

1980

Robert Myers and Jackie Myers v. Reggie McDonald : Brief of Plaintiffs-Appellants

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

ROBERT MYERS and
JACKIE MYERS, his
wife,

Plaintiffs-Appellants,)

vs.)

Case No. 17046

REGGIE MC DONALD,

Defendant-Respondent.)

BRIEF OF PLAINTIFFS-APPELLANTS

APPEAL FROM THE ORDER OF THE
THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY
HONORABLE BRYANT H. CROFT, PRESIDING

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IN THE SUPREME COURT
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ROBERT MYERS and)	
JACKIE MYERS, his)	
wife,)	
)	
Plaintiffs-Appellants,)	
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vs.)	Case No. 17046
)	
REGGIE MC DONALD,)	
)	
Defendant-Respondent.)	

BRIEF OF PLAINTIFFS-APPELLANTS

STATEMENT OF KIND OF CASE

This is a wrongful death action brought against Reggie McDonald for the death of Bobby Charles Menzies resulting from an automobile accident on November 22, 1976.

DISPOSITION IN THE LOWER COURT

Defendant's Motion to Dismiss based on the limitation period found in Utah Code Ann. § 78-12-28 was heard on March 13, 1980, and an Order granting such motion was entered on March 31, 1980. Plaintiffs appeal from that Order.

STATEMENT OF FACTS

Robert and Jackie Myers were appointed guardians and given custody of Bobbie Charles Menzies, a minor and natural

brother of Jackie Myers, on January 15, 1976 by Order of Judge John Farr Larson of the Salt Lake County Juvenile Court. On November 21, 1976, Bobbie left home with some friends, never to return. Jackie called the police and reported Bobbie as a runaway. On November 22, 1976, Bobbie was killed in an automobile accident, but was identified by Reggie McDonald, driver of the accident vehicle, only as "Joey". "Joey" was described by police and newspaper accounts as having physical characteristics totally different from those Bobbie possessed. Jackie Myers requested that the local morgues be checked by the police, but her request was refused. The mysterious "Joey" was buried without ever having been identified. Finally, Robert Myers requested permission to try and identify photographs of the mysterious "Joey". On or about July 24, 1979, the Myers' positively identified "Joey" as Jackie's brother and their ward, Bobbie Charles Menzies.

This action for wrongful death was commenced against Reggie McDonald on October 29, 1979. The action was dismissed by the district court on March 31, 1980 upon the ground that the action had not been commenced within two years from the date of death.

ISSUE

Whether the limitation period provided by Utah Code Ann. § 78-12-28 was properly applied by the district court.

ARGUMENT

POINT I

PLAINTIFFS' CAUSE OF ACTION DID NOT ACCRUE UNTIL THE IDENTITY OF THE DECEDENT WAS KNOWN

As the affidavit of plaintiff-appellant, Jackie Myers, indicates, the identity of Bobbie Charles Menzies was not discovered by the Myers until almost three years after his death, despite diligent efforts on their part. When Bobbie's identity and the fact of his death was finally revealed, the Myers became aware of the circumstances which led to his death. Those facts and circumstances indicate both intoxication and willful misconduct on the part of defendant and are the subject matter of this litigation.

It is undisputed that from November 22, 1976 until July 24, 1979 no action was filed, and that such time period exceeded the two year limitation period provided by the statute. Under the circumstances, it cannot, however, be said that the plaintiff's cause of action "accrued" until the plaintiffs knew or should have known that Bobbie was in fact dead and of the circumstances surrounding his death.

This court, in Platz v. International Smelting Co., 61 Utah 342, 213 P. 187 (1922), addressed the former wrongful death statute with respect to whether a cause of action accrues at the time of death or at the time an administrator is appointed

for the decedent's estate. The court held under the circumstances of that case that the cause accrued at the time of death. It is clear that the issue presented here was not before the court in Platz. However, in that case the court quoted with approval the following language from the opinion in Collier v. Goessling, 160 F. 604, 611 (1908).

To start the running of a statute of limitations, there must be some one capable of suing, some one subject to be sued, and a tribunal open for such suits. 213 P. at 188.

Such reasoning has clear application to the present action. The Myers' could not have brought an action against this defendant until the fact and circumstances of Bobbie's death were known. There was no death certificate in existence bearing the name of Bobbie Charles Menzies until after July 24, 1979.

To say that the limitation period found in Utah Code Ann. § 78-12-28 ran before the Myers knew or should have known that Bobbie was dead defies logic. This court, in its recent holding in Foil v. Ballinger, 601 P.2d 144 (Utah 1979), addressed the question of discoverability of medical negligence in malpractice actions as affecting the date of accrual of a cause of action for statute of limitation purposes. This court quite properly held that "the law ought not to be construed to destroy a right of action before a person even becomes aware of the existence of that right." 601 P.2d at 147. The court

quoted with approval the Oregon Supreme Court's reasoning in Berry v. Branner, 245 Or. 307, 421 P.2d 966, 988 (1966):

To say that a cause of action accrues to a person when she may maintain an action thereon and, at the same time, that it accrues before she has or can reasonably be expected to have knowledge of any wrong inflicted upon her is patently inconsistent and unrealistic. She cannot maintain an action before she knows she has one. To say to one who has been wronged, 'You had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy,' makes a mockery of the law. 601 P.2d at 148, 149.

