was barred by the doctrine of res judicata.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the order denying Appellant's motion to intervene.

STATEMENT OF FACTS

Because the statement of facts in Appellant's brief is incomplete, Respondent will here set forth facts it believes are material to this appeal.

On or about May 15, 1975, Ada Hannah Tracy died while a patient at the University of Utah Hospital. She was survived by three daughters including Lynda Lea Tracy, Donna Tracy King and Appellant.

On or about January 20, 1977, Lynda Lea Tracy and Donna Tracy King instituted an action against the University of Utah Hospital in the District Court of Salt Lake County seeking damages for the wrongful death of Ada Hannah Tracy.

On or about November 10, 1977, Sharon Tracy, sometimes known in these proceedings as Sharon Tracy Voigt, appearing pro se, filed a motion on behalf of herself and Ada Hannah

Tracy, her deceased mother, to intervene in the pending action initially brought by her sisters.

The motion to intervene was argued before the Honorable David K. Winder, District Judge, on February 14, 1978. At the conclusion of the hearing Judge Winder denied the motion to intervene without prejudice (R. 64).

Appellant took an appeal to this Court from Judge Winder's order (R. 64). On or about May 25, 1978, Respondent filed a motion to dismiss the appeal on the ground that the denial of a motion to intervene without prejudice was not a final order within the meaning of Rule 72 (a), Utah Rules of Civil Procedure. This Court agreed and on June 7, 1978, granted the motion to dismiss the appeal (R. 177-178).

During the time this Court was considerir the appeal from Judge Winder's order denying intervention, Appellant filed a second motion to intervene along with other motions (R. 122-123). A hearing was held thereon on April 10, 1978, before Judge Winder. At the conclusion of the hearing Judge Winder entered his order dated April 12, 1978, denying Appellant's second motion to intervene (R. 130-131).

Appellant attempted to file a notice of appeal from the April 12, 1978 order but failed and refused to pay the filing fees required by law after notice that the appeal would not be accepted without the fees. A copy of Judge Winder's letter to Appellant on May 3, 1978, relating to the filing of the appeal

is at R. 153-154. The notice of appeal was never filed from Judge Winder's order of April 12, 1978, denying the second motion to intervene.

On or about March 1, 1979, Appellant filed her third motion to intervene in the pending action (R. 339-340). A hearing was held thereon on November 16, 1979, before the Honorable Homer F. Wilkinson, District Judge. Judge Wilkinson entered his order on November 30, 1979, (R. 408-409) denying Appellant's third motion to intervene on the ground that Judge Winder's order of April 12, 1978, (R. 130-131) denied the same motion with prejudice and was a valid, binding order which barred the granting of the third motion to intervene under the doctrine of res judicata.

ARGUMENT

POINT I

JUDGE WINDER'S ORDER DENYING APPELLANT'S SECOND MOTION TO INTERVENE WAS A FINAL APPEALABLE ORDER FROM WHICH NO APPEAL WAS TAKEN AND WHICH BARS APPELLANT'S RIGHT TO INTERVENE.

Rules 72 (a), Utah Rules of Civil Procedures provides in material part as follows:

> An appeal may be taken to the Supreme Court from all final orders and judgments, in accordance with these rules; provided, that when other claims remain to be determined in the proceedings, a party may preserve his right to appeal on the decided issue until a final determination of the other claims by filing with the trial court and serving on the adverse parties within the time permitted in Rule 73 (a), a notice of his intention to do so.

The above rule provides that either a notice of appeal or a notice of intent to appeal must be filed within one month from the entry of an appealable order.

Orders which finally adjudicate a person's status in a suit or controversy are by definition final orders from which appeal can be taken. Judge Winder's second order finally adjudicated Appellant's right to intervene in the suit in that it was not granted "without prejudice". See Rule 41 (b), Utah Rules of Civil Procedure. In Utah the denial of a motion to intervene with prejudice is an appealable order.

In Commercial Block Realty Company v. United States Fidelity and Guaranty Co. 28 P.2d 1081, 83 Utah 414 (1934), this Court said:

> We believe that the better reasoned decisions are to the effect that where it is a proper case for intervention a judgment denying the right to intervene is appealable. At 1082.

