2010

Claudia Orr and Eugene Orr v. Uintah County, State of Utah : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

CLAUDIA ORR and EUGENE ORR, individually, on behalf of their deceased son, KEVIN ORR, HOLLY ORR, individually and on behalf of the estate and heirs of KEVIN ORR, Plaintiffs and Appellants, v. UINTAH COUNTY, STATE OF UTAH, Defendant and Appellee.	)	Appellate Case No. 20100373

REPLY TO BRIEF OF APPELLANTS

Joseph W. Steele (#9697)
David C. Biggs (#0321)
STEELE & BIGGS, LLC
5664 South Green Street
Salt Lake City, Utah 84123

Kenneth D. Lougee (#10682)
Mark R. Taylor (#11264)
SIEGFRIED & JENSEN
5664 South Green Street
Salt Lake City, Utah 84123

Attorneys for Plaintiffs/Appellants

Jesse C. Trentadu
SUITTER AXLAND, PLLC
8 East Broadway, Suite 200
Salt Lake City, UT 84111

Attorney for Defendant/Appellee

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Attorneys for Plaintiffs/Appellants

Jesse C. Trentadu
SUITTER AXLAND, PLLC
8 East Broadway, Suite 200
Salt Lake City, UT 84111

Attorney for Defendant/Appellee

LIST OF PARTIES TO THE ACTION

CLAUDIA ORR and EUGENE ORR, individually, on behalf of their deceased son, KEVIN ORR, HOLLY ORR, individually and on behalf of the estate and heirs of KEVIN ORR.

UINTAH COUNTY, STATE OF UTAH.

Table of Contents

TABLE OF AUTHORITIES

Case Law

Statutes

Rules

INTRODUCTION

There are but three questions, all simple, in this appeal. First, the Court must determine if Mrs. Orr's pleadings, which request damages, are sufficient to establish a cause of action against Uintah County under the Immunity for Voluntary Services Act, Utah Code Ann. §63G-8-202. Second, the Court must determine if this cause of action was precluded by prior litigation. Third, this Court must decide if there is a danger of inconsistent verdicts with regard to Brian Grayson's negligence? Those are the only issues which must be determined in this appeal.

1. Mrs. Orr Adequately Pled a Cause of Action.

In this case, Mrs. Orr clearly pled that she was entitled to monetary damages from the County. R. 000137 Paragraph 2. Further, in the second claim for relief, she clearly pleads that the County has liability under the Voluntary Services Act. R. 000136.

There is no question about the sufficiency of pleading Grayson's negligence or the facts of the collision. Mrs. Orr clearly raised the issue of Grayson volunteer status. Indeed, given the County Commissioner's statements the County cannot, in good faith, deny that Grayson was its volunteer. All of those allegations must be accepted as true and all reasonable inferences from those facts must be viewed in the light most favorable to Mrs. Orr. *Miller v. State*, 2010 UT App 25. Therefore, before this court is a request for damages against the county and a specification of relief under the Voluntary Service Act.

The applicable law is found in *Bennett v. Jones Waldo, Holbrook and McDonough,* 2003 UT 9#30, 70 P.3d 17. "Under Rule 12 of the Utah Rules of Civil

Procedure, a motion to dismiss is proper only where it clearly appears that the plaintiff or plaintiffs would not be entitled to relief under the facts alleged or under any state of facts they could prove to support their claim. Therefore, we will affirm the trial court's dismissal only if it is apparent that as a matter of law, the plaintiff could not recover under the facts alleged."

A cause of action against the County under Immunity for Voluntary Services Act, Utah Code Ann. §63G-8-202 requires Mrs. Orr to plead an injury occurring as a result of the actions taken by a person performing volunteer services. As noted there is no question as to Grayson's status. Mrs. Orr's pleading demonstrates that she alleged the death of Detective Orr was proximately caused by the negligence of Mr. Grayson. Combined with the demand for monetary damages from the County, she has pled all that is needed to put the County on notice that it will be responsible for the monetary loss caused by Grayson.

