

1989

Virginia Yearsley v. Officer Dean Jensen, Et Al. : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Yearsley v. Washington Terrace Police Department*, No. 890217.00 (Utah Supreme Court, 1989).
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890217

BRIEF

IN THE SUPREME COURT

STATE OF UTAH

VIRGINIA YEARSLEY,

:

Plaintiff/Appellant. :

vs. :

OFFICER DEAN JENSEN, ET AL, :

Case No. 890217

Defendants/Respondents:

APPELLANT'S BRIEF ON APPEAL

WRIT OF CERTIORARI FROM A DECISION
RENDERED BY THE UTAH COURT OF APPEALS

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vs.	:	
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IN THE SUPREME COURT

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Plaintiff/Appellant,	:	BRIEF ON APPEAL
vs.	:	
OFFICER DEAN JENSEN, ET AL,	:	Case No. 890217
Defendants/Respondents:	:	

STATEMENT OF CASE

This was an action sounding in tort which alleged assault, battery, malicious prosecution and false imprisonment that was originally filed by the Plaintiff as an action against three (3) police officers from three (3) different jurisdictions, that happened at the Plaintiff's home on the late evening hours of August 28, 1983 and continued into the early morning hours of August 29, 1983.

DISPOSITION IN THE COURT BELOW

Following the filing of a Notice of Readiness of Trial, after discovery had been completed and immediately prior to a Trial which had been set, Defendants filed a Motion to Dismiss on the basis of violation of the statute of limitations.

In a hearing on September 14, 1987, Plaintiff's claims against the Defendant Cities were dismissed by Stipulation and

the Court agreed to consider at a later hearing, Plaintiff's request to amend her Complaint to include claims for false imprisonment and malicious prosecution which would defeat Defendants' Motion for Summary Judgment as against the Officers on the basis of a statute of limitation violation.

A proposed Amended Complaint was prepared alleging both false imprisonment and malicious prosecution claims and alleging that those claims arose from a continuous act, beginning on August 28, 1983 continuing through August 29, 1983 and thereafter. (See Record on Appeal, Plaintiff's Proposed Amended Complaint)

At the subsequent hearing on November 2, 1987, the Motion to Amend the Complaint was denied and the Defendants were granted Summary Judgment against the Plaintiff on the basis that the claim against the police officers, pursuant to Rule 63-30-13, which had been filed on August 29, 1984 were not timely filed.

An appeal was taken to the Utah Supreme Court which transferred the matter to the Utah Court of Appeals. Following the presentation of Briefs and Oral Argument, the Utah Court of Appeals, on March 30, 1989, entered an Order of Affirmance in a two-to-one hearing, a copy of which is attached hereto as Appendix "1". Justices Jackson and Greenwood merely affirmed the Judgment of the Trial Court on the basis that the Notice of Claim made against the Defendants was not timely filed. Justice Newey dissented and argued that the Trial Court should have allowed the Complaint to be amended to include claims of false imprisonment

and malicious prosecution and that the Court abused its discretion in rejecting such Complaint.

A request to file an extension for a Writ of Certiorari was filed and granted on April 27, 1989 and the Certiorari Petition was filed on May 26, 1989 and this Court granted the Petition and the Record on Appeal was filed on September 8, 1989.

JURISDICTION

Jurisdiction is conferred upon this Court pursuant to Rule 43 of the Supreme Court Rules, State of Utah, in that a decision of the Court of Appeals in this case has rendered a decision that has so departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision.

That this Court can, by the granting of a Petition of Certiorari, review said decision. Said Petition for Certiorari having been granted, the Court now has jurisdiction to consider the case on its merits.

STATEMENT OF THE ISSUES SOUGHT TO BE REVIEWED

1. Whether the Trial Court abused its discretion in not granting Plaintiff's request to amend her Complaint prior to Trial to defeat the Defendants' statute of limitation argument, pursuant to Rule 15 of the Utah Ruled of Civil Procedure.

STATEMENT OF THE FACTS

(The following fact statement is taken from the pleadings in the case, including Plaintiff's Affidavit and Memorandum

supplied at the time of the Summary Judgment Hearing. There has been no evidentiary hearing in the case and therefore, citations will not be to a transcript, but to various documents in the Record on Appeal. The facts set forth below however, are based upon the allegations contained in those pleadings.)