This Court again affirmed that an order refusing to permit intervention is appealable in Tripp v. District Court of Third Judicial District, 56 P.2d 1355, 89 Utah 8 (1936).

Since Judge Winder's order of April 12, 1978, denying Appellant the right to intervene was an appealable order, an appeal or notice of intent to appeal was required to have been filed within one month of the entry of the order. Appellant failed to do so even in the face of precise instructions from

the Court, and the order must now stand as the final adjudication, on the merits, on her rights to intervene in the pending litigation.

Judge Winder's order of April 12, 1978, is res judicata and bars the granting of a subsequent motion to intervene made on behalf of the same parties and for the same reasons. Therefore, Judge Wilkinson's order of November 30, 1979, denying Appellant's third motion to intervene was proper and made without error.

POINT II

THE TRIAL COURT HAD JURISDICTION TO CONSIDER AND DETERMINE THE MERITS OF APPELLANT'S SECOND MOTION TO INTERVENE WHILE THE ORDER ON APPELLANT'S FIRST MOTION TO INTERVENE WAS ON APPEAL BEFORE THIS COURT

Appellant contends that the lower court lacked jurisdiction to hear and consider her second motion to intervene during the time the denial of her first motion to intervene was on appeal to this Court.

It is the general rule that an appeal of a final order, when duly perfected, divests the trial court of jurisdiction of the cause and transfers jurisdiction to the appellate court. However, this rule does not apply in the case of a nonappealable interlocutory order.

12 AM. JUR. Appeal and Error §357 states:

> A litigant cannot deprive the trial court of jurisdiction by taking an appeal from a nonappealable interlocutory order, and even an appeal from an appealable intermediate or interlocutory order does not divest the trial court of jurisdiction to proceed in matters not involved in the appeal.

In Veazey v. City of Durham, 57 SE 2d 377 (N.C. 1950), the defendant asked the trial court to order a compulsory reference of the case. When the trial court declined to enter such an order, the defendant appealed to the North Carolina Supreme Court. The trial court retained jurisdiction over the cause and tried the matter on its merits during the time its prior order was on appeal to the Supreme Court. At some time following trial on the merits, the Supreme Court considered and dismissed the appeal on the ground that the order was not an appealable order and was thus not subject to review.

The defendant appealed a second time contending that the trial court had no jurisdiction to undertake further proceedings on the cause while the Judge's first order was on appeal. In its opinion the North Carolina Supreme Court addressed the issue that is now before this Court on this appeal.

> [W]e are presently concerned with this precise question: What is the effect of an appeal from a nonappealable interlocutory order upon proceedings in the Superior Court pending the dismissal of an appeal by the Supreme Court? . . .
>
> ". . .[A] litigant cannot deprive the Supreme Court of jurisdiction to try and determine a case on its merits by taking an appeal to the Supreme Court from a nonappealable interlocutory order of the Superior Court. A contrary decision would necessarily require an acceptance of the paradoxical paralogism that a party to an action can paralyze the administration of justice in the Superior Court by the simple expedient of doing what the law does not allow him to do, i.e. taking an appeal from an order which is not appealable.

> Our conclusion on this aspect of the controversy finds full sanction in previous decisions of this Court adjudging that when an appeal is taken to the Supreme Court from an interlocutory order of the Superior Court which is not subject to appeal, the Superior Court need not stay proceedings, but may disregard the appeal and proceed to try the action while the appeal on the interlocutory matter is in Supreme Court. (Citing cases) Moreover, this conclusion is sustained by the repeated cases holding by implication rather than by express declaration that an appeal to the Supreme Court from a nonappealable order of the Superior Court confers no power on the Supreme Court to decide the appeal and that the Supreme Court must dismiss the appeal because it cannot properly exercise a jurisdiction which it does not possess. 57 SE 2d 377 at 382, 383.

The North Carolina Supreme Court concluded that it had no jurisdiction to hear the nonappealable order. Therefore, the trial court was not divested of jurisdiction in the matter. Thus, the orders and judgments of the trial court during the pending appeal of the nonappealable order were rendered within the full jurisdiction of the court and were binding on the parties.