Whether the cause of action is perfectly pled is not before the Court. Rather, the appropriate question is if she has pled sufficient facts to support her claim for damages. The universal Utah pleading rule requires no more than giving the defendant notice of the type and nature of the action. The Supreme Court held in *Hill v. Allred*, 26 P.3d1271,1275 (Utah 2001), "Our liberalized pleading rules are designed to afford parties the privilege of presenting whatever legitimate contentions they have pertaining to their dispute subject only to the requirement that their adversary have fair notice of the nature and basis or grounds of the type of litigation involved."

If the County was not alerted to the type and nature of liability for damages asserted. the proper remedy was not a Motion to Dismiss but a Motion for More Definite Statement under Civil Rule 12(e) of the Utah Rules of Civil Procedure. If it appears that this pleading is technically inadequate, the remedy is not dismissal on the merits but a remand to the District Court to enter an order requiring an amended complaint.

The Court should not be confused by the remaining portions of Mrs. Orr's complaint. At the time the complaint was filed, Judge Anderson had ruled that Pete Martin Drilling (hereinafter "PMD") and Brian Grayson (hereinafter "Grayson") were not volunteers under the Voluntary Government Workers Act, Utah Code Ann §67-20-1 et seq. because the County officials had not pre-approved their services. If PMD and Grayson had been covered under that act, they would have been immune for their non-intentional actions. If, at a later date, the Government Workers Act was found to apply, Mrs. Orr's only remedy would have been against Uintah County. This is because the Workers' Act treats voluntary government workers as regular county employees for the purpose of the Governmental Immunity Act.

Portions of the Complaint addressed the possibility that an appeal by PMD and Grayson of the ruling on the Government Workers Act might succeed after trial. PMD and Grayson (but not the County) filed an interlocutory appeal of Judge Anderson's decision. Interlocutory appeal was denied. Mrs. Orr was concerned that if an appellate court found Grayson immune through the Government Workers Act, she would have been left without a remedy by the passage of time pursuant to the Immunity Act.

There is presently no possibility of Mrs. Orr losing her remedy against the county through a reversal of Judge Anderson's refusal to allow intervention under the Workers Act. That appeal is no longer judiciable. Mrs. Orr settled her claims against PMD and Grayson. The County did not appeal Judge Anderson's ruling and it has become final as to the County. Therefore, this Court need not trouble itself with the allegations in the complaint relating to the Workers Act. There is no mechanism for the County to resurrect its argument that PMD and Grayson are immune from suit. Mrs. Orr through settlement with PMD and Grayson has no further concern with a reversal of the County's attempt to intervene under the Government Workers Act.

2. No Prior Judicial Action Precludes Mrs. Orr From Pursuing this Case.

The County argues that Mrs. Orr's Voluntary Services complaint against the County is barred by some prior judicial action. The County uses terms such as collateral estoppel, judicial estoppel and law of the case. These doctrines do not help the County. All of them depend upon prior litigation of Mrs. Orr's Voluntary Services complaint. For example, in *PGM, In. v. Westchester Inv. Partners*, 995 P.2d 1252, 1254 (UT App 2000),the court held that both branches of res judicata ("claims preclusion" and "issue preclusion") required the defendant to show an identity of parties and an identity of issues.

The demonstration that there are no common parties and issues is simple. Mrs. Orr filed her complaint against PMD and Grayson. The County (joined by PMD and Grayson) moved to intervene based upon their view that PMD and Grayson came within

the Governmental Immunity Act, via the provisions of the Volunteer Government Workers Act. Judge Anderson denied the County's Motion for Intervention. Judge Anderson then retired. This case was filed and the County moved to dismiss. Mrs. Orr asked the succeeding Judge, Judge Lynn A. Payne, for clarification on Judge Anderson's order. Specifically, Mrs. Orr wanted to know if Judge Anderson's order denied intervention by the County on the alternative basis of the Immunity for Voluntary Services Act. Judge Payne entered the following order which demonstrates that the Voluntary Services Act was never raised by the County before Judge Anderson.