In the late evening hours of August 28, 1983 at approximately 10:30 p.m., Plaintiff, along with other friends was returning to her home in Washington Terrace, Weber County, Utah, from a boating excursion at Pineview Reservoir, East of Ogden.

At that time, Plaintiff was a passenger of a motorhome, driven by her boyfriend, Jerry Wells. The motorhome was owned by, and registered to, him.

That upon entering Washington Terrace City, a Washington Terrace police officer pulled behind the motorhome as it stopped and parked in front of the Plaintiff's home. Plaintiff exited the motorhome and entered her home.

Shortly thereafter, the officers began to arrest both Jerry Wells and Charlie Schultz, for driving while intoxicated and public intoxication. The Washington Terrace officer apparently called for assistance from officers from South Ogden City and Riverdale City.

The named officers in the Complaint then entered the Plaintiff's home, without knocking and without any authorization and requested that she move the motorhome. After informing the officers that the motorhome did not belong to her, a verbal

argument ensued, at which time the Plaintiff refused to move the motorhome or leave her house. The officers drug her from her home to the porch and onto the driveway area where she was physically beaten and abused.

At this time, Plaintiff was not arrested, but was then transported by the officers to McKay Dee Hospital approximately ten (10) miles away. Plaintiff was not released from McKay Dee Hospital until 1:00 a.m. on the morning of August 29, 1983. Following her release, she was then arrested, handcuffed and placed into a patrol car and taken to the Weber County Jail in Ogden where she was booked at approximately 1:30 a.m. on a number of charges including resisting arrest, interfering with an officer and disturbing the peace. Plaintiff remained incarcerated in the Weber County Jail until she was able to arrange bail at approximately 8:00 a.m. on August 29, 1983.

The officers then contacted the Washington Terrace City Attorney who caused Informations to be filed on Misdemeanor Counts for the above referenced charges.

The Plaintiff initially plead not guilty to all charges and some two (2) months later, all charges, but one, was dismissed through a plea bargain. The only charge to which Plaintiff plead guilty was disorderly conduct and there was no agreement on the part of the Plaintiff that she would not take legal action against the City, the various police agencies or the officers involved. Nor was there any factual determination by the Court that the charge of Disorderly Conduct justified any of

the officers' action.

The Plaintiff initially filed her Notice of Claim against all the Cities and named officers in this case on August 29, 1984. Plaintiff contended that none of the parties had specifically responded, either affirmatively or negatively, to the Notice of Claim and the lawsuit was initiated on November 27, 1985. Answers were filed on behalf of the three (3) named officers and the Cities and the matter proceeded to Trial.

Discovery ensued and Interrogatories were submitted which were answered by the Plaintiff and numerous settlement discussions were entertained, but none came to fruition for a period of almost two (2) years. At this time, Plaintiff filed a Notice of Readiness of Trial. No objection to the Trial was raised, nor were any Motions made following discovery.

Approximately three (3) weeks before the Trial, the Defendants, for the first time, filed Motions for Summary Judgment claiming that the statute of limitations had been violated. The basis of the claim was that the gravamen of the lawsuit was the actual assault on Plaintiff by Defendants which occurred at approximately 11:00 p.m. on August 28th and therefore, the Notice of Claim was one (1) day late.

Plaintiff took the position at the initial hearing on September 14, 1987 that she considered the incident as one (1) continuous tort beginning in the late evening hours and continuing until the Plaintiff's release from jail at 8:00 on the morning of the 29th.

Plaintiff further requested that she be allowed to amend her Complaint to conform to the facts, including the offenses of false imprisonment and malicious prosecution which clearly took place on August 29th and subsequent thereto.

The Court took this matter under advisement and allowed the Plaintiff to prepare and Amended Complaint. Plaintiff then filed an Amended Complaint and at that time, the Judge after reviewing the Plaintiff's Amended Complaint refused to accept it, claiming that it changed the basis of the lawsuit and further found that the conduct, although beginning on August 28th and continued to August 29th was not of such continuous tortious nature that it could be brought into the suit and considered a single act.