This court need not view the Platz decision as rejecting the foregoing reasoning and argument. That decision does not deal with discovery or discoverability as affecting accrual of a cause of action. That decision assumes that when a person dies, his or her heirs or personal representatives are immediately aware of it. Obviously, when the fact of death is not known, nothing can be done about it until the fact and circumstances of death are known. An heir or representative can only commence action when those facts are known. Otherwise, there is no one to sue, nor any facts to allege as constituting a cause of action.

To follow the district court's reasoning, a plaintiff in the Myers' position would be required to file an action within two years against an unknown person, claiming a death they were not certain had occurred, under circumstances of which they were not aware. The fallacy and futility of requiring the filing of such actions does not require comment.

POINT II

THE UTAH LIMITATION OF WRONGFUL DEATH ACTIONS IS A LIMITATION NOT UPON THE RIGHT OF ACTION BUT ONLY UPON THE REMEDY

This court has consistently held that the limitation period imposed upon wrongful death causes of action in Utah is a limitation upon the remedy and not upon the right of action for wrongful death. Platz v. International Smelting Co., 61 Utah 342, 213 P. 187 (1922); Seely v. Cowley, 12 Utah 2d 252, 365 P.2d 63 (1961); Switzer v. Reynolds, 606 P.2d 244 (Utah 1980).

Limitations imposed upon the remedy are legally considered to be "general" as opposed to "special" statutes of limitations. Special statutes of limitation apply to causes of action which did not exist at common law but were created by the statute containing the limitation period. General statutes of limitation are subject to tolling provisions such as minority, absence of the defendant from jurisdiction, incarceration, etc., whereas special statutes of limitation are not. (See those cases cited immediately above.)

The district court in its memorandum decision acknowledges that the limitation in wrongful death cases affects the remedy rather than the right. "The statute of limitations in wrongful death cases bars the remedy (Seely v. Cowley, 12 U. 2d 252, 365 P.2d 63)."

The district court considered this court's recent decision in Foil v. Ballinger, 601 P.2d 144 (Utah 1979) wherein the court held that a cause of action for medical malpractice "accrues" when the plaintiff knows or should know of the facts constituting a cause of action and not before. This court in Foil has determined that the limitation period in medical malpractice actions is a general statute of limitations since causes of action for medical negligence were not created by statute but existed at common law.

This court in Switzer, Id., as well as the earlier cases cited dealing with wrongful death statutes of limitation, has held that statutes of limitation in such cases in Utah are general and not special statutes of limitation for the same reason. Both must therefore be considered as tolled by the same tolling factors, and accrual of a cause of action in either medical negligence or wrongful death cases must be considered to occur when the plaintiff knows or should know of his right of action. Foil is determinative of the question presented by this appeal in view of this court's prior decisions in Platz, Switzer and Seely.

POINT III

EQUITABLE PRINCIPLES ALLOW THIS
ACTION TO SURVIVE AND ESTOP THE
DEFENDANT FROM PLEADING THE STATUTE
OF LIMITATIONS

In Jackie Myers' affidavit (paragraph No. 9), it

is stated that Reggie McDonald, the defendant-respondent, gave the name of "Joey" to police as the name of the deceased individual who proved to be Bobbie Charles Menzies. There is no indication that the defendant did not know Bobbie's real name. Circumstances exist which raise the genuine possibility that McDonald intentionally concealed Bobbie's true identity. Should that be the case, Utah case law clearly tolls the limitation period for such concealment; e.g., Burningham v. Ott, 525 P.2d 620 (Utah 1974). The Meyers are, at the very least, entitled to further proceedings for the purpose of presenting such evidence to the trier of fact.


CONCLUSION

Plaintiffs' cause of action must be considered to have accrued when, in the exercise of due diligence, they became aware of the fact and circumstances of the death of Bobbie Charles Menzies. That occurred on July 24, 1979, more than two years after the accident. This action was commenced October 29, 1979, or three months after plaintiffs' cause of action accrued. This court has held in Foil that it is the date of the legal wrong upon which the applicable statute of limitations begins to run in cases where, as here, the limitation affects the remedy and not the right. The district court's dismissal on statute of limitations grounds is error

and should be reversed, and the matter remanded to that court for further proceedings consistent with this court's opinion.

DATED this 9th day of July, 1980.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Plaintiffs-Appellants were personally served upon Nelson L. Hayes of Richards, Brandt, Miller & Nelson, attorneys for defendant-respondent, 48 Post Office Place, Salt Lake City, Utah 84101 this 10th day of July, 1980.