> At the hearing on the Motion to Dismiss (on March 16, 2010), the Court agreed to delay ruling on this matter until Judge Anderson ruled on an issue previously decided in Orr I; i.e. whether the Defendants in Orr I qualified as volunteers under the Volunteer Services Act, Utah Code Ann. 63G-8-101. Based upon the pleadings in this matter concerning the Motion to Dismiss, the Court was under the impression that Uintah County had raised the issue of whether the Defendants qualified as volunteers in its motion to intervene in Orr I. The Court has reviewed the issues which Uintah County raised in its motion to intervene. Indeed, Uintah County's pleadings clearly state that they were not seeking to intervene on the basis of the Volunteer Services Act. Therefore, there is no pending issue for Judge Anderson to rule on.
>
> R. 00520

Because, the County never raised the issue of the Voluntary Service Act and Judge Anderson did not rule on this imaginary issue, there is no prior ruling, final or otherwise, holding that the County is not liable for the actions of its volunteers under statutory provisions of the Voluntary Service Act. Any vague reference to issue preclusion or similar theories is simply inapplicable.

3. This Complaint Alleges a Direct Cause of Action against the County.

Judge Payne's error was the failure to consider the applicability of Utah Code Ann. §63G-8-202 contained in the Volunteer Services Act. That section makes the county liable for the negligence of its volunteers. When viewed in the light of the County's statutory responsibility to pay for the negligence of its volunteer, Judge Payne's conclusion that the present complaint is a "fall back" if Mrs. Orr does not succeed in her case against PMD and Grayson is not sustainable. If Mrs. Orr failed to establish the negligence of Grayson in her original action, of course, she would be estopped from claiming the county to be liable under Section 202 for Grayson's negligence. That is not this case.

The question of inconsistent rulings on Grayson's negligence was never before Judge Payne as it had never been ruled upon. Indeed, at the present time, given the settlement with Grayson, there never will be inconsistent rulings on Grayson's negligence. Judge Payne's view that this case was a "second bite of the apple" is therefore not correct. Mrs. Orr has recovered a portion of her damages from PMD and Grayson. She did not release the County for liability arising under the Voluntary Services Act. It has long been the law in Utah that a plaintiff may collect her damages from either party in a respondeat superior situation, particularly where the settlement documents do no release the "employer." *Peterson v. Coca-Cola USA*, 48 P.3d 941 (Utah 2002).

Of course, in calculating Mrs. Orr's damages, the County would be credited with the amount of the settlement. However, Mrs. Orr's failure to include the County in her original complaint, does not immunize the county from later suit. We have found no cases requiring a plaintiff to sue disparate defendants in the same suit. Because Judge Anderson denied Uintah County's motion to intervene in Mrs. Orr's suit against PMD and Grayson, Uintah County was never a party. Mrs. Orr's cause of action against the county was never a Rule 13 Counterclaim, let alone a mandatory counterclaim.

Simply put, Judge Payne perceived this suit to be "a second bite" at Grayson's negligence. That view was then incorrect but is now irrelevant because of the settlement.

CONCLUSION

The questions are easily answered. The liberal pleading rules allow a complaint for damages to proceed if sufficient facts are pled which demonstrate a right to relief. This complaint does so.

Any issue preclusion is not appropriate because Judge Anderson never considered the applicability of the Services Act.

Finally, Judge Payne misperceived this action as a potential remedy for Mrs. Orr should she fail to prove Grayson negligence in her direct case. This was a misperception but is now irrelevant given the settlement with Grayson. It is now impossible to reach inconsistent verdicts on Grayson Negligence.

For the above reasons, the dismissal of Mrs. Orr's complaint should be reversed with directions to proceed to trial against Uintah County pursuant to

Section 202 of the Immunity for Volunteer Services Act.

DATED this 24th day of February, 2011.

Joseph W. Steele
David C. Biggs
STEELE & BIGGS, LLC
5664 South Green Street
Salt Lake City, Utah 84123

Kenneth D. Lougee
Mark R. Taylor
SIEGFRIED & JENSEN
5664 South Green Street
Salt Lake City, UT 84123

Attorneys for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 2011, I served the attached **REPLY BRIEF OF APPELLANTS** by U. S. Mail, postage paid, on the following:

Jesse C. Trentadue
SUITTER AXLAND
8 East Broadway, Suite 200, 2nd Floor
Salt Lake City, UT 84111