Therefore, the Court determined that the matters raised in the initial Complaint were completed on August 28, 1983 and therefore, the claim was outside the statute and Summary Judgment was granted.

SUMMARY OF THE ARGUMENT

The District Court Judge erred in refusing to allow the Plaintiff to amend her Complaint prior to the Trial to conform to the facts to include a malicious prosecution and false imprisonment, which claims were either part of a continuous tortuous act or took place on August 29, 1983 or beyond, which would have brought them within the one (1) year Notice of Claim filing.

Rule 15 of the Utah Rules of Civil Procedure allows the

amendment of a Complaint prior to Trial to conform to the evidence by leave of Court and leave shall be freely given when justice so requires.

In this case justice required the amendment of the pleading to allow Plaintiff's legitimate claims against three (3) police officers to be heard in a full evidentiary hearing.

ARGUMENT

THE COURT OF APPEALS ERRED IN UPHOLDING THE DECISION OF THE TRIAL COURT, IN THAT THE MAJORITY FAILED TO ADDRESS THE KEY ISSUE RAISED IN THE APPEAL, WHICH WAS THE FAILURE OF THE COURT TO ALLOW THE AMENDMENT TO PLEADINGS WHICH WOULD HAVE BROUGHT THE ACTION WITHIN THE APPLICABLE STATUTE OF LIMITATIONS PERIOD ON THE BASIS THAT SUCH A DECISION DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

This is a case in which the Plaintiff is being denied access to the Courts for a redress of grievance on the basis of a very strict view of both the construction of pleadings and a definition of tortious conduct by a Trial Court Judge.

It was unrefuted in this case and in any of the prior pleadings, documents, or memoranda that was presented to the Trial Judge that the Defendant police officers began a course of conduct in the late evening hours of August 28, 1983 which also continued into the early morning hours of August 29, 1983. That conduct consisted of dragging the Plaintiff from her home and beating her at approximately 10:30 p.m. on August 28, 1983, then transporting her to the McKay Dee Hospital to be treated for her injuries, removing her from the McKay Dee Hospital at approximately 1:00 a.m. on August 29, 1983, placing her under

arrest, taking her to the Weber County Jail and booking her in the jail at approximately 1:30 a.m. August 29, 1983. Plaintiff was released from the jail at approximately 8:30 a.m. on August 29, 1983 and then was charged with various misdemeanor offenses which resulted in Court action thereafter.

There is also no question that the police officers set in motion a sequence of events, that while they began on August 28, 1983, extended far beyond that time, if they are viewed as a continuous act. A Notice of Claim filed in this case on August 29, 1984 and for any acts that took place on August 29, 1984 or thereafter, or any acts which began on August 28, 1983 and by their nature, continued beyond that date would be timely and any statute of limitations argument that was raised in this case would be moot.

The entire focus therefore, before the Trial Court in two (2) separate hearings approximately three (3) weeks prior to Trial was whether the specific allegations of Plaintiff's original Complaint (the assault and battery) which clearly took place on the 28th could extend, by the virtue of the other actions taken by those same officers as a single tortious act to the 29th, or whether the Plaintiff should simply be allowed amend the Complaint to allege the other specific acts which naturally flowed from the officers original conduct and which obviously took place on August 29, 1983.

The Court was asked to consider both propositions and denied Plaintiff her day in Court under either theory. The first

proposition, that of a continuous tortious act, has been addressed in at least two (2) other jurisdictions in the case of Shores v. Branch, 720 P.2d 239 (1986) a Montana case and the case of Baker v. Burbank, 705 P.2d 866 (1985) Cert. denied 475 US 1017 (1986) a California case.

While it is true and Defendants have constantly raised this issue, both in the Trial Court and in the Appellate Court, that these cases were civil cases and dealt with nuisance and easements, the language of the Court in both cases is compelling when applied to what happened here.

In the Shores case, the Court held that,

"continuing torts are those torts in which the tortious act can be readily abated." (Id at 243)

In this case, if the officers conduct is viewed as a continuing series of actions, each of which may be somewhat different, but results in an ongoing course of conduct, it is clear that at any time it could have been readily abated. The officers, following the altercation at the home, could have left and stopped any further contact with the Plaintiff, or following her release from the hospital, the officers could have simply issued her a citation and let her return to her home. This action would have abated their prior conduct.

However, they chose not to do this, but continued their conduct by taking the Plaintiff to the Weber County Jail and booking her. Even after Plaintiff was booked and released, the officers could have dismissed the case or not filed the case through the City Attorney and conclude the matter at that point.

They chose not to do this, but continued the conduct in causing charges to be filed and causing the Plaintiff to be prosecuted. Any of these acts therefore, could have been abated at any time and were one continuing course of conduct. Thus, the conduct clearly fits within the Shores definition.

The Court in Baker said,

"The classic example of a continuing nuisance (tort), is an ongoing or repeated disturbance."
(Id at 870)

The actions here were clearly ongoing and repeated. We begin on August 28, 1983 with the officers entering the Plaintiff's home. They continued by taking her from her home, then committing an assault, taking her to a hospital, then transporting her to a jail, having her incarcerated and then prosecuting her. An ongoing repeated series of events, although criminal rather than civil in nature, clearly fitting within the continuous tort concept.

In essence, what actually happened on August 28-29, 1983, is a continual sequence of activities, each of which was tortious and each of which, when combined with the other, constituted an overall violation of this Plaintiff's fundamental rights as a human being.

To suggest that because one of the acts happened on August 28th and that therefore, the Court should ignore whatever happened on August 29th, to deprive this Plaintiff from access to a full evidentiary hearing, is ludicrous and should not have been condoned by the Court of Appeals and certainly should not be

sanctioned by this Court.

It is interesting that in the Trial Court's decision, it gave no specific reason for not adopting the continual tort view, but simply denied the approach. It is also interesting that the Court of Appeals did not address this issue, but simply stated that the Notice of Claim was not timely filed.

What is even more compelling however, is the Court's failure to allow Plaintiff to amend her Complaint to allege specific incidents of tortious conduct that clearly happened on August 29th, particularly, the false imprisonment and malicious prosecution claims.

Rule 15 of the Utah Rules of Civil Procedure reads as follows:

"A party may amend his pleading once as a matter of course at any time before a responsive pleading is served, or if the pleading is one to which no responsive pleading is permitted and action has not been placed upon the Trial calendar, he may so amend it in time within twenty (20) days after it is served. Otherwise a party may amend his pleading only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires." (Emphasis added)

This Court has continuously held that amendments to pleadings, even during the Trial of the case should be allowed in order to afford all parties an opportunity to be heard on the merits and secure an appropriate remedy.

The Court is directed to its own case of Girard v. Appleby, 660 P.2d 245 (1983 Utah) that was rendered even before the most recent amendments to the Rules of Civil

Procedure in which this Court specifically took the position that Trial Courts should be extremely lenient and liberal in allowing amendments to pleadings, unless they would do violence to the process or unduly prejudice one party or another.

The recent revision of Rule 15 as set forth above even more clearly delineates this broad public policy consideration.

In this case, there was no prejudice to the Defendants as they had been aware for some two (2) years prior to the Motion to Amend of the totality of the circumstances surrounding the arrest of the Plaintiff and in fact, the record is completely void of any claim by the Defendants of surprise or prejudice that would have arisen had the Court granted the Motion. They never raised this in their pleadings at the lower Court and did not address it in their Brief to the Court of Appeals.

It is also clear, contrary to the Defendants position in their Brief in Opposition to Appellant's Petition for a Writ of Certiorari, the unlawful arrest did not necessarily take place on August 28th. The Plaintiff was simply detained by the police officers and taken to a hospital. She was not arrested until she was taken from the hospital to the Weber County Jail, where she was booked into the jail. This was when the actual arrest took place, which was clearly on August 29th.

What is interesting however, is that even if Defendants' allegations are true, that the actual "arrest" took place on August 28th, it clearly continued to August 29th as other requirements were necessary to complete the arrest, to-wit:

handcuffing, transporting to the jail and booking into the jail, all of which took place on the 29th. Therefore, under either theory, a direct action or a continuous tort, August 29, 1983, would have been within the statute of limitations period.

With respect to the malicious prosecution claim, Defendants claim has been that because Plaintiff eventually plead to one misdemeanor count, that this defeats any malicious prosecution claim. Of course, they have never cited any legal basis for this argument, because in fact, there is none. The malicious prosecution stems from the fact that charges were filed at all in the light of the actual conduct that took place.

The fact that Plaintiff was forced to obtain an attorney and fight the case and then resolve it is simply part of the malicious prosecution allegation. Her plea also did not involve an agreement not to sue or a factual agreement that the officers had probable cause to bring any action whatsoever and this was clearly delineated at the time the plea was taken.

Therefore, the Trial Court simply for some unknown reason, determined that this Plaintiff would not be allowed an opportunity to factually present her case and obtain a remedy. That is the real tragedy of the District Court's decision that was further exacerbated by the decision of the Appellate Court. The majority of the Appellate Court, in a one line affirmance, simply indicated that the Notice of Claim was not timely filed, without addressing the two (2) principal issues that were raised.

Judge Newey however, in his dissent, specifically focuses

on the issue of the amendment of pleadings and found that such an amendment should have been allowed and the case should have proceeded to Trial.

This Court, in granting the Petition for Certiorari, at least found the threshold argument that this decision has departed from common practice in the District Courts below to liberally allow amendments to pleadings.

This Court therefore, is specifically requested to review the entire record on this case in accordance with the issues that were raised in both the Trial Court and the Appellate Court and to adopt the dissenting view of Judge Newey, which this Plaintiff believes is the correct view of the law in this case and allow Plaintiff to have her day in Court.


CONCLUSION

The Trial Court erred in this case in failing to either consider that under the totality of the circumstances that the conduct of the officers on August 29th was part of a continuous tortious act beginning on August 28th, or allowing the Plaintiff to specifically amend her Complaint to reflect specific incidents of conduct on the 29th, either of which would have rendered the statute of limitations argument moot.

The majority of the Appellate Court further compounded the error by failing to address those two (2) issues. The dissenting opinion of Judge Newey addressed the issue and correctly resolved it based upon the current status of the law in this case and it is respectfully requested that his view be

adopted by this Court in its review of the Appellate Court decision.

RESPECTFULLY SUBMITTED this 3rd day of November, 1989.


JOHN T. CAINE
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing Brief on Appeal to counsel for the Respondents, Joy L. Sanders and Andrew M. Morse, Attorneys at Law, 10 Exchange Place, P.O. Box 45000, Eleventh Floor, Salt Lake City, Utah 84145 and Dale J. Lambert, Attorney at Law, 175 South West Temple, Clark Leaming Building, Salt Lake City, Utah 84101, postage prepaid this 3rd day of November, 1989.



IN THE UTAH COURT OF APPEALS

-----oo0oo-----

Virginia Yearsley,)	
Plaintiff and Appellant,)	
)	ORDER OF AFFIRMANCE
v.)	
)	Case No. 880145-CA
Officer Dean Jensen, Officer)	
Steven Wallerstein, and)	
Officer Steven Smith,)	
Defendants and Respondents.)	

Before Judges Jackson, Greenwood, and Newey (Retired Juvenile Judge
Sitting by Special Assignment) (On Rule 31 Hearing).

The order and judgment of the trial court is affirmed because
the notice of claim made against defendants, pursuant to Utah Code
Ann. § 63-30-13 (1986), was not timely filed.

Dated this 30th day of March, 1989.

FOR THE COURT:



Norman H. Jackson, Judge

Newey, Judge dissenting:

I dissent because, in my view, the actions upon which
plaintiff has sued continued from August 28th into August 29, 1983,
on the false imprisonment and malicious prosecution claims. The
notice of claim filed under Utah Code Ann. § 63-30-13 (1986) should
be liberally construed to include the issues plaintiff raised in her
proposed amended complaint and was, therefore, timely. Based upon
that notice of claim, the trial court abused its discretion in
rejecting the proposed amended complaint. Consequently, summary
judgment should not have been granted.

CERTIFICATE OF MAILING

I hereby certify that on the 4th day of April, 1989, a true and correct copy of the foregoing Order of Affirmance was mailed to each of the following:

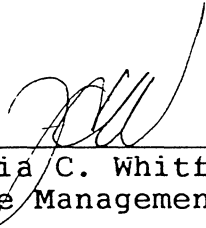
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