Here Appellant appealed Judge Winder's first order denying her right to intervene without prejudice. The order was found by this Court to be nonappealable, and the appeal was summarily dismissed. Under the teachings of Veazey v. City of Durham the trial court retained jurisdiction over the matter for all purposes.

While the first nonappealable order was pending in this

Court, Appellant sought to take advantage of the continuing jurisdiction of the trial court and filed various other motions including a second motion seeking to intervene in the pending action. The trial court properly exercised its jurisdiction, and considered and ruled upon the motion. Judge Winder's order of April 12, 1978, (R. 130-131) denied Appellant's motion to intervene with prejudice. No appeal was taken from it and it, therefore, became final.

Appellant has raised the issue that her second motion to intervene was but a motion to reconsider. It should be noted that the Utah Rules of Civil Procedure make no provision for such a motion. Drury v. Lunceford, 415 P2d 662, 14 Utah 2974 (1966). There can be no mistake that Appellant's second motion was a separately filed motion and that it sought leave for Appellant to intervene in the pending suit. Thus, Appellant's contention is without merit and has no effect on the validity of Judge Winder's order denying the motion.

POINT III

APPELLANT IS NOT PRECLUDED FROM RECOVERY OF HER SHARE OF SUCH DAMAGES AS MAY ULTIMATELY BE AWARDED.

Judge Wilkinson's order of November 30, 1979, contains a provision which preserves to Appellant her rightful share of any recovery for wrongful death which may be made in the pending litigation. That portion of the order reads as follows:

> Lynda Lea Tracy and Donna Tracy King are entitled to prosecute this action for the benefit of all heirs of Ada Hannah Tracy, deceased, and the proceeds of any settlement or judgment rendered herein

> shall be held by the present Plaintiffs for the use and benefit of said heirs, including Tracy Voigt, in accordance with their lawful claim upon said proceeds.

Judge Wilkinson's order is wholly consistent with Utah law. In Parmley v. Pleasant Valley Coal Co., 228 P. 557, 64 Utah 125 (1924), the Supreme Court held that there was only one cause of action for wrongful death in the State of Utah and that if an action for wrongful death is prosecuted by less than all of the heirs of the decedent, they prosecute it for the benefit of all heirs. This Court said:

> Nor is the omitted heir, if there be one, without a remedy. If damages are recovered, each heir is entitled to his proportionate share, whether he was a party to the action or not, and, if his share is withheld from him, he may always sustain an action against his co-heirs for contribution. At 562.

Therefore, Appellant will not be prejudiced by denial of her motion to intervene.

SUMMARY

Judge Wilkinson did not err in denying Appellant's third motion to intervene. The issue had been finally adjudicated in a prior hearing before Judge Winder who had jurisdiction to hear and to enter the dismissal order from which no appeal was taken. Judge Wilkinson properly denied the third motion to intervene under the doctrine of res judicata.

Further, Judge Wilkinson's order preserves the right of recovery of Appellant, and she, therefore, is not prejudiced

by the ruling of the Court.

The Judgment of the lower court should be affirmed.

RESPECTFULLY SUBMITTED this 28 day of March, 1980.

SNOW, CHRISTENSEN & MARTINEAU

By: /s/
Merlin R. Lybbert
Attorneys for
Defendant-Respondent

CERTIFICATE OF MAILING

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Sandra Sparley, being duly sworn, says:

That she is employed in the offices of Snow, Christensen & Martineau, attorneys for Defendants-Respondent herein; that she served the attached Brief of Respondent (Case No. 16784) upon the parties listed below by placing two true and correct copies thereof in an envelope addressed to:

Sharon Tracy Voigt
P. O. Box 874
Cathedral City, CA 92234
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Appellant
pro se

D. Kendall Perkins
12 Exchange Place
Salt Lake City, UT 84111
Attorney for plaintiffs

and mailing the same, postage prepaid, on the _____day of March, 1980.

_____

SUBSCRIBED AND SWORN to before me this _____day of March, 1980.

